"The law is progressive and expansive, adapting itself to the new relations and interests which are constantly springing up in the progress of society. But this progress must be by analogy to what is already settled."

Chief Justice Greene, in 1 R.I. 356.

CITE BY TITLE AND SECTION

Thus

32 C.J.S. Evidence § 411

CORPUS JURIS SECUNDUM

A COMPLETE RESTATEMENT OF THE ENTIRE AMERICAN LAW

AS DEVELOPED BY

ALL REPORTED CASES

By

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Editor in Chief

Assisted by
The Combined Editorial Staffs
of
The American Law Book Co. and West Publishing Co.

VOLUME XXXII

Kept to Date by Cumulative Annual Pocket Parts

Brooklyn, N. Y.
The American Law Book Co.

EXPLANATION

THE object in view in preparing *Corpus Juris Secundum* has been two-fold: First, to provide a complete encyclopedic treatment of the whole body of the law, which means that it must be based upon all the reported cases; Second, to present each title of the law in form and content most suitable as a means of practical reference for the Bench and Bar.

Corpus Juris Secundum is therefor a complete restatement of the entire body of American Law. The clear-cut and exhaustive propositions comprising the text are supported by all the authorities from the earliest times to date. The supporting case citations, conspicuously set out in the notes, point to all decisions handed down since the publication of Corpus Juris. When the searcher may wish to consult earlier authorities, a specific reference to Corpus Juris makes available all cases back to 1658.

Each title is preceded by a complete section analysis, greatly simplified to facilitate research. Where the scope of any section is such as to require it, a more minute analysis is found thereunder in its appropriate place within the title (see Abatement and Revival, Section 112). The convenience of this method—an innovation in encyclopedic writing—must immediately commend itself.

A concise black-letter summary, indicative of its scope, precedes the full treatment or statement of the law under each section. These introductory summaries, concise and free from interlineation of authorities, have proven of great convenience and value in legal research.

An index is found in the back of each volume covering the titles contained therein, thus providing another convenient means of ready access to the text and notes.

Corpus Juris Secundum is kept to date by means of annual cumulative pocket parts for each volume. This feature of supplementation which has proved so successful in modern digests and statutes conveniently, and with certainty, keeps each title constantly to date through current cases and new precedents.

Corpus Juris Secundum represents the combined product of the highest editorial talent and manufacturing skill. Its many excellent editorial features are fittingly accompanied by corresponding innovations and improvements in mechanical arrangement, typography, and design, which the publisher believes will commend themselves to the profession as representing a new standard in legal publications.

THE PUBLISHERS

TABLE OF ABBREVIATIONS

REPORTS AND TEXTBOOKS

A

A.	Atlantic Reporter
Abb.	Abbott (U.S.)
Abb.Adm.	Abbott's Admiralty (U.S.)
Abb.App.Dec.	Abbott's Appeals Decisions (N.Y.)
Abb.Dec.	Abbott's Decisions (N.Y.)
Abb.N.Cas.	Abbott's New Cases (N.Y.)
Abb.Pr.	Abbott's Practice (N.Y.)
Abb.Pr.N.S.	Abbott's Practice New Series (N.Y.)
A'Beck.Res. Judgm.	A'Beckett's Reserved Judgments (Vict.)
[1917]A.C.	[1917] Appeal Cases (Can.)
[1918]A.C.	Law Reports [1918] Appeal Cases (Eng.)
Acton	Acton (Eng.)
Adams	Adams Reports (N.H.)
Add.	Addison (Pa.)
Add.Eccl.	Addams' Ecclesiastical (Eng.)
A.&E.	Adolphus & Ellis (Eng.)
A.&E.Enc.L.	American & English Encyclopædia of Law
A.&E.Enc.L.&Pr.	American & English Encyclopædia of Law & Practice
Aik.	Aikens (Vt.)
A.K.Marsh.	A. K. Marshall (Ky.)
Ala.	Alabama
Ala.App.	Alabama Appellate Court
Alaska	Alaska
Alb.L.J.	Albany Law Journal
A.L.C.	American Leading Cases
Alc.&N.	Alcott & Napier (Eng.)
Alc.Reg.Cas.	Alcock's Registry Cases (Eng.)
Aleyn	Aleyn (Eng.)
Alison Pr.	Alison's Practice (Sc.)
Allen	Allen (Mass.)
Allen (N.B.)	Allen, New Brunswick
Alta.L.	Alberta Law
A.L.R.	American Law Reports
Am.Bankr.	American Bankruptcy (U.S.)
Ambl.	Ambler (Eng.)
A.M.C.	American Maritime Cases
Am.Corp.Cas.	American Corporation Cases
Am.Cr.	American Criminal
Am.D.	American Decisions
Am.&E.Corp.Cas.	American & English Corporation Cases
Am.&E.Corp.Cas. N.S.	American & English Corporation Cases New Series
Am.&Eng.Ency. Law	American and English Encyclopedia of Law
Am.&E.Eq.D.	American & English Decisions in Equity
Am.&Eng.Pat. Cas.	American and English Patent Cases
Am.&Eng.R.R. Cas.	American and English Railroad Cases
Am.Electr.Cas.	American Electrical Cases
Am.&E.R.Cas.	American & English Railroad Cases
Am.&E.R.Cas.N. S.	American & English Railroad Cases New Series
Am.J.Int.L.	American Journal of International Law
Am.L.J.	American Law Journal (Pa.)
Am.L.J.N.S.	American Law Journal New Series (Pa.)
Am.L.Rec.	American Law Record (Ohio)
Am.L.Reg.	American Law Register
Am.L.Reg.N.S.	American Law Register New Series
Am.Law Reg.(O. S.)	American Law Register Old Series
Am.L.Rev.	American Law Review
Am.L.T.Bankr.	American Law Times Bankruptcy Reports
Am.Law Inst.	American Law Institute, Restatement of the Law
Am.Negl.Cas.	American Negligence Cases
Am.Negl.R.	American Negligence Reports
A.M.&O.	Armstrong, Macartney & Ogle (Ir.)
Am.Prob.	American Probate
Am.Prob.N.S.	American Probate New Series
Am.Pr.	American Practice
Am.R.	American Reports
Am.R.&Corp.	American Railroad & Corporation
Am.R.Rep.	American Railway Reports
Am.S.R.	American State Reports
Am.St.R.D.	American Street Railway Decisions
And.	Anderson (Eng.)
Andr.	Andrews (Eng.)
Ann.Cas.	American & English Annotated Cases
Ann.Cas.1912A	American Annotated Cases 1912A, et seq.
Anstr.	Anstruther (Eng.)
Anth.N.P.	Anthon's Nisi Prius (N.Y.)
App.D.C.	Appeal Cases (D.C.)
App.Cas.	Law Reports Appeal Cases (Eng.)
App.Div.	Appellate Division (N.Y.)
Ariz.	Arizona
Ark.	Arkansas
Ark.Just.	Arkley's Justiciary (Sc.)
Arn.	Arnold (Eng.)
Arn.&H.	Arnold & Hodges (Eng.)
Ashm.	Ashmead (Pa.)
Aspin.	Aspinall's Maritime Cases (Eng.)
Atk.	Atkyn (Eng.)
Austr.C.L.R.	Commonwealth Law Reports, Australia
Austr.Jur.	Australian Jurist
Austr.L.T.	Australian Law Times

B

Bacon Abr.	Bacon's Abridgment (Eng.)
Bail.Eq.	Bailey's Equity (S.C.)
Bailey	Bailey's Law (S.C.)
B.&Ad.	Barnewall & Adolphus (Eng.)
B.&Ald.	Barnewall & Alderson (Eng.)
Baldw.	Baldwin (U.S.)
Balf.Pr.	Balfour's Practice (Sc.)
Ball&B.	Ball & Beatty (Ir.)
Bank.&Ins.R.	Bankruptcy and Insolvency Reports (Eng.)
Bann.	Bannister (Eng.)
Bann.&A.	Banning & Arden (U.S.)
Barb.	Barbour (N.Y.)
Barb.Ch.	Barbour's Chancery (N.Y.)
B.&Arn.	Barron & Arnold (Eng.)
Barn.	Barnardiston King's Bench (Eng.)
Barn.Ch.	Barnardiston Chancery (Eng.)
Barnes	Barnes' Practice Cases (Eng.)
Barnes Notes	Barnes' Notes (Eng.)
Batty	Batty (Ir.)
B.&Aust.	Barron & Austin (Eng.)
Baxt.	Baxter (Tenn.)
Bay	Bay (S.C.)
B.&B.	Broderip & Bingham (Eng.)
B.C.	British Columbia

B.&C.	Barnewall & Cresswell (Eng.)
B.&Macn.	Browne & Macnamara (Eng.)
B.D.&O.	Blackham, Dundas & Osborne (Ir.)
Beatty	Beatty (Ir.)
Beav.	Beavan (Eng.)
Beav.&Wal.Ry. Cas.	Beavan & Walford's Railway and Canal Cases (Eng.)
Beav.R.&C.Cas.	English Railway and Canal Cases
Beaw.Lex.Mer.	Beawes Lex Mercatoria (Eng.)
Bee	Bee (U.S.)
Bell.	Bellewe (Eng.)
Bell App.Cas.	Bell's Appeal Cases (Sc.)
Bell Cas.	Bell's Cases (Sc.)
Bell C.C.	Bell's Crown Cases (Eng.)
Bell Comm.	Bell's Commentaries (Eng.)
Bell Sc.Cas.	Bell's Scotch Court of Session Cases
Ben.	Benedict (U.S.)
Benl.	Benloe (Eng.)
Benl.&D.	Benloe & Dallison (Eng.)
B.&H.Cr.Cas.	Bennett & Heard Leading Criminal Cases (Eng.)
Bibb	Bibb (Ky.)
Bing.	Bingham (Eng.)
Bing.N.Cas.	Bingham's New Cases (Eng.)
Binn.	Binney (Pa.)
Biss.	Bissell (U.S.)
Bitt.W.&P.	Bittleson, Wise & Parnell (Eng.)
Black	Black (U.S.)
Blackf.	Blackford (Ind.)
Blackstone Comm.	Blackstone Commentaries
Bla.H.	Henry Blackstone's English Common Pleas (Eng.)
Blair Co.	Blair County (Pa.)
Bland	Bland (Md.)
Bland's Ch.	Bland Chancery (Md.)
Blatchf.	Blatchford (U.S.)
Blatchf.&H.	Blatchford & Howland (U.S.)
Blatchf.PrizeCas.	Blatchford's Prize Cases (U.S.)
Bligh	Bligh (Eng.)
Bligh N.S.	Bligh New Series (Eng.)
B.Mon.	B. Monroe (Ky.)
Bond	Bond (U.S.)
Bouvier.	Bouvier's Law Dictionary
Boyce	Boyce (Del.)
B.&P.	Bosanquet & Puller (Eng.)
B.&P.N.R.	Bosanquet & Puller's New Reports (Eng.)
Bract.	Bracton de Legibus et Consuetudinibus Angliæ
Bradf.Surr.	Bradford's Surrogate (N.Y.)
Brayt.	Brayton (Vt.)
B.R.C.	British Ruling Cases
Brev.	Brevard (S.C.)
Brewst.	Brewster (Pa.)
Brightly	Brightly (Pa.)
Brightly El.Cas.	Brightly's Election Cases (Pa.)
Bro.Ch.	Brown's Chancery (Eng.)
Brock.	Brockenbrough (U.S.)
Brock.Cas.	Brockenbrough's Virginia Cases
Brod.&B.	Broderip & Bingham (Eng.)
Brod.&Fr.	Broderick & Fremantle's Ecclesiastical Cases
Brodix Am.&E. Pat.Cas.	Brodix's American & English Patent Cases
Bro.Just.	Broun's Justiciary (Sc.)
Brook Abr.	Brook's Abridgments (Eng.)
Brook N.Cas.	Brook's New Cases (Eng.)
Brooke N.C.	Brooke's New Cases
Bro.P.C.	Brown's Parliament Cases (Eng.)
Brown Adm.	Brown's Admiralty (U.S.)
Brown, Ch.	Brown's Chancery Cases (Eng.)
Brown Ecc.	Brown Ecclesiastical (Eng.)
Brown N.P.	Brown's Michigan Nisi Prius
Brown,Parl.Cas.	Brown Parliamentary Cases (Eng.)
Browne	Browne (Pa.)
Brown.&L.	Browning & Lushington (Eng.)
Brownl.&G.	Brownlow & Goldesborough (Eng.)
Bruce	Bruce (Sc.)
Brunn.Coll.Cas.	Brunner's Collective Cases (U.S.)
B.&S.	Best & Smith (Eng.)
B.T.A.	Board of Tax Appeals (U.S.)
Buck	Buck (Eng.)
Buller N.P.	Buller's Nisi Prius (Eng.)
Bulstr.	Bulstrode (Eng.)
Bunb.	Bunbury (Eng.)
Burn.	Burnett (Wis.)
Burr.	Burrows (Eng.)
Burr.S.Cas.	Burrows' Settlement Cas. (Eng.)
Busb.	Busbee (N.C.)
Busb.Eq.	Busbee Equity (N.C.)
Bush	Bush (Ky.)
B.W.C.C.	Butterworth's Workmen's Compensation Cases (Eng.)

C

Cab.&E.	Cababe & Ellis (Eng.)
Cai.	Caines (N.Y.)
Cai.Cas.	Caines' Cases (N.Y.)
Cal.	California
Cal.(2d)	California Reports, Second Series
Cal.App.	California Appellate Court
Cal.App.(2d)	California Appellate Reports, Second Series
Cald.	Caldecott (Eng.)
Call	Call (Va.)
Calthr.	Calthrop (Eng.)
Cal.Unrep.Cas.	California Unreported Cases
Cam.Cas.	Cameron's Cases (Can.)
Campb.	Campbell (Eng.)
Canal Zone	Canal Zone Supreme Court
Can.App.Cas.	Canadian Appeal Cases
Can.Cr.Cas.	Canadian Criminal Cases
Can.Exch.	Canadian Exchequer
Can.L.J.	Canada Law Journal
Can.L.J.N.S.	Canada Law Journal New Series
Can.L.T.Occ. Notes	Canadian Law Times Occasional Notes
Can.R.Cas.	Canadian Railway Cases
Can.S.C.	Canada Supreme Court
Cane&L.	Cane & Leigh Crown Cases Reserved (Eng.)
Car.&K.	Carrington & Kirwan (Eng.)
Car.&M.	Carrington & Marshman (Eng.)
Car.&P.	Carrington & Payne (Eng.)
Car.H.&A.	Carrow, Hamerton & Allen (Eng.)
Carp.P.C.	Carpmael Patent Cases (Eng.)
Carter	Carter (Eng.)
Carth.	Carthew (Eng.)
Cartwr.Cas.	Cartwright's Cases (Can.)
Cary	Cary (Eng.)
Cas.	Casey (Pa.)
Cas.t.Hardw.	Cases temp. Hardwicke (Eng.)
Cas.t.Holt	Cases temp. Holt (Eng.)
Cas.t.King	Cases temp. King (Eng.)
Cas.t.Talb.	Cases temp. Talbot (Eng.)
C.B.	Common Bench (Manning, Granger & Scott) (Eng.)
C.B.N.S.	Common Bench New Series (Manning, Granger & Scott New Series) (Eng.)
C.C.A.	Circuit Court of Appeals (U.S.)
C.C.P.A.	Court of Customs and Patent Appeals
Centr.L.J.	Central Law Journal
[1891] Ch.	Law Reports [1891] Chancery (Eng.)
Chamb.Rep.	Chamber (Ont.)
Chandl.	Chandler (Wis.)
Charlt.R.M.	R. M. Charlton (Ga.)
Charlt.T.U.P.	T. U. P. Charlton (Ga.)
Chase	Chase (U.S.)
Ch.Cas.	Cases in Chancery (Eng.)
Ch.Chamb.	Chancery Chambers (U.C.)
Ch.Col.Op.	Chalmers' Colonial Opinions
Ch.D.	Law Reports Chancery Division (Eng.)
Chest.Co.	Chester County (Pa.)
Chev.	Cheves (S.C.)
Chit.	Chitty (Eng.)
Choyce Cas.Ch.	Choyce Cases in Chancery (Eng.)
Ch.Rep.	Chancery Reports (Eng.)
Ch.Sent.	Chancery Sentinel (N.Y.)
Cinc.L.Bul.	Weekly Law Bulletin (Oh.)
Cinc.Super.	Cincinnati Superior Court Reporter (Oh.)
City Ct.R.	City Court Reports (N.Y.)
City Hall Rec.	City Hall Recorder (N.Y.)

Civ.Proc.Rep.	Civil Procedure Reports (N.Y.)
C.J.	Corpus Juris
C.J.Ann.	Corpus Juris Annotations
C.J.S.	Corpus Juris Secundum
C.&K.	Carrington & Kirwan (Eng.)
C.&L.	Connor & Lawson (Ir.)
Cl.App.	Clark's Appeal Cases (Eng.)
Cl.Ch.	Clarke's Chancery (N.Y.)
Clark &F.	Clark & Finnelly (Eng.)
Clark &Fin.N.S.	Clark's House of Lords Cases (Eng.)
Clarke	Clarke's Chancery (N.Y.)
Clarke &S.Dr.Cas.	Clarke & Scully's Drainage Cases (Ont.)
Clarke Ch.	Clarke's Chancery (N.Y.)
Clayt.	Clayton's Reports, York Assizes (Eng.)
C.L.Chamb.	Chamber's Common Law (U.C.)
Clev.L.Rec.	Cleveland Law Record (Oh.)
Clev.L.Rep.	Cleveland Law Reporter (Oh.)
Cl.&F.	Clark & Finnelly (Eng.)
Clif.El.Cas.	Clifford's Southwick Election Cases
Cliff.	Clifford (U.S.)
C.L.R.	Common Law Reports (Eng.)
C.&M.	Carrington & Marshman (Eng.)
C.M.&R.	Crompton, Meeson & Roscoe (Eng.)
Cock.&Rowe	Cockburn & Rowe's Election Cases
Code Rep.	Code Reporter (N.Y.)
Code Rep.N.S.	Code Reports New Series (N.Y.)
Coff.Prob.	Coffey's Probate (Cal.)
Co.Inst.	Coke's Institutes
Coke	Coke (Eng.)
Col.Cas.	Coleman's Cases (N.Y.)
Col.&C.Cas.	Coleman & Caines' Cases (N.Y.)
Col.C.C.	Collyer's Chancery Cases (Eng.)
Coldw.	Coldwell (Tenn.)
Coll.	Collyer (Eng.)
Col.L.Rep.	Colorado Law Reporter
Col.Law Review	Columbia Law Review
Coll.&E.Bank.	Collier and Eaton's American Bankruptcy Reports
Colles	Colles' Cases in Parliament (Eng.)
Colo.	Colorado
Colo.App.	Colorado Appeals
Colq.	Colquit
Coltm.	Coltman (Eng.)
Comb.	Comberbach (Eng.)
Com.Cas.	Commercial Cases (Eng.)
Com.L.	Commercial Law (Can.)
Comptr.Treas. Dec.	Comptroller Treasury Decisions
Comst.	Comstock (N.Y.)
Comyns	Comyns (Eng.)
Comyns Dig.	Comyns Digest (Eng.)
Con.&Law.	Connor & Lawson (Ir.)
Conf.	Conference Reports (N.C.)
Conn.	Connecticut
Conn.Surr.	Connolly's Surrogate (N.Y.)
Const.	Constitutional Reports (N.C.)
Cooke	Cooke (Eng.)
Cooke	Cooke (Tenn.)
Cooke & A.	Cooke & Alcock (Ir.)
Cook Vice-Adm.	Cook's Vice-Admiralty (L.C.)
Coop.	Cooper's Chancery (Eng.)
Coop.Pr.Cas.	Cooper's Practice Cases (Eng.)
Coop.t.Brough.	Cooper's Cases temp. Brougham (Eng.)
Coop.t.Cott.	Cooper's Cases temp. Cottenham (Eng.)
Coop.t.Eld.	Cooper's Cases *tempore* Eldon (Eng.)
Co.P.C.	Coke's Reports (Eng.)
Corb.&D.	Corbett & Daniell's Election Cases (Eng.)
Court.&Macl.	Courtnay & Maclean (Sc.)
Cow.	Cowen (N.Y.)
Cow.Cr.Rep.	Cowen's Criminal (N.Y.)
Cowp.	Cowper (Eng.)
Cox.Am.T.M.Cas.	Cox's American Trade-Mark Cases
Cox C.C.	Cox's Criminal Cases (Eng.)
Cox Ch.	Cox's Chancery (Eng.)
Cox &Atk.	Cox & Atkinson (Eng.)
C.&P.	Carrington & Payne (Eng.)
C.P.C.	C. P. Cooper's Chancery Practice Cases (Eng.)
C.P.D.	Law Reports Common Pleas Division (Eng.)
Crabbe	Crabbe (U.S.)
Cranch	Cranch (U.S.)
Cranch C.C.	Cranch's Circuit Court (U.S.)
Cranch Pat.Dec.	Cranch's Patent Decisions (U.S.)
Cr.App.	Criminal Appeals (Eng.)
Crawf.&D.	Crawford & Dix (Ir.)
Crawf.&D.Abr. Cas.	Crawford & Dix's Abridged Cases (Ir.)
Cripp's Ch.Cas.	Cripp's Church and Clergy Cases
Cr.L.Mag.	Criminal Law Magazine
Cr.&Ph.	Craig & Phillips (Eng.)
C.Rob.	Christopher Robinson's Admiralty (Eng.)
Cro.Car.	Croke Charles (Eng.)
Cro.Eliz.	Croke Elizabeth (Eng.)
Cro.Jac.	Croke's Reports tempore James (Jacobus) (Eng.)
Cromp.&J.	Crompton & Jervis (Eng.)
Cromp.&M.	Crompton & Meeson (Eng.)
Crosw.Pat.Cas.	Croswell's Collection of Patent Cases (U.S.)
Cr.&Ph.	Craig & Phillips (Eng.)
Ct.Cl.	Court of Claims (U.S.)
Ct.Cust.&Pat. App.	Court of Customs and Patent Appeals
Cunn.	Cunningham (Eng.)
Curt.	Curtis (U.S.)
Curt.Eccl.	Curteis Ecclesiastical (Eng.)
Cush.	Cushing (Mass.)
Cust.A.	United States Customs Appeals
Cyc.	Cyclopedia of Law & Procedure
Cyc.Ann.	Cyclopedia of Law & Procedure Annotations

D

Dak.	Dakota
Dal.C.P.	Dalison's Common Pleas (Eng.)
Dall.	Dallaman's Decisions (Tex.)
Dall.	Dallas (Pa.)
Dall.	Dallas (U.S.)
Dalr.Dec.	Dalrymple's Decisions (Sc.)
Daly	Daly (N.Y.)
Dan.	Daniell (Eng.)
Dana	Dana (Ky.)
Dane Abr.	Dane's Abridgment
Dans.&L.	Danson & Lloyd (Eng.)
D'Anv.Abr.	D'Anver's Abridgment (Eng.)
Dauph.Co.	Dauphin County (Pa.)
Dav.&M.	Davison & Merivale (Eng.)
Davys	Davys (Ir.)
Day	Day (Conn.)
D.B.&M.	Dunlop, Bell & Murray (Sc.)
D.C.	District of Columbia
D.Chipm.	D. Chipman (Vt.)
Deac.	Deacon (Eng.)
Deac.&C.	Deacon & Chitty (Eng.)
Deady	Deady (U.S.)
Dears.&B.	Dearsley & Bell (Eng.)
Dears.C.C.	Dearsley's Crown Cases (Eng.)
Deas & A.	Deas & Anderson (Eng.)
De Gex	De Gex (Eng.)
De G.F.&J.	De Gex, Fisher & Jones (Eng.)
De G.J.&S.	De Gex, Jones & Smith (Eng.)
De G.&J.	De Gex & Jones (Eng.)
De G.M.&G.	De Gex, MacNaghten & Gordon (Eng.)
De G.&Sm.	De Gex & Smale (Eng.)
Del.	Delaware
Del.Ch.	Delaware Chancery
Del.Co.	Delaware County (Pa.)
Dem.Surr.	Demarest's Surrogate (N.Y.)
Den.	Denio (N.Y.)
Den.C.C.	Denison's Crown Cases (Eng.)
Desaus.Eq.	Desaussure (S.C.)
Dev.Ct.Cl.	Devereux's Court of Claims (U.S.)
Dev.L.	Devereux (N.C.)
Dev.&Bat.	Devereux & Battle (N.C.)
Dick.	Dickens (Sc.)
Dill.	Dillon (U.S.)
Dirl.Dec.	Dirleton's Decisions (Sc.)
Disn.	Disney (Oh.)

D.&L.	Dowling & Lowndes (Eng.)
Dods.	Dodson's Admiralty (Eng.)
Dom.L.R.	Dominion Law Reports (Can.)
Donnelly	Donnelly (Eng.)
Dorion	Dorion (L.C.)
Dougl.	Douglas (Eng.)
Dougl.	Douglass (Mich.)
Dougl.El.Cas.	Douglas' Election Cases (Eng.)
Dow	Dow (Eng.)
Dow & Cl.	Dow & Clark (Eng.)
Dow.&L.	Dowling & Lowndes (Eng.)
Dow.N.S.	Dowling, New Series (Eng.)
Dowl.	Dowling's English Bail Court (Practice) Cases
Dowl.P.C.	Dowling's Practice Cases (Eng.)
Dowl.P.C.N.S.	Dowling's Practice Cases New Series (Eng.)
D.&R.	Dowling & Ryland (Eng.)
Draper	Draper (U.C.)
Drew.	Drewry (Eng.)
Drinkw.	Drinkwater (Eng.)
D.&R.Mag.Cas.	Dowling & Ryland's Magistrate Cases (Eng.)
D.&R.N.P.	Dowling & Ryland's Nisi Prius (Eng.)
Dr.&Sm.	Drewry & Smale (Eng.)
Drury	Drury (Ir.)
Dr.&Wal.	Drury & Walsh (Ir.)
Dr.&War.	Drury & Warren (Ir.)
D.&Sw.	Deane & Swabey (Eng.)
Dud.Eq.	Dudley (S.C.)
Dudl.	Dudley (Ga.)
Duer	Duer's Superior Court (N.Y.)
Dunl.B.&M.	Dunlop, Bell & Murray (Sc.)
Dunlop	Dunlop (Sc.)
Dunn.	Dunning (Eng.)
Durie	Durie (Sc.)
Durn.&E.	Durnford & East (Eng.)
Duv.	Duvall (Ky.)
Dyer	Dyer (Eng.)

E

East	East (Eng.)
East.L.R.	Eastern Law Reporter (Can.)
East P.C.	East's Pleas of the Crown (Eng.)
East.T.	Eastern Term (Eng.)
E.&B.	Ellis & Blackburn (Eng.)
E.B.&E.	Ellis, Blackburn & Ellis (Eng.)
E.B.&S.	Ellis, Best & Smith (Eng.)
E.C.L.	English Common Law
Eden	Eden (Eng.)
Edgar	Edgar (Sc.)
Edm.Sel.Cas.	Edmond's Select Cases (N.Y.)
E. D. Smith	E. D. Smith (N.Y.)
Edw.	Edwards (Eng.)
Edw.	Edwards' Chancery (N.Y.)
Edw.Abr.	Edwards' Abridgment of Prerogative Court Cases
Edw.Adm.	Edwards' Admiralty (Eng.)
E.&E.	Ellis & Ellis (Eng.)
Enc.Pl.&Pr.	Encyclopædia of Pleading & Practice
Ency.Law.	American and English Encyclopædia of Law
Eng.Ad.	English Admiralty
Eng.C.C.	English Crown Cases
Eng.Ch.	English Chancery
Eng.Eccl.	English Ecclesiastical Reports
Eng.Ecc.R.	English Ecclesiastical Reports
Eng.Exch.	English Exchequer Reports
Eng.L.&Eq.	English Law & Equity
Eng.Rep.R.	English Reports, Full Reprint
Eng.Ry.&C.Cas.	English Railway and Canal Cases
Eng.&Ir.App.	Law Reports, English and Irish Appeal Cases
Eq.Cas.Abr.	Equity Cases Abridged (Eng.)
Eq.Rep.	Equity Reports (Eng.)
E.R.C.	English Ruling Cases
Esp.	Espinasse's Nisi Prius (Eng.)
Euer	Euer (Eng.)
Exch.	Exchequer (Eng.)
Exch.Cas.	Exchequer Cases (Sc.)
Ex.D.	Law Reports Exchequer Division (Eng.)
Eyre	Eyre's Reports (Eng.)

F

Falc.	Falconer's Court of Sessions (Sc.)
Falc.&F.	Falconer & Fitzherbert (Eng.)
Far.	Farresley (Eng.)
F.Cas.No.	Federal Cases (U.S.)
F.(Ct.Sess.)	Fraser's Court of Sessions Cases (Sc.)
F.	Federal Reporter (U.S.)
F.(2d)	Federal Reporter Second Series
F.R.D.	Federal Rules Decisions
F.Supp.	Federal Supplement
Ferg.Cons.	Ferguson's Consistory (Eng.)
F.&F.	Foster & Finlason (Eng.)
Fish.Pat.Cas.	Fisher's Patent Cases (U.S.)
Fish.Pat.R.	Fisher's Patent Reports (U.S.)
Fish.PrizeCas.	Fisher's Prize Cases (U.S.)
Fitzg.	Fitzgibbon (Eng.)
Fitzh.	Fitzherbert's Abridgment (Eng.)
Fitzh.N.Br.	Fitzherbert's Natura Brevium (Eng.)
Fla.	Florida
Flipp.	Flippin (U.S.)
Fl.&K.	Flanagan & Kelly (Ir.)
Fonb.Eq.	Fonblanque's Equity (Eng.)
Fonbl.	Fonblanque (Eng.)
Fonbl.R.	Fonblanque's English Cases
Forbes	Forbes (Eng.)
Forr.	Forrest (Eng.)
Forrester	Forrester's Cases (Eng.)
Fortesc.	Fortescue (Eng.)
Fost.	Foster (Eng.)
Fost.	Foster (N.H.)
Fost.&Fin.	Foster & Finlason (Eng.)
Fount.Dec.	Fountainhall's Decisions (Sc.)
Fox	Fox Reports (Eng.)
Fox & S.	Fox & Smith (Ir.)
Freem.	Freeman's Chancery (Eng.)
Freem.	Freeman's Chancery (Miss.)
Freem.K.B.	Freeman's King's Bench (Eng.)

G

Ga.	Georgia
Ga.App.	Georgia Appeals
Ga.Dec.	Georgia Decisions
Gale	Gale (Eng.)
Gal.	Gallison (U.S.)
G.Coop.	G. Cooper (Eng.)
G.&D.	Gale & Davidson (Eng.)
Geld.&M.	Geldart & Maddock (Eng.)
Gibb.Surr.	Gibbon's Surrogate (N.Y.)
Giffard	Giffard (Eng.)
Giff.&H.	Giffard and Hemming (Eng.)
Gil.	Gilfillan's Edition (Minn.)
Gilb.	Gilbert's (Eng.)
Gilb.Cas.	Gilbert's Cases (Eng.)
Gilb.C.P.	Gilbert's Common Pleas (Eng.)
Gilb.Exch.	Gilbert's Exchequer (Eng.)
Gill	Gill (Md.)
Gill&J.	Gill & Johnson (Md.)
Gilm.	Gilmer (Va.)
Gilm.&Falc.	Gilmour & Falconer (Sc.)
Gilp.	Gilpin (U.S.)
Glasc.	Glascock (Ir.)
Glyn&J.	Glyn & Jameson (Eng.)
Godb.	Godbolt (Eng.)
Godo.	Godolphin's Abridgment of Ecclesiastical Law
Goeb.	Goebel's Probate Court Cases
Gosf.	Gosford (Eng.)
Gouldsb.	Gouldsborough (Eng.)
Gow	Gow (Eng.)
Gow N.P.	Gow's English Nisi Prius Cases
Grant	Grant's Cases (Pa.)
Grant Ch.	Grant's Chancery (U.C.)
Grant Err.&App.	Grant's Error & Appeal (U.C.)
Gratt.	Grattan (Va.)
Gray	Gray (Mass.)

Green Cr.	Green's Criminal Law (Eng.)
Greene	Greene (Iowa)
Gwill.T.Cas.	Gwillim's Tithe Cases (Eng.)

H

Hadd.	Haddington (Eng.)
Hagg.Adm.	Haggard's Admiralty (Eng.)
Hagg.Cons.	Haggard's Consistory (Eng.)
Hagg.Eccl.	Haggard's Ecclesiastical (Eng.)
Hailes Dec.	Hailes' Decisions (Sc.)
Hale	Hale's Common Law (Eng.)
Hale Ecc.	Hale's Ecclesiastical (Eng.)
Hale P.C.	Hale's Pleas of the Crown (Eng.)
Hall	Hall's Superior Court (N.Y.)
Hall&T.	Hall & Twells (Eng.)
Halsbury L.Eng.	Halsbury's Law of England
Handy	Handy (Oh.)
Han.(N.B.).	Hannay's Reports, New Brunswick
Hard.	Hardin (Ky.)
Hardres	Hardres (Eng.)
Hare	Hare (Eng.)
Harp.Eq.	Harper (S.C.)
Harr.	Harrison's Chancery (Mich.)
Harr.(Del.)	Harrington (Del.)
Harr.(Mich.)	Harrington's Michigan Chancery Reports
Harr.&G.	Harris & Gill (Md.)
Harr.Ch.	Harrison's Chancery (Eng.)
Harr.&H.	Harrison & Hodgins (U.C.)
Harr.&J.	Harris & Johnson (Md.)
Harr.&M.	Harris & McHenry (Md.)
Harr.&R.	Harrison & Rutherford (Eng.)
Harr.&W.	Harrison & Wollaston (Eng.)
Hask.	Haskell (U.S.)
Havil.	Haviland (Pr.Edw.Isl.)
Hawaii	Hawaiian
Hawaii.Fed.	Hawaiian Federal
Hawaiian Rep.	Hawaii Reports
Hawk.P.C.	Hawkins' Pleas of the Crown (Eng.)
Hay.Exch.	Hayes Exchequer (Ir.)
Hayes	Hayes (Ir.)
Hayes&J.	Hayes & Jones (Ir.)
Hay&M.	Hay & Marriott (Eng.)
Hayw.	Haywood (N.C.)
Hayw.	Haywood (Tenn.)
Hayw.&H.	Haywood & Hazelton (U.S.)
Haz.Reg.	Hazard's Register (Pa.)
H.Bl.	Henry Blackstone (Eng.)
H.&C.	Hurlstone & Coltman (Eng.)
Head	Head (Tenn.)
Heisk.	Heiskell (Tenn.)
Hem.&M.	Hemming & Miller (Eng.)
Hempst.	Hempstead (U.S.)
Hen.&M.	Henning & Munford (Va.)
Het.	Hetley (Eng.)
Het.C.P.	Hetley's Common Pleas (Eng.)
H.&H.	Horn & Hurlstone (Eng.)
Hill	Hill (N.Y.)
Hill S.C.	Hill (S.C.)
Hill &Den.	Hill & Denio (N.Y.)
Hill &Den. Supp.	Lalor's Supplement to Hill & Denio's (N.Y.)
Hilt.	Hilton (N.Y.)
Hil.T.	Hilary Term (Eng.)
H.L.Cas.	House of Lords Cases (Eng.)
H.&N.	Hurlstone & Norman (Eng.)
Hob.	Hobart (Eng.)
Hodg.El.	Hodgins' Election (U.C.)
Hodges	Hodges (Eng.)
Hoffm.	Hoffman's Chancery (N.Y.)
Hoffm.Land Cas.	Hoffman's Land Cases (U.S.)
Hog.	Hogan (Ir.)
Holmes	Holmes (U.S.)
Holt Adm.Cas.	Holt's English Admiralty Cases
Holt Eq.	Holt's Equity (Eng.)
Holt K.B.	Holt's King's Bench (Eng.)
Holt N.P.	Holt's Nisi Prius (Eng.)
Home	Home (Sc.)
Hope Dec.	Hope's Decisions (Sc.)
Hopk.	Hopkins' Chancery (N.Y.)
Hopk.Dec.	Hopkins' Decisions (Pa.)
Hopw.&C.	Hopwood & Coltman (Eng.)
Hopw.&P.	Hopwood & Philbrick (Eng.)
Hosea.	Hosea (Ohio)
Houst.	Houston (Del.)
Houst.Cr.	Houston's Criminal Cases (Del.)
How.	Howard (U.S.)
How.(Miss.)	Howard (Miss.)
How.A.Cas.	Howard's Appeal Cases (N.Y.)
How.N.P.	Howell's Nisi Prius (Mich.)
How.Pr.	Howard's Practice (N.Y.)
How.Pr.N.S.	Howard's Practice New Series (N.Y.)
How.St.Tr.	Howell's State Trials (Eng.)
Hud.&B.	Hudson & Brooke (Ir.)
Hughes	Hughes (Ky.)
Hughes	Hughes (U.S.)
Hume	Hume's Decisions (Sc.)
Humphr.	Humphreys (Tenn.)
Hun	Hun (N.Y.)
Hurl.&Gord.	Hurlstone & Gordon (Eng.)
Hurl.&W.	Hurlstone & Walmsley (Eng.)
Hutt.	Hutton (Eng.)

I

Idaho	Idaho
Iddings D.R.D.	Iddings Dayton Term Reports
Ill.	Illinois
Ill.App.	Illinois Appellate Court
Ill.Cir.	Illinois Circuit Court
Ind.	Indiana
Ind.App.	Indiana Appellate Court
Ind.T.	Indian Territory
Ins.L.J.	Insurance Law Journal
Int.Com.Commn.	Interstate Commerce Commission
Int.Com.Rep.	Interstate Commerce Reports
Int.Rev.Rec.	Internal Revenue Record
Iowa	Iowa
[1891]Ir.	Law Reports [1891] Irish
Ir.Ch.	Irish Chancery
Ir.C.L.	Irish Common Law
Ir.Eccl.	Irish Ecclesiastical Reports
Ired.	Iredell (N.C.)
Ir.Eq.	Irish Equity
Ir.Law Rep.	Irish Law Reports
Ir.Law &Eq.	Irish Law and Equity Reports
Ir.R.1894.	Irish Law Reports for year 1894
Ir.R.C.L.	Irish Reports Common Law
Ir.R.Eq.	Irish Reports Equity
Irv.Just.	Irvine's Justiciary Cases (Eng.)

J

Jac.	Jacob (Eng.)
Jac.&W.	Jacob & Walker (Eng.)
J.Bridgm.	John Bridgman (Eng.)
J.&C.	Jones & Carey (Ir.)
Jebb &B.	Jebb & Bourke (Ir.)
Jebb C.C.	Jebb's Crown Cases (Ir.)
Jebb&S.	Jebb & Symes (Ir.)
Jeff.	Jefferson (Va.)
Jenk.	Jenkins (Eng.)
J.J.Marsh.	J. J. Marshall (Ky.)
J.&L.	Jones & La Touche (Eng.)
Johns.	Johnson (Eng.)
Johns.	Johnson (N.Y.)
Johns.Cas.	Johnson's Cases (N.Y.)
Johns.Ch.	Johnson's Chancery (N.Y.)
Johns.V.C.	Johnson's English Vice-Chancellors (Eng.)
Johns.&H.	Johnson & Hemming (Eng.)
Jones Exch.	Jones Exchequer (Ir.)
Jones T.	Sir Thomas Jones' English King's Bench Reports
Jones W.	Sir William Jones' English King's Bench Reports
Jones&Spen.	Jones & Spencer (N.Y.)
Journ.Jur.	Journal of Jurisprudence (Pa.)
J.P.	Justice of Peace (Eng.)
Jur.	Jurist (Eng.)
Jur.N.S.	Jurist New Series (Eng.)
Just.L.R.	Justices' Law Reporter (Pa.)

K

Kames Dec.	Kames' Decisions (Sc.)
Kames Elucid.	Kames' Elucidation (Sc.)
Kames Rem.Dec.	Kames' Remarkable Decisions (Sc.)
Kames Sel.Dec.	Kames' Select Decisions (Sc.)
Kan.	Kansas
Kan.App.	Kansas Appeals
Kay	Kay (Eng.)
Kay&J.	Kay & Johnson (Eng.)
[1917]K.B.	Law Reports [1917] King's Bench (Eng.)
Keane &Gr.	Keane & Grant (Eng.)
Keb.	Keble (Eng.)
Keen	Keen (Eng.)
Keilw.	Keilway (Eng.)
Kel.C.C.	Kelyng's Crown Cases (Eng.)
Kelly	Kelly (Ga.)
Kelyng, J.	Kelyng's English Crown Cases
Kelynge, W.	Kelynge's Chancery (Eng.)
Keyes	Keyes (N.Y.)
Keyl.	Keilwey (Eng.)
K.&G.	Keane & Grant (Eng.)
Kilk.	Kilkerran's Decisions (Sc.)
Kirby	Kirby (Conn.)
Knapp	Knapp (Eng.)
Knapp&O.	Knapp & Ombler (Eng.)
Kn.&Moo.	Knapp & Moore (Eng.)
Knox	Knox (N.S.Wales)
Knox&F.	Knox & Fitzhardinge (N.S.Wales)
Kulp	Kulp (Pa.)
Ky.	Kentucky
Ky.Dec.	Kentucky Decisions
Ky.L.	Kentucky Law Reporter
Ky.Op.	Kentucky Opinions

L

La.	Louisiana
La.App.	Louisiana Court of Appeals
La.A.(Orleans)	Court of Appeal, Parish of Orleans
La.Ann.	Louisiana Annual
Lab.	Labatt's District Court (Cal.)
Lack.Jur.	Lackawanna Jurist (Pa.)
Lack.Leg.N.	Lackawanna Legal News (Pa.)
Lack.Leg.Rec.	Lackawanna Legal Record (Pa.)
Lalor	Lalor's Supplement to Hill & Denio (N.Y.)
Lanc.Bar	Lancaster Bar (Pa.)
Lanc.L.Rev.	Lancaster Law Review (Pa.)
Land Dec.	Land Decisions (U.S.)
Lane	Lane (Eng.)
Lans.	Lansing (N.Y.)
Lans.Ch.	Lansing's Chancery Decisions (N.Y.)
Latch	Latch (Eng.)
Law Rep.N.S.	Law Reports New Series (N.Y.)
L.C.	Lower Canada
L.&C.	Leigh & Cave (Eng.)
L.C.Jur.	Lower Canada Jurist
L.C.L.J.	Lower Canada Law Journal
L.C.Rep.S.Qu.	Lower Canada Reports Seignorial Questions
L.D.	Law Dictionary
Ld.Ken.	Lord Kenyon (Eng.)
Ld.Raym.	Lord Raymond (Eng.)
Lea	Lea (Tenn.)
Leach C.C.	Leach's Crown Cases (Eng.)
L.Ed.	Lawyers' Edition United States Supreme Court
Lee Eccl.	Lee's Ecclesiastical (Eng.)
Lee t.Hardw.	Lee temp. Hardwicke (Eng.)
Lef.Dec.	Lefevre's Parliamentary Decisions (Eng.)
Leg.Chron.	Legal Chronicle (Pa.)
Leg.Gaz.	Legal Gazette (Pa.)
Leg.&Ins.R.	Legal & Insurance Reporter (Pa.)
Leg.Int.	Legal Intelligencer (Pa.)
Leg.Op.	Legal Opinions (Pa.)
Leg.Rec.	Legal Record (Pa.)
Lehigh Co.L.J.	Lehigh County Law Journal (Pa.)
Lehigh Val.L.R.	Lehigh Valley Law Reporter (Pa.)
Leigh	Leigh (Va.)
Leigh &C.	Leigh & Cave's English Crown Cases
Leon.	Leonard (Eng.)
Lev.	Levinz (Eng.)
Lew.C.C.	Lewin's Crown Cases (Eng.)
Ley	Ley (Eng.)
L.G.	Law Glossary
Liberian L.	Liberian Law
Litt.	Littell (Ky.)
Litt.	Littleton (Eng.)
Litt.Sel.Cas.	Littell's Select Cases (Ky.)
L.J.Adm.	Law Journal Admiralty New Series (Eng.)
L.J.Bankr.	Law Journal Bankruptcy New Series (Eng.)
L.J.Ch.	Law Journal Chancery New Series (Eng.)
L.J.Ch.O.S.	Law Journal Chancery Old Series (Eng.)
L.J.C.P.	Law Journal Common Pleas New Series (Eng.)
L.J.C.P.O.S.	Law Journal Common Pleas Old Series (Eng.)
L.J.Eccl.	Law Journal Ecclesiastical New Series (Eng.)
L.J.Exch.	Law Journal Exchequer New Series (Eng.)
L.J.Exch.O.S.	Law Journal Exchequer Old Series (Eng.)
L.J.K.B.	Law Journal King's Bench New Series (Eng.)
L.J.K.B.O.S.	Law Journal King's Bench Old Series (Eng.)
L.J.M.C.	Law Journal Magistrate Cases New Series (Eng.)
L.J.M.C.O.S.	Law Journal Magistrate Cases Old Series (Eng.)
L.J.P.C.	Law Journal Privy Council New Series (Eng.)
L.J.P.D.&Adm.	Law Journal Probate Divorce & Admiralty New Series (Eng.)
L.J.P.&M.	Law Journal Probate & Matrimonial New Series (Eng.)
L.J.Q.B.	Law Journal Queen's Bench New Series (Eng.)
L.J.Rep.	Law Journal Reports (Eng.)
Ll.&G.t.Pl.	Lloyd & Goold temp. Plunket (Ir.)
Ll.&G.t.S.	Lloyd & Goold temp. Sugden (Ir.)
Ll.&W.	Lloyd & Welsby (Eng.)
L.&M.	Lowndes & Maxwell (Eng.)
L.M.&P.	Lowndes, Maxwell & Pollack (Eng.)
Loc.Gov.	Local Government (Eng.)
Lofft	Lofft (Eng.)
Longf.&T.	Longfield & Townsend (Ir.)
Low.Can.Seign.	Lower Canada Seignorial Reports
Lowell	Lowell (U.S.)
L.R.	Law Reports (U.S.)
L.R.A.	Lawyers' Reports Annotated
L.R.A.1915A.	Lawyers' Reports Annotated 1915A
L.R.App.Cas.	English Law Reports, Appeal Cases (Eng.)
L.R.A.&E.	Law Reports Admiralty & Ecclesiastical (Eng.)
L.R.A.N.S.	Lawyers' Reports Annotated New Series
L.R.C.C.	Law Reports Crown Cases (Eng.)
L.R.Ch.	Law Reports Chancery Appeal Cases (Eng.)
L.R.C.P.	Law Reports Common Pleas Cases (Eng.)
L.R.Eq.	Law Reports Equity Cases (Eng.)
L.R.Exch.	Law Reports Exchequer Cases (Eng.)
L.R.H.L.	Law Reports House of Lords (English & Irish Appeal Cases)
L.R.H.L.Sc.	Law Reports House of Lords (Scotch Appeal Cases)
L.R.Indian App.	Law Reports Indian Appeals (Eng.)
L.R.Ir.	Law Reports Irish
L.R.P.C.	Law Reports Privy Council (Eng.)
L.R.P.&D.	Law Reports Probate & Divorce (Eng.)
L.R.Q.B.	Law Reports Queen's Bench Cases (Eng.)
L.T.	Law Times (Pa.)
L.T.N.S.	Law Times New Series (Pa.)
L.T.O.S.	Law Times, Old Series (Eng.)

L.T.Rep.N.S.	Law Times Reports New Series (Eng.)
Lush.	Lushington's Admiralty (Eng.)
Lutw.	Lutwyche (Eng.)
Lutw.Reg.Cas.	Lutwyche's Registration Cases (Eng.)
Luz.Leg.Obs.	Luzerne Legal Observer (Pa.)
Luz.Leg.Reg.	Luzerne Legal Register (Pa.)
Lynd.Prov.	Lyndwood's Provinciales

M

MacA.Pat.Cas.	MacArthur's Patent Cases (D.C.)
MacArth.	MacArthur's District of Columbia Reports
MacAr.&M.	MacArthur & Mackey's District of Columbia Reports
Maccl.	Macclesfield (Eng.)
MacFarl.	MacFarlane (Sc.)
Mackey	Mackey's Reports, District of Columbia
Macl.&R.	Maclean & Robinson (Eng.)
Macn.&G.	Macnaghten & Gordon (Eng.)
Macph.	Macpherson (Sc.)
Macph.S.&L.	Macpherson, Shirreff & Lee (Sc.)
Macq.	Macqueen's Scotch Appeal Cases
Madd.	Maddock (Eng.)
Madd.Ch.Pr.	Maddock's Chancery Practice (Eng.)
Malloy	Malloy (Ir.)
Man.	Manitoba Law
Man.El.Cas.	Manning's Election Cases (Eng.)
Man.Exch.Pr.	Manning's Exchequer Practice (Eng.)
Man.Gr.&S.	Manning. Granger, & Scott (Eng.)
Man.L.J.	Manitoba Law Journal
Man.&Ry.	Manning & Ryland (Eng.)
Man.&Ry.Mag.Cas.	Manning & Ryland's Magistrates' Cases (Eng.)
Man.&S.	Manning & Scott (Eng.)
Mann.Unrep.Cas.	Manning's Unreported Cases (La.)
Manson	Manson (Eng.)
Man.t.Wood	Manitoba temp. Wood
March	March (Eng.)
Mar.Prov.	Maritime Province Reports (Can.)
Mars.Adm.	Marsden's Admiralty (Eng.)
Marsh.	Marshall (Eng.)
Marsh.J.J.	J. J. Marshall (Ky.)
Mart.	Martin Old Series (La.)
Mart.(N.S.)	Martin, New Series (La.)
Mart.	Martin (N.C.)
Marv.	Marvel (Del.)
Mart.N.S.	Martin New Series (La.)
Mart.&Y.	Martin & Yerger (Tenn.)
Mason	Mason (U.S.)
Mass.	Massachusetts
Maule &S.	Maule & Selwyn (Eng.)
Mayn.	Maynard (Eng.)
McAll.	McAllister (U.S.)
McC.	McCahon (Kan.)
McClell.	McClelland (Eng.)
McClell.&Y.	McClelland & Younge (Eng.)
McCord.	McCord (S.C.)
McCrary	McCrary (U.S.)
McG.	McGloin (La.)
McLean	McLean (U.S.)
McMul.	McMullan (S.C.)
Md.	Maryland
Md.Ch.	Maryland Chancery
Me.	Maine
Mees.&Ros.	Meeson & Roscoe (Eng.)
Mees.&W.	Meeson & Welsby (Eng.)
Meg.	Megone (Eng.)
Meigs	Meigs (Tenn.)
Menzies Cape of Good Hope	Menzies Cape of Good Hope
Meriv.	Merivale (Eng.)
Metc.	Metcalf (Mass.)
Metc.	Metcalfe (Ky.)
M.&G.	Manning & Granger (Eng.)
M.&H.	Murphy & Hurlstone (Eng.)
Mich.	Michigan
Mich.N.P.	Michigan Nisi Prius
Mich.T.	Michaelmas Term (Eng.)
Miles	Miles (Pa.)
Mill.Const.	Mill's Constitutional (S.C.)
Mill.Dec.	Miller's Decisions (U.S.)
Mills	Mills (N.Y.)
Milw.	Milward (Ir.)
Minn.	Minnesota
Minor	Minor (Ala.)
Misc.	Miscellaneous (N.Y.)
Miss.	Mississippi
Miss.Dec.	Mississippi Decisions
Miss.St.Cas.	Mississippi State Cases
M.&M.	Moody & Malkin (Eng.)
Mo.	Missouri
Mo.App.	Missouri Appeals
Moak	Moak (Eng.)
Mo.A.R.	Missouri Appeals Reporter
Mod.	Modern (Eng.)
Mod.Cas.L.&Eq.	Modern Cases at Law and Equity (Eng.)
Molloy	Molloy (Ir.)
Mon.	Monaghan (Pa.)
Mont.	Montana
Mont.	Montagu (Eng.)
Mont.Bank.Rep.	Montagu's English Bankruptcy Reports
Mont.L.R.	Montreal Law Reports (Can.)
Mont.&A.	Montagu & Ayrton (Eng.)
Mont.&B.	Montagu & Bligh (Eng.)
Mont.&C.	Montagu & Chitty (Eng.)
Mont.D.&DeG.	Montagu, Deacon & De Gex (Eng.)
Montg.Co.	Montgomery County Law Reporter (Pa.)
Mont.&M.	Montagu & McArthur (Eng.)
Montr.Cond.Rep.	Montreal Condensed Reports
Montr.Leg.N.	Montreal Legal News
Montr.Q.B.	Montreal Law Reports Queen's Bench
Montr.Super.	Montreal Law Reports Superior Court
Moody C.C.	Moody's Crown Cases (Eng.)
Moore C.P.	Moore's Common Pleas (Eng.)
Moore Indian App.	Moore's Indian Appeals (Eng.)
Moore K.B.	Moore's King's Bench (Eng.)
Moore P.C.	Moore's Privy Council Old Series (Eng.)
Moore P.C.N.S.	Moore's Privy Council New Series (Eng.)
Moore&S.	Moore & Scott (Eng.)
Moore&W.	Moore & Walker (Tex.)
Mor.Min.Rep.	Morrison's Mining Reports
Morr.	Morris (Iowa)
Morr.Bankr.Cas.	Morrell's Bankruptcy Cases (Eng.)
Morr.St.Cas.	Morris' State Cases (Miss.)
Mosely	Mosely (Eng.)
M.&P.	Moore & Payne (Eng.)
M.&R.	Manning & Ryland (Eng.)
M.&Rob.	Moody & Robinson (Eng.)
M.&S.	Maule & Selwyn (Eng.)
Mun.Corp.Cas.	Municipal Corporation Cases
Munf.	Munford (Va.)
Murph.	Murphey (N.C.)
Murr.	Murray (Sc.)
M.&W.	Meeson & Welsby (Eng.)
Myl.&C.	Mylne & Craig (Eng.)
Myl.&K.	Mylne & Keen (Eng.)
Myr.Prob.	Myrick's Probate (Cal.)

N

Nat.Bankr.Reg.	National Bankruptcy Register (U.S.)
Nat.Corp.Rep.	National Corporation Reporter
Nat.L.Rep.	National Law Reporter
N.B.	New Brunswick
N.Benl.	New Benloe (Eng.)
N.B.Eq.	New Brunswick Equity
N.C.	North Carolina
N.Chipm.	N. Chipman (Vt.)
N.C.Conf.	North Carolina Conference
N.C.T.Rep.	North Carolina Term Reports
N.D.	North Dakota
N.E.	North Eastern Reporter
N.E.(2d)	North Eastern Reporter Second Series
Neb.	Nebraska
Neb.(Unoff.)	Nebraska Unofficial
Nels.	Nelson (Eng.)
Nels.Abr.	Nelson's Abridgment of the Common Law

Nev.	Nevada
Newb.Adm.	Newberry's Admiralty (U.S.)
Newfoundl.	Newfoundland
Newf.Sel.Cas.	Newfoundland Select Cases
New Rep.	New Reports in all Courts (Eng.)
New Sess.Cas.	New Session Cases (Eng.)
New Zeal.L.	New Zealand Law
N.H.	New Hampshire
N.J.Eq.	New Jersey Equity
N.J.Law	New Jersey Law
N.J.L.J.	New Jersey Law Journal
N.J.Misc.	New Jersey Miscellaneous
N.M.	New Mexico
N.&M.	Nevile & Manning (Eng.)
N.&Macn.	Neville & Macnamara (Eng.)
Nolan	Nolan (Eng.)
North.	Northington (Eng.)
North.Co.	Northampton County Reporter (Pa.)
Northum.	Northumberland County Legal News (Pa.)
Northumb.Co.Leg. N.	Northumberland County Legal News (Pa.)
Notes of Cas.	Notes of Cases (Eng.)
Nott & McC.	Nott & McCord (S.C.)
Noy	Noy (Eng.)
N.&P.	Nevile & Perry (Eng.)
N.S.	Nova Scotia
N.S.Dec.	Nova Scotia Decisions
N.S.Wales	New South Wales
N.S.Wales L.	New South Wales Law
N.S.Wales L.R.Eq.	New South Wales Law Reports Equity
N.W.	North Western Reporter
N.Y.	New York
N.Y.Ann.Cas.	New York Annotated Cases
N.Y.City Ct.	New York City Court
N.Y.City Ct.Suppl.	New York City Court Supplement
N.Y.Civ.Proc.	New York Civil Procedure
N.Y.Civ.Pr.Rep.	New York Civil Procedure Reports
N.Y.Code Reports, N.S.	New York Code Reports, New Series
N.Y.Cr.	New York Criminal
N.Y.Leg.Obs.	New York Legal Observer
N.Y.L.Rec.	New York Law Record
N.Y.Month.L.Bul.	New York Monthly Law Bulletin
N.Y.S.	New York Supplement
N.Y.St.	New York State Reporter
N.Y.Super.	New York Superior Court
N.Y.Wkly.Dig.	New York Weekly Digest

O

O.Ben.	Old Benloe (Eng.)
O.Bridgm.	Orlando Bridgman (Eng.)
Off.Gaz.	Official Gazette
Ohio	Ohio
Ohio App.	Ohio Court of Appeals
Ohio Cir.Ct.	Ohio Circuit Court
Ohio Cir.Ct.N.S.	Ohio Circuit Court New Series
Ohio Cir.Dec.	Ohio Circuit Decisions
Ohio Dec. (Reprint)	Ohio Decisions (Reprint)
Ohio F.Dec.	Ohio Federal Decisions
Ohio L.J.	Ohio Law Journal
Ohio N.P.	Ohio Nisi Prius
Ohio N.P.N.S.	Ohio Nisi Prius New Series
Ohio O.	Ohio Opinions
Ohio Prob.	Ohio Probate
Ohio S.&C.P.	Ohio Superior & Common Pleas Decisions
Ohio St.	Ohio State
Okl.	Oklahoma
Okl.Cr.	Oklahoma Criminal
Olcott	Olcott (U.S.)
Oliv.B.&L.	Oliver, Beavan & Lefroy (Eng.)
O'M.&H.	O'Malley & Hardcastle (Ir.)
Ont.	Ontario
Ont.A.	Ontario Appeals
Ont.El.Cas.	Ontario Election Cases
Ont.L.	Ontario Law
Ont.L.J.	Ontario Law Journal
Ont.L.J.N.S.	Ontario Law Journal New Series
Ont.Pr.	Ontario Practice
Ont.W.N.	Ontario Weekly Notes
Ont.W.R.	Ontario Weekly Reporter
Op.Atty.-Gen.	Opinions of Attorneys-General (U.S.)
Op.Sol.Dept. Labor	Opinions of the Solicitor for the Department of Labor dealing with Workmen's Compensation
Or.	Oregon
Orleans App.	Orleans Appeals (La.)
Overt.	Overton (Tenn.)
Owen	Owen (Eng.)

P

P.	Pacific Reporter
P.(2d)	Pacific Reporter Second Series
[1891]P.	Law Reports [1891] Probate (Eng.)
Pa.	Pennsylvania State
Pa.Cas.	Pennsylvania Supreme Court Cases (Sadler)
Pa.Co.	Pennsylvania County Court
Pa.C.Pl.	Common Pleas (Pa.)
Pa.Dist.	Pennsylvania District
Pa.Dist.&Co.	Pennsylvania District and County
Paige	Paige's Chancery (N.Y.)
Paine	Paine (U.S.)
Pa.L.J.	Pennsylvania Law Journal
Pa.L.Rec.	Pennsylvania Law Record
Pa.L.J.R.	Clark's Pennsylvania Law Journal Reports
Palm.	Palmer (Eng.)
Park.	Parker (Eng.)
Park.Cr.	Parker's Criminal (N.Y.)
Park.Exch.	Parker's Exchequer (Eng.)
Park.Ins.	Parker's Insurance (Eng.)
Pars.Eq.Cas.	Parsons' Equity Cases (Pa.)
Pa.Super.	Pennsylvania Superior Court
Paton App.Cas.	Paton's Appeal Cases (Sc.)
Patrick El.Cas.	Patrick's Election Cases (Can.)
Patt.&H.	Patton & Heath (Va.)
P.D.	Law Reports Probate Division (Eng.)
P.&D.	Perry & Davison (Eng.)
Peake N.P.	Peake's Nisi Prius (Eng.)
Pearce C.C.	Pearce's Reports in Dearsly's (Eng.)
Pearson	Pearson (Pa.)
Peck	Peck (Tenn.)
Peck.El.Cas.	Peckwell's Election Cases (Eng.)
Pennew.	Pennewill (Del.)
Pennyp.	Pennypacker (Pa.)
Penr.&W.	Penrose & Watts (Pa.)
Perry & Kn.	Perry & Knapp Election Cases (Eng.)
Pet.	Peters (U.S.)
Pet.Adm.	Peters' Admiralty (U.S.)
Pet.C.C.	Peters' Circuit Court (U.S.)
Phil.	Phillips (Eng.)
Phil.	Phillip (N.C.)
Phila.	Philadelphia (Pa.)
Philippine	Philippine
Phillim.	Phillimore Ecclesiastical (Eng.)
Pick.	Pickering (Mass.)
Pig.&R.	Pigott & Rodwell (Eng.)
Pig.Rec.	Pigott's Recoveries (Eng.)
Pinn.	Pinney (Wis.)
Pittsb.	Pittsburgh (Pa.)
Pittsb.Leg.J.	Pittsburgh Legal Journal (Pa.)
Pittsb.Leg.J.N.S.	Pittsburgh Legal Journal New Series (Pa.)
P.&K.	Perry & Knapp (Eng.)
Plowd.	Plowden (Eng.)
Pollexf.	Pollexfen (Eng.)
Poph.	Popham (Eng.)
Port.	Porter (Ala.)
Posey	Posey's Unreported Cases (Tex.)
Puerto Rico	Puerto Rico
Puerto Rico Fed.	Puerto Rico Federal
Pow.Surr.	Powers' Surrogate (N.Y.)
P.R.&D.El.Cas.	Power, Rodwell & Dew's Election Cases (Eng.)
Prec.Ch.	Precedents in Chancery (Eng.)
Pr.Edw.Isl.	Prince Edward Island
Price	Price (Eng.)
Price Pr.Cas.	Price's Practice Cases (Eng.)
Prid.&C.	Prideaux & Cole (Eng.)
Prob.[1917]	Law Reports, Probate Division (Eng.)

Prob.Rep.	Probate Reports (Eng.)
Pr.Rep.	Practice Reports (Eng.)
P.Wms.	Peere-Williams (Eng.)
P.U.R.	Public Utilities Reports
Pyke	Pyke (Can.)

Q

Q.B.	Queen's Bench (Adolphus & Ellis New Series) (Eng.)
[1891] Q.B.	Law Reports [1891] Queen's Bench (Eng.)
Q.B.D.	Law Reports Queen's Bench Division (Eng.)
Queensl.J.P.	Queensland Justice of the Peace
Queensl.L.	Queensland Law
Queensl.L.J.	Queensland Law Journal
Que.L.	Quebec Law
Que.Pr.	Quebec Practice
Que.Q.B.	Quebec Official Reports Queen's Bench
Que.Rev.Jud.	Quebec Revised Judicial
Que.Super.	Quebec Official Reports Superior Court
Quincy	Quincy (Mass.)

R

Rand.	Randolph (Va.)
Rap.Jud.Q.C.S.	Rapport's Judiciaries de Quebec Cour Superieure
Rawle	Rawle (Pa.)
R.C.L.	Ruling Case Law
R.&Can.Cas.	Railway & Canal Cases (Eng.)
R.&Can.Tr.Cas.	Railway & Canal Traffic Cases (Eng.)
Redf.	Redfield's Surrogate (N.Y.)
Redf.&B.	Redfield & Bigelow's Leading Cases (Eng.)
Redf.R.Cas.	Redfield's Railway Cases (Eng.)
Redf.Surr.	Redfield's Surrogate (N.Y.)
Reeve Eng.L.	Reeve's English Law
Reports	Reports (Eng.)
Reprint	English Reprint
Rep.t.Finch	Cases temp. Finch (Eng.)
Rep.t.Hard.	Lee's Reports *tempore* Hardwicke (Eng.)
Rep.t.Holt	Reports *tempore* Holt (English Cases of Settlement)
Res.&Eq.Judgm.	Reserved & Equity Judgments (N.S. Wales)
Rev.Crit.	Revue Critique (Can.)
Rev.de Jur.	Revue de Jurisprudence (Can.)
Rev.de Legis.	Revue de Legislation (Can.)
Rev.Leg.	Revue Legale (Can.)
Rev.Leg.N.S.	Revue Legale New Series (Can.)
Rev.Rep.	Revised Reports (Eng.)
R.I.	Rhode Island
Rice	Rice (S.C.)
Rich.	Richardson (S.C.)
Rich.C.P.	Richardson's Practice Common Pleas (Eng.)
Ridg.	Ridgeway's Reports *tempore* Hardwicke (Eng.)
Ridg.Ap.	Ridgeway's Appeal (Ir.)
Ridg.L.&S.	Ridgeway, Lapp & Schoale (Ir.)
Ridg.P.C.	Ridgeway's Parliament Cases (Ir.)
Ridg.t.Hardw.	Ridgeway temp. Hardwicke (Eng.)
Riley	Riley (S.C.)
R.&M.	Ryan & Moody (Eng.)
R.M.Charlt.	R. M. Charlton (Ga.)
Rob.	Robinson (La.)
Rob.	Robinson (Va.)
Robb Pat.Cas.	Robb's Patent Cases (U.S.)
Robert.App.Cas.	Robertson's Appeal Cases (Sc.)
Rob.Eccl.	Robertson's Ecclesiastical (Eng.)
Robin.App.Cas.	Robinson's Appeal Cases (Sc.)
Rob.Wm.Adm.	William Robinson's Admiralty (Eng.)
Rolle	Rolle (Eng.)
Rolle Abr.	Rolle's Abridgment (Eng.)
Rolls Ct.Rep.	Rolls' Court Reports
Rom.Cas.	Romilly's Notes of Cases (Eng.)
Root	Root (Conn.)
Rose	Rose (Eng.)
Ross Lead.Cas.	Ross' Leading Cases (Eng.)
R.&R.	Russell & Ryan Crown Cases (Eng.)
Russ.	Russell (Eng.)
Russ.&C.Eq.Cas.	Russell's & Chesley's Equity Cases (N.S.)
Russ.Eq.Cas.	Russell's Equity Cases (N.S.)
Russ.&Geld.	Russell & Geldert, Nova Scotia
Russ.&M.	Russell & Mylne (Eng.)
Ry.&M.	Ryan & Moody (Eng.)

S

Salk.	Salkeld (Eng.)
Sandf.	Sandford's Superior Court (N.Y.)
Sandf.Ch.	Sandford's Chancery (N.Y.)
Sask.L.	Saskatchewan Law
Saund.	Saunders (Eng.)
Saund.&C.	Saunders & Cole (Eng.)
Sau.&Sc.	Sausse & Scully (Ir.)
S.Austr.L.	South Australia Law
Sav.	Savile (Eng.)
Sawy.	Sawyer (U.S.)
Saxt.	Saxton (N.J.)
Say.	Sayer (Eng.)
S.C.	South Carolina
[1907] S.C.	Court of Session Cases (Sc.)
Scam.	Scammon (Ill.)
S.C.Eq.	South Carolina Equity
Sch.&Lef.	Schoales & Lefroy (Ir.)
[1907] S.C. (J.)	Court of Justiciary Cases (Sc.)
Sc.Jur.	Scottish Jurist
S.C.L.	South Carolina Law
Sc.L.Rep.	Scottish Law Reporter
Scot L.T.	Scot Law Times
Scott	Scott (Eng.)
Scott N.R.	Scott's New Reports (Eng.)
Scr.L.T.	Scranton Law Times (Pa.)
Sc.Sess.Cas.	Scotch Court of Session Cases
S.Ct.	Supreme Court Reporter (U.S.)
S.D.	South Dakota
S.E.	South Eastern Reporter
Searle & Sm.	Searle & Smith (Eng.)
Sel.Cas.Ch.	Select Cases in Chancery (Eng.)
Seld.	Selden's Notes (N.Y.)
Selden	Selden (N.Y.)
Selw.	Selwyn's Nisi Prius (Eng.)
Serg.&R.	Sergeant & Rawle (Pa.)
Sess.Cas.	Court of Session Cases (Eng.)
Shan.	Shannon (Tenn.)
Shaw	Shaw (Sc.)
Shaw&D.	Shaw & Dunlop (Sc.)
Shaw Dec.	Shaw's Digest of Decisions (Sc.)
Shaw, Dunl.&B.	Shaw, Dunlop & Bell (Sc.)
Shaw&M.	Shaw & MacLean (Sc.)
Sheld.	Sheldon (N.Y.)
Shep.Abr.	Sheppard's Abridgment
Sheph.Sel.Cas.	Shepherd's Select Cases (Ala.)
Show.	Shower (Eng.)
Show.P.C.	Shower's Parliament Cases (Eng.)
Sid.	Siderfin (Eng.)
Silv.A.	Silvernail's Appeals (N.Y.)
Silv.Sup.	Silvernail's Supreme (N.Y.)
Sim.	Simons (Eng.)
Sim.N.S.	Simons New Series (Eng.)
Sim.&St.	Simons & Stuart (Eng.)
Skin.	Skinner (Eng.)
Smale&G.	Smale & Giffard (Eng.)
Smith	Smith (Ind.)
Smith	Smith (N.H.)
Smith&B.	Smith & Batty (Ir.)
Smith K.B.	Smith's King's Bench (Eng.)
Smith Lead.Cas.	Smith's Leading Cases (Eng.)
Smith Reg.	Smith's Registration (Eng.)
Sm.&M.	Smedes & Marshall (Miss.)
Sm.&M.Ch.	Smedes & Marshall Chancery (Miss.)
Smythe	Smythe (Ir.)
Sneed	Sneed (Tenn.)
So.	Southern Reporter
Sol.J.	Solicitor's Journal (Eng.)
Sp.	Speers (S.C.)
Spinks	Spinks Admiralty (Eng.)
Spinks	Spinks' Ecclesiastical and Admiralty (Eng.)

Spinks, P.C.	Spinks' Prize Cases (Eng.)
Spottisw.	Spottiswoode (Sc.)
Spottisw.Eq.	Spottiswoode's Equity (Sc.)
Sprague	Sprague (U.S.)
Stair	Stair (Sc.)
Stark.	Starkie Nisi Prius (Eng.)
Stat. at L.	United States Statutes at Large
Stew.	Stewart (Ala.)
Stew.	Stewart's Reports (N.S.)
Stew.&P.	Stewart & Porter (Ala.)
Stockt.Vice-Adm.	Stockton's Vice-Admiralty (N.B.)
Story	Story (U.S.)
Str.	Strange (Eng.)
Strob.	Strobhart (S.C.)
Stuart Vice-Adm.	Stuart's Vice-Admiralty (L.C.)
Stu.M.&P.	Stuart, Milne & Peddie (Sc.)
Style	Style (Eng.)
Sumn.	Sumner (U.S.)
Susq.Leg.Chron.	Susquehanna Legal Chronicle (Pa.)
S.W.	South Western Reporter
S.W.(2d)	South Western Reporter Second Series
Swab.	Swabey's Admiralty (Eng.)
Swab.&Tr.	Swabey & Tristram (Eng.)
Swan	Swan (Tenn.)
Swanst.	Swanston (Eng.)

T

Taml.	Tamlyn (Eng.)
Taney	Taney (U.S.)
Tapp.	Tappan (Oh.)
Taunt.	Taunton (Eng.)
Taylor	Taylor (N.C.)
T.B.Mon.	T. B. Monroe (Ky.)
Tenn.	Tennessee
Tenn.App.	Tennessee Appeals
Tenn.Cas.	Unreported Tennessee Cases
Tenn.Ch.	Tennessee Chancery
Tenn.Ch.A.	Tennessee Chancery Appeals
Tenn.Civ.A.	Tennessee Civil Appeals
Terr.L.	Territories Law (Northwest Territories)
Tex.	Texas
Tex.App.	Texas Court of Appeals
Tex.A.Civ.Cas.	White & Wilson's Civil Cases (Tex.)
Tex.Civ.App.	Texas Civil Appeals
Tex.Cr.	Texas Criminal
Tex.Suppl.	Texas Supplement
Tex.Unrep.Cas.	Posey's Unreported Cases (Tex.)
Thach.Cr.	Thacher's Criminal Cases (Mass.)
Thomps.&C.	Thompson & Cook (N.Y.)
Thomps.Cas.	Thompson's Cases (Tenn.)
Tinw.	Tinwald (Sc.)
T.Jones	Thomas Jones (Eng.)
T.L.R.	Times Law Reports (Eng.)
T.M.R.	Trade Mark Reports
T.&M.	Temple & Mew (Eng.)
Toth.	Tothill (Eng.)
T.R.	Term Reports (Durnford & East) (Eng.)
Transcr.A.	Transcript Appeals (N.Y.)
T.Raym.	Thomas Raymond (Eng.)
Tread.Const.	Treadway Constitutional (S.C.)
Treas.Dec.	Treasury Decisions (U.S.)
Tr.&H.Pr.	Troubat & Haly's Practice (Pa.)
Trint.T.	Trinity Term (Eng.)
Truem.Eq.Cas.	Trueman's Equity Cases (N.B.)
Tuck.Sel.Cas.	Tucker's Select Cases (Newfoundland)
Tuck.Surr.	Tucker's Surrogate (N.Y.)
T.U.P.Charlt.	T. U. P. Charlton (Ga.)
Turn.&R.	Turner & Russell (Eng.)
Tyler	Tyler (Vt.)
Tyrw.	Tyrwhitt (Eng.)
Tyrw.&G.	Tyrwhitt & Granger (Eng.)

U

U.C.	Upper Canada
U.C.Ch.	Upper Canada Chancery
U.C.Cham.	Upper Canada Chamber
U.C.C.P.	Upper Canada Common Pleas
U.C.E.&A.	Upper Canada Error and Appeal
U.C.K.B.	Upper Canada King's Bench Reports
U.C.Q.B.	Upper Canada Queen's Bench
U.C.Q.B.O.S.	Upper Canada Queen's Bench Old Series
U.S.	United States
U.S.Aviation Rep.	Aviation Reports (U.S.)
U.S.C.A.	United States Code Annotated
Utah	Utah

V

Va.	Virginia
Va.Cas.	Virginia Cases
Va.Ch.Dec.	Chancery Decisions (Va.)
Va.Dec.	Virginia Decisions
Van Ness Prize Cas.	Van Ness Prize Cases (U.S.)
Vaugh.	Vaughan (Eng.)
Vaux	Vaux's Decisions (Pa.)
Vent.	Ventris (Eng.)
Vern.	Vernon's Cases (Eng.)
Vern.Ch.	Vernon's Chancery (Eng.)
Vern.&S.	Vernon & Scriven (Ir.)
Ves.	Vesey Senior (Eng.)
Ves.&B.	Vesey & Beames (Eng.)
Ves.Jr.	Vesey Junior (Eng.)
Ves.Jr.Suppl.	Vesey Junior Supplement (Eng.)
Ves.Suppl.	Vesey Senior Supplement (Eng.)
Vict.	Victorian
Vict.L.	Victorian Law
Vict.L.T.	Victorian Law Times
Vict.Rep.	Victorian Reports
Vict.St.Tr.	Victorian State Trials
Vin.Abr.	Viner's Abridgment (Eng.)
Virgin Islands	Virgin Islands
Vt.	Vermont

W

Walk.	Walker (Pa.)
Walk.	Walker's Chancery (Mich.)
Wall.	Wallace (U.S.)
Wall.C.C.	Wallace (U.S.)
Wall.Jr.	Wallace Junior (U.S.)
Wall.Sr.	Wallace Senior (U.S.)
Wallis	Wallis (Ir.)
Ware	Ware (U.S.)
Wash.	Washington
Wash.	Washington (Va.)
Wash.St.	Washington State
Wash.C.C.	Washington Circuit Court (U.S.)
Wash.T.	Washington Territory
Watts	Watts (Pa.)
Watts&S.	Watts & Sergeant (Pa.)
W.Bl.	William Blackstone (Eng.)
W.C.C.	Minton-Senhouse's Workmen's Compensation Cases (Eng.)
Webb, A'B.&W.I. P.&M.	Webb, A'Beckett, & Williams' Insolvency, Probate, and Matrimonial Reports (Victoria)
Web.Pat.Cas.	Webster's Patent Cases (Eng.)
Welsh	Welsh Registry Cases (Ir.)
Wend.	Wendell (N.Y.)
West	West (Eng.)
West.L.J.	Western Law Journal (Oh.)
West.L.Month.	Western Law Monthly (Oh.)
West.L.R.	Western Law Reporter (Can.)
West.L.T.	Western Law Times (Can.)
West.R.	Western Reporter
West t.Hardw.	West temp. Hardwicke (Eng.)
West.Wkly.	Western Weekly (Can.)
[1917]West.Wkly.	[1917] Western Weekly (Can.)
Whart.	Wharton (Pa.)
Wheat.	Wheaton (U.S.)
Wheel.Cr.	Wheeler's Criminal (N.Y.)
White&T.Lead. Cas.Eq.	White & Tudor's Leading Cases in Equity (Eng.)
Whitm.Pat.Cas.	Whitman's Patent Cases (U.S.)
Wight.	Wightwicke (Eng.)
Wilcox	Wilcox (Pa.)
Willes	Willes (Eng.)
Wilm.	Wilmot's Notes (Eng.)
Wils.	Wilson (Ind.)

Wils.Ch.	Wilson's Chancery (Eng.)
Wils.C.P.	Wilson's Common Pleas (Eng.)
Wils.Exch.	Wilson's Exchequer (Eng.)
Wils.P.C.	Wilson's Privy Council (Eng.)
Wils.&S.	Wilson & Shaw (Sc.)
Winch	Winch (Eng.)
Winst.	Winston (N.C.)
Wis.	Wisconsin
W.Jones	William Jones (Eng.)
W.Kel.	William Kelynge (Eng.)
Wkly.L.Gaz.	Weekly Law Gazette (Oh.)
Wkly.N.C.	Weekly Notes of Cases (Pa.)
Wkly.Rep.	Weekly Reporter (Eng.)
Wms.Saund.	Williams Notes to Saunders' Reports
W.N.	Weekly Notes (Eng.)
Wolf.&B.	Wolferstan & Bristow's Election Cases (Eng.)
Wolf.&D.	Wolferstan & Dew's Election Cases (Eng.)
Woll.	Wollaston (Eng.)
Woodb.&M.	Woodbury & Minot (U.S.)
Woods	Woods (U.S.)
Woodw.	Woodward's Decisions (Pa.)
Woolw.	Woolworth (U.S.)
Words & Phrases	Words & Phrases
Wright	Wright (Oh.)
W.Rob.	William Robinson's Admiralty (Eng.)
Wr.Pa.	Wright (Pa.)
W.Va.	West Virginia
W.W.Harr.	W. W. Harrington
W.W.&D.	Willmore, Wollaston & Davidson (Eng.)
W.W.&H.	Willmore, Wollaston & Hodges (Eng.)
Wyo.	Wyoming
Wythe	Wythe's Chancery (Va.)
Wy.&W.	Wyatt & Webb (Vict.)
Wy.W.&A'Beck.	Wyatt, Webb & A'Beckett (Vict.)

Y

Yates Sel.Cas.	Yates Select Cases (N.Y.)
Y.B.	Year Book (Eng.)
Y.&C.Exch.	Younge & Collyer's Exchequer (Eng.)
Y.&Coll.	Younge & Collyer's Chancery (Eng.)
Yeates	Yeates (Pa.)
Yelv.	Yelverton (Eng.)
Yerg.	Yerger (Tenn.)
Y.&J.	Younge & Jervis (Eng.)
York Leg.Rec.	York Legal Record (Pa.)
Young Adm.	Young's Admiralty Decisions (N.S.)
Younge	Younge Exchequer (Eng.)

LAW REVIEWS AND LAW JOURNALS

A.B.A.Jour.	American Bar Association Journal
Am.J.Int.Law	American Journal of International Law
Am.Law S.Rev.	American Law School Review
B.U.L.Rev.	Boston University Law Review
Brooklyn L.Rev.	Brooklyn Law Review
Calif.L.Rev.	California Law Review
Camb.L.J.	Cambridge Law Journal
Chi-Kent Rev.	Chicago-Kent Review
Colum.L.Rev.	Columbia Law Review
Com.L.J.	Commercial Law Journal
Cornell L.Q.	Cornell Law Quarterly
Detroit L.Rev.	Detroit Law Review
Dick.L.Rev.	Dickinson Law Review
Fed.B.A.J.	Federal Bar Association Journal
Fla.L.J.	Florida Law Journal
Fordham L.Rev.	Fordham Law Review
Geo.Wash.L.Rev.	George Washington Law Review
Geo.L.J.	Georgetown Law Journal
Harv.L.Rev.	Harvard Law Review
Ia.L.Rev.	Iowa Law Review
Idaho L.J.	Idaho Law Journal
Ill.L.Rev.	Illinois Law Review
Ind.L.J.	Indiana Law Journal
J.Am.Jud.Soc.	Journal of the American Judicature Society
J.Comp.Leg.	Journal of the Society of Comparative Legislation
J.N.A.Referees Bank.	Journal of the National Association of Referees in Bankruptcy
J.Soc.Pub.Teach. Law	Journal of the Society of Pub. Teachers of Law
John Marshall L. Q.	The John Marshall Law Quarterly
Kan.City L.Rev.	Kansas City Law Review
Kan.St.L.J.	Kansas State Law Journal
Ky.L.J.	Kentucky Law Journal
L.J.	Law Journal
L.Lib.J.	Law Library Journal
Law Ser.Mo.Bull.	University of Missouri Bulletin, Law Series
Law Soc.J.	Law Society Journal
Lincoln L.Rev.	Lincoln Law Review
Marq.L.Rev.	Marquette Law Review
Mass.L.Q.	Massachusetts Law Quarterly
Mercer, Beasley L.Rev.	Mercer, Beasley Law Review
Mich.L.Rev.	Michigan Law Review
Minn.L.Rev.	Minnesota Law Review
Miss.L.J.	Mississippi Law Journal
Neb.L.B.	Nebraska Law Bulletin
N.J.L.J.	New Jersey Law Journal
N.J.L.Rev.	New Jersey Law Review
N.Y.U.L.Q.Rev.	New York University Law Quarterly Review
Notre Dame Law.	Notre Dame Lawyer
N.C.L.Rev.	North Carolina Law Review
Okla.S.B.J.	Oklahoma State Bar Journal
Oreg.L.Rev.	Oregon Law Review
Phil.L.J.	Philippine Law Journal
Rocky Mt.L.Rev.	Rocky Mountain Law Review
St. John's L.Rev.	St. John's Law Review
St. Louis L.Rev.	St. Louis Law Review (now Washington University Law Quarterly)
So.Calif.L.Rev.	Southern California Law Review
Temp.L.Q.	Temple Law Quarterly
Tenn.L.Rev.	Tennessee Law Review
Tex.L.Rev.	Texas Law Review
Tul.L.Rev.	Tulane Law Review
U.Chi.L.Rev.	University of Chicago Law Review
U.Cin.L.Rev.	University of Cincinnati Law Review
U.Detroit L.J.	University of Detroit Law Journal
U.Pa.L.Rev.	University of Pennsylvania Law Review
U. of Pitts.L.Rev.	University of Pittsburgh Law Review
U.Toronto L.J.	University of Toronto Law Journal
Va.L.Rev.	Virginia Law Review
Wash.L.Rev.	Washington Law Review
Wash.U.L.Q.	Washington University Law Quarterly
W.Va.L.Q.	West Virginia Law Quarterly and The Bar
Wis.L.Rev.	Wisconsin Law Review
Yale L.J.	Yale Law Journal

LIST OF TITLES

IN

CORPUS JURIS SECUNDUM

CORPUS JURIS SECUNDUM

VOLUME THIRTY-TWO

EVIDENCE

This Title includes means of ascertaining the truth respecting matters of fact in issue in civil actions and proceedings in general; admissibility for that purpose of relevant facts, statements, oral or written, opinions, character, reputation, etc.; modes of proof and production of evidence other than testimony of witnesses, particularly documentary evidence, and exclusion of oral by documentary evidence; burden of making proof, and operation of presumptions; and sufficiency and effect of evidence in civil cases in general.

Matters not in this Title, treated elsewhere in this work, see Descriptive-Word Index

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Sub-Analysis

For Sub-Analysis of §§ 1 to 402 see Vol. 31

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C. Limitations of, and Exceptions to, Rule—Continued

X. RES GESTÆ

A. IN GENERAL

§ 403. Nature of Doctrine

The term "res gestae" may be defined as those circumstances which are the undesigned incidents of a particular litigated act and which are admissible when illustrative of such act.

"Res gestæ" has been described as a term of protean significance.[24] The rule as to the admissibility of evidence known as the "res gestæ rule" has been declared to be incapable of any precise definition,[25] and it has been applied to so many different and unrelated situations that it has been said that the difficulty of formulating a description of "res gestæ" which will serve for all cases seems insurmountable.[26] However, notwithstanding the term "res gestæ" lacks scientific precision and has been much criticized, it has been too often passed on by the courts to be discarded at this late date.[27]

It may be stated generally that in any particular case submitted to judicial investigation, the nature of the right or liability asserted involves consideration by the tribunal of a certain number of principal facts, the happening of which extends over a definite period of time and directly determines the existence of the right or liability. This collection of primary facts constituting the necessary and immediate field of a judicial inquiry may be designated as the res gestæ,[28] within this field of immediate inquiry the court will receive evidence of all the facts.[29] The term "res gestæ" has, however, frequently been given a greatly extended application and has been defined as "those circumstances which are the undesigned incidents of a particular litigated act and which are admissible when illustrative of such act;"[30] it may also be defined in a general way as meaning the circumstances, facts, and declarations which grow out of the main fact and serve to illustrate its character and which are so spontaneous and contemporaneous with the main fact as to exclude the idea of deliberation or fabrication,[31] and it has been made to embrace all facts which are relevant to the principal fact in any degree as tending to establish the existence of a claim or a liability in dispute between the parties which

24. Mo.—Landau v. Travelers' Ins. Co., 267 S.W. 376, 305 Mo. 563.

25. Va.—Ellis v. Virginia Ry. & Power Co., 110 S.E. 382, 132 Va. 24—Washington-Virginia Ry. Co. v. Deahl, 100 S.E. 840, 126 Va. 141.

26. Mo.—Landau v. Travelers' Ins. Co., 267 S.W. 376, 305 Mo. 563.

27. Va.—Upton v. Commonwealth, 2 S.E.2d 337, 172 Va. 654.

28. N.C.—Fraley v. Fraley, 64 S.E. 381, 150 N.C. 501.
22 C.J. p 443 note 11.
"'Res gestae' consists of all the things done in relation to, and as a part of, a certain event."—Travelers Ins. Co. v. Minton, 73 P.2d 422, 423, 181 Okl. 306.

Thing done

(1) "Res gestae means thing done."—McClory v. Schneider, Tex.Civ. App., 51 S.W.2d 738, 741, error dismissed.

(2) "Res gestae means 'things done' at the transaction being investigated, and includes not only the facts and circumstances of the occurrence, but also the declarations made under the immediate spur of, and as a part of, the main transaction."—Roh v. Opocensky, 253 N.W. 680, 681, 126 Neb. 518.

29. Mo.—Royle Mining Co. v. Fidelity & Casualty Co. of New York, 142 S.W. 438, 161 Mo.App. 185.
22 C.J. p 443 note 12.

30. Ark.—Ft. Smith Oil Co. v. Slover, 24 S.W. 106, 58 Ark. 168—Little Rock, M. R & T. R. Co. v. Leverett, 3 S.W. 50, 48 Ark. 333, 3 Am. S.R. 230.
Colo.—Denver & R. G. R. Co. v. Spencer, 52 P. 211, 25 Colo. 9.
Fla.—State Board of Funeral Directors and Embalmers for Florida v. Cooksey, 3 So.2d 502.
Me.—McLeod v. Johnson, 52 A. 760, 96 Me. 271.
Mo.—Pryor v. Payne, 263 S.W. 982, 304 Mo. 560—Kuether v. Kansas City Light & Power Co., 276 S.W. 105, 220 Mo.App. 452.
Pa.—First Nat. Bank v. Home Ins. Co., 118 A. 17, 274 Pa. 129—Coll v. Easton Transit Co., 37 A. 89, 180 P. 618.
Va.—Ward v. White, 9 S.E. 1021, 86 Va. 212, 19 Am.S.R. 883.
22 C.J. p 444 note 13.

Similar definitions

Kan.—Eagon v. Eagon, 57 P. 942, 60 Kan. 697.
Mass.—Lund v. Tyngsborough, 9 Cush. 36.
Minn.—O'Connor v. Chicago, M. & St. P. R. Co., 6 N.W. 481, 27 Minn. 166, 38 Am.R. 288.
Mo.—State ex rel. Metropolitan Life Ins. Co. v. Shain, 121 S.W.2d 789, 343 Mo. 435, quashing certiorari Bailey v. Metropolitan Life Ins. Co., App., 115 S.W.2d 151—Kansas City v. Boruff, 243 S.W. 167, 295 Mo. 28—Redmon v. Metropolitan St. Ry. Co., 84 S.W. 26, 185 Mo. 1, 105 Am.S.R. 558.
Mont.—Sullivan v. Metropolitan Life Ins. Co., 29 P.2d 1046, 96 Mont. 254.
N.J.—Hannaford v. Central R. Co. of New Jersey, 181 A. 306, 115 N.J. Law 573, affirmed 185 A. 46, 116 N.J.Law 412.

31. Mont.—Stagg v. Stagg, 32 P.2d 856, 96 Mont. 575—Sullivan v. Metropolitan Life Ins. Co., 29 P.2d 1046, 96 Mont. 254.
Tex.—Southern Surety Co. v. Weaver, Com.App., 273 S.W. 838, affirming, Civ.App., 260 S.W. 622—San Antonio Public Service Co. v. Alexander, Civ.App., 270 S.W. 199, affirmed, Com.App., 280 S.W. 753.

Other and similar definitions

Cal.—Rulofson v. Billings, 74 P. 35, 140 Cal. 452—Heckle v. Southern Pac. Co., 56 P. 56, 123 Cal. 441.
Colo.—Denver City Tramway Co. v. Brumley, 116 P. 1051, 51 Colo. 251.
Conn.—Pinney v. Jones, 30 A. 762, 64 Conn. 545, 42 Am.S.R. 209—Stirling v. Buckingham, 46 Conn. 461.
Ga.—Carter v. Buchannon, 3 Ga. 513.
Ind.—Chicago & E. Ry. Co. v. Cummings, 53 N.E. 1026, 24 Ind.App. 192.
Ky.—Illinois Cent. R. Co. v. Houchins, 101 S.W. 924, 125 Ky. 483, 31 Ky.L. 93.
N.J.—Demeter v. Rosenberg, 175 A. 621, 114 N.J.Law 55.
Wis.—Hermes v. Chicago & N. W. R. Co., 50 N.W. 584, 80 Wis. 590, 27 Am.S.R. 69.

directly arises, if at all, from the primary fact.[32] The term has also been extended to cover the admissions of a party[33] or his agent,[34] statements indicative of a relevant mental state,[35] and facts which tend to establish liability by showing acts done on other distinct occasions, as part of a consistent plan of operation.[36] The res gestæ may include things left undone as well as things done.[37]

The res gestæ rule is frequently applied to let in evidence of unsworn statements,[38] it being held that, if the existence of a conversation is relevant for any purpose, the statements in such conversation are competent.[39] In applying the broad general principle, no logical distinction can be drawn between statements and acts, for in reality, except so far as relates to the truth of the assertion, a verbal act

32. Ala.—Roan v. State, 143 So. 454, 458, 225 Ala. 428, citing **Corpus Juris.**
22 C.J. p 444 notes 14, 15.

33. Ind.—Keyes v. State, 23 N.E. 1097, 122 Ind. 527.
Pa.—O'Mara v. Commonwealth, 75 Pa. 424.
Tex.—Weathersby v. State, 15 S.W. 823, 29 Tex.App. 278.

34. N.H.—Semprini v. Boston & M. R. R., 179 A. 349, 87 N.H. 279.
N.C.—Smith v. Kappas, 12 S.E.2d 693, 218 N.C. 758, rehearing granted and opinion modified on other grounds 15 S.E.2d 375, 219 N.C. 850.
22 C.J. p 445 note 24.
Statements by agents and employees generally see infra § 410.

35. N.H.—American Employers Ins. Co. v. Wentworth, 5 A.2d 265, 90 N.H. 112.
Tenn.—Long v. Tomlin, 125 S.W.2d 171, 22 Tenn.App. 607.
22 C.J. p 280 note 33, p 445 note 25.

Intent or intention

(1) Evidence held admissible generally.
Ala.—McManus v. State, 36 Ala. 285.
Ill.—Oscar Heyman & Bros. v. Marshall Field & Co., 22 N.E.2d 776, 301 Ill.App. 340.
Mo.—Rowland v. Boston Ins. Co., 55 S.W.2d 1011, 225 Mo.App. 597.
N.J.—Kelly v. Pitney, 121 A. 593, 98 N.J.Law 773.
Ohio.—U. S. Fidelity & Guaranty Co. v. Kinneman, 153 N.E. 261, 22 Ohio App. 369.
Okl.—Gibson Oil Co. v. Westbrooke, 16 P.2d 127, 160 Okl. 26.
22 C.J. p 282 note 64.

(2) Declarations of a person showing his intention as to residence, made under such circumstances as to explain, and to constitute a part of the res gestæ of, his acts in reference to his residence, are competent.—Gilmartin v. Emery, 160 A. 874, 131 Me. 236.
48 C.J. p 491 notes 61, 62.

Knowledge or notice

Ill.—Swanson v. Chicago City Ry. Co., 90 N.E. 210, 242 Ill. 388.

On departure or absence

(1) When it is material to show the purpose or reason for the departure of a person, his declarations of his purpose made at or about the time of his departure are admissible as part of the res gestæ.
Ill.—Boyer Chemical Laboratory Co. v. Industrial Commission, 10 N.E 2d 389, 366 Ill. 635, 113 A.L.R. 264.
La.—Champagne v. Welsh Motor Car Co., 150 So. 35.
Mo.—Edwards v. Ethyl Gasoline Corporation, 112 S.W.2d 555, 342 Mo. 98.
Ohio.—Outland v. Industrial Commission, 26 N.E.2d 760, 136 Ohio St. 488, reversing 18 N.E.2d 499, 59 Ohio App. 427—Lake Shore & M. S. Ry. Co. v. Herrick, 29 N.E. 1052, 49 Ohio St. 25.
Tex.—Texas Employers' Ins. Ass'n v. White, Civ.App., 68 S.W.2d 511, error dismissed—Compton v. Republic Building & Loan Ass'n, Civ. App., 67 S.W.2d 1095, 1097, error dismissed, quoting **Corpus Juris**—Maryland Casualty Co. v. Kent, Civ.App., 271 S.W. 929, affirmed, Com.App., 3 S.W.2d 414.
22 C.J. p 287 note 25.

(2) To be admissible as part of the res gestae, such statements must not have been too remote from the time of departure.
Ala.—Cook v. State, 32 So. 696, 134 Ala. 137.
Ill.—Chicago & E. I. R. Co. v. Chancellor, 46 N.E. 269, 165 Ill. 438.
Va.—McBride v. Commonwealth, 30 S.E. 454, 95 Va. 818.

(3) The admissibility of such evidence depends on whether declaration sought to be considered as part of res gestæ is so separated from act of departure by lapse of time as to render it probable that deceased spoke from design rather than instinctive impulse.—Boyer Chemical Laboratory Co. v. Industrial Commission, 10 N.E.2d 389, 366 Ill. 635, 113 A.L.R. 264.

Suicide notes

(1) Where the presumption of death has arisen from declarant's absence for seven years, notes written by him just before his disappearance stating his intention to commit suicide have been held to be admissible as part of the res gestae.
U.S.—U. S. v. O'Brien, C.C.A.Va., 51 F.2d 37.
Ky.—Mutual Life Ins. Co. of New York v. Louisville Trust Co., 269 S. W. 1014, 207 Ky. 654.

(2) On the other hand, in an action on life insurance certificate where insured had disappeared, a letter from insured to his children stating "When you read these lines I am no more," merely indicating a present intention to commit suicide, was held not to be admissible as a part of res gestæ, since his death was not shown.—Bergman v. Supreme Tent, Knights of Maccabees of the World, 220 S.W. 1029, 203 Mo. App. 685.

36. La.—State v. Terry, 53 So. 15, 128 La. 680.
S.D.—State v. Halpin, 91 N.W. 605, 16 S.D. 170.

Prior transactions

Evidence as to prior transactions and conversations between parties is admissible where it tends to illustrate transaction in question, or where question of intent or knowledge is material.—Panhandle Const. Co. v. City of Spearman, Tex.Civ. App., 89 S.W.2d 1053.

37. N.J.—Slayback Van Order Co. v. Eiben, 177 A. 671, 115 N.J.Law 17.

38. U.S.—Fort Street Union Depot Co. v. Hillen, C.C.A.Mich., 119 F. 2d 307.
Iowa.—Miser v. Iowa State Traveling Men's Ass'n, 273 N.W. 155, 223 Iowa 662.
Mo.—Nanney v. I. H. Shell & Son, 138 S.W.2d 717, 719, citing **Corpus Juris.**
Okl.—Henry Chevrolet Co. v. Taylor, 108 P.2d 1024.
22 C.J. p 445 note 27.

How proved

Such declarations should be proved by those to whom they were made, and not by declarant.—Parker v. Schrimsher, Tex.Civ.App., 172 S.W. 165.

39. Cal.—Turner v. Donovan, 39 P. 2d 858, 3 Cal.App.2d 485.
Tex.—Oliver v. Scott, Civ.App., 253 S.W. 503.
Wash.—Bayers v. Barry, 104 P. 993, 114 Wash. 252.
22 C.J. p 446 note 28.

Necessary to understanding

In an action against a street railroad company for personal injuries, evidence of a statement made by a bystander was admissible, where such statement was necessary to the understanding of the motorman's reply thereto, admitted in evidence.—Champlin v. Pawcatuck Valley St. Ry. Co., 82 A. 481, 33 R.I. 572.

does not essentially differ from any other.[40] The rule is, therefore, that where the making of a statement in controversy, or the doing of an act, assists in constituting the transaction or in proving per se a relevant fact, the declaration or act is competent.[41] An examination of the cases will disclose, it has been stated,[42] that the statement or declaration concerning which testimony is offered must, in order to be admissible as part of the res gestæ, possess at least the following essential elements: (1) The statement or declaration must relate to the main event and must explain, elucidate, or in some manner characterize that event, see infra §§ 404–409. (2) It must be a natural declaration or statement growing out of the event, and not a mere narrative of a past, completed affair, see infra § 420. (3) It must be a statement of fact, and not the mere expression of an opinion, see infra § 421. (4) It must be a spontaneous or instinctive utterance of thought, dominated or evoked by the transaction or occurrence itself, and not the product of premeditation, reflection, or design, see infra § 417. (5) While the declaration or statement need not be coincident or contemporaneous with the occurrence of the event, it must be made at such time and under such circumstances as will exclude the presumption that it is the result of deliberation. See infra §§ 411–413. (6) It must appear that the declaration or statement was made by one who either participated in the transaction or witnessed the act or fact concerning which the declaration or statement was made, see infra § 410.

The test of the admissibility of evidence as a part of the res gestæ is whether the act, declaration, or exclamation is so intimately interwoven or connected with the principal fact or event which it characterizes as to be regarded as a part of the transaction itself, and also whether it clearly negatives any premeditation or purpose to manufacture testimony.[43]

Unsworn declarations which are received as part of the res gestæ do not depend for their effect on the credit or credibility of declarant, but derive their probative force from their close connection with the occurrence which they accompany and tend to explain,[44] and are admissible as original evidence,[45] although it is frequently stated that they are received under an exception to the hearsay rule.[46]

No hard and fast rule can be laid down as to the

40. Mo.—Bailey v. Metropolitan Life Ins. Co., App., 115 S.W.2d 151, 156, quoting **Corpus Juris**, and opinion quashed on other grounds State ex rel. Metropolitan Life Ins. Co. v. Shain, 121 S.W.2d 789, 343 Mo. 435.
22 C.J. p 446 note 29.

41. Ala.—William E. Harden, Inc., v. Harden, 197 So. 94, 29 Ala.App. 411.
Cal.—People v. Collier, 295 P. 898, 901, 111 Cal.App. 215, quoting **Corpus Juris** as the "well-settled res gestæ rule", and affirmed People v. Shurtleff, 299 P. 92, 113 Cal.App. 739.
Ill.—Dunn v. Dunn, 241 Ill.App. 11, 19, citing **Corpus Juris.**
Mo.—Bank of Conception of Clyde v. American Bonding Co. of Baltimore, 89 S.W.2d 554, 230 Mo.App. 54.
Mont.—Stagg v. Stagg, 32 P.2d 856, 863, 96 Mont. 575, quoting **Corpus Juris.**
Tex.—Royal Indemnity Co. v. Hogan, Civ.App., 4 S.W.2d 93, 95, citing **Corpus Juris**, error refused.
Wash.—Knight v. Hibler, 213 P. 675, 124 Wash. 82.
22 C.J. p 446 note 30.

42. Wash.—Beck v. Dye, 92 P.2d 1113, 200 Wash. 1, 127 A.L.R. 1022.

43. Ill.—Molloy v. Chicago Rapid Transit Co., 166 N.E. 530, 335 Ill. 164—Charles E. Reed & Co. v. Industrial Commission, 159 N.E. 777, 328 Ill. 345.
Ky.—Sparks Bus Line v. Spears, 124 S.W.2d 1031, 276 Ky. 600—Castle v. Allen, 120 S.W.2d 219, 274 Ky. 658.
Mo.—Schroeder v. Rawlings, 127 S.W.2d 678, 344 Mo. 630—Evans v. Sears, Roebuck & Co., App., 129 S.W.2d 53, 59, citing **Corpus Juris.**
Pa.—Yost v. Susquehanna Pipe Line Co., 32 Luz.Leg.Reg. 324.

The only conditions on which explanations will be admitted as part of the res gestae are that there is a startling occasion, startling enough to produce nervous excitement, and render the utterance spontaneous and unreflecting; that the statement must have been made before there was time to contrive and misrepresent; and the statement must relate to the circumstances of the occurrence preceding it.—Carter v. C. F. Smith Co., 281 N.W. 380, 285 Mich. 621—Froman v. Banquet Barbecue, 278 N.W. 758, 284 Mich. 44—Sheathelm v. Consumers Power Co., 273 N.W. 410, 280 Mich. 106—Sexton v. Balinski, 273 N.W. 335, 280 Mich. 28—Ayling v. City of Detroit, 266 N.W. 372, 275 Mich. 338—McAvon v. Brightmoor Transit Co., 222 N.W. 126, 245 Mich. 44—Stone v. Sinclair Refining Co., 196 N.W. 339, 225 Mich. 344—Rogers v. Saginaw-Bay City R. Co., 153 N.W. 784, 187 Mich. 490.

44. Mo.—Bailey v. Metropolitan Life Ins. Co., App., 115 S.W.2d 151, 156, quoting **Corpus Juris**, and opinion quashed on other grounds State ex rel. Metropolitan Life Ins. Co. v. Shain, 121 S.W.2d 789, 343 Mo.App. 435.
R.I.—Powell v. Gallivan, 118 A. 769, 44 R.I. 453.
22 C.J. p 448 note 31.

45. Ill.—Culver Military Academy v. Staley, 250 Ill.App. 531, 537, citing **Corpus Juris.**
22 C.J. p 448 note 32.

Substantive evidence
Iowa.—Muntz v. Travelers Mut. Casualty Co., 295 N.W. 837—McNeely v. Conlon, 248 N.W. 17, 216 Iowa 796—Duncan v. Rhomberg, 236 N.W. 638, 212 Iowa 389.

Statements to a physician by a patient, which are a part of the res gestae, are admissible to establish the truth of the matters communicated.—Reid v. Yellow Cab Co., 279 P. 635, 131 Or. 27, 67 A.L.R. 1.

Weight
Res gestae statements are of material weight and substance, and are on the same footing and standing as any other facts relating to the immediate transaction.—John v. Pierce, 178 N.W. 297, 172 Wis. 44.

46. Mich.—Sexton v. Balinski, 273 N.W. 335, 280 Mich. 28.
N.H.—Semprini v. Boston & M. R. R., 179 A. 349, 87 N.H. 279.
N.J.—Demeter v. Rosenberg, 175 A. 621, 114 N.J.Law 55.
Pa.—Rudisill v. Cordes, 5 A.2d 217, 333 Pa. 544—Deater v. Penn Mach. Co., 166 A. 846, 311 Pa. 291.

admissibility of evidence as a part of the res gestæ. The facts and circumstances presented in different cases vary so widely that the courts have come to the point of adjudging this question as it is presented by the particular case under consideration;[47] and the admissibility vel non of evidence as part of the res gestæ is a matter resting very largely in the discretion of the trial court.[48] The tendency of the courts, however, has been to extend rather than narrow the matters which may be admitted under the res gestæ doctrine.[49]

Civil and criminal cases. The res gestæ rule ap-

Wash.—Moen v. Chestnut, 118 P.2d 1030.

22 C.J. p 448 note 33.

47. U.S.—Fort Street Union Depot Co. v. Hillen, C.C.A.Mich., 119 F.2d 307—Standard Oil Co. of New Jersey v. Neville, C.C.A.W.Va., 48 F.2d 580.

Ariz.—Pickwick Stages Corporation v. Williams, 287 P. 440, 36 Ariz. 520.

Ark.—Public Utilities Corporation of Arkansas v. Cordell, 43 S.W.2d 746, 184 Ark. 878—Intercity Terminal Ry. Co. v. Worden, 6 S.W.2d 547, 177 Ark. 464.

Ga.—Usry v. Augusta Southern R. Co., 102 S.E. 184, 24 Ga.App. 722.

Ill.—Kalschinski v. Illinois Bankers Life Assur. Co., 35 N.E.2d 705, 311 Ill.App. 181—Peterson v. Cochran & McCluer Co., 31 N.E.2d 825, 308 Ill.App. 348—Johnson v. Swords Co., 3 N.E.2d 705, 286 Ill.App. 377.

Ind.—Lake Erie & W. R. Co. v. Scott, 147 N.E. 315, 83 Ind.App. 357.

Ky.—Consolidated Coach Corporation v. Earls' Adm'r, 94 S.W.2d 6, 263 Ky. 814.

Miss.—Simon v. Dixie Greyhound Lines, 176 So. 160, 179 Miss. 568.

Mo.—Landau v. Travelers' Ins. Co, 267 S.W. 376, 305 Mo. 563—Sciasm v. Alexander, 93 S.W.2d 36, 230 Mo.App. 1175.

Neb.—Roh v. Opocensky, 251 N.W. 102, 105, 125 Neb. 551, quoting Corpus Juris.

Okl.—Standard Accident Ins. Co. v. Baker, 291 P. 962, 145 Okl. 100—Marland Refining Co. v. Snider, 251 P. 989, 120 Okl. 116.

Pa.—Smith v. Welsh Bros., 156 A. 598, 102 Pa.Super. 54.

S.C.—Funderburk v. Powell, 187 S.E. 742, 181 S.C. 412.

Tex.—Tyreco Refining Co. v. Cook, Civ.App., 110 S.W.2d 219, error dismissed—Texas Employers Ins. Ass'n v. Shifflette, Civ.App., 91 S.W.2d 787, error dismissed.

22 C.J. p 449 note 34.

Precedents merely illustrative

"Each case is in a sense a law unto itself and must be decided on its particular facts, so that precedents are valuable more for the purpose of illustration than for establishment of a rule which may be generally followed."—Sullivan v. Metropolitan Life Ins. Co., 29 P.2d 1046, 1049, 96 Mont. 254.

48. U.S.—Fort Street Union Depot Co. v. Hillen, C.C.A.Mich., 119 F.2d 307; Rast v. Mutual Life Ins. Co. of New York, C.C.A.S.C., 112 F.2d 769—Bonner v. Texas Co., C.C.A.Tex., 89 F.2d 291—Provident Life & Accident Ins. Co. v. Eaton, C.C.A.Va., 84 F.2d 528—William C. Barry, Inc., v. Baker, C.C.A.Me., 82 F.2d 79—U. S. v. O'Brien, C.C.A.Va., 51 F.2d 37—Flannagan v. Provident Life & Accident Ins. Co., C.C.A.Va., 22 F.2d 136.

Ariz.—Pickwick Stages Corporation v. Williams, 287 P. 440, 36 Ariz. 520.

Ga.—Davis v. Metropolitan Life Ins. Co., 172 S.E. 467, 48 Ga.App. 179—Chapman v. Gilmore, 143 S.E. 773, 38 Ga.App. 297—Alvaton Mercantile Co. v. Caldwell, 128 S.E. 781, 34 Ga.App. 151.

Idaho.—Towne v. Northwestern Mut. Life Ins. Co. of Milwaukee, Wis., 70 P.2d 364, 58 Idaho 83.

Ill.—Kalschinski v. Illinois Bankers Life Assur. Co., 35 N.E.2d 705, 311 Ill.App. 181—Peterson v. Cochran & McCluer Co., 31 N.E.2d 825, 308 Ill.App. 348—Home for Destitute Crippled Children v. Boomer, 31 N.E.2d 812, 308 Ill.App. 170—Johnson v. Swords Co., 3 N.E.2d 705, 286 Ill.App. 377.

Ind.—Kelley v. Dickerson, 13 N.E.2d 535, 213 Ind. 624.

Iowa.—Miser v. Iowa State Traveling Men's Ass'n, 273 N.W. 155, 223 Iowa 662—Case v. Case, 238 N.W. 85, 212 Iowa 1318—Pride v. Interstate Business Men's Acc. Ass'n of Des Moines, 216 N.W. 62, 207 Iowa 167, 62 A.L.R. 31—Lynch v. Egypt Coal Co., 181 N.W. 385, 190 Iowa 1272.

Kan.—State v. McCrady, 106 P.2d 696, 698, 152 Kan. 566, citing Corpus Juris.

Minn.—Zane v. Home Ins. Co. of New York, 254 N.W. 453, 191 Minn. 382—O'Connor v. Chicago, M., St. P. & P. Ry. Co., 251 N.W. 674, 190 Minn. 277, followed in 253 N.W. 670, 190 Minn. 290, certiorari denied Chicago, M., St. P. & P. R. Co. v. O'Connor, 54 S.Ct. 860, 292 U.S. 651, 78 L.Ed. 1500.

Mo.—Woods v. Southern Ry. Co., 73 S.W.2d 374—Smith v. Producers Cold Storage Co., App., 128 S.W.2d 299—Goucher v. Woodmen Accident Co. of Lincoln, Neb., 104 S.W.2d 289, 231 Mo.App. 573.

Mont.—Stagg v. Stagg, 32 P.2d 856, 96 Mont. 575—Sullivan v. Metropolitan Life Ins. Co., 29 P.2d 1046, 96 Mont. 254.

Neb.—Suhr v. Lindell, 277 N.W. 381, 133 Neb. 856.

N.J.—Demeter v. Rosenberg, 175 A. 631, 114 N.J.Law 55.

Okl.—Henry Chevrolet Co. v. Taylor, 108 P.2d 1024—Feenberg Supply Co. v. Pierce, 95 P.2d 610, 185 Okl. 662—Wray v. Garrett, 90 P.2d 1050, 185 Okl. 138—Travelers Ins. Co. v. Minton, 73 P.2d 122, 181 Okl. 306—Margay Oil Corporation v. Jamison, 59 P.2d 790, 177 Okl. 433—West v. Fondren, 218 P. 1080, 93 Okl. 239—Chicago, R. I. & P. Ry. Co. v. Owens, 186 P. 1092, 78 Okl. 56, certiorari denied 40 S.Ct. 485, 253 U.S. 492, 64 L.Ed. 1027—Chicago, R. I. & P. Co. v. Tate, 156 P. 1182, 57 Okl. 215.

S.C.—Lazar v. Great Atlantic & Pacific Tea Co., 14 S.E.2d 560—[illegible] v. Southern Public Utilities Co., 187 S.E. 363, 181 S.C. 316—Neal v. Southern Ry., Carolina Division, 160 S.E. 537, 162 S.C. [illegible], certiorari denied Southern Ry. Carolina Division v. Neal, 52 S.Ct. [illegible], 284 U.S. 621, 76 L.Ed. [illegible].

Tenn.—Riverside Mill Co. v. [illegible], 141 S.W.2d [illegible]—Armstrong v. Bowman, 115 S.W.2d [illegible], 21 Tenn.App. 673—Tennessee [illegible] v. Gleaves, 2 Tenn.App. [illegible].

Tex.—Southern Surety Co. v. [illegible], Com.App., 273 S.W. [illegible]—[illegible], Civ.App., 280 S.W. [illegible]—[illegible] v. International Travelers Assur. Co., Civ.App., 110 S.W.2d [illegible], error dismissed—Richardson v. [illegible], Civ.App., 105 S.W.2d [illegible], error dismissed—Texas Employers Ins. Ass'n v. Shifflette, Civ.App., 91 S.W.2d 787, error dismissed.

Utah.—Jackson v. Utah Rapid Transit Co., 290 P. 970, 77 Utah [illegible].

Wis.—Kressin v. Chicago & N. W. Ry. Co., 215 N.W. [illegible], [illegible] Wis. 480.

22 C.J. p 449 note 35.

Discretion held abused

U.S.—Ætna Life Ins. Co. v. Kornhauer, C.C.A.Okl., [illegible] F.2d [illegible].

Utah.—Hall v. Smith, [illegible] P.2d [illegible], 81 Utah 179.

Discretion held not abused

N.C.—Swinson v. [illegible], [illegible] S.E.2d 284, 219 N.C. 772.

Some element of discretion

Cal.—Showalter v. Western Pacific R. Co., 106 P.2d [illegible], [illegible] App., 96 P.2d 961.

49. U.S.—Yarborough v. Prudential Ins. Co. of America, C.C.A.Ala., 99 F.2d 874, rehearing denied 100 F.2d 547.

Ky.—Sparks Bus Line v. Spears, 124 S.W.2d 1031, 276 Ky. 600.

plies as well in civil as in criminal cases.[50]

Presence of adverse party. A statement may properly be admitted in evidence as a part of the res gestæ notwithstanding it was not made in the presence of the party adversely affected thereby.[51]

§ 404. Main or Principal Fact

The necessary relation of res gestæ statements to the main or principal fact, and the essential nature of such fact will be discussed in detail in the sections immediately following.

Examine Pocket Parts for later cases.

§ 405. —— Necessity

In order for evidence to be admissible as part of the res gestae, there must be a main or principal fact.

From the very nature of evidence admitted as part of the res gestæ, there must be a main or principal fact,[52] which may, however, be either the ultimate fact to be proved or some fact evidentiary of that fact.[53] It is proceeding in a circle to use the declarations as proof of facts necessary to constitute the declarations part of the res gestæ.[54]

§ 406. —— Admissibility

The main or principal fact must itself be admissible.

It is essential that the main act or fact should itself be relevant and admissible in order to make the res gestæ admissible;[55] and if it is not of this character its actual admission, without objection, does not render an accompanying declaration competent.[56]

§ 407. —— Equivocalness

The main or principal fact must be equivocal in order for res gestae evidence to be admissible to explain it.

It is only when the thing done is equivocal that it is competent to prove declarations accompanying it as falling within the class of res gestæ.[57]

§ 408. —— Duration or Extent

The duration of the main or principal fact depends on its nature.

The main transaction is not necessarily confined to a particular point of time, but may extend over a longer or shorter period, according to the nature and character of the transaction.[58]

§ 409. Attendant Circumstances

The circumstances attendant on the main or principal fact may be shown as part of the res gestae.

Facts or circumstances attendant on the main fact in issue may be shown as part of the res gestæ, although they involve no idea of action.[59]

Tex.—Evans v. McKay, Civ.App., 212 S.W. 680, dismissed for want of jurisdiction.
Wash.—Heg v. Mullen, 197 P. 51, 115 Wash. 252.

50. Wash.—Norton v. Payne, 281 P. 991, 154 Wash. 241.

51. Tex.—Edwards v. West Texas Hospital, Civ.App., 89 S.W.2d 801, error dismissed.

52. U.S.—Yarbrough v. Prudential Ins. Co. of America, C.C.A.Ga., 99 F.2d 874, rehearing denied 100 F. 2d 547.
Ga.—Carter v. Buchannon, 3 Ga. 513.
Ill.—Kalschinski v. Illinois Bankers Life Assur. Co., 35 N.E.2d 705, 311 Ill.App. 181.
N.C.—Staley v. Royal Pines Park, 162 S.E. 202, 202 N.C. 155.
Tex.—McBeath v. Campbell, Civ.App., 4 S.W.2d 999, 1002, citing **Corpus Juris**, and reversed in part on other grounds and affirmed in part, Com.App., 12 S.W.2d 118—Southland Life Ins. Co. v. Hopkins, Com. App., 219 S.W. 254, reversed on other ground, Com.App., 244 S.W. 989.
Vt.—In re Campbell's Will, 138 A. 725, 100 Vt. 395, 54 A.L.R. 1369.
W.Va.—Collins v. Equitable Life Ins. Co., 8 S.E.2d 825, 826, 122 W.Va. 171, 130 A.L.R. 287, citing **Corpus Juris**.
Wis.—Hermes v. Chicago & N. W. R. Co., 50 N.W. 584, 80 Wis. 590, 27 Am.S.R. 69.
22 C.J. p 449 note 38.

Permission to use rest room

Rest room custodian's giving woman permission to use it was not such exertion of power simultaneously with woman's injury in falling over defective carpet as to render custodian's declarations following fall admissible as res gestæ.—Staley v. Royal Pines Park, 162 S.E. 202, 202 N.C. 155.

53. Mass.—Lund v. Tyngsborough, 9 Cush. 36.
N.J.—Hunter v. State, 40 N.J.Law 495.
Tex.—Upton v. State, 88 S.W. 212, 48 Tex.Cr. 289.

54. La.—State v. Williams, 32 So. 402, 108 La. 222.

55. Neb.—Horst v. Lewis, 103 N.W. 460, 71 Neb. 365.
N.C.—Staley v. Royal Pines Park, 162 S.E. 202, 202 N.C. 155.
22 C.J. p 450 note 41.

56. Conn.—Pinney v. Jones, 30 A. 762, 64 Conn. 545, 42 Am.S.R. 209.

57. Mass.—Hargreaves v. Keogh Storage Co., 145 N.E. 456, 250 Mass. 339.
Vt.—Fitch v. Bemis, 177 A. 193, 107 Vt. 165.
22 C.J. p 450 note 43, p 461 note 88.

58. U.S.—Yarbrough v. Prudential Ins. Co. of America, C.C.A.Ga., 99 F.2d 874, rehearing denied 100 F.2d 547.
22 C.J. p 450 note 44.
Res gestæ statements by one in possession see supra § 247.

59. Ala.—Louisville & N. R. Co. v. Hamby, 93 So. 698, 700, 208 Ala. 75, citing **Corpus Juris**.
Okl.—Gibson Oil Co. v. Westbrooke, 16 P.2d 127, 160 Okl. 26.
Pa.—MacDougall v. Pennsylvania Power & Light Co., 166 A. 589, 311 Pa. 387—Nevin Bus Line v. Paul R. Hostetter Co., 155 A. 872, 305 Pa. 72.
22 C.J. p 470 note 16.

Particular matters held admissible

(1) Appearance and physical condition of a person.—Hammond v. Industrial Commission, 34 P.2d 687, 84 Utah 67—22 C.J. p 470 note 16 [a] (1), (2).

(2) Contract between defendant and agent, in action for services by plaintiff employed by agent.—Pandem Oil Corporation v. McKinney, Tex.Civ.App., 3 S.W.2d 466, error dismissed.

(3) Claim of ownership of property, in an action for assault and battery committed in dispute over

B. ACCOMPANYING ACTS OR STATEMENTS

§ 410. By Whom Done or Made

Statements of persons who participate in or witness the main or principal fact may be admissible as part of the res gestae.

In order for a declaration or statement to be admissible as a part of the res gestæ it must appear that it was made by one who either participated in the transaction or witnessed the act or fact concerning which the declaration or statement was made.[60] As this rule implies, it is not necessary, in order to render a statement or act admissible as part of the res gestæ, that it should have been made or done by one of the participants in the main transaction,[61] but, if it has the necessary connection with the main

such property.—Goodwin v. Aaron, 85 So. 17, 203 Ala. 677.

(4) Effect on others of the force which injured plaintiff.
Ala.—Routledge v. Schmitt, 195 So. 246, 239 Ála. 436—Alabama Power Co. v. Bruce, 96 So. 346, 209 Ala. 423.
Ill.—West Chicago St. Ry. Co. v. Kennelly, 48 N.E. 996, 170 Ill. 508.
Mo.—Feltz v. Terminal Railroad Ass'n of St. Louis, 81 S.W.2d 616, 336 Mo. 790—Conduitt v. Trenton Gas & Electric Co., 31 S.W.2d 21, 326 Mo. 133—Gaty v. United Rys. Co., 251 S.W. 61—Crockett v. Kansas City Rys. Co., 243 S.W. 902—Fenton v. Hart, App., 73 S.W.2d 1034—Ridenhour v. Oklahoma Contracting Co., App., 45 S.W.2d 108—Grubb v. Kansas City Rys. Co., 230 S.W. 675, 207 Mo.App. 16.

(5) Full description of locus in quo of difficulty.—Sovereign Camp, W. O. W., v. Colvin, 119 So. 635, 218 Ala. 616.

(6) In actions for death of mother and child hit by truck, condition and location of bodies.—Asumendi v. Ferguson, 65 P.2d 713, 57 Idaho 450.

(7) In action for killing of plaintiff's horse when released from trestle by railroad employees, place where horse was buried, condition of embankment near trestle, and general condition of locus in quo.—Bugg v. Mitchell, 103 So. 713, 20 Ala. App. 555.

(8) Intoxication of driver of motor vehicle involved in accident.
Mo.—Wallace v. St. Joseph Ry., Light, Heat & Power Co., 77 S.W. 2d 1011, 1012, 336 Mo. 282, quoting **Corpus Juris.**
Tex.—Ford Motor Co. v. Whitt, Civ. App., 81 S.W.2d 1032, error refused.

(9) On issue of lack of mental capacity of mother to execute deed to son, questions as to her mental and physical condition at such time.—Rocha v. Rocha, 240 P. 1010, 197 Cal. 396.

(10) Proof of railroad crossing defects, other than those complained of in declaration.—St. Louis-San Francisco Ry. Co. v. Thompson, C. C.A.Miss., 30 F.2d 586.

(11) Testimony of physician who did not assist in operation, but made examination of female patient, that uterus was ruptured, in malpractice action for patient's death resulting from failure to discover and remove second fetus before decomposition.—Edwards v. West Texas Hospital, Tex.Civ.App., 89 S.W.2d 801, error dismissed.

(12) Other matters.
Ala.—Harris v. Wright, 144 So. 834, 225 Ala. 627.
Ky.—Thronton v. Phillips, 90 S.W. 2d 347, 262 Ky. 346.
Mo.—Grott v. Johnson, Stephens & Shinkle Shoe Co., 2 S.W.2d 785—Ganahl Lumber Co. v. Travelers Indemnity Co., App., 133 S.W.2d 1050.
Ohio.—Kronenberg v. Whale, 153 N. E. 302, 21 Ohio App. 322.
Tex.—Capitol Hotel Co. v. Rittenberry, Civ.App., 41 S.W.2d 697, error dismissed—Murphy v. Murphy, Civ. App., 237 S.W. 640, dismissed for want of jurisdiction—Baker v. Galbreath, Civ.App., 211 S.W. 626, dismissed for want of jurisdiction.
22 C.J. p 470 note 16 [a].

Surrounding circumstances, constituting part of res gestæ, may be always shown along with principal fact.—Alvaton Mercantile Co. v. Caldwell, 128 S.E. 781, 34 Ga.App. 151.

60. U.S.—Michigan Mut. Life Ins. Co. v. Oliver, Ala., 256 F. 212, 167 C.C.A. 428, certiorari denied 39 S. Ct. 494, 250 U.S. 646, 63 L.Ed. 1187.
Ala.—Travelers' Ins. Co. v. Whitman, 80 So. 470, 202 Ala. 388.
Ill.—Schuman v. Bader & Co., 227 Ill. App. 28.
Ind.—Indianapolis Rys. v. Waters, 12 N.E.2d 119, 213 Ind. 527, superseding, App., 8 N.E.2d 400.
Mo.—Lynch v. Missouri-Kansas-Texas R. Co., 61 S.W.2d 918, 333 Mo. 89.
Ohio.—New York, C. & St. L. R. Co. v. Kovatch, 166 N.E. 682, 120 Ohio St. 532.
S.C.—Crawford v. Charleston-Isle of Palms Traction Co., 120 S.E. 381, 126 S.C. 447.
Tex.—Harper v. Highway Motor Freight Lines, Civ.App., 89 S.W.2d 448, error dismissed.
Wash.—Beck v. Dye, 92 P.2d 1113, 200 Wash. 1, 127 A.L.R. 1022.
W.Va.—Reynolds v. W. T. Grant Co., 186 S.E. 603, 117 W.Va. 615.

Letter by stranger

In a suit by a wife against an alleged paramour for alienation of her husband's affections, letters, written by a stranger to the husband's business associate and found in the latter's possession, imputing lascivious conduct between the husband and defendant, are not competent as part of the res gestae.—Geller v. Geller, 154 N.E. 727, 115 Ohio St. 468.

Not party litigant

Statements of a participant in an accident or other transaction, although not a party litigant, are admissible as part of "res gestae" if other requirements of res gestae rule are met.—Sparks Bus Line v. Spears, 124 S.W.2d 1031, 276 Ky. 600.

Personal knowledge necessary

W.Va.—Reynolds v. W. T. Grant Co., 186 S.E. 603, 117 W.Va. 615.

Report

A hospital interne, after the death of a patient, made an investigation and report of the cause of death and filed it with the hospital records. The testimony of a witness that he called on the director of the hospital who, having no personal knowledge, handed the interne's report to the witness saying at the time, "This is how it happened", is not part of the res gestae.—Lakeside Hospital v. Kovar, 2 N.E.2d 857, 131 Ohio St. 333.

Taking of car number

Statements of a person, not concerned in or witnessing the accident, as to the license number of a motor vehicle moving away from the scene of the accident are not admissible as part of the res gestae.—Athas v. Fort Pitt Brewing Co., 188 A. 113, 324 Pa. 313.

That plaintiff fainted

In action for damages by one who fell while alighting from a train, evidence of conductor concerning a statement of a bystander to the effect that plaintiff fainted was not admissible as a part of the res gestæ, where there was no showing that the bystander saw plaintiff faint, or that he was present at the time of the occurrence, since he may have received the information that she fainted from others.—Hines v. Patterson, 225 S.W. 642, 146 Ark. 367.

61. Ala.—Blue v. Hooks, 141 So. 627, 629, 224 Ala. 696, citing **Corpus Juris.**
Mo.—Nahorski v. St. Louis Electric Terminal Rys. Co., 271 S.W. 749

fact, it may be admissible no matter by whom it was made or done,[62] provided, in the case of a declaration, it relates to a matter of fact to which declarant might testify if called as a witness.[63] Accordingly, the exclamations or declarations of a mere bystander may be admissible as part of the res gestæ,[64] although there are numerous cases in which such declarations have been excluded.[65]

Declarations of a deceased person are admissible when part of the res gestæ.[66]

Mental condition of declarant. The fact that a person injured was dazed and shocked at the time of making a statement as to how he received the injury does not render his statement inadmissible, but bears merely on the weight and credibility thereof.[67]

Person not a witness. A statement made as a part of the res gestæ may be given as evidence, although the person by whom the statement is made does not testify as a witness at the trial.[68]

Persons not competent to testify. Declarations of persons not competent to testify may be received

—May v. Chicago, B. & Q. R. Co., 225 S.W. 660, 284 Mo. 508.
N.J.—Slayback Van Order Co. v. Eiben, 177 A. 671, 115 N.J.Law 17.
22 C.J. p 450 note 46.

62. Mont.—Stagg v. Stagg, 32 P.2d 856, 863, 96 Mont. 573, quoting **Corpus Juris.**
Pa.—Vescio v. Pennsylvania Electric Co., 9 A.2d 546, 336 Pa. 502.
S.C.—State v. Long, 195 S.E. 624, 626, 186 S.C. 439, citing **Corpus Juris.**
22 C.J. p 450 note 47.

General conversation
Statements by disinterested parties shortly after accident that defendant was drunk, etc., there being substantial evidence that they were part of general conversation wherein defendant joined, were properly admitted, regardless whether their authorship was identified.—Garner v. Morgan, 183 N.E. 916, 98 Ind.App. 461.

If the declaration is spontaneous and made as a part of the transaction itself, it may be shown whether made by the injured person or the person responsible for such injury, or even if made by a bystander. —Rosenzweig v. Wells, 273 S.W. 1071, 308 Mo. 617.

63. Iowa.—Gose v. True, 198 N.W. 528, 197 Iowa 1094.
Pa.—Rich Hill Coal Co. v. Bashore, 7 A.2d 302, 334 Pa. 449.
See Szwed v. Bruno, 56 Montg. 21.
Tex.—San Antonio Public Service Co. v. Alexander, Com.App., 280 S.W. 753, affirming, Civ.App., 270 S.W. 199—Barnes v. Barnes, 261 S. W. 485, 486, citing **Corpus Juris.**
Wash.—Nelson v. Eastern Ry. & Lumber Co., 6 P.2d 1111, 166 Wash. 363—Field v. North Coast Transp. Co., 2 P.2d 672, 164 Wash. 123, 76 A.L.R. 1114—Sullivan v. Seattle Electric Co., 97 P. 1109, 51 Wash. 71, 130 Am.S.R. 1082.
W.Va.—Reynolds v. W. T. Grant Co., 186 S.E. 603, 117 W.Va. 615.

Matters which have no probative force on any issue may properly be excluded.—Lee v. Houston Electric Co., Tex.Civ.App., 152 S.W.2d 379, error dismissed, judgment correct.

Partial admissibility
It was not an abuse of discretion to admit evidence of a declaration which was equivalent to a statement by defendant's driver that he did not have his lights on or flares placed around his truck and he did not know why he did not, where the statement was admissible as to the lights and the court instructed the jury that there could be no recovery for failure to place flares around truck.—Smith v. Producers Cold Storage Co., Mo.App., 128 S.W.2d 299.

Unidentified voice
In action for death caused by automobile accident, testimony as to statement heard at time of accident by witness who did not know who made statement and did not recognize voice was properly excluded, even though statement could be classed as res gestæ.—Gose v. True, 198 N.W. 528, 197 Iowa 1094.

64. U.S.—Armborst v. Cincinnati Traction Co., C.C.A.Ohio, 25 F.2d 240—Standard Oil Co. of New York v. Johnson, C.C.A.Mass., 299 F. 93.
Ala.—Kelly v. Hanwick, 153 So. 269, 228 Ala. 336—Stoudemire v. Davis, 94 So. 498, 208 Ala. 495—Birmingham Macaroni Co. v. Tadrick, 88 So. 858, 205 Ala. 540—Travelers' Ins. Co. v. Whitman, 80 So. 470, 202 Ala. 388.
Iowa.—Riddle v. Frankl, 247 N.W. 493, 215 Iowa 1083.
Md.—Phillips v. Haugaard, 109 A. 95, 135 Md. 427.
Mo.—Nahorski v. St. Louis Electric Terminal Rys. Co., 271 S.W. 749—Kuether v. Kansas City Light & Power Co., 276 S.W. 105, 220 Mo. App. 452.
Ohio.—New York, C. & St. L. R. Co. v. Kovatch, 166 N.E. 682, 120 Ohio St. 532.
Or.—Hornschuch v. Southern Pac. Co., 203 P. 886, 101 Or. 280.
Tex.—Tyreco Refining Co. v. Cook, Civ.App., 110 S.W.2d 219, error dismissed—Dallas Ry. & Terminal Co. v. Burns, Civ.App., 60 S.W.2d 801—Firemen's Ins. Co. v. Havron, Civ.App., 277 S.W. 742—St. Louis, B. & M. Ry. Co. v. Watkins, Civ. App., 245 S.W. 794.
Utah.—Jackson v. Utah Rapid Transit Co., 290 P. 970, 77 Utah 21.
Wash.—Glaser v. Katalinich, 13 P.2d 468, 169 Wash. 133—Mathewson v. Olmstead, 218 P. 226, 126 Wash. 269—Heg v. Mullen, 197 P. 51, 115 Wash. 252.
22 C.J. p 450 note 49, p 466 note 85.

Mother of injured child
Tex.—Martin v. City of Corsicana, Civ.App., 130 S.W.2d 405, error dismissed, judgment correct.

Nervous excitement which renders an utterance admissible as part of res gestae may exist equally for a mere bystander as well as for the injured or injuring person, and therefore the utterances of either, concerning what they observed, are equally admissible as part of "res gestae."—Vescio v. Pennsylvania Electric Co., 9 A.2d 546, 336 Pa. 502.

Protest by bystander at scene of accident against defendant's slapping deceased is admissible.—Clason v. Velguth, 11 P.2d 249, 168 Wash. 242.

65. Ky.—Louisville & N. R. Co. v. Cox, 141 S.W. 59, 145 Ky. 716.
W.Va.—Mercer Funeral Home v. Addison Bros. & Smith, 163 S.E. 439, 111 W.Va. 616.
22 C.J. p 451 note 50, p 466 note 86.

66. U.S.—Halleck v. Hartford Accident & Indemnity Co., C.C.A.Tex., 75 F.2d 800.

Deceased insured
Pa.—Purcell v. Metropolitan Life Ins. Co., 10 A.2d 442, 336 Pa. 588.
37 C.J. p 627 note 14.

67. S.C.—Magill v. Southern R. Co., 78 S.E. 1033, 95 S.C. 306.

68. N.C.—Queen City Coach Co. v. Lee, 11 S.E.2d 341, 218 N.C. 320 —Young v. Stewart, 131 S.E. 735, 191 N.C. 297.

Unidentified persons
Statements by unidentified persons have been held to be admissible as part of the res gestæ.
U.S.—Armborst v. Cincinnati Traction Co., C.C.A.Ohio, 25 F.2d 240.
Ohio.—New York, C. & St. L. R. Co. v. Kovatch, 166 N.E. 682, 120 Ohio St. 532.
Wis.—Johnson v. St. Paul & W. Coal Co., 105 N.W. 1048, 126 Wis. 492.

as part of the res gestæ,[69] although it would be improper to admit the declarations of one who was so lacking in intelligence and discrimination that he could not comprehend passing events with anything like such accuracy as would render his exclamations or observations in reference thereto reliable.[70]

Agents or employees. A spontaneous utterance, arising from the influence of the principal fact, made by an agent or employee is admissible the same as that of any other observer;[71] and acts or declarations of an agent or employee which lack the necessary spontaneity,[72] or which are made after the lapse of such time that they cannot be considered a

69. Ark.—Beal-Doyle Dry Goods Co. v. Carr, 108 S.W. 1053, 85 Ark. 479, 14 Ann.Cas. 48.
22 C.J. p 451 note 52.

Infant

Ga.—Louisville & N. R. Co. v. Studdard, 130 S.E. 532, 34 Ga.App. 570.
Minn.—Ball v. Gessner, 240 N.W. 100, 185 Minn. 105.
Ohio.—New York, C. & St. L. R. Co. v. Kovatch, 166 N.E. 682, 120 Ohio St. 532.
R.I.—Powell v. Gallivan, 118 A. 769, 44 R.I. 453.
22 C.J. p 451 note 52 [a].

70. Ga.—Louisville & N. R. Co. v. Studdard, 130 S.E. 532, 533, 34 Ga. App. 570, citing **Corpus Juris.**
22 C.J. p 451 note 53.

71. U.S.—William C. Barry, Inc. v. Baker, C.C.A.Me., 82 F.2d 79—Overland Const. Co. v. Sydnor, C.C.A. Ohio, 70 F.2d 338.
Ala.—Pollard v. Rogers, 173 So. 881, 234 Ala. 92—Standard Oil Co. v. Douglass, 93 So. 286, 18 Ala.App. 625.
Ariz.—Pickwick Stages Corporation v. Williams, 287 P. 440, 36 Ariz. 520—Hines v. Gale, 213 P. 395, 25 Ariz. 65.
Ark.—Intercity Terminal Ry. Co. v. Worden, 6 S.W.2d 547, 177 Ark. 464.
Cal.—Lloyd v. Boulevard Express, 249 P. 837, 79 Cal.App. 406.
Conn.—Perry v. Haritos, 124 A. 44, 100 Conn. 476.
D.C.—Sanitary Grocery Co. v. Snead, 90 F.2d 374, 67 App.D.C. 129, certiorari denied 58 S.Ct. 22, 302 U.S. 703, 82 L.Ed. 543.
Ga.—Piedmont Operating Co. v. Cummings, 149 S.E. 814, 40 Ga.App. 397—Georgia Ry. & Power Co. v. Simms, 126 S.E. 850, 33 Ga.App. 535—Georgia Ry. & Power Co. v. Jenkins, 112 S.E. 734, 28 Ga.App. 632.
Idaho.—McIntire v. Oregon Short Line R. Co., 55 P.2d 148, 56 Idaho 392—Judd v. Oregon Short Line R. Co., 44 P.2d 291, 55 Idaho 461—Wilson v. St. Joe Boom Co., 200 P. 884, 34 Idaho 253.
Ind.—Great Atlantic & Pacific Tea Co. v. Custin, 13 N.E.2d 542, 214 Ind. 54, rehearing denied 14 N.E.2d 538, 214 Ind. 54.
Iowa.—Duncan v. Rhomberg, 236 N. W. 638, 212 Iowa 389—Barrett v. Chicago, M. & St. P. Ry. Co., 175 N.W. 950, 190 Iowa 509, rehearing denied 180 N.W. 670, 190 Iowa 509.
Kan.—Seymour v. Kelso, 16 P.2d 958, 136 Kan. 543.
Ky.—Vale v. Illinois Pipe Line Co., 134 S.W.2d 940, 281 Ky. 1—Wimsatt's Adm'x v. Louisville & N. R. Co., 31 S.W.2d 729, 253 Ky. 405—Louisville & N. R. Co. v. Horton, 219 S.W. 1084, 187 Ky. 617.
La.—Mancuso v. Hurwitz-Mintz Furniture Co., App., 183 So. 461, denying rehearing 181 So. 814.
Md.—Singer Transfer Co. v. Buck Glass Co., 181 A. 672, 169 Md. 258—Montgomery Bus Lines v. Diehl, 148 A. 453, 158 Md. 233.
Mich.—Carter v. C. F. Smith Co., 281 N.W. 380, 285 Mich. 621—Fishlaine v. White Star Line, 194 N.W. 494, 224 Mich. 173.
Minn.—Linderoth v. Kieffer, 203 N. W. 415, 162 Minn. 440.
Mo.—Chawkley v. Wabash Ry. Co., 297 S.W. 20, 317 Mo. 782—State ex rel. Smith v. Trimble, 285 S.W. 729, 315 Mo. 166—Beeson v. Fleming, 285 S.W. 708, 315 Mo. 177—Rosenzweig v. Wells, 273 S.W. 1071, 308 Mo. 617—Seism v. Alexander, 93 S. W.2d 36, 230 Mo.App. 1175—Coy v. Dean, 4 S.W.2d 835, 222 Mo.App. 67—Munoz v. American Car & Foundry Co., 296 S.W. 228, 220 Mo. App. 902—Noland v. Morris & Co., 248 S.W. 627, 212 Mo.App. 1.
N.H.—Chellis Realty Co. v. Boston & M. R. R., 106 A. 742, 79 N.H. 231.
N.J.—Brawer Bros. v. DeGise Silk Dyeing Co., 185 A. 47, 14 N.J.Misc. 355.
Ohio.—Patton Motor Trucking Co. v. Knapp, 157 N.E. 402, 25 Ohio App. 89.
Okl.—Henry Chevrolet Co. v. Taylor, 108 P.2d 1024—Gibson Oil Co. v. Westbrooke, 16 P.2d 127, 160 Okl. 26—Jackson v. Hedlund, 10 P.2d 385, 157 Okl. 14.
Or.—Personius v. Asbury Transp. Co. of Oregon, 53 P.2d 1065, 152 Or. 286—Wemmett v. Mount, 292 P. 93, 134 Or. 305.
Pa.—Powe v. Pittsburgh Rys. Co., 154 A. 795, 303 Pa. 533—McGrath v. Pennsylvania Sugar Co., 131 A. 926, 285 Pa. 84—McGrath v. Pennsylvania Sugar Co., 127 A. 780, 282 Pa. 265—Thomas v. Pennsylvania R. Co., 119 A. 717, 275 Pa. 579—Moyer v. Pittsburgh, M. & B. Ry. Co., 119 A. 469, 275 Pa. 363.
S.C.—Eudy v. Atlantic Greyhound Lines, 191 S.E. 85, 183 S.C. 306—Price v. American Agr. Chemical Co., 176 S.E. 352, 173 S.C. 518—Neal v. Southern Ry., Carolina Division, 160 S.E. 837, 162 S.C. 258, certiorari denied Southern Ry.-Carolina Division v. Neal, 52 S.Ct. 9, 284 U.S. 621, 76 L.Ed. 530.
Tex.—Gillette Motor Transport v. Kelly, Civ.App., 141 S.W.2d 959—Beck v. Wahlgren, Civ.App., 87 S. W.2d 890—J. Lee Vilbig & Co. v. Lucas, Civ.App., 23 S.W.2d 516, error dismissed—Houston & T. C. R. Co. v. Brooks, Civ.App., 294 S.W. 282—Lang Floral & Nursery Co. v. Sheridan, Civ.App., 245 S.W. 467—Davis v. Kennedy, Civ.App., 245 S.W. 259—Houston Electric Co. v. Schmidt, Civ.App., 233 S.W. 637, reversed on other grounds Schmidt v. Houston Electric Co., Com.App., 242 S.W. 1019.
Utah.—Jackson v. Utah Rapid Transit Co., 290 P. 970, 77 Utah 21.
Va.—Washington-Virginia Ry. Co. v. Deahl, 100 S.E. 840, 126 Va. 141.
Wash.—Nicolle v. United Auto Transp. Co., 241 P. 137, 148 Wash. 48—Lucchesi v. Reynolds, 216 P. 12, 125 Wash. 352.
22 C.J. p 451 note 51.

72. U.S.—Wicker v. Scott, C.C.A. Ohio, 29 F.2d 807.
Ala.—Ashworth v. Alabama Great Southern R. Co., 94 So. 101, 211 Ala. 20—Teague v. McAlister Coca-Cola Bottling Co., 95 So. 883, 209 Ala. 205—Norwood Transp. Co. v. Bickell, 92 So. 461, 207 Ala. 232.
Ark.—St. Louis-San Francisco Ry. Co. v. Vernon, 258 S.W. 125, 162 Ark. 226.
Cal.—Lampton v. Davis Standard Bread Co., 191 P. 710, 48 Cal.App. 116.
Mich.—Phinney v. Detroit United Ry. Co., 205 N.W. 124, 232 Mich. 399.
Minn.—O'Connor v. Chicago, M., St. P. & P. Ry. Co., 251 N.W. 674, 190 Minn. 277, followed in 253 N.W. 670, 190 Minn. 290, certiorari denied Chicago, M., St. P. & P. R. Co. v. O'Connor, 54 S.Ct. 860, 292 U.S. 651, 78 L.Ed. 1500—Schindel v. Chicago, M. & St. P. Ry. Co., 197 N. W. 744, 158 Minn. 378.
N.H.—Semprini v. Boston & M. R. R., 179 A. 349, 87 N.H. 279.
Okl.—Eastern Torpedo of Ohio Co. v. Shelts, 247 P. 974, 121 Okl. 129.
S.D.—Jungworth v. Chicago, M. & St. P. Ry. Co., 123 N.W. 695, 24 S. D. 342.
Tex.—Harper v. Highway Motor Freight Lines, Civ.App., 89 S.W. 2d 448, error dismissed—Red Arrow Freight Lines v. Gravis, Civ.

part of the res gestæ,[73] and which are mere narratives of past events,[74] are not admissible as part of the res gestæ. Likewise, at least after a prima facie case of agency has been established,[75] the acts

App., 84 S.W.2d 540—Wall & Stabe Co. v. Berger, Civ.App., 212 S.W. 975.
Spontaneity generally see infra §§ 417-420.

73. U.S.—F. W. Martin & Co. v. Cobb, C.C.A.Ark., 110 F.2d 159—Standard Oil Co. of New Jersey v. Neville, C.C.A.W.Va., 48 F.2d 580—The Condor, D.C.N.Y., 8 F.Supp. 929, affirmed, C.C.A., The Nordpol, 84 F.2d 3, certiorari denied Grace S. S. Co. v. Anglo-Chilean Nitrate Sales Corporation, 57 S.Ct. 111, two cases, 299 U.S. 586, 81 L.Ed. 432.
Cal.—Baker v. Western Auto Stage Co., 192 P. 73, 48 Cal.App. 283.
Ga.—Usry v. Augusta Southern R. Co., 102 S.E. 184, 24 Ga.App. 722.
Ill.—Johnson v. Swords Co., 3 N.E. 2d 705, 286 Ill.App. 377—Franks v. Baltimore & O. S. W. R. Co., 269 Ill.App. 129—Swanson v. Peter Schoenhofen Brewing Co., 215 Ill. App. 185.
Ind.—Haskell & Barker Car Co. v. Logermann, 123 N.E. 818, 71 Ind. App. 69.
Iowa.—Droullard v. Rudolph, 223 N. W. 100, 207 Iowa 367.
Ky.—Consolidated Coach Corporation v. Earls' Adm'r, 94 S.W.2d 6, 263 Ky. 814—Chesapeake & O. Ry. Co. v. Carter's Adm'r, 47 S.W.2d 1014, 243 Ky. 268—Dennes v. Jefferson Meat Market, 14 S.W.2d 408, 228 Ky. 164—Peter Fox & Sons Co. v. Louisville & N. R. Co., 259 S.W. 37, 202 Ky. 189—South Covington & C. Ry. Co. v. Goldsmith, 218 S.W. 286, 187 Ky. 68.
Mass.—Rankin v. Brockton Public Market, 153 N.E. 97, 257 Mass. 6—Nager v. Reid, 133 N.E. 98, 240 Mass. 211.
Mich.—McPeake v. Grand Trunk Western Ry. Co., 219 N.W. 734, 242 Mich. 676—Nord v. West Michigan Flooring Co., 214 N.W. 236, 238 Mich. 669—Fishbaine v. White Star Line, 194 N.W. 494, 224 Mich. 173—Metcalf v. Peerless Laundry & Dye Co., 184 N.W. 482, 215 Mich. 601—Jonescu v. Orlich, 175 N.W. 174, 208 Mich. 89.
Mo.—Grotjan v. Thompson, App., 140 S.W.2d 706—Smith v. East St. Louis Ry. Co., 123 S.W.2d 198, 234 Mo.App. 1220—Renfro v. Central Coal & Coke Co., 19 S.W.2d 766, 223 Mo.App. 1219—Courter v. George W. Chase & Son Mercantile Co., 299 S.W. 622, 222 Mo.App. 43—Downing v. St. Louis-San Francisco Ry. Co., 285 S.W. 791, 220 Mo.App. 260—Monan v. Arkansas Grocer Co., 264 S.W. 486, 216 Mo. App. 289—Jackels v. Kansas City Rys. Co., App., 231 S.W. 1023—Reisinger v. Kansas City Rys. Co., App., 211 S.W. 909—Yarbrough v. Wisconsin Lumber Co., App., 211 S.W. 713.
Mont.—Rossberg v. Montgomery Ward & Co., 99 P.2d 979, 110 Mont. 154.
N.Y.—Cook v. Great Atlantic & Pacific Tea Co., 278 N.Y.S. 777, 244 App.Div. 63, affirmed 198 N.E. 423, 268 N.Y. 599—Golden v. Horn & Hardart Co., 278 N.Y.S. 385, 244 App.Div. 92, affirmed 200 N.E. 309, 270 N.Y. 544—Page v. Hirsch, 202 N.Y.S. 787, 207 App.Div. 733—Molino v. City of New York, 186 N. Y.S. 742, 195 App.Div. 496—Setzkorn v. City of Buffalo, 215 N.Y.S. 584, 126 Misc. 858, affirmed 219 N. Y.S. 351, 219 App.Div. 416, affirmed 159 N.E. 670, 246 N.Y. 605.
N.C.—Brown v. Montgomery Ward & Co., 8 S.E.2d 199, 217 N.C. 368.
N.D.—Kutchera v. Minneapolis, St. P. & S. S. M. Ry. Co., 212 N.W. 51, 54 N.D. 897.
Ohio.—Liberty Highway Co. v. Callahan, 157 N.E. 708, 24 Ohio App. 374.
Okl.—Roy v. St. Louis-San Francisco Ry. Co., 4 P.2d 1038, 153 Okl. 270.
Pa.—McGrath v. Pennsylvania Sugar Co., 131 A. 926, 285 Pa. 84—McGrath v. Pennsylvania Sugar Co., 127 A. 780, 282 Pa. 265—McCaulif v. Griffith, 168 A. 536, 110 Pa.Super. 522.
S.C.—Housand v. Armour & Co., 175 S.E. 516, 173 S.C. 268—Templeton v. Charleston & W. C. Ry. Co., 108 S.E. 363, 117 S.C. 44.
Tex.—Gause-Ware Funeral Home v. McGinley, Civ.App., 21 S.W.2d 347—Rosenthal Dry Goods Co. v. Hillebrandt, Civ.App., 280 S.W. 882—St. Louis Southwestern Ry. Co. of Texas v. Gross, Civ.App., 268 S.W. 487—Lang Floral & Nursery Co. v. Sheridan, Civ.App., 245 S.W. 467—Main Street Garage v. Eganhouse Optical Co., Civ.App., 223 S.W. 316.
Utah.—Fish Lake Resort Co. v. Industrial Commission of Utah, 275 P. 580, 73 Utah 479—Booth v. Nelson, 211 P. 985, 61 Utah 239.
Wash.—Brown v. Chicago, M. & St. P. Ry. Co., 217 P. 16, 125 Wash. 463—Harry v. Northern Pac. Ry. Co., 178 P. 465, 105 Wash. 469.
Wis.—Hamilton v. Reinemann, 290 N. W. 194, 233 Wis. 572.
Subsequent statements see infra § 413.

74. U.S.—Swinger v. Firman Equipment Corporation, C.C.A.Ill., 94 F. 2d 269—Frederick Leyland & Co. v. Hornblower, Mass., 256 F. 289, 167 C.C.A. 461.
Ala.—General Refrigeration Sales Co. v. Taylor, 158 So. 314, 229 Ala. 479—Central of Georgia Ry. Co. v. Corbitt, 118 So. 755, 218 Ala. 410—Johns Undertaking Co. v. Hess-Strickland Transfer & Storage Co., 104 So. 250, 213 Ala. 78—Smith v. Bugg, 100 So. 503, 211 Ala. 341—Ex parte Alabama Great Southern R. Co., 86 So. 100, 204 Ala. 504, granting certiorari Alabama Great Southern R. Co. v. Hunt, 86 So. 97, 17 Ala.App. 566.
Ark.—Webb v. Kansas City Southern Ry. Co., 208 S.W. 301, 137 Ark. 107.
Ky.—Prestonsburg Superior Oil Gas Co. v. Wheeler, 284 S.W. 409, 215 Ky. 85.
Minn.—Wenell v. Shapiro, 260 N.W. 503, 194 Minn. 368.
Miss.—Crosby v. Columbus & G. Ry. Co., 181 So. 139, 182 Miss. 771.
Mo.—Ellis v. Wolfe-Shoemaker Motor Co., 55 S.W.2d 309, 227 Mo. App. 508—Fore v. Rodgers, App., 216 S.W. 566.
Mont.—Rossberg v. Montgomery Ward & Co., 99 P.2d 979, 110 Mont. 154.
N.J.—Christine v. Mutual Grocery Co., 194 A. 625, 119 N.J.Law 149—Thompson v. Giant Tiger Corporation of Camden, 189 A. 649, 118 N. J.Law 10.
N.Y.—Muessling v. Leisner, 224 N.Y. S. 689, 221 App.Div. 524—Burns v. Borden's Condensed Milk Co., 87 N.Y.S. 883, 93 App.Div. 566—Simon v. Pullman Co., 215 N.Y.S. 798, 127 Misc. 272.
N.C.—Hubbard v. Southern Ry. Co., 166 S.E. 802, 203 N.C. 675—Batchelor v. Atlantic Coast Line R. Co., 144 S.E. 542, 196 N.C. 84, 60 A.L. R. 1091—Nance v. Norfolk Southern R. Co., 127 S.E. 635, 189 N.C. 638.
Okl.—Sears, Roebuck & Co. v. Robinson, 80 P.2d 938, 183 Okl. 253—Lacy Chevrolet Co. v. McGinnis, 72 P.2d 785, 181 Okl. 97.
Pa.—VanWhy v. Neisner Bros., 33 Luz.L.Reg. 233.
S.D.—Stratton v. Sioux Falls Traction System, 226 N.W. 644, 55 S. D. 464.
Tenn.—Gulf Refining Co. v. Frazier, 15 Tenn.App. 662—Tennessee Cent. Ry. Co. v. Gleaves, 2 Tenn.App. 549.
Wash.—Space v. Tacoma Durant Co., 296 P. 822, 161 Wash. 232.
Narrative statements generally see infra § 420.

Employee's report of the accident held inadmissible as res gestae.
Utah.—Jackson v. Utah Rapid Transit Co., 290 P. 970, 77 Utah 21.
Wis.—Bell v. Milwaukee Electric Ry. & Light Co., 172 N.W. 791, 169 Wis. 408.

75. Ga.—Collier v. Schoenberg, 106 S.E. 581, 26 Ga.App. 496—J. E. Williams & Bro. v. King Hardware Co., 104 S.E. 454, 25 Ga.App. 680.

and declarations of an agent made at the time of a particular occurrence or transaction, or near enough thereto to form a part thereof, which tend to explain or illustrate it, made while the agent is acting within the scope of his authority, may be given in evidence as part of the res gestæ,[76] either for or against the principal or employer.[77] On the other hand, in order for a declaration of an agent, other than a spontaneous exclamation, to be admissible under the doctrine of res gestæ, it must be within the scope of his authority and concerning the act or transaction pending at the moment,[78] and decla-

Or.—Thomas v. Smith-Wagoner Co., 234 P. 814, 114 Or. 69.

Authority of agent or employee to bind principal by admissions see supra §§ 343–348.

76. U.S.—American Ins. Union v. Lowry, C.C.A.Tex., 62 F.2d 209, certiorari denied Lowry v. American Ins. Union, 289 U.S. 745, 53 S.Ct. 689, 77 L.Ed. 1491—Champlin Refining Co. v. Gasoline Products Co., C.C.A.Me., 29 F.2d 331—Ætna Ins. Co. of Hartford, Conn., v. Licking Valley Milling Co., C.C.A.Ky., 19 F.2d 177, certiorari denied 48 S.Ct. 37, 275 U.S. 541, 72 L.Ed. 415—Denver Omnibus & Cab Co. v. Krebs, Colo., 255 F. 543, 166 C.C.A. 611.

Ala.—Mount Vernon-Woodberry Mills v. Little, 133 So. 710, 222 Ala. 605—American Cast-Iron Pipe Co. v. Birmingham Tailoring Co., 91 So. 484, 206 Ala. 609—Corley v. Vizard, 84 So. 299, 203 Ala. 564—American Discount Co. v. Wyckroff, 191 So. 790, 29 Ala.App. 82.

Ariz.—Benton v. Regeser, 179 P. 966, 20 Ariz. 273.

Colo.—Manby v. Sweet Inv. Co., 242 P. 51, 78 Colo. 371.

Del.—Eastern Shore Public Service Co. v. Town of Seaford, 2 A.2d 265, sustaining Town of Seaford v. Eastern Shore Public Service Co., 2 A.2d 258, appeal dismissed Eastern Shore Public Service Co. v. Town of Seaford, 59 S.Ct. 483, 306 U.S. 616, 83 L.Ed. 1024, rehearing denied 59 S.Ct. 589, 306 U.S. 668, 83 L.Ed. 1063.

Ga.—Tuggle v. Duke, 157 S.E. 224, 42 Ga.App. 634—Alexander v. Richardson, 140 S.E. 638, 37 Ga.App. 407—Collier v. Schoenberg, 106 S.E. 581, 26 Ga.App. 496—J. E. Williams & Bro. v. King Hardware Co., 104 S.E. 454, 25 Ga.App. 680.

Iowa.—Muntz v. Travelers Mut. Casualty Co., 295 N.W. 837—Swift v. Clarinda Trust & Savings Bank, 177 N.W. 519.

Ky.—Brumfield v. Consolidated Coach Corporation, 40 S.W.2d 356, 240 Ky. 1.

Mich.—Zart v. Singer Sewing Mach. Co., 127 N.W. 272, 162 Mich. 387.

Minn.—Ahlberg v. Griggs, 196 N.W. 652, 158 Minn. 11.

Mo.—Bergerson v. General Ins. Co. of America of Seattle, Wash., 105 S.W.2d 1015, 232 Mo.App. 549—Gillis v. Singer, App., 86 S.W.2d 352—Fisher v. Pullman Co., 254 S.W. 114, 212 Mo.App. 280—Noland v. Morris & Co., 248 S.W. 627, 212 Mo.App. 1.

Mont.—Exchange State Bank of Glendive v. Occident Elevator Co., 24 P.2d 126, 95 Mont. 78, 90 A.L.R. 740.

N.Y.—Hedman v. Security Title & Guaranty Co., 281 N.Y.S. 565, 245 App.Div. 224.

N.C.—Brunswick County v. North Carolina Bank & Trust Co., 173 S.E. 327, 206 N.C. 127—Murphy v. Carolina Power & Light Co., 146 S.E. 204, 196 N.C. 484—Pangle v. Appalachian Hall, 131 S.E. 42, 190 N.C. 833—Berry v. Richmond Cedar Works, 113 S.E. 772, 184 N.C. 187—Queen v. Dixie Fire Ins. Co., 97 S.E. 741, 177 N.C. 34—American Pure Food Co. v. G. W. Elliott & Co., 66 S.E. 451, 151 N.C. 393, 31 L.R.A.,N.S., 910.

Okl.—Lacy Chevrolet Co. v. McGinnis, 72 P.2d 785, 181 Okl. 97—Russell Products Co. v. Bailey, 19 P.2d 601, 162 Okl. 212.

Pa.—York Mfg. Co. v. Chelten Ice-Mfg. Co., 123 A. 327, 278 Pa. 351—First Nat. Bank v. Home Ins. Co., 118 A. 17, 274 Pa. 129.

S.C.—Williams v. Western Union Telegraph Co., 136 S.E. 218, 138 S.C. 281—Nelson v. Charleston & W. C. Ry. Co., 121 S.E. 198, 92 S.C. 151.

Tex.—Rhodes v. Taliaferro, Civ.App., 119 S.W.2d 703—Foster v. Beckman, Civ.App., 85 S.W.2d 789, error refused—Davenport v. Texas & N. O. R. Co., Civ.App., 72 S.W.2d 933—Capitol Hotel Co. v. Rittenberry, Civ.App., 41 S.W.2d 697, error dismissed—Firemen's Ins. Co. v. Havron, Civ.App., 277 S.W. 742.

Wash.—Samuels v. Hiawatha Holstein Dairy Co., 197 P. 24, 115 Wash. 343—Haskell v. Carlisle Packing Co., 177 P. 780, 105 Wash. 368.

22 C.J. p 451 note 51.

Against principal's sureties

Declarations of an agent while acting within the scope of his authority, when so made as to be a part of the res gestæ, are admissible against the sureties on the principal's bond given for faithful performance of his duty.

Ga.—American Surety Co. v. Smith, 191 S.E. 137, 55 Ga.App. 633.

Okl.—Coon v. Boston Ins. Co., 192 P. 1092, 79 Okl. 296.

Attorney

Declarations of attachment plaintiff's attorney as to his reasons for suing out the writ, made at the time of suing it out, are admissible as part of the res gestæ.—Wood v. Barker, 37 Ala. 60, 76 Am.D. 316.

Declarations of officer of corporation

Mont.—Raish v. Orchard Canal Co., 218 P. 655, 67 Mont. 140.

General transaction

Where a statement was made by an agent while still about the instant business of the principal, it is admissible on the theory that such statement was, although not res gestæ as to the immediate transaction, a part of the res gestæ as to the general transaction in its entirety.—Halsey v. Minnesota-South Carolina Land & Timber Co., 177 S.E. 29, 174 S.C. 97, 100 A.L.R. 1—Snipes v. Augusta-Aiken Ry. & Electric Corporation, 119 S.E. 111, 151 S.C. 391—Williams v. Western Union Telegraph Co., 136 S.E. 218, 138 S.C. 286.

77. Colo.—Seaton-Hayden Mines Co. v. Renshaw, 73 P.2d 993, 101 Colo. 342.

N.C.—Hubbard v. Southern Ry. Co., 166 S.E. 802, 203 N.C. 675.

78. Cal.—Dryden v. Western Pac. R. Co., 36 P.2d 224, 1 Cal.App.2d 49—Umstead v. Automobile Funding Co. of America, 183 P. 1011, 41 Cal.App. 16.

Ga.—Wallinghom v. Denton, 103 S.E. 497, 25 Ga.App. 11[illegible].

Iowa.—Muntz v. Travelers Mut. Casualty Co., 295 N.W. 837.

Mo.—Brandtjen & Kluge v. Hunter, App., 115 S.W.2d 1009.

Okl.—Russell Products Co. v. Bailey, 19 P.2d 601, 162 Okl. 212.

Requirement that statement be part of pending transaction to constitute admission against principal see supra § 345.

Agency in distinct matters

Where superintendent was defendant's agent in two distinct matters, one in reference to changes in construction of a building, and other in reference to change of contract for construction, statement made by superintendent in reference to construction of building would not be a part of res gestæ as to change in contract for construction.—Stipel v. Piggott, 269 S.W. 942, 219 Mo.App. 222.

Hearsay

Janitor's statements as to what landlord had told him, made in the course of rental negotiations, held hearsay.—Gordon v. Hall, 203 N.Y.S. 107.

In Vermont it has been questioned whether the doctrine of res gestæ has any application in situations

rations of an agent made after the transaction is fully completed and ended are not admissible as part of the res gestæ,[79] particularly when made after the termination of the agency.[80]

Declarations of an alleged agent with reference to the fact that he represented a certain principal,[81] or as to the extent of his agency[82] in negotiating a transaction, have been held to be admissible as part of the res gestæ of the transaction. It has also been held in a personal injury action that statements of an employee made immediately after the infliction of the injury, that he was employed by defendant and was engaged in his duties at the time, are admissible as part of the res gestæ.[83] On the other hand, it has also been held that evidence of such statements is not admissible as part of the res gestæ,[84] for the reason that the transaction, speaking of itself spontaneously through the employee at the time, could not include any such unrelated statement,[85] and that such a statement throws no light on the principal fact.[86]

§ 411. Time of Act or Statement

Although an act or declaration to be admissible as part of the res gestæ must be contemporaneous with the main or principal fact, exact coincidence in point of time is unnecessary.

It may be stated generally that in order to constitute a part of the rest gestæ an act or a declaration must accompany,[87] and be contemporaneous with,[88] the act of which it is alleged to be a part,

where the declarations of an agent are involved, the only question being whether the agent has power to bind his principal. In the particular case the court went no further than to hold that the agent had no authority under the circumstances to bind his principal by declarations.—Jones v. Gay's Express, 9 A. 2d 121, 110 Vt. 531.

79. U.S.—Tate v. Baugh, C.C.A. Tenn., 264 F. 892.
Ariz.—Benton v. Regeser, 179 P. 966, 20 Ariz. 273.
Cal.—Dryden v. Western Pac. R. Co., 36 P.2d 394, 1 Cal.App.2d 49.
Iowa.—Muntz v. Travelers Mut. Casualty Co., 295 N.W. 837.
Minn.—Longman v. Anderson, 199 N.W. 742, 160 Minn. 15.
Mo.—Youel v. Bank of Atchison County, 117 S.W.2d 376, 233 Mo. App. 1.
Tex.—Grimes v. Virginia Fire & Marine Ins. Co., Civ.App., 218 S.W. 810.

80. N.M.—Bezemek v. Balduini, 207 P. 330, 28 N.M. 124.

81. Cal.—Carter v. Carr, 33 P.2d 852, 139 Cal.App. 15.
Vt.—Wilder v. Hinckley Fibre Co., 122 A. 428, 97 Vt. 45.

Where there is other evidence of agency, declarations by the alleged agent during the course of the negotiations tending to show agency are admissible as part of the res gestæ.—Schlick v. Berg, 286 N.W. 356, 205 Minn. 465.

82. Ga.—Washington Loan & Banking Co. v. Stanton, 124 S.E. 557, 32 Ga.App. 712—Jolly v. Chattahoochee Fertilizer Co., 110 S.E. 639, 28 Ga.App. 194.

83. Ga.—American Fidelity & Casualty Co. v. McWilliams, 191 S.E. 191, 55 Ga.App. 658—Piedmont Operating Co. v. Cummings, 149 S.E. 814, 40 Ga.App. 397.
Mo.—Barz v. Fleischmann Yeast Co., 271 S.W. 361, 308 Mo. 288.
S.C.—Lowie v. Dixie Stores, 174 S. E. 394, 172 S.C. 468—Chantry v. Pettit Motor Co., 152 S.E. 753, 156 S.C. 1.

84. Ala.—Hackney v. Dudley, 113 So. 401, 216 Ala. 400—Beville v. Taylor, 80 So. 370, 202 Ala. 305.
Ill.—Martin v. Turek, 227 Ill.App. 379.
Minn.—Wenell v. Shapiro, 260 N.W. 503, 194 Minn. 368.
Mo.—Kurz v. Greenlease Motor Car Co., App., 52 S.W.2d 498, certiorari quashed State ex rel. Kurz v. Bland, 64 S.W.2d 638, 333 Mo. 941 —Renfro v. Central Coal & Coke Co., 19 S.W.2d 766, 223 Mo.App. 1219.
Pa.—Deater v. Penn Mach. Co., 166 A. 846, 311 Pa. 291.
Tex.—Empire Gas & Fuel Co. v. Muegge, 143 S.W.2d 763, 135 Tex. 520, reversing, Civ.App., 116 S.W. 2d 758—Elmore v. Peavy, Civ.App., 143 S.W.2d 983—Lewis v. J. P. Word Transfer Co., Civ.App., 119 S.W.2d 106, error refused.

Ownership of truck

Statement of truck driver after collision as to ownership of truck was not admissible as res gestæ.—McAvon v. Brightmoor Transit Co., 222 N. W. 126, 245 Mich. 44.

Such statements lacking necessary spontaneity are inadmissible.—Sheathelm v. Consumers Power Co., 273 N.W. 410, 280 Mich. 106.

85. Tex.—Alfano v. International Harvester Co. of America, Civ.App., 121 S.W.2d 466, error dismissed—Stokes Bros. v. Thornton, Civ.App., 91 S.W.2d 756.

However, it has been held that a telegraph messenger boy's statement, immediately after bicycle struck plaintiff, that he was hurrying back from delivering message, was admissible as part of res gestæ.—Western Union Telegraph Co. v. Brown, Tex. Civ.App., 297 S.W. 267.

86. U.S.—Dudley v. Preston Motor Co., C.C.A.Tenn., 51 F.2d 8.
Ind.—Red Star Yeast Co. v. Shackleford, 171 N.E. 302, 91 Ind.App. 370.

87. Mass.—Gray v. Boston El. R. Co., 102 N.E. 71, 215 Mass. 143.
22 C.J. p 451 note 55, p 452 note 57.

88. Ky.—Galloway Motor Co. v. Huffman's Adm'r, 137 S.W.2d 379, 281 Ky. 841.
Mo.—Weller v. Weaver, 100 S.W.2d 594, 231 Mo.App. 400.
Ohio.—Liberty Highway Co. v. Callahan, 157 N.E. 708, 24 Ohio App. 374.
S.D.—Gilmore v. Gilmore, 173 N.W. 865, 42 S.D. 236.
Tenn.—Bell v. Travelers' Ins. Co., 79 S.W.2d 824, 18 Tenn.App. 552.
22 C.J. p 452 notes 56, 57.

"Cotemporaneous"

The term "cotemporaneous" does not always of necessity refer to any single or ultimate fact, however important to any precise or definite time; for a "transaction" may, and not infrequently does, include a series of occurrences extending over a great length of time, and a relevant fact in any one of them, and, until the close of the matter, may come within this term "cotemporaneous," and constitute a part of the res gestæ.—Fraley v. Fraley, 64 S.E. 381, 150 N.C. 501.

Marriage

Declarations to prove marriage to be admissible as part of the res gestæ must be made during the cohabitation of the parties, otherwise they are not contemporaneous with the fact sought to be proved.—Aldana v. Aldana, Tex.Civ.App., 42 S. W.2d 661, error dismissed.

Substantially contemporaneous

"What lapse of time is embraced in the word 'contemporaneous' is often a question of difficulty. Perfect coincidence of time between the declaration and the main fact is not, of course, required. It is enough that the two are substantially contemporaneous; they need not be literally so. The declarations must,

as otherwise, in the case of a declaration, it amounts to nothing more than a narrative of what has been, or an assertion of what will be.[89] In few cases, however, can the doing of an act and the making of the statement be precisely synchronous. Part of the essential difficulty of the subject lies in the fact that almost invariably an interval, however slight, must elapse between the act and the declaration.[90] The modern tendency seems to be to treat spontaneity as a substitute for contemporaneousness, see infra § 417, and, while the time element is always important in determining whether a statement should be admitted as a part of the res gestæ, it is not controlling, see infra § 419. Accordingly, although the utterance must have been made before there has been time to contrive and misrepresent,[91] and before there has been a break in the continuity which affords time for reflection,[92] the act or declaration is not required to be exactly coincident in point of time with the main fact,[93] but may even be separated from it by a considerable length of time,[94] provided it is so immediately and closely connected with the main fact as to be practically inseparable therefrom and serviceable to a clear understanding thereof.[95] The time when a statement was made, however, must be made to appear before the statement can be admitted.[96]

Statements, acts, or conduct accompanying or so

however, be so proximate in point of time as to grow out of, elucidate, and explain the character and quality of the main fact, and must be so closely connected with it as to virtually constitute but one entire transaction, and to receive support and credit from the principal act sought to be thus elucidated and explained."

Ala.—Bessierre v. Alabama City, G. & A. Ry. Co., 60 So. 82, 86, 179 Ala. 317—Alabama Great Southern R. Co. v. Hawk, 72 Ala. 112, 117, 47 Am.R. 403.

Ark.—Little Rock Traction & Electric Co. v. Nelson, 52 S.W. 7, 9, 66 Ark. 494.

To same effect Showalter v. Western Pac. R. Co., Cal., 106 P.2d 895, prior opinion, App., 96 P.2d 964.

89. Ky.—Louisville R. Co v. Johnson, 115 S.W. 207, 131 Ky. 277, 20 L.R.A.,N.S., 133.

22 C.J. p 452 note 58.

Narrative excluded see infra § 420.

90. Mo.—Talbert v. Chicago, R. I. & P. Ry. Co., 284 S.W. 499, 504, 314 Mo. 352, citing Corpus Juris.

Ohio.—Dugan v. Industrial Commission of Ohio, 22 N.E.2d 132, 133, 135 Ohio St. 652, quoting Corpus Juris.

W.Va.—Collins v. Equitable Life Ins. Co., 8 S.E. 825, 826, 130 A.L.R. 287, citing Corpus Juris.

22 C.J. p 452 note 59.

91. Colo.—H. C. Lallier Construction & Engineering Co. v. Industrial Commission, 17 P.2d 532, 91 Colo. 593.

92. Pa.—McMahon v. Edward G. Budd Mfg. Co., 164 A. 850, 108 Pa. Super. 235.

93. U.S.—Wicker v. Scott, C.C.A. Ohio, 29 F.2d 807.

Ala.—Birmingham & A. Ry. Co. v. Campbell, 82 So. 546, 203 Ala. 296.

Ariz.—Pickwick Stages Corporation v. Williams, 287 P. 440, 36 Ariz. 520.

Ark.—Public Utilities Corporation of Arkansas v. Cordell, 43 S.W.2d 746, 184 Ark. 878.

Cal.—Showalter v. Western Pac. R. Co., Sup., 106 P.2d 895, overruling all prior inconsistent cases, prior opinion, App., 96 P.2d 964.

Iowa.—Dawson v. Bankers' Life Co., 247 N.W. 279, 216 Iowa 586.

Kan.—State v. McCrady, 106 P.2d 696, 698, citing Corpus Juris.

Ky.—Norton's Adm'r v. Winstead, 291 S.W. 723, 218 Ky. 488.

La.—Donaldson v. Redding's Succession, App., 145 So. 804—Day v. Armour Fertilizer Works, 8 La.App. 720.

Mo.—Bennette v. Hader, 87 S.W.2d 413, 337 Mo. 977, 101 A.L.R. 1190—Smith v. Southern Illinois & Missouri Bridge Co., 30 S.W.2d 1077, 326 Mo. 109—Pryor v. Payne, 263 S.W. 983, 304 Mo. 560—Russell v. Metropolitan Life Ins. Co., App., 149 S.W.2d 433—Hatfield v. Southwestern Grocer Co., App., 104 S.W.2d 717—Noland v. Morris & Co., 248 S.W. 627, 212 Mo.App. 1.

Mont.—Sullivan v. Metropolitan Life Ins. Co., 39 P.2d 1046, 96 Mont. 254.

Neb.—Suhr v. Lindell, 277 N.W. 381, 133 Neb. 856.

N.C.—Queen City Coach Co. v. Lee, 11 S.E.2d 341, 347, 218 N.C. 320, quoting Corpus Juris.

Ohio.—Whipp v. Industrial Commission of Ohio, 27 N.E.2d 141, 136 Ohio St. 531—Dugan v. Industrial Commission of Ohio, 22 N.E.2d 132, 133, 135 Ohio St. 652, quoting Corpus Juris.

Okl.—Gibson Oil Co. v. Westbrooke, 16 P.2d 127, 160 Okl. 26.

S.C.—Lazar v. Great Atlantic & Pacific Tea Co., 14 S.E.2d 560.

Tex.—Crumley v. Gile, Civ.App., 271 S.W. 641, 643, citing Corpus Juris.

22 C.J. p 452 note 61.

Causal relation

Declarations which are the immediate accompaniments of an act are admissible as part of the res gestæ, and immediateness is tested by closeness, not of time, but by causal relation.

Ark.—Public Utilities Corporation of Arkansas v. Cordell, 43 S.W.2d 746, 184 Ark. 878—Ft. Smith Oil Co. v. Slover, 24 S.W. 106, 58 Ark. 168—Little Rock, M. R. & T. Ry. Co. v. Leverett, 3 S.W. 50, 48 Ark. 333, 3 Am.S.R. 230.

Tex.—Texas Employers Ins. Ass'n v. Shifflette, Civ.App., 91 S.W.2d 787, error dismissed.

Present time of transaction

"The rule contemplates that all the res gestæ, including declarations forming a part thereof, must transpire within the present time of the transaction. But that time, while it cannot be less, may be more extended than the present time of the principal fact, in some instances a little, in others much and in others very much more. Usually, if they can all be ascertained, some of the res gestæ will be found contemporaneous with, and some anterior and others posterior to, the principal fact."—Travelers' Ins. Co. v. Sheppard, 12 S.E. 18, 26, 85 Ga. 751—Atlanta Mercantile Co. v. Caldwell, [illegible] S.E. 781, 782, 21 Ga.App. 151.

94. Mo.—Koether v. Kansas City Light & Power Co., 276 S.W. 105, 220 Mo.App. 452.

N.J.—Slayback Van Order Co. v. Eiben, 177 A. 671, 115 N.J.Law 17.

22 C.J. p 452 note 62, p 462 note 98.

95. N.C.—Young v. Stewart, 131 S.E. 735, 738, 191 N.C. 297, quoting Corpus Juris.

22 C.J. p 452 note 63.

96. Cal.—Salvo v. Market St. Ry. Co., 2 P.2d 585, 116 Cal.App. [illegible].

Ga.—Davis v. Metropolitan Life Ins. Co., 172 S.E. 167, 48 Ga.App. 159—Southern Ry. Co. v. Bullock, 156 S.E. 138, 42 Ga.App. 195.

Ill.—Molloy v. Chicago Rapid Transit Co., 166 N.E. 530, 335 Ill. 164.

Ky.—Chesapeake & O. Ry. Co. v. Carter's Adm'r, 17 S.W.2d 1011, 213 Ky. 268.

Mo.—Landau v. Travelers' Ins. Co., 287 S.W. 346, 315 Mo. 760—De Moss v. Evens & Howard Fire Brick Co., App., 57 S.W.2d 720—Fenton v. Missouri Motor Distributing Corporation, App., 52 S.W.2d 213.

nearly connected with the main transaction as to form a part of it, and which illustrate, elucidate, qualify, or characterize the act, are admissible as part of the res gestæ.[97] Accordingly the attendant

N.C.—Staley v. Royal Pines Park, 162 S.E. 202, 202 N.C. 155.
R.I.—Ficocelli v. Yellow Cab Co., 3 A.2d 246.
Tex.—Gause-Ware Funeral Home v. McGinley, Civ.App., 21 S.W.2d 347.
22 C.J. p 453 note 65.

97. U.S.—Yarbrough v. Prudential Ins. Co. of America, C.C.A.Ga., 99 F.2d 874, rehearing denied 100 F.2d 547—Hartford Accident & Indemnity Co. v. Collins-Dietz-Morris Co., C.C.A.Okl., 80 F.2d 441—Halleck v. Hartford Accident & Indemnity Co., C.C.A.Tex., 75 F.2d 800—In re Bradley, D.C.Conn., 263 F. 446, affirmed, C.C.A., 269 F. 784.
Ala.—B. F. Goodrich Co. v. Hughes, 194 So. 842, 239 Ala. 373—National Surety Corporation v. Monroe County, 193 So. 173, 239 Ala. 35—Franklin Life Ins. Co. v. Brantley, 165 So. 834, 231 Ala. 554—Martin v. Davis, 141 So. 667, 224 Ala. 648—Gulf Trading Co. v. Radcliff, 114 So. 308, 216 Ala. 645—Mizell v. Sylacauga Grocery Co., 106 So. 858, 214 Ala. 204—Kelly v. Sanders, 92 So. 424, 207 Ala. 259—American Cast-Iron Pipe Co. v. Birmingham Tailoring Co., 91 So. 484, 206 Ala. 609—Walsh v. Bank of Moundville, 164 So. 391, 26 Ala. App. 602, reversed on other grounds 164 So. 394, 231 Ala. 194.
Cal.—Barcroft v. Livacich, 96 P.2d 951, 35 Cal.App.2d 710—Salvo v. Market St. Ry. Co., 2 P.2d 585, 116 Cal.App. 339—Schaad v. Barceloux, 183 P. 716, 42 Cal.App. 337.
Colo.—Wilson v. Birt, 235 P. 563, 77 Colo. 206.
Fla.—State Board of Funeral Directors and Embalmers for Florida v. Cooksey, 3 So.2d 502.
Ga.—Travelers' Ins. Co. v. Sheppard, 12 S.E. 18, 85 Ga. 751—Atlanta & W. P. R. Co. v. Truitt, App., 16 S.E.2d 273—Palmer-Murphey Co. v. Barnett, 124 S.E. 538, 32 Ga.App. 635.
Ill.—Kalschinski v. Illinois Bankers Life Assur. Co., 35 N.E.2d 705, 311 Ill.App. 181—Oscar Heyman & Bros. v. Marshall Field & Co., 22 N.E.2d 776, 301 Ill.App. 340—Culver Military Academy v. Staley, 250 Ill.App. 531, 537, citing **Corpus Juris**.
Iowa.—Farmers' Sav. Bank of New Albin v. Bunge, 231 N.W. 651, 211 Iowa 1357.
Minn.—Peterson v. Pete-Erickson Co., 244 N.W. 68, 186 Minn. 583.
Mo.—Sconce v. Jones, 121 S.W.2d 777, 343 Mo. 362—B. F. Sturtevant Co. v. Ford Mfg. Co., 288 S.W. 59, 315 Mo. 1025, reversing, App., 253 S.W. 76, and 254 S.W. 419—Nanney v. I. H. Shell & Son, App., 138 S.W.2d 717—Gilchrist v. Stark, App., 41 S.W.2d 888—Hill v. Edward F. Guth Co., App., 35 S.W.2d 924—Coy v. Dean, 4 S.W.2d 835, 222 Mo.App. 67—Wagner v. Security Ben. Ass'n, App., 276 S.W. 81.
Mont.—Simpson v. Miller, 34 P.2d 528, 97 Mont. 328—Stagg v. Stagg, 32 P.2d 856, 96 Mont. 573.
N.J.—Thompson v. Giant Tiger Corporation of Camden, 189 A. 649, 118 N.J.Law 10—Steinert v. Pennsylvania R. Co., 153 A. 533, 107 N.J. Law 505.
N.Y.—Young v. Grant Lunch Corporation, 4 N.Y.S.2d 366, 254 App. Div. 174—Holley v. A. W. Haile Motor Co., 177 N.Y.S. 429, 188 App.Div. 798—Pope v. W. W. Dutton Co., 177 N.Y.S. 162, 188 App. Div. 328—In re Flynn's Estate, 21 N.Y.S.2d 496, 174 Misc. 565—In re Strong's Estate, 6 N.Y.S.2d 300, 168 Misc. 716, affirmed In re Strong's Will, 11 N.Y.S.2d 225, 256 App.Div. 971—Gorelich v. Bronstein, 206 N.Y.S. 522, 123 Misc. 943—Walsh v. Emigrant Industrial Sav. Bank, 176 N.Y.S. 418, 106 Misc. 628.
N.D.—Asch v. Washburn Lignite Coal Co., 186 N.W. 757, 48 N.D. 734.
Ohio.—Parker v. Mutual Life Ins. Co. of New York, 156 N.E. 231, 23 Ohio App. 535—U. S. Fidelity & Guaranty Co. v. Kinneman, 153 N.E. 261, 22 Ohio App. 369.
Okl.—Gibson Oil Co. v. Westbrooke, 16 P.2d 127, 160 Okl. 26—Eggstaff v. Phelps, 226 P. 82, 99 Okl 54.
Or.—Lake County Pine Lumber Co. v. Underwood Lumber Co., 12 P.2d 324, 140 Or. 19—Tracy v. Juanto, 205 P. 822, 103 Or. 416—Andrew v. Oregon-Washington R. & Nav. Co., 178 P. 181, 90 Or. 611.
Pa.—Fye v. Baltimore & O. R. Co., 3 A.2d 275, 133 Pa.Super. 550—Kline v. Yeager, 33 Luz.L.Reg. 253.
S.C.—Cobb v. Southern Public Utilities Co., 187 S.E. 363, 181 S.C. 310.
S.D.—Stratton v. Sioux Falls Traction System, 226 N.W. 644, 55 S.D. 464.
Tenn.—Wilson v. Wilson, 130 S.W.2d 140, 23 Tenn.App. 244.
Tex.—Southern Underwriters v. Thompson, Civ.App., 127 S.W.2d 389, error granted—Clark v. West, Civ.App., 126 S.W.2d 569, reversed on other grounds Aetna Casualty & Surety Co. v. Clark, Com.App., 150 S.W.2d 78—Rhodes v. Taliaferro, Civ.App., 119 S.W.2d 703—Edwards v. West Texas Hospital, Civ.App., 89 S.W.2d 801, error dismissed—Newton v. McCarrick, Civ. App., 75 S.W.2d 472, error dismissed—Davenport v. Texas & N. O. R. Co., Civ.App., 72 S.W.2d 933, 936, citing **Corpus Juris**—McClung Const. Co. v. Muncy, Civ.App., 65 S.W.2d 786, error dismissed—Pierson v. Warren, Civ.App., 52 S.W. 2d 278, error refused—Capitol Hotel Co. v. Rittenberry, Civ.App., 41 S.W.2d 697, error dismissed—Maryland Casualty Co. v. Marshall, Civ.App., 14 S.W.2d 337, error dismissed—Sherwin-Williams Paint Co. v. Rausin, Civ.App., 10 S.W.2d 196, error refused—Sherrod v. City Nat. Bank of Wichita Falls, Civ. App., 294 S.W. 295—Durham v. Scrivener, Civ.App., 259 S.W. 606, affirmed, Com.App., 270 S.W. 161—Independent Fruit Co. v. Platt Produce Co., Civ.App., 250 S.W. 1067—Brite v. Atascosa County, Civ.App., 247 S.W. 878—Lumbermen's Reciprocal Ass'n v. Adcock, Civ.App., 244 S.W. 645—Kansas City Life Ins. Co. v. Elmore, Civ. App., 226 S.W. 709—Evans v. McKay, Civ.App., 212 S.W. 680, dismissed for want of jurisdiction.
Vt.—Smith v. Reynolds, 108 A. 697, 94 Vt. 28.
Wash.—Timewell Inv. Co. v. Beckwith, 198 P. 735, 116 Wash. 102.
Wis.—McComb v. McComb, 234 N.W. 707, 204 Wis. 293—In re Cramer's Will, 198 N.W. 386, 183 Wis. 525.
22 C.J. p 443 note 12, p 444 note 16, p 462 note 96—48 C.J. p 1145 note 77 [a]—51 C.J. p 251 note 44.

Bailee

(1) Statements made by a bailee at the time of demand, excusing a failure of delivery or qualifying his refusal, are admissible as part of the res gestæ attending the demand.
Ark.—Gracie v. Robinson, 14 Ark. 438.
Miss.—Lampley v. Scott, 24 Miss. 528.

(2) Likewise the acts and declarations of a bailee made immediately before and after the loss of the bailed property are admissible.
Miss.—Lampley v. Scott, 24 Miss. 528.
Pa.—Tompkins v. Saltmarsh, 14 Serg. & R. 275.
6 C.J. p 1162 note 15.

Creation of trust

Where declarations made on the 19th, 20th, and 31st of the same month are relied on as part of a parol declaration of trust, intermediate adverse statements made on the 26th are part of the res gestæ and admissible in an action to establish such trust.—Schooler v. Williamson, 221 P. 195, 192 Cal. 472.

Declarations of physician

In an action against a physician for malpractice, the declarations of the physician at the time of the treatment are admissible as a part of the res gestæ.—Dameron v. Ansbro, 178 P. 874, 39 Cal.App. 289.

circumstances and the statements then made by the parties are admissible as part of the res gestæ to show the execution of a contract,[98] and, where relevant, matters said and done which are parts of the res gestæ of the negotiation and execution of a contract are admissible to show the existence and nature of the contract and the relation of the parties.[99] Matters attendant upon a sale or conveyance may also be admissible as part of the res gestæ.[1] Likewise, provided it reflects some light on

Existence of will

(1) In a proceeding to establish a lost will, testimony as to what was said and done by testatrix and her lawyer when the paper was being prepared is admissible as part of the res gestæ.—In re Zick's Estate, 172 N.W. 382, 205 Mich. 681.

(2) Accordingly, where decedent stated that the document in her hands was her will and that it was prepared by an attorney whom she named, the statements made became part of the res gestæ as to the existence of the will at that time.—In re Shlevin's Estate, 283 N.Y.S. 377, 157 Misc. 40.

Fraud

(1) In proving fraud, the acts and declarations of the parties at the time of the transaction are admissible as part of the res gestæ.—Davidson v. O'Connell, 158 A. 207, 114 Conn. 116.

(2) Other representations made at the time, even though they may not be actionable in themselves, are admissible.—Wolfersberger v. Miller, 39 S.W.2d 758, 327 Mo. 1150.

(3) Where it is alleged that property bought in the name of the debtor's wife was paid for by money belonging to the debtor, the debtor's statements at the time of the purchase are admissible as part of the res gestæ to show fraudulent intent. —Hinton v. Saul, 259 P. 185, 37 Wyo. 78.

Marriage

Conduct and declarations of cohabiting parties are admissible as part of the res gestæ to illustrate their intention and to show marriage.

Ala.—Rogers v. McLeskey, 142 So. 526, 225 Ala. 145.

Va.—Reynolds v. Adams, 99 S.E. 695, 125 Va. 295.

Particular evidence held admissible

(1) Employer's statements regarding the cause of an employee's discharge.—Hill Grocery Co. v. Carroll, 136 So. 789, 223 Ala. 376—U. S. Fidelity & Guaranty Co. v. Millonas, 89 So. 732, 206 Ala. 147, 29 A.L.R. 520.

(2) Rate of speed at which car on which plaintiff was riding was moving at time of injury.—Jenkins v. Wabash Ry. Co., 107 S.W.2d 204, 232 Mo.App. 438, certiorari denied Wabash R. Co. v. Jenkins, 58 S.Ct. 139, 302 U.S. 737, 82 L.Ed. 570.

(3) Receipts, to show the purpose for which money was received.—Wilson v. Birt, 235 P. 563, 77 Colo. 206.

(4) That automobile passed witness' home about half mile from scene of accident, traveling at fifty to seventy-five miles per hour.—Central of Georgia Ry. Co. v. Keating, 170 S.E. 493, 177 Ga. 345, reversing 165 S.E. 873, 45 Ga.App. 811, and conformed to mandate 170 S.E. 497, 47 Ga.App. 336.

(5) Decedent's question to his companion, at time of taking hold of live wire, as to whether there was any juice in it.—Kentucky & West Virginia Power Co. v. Brown's Adm'x, 135 S.W.2d 70, 281 Ky. 133.

98. Mo.—Gillespie v. Holland, 31 S.W.2d 774—Byrne v. Prudental Ins. Co. of America, App., 79 S.W.2d 789, reversed on other grounds, Sup., 88 S.W.2d 344.

S.C.—Land v. Reese, 134 S.E. 252, 136 S.C. 267.

Tex.—Simmons v. Eakin, Civ.App., 54 S.W.2d 1045—Empire Gas & Fuel Co. v. Pendar, Civ.App., 244 S.W. 184.

Independently relevant statements constituent of legal result, such as contract, see supra § 261.

Conditional indorsement

Evidence of what occurred at the time notes were indorsed is admissible as part of the res gestæ to show that the indorsement was conditional.—Langham v. Jackson, 100 So. 757, 211 Ala. 416.

Unsigned memorandum

While an unsigned memorandum of contract may not be admitted as evidence of the contract, where the controversy before the jury is whether there was an oral contract and the terms thereof, and it is shown that such unsigned memorandum was shown to and read over by the defendant and its terms assented to by him, the trial court may properly admit the same in evidence as a part of the res gestæ.—Reiser v. Lawrence, 123 S.E. 451, 96 W.Va. 82.

Where no connection with the main transaction is shown, it is improper to receive the statements of an alleged agent relating to the contract. —Continental Nat. Bank of Salt Lake City v. Cole, 3 P.2d 1103, 51 Idaho 140, 77 A.L.R. 484.

99. U.S.—Ætna Ins. Co. of Hartford, Conn., C.C.A.Ky., 19 F.2d 177, certiorari denied 48 S.Ct. 37, 275 U.S. 541, 72 L.Ed. 415.

Ala.—America Mining Co. v. Taylor, 100 So. 761, 211 Ala. 513—Irvin v. Irvin, 93 So. 517, 207 Ala. 493—Dixie Industrial Co. v. Bank of Wetumpka, 92 So. 786, 207 Ala. 293.

Ga.—Anderson & Jones v. Garnett, 141 S.E. 921, 37 Ga.App. 770—Jones v. Norris N. Smith Co., 120 S.E. 804, 31 Ga.App. 358—Saunders & McMullen v. Hudson, 119 S.E. 535, 30 Ga.App. 732.

Md.—Catalano v. Bopst, 170 A. 562, 166 Md 91.

Minn.—Fikkan v. Holter, 230 N.W. 468, 180 Minn. 75.

Mo.—Porter v. Withers' Estate Co., 210 S.W. 109, 201 Mo.App. 27.

Neb.—Thomas v. Jarecki, 191 N.W. 669, 109 Neb. 519.

N.Y.—Holcomb v. Campbell, 22 N.E. 1107, 118 N.Y. 46.

Ohio.—Kimbark v. Timken Roller Bearing Co., 152 N.E. 385, 115 Ohio St. 161.

Okl.—West v. Fondren, 218 P. 1080, 92 Okl. 239.

Tex.—Citizens' Nat. Bank of Lubbock v. Ivey, Civ.App., 73 S.W.2d 133, error refused—Capitol Hotel Co. v. Rittenberry, Civ.App., 41 S.W.2d 697, error dismissed—Darby v. Farmers' State Bank of Burkburnett, Civ.App., 253 S.W. 341—Haskell v. Merrill, Civ.App., 212 S.W. 331—Connecticut Fire Ins. Co. v. Fields, Civ.App., 236 S.W. 750.

Va.—White Sewing Mach. Co. v. Gilmore Furniture Co., 105 S.E. 131, 128 Va. 630—Watson v. Mitchell, 104 S.E. 825, 128 Va. 312.

Wyo.—Holly Sugar Corporation v. Fritzler, 296 P. 206, 42 Wyo. 446.

Advice

In an action for failure to deliver a telegram, evidence that the telegraph agent told his friend, who took down plaintiff's message, "that in all probability the receiving station would be closed," and that the friend repeated it over the telephone to plaintiff was competent as res gestæ. —Woodall v. Western Union Telegraph Co., 97 So. 830, 210 Ala. 265.

A secret intent is not part of the res gestæ.—McCrory v. Schneider, Tex.Civ.App., 51 S.W.2d 738, error dismissed.

A verbal lease, consummated on Sunday was void, under Code 1907 § 3346, but was admissible in an unlawful detainer action when undisputed, to prove the character and quality of defendant's possession of the premises, and the relations between defendant and plaintiff, and the intent of the parties, on the theory that its declarations or admissions formed a part of the res gestæ of the parties' acts.—Eddins v. Galloway Coal Co., 87 So. 557, 205 Ala. 361.

1. **Declarations in executing deed**

Where relevant, the declarations of the parties in executing or acknowl-

the issues in the case,[2] what was said and done at the time of the commission of a tort, or so near thereto as to constitute a part thereof, is admissible as part of the res gestæ.[3] This rule has been applied to such wrongs as injury to or loss of property,[4] alienation of affections,[5] assault,[6] false impris-

edging a deed, which characterize the act and expresses their real intent at the time are admissible as part of the res gestæ.
Mo.—Gobel v. Kitchen, 266 S.W. 992, 217 Mo.App. 354.
N.C.—Blades v. Wilmington Trust Co., 178 S.E. 565, 207 N.C. 771—Reece v. Woods, 105 S.E. 337, 180 N.C. 631.
Tenn.—McDonald v. Baldwin, App., 148 S.W.2d 385—Wilson v. Wilson, 130 S.W.2d 140, 23 Tenn.App. 244.

Sale

(1) Relevant statements constituting a part of the res gestæ of a sale are admissible.
Ala.—Polytinsky v. Johnston, 99 So. 839, 211 Ala. 99.
N.Y.—Gorman v. La Bella, 262 N.Y.S. 345, 146 Misc. 408.
Wis.—Walter v. Four Wheel Drive Auto Co., 252 N.W. 346, 213 Wis. 559.

(2) The reasons assigned by defendant's agent for his refusal to comply with a contract to purchase are part of the res gestæ of the breach, and are admissible.—Farmers' Mill & Elevator Co. v. Hodges, Tex.Com.App., 260 S.W. 166, reversing, Civ.App., 248 S.W. 72.

(3) What was said and done on the service of a notice of refusal to perform a contract is admissible as res gestæ.—Cooper v. Newsom, Civ. App., 224 S.W. 568, dismissed for want of jurisdiction.

(4) It is not improper to exclude a memorandum of items sold never read by defendant where the contract was arrived at independently thereof.—Duke v. Cason, 103 S.E. 176, 25 Ga.App. 344.

Statements of vendor as to the value of land are only admissible where part of the res gestæ, and so tending to lend force and effect to principal statement.—Moncion v. Bertrand, 127 A. 371, 98 Vt. 332.

2. Ky.—Webb v. Linnemann, 255 S.W. 1036, 201 Ky. 131.

3. U.S.—Wilks v. U. S., C.C.A.N.Y., 65 F.2d 775.
Ala.—Tennessee Coal, Iron & R. Co. v. Wilhite, 100 So. 135, 211 Ala. 195—Louisville & N. R. Co. v. Hamby, 93 So. 698, 208 Ala. 75—American Discount Co. v. Wyckroff, 191 So. 790, 29 Ala.App. 82.
D.C.—Sanitary Grocery Co. v. Snead, 90 F.2d 374, 67 App.D.C. 129, certiorari denied 58 S.Ct. 22, 302 U.S. 703, 82 L.Ed. 543.
Ga.—Atlanta St. R. Co. v. Walker, 21 S.E. 48, 93 Ga. 462.
Ind.—Flamion v. Dawes, 169 N.E. 60, 91 Ind.App. 394.
Iowa.—Califore v. Chicago, St. P., M & O. Ry. Co., 263 N.W. 29, 220 Iowa 676.
Ky.—Bailey v. Shrader, 97 S.W.2d 575, 265 Ky. 663—Brumfield v. Consolidated Coach Corporation, 40 S.W.2d 356, 240 Ky. 1—Powers v. Gatliff Coal Co., 14 S.W.2d 216, 228 Ky. 5—Louisville & N. R. Co. v. Rowland's Adm'r, 286 S.W. 929, 215 Ky. 663.
La.—Mancuso v. Hurwitz-Mintz Furniture Co., App., 183 So. 461, denying rehearing 181 So. 814.
Miss.—Tucker v. Gurley, 170 So. 230, 176 Miss. 708.
Mo.—Kelly v. Kansas City Rys. Co., App., 225 S.W. 133.
Mont.—Sullivan v. Metropolitan Life Ins. Co., 29 P.2d 1046, 96 Mont. 254.
N.Y.—Jones v. Perry, 219 N.Y.S. 295, 128 Misc. 263.
N.D.—Asch v. Washburn Lignite Coal Co., 186 N.W. 757, 48 N.D. 734.
Ohio.—Schomer v. State ex rel. Bettman, 190 N.E. 638, 47 Ohio App. 84.
Okl.—Shawnee-Tecumseh Traction Co. v. Henry, 236 P. 894, 110 Okl. 160.
Or.—Hornschuch v. Southern Pac. Co., 203 P. 886, 101 Or. 280.
Pa.—Guyer v. Equitable Gas Co., 123 A. 590, 297 Pa. 5.
S.C.—Halsey v. Minnesota-South Carolina Land & Timber Co., 177 S.E. 29, 174 S.C. 97, 100 A.L.R. 1.
Tex.—Willard v. Whitaker, Civ.App., 153 S.W.2d 878.
Wash.—Glaser v. Katalinich, 13 P.2d 468, 169 Wash. 133.
42 C.J. p 1218 note 23, p 1227 note 42—p 1228 note 46—45 C.J. p 1232 notes 31, 32, p 1259 note 80.

Statements of matters of justification which do not justify the act, where made at the time, are admissible as part of the res gestæ.—Gadsden General Hospital v. Hamilton, 103 So. 553, 212 Ala. 531, 40 A.L.R. 294.

4. **Evidence held admissible**

(1) Generally.
Ala.—Alabama Power Co. v. Davidson, 90 So. 915, 206 Ala. 501.
Cal.—Rhodes v. Firestone Tire & Rubber Co., 197 P. 392, 51 Cal.App. 569.
Ga.—Louisville & N. R. Co. v. Studdard, 130 S.E. 532, 34 Ga.App. 570—Atlantic Coast Line R. Co. v. Barksdale, 124 S.E. 362, 32 Ga.App. 643.
Tex.—Galveston H. & S. A. Ry. Co. v. Harris Bros., Civ.App., 211 S.W. 255, error refused.

(2) Who was present at the time and place of the wrong alleged.—Dixie Const. Co. v. McCauley, 101 So. 601, 211 Ala. 683.

(3) Statement by one of brush burners to other "I told you not to do it," made while they were attempting to put out fire.—Pruitt v. Williams, 106 S.W.2d 892, 21 Tenn. App. 171.

(4) Statements, made while fire was at its height, by defendant's employees that they started the fire and that it got beyond their control.—Patterson v. Baltimore & O. R. Co., 105 A. 159, 133 Md. 276.

(5) Telegraphic records of movement of trains on night of fire.—Central of Georgia Ry. Co. v. Wilson, 111 So. 901, 215 Ala. 612.

(6) That during fire witness noticed peculiar odor which was said to be gas.—Sellers v. Montana-Dakota Power Co., 41 P.2d 44, 99 Mont. 39.

5. Ky.—Doom v. Vinson, 244 S.W. 894, 196 Ky. 449.
N.H.—Caplan v. Caplan, 142 A. 121, 83 N.H. 318.

6. U.S.—Mutual Life Ins. Co. of New York v. Treadwell, C.C.A.La., 79 F.2d 487.
Ala.—Birmingham Electric Co. v. Driver, 166 So. 701, 232 Ala. 36—Harris v. Harris, 100 So. 333, 211 Ala. 222—Birmingham Macaroni Co. v. Tadrick, 88 So. 858, 205 Ala. 540.
Conn.—Lentine v. McAvoy, 136 A. 76, 105 Conn. 528.
Ill.—Wolen v. Metropolitan Life Ins. Co., 5 N.E.2d 249, 287 Ill.App. 415.
Ky.—Mann v. Watson, 283 S.W. 1052, 214 Ky. 729—Sherley v. Billings, 8 Bush 147, 8 Am.R. 451.
Mass.—Benjamin v. McLellan, 129 N.E. 368, 237 Mass. 141.
Mich.—Albrecht v. St. Hedwig's Roman Catholic Benev. Soc., 171 N.W. 461, 205 Mich. 395.
Mo.—State ex rel. Gosselin v. Trimble, 41 S.W.2d 801, 328 Mo. 760, quashing certiorari Gosselin v. Yellow Cab Co., App., 29 S.W.2d 186—Young v. Sinclair Refining Co., App., 92 S.W.2d 995—Campbell v. Crutcher, App., 224 S.W. 115—Gieske v. Redemeyer, App., 224 S.W. 92.
S.C.—Lazar v. Great Atlantic & Pacific Tea Co., 14 S.E.2d 560.

All that was done and said by the parties, at the time and place of the difficulty, and immediately preceding it, is admissible testimony as a part of the res gestæ.
Ala.—Powell v. Bingham, 196 So. 154, 29 Ala.App. 248, certiorari dismissed 196 So. 160, 239 Ala. 515.
N.J.—Clawans v. O'Connor, 143 A. 354, 105 N.J.Law 117.

onment,[7] libel and slander,[8] and personal injuries.[9] On the other hand, acts and declarations which are not part of the circumstances attendant on the main fact, and which do not illustrate or characterize such fact so as to form a part of it, are not admissible as part of the res gestæ.[10]

Arrest of another

In an action for an assault by a policeman on plaintiff when he was attempting to arrest plaintiff, evidence that just prior to the arrest of plaintiff the policeman had arrested a soldier in plaintiff's presence was competent as part of the same transaction, especially where one ground of arrest relied on by the policeman was that plaintiff had committed a breach of the peace by threatening the policeman while he was engaged in arresting the soldier.—Rice v. Lavin, 251 S.W. 990, 199 Ky. 790.

Other assaults

In an action for assault by defendant's agent, testimony as to an assault on plaintiff's wife at the same time was admissible, both assaults being parts of the same transaction and so intimately connected therewith that a witness could not separate the facts of the two.—Davis v. Teague, Tex.Civ.App., 256 S.W. 957.

Testimony of opprobrious words as used by parties was admissible to explain character of assault, as part of res gestæ of difficulty.—Metropolitan Life Ins. Co. v. Carter, 102 So. 130, 212 Ala. 212.

7. Ala.—Tolleson v. Jackson, 114 So. 801, 217 Ala. 66—Southern Ry. Co. v. Hall, 96 So. 73, 209 Ala. 237—Rich v. McInerny, 15 So. 663, 103 Ala. 345, 49 Am.S.R. 32—Burk v. Knott, 101 So. 811, 20 Ala.App. 316.

Ga.—McClure Ten Cent Co. v. Humphries, 127 S.E. 151, 33 Ga.App. 523.

Ky.—McDonald v. Lunsford, 57 S.W. 2d 1018, 1019, 247 Ky. 828, citing **Corpus Juris.**

Mo.—Randol v. Kline's Inc., 18 S.W. 2d 500, 322 Mo. 746.

Tex.—McBeath v. Campbell, Civ.App., 4 S.W.2d 999, reversed in part on other grounds and affirmed in part, Com.App., 12 S.W.2d 118.

Statements by police officers and detectives may be admissible as part of the res gestæ, in an action for false imprisonment.

U.S.—Montgomery Ward & Co. v. Medline, C.C.A.N.C., 104 F.2d 485.

Ga.—Conoly v. Imperial Tobacco Co., 12 S.E.2d 398, 63 Ga.App. 880.

25 C.J. p 544 note 73.

8. Md.—Phillips v. Haugaard, 109 A. 95, 135 Md. 427.

Humiliation

In libel action for newspaper statement that plaintiff was fined for vagrancy, mental and physical pain and humiliation suffered by plaintiff when she saw article was admissible as res gestæ.—El Paso Times Co. v. Eicke, Tex.Civ.App., 292 S.W. 594.

9. U.S.—McCrate v. Morgan Packing Co., C.C.A.Ohio, 117 F.2d 702.

Ala.—Lewy Art Co. v. Agricola, 53 So. 145, 169 Ala. 60—Southern Amusement Corporation v. Summers, 129 So. 489, 23 Ala.App. 595.

Ga.—New Winder Lumber Co. v. Payne, 149 S.E. 85, 40 Ga.App. 188.

Ind.—Indiana Service Corporation v. Krasenko, 158 N.E. 514, 86 Ind. App. 458.

Ky.—Poe v. Hankins' Adm'x, 65 S.W. 2d 457, 251 Ky. 466.

Mo.—Sconce v. Jones, 121 S.W.2d 777, 343 Mo. 362—Woods v. St. Louis Merchants' Bridge Terminal Ry. Co., 8 S.W.2d 922, certiorari denied St. Louis Merchants' Bridge Terminal Ry. Co. v. Woods, 49 S.Ct. 94, 278 U.S. 649, 73 L.Ed. 561—Unrein v. Oklahoma Hide Co., 244 S. W. 924, 295 Mo. 353—Maloney v. United Rys. Co. of St. Louis, 237 S.W. 509—Coffey v. S. S. Kresge Co., App., 102 S.W.2d 161—McGuire v. Springfield Traction Co., App., 30 S.W.2d 794.

Okl.—Feenberg Supply Co. v. Pierce, 95 P.2d 640, 185 Okl. 662.

Or.—Schneider v. Moe, 50 P.2d 577, 151 Or. 353—Wemmett v. Mount, 292 P. 93, 134 Or. 305.

Tenn.—Armstrong v. Bowman, 115 S. W.2d 229, 21 Tenn.App. 673.

Tex.—Roadway Express v. Gaston, Civ.App., 90 S.W.2d 874—Texas Interurban Ry. v. Hughes, Civ.App., 34 S.W.2d 1103, affirmed Texas Interurban Ry. Co. v. Hughes, Com. App., 53 S.W.2d 448—El Paso Electric Ry. Co. v. Terrazas, Civ.App., 208 S.W. 387, error refused.

Wash.—Meagher v. Wagner Tug Boat Co., 11 P.2d 245, 168 Wash. 253, certiorari denied Wagner Tug Boat Co. v. Meagher, 53 S.Ct. 120, 287 U.S. 657, 77 L.Ed. 567.

Particular matters held admissible

(1) Exclamation, "Take care of that lady, an insulator hit her." Kuether v. Kansas City Light & Power Co., 276 S.W. 105, 220 Mo. App. 452.

(2) Exclamation, "The old man has been hit."—Schneider v. Moe, 50 P. 2d 577, 151 Or. 353.

(3) Exclamations of passenger, at time she fell on plaintiff, causing the injury.—Kelly v. Kansas City Rys. Co., Mo.App., 225 S.W. 133.

(4) Injuries and death of plaintiff's intestate resulting from automobile collision.—Midland Trail Bus Lines v. Martin, 194 N.E. 862, 100 Ind.App. 206.

(5) Testimony of another passenger that immediately before the car left the track it struck the curve and she was thrown against the window.—Schroth v. Philadelphia Rapid Transit Co., 121 A. 279, 280 Pa. 36.

(6) Statement, "I tried to throw the belt over the pulley so that I could put it on. I have done it a thousand times, but this is one time I didn't." Chapman v. Hund-Ashcroft Mfg. Co., Mo., 263 S.W. 993.

(7) Statement that driver of plaintiff's truck was trying to commit suicide.—Nahorski v. St. Louis Electric Terminal Rys. Co., Mo., 271 S.W. 749.

(8) Testimony of bystander that injured passenger in automobile was killed in collision. Lauth v. Emmick, 61 P.2d 338, 16 Cal.App.2d 676.

(9) That driver of car was killed in the collision in which plaintiff was injured.—Miles v. Hayes, 87 So. 837, 205 Ala. 83.

(10) That truck went out of sight and kept on going after collision with automobile. Batlan Coal & Transfer Co. v. Bach, 108 So. 609, 211 Ala. 622.

(11) The manner in which a boy was required to get off the car.—Terletski v. Philadelphia & R. Ry. Co., 107 A. 372, 264 Pa. 35.

Spontaneous manifestations of distress or pain are admissible under the ordinary application of the rule of res gestæ. Gulf, C. & S. F. Ry. Co. v. Young, Tex.Civ.App., 281 S.W. 661.

Independently relevant statements as to bodily condition see supra §§ 242–246.

10. Iowa. Fitter v. Iowa Telephone Co., 106 N.W. 7, 129 Iowa 610.

22 C.J. p 449 note 37—12 C.J. p 1219 note 30—18 C.J. p 1125 note 77 [b].

Undisclosed memorandum

In action for interest on bank deposits, notation on bank's book, stating rate of interest not disclosed to depositor would not be evidence to disprove contract alleged by him as to rate, either as part of res gestæ, or on any other theory. Gstering v. Allegheny Trust Co., 153 A. 428, 269 Pa. 64.

Evidence held inadmissible

U.S. Harris v. U. S., C.C.A.Va., 70 F.2d 889.

Ala.—Kondaris v. Barganis, 137 So. 303, 223 Ala. 512—Jones v. Central of Georgia Ry. Co., 85 So. 428, 204 Ala. 148.

Ark.—Arkmo Lumber Co. v. Cantrell, 252 S.W. 901, 159 Ark. 445—Watson v. Davidson, 217 S.W. 777, 141 Ark. 581.

Cal.—Hollander v. Wilson Estate Co., 7 P.2d 177, 214 Cal. 582—Paez v. Mutual Indemnity, Accident, Health

Acts of animals. The unreasoning nature of animals and their lack of ability to concoct evidence renders the element of time of less importance, when it is sought to show their acts as part of the res gestæ, than it would be in the case of the declarations of a human being.[11]

§ 412. —— Antecedent Facts or Statements

A declaration or a fact which, although antecedent in point of time, is preliminary or immediately preparatory to the main fact may be received as part of the res gestæ.

While prior disconnected declarations or facts must be excluded,[12] a declaration or a fact which, although antecedent in point of time, is preliminary or immediately preparatory to the main fact may be received where it tends to illustrate or give character to the act in question.[13] Thus statements made

& Life Ins. Co. of California, 3 P. 2d 69, 116 Cal.App. 654.
Conn.—Britton v. Hartshorn, 156 A. 48, 113 Conn. 484.
Ga.—Shadburn Banking Co. v. Streetman, 179 S.E. 377, 180 Ga. 500, 99 A.L.R. 854.
Ill.—Roche v. Roche, 121 N.E. 621, 286 Ill. 336—Peterson v. Cochran & McCluer Co., 31 N.E.2d 825, 308 Ill.App. 348.
Ind.—American Aggregates Corporation v. Wente, 190 N.E. 552, 100 Ind.App. 59.
Iowa.—Albright v. Moeckly, 210 N. W. 813, 202 Iowa 565.
Kan.—Fidelity & Casualty Co. v. Reed, 86 P.2d 522, 149 Kan. 58.
Ky.—Chesapeake & O. R. Co. v. Hay, 58 S.W.2d 228, 248 Ky. 69—Pullman Co. v. Pulliam, 218 S.W. 1005, 187 Ky. 213.
La.—Parkerson v. Ogden, 97 So. 404, 154 La. 208.
Mich.—Dreyfus v. Daronco, 234 N. W. 587, 253 Mich. 235.
Minn.—Ghelin v. Johnson, 243 N.W. 443, 186 Minn. 405—Morner v. Kohen, 216 N.W. 233, 172 Minn. 543.
Miss.—Standard Coffee Co. v. Carr, 157 So. 685, 171 Miss. 714.
Mo.—German Evangelical Bethel Church of Concordia v. Reith, 39 S.W.2d 1057, 327 Mo. 1098, 76 A. L.R. 604—Niswonger v. Thompson, App., 124 S.W.2d 669—Mick v. John R. Thompson Co., App., 77 S.W.2d 470—Williams v. American Life & Accident Ins. Co., App., 71 S.W.2d 68.
N.J.—Higgins v. Goerke-Krich Co., 103 A. 37, 91 N.J.Law 464, affirmed 106 A. 394, 92 N.J.Law 424.
N.C.—Chandler & Ragland v. Marshall, 126 S.E. 742, 189 N.C. 301—Nobles v. Davenport, 111 S.E. 180, 183 N.C. 207, 26 A.L.R. 1086.
Okl.—Lieuallen v. Young, 241 P. 342, 115 Okl. 153.
Pa.—Meeder v. Masajada, 86 Pittsb. L.J. 413.
Tex.—Willard v. Whitaker, Civ.App., 153 S.W.2d 878—Latham v. Jordan, Civ.App., 3 S.W.2d 555, reversed on other grounds, Com.App., 17 S.W.2d 805.
Utah.—Knowlton v. Thompson, 218 P. 117, 62 Utah 142.
Wash.—Williams v. Clayton, 64 P.2d 1017, 189 Wash. 282.
Wis.—Lehan v. Chicago & N. W. Ry. Co., 172 N.W. 787, 169 Wis. 327.

11. Ky.—Thornton v. Layle, 111 S. W. 279, 33 Ky.L. 382, 17 L.R.A., N.S., 1233.
22 C.J. p 453 note 66.

12. Ill.—Boyer Chemical Laboratory Co. v. Industrial Commission, 10 N.E.2d 389, 366 Ill. 635, 113 A.L.R. 264.
Iowa.—Anderson v. Ætna Life Ins. Co., 188 N.W. 883, 193 Iowa 1037.
Ky.—Cumberland Gasoline Corporation v. Fields' Adm'r, 80 S.W.2d 28, 258 Ky. 417—Meyers' Adm'x v. Chesapeake & O. Ry. Co., 259 S.W. 1027, 202 Ky. 443.
Pa.—Purcell v. Metropolitan Life Ins. Co., 10 A.2d 442, 336 Pa. 588.
Wash.—Barnett v. Bull, 250 P. 955, 141 Wash. 139.
W.Va.—Mercer Funeral Home v. Addison Bros. & Smith, 163 S.E. 439, 111 W.Va. 616.
22 C.J. p 453 note 67—42 C.J. p 1227 notes 37, 38.

Must explain principal act

"It can be stated as a general rule that anything said or done before the principal act occurred or was within the contemplation of the parties cannot be regarded as part of the res gestæ, although only separated by the least possible time, unless it tends to explain and unfold the principal act by the undesigned act or declaration of the party, for the reason that such declaration could not be said to throw any light upon the motives of the parties."—Molloy v. Chicago Rapid Transit Co., 166 N. E. 530, 533, 335 Ill. 164—Chicago & E. I. R. Co. v. Chancellor, 46 N.E. 269, 271, 165 Ill. 438.

Statements arising from similar injuries

Testimony as to statements by persons stumbling over scales in restaurant at times of such mishaps was inadmissible in action for injuries to woman subsequently falling over scales.—Mick v. John R. Thompson Co., Mo.App., 77 S.W.2d 470.

13. U.S.—Reading Co. v. Larkin, C. C.A.Pa., 114 F.2d 416, affirming, D. C., Larkin v. Reading Co., 28 F. Supp. 292, and certiorari denied Reading Co. v. Larkin, 61 S.Ct. 175, 311 U.S. 707.
Ala.—Birmingham Electric Co. v. Driver, 166 So. 701, 232 Ala. 36—Louisville & N. R. Co. v. Crick, 117 So. 167, 217 Ala. 547, followed in Louisville & N. R. Co. v. Copeland, 117 So. 176, 217 Ala. 556—Stoudemire v. Davis, 94 So. 498, 208 Ala. 495.
Cal.—McAlvay v. Consumers' Salt Co., 297 P. 135, 139, 112 Cal.App. 383, citing **Corpus Juris.**
Ga.—Seaboard Air Line Ry. Co. v. Benton, 159 S.E. 717, 43 Ga.App. 495, reversed on other grounds 165 S.E. 593, 175 Ga. 491, conformed to 166 S.E. 219, 45 Ga.App. 832.
Idaho.—McIntire v. Oregon Short Line R. Co., 55 P.2d 148, 56 Idaho 392.
Ill.—Jackson v. Thompson, 32 N.E.2d 997, 309 Ill.App. 187—Sullivan v. Heyer, 21 N.E.2d 776, 300 Ill.App. 599.
Ind.—Flamion v. Dawes, 169 N.E. 60, 91 Ind.App. 394.
Ky.—Chesapeake & O. Ry. Co. v. McDonald, 39 S.W.2d 253, 239 Ky. 258.
Md.—Tittlebaum v. Pennsylvania R. Co., 174 A. 89, 167 Md. 397.
Mich.—Adams v. Novo Engine Co., 249 N.W. 859, 264 Mich. 292—Morse v. Port Huron & D. R. Co., 232 N. W. 369, 370, 251 Mich. 309, citing **Corpus Juris.**
Minn.—Arnold v. Northern States Power Co., 297 N.W. 182.
Mo.—Edwards v. Ethyl Gasoline Corporation, 112 S.W.2d 555, 561, 342 Mo. 98, citing **Corpus Juris**—Koonse v. Missouri Pac. R. Co., 18 S. W.2d 467, 322 Mo. 813, certiorari denied Missouri Pac. R. Co. v. Koonse, 50 S.Ct. 34, 280 U.S. 582, 74 L.Ed. 632—Nahorski v. St. Louis Electric Terminal Ry. Co., 274 S.W. 1025, 310 Mo. 227—May v. Chicago, B. & Q. R. Co., 235 S.W. 660, 284 Mo. 508.
N.J.—Clawans v. O'Connor, 143 A. 354, 105 N.J.Law 117.
N.D.—Asch v. Washburn Lignite Coal Co., 186 N.W. 757, 48 N.D. 734.
Tex.—Miller v. Wyrick, Civ.App., 96 S.W.2d 253, error dismissed—Heaton v. Globe Indemnity Co., Civ. App., 71 S.W.2d 328, error dismissed—Texas Employers' Ins. Ass'n v. White, Civ.App., 68 S.W. 2d 511, error dismissed—Sovereign Camp, W. O. W., v. Barnes, Civ. App., 67 S.W.2d 417.
Wash.—Nelson v. Bjelland, 95 P.2d

in the course of negotiations leading up to the execution of a contract may be admissible as part of the res gestæ,[14] or fear of an impending peril may compel an utterance which is admissible, although it precedes the relevant fact.[15]

§ 413. —— Subsequent Facts or Statements

Statements or acts, although subsequent to the main or principal event, which are so intimately interwoven with it by the surrounding circumstances as to raise a reasonable presumption that they were made or done under the immediate influence of the principal transaction or event itself, rather than the result of premeditation or design, are admissible.

Although as a general rule statements which are merely narrative of a past transaction, see infra § 420, or acts or declarations which are subsequent to the principal event and not directly connected therewith,[16] will not be received in evidence, especially,

784, 786, citing **Corpus Juris**—Heg v. Mullen, 197 P. 51, 115 Wash. 252.
22 C.J. p 453 note 68—42 C.J. p 1227 notes 39, 40.

Evidence held admissible

(1) Bus driver's statement immediately before collision that they would be lucky to make it.—Correira v. Boston Motor Tours, 169 N.E. 775, 270 Mass. 88.

(2) Exclamation of driver, referring to approaching truck before collision, "Look at that fool on the wrong side of the road."—Gerbing v. McDonald, 229 N.W. 860, 201 Wis. 214, followed in 229 N.W. 864, 201 Wis. 222.

(3) Exclamation of street car motorman, when his car was ten or fifteen feet distant from automobile in dangerous position, "I am going to hit them; my brakes won't work."—Shawnee-Tecumseh Traction Co. v. Henry, 236 P. 894, 110 Okl. 160.

(4) Responses of occupants of car to driver's inquiries whether way was clear, made before going on a railroad track at a crossing, in an action against the railroad for injuries to driver from running into him.—Central of Georgia Ry. Co. v. Dumas, 160 S.E. 814, 44 Ga.App. 152.

(5) Testimony that just before collision a bystander called, "Stop."—Hornschuch v. Southern Pac. Co., 203 P. 886, 101 Or. 280.

(6) Warnings given just prior to personal injury.
Ark.—Arkansas Power & Light Co. v. Heyligers, 67 S.W.2d 1021, 188 Ark. 815.
N.C.—Butler v. Carolina Power & Light Co., 10 S.E.2d 603, 218 N.C. 116.

(7) Other instances.—New Winder Lumber Co. v. Payne, 149 S.E. 85, 40 Ga.App. 188—22 C.J. p 453 note 68 [a].

Gifts

Declarations of the donor made prior to the gift and constituting a part of the res gestæ are admissible.
Iowa.—Flint v. Varney, 264 N.W. 277, 220 Iowa 1241.
N.C.—Bynum v. Fidelity Bank of Durham, 12 S.E.2d 898, 901, 219 N.C. 109, quoting **Corpus Juris**.
28 C.J. p 704 note 7.

14. Vt.—Grout v. Moulton, 64 A. 453, 79 Vt. 122.
22 C.J. p 454 note 69.

15. U.S.—Emens v. Lehigh Valley R. Co., D.C.N.Y., 223 F. 810.
22 C.J. p 454 note 70.

16. U.S.—Williams v. Great Southern Lumber Co., La., 48 S.Ct. 417, 277 U.S. 19, 72 L.Ed. 761, affirming, C.C.A., Great Southern Lumber Co. v. Williams, 17 F.2d 468, which reversed, D.C., Williams v. Great Southern Lumber Co., 13 F.2d 246, and certiorari granted 48 S.Ct. 19, 275 U.S. 511, 72 L.Ed. 399—Yarbrough v. Prudential Ins. Co. of America, C.C.A.Ga., 99 F.2d 874, rehearing denied 100 F.2d 547—Standard Oil Co. of New Jersey v. Neville, C.C.A.W.Va., 48 F.2d 580, 581, citing **Corpus Juris**—Missouri State Life Ins. Co. v. Makiver, C.C.A.Pa., 4 F.2d 185, affirming, D.C., Makiver v. Missouri State Life Ins. Co., 296 F. 715—Ætna Life Ins. Co. of Hartford, Conn., v. Ryan, N.Y., 255 F. 483, 166 C.C.A. 559.
Ala.—Smith v. Bugg, 100 So. 503, 211 Ala. 341.
Ark.—Liberty Cash Grocers v. Clements, 102 S.W.2d 836, 193 Ark. 808—Payne v. Thurston, 230 S.W. 561, 148 Ark. 456.
Cal.—Salvo v. Market St. Ry. Co., 2 P.2d 585, 116 Cal.App. 339—Ayres v. Wright, 284 P. 1077, 103 Cal.App. 610—Provensal v. Michel, 265 P. 580, 89 Cal.App. 594.
Conn.—Krooner v. City of Waterbury, 136 A. 93, 105 Conn. 476.
Ga.—Gullatt v. Thompson, 196 S.E. 107, 57 Ga.App. 669—Chapman v. Gilmore, 143 S.E. 773, 38 Ga.App. 297.
Idaho.—Towne v. Northwestern Mut. Life Ins. Co. of Milwaukee, Wis., 70 P.2d 364, 58 Idaho 83.
Ill.—Scully v. Wilhelm, 15 N.E.2d 313, 368 Ill. 573—Pluard v. The Maccabees, 136 N.E. 767, 304 Ill. 552, reversing 221 Ill.App. 647—Johnson v. Swords Co., 3 N.E.2d 705, 286 Ill.App. 377.
Ind.—Montgomery v. Pierson, 145 N.E. 771, 195 Ind. 475—G. W. Opell Co. v. Phillips, 169 N.E. 354, 90 Ind.App. 552.
Iowa.—Muirhead v. Challis, 240 N.W. 912, 213 Iowa 1108—Pride v. Interstate Business Men's Acc. Ass'n of Des Moines, 216 N.W. 62, 207 Iowa 167, 62 A.L.R. 31.
Ky.—Honaker v. Crutchfield, 57 S.W.2d 502, 247 Ky. 495.
Md.—Lynch v. Rogers, 10 A.2d 619, 177 Md. 478.
Mass.—Rankin v. Brockton Public Market, 153 N.E. 97, 257 Mass. 6.
Mich.—Sexton v. Baltinski, 273 N.W. 335, 280 Mich. 28.
Minn.—In re Knutson's Estate, 174 N.W. 617, 141 Minn. 111.
Mo.—Aly v. Terminal R. R. Ass'n of St. Louis, 78 S.W.2d 851, 336 Mo. 340—Cramer v. Parker, App., 100 S.W.2d 640—Shirley v. Kansas City Southern Ry. Co., 298 S.W. 125, 221 Mo.App. 1158.
N.Y.—Bishop v. New York Times Co., 135 N.E. 845, 233 N.Y. 446, reversing 181 N.Y.S. 378, 194 App.Div. 881—In re Fogarty's Estate, 281 N.Y.S. 577, 155 Misc. 727—Queens & Nassau Delivery Corporation v. Railway Express Agency, 273 N.Y.S. 199, 152 Misc. 293.
N.C.—Chandler & Ragland v. Marshall, 126 S.E. 742, 189 N.C. 301.
Ohio.—Weaver v. Industrial Commission of Ohio, 181 N.E. 894, 125 Ohio St. 465, affirming Industrial Commission of Ohio v. Weaver, 187 N.E. 186, 45 Ohio App. 371—Lacey v. Heisey, 5 N.E.2d 698, 53 Ohio App. 451.
Or.—Francisco v. Circle Tours Sightseeing Co., 265 P. 801, 125 Or. 80.
Pa.—Purcell v. Metropolitan Life Ins. Co., 10 A.2d 412—Weissburg v. People's State Bank of New Kensington, 131 A. 181, 284 Pa. 260—Duggan v. York-Buffalo Motor Express, 13 Northumb.Leg.J. 381.
R.I.—Douglas v. Newport County Electric Co., 132 A. 886.
Tenn.—Tennessee Cent. Ry. Co. v. Gleaves, 2 Tenn.App. 513.
Tex.—Thames v. Caldwell Packing Co., Civ.App., 111 S.W.2d 664—Dale v. Stevens, Civ.App., 75 S.W.2d 129—Calamiss v. Grayburg Oil Co., Civ.App., 50 S.W.2d 437, error refused—Dallas Hotel Co. v. McCue, Civ.App., 25 S.W.2d 902—Barnes v. Barnes, Civ.App., 261 S.W. 485—Lumbermen's Reciprocal Ass'n v. Adcock, Civ.App., 244 S.W. 645.
Wash.—MacGierry v. Rodgers, 258 P. 314, 144 Wash. 375—Bullock v. Yakima Valley Transp. Co., 184 P. 641, 108 Wash. 413, affirmed 187 P. 410, 108 Wash. 413.

in the case of declarations, where they are of a self-serving nature,[17] a declaration made or an act done after the happening of the principal fact may be admissible as part of the res gestæ[18] when it is so intimately interwoven with the principal fact by the surrounding circumstances as to raise a reasonable presumption that it was made or done under the immediate influence of the principal transaction or event itself and is the spontaneous utterance or expression of thoughts created by, and springing out of, the transaction itself rather than the result of any premeditation or design.[19] There can be no

W.Va.—Cook v. Coleman, 111 S.E. 750, 90 W.Va. 748.
Wis.—Burton v. Brown, 263 N.W. 573, 219 Wis. 520.
22 C.J. p 454 note 72.

Not continuous transaction

Where the statement and the main event did not form a continuous transaction, the statement was not a part of the res gestæ.
Mo.—Robyn v. New Amsterdam Casualty Co., App., 257 S.W. 1065.
Pa.—Milwaukee Locomotive Mfg. Co. v. Point Marion Coal Co., 144 A. 100, 294 Pa. 238.
Tex.—Texas Interurban Ry. Co. v. Hughes, Com.App., 53 S.W.2d 448, affirming Texas Interurban Ry. v. Hughes, Civ.App., 34 S.W.2d 1103.

17. U.S.—Flannagan v. Provident Life & Accident Ins. Co., C.C.A.Va., 22 F.2d 136.
Mo.—Robyn v. New Amsterdam Casualty Co., App., 257 S.W. 1065.
22 C.J. p 455 note 73.

18. U.S.—Stewart v. Travelers Protective Ass'n of America, C.C.A. Tex., 81 F.2d 25.
La.—Donaldson v. Riddling's Succession, App., 145 So. 804—Day v. Armour Fertilizer Works, 8 La. App. 720, 723, citing **Corpus Juris.**
S.C.—Nock v. Fidelity & Deposit Co., 178 S.E. 839, 175 S.C. 188, 98 A.L.R. 757.
Tex.—Harris v. Allison, Civ.App., 11 S.W.2d 821, error dismissed—Crumley v. Gile, Civ.App., 271 S.W. 641, 642, citing **Corpus Juris**—McCrary v. McCrary, Civ.App., 230 S.W. 187.
Va.—Willis v. Blue Ridge Bank, 149 S.E. 624, 153 Va. 392.
Wash.—Meagher v. Wagner Tug Boat Co., 11 P.2d 245, 168 Wash. 253, certiorari denied Wagner Tug Boat Co. v. Meagher, 53 S.Ct. 120, 287 U.S. 657, 77 L.Ed. 567.
W.Va.—Ambrose v. Young, 130 S.E. 810, 100 W.Va. 452.
Wis.—Booth v. Frankenstein, 245 N.W. 191, 209 Wis. 362—Andrzejewski v. Northwestern Fuel Co., 148 N.W. 37, 158 Wis. 170.
22 C.J. p 455 note 74.

Where subsequent libel refers to one sued on, it is admissible as part of res gestæ.—Mannix v. Portland Telegram, 23 P.2d 138, 144 Or. 172, 90 A.L.R. 55.

19. U.S.—Somogyi v. Cincinnati, N. O. & T. P. Ry. Co., C.C.A.Ky., 101 F.2d 480—Chesapeake & O. Ry. Co. v. Mears, C.C.A.Va., 64 F.2d 291—Ætna Life Ins. Co. v. Kern-Bauer, C.C.A.Okl., 62 F.2d 477—Missouri State Life Ins. Co. v. Makiver, C. C.A.Pa., 4 F.2d 185, affirming, D C., Makiver v. Missouri State Life Ins. Co., 296 F. 715.
Ariz.—Hines v. Gale, 213 P. 395, 399, 25 Ariz. 65, citing **Corpus Juris.**
Ark.—Public Utilities Corporation of Arkansas v. Cordell, 43 S.W.2d 746, 184 Ark. 878—Intercity Terminal Ry. Co. v. Worden, 6 S.W.2d 547, 177 Ark. 464.
Cal.—Showalter v. Western Pac. R. Co., 106 P.2d 895, overruling all prior inconsistent cases, prior opinion, App., 96 P.2d 964—Lloyd v. Boulevard Express, 249 P. 837, 79 Cal.App. 406.
Conn.—Rockhill v. White Line Bus Co., 145 A. 504, 109 Conn. 706—Perry v. Haritos, 124 A. 44, 100 Conn. 476.
Fla.—Foster v. Thornton, 170 So. 459, 125 Fla. 699.
Ga.—Southeastern Express Co. v. Nightingale, 126 S.E. 915, 33 Ga. App. 515.
Iowa.—Miser v. Iowa State Traveling Men's Ass'n, 273 N.W. 155, 223 Iowa 662—Hinnah v. Seaba, 188 N.W. 909, 193 Iowa 1206.
Ky.—Sparks Bus Line v. Spears, 124 S.W.2d 1031, 276 Ky. 600—Consolidated Coach Corporation v. Earls' Adm'r, 94 S.W.2d 6, 263 Ky. 814—Chesapeake & O. Ry. Co. v. Carter's Adm'r, 47 S.W.2d 1014, 1047, 243 Ky. 268, quoting **Corpus Juris**—Davis v. Burns' Adm'x, 269 S.W. 763, 207 Ky. 703.
La.—Butler v. Washington-Youree Hotel Co., App., 160 So. 825.
Mich.—Martin Parry Corporation v. Berner, 244 N.W. 180, 259 Mich. 621.
Mo.—Bennette v. Hader, 87 S.W.2d 413, 337 Mo. 977, 101 A.L.R. 1190—Pryor v. Payne, 263 S.W. 982, 304 Mo. 560—Russell v. Metropolitan Life Ins. Co., App., 149 S.W.2d 432—Hatfield v. Southwestern Grocer Co., App., 104 S.W.2d 717—Goucher v. Woodmen Accident Co. of Lincoln, Neb., 104 S.W.2d 289, 231 Mo. App. 573—Toon v. David G. Evans Coffee Co., App., 103 S.W.2d 533.
Neb.—Suhr v. Lindell, 277 N.W. 381, 133 Neb. 856—Tongue v. Perrigo, 265 N.W. 737, 130 Neb. 564.
N.J.—Demeter v. Rosenberg, 175 A. 621, 114 N.J.Law 55.
Okl.—Feenberg Supply Co. v. Pierce, 95 P.2d 640, 185 Okl. 662—Gibson Oil Co. v. Westbrooke, 16 P.2d 127, 160 Okl. 26.
Pa.—Curry v. Riggles, 153 A. 325, 302 Pa. 156—Harring v. Glen Alden Coal Co., 198 A. 508, 130 Pa.Super. 552, reversed on other grounds 3 A.2d 381, 332 Pa. 410—Roth v. Locust Mountain State Hospital, 196 A. 924, 130 Pa.Super. 1—Mulac v. Pittsburgh & L. E. R. Co., 2 Fay. L.J. 191.
S.C.—Lazar v. Great Atlantic & Pacific Tea Co., 14 S.E.2d 560.
Tex.—Texas Interurban Ry. Co. v. Hughes, Com.App., 53 S.W.2d 448, affirming Texas Interurban Ry. v. Hughes, Civ.App., 34 S.W.2d 1103—Southern Surety Co. v. Weaver, Com.App., 273 S.W. 838, affirming, Civ.App., 260 S.W. 622—Martin v. City of Corsicana, Civ.App., 130 S.W.2d 405, 407, quoting **Corpus Juris,** and declaring rule well stated, error dismissed, judgment correct—Davenport v. Texas & N. O. R. Co., Civ.App., 72 S.W.2d 933, 936, citing **Corpus Juris**—Railway Mail Ass'n v. Forbes, Civ.App., 49 S.W.2d 880, error dismissed—Houston & T. C. R. Co. v. Brooks, Civ.App., 294 S.W. 282—San Antonio Public Service Co. v. Alexander, Civ.App., 270 S.W. 199, affirmed, Com.App., 280 S.W. 753—International Travelers' Ass'n v. Griffing, Civ.App., 264 S.W. 263, 265, quoting **Corpus Juris,** and error dismissed National Compress Co. v. Hamlin, 269 S.W. 1024, 114 Tex. 375—Lang Floral & Nursery Co. v. Sheridan, Civ. App., 245 S.W. 467—Wall & Stabe Co. v. Berger, Civ.App., 212 S.W. 975.
Utah.—Jackson v. Utah Rapid Transit Co., 290 P. 970, 77 Utah 21.
Va.—Baptist v. State, 173 S.E. 512, 162 Va. 1—Ellis v. Virginia Ry. & Power Co., 110 S.E. 382, 132 Va. 24.
Wash.—Lucchesi v. Reynolds, 216 P. 12, 125 Wash. 352.
W.Va.—Blagg v. Baltimore & O. R. Co., 98 S.E. 526, 83 W.Va. 449.
Wis.—Kressin v. Chicago & N. W. Ry. Co., 215 N.W. 908, 194 Wis. 480.
Wyo.—Bankers Life Co. v. Nelson, 108 P.2d 584, rehearing denied 111 P.2d 136.
22 C.J. p 458 note 75.

Confession by bank teller to officials immediately after discovery of embezzlements was properly admitted as res gestæ.—American Surety Co. of New York v. North Texas Nat. Bank, Tex.Civ.App., 14 S.W.2d 88, reversed on other grounds Royal Indemnity Co. v. North Texas Nat. Bank, Com.App., 25 S.W.2d 822, modified on other grounds 34 S.W.2d 249.

definite and fixed limit of time within which statements must be made to become a part of the res gestæ, but each case must depend on its own circumstances, and the trial court must be allowed some latitude in the matter,[20] the burden being on the party offering the evidence to show such connection as makes it admissible.[21]

In accordance with these rules, facts or statements which, although subsequent in point of time to a personal injury, follow at once thereafter and serve to characterize the occurrence,[22] or which are done or made under such circumstances as to exclude the possibility of premeditation or design and which are so close to the injury as to be fairly a part of the occurrence,[23] are admissible as part of the res gestæ. Accordingly, statements by the

20. U.S.—Fort Street Union Depot Co. v. Hillen, C.C.A.Mich., 119 F.2d 307—Missouri State Life Ins. Co. v. Makiver, C.C.A.Pa., 4 F.2d 185, affirming, D.C., Makiver v. Missouri State Life Ins. Co., 296 F. 715.
Ariz.—Benton v. Regeser, 179 P. 966, 20 Ariz. 273.
Ga.—Usry v. Augusta Southern R. Co., 102 S.E. 184, 24 Ga.App. 722.
Iowa.—Dawson v. Bankers' Life Co., 247 N.W. 279, 216 Iowa 586—Pride v. Interstate Business Men's Acc. Ass'n of Des Moines, 216 N.W. 62, 207 Iowa 167, 62 A.L.R. 31.
Mo.—Hatfield v. Southwestern Grocer Co., App., 104 S.W.2d 717.
Okl.—Margay Oil Corporation v. Jamison, 59 P.2d 790, 177 Okl. 433.
Pa.—Ceccato v. Union Collieries Co., 15 A.2d 401, 141 Pa.Super. 440—Roth v. Locust Mountain State Hospital, 196 A. 924, 130 Pa.Super. 1—Thompson v. Conemaugh Iron Works, 175 A. 45, 145 Pa.Super. 247—Curran v. James Regulator Co., 8 Sch.Reg. 9.
22 C.J. p 458 note 76.

21. Ga.—Pool v. Warren County, 51 S.E. 328, 123 Ga. 205.

22. **Anything said or done** immediately after automobile accident, tending to illustrate or give connection to it, was admissible in evidence as part of res gestæ.—Shipp v. Davis, 141 So. 366, 25 Ala.App. 104.

Exercise of duress

As reflecting on defendant's asserted freedom from fault in running down, with his automobile, plaintiff's motorcycle, testimony, contradicted by defendant, that he ordered others not to extricate plaintiff from under the auto until he had admitted his fault in causing the collision, and that while driving him home he told plaintiff not to go to court, and that he (defendant) had a case against plaintiff, was admissible.—Stoudemire v. Davis, 94 So. 498, 208 Ala. 495.

Where arrest or nonarrest of a motorist after an accident is a part of the res gestæ, it may be admissible.—Wolfe v. Baskin, 28 N.E.2d 629, 137 Ohio St. 284.

Whether anything said

In action to recover double accidental death benefit under life policy, insured's attending physician was properly permitted to testify as to whether anything was said by deceased about having received accidental injury.—Werth v. Minnesota Mut. Life Ins. Co., 47 P.2d 76, 142 Kan. 255.

23. U.S.—Marsh v. Preferred Accident Ins. Co., C.C.A.Ohio, 89 F.2d 932, certiorari denied Preferred Accident Ins. Co. v. Marsh, 58 S.Ct. 36, 302 U.S. 715, 82 L.Ed. 552—Marsh v. New York Life Ins. Co., C.C.A.Ohio, 89 F.2d 932, certiorari denied 58 S.Ct. 36, 302 U.S. 716, 82 L.Ed. 553.
Cal.—Olden v. Babicora Development Co., 290 P. 1062, 107 Cal.App. 399.
Ky.—Powers v. Gatliff Coal Co., 14 S.W.2d 216, 228 Ky. 5—Davis v. Burns' Adm'x, 269 S.W. 763, 207 Ky. 703.
Mo.—Lynch v. Missouri-Kansas-Texas R. Co., 61 S.W.2d 918, 333 Mo. 89—Metropolitan Life Ins. Co. v. Underwood, 256 S.W. 232, 301 Mo. 87—Goucher v. Woodmen Accident Co. of Lincoln, Neb., 104 S.W.2d 289, 231 Mo.App. 573.
Neb.—Roh v. Opocensky, 251 N.W. 102, 125 Neb. 551.
N.H.—Merchants Mut. Casualty Co. v. Smith, 17 A.2d 88—Mason v. Dover, S. & R. St. Ry., 109 A. 841, 79 N.H. 300.
N.J.—Demeter v. Rosenberg, 175 A. 621, 114 N.J.Law 55.
Tex.—Tyreco Refining Co. v. Cook, Civ.App., 110 S.W.2d 219, error dismissed—International Travelers' Ass'n v. Melaun, Civ.App., 270 S.W. 246.
Utah.—Balle v. Smith, 17 P.2d 224, 81 Utah 179.
Wash.—Duvall v. Pioneer Sand & Gravel Co., 71 P.2d 567, 191 Wash. 417—Hines v. Foster, 6 P.2d 597, 166 Wash. 165.
W.Va.—Blagg v. Baltimore & O. R. Co., 98 S.E. 526, 83 W.Va. 449.

Evidence held admissible

(1) Evidence of scream immediately after accident, "Engine runned over David," made by unidentified child in position to observe accident.—New York, C. & St. L. R. Co. v. Kovatch, 166 N.E. 682, 120 Ohio St. 532.

(2) Evidence that a third person on the platform came into the car and announced that "you have jerked a woman off of this car on her head."—Rooker v. Deering S. W. Ry. Co., Mo.App., 247 S.W. 1016.

(3) Statements made by the person inflicting the injury, made immediately thereafter.
Wash.—Samuels v. Hiawatha Holstein Dairy Co., 197 P. 24, 115 Wash. 313.
Wis.—John v. Pierce, 178 N.W. 297, 172 Wis. 41.

(4) Statement of boy's mother in presence of physician that boy was playing with torch at time of his injuries.—Martin v. City of Corsicana, Tex.Civ.App., 130 S.W.2d 405, error dismissed, judgment correct.

(5) Testimony of bystander as to what he did and said in assisting insured a few moments after his fall, while yet alive.—Travelers' Ins. Co. v. Whitman, 80 So. 179, 202 Ala. 388.

(6) Where a boy was struck and killed by a truck on a bridge, testimony that a woman came up immediately after, and before the truck had been backed off from the boy's foot, and said to the driver, "You didn't blow your horn" to which he made no reply.—Standard Oil Co. of New York v. Johnson, C.C.A.Mass., 299 F. 93.

(7) Other evidence.
Kan.—Miller v. Hartman, 36 P.2d 965, 140 Kan. 298.
N.D.—Nichols v. Kluver, 237 N.W. 640, 61 N.D. 12.
22 C.J. p 455 note 74 [b]-[d].

Use of past tense

Eyewitness' testimony that, immediately after insured vaulted through window, witness ran out of office shouting insured "has just jumped out of window," was admissible as res gestæ, the fact that the tense of the verb indicated a past transaction not being determinative of its admissibility.—Travelers' Ins. Co. of Hartford, Conn., v. Miller, C.C.A.Ill., 62 F.2d 910.

Fact of insurance

(1) Statements by one of the parties involved in a motor vehicle accident to the effect that he carried insurance which would take care of the injured person has been held to be admissible.
Ga.—Goldstein v. Johnson, 12 S.E.2d 92, 64 Ga.App. 31—Sims v. Martin, 126 S.E. 872, 33 Ga.App. 486.
Mo.—Schroeder v. Rawlings, 127 S.W.2d 678, 344 Mo. 630.
Mont.—Tanner v. Smith, 33 P.2d 547, 97 Mont. 229.

injured person made immediately after the accident,[24] such as exclamations or complaints of present pain,[25] or statements as to the fact of injury,[26] are admissible as part of the res gestæ.

On the other hand, subsequent statements of an injured person,[27] or others,[28] which cannot be re-

N.H.—McCurdy v. Flibotte, 139 A. 367, 83 N.H. 143.

(2) On the other hand, it has also been held that a statement by one of the parties as to his being insured was not part of the res gestæ in that it threw no light on the fact of the collision.

Ind.—Red Star Yeast Co. v. Shackleford, 171 N.E. 302, 91 Ind.App. 370.

Ky.—Trevillian v. Boswell, 43 S.W. 2d 715, 241 Ky. 237.

Ohio.—Patton Motor Trucking Co. v. Knapp, 157 N.E. 402, 25 Ohio App. 89.

24. U.S.—Somogyi v. Cincinnati, N. O. & T. P. Ry. Co., C.C.A.Ky., 101 F.2d 480—Stewart v. Travelers Protective Ass'n of America, C.C.A. Tex., 81 F.2d 25.

Ark.—Continental Casualty Co. v. Bruden, 11 S.W.2d 493, 178 Ark. 683, 61 A.L.R. 1192.

Ill.—Cuneo Press Co. v. Industrial Commission, 173 N.E. 470, 341 Ill. 569.

Iowa.—Dawson v. Bankers' Life Co., 247 N.W. 279, 216 Iowa 586.

Ky.—National Life & Accident Ins. Co. v. Hedges, 27 S.W.2d 422, 233 Ky. 840—Prudential Ins. Co. of America v. Grant, 10 S.W.2d 1073, 226 Ky. 372.

Mo.—Demaray v. Missouri-Kansas-Texas R. Co., 50 S.W.2d 127, 330 Mo. 589, certiorari denied Missouri-Kansas-Texas R. Co. v. Demaray, 53 S.Ct. 20, 287 U.S. 620, 77 L. Ed. 538—Sculley v. Rolwing, App., 88 S.W.2d 394.

Mont.—Koppang v. Sevier, 75 P.2d 790, 106 Mont. 79.

Ohio.—U. S. Casualty Co. v. Thrush, 152 N.E. 796, 21 Ohio App. 129.

Okl.—Marland Refining Co. v. Snider, 251 P. 989, 120 Okl. 116.

Pa.—Smith v. Welsh Bros., 156 A. 598, 102 Pa.Super. 54—Curran v. James Regulator Co., 8 Sch.Reg. 9.

S.C.—Cobb v. Southern Public Utilities Co., 187 S.E. 363, 181 S.C. 310.

Tenn.—National Life & Accident Ins. Co. v. Follett, 80 S.W.2d 92, 168 Tenn. 647—Highland Coal & Lumber Co. v. Cravens, 8 Tenn.App. 419.

Tex.—Weidmer v. Stott, Civ.App., 48 S.W.2d 389, error refused—Southern Casualty Co. v. Hernandez, Civ. App., 297 S.W. 544.

Wash.—Norton v. Payne, 281 P. 991, 154 Wash. 241.

"When appearances indicate that one has suffered an injury, a statement by him, if spontaneous and reasonably coincident with, and explanatory of, the occurrence, may be regarded as a part of it and be competent evidence under the doctrine of res gestæ."—Collins v. Equitable Life Ins. Co., W.Va., 8 S.E.2d 825, 130 A. L.R. 287.

Fact of looking

Injured licensee's statement, made when he was removed from beneath cars, that before going on the track he looked and saw no train in either direction, was admissible as part of the res gestæ. Robertson v. Coal & Coke Ry. Co., 104 S.E. 615, 87 W.Va. 106.

Indications of injury

It was proper to permit the mother of a three-year-old child who was injured to testify as to the indications the child gave of injury at the time of the accident.—Ball v. Gessner, 240 N.W. 100, 185 Minn. 105.

Statement to physician

Statements made by a patient to his attending physician immediately after the accident, under such circumstances as to lend character and color to the incident sought to be established, are admissible as part of the res gestæ.

La.—Auzene v. Gulf Public Service Co., App., 188 So. 512.

Ohio.—Baker v. Industrial Commission of Ohio, 186 N.E. 10, 44 Ohio App. 539.

Independently relevant statements as to bodily condition made to a physician see supra § 246.

25. U.S.—Travelers' Ins. Co. v. Locke, D.C.N.Y., 56 F.2d 443—Standard Accident Ins. Co. v. Rossi, C.C.A.Ark., 35 F.2d 667.

Ky.—Elcomb Coal Co. v. Coffman, 113 S.W.2d 847, 272 Ky. 93—Consolidated Coach Corporation v. Saunders, 17 S.W.2d 233, 229 Ky. 284.

Mo.—Toon v. David G. Evans Coffee Co., App., 103 S.W.2d 533.

Tex.—Texas Employers' Ins. Ass'n v. Davidson, Civ.App., 288 S.W. 471, rehearing denied 290 S.W. 871.

Admissibility of exclamations of pain as independently relevant statement see supra § 244.

26. Ala.—Johnston v. Warrant Warehouse Co., 99 So. 920, 211 Ala. 165.

Ga.—U. S. Fidelity & Guaranty Co. v. Bohannan, 135 S.E. 319, 36 Ga. App. 34.

N.J.—Minnisink Oil Co. v. Miller, 177 A. 844, 13 N.J.Misc. 289, affirmed 181 A. 35, 115 N.J.Law 499.

Tex.—Railway Mail Ass'n v. Forbes, Civ.App., 49 S.W.2d 880, error dismissed.

27. Ala.—Birmingham Electric Co. v. Mealing, 108 So. 511, 214 Ala. 597.

Cal.—Ensign v. Southern Pac. Co., 223 P. 953, 193 Cal. 311.

Iowa.—Budde v. National Travelers' Ben. Ass'n, 169 N.W. 766, 184 Iowa 1219.

Ky.—Everman's Adm'r v. Louisville & N. R. Co., 293 S.W. 977, 219 Ky. 478.

La.—Holland v. Owners' Automobile Ins. Co. of New Orleans, App., 155 So. 780.

Miss.—Simon v. Dixie Greyhound Lines, 176 So. 160, 179 Miss. 568.

Mo.—Landau v. Travelers' Ins. Co., 267 S.W. 376, 305 Mo. 563—Gray v. Earls, 250 S.W. 567, 298 Mo. 116—Evans v. Sears, Roebuck & Co., App., 129 S.W.2d 53.

Pa.—Guyer v. Equitable Gas Co., 123 A. 590, 279 Pa. 5—Riley v. Carnegie Steel Co., 119 A. 832. 276 Pa. 82—Watson v. A. M. Byers Co., 14 A.2d 201, 140 Pa.Super. 245.

R.I.—Zannelle v. Pettine, 155 A. 286, 51 R.I. 359.

S.C.—Funderburk v. Powell, 187 S.E. 742, 181 S.C. 412.

Tex.—Texas Employers' Ins. Ass'n v. Shoemake, Civ.App., 21 S.W.2d 583.

Evidence of complaints of pain and suffering which are made subsequent to the injury and which cannot be regarded as a part of such event are not admissible as part of the res gestæ.

U.S.—Standard Accident Ins. Co. v. Rossi, C.C.A.Ark., 35 F.2d 667.

Ill.—Boss v. Illinois Cent. R. Co., 221 Ill.App. 504.

Iowa.—Budde v. National Travelers' Ben. Ass'n, 169 N.W. 766, 184 Iowa 1219.

Tex.—Texas Employers' Ins. Ass'n v. Davidson, Civ.App., 288 S.W. 471, rehearing denied 290 S.W. 871.

Admissibility of complaints as independently relevant statements see supra § 243.

28. Ala.—Birmingham Electric Co. v. Mealing, 108 So. 511, 214 Ala. 597—Ex parte Alabama Great Southern R. Co., 86 So. 100, 204 Ala. 504, granting certiorari Alabama Great Southern R. Co. v. Hunt, 86 So. 97, 17 Ala.App. 566.

Ark—Volentine v. Wyatt, 261 S.W. 308, 164 Ark. 172.

Iowa.—Gose v. True, 198 N.W. 528, 197 Iowa 1094.

Ky.—Cincinnati, N. O. & T. P. Ry. Co. v. Gilreath's Adm'r, 15 S.W.2d 267, 228 Ky. 385—Webb v. Linnemann, 255 S.W. 1036, 201 Ky. 131.

Pa.—McIlhenny v. Baker, 63 Pa.Super. 385.

Tex.—Texas Interurban Ry. Co. v. Hughes, Com.App., 53 S.W.2d 448, affirming Texas Interurban Ry. v. Hughes, Civ.App., 34 S.W.2d 1103—

garded as a part of the occurrence or as a spontaneous exclamation arising from the accident, are not admissible as part of the res gestæ.

Cause and circumstances of injury. Spontaneous statements by a participant as to the cause and circumstances of an accident or injury have been admitted as part of the res gestæ,[29] but where such

Justiss v. Naquin, Civ.App., 137 S.W.2d 72, error dismissed, judgment correct—Panhandle & S. F. Ry. Co. v. Laird, Civ.App., 224 S. W. 305, dismissed for want of jurisdiction.

W.Va.—Cook v. Coleman, 111 S.E. 750, 90 W.Va. 748.

Wis.—Zastrow v. Schaumburger, 245 N.W. 202, 210 Wis. 116—Kausch v. Chicago & Milwaukee Electric Ry. Co., 180 N.W. 808, 173 Wis. 220.

42 C.J. p 1228 notes 51, 53, 54.

Break in continuity

Where a policeman testified concerning conversation with the driver of a car in which plaintiff was riding, immediately after the collision, but his investigation and inquiry necessarily broke the continuity between the main facts sought to be elicited and the narrative given of it, evidence as to the driver's statements cannot be received as part of the res gestæ.—Itzkowitz v. P. H. Reubel & Co., 250 S.W. 535, 158 Ark. 454.

Particular evidence held inadmissible

(1) Declarations of defendant's automobile driver at the police station after he had accompanied a policeman from the scene of the injury to the station.—Thomas v. Lockwood Oil Co., 182 N.W. 841, 174 Wis. 486.

(2) Mother's testimony as to conversations had with physicians attending injured child, some statements being made a year and a half or two years after the accident, were not admissible as res gestæ.—Zipus v. United Rys. & Electric Co. of Baltimore City, 108 A. 884, 135 Md. 297.

(3) Response of witness, who came on scene twenty minutes after accident, to question of decedent as to blame, that "they all say it was your fault; you were on the wrong side of the road."—Roark Transp. v. Sneed, 68 S.W.2d 996, 188 Ark. 928.

29. U.S.—Fort Street Union Depot Co. v. Hillen, C.C.A.Mich., 119 F.2d 307—Rast v. Mutual Life Ins. of New York, C.C.A.S.C., 112 F.2d 769—Southern Extract Co. v. Green, C.C.A.Tenn., 103 F.2d 232, certiorari denied 60 S.Ct. 81, 308 U.S. 568, 84 L.Ed. 476—Marsh v. Preferred Accident Ins. Co., C.C.A.Ohio, 89 F.2d 932, certiorari denied Preferred Accident Ins. Co. v. Marsh, 58 S.Ct. 36, 302 U.S. 715, 82 L.Ed. 552—Marsh v. New York Ins. Co., 89 F.2d 932, certiorari denied New York Life Ins. Co. v. Marsh, 58 S. Ct. 36, 302 U.S. 716, 82 L.Ed. 553—Stewart v. Travelers Protective Ass'n of America, C.C.A.Tex., 81 F.2d 25—Preferred Accident Ins. Co. of New York v. Combs, C.C. A.Neb., 76 F.2d 775—Chesapeake & O. Ry. Co. v. Mears, C.C.A.Va., 64 F.2d 291.

Ariz.—Young v. Hodgman & MacVicar, 26 P.2d 355, 42 Ariz. 370—Southern Pac. Co. v. Thomas, 188 P. 268, 21 Ariz. 355, certiorari denied 41 S.Ct. 447, 255 U.S. 576, 65 L.Ed. 793.

Ark.—Public Utilities Corporation of Arkansas v. Cordell, 43 S.W.2d 746, 184 Ark. 878.

Cal.—Showalter v. Western Pac. R. Co., 106 P.2d 895, prior opinion, App., 96 P.2d 964.

Colo.—Armour & Co. v. Industrial Commission of Colorado, 243 P. 546, 78 Colo. 569.

Conn.—Rockhill v. White Line Bus Co., 145 A. 504, 109 Conn. 706.

Ill.—Morris v. Central West Casualty Co., 183 N.E. 595, 351 Ill. 40, reversing 265 Ill.App. 205.

Ind.—Southern Ry. Co. v. Wilkins, 178 N.E. 454, 95 Ind.App. 130, certiorari denied 53 S.Ct. 85, 287 U.S. 635, 77 L.Ed. 550—Kauffman v. Bardo, 148 N.E. 496, 83 Ind.App. 482.

Iowa.—Aldine Trust Co. v. National Ben. Accident Ass'n, 268 N.W. 507, 222 Iowa 20—Dawson v. Bankers' Life Co., 247 N.W. 279, 216 Iowa 586—Farrow v. What Cheer Clay Products Co., 200 N.W. 625, 198 Iowa 922—Lynch v. Egypt Coal Co., 181 N.W. 385, 190 Iowa 1272—Stukas v. Warfield, Pratt, Howell Co., 175 N.W. 81, 188 Iowa 878.

Ky.—Commonwealth Life Ins. Co. v. Clarke, 123 S.W.2d 811, 276 Ky. 151—Provident Life & Accident Ins. Co. of Chattanooga, Tenn., v. Diehlman, 82 S.W.2d 350, 259 Ky. 320—Norton's Adm'r v. Winstead, 291 S.W. 723, 218 Ky. 488—Louisville & N. R. Co. v. Rowland's Adm'r, 286 S.W. 929, 215 Ky. 663—Davis v. Burns' Adm'x, 269 S.W. 763, 207 Ky. 703.

La.—Donaldson v. Riddling's Succession, App., 145 So. 804—Day v. Armour Fertilizer Works, 8 La.App. 720.

Md.—Montgomery Bus Lines v. Diehl, 148 A. 453, 158 Md. 233.

Mich.—Froman v. Banquet Barbecue, 278 N.W. 758, 284 Mich. 44—Martin Parry Corporation v. Berner, 244 N.W. 180, 259 Mich. 621—Rife v. Gafill Oil Co., 209 N.W. 172, 235 Mich. 15—Stone v. Sinclair Refining Co., 196 N.W. 339, 225 Mich. 344.

Mo.—Roach v. Kansas City Public Service Co., 141 S.W.2d 800—Sconce v. Jones, 121 S.W.2d 777, 781, 343 Mo. 362, citing **Corpus Juris**—Bennette v. Hader, 87 S.W.2d 413, 337 Mo. 977, 101 A.L.R. 1190—Smith v. Southern Illinois & Missouri Bridge Co., 30 S.W.2d 1077, 326 Mo. 109—Talbert v. Chicago, R. I. & P. Ry. Co., 284 S.W. 499, 314 Mo. 352—Rosenzweig v. Wells, 273 S.W. 1071, 308 Mo. 617—Metropolitan Life Ins. Co. v. Underwood, 256 S.W. 232, 301 Mo. 87—Soderstrom v. Missouri Pac. R. Co., App., 141 S.W.2d 73—Goucher v. Woodmen Accident Co. of Lincoln, Neb., 104 S.W.2d 289, 231 Mo.App. 573—Toon v. David G. Evans Coffee Co., App., 103 S.W.2d 533.

Neb.—Suhr v. Lindell, 277 N.W. 381, 133 Neb. 856—Falkinburg v. Prudential Ins. Co. of America, 273 N. W. 478, 132 Neb. 831—Perry v. Johnson Fruit Co., 243 N.W. 655, 123 Neb. 558—Ridenour v. Lewis, 238 N.W. 745, 121 Neb. 823, 80 A. L.R. 119.

N.H.—Merchants Mut. Casualty Co. v. Smith, 17 A.2d 88.

Ohio.—Hauer v. French Bros. Bauer Co., 183 N.E. 186, 43 Ohio App. 333—Haubrock v. Lamping, 152 N.E. 205, 20 Ohio App. 307.

Okl.—Travelers Ins. Co. v. Minton, 73 P.2d 422, 181 Okl. 306—Standard Accident Ins. Co. v. Baker, 291 P. 962, 145 Okl. 106.

Pa.—Ford v. A. E. Dick Co., 135 A. 903, 288 Pa. 140—Razzis v. Philadelphia & R. Ry. Co., 128 A. 294, 281 Pa. 96—Timlin v. City of Scranton, 12 A.2d 502, 139 Pa.Super. 503—Rodgers v. Woodlock Valley Telephone Co., 92 Pa.Super. 445.

R.I.—Powell v. Gallivan, 118 A. 769, 44 R.I. 453.

Tenn.—National Life & Accident Ins. Co. v. Follett, 80 S.W.2d 92, 168 Tenn. 647.

Tex.—Tullos v. Texas Pipe Line Co., Civ.App., 145 S.W.2d 267, error dismissed, judgment correct—Worley v. International Travelers Assur. Co., Civ.App., 110 S.W.2d 1202, error dismissed—Texas Employers' Ins. Ass'n v. Harbuck, Civ.App., 73 S.W.2d 113, error dismissed—Norwich Union Indemnity Co. v. Smith, Civ.App., 3 S.W.2d 120, certified question answered 298 S.W. 403, 117 Tex. 103, and affirmed, Com. App., 12 S.W.2d 558—Southern Casualty Co. v. Hernandez, Civ.App., 297 S.W. 544—Western Union Telegraph Co. v. Brown, Civ.App., 297 S.W. 267—Home Ben. Ass'n v. Horne, Civ.App., 290 S.W. 226—International Travelers' Ass'n v. Melaun, Civ.App., 270 S.W. 246—

statements lack the necessary close connection with the principal fact they will be excluded.[30]

Travelers' Ass'n v. Griffing, Civ. App., 264 S.W. 263, error dismissed National Compress Co. v. Hamlin, 269 S.W. 1024, 114 Tex. 375—Southern Surety Co. v. Weaver, Civ.App., 260 S.W. 622, affirmed, Com.App., 273 S.W. 838—American Express Co. v. Chandler, Civ.App., 215 S. W. 364, reversed on other grounds, Com.App., 231 S.W. 1085—Southwestern Portland Cement Co. v. Graves, Civ.App., 208 S.W. 979—Dallas Hotel Co. v. Fox, Civ.App., 196 S.W. 647, affirmed Fox v. Dallas Hotel Co., 240 S.W. 517, 111 Tex. 461.

Utah.—Chief Consol. Mining Co. v. Industrial Commission of Utah, 260 P. 271, 70 Utah 333.

Wash.—Whiting v. City of Seattle, 258 P. 824, 144 Wash. 668.

Wyo.—Bankers Life Co. v. Nelson, 108 P.2d 584, rehearing denied 111 P.2d 136.

22 C.J. p 458 note 78—1 C.J. p 500 note 85—17 C.J. p 1307 note 5.

Cautiously received

Such statements must be closely scrutinized and cautiously received, although admissible as part of res gestæ.—Belyus v. Wilkinson, Gaddis & Co., 178 A. 181, 115 N.J.Law 43, affirmed 182 A. 873, 116 N.J.Law 92.

Workmen's compensation cases

(1) In workmen's compensation cases, things said and done immediately following the injury to the employee are admissible as part of the res gestæ.

Colo.—Industrial Commission of Colorado v. Diveley, 294 P. 532, 88 Colo. 190—New Jersey Fidelity & Plate Glass Ins. Co. v. Richey, 275 P. 937, 85 Colo. 376.

Ill.—American Mut. Liability Ins. Co. v. Industrial Commission, 174 N.E. 905, 342 Ill. 605.

Iowa.—Califore v. Chicago, St. P., M. & O. Ry. Co., 263 N.W. 29, 220 Iowa 676.

Ky.—Friedman Co. v. Friedman, 113 S.W.2d 1172, 272 Ky. 205.

La.—Pitre v. Guidry, App., 147 So. 767.

Md.—Spence v. Bethlehem Steel Co., 197 A. 302, 173 Md. 539.

Mich.—Froman v. Banquet Barbecue, 278 N.W. 758, 284 Mich. 44—Bunker v. Motor Wheel Corporation, 204 N.W. 110, 231 Mich. 334.

Minn.—Jacobs v. Village of Buhl, 273 N.W. 245, 199 Minn. 572—Bliss v. Swift & Co., 248 N.W. 754, 189 Minn. 210—Johnston v. W. S. Nott Co., 236 N.W. 466, 183 Minn. 309.

Mo.—Buttinger v. Ely & Walker Dry Goods Co., App., 42 S.W.2d 982.

Neb.—Perry v. Johnson Fruit Co., 243 N.W. 655, 123 Neb. 558—Ridenour v. Lewis, 238 N.W. 745, 121 Neb. 823, 80 A.L.R. 119.

N.J.—Sharp v. Sears Roebuck & Co., 9 A.2d 795, 123 N.J.Law 494—Hannaford v. Central R. Co. of New Jersey, 181 A. 306, 115 N.J.Law 573, affirmed 185 A. 46, 116 N.J.Law 412—Belyus v. Wilkinson, Gaddis & Co., 178 A. 181, 115 N.J.Law 43, affirmed 182 A. 873, 116 N.J.Law 92—Slayback Van Order Co. v. Eiben, 177 A. 671, 115 N.J.Law 17—Minnisink Oil Co. v. Miller, 177 A. 844, 13 N.J.Misc. 289, affirmed 181 A. 35, 115 N.J.Law 499—Standard Water Systems Co. v. Ort, 160 A. 523, 10 N.J.Misc. 659, reversed on other grounds Standard Water Systems Co. of New Jersey v. Ort, 166 A. 335, 110 N.J.Law 586.

N.Y.—Wanda v. Jamestown Brewing Co., 180 N.Y.S. 694, 191 App.Div. 17.

N.D.—Gotchy v. North Dakota Workmen's Compensation Bureau, 194 N. W. 663, 49 N.D. 915.

Ohio.—Industrial Commission of Ohio v. Mounjoy, 173 N.E. 263, 36 Ohio App. 476—Taylor v. Industrial Commission of Ohio, 13 Ohio App. 262.

Pa.—Harring v. Glen Alden Coal Co., 3 A.2d 381, 332 Pa. 410, reversing 198 A. 508, 130 Pa.Super. 552—Johnston v. Payne-Yost Const. Co., 141 A. 481, 292 Pa. 509—Ford v. A. E. Dick Co., 135 A. 903, 288 Pa. 140—Moyer v. Branch Storage Co., 10 A.2d 33, 138 Pa.Super. 71—Roth v. Locust Mountain State Hospital, 196 A. 924, 130 Pa.Super. 1—Broad Street Trust Co. v. Heyl Bros., 193 A. 397, 128 Pa.Super. 65—Redrick v. Knapp Bros. Co., 193 A. 117, 127 Pa.Super. 92—Hunter v. St. Mary's Natural Gas Co., 186 A. 325, 122 Pa.Super. 300—Lantz v. Central Pennsylvania Conference of M. E. Church, 159 A. 57, 104 Pa.Super. 35—Smith v. Welsh Bros., 156 A. 598, 102 Pa.Super. 54—Foster v. State Workmen's Ins. Fund, 48 Dauph.Co. 301.

Tenn.—Riverside Mill Co. v. Parsons, 141 S.W.2d 895.

Tex.—Zurich General Accident & Liability Ins. Co. v. Moss, Civ.App., 118 S.W.2d 410, error dismissed—Texas Employers' Ins. Ass'n v. Harbuck, Civ.App., 73 S.W.2d 113, error dismissed—Maryland Casualty Co. v. Stevens, Civ.App., 55 S. W.2d 149, error refused—Employers' Liability Assur. Corporation, Limited, of London, England, v. Flint, Civ.App., 14 S.W.2d 1046, error refused—Southern Casualty Co. v. Hernandez, Civ.App., 297 S. W. 544, error dismissed.

Utah.—Chief Consol. Mining Co. v. Industrial Commission of Utah, 260 P. 271, 70 Utah 333.

Wash.—Devlin v. Department of Labor and Industries of Washington, 78 P.2d 952, 194 Wash. 549.

(2) The fact that the statement was made to the first person to whom the employee spoke after the accident may render the statement admissible as part of the res gestæ.—Ceccato v. Union Collieries Co., 15 A.2d 401, 141 Pa.Super. 440.

(3) Evidence that employee immediately after, and at place of injury requested order of foreman to go to doctor, and that request was refused, was admissible on issue as to whether or not employee was injured at time and place alleged.—Gulf, C. & S. F. Ry. Co. v. Young, Tex.Civ.App., 284 S.W. 664.

Statement to physician, made immediately after the accident, as to the cause thereof, is admissible as part of the res gestæ.—Almquist v. Shenandoah Nurseries, 254 N.W. 35, 218 Iowa 724, 94 A.L.R. 573—22 C.J. p 458 note 78 [b].

30. U.S.—Ætna Life Ins. Co. v. Kern-Bauer, C.C.A.Okl., 62 F.2d 477.

Ala.—Birmingham & A. Ry. Co. v. Campbell, 82 So. 546, 203 Ala. 296.

Cal.—Kimic v. San Jose-Los Gatos Interurban Ry. Co., 104 P. 986, 156 Cal. 379—Villegas v. Strohm, 297 P. 588, 112 Cal.App. 633.

Iowa.—Looney v. Parker, 230 N.W. 570, 210 Iowa 85.

Ky.—Metropolitan Life Ins. Co. v. Osborne, 150 S.W.2d 479, 286 Ky. 301—Cumberland Gasoline Corporation v. Fields' Adm'r, 80 S.W.2d 28, 258 Ky. 417—North American Acc. Ins. Co. v. Caskey's Adm'r, 4 S.W.2d 383, 223 Ky. 600—Ballard & Ballard Co. v. Durr, 177 S.W. 445, 165 Ky. 632.

La.—Ellis v. Edwards, App., 183 So. 116.

Mich.—Takacs v. Ford Motor Co., 236 N.W. 854, 254 Mich. 537.

Miss.—Simon v. Dixie Greyhound Lines, 176 So. 160, 179 Miss. 568—Woods v. Franklin, 118 So. 450, 151 Miss. 635.

Mo.—Sconce v. Jones, 121 S.W.2d 777, 343 Mo. 362—Woods v. Southern Ry. Co., 73 S.W.2d 374—Conduitt v. Trenton Gas & Electric Co., 31 S.W.2d 21, 326 Mo. 133—Landau v. Travelers' Ins. Co., 267 S.W. 376, 305 Mo. 563—Brashear v. Missouri Pac. R. Co., App., 6 S.W.2d 650.

Neb.—Markel v. Glassmeyer, 273 N. W. 33, 132 Neb. 716—Milton v. City of Gordon, 263 N.W. 208, 129 Neb. 888.

N.J.—Slayback Van Order Co. v. Eiben, 177 A. 671, 115 N.J.Law 17.

N.Y.—Ingersoll v. Liberty Bank of Buffalo, 14 N.E.2d 828, 278 N.Y. 1, reversing 300 N.Y.S. 126, 252 App.Div. 921—Muessling v. Leisner, 224 N.Y.S. 689, 221 App.Div. 524.

§ 414. Place of Act or Statement

The fact that a statement was made at a place other than that where the main or principal transaction or event took place must be considered, but is not alone usually controlling, in determining its admissibility.

As a general rule, the res gestæ remains with the locus in quo, and does not follow the parties about after the principal act is completed;[31] but if an act or statement possesses the spontaneity necessary to make it a part of the res gestæ, as discussed infra §§ 417–420, it is not essential to its admissibility that it should have been made or done at the place where the principal fact occurred.[32] Of course, a state-

N.C.—Holmes v. Wharton, 140 S.E. 93, 194 N.C. 470.
Ohio.—Creech v. New York, C. & St. L. Ry. Co., 153 N.E. 299, 22 Ohio App. 216.
Tenn.—Bell v. Travelers' Ins. Co., 79 S.W.2d 824, 18 Tenn.App. 552.
Tex.—International Travelers' Ass'n v. Branum, 212 S.W. 630, 109 Tex. 543, reversing, Civ.App., 169 S.W. 389—Great Atlantic & Pacific Tea Co. v. Walker, Civ.App., 104 S.W. 2d 627, reversed on other grounds Walker v. Great Atlantic & Pacific Tea Co., 112 S.W.2d 170, 131 Tex. 57—Panhandle & S. F. Ry. Co. v. Huckabee, Civ.App., 207 S.W. 329.
22 C.J. p 458 note 79—1 C.J. p 500 notes 86, 87.

Statement to physician of decedent that he was standing and not lying on the side track when struck, waiting for a train to pass on the main track, made an hour after the accident, is not admissible as part of the res gestæ.—Bevin's Adm'r v. Chesapeake & O. Ry. Co., 227 S.W. 794, 190 Ky. 501.

Admissibility of narrative statements to physician as independently relevant fact see supra § 246.

Workmen's compensation cases

(1) The rule that before declarations or statements of an injured person as to the cause of his injury are admissible in evidence they must be shown to have been made at a point of time so close to the injury as to appear entirely spontaneous, is under some statutes applied to actions under the workmen's compensation law.—Mayeur v. J. R. Crowe Coal & Mining Co., 186 P. 1035, 106 Kan. 123.

(2) Evidence of particular statements held inadmissible.
U.S.—Winningham v. Travelers Ins. Co., C.C.A.Tex., 93 F.2d 520.
Colo.—H. C. Lallier Construction & Engineering Co. v. Industrial Commission, 17 P.2d 532, 91 Colo. 593.
Ga.—Bolton v. Columbia Casualty Co., 130 S.E. 535, 34 Ga.App. 658.
Idaho.—Butler v. Anaconda Copper Mining Co., 268 P. 6, 46 Idaho 326—Erickson v. Rutledge Timber Co., 191 P. 212, 33 Idaho 179.
Ill.—Frederick v. Industrial Commission, 160 N.E. 845, 329 Ill. 490—Charles E. Reed & Co. v. Industrial Commission, 159 N.E. 777, 328 Ill. 345.
Ind.—Morris v. Miller, 179 N.E. 29, 93 Ind.App. 534.
Kan.—Mayeur v. J. R. Crowe Coal & Mining Co., 186 P. 1035, 106 Kan. 123.
Ky.—Friedman Co. v. Friedman, 113 S.W.2d 1172, 272 Ky. 305.
Mich.—Tjernstrom v. Ford Motor Co., 230 N.W. 823, 285 Mich. 450—Ayling v. City of Detroit, 268 N.W. 372, 275 Mich. 338.
Mo.—Hatfield v. Southwestern Grocer Co., App., 104 S.W.2d 717—De Moss v. Evens & Howard Fire Brick Co., App., 57 S.W.2d 720.
Neb.—Price v. Burlington Refrigerator Express Co., 269 N.W. 425, 131 Neb. 657—Young v. Johnson & Blund, 202 N.W. 463, 113 Neb. 119.
Ohio.—Dugan v. Industrial Commission of Ohio, 23 N.E.2d 132, 135 Ohio St. 652—Bake v. Industrial Commission of Ohio, 22 N.E.2d 130, 135 Ohio St. 637, affirming Bake v. Industrial Commission, 22 N.E.2d 1017, 62 Ohio App. 39—Weaver v. Industrial Commission of Ohio, 181 N.E. 894, 125 Ohio St. 465, affirming Industrial Commission of Ohio v. Weaver, 187 N.E. 186, 45 Ohio App. 371.
Pa.—Kirby v. Carnegie-Illinois Steel Corporation, 21 A.2d 123—Cerrato v. Union Collieries Co., 15 A.2d 401, 141 Pa.Super. 410—Goettel v. Pittsburgh Coal Co., 14 A.2d 344, 140 Pa.Super. 516—Watson v. A. M. Byers Co., 14 A.2d 201, 140 Pa. Super. 245—Baker v. Freed, 10 A. 2d 913, 138 Pa.Super. 315—Thomas v. DeCommene, 3 A.2d 41, 133 Pa. Super. 489—Mulac v. Pittsburgh & L. E. R. Co., 2 Fay.L.J. 191.
Tenn.—Kennedy v. Columbian Casualty Co., 43 S.W.2d 201, 163 Tenn. 312—Baxter v. Jordan, 14 S.W.2d 717, 158 Tenn. 471.
Tex.—Federal Underwriters Exchange v. Arnold, Civ.App., 127 S. W.2d 972, error dismissed, judgment correct—Gooden v. Ætna Life Ins. Co., Civ.App., 84 S.W.2d 563—Metropolitan Casualty Ins. Co. v. Woody, Civ.App., 80 S.W.2d 771, error dismissed.
Utah.—Boyd v. Industrial Commission of Utah, 48 P.2d 498, 88 Utah 173, rehearing denied 53 P.2d 80, 88 Utah 184—Zion's Co-op. Mercantile Institution v. Industrial Commission of Utah, 262 P. 99, 70 Utah 549.

In Vermont

(1) It has been stated to be well settled that the declarations of a party, injured when no one is present, are not evidence to show the manner in which the injury occurred, however nearly contemporaneous with the occurrence.—Gomlette's Adm'r v. Grand Trunk Ry. Co., 107 A. 118, 93 Vt. 266.

(2) This rule, however, is inapplicable where the declarations, tending to show the manner in which it occurred, were a part of a declaration, much of which was against the interest of the party making it, introduced by defendant against him.—Wellman v. Wales, 122 A. 659, 97 Vt. 245.

31. Ill.—Johnson v. Swords Co., 3 N.E.2d 705, 286 Ill.App. 377.
22 C.J. p 465 notes 71, 72, p 467 note 91.

Statements held inadmissible where made at a place other than that where the principal fact occurred.
U.S.—Bonner v. Texas Co., C.C.A. Tex., 89 F.2d 291.
Ala.—O'Bar v. Southern Life & Health Ins. Co., 168 So. 580, 232 Ala. 459.
Idaho.—Erickson v. Edward Rutledge Timber Co., 191 P. 212, 33 Idaho 179.
Ind.—Massachusetts Bonding & Ins. Co. v. Free, 121 N.E. 716, 71 Ind. App. 275—Meadroth v. Fidelity & Deposit Co. of Maryland, 121 N.E. 714, 73 Ind.App. 50.
Ky.—Cincinnati, N. O. & T. P. Ry. Co. v. Galreath's Adm'r, 15 S.W. 2d 267, 228 Ky. 385—Bevin's Adm'r v. Chesapeake & O. Ry. Co., 227 S. W. 794, 190 Ky. 501.
Mich.—Ayling v. City of Detroit, 268 N.W. 372, 275 Mich. 338.
Mo.—Venters v. Bunnell, 93 S.W.2d 70, 72, 230 Mo.App. 1100, citing Corpus Juris—Moran v. Arkansas Grocer Co., 261 S.W. 486, 216 Mo. App. 280.
Neb.—Markel v. Glassmeyer, 253 N. W. 33, 132 Neb. 716.
Ohio.—Mitchell v. New York Life Ins. Co., 22 N.E.2d 998, 62 Ohio App. 51, reversed on other grounds 27 N.E.2d 213, 136 Ohio St. 551—Callahan v. Champion Paper & Fibre Co., 16 N.E.2d 791, 58 Ohio App. 459.
Or.—Hartley v. State Industrial Accident Commission, 261 P. 71, 123 Or. 310.
Tex.—A. B. C. Storage & Moving Co. v. Herron, Civ.App., 138 S.W.2d 211, error dismissed, judgment correct—Rosenthal Dry Goods Co. v. Hillebrandt, Civ.App., 288 S.W. 582.

32. Minn.—Clark v. Davis, 190 N.W. 45, 153 Minn. 143, certiorari denied

ment is not necessarily admissible merely because of the fact that it was made at the place where the occurrence to which it related happened.[33]

§ 415. Form of Statement

A writing may form a part of the res gestæ.

Although res gestæ statements are usually in oral form, a writing may be part of the res gestæ of a transaction with which it is closely connected.[34] Where, however, the writing does not bear such relation in point of time to the principal fact as to constitute a part of the res gestæ, within the rules already discussed in §§ 411–413, or does not contain the necessary element of spontaneity, within the rules hereinafter considered in §§ 417–420, it is not admissible as a part of the res gestæ.[35] Testimony

Davis v. Clark, 43 S.Ct. 432, 261 U.S. 621, 67 L.Ed. 831.
Mo.—Soderstrom v. Missouri Pac. R. Co., App., 141 S.W.2d 73.
Wash.—Nicolle v. United Auto Transp Co., 244 P. 127, 138 Wash. 48.
W.Va.—Collins v. Equitable Life Ins. Co., 8 S.E.2d 825, 130 A.L.R. 287.
22 C.J. p 458 note 80, p 467 notes 92, 93.

Entry of home

Statements of a gas meter reader, on entering into the house of a customer while looking pale, that he had just slipped and hurt himself, pointing to his back, are admissible as part of the res gestæ.—Guyer v. Equitable Gas Co., 123 A. 590, 279 Pa. 5, citing **Corpus Juris.**

Statement made in hospital where person had been taken after injury held admissible.
Iowa.—Stukas v. Warfield, Pratt, Howell Co., 175 N.W. 81, 188 Iowa 878.
Tex.—Tullos v. Texas Pipe Line Co., Civ.App., 145 S.W.2d 267, error dismissed, judgment correct.

Workman returning home

(1) Statements of workmen on returning home from their employment as to injuries received during the course of their employment have been held to be spontaneous and admissible as part of the res gestæ.
La.—Temple v. Martin Veneer Co., App., 200 So. 676—Butler v. Washington-Youree Hotel Co., App., 160 So. 825.
Tex.—Texas Employers Ins. Ass'n v. Shifflette, Civ.App., 91 S.W.2d 787, error dismissed.

(2) On the other hand, such statements have been excluded as lacking the necessary spontaneity.
U.S.—Winningham v. Travelers Ins. Co., C.C.A.Tex., 93 F.2d 520—Halleck v. Hartford Accident & Indemnity Co., C.C.A.Tex., 75 F.2d 800.
Ga.—Hodge v. American Mut. Liability Ins. Co., 195 S.E. 765, 57 Ga. App. 403.
Mich.—Ginsberg v. Burroughs Adding Mach. Co., 170 N.W. 15, 204 Mich. 130.
Mo.—Hatfield v. Southwestern Grocer Co., App., 104 S.W.2d 717—Weiler v. Peerless White Lime Co., App., 64 S.W.2d 125.
Pa.—Goettel v. Pittsburgh Coal Co., 14 A.2d 344, 140 Pa.Super. 516—Watson v. A. M. Byers Co., 14 A.2d 201, 140 Pa.Super. 245—Heite v. Vare Const. Co., 195 A. 437, 129 Pa.Super. 204.
Tex.—McDowell v. Security Union Ins. Co., Civ.App., 10 S.W.2d 782.

33. Ala.—Walker v. Smith, 74 So. 451, 199 Ala. 514.

34. U.S.—Title Guaranty & Surety Co. v. State of Missouri ex rel. and to Use of Stormfeltz, C.C.A.Mo., 105 F.2d 496—Jennings v. U. S., C. C.A.Ga., 73 F.2d 470.
Ala.—Wallace v. W. B. Folmar & Sons, 110 So. 402, 215 Ala. 246.
Ark.—Indemnity Ins. Co. of North America v. Krone, 9 S.W.2d 83, 177 Ark. 953, 60 A.L.R. 1493.
D.C.—Cayton v. English, 23 F.2d 745, 57 App.D.C. 324, followed in Cayton v. English, 23 F.2d 749, 57 App. D.C. 328.
Ga.—Millsaps v. J. T. Strange Co., 141 S.E. 513, 37 Ga.App. 716.
Ind.—Davis Const. Co. v. Granite Sand & Gravel Co., 163 N.E. 240, 90 Ind.App. 379.
Minn.—In re Marttinen's Estate, 214 N.W. 469, 171 Minn. 475.
N.Y.—Cavanagh v. Staten Island Edison Corp., 218 N.Y.S. 711, 218 App.Div. 839.
Tex.—Geer v. Miller, Civ.App., 277 S. W. 172—Kansas City Life Ins. Co. v. Elmore, Civ.App., 226 S.W. 709.
Va.—Harrison v. Gardner Inv. Corporation, 111 S.E. 234, 132 Va. 238.
22 C.J. p 458 note 82.

Letters forming a part of the res gestæ of the transaction are admissible.
U.S.—Montgomery v. Pacific Electric Ry. Co., C.C.A.Cal., 293 F. 680, certiorari denied 44 S.Ct. 334, 264 U.S. 586, 68 L.Ed. 862.
Ala.—Denson v. Kirkpatrick Drilling Co., 144 So. 86, 225 Ala. 473—Motor Sales Co. v. Birmingham Electric Battery Co., 97 So. 907, 210 Ala. 277—Starr Jobbing House v. May Hosiery Mills, 93 So. 572, 207 Ala. 620.
Cal.—Sethman v. Bulkley, 68 P.2d 961, 9 Cal.2d 21.
Ga.—Fair & Martin v. Brewer, 106 S.E. 22, 26 Ga.App. 310.
Ill.—Lyon v. Oliver, 227 Ill.App. 511, reversed on other grounds 147 N.E. 251, 316 Ill. 292.
Iowa.—Swift v. Clarinda Trust & Savings Bank, 177 N.W. 519.
Minn.—Mid-West Public Utilities v. Donovan Const. Co., 246 N.W. 257, 187 Minn. 580.
Mo.—B. F. Sturtevant Co. v. Ford Mfg. Co., 288 S.W. 59, 315 Mo. 1025, reversing, App., 253 S.W. 76, and 254 S.W. 419.
N.J.—Wickham v. Monmouth Memorial Hospital, 162 A. 891, 10 N.J. Misc. 1086.
N.C.—Brunswick County v. North Carolina Bank & Trust Co., 173 S. E. 327, 206 N.C. 127.
Tex.—Conner v. Angelina County Lumber Co., Civ.App., 146 S.W.2d 1093—Maryland Casualty Co. v. Marshall, Civ.App., 14 S.W.2d 337, error dismissed—Bourland v. Huffhines, Civ.App., 244 S.W. 847—West Side Oil Co. v. McDorman, Civ.App., 244 S.W. 167.
Va.—Deitz v. Whyte, 109 S.E. 212, 131 Va. 19.
W.Va.—Wallace v. Prichard, 115 S. E. 415, 92 W.Va. 352.
22 C.J. p 458 note 82 [c].

Memorandum

Where at the time parties enter into parol contract a memorandum is read containing the terms thereof, which are assented to by the parties, such memorandum becomes a part of the transaction, and in an action on the contract is admissible in evidence as a part of the res gestæ.—Janson v. Pacific Diking Co., 190 P. 340, 97 Or. 129.

Slips of paper upon which payments to a bank are entered at the time they occur are admissible as res gestæ to prove the transaction.—Smith v. Farmers' State Bank, Tex. Civ.App., 262 S.W. 835.

35. U.S.—Tate v. Baugh, C.C.A. Tenn., 264 F. 892.
Mo.—German Evangelical Bethel Church of Concordia v. Reith, 39 S.W.2d 1057, 327 Mo. 1098, 76 A.L. R. 604.
N.Y.—State Bank of Binghamton v. Bache, 293 N.Y.S. 667, 162 Misc. 128.
N.C.—Newton v. Texas Co., 105 S.E. 433, 180 N.C. 561.
Tex.—Morris v. Davis, Civ.App., 3 S.W.2d 109, affirmed, Davis v. Morris, Com.App., 13 S.W.2d 63.
22 C.J. p 458 note 83.

Letters

Cal.—Potter v. Smith, 191 P. 1023, 48 Cal.App. 162

of an injured person as to present physical pain has been held admissible as part of the res gestæ.[36] Declarations contemporaneous with the infliction of an injury which tend to explain, illustrate, or characterize the transaction are admissible under the res gestæ rule, even though they are not declarations of pain and suffering.[37] Where mental feelings are the subject of injury, the usual and natural signs and expressions of such feelings made at the time are competent evidence of such feelings.[38]

§ 416. Explanatory Character

In order for an act or declaration to be admissible as part of the res gestæ, it must explain or illustrate the main or principal transaction or event.

Statements or circumstances which otherwise meet the requirements of the res gestæ rule and which are explanatory of the main fact are admissible in evidence as part of the res gestæ.[39] Indeed, this explanatory nature is essential, for a substantial coincidence in point of time with the principal fact is not sufficient to render a declaration or accompanying fact admissible as part of the res gestæ; it must possess the further characteristic of being well calculated to unfold the nature and quality of the main fact, and so harmonize with it as obviously to constitute a single transaction.[40] Whether or not

Ill.—In re Keshner's Estate, 26 N.E. 2d 529, 304 Ill.App. 640.
Me.—Small v. Gilman, 48 Me. 506.
Pa.—Weissburg v. People's State Bank of New Kensington, 131 A. 131, 284 Pa. 260.
S.D.—McMacken v. Lennan, 193 N.W. 668, 46 S.D. 448.
Tex.—New Amsterdam Casualty Co. v. Parham, Civ.App., 2 S.W.2d 866, error dismissed—Crumley v. Gile, Civ.App., 271 S.W. 641—Lomax v. Trull, Civ.App., 232 S.W. 861, dismissed for want of jurisdiction.
Wash.—Bullock v. Yakima Valley Transp. Co., 184 P. 641, 108 Wash. 413, affirmed 187 P. 410, 108 Wash. 413.

Pleadings in another case

In an action on a note which defendant asserted was a forgery, her petition in another suit, seeking cancellation of alleged forged instruments, is not admissible under the res gestæ rule, not being so closely connected with the principal fact as to be considered spontaneous.—Rakestraw v. Sebree Deposit Bank, 225 S.W. 506, 189 Ky. 668.

36. Tex.—Texas Cent. R. Co. v. Powell, 86 S.W. 21, 38 Tex.Civ. App. 157.

37. Utah.—Hammond v. Industrial Commission, 34 P.2d 687, 84 Utah 67.

38. **Throwing self on grave**

In an action for failure to deliver a telegram, evidence that plaintiff, when she found that her father had been buried before her arrival, "was very much grieved. She went down to the grave and she fell on the grave and was unable to rise, and she had to be lifted and carried back," was admissible.—Western Union Telegraph Co. v. Kilgore, Civ. App., 220 S.W. 593.

39. U.S.—Reading Co. v. Larkin, C. C.A.Pa., 114 F.2d 416, affirming, D.C., Larkin v. Reading Co., 28 F. Supp. 292, and certiorari denied Reading Co. v. Larkin, 61 S.Ct. 175, 311 U.S. 707, 85 L.Ed. 459—Yarbrough v. Prudential Ins. Co. of America, C.C.A.Ga., 100 F.2d 547, denying rehearing 99 F.2d 874.
Ala.—Blue v. Hooks, 141 So. 627, 629, 224 Ala. 696, citing **Corpus Juris**—Sovereign Camp, W. O. W. v. Hoehn, 85 So. 696, 204 Ala. 248—Shipp v. Davis, 141 So. 366, 25 Ala. App. 104.
Ark.—Arkansas Power & Light Co. v. Heyligers, 67 S.W.2d 1021, 188 Ark. 815.
Cal.—McAlvay v. Consumers' Salt Co., 297 P. 135, 139, 112 Cal.App. 383, citing **Corpus Juris**.
Ga.—Alvaton Mercantile Co. v. Caldwell, 128 S.E. 781, 34 Ga.App. 151.
Ind.—Sovereign Camp, W. O. W., v. Ferguson, 141 N.E. 356, 88 Ind.App. 144.
Iowa.—Miser v. Iowa State Traveling Men's Ass'n, 273 N.W. 155, 158, 223 Iowa 662, citing **Corpus Juris**—Case v. Case, 238 N.W. 85, 212 Iowa 1213.
Mich.—McAvon v. Brightmoor Transit Co., 222 N.W. 126, 245 Mich. 44.
Mo.—Edwards v. Ethyl Gasoline Corporation, 112 S.W.2d 555, 342 Mo. 98—Wallace v. St. Joseph Ry., Light, Heat & Power Co., 77 S.W. 2d 1011, 336 Mo. 282.
N.C.—Fox v. Volunteer State Life Ins. Co., 119 S.E. 172, 186 N.C. 763.
Okl.—Gibson Oil Co. v. Westbrooke, 16 P.2d 127, 160 Okl. 26.
Pa.—MacDougall v. Pennsylvania Power & Light Co., 166 A. 589, 311 Pa. 387.
Tex.—Continental Ins. Co. of New York v. Nabors, Civ.App., 6 S.W. 2d 151, error refused.
Wash.—Knight v. Hibler, 213 P. 675, 124 Wash. 82.
Wis.—McComb v. McComb, 234 N.W. 707, 204 Wis. 293.
22 C.J. p 458 note 85.

"Where evidence of an act done by a party is admissible, his declarations, made at the same time and in explanation thereof, are also admissible, as part of the res gestæ."—Tracy v. Juanto, 205 P. 822, 824, 103 Or. 416.

Declarations by surveyor

Declarations made by the original surveyor of land at the time of the survey might be admissible in a boundary suit as res gestæ, even if the surveyor were living.—Brooks v. Slaughter, Tex.Civ.App., 218 S.W. 632.

Facts received as explanatory

(1) Where issue was whether house was occupied at time of fire, statement of alleged tenant that he had "moved in."—Continental Ins. Co. of New York v. Nabors, Tex.Civ. App., 6 S.W.2d 151, error refused.

(2) In proceeding for death of city employee from overexertion causing acute dilatation of heart, deceased's statement to wife that when he pried and pulled in opening gate while working he felt pain in chest.—Hammond v. Industrial Commission, 34 P. 2d 687, 84 Utah 67.

(3) Statements of insured, on discovery immediately after being shot, that the "gun went off" and that "it was an accident."—Falkinburg v. Prudential Ins. Co. of America, 273 N.W. 478, 132 Neb. 831.

(4) Other facts see 22 C.J. p 458 note 85 [a].

Object or motive

Statements or declarations which tend to explain, illustrate, or show the object or motive for the main act are admissible as part of the res gestæ.—Nanney v. I. H. Shell & Son, Mo.App., 138 S.W.2d 717.

40. Ala.—Birmingham & A. Ry. Co. v. Campbell, 82 So. 516, 203 Ala. 296.
Ga.—Carter v. Buchannon, 3 Ga. 513.
Ill.—Boyer Chemical Laboratory Co. v. Industrial Commission, 10 N.E. 2d 389, 366 Ill. 635, 113 A.L.R. 264—Frederick v. Industrial Commission, 160 N.E. 845, 329 Ill. 490—Johnson v. Swords Co., 3 N.E.2d 705, 286 Ill.App. 377.
Ind.—Brown v. Freudenberg, 17 N. E.2d 865, 106 Ind.App. 692—Red Star Yeast Co. v. Shackleford, 171 N.E. 302, 91 Ind.App. 270.

a declaration or an act is sufficiently so connected with the main facts as to be admissible as part of the res gestæ is a matter which rests largely in the sound discretion of the trial court.[41]

§ 417. Spontaneity

In order for a declaration to be admissible as part of the res gestæ, it must be the spontaneous utterance of the mind while under the influence of the transaction or event.

In order for a declaration to be admissible as a part of the res gestæ, it must be the spontaneous utterance of the mind while under the influence of the transaction,[42] the test being whether the decla-

Kan.—Eagon v. Eagon, 57 P. 942, 60 Kan 697.
Ky.—Trevillian v. Boswell, 43 S.W. 2d 715, 241 Ky. 237—Webb v. Linnemann, 255 S.W. 1036, 201 Ky. 131.
Miss.—Crosby v. Columbus & G. Ry. Co., 181 So. 139, 182 Miss. 771.
Mo.—State ex rel. Metropolitan Life Ins. Co. v. Shain, 121 S.W.2d 789, 343 Mo. 435, quashing certiorari Bailey v. Metropolitan Life Ins. Co., App., 115 S.W.2d 151—Smith v. East St. Louis Ry. Co., 123 S.W. 2d 198, 234 Mo.App. 1220.
Neb.—Suhr v. Lindell, 277 N.W. 381, 133 Neb. 856.
N.J.—Slayback Van Order Co. v. Eiben, 177 A. 671, 115 N.J.Law 17.
Tex.—Texas Employers Ins. Ass'n v. Shifflette, Civ.App., 91 S.W.2d 787, error dismissed—Panhandle & S. F. Ry. Co. v. Laird, Civ.App., 224 S.W. 305, dismissed for want of jurisdiction.
Wash.—Beck v. Dye, 92 P.2d 1113, 200 Wash. 1, 127 A.L.R. 1022—Crock v. Magnolia Milling Co., 266 P. 727, 147 Wash. 589.
22 C.J. p 460 note 86.

A scolding given a street car conductor by a passenger in which he claimed the conductor had been remiss in his duty to aid plaintiff after his injury is not admissible as part of the res gestæ in that it does not characterize the injury.—Kausch v. Chicago & Milwaukee Electric Ry. Co., 180 N.W. 808, 173 Wis. 220.

Declarations of actor in accident, to be admissible as part of the res gestæ, must be statements of what occurred in and at the time of the accident.—Deater v. Penn Mach. Co., 166 A. 846, 311 Pa. 291.

Mere narrative of irrelevant matter should be excluded.—Hines v. Gale, 213 P. 395, 25 Ariz. 65.

Narratives unconnected with principal facts are excluded.—Kansas City v. Boruff, 243 S.W. 167, 295 Mo. 28.

Purpose previously entertained

Rest room custodian's declaration that they had intended to fix carpet over which woman fell was inadmissible as res gestæ, since it related, not to concomitant act, but to purpose previously entertained.—Staley v. Royal Pines Park, 162 S.E. 202, 202 N.C. 155.

Verbal act

In determining the admissibility of a statement as a part of the res gestæ, the true inquiry is whether it is a verbal act illustrating, explaining, or interpreting other parts of the transaction of which it is itself a part.—Simon v. Dixie Greyhound Lines, 176 So. 160, 179 Miss. 568.

41. Iowa.—Stukas v. Warfield, Pratt, Howell Co., 175 N.W. 81, 188 Iowa 878.
22 C.J. p 460 note 87.

42. U.S.—Yarbrough v. Prudential Ins. Co. of America, C.C.A.Ga., 99 F.2d 874, rehearing denied 100 F.2d 547—Halleck v. Hartford Accident & Indemnity Co., C.C.A.Tex., 75 F. 2d 800—Overland Const. Co. v. Sydnor, C.C.A.Ohio, 70 F.2d 338—U. S. v. O'Brien, C.C.A.Va., 51 F.2d 37—Wicker v. Scott, C.C.A.Ohio, 29 F. 2d 807—Missouri State Life Ins. Co. v. Makiver, C.C.A.Pa., 4 F.2d 185, affirming, D.C., Makiver v. Missouri State Life Ins. Co., 296 F. 715.
Ala.—Kelly v. Hanwick, 153 So. 269, 278, 228 Ala. 336, citing **Corpus Juris.**
Ariz.—Pickwick Stages Corporation v. Williams, 287 P. 440, 443, 36 Ariz. 520, quoting **Corpus Juris.**
Colo.—H. C. Lallier Construction & Engineering Co. v. Industrial Commission, 17 P.2d 532, 91 Colo. 593.
Fla.—Pillet v. Ershick, 126 So. 784, 99 Fla. 483.
Idaho.—Erickson v. Edward Rutledge Timber Co., 191 P. 212, 33 Idaho 179.
Ill.—Johnson v. Swords Co., 3 N.E. 2d 705, 286 Ill.App. 377.
Ind.—Kelley v. Dickerson, 13 N.E.2d 535, 213 Ind. 624—Lake Erie & W. R. Co. v. Scott, 147 N.E. 315, 83 Ind.App. 357—Sovereign Camp, W. O. W. v. Ferguson, 141 N.E. 356, 88 Ind.App. 144.
Iowa.—McQueen v. Safeway Stores, 244 N.W. 278, 214 Iowa 1300—Muirhead v. Challis, 240 N.W. 912, 213 Iowa 1108—Duncan v. Rhomberg, 236 N.W. 638, 212 Iowa 389.
Ky.—Galloway Motor Co. v. Huffman's Adm'r, 137 S.W.2d 379, 281 Ky. 841—Davis v. Bennett's Adm'r, 132 S.W.2d 334, 279 Ky. 799—Castle v. Allen, 120 S.W.2d 219, 274 Ky. 658—Hall's Adm'r v. Burton Produce Co., 88 S.W.2d 938, 262 Ky. 36, citing **Corpus Juris**—Norton's Adm'r v. Winstead, 291 S.W. 723, 218 Ky. 488.
La.—Ellis v. Edwards, App., 183 So. 116—Davis v. Texas Lumber Co., App., 146 So. 788, 789, citing **Corpus Juris**—Day v. Armour Fertilizer Works, 8 La.App. 720.
Md.—Baltimore & O. R. Co. v. State, for Use of Carbone, 181 A. 830, 169 Md. 345.
Mich.—Phinney v. Detroit United Ry. Co., 205 N.W. 124, 232 Mich. 399.
Minn.—Dell v. Marckel, 238 N.W. 1, 184 Minn. 147.
Miss.—Crosby v. Columbus & G. Ry. Co., 181 So. 139, 182 Miss. 771.
Mo.—State ex rel. Metropolitan Life Ins. Co. v. Shain, 121 S.W.2d 789, 343 Mo. 435, quashing certiorari Bailey v. Metropolitan Life Ins. Co., App., 115 S.W.2d 151—Sconce v. Jones, 121 S.W.2d 777, 343 Mo. 362—Bennette v. Hader, 87 S.W.2d 413, 337 Mo. 977, 101 A.L.R. 1190—Woods v. Southern Ry. Co., 73 S. W.2d 374—Russell v. Metropolitan Life Ins. Co., App., 149 S.W.2d 432—Evans v. Sears, Roebuck & Co., App., 129 S.W.2d 53—Smith v. Producers Cold Storage Co., App., 128 S.W.2d 299—Goucher v. Woodmen Accident Co. of Lincoln, Neb., 104 S.W.2d 289, 231 Mo.App. 573.
Mont.—Wilson v. Davis, 103 P.2d 149, 110 Mont. 356.
Neb.—Markel v. Glassmeyer, 273 N. W. 33, 132 Neb. 716—Tongue v. Perrigo, 265 N.W. 737, 130 Neb. 564.
N.H.—Bullard v. McCarthy, 195 A. 355, 89 N.H. 158.
N.J.—Sharp v. Sears Roebuck & Co., 9 A.2d 795, 123 N.J.Law 494.
N.Y.—Hill v. Erie R. Co., 224 N.Y. S. 640, 221 App.Div. 518—Queens & Nassau Delivery Corporation v. Railway Express Agency, 273 N.Y. S. 199, 152 Misc. 299.
Ohio.—Whipp v. Industrial Commission of Ohio, 27 N.E.2d 141, 136 Ohio St. 531—Dugan v. Industrial Commission of Ohio, 22 N.E.2d 132, 135 Ohio St. 652—Weaver v. Industrial Commission of Ohio, 181 N.E. 894, 125 Ohio St. 465, citing **Corpus Juris,** and affirming Industrial Commission of Ohio v. Weaver, 187 N.E. 186, 45 Ohio App. 371—Lacey v. Heisey, 5 N.E.2d 699, 53 Ohio App. 451—Industrial Commission v. Forthman, 1 N.E.2d 158, 51 Ohio App. 389.
Okl.—Travelers Ins. Co. v. Minton, 73 P.2d 422, 181 Okl. 306—Gibson Oil Co. v. Westbrooke, 16 P.2d 127, 160 Okl. 26.
Pa.—Rich Hill Coal Co. v. Bashore, 7 A.2d 302, 334 Pa. 449—Athas v. Fort Pitt Brewing Co., 188 A. 113,

ration was the facts talking through the party, or the party talking about the facts.[43] The test has also been declared to be whether the statement was made under such circumstances of physical shock or nervous excitement as to preclude the likelihood of reflection and fabrication.[44] The admission of such testimony is justified on the ground that the spontaneity and unreflected character of the statements are taken as sufficient safeguard of trustworthiness,[45] and a suspicion of afterthought will prevent

324 Pa. 313—Deater v. Penn Mach. Co., 166 A. 846, 311 Pa. 291—Redrick v. Knapp Bros. Co., 193 A. 117, 127 Pa.Super. 93.

R.I.—Zannelle v. Pettine, 155 A. 236, 51 R.I. 359.

Tenn.—Riverside Mill Co. v. Parsons, 141 S.W.2d 895—National Life & Accident Ins. Co. v. Follett, 80 S.W.2d 92, 168 Tenn. 647.

Tex.—Dallas Railway & Terminal Co. v. Little, Civ.App., 109 S.W.2d 289, error dismissed—Dale v. Stevens, Civ.App., 75 S.W.2d 129—Cabaniss v. Grayburg Oil Co., Civ.App., 50 S.W.2d 437, error refused—Panhandle & S. F. Ry. Co. v. Laird, Civ.App., 224 S.W. 305, dismissed for want of jurisdiction.

Utah.—Jackson v. Utah Rapid Transit Co., 290 P. 970, 77 Utah 21—Zion's Co-op. Mercantile Institution v. Industrial Commission of Utah, 262 P. 99, 70 Utah 549.

Wash.—Barnett v. Bull, 250 P. 955, 141 Wash. 139.

32 C.J. p 461 note 89.

A consciousness of approaching death does not supply the element of spontaneity, or dispense with the necessity therefor.—Cumberland Gasoline Corporation v. Fields' Adm'r, 80 S.W.2d 28, 258 Ky. 417, quoting **Corpus Juris**—32 C.J. p 461 note 89 [b].

Declarations of third persons, to be considered as part of res gestæ, must be part of transaction, and under such circumstances as that their spontaneity is assured.—Johns Undertaking Co. v. Hess-Strickland Transfer & Storage Co., 104 So. 250, 213 Ala. 78.

Exclamation

To be admissible the statement should be in the nature of an exclamation.—Bake v. Industrial Commission of Ohio, 22 N.E.2d 130, 135 Ohio St. 627, affirming Bake v. Industrial Commission, 22 N.E.2d 1017, 63 Ohio App. 29.

Immediate spur of transaction

Only that which is said or done under immediate spur of transaction becomes part of transaction itself and is admissible as res gestæ.—Harper v. Highway Motor Freight Lines, Tex.Civ.App., 89 S.W.2d 448, error dismissed.

Voluntary changes in habits of plaintiff after the publication of the libel, in a suit for libel, which could be easily simulated, are incompetent.—Bishop v. New York Times Co., 135 N.E. 845, 233 N.Y. 446, reversing 184 N.Y.S. 378, 194 App.Div. 881.

43. U.S.—Proechel v. U. S., C.C.A. Minn., 59 F.2d 648, 650, quoting **Corpus Juris**.

Ark.—Liberty Cash Grocers v. Clements, 102 S.W.2d 836, 193 Ark. 898.

Ind.—Red Star Yeast Co. v. Shackleford, 171 N.E. 302, 91 Ind.App. 370.

Ky.—Cumberland Gasoline Corporation v. Field's Adm'r, 80 S.W.2d 28, 258 Ky. 417, quoting **Corpus Juris**—Davis v. Burns' Adm'x, 269 S.W. 763, 207 Ky. 703.

Mo.—Kuether v. Kansas City Light & Power Co., 276 S.W. 105, 220 Mo.App. 452.

N.C.—Queen City Coach Co. v. Lee, 11 S.E.2d 341, 347, 218 N.C. 320, quoting **Corpus Juris**—Batchelor v. Atlantic Coast Line R. Co., 144 S.E. 542, 196 N.C. 84, 60 A.L.R. 1091—Young v. Stewart, 131 S.E. 735, 738, 191 N.C. 297, quoting **Corpus Juris**.

Okl.—Jackson v. Hedlund, 10 P.2d 385, 157 Okl. 14—Standard Accident Ins. Co. v. Baker, 291 P. 962, 145 Okl. 100—Schaff v. Coyle, 249 P. 947, 121 Okl. 228.

S.C.—Funderburk v. Powell, 187 S.E. 742, 181 S.C. 412.

Tex.—Landers v. Overaker, Civ.App., 141 S.W.2d 451, 456, error dismissed, judgment correct, citing **Corpus Juris**—Richardson v. Watson, Civ.App., 105 S.W.2d 473, error dismissed.

Va.—Upton v. Commonwealth, 2 S.E.2d 337, 339, 172 Va. 654, quoting **Corpus Juris**.

32 C.J. p 461 note 90.

"The term 'res gestæ' is not a mere shibboleth by an indiscriminate use of which every unsworn statement made during a particular transaction or occurrence is to be admitted. It is a doctrine which recognizes that, under certain circumstances, a declaration may be of such spontaneous utterance that, metaphorically, it is an event speaking through the person, as distinguished from a person merely narrating the details of an event."—Beck v. Dye, 92 P.2d 1113, 1117, 200 Wash. 1, 127 A.L.R. 1022.

Act speaking for itself

Res gestæ may be said to be the act speaking for itself, not what bystanders say when telling about the act.

Neb.—Roh v. Opocensky, 253 N.W. 680, 126 Neb. 518.

Wis.—Kressin v. Chicago & N. W. Ry. Co., 215 N.W. 908, 194 Wis. 480.

Not witness speaking

Res gestæ evidence is not the witness speaking, but the transaction voicing itself.—Powell v. Gallivan, 118 A. 769, 41 R.I. 453.

44. Cal.—Showalter v. Western Pac. R. Co., 106 P.2d 895, prior opinion, App., 98 P.2d 861.

Iowa.—Stukas v. Warfield, Pratt, Howell Co., 175 N.W. 81, 188 Iowa 878.

Kan.—Wrage v. King, [illegible] P. 259, 260, 114 Kan. 539—Johnson v. McLain Inv. Co., 100 P. 52, 79 Kan. 433, 131 Am.S.R. 302.

Ky.—Norton's Adm'r v. Winstead, 291 S.W. 723, 218 Ky. [illegible].

Minn.—O'Connor v. Chicago, M. St. P. & P. Ry. Co., 251 N.W. 671, 190 Minn. 277, followed in 253 N.W. 670, 190 Minn. 290, certiorari denied Chicago, M., St. P. & P. R. Co. v. O'Connor, 54 S.Ct. [illegible], 292 U.S. 651, 78 L.Ed. 1500.

N.J.—Demeter v. Rosenberg, 175 A. 621, 114 N.J.Law 55.

Pa.—See Malne v. Pittsburgh & L. E. R. Co., 2 Pa.Dist.J. 191.

Wis.—Zartner v. Scheunsburger, 215 N.W. 202, 210 Wis. 116.

Evidence held insufficient to show such shock or loss of mental faculties as to bring statement within res gestæ rule.—Simon v. Dixie Greyhound Lines, 156 So. 180, 179 Miss. 568.

Startling occasion

To render statements admissible as part of the res gestæ, there must have been a startling occasion, startling enough to produce nervous excitement, and render the utterance spontaneous and unreflecting.—Carter v. C. F. Smith Co., 281 N.W. [illegible], 285 Mich. 621—Freeman v. Ruppert [illegible], 278 N.W. 758, 283 Mich. 41—Sexton v. Bulinski, 273 N.W. 235, 280 Mich. 28—Rogers v. Saginaw Bay City R. Co., 153 N.W. 784, 187 Mich. 490.

Truth no test

"The controlling test is not whether the statement made is probably true, but whether it was made at a time when the declarant was in such a calm, reflective, and deliberate state of mind as to enable him to fabricate a statement, if he chose, thereby constituting the statement a narrative of a past transaction. Where the circumstances, as in this case, show that the statement was made while the declarant was in such a state of mind, it is immaterial whether what he said is true or false."—Erickson v. Edward Rutledge Timber Co., 191 P. 211, 214, 33 Idaho 179.

45. U.S.—Fort Street Union Depot

the reception of the statement.[46] The rule admitting spontaneous declarations meets the needs of justice when other evidence of the same fact cannot be procured,[47] and the modern tendency is toward the extension of the rule.[48] The result has been a very general recognition of spontaneity as a sufficient substitute for the requirement of contemporaneous connection, and the establishment of a rule to the effect that an unsworn statement is evidence of what it asserts, when it is so connected with the transaction as a whole that the utterance may fairly be regarded as an expression of feeling forced from the declarant by the pressure of the circumstances under which it was made, rather than the narrative result of thought.[49]

Statements which are merely self-serving are no

Co. v. Hillen, C.C.A.Mich., 119 F.2d 307—Overland Const. Co. v. Sydnor, C.C.A.Ohio, 70 F.2d 338—Chesapeake & O. Ry. Co. v. Mears, C.C.A.Va., 64 F.2d 291—Missouri State Life Ins. Co. v. Makiver, C.C.A.Pa., 4 F.2d 185, affirming, D.C., Makiver v. Missouri State Life Ins. Co., 296 F. 715.
Conn.—Perry v. Haritos, 124 A. 44, 100 Conn. 476.
Ky.—Davis v. Bennett's Adm'r, 132 S.W.2d 334, 279 Ky. 799—Louisville & N. R. Co. v. Rowland's Adm'r, 286 S.W. 929, 215 Ky. 663.
Mich.—Froman v. Banquet Barbecue, 278 N.W. 758, 284 Mich. 44.
Mo.—Sconce v. Jones, 121 S.W.2d 777, 343 Mo. 362.
Mont.—Sellers v. Montana-Dakota Power Co., 41 P.2d 44, 99 Mont. 39.
N.H.—Semprini v. Boston & M. R. R., 179 A. 349, 87 N.H. 279.
Tex.—Panhandle & S. F. Ry. Co. v. Huckabee, Civ.App., 207 S.W. 329.
W.Va.—Collins v. Equitable Life Ins. Co., 8 S.E.2d 825, 826, 130 A.L.R. 287, citing **Corpus Juris.**
22 C.J. p 461 note 91.

Spontaneity substitute for oath
Pa.—Rudisill v. Cordes, 5 A.2d 217, 333 Pa. 544.

The basis for this circumstantial probability of trustworthiness is that in the stress of nervous excitement the reflective faculties may be stilled and the utterance may become the unreflecting and sincere expression of one's actual impressions and belief.—Showalter v. Western Pac. R. Co., Cal., 106 P.2d 895, prior opinion, App., 96 P.2d 964.

46. U.S.—Wicker v. Scott, C.C.A. Ohio, 29 F.2d 807.
Ariz.—Pickwick Stages Corporation v. Williams, 287 P. 440, 442, 36 Ariz. 520, quoting **Corpus Juris.**
22 C.J. p 461 note 92.
"It is not necessary to the exclusion of such testimony that it be shown that the person making the statement did deliberate, design, or fabricate it, but it is necessary, to render the evidence admissible, that, under the conditions and circumstances prevailing during the moments of tenseness, the one making the statement was reasonably precluded from coolly deliberating or designing so as to fabricate in his own interest."—Holland v. Owners' Automobile Ins. Co. of New Orleans, La.App., 155 So. 780, 782.

Number of car
Plaintiff's testimony that man got number of truck as it was backing off curb after striking plaintiff, and wrote number on paper and gave it to plaintiff, was not admissible as "res gestæ" in that his action was dictated by thought.—Davis v. Texas Lumber Co., La.App., 146 So. 788.

Statement exculpatory in character was held inadmissible although made within a minute after the main fact, where it was not free from all suspicion of device or afterthought.—Chapman v. Gilmore, 143 S.E. 773, 38 Ga.App. 297.

Taint of fabrication excluded
Evidence of statements made by an injured person after injuries are sustained is inadmissible unless statements were a part of transaction so nearly coincident with it that taint of fraud and fabrication is excluded. Worley v. International Travelers Assur. Co., Tex.Civ.App., 110 S.W.2d 1202, error dismissed.

47. N.H.—Murray v. Boston, etc., R. Co., 54 A. 289, 72 N.H. 32, 101 Am. S.R. 660, 61 L.R.A. 495.
22 C.J. p 461 note 93.

48. Minn.—Jacobs v. Village of Buhl, 273 N.W. 245, 199 Minn. 572.
22 C.J. p 461 note 94.

49. U.S.—Rast v. Mutual Life Ins. Co. of New York, C.C.A.S.C., 112 F.2d 769—Somogyi v. Cincinnati, N. O. & T. P. Ry. Co., C.C.A.Ky., 101 F.2d 480—Chesapeake & O. Ry. Co. v. Mears, C.C.A.Va., 64 F.2d 291.
Cal.—Showalter v. Western Pac. R. Co., 106 P.2d 895, overruling all prior inconsistent cases, prior opinion, App., 96 P.2d 964.
Conn.—Perry v. Haritos, 124 A. 44, 100 Conn. 476.
Ky.—Sparks Bus Line v. Spears, 124 S.W.2d 1031, 276 Ky. 600—Friedman Co. v. Friedman, 113 S.W.2d 1172, 1174, 272 Ky. 205, citing **Corpus Juris**—Provident Life & Accident Ins. Co. of Chattanooga, Tenn., v. Diehlman, 82 S.W.2d 350, 259 Ky. 320—Honaker v. Crutchfield, 57 S.W.2d 502, 247 Ky. 495—National Life & Accident Ins. Co. v. Hedges, 27 S.W.2d 422, 425, 233 Ky. 840, citing **Corpus Juris.**
La.—Donaldson v. Riddling's Succession, App., 145 So. 804.
Md.—Patterson v. Baltimore & O. R. Co., 105 A. 159, 133 Md. 276.
Mo.—Bennette v. Hader, 87 S.W.2d 413, 337 Mo. 977, 101 A.L.R. 1190—Talbert v. Chicago, R. I. & P. Ry. Co., 284 S.W. 499, 314 Mo. 352—Landau v. Travelers' Ins. Co., 267 S.W. 376, 305 Mo. 563—Pryor v. Payne, 263 S.W. 982, 304 Mo. 560—Russell v. Metropolitan Life Ins. Co., App., 149 S.W.2d 432—Sculley v. Rolwing, App., 88 S.W.2d 394—Noland v. Morris & Co., 248 S.W. 627, 212 Mo.App. 1.
Neb.—Roh v. Opocensky, 253 N.W. 680, 126 Neb. 518.
N.J.—Slayback Van Order Co. v. Eiben, 177 A. 671, 115 N.J.Law 17—Wickham v. Monmouth Memorial Hospital, 162 A. 891, 10 N.J. Misc. 1086.
Pa.—Ceccato v. Union Collieries Co., 15 A.2d 401, 141 Pa.Super. 440—Smith v. State Workmen's Ins. Fund, 14 A.2d 554, 140 Pa.Super. 602—Broad Street Trust Co. v. Heyl Bros., 193 A. 397, 128 Pa. Super. 65—McMahon v. Edward G. Budd Mfg. Co., 164 A. 850, 108 Pa. Super. 235—Smith v. Welsh Bros., 156 A. 598, 102 Pa.Super. 54.
Tenn.—Pruitt v. Williams, 106 S.W. 2d 892, 21 Tenn.App. 171.
Tex.—Western Union Telegraph Co. v. Brown, Civ.App., 297 S.W. 267—St. Louis, B. & M. Ry. Co. v. Watkins, Civ.App., 245 S.W. 794.
Va.—Ellis v. Virginia Ry. & Power Co., 110 S.E. 382, 132 Va. 24.
W.Va.—Collins v. Equitable Life Ins. Co., 8 S.E.2d 825, 130 A.L.R. 287.
Wyo.—Bankers Life Co. v. Nelson, 108 P.2d 584, rehearing denied 111 P.2d 136.
22 C.J. p 461 note 95.
"What the law altogether distrusts is not after-speech, but afterthought."
U.S.—Halleck v. Hartford Accident & Indemnity Co., C.C.A.Tex., 75 F.2d 800, 803.
Ga.—Travelers' Ins. Co. v. Sheppard, 12 S.E. 18, 26, 85 Ga. 751.
Minn.—Arnold v. Northern States Power Co., 297 N.W. 182, 188.
Mont.—Sullivan v. Metropolitan Life Ins. Co., 29 P.2d 1046, 1050, 96 Mont. 254.

part of the res gestæ,[50] unless the circumstances are such as clearly to exclude the idea of premeditation, in which case the self-serving character of the statement does not preclude its admission.[51]

§ 418. —— Determination as to Spontaneity in General

The burden rests on the party offering a statement to show that it is in fact spontaneous, and if it appears that there was sufficient opportunity for invention or fabrication it will be rejected.

The burden rests on the party who offers a declaration as part of the res gestæ to show that it was in fact spontaneous,[52] and the admissibility of evidence as part of the res gestæ is, of course, a question for the court to decide and it should not be left to the jury.[53] To be admissible it must appear that such statement was made under circumstances showing lack of opportunity for reflection,[54] or, as sometimes stated, it must be such as to exclude the idea of premeditation,[55] and if under the circumstances it appears that a sufficient opportunity for the invention or fabrication of a story was afforded the statement will be rejected.[56] The impossibility of formulating any precise rule as to when a statement should or should not be regarded as spontaneous, and the resulting necessity that each case shall be determined according to its own peculiar facts, have led to a very general adoption of the view that the determination as to spontaneity is a matter resting in the discretion of the trial court.[57] The propriety of this view, however, has been seriously questioned, on the ground that it places the rights of the parties, as to the use of hearsay in one of its most dangerous forms, largely on the decision of a preliminary question of fact, which it is difficult, if not practically impossible, to review,[58] and it has even been held that whether a statement should be

In Vermont the text rule is not followed, it being held that the statement must be contemporaneous with the principal fact.—Goulette's Adm'r v. Grand Trunk Ry. Co., 107 A. 118, 93 Vt. 266.

50. Ga.—Gullatt v. Thompson, 6 S.E.2d 447, 61 Ga.App. 253.
Mo.—Robyn v. New Amsterdam Casualty Co., App., 257 S.W. 1065.
Tex.—Brightwell v. Scott, Civ.App., 111 S.W.2d 739, error dismissed.
22 C.J. p 462 note 99.

A report made by defendant's employees who examined the engine on which plaintiff was injured for the purpose of ascertaining whether any defect existed is self serving, and, when made with deliberation at a time wholly disconnected with the main event, it cannot be admitted as part of the res gestæ.—Aly v. Terminal R. R. Ass'n of St. Louis, 78 S.W.2d 851, 336 Mo. 340.

Consideration of interest
In determining whether evidence is admissible as part of "res gestæ," the trial court can consider the declarant's interest, whether declarations are against interest, and the incentive to color the facts or deliberately make a fabrication of them.—Martin v. City of Corsicana, Tex. Civ.App., 130 S.W.2d 405, error dismissed, judgment correct.

Testimony by party
The res gestæ doctrine should not be extended to permit a party to testify to his own self-serving declarations.—Perkins v. Great Northern Ry. Co., 188 N.W. 564, 152 Minn. 226.

51. Ky.—Commonwealth Life Ins. Co. v. Clarke, 123 S.W.2d 811, 276 Ky. 151.
Mo.—Edwards v. Ethyl Gasoline Corporation, 112 S.W.2d 555, 560, 342 Mo. 98, quoting **Corpus Juris**—Bennette v. Hader, 87 S.W.2d 413, 337 Mo. 977, 101 A.L.R. 1190—Coffey v. S. S. Kresge Co., App., 102 S.W.2d 161—Weller v. Weaver, 100 S.W.2d 594, 231 Mo.App. 400.
N.H.—Semprini v. Boston & M. R. R., 179 A. 349, 87 N.H. 279.
S.C.—Carson v. McCaskill, 99 S.E. 108, 111 S.C. 516.
22 C.J. p 230 note 65, p 462 notes 1, 2.

52. U.S.—Ætna Life Ins. Co. v. Kern-Bauer, C.C.A.Okl., 62 F.2d 477.
Ill.—Johnson v. Swords Co., 3 N.E.2d 705, 286 Ill.App. 377.
Mich.—Sanborn v. Income Guaranty Co., 221 N.W. 162, 244 Mich. 99.
Mo.—Polk v. Missouri-Kansas-Texas R. Co., 142 S.W.2d 1061, 1064, 346 Mo. 793, quoting **Corpus Juris**—Sconce v. Jones, 121 S.W.2d 777, 782, 343 Mo. 362, citing **Corpus Juris**—Woods v. Southern Ry. Co., 73 S.W.2d 374, 377, quoting **Corpus Juris**—Hatfield v. Southwestern Grocer Co., App., 104 S.W.2d 717—Brashear v. Missouri Pac. R. Co., App., 6 S.W.2d 650.
N.C.—Staley v. Royal Pines Park, 162 S.E. 202, 202 N.C. 155.
22 C.J. p 462 note 3.

53. Ind.—Lake Erie & W. R. Co. v. Scott, 147 N.E. 315, 83 Ind.App. 357.
N.H.—Nawn v. Boston & M. R. R., 91 A. 181, 77 N.H. 299.
Tex.—Texas Employers Ins. Ass'n v. Shiflette, Civ.App., 91 S.W.2d 787, error dismissed.

Question of law for court
Ga.—Usry v. Augusta Southern R. Co., 102 S.E. 184, 24 Ga.App. 722.

54. U.S.—Fort Street Union Depot Co. v. Hillen, C.C.A.Mich., 119 F.2d 307.
Mo.—Russell v. Metropolitan Life Ins. Co., App., 149 S.W.2d 432.

The material inquiry is whether the statements were made at a time and under such circumstances as to induce the belief that they were not the result of reflection and premeditation.—Tongue v. Perrigo, 265 N.W. 737, 130 Neb. 564.

55. Tex.—Texas Employers Ins. Ass'n v. Shiflette, Civ.App., 91 S.W.2d 787, error dismissed.

56. Ind.—Lake Erie & W. R. Co. v. Scott, 147 N.E. 315, 83 Ind.App. 357—Sovereign Camp, W. O. W. v. Ferguson, 141 N.E. 356, 88 Ind.App. 144.
Mo.—Woods v. Southern Ry. Co., 73 S.W.2d 374, 377, quoting **Corpus Juris**—Evans v. Sears, Roebuck & Co., App., 129 S.W.2d 53.
Tex.—Wall & Stale Co. v. Berger, Civ.App., 212 S.W. 975.
22 C.J. p 462 note 4.

57. Ill.—Johnson v. Swords Co., 3 N.E.2d 705, 286 Ill.App. 377.
Ind.—Kelley v. Dickerson, 13 N.E.2d 535, 213 Ind. 624.
Minn.—O'Connor v. Chicago, M., St. P. & P. Ry. Co., 251 N.W. 671, 190 Minn. 277, followed in 253 N.W. 670, 190 Minn. 290, certiorari denied Chicago, M., St. P. & P. R. Co. v. O'Connor, 54 S.Ct. 860, 292 U.S. 651, 78 L.Ed. 1500.
Mo.—Woods v. Southern Ry. Co., 73 S.W.2d 374.
Tex.—Panhandle & S. F. Ry. Co. v. Huckabee, Civ.App., 207 S.W. 329.
22 C.J. p 462 note 5.

Some element of discretion
Cal.—Showalter v. Western Pac. R. Co., 106 P.2d 895, prior opinion, App., 96 P.2d 964.

58. Colo.—Equitable Mut. Acc. Ass'n v. McClusky, 29 P. 383, 1 Colo.App. 473.
Or.—Sullivan v. Oregon R. & Nav.

considered as part of the res gestæ is a matter to be determined by the jury.[59]

§ 419. —— Elements for Consideration

A number of circumstances, such as the time elapsed, the condition of the declarant, the influence of intervening occurrences, and the nature and circumstances of the statement will be considered in determining its spontaneity.

While it is obvious that a declaration or an act is usually spontaneous in proportion as it is near, in point of time, to the occurrence which calls it forth, the circumstances of the case or the nature of the statement may be such as to offset any inference as to spontaneity which might otherwise arise from proximity or remoteness in point of time.[60] The element of time is, therefore, not controlling, but merely of importance, on the question of spontaneity.[61] Thus, while declarations made "immediately" after the main event have been received in a large number of cases,[62] there are numerous other cases in which declarations have been rejected notwithstanding the proximity in point of time thus indicated.[63] So, while the closeness of connection, indicated by various indefinite expressions, as "almost immediately after,"[64] "just after,"[65] "just right after,"[66] "shortly after,"[67] "soon after,"[68] "a few minutes after,"[69] "a very few minutes after,"[70] or "a short time after,"[71] has been held to render the statement competent, the courts have rejected statements alleged to have been made "almost immediately after,"[72] "a few minutes after,"[73] "several minutes after,"[74] "shortly after,"[75] "just after,"[76] or "several hours after,"[77] the main event. The same divergence of opinion is found in cases in which the time elapsed is definitely stated. Thus a declaration or act has been received where it followed the main event by the space of one minute,[78] two minutes,[79]

Co., 7 P. 508, 12 Or. 392, 53 Am.R. 364.

59. Mont.—State v. Tighe, 71 P. 8, 27 Mont. 327.

60. Cal.—Losleben v. California State Life Ins. Co., 6 P.2d 1012, 119 Cal.App. 556.
Minn.—Perkins v. Great Northern Ry. Co., 188 N.W. 564, 152 Minn. 226.
22 C.J. p 462 note 97, 8, p 463 note 9.

61. U.S.—Missouri State Life Ins. Co. v. Makiver, C.C.A.Pa., 4 F.2d 185, affirming, D.C., Makiver v. Missouri State Life Ins. Co., 296 F. 715.
Ariz.—Pickwick Stages Corporation v. Williams, 287 P. 440, 36 Ariz. 520.
Conn.—Perry v. Haritos, 124 A. 44, 100 Conn. 476.
Idaho.—Erickson v. Edward Rutledge Timber Co., 191 P. 212, 33 Idaho 179.
Iowa.—Stukas v. Warfield, Pratt, Howell Co., 175 N.W. 81, 188 Iowa 878.
La.—Holland v. Owners' Automobile Ins. Co. of New Orleans, App., 155 So. 780.
Minn.—Jacobs v. Village of Buhl, 273 N.W. 245, 199 Minn. 572—Linderoth v. Kieffer, 203 N.W. 415, 162 Minn. 440.
Mo.—Bailey v. Metropolitan Life Ins. Co., App., 115 S.W.2d 151, certiorari quashed State ex rel. Metropolitan Life Ins. Co. v. Shain, 121 S.W. 2d 789, 343 Mo. 435—Cramer v. Parker, App., 100 S.W.2d 640—Scism v. Alexander, 93 S.W.2d 36, 40, 230 Mo.App. 1175, citing **Corpus Juris**—Brashear v. Missouri Pac. R. Co., App., 6 S.W.2d 650.
Mont.—Sullivan v. Metropolitan Life Ins. Co., 29 P.2d 1046, 96 Mont. 254.
N.J.—Slayback Van Order Co. v. Eiben, 177 A. 671, 115 N.J.Law 17.
S.D.—Chiles v. Rohl, 201 N.W. 154, 47 S.D. 580.
Tex.—Texas Employers Ins. Ass'n v. Shifflette, Civ.App., 91 S.W.2d 787, error dismissed—Heaton v. Globe Indemnity Co., Civ.App., 71 S.W.2d 328, error dismissed.
Utah.—Jackson v. Utah Rapid Transit Co., 290 P. 970, 77 Utah 21.
Wis.—Kressin v. Chicago & N. W. Ry. Co., 215 N.W. 908, 194 Wis. 480.
22 C.J. p 463 notes 10, 11.

62. Ark.—Intercity Terminal Ry. Co. v. Worden, 6 S.W.2d 547, 177 Ark. 464.
Ind.—Red Star Yeast Co. v. Shackleford, 171 N.E. 302, 91 Ind.App. 370.
Okl.—Jackson v. Hedlund, 10 P.2d 385, 157 Okl. 14.
Pa.—Redrick v. Knapp Bros. Co., 193 A. 117, 127 Pa.Super. 92.
22 C.J. p 463 note 12.

63. Ga.—Pool v. Warren County, 51 S.E. 328, 123 Ga. 205, 206.
22 C J. p 463 note 13.

64. U.S.—Pierce v. Van Dusen, Ohio, 78 F. 693, 24 C.C.A. 280, appeal dismissed 19 S.Ct. 879, 43 L.Ed. 1184.
Mich.—Jolman v. Alberts, 158 N.W. 170, 192 Mich. 25.
Wis.—Johnson v. St. Paul, etc., Coal Co., 105 N.W. 1048, 126 Wis. 492.

65. Ky.—Louisville & N. R. R. Co. v. Earl's Adm'x, 22 S.W. 607, 94 Ky. 368, 15 Ky.L. 184.

66. N.C.—Seawell v. Carolina Cent. R. Co., 44 S.E. 610, 132 N.C. 856, 45 S.E. 850, 133 N.C. 515.

67. Okl.—Herring v. Hood, 155 P. 253, 55 Okl. 737.

68. Pa.—Tomczak v. Susquehanna Coal Co., 95 A. 465, 250 Pa. 325.

69. Neb.—Roh v. Opocensky, 251 N. W. 102, 125 Neb. 551.
Okl.—Henry Chevrolet Co. v. Taylor, 108 P.2d 1024.
Utah.—State v. Rasmussen, 68 P.2d 176, 179, 92 Utah 357, citing **Corpus Juris**—Balle v. Smith, 17 P. 2d 224, 231, 81 Utah 179, citing **Corpus Juris.**
22 C.J. p 463 note 19.

70. Nev.—State v. Ah Loi, 5 Nev. 99.

71. La.—State v. Foley, 36 So. 885, 113 La. 52, 104 Am.S.R. 493.
Wash.—State v. Smith, 67 P. 70, 26 Wash. 354.

72. N.Y.—Norris v. Interurban St. R. Co., 90 N.Y.S. 460.

73. Ala.—Ashworth v. Alabama Great Southern R. Co., 99 So. 191, 211 Ala. 20—Birmingham & A. Ry. Co. v. Campbell, 82 So. 546, 203 Ala. 296.
22 C.J. p 464 note 23.

74. Ala.—Pitts v. State, 37 So. 101, 140 Ala. 70.
Ark—Hot Springs St. R. Co. v. Hildreth, 82 S.W. 245, 72 Ark. 572.

75. Utah.—Balle v. Smith, 17 P.2d 224, 81 Utah 179.
22 C.J. p 464 note 25.

76. Ind.—Indianapolis St. R. Co. v. Whitaker, 66 N.E. 433, 160 Ind. 125.

77. Neb.—Young v. Johnson & Blind, 202 N.W. 463, 113 Neb. 149.
Or.—Hartley v. State Industrial Accident Commission, 261 P. 71, 123 Or. 310.

78. Ky.—Roberts v. Louisville R. Co., 181 S.W. 1131, 168 Ky. 230.
N.C.—Seawell v. Carolina Cent. R. Co., 44 S.E. 610, 132 N.C. 856, 45 S. E. 850, 133 N.C. 515.

79. Ky.—Louisville & N. R. Co. v. Horton, 219 S.W. 1084, 187 Ky. 617.
Ohio.—Williamson v. Shobe, 24 Ohio N.P., N.S., 533.
Tex.—Southwestern Portland Cement Co. v. Graves, Civ.App., 208 S.W. 979.
22 C.J. p 464 notes 28, 29.

three minutes,[80] four minutes,[81] five minutes,[82] six minutes,[83] seven minutes,[84] ten minutes,[85] fifteen minutes,[86] twenty minutes,[87] thirty minutes,[88] forty-five minutes,[89] an hour,[90] two hours,[91] or, under exceptional circumstances by even a longer period of time.[92] On the other hand, courts have rejected acts done or statements made one minute,[93] or more,[94] two minutes,[95] three or four minutes,[96] five minutes,[97] seven minutes,[98] eight minutes,[99] ten minutes,[1] statements made fifteen minutes[2] and

Two or three minutes
Tex.—Gillette Motor Transport v. Kelly, Civ.App., 141 S.W.2d 959.

80. Ky.—Norton's Adm'r v. Winstead, 291 S.W. 723, 218 Ky. 488.
Tex.—American Express Co. v. Chandler, Civ.App., 215 S.W. 364, reversed on other grounds, Com.App., 231 S.W. 1085.
Utah.—Jackson v. Utah Rapid Transit Co., 290 P. 970, 77 Utah 21.
22 C.J. p 464 note 30.

81. Mo.—Lynch v. Missouri-Kansas-Texas R. Co., 61 S.W.2d 918, 333 Mo. 89.
22 C.J. p 464 note 31.
Four or five minutes
Minn.—O'Connor v. Chicago, M., St. P. & P. Ry. Co., 251 N.W. 674, 190 Minn. 277, followed in 253 N.W. 676, 190 Minn. 290, certiorari denied Chicago, M., St. P. & P. R. Co. v. O'Connor, 54 S.Ct. 860, 292 U.S. 651, 78 L.Ed. 1500.

82. U.S.—Fort Street Union Depot Co. v. Hillen, C.C.A.Mich., 119 F.2d 307.
Ark.—Public Utilities Corporation of Arkansas v. Cordell, 43 S.W.2d 746, 184 Ark. 278.
Iowa.—Barrett v. Chicago, M. & St. P. Ry. Co., 175 N.W. 950, 190 Iowa 509, rehearing denied 180 N.W. 670, 190 Iowa 509.
Mo.—Pryor v. Payne, 263 S.W. 982, 304 Mo. 560.
S.C.—Hudy v. Atlantic Greyhound Lines, 191 S.E. 85, 183 S.C. 306.
Tex.—Zurich General Accident & Liability Ins. Co. v. Moss, Civ.App., 113 S.W.2d 410, error dismissed—Tyreco Refining Co. v. Cook, Civ.App., 110 S.W.2d 219, error dismissed.
22 C.J. p 464 note 32.
Within five or ten minutes
Pa.—Rassis v. Philadelphia & R. Ry. Co., 136 A. 204, 281 Pa. 96.
Tex.—Western Union Telegraph Co. v. Brown, Civ.App., 297 S.W. 267.

83. Tex.—San Antonio & A. P. R. Co. v. Gray, 67 S.W. 763, 95 Tex. 424.

84. Six or seven minutes
R.I.—Champlin v. Pawcatuck Valley St. R. Co., 83 A. 461, 33 R.I. 572.

85. Kan.—Miller v. Hartman, 36 P.2d 985, 140 Kan. 398.
Pa.—Johnston v. Payne-Yost Const. Co., 141 A. 481, 292 Pa. 509.
22 C.J. p 464 note 35.
Ten or fifteen minutes
Mich.—Froman v. Banquet Barbecue, 278 N.W. 758, 284 Mich. 44.
Wash.—Whiting v. City of Seattle 258 P. 834, 144 Wash. 668.

86. N.C.—Young v. Stewart, 131 S.E. 735, 191 N.C. 297.
S.C.—Cobb v. Southern Public Utilities Co., 187 S.E. 363, 181 S.C. 310.
Tex.—Houston & T. C. R. Co. v. Brooks, Civ.App., 294 S.W. 283.
22 C.J. p 464 note 36.
Fifteen or twenty minutes
Mich.—Rife v. Gafill Oil Co., 209 N.W. 172, 235 Mich. 15.
Fifteen to thirty minutes
Okl.—Travelers Ins Co. v. Minton, 73 P.2d 423, 181 Okl 306.
Pa.—Rodgers v. Woodcock Valley Telephone Co., 93 Pa.Super. 445.

87. W.Va.—Ambrose v. Young, 130 S.E 810, 100 W.Va. 452.
Wis.—Kressin v. Chicago & N. W. Ry. Co., 215 N.W. 908, 194 Wis. 480.
22 C.J. p 464 note 37.
Twenty or twenty-five minutes
Pa.—Broad Street Trust Co. v. Heyl Bros., 193 A. 397, 128 Pa.Super. 65.

88. Tex.—Texas Employers' Ins. Ass'n v. Harbuck, Civ.App., 73 S.W.2d 113, error dismissed.
Wash.—Hines v. Foster, 6 P.2d 597, 166 Wash. 165.
22 C.J. p 464 note 38.

89. Minn.—Jacobs v. Village of Buhl, 273 N.W. 245, 199 Minn. 572—Roach v. Great Northern R. Co., 158 N.W. 232, 133 Minn. 257.
Forty or fifty minutes
Mo.—Goucher v. Woodmen Accident Co. of Lincoln, Neb., 104 S.W.2d 289, 231 Mo.App. 573.

90. Tex.—Dallas Hotel Co. v. Fox, Civ.App., 196 S.W. 647, affirmed Fox v. Dallas Hotel Co., 240 S.W. 517, 111 Tex. 461.
22 C.J. p 464 note 40.
Between forty and sixty minutes
Tex.—Martin v. City of Corsicana, Civ.App., 130 S.W.2d 405, error dismissed, judgment correct.
Within hour
Tex.—Southern Surety Co. v. Weaver, Civ.App., 260 S.W. 632, affirmed, Com.App., 273 S.W. 838—Norwich Union Indemnity Co. v. Smith, Civ.App., 3 S.W.2d 120, certified question answered 298 S.W. 403, 117 Tex. 103, and affirmed, Com.App., 12 S.W.2d 558.

91. Tex.—Tullos v. Texas Pipe Line Co., Civ.App., 145 S.W.2d 307, error dismissed, judgment correct.

92. Pa.—Commonwealth v. Werntz, 29 A. 272, 161 Pa. 591.
Tex.—Lewis v. State, 15 S.W. 642, 29 Tex.App. 201, 25 Am.S.R. 720.
22 C.J. p 464 note 41.
Day after
Conductor's statements, made the day after a wreck, to a passenger from whom, as part of his duty in connection with the wreck, he was attempting to get a statement, were held to be admissible.—Nelson v. Charleston & W. C. Ry. Co., 121 S.E. 198, 93 S.C. 131.
Few days
It has been stated that matters of this kind should be tested, not so much by the closeness of time, but by their causal relation, and that the inquiry should relate to the event, rather than to the precise time elapsed. Accordingly, the statements of a telegraph agent to a sender, a few days after the taking of an undelivered message, were held to be competent.—Williams v. Western Union Telegraph Co., 136 S.E. 215, 138 S.C. 281.

93. Ill.—Leckliter v. Chicago City R. Co., 113 Ill.App. 129.

94. Ga.—Chapman v. Atlanta, 142 S.E. 773, 38 Ga.App. 297.
22 C.J. p 464 note 17.

95. Mo.—Smith v. East St. Louis Ry. Co., 123 S.W.2d 198, 233 Mo.App. 1220.
22 C.J. p 464 note 44.

96. Me.—Barnes v. Rumford, 52 A. 844, 96 Me. 315.
22 C.J. p 464 note 45.

97. Ark.—Liberty Cash Grocers v. Clements, 102 S.W.2d 536, 193 Ark. 806.
22 C.J. p 464 note 16.
Five or ten minutes
Tex.—Rosenthal Dry Goods Co. v. Hillebrandt, Civ.App., 299 S.W. 542.

98. Cal.—Kimic v. San Jose-Los Gatos Interurban R. Co., 145 P. 94, 156 Cal. 379.

99. La.—State v. Melton, 37 La.Ann. 77.

1. Conn.—Kraemer v. City of Waterbury, 136 A. 93, 105 Conn. 476.
Mich.—Phinney v. Detroit United Ry. Co., 205 N.W. 121, 232 Mich. 399.
Ohio.—Lacey v. Heisey, 5 N.E.2d 699, 53 Ohio App. 151.
22 C.J. p 464 note 49.
Ten to thirty minutes
Ind.—Lake Erie & W. R. Co. v. Mcott, 147 N.E. 913, 83 Ind.App. 257.

2. U.S.—Williams v. Great Southern Lumber Co., La., 44 S.Ct. 417, 277 U.S. 19, 72 L.Ed. 761, affirming, C.

likewise statements made twenty minutes,[3] twenty-five minutes,[4] thirty minutes,[5] forty minutes,[6] forty-five minutes,[7] one hour,[8] one hour and a half,[9] two hours,[10] three hours,[11] four or five hours,[12] eight to twelve hours,[13] ten hours,[14] twelve hours,[15] or a day[16] after the main event. It has been sought, but unsuccessfully, to introduce as res gestæ statements made a number of days,[17] nearly a week,[18] a week,[19] ten days,[20] three weeks,[21] six weeks,[22] three months,[23] six months,[24] and even more than a year,[25] after the main event.

Condition of declarant. A consideration of importance in determining the question of spontaneity is how far the fact out of which the declaration arises is of a nature to create a more or less permanent impression on the mind of declarant.[26] A statement will ordinarily be deemed spontaneous if, at the time when it was made, the condition of declarant was such as to raise an inference that the effect of the occurrence on his mind still continued, as where he had just received a serious inju-

C.A., Great Southern Lumber Co. v. Williams, 17 F.2d 468, which reversed, D.C., Williams v. Great Southern Lumber Co., 13 F.2d 246, and certiorari granted 48 S.Ct. 19, 275 U.S. 511, 72 L.Ed. 399—Frederick Leyland & Co. v. Hornblower, Mass., 256 F. 289, 167 C.C.A. 461.
Mich.—Sexton v. Balinski, 273 N.W. 335, 280 Mich. 28.
S.D.—Stratton v. Sioux Falls Traction System, 226 N.W. 644, 55 S.D. 464.
Tex.—Wall & Stabe Co. v. Berger, Civ.App., 212 S.W. 975.
22 C.J. p 464 note 50.

3. Tex.—St. Louis Southwestern Ry. Co. of Texas v. Gross, Civ.App., 268 S.W. 487.
22 C.J. p 465 note 51.

4. **Twenty-five to thirty minutes**
Del.—State v. Frazier, Houst. Cr. 176.
Neb.—Milton v. City of Gordon, 263 N.W. 208, 129 Neb. 888.

5. Ala.—Teague v. Alabama Coca-Cola Bottling Co., 95 So. 883, 209 Ala. 205.
Ky.—Metropolitan Life Ins. Co. v. Osborne, 150 S.W.2d 479, 286 Ky. 301.
Minn.—Zane v. Home Ins. Co. of New York, 254 N.W. 453, 191 Minn. 382.
N.Y.—Sokolof v. Donn, 194 N.Y.S. 580.
Tex.—Foster v. Beckman, Civ.App., 85 S.W.2d 789, error refused.
Wis.—Hamilton v. Reinemann, 290 N.W. 194, 233 Wis. 572—Zastrow v. Schaumburger, 245 N.W. 202, 210 Wis. 116.
22 C.J. p 465 note 53.
"Evidence of statements made by the driver as much as thirty minutes after the accident should not have been admitted under the res gestæ rule; but should have been limited to statements made within five to ten minutes following the accident."—Consolidated Coach Corporation v. Earls' Adm'r, 94 S.W.2d 6, 9, 263 Ky. 814.
Thirty to forty minutes
Mich.—Ayling v. City of Detroit, 266 N.W. 372, 275 Mich. 338.

6. Ky.—Dennes v. Jefferson Meat Market, 14 S.W.2d 408, 228 Ky. 164.
Mo.—Grotjan v. Thompson, App., 140 S.W.2d 706.
Forty minutes to one hour
Okl.—Roy v. St. Louis-San Francisco Ry. Co., 4 P.2d 1038, 153 Okl. 270.

7. U.S.—Bonner v. Texas Co., C.C.A. Tex., 89 F.2d 291—Standard Oil Co. of New Jersey v. Neville, C.C.A.W. Va., 48 F.2d 580.
N.Y.—Muessling v. Leisner, 224 N.Y.S. 689, 221 App.Div. 524.
22 C.J. p 465 note 54.

8. Mo.—Sconce v. Jones, 121 S.W.2d 777, 343 Mo. 362.
Pa.—Watson v. A. M. Byers Co., 14 A.2d 201, 140 Pa.Super. 245.
W.Va.—Collins v. Equitable Life Ins. Co., 8 S.E.2d 825, 130 A.L.R. 287.
22 C.J. p 465 note 55.

9. Ga.—Usry v. Augusta Southern R. Co., 102 S.E. 184, 24 Ga.App. 722.
Ind.—G. W. Opell Co. v. Phillips, 169 N.E. 354, 90 Ind.App. 552.
La.—Ellis v. Edwards, App., 183 So. 116.
Pa.—McCaulif v. Griffith, 168 A. 536, 110 Pa.Super. 522.
Tex.—Panhandle & S. F. Ry. Co. v. Huckabee, Civ.App., 207 S.W. 329.
22 C.J. p 465 note 56.

10. Idaho.—Erickson v. Edward Rutledge Timber Co., 191 P. 212, 33 Idaho 179.
Ky.—Friedman Co. v. Friedman, 113 S.W.2d 1172, 272 Ky. 205.
Tex.—McDowell v. Security Union Ins. Co., Civ.App., 10 S.W.2d 782.
22 C.J. p 465 note 57.

11. Okl.—Wray v. Garrett, 90 P.2d 1050, 185 Okl. 138.
Pa.—Goettel v. Pittsburgh Coal Co., 14 A.2d 344, 140 Pa.Super. 516.
Utah.—Zion's Co-öp. Mercantile Institution v. Industrial Commission of Utah, 262 P. 99, 70 Utah 549.
22 C.J. p 465 note 58.

12. U.S.—Smith v. United States, C.C.A.Wash., 47 F.2d 518, 520, citing **Corpus Juris.**
22 C.J. p 465 note 59.
Five and one-half hours
Tex.—Gooden v. Ætna Life Ins. Co., Civ.App., 84 S.W.2d 563.

13. Pa.—Thomas v. De Commene, 3 A.2d 41, 133 Pa.Super. 489.

14. U.S.—Kyner v. Portland Gold Min. Co., Colo., 184 F. 43, 106 C.C.A. 245.

15. Fla.—Lambright v. State, 16 So. 582, 34 Fla. 564.

16. Ky.—Prestonsburg Superior Oil Gas Co. v. Wheeler, 284 S.W. 409, 215 Ky. 85.
Mich.—Fishbaine v. White Star Line, 194 N.W. 494, 224 Mich. 173.
Ohio.—Weaver v. Industrial Commission of Ohio, 181 N.E. 894, 125 Ohio St. 465, affirming Industrial Commission of Ohio v. Weaver, 187 N.E. 186, 45 Ohio App. 371.
S.C.—Kitchens v. Melton, 87 S.E. 1006, 103 S.C. 270.

17. Ala.—Smith v. Bugg, 100 So. 503, 211 Ala. 341.
N.D.—Kutchera v. Minneapolis, St. P. & S. S. M. Ry. Co., 212 N.W. 51, 54 N.D. 897.

18. Ark.—St. Louis, R. I. & P. R. Co. v. Enlow, 171 S.W. 912, 115 Ark. 584.

19. Mo.—Reisinger v. Kansas City Rys. Co., App., 211 S.W. 909.

20. Colo.—Chappell v. John, 99 P. 44, 45 Colo. 45, 132 Am.S.R. 134, 16 Ann.Cas. 854.

21. Ky.—John H. Radel Co. v. Borches, 145 S.W. 155, 147 Ky. 506, 39 L.R.A.,N.S., 227.
Mont.—Rossberg v. Montgomery Ward & Co., 99 P.2d 979, 110 Mont. 154.

22. N.Y.—People v. Hawkins, 17 N.E. 371, 109 N.Y. 408.

23. Ky.—Castleman-Blakemore Co. v. Brucker, 180 S.W. 360, 167 Ky. 269.

24. Colo.—Colorado Midland R. Co. v. McGarry, 92 P. 915, 41 Colo. 398.

25. Ky—South Covington & C. Ry. Co. v. Goldsmith, 218 S.W. 286, 187 Ky. 68.
Tex.—Parks v. Knox, Civ.App., 130 S.W. 203.

26. N.H.—Murray v. Boston & M. R. Co., 54 A. 289, 72 N.H. 32, 37, 101 Am.S.R. 660, 61 L.R.A. 495.
22 C.J. p 465 note 73.

ry,[27] was suffering severe pain,[28] or was under intense excitement.[29] Conversely, a lack of spontaneity may be inferred from the cool demeanor of declarant,[30] his consciousness of the absence of all danger,[31] his delay in making a statement until witnesses can be procured,[32] or from the fact that he made a different statement prior to the one which is offered in evidence.[33] A statement made as soon as declarant has recovered consciousness[34] or the ability to speak[35] may fairly be regarded as spontaneous, even though a considerable time has elapsed since the principal occurrence; but a relapse into unconsciousness after an interval following an injury does not render competent statements made on again returning to consciousness.[36] The fact of declarant's death soon after making the statement is an element which the court may consider in determining the admissibility of the statement.[37] Where declarant died as a result of the injury, two important elements with reference to the admissibility of a statement made by him are: (1) Was he suffering great pain at the time the statement was made? (2) Did death from the injury follow soon after the making of the statement?[38] A statute permitting the admission of certain dying declarations in criminal cases has no application to civil cases,[39] and a dying declaration to be admissible in a civil case must be a part of the res gestæ.[40]

Influence of intervening occurrences. An important consideration is whether there intervened, between an occurrence and a statement relative thereto, any circumstances calculated to divert the mind of declarant, and thus restore his mental balance and afford opportunity for deliberation.[41] Diversion of thought may be the result of attention to other matters,[42] or the receipt of medical assistance,[43] although a statement made by an injured person while trying to secure such assistance has been regarded as spontaneous.[44] The effect of removal from the place of the main or principal fact has already been discussed in § 414.

Nature and circumstances of statement. In determining the question of spontaneity, it is important to consider the form and nature of the statement and the circumstances under which it was made.[45] So, while a statement against the appar-

27. Mo.—Sculley v. Rolwing, App., 88 S.W.2d 394, 398, quoting **Corpus Juris**.
Tex.—International Travelers' Ass'n v. Griffing, Civ.App., 264 S.W. 263, error dismissed National Compress Co. v. Hamlin, 269 S.W. 1024, 114 Tex. 375.
22 C.J. p 465 note 75.

28. Iowa.—Stukas v. Warfield, Pratt, Howell Co., 175 N.W. 81, 188 Iowa 878.
Ohio.—Van Allen v. Industrial Commission of Ohio, 26 Ohio N.P., N.S., 179.
Tex.—Southern Surety Co. v. Weaver, Civ.App., 260 S.W. 622, affirmed, Com.App., 273 S.W. 838.
22 C.J. p 466 note 76.

29. Wash.—Britton v. Washington Water Power Co., 110 P. 20, 59 Wash. 440, 140 Am.S.R. 858, 33 L.R.A.N.S., 109.
22 C.J. p 466 note 77.

30. Tex.—Brown v. State, Cr., 44 S.W. 174.

31. Idaho.—People v. Dewey, 6 P. 103, 2 Idaho (Hasb.) 83.
Miss.—Kraner v. State, 61 Miss. 158.
N.J.—Estell v. State, 17 A. 118, 51 N.J.Law 182.

32. Kan.—Atchison, T. & S. F. R. Co. v. Logan, 70 P. 878, 65 Kan. 748.

33. Ky.—Fitzgerald v. Commonwealth, 6 S.W. 152, 9 Ky.L. 664.

34. Fla.—Foster v. Thornton, 170 So. 459, 125 Fla. 699.
Mo.—Bennette v. Hader, 87 S.W.2d 413, 337 Mo. 977, 101 A.L.R. 1190—Barlow v. Shawnee Inv. Co., 48 S.W.2d 31, 50, citing **Corpus Juris**.
N.J.—Demeter v. Rosenberg, 175 A. 621, 114 N.J.Law 55.
Okl.—Chicago, R. I. & P. Ry. Co. v. Owens, 186 P. 1092, 78 Okl. 50, certiorari denied 40 S.Ct. 485, 253 U.S. 489, 64 L.Ed. 1027.
Pa.—Smith v. State Workmen's Ins. Fund, 14 A.2d 554, 556, 140 Pa.Super. 602, quoting **Corpus Juris**.
S.C.—Cobb v. Southern Public Utilities Co., 187 S.E. 363, 181 S.C. 310.
Tex.—International Travelers' Ass'n v. Milaun, Civ.App., 270 S.W. 246.
22 C.J. p 466 note 82.

35. Pa.—Eby v. Travelers' Ins. Co., 102 A. 209, 258 Pa. 525.
Tex.—Fulcher v. State, 13 S.W. 750, 28 Tex.App. 465.

36. Mo.—State v. Curtis, 70 Mo. 594.
Pa.—Smith v. State Workmen's Ins. Fund, 14 A.2d 554, 140 Pa.Super. 602.

37. Tex.—Dallas Hotel Co. v. Fox, Civ.App., 196 S.W. 647, affirmed Fox v. Dallas Hotel Co., 240 S.W. 517, 111 Tex. 461.

Evidence held admissible as part of the res gestæ where declarant died soon after making the statement.
Okl.—Standard Accident Ins. Co. v. Baker, 291 P. 962, 145 Okl. 100.
Tex.—Tullos v. Texas Pipe Line Co., Civ.App., 145 S.W.2d 267, error dismissed, judgment correct.

Under some statutes, in actions for death caused by wrongful act, neglect, etc., of another, the dying declarations of deceased as to the cause of his death are admissible in like manner and under the same rules as the dying declarations of deceased in criminal actions for homicide. These declarations extend to the act of killing and the circumstances immediately attending the act and forming a part of the res gestæ.—Dellinger v. Elliott Bldg. Co., 123 S.E. 78, 187 N.C. 845; Latham v. Andrews Mfg. Co., 105 S.E. 423, 180 N.C. 627.

38. Tex.—Texas Employers Ins. Ass'n v. Shilliette, Civ.App., 91 S.W.2d 787, error dismissed.

39. Ga.—Davis v. Metropolitan Life Ins. Co., 172 S.E. 467, 48 Ga.App. 179.

40. Ga.—Davis v. Metropolitan Life Ins. Co., supra.

41. Tex.—Ford v. State, 50 S.W. 350, 40 Tex.Cr. 280.
22 C.J. p 466 note 87.

42. Ky.—Fitzgerald v. Commonwealth, 6 S.W. 152, 9 Ky.L. 664.
Mich.—People v. O'Brien, 52 N.W. 84, 92 Mich. 17.
Tex.—Dodson v. State, 70 S.W. 969, 44 Tex.Cr. 200.
22 C.J. p 466 note 88.

43. Iowa.—State v. Deuble, 38 N.W. 383, 74 Iowa 509.
Wis.—Mutcha v. Pierce, 5 N.W. 356, 49 Wis. 231, 35 Am.R. 776.

44. N.Y.—Scheir v. Quirin, 78 N.Y.S. 956, 77 App.Div. 624, affirmed 69 N.E. 1130, 177 N.Y. 568.

45. Tex.—Martin v. City of Corsicana, Civ.App., 130 S.W.2d 405, error dismissed, judgment correct.
22 C.J. p 467 note 94.

ent interest of declarant will readily be received,[46] a self-serving declaration, will be carefully scrutinized.[47] Intrinsic evidence of premeditation may appear in a long, coherent, closely connected story,[48] and the same fatal characteristic is indicated where declarant, before speaking, inquires how the bystanders will testify.[49] A statement made in a whisper has been rejected,[50] but there is also authority for the reception of such a statement.[51] A statement made under duress should be rejected.[52] It has been indicated that evidence of statements as part of the res gestæ should be limited to the first person or persons to whom declarant talked after the accident.[53]

Whether or not the statement was elicited in response to a question is an important element entering into a determination of the fact of spontaneity.[54] A statement elicited by a question may, by reason of this fact, lack the necessary spontaneity,[55] although, on the other hand, the situation may be such that the statement should be received notwithstanding it was so elicited.[56]

§ 420. —— Narrative Excluded

Narrative statements of past transactions or events are not admissible as part of the res gestæ.

A statement which is merely narrative of past transactions or events is not admissible as part of the res gestæ,[57] even though it was made soon after

Hearsay

Conductor's statement, immediately after accident, repeating another trainman's antecedent remark which was either made in conductor's presence or was related to conductor by third person, was inadmissible as res gestæ.—Spokane County v. Great Northern Ry. Co., 35 P.2d 1, 178 Wash. 389.

Insufficient circumstances

That deceased's declarations were made at earliest opportunity and he filed no claim against employer, but died without realizing that injury was cause of trouble, were insufficient to bring them within res gestæ rule.—Brashear v. Missouri Pac. R. Co., Mo.App., 6 S.W.2d 650.

46. Ga.—O'Shields v. State, 55 Ga. 696.

La.—State v. Estoup, 1 So. 448, 39 La.Ann. 219.

Neb.—Sullivan v. State, 79 N.W. 721, 58 Neb. 796.

Mother

A ten-year-old boy's mother was financially interested in outcome of suit for boy's injuries and expenses incurred in treatment thereof, and was in fact a party thereto even though she was not nominally a party, as respects whether mother's statements concerning accident were admissible as part of res gestæ.—Martin v. City of Corsicana, Tex.Civ. App., 130 S.W.2d 405, error dismissed, judgment correct.

47. N.H.—Hansen v. Grand Trunk R. Co., 102 A. 625, 78 N.H. 518.

22 C.J. p 467 note 96.

48. Ind.—Indianapolis St. R. Co. v. Whitaker, 66 N.E. 433, 160 Ind. 125.

Mo.—State v. Hendricks, 73 S.W. 194, 172 Mo. 654.

49. Ky.—Jackson v. Commonwealth, 37 S.W. 847, 18 Ky.L. 670.

50. Ga.—Futch v. State, 16 S.E. 102, 90 Ga. 472.

51. Tex.—Cox v. State, 8 Tex.App. 254, 34 Am.R. 746.

52. Mich.—Feldman v. Detroit United R. Co., 127 N.W. 687, 162 Mich. 486.

53. Ky.—Consolidated Coach Corporation v. Earls' Adm'r, 94 S.W.2d 6, 263 Ky. 814.

54. Idaho.—Erickson v. Edward Rutledge Timber Co., 191 P. 212, 33 Idaho 179.

55. Idaho.—Erickson v. Edward Rutledge Timber Co., supra.

Iowa.—McQueen v. Safeway Stores, 244 N.W. 278, 214 Iowa 1300.

Ky.—Castle v. Allen, 120 S.W.2d 219, 274 Ky. 658.

Mich.—Sheathelm v. Consumers Power Co., 273 N.W. 410, 280 Mich. 106—Ayling v. City of Detroit, 266 N.W. 372, 275 Mich. 338.

Okl.—Schaff v. Coyle, 249 P. 947, 121 Okl. 228.

Pa.—Watson v. A. M. Byers Co., 14 A.2d 201, 140 Pa.Super. 245.

22 C.J. p 467 note 1.

"The dividing line between admissibility and nonadmissibility lies between the words outcry and narration; between impulse and reflection. Such statements are rarely admitted where they are made in response to interrogation, as that tends to remove the necessary element of spontaneity."—Cumberland Gasoline Corporation v. Field's Adm'r, 80 S.W.2d 28, 258 Ky. 417.

After declarant has had time for reflection, a statement made in answer to a question is not admissible.—Russell v. Metropolitan Life Ins. Co., Mo.App., 149 S.W.2d 432.

56. U.S.—Town of Bolivar, Tenn., v. Kelly, C.C.A.Tenn., 69 F.2d 58—Chesapeake & O. Ry. Co. v. Mears, C.C.A.Va., 64 F.2d 291.

Ark.—Public Utilities Corporation of Arkansas v. Cordell, 43 S.W.2d 746, 184 Ark. 878.

Ga.—Central of Georgia Ry. Co. v. Dumas, 160 S.E. 814, 44 Ga.App. 152.

Ky.—Friedman Co. v. Friedman, 113 S.W.2d 1172, 272 Ky. 205—Consolidated Coach Corporation v. Saunders, 17 S.W.2d 233, 229 Ky. 284.

Minn.—Bliss v. Swift & Co., 248 N.W. 754, 189 Minn. 210—Linderoth v. Kieffer, 203 N.W. 415, 162 Minn. 440.

Mo.—Smith v. Southern Illinois & Missouri Bridge Co., 30 S.W.2d 1077, 326 Mo. 109—Beeson v. Fleming, 285 S.W. 708, 315 Mo. 177—Landau v. Travelers' Ins. Co., 267 S.W. 376, 305 Mo. 563—Pryor v. Payne, 263 S.W. 982, 304 Mo. 560—Goucher v. Woodmen Accident Co. of Lincoln, Neb., 104 S.W.2d 289, 231 Mo.App. 573—Scism v. Alexander, 93 S.W.2d 38, 230 Mo.App. 1175—Buttinger v. Ely & Walker Dry Goods Co., App., 42 S.W.2d 982.

N.H.—Semprini v. Boston & M. R. R., 179 A. 349, 87 N.H. 279.

Pa.—Redrick v. Knapp Bros. Co., 193 A. 117, 127 Pa.Super. 92.

Tenn.—Highland Coal & Lumber Co. v. Cravens, 8 Tenn.App. 419.

Tex.—Tullos v. Texas Pipe Line Co., Civ.App., 145 S.W.2d 267, error dismissed, judgment correct—Zurich General Accident & Liability Ins. Co. v. Moss, Civ.App., 118 S.W.2d 410, error dismissed—Dallas Ry. & Terminal Co. v. Burns, Civ.App., 60 S.W.2d 801—Lang Floral & Nursery Co. v. Sheridan, Civ.App., 245 S.W. 467.

Wash.—Lucchesi v. Reynolds, 216 P. 12, 125 Wash. 352.

22 C.J. p 467 note 2.

57. U. S.—Winningham v. Travelers Ins. Co., C.C.A.Tex., 93 F.2d 520—Bonner v. Texas Co., C.C.A.Tex., 89 F.2d 291—Halleck v. Hartford Accident & Indemnity Co., C.C.A.Tex., 75 F.2d 800—Flannagan v. Provident Life & Accident Ins. Co., C.C.A.Va., 22 F.2d 136—Frederick Leyland & Co. v. Hornblower, Mass., 256 F. 289, 167 C.C.A. 461.

Ala.—O'Bar v. Southern Life & Health Ins. Co., 168 So. 580, 232 Ala. 459—Johns Undertaking Co. v. Hess-Strickland Transfer &

the occurrence to which it relates.[58] The mere fact that a statement is in narrative form, however, will not exclude it if it is actually a part of the res gestæ.[59]

§ 421. Expressions of Opinion

Ordinarily a mere expression of an opinion is not admissible as part of the res gestæ.

Expressions of opinion are not ordinarily admissible as part of the res gestæ,[60] even though they

Storage Co., 104 So. 250, 213 Ala. 78.
Ark.—Itzkowitz v. P. H. Reubel & Co., 250 S.W. 535, 158 Ark. 454—Payne v. Thurston, 230 S.W. 561, 148 Ark. 456—Webb v. Kansas City Southern Ry. Co., 208 S.W. 301, 137 Ark. 107.
Cal.—Zohner v. Sierra Nevada Life & Casualty Co., 299 P. 749, 114 Cal. App. 85.
Fla.—Atlantic Coast Line R. Co. v. Shouse, 91 So. 90, 83 Fla. 156.
Idaho.—Erickson v. Edward Rutledge Timber Co., 191 P. 212, 33 Idaho 179.
Ill.—Frederick v. Industrial Commission, 160 N.E. 845, 329 Ill. 490—In re Keshner's Estate, 26 N.E. 2d 529, 304 Ill.App. 640—Schuman v. Bader & Co., 227 Ill.App. 28.
Ind.—Kelley v. Dickerson, 13 N.E.2d 535, 213 Ind. 624—Brown v. Freudenberg, 17 N.E.2d 865, 106 Ind.App. 692—Morris v. Miller, 179 N.E. 29, 93 Ind.App. 534—Massachusetts Bonding & Ins. Co. v. Free, 124 N. E. 716, 71 Ind.App. 275—Abendroth v. Fidelity & Deposit Co. of Maryland, 124 N.E. 714, 73 Ind.App. 50.
Iowa.—Muntz v. Travelers Mut. Casualty Co., 295 N.W. 837—Vincent, Albin & Strahl v. Hines, 200 N.W. 1, 198 Iowa 1224—Budde v. National Travelers' Ben. Ass'n, 169 N.W. 766, 184 Iowa 1219.
Ky.—Castle v. Allen, 120 S.W.2d 219, 274 Ky. 658—Cumberland Gasoline Corporation v. Fields' Adm'r, 80 S. W.2d 28, 258 Ky. 417.
Mich.—Ginsberg v. Burroughs Adding Mach. Co., 170 N.W. 15, 204 Mich. 130.
Minn.—Dell v. Marckel, 238 N.W. 1, 184 Minn. 147.
Miss.—Simon v. Dixie Greyhound Lines, 176 So. 160, 179 Miss. 568.
Mo.—Sconce v. Jones, 121 S.W.2d 777, 781, 343 Mo. 362, citing **Corpus Juris**—Woods v. Southern Ry. Co., Sup., 73 S.W.2d 374—Russell v. Metropolitan Life Ins. Co., App., 149 S.W.2d 432—Hatfield v. Southwestern Grocer Co., App., 104 S.W. 2d 717—Goucher v. Woodmen Accident Co. of Lincoln, 104 S.W.2d 289, 231 Mo.App. 573—Cramer v. Parker, App., 100 S.W.2d 640—Weiler v. Peerless White Lime Co., App., 64 S.W.2d 125—Robyn v. New Amsterdam Casualty Co., App., 257 S.W. 1065.
Mont.—Wilson v. Davis, 103 P.2d 149, 110 Mont. 356—Rossberg v. Montgomery Ward & Co., 99 P.2d 979, 110 Mont. 154.
Neb.—Price v. Burlington Refrigerator Express Co., 269 N.W. 425, 131 Neb. 657—Milton v. City of Gordon, 263 N.W. 208, 129 Neb. 888.
N.J.—Thompson v. Giant Tiger Corporation of Camden, 189 A. 649, 118 N.J.Law 10—Slayback Van Order Co. v. Eiben, 177 A. 671, 115 N.J.Law 17.
N.Y.—Handel v. New York Rapid Transit Corporation, 297 N.Y.S. 216, 252 App.Div. 142, affirmed 13 N.E. 2d 468, 277 N.Y. 548—Hill v. Erie R. Co., 224 N.Y.S. 640, 221 App.Div. 518.
N.C.—Hubbard v. Southern Ry. Co., 166 S.E. 802, 804, 203 N.C. 675, citing **Corpus Juris**—Holmes v. Wharton, 140 S.E 93, 194 N.C. 470.
Ohio.—Whipp v. Industrial Commission of Ohio, 27 N.E.2d 141, 136 Ohio St. 531—Dugan v. Industrial Commission of Ohio, 22 N.E.2d 132, 135 Ohio St. 652—Bake v. Industrial Commission of Ohio, 22 N.E. 2d 130, 135 Ohio St. 627, affirming Bake v. Industrial Commission, 22 N.E.2d 1017, 62 Ohio App. 29—Mitchell v. New York Life Ins. Co., 22 N.E.2d 998, 62 Ohio App. 54, reversed on other grounds 27 N.E. 2d 243, 136 Ohio St. 551.
Okl.—Wray v. Garrett, 90 P.2d 1050, 185 Okl. 138—Lacy Chevrolet Co. v. McGinnis, 72 P.2d 785, 181 Okl. 97.
Or.—Raymond v. Shell Oil Co. of California, 103 P.2d 745.
Pa.—Milwaukee Locomotive Mfg. Co. v. Point Marion Coal Co., 144 A. 100, 294 Pa. 238—McMillen v. Strathmann, 107 A. 332, 264 Pa. 13.
R.I.—Zannelle v. Pettine, 155 A. 236, 239, 51 R.I. 359, citing **Corpus Juris.**
S.C.—Lazar v. Great Atlantic & Pacific Tea Co., 14 S.E.2d 560.
Tex.—Texas Interurban Ry. Co. v. Hughes, Com.App., 53 S.W.2d 448, affirming Texas Interurban Ry. v. Hughes, Civ.App., 34 S.W.2d 1103—Landers v. Overaker, Civ.App., 141 S.W.2d 451, error dismissed, judgment correct—Southern Underwriters v. Thompson, Civ.App., 127 S. W.2d 389, error granted—Dallas Railway & Terminal Co. v. Little, Civ.App., 109 S.W.2d 289, error dismissed—Texas Employers' Ins. Ass'n v. Davidson, Civ.App., 288 S.W. 471, rehearing denied 290 S. W. 871.
W.Va.—De Pue v. Steber, 108 S.E. 590, 89 W.Va. 78.
22 C.J. p 467 note 6, p 469 note 10.

Similar accident

In personal injury action, declaration by defendant's employee at time of accident that similar accident occurred that morning, was inadmissible, not being related to fact of the accident.—Higgins v. Goerke-Krich Co., 103 A. 37, 91 N.J.Law 464, affirmed 106 A. 394, 92 N.J.Law 424.

Statements to a physician which are mere narrations of past events are not admissible as part of the res gestæ.

U.S.—Hartford Accident & Indemnity Co. v. Carter, C.C.A.Tex., 110 F.2d 355—Somogyi v. Cincinnati, N. O. & T. P. Ry. Co., C.C.A.Ky., 101 F.2d 480—Raymond & Whitcomb Co. v. Ebsary, C.C.A.N.Y., 9 F.2d 889, reversing, D.C., Evsary v. Raymond & Whitcomb Co., 4 F.2d 285.
Ky.—Valentine v. Weaver, 228 S.W. 1036, 191 Ky. 37.
Mo.—Venters v. Bunnell, 93 S.W.2d 70, 230 Mo.App. 1190.
Ohio.—Dugan v. Industrial Commission of Ohio, 22 N.E.2d 132, 135 Ohio St. 652—Industrial Commission of Ohio v. Strassel, 11 Ohio App. 234.
Pa.—Guyer v. Equitable Gas Co., 123 A. 590, 279 Pa. 5—Riley v. Carnegie Steel Co., 119 A. 832, 276 Pa. 82.
Tenn.—Bell v. Travelers' Ins. Co., 79 S.W.2d 824, 18 Tenn.App. 552.
Tex.—Lumbermen's Reciprocal Ass'n v. Adcock, Civ.App., 244 S.W. 645.
Wis.—Maine v. Maryland Casualty Co., 178 N.W. 749, 172 Wis. 350, 15 A.L.R. 1536.

Admissibility of independently relevant statements made to physicians see supra § 216.

58. Cal.—Losleben v. California State Life Ins. Co., 6 P.2d 1012, 119 Cal.App. 556.
Mich.—Sanborn v. Income Guaranty Co., 221 N.W. 162, 244 Mich. 93.
Mo.—Schroeder v. Rawlings, 127 S. W.2d 678, 681, 344 Mo. 630, quoting **Corpus Juris.**
22 C.J. p 468 note 7.

59. Ga.—Louisville & N. R. Co. v. Studdard, 130 S.E. 532, 34 Ga.App. 570.
Mont.—Sullivan v. Metropolitan Life Ins. Co., 29 P.2d 1046, 96 Mont. 254.
Tenn.—Tennessee Cent. Ry. Co. v. Gleaves, 2 Tenn.App. 519.
22 C.J. p 469 notes 8, 9.

60. Idaho.—Towne v. Northwestern Mut. Life Ins. Co. of Milwaukee, Wis., 70 P.2d 364, 58 Idaho 83.
Iowa.—Gose v. True, 198 N.W. 528, 197 Iowa 1091—Budde v. National Travelers' Ben. Ass'n, 169 N.W. 766, 184 Iowa 1219.

are accompanied by acts tending to show that the declarant really entertained the opinion so expressed;[61] but it is not conclusive against a spontaneous exclamation of an injured person that it involves the expression of an opinion as to the legal or physical effect of his injury,[62] and it has also been held that the opinions or conclusions of competent physicians, stated while examining a patient, may be admissible as part of the res gestæ.[63]

XI. CHARACTER AND REPUTATION

§ 422. Distinction

Comparisons and distinctions with respect to the terms "character" and "reputation" have been discussed in 14 C.J.S. pp 399, 400.

§ 423. Admissibility of Evidence of Character

As a general rule evidence as to the character of a party or of a third person is not admissible in a civil action as substantive proof or primary evidence.

As a general rule the character of a party to a civil action is not a proper subject of inquiry,[64] for,

Minn.—Pacific Fire Ins. Co. v. Kenny Boiler & Manufacturing Co., 277 N. W. 226, 201 Minn. 500.

Mo.—Sconce v. Jones, 121 S.W.2d 777, 782, 343 Mo. 362, citing **Corpus Juris**—Courter v. George W. Chase & Son Mercantile Co., 299 S.W. 622, 222 Mo.App. 43.

Neb.—Wert v. Equitable Life Assur. Soc., 283 N.W. 506, 512, 135 Neb. 654, quoting **Corpus Juris.**

N.H.—Bullard v. McCarthy, 195 A. 355, 89 N.H. 158.

Pa.—Commonwealth v. Fugmann, 198 A. 99, 105, 330 Pa. 4, quoting **Corpus Juris**—McGrath v. Pennsylvania Sugar Co., 131 A. 926, 285 Pa. 84—McGrath v. Pennsylvania Sugar Co., 127 A. 780, 282 Pa. 265.

Tenn.—National Funeral Home v. Dalehite, 15 Tenn App. 482.

Tex.—Morgan v. Maunders, Civ.App., 37 S.W.2d 791, error dismissed—Hardin v. Rust, Civ.App., 294 S. W. 625—W. F. Norman & Sons v. Clark, Civ.App., 221 S.W. 235.

Wash.—Field v. North Coast Transp. Co., 2 P.2d 672, 164 Wash. 123, 76 A.L.R. 1114.

22 C.J. p 469 note 12.

Fault

(1) Expressions of opinion as to whose fault caused the accident are generally not admissible as part of the res gestæ.

Neb.—Suhr v. Lindell, 277 N.W. 381, 133 Neb. 856.

Ohio.—Neisner Bros. v. Schafer, 178 N.E. 269, 124 Ohio St. 311.

Tex.—San Antonio Public Service Co. v. Alexander, Com.App., 280 S.W. 753, affirming, Civ.App., 270 S.W. 199—A. B. C. Storage & Moving Co. v. Herron, Civ.App., 138 S.W. 2d 211, error dismissed, judgment correct—Red Arrow Freight Lines v. Gravis, Civ.App., 84 S.W.2d 540, 544, citing **Corpus Juris**—Rosenthal Dry Goods Co. v. Hillebrandt, Civ.App., 280 S.W. 882, 885, citing **Corpus Juris.**

Wash.—Baird v. Webb, 294 P. 1000, 160 Wash. 157.

22 C.J. p 469 note 12 [a] (1).

(2) In a number of cases, however, spontaneous exclamations by the person causing an injury that it was his fault have been held to be admissible as part of the res gestæ.

Ariz.—Pickwick Stages Corporation v. Williams, 287 P. 440, 36 Ariz. 520.

Cal.—Olden v. Babicora Development Co., 290 P. 1062, 107 Cal.App. 399.

Mo.—Chawkley v. Wabash Ry. Co., 297 S.W. 20, 317 Mo. 782.

(3) Accordingly, a spontaneous declaration, "Arrest me officer; it was my fault," made immediately after the accident, has been held to be admissible.—Perry v. Haritos, 124 A. 44, 100 Conn. 476.

(4) Likewise a statement of a third person as to whose fault caused a collision, made just after the collision, has been held to be admissible as part of the res gestæ.

N.Y.—Judson v. Fielding, 237 N.Y.S. 348, 227 App.Div. 430, affirmed 171 N.E. 798, 253 N.Y. 596, and followed in Johnson v. Palmer, 242 N. Y.S. 763, 229 App. Div. 813.

S.C.—York v. Charles, 128 S.E. 29, 132 S.C. 230.

Would not recover

Statements made by an injured person relating to his physical condition and his then settled belief that he would not recover were erroneously admitted as a part of the res gestæ, such statements constituting a mere conclusion of the declarant.—Suhr v. Lindell, 277 N.W. 381, 133 Neb. 856.

61. Ala.—Nashville, C. & St. L. R. Co. v. Moore, 41 So. 984, 148 Ala. 63

22 C.J. p 470 note 13.

62. N.C.—State v. Mace, 24 S.E. 798, 118 N C. 1244.

Expressions of bodily feelings which are a part of the res gestæ are not inadmissible as expression of opinion by lay witness.—Dawson v. Bankers' Life Co., 247 N.W. 279, 216 Iowa 586.

63. Ala.—Franklin Life Ins. Co. v. Brantley, 165 So. 834, 231 Ala. 554.

Tex.—New York Mut. L. Ins. Co. v. Tillman, 19 S.W. 294, 84 Tex. 31.

64. U.S.—Davila v. U. S., C.C.A. Puerto Rico, 54 F.2d 356.

Ala.—Drummond v. Drummond, 102 So. 112, 115, 212 Ala. 242, citing **Corpus Juris.**

Idaho.—Johnson v. Richards, 294 P. 507, 512, 50 Idaho 150, citing **Corpus Juris.**

Ill.—Weeks v. Jones, 200 Ill.App. 215.

Me.—Low v. Mitchell, 18 Me. 372.

Md —Sappington v. Fairfax, 108 A. 575, 135 Md. 186.

Minn.—Dauer v. Dauer, 210 N.W. 878, 169 Minn. 148.

N.C.—Merrill v. Tew, 110 S.E. 850, 183 N.C. 172.

Okl.—Baker v. First Nat. Bank, 54 P 2d 355, 176 Okl. 70—Mitchell v. Fahey, 240 P. 612, 112 Okl. 251.

Pa.—McCommon v. Johnson, 187 A. 445, 123 Pa.Super. 581—Rosen v. Lis, 88 Pa.Super. 84.

S.C.—Smoak v. Robinson, 153 S.E. 342, 343, 156 S.C. 370, quoting **Corpus Juris.**

22 C.J. p 470 note 19.

Other statements

(1) "It is the universal, general rule that when the character of a party to a civil action is not a relevant fact apart from any inference of conduct arising therefrom, it is not a proper subject of inquiry."—Hager v. Hager, 66 S.W.2d 250, 255, 17 Tenn.App. 143.

(2) "In civil case the character of a party who is not a witness is generally irrelevant, and evidence may not be received touching it unless the nature of the issue directly involves it."—Mutual Life Ins. Co. of New York v. Treadwell, C.C.A.La., 79 F.2d 487, 489.

(3) In civil actions, the character of a party, until assailed, cannot be inquired into, unless it is put in issue by the nature of the proceeding itself.—Vawter v. Hultz, 20 S.W. 689, 690, 112 Mo. 633—Browning v. Browning, 41 S.W.2d 860, 226 Mo. App. 322—Humphreys v. St. Louis-

while it is recognized that ground for an inference of some logically probative force as to whether or not a person did a certain act may be furnished by the fact that his character is such as might reasonably be expected to predispose him toward or against such an act,[65] this consideration is outweighed by the practical objections to opening the door to this class of evidence.[66] There are, however, exceptions to the general rule,[67] and these exceptions are discussed infra § 424 et seq.

In the absence of facts taking the case out of the general rule, a party to a civil action may not support his position by evidence of his good character,[68] or, as otherwise stated, such evidence is not admissible unless the character of the party has been attacked or drawn in question in the action or proceeding.[69]

San Francisco Ry. Co., Mo.App., 286 S.W. 738.

(4) Evidence concerning the general character of a party is not admissible except in cases in which the nature of the action itself puts character in issue.

Mo.—State ex rel. Massachusetts Bonding & Insurance Co. v. Allen, 271 S.W. 757, 308 Mo. 109, quashing certiorari Niese Grocer Co. v. Massachusetts Bonding & Insurance Co., App., 259 S.W. 852.

Pa.—American Fire Ins. Co. v. Hazen, 1 A. 605, 110 Pa. 530—McCommon v. Johnson, 187 A. 445, 128 Pa. Super. 581.

Reasons for rule

Tex.—Houston & T. Cent. R. Co. v. Bell, Civ.App., 73 S.W. 56, affirmed 75 S.W. 484, 97 Tex. 71.

5 C.J. p 680 note 21 [a]—22 C.J. p 470 note 19 [a].

Evidence of character as substantive proof

Ordinarily, in civil actions, evidence of the character of parties is not to be considered as substantive proof.—In re McKay's Will, 111 S. E. 5, 183 N.C. 226.

That the party is little known in the neighborhood of the place of trial does not alter the rule.—Timmony v. Burns, Tex.Civ.App., 42 S. W. 133.

Plaintiff

(1) Ordinarily in civil actions evidence as to the character of plaintiff is not admissible.—Ferguson v. Simmons, 43 S.W.2d 875, 226 Mo. App. 178.

(2) In action on automobile fire policy, evidence that plaintiff was reputed to be bootlegger was not admissible.—Reliance Ins. Co. v. Smith, Tex.Civ.App., 44 S.W.2d 446, affirmed, Com.App., 66 S.W.2d 675.

Defendant

General character of defendant is not admissible as primary evidence in civil actions.—Phillips v. Ashworth, 124 So. 519, 220 Ala. 237.

Evidence of prior conviction

Evidence that party to suit had been convicted of, and imprisoned for, fraud was inadmissible, where he did not take witness stand.—Boone Nat. Bank v. Evans, Iowa, 213 N.W. 786.

65. S.C.—Smoak v. Robinson, 153 S. E. 342, 343, 156 S.C. 370, quoting **Corpus Juris.**

Tenn.—Hager v. Hager, 66 S.W.2d 250, 255, 17 Tenn.App. 143, citing **Corpus Juris.**

22 C.J. p 472 note 20.

66. S.C.—Smoak v. Robinson, 153 S. E. 342, 343, 156 S.C. 370, quoting **Corpus Juris.**

Tenn.—Hager v. Hager, 66 S.W.2d 250, 255, 17 Tenn.App. 143, citing **Corpus Juris.**

22 C.J. p 470 note 19.

67. Minn.—Dauer v. Dauer, 210 N. W. 878, 169 Minn. 148.

68. Ky.—Hignite v. Nantz, 71 S.W. 2d 442, 254 Ky. 214—Colker v. Connecticut Fire Ins. Co., 7 S.W.2d 502, 224 Ky. 837.

Md.—Sappington v. Fairfax, 108 A. 575, 135 Md. 186.

N.Y.—Young v. Johnson, 25 N.E. 363, 123 N.Y. 226.

Okl.—Baker v. First Nat. Bank, 54 P.2d 355, 176 Okl. 70—Seybold v. Pierce, 44 P.2d 826, 171 Okl. 112—Wyrick v. Campbell, 170 P. 267, 67 Okl. 240.

Pa.—Rosen v. Lis, 88 Pa.Super. 84.

22 C.J. p 470 note 19.

Other statements

(1) As a general rule, in ordinary civil case, parties may not support their position by offering testimony as to their good character or reputation.—Graves v. Johnson, 176 So. 256, 179 Miss. 465, followed in Graves v. Hamilton, Miss., 177 So. 360—Harris v. Sims, 124 So. 325, 155 Miss. 207.

(2) A party to a civil action will not be allowed to introduce general evidence as to his reputation as to moral character, unless the same is an issue in the case from the nature of the action.—Keyes v. Keyes, 199 P. 361, 27 N.M. 215.

(3) A party cannot ordinarily offer evidence of his own good character for truth and veracity until the matter has been put in issue by the opposing party.—Barrera v. Duval County Ranch Co., Tex.Civ.App., 135 S.W.2d 518, error refused.

(4) Evidence of general reputation for chastity or good character in civil action, where general reputation has not been assailed, may not generally be received.—Booth v. Booth, 238 N.Y.S. 193, 135 Misc. 350.

Evidence of good character as substantive evidence

Ordinarily, in civil actions, evidence of the good character of a party is not to be considered as substantive evidence.—Kirkpatrick v. Crutchfield, 100 S.E. 602, 178 N.C. 318.

Honesty and integrity

(1) Party may not introduce evidence of his general reputation for honesty and integrity where his character in that regard is not in issue.—Seybold v. Pierce, 44 P.2d 826, 171 Okl. 112.

(2) Defendant was not entitled to give evidence of his good reputation for honesty and upright dealings where his character or reputation was not attacked or put in issue.—Lowe v. Montgomery, 11 S.W.2d 41, 321 Mo. 330.

Party who is stranger

Fact that a party to an action is a stranger at the place of trial does not authorize the admission of supporting evidence of his good character.—Grant v. Pendley, Tex.Com. App., 39 S.W.2d 596, 78 A.L.R. 638, reversing, Civ.App., 22 S.W.2d 467.

Plaintiff

Evidence of the good reputation of plaintiff was not admissible where the proceeding did not put his character in issue and his character or reputation was not directly attacked. —Humphreys v. St. Louis-San Francisco Ry. Co., Mo.App., 286 S.W. 738.

Defendant

(1) In a civil action defendant ordinarily may not support his position by evidence of his good character.

Ala.—Drummond v. Drummond, 102 So. 112, 212 Ala. 242.

Mo.—Burns v. Colley, 9 S.W.2d 159, 223 Mo.App. 76.

S.C.—Smoak v. Robinson, 153 S.E. 342, 156 S.C. 370.

W.Va.—Hess v. Marinari, 94 S.E. 968, 81 W.Va. 500.

(2) In an action for breach of a contract to purchase a carload of potatoes, evidence offered by defendant as to his reputation with respect to his dealing in potatoes was incompetent, as his character or reputation was not in issue.—Merrill v. Tew, 110 S.E. 850, 183 N.C. 172.

69. Ga.—Cooper v. Reeves, 131 S.E. 63, 161 Ga. 232.

22 C.J. p 470 note 19.

Character of third person. The character of a third person may not, as a rule, be shown in a civil action any more than may the character of a party.[70]

§ 424. —— Where Character in Issue

Evidence of character may be admissible on the ground that character is in issue because of the nature of the action or of the pleading and evidence.

Where the nature of the action is such that the character of one of the parties[71] or of a third per-

Evidence of good character when character attacked see infra § 428.

Defendant

(1) As a general rule evidence as to the good character of defendant in a civil action is not admissible unless and until that character has been drawn in question by evidence offered on behalf of plaintiff.—Lester v. Gay, 117 So. 211, 217 Ala. 585, 59 A.L.R. 1561.

(2) Defendant was not entitled to prove his good character where his character was not attacked.—Burns v. Colley, 9 S.W.2d 159, 223 Mo.App. 76.

(3) Defendant was not entitled to introduce evidence of his general good character, where there was no evidence by plaintiff tending to impeach the character or testimony of defendant.—Hancock v. Hullett, 82 So. 522, 203 Ala. 272.

In Texas

(1) The rule has been announced that supporting evidence of good character of a party is not admissible unless it has been attacked, either by evidence or by the pleadings of the opposing party, or unless the very nature of the action is such as to make character an issue.—Fort Worth Hotel Co. v. Waggoman, Civ. App., 126 S.W.2d 578, error dismissed, judgment correct—22 C.J. p 470 note 19, Texas cases.

(2) The rule is based on the theory that every man's character is regarded as good until it is called in question.—Fort Worth Hotel Co. v. Waggoman, supra.

(3) In respect of supporting evidence of the good character of a party, it has been laid down in somewhat different form that supporting evidence of his good character, either for truth and veracity or for honesty and fair dealing, should be admitted only where the nature of the action directly involves his character or he is charged by the pleading or evidence of his adversary with the commission of a crime involving moral turpitude.—Waggoman v. Fort Worth Well Machinery & Supply Co., 76 S.W.2d 1005, 124 Tex. 325, reversing Fort Worth Well Machinery & Supply Co. v. Waggoman, Civ.App., 52 S.W.2d 306—Grant v. Pendley, Com.App., 39 S.W.2d 596, 78 A.L.R. 638, reversing, Civ.App., 22 S.W.2d 467—Wells v. Lewis, Civ.App., 108 S.W.2d 926, error dismissed.

(4) Ordinarily, character evidence, such as testimony as to party's competency, care, and skill, is inadmissible to bolster party's testimony or strengthen his case, unless the pleadings or evidence impeach his competency, care, and skill.—Beckner v. Barrett, Civ.App., 81 S.W.2d 719, error dismissed.

70. Ala.—South & North Alabama R. Co. v. Chappell, 61 Ala. 527.
Neb.—Sanford v. Craig, 72 N.W. 864, 52 Neb. 483.
N.Y.—Pratt v. Andrews, 4 N.Y. 59.
Wash.—Houston v. New York Life Ins. Co., 8 P.2d 434, 166 Wash. 611.
22 C.J. p 472 note 22.

Deceased person

(1) In a suit for specific performance of an alleged oral agreement made by a person since deceased to leave a part of his property to plaintiff, testimony to the effect that decedent was methodical and careful in conducting business was irrelevant and not admissible on behalf of defendant.—Sherling v. Continental Trust Co., 165 S.E. 560, 175 Ga. 672.

(2) In such case, evidence that decedent's reputation for performing his obligations was good was irrelevant and not admissible on behalf of defendant.—Sherling v. Continental Trust Co., supra.

(3) In such case, evidence that decedent's general reputation for honesty and integrity was good was irrelevant and not admissible on behalf of defendant, where there was no such attack on decedent's reputation for honesty and integrity as involved his character.—Sherling v. Continental Trust Co., supra.

Race or tribe

Testimony, effect of which would be to overcome individual transactions by indictment of a whole race or tribe, is properly excluded.—Kanimaya v. Choctaw Lumber Co., 294 P. 817, 147 Okl. 90, followed in Kanimaya v. Choctaw Lumber Co., 294 P. 822 (two cases), 147 Okl. 94.

Witnesses

(1) Ordinarily, in civil actions, evidence as to the character of witnesses is admissible only as affecting the credibility of their testimony and is not to be considered as substantive proof.—In re McKay's Will, 111 S.E. 5, 183 N.C. 226.

(2) The rule applies to evidence of good character of a witness.—Kirkpatrick v. Crutchfield, 100 S.E. 602, 178 N.C. 348.

Impeachment of witness by inquiry into character or reputation see the C.J.S. title Witnesses §§ 491–537, also 70 C.J. p 820 note 22–p 936 note 8.

Virtue and chastity

In trespass to try title in which the right of one of the claimants depended on the existence of a marriage between such claimant's mother and the deceased owner, testimony assailing the character of the mother for virtue and chastity was not admissible.—Dancy v. Peyton, Tex. Civ.App., 282 S.W. 819, 823, error dismissed, citing **Corpus Juris.**

71. Idaho.—Johnson v. Richards, 294 P. 507, 512, 50 Idaho 150, citing **Corpus Juris.**
Ill.—Woodruff v. Mutual Life Ins. Co., of New York, 229 Ill.App. 213, 220, quoting **Corpus Juris.**
Md.—Sappington v. Fairfax, 108 A. 575, 135 Md. 186.
Miss.—Graves v. Johnson, 176 So. 256, 179 Miss. 465.
N.M.—Keyes v. Keyes, 199 P. 861, 27 N.M. 215.
Tex.—Fort Worth Hotel Co. v. Waggoman, Civ.App., 126 S.W.2d 578, error dismissed, judgment correct.
22 C.J. p 472 notes 23, 25, p 474 note 53.

When put in issue by nature of action

(1) "Putting character in issue" is a technical expression, which means not only that character may be affected, but that it is of particular importance in the action itself.—State ex rel. Massachusetts Bonding & Ins. Co. v. Allen, 271 S.W. 757, 308 Mo. 109, quashing certiorari Niese Grocer Co. v. Massachusetts Bonding & Ins. Co., App., 259 S.W. 852—Dudley v. McCluer, 65 Mo. 241, 27 Am.R. 273—22 C.J. p 473 note 40 [a].

(2) The action, in its nature, must directly involve the question of character.—American Fire Ins. Co. v. Hazen, 1 A. 605, 110 Pa. 530.

(3) Character is put in issue by the nature of the proceeding itself only in cases in which its value is to be considered in assessing the damages.—State ex rel. Massachusetts Bonding & Ins. Co. v. Allen, supra—Black v. Epstein, 120 S.W. 754, 221 Mo. 286—Vawter v. Hultz, 20 S.W. 689, 112 Mo. 633—Dudley v. McCluer, 65 Mo. 241, 27 Am.R. 273—Browning v. Browning, 41 S.W.2d 860, 226 Mo.App. 322—Humphreys v. St. Louis-San Francisco Ry. Co., Mo. App., 286 S.W. 738.

Character directly involved

(1) Supporting evidence of the

son[72] is put in issue, evidence of character is admissible, and such evidence is admissible where character is put in issue by the pleadings and proof.[73] Evidence of the good character of a party is admissible where his character is in issue,[74] or where it is assailed or put in issue by the opposing party,[75] and, under certain circumstances, evidence to show the good character of a third person is admissible where his character has been attacked.[76]

In order to permit the introduction of evidence as to the character of a party on the theory that his character is in issue or has been attacked, it must actually appear that his character is in issue or has been attacked.[77] While it has been held that the character of a party may be put in issue to permit the introduction of evidence of good character where he is asked on cross-examination a question containing an imputation of wrongdoing on his part which he neither admits nor denies,[78] it has also been held that such evidence is not admissible where the party so questioned denies any wrongdoing,[79] and that the mere propounding of a question, an affirmative answer to which might reflect on the character of a party, does not constitute such an attack as permits evidence of his good character, where a negative answer is given.[80] The fact that counsel for one party, in his opening statement, has attacked the character of the other party with respect to honesty and fair dealing does not warrant the introduction by the other party of evidence of good character of a party, either for truth and veracity or for honesty and fair dealing, is admissible where the nature of the action directly involves his character.—Waggoman v. Fort Worth Well Machinery & Supply Co., 76 S.W.2d 1005, 124 Tex. 325, reversing Fort Worth Well Machinery & Supply Co. v. Waggoman, Civ.App., 52 S.W.2d 306—Grant v. Pendley, Tex.Com.App., 39 S.W.2d 596, 78 A.L.R. 638, reversing, Civ.App., 22 S.W.2d 467—Wells v. Lewis, Tex. Civ.App., 108 S.W.2d 926, error dismissed.

(2) In a suit to cancel certain instruments in which the question involved was whether a party had drilled to a certain depth a well for the production of oil and gas and had drilled it in a good workmanlike manner, the character of a party was not directly involved.—Wells v. Lewis, supra.

Evidence admissible under statute

Ga.—Caldwell v. Caldwell, 1 S.E.2d 764, 59 Ga.App. 637.

72. Ill.—Woodruff v. Mutual Life Ins. Co. of New York, 229 Ill.App. 213, 220, quoting **Corpus Juris.**
22 C.J. p 472 note 24.

73. Minn.—Dauer v. Dauer, 210 N. W. 878, 169 Minn. 148.
Mo.—Ferguson v. Simmons, 43 S.W. 2d 875, 226 Mo.App. 178.

74. **Particular trait**
Where a particular trait of character of a party is in issue as a result of the pleadings and evidence, he may introduce evidence of his good character in that regard.—Harris v. Sims, 124 So. 325, 155 Miss. 207.

75. Md.—Sappington v. Fairfax, 108 A. 575, 135 Md. 186.
Mo.—Ferguson v. Simmons, 43 S.W. 2d 875, 226 Mo.App. 178—Browning v. Browning, 41 S.W.2d 860, 226 Mo.App. 322—Gourlay v. Callahan, 176 S.W. 239, 190 Mo.App. 666.
Tex.—Fort Worth Hotel Co. v. Waggoman, Civ.App., 126 S.W.2d 578, error dismissed, judgment correct.
22 C.J. p 472 notes 23, 25.

Method of attack or drawing in issue

(1) Evidence of the good character of a party may be admissible where his character has been attacked or drawn in question by the pleading of the opposing party.—Fort Worth Hotel Co. v. Waggoman, supra.

(2) Where pleadings impeach the skill, care, or competency of a party involved, character evidence is admissible in rebuttal.—Beckner v. Barrett, Tex.Civ.App., 81 S.W.2d 719, error dismissed.

(3) Where the adversary, under his averments, gives evidence of particular acts and circumstances, from which natural and designed inferences throw strong suspicion on the probity of the other party, the other party may meet the suspicion thus created by proof of general good character with respect to the particular traits involved.—Hilker v. Hilker, 55 N.E. 81, 153 Ind. 425.

(4) In action for illegal search of person, evidence by defendant that plaintiff was carrying pistol day before put plaintiff's character in issue, making issue of plaintiff's reputation relevant so that evidence of his good reputation was admissible. —Ferguson v. Simmons, 43 S.W.2d 875, 226 Mo.App. 178.

(5) In an action by a negro passenger against a railroad company for injuries, admission of evidence of plaintiff's good character, reputation for truth, honesty, that she was a negro very polite to white people, and above the average of her class, was not improper, where the detailed statements in defendant's special answer and way in which defendant's attorneys conducted the trial were designed to arouse race prejudice of jurors and discredit plaintiff as an offensive negro, and where all of the defensive matter in the answer might have been shown under the general denial.—Schaff v. Beale, Tex. Civ.App., 250 S.W. 757.

(6) In an action for alienation of affection of plaintiff's husband in which defendant sought to avoid liability on the ground that the separation resulted from the misconduct of plaintiff and pleaded, and cross-examined plaintiff's witnesses as to, matters tending to show misconduct, evidence of plaintiff's general good reputation for chastity, virtue, and morality was admissible.—Browning v. Browning, 41 S.W.2d 860, 226 Mo. App. 322.

Effect of admission of evidence attacking good character see infra § 428.

76. Tex.—Cudipp v. C. R. Cummings Export Co., Civ.App., 119 S.W. 414.
22 C.J. p 472 note 21.

77. Ga.—Cooper v. Reeves, 131 S.E. 63, 161 Ga. 232.
Ky.—Caskey v. Nussbaum, 13 S.W. 2d 493, 227 Ky. 179.
22 C.J. p 470 note 19.

Character not put in issue

(1) Character of plaintiff, suing for injuries when shot by defendant's watchman, was not put in issue by inquiry by plaintiff's counsel as to whether plaintiff was armed on the occasion in question or was in the habit of carrying arms.—Caskey v. Nussbaum, supra.

(2) The mere contradiction of defendant as a witness does not authorize evidence of his good character.—Lester v. Gay, 117 So. 211, 217 Ala. 585, 59 A.L.R. 1561—Hancock v. Hullett, 82 So. 522, 203 Ala. 272.

78. Mo.—Gourley v. Callahan, 176 S.W. 239, 190 Mo.App. 666.

79. Mich.—Munroe v. Godkin, 69 N. W. 244, 111 Mich. 183.

80. Ga.—Cooper v. Reeves, 131 S.E. 63, 161 Ga. 232.

his good character in these respects.[81]

Admissibility of evidence of character where the action involves a charge of wrong or matters constituting a criminal offense is discussed infra § 426.

Character of place. The character of a place may be in issue so as to render admissible evidence in that regard.[82]

§ 425. —— Where Character Relevant

Character may be relevant apart from any inference as to conduct arising therefrom, and in such case evidence of character is admissible.

Character may be a relevant fact[83] apart from any inference as to conduct arising therefrom,[84] and, where this is the case, evidence of the character of the person in question is admissible.[85] Thus it may be shown that plaintiff's character is such that less than a normal injury could be inflicted by the acts of defendant where the damages claimed embrace injury to feelings,[86] as, for example, in actions involving chastity.[87]

The view has been taken that, where the intent of a party is a material inquiry, and the facts and circumstances shown in evidence leave the question of intent in doubt, the character of the party may be shown to aid in the determination of such question.[88]

Character of third person. The character of a third person may be relevant[89] as bearing on the probability that such person did or omitted particular acts,[90] or to show the purposes for which a certain building is used as a place of resort.[91]

§ 426. —— Where Action Involves Charge of Crime or Wrong

The mere fact that, in a civil action, a party or a third person is charged with the commission of a legal wrong or of acts constituting a criminal offense does not authorize the admission of evidence to show his good character, although in some jurisdictions evidence to show the good character of a party or of a third person has been admitted in certain cases.

In view of the presumption in favor of the good character of an individual, see supra §§ 122, 123, as a general rule a party is not entitled to introduce evidence of his good character, in the first instance, merely because his adversary has, by the pleadings or the nature of the action, charged him with committing a legal wrong,[92] or even an act

81. Ill.—Weeks v. Jones, 200 Ill.App. 215.

82. R.I.—Horaho v. Wanelik, 184 A. 323, 56 R.I. 193, reargument denied 185 A. 256, 56 R.I. 264.
Wash.—W. B. Hutchinson Inv. Co. v. Van Noslern, 170 P. 121, 99 Wash. 549.

As evidence of character of party
Evidence tending to show the character or nature of a place and the sale of intoxicants there did not constitute an attack on the character of defendant so as to render such evidence inadmissible as evidence of defendant's character, where the character of the place was in issue, especially in view of the fact that the first reference to the sale of intoxicants was made by defendant's counsel on his cross-examination of a witness for plaintiff.—Horaho v. Wanelik, 184 A. 323, 56 R.I. 193, reargument denied 185 A. 256, 56 R.I. 264.

83. Mo.—Ferguson v. Simmons, 43 S.W.2d 875, 226 Mo.App. 178.
Tex.—Fort Worth Hotel Co. v. Waggoman, Civ.App., 126 S.W.2d 578, 584, error dismissed, judgment correct, quoting **Corpus Juris.**
22 C.J. p 472 note 26.

Probable cause and malice
In an action for a wrongful search, evidence of plaintiff's good character was properly admitted as bearing on questions as to justification of defendant's obtaining search warrant and as to malice.—Mark v. Merz, 53 Ill.App. 458.

84. Tex.—Fort Worth Hotel Co. v. Waggoman, Civ.App., 126 S.W.2d 578, 584, and error dismissed, judgment correct, quoting **Corpus Juris.**
22 C.J. p 472 note 27.

85. Mo.—Ferguson v. Simmons, 43 S.W.2d 875, 226 Mo.App. 178.
Tenn.—Hager v. Hager, 66 S.W.2d 250, 255, 17 Tenn.App. 143, citing **Corpus Juris.**
Tex.—Fort Worth Hotel Co. v. Waggoman, Civ.App., 126 S.W.2d 578, 584, error dismissed, judgment correct, quoting **Corpus Juris.**
22 C.J. p 472 notes 26, 27.

On an issue as to the belief of an uncle, who had long known his niece, who was the defendant in the action, intimately, that she had an irritable disposition, the fact that she had exhibited outward manifestations of such a disposition is relevant, when coupled with evidence of his declaration that he had such a belief, presumably based on his observation of her.—Curtice v. Dixon, 68 A. 587, 74 N.H. 386.

86. Tex.—Fort Worth Hotel Co. v. Waggoman, Civ.App., 126 S.W.2d 578, 584, error dismissed, judgment correct, quoting **Corpus Juris.**
22 C.J. p 472 notes 29–32.
Plaintiff's character in mitigation of damages in actions for:
False imprisonment see the C.J.S. title False Imprisonment § 56, also 25 C.J. p 544 note 87.
Libel or slander see the C.J.S. title Libel and Slander §§ 190, 267, also 37 C.J. p 61 notes 14–17, p 122 note 41.
Malicious prosecution see the C.J.S. title Malicious Prosecution § 86, also 38 C.J. p 484 notes 75–78, p 496 note 36.

87. Tex.—Fort Worth Hotel Co. v. Waggoman, supra.
22 C.J. p 472 note 29.

88. Okl.—Sovereign Camp W. W. v. Welch, 83 P. 547, 16 Okl. 188.
22 C.J. p 472 note 34.

89. Tex.—Moore v. Miller, Civ.App., 155 S.W. 573.
22 C.J. p 473 note 35.

90. Tex.—Moore v. Miller, supra.
22 C.J. p 473 note 36.

91. Cal.—Demartini v. Anderson, 59 P. 207, 127 Cal. 33.
22 C.J. p 473 note 37.

92. Ala.—Drummond v. Drummond, 102 So. 112, 212 Ala. 242.
Tex.—Grant v. Pendley, Com.App., 39 S.W.2d 596, 597, 78 A.L.R. 638, quoting **Corpus Juris** and reversing, Civ.App., 22 S.W.2d 467—Knollenberg v. Farmers' Gin Co., Civ. App., 80 S.W.2d 1040.
22 C.J. p 473 note 40.

Charge by inference
As a general rule a party may not introduce evidence of his good character merely because he has been

for which he might be subjected to a criminal prosecution,[93] as, for example, where there is involved in the action a charge of adultery or fornication,[94] conspiracy,[95] embezzlement,[96] fraud,[97] incendiarism,[98] or malicious mischief.[99] It has been held or recognized that evidence of the good character of a party is not rendered admissible by the introduction of evidence bearing on the issue of whether or not the act charged has been committed, although such evidence if believed tends also incidentally to assail character.[1]

There is, however, authority to the effect that ev-

charged by inference with wrongdoing.—Colker v. Connecticut Fire Ins. Co., 7 S.W.2d 502, 224 Ky. 837.

Wrongfully causing death

Defendant's character not being assailed in action for wrongfully causing death, evidence thereof was properly excluded.—Burns v. Colley, 9 S.W.2d 159, 223 Mo.App. 76.

93. Ala.—Hancock v. Hullett, 82 So. 522, 203 Ala. 272.
Okl.—Baker v. First Nat. Bank, 54 P.2d 355, 176 Okl. 70.
22 C.J. p 473 notes 41, 42.

Right to show absence of criminal prosecution

(1) In a civil action for assault and battery, defendant may not show that he was never arrested and prosecuted criminally for the alleged assault and battery.—Barr v. Post, 77 N.W. 123, 56 Neb. 698.

(2) In such an action, defendant may not show that the grand jury refused to indict him for assault and battery.—Bonino v. Caledonio, 11 N.E. 98, 144 Mass. 299.

94. Mo.—Owens v. Fanning, App., 205 S.W. 69.
N.Y.—Booth v. Booth, 238 N.Y.S. 193, 135 Misc. 350.
22 C.J. p 473 note 43.

95. Ala.—Sharp v. Clopton, 117 So. 647, 218 Ala. 140.

96. **Honesty and integrity**

In action on a fidelity bond indemnifying against loss from embezzlement by an employee, evidence of his reputation for honesty, integrity, etc., was not admissible if he was regarded as a party.—State ex rel. Massachusetts Bonding & Insurance Co. v. Allen, 271 S.W. 757, 308 Mo. 109, quashing certiorari Niese Grocer Co. v. Massachusetts Bonding & Insurance Co., App., 259 S.W. 852.

97. U.S.—Mutual Life Ins. Co. of New York v. Treadwell, C.C.A.La., 79 F.2d 487.
Ala.—Sharp v. Clopton, 117 So. 647, 218 Ala. 140—Ward & Thompson v. Herndon, 5 Port. 382.
Ill.—McBean v. Fox, 1 Ill.App. 177.
Mo.—Lowe v. Montgomery, 11 S.W.2d 41, 321 Mo. 330.
Pa.—McCommon v. Johnson, 187 A. 445, 123 Pa.Super. 581. See Berberian v. Allsman, 28 Del.Co. 374.
W.Va.—Horton v. Tyree, 139 S.E. 737, 104 W.Va. 238.
Wis.—Drexler v. Zohlen, 257 N.W. 675, 216 Wis. 483.
22 C.J. p 473 notes 40, 45.

Action against attorney

In an action against an attorney for damages based on alleged fraud in inducing plaintiff by false representations to execute a deed, rejection of evidence, offered by defendant, to show his general reputation, among members of the bar, for being an upright, honorable, truthful, and faithful practitioner, was proper, where there was neither a direct nor an indirect attack on his reputation or character.—McCommon v. Johnson, 187 A. 445, 123 Pa.Super. 581.

In Texas

(1) The rule has been announced that a party is not entitled to introduce supporting evidence of his general good character merely because his adversary has by pleading or evidence charged him with fraud.—Grant v. Pendley, Com.App., 39 S.W.2d 596, 78 A.L.R. 638, reversing, Civ.App., 22 S.W.2d 467—Wells v. Lewis, Civ.App., 108 S.W.2d 926, error dismissed—Knollenberg v. Farmers' Gin Co., Civ.App., 80 S.W.2d 1040.

(2) The rule appears to be that, when the fraud charged involves the commission of a crime involving moral turpitude, character evidence is admissible.—Wells v. Lewis, supra.

See Texas cases infra notes 5, 9 this section.

(3) In an action to recover a commission on the sale of land, in which plaintiff alleged that defendant had made false and fraudulent representations in connection with the transaction, evidence that defendant's reputation for honesty and fair dealing was good was not admissible if proper objection had been presented.—Gilmer v. Graham, Com.App., 52 S.W.2d 263, reversing, Civ.App., 26 S.W.2d 687.

(4) In action by daughter, as executrix and sole devisee of mother's estate, against mother's agent for actual damages for agent's fraud in loaning mother's funds on insufficient security, wherein allegations of fraud were of present or pre-existing facts, evidence that on occasions previous to transaction in question borrower had promptly repaid loans from agent and that agent had lost no other funds than amount in question was inadmissible as indirectly tending to show good character of agent for honesty and fair dealing.—Blondeau v. Sommer, Civ.App., 99 S.W.2d 668.

(5) It has been held that, where an issue of fraud is to be determined by virtue of the credit to be given to the testimony of the witnesses as to whether certain statements were made and whether they were true or false, evidence supporting the good character for honesty and fair dealing of the party charged with making the false representations is not admissible.—Luckenbach v. Thomas, Civ.App., 166 S.W. 99.

(6) In some cases, decided before the decision in Grant v. Pendley, supra, it was held or recognized that a party who was charged with fraud could introduce supporting evidence of his good character for honesty and fair dealing.—Brannon v. Gartman, Com.App., 288 S.W. 817, reversing Gartman v. Brannon, Civ.App., 270 S.W. 255—Hunt v. Garrett, Civ.App., 275 S.W. 96, modified on other grounds, Garrett v. Hunt, Com.App., 283 S.W. 489—Philadelphia Fire Ass'n v. Jones, Civ.App., 40 S.W. 44.

(7) So it was stated broadly that, where a party's reputation for honesty and fair dealing is attacked by the pleadings, and his reputation is thereby put in controversy, it is permissible to offer testimony to show that the allegations are not true.—Waco Mut. Life & Accident Ass'n v. Hafferkamp, Civ.App., 293 S.W. 256.

(8) As to the statement as to fraud in Brannon v. Gartman, supra, it has been asserted that it is not authoritative and must be regarded as dictum.—Grant v. Pendley, Com.App., 39 S.W.2d 596, 78 A.L.R. 638, reversing, Civ.App., 22 S.W.2d 467.

(9) In an action based on a charge of fraudulent statements and fraudulent concealment of facts, it has been held that the admission of evidence tending to show defendant's good standing in the community was not reversible, especially in view of the prior admission of evidence tending to show plaintiff's good standing in the community.—Haynes v. Germany, Civ.App., 144 S.W.2d 981.

98. Ky.—Northern Assur. Co. v. Griffin, 33 S.W.2d 7, 236 Ky. 296.
Mo.—Wood v. General Ins. Co. of America, 77 S.W.2d 167, 229 Mo.App. 298.
22 C.J. p 473 note 41, p 474 note 46.

99. Me.—Thayer v. Boyle, 30 Me. 475.

1. Miss.—Leinkauf v. Brinker, 62 Miss. 255, 52 Am.R. 183.
22 C.J. p 474 note 50.

idence of the good character of a party may be admissible on the ground that the nature of the action is such as directly to involve his character and to constitute a charge of wrongful conduct,[2] or on the ground that he is charged with wrongdoing involving moral turpitude which his adversary seeks to establish by circumstantial evidence,[3] as for example where there is a charge of fraud and conspiracy;[4] and, according to some cases, evidence of the good character of a party to a civil action is admissible where he is charged with acts which would constitute a criminal offense.[5]

Charge against third person. A charge that a third person committed a wrongful act does not, according to some cases, authorize the introduction of evidence of such person's good character,[6] even

2. Ga.—McNabb v. Lockhart, 18 Ga. 495.

Tort or quasi tort

It has been stated broadly that in tort, or quasi tort, where the injury alleged is doubtful, character may be given in evidence.—Scott v. Fletcher, 1 Overt., Tenn., 488.

3. Tenn.—Henry v. Brown, 2 Heisk. 213.
22 C.J. p 474 note 53.

4. Ga.—Wimberly v. Toney, 165 S.E. 257, 175 Ga. 416.

In South Carolina

(1) The view has been taken that, where there are charges of actual fraud against defendant, which charges rest in great part on circumstances, evidence as to his character is admissible on his behalf.—Werts v. Spearman, 22 S.C. 200.

(2) It was announced in an earlier case, however, that, where the nature of the action itself does not involve the general character of a party, evidence as to that character is not admissible to contradict an imputation of dishonesty, or even of fraud.—Smets v. Plunket, 32 S.C.L. 372.

5. Tenn.—Livingston v. United States Fire Ins. Co., 7 Tenn.App. 230.
22 C.J. p 474 note 53.

Admission of evidence under statute

In view of Civ.Code 1910 § 5745, Code 1933 § 38-202, where defendant, in suit to set aside deeds, was charged in effect in petition with forging or altering them, evidence of his good character was properly admitted.—Mays v. Mays, 113 S.E. 154, 153 Ga. 835.

Where proof of criminal intent essential to recovery

Where, in order to entitle plaintiff to the recovery sought, it is necessary to establish that defendant acted with criminal intent, it is proper for defendant to introduce evidence of his general good character as to the element or feature thereof involved in the charge against him, for the purpose of rebutting the proof, showing or tending to show criminal intent.
Ill.—People v. Matt, 224 Ill.App. 210.
W.Va.—Hess v. Marinari, 94 S.E. 968, 81 W.Va. 500.

In Texas

(1) Supporting evidence of the good character of a party, either for truth and veracity or for honesty and fair dealing, is admissible where he is charged by his adversary's pleading or evidence with the commission of a crime involving moral turpitude.—Waggoman v. Fort Worth Well Machinery & Supply Co., 76 S.W.2d 1005, 124 Tex. 325, reversing Fort Worth Well Machinery & Supply Co. v. Waggoman, Civ.App., 52 S.W.2d 306—Grant v. Pendley, Com.App., 39 S.W.2d 596, 78 A.L.R. 638, reversing, Civ.App., 22 S.W.2d 467—Wells v. Lewis, Civ.App., 108 S.W.2d 926, error dismissed.

(2) Petition, charging one defendant with false swearing and another defendant and his father with subornation of false swearing, rendered evidence of their good character for truth and veracity or honesty and fair dealing admissible.—Wells v. Lewis, supra.

(3) Where cross-examination by defendant and testimony elicited by him constituted an attack on plaintiff's character and charged him with embezzling defendants' funds, supporting evidence of plaintiff's good reputation for truth and veracity and for honesty and fair dealing was admissible.—Waggoman v. Fort Worth Well Machinery & Supply Co., supra.

(4) Where, in an action for money loaned and the price of labor, defendant's answer charged plaintiff with embezzlement of defendant's money, plaintiff's good reputation for honesty was in issue so that evidence thereof was admissible.—Mullinay v. Pyron, 123 S.W. 1139, 58 Tex.Civ. App. 253.

(5) Evidence of plaintiff's good reputation for honesty and fair dealing in community wherein he lived was admissible, in view of defendant's allegations in its pleadings that plaintiff had been convicted of burglary and of assault with intent to murder.—St. Louis, S. F. & T. Co. v. Barr, Civ.App., 67 S.W.2d 1086.

(6) Prior to the decision in Grant v. Pendley, supra, the view was expressed that supporting evidence of good character for honesty and fair dealing was admissible on behalf of a party who is charged with a crime, without mention of the modifying phrase "involving moral turpitude."—Brannon v. Gartman, Com.App., 288 S.W. 817, reversing Gartman v. Brannon, Civ.App., 270 S.W. 255—Hunt v. Garrett, Civ.App., 275 S.W. 96, modified on other grounds Garrett v. Hunt, Com.App., 283 S.W. 489.

In Vermont

(1) In an action on a fire insurance policy in which defendant insurance company introduced evidence tending to show not only that plaintiff burned the building in which the insured goods were located, but also that plaintiff was guilty of perjury in making out his sworn statement of loss, it was held that it was not error to admit evidence in support of plaintiff's character for honesty, integrity, and truthfulness, where such evidence was objected to on the ground that defendant had introduced no impeaching testimony of plaintiff's character.—Mosley v. Vermont Mut. Fire Ins. Co., 55 Vt. 142.

(2) Evidence of general good character is not admissible as a defense in civil cases, except where the question of character is directly in issue and material to the amount of damages, even though plaintiff's testimony virtually charges defendant with the crime of embezzlement.—Wright v. McKee, 37 Vt. 161.

6. Mo.—Milan Bank v. Richmond, 139 S.W. 352, 235 Mo. 532.
22 C.J. p 474 note 57.

Deceased person

(1) In an action on a life insurance policy in which defendant insurance company set up as a defense that insured had made false and fraudulent statements in his application for insurance, evidence that the general reputation of insured for being a truthful and honest man was good was not admissible.—Great Western Life Ins. Co. v. Sparks, 132 P. 1092, 38 Okl. 395, 49 L.R.A.,N.S., 724.

(2) In Texas the same rule has been applied.—Dorsey Life Ass'n v. Sitton, Tex.Civ.App., 76 S.W.2d 550.

(3) However, in an earlier case in Texas it was held, under a similar state of facts, that evidence that insured's reputation for honesty and fair dealing was good was admissible.—Waco Mut. Life & Accident Ass'n v. Hafferkamp, Tex.Civ.App., 293 S.W. 250.

7. Mo.—Niese Grocer Co. v. Massachusetts Bonding & Ins. Co., App., 259 S.W. 852, certiorari quashed State ex rel. Massachusetts Bonding & Insurance Co. v. Allen, 271 S.W. 757, 308 Mo. 109.

8. **Charge of fraudulent misrepresentation by party**

In an action by the buyer of stock of a bank against the seller, based on the alleged fraud of the seller in inducing the purchase by false representations as to value, evidence of the good reputation for business ability, honesty, and integrity of the directors and officers of the bank was admissible on behalf of defendant seller, in view of evidence offered by plaintiff as to representations by defendant that such directors and officers were competent.—Jones v. Pingree, 273 P. 303, 73 Utah 190.

Charge of fraudulent misrepresentation by third person

(1) Where, in an action on a life insurance policy, defendant insurance company charged that insured made fraudulent misrepresentations in his application for insurance, evidence to show the good character of insured was admissible.

Ga.—German-American Life Ass'n v. Farley, 29 S.E. 615, 102 Ga. 720—Henderson v. Jefferson Standard Life Ins. Co., 147 S.E. 901, 39 Ga. App. 609.

Ill.—Woodruff v. Mutual Life Ins. Co. of New York, 229 Ill.App. 213.

(2) A like rule has been applied where defendant life insurance company charged that insured made fraudulent misrepresentations in an application for reinstatement of the policy.—Houston v. New York Life Ins. Co., 8 P.2d 434, 166 Wash. 611.

(3) It has also been held that, where fire insurance companies sought to defeat a recovery by evidence purporting to show that insured, who died prior to trial, fraudulently overstated the value in proofs of loss, evidence of insured's good reputation was admissible.—Rassmusson v. North Coast Fire Ins. Co., 145 P. 610, 83 Wash. 569, L.R.A. 1915C 1179.

Charge against party and third person

Where defendant was charged with fraudulent misrepresentation and a third person, since deceased, was charged as a co-conspirator with defendant, evidence of the good character of such third person in regard to business matters and for honor and integrity was admissible.—Continental Nat. Bank v. First Nat. Bank, 68 S.W. 497, 108 Tenn. 374.

9. **Admission of evidence under statute**

In an action on notes against the executor of the alleged maker, in which plaintiff claimed that the notes had been lost or stolen and evidence on behalf of plaintiff contained intimations that the alleged maker had stolen the notes, evidence of the good character of the maker as respects his honesty and integrity was admissible, in view of Code 1933 § 38-202.—Caldwell v. Caldwell, 1 S.E.2d 764, 59 Ga.App. 637.

10. Tex.—Wells v. Lewis, Civ.App., 108 S.W.2d 926, error dismissed.

Theft

Where plaintiff pleaded fraud by persons who did the scaling and classification of logs for defendant and testified that they had stolen his logs, evidence of their general reputation for honesty was admissible.—Cudlipp v. C. R. Cummings Export Co., Tex.Civ.App., 149 S.W. 444.

11. **Charge of embezzlement**

Tex.—Mullinax v. Pyron, 123 S.W. 1139, 58 Tex.Civ.App. 253.

12. Tex.—Daniels v. Starnes, Civ. App., 61 S.W.2d 548, 551, quoting **Corpus Juris**—Underwood Typewriter Co. v. Shoulds, Civ.App., 253 S.W. 935, 940, quoting **Corpus Juris**.

22 C.J. p 474 note 53.

Payment of debts

In a case where plaintiff sought to recover for services rendered to defendant's testator during his last illness, it seems that evidence of the testator's good reputation for payment of debts is not relevant.—Marshall v. Mitchell, 38 S.E. 158, 59 S.C. 523.

13. **Honesty**

Tex.—Mullinax v. Pyron, 123 S.W. 1139, 58 Tex.Civ.App. 253.

22 C.J. p 475 note 83, p 476 note 21.

Sobriety

Miss.—Harris v. Sims, 124 So. 325, 155 Miss. 207.

14. Conn.—Stow v. Converse, 3 Conn. 325, 8 Am.D. 189.

Mass.—McCarty v. Leary, 118 Mass. 509.

Particular fraudulent act

Evidence as to the general reputation of a third person for truth and veracity was not admissible as tending to show that such person committed a particular fraudulent act.—Trimble v. Carlisle, 88 S.E. 28, 103 S.C. 411.

Drinking and intoxication

(1) In action against highway contractor for death of motorist who crashed into steel trailer barrier, where defendant introduced evidence that motorist was intoxicated, evidence that motorist was careful driver, sober by habit, and had good general reputation for sobriety, was not competent in rebuttal, since issue was intoxication on a particular occasion, not character or reputation.—Graves v. Johnson, 176 So. 256, 179 Miss. 465, followed in Graves v. Hamilton, Miss., 177 So. 360.

there is other definite proof concerning such acts or conduct;[15] and it has been held that such evidence as to a party is not admissible to negative a contrary and unfavorable imputation arising from his admissions on his cross-examination as to immaterial issues.[16]

As to showing relevant traits of character of accused in criminal prosecutions see Criminal Law § 677 e and the titles treating specific offenses.

§ 428. —— Effect of Admission of Evidence

Evidence of the good character of a party is admissible to rebut evidence attacking his character, and, according to some authorities, the admission of evidence of good character justifies the reception of evidence in rebuttal.

It has been held or recognized that evidence of the good character of a party is admissible where his character is attacked or called in question by evidence of the opposing party.[17]

While there is authority for the view that, where evidence of good character is introduced by one party, the other party may rebut it by evidence along similar lines,[18] it has been asserted that the mere fact that a party gives evidence of his good character, without objection, does not authorize the adverse party to give improper evidence on the same subject.[19]

§ 429. —— Knowledge of Character of Third Person

As to necessity of knowledge by defendant, in an action for libel, of the character of a third person who furnished information on which the libel was based, as a preliminary to introduction of evidence of the good character of such person in mitigation of damages see the C.J.S. title Libel and Slander § 267, also 22 C.J. p 477 note 35.

Examine Pocket Parts for later cases.

§ 430. Admissibility of Evidence As to Reputation

In order to be admissible, evidence as to reputation should be relevant to the matters involved.

Evidence of reputation is regarded as the most appropriate proof of character as shown infra § 434, and cases dealing with the circumstances under which evidence of reputation, when considered as proof of character, is admissible have been considered supra §§ 423–428. In some instances, reputation, as distinct from actual character, may be a proper subject for investigation, under rules considered infra §§ 431, 432.

Evidence as to reputation should have some relevancy to the matters involved in order to be admissible.[20]

(2) Other cases see Ryan v. New York, etc., R. Co., 111 N.Y.S. 21, 127 App.Div. 11—22 C.J. p 474 note 59 [a].

Recklessness

(1) Evidence that defendant had the reputation of being a reckless driver was not admissible on behalf of plaintiff in an action for personal injuries resulting from being struck by an automobile driven by defendant, the question at issue being whether defendant was reckless on a particular occasion.—Pounders v. Day, 118 So. 298, 151 Miss. 436.

(2) Evidence, on behalf of plaintiff, of reputation for recklessness of defendant's employee was not admissible where the question involved was the conduct of the employee at the time of the accident.—Phinney v. Detroit United Ry. Co., 205 N.W. 124, 232 Mich. 399.

(3) In action for personal injuries against bus company, based on alleged negligence in inspection and repair, evidence of the general reputation of the manufacturer of the bus was not admissible on behalf of defendant.—Rapp v. Butler-Newark Bus Line, 138 A. 377, 103 N.J. Law 512, affirmed 140 A. 921, 104 N. J.Law 444.

15. Miss.—Graves v. Johnson, 176 So. 256, 179 Miss. 465, followed in Graves v. Hamilton, Miss., 177 So. 360.

22 C.J. 475 note 62.

16. Mass.—McCarty v. Leary, 118 Mass. 509.

17. Ala.—Goldsmith v. Picard, 27 Ala. 142—Holley v. Burgess, 9 Ala. 728.

Mo.—Ferguson v. Simmons, 43 S.W. 2d 875, 226 Mo.App. 178.

N.Y.—Inman v. Foster, 8 Wend. 602.

Tenn.—Nashville Ry. & Light Co. v. Owen, 11 Tenn.App. 19.

Tex.—Fort Worth Hotel Co. v. Waggoman, Civ.App., 126 S.W.2d 578, error dismissed, judgment correct.

Evidence admissible by reason of admission of similar evidence of adverse party see supra § 190.

Where attacking evidence improperly admitted

Where one party is improperly permitted to assail the character of another, the other party is properly permitted to introduce evidence of his good character.

Ala.—Findlay v. Pruitt, 9 Port. 195.

N.H.—Dame v. Kenney, 25 N.H. 318.

Where skill, care, or competency attacked

Where evidence impeaches the skill, care, or competency of a party involved, character evidence is admissible in rebuttal.—Beckner v. Barrett, Tex.Civ.App., 81 S.W.2d 719, error dismissed.

18. N.Y.—Townsend v. Graves, 3 Paige, 453.

19. Tex.—Gilmer v. Graham, Com. App., 52 S.W.2d 263, reversing, Civ. App., 26 S.W.2d 687—Landa v. Obert, 25 S.W. 342, 5 Tex.Civ.App. 620.

20. **Evidence not admissible**

(1) Where a party's general reputation for truth and veracity is not involved in any peculiar or unusual sense, evidence of his general good reputation in that regard is not admissible.—Fort Worth Hotel Co. v. Waggoman, Tex.Civ.App., 126 S.W.2d 578, error dismissed, judgment correct.

(2) In detinue for a horse, it was proper for plaintiff to testify that he knew a person who defendant claimed had been owner and possessor of such horse, but not that such person was known as a horse-swapper.—Maddox v. Johnson, 106 So. 37, 213 Ala. 695.

(3) In action for damages from wrongful seizure of grocery store stock, excluding testimony that store had reputation of selling whisky was proper.—J. M. Radford Grocery Co. v. Hothan, Tex.Civ.App., 42 S.W.2d 119.

§ 431. —— Where Reputation in Issue

Where the previous good reputation of plaintiff is in issue, plaintiff may give evidence of his good reputation and defendant may show that plaintiff's reputation was not good.

The nature of the action,[21] the pleadings,[22] or the evidence[23] may be such as to put in issue plaintiff's previous good reputation and the extent of the injury thereto by reason of the acts complained of, and it has been held or recognized that in such case plaintiff may introduce evidence of his good reputation.[24] On the other hand, it has been held or recognized that defendant may show that, prior to the act complained of, plaintiff's reputation was not good.[25]

§ 432. —— Where Reputation Relevant

The reputation of a person, animal, or place may be a relevant fact in various connections.

The reputation of a person may be a relevant fact in various connections.[26] For instance, the reputation of an agent or employee in regard to skill, competency, and carefulness, may be relevant as bearing on the negligence of the principal or employer in employing or retaining him;[27] and similar considerations indicate the relevancy of reputation in connection with such questions as the propriety of intrusting property to,[28] or conferring responsibility on,[29] a servant, or the proper selection of a trustee.[30]

Reputation may also be relevant in determining whether credit was given to a certain person,[31] or whether the representations of a certain person were relied on,[32] or as tending to prove notice of a fact reputed to exist.[33]

Animal. The reputation of an animal may be relevant on the question of knowledge or notice.[34]

Place. The reputation of a particular place may be relevant in certain connections.[35]

§ 433. Mode of Proof

a. In general
b. Inference from observation
c. Negative evidence
d. Written declaration

a. In General

The rules regulating proof of character have been

(4) Testimony as to reputation of subcontractors was not admissible under the circumstances involved.—Hewitt v. Buchanan, Tex.Civ.App., 4 S.W.2d 169.

21. Miss.—Graves v. Johnson, 176 So. 256, 179 Miss. 465.
N.M.—Keyes v. Keyes, 199 P. 361, 27 N.M. 215.
22 C.J. p 477 notes 40–43.

22. Mo.—Ferguson v. Simmons, 43 S.W.2d 875, 226 Mo.App. 178—Milton v. Missouri Dairy Co., 175 S.W. 105, 188 Mo.App. 278.
Tex.—Fort Worth Hotel Co. v. Waggoman, Civ.App., 126 S.W.2d 578, error dismissed, judgment correct—Houston Chronicle Pub. Co. v. Tiernan, Civ.App., 171 S.W. 542.

23. Ala.—Goldsmith v. Picard, 27 Ala. 142.

24. Ala.—Goldsmith v. Picard, supra.
Miss.—Graves v. Johnson, 176 So. 256, 179 Miss. 465.
Mo.—Ferguson v. Simmons, 43 S.W. 2d 875, 226 Mo.App. 178—Milton v. Missouri Dairy Co., 175 S.W. 105, 188 Mo.App. 278.
N.M.—Keyes v. Keyes, 199 P. 361, 27 N.M. 215.
Tex.—Houston Chronicle Pub. Co. v. Tiernan, Civ.App., 171 S.W. 542.
22 C.J. p 477 notes 45–47.
Reputation or character of plaintiff in actions for:
Breach of promise to marry see Breach of Marriage Promise §§ 29, 31.
False imprisonment see the C.J.S. title False Imprisonment § 56, also 25 C.J. p 544 note 85–p 545 note 88.
Libel or slander see the C.J.S. title Libel and Slander §§ 190, 210, 264, 266, 267, also 22 C.J. p 477 note 43, 37 C.J. p 59 note 69–p 61 note 17, p 75 note 66–p 77 note 80, p 94 notes 79, 81, p 97 notes 45, 46, p 122 note 41.
Malicious prosecution see the C.J.S. title Malicious Prosecution § 86, also 22 C.J. p 477 note 42, 38 C.J. p 482 note 62–p 484 note 81, p 496 note 36.

Particular trait

Where a particular trait has been put in issue by the pleadings and evidence and plaintiff has alleged injury to his reputation, he may introduce evidence of his general good reputation in regard to such trait.—Harris v. Sims, 124 So. 325, 155 Miss. 207.

25. R.I.—Folwell v. Providence Journal Co., 37 A. 6, 19 R.I. 551.
22 C.J. p 477 note 48.

26. Okl.—Balch v. State, 164 P. 776, 65 Okl. 146.
22 C.J. p 477 note 49.

Reputation of third person

Ala.—Starks v. Comer, 67 So. 440, 190 Ala. 245.
Ill.—Kennedy v. Modern Woodmen of America, 90 N.E. 1084, 243 Ill. 560, 28 L.R.A.,N.S., 181.

Unlawful search

In an action for unlawful search, evidence of the reputation of plaintiff for bad character is admissible in mitigation of damages.—Banfill v. Byrd, 84 So. 227, 122 Miss. 288.

27. U.S.—Baltimore O. R. Co. v. Henthorne, Ohio, 73 F. 634, 19 C.C.A. 623.
Ill.—Western Stone Co. v. Whalen, 38 N.E. 241, 151 Ill. 472, 42 Am.S.R. 244.
22 C.J. p 478 note 50.

28. Cal.—Ficken v. Jones, 28 Cal. 618.

29. Mass.—Monahan v. Worcester, 23 N.E. 228, 150 Mass. 439, 15 Am.S.R. 226.

30. Kan.—Holmberg v. Dean, 21 Kan. 73.

31. Mass.—Buswell Trimmer Co. v. Case, 11 N.E. 549, 144 Mass. 350.

32. Mich.—Daniels v. Dayton, 13 N.W. 392, 49 Mich. 137.

33. Mich.—Wormsdorf v. Detroit City R. Co., 42 N.W. 1000, 75 Mich. 472, 13 Am.S.R. 453.
22 C.J. p 478 note 55.

34. Mich.—Wormsdorf v. Detroit City R. Co., supra.

35. Okl.—Balch v. State, 164 P. 776, 65 Okl. 146.

Unlawful search

The view has been taken that in an action for an unlawful search, the general reputation of the hotel involved as being a place of evil resort is admissible in mitigation of damages.—Banfill v. Byrd, 84 So. 227, 122 Miss. 288.

criticized, but proof of character by showing general reputation possesses certain advantages and is the least objectionable mode of proof available.

The rules regulating proof of character, discussed infra this section and in §§ 434–436, have been criticized as illogical, unscientific, and anomalous, explainable only as archaic survivals of compurgation or of states of legal development when the jury personally knew the facts on which their verdict was based.[36]

Evidence of general reputation, as proof of actual character, see infra § 434, may, it seems, be probatively weak.[37] Such evidence possesses the advantage, however, that it makes a comparatively simple issue and one which the person affected may fairly be supposed to be able to meet without surprise,[38] and the view has been expressed that proof of character by showing general reputation is the least objectionable mode of proof and particularly that it is less objectionable than that which depends on the individual opinion of witnesses.[39] Evidence of common reputation in the community is entirely proper when the reputation is, itself, the ultimate fact.[40]

As to knowledge affecting the competency of a character witness see the C.J.S. title Witnesses § 55, also 70 C.J. p 89 note 59–p 91 note 80.

Functions of court. Where a satisfactory test has been made, the court should exclude further evidence as to character which is not, under the circumstances, relevant to the inquiry,[41] and the court may decline to receive evidence the probative value of which would be slight.[42] It has been intimated that, under some circumstances, the court may, in its discretion and as a matter of favor, permit defendant to use other means of establishing his character than by proof of reputation.[43]

b. Inference from Observation

As a general rule, character cannot be proved from the mere personal knowledge of the witness or by his opinion or an inference drawn by him, based on observation; but apparently the rule is subject to qualifications in some jurisdictions.

As a general rule, the character of a person cannot be proved from the personal knowledge of the witness,[44] and the personal or individual opinion of the witness in that regard is not admissible;[45] the existence of an inference on the part of an observer as to the existence of a particular relevant trait of character is inadmissible,[46] even where it is an inference from observed conduct.[47]

According to some cases, however, such evidence may be received when the fact as to actual character was placed in issue by the pleadings,[48] and it has been stated broadly that the habits or moral character of a person may be shown by the testimony of one who has personal knowledge of the facts.[49]

Character of animals. The character of animals may be established by the inference of competent observers.[50]

36. Iowa.—Foster v. Crisman, 144 N.W. 1021, 165 Iowa 189.
22 C.J. p 478 notes 65, 67, 68.

37. N.H.—Curtice v. Dixon, 68 A. 587, 74 N.H. 386.
22 C.J. p 478 note 64.

38. N.C.—Nixon v. McKinney, 11 S. E. 154, 105 N.C. 23—Bottoms v. Kent, 48 N.C. 160.
22 C.J. p 478 note 66.

39. N.C.—Bottoms v. Kent, supra.

40. Iowa.—Foster v. Crisman, 144 N.W. 1021, 165 Iowa 189.

41. Iowa.—State v. Potts, 43 N.W. 534, 78 Iowa 656, 5 L.R.A. 814.
22 C.J. p 479 note 72.
Limiting number of witnesses as to character in:
Civil cases see the C.J.S. title Trial § 92, also 64 C.J. p 144 notes 54–61.
Criminal prosecutions see Criminal Law § 1042.

42. Wyo.—State v. Williams, 266 P. 1056, 1057, 38 Wyo. 340, quoting Corpus Juris.
22 C.J. p 479 note 73.

43. Vt.—State v. Emery, 7 A. 129, 59 Vt. 84.

44. Tenn.—Hager v. Hager, 66 S.W. 2d 250, 17 Tenn.App. 143.
22 C.J. p 484 note 65.
Proof of character by general reputation see infra § 434.

45. Tex.—Tarwater v. Donley County State Bank, Civ.App., 277 S.W. 176—Negociacion Agricola y Ganadera de San Enrique, S. A., v. Love, Civ.App., 220 S.W. 224.
22 C.J. p 484 note 65.

46. Cal.—Marks v. Reissinger, 169 P. 243, 35 Cal.App. 44.
Nev.—Davis v. Davis, 13 P.2d 1109, 54 Nev. 267.
22 C.J. p 484 notes 65, 66.
As to character of accused in criminal prosecutions see Criminal Law § 678.

47. Mass.—Hunneman v. Phelps, 85 N.E. 169, 199 Mass. 15.
22 C.J. p 484 notes 65, 67.
Disposition of party
Court improperly admitted evidence on whether witness had ever observed whether plaintiff was of quarrelsome disposition.—Davis v. Davis, 13 P.2d 1109, 54 Nev. 267.

48. U.S.—Ardmore Coal Co. v. Bevil, Ind.T., 61 F. 757, 10 C.C.A. 41.
22 C.J. p 484 notes 68, 69.

49. Ala.—Eminent Household of Columbian Woodmen v. Blackerby, 85 So. 528, 204 Ala. 202.
Opinion of witness
The view has been taken that evidence of character by a witness who knows the person whose character is under inquiry is admissible and that, where such a witness has had opportunity to obtain knowledge as to a particular trait, he may express an opinion as to such person's character in that regard.—Richmond v. City of Norwich, 115 A. 11, 96 Conn. 582.
(2) Usual method of proving character is by testimony of witnesses who know subject and are able from such knowledge to say that in their opinion character is good or bad.—Noll v. Wilson, 190 N.E. 581, 47 Ohio App. 134.

50. Conn.—Sydleman v. Beckwith, 43 Conn. 9.
Mich.—Wormsdorf v. Detroit City R. Co., 42 N.W. 1000, 75 Mich. 472, 13 Am.S.R. 453.

c. Negative Evidence

Negative facts relating to character may be admissible, although the view has been expressed that testimony that the witness has never heard anything said for or against a certain person is not evidence of reputation.

It has been held or recognized that negative facts relating to character, as that a witness well acquainted with the person whose character is the subject of inquiry, in the locality where he lived, never heard anything evil said of him,[51] or his character even discussed or spoken of,[52] are admissible as tending to establish circumstantially good character. However, it has been held that testimony that so far as the witness knows the reputation of a particular person is good and that the witness has never heard anything said for or against such person is not evidence of reputation,[53] and that one offered as a witness may not testify as to the reputation of another if he has not heard any discussion or conversation concerning such other.[54]

d. Written Declaration

Written declarations made by third persons, out of court, ordinarily are not admissible as evidence of character.

Written declarations, official or otherwise, made by third persons out of court, ordinarily are not admissible as evidence of character.[55]

§ 434. —— General Reputation

a. In general
b. Time to which evidence relates
c. Place to which evidence relates

a. In General

The appropriate method of proving character is by establishing general reputation as to the particular trait involved.

The appropriate proof of character is by establishing general reputation[56] as to the particular trait involved.[57] The reputation which is admissible is the common report which others make concerning the person in question, that is to say, the talk about him which shows the opinion which is held in his community;[58] hearsay evidence as to statements of

51. Minn.—Bingham v. Bernard, 30 N.W. 404, 36 Minn. 114.
22 C.J. p 484 note 71.

52. Va.—Davis v. Virginia, 33 Gratt. 413, 74 Va. 413.
22 C.J. p 484 note 72.

53. Mass.—Clark v. Eastern Massachusetts St. Ry., 150 N.E. 184, 254 Mass. 441.

54. Mass.—Clark v. Eastern Massachusetts St. Ry., supra.

55. **Certificate, statement, or records**
(1) Good moral character cannot be established by the introduction of an ex parte certificate or statement.—Keyes v. Keyes, 199 P. 361, 27 N. M. 215.
(2) In a suit for criminal conversation and seduction of plaintiff's wife, a certificate of good moral character of plaintiff, signed by General Goethals, Governor of the Panama Canal Zone, was inadmissible.—Keyes v. Keyes, supra.
(3) Letter or certificate of good character given by a person's neighbors was not admissible under the circumstances involved.—Jones v. Duchow, 23 P. 371, 25 P. 256, 87 Cal. 109.
(4) For other illustrations see 22 C.J. p 485 note 74 [a].
Discharge from army
(1) In action against railroad for injuries alleged to have resulted from being assaulted and kicked off moving freight train, war records of plaintiff, showing honorable discharge, certifying good character, were inadmissible, as tending to influence jury toward favorable finding for plaintiff.—Quinn v. Louisville & N. R. Co., 110 So. 436, 144 Miss. 505.
(2) However, it has been held that plaintiff's good reputation for honesty and fair dealing may be proved by an honorable discharge from the United States army.—Timmins v. Hale, 256 P. 770, 122 Or. 24.
Military record of accused in criminal prosecution as evidence of character see Criminal Law § 677 e.

56. U.S.—Bird v. Halsy, C.C.Va., 87 F. 671.
Cal.—Marks v. Reissinger, 169 P. 243, 35 Cal.App. 44.
Iowa.—State v. Pickett, 210 N.W. 782, 783, 202 Iowa 1321, citing **Corpus Juris.**
Ky.—Louisville Times Co. v. Emrich, 66 S.W.2d 73, 252 Ky. 210.
Md.—Sappington v. Fairfax, 108 A. 575, 135 Md. 186.
Mich.—People v. Hill, 241 N.W. 873, 874, 258 Mich. 79, quoting **Corpus Juris.**
Miss.—Powers v. Presgroves, 38 Miss. 227.
N.Y.—Hart v. McLaughlin, 64 N.Y.S. 827, 51 App.Div. 411.
N.C.—Davis v. Long, 126 S.E. 321, 189 N.C. 129.
Tenn.—Hager v. Hager, 66 S.W.2d 250, 17 Tenn.App. 143.
22 C.J. p 479 note 75.
Advantages of proof of character by general reputation see supra § 433.
Entire character or single trait
Evidence of general reputation is a proper method of proving either general character or a particular trait, and affords a basis for an inference as to actual character.—Richmond v. City of Norwich, 115 A. 11, 96 Conn. 582.
Confining proof to general reputation or general character
(1) Character witness should be confined to general reputation or general character of person.—Tingle v. Worthington, 110 So. 143, 215 Ala. 126.
(2) When it becomes permissible to offer evidence as to good character, such evidence must be confined to proof of general reputation.—Negociacion Agricola y Ganadera de San Enrique, S. A., v. Love, Tex.Civ. App., 220 S.W. 224.
(3) When evidence of good character and disposition is admissible, it must be confined to proof of general reputation.—Tarwater v. Donley County State Bank, Tex.Civ.App., 277 S.W. 176.
Personal knowledge or opinion of witness see supra § 433 b.
Habits or moral character
Where the fact is relevant, the habits or moral character of a person may be proved in some cases by evidence of his general reputation in the community in which he lives.—Eminent Household of Columbian Woodmen, 85 So. 528, 204 Ala. 202.

57. Nev.—Davis v. Davis, 13 P.2d 1109, 54 Nev. 267.
N.C.—Bottoms v. Kent, 48 N.C. 160.
22 C.J. p 480 note 76.

58. Mass.—Clark v. Eastern Massachusetts St. Ry., 150 N.E. 184, 254 Mass. 441.

particular persons cannot be received.[59] The general reputation of a person cannot be proved by a statement of one or two individuals; the reputation shown must be such as is generally current in the community.[60]

Knowledge as affecting the competency of a character witness see the C.J.S. title Witnesses § 55, also 70 C.J. p 89 note 59–p 91 note 80; of a witness to impeach the character of another witness see the C.J.S. title Witnesses § 520, also 70 C.J. p 901 note 13–p 905 note 59.

Rebutting evidence. Rebutting evidence of character should in general be by proof of general reputation.[61]

Animal. While the admissibility of evidence of general reputation of an animal with regard to certain traits has been questioned,[62] and even denied,[63] there is authority that such evidence is admissible on the question of notice to the owner.[64]

Character of place. The character of a place as a nuisance may be proved by reputation.[65] The general reputation of a place cannot be proved by a statement of one or two individuals; the reputation shown must be such as is generally current in the community.[66]

b. Time to Which Evidence Relates

Evidence as to character should be limited to a period reasonably close to the time involved and should refer to reputation before the occurrence of the circumstances involved, although remoteness may go to the weight, rather than to the admissibility, of the evidence.

While testimony as to character and reputation should be limited to a period reasonably close to the time involved,[67] remoteness, if not too great, goes to the weight, rather than to the admissibility, of the evidence.[68] It is necessary that the reputation shown should be that which existed before the occurrence of the circumstances out of which the litigation arose.[69] Whether the evidence offered as to reputation is irrelevant because too remote in time is a preliminary question to be determined by the trial judge in his discretion, and his determination will not be disturbed unless there has been an abuse of discretion.[70]

As to the time to which inquiry extends or relates with regard to character or reputation of accused in a criminal prosecution see Criminal Law § 677 b; with regard to impeachment of character of a witness see the C.J.S. title Witnesses § 500, also 70 C.J. p 828 note 11–p 831 note 54; with regard to sustaining character of a witness see the C.J.S. title Witnesses § 534, also 70 C.J. p 928 note 67–p 929 note 77.

c. Place to Which Evidence Relates

The place to which evidence as to character or reputation relates generally is that in which the person in question lives or resides, has resided, or is best known.

The general rule is that the community or place in which the estimate of a person's character is relevant and admissible is that in which such person lives or resides,[71] or has resided,[72] or in which such person is best known.[73] Evidence as to reputation in places of former residence is not necessarily excluded,[74] and, where a person has not acquired a reputation in his present neighborhood, evidence as to the reputation acquired at a prior residence may be received.[75]

59. Ky.—Asher v. Beckner, 41 S.W. 35, 19 Ky.L. 521.

60. Iowa.—State v. Pickett, 210 N. W. 782, 202 Iowa 1321.

61. Ky.—Louisville Times Co. v. Emrich, 66 S.W.2d 73, 252 Ky. 210.
Mich.—People v. Hill, 241 N.W. 873, 874, 258 Mich. 79, quoting **Corpus Juris.**
22 C.J. p 480 note 82.

62. N.H.—Whittier v. Franklin, 46 N.H. 23, 88 Am.D. 185.
Admissibility of general reputation in action for injuries by animals to persons or animals see Animals § 175.

63. Ill.—Norris v. Warner, 59 Ill. App. 300.

64. Mich.—Wormsdorf v. Detroit City R. Co., 42 N.W. 1000, 75 Mich. 472, 13 Am.S.R. 453.

65. Okl.—Balch v. State, 164 P. 776, 65 Okl. 146.
Wash.—W. B. Hutchinson Inv. Co. v. Van Nostern, 170 P. 121, 99 Wash. 549.

66. Iowa.—State v. Pickett, 210 N. W. 782, 202 Iowa 1321.

67. Ohio.—Noll v. Wilson, 190 N.E. 581, 47 Ohio App. 134.
22 C.J. p 480 notes 87, 88.

68. Tex.—Clark v. Hendricks, Civ. App., 164 S.W. 57.
22 C.J. p 480 notes 88, 89.
Four or five years not too remote
Tex.—Clark v. Hendricks, Civ.App., 164 S.W. 57.

69. Ind.—In re Darrow, 92 N.E. 369, 175 Ind. 44.
22 C.J. p 480 note 90.

70. Me.—State v. Albanes, 83 A. 548, 109 Me. 199.
22 C.J. p 480 notes 91, 92.

71. Ala.—Rutledge v. Rowland, 49 So. 461, 161 Ala. 114.
Iowa.—Halley v. Tichenor, 94 N.W. 472, 120 Iowa 164.
22 C.J. p 480 note 93, p 481 note 94.

72. Ky.—Louisville Times Co. v. Emrich, 66 S.W.2d 73, 252 Ky. 210.
22 C.J. p 480 note 93.

73. Fla.—Hamilton v. State, 176 So. 89, 94, citing **Corpus Juris.**
Miss.—Powers v. Presgroves, 38 Miss. 227.
22 C.J. p 480 note 93.

74. N.Y.—Sleeper v. Van Middlesworth, 4 Den. 431.
Tex.—Clark v Hendricks, Civ.App., 164 S.W. 7.
Distance from former residence
The propriety of receiving evidence as to the character of a person in a neighborhood in which he formerly resided has been recognized in a case in which it appeared that, at the time of the trial, such person resided about six miles from his former residence.—Prater v. State, 18 So. 238, 107 Ala. 26.

75. Tex.—Clark v. Hendricks, Civ. App., 164 S.W 57.
22 C.J. p 481 note 96.

It has been held that, where a party introduces witnesses as to his character in certain communities of his residence, the adverse party may rebut as to those and other communities where he has lived.[76] It is not, however, competent to rebut evidence of good character by proof of a bad local reputation, limited to a neighborhood remote from the party's residence, where he has never lived and where he is not shown to be generally known.[77]

As to place to which inquiry relates with regard to accused in a criminal prosecution see Criminal Law § 677 c; with regard to impeachment of the character of a witness see the C.J.S. title Witnesses § 501, also 70 C.J. p 831 note 56–p 834 note 85; with regard to sustaining the character of a witness see the C.J.S. title Witnesses § 534, also 70 C.J. p 928 note 67–p 929 note 77.

§ 435. —— Rumor

On an inquiry as to character or reputation it is not ordinarily permissible to give evidence of mere rumors.

As regards evidence as to reputation, it has been laid down that rumor is not always reputation,[78] and mere rumors ordinarily cannot be shown on an inquiry as to character or reputation,[79] unless they are so common and prevalent that they have affected the general character.[80]

§ 436. —— Specific Acts

a. In general
b. Rebuttal
c. Independent relevancy

a. In General

As a general rule, evidence of specific acts or conduct is not admissible to show character, although, in the case of lower animals, specific instances in which a relevant trait was manifested may be proved.

While a somewhat broader rule has apparently been recognized in some cases,[81] as a general rule, evidence of specific acts or conduct is not admissible to prove character.[82] The propriety of the general rule is obvious when it is considered that, while one may readily be supposed to be prepared to defend his general character, he cannot be expected to anticipate, without notice, proof of particular acts not relevant to the issue but offered

76. Iowa.—State v. Foster, 59 N.W. 8, 91 Iowa 164.

Certain rebuttal evidence held incompetent

Tex.—Burns v. State, 5 S.W. 140, 23 Tex.App. 641.

77. Ohio.—Griffin v. State, 14 Ohio St. 55.

78. Ala.—Hartzog-Ganey Motor Co. v. State, 130 So. 771.

79. Mass.—Peterson v. Morgan, 116 Mass. 350.

22 C.J. p 481 note 11.

Admission of evidence as to rumors:

Accused's character in criminal prosecution see Criminal Law § 678.

As basis of testimony impeaching witness see the C.J.S. title Witnesses § 521, also 70 C.J. p 906 note 62.

In mitigation of damages see the C.J.S. title Libel and Slander § 267, also 37 C.J. p 98 note 59.

Plaintiff's character see the C.J.S. title Libel and Slander § 210, also 37 C.J. p 76 notes 72, 73.

Proving truth of charge see the C.J.S. title Libel and Slander § 218, also 37 C.J. p 86 note 49.

To rebut evidence of malice see the C.J.S. title Libel and Slander § 218, also 37 C.J. p 82 notes 76, 77.

Rumors among minority

Evidence showing rumors among minority of person's neighbors is not admissible in inquiry as to his character.—Powers v. Presgroves, 38 Miss. 227.

80. R.I.—Folwell v. Providence Journal Co., 37 A. 6, 19 R.I. 551.

81. N.H.—Plummer v. Ossipee, 59 N.H. 55.

22 C.J. p 481 note 12.

Value of services to show character or standing

Evidence of value of personal services which plaintiff would render in employment offered him by prospective employer was competent, in action for injuries, as showing character and standing in community.—Chicago, B. & Q. R. Co. v. Conway, C.C.A.Mo., 29 F.2d 551.

82. Ala.—Central Iron & Coal Co. v. Wright, 101 So. 815, 20 Ala.App. 82, certiorari denied Ex parte Central Iron & Coal Co., 101 So. 824, 212 Ala. 130.

Cal.—Pyper v. Jennings, 191 P. 565, 47 Cal.App. 623—Marks v. Reissenger, 169 P. 243, 35 Cal.App. 44.

Iowa.—State v. Ferguson, 270 N.W. 874, 883, 222 Iowa 1148, citing **Corpus Juris.**

Ky.—Louisville Times Co. v. Emrich, 66 S.W.2d 73, 252 Ky. 210.

Nev.—Davis v. Davis, 13 P.2d 1109, 1110, 54 Nev. 267, citing **Corpus Juris.**

N.J.—Ippolito v. Turp, 19 A.2d 782, 784, 126 N.J.Law 403, citing **Corpus Juris.**

N.C.—Davis v. Long, 126 S.E. 321, 189 N.C. 129.

Tenn.—Hager v. Hager, 66 S.W.2d 250, 255, 17 Tenn.App. 143, citing **Corpus Juris.**

Tex.—Green v. Enen, Civ.App., 270 S.W. 929, 931, citing **Corpus Juris.**

22 C.J. p 481 note 13.

Inquiry as to specific acts to:

Impeach witness with regard to character see the C.J.S. title Witnesses §§ 502–513, also 70 C.J. p 831 note 87–p 866 note 91.

Show character of:

Accused in criminal prosecution see Criminal Law § 678.

Third person in criminal prosecution see Criminal Law § 680.

Reason for rule

A reason sometimes given is that the introduction of specific instances would raise collateral issues and unduly prolong the trial.—Richmond v. City of Norwich, 115 A. 11, 96 Conn. 582.

Entire character or single trait

Character, whether the entire character or disposition, or a single trait of character, cannot, except in certain defined cases, be proved by specific instances, or by the inference to be drawn from them.—Richmond v. City of Norwich, supra.

Unrelated specific acts or transactions

(1) In suit for damages for homicide of plaintiff's husband, proof of character and habits of deceased by unrelated specific acts was properly excluded.—Edwards v. Griner, 155 S.E. 789, 42 Ga.App. 282.

(2) Evidence of certain isolated transactions which had no bearing on the issues could not be received to prove the general reputation of one of the parties.—Green v. Enen, Tex. Civ.App., 270 S.W. 929.

merely to support an inference as to character,[83] and that human experience shows that a person will frequently do acts, either good or bad, which are utterly at variance with his real character.[84]

Under the general rule, evidence of specific acts or conduct is not admissible to show either good character[85] or bad character.[86]

As to cross-examination of character witnesses as to specific facts see the C.J.S. title Witnesses § 387, also 22 C.J. p 483 notes 46–51, 70 C.J. p 642 note 57–p 647 note 83; and as to cross-examination of impeaching witness as to particular facts see the C.J.S. title Witnesses § 525, also 22 C.J. p 483 notes 46–51, 70 C.J. p 912 note 44–p 913 note 61.

Chastity. Evidence of specific acts of unchastity is rejected where the inquiry is as to reputation directly, or as to character in the sense of reputation,[87] but where actual chastity, as distinguished from reputation in this respect, is in issue, proof of specific acts of unchastity is the very best evidence and is accordingly received.[88]

Animals. In the case of lower animals, character may be shown by evidence of specific instances in which a relevant trait was manifested,[89] even though the acts are subsequent to the occurrence involved in the inquiry.[90]

b. Rebuttal

Generally it is not permissible to show specific acts in rebuttal of evidence as to character.

As a general rule, specific acts, whether of good conduct or bad conduct, cannot be shown in rebuttal of evidence as to character.[91]

Where, however, the inquiry is as to actual character, as distinguished from reputation, and particular acts have been shown by the party attacking character, the other party may be permitted to show specific acts in rebuttal.[92] Where, in an action against an executor, plaintiff offers proof attacking testator's general character, it has been held proper to allow defendant to show in what respect testator's moral character was bad.[93]

c. Independent Relevancy

Specific instances of conduct may be independently relevant and admissible in evidence.

Specific instances of conduct, may be independent-

83. Conn.—Richmond v. City of Norwich, 115 A. 11, 96 Conn. 582.
Tenn.—Hager v. Hager, 66 S.W.2d 250, 255, 17 Tenn.App. 143, citing **Corpus Juris.**
22 C.J. p 482 note 14.

84. Pa.—Frazier v. Pennsylvania R. Co., 38 Pa. 104, 110, 80 Am.D. 467.
22 C.J. p 482 note 15.

85. Mass.—Hunneman v. Phelps, 85 N.E. 169, 199 Mass. 15.
22 C.J. p 481 note 13, p 482 notes 16–23.

Truth and veracity
It has been held not permissible for the purpose of showing good character for truth and veracity to prove that a person has been truthful in certain dealings.—Hunneman v. Phelps, supra.

Other evidence held not admissible
That a person has held positions of trust.
Mo.—Carson v. Smith, 34 S.W. 855, 133 Mo. 606.
Tex.—Howard v. State, 36 S.W. 475, 37 Tex.Cr. 494, 66 Am.S.R. 812.

86. Va.—Dellastatious v. Boyce, 147 S.E. 267, 152 Va. 368.
22 C.J. p 481 note 13, p 482 notes 25–40.

Specific instances of improper conduct may not be put in evidence as indicative of bad character.—Noll v. Wilson, 190 N.E. 581, 47 Ohio App. 134.

Conduct of persons other than parties
In an action for an unlawful search, evidence of special or specific acts of wrongful conduct on the part of third persons at the hotel of plaintiff which was the place searched was not admissible even in mitigation of damages, where it was not shown that plaintiff had knowledge of, and acquiesced in, such conduct.—Banfill v. Byrd, 84 So. 227, 122 Miss. 288.

Arrest
In suit for injuries to plaintiff, shot by defendant's watchman, evidence of plaintiff's arrest for breaking into other premises was not admissible, arrest not being conclusive of guilt, especially in collateral proceeding.—Caskey v. Nussbaum, 13 S.W.2d 493, 227 Ky. 479.

Evidence not admissible
(1) That a person had disreputable associates.—Indianapolis Journal Newspaper Co. v. Pugh, 33 N.E. 991, 6 Ind.App. 510—22 C.J. p 482 note 26.

(2) That the house in which a person once lived has become a disorderly house.—Indianapolis, Peru & Chicago R. Co. v. Bush, 101 Ind. 582.

(3) That a person was loudmouthed and profane, and in the habit of being out late at night.—Dorsey v. Clapp, 35 N.W. 389, 22 Neb. 564.

(4) That a person had the reputation of being a dealer in liquor and a bootlegger.—Davila v. U. S., C.C.A. Puerto Rico, 54 F.2d 356.

(5) That a person had been charged with assault with intent to kill and that he had agreed not to return to a certain locality.—Parke v. Dennard, 118 So. 396, 218 Ala. 209.

87. Ind.—Hallowell v. Guntle, 82 Ind. 554.
22 C.J. p 483 note 41.

88. Iowa.—West v. Druff, 7 N.W. 636, 55 Iowa 335.
22 C.J. p 483 notes 42, 43.

89. Mont.—Kennon v. Gilmer, 5 P. 847, 5 Mont. 257, 51 Am.R. 45.
22 C.J. p 483 note 44.
Admissibility of specific instances in action for injuries by animals to persons or animals see Animals § 175 d, e.

90. Mont.—Kennon v. Gilmer, 5 P. 847, 5 Mont. 257, 51 Am.R. 45.
Tenn.—Lebanon & S. Turnp. Co. v. Hearn, 10 S.W. 510, 87 Tenn. 291.

91. Ill.—Waters v. West Chicago St. R. Co., 101 Ill.App. 265.
Ky.—Louisville Times Co. v. Emrich, 66 S.W.2d 73, 252 Ky. 210.
22 C.J. p 483 note 52, p 484 notes 53, 54.

92. Mo.—State v. Ritter, 221 S.W. 606, 608, 288 Mo. 381, citing **Corpus Juris.**
N.H.—Plummer v. Ossipee, 59 N.H. 55.

93. Ky.—Ratliff v. Daniel, 121 S.W. 1034, 137 Ky. 55.

ly relevant and admissible,[94] as bearing, for example, on motive,[95] intent,[96] design,[97] or belief,[98] or probable cause in an action for maliciously suing out a search warrant.[99]

Evidence of particular conduct is not necessarily subject to the objection that it is an attempt to prove character, even though it might be the subject of an unfavorable inference against the person concerned.[1]

§ 437. Weight of Evidence

The weight to be given to character evidence depends on the facts of the particular case and is a question for the determination of the jury.

The weight to be given to evidence of character depends largely on the facts involved in the particular case,[2] and is a question for the jury to determine.[3]

As bearing on the weight of character evidence, the distinction between character and reputation, discussed in 14 C.J.S. pp 399, 400, should be considered.

XII. OPINION

A. IN GENERAL

§ 438. Rule of Exclusion

Under ordinary circumstances an opinion or conclusion of a witness may not be received in evidence.

In the law of evidence, "opinion" is an inference or conclusion drawn by a witness from facts, some of which are known to him and others assumed, or drawn from facts, which, although lending probability to the inference, do not evolve it by a process of absolutely necessary reasoning.[4]

Under ordinary circumstances a witness in testifying is to be restricted to facts within his personal knowledge, and his opinion or conclusion with respect to matters in issue or relevant to the issue may not be received in evidence.[5] However, as is shown

94. N.H.—Curtice v. Dixon, 68 A. 587, 74 N.H. 587.
S.C.—Sun Ins. Office, Ltd. v. Foil, 197 S.E. 683, 686, 187 S.C. 183, quoting **Corpus Juris.**
22 C.J. p 484 notes 58–60.

95. S.C.—Sun Ins. Office, Ltd. v. Foil, supra, quoting **Corpus Juris.**
22 C.J. p 484 note 61.

96. S.C.—Sun Ins. Office, Ltd. v. Foil, 197 S.E. 683, 686, 187 S.C. 183.

97. S.C.—Sun Ins. Office, Ltd. v. Foil, supra.

98. S.C.—Sun Ins. Office, Ltd. v. Foil, supra, quoting **Corpus Juris.**
22 C.J. p 484 note 62.

99. Ill.—Mark v. Merz, 53 Ill.App. 458.

1. Tex.—Edmunds v. State, Cr., 63 S.W. 871.

2. Ind.—Wagner v. State, 7 N.E.2d 896, 107 Ind. 71, 57 Am.R. 79.
22 C.J. p 485 notes 77, 79, 80.
Weight of evidence:
As to character of accused in criminal prosecution see Criminal Law § 679.
Impeaching witness see the C.J.S. title Witnesses § 496, also 70 C. J. p 824 notes 76–87.

3. Fla.—Mitchell v. State, 30 So. 803, 43 Fla. 188.
22 C.J. p 485 note 80.

4. Mo.—Wright v. Order of United Commercial Travelers, 174 S.W. 833, 835, 188 Mo.App. 457.
46 C.J. p 1118 note 28.

5. U.S.—Pennsylvania R. Co. v. Chamberlain, N.Y., 53 S.Ct. 391, 288 U.S. 333, 77 L.Ed. 819, reversing, C.C.A., Chamberlain v. Pennsylvania R. Co., 59 F.2d 986, certiorari granted Pennsylvania R. Co. v. Chamberlain, 53 S.Ct. 93, 287 U.S. 589, 77 L.Ed. 514—Thatenhorst v. U. S., C.C.A.Kan., 119 F.2d 567—Mutual Life Ins. Co. of New York v. Tormohlen, C.C.A.Ind., 118 F.2d 163—Public Opinion Pub. Co. v. Jensen, C.C.A.S.D., 76 F.2d 494—Ætna Life Ins. Co. of Hartford, Conn., v. Kelley, C.C.A.Mo., 70 F.2d 589, 93 A.L.R. 471—Hirning v. Live Stock Nat. Bank, C.C.A.Iowa, 1 F.2d 307—Watts v. U. S., D.C.Miss., 24 F.Supp. 969.
Ala.—McPherson v. Martin, 174 So. 791, 234 Ala. 244—Alabama Power Co. v. Smith, 155 So. 601, 229 Ala. 105—Louisville & N. R. Co. v. Steverson, 124 So. 205, 220 Ala. 158—Birmingham Stove & Range Co. v. Vanderford, 116 So. 334, 217 Ala. 342—Alabama Fuel & Iron Co. v. Adams, Rowe & Norman, 113 So. 265, 216 Ala. 403—Pettus v. Louisville & N. R. Co., 106 So. 807, 214 Ala. 187—Oden-Elliott Lumber Co. v. Butler County Bank, 104 So. 3, 213 Ala. 84—Long v. Myers, 80 So. 76, 202 Ala. 238—Baker v. Green, 84 So. 545, 17 Ala.App. 290.
Ark.—Arkansas Motor Coaches v. Williams, 116 S.W.2d 585, 196 Ark. 48—Cahill v. Bradford, 287 S.W. 595, 172 Ark. 69.
Cal.—W. F. Boardman Co. v. Petch, 199 P. 1047, 186 Cal. 476—Irwin v. Brown, App., 115 P.2d 601—Johnson v. Western Air Express Corporation, App., 114 P.2d 688—Evinger v. MacDougall, 82 P.2d 194, 28 Cal. App.2d 175—Llewellyn Iron Works v. Smith, 24 P.2d 532, 133 Cal.App. 475—Kronman v. Kronman, 18 P. 2d 712, 129 Cal.App. 10—Clinton v. Yates, 263 P. 383, 88 Cal.App. 281.
Colo.—Weicker Transfer & Storage Co. v. Bedwell, 35 P.2d 1022, 95 Colo. 280.
Del.—South Atlantic S. S. Co. of Delaware v. Munkacsy, 187 A. 600, 7 W.W.Harr. 580, certiorari denied 57 S.Ct. 233, 299 U.S. 607, 81 L.Ed. 448.
Ga.—Metropolitan Life Ins. Co. v. Saul, 5 S.E.2d 214, 189 Ga. 1—Metropolitan Life Ins. Co. v. Marshall, App., 16 S.E.2d 33—Friedlander Bros. v. Kassell, 111 S.E. 143, 38 Ga.App. 443—Taff v. Larey, 116 S.E. 866, 29 Ga.App. 631.
Idaho.—Union Cent. Life Ins. Co. v. Nielson, 114 P.2d 252—Towne v. Northwestern Mut. Life Ins. Co., 70 P.2d 364, 367, 58 Idaho 83, citing **Corpus Juris.**
Ill.—Beskin v. City of Chicago, 173 N.E. 364, 341 Ill. 489—Grosh v. Acom, 156 N.E. 485, 325 Ill. 474—International Coal & Mining Co. v. Industrial Commission, 127 N.E. 703, 293 Ill. 524, 10 A.L.R. 1010—Gayton v. Equitable Life Assur. Soc. of U. S., 245 Ill.App. 432—Bissel v. Eastern Illinois Utility Co., 222 Ill.App. 408.
Ind.—Albright v. Hughes, 26 N.E.2d 576, 107 Ind.App. 651—Jackson v. Pirtle, 127 N.E. 305, 75 Ind.App. 336.

infra § 444 et seq, under certain conditions the rule excluding opinion evidence is relaxed.

§ 439. —— Form of Statement

The substance of a witness' statement determines whether the statement is one of fact or of conclusion.

Whether a statement of a witness is one of fact or of conclusion within the rule excluding opinion evidence is to be determined by the substance of the statement rather than by its form.[6] The use of phraseology appropriate to the expression of an inference, such as "believe," "think," etc., may in fact signify an opinion which renders the statement inadmissible.[7] Nevertheless the use of such terms is not conclusive that the witness is stating his opinion, for the language may be used merely to indicate that he is not speaking with entire certainty, in which case the evidence may be received for what it is worth.[8]

Statement relating to future. That a statement

Iowa.—Randell v. Iowa State Highway Commission, 241 N.W. 685, 214 Iowa 1—In re Diver's Estate, 240 N.W. 622, 214 Iowa 497.
Kan.—Malone v. New York Life Ins. Co., 83 P.2d 639, 641, 148 Kan. 555, citing **Corpus Juris.**
Ky.—Springfield Fire & Marine Ins. Co. v. Ramey, 53 S.W.2d 560, 245 Ky. 367—Boggess v. Insurance Co. of North America, 31 S.W.2d 899, 235 Ky. 529—Staples v. Continental Ins. Co. of New York, 5 S.W.2d 265, 223 Ky. 842—Irvine v. Greenway, 295 S.W. 445, 220 Ky. 388—Coker v. Coker, 288 S.W. 291, 216 Ky. 669—Clore v. Argue, 281 S.W. 1005, 213 Ky. 664.
Md.—James L. Kernan Co. v. Cook, 159 A. 256, 162 Md. 137.
Mass.—Birch v. Strout, 20 N.E.2d 429, 303 Mass. 28.
Mich.—In re McCarbery, 219 N.W. 707, 243 Mich. 39.
Minn.—Clancy v. Daily News Corporation, 277 N.W. 264, 202 Minn. 1.
Miss.—Columbus & G. R. Co. v. Coleman, 160 So. 277, 172 Miss. 514—Greer v. Pierce, 147 So. 303, 167 Miss. 65.
Mo.—Sullivan v. Union Electric Light & Power Co., 56 S.W.2d 97, 331 Mo. 1065—Anderson v. Asphalt Distributing Co., 55 S.W.2d 688, 86 A.L.R. 1033—Cole v. Empire Dist. Electric Co., 55 S.W.2d 434, 331 Mo. 824—Benjamin v. Metropolitan St. Ry. Co., 34 S.W. 590, 133 Mo. 274—Haddow v. St. Louis Public Service Co., App., 38 S.W.2d 284—Schmidt v. Pitluck, App., 26 S.W. 2d 859—Schwartz v. Mercantile Trust Co., App., 279 S.W. 253—Headdy v. Wright Tie Co., App., 262 S.W. 447—Jepson v. Shaw Transfer Co., 243 S.W. 370, 211 Mo. App. 366, certiorari quashed State ex rel. Shaw Transfer Co. v. Trimble, Sup., 250 S.W. 396.
Mont.—Wibaux Realty Co. v. Northern Pac. Ry. Co., 54 P.2d 1175, 1181, 101 Mont. 126, quoting **Corpus Juris**—Demarais v. Johnson, 3 P.2d 283, 90 Mont. 366, 77 A.L.R. 553.
Neb.—Campbell v. Columbia Casualty Co., 248 N.W. 690, 125 Neb. 1.
Nev.—Kline v. Vansickle, 217 P. 585, 47 Nev. 139.
N.J.—O'Brien v. Bilow, 3 A.2d 641, 121 N.J.Law 576—Jackson v. Geiger, 134 A. 288, 4 N.J.Misc. 723, affirmed 135 A. 917, 103 N.J.Law 490.
N.Y.—Metropolitan Casualty Ins. Co. of New York v. Rochester Fruit & Vegetable Co., 249 N.Y.S. 572, 232 App.Div. 321—Kahle v. Mount Vernon Trust Co., 22 N.Y.S.2d 454.
N.D.—Kist v. Kist, 243 N.W. 820, 822, 62 N.D. 408, quoting **Corpus Juris.**
Ohio.—Horth v. American Aggregates Corporation, App., 35 N.E.2d 592.
Okl.—Arnold v. Board of Com'rs of Creek County, 254 P. 31, 124 Okl. 42—Bilby v. Owen, 181 P. 724, 74 Okl. 158.
Or.—Wallace v. American Life Ins. Co. of Des Moines, 225 P. 192, 227 P. 465, 111 Or. 510.
Pa.—William Schuette & Co. v. Swank, 109 A. 531, 265 Pa. 576.
R.I.—Latham v. Latham, 133 A. 241.
S.C.—Knight v. Sullivan Power Co., 138 S.E. 818, 140 S.C. 296.
S.D.—Filbert v. Hamilton, 181 N.W. 838, 43 S.D. 626.
Tenn.—Wilson v. Nashville, C. & St. L. Ry., 65 S.W.2d 637, 16 Tenn.App. 695.
Tex.—Colonial Trust Co. v. Hill County, Com.App., 27 S.W.2d 144, reversing Hill County v. Colonial Trust Co., Civ.App., 18 S.W.2d 787—Great Atlantic & Pacific Tea Co. v. Walker, Civ.App., 104 S.W.2d 627, reversed on other grounds Walker v. Great Atlantic & Pacific Tea Co., 112 S.W.2d 170, 131 Tex. 57—San Antonio Public Service Co. v. Jackson, Civ.App., 103 S.W.2d 251, error dismissed—Texas & N. O. R. Co. v. Hellen, Civ.App., 47 S.W. 2d 1112—Turner v. Stoker, Civ.App., 289 S.W. 190—Burchill v. Hermsmeyer, Civ.App., 262 S.W. 511—Dunlap Hardware Co. v. E. F. Elmberg Co., Civ.App., 252 S.W. 1098, affirmed E. F. Elmberg Co. v. Dunlap Hardware Co., Com.App., 267 S.W. 258—Maier v. Langerhans, Civ.App., 231 S.W. 145—First Nat. Bank v. Rush, Civ.App., 227 S.W. 378, modified on other grounds, Com.App., 246 S.W. 349, motion granted 249 S.W. 183—Hines v. Collins, Civ.App., 227 S.W. 332.
Utah.—General Motors Acceptance Corporation v. Lund, 208 P. 502, 60 Utah 247.
Vt.—Dieter v. Scott, 9 A.2d 95, 110 Vt. 376—Land Finance Corporation v. St. Johnsbury Wiring Co., 147 A. 285, 102 Vt. 256—Hendrickson v. International Harvester Co. of America, 135 A. 702, 100 Vt. 161.
Va.—Virginia Iron, Coal & Coke Co. v. Dickenson, 129 S.E. 228, 143 Va. 250.
Wash.—Randanite Co. v. Smith, 20 P. 2d 33, 172 Wash. 390.
Wis.—Folding Furniture Works v. Wisconsin Labor Relations Board, 285 N.W. 851, 232 Wis. 170, rehearing denied 286 N.W. 875, 232 Wis. 170.
Wis.—Allen v. Hutchinson, 45 Wis. 259.
10 C.J. p 1235 note 84—18 C.J. p 874 note 64—22 C.J. p 485 notes 81, 82—42 C.J. p 1219 note 43—48 C.J. p 1145 note 78—52 C.J. p 117 note 62.

Corpus Juris quoted and cited in cases involving criminal prosecutions.
Idaho.—State v. Calico, 38 P.2d 1002, 1003, 55 Idaho 96.
Mo.—State v. Trice, 92 S.W.2d 135, 138, 338 Mo. 744.
Opinion evidence in criminal prosecutions see Criminal Law §§ 858–891.

Opinion in memorandum
Conclusions and opinions are no more admissible in a memorandum used in evidence than they would be in direct oral testimony.—Deal v. Hubert, 95 So. 349, 209 Ala. 18, followed in Bell v. Hubert, 95 So. 350, 209 Ala. 22.

6. Ala.—Gulf Trading Co. v. Radcliff, 114 So. 308, 216 Ala. 645.
Okl.—Pate v. Specht, 53 P.2d 289, 175 Okl. 318.

7. Kan.—Losey v. Atchison, T. & S. F. R. Co., 114 P. 198, 84 Kan. 224, 33 L.R.A.,N.S., 414.
22 C.J. p 491 note 84.
Use of term "understanding" see infra § 451.

8. Iowa.—Davenport Elevator Co. v. Halloran, 178 N.W. 350.
22 C.J. p 491 note 83.

relates to the future does not necessarily render it objectionable as opinion, for it may be merely a mode of expressing past experience as to a condition of permanent character.[9]

§ 440. —— Unwarranted Conclusions

The rule excluding from evidence a conclusion of a witness is especially applicable where the conclusion is unwarranted.

The reasons for rejecting a conclusion of a witness become stronger where it is apparent that it cannot reasonably be reached on the facts which are claimed to support it,[10] where such facts are themselves the result of inference,[11] where the conclusion is at variance with admitted facts,[12] or where the conclusion is not a necessary one.[13]

§ 441. —— Trial by Court

The rule excluding opinion evidence applies where a trial or hearing is had before the court without a jury.

The rule excluding opinion evidence, see supra § 438, applies where a trial or hearing is had before a court or judge without a jury,[14] although the court is unlikely to be misled by the inference of a witness whose qualifications it understands.[15]

§ 442. —— Specific Matters within Rule

Specific instances in which the rule excluding opinion evidence has been applied are discussed infra §§ 447, 448, 450, 451, 453, 462–471, 473–484, 489–517, 524–546.

Examine Pocket Parts for later cases.

§ 443. —— Independent Relevancy

The fact that a person did or did not entertain a certain opinion at a certain time may be shown if independently relevant.

The fact that a person did or did not entertain a certain opinion at a certain time may of itself be a relevant fact, in which case it may be shown.[16] Under express statutory provisions, where the question under examination is one of opinion, any witness may swear to his opinion or belief, giving his reasons therefor.[17]

§ 444. Relaxation of Rule

The rule excluding opinion evidence is subject to certain exceptions, although exceptions to the rule are favored only to the extent necessary to prevent a failure of justice.

While the propriety of the rule excluding opinion evidence, see supra § 438, has never been questioned, the practical conditions under which cases are tried necessitates a relaxation of the rule.[18] The rule may be relaxed when from the nature of the subject matter no better evidence can be obtained,[19] and nonexpert opinion may be admitted if it will aid the triers in their search for truth.[20]

9. Mass.—Stone v. Commonwealth, 63 N.E. 1074, 181 Mass. 438.
22 C.J. p 492 note 85.

10. Ala.—Dersis v. Dersis, 98 So. 27, 210 Ala. 308.
Mont.—Irion v. Hyde, 105 P.2d 666, 671, 110 Mont. 570, quoting **Corpus Juris.**
22 C.J. p 492 note 86.

11. Mont.—Irion v. Hyde, 105 P.2d 666, 110 Mont. 570.
22 C.J. p 492 note 87.
Opinion based on hearsay
N.J.—Carey v. Deems, 129 A. 191, 101 N.J.Law 419.

12. Colo.—Zang v. Wright, 23 P.2d 580, 93 Colo. 80.

13. Mont.—Irion v. Hyde, 105 P.2d 666, 110 Mont. 570.
22 C.J. p 492 note 88.

14. Conn.—LaFrance v. LaFrance, 14 A.2d 739, 127 Conn. 149.
Pa.—Esenwein v. Esenwein, 167 A. 350, 312 Pa. 77, affirming 161 A. 425, 105 Pa.Super. 261.
R.I.—Latham v. Latham, 133 A. 241.
Tex.—Krumb v. Porter, Civ.App., 152 S.W.2d 495.
22 C.J. p 492 note 89.

15. Cal.—Barnum v. Bridges, 22 P. 924, 81 Cal. 604.
Or.—Cunningham v. Friendly, 139 P. 928, 140 P. 989, 70 Or. 222.

16. Mass.—Cannon v. Bassett, 162 N.E. 772, 264 Mass. 383.
22 C.J. p 498 note 85.

17. Ga.—Central of Georgia Ry. Co. v. Evans, 134 S.E. 123, 35 Ga.App. 438.

18. U.S.—Mutual Life Ins. Co. of New York v. Tormohlen, C.C.A. Ind., 118 F.2d 163.
Ark.—Ross v. Clark County, 45 S.W. 2d 31, 185 Ark. 1.
Iowa.—Slinger v. Farmers' Mut. Hail Ins. Ass'n of Iowa, 258 N.W. 101, 219 Iowa 329.
Minn.—Jones v. Robert Burgess & Son, 144 N.W. 954, 124 Minn. 265.
Mo.—Adams v. Carlo, App., 84 S.W. 2d 682.
Tenn.—City of Maryville v. McConkey, 90 S.W.2d 951, 956, 19 Tenn. App. 520, citing **Corpus Juris**—Wilson v. Nashville, C. & St. L. Ry., 65 S.W.2d 637, 16 Tenn.App. 695.
Tex.—Traders & General Ins. Co. v. Keahey, Civ.App., 119 S.W.2d 618, error dismissed.
W.Va.—Curfman v. Monongahela West Penn Public Service Co., 166 S.E. 848, 113 W.Va. 85.

19. Ala.—McPherson v. Martin, 174 So. 791, 234 Ala. 244—Louisville & N. R. Co. v. Steverson, 124 So. 205, 220 Ala. 158.
Ky.—Springfield Fire & Marine Ins. Co. v. Ramey, 53 S.W.2d 560, 245 Ky. 367.
Miss.—Messina v. New York Life Ins. Co., 161 So. 462, 464, 173 Miss. 378, citing **Corpus Juris.**
22 C.J. p 498 note 87.

20. Conn.—MacLaren v. Bishop, 155 A. 210, 113 Conn. 312.
Minn.—Jones v. Robert Burgess & Son, 144 N.W. 954, 124 Minn. 265.
N.H.—Dowling v. L. H. Shattuck, Inc., 17 A.2d 529—Ballas v. F. W. Woolworth Co., 10 A.2d 233, 90 N.H. 428.
Test to determine admissibility
(1) The test to determine the admissibility of opinion evidence is not whether the issue is a matter for the jury, nor whether it is a matter open to common observation, but whether the witness' knowledge will probably aid the triers in their search for truth; and the admission of such evidence cannot be attacked on the ground that there was no evidence that the knowledge of the witness was superior to that of the jurors.—Paquette v. Connecticut Valley Lumber Co., 109 A. 836, 79 N.H. 238.

The usual conditions of relaxation may be summarized as follows: (1) An ordinary observer is permitted to state a natural inference from observed conditions or occurrences, see infra § 485, or, as is shown infra § 459, the impression made on his mind by a number of connected facts which it is impracticable to place before the jury in detail. (2) A skilled witness is permitted to state facts known to him because of his special knowledge and experience, see infra § 472, or his inference from facts observed by him where the matter involved is such that persons without his special training could not observe intelligently or draw correct inferences, see infra §§ 518–523.

The law does not, however, look with favor on opinion evidence,[21] and the practice of receiving opinions has been subjected to considerable criticism.[22] Exceptions to the rule excluding opinion evidence are not to be made except as they may be required to prevent a failure of justice.[23] The rule cannot be relaxed to such an extent as to permit predicating one opinion on another.[24]

§ 445. —— Requirements for Admissibility

To be admissible, opinion evidence must be relevant, material, and necessary.

Opinion evidence cannot be received unless it is relevant and material to the issues.[25]

Necessity. The danger involved in receiving the opinion of a witness is that the jury may substitute such opinion for their own,[26] and the courts will not require parties to encounter this danger unless some necessity therefor appears.[27] Accordingly, where all the relevant facts can be introduced in evidence, and the jury are competent to draw a reasonable inference therefrom, opinion evidence will not be received.[28] In the application of this rule it has been held to be unnecessary to

(2) "There is only one test for the nonexpert opinion: Is the evidence relevant, is it the best the nature of the case admits of, and does it come from a competent witness?"—MacLaren v. Bishop, 155 A. 210, 113 Conn. 312.
22 C.J. p 498 note 87 [a].

21. Mont.—Irion v. Hyde, 105 P.2d 666, 671, 110 Mont. 570, quoting **Corpus Juris**.
22 C.J. p 498 note 93.

22. Mont.—Irion v. Hyde, supra, quoting **Corpus Juris**.
22 C.J. p 498 note 94.

23. U.S.—Fireman's Ins. Co. v. J. H. Mohlman Co., N.Y., 91 F. 85, 33 C.C.A. 347.

24. Mo.—McAnany v. Henrici, 141 S.W. 633, 238 Mo. 103.
N.Y.—Kreutzwald v. Walters, 275 N.Y.S. 878, 242 App.Div. 479.

25. Ala.—Dersis v. Dersis, 98 So. 27, 210 Ala. 308.
Mass.—Bickford v. Boston Elevated Ry. Co., 7 N.E.2d 276, 296 Mass. 580.
Mo.—Sisk v. Industrial Track Const. Co., 295 S.W. 751.
N.C.—Mebane Graded School Dist. v. Alamance County, 189 S.E. 873, 211 N.C. 213.
Pa.—Edwards v. Hall, 141 A. 638, 293 Pa. 97.
Tex.—Traders & General Ins. Co. v. Keahey, Civ.App., 119 S.W.2d 618, error dismissed—Fontana v. Port Arthur Traction Co., Civ.App., 235 S.W. 1098.
22 C.J. p 498 note 96.
Evidence held relevant and material
Tex.—W. T. Wilson Grain Co. v. Fitch, Civ.App., 208 S.W. 556.
Utah.—Campbell v. Los Angeles & S. L. R. Co., 263 P. 495, 71 Utah 173.

26. Ala.—Sovereign Camp, W. O. W. v. Fischer, 183 So. 653, 655, 236 Ala. 494, quoting **Corpus Juris**.
Mo.—Pioneer Lumber Co. v. Van Cleave, App., 279 S.W. 241, 245, citing **Corpus Juris**.
22 C.J. p 498 note 97.

27. U.S.—Hamilton v. U. S., C.C.A. Ga., 73 F.2d 357.
Ala.—Sovereign Camp, W. O. W. v. Fischer, 183 So. 653, 236 Ala. 494.
Miss.—Harris v. Pounds, 187 So. 891, 185 Miss. 688—Messina v. New York Life Ins. Co., 161 So. 462, 464, 173 Miss. 378, citing **Corpus Juris**.
Mo.—Pioneer Lumber Co. v. Van Cleave, App., 279 S.W. 241.
Pa.—Delair v. McAdoo, 188 A. 181, 324 Pa. 392—Shaner v. Latsha, 49 Dauph.Co. 304.
22 C.J. p 499 note 98.

28. U.S.—U. S. v. Boston, C. C. & N. Y. Canal Co., C.C.A.Mass., 271 F. 877—Mullins Lumber Co. v. Williamson & Brown Land & Lumber Co., S.C., 255 F. 645, 167 C.C.A. 21.
Ala.—Capital Motor Lines v. Gillette, 177 So. 881, 235 Ala. 157—Dersis v. Dersis, 98 So. 27, 210 Ala. 308—Brotherhood of Painters, Decorators and Paperhangers of America v. Trimm, 97 So. 770, 19 Ala.App. 429.
Cal.—Moore v. Norwood, 106 P.2d 939, 41 Cal.App.2d 359—Rudat v. Carithers, 30 P.2d 435, 137 Cal.App. 92—Hutchinson v. Miller & Lux, 212 P. 394, 60 Cal.App. 1.
Ga.—Whatley v. Henry, App., 16 S.E.2d 214—Mishoe v. Davis, 14 S.E.2d 187, 64 Ga.App. 700.
Ind.—Citizens' Telephone Co. v. Prickett, 125 N.E. 193, 189 Ind. 141.
Iowa.—Kelly v. Muscatine, B. & S. R. Co., 191 N.W. 525, 195 Iowa 17.
Kan.—Benton Grain Co. v. Reger, 293 P. 955, 131 Kan. 735.
Md.—Williams v. New York, P. & N. R. Co., 137 A. 506, 153 Md. 102.
Mich.—In re Astolas' Estate, 262 N.W. 766, 273 Mich. 189, 101 A.L.R. 760—Bockoff v. Curtis, 217 N.W. 750, 241 Mich. 553.
Mo.—Scanlon v. Kansas City, 28 S.W.2d 84, 325 Mo. 125—Melican v. Whitlow Const. Co., 278 S.W. 361—Humphreys v. Chicago, M., St. P. & P. R. Co., App., 83 S.W.2d 586.
Mont.—Demarais v. Johnson, 3 P.2d 283, 90 Mont. 366, 77 A.L.R. 553—In re Miller's Estate, 229 P. 851, 71 Mont. 330.
Ohio.—Wills Creek Coal Co. v. Jones, 11 Ohio Cir.Ct.,N.S., 293.
Or.—Nutt v. Southern Pac. Ry. Co., 35 P. 653, 25 Or. 291.
Pa.—Delair v. McAdoo, 188 A. 181, 324 Pa. 392—Frank v. Bayuk, 26 Pa.Dist. & Co. 314.
R.I.—Fontaine v. Follett, 155 A. 363, 51 R.I. 413.
Tex.—Southern Pine Lumber Co. v. Whiteman, Civ.App., 104 S.W.2d 635, error dismissed—Great Atlantic & Pacific Tea Co. v. Walker, Civ.App., 104 S.W.2d 627, reversed on other grounds Walker v. Great Atlantic & Pacific Tea Co., 112 S.W.2d 170, 131 Tex. 57—Plunkett v. Simmons, Civ.App., 63 S.W.2d 313, error dismissed—Tokio Marine & Fire Ins. Co. v. Aldridge, Civ.App., 21 S.W.2d 547, error refused—Exporters' & Traders' Compress & Warehouse Co. v. Shaw, Civ.App., 20 S.W.2d 248—Dunlap Hardware Co. v. E. F. Elmberg Co., Civ.App., 252 S.W. 1098, affirmed E. F. Elmberg Co. v. Dunlap Hardware Co., Com.App., 267 S.W. 258—St. Louis, B. & M. Ry. Co. v. McLean, Civ.App., 241 S.W. 1072, reversed on other grounds, Com.App., 253 S.W. 248—American Nat. Ins. Co. v.

rely on the inferences of witnesses as to a fact when all doubt has been or may be set at rest by the use of the senses, either directly[29] or through the use of plans, photographs, or other exhibits.[30]

§ 446. —— Invasion of Province of Jury in General

An opinion or conclusion of a witness, including skilled or expert witnesses, ordinarily is excluded from evidence where such opinion or conclusion is determinative of vital issues or of the ultimate fact in issue.

An inference, opinion, or conclusion of a witness which is determinative of vital issues or of the ultimate fact in issue ordinarily is excluded as an invasion of the province of the jury.[31] The rule is not, however, absolute, for it frequently occurs that

Nussbaum, Civ.App., 230 S.W. 1102, dismissed for want of jurisdiction.
Utah.—Yowell v. Occidental Life Ins. Co., 110 P.2d 566—Flora v. Union Pac. R. Co., 237 P. 948, 65 Utah 395.
Wash.—Simonson v. Huff, 215 P. 49, 124 Wash. 549.
W.Va.—Stone v. Safe Ins. Co., 156 S.E. 106, 109 W.Va. 739—Collar v. McMullin, 148 S.E. 496, 107 W.Va. 440—Lively v. Virginian Ry. Co., 140 S.E. 51, 104 W.Va. 335—Hancock v. Snider, 133 S.E. 131, 135, 101 W.Va. 535, citing **Corpus Juris**—Cavender v. Cline Ice Cream Co., 131 S.E. 862, 101 W.Va. 3—Barna v. Gleason Coal & Coke Co., 98 S.E. 158, 83 W.Va. 216.
22 C.J. p 499 note 99—52 C.J. p 116 note 30.

29. U.S.—Coca-Cola Co. v. Joseph C. Wirthman Drug Co., C.C.A.Mo., 48 F.2d 743.
Del.—South Atlantic S. S. Co. of Delaware v. Munkacsy, 187 A. 600, 7 W.W.Harr. 580, certiorari denied 57 S.Ct. 233, 299 U.S. 607, 81 L.Ed. 448.
N.Y.—Meiselman v. Crown Heights Hospital, 34 N.E.2d 367, 285 N.Y. 389, reversing 20 N.Y.S.2d 174, 259 App.Div. 840, appeal denied 20 N.Y.S.2d 669, 259 App.Div. 916.
W.Va.—Lively v. Virginian Ry. Co., 140 S.E. 51, 104 W.Va. 335.
22 C.J. p 502 notes 1–3.

30. Ala.—Brotherhood of Painters, Decorators and Paperhangers of America v. Trimm, 97 So. 770, 19 Ala.App. 429.
Tex.—St. Louis, B. & M. Ry. Co. v. McLean, Civ.App., 241 S.W. 1072, reversed on other grounds, Com. App., 253 S.W. 248.
22 C.J. p 502 notes 4–6.

31. U.S.—Altmayer v. Travelers Protective Ass'n of America, C.C.A. Wis., 119 F.2d 1005—U. S. v. McCreary, C.C.A.Or., 105 F.2d 297, reversing, D.C., McCreary v. U. S., 23 F.Supp. 385—U. S. v. Stephens, C.C.A.Idaho, 73 F.2d 695, 702, citing **Corpus Juris**—U. S. v. Sauls, C.C.A.N.C., 65 F.2d 886, 887, citing **Corpus Juris**—Sprencel v. U. S., C.C.A.Tex., 47 F.2d 501—St. Louis-San Francisco Ry. Co. v. Barton, C.C.A.Miss., 18 F.2d 96.
Ala.—Crotwell v. Cowan, 184 So. 195, 236 Ala. 578—Roberts v. Kurn, 165 So. 77, 231 Ala. 384—Jefferson County Burial Soc. v. Cotton, 133 So. 256, 222 Ala. 578—Inter-Ocean Casualty Co. v. Stallworth, 127 So. 850, 221 Ala. 71—Birmingham Stove & Range Co. v. Vanderford, 116 So. 334, 217 Ala. 342—J. H. Arnold & Co. v. Gibson, 113 So. 25, 216 Ala. 314—Standard Cooperage Co. v. Dearman, 86 So. 537, 204 Ala. 553—O'Rear v. Richardson, 81 So. 865, 17 Ala.App. 87.
Cal.—Hurwit v. Prudential Ins. Co. of America, App., 113 P.2d 691—Moore v. Norwood, 106 P.2d 939, 41 Cal.App.2d 359—Weaver v. Shell Co. of California, 94 P.2d 364, 34 Cal.App.2d 713—Garris v. Carpenter, 92 P.2d 688, 33 Cal.App.2d 649.
Ga.—Metropolitan Life Ins. Co. v. Saul, 5 S.E.2d 214, 189 Ga. 1—Georgia Ry. & Power Co. v. Head, 116 S.E. 620, 155 Ga. 337—Whatley v. Henry, App., 16 S.E.2d 214—New York Life Ins. Co. v. Ittner, 8 S.E.2d 582, 588, 62 Ga.App. 31, quoting **Corpus Juris.**
Ill.—Hairgrove v. City of Jacksonville, 8 N.E.2d 187, 366 Ill. 163—Armstrong Paint & Varnish Works v. Continental Can Co., 139 N.E. 395, 308 Ill. 242, affirming 225 Ill. App. 650—Crane v. Railway Express Agency, 12 N.E.2d 672, 293 Ill.App. 328, modified on other grounds 15 N.E.2d 866, 369 Ill. 110—Ross P. Beckstrom Co. v. Armstrong Paint & Varnish Works, 220 Ill.App. 598.
Ind.—State v. Reid, 185 N.E. 449, 204 Ind. 631, 86 A.L.R. 1442.
Iowa.—McKeever v. Batcheler, 257 N.W. 567, 219 Iowa 93.
Kan.—Rapier v. Stockgrowers' State Bank of Maple Hill, 185 P. 888, 105 Kan. 606.
Ky.—Morton's Adm'r v. Kentucky-Tennessee Light & Power Co., 138 S.W.2d 345, 282 Ky. 174.
Me.—Foster v. Congress Square Hotel Co., 145 A. 400, 128 Me. 50, 67 A.L.R. 239.
Mass.—Betts v. Rendle, 128 N.E. 790, 236 Mass. 441.
Mich.—De Groot v. Winter, 247 N.W. 69, 71, 261 Mich. 660, quoting **Corpus Juris.**
Miss.—Harris v. Pounds, 187 So. 891, 894, 185 Miss. 688, citing **Corpus Juris.**
Mo.—Baptiste v. Boatmen's Nat. Bank of St. Louis, 148 S.W.2d 743—Clark v. Prue, App., 151 S.W.2d 487—Pioneer Lumber Co. v. Van Cleave, App., 279 S.W. 241—Indiahoma Refining Co. v. National Fire Ins. Co. of Hartford, Conn., App., 242 S.W. 710.
Mont.—Wibaux Realty Co. v. Northern Pac. Ry. Co., 54 P.2d 1175, 1181, 101 Mont. 126, quoting **Corpus Juris.**
N.C.—Cheek v. Barnwell Warehouse & Brokerage Co., 183 S.E. 729, 209 N.C. 569—Pace v. McAden, 131 S.E. 629, 191 N.C. 137—Hill & Brooks v. Louisville & N. R. Co., 119 S.E. 884, 186 N.C. 475—Snyder v. Town of Ashboro, 110 S.E. 84, 182 N.C. 708.
Ohio.—Cottom v. Klein, 175 N.E. 689, 123 Ohio St. 440—Gano v. Cleveland, C., C. & St. L. Ry. Co., 168 N.E. 566, 33 Ohio App. 142.
Okl.—Sterling Milk Products Co. v. Brown, 49 P.2d 68, 173 Okl. 452—Federal Oil & Gas Co. v. Campbell, 183 P. 894, 65 Okl. 49, followed in Okmulgee Window Glass Co. v. Bright, 183 P. 898, 65 Okl. 53.
Or.—Goldfoot v. Lofgren, 296 P. 843, 135 Or. 533—In re Barton, 225 P. 322, 111 Or. 111—Lehman v. Knott, 196 P. 476, 480, 100 Or. 59, citing **Corpus Juris**—Porges v. Jacobs, 147 P. 396, 75 Or. 488.
R.I.—King v. Wiesel, 21 A.2d 262—Edward Wilkinson & Co. v. Universal Safety Ash Tray Co., 133 A. 658.
Tex.—Phoenix Assur. Co. of London v. Stobaugh, 94 S.W.2d 428, 429, 127 Tex. 308, citing **Corpus Juris**—Crawford v. El Paso Sash & Door Co., Com.App., 288 S.W. 169, reversing El Paso Sash & Door Co. v. Crawford, Civ.App., 283 S.W. 232, error granted Crawford v. El Paso Sash & Door Co., 283 S.W. 754, 115 Tex. 508, and modified on other grounds Crawford v. El Paso Sash & Door Co., Com.App., 289 S.W. 994—Commercial Union Assur. Co., Limited, of London, England, v. Everidge, Civ.App., 72 S.W.2d 311—Home Ins. Co. v. Collins, Civ. App., 55 S.W.2d 898, 890, citing **Corpus Juris**—Hamon v. Sanderford, Civ.App., 28 S.W.2d 861—Horton & Horton v. House, Civ.App., 13 S.W.2d 966, reversed on other grounds, Com.App., 29 S.W.2d 984—Barstow Town Co. v. Carr, Civ. App., 234 S.W. 555.
Utah.—Sutton v. Otis Elevator Co., 249 P. 437, 68 Utah 85—Roberts v.

the only possible or practical method of making proof of the fact in issue is by means of opinion evidence.[32] If found by the trial court to be of aid to the jury, an opinion may be admitted notwithstanding it bears directly on the main issue.[33]

Skilled and expert witnesses. An inference, opinion, or conclusion of a skilled or expert witness ordinarily is excluded from evidence where such opinion or conclusion is determinative of vital issues or of the ultimate fact in issue.[34] However, to aid the jury, the opinion of experts as to an ultimate fact may be admitted in certain cases.[35] When the conclusion to be drawn from the facts stated depends on professional or scientific knowledge or skill, not within the range of ordinary training or intelligence, the conclusion may be stated by a qualified expert, even though it is the statement of an ultimate fact to be found by the jury.[36] Expert opinion testimony on ultimate facts has been allowed in evidence under particular circumstances as a factor to be weighed and considered by the jury in the final determination of the case,[37] although an ex-

Salt Lake & O. Ry. Co., 176 P. 856, 53 Utah 30.
Wis.—Peacock v. Wisconsin Zinc Co., 188 N.W. 641, 177 Wis. 510.
19 C.J. p 128 note 44—22 C.J. p 502 notes 7, 8, p 504 note 9.

Credibility of witness

(1) One witness may not pass upon the credibility of another.—Henson v. Kansas City, 210 S.W. 13, 277 Mo. 443—22 C.J. p 493 note 41.

(2) An expert witness' opinion relating to veracity of another witness is inadmissible.—Campanale v. Metropolitan Life Ins. Co., 194 N.E. 831, 290 Mass. 149, 97 A.L.R. 1282—Coulombe v. Horne Coal Co., 175 N.E. 631, 275 Mass. 226.

Opinion as to weight of evidence

An opinion as to the probative effect of evidence is inadmissible.—Johnston v. Cedar Rapids & M. C. R. Co., 119 N.W. 286, 141 Iowa 114—22 C.J. p 493 note 42.

32. Or.—Lehman v. Knott, 196 P. 476, 100 Or. 59.
Tex.—Home Ins. Co. v. Collins, Civ. App., 55 S.W.2d 898, 900, quoting **Corpus Juris.**
22 C.J. p 504 note 10.

33. N.H.—Christie v. New England Telephone & Telegraph Co., 177 A. 300, 87 N.H. 236—Goldstein v. United Amusement Corporation, 169 A. 587, 86 N.H. 402—Higgins v. Town of Carroll, 167 A. 270, 86 N.H. 312.

34. U.S.—Farris v. Interstate Circuit, C.C.A.Tex., 116 F.2d 409—U. S. v. Ware, C.C.A.La., 110 F.2d 739—Coca-Cola Bottling Co. of Henderson v. Munn, C.C.A.N.C., 99 F. 2d 190—Rackoff v. U. S., C.C.A.N. Y., 78 F.2d 671—Hamilton v. U. S., C.C.A.Ga., 73 F.2d 357.
Cal.—Hurwit v. Prudential Ins. Co. of America, App., 113 P.2d 691—Weaver v. Shell Co. of California, 94 P.2d 364, 34 Cal.App.2d 713—Sin v. Weeks, 45 P.2d 350, 7 Cal. App.2d 28.
Ill.—Freedman v. Erie R. Co., 246 Ill.App. 479.
Ind.—McCoy v. General Glass Corporation, 17 N.E.2d 473, 106 Ind. App. 116.
Iowa.—Justis v. Union Mut. Casualty Co., 244 N.W. 696, 215 Iowa 109—Eclipse Lumber Co. v. Davis, 195 N.W. 337, 196 Iowa 1349.
Ky.—Morton's Adm'r v. Kentucky-Tennessee Light & Power Co., 138 S.W.2d 345, 282 Ky. 174.
Md.—Prudential Ins. Co. of America v. Brookman, 175 A. 838, 167 Md. 616.
Mass.—Coulombe v. Horne Coal Co., 175 N.E. 631, 275 Mass. 226.
Mo.—Baptiste v. Boatmen's Nat. Bank of St. Louis, 148 S.W.2d 743—Mahany v. Kansas City Rys. Co., 228 S.W. 821, 286 Mo. 601—Henson v. Kansas City, 210 S.W. 13, 277 Mo. 443.
N.Y.—Hennessy Realty Co. v. Hayes, 193 N.Y.S. 571.
Or.—Lehman v. Knott, 196 P. 476, 100 Or. 59.
Utah.—Utah Copper Co. v. Industrial Commission of Utah, 256 P. 397, 69 Utah 452.

Use of term "did"

Expert opinion testimony that a certain factor "did" rather than "could" occasion a certain result is incompetent as invading the province of the jury.—De Groot v. Winter, 247 N.W. 69, 261 Mich. 660.

Matters for court's decision

Experts' testimony as to matters for court to decide are inadmissible.—The Domira, D.C.N.Y., 49 F.2d 324, affirmed, C.C.A., 56 F.2d 585.

Opinions in compensation cases

Experts should not decide ultimate facts when called as witnesses in compensation cases, since such power is vested solely in the fact-finding bodies before which witnesses appear.—Zbirowski v. John T. Lewis & Bros. Co., 196 A. 606, 130 Pa.Super. 222.

35. Kan.—Tovey v. Geiser, 92 P.2d 3, 150 Kan. 149.

Affirmation or disaffirmation of issue

Question propounded to expert is not improper because eliciting opinion in practical affirmation or disaffirmation of material issue.—Watson v. Hardaway-Covington Cotton Co., 137 So. 33, 223 Ala. 443.

36. U.S.—U. S. v. Bowman, C.C.A. Utah, 73 F.2d 716—New York Life Ins. Co. v. Doerksen, C.C.A.Kan., 64 F.2d 240.
Cal.—Moore v. Norwood, 106 P.2d 939, 41 Cal.App.2d 359.
Conn.—Britton v. Hartshorn, 156 A. 48, 113 Conn. 484.
Md.—Langenfelder v. Thompson, 20 A.2d 491.
Mo.—Pedigo v. Roseberry, 102 S.W. 2d 600, 340 Mo. 724.
Mont.—Kelley v. John R. Daily Co., 181 P. 326, 56 Mont. 63.
Okl.—Federal Oil & Gas Co. v. Campbell, 183 P. 894, 65 Okl. 49, followed in Okmulgee Window Glass Co. v. Bright, 183 P. 898, 65 Okl. 53.
S.C.—O'Kelley v. Mutual Life Ins. Co. of New York, 14 S.E.2d 582.
Tex.—Brotherhood of Locomotive Firemen and Enginemen v. Raney, Civ.App., 101 S.W.2d 863, error dismissed.
Wis.—Marsh Wood Products Co. v. Babcock & Wilcox Co., 240 N.W. 392, 207 Wis. 209—Peacock v. Wisconsin Zinc Co., 188 N.W. 641, 177 Wis. 510—Hite v. Keene, 134 N. W. 383, 149 Wis. 207, Ann.Cas. 1913D 251.

37. U.S.—Woelfle v. Connecticut Mut. Life Ins. Co. of Hartford, Conn., C.C.A.Mo., 103 F.2d 417—Svenson v. Mutual Life Ins. Co. of New York, C.C.A.S.D., 87 F.2d 441—New York Life Ins. Co. v. Wolf, C.C.A.S.D., 85 F.2d 162, certiorari denied 57 S.Ct. 316, 299 U.S. 614, 81 L.Ed. 453—Illinois Power & Light Corporation v. Hurley, C.C. A.Mo., 49 F.2d 681, certiorari denied 52 S.Ct. 19, 284 U.S. 637, 76 L.Ed. 541—Cropper v. Titanium Pigment Co., C.C.A.Mo., 47 F.2d 1038, 78 A.L.R. 737.
Ala.—Watson v. Hardaway-Covington Co., 137 So. 33, 223 Ala. 443.
Cal.—Lemley v. Doak Gas Engine Co., 180 P. 671, 40 Cal.App. 146.
Mass.—Coulombe v. Horne Coal Co., 175 N.E. 631, 275 Mass. 226.
Mo.—State ex rel. State Highway Commission v. Lindley, 113 S.W.2d 132, 232 Mo.App. 831, conforming to mandate State ex rel. State Highway Commission of Missouri v. Shain, 102 S.W.2d 666, 340 Mo. 802, quashing record and remanding cause State ex rel. State Highway Commission v. Lindley, App., 96 S.W.2d 1065.

pert witness cannot state conclusions on the whole case by summing up the entire issues.[38] An expert may not invade the province of the jury by stating his conclusion as to an ultimate fact when his conclusion is based on conflicting evidence in the case,[39] but his conclusion may be received in evidence if it is based on hypothetical facts which fairly reflect the facts in evidence.[40]

§ 447. —— Issue as to Damages

a. In general
b. Admission of opinion evidence

a. In General

A witness may not state his mere opinion or conclusion as to the amount or extent of damages sustained where no proper basis for the receipt of such evidence has been shown.

Under the rule excluding opinion evidence, see supra § 438, a witness may not state his mere opinion or conclusion as to the amount or extent of damages sustained where no proper basis for the receipt of such evidence has been shown,[41] and he may not state his conclusion as to whether any damage or injury has been sustained.[42] The same

N.C.—Vann v. Atlantic Coast Line R. Co., 109 S.E. 556, 182 N.C. 567.

38. U.S.—Travelers Ins. Co. v. Drake, C.C.A.Cal., 89 F.2d 47—New York Life Ins. Co. v. Wolf, C.C.A. S.D., 85 F.2d 162, certiorari denied 57 S.Ct. 316, 299 U.S. 614, 81 L.Ed. 453.

39. Ill.—Maton Bros. v. Central Illinois Public Service Co., 191 N.E. 321, 356 Ill. 584, affirming 269 Ill. App. 99—Phillips v. Brown, 2 N.E.2d 126, 285 Ill.App. 443.
Kan.—Shouse, Doolittle & Morelock, v. Consolidated Flour Mills Co., 294 P. 657, 132 Kan. 108.
Md.—Thompson v. Standard Wholesale Phosphate & Acid Works, 13 A.2d 328, 178 Md. 305.

40. Idaho.—Hayhurst v. Boyd Hospital, 254 P. 528, 43 Idaho 661—Cochran v. Gritman, 203 P. 289, 34 Idaho 654.
Ill.—See Parker v. Crane Co., 185 Ill.App. 377.
Tex.—Montgomery Ward & Co. v. Levy, Civ.App., 136 S.W.2d 663, error dismissed, judgment correct.
Hypothetical questions to expert witnesses see infra § 551.

41. U.S.—U. S. v. George A. Fuller Co., D.C.Kan., 300 F. 206.
Ala.—Alabama Power Co v. Henson, 187 So. 718, 237 Ala. 561—Alabama Power Co. v. Smith, 155 So. 601, 229 Ala. 105—Bragan v. Birmingham R., Light & Power Co., 51 So. 30, 163 Ala. 93.
Cal.—Miller & Lux v. Pinelli, 257 P. 573, 577, 84 Cal.App. 42, citing **Corpus Juris**.
Ga.—Pierce v. Dennett, 136 S.E. 440, 163 Ga. 471—Carter v. Carter Electric Co., 119 S.E. 737, 156 Ga. 297—Rice & Hutchins Atlanta Co. v. Griffin, 104 S.E. 634, 150 Ga. 607—Mendel v. Converse & Co., 118 S.E. 586, 30 Ga.App. 549.
Ky.—Illinois Cent. R. Co. v. Smith, 61 S.W. 2, 110 Ky. 203, 22 Ky.L. 1655.
Mass.—Doherty v. Ruiz, 18 N.E.2d 542, 302 Mass. 145.
Miss.—St. Louis & S. F. Ry. Co. v. Rylee, 102 So. 838, 137 Miss. 759.
Mo.—Homan v. Missouri Pac. R. Co., 64 S.W.2d 617, 334 Mo. 61, certiorari denied Missouri Pac. R. Co. v. Homan, 54 S.Ct. 561, 291 U.S. 683, 78 L.Ed. 1070—Union Elevator Co. v. Kansas City Suburban Belt Ry. Co., 36 S.W. 1071, 135 Mo. 353, modifying 33 S.W. 926—Funke v. St. Louis-San Francisco Ry. Co., 35 S.W.2d 977, 225 Mo.App. 347.
Mont.—Downey v. Northern Pac. Ry. Co., 232 P. 531, 72 Mont. 166.
N.Y.—De Witt v. Barly, 17 N.Y. 340—Morehouse v. Mathews, 2 N.Y. 514—States Import & Export Corporation v. Hartford Fire Ins. Co., 206 N.Y.S. 323, 210 App.Div. 374.
Okl.—Empire Oil & Refining Co. v. Webb, 62 P.2d 652, 653, 178 Okl. 241, citing **Corpus Juris**.
Or.—Coos Bay Logging Co. v. Barclay, 79 P.2d 672, 159 Or. 272—Compton v. Hammond Lumber Co., 55 P.2d 21, 153 Or. 546, reversed on other grounds and rehearing denied 58 P.2d 235, 153 Or. 546, certiorari denied Hammond Lumber Co. v. Compton, 57 S.Ct. 42, 299 U.S. 578, 81 L.Ed. 426, modified on other grounds Compton v. Hammond Lumber Co., 61 P.2d 1257, 154 Or. 650—Smith v. Pallay, 279 P. 279, 130 Or. 282.
22 C.J. p 505 note 12.

Reason for rule

The primary reason for the rejection of such evidence is that the ascertainment of damages is precisely the point on which the jury must pass.
U.S.—U. S. v. George A. Fuller Co., D.C.Kan., 300 F. 206.
Ala.—Alabama Power Co. v. Henson, 187 So. 718, 237 Ala. 561—London & Scottish Assur. Corporation of London, England v. Smith, 158 So. 892, 229 Ala. 556.
Colo.—Mogote-Northeastern Consol. Ditch Co. v. Gallegos, 203 P. 668, 70 Colo. 550.
Ind.—Dollman v. Pauley, 174 N.E. 729, 202 Ind. 387.
Mass.—Leave v. Boston Elevated Ry. Co., 28 N.E.2d 483, 306 Mass. 391.
N.Y.—States Import & Export Corporation v. Hartford Fire Ins. Co., 206 N.Y.S. 323, 210 App.Div. 374.
Ohio.—Gano v. Cleveland, C., C. & St. L. Ry. Co., 168 N.E. 566, 33 Ohio App. 142.
Okl.—Empire Oil & Refining Co. v. Webb, 62 P.2d 652, 653, 178 Okl. 241, citing **Corpus Juris**.
Tex.—Miller v. Hooper, Civ.App., 94 S.W.2d 230, 231, citing **Corpus Juris**—Houston Chronicle Pub. Co. v. Martin, Civ.App., 5 S.W.2d 170, error dismissed.
22 C.J. p 507 note 21.

Seriousness of injury

An opinion as to the seriousness of the injury is inadmissible. Commonwealth v. Burton, 67 N.E. 419, 183 Mass. 461.

Plaintiff as witness

The rule of the text applies although the witness is the plaintiff in the action.
Iowa.—Rauch v. Dengle, 218 N.W. 470—Harriman v. New Nonpareil Co., 110 N.W. 33, 132 Iowa 616.
Kan.—Atchison, T. & S. F. R. Co. v. Wilkinson, 39 P. 1043, 55 Kan. 83.
Ky.—City of Hazard v. Eversole, 35 S.W.2d 313, 237 Ky. 242.
La.—Goynes v. St. Charles Dairy, App., 197 So. 819.
Mont.—Downey v. Northern Pac. Ry. Co., 232 P. 531, 72 Mont. 166.
S.D.—McMonies v. Genman, 219 N.W. 262, 52 S.D. 548.
Tex.—King v. Roberts, 84 S.W.2d 718, 125 Tex. 623, affirming Roberts v. King, Civ.App., 49 S.W.2d 991—Miller v. Hooper, Civ.App., 94 S.W.2d 230, 231, citing **Corpus Juris**—Myrick v. Tollvar, Civ.App., 227 S.W. 555—Williams v. Gardner, Civ.App., 215 S.W. 981.
22 C.J. p 504 note 11.

42. Ill.—Richmond v. Brandt, 118 Ill.App. 624.
S.C.—Howell v. State Highway Department, 166 S.E. 129, 167 S.C. 217.
22 C.J. p 497 note 35, p 507 note 30.

Damage from assessment lien

Permitting witness to express opinion that placing of lien on property, in nature of benefit assessment, would damage property, was held error.—City of Dallas v. Johnson, Tex. Civ.App., 54 S.W.2d 1024.

rule applies to opinion evidence as to benefits in mitigation of damages.[43]

On the other hand, a statement as to the elements of damages is not within the evil and is usually received,[44] and expressions which amount to statements of fact as to the injury or damages sustained are not objectionable as opinions.[45]

Applications of rule. The rule excluding an expression of opinion as to damages has been applied to statements as to damages sustained from the taking of land for a railroad[46] or highway;[47] an injury to the person,[48] or to real[49] or personal[50] property; loss of goods by a carrier;[51] the creation of a nuisance;[52] fraud or deceit;[53] or the breach of a contract.[54]

b. Admission of Opinion Evidence

Under the necessities of the case, an expert or other qualified witness may estimate the damages sustained, but the facts on which his opinion is based must be shown as far as possible.

An expert or other witness with such knowledge and experience as to qualify him to form a reasonably intelligent judgment may state his opinion as to the amount and extent of damages sustained,[55] at

43. Ala.—City of Ozark v. Byrd, 143 So. 168, 225 Ala. 332—Ex parte South, 88 So. 221, 205 Ala. 31, denying certiorari South v. First Nat. Bank, 88 So. 219, 17 Ala.App. 569.
Ark.—Missouri Pac. R. Co. v. Parker, 266 S.W. 959, 167 Ark. 42.
Ill.—Inlet Swamp Drainage Dist. v. Gehant, 122 N.E. 127, 286 Ill. 558.
Ind.—Dollman v. Pauley, 174 N.E. 729, 202 Ind. 387.
22 C.J. p 507 note 29.

44. Neb.—Republican Valley R. Co. v. Linn, 18 N.W. 35, 15 Neb. 234.
22 C.J. p 507 notes 31, 33 [a].

45. Ala.—Ryall v. Allen, 38 So. 851, 143 Ala. 222.
Ky.—Colyer v. James, 30 S.W.2d 882, 235 Ky. 197.
Mich.—City of Grand Rapids v. Kotvis, 222 N.W. 740, 245 Mich. 319.
Mo.—Dick v. Puritan Pharmaceutical Co., App., 46 S.W.2d 941—Smith v. Ætna Ins. Co., App., 269 S.W. 682.
Or.—Moore v. Shell Oil Co., 6 P.2d 216, 139 Or. 72.
Tenn.—Black Diamond Collieries v. Gibbs, 32 S.W.2d 1041, 161 Tenn. 413.
Tex.—Maryland Casualty Co. v. Swanson, Civ.App., 91 S.W.2d 843, error dismissed—Turner v. Stoker, Civ.App., 289 S.W. 190.

46. Ohio.—Gano v. Cleveland, C. C. & St. L. Ry. Co., 168 N.E. 566, 33 Ohio App. 142.
Or.—Coos Bay Logging Co. v. Barclay, 79 P.2d 672, 159 Or. 272.
22 C.J. p 505 note 13.

47. Iowa.—Kukkuk v. City of Des Moines, 187 N.W. 209, 193 Iowa 444.
Or.—Kerns v. Couch, 12 P.2d 1011, 141 Or. 147, opinion adhered to 17 P.2d 323, 141 Or. 147.
S.C.—Howell v. State Highway Department, 166 S.E. 129, 167 S.C. 217.
22 C.J. p 506 note 14.

48. Ill.—St. Louis, Smelting & Refining Co. v. Industrial Commission, 131 N.E. 617, 298 Ill. 272.
Mass.—Matloff v. City of Chelsea, 31 N.E.2d 518, 308 Mass. 134—Leave v. Boston Elevated Ry. Co., 28 N.E.2d 483, 306 Mass. 391—Doherty v. Ruiz, 18 N.E.2d 542, 302 Mass. 145.
Tex.—Miller v. Hooper, Civ.App., 94 S.W.2d 230, 231, citing **Corpus Juris.**
22 C.J. p 506 note 15.

Death of minor
Amount of loss sustained by parents by reason of death of minor child is not fixed by law, and witnesses cannot be called to estimate amount.—Red Arrow Freight Lines v. Smith, Tex.Civ.App., 93 S.W.2d 495, error dismissed.

49. Ala.—Alabama Power Co. v. Henson, 187 So. 718, 237 Ala. 561.
Ind.—Dollman v. Pauley, 174 N.E. 729, 202 Ind. 387—Click v. Arnold, 149 N.E. 178, 197 Ind. 350.
Okl.—Durell v. Public Service Co. of Oklahoma, 51 P.2d 517, 174 Okl. 549.
22 C.J. p 506 note 16.

Damage from trespass by animals
Cal.—Miller & Lux v. Pinelli, 257 P. 573, 84 Cal.App. 42.
Idaho.—Cox v. Crane Creek Sheep Co., 200 P. 678, 34 Idaho 327—Kirk v. Madareita, 184 P. 225, 32 Idaho 403.
3 C.J. p 149 note 73.

Overflow
Colo.—Mogote-Northeastern Consol. Ditch Co. v. Gallegos, 203 P. 668, 70 Colo. 550.
Ga.—Georgia Ry. & Power Co. v. Head, 116 S.E. 620, 155 Ga. 337.
22 C.J. p 506 note 16 [b].

Unlawful withholding of water from land
Utah.—Bigler v. Fryer, 25 P.2d 598, 82 Utah 380.

Damage to crops from hail
(1) In an action on an hail insurance policy which provides that damages are to be computed on a percentage basis, an estimate of the percentage of the crop damaged is inadmissible.
Kan.—Beam v. Farmers' Union Mut. Hail Ins. Co., 278 P. 440, 127 Kan. 234, 62 A.L.R. 211.
Ky.—Fidelity-Phenix Fire Ins. Co. of New York v. Henry, 60 S.W.2d 111, 248 Ky. 818.
(2) However, there is authority to the contrary.—St. Paul Fire & Marine Ins. Co. v. Mackey-McBrayer Lumber Co., 21 P.2d 23, 163 Okl. 13.

Total loss
In action on fire policy, testimony that building was not a total loss is inadmissible.—St. Paul Fire & Marine Ins. Co. v. Green, 29 S.W.2d 304, 181 Ark. 1096.

50. Ala.—London & Scottish Assur. Corporation of London, England, v. Smith, 158 So. 892, 229 Ala. 556—Byars v. James, 94 So. 536, 208 Ala. 390.
Ill.—Welter v. Schell, 252 Ill.App. 586.
N.Y.—States Import & Export Corporation v. Hartford Fire Ins. Co., 206 N.Y.S. 323, 210 App.Div. 374.
Tex.—Houston Chronicle Pub. Co. v. Martin, Civ.App., 5 S.W.2d 170, error dismissed.
22 C.J. p 506 note 17.

51. Ala.—American Ry. Express Co. v. Stanley, 92 So. 642, 207 Ala. 380.

52. Tex.—St. Louis, B. & M. Ry. Co. v. Griffin, Civ.App., 56 S.W.2d 482.
22 C.J. p 506 note 18.

53. **In sale of land**
Neb.—Odell v. Story, 116 N.W. 269, 81 Neb. 437.

54. Ky.—Yellow Poplar Lumber Co. v. Varney, 272 S.W. 411, 209 Ky. 112.
Mo.—Hillin v. La Fayette Land & Farming Co., App., 296 S.W. 243.
Neb.—Forburger Stone Co. v. Young, 199 N.W. 505, 112 Neb. 345.
Okl.—Waken v. Davis, 239 P. 659, 112 Okl. 23.
Tex.—Freeman & Browne v. Dietert Bros., Civ.App., 258 S.W. 844.
22 C.J. p 506 note 20.

55. U.S.—Prudence Co. v. Fidelity & Deposit Co. of Maryland, C.C.A. N.Y., 77 F.2d 834, reversing, D.C., 7 F.Supp. 392, and certiorari granted 56 S.Ct. 123, 296 U.S. 566, 80 L.Ed. 399, modified on other grounds 56 S.Ct. 387, 297 U.S. 198, 80 L.Ed. 581, motion denied 56 S.Ct. 679, amended 56 S.Ct. 935, 298 U.S. 642, 80 L.Ed. 1374.

least where he details the elements of damage or the items on which the estimate is based,[56] the rule being that the best evidence of which the subject will admit is receivable, even though it is nothing more than the opinion of well informed people.[57] Such a witness may also state whether there has been any damage,[58] or, on the other hand, an affirmative gain,[59] or whether any compensation in money could afford redress.[60] The difficulty of stating minute constituent facts may make it necessary to receive such evidence of damages[61] or the offset of benefits,[62] or as to the effect of any injuries which can be best expressed by the damage they cause.[63]

Opinion evidence may not be received as to damages unless it appears that the witness is qualified to testify,[64] and, in accordance with the general rule

Ala.—Coffee County v. Marsh, 96 So. 891, 209 Ala. 566.
Cal.—W. C. Cook & Co. v. White Truck & Transfer Co., 13 P.2d 549, 124 Cal.App. 721.
Ga.—Southern Ry. Co. v. Thacker, 179 S.E. 225, 50 Ga.App. 706.
Idaho.—Kelso v. Edward Rutledge Timber Co., 269 P. 94, 46 Idaho 497.
Ind.—State v. Reid, 185 N.E. 449, 204 Ind. 631, 86 A.L.R. 1442.
Mass.—Johnson v. City of Lowell, 134 N.E. 627, 240 Mass. 546.
Mo.—Wamsganz v. Blanke-Wenneker Candy Co., App., 216 S.W. 1025.
Neb.—Wahlgren v. Loup River Public Power Dist., 297 N.W. 833.
N.C.—Owens v. Blackwood Lumber Co., 193 S.E. 219, 212 N.C. 133—Myers v. Wilmington-Wrightsville Beach Causeway Co., 171 S.E. 859, 205 N.C. 508—Lambeth v. City of Thomasville, 102 S.E. 775, 179 N.C. 452.
Pa.—Westinghouse Air Brake Co. v. City of Pittsburgh, 176 A. 13, 316 Pa. 372—Western Show Co. v. Mix, 162 A. 667, 669, 308 Pa. 215, citing **Corpus Juris**—Neidlinger v. Haines, 5 Sch.Reg. 51.
Tenn.—Margaret Mill v. Aycock Hosiery Mills, 101 S.W.2d 154, 20 Tenn.App. 533.
Tex.—Graham Hotel Co. v. Garrett, Civ.App., 33 S.W.2d 522, error dismissed—North River Ins. Co. v. Rippy, Civ.App., 23 S.W.2d 853—Assurance Co. of America v. Continental Sav. & Bldg. Ass'n, Civ.App., 8 S.W.2d 787, error refused.
Va.—Southern Ry. Co. v. White, 104 S.E. 865, 128 Va. 551.
22 C.J. p 507 note 33.

Estimate by plaintiff or owner of property
Mass.—Costa v. Goldenberg, 154 N.E. 579, 258 Mass. 264.
Minn.—Egekvist v. Minnetonka & White Bear Nav. Co., 178 S.W. 238, 146 Minn. 474.
Pa.—Westinghouse Air Brake Co. v. City of Pittsburgh, 176 A. 13, 316 Pa. 372.
S.C.—Rountree v. Charleston, etc., R. Co., 52 S.E. 231, 72 S.C. 474.
Tex.—Tubbs v. American Transfer & Storage Co., Civ.App., 297 S.W. 670.
Wash.—McBride v. Willamette & Columbia River Towing Co., 232 P. 286, 132 Wash. 360.

Cost of reparation
A qualified witness may testify as to the cost of reparation.
Idaho.—Raide v. Dollar, 203 P. 469, 34 Idaho 682.
Ky.—Commercial Union Assur. Co. v. Howard, 76 S.W.2d 246, 256 Ky. 363.
La.—Stamm v. Eagle Rice & Feed Mill, App., 151 So. 257.
Mich.—Danielski v. Lukomski, 169 N.W. 887, 204 Mich. 304.
22 C.J. p 508 note 34.

Matter of common knowledge
A nonexpert witness may testify as to the extent of damage where the matter is one of common knowledge.—Louisville & N. R. Co. v. Jones, 1 S.W.2d 972, 222 Ky. 531.

Effect of rejection of opinion by jury
That jury gave a verdict for but a fraction of the sums fixed by experts did not prove that experts' testimony was inadmissible, but rather that jury thereby disproved fears defendant expressed as to effect of receiving such expert testimony.—Eddyside Co. v. Seibel, 15 A.2d 691, 142 Pa.Super. 174.

56. Ga.—Sandersville R. Co. v. McDaniel, 138 S.E. 584, 37 Ga.App. 34.
Idaho.—Raide v. Dollar, 203 P. 469, 34 Idaho 682.
Ky.—Great American Ins. Co. v. Crume, 138 S.W.2d 480, 282 Ky. 282.
Miss.—St. Louis & S. F. Ry. Co. v. Rylee, 102 So. 838, 137 Miss. 759.
S.C.—Howell v. State Highway Department, 166 S.E. 129, 167 S.C. 217.
Tex.—North River Ins. Co. v. Rippy, Civ.App., 23 S.W.2d 853.
W.Va.—Clay County Court v. Adams, 155 S.E. 174, 109 W.Va. 421.

57. Ill.—Johnston v. City of Galva, 147 N.E. 453, 316 Ill. 598, 38 A.L.R. 1384, reversing 232 Ill.App. 632—Daughetee v. Ohio Oil Co., 105 N.E. 308, 263 Ill. 518, affirming 181 Ill.App. 135.
Mich.—Compton v. Fisher-McCall, Inc., 299 N.W. 750, 298 Mich. 648—De Vries v. Meyering Land Co., 226 N.W. 824, 248 Mich. 128.
N.Y.—In re William and North William Sts. in City of New York, 177 N.Y.S. 318, 188 App.Div. 668, appeal dismissed In re Corporation Counsel of City of New York, 126 N.E. 904, 228 N.Y. 523.

58. Ala.—Alabama Power Co. v. Sides, 103 So. 859, 212 Ala. 687.
Mich.—In re City of Detroit, 246 N.W. 51, 261 Mich. 278.
Mo.—State ex rel. State Highway Commission v. Lindley, 113 S.W.2d 132, 232 Mo.App. 831, conforming to mandate State ex rel. State Highway Commission of Missouri v. Shain, 102 S.W.2d 666, 340 Mo. 802, quashing record and remanding cause State ex rel. State Highway Commission v. Lindley, App., 96 S.W.2d 1065—Cities Service Gas Co. v. Peak, 54 S.W.2d 482, 227 Mo.App. 515.
22 C.J. p 508 note 36.

59. Ala.—Schwend v. City of Birmingham, 111 So. 265, 215 Ala. 491.
Mo.—State ex rel. State Highway Commission of Missouri v. Craighead, App., 65 S.W.2d 145.
22 C.J. p 508 note 37.

60. S.C.—Gilman v. Florida Cent., etc., R. Co., 31 S.E. 224, 53 S.C. 210.

61. Ind.—State v. Reid, 185 N.E. 449, 204 Ind. 631, 86 A.L.R. 1442.
22 C.J. p 508 note 40.

62. **Depot near land**
Ill.—Hayes v. Ottawa, etc., R. Co., 54 Ill. 373.

63. S.C.—Jones v. Fuller, 19 S.C. 66, 45 Am.R. 761.
Tex.—Gulf, etc., R. Co. v. Vancil, 21 S.W. 303, 2 Tex.Civ.App. 427.

64. Cal.—Moore v. Levy, 18 P.2d 362, 128 Cal.App. 687—Coast Counties Gas & Electric Co. v. Miller & Lux, 5 P.2d 34, 118 Cal.App. 140—Los Angeles County v. Signal Realty Co., 261 P. 536, 86 Cal.App. 701.
Ky.—Conn v. Lexington Utilities Co., 25 S.W.2d 370, 233 Ky. 230—City of Prestonsburg v. Mellon, 295 S.W. 1064, 220 Ky. 808.
La.—Wagner v. T. S. C. Motor Freight Lines, App., 181 So. 625.
N.J.—In re Acquisition of Lands of Morris & Cummings Dredging Co. for Passaic Valley Sewerage Com'rs, Sup., 115 A. 433—In re Morris & Cummings Dredging Co., 119 A. 308, 96 N.J.Law 218—Kutschinski v. Thompson, 138 A. 569, 101 N.J.Eq. 649.
Pa.—Apfelbaum v. Markley, 13 Northumb.L.J. 223.
Tex.—Grayce Oil Co. v. Peterson, 98 S.W.2d 781, 128 Tex. 550, affirming

stated in § 458 infra, whether the qualification of a witness has been established rests in the trial court's sound discretion.[65]

The facts on which an opinion as to damages is based must be shown so far as this is possible.[66] Opinion evidence as to damages is inadmissible where the opinion is based on speculation and guess without an adequate foundation,[67] or based in part at least on improper elements of damage;[68] and a general statement as to damages which is not shown to have been based on the proper elements of damage has been held to be incompetent.[69] Where other elements of damage may properly enter into the jury's judgment, the witness is restricted to stating his estimate of the values under the different conditions shown or assumed to exist in the case.[70] A statement of damages sustained is not inadmissible because of testimony tending to impeach the basis on which the items of damage were computed.[71]

Estimate by stating difference in value. Where the damages sustained consist of the difference in value, according to some authorities a qualified witness may state the difference in value,[72] but it has also been held that the opinion should be limited to

Peterson v. Grayce Oil Co., Civ. App., 37 S.W.2d 367—Fort Worth & D. C. Ry. Co. v. Helm, Civ.App., 30 S.W.2d 492—Nunn v. Brillhart, Civ.App., 230 S.W. 862, affirmed, Com.App., 242 S.W. 459.

65. Ark.—Malvern & O. R. R. Co. v. Smith, 26 S.W.2d 1107, 181 Ark. 626.
Mass.—Harrington v. Travers, 192 N. E. 495, 288 Mass. 156—Twombly v. Framingham Gas, Fuel & Power Co., 142 N.E. 828, 248 Mass. 53—Johnson v. City of Lowell, 134 N. E. 627, 240 Mass. 546.
Minn.—Caldwell v. First Nat. Bank, 205 N.W. 282, 164 Minn. 401—Bazille & Partridge v. American Eagle Fire Ins. Co. of New York, 194 N.W. 14, 155 Minn. 475.
Neb.—Wahlgren v. Loup River Public Power Dist., 297 N.W. 833.
Tex.—Ætna Ins. Co. v. Collins, Civ. App., 134 S.W.2d 709.

66. Cal.—Miller & Lux v. Pinelli, 257 P. 573, 84 Cal.App. 42.
Ky.—Great American Ins. Co. v. Crume, 138 S.W.2d 480, 282 Ky. 282.
Ohio.—Groves v. Freedom Oil Works Co., 21 N.E.2d 599, 60 Ohio App. 376.
Okl.—Empire Oil & Refining Co. v. Webb, 62 P.2d 652, 178 Okl. 241.
Tex.—Miller v. Hooper, Civ.App., 94 S.W.2d 230.
22 C.J. p 508 note 44.

67. Cal.—Los Angeles County v. Signal Realty Co., 261 P. 536, 86 Cal. App. 704.
Colo.—Detroit Fire & Marine Ins. Co. v. Gagliardi, 32 P.2d 832, 94 Colo. 453, followed in Eagle Fire Co. of New York v. Gagliardi, 32 P.2d 840, 94 Colo. 474.
Del.—Scotton v. Wright, 122 A. 541, 14 Del.Ch. 124.
Iowa.—Randell v. Iowa State Highway Commission, 241 N.W. 685, 214 Iowa 1.
Md.—Washington, B. & A. E. Ry. Co. v. State, 113 A. 338, 137 Md. 538.
Mass.—Wesson v. Washburn Iron Co., 13 Allen 95, 90 Am.D. 181.
Mich.—Compton v. Fisher-McCall, Inc., 299 N.W. 750, 298 Mich. 648.
N.Y.—Berla v. Zambetti, 257 N.Y.S. 179, 235 App.Div. 464.
Pa.—Pittsburgh Terminal Warehouse & Transfer Co. v. City of Pittsburgh, 198 A. 632, 330 Pa. 72—Beatty, Now for Use of Palmer, v. Netherlands Ins. Co. of the Hague, Holland, 181 A. 513, 119 Pa.Super. 567.
22 C.J. p 641 note 45.

Opinion held not merely conjectural or speculative
U.S.—Feather River Lumber Co. v. U. S., C.C.A.Cal., 30 F.2d 642, affirming, D.C., U. S. v. Feather River Lumber Co., 23 F.2d 936.
Cal.—People v. O'Connor, 87 P.2d 702, 31 Cal.App.2d 157.

68. Ill.—Illinois Power & Light Corporation v. Cooper, 152 N.E. 491, 322 Ill. 11—Illinois Power & Light Corporation v. Talbott, 152 N.E. 486, 321 Ill. 538.
Ky.—Jefferson County v. Pohlman 49 S.W.2d 344, 243 Ky. 556.
Mo.—Security Printing Co. v. Connecticut Fire Ins. Co. of Hartford, Conn., 240 S.W. 263, 209 Mo.App. 422.
Pa.—Jordan v. Clearfield County, 164 A. 98, 107 Pa.Super. 441—Lacey v. Hardy, 159 A. 68, 104 Pa.Super. 490.
Tex.—Ara v. Rutland, Com.App., 215 S.W. 445, reversing, Civ.App., 172 S.W. 993—Fort Worth & D. S. P. Ry. Co. v. Gilmore, Civ.App., 13 S.W.2d 416.

Assumption based on adverse party's pleading
Power company, condemning land on theory that easement of one hundred feet was being taken, could not complain because witnesses assumed such width in testifying on damages.—Evans v. Iowa Southern Utilities Co. of Delaware, 218 N.W. 66, 205 Iowa 283.

69. Ky.—Helton v. Asher, 123 S.W. 285, 135 Ky. 751.

Determination of measure of damages by witness
An opinion of a witness based on a measure of damages determined by the witness himself is inadmissible.—Illinois Cent. R. Co. v. Smith, 61 S.W. 2, 110 Ky. 203, 22 Ky.L. 1655.

70. Ill.—Illinois Power & Light Corporation v. Peterson, 153 N.E. 577, 322 Ill. 342, 49 A.L.R. 692.
22 C.J. p 508 note 43.

Cost to complete contract
Where the question is what was necessarily expended to complete a contract and not what the contract could be completed for, it is not permissible to show by expert testimony what would be the reasonable amount to complete the work, or any part thereof.
N.Y.—Clark v. Fleischmann Vehicle Co., 187 N.Y.S. 807.
Utah.—Corporation of President of Church of Jesus Christ of Latter-Day Saints v. Hartford Accident & Indemnity Co., 95 P.2d 736, 98 Utah 297.

71. U.S.—Hettrick Mfg. Co. v. James A. Shepherd & Co., C.C.A.Ohio, 295 F. 10, certiorari denied 44 S.Ct. 456, 265 U.S. 581, 68 L.Ed. 1190.

72. Ark.—Malvern & O. R. R. Co. v. Smith, 26 S.W.2d 1107, 181 Ark. 626.
Tex.—Houston & T. C. R. Co. v. Ellis, 224 S.W. 471, 111 Tex. 15, affirming, Civ.App., 160 S.W. 606—City of Wichita Falls v. Mauldin, Civ.App., 23 S.W.2d 771, affirmed, Com.App., 39 S.W.2d 859.
22 C.J. p 507 note 33, p 592 note 6.

Computation of profits from figures before jury
Testimony that profits amounted to certain sum which was difference between receipts and expenditures shown by written statement is not strictly a conclusion, and not prejudicial, although it was for jury to make subtraction.—Zabawa v. Osman, 210 N.W. 602, 202 Iowa 561.

Estimation of difference on percentage basis
Witnesses' estimation of difference between market value of property before and after obstruction of street on percentage, instead of dollars and cents, basis is not error.—Elizabeth City v. Gregory, 164 S.E. 354, 202 N.C. 759.

a statement of the value before and after the commission of the act complained of and the computation should be left to the jury.[73] Where the witness is permitted to state the difference in value, he should, according to some authorities, first state the value before and after the commission of the act so as to afford the jury a basis for the estimate,[74] but it has also been held that a statement of the value before and after the commission of the act is not an essential preliminary.[75]

Estimates as to value of property are considered infra §§ 501, 545.

Applications of rule. The rule permitting an estimate of damages by a qualified witness has been applied to damages to real property,[76] as in cases of trespass,[77] as in cases of nuisances,[78] overflow,[79]

73. Ala.—Tennessee Coal, etc., Co. v. McMillion, 49 So. 880, 161 Ala. 130.
Ill.—Village of Marissa v. Jones, 158 N.E. 389, 327 Ill. 180.
Neb.—City of Omaha v. Kramer, 41 N.W. 295, 25 Neb. 489.
N.M.—New Mexican R. Co. v. Hendricks, 30 P. 901, 6 N.M. 611.

74. Mo.—State ex rel. State Highway Commission v. Lindley, App., 96 S.W.2d 1065, record quashed and cause remanded State ex rel. State Highway Commission of Missouri v. Shain, 102 S.W.2d 666, 340 Mo. 802, mandate conformed to State ex rel. State Highway Commission v. Lindley, 113 S.W.2d 132, 232 Mo. App. 831.
Pa.—Hahn v. City of Bethlehem, 185 A. 227, 322 Pa. 129.

75. Tex.—Houston & T. C. R. Co. v. Ellis, 224 S.W. 471, 111 Tex. 15; affirming, Civ.App., 160 S.W. 606. However, it has been held that while an unexplained answer of a witness that damage to premises was in a given sum would be objectionable, yet, where the witness states the value of the property before and after the injury, no reversible error is shown.—City of Wichita Falls v. Mauldin, Tex.Civ.App., 23 S.W.2d 771, affirmed, Com.App., 39 S.W.2d 859.

76. Ala.—Finley v. City of Decatur, 150 So. 686, 227 Ala. 452.
Cal.—Los Angeles County v. Signal Realty Co., 261 P. 536, 86 Cal.App. 704.
Colo.—City and County of Denver v. Tondall, 282 P. 191, 86 Colo. 372.
Ind.—Indiana Limestone Co. v. Murphy, 177 N.E. 350, 93 Ind.App. 76.
Mass.—Dorr v. Massachusetts Title Ins. Co., 131 N.E. 191, 238 Mass. 490.
N.J.—Burrough v. New Jersey Gas Co., 110 A. 915, 94 N.J.Law 536.
N.Y.—In re William and North William Sts. in City of New York, 177 N.Y.S. 318, 188 App.Div. 668, appeal dismissed In re Corporation Counsel of City of New York, 126 N.E. 904, 228 N.Y. 523.
N.C.—Owens v. Blackwood Lumber Co., 193 S.E. 219, 212 N.C. 133—Nantahala Power & Light Co. v. Rogers, 178 S.E. 575, 207 N.C. 751.
Okl.—Katschor v. Eason Oil Co., 63 P.2d 977, 178 Okl. 634.
Tex.—North River Ins. Co. v. Rippy, Civ.App., 23 S.W.2d 853—Texas Interurban Ry. Co. v. Halford, Civ. App., 299 S.W. 277—Missouri-Kansas-Texas Ry. Co. of Texas v. Wells, Civ.App., 275 S.W. 218.
22 C.J. p 508 note 45.

Building contractor
Pa.—Strauch v. City of Pittsburgh, 70 Pa.Super. 251.
Tex.—North River Ins. Co. v. Rippy, Civ.App., 23 S.W.2d 853.

Real estate agent
Pa.—Krein v. Steigerwald, 193 A. 390, 128 Pa.Super. 51—Commonwealth Trust Co. v. Heh, 99 Pa. Super. 479.
Tex.—Texas Interurban Ry. Co. v. Halford, Civ.App., 299 S.W. 277.

Qualification of witnesses
Witnesses shown to be acquainted with lands, damage done, and surrounding circumstances may give an opinion regarding the amount of damages.
Ill.—Illinois Power & Light Corporation v. Talbott, 152 N.E. 486, 321 Ill. 538.
Ky.—Norfolk & W. Ry. Co. v. McCoy, 61 S.W.2d 1080, 250 Ky. 190—Louisville & N. R. Co. v. Jones, 1 S.W.2d 972, 222 Ky. 531.
Md.—Williams v. New York, P. & N. R. Co., 137 A. 506, 153 Md. 102.
Miss.—Yorkshire Ins. Co. v. Brewer, 166 So. 361, 175 Miss. 538.
Mo.—Funke v. St. Louis-San Francisco Ry. Co., 35 S.W.2d 977, 225 Mo.App. 347.
Neb.—Wahlgren v. Loup River Public Power Dist., 297 N.W. 833.
Tex.—Houston Lighting & Power Co. v. Daily, Civ.App., 291 S.W. 317—Denton County v. Sauls, Civ.App., 265 S.W. 1091.
Va.—Kerr v. Clinchfield Coal Corporation, 192 S.E. 741, 169 Va. 149.
Wis.—In re Oklahoma Ave. in City of Milwaukee, 190 N.W. 1001, 179 Wis. 136.

Knowledge as basis of opinion
Where the question is whether realty will be damaged or benefited by an improvement, and how much, expert witnesses testifying on such questions must do so from their own knowledge, and must first qualify by showing that they have such knowledge of the facts as will render their opinions valuable. It is not permissible to allow such witnesses to answer hypothetical questions or to give opinions based on the testimony of other witnesses, as expert witnesses may testify in other cases.—City of Elmhurst v. Rohmeyer, 130 N. E. 761, 297 Ill. 430.

Basis for receipt of nonexpert opinion
Nonexperts' opinion testimony is admissible as to amount of damages suffered by landowner as result of condemnation since primary facts leading to opinion cannot be so stated as to enable person not an eyewitness to form an accurate judgment thereon.—State v. Reid, 185 N.E. 449, 204 Ind. 631, 86 A.L.R. 1442.

Effect of exaggeration of damages
Where witness has disclosed sufficient knowledge of values to qualify as a witness on question of damages in condemnation proceedings, his testimony should not be excluded on ground that his estimate of damages is exaggerated.—Alabama Power Co. v. Henson, 187 So. 718, 237 Ala. 561.

77. Idaho.—Roseborough v. Whittington, 96 P. 437, 15 Idaho 100.
Miss.—St. Louis & S. F. Ry. Co. v. Rylee, 102 So. 838, 137 Miss. 759.
Tex.—Tippett v. Corder, Civ.App., 117 S.W. 186.
22 C.J. p 509 note 46.

Competency of witnesses
(1) Admissible evidence of damage to pasturage by trespassing animals is opinion of men qualified by experience to speak about such matters.—White River Sheep Co. v. Barkley, 288 P. 1029, 37 Ariz. 49.

(2) Owners were competent to testify as to reasonable expense of driving trespassing horses off their leaseholds.—Hill v. Chappel Bros. of Montana, 18 P.2d 1106, 93 Mont. 92.

(3) Other cases see Montgomery v. Southern Power Co., 68 S.E. 1047, 87 S.C. 293—22 C.J. p 509 note 46 [a].

78. Mont.—Watson v. Colusa-Parrot Min., etc., Co., 79 P. 14, 31 Mont. 513.
22 C.J. p 509 note 47.

79. Ark.—St. Louis San Francisco Ry. Co. v. Manning, 26 S.W.2d 579, 181 Ark. 517.
Ga.—Keener v. Addis, 5 S.E.2d 695, 61 Ga.App. 40.
Tex.—Owens v. Navarro County Levee Improvement Dist. No. 8, Civ.App., 281 S.W. 577, certified

and, likewise, as in cases of fire,[80] and waste,[81] or the construction of railroads,[82] canals,[83] streets and highways,[84] dams,[85] levees,[86] telegraph, telephone, or power lines,[87] pipe lines,[88] sewers,[89] or drains.[90] In addition, an estimate of damages by a qualified witness has been allowed in the case of damage to crops[91] or trees;[92] damage to animals,[93]

questions answered, Com.App., 280 S.W. 532.

Va.—Southern Ry. Co. v. White, 104 S.E. 865, 128 Va. 551.

22 C.J. p 509 note 48.

80. U.S.—Feather River Lumber Co. v. U. S., C.C.A.Cal., 30 F.2d 642, affirming U. S. v. Feather River Lumber Co., D.C., 23 F.2d 936.

Ark.—Firemen's Ins. Co. v. Little, 74 S.W.2d 777, 189 Ark. 640.

Mo.—Alcorn v. St. Louis & H. R. Co., 284 S.W. 510, 219 Mo.App. 657.

N.J.—Vinik v. Niagara Fire Ins. Co., 174 A. 753, 113 N.J.Law 406, affirming 171 A. 555, 112 N.J.Law 462.

S.C.—Hall v. Seaboard Air Line Ry. Co., 119 S.E. 910, 126 S.C. 330, 33 A.L.R. 292.

22 C.J. p 509 note 49.

View of premises before fire

(1) An opinion estimate as to the amount of the loss, based on inspection of the premises after the fire, should not be limited to witnesses who had seen the premises before the fire.—Hall v. Seaboard Air Line Ry. Co., 119 S.E. 910, 126 S.C. 330, 33 A.L.R. 292.

(2) However, it has been held that, where a witness testified he did not know condition of house before fire, the court properly excluded his testimony regarding damages.—Conn v. Lexington Utilities Co., 25 S.W.2d 370, 233 Ky. 230.

Inspection after fire

Witnesses who had examined building covered by fire policy which sustained partial loss could testify as to what parts of building were injured by fire, but only those witnesses who had examined any particular item and were otherwise qualified could testify as to cost of repairing that item, and witness testifying as to total cost of making repairs must know cost of items making up total. —Great American Ins. Co. v. Crume, 99 S.W.2d 742, 266 Ky. 729.

81. Ind.—Ferguson v. Stafford, 33 Ind. 162.

82. Ala.—Hays v. Ingham-Burnett Lumber Co., 116 So. 689, 217 Ala. 524.

Ark.—Malvern & O. R. R. Co. v. Smith, 26 S.W.2d 1107, 181 Ark. 626.

Mo.—Chicago, R. I. & P. Ry. Co. v. Hosman, 57 S.W.2d 434, 227 Mo. App. 659.

22 C.J. p 509 note 51.

83. Ill.—Chicago Sanitary Dist. v. Baumbach, 110 N.E. 331, 270 Ill. 128.

84. Cal.—People v. O'Connor, 87 P. 2d 702, 31 Cal.App.2d 157.

Ga.—McDuffie County v. Gunn, 177 S.E. 363, 50 Ga.App. 198.

Idaho.—Palmer v. Highway Dist. No. 1, Bonner County, 290 P. 393, 49 Idaho 596.

Tex.—Denton County v. Sauls, Civ. App., 265 S.W. 1091.

22 C.J. p 509 note 53.

85. Mass.—Chandler v. Jamaica Pond Aqueduct Corp., 125 Mass. 544.

86. Ark.—Board of Directors of St. Francis Levee Dist. v. Permenter, 92 S.W.2d 391, 192 Ark. 521.

87. Ala.—Alabama Power Co. v. Henson, 187 So. 718, 237 Ala. 561.

Ill.—Illinois Power & Light Corporation v. Cooper, 152 N.E. 491, 322 Ill. 11.

Mo.—Missouri Power & Light Co. v. Creed, App., 32 S.W.2d 783, transferred, see 30 S.W.2d 605, 325 Mo. 1194.

Neb.—Wahlgren v. Loup River Public Power Dist., 297 N.W. 833.

N.C.—Wade v. Carolina Tel., etc., Co., 60 S.E. 987, 147 N.C. 219.

Tex.—Houston Lighting & Power Co. v. Daily, Civ.App., 291 S.W. 317.

88. Pa.—Winnett v. Carnegie Natural Gas Co., 37 Pa.Super. 204—Swank v. Carnegie Natural Gas Co., 5 Pa.Super. 371, 40 Wkly.N.C. 490.

89. Mass.—Taft v. Commonwealth, 33 N.E. 1046, 158 Mass. 526.

Pa.—Wilson v. Scranton City, 21 A. 779, 141 Pa. 621.

90. Tenn.—Madison County Drain. Dist. No. 4 v. Askew, 204 S.W. 984, 140 Tenn. 314.

22 C.J. p 509 note 58.

91. Ala.—Alabama Machinery & Supply Co. v. Caffey, 104 So. 509, 213 Ala. 260.

N.Y.—Sickles v. Gould, 51 How.Pr. 22.

Tex.—Ætna Ins. Co. v. Collins, Civ. App., 134 S.W.2d 709.

Wis.—Watry v. Hiltgen, 16 Wis. 516.

Damage to grass

Cattlemen of many years' experience in buying and selling grass and grass land were qualified to testify as to the damage done to a pasture and grass by a fire.—Wichita Valley Ry. Co. v. Martin & Walker, Tex.Civ.App., 219 S.W. 559.

Estimate as to yield

Farmer having experience in growing sorghum cane of same variety, in same neighborhood, and on similar soil, and shown to have known plaintiff's crop, might give his judgment as to probable yield, and, in aid of his opinion and as evidence of probable yield, might give yield of his own crop with evidence that it was same variety, grown on like soil, in same community, same season, and that plaintiff's cane was as good as his.—Alabama Machinery & Supply Co. v. Caffey, 104 So. 509, 213 Ala. 260.

92. Ga.—Ayers v. John B. Daniel Co., 133 S.E. 878, 35 Ga.App. 511.

Ky.—Louisville & N. R. Co. v. Jones, 1 S.W.2d 972, 222 Ky. 531.

Okl.—Denver Producing & Refining Co. v. Bunch, 45 P.2d 117, 172 Okl. 209.

93. Okl.—Central Petroleum Co. v. Lewis, 224 P. 186, 98 Okl. 26.

Tex.—Holt v. Lowden, Civ.App., 140 S.W.2d 318.

22 C.J. p 509 note 60.

Depreciation from improper handling by carrier

(1) A qualified witness may state the amount livestock depreciated due to improper handling by the carrier.

Mo.—Phillippi v. Wabash Ry. Co., App., 267 S.W. 960—Sandker v. Wabash Ry. Co., App., 267 S.W. 957.

Okl.—Kurn v. Westheimer & Daube, 73 P.2d 835, 181 Okl. 345—Chicago, R. I. & P. Ry. Co. v. Haskell, 245 P. 858, 117 Okl. 185—Payne v. Parsons, 223 P. 618, 97 Okl. 168.

Tex.—Hartford Fire Ins. Co. v. Galveston, H. & S. A. Ry. Co., Com. App., 239 S.W. 919, reversing Galveston, H. & S. A. R. Co. v. Hartford Fire Ins. Co., Civ.App., 220 S. W. 781—Wichita Valley Ry. Co. v. Brown, Civ.App., 274 S.W. 305—Fort Worth & D. C. R. Co. v. Harle, Civ.App., 240 S.W. 1004, error refused.

(2) Where the opinion includes or is based on the witness' own opinion as to what would be a reasonable time for transport or the degree of care owed the shipper, the estimate is inadmissible.—Wichita Valley Ry. Co. v. Turbeville, Tex.Civ.App., 269 S.W. 498—Hines v. Edwards, Tex.Civ. App., 228 S.W. 1117—Ft. Worth & D. C. R. Co. v. Gatewood, Com.App., 185 S.W. 932, affirmed Gatewood v. Ft. Worth & D. C. Ry. Co., 232 S.W. 493, 111 Tex. 291.

(3) A witness who does not know the market value at the place of destination is not qualified to express an opinion as to the amount of depreciation in value.—Hartford Fire Ins. Co. v. Galveston, H. & S. A. R. Co., Tex.Com.App., 239 S.W. 919, reversing Galveston, H. & S. A. Ry. Co. v. Hartford Fire Ins. Co., Civ.App., 220 S.W. 781—Chicago, R. I. & G. Ry. Co. v. Kapp, Tex.Civ.App., 117 S.W. 904.

automobiles,[94] or other personal property;[95] and in the case of damages resulting from breach of contract,[96] loss of time,[97] loss of profits,[98] and injury to the person.[99]

§ 448. —— Issue as to Negligence

Conclusions of a witness as to the issue of negligence and related issues are inadmissible where the material facts can be placed before the jury for their consideration and they are competent to draw a correct inference therefrom.

The issue of negligence can in most cases be well determined by the judgment of a jury, and the inference, conclusion, or judgment of witnesses is rejected where the material facts can be placed before the jury for their consideration and they are competent to draw a correct inference therefrom.[1]

94. Ark.—Arkansas Power & Light Co. v. Cummins, 28 S.W.2d 1077, 181 Ark. 1145, 182 Ark. 1.
Conn.—MacLaren v. Bishop, 155 A. 210, 113 Conn. 312.
Ga.—Sandersville R. Co. v. McDaniel, 138 S.E. 584, 37 Ga.App. 34.
Ill.—Mammina v. Homeland Ins. Co. of America, 21 N.E.2d 726, 371 Ill. 555, reversing 17 N.E.2d 264, 297 Ill.App. 636.
Kan.—Broadie v. Randall, 216 P. 1103, 114 Kan. 92, 32 A.L.R. 708.
Ky.—Crampton v. Daime, 6 S.W.2d 686, 224 Ky. 507.
Minn.—Egekvist v. Minnetonka & White Bear Nav. Co., 178 N.W. 238, 146 Minn. 474.
Mo.—Brown v. Adams Transfer & Storage Co., App., 31 S.W.2d 117.
Pa.—Barrilo v. Frank, 177 A. 58, 116 Pa.Super. 461.
Utah.—Vadner v. Rozzelle, 45 P.2d 561, 88 Utah 162, rehearing denied 54 P.2d 1214, 88 Utah 172.

95. U.S.—The Anaconda, C.C.A.N.Y., 60 F.2d 898, modifying American Linseed Co. v. U. S., D.C., 40 F.2d 657—The B. F. Guinan, D.C.N.Y., 40 F.2d 277—The Edward G. Murray, C.C.A.N.Y., 278 F. 895.
Ala.—Churchill v. Walling, 88 So. 582, 205 Ala. 509.
Ark.—Penn-National Hardware Mutual of Huntington, Pa., v. Griffin, 296 S.W. 66, 174 Ark. 627, 53 A.L.R. 1106.
22 C.J. p 509 note 61.

Piano

In action for damages alleged to have resulted from leaking roof, due to faulty construction, plaintiffs' witness, who testified he had twenty years' experience as piano tuner, and had been in wholesale and retail trade of pianos for fifteen years, and was familiar with prices of pianos, was qualified to testify as to damage to piano by moisture.—De Honey v. Gjarde, 236 P. 290, 134 Wash. 647.

View of property as essential

One who has had experience with reference to the kind of property damaged may testify as to injury caused by the elements, even though he has never seen the property in question.—Sonneborn v. Southern R. Co., 44 S.E. 77, 65 S.C. 502.

96. U.S.—Prudence Co. v. Fidelity & Deposit Co. of Maryland, C.C.A. N.Y., 77 F.2d 834, reversing, D.C., 7 F.Supp. 392, and certiorari granted 56 S.Ct. 123, 296 U.S. 566, 80 L. Ed. 399, modified on other grounds 56 S.Ct. 387, 297 U.S. 198, 80 L. Ed. 581, motion denied 56 S.Ct. 679, amended on other grounds 56 S.Ct. 935, 298 U.S. 642, 80 L.Ed. 1374.
Ala.—Burnett & Bean v. Miller, 88 So. 871, 205 Ala. 606.
Mich.—De Vries v. Meyering Land Co., 226 N.W. 824, 248 Mich. 128—Gitson v. Yale Land Co., 180 N. W. 593, 212 Mich. 292.
Mo.—Hiatt Inv. Co. v. Buehler, 16 S.W.2d 219, 225 Mo.App. 151.
N.C.—Lambeth v. City of Thomasville, 102 S.E. 775, 179 N.C. 452.
Pa.—Western Show Co. v. Mix, 173 A. 183, 315 Pa. 139—Western Show Co. v. Mix, 162 A. 667, 308 Pa. 215—Taber v. Porter-Gildersleeve Co., 114 A. 773, 271 Pa. 245—Eddyside Co. v. Seibel, 15 A.2d 691, 142 Pa. Super. 174.
Tex.—Owens v. Fain-McGaha Oil Corporation, Civ.App., 98 S.W.2d 1014, reversed on other grounds Fain-McGaha Oil Corporation v. Owens, 121 S.W.2d 982, 132 Tex. 109—Noe Equal Textile Mills v. Waller, Civ.App., 9 S.W.2d 400, error dismissed.
Wash.—Nelson v. Davenport, 183 P. 132, 108 Wash. 259.
22 C.J. p 510 note 62.

Breach of marriage promise

The opinions of neighbors and friends have been admitted to show the amount of damages sustained by plaintiff from a breach of marriage promise.—Jones v. Fuller, 19 S.C. 66, 45 Am.R. 761.

97. Iowa.—Salinger v. Western Union Tel. Co., 126 N.W. 362, 147 Iowa 484.

98. Ga.—City of Thomson v. McCorkle, 171 S.E. 186, 47 Ga.App. 529.
Tex.—Ewing v. Wm. L. Foley, Inc., Civ.App., 239 S.W. 251, reversed on other grounds 280 S.W. 499, 115 Tex. 222, 44 A.L.R. 627.

99. S.C.—Jackson v. Southern R. Co., Carolina Div., 54 S.E. 231, 73 S.C. 557.
22 C.J. p 510 note 64.

Action for death

In death actions, testimony of expert witness on question of damages, based on tables in general use by insurance companies showing amount necessary at various ages to produce certain income for normal expectancy of life, is admissible.—Hanley v. Boston & M. R. R., 190 N.E. 501, 286 Mass. 390, certiorari denied Boston & M. R. R. v. Hanley, 55 S.Ct. 112, 293 U.S. 597, 79 L.Ed. 690—Murphy v. Boston & M. R. R., 190 N.E. 501, 286 Mass. 390, certiorari denied Boston & M. R. R. v. Murphy, 55 S.Ct. 112, 293 U.S. 597, 79 L.Ed. 690.

1. U.S.—Morrison v. Coombs, D.C. Me., 24 F.Supp. 366, adhering to former opinion 23 F.Supp. 852.
Ala.—Priester v. Western Union Telegraph Co., 102 So. 372, 20 Ala. App. 388, reversed on other grounds Ex parte Priester, 102 So. 376, 212 Ala. 271.
Ark.—McEachin v. Martin, 102 S.W. 2d 864, 193 Ark. 787—P. J. Lewelling Const. Co. v. Longstreth, 246 S.W. 19, 156 Ark. 236.
Cal.—Weaver v. Shell Co. of California, 94 P.2d 364, 34 Cal.App.2d 713.
Colo.—Burke v. South Boulder Cañon Ditch Co., 231 P. 671, 76 Colo. 354.
Conn.—Kelly v. City of Waterbury, 114 A. 530, 96 Conn. 491.
Del.—South Atlantic S. S. Co. of Delaware v. Munkacsy, 187 A. 600, 7 W.W.Harr. 580, certiorari denied 57 S.Ct. 233, 299 U.S. 607, 81 L.Ed. 448.
Ill.—Clark v. Public Service Co., 278 Ill.App. 426.
Iowa.—Eclipse Lumber Co. v. Davis, 195 N.W. 337, 196 Iowa 1319.
Mo.—Robison v. Chicago Great Western R. Co., App., 66 S.W.2d 180—Givens v. Spalding Cloak Co., 63 S. W.2d 819, 228 Mo.App. 169.
N.D.—Halverson v. Zimmerman, 218 N.W. 862, 56 N.D. 607.
Ohio.—Neisner Bros. v. Schafer, 178 N.E. 269, 124 Ohio St. 311.
Okl.—Okmulgee Window Glass Co. v. Bright, 183 P. 898, 65 Okl. 53—Federal Oil & Gas Co. v. Campbell, 183 P. 894, 65 Okl. 49.
S.C.—Atlantic Coast Line R. Co. v. Columbia Salvage Corporation, 135 S.E. 877, 138 S.C. 113.
Tex.—Portilla Drilling Co. v. Miller, Civ.App., 144 S.W.2d 936, error dismissed, judgment correct—Fort Worth & D. C. Ry. Co. v. Helm, Civ.App., 30 S.W.2d 492.
22 C.J. p 510 note 65—42 C.J. p 1219 note 43, p 1220 note 53.

Opinion by experienced telegraph operators

The mere fact that witnesses were

This rule is applied to questions of safety and danger,[2] as applied to a rate of speed,[3] a situation,[4] the method adopted for doing particular work,[5] or to the condition of localities or objects,[6] as, for example, an alley,[7] an area,[8] a bridge,[9] a car,[10] a cattle guard,[11] a crossing,[12] a dock,[13] an excavation,[14] machinery,[15] a mechanical appliance,[16] a mine,[17] a railroad station,[18] a road or highway,[19] a sidewalk,[20] a street,[21] a railroad or street railway track,[22] a trap door,[23] a switch,[24] or a trench.[25]

The rule also precludes opinions characterizing acts or conduct as careful,[26] careless,[27] cautious,[28]

experienced telegraph operators did not qualify them to give an opinion as to whether in transmitting telegram change of word "fifty" to "fifteen" would be gross negligence or willful misconduct.—Priester v. Western Union Telegraph Co., 102 So. 372, 20 Ala.App. 388, reversed on other grounds Ex parte Priester, 102 So. 376, 212 Ala. 271.

2. U.S.—Parker v. Elgin, C.C.A. Tenn., 5 F.2d 562.
Ill.—Kesner v. Consumers' Co., 239 Ill.App. 92.
Ky.—Morton's Adm'r v. Kentucky-Tennessee Light & Power Co., 138 S.W.2d 345, 282 Ky. 174.
Mo.—F.shang v. Eyermann Contracting Co., 63 S.W.2d 30, 333 Mo. 874—Walls v. Thompson, App., 119 S.W.2d 43.
Va.—Davis v. Souder, 114 S.E. 605, 134 Va. 356.
Wis.—Robinson v. Waupaca, 46 N.W. 809, 77 Wis. 544.
22 C.J. p 511 note 67.

Comparative safety or danger
Utah.—Moss v. Taylor, 273 P. 515, 73 Utah 277.
22 C.J. p 511 note 67 [a].

3. Ala.—Crotwell v. Cowan, 184 So. 195, 236 Ala. 578.
N.D.—Kist v. Kist, 243 N.W. 820, 62 N.D. 408.
22 C.J. p 512 note 88.

4. Del.—South Atlantic S. S. Co. of Delaware v. Munkacsy, 187 A. 600, 7 W.W.Harr. 580, certiorari denied 57 S.Ct. 233, 299 U.S. 607, 81 L.Ed. 448.
Pa.—Magyar v. Pennsylvania R. Co., 144 A. 765, 294 Pa. 585.
22 C.J. p 512 note 89.

5. Del.—South Atlantic S. S. Co. of Delaware v. Munkacsy, 187 A. 600, 7 W.W.Harr. 580, certiorari denied 57 S.Ct. 233, 299 U.S. 607, 81 L.Ed. 448.
22 C.J. p 512 note 90.

6. Ala.—Doby v. Layton, 98 So. 9, 210 Ala. 303.
Mo.—Fishang v. Eyermann Contracting Co., 63 S.W.2d 30, 333 Mo. 874.
N.C.—Parks v. Sandford & Brooks, 144 S.E. 364, 196 N.C. 36—Marshall v. Interstate Telephone & Telegraph Co., 106 S.E. 818, 181 N.C. 292, rehearing denied 107 S.E. 498, 181 N.C. 410.
Pa.—Ginsburg v. City of Philadelphia, 98 Pa.Super. 131.
22 C.J. p 511 note 68.

7. Pa.—Musick v. Latrobe, 39 A. 226, 184 Pa. 375.

8. Kan.—Holton v. Hicks, 58 P. 998, 9 Kan.App. 179.

Particular place on moving vehicle
Ky.—Rockport Coal Co. v. Barnard, 273 S.W. 538, 210 Ky. 5.
Or.—Richardson v. Portland Trackless Car Co., 233 P. 540, 113 Or. 544.

9. Iowa.—Escher v. Carroll County, 141 N.W. 38, 159 Iowa 627.
22 C.J. p 511 note 71.

10. U.S.—Spokane & Inland Empire R. Co. v. U. S., Wash., 36 S.Ct. 668, 241 U.S. 344, 60 L.Ed. 1037.
22 C.J. p 511 note 72.

11. Ind.—Cleveland, C., C. & St. L. R. Co. v. De Bolt, 37 N.E. 737, 10 Ind.App. 174.
52 C.J. p 117 note 66.

12. Del.—Evans v. Philadelphia, B. & W. R. Co., 77 A. 831, 24 Del. 562.
Ga.—Savannah, F. & W. R. Co. v. Evans, 49 S.E. 308, 121 Ga. 391.
Md.—State, for Use of Emerson, v. Poe, 190 A. 231, 171 Md. 584.
Miss.—Columbus & G. Ry. Co. v. Robinson, 198 So. 749, 189 Miss. 675.
Tex.—St. Louis, S. F. & T. Ry. Co. v. Williams, Civ.App., 104 S.W.2d 103, error dismissed.

Street intersection
Cal.—Wilkerson v. City of El Monte, 62 P.2d 790, 17 Cal.App.2d 615.

13. La.—Marcy v. Sun Mut. Ins. Co., 11 La.Ann. 748.

14. Cal.—Carty v. Boeseke-Dawe Co., 84 P. 267, 2 Cal.App. 646.

15. Ark.—Seaman-Dunning Corporation v. Haralson, 29 S.W.2d 1085, 182 Ark. 93.
22 C.J. p 511 note 77.

16. N.C.—Wilson v. Suncrest Lumber Co., 118 S.E. 797, 186 N.C. 56.
22 C.J. p 511 note 78.

17. Tex.—Consumers' Lignite Co. v. Hubner, Civ.App., 154 S.W. 249.
22 C.J. p 511 note 79.

18. Conn.—Chamberlain v. Platt, 35 A. 780, 68 Conn. 126.

19. Mich.—Stanton v. Webster Tp., 136 N.W. 421, 170 Mich. 428.
22 C.J. p 512 note 81.

20. Idaho.—Berland v. City of Hailey, 101 P.2d 17, 18, 61 Idaho 333, citing **Corpus Juris.**
Iowa.—Smith v. Sioux City, 205 N.W. 956, 200 Iowa 1100.
Ky.—City of Providence v. Hunter, 21 S.W.2d 135, 231 Ky. 72.
Mass.—Cannon v. Inhabitants of Town of Brookline, 152 N.E. 752, 256 Mass. 468.
22 C.J. p 512 note 82.

21. Pa.—McKim v. Philadelphia, 66 A. 340, 217 Pa. 243, 19 L.R.A., N.S., 506.
22 C.J. p 512 note 83.

22. Tex.—Missouri, K. & T. R. Co. v. Grimes, Civ.App., 196 S.W. 691.
22 C.J. p 512 note 84.

Propriety of construction of cattle guards
While the facts as to the condition of the tracks, their location, and the uses made of them at the place in question are admissible in evidence, opinions of witnesses as to whether defendant could properly fence at the place in question, or whether the construction of cattle guards at such places would endanger the lives or limbs of defendant's employees, are not admissible.—Chicago & E. I. R. Co. v. Modesitt, 24 N.E. 986, 124 Ind. 212—52 C.J. p 117 notes 63–65.

23. Ill.—Kolb v. Sandwich Enterprise Co., 36 Ill.App. 419.

24. Ala.—Birmingham R. & E. Co. v. Baylor, 13 So. 793, 101 Ala. 488.
22 C.J. p 512 note 86.

25. N.Y.—Winters v. Naughton, 86 N.Y.S. 439, 91 App.Div. 80.

26. Ala.—Jackson v. Vaughn, 86 So. 469, 204 Ala. 543.
Ariz.—Buehman v. Smelker, 68 P.2d 946, 50 Ariz. 18.
Ark.—Dermott Grocery & Commission Co. of Eudora v. Meyer, 101 S.W.2d 443, 193 Ark. 591.
N.H.—Heidenreich v. Dumas, 190 A. 705, 88 N.H. 453.
Pa.—Snyder v. Walters, 19 Pa.Dist. & Co. 550, 25 Berks Co.L.J. 253.
Tex.—Pecos & N. T. R. Co. v. Bishop, Civ.App., 154 S.W. 305.
Vt.—Landry v. Hubert, 137 A. 97, 100 Vt. 268.
Va.—Norfolk Southern R. Co. v. Banks, 126 S.E. 662, 141 Va. 715.
22 C.J. p 512 note 91.

27. Ariz.—Buehman v. Smelker, 68 P.2d 946, 50 Ariz. 18.
Ark.—Dermott Grocery & Commission Co. of Eudora v. Meyer, 101 S.W.2d 443, 193 Ark. 591.
Or.—Guedon v. Rooney, 87 P.2d 209, 216, 160 Or. 621, 120 A.L.R. 1298, citing **Corpus Juris.**
22 C.J. p 512 note 92.

28. Fla.—Atlantic Coast Line R. Co. v. Shouse, 91 So. 90, 83 Fla. 156.

dangerous,[29] in the line of duty,[30] necessary,[31] negligent,[32] omitting anything,[33] practicable,[34] proper,[35] prudent,[36] reasonable or unreasonable,[37] reckless,[38] safe,[39] skillful,[40] usual,[41] or unusual.[42]

A witness cannot be permitted to state his inference as to assumption of risk,[43] or state his inference as to the existence of contributory negligence,[44] even though the witness is the actor himself.[45] Further, a witness may not state conclusions as to the competency of a person to drive a motor vehicle, to operate certain machinery, or to engage in other pursuits,[46] and as to his habitual care while so engaged.[47] A witness may not state whether a machine was properly guarded;[48] whether sufficient time was afforded for the doing of an act;[49] whether an accident was unavoidable;[50] whether a person did all that was possible to avoid the accident or injury;[51] whether a vehicle could have been stopped in time to avoid the accident;[52] whether the driver stopped the vehicle as quickly

Mo.—Hall v. Wilkerson, App., 84 S.W.2d 1063.
22 C.J. p 512 note 93.

29. Ala.—Putman v. White, 88 So. 355, 18 Ala.App. 15.
Va.—Davis v. Souder, 114 S.E. 605, 607, 134 Va. 356, quoting **Corpus Juris.**
22 C.J. p 512 note 94.

30. Mo.—Rigley v. Prior, 233 S.W. 828, 290 Mo. 10.
22 C.J. p 512 note 96.

31. Ala.—Anders v. Wallace, 82 So. 644, 17 Ala.App. 154.
Cal.—Primmer v. C. C. Harris Oil Co., 196 P. 921, 51 Cal.App. 401.
22 C.J. p 512 note 97.

32. Ariz.—Buehman v. Smelker, 68 P.2d 946, 949, 50 Ariz. 18, citing **Corpus Juris**—Lee Moor Contracting Co. v. Blanton, 65 P.2d 35, 49 Ariz. 130.
Or.—Lehman v. Knott, 196 P. 476, 100 Or. 59.
Pa.—Snyder v. Walters, 19 Pa.Dist. & Co. 550, 25 Berks Co.L.J. 253.
Tex.—Portilla Drilling Co. v. Miller, Civ.App., 144 S.W.2d 936, error dismissed, judgment correct—Stowell v. Texas Employers' Ins. Ass'n, Civ.App., 259 S.W. 311.
22 C.J. p 512 note 98—42 C.J. p 1220 note 53.

33. Ill.—Springfield Cons. R. Co. v. Puntenney, 101 Ill.App. 95, affirmed 65 N.E. 442, 200 Ill. 9.
22 C.J. p 513 note 99.

34. Setting brakes on cars
S.C.—Miller v. Atlantic Coast Line R. Co., 77 S.E. 1111, 94 S.C. 388.

35. Mich.—Hertzler v. Manshum, 200 N.W. 155, 228 Mich. 416.
22 C.J. p 513 note 3—p 653 notes 33, 34.

36. Ariz.—Buehman v. Smelker, 68 P.2d 946, 50 Ariz. 18—Lee Moor Contracting Co. v. Blanton, 65 P.2d 35, 49 Ariz. 130.
Fla.—Atlantic Coast Line R. Co. v. Shouse, 91 So. 90, 83 Fla. 156.
22 C.J. p 513 note 4—10 C.J. p 1054 note 11 [e].

37. Cal.—Foley v. American Ry. Express Co., 232 P. 169, 69 Cal.App. 669.
22 C.J. p 513 note 5.

38. Ala.—Jackson v. Vaughn, 86 So. 469, 204 Ala. 543.
Or.—Guedon v. Rooney, 87 P.2d 209, 160 Or. 621, 120 A.L.R. 1298.

39. Wash.—Nicktovich v. Olympic Motor Transit Co., 272 P. 736, 150 Wash. 278.
22 C.J. p 513 note 6.

40. Ill.—Hoener v. Koch, 84 Ill. 408.
Pa.—Woeckner v. Erie Electric Motor Co., 41 A. 28, 187 Pa. 206.

41. Ark.—Fordyce v. Lowman, 34 S.W. 255, 62 Ark. 70.
Mass.—Boisvert v. Ward, 85 N.E. 849, 199 Mass. 594.

42. Or.—Pointer v. Klamath Falls Land Co., 117 P. 605, 59 Or. 438, Ann.Cas.1913C 1076.
22 C.J. p 513 note 9.

43. Tex.—Consumers' Cotton Oil Co. v. Jonte, 80 S.W. 847, 36 Tex.Civ.App. 18.

44. U.S.—Bradford Glycerine Co. v. Kizer, Ohio, 113 F. 894, 51 C.C.A. 524.
22 C.J. p 514 note 14.

45. N.C.—Phifer v. Carolina Cent. R. Co., 29 S.E. 578, 122 N.C. 940.
22 C.J. p 514 note 13.

46. N.Y.—Shaw v. Skopp, 190 N.Y.S. 859, 198 App.Div. 618.
Okl.—Massey v. Ivester, 33 P.2d 765, 168 Okl. 464.
Wash.—Pantages v. Seattle Electric Co., 104 P. 629, 55 Wash. 453.
22 C.J. p 513 note 12.
Admissibility of evidence as to the competency of motor vehicle driver see the C.J.S. title Motor Vehicles § 515, also 42 C.J. p 1220 note 54.

47. Conn.—Morris v. East Haven, 41 Conn. 252.
Iowa.—In re Hill's Estate, 208 N.W. 334, 202 Iowa 1038, modified on other grounds 210 N.W. 241, 202 Iowa 1038.
Okl.—Massey v. Ivester, 33 P.2d 765, 168 Okl. 464.
Or.—Guedon v. Rooney, 87 P.2d 209, 160 Or. 621, 120 A.L.R. 1298.

Bicycle rider
Testimony that a bicycle rider was "very careful at crossings" and "was a very careful rider" is incompetent, being merely the conclusion of the witness.—Winski v. Clegg, 142 N.E. 130, 81 Ind.App. 560.

48. Iowa.—Stephenson v. Sheffield Brick & Tile Co., 130 N.W. 586, 151 Iowa 371.

49. N.Y.—Lichtbach v. Kelbach, 186 N.Y.S. 126.
22 C.J. p 513 note 11.

50. Ala.—Alabama Water Co. v. Wilson, 107 So. 821, 214 Ala. 361.
Ga.—Bailey v. Georgia Ry. & Power Co., 124 S.E. 907, 32 Ga.App. 793.
N.J.—Newhouse v. Phillips, 166 A. 482, 110 N.J.Law 421.
Tex.—Barber v. Anderson, Civ.App., 127 S.W.2d 358, error dismissed, judgment correct.
42 C.J. p 1223 note 37.

51. Ala.—Pittman v. Calhoun, 165 So. 391, 231 Ala. 460.
Cal.—Sommer v. Martin, 204 P. 33, 55 Cal.App. 603.
Iowa.—Allen v. Des Moines Ry. Co., 253 N.W. 143, 218 Iowa 286.
Ky.—Goins v. Slusher, 110 S.W.2d 363, 282 Ky. 710.
Mass.—Birch v. Strout, 20 N.E.2d 429, 303 Mass. 28.
Mich.—Patterson v. Jacobs, 286 N.W. 643, 289 Mich. 351.
N.C.—Bevan v. Carter, 186 S.E. 321, 210 N.C. 291.
Or.—Tyler v. Moore, 226 P. 443, 111 Or. 499.
S.C.—Johnston v. Dagger, 149 S.E. 241, 151 S.C. 537.
42 C.J. p 1223 note 38.

Injury to shipment
In an action for loss or injury to goods, testimony of a witness that everything was done which could be done to save goods shipped from being burned, being a mere matter of opinion, is not admissible.—Montgomery & West Point R. Co. v. Edmonds, 41 Ala. 667.

52. Ky.—Mann v. Woodward, 290 S.W. 333, 217 Ky. 491.
Md.—Capital Tract. Co. v. Contner, 87 A. 904, 120 Md. 78.
42 C.J. p 1226 note 11.

Control of car
Refusing to permit defendant, not qualified as expert in operation of automobile, to testify he had automobile under control up to time of collision, is not error.—Brasfield v. Hood, 128 So. 433, 221 Ala. 340.

as he could;[53] whether a person was or was not at fault;[54] whether a person was or was not in the exercise of due care,[55] ordinary care,[56] or reasonable care;[57] what a person in the exercise of ordinary care should have done;[58] or what would constitute reasonable care under given circumstances.[59]

Statements from knowledge or observation. A witness may state a fact, or if qualified either by training or by observation, he may state an impression derived from facts which are too detailed to be set forth, although the testimony is pertinent to the issue of negligence.[60] Within this rule a witness may measure conduct by the standard of care,[61] mechanical skill,[62] or safety;[63] he may state what course of conduct is ordinarily pursued under similar circumstances;[64] he may state the competency of a person to drive a motor vehicle, to operate certain machinery, or to engage in other pursuits,[65] and his customary carefulness;[66] and he may state his impression from appearance as to the safety or danger,[67] either absolute or compar-

53. Ala.—Taylor v. Lewis, 89 So. 581, 206 Ala. 338.
Ind.—Hamilton v. Larrimer, 105 N.E. 43, 183 Ind. 429.
Mich.—Stinson v. Payne, 203 N.W. 831, 231 Mich. 158.

54. Ark.—Dermott Grocery & Commission Co. of Eudora v. Meyer, 101 S.W.2d 443, 193 Ark. 591.
Mo.—State v. Terry, 72 S.W. 513, 172 Mo. 213.
Ohio.—Cottom v. Klein, 175 N.E. 689, 123 Ohio St. 440.

55. Ala.—Union Painless Dentists v. Dement, 60 So. 421, 6 Ala.App. 505.
Ga.—City Council of Augusta v. Lombard, 25 S.E. 772, 99 Ga. 282.
Iowa.—Duer v. Allen, 64 N.W. 682, 96 Iowa 36.
Ky.—Morton's Adm'r v. Kentucky-Tennessee Light & Power Co., 138 S.W.2d 345, 282 Ky. 174.
W.Va.—Hendricks v. Monongahela West Penn Public Service Co., 163 S.E. 411, 111 W.Va. 576.
22 C.J. p 514 note 15, p 653 notes 33, 34.

Use of good judgment
In action against street railway for a death on its track, testimony of a witness that in his opinion the motorman used very good judgment was improper.—Williams v. Duluth St. Ry. Co., 171 N.W. 939, 169 Wis. 261.

56. Iowa.—Rauch v. Dengle, 218 N. W. 470.
Va.—City of Roanoke v. Shull, 34 S. E. 34, 97 Va. 419, 75 Am.S.R. 791.
22 C.J. p 495 note 38, p 512 note 91 [b].

Proper route
A witness cannot state whether the driver of an automobile went down the street "as he should go."—Hensen v. Connecticut Co., 118 A. 464, 98 Conn. 71.

57. Wash.—Bruenn v. North Yakima School Dist. No. 7, Yakima County, 172 P. 569, 101 Wash. 374.
22 C.J. p 512 note 91 [c].

58. Ark.—Holmes v. Bluff City Lumber Co., 133 S.W. 819, 97 Ark. 180.

Extension of credit by business man
In action against salesman for negligence in extending credit, opinion whether ordinary business man would have credited customers is inadmissible.—Blackshear Mfg. Co. v. Umatilla Fruit Co., C.C.A.Fla., 48 F. 2d 174.

59. Ala.—Roberts v. Kurn, 165 So. 77, 231 Ala. 384.
Tex.—Freeport Town-Site Co. v. S. H. Hudgins & Sons, Civ.App., 212 S.W. 287, error refused.
22 C.J. p 514 note 16.

Use of other means
It was not competent for a witness not an expert to testify as to what other means than those used by the motorman of an interurban car might have been employed for the safety of persons using a railroad crossing.—Johnson's Adm'r v. Louisville & I. R. Co., 251 S.W. 843, 199 Ky. 524, overruled Johnson v. Louisville & I. R. Co., 252 S.W. 122, 200 Ky. 74.

60. Ala.—Standard Cooperage Co. v. Dearman, 86 So. 537, 204 Ala. 553.
Ark.—Missouri Pac. R. Co. v. Riley, 49 S.W.2d 397, 185 Ark. 699.
Cal.—Cooper v. Kellogg, 42 P.2d 59, 2 Cal.2d 504.
Conn.—Britton v. Hartshorn, 156 A. 48, 113 Conn. 484.
Idaho.—Curtis v. Curtis, 70 P.2d 369, 58 Idaho 76.
Ill.—Williams v. Morris, 86 N.E. 729, 237 Ill. 254.
Kan.—Linscott v. Hughbanks, 37 P. 2d 26, 140 Kan. 353—McArthur v. Independent Torpedo Co., 190 P. 787, 107 Kan. 68.
Mich.—Shier v. American Ry. Express Co., 208 N.W. 746, 234 Mich. 505.
Tex.—Papin v. Japhet, Civ.App., 74 S.W.2d 737, error dismissed—Gray v. Missouri, K. & T. R. Co. of Texas, Civ.App., 45 S.W.2d 267.
22 C.J. p 555 note 91, p 652 note 32 —42 C.J. p 1219 note 43.
Statement of facts and inferences from sensation see infra §§ 459–519.

61. Ill.—Illinois Cent. R. Co. v. Ashline, 49 N.E. 521, 171 Ill. 313.
22 C.J. p 558 note 88, p 511 note 66 [a], p 652 note 32.

Cautiously
Admission of testimony that person would have to drive very cautiously, in view of condition of road, is not reversible error in crossing collision case.—Houston E. & W. T. Ry. Co. v. Sherman, Com.App., 42 S. W.2d 241, reversing, Civ.App., 10 S. W.2d 243.

Use of best judgment by physician
In an action against a physician for malpractice in treatment of plaintiff's fractured leg, testimony of the physician, on redirect examination by his counsel, as to whether he had given plaintiff the benefit of his best judgment and skill, was admissible.—Osnes v. Scanlon, 179 N.W. 869, 189 Iowa 1364.

62. Kan.—State v. Baldwin, 12 P. 318, 36 Kan. 1.
22 C.J. p 558 note 91.

63. S.C.—Berry v. Greenville, 65 S. E. 1030, 84 S.C. 122, 19 Ann.Cas. 978.
Wash.—Bergen v. Lewis County, 164 P. 73, 95 Wash. 499.

64. Ark.—McEachin v. Martin, 102 S. W.2d 864, 193 Ark. 787.

65. Ala.—Buckalew v. Tennessee Coal, Iron & R. Co., 20 So. 606, 112 Ala. 146.
Ark.—Missouri Pac. R. Co. v. Riley, 49 S.W.2d 397, 185 Ark. 699.

Statement admissible under statute
Ga.—Seaboard Air Line Ry. Co. v. Young, 148 S.E. 757, 40 Ga.App. 4.

Reputable plumber
In action for death caused by asphyxiation, in which it was claimed that defendant gas company was negligent in causing gas with excessive pressure to be transmitted through instantaneous heater, question as to whether the plumbers who installed the instantaneous heater were reputable plumbers was not objectionable as calling for a conclusion.—Alabama Power Co. v. Talmadge, 93 So. 548, 207 Ala. 86, error dismissed 42 S.Ct. 463, 259 U.S. 575, 66 L.Ed. 1071.

66. Ark.—Missouri Pac. R. Co. v. Riley, 49 S.W.2d 397, 185 Ark. 699.
Tex.—Papin v. Japhet, Civ.App., 74 S.W.2d 737, error dismissed.

67. Ala.—Alabama Mineral R. Co. v. Jones, 21 So. 507, 114 Ala. 519, 62 Am.S.R. 121.
22 C.J. p 555 note 92.

ative,[68] of objects or localities, as for instance an area way,[69] a boat landing,[70] a bridge,[71] a car,[72] a crossing,[73] a floor,[74] machinery,[75] a pavement,[76] a railroad platform,[77] a railroad track,[78] a ramp in a store,[79] a sidewalk,[80] a steam shovel,[81] a street or highway,[82] a tool,[83] or a turntable.[84]

The rule allowing in evidence a statement of fact or an impression derived from facts has been applied to statements that shipments were roughly handled,[85] that nothing more could have been done to avoid an accident,[86] that a driver could have done certain things to avoid the accident,[87] that witness had his car under control when approaching the scene of the accident,[88] that the injured person had sufficient time to avoid the danger,[89] that brakes were applied too quickly,[90] and that a vehicle was skidding at the time of the collision.[91] In addition, the rule has been applied to statements that a warning was given by a third person;[92] to statements as to the condition of tools or appliances,[93] and as to whether machinery was guarded;[94] and to statements as to the duties of defendant.[95] A witness may testify to specific acts of negligence of a fellow servant, in an action for injuries caused by the negligence of such fellow servant.[96]

Particular subjects of expert testimony, which under the circumstances of the case may be pertinent to the issue of negligence, are considered in §§ 524–546 infra.

§ 449. —— Discretion of Court

The admission of opinion evidence and the extent to which it will be received rest largely in the discretion of the court.

The receipt of opinion evidence, and the extent to which it will be received in any particular case, are matters resting largely in the administrative discretion of the court.[97] The court may control the num-

Precautions against fire

In suit against warehouseman for value of goods destroyed by fire, where special agent of warehouseman's insurer was shown to have experience sufficient to qualify him to express an opinion regarding necessary precautions against fire, the special agent's recommendations, after investigation, with reference to additional precautions, were admissible.—Exporters' & Traders' Compress & Warehouse Co. v. Shaw, Tex. Civ.App., 20 S.W.2d 248.

68. Pa.—Cookson v. Pittsburgh & W. R. Co., 36 A. 194, 179 Pa. 184.

69. Pa.—McNerney v. Reading City, 25 A. 57, 150 Pa. 611.

70. Ky.—Louisville & E. Mail Co. v. Mossberger, 13 Ky.L. 927.

71. Conn.—Ryan v. Bristol, 27 A. 309, 63 Conn. 26.
22 C.J. p 555 note 96.

72. Iowa.—Betts v. Chicago, R. I. & P. R. Co., 60 N.W. 623, 92 Iowa 343, 54 Am.S.R. 558, 26 L.R.A. 248.

73. Tenn.—Louvier v. City of Nashville, 1 Tenn.App. 401.
22 C.J. p 555 note 98.

74. Ky.—Newport Rolling Mill Co. v. Mason, 153 S.W. 220, 152 Ky. 224.
22 C.J. p 555 note 99.

Slippery condition of floor
Mass.—Blake v. Great Atlantic & Pacific Tea Co., 164 N.E. 486, 266 Mass. 12.
Tenn.—Commercial Club v. Epperson, 15 Tenn.App. 649.

75. Ind.—Sievers v. Peters Box & Lumber Co., 50 N.E. 877, 52 N.E. 399, 151 Ind. 642.
22 C.J. p 555 note 1.

76. R.I.—Garberg v. Samuels, 62 A. 211, 27 R.I. 359.

77. Pa.—Graham v. Pennsylvania Co., 21 A. 151, 139 Pa. 149, 12 L.R.A. 293.
22 C.J. p 555 note 3.

78. Ala.—Alabama Mineral R. Co. v. Jones, 21 So. 507, 114 Ala. 519, 62 Am.S.R. 121.
22 C.J. p 555 note 4.

79. Conn.—Lunny v. Pepe, 165 A. 552, 116 Conn. 684.

80. Conn.—Campbell v. New Haven, 62 A. 665, 78 Conn. 394.
22 C.J. p 555 note 5.

81. Iowa.—Heinmiller v. Winston, 107 N.W. 1102, 131 Iowa 32, 117 Am.S.R. 405, 6 L.R.A.,N.S., 150.

82. Conn.—Ryan v. Bristol, 27 A. 309, 63 Conn. 26.
22 C.J. p 556 note 7.

83. N.C.—McCord v. Harrison-Wright Co., 153 S.E. 406, 198 N.C. 742.
Wash.—Arneson v. Grant Smith & Co., 206 P. 960, 120 Wash. 98.

84. S.C.—Bridger v. Asheville & Spartanburg R. Co., 25 S.C. 24.

85. Mich.—Shier v. American Ry. Express Co., 208 N.W. 746, 234 Mich. 505.
Tex.—Gray v. Missouri, K. & T. R. Co. of Texas, Civ.App., 45 S.W.2d 267.

86. N.H.—Ramsdell v. John B. Varick Co., 170 A. 12, 86 N.H. 457 —Reed v. Nashua Buick Co., 147 A. 898, 84 N.H. 156.
Vt.—Merrihew v. Goodspeed, 147 A. 346, 102 Vt. 206, 66 A.L.R. 1109.
42 C.J. 1223 note 36.

87. N.H.—Dimock v. Lussier, 163 A. 500, 86 N.H. 54.
Va.—R. F. Trant, Inc., v. Upton, 165 S.E. 404, 159 Va. 355.

88. Vt.—Duprat v. Chesmore, 110 A. 305, 94 Vt. 218.

89. Va.—Virginia Ry. & Power Co. v. Burr, 133 S.E. 776, 145 Va. 338.

90. Mo.—Wells v. Wells, App., 48 S.W.2d 109.

91. Mass.—Correira v. Boston Motor Tours, 169 N.E. 775, 270 Mass. 88.

92. Wash.—Nelson v. Bjelland, 95 P. 2d 784, 1 Wash. 2d 268, 125 A.L.R. 641.

93. N.C.—Watson v. City of Durham, 178 S.E. 218, 207 N.C. 624.

94. Ala.—Standard Cooperage Co. v. Dearman, 86 So. 537, 204 Ala. 553.

95. Ala.—Sloss-Sheffield Steel & Iron Co. v. Jones, 91 So. 808, 207 Ala. 7.

96. Mo.—Burns v. R. L. McDonald Mfg. Co., 252 S.W. 981, 213 Mo. App. 640.

97. U.S.—Tillman v. National City Bank of New York, C.C.A.N.Y., 118 F.2d 631—Empire Oil & Refining Co. v. Hoyt, C.C.A.Mich., 112 F.2d 356—Patrick v. Rice, C.C.A.Pa., 98 F.2d 550—Hamilton v. U. S., C.C.A. Ga., 73 F.2d 357—Taylor v. U. S., C.C.A.Ala., 71 F.2d 76—The Domira, C.C.A.N.Y., 56 F.2d 585, affirming, D.C., 49 F.2d 324—Meador v. National Liberty Ins. Co. of America, C.C.A.Tex., 53 F.2d 731—Farish Co. v. Madison Distributing Co., C.C.A.N.Y., 37 F.2d 455—Hatch v. U. S., C.C.A.Iowa, 34 F.2d 136, certiorari denied 50 S.Ct. 246, 281 U.S. 731, 74 L.Ed. 1147.
Ala.—Dersis v. Dersis, 98 So. 27, 210 Ala. 308.
Cal.—Rudat v. Carithers, 30 P.2d 435, 137 Cal.App. 92—Dobbie v. Pacific Gas & Electric Co., 273 P. 630, 95 Cal.App. 781—Davenport v. National Reserve Ins. Co. of Illinois,

ber of witnesses who may be called,[98] or decline to receive the evidence where it does not appear to be the best and most reliable which could be produced,[99] or where it is directed to proof of assertions which the court knows to be false.[1]

§ 450. Suppositions

Testimony which consists of no more than a guess or a conjecture of the witness is not admissible, but testimony as to a definite probability or possibility depending on obvious natural courses and not involving to an excessive degree the element of speculation or conjecture is admissible.

Testimony which consists of no more than a guess or a conjecture of the witness is not admissible.[2] A mere supposition of a witness as to what would have happened if something had occurred which did not,[3] or something had not occurred which did,[4]

Dubuque, Iowa, 267 P. 132, 91 Cal. App. 460.
Del.—South Atlantic S. S. Co. of Delaware v. Munkacsy, 187 A. 600, 7 W.W.Harr. 580, certiorari denied 57 S.Ct. 233, 299 U.S. 607, 81 L.Ed. 448—Scotton v. Wright, 122 A. 541, 544, 14 Del.Ch. 124, citing **Corpus Juris.**
Idaho.—Call v. City of Burley, 62 P. 2d 101, 57 Idaho 58—Lowe v. Skaggs Safeway Stores, 286 P. 616, 49 Idaho 48.
Ill.—Down v. Comstock, 149 N.E. 507, 318 Ill. 445—Corelis v. Chicago, B. & Q. R. Co., 244 Ill.App. 47.
Kan.—Myers v. Shell Petroleum Corporation, 110 P.2d 810, 153 Kan. 287.
Md.—United Railways & Electric Co. v. Corbin, 72 A. 606, 109 Md. 442.
Mass.—Graustein v. H. P. Hood & Sons, 200 N.E. 14, 293 Mass. 207—Menici v. Orton Crane & Shovel Co., 189 N.E. 839, 285 Mass. 499—Young v. New York, N. H. & H. R. Co., 174 N.E. 318, 273 Mass. 567—Blanchette v. Union St. Ry. Co., 143 N.E. 310, 248 Mass. 407.
Minn.—Simon v. Larson, 292 N.W. 270, 207 Minn. 605—Miller v. McCarthy, 270 N.W. 559, 198 Minn. 497—Tracey v. City of Minneapolis, 241 N.W. 390, 185 Minn. 380—In re Olson's Estate, 180 N.W. 1009, 148 Minn. 122, rehearing denied Olson's Estate v. Johnson, 181 N.W. 569, 148 Minn. 122.
Neb.—James Poultry Co. v. Nebraska City, 284 N.W. 273, 135 Neb. 787, rehearing denied and opinion supplemented 286 N.W. 337, 136 Neb. 456.
N.H.—Dowling v. L. H. Shattuck, Inc., 17 A.2d 529.
N.J.—Ringwood Co. v. North Jersey Dist. Water Supply Commission, 143 A. 369, 105 N.J.Law 165.
Ohio.—Gano v. Cleveland, C., C. & St. L. Ry. Co., 168 N.E. 566, 33 Ohio App. 142.
Okl.—Hudson v. McGraw-Bearly Lumber Co., 36 P.2d 512, 169 Okl. 160—Phœnix Ins. Co. of Hartford, Conn., v. School Dist. No. 132 of Comanche County, 228 P. 489, 102 Okl. 251.
Or.—Pennebaker v. Kimble, 269 P. 981, 126 Or. 317.
Pa.—Cooper v. Metropolitan Life Ins. Co., 186 A. 125, 323 Pa. 295, 111 A. L.R. 598—Brown, for Use of McArdle, v. Borough of Castle Shannon, 178 A. 678, 318 Pa. 363—Cover v. Hershey Transit Co., 139 A. 266, 290 Pa. 551.
S.C.—O'Kelley v. Mutual Life Ins. Co. of New York, 14 S.E.2d 582—Collins v. Atlantic Coast Line R. Co., 190 S.E. 817, 183 S.C. 284.
Tex.—Portilla Drilling Co. v. Miller, Civ.App., 144 S.W.2d 936, error dismissed, judgment correct—Home Ins. Co. v. Collins, Civ.App., 55 S. W.2d 898, 900, citing **Corpus Juris**—Goode v. Ramey, Civ.App., 48 S.W.2d 719, error refused—Turner v. Stoker, Civ.App., 289 S.W. 190—Ft. Worth & D. C. Ry. Co. v. Hapgood, Civ.App., 210 S.W. 969.
Va.—Lawson v. Darter, 160 S.E. 74, 157 Va. 284—Chesapeake & O. Ry. Co. v. Meyer, 143 S.E. 478, 150 Va. 656.
Wash.—Standard Oil Co. of California v. Grenfell, 10 P.2d 573, 576, 168 Wash. 66, quoting **Corpus Juris**—Wilkins v. Knox, 253 P. 797, 142 Wash. 571.
Wis.—Anderson v. Eggert, 291 N.W. 365, 234 Wis. 348.
Wyo.—Morrison v. Cottonwood Development Co., 266 P. 117, 38 Wyo. 190.
22 C.J. p 514 note 17.

98. Mich.—Fraser v. Jennison, 3 N. W. 882, 42 Mich. 206.
Tenn.—Powers v. McKenzie, 16 S.W. 559, 90 Tenn. 167.

99. Miss.—Russell v. State, 53 Miss. 367.
S.D.—Peterson v. Chicago, M. & St. P. R. Co., 102 N.W. 595, 19 S.D. 122.

1. Ala.—Warden v. Louisville & N. R. Co., 10 So. 276, 94 Ala. 277, 14 L.R.A. 552.
Mass.—Commonwealth v. Marzynski, 21 N.E. 228, 149 Mass. 68.

2. U.S.—U. S. v. Hercules Co., D.C. Miss., 52 F.2d 451.
Ala.—Dersis v. Dersis, 98 So. 27, 210 Ala. 308.
Cal.—Los Angeles County v. Signal Realty Co., 261 P. 536, 86 Cal.App. 704.
Del.—Scotton v. Wright, 121 A. 180, 2 W.W.Harr. 192.
Iowa.—Randell v. Iowa State Highway Commission, 241 N.W. 685, 214 Iowa 1.
Mo.—Claiborne Commission Co. v. Stirlen, App., 262 S.W. 387.
Or.—Storla v. Spokane, Portland & Seattle Transp. Co., 297 P. 367, 136 Or. 315, rehearing denied 298 P. 1065, 136 Or. 315—Scarpelli v. Portland Electric Power Co., 278 P. 99, 130 Or. 267—Hall v. Brown, 202 P. 719, 102 Or. 389.
S.C.—Hartford Fire Ins. Co. v. Etheredge, 129 S.E. 428, 132 S.C. 488.
Tex.—Commercial Standard Ins. Co. v. Billings, Civ.App., 114 S.W.2d 709, error dismissed—City of Pampa v. Todd, Civ.App., 39 S.W.2d 636, reversed on other grounds, Com.App., 59 S.W.2d 114.
Va.—James v. Haymes, 168 S.E. 333, 160 Va. 253.

Probable acts under similar circumstances
Evidence regarding what witness, in charge of railroad engine under similar circumstances, would do, is incompetent.—Chawkley v. Wabash Ry. Co., 297 S.W. 20, 317 Mo. 782.

3. Ala.—Alaga Coach Line v. Foy, 150 So. 493, 227 Ala. 506—Conway v. Robinson, 113 So. 531, 216 Ala. 495—Johnson-Brown Co. v. Dominey Produce Co., 102 So. 606, 212 Ala. 377—Houston v. Elrod, 81 So. 831, 203 Ala. 41.
D.C.—Economon v. Barry-Pate Motor Co., 3 F.2d 84, 55 App.D.C. 143.
Ga.—Jenkins v. Elliott, 178 S.E. 702, 180 Ga. 303—Metropolitan Life Ins. Co. v. Marshall, App., 16 S.E.2d 33.
Mass.—J. P. Devine Co. v. Monatiquot Rubber Works Co., 143 N.E. 903, 249 Mass. 152.
N.J.—Maloney v. Carey, 9 A.2d 791, 123 N.J.Law 501.
Pa.—Razzis v. Philadelphia & R. Ry. Co., 126 A. 204, 281 Pa. 96.
S.C.—Holder v. Sovereign Camp, W. O. W., 185 S.E. 547, 180 S.C. 242—Pardue v. Pardue, 166 S.E. 101, 167 S.C. 129.
Tex.—Grubstake Inv. Ass'n v. Worley, Civ.App., 116 S.W.2d 472, error dismissed—Casler v. Southwest Nat. Bank of Dallas, Civ.App., 274 S.W. 286—Frick v. International & G. N. R. Co., Civ.App., 207 S.W. 198, error refused.
22 C.J. p 514 note 21.

4. Ala.—Holman v. Brady, 3 So.2d 30.
Mo.—Johannes v. Edward G. Becht Laundry Co., 274 S.W. 377.
N.C.—Warren v. Pilot Life Ins. Co., 2 S.E.2d 17, 215 N.C. 402.
Pa.—Kirschman v. Pitt Pub. Co., 178

what a person would have done if he had known certain facts,[5] or whether a certain thing could have happened under certain circumstances, which the witness says did not exist,[6] will ordinarily be rejected.

However, testimony as to a definite probability or possibility depending on obvious natural courses and not involving to an excessive degree the element of speculation or conjecture, is admissible as a statement of fact,[7] and when the objectionable element of speculation or conjecture is subordinated, statements based on the knowledge of the witness as to what would have been the result if a certain condition had existed or if a certain occurrence had or had not taken place, are not inadmissible as conclusions,[8] as where the inquiry is whether a thing could have happened and the witness not know of it.[9] Statements as to what one's conduct would have been under given circumstances have been received,[10] and a witness has been allowed to state what he would have done if he had received certain telegrams,[11] or heard the whistle of a locomotive.[12]

§ 451. Understanding

A witness cannot testify as to his understanding of a matter unless the facts can be presented in no other way, but a statement of the substance of what the witness heard or read is not objectionable.

As a general rule, the testimony of a witness must be confined to facts within his knowledge, see supra § 438, and he cannot testify as to his understanding.[13] Thus a witness cannot state his understanding of the language used in a written contract,[14] deed,[15] letter,[16] or his understanding

A. 828, 318 Pa. 570, 100 A.L.R. 1062.
Va.—Davis v. Souder, 114 S.E. 605, 607, 134 Va. 356, quoting **Corpus Juris.**
Wash.—Hamilton v. Cadwell, 81 P.2d 815, 195 Wash. 683.
22 C.J. p 515 note 22.

5. Cal.—Everett v. Standard Acc. Ins. Co., 187 P. 996, 45 Cal.App. 332.
Minn.—Domico v. Metropolitan Life Ins. Co., 253 N.W. 538, 191 Minn. 215.
N.Y.—Marine Trust Co. of Buffalo v. Willis, 269 N.Y.S. 204, 240 App. Div. 176.

Misrepresentation in application for insurance

(1) In an action on an insurance policy, opinions of witnesses are inadmissible to show that the insurance company would not have issued the policy had it known the truth in regard to certain material facts which were suppressed or misrepresented in the application.
Ga.—Metropolitan Life Ins. Co. v. Marshall, App., 16 S.E.2d 33—Rhodes v. Mutual Ben. Health & Accident Ass'n, 194 S.E. 33, 56 Ga. App. 728—Mutual Ben. Health & Accident Ass'n of Omaha, Neb., v. Bell, 176 S.E. 124, 49 Ga.App. 640.
Minn.—Mack v. Pacific Mut. Life Ins. Co., 208 N.W. 410, 167 Minn. 53.

(2) However, it has been held that, where plaintiff contends that if the facts were known the company nevertheless would have issued the policy, the testimony of the medical examiner of the company that he would have rejected the application if applicant had answered the questions truthfully is admissible.—Gorman v. Jefferson Standard Life Ins. Co., Tex. Civ.App., 275 S.W. 248.

Admissibility of evidence as to materiality of facts suppressed or falsely represented in application for insurance see the C.J.S. title Insurance § 1335, also 33 C.J. p 116 note 64.

6. Mo.—Golden v. Onerem, App., 123 S.W.2d 617.
N.C.—Stanley v. Whiteville Lumber Co., 114 S.E. 385, 184 N.C. 302.
Tenn.—Wilson v. Nashville, C. & St. L. Ry., 65 S.W.2d 637, 16 Tenn. App. 695.
22 C.J. p 515 note 23.

7. N.C.—Street v. Erskine-Ramsey Coal Co., 145 S.E. 11, 196 N.C. 178.
Pa.—Pennsylvania R. Co. v. Henderson, 51 Pa. 315.
22 C.J. p 515 note 27.

8. Ark.—Missouri Pac. R. Co. v. Simmons, 81 S.W.2d 924, 190 Ark. 876—St. Louis-San Francisco Ry. Co. v. Barron, 267 S.W. 582, 166 Ark. 641.
Ga.—Georgia Ry. & Power Co. v. Simms, 126 S.E. 850, 33 Ga.App. 535.
Md.—Taxicab Co. v. Ottenritter, 135 A. 587, 151 Md. 525.
N.C.—Myers v. Southern Public Utilities Co., 180 S.E. 694, 208 N.C. 293.
22 C.J. p 515 note 26.

9. Neb.—Barr v. Post, 77 N.W. 123, 56 Neb. 698.
Wis.—Finch v. Phillips, 41 Wis. 387.

10. U.S.—Searfoss v. Lehigh Valley R. Co., C.C.A.N.Y., 76 F.2d 762.
Iowa.—Neese v. Wilke, 200 N.W. 689
Mo.—Brown v. Adams Transfer & Storage Co., App., 31 S.W.2d 117.
S.C.—Anderson v. Ætna Casualty & Surety Co., 178 S.E. 819, 175 S.C. 254.
22 C.J. p 558 note 1.

11. Ala.—Western Union Telegraph Co. v. Ryan, 90 So. 793, 206 Ala. 511—Western Union Telegraph Co. v. Benson, 48 So. 712, 159 Ala. 254—Western Union Telegraph Co. v. Heathcoat, 43 So. 117, 149 Ala. 623.
Tex.—Western Union Telegraph Co. v. Kilgore, Civ.App., 220 S.W. 593.
22 C.J. p 515 note 24.

However, in an action for nondelivery of a telegram, notifying plaintiff's daughter of a funeral, questions as to whether he could and would have gone after her, if notified of such nondelivery before the funeral, were held properly refused as calling for an expression of an undisclosed intention.—Barbour v. Western Union Telegraph Co., 97 So. 136, 210 Ala. 135.

12. Tex.—International & G. N. R. Co. v. Davis, Civ.App., 84 S.W. 669.

13. Ky.—Louisville Gas & Electric Co v. Moore, 284 S.W. 1082, 215 Ky. 273.
Md.—Marvil Package Co. v. Ginther, 140 A. 95, 154 Md. 213.
N.Y.—New York Canners v. Milbourne, 160 N.E. 914, 247 N.Y. 460, reversing 215 N.Y.S. 891, 217 App. Div. 714.
Pa.—Grove v. Equitable Life Assur. Soc. of U. S., 9 A.2d 723, 336 Pa. 519.

General understanding in community

Exclusion of testimony that general understanding in community was that claimant was wife of decedent was not error, since such testimony would have been a mere expression of opinion or conclusion.—Usalatz v. Pleshe's Estate, 23 N.E.2d 929, 302 Ill.App. 392.

14. Mo.—Cox v. McKinney, 258 S.W. 445, 212 Mo.App. 522.
N.H.—Metropolitan Life Ins. Co. v. Olsen, 123 A. 576, 81 N.H. 113, 32 A.L.R. 1472.
Or.—Tipton v. Dunn, 276 P. 252, 129 Or. 98.
22 C.J. p 515 note 30.

15. Fla.—Cross v. Aby, 45 So. 820, 55 Fla. 311.
22 C.J. p 515 note 31.

16. Md.—Bogart v. Willis, 148 A. 585, 158 Md. 393.

of the language used in other writing,[17] or of the meaning of words,[18] phrases,[19] statements,[20] or figures[21] therein, or what was the intention or understanding on which it was executed.[22] Further, a witness may not state the impression made on him by oral statements,[23] whether the statements resulted in an understanding or contract between certain parties on a given point,[24] or his understanding as to what the contract was.[25] One who heard a statement[26] or conversation[27] may not testify as to what he or another person[28] understood by it. Unless some special reason can be assigned, the observer of a transaction or other fact will not be permitted to state his understanding of its meaning or significance.[29]

A witness' understanding of a statement or conversation may, however, be admissible where the facts can be presented in no other way,[30] or where the facts cannot be placed before the jury so that they themselves can draw a reasonable inference,[31] provided the witness has stated all of the facts he can.[32] The same is true where it is apparent that he uses the word "understanding" as synonymous with "agreement,"[33] or where the understanding is a fact independently relevant.[34] The fact that a witness while testifying uses the expression "understanding" does not render his testimony inadmissible when the term is used in the sense of recollection,[35] knowledge of the fact or transaction,[36] or a statement of what the witness heard.[37]

A statement of the substance of what the witness heard or read is not objectionable,[38] unless it is apparent that the witness is merely stating his understanding.[39] A witness may be asked what he

S.C.—Lester v. Guardian Life Ins. Co., 13 S.E.2d 627, 196 S.C. 357.
Tex.—Negociacion Agricola y Ganadera de San Enrique, S. A. v. Love, Civ.App., 220 S.W. 224.
22 C.J. p 515 note 32.

17. D.C.—Avignone v. Roumel, 13 F. 2d 292, 56 App.D.C. 320.
Mo.—Aldridge v. Zorn, App., 287 S.W. 650, quashed on other grounds State ex rel. Zorn v. Cox, 298 S.W. 837, 318 Mo. 112.
Tex.—Times Pub. Co. v. Ray, Civ. App., 1 S.W.2d 471, affirmed Ray v. Times Pub. Co., Com.App., 12 S. W.2d 165.
22 C.J. p 515 note 33.

18. Ga.—Chero Cola Bottling Co. v. Southern Express Co., 116 S.E. 325, 29 Ga.App. 656.
22 C.J. p 515 note 34.

19. Ga.—Chero Cola Bottling Co. v. Southern Express Co., 116 S.E. 325, 29 Ga.App. 656.
22 C.J. p 515 note 35.

20. N.Y.—Lawrence v. Thompson, 49 N.Y.S. 839, 26 App.Div. 308.

21. Conn.—Harris v. Ansonia, 47 A. 672, 73 Conn. 359.
22 C.J. p 515 note 37.

22. Cal.—Minor v. Carpenter, 169 P. 434, 35 Cal.App. 200.
22 C.J. p 515 note 38.

23. Tex.—Sloan v. Sloan, Civ.App., 32 S.W.2d 513.
Utah.—Farmers' & Merchants' Sav. Bank v. Jensen, 232 P. 1084, 64 Utah 609.
22 C.J. p 515 note 39.

24. Ga.—Pope v. Peeples, 101 S.E. 303, 24 Ga.App. 467.
Ky.—S. J. Marx Co.'s Trustee v. Marx, 3 S.W.2d 644, 223 Ky. 339.
22 C.J. p 516 notes 40, 41.

25. U.S.—Fish v. Wise, C.C.A.Okl., 52 F.2d 544, certiorari denied 52 S.Ct. 265, 284 U.S. 688, 76 L.Ed. 581.
Ala.—Navco Hardwood Co. v. Becks, 134 So. 4, 222 Ala. 631.
N.Y.—Hillock v. Grape, 97 N.Y.S. 823, 111 App.Div. 720.
22 C.J. p 516 note 42.

26. Ky.—White Const. Co. v. Brooks, 1 S.W.2d 1076, 222 Ky. 621.
Md.—Smeak v. Perry, 199 A. 788, 175 Md. 73.
Mo.—Parker v. Ætna Life Ins. Co., 232 S.W. 708, 289 Mo. 42.
Tex.—Anderson v. Paschall, Civ.App., 60 S.W.2d 1087, affirmed Paschall v. Anderson, 91 S.W.2d 1050, 127 Tex. 251.
Wis.—Allen v. Hutchinson, 45 Wis. 259.
22 C.J. p 516 note 43.

27. Cal.—Ward v. Andrews, 186 P. 605, 44 Cal.App. 390.
Conn.—Morache v. Greenberg, 165 A. 684, 116 Conn. 549.
Mass.—Falk v. Falk, 181 N.E. 715, 279 Mass. 530—Horowitz v. S. Slater & Sons, 164 N.E. 72, 265 Mass. 143, followed in Connelly v. S. Slater & Sons, 164 N.E. 77, 265 Mass. 155.
S.D.—Shirley v. Madsen, 216 N.W. 601, 52 S.D. 43.
Tex.—Colonial Trust Co. v. Hill County, Com.App., 27 S.W.2d 144, reversing Hill County v. Colonial Trust Co., Civ.App., 18 S.W.2d 787—Springfield Fire & Marine Ins. Co. v. Barnett, Civ.App., 213 S.W. 365, dismissed for want of jurisdiction.
22 C.J. p 516 note 44.

28. Conn.—Gorham v. Gorham, 41 Conn. 242.
Mich.—Wolverton v. Saranac, 137 N. W. 211, 171 Mich. 419.

29. Ala.—Hotel Tutwiler Operating Co. v. Evans, 94 So. 120, 208 Ala. 252—Industrial Sav. Bank v. Mitchell, 140 So. 449, 25 Ala.App. 13, certiorari denied 140 So. 452, 224 Ala. 335—King v. Dearing-Orman Mercantile Co., 82 So. 627, 17 Ala. App. 143.
Mo.—Messerli v. Bantrup, App., 235 S.W. 485.
22 C.J. p 516 note 46.

30. Iowa.—Blossi v. Chicago & N. W. R. Co., 123 N.W. 360, 144 Iowa 697, 26 L.R.A.,N.S., 255.

31. Mass.—Leonard v. Allen, 11 Cush. 241.
22 C.J. p 516 note 48.

32. Ga.—Neal v. Field, 68 Ga. 534—Phillips v. Lindsey, 65 Ga. 139.

33. U.S.—Michigan Mut. Life Ins. Co. v. Oliver, Ala., 256 F. 212, 167 C.C.A. 428, certiorari denied 39 S. Ct. 494, 250 U.S. 646, 63 L.Ed. 1187.
Ala.—Gulf Trading Co. v. Radcliff, 114 So. 308, 216 Ala. 645.
22 C.J. p 516 note 50.

34. Or.—Farmers' Bank v. Saling, 54 P. 190, 33 Or. 394.
22 C.J. p 516 note 51.

35. Ala.—Gulf Trading Co. v. Radcliff, 114 So. 308, 216 Ala. 645.

36. Ga.—Millsaps v. J. T. Strange Co., 141 S.E. 513, 37 Ga.App. 716.
Mo.—Baird v. Wilks, App., 218 S.W. 918.

37. N.C.—Shepherd v. Sellers, 109 S. E. 847, 182 N.C. 701.

38. Mo.—Parks v. Marshall, 14 S.W. 2d 590, 322 Mo. 218, 62 A.L.R. 835.
Okl.—Hudson v. McGraw-Bearly Lumber Co., 36 P.2d 512, 169 Okl. 160.
S.C.—Holman v. Farrell, 109 S.E. 886, 118 S.C. 12.
22 C.J. p 516 note 52.
Statement of terms of contract see infra § 465.

39. Ky.—White Const. Co. v. Brooks, 1 S.W.2d 1076, 222 Ky. 621.
22 C.J. p 516 note 54.

means by certain expressions used by him,[40] or in what sense he used a word,[41] and he may be allowed to state that he knows what a given expression means.[42] The meaning of foreign words or phrases may be proved as facts by persons acquainted with the language.[43]

§ 452. Opinion of Person Not a Witness

The opinion of a person not a witness is inadmissible.

Testimony as to the opinion of a person not a witness in the cause is inadmissible,[44] particularly where such person is unqualified to express an opinion.[45]

§ 453. Conclusions of Law

As a general rule a witness may not state conclusions of law, but testimony which in the main constitutes a mere statement of fact may be admitted although it rests to a certain extent on the application of legal principles.

As a general rule a witness will not be permitted to state a conclusion of law,[46] unless the objection to such testimony is waived.[47]

As a practical matter, however, the rule excluding conclusions of law cannot be extended so far as to reject every statement that may possibly involve such conclusion,[48] and where the testimony offered, although to a certain extent resting on the application of legal principles, is in the main a mere statement of fact, and especially where the matter is only collaterally involved, a witness will be permitted to state it.[49] The witness may accompany his statement with a detailed statement of the facts

40. Ala.—Doe v. Beck, 19 So. 802, 108 Ala. 71.

41. **Insanity**
Mont.—State v. Peel, 59 P. 169, 23 Mont. 358, 75 Am.S.R. 529.

42. Mass.—Miller v. Butler, 6 Cush. 71, 52 Am.D. 768.
Tex.—International & G. N. R. Co. v. Tel., Tel. Co., 5 S.W. 517, 69 Tex. 277, 5 Am.S.R. 45.

43. U.S.—Colombia v. Cauca Co., W.Va. 113 F. 1020, 51 C.C.A. 604, reversed on other grounds 23 S. Ct. 704, 190 U.S. 524, 47 L.Ed. 1159.

44. U.S.—U. S. v. Ware, C.C.A.La., 110 F.2d 739—Third Nat. Bank & Trust Co. v. U. S., C.C.A.Ohio, 53 F.2d 599.
Ala.—Atlas Portland Cement Co. v. Sharpe, 96 So. 632, 209 Ala. 464.
Ill.—Gayton v. Equitable Life Assur. Soc. of U. S., 245 Ill.App. 432.
Md.—New York Life Ins. Co. v. Rogers, 143 A. 651, 156 Md. 88.
N.J.—Carey v. Deems, 129 A. 191, 101 N.J.Law 419.
N.Y.—Bishop v. New York Times Co., 135 N.E. 845, 233 N.Y. 446, reversing 184 N.Y.S. 378, 194 App. Div. 881.
Tex.—Texas Indemnity Ins. Co. v. Allison, Civ.App., 31 S.W.2d 319, 321, error refused, citing **Corpus Juris**—Dalton v. Dalton, Civ.App., 233 S.W. 546.
Wash.—Harry v. Northern Pac. Ry. Co., 178 P. 465, 105 Wash. 469.
22 C.J. p 726 note 34.
Impression on others
Conclusions of a witness as to impressions formed by others from a person's conduct are inadmissible.—Houston & T. C. R. Co. v. Lee, 133 S.W. 868, 104 Tex. 82.

45. U.S.—Coen v. American Surety Co. of New York, C.C.A.Mo., 120 F. 2d 393.

46. U.S.—I. T. S. Rubber Co. v. Essex Rubber Co., D.C.Mass., 270 F. 593, dismissal of appeal denied, C. C.A., 276 F. 478, and appeal dismissed 42 S.Ct. 45, 257 U.S. 664, 66 L.Ed. 424, and reversed on other grounds, C.C.A., 281 F. 5.
Ala.—Ex parte South, 88 So. 221, 205 Ala. 31, denying certiorari South v. First Nat. Bank, 88 So. 219, 17 Ala.App. 569.
Del.—Fisher v. News-Journal Co., Ch., 21 A.2d 685.
Ky.—Gibson v. Crawford, 83 S.W.2d 1, 7, 259 Ky. 708, citing **Corpus Juris.**
Md.—Fleischmann v. Clark, 111 A. 851, 137 Md. 171.
Mass.—Bachinsky v. Rogers, 173 N.E. 549, 273 Mass 381—McKay v. Morgan Memorial Co-op. Industries and Stores, 172 N.E. 68, 272 Mass. 121.
Mich.—Bradford v. Goldman, 287 N. W. 541, 290 Mich. 338.
Mo.—Mann v. Grim-Smith Hospital and Clinic, 147 S.W.2d 606—Cole v. Uhlmann Grain Co., 100 S.W.2d 311, 340 Mo. 277—Young v. Wheelock, 64 S.W.2d 950, 333 Mo. 992, certiorari denied Wheelock v. Young, 54 S.Ct. 527, 291 U.S. 676, 78 L. Ed. 1064—Fields v. Luck, 44 S.W. 2d 18—Gore v. Whitmore Hotel Co., 83 S.W.2d 114, 229 Mo.App. 910.
Nev.—Wells v. Justice's Court of Las Vegas Tp., Clark County, 42 P.2d 1008, 56 Nev. 34.
Ohio.—Hoare v. City of Cleveland, 186 N.E. 710, 126 Ohio St. 625, affirming Heiser Bros. Co. v. City of Cleveland, 186 N.E. 620, 44 Ohio App. 560.
Or.—Patterson v. Howe, 202 P. 225, 102 Or. 275.
Tex.—Texarkana & Ft. S. Ry. Co. v. Brass, Com.App., 260 S.W. 828, affirming, Civ.App., 245 S.W. 457, rehearing overruled, Com.App., 262 S.W. 737—Fidelity & Deposit Co. of Maryland v. First Nat. Bank, Civ. App., 113 S.W.2d 622, 624, error dismissed, citing **Corpus Juris**—Ogden v. Shropshire & Adkins, Civ. App., 37 S.W.2d 249, error refused—Panhandle & S. F. Ry. Co. v. Sanderson, Civ.App., 218 S.W. 540, dismissed for want of jurisdiction—Milner v. Sims, Civ.App., 171 S. W. 784.
Va.—Edwards v. W. M. Ritter Lumber Co., 177 S.E. 841, 163 Va. 851—Davis v. Souder, 114 S.E. 605, 134 Va. 356.
Wis.—State ex rel. Morehouse v. Hunt, 291 N.W. 745, 749, citing **Corpus Juris**—Douglass v. Ransom, 237 N.W. 260, 205 Wis. 439.
22 C.J. p 634 note 35.

47. Ala.—Sterne v. State, 20 Ala. 43.

48. Md.—Morris v. Hazlehurst, 30 Md. 362.
Recitals in archives
The fact that recitals in ancient archives were in the form of conclusions does not render them inadmissible as evidence of claim of ownership, especially where an affidavit not stating conclusions would not have complied with the statute.—Magee v. Paul, 221 S.W. 254, 110 Tex. 470, answering certified questions, Civ.App., 159 S.W. 325, and answers conformed to, Civ.App., 221 S.W. 1118.

49. U.S.—U. S. v. Lesh Paper Co., 11 Ct.Cust.App. 523.
Cal.—Emery v. Pacific Employers Ins. Co., 67 P.2d 1046, 8 Cal.2d 663—Linforth v. Montgomery, 231 P. 735, 195 Cal. 49—Ryckman v. Fox Film Corporation, 285 P. 431, 188 Cal. 271.
Conn.—Byard v. Hoelscher, 151 A. 351, 112 Conn. 5.
Iowa.—Frahm & Dugdale v. Douglas & Thompson, 188 N.W. 865—Robbins v. Weed, 169 N.W. 773, 187 Iowa 64.
Kan.—Kyte v. Chessmore, 188 P. 251, 106 Kan. 394.
Mass.—New York Cent. R. Co. v.

on which the conclusion of law, so far as one is announced, is based,[50] or these facts may be elicited on cross-examination.[51]

Applications of rule. The general rule forbidding a witness to state conclusions of law has been applied to conclusions as to the existence of an agency[52] or other authority;[53] as to the existence of a partnership,[54] membership in an association,[55] or tenancy;[56] as to ownership[57] or possession[58] of property, either real or personal; as to the existence or sufficiency of a title to property,[59] the passing of title,[60] or the abandonment of property or rights;[61] as to the validity of an instrument[62] or the authority of an agent;[63] as to boundaries,[64] duty,[65] excuse,[66] indebtedness,[67] justification,[68] payment,[69] the powers of a corporation,[70] ratification,[71] residence,[72] responsibility,[73] and, likewise the gener-

Central Vermont Ry. Co., 136 N.E. 825, 243 Mass. 56.
N.H.—Merchants Mut. Casualty Co. v. Smith, 17 A.2d 88.
Tex.—Federal Underwriters Exchange v. Woods, Civ.App., 140 S.W.2d 285, error granted—Capitol Hotel Co. v. Rittenberry, Civ.App., 41 S.W.2d 697, error dismissed—Sherwin-Williams Paint Co. v. Rausin, Civ.App., 10 S.W.2d 196, error refused.
Wyo.—Chapman v. First Nat. Bank of Cody, 181 P. 360, 26 Wyo. 138, rehearing denied 182 P. 91, 26 Wyo. 138.
22 C.J. p 638 note 99.

50. Iowa.—Tremaine v. Weatherby, 12 N.W. 609, 58 Iowa 615.
22 C.J. p 639 note 23.

51. Ga.—Scott v. Kelly-Springfield Tire Co., 125 S.E. 773, 33 Ga.App. 297.
Ind.—Kaufman v. American Surety Co., 166 N.E. 615, 89 Ind.App. 393.
N.Y.—Parsons v. Brown, 15 Barb. 590.
Wis.—Christiansen v. Schenkenberg, 236 N.W. 109, 204 Wis. 323.

52. Ala.—Clark & Barker v. Eufaula Brick Works, 88 So. 669, 205 Ala. 545.
Del.—James Bradford Co. v. Edward Hill's Son & Co., 116 A. 350, 1 W.W.Harr. 538, affirmed 116 A. 353, 1 W.W.Harr. 546.
Ga.—Georgia Ry. & Power Co. v. Head, 116 S.E. 620, 155 Ga. 337.
N.J.—Sutro v. Jacobson, 115 A. 79, 96 N.J.Law 555.
22 C.J. p 635 note 36.

53. Kan.—Fidelity & Casualty Co. v. Reed, 86 P.2d 522, 149 Kan. 58.
22 C.J. p 635 note 37.

54. Cal.—Blinn v. Ritchie, 282 P. 390, 101 Cal.App. 691.
Iowa.—De Long v. Whitlock, 215 N.W. 954, 204 Iowa 701.
Mo.—Hely v. Hinerman, 260 S.W. 471, 303 Mo. 147—Hely v. Hinerman, 236 S.W. 698, 208 Mo.App. 691.
N.Y.—Ellis v. Ellis, 187 N.Y.S. 816, 196 App.Div. 896.
Tex.—Graham Hotel Corporation v. Leader, Civ.App., 241 S.W. 700.
22 C.J. p 635 note 38.

Conclusion after stating facts
In an action on partnership note, admitting testimony that deceased and others composed partnership was not error, where witness detailed facts on which he reached conclusion.—Green v. Hagens, Tex.Civ.App., 51 S.W.2d 771, error dismissed.

55. Mich.—Wagner v. Supreme Lodge K. & L. H., 87 N.W. 903, 128 Mich. 660.
22 C.J. p 635 note 39.

56. Ala.—Parker v. Haggerty, 1 Ala. 632.

57. Ga.—Sears, Roebuck & Co. v. Kitchens, 121 S.E. 583, 31 Ga.App. 574.
Idaho.—Servel v. Corbett, 290 P. 200, 49 Idaho 536.
Mich.—Bradford v. Goldman, 287 N.W. 541, 290 Mich. 338.
Mo.—Thompson v. Portland Hotel Co., 239 S.W. 1090, 209 Mo.App. 476.
Tex.—Stovall v. Martin, Civ.App., 210 S.W. 321.
22 C.J. p 635 note 41.

58. Del.—Shepherd v. Niles, 125 A. 669, 14 Del.Ch. 316.
Ky.—Williams v. Waddle, 148 S.W.2d 298, 285 Ky. 416.
22 C.J. p 636 note 42.

Adverse possession
Ky.—Logan County v. Davenport, 284 S.W. 98, 214 Ky. 845.
22 C.J. p 636 note 42 [a].

59. Ga.—Davies v. Blasingame, 170 S.E. 477, 177 Ga. 450.
Ill.—Young v. Ebersohl, 159 N.E. 235, 328 Ill. 273.
Md.—Wlodarek v. Thrift, 13 A.2d 774, 178 Md. 453.
Mont.—Green v. Baker, 214 P. 88, 66 Mont. 568.
Okl.—Horn v. First Mortgage Loan Co., 72 P.2d 777, 181 Okl. 87.
R.I.—Standish v. Heaton, 123 A. 691, 45 R.I. 421.
S.D.—Moter v. Hershey, 205 N.W. 239, 48 S.D. 493.
Tex.—Moseley v. Fikes, Civ.App., 126 S.W.2d 589, error granted—Bourland v. Huffhines, Civ.App., 244 S.W. 847—Nicholson v. Whyte, Civ.App., 236 S.W. 770—Wakeland v. Robertson, Civ.App., 219 S.W. 842.
Wis.—Douglass v. Ransom, 237 N.W. 260, 205 Wis. 439.
22 C.J. p 636 note 43.

60. Ala.—Alabama Machinery & Supply Co. v. Roquemore, 87 So. 435, 205 Ala. 244.
Ga.—Bleckley v. White, 25 S.E. 592, 98 Ga. 594.
Tex.—Waggoner v. Magnolia Petroleum Co., Civ.App., 252 S.W. 865.
Wis.—State v. Bousley, 179 N.W. 783, 172 Wis. 613.

61. Ga.—Gaston v. Gainesville & D. Electric R. Co., 48 S.E. 188, 120 Ga. 516.
22 C.J. p 636 note 45.

62. S.C.—Stepp v. National Life & Maturity Ass'n of Washington, 16 S.E. 134, 37 S.C. 417.
Tex.—Humble Oil & Refining Co. v. Jeffrey, Civ.App., 38 S.W.2d 374, affirmed, Com.App., 55 S.W.2d 521.

63. Ala.—Clark & Barker v. Eufaula Brick Works, 88 So. 669, 205 Ala. 545.
22 C.J. p 636 note 47.

64. Conn.—Hamilton v. Smith, 50 A. 884, 74 Conn. 374.
Va.—Edwards v. W. M. Ritter Lumber Co., 177 S.E. 841, 163 Va. 851.
W.Va.—Clear Fork Coal Co. v. Anchor Coal Co., 161 S.E. 229, 111 W.Va. 219.

65. Ala.—Stone v. Pratt Consol. Coal Co., 80 So. 882, 202 Ala. 498.

Duty to repair
Ill.—Chicago & A. R. Co. v. Springfield & N. R. Co., 67 Ill. 142.

66. R.I.—State v. Babcock, 55 A. 685, 25 R.I. 224.

67. Fla.—Knowles v. Boylston, 137 So. 6, 103 Fla. 20.
22 C.J. p 636 note 52.

68. Mass.—Barts v. Morse, 126 Mass. 226.

69. U.S.—Gill v. Smith, C.C.A.Ohio, 31 F.2d 396, certiorari denied 50 S.Ct. 19, 280 U.S. 562, 74 L.Ed. 617.
Mont.—Erlandson v. Erskine, 248 P. 209, 76 Mont. 537.

70. Utah.—North Point Cons. Irr. Co. v. Utah & S. L. Canal Co., 52 P. 168, 16 Utah 246, 67 Am.S.R. 607, 40 L.R.A. 851.

71. **Illegal sheriff's sale**
U.S.—Walker v. McLoud, Ind. T., 27 S.Ct. 293, 204 U.S. 302, 51 L.Ed. 495, affirming 138 F. 394, 70 C.C.A. 534.

72. Tex.—Fidelity & Deposit Co. of Maryland v. First Nat. Bank, Civ. App., 113 S.W.2d 622, error dismissed.

73. Ky.—Community Public Service Co. v. Northcutt, 114 S.W.2d 729, 272 Ky. 494.

al rule has been applied as to rights,[74] the sufficiency of evidence,[75] the unlawful character of a refusal[76] or a waiver;[77] as to rules of law[78] or practice,[79] the regularity of judicial proceedings,[80] or of the papers used in them,[81] or the regularity and sufficiency of legal process;[82] as to whether[83] or on what consideration[84] a contract was made, what it means,[85] its legal effect,[86] and whether it has been performed;[87] and as to the effect, meaning, or purpose of any other document, or words or phrases not ambiguous.[88]

Further applications of the rule excluding conclusions of law are found in cases where the courts have refused to permit witnesses to construe or interpret statutes or ordinances;[89] to state whether a statute

Nev.—Kline v. Vansickle, 217 P. 585, 47 Nev. 139.
22 C.J. p 636 note 56.

74. R.I.—Keenan v. Cherry & Webb, 131 A. 309, 47 R.I. 125.
22 C.J. p 636 note 57.

75. Ga.—Frink v. Southern Express Co., 8 S.E. 862, 82 Ga. 33, 3 L.R.A. 482.

76. N.J.—Ex parte Clark, 20 N.J. Law 648, 45 Am.D. 394.

77. Iowa.—Getchell & Martin Lumber & Mfg. Co. v. National Surety Co., 100 N.W. 1123.

78. U.S.—The Clement, C.C.Mass., 5 F.Cas.No.2,879, 2 Curt. 363, affirming, D.C., 5 F.Cas.No.2,880, 1 Sprague 257.
22 C.J. p 636 note 61.

79. U.S.—Roberts v. Cooper, Mich., 20 How. 467, 15 L.Ed. 969.
22 C.J. p 636 note 62.

80. Ga.—Mobley v. Breed, 48 Ga. 44.
22 C.J. p 636 note 63.

81. Ill.—Massure v. Noble, 11 Ill. 531.

82. Iowa.—Faville v. State Trust Co., 96 N.W. 1109.

83. Ga.—Ralston Purina Co. v. Arthur, 139 S.E. 366, 37 Ga.App. 198.
Iowa.—Farmer v. Brokaw, 71 N.W. 246, 102 Iowa 246.
Mo.—Hely v. Hinerman, 260 S.W. 471, 303 Mo. 147.
Pa.—Spotts v. Spotts, 4 Pa.Super. 448, 40 Wkly.N.C. 340.
Wis.—In re Leedom's Estate, 261 N. W. 683, 218 Wis. 534.
22 C.J. p 636 note 66.

84. Neb.—Peck v. Tingley, 73 N.W. 450, 53 Neb. 171.
22 C.J. p 636 notes 49, 67.

85. Cal.—Black v. Black, 246 P. 90, 77 Cal.App. 82.
Md.—Standard Scale & Supply Co. v. Baltimore Enamel & Novelty Co., 110 A. 486, 136 Md. 278, 9 A.L.R. 1502.
Mo.—Cuneo v. U. S. Casualty Co., App., 125 S.W.2d 908—Producers' Packing Co. v. Fischer, 275 S.W. 979, 219 Mo.App. 429.
Mont.—Dick v. King, 236 P. 1093, 73 Mont. 456.
Pa.—Mannella v. City of Pittsburgh, 6 A.2d 70, 334 Pa. 396—Crew Levick Co. v. Philadelphia Inv. Building & Loan Ass'n, 177 A. 498, 117 Pa.Super. 397.

Philippine.—Cruz v. Alberto, 39 Philippine 991.
Tenn.—Ward v. Gulf, M. & N. R. Co., 134 S.W.2d 917, 23 Tenn.App. 533.
Tex.—Dial v. Martin, Civ.App., 37 S. W.2d 166, reversed on other grounds Martin v. Dial, Com.App., 57 S.W.2d 75, 89 A.L.R. 571—Humble Oil & Refining Co. v. Davis, Civ.App., 282 S.W. 930, modified on other grounds, Com.App., 296 S.W. 285—Lynch Davidson & Co. v. Denman Lumber Co., Civ.App., 273 S. W. 803—Polk v. Inman, Civ.App., 211 S.W. 261.
22 C.J. p 636 note 68.

Judicial determination of meaning

Where meaning of term in contract has been judicially determined, its meaning, when used in subsequent transactions, must be taken to be same, and testimony tending to show different meaning is incompetent.—Kerber Straw Hat Corporation v. Lincoln, 268 N.Y.S. 745, 239 App.Div. 727, affirming 236 N.Y.S. 68, 134 Misc. 211, and affirmed 269 N.Y.S. 953, 241 App.Div. 679, certified questions answered 195 N.E. 130, 266 N.Y. 410.

86. Cal.—Fanning v. Merchants' Nat. Trust & Savings Bank, 275 P. 967, 97 Cal.App. 676.
Ill.—Kirchner v. Morrison, 150 N.E. 690, 320 Ill. 236.
Iowa.—Hawbaker v. Laco Gas Burner Co., 231 N.W. 347, 210 Iowa 544.
Md.—O'Ferrall v. De Luxe Sign Co., 149 A. 290, 158 Md. 544.

87. Md.—Standard Scale & Supply Co. v. Baltimore Enamel & Novelty Co., 110 A. 486, 136 Md. 278, 9 A. L.R. 1502.
22 C.J. p 637 note 69.

Whether an agreement still held good has been held inadmissible.—Jones v. Dugan, 92 A. 775, 124 Md. 346.

88. U.S.—Claude Neon Electrical Products v. Brilliant Tube Sign Co., D.C.Wash., 40 F.2d 708, reversed on other grounds, C.C.A., 48 F.2d 176—I. T. S. Rubber Co. v. Essex Rubber Co., D.C.Mass., 270 F. 593, dismissal of appeal denied, C.C.A., 276 F. 478, and appeal dismissed 42 S.Ct. 45, 257 U.S. 664, 66 L.Ed. 424, and reversed on other grounds, C.C.A., 281 F. 5.
Ala.—City of Birmingham v. Hudson, 132 So. 1, 222 Ala. 332—Gaston v. McDonald, 124 So. 208, 220 Ala. 155.
Ill.—Carr v. Butterworth, 219 Ill. App. 14.
Ind.—Federal Life Ins. Co. v. Sayre, 142 N.E. 223, 195 Ind. 7, followed in Life Ins. Co. v. Harding, 166 N. E. 926, 201 Ind. 704.
Iowa.—Swanson Automobile Co. v. Stone, 174 N.W. 247, 187 Iowa 309.
Tex.—Watson v. Tamez, Civ.App., 136 S.W.2d 645.
22 C.J. p 637 notes 70–73.

Bill of sale

A witness cannot state the legal effect of a bill of sale.—Woodson v. Bumpers, 140 So. 766, 224 Ala. 390—Ward v. Shirley, 32 So. 489, 131 Ala. 568.

Construction of a will by a witness is not permissible.—Hunt v. Lavender, 78 S.E. 805, 140 Ga. 157.

Nature of bond

A statement as to whether a bond was a common-law or a statutory bond is inadmissible.—Union Sheet Metal Works v. Dodge, 62 P. 41, 129 Cal. 390.

Effect of comma in instrument

Question to witness skilled in matter of written land numbers, asking what comma in land description indicated, was objectionable on the ground that this was a question for the court.—McClelland v. Coston, 119 So. 697, 227 Ala. 267.

Printed rules

In an action by a conductor for injuries in a collision, opinion evidence as to the interpretation and application of the company's printed operating rules, objected to as invading province of court and jury was erroneous, for, if the rules required elucidation, it was the duty of the court to interpret them in view of Code Civ.Proc. § 2102.—Richman v. San Francisco, N. & C. Ry., 181 P. 769, 180 Cal. 454.

Warrant of attorney

Party sued on foreign judgment may not testify to legal effect of warrant of attorney authorizing confession of judgment.—Bonnett-Brown Corporation v. Coble, 142 S.E. 772, 195 N.C. 491.

89. Ala.—Alabama Power Co. v. Williams, 130 So. 788, 222 Ala. 75.
Mass.—Killam v. Standard Oil Co. of New York, 143 N.E. 698, 248 Mass. 575.

Municipal ordinance

Wis.—State ex rel. Morehouse v. Hunt, 291 N.W. 745.

had been complied with,[90] whether articles were within the Pure Food Law,[91] whether articles fall within an inspection law,[92] whether interest charged was usurious,[93] whether a particular business as conducted was unlawful,[94] whether a lien existed,[95] whether an instrument is a duplicate,[96] whether a certain street intersection is a blind crossing,[97] whether certain acts constitute the manufacture or production of goods,[98] or whether a person is a fugitive from justice;[99] to state that an act of a corporation was ultra vires,[1] that a gift was made,[2] that a loss from fire was total within a fire policy,[3] that a certain obstruction constitutes a nuisance,[4] that there was no ground for making an arrest,[5] that an insurance policy was surrendered;[6] that language was profane and vulgar,[7] that a patent was improperly issued,[8] that property was community property,[9] that a transfer was colorable,[10] or that the transferee of an interest in a leasehold recognized a mortgage thereon;[11] to state what ought to have been done in issuing an insurance policy;[12] and to state when an insurance policy becomes binding.[13]

The existence of a particular legal status cannot be stated as the conclusion of the witness,[14] nor is he permitted to state the legal result of a transaction or series of transactions,[15] or in any other way to apply a legal standard to the inferences from facts.[16]

Subjects of testimony which, under the particular circumstances of the case, have been held to be primarily statements of fact rather than conclusions are considered infra §§ 462–471.

B. QUALIFICATIONS OF WITNESS

§ 454. In General

A witness stating his opinion should possess adequate knowledge regarding the subject matter to which his testimony relates, and, where the testimony is as to an inference, it must also appear that he is qualified to draw the correct inference.

In all cases in which opinion evidence is admitted, it is essential that the witness should be possessed of adequate knowledge regarding the subject matter to which his testimony relates,[17] and, where the testimony is as to an inference, it must also ap-

90. Ky.—Louisville & N. R. Co. v. Loesch, 284 S.W. 1097, 215 Ky. 452, 47 A.L.R. 347.
La.—Miller v. Doyal, 119 So. 477, 9 La.App. 313.
R.I.—Michaels-Bauer v. Doughty, 124 A. 253, 45 R.I. 510.

91. Pa.—Commonwealth v. Mellett, 27 Pa.Super. 41.

92. Pa.—Commonwealth v. Giltinan, 64 Pa. 100.

93. Md.—Penrose v. Canton Nat. Bank of Canton, 127 A. 852, 147 Md. 200.
Minn.—Wade v. Citizens' State Bank of St. Paul, 206 N.W. 728, 165 Minn. 396.

94. Ill.—Kelly v. Williams, 162 Ill. App. 571.

95. Pa.—Bisk Candy Co. v. Stout, 137 A. 612, 289 Pa. 369.

96. U.S.—Wright v. Michigan Cent. R. Co., Mich., 130 F. 843, 65 C.C. A. 327.

97. Ala.—Crotwell v. Cowan, 184 So. 195, 236 Ala. 578.

98. N.C.—Hart v. Gregory, 10 S.E. 2d 644, 218 N.C. 184, 130 A.L.R. 265.

99. Ala.—Jones v. State, 93 So. 210, 18 Ala.App. 478.

1. Tex.—W. R. Case & Sons Cutlery Co. v. Folsom, Civ.App., 170 S.W. 1066.

2. Ga.—Carter v. Buchannon, 3 Ga. 513.
Ohio.—Logue v. Rouse, 192 N.E. 136, 47 Ohio App. 476.

3. Tex.—Transcontinental Ins. Co. of New York v. Frazier, Civ.App., 60 S.W.2d 268.

4. Tex.—Barstow Town Co. v. Carr, Civ.App., 234 S.W. 555.

5. Md.—Riggins v. State, 93 A. 437, 125 Md. 165, Ann.Cas.1916E 1117.

6. Ill.—New York Mut. L. Ins. Co. v. Allen, 72 N.E. 200, 212 Ill. 134.

7. Ga.—Lamb v. Brunswick, 49 S.E. 275, 121 Ga. 345.

8. Tex.—Houston & T. Cent. R. Co. v. McGehee, 49 Tex. 481.

9. Cal.—In re Pepper, 112 P. 62, 158 Cal. 619, 31 L.R.A.,N.S., 1092.

10. Wis.—McKesson v. Sherman, 8 N.W. 200, 51 Wis. 303.

11. Or.—Barber v. Toomey, 136 P. 343, 67 Or. 452.

12. N.Y.—Trenton Potteries Co. v. Title Guarantee & Trust Co., 68 N.E. 132, 176 N.Y. 65.

13. Va.—Life Ins. Co. v. Hairston, 62 S.E. 1057, 108 Va. 832, 128 Am.S.R. 989.

14. Ark.—Hinkle v. Lassiter, 218 S. W. 825, 142 Ark. 223.
Ga.—Milam v. Lewis, 170 S.E. 404, 47 Ga.App. 376—Strange v. McCall, 166 S.E. 33, 45 Ga.App. 718.
Tex.—Southwestern Settlement & Development Co. v. Village Mills Co., Civ.App., 230 S.W. 869.
22 C.J. p 637 note 92.

15. U.S.—Aachen & Munich Fire Ins. Co. v. Guaranty Trust Co. of New York, C.C.A.N.Y., 39 F.2d 578.
Ala.—Capitol Lumber Co. v. Mullinix, 94 So. 88, 208 Ala. 266.
Ill.—Chicago Smelting & Refining Corporation v. Sullivan, 246 Ill.App. 538.
Md.—Roberts v. Link, 121 A. 633, 142 Md. 676.
R.I.—Di Fonzo v. Notarianni, 200 A. 774, 61 R.I. 287.
S.D.—Wood v. McCain, 171 N.W. 82, 41 S.D. 418.
Tenn.—Groveland Banking Co. v. City Nat. Bank, 234 S.W. 643, 144 Tenn. 520.
Tex.—Olson v. Smith, Civ.App., 72 S.W.2d 650, error dismissed.
22 C.J. p 637 note 93.

Corpus Juris quoted in case involving a criminal prosecution.—Stewart v. State, 172 So. 675, 676, 27 Ala.App. 315, certiorari denied 172 So. 678, 233 Ala. 480.

16. Ala.—Baker v. Green, 84 So. 545, 17 Ala.App. 290.
La.—First National Bank v. Gantt, 3 La.App. 713.
N.C.—American Trust Co. v. United Cash Store Co., 136 S.E. 289, 193 N.C. 122.
22 C.J. p 638 notes 94, 95.

17. Iowa.—Roberts v. Koons, 296 N.W. 811.
Md.—James L. Kernan Co. v. Cook, 159 A. 256, 162 Md. 137.
Mich.—Gloeser v. Moore, 278 N.W. 781, 284 Mich. 106.
Okl.—National Zinc Co. v. Crow, 103 P.2d 560, 187 Okl. 513.

pear that the witness is qualified to draw the correct inference.[18] Mere opportunity for acquiring the requisite knowledge is not sufficient,[19] in the absence of facts which raise a satisfactory inference that the observer had sufficient capacity to coördinate his observations into relevant knowledge.[20] However, extended opportunities for observation may well produce a special skill, denied to ordinary persons, even in the absence of special study.[21]

The qualifications of witnesses stating opinions as to particular matters are treated in connection with the subject matter of their evidence in §§ 459–546 infra.

§ 455. Ordinary Observer

The ordinary observer is qualified if he has had sufficient opportunities for drawing the inference he proposes to state, and possesses the capacity necessary to make and state it.

Opinion evidence may be given by an ordinary observer.[22] The ordinary observer is qualified if it appears to the presiding judge that he has had sufficient opportunities for drawing the inference which he proposes to state,[23] and possesses the capacity necessary to make and state it.[24] Where the statement is largely one of fact, the qualification of the witness consists, not in skill or special experience, but in his possession of satisfactory data;[25] but a witness who cannot claim to be a skilled witness may nevertheless have a special experience which enables him to draw a more accurate inference from particular phenomena than could be drawn by a mere casual observer.[26]

§ 456. Skilled Witness

A skilled witness stating an inference must have the ability, skill, and experience, not only to observe accurately, but to draw the correct conclusion from what he observes.

Opinion evidence may be given by a skilled witness.[27] A skilled witness is one possessing, with regard to a particular subject or department of human activity, knowledge and experience which are not acquired by ordinary persons.[28] Where he testifies as to facts he must be shown to have adequate knowledge of the matters of which he speaks,[29] and where he states an inference he must have the ability, skill, and experience, not only to observe accurately, but to draw the correct conclusion from what he observes.[30]

A skilled witness may be qualified by professional, scientific, or technical training,[31] or by practi-

S.C.—Huggins v. Broom, 199 S.E. 903, 189 S.C. 15.

Tex.—Turner v. Stoker, Civ.App., 289 S.W. 190—Stowell v. Texas Employer's Ins. Ass'n, Civ.App., 259 S.W. 311.

W.Va.—Chesapeake & O. Ry. Co. v. Allen, 163 S.E. 22, 23, 111 W.Va. 481, citing **Corpus Juris.**

22 C.J. p 516 note 59.

18. Mich.—Jacobs v. Hagenback-Wallace Shows, 164 N.W. 548, 198 Mich. 73, L.R.A.1918A 504.

22 C.J. p 517 note 60.

19. N.J.—Wheeler, etc., Mfg. Co. v. Buckhout, 36 A. 772, 60 N.J.Law 102.

22 C.J. p 518 note 61.

20. Tex.—Gulf, C. & S. F. R. Co. v. Hughes, Civ.App., 31 S.W. 411.

22 C.J. p 518 note 62.

21. N.J.—Wheeler, etc., Mfg. Co. v. Buckhout, 36 A. 772, 60 N.J.Law 102.

22 C.J. p 518 note 63.

22. Okl.—Roxana Petroleum Corporation v. City of Pawnee, 7 P.2d 663, 152 Okl. 141.

23. Ga.—Piedmont Hospital v. Anderson, App., 16 S.E.2d 90.

Iowa.—McKeever v. Batcheler, 257 N.W. 567, 569, 219 Iowa 93, citing **Corpus Juris.**

Mo.—Brown v. Winnwood Amusement Co., 34 S.W.2d 149, 225 Mo. App. 1180.

Mont.—Cash v. Knapp, 113 P.2d 343.

22 C.J. p 518 note 65.

Experience and knowledge

Nonexpert may not express opinion unless shown to be qualified from experience and knowledge.—Turner v. Stoker, Tex.Civ.App., 289 S.W. 190.

Knowledge of facts is essential.—Devoto v. United Auto Transp. Co., 223 P. 1050, 128 Wash. 604, affirmed 226 P. 1118, 130 Wash. 707.

Patient's use of term "quiescent period"

In malpractice action based on improper treatment of appendicitis, patient's use of term "quiescent period" did not render his testimony objectionable as expert testimony, since term as used meant between attacks or at intervals when the patient was enjoying good health, or was not suffering and running a temperature.—Wright v. Stickler, Mo.App., 96 S.W.2d 932.

24. Ga.—Central R. & Banking Co. v. Kent, 10 S.E. 965, 84 Ga. 351.

22 C.J. p 518 note 66.

25. Cal.—Northern California Power Co. v. Waller, 163 P. 214, 174 Cal. 377.

22 C.J. p 519 note 67.

26. Miss.—First Nat. Bank v. Owen, 171 So. 4, 6, 177 Miss. 339, citing **Corpus Juris.**

22 C.J. p 519 note 68.

27. Okl.—Roxana Petroleum Corporation v. City of Pawnee, 7 P.2d 663, 152 Okl. 141.

28. Wash.—Conrad v. Cascade Timber Co., 7 P.2d 19, 20, 166 Wash. 369, quoting **Corpus Juris.**

22 C.J. p 519 note 71.

29. Mont.—Irion v. Hyde, 105 P.2d 666, 110 Mont. 570.

Tex.—Yellow Cab & Transfer Corporation v. Warren Co., Civ.App., 148 S.W.2d 209.

Wash.—Conrad v. Cascade Timber Co., 7 P.2d 19, 20, 166 Wash. 369, quoting **Corpus Juris.**

22 C.J. p 520 note 72.

30. Ark.—Firemen's Ins. Co. v. Little, 74 S.W.2d 777, 781, 189 Ark. 640, quoting **Corpus Juris.**

22 C.J. p 520 note 73.

31. Ind.—Illinois Steel Co. v. Fuller, 23 N.E.2d 259.

N.J.—Schwartz Bros. Truckmen v. International Brotherhood of Teamsters, Chauffeurs, Stablemen and Helpers, Local 478, 19 A.2d 690, 126 N.J.Law 379.

22 C.J. p 520 note 74.

Practical experience not necessary

It is usually considered not necessary, in order to qualify as a skilled witness one who has the necessary professional, scientific, or technical training, that he should ever have had much, or indeed any, opportunity, in his own experience, to test the accuracy of his judgment.—Selby v. Osage Torpedo Co., 241 P. 130, 131, 112 Okl. 303, 11 A.L.R. 120, quoting **Corpus Juris**—22 C.J. p 520 note 74 [a].

cal experience in some field of activity conferring on him special knowledge not shared by mankind in general,[32] the rule in this respect being that one who has been engaged for a reasonable time in a particular profession, trade, or calling will be assumed to have the ordinary knowledge common to persons so engaged.[33] The combination of scientific knowledge and practical experience produces a higher degree of qualification than would result from either alone.[34] However, mere casual observation[35] or desultory and superficial reading[36] is not sufficient; nor is there any assumption that a witness is skilled in a subject because he is engaged in a business where knowledge of it would be eminently useful.[37]

Degree of skill or knowledge. It is not required that a skilled witness shall have the highest degree of skill, or possess the greatest possible knowledge with respect to the occupation to which his special knowledge relates;[38] nor is there any well defined standard by which to measure the qualifications of such a witness[39] beyond the general requirement that capacity must be commensurate with the reasonable requirements called for by the nature of the subject matter.[40]

§ 457. Expert Witness

An expert witness will be deemed qualified if, and only if, he possesses special skill or knowledge respecting the matter involved so superior to that of men in general as to make his formation of a judgment a fact of probative value.

Opinion evidence may be given by an expert witness.[41] The term "expert" is generally used to designate a person who possesses knowledge and experience not possessed by mankind in general,[42] but in a stricter sense it involves the further element

32. U.S.—Nichols v. U. S., C.C.A. Fla., 48 F.2d 46, 49, citing **Corpus Juris.**
Mo.—Ambruster v. Levitt Realty & Investment Co., 107 S.W.2d 74, 80, 341 Mo. 364, citing **Corpus Juris.**
22 C.J. p 520 note 75.

33. Ark.—Firemen's Ins. Co. v. Little, 74 S.W.2d 777, 781, 189 Ark. 640, quoting **Corpus Juris.**
Ky.—Black Starr Coal Corporation v. Reeder, 128 S.W.2d 905, 906, 278 Ky. 532, citing **Corpus Juris.**
22 C.J. p 521 note 76.

Kindred occupations
Where the occupation of a witness is such as to afford him special opportunities for acquiring knowledge and experience with respect to a kindred occupation, and to render it probable that such knowledge and experience were acquired, the witness is competent as to matters connected with the latter occupation.—Black Starr Coal Corporation v. Reeder, 128 S.W.2d 905, 906, 278 Ky. 532, quoting **Corpus Juris**—22 C.J. p 521 note 76 [d] (1).

34. Tex.—Missouri, K. & T. R. Co. v. Hagler, Civ.App., 112 S.W. 783.
22 C.J. p 521 note 77.

35. Ala.—White v. State, 34 So. 177, 136 Ala. 58.
22 C.J. p 522 note 78.

36. Kan.—Missouri Pac. R. Co. v. Finley, 16 P. 951, 38 Kan. 550.
22 C.J. p 522 note 79.

37. Mo.—Fuchs v. St. Louis City, 67 S.W. 610, 167 Mo. 620, 57 L.R.A. 136.
22 C.J. p 522 note 80.

38. Iowa.—State v. Hinkle, 6 Iowa 380.
22 C.J. p 522 note 81.

39. Mich.—Kelley v. Richardson, 37 N.W. 514, 69 Mich. 430.
22 C.J. p 522 note 82.

40. Ind.—Public Utilities Co. v. Handorf, 112 N.E. 775, 185 Ind. 254.
Mich.—Colwell v. Alpena Power Co., 157 N.W. 21, 190 Mich. 255.

41. Okl.—Roxana Petroleum Corporation v. City of Pawnee, 7 P.2d 663, 152 Okl. 141.

42. U.S.—Farris v. Interstate Circuit, C.C.A.Tex., 116 F.2d 409.
Ala.—Louisville & N. R. Co. v. Hall, 135 So. 466, 223 Ala. 338.
D.C.—Tri-State Broadcasting Co. v. Federal Communications Commission, 96 F.2d 564, 568, 68 App.D.C. 292.
Ga.—Robertson v. Ætna Life Ins. Co., 141 S.E. 504, 37 Ga.App. 703—Hines v. Hendricks, 104 S.E. 520, 25 Ga.App. 682.
Ky.—Black Starr Coal Corporation v. Reeder, 128 S.W.2d 905, 278 Ky. 532.
Me.—Mills v. Richardson, 137 A. 689, 126 Me. 244.
Mo.—St. Louis-Southwestern Ry. Co. v. Hoyt, App., 63 S.W.2d 214, 216.
Okl.—Small v. Comer, 43 P.2d 716, 171 Okl. 418—Oklahoma Natural Gas Corporation v. Schwartz, 293 P. 1087, 146 Okl. 250—Cook v. First Nat. Bank, 236 P. 883, 110 Okl. 111.
Or.—Scott v. Astoria R. Co., 72 P. 594, 43 Or. 26, 38, 99 Am.S.R. 710, 62 L.R.A. 543—State v. Simonis, 65 P. 595, 39 Or. 111—Farmers', etc. Nat. Bank v. Woodell, 61 P. 837, 38 Or. 294, affirmed 65 P. 520, 38 Or. 294—Pendleton v. Saunders, 24 P. 506, 19 Or. 9, 26—State v. Anderson, 10 Or. 448.
R.I.—Buffum v. Harris, 5 R.I. 243.
22 C.J. p 639 note 25.

Other definitions
(1) Person who is competent to give expert testimony is denominated as "expert witness."—Ambruster v. Levitt Realty & Investment Co., 107 S.W.2d 74, 341 Mo. 364—McAnany v. Henrici, 141 S.W. 633, 238 Mo. 103.

(2) Persons versed in the knowledge either of a science, an art, or a profession, selected in order to give their opinion on some point or question on which the decision of a cause depends, are termed experts.—Crichton v. Krouse, La.App., 150 So. 443.

(3) "Expert" is one instructed by experience, a man of science, a person of skill, an experienced person, a person possessed of some peculiar science or skill.—U. S. Fidelity & Guaranty Co. v. Rochester, 281 S.W. 306, 311, affirmed 283 S.W. 135, 115 Tex. 404.

(4) Further definitions.
Mich.—Kelley v. Richardson, 37 N.W. 514, 69 Mich. 430.
Mo.—Goins v. Chicago, R. I. & P. R. Co., 47 Mo.App. 173.
N.Y.—Ellis v. Thomas, 82 N.Y.S. 1064, 84 App.Div. 626.
N.C.—Pridgen v. Gibson, 139 S.E. 443, 194 N.C. 289, 54 A.L.R. 855.
Or.—Town of Pendleton v. Saunders, 24 P. 506, 19 Or. 9.
22 C.J. p 639 note 25 [a].

Who may be considered "experts"
(1) Farmer.
Colo.—Mayhew v. Glazier, 189 P. 843, 68 Colo. 350.
Tex.—Texas Rural Communities v. Avary, Civ.App., 113 S.W.2d 597, error dismissed.

(2) Shipbuilder.—State v. Jacobs, 51 N.C. 284.

(3) Other persons.—Yates v. Yates, 76 N.C. 142—Horton v. Green, 64 N.C. 64—State v. Jacobs, supra—State v. Cheek, 35 N.C. 114.

Expert evidence
(1) Expert evidence is an opinion by a qualified person on facts already proved involving scientific or

that the testimony given by such person is based, not on his personal knowledge of the facts, but on an assumption of the truth of certain facts hypothetically stated.[43]

While there is no exact standard fixing the qualifications of an expert witness,[44] such a witness will be deemed qualified if, and only if, he possesses special skill or knowledge respecting the matter involved[45] so superior to that of men in general as to make his formation of a judgment a fact of probative value.[46] It is not necessary that he should be infallible or possess the highest degree of skill or knowledge.[47] There is no precise rule governing the manner of acquiring the requisite skill or knowledge;[48] one may be qualified to testify as an ex-

technical knowledge, and is not evidence of things done or measurements taken which anyone is competent to prove, the weight to be given to his evidence depending on his ability.
La.—Crichton v. Krouse, App., 150 So. 443, 445, citing **Corpus Juris.**
Tex.—Allen v. Texas & N. O. R. Co., Civ.App., 70 S.W.2d 758, 763, quoting **Corpus Juris.**

(2) Other definitions.—Mills v. Richardson, 137 A. 689, 126 Me. 244.

Expert testimony

(1) "Expert testimony" is evidence of persons who are skilled in some art, science, profession, or business, which skill or knowledge is not common to their fellow men, and which has come to such experts by reason of special study and experience in such art, science, profession, or business.
Del.—Culver v. Prudential Ins. Co. of America, 179 A. 400, 6 W.W. Harr. 582—Louft v. C. & J. Pyle Co., 75 A. 619, 1 Boyce 192—State v. Collins, 62 A. 224, 5 Pennew. 263.
Ky.—Black Starr Coal Corporation v. Reeder, 128 S.W.2d 905, 278 Ky. 532.

(2) Other definitions.
Mo.—Ambruster v. Levitt Realty & Investment Co., 107 S.W.2d 74, 341 Mo. 364—McAnany v. Henrici, 141 S.W. 633, 636, 238 Mo. 103.
Tex.—Langford v. State, 63 S.W.2d 1027, 124 Tex.Cr. 473.

43. Mo.—Aurora v. Fireman's Fund Ins. Co., 165 S.W. 357, 180 Mo.App. 263.
22 C.J. p 639 note 26.

44. Neb.—Sioux City & P. R. Co. v. Finlayson, 20 N.W. 860, 16 Neb. 578, 49 Am.R. 724.
22 C.J. p 522 note 82, p 523 note 86, p 526 note 11 [a].

45. Ala.—Norwood Clinic v. Spann, 199 So. 840, 240 Ala. 427.
Cal.—Forrest v. Fink, 234 P. 860, 71 Cal.App. 34.
Ill.—Illinois Commerce Commission v. Illinois Traction, 167 N.E. 38, 335 Ill. 247—City of Elmhurst v. Rohmeyer, 130 N.E. 761, 297 Ill. 430.
Ky.—City of Owensboro v. Day, 145 S.W.2d 856, 284 Ky. 644—Black Starr Coal Corporation v. Reeder, 128 S.W.2d 905, 278 Ky. 532.
Md.—Peninsula Produce Exch. v. American Ry. Express Co., 128 A. 403, 147 Md. 424.
Miss.—King v. King, 134 So. 827, 161 Miss. 51.
N.H.—Dole v. Johnson, 50 N.H. 452—Jones v. Tucker, 41 N.H. 546.
N.J.—Independent Ætna Sprinkler Corporation v. Morris, 175 A. 102, 114 N.J.Law 23—Precipio v. Insurance Co. of State of Pennsylvania, 137 A. 549, 103 N.J.Law 589.
N.Y.—Nelson v. Sun Mut. Ins. Co., 71 N.Y. 453—Shinnecock Hills, etc., Realty Co. v. Aldrich, 116 N.Y.S. 532, 132 App.Div. 118, affirmed 93 N.E. 1132, 200 N.Y. 583.
Ohio.—Mosher v. Equitable Life Assur. Soc. of U. S., 14 N.E.2d 413, 57 Ohio App. 435.
Okl.—Roxana Petroleum Corporation v. Dormire, 18 P.2d 544, 161 Okl. 262.
Or.—Town of Pendleton v. Saunders, 24 P. 506, 19 Or. 9.
Tex.—Blythe v. Houston, 46 Tex. 65—Montgomery Ward & Co. v. Levy, Civ.App., 136 S.W.2d 663, error dismissed, judgment correct—Mars v. Panhandle & S. F. Ry. Co., Civ.App., 25 S.W.2d 1004, error dismissed.
22 C.J. p 522 note 84.

Testifying as expert in another case

That witness had testified as an expert in another case arising out of the same state of facts would not show that he was qualified.—Williams v. Alabama Fuel & Iron Co., 102 So. 136, 212 Ala. 159.

Care in qualifying farmer

Great care must be used in qualifying a farmer as to his knowledge, observation, and experience in respect of the matters about which he may be called to testify.—Bowman & Blatz v. Raley, Tex.Civ.App., 210 S.W. 723.

46. U.S.—Westinghouse Electric & Mfg. Co. v. Denver Tramway Co., D.C.Colo., 3 F.2d 285, appeal transferred City and County of Denver v. Stenger, 47 S.Ct. 343, 273 U.S. 657, 71 L.Ed. 826.
Ark.—Blanton v. Missouri Pac. R. Co., 31 S.W.2d 947, 182 Ark. 543.
Cal.—Hutter v. Hommel, 3 P.2d 554, 213 Cal. 677—Valdez v. Percy, 96 P.2d 142, 35 Cal.App.2d 485.
Ind.—Hurst v. Reeder, 157 N.E. 101, 86 Ind.App. 294.
Me.—Mills v. Richardson, 137 A. 689, 126 Me. 244.
Mo.—Pedigo v. Roseberry, 102 S.W.2d 600, 340 Mo. 724—Robison v. Chicago Great Western R. Co., App., 66 S.W.2d 180—Wright v. Berry Iron & Steel Co., 250 S.W. 942, 213 Mo.App. 593.
N.H.—Dowling v. L. H. Shattuck, Inc., 17 A.2d 529—Metropolitan Life Ins. Co. v. Olsen, 123 A. 576, 81 N.H. 143, 32 A.L.R. 1472—Kelsea v. Town of Stratford, 118 A. 9, 80 N.H. 148—Paquette v. Connecticut Valley Lumber Co., 109 A. 836, 79 N.H. 288.
Iowa.—Fightmaster v. Mode, 167 N.E. 407, 31 Ohio App. 273.
Tex.—Great Atlantic & Pacific Tea Co. v. Walker, Civ.App., 104 S.W.2d 627, reversed on other grounds Walker v. Great Atlantic & Pacific Tea Co., 112 S.W.2d 170, 131 Tex. 57.
22 C.J. p 522 note 84—12 C.J. p 1219 note 45—p 1220 note 47.

Mere conjecture

The facts on which the witness bases his opinion must be sufficient to enable him to express an opinion which is more than a mere conjecture.
Iowa.—Roberts v. Koons, 296 N.W. 811.
Tex.—Peterson v. Grayce Oil Co., Civ.App., 37 S.W.2d 367, affirmed Grayce Oil Co. v. Peterson, 98 S.W.2d 781, 128 Tex. 550.

Superior to tribunal

Tribunal will not listen to opinions from persons who possess no more skill than the tribunal itself in drawing inferences from the premises.—Sweeney v. Blue Anchor Beverage Co., 189 A. 331, 325 Pa. 216.

47. Iowa.—State v. Hinkle, 6 Iowa 380.
Ky.—Black Starr Coal Corporation v. Reeder, 128 S.W.2d 905, 278 Ky. 532.
Miss.—King v. King, 134 So. 827, 161 Miss. 51.
Ohio.—Fightmaster v. Mode, 167 N.E. 407, 31 Ohio App. 273.
Pa.—Follansbee Bros. Co. v. Engineering Co., 48 Pa.Super. 183—Perseo v. Demito, 55 Montg.Co. 143.
Tex.—Montgomery Ward & Co. v. Levy, Civ.App., 136 S.W.2d 663, error dismissed, judgment correct.
22 C.J. p 522 note 81.

48. Cal.—Forrest v. Fink, 234 P. 860, 71 Cal.App. 34.

pert by study and experience,[49] or, ordinarily, by study without practice,[50] or by practice without study.[51] However, in some fields of endeavor study may be regarded as essential,[52] and a statement based solely on reading has been excluded.[53] There is no assumption that a witness is skilled in a subject because he has studied it.[54]

Interest of witness. It has been held that a witness is not disqualified as an expert because he is interested in the outcome of the proceedings.[55]

§ 458. Determination as to Competency

a. In general
b. Discretion of court

a. In General

Whether a witness possesses the necessary qualifications to state his opinion is a preliminary question of fact to be determined by the trial court on the basis of the evidence adduced.

The determination of the qualification of a witness to state his opinion is primarily for the trial court,[56] and not for the jury[57] or the witness.[58] Whether a particular witness possesses the necessary qualifications is a question of fact,[59] which should be determined on the basis of the evidence

Mont.—Sellers v. Montana-Dakota Power Co., 41 P.2d 44, 99 Mont. 39.
N.Y.—Meiselman v. Crown Heights Hospital, 34 N.E.2d 367, 285 N.Y. 389, reversing 20 N.Y.S.2d 174, 259 App.Div. 840, appeal denied 20 N.Y. S.2d 669, 259 App.Div. 916.

49. Ind.—Carter v. State, 2 Ind. 617.
N.H.—Laird v. Boston & M. R. R., 117 A. 591, 80 N.H. 377.
22 C.J. p 523 note 87.

50. U.S.—Empire Oil & Refining Co. v. Hoyt, C.C.A.Mich., 112 F.2d 356.
Cal.—Forrest v. Fink, 234 P. 860, 71 Cal.App. 34.
Ga.—Carter v. Marble Products, 175 S.E. 480, 179 Ga. 122—Thompson v. Ammons, 129 S.E. 539, 160 Ga. 886.
N.H.—Dowling v. L. H. Shattuck, Inc., 17 A.2d 529.
N.J.—Fenias v. Reichenstein, 11 A.2d 10, 124 N.J.Law 196—Wheeler & Wilson Mfg. Co. v. Buckhout, 36 A. 772, 60 N.J.Law 102.
Okl.—Roxana Petroleum Corporation v. Dormire, 18 P.2d 544, 161 Okl. 262.
22 C.J. p 520 note 74, p 523 note 87.

Necessity of definite opinion
Witness must have definite opinion of his own to enable him to qualify as an expert on the basis of study alone.—People v. Thacker, 66 N.W. 562, 108 Mich. 652.

51. U.S.—Empire Oil & Refining Co. v. Hoyt, C.C.A.Mich., 112 F.2d 356.
Ala.—Roberts v. Davis, 160 So. 718, 230 Ala. 272, citing **Corpus Juris.**
Ga.—Carter v. Marble Products, 175 S.E. 480, 179 Ga. 122.
Mo.—Wright v. Berry Iron & Steel Co., 250 S.W. 942, 213 Mo.App. 599.
N.H.—Dowling v. L. H. Shattuck, Inc., 17 A.2d 529.
N.J.—Fenias v. Reichenstein, 11 A. 2d 10, 124 N.J.Law 196—Wheeler & Wilson Mfg. Co. v. Buckhout, 36 A. 772, 60 N.J.Law 102.
N.Y.—Meiselman v. Crown Heights Hospital, 34 N.E.2d 367, 285 N.Y. 389, reversing 20 N.Y.S.2d 174, 259 App.Div. 840, appeal denied 20 N.Y. S.2d 669, 259 App.Div. 916.
Okl.—Roxana Petroleum Corporation v. Dormire, 18 P.2d 544, 161 Okl. 262.
22 C.J. p 520 note 75, p 523 note 92.

52. **Medicine**
"To allow a physician to testify who claims to know solely by personal experience is to appropriate the witness stand to imposters."—Laird v. Boston & M. R. R., 117 A. 591, 593, 80 N.H. 377.

53. Wis.—Luning v. State, 2 Pinn. 284, 1 Chandl. 264, 52 Am.D. 153.

54. Ky.—Paducah St. R. Co. v. Graham, 15 Ky.L. 748.

55. Mich.—O'Donnell v. Oliver Iron Mining Co., 262 N.W. 728, 273 Mich. 27.
Tex.—Garrison v. Garrison, Civ.App., 66 S.W.2d 451, error dismissed.
Interest as affecting competency of witnesses see the C.J.S. title Witnesses § 122, also 70 C.J. p 195 notes 24–29.

56. Colo.—City and County of Denver v. Lyttle, 103 P.2d 1, 106 Colo. 157.
Fla.—Fred Howland, Inc., v. Morris, 196 So. 472, 143 Fla. 189, 128 A.L.R. 1013.
Mass.—Snow v. Merchants Nat. Bank of New Bedford, 35 N.E.2d 213, 309 Mass. 354—Langis v. Danforth, 33 N.E.2d 287, 308 Mass. 508—Flynn v. Growers Outlet, 30 N.E.2d 250, 307 Mass. 373—Carbonneau v. Lachance, 29 N.E.2d 696, 307 Mass. 153—Goodyear Park Co. v. City of Holyoke, 11 N.E.2d 439, 298 Mass. 510—Adams v. Town of Bolton, 9 N.E.2d 562, 297 Mass. 459, 111 A.L.R. 856—Corrao v. Sears, Roebuck & Co., 9 N.E.2d 378, 298 Mass. 23.
Minn.—Keough v. St. Paul Milk Co., 285 N.W. 809, 205 Minn. 96.
N.J.—Chmiel v. Yatsko, 13 A.2d 219, 124 N.J.Law 508—Higgins v. County Seat Building & Loan Ass'n, 8 A.2d 101, 123 N.J.Law 116—Robbins v. Thies, 189 A. 67, 117 N.J. Law 389—Hopper v. Public Service Coordinated Transport, 177 A. 430, 114 N.J.Law 468—Farrell v. New Jersey Power & Light Co., 170 A. 25, 111 N.J.Law 526—Kopko v. New York Live Poultry Trucking Co., 128 A. 870, 3 N.J.Misc. 198, affirmed 131 A. 923.
Okl.—Dalton v. Bilbo, 258 P. 274, 126 Okl. 139.
Tex.—Southern Underwriters v. Blair, Civ.App., 144 S.W.2d 641.
Utah.—Walkenhorst v. Kesler, 67 P.2d 654, 92 Utah 312.
Vt.—Shields v. Vermont Mut. Fire Ins. Co., 147 A. 352, 102 Vt. 224.

57. Idaho.—Joyce Bros. v. Stanfield, 189 P. 1104, 33 Idaho 68.
Vt.—Cole v. North Danville Co-op. Creamery Ass'n, 151 A. 568, 103 Vt. 32.

58. Ga.—Williams v. McCranie, 109 S.E. 699, 27 Ga.App. 693.

59. Cal.—Johnson v. Western Air Express Corporation, App., 114 P. 2d 688.
Ill.—Werner v. Illinois Cent. R. Co., 33 N.E.2d 121, 309 Ill.App. 292.
Mass.—Flynn v. Growers Outlet, 30 N.E.2d 250, 307 Mass. 373—Goodyear Park Co. v. City of Holyoke, 11 N.E.2d 439, 298 Mass. 510—Sacks v. McKane, 183 N.E. 140, 281 Mass. 11—Old Silver Beach Corporation v. Town of Falmouth, 165 N.E. 1, 266 Mass. 224.
Minn.—Backstrom v. New York Life Ins. Co., 259 N.W. 681, 194 Minn. 67.
N.H.—Whipple v. Boston & Maine R. R., 7 A.2d 239, 90 N.H. 261—Emery v. Tilo Roofing Co., 195 A. 409, 89 N.H. 165—Theobald v. Shepard Bros., 71 A. 26, 75 N.H. 52.
N.J.—Holden v. Rolff, 166 A. 201, 110 N.J.Law 499—Perth Amboy Dry Dock Co. v. Crawford, 135 A. 897, 103 N.J.Law 440.
N.Y.—Harris Structural Steel Co. v. Chapman, 295 N.Y.S. 443, 162 Misc. 709.
22 C.J. p 524 note 96, p 527 note 12 [b].

The rules prescribing the qualifications of a witness stating an opinion

adduced[60] before the witness' testimony is received.[61] The qualifications of the witness must be affirmatively shown by the proponent of the evidence.[62]

The necessary qualification may be shown by an examination of the witness himself,[63] which should not be limited by narrow and stringent rules,[64] or it may be shown by other proper evidence.[65] Cross-examination of the witness as to his qualifications is usually permitted,[66] and if facts favorable to competency are thus brought out, the direct evidence as to competency may be aided thereby.[67] A witness is not necessarily qualified because he claims to be,[68] although it has been held that such a claim by a witness is prima facie sufficient.[69] On the other hand, a witness who is in fact qualified is not to be ex-

are questions of law.—Harris Structural Steel Co. v. Chapman, 295 N.Y.S. 443, 162 Misc. 709—22 C.J. p 527 note 12 [b].

The question of the sufficiency of the evidence to show qualification is one of law.—Wood v. Manufacturers & Merchants Mut. Ins. Co., 195 A. 667, 89 N.H. 213.

60. Ohio.—Emery v. City of Toledo, 173 N.E. 635, 36 Ohio App. 488.
22 C.J. p 524 note 96.

61. U.S.—Clarke v. Hot Springs Electric Light & Power Co., C.C.A. Wyo., 55 F.2d 612, certiorari denied 53 S.Ct. 19, 287 U.S. 619, 77 L.Ed. 537—Westinghouse Electric & Mfg. Co. v. Denver Tramway Co., D.C. Colo., 3 F.2d 285, appeal transferred City and County of Denver v. Stenger, 47 S.Ct. 343, 273 U.S. 657, 71 L.Ed. 826—Smillie & Co. v. U. S., 12 Ct.Cust.App. 365.
Ala.—Tucker v. Houston, 112 So. 360, 216 Ala. 43—Hale v. Southern Ry. Co., 142 So. 587, 25 Ala.App. 111, certiorari denied Ex parte Hale, 142 So. 589, 225 Ala. 267—Robert S. Armstrong & Bros. Co. v. Rowland, 118 So. 502, 22 Ala.App. 613.
Ariz.—Gila Water Co. v. Gila Land & Cattle Co., 249 P. 751, 30 Ariz. 569.
Ark.—Puryear v. Puryear, 94 S.W.2d 695, 192 Ark. 692.
Cal.—Johnson v. Western Air Express Corporation, App., 114 P.2d 688.
Colo.—City and County of Denver v. Lyttle, 103 P.2d 1, 106 Colo. 157.
Idaho.—Hard v. Spokane International Ry. Co., 238 P. 891, 41 Idaho 285.
Ind.—Hurst v. Reeder, 157 N.E. 101, 86 Ind.App. 294.
Iowa.—Roberts v. Koons, 296 N.W. 811.
Md.—Pumphrey v. Tabler, 2 A.2d 668, 175 Md. 498.
Mass.—Snow v. Merchants Nat. Bank of New Bedford, 35 N.E.2d 213, 309 Mass. 354—Langis v. Danforth, 33 N.E.2d 287, 308 Mass. 508—Adams v. Town of Bolton, 9 N.E.2d 562, 297 Mass. 459, 111 A.L.R. 856—Corrao v. Sears, Roebuck & Co., 9 N.E.2d 378, 298 Mass. 23—Sacks v. McKane, 183 N.E. 140, 281 Mass. 11—Guinan v. Boston Elevated Ry. Co., 167 N.E. 247, 267 Mass. 526.
Mich.—Grzelka v. Chevrolet Motor Car Co., 281 N.W. 568, 286 Mich. 141.
Minn.—Lucas v. Ganley Bros., 206 N.W. 934, 166 Minn. 7.
Mo.—Cities Service Gas Co. v. Peak, 54 S.W.2d 482, 483, 227 Mo.App. 515, citing **Corpus Juris.**
N.H.—Theobald v. Shepard Bros., 71 A. 26, 75 N.H. 52.
N.J.—Schwartz Bros. Truckmen v. International Brotherhood of Teamsters, Chauffeurs, Stablemen and Helpers, Local 478, 19 A.2d 690, 126 N.J.Law 379—Precipio v. Insurance Co. of State of Pennsylvania, 137 A. 549, 103 N.J.Law 589.
N.Y.—Masocco v. Schaaf, 254 N.Y.S. 439, 234 App.Div. 181.
N.C.—Pridgen v. Gibson, 139 S.E. 443, 194 N.C. 289, 54 A.L.R. 855.
N.D.—Braufman v. Bender, 225 N.W. 69, 58 N.D. 165.
Okl.—Kurn v. Margolin, 101 P.2d 818, 187 Okl. 135.
Pa.—Commonwealth v. Rouche, 7 A.2d 102, 107, 135 Pa. 594, citing **Corpus Juris**—Smith v. Penn Federal Corporation, 172 A. 147, 315 Pa. 20—Zellner v. Haddock Mining Co., 10 A.2d 918, 139 Pa.Super. 16.
S.C.—Huggins v. Broom, 199 S.E. 903, 189 S.C. 15.
Tex.—Grayce Oil Co. v. Peterson, 98 S.W.2d 781, 128 Tex. 550, affirming Peterson v. Grayce Oil Co., Civ.App., 37 S.W.2d 367—State Life Ins. Co. v. Barnes, Civ.App., 58 S.W.2d 189, error dismissed—St. Louis Southwestern Ry. Co. of Texas v. Follis, Civ.App., 268 S.W. 1030.
Utah.—Graham v. Ogden Union Ry. & Depot Co., 6 P.2d 465, 79 Utah 1.
22 C.J. p 523 note 93.

In equity the fact that a witness stating his opinion is not properly qualified goes to the weight and not to the admissibility of his testimony.—Stegner v. Blake, C.C.Vt., 36 F. 183.

62. W.Va.—Byrd v. Virginian Ry. Co., 13 S.E.2d 273.
22 C.J. p 524 note 95.

Presumption as to qualification

There is no presumption that a witness is qualified.
Ala.—Birmingham Ry., Light & Power Co. v. Barrett, 60 So. 262, 179 Ala. 274.
Ill.—Mauvaisterre Drainage & Levee Dist. v. Wabash Ry. Co., 132 N.E. 559, 299 Ill. 299, 22 A.L.R. 944.

63. Ala.—Elder v. Ralls Sanitarium, 122 So. 41, 219 Ala. 298—Security Finance Co. v. Kelly's Tire Shop, 114 So. 298, 216 Ala. 612—Birmingham Ry., Light & Power Co. v. Barrett, 60 So. 262, 179 Ala. 274.
Md.—Pumphrey v. Tabler, 2 A.2d 668, 175 Md. 498.
22 C.J. p 525 note 97.

64. Md.—Pumphrey v. Tabler, supra.
22 C.J. p 525 note 98.

Professional standing of witness

Permitting expert witness to tell what positions of honor he held in his profession is no error.—Alabama Utilities Service Co. v. Hammond, 144 So. 822, 225 Ala. 657.

65. Ala.—Birmingham Ry., Light & Power Co. v. Barrett, 60 So. 262, 179 Ala. 274.
22 C.J. p 525 note 99.

Rumor or hearsay cannot be used to establish the witness' qualification.—Lever v. Lagomarsino, 127 A. 452, 282 Pa. 110.

66. Md.—Pumphrey v. Tabler, 2 A.2d 668, 672, 175 Md. 498, citing **Corpus Juris.**
Pa.—Hoffman v. Berwind-White Coal Mining Co., 109 A. 231, 265 Pa. 476—Tiffany v. Delaware, L. & W. R. Co., 105 A. 101, 262 Pa. 300.
22 C.J. p 525 note 1.

Matters considered on cross-examination

In condemnation proceedings, testimony, on cross-examination of witness as to his competency to estimate the value of the land, as to price previously paid by the railroad for a part of the same land as that appropriated, is inadmissible.—Leaf v. Pennsylvania Co., 112 A. 243, 268 Pa. 579.

67. Minn.—Crich v. Williamsburg City F. Ins. Co., 48 N.W. 198, 45 Minn. 441.
22 C.J. p 525 note 2.

68. Md.—Pumphrey v. Tabler, 2 A.2d 668, 175 Md. 498.
Tex.—Mars v. Panhandle & S. F. Ry. Co., Civ.App., 25 S.W.2d 1001, error dismissed.
22 C.J. p 525 note 3.

69. Wis.—Bloch v. American Ins. Co., 112 N.W. 45, 132 Wis. 150.
22 C.J. p 526 note 4.

cluded because he thinks that he is not qualified,[70] even where he is a party to the suit,[71] although where the witness' disclaimer is all the evidence on the subject of disqualification, he should be rejected.[72]

Where the competency of the witness has been shown, it is not permissible to go further into his qualifications for the purpose of adding to the weight of his testimony.[73] A ruling admitting opinion evidence necessarily involves a ruling that the witness is competent.[74] A decision that an expert or skilled witness is competent involves no adjudication as to his credibility, but the weight of his statement, no matter what his skill, remains for the jury.[75]

Waiver. The qualification of a witness to state his opinion may be waived by the parties by express stipulation or by failure to object to the testimony when offered.[76]

b. Discretion of Court

Whether a witness' qualification to state his opinion is sufficiently established rests largely in the discretion of the trial court.

Whether or not the qualification of a witness to state his opinion is sufficiently established is a matter resting largely in the discretion of the trial court,[77] and its ruling thereon, as appears in Appeal

70. N.H.—Boardman v. Woodman, 47 N.H. 120.
22 C.J. p 526 note 5.

71. Pa.—Beck v. Philadelphia Auto Trade Ass'n, 59 Pa.Super. 145.
Tex.—Standefer v. Aultman & Taylor Machinery Co., 78 S.W. 552, 34 Tex.Civ.App. 160.

72. Md.—Cumberland & Westernport Transit Co. v. Metz, 149 A. 4, 158 Md. 424, reargument denied 149 A. 565, 158 Md. 424, and appeal dismissed American Oil Co. v. Metz, 51 S.Ct. 40, 282 U.S. 801, 75 L.Ed. 720.
W.Va.—Fisher v. Flanagan Coal Co., 103 S.E. 359, 86 W.Va. 460.
22 C.J. p 526 note 7.

73. Iowa.—Forcheimer v. Stewart, 32 N.W. 665, 35 N.W. 148, 73 Iowa 216.
22 C.J. p 526 note 8.

74. Ala.—Tucker v. Houston, 112 So. 360, 216 Ala. 43.
N.H.—Emery v. Tilo Roofing Co., 195 A. 409, 89 N.H. 165.
22 C.J. p 526 note 9.

Permitting evidence of disqualification

Where plaintiff had testified as an expert as to the existence of a custom fixing the meaning of words employed in a contract, but testimony of other experts as to such custom had been excluded on defendant's objection, defendant was held not entitled to introduce expert testimony, for the purpose of showing plaintiff's disqualification as an expert.—Beardsley v. American Bonding Co. of Baltimore, 193 N.Y.S. 138, 200 App. Div. 452.

75. Ill.—Gogerty v. Decatur, 190 Ill. App. 548.
Pa.—Jones v. Erie & W. V. R. Co., 25 A. 134, 151 Pa. 30, 31 Am.S.R. 722, 17 L.R.A. 758.
Weight of opinion see infra §§ 567–572.

76. Idaho.—Hard v. Spokane International Ry. Co., 238 P. 891, 41 Idaho 285.
N.J.—Precipio v. Insurance Co. of State of Pennsylvania, 137 A. 549, 103 N.J.Law 589.
N.C.—Pridgen v. Gibson, 139 S.E. 443, 194 N.C. 289, 54 A.L.R. 855.
22 C.J. p 524 note 94.

Mode of objection

The objection should be directed to the incompetency of the witness rather than to the incompetency, irrelevancy, or immateriality of the evidence.—Silverman v. Siegelstein, 173 N.Y.S. 762—22 C.J. p 524 note 94 [a].

77. U.S.—White v. State of Maryland, to Use of Anderson, C.C.A. Md., 106 F.2d 392, 397, citing **Corpus Juris**—American Glycerin Co. v. Eason Oil Co., C.C.A.Okl., 98 F. 2d 479, 484, citing **Corpus Juris**, and certiorari denied 59 S.Ct. 107, 305 U.S. 640, 83 L.Ed. 413, rehearing denied 59 S.Ct. 153, 305 U.S. 672, 83 L.Ed. 435—Davidson v. Commissioner of Internal Revenue, C.C.A. Tex., 91 F.2d 516—General Paint Corporation v. Kramer, C.C.A.Okl., 68 F.2d 40, certiorari denied 54 S. Ct. 628, 292 U.S. 623, 78 L.Ed. 1478—Clarke v. Hot Springs Electric Light & Power Co., C.C.A.Wyo., 55 F.2d 612, 615, citing **Corpus Juris**, and certiorari denied 53 S.Ct. 19, 287 U.S. 619, 77 L.Ed. 537—James Baird Co. v. Boyd, C.C.A.N.C., 41 F.2d 578—Sacramento Suburban Fruit Lands Co. v. Soderman, C.C. A.Cal., 36 F.2d 934—Nussbaum v. Atlas Laundry Co., C.C.A.Ohio, 10 F.2d 353—Hamilton v. Empire Gas & Fuel Co., C.C.A.Kan., 297 F. 422, certiorari denied 45 S.Ct. 92, 266 U. S. 607, 69 L.Ed. 465—Minnesota & Ontario Paper Co. v. Swenson Evaporator Co., C.C.A.Minn., 281 F. 622.
Ala.—Pope v. Ryals, 167 So. 721, 232 Ala. 260—Kirby v. Brooks, 111 So. 235, 215 Ala. 507—Brown v. Mobile Electric Co., 91 So. 802, 207 Ala. 61—Morris v. State, 149 So. 359, 360, 25 Ala.App. 494, citing **Corpus Juris**—Hale v. Southern Ry. Co., 142 So. 587, 588, 25 Ala.App. 111, citing **Corpus Juris** and certiorari denied Ex parte Hale, 142 So. 589, 225 Ala. 267.
Ark.—Firemen's Ins. Co. v. Little, 74 S.W.2d 777, 781, 189 Ark. 640, quoting **Corpus Juris**.
Cal.—Hutter v. Hommel, 3 P.2d 554, 213 Cal. 677—Darling v. Pacific Electric Ry., 242 P. 703, 197 Cal. 702—Union Colonization Co. v. Madera Canal & Irrigation Co., 178 P. 957, 179 Cal. 774—Johnson v. Western Air Express Corporation, App., 114 P.2d 688—Valdez v. Percy, 96 P.2d 142, 35 Cal.App.2d 485—People v. Willis, 86 P.2d 670, 30 Cal. App.2d 419—People v. Pacific Gas & Electric Co., 81 P.2d 584, 27 Cal. App.2d 725—Linde v. Emmick, 61 P.2d 338, 16 Cal.App.2d 676—Rasmussen v. Shickle, 41 P.2d 184, 4 Cal.App.2d 426—Gaumnitz v. Indemnity Ins. Co. of North America, 37 P.2d 712, 2 Cal.App.2d 134—Bryson v. Luse, 9 P.2d 844, 122 Cal.App. 192—Pitt v. Southern Pac. Co., 9 P.2d 273, 121 Cal.App. 228—Coast Counties Gas & Electric Co. v. Miller & Lux, 5 P.2d 34, 118 Cal. App. 140—Johnston v. Peairs, 3 P. 2d 617, 117 Cal.App. 208—Home Fire Ins. Co. v. Southwestern Engineering Corporation, 299 P. 771, 114 Cal.App. 235—Powers v. Central Surety & Insurance Corporation, 298 P. 1027, 113 Cal.App. 735—Branch v. Bekins Van & Storage Co., 290 P. 146, 106 Cal.App. 623—Burns v. Osborne-Fitz-Patrick Finance Co., 282 P. 419, 101 Cal.App. 680.
Conn.—Wray v. Fairfield Amusement Co., 10 A.2d 600, 126 Conn. 221—Stressman v. Vitiello, 158 A. 879, 114 Conn. 370.
Del.—Scotton v. Wright, 122 A. 541, 14 Del.Ch. 124.
Ga.—Hines v. Hendricks, 104 S.E. 520, 25 Ga.App. 682.
Idaho.—Hobbs v. Union Pac. R. Co., 108 P.2d 841.
Ill.—Evanston Best & Co. v. Goodman, 16 N.E.2d 131, 369 Ill. 207—Mauvaisterre Drainage & Levee Dist. v. Wabash Ry. Co., 132 N.E. 559, 299 Ill. 299, 22 A.L.R. 944—

and Error § 1604, ordinarily will not be disturbed on appeal unless there is a clear showing of abuse. If

Werner v. Illinois Cent. R. Co., 38 N.E.2d 121, 309 Ill.App. 292.

Ind.—Pettibone v. Howard, 34 N.E. 2d 12—Illinois Steel Co. v. Fuller, 23 N.E.2d 259.

Ky.—Commercial Union Assur. Co. v. Howard, 76 S.W.2d 246, 256 Ky. 863.

Md.—Bresnan v. Weaver, 135 A. 584, 151 Md. 375—Peninsula Produce Exch. v. American Ry. Express Co., 128 A. 403, 147 Md. 424—Mahan v. Adam, 124 A. 901, 144 Md. 355—Riley v. State, 117 A. 237, 140 Md. 137.

Mass.—Kramer v. New York Life Ins. Co., 200 N.E. 390, 293 Mass. 440—Harrington v. Travers, 192 N.E. 495, 288 Mass. 156—Guinan v. Boston Elevated Ry. Co., 167 N.E. 247, 267 Mass. 526—Vineyard Grove Co. v. Town of Oak Bluffs, 163 N.E. 888, 265 Mass. 270—W. B. Mfg. Co. v. Rubenstein, 128 N.E. 21, 236 Mass. 215, 11 A.L.R. 1283.

Minn.—Rahn v. First Nat. Bank, 240 N.W. 529, 185 Minn. 246—Dumbeck v. Chicago Great Western Ry. Co., 225 N.W. 111, 177 Minn. 261—Noe v. Great Northern Ry. Co., 209 N.W. 905, 168 Minn. 259.

Mo.—Ambruster v. Levitt Realty & Investment Co., 107 S.W.2d 74, 341 Mo. 364—Radler v. St. Louis-San Francisco Ry. Co., 51 S.W.2d 1011, 1013, 330 Mo. 968, citing **Corpus Juris**—Thompson v. City of Lamar, 17 S.W.2d 960, 322 Mo. 514—Ternetz v. St. Louis Lime & Cement Co., 252 S.W. 65—Adams v. Quincy, O. & K. C. R. Co., 229 S.W. 790, 287 Mo. 535—State ex rel. State Highway Commission of Missouri v. Craighead, App., 65 S.W.2d 145—Oliver v. City of Vandalia, App., 28 S.W.2d 1044—Spaulding v. Kansas City Public Service Co., App., 16 S.W.2d 1012.

Neb.—Wahlgren v. Loup River Public Power Dist., 297 N.W. 833—Beebe & Runyan Furniture Co. v. Board of Equalization of Douglas County, 296 N.W. 764.

N.H.—Dowling v. L. H. Shattuck, Inc., 17 A.2d 529—Ricard v. Prudential Ins. Co. of America, 173 A. 375, 93 A.L.R. 784, 87 N.H. 31.

N.J.—Stefanacci v. Bordens Farms Products Co., 125 A. 129, 100 N.J.Law 160.

N.Y.—Meiselman v. Crown Heights Hospital, 34 N.E.2d 367, 285 N.Y. 389, reversing 20 N.Y.S.2d 174, 259 App.Div. 840, appeal denied 20 N.Y.S.2d 669, 259 App.Div. 916.

N.C.—LaVecchia v. North Carolina Joint Stock Land Bank of Durham, 9 S.E.2d 489, 218 N.C. 35—Hardy v. Dahl, 187 S.E. 788, 210 N.C. 530—Liles v. Hannah Pickett Mills, 150 S.E. 363, 197 N.C. 772—Pridgen v. Gibson, 139 S.E. 443, 194 N.C. 289, 54 A.L.R. 855—Shaw v. National Handle Co., 124 S.E. 325, 188 N.C. 222.

Okl.—Kurn v. Margolin, 101 P.2d 818, 187 Okl. 135—Cities Service Gas Co. v. Eggers, 98 P.2d 1114, 186 Okl. 466, 126 A.L.R. 1278—Oklahoma City v. Dyer, 61 P.2d 660, 177 Okl. 620—Town of Sentinel v. Boggs, 61 P.2d 654, 177 Okl. 623—Gypsy Oil Co. v. Brightwell, 49 P.2d 800, 174 Okl. 519—Town of Sentinel v. Riley, 43 P.2d 742, 171 Okl. 533—Small v. Comer, 43 P.2d 716, 171 Okl. 418—Texas Co. v. Alred, 28 P.2d 556, 167 Okl. 128—Roxana Petroleum Corporation v. Dormire, 18 P.2d 544, 161 Okl. 262—Toombs v. Cummings, 3 P.2d 177, 151 Okl. 166—Bell v. Tackett, 272 P. 461, 134 Okl. 164—Tankersley v. Ferrin, 238 P. 853, 113 Okl. 68—Phœnix Ins. Co. of Hartford, Conn., v. School Dist. No. 132 of Comanche County, 228 P. 489, 491, 102 Okl. 251, quoting **Corpus Juris**—Selby Oil & Gas Co. v. Rogers, 221 P. 1012, 94 Okl. 269.

Or.—Carnine v. Tibbetts, 74 P.2d 974, 158 Or. 21—Fidelity Sec. Corporation v. Brugman, 1 P.2d 131, 137 Or. 38, 75 A.L.R. 1333—Goldfoot v. Lofgren, 296 P. 843, 135 Or. 533—Schairer v. Johnson, 272 P. 1027, 128 Or. 409—Laam v. Green, 211 P. 791, 106 Or. 311—Northwest Door Co. v. Lewis Inv. Co., 180 P. 495, 92 Or. 186.

Pa.—Cooper v. Metropolitan Life Ins. Co., 186 A. 125, 323 Pa. 295, 111 A.L.R. 598—Davis v. Southern Surety Co., 153 A. 119, 302 Pa. 21—Steel v. Snyder, 144 A. 912, 295 Pa. 120—Lever v. Lagomarsino, 127 A. 452, 282 Pa. 110—Commonwealth Trust Co. v. Heh, 99 Pa.Super. 479—Commonwealth v. Blankenstein, 81 Pa.Super. 340—Glenn v. Kittanning Iron & Steel Mfg. Co., 62 Pa. Super. 163—Yorkshire Worsted Mills v. National Transit Co., 28 Del.Co. 402.

Puerto Rico.—Del Toro v. The Municipal Court, 16 Puerto Rico 89—De Toro v. Ct., 16 Puerto Rico 89.

R.I.—Combination Fountain Co. v. Millard, 144 A. 883, 50 R.I. 50—Burden v. Tax Assessors of City of Newport, 134 A. 9, 47 R.I. 473.

S.C.—O'Kelley v. Mutual Life Ins. Co. of New York, 14 S.E.2d 582—Huggins v. Broom, 199 S.E. 903, 189 S.C. 15—Collins v. Atlantic Coast Line R. Co., 190 S.E. 817, 183 S.C. 284.

Tenn.—Keys v. Keys, 129 S.W.2d 1103, 23 Tenn.App. 188—City of Clarksville v. Deason, 9 Tenn.App. 274.

Tex.—City of Corpus Christi v. McLaughlin, Civ.App., 147 S.W.2d 576, error dismissed—Indian Territory Illuminating Oil Co. v. Rainwater, Civ.App., 140 S.W.2d 491, error dismissed—Montgomery Ward & Co. v. Levy, Civ.App., 136 S.W.2d 663, error dismissed, judgment correct—Ætna Ins. Co. v. Collins, Civ.App., 134 S.W.2d 709—Cobb v. Texas & N. O. R. Co., Civ.App., 107 S.W.2d 670, error dismissed—Bettis v. Bettis, Civ.App., 83 S.W.2d 1076, 1078, citing **Corpus Juris**—Texas Pacific Coal & Oil Co. v. Taylor, Civ.App., 47 S.W.2d 1110—Mars v. Panhandle & S. F. Ry. Co., Civ.App., 25 S.W.2d 1004, error dismissed—St. Mary's Oil Engine Co. v. Allen-Morrow Co., Civ.App., 20 S.W.2d 266—Longenecker v. Ward County Water Improvement Dist. No. 3, Civ.App., 8 S.W.2d 306—Texas & P. Ry. Co. v. Moore, Civ.App., 7 S.W.2d 902, error dismissed—El Paso Electric Co. v. Gambrell, Civ.App., 292 S.W. 577—Sparrow v. Tillman, Civ.App., 283 S.W. 877—Davis v. Cochran, Civ.App., 275 S.W. 423—Cattle Raisers' Loan Co. v. Sutton, Civ.App., 271 S.W. 233, 240, citing **Corpus Juris**—Hartford Fire Ins. Co. v. Evans, Civ.App., 255 S.W. 487—Dunlap Hardware Co. v. E. F. Elmberg Co., Civ.App., 252 S.W. 1098, affirmed E. F. Elmberg Co. v. Dunlap Hardware Co., Com.App., 267 S.W. 258—Humble Oil & Refining Co. v. Strauss, Civ.App., 243 S.W. 528.

Utah.—In re Hanson's Estate, 52 P.2d 1103, 87 Utah 580—Coon v. Shields, 39 P.2d 348, 88 Utah 76—Graham v. Ogden Union Ry. & Depot Co., 6 P.2d 465, 467, 79 Utah 1, quoting **Corpus Juris**.

Vt.—Holbrook Grocery Co. v. Armstrong, 122 A. 158, 97 Vt. 197—In re Wood's Will, 115 A. 231, 95 Vt. 407.

Wash.—Oyster v. Dye, 110 P.2d 863, 133 A.L.R. 720—State v. City of Hoquiam, 286 P. 286, 155 Wash. 678, modified on other grounds 287 P. 670, 155 Wash. 678.

W.Va.—Byrd v. Virginian Ry. Co., 13 S.E.2d 273.

Wis.—Anderson v. Eggert, 291 N.W. 365, 234 Wis. 348.

22 C.J. p 526 note 11, p 527 note 13 [a].

Discretion of referee

Mass.—Maher v. Commonwealth, 197 N.E. 78, 291 Mass. 343.

Discretion of master

Mass.—Cook v. City of Fall River, 131 N.E. 346, 239 Mass. 90, 18 A.L.R. 119.

Board of tax appeals

Qualifications of witnesses as experts in tax abatement proceedings before board of tax appeals were for board to determine.—City of Revere v. Revere Const. Co., 189 N.E. 73, 285 Mass. 243.

the witness has some qualifications, he should be permitted to testify.[78]

If, however, the testimony given by the witness shows clearly that his opinion is a mere guess, the court may not rule that he has qualified.[79]

C. STATEMENTS OF FACT

§ 459. By Ordinary Observer

A witness is permitted to state a fact known to or observed by him, even though his statement involves a certain element of inference. Negative statements have been said to be less apt to involve inferences.

Much effort is expended during the trial of causes to confine the testimony of witnesses to statements of what they saw, heard, or otherwise observed, as distinguished from the inferences or opinions formed as a result of such observation.[80] The distinction is, however, one which it is in many cases impossible to draw,[81] for the reason that the most simple statement of fact involves an element of coordination, induction, or inference,[82] the fact and the inference being frequently so blended that they cannot be separated.[83] The modern tendency is to regard it as more important to get to the truth of the matter than to quibble over distinctions which are in many cases impracticable,[84] and a witness is permitted to state a fact known to or observed by him, even though his statement involves a certain element of inference.[85] Nonexperts may testify to

Where subject of inquiry is technical, involved, or scientific

As the subject of inquiry becomes more technical, involved, or scientific, the trial court must exercise greater care in exercising its reasonable discretion in determining qualifications of witnesses.—New York Life Ins. Co. v. Kuhlenschmidt, Ind., 33 N.E. 2d 340.

78. Tex.—Cattle Raisers' Loan Co. v. Sutton, Civ.App., 271 S.W. 233.

Slight qualifications

Permitting testimony is not error if witness has even slight qualifications.—Lutz v. Allegheny County, 195 A. 1, 327 Pa. 587—Davis v. Southern Surety Co., 153 A. 119, 302 Pa. 21—Delaware & C. Steam Towboat Co. v. Starrs, 69 Pa. 36—Yorkshire Worsted Mills v. National Transit Co., 28 Del.Co. 402.

Reasonable qualifications

If any reasonable qualifications can be established for expert witness, the objection to qualification goes to the weight rather than the admissibility of the expert testimony.—Wray v. Fairfield Amusement Co., 10 A.2d 600, 126 Conn. 221.

The fact that a witness is not well qualified to give opinion evidence affects the weight and not the admissibility of his evidence.—Cincinnati St. Ry. Co. v. Hickey, 163 N.E. 310, 29 Ohio App. 399.

79. Tex.—Peterson v. Grayce Oil Co., Civ.App., 37 S.W.2d 367, affirmed Grayce Oil Co. v. Peterson, 98 S.W.2d 781, 128 Tex. 550.

80. N.C.—Jordan v. Glickman, 14 S.E.2d 40, 219 N.C. 388.
Tenn.—Black Diamond Collieries v. Gibbs, 32 S.W.2d 1041, 1042, 161 Tenn. 413, quoting **Corpus Juris.**
22 C.J. p 527 note 20.

81. Tenn.—Black Diamond Collieries v. Gibbs, supra, quoting **Corpus Juris.**
22 C.J. p 528 note 21.

82. Tenn.—Black Diamond Collieries v. Gibbs, supra, quoting **Corpus Juris.**
22 C.J. p 528 note 22.

83. Tenn.—Black Diamond Collieries v. Gibbs, supra, quoting **Corpus Juris.**
22 C.J. p 528 note 23.

84. Kan.—Smith v. Prudential Ins. Co. of America, 12 P.2d 793, 795, 136 Kan. 120, citing **Corpus Juris.**
Tenn.—Black Diamond Collieries v. Gibbs, 32 S.W.2d 1041, 1042, 161 Tenn. 413, quoting **Corpus Juris.**
22 C.J. p 528 note 24.

85. U.S.—American Glycerin Co. v. Eason Oil Co., C.C.A.Okl., 98 F.2d 479, certiorari denied 59 S.Ct. 107, 305 U.S. 640, 83 L.Ed. 413, rehearing denied 59 S.Ct. 153, 305 U.S. 672, 83 L.Ed. 435—Roberts v. U. S., C.C.A.Va., 60 F.2d 871, 872, citing **Corpus Juris.**
Ala.—Pollard v. Rogers, 173 So. 881, 234 Ala. 92—Southern Building & Loan Ass'n v. Argo, 141 So. 545, 224 Ala. 611—Tillery v. Gulf Refining Co., 126 So. 872, 873, 220 Ala. 577, citing **Corpus Juris**—American Ry. Express Co. v. McMinn, 99 So. 657, 19 Ala.App. 591.
Ark.—Jewel Tea Co. v. McCrary, 122 S.W.2d 534, 197 Ark. 294—Ross v. Clark County, 45 S.W.2d 31, 33, 185 Ark. 1, citing **Corpus Juris.**
Cal.—Gray v. Bekins, 199 P. 767, 771, 186 Cal. 389, citing **Corpus Juris**—Von Stetten v. Yellow-Checker Cab Co., Consolidated, 281 P. 95, 100 Cal.App. 775—Guidera v. Lapiana, 199 P. 557, 52 Cal.App. 460.
Ga.—Hawthorne v. Pope, 180 S.E. 920, 51 Ga.App. 498.
Ill.—Rost v. F. H. Noble & Co., 147 N.E. 258, 316 Ill. 357, reversing 232 Ill.App. 430.
Me.—Johnson v. Bangor Ry. & Electric Co., 131 A. 1, 125 Me. 88.
Md.—State, for Use of Kalives, v. Baltimore Eye, Ear and Throat Hospital, 10 A.2d 612, 177 Md. 517—Lange v. Affleck, 155 A. 150, 160 Md. 695, 79 A.L.R. 1274—Livingston v. Safe Deposit & Trust Co. of Baltimore, 146 A. 432, 157 Md. 492.
Mass.—Crafts v. McCobb, 21 N.E.2d 226, 303 Mass. 172—McGrath v. Fash, 139 N.E. 303, 244 Mass. 327—Morrissey v. Connecticut Valley St. Ry. Co., 124 N.E. 435, 233 Mass. 554.
Mich.—Files v. Arenac Tp., 201 N.W. 459, 229 Mich. 460.
Minn.—Lestico v. Kuehner, 283 N.W. 122, 204 Minn. 125.
Mo.—Streicher v. Mercantile Trust Co., 62 S.W.2d 461, 463, citing **Corpus Juris**—Dickey v. Western Tablet Co., 267 S.W. 431, 218 Mo.App. 253—Cooper v. City of Caruthersville, App., 264 S.W. 46.
Mont.—McCarthy v. Anaconda Copper Mining Co., 225 P. 391, 70 Mont. 309.
N.Y.—In re Liquors Seized at Auto Inn, Plattsburgh, Clinton County, N. Y., 197 N.Y.S. 758, 204 App.Div. 185.
N.C.—Keller v. Caldwell Furniture Co., 154 S.E. 674, 199 N.C. 413.
Or.—Rhodes v. Libby, McNeill & Libby, 288 P. 207, 133 Or. 128.
S.C.—Greer v. Equitable Life Assur. Soc. of U. S., 185 S.E. 68, 180 S.C. 162.
S.D.—McCaull-Dinsmore Co. v. Heyler, 203 N.W. 505, 48 S.D. 211.
Tenn.—Black Diamond Collieries v. Gibbs, 32 S.W.2d 1041, 1042, 161 Tenn. 413, quoting **Corpus Juris.**
Tex.—Rountree Motor Co. v. Insurance Co. of North America, Civ. App., 95 S.W.2d 550, error dismissed—Texas Co. v. Andrade, Civ. App., 52 S.W.2d 1063, affirmed Carter v. Texas Co., 87 S.W.2d 1079,

facts coming under their observation although the facts are such as are ordinarily provable by experts.[86] Questions calling for statements of fact which are susceptible of categorical denial are not objectionable as calling for conclusions.[87]

A witness is also permitted to deny the existence of a fact,[88] or the occurrence of an event,[89] or to state that he did not know of a fact or circumstance which might reasonably have been supposed to have been known to him had it existed,[90] although the circumstance that the inference is negative does not necessarily reduce its statement to one of fact.[91] A negative statement,[92] as that one gave no authority,[93] had no authority,[94] had no connection,[95] interest,[96] or title,[97] or offered no inducement,[98] or that no contract as to certain subject matter existed,[99] is less apt to involve the use of inference than the corresponding positive assertion, and is consequently more frequently admitted. Negative statements have been held inadmissible where they are conclusions rather than statements of fact.[1]

It has been said that, where facts and inferences are blended to an objectionable extent, the statement of fact may still be received if separable from the inferences to which it gives rise in the mind of the witness.[2]

§ 460. —— Facts Part of Common Stock of Knowledge

Where an inference is so usual, natural, or instinctive as to accord with general experience, it is admissible as part of the common stock of knowledge.

Where an inference is so usual, natural, or instinctive as to accord with general experience,[3] its statement is received as substantially one of a fact—part of the common stock of knowledge.[4] It is under this principle that an ordinary observer is permitted to identify and name objects seen or observed by him,[5] which are so familiar to mankind in general that no special skill or training is re-

126 Tex. 388—Adkins-Polk Co. v. John Barkley & Co., Civ.App., 297 S.W. 757—Baker v. Nance Bros., Civ.App., 294 S.W. 290.
Va.—Ferguson v. Ferguson, 192 S.E. 774, 169 Va. 77—Virginia Ry. & Power Co. v. Burr, 133 S.E. 776, 780, 145 Va. 338, citing **Corpus Juris.**
22 C.J. p 528 note 25.

86. W.Va.—Willis v. Norfolk & W. Ry. Co., 123 S.E. 585, 96 W.Va. 646.

87. Fla.—Liddon v. Board of Public Instruction for Jackson County, 175 So. 806, 128 Fla. 838.

88. Ala.—Mobile & O. R. Co. v. Watson, 130 So. 199, 221 Ala. 585.
Ga.—Seaboard Air Line Ry. Co. v. Young, 148 S.E. 757, 40 Ga.App. 4.
Mo.—Marshall v. Kansas City, 249 S.W. 82, 297 Mo. 304.
Vt.—Button v. Knight, 115 A. 499, 95 Vt. 381.
22 C.J. p 530 note 26.

89. Iowa.—Tamingo v. Freiberg, 176 N.W. 791, 188 Iowa 788.
22 C.J. p 530 note 27.

90. Mo.—Dodd v. Terminal R. Ass'n of St. Louis, App., 108 S.W.2d 982.
22 C.J. p 530 note 28.

91. Ind.—Stevens v. Leonard, 56 N.E. 27, 154 Ind. 67, 77 Am.S.R. 446.
22 C.J. p 530 note 29.

92. Conn.—Fox v. Shanley, 109 A. 249, 94 Conn. 350.
Ga.—Harrison v. Central Georgia Automotive Co., 121 S.E. 689, 31 Ga.App. 603.
22 C.J. p 639 note 15.

93. Ga.—J. C. Lysle Milling Co. v. Whitfield Grocery Co., 106 S.E. 8, 26 Ga.App. 216.
Iowa.—Lozier v. Graves, 59 N.W. 285, 91 Iowa 482.
Tex.—Featherston v. Greer, Civ.App., 169 S.W. 912.

94. Ind.—Kaufman v. American Surety Co., 166 N.E. 615, 89 Ind. App. 393.
Tex.—Keen & Woolf Oil Co. v. Fulenwider, Civ.App., 284 S.W. 322.

95. Minn.—Marcotte v. Beaupre, 15 Minn. 152.
Tex.—San Antonio & A. P. R. Co. v. Brooking, Civ.App., 51 S.W. 537.

96. U.S.—Elmore County, Ala., v. Moon, C.C.A.Ala., 293 F. 297.
22 C.J. p 639 note 18.

97. Ala.—Norton v. Linton, 18 Ala. 690.

98. Cal.—People v. Jackson, 71 P. 566, 138 Cal. 462.

99. Ala.—Solomon v. Rogers, 98 So. 370, 210 Ala. 423.
Cal.—Steinhofer v. Georgesen, 202 P. 350, 54 Cal.App. 550.

1. Colo.—Miller v. Colorado Discount Corporation, 251 P. 1049, 80 Colo. 355—General Accident, Fire & Life Assur. Corporation, Limited, of Perth, Scotland, v. Cohen, 216 P. 522, 73 Colo. 459.
N.Y.—Brito v. City of New York, 5 N.Y.S.2d 519, 254 App.Div. 896.

2. Wash.—Tilden v. Gordon, 74 P. 1016, 34 Wash. 92.

3. N.H.—Gardner v. Commercial Mach. Co., 111 A. 317, 79 N.H. 452.
N.C.—Street v. Erskine-Ramsey Coal Co., 145 S.E. 11, 13, 196 N.C. 178, quoting **Corpus Juris**—Kepley v. Kirk, 132 S.E. 788, 790, 191 N.C. 690, quoting **Corpus Juris.**
Tenn.—National Life & Accident Ins. Co. v. Follett, 80 S.W.2d 92, 168 Tenn. 647.
22 C.J. p 530 note 31.

4. Mo.—Adams v. Carlo, App., 84 S.W.2d 682—Davis v. Geiger, App., 212 S.W. 384.
N.Y.—Goldstein v. Equitable Life Assur. Soc. of U. S., 289 N.Y.S. 1064, 160 Misc. 364.
N.C.—State v. Atlantic Ice & Coal Co., 188 S.E. 412, 418, 210 N.C. 742, quoting **Corpus Juris**—Lambert v. Caronna, 175 S.E. 303, 304, 206 N.C. 616, quoting **Corpus Juris**—Bateman v. Brooks, 167 S.E. 627, 632, 204 N.C. 176, quoting **Corpus Juris**—Street v. Erskine-Ramsey Coal Co., 145 S.E. 11, 13, 196 N.C. 178, quoting **Corpus Juris**—Kepley v. Kirk, 132 S.E. 788, 790, 191 N.C. 690, quoting **Corpus Juris.**
Tex.—Williams v. Hall, Civ.App., 111 S.W.2d 803.
22 C.J. p 530 note 32.

Time of reaction

In actions by passenger against driver of automobile which struck rear of another automobile which came to sudden stop at intersection, evidence on behalf of driver, that a driver who knows he has to stop automobile can make a little quicker stop than one who does not know it and who has to react and put foot on brake, was competent, at least in trial court's discretion, as being testimony either of an expert or of a layman, even if the evidence bore on a main issue.—Weiss v. Wasserman, N.H., 15 A.2d 861.

5. N.J.—Murphy v. North Jersey St. R. Co., 80 A. 331, 81 N.J.Law 706, 35 L.R.A.,N.S., 593, reversing 73 A. 1119.
22 C.J. p 531 note 33.

quired to identify them,[6] and to summarize the result of his observation of familiar phenomena.[7]

§ 461. —— Complex or Collective Facts

A witness may state his conclusion, usually called a shorthand statement of fact, where the facts are known to him but are so numerous and of such complexity that it is practically impossible to reproduce or adequately describe them to the jury.

The statement may still remain one substantially of fact, although one of some complexity,[8] provided the mental process which immediately gives rise to the statement has been one of coördinating separate facts into one more complicated rather than the deduction or induction of a new fact by a process of reasoning.[9] The rule in this respect is that where numerous impressions of a more primary order are blended into a composite fact of more complex but still inevitably recognizable nature, and it is practically impossible to reproduce or adequately describe to the jury the primary facts on which the witness' inference as to the existence of the ultimate fact is based, the ultimate fact may be stated.[10]

§ 462. —— Subjects of Testimony in General

The various subjects of testimony of ordinary observers are considered in detail in §§ 463–471.

Examine Pocket Parts for later cases.

§ 463. —— Animals

So long as their testimony consists of statements of fact, ordinary observers may testify to matters relating to animals, but their opinions or conclusions must be rejected.

A witness has been permitted to state where and by whom an animal was raised;[11] the condition of cattle[12] on delivery by a carrier;[13] whether the temper of the animals was good or bad;[14] the ef-

6. Fla.—Gantling v. State, 23 So. 857, 40 Fla. 237.
22 C.J. p 531 note 34.

7. S.C.—Lamb v. Southern R. Co., 67 S.E. 958, 86 S.C. 106, 138 Am. S.R. 1030.
22 C.J. p 531 note 35.

8. Iowa.—Lee v. Kirby, 191 N.W. 865, 867, 195 Iowa 441, citing **Corpus Juris.**
22 C.J. p 531 note 36.

9. Ala.—Mobile, J. & K. C. R. Co. v. Hawkins, 51 So. 37, 163 Ala. 565.
22 C.J. p 531 note 37.

10. U.S.—Pillsbury Flour Mills Co. v. Miller, C.C.A.Mo., 121 F.2d 297—Parker v. Elgin, C.C.A.Tenn., 5 F.2d 562—New York Life Ins. Co. v. Mason, C.C.A.Mont., 272 F. 28.
Ala.—Holman v. Brady, 3 So.2d 30—McPherson v. Martin, 174 So. 791, 234 Ala. 244—Pollard v. Rogers, 173 So. 881, 234 Ala. 92—Rowe v. Alabama Power Co., 167 So. 324, 232 Ala. 257—Alabama Power Co. v. Jackson, 166 So. 692, 232 Ala. 42—Hancock v. Oliver, 154 So. 571, 574, 228 Ala. 548, citing **Corpus Juris**—Acme Machine & Welding Co. v. Home Industry Iron Works, 135 So. 183, 184, 223 Ala. 248, quoting **Corpus Juris**—Louis Werner Sawmill Co. v. Vinson & Bolton, 124 So. 420, 220 Ala. 210—Louisville & N. R. Co. v. Steverson, 124 So. 205, 220 Ala. 158—J. H. Arnold & Co. v. Gibson, 113 So. 25, 216 Ala. 314—Hollingsworth v. Corbin, 101 So. 843, 844, 212 Ala. 104, citing **Corpus Juris**—Hilburn v. McKinney, 96 So. 61, 209 Ala. 229—Shelby Iron Co. v. Cole, 95 So. 47, 208 Ala. 657—Standard Cooperage Co. v. Dearman, 86 So. 537, 204 Ala. 553.
Ark.—Cahill v. Bradford, 287 S.W. 595, 172 Ark. 69.
Kan.—Gilbreath v. Prairie Oil & Gas Co., 278 P. 707, 128 Kan. 618.
Mass.—Gentile Flour & Products Co. v. Moschella, 146 N.E. 721, 251 Mass. 512.
Mo.—Sullivan v. Union Electric Light & Power Co., 56 S.W.2d 97, 331 Mo. 1065—Griffith v. Continental Casualty Co., 253 S.W. 1043, 299 Mo. 426—Osborne v. Wells, App., 211 S.W. 887.
Mont.—McCarthy v. Anaconda Copper Mining Co., 225 P. 391, 70 Mont. 309.
Neb.—McCann v. Omaha & Council Bluffs Street Ry. Co., 222 N.W. 633, 117 Neb. 786.
N.C.—Pack v. Katzin, 1 S.E.2d 566, 215 N.C. 233—Teseneer v. Henrietta Mills Co., 184 S.E. 535, 209 N. C. 615.
Pa.—In re Culhane's Estate, 2 A.2d 567, 133 Pa.Super. 339, affirmed 5 A.2d 377, 334 Pa. 124.
Tex.—Beaumont, S. L. & W. Ry. Co. v. Schmidt, 72 S.W.2d 899, 123 Tex. 580, affirming, Civ.App., 45 S.W.2d 734—Magee v. Paul, 221 S.W. 254, 110 Tex. 470, answering certified questions, Civ.App., 159 S.W. 325, and answers conformed to, Civ. App., 224 S.W. 1118—Southern Pine Lumber Co. v. Whiteman, Civ. App., 104 S.W.2d 635, error dismissed—Dave Lehr, Inc., v. Brown, Civ.App., 58 S.W.2d 886, reversed on other grounds 91 S.W.2d 693, 127 Tex. 236—Texas Co. v. Andrade, Civ.App., 52 S.W.2d 1063, affirmed Carter v. Texas Co., Com.App., 87 S.W.2d 1079—Dunlap Hardware Co. v. E. F. Elmberg Co., Civ.App., 252 S.W. 1098, affirmed E. F. Elmberg Co. v. Dunlap Hardware Co., Com.App., 267 S.W. 258—Hines v. Collins, Civ.App., 227 S.W. 332.
Vt.—Bollés v. City of Montpelier, 108 A. 565, 93 Vt. 513.
Va.—Ferguson v. Ferguson, 192 S.E. 774, 169 Va. 77—Virginia Ry. & Power Co. v. Burr, 133 S.E. 776, 780, 145 Va. 338, citing **Corpus Juris.**
W.Va.—Thomas v. Monongahela Valley Traction Co., 112 S.E. 228, 90 W.Va. 681.
22 C.J. p 531 note 38—46 C.J. p 811 note 60, 61.

Determination of admissibility

Where the admissibility of a lay witness' conclusion based on actual observation but not formed until later is in question, whether observations of witness are sufficiently within his memory so that results following therefrom by way of conclusion and inference are reliable is important, since his testimony is not a mere "opinion" but a "conclusion of fact", to which his judgment, observation, and common knowledge has led him.—Copithorn v. Boston & M. R. R., 35 N.E.2d 254, 309 Mass. 363.

Opinion evidence is inadmissible unless subject of inquiry is so indefinite as not to be subject to direct proof and concerns matter regarding which jurors are incapable from want of experience or knowledge of subject of drawing proper conclusions from evidence.—Miller v. Great American Ins. Co. of New York, Mo. App., 61 S.W.2d 205.

11. Fla.—Jones v. State, 59 So. 892, 64 Fla. 92, L.R.A. 1915B 71.

12. Tex.—Gulf, C. & S. F. R. Co. v. Kimble, 109 S.W. 234, 49 Tex. Civ.App. 622.
22 C.J. p 533 note 40.

13. Ala.—Southern R. Co. v. Proctor, 57 So. 513, 3 Ala.App. 413.

14. Ill.—Cole v. East St. Louis, 158 Ill.App. 494.

fect of loading on cows in a certain condition;[15] that a mule was gentle;[16] that a horse was a "bad actor,"[17] or a good, safe driving horse;[18] that an animal was frightened;[19] that a new object in a highway was likely to frighten horses;[20] and that a horse had a "nice round hoof."[21] On the other hand, a witness will not be permitted to state his opinion or conclusion as to the character of an animal;[22] defects in an animal;[23] fitness of horse for a lady to drive;[24] what is likely to frighten[25] or injure[26] animals, or what may be approached by them with safety.[27]

§ 464. —— Business and Conduct Thereof

The ordinary witness may testify to matters of fact with relation to business and the conduct thereof; but matters of opinion or conclusions are inadmissible.

A witness has been permitted to testify as to the existence of a market for farm products at a particular place,[28] that a business was an established business;[29] the correctness of an account;[30] that the authority of a traveling salesman of a corporation was limited to his taking orders subject to approval by the corporation;[31] that the purpose of the witness, an agent, in sending an order to his principal was "for confirmation;"[32] that one's books were kept according to the usual business system in similar enterprises;[33] that expenses of a branch were paid before remittances were made to the main office;[34] the attitude of a corporation with reference to the matter in controversy;[35] that an automobile was used for business purposes,[36] and was being so used at a particular time;[37] the position or relation of the witness to the business;[38] that a particular officer was in charge of a corporation's business;[39] the duties of a foreman,[40] who controlled workmen;[41] who was in charge of work;[42] and that an employee hired and discharged other employees.[43] On the other hand, under the rule that a witness may not be permitted to state his opinions or conclusions, it has been held that a witness may not state that one operated his business under a fictitious name,[44] or whether there was competition;[45] and the rule has been applied to exclude opinion evidence as to the balance of an account;[46] manner in which a simple account was kept;[47] correctness of an account;[48] conduct of business by receivers;[49] management of a business;[50] mismanagement by employee;[51] who seemed to be manager;[52] the powers of a corporation;[53] whether a foreign corporation was doing business in the state;[54] matters which, although relating to a particular trade or business, involve no special

15. Tex.—St. Louis, B. & M. Ry. Co. v. Lane, Civ.App., 248 S.W. 59.

16. Ala.—Alabama Cons., Coal & Iron Co. v. Cowden, 56 So. 984, 175 Ala. 108.

17. Mich.—Dyer v. People's Ice Co., 154 N.W. 135, 188 Mich. 203.

18. N.H.—Simoneau v. Keene Electric R. Co., 100 A. 551, 78 N.H. 363.

19. Ill.—Ward v. Meredith, 77 N.E. 118, 220 Ill. 66, affirming 122 Ill. App. 159.
22 C.J. p 538 note 46.

20. Conn.—Clinton v. Howard, 42 Conn. 294.

21. Ohio.—Palmer v. Cowie, 27 Ohio Cir.Ct. 617.

22. Ill.—Chicago & A. R. Co. v. Kuckkuck, 64 N.E. 358, 197 Ill. 304.
22 C.J. p 493 note 30—3 C.J. p 161 note 96.

23. Iowa.—Steele v. Andrews, 121 N.W. 17, 144 Iowa 360.

24. Md.—Fletcher v. Dixon, 68 A. 875, 107 Md. 420.

25. Mich.—Smith v. Sherwood Tp., 28 N.W. 806, 62 Mich. 159.
22 C.J. p 497 note 54.

26. Ill.—Brewster v. Weir, 93 Ill. App. 588.
22 C.J. p 497 note 55.

27. Cal.—Kauffman v. Maier, 29 P. 481, 94 Cal. 269, 18 L.R.A. 124.
Mass.—Connelly v. Hamilton Woolen Co., 39 N.E. 787, 163 Mass. 156.

28. Tex.—American Rio Grande Land & Irr. Co. v. Mercedes Plantation Co., Civ.App., 155 S.W. 286.

29. Mo.—Dick v. Puritan Pharmaceutical Co., App., 46 S.W.2d 941.

30. Tex.—Dunman v. South Texas Lumber Co., Civ.App., 252 S.W. 274.
22 C.J. p 533 note 50, 51, p 535 note 22.

31. Ala.—Gould v. Gates Chair Co., 41 So. 675, 147 Ala. 629.

32. Tex.—Bybee v. Embree-McLean Carriage Co., Civ.App., 135 S.W. 203.

33. Tex.—German F. Ins. Co. v. Walker, Civ.App., 146 S.W. 606.

34. Mo.—McCahon v. Quick Service Laundry Co., App., 263 S.W. 238.

35. Tex.—Security Drilling Co. v. Rathke Oil Co., Civ.App., 41 S.W.2d 1019, error dismissed.

36. D.C.—Wagner v. Lucas, 38 F.2d 391, 59 App.D.C. 219.

37. Ala.—Brown v. Woolverton, 121 So. 404, 219 Ala. 112, 64 A.L.R. 640.

38. Ala.—Doby v. Layton, 98 So. 9, 210 Ala. 303.

39. Ala.—Kartus Department Stores v. Deason, 109 So. 751, 215 Ala. 97.

40. Ill.—Western Stone Co. v. Musical, 63 N.E. 664, 196 Ill. 382, 89 Am.S.R. 325.
Tex.—Kirby Lumber Co. v. Chambers, 95 S.W. 607, 41 Tex.Civ.App. 632.

41. Ala.—Marbury Lumber Co. v. Heinege, 85 So. 453, 204 Ala. 241.
22 C.J. p 534 note 56.

42. Ala.—Marbury Lumber Co. v. Heinege, 85 So. 453, 204 Ala. 241.

43. Tex.—Kirby Lumber Co. v. Williams, Civ.App., 159 S.W. 309.

44. Cal.—Fesler v. Rawlins, App., 111 P.2d 380.

45. Neb.—Riggs Optical Co. v. Riggs, 270 N.W. 667, 132 Neb. 26.

46. N.Y.—Smith v. Castle, 81 N.Y.S. 18, 81 App.Div. 638.

47. Pa.—Ryder v. Jacobs, 38 A. 471, 182 Pa. 624.

48. Colo.—Wahl v. Larsen, 201 P. 48, 70 Colo. 274.
Tex.—Webb v. Smith, Civ.App., 288 S.W. 624.

49. Mo.—Blanke v. C. F. Blanke Tea & Coffee Co., App., 124 S.W.2d 568.

50. Cal.—People v. Bidleman, 38 P. 502, 104 Cal. 608.
Tex.—Arndt v. Boyd, Civ.App., 48 S.W. 771.

51. Ala.—Bass Furnace Co. v. Glasscock, 2 So. 315, 82 Ala. 452, 60 Am.R. 748.

52. Iowa.—Oberholtzer v. Hazen, 61 N.W. 365, 92 Iowa 602.

53. Mont.—Alley v. Butte & Western Mining Co., 251 P. 517, 77 Mont. 477.

54. N.Y.—M. S. Huey Co. v. Rothfeld, 84 N.Y.S. 883.

training or are easily explained,[55] as, for instance, adjustment of insurance losses,[56] bookkeeping,[57] freighting,[58] nautical matters,[59] noninsurability of an habitual drunkard,[60] outlays of a factor,[61] packing of bark,[62] piling of bark[63] or lumber,[64] stringing wires,[65] or unloading tiles.[66]

§ 465. —— Contracts, Sales, and Mortgages

Ordinary witnesses are permitted to testify to statements of fact relative to contracts, sales, or mortgages, but opinions or conclusions of such witnesses are inadmissible.

A witness has been permitted to state the fact of agreement;[67] what an agreement was[68] or was represented to be;[69] consideration;[70] whether he consented to a variation of a contract to which he was a party;[71] whether he ratified or agreed to a transaction;[72] whether there was performance under the contract;[73] whether services were rendered under a contract;[74] the manner in which plaintiff performed services and that the services were the best plaintiff was able to perform under the circumstances;[75] completion of work according to contract;[76] that items of an account were delivered to, and used by, defendant;[77] that a sale[78] or purchase[79] was made; whether he was the purchaser

55. Ill.—Illinois Cent. R. Co. v. People, 33 N.E. 173, 143 Ill. 434, 19 L.R.A. 119.

56. Iowa.—Williams v. Niagara F. Ins. Co., 50 Iowa 561.

57. Conn.—Irving v. Shethar, 42 A. 258, 71 Conn. 434.
Tex.—McKay v. Overton, 65 Tex. 82.

58. Md.—Stumore v. Shaw, 11 A. 360, 68 Md. 11, 6 Am.S.R. 412.

59. Mass.—Perkins v. Augusta Ins. & Banking Co., 10 Gray 312, 71 Am. D. 654.

60. N.Y.—Rawls v. American Mut. L. Ins. Co., 27 N.Y. 282, 84 Am.D. 280.

61. U.S.—Patten v. U. S., 15 Ct.Cl. 288.

62. Vt.—Brown v. Doubleday, 17 A. 135, 61 Vt. 523.

63. Vt.—Brown v. Doubleday, supra.

64. Iowa.—Baldwin v. St. Louis, K. & N. R. Co., 25 N.W. 918, 68 Iowa 37.

65. Mass.—Meehan v. Holyoke St. R. Co., 72 N.E. 61, 186 Mass. 511—Flynn v. Boston Electric Light Co., 50 N.E. 937, 171 Mass. 395.

66. Or.—Nutt v. Southern Pac. R. Co., 35 P. 653, 25 Or. 291.

67. Ala.—Gaston v. McDonald, 124 So. 208, 220 Ala. 155.
Md.—Fleischmann v. Clark, 111 A. 851, 137 Md. 171.
Mass.—New York Cent. R. Co. v. Central Vermont Ry. Co., 136 N.E. 825, 243 Mass. 56.
Tenn.—Walgreen Co. v. Walton, 64 S.W.2d 44, 16 Tenn.App. 218.
Tex.—Farmers' Mill & Elevator Co. v. Hodges, Civ.App., 248 S.W. 72, reversed on other grounds, Com. App., 260 S.W. 166.
22 C.J. p 534 note 58, p 639 note 10.

Contract of employment

Where plaintiff, after a talk with B relative to going to work as a painter on buildings belonging to the W estate, reported for work and met G, agent of estate, a statement by G that plaintiff "was working for us, the W. estate," and that the estate would not pay more than forty cents an hour, was not a mere conclusion or opinion on the meaning of the contract made by B, issue being whether B was an employee of defendant or independent contractor.—Porter v. Withers Estate Co., 210 S.W. 109, 201 Mo.App. 27.

68. U.S.—New York Life Ins. Co. v. Rees, C.C.A.Mo., 19 F.2d 781.
Ala.—Tennessee River Nav. Co. v. Walls, 96 So. 266, 209 Ala. 320.
Ark.—Black v. Hogsett, 224 S.W. 439, 145 Ark. 178—Johnson v. Missouri Pac. R. Co., 224 S.W. 427, 144 Ark. 308.
Colo.—Caldwell v. States, 6 P.2d 1, 89 Colo. 529.
Ga.—Mallory v. Clay County, 159 S.E. 578, 173 Ga. 59.
Ill.—Kirchner v. Morrison, 150 N.E. 690, 320 Ill. 236.
Iowa.—Linnemann v. Kirchner, 178 N.W. 899, 189 Iowa 336—Qualley v. Citizens' Sav. Bank, 177 N.W. 539, 188 Iowa 1212.
Mass.—New York Cent. R. Co. v. Central Vermont Ry. Co., 136 N.E. 825, 243 Mass. 56.
Okl.—Hudson v. McGraw-Bearly Lumber Co., 36 P.2d 512, 169 Okl. 160.
Tex.—Schebesta v. Stewart, Civ. App., 37 S.W.2d 781, error dismissed—Rhodes v. Bryson, Civ. App., 272 S.W. 517.
22 C.J. p 516 note 53, p 534 note 59.

Terms of lease

In action by filling station proprietor against oil company on commission contract, proprietor's testimony concerning statements by company's agent that purpose of alleged modifying contract was to give proprietor a little more money was held statement of material fact regarding terms of lease or commission contract, and not mere expression of opinion, as regards right to recover on original contract.—Standard Oil Co. v. Myers, 169 So. 312, 232 Ala. 662.

69. Ala.—Roth Shoe Mfg. Co. v. Kartus, 99 So. 772, 19 Ala.App. 612.

70. Cal.—Ryckman v. Fox Film Corporation, 205 P. 431, 188 Cal. 271.
22 C.J. p 536 note 56, p 639 note 7.

71. S.C.—Providence Mach. Co. v. Browning, 52 S.E. 117, 72 S.C. 424.

72. Ga.—Hawthorne v. Pope, 180 S.E. 920, 51 Ga.App. 498.

73. Ga.—Arkansas Fuel Oil Co. v. Andrews Point Co., 13 S.E.2d 738, 64 Ga.App. 595.
Mass.—Tirrell v. Anderson, 138 N.E. 569, 244 Mass. 200.
Mo.—Globe American Corporation v. Miller, 131 S.W.2d 340, 234 Mo.App. 253—Thos. Cusack Co. v. Lubrite Refining Co., App., 261 S.W. 727.
Tex.—Great Southern Oil & Refining Ass'n v. Cooper, Civ.App., 231 S.W. 157.

74. Iowa.—Jamison v. Weaver, 46 N.W. 996, 81 Iowa 212.

75. Ga.—Sinclair v. Kelly, 177 S.E. 348, 50 Ga.App. 135.

76. Cal.—Taylor's Estate, 28 P. 603, 92 Cal. 564.

77. Tex.—Dunman v. South Texas Lumber Co., Civ.App., 252 S.W. 274.

78. Ala.—Hamilton v. O'Rear, 141 So. 565, 224 Ala. 625.
Ark.—Hinkle v. Lassiter, 218 S.W. 825, 142 Ark. 223.
Ga.—Terrell County v. City of Dawson, 158 S.E. 47, 172 Ga. 403.
Kan.—Finley v. Pierce, 244 P. 2, 120 Kan. 474.
Md.—Eastern Shore Trust Co. v. Lockerman, 129 A. 915, 148 Md. 628.
Tex.—Magee v. Paul, 221 S.W. 254, 110 Tex. 470, answering certified questions, Civ.App., 159 S.W. 325, and answers conformed to, 224 S.W. 1118.
22 C.J. p 534 note 61.

79. Iowa.—Frahm & Dugdale v. Douglas & Thompson, 188 N.W. 805.
S.D.—Ward v. Reisdorf, 226 N.W. 339, 55 S.D. 322.
22 C.J. p 534 note 62.

of property in dispute;[80] that he bought the logs on certain land cut by a purchaser of standing timber, but not removed within the time fixed for the cutting and removal of timbers;[81] that he was ready, willing, and able to comply with the terms of sale of certain property;[82] that he never received or accepted a deed;[83] why delivery of deed was delayed;[84] what were the profits on a sale of realty;[85] whether he knew that an amount due on a mortgage was correct;[86] whether money was lent or paid by one party to a contract to the other;[87] and he may be permitted to answer questions as to others than himself interested in the purchase of property.[88] It has also been held proper for a witness to state that a broker's efforts influenced him to make a purchase;[89] that deeds, notes, and mortgage were delivered to parties to an exchange contract;[90] that the buyer of goods did not consent to the retaking and selling of them for his account by the seller;[91] that plaintiff got the benefit of a loan in payment of a debt;[92] that one signed a note as maker;[93] that credit for the amount sued on was given defendant and not the company of which he was an officer;[94] that a lease of property was renewed;[95] who represented a party to a transaction;[96] and whether an insurance policy was delivered.[97]

Where, however, it is a mere conclusion or opinion of the witness, he will not be permitted to state whether there was a contract;[98] what the contract was;[99] what the intention of the parties was;[1] that a written instrument expresses the intention of the parties;[2] what instructions were given to an agent making a contract;[3] whether there was consideration;[4] that a contract was transferred;[5] or whether the contract was performed[6] or could have been

80. Ala.—Driver v. King, 40 So. 315, 145 Ala. 585.

81. N.C.—Frank Hitch-Lumber Co. v. Brown, 75 S.E. 714, 160 N.C. 281.

82. Iowa.—Fisher v. Skidmore Land Co., 179 N.W. 152, 189 Iowa 833.
Tex.—Lundell v. Allen, Civ.App., 244 S.W. 1098.
22 C.J. p 534 note 65, p 535 note 13.

83. Iowa.—Renshaw v. Dignan, 105 N.W. 209, 128 Iowa 722.

84. Ind.—Kolling v. Martin, App., 33 N.E.2d 808.

85. Ill.—Grossky v. DeVoney, 179 Ill.App. 53.

86. Ala.—Baker v. Lauderdale, 69 So. 299, 14 Ala.App. 244.

87. Ala.—Birmingham Paint & Roofing Co. v. Gillespie, 50 So. 1032, 163 Ala. 408.

88. Ala.—Espalla v. Lyon Co., 146 So. 398, 226 Ala. 235.

89. Colo.—Minneapolis Steel & Machinery Co. v. Yeggy, 194 P. 362, 69 Colo. 313.
Ga.—Wilcox v. Wilcox, 119 S.E. 445, 31 Ga.App. 486.
Iowa.—Thomas v. Wyckoff, 174 N.W. 26, 187 Iowa 148.

90. Iowa.—In re Gensicke's Estate, 237 N.W. 333.

91. Ala.—Fulton Bag & Cotton Mills v. Leder Oil Co., 92 So. 613, 207 Ala. 350.

92. Ala.—Mosely v. Verner, 110 So. 895, 215 Ala. 420.

93. Tenn.—Duncan v. Richards, 7 Tenn.App. 99.

94. Ga.—Simms v. Massengale Advertising Agency, 100 S.E. 235, 24 Ga.App. 182.

95. Ala.—Tillery v. Gulf Refining Co., 126 So. 872, 220 Ala. 577.

96. Mo.—Davis v. Geiger, App., 212 S.W. 384.

97. Ala.—Lincoln Reserve Life Ins. Co. v. Fowler, 132 So. 37, 222 Ala. 348.

98. Cal.—Kerr Gifford & Co. v. American Distilling Co., 95 P.2d 694, 35 Cal.App.2d 390—Evinger v. MacDougall, 82 P.2d 194, 28 Cal. App.2d 175—Ackerman v. Channel Commercial Co., 199 P. 1101, 53 Cal.App. 259.
Iowa.—Sheldon v. Bigelow, 92 N.W. 701, 118 Iowa 586.
Ky.—Gault v. Carpenter, 218 S.W. 254, 187 Ky. 25.
Mo.—Goldsberry v. Farmers Mut. Fire & Lightning Ins. Co. of Polk County, App., 86 S.W.2d 578.
Ohio.—Harding v. Talbott, 11 N.E.2d 266, 57 Ohio App. 21.
R.I.—Di Fonzo v. Notarianni, 200 A. 774, 61 R.I. 287.

99. Ala.—Woody v. Tucker, Willingham & Co., 110 So. 465, 215 Ala. 278—McClellan v. Lyle-Taylor Grain Co., 87 So. 596, 205 Ala. 59.
Cal.—Mayfield v. Fidelity & Casualty Co. of New York, 61 P.2d 83, 16 Cal.App.2d 611—Consolidated Irr. Dist. v. Crawshaw, 20 P.2d 119, 130 Cal.App. 455, followed in 20 P.2d 122, 130 Cal.App. 463—Turner, Kuhn & Fraser v. Jones, 215 P. 1033, 61 Cal.App. 732—Ewing v. Hayward, 195 P. 970, 50 Cal.App. 708.
Colo.—Anderson v. Juanita Coal & Coke Co., 267 P. 400, 83 Colo. 562.
Ga.—Tarbutton v. Duggan, 163 S.E. 298, 45 Ga.App. 31—Brown v. Bell, 142 S.E. 201, 37 Ga.App. 818.
Ill.—Leeper v. Gay, 253 Ill.App. 176.
Iowa.—Baitinger v. Elmore, 227 N. W. 344, 208 Iowa 1342.
Ky.—Caudill v. John P. Gorman Coal Co., 46 S.W.2d 93, 242 Ky. 294.
Mo.—Turpin v. Turpin, App., 128 S. W.2d 279—Bonnett Brown Sales Service v. Klepper, 265 S.W. 993, 218 Mo.App. 597—Bergman v. Service Caster & Truck Co., App., 249 S.W. 973.
N.J.—Borus Waton, Inc. v. Henn, 158 A. 484, 108 N.J.Law 514, 81 A.L.R. 1208.
Va.—Monroe & Monroe v. Cowne, 112 S.E. 848, 133 Va. 181.
W.Va.—Charles Chipman's Sons Co. v. Thomas, Field & Co., 187 S.E. 321, 117 W.Va. 637.

1. Ark.—Harris v. Ashdown Potato Curing Ass'n, 284 S.W. 755, 171 Ark. 399.

2. Tex.—Nesbit v. Richardson, Civ. App., 229 S.W. 595, dismissed for want of jurisdiction.

3. Wis.—Sell v. Mississippi River Logging Co., 60 N.W. 1065, 88 Wis. 581.

4. Cal.—Miller v. Henning, 21 P.2d 231, 133 Cal.App. 410.
Ill.—Moore v. Hahn, 274 Ill.App. 125.
Iowa.—Strand v. Bleakley, 243 N.W. 306, 214 Iowa 1116.
Kan.—Boner v. Texas Co., 57 P.2d 420, 143 Kan. 746.
Tex.—Pool v. Dunnam, Civ.App., 72 S. W.2d 398—Nolan v. Young, Civ. App., 220 S.W. 154.

5. N.Y.—United Press v. A. S. Abell Co., 80 N.Y.S. 454, 79 App.Div. 550, affirmed 70 N.E. 1110, 178 N.Y. 578 —Mardowitz v. Goldberg, 87 N.Y.S. 234.

6. Ala.—Newell Contracting Co. v. Lacy, 155 So. 379, 229 Ala. 208—Gulf Trading Co. v. Radcliff, 114 So. 308, 216 Ala. 645—Lafayette Ry. Co. v. Tucker, 27 So. 447, 124 Ala. 514—Jones v. Ballard, 98 So. 40, 19 Ala.App. 460—Baker v. Green, 84 So. 545, 17 Ala.App. 290.
Mo.—Cantrell v. Burgess, App., 141 S.W.2d 200—Furst v. Scally, App., 280 S.W. 716—Johnston v. Downey, App., 257 S.W. 504.
R.I.—Cooper v. Ceco Mfg. Co., 155 A. 590, 51 R.I. 487.

performed,[7] and the time required for performance.[8] The rule excluding opinions has been applied to exclude evidence as to ability to use wells;[9] the amount due on the contract;[10] approval of construction under contract;[11] beneficial nature of services;[12] breach;[13] capacity of employee suing for wages to manage other employees;[14] inconvenience resulting from water being shut off from a residence in breach of contract;[15] liability;[16] to whom goods were sold;[17] what order defendant's acceptance of goods was based on;[18] whether construction work was done according to the plans and specifications;[19] whether a transaction was a sale;[20] or the unusual character of a purchase.[21] The witness should not be permitted to state to whom money was due under a contract;[22] that plaintiff, seeking commissions as a broker, sold to other persons;[23] that broker was the procuring cause of a sale;[24] that witness had purchasers who were ready, willing, and able to buy;[25] or that an engagement was broken off.[26]

One who merely types an agreement as dictated to him by the parties may not testify as to the intention of the parties.[27]

When such matters constitute the issues involved in the case, it is proper to exclude testimony as to accord and satisfaction.[28]

§ 466. —— Financial Condition

Statements of fact relative to financial condition are admissible but opinions or conclusions are not.

A witness has been permitted to testify as to the financial condition of a person,[29] or to whom credit was given.[30] However, where the testimony of a witness is merely the expression of his opinion, he will not be permitted to testify as to financial condition[31] or insolvency;[32] nor to state to whom credit was given.[33]

§ 467. —— Health and Physical Condition

Ordinary witnesses may testify as to facts relating to health or physical condition of themselves or others, but may not state their opinions or conclusions thereon.

A witness has been permitted to state the prevalence of health or sickness in a neighborhood;[34] the health or condition of another;[35] the appear-

Tex.—Dimmitt Elevator Co. v. Carter, Civ.App., 70 S.W.2d 615.
Va.—Forsberg v. Zehm, 143 S.E. 284, 150 Va. 756, 61 A.L.R. 232.
22 C.J. p 507 note 27.

Performance of work
Question whether installation of lighting plant in buyer's house was done by seller of plant was held objectionable as calling for conclusion. —Vest v. Night Commander Lighting Co., 139 So. 297, 224 Ala. 213, denying certiorari 139 So. 295, 24 Ala.App. 549.

7. Cal.—Mills v. Garner, 259 P. 479, 85 Cal.App. 399—Long Beach Fisheries Co. v. Curtis Corporation, 208 P. 372, 58 Cal.App. 318.

8. Mo.—Baker v. J. W. McMurry Contracting Co., 223 S.W. 45, 282 Mo. 685.

9. N.Y.—Dubois v. Williamson, 87 N.Y.S. 645, 93 App.Div. 361.

10. Ind.—Reitemeier v. Linard, 150 N.E. 797, 90 Ind.App. 363.

11. Mass.—Plunger El. Co. v. Day, 68 N.E. 16, 184 Mass. 130.

12. Ala.—Minniece v. Jeter, 65 Ala. 222.

13. Pa.—Wright v. Barber, 113 A. 200, 270 Pa. 186—Eddyside Co. v. Seibel, 15 A.2d 691, 142 Pa.Super. 174.

14. Ala.—Troy Fertilizer Co. v. Logan, 8 So. 46, 90 Ala. 325.

15. Ala.—Birmingham Water Works Co. v. Ferguson, 51 So. 150, 164 Ala. 494.

16. N.Y.—Sisson v. Yost, 12 N.Y.S. 373.

17. Pa.—Horowitz v. Rosenzweig, 95 Pa.Super. 212.

18. Mo.—Bergman v. Service Caster & Truck Co., App., 249 S.W. 973.

19. Md.—County Com'rs of Harford County v. Bel Air Suburban Improvement Ass'n of Harford County, 107 A. 348, 134 Md. 548.
22 C.J. p 497 note 62.

20. Mo.—Martin v. Connor, 128 S.W.2d 309, 233 Mo.App. 1024.

21. Ill.—Gilbert v. Kuppenheimer, 67 Ill.App. 251.

22. Neb.—Martin v. Connell, 91 N.W. 516, 3 Neb. (Unoff.) 240.

23. Tex.—Kolp v. Brazer, Civ.App., 161 S.W. 899.

24. Cal.—Falkenberg v. Giacomazzi, 200 P. 372, 53 Cal.App. 449.
Ga.—Washington v. Jordan, 109 S.E. 923, 28 Ga.App. 18.
Ill.—See Regelin v. Lothgren, 207 Ill. App. 409.
Mo.—Shortridge v. Raiffeisen, 222 S.W. 1031, 204 Mo.App. 166.
Tex.—McClory v. Schneider, Civ.App., 51 S.W.2d 738, error dismissed—San Antonio Cotton Mills v. De Latte, Civ.App., 43 S.W.2d 486.
22 C.J. p 493 note 16 [b].

25. Cal.—Northwestern Packing Co. v. Whitney, 89 P. 981, 5 Cal.App. 105.

26. Tenn.—Brown v. Odill, 56 S.W. 840, 104 Tenn. 250, 78 Am.S.R. 914, 52 L.R.A. 660.

27. Mich.—Asher v. Linn, 298 N.W. 372, 297 Mich. 699, reversed on other grounds 1 N.W.2d 496.

28. Ala.—J. H. Arnold & Co. v. Gibson, 113 So. 25, 216 Ala. 314.

29. Ala.—Street v. Browning, 87 So. 527, 205 Ala. 110.
Iowa.—Lee v. Kirby, 191 N.W. 865, 195 Iowa 441.
Tex.—Western Indemnity Co. v. Milam, Civ.App., 230 S.W. 825, error refused.
Va.—Budowitz v. Commonwealth, 118 S.E. 238, 136 Va. 227.
Wis.—Neugent Garment Co. v. U. S. Fidelity & Guaranty Co., 243 N.W. 454, 208 Wis. 560.
22 C.J. p 535 note 12.

30. Ga.—Reynolds v. Simpson, 74 Ga. 454.

31. U.S.—Gould v. U. S., Colo., 209 F. 730, 126 C.C.A. 454.
Iowa.—Wolfson v. Allen Bros. Co., 94 N.W. 910, 120 Iowa 455.

32. Kan.—State v. Myers, 38 P. 296, 54 Kan. 206.
Miss.—Freeman v. State, 67 So. 460, 108 Miss. 818.
S.D.—State v. Stevens, 92 N.W. 420, 16 S.D. 309.

33. U.S.—In re Weisenberg, 131 F. 517.
22 C.J. p 497 note 51.

34. Mich.—Evans v. People, 12 Mich. 27.

35. Ala.—Jefferson Standard Life Ins. Co. v. Simpson, 153 So. 198, 228 Ala. 146.
Md.—Lawson v. Ward, 137 A. 479, 153 Md. 93.
Minn.—Fryklind v. Jackson, 252 N.W. 232, 190 Minn. 356.
Mo.—Godfrey v. Kansas City Light & Power Co., 253 S.W. 233, 299 Mo.

ance of a person[36] who had received an injury;[37] the nervous condition of a person before and after an injury, where such statements are a shorthand rendition of the facts;[38] the temperature of a person, taken with an ordinary thermometer;[9] that a person was helpless;[40] that a person claiming to be totally disabled has been under the care of a doctor from a certain date up to the time of the trial;[41] that a person after injury tried to do all the work he could;[42] that certain work exhausted deceased person and required nearly all the strength he had, as bearing on the physical condition of another,[43] and his inability to follow an occupation on account of condition;[44] that a person was delirious at a certain time,[45] and talked in an incoherent manner;[46] that witness, at the time of an assault on another, was choked so as to be unable to speak;[47] and that a person talked as if he had difficulty in breathing.[48] A lay witness may not diagnose disease as an expert, but he may testify to facts within his actual knowledge.[49] A witness has been permitted to testify as to his own health or physical condition, his statements being in some cases regarded as a collective statement of fact; and in this connection he may state his suffering,[50] or nervous condition,[51] injury,[52] prior condition,[53] or recovery;[54] and he may be permitted to state whether, in his crippled condition, he is able to work, the question as to ability calling for a collective fact.[55]

Statements of a witness as to his own health or physical condition are frequently admitted as inferences from sensation discussed infra § 710.

The rule requiring the exclusion of opinions of witnesses has been held to exclude evidence as to health,[56] physical condition,[57] cause of death,[58] ability of a crippled chauffeur to handle a motor car,[59] ability to stand on a wooden leg,[60] that condition was caused by chemicals,[61] or that injuries necessitated an operation.[62]

472—Brown v. Metropolitan Life Ins. Co., App., 151 S.W.2d 499—Osborne v. Wells, App., 211 S.W. 887.
Or.—Shaw v. Pacific Supply Co-op., 113 P.2d 627.
Pa.—Baum v. Metropolitan Life Ins. Co., 19 A.2d 486, 144 Pa.Super. 37.
Tex.—Shuffield v. Taylor, 83 S.W.2d 955, 125 Tex. 601, reversing Taylor v. Shuffield, Civ.App., 52 S.W.2d 788—Edwards v. West Texas Hospital, Civ.App., 89 S.W.2d 801, error dismissed—National Life & Accident Ins. Co. v. Bennett, Civ.App., 73 S.W.2d 676—Stedman Fruit Co. v. Smith, Civ.App., 28 S.W.2d 622, error dismissed—Zetsche v. Lawler, Civ.App., 25 S.W.2d 907—Oilmen's Reciprocal Ass'n v. Hayes, Civ.App., 295 S.W. 675—Galveston, H. & S. A. Ry. Co. v. Ford, Civ.App., 275 S.W. 463.
22 C.J. p 534 note 71.

36. Ga.—Guaranty Life Ins. Co. v. Primo, 140 S.E. 780, 37 Ga.App. 472.

37. Ala.—Pollard v. Rogers, 173 So. 881, 234 Ala. 92.
Ill.—Scofield v. Wabash Ry. Co., 214 Ill.App. 353.
Md.—Zipus v. United Rys. & Electric Co. of Baltimore City, 108 A. 884, 135 Md. 297.
Mass.—Mielke v. Dobrydnio, 138 N.E. 561, 244 Mass. 89.
Or.—Shaw v. Pacific Supply Co-op., 113 P.2d 627.
Tex.—Phœnix Refining Co. v. Walker, Civ.App., 108 S.W.2d 323, error dismissed.
22 C.J. p 534 note 72.

Bruise on body
Ky.—North American Acc. Ins. Co. v. Caskey's Adm'r, 292 S.W. 297, 218 Ky. 750.

38. Ala.—Feore v. Trammel, 102 So. 529, 212 Ala. 325.
Tex.—Republic Underwriters v. Howard, Civ.App., 69 S.W.2d 584, error dismissed.

39. U.S.—Sprencel v. U. S., C.C.A. Tex., 47 F.2d 501.

40. Tex.—San Antonio Public Service Co. v. Mitchell, Civ.App., 238 S.W. 265, error granted.

41. Ga.—Metropolitan Life Ins. Co. v. Saul, 5 S.E.2d 214, 189 Ga. 1.

42. Me.—Johnson v. Bangor Ry. & Electric Co., 131 A. 1, 125 Me. 88.

43. Ind.—Pittsburgh, C., C. & St. L. R. Co. v. Edwards, 129 N.E. 310, 190 Ind. 57.

44. Or.—Tyler v. Moore, 226 P. 443, 111 Or. 499.
22 C.J. p 535 note 31.

45. Iowa.—Dolan v. Henry, 177 N.W. 712, 189 Iowa 104.

46. Iowa.—Dolan v. Henry, supra.

47. Ala.—Hollingsworth v. Corbin, 101 So. 843, 212 Ala. 104.

48. Mich.—Loose v. Deerfield Tp., 153 N.W. 913, 187 Mich. 206.
22 C.J. p 534 note 73.

49. Ky.—Prudential Ins. Co. of America v. Hodge's Adm'x, 22 S.W.2d 435, 232 Ky. 44.
Tex.—Baker v. Adkins, Civ.App., 278 S.W. 272.

50. Ala.—Whistle Bottling Co. v. Searson, 92 So. 657, 207 Ala. 387.

51. Md.—Marine v. Stewart, 168 A. 891, 165 Md. 698.
22 C.J. p 535 note 41.

52. Ind.—Indiana Limestone Co. v. Ridge, 167 N.E. 617, 89 Ind.App. 689.
Mass.—Buckley v. Frankel, 159 N.E. 459, 262 Mass. 13.
Mo.—Hill v. Jackson, 290 S.W. 1012, 220 Mo.App. 1302.
Wash.—Hauer v. Cuschner, 216 P. 833, 125 Wash. 555.

53. Ala.—Ensley Holding Co. v. Kelley, 158 So. 896, 229 Ala. 650.
Cal.—North Elk Oil Co. v. Industrial Accident Commission of California, 254 P. 582, 81 Cal.App. 582.
Ky.—Prudential Ins. Co. of America v. Downs, 64 S.W.2d 902, 251 Ky. 208.
Mo.—Kinchlow v. Kansas City, K. V. & W. Ry. Co., 264 S.W. 416.
Tex.—Texas Employers' Ins. Ass'n v. Perry, Civ.App., 35 S.W.2d 1087, error refused—Central Texas Mut. Life Ass'n v. Parrish, Civ.App., 23 S.W.2d 780—Chicago, R. I. & G. Ry. Co. v. Bernnard, Civ.App., 290 S.W. 292.

54. Tex.—Texas Employers Ins. Ass'n v. Griffis, Civ.App., 141 S.W.2d 687.

55. Ala.—Sloss-Sheffield Steel & Iron Co. v. Underwood, 85 So. 441, 204 Ala. 286.
Tex.—Standard Acc. Ins. Co. v. Williams, Civ.App., 4 S.W.2d 1023, affirmed, Com.App., 14 S.W.2d 1015.

56. Ky.—Louisville & N. R. Co. v. Houck, 151 S.W.2d 432.

57. Ky.—Louisville & N. R. Co. v. Lee, 130 S.W. 813, 140 Ky. 91.
22 C.J. p 495 note 44.

58. Ga.—Johnson v. Ætna Life Ins. Co., 101 S.E. 134, 24 Ga.App. 431.

59. Ala.—Blalack v. Blacksher, 66 So. 863, 11 Ala.App. 545.

60. N.J.—New Jersey Tract. Co. v. Brabban, 32 A. 217, 57 N.J.Law 691.

61. Miss.—F. W. Woolworth Co. v. Haynie, 170 So. 150, 176 Miss. 703.

62. Tex.—Northern Texas Traction

§ 468. —— Indebtedness

Ordinary witnesses may testify as to facts relating to indebtedness, but opinions or conclusions are inadmissible.

A witness may testify as to indebtedness,[63] and, as a collective fact, the amount owed;[64] making of a loan;[65] that a loan was individual;[66] that a loan was made to a wife and not to her husband;[67] that property purchased with borrowed money was pledged to the lender;[68] that a note had not been paid;[69] whether witness knew of the existing indebtedness between plaintiff and defendant, where witness was an incorporator of defendant;[70] that money paid debtor was not a loan, but the purchase price of a refund due from a garnishee paving district;[71] and the alleged debtor may testify that he owes nothing.[72] On the other hand, the rule excluding opinions or conclusions has been held to exclude evidence as to indebtedness,[73] or responsibility therefor,[74] settlement,[75] making of a loan,[76] whether witness had any occasion to borrow money of plaintiff,[77] that a debt was not that of witness, but was a debt of her husband,[78] that checks issued showed deductions for debt claimed to have been paid,[79] that witness owed nothing,[80] or whether a mortgage was given as collateral security.[81] A witness cannot testify as to the existence of an indebtedness which arises, if at all, as the legal effect of a proved or admitted state of facts.[82]

§ 469. —— Ownership and Possession of Property

The general rules as to the admission of statements of

Co. v. Gilbert, Civ.App., 282 S.W. 850.

63. Ala.—Shrimpton v. Brice, 20 So. 10, 109 Ala. 640.
N.J.—Edward Thompson Co. v. Weeks, 158 A. 429, 10 N.J.Misc. 174, affirmed 164 A. 14, 110 N.J.Law 22.
22 C.J. p 638 note 2, p 534 note 74.
"Indebtedness is not mere opinion, but fact capable of being within personal knowledge, even though it may depend upon or be mixed with law. . . . Where indebtedness or some similar concept constitutes the vital issue, a witness commonly is required to state the basic facts rather than the ultimate conclusion." —Kulchinsky v. Segal, 30 N.E.2d 830, 831, 307 Mass. 571.

Assumption of debt
In action for debt allegedly assumed by defendant, original debtor's testimony that defendant agreed to assume debt is not objectionable as conclusion.—Sloan Lumber Co. v. Southern Ornamental Iron Works, Tex.Civ.App., 66 S.W.2d 722.

64. Ala.—Newell Contracting Co. v. Wheeler, 135 So. 479, 223 Ala. 323—Acme Machine & Welding Co. v. Home Industry Iron Works, 135 So. 183, 223 Ala. 248—Cumbee v. Eady-Baker Grocery Co., 100 So. 336, 211 Ala. 316—Commonwealth Life Ins. Co. v. Reilly, 94 So. 294, 208 Ala. 313.
Tex.—Barron G. Collier, Inc., of Texas v. Davidson-Levine, Civ.App., 294 S.W. 223.

Whether payments made
A question to a plaintiff, whether he had received any other payments "on account of this work" for which the claim is made, is not objectionable on the ground that a legal question is involved, where it is made clear that the question is intended to ask nothing more than whether any other payments were made.—Henderson v. Murphy, 47 App.D.C. 558.

65. Ala.—Cole v. Varner, 31 Ala. 244.

66. N.Y.—Davis v. Peck, 54 Barb. 425.

67. Ga.—Williamson v. Walker, 1 S. E.2d 718, 187 Ga. 603.

68. Md.—Winakur v. Sapourn, 145 A. 342, 156 Md. 662.

69. N.D.—Lloyd Mortg. Co. v. Davis, 199 N.W. 869, 51 N.D. 336, 36 A.L.R. 465.

70. Ala.—Newell Contracting Co. v. Wheeler, 135 So. 479, 223 Ala. 323.

71. Ark.—City Nat. Bank v. Friedman, 62 S.W.2d 28, 187 Ark. 854.

72. Ala.—Moore v. Oneonta Motor Co., 137 So. 301, 223 Ala. 510.
Ga.—Malleable Iron Range Co. v. Caffey, 13 S.E.2d 722, 64 Ga.App. 497.
Mo.—Algeo v. Stewart, 7 S.W.2d 470, 222 Mo.App. 1003.

Correctness of account
Question whether certain account was correct was not objectionable.—Birmingham News Co. v. Moseley, 141 So. 689, 225 Ala. 45.

73. N.D.—Great Western L. Assur. Co. v. Shumway, 141 N.W. 479, 25 N.D. 268.

Increase of debt
Conclusions of witnesses should be disregarded in determining whether bank's debt to depositor was increased by mere deposit of checks for collection.—In re Kountze Bros., D. C.N.Y., 4 F.Supp. 679.

Opinion as to balance due
In an action for balance of purchase price of lumber, in which the defense of settlement of a disputed balance was interposed, the question asked defendant by his counsel, "You disputed over it?" (the balance), called for a conclusion.—East Arkansas Lumber Co. v. Kelley, Mo. App., 247 S.W. 478.

Questions as to entries on books
In proceeding on accounting of liquidator of insolvent trustee, wherein liquidator claimed lien for trustee for advancements, interrogation of former assistant trust officer of trustee as to whether trustee carried any claim, account, or credit against trust on its books after accepting note and collateral for advancements was improper, where entry was made showing that advancements were secured by trust agreement and assignment and note given for amount of advancements, as asking witness to testify as to a matter for the court.—Bessel v. Department of Financial Institutions, 11 N.E.2d 683, 213 Ind. 446.

74. Cal.—Spencer v. Associated Rock Co., 33 P.2d 687, 139 Cal.App. 316—McClenahan v. Keyes, 224 P. 241, 65 Cal.App. 467.

75. Iowa.—Schmidt v. Schumacher, 179 N.W. 846, 190 Iowa 1.

76. Ala.—Saltmarsh v. Bower, 34 Ala. 613.
Cal.—Spreckels v. Butler, 61 P. 378, 128 Cal. 645.

77. Mo.—Massman v. Muehlebach, 95 S.W.2d 808, 231 Mo.App. 72.

78. Ga.—Haygood v. E. B. Clark Co., 107 S.E. 379, 27 Ga.App. 101.

79. Ga.—Jones v. Berry, 151 S.E. 538, 40 Ga.App. 813.

80. Ala.—Scharnagel v. Furst, 112 So. 102, 215 Ala. 528.
Mo.—Dorroh v. Wall, App., 297 S.W. 705.

81. S.D.—State Bank of Carpenter v. Gross, 210 N.W. 103, 50 S.D. 338.

82. Ala.—Western Union Tel. Co. v. Merrill, 39 So. 121, 144 Ala. 618, 113 Am.S.R. 66.
Conclusions of law generally see infra § 731.

facts and the exclusion of opinions or conclusions apply to the testimony of ordinary witnesses relative to the ownership or possession of property.

A witness has been permitted to testify that he was the owner of certain property[83] and to answer a question as to who was the owner of property,[84] either real[85] or personal;[86] as to exercise of ownership;[87] who claimed certain land;[88] that a deed covered land in dispute;[89] that a deed conveyed land to witness by mistake;[90] that a deed does not include certain land;[91] or that plaintiff told the witness that a deed was to remain in possession of plaintiff for life so that plaintiff could benefit from the rents while living;[92] and to state that the father of the witness had a survey made and his property subdivided, and that the witness took money from his father instead of a portion of the subdivided land in dispute.[93] On the other hand, however, a witness cannot testify as to his opinion or impression as to the ownership of property[94] and the

83. Ala.—Milner v. J. H. Lewis & Son, 104 So. 444, 20 Ala. 598.
Cal.—St. Clair v. Joos, 265 P. 968, 90 Cal.App. 311.
Okl.—DeMatte v. Clark, 50 P.2d 342, 174 Okl. 297.
S.D.—Bank of Dallas v. Wright, 196 N.W. 300, 47 S.D. 88.
22 C.J. p 534 note 76.

84. Ala.—Henry v. White, 140 So. 391, 224 Ala. 427.
Cal.—Skinner v. City of Los Angeles, 54 P.2d 446, 5 Cal.2d 317—Diamond v. Grath, App., 116 P.2d 114—Strauss v. Dubuque Fire & Marine Ins. Co. of Dubuque, Iowa, 22 P.2d 582, 132 Cal.App. 283.
Ga.—McCrea v. Georgia Power Co., 1 S.E.2d 664, 187 Ga. 708—Garrick v. Tidwell, 106 S.E. 551, 151 Ga. 294.
Mo.—In re Martin's Estate, 266 S.W. 750, 219 Mo.App. 51—Baird v. Wilks, App., 218 S.W. 918.
N.C.—Herring v. Ipock, 121 S.E. 758, 187 N.C. 459.
Okl.—Mitchell v. McCollister, 220 P. 631, 93 Okl. 203.
Or.—Ellerath Steel & Iron Co. v. Cornfoot, 240 P. 229, 116 Or. 83.
S.D.—First Nat. Bank v. Veglahn, 231 N.W. 601, 57 S.D. 127.
Tex.—Martinez v. Bruni, Civ.App., 216 S.W. 655, modified on other grounds, Com.App., 235 S.W. 549.
Wyo.—Chapman v. First Nat. Bank of Cody, 181 P. 360, 26 Wyo. 138, rehearing denied 182 P. 91, 26 Wyo. 138.
22 C.J. p 534 note 77, p 638 note 3.

Ownership of business
U.S.—Moyer v. Ætna Life Ins. Co., D.C.Pa., 39 F.Supp. 725.

Timber rights
In an action for title to timber and for damages for timber cut, a witness' testimony as to his father's cutting and disposing of growing timber was not inadmissible as conclusion of witness, notwithstanding witness did not live at home, where witness frequently visited home and was familiar with father's affairs.—Dunn v. Peters, Tex.Civ.App., 126 S.W.2d 997.

Claim of ownership
Tex.—American Exchange Nat. Bank v. Jeffries, Civ.App., 36 S.W.2d 558, error dismissed.

85. N.Y.—De Wolf v. Williams, 69 N.Y. 621, followed in Parmele Co. v. Haas, 64 N.E. 440, 171 N.Y. 579.

86. Ala.—Wolff v. Zurga, 150 So. 144, 227 Ala. 370—Gaston v. McDonald, 124 So. 208, 220 Ala. 155.
Conn.—Potts v. Buckley, 115 A. 726, 729, 97 Conn. 174, citing **Corpus Juris.**
Del.—State v. Stidham, 110 A. 680, 1 W.W.Harr. 8.
Fla.—Bourne v. State Bank of Orlando & Trust Co., 142 So. 810, 816, 106 Fla. 46, citing **Corpus Juris.**
Ga.—Downs v. Brandon, 174 S.E. 647, 49 Ga.App. 198.
Iowa.—Ballard v. Ballard, 285 N.W. 165, 226 Iowa 699.
N.Y.—Gratwick v. Smith, 195 N.Y.S. 568, 202 App.Div. 600.
Okl.—DeMatte v. Clark, 50 P.2d 342, 174 Okl. 297—Mitchell v. McCollister, 220 P. 631, 93 Okl. 203.
22 C.J. p 534 note 79.

Commercial paper
Ill.—Feulner v. Gillam, 216 Ill.App. 85.

87. Cal.—Bunting v. Salz, 22 P. 1132, 3 Cal.Unrep.Cas. 193.

88. Tex.—Field v. Field, 87 S.W. 726, 39 Tex.Civ.App. 1.

89. N.C.—McQueen v. Graham, 111 S.E. 860, 183 N.C. 491.

90. Ala.—Tennessee Valley Bank v. Valley View Farm, 97 So. 62, 210 Ala. 123.

91. Ala.—Donehoo v. Johnson, 24 So. 888, 120 Ala. 438.

92. N.M.—Evans v. Evans, 101 P.2d 179, 44 N.M. 223.

93. Tex.—Texas Co. v. Andrade, Civ. App., 52 S.W.2d 1063, affirmed Carter v. Texas Co., 87 S.W.2d 1079, 126 Tex. 388.

94. U.S.—Fox v. Spiegel, D.C.Conn., 50 F.2d 195.
Ala.—Fidelity & Deposit Co. of Maryland v. Adkins, 130 So. 552, 222 Ala. 17—Aiken v. McMillan, 106 So. 150, 213 Ala. 494—Copeland v. Benson Hardware Co., 131 So. 1, 24 Ala. App. 127.
Cal.—Fesler v. Rawlins, App., 111 P.2d 380—Simons v. Inyo Cerro Gordo Mining & Power Co., 192 P. 144, 48 Cal.App. 524.
Ga.—Nalley Land & Investment Co. v. Merchants & Planters Bank, 199 S.E. 815, 187 Ga. 142—Ewing v. Tanner, 193 S.E. 243, 184 Ga. 773—Worthy v. Williams, 12 S.E.2d 139, 64 Ga.App. 47—Downs v. Brandon, 174 S.E. 647, 49 Ga.App. 198.
Idaho.—Swager v. Peterson, 291 P. 1049, 49 Idaho 785.
Ill.—Feulner v. Gillam, 216 Ill.App. 85.
Kan.—Toelle v. Sells-Floto Shows Co., 207 P. 849, 111 Kan. 562.
Minn.—Brodsky v. Brodsky, 215 N.W. 181, 172 Minn. 250.
Mo.—Banty v. City of Sedalia, App., 120 S.W.2d 59—Cox v. McKinney, 258 S.W. 445, 212 Mo.App. 522.
N.J.—Helstowski v. Greenberg, 126 A. 615, 2 N.J.Misc. 1094, affirmed 130 A. 918, 101 N.J.Law 560.
N.C.—Denton v. Shenandoah Milling Co., 170 S.E. 107, 205 N.C. 77.
Or.—Klingback v. Mendiola, 6 P.2d 237, 138 Or. 234.
Tex.—Magee v. Paul, 221 S.W. 254, 110 Tex. 470, answering certified questions, Civ.App., 159 S.W. 325, and answers conformed to, Civ.App., 221 S.W. 1118—Rutledge v. Mitchell, Civ.App., 91 S.W.2d 1135, error dismissed—Commercial Standard Ins. Co. v. Bessent, Civ. App., 37 S.W.2d 789, error dismissed—Dominguez v. Garcia, Civ. App., 36 S.W.2d 299, affirmed, Com. App., 53 S.W.2d 459—Kitchen v. Lloyd, Civ.App., 14 S.W.2d 335—Reynolds v. Reynolds, Civ.App., 224 S.W. 382—Frost v. Smith, Civ. App., 207 S.W. 392, reversed on other grounds, Com.App., Smith v. Frost, 254 S.W. 926.
Vt.—Cameron v. Blanchard, 176 A. 290, 107 Vt. 51—Ravine House Co. v. Bradstreet, 148 A. 481, 102 Vt. 370—Dutchburn v. Dutchburn, 115 A. 228, 95 Vt. 417.
22 C.J. p 534 note 80, p 495 note 42.

Ownership of personalty generally
Mass.—Chase v. New York Cent. R. Co., 94 N.E. 377, 208 Mass. 137.

Ownership of money
Iowa.—Rice v. Armour & Co., 187 N.W. 588, 194 Iowa 144.
22 C.J. p 495 note 41.

Ownership of dog
Mass.—O'Donnell v. Pollock, 49 N.E. 745, 170 Mass. 441.

exercise thereof;[95] or that others so acted as to indicate their claim to land;[96] and cannot state to the jury his opinion or conclusion that he has a valid title to land,[97] or that he is the owner of land;[98] or whether a certain tax deed was made in pursuance of an order of court.[99] One cannot testify that he is the owner of property where his ownership is the issue of the case.[1] Of course a witness cannot testify as to ownership where he has not the necessary knowledge.[2]

Possession. While a witness has been permitted to state who was in possession of property,[3] or that at no time during a period of years were there no tenants of plaintiff living within the boundaries of land in dispute,[4] it has also been held that testimony as to possession should be rejected where it is a conclusion,[5] or one of the ultimate facts for the jury to determine;[6] and a court has refused to permit a witness to testify as to exclusive possession of land,[7] notorious character of possession,[8] that he moved on land in pursuance of a gift,[9] or that a grantor had control of her property up to the time of her death.[10]

§ 470. —— Railroads and Street Railroads

Ordinary witnesses may testify to matters concerning railroads or street railroads which are within the range of common experience or knowledge, but opinions or conclusions on other matters must be rejected.

In cases involving railroads or street railroads the inference of the ordinary unskilled observer concerning a matter within the range of common experience is admissible[11] in connection with facts observed.[12] A witness has been permitted to state who was in charge of work in a railroad yard;[13] the schedule of trains, his knowledge being derived from the official time card furnished the public by the railroad;[14] that locomotives throw out more or less sparks;[15] that he had seen locomotives of a certain railroad emit sparks of unusual size or in unusual quantities;[16] that a railroad engine was throwing more sparks at a particular time than were usually thrown by other engines passing in that di-

Ownership of returned property
Ind.—Wilson v. Reynolds, 13 N.E.2d 218, 213 Ind. 436.

95. N.D.—Red River Valley Nat. Bank v. Monson, 92 N.W. 807, 11 N.D. 423.

96. Tex.—Hintze v. Krabbenschmidt, Civ.App., 44 S.W. 38.

97. W.Va.—Parks v. Morris, 59 S. E. 753, 63 W.Va. 51.

98. S.D.—Kjolseth v. Kjolseth, 129 N.W. 752, 27 S.D. 80.

99. Ga.—Thompson v. Tasker, 67 S. E. 446, 134 Ga. 80.

1. Ga.—Downs v. Brandon, 174 S.E. 647, 49 Ga.App. 198.
Idaho.—Servel v. Corbett, 290 P. 200, 49 Idaho 536.

2. Vt.—H. C. Jaquith Co. v. Shumway, 69 A. 157, 80 Vt. 556.
22 C.J. p 534 note 83.

3. U.S.—Virginia-Carolina Tie & Wood Co. v. Dunbar, C.C.A.N.C., 106 F.2d 383.
Ala.—McDowell v. Hutto, 135 So. 322, 223 Ala. 307—Louis Werner Sawmill Co. v. Vinson & Bolton, 124 So. 420, 220 Ala. 210—Gaston v. McDonald, 124 So. 208, 220 Ala. 155—Prescoat v. Hester, 118 So. 585, 218 Ala. 348—Jackson v. O'Neal, 118 So. 552, 218 Ala. 328—Washington v. Spriggs, 105 So. 811, 213 Ala. 622—Burkett v. Newell, 101 So. 836, 212 Ala. 183—Davis v. Reed, 100 So. 226, 211 Ala. 207—Hood v. Johnston, 99 So. 75, 210 Ala. 617—Stephens v. Bowen, 96 So. 331, 209 Ala. 417—McMillan v. Aiken, 88 So. 135, 205 Ala. 35—Gerald v. Hayes, 87 So. 351, 205 Ala. 105—Acree v. Shaw, 80 So. 817, 202 Ala. 433.
Ga.—Odum v. McArthur, 139 S.E. 870, 165 Ga. 103—Rollins v. Cox, 138 S.E. 76, 164 Ga. 231.
Tenn.—Westmoreland v. Farmer, 7 Tenn.App. 385.
Tex.—Adams v. Brown, Civ.App., 113 S.W.2d 310—Niles v. Houston Oil Co. of Texas, Civ.App., 288 S.W. 614—Houston Oil Co. of Texas v. Ainsworth, Civ.App., 245 S.W. 760.
22 C.J. p 534 note 84, p 638 note 4.

Possession of executor or administrator
Testimony by an administratrix that the inventory filed included all of the property of deceased that she had in hand, or that she then knew or could then recollect, and that she had not disposed of any of the property of the estate and had the same in her possession subject to distribution, is not incompetent as being a statement of opinion or conclusion.—Willoughby v. Willoughby, 82 So. 168, 203 Ala. 138.

Value of testimony
It is extremely doubtful whether testimony in hæc verba that a party was in possession of lands is of any weight; possession may often be a matter of opinion.—Horton v. Smith-Richardson Inv. Co., 87 So. 905, 81 Fla. 255.

4. Ky.—New York-Kentucky Oil & Gas Co. v. Miller, 220 S.W. 535, 187 Ky. 742.

5. Ala.—Smith v. East Alabama Nat. Bank, 128 So. 600, 221 Ala. 322.
Ga.—Mitchell v. Gunter, 152 S.E. 466, 170 Ga. 135.
Mo.—Lumsden v. Howard, 236 S.W. 420, 210 Mo.App. 645.
N.M.—Romero v. Herrera, 228 P. 604, 30 N.M. 139.
Or.—Wheeler Lumber, Bridge & Supply Co. v. Shelton, 31 P.2d 163, 146 Or. 550, denying rehearing 29 P.2d 1013, 146 Or. 559.
Tex.—Reed v. James, Civ.App., 113 S.W.2d 580, error dismissed.
22 C.J. p 534 note 85, p 495 note 46.

6. Neb.—Carnahan v. Cummings, 180 N.W. 558, 105 Neb. 337, 12 A.L.R. 1455.

7. Tex.—Dunn v. Land, Civ.App., 193 S.W. 698.

8. Ga.—Acme Brewing Co. v. Central R., etc., Co., 42 S.E. 8, 115 Ga. 494.

9. Ga.—Allen v. Allen, 106 S.E. 81, 151 Ga. 278.

10. Tex.—Hambleton v. Southwest Texas Baptist Hospital, Civ.App., 172 S.W. 574.

11. Ark.—St. Louis Southwestern R. Co. v. Jackson, 124 S.W. 241, 93 Ark. 119.
22 C.J. p 688 note 15—52 C.J. p 116 note 28.

12. Iowa.—Rietveld v. Wabash R. Co., 105 N.W. 515, 129 Iowa 249.
22 C.J. p 689 note 16.

13. Ill.—Offner v. Chicago & E. R. Co., 174 Ill.App. 82.

14. Tex.—Western Union Tel. Co. v. O'Fiel, 104 S.W. 406, 47 Tex.Civ. App. 40.

15. Tex.—Texas & N. O. R. Co. v. Cook, Civ.App., 167 S.W. 158.

16. Ala.—Birmingham R., Light & Power Co. v. Martin, 42 So. 618, 148 Ala. 8.

rection;[17] that there was an old break in a car wheel which he examined immediately after the derailment of a train;[18] the mechanical condition of a coupler;[19] that a train was under control;[20] that a train did not slacken speed;[21] that he had seen trains of the same length, under similar circumstances and conditions, stop in a train's length;[22] that certain work was done by witness for the accommodation of a railroad;[23] that a certain place had not been used for several years for switching of cars;[24] that a jar[25] or a jerk of a railroad train[26] was unusual or unusually hard;[27] whether the view of a railroad track was obstructed;[28] how far an obstruction on a railroad track could be seen;[29] whether many or few people used a particular railroad crossing;[30] whether he looked and listened "carefully" before traversing a railroad crossing;[31] that the flagman at a crossing signaled him to go ahead;[32] that there was nothing to prevent a locomotive engineer from seeing another locomotive approaching his own;[33] whether he stepped or fell from a car;[34] whether there was room for a person to sit on the frame of a car without sitting on a plank from which he fell and was killed;[35] experience or inexperience of an employee,[36] unless the answer of the witness is merely an expression of opinion;[37] that the noise and motion of a street car were unusual;[38] that a person could not see a car while at a certain point;[39] whether the horses attached to a street car were going at full speed;[40] that a car did not stop long enough for a person to alight;[41] that a street car started with a jerk or jolt,[42] was stopped suddenly and started with a jerk,[43] or that a sudden jerk was not enough to cause a fall;[44] that an individual was not thrown from a street car by any jerking in its movement;[45] that a stop was made in a usual manner;[46] how rules as to assistance of passengers were enforced;[47] and that a car was so crowded that it was impossible for him to get between the seats.[48] On the other hand, where the matter is not of common knowledge, the statement of the ordinary observer is rejected,[49] and the rule requiring the exclusion of opinions or conclusions has been applied to exclude evidence as to manner of operation,[50] safety of manner of discharging passengers,[51] sudden jerks or jolts,[52] manner of shipment of animals,[53] duties of a brakeman[54] or other employees,[55] qualifications

17. Ala.—Louisville & N. R. Co. v. Steverson, 124 So. 205, 220 Ala. 158.
22 C.J. p 535 note 91.

18. Ohio.—Cleveland & South-Western Tract. Co. v. Ward, 27 Ohio Cir.Ct. 761.

19. Va.—Chesapeake & O. Ry. Co. v. Arrington, 101 S.E. 415, 126 Va. 194.

20. Tex.—Texas & N. O. R. Co. v. Mortensen, 66 S.W. 99, 27 Tex.Civ. App. 106.

21. Ala.—Alabama Great Southern R. Co. v. Mims, 92 So. 548, 207 Ala. 331.

22. Mo.—Murray v. Hines, App., 227 S.W. 860.

23. Ala.—Atlantic Coast Line R. Co. v. Carroll, 94 So. 820, 208 Ala. 361.

24. Tex.—Ft. Worth & D. C. R. Co. v. Decatur Cotton Seed Oil Co., Civ.App., 193 S.W. 392.

25. Mo.—Guffey v. Hannibal & St. J. R. Co., 53 Mo.App. 462.

26. N.Y.—Fellows v. Interborough Rapid Transit Co., 190 N.Y.S. 547, 117 Misc. 64.
22 C.J. p 535 note 96.

27. N.Y.—Fellows v. Interborough Rapid Transit Co., supra.
22 C.J. p 535 note 97.

Negative testimony
In passenger's action for injuries, testimony of engineer that, if there had been an unusual jar or jerk, he would have remembered it, was admissible for what it was worth, as it was not a mere conclusion, but a statement of positive fact.—Jones v. Western & A. R. Co., 99 S.E. 388, 23 Ga.App. 725.

28. Iowa.—Rietveld v. Wabash R. Co., 105 N.W. 515, 129 Iowa 249.

29. Ala.—Louisville & N. Co. v. Fitzgerald, 49 So. 860, 161 Ala. 397.

30. Ala.—Southern R. Co. v. Weatherlow, 44 So. 1019, 153 Ala. 171.

31. Ala.—Southern R. Co. v. Stollenwerck, 52 So. 204, 166 Ala. 556.

32. Ala.—Cunningham Hardware Co. v. Louisville & N. R. Co., 96 So. 358, 209 Ala. 327.

33. Ind.—Southern Indiana R. Co. v. Osborn, 78 N.E. 248, 79 N.E. 1067, 39 Ind.App. 333.

34. Ala.—Selma St. & S. R. Co. v. Campbell, 48 So. 378, 148 Ala. 438.

35. Tex.—Beaumont Tract. Co. v. Dilworth, Civ.App., 94 S.W. 352.

36. Ala.—Bice v. Steverson, 88 So. 753, 205 Ala. 576.

37. Ala.—Bice v. Steverson, supra.

38. N.Y.—Beers v. West Side R. Co., 91 N.Y.S. 957, 101 App.Div. 308.

39. Ala.—Wallace v. North Alabama Tract. Co., 40 So. 89, 145 Ala. 682.

40. Tex.—Beaumont Tract. Co. v. Dilworth, Civ.App., 94 S.W. 352.

41. Ala.—Birmingham R., Light & Power Co. v. Glenn, 60 So. 111, 179 Ala. 263.

42. Mo.—Beckner v. Kansas City Rys. Co., App., 232 S.W. 745—Fletcher v. Kansas City Rys. Co., App., 221 S.W. 1070.

43. Mo.—Crenshaw v. St. Louis Public Service Co., App., 52 S.W.2d 1035.

44. Mo.—Laycock v. United Rys. Co. of St. Louis, 235 S.W. 91, 290 Mo. 344, answering certified questions, App., 227 S.W. 883.

45. Ala.—Smith v. Birmingham R., Light & Power Co., 41 So. 307, 147 Ala. 702.

46. N.Y.—Lombardi v. New York State Rys., 231 N.Y.S. 306, 224 App. Div. 438.

47. Tex.—San Antonio Tract. Co. v. Higdon, Civ.App., 123 S.W. 732.

48. Ind.—Indianapolis St. R. Co. v. Haverstick, 74 N.E. 34, 35 Ind.App. 281, 111 Am.S.R. 163.

49. Md.—Capital Tract. Co. v. Contner, 87 A. 904, 120 Md. 78.
22 C.J. p 689 note 17.

50. Ala.—Bradford v. Birmingham Electric Co., 149 So. 729, 227 Ala. 285.

51. Utah.—Barlow v. Salt Lake & U. R. Co., 194 P. 665, 57 Utah 312.

52. Ga.—Cooper v. Georgia Power Co., 162 S.E. 302, 44 Ga.App. 581.

53. Iowa.—Buck v. American Railway Express Co., 192 N.W. 277, 195 Iowa 1024.

54. Ind.—Tarnowski v. Lake Shore & M. S. R. Co., 104 N.E. 16, 181 Ind. 202.

55. Tex.—St. Louis, S. F. & T. Ry. Co. v. Williams, Civ.App., 104 S.W. 2d 103, error dismissed.

of a baggage master,[56] or that work of a railroad employee was in interstate commerce.[57]

§ 471. —— Other Matters

a. In general
b. Cause and effect
c. Conduct
d. Fraud, mistake, duress, or undue influence
e. Intent, motive, or purpose
f. Mental condition; mental state
g. Nature or character
h. Necessity, propriety, or sufficiency
i. Payment
j. Physical facts or conditions
k. Probability or possibility
l. Relationship
m. Time, place, quality, quantity, and speed
n. Motor vehicle cases
o. Miscellaneous

a. In General

The general rules governing the admission or exclusion of testimony of ordinary witnesses have been applied in a wide variety of cases other than those considered supra §§ 463–470.

Examine Pocket Parts for later cases.

b. Cause and Effect

The general rules as to admission or exclusion of testimony of ordinary witnesses have been applied to testimony of such witnesses relative to cause and effect.

Witnesses have been permitted to testify that a particular effect was the result of a certain cause,[58] and to testify as to the effect of embankments[59] or of polluted water on land and crops;[60] effect of nuisance;[61] that plaintiff was forced to give up place of residence as a result of a false charge and arrest for theft;[62] or that witness's heel caught in a hole in the floor and witness stumbled and fell and was injured.[63] Testimony which is not a statement of fact is, of course, not admissible, and this rule operates to exclude opinion evidence as to actual operation of any cause for which liability is claimed;[64] cause of a physical condition[65] or of a particular occurrence or result,[66] as for instance abortion,[67] accident,[68] asphyxiation,[69] collapse of bridge,[70] collision,[71] conduct,[72] damage,[73] death,[74] derailment,[75] explosion,[76] fire,[77] loss of health,[78] obstructions,[79] physical injury,[80] and, likewise, of a

56. Iowa.—Moore v. Chicago, B. & Q. R. Co., 22 N.W. 650, 65 Iowa 505, 54 Am.R. 26.

57. Mo.—Clevinger v. St. Louis-San Francisco Ry. Co., 109 S.W.2d 369, 341 Mo. 797, certiorari denied 58 S.Ct. 366, 302 U.S. 760, 82 L.Ed. 588.

58. Mass.—Crafts v. McCobb, 21 N.E.2d 226, 303 Mass. 172.

59. Iowa.—Smalley v. Iowa Pac. R. Co., 36 Iowa 571.

60. Mont.—Watson v. Colusa-Parrot Mining & Smelting Co., 79 P. 14, 31 Mont. 513.

61. Mass.—Fay v. Whitman, 100 Mass. 76.
46 C.J. p 811 notes 57, 58.

62. Tex.—Underwood Typewriter Co. v. Shouldis, Civ.App., 253 S.W. 935.

63. Mo.—Long v. F. W. Woolworth Co., 109 S.W.2d 85, 232 Mo.App. 417.

64. Mo.—Miller v. Great American Ins. Co. of New York, 61 S.W.2d 205.
22 C.J. p 493 note 4.

65. Ill.—Chicago v. Powers, 117 Ill. App. 453.
Mo.—Sutter v. Kansas City, 119 S.W. 1084, 138 Mo.App. 105.

66. Ala.—Lacey v. Deaton, 153 So. 650, 228 Ala. 368—Prudential Ins. Co. v. Calvin, 148 So. 837, 227 Ala. 146—Alabama Power Co. v. Talmadge, 93 So. 548, 207 Ala. 86, error dismissed 42 S.Ct. 463, 259 U.S. 575, 66 L.Ed. 1071—Louisville & N. R. Co. v. Abercrombie, 84 So. 423, 17 Ala.App. 233.
Ill.—Clark v. Public Service Co., 278 Ill.App. 426.
Iowa.—Rauch v. Dengle, 218 N.W. 470.
Kan.—Hunter v. Joplin & P. Ry. Co., 197 P. 1092, 109 Kan. 169.
N.C.—Hill & Brooks v. Louisville & N. R. Co., 119 S.E. 884, 186 N.C. 475.
Tenn.—De Kalb County v. Tennessee Electric Power Co., 67 S.W.2d 555, 17 Tenn.App. 343.
22 C.J. p 493 note 16.

67. Tex.—Stanley v. State, 73 S.W. 400, 44 Tex.Cr. 606.

68. Ala.—Central of Georgia Ry. Co. v. Robertson, 91 So. 470, 206 Ala. 578—Standard Cooperage Co. v. Dearman, 86 So. 537, 204 Ala. 553.
Mo.—Denkman v. Prudential Fixture Co., 289 S.W. 591—Clear v. Van Blarcum, App., 241 S.W. 81.
22 C.J. p 493 note 18.

69. N.Y.—Stenger v. Buffalo Union Furnace Co., 95 N.Y.S. 793, 109 App.Div. 183.

70. Iowa.—Hughes v. Muscatine County, 44 Iowa 672.

71. Ala.—Weaver v. Alabama Coal Min. Co., 35 Ala. 176.
Mass.—Smith v. Holyoke St. R. Co., 96 N.E. 135, 210 Mass. 202.

72. Ill.—Hoehn v. Chicago, P. & St. L. R. Co., 38 N.E. 549, 152 Ill. 223.

73. Tex.—Pegnes Mercantile Co. v. Brown, Civ.App., 145 S.W. 280.

74. Iowa.—Polk County v. Owen, 174 N.W. 99, 187 Iowa 220.
S.C.—Sanders v. Commonwealth Life Ins. Co. of Kentucky, 132 S.E. 828, 134 S.C. 485.
22 C.J. p 493 note 23.

75. Tex.—Hines v. Collins, Civ.App., 227 S.W. 332.
22 C.J. p 493 note 24.

76. Ill.—National Gas Light & Fuel Co. v. Miethke, 35 Ill.App. 629.

77. Iowa.—Walters v. Iowa Electric Co., 212 N.W. 886, 203 Iowa 467.
Ky.—King v. Ohio Valley Fire & Marine Ins. Co., 280 S.W. 127, 212 Ky. 770.
Mo.—Rodefer v. Grange Mut. Ins. Co. of Lewis County, App., 91 S.W.2d 112—Miller v. Great American Ins. Co of New York, App., 61 S.W.2d 205—Clark v. St. Louis S. F. Ry. Co., App., 4 S.W.2d 843.
22 C.J. p 493 note 26.

78. Tex.—St. Louis, B. & M. Ry. Co. v. Griffin, Civ.App., 56 S.W.2d 482.
Utah.—Thomas v. Frost, 27 P.2d 459, 83 Utah 207.

79. Ala.—Cane Creek Coal Mining Co. v. Braden, 144 So. 143, 25 Ala. App. 256.
Mont.—Wibaux Realty Co. v. Northern Pac. Ry. Co., 54 P.2d 1175, 101 Mont. 126.

80. Ga.—Harley v. Life & Casualty Ins. Co. of Tennessee, 149 S.E. 76, 40 Ga.App. 171.
Kan.—Hunter v. Joplin & P. Ry. Co., 197 P. 1092, 109 Kan. 169.
22 C.J. p 493 note 27.

particular occurrence or result as sleeplessness,[81] or wounds;[82] that one fire started another;[83] whether a train traveling at a given momentum could strike a man without inflicting more than a certain amount of visible injury;[84] result of delay in delivery of goods;[85] effect of alcoholic drunkenness;[86] of alteration of building;[87] or the effect of drugs on a person accused of crime,[88] of fire,[89] of fog on lights,[90] of fumes on vegetation,[91] of a garnishment on reputation,[92] of a libelous publication,[93] of light at certain places,[94] of maintenance of picture show,[95] of painting as covering defects,[96] of pollution of a stream as rendering premises unhealthy or uninhabitable,[97] of power line on sale of property,[98] or of rain on a street.[99]

c. Conduct

Witnesses have been permitted to testify as to facts relative to conduct, but opinions or conclusions are not admissible.

Witnesses have been permitted to testify as to the manner in which a person acted;[1] how a testator spoke of his brother, "whether affectionately or otherwise;"[2] whether a servant was wide awake and attentive when engaged in his duties;[3] that a person was trying to fight[4] or get away;[5] that persons had an altercation;[6] or that there was friction between individuals.[7] A witness has also been allowed to state that he never saw a person abuse another;[8] that if witness had known of the extent of injuries she would not have signed a release;[9] to give his opinion as to what would have happened if he had not acted as he did;[10] or to explain that at the time of his injury he was hunting, for the purpose of recreation.[11] On the other hand, under the rule excluding opinions or conclusions, evidence has been excluded as to epithets;[12] naturalness of conduct;[13] provocation;[14] reason for actions;[15] what course of conduct resulted from a lawyer's advice;[16] whether witness made a positive statement of fact[17] that a person avoided meeting another,[18] answered evasively,[19] "boasted,"[20] "lied,"[21] spoke in a friendly manner,[22] or in a complaining way,[23] or testified truthfully or falsely;[24] whether persons appeared to be acting together;[25] whether a person "acted like a lover;"[26] whether a witness was "shamming" before the jury;[27] whether persons maintain separate

81. Utah.—Nichols v. Oregon Short Line R. Co., 70 P. 996, 25 Utah 240.

82. Tex.—Taylor v. State, 51 S.W. 1106, 41 Tex.Cr. 148.

83. Mich.—Smaltz v. Boyce, 69 N. W. 21, 109 Mich. 382.

84. Ill.—Hellyer v. People, 58 N.E. 245, 186 Ill. 550.

85. Iowa.—Enslow v. Ennis, 135 N. W. 1105, 155 Iowa 266.

86. Ala.—Johnson v. Louisville & N. R. Co., 16 So. 75, 104 Ala. 241, 53 Am.S.R. 39.

87. Ga.—Rice & Hutchins Atlanta Co. v. Griffin, 104 S.E. 634, 150 Ga. 607.

88. Mo.—State v. Morris, 172 S.W. 603, 263 Mo. 339.

89. N.J.—Public Nat. Bank of New York v. Patriotic Ins. Co. of America, 144 A. 566, 105 N.J.Law 477.

90. Del.—Hearn v. Wilmington City R. Co., 76 A. 629, 24 Del. 271.

91. Ill.—Paisley v. American Zinc Co. of Illinois, 235 Ill.App. 22.
Wis.—Peacock v. Wisconsin Zinc Co., 188 N.W. 641, 177 Wis. 510.

92. Ala.—Askin & Marine Co. v. King, 116 So. 804, 22 Ala.App. 452.

93. U.S.—New England Newspaper Pub. Co. v. Bonner, C.C.A.Mass., 68 F.2d 880, certiorari denied 54 S.Ct. 630, 292 U.S. 625, 78 L.Ed. 1480, and Bonner v. New England Newspaper Pub. Co., 54 S.Ct. 631, 292 U. S. 625, 78 L.Ed. 1480.
22 C.J. p 494 note 56.

94. Cal.—Doyle v. Eschen, 89 P. 836, 5 Cal.App. 55.

95. Tex.—City of Dallas v. Urbish, Civ.App., 252 S.W. 258.

96. N.Y.—Miller v. Erie R. Co., 54 N.Y.S. 606, 34 App.Div. 217.

97. Ala.—Stennett v. Bessemer, 45 So. 890, 154 Ala. 637.

98. Tex.—Central Power & Light Co. v. Mauritz, Civ.App., 7 S.W.2d 937.

99. N.Y.—Role v. New York, 4 N. Y.S. 447, 56 N.Y.Super. 298.

1. Ala.—Dixon v. Hotel Tutwiler Operating Co., 108 So. 26, 214 Ala. 396.
22 C.J. p 535 note 40.

2. Conn.—Spencer's App., 60 A. 289, 77 Conn. 638.

3. Ala.—Montgomery First Nat. Bank v. Chandler, 39 So. 822, 144 Ala. 286, 113 Am.S.R. 39.

4. Ala.—Reeves v. State, 11 So. 296, 96 Ala. 33.

5. Ala.—Lewis v. State, 49 Ala. 1.

6. Del.—State v. Day, 58 A. 946, 21 Del. 101.

7. Tex.—Missouri, O. & G. R. Co. v. Love, Civ.App., 169 S.W. 922.

8. Vt.—In re Clogston's Estate, 106 A. 594, 93 Vt. 46.

9. Tex.—Schaff v. Hollin, Civ.App., 213 S.W. 279, error refused.

10. Mo.—Sullivan v. Union Electric Light & Power Co., 56 S.W.2d 97, 331 Mo. 1065.

11. Mo.—Boillot v. Income Guaranty Co., 83 S.W.2d 219, 231 Mo.App. 990.

12. Mo.—Johnston v. Johnston, App., 260 S.W. 770.

13. N.Y.—People v. Smith, 64 N.E. 814, 172 N.Y. 210.

14. Mont.—McCarthy v. Anaconda Copper Mining Co., 225 P. 391, 70 Mont. 309.

15. Ga.—Avera v. Marshall, 134 S.E. 187, 35 Ga.App. 573.
N.J.—Mulock v. Ulizio, 129 A. 204, 3 N.J.Misc. 631.
Tex.—Walker v. Kellar, Civ.App., 218 S.W. 792.

16. Kan.—State v. Asbell, 46 P. 770, 57 Kan. 398.

17. Iowa.—Peterson v. McManus, 172 N.W. 460, 187 Iowa 522.

18. Tex.—Curtis v. State, Cr., 59 S. W. 263.

19. Tex.—Strack v. Strong, Civ.App., 114 S.W.2d 313, error dismissed.

20. Ala.—Meadors v. Haralson, 147 So. 184, 226 Ala. 413.

21. Ill.—Parish v. Hendrickson, 50 Ill.App. 329.

22. Mo.—Stevens v. Larwill, 84 S.W. 113, 110 Mo.App. 140.

23. Iowa.—McCollister v. Showers, 248 N.W. 363, 216 Iowa 108.

24. Ga.—Melvin v. Askew, 100 S.E. 49, 24 Ga.App. 164.

25. Iowa.—State v. Pasnau, 92 N.W. 682, 118 Iowa 501.

26. Ala.—Carney v. State, 79 Ala. 14.

27. Mich.—Cole v. Lake Shore, & M. S. R. Co., 54 N.W. 638, 95 Mich. 77.
22 C.J. p 498 note 79.

establishments in the same house;[28] or whether an injured person did not do certain things which would have prevented his injury.[29] The rule that the opinions and conclusions of witnesses as to the facts in issue are not admissible has been generally applied to actions based on adultery,[30] unless the conclusions are warranted by the facts testified to.[31]

d. Fraud, Mistake, Duress, or Undue Influence

The general rules govern the admission or exclusion of testimony relative to fraud, duress, mistake, or undue influence.

While a witness has been permitted to testify that his action was because of duress, coercion, and threats,[32] the rule excluding the opinion of ordinary witnesses has been held to exclude evidence as to fraud;[33] fullness of disclosure;[34] materiality of information not disclosed;[35] sentiment of people who knew parties to a deed as to its being fraudulent;[36] duress;[37] influence on another;[38] misrepresentation;[39] mistake;[40] undue influence;[41] or the voluntary nature of an act.[42]

e. Intent, Motive, or Purpose

The admission or exclusion of testimony as to intent, motive, or purpose is determined by the general rules.

Witnesses have been permitted to testify as to an intent already formed,[43] good faith,[44] the purpose for which certain railroad ties were to be used,[45] or the purpose for which a room inside of another was built;[46] but opinion evidence is inadmissible as to good faith,[47] intent or intention,[48] motive,[49] purpose,[50] incapacity to form a specific intent,[51] theory on which payments were made,[52] or understanding of witness that grantors executed a conveyance as security.[53]

f. Mental Condition; Mental State

Testimony of the ordinary witness as to mental state or mental condition may be received where his testimony is a statement of fact; but opinions or conclusions of such a witness are not admissible.

Witnesses have been permitted to testify as to mental condition;[54] strength of will;[55] whether one was firm or weak in his decisions;[56] attitude of one person toward another;[57] the progress made by an injured child in school after the injury;[58] whether the witness heard another say or do anything which indicated he was not of sound mind;[59] that he did not notice that one had any appearance of marked mental decline;[60] and that he was scared.[61] However, opinion evidence is not admissible as to

28. Ala.—Stephenson v. Stephenson, 105 So. 867, 213 Ala. 545.

29. Ind.—Hubbard Steel Foundry Co. v. Remiszewski, 132 N.E. 691, 76 Ind.App. 619.

30. Ill.—Carter v. Carter, 28 N.E. 948, 38 N.E. 669, 152 Ill. 434.
19 C.J. p 128 note 52.

31. Iowa.—Bizer v. Bizer, 81 N.W. 465, 110 Iowa 248.
19 C.J. p 128 note 53.

32. S.D.—Daum v. Urquhart, 249 N.W. 738, 61 S.D. 431.

33. Ky.—Gahren v. Parkersburg Nat. Bank, 162 S.W. 1135, 157 Ky. 266.
22 C.J. p 494 note 68.
Haste in closing deal
Ind.—Romine v. Thayer, 128 N.E. 456, 74 Ind.App. 536.
Honest construction of scales.—Moneyweight Scale Co. v. Deis, 104 N.Y.S. 456.

34. Ky.—Insurance Co. of North America v. Gore, 284 S.W. 1107, 215 Ky. 487.

35. Ga.—Metropolitan Life Ins. Co. v. Marshall, App., 16 S.E.2d 33.

36. Ky.—Perry v. Pore, 90 S.W. 952, 28 Ky.L. 897.

37. Ill.—O'Day v. Crabb, 109 N.E. 724, 269 Ill. 123—Adams v. Irving-Park First M. E. Church, 96 N.E. 253, 251 Ill. 268.

38. Ala.—Vaughn v. Vaughn, 116 So. 427, 217 Ala. 364—Miller v. Whittington, 80 So. 499, 202 Ala. 400.
22 C.J. p 494 note 83.

39. Ill.—German F. Ins. Co. v. Grunert, 1 N.E. 113, 112 Ill. 68.

40. Ala.—Moss v. State, 44 So. 598, 152 Ala. 30.
N.Y.—Cole v. Roby, 11 N.Y.S. 257.

41. Ill.—O'Day v. Crabb, 109 N.E. 724, 269 Ill. 123.
22 C.J. p 497 note 14.

42. Kan.—Gabbey v. Forgeus, 15 P. 866, 38 Kan. 62.
22 C.J. p 497 note 19.

43. Or.—Smith v. Cram, 230 P. 812, 815, 113 Or. 313, citing **Corpus Juris.**
Tex.—Millerman v. Walton, Civ.App., 278 S.W. 483—Dean v. Dean, Civ. App., 214 S.W. 505.
22 C.J. p 535 note 32.

44. Mont.—Beadle v. Harrison, 194 P. 134, 58 Mont. 606.

45. Ky.—Louisville & N. R. Co. v. Brandenburg, 270 S.W. 1, 207 Ky. 689.

46. Tex.—Hanover F. Ins. Co. v. Huff, Civ.App., 175 S.W. 465.

47. Ky.—Taylor v. Harris, 176 S.W. 168, 164 Ky. 654.
22 C.J. p 494 note 70.

48. Tex.—Bevil v. Kirby Lumber Co., Civ.App., 58 S.W.2d 843.
22 C.J. p 494 note 88.

49. Ala.—Southern R. Co. v. Haynes, 65 So. 339, 186 Ala. 60.

50. Ala.—Gray v. Strickland, 50 So. 152, 163 Ala. 344—Chandler v. Higgins, 47 So. 284, 156 Ala. 511.
Idaho.—State v. Barber, 88 P. 418, 13 Idaho 65.

51. Ala.—Armor v. State, 63 Ala. 173.
22 C.J. p 494 note 79.

52. Mo.—Ætna L. Ins. Co. v. Kansas City Electric Light Co., 171 S.W. 580, 184 Mo.App. 718.

53. Ala.—Henderson v. Brunson, 37 So. 549, 141 Ala. 674.

54. Ala.—Pollard v. Rogers, 173 So. 881, 234 Ala. 92—Jones v. Keith, 134 So. 630, 223 Ala. 36.

55. Ala.—Houston v. Grigsby, 116 So. 686, 217 Ala. 506.

56. Mass.—Neill v. Brackett, 135 N.E. 690, 241 Mass. 534.

57. N.J.—Rolfe v. Fingerhut, 121 A. 85, 98 N.J.Law 894.

58. Or.—Benson v. Birch, 10 P.2d 1050, 139 Or. 459.

59. Ky.—Mays v. Mays, 92 S.W.2d 827, 263 Ky. 546.
Mass.—Old Colony Trust Co. v. Di Cola, 123 N.E. 454, 233 Mass. 119.

60. Mass.—Neill v. Brackett, 135 N.E. 690, 241 Mass. 534.

61. Ala.—Alabama Power Co. v. Edwards, 121 So. 543, 219 Ala. 162.

mental condition,[62] mental capacity,[63] testamentary capacity;[64] insane delusion;[65] ability to appreciate[66] or avoid[67] danger; manner of speaking;[68] or melancholia.[69]

g. Nature or Character

Whether the testimony is a statement of fact or the expression of an opinion or a conclusion determines the admissibility of testimony of the ordinary witness as to nature or character.

Witnesses have been permitted to testify as to the character of a house as a gambling house,[70] or a theater as a place of public amusement;[71] the character of a jerk given by a roller coaster when a passenger thereon was injured;[72] the character of work as strenuous;[73] that land is swamp land;[74] that a substance is explosive;[75] or whether a road was a public road.[76] The rule excluding opinion evidence has been applied to exclude evidence as to accidental character of a shooting;[77] character of improvement;[78] deadly nature of a weapon;[79] disorderly character of a house;[80] nature of substance;[81] public character of places,[82] or highways or streets;[83] character of a pugilistic encounter as a fight;[84] or public utility of a proposed highway.[85]

h. Necessity, Propriety, or Sufficiency

Evidence as to necessity, propriety, and sufficiency has usually been held to call for matter of opinion.

While witnesses have been permitted to testify as to the necessity for school buildings and equipment,[86] or that labor used and charged for was more than was reasonably necessary,[87] the rule excluding opinion evidence has been held to exclude evidence as to necessity,[88] as for assisting female passengers to alight from street cars,[89] building a bridge,[90] a drain in a street,[91] repairs to a sidewalk crossing,[92] a sale of real estate,[93] signalmen to protect employees working on a platform and in a pit,[94] or taking property sought to be condemned for public use;[95] or propriety;[96] or sufficiency,[97] as of cattle gates[98] or guards,[99] cattle pens,[1] a drain pipe to carry off ordinary rain fall,[2] fences,[3] fire appa-

62. Or—Springer v. Steiner, 178 P. 592, 91 Or. 100.
22 C.J. p 495 notes 16, 17, p 496 note 8.

63. Ill.—Bailey v. Beall, 96 N.E. 567, 251 Ill. 577.
22 C.J. p 495 note 15.

64. Tex.—Milner v. Sims, Civ.App., 171 S.W. 784.
22 C.J. p 496 note 9.

65. Minn.—State v. Scott, 43 N.W. 62, 41 Minn. 365.

66. Tex.—Citizens' R. Co. v. Robertson, 91 S.W. 609, 41 Tex.Civ.App. 324.

67. Tex.—San Antonio & A. P. R. Co. v. Morgan, 58 S.W. 544, 24 Tex. Civ.App. 58.
22 C.J. p 492 note 96.

68. Mo.—Stevens v. Larwill, 84 S.W. 113, 110 Mo.App. 140.

69. N.Y.—Van Zandt v. Mutual Benev. L. Ins. Co., 55 N.Y. 169, 14 Am.R. 215.

70. La.—State v. Williams, 35 So. 521, 111 La. 205.

71. Tex.—Oliver v. State, 144 S.W. 604, 65 Tex.Cr. 150.

72. Mo.—Brown v. Winnwood Amusement Co., 34 S.W.2d 149, 225 Mo.App. 1180.

73. Tex.—Great West Mill & Elevator Co. v. Hess, Civ.App., 281 S.W. 234.

74. N.C.—State Bd. of Education v. Roanoke R. & Lumber Co., 73 S.E. 994, 158 N.C. 313.

75. Ala.—Davis v. State, 37 So. 676, 141 Ala. 62.

76. Ala.—McCullar v. Williams, 116 So. 137, 217 Ala. 278.

77. Tex.—Barnard v. State, 73 S.W. 957, 45 Tex.Cr. 67.

78. Ga.—Allen v. Allen, 106 S.E. 81, 151 Ga. 278.

79. Miss.—Majors v. State, 35 So. 825, 83 Miss. 439.

80. Ky.—Smith v. Commonwealth, 6 B.Mon. 21.

81. Iowa.—Schraeder v. Sears, 185 N.W. 110, 192 Iowa 604.

82. Ga.—O'Neill Mfg. Co. v. Harris, 56 S.E. 739, 127 Ga. 640.
22 C.J. p 496 note 70.

83. Ala.—Central of Georgia Ry. Co. v. Faulkner, 114 So. 686, 217 Ala. 82—Ogburn v. Montague, 155 So. 633, 26 Ala.App. 166, certiorari denied 155 So. 636, 229 Ala. 78—Bryson v. Phelps, 125 So. 795, 23 Ala. App. 346, certiorari denied 125 So. 798, 220 Ala. 389.
Mo.—Hanke v. City of St. Louis, 272 S.W. 933.
22 C.J. p 493 note 31.

84. Ohio.—Seville v. State, 30 N.E. 621, 49 Ohio St. 117, 15 L.R.A. 516.

85. Ind.—Thompson v. Deprez, 96 Ind. 67—Dillman v. Crooks, 91 Ind. 158—Loshbaugh v. Birdsell, 90 Ind. 466.

86. N.C.—Mebane Graded School Dist. v. Alamance County, 189 S.E. 873, 211 N.C. 213.

87. U.S.—The Rosalie Mahoney, D. C.N.Y., 297 F. 294.

88. Ind.—Ætna Powder Co. v. Earlandson, 71 N.E. 185, 33 Ind.App. 251.
22 C.J. p 495 note 23.

89. Tex.—San Antonio Tract. Co. v. Flory, 100 S.W. 200, 45 Tex.Civ. App. 233.

90. Mich.—Berube v. Wheeler, 87 N. W. 50, 128 Mich. 32.

91. Mo.—Gallagher v. Tipton, 113 S. W. 674, 133 Mo.App. 557.

92. Kan.—Martin v. Columbus, 143 P. 421, 93 Kan. 79.

93. Ala.—Miller v. Mayer, 26 So. 892, 129 Ala. 434.

94. N.Y.—Simpson v. Foundation Co., 95 N.E. 10, 201 N.Y. 479, Ann. Cas.1912B 321.

95. Ind.—Eckart v. Ft. Wayne & N. I. Tract. Co., 104 N.E. 762, 181 Ind. 352.
Mich.—Grand Rapids v. Coit, 113 N. W. 362, 149 Mich. 668.

96. Wis.—Hamann v. Milwaukee Bridge Co., 106 N.W. 1081, 127 Wis. 550, 7 Ann.Cas. 458.
22 C.J. p 496 note 69.

97. Iowa.—Wilson v. Big Joe Block Coal Co., 112 N.W. 89, 134 Iowa 594.
22 C.J. p 496 note 91.

98. Iowa.—Collins v. Chicago, M. & St. P. R. Co., 97 N.W. 1103, 122 Iowa 231.

99. Mich.—Smead v. Lake Shore & M. S. R. Co., 24 N.W. 761, 58 Mich. 200.
Miss.—Grace v. Gulf & C. R. Co., 25 So. 875—Kansas City, M. & B. R. Co. v. Spencer, 17 So. 168, 72 Miss. 491.

1. Tex.—Texas & P. R. Co. v. Slator, Civ.App., 102 S.W. 156.

2. Ala.—Nashville C. & St. L. R. Co. v. Yarbrough, 69 So. 582, 194 Ala. 162.

3. Ill.—Chicago & A. R. Co. v. O'Brien, 34 Ill.App. 155.

ratus,[4] lighting of stairways,[5] the prepared portion of a street for public travel,[6] property to pay debts,[7] protection to stock,[8] repairs,[9] a scaffold,[10] or time to do a particular act.[11]

i. Payment

The general rules govern the admissibility of testimony as to payment.

While it has been held proper to admit testimony of witnesses as to payment, where these are statements of fact,[12] including payment of taxes,[13] or that insured demanded payment of insurer and that the demand was never complied with,[14] it is not proper to permit a witness to testify to an opinion or conclusion as to payment,[15] that payment was "excused,"[16] or that a certain payment was an advance.[17]

j. Physical Facts or Conditions

Testimony of an ordinary witness as to physical facts or conditions is admissible where it is a statement of fact, but not where it is the opinion or conclusion of the witness.

The courts have permitted witnesses to testify as to the condition of articles or property;[18] condition of car destroyed by fire;[19] the appearance or condition of a particular place,[20] fence,[21] or road;[22] the contents of letters written to third persons;[23] location of a lot;[24] the manner of construction of pools for salt water from oil wells;[25] obstruction of waterways[26] or highways;[27] physical condition of water tanks,[28] or tools or appliances furnished by an employer;[29] protection from fire;[30] how the danger appeared to a person attempting to rescue another in imminent danger;[31] that trees and logs had piled up in a creek bed so as to impede the stream;[32] that witness had seen a certain appliance perform certain work;[33] and whether there was any other place for coal that struck plaintiff to come from.[34] Witnesses have also been permitted to

Minn.—Sowers v. Dukes, 8 Minn. 23.
N.Y.—Green v. Hornellsville & C. R. Co., 48 N.Y.S. 576, 24 App.Div. 434.

4. Mich.—Cowley v. Colwell, 52 N. W. 73, 91 Mich. 537.

5. N.Y.—People v. Pullman, 151 N. Y.S. 741, 166 App.Div. 99.

6. Utah.—Herndon v. Salt Lake City, 95 P. 646, 34 Utah 65, 131 Am. S.R. 827.

7. Ala.—Hunt v. Curtis, 44 So. 54, 151 Ala. 507—Miller v. Mayer, 26 So. 892, 124 Ala. 434.

8. Iowa.—Winch v. Baldwin, 28 N. W. 62, 68 Iowa 764.

9. Mo.—Dammann v. St. Louis, 53 S. W. 932, 152 Mo. 186.

10. N.Y.—Burns v. Crow, 107 N.Y.S. 944, 123 App.Div. 251.

11. S.C.—Moody v. Southern R. Co., 60 S.E. 711, 79 S.C. 297.
22 C.J. p 496 note 5.

12. Mass.—Federal Nat. Bank v. O'Keefe, 165 N.E. 897, 267 Mass. 75.
Tex.—National Life & Accident Ins. Co. of Nashville, Tenn., v. Jackson, Civ.App., 108 S.W.2d 738, error dismissed.
22 C.J. p 535 note 44.

13. Ala.—Phillips v. Langston, 88 So. 177, 17 Ala.App. 572.

14. Tex.—Federal Surety Co. v. Smith, Civ.App., 25 S.W.2d 994, reversed on other grounds, Com.App., 41 S.W.2d 210.

15. Ala.—Texas Co. v. Harold, 153 So. 442, 228 Ala. 350, 92 A.L.R. 523—Peinhardt v. West, 115 So. 80, 22 Ala.App. 231, reversed on other grounds 115 So. 88, 217 Ala. 12, second certiorari denied 115 So. 89, 217 Ala. 14.
Ga.—New York Life Ins. Co. v. Sumner, 165 S.E. 920, 45 Ga.App. 792.

16. Cal.—Berliner v. Travelers' Ins. Co., 53 P. 922, 121 Cal. 451.

17. Ga.—Fuller v. State, 59 S.E. 1, 2 Ga.App. 696.

18. Conn.—Dwyer v. Redmond, 124 A. 7, 100 Conn. 393.
Tex.—Ineeda Laundry v. Newton, Civ.App., 33 S.W.2d 208, error dismissed.
22 C.J. p 535 note 18—42 C.J. p 779 note 25.

State of repair

The owner of a building who is familiar therewith is competent to testify as to its general condition of repair, without being first qualified as an expert in such matters.—Leonard v. Standard Aero Corporation of New York, 112 A. 252, 95 N.J.Law 235.

Machinery

Ala.—Woodall v. Malone-Harrison Motor Co., 122 So. 357, 219 Ala. 366.

19. Ga.—Hight Accessory Place v. Lam, 105 S.E. 872, 26 Ga.App. 163.

20. Cal.—Dickey v. Dunn, 252 P. 770, 80 Cal.App. 724.
Ga.—Mutual Life Ins. Co. of New York v. Burson, 179 S.E. 390, 50 Ga.App. 859.
Ill.—Jent v. Old Ben Coal Corporation, 222 Ill.App. 380.
Mo.—Busby v. Southwestern Bell Telephone Co., 287 S.W. 434.
N.J.—Turzay v. Berkowitz, 14 A.2d 265, 125 N.J.Law 61.
N.Y.—Ferreri v. Webb, 206 N.Y.S. 225, 210 App.Div. 400.
Pa.—Olive v. Director General of Railroads, 118 A. 763, 275 Pa. 173.
Tex.—City of Pampa v. Todd, Civ. App., 39 S.W.2d 636, reversed on other grounds, Com.App., 59 S.W. 2d 114.
Utah.—Pennock v. Newhouse Realty Co., 93 P.2d 482, 97 Utah 408.
22 C.J. p 535 note 16.

21. Tex.—Corn v. McNutt, Civ.App., 230 S.W. 1052, dismissed for want of jurisdiction.

22. N.C.—Kepley v. Kirk, 132 S.E. 788, 191 N.C. 690.
22 C.J. p 536 note 34.

23. Tex.—Lindsay v. Woods, Civ. App., 27 S.W.2d 263.

24. N.Y.—Whyland v. Weaver, 67 Barb. 116.

25. U.S.—Manhattan Oil Co. v. Mosby, C.C.A.Mo., 72 F.2d 840, certiorari denied 55 S.Ct. 237, 293 U.S. 623, 79 L.Ed. 710.

26. Ill.—Illinois River Packet Co. v. Peoria Bridge Ass'n, 38 Ill. 467.
Mo.—Owen v. Chicago, R. I. & P. R. Co., 83 S.W. 92, 109 Mo.App. 608.

27. Mich.—Clark v. Lake St. Clair & New Up-River Ice Co., 24 Mich. 508.

28. Okl.—Berryhill v. Strickland, 132 P. 687, 37 Okl. 496.

29. Tex.—Texas & N. O. R. Co. v. Kveton, Civ.App., 48 S.W.2d 523.

30. Ala.—Grey v. Mobile Trade Co., 55 Ala. 387, 28 Am.R. 729.

31. Tex.—Panhandle & S. F. R. Co. v. Haywood, Civ.App., 227 S.W. 347, error refused.

32. Ala.—Cane Creek Coal Mining Co. v. Braden, 144 So. 143, 25 Ala. App. 256.

33. Tex.—Dunlap Hardware Co. v. E. F. Elmberg Co., Civ.App., 252 S. W. 1098, affirmed E. F. Elmberg Co. v. Dunlap Hardware Co., Com. App., 267 S.W. 258.

34. Ala.—Montevallo Mining Co. v. Little, 93 So. 873, 208 Ala. 131.

state from what direction a fire came;[35] from what point a photograph was taken;[36] that the brakes of an automobile were not set and the machinery was in gear;[37] that the cultivation of land was continuous;[38] that planks were placed on a bin so that men could go from one part to the other;[39] or whether fire could be started on the roof of a house by sparks from a fire which was in the yard.[40] On the other hand the rule excluding opinions or conclusions has been applied to exclude evidence as to application of force in a familiar form;[41] appearance;[42] condition of goods[43] or property,[44] or of a vessel;[45] construction;[46] course of fire under the influence of wind;[47] cracking of plastering from settling of a building;[48] creation of drafts of air by opening of doors and windows;[49] destructive quality of fire;[50] how long a condition had existed;[51] how long a hammer had been in the process of chipping;[52] how long it would take a screw to work out of a hole;[53] location of sidewalk;[54] manner in which a person was injured;[55] obstruction of view by a fence;[56] operation of natural laws;[57] place from which a shot was fired;[58] permanence of obstruction;[59] pollution of a stream;[60] precautions necessary to guard an excavation in a street;[61] resemblance;[62] room for an automobile and a wagon to pass in safety;[63] size;[64] strength of a plank;[65] visibility;[66] that a sidewalk was not good;[67] what is the highest part of a hill;[68] where travelers were expected to cross a bridge;[69] whether a bullet hole in a door exhibited to the jury was made from within or without;[70] whether cars would appear to be clear of the track under certain conditions;[71] whether a certain doorway was the principal doorway to part of a mine;[72] whether leaves which had been detached, and were fastened in a book, belonged to it;[73] whether one struck by a train going at a given speed can live;[74] whether a street could be traversed in safety;[75] the danger of locating a vulcanizing department of a garage next to an elevator shaft;[76] and use of certain appliances.[77] A witness should not be permitted to describe an object by a general comparison.[78]

k. Probability or Possibility

Opinions or conclusions of ordinary witnesses as to probability or possibility must be excluded.

The rule requiring witnesses to testify to facts, and excluding opinions or conclusions, has been held to exclude evidence as to probability;[79] or possibil-

35. N.D.—Wilson v. Northern Pac. R. Co., 153 N.W. 429, 30 N.D. 456, L.R.A.1915C 991.

36. S.C.—Case v. Atlanta & C. A. L. R. Co., 92 S.E. 472, 107 S.C. 216.

37. Iowa.—Scott v. O'Leary, 138 N. W. 512, 157 Iowa 222.

38. Tex.—Olcott v. Squires, Civ. App., 144 S.W. 314.

39. Cal.—Polkinghorn v. Riverside Portland Cement Co., 142 P. 140, 24 Cal.App. 615.

40. Mo.—Connecticut Fire Ins. Co. v. Chester, P. & Ste. G. R. Co., 153 S.W. 544, 171 Mo.App. 70.

41. U.S.—Bishop v. Wight, Colo., 221 F. 392, 137 C.C.A. 200.

42. Ala.—J. H. Burton & Sons Co. v. May, 103 So. 46, 212 Ala. 435.

43. Tex.—Gulf, C. & S. F. Ry. Co. v. Dean, Civ.App., 261 S.W. 520.

44. U.S.—Henry H. Cross Co. v. Rice, C.C.A.Ind., 45 F.2d 940, certiorari denied 51 S.Ct. 657, 283 U.S. 865, 75 L.Ed. 1469.

45. N.Y.—Voisin v. Commercial Mut. Ins. Co., 16 N.Y.S. 410, 62 Hun. 4.

46. Ala.—Cox v. City of Birmingham, 108 So. 622, 21 Ala.App. 341, certiorari denied 108 So. 625, 214 Ala. 584.
N.Y.—Oppenheimer v. Harrisetta Holding Co., 176 N.Y.S. 716, 188 App.Div. 472.
22 C.J. p 497 notes 20, 69.

47. Me.—Boothby v. Lacasse, 47 A. 916, 94 Me. 392.

48. Cal.—Richardson v. Eureka, 31 P. 458, 96 Cal. 443.

49. N.Y.—People v. Brown, 96 N.Y. S. 957, 110 App.Div. 490.

50. W.Va.—Welch v. Franklin Ins. Co., 23 W.Va. 288.

51. Mo.—Dammann v. St. Louis, 53 S.W. 932, 152 Mo. 186.

52. Mich.—Dompier v. Lewis, 91 N. W. 152, 131 Mich. 144.

53. N.Y.—Levy v. J. L. Mott Iron Works, 127 N.Y.S. 506, 143 App. Div. 7.

54. N.Y.—Klepper v. Seymour House Corporation of Ogdensburg, 209 N. Y.S. 67, 212 App.Div. 277.

55. Ala.—Forbes v. Davidson, 41 So. 312, 147 Ala. 702.

56. Tex.—Ft. Worth & D. C. R. Co. v. Ayers, Civ.App., 149 S.W. 1068.

57. Ala.—Nichols v. State, 14 So. 539, 100 Ala. 23.
22 C.J. p 495 note 35.

58. Or.—State v. Jennings, 87 P. 524, 89 P. 421, 48 Or. 483.

59. Ky.—Chesapeake & O. Ry. Co. v. Coleman, 210 S.W. 947, 184 Ky. 9.

60. Ala.—American Tar Products Co. v. Jones, 86 So. 113, 17 Ala. App. 481.

61. Utah.—Sweet v. Salt Lake City, 134 P. 1167, 43 Utah 306.

62. N.Y.—Squire v. Press Pub. Co., 68 N.Y.S. 1028, 58 App.Div. 362.

63. Mo.—Marshall v. Taylor, 153 S.W. 527, 168 Mo.App. 240.

64. Mo.—Blaske v. Wehmeyer, 226 S.W. 868, 285 Mo. 524.

65. N.C.—Cogdell v. Wilmington & W. R. Co., 44 S.E. 618, 132 N.C. 852.

66. Ala.—Nichols v. State, 14 So. 539, 100 Ala. 23.

67. Iowa.—Spears v. Mt. Ayr, 24 N. W. 504, 66 Iowa 721.

68. Mass.—Hovey v. Sawyer, 5 Allen 554.

69. Tex.—Marshall v. McAllister, 54 S.W. 1068, 22 Tex.Civ.App. 214.

70. Ala.—Golson v. State, 26 So. 975, 124 Ala. 8.

71. Tex.—Gulf, C. & S. F. R. Co. v. Bell, 58 S.W. 614, 24 Tex.Civ.App. 579.

72. Ill.—Karkowski v. La Salle County Carbon Coal Co., 93 N.E. 780, 248 Ill. 195.

73. Mich.—Passmore v. Passmore, 27 N.W. 601, 60 Mich. 463.

74. Ill.—Chicago & A. R. Co. v. Lewandowski, 60 N.E. 497, 190 Ill. 301.

75. Ala.—Atlantic Coast Line R. Co. v. Carroll, 94 So. 820, 208 Ala. 361.

76. Ga.—Hight Accessory Place v. Lam, 105 S.E. 872, 26 Ga.App. 163.

77. Ind.—Ideal Laundry & Dry Cleaning Co. v. Mackowiak, 143 N. E. 614, 83 Ind.App. 1.

78. Md.—State v. Eastern Shore Gas & Electric Co. of Maryland, 142 A. 503, 155 Md. 660.

79. Ala.—Knowlton v. Central of

ity of acts or results,[80] as committing rape on a mature female,[81] determining percentage of alcohol by taste,[82] discovering a defect,[83] first crossing a point of intersection,[84] hearing,[85] identifying a head,[86] leaving a room or house without knowledge of the witness,[87] locating a survey on the ground,[88] loss of articles,[89] moving goods from a burning building,[90] receiving merchandise in good order,[91] seeing a person under certain circumstances,[92] setting fires by sparks,[93] tipping of a sewer cover before slipping,[94] or transacting business properly.[95]

l. Relationship

The general rules governing the admission of statements of fact and the exclusion of opinions apply to testimony of an ordinary witness as to particular relationships.

Witnesses have been permitted to testify as to the relationship of persons or parties interested in, or connected with, the matter under consideration, and have been permitted to testify to the existence of agency,[96] authority,[97] or connection with a certain transaction;[98] that one was,[99] or was not,[1] employed by defendant, or for whom he was working;[2] that a person was foreman,[3] pastor of a certain church,[4] or trustee and steward and head trustee of the church;[5] that plaintiff was a member of insured's household to the extent that she boarded and slept there, where plaintiff's dependency is in issue;[6] whether two persons were living together as man and wife;[7] that there was no conspiracy between witness and another;[8] whether there was a partnership;[9] that a person signed a note as surety;[10] or that a church was of a certain denomination and a branch of a certain church.[11] Witness may not state what the nature of the relation with another is where this is a conclusion;[12] and may not give his opinion or state his conclusions as to

Georgia R. Co., 68 So. 281, 192 Ala. 456.
22 C.J. p 496 note 65.

80. Mass.—Lawlor v. Wolff, 62 N.E. 973, 180 Mass. 448.
22 C.J. p 495 note 47.

81. Mass.—Lawlor v. Wolff, supra.

82. Mass.—Commonwealth v. Collier, 134 Mass. 203.

83. Ill.—Upper Alton v. Green, 112 Ill.App. 439.
N.Y.—Dittman v. Edison Electric Illum. Co., 83 N.Y.S. 1078, 87 App. Div. 68.

84. N.Y.—Galligan v. Metropolitan St. R. Co., 67 N.Y.S. 180, 33 Misc. 87.

85. Ala.—Alabama Great Southern R. Co. v. Linn, 15 So. 508, 103 Ala. 134.
22 C.J. p 496 note 52.

86. Iowa.—State v. Vincent, 24 Iowa 570, 95 Am.D. 753.

87. Ala.—Bennett v. State, 52 Ala. 370.
Ill.—Sahlinger v. People, 102 Ill. 241.

88. Mont.—Bramlett v. Flick, 57 P. 869, 23 Mont. 95.

89. Mass.—Lynch v. Lowell Electric Light Corporation, 160 N.E. 413, 263 Mass. 81.

90. Ind.—Insurance Co. of North America v. Osborn, 59 N.E. 181, 26 Ind.App. 88.

91. Tex.—Bath v. Houston & T. C. R. Co., 78 S.W. 993, 34 Tex.Civ.App. 234.

92. Ind.—Jones v. State, 71 Ind. 66.

93. N.Y.—Peck v. New York Cent. & H. R. R. Co., 59 N.E. 206, 165 N.Y. 347.

94. N.Y.—Ward v. Troy, 66 N.Y.S. 925, 55 App.Div. 192.

95. Colo.—Shapter v. Pillar, 63 P. 302, 28 Colo. 209.

96. U.S.—Wheeler & Motter Mercantile Co. v. Lamerton, C.C.A.Okl., 8 F.2d 957, 44 A.L.R. 769.
Ala.—Yorkshire Ins. Co. v. Bunch-Morrow Motor Co., 103 So. 670, 212 Ala. 588.
Cal.—Collette v. Sarrasin, 193 P. 571, 184 Cal. 2.
Ga.—George v. Rothstein & Nelson, 132 S.E. 414, 35 Ga.App. 126—Scott v. Kelly-Springfield Tire Co., 125 S.E. 773, 33 Ga.App. 297—Floyd v. Taylor Cotton Co., 105 S.E. 646, 26 Ga.App. 96.
Ind.—Blackstone Theatre Corporation v. Goldwyn Distributing Corporation, 146 N.E. 217, 86 Ind.App. 277, followed in Metro-Goldwyn Picture Corporation v. Berger, 174 N.E. 926, 91 Ind.App. 723.
Iowa.—Lozier Automobile Exch. v. Interstate Casualty Co., 195 N.W. 885, 197 Iowa 935.
Mass.—Irwin v. Worcester Paper Box Co., 141 N.E. 286, 246 Mass. 453.
Mo.—Tosh v. Kirshner, 248 S.W. 994, 213 Mo.App. 257.
Mont.—Exchange State Bank of Glendive v. Occident Elevator Co., 24 P.2d 126, 95 Mont. 78, 90 A.L.R. 740.
Tex.—Bayliss v. Raney, Civ.App., 273 S.W. 932—Goodman v. Republic Inv. Co., Civ.App., 215 S.W. 466, dismissed for want of jurisdiction.
22 C.J. p 638 note 1.

97. Ala.—Hodges v. Collins, 106 So. 144, 213 Ala. 662—Somerall v. Citizens' Bank, 101 So. 429, 211 Ala. 630—Kinney v. Glenn, 198 So. 250, 29 Ala.App. 478, certiorari denied 198 So. 256, 240 Ala. 202.
Mont.—McCarthy v. Anaconda Copper Mining Co., 225 P. 391, 70 Mont. 309.
22 C.J. p 639 note 8—2 C.J. p 948 notes 23, 24.

Extent of authority
Ala.—Knight Iron & Metal Co. v. Ardis, 199 So. 716, 240 Ala. 305, reversing 199 So. 712, 29 Ala.App. 600.

98. Tex.—Philadelphia Fire Assoc. v. Jones, Civ.App, 40 S.W. 44.

99. Ky.—Sympson Bros. Coal Co. v. Coomes, 58 S.W.2d 594, 248 Ky. 324.

1. Ky.—Grubb v. Coleman Fuel Co., 114 S.W.2d 477, 272 Ky. 847.

2. Tex.—Federal Surety Co. v. Scott, Civ.App., 22 S.W.2d 157, error refused.

3. Tex.—Southern Cotton-Oil Co. v. Wallace, 54 S.W. 638, 23 Tex.Civ. App. 12.

4. Ga.—Bass v. African Methodist Episcopal Church, 116 S.E. 816, 155 Ga. 57.

5. Ga.—Bass v. African Methodist Episcopal Church, supra.

6. Ala.—Sovereign Camp, W. O. W., v. Hoehn, 85 So. 696, 204 Ala. 248.

7. Ga.—Rudulph v. Brown, 103 S.E. 251, 150 Ga. 147.
22 C.J. p 536 note 88.

8. Ga.—Wimberly v. Toney, 165 S.E. 257, 175 Ga. 416.

9. Ala.—Meador-Pasley Co. v. Owen, 133 So. 35, 222 Ala. 392.
Pa.—Perry v. Sims, 123 A. 660, 279 Pa. 165.
22 C.J. p 639 note 5.

10. Ga.—Bond v. Harrison, 176 S.E. 374, 179 Ga. 490.
22 C.J. p 639 note 13.

11. Ga.—Bass v. African Methodist Episcopal Church, 116 S.E. 816, 155 Ga. 57.

12. Mo.—Meredith v. Meredith, 229 S.W. 179, 287 Mo. 250.

the existence of an agency,[13] or the nature and extent of the agent's authority;[14] confidential relations;[15] existence of a partnership;[16] marriage;[17] bigamy;[18] divorce;[19] or employment;[20] that a person was president of a corporation,[21] that one was working for another, on question whether he was an employee or an independent contractor;[22] who were the sole heirs of a person named;[23] whom an attorney represented;[24] for whom a committee was acting;[25] or what relation a party to a note bore to the note.[26] A witness may not testify as to his impression that a couple conveyed the impression that they were husband and wife;[27] and the opinion of a subtenant as to whom he occupied the premises under is inadmissible.[28]

m. Time, Place, Quality, Quantity, and Speed

The ordinary witness may testify to facts, but cannot state opinions or conclusions, as to time, place, quality, quantity, or speed.

Under the rule admitting statements of fact, a witness has been permitted to testify as to the time when a certain thing was done,[29] that there was time to have done certain things before the happening of another event,[30] or as to the priority in time of certain events.[31] Likewise the witness may testify as to the results of measurements made by

13. U.S.—Fuller Process Co. v. Texas Co., C.C.A.Mo., 16 F.2d 108.
Ala.—Clark & Barker v. Eufaula Brick Works, 88 So. 669, 205 Ala. 545—Allison v. Fuller-Smith & Co., 101 So. 626, 20 Ala.App. 216, certiorari denied Ex parte Allison, 101 So. 629, 211 Ala. 616.
Cal.—Dimond v. Bessemer Gas Engine Co., 177 P. 858, 39 Cal.App. 8.
Colo.—Commercial Standard Ins. Co. v. Rinn, 65 P.2d 705, 100 Colo. 76.
Ill.—Smoot v. Hollingsworth, 265 Ill.App. 447.
Iowa.—Rice v. Armour & Co., 187 N.W. 588, 194 Iowa 144—Swift v. Clarinda Trust & Savings Bank, 177 N.W. 519.
Ky.—Keene's Ex'x v. Newton, 232 S. W. 71, 192 Ky. 6—Irvine Development Co. v. Clark, 231 S.W. 539, 191 Ky. 744.
Mo.—Webster v. Leiman, 44 S.W.2d 40, 328 Mo. 1232.
Mont.—Wells-Dickey Co. v. Embody, 266 P. 869, 82 Mont. 150.
Or.—Finney v. Stanfield Fraternal Ass'n, 283 P. 415, 131 Or. 393.
Tex.—Gulf, C. & S. F. Ry. Co. v. Kempner, Civ.App., 275 S.W. 459, reversed on other grounds, Com. App., 282 S.W. 795.
Vt.—Dieter v. Scott, 9 A.2d 95, 110 Vt. 376.
22 C.J. p 497 note 48—2 C.J. p 935 note 21, p 948 note 21.

Witness may state facts and circumstances concerning various transactions between him and alleged principal, leaving court and jury to determine, under facts, whether he was agent; but evidence that party is or is not agent is mere conclusion.—Sanley v. Wilkinson, 229 P. 574, 107 Okl. 54.

14. Ala.—Atlantic Pacific Stages v. Yandle, 140 So. 603, 224 Ala. 481—Lincoln Reserve Life Ins. Co. v. Fowler, 132 So. 37, 222 Ala. 348.
Ariz.—Benton v. Regeser, 179 P. 966, 20 Ariz. 273.
Ind.—Krauss v. Weaver, 130 N.E. 800, 191 Ind. 133.
Iowa.—Swanson Automobile Co. v. Stone, 174 N.W. 247, 187 Iowa 309.
Md.—Eastern Shore Brokerage & Commission Co. v. Harrison, 118 A. 192, 141 Md. 91—Deane v. Big Spring Distilling Co., 113 A. 891, 138 Md. 388.
Mich.—Freeman v. Millen, 196 N.W. 200, 225 Mich. 271.
Mo.—Buffalo Trust Co. v. Producers' Exchange No. 148, California, Mo., 23 S.W.2d 644, 224 Mo.App. 199—Gorin Sav. Bank v. Early, App., 260 S.W. 480.
Mont.—Becwar v. McNicol, 296 P. 1027, 89 Mont. 318—Parsons v. Rice, 264 P. 396, 81 Mont. 509.
S.D.—Cole v. City of Britton, 260 N.W. 266, 63 S.D. 428.
Tex.—Hardin v. Rust, Civ.App., 294 S.W. 625—Terry v. Witherspoon, Civ.App., 255 S.W. 471, affirmed Witherspoon v. Terry, Com.App., 267 S.W. 973—Weimer v. Prince & Prince, Civ.App., 246 S.W. 666—Vaughn v. Charpiot, Civ.App., 213 S.W. 950.
Wash.—Associated Indemnity Corporation v. King County School Dist. No. 181, 47 P.2d 10, 182 Wash. 414.
22 C.J. p 497 note 74—2 C.J. p 948 note 22.

15. Cal.—Boye v. Andrews, 102 P. 551, 10 Cal.App. 494.

16. Fla.—Mach v. Mayo, 86 So. 222, 80 Fla. 372.
Iowa.—Central Nat. Bank & Trust Co. v. Redman Freight Lines, 294 N.W. 915.
Mo.—Roark v. Pullam, 229 S.W. 235, 207 Mo.App. 425.
22 C.J. p 494 note 63 [b].

17. Ill.—Sokel v. People, 72 N.E. 382, 212 Ill. 238.

18. N.Y.—Linado v. Linado, 15 N.Y. S.2d 570, 172 Misc. 782.

19. Ga.—McDonald v. McDonald, 180 S.E. 815, 180 Ga. 771.

20. Ariz.—Inspiration Consol. Copper Co. v. Bryan, 252 P. 1012, 31 Ariz. 302.
Ky.—Clendenin v. Colonial Supply Co., 102 S.W.2d 992, 267 Ky. 544.
Mo.—Davis v. Geiger, App., 212 S. W. 384.
N.Y.—Brown v. St. Vincent's Hospital, 226 N.Y.S. 317, 222 App.Div. 402.
Tex.—Casualty Underwriters v. Rhone, 132 S.W.2d 97, 134 Tex. 50, affirming Traders & General Ins. Co. v. Rhone, Civ.App., 110 S.W.2d 621—Texas Reciprocal Ins. Ass'n v. Stadler, Civ.App., 126 S.W.2d 706, error dismissed, judgment correct.
Wis.—Tesch v. Industrial Commission, 229 N.W. 194, 200 Wis. 616.
22 C.J. p 494 notes 61, 63 [a], p 497 note 76.

21. Cal.—Ewing v. Hayward, 195 P. 970, 50 Cal.App. 708.

22. Ark.—W. H. Moore Lumber Co. v. Starrett, 279 S.W. 4, 170 Ark. 92.
Mo.—Dagley v. National Cloak & Suit Co., 22 S.W.2d 892, 224 Mo. App. 61.
Wis.—Kolman v. Dvorak, 262 N.W. 622, 219 Wis. 139.

23. Mo.—Barron v. H. D. Williams Cooperage Co., 171 S.W. 653, 185 Mo.App. 625.

24. Iowa.—Chew v. O'Hara, 81 N.W. 157, 110 Iowa 81.

25. Ala.—Tison v. Citizens' Bank & Security Co., 93 So. 857, 208 Ala. 111.

26. Ala.—Long v. Gwin, 80 So. 440, 202 Ala. 358.
Ga.—Taff v. Larey, 116 S.E. 866, 29 Ga.App. 631.

27. N.J.—Horton v. Horton, 130 A. 24, 2 N.J.Misc. 683.

28. Mass.—Pierce v. Kolikof, 122 N.E. 558, 232 Mass. 479.

29. Iowa.—Cleophas v. Walker, 233 N.W. 257, 211 Iowa 122.

30. Ala.—Sloss-Sheffield Steel & Iron Co. v. Jones, 91 So. 808, 207 Ala. 7.

31. Cal.—Tate v. Fratt, 44 P. 1061, 112 Cal. 613.

him,[32] or the amount of wastage of a machine,[33] or the number of men customarily employed to perform certain work.[34]

On the other hand, under the rule excluding opinions of witnesses, evidence has been excluded as to the time for performance of certain work,[35] reasonableness of time in which to complete a building[36] or to transport live stock[37] or merchandise;[38] time of alteration of an instrument;[39] time of discovery of overpayments;[40] time in which a train would pass a given space where its speed was proved;[41] time which an injured party had to avoid injury;[42] period covered by payment of assessment for insurance;[43] probable interval between slate becoming loose in the roof of the entry to a mine and its dropping;[44] place of making a contract;[45] place of residence;[46] whether a place was urban or suburban territory;[47] quality of work;[48] productiveness of a gas well;[49] quality and quantity of moonlight;[50] and speed.[51]

n. Motor Vehicle Cases

The general rules govern the admission or exclusion of testimony of ordinary witnesses in cases involving motor vehicles.

The general rules as to the admissibility of the opinion or conclusion of a witness apply in actions arising out of injuries attending the operation of motor vehicles.[52] Testimony of a witness as to an automobile accident is not objectionable as a conclusion where he states the facts.[53] Thus, a witness has been permitted to testify as to control of vehicle;[54] as to why he did what he did;[55] that he was to blame for the accident;[56] that a mark on a highway appeared to have been made by a free running wheel of defendant's automobile;[57] that defendant's car struck the one in which the witness was riding;[58] that defendant ran into the other car and turned it over;[59] that driver had no permission of owner to take car;[60] that witness could see the tracks of each car involved in the accident;[61] that marks on the highway could have been caused by defendant's vehicle;[62] that witness noticed signs of skidding at a railroad crossing where motorist was killed;[63] that witness, while driving, must have dozed, because he had caught himself doing that before;[64] when witness first saw defendant's car;[65] whether an automobile horn was blown before the accident;[66] and whether the motorist observed at the place where he made a sudden turn if the automobile changed its direction from the tire marks.[67] Questions addressed to an inspector of motor vehicles as to what his duties were call for

32. Ala.—Alabama Great Southern R. Co. v. Sanders, 82 So. 17, 203 Ala. 57.
Ga.—Dyson v. Sellers, 100 S.E. 791, 24 Ga.App. 411.
Minn.—State v. Horr, 203 N.W. 979, 163 Minn. 141.
22 C.J. p 564 note 97.

33. Utah.—Battle Creek Bread Wrapping Mach. Co. v. Paramount Baking Co., 39 P.2d 323, 88 Utah 67.

34. Mo.—Hulsey v. Tower Grove Quarry & Construction Co., 30 S.W.2d 1018, 326 Mo. 194.

35. Ind.—Clay County v. Redifer, 69 N.E. 305, 32 Ind.App. 93.

36. Cal.—Giberson v. Fink, 151 P. 371, 28 Cal.App. 25.

37. Tex.—Texas & P. R. Co. v. Crowder, Civ.App., 157 S.W. 281.
22 C.J. p 496 note 75.

38. Ill.—Hennigh v. Cleveland, C., C. & St. L. R. Co., 143 Ill.App. 283.

39. Ala.—Whitewater Lumber Co. v. Langford, 113 So. 525, 216 Ala. 510.

40. N.Y.—Rowley v. Parsons, 61 N.Y.S. 392, 45 App.Div. 174.

41. Pa.—Blauvelt v. Delaware, L. & W. R. Co., 55 A. 857, 206 Pa. 141.

42. Ala.—Central of Georgia R. Co. v. Ellison, 75 So. 159, 199 Ala. 571.

43. Mo.—Welch v. Fraternal Aid Union, 253 S.W. 187, 214 Mo.App. 443.

44. Iowa.—Thayer v. Smoky Hollow Coal Co., 96 N.W. 718, 121 Iowa 121.

45. Cal.—California Bean Growers' Ass'n v. C. H. & O. B. Fuller Co., 248 P. 967, 78 Cal.App. 522.

46. Tex.—Fidelity & Deposit Co. of Maryland v. First Nat. Bank, Civ. App., 113 S.W.2d 622, error dismissed.
22 C.J. p 496 note 80.

47. W.Va.—Collar v. McMullin, 148 S.E. 496, 107 W.Va. 440.

48. N.Y.—Woarms v. Becker, 82 N.Y.S. 1086, 84 App.Div. 491.

49. Ohio.—Ohio Oil Co. v. McCrory, 14 Ohio Cir.Ct. 304, 7 Ohio Cir. Dec. 344.
22 C.J. p 496 note 67.

50. Ind.—Green v. State, 57 N.E. 637, 154 Ind. 655.

51. U.S.—Northern Pac. R. Co. v. Hayes, Ill., 87 F. 129, 30 C.C.A. 576.

52. Ala.—Massey v. Pentecost, 90 So. 866, 206 Ala. 411.
42 C.J. p 1219 note 43.

53. Ala.—McPherson v. Martin, 174 So. 791, 234 Ala. 244—Pollard v. Rogers, 173 So. 881, 234 Ala. 92—Allison Coal & Transfer Co. v. Davis, 129 So. 9, 221 Ala. 334.

54. Ga.—Atlanta & W. P. R. Co. v. Patton, 123 S.E. 900, 32 Ga.App. 527.
Kan.—Baker v. Magnolia Petroleum Co., 207 P. 789, 111 Kan. 555.
Mass.—McGrath v. Fash, 139 N.E. 303, 244 Mass. 327.

55. Ala.—Pittman v. Calhoun, 172 So. 263, 233 Ala. 450.

56. Iowa.—Robbins v. Weed, 169 N.W. 773, 187 Iowa 64.

57. Cal.—Mace v Watanabe, 87 P.2d 893, 31 Cal.App.2d 321.

58. Ill.—Land v. Bachman, 223 Ill. App. 473.

59. Ala.—Schrimsher v. Carroll, 142 So. 547, 225 Ala. 188.

60. Wis.—Christiansen v. Schenkenberg, 236 N.W. 109, 204 Wis. 323.

61. Mich.—Anderson v. Lynch, 205 N.W. 134, 232 Mich. 276.

62. Mo.—Silsby v. Hinchey, App., 107 S.W.2d 812.

63. Ga.—Southern Ry. Co. v. Tudor, 168 S.E. 98, 46 Ga.App. 563.

64. Tex.—McMillian v. Sims, Civ. App., 112 S.W.2d 793, error granted.

65. Tex.—Sanders v. Lowrimore, Civ.App., 73 S.W.2d 148, reversed on other grounds Lowrimore v. Sanders, 103 S.W.2d 739, 129 Tex. 563, which affirmed 106 S.W.2d 266, 129 Tex. 563.

66. Ala.—Jordan v. Capers, 131 So. 557, 222 Ala. 197.

67. Minn.—Lestico v. Kuehner, 283 N.W. 122, 204 Minn. 125.

statements of fact.[68] On the other hand, the rule against admission of opinions or conclusions had been applied to exclude evidence as to absence of signs of dragging of car;[69] cause of wreck;[70] cause of mark on highway;[71] condition of street at place of collision;[72] control of vehicle;[73] effect of illumination from headlights;[74] effect of collision;[75] effect of sudden turn;[76] employment between driver and defendant;[77] lack of skill of driver;[78] where car was hit by other vehicle;[79] whether vehicle was under control;[80] who was driving;[81] whether witness was guest;[82] or whether guest approved of manner of operation.[83]

A conclusion of defendant, as a witness, as to whether the driver was on defendant's business[84] or knew that he was without authority to take the automobile[85] is not admissible.

o. Miscellaneous

In numerous cases of miscellaneous nature the admissibility or inadmissibility of testimony of ordinary witnesses has been made the subject of judicial decision.

The courts have permitted witnesses to testify as to amount of liquor delivered to a person;[86] boundaries;[87] confidence in another;[88] connection with an event;[89] consent,[90] or control;[91] cost of replacement;[92] duties of officer;[93] duty to maintain a mine roof;[94] experience;[95] home life of insured;[96] improvement of land;[97] intoxication;[98] involuntary character of detention;[99] knowledge or experience of employee;[1] the making of a gift;[2] propriety of assessment;[3] realization of danger;[4] receipt of rents;[5] regularity of an assessment;[6] result of a calculation;[7] safe method of work;[8] a system of church government;[9] truth of a statement,[10] or of allegations in an affidavit,[11] that all

68. Vt.—Ronan v. J. G. Turnbull Co., 131 A. 788, 99 Vt. 280.

69. Tex.—Dixie Motor Coach Corporation v. Ball, Civ.App., 69 S.W.2d 581, error dismissed.

70. Ga.—Holloway v. City of Milledgeville, 132 S.E. 106, 35 Ga.App. 87.

71. Conn.—Weller v. Fish Transport Co., 192 A. 317, 123 Conn. 49.

72. Ala.—Birmingham Stove & Range Co. v. Vanderford, 116 So. 334, 217 Ala. 342.

73. Ala.—Birmingham Stove & Range Co. v. Vanderford, supra.

74. Ga.—Maner v. Dykes, 190 S.E. 189, 55 Ga.App. 436, transferred, see 187 S.E. 699, 183 Ga. 118, transferred, see 184 S.E. 438, 52 Ga.App. 715.

75. Ala.—Leeper Cleaning & Dyeing Co. v. McKinney, 161 So. 529, 230 Ala. 462.
Mo.—Berthold v. Danz, App., 27 S.W. 2d 448.
Tex.—Southwestern Bell Telephone Co. v. Doell, Civ.App., 1 S.W.2d 501.

76. Mo.—Martin v. Kansas City, App., 224 S.W. 141.

77. Iowa.—Zieman v. World Amusement Service Ass'n of South Dakota, 228 N.W. 48, 209 Iowa 1298.

78. N.D.—Kist v. Kist, 243 N.W. 820, 62 N.D. 408.

79. Md.—Bode v. Carroll-Independent Coal Co., 191 A. 685, 172 Md. 406.

80. Ala.—Capital Motor Lines v. Loring, 189 So. 897, 238 Ala. 260.

81. Minn.—Nicol v. Geitler, 247 N. W. 8, 188 Minn. 69.

82. Wash.—Jensen v. Chicago, M. & St. P. Ry. Co., 233 P. 635, 133 Wash. 208.

83. Ala.—Kelly v. Hanwick, 153 So. 269, 228 Ala. 336.

84. Ariz.—Benton v. Regeser, 179 P. 966, 20 Ariz. 273.

85. Ala.—Massey v. Pentecost, 90 So. 866, 206 Ala. 411.

86. Iowa.—Cvitanovich v. Bromberg, 151 N.W. 1073, 169 Iowa 736, Ann. Cas.1917B 309.

87. Kan.—Kyte v. Chessmore, 188 P. 251, 106 Kan. 394.
N.C.—McQueen v. Graham, 111 S.E. 860, 183 N.C. 491.

88. Tex.—Goodrich v. First Nat. Bank, Civ.App., 70 S.W.2d 609, error refused.

89. Iowa.—Coldren v. Le Gore, 91 N.W. 1066, 118 Iowa 212.

90. Ala.—Street v. Sinclair, 71 Ala. 110.
N.Y.—Thompson v. Vrooman, 21 N.Y. S. 179, 66 Hun 245.

91. Mont.—McCarthy v. Anaconda Copper Mining Co., 225 P. 391, 70 Mont. 309.
Tex.—Ætna Life Ins. Co. v. Casper, Civ.App., 11 S.W.2d 594.
Wash.—Long v. Shirrod, 222 P. 482, 128 Wash. 258.
22 C.J. p 535 note 27, p 639 note 9.

92. Mont.—Mather v. Musselman, 257 P. 427, 79 Mont. 566.

93. Ala.—Most Worshipful Grand Lodge of A. F. & A. M. of Alabama (Colored) v. Callier, 140 So. 557, 224 Ala. 364.

94. Ala.—Stith Coal Co. v. Crayton, 86 So. 148, 17 Ala.App. 449.

95. Mont.—Lander v. Sheehan, 79 P. 406, 32 Mont. 25.

96. Mo.—Parker v. Ætna Life Ins. Co., 232 S.W. 708, 289 Mo. 42.

97. Ala.—Cofer v. Scroggins, 13 So. 115, 98 Ala. 342, 39 Am.S.R. 54.
Pa.—McNamara v. Shorb, 2 Watts. 288.

98. Iowa.—Little v. Iowa State Traveling Men's Assoc., 134 N.W. 1087, 154 Iowa 1087.

99. Ala.—Robinson v. Greene, 43 So. 797, 148 Ala. 434.

1. Tex.—San Antonio Portland Cement Co. v. Gschwender, Civ.App., 207 S.W. 967, error refused.

2. Tenn.—Scott v. Union & Planters' Bank & Trust Co., 130 S.W. 757, 123 Tenn. 258.
22 C.J. p 639 note 6.

3. Ala.—Bynum Bros. v. State, 112 So. 348, 216 Ala. 102.

4. Tex.—Haynes v. Bernhard, Civ. App., 268 S.W. 509.

5. Ill.—Gold v. Rousso, 238 Ill.App. 427.
Vt.—Capital Garage Co. v. Powell, 122 A. 423, 97 Vt. 204, petition dismissed 123 A. 200, 194 Vt. 328.
22 C.J. p 536 note 50.

6. Tex.—Supreme Council A. L. H. v. Landers, 57 S.W. 307, 23 Tex. Civ.App. 625.

7. Ga.—Central Georgia Power Co. v. Mays, 72 S.E. 900, 137 Ga. 120.
Ill.—Smith v. Chicago Sanitary Dist., 103 N.E. 254, 260 Ill. 453—Smythe v. Evans, 70 N.E. 906, 209 Ill. 376.
Mo.—Rosenfeld v. Siegfried, 91 Mo. App. 169.

8. N.H.—Gardner v. Commercial Mach. Co., 111 A. 317, 79 N.H. 452.

9. Iowa.—Bird v. St. Mark's Church, 17 N.W. 747, 62 Iowa 567.

10. N.Y.—Liscomb v. Agate, 22 N.Y. S. 126, 67 Hun 388.

11. Ga.—Scott v. Mayor, etc., of Mount Airy, 14 S.E.2d 127, 64 Ga. App. 828.

money collected was turned over;[12] that a paper was abstracted from the files of a public office;[13] that an instrument purports to be a copy;[14] that a place was frequented by people;[15] that a person held a certain office;[16] that more force than necessary was used;[17] that the only available right of way is over private property;[18] that signals were used at a certain betting place;[19] that at an organization meeting a corporate charter was accepted;[20] that a company was under the jurisdiction and direction of the interstate commerce commission;[21] that certain parties were interested in the drilling of an oil well;[22] that county funds were paid out for certain purposes;[23] that deceased jumped or leaped under a train;[24] that notices of cancellation of insurance policy had never been sent to insured at his home address;[25] that a transcript of a justice of the peace judgment was not recorded;[26] that witness was arrested;[27] that he was placed in a hospital ward reserved for certain diseases;[28] that witness made a deposit, in an action to recover bank deposits;[29] that witness was well known on the street where she lived;[30] that witness knew where defendant lived, and he may state where he lived, although he testifies that he had never been to or past defendant's house;[31] that litigation took place between certain persons;[32] that articles furnished to a wife and child were needed by them,[33] that purchaser told owner of property that he could not buy, and later concluded otherwise, in an action for commissions for lots sold by the owner;[34] to which bank a check was first sent, and how and when it was sent to, and returned by, that bank with information it did not have sufficient funds;[35] the value of audit;[36] the number of times the foreman visited the place where the employee was injured;[37] what was a fair and just wage rate;[38] what one did as an officer;[39] whether articles included in an inventory, which included items not covered by the terms of an insurance policy, were insured by the policy;[40] whether employee was discharged by employer;[41] the kind of an inventory required under the policy;[42] whether a party signing a deposition understood it;[43] whether certain property had been tied up by a suit;[44] whether insurance policies were canceled;[45] whether two suits were for the same cause of action;[46] whether he ever advised his son to separate from the latter's wife;[47] whether safety appliances around a machine would create interference;[48] whether witness knew a certain result would follow;[49] who furnished money;[50] who requested an arrest;[51] for whom witness acted;[52]

12. N.Y.—Metropolitan L. Ins. Co. v. Schaefer, 40 N.Y.S. 984, 16 Misc. 625.

13. Tex.—Pope v. Anthony, 68 S.W. 521, 29 Tex.Civ.App. 298.

14. Ala.—Murphy v. State, 23 So. 719, 118 Ala. 137.

15. Ala.—Alabama Power Co. v. Jones, 101 So. 898, 212 Ala. 206.

16. Iowa.—State v. Haskins, 80 N. W. 1063, 109 Iowa 656, 77 Am.S.R. 560, 47 L.R.A. 223.

17. Ala.—Louisville & N. R. Co. v. Watson, 8 So. 249, 90 Ala. 68.

18. Tex.—Denison & P. S. R. Co. v. O'Malley, 45 S.W. 225, 18 Tex.Civ. App. 200.

19. Conn.—Sofas v. McKee, 124 A. 380, 100 Conn. 541.

20. Ga.—Smith v. Satilla Pecan Orchard & Stock Co., 110 S.E. 303, 152 Ga. 538.

21. Ind.—Selph v. Illinois Pipe Line, 190 N.E. 191, 206 Ind. 490.

22. Tex.—Harvey Company v. Braden, Civ.App., 260 S.W. 655.

23. Ga.—Payne v. Franklin County, 116 S.E. 627, 155 Ga. 219.

24. Tex.—Feinberg v. Great Southern Life Ins. Co., Civ.App., 111 S. W.2d 729.

25. Mont.—McGonigle v. Prudential Ins. Co. of America, 46 P.2d 687, 100 Mont. 203.

26. Ill.—Swanson v. Kohout, 136 N. E. 656, 304 Ill. 606.

27. Ala.—Alabama Co. v. Norwood, 100 So. 479, 211 Ala. 385.

28. U.S.—U. S. v. Sessin, C.C.A. Kan., 84 F.2d 667.

29. Minn.—Larson v. Citizens' State Bank of Westbrook, 172 N.W. 125, 142 Minn. 334.

30. Ga.—Western Union Tel. Co. v. Travis, 86 S.E. 221, 144 Ga. 110.

31. Tex.—Smith v. Woods, Taylor & Co., Civ.App., 235 S.W. 720.

32. Ky.—Ball v. Loughridge, 100 S. W. 275, 30 Ky.L. 1123.

33. Iowa.—Baker v. Oughton, 106 N. W. 272, 130 Iowa 35.
22 C.J. p 536 note 77.

34. Tex.—Millerman v. Walton, Civ. App., 278 S.W. 483.

35. Tex.—Jackes-Evans Mfg. Co. v. Goss, Civ.App., 254 S.W. 320.

36. Tex.—West Audit Co. v. Yoakum County, Civ.App., 53 S.W.2d 311, error dismissed.

37. Md.—M. A. Long Co. v. State Accident Fund, 144 A. 775, 156 Md. 639.

38. Tex.—Federal Underwriters Exchange v. Woods, Civ.App., 140 S. W.2d 285, error granted.

39. Ill.—Chicago v. Murdock, 72 N. E. 46, 212 Ill. 9, 103 Am.S.R. 221.

40. Tex.—Delaware Ins. Co. v. Hill, Civ.App., 127 S.W. 283.

41. Ind.—Prudential Ins. Co. of America v. Bidwell, 8 N.E.2d 123, 103 Ind.App. 386.

42. Tex.—Camden Fire Ins. Ass'n v. Yarborough, Civ.App., 229 S.W. 336, dismissed for want of jurisdiction.

43. Tex.—Sarro v. Bell, 126 S.W. 24, 59 Tex.Civ.App. 152.

44. Mo.—Crews v. Bogy, App., 285 S.W. 549.

45. Cal.—Emery v. Pacific Employers Ins. Co., 67 P.2d 1046, 8 Cal. 2d 663.

46. Tex.—Allen v. Burr's Ferry, B. & C. R. Co., Civ.App., 143 S.W. 1185.

47. Mo.—Leavell v. Leavell, 89 S.W. 55, 114 Mo.App. 24.

48. Ill.—McCormick Harvesting Mach. Co. v. Burandt, 26 N.E. 588, 136 Ill. 170.

49. Ala.—National Supply Co. v. Southern Creamery Co., 140 So. 590, 224 Ala. 507.

50. Cal.—Kirk White & Co. v. Bieg-Hoffine Co., 44 P.2d 439, 6 Cal.App. 2d 188.

51. Ala.—Dismukes v. Trivers Clothing Co., 127 So. 188, 221 Ala. 29.
22 C.J. p 536 note 89.

52. N.Y.—Duryea v. Vosburgh, 17 N.Y.S. 742, reversed on other grounds 33 N.E. 932, 138 N.Y. 621.

and why goods were not delivered.[53]

The decisions under the rule excluding opinion evidence are very numerous[54] and include evidence as to absence of records;[55] acceptance;[56] accuracy of a machine;[57] attestation in presence of testator;[58] attempt to stop a car;[59] attempt to find accommodations,[60] authority;[61] belief of another;[62] benefits;[63] best interest of a child with respect to its custody;[64] cancellation of insurance;[65] comparative prices;[66] compensation;[67] contents of city budget;[68] control;[69] cruelty;[70] custom;[71] degree of willfulness shown in doing certain acts;[72] duty to maintain electric wires;[73] duties of a workman operating a particular machine;[74] duties of a farmer;[75] duty of officer;[76] earning capacity;[77] effort to escape injury;[78] efforts to obtain loan;[79] election of officers;[80] equipment of hospital;[81] exhaustion of funds;[82] evasion of the law;[83] fair and regular appearance of a certain paper;[84] full disclosure to counsel, in an action for malicious prosecution;[85] habitual drunkenness;[86] how possession was obtained;[87] identity;[88] inducement in seduction;[89] injury to health by intoxication;[90] intemperance;[91] interpretation of laws of benevolent society;[92] knowledge of another;[93] making of gift;[94] market value;[95] meaning conveyed by well-known words;[96] meaning of libelous matter;[97] membership in association;[98] mode of computation of tax;[99] necessity for application for charity;[1] necessity for highway;[2] notice;[3] number of persons

53. Minn.—Derosia v. Winona & St. Peter R. Co., 18 Minn. 133.

54. Pa.—Graham v. Pennsylvania Co., 21 A. 151, 139 Pa. 149, 12 L.R.A. 293.
22 C.J. p 492 note 93.

55. N.D.—Fisher v. Betts, 96 N.W. 132, 12 N.D. 197.

56. Ga.—Skipper v. Alexander, 158 S.E. 32, 172 Ga. 246.
N.J.—Thompson v. Briscoe, 156 A. 488, 108 N.J.Law 387.
N.Y.—In re Kelly's Will, 271 N.Y.S. 457, 151 Misc. 277.

57. N.Y.—Dunn v. Ultsch, 21 N.Y.S. 262, 2 Misc. 211.

58. Ill.—Snyder v. Steele, 122 N.E. 520, 287 Ill. 159.

59. Ala.—Birmingham R., Light & Power Co. v. Randle, 43 So. 355, 149 Ala. 539.

60. N.Y.—Kline v. Kleenan, 185 N.Y.S. 113.

61. Mich.—Michigan Shoe Co. v. Paul, 113 N.W. 310, 149 Mich. 695.

62. Cal.—Huyck v. Rennie, 90 P. 929, 151 Cal. 411.

63. U.S.—Wabash Ry. Co. v. City of St. Louis, C.C.A.Mo., 64 F.2d 921, affirming, D.C., City of St. Louis v. Senter Commission Co., 3 F.Supp. 308, and certiorari denied Wabash Ry. Co. v. City of St. Louis, Mo., 54 S.Ct. 88, 290 U.S. 668, 78 L.Ed. 577.

64. Ga.—Milner v. Gatlin, 76 S.E. 860, 139 Ga. 109.
Mont.—State v. Giroux, 47 P. 798, 19 Mont. 149.
Tex.—Long v. Smith, Civ.App., 162 S.W. 25.
22 C.J. p 493 note 12.

65. Okl.—Great American Life Ins. Co. v. Stephenson, 55 P.2d 56, 176 Okl. 295.

66. Ill.—Kenfield-Leach Co. v. Industrial Publications, 151 N.E. 239, 320 Ill. 449.

67. Cal.—Abbott v. Limited Mut. Compensation Ins. Co., 85 P.2d 961, 30 Cal.App.2d 157.

68. Tex.—Moore v. Logan, Civ.App., 10 S.W.2d 428, error dismissed.

69. U.S.—Crow v. Continental Oil Co., C.C.A.Tex., 115 F.2d 740—Eldridge v. McGeorge, C.C.A.Ark., 99 F.2d 835.
22 C.J. p 493 note 37, p 638 note 98.

70. Ala.—Hall v. Goodson, 32 Ala. 277.
22 C.J. p 493 note 43.

71. Pa.—Gordon v. Diffenderffer, 177 A. 21, 317 Pa. 425.

72. S.C.—Entzminger v. Seaboard Air Line R. Co., 60 S.E. 441, 79 S.C. 151.

73. Ala.—Alabama Power Co. v. Fergusen, 87 So. 796, 205 Ala. 204.

74. Ind.—Blanchard-Hamilton Furniture Co. v. Colvin, 69 N.E. 1032, 32 Ind.App. 398.

75. Mo.—Stoner v. New York Life Ins. Co., 114 S.W.2d 167, 232 Mo.App. 1048.

76. Md.—City of Baltimore v. First Methodist Episcopal Church of Baltimore City, 107 A. 351, 134 Md. 593.

77. Tex.—Texas-Louisiana Power Co. v. Webster, Civ.App., 59 S.W.2d 902, affirmed 91 S.W.2d 302, 127 Tex. 126.
22 C.J. p 494 note 52.

78. Mo.—Beitling v. S. S. Kresge Co., 116 S.W.2d 522, 232 Mo.App. 1195.

79. Tex.—B. F. Goodrich Rubber Co. v. Valley Plumbing & Supply Co., Civ.App., 267 S.W. 1036.

80. Ga.—Skipper v. Alexander, 158 S.E. 32, 172 Ga. 246.

81. Ala.—Atlantic Pacific Stages v. Yandle, 140 So. 603, 224 Ala. 481.

82. Tex.—Loyal Friends of America Benev. Ass'n v. Steward, Civ.App., 53 S.W.2d 91.

83. Tex.—Petteway v. State, 35 S.W. 646, 36 Tex.Cr. 97.

84. Mich.—Brown v. Kennedy, 93 N.W. 1073, 131 Mich. 464.

85. Neb.—Jensen v. Halstead, 85 N.W. 78, 61 Neb. 249.

86. Mo.—Golding v. Golding, 6 Mo. App. 602, affirmed 74 Mo. 123.

87. Mo.—Foster v. Modern Woodmen of America, App., 138 S.W.2d 18.

88. Utah.—Golden v. American Keene Cement & Plaster Co., 95 P.2d 755, 98 Utah 23.

89. Ala.—Anderson v. State, 16 So. 108, 104 Ala. 83.

90. N.Y.—Rawls v. American Mut. L. Ins. Co., 27 N.Y. 282, 84 Am.D. 280.

91. Ala.—Smith v. State, 55 Ala. 1.

92. Mo.—Davidson v. Supreme Lodge K. P., 22 Mo.App. 263.

93. Ala.—Globe & Rutgers Fire Ins. Co. v. Pappas, 122 So. 346, 219 Ala. 332.
Mass.—Shachoy v. Chevrolet Motor Co., 182 N.E. 830, 280 Mass. 442.
22 C.J. p 494 note 89.

94. U.S.—Shwab v. Doyle, Mich., 269 F. 321, reversed on other grounds 42 S.Ct. 391, 258 U.S. 529, 66 L.Ed. 747, 26 A.L.R. 1454.

95. Tenn.—Green v. Arnold, App., 150 S.W.2d 1075.

96. Tex.—Lehmann v. Medack, Civ. App., 152 S.W. 438.

97. Or.—Peck v. Coos Bay Times Pub. Co., 259 P. 307, 122 Or. 408.

98. Ala.—Sovereign Camp, W. O. W., v. Tucker, 110 So. 901, 215 Ala. 509.

99. U.S.—John M. Parker Co. v. Commissioner of Internal Revenue, C.C.A., 49 F.2d 254.

1. Iowa.—Polk County v. Owen, 174 N.W. 99, 187 Iowa 220.

2. Vt.—Bolles v. City of Montpelier, 108 A. 565, 93 Vt. 513.

3. Mont.—McGonigle v. Prudential

present;[4] obscenity;[5] obstruction;[6] opportunity;[7] overcrowding of car;[8] previous attempts to obtain warrant;[9] reason for absence of witness;[10] reasonableness of disposition of property;[11] recognition of a cow by a calf;[12] recognized division line;[13] relative efficiency of safety precautions;[14] remembrance of similar occurrence;[15] results of analysis;[16] result of computation;[17] result of investigation;[18] rules of surveying;[19] services rendered;[20] similarity of statements;[21] social customs;[22] suicide;[23] suspicious circumstances;[24] that a fact was generally known;[25] that bond could have been made;[26] that goods sold constituted necessaries;[27] that insured had no insurance in certain companies;[28] that letters were threatening and blackmailing;[29] that services were unsatisfactory;[30] that two conversations were similar;[31] that there was nothing to prevent learning facts;[32] that there was no objection by other party to bill for work;[33] transfer of insurance;[34] truth of a statement alleged to be libelous;[35] understanding of English;[36] understanding of one with whom the witness had a conversation;[37] use of capital of trust company;[38] use of force;[39] validity of will;[40] whether a certain organization is a charity;[41] and worthlessness.[42]

It has also been held that a witness should not be allowed to state that brakes were applied;[43] that best endeavors were used;[44] that regulations were properly adopted;[45] that surety on note was treated as accommodation indorser on other notes;[46] what is covered by an assessment;[47] whether defendant owed assessment;[48] what constitutes practising medicine;[49] what is regular route;[50] in what official capacity the witness acted;[51] whether a carrier was a public or private carrier;[52] whether codefendant induced bringing of suit;[53] what is shown by records;[54] whether an employee could have been warned or instructed;[55] whether one

Ins. Co. of America, 46 P.2d 687, 100 Mont. 203.

4. Vt.—Girard v. Vermont Mut. Fire Ins. Co., 154 A. 666, 103 Vt. 330.

5. N.Y.—People v. Muller, 96 N.Y. 408, 48 Am.R. 635.

6. Iowa.—Cason v. City of Ottumwa, 71 N.W. 192, 102 Iowa 99.

7. Mich.—Mack v. Cole, 89 N.W. 564, 130 Mich. 84.

8. Ill.—Chicago Terminal Transfer R. Co. v. O'Donnell, 72 N.E. 1133, 213 Ill. 545, affirming 114 Ill.App. 345.

22 C.J. p 495 note 39.

9. N.Y.—Luhan v. Slavik, 185 N.Y. S. 878, 194 App.Div. 728.

10. Ga.—Granger v. National Convoy & Trucking Co., 7 S.E.2d 915, 62 Ga.App. 294.

11. Ga.—Colbert v. Pitner, 122 S.E. 315, 157 Ga. 690.

12. Tex.—Berry v. State, 38 S.W. 812, 37 Tex.Cr. 44.

13. Pa.—Reiter v. McJunkin, 45 A. 46, 194 Pa. 301.

14. Tenn.—Nashville, C. & St. L. Ry. v. White, 15 S.W.2d 1, 158 Tenn. 407.

15. Ala.—Houston v. Town of Waverly, 142 So. 80, 225 Ala. 98.

16. U.S.—Coca-Cola Co. v. Joseph C. Wirthman Drug Co., C.C.A.Mo., 48 F.2d 743.

17. Okl.—Blumenfeld v. Mann, 258 P. 918, 126 Okl. 64.

18. Tex.—Aldana v. Aldana, Civ. App., 42 S.W.2d 661, error dismissed.

19. Va.—Smith v. Stanley, 75 S.E. 742, 114 Va. 117.

20. Ky.—Clark v. Hale, 278 S.W. 39, 209 Ky. 496.

21. N.C.—State v. McLaughlin, 35 S.E. 1037, 126 N.C. 1080.

22. Wash.—Pearson v. Alaska Pac. SS. Co., 99 P. 753, 51 Wash. 560, 130 Am.S.R. 1117.

23. Iowa.—Scott v. Sovereign Camp, W. O. W., 129 N.W. 302, 149 Iowa 562.

24. Vt.—State v. Gorham, 31 A. 845, 67 Vt. 365.

25. S.C.—Brown v. Foster, 19 S.E. 299, 41 S.C. 118.

26. Ala.—Lipscomb v. Moore, 150 So. 907, 227 Ala. 547.

27. Ill.—Compton v. Bates, 10 Ill. App. 78.

28. Mo.—Welch v. Fraternal Aid Union, 253 S.W. 187, 214 Mo.App. 443.

29. Conn.—Morache v. Greenberg, 165 A. 684, 116 Conn. 549.

30. Tex.—Golden Rod Mills v. Green, Civ.App., 230 S.W. 1089, dismissed for want of jurisdiction.

31. Conn.—Chatfield v. Bunnell, 37 A. 1074, 69 Conn. 511.

32. Md.—Johnson & Higgins v. Simpson, 163 A. 832, 163 Md. 574.

33. Ill.—Harrison v. Trickett, 57 Ill. App. 515.

34. Mo.—Clair v. American Bankers Ins. Co., App., 137 S.W.2d 969.

35. Iowa.—State v. Heacock, 76 N. W. 654, 106 Iowa 191.

22 C.J. p 497 note 13—37 C.J. p 86 note 44.

36. N.J.—Koccis v. State, 27 A. 800, 56 N.J.Law 44.

37. Mich.—Wolverton v. Saranac, 137 N.W. 211, 171 Mich. 419.

38. U.S.—Germantown Trust Co. v. Lederer, C.C.A.Pa., 263 F. 672.

39. Conn.—Lentine v. McAvoy, 136 A. 76, 105 Conn. 528.

40. Ala.—Kellett v. Cochran, 194 So. 805, 239 Ala. 313.

41. Ga.—Atlanta Masonic Temple Co. v. City of Atlanta, 183 S.E. 864, 162 Ga. 244.

42. Ind.—Crim v. Fleming, 24 N.E. 358, 123 Ind. 438.

43. Ala.—Southern R. Co. v. Bonner, 37 So. 702, 141 Ala. 517—Alabama Great Southern R. Co. v. Burgess, 22 So. 169, 114 Ala. 587.

44. N.Y.—Sternberger v. Metropolitan El. R. Co., 20 N.Y.S. 857, 2 Misc. 113.

45. Ala.—Wheeler v. River Falls Power Co., 111 So. 907, 215 Ala. 655.

46. Mo.—Chavaux v. Brewer, App., 223 S.W. 751.

47. Neb.—Orcutt v. Polsley, 81 N.W. 616, 59 Neb. 575.

48. Ga.—City of La Grange v. Pound, 177 S.E. 762, 50 Ga.App. 219.

49. Ill.—People v. Lehr, 63 N.E. 725, 196 Ill. 361.

50. Wash.—Andersen v. Seattle Automobile Co., 265 P. 162, 147 Wash. 76.

51. Ala.—Kemp v. Wilson, 84 So. 636, 17 Ala.App. 224.

52. U.S.—Chenery v. Employers' Liability Assur. Corporation, C.C.A. Cal., 4 F.2d 826.

53. Tex.—Cohn v. Saenz, Civ.App., 211 S.W. 492, error refused.

54. Ala.—Phillips v. Langston, 88 So. 177, 17 Ala.App. 572.

55. Del.—Seihinski v. Wilmington Leather Co., 83 A. 20, 26 Del. 288.

could work at a machine without knowing that there was a knife in it;[56] whether one is a fugitive from justice;[57] whether a fellow servant knew anything about running a hoisting engine;[58] whether insurance policy covered certain property;[59] whether filter beds would benefit plaintiff in an action for a nuisance caused by discharge of a sewer;[60] whether one had a lien;[61] whether a hoe could kill a man within striking distance;[62] whether money was honestly obtained;[63] whether one can write his name;[64] whether the provisions of a will have been followed;[65] who fired a shot;[66] whose duty it was to pile up timber;[67] whether employers were under the Workmen's Compensation Act, and whether they were insured in a certain company under such act;[68] whether an injury was accidental or intentional;[69] whether witness was a party to a suit;[70] whether witness acted under the terms of a mortgage;[71] and whose money paid a loan.[72]

A witness should not state his conclusion as to what he told another, but should state the facts.[73] Opinions or conclusions on matters which it is an industrial board's duty to find as ultimate facts are not admissible.[74]

§ 472. By Skilled Witness

A skilled witness should be permitted to state a fact not generally known, but known to him because of his peculiar training and experience, unless it involves too much reasoning or conjecture.

A skilled witness should be permitted to state a fact not generally known, but known to him because of his peculiar training and experience,[75] although it may involve an element of inference,[76] unless the statement contains too much of the objectionable element of reasoning or conjecture.[77] Such witnesses are frequently spoken of as experts;[78] but, while the true expert will as a rule be possessed of the knowledge requisite to enable him to give such testimony,[79] it is not necessary that the witness through whom such evidence is introduced should rise to the grade of an expert whose opinion on hypothetical facts would be received.[80]

Regarding a so-called expert witness, in this connection, as a skilled witness, there are generally two classes of cases in which expert testimony as to the facts is admissible. In one class the facts are stated by the expert witness, but the conclusions therefrom are drawn by the jury. In the other class the expert witness not only states the facts, but also gives his

56. Del.—Seininski v. Wilmington Leather Co., supra.

57. Ala.—Jones v. State, 93 So. 210, 18 Ala.App. 478.

58. Md.—McCall's Ferry Power Co. v. Price, 69 A. 832, 108 Md. 96.

59. Mo.—Indiahoma Refining Co. v. National Fire Ins. Co. of Hartford, Conn., App., 242 S.W. 710.

60. Iowa.—Suddeth v. Boone, 96 N.W. 853, 121 Iowa 258.

61. Pa.—Bisk Candy Co. v. Stout, 137 A. 612, 289 Pa. 369.

62. Ala.—Holmes v. State, 14 So. 864, 100 Ala. 80.

63. Ala.—Johnson v. State, 35 Ala. 370.

64. Ala.—Childers v. Holmes, 92 So. 615, 207 Ala. 382.

65. Ill.—McFarland v. McFarland, 52 N.E. 281, 177 Ill. 208.

66. Tex.—Terry v. State, Cr., 72 S.W. 382.

67. Conn.—Brennan v. Berlin Iron Bridge Co., 50 A. 1030, 74 Conn. 382.

68. Ill.—Wachuta v. Chicago Rys. Co., 222 Ill.App. 329.

69. Mo.—Landau v. Travelers' Ins. Co., 287 S.W. 346, 315 Mo. 760.

70. Ala.—Riedermann v. Stewart, 103 So. 810, 20 Ala.App. 512.

71. Tex.—City Grocery Co. v. Hallmark, Civ.App., 123 S.W.2d 988, error dismissed.

72. Kan.—Moyer v. Knapp, 59 P. 674, 9 Kan.App. 226.

73. Ill.—Garden City Foundry Co. v. Industrial Commission, 138 N.E. 122, 307 Ill. 76.

74. Ind.—Avalos v. Inland Steel Co., 183 N.E. 322, 95 Ind.App. 291.

75. U.S.—Cropper v. Titanium Pigment Co., C.C.A.Mo., 47 F.2d 1038, 78 A.L.R. 737.
Mont.—Irion v. Hyde, 105 P.2d 666, 110 Mont. 570.
N.Y.—Kenny v. Douglas Manor Ass'n, 299 N.Y.S. 384, 252 App.Div. 780.
Pa.—Commonwealth v. Blankenstein, 81 Pa.Super. 340.
22 C.J. p 536 note 93.
The result of his personal investigations may be testified to by a skilled witness.—Green v. Ashland Water Co., 77 N.W. 722, 101 Wis. 258, 70 Am.S.R. 911, 43 L.R.A. 117.

76. U.S.—Cropper v. Tatanium Pigment Co., C.C.A.Mo., 47 F.2d 1038, 78 A.L.R. 737.
Statement of fact and inference from fact compared
"When a lay witness gives an opinion and it is received on the ground that the nature of the subject-matter is such that it cannot be reproduced or detailed to the jury precisely as it appeared to the witness at the time, his testimony is said to be a shorthand rendering of the fact; an inference drawn from given data by a person who is peculiarly qualified to do so by reason of his experience or special skill or learning is no less a fact. There is therefore no logical distinction between opinion testimony in the sense here used and so-called fact testimony."—Scanlon v. Kansas City, 28 S.W.2d 84, 95, 325 Mo. 125.
Inferences by skilled witness see infra §§ 518, 519.

77. Ohio.—Lake Erie & W. R. Co. v. Mulcahy, 16 Ohio Cir.Ct. 204, 9 Ohio Cir.Dec. 82.
22 C.J. p 536 note 94.

78. Ind.—Shields v. State, 49 N.E. 351, 149 Ind. 395.
Me.—Cottrill v. Myrick, 12 Me. 222.

79. Wash.—Hill v. Great Northern Life Ins. Co., 57 P.2d 405, 186 Wash. 167.
22 C.J. p 537 note 96.

80. Pa.—Commonwealth v. Blankenstein, 81 Pa.Super. 340.
Rule as to actual experience not applicable
The rule that competency of expert witness depends on actual experience with respect to the subject under investigation or previous study and scientific research has no application to case, where witness is called on for statement of facts and not for an opinion.—Jewel Tea Co. v. McCrary, 122 S.W.2d 534, 197 Ark. 294.
Qualifications of skilled witness generally see supra § 456.

conclusions in the form of an opinion, which the jury may either accept or reject.[81]

§ 473. —— Subjects of Testimony in General

A statement of fact by a skilled witness may be made on any subject as to which he has special knowledge and experience.

The subjects to which a statement of fact by a skilled witness are applicable are not confined to classed and specified professions,[82] or to matters of science or skill, technically speaking,[83] but special knowledge and experience in any line of human activity, not presumably shared by the average jury, may authorize such a statement,[84] nor is it necessary that the skill or experience should be along desirable or even moral lines.[85] The range of such testimony is limited only by the sound discretion of the court in insisting on the requisite conditions,[86] and, of course, by the requirement of relevancy.[87]

§ 474. —— Accounting

An accountant or bookkeeper, as a skilled witness, may state the results of his examination of books and schedules of account.

An accountant who has examined certain books and schedules which have been introduced in evidence may state the results of his computations therefrom,[88] such as to credits and charges,[89] and

81. Mont.—Irion v. Hyde, 105 P.2d 666, 671, 110 Mont. 570—Copenhaver v. Northern Pac. R. Co., 113 P. 467, 470, 42 Mont. 453.
N.Y.—Dougherty v. Milliken, 57 N.E. 757, 163 N.Y. 527, 79 Am.S.R. 608.
Wash.—Hill v. Great Northern Life Ins. Co., 57 P.2d 405, 186 Wash. 167.

Explanation of classes
"The first class comprises those instances where the existence of particular facts is not of common knowledge, but is peculiarly within the knowledge of men whose experience or study enables them to speak with authority. If, with such facts before it, the jury is able to form a conclusion therefrom, it is the sole province of the jury to do so. The other class comprises those cases where not only the knowledge of the facts, but also the conclusions to be drawn therefrom, depend on professional and scientific knowledge or skill. In such cases, qualified experts may testify both as to the facts and as to the conclusions."
N.Y.—Dougherty v. Milliken, 57 N.E. 757, 759, 163 N.Y. 527, 79 Am.S. R. 608.
Wash.—Hill v. Great Northern Life Ins. Co., 57 P.2d 405, 409, 186 Wash. 167.
Judgment or conclusion by expert witnesses generally see infra §§ 520–523.

82. N.Y.—Hostetter Co. v. McGowan, 167 N.Y.S. 276, 101 Misc. 501.

83. Wis.—Zarnik v. C. Reiss Coal Co., 113 N.W. 752, 133 Wis. 290—Namann v. Milwaukee Bridge Co., 106 N.W. 1081, 127 Wis. 550, 7 Ann. Cas. 458.

84. Tex.—Grant v. State, 148 S.W. 760, 67 Tex.Cr. 155, 42 L.R.A.,N.S., 428.
Wis.—Zarnik v. C. Reiss Coal Co., 113 N.W. 752, 755, 133 Wis. 290—Hamann v. Milwaukee Bridge Co., 106 N.W. 1081, 127 Wis. 550, 7 Ann. Cas. 458—Schwantes v. State, 106 N.W. 237, 247, 127 Wis. 160.
22 C.J. p 537 note 99.

Acreage
A surveyor, having testified to his experience as such, and that he had made a survey of the lands in question, may state as a fact the acreage of land described in a deed.—Hill v. Johnson, 106 So. 814, 214 Ala. 194.

Effect of ponding water on upper streams and land
In action for damage to real estate, expert witness who had surveyed land was properly permitted to state effect of ponding water on upper streams and land.—Knight v. Sullivan Power Co., 138 S.E. 818, 140 S.C. 296.

Identity of lines cut on tract
Testimony of real estate agent that lines cut on tract from which timber was sold, as run by surveyor, were same as shown him by seller and shown by him to buyer, was not conclusion from facts, but admissible as direct statement of fact.—White v. Northup, 132 A. 258, 150 Md. 18.

Location of tract
Testimony of expert civil engineer and land surveyor as to location of tract, based on his survey and on plaintiff's declaration containing description of tract, is admissible against an objection that it called for conclusion, where permanent monument shown on plat was no longer in existence on ground at one terminus of boundary line.—Deleware Securities Corporation v. Kahn, 175 So. 779, 129 Fla. 26.

Properties of matter, not of such usual nature as to be within the range of common experience, may be stated by one familiar therewith.—Davis v. State, 37 So. 676, 141 Ala. 62—22 C.J. p 537 note 99 [c].

That linoleum cannot be laid successfully on a concrete floor that rests on the ground, and without any ventilation under it, may be the subject of testimony of a skilled witness.—McReynolds v. National Woodworking Co., 26 F.2d 975, 58 App.D.C. 197.
Qualification of skilled witness see supra § 456.

85. Tenn.—Hall v. State, 6 Baxt. 522.
Va.—Nuckolls v. Commonwealth, 32 Gratt. 884, 73 Va. 884.
22 C.J. p 537 note 1.

86. N.J.—Schwartz Bros. Truckmen v. International Brotherhood of Teamsters, Chauffeurs, Stablemen and Helpers, Local 478, 19 A.2d 690, 126 N.J.Law 379.
Okl.—Prickett v. Sulzberger & Sons Co., 157 P. 356, 57 Okl. 567.
Wyo.—Morrison v. Cottonwood Development Co., 266 P. 117, 38 Wyo. 190.
22 C.J. p 537 note 2.

87. Tex.—Quinn v. Galveston, H. & S. A. R. Co., Civ.App., 84 S.W. 395.
22 C.J. p 537 note 3.

Subject of opinion evidence not before court
In attachment execution against defendant contractor and railroad for which it had been working, where journal of garnishee railroad was produced at trial, but none other of its books was offered, it was not error to refuse to permit an expert bookkeeper to express opinion as to what journal entries indicated for the reason that there was nothing before the court which was the subject of opinion evidence.—American Surety Co. of New York v. Vandegrift Const. Co., 107 A. 733, 264 Pa. 193.

88. Ga.—Payne v. Franklin County, 116 S.E. 627, 155 Ga. 219.
Ill.—Smythe v. Evans, 70 N.E. 906, 209 Ill. 376, reversing 108 Ill.App. 145.
22 C.J. p 537 note 4.

An auditor of public accounts or a certified accountant may be permitted to give the result of his findings after the examination of the books of a bank, when they are voluminous. —Scharlau v. Lombard State Bank, 278 Ill.App. 487.

89. N.C.—Forest City Building & Loan Ass'n v. Davis, 133 S.E. 530, 192 N.C. 108, modified on other grounds 138 S.E. 338, 193 N.C. 710.

as to the net earnings of a certain company.[90] It has been held proper to allow a bookkeeper to state the amount due and unpaid on a note as shown by his books,[91] but, on the other hand, a bookkeeper's statement, based on his examination of the books of account, as to the profits of his business has been rejected.[92] Where an audit is made by more than one person, one or more of them may be interrogated as to the summaries and finished results and his testimony is not confined solely to the part done by him.[93]

§ 475. —— Agriculture

Persons engaged in agriculture may testify to facts generally known in the agricultural world.

Persons engaged in agriculture may testify to facts generally known in the agricultural world,[94] such as the proper time for[95] or method of[96] conducting various agricultural operations, the average yield of given crops,[97] what constitutes a proper fence,[98] the sufficiency of a fence to turn cattle,[99] or definite probabilities in farming.[1] They may also state whether or not certain acts are prudent under given circumstances,[2] or the effect of certain forces or operations on land[3] or agricultural products.[4] A witness who states that he has knowledge of what constitutes agricultural land may state whether or not certain land is agricultural land.[5]

§ 476. —— Animals

A witness experienced in stock or cattle raising and trading may state facts generally known in such business.

Witnesses who are experienced[6] in stock or cattle raising and trading may state facts generally known in such business,[7] provided a necessity therefor exists.[8] Such witnesses may testify as to brands and the defacing thereof[9] or the number of a herd as indicated by the number of calves branded;[10] or may state facts with regard to the physical characteristics,[11] unsoundness,[12] or pedigree[13] of animals, the effects on them of a designated treatment;[14] the approximate cost of feeding,[15] or the

In action on employee's fidelity bond, expert accountants may testify that employee credited himself with deposit of checks he received for employer but did not charge himself with them, and that he was not entitled to credit for deposit.—Forest City Building & Loan Ass'n v. Davis, supra.

90. N.J.—Schwartz Bros. Truckmen v. International Brotherhood of Teamsters, Chauffeurs, Stablemen and Helpers, Local 478, 19 A.2d 690, 126 N.J.Law 379.

A witness who has not made computations of earning balances for a series of years, and does not know whether such balances are correct, nor what items they include, is not entitled to testify thereto.—State v. Nevada Cent. R. Co., 81 P. 99, 28 Nev. 186, 113 Am.S.R. 884.

91. Ind.—Plank v. Indiana Mut. Bldg., etc., Assoc., 62 N.E. 652, 28 Ind.App. 259.

92. Ill.—Smythe v. Evans, 70 N.E. 906, 209 Ill. 376, reversing 108 Ill. App. 145.

93. Miss.—Missouri Pac. Transp. Co. v. Beard, 176 So. 156, 179 Miss. 764.

94. Iowa.—Whitlock v. Berry, 140 N.W. 404, 159 Iowa 135.

The testimony of a farmer who qualifies as an expert, testifying from his common experience with, and result of his observations made at the time as to, the usual and common appearance or facts and condition of things, which cannot be reproduced to the jury, is admissible under an exception to the general rule excluding the conclusions of a witness.—Bowman & Blatz v. Raley, Tex.Civ.App., 210 S.W. 723.

95. Or.—Farmers' & Traders' Nat. Bank v. Woodell, 61 P. 837, 65 P. 520, 38 Or. 294.

96. Cal.—Thresher v. Gregory, 42 P. 421, 5 Cal.Unrep.Cas. 185.

Fla.—Vaughan's Seed Store v. Stringfellow, 48 So. 410, 56 Fla. 708.

97. Tex.—Chicago, R. I. & G. R. Co. v. Longbottom, Civ.App., 80 S.W. 542.

22 C.J. p 537 note 11.

98. Ind.—Louisville, N. A. & C. R. Co. v. Spain, 61 Ind. 460.

99. Iowa.—Whitlock v. Berry, 140 N.W. 404, 159 Iowa 135.

1. N.H.—Folsom v. Concord & M. R. Co., 38 A. 209, 68 N.H. 454.

2. Minn.—Krippner v. Biebl, 9 N.W. 671, 28 Minn. 139.

22 C.J. p 537 note 16.

3. Tex.—Texas & N. O. R. Co. v. Norman, Civ.App., 153 S.W. 1184.

22 C.J. p 537 note 17.

4. Tex.—Houston, E. & W. T. R. Co. v. Brackin, Civ.App., 191 S.W. 804.

5. Iowa.—Peterson v. McManus, 172 N.W. 460, 187 Iowa 522.

6. Tex.—Houston Packing Co. v. Griffith, Civ.App., 164 S.W. 431.

22 C.J. p 537 note 19.

7. U.S.—New York, L. E. & W. R. Co. v. Estill, Mo., 13 S.Ct. 444, 147 U.S. 591, 612, 37 L.Ed. 292.

22 C.J. p 537 note 20.

Interpretation of market quotations

A rancher and commission man of many years' experience may be permitted to interpret market quotations of cattle on certain dates and to apply them to cattle comparable to plaintiff's.—Manhattan Oil Co. v. Mosby, C.C.A.Mo., 72 F.2d 840, certiorari denied 55 S.Ct. 237, 293 U.S. 623, 79 L.Ed. 710.

Inference or judgment as to animals see infra § 524.

8. Tex.—Tyler v. State, 11 Tex.App. 388.

9. N.M.—State v. Brown, 70 P.2d 147, 148, 41 N.M. 416, citing Corpus Juris.

Tex.—Simonds v. State, 175 S.W. 1064, 76 Tex.Cr. 487—Gatlin v. State, 163 S.W. 428, 72 Tex.Cr. 516.

10. Tex.—Cabaness v. Holland, 47 S. W. 379, 19 Tex.Civ.App. 383.

11. U.S.—New York, L. E. & W. R. Co. v. Estill, Mo., 13 S.Ct. 444, 147 U.S. 591, 37 L.Ed. 292.

12. Vt.—Moore v. Haviland, 17 A. 725, 61 Vt. 58.

13. Ind.—Fleming v. McClaflin, 27 N.E. 875, 1 Ind.App. 537.

Ky.—Southern R. Co. v. Graddy, 109 S.W. 881, 33 Ky.L. 183.

14. N.C.—Coley Farming Co. v. Seaboard Air Line Ry. Co., 126 S.E. 167, 189 N.C. 63.

22 C.J. p 538 note 28.

Improper handling by carrier

U.S.—Missouri Pac. R. Co. v. Hall, Ind.T., 66 F. 868, 14 C.C.A. 153.

N.C.—Coley Farming Co. v. Seaboard Air Line Ry. Co., 126 S.E. 167, 189 N.C. 63.

Tex.—Gulf, R. Co. v. Ideus, Civ.App., 157 S.W. 173.

15. Tex.—Howard v. Howard, Civ. App., 48 S.W.2d 489, error refused.

usual method of butchering.[16] A veterinary surgeon[17] or other person qualified by long and extensive practical experience may state facts with regard to the diseases of animals.[18] Persons familiar with the use of horses and other domestic animals may state relevant facts not generally known as to their habits[19] or handling.[20]

§ 477. —— Building Trades

A witness skilled in the particular line involved may state facts with regard to ordinary building operations.

The proper manner of conducting ordinary building operations,[21] the time required therefor,[22] the cost thereof,[23] the life,[24] strength,[25] and other characteristics[26] of building materials, including their adaptability for certain purposes,[27] and the effect produced on them by decay,[28] heat,[29] or wear,[30] may be stated by a witness skilled in the particular line involved in the inquiry, unless the fact is one within the special function of the jury to determine.[31] Such a witness may state the condition of public bridges and buildings and the probable cost of repairing them.[32] A builder may state what forms of construction would be covered by a certain designation,[33] and a gas fitter may testify whether gas meters are usually classified as gas fixtures.[34]

§ 478. —— Electricity, Engineering, Manufacturing and Mechanics

A witness skilled in matters relating to electricity, engineering, manufacturing, or mechanics may be permitted to state relevant facts known to him by reason of his skill or experience.

A person skilled in matters relating to electricity may state facts known to him by reason of such special experience.[35]

16. Tex.—Taylor v. State, Cr., 42 S. W. 285.

17. U.S.—Grayson v. Lynch, N.M., 16 S.Ct. 1064, 163 U.S. 468, 41 L.Ed. 230.

A veterinary surgeon cannot testify regarding a disease of an animal, where it does not appear that he has actually practiced veterinary medicine and surgery, nor been registered, as required by statute.—McCann v. Ullman, 85 N.W. 493, 109 Wis. 574.

18. Ill.—Pearson v. Zehr, 29 N.E. 854, 138 Ill. 48, 32 Am.S.R. 113.
Tex.—Nations v. Love, Civ.App., 26 S.W. 232.
22 C.J. p 538 note 24.

Editor of stock journal not qualified
N.H.—Dole v. Johnson, 50 N.H. 452.

A physician may testify as to the effects of poison on brute animals, although he has never treated an animal therefor.—State v. Sheets, 89 N.C. 543.

A person who is not a physician, surgeon, or veterinarian is not qualified to testify as an expert or skilled witness as to such matters from the mere facts that he has read extensively from books, observed the methods of treatment, and heard the testimony of experts in court with regard to the diseases of men or cattle.—Missouri Pac. Ry. Co. v. Finley, 16 P. 951, 38 Kan. 550—Rouse v. Youard, 41 P. 426, 1 Kan.App. 270.

19. Kan.—Dannenberg v. Missouri Pac. R. Co., 153 P. 504, 96 Kan. 708.
22 C.J. p 538 note 31.

20. Ala.—Staples v. Steed, 52 So. 646, 167 Ala. 241, Ann.Cas.1912A 480.
22 C.J. p 538 note 32.

21. Tex.—Capitol Hotel Co. v. Rittenberry, Civ.App., 41 S.W.2d 697.
22 C.J. p 538 note 33.

Completion of plans and details
Tex.—Capitol Hotel Co. v. Rittenberry, Civ.App., 41 S.W.2d 697, error dismissed.

Cutting upright as weakening stage
Mass.—Brady v. Norcross, 54 N.E. 874, 174 Mass. 442.

Effect of blasting
A carpenter not otherwise specially qualified cannot state the effects on a building of the concussion of blasting one hundred feet below the surface.—In re Thompson, 12 N.Y.S. 182.

Passing brace without holding
Testimony as to whether it was possible for an employee, walking on a girder during the erection of a building, to pass a brace without taking hold of it, has been held competent.—Hogan v. Pennock, 103 N.E. 831, 216 Mass. 274.

Supervision of letting of contract
Tex.—Capitol Hotel Co. v. Rittenberry, Civ.App., 41 S.W.2d 697, error dismissed.

Inference or judgment as to building trades see infra § 546.

22. Cal.—Swain v. Naglee, 17 Cal. 416.

23. Cal.—Iffland v. John, 17 P.2d 1028, 128 Cal.App. 531.
Mo.—Kennett v. Katz Constr. Co., 202 S.W. 558, 273 Mo. 279—Moore v. McCutchen, App., 190 S.W. 350.

Cost of moving dwelling cannot be testified to by witness not qualified to testify on that issue.—Fort Worth & D. S. P. Ry. Co. v. Gilmore, Tex. Civ.App., 2 S.W.2d 543.

24. Iowa.—Morgan v. Freemont County, 61 N.W. 231, 92 Iowa 644.
22 C.J. p 538 note 36.

25. N.Y.—Kuhn v. Delaware, L. & W. R. Co., 36 N.Y.S. 339, 92 Hun 74, affirmed 48 N.E. 1105, 153 N.Y. 683.
Vt.—Lewis v. Crane, 62 A. 60, 78 Vt. 216.
22 C.J. p 538 note 37.

26. N.Y.—Kuhn v. Delaware, L. & W. R. Co., 36 N.Y.S. 339, 92 Hun 74, affirmed 48 N.E. 1105, 153 N.Y. 683.
22 C.J. p 538 note 38.

27. N.Y.—Kuhn v. Delaware, L. & W. R. Co, supra.

28. Iowa.—Morgan v. Freemont County, 61 N.W. 231, 92 Iowa 644.

29. Ohio.—Dixon v. Wachenheimer, 9 Ohio Cir.Ct. 401, 6 Ohio Cir.Dec. 380.

30. Ill.—Acme Harvester Co. v. Chittick, 82 N.E. 647, 230 Ill. 558.

31. N.Y.—Cramer v. Slade, 73 N.Y.S. 125, 66 App.Div. 59.

32. Ga.—McMillan v. Tucker, 113 S. E. 391, 154 Ga. 154.

33. Cal.—Alta Planing Mill Co. v. Garland, 138 P. 738, 167 Cal. 179.
N.Y.—Mead v. Northwestern Ins. Co., 7 N.Y. 530.

34. N.Y.—Downs v. Sprague, 1 Abb. Dec. 550, 2 Keyes 57.

35. Ala.—Alabama Power Co. v. Curry, 153 So. 634, 228 Ala. 444.
22 C.J. p 539 note 50.

Statements of fact held admissible
(1) Whether there was a ground wire connected with a switch.—Alabama Power Co. v. Curry, supra.

(2) Voltage shown on volt meter record at given hour and minimum and maximum voltage during period recorded.—Blakeney v. Alabama Power Co., 133 So. 16, 222 Ala. 394.

(3) Quantity of "juice per hour" used by lamp.—Silverman v. Siegelstein, 173 N.Y.S. 762.

(4) Other statements see 22 C.J. p 539 note 50 [a].

An engineer possessing the necessary qualifications[36] may state relevant facts connected with his profession.[37]

Manufacturing. Witnesses who possess experience in manufacturing pursuits relative to the matter involved in the inquiry[38] may state facts within their knowledge relating to such pursuit,[39] as, for instance, the cost of manufacturing,[40] the proper method of doing certain manufacturing work,[41] and the effect of improper methods,[42] the safety or danger of certain lines of manufacturing,[43] or the disease-producing effects of certain manufacturing occupations.[44]

Mechanics. Persons who are skilled in mechanical matters[45] are competent to testify as to relevant[46] facts which are familiar in the mechanical arts.[47] Such facts may be simple and involve little of the element of reasoning, as, for example, the limits of ordinary observation,[48] the lightness[49] or strength[50] of materials or appliances,[51] under what strain they are at a given time,[52] or how their strength is affected by given imperfections.[53]

36. N.H.—Flint v. Union Water Power Co., 62 A. 788, 73 N.H. 483.
22 C.J. p 539 note 51.

Finding of qualification implied from receipt of testimony
N.H.—Flint v. Union Water Power Co., supra.

37. Cal.—Caletti v. State, App., 114 P.2d 9.
D.C.—District of Columbia v. Chessin, 61 F.2d 523, 61 App.D.C. 260.
Wyo.—Morrison v. Cottonwood Development Co., 266 P. 117, 38 Wyo. 190.
22 C.J. p 539 note 52.

Statements held admissible
(1) The meaning of "average and areas," in a construction contract for roadwork.—Caletti v. State, Cal.App., 114 P.2d 9.
(2) Other statements see 22 C.J. p 539 note 52 [a].

Civil engineer in charge of drainage construction may testify as to whether tile was laid at depth shown by original plans and profiles, although he had no present recollection of levels at any particular station, regardless of loss of book containing notes he made when tile was laid.—Blue Earth County v. National Surety Co., 205 N.W. 277, 164 Minn. 390.

A hydraulic engineer, having many years experience in ditch construction and reclamation service, may be permitted to testify as an expert as to the cost of constructing a lateral ditch for irrigation purposes.—Morrison v. Cottonwood Development Co., 266 P. 117, 38 Wyo. 190.

38. Pa.—Fraim v. National F. Ins. Co., 32 A. 613, 170 Pa. 151, 50 Am. S.R. 753.
22 C.J. p 542 note 84.

39. Ill.—Weber Wagon Co. v. Kehl, 29 N.E. 714, 139 Ill. 644.
22 C.J. p 542 note 85.

40. Ark.—Nashville Lumber Co. v. Ingersoll, 125 S.W. 139, 93 Ark. 447.
Mich.—City of Allegan v. Vonasek, 245 N.W. 557, 559, 251 Mich. 16, citing **Corpus Juris.**

41. Mo.—Wolff v. Scullin Steel Co., App., 217 S.W. 571.
22 C.J. p 542 note 87.

Duties of cranemen
Mo.—Wolff v. Scullin Steel Co., supra.

42. N.Y.—Wiggins v. Wallace, 19 Barb. 338.
22 C.J. p 542 note 88.

43. Cal.—Judson v. Giant Powder Co., 40 P. 1020, 107 Cal. 549, 48 Am. S.R. 146, 29 L.R.A. 718.

44. Mich.—Fox v. Peninsular White Lead & Color Works, 52 N.W. 623, 92 Mich. 243.

45. U.S.—Pullman's Palace-Car Co. v. Harkins, Del., 55 F. 932, 5 C.C. A. 326.
22 C.J. p 542 note 91.

A witness must be qualified either technically or by experience.—Bradley v. District of Columbia, 20 App. D.C. 169.

46. Va.—Parlett v. Dunn, 46 S.E. 467, 102 Va. 459.
22 C.J. p 542 note 92.

Individual practice in particular matters is irrelevant.—Parlett v. Dunn, supra—Richmond Locomotive Works v. Ford, 27 S.E. 509, 94 Va. 627.

47. Ky.—E. M. F. Co. v. Davis, 142 S.W. 391, 146 Ky. 231.
Tex.—Beaumont, S. L. & W. Ry. Co. v. Schmidt, 72 S.W.2d 899, 123 Tex. 580, affirming, Civ.App., 45 S.W.2d 734.
22 C.J. p 542 note 93.

Automobile agent with several years' experience in selling Ford machines is qualified to testify regarding construction of machine.—Gaumnitz v. Indemnity Ins. Co. of North America, 37 P.2d 712, 2 Cal.App.2d 134.

Automobile mechanic of twenty years' experience was competent to state facts showing how ignition could occur by filling gasoline tank while motor was running.—Walker v. Stephens, 127 So. 668, 221 Ala. 18.

An expert machinist's testimony that he would not have looked for a change in the links of a revolving clutch from a flat to a protruding position when the engine was in gear if he did not have mechanical experience is admissible as descriptive of the machinery, rather than a conclusion or opinion, when read in connection with the witness' other testimony describing the machinery.—Beaumont, S. L. & W. Ry. Co. v. Schmidt, 72 S.W.2d 899, 123 Tex. 580, affirming, Civ.App., 45 S.W.2d 734.

Mechanical defects in car
A witness who is experienced in running automobiles, although not an expert machinist, may testify as to whether an automobile is defective where his ability to handle such machines is shown.—E. M. F. Co. v. Davis, 142 S.W. 391, 146 Ky. 231.

Whether pieces of steel were "shafts" or "rough forgings"
U.S.—Puget Sound Machinery Depot v. Davis, C.C.A.Wash., 300 F. 729.

48. Cal.—Silveira v. Iversen, 60 P. 687, 128 Cal. 187.
22 C.J. p 542 note 95.

49. Cal.—People v. Goldsworthy, 62 P. 1074, 130 Cal. 600.

50. Mass.—Erickson v. American Steel & Wire Co., 78 N.E. 761, 193 Mass. 119.
22 C.J. p 542 note 97.

Relative strength
Cal.—McFaul v. Madera Flume & Trading Co., 66 P. 308, 134 Cal. 313.

Tensile strength
Me.—Caven v. Bodwell Granite Co., 54 A. 851, 97 Me. 381.
22 C.J. p 542 note 97 [c].

A carpenter and builder, as such, is not competent to testify as to strength of and strain on wire rope.—Caven v. Bodwell Granite Co., 54 A. 851, 97 Me. 381.

51. Ind.—Louisville, N. A. & C. R. Co. v. Berkey, 35 N.E. 3, 136 Ind. 181.
22 C.J. p 542 note 98.

52. Ill.—Devine v. Mathis Bros. Co., 160 Ill.App. 122.
Me.—Caven v. Bodwell Granite Co., 54 A. 851, 97 Me. 381.

53. Mo.—Boettger v. Scherpe & Koken Architectural Iron Co., 27 S.W. 466, 124 Mo. 87.
Wash.—Murphy v. Pacific Tel. & Tel. Co., 124 P. 114, 68 Wash. 643.

The facts, however, may be more complicated without losing their essential character as facts, as where the witness states the cause of observed phenomena,[54] the dangers attendant on the use of particular machinery,[55] or the prosecution of certain lines of business,[56] how injuries from these dangers can be prevented,[57] how mechanical operations should be conducted,[58] the physical effects of certain mechanical devices[59] such as firearms,[60] the result of special defects,[61] and in general what certain appearances would indicate to an observer experienced or skilled in mechanical trades.[62]

§ 479. —— Law

An attorney or other person versed in legal matters may state facts connected therewith, and may testify regarding the existence and nature of, and the construction given to, a law of a foreign country or sister state.

Members of the legal profession and others acquainted with the conduct of affairs with which it deals may state facts connected with it.[63]

A witness who possesses the necessary qualifications may testify regarding the existence and nature of a provision of the unwritten law of a foreign country[64] or of a sister state[65] applicable to the facts of the case in question; and as to the existence and nature of an applicable written law of a foreign country[66] or sister state.[67] Such testimony is admissible under a statutory provision that

54. Mass.—Tremblay v. Mapes-Reeve Constr. Co., 47 N.E. 1016, 169 Mass. 284.
22 C.J. p 543 note 2.

55. U.S.—American Car & Foundry Co. v. Thornton, Pa., 183 F. 114, 105 C.C.A. 33.
22 C.J. p 543 note 3.

56. Cal.—Judson v. Giant Powder Co., 40 P. 1020, 107 Cal. 549, 48 Am.S.R. 146, 29 L.R.A. 718.

57. U.S.—Stone & Webster Engineering Corp. v. Melovich, Wash., 202 F. 438, 120 C.C.A. 544.
22 C.J. p 543 note 5.

58. Mass.—Leslie v. Granite R. Co., 52 N.E. 542, 172 Mass. 468.
22 C.J. p 543 note 6.

Conjectural estimates as to whether an experienced lineman engaged in running electric wires would under certain conditions have deemed a certain precaution necessary in order to insure that the current has been cut off have been rejected.—Dallas Electric Co. v. Mitchell, 76 S. W. 935, 33 Tex.Civ.App. 424.

Movement of hands
Where employee's hand was cut by a circular saw, a witness having thirty years' experience with similar saws could state the movement of an operator's hands in sawing boards.—Olgiati v. New England Box Co., 117 A. 735, 80 N.H. 399.

Standard practice
That experts, in testifying that it was standard practice to pipe steam to outside of building, did not say such method was the only standard practice did not render evidence inadmissible.—Cole v. North Danville Co-op. Creamery Ass'n, 151 A. 568, 103 Vt. 32.

59. Okl.—Prickett v. Sulzberger & Sons Co., 157 P. 356, 57 Okl. 567.
22 C.J. p 543 note 7.

60. Iowa.—Long v. Travellers' Ins. Co., 85 N.W. 24, 113 Iowa 259.
22 C.J. p 543 note 7 [b].

61. Ill.—Slack v. Harris, 65 N.E. 669, 200 Ill. 96, affirming 101 Ill. App. 527.
Vt.—Comeau v. C. C. Manuel & Sons Co., 80 A. 51, 84 Vt. 501.

62. N.Y.—Starer v. Stern, 91 N.Y.S. 821, 100 App.Div. 393.
Tex.—Carlisle v. West Texas Fair Ass'n, Civ.App., 12 S.W.2d 599, error refused—Dallas Electric Co. v. Mitchell, 76 S.W. 935, 33 Tex.Civ. App. 424.

Breaking of axle
Testimony that an inspector, from looking at an automobile axle which broke, could not determine that it would break and could not have told it by any other test is a statement of fact, and not a conclusion or opinion.—Carlisle v. West Texas Fair Ass'n, Tex.Civ.App., 12 S.W.2d 599, error refused.

63. Ill.—Fitchburg Steam Engine Co. v. Potter, 71 N.E. 933, 211 Ill. 138.
22 C.J. p 540 note 61.

Professional charges
(1) Evidence of what is ordinarily charged by attorneys at law in cases of the same character is admissible, where the compensation is not fixed.—Stanton v. Embrey, D.C., 93 U.S. 548, 23 L.Ed. 983.
(2) An attorney at law may so testify.
Pa.—Thompson v. Boyle, 85 Pa. 477.
Vt.—Vilas v. Downer, 21 Vt. 419.

State's attorney's testimony as to whether he acted on his own judgment in prosecuting is a statement of fact and not a conclusion.—Wadlington v. Coyne, 207 N.W. 539, 49 S.D. 563.

A witness not assuming to be fully advised with respect to the subject of set-back lines, may not testify on the subject of reasonableness of set-back lines in zoning ordinance.—Harris v. State, 155 N.E. 166, 23 Ohio App. 33.

Matters of fact
An attorney will not be allowed to prove that he consulted a distinguished attorney respecting the proper course to be pursued by him, such matter not being a question of science warranting proof by experts.—Goodman v. Walker, 30 Ala. 482, 68 Am.D. 134.

64. Mich.—Shields v. Weller, 257 N. W. 765, 270 Mich. 7.
Minn.—In re Henrikson's Estate, 203 N.W. 778, 163 Minn. 176.
22 C.J. p 540 note 63.

65. Ala.—Smith v. Blinn, 127 So. 155, 221 Ala. 24.
Pa.—Bank of America Nat. Trust & Savings Ass'n v. Sunseri, 166 A. 573, 311 Pa. 114.
Tex.—Grange v. Kayser, Civ.App., 80 S.W.2d 1007—Illinois Cent. R. Co. v. Ryan, Civ.App., 214 S.W. 642.
22 C.J. p 540 note 64.

The testimony must be specific; testimony that the common law prevails and obtains in the other state, except as modified by statute, is not sufficient.—Clardy v. Wilson, 58 S. W. 52, 24 Tex.Civ.App. 196.

66. Me.—Pringle v. Gibson, 195 A. 695, 135 Me. 297, rehearing denied 197 A. 553, 135 Me. 512.
N.Y.—Robert Reis & Co. v. New York Trust Co., 239 N.Y.S. 568, 136 Misc. 141.
22 C.J. p 540 note 65.

67. Ala.—Equitable Life Assur. Soc. of U. S. v. Brandt, 198 So. 595, 240 Ala. 260—Smith v. Blinn, 127 So. 155, 221 Ala. 24.
Mass.—Eastern Offices v. P. F. O'-Keefe Advertising Agency, 193 N. E. 837, 289 Mass. 23.
N.J.—Max v. Max, 10 A.2d 163, 123 N.J.Law 580, affirmed 15 A.2d 616, 125 N.J.Law 271—Coral Gables v. Kretschmer, 184 A. 825, 116 N.J. Law 580.
N.C.—Howard v. Howard, 158 S.E. 101, 200 N.C. 574.
Ohio.—Smith v. Rogers, 16 Ohio App. 110.
22 C.J. p 540 note 66.

the law of another state may be proved, as a fact, by parol evidence;[68] and it has also been held admissible although a statute provides another mode of proving such laws,[69] but there is authority to the contrary.[70]

A qualified witness may also testify as to the construction given to a law by the courts of the foreign country[71] or sister state;[72] and, where the statute of another state has been construed by the court of last resort of that state, an attorney or other expert cannot testify further as to his opinion, or as to the consensus of opinion of the bench and bar, as to the meaning of the statute.[73] So, where the meaning of the statute is plain, although it has not been construed by the courts of that state, witnesses cannot be allowed to state what they believe should be its construction.[74]

A qualified witness may also testify as to the effect[75] or propriety[76] of acts done under a law of another country or state; or as to the existence of a rule of practice in the country[77] or state.[78] Such a witness may also explain legal terms of a foreign system of jurisprudence, which are in a language foreign to the forum.[79]

Qualifications of witness. The witness must be shown to the satisfaction of the court to possess sufficient knowledge of the law to render his evidence of value.[80] One who is[81] a practicing at-

Opinion evidence concerning foreign law, but not domestic law, is admissible.—U. S. v. Hoblitzell, D.C. Va., 2 F.Supp. 832.

Affidavit

Proof of law of another state by affidavit of lawyer of such state is proper.—Tradesmen's Nat. Bank & Trust Co. v. Cummings Bros. Co., 157 A. 386, 9 N.J.Misc. 1333.

68. Cal.—Motor Inv. Co. v. Breslauer, 221 P. 700, 64 Cal.App. 230.
Ind.—Smith v. Smith, 168 N.E. 462, 91 Ind.App. 13.
Minn.—In re Henrikson's Estate, 203 N.W. 778, 163 Minn. 176.

69. Ohio.—Smith v. Rogers, 16 Ohio App. 110—Brady v. Palmer, 19 Ohio Cir.Ct. 687, 10 Ohio Cir.Dec. 27.

70. Neb.—Johnson v. Hesser, 85 N. W. 894, 61 Neb. 631.

71. U.S.—Shapleigh v. Mier, C.C.A. Tex., 83 F.2d 673, certiorari granted 57 S.Ct. 17, 299 U.S. 524, 81 L. Ed. 386, affirmed 57 S.Ct. 261, 299 U.S. 468, 81 L.Ed. 355, 113 A.L.R. 253.
N.Y.—Reilly v. Steinhart, 146 N.Y.S. 534, 161 App.Div. 242, reversed on other grounds 112 N.E. 468, 217 N.Y. 549.
S.C.—Rauton v. Pullman Co., 191 S. E. 416, 183 S.C. 495.
22 C.J. p 541 note 67.

Mexican constitution and statutes

In trespass to try title to land which has been expropriated by a state in Mexico and which subsequently comes within the jurisdiction of the United States, the Mexican law and its application to the case are questions of fact, and the Mexican constitution and statutes may properly be considered as other writings in evidence, and, if uncertain in meaning or application, evidence of experts is admissible to aid construction.—Shapleigh v. Mier, C. C.A.Tex., 83 F.2d 673, certiorari granted 57 S.Ct. 17, 299 U.S. 524, 81 L.Ed. 386, affirmed 57 S.Ct. 261, 299 U.S. 468, 81 L.Ed. 355, 113 A.L.R. 253.

Japanese law

Testimony regarding the construction placed on the Japanese textile consumption tax law by the Japanese revenue authorities is competent.—U. S. v. F. S. Allenby & Co., 20 C.C.P.A. (Customs) 80.

72. N.J.—Coral Gables v. Kretschmer, 184 A. 825, 116 N.J.Law 580.
N.C.—Temple v. Board of Com'rs of Pasquotank County, 15 S.E. 886, 111 N.C. 36.
Tenn.—Rice-Stix Dry Goods Co. v. Self, 101 S.W.2d 132, 20 Tenn.App. 498.
22 C.J. p 541 note 68.

73. Pa.—Bank of America Nat. Trust & Savings Ass'n v. Sunseri, 166 A. 573, 311 Pa. 114.
Wash.—Clark v. Eltinge, 80 P. 556, 38 Wash. 376, 107 Am.S.R. 858.

Statute of foreign country

The judgment of the witness as to the construction of a statute enacted by a country cannot control the statute itself and decisions of the courts of that country as to its meaning.—Bank of China, Japan & The Straits v. Morse, 61 N.E. 774, 168 N.Y. 458, 85 Am.S.R. 676, 56 L. R.A. 139.

74. N.Y.—Molson's Bank v. Boardman, 47 Hun 135.
22 C.J. p 541 note 74.

75. U.S.—Badische Anilin & Soda Fabrik v. Klipstein & Co., C.C.N. Y., 125 F. 543.
Ky.—Traughber v. King, 32 S.W.2d 8, 235 Ky. 658.

Attorney's testimony held inadmissible

Md.—Mercantile Trust & Deposit Co. v. Rode, 112 A. 574, 137 Md. 362.

76. Md.—Baltimore Cons. Real Est., & F. Ins. Co. v. Cashow, 41 Md. 59.

77. U.S.—U. S. v. Gardiner, C.C.D.C., 25 F.Cas.No.15,186a, 2 Hayw. & H. 89.
Mich.—Patterson v. Kennedy, 81 N. W. 91, 122 Mich. 343.

78. Ark.—Barkman v. Hopkins, 11 Ark. 157.
Iowa.—Crafts v. Clark, 38 Iowa 237.
Mass.—Mowry v. Chase, 100 Mass. 79.

79. U.S.—Republic of Colombia v. Cauca Co., C.C.W.Va., 106 F. 337, affirmed 113 F. 1020, 51 C.C.A. 604, reversed on other grounds 23 S. Ct. 704, 190 U.S. 524, 47 L.Ed. 1159.

80. Ala.—Smith v. Blinn, 127 So. 155, 221 Ala. 24.
Me.—Pringle v. Gibson, 195 A. 695, 135 Me. 297, rehearing denied 197 A. 553, 135 Me. 512.
N.C.—Howard v. Howard, 158 S.E. 101, 200 N.C. 574.
22 C.J. p 541 note 75.

The opinion of a layman, who did not qualify as an expert on the law, cannot be accepted as proof of facts.—Kirsten v. Chrystmos, 14 N. Y.S.2d 442.

Qualifications of skilled witnesses in general see supra § 456.

81. Ind.—Smith v. Smith, 168 N.E. 462, 91 Ind.App. 13.
Ky.—Traughber v. King, 32 S.W.2d 8, 235 Ky. 658.
Md.—Baltimore Cons. Real Est. & F. Ins. Co. v. Cashow, 41 Md. 59.
Mass.—Eastern Offices v. P. F. O'-Keefe Advertising Agency, 193 N. E. 837, 289 Mass. 23.
N.J.—Max v. Max, 10 A.2d 163, 123 N.J.Law 580, affirmed 15 A.2d 616, 125 N.J.Law 271—Tradesmen's Nat. Bank & Trust Co. v. Cummings Bros. Co., 157 A. 386, 9 N.J. Misc. 1333.
Ohio.—Smith v. Rogers, 16 Ohio App. 110.
S.C.—Rauton v. Pullman Co., 191 S.E. 416, 183 S.C. 495.
Tenn.—Rice-Stix Dry Goods Co. v. Self, 101 S.W.2d 132, 20 Tenn.App. 498.
Tex.—Grange v. Kayser, Civ.App., 80 S.W.2d 1007—Illinois Cent. R. Co. v. Ryan, Civ.App., 214 S.W. 642—Sierra Madre Constr. Co. v. Brick, Civ.App., 55 S.W. 521.

"Eminent lawyers become a favored source of expert evidence as to the state of the law in force at

torney in the country or state whose laws are in question, or one who has been such practicing attorney,[82] is competent; but it is not necessary that the witness should be a lawyer,[83] as the opinions of text writers and the evidence of persons skilled in the foreign law may be resorted to in proving or construing the foreign statute;[84] and a fortiori it is not required that the witness should be a professor of law.[85] Study alone may qualify the witness as to the law with which he has familiarized himself,[86] although the combination of study and practical experience adds to his qualification.[87] A local attorney may testify as to the law of a foreign state where he testifies, that he has investigated and is familiar with the laws of such state with reference to the matter in question and, in substantiation of his interpretation of the law, produces an authenticated report of a case by the court of last resort of such state.[88]

§ 480. —— Medicine and Surgery

A qualified member of the medical, surgical, or an allied profession may, as a skilled witness, state facts known to members of his profession. A nonprofessional witness, having special knowledge or experience as to medical or surgical matters, may state facts known by him.

A witness who is shown to the satisfaction of the court to be a competent physician,[89] dentist,[90] surgeon,[91] osteopathist,[92] or veterinary[93] may state relevant facts known to him as a qualified member of his profession,[94] except as to subjects with which

the time."—Smith v. Blinn, 127 So. 155, 156, 221 Ala. 24.

82. Ark.—Union Cent. L. Ins. Co. v. Caldwell, 58 S.W. 355, 68 Ark. 505.
Cal.—Motor Inv. Co. v. Breslauer, 221 P. 700, 64 Cal.App. 230.
N.C.—Temple v. Board of Com'rs of Pasquotank County, 15 S.E. 886, 111 N.C. 36.

83. Minn.—In re Henrikson's Estate, 203 N.W. 778, 163 Minn. 176.
N.Y.—Masocco v. Schaaf, 254 N.Y.S. 439, 443, 234 App.Div. 181, citing **Corpus Juris.**
22 C.J. p 541 note 78.

Secretary of foreign consulate as competent.—Masocco v. Schaaf, 254 N.Y.S. 439, 234 App.Div. 181.

84. Mo.—Charlotte v. Chouteau, 25 Mo. 465.

85. Cal.—In re Faber, 143 P. 737, 168 Cal. 491.

86. Conn.—Barber v. Mexico International Co., 48 A. 758, 73 Conn. 587.
22 C.J. p 542 note 81.

Person professing knowledge of laws of foreign country may testify as to their tenor and effect, although not a lawyer, or learned in such country's law.—In re Henrikson's Estate, 203 N.W. 778, 163 Minn. 176.

Mere general study is not necessarily sufficient, as study of Justinian code does not qualify a person to testify as to a provision in the law of Mexico.—Banco de Sonora v. Bankers' Mut. Casualty Co., Iowa, 95 N.W. 232.

87. U.S.—Dauphin v. U. S., 6 Ct.Cl. 221.
N.H.—Pickard v. Bailey, 26 N.H. 152.

88. Pa.—Hatfield v. Sovereign Camp, W. O. W., 196 A. 904, 129 Pa.Super. 570.

89. U.S.—Canal Const. Co. v. Henson, C.C.A.Ark., 280 F. 98.
Ala.—Pope v. Ryals, 167 So. 721, 232 Ala. 260—Atlantic Pacific Stages v. Yandle, 140 So. 603, 224 Ala. 481.
Iowa.—Wilcox v. Crumpton, 258 N.W. 704, 219 Iowa 389.
Mo.—Martin v. Springfield City Water Co., App., 128 S.W.2d 674.
N.H.—Howson v. Foster Beef Co., 177 A. 656, 87 N.H. 200.
Or.—Derrick v. Portland Eye, Ear, Nose & Throat Hospital, 209 P. 344, 349, 105 Or. 90, quoting **Corpus Juris.**
Tex.—Gaines v. Stewart, Civ.App., 57 S.W.2d 207.
22 C.J. p 543 note 10.

Qualification not shown to testify as to plaintiff being allergic to insecticide.—Simpson v. American Oil Co., 14 S.E.2d 638, 219 N.C. 595.

90. Mass.—Langis v. Danforth, 33 N.E.2d 287, 308 Mass. 508.

Not properly qualified
In action against dentist for injuries to patient, falling from dental chair after inhaling nitrous oxide, exclusion of testimony as to effect of inhalation of such gas on patients by another dentist, who testified that he had not used nitrous oxide for twenty-five years, on ground that witness was not qualified to testify as expert on such question, was not abuse of trial judge's discretion.—Langis v. Danforth, supra.

91. Ala.—Atlantic Pacific Stages v. Yandle, 140 So. 603, 224 Ala. 481.
N.J.—Cattania v. Fleckenstein, 143 A. 315, 105 N.J.Law 174.
22 C.J. p 543 note 11.

92. Cal.—Kershaw v. Tilbury, 8 P.2d 109, 214 Cal. 679.
Ga.—Macon R. & Light Co. v. Mason, 51 S.E. 569, 123 Ga. 773.
22 C.J. p 543 note 12.

93. U.S.—Grayson v. Lynch, N.M., 16 S.Ct. 1064, 163 U.S. 468, 41 L. Ed. 230.

94. Mo.—Quinn v. Berberich, App., 51 S.W.2d 153, quashed on other grounds State ex rel. Berberich v. Haid, 64 S.W.2d 667, 333 Mo. 1224—Carlson v. Kansas City, Clay County & St. Joseph Auto Transit Co., 282 S.W. 1037, 221 Mo.App. 537—Pyle v. Kansas City Light & Power Co., App., 246 S.W. 979.
Tex.—Texas Independence Life Ins. Co. v. Pickens, Civ.App., 153 S.W. 2d 884.
Wash.—State v. Brown, 20 P.2d 1114, 1116, 172 Wash. 563, citing **Corpus Juris.**
22 C.J. p 543 note 14.

Consciousness of acts
Testimony of a medical expert on insanity that defendant for a designated period to the date of trial would not have been conscious of the effect of his acts on himself or surrounding circumstances was not subject to the objection that the witness was stating a legal conclusion rather than a point of fact.—Beasley v. Faust, Tex.Civ.App., 217 S.W. 179.

Matters observed
(1) A doctor's testimony naming and describing certain objects which he saw in his physical examinations of a certain person was a statement of facts and not an opinion.—Borkheim v. Borkheim, 223 P. 429, 65 Cal. App. 218.

(2) In an action against a sanipractor, or drugless physician, belonging to a school which performed no operations, for negligent diagnosis and improper treatment, resulting in the death of plaintiff's minor son, testimony of allopaths, who performed an operation after the child's condition became desperate, that the child had acute appendicitis, and that the appendix had burst and peritonitis had set in, was testimony of facts found, and was not objectionable as being the opinion of experts belonging to another school of practice.—Wilcox v. Carroll, 219 P. 34, 124 Wash. 1.

Nature of medicine prescribed
Tex.—Phœnix Refining Co. v. Walk-

an average jury may fairly be assumed to be already familiar.[95]

Such a witness may state the effect,[96] extent,[97] and tendency[98] of professional knowledge regarding certain matters; the usual and ordinary practice among physicians in the locality in treating a given injury;[99] what ligaments a particular surgical operation severs;[1] what are the vital parts of the body;[2] conditions of gestation;[3] the existence, origin, and method of communication of a certain disease;[4] the symptoms of a given disease or injury in body[5] or mind,[6] the usual period for recovery,[7] and the chance that it will occur;[8] what certain medical facts indicate;[9] what certain symptoms indicate;[10] or what certain medical terms cover.[11]

He may also state the effects commonly produced by age,[12] death,[13] disease,[14] drugs,[15] or intoxicants,[16] emotions,[17] injury,[18] poison,[19] or a surgical operation[20] on the body or mind of a human being,[21] but not the effects on the moral nature.[22]

Definite possibilities[23] or probabilities as to whether a certain force or other cause may produce a giv-

er, Civ.App., 108 S.W.2d 323, error dismissed.

Normal function of nervous system and effect on individual of disturbance thereof.—Adams v. Carlo, Mo. App., 101 S.W.2d 753.

95. Ill.—Casey v. Chicago City R. Co., 86 N.E. 606, 237 Ill. 140.
22 C.J. p 545 note 46.

96. Me.—State v. Knight, 43 Me. 11.
22 C.J. p 544 note 15.

97. N.Y.—People v. Osmond, 33 N. E. 739, 138 N.Y. 80.
22 C.J. p 544 note 16.

98. Me.—Powers v. Mitchell, 77 Me. 361.

99. Iowa.—Wilcox v. Crumpton, 258 N.W. 704, 219 Iowa 389—Lemon v. Kessel, 209 N.W. 393, 202 Iowa 273.

Putting unsterilized fingers in wound as not customary
Ala.—Torrance v. Wells, 122 So. 322, 219 Ala. 384.

X-ray treatment
A general practitioner of exceptionally high standing, although he had never used X-ray curatively, was competent to testify as to the general professional standard of skill and care required in giving X-ray treatments.—Hunter v. Burroughs, 96 S.E. 360, 123 Va. 113.

1. Neb.—Johnson v. Winston, 94 N. W. 607, 68 Neb. 425.

2. Tex.—Sebastian v. State, 53 S.W. 875, 41 Tex.Cr. 248.

3. Ill.—People v. Johnson, 70 Ill. App. 634.
Iowa.—Kesselring v. Hummer, 106 N. W. 501, 130 Iowa 145.

4. Ga.—U. S. Casualty Co. v. Smith, 133 S.E. 851, 162 Ga. 130, affirming 129 S.E. 880, 34 Ga.App. 363.

5. Tex.—Gaines v. Stewart, Civ. App., 57 S.W.2d 207.
22 C.J. p 544 note 20.

6. Fla.—Williams v. State, 34 So. 279, 45 Fla. 128.
22 C.J. p 544 note 21.

7. Ill.—Morton v. Zwierzykowski, 61 N.E. 413, 192 Ill. 328.
Wis.—Collins v. Janesville, 87 N.W. 241, 1087, 111 Wis. 348.
22 C.J. p 544 note 22.

8. Ill.—Morton v. Zwierzykowski, 61 N.E. 413, 192 Ill. 328.

9. N.C.—State v. Wilcox, 44 S.E. 625, 132 N.C. 1120.
22 C.J. p 544 note 24.

10. Mich.—Dunwoody v. Royal Indemnity Co., 188 N.W. 498, 218 Mich. 358.
22 C.J. p 545 note 38.

11. Tex.—Bonart v. Lee, Civ.App., 46 S.W. 906.

Epidemics and their causes, from a physician's standpoint.—Martin v. Springfield City Water Co., Mo.App., 128 S.W.2d 674.

"Hatters' shakes" as another name for mercury poisoning.—Farrell v. Ferry Hat Co., 159 A. 153, 10 N.J. Misc. 319.

Infectious disease
Wash.—Kane v. Order of United Commercial Travelers of America, 100 P.2d 1036, 3 Wash.2d 355.

12. N.C.—Lord v. Beard, 79 N.C. 5.

13. Iowa.—State v. Vincent, 24 Iowa 570, 95 Am.D. 753.
Mo.—State v. Moxley, 14 S.W. 969, 15 S.W. 556, 102 Mo. 374.
22 C.J. p 544 note 26.

14. N.Y.—In re Roch's Will, 278 N. Y.S. 929, 244 App.Div. 756.
22 C.J. p 544 note 27.

15. Ind.—Isenhour v. State, 62 N.E. 40, 157 Ind. 517, 87 Am.S.R. 228.
22 C.J. p 544 note 28.

Harmful effect of novocaine in operating on foot
Vt.—Williams v. Marini, 162 A. 796, 105 Vt. 11.

16. Ky.—Murphy v. Murphy, 65 S.W. 165, 23 Ky.L. 1460.
Neb.—In re Crosby's Estate, 253 N. W. 652, 654, 126 Neb. 509, citing **Corpus Juris.**
22 C.J. p 544 note 29.

17. W.Va.—State v. Maier, 15 S.E. 991, 36 W.Va. 757.

18. Ala.—Pope v. Ryals, 167 So. 721, 232 Ala. 260.
Idaho.—Reinhold v. Spencer, 26 P.2d 796, 53 Idaho 688.
Mo.—Barnett v. Kansas City, App., 214 S.W. 240, record quashed State ex rel. Kansas City v. Ellison, 220 S.W. 498, 281 Mo. 667.
Pa.—Harmon v. Knoll, 195 A. 448, 129 Pa.Super. 390.
22 C.J. p 544 note 31.

Fractures
U.S.—Canal Const. Co. v. Henson, C. C.A.Ark., 280 F. 98.

Pain
(1) A physician may testify whether the effects of an injury are necessarily painful.—Lake Erie & W. R. Co. v. Wills, 39 Ill.App. 649, affirmed 31 N.E. 122, 141 Ill. 614.

(2) Testimony by a physician that the pain caused by an injury would weaken the patient, and leave her subject to any infection—that it might weaken the patient, but would not always do it—was not objectionable as a surmise.—San Antonio Public Service Co. v. Mitchell, Tex.Civ. App., 238 S.W. 265, error granted.

Severed arteries
In personal injury action, physician could state that blood would have kept running unless he tied blood vessels, that blood was spurting from wound, and that five or six arteries were severed.—Atlantic Pacific Stages v. Yandle, 140 So. 603, 224 Ala. 481.

Surgeon examining injured person may testify of what examination consisted and the symptoms he observed in the examination.—Cattania v. Fleckenstein, 143 A. 315, 105 N.J.Law 174.

19. Ala.—Thaggard v. Vafes, 119 So. 647, 218 Ala. 609.
22 C.J. p 544 note 32.

Diseased meat
N.H.—Howson v. Foster Beef Co., 177 A. 656, 87 N.H. 200.

20. Ill.—Morton v. Zwierzykowski, 61 N.E. 413, 192 Ill. 328.

21. Kan.—State v. Reddick, 7 Kan. 143.
Ky.—Murphy v. Murphy, 65 S.W. 165, 23 Ky.L. 1460.
N.Y.—In re Roche's Will, 278 N.Y.S. 929, 244 App.Div. 756.
22 C.J. p 544 note 35.

22. Cal.—People v. Royal, 53 Cal. 62.
Wash.—State v. Robinson, 41 P. 884, 12 Wash. 491.

23. Tex.—Bankers Lloyds v. Mont-

en physical result,[24] or that a given disease or injury will induce other troubles,[25] will be permanent,[26] will be followed by recovery,[27] or will require a certain length of time[28] may be stated as facts where no especial exercise of the reasoning faculty is involved.

A member of an allied profession may testify in relevant medical connections.[29]

Nonprofessional witnesses are incompetent as to medical matters in the absence of special study or experience;[30] but those who have special knowledge or experience may state facts known to them,[31] particularly where they are matters of common knowledge.[32] A nonexpert witness should not be permitted to testify as to the existence of a particular injury, but he may testify as to the actual condition of the part injured, no opinion being expressed,[33] and he may testify as to commonplace

gomery, Civ.App., 42 S.W.2d 285, 287, quoting **Corpus Juris.**
22 C.J. p 545 note 40.

24. Md.—Abend v. Sieber, 158 A. 63, 64, 161 Md. 645, citing **Corpus Juris.**
Pa.—Harmon v. Knoll, 195 A. 448, 129 Pa.Super. 390.
Tex.—Bankers Lloyds v. Montgomery, Civ.App., 42 S.W.2d 285, 287, quoting **Corpus Juris.**
22 C.J. p 545 note 41.

Hernia from strain

Physician's testimony that hernia can result by strain or stress from heavy lifting, and that it could have occurred under a fact situation stated hypothetically to him, and that within a day or two after the injury there would not necessarily be blood, lacerations or swelling where the hernia occurred, was admissible. —National Mut. Casualty Co. v. Lowery, Tex.Civ.App., 135 S.W.2d 1044, affirmed, Sup., 148 S.W.2d 1089.

25. Iowa.—Worez v. Des Moines City Ry. Co., 156 N.W. 867, 175 Iowa 1.
22 C.J. p 545 note 42.

Total disability

In action for disability benefits under insurance policies where fact issue was whether plaintiff was totally disabled within meaning of policies, testimony of plaintiff's physicians, who had testified as to their education and experience, that in physicians' opinions plaintiff was totally disabled, was competent, and did not interfere with jury's function. —O'Kelley v. Mutual Life Ins. Co. of New York, S.C., 14 S.E.2d 582.

26. Mo.—Langeneckert v. St. Louis Sulphur & Chemical Co., App., 65 S.W.2d 648—Gorman v. A. R. Jackson Kansas City Showcase Works Co., App., 19 S.W.2d 559—Smith v. Wilson, App., 296 S.W. 1036.
22 C.J. p 545 note 43.

27. Ga.—Jackson v. Boone, 20 S.E. 46, 93 Ga. 662.
Mich.—Cole v. Lake Shore & M. S. R. Co., 54 N.W. 638, 95 Mich. 77.

28. Pa.—Harmon v. Knoll, 195 A. 448, 129 Pa.Super. 390.
22 C.J. p 545 note 45.

29. Ala.—Watkins v. Potts, 122 So. 416, 219 Ala. 427, 65 A.L.R. 1097.
22 C.J. p 545 note 47.

A chemist, qualified by study and experience, may testify as to:

(1) The effect of certain chemicals on the skin.—Greengard v. Odorono Co., 256 N.Y.S. 708, 235 App.Div. 806.

(2) The nature of poison and its effect on the system.—Thaggard v. Vafes, 119 So. 647, 218 Ala. 609.

(3) The poisonous effect of copper. —Dickey v. Western Tablet Co., 267 S.W. 431, 218 Mo.App. 253.

(4) A professor of chemistry may state the effect of coal gas on the human system.—Citizens' Gaslight & Heating Co. v. O'Brien, 19 Ill.App. 231, affirmed 8 N.E. 310, 118 Ill. 174.

A chemist-toxicologist, if properly qualified, may testify as expert concerning effect of heat treatment on bacteria and toxins commonly found in mice.—Gray v. Pet Milk Co., C.C. A.Ill., 108 F.2d 974, certiorari denied Pet Milk Co. v. Gray, 60 S.Ct. 890, 309 U.S. 688, 84 L.Ed. 1031.

Eye expert may testify

(1) In an action for loss of the sight of an eye as to plaintiff's chances of using an artificial lens for the eye had he been given proper treatment.—Derrick v. Portland Eye, Ear, Nose & Throat Hospital, 209 P. 344, 105 Or. 90.

(2) Whether normal eye could read photographic copy of application for life insurance.—Eastman v. Metropolitan Life Ins. Co., 199 N.W. 655, 228 Mich. 125.

A pharmacist, not a physician, may testify as to morphine content of cheracol and effect of opiates on children.—Watkins v. Potts, 122 So. 416, 219 Ala. 427, 65 A.L.R. 1097.

A throat specialist may testify, in an action against a dentist for allowing plaintiff to swallow foreign substances, regarding the relative merits of gauze and cotton packing.— O'Connor v. Bonney, 231 N.W. 521, 57 S.D. 134.

30. Conn.—Green v. Stone, 176 A. 123, 119 Conn. 300.
Ky.—Western & Southern Life Ins. Co. v. Edelen, 95 S.W.2d 1062, 265 Ky. 142.
Tex.—General Life Ins. Co. v. Potter, Civ.App., 124 S.W.2d 409—Dallas Hotel Co. v. McCue, Civ.App., 25 S.W.2d 902.
22 C.J. p 545 note 48.

Laymen as nonexperts cannot set up any artificial standards as to methods of treatment or probability of cure.—Green v. Stone, 176 A. 123, 119 Conn. 300.

Internal conditions

Nonexpert witnesses should not be permitted to testify as to the nature of the internal conditions resulting from injuries or that person injured was in good or bad health prior or subsequent to the accident complained of.—Louisville & N. R. Co. v. Houck, Ky., 151 S.W 2d 432.

A boy's mother cannot testify that in her opinion his death was caused by injury sustained in collision with automobile.—Jordan v. Glickman, 14 S.E.2d 40, 219 N.C. 388.

31. Mass.—Whipple v. Grandchamp, 158 N.E. 270, 261 Mass. 40, 57 A.L. R. 974.
22 C.J. p 545 note 49.

Practical experience

One who is not a physician but who has prepared many corpses for burial may testify as to lack of rigidity in the neck of a deceased person.—State v. Moxley, 14 S.W. 969, 15 S.W. 556, 102 Mo. 374.

32. Mass.—Whipple v. Grandchamp, 158 N.E. 370, 261 Mass. 40, 57 A.L. R. 974.

Infectious character of particular disease

Minn.—Taaje v. St. Olaf Hospital, 271 N.W. 109, 199 Minn. 113.

Use of X-ray pictures

Where it is common knowledge that in other professions than medicine X-ray photographs are read in connection with the human anatomy, in an action against a chiropractor for negligence in the adjustment or treatment of a patient an expert, although not a doctor, should be permitted to testify on matters relating to the human spine and injuries thereto as shown by X-ray pictures.—Whipple v. Grandchamp, 158 N.E. 270, 261 Mass. 40, 57 A.L.R. 974.

33. Ky.—Williams v. Nally, 45 S.W. 874, 20 Ky.L. 244.
Neb.—O'Hara v. Wells, 15 N.W. 722, 14 Neb. 403.

conditions and actions, observed by him, in connection with a surgical operation.[34]

§ 481. —— Railroads and Street Railroads

A witness experienced or skilled in matters relating to railroad or street railroad operation may state facts generally known among persons engaged in such business and relating to the operation of such roads.

A person who is shown to the satisfaction of the court to be experienced in railroad operation,[35] whether in its track,[36] freight,[37] or passenger[38] departments, may state facts commonly known in the business,[39] including those relating to the apparatus employed in drawing[40] or stopping[41] trains; the duties of engineers,[42] firemen,[43] conductors,[44] brakemen,[45] or other train hands,[46] or of switchmen[47] or inspectors;[48] and how these duties should be[49] or usually are[50] performed.

Such a witness may also state details as to practical operations,[51] the roadbed,[52] or rolling stock;[53]

34. Okl.—Aderhold v. Stewart, 46 P. 2d 346, 172 Okl. 77—Aderhold v. Stewart, 46 P.2d 340, 172 Okl. 72.

Observation of sponge inserted in body cavity, which she did not see removed.—Aderhold v. Stewart, 46 P.2d 340, 172 Okl. 72.

35. Ala.—Louisville & N. R. Co. v. Jacobson, 118 So. 565, 218 Ala. 384.
Ill.—Herb v. Pitcairn, 29 N.E.2d 543, 306 Ill.App. 583.
Tex.—Cobb v. Texas & N. O. R. Co., Civ.App., 107 S.W.2d 670.
22 C.J. p 546 note 81.

A fireman, in an action for injuries from escaping steam from an engine on which he was employed, may testify that he had noticed the pounding in other engines similar to that in the one which he alleged injured him, to show his experience and capacity to know the facts as to which he is testifying.—Louisville & N. R. Co. v. Cook, 53 So. 190, 168 Ala. 592.

Operator on parallel road
A witness who, for many years, had operated electric trains parallel with the tracks of a steam railroad and had observed the distance that the engine headlights would illuminate the track was qualified to testify to such distance.—Cobb v. Texas & N. O. R. Co., Tex.Civ.App., 107 S. W.2d 670, error dismissed.

36. Mich.—Walker v. Lake Shore & M. S. R. Co., 62 N.W. 1032, 104 Mich. 606.
22 C.J. p 546 note 82.

37. Va.—New York, P. & N. R. Co. v. Wilson, 64 S.E. 1060, 109 Va. 754.
22 C.J. p 546 note 83.

Shipper
In an action for delay in shipping cattle, the shipper, a man of large experience, who did not accompany the train, but observed the crew, was properly permitted to testify to delay in getting started from loading point, and that experience had taught him that the movement of the crew was one indication of the chance a shipper would have in making timely arrival at the market.—Gilbreath v. Atchison, T. & S. F. R. R., Mo.App., 217 S.W. 636.

38. U.S.—Union Pac. R. Co. v. Novak, Wash., 61 F. 573, 9 C.C.A. 629, appeal dismissed 17 S.Ct. 1001, 41 L.Ed. 1184.
Ala.—Louisville & N. R. Co. v. Jacobson, 118 So. 565, 218 Ala. 384.

39. Iowa.—Mitchell v. Chicago, R. I. & P. R. Co., 114 N.W. 622, 138 Iowa 283.
22 C.J. p 547 note 85.

40. U.S.—Grand Trunk Western R. Co. v. Lindsay, Ill., 201 F. 836, 120 C.C.A. 166, affirmed 34 S.Ct. 581, 233 U.S. 42, 58 L.Ed. 838.
22 C.J. p 547 note 86.

41. Ill.—Herb v. Pitcairn, 29 N.E.2d 543, 306 Ill.App. 583, reversed on other grounds, Sup., 36 N.E.2d 555.
22 C.J. p 547 note 87.

Brake wheel
In switchman's action for injuries when brake wheel on which he placed his hand spun around and threw him to the ground, testimony of switchman as to whether he did, or did not, do anything to cause the brake wheel to spin around was properly admitted as testimony as to facts learned by switchman from observation and experience.—Herb v. Pitcairn, supra.

42. Ga.—Southern Ry. Co. v. Blanton, 200 S.E. 471, 474, 59 Ga.App. 252, citing **Corpus Juris.**
22 C.J. p 547 note 88.

Practice
An experienced engineer may testify as to his own practice with respect to a given operation of his train, or as to the practice in another locality or on another railroad.—Southern Ry. Co. v. Blanton, supra.

43. Kan.—Missouri Pac. R. Co. v. Mackey, 6 P. 291, 33 Kan. 298.

44. Ind.—Pittsburgh, C. C. & St. L. R. Co. v. Nicholas, App., 73 N.E. 195, rehearing denied 74 N.E. 626.
Tex.—Pullman Co. v. Norton, Civ. App., 91 S.W. 841.

45. Iowa.—Quinlan v. Chicago, etc., R. Co., 84 N.W. 960, 113 Iowa 89.
22 C.J. p 547 note 91.

46. S.C.—Price v. Richmond & D. R. Co., 17 S.E. 732, 38 S.C. 199.
22 C.J. p 547 note 92.

47. Ill.—Devine v. Delano, 111 N.E. 742, 272 Ill. 166, Ann.Cas.1918A 689.
22 C.J. p 547 note 93.

48. Neb.—Missouri Pac. R. Co. v. Fox, 83 N.W. 744, 60 Neb. 531.
Tex.—St. Louis, S. F. & T. Ry. Co. v. Green, Civ.App., 22 S.W.2d 550, reversed on other grounds, Com. App., 37 S.W.2d 123.

On cross-examination
Tex.—St. Louis, S. F. & T. Ry. Co. v. Green, supra.

49. Tex.—St. Louis, S. F. & T. Ry. Co. v. Green, supra.
22 C.J. p 547 note 94.

Testimony may relate to the manner of inspecting cars.—St. Louis, S. F. & T. Ry. Co. v. Green, supra.

Other duties, subject of testimony, see 22 C.J. p 547 note 94 [a].

50. Iowa.—Miller v. Illinois Cent. R. Co., 57 N.W. 418, 89 Iowa 567.
22 C.J. p 547 note 95.

51. Ga.—Southern Ry. Co. v. Blanton, 200 S.E. 471, 59 Ga.App. 252.
22 C.J. p 547 note 96.

Testimony may relate to whether train was under control.
Ala.—Louisville & N. R. Co. v. Jacobson, 118 So. 565, 218 Ala. 384.
Tex.—International & G. N. R. Co. v. Brice, Civ.App., 126 S.W. 613.

Other operations see 22 C.J. p 547 note 96 [a].

Duty to keep lookout
The testimony of a railroad engineer as to whose duty it was to keep a lookout for obstructions as the train backed down the track has been held to be properly excluded.—Armstrong v. Chicago & W. I. R. Co., 263 Ill.App. 126, affirmed 183 N. E. 478, 350 Ill. 426, certiorari denied Chicago & W. I. R. Co. v. Armstrong, 53 S.Ct. 523, 289 U.S. 724, 77 L.Ed. 1475.

52. Minn.—Kelly v. Southern Minnesota R. Co., 9 N.W. 588, 28 Minn. 98.
22 C.J. p 547 note 97.

53. Mo.—Brown v. Chicago, R. I. & P. Ry. Co., 286 S.W. 45, 315 Mo. 409.
22 C.J. p 547 note 98.

Testimony may relate to
(1) Allowing steam to escape from defective engine.—Brown v. Chicago, R. I. & P. Ry. Co., 286 S.W. 45, 315 Mo. 409.
(2) Distance at which a headlight is visible.

whether certain operations are safe[54] or dangerous;[55] the comparative danger involved in two methods of doing the work[56] or employing different devices for the same purpose;[57] and what are the proper functions of railroad appliances,[58] the observed effect of certain acts,[59] or the faculties requisite for doing them,[60] or what is the practice in another locality or on another railroad with respect to the operation in question.[61]

Such a witness is frequently permitted to state facts more nearly resembling conclusions, as whether certain acts are necessary;[62] whether it would be possible to stop a train[63] or do other acts,[64] or that certain things should happen.[65] He may also testify as to what are the probabilities with regard to certain occurrences.[66] It is also proper to permit such a witness to point out, explain, or construe the rules of the company in ordinary every day practice.[67]

Where a fact in railroad matters is known to a person not connected with the business, the latter may state it.[68] However, mere opportunity for general observation is not sufficient to qualify a witness.[69]

Street railways. Persons who are shown to the satisfaction of the court[70] to be skilled in matters relating to the operation of street railways,[71] and to possess adequate knowledge on which to base their statements,[72] such as general officers,[73] conductors,[74] drivers,[75] and motormen,[76] may state facts generally known among persons engaged in this business,[77] and relating to the operation of such

Ala.—Southern R. Co. v. Bonner, 37 So. 702, 141 Ala. 517.
Tex.—Cobb v. Texas & N. O. R. Co., Civ.App., 107 S.W.2d 670.
(3) Other subjects of testimony as to rolling stock see 22 C.J. p 547 note 98 [a].

54. Mo.—Brown v. Chicago, R. I. & P. Ry. Co., 286 S.W. 45, 315 Mo. 409.
22 C.J. p 547 note 99.

55. N.C.—Pyatt v. Southern Ry. Co., 154 S.E. 847, 199 N.C. 397.
22 C.J. p 548 note 1.

Unsafe engine
Mo.—Brown v. Chicago, R. I. & P. Ry. Co., 286 S.W. 45, 315 Mo. 409.

56. Ala.—Schlaff v. Louisville, etc., R. Co., 14 So. 105, 100 Ala. 377.
22 C.J. p 548 note 2.

57. Ark.—Kansas City Southern R. Co. v. Leslie, 167 S.W. 83, 112 Ark. 305, Ann.Cas.1915B 834.
22 C.J. p 548 note 3.

58. Wis.—Bonnell v. Chicago, St. P. M. & O. R. Co., 147 N.W. 1046, 158 Wis. 153.
22 C.J. p 548 note 4.

59. N.Y.—Harrison v. New York Cent. & H. R. R. Co., 87 N.E. 802, 195 N.Y. 86, modifying 111 N.Y.S. 812, 127 App.Div. 804.
22 C.J. p 548 note 5.

60. N.C.—Stewart v. Raleigh & A. Air Line R. Co., 53 S.E. 877, 141 N.C. 253.
22 C.J. p 548 note 6.

61. Ga.—Southern Ry. Co. v. Blanton, 200 S.E. 471, 59 Ga.App. 252.

62. Tex.—San Antonio & A. P. Ry. Co. v. Wagner, Civ.App., 166 S.W. 24, affirmed 36 S.Ct. 626, 241 U.S. 476, 60 L.Ed. 1110.
Va.—Chesapeake & O. Ry. Co. v. Arrington, 101 S.E. 415, 126 Va. 194.
22 C.J. p 548 note 7.

Brakeman going between cars
In an action by a brakeman injured while going between an engine and a car to make a coupling, there was no error in permitting plaintiff to state that there was a necessity for his going between the cars, such testimony being a conclusion drawn from alleged facts, sometimes called the collective fact rule. —Chesapeake & O. Ry. Co. v. Arrington, supra.

63. U.S.—Union Pac. R. Co. v. Novak, Wash., 61 F. 573, 9 C.C.A. 629, appeal dismissed 17 S.Ct. 1001, 41 L.Ed. 1184.
22 C.J. p 548 note 8.

64. U.S.—Union Pac. R. Co. v. Novak, supra.
22 C.J. p 548 note 9.

65. N.Y.—Jamieson v. New York & R. B. R. Co., 42 N.Y.S. 915, 11 App. Div. 50, affirmed 57 N.E. 1113, 162 N.Y. 630.
22 C.J. p 548 note 10.

66. Ala.—American Oak Leather Co. v. Atwood, 67 So. 663, 191 Ala. 450.
22 C.J. p 548 note 11.

67. U.S.—Wiggins v. Powell, C.C.A. Fla., 119 F.2d 751, 754, citing **Corpus Juris.**
Ala.—Louisville & N. R. Co. v. Grizzard, 189 So. 203, 207, 238 Ala. 49, citing **Corpus Juris,** and certiorari denied 60 S.Ct. 140, 308 U.S. 603, 84 L.Ed. 504—Louisville & N. R. Co. v. Jacobson, 118 So. 565, 570, 218 Ala. 384, citing **Corpus Juris.**
Ky.—Louisville & N. R. Co. v. Mitchell, 191 S.W. 465, 173 Ky. 622.
Mo.—Finnegan v. Missouri Pac. R. Co., 169 S.W. 969, 261 Mo. 481.
Tex.—Texas & P. Ry. Co. v. Wylie, Civ.App., 36 S.W.2d 238.
22 C.J. p 548 note 12.

68. N.C.—Gerow v. Seaboard Air Line Ry. Co., 123 S.E. 473, 188 N. C. 76.
22 C.J. p 548 note 13.

Expert in service of commission
In an action for death of engineer engaged in interstate commerce, Act Congr. May 6, 1910, § 4 (U.S.Comp.St. § 8645), prohibiting a report of accident from being used as evidence, does not prevent an expert in service of interstate commerce commission, who made a personal examination of exploded boiler, from testifying as to facts coming under his personal observation.—Gerow v. Seaboard Air Line Ry. Co., 123 S.E. 473, 188 N.C. 76.

69. S.C.—Cain v. Atlantic Coast Line R. Co., 54 S.E. 244, 74 S.C. 89.
22 C.J. p 548 note 14.

70. Minn.—Blondel v. St. Paul City R. Co., 68 N.W. 1079, 66 Minn. 284.

71. Ga.—Daughtry v. Georgia Power Co., 6 S.E.2d 454, 61 Ga.App. 505.
22 C.J. p 549 note 16.

72. Mich.—Phinney v. Detroit United Ry. Co., 205 N.W. 124, 232 Mich. 399—Travelers' Indemnity Co. v. Detroit United Ry., 159 N.W. 528, 193 Mich. 375.
22 C.J. p 549 note 17.

73. Conn.—Laufer v. Bridgeport Tract. Co., 37 A. 379, 68 Conn. 475, 37 L.R.A. 533.

74. Mich.—Travelers' Indemn. Co. v. Detroit United R., 159 N.W. 528, 193 Mich. 375.
22 C.J. p 549 note 19.

75. Mich.—Walter v. Detroit, J. & C. R. Co., 158 N.W. 154, 191 Mich. 667.
22 C.J. p 549 note 20.

76. Ga.—Daughtry v. Georgia Power Co., 6 S.E.2d 454, 61 Ga.App. 505—Georgia Ry. & Power Co. v. Simms, 126 S.E. 850, 33 Ga.App. 535.
Ga.—Smith v. Galveston-Houston Electric Ry. Co., Civ.App., 265 S. W. 267, reversed on other grounds, Com.App., 277 S.W. 103.
22 C.J. p 549 note 21.

77. Pa.—Dougherty v. Philadelphia

roads.[78] The experience need not be acquired on the railway to which the testimony relates,[79] and may even be acquired on a steam railroad where the operations in question are analogous,[80] but not otherwise.[81]

§ 482. —— Trade Terms

A witness having knowledge and experience in a particular art, calling, trade, etc., may state whether a term or phrase used therein has a technical or trade meaning, and if so what it is.

A witness who is shown to be familiar with, and have the necessary knowledge and experience in any art, calling, trade, etc.,[82] may, when the fact to be proved is relevant,[83] state whether a word or phrase used in it, as in a contract or other writing, has acquired a technical meaning, and if so what it is,[84]

Rapid Transit Co., 101 A. 344, 257 Pa. 118.

78. Ga.—Daughtry v. Georgia Power Co., 6 S.E.2d 454, 61 Ga.App. 505.

22 C.J. p 549 note 23.

Testimony may relate to

(1) Streetcar being immovable when door is open.—Daughtry v. Georgia Power Co., supra.

(2) Inadequacy of brakes.

Cal.—Grossetti v. Sweasey, 169 P. 687, 176 Cal. 793.

Ga.—Georgia Ry. & Power Co. v. Simms, 126 S.E. 850, 33 Ga.App. 535.

(3) That motorman did all he could to stop car and avoid injury. —Smith v. Galveston-Houston Electric Ry. Co., Tex.Civ.App., 265 S.W. 267, reversed on other grounds, Com. App., 277 S.W. 103.

(4) Other testimony as to operation see 22 C.J. p 549 note 23 [a].

79. Wash.—Traver v. Spokane St. R. Co., 65 P. 284, 25 Wash. 225.

80. Del.—Maxwell v. Wilmington City R. Co., 40 A. 945, 15 Del. 199.

22 C.J. p 549 note 25.

81. Ind.—Indiana Union Tract. Co. v. Hiatt, App., 114 N.E. 478, 65 Ind. App. 233, reversing on rehearing 112 N.E. 406, rehearing denied 115 N.E. 101, 65 Ind.App. 233.

82. U.S.—Butte & B. Cons. Min. Co. v. Montana Ore Purchasing Co., 121 F. 524, 58 C.C.A. 634.

Ala.—W. L. Shepherd Lumber Co. v. Atlantic Coast Line R. Co., 112 So. 323, 216 Ala. 89.

Ky.—McGregor v. Louisville & N. R. Co., 51 S.W.2d 953, 244 Ky. 696.

Me.—Simoneau v. Inhabitants of Livermore Falls, 159 A. 853, 131 Me. 165.

22 C.J. p 549 note 27.

83. N.Y.—Healy v. Brandon, 21 N. Y.S. 390, 66 Hun 515, affirmed 37 N.E. 825, 142 N.Y. 681.

22 C.J. p 549 note 28.

84. U.S.—Holyoke Water Power Co. v. American Writing Paper Co., C. C.A.Mass., 68 F.2d 261—Texas & St. L. Ry. Co. v. Rust, C.C.Ark., 19 F. 239.

Ala.—Commonwealth Life Ins. Co. v. Reilly, 94 So. 294, 208 Ala. 313.

Colo.—Moul v. Thompson, 14 P.2d 1004, 91 Colo. 323.

Ill.—Arkansas Sweet Potato Growers' Exchange v. Wignall-Moore Co., 249 Ill.App. 34—Goetz v. Continental Casualty Co., 245 Ill.App. 350—Acme Waste Paper Co. v. U. S. Paper Supply Co., 233 Ill.App. 262.

Ky.—McGregor v. Louisville & N. R. Co., 51 S.W.2d 953, 955, 244 Ky. 696, citing **Corpus Juris.**

Mass.—Northern Industrial Chemical Co. v. Davis, 144 N.E. 64, 249 Mass. 246.

Mich.—Edgar v. Hewett Grain & Provision Co. of Escanaba, 202 N. W. 972, 230 Mich. 168.

Mo.—Wentzel v. Lake Lotawana Development Co., 48 S.W.2d 185, 226 Mo.App. 960.

N.Y.—Allen v. Merchants' Bank, 15 Wend. 482, reversed on other grounds 22 Wend. 215, 34 Am.D. 289.

Pa.—Purcell v. Metropolitan Life Ins. Co., 3 A.2d 340, 332 Pa. 535—Railway Express Agency v. Pennsylvania Public Utility Commission, 4 A.2d 176, 134 Pa.Super. 405.

22 C.J. p 549 note 29.

Such a witness may testify as to the meaning of

(1) Aeronautical terms.—Parker v. James E. Granger, Inc., 52 P.2d 226, 4 Cal.2d 668, appeal dismissed and certiorari denied 56 S.Ct. 958, 298 U. S. 644, 80 L.Ed. 1375.

(2) "Clean bill of lading."—Northern Industrial Chemical Co. v. Davis, 144 N.E. 64, 249 Mass. 246.

(3) "Clearing," with respect to clearing timber.—Wentzel v. Lake Lotawana Development Co., 48 S.W. 2d 185, 226 Mo.App. 960.

(4) "Clothing wool," as used in tariff classification.—U. S. v. Stone & Downer Co., 47 S.Ct. 616, 274 U.S. 225, 71 L.Ed. 1013, modifying 12 Ct. Cust.App. 557, certiorari granted 46 S.Ct. 20, 269 U.S. 542, 70 L.Ed. 402.

(5) "Completed", as applied to oil well.—Chapman v. Ellis, Tex.Civ. App., 254 S.W. 615.

(6) Dotted lines on blueprint, as indicating city sewer in front of building.—Des Moines Plumbing & Heating Co. v. Magarian, 207 N.W. 750, 201 Iowa 647.

(7) "Estimate."—First Nat. Bank v. U. S. Fidelity & Guaranty Co., 271 P. 57, 127 Or. 147.

(8) "Grade," as used in "change of goods."—Simoneau v. Inhabitants of Livermore Falls, 159 A. 853, 131 Me. 165.

(9) "Kilowatt capacity" of electric generating plant.—Merced Irr. Dist. v. San Joaquin Light & Power Corporation, 281 P. 415, 101 Cal.App. 153.

(10) "Merchantable cattle."—Carothers v. Finley, Tex.Civ.App., 209 S.W. 801, error refused.

(11) "Mill weights and grading to govern."—Acme Waste Paper Co. v. U. S. Paper Supply Co., 233 Ill.App. 262.

(12) Oil and gas in place as being minerals.—Warren v. Clinchfield Coal Corporation, 186 S.E. 20, 166 Va. 524.

(13) "Putting on sticks," in lumber trade.—Oden-Elliott Lumber Co. v. Daniel-Gaddis Lumber Co., 98 So. 730, 210 Ala. 582.

(14) "Quality," as applied to yarn. —Taber Mill v. Southern Brighton Mills, 175 S.E. 665, 49 Ga.App. 390.

(15) "Scrap steel."—Watson, Geach & Co. v. York Metal & Alloys Co., 14 Ct.Cust.App. 449.

(16) "Shipment."—Victor v. National City Bank of New York, 193 N.Y.S. 868, 200 App.Div. 557.

(17) Terms of tariff.—W. L. Shepherd Lumber Co. v. Atlantic Coast Line R. Co., 112 So. 323, 216 Ala. 89.

(18) Other terms and phrases explained see 22 C.J. p 549 note 29 [a].

Technical terms in a foreign language may be explained.

U.S.—Cauca Co. v. Republic of Colombia, W.Va., 113 F. 1020, 51 C. C.A. 604, reversed on other grounds 23 S.Ct. 704, 190 U.S. 524, 47 L.Ed. 1159.

Pa.—Purcell v. Metropolitan Life Ins. Co., 3 A.2d 340, 332 Pa. 535.

Proof merely that a term has a definite, uniform, and general meaning in the trade and commerce of the United States, without proof of what the definite, uniform, and general meaning is, amounts merely to statement of conclusions, not based on related facts, and does not even rise to the dignity of "opinion evidence." —U. S. v. D. L. Moss & Co., 22 C.C. P.A.(Customs) 249.

Extrinsic evidence to construe tech-

although the term may not be technical, scientific, or ambiguous in itself.[85] The trade or technical meaning, however, must differ from the ordinary dictionary meaning of the term, or its meaning in common speech;[86] the meaning of familiar words of fixed definition in the vernacular cannot be proved by testimony of such a skilled witness.[87]

§ 483. —— Customs and Usages

The existence of a custom or usage in any particular trade, art, or calling may be testified to as a fact by a witness who, by his possession of adequate knowledge of the matter, is qualified so to testify.

A custom or usage of trade must be established as a matter of fact and not of opinion, hence witnesses must testify to its existence as a fact.[88] It must be proved by instances and not by opinion;[89] but the proof must be of a general custom and not of an individual instance.[90]

Accordingly a witness who is qualified by knowledge and experience may testify as to the existence, as a fact, at a time and place sufficiently near to be relevant,[91] of a custom or usage in any particular trade, art, or calling,[92] such as the trade, art or call-

nical words and phrases generally see infra § 962.

85. N.D.—State v. Gordon, 155 N.W. 59, 32 N.D. 31, Ann.Cas.1918A 442.
22 C.J. p 550 note 30.

86. U.S.—U. S. v. Nordlinger, N.Y., 121 F. 690, 692, 58 C.C.A. 438, reversing, C.C., 115 F. 828, and certiorari denied 24 S.Ct. 848, 191 U.S. 575, 48 L.Ed. 308.

87. U.S.—Wisconsin Alumni Research Foundation v. George A. Breon & Co., C.C.A.Mo., 85 F.2d 166, reversing, D.C., 12 F.Supp. 928, certiorari denied George A. Breon & Co. v. Wisconsin Alumni Research Foundation, 57 S.Ct. 191, 299 U.S. 598, 81 L.Ed. 441—U. S. v. Nordlinger, N.Y., 121 F. 690, 58 C.C.A. 438, reversing, C.C., 115 F. 828, and certiorari denied 24 S.Ct. 848, 191 U.S. 575, 48 L.Ed. 308.
Cal.—Rath v. Indemnity Ins. Co. of North America, 38 P.2d 435, 2 Cal. App.2d 637.
Pa.—Railway Express Agency v. Pennsylvania Public Utilities Commission, 4 A.2d 176, 134 Pa.Super. 405.
22 C.J. p 550 note 31.

Expert testimony is not admissible to explain the meaning of:

(1) "Service station."—Alberga, to Use of Colton, v. Pennsylvania Indemnity Corporation, 178 A. 697, 114 Pa.Super. 42.

(2) "Trading;" and "trading loss."—Rath v. Indemnity Ins. Co. of North America, 38 P.2d 435, 2 Cal. App.2d 637—Earl v. Fidelity & Deposit Co. of Maryland, 32 P.2d 409, 138 Cal.App. 435.

(3) Other terms not subject of expert testimony see 22 C.J. p 550 note 31 [a].

88. U.S.—Western Petroleum Co. v. Tidal Gasoline Co., C.C.A.Ill., 284 F. 82.
Ill.—Gourley v. Chicago & E. I. R. Co., 14 N.E.2d 842, 848, 295 Ill.App. 160, citing **Corpus Juris.**
Md.—Chesapeake Bank v. Swain, 29 Md. 483.
Mo.—Anderson v. Davis, 284 S.W. 439, 314 Mo. 515, reversing 251 S. W. 86, 215 Mo.App. 318.
Or.—Green Mountain Log Co. v. Columbia & N. R. R. R., 16 P.2d 1106, 141 Or. 188.
17 C.J. p 521 note 51.

A usage or custom relied on as giving a peculiar and technical meaning to words and phrases used in a commercial contract, and as controlling the interpretation and effect of such contract, must be proved and determined as a fact on the trial.
N.Y.—Marine Nat. Bank v. National City Bank, 59 N.Y. 67, 17 Am.R. 305.
Tex.—Standard Paint Co. v. San Antonio Hardware Co., Civ.App., 136 S.W. 1150.

A conclusion of law as to existence of a custom is incompetent.
N.Y.—Mills v. Hallock, 2 Edw. 652.
Ohio.—Austin v. Williams, 2 Ohio 61.

89. U.S.—Ames Mercantile Co. v. Kimball S. S. Co., D.C.Cal., 125 F. 52.
Cal.—Brumhall v. Sutherland, 293 P. 672, 110 Cal.App. 10.
17 C.J. p 521 note 52.

Hypothetical question improper

It is not permissible to ask the witness what he would do under a given state of facts; the question must call for what he has done or seen done.—Rickerson v. Hartford F. Ins. Co., 43 N.E. 856, 149 N.Y. 307.

Testimony to the existence of a usage is of no value where the witness cannot state from his own knowledge instances of its operation.—Ames Mercantile Co. v. Kimball SS., D.C.Cal., 125 F. 332—17 C.J. p 521 note 53.

90. U.S.—Granger v. Providence-Washington Ins. Co., Ill., 200 F. 730, 119 C.C.A. 174, certiorari denied 34 S.Ct. 329, 232 U.S. 721, 58 L.Ed. 814.
Ala.—Louisville & N. R. Co. v. Hall, 135 So. 466, 223 Ala. 338, certiorari denied 52 S.Ct. 37, 284 U.S. 661, 76 L.Ed. 560.
Mo.—Asbury v. Fidelity Nat. Bank & Trust Co., 100 S.W.2d 946, 231 Mo. App. 437—Sharp v. Stuebner Cleaning & Mercantile Co., App., 300 S. W. 559.
N.Y.—Noah v. Bowery Sav. Bank, 122 N.E. 235, 225 N.Y. 284, reversing 155 N.Y.S. 1128, 171 App. Div. 912.
Or.—Green Mountain Log Co. v. Columbia & N. R. R. R., 16 P.2d 1106, 141 Or. 188.

Expert witness may not testify to particular custom in performing dangerous work.—Louisville & N. R. Co. v. Hall, 135 So. 466, 223 Ala. 338, certiorari denied 52 S.Ct. 37, 284 U.S. 661, 76 L.Ed. 560.

91. Del.—White v. Wilmington City Ry. Co., 63 A. 931, 22 Del. 105.
Iowa.—Hale v. Gibbs, 43 Iowa 380.
Mo.—Robison v. Chicago Great Western R. Co., App., 66 S.W.2d 180.

92. U.S.—Western Petroleum Co. v. Tidal Gasoline Co., C.C.A.Ill., 284 F. 82.
Ala.—Walker v. Stephens, 127 So. 668, 221 Ala. 18—Oden-Elliott Lumber Co. v. Daniel-Gaddis Lumber Co., 98 So. 730, 210 Ala. 582.
Ark.—McEachin v. Martin, 102 S.W. 2d 864, 193 Ark. 787.
Conn.—Wray v. Fairfield Amusement Co., 10 A.2d 600, 126 Conn. 221.
Ga.—Gulf Refining Co. v. Smith, 139 S.E. 716, 164 Ga. 811—Taber Mill v. Southern Brighton Mills, 175 S.E. 665, 49 Ga.App. 390.
Idaho.—Isaak v. Journey, 15 P.2d 1069, 52 Idaho 392.
Kan.—Sissell v. Sihler Serum Co., 204 P. 988, 110 Kan. 446.
Ky.—Thomas' Adm'x v. Ashland Fire Brick Co., 4 S.W.2d 757, 223 Ky. 821.
N.J.—Higgins v. County Seat Building & Loan Ass'n, 8 A.2d 101, 123 N.J.Law 116—Fiedler Corporation v. Manufacturer's Development Co., 158 A. 450, 108 N.J.Law 364.
N.Y.—Noah v. Bowery Sav. Bank, 122 N.E. 235, 225 N.Y. 284, reversing 155 N.Y.S. 1128, 171 App. Div. 912—Vietor v. National City Bank of New York, 193 N.Y.S. 868, 200 App.Div. 557.
N.C.—T. C. May Co. v. Menzies Shoe Co., 119 S.E. 227, 186 N.C. 144.
Pa.—Pirrung v. Weisbrod, 39 Pa. Dist. & Co. 196, 201, citing **Corpus Juris.**

ing of banking,[93] insurance,[94] or railroading;[95] or in any office,[96] or in any particular locality;[97] and he need not first state the incidents or instances within his knowledge by which he became possessed of the knowledge of the custom,[98] unless required to do so.[99] Where a witness has been shown to have competent knowledge, it is proper to ask him directly what the usage is.[1] A witness, however, cannot state the effect of a custom,[2] or testify that a custom is so generally uniform as to create a pre-

S.C.—Rhodus v. Dukes, 122 S.E. 872, 128 S.C. 354.

Wash.—Mattson v. Carlisle Packing Co., 212 P. 179, 123 Wash. 243—Knapp v. Siegley, 208 P. 13, 120 Wash. 478.

17 C.J. p 521 note 54—22 C.J. p 550 note 33.

An expert accountant is competent to state rule adopted by his profession upon which to calculate value of good will, and to state that value.—Sharon v. Kansas City Granite & Monument Co., 125 S.W.2d 959, 233 Mo.App. 547.

Architects

N.J.—Higgins v. County Seat Building & Loan Ass'n, 8 A.2d 101, 123 N.J.Law 116.

22 C.J. p 550 note 33 [f].

Custom in operation of beauty parlors

Pa.—Pirrung v. Weisbrod, 39 Pa. Dist. & Co. 196.

Experienced gasoline pump inspector may testify to custom at filling stations to shut off motor while filling gasoline tank.—Walker v. Stephens, 127 So. 668, 221 Ala. 18.

Forestry expert may properly testify as to custom of burning logging slashing and methods of fire prevention.—Conrad v. Cascade Timber Co., 7 P.2d 19, 166 Wash. 369.

General usage or rule in construction work

In laborer's action against sewer contractor for personal injuries, a qualified witness may testify as to methods in general use in type of construction in which laborer was engaged, whether experience of contractors in similar work had crystallized into rules regulating manner of doing similar work, and as to what those rules were, and it would not be improper for witness to say what rule was, if rule applied to facts.—McEachin v. Martin, 102 S.W. 2d 864, 193 Ark. 787.

93. U.S.—Pennsylvania Co. for Insurances on Lives and Granting Annuities v. U. S., D.C.Pa., 39 F. Supp. 1019.

N.Y.—Noah v. Bowery Sav. Bank, 122 N.E. 235, 225 N.Y. 284, reversing 155 N.Y.S. 1128, 171 App.Div. 912—Griffin v. Rice, 1 Hilt. 184.

22 C.J. p 550 note 33 [a].

Certificate of interest, as not corporate security

In action for amount of taxes paid under protest for stamps required to be attached to certificates of interest in bond and mortgage, which certificates were not patently and plainly on their face corporate securities within provisions of the revenue act imposing stamp tax, testimony of bank officer and investment broker that certificates were not generally referred to, called, or known as corporate securities, was admissible.—Pennsylvania Co. for Insurances on Lives and Granting Annuities v. U. S., D.C.Pa., 39 F.Supp. 1019.

94. Cal.—California-Western States Life Ins. Co. v. Feinstein, 101 P.2d 696, 15 Cal.2d 413, 131 A.L.R. 608.

R.I.—Evans v. Commercial Mut. Ins. Co., 6 R.I. 47.

S.C.—Hartford Fire Ins. Co. v. Garvin, 133 S.E. 29, 136 S.C. 307.

22 C.J. p 550 note 33 [c].

Usage as to accepting or rejecting risks

Cal.—California-Western States Life Ins. Co. v. Feinstein, 101 P.2d 696, 15 Cal.2d 413, 131 A.L.R. 608.

Ky.—Etter v. National Life & Accident Ins. Co., 15 S.W.2d 242, 228 Ky. 399—New York Life Ins. Co. v. Long, 250 S.W. 812, 199 Ky. 133.

N.D.—Thomas v. New York Life Ins. Co., 260 N.W. 605, 65 N.D. 625.

Opinion of medical director

In suit on life policy, sought to be avoided because of false representations in application, opinion of insurer's medical director as to action on application if all representations were true as contended for by insurer or as to general custom of insurers on application containing such representation was inadmissible as being merely opinion, not dependent on scientific knowledge or skill.—Myers v. Mutual Life Ins. Co. of New York, 98 S.E. 424, 83 W.Va. 390.

95. Mo.—Derrington v. Southern Ry. Co., 40 S.W.2d 1069, 328 Mo. 283, certiorari denied Southern Ry. Co. v. Derrington, 52 S.Ct. 37, 284 U.S. 662, 76 L.Ed. 561—Chapman v. Kansas City Rys. Co., 233 S.W. 177—Robison v. Chicago Great Western R. Co., App., 66 S.W.2d 180.

Tex.—Texas & P. Ry. Co. v. Wylie, Civ.App., 36 S.W.2d 238.

22 C.J. p 550 note 33 [b].

Shipper

(1) A shipper who testifies that he has had about thirty years' experience in raising, buying, selling, and shipping cattle, and has on numerous occasions observed shipments of cattle to the point in question as well as other points, may testify as to the usual and customary manner of spotting cars.—Galveston, H. & S. A. R. Co. v. Harris Bros., Tex.Civ.App., 211 S.W. 255, error refused.

(2) A shipper, who has made only one or two shipments, is not qualified to testify to the usual and customary time required for shipment over a given route.—Fort Worth & D. C. Ry. Co. v. Helm, Tex.Civ.App., 30 S.W.2d 492.

(3) A shipper who testifies that he had engaged in raising and shipping cattle, for a number of years, but had never traveled on a freight train over the route taken by his shipment is incompetent to testify regarding customary running time over such route.—Mars v. Panhandle & S. F. Ry. Co., Tex.Civ.App., 25 S.W.2d 1004, error dismissed.

96. Mass.—Chandler v. Prince, 100 N.E. 1029, 214 Mass. 180.

S.D.—Schmidt v. Scanlan, 144 N.W. 128, 32 S.D. 608.

A clerk is competent.—Worcester v. Northborough, 5 N.E. 270, 140 Mass. 397.

97. La.—Taylor v. Swett, 3 La. 33, 22 Am.D. 156.

The usages of another state may be proved by the testimony of witnesses skilled therein.—McNeill v. Arnold, 17 Ark. 154.

Marriage custom in sister state

La.—Taylor v. Swett, 3 La. 33, 22 Am.D. 156.

98. Ind.—Conner v. Citizens R. Co., 45 N.E. 662, 146 Ind. 430.

99. Ky.—Thomas' Adm'x v. Ashland Fire Brick Co., 4 S.W.2d 757, 223 Ky. 821.

1. Kan.—Campbell v. Fuller, 25 Kan. 723.

17 C.J. p 522 note 56.

2. U.S.—Western Petroleum Co. v. Tidal Gasoline Co., C.C.A.Ill., 284 F. 82.

Ga.—Farmers' Ginnery & Mfg. Co. v. Thrasher, 87 S.E. 804, 144 Ga. 598.

Ind.—Huston v. Roots, 30 Ind. 461.

Mass.—Haskins v. Warren, 115 Mass. 514.

Mich.—Obenauer v. Solomon, 115 N.W. 696, 151 Mich. 570.

N.Y.—Collyer v. Collins, 17 Abb.Pr. 467.

Pa.—Columbia Glass Co. v. Atlantic Glass Co., 43 Pa.Super. 367.

S.C.—Hartford Fire Ins. Co. v. Garvin, 133 S.E. 29, 136 S.C. 307.

Intra-state character of railroad

Whether custom between railroad and another resulted in railroad being engaged in interstate or intrastate commerce is for jury, and offered testimony, witness' opinion,

sumption of knowledge thereof.[3]

Qualification of witness. In order to render a witness qualified to testify to the existence of a custom or usage it must appear to the satisfaction of the court[4] that the witness has adequate knowledge of the custom or usage as a fact.[5] He may testify from his belief as derived from his knowledge;[6] or he may testify from his own knowledge and experience or from information derived from others through the course of trade,[7] although he is not engaged in the trade or business as to the custom of which he testifies,[8] or shows no special skill,[9] and although his knowledge is derived from his own business, if that has been sufficiently long continued and extensive;[10] all that is necessary is that he should have occupied such a position as to know of the existence of the custom as a fact.[11] However, the fact that a witness knew of a custom or usage existing at one time does not prove that he had a knowledge of its existence at another;[12] and a witness will not be considered competent whose knowledge is confined to the practice of certain individuals only,[13] or who otherwise is not familiar with the

that supported idea of intra-state commerce was properly excluded.—Brown v. Illinois Terminal Co., 150 N.E. 242, 319 Ill. 326, affirming 237 Ill.App. 145.

3. Mo.—Ford v. St. Louis, K. & N. R. Co., 63 Mo.App. 133.

4. Ala.—Price v. White, 9 Ala. 563.
Ky.—Thomas' Adm'x v. Ashland Fire Brick Co., 4 S.W.2d 757, 223 Ky. 821.
Mass.—Barrie v. Quinby, 92 N.E. 451, 206 Mass. 259—A. J. Tower Co. v. Southern Pac. Co., 69 N.E. 348, 184 Mass. 472.
N.H.—Hess v. Shurtlef, 65 A. 377, 74 N.H. 114.
N.Y.—Haslam v. Adams Express Co., 19 N.Y.Super. 235.

5. U.S.—Ames Mercantile Co. v. Kimball S. S. Co., D.C.Cal., 125 F. 332.
Idaho.—Isaak v. Journey, 15 P.2d 1069, 1072, 52 Idaho 922, quoting **Corpus Juris.**
Iowa.—Alley, Greene & Pipe Co. v. Thornton Creamery Co., 207 N.W. 767, 201 Iowa 621.
Ky.—Thomas' Adm'x v. Ashland Fire Brick Co., 4 S.W.2d 757, 223 Ky. 821.
Miss.—Shackelford v. New Orleans, J. & G. N. R. Co., 37 Miss. 202.
Mo.—Chapman v. Kansas City Rys. Co., 233 S.W. 177—Wear v. Sanger, 2 S.W. 307, 91 Mo. 348—Meyer v. Johnson, 30 S.W.2d 641, 224 Mo. App. 565—Martin v. Kansas City, App., 224 S.W. 141.
N.Y.—Rosenstein v. McCutcheon, 140 N.Y.S. 315, 155 App.Div. 278.
Or.—Holmes v. Whitaker, 31 P. 705, 23 Or. 319.
Pa.—Pirrung v. Weisbrod, 39 Pa. Dist. & Co. 196—Maser v. Royal Union Mutual Life Ins. Co., 12 Pa. Dist. & Co. 335.
22 C.J. p 550 note 38.

Contractors and builders, who are acquainted with the premises and with the surrounding circumstances are peculiarly qualified, in an action for damages for removal of lateral support, in determining whether the excavator has been careless, to give information as to what is usually done under such circumstances.—Knapp v. Siegley, 208 P. 13, 120 Wash. 478.

A witness who stated that he knew the custom in the vicinity is competent to testify thereto.—Taylor v. Jackson, Tex.Civ.App., 180 S.W. 1142

Knowledge held insufficient

(1) A witness who has been on only two engines for a short time, is incompetent to testify as to the practice of engineers with reference to punching holes in spark arresters to make their engines steam better.—Hitchner Wall Paper Co. v. Pennsylvania R. Co., C.C.Pa., 158 F. 1011, affirmed 168 F. 602, 93 C.C.A. 598.

(2) A witness who had worked for a railroad company only fifteen days and had never seen the master mechanic hire firemen in the yards is not qualified to testify that he customarily did so.—St. Louis, I. M. & S. R. Co. v. Wirbel, 158 S.W. 118, 108 Ark. 437.

6. Mass.—Hamilton v. Nickerson, 13 Allen 351.
17 C.J. p 521 note 54 [a].

7. Idaho.—Isaak v. Journey, 15 P.2d 1069, 1072, 52 Idaho 922, quoting **Corpus Juris.**
Pa.—Pirrung v. Weisbrod, 39 Pa. Dist. & Co. 196, 201, citing **Corpus Juris.**
Vt.—King v. Woodbridge, 34 Vt. 565.
17 C.J. p 525 note 76.

8. Ga.—Farmers' Ginnery & Mfg. Co. v. Thrasher, 87 S.E. 804, 144 Ga. 598.
N.Y.—Griffin v. Rice, 1 Hilt. 184.
Or.—Green Mountain Log Co. v. Columbia & N. R. R. R., 16 P.2d 1106, 141 Or. 188.
17 C.J. p 525 note 81.

A witness need not be a warehouseman to have sufficient knowledge to be competent to testify to the existence of a custom among warehousemen of a particular municipality to insure to its full value cotton stored with them, it being sufficient that he is accustomed to deal with such warehouses and knows their custom.—Farmers' Ginnery & Mfg. Co. v. Thrasher, 87 S.E. 804, 144 Ga. 598.

9. Ill.—Wilson v. Bauman, 80 Ill. 493.
Pa.—Pirrung v. Weisbrod, 39 Pa.Dist. & Co., 196, 201, citing **Corpus Juris.**

Need not qualify as expert

Cal.—People v. Borda, 38 P. 1110, 105 Cal. 636.

10. Mass.—Hamilton v. Nickerson, 13 Allen 351.

11. Ga.—Gulf Refining Co. v. Smith, 139 S.E. 716, 164 Ga. 811—Farmers' Ginnery & Mfg. Co. v. Thrasher, 87 S.E. 804, 144 Ga. 598.
Idaho.—Isaak v. Journey, 15 P.2d 1069, 1072, 52 Idaho 922, quoting **Corpus Juris.**
Iowa.—Alley, Greene & Pipe Co. v. Thornton Creamery Co., 207 N.W. 767, 201 Iowa 621.
Mo.—Derrington v. Southern Ry. Co., 40 S.W.2d 1069, 328 Mo. 283, certiorari denied Southern Ry. Co. v. Derrington, 52 S.Ct. 37, 284 U.S. 662, 76 L.Ed. 561.
N.Y.—Vietor v. National City Bank of New York, 193 N.Y.S. 868, 200 App.Div. 557.
17 C.J. p 525 note 77.

Attorney engaged in general practice may be competent to testify regarding custom existing in county that absolute assignments were made for purpose of security.—Isaak v. Journey, 15 P.2d 1069, 52 Idaho 392.

12. Iowa.—Hale v. Gibbs, 43 Iowa 380.
Mass.—Farnum v. Pitcher, 24 N.E. 590, 151 Mass. 470.
N.Y.—Newhall v. Appleton, 9 N.Y.S. 306, 57 N.Y.Super. 343.

13. Ky.—Ætna Casualty & Surety Co. v. Commonwealth, 25 S.W.2d 51, 54, 233 Ky. 142, citing **Corpus Juris**—Etter v. National Life & Accident Ins. Co., 15 S.W.2d 242, 228 Ky. 399.
Mo.—Tuttle v. Kline's, Inc., 89 S.W.2d 676, 680, 230 Mo.App. 230, quoting **Corpus Juris**—Sharp v. Stuebner Cleaning & Mercantile Co., App., 300 S.W. 559.
17 C.J. p 525 note 79.

If based wholly on his own practice, the witness' knowledge is not sufficient to qualify him.

custom or usage.[14]

§ 484. —— Other Matters

A skilled witness may testify to many and various matters as facts other than those specifically considered in the preceding sections.

A witness having the proper experience and knowledge with regard to the particular matter may testify as a skilled witness to such matters; among others, as a fact connected with ecclesiastical affairs,[15] logging,[16] military affairs,[17] or oyster culture.[18]

Chemistry and physiology. A witness who is shown to possess the necessary knowledge and experience[19] may testify as to relevant chemical or physiological facts.[20]

Insurance. A witness who is affirmatively shown to have special experience in the insurance business[21] may state facts connected with and commonly known to those engaged in such business.[22] Life insurance experience may qualify one to testify as to expectancy of life,[23] or insurability of a certain person;[24] fire insurance experience may qualify one to state increase of hazard arising from the location of a building[25] or the fact that it is unoccupied,[26] unless all the facts and circumstances are capable of being clearly detailed and described to the jury.[27] One versed in marine insurance may testify as to whether certain matters are material to the risk.[28] It has also been considered that persons engaged in the insurance business may testify as to the value of a particular insurance business.[29]

U.S.—Greenwich Ins. Co. v. Waterman, Mich., 54 F. 839, 4 C.C.A. 600.
N.Y.—Leitner v. Boehm, 56 N.Y.S. 227, 26 Misc. 790.

A custom among notaries cannot be established by the testimony of particular notaries as to their particular practices.—Ætna Casualty & Surety Co. v. Commonwealth, 25 S.W. 2d 51, 233 Ky. 142.

A local agent or manager of a life insurer, who never worked for any other company, and whose only information was derived from conversations with representatives of other companies and from reading magazines, is not qualified to testify concerning the usual practice of insurance companies other than the one he represents, in accepting or rejecting applications for insurance.—Etter v. National Life & Accident Ins. Co., 15 S.W.2d 242, 228 Ky. 399.

14. D.C.—Chapman v. Capital Traction Co., 37 App.D.C. 479.
Ill.—Chicago City R. Co. v. Taylor, 48 N.E. 831, 170 Ill. 49, affirming 68 Ill.App. 613.
Iowa.—Schultz v. Ford Bros., 109 N. W. 614, 133 Iowa 402, 12 Ann.Cas. 428.
Ky.—New York Life Ins. Co. v. Long, 250 S.W. 812, 199 Ky. 133.
Miss.—Shackelford v. New Orleans, J. & G. N. R. Co., 37 Miss. 202.
Mo.—Meyer v. Johnson, 30 S.W.2d 641, 224 Mo.App. 565.
N.Y.—Kugelman v. Levy, 24 N.Y.S. 559, 4 Misc. 519.
Pa.—Maser v. Royal Union Mutual Life Ins. Co., 12 Pa.Dist. & Co. 335.
R.I.—Evans v. Commercial Mut. Ins. Co., 6 R.I. 47.
Tex.—Woldert v. Arledge, 33 S.W. 372, 11 Tex.Civ.App. 484.
Wis.—Greenfield v. Miller, 180 N.W. 834, 173 Wis. 184, 12 A.L.R. 982.

15. Iowa.—Bird v. St. Mark's Church, 17 N.W. 747, 62 Iowa 567.

A bishop of the Protestant Episcopal church has been permitted to state the organization of a parish and its admission into a diocesan convention.—Bird v. St. Mark's Church, supra.

16. U.S.—Crane & Co. v. Fry, W. Va., 126 F. 278, 61 C.C.A. 260.
22 C.J. p 542 note 83.

Such a witness may state whether all merchantable timber on lands he had been over numerous times had been cut.—Snow v. Cleveland Lumber Co., 141 So. 243, 224 Ala. 564.

Other facts witness may state see 22 C.J. p 542 note 83 [a].

17. Conn.—Gray v. Mossman, 99 A. 1062, 91 Conn. 430.

Qualifications and personality essential and desirable in an officer.—Gray v. Mossman, supra, 99 A. 1062, 91 Conn. 430.

18. Conn.—Lewis v. Hartford Dredging Co., 35 A. 1127, 68 Conn. 221.
22 C.J. p 546 note 80.

19. Mo.—Dickey v. Western Tablet Co., 267 S.W. 431, 218 Mo.App. 253.
Tex.—Four States Grocery Co. v. Gray, Civ.App., 97 S.W.2d 355.
22 C.J. p 539 note 47.

20. Ala.—Bessemer Coal, Iron & Land Co. v. Doak, 44 So. 627, 152 Ala. 166, 12 L.R.A.,N.S., 389.
Mo.—Dickey v. Western Tablet Co., 267 S.W. 431, 218 Mo.App. 253.
22 C.J. p 539 note 48.

A pharmacist who testifies that, from his knowledge of chemistry and experience of chemical reactions, he can take a substance and determine different component parts of it, may testify, as an expert, as to whether a syrup contains arsenic.—Four States Grocery Co. v. Gray, Tex.Civ.App., 97 S.W.2d 355, error dismissed.

21. Iowa.—Lee v. Agricultural Ins. Co., 44 N.W. 683, 79 Iowa 379.
22 C.J. p 540 note 53.

22. N.Y.—Greenfield v. Massachusetts Mut. L. Ins. Co., 47 N.Y. 430.
22 C.J. p 540 note 54.

Amount due insured

Insured's attending physician, who had familiarized himself with accident and health policy, may testify as to how much sick benefits insurer owed insured.—Inter-Ocean Casualty Co. v. Copeland, 43 S.W.2d 65, 184 Ark. 648.

Authority of adjuster to assign subrogation rights

Utah.—Vadner v. Rozzelle, 45 P.2d 561, 88 Utah 162, rehearing denied 54 P.2d 1214, 88 Utah 172.

Proper and necessary precautions against fire

Tex.—Exporters' & Traders' Compress & Warehouse Co. v. Shaw, Civ.App., 20 S.W.2d 248.

Custom or usage as to insurance see supra § 483.

23. Ind.—Chicago, I. & L. R. Co. v. Neff, 56 N.E. 927, 25 Ind.App. 107.
22 C.J. p 540 note 55.

24. S.C.—Smoak v. Martin, 94 S.E. 869, 108 S.C. 472.

25. Minn.—Harrington v. St. Paul & S. C. R. Co., 17 Minn. 215.

26. N.Y.—Cornish v. Farm Buildings F. Ins. Co., 74 N.Y. 295, affirming 10 Hun 466.
22 C.J. p 540 note 58.

27. Ga.—Southern Mut. Ins. Co. v. Hudson, 42 S.E. 60, 115 Ga. 638.
Tenn.—Kirby v. Phœnix Ins. Co., 9 Lea 142.

28. Mass.—Lapham v. Atlas Ins. Co., 24 Pick. 1.
N.Y.—Cox v. C. G. Blake Co., 166 N. Y.S. 294, 100 Misc. 135.
22 C.J. p 540 note 59.

Practice of shipper, affecting risk, as not subject of expert testimony

U.S.—Granger v. Providence-Washington Ins. Co., Ill., 200 F. 730, 119 C.C.A. 174, certiorari denied 34 S. Ct. 329, 232 U.S. 721, 58 L.Ed. 814.

29. Mich.—Graves v. Kennedy, 78 N.W. 667, 119 Mich. 621.

Mercantile affairs. A witness acquainted with mercantile affairs,[30] wholesale or retail,[31] may testify as to the usual mode of doing business;[32] the usual custom on rates of exchange;[33] the effect of changes in temperature on perishable articles;[34] the percentage of loss caused in handling;[35] suitable storage for perishable articles;[36] the general duties of clerks or officers engaged in mercantile occupations;[37] the effect of certain acts on mercantile credit;[38] what qualities render an article merchantable,[39] or within a certain trade designation;[40] what tests are applied in grading commodities;[41] or the symbols or ciphers used in a given business.[42]

Mining. Persons experienced in mining may state facts connected with the business,[43] as, for instance, the proper way of doing mining work,[44] the duties of particular employees,[45] what constitutes a full equipment of mining machinery,[46] the cost of mining,[47] or what workings are profitable.[48]

Natural history. An ethnologist may state the marks distinguishing different races of mankind,[49] and practical experience may qualify one to state the race to which a given individual belongs.[50] A person sufficiently acquainted with the subject may state the characteristics and habits of animals[51] or fish,[52] or the characteristics of trees.[53]

Nautical matters. Persons of nautical experience are permitted to state facts pertaining to their calling and known to persons engaged therein,[54] such

30. U.S.—Kerrch v. U. S., Mass., 171 F. 366, 96 C.C.A. 258, certiorari denied 30 S.Ct. 402, 215 U.S. 602, 54 L.Ed. 344.
22 C.J. p 545 note 50.

31. Iowa.—Sylvester v. Ammons, 101 N.W. 782, 126 Iowa 140.
Kan.—Sexton v. Lamb, 27 Kan. 426.

32. U.S.—Kerrch v. U. S., Mass., 171 F. 366, 96 C.C.A. 258, certiorari denied 30 S.Ct. 402, 215 U.S. 602, 54 L.Ed. 344.
22 C.J. p 545 note 52.

33. Tex.—Sullivan v. Owens, Civ. App., 90 S.W. 690.

34. Ill.—St. Louis Southwestern R. Co. v. Elgin Condensed Milk Co., 51 N.E. 911, 175 Ill. 557, 67 Am.S.R. 238, affirming 74 Ill.App. 619.
22 C.J. p 545 note 54.

35. Kan.—Sexton v. Lamb, 27 Kan. 426.
22 C.J. p 545 notes 55, 56.

36. N.Y.—Rust v. Eckler, 41 N.Y. 488.

37. Ky.—Pepper v. Planters Nat. Bank, 5 Ky.L. 85.
S.D.—Schmidt v. Scanlan, 144 N.W. 128, 32 S.D. 608.

Store manager
Witness was competent to testify as to duties of a store manager where witness previously stated that he had acted in that capacity for same employer ten years before and had observed the manager at work. —Woodrow v. Travelers Ins. Co., 1 A.2d 447, 121 N.J.Law 170.

38. Minn.—MacLaren v. Cochran, 46 N.W. 408, 44 Minn. 255.
22 C.J. p 545 note 59.

39. N.Y.—Austin v. Hartwig, 49 N. Y.Super. 256.

40. U.S.—Nordlinger v. U. S., C.C. N.Y., 115 F. 828, reversed on other grounds 121 F. 690, 58 C.C.A. 438, certiorari denied 24 S.Ct. 848, 191 U.S. 575, 48 L.Ed. 308—U. S. v. Shokai, 14 Ct.Cust.App. 392.
22 C.J. p 546 note 61.

Stearic acid
Witness who has dealt extensively in stearic acid and is familiar with trade requirements and products so designated in trade may testify in determining whether merchandise was definitely, uniformly, and generally so designated.—Lamont, Corliss & Co. v. U. S, 16 Ct.Cust.App. 488, certiorari denied 52 S.Ct. 10, 284 U. S. 622, 76 L.Ed. 531, followed in Strohmeyer & Arpe Co. v. U. S., 16 Ct.Cust.App. 498.

Witnesses unqualified
U.S.—U. S. v. Sheepshearers Merchandise & Commission Co., 20 C.C. P.A.(Customs) 327—U. S. v. Globe Overseas Corporation, 13 Ct.Cust. App. 10.

41. Ga.—Downing v. State, 66 Ga. 110.

Gravity test of oil
A witness who has had long experience in the oil business may testify that he knows the gravity test of certain oil and that it tests a certain figure.—Coad v. Pennsylvania Ry. Co., 175 N.W. 344, 187 Iowa 1025.

42. Iowa.—Sylvester v. Ammons, 101 N.W. 782, 126 Iowa 140.
22 C.J. p 546 note 63.

43. Ga.—Carter v. Marble Products, 175 S.E. 480, 179 Ga. 122.
22 C.J. p 546 note 66.

A qualified witness may state
(1) When an oil and gas well is deemed completed.—Chapman v. Ellis, Tex.Civ.App., 254 S.W. 615.
(2) Whether he could determine whether or not rock was loose or not by sounding and by picking and making the tests usually made.—Wooton v. Dragon Consol. Mining Co., 181 P. 593, 54 Utah 459.
(3) Other facts witness may state see 22 C.J. p 546 note 66 [a].

Commercial marble
A witness with experience as manager of marble mining plant and in marble quarries may testify as an expert on nature of commercial marble.—Carter v. Marble Products, 175 S.E. 480, 179 Ga. 122.

A tool dresser who has worked on an oil well may testify as to depth of the well and that it was not at a particular time a producing well. —Solberg v. Sunburst Oil & Gas Co., 235 P. 761, 73 Mont. 94.

44. Mich.—Ranta v. Newport Min. Co., 147 N.W. 609, 180 Mich. 459.
22 C.J. p 546 note 67.

45. Ind.—Princeton Coal Min. Co. v. Downer, 93 N.E. 1009, 48 Ind.App. 136—Eureka Block Coal Co. v. Wells, 61 N.E. 236, 29 Ind.App. 1, 94 Am.S.R. 259.

46. Ill.—Morris v. O'Gara Coal Co., 181 Ill.App. 309.

47. Pa.—Cole v. Lowery, 5 Lack. Jur. 225.

48. U.S.—Anderson v. U. S., Idaho, 152 F. 87, 81 C.C.A. 311.
22 C.J. p 546 note 71.

49. Ark.—Daniel v. Guy, 19 Ark. 121.

50. U.S.—U. S. v. Hung Chang, C. C.A.Ohio, 134 F. 19, 64 C.C.A. 93, reversing, D.C., 126 F. 400.
22 C.J. p 546 note 72½.

51. Iowa.—State v. McIntosh, 80 N. W. 349, 109 Iowa 209.
Me.—Cottrill v. Myrick, 12 Me. 222.

52. Ill.—Smith v. People, 46 Ill. App. 130.
Me.—Cottrill v. Myrick, 12 Me. 222.
22 C.J. p 546 note 74.

53. Tex.—Cochran v. Casey, Civ. App., 128 S.W. 1145.

Usual size of certain trees
Tex.—Cochran v. Casey, supra.

54. Mass.—Parsons v. Manufacturers' Insurance Co., 16 Gray 463.
22 C.J. p 546 note 75.

Such testimony may relate to the cause of the leaking of a vessel.—Parsons v. Manufacturers' Insurance Co., supra.
Other facts which may be testified to see 22 C.J. p 546 note 75 [a].

as, according to the judicial rulings noted below, the usages of navigation,[55] the proper way of doing certain acts,[56] and the possibility of certain occurrences.[57]

D. INFERENCES FROM SENSATION

1. Ordinary Witness

§ 485. In General

An ordinary witness may be permitted to state his inference or conclusion from his constituent impressions, of an occurrence or condition, which are such that they cannot be sufficiently presented to, or coördinated by, the jury.

It frequently occurs that the constituent impressions received from observation of an occurrence or condition are so subtle,[58] so interwoven,[59] so transitory and evanescent,[60] or so numerous[61] that their proper presentation to, or suitable coördination by, the jury is practically impossible;[62] and under such circumstances the observing witness is permitted to state his inference[63] or conclusion,[64] for the reason that such a statement is the only method of conveying to the jury the effect on his mind of what was observed by him.

§ 486. Stating Facts on Which Opinion Based

As a condition to stating his opinion the witness generally must state the facts on which such opinion is based.

In order that a witness may state his opinion, he generally must state, so far as these permit of a detailed enumeration,[65] the facts observed by him and which form the basis of his opinion,[66] and the

55. U.S.—The Alaska, C.C.N.Y., 33 F. 107, affirmed 9 S.Ct. 461, 130 U.S. 201, 32 L.Ed. 923.

56. Or.—Multnomah County v. Willamette Towing Co., 89 P. 389, 49 Or. 204.
22 C.J. p 546 note 77.

57. Ky.—Louisville Ins. Co. v. Monarch, 36 S.W. 563, 99 Ky. 578, 18 Ky.L. 444.

58. Cal.—Holland v. Zollner, 36 P. 930, 37 P. 231, 102 Cal. 633.

59. Conn.—Clinton v. Howard, 42 Conn. 294.
22 C.J. p 551 note 45.

60. Conn.—Atwood v. Atwood, 79 A. 59, 84 Conn. 169, 37 L.R.A.,N.S., 591.
22 C.J. p 551 note 46.

61. Conn.—Atwood v. Atwood, supra.
22 C.J. p 551 note 47.

62. Conn.—Atwood v. Atwood, supra.
Ind.—Carthage Turnpike Co. v. Andrews, 1 N.E. 364, 102 Ind. 138, 52 Am.S.R. 653.
Minn.—Plaude v. Mississippi & Rum River Boom Co., 169 N.W. 600, 141 Minn. 170.
S.C.—Smith v. Smith, 9 S.E.2d 584, 194 S.C. 247.
Utah.—Rockefeller v. Industrial Commission of Utah, 197 P. 1038, 58 Utah 124.
22 C.J. p 551 note 48.

63. U.S.—Mutual Life Ins. Co. of New York v. Tormohlen, C.C.A. Ind., 118 F.2d 163.
Minn.—Plaude v. Mississippi & Rum River Boom Co., 169 N.W. 600, 141 Minn. 170.
Or.—Kohlhagen v. Cardwell, 184 P. 261, 93 Or. 610, 8 A.L.R. 11.
Utah.—Rockefeller v. Industrial Commission of Utah, 197 P. 1038, 58 Utah 124.
22 C.J. p 551 note 49.

64. U.S.—Mutual Life Ins. Co. of New York v. Tormohlen, C.C.A. Ind., 118 F.2d 163.
Ala.—Rowe v. Alabama Power Co., 167 So. 324, 232 Ala. 257—Alabama Power Co. v. Jackson, 166 So. 692—Adler v. Pruitt, 53 So. 315, 169 Ala. 213, 32 L.R.A.,N.S., 889.
Ind.—State v. Reid, 185 N.E. 449, 204 Ind. 631, 86 A.L.R. 1442.
Mo.—Cole v. Uhlmann Grain Co., 100 S.W.2d 311, 340 Mo. 277.
S.C.—Smith v. Smith, 9 S.E.2d 584, 194 S.C. 247.
Utah.—Rockefeller v. Industrial Commission of Utah, 197 P. 1038, 58 Utah 124.
22 C.J. p 551 note 50.

65. S.C.—Virginia-Carolina Chemical Co. v. Kirven, 35 S.E. 745, 57 S.C. 445.
22 C.J. p 551 note 51.

Where facts are not capable of reproduction in such a way as to bring before the minds of the jury the condition of things on which the witness bases his opinion, he may give his opinion without a preliminary statement of facts.—Smith v. Smith, 9 S.E.2d 584, 588, 194 S.C. 247—22 C.J. p 551 note 51 [a].

66. U.S.—Mutual Life Ins. Co. of New York v. Tormohlen, C.C.A. Ind., 118 F.2d 163—Taylor v. U. S., C.C.A.Ala., 71 F.2d 76.
Ala.—Huey v. Dykes, 82 So. 481, 203 Ala. 231.
Ark.—Puryear v. Puryear, 94 S.W.2d 695, 192 Ark. 692—Sutherland v. Sutherland, 68 S.W.2d 1022, 188 Ark. 955—Bankers' Reserve Life Co. v. Harper, 64 S.W.2d 327, 188 Ark. 81.
Ga.—Winkles v. Drake, 141 S.E. 67, 165 Ga. 335—Atlanta Masonic Temple Co. v. City of Atlanta, 133 S.E. 864, 162 Ga. 244—Dean v. Littleton, 131 S.E. 507, 161 Ga. 651—Rice & Hutchins Atlanta Co. v. Griffin, 104 S.E. 634, 150 Ga. 607—Atlanta & W. P. R. Co. v. Truitt, App., 16 S.E.2d 273—New York Life Ins. Co. v. Ittner, 14 S.E.2d 203, 64 Ga.App. 806—New York Life Ins. Co. v. Ittner, 8 S.E.2d 582, 62 Ga.App. 31—Fowler v. National City Bank of Rome, 176 S.E. 113, 49 Ga.App. 435—Townsend v. Hammes, 151 S.E. 665, 40 Ga.App. 834.
Ill.—Quathamer v. Schoon, 19 N.E.2d 750, 370 Ill. 606.
Ind.—Western & Southern Life Ins. Co. v. Danciu, 26 N.E.2d 912, rehearing denied 27 N.E.2d 763.
Ky.—City of Hazard v. Eversole, 35 S.W.2d 313, 237 Ky. 242.
Md.—Livingston v. Safe Deposit & Trust Co. of Baltimore, 146 A. 432, 157 Md. 492.
Mich.—In re Astolas' Estate, 262 N.W. 766, 273 Mich. 189, 101 A.L.R. 760.
Mo.—Cole v. Uhlmann Grain Co., 100 S.W.2d 311, 340 Mo. 270—Rubinstein v. New York Life Ins. Co., App., 153 S.W.2d 760—Ingram v. Hargis, App., 153 S.W.2d 389—Kelley v. United Mut. Ins. Ass'n, App., 149 S.W.2d 905—State ex rel. State Highway Commission v. Pope, 74 S.W.2d 265, 228 Mo.App. 888—Gar-

facts stated should be such as to render the witness able to arrive at an intelligent opinion with respect to the matter testified to.[67] If the basis of fact is partly illegal, the inference should be restricted to the part that is legally relevant.[68]

The enumeration of facts not only goes to show the competency of the witness, as explained supra § 455, but also affords an opportunity of testing the reasonableness of the inference,[69] for a witness will not be permitted to state an opinion inconsistent with,[70] or finding no support in, the facts stated by him,[71] although in some cases a slight basis of fact may be sufficient.[72] The enumeration of facts further tends to demonstrate the necessity for receiving the inference, as explained supra § 445, for if it is satisfactorily complete, and the facts appear to be such as can properly be coördinated by the jury, the inference or opinion is rejected.[73] It follows from the requirement of a statement of facts that a directly percipient witness cannot testify on the basis of a hypothetical statement of facts testified to by other witnesses.[74]

While it has been considered in a number of cases that the statement of the facts on which an opinion is based should precede a statement of the opinion,[75] a witness may, in the discretion of the court, be permitted first to express his opinion, and then proceed to state the facts on which the opinion is based,[76] or be permitted to state his bare inference, leaving the adverse party to develop the basis thereof on cross-examination.[77]

§ 487. Positive Inferences

A positive inference from observation or other states of consciousness may be admissible, although it involves a larger element of reasoning than the statement of a fact.

Direct inference from observation or other states of consciousness may involve a larger element of reasoning faculty than is involved in the statement of a fact, and yet be admissible.[78] This happens in a simple way, where a witness goes beyond the instinctive, automatic mental impression which is implied in naming objects, and testifies, as he may, to their form,[79] color,[80] freshness,[81] location,[82] or obvious properties,[83] as recognized by the ordinary action of the senses.[84]

§ 488. Negative Inferences

A negative inference may be testified to where it is largely a matter of intuition rather than of reasoning.

rett v Deering Southwestern Ry., 218 S.W. 894, 204 Mo.App. 664.
Ohio.—Frey v. E. G. Buscheib, Inc., App., 33 N.E.2d 862.
S.C.—Smith v. Smith, 9 S.E.2d 584, 194 S.C. 247.
Tenn.—Securities Inv. Co. v. White, 91 S.W.2d 581, 19 Tenn.App. 540.
Tex.—Columbia Casualty Co. v. Ray, Civ.App., 5 S.W.2d 230, error dismissed—Tyrrell-Combest Realty Co. v. Adams, Civ.App., 291 S.W. 252—Houston & T. C. R. Co. v. Long, Civ.App., 219 S.W. 212.
Utah.—Rockefeller v. Industrial Commission of Utah, 197 P. 1038, 58 Utah 124.
Va.—Ferguson v. Ferguson, 192 S.E. 774, 169 Va. 77.
22 C.J. p 551 note 52.

"When the facts are all stated, on a subject of inquiry, if an intelligent opinion cannot be drawn therefrom by inexperienced persons such as constitute the ordinary jury, an exception is made to the general rule, and persons who, by experience, observation, or knowledge, are peculiarly qualified to draw conclusions from such facts, are, for the purpose of aiding the jury, permitted to give their opinion."—Cole v. Uhlmann Grain Co., 100 S.W.2d 311, 322, 340 Mo. 277—Cole v. Empire District Electric Co., 55 S.W.2d 434, 438, 331 Mo. 824.

67. Iowa.—Roberts v. Koons, 296 N. W. 811.
Tex.—Tyrrell-Combest Realty Co. v. Adams, Civ.App., 291 S.W. 252.

68. Iowa.—Smalley v. Iowa Pac. R. Co., 36 Iowa 571.

69. Or.—Hansen-Rynning v. Oregon-Washington R. & Nav. Co., 209 P. 462, 105 Or. 67.
22 C.J. p 552 note 54.

70. Ark.—Puryear v. Puryear, 94 S. W.2d 695, 699, 192 Ark. 692, quoting **Corpus Juris.**
Mich.—Hibbard v. Baker, 104 N.W. 399, 141 Mich. 124.
W.Va.—Lawrence v. Hyde, 88 S.E. 45, 77 W.Va. 639.

71. Ark.—Puryear v. Puryear, 94 S. W.2d 695, 699, 192 Ark. 692, quoting **Corpus Juris.**
22 C.J. p 552 note 56.

72. Tex.—Koppe v. Koppe, 122 S.W. 68, 57 Tex.Civ.App. 204.
22 C.J. p 552 note 56 [d].

73. Ill.—Pennsylvania Co. v. Conlan, 101 Ill. 93.
Ind.—Carthage Turnpike Co. v. Andrews, 1 N.E. 364, 102 Ind. 138, 52 Am.S.R. 653.
N.Y.—Lund v. Masonic L. Assoc., 30 N.Y.S. 775, 81 Hun 287.

74. Ga.—Thompson v. Ammons, 129 S.E. 539, 160 Ga. 886.
22 C.J. p 553 note 59.

75. Iowa.—Spiers v. Hendershott, 120 N.W. 1058, 142 Iowa 446.
22 C.J. p 553 note 60.

76. Or.—Hansen-Rynning v. Oregon-Washington R. & Nav. Co., 209 P. 462, 105 Or. 67.

77. Conn.—Atwood v. Atwood, 79 A. 59, 84 Conn. 169, 37 L.R.A.,N.S., 591.
Kan.—Order of United Commercial Travelers v. Barnes, 90 P. 293, 75 Kan. 720, 729.
22 C.J. p 553 note 61.

78. U.S.—Kansas City Southern R. Co. v. Clinton, Ark., 224 F. 896, 140 C.C.A. 340.
Utah.—Rockefeller v. Industrial Commission of Utah, 197 P. 1038, 58 Utah 124.
22 C.J. p 553 note 62.

79. Vt.—Morrisette v. Canadian Pac. R. Co., 56 A. 1102, 76 Vt. 267.
22 C.J. p 553 note 63.

80. Mo.—State v. Buchler, 15 S.W. 331, 103 Mo. 203, 207.
22 C.J. p 553 note 64.

81. U.S.—Jackson v. U. S., Alaska, 102 F. 473, 42 C.C.A. 452.
Iowa.—Robinson v. Halley, 100 N.W. 238, 124 Iowa 328.
22 C.J. p 553 note 65.

82. Ala.—McDonald v. Wood, 24 So. 86, 118 Ala. 589.
Me.—Carter v. Clark, 42 A. 398, 92 Me. 225.
22 C.J. p 553 note 66.

83. Iowa.—Harrison v. Ayrshire, 99 N.W. 132, 123 Iowa 528.
22 C.J. p 554 note 67.

84. Ill.—Marschall v. Laughran, 47 Ill.App. 29.
22 C.J. p 554 note 68.

The inference that something did not exist because one who could have done so did not notice it may be designated a negative inference. In proportion as the mental process is of the necessary intuitive nature characteristic of a mere statement of fact, as, for example, where it is clearly shown, either directly[85] or by relevant facts, that if a certain event had occurred or fact existed the witness must have observed it, the evidence is received,[86] and the observing witness is permitted to state in connection with such proof the probability[87] or certainty that he would have heard,[88] seen,[89] or otherwise observed an alleged occurrence had it actually taken place.[90] On the other hand, the inference is rejected where it is largely the result of reasoning,[91] and all the facts are before the jury.[92]

§ 489. Appearance

A witness may state his impression or inference with respect to the appearance of a person, animal, object, or place, if he has had adequate opportunity for observation, the details of such appearance cannot be reproduced before the jury to enable them to draw a correct inference, and he states as much as possible of the constituent facts.

Where the appearance of an object, whether animate or inanimate, is relevant to the issue,[93] and the details of such appearance cannot be reproduced to the jury in such manner as to enable them to draw a correct inference,[94] a witness who had adequate opportunities for observation,[95] may, after stating as much as he can of the constituent facts,[96] state his impression or inference with respect to the appearance of the person, animal, object, or place in question.[97] The witness may describe an ob-

85. Ala.—Dulaney v. Burns, 119 So. 21, 218 Ala. 493.
Mass.—Commonwealth v. Cooley, 6 Gray 350.

Nonexistence of person may be testified to by a witness.—Morris v. Equitable Life Assur. Soc. of U. S., 191 N.W. 190, 109 Neb. 348.

Testimony of witness to accident in mine, which is merely negative to the effect that there were no places of refuge cut in the wall at the side of the roadway, is competent, and not subject to objection as being the conclusion of the witness.—Skinner v. Illinois Third Vein Coal Co., 225 Ill.App. 158.

86. Vt.—Blunt v. Montpelier & W. R. R. Co., 94 A. 106, 89 Vt. 152.
22 C.J. p 554 note 70.

87. Ill.—Pittsburgh, C. C. & St. L. R. Co. v. Story, 104 Ill.App. 132.

88. Md.—Baltimore, C. & A. Ry. Co. v. Turner, 136 A. 609, 152 Md. 216.
22 C.J. p 554 note 72.

Whistle and bell of train
Md.—Baltimore, C. & A. Ry. Co. v. Turner, supra.

89. Or.—Kohlhagen v. Cardwell, 93 Or. 610, 184 P. 261, 8 A.L.R. 11.
22 C.J. p 554 note 73.

90. Or.—Kohlhagen v. Cardwell, 184 P. 261, 93 Or. 610, 8 A.L.R. 11.
22 C.J. p 554 notes 69–73.

91. Mich.—Marcott v. Marquette, H. & O. R. Co., 13 N.W. 374, 49 Mich. 99.
22 C.J. p 554 note 75.

92. Mass.—Commonwealth v. Cooley, 6 Gray 350.

93. Mich.—Wolscheid v. Thome, 43 N.W. 12, 76 Mich. 265.

Evidence must relate to time when the fact inferred would have been competent.—Wolscheid v. Thome, 43 N.W. 12, 76 Mich. 265.

94. Ala.—Rowe v. Alabama Power Co., 167 So. 324, 326, 232 Ala. 257, citing **Corpus Juris**—Alabama Power Co. v. Jackson, 166 So. 692.
22 C.J. p 554 note 78.

95. Utah.—In re Miller, 102 P. 996, 36 Utah 228.
22 C.J. p 554 note 79.

Nonexpert witnesses may testify as to external appearances and manifest conditions observable by anyone.—Paulich v. Nipple, 180 P. 771, 104 Kan. 801—Johnson v. Powell, 123 P. 881, 883, 87 Kan. 142.

96. Ala.—Alaga Coach Line v. McCarroll, 151 So. 834, 227 Ala. 686, 92 A.L.R. 470.
Mont.—Hill v. Chappel Bros. of Montana, 33 P.2d 819, 97 Mont. 305.
Ohio.—Frey v. E. G. Buchseib, Inc., App., 33 N.E.2d 862.
22 C.J. p 554 note 80.

97. U.S.—Moyer v. Ætna Life Ins. Co., D.C.Pa., 39 F.Supp. 725.
Ala.—Rowe v. Alabama Power Co., 167 So. 324, 326, 232 Ala. 257, citing **Corpus Juris**—Alabama Power Co. v. Jackson, 166 So. 692, 695, citing **Corpus Juris**—Alaga Coach Line v. McCarroll, 151 So. 834, 227 Ala. 686, 92 A.L.R. 470—Johnston v. Warrant Warehouse Co., 99 So. 920, 211 Ala. 165.
Ga.—Major v. Atlanta Flying Club, 156 S.E. 723, 42 Ga.App. 561—Guaranty Life Ins. Co. v. Primo, 140 S.E. 780, 37 Ga.App. 472.
Ill.—Denny v. Goldblatt Bros., 18 N.E.2d 555, 298 Ill.App. 325.
Ky.—Meador v. Arnold, 94 S.W.2d 626, 264 Ky. 378—Whittaker v. Prater, 39 S.W.2d 248, 239 Ky. 173.
Md.—Eyerly v. Baker, 178 A. 691, 168 Md. 599.
Mo.—O'Connor v. Columbian Nat. Life Ins. Co., 232 S.W. 218, 208 Mo. App. 46.
Mont.—Hill v. Chappel Bros. of Montana, 33 P.2d 819, 97 Mont. 305.
Neb.—Kubicek v. Slezak, 230 N.W. 248, 119 Neb. 542, 69 A.L.R. 1166.
N.J.—Sutton v. Lerner Stores Corporation, 162 A. 645, 10 N.J.Misc. 1126.
N.C.—Moore v. Jefferson Standard Life Ins. Co., 135 S.E. 456, 192 N.C. 580.
Ohio.—Frey v. E. G. Buchseib, Inc., App., 33 N.E.2d 862.
Tex.—Ætna Life Ins. Co. v. Robinson, Civ.App., 262 S.W. 118, affirmed Robinson v. Ætna Life Ins. Co., Com.App., 276 S.W. 900, motion overruled 277 S.W. 629.
Wash.—Graham v. Police & Firemen's Ins. Ass'n, 116 P.2d 352.
22 C.J. p 554 note 81.

"Instantaneous conclusions of the mind as to the appearance . . . of persons, animals or things, derived from the observation of a variety of facts presented to the senses at one and the same time, are, legally speaking, matters of fact and are admissible in evidence."—Moore v. Jefferson Standard Life Ins. Co., 135 S.E. 456, 457, 192 N.C. 580—State v. Leak, 72 S.E. 567, 568, 156 N.C. 643.

Appearance, condition, and location of banana peel, when alighting from street car.—Rowe v. Alabama Power Co., 167 So. 324, 232 Ala. 257.

Testimony held inadmissible as conclusion

(1) In general.—San Antonio Public Service Co. v. Jackson, Tex.Civ. App., 103 S.W.2d 251, 252, error dismissed.

(2) As to stairway in store, being "dark" and "dim."—Lindquist v. S. S. Kresge Co., 136 S.W.2d 303, 345 Mo. 849.

(3) As to whether road was hilly, as shown by photograph.—Ridenhour v. Oklahoma Contracting Co., Mo. App., 45 S.W.2d 108.

(4) As to whether certain coat had appearance of having been laid or placed, or having fallen, where it was found, and whether certain paper appeared to have been stuffed in

ject as affected by fire,[98] or as affected by force,[99] impact,[1] mud,[2] or water.[3] He may state any change in appearance observed by him,[4] or the fact that there is none;[5] where an object stood when struck;[6] or that two things appeared similar.[7] A witness may state what was the actual condition of inanimate objects observed by him,[8] such as bolts,[9] a bridge,[10] bushes,[11] cattle guards,[12] a car,[13] furniture,[14] a machine,[15] onions,[16] potatoes,[17] a rope,[18] a semaphore,[19] a sidewalk,[20] trees,[21] or a wall;[22] and whether such condition was similar in certain instances[23] or was sound[24] or unsound.[25]

So, also, a witness may testify as to erasures and the like;[26] as to the existence of traces of a seal;[27] as to the imprint of a foot or foot gear[28] of different sizes,[29] or of the feet of animals;[30] as to the mode of progression, as indicated by footprints and the like;[31] as to the impression made on one object by another, as a track of a sleigh runner;[32] as to tracks made by a truck;[33] as to marks made by an automobile;[34] as to the presence of automobile or buggy tracks near the scene of a collision;[35] as to a person's peculiar method of spelling words and

back of window.—Towne v. Northwestern Mut. Life Ins. Co. of Milwaukee, Wis., 70 P.2d 364, 58 Idaho 83.

(5) That a scuffle had taken place between insured and another at place where insured was found dead.—New York Life Ins. Co. v. Ittner, 8 S.E. 2d 582, 62 Ga.App. 31.

98. Wyo.—Union Pac. Co. v. Gilland, 34 P. 953, 4 Wyo. 395.
22 C.J. p 555 note 82.

99. Ark.—Fort v. State, 11 S.W. 959, 52 Ark. 180, 20 Am.S.R. 163.
22 C.J. p 555 note 83.

1. Iowa.—Scagel v. Chicago, M. & St. P. R. Co., 49 N.W. 990, 83 Iowa 380.
22 C.J. p 555 note 84.

Testimony held inadmissible

(1) In an action for injuries received by a motorist when his automobile was struck by a bus, testimony of a witness, after describing the condition of the automobile, that the automobile looked as if it had sideswiped something, is inadmissible, since the jury must determine from the facts which automobile sideswiped the other.—Arkansas Motor Coaches v. Williams, 116 S.W.2d 585, 196 Ark. 48.

(2) In an action for injuries in an automobile collision, a question asked a witness as to whether the appearance of the running board as shown in a picture would necessarily indicate that it was hit by the other machine was objectionable as calling for the opinion of the witness.—Johnson v. Underwood, 203 P. 879, 102 Or. 680.

2. La.—State v. Marceaux, 24 So. 611, 50 La.Ann. 1137.

3. La.—State v. Marceaux, supra.
Mass.—Commonwealth v. Sturtivant, 117 Mass. 122, 19 Am.R. 401.

4. Cal.—Gallagher v. Williamson, 23 Cal. 331, 83 Am.D. 114.
Tex.—Houston Life Ins. Co. v. Dabbs, Civ.App., 95 S.W.2d 484, modified on other grounds 125 S.W.2d 1041, 132 Tex. 566.

Difference in physical appearance at time of trial and at prior designated date.—Houston Life Ins. Co. v. Dabbs, supra.

5. Iowa.—Yeager v. Spirit Lake, 88 N.W. 1095, 115 Iowa 593.
22 C.J. p 555 note 88.

6. N.Y.—Fanning v. Long Island R. Co., 2 Thomps. & C. 585.

7. Ala.—Wright v. State, 47 So. 201, 156 Ala. 108.
Cal.—People v. Mitchell, 29 P. 1106, 94 Cal. 550.

8. Ill.—Chicago, etc., R. Co. v. Vipond, 72 N.E. 22, 212 Ill. 199, affirming 112 Ill.App. 558.
22 C.J. p 556 note 9.

9. Tex.—Tyler Southeastern R. Co. v. Rasberry, 34 S.W. 794, 13 Tex. Civ.App. 185.

10. Mich.—Merkle v. Bennington Tp., 35 N.W. 846, 68 Mich. 133.

11. Tex.—Sanford v. State, 185 S. W. 22, 79 Tex.Cr. 346.

12. Mich.—Johnson v. Detroit & M. R. Co., 97 N.W. 760, 135 Mich. 353.

13. Tex.—International & G. N. R. Co. v. McCullough, Civ.App., 118 S. W. 558.
22 C.J. p 556 note 14.

14. Tex.—International & G. N. R. Co. v. Davis, Civ.App., 175 S.W. 509.

15. Wis.—Bowser v. Savidusky, 142 N.W. 182, 154 Wis. 76.
22 C.J. p 556 note 16.

16. Mo.—Conklin v. Redemeyer-Hollister Commn. Co., 86 Mo.App. 190.

17. Ill.—Illinois Cent. R. Co. v. Foulks, 60 N.E. 890, 191 Ill. 57.

18. Ind.—Consolidated Stone Co. v. Williams, 57 N.E. 558, 26 Ind.App. 131, 84 Am.S.R. 278.
22 C.J. p 556 note 19.

19. Ill.—Chicago & A. R. Co. v. Vipond, 72 N.E. 22, 212 Ill. 199, affirming 112 Ill.App. 558.

20. Iowa.—Harrison v. Ayrshire, 99 N.W. 132, 123 Iowa 528.
Mich.—Brown v. Owosso, 89 N.W. 568, 130 Mich. 107.

21. Tex.—Massingill v. Moody, Civ. App., 201 S.W. 265.
22 C.J. p 556 note 22.

22. Wis.—Reynolds v. Shanks, 23 Wis. 307.

23. Iowa.—Yeager v. Spirit Lake, 88 N.W. 1095, 115 Iowa 593.

24. Ga.—Crawford v. Georgia Pac. R. Co., 12 S.E. 176, 86 Ga. 5.
22 C.J. p 556 note 25.

25. Tex.—International & G. N. R. Co. v. Davis, Civ.App., 175 S.W. 509.
22 C.J. p 556 note 26.

Whether wood is rotten or not is a matter of common knowledge and not a subject of expert testimony.—Reynolds v. Van Beuren, 31 N.Y.S. 827, 10 Misc. 703, reversed on other grounds 49 N.E. 763, 155 N.Y. 120, 42 L.R.A. 129.

Distinction has been made, that to state that a walk is defective is to announce a conclusion, as the condition which renders it defective should be pointed out; but to state that a walk is sound and in good condition is a statement of fact, as it would be impossible for a witness to describe the absence of defects which constitute soundness and good condition.—Brooks v. City of Sioux City, 87 N.W. 682, 114 Iowa 641.

26. N.Y.—Dubois v. Baker, 30 N.Y. 355.

27. U.S.—Follett v. Rose, C.C.Ind., 9 F.Cas.No.4,900, 3 McLean 332.

28. Ala.—James v. State, 16 So. 94, 104 Ala. 20.
Mass.—Commonwealth v. Pope, 103 Mass. 440.

29. Ala.—Littleton v. State, 29 So. 390, 128 Ala. 31.

30. Ill.—Chicago & A. R. Co. v. Legg, 32 Ill.App. 218.
Iowa.—Craig v. Wabash R. Co., 96 N. W. 965, 121 Iowa 471.

31. Iowa.—Craig v. Wabash R. Co., 96 N.W. 965, 121 Iowa 471.
22 C.J. p 556 note 32.

32. Vt.—State v. Ward, 17 A. 483, 61 Vt. 153.

33. Ala.—Alaga Coach Line v. McCarroll, 151 So. 834, 227 Ala. 686, 92 A.L.R. 470.

34. Iowa.—McKeever v. Batcheler, 257 N.W. 567, 219 Iowa 93.

35. Iowa.—Scott v. O'Leary, 138 N. W. 512, 157 Iowa 222.

writing on a typewriter;[36] that approaching motorbus seemed to be over the center line of the highway;[37] that a wharf had the appearance of the extension of a street;[38] that the water in a stream was sticky, nasty, and filthy;[39] that a weapon "seemed like a knife;"[40] that a scar "looked like a burn;"[41] that he found blood at various places;[42] that a bed looked as if it had been slept in;[43] that a depression in a bed was caused by a head;[44] that a mashed place in sand "looked like where a man's shoulder had struck the ground;"[45] that trees were infected with disease;[46] that a cartridge had been inserted[47] or fired;[48] and whether a storage place is suitable for a given purpose.[49]

An observer may summarize the impression created by the appearance of a person or animal as related to æsthetic or artistic standards, as pleasing, nice-looking, or otherwise;[50] but he cannot be permitted to state how appearances affect the moral sense,[51] or to make a derogatory comparison.[52]

§ 490. Conduct of Human Beings

A witness may be permitted to summarize human conduct by stating the effect which it produced on his mind, if he states, so far as possible, the facts on which the inference is based.

Because of the difficulty of reproducing human conduct so as to enable a jury to draw a correct inference therefrom, a witness may be permitted to summarize such conduct by stating the effect which it produced on his mind,[53] if he states, so far as possible, the facts on which the inference is based.[54] Accordingly, a witness has been permitted to state that a person acted like an owner,[55] promptly,[56] or "kind of sneaky;"[57] cursed;[58] did not seem to know what he was about;[59] had an altercation;[60] looked as if he were looking at another;[61] made a threat;[62] "managed pretty well;"[63] manifested affection;[64] "shot me like a dog;"[65] shuddered;[66]

36. Ark.—Josephs v. Briant, 172 S.W. 1002, 115 Ark. 538, Ann.Cas. 1916E 741.

37. Iowa.—Henriksen v. Crandic Stages, 246 N.W. 913, 216 Iowa 643.

38. Tex.—City of Beaumont v. Kane, Civ.App., 33 S.W.2d 234, error dismissed.

39. Iowa.—Hollenbeck v. Marion, 89 N.W. 210, 116 Iowa 69.

40. Ala.—Trailer v. State, 63 So. 37, 8 Ala.App. 217.

41. Ill.—Fortier v. Western Foundry Co., 182 Ill.App. 115.

42. Tex.—Belcher v. State, 161 S.W. 459, 71 Tex.Cr. 646.

43. N.Y.—People v. Fanshawe, 19 N.Y.S. 865, 65 Hun 77, 8 N.Y.Cr. 326, affirmed 32 N.E. 1102, 137 N.Y. 68.

44. W.Va.—State v. Welch, 15 S.E. 419, 36 W.Va. 690.

45. Ala.—Watkins v. State, 8 So. 134, 89 Ala. 82.

46. Conn.—State v. Main, 37 A. 80, 69 Conn. 123, 61 Am.S.R. 30, 36 L.R.A. 623.

47. Cal.—People v. Mitchell, 29 P. 1106, 94 Cal. 550.

48. Ala.—Patton v. State, 46 So. 862, 156 Ala. 23.

49. N.Y.—Rust v. Eckler, 41 N.Y. 488.

50. Ala.—East Tennessee, V. & G. R. Co. v. Watson, 7 So. 813, 90 Ala. 41.

22 C.J. p 556 note 47.

51. N.Y.—People v. Muller, 96 N.Y. 408, 48 Am.R. 635.

52. Ala.—Stovall v. City of Jasper, 110 So. 317, 215 Ala. 300.

53. U.S.—American Glycerin Co. v. Eason Oil Co., C.C.A.Okl., 98 F.2d 479, certiorari denied 59 S.Ct. 107, 305 U.S. 640, 83 L.Ed. 413, rehearing denied 59 S.Ct. 153, 305 U.S. 672, 83 L.Ed. 435.

Ala.—Union Indemnity Co. v. Cunningham, 114 So. 285, 22 Ala.App. 226.

Ark.—Bankers' Reserve Life Co. v. Harper, 64 S.W.2d 327, 188 Ark. 81.

Cal.—Wasserman v. Los Angeles Ry. Corporation, 193 P. 130, 184 Cal. 202.

Ky.—Cox's Adm'r v. Cincinnati, N. O. & T. P. Ry. Co., 37 S.W.2d 859, 238 Ky. 312.

Mo.—Rubinstein v. New York Life Ins. Co., App., 153 S.W.2d 760.

Tex.—Bell v. Blackwell, Civ.App., 273 S.W. 866, reversed on other grounds, Com.App., 283 S.W. 765—Chiles v. Good, Civ.App., 41 S.W.2d 738, 739, citing **Corpus Juris.**

Vt.—Button v. Knight, 115 A. 499, 95 Vt. 381.

Wyo.—State v. Carroll, 69 P.2d 542, 549, 52 Wyo. 29, citing **Corpus Juris.**

22 C.J. p 557 note 49.

54. Ark.—Bankers' Reserve Life Co. v. Harper, 64 S.W.2d 327, 188 Ark. 81.

Ky.—Cox's Adm'r v. Cincinnati, N. O. & T. P. Ry. Co., 37 S.W.2d 859, 238 Ky. 312.

Mo.—Rubinstein v. New York Life Ins. Co., App., 153 S.W.2d 760—Kelley v. United Mut. Ins. Ass'n, App., 149 S.W.2d 905.

Tex.—Chiles v. Good, Civ.App., 41 S.W.2d 738—Bell v. Blackwell, Civ. App., 273 S.W. 866, reversed on other grounds, Com.App., 283 S.W. 765.

Vt.—Button v. Knight, 115 A. 499, 95 Vt. 381.

22 C.J. p 558 note 2.

Cross-examination

The constituent facts of such an inference may be sought on cross-examination.—Fuller v. State, 23 So. 688, 117 Ala. 36.

55. S.C.—Trimmier v. Thomson, 19 S.E. 291, 41 S.C. 125.

56. Ind.—Pittsburgh, C. C. & St. L. R. Co. v. Martin, 61 N.E. 229, 157 Ind. 216.

57. Mass.—Commonwealth v. Borasky, 101 N.E. 377, 214 Mass. 313.

58. Ala.—Linnehan v. State, 22 So. 662, 116 Ala. 471.

59. Ark.—Green v. State, 43 S.W. 973, 64 Ark. 523.

60. Del.—State v. Day, 58 A. 946, 21 Del. 101.

61. Tex.—Gulf, C. & S. F. R. Co. v. Miller, 79 S.W. 1109, 35 Tex.Civ. App. 116.

62. Tex.—Gerick v. State, Cr., 45 S.W. 717.

63. Ala.—Spiva v. Stapleton, 38 Ala. 171.

64. Conn.—Spencer's Appeal, 60 A. 289, 77 Conn. 638.

Ga.—Shinholser v. Henry, 106 S.E. 719, 151 Ga. 237.

Utah.—In re Miller, 102 P. 996, 36 Utah 228.

In action for breach of promise of marriage, a witness living with plaintiff has been permitted to give an opinion as to the affection borne by plaintiff for defendant.—McKee v. Nelson, 4 Cow., N.Y., 355, 15 Am.D. 384.

65. Or.—State v. Saunders, 12 P. 441, 14 Or. 300.

66. Tex.—Bruce v. State, 21 S.W. 681, 31 Tex.Cr. 590.

spoke or acted "in fun;"[67] "tried" to do a certain thing;[68] or turned to run.[69] Statements have also been received that a person was childish;[70] excited;[71] friendly;[72] gloomy, sullen, and quarrelsome;[73] hardworking;[74] industrious;[75] insulting;[76] jesting;[77] "kinder mad;"[78] listening;[79] pleasant;[80] polite, courteous, or otherwise;[81] speaking with his usual intelligence;[82] or "talking mad."[83]

Other statements which have been regarded as admissible are that a man or woman lived together as husband and wife;[84] that a man courted a woman,[85] or held out a woman as his wife;[86] that persons were on good terms;[87] and whether a man in ordering work to be done did anything different from what might be expected of one ordering for himself.[88] A witness has also been permitted to state an inference as to the object of certain conduct,[89] or as to the emotions,[90] influence,[91] or relations between persons which it indicates.[92] A witness may measure conduct observed by him by the standard of correct performance,[93] or propriety.[94]

Form of statement. The inference as to conduct may be stated in the form of the existence of habits,[95] including sobriety[96] or intemperance;[97] or characteristic traits may be stated.[98] A witness may state that a person understood English.[99]

The evidence has been rejected where the testimony involved a large proportion of the personal mentality or morality of the observer,[1] as where it characterized conduct as objectionable,[2] or dancing as indecent,[3] or characterized a person or a statement from a moral standpoint;[4] or where the evidence too obviously intruded on the province of the jury,[5] or manifestly was a mere general conclu-

67. N.C.—State v. Edwards, 17 S.E. 521, 112 N.C. 901.

68. Ga.—Turner v. State, 40 S.E. 308, 114 Ga. 421.

69. Tex.—Tollett v. State, Cr., 60 S.W. 964.

70. Iowa.—Smith v. Hickenbottom, 11 N.W. 664, 57 Iowa 733.
22 C.J. p 557 note 65.

71. Ala.—Alabama Power Co. v. Smith, 155 So. 601, 229 Ala. 105—State v. Houston, 78 Ala. 576, 56 Am.R. 59.

72. N.Y.—Blake v. People, 73 N.Y. 586.

73. Wis.—Boorman v. Northwestern Mut. Relief Assoc., 62 N.W. 924, 90 Wis. 144.

74. Tex.—St. Louis & S. F. R. Co. v. Smith, 79 S.W. 340, 34 Tex.Civ. App. 612.

75. Ind.—Louisville, N. A. & C. R. Co. v. Miller, 37 N.E. 343, 141 Ind. 533.
Iowa.—Pearl v. Omaha & St. L. R. Co., 88 N.W. 1078, 115 Iowa 535.

76. Ala.—Dixon v. Hotel Tutweiler Operating Co., 108 So. 26, 214 Ala. 396.
22 C.J. p 557 note 71.

77. Ala.—Ray v. State, 50 Ala. 104.

Joking

A witness, "after laying a proper predicate by stating what was said and done by the parties, may testify as to whether or not the parties appeared to be joking; but he should not be permitted to state that in his opinion they were joking, for this would be permitting the witness to decide the very question before the jury."—Chiles v. Good, Tex.Civ. App., 41 S.W.2d 738, 739.

78. Tex.—Bennett v. State, 48 S.W. 61, 39 Tex.Cr. 639.

79. Mass.—Commonwealth v. Galavan, 9 Allen 271.

80. Ala.—Alabama Great Southern R. Co. v. Frazier, 9 So. 303, 93 Ala. 45, 30 Am.S.R. 28.

81. Ga.—Atlantic Coast Line R. Co. v. Register, 139 S.E. 735, 37 Ga. App. 219.
Tex.—Rutherford v. St. Louis S. W. R. Co. of Tex., 67 S.W. 161, 28 Tex. Civ.App. 625.

82. Ala.—White v. State, 16 So. 63, 103 Ala. 72.

83. Ala.—Reeves v. State, 11 So. 296, 96 Ala. 33.

84. Ala.—Bynon v. State, 23 So. 640, 117 Ala. 80, 67 Am.S.R. 163.

85. Ill.—Greenup v. Stoker, 8 Ill. 202.

86. Ala.—Bynon v. State, 23 So. 640, 117 Ala. 80, 67 Am.S.R. 163.

87. Kan.—State v. Stackhouse, 24 Kan. 445.

88. S.C.—Trimmier v. Thomson, 19 S.E. 291, 41 S.C. 125.

89. Iowa.—Christensen v. Thompson, 99 N.W. 591, 123 Iowa 717.
22 C.J. p 557 note 84.

90. Mass.—Culver v. Dwight, 6 Gray 444.

91. Iowa.—In re Goldthorp, 62 N.W. 845, 94 Iowa 336, 58 Am.S.R. 400.
22 C.J. p 557 note 86.

92. Mich.—Sullivan v. Truszkowski, 151 N.W. 665, 185 Mich. 17, L.R.A. 1918A 617.
22 C.J. p 557 note 87.

93. Ala.—Shook v. Pate, 50 Ala. 91.
Tenn.—McKarsie v. Citizens' Bldg. & Loan Ass'n, Ch.A., 53 S.W. 1007.
22 C.J. p 558 note 89.

94. Ind.—Pittsburgh, C., C. & St. L. R. Co. v. Martin, 61 N.E. 229, 157 Ind. 216.
Tex.—St. Louis Southwestern R. Co. v. Wright, Civ.App., 84 S.W. 270.
22 C.J. p 558 note 93.
Necessity see infra § 517.

95. Ill.—Swift v. Zerwick, 88 Ill. App. 558.

96. Ala.—Stanley v. State, 26 Ala. 26.
22 C.J. p 558 note 96.

97. N.C.—Taylor v. Security Life & Annuity Co., 59 S.E. 139, 145 N.C. 383, 15 L.R.A.,N.S., 583, 13 Ann. Cas. 248.
22 C.J. p 558 note 97.
Intoxication on a particular occasion see infra § 508.

98. Iowa.—Pearl v. Omaha & St. L. R. Co., 88 N.W. 1078, 115 Iowa 535.
22 C.J. p 558 note 98.

99. Iowa.—Kuen v. Upweir, 67 N.W. 374, 98 Iowa 393.

1. Vt.—Fowlie v. McDonald, 82 A. 667, 85 Vt. 438.

2. Ala.—Suttles v. State, 74 So. 400, 15 Ala.App. 582.

3. Ala.—Brinkley v. State, 8 So. 22, 89 Ala. 34, 18 Am.S.R. 87.

4. Ga.—Jackson v. Jackson, 185 S.E. 89, 182 Ga. 131.
Mass.—Commonwealth v. Mullen, 23 N.E. 51, 150 Mass. 394.

5. N.H.—Lafferty v. Houlihan, 121 A. 92, 81 N.H. 67.
Tex.—Chiles v. Good, Civ.App., 41 S. W.2d 738—Joseph v. Puryear, Civ. App., 273 S.W. 974.
Va.—Davidson v. Allam, 130 S.E. 245, 143 Va. 367.
22 C.J. p 558 note 7.

Fit to raise child

Refusal to allow witness, who admitted that he knew nothing about plaintiff's domestic relations, social life, or morals, to state whether in his opinion plaintiff was fit man to raise child, is not error, especially where such is the ultimate issue to be decided by jury.—Joseph v. Puryear, Tex.Civ.App., 273 S.W. 974.

sion.[6] Where the circumstances are unusual, as for instance, where the question is one of contemplation of suicide, such testimony has been rejected because of the difficulty of fixing a standard of conduct with which to compare that in question.[7]

§ 491. Conduct of Animals

Testimony as to the conduct or habits of animals may be admitted, unless all the facts can be placed before the jury.

As stated in Corpus Juris, which has been quoted and cited with approval, the conduct[8] or habits[9] of animals, and the conditions or emotions of which they are in whole or in part a reaction may be stated in a shorthand way, by one who has observed them,[10] although they were not observed under the same conditions as existed at the time in question.[11] Where, however, all the facts can be placed before the jury so as to enable them to form a reasonable inference, the conclusion of the witness is an intrusion on their function and is excluded.[12]

§ 492. Estimates

In the absence of better evidence, the estimates of a witness are admitted in various connections.

The court, in discharging its administrative function of securing for the jury the best evidence fairly available, may well, where accurate measurements, weights, or other applications of standards to phenomena are available, reject the estimate of a witness in such matters.[13] Nevertheless, from the nature of things, it is often absolutely necessary that a lower grade of evidence should be admissible,[14] and accordingly the estimates of a witness are admitted in various connections.[15]

§ 493. —— Age and Personal Identity, Status, and Characteristics

In a proper case a competent observer may be permitted to state his estimate or opinion as to the age of human beings, animals, or inanimate objects, or as to a person's industry and habits.

In a proper case, a competent observer may be permitted to state his estimate or opinion as to the age of human beings,[16] whether they are adults,[17]

6. U.S.—Ardmore Coal Co. v. Bevil, Ind.T., 61 F. 757, 10 C.C.A. 41.
Ga.—Dougherty v. Dougherty, 112 S.E. 454, 153 Ga. 487—Smith v. Savannah Electric Co., 102 S.E. 548, 25 Ga.App. 59.
Ky.—Phillips' Adm'r v. Tway, 108 S.W.2d 525, 269 Ky. 583—McCubbins v. McCubbins, 24 S.W.2d 573, 232 Ky. 698.
Minn.—Brodsky v. Brodsky, 215 N.W. 181, 172 Minn. 250.
N.J.—Mulock v. Ulizio, 129 A. 204, 3 N.J.Misc. 631.
N.C.—Smith v. Smith, 23 S.E. 270, 117 N.C. 348.
S.C.—Murrell v. Charleston & W. C. R. Co., 105 S.E. 350, 115 S.C. 228.
22 C.J. p 558 note 8.
In wife's suit for support, in which the husband sought a divorce, testimony of plaintiff's witness as to whether the parties appeared to be friendly or unfriendly is properly excluded as a mere conclusion, where plaintiff's cause of action does not call for proof as to conduct.—Brodsky v. Brodsky, 215 N.W. 181, 172 Minn. 250.

7. Tex.—Mutual L. Ins. Co. v. Hayward, Civ.App., 27 S.W. 36.

8. Mont.—State v. Grimsley, 30 P.2d 85, 88, 96 Mont. 327, quoting **Corpus Juris.**
22 C.J. p 558 note 10.

9. Ala.—Shelby Iron Co. v. Morrow, 95 So. 370, 209 Ala. 116.
Kan.—Roman v. St. Louis & S. F. Ry. Co., 245 P. 115, 120 Kan. 585.
Mass.—Mitchell v. Central Vermont Ry. Co., 158 N.E. 336, 261 Mass. 29.
Mont.—State v. Grimsley, 30 P.2d 85, 96 Mont. 327.
22 C.J. p 558 note 11.
Gentleness of mule
A witness may testify that he has had long experience with mules in general, that he was well acquainted with the mule in question, and that it was one of ordinary gentleness.—Shelby Iron Co. v. Morrow, 95 So. 370, 209 Ala. 116—Alabama Consol. Coal & Iron Co. v. Cowden, 56 So. 984, 175 Ala. 108.
Habits of cows in lying down and getting up beside gate through which they were daily accustomed to pass may be testified to.—Roman v. St. Louis & S. F. Ry. Co., 245 P. 115, 120 Kan. 585.

10. Mont.—State v. Grimsley, 30 P.2d 85, 96 Mont. 327.
22 C.J. p 558 note 12.

11. Mass.—Mitchell v. Central Vermont Ry. Co., 158 N.E. 336, 261 Mass. 29.

12. Mont.—State v. Grimsley, 30 P.2d 85, 96 Mont. 327.
N.H.—Whittier v. Franklin, 46 N.H. 23, 88 Am.D. 185.

13. Ariz.—Jacobson v. Laurel Canyon Mining Co., 234 P. 823, 27 Ariz. 546.
Pa.—Rothchild v. New Jersey Cent. R. Co., 29 A. 702, 163 Pa. 49.
22 C.J. p 559 note 14.
Corpus Juris cited in support of the proposition that expert's opinion or estimate was not controlling in view of the actual tests made.—Dimond v. Terminal R. R. Ass'n of St. Louis, 141 S.W.2d 789, 797, 346 Mo. 333.

14. Ill.—Pennsylvania Co. v. Carlan, 101 Ill. 93.

15. Md.—Peoples Drug Stores v. Windham, 12 A.2d 532, 178 Md. 172.
Tenn.—Black Diamond Collieries v. Gibbs, 32 S.W.2d 1041, 1042, 161 Tenn. 413, quoting **Corpus Juris.**
22 C.J. p 559 note 16.

16. Ala.—Southern Ins. Co. v. Tate, 112 So. 365, 22 Ala.App. 72, certiorari denied 112 So. 918, 216 Ala. 694.
Ga.—Hood v. Duren, 125 S.E. 787, 33 Ga.App. 203.
Mo.—Harris v. Switchmen's Union of North America, App., 237 S.W. 155.
22 C.J. p 560 note 43.
Much must be left to the discretion of the trial judge in permitting a witness to state the age of another.—McLoughlin v. Sheehan, 145 N.E. 259, 250 Mass. 132.
Testimony that person appeared to be of a certain age held competent.—National Aid Life Ass'n v. Wiles, 41 P.2d 655, 171 Okl. 57.

17. Ala.—Southern Ins. Co. v. Tate, 112 So. 365, 22 Ala.App. 72, certiorari denied 112 So. 918, 216 Ala. 694.
22 C.J. p 560 note 44.
Statement rejected
Ky.—New York Life Ins. Co. v. McQuie, 126 S.W.2d 458, 277 Ky. 268.
Va.—Valley Mut. Life Ass'n v. Teewalt, 79 Va. 421.

minors,[18] or young children.[19] Such statements will be permitted when a rough approximation of the age of a person is sufficient for the purpose of the particular inquiry, and even when very nearly the exact age is the subject under investigation if no better evidence is practically obtainable.[20] Similar statements have also been received with respect to animals,[21] and inanimate objects.[22] The witness should state facts observed and used by him as the basis of the inference,[23] and must be shown to have had adequate opportunities of observation.[24] Such statements will not be permitted when the necessity therefor does not exist,[25] and where the person is present in court or the object may be inspected by the jury, or where all the constituent facts can be placed before them, the estimate is unnecessary and should be rejected.[26] A witness should not be allowed to state that a child was old enough to appreciate and avoid danger.[27]

Characteristics. In a proper case a witness may be permitted to give an estimate based on observation and knowledge of a person's industry and habits.[28]

§ 494. —— Cause or Effect

A competent witness may state in the form of an inference the cause or effect of a certain occurrence or phenomenon.

A competent witness may state in the form of an inference the cause of a certain occurrence or phenomenon,[29] as for instance the cause of a personal[30] or property[31] injury, sickness,[32] death,[33] or acci-

18. Ga.—Merry Bros. Brick & Tile Co. v. Holmes, 195 S.E. 223, 57 Ga. App. 281—Dixie Mfg. Co. v. Ricks, 110 S.E. 454, 28 Ga.App. 160.
22 C.J. p 560 note 45.

19. Iowa.—Stewart v. Anderson, 82 N.W. 770, 111 Iowa 329.
22 C.J. p 561 note 46.

20. Miss.—Messina v. New York Life Ins. Co., 161 So. 462, 173 Miss. 378.

21. Minn.—Clague v. Hodgson, 16 Minn. 329.

22. N.Y.—Ramapo Mfg. Co. v. Mapes, 110 N.E. 772, 216 N.Y. 362.
22 C.J. p 561 note 48.
Age of mark on tree could be testified to by a nonexpert witness.—Dennis v. Hearn, 129 A. 354, 148 Md. 391.

23. Mass.—McLoughlin v. Sheehan, 145 N.E. 259, 250 Mass. 132.
Okl.—National Aid Life Ass'n v. Wiles, 41 P.2d 655, 171 Okl. 57.
22 C.J. p 561 note 49.

24. Mass.—McLoughlin v. Sheehan, 145 N.E. 259, 250 Mass. 132.
22 C.J. p 561 note 50.

25. Miss.—Messina v. New York Life Ins. Co., 161 So. 462, 173 Miss. 378.

26. Ala.—Ham v. State, 47 So. 126, 156 Ala. 645.
Or.—State v. Robinson, 48 P. 357, 32 Or. 43.
22 C.J. p 561 note 51.

27. Mass.—Lynch v. Smith, 104 Mass. 52, 6 Am.R. 188.
Tex.—San Antonio & A. P. R. Co. v. Morgan, 58 S.W. 544, 24 Tex.Civ. App. 58, error refused.

28. N.C.—Rigsbee v. Atlantic Coast Line R. Co., 129 S.E. 580, 190 N. C. 231.
Proof of traits of character generally see § 433 supra.

29. Ala.—Hodges v. Wells, 147 So. 672, 226 Ala. 558—Crimm Lumber Co. v. Walden, 97 So. 833, 210 Ala. 323.
Cal.—Evans v. Mitchell, 38 P.2d 437, 2 Cal.App.2d 702.
Mo.—Sooby v. Postal Telegraph-Cable Co., 217 S.W. 877.
N.H.—Kelsea v. Town of Stratford, 118 A. 9, 80 N.H. 148.
N.C.—Morris v. Lambeth, 166 S.E. 790, 203 N.C. 695—Barnes v. Seaboard Air Line Ry. Co., 100 S.E. 519, 178 N.C. 264.
Pa.—Gandy v. Klaw, 112 A. 464, 269 Pa. 320.
22 C.J. p 561 note 56, p 562 note 71.
Exclusion discretionary
Exclusion of opinion of witnesses that clumps or hummocks of ice on which plaintiff fell had been caused by occupant in attempt to clean driveway was held within court's discretion.—Abar v. Ramsey Motor Service, 263 N.W. 917, 195 Minn. 597.
Fermentation
Nonexpert was held competent to testify that containers burst by reason of fermentation of contents.—Rhodes v. Libby, McNeill & Libby, 288 P. 207, 133 Or. 128.
Back-firing of engine
Witness was properly permitted to testify, without qualifying as expert, that defects caused engine to back-fire.—Lane v. St. Louis-San Francisco R. Co., Mo.App., 10 S.W. 2d 962.
Horse's fright
A witness may testify that certain appearances or occurrences frightened a horse.
Conn.—Clinton v. Howard, 42 Conn. 294, 307.
Iowa.—Yahn v. Ottumwa, 15 N.W. 257, 60 Iowa 429.
R.I.—Stone v. Pendleton, 43 A. 643, 21 R.I. 332.
Tex.—St. Louis Southwestern R. Co. v. Smith, Civ.App., 153 S.W. 391.
Permitting testimony that delay in the shipment of live stock was occasioned by the necessity of holding the freight train for a passenger train, which had the right of way was not error.—Missouri, K. & T. R. Co. v. Howell, 126 S.W. 899, 59 Tex.Civ.App. 250.

30. U.S.—Wagner Electric Corporation v. Snowden, C.C.A.Mo., 38 F.2d 599.
Ga.—Pollard v. Page, 193 S.E. 117, 56 Ga.App. 503.
Okl.—Letcher v. Skiver, 226 P. 1029, 99 Okl. 269—Novak v. Miller, 223 P. 155, 97 Okl. 144.
22 C.J. p 562 note 67.
Mental suffering
Tex.—Southern Pub. Co. v. Foster, Civ.App., 36 S.W.2d 231, reversed on other grounds, Com.App., 53 S. W.2d 1014.
Wounds
A witness may testify as to the type of instrument causing a wound.
Mo.—State v. Ivy, 192 S.W. 737.
Tex.—Metropolitan Life Ins. Co. v. Wagner, 109 S.W. 1120, 50 Tex.Civ. App. 233.

31. N.Y.—Wintringham v. Hayes, 38 N.E. 999, 144 N.Y. 1, 43 Am.S.R. 725.
N.C.—Teseneer v. Henrietta Mills Co., 184 S.E. 535, 209 N.C. 615.
Witness may testify that hole in hat was made by a bullet.—Hickey v. State, 76 S.W. 920, 45 Tex.Cr. 297.
Cause of flood
(1) A witness may testify as to the cause of a flood causing property damage.—Covert v. Chesapeake & O. Ry. Co., 100 S.E. 854, 85 W.Va. 64—22 C.J. p 561 notes 57–60.
(2) Permitting nonexpert witnesses, who had observed flood and occupied land in the vicinity, to testify that from their knowledge of conditions the land in question would have been covered by the floodwaters if the particular obstruction had not been there was not error.—Johnson v. San Antonio & A. P. Ry. Co., Tex. Civ.App., 220 S.W. 388.

32. Ga.—Town of Rentz v. Roach, 115 S.E. 94, 154 Ga. 491.
22 C.J. p 562 note 68.

33. Ga.—Bullard v. Metropolitan

dent.[34] It merely reverses the statement to say that a witness may equally well infer that given phenomena are the effect of a designated cause, or what has been the effect of such cause,[35] and under what conditions it will manifest its existence.[36] He may even, where the inference is a simple one,[37] testify as to what would have been the effect under different conditions;[38] what will be the probable future effect;[39] and whether the result is constant on the cause.[40] The inference should be the result of personal observation,[41] and not distinctly the deduction of a process of reasoning,[42] conjecture,[43] or inability to reach any positive conclusion.[44] The inference should be one which a nonexpert is capable of making,[45] and should not invade the province of the jury.[46] In order for the inference to be

Life Ins. Co., 122 S.E. 75, 31 Ga. App. 641.
Kan.—Foley v. Crawford, 264 P. 59, 125 Kan. 252.
Ky.—Phillips' Committee v. Ward's Adm'r, 43 S.W.2d 331, 241 Ky. 25.
Wash.—Graham v. Police & Firemen's Ins. Ass'n, 116 P.2d 352.
22 C.J. p 562 note 69.

Permitting embalmer to state opinion as to cause of death was not error.—Pacific Mut. Life Ins. Co. v. McCombs, 64 S.W.2d 333, 188 Ark. 52, certiorari denied Pacific Mut. Life Ins. Co. of California v. McCombs, 54 S.Ct. 628, 292 U.S. 624, 78 L.Ed. 1479.

Animals
Ga.—Monroe v. Guess, 154 S.E. 301, 41 Ga.App. 697.
Miss.—Jackson County v. Meaut, 179 So. 343, 181 Miss. 282.

34. Iowa.—Judd v. Rudolph, 222 N. W. 416, 207 Iowa 113, 62 A.L.R. 1174.
Mo.—Busby v. Southwestern Bell Telephone Co., 287 S.W. 434.
Vt.—Dooley v. Economy Store, 194 A. 375, 109 Vt. 138.
22 C.J. p 562 note 70.

Speed
It was not improper to permit plaintiff to testify that had car been traveling at usual speed collision would not have occurred, where he stated what he meant by ordinary speed.—Andersen v. Wells, Mo.App., 261 S.W. 952.

35. U.S.—Hadley v. Baltimore, C.C. A.Pa., 120 F.2d 993.
Ala.—Bradford v. Lawrence, 94 So. 103, 208 Ala. 248.
Ark.—Ross v. Clark County, 45 S. W.2d 31, 185 Ark. 1.
Cal.—Bowman v. Motor Transit Co., 284 P. 443, 208 Cal. 652.
Ky.—Equitable Life Assur. Soc. of U. S. v. Davis, 96 S.W.2d 689, 265 Ky. 259.
N.C.—Barnes v. Seaboard Air Line Ry. Co., 100 S.E. 519, 178 N.C. 264.
Okl.—Novak v. Miller, 223 P. 155, 97 Okl. 144.
22 C.J. p 562 notes 72, 73.
Admissibility of testimony as to effect of force see § 503 infra.

Effect of electric shock on skin
Cal.—Robinson v. Western States Gas & Electric Co., 194 P. 39, 184 Cal. 401.

36. Ala.—Miller v. State, 19 So. 37, 107 Ala. 40.
Wis.—Karlen v. Hadinger, 132 N.W. 591, 147 Wis. 78.
22 C.J. p 563 note 74.

37. Mo.—Marshall v. Bingle, 36 Mo. App. 122.
22 C.J. p 563 note 75.

38. Tex.—Missouri, K. & T. R. Co. v. Reno, Civ.App., 146 S.W. 207.
22 C.J. p 563 note 76.

39. Tex.—Petroleum Casualty Co. v. Bristow, Civ.App., 35 S.W.2d 246, error dismissed—Texas Employer's Ins. Ass'n, v. Davies, Civ.App., 6 S.W.2d 792, reversed on other grounds Davies v. Texas Employers' Ins. Ass'n, Com.App., 16 S.W. 2d 524, motion overruled 29 S.W.2d 987—Burrell v. Michaux, Civ.App., 273 S.W. 874, affirmed, Com.App., 286 S.W. 176, certiorari granted Ancient Egyptian Arabic Order Nobles of the Mystic Shrine v. Michaux, 47 S.Ct. 472, 273 U.S. 690, 71 L.Ed. 842.
22 C.J. p 563 note 77.

Exclusion discretionary
Excluding evidence touching probability that advertisers would withdraw patronage from complainants, if conforming to public regulations, was within master's discretion.—General Outdoor Advertising Co. v. Department of Public Works, 193 N. E. 799, 289 Mass. 149, appeal dismissed General Outdoor Advertising Co. v. Callahan, 56 S.Ct. 495, 297 U. S. 725, 80 L.Ed. 1008, General Outdoor Advertising Co. v. Hoar, 56 S. Ct. 495, 297 U.S. 725, 80 L.Ed. 1008, and Brink v. Callahan, 56 S.Ct. 496, 297 U.S. 725, 80 L.Ed. 1008.

Acts of cruelty
In an action by a wife for a divorce on the ground of cruelty, where the acts of cruelty are shown, the opinion of those in a position to know the effect of the cruelty on her, that it would be unsafe for her to live longer with defendant, has been admitted.—Myers v. Myers, 6 S.E. 630, 83 Va. 806.

40. Wis.—Doan v. Willow Springs, 76 N.W. 1104, 101 Wis. 112.

41. U.S.—Hadley v. Baltimore & O. R. Co., C.C.A.Pa., 120 F.2d 993.
Wash.—Graham v. Police & Firemen's Ins. Ass'n, 116 P.2d 352.
22 C.J. p 563 note 79.

Time of forming conclusion
A witness' conclusion is not inadmissible because it was not reached at the actual time of observation.—Copithorn v. Boston & M. R. R., 35 N.E.2d 254, 309 Mass. 363.

42. Ala.—Central of Georgia R. Co. v. Keyton, 41 So. 918, 148 Ala. 675.
22 C.J. p 563 note 80.

43. Ga.—New York Life Ins. Co. v. Ittner, 14 S.E.2d 203, 64 Ga.App. 806.
Miss.—F. W. Woolworth Co. v. Volking, 100 So. 3, 135 Miss. 410.
22 C.J. p 563 note 81.

Testimony, although seemingly based on conjecture, admitted.—Dooley v. Economy Store, 194 A. 375, 109 Vt. 138.

44. N.H.—Patterson v. Colebrook, 29 N.H. 94.
N.Y.—Zimmerman v. Ullmann, 160 N.Y.S. 81, 173 App.Div. 650.
22 C.J. p 563 note 82.

45. Ala.—Union Cemetery Co. v. Harrison, 101 So. 517, 20 Ala.App. 291.
Ky.—North-East Coal Co. v. Hayes, 51 S.W.2d 960, 244 Ky. 639.
Md.—Symington v. Graham, 169 A. 316, 165 Md. 441.
N.J.—Sarco Co. of New Jersey v. Gulliver, 129 A. 399, 3 N.J.Misc. 641, affirmed 131 A. 923, 99 N.J.Eq. 432.
Okl.—National Zinc Co. v. Crow, 103 P.2d 560, 187 Okl. 513.
R.I.—S. & S. Service Co. v. Weiner, 126 A. 643.

Excluding testimony as to effect of ammonia on the eyesight held not error where witnesses were not qualified as experts.—Sharp v. Pawhuska Ice Co., 217 P. 214, 90 Okl. 211.

46. U.S.—Shell Pipe Line Corporation v. Bevans, C.C.A.Tex., 51 F.2d 364.
Ark.—Missouri Pac. R. Co. v. L. B. Stone Grocery Co., 259 S.W. 728, 163 Ark. 247.
Cal.—Wilkerson v. City of El Monte, 62 P.2d 790, 17 Cal.App.2d 615.
Tex.—Carter v. Lindeman, Civ.App., 111 S.W.2d 318—Wichita Valley Ry. Co. v. Turbeville, Civ.App., 269 S.W. 498.

Cause of death
In action on a benefit certificate defended on the ground that deceased committed suicide, a witness, who examined the body at the place where found, together with the locus in quo, cannot give his opinion as an expert, as to the cause of death, but

admissible it is necessary that all the facts cannot be fully placed before the jury,[47] that the witness shall state such facts as he can,[48] and that he shall be possessed of sufficient knowledge on the subject to make his inference an aid to the jury.[49]

As statement of fact. It sometimes happens that the cause or effect of a certain occurrence is so obvious that a statement thereof by an observer falls within the category of statements of fact.[50]

§ 495. —— Damages

Under proper circumstances, as appears in § 447 supra, a witness may be permitted to state an estimate of damages.

§ 496. —— Dimensions

An observer may state his estimate of size, including height, width, and length.

An observer may state his estimate of size, including height or depth, thickness or width, and length,[51] and any change in dimensions.[52] Where all the material facts can be placed before a jury with exactness, a witness will not be permitted to state his estimate,[53] and where estimates of dimensions have been placed in evidence, a witness will not be permitted to make a calculation based thereon which the jury is equally capable of making.[54]

§ 497. —— Distance and Space

An ordinary witness may give his estimate of distances, provided he is cognizant of the facts on which it is based.

An ordinary witness may give his estimate of distances,[55] provided he is cognizant of the facts on which it is based.[56] Accordingly, a witness may state the limitation, in point of distance, of human hearing,[57] or of human vision of objects under given conditions.[58] So, also, one may testify as to the distance within which a moving body could be

must limit his testimony to the facts, from which the jury must draw the conclusions.—Sovereign Camp, W. O. W. v. Dennis, 87 So. 616, 17 Ala.App. 642, certiorari denied Ex parte Sovereign Camp W. O. W., 87 So. 620, 205 Ala. 316.

Causal connection between fright and abortion cannot be testified to by any witness.—Alabama Power Co. v. Edwards, 121 So. 543, 219 Ala. 162.

47. Cal.—Wilkerson v. City of El Monte, 62 P.2d 790, 17 Cal.App.2d 615.
Pa.—Gandy v. Klaw, 112 A. 464, 269 Pa. 320.
Tex.—Great Atlantic & Pacific Tea Co. v. Walker, Civ.App., 104 S.W.2d 627, 630, quoting **Corpus Juris**—Kansas City, M. & O. Ry. Co. of Texas v. Cliett, Civ.App., 216 S.W. 682.
22 C.J. p 563 note 83.

48. Ind.—Bennett v. Meehan, 83 Ind. 566, 43 Am.R. 78.
22 C.J. p 563 note 84.

Opinion held admissible where the substantiating facts were presented.—Monroe v. Guess, 154 S.E. 301, 41 Ga.App. 697.

49. N.H.—Kelsea v. Town of Stratford, 118 A. 9, 80 N.H. 148.
Pa.—Loss v. Borough of Avalon, 119 A. 915, 276 Pa. 207.
22 C.J. p 563 note 85.

50. Wis.—Johnson v. Ætna Life Ins. Co., 147 N.W. 32, 158 Wis. 56, Ann. Cas.1916E 603.
22 C.J. p 564 note 86.

51. Mo.—Pedigo v. Roseberry, 102 S.W.2d 600, 340 Mo. 724.
22 C.J. p 564 note 95.
Estimate of area see § 503 infra.

Where measurements taken were inaccurate the estimates of observers as to the size and depth of a hole were admissible.—Buckhout v. City of Niagara Falls, 193 N.Y.S. 38, 199 App.Div. 263.

How witness was enabled to know the dimensions must be shown before his estimate will be admitted.—City of Hazard v. Eversole, 35 S.W.2d 313, 237 Ky. 242.

Testimony by person who had not seen the object is held properly excluded.—German v. Continental Jewelry Co., Tex.Civ.App., 22 S.W.2d 341.

52. Ind.—Romack v. Hobbs, 32 N.E. 307, superseded 41 N.E. 391, 13 Ind. App. 138.
22 C.J. p 564 note 96.

53. N.Y.—Kummer v. Christopher & T. St. R. Co., 20 N.Y.S. 116.
22 C.J. p 564 note 99.

54. Ga.—Southern Ry. Co. v. Reed, 149 S.E. 582, 40 Ga.App. 332.

55. Ala.—Southern Ry. Co. v. Sherrill, 167 So. 731, 739, 232 Ala. 184, citing **Corpus Juris**—Alabama Power Co. v. Bodine, 105 So. 869, 213 Ala. 627—Boyette v. Bradley, 100 So. 647, 211 Ala. 370—Hines v. Laurendine, 84 So. 780, 17 Ala.App. 350.
Cal.—McComb v. Atchison, T. & S. F. Ry. Co., App., 294 P. 81, certiorari denied Atchison, T. & S. F. Ry. Co. v. McComb, 51 S.Ct. 486, 283 U.S. 838, 75 L.Ed. 1449.
Iowa.—McKeever v. Batcheler, 257 N. W. 567, 219 Iowa 93.
Ky.—Tucker v. Ragland-Potter Co., 148 S.W.2d 691, 285 Ky. 533.
Utah.—Moss v. Taylor, 273 P. 515, 73 Utah 277.
Vt.—Shields v. Vermont Mut. Fire Ins. Co., 147 A. 352, 102 Vt. 224.
Wash.—Baird v. Webb, 294 P. 1000, 160 Wash. 157.
22 C.J. p 565 note 8.

Estimate of distance between passing vehicles admitted.—Atlantic Pacific Stages v. Yandle, 140 So. 603, 224 Ala. 481.

Estimate of distance as shown by plan drawn to scale permitted.—MacLaughlin v. Hull, C.C.A.Wash., 87 F. 2d 641.

Inference as to distance car traveled after collision, based on the character of the tire marks, was not objectionable.—Mitrich v. Tuttle, 11 A.2d 818, 90 N.H. 512.

Testimony of approximate distance is opinion evidence.—American Automobile Ins. Co. v. Carson, 102 So. 219, 212 Ala. 293.

56. Ala.—Morgan Hill Paving Co. v. Fonville, 119 So. 610, 218 Ala. 566.
Ark.—St. Louis-San Francisco Ry. Co. v. Bishop, 33 S.W.2d 383, 182 Ark. 763, certiorari denied 51 S.Ct. 647, 283 U.S. 854, 75 L.Ed. 1461.
Md.—Taxicab Co. v. Hamburger, 125 A. 914, 146 Md. 122.
Va.—Chesapeake & O. Ry. Co. v. Palmer, 140 S.E. 831, 149 Va. 560.

Degree of cognizance

Whether the witness was in a position to form an accurate judgment goes to the weight and not the admissibility of his testimony.—McComb v. Atchison, T. & S. F. Ry. Co., 294 P. 81, 110 Cal.App. 303, certiorari denied Atchison, T. & S. F. Ry. Co. v. McComb, 51 S.Ct. 486, 283 U.S. 838, 75 L.Ed. 1449.

Distance of lightning

Witness, who heard thunder "within half a minute" after lightning flash, could express opinion that it struck close by.—Shields v. Vermont Mut. Fire Ins. Co., 147 A. 352, 102 Vt. 224.

57. Ga.—Holcombe v. State, 62 S.E. 647, 5 Ga.App. 47.

58. Ala.—Jones v. Keith, 134 So. 630, 223 Ala. 36.

stopped,[59] or could pass another,[60] or whether a distance is safe,[61] or is adequate or too great for a given purpose.[62] A witness will not be permitted to give an estimate of distance where the jury is equally capable of forming a judgment on proper presentation of the facts.[63]

§ 498. —— Quality and Quantity or Capacity

a. Quality
b. Quantity or capacity

a. Quality

An ordinary witness may state his estimate of the common qualities of familiar articles observed by him, as they existed at any time sufficiently near to be relevant.

An ordinary witness may state his estimate of the common qualities of familiar articles observed by him,[64] as they existed at any time sufficiently near to be relevant.[65] He may also state that a similarity in quality exists,[66] or state his inference as to whether the quality observed conforms to a given standard, as merchantability,[67] that prescribed by contract,[68] or that established by a sample.[69]

b. Quantity or Capacity

In a proper case a witness may state his estimate of quantity provided he is qualified by observation and possesses sufficient data and knowledge or experience on which to ground an inference.

In a proper case, a witness may state his estimate of quantity,[70] provided he is qualified by observation[71] and possesses sufficient data[72] and knowledge or experience[73] on which to ground an inference, and he shows this by stating the facts on which his inference is based.[74] The knowledge must

Mo.—Owens v. Kansas City, C. C. & S. J. Ry. Co., App., 225 S.W. 234.
Utah.—Smith v. Utah-Idaho Cent. R. Co., 209 P. 235, 60 Utah 563.
Wash.—Baird v. Webb, 294 P. 1000, 1001, 160 Wash. 157, quoting **Corpus Juris.**
22 C.J. p 565 note 10.

59. N.C.—Costin v. Tidewater Power Co., 106 S.E. 568, 181 N.C. 196.
Tex.—Nicholson v. Houston Electric Co., Civ.App., 220 S.W. 632, dismissed for want of jurisdiction.

Witness should not be forced to estimate distance in which moving body could be stopped after declaring he could not do so.—Healey v. Robertson, 101 Pa.Super. 342.

60. Vt.—Fulsome v. Concord, 46 Vt. 135.

61. Ala.—Culver v. Alabama Midland R. Co., 18 So. 827, 108 Ala. 330.

62. Mo.—Vogts v. Kansas City Rys. Co., App., 228 S.W. 526.
Tex.—International & G. N. R. Co. v. Clark, Civ.App., 71 S.W. 587, reversed on other grounds 72 S.W. 584, 96 Tex. 349.
Wash.—Shelley v. Norman, 195 P. 243, 114 Wash. 381.

63. Ala.—Alabama Power Co. v. Brown, 87 So. 608, 205 Ala. 167.

Testimony that car was so close that collision was unavoidable, was held properly excluded.—San Antonio Public Service Co. v. Alexander, Tex.Civ.App., 270 S.W. 199.

64. Ala.—Thornton v. Savage, 25 So. 27, 120 Ala. 449.
22 C.J. p 567 notes 48 [a], 49.

Whether article was new or second-hand could be testified to by ordinary witness.—Parker v. Taylor, 124 So. 199, 220 Ala. 68.

Whether beef was good could be testified to by ordinary witnesses who ate it.—Kelly v. Sanders, 92 So. 424, 207 Ala. 259.

Whether ditch was artificial could not be testified to by a nonexpert witness.—Heisserer v. Missouri Pac. R. Co., Mo.App., 294 S.W. 132.

Habitual payment for certain articles for a period of years does not of itself render a person competent to testify as to quality.—Perkins v. Stickney, 132 Mass. 217.

65. Mo.—Werner v. O'Brien, 40 Mo. App. 483.

66. Cal.—People v. Lovren, 51 P. 22, 638, 119 Cal. 88.
22 C.J. p 567 note 51.

67. Ala.—Alabama Power Co. v. Bodine, 105 So. 869, 213 Ala. 627.
22 C.J. p 567 note 52.

68. Wash.—Pacific Coast Elevator Co. v. Bravinder, 44 P. 544, 14 Wash. 315.

69. Cal.—Grunwald v. Freese, 34 P. 73, 4 Cal.Unrep.Cas. 182.
Ill.—Sallwasser v. Hazlitt, 18 Ill. App. 243.

70. Ga.—Keener v. Addis, 5 S.E.2d 695, 61 Ga.App. 40.
Iowa.—Cvitanovich v. Bromberg, 151 N.W. 1073, 169 Iowa 736, Ann.Cas. 1917B 309.
Mich.—Marsh v. Rogers, 197 N.W. 540, 226 Mich. 290.
Mo.—Pedigo v. Roseberry, 102 S.W. 2d 600, 340 Mo. 724.
N.D.—Wishek v. U. S. Fidelity & Guaranty Co. of Baltimore, Md., 213 N.W. 488, 490, 55 N.D. 321, citing **Corpus Juris.**
22 C.J. p 567 notes 55, 56.
Judgment of quantity or capacity by skilled or expert witnesses see § 543 infra.

Comparative quantity

A witness may state his estimate of comparative quantity.
Ala.—Perry v. McCraw, 147 So. 178, 226 Ala. 400.
Mont.—Hill v. Chappel Bros. of Montana, 33 P.2d 819, 97 Mont. 305—Hill v. Chappel Bros. of Montana, 18 P.2d 1106, 1109, 93 Mont. 92, citing **Corpus Juris.**
22 C.J. p 567 note 57.

Quantity necessary

A witness may state his estimate of the quantity requisite for a future result.—Myers v. Charlotte, 59 S.E. 674, 146 N.C. 246—22 C.J. p 567 note 58.

Amount of electricity in lines

The court properly permitted witnesses to testify with regard to the amount of electricity in the lines at their homes.—Town of Lebanon v. Jackson, 14 Tenn.App. 15.

Capacity of engine for pumping water may be stated by an ordinary witness.—Frolich v. Hicks, 222 S.W. 373, 143 Ark. 565.

71. Mo.—Pedigo v. Roseberry, 102 S.W.2d 600, 340 Mo. 724.
Mont.—Hill v. Chappel Bros. of Montana, 18 P.2d 1106, 93 Mont. 92.

72. N.D.—Wishek v. U. S. Fidelity & Guaranty Co. of Baltimore, Md., 213 N.W. 488, 490, 55 N.D. 321, citing **Corpus Juris.**
22 C.J. p 567 note 60.

73. Cal.—San Mateo County v. Christen, 71 P.2d 88, 22 Cal.App. 2d 375.
Mo.—Pedigo v. Roseberry, 102 S.W. 2d 600, 340 Mo. 724.
Mont.—Hill v. Chappel Bros. of Montana, 18 P.2d 1106, 93 Mont. 92.
N.D.—Wishek v. U. S. Fidelity & Guaranty Co. of Baltimore, Md., 213 N.W. 488, 490, 55 N.D. 321, citing **Corpus Juris.**
22 C.J. p 567 note 59.

74. Ga.—Woodward v. Gates, 38 Ga. 205—Bugg v. State, 86 S.E. 405, 17 Ga.App. 211.

be commensurate with the nature of the subject matter,[75] but where knowledge is general a specialist is not required, although an inference by him would have greater weight.[76] A witness cannot state his estimate of quantity if the jury itself is equally capable of determining the quantity.[77]

§ 499. —— Speed

a. In general
b. Form of statement
c. Qualification of witness

a. In General

A witness may state his estimate of the apparent speed of a moving object and should state the factual basis therefor. Generally, estimates based on the noise made by a moving object are inadmissible and one based simply on the force of impact has also been held inadmissible.

An observer may state his estimate of the apparent speed of a moving object,[78] such as flowing water;[79] the wind;[80] an animal;[81] a revolving door;[82] or a vehicle,[83] as for instance a motor vehicle,[84] a street car,[85] a railroad train,[86] or a carriage or wagon.[87] The witness should state the facts on which he bases his estimate or opinion,[88] if the facts are such as are capable of being reproduced in language.[89] While it has been recognized that in some circumstances an opinion or estimate as to the speed of a moving object based not on observation but on

75. N.Y.—Thomas v. Kenyon, 1 Daly 132.
22 C.J. p 567 note 63.

76. Wash.—Park v. Northport Smelting & Refining Co., 92 P. 442, 47 Wash. 597.
22 C.J. p 567 note 64.

77. **Witness' calculations** as to number of bales that could be stored in compartment of certain dimensions were excluded.—National Union Fire Ins. Co. v. Forkner, 292 S.W. 765, 219 Ky. 119.

78. Ala.—Southern Ry. Co. v. Sherrill, 167 So. 731, 739, 232 Ala. 184, citing **Corpus Juris.**
Colo.—Larson v. Long, 219 P. 1066, 74 Colo. 152.
Mo.—Pedigo v. Roseberry, 102 S.W. 2d 600, 340 Mo. 724.
22 C.J. p 568 note 65.

79. Tenn.—Madison County Drain. Dist. No. 4 v. Askew, 204 S.W. 984, 140 Tenn. 314.

80. Ind.—Scottish Union & National Ins. Co. v. B. E. Linkenhelt & Co., 121 N.E. 373, 70 Ind.App. 324.

81. Conn.—Nesbit v. Crosby, 51 A. 550, 74 Conn. 554.

82. Md.—Eyerly v. Baker, 178 A. 691, 168 Md. 599.

83. Ala.—Highland Ave. & B. R. Co. v. Sampson, 20 So. 566, 112 Ala. 425.
Cal.—Bowman v. Motor Transit Co., 284 P. 443, 208 Cal. 652.
22 C.J. p 568 note 68.

84. U.S.—Perez v. Fayard, C.C.A. Miss., 64 F.2d 667.
Ala.—Baker v. Baker, 124 So. 740, 220 Ala. 201—Davis v. Smitherman, 96 So. 208, 209 Ala. 244—Cargall v. Riley, 95 So. 821, 209 Ala. 183—Edwards v. Earnest, 94 So. 598, 208 Ala. 539—Hines v. Laurendine, 84 So. 780, 17 Ala.App. 350.
Cal.—Sonstelie v. Bush, 283 P. 336, 102 Cal.App. 396—Sommer v. Martin, 204 P. 33, 36, 55 Cal.App. 603, citing **Corpus Juris.**
Colo.—Larson v. Long, 219 P. 1066, 74 Colo. 152.
Ga.—Rentz v. Collins, 181 S.E. 678, 51 Ga.App. 782.
Iowa.—Judd v. Rudolph, 222 N.W. 416, 207 Iowa 113, 62 A.L.R. 1174.
Kan.—Birdsong v. Meyers, 40 P.2d 430, 141 Kan. 140—Kelly v. Vuklich, 206 P. 894, 111 Kan. 199.
Ky.—Wilder v. Cadle, 13 S.W.2d 497, 227 Ky. 486.
Mass.—Barney v. Magenis, 135 N.E. 142, 241 Mass. 268.
N.C.—Jones v. Bagwell, 177 S.E. 170, 207 N.C. 378.
22 C.J. p 568 note 69—42 C.J. p 1225 note 78.

Motorcycle
Iowa.—Schultz v. Starr, 164 N.W. 163, 180 Iowa 1319.

Occupant of a motor vehicle may estimate its speed.
Cal.—Perry v. McLaughlin, 297 P. 554, 212 Cal. 1.
Mo.—State ex rel. Shaw Transfer Co. v. Trimble, 250 S.W. 384, quashing certiorari Burke v. Shaw Transfer Co., 243 S.W. 449, 211 Mo.App. 353.
Tex.—Zetsche v. Lawler, Civ.App., 25 S.W.2d 907.
Wis.—Kaboth v. Schrewe, 247 N.W. 835, 211 Wis. 280.
42 C.J. p 1225 note 77.

85. Ill.—McKenna v. Chicago City Ry. Co., 129 N.E. 814, 296 Ill. 314.
Md.—Washington B. & A. Electric Ry. Co. v. William A. Fingles, Inc., 109 A. 431, 135 Md. 574.
Mass.—Gould v. Boston & M. R. R., 184 N.E. 449, 282 Mass. 160.
Neb.—Oakes v. Omaha & C. B. St. Ry. Co., 178 N.W. 758, 104 Neb. 788.
N.J.—Baus v. Trenton & Mercer County Traction Corporation, 134 A. 915, 102 N.J.Law 712, affirming 131 A. 92, 102 N.J.Law 1.
22 C.J. p 568 notes 70–73.

86. U.S.—Canadian Pac. Ry. Co. v. Slayton, C.C.A.Vt., 29 F.2d 687.
Ala.—Davis v. Smitherman, 96 So. 208, 209 Ala. 244—Payne v. Roy, 90 So. 605, 206 Ala. 432—Hines v. Laurendine, 84 So. 780, 17 Ala. App. 350.
Iowa.—Hines v. Chicago, M. & St. P. Ry. Co., 194 N.W. 188, 196 Iowa 109.
Mass.—Copithorn v. Boston & M. R. R., 35 N.E.2d 254, 309 Mass. 363.
Mo.—Brown v. Alton R. Co., App., 151 S.W.2d 727.
S.C.—Moore v. Southern Ry. Co., 161 S.E. 525, 163 S.C. 342, reversed on other grounds 52 S.Ct. 38, 284 U. S. 581, 76 L.Ed. 503.
Tex.—Humphries v. Louisiana Ry. & Irr. Co. of Texas, Com.App., 291 S.W. 1094, reversing Louisiana Ry. & Nav. Co. of Texas v. Humphries, Civ.App., 285 S.W. 869—Galveston, H. & S. A. Ry. Co. v. Mallott, Civ. App., 6 S.W.2d 432, error dismissed —St. Louis, B. & M. Ry. Co. v. McLean, Civ.App., 241 S.W. 1072, reversed on other grounds, Com. App., 253 S.W. 248—Hines v. Kelley, Civ.App., 226 S.W. 493, reversed on other grounds, Com.App., 252 S.W. 1033.
Va.—Morgan v. Atlantic Coast Line R. Co., 118 S.E. 233, 136 Va. 394.
Wash.—Bennington v. Northern Pac. Ry. Co., 192 P. 1073, 113 Wash. 1.
22 C.J. p 568 note 76.

87. Mo.—Lorenzen v. United R. Co., 155 S.W. 30, 249 Mo. 182.
22 C.J. p 568 note 73.

88. Iowa.—Livingstone v. Dole, 167 N.W. 639, 184 Iowa 1340.
Neb.—Union Pac. R. Co. v. Ruzicka, 91 N.W. 543, 65 Neb. 621.

When witness details basis for his opinion as to speed of a moving object, his opinion is admissible.
Cal.—Sonstelie v. Bush, 283 P. 336, 102 Cal.App. 396.
Ga.—Hall v. Slaton, 144 S.E. 827, 38 Ga.App. 619, reversed on other grounds Slaton v. Hall, 148 S.E. 741, 168 Ga. 710, 73 A.L.R. 891, opinion conformed to Hall v. Slaton, 149 S.E. 306, 40 Ga.App. 288.

89. S.C.—Nelson v. Charleston & W. C. Ry. Co., 121 S.E. 198, 92 S.C. 151.

the noise made is admissible,[90] generally opinions based on noise rather than observation are inadmissible.[91] It has been held that an estimate of speed based simply on an opinion as to the force of impact is inadmissible,[92] but it has also been held that, irrespective of the size and weight of an object, its rate of speed may be determined from the impression made by it on another object.[93]

Time of forming opinion. The fact that a witness did not estimate the speed of a moving object at the moment when he saw it, but formed his estimate afterward, does not render his testimony incompetent,[94] although it may diminish its weight.[95]

b. Form of Statement

It is not necessary that a witness as to speed should state his opinion in miles per hour, although he may do so; but he may apply other standards than distance traversed, as that of safety.

It is not necessary that a witness as to speed should state his opinion in miles per hour,[96] although he may do so;[97] but he may apply other standards than distance traversed as related to time, as that of safety.[98] The testimony may relate to the speed as compared to other modes of motion,[99] and it is usually held that it may relate to the relative speed of different objects or of the same object at different times,[1] although a contrary view has been expressed.[2] Witnesses have been permitted to characterize a rate of speed as dangerous,[3] fair,[4] fast,[5]

90. Cal.—Bennett v Central California Traction Co., 1 P.2d 47, 115 Cal.App. 1.
Ind.—Kuhn v. Stephenson, 161 N.E. 384, 87 Ind.App. 157.
Iowa.—Lane v. Varlamos, 239 N.W. 689, 213 Iowa 795.
Estimate partly based on noise held not inadmissible.—Hamilton v. De Camp, 244 P. 1057, 120 Kan. 645.

91. Del.—Law v. Gallegher, 197 A. 479, 9 W.W.Harr. 189.
Ky.—Challinor v. Axton, 54 S.W.2d 600, 246 Ky. 76.
Mich.—Park v. Gaudio, 281 N.W. 565, 286 Mich. 133—Wright v. Crane, 106 N.W. 71, 142 Mich. 508.
42 C.J. p 1226 note 86.
Qualification of ordinary witness to testify as to speed on basis of noise see § 499 c infra.

92. Mich.—Hinderer v. Ann Arbor R. Co., 211 N.W. 734, 735, 237 Mich. 232, citing **Corpus Juris.**
22 C.J. p 568 note 76 [d].

93. Ga.—Hall v. Slaton, 144 S.E. 827, 38 Ga.App. 619, reversed on other grounds Slaton v. Hall, 148 S.E. 741, 168 Ga. 710, 73 A.L.R. 891, opinion conformed to Hall v. Slaton, 149 S.E. 306, 40 Ga.App. 288.
Qualification of ordinary witness to testify as to speed on basis of impression made see § 499 c infra.
Opinion of injured party on speed of train, based on the way it struck him, was admissible.—Western & A. R. R. v. Thompson, 144 S.E. 831, 38 Ga.App. 599.

94. Ga.—Engle v. Finch, 140 S.E. 632, 37 Ga.App. 389, conforming to answer to certified questions 139 S.E. 868, 165 Ga. 131.
Mass.—Copithorn v. Boston & M. R. R., 35 N.E.2d 254, 309 Mass. 363.
22 C.J. p 572 note 14.
Opinion held not formed from review of occurrence.—Humphries v. Louisiana Ry. & Irr. Co. of Texas, Tex.Com.App., 291 S.W. 1094, reversing Louisiana Ry. & Nav. Co. of Texas v. Humphries, Civ.App., 285 S.W. 869.

95. Mo.—Dalton v. United R. Co., 114 S.W. 561, 134 Mo.App. 392.

96. Ala.—Davis v. Smitherman, 96 So. 208, 209 Ala. 244.
Cal.—Bennett v. Central California Traction Co., 1 P.2d 47, 115 Cal. App. 1.
Conn.—Shea v. Hemming, 115 A. 686, 97 Conn. 149.
Va.—Davis v. Powell, 125 S.E. 751, 140 Va. 649, 142 Va. 711, rehearing denied 128 S.E. 242, 142 Va. 711.
22 C.J. p 569 note 81.
Permissible forms of expression
(1) Statement that vehicle was "going like hell," or "like a bat out of hell," was admissible.—Hartman v. Fleming, Mo., 264 S.W. 873.
(2) Other expressions see Torres v. Vidal, 28 Puerto Rico 915.

97. Ala.—Davis v. Smitherman, 96 So. 208, 209 Ala. 244.
Kan.—Birdsong v. Meyers, 40 P.2d 430, 141 Kan. 140—Hamilton v. De Camp, 244 P. 1057, 120 Kan. 645.
Mass.—Gould v. Boston & M. R. R., 184 N.E. 449, 282 Mass. 160.
Tex.—St. Louis, B. & M. Ry. Co. v. McLean, Civ.App., 241 S.W. 1072, reversed on other grounds, Com. App., 253 S.W. 248.
Va.—Morgan v. Atlantic Coast R. Co., 118 S.E. 233, 136 Va. 394.
Wash.—Girardi v. Union High School Dist. No. 1, Skagit County, 93 P. 2d 298, 200 Wash. 21.
22 C.J. p 569 note 82.

98. Wash.—McKinney v. City of Seattle, 245 P. 913, 915, 139 Wash. 148, citing **Corpus Juris.**
22 C.J. p 569 note 83.

99. Ala.—Kansas City, M. & B. R. Co. v. Crocker, 11 So. 262, 95 Ala. 412.
22 C.J. p 569 note 78.

1. Cal.—Dawson v. San Diego Electric Ry. Co., 255 P. 215, 82 Cal. App. 141.
Mass.—Sax v. Horn, 174 N.E. 673, 274 Mass. 428.
22 C.J. p 569 note 79.
Calculation not permitted
After evidence as to the speed of two objects has been admitted in evidence, a witness should not be permitted to state which was going faster, as this was simply a matter of calculation within the jury's province.—Alabama Power Co. v. Armour & Co., 92 So. 111, 207 Ala. 15.

2. Ind.—Citizens' St. R. Co. v. Spahr, 33 N.E. 416, 7 Ind.App. 23.
Iowa.—Seager v. Foster, 169 N.W. 681, 185 Iowa 32.
22 C.J. p 569 note 80.

3. Pa.—Lockhart v. Lichtenthaler, 46 Pa. 151.
22 C.J. p 570 note 84.

4. Ill.—Heidenreich v. Bremner, 176 Ill.App. 230, affirmed 103 N.E. 275, 260 Ill. 439.

5. Ala.—Davis v. Smitherman, 96 So. 208, 209 Ala. 244—Alabama Great Southern R. Co. v. Molette, 93 So. 644, 207 Ala. 624—Hines v. Laurendine, 84 So. 780, 17 Ala.App. 350.
D.C.—Smith v. Doyle, 98 F.2d 341, 69 App.D.C. 60.
Md.—State v. United Rys. & Electric Co. of Baltimore, 115 A. 109, 139 Md. 306.
S.C.—Nelson v. Charleston & W. C. Ry. Co., 121 S.E. 198, 92 S.C. 151.
Wis.—Gerbing v. McDonald, 229 N.W. 860, 201 Wis. 214, followed in 229 N.W. 864, 201 Wis. 222.
22 C.J. p 570 note 86—42 C.J. p 1226 note 91.
Similar statements held admissible.
Ill.—McKenna v. Chicago City Ry. Co., 129 N.E. 814, 296 Ill. 314.
N.J.—Baus v. Trenton & Mercer County Traction Corporation, 131 A. 92, 102 N.J.Law 1, affirmed 134 A. 915, 102 N.J.Law 712.

full,[6] high,[7] just running,[8] mighty fast,[9] moderate,[10] pretty fast,[11] pretty good rate,[12] rapid,[13] real fast,[14] reckless,[15] slow,[16] swift,[17] too fast,[18] unusual,[19] usual,[20] or very fast.[21] Such expressions are, however, mere expressions of comparative opinion meaning little in law,[22] and according to some authorities, are inadmissible unless the witness shows more definitely what he means thereby.[23] It has been held that a witness should not be allowed to testify that a vehicle was traveling "at a terrible speed,"[24] "as fast as it could,"[25] or "as fast as a man running,"[26] or that its speed was unreasonable,[27] not reckless,[28] or sufficient to enable it to reach a certain point before another vehicle.[29] So, also, testimony that one was "concerned" or frightened by the speed of a vehicle should be excluded.[30] Also, it has been held that the testimony of a witness that a car was being driven "ever so much faster" than cars were "commonly" driven in a certain place is not admissible;[31] but it has also been held proper to permit a witness to state he had seen other cars in the same locality traveling at a fast rate of speed and had never seen any traveling faster than the car in question was traveling.[32]

c. Qualification of Witness

As a general rule, an estimate of the speed of a moving object may be given by any observer of reasonable intelligence and ordinary experience, or, as otherwise stated, by any observer with knowledge of time and distance.

The qualification of a witness to estimate the speed of a moving object is a preliminary question to be passed on by the court before his testimony is

6. Tex.—Beaumont Tract. Co. v. Dilworth, Civ.App., 94 S.W. 352.
22 C.J. p 570 note 87.

7. Wash.—Sears v. Seattle Cons. St. R. Co., 33 P. 389, 1081, 6 Wash. 227.
22 C.J. p 570 note 88.

8. Ill.—Heidenreich v. Bremner, 176 Ill.App. 230, affirmed 103 N.E. 275, 260 Ill. 439.

9. Ill.—Trzetiatowski v. Evening American Pub. Co., 185 Ill.App. 451.

10. Mo.—Hartman v. Fleming, 264 S. W. 873.

11. Ind.—Vanosdol v. Henderson, 22 N.E.2d 812, 816, 216 Ind. 240, citing **Corpus Juris.**
22 C.J. p 570 note 90.

12. Ark.—Little Rock R. & Electric Co. v. Green, 93 S.W. 752, 78 Ark. 129.

13. Md.—Eyerly v. Baker, 178 A. 691, 168 Md. 599.
Va.—Davis v. Powell, 125 S.E. 751, 140 Va. 649, 142 Va. 711, rehearing denied 128 S.E. 242, 142 Va. 711.
22 C.J. p 570 note 92.

14. Ky.—Consolidated Coach Corporation v. Earls' Adm'r, 94 S.W.2d 6, 263 Ky. 814.

15. Nev.—Sherman v. Southern Pac. Co., 111 P. 416, 115 P. 909, 33 Nev. 385, Ann.Cas.1914A 287.
Tex.—Galveston, H. & S. A. R. Co. v. Wesch, Civ.App., 21 S.W. 62.

16. Ala.—Davis v. Smitherman, 96 So. 208, 209 Ala. 244—Alabama Great Southern R. Co. v. Molette, 93 So. 644, 207 Ala. 624—Hines v. Laurendine, 84 So. 780, 17 Ala.App. 350.
Md.—State v. United Rys. & Electric Co. of Baltimore, 115 A. 109, 139 Md. 306.
22 C.J. p 570 note 94.

17. Conn.—Shea v. Hemming, 115 A. 686, 97 Conn. 149.
Ky.—Consolidated Coach Corporation v. Earls' Adm'r, 94 S.W.2d 6, 263 Ky. 814.
22 C.J. p 570 note 95.

18. S.C.—Nelson v. Charleston & W. C. Ry. Co., 121 S.E. 198, 92 S.C. 151.

19. Or.—Macchi v. Portland R. Light & Power Co., 148 P. 72, 76 Or. 215.
22 C.J. p 570 note 96.
Faster than usual
Cal.—Dawson v. San Diego Electric Ry. Co., 255 P. 215, 82 Cal.App. 141.
Tex.—Hines v. Kelley, Civ.App., 226 S.W. 493, reversed on other grounds, Com.App., 252 S.W. 1033.

20. Ark.—Little Rock R. & Electric Co. v. Green, 93 S.W. 752, 78 Ark. 129.
Not faster than usual
Wash.—McKinney v. City of Seattle, 245 P. 913, 139 Wash. 148.

21. Cal.—Bennett v. Central California Traction Co., 1 P.2d 47, 115 Cal.App. 1.
Mo.—State ex rel. Shaw Transfer Co. v. Trimble, 250 S.W. 384, quashing certiorari Burke v. Shaw Transfer Co., 243 S.W. 449, 211 Mo. App. 353.
22 C.J. p 570 note 98—42 C.J. p 1226 note 92.

22. Cal.—Bates v. Escondido Union High School Dist. of San Diego County, 48 P.2d 728, 9 Cal.App.2d 43.

23. Ky.—Teague v. Princeton Ice & Storage Co., 265 S.W. 611, 205 Ky. 231.
Neb.—Baldwin v. Omaha & C. B. St. Ry. Co., 181 N.W. 525, 105 Neb. 614.
42 C.J. p 1226 note 98.
Statement held objectionable
Statement that car was going "awful fast" was objectionable as conclusion.—Morgan v. Maunders, Tex. Civ.App., 37 S.W.2d 791, error dismissed.
Statement held without probative force
(1) Answer of witness that automobile was going fast was merely a conclusion of the witness, having no probative force, where no fact was stated upon which to base it.—Bibb v. Grady, Mo.App., 231 S.W. 1020.
(2) Where the speed of a train is shown by a train record made by the conductor at the time, as at a certain rate per hour, testimony of a witness that the train was running very fast but not fixing any standard by which the speed could be estimated is immaterial.—Keiser v. Lehigh Valley R. Co., 61 A. 903, 212 Pa. 409, 108 Am.S.R. 872.

24. Ill.—Chicago City R. Co. v. Wall, 93 Ill.App. 411.
22 C.J. p 570 note 99.

25. Ill.—Pfeiffer v. Chicago City R. Co., 96 Ill.App. 10.
22 C.J. p 570 note 1.

26. Iowa.—Livingstone v. Dole, 167 N.W. 639, 184 Iowa 1340.
22 C.J. p 570 note 2.

27. Ohio.—Tyler v. Hocking Valley Ry. Co., 162 N.E. 623, 28 Ohio App. 88.
W.Va.—Colebank v. Standard Garage Co., 84 S.E. 1051, 75 W.Va. 389.

28. Md.—Newman v. Stocker, 157 A. 761, 161 Md. 552.

29. Ala.—Hines v. Laurendine, 84 So. 780, 17 Ala.App. 350.

30. Mass.—Beaucage v. Mercer, 92 N.E. 774, 206 Mass. 492, 138 Am.S. R. 401.

31. Mich.—Grand Rapids v. Crocker, 189 N.W. 221, 219 Mich. 178.

32. Cal.—Scragg v. Sallee, 140 P. 706, 24 Cal.App. 133.

received.[33] A witness offered to estimate the speed of a moving object[34] within the common observation of men in the everyday affairs of life,[35] such as a motor vehicle,[36] street car,[37] or train,[38] is not required to have any special skill or expert training, unless, according to one view, he attempts to fix the rate of speed at so many miles per hour.[39] As a general rule, an estimate of the speed of such moving objects may be given by any observer of reasonable intelligence and ordinary experience,[40]

33. Iowa.—Klaaren v. Shadley, 247 N.W. 301, 215 Iowa 1043.
Tex.—St. Louis, B. & M. Ry. Co. v. McLean, Com.App., 253 S.W. 248, reversing, Civ.App., 241 S.W. 1072.

It is not always essential for the witness to state his previous experience before testifying, although it is the better practice for him to do so. —Hicks v. Love, 161 S.E. 394, 201 N.C. 773.

34. Ala.—Alabama Power Co. v. Edwards, 121 So. 543, 219 Ala. 162.
Ky.—Wilder v. Cadle, 13 S.W.2d 497, 227 Ky. 486.
Mich.—Luttenton v. Detroit, J. & C. Ry., 176 N.W. 558, 209 Mich. 20.
Mo.—Pedigo v. Roseberry, 102 S.W. 2d 600, 340 Mo. 724.
N.C.—Hicks v. Love, 161 S.E. 394, 201 N.C. 773.
Tex.—Debes v. Greenstone, Civ.App., 260 S.W. 211—Schaff v. Moss, Civ. App., 219 S.W. 548, dismissed for want of jurisdiction.
Wash.—Girardi v. Union High School Dist. No. 1, Skagit County, 93 P.2d 298, 200 Wash. 21.
22 C.J. p 570 note 5.

35. Md.—Peoples Drug Stores v. Windham, 12 A.2d 532, 178 Md. 172.

36. U.S.—Leadbetter v. Glaisyer, C. C.A.Or., 44 F.2d 350—Nussbaum v. Atlas Laundry Co., C.C.A.Ohio, 10 F.2d 353—Denver Omnibus & Cab Co. v. Krebs, Colo., 255 F. 543, 166 C.C.A. 611.
Ala.—Edwards v. Earnest, 94 So. 598, 208 Ala. 539.
Cal.—Jordan v. Great Western Motorways, 2 P.2d 786, 213 Cal. 606 —Bowman v. Motor Transit Co., 284 P. 443, 208 Cal. 652.
Colo.—Larson v. Long, 219 P. 1066, 74 Colo. 152.
Ill.—Koch v. Pearson, 219 Ill.App. 468.
Iowa.—Teufel v. Hayes, 196 N.W. 1022, 197 Iowa 340.
Ky.—Bowling Green-Hopkinsville Bus Co. v. Edwards, 59 S.W.2d 584, 248 Ky. 684.
Md.—Waltring v. James, 111 A. 125, 136 Md. 406.
Mass.—Davidson v. Beacon Hill Taxi Service, 180 N.E. 503, 278 Mass. 540.
Mich.—Stehouwer v. Lewis, 227 N.W. 759, 249 Mich. 76, 74 A.L.R. 844—Jones v. Detroit Taxicab & Transfer Co., 188 N.W. 394, 218 Mich. 673—Luttenton v. Detroit, J. & C. Ry., 176 N.W. 558, 209 Mich. 20.
Mo.—Messer v. Gentry, 290 S.W. 1014, 220 Mo.App. 1294—Burke v. Shaw Transfer Co., 243 S.W. 449, 211 Mo.App. 353, certiorari quashed State ex rel. Shaw Transfer Co. v. Trimble, Sup., 250 S.W. 384—Flach v. Ball, 240 S.W. 465, 209 Mo.App. 389.
Neb.—Mierendorf v. Saalfeld, 295 N. W. 901, 138 Neb. 876—Carnes v. Deklotz, 291 N.W. 490, 137 Neb. 787—Knoche v. Pease Grain & Seed Co., 277 N.W. 798, 134 Neb. 130—Bergendahl v. Rabeler, 276 N.W. 673, 133 Neb. 699—Serratore v. Miller, 267 N.W. 159, 130 Neb. 908 —Patterson v. Kerr, 254 N.W. 704, 127 Neb. 73—Miller v. Central Taxi Co., 193 N.W. 919, 110 Neb. 306.
N.C.—Jones v. Bagwell, 177 S.E. 170, 207 N.C. 378.
Okl.—Eughlin v. Pittsburgh County Ry. Co., 36 P.2d 32, 169 Okl. 106, 94 A.L.R. 1180.
Or.—Archer v. Gage, 270 P. 521, 126 Or. 532.
Tex.—Giannukes v. Sfiris, 81 S.W.2d 999, 125 Tex. 354, reversing Giannukos v. Sfiris, Civ.App., 51 S.W.2d 753—Zepeda v. Moore, Civ.App., 153 S.W.2d 212—Lightsey Black & White Cab Corporation v. Littlefield, Civ.App., 48 S.W.2d 766, error refused—Debes v. Greenstone, Civ.App., 260 S.W. 211—Merchants' Transfer Co. v. Wilkinson, Civ. App., 219 S.W. 891, dismissed for want of jurisdiction.
Wis.—Kaboth v. Schrewe, 247 N.W. 835, 211 Wis. 280.
42 C.J. p 1225 note 79.

37. Neb.—Oakes v. Omaha & C. B. St. Ry. Co., 178 N.W. 758, 104 Neb. 788.

38. Ala.—Payne v. Roy, 90 So. 605, 206 Ala. 432.
Ky.—Chesapeake & O. Ry. Co. v. Prater's Adm'x, 106 S.W.2d 625, 269 Ky. 174.
Mass.—Copithorn v. Boston & M. R. R., 35 N.E.2d 254, 309 Mass. 363.
Pa.—Muehlhof v. Reading Co., 162 A. 827, 309 Pa. 17.
S.C.—Moore v. Southern Ry. Co., 161 S.E. 525, 163 S.C. 342, reversed on other grounds Southern Ry. Co. v. Moore, 52 S.Ct. 38, 284 U.S. 581, 76 L.Ed. 503.
Tex.—Humphries v. Louisiana Ry. & Irr. Co. of Texas, Com.App., 291 S. W. 1094, reversing Louisiana Ry. & Nav. Co. of Texas v. Humphries, Civ.App., 285 S.W. 869—Texas & P. Ry. Co. v. Edwards, Civ.App., 21 S.W.2d 754, reversed on other grounds, Com.App., 36 S.W.2d 477 —Hines v. Kelley, Civ.App., 226 S. W. 493, reversed on other grounds, Com.App., 252 S.W. 1033.
Wash.—Bennington v. Northern Pac. Ry. Co., 192 P. 1073, 113 Wash. 1.
22 C.J. p 570 note 5.

39. Md.—Peoples Drug Stores v. Windham, 12 A.2d 532, 178 Md. 172 —Hopper McGaw & Co. v. Kelly, 125 A. 779, 145 Md. 161—State v. United Rys. & Electric Co. of Baltimore, 115 A. 109, 139 Md. 306.

40. U.S.—Leadbetter v. Glaisyer, C. C.A.Or., 44 F.2d 350.
Cal.—Perry v. McLaughlin, 297 P. 554, 212 Cal. 1.
Colo.—Larson v. Long, 219 P. 1066, 74 Colo. 152.
Conn.—Fitzpatrick v. Cinitis, 139 A. 639, 107 Conn. 91.
Del.—Law v. Gallegher, 197 A. 479, 9 W.W.Harr. 189.
Kan.—Kelly v. Vuklich, 206 P. 894, 111 Kan. 199.
Ky.—Wilder v. Cadle, 13 S.W.2d 497, 227 Ky. 486.
Tex.—Giannukes v. Sfiris, 81 S.W.2d 999, 125 Tex. 354, reversing Giannukos v. Sfiris, Civ.App., 51 S.W.2d 753—Debes v. Greenstone, Civ.App., 260 S.W. 211.
22 C.J. p 570 note 5 [c]—42 C.J. p 1225 note 80.

Person of ordinary intelligence is presumed competent to express opinion as to speed of automobile.—Nussbaum v. Atlas Laundry Co., C.C.A. Ohio, 10 F.2d 353.

Other expressions of rule

(1) Speed may be testified to by any one who has frequently observed it.—Alabama Power Co. v. Edwards, 121 So. 543, 219 Ala. 162—Alabama Great Southern R. Co. v. Molette, 93 So. 644, 207 Ala. 624.

(2) Any intelligent person accustomed to observing moving objects can testify to the speed of an automobile or train.
Or.—Johnson v. Underwood, 203 P. 879, 102 Or. 680.
Pa.—Muehlhof v. Reading Co., 162 A. 827, 309 Pa. 17.

(3) Any person of ordinary intelligence is competent to testify to the speed of vehicles observed by him. —Merchants' Transfer Co. v. Wilkinson, Tex.Civ.App., 219 S.W. 891, dismissed for want of jurisdiction.

(4) An observer of ordinary intelligence, having some knowledge as to the speed of automobiles generally, may testify.—Bowling Green-Hopkinsville Bus Co. v. Edwards, 59 S.W.2d 584, 248 Ky. 684.

(5) Any witness qualified by observation and experience, expert or nonexpert, can testify to speed of a moving automobile which he has ob-

or, as otherwise stated, by any observer with knowledge of time and distance.[41] An observer not in any way qualified to estimate the speed of a moving object will not be permitted to testify,[42] but, as a general rule, a witness who observed the moving object in question will be permitted to estimate its speed if he possesses some knowledge or experience, however slight, which will enable him to form an opinion.[43] A witness' claim to knowledge may be accepted as a prima facie qualification.[44] It must also be shown that the witness was in a position to know the speed of the moving object in question either through direct observation or other sensory experience,[45] and according to some authorities his opinion or estimate may be rejected because of insufficient opportunity for observation,[46] while ac-

served.—Peoples Drug Stores v. Windham, 12 A.2d 532, 178 Md. 172.

(6) Any witness who, within judge's discretion, understands oath and possesses sufficient knowledge and intelligence regarding point, may testify as to a motor vehicle's speed. —Davidson v. Beacon Hill Taxi Service, 180 N.E. 503, 278 Mass. 540.

(7) Persons of intelligence and observation may testify as to the speed of a moving automobile.—Enghlin v. Pittsburg County Ry. Co., 36 P.2d 32, 169 Okl. 106, 94 A.L.R. 1180.

41. Ky.—Wilder v. Cadle, 13 S.W.2d 497, 227 Ky. 486.
Mich.—Luttenton v. Detroit, J. & C. Ry., 176 N.W. 558, 209 Mich. 20.
Neb.—Mierendorf v. Saalfeld, 295 N. W. 901, 138 Neb. 876—Carnes v. Deklotz, 291 N.W. 490, 137 Neb. 787—Knoche v. Pease Grain & Seed Co., 277 N.W. 798, 134 Neb. 130—Bergendahl v. Rabeler, 276 N. W. 673, 133 Neb. 699—Serratore v. Miller, 267 N.W. 159, 130 Neb. 908—Patterson v. Kerr, 254 N.W. 704, 127 Neb. 73—Miller v. Central Taxi Co., 193 N.W. 919, 110 Neb. 306—Oakes v. Omaha & C. B. St. Ry. Co., 178 N.W. 758, 104 Neb. 788.
22 C.J. p 572 note 11.

42. Ala.—Houston v. Smith, 141 So. 264, 25 Ala.App. 76.
Ill.—Barnett v. Levy, 213 Ill.App. 129 —Grudzinski v. Chicago City R. Co., 165 Ill.App. 152.
Iowa.—Seager v. Foster, 169 N.W. 681, 185 Iowa 32, 8 A.L.R. 690.
Ky.—Teague v. Princeton Ice & Storage Co., 265 S.W. 611, 205 Ky. 231.
Mo.—Priebe v. Crandall, App., 187 S. W. 605.
Tex.—St. Louis Southwestern Ry. Co. of Texas v. Osborne, Civ.App., 270 S.W. 922.
22 C.J. p 571 note 6.

Witness who disclaims ability to form an opinion as to the speed of a moving object should not be permitted to guess.
Mo.—Gorman v. Franklin, 117 S.W.2d 289.
Pa.—Wenhold v. O'Dea, 12 A.2d 115, 338 Pa. 33.
22 C.J. p 571 note 6 [b].

Witness observing speedometer in a moving vehicle may testify as to its speed even though he disclaims ability to estimate speed.—Livingstone v. Dole, 167 N.W. 639, 184 Iowa 1340—22 C.J. p 571 note 7.

Witness who does not know ordinary rate of speed of a street car on a particular route is not competent to testify that a car on a particular occasion on that route was run at an extraordinary rate of speed.—Verrone v. Rhode Island Suburban R. Co., 62 A. 512, 27 R.I. 370, 114 Am.S.R. 41.

Estimate based on false and unreasonable assumption of facts should be stricken from the testimony.—Dashell v. Jacoby, 120 A. 751, 142 Md. 330.

43. U.S.—Canadian Pac. Ry. Co. v. Slayton, C.C.A.Vt., 29 F.2d 687.
Ala.—Taylor v. Lewis, 89 So. 581, 206 Ala. 338.
Iowa.—Becvar v. Batesole, 256 N.W. 297, 218 Iowa 858.
Ky.—Rose v. Edmonds, 111 S.W.2d 427, 271 Ky. 36.
Mich.—Jenks v. Ingham County, 286 N.W. 93, 288 Mich. 600—Stehouwer v. Lewis, 227 N.W. 759, 249 Mich. 76, 74 A.L.R. 844—Zylstra v. Graham, 221 N.W. 318, 244 Mich. 319, affirmed 224 N.W. 343, 246 Mich. 91.
Mo.—Jones v. St. Louis-San Francisco R. Co., 220 S.W. 484—Brown v. Alton R. Co., App., 151 S.W.2d 727 —Brown v. Alton R. Co., App., 132 S.W.2d 713, record quashed on other grounds, State ex rel. Alton R. Co. v. Shain, Sup., 143 S.W.2d 233.
Neb.—Sterns v. Hellerich, 264 N.W. 677, 130 Neb. 251.
N.H.—McCarthy v. Souther, 137 A. 445, 83 N.H. 29.
N.Y.—Parsons v. Syracuse, B. & N. Y. R. Co., 117 N.Y.S. 1058, 133 App. Div. 461.
S.D.—Morton v. Holscher, 243 N.W. 89, 60 S.D. 50.
Wash.—Nicktovich v. Olympic Motor Transit Co., 272 P. 736, 150 Wash. 278.
Wis.—Gerbing v. McDonald, 229 N. W. 860, 201 Wis. 214, followed in 229 N.W. 864, 201 Wis. 222.

Witness' experience affects weight and not competency of his testimony. —Jordan v. Great Western Motorways, 2 P.2d 786, 213 Cal. 606.

Fourteen-year-old boy held qualified.
Mass.—Mahoney v. Goech, 141 N.E. 605, 246 Mass. 567.
Mich.—Tyler v. Weed, 280 N.W. 827, 285 Mich. 460.
Mo.—Messer v. Gentry, 290 S.W. 1014, 220 Mo.App. 1294.

Mere fact that person has ridden on street cars for a good many years does not qualify him.
Ill.—Grudzinski v. Chicago City R. Co., 165 Ill.App. 152.
Mo.—Campbell v. St. Louis & Suburban R. Co., 75 S.W. 86, 175 Mo. 161.

Evidence that witness observed speedometers of cars in which he was riding to show qualification to express opinion on speed was erroneously excluded, on ground that speedometers might have been inaccurate. —Shulman v. Roseth Corporation, 238 N.Y.S. 575, 227 App.Div. 577.

44. Mo.—Tinkle v. St. Louis & S. F. R. Co., 110 S.W. 1086, 212 Mo. 445.
22 C.J. p 572 note 10.

Witness previously giving conflicting testimony as to speed may nevtheless testify thereon.—Engle v. Finch, 140 S.E. 632, 37 Ga.App. 389, conforming to answer to certified questions 139 S.E. 868, 165 Ga. 131.

45. Iowa—Klaaren v. Shadley, 247 N.W. 301, 215 Iowa 1043.
Neb.—Mierendorf v. Saalfeld, 295 N. W. 901, 138 Neb. 876—Knoche v. Pease Grain & Seed Co., 277 N.W. 798, 134 Neb. 130—Mathieson v. Omaha St. R. Co., 92 N.W. 639, 3 Neb. (Unoff.) 743.
Pa.—Laubach v. Colley, 129 A. 88, 283 Pa. 366.
22 C.J. p 571 note 8—42 C.J. p 1226 note 82.

It is court's province to decide whether witness has shown himself to be in such a position that he could have formed an estimate.—Louisiana Ry. & Nav. Co. of Texas v. Humphreys, Tex.Civ.App., 285 S.W. 869, reversed on other grounds Humphries v. Louisiana Ry. & Irr. Co. of Texas, Com.App., 291 S.W. 1094.

Intoxication of witness not shown
Tex.—Holton v. Hutchinson, Civ. App., 90 S.W.2d 1103.

Object held sufficiently identified to admit testimony regarding its speed.—Hicks v. Love, 161 S.E. 394, 201 N.C. 773.

Witness permitted to state he observed speed of moving object.—Atlantic Pacific Stages v. Yandle, 140 So. 603, 224 Ala. 481.

46. Ky.—Bowling Green-Hopkins-

cording to other authorities the slightness or inadequacy of his opportunity for observation affects the weight rather than the competency of his testimony,[47] and his opinion or estimate is admissible in evidence where he had some opportunity for observation, even though it was limited.[48] A witness is not rendered incompetent to testify as to speed by reason of the fact that his judgment is based on knowledge gained through feeling[49] or hearing,[50] rather than on sight. Although the contrary has been held in the case of a qualified witness,[51] it has been held that a nonexpert witness cannot give an opinion of the speed of a motor vehicle based solely on observation of skid marks.[52] It has also been held that an ordinary witness is not qualified to testify as to the speed of a vehicle at the time of a collision, solely on the basis of the damage.[53]

§ 500. —— Time and Duration

A lay witness may be permitted to estimate time, but generally nonexperts should not be permitted to testify as to what is a reasonable time for the performance of a certain act.

A lay witness may be permitted to make an estimate of time.[54] Thus, a lay witness may be per-

ville Bus Co. v. Edwards, 59 S.W.2d 584, 248 Ky. 684.

Mass.—Davidson v. Beacon Hill Taxi Service, 180 N.E. 503, 278 Mass. 540.

Mich.—Hinderer v. Ann Arbor R. Co., 211 N.W. 734, 237 Mich. 232.

"Ordinarily, the witness' opportunity for observing the speed of a moving object and the extent of his observation go to the weight of his testimony and not its competency, but unless he had sufficient opportunity to observe the speed his testimony is incompetent."—Chesapeake & O. Ry. Co. v. Prater's Adm'x, 106 S.W.2d 625, 626, 269 Ky. 174.

Witness who saw vehicle "just as it struck" is not entitled to give opinion as to its speed.—Koch v. Lynch, 141 N.E. 677, 247 Mass. 459.

Opportunity held sufficient

Mass.—Nicholas v. Lewis Furniture Co., 198 N.E. 753, 292 Mass. 500.

Mich.—Faulkner v. Payne, 157 N.W. 565, 191 Mich. 263.

47. Ala.—Jack Cole, Inc., v. Walker, 200 So. 768, 770, 240 Ala. 683, citing **Corpus Juris.**

Mo.—Flach v. Ball, 240 S.W. 465, 209 Mo.App. 389.

Neb.—Serratore v. Miller, 267 N.W. 159, 130 Neb. 908—Patterson v. Kerr, 254 N.W. 704, 127 Neb. 73.

Tex.—Humphries v. Louisiana Ry. & Irr. Co. of Texas, Com.App., 291 S.W. 1094, reversing Louisiana Ry. & Nav. Co. of Texas v. Humphries, Civ.App., 285 S.W. 869.

Vt.—Bianchi v. Millar, 111 A. 524, 94 Vt. 378.

Wash.—Hines v. Foster, 6 P.2d 597, 166 Wash. 165—Nicktovich v. Olympic Motor Transit Co., 272 P. 736, 150 Wash. 278.

42 C.J. p 1226 note 84.

48. Ala.—Jack Cole, Inc., v. Walker, 200 So. 768, 240 Ala. 683.

Iowa.—Albert v. Maher Bros. Transfer Co., 243 N.W. 561, 215 Iowa 197.

Md.—Jackson v. Leach, 152 A. 813, 160 Md. 139.

Mo.—Nixon v. Hill, 52 S.W.2d 208, 227 Mo.App. 312—Tutie v. Kennedy, App., 272 S.W. 117.

N.H.—Bissonnette v. Cheverette, 176 A. 285, 87 N.H. 211.

42 C.J. p 1226 note 83.

Object approaching directly

A witness otherwise qualified is not incompetent to estimate the speed of a moving object solely from the fact that it is approaching him directly.

Neb.—Gerish v. Hinchey, 231 N.W. 503, 120 Neb. 51—Lewis v. Miller, 230 N.W. 769, 119 Neb. 765, 70 A.L.R. 532.

Vt.—Bianchi v. Millar, 111 A. 524, 94 Vt. 378.

Witness who merely saw light beam of vehicle approaching held competent to estimate speed.

Minn.—Perkins v. Chicago, M. & St. P. Ry. Co., 197 N.W. 758, 158 Minn. 184.

S.D.—Pemberton v. Fritts, 228 N.W. 409, 56 S.D. 374.

Vt.—Bianchi v. Millar, 111 A. 524, 94 Vt. 378.

49. Ga.—Western & A. R. R. v. Thompson, 144 S.E. 831, 38 Ga.App. 599.

Tex.—Schaff v. Moss, Civ.App., 219 S.W. 548, dismissed for want of jurisdiction.

50. Iowa.—Van Horn v. Burlington, C. R. & N. R. Co., 12 N.W. 752, 59 Iowa 33.

22 C.J. p 572 note 12.

Admissibility of opinion based on sound see § 499 a supra.

Witness held not qualified to estimate in miles per hour although sufficiently qualified to state whether object was moving fast or slow.—Parsons v. Syracuse, B. & N. Y. R. Co., 117 N.Y.S. 1058, 133 App.Div. 461—22 C.J. p 571 note 9 [c].

51. Tex.—Southern Transp. Co. v. Adams, Civ.App., 141 S.W.2d 739, error dismissed, judgment correct.

Almost any person acquainted with movements of automobiles when brakes are suddenly applied is competent to give opinion from marks of skidding and other circumstances as to automobile's speed.—Stamper v. Scholtz, Tex.Civ.App., 29 S.W.2d 883, error refused.

Witness familiar with handling of cars, who had examined roadbed and seen marks made by the sliding car, could testify as to rate of speed.—Heidner v. Germschied, 171 N.W. 208, 41 S.D. 430.

52. Iowa.—Ward v. Zerzanek, 289 N.W. 443, 227 Iowa 918.

Wash.—Cleasby v. Taylor, 28 P.2d 795, 176 Wash. 251.

22 C.J. p 572 note 13.

53. Iowa.—Roberts v. Koons, 296 N.W. 811.

Wash.—Cook v. Stimson Mill Co., 83 P. 419, 41 Wash. 314.

But it has been held that a witness' admission that he did not know what speed would break timbers did not render inadmissible opinion of speed based on damage to timbers caused by collision.—Hall v. Slaton, 144 S.E. 827, 38 Ga.App. 619, reversed on other grounds Slaton v. Hall, 148 S.E. 741, 168 Ga. 710, 73 A.L.R. 891, conformed to Hall v. Slaton, 149 S.E. 306, 40 Ga.App. 288.

Admissibility of opinion based on damage see § 499 a supra.

Auto repairmen held not qualified to testify as to speed on basis of damage.

Idaho.—Faris v. Burroughs Adding Mach. Co., 282 P. 72, 48 Idaho 310.

Iowa.—Roberts v. Koons, 296 N.W. 811.

54. Ala.—Southern Ry. Co. v. Sherrill, 167 So. 731, 739, 232 Ala. 184, citing **Corpus Juris.**

Mo.—Pedigo v. Roseberry, 102 S.W.2d 600, 340 Mo. 724.

Approximate estimate of time is opinion evidence.—American Automobile Ins. Co. v. Carson, 102 So. 219, 212 Ala. 293.

Time of death of animal may be estimated from condition of carcass.—Board of Com'rs of Stokes County v. George, 109 S.E. 77, 182 N.C. 414.

Time of death of human being

Testimony of nonexpert as to how long decedents had been dead when found, where based on facts detailed by witness, was held competent on question of which of decedents survived the other, in view of rule that

mitted to estimate the point of time[55] and its duration, either generally[56] or between two events.[57] However, a witness will not be permitted to make a mere calculation of time which the jury is equally capable of making.[58] While an ordinary witness has been permitted to state whether or not he,[59] or another,[60] had sufficient time to perform certain acts, it has been held that a witness will not be permitted to state whether or not another individual had sufficient time to avoid an injury.[61] A nonexpert witness has been held not competent to testify as to the time necessary to stop a street car;[62] and it has been held improper to allow a witness to state that a woman was not able to do her own housework one half of the time.[63]

Reasonable time. It has been said that there might be cases in which it would be proper for opinion evidence to be introduced as to what would be a reasonable time for the performance of a given act,[64] although this would be improper if the calculations could be made by a jury if furnished with the proper data.[65] Accordingly, it is generally considered that nonexperts should not be permitted to testify as to what is a reasonable time for railroad transportation,[66] but such a statement by an experienced shipper has been held to be admissible.[67]

§ 501. —— Value

Generally an ordinary witness having no knowledge or skill beyond that common to the community at large is not competent to testify to value.

Although there is authority to the contrary,[68] it is generally held that an ordinary witness, having no knowledge or skill beyond that common to the community at large, is not competent to testify as to value.[69] The qualifications which a witness must possess to be competent to testify to value are discussed infra § 545.

§ 502. —— Weight

Persons familiar with the property in question may estimate its weight.

Estimates of weight by persons familiar with the property or article in question are competent;[70] and accordingly a witness may state his opinion as to the

non-expert may state facts and circumstances and his opinion predicated thereon, where question under consideration is one of opinion.—Roberts v. Hardin, 180 S.E. 634, 180 Ga. 757.

55. Mo.—Childs v. McGirk State Bank, App., 2 S.W.2d 123.
S.D.—Sprick v. Schreiner, 220 N.W. 860, 53 S.D. 392.
22 C.J. p 572 note 20.

Witness' reasons for estimating that an event took place at a certain time may be required to be stated.—Texas Co. v. Wimberly, Tex. Civ.App., 213 S.W. 286.

56. Tex.—Baker v. Galbreath, Civ. App., 211 S.W. 626, dismissed for want of jurisdiction.
22 C.J. p 572 note 21.

57. Ga.—Allison v. Wall, 49 S.E. 831, 121 Ga. 822.
22 C.J. p 573 note 22.

58. Wash.—Nicktovich v. Olympic Motor Transit Co., 272 P. 736, 150 Wash. 278.

59. **Time to avoid being hit**
Iowa.—Boice v. Des Moines City Ry. Co., 133 N.W. 657, 153 Iowa 472.

60. **Placing pistol in person's hand**
Ark.—Benefit Ass'n of Ry. Employees v. Jacklin, 294 S.W. 353, 173 Ark. 937.

61. Iowa.—King v. Chicago, R. I. & P. Ry. Co., 172 N.W. 268, 185 Iowa 1227.

62. Ala.—Billingsley v. Nashville, C. & St. L. R. Co., 58 So. 433, 177 Ala. 342.

63. Me.—King v. Thompson, 101 A. 724, 116 Me. 316.

64. Ga.—Allison v. Wall, 49 S.E. 831, 121 Ga. 822.
22 C.J. p 573 note 29.

65. Ga.—Carolina Portland Cement Co. v. Zuber, 113 S.E. 813, 29 Ga. App. 96.
22 C.J. p 573 note 30.

Witness held not qualified
Mo.—Lion Match Co. v. Hess, App., 253 S.W. 108.

66. Ga.—Southern Ry. Co. v. Bloch, 90 S.E. 656, 18 Ga.App. 767.
Idaho.—Ritchie v. Oregon Short Line R. Co., 244 P. 580, 42 Idaho 193, 45 A.L.R. 909.
Tex.—Davis v. Pittman-Harrison Co., Civ.App., 249 S.W. 889.
10 C.J. p 303 note 32—22 C.J. p 496 notes 75, 76, p 573 note 31.

67. Ky.—Louisville & N. R. Co. v. McClintock, 152 S.W. 253, 151 Ky. 455.
22 C.J. p 573 note 32.

68. Mo.—Taylor v. St. Louis & H. R. Co., App., 256 S.W. 499.

69. U.S.—Welch v. Tennessee Valley Authority, C.C.A.Tenn., 108 F. 2d 95, certiorari denied Welch v. U. S. ex rel. and for Use of Tennessee Valley Authority, 60 S.Ct. 889, 309 U.S. 688, 84 L.Ed. 1030.
Idaho.—Bassett v. Swenson, 5 P.2d 722, 51 Idaho 256—Thibadeau v. Clarinda Copper Mining Co., 272 P. 254, 47 Idaho 119.
Ill.—Mauvaisterre Drainage & Levee Dist. v. Wabash Ry. Co., 132 N.E. 559, 299 Ill. 299, 22 A.L.R. 944.
Ky.—Insurance Co. of North America v. Creech Drug Store, 75 S.W. 2d 552, 256 Ky. 56.
Mass.—Jackson v. Innes, 121 N.E. 489, 231 Mass. 558.
Mich.—Watrous v. Bialy's Estate, 192 N.W. 628, 631, 222 Mich. 137, quoting **Corpus Juris.**
Mo.—Lee v. Allen, App., 120 S.W.2d 172, 174, citing **Corpus Juris.**
N.J.—Hopper v. Public Service Coordinated Transport, 177 A. 430, 114 N.J.Law 468.
N.Y.—Berkowitz v. Iorizzo, 174 N.Y. S. 719, 106 Misc. 489.
N.D.—Hedrick v. Stockgrowers' Credit Corporation, 250 N.W. 539, 64 N.D. 101—Hellstrom v. First Guaranty Bank, 209 N.W. 379, 385, 54 N.D. 322, citing **Corpus Juris.**
Pa.—Fantozzi v. Schappert, 192 A. 114, 326 Pa. 298.
R.I.—McGovern v. Michael, 6 A.2d 709, 62 R.I. 485, modified on other grounds 9 A.2d 274.
Tex.—Massie v. City of Floydada, Civ.App., 112 S.W.2d 243—Chicago Fire & Marine Ins. Co. v. Harkness, Civ.App., 58 S.W.2d 171—Texas Power Corporation v. Kuehler, Civ.App., 34 S.W.2d 381, modified on other grounds, Com.App., 52 S.W.2d 76.
Vt.—Houghton v. Grimes, 151 A. 642, 103 Vt. 54.
W.Va.—Cochran v. Craig, 106 S.E. 633, 639, 88 W.Va. 281.
22 C.J. p 579 note 84.

70. Miss.—Hardaway Contracting Co. v. Rivers, 180 So. 800, 804, 181 Miss. 727, quoting **Corpus Juris.**

weight of livestock[71] or inanimate objects.[72]

On the other hand, an estimate as to weight is incompetent where it is not shown that the witness is qualified by experience to estimate weight,[73] or where there is no showing that he has had an adequate opportunity to form a judgment.[74] Estimates arrived at by assuming that the marks found on an object indicate its correct weight are incompetent.[75] Wild guesses as to weight should not be permitted, but the witness should be required to give the grounds on which he basis his estimate.[76]

The limits of the power of an average observer to estimate weight may be stated by a competent witness.[77]

§ 503. —— Estimates as to Other Matters

Under certain conditions, an ordinary witness may state his estimate with respect to ability, area, cost or expense, direction, earning capacity, force, grade, location, number, profit and loss, temperature, etc.

In addition to estimates as to matters considered supra §§ 492–502, an ordinary witness with sufficient knowledge of the facts may state his estimate or opinion as to various other matters.[78] Thus it has been held that such a witness may state his estimate or opinion with respect to the condition of objects at a certain time,[79] and conditions as regards lights and lighting.[80]

On the other hand, the opinions of nonexperts have been held to be inadmissible on questions relating to the condition of an object,[81] the accuracy of scales,[82] and what is, or is not, witnesses' idea

N.Y.—Friedman-Wallach Co. v. Rosenau Bros., 189 N.Y.S. 102.
22 C.J. p 596 note 79.

71. **Cattle**
Neb.—McElwain v. Union Pac. R. Co., 163 N.W. 845, 101 Neb. 484, 1 A.L.R. 533.
22 C.J. p 596 note 80.

Hogs
Va.—McCormick v. Hamilton, 23 Gratt. 561, 64 Va. 561.

72. **Bluestone**
N.Y.—People v. Wilson, 16 N.Y.S. 583.

Cases of merchandise
N.Y.—Friedman-Wallach Co. v. Rosenau Bros., 189 N.Y.S. 102.

Counterbalance on derrick
Cal.—Dyas v. Southern Pac. Co., 73 P. 972, 140 Cal. 296.

Locomotive
Ala.—Jackson Lumber Co. v. Cunningham, 87 So. 445, 141 Ala. 206.

Wooden mat
Miss.—Hardaway Contracting Co. v. Rivers, 180 So. 800, 181 Miss. 727.

73. Miss.—Harris v. Pounds, 187 So. 891, 185 Miss. 688.

Log
The assertion of witnesses that a log is too heavy to be carried by a certain number of men without showing what experience such witnesses had had in judging such weight, is inadmissible.—Harris v. Pounds, supra.

74. Tex.—German v. Continental Jewelry Co., Civ.App., 22 S.W.2d 341.

Objects not exhibited
Buyer's testimony as to weight of collar buttons not shown to have been exhibited to him by salesman is inadmissible.—German v. Continental Jewelry Co., supra.

75. N.Y.—Straus v. Minneapolis, St. P. & S. S. M. Ry. Co., 173 N.Y.S. 377.

Railroad car and contents thereof
In computing the weight of furniture contained in a railroad car, it was improper, as the basis of a weighmaster's conclusion, as witness, to subtract the tare weight, as taken from stencil marks on the car, from the gross weight, ascertained by weighing car and its contents, there being nothing to show actual tare weight, or how it was ascertained.—Straus v. Minneapolis, St. P. & S. S. M. Ry. Co., supra.

76. Tex.—St. Louis, B. & M. Ry. Co. v. Freasier, Civ.App., 237 S.W. 344.
Stating facts on which opinion based see supra § 486.

Loss of weight in shipped livestock
Tex.—St. Louis, B. & M. Ry. Co. v. Freasier, Civ.App., 237 S.W. 344.

77. Tex.—New York Mut. Life Ins. Co. v. Tillman, 19 S.W. 294, 84 Tex. 31.
22 C.J. p 596 note 85.

78. Ala.—Wood v. Lambert, 92 So. 428, 207 Ala. 260.

79. **Buildings**
Ark.—St. Paul Fire & Marine Ins. Co. v. Green, 29 S.W.2d 304, 181 Ark. 1096.
Kan.—Darling v. Franklin Fire Ins. Co. of Philadelphia, Pa., 253 P. 245, 122 Kan. 620.

Motor vehicles
Ala.—Wood v. Lambert, 92 So. 428, 207 Ala. 260.
Pa.—Struse v. Philadelphia Rapid Transit Co., 87 Pa.Super. 46.

80. Pa.—Jacobs v. Firch Baking Co., 20 Erie Co.L.J. 435.

Carrying power of light
Witness was held qualified to give an opinion as to carrying power of substituted light on locomotive, although he had never ridden in the cab of a locomotive at night and observed how headlight illuminated way ahead, where he had noticed how headlights on passing locomotive illuminated track, and had driven automobiles at night, and observed how lights used on same illuminated road ahead.—Lancaster v. Cox, Tex.Civ.App., 274 S.W. 200.

Blinding effect of lights as affecting visibility at a certain place may be stated by ordinary witness under certain circumstances.—Willis v. City of New Bern, 132 S.E. 286, 191 N.C. 507.

Whether light would shine on object
Where the information as to whether a light from a locomotive operated as a switch engine in a railroad yard at night would shine on a car moving in a certain direction on the same track as that on which the engine was moving is material, a witness, who is familiar with the location of the yard tracks, may testify from his experience whether such would be the case.—Atlantic Coast Line R. Co. v. Shouse, 91 So. 90, 83 Fla. 156.

81. **Condition as regards safety**
It not appearing that witness was builder, contractor, engineer, architect, or otherwise trained to give opinion on question whether floor, unleveled by adjoining landowner's building operations, was safe for dancing or skating, witness was held not competent, unless it was so apparent as to be determined by observation.—Mary Jane Stevens Co. v. First Nat. Bldg. Co., 57 P.2d 1099, 89 Utah 456.

82. **Cotton scales**
In a warehouseman's action for storage charges of cotton, where the correctness of his scales was questioned, such correctness was to be proved by standard of weight, and not by opinion of cotton buyers.—Kitchens v. Mann, 80 So. 173, 16 Ala. App. 599.

of a "line fence".[83]

Ability. Evidence that a person could or could not do any particular act, such as hear something;[84] see,[85] or otherwise perceive,[86] a given object;[87] endure the effects of a given exposure;[88] or estimate accurately the speed at which a train or other object is moving,[89] or within what distance it can be stopped,[90] may be admissible as a statement of inference from observation,[91] provided the fact itself is relevant,[92] the constituent facts cannot adequately be placed before the jury,[93] and the witness had suitable opportunities for observation,[94] and adequate knowledge.[95]

A witness may also state the physical possibility

83. **In devise of property**
Where testatrix devised lot running along street to "line fence," testimony of neighboring farmers regarding their ideas of what was line fence was inadmissible.—Keech v. Delaware County Trust Co., 147 A. 96, 297 Pa. 442.

84. Miss.—Heafner v. Columbus & G. R. Co., 190 So. 1, 185 Miss. 773.
Tex.—Chicago, R. I. & G. Ry. Co. v. Steele, Civ.App., 264 S.W. 503.
22 C.J. p 559 note 19.

Hearing distance
(1) In an action by a fireman against the owner of a motor bus for injuries in a collision between a fire truck on which plaintiff was riding and the bus, permitting a witness of many years' experience in the fire department and familiar with a fire bell which was on the fire truck to testify that the bell could be heard several blocks under any conditions was not error.—Norwood Transp. Co. v. Crossett, 92 So. 461, 207 Ala. 222.

(2) Other cases see Crane v. Michigan Cent. R. Co., 65 N.W. 527, 107 Mich. 511—22 C.J. p 559 note 19 [a].
Estimates as to distance and space see supra § 497.

In position to hear
Where witness who was riding in rear of truck testified that he did not hear motor horn within short time previous to accident, he should have been permitted to answer question whether he was in position so that he could have heard horn if one had been sounded.—Christie v. New England Telephone & Telegraph Co., 177 A. 300, 87 N.H. 236.

Rejection of evidence
(1) In slander action, testimony that slander was spoken in so loud a tone that it could be heard in hotel lobby was properly excluded as mere conclusion.—McKenna v. Mansfield Leland Hotel Co., 9 N.E.2d 166, 55 Ohio App. 163.

(2) In action for death of pedestrian struck by train while walking along track, exclusion of testimony as to engineer's statement that it was impossible for the deceased to have heard the train, owing to other train passing in opposite direction, was held proper.—Wery v. Buffalo, R. & P. Ry. Co., 112 A. 117, 268 Pa. 381.

(3) Other cases see Raymond v. Glover, 55 P. 398, 122 Cal. 471—22 C.J. p 559 note 19 [d], [e].

85. Ala.—Alabama Great Southern R. Co. v. Sanders, 32 So. 17, 203 Ala. 57.
Cal.—Fouch v. Werner, 279 P. 183, 99 Cal.App. 557.
Idaho.—Tendoy v. West, 9 P.2d 1026, 51 Idaho 679.
Ill.—Rost v. F. H. Noble & Co., 147 N.E. 258, 316 Ill. 357, reversing 232 Ill.App. 430.
Iowa.—Dombrenos v. Chicago, R. I. & P. Ry. Co., 174 N.W. 596, reversed on other grounds on rehearing 191 N.W. 158, 194 Iowa 1161.
Md.—McAdoo v. State, 111 A. 476, 136 Md. 452.
Minn.—Olson v. Purity Baking Co., 242 N.W. 283, 185 Minn. 571.
Mo.—Dobson v. St. Louis-San Francisco Ry. Co., 10 S.W.2d 528, 223 Mo.App. 812.
N.C.—Willis v. City of New Bern, 132 S.E. 286, 191 N.C. 507.
Pa.—Rex v. Lehigh Valley Transit Co., 199 A. 324, 330 Pa. 275.
Tenn.—Louisville & N. R. Co. v. Frakes, 11 Tenn.App. 593.
22 C.J. p 559 note 20.

Obstruction of view
(1) A witness may state that a certain object obstructed the view of a person.—Baltimore, C. & A. Ry. Co. v. Turner, 136 A. 609, 152 Md. 216.

(2) Witness may testify that there was nothing to obstruct view from one point to another.—Central of Georgia Ry. Co. v. Burkett, 124 So. 404, 23 Ala.App. 294.

Rejection of evidence
(1) Where nonexpert witnesses do not have sufficient knowledge or opportunity to estimate the ability of a person to see in the situation in question, their testimony has been excluded.
Ala.—Turbeville v. Mobile Light & R. Co., 127 So. 519, 221 Ala. 91.
Ill.—Sutton v. Penn, 238 Ill.App. 182.
Mont.—McIntyre v. Northern Pac. Ry. Co., 180 P. 971, 56 Mont. 43.

(2) Where witness testified that he saw unlighted automobile, exclusion of testimony whether he would have seen car if it had had lights is proper.—Simpson v. Miller, 34 P.2d 528, 97 Mont. 328.

(3) Other cases.
Ala.—Berry v. Dannelly, 145 So. 663, 226 Ala. 151.
Minn.—Newton v. Minneapolis Street Ry. Co., 243 N.W. 684, 186 Minn. 439.
Mo.—Jackson v. City of Malden, App., 72 S.W.2d 850—Martin v. Kansas City, App., 224 S.W. 141.
22 C.J. p 559 note 20 [e].

86. Ky.—King v. Ohio Valley Fire & Marine Ins. Co., 280 S.W. 127, 212 Ky. 770.
22 C.J. p 560 note 21.

Smelling gasoline
Statement that witness could smell gasoline is not objectionable as conclusion of witness.—King v. Ohio Valley Fire & Marine Ins. Co., supra.

87. Md.—McAdoo v. State, 111 A. 476, 136 Md. 452.
22 C.J. p 560 note 22.

88. Ala.—Birmingham Furnace & Mfg. Co. v. Gross, 12 So. 36, 97 Ala. 220.
22 C.J. p 560 note 23.

89. Tex.—Gulf, C. & S. F. R. Co. v. Duvall, 35 S.W. 699, 12 Tex.Civ. App. 348.
22 C.J. p 560 note 24.
Estimates as to speed see supra § 499.

90. Md.—Capital Tract. Co. v. Contner, 87 A. 904, 120 Md. 78.
22 C.J. p 560 note 25 [a].

Rejection of evidence
Witness could not testify to opinion that automobile brakes were not in good condition and estimate distance in which it could have been stopped when running at stated speed, where only predicate was that he pushed brake pedal down after accident.—Great Atlantic & Pacific Tea Co. v. Donaldson, 156 So. 859, 26 Ala.App. 179, certiorari denied 156 So. 865, 229 Ala. 276.

91. Md.—McAdoo v. State, 111 A. 476, 136 Md. 452.
22 C.J. p 560 note 26.

92. Ill.—Chicago, M. & St. P. R. Co. v. O'Sullivan, 32 N.E. 398, 143 Ill. 48.
Mo.—Piper v. Wayne Mfg. Co., App., 253 S.W. 437.

93. Minn.—Olson v. Purity Baking Co., 242 N.W. 283, 185 Minn. 571.
Mo.—Piper v. Wayne Mfg. Co., App., 253 S.W. 437.
22 C.J. p 560 note 28.

94. Md.—McAdoo v. State, 111 A. 476, 136 Md. 452.
22 C.J. p 560 note 29.

95. Md.—McAdoo v. State, supra.
22 C.J. p 560 note 30.

that an object could have produced a given result,[96] or that a man[97] or gang of men,[98] a machine,[99] manufacturing establishment,[1] bridge,[2] ditch,[3] sewer,[4] or sluice,[5] is capable of doing a certain thing or a given amount of work.[6]

The inference must be the result of personal observation,[7] and its weight may be tested on cross-examination.[8]

Area. Superficial area, as the number of acres in a given territory[9] and superficial space in general,[10] may be estimated by one suitably qualified who has observed it, provided the tract is shown to have been correctly identified to the witness.[11]

Cost or expense. A witness qualified by observation may state the cost of doing certain work,[12] reaching given results of a common nature,[13] carrying on a business,[14] or supporting a family,[15] provided sufficient constituent facts are stated[16] and the witness is shown to be capable of drawing a reasonable inference.[17]

A witness will not, however, be permitted to state his estimate of cost as to a matter not in issue;[18] or where his estimate is based on a false standard of measurement;[19] or where he does not detail the facts on which his estimate is based;[20] or where his estimate is too indefinite, uncertain, and remote.[21]

Direction. A witness may state the direction in which motion took place,[22] the directions of footprints,[23] the direction or range of wounds,[24] the point from which a vehicle seemed to come,[25] the starting point of a fire,[26] or the direction in which force was applied[27] or from which a sound proceeded.[28]

Earning capacity. A witness has been permitted to state an estimate as to the earning capacity of

96. U.S.—Hunt v. Stimson, C.C.A. Ky., 23 F.2d 447.
22 C.J. p 560 note 31.

97. Iowa.—Kuen v. Upmier, 67 N.W. 374, 98 Iowa 393.
22 C.J. p 560 note 32.

Witness' ability

Witness' opinion that he could have pushed rail off bridge was admissible, particularly where he has previously testified to condition of such rail struck by automobile.—Seaboard Air Line Ry. Co. v. Young, 148 S.E. 757, 40 Ga.App. 4.

98. Wis.—Allen v. Murray, 57 N.W. 979, 87 Wis. 41.

99. Mich.—McCormick Harvesting Mach. Co. v. Cochran, 81 N.W. 561, 64 Mich. 636.
22 C.J. p 560 note 34.

1. U.S.—Hunt v. Stimson, C.C.A. Ky., 23 F.2d 447.
22 C.J. p 560 note 35.

2. Md.—Hartford County v. Wise, 18 A. 31, 71 Md. 43.

3. Colo.—Denver, T. & Ft. W. R. Co. v. Pulaski Irr. Ditch Co., 35 P. 910, 19 Colo. 367.
22 C.J. p 560 note 37.

4. Ind.—Indianapolis v. Huffer, 30 Ind. 235.

5. Vt.—Brown v. Swanton, 37 A. 280, 69 Vt. 53.

6. U.S.—Hunt v. Stimson, C.C.A.Ky., 23 F.2d 447.
22 C.J. p 560 note 40.

7. Ark.—Kansas City, Ft. S. & M. R. Co. v. Cook, 21 S.W. 1066, 57 Ark. 387.

8. U.S.—Hunt v. Stimson, C.C.A.Ky., 23 F.2d 447.
22 C.J. p 560 note 42.

9. Tex.—Mercedes Produce Co. v. Roddy, Civ.App., 249 S.W. 249.
22 C.J. p 561 note 52.

10. Tex.—International & G. N. R. Co. v. Satterwhite, 47 S.W. 41, 19 Tex.Civ.App. 170.

11. N.Y.—Holcombe v. Munson, 61 N.E. 443, 103 N.Y. 682.

12. Mich.—Holmes v. J. W. Wells Lumber Co., 264 N.W. 329, 331, 274 Mich. 166, quoting **Corpus Juris.**
22 C.J. p 564 note 87.

13. Tex.—Pecos & N. T. R. Co. v. Maxwell, Civ.App., 156 S.W. 548.
22 C.J. p 564 note 88.

14. Mass.—Tucker v. Massachusetts Cent. R. Co., 118 Mass. 546.

15. Ala.—Torry v. Krauss, 43 So. 184, 149 Ala. 200.
Conn.—Cunningham v. Cunningham, 52 A. 318, 75 Conn. 64.

16. Mich.—Holmes v. J. W. Wells Lumber Co., 264 N.W. 329, 274 Mich. 166.
22 C.J. p 564 note 91.

17. Mich.—Holmes v. J. W. Wells Lumber Co., supra.
22 C.J. p 564 note 92.

18. N.Y.—Atlantic Mortg. Corp. v. Kramer Contracting Co., 224 N.Y.S. 453, 221 App.Div. 560.

19. Ky.—Prestonsburg Superior Oil Gas Co. v. Vance, 284 S.W. 405, 215 Ky. 77, 47 A.L.R. 483.

Building destroyed by fire

Testimony as to what house destroyed by fire would cost, based on judge's erroneous statement that measure of damages was reconstruction cost or market value with cost of replacement, and that if market value was equal to replacement cost, that would be same criterion, was incompetent.—Prestonsburg Superior Oil Gas Co. v. Vance, supra.

20. Mo.—Hillin v. Lafayette Land & Farming Co., App., 296 S.W. 243.

Completing contract to clear land

Mo.—Hillin v. Lafayette Land & Farming Co., supra.

Operating expenses of business

Where a party has the burden of proving the operating expenses of a business and is under a duty of keeping an accurate record to show them, he will not be permitted as his own witness to testify merely that they amounted to a certain lump sum.—Craig v. Baggs, 14 S.E.2d 156, 64 Ga.App. 850.

21. Tex.—Gerhart v. Harris County, Civ.App., 244 S.W. 1103, affirmed Harris County v. Gerhart, 283 S.W. 139, 115 Tex. 449.

Crops

Testimony that the cost of raising and harvesting a crop is approximately one third of its market value, constituting the opinion of witnesses based on a series of crops not confined to the crops in question, is too indefinite, uncertain, and remote.—Gerhart v. Harris County, supra.

22. Tex.—International & G. N. R. Co. v. Morin, 116 S.W. 656, 53 Tex. Civ.App. 531.
22 C.J. p 564 note 1.

23. Tex.—Hickey v. State, 102 S.W. 417, 51 Tex.Cr. 230.

24. Ala.—Reid v. State, 61 So. 324, 181 Ala. 14.

25. N.H.—State v. Shinborn, 46 N.H. 497, 88 Am.D. 224.

26. Tex.—Houston & T. C. R. Co. v. Ellis, Civ.App., 134 S.W. 246.
22 C.J. p 564 note 5.

27. Mass.—Commonwealth v. Sturtivant, 117 Mass. 122, 135, 19 Am.R. 401.
22 C.J. p 564 note 6.

28. Mass.—Commonwealth v. Best, 62 N.E. 748, 180 Mass. 492.
22 C.J. p 565 note 7.

another person,[29] and the probable earnings of a certain business project.[30] On the other hand, an estimate of a person's earning capacity based solely on the profit and loss of his business enterprise has been held to be incompetent.[31]

Force. A witness having knowledge of the facts may be permitted to state the strength of a force,[32] and whether a person could continue in a sitting or standing position after the force was applied,[33] or whether force has been applied,[34] and in what order of succession,[35] and its general nature, as that of natural forces or intelligent design.[36]

An unskilled witness cannot, however, state an inference as to how far a moving train under given conditions will knock a man, except by giving the facts on which his conclusion is based.[37] A witness, not shown to be familiar with the condition of a building or an awning attached thereto at the time it pulled out of place and fell, may not state whether it would take a sudden jerk or heavy weight to pull the awning out of place;[38] nor may a non-expert state whether a sudden jolt of a car was sufficient to cause any trouble to a woman in the early stages of pregnancy.[39] An ordinary witness may not state that a violent impact was indicated, where his opinion is based merely on the appearance of an automobile radiator.[40]

Grade. In the absence of accurate measurements, a person of adequate knowledge and judgment may state the grade of a ditch,[41] hill,[42] railroad track,[43] or road or street.[44]

Location. The location of public streets and roads,[45] of the boundary between two counties,[46] of a parcel of land,[47] of a building,[48] trees,[49] or oth-

29. Tex.—Houston, E. & W. T. Ry. Co. v. Sherman, Com.App., 42 S.W.2d 241, reversing Civ.App., 10 S.W.2d 243.
22 C.J. p 566 note 18.

Knowledge of witness

(1) Testimony as to a person's earning capacity based on witness' personal knowledge and examination of checks received by such person, is competent.—Houston E. & W. T. Ry. Co. v. Sherman, supra.

(2) Whether witness' knowledge justifies admitting testimony as to earnings of another in trade or business, is preliminary matter for court. —McCullough v. Holland Furnace Co., 141 A. 631, 293 Pa. 45.

30. Cal.—Metropolitan Water Dist. of Southern California v. Adams, 116 P.2d 7, prior opinion, App., 99 P.2d 659, rehearing denied 100 P.2d 357.

31. Tex.—Merchants Bldg. Corporation v. Adler, Civ.App., 110 S.W.2d 978, error dismissed.

Diminished earning capacity, based on testimony that prior to injury plaintiff's business showed a profit and thereafter a loss, is incompetent in the absence of evidence showing a direct relation between earning capacity and profits.—Merchants Bldg. Corporation v. Adler, supra.

32. Cal.—McComb v. Atchison, T. & S. F. Ry. Co., 294 P. 81, 110 Cal. App. 303, certiorari denied Atchison, T. & S. F. Ry. Co. v. McComb, 51 S.Ct. 486, 283 U.S. 838, 75 L.Ed. 1449.
Kan.—Darling v. Franklin Fire Ins. Co. of Philadelphia, Pa., 253 P. 245, 122 Kan. 620.
22 C.J. p 566 note 19.

Usual water pressure

In action against water company for failing to furnish sufficient water pressure for extinguishing fire, witnesses' testimony regarding usual water pressure is competent.—Kentucky Utilities Co. v. Farmers' Co-op. Stock Yards Co., 54 S.W.2d 364, 246 Ky. 40.

33. Cal.—Healy v. Visalia & T. R. Co., 36 P. 125, 101 Cal. 585.
22 C.J. p 566 note 20.

34. Ark.—Fort v. State, 11 S.W. 959, 52 Ark. 180, 20 Am.S.R. 163.
N.H.—State v. Greenleaf, 54 A. 38, 71 N.H. 606.

35. Ark.—Fort v. State, 11 S.W. 959, 52 Ark. 180, 20 Am.S.R. 163.

36. Iowa.—State v. Rainsbarger, 31 N.W. 865, 71 Iowa 746.

37. Ga.—Georgia Cent. R. Co. v. Bond, 36 S.E. 299, 111 Ga. 13.

38. Ala.—S. H. Kress & Co. v. Barratt, 147 So. 386, 226 Ala. 455.

39. Utah.—Murray v. Salt Lake City R. Co., 52 P. 596, 16 Utah 356.

40. Cal.—Kroll v. Rasin, 278 P. 820, 96 Cal.App. 84.

41. Cal.—Posachane Water Co. v. Standart, 32 P. 532, 97 Cal. 476.

42. Tex.—Galveston, H. & S. A. R. Co. v. Ford, 54 S.W. 37, 22 Tex. Civ.App. 131.

43. Mo.—Gardner v. Metropolitan St. R. Co., 122 S.W. 1068, 223 Mo. 389, 18 Ann.Cas. 1166.
22 C.J. p 566 note 28.

44. Mo.—Burgess v. Garvin, 272 S.W. 108, 219 Mo.App. 162.
Pa.—Downey v. Pennsylvania R. Co., 67 A. 916, 219 Pa. 32.

Sufficiency of knowledge

A witness was properly permitted to state that grade of street on which accident occurred was about three per cent, where he stated that he understood percentage of grade to mean so many feet in one hundred although he had no experience in surveying or engineering.—Burgess v. Garvin, 272 S.W. 108, 219 Mo.App. 162.

Change of grade

Evidence of those who saw work done and estimated extent of change is admissible to prove extent of change of street grade.—Pfeffer v. City of Johnstown, 135 A. 127, 287 Pa. 370.

45. Tex.—International & G. N. R. Co. v. Morin, 116 S.W. 656, 53 Tex. Civ.App. 581.

Location by mere "sighting"

The location of a street cannot be determined by mere "sighting," especially when official plats show it to be otherwise, and in action for injuries to child, on whom a wagon box fell from a leaning position against a building, that the building extended into the street could not be proved by testimony that the building looked like it was a foot and a half on the public highway, the opinion of the witness being based on sighting down the street.—Blakesley v. Standard Oil Co., 187 N.W. 28, 193 Iowa 315.

46. Tex.—Carter v. State, 181 S.W. 473, 78 Tex.Cr. 240.

47. U.S.—Virginia-Carolina Tie & Wood Co. v. Dunbar, C.C.A.N.C., 106 F.2d 383.

Discretion as to preliminary proof

In action for trespass where boundaries set forth in deeds under which defendants were claiming disputed area were read to witness, whether the witness should have been required to locate the measurements and boundaries more specifically before testifying to location of land was a matter resting largely in discretion of trial judge.—Virginia-Carolina Tie & Wood Co. v. Dunbar, supra.

48. **Within city limits**

Ind.—Shea v. Muncie, 46 N.E. 138, 148 Ind. 14.

49. Tex.—Strickland v. State, 161 S.W. 110, 71 Tex.Cr. 582.

er object,[50] or of a sound,[51] may be stated by a witness as a result of his inference. The location of the point at which an event occurred may be stated as a result of inference.[52]

On the other hand, where the location of section lines is in dispute, a nonexpert witness, while competent to testify as to existing and visible lines and monuments, may not testify as to what is the true line.[53] An ordinary witness may not state the relative positions of certain objects in the absence of an opportunity to observe them at the time in question,[54] particularly where the jury have sufficient opportunity to judge such positions from other evidence in the case.[55]

Number. A witness may state his estimate as to number[56] with respect to persons,[57] animals,[58] or other objects[59] observed by him, provided his inference is founded on adequate data,[60] failing in which his statement is not relevant.[61]

Profit and loss. A witness with sufficient knowledge acquired by observation may estimate the profit derived from conducting a certain business,[62] but an estimate of profit or loss for which no basis or definite foundation is given or shown is devoid of probative weight[63] and should not be received.[64] It has also been held proper to exclude a mere calculation based on an examination of documents and evidence,[65] or a statement based on merely a general knowledge of the business.[66]

Profit and loss as sole basis for estimating earning capacity, see supra this section.

Temperature. A witness may be allowed to estimate temperature, either in a general way,[67] or in connection with a given event.[68]

§ 504. Identity and Correspondence

An ordinary witness may under certain circumstances state his inferences as to identity and correspondence.

A witness who is shown to be possessed of adequate knowledge[69] and the capacity to apply

50. Ala.—Atlantic Pacific Stages v. Yandle, 140 So. 603, 224 Ala. 481.
22 C.J. p 566 note 34.

Relative position

Witness could state whether he could tell position of motor vehicle when he discovered its approach, and what part of road it was on.—Atlantic Pacific Stages v. Yandle, supra.

51. **Within house**
Cal.—People v. Chin Hane, 41 P. 697, 108 Cal. 597.

52. Ala.—Alabama Great Southern R. Co. v. Sanders, 82 So. 17, 203 Ala. 57.

Impact

In action against motorist for death of motorcyclist, examination of witness first arriving at place of collision, as to location of impact and impression showing that fact, was not error, where witness had made investigation of facts, observed tracks of automobile and motorcycle, and studied condition of road.—McPherson v. Martin, 174 So. 791, 234 Ala. 244.

53. Ala.—Pounders v. Nix, 130 So. 537, 222 Ala. 27—Deal v. Hubert, 95 So. 349, 209 Ala. 18, followed in Bell v. Hubert, 95 So. 350, 209 Ala. 22.

54. **Objects involved in automobile collision**
Mo.—Ridenhour v. Oklahoma Contracting Co., App., 45 S.W.2d 108.

55. Mo.—Ridenhour v. Oklahoma Contracting Co., supra.

56. N.H.—Eastman v. Amoskeag Mfg. Co., 44 N.H. 143, 82 Am.D. 201.
22 C.J. p 566 notes 36–40.

57. Ind.—Pittsburgh, C., C. & St. L. R. Co. v. Edwards, 129 N.E. 310, 190 Ind. 57.
22 C.J. p 566 note 37.

Men required to perform operation

(1) In an action for injuries sustained by plaintiff while moving a joist, it was not error to ask plaintiff how many men were necessary to move the joist.—Smith v. Greer, 257 S.W. 829, 216 Mo.App. 155, certiorari quashed State ex rel. Greer v. Cox, Sup., 274 S.W. 373.

(2) An estimate by railroad foreman as to the number of men required to operate a derrick in lifting certain objects is competent.—Pittsburgh, C., C. & St. L. R. Co. v. Edwards, 129 N.E. 310, 190 Ind. 57.

58. Mont.—Hill v. Chappel Bros. of Montana, 18 P.2d 1106, 1109, 93 Mont. 92, citing **Corpus Juris.**
22 C.J. p 566 note 38.

59. Ala.—Alabama Power Co. v. Bodine, 105 So. 869, 213 Ala. 627.
22 C.J. p 566 notes 39, 40.

60. Ala.—Alabama Power Co. v. Bodine, supra.
22 C.J. p 566 note 41.

61. Md.—Baltimore Union Pass. R. Co. v. Baltimore, 18 A. 917, 71 Md. 405.
Mich.—People v. Worges, 142 N.W. 1100, 176 Mich. 685.

62. U.S.—Pennsylvania R. Co. v. Cutting, C.C.A.N.Y., 5 F.2d 936.
22 C.J. p 566 note 43.

Dairy farming

U.S.—Pennsylvania R. Co. v. Cutting, supra.

Testimony as to when witness finally determined there was loss in partnership business is properly excluded as immaterial and a conclusion in suit on note given to partner on his withdrawal.—Franceschi v. Nardi, 246 P. 130, 77 Cal.App. 78.

63. N.Y.—Spring v. Markowitz, 90 N.Y.S. 602, 98 App.Div. 324.

64. Pa.—Cox v. Philadelphia City Pottery Co., 38 Pa.Super. 545.
22 C.J. p 567 note 45.

65. Mass.—Carpenter v. Leonard, 3 Allen 32—Rider v. Ocean Ins. Co., 20 Pick. 259.

66. Mass.—Bartlett v. Decreet, 4 Gray 111.

67. Wis.—Leopold v. Van Kirk, 29 Wis. 548.

Form of statement

Where weather conditions are exceptional, the impression of witnesses as to temperature may be given in general terms, but, unless it is shown that resort to thermometers is impracticable, testimony concerning temperature can be expressed only in thermometric degrees as observed by the witness or recorded by signal service officers.—Peterson v. Chicago, M. & St. P. R. Co., 102 N.W. 595, 19 S.D. 122.

68. **Freezing of potatoes**
Wis.—Curtis v. Chicago & N. W. R. Co., 18 Wis. 312.

69. U.S.—Atles v. U. S., C.C.A.N.J., 50 F.2d 808, 78 A.L.R. 435.
Ala.—Miller v. Millstead & Hill, 81 So. 182, 17 Ala.App. 6.
Ark.—Fidelity & Guaranty Fire Corporation v. Goforth, 63 S.W.2d 976, 187 Ark. 1098.
22 C.J. p 597 note 87.

Insufficient knowledge

A nonexpert witness may not testify as to identity where he is without sufficient knowledge.
Ill.—Paden v. Rockford Palace Fur-

it,[70] may state his inference on a question of identity,[71] whether the inquiry relates to identity of human beings,[72] of animals,[73] of inanimate things,[74] or even of occurrences.[75]

A witness may also state an inference as to correspondence of footprints,[76] or may state whether tracks corresponded to certain peculiarities or characteristics of a person's footprints,[77] or to tracks admitted to have been made by him,[78] whether a boot or shoe would make certain tracks,[79] or whether certain tracks correspond with those made or which would be made by a particular automobile,[80] wagon,[81] sleigh,[82] or horse.[83] In like manner a witness may state whether two pieces of wood came from the same stick or block,[84] or whether the holes in a human body corresponded with those in certain garments.[85]

Where the inference of identity is merely an act of the reasoning faculty, divorced from direct observation, it is to be rejected.[86]

Ground of admissibility. The ground of admissibility of evidence of this character lies frequently in the difficulty of stating the facts constituent of the inference,[87] and where the jury are equally capable of reaching a reasonable conclusion by having the same facts before them, and a question may exist as to the truth of the inference, the statement is rejected.[88]

Form of statement. It is not necessary that the testimony of a witness as to identity should be absolutely positive,[89] and where the inference is one from correspondence, a witness is not allowed to state positively that certain marks were made with a particular instrument,[90] or that certain tracks

niture Co., 220 Ill.App. 534, certiorari denied in Rockford Palace Furniture Co. v. Paden, 42 S.Ct. 54, 257 U.S. 645, 66 L.Ed. 413.
Tex.—W. W. Kimball Co. v. Parson, Civ.App., 49 S.W.2d 821.
22 C.J. p 597 note 87 [c], [e].

70. Mich.—Morrissey v. People, 11 Mich. 327.
22 C.J. p 597 note 88.

71. U.S.—Atles v. U. S., C.C.A.N.J., 50 F.2d 808, 78 A.L.R 435.
Ala.—Shows v. Brunson, 159 So. 248, 229 Ala. 682.
Ariz.—Pallas v. Funk, 231 P. 919, 27 Ariz. 170.
Ark.—Fidelity & Guaranty Fire Corporation v. Goforth, 63 S.W.2d 976, 187 Ark. 1098.
Miss.—Hulett v. Hulett, 119 So. 581, 152 Miss. 476.
Pa.—Devlin v. McCauley, 144 A. 828, 295 Pa. 101.
Wash.—State v. Baird, 93 P.2d 409, 412, 200 Wash. 227, citing **Corpus Juris.**
22 C.J. p 597 note 89.
Stating inference as to resemblance see infra §§ 515, 516.

72. Ariz.—Pallas v. Funk, 231 P. 919, 27 Ariz. 170.
Ark.—Fidelity & Guaranty Fire Corporation v. Goforth, 63 S.W.2d 976, 187 Ark. 1098.
Ind.T.—Missouri, K. & T. R. Co. v. Elliott, 51 S.W. 1067, 2 Ind.T. 407.
Miss.—Hulett v. Hulett, 119 So. 581, 152 Miss. 476.
Mo.—Eisenbarger v. Wilhite, App., 238 S.W. 159.
Pa.—Devlin v. McCauley, 144 A. 828, 295 Pa. 101.
Tex.—Walker v. Kellar, Civ.App., 218 S.W. 792.
22 C.J. p 597 note 90.

73. Okl.—Lawton v. Shepard, 130 P. 135, 36 Okl. 772.
22 C.J. p 597 note 91.

74. U.S.—Atles v. U. S., C.C.A.N.J., 50 F.2d 808, 78 A.L.R. 435.
Ala.—Miller v. Millstead & Hill, 81 So. 182, 17 Ala.App. 6.
Pa.—Devlin v. McCauley, 144 A. 828, 295 Pa. 101.
Tex.—Pecos & N. T. Ry. Co. v. Porter, Civ.App., 183 S.W. 98, error refused.
Wash.—State v. Baird, 93 P.2d 409, 412, 200 Wash. 227, citing **Corpus Juris.**
22 C.J. p 597 note 92.

Beverage
U.S.—Atles v. U. S., C.C.A.N.J., 50 F.2d 808, 78 A.L.R. 435—Lewinsohn v. U. S., C.C.A.Ill., 278 F. 421, certiorari denied 42 S.Ct. 463, 258 U.S. 630, 66 L.Ed. 800.

Complaints
S.D.—Pierce v. Lyons, 176 N.W. 521, 42 S.D. 543.

Insurance policies
Tex.—Missouri State Life Ins. Co. v. Woodson, Civ.App., 256 S.W. 988.

Lead dust
Tex.—Travelers Ins. Co. v. Noble, Civ.App., 129 S.W.2d 778, error dismissed, judgment correct.

Motor vehicle
Tex.—Richardson v. Impey, Civ.App., 94 S.W.2d 490, error dismissed.

Note
Ala.—Shows v. Brunson, 159 So. 248, 229 Ala. 682.

75. Iowa.—State v. Maxwell, 1 N. W. 666, 51 Iowa 314.

76. N.C.—State v. Reitz, 83 N.C. 634.
22 C.J. p 597 note 94.

77. Tex.—Thompson v. State, 77 S. W. 449, 45 Tex.Cr. 397.
22 C.J. p 598 note 95.

78. Ga.—Blackman v. State, 7 S.E. 626, 80 Ga. 785.

79. Tex.—Baines v. State, 66 S.W. 847, 43 Tex.Cr. 490.
22 C.J. p 598 note 97.

80. Ark.—Cahill v. Bradford, 287 S. W. 595, 172 Ark. 69.
Ind.—Smith v. Keyes, 9 N.E.2d 119, 103 Ind.App. 487.
Or.—White v. East Side Mill Co., 161 P. 969, 164 P. 736, 84 Or. 224.

81. Kan.—State v. Folwell, 14 Kan. 105.

82. Vt.—State v. Ward, 17 A. 483, 61 Vt. 153.

83. Ala.—Campbell v. State, 23 Ala. 44.
Tex.—Elmore v. State, 162 S.W. 517, 72 Tex.Cr. 226.

84. Mass.—Commonwealth v. Choate, 105 Mass. 451.

85. Pa.—Commonwealth v. Karamarkovic, 67 A. 650, 218 Pa. 405.
Wash.—State v. Cushing, 50 P. 512, 17 Wash. 544.

86. Iowa.—Roziene v. Ball, 1 N.W. 668, 51 Iowa 328.
22 C.J. p 597 note 87 [d].

87. N.D.—Smith v. Northern Pac. R. Co., 58 N.W. 345, 3 N.D. 555.
22 C.J. p 598 note 5.

88. Del.—South Atlantic S. S. Co. of Delaware v. Munkacsy, 187 A. 600, 7 W.W.Harr. 580, certiorari denied 57 S.Ct. 233, 299 U.S. 607, 81 L.Ed. 448.
Iowa.—McKeever v. Batcheler, 257 N.W. 567, 219 Iowa 93.
Pa.—William Schuette & Co. v. Swank, 109 A. 531, 265 Pa. 576.
22 C.J. p 597 note 94 [a], p 598 note 6.

89. Ariz.—Pallas v. Funk, 231 P. 919, 27 Ariz. 170.
Miss.—Hulett v. Hulett, 119 So. 581, 152 Miss. 476.
Tex.—Thetford v. Modern Woodmen of America, Civ.App., 273 S.W. 666.
22 C.J. p 598 note 7.

90. Mass.—Commonwealth v. Webster, 5 Cush. 295, 52 Am.D. 711.

were or were not made by a particular horse.[91] Evidence of the witness' "thought" or "impression" has been rejected,[92] and courts have also refused to receive statements that a witness was "satisfied" as to identity,[93] or that an individual "tallied" with a description.[94]

Statement of facts by witness. The witness should state the facts on which his inference is based, so far as this is possible,[95] as, for instance, a distinctive motion,[96] odor,[97] sound,[98] voice,[99] or walk.[1] The fact that the data for the inference are meager affects only the weight of the evidence,[2] but an inference based on clearly insufficient facts[3] or on no facts at all[4] will be rejected. Evidence may be received to show that the data relied on are valueless for purposes of identification.[5]

§ 505. Mental Condition

Whether an ordinary witness may properly be permitted to testify as to mental condition is considered infra §§ 506, 507, as the question may involve the mental condition of the witness or of a third person.

§ 506. —— Of Witness

A witness may not testify to his own unsoundness of mind.

A witness cannot be permitted to testify to his own mental soundness or unsoundness.[6] However, a witness may testify as to when he regained control of his faculties,[7] and he may state that his memory is affected,[8] and that, since an injury, his mind is so confused that he is unable to instruct children and teach school, as he had been able to dc before the injury.[9]

§ 507. —— Of Other Persons

a. In general
b. Change in condition
c. Irrationality or peculiarity or absence thereof
d. Sanity or soundness of mind
e. Mental capacity or competency
f. Opinions of attesting or subscribing witnesses

a. In General

Under certain conditions an ordinary or nonexpert witness may state his opinion as to the mental condition of another person.

Although there is some contrary authority,[10] as a general rule an ordinary or nonexpert witness who, through acquaintance or association,[11] has had reasonably adequate opportunity to observe another person[12] and to form a conclusion or opinion as to the mental condition of such person,[13] and

91. Tex.—Hester v. State, Cr., 51 S. W. 932.
22 C.J. p 598 note 9.

92. N.Y.—People v. Williams, 1 N. Y.Cr. 336.

93. U.S.—Templeton v. Luckett, Tex., 75 F. 254, 21 C.C.A. 325.

94. Ala.—Chilton v. State, 16 So. 797, 105 Ala. 98.

95. U.S.—Templeton v. Luckett, Tex., 75 F. 254, 21 C.C.A. 325.
22 C.J. p 598 note 14.

96. Mo.—State v. Hopkirk, 84 Mo. 278.

97. Ala.—Walker v. State, 58 Ala. 393.

98. Iowa.—State v. Rainsbarger, 37 N.W. 153, 74 Iowa 196.
22 C.J. p 598 note 17.

99. N.Y.—Wilbur v. Hubbard, 35 Barb. 303.
22 C.J. p 598 note 18.

1. Ala.—Beale v. Posey, 72 Ala. 323.

2. Ala.—Shows v. Brunson, 159 So. 248, 229 Ala. 682.
Tex.—Osgood v. State, Cr., 49 S.W. 94.
Weight of opinion evidence see infra §§ 567–572.

3. Tex.—Grant v. State, 58 S.W. 1025, 42 Tex.Cr. 275.

4. Pa.—Commonwealth v. Farrell, 41 A. 382, 187 Pa. 408.

5. Ala.—Buchanan v. State, 19 So. 410, 109 Ala. 7.
22 C.J. p 599 note 23.

6. N.Y.—O'Connell v. Beecher, 47 N. Y.S. 334, 21 App.Div. 298.

7. Ala.—Alabama Power Co. v. Shaw, 111 So. 17, 215 Ala. 436.
As evidence of unsoundness of mind
The testimony of a witness as to when he regained control of his faculties is not evidence of his own unsoundness of mind, but is rather evidence of a fact, and is in the same class with testimony of a witness who was rendered unconscious by a blow as to when he first regained consciousness.—Alabama Power Co. v. Shaw, supra.

8. Ala.—Whiddon v. Malone, 124 So. 516, 220 Ala. 220.

9. Tex.—Panhandle & S. F. R. Co. v. Haywood, Civ.App., 227 S.W. 347, error refused.

10. Me.—Appeal of Martin, 179 A. 655, 133 Me. 422—Plummer v. Metropolitan Life Ins. Co., 169 A. 302, 132 Me. 220.

11. U.S.—Equitable Life Assur. Soc. of U. S. v. Bomar, C.C.A.Ky., 106 F.2d 640.
Ala.—Chandler v. Chandler, 85 So. 558, 204 Ala. 164.
Kan.—Cunningham v. Cunningham, 191 P. 294, 107 Kan. 318.
Tex.—King v. King, Civ.App., 91 S.W.2d 511, error dismissed—Applegate v. McFadin, Civ.App., 20 S.W.2d 396.
Wash.—Moffitt v. Goldcamp, 79 P.2d 695, 195 Wash. 75.
22 C.J. p 603 note 88 [c] (2), (3).
Extended and intimate acquaintance
Neb.—In re Steininger's Estate, 297 N.W. 159—Bankers Life Ins. Co. v. Aron, 273 N.W. 280, 133 Neb. 187—Davidson v. First American Ins. Co., 281 N.W. 144, 129 Neb. 184—Kehl v. Omaha Nat. Bank, 254 N. W. 397, 126 Neb. 695.
Intimate acquaintance
Mont.—In re Bright's Estate, 300 P. 329, 89 Mont. 394.
Neighbors and friends
Mont.—Iler v. Farmers Mut. Fire Ins. Co., 67 P.2d 831, 104 Mont. 471, 110 A.L.R. 1051.

12. Mich.—Henderson v. Henderson, 172 N.W. 623, 206 Mich. 36.
N.C.—Mangum v. Brown, 156 S.E. 535, 200 N.C. 296—In re Craig's Will, 135 S.E. 798, 192 N.C. 656—Graham v. Sandhill Power Co., 127 S.E. 429, 189 N.C. 381—Hyatt v. Hyatt, 120 S.E. 830, 187 N.C. 113.
Va.—McComb v. Farrow, 104 S.E. 812, 128 Va. 455.

13. N.C.—Harris v. Aycock, 181 S.E. 554, 208 N.C. 523—Hyatt v. Hyatt, 120 S.E. 830, 187 N.C. 113.

who states, as far as possible, the facts within his knowledge on which his opinion is founded,[14] may, on the basis of such facts and his knowledge and observation thereof,[15] state his opinion as to the mental condition of such person.[16]

Accordingly witnesses have been allowed to state whether a person observed was, at a time sufficiently near to be relevant,[17] absent minded;[18] lacking in,[19] or without,[20] memory; feeble-minded;[21] weak;[22] weak-minded;[23] fickle;[24] uncertain;[25] simple;[26] stupid;[27] a mental wreck;[28] an idiot;[29] judicious;[30] normal;[31] or of average intelligence.[32] A witness may also state that a given condition of mind on one occasion resembled that observed on another.[33] A statement of a witness that after the completion of a conversation with a person the person did not understand what he himself had said is a statement of fact as to his mental condition.[34]

Lay witnesses have been permitted to testify that a certain person appeared to be keen mentally[35]

Wash.—Moffitt v. Goldcamp, 79 P.2d 695, 195 Wash. 75.

14. Ark.—Missouri State Life Ins. Co. v. Case, 71 S.W.2d 199, 189 Ark. 223.
Ind.—New York Cent. R. Co. v. De Leury, 192 N.E. 125, 100 Ind.App. 140.
Mo.—Baker v. Mardis, 1 S.W.2d 223, 221 Mo.App. 1185.
Neb.—In re Steininger's Estate, 297 N.W. 159.
Tex.—Hale v. Herring, Civ.App., 102 S.W.2d 468—King v. King, Civ. App., 91 S.W.2d 511, error dismissed—Galveston, H. & S. A. Ry. Co. v. Ford, Civ.App., 275 S.W. 463.
Va.—McComb v. Farrow, 104 S.E. 812, 128 Va. 455.

Permission to state facts
(1) The witness should be permitted to state the facts which he has observed and on which he bases his opinion.
Mo.—Parks v. Marshall, 14 S.W.2d 590, 322 Mo. 218, 62 A.L.R. 835.
Ohio.—Fox v. Lynch, 183 N.E. 177, 43 Ohio App. 305.

(2) However, the refusal to permit witness who had been called to give his opinion as to insured's mental condition to detail a conversation with the insured as the basis for such opinion was held proper, where witness showed sufficient acquaintance from association with deceased to form a correct opinion without detailing facts on which opinion was based, and the conversation related to delicate family affairs.—National Life Ins. Co. of Montpelier, Vermont, v. Watson, 239 S.W. 35, 194 Ky. 355.

15. Ga.—Smith v. Tindol, 177 S.E. 588, 179 Ga. 801—May v. May, 165 S.E. 617, 175 Ga. 693.
Iowa.—In re Cooper's Estate, 206 N.W. 95, 200 Iowa 1180—In re Goldthorp's Estate, 62 N.W. 845, 94 Iowa 336, 58 Am.S.R. 400.
Ky.—Sovereign Camp, W. O. W., v. Havas, 290 S.W. 690, 217 Ky. 846.
Md.—Livingston v. Safe Deposit & Trust Co. of Baltimore, 146 A. 432, 157 Md. 492.
Mo.—Parks v. Marshall, 14 S.W.2d 590, 322 Mo. 218, 62 A.L.R. 835.
Tex.—Wigley v. Buzzard, Civ.App., 124 S.W.2d 898, error dismissed, judgment correct.
Utah.—In re Hanson's Estate, 52 P. 2d 1103, 87 Utah 580.
Wash.—Moffitt v. Goldcamp, 79 P.2d 695, 195 Wash. 75.

16. Ark.—Missouri State Life Ins. Co. v. Case, 71 S.W.2d 199, 189 Ark. 223.
Idaho.—Herring v. Davis, 273 P. 757, 47 Idaho 211.
Ill.—Craig v. Southard, 35 N.E. 361, 148 Ill. 37.
Ind.—Rice v. Rice, 175 N.E. 540, 92 Ind.App. 640.
Ky.—Anderson v. Standard Acc. Ins. Co., 266 S.W. 237, 205 Ky. 587—Fidelity Mut. Life Ins. Co. v. Cochran, 219 S.W. 172, 187 Ky. 430.
Mo.—Carl v. Ellis, App., 110 S.W. 2d 805—Baker v. Mardis, 1 S.W.2d 223, 221 Mo.App. 1185—Osborne v. Wells, App., 211 S.W. 887.
Mont.—In re Bright's Estate, 300 P. 229, 89 Mont. 394.
R.I.—Hollingworth v. Kresge, 137 A. 908, 48 R.I. 341.
S.C.—Whetstone v. Dreher, 136 S.E. 209, 138 S.C. 169.
Tex.—Cardinal v. Cardinal, Civ.App., 131 S.W.2d 1005, error dismissed.
Va.—McComb v. Farrow, 104 S.E. 812, 128 Va. 455.
W.Va.—Kerr v. Lunsford, 8 S.E. 493, 31 W.Va. 659, 2 L.R.A. 668.
22 C.J. p 599 notes 41, 42.
Opinion of decedent's mental condition by witness incompetent to testify as to transactions see the C.J.S. title Witnesses § 220, also 70 C.J. p 319 note 71 et seq.

Reason for rule
It usually is impossible, as a practical matter, to present to the jury a detailed statement of the constituent facts or matters of appearance on which the inference is based, with such degree of completeness or accuracy as to enable them to draw a proper inference.—De Witt v. Barly, 17 N.Y. 340—22 C.J. p 509 note 42, p 510 note 43.

17. Utah.—In re Hanson's Estate, 52 P.2d 1103, 87 Utah 580.
22 C.J. p 600 note 44.

18. Iowa.—State v. Wright, 84 N.W. 541, 112 Iowa 436.

19. Mass.—McCoy v. Jordan, 69 N.E. 358, 184 Mass. 575.

20. Tex.—Johnson v. State, 62 S.W. 756, 42 Tex.Cr. 618.

21. Iowa.—In re Fenton's Will, 66 N.W. 99, 97 Iowa 192.

22. Cal.—People v. Worthington, 38 P. 689, 105 Cal. 166.

23. Iowa.—In re Goldthorp's Estate, 62 N.W. 845, 94 Iowa 336, 58 Am. S.R. 400.
Tex.—Buchanan v. Davis, Com.App., 12 S.W.2d 978, affirming, Civ.App., 300 S.W. 985, and rehearing denied, Com.App., 15 S.W.2d 562.
22 C.J. p 601 note 61.

24. Ind.—Mills v. Winter, 94 Ind. 329.
22 C.J. p 600 note 50.

25. N.M.—Territory v. Padilla, 46 P. 346, 8 N.M. 510.

26. Tex.—Johnson v. State, 62 S.W. 756, 42 Tex.Cr. 618.

27. N.M.—Territory v. Padilla, 46 P. 346, 8 N.M. 510.

28. Tex.—Galveston, H. & S. A. Ry. Co. v. Ford, Civ.App., 275 S.W. 463.

29. Ark.—Missouri State Life Ins. Co. v. Case, 71 S.W.2d 199, 189 Ark. 223.

That a person "acted foolish" has been rejected.—Wallace v. Whitman, 66 N.E. 311, 201 Ill. 59.

30. Tex.—St. Louis & S. W. R. Co. v. Shiflet, Civ.App., 56 S.W. 697—Carr v. State, 7 S.W. 328, 24 Tex. App. 562, 5 Am.S.R. 905.

31. Iowa.—Lucas v. McDonald, 102 N.W. 532, 126 Iowa 678.
N.C.—White v. Hines, 109 S.E. 31, 182 N.C. 275.
Tex.—Applegate v. McFadin, Civ. App., 20 S.W.2d 396.

32. Mass.—Hewitt v. Taunton St. R. Co., 46 N.E. 106, 167 Mass. 483.

33. Ala.—Houston v. Grigsby, 116 So. 686, 217 Ala. 506.
Tex.—Stallings v. State, Cr., 63 S.W. 127.

34. Ala.—Hale v. Cox, 163 So. 335, 231 Ala. 22.

35. Cal.—Carleton v. Bonham, 214 P. 503, 60 Cal.App. 725.

or was bright and quick;[36] but they have been refused permission to testify that a person was as bright as the common run of men[37] or to express their opinions as to the comparative shrewdness and business acumen of two persons.[38] A witness may describe another person as very sensible;[39] but the conclusion of a nonexpert witness as to whether a certain boy had, at a particular time, more or less common sense than other boys of the same age usually have is not competent on the question of lack of mental development.[40]

Person childish. According to some authorities a witness may describe another person or his acts as childish,[41] but according to other authorities such testimony is a mere conclusion to be drawn only by the jury from the facts adduced.[42]

Person easily impressed or influenced. It has been held that a witness may state whether another person was easily impressed or influenced,[43] although there is authority to the contrary.[44]

Requisites to admissibility. A witness giving his opinion as to the mental condition of another person must, as far as possible, state the facts on which his opinion is based;[45] and his opinion must be connected with, based on, and supported by,[46] or at least it must be reasonably supported by,[47] and not be inconsistent with,[48] the facts observed by him and testified to by him as fully as possible.

The testimony must be based on the witness' own knowledge or observation and not on what he has learned from others;[49] and the witness must be shown to be qualified to express an opinion[50] by reason of having had, through acquaintance sufficiently long and intimate, and intercourse sufficiently frequent for the purpose,[51] adequate opportunity for observation and the formation of a correct judgment as to mental condition.[52] However, the view has been taken that insufficiency of the opportunity for observation is an objection going to the weight, rather than to the admissibility, of the opinion.[53]

The opinion of a lay witness as to the mental condition of a testator must be limited to mental

36. Ala.—Martin v. State, 8 So. 858, 90 Ala. 602, 24 Am.S.R. 844.
Mass.—Laplante v. Warren Cotton Mills, 43 N.E. 294, 165 Mass. 487.

37. Ill.—Bundy v. West, 130 N.E. 709, 297 Ill. 238.

38. Tex.—Belt v. McGehee, Civ.App., 9 S.W.2d 407.

39. Vt.—In re Smith, 92 A. 223, 88 Vt. 259.

40. Del.—Braderman v. Baltimore & P. R. Co., 134 A. 56, 3 W.W.Harr. 206.

41. Iowa.—In re Cooper's Estate, 206 N.W. 95, 200 Iowa 1180—Parsons v. Parsons, 21 N.W. 570, 66 Iowa 754, affirmed 24 N.W. 564, 66 Iowa 754.
22 C.J. p 600 note 47.

42. Ky.—Irvine v. Greenway, 295 S. W. 445, 220 Ky. 388.

43. Ala.—Moore v. Spier, 80 Ala. 129.
Ind.—Griffith v. Thrall, App., 29 N.E. 2d 345.
22 C.J. p 600 notes 48, 49, p 602 note 84 [b].

44. Ill.—Michael v. Marshall, 66 N. E. 273, 201 Ill. 70.
22 C.J. p 600 note 49 [a].

45. Ga.—McWilliam v. Pattillo, 161 S.E. 597, 173 Ga. 771.
Mo.—Carl v. Ellis, App., 110 S.W.2d 805—Bear v. Sovereign Camp, W. O. W., 230 S.W. 369, 207 Mo.App. 82.
Neb.—In re Steininger's Estate, 297 N.W. 159.
Ohio.—Rhoads v. Rhoads, 163 N.E. 724, 29 Ohio App. 449.
Pa.—Commonwealth v. Rouchie, 7 A. 2d 102, 103, 135 Pa.Super. 594, citing **Corpus Juris.**
Utah.—In re Hanson's Estate, 52 P. 2d 1103, 87 Utah 580.
22 C.J. p 602 note 84.

Facts showing knowledge

Unless the witness details conversations with testator, incidents, facts, and circumstances sufficient to impress the mind of a man of common experience that the witness has a knowledge of testator's mental condition, and that his opinion is not a guess, supposition, or speculation, the court should not admit his opinion on that point.—Baddeley v. Watkins, 127 N.E. 725, 293 Ill. 394.

46. Ark.—Seeman v. Hilderbrand, 113 S.W.2d 724, 195 Ark. 677—Puryear v. Puryear, 94 S.W.2d 695, 192 Ark. 692.
Ohio.—Rhoads v. Rhoads, 163 N.E. 724, 29 Ohio App. 449.
Vt.—In re Wood's Will, 115 A. 231, 95 Vt. 407.
22 C.J. p 603 note 85.

Alternative requirement

Nonexpert witnesses can give their opinions as to ward's mental condition only as supplemental to stating facts or instances indicating some basis for conclusions expressed, or by giving testimony showing such intimate and close relations between witness and ward as to fairly warrant conclusion that opinion of witness is justified by witness' opportunities for observation.—Henderson v. Henderson, 172 N.W. 623, 206 Mich. 36.

Improper questions

(1) A question calling for the opinion of a witness as to the mental condition of a person, which goes beyond the facts testified to by the witness, and predicates his opinion on other matters, is improper.—Loveman v. Birmingham R., Light & Power Co., 43 So. 411, 149 Ala. 515.

(2) The question should not call for an independent answer; and, where it does not clearly make the opinion asked for depend on the facts shown as a basis therefor the uncertainty should operate against the questioner rather than the other party.—Goldthrop v. Goldthrop, 77 N. W. 471, 106 Iowa 722.

47. Pa.—Commonwealth v. Rouchie, 7 A.2d 102, 107, 135 Pa.Super. 594, quoting **Corpus Juris.**
22 C.J. p 603 note 86.

48. Mich.—Blackman v. Andrews, 114 N.W. 218, 150 Mich. 322.
Pa.—Commonwealth v. Rouchie, 7 A. 2d 102, 107, 135 Pa.Super. 594, quoting **Corpus Juris.**

49. Iowa.—Denning v. Butcher, 59 N.W. 69, 91 Iowa 425.
22 C.J. p 603 note 88.

50. Mo.—Kuehn v. Ritter, 233 S.W. 5.

51. Ala.—Moore v. Spier, 80 Ala. 129.
Ill.—Baddeley v. Watkins, 127 N.E. 725, 293 Ill. 394.
22 C.J. p 603 note 88 [d].

Personal acquaintanceship is necessary.—In re Hanson's Estate, 52 P. 2d 1103, 87 Utah 580.

52. Mich.—Buys v. Buys, 58 N.W. 331, 99 Mich. 354.
22 C.J. p 603 note 88 [a].

53. Conn.—Jackson v. Waller, 10 A. 2d 763, 126 Conn. 294.

condition at a time when the testator was under observation by the witness,[54] and the observation must not have been too remote from the time of the execution of the will.[55]

Inference of technical nature. An opinion or inference of a technical nature, such as a diagnosis of a mental condition,[56] the effect, if any, of an illness on the mind,[57] or whether the controlling impulse of certain conduct was a delusion, or irresistible,[58] should not be asked of, or given by, a nonexpert witness.

b. Change in Condition

A witness may state a change, or the absence of change, in mental condition.

A witness may state a change in mental condition,[59] whether such change is for the better[60] or for the worse,[61] or the witness may state that there has been no change in mental condition.[62]

The witness, wherever possible, should state the grounds of his inference,[63] although it has been considered that a statement of facts is not indispensable.[64] The evidence must be given by witnesses in the usual way; letters indicative of such opinion are not in themselves competent.[65]

c. Irrationality or Peculiarity or Absence Thereof

A witness may state his impression of the conduct, appearance, or manner of speech of another person as being rational or irrational or peculiar or not peculiar.

A witness who has observed another person or has heard him speak may state his impression as to such other person's acts, conduct, appearance, declarations, or manner of speech, being rational or irrational[66] or, except in some jurisdictions,[67] as being, on the one hand, peculiar, eccentric, unnatural, or incoherent, or, on the other hand, natural or not peculiar or out of the ordinary.[68] The rule permitting a witness to testify whether a person appeared rational or irrational or peculiar or natural obtains even in states, see subdivision d (2) of this section, where a nonexpert witness is not allowed to state directly and expressly an opinion or inference that another person is sane or insane;[69] and a statute requiring a lay witness on the question of sanity to be an intimate acquaintance, see subdivision d (1) (b) bb of this section, does not prevent any observer from testifying whether a person's appearance at a particular time was rational or irrational,[70] or whether at a particular time he noticed anything strange or peculiar in a given person.[71]

It is not permissible for a witness to state that two

54. Ill.—Baddeley v. Watkins, 127 N.E. 725, 293 Ill. 394—Strick v. Kiss, 26 Ohio Cir.Ct.,N.S., 456.
Vt.—In re Waterman's Will, 150 A. 65, 102 Vt. 443.

55. Utah.—In re Hanson's Estate, 52 P.2d 1103, 87 Utah 580.

Proximity to time of execution
The time within which the observation must have been made varies; a longer time is allowable in the case of inherent weakness or disturbance of a permanent nature than in the case of a condition of a temporary nature.—In re Hanson's Estate, supra.

56. Ky.—McDonald's Ex'r v. Transylvania University, Lexington, 118 S.W.2d 171, 274 Ky. 168.

57. Ga.—McWilliam v. Pattillo, 161 S.E. 597, 173 Ga. 771.

58. Ga.—Patterson v. State, 12 S.E. 174, 86 Ga. 70.

59. Ala.—Watson v. Anderson, 11 Ala. 43.
Iowa.—Severin v. Zack, 7 N.W. 404, 55 Iowa 28.
22 C.J. p 604 note 94.

60. Ind.—Swygart v. Willard, 76 N.E. 755, 166 Ind. 25.
22 C.J. p 604 note 95.

61. Ala.—Koppers Co. v. Jernigan, 89 So. 706, 206 Ala. 159.
Ga.—Rice v. Rice, 161 S.E. 594, 173 Ga. 804.
Tex.—Bell v. Blackwell, Civ.App., 273 S.W. 866, 870, citing **Corpus Juris**, and reversed on other grounds, Com.App., 283 S.W. 765.
22 C.J. p 604 note 96.

62. Iowa.—Hertrich v. Hertrich, 87 N.W. 689, 114 Iowa 643, 89 Am.S.R. 389—Severin v. Zack, 7 N.W. 404, 55 Iowa 28.
Tex.—Bell v. Blackwell, Civ.App., 273 S.W. 866, 870, citing **Corpus Juris**, and reversed on other grounds, Com.App., 283 S.W. 765.

63. Mass.—Barker v. Comins, 110 Mass. 477.

64. Iowa.—Manatt v. Scott, 76 N.W. 717, 106 Iowa 203, 68 Am.S.R. 293.

65. Mass.—Commonwealth v. Brayman, 136 Mass. 438.

66. Ala.—Watson v. Anderson, 11 Ala. 43.
Ill.—Petefish v. Becker, 52 N.E. 71, 176 Ill. 448.
Mich.—Henderson v. Henderson, 172 N.W. 623, 206 Mich. 36.
N.Y.—Weinberg v. Weinberg, 8 N.Y.S.2d 341, 255 App.Div. 366—Higbee v. Guardian Mut. Life Ins. Co., 66 Barb. 462, affirmed 53 N.Y. 603.
22 C.J. p 601 note 55.

67. Md.—Daugherty v. Robinson, 122 A. 124, 143 Md. 259.

68. Ga.—Jenkins v. Lane, 115 S.E. 126, 154 Ga. 454—Shinholser v. Henry, 106 S.E. 719, 151 Ga. 237—Mutual Life Ins. Co. of New York v. Burson, 179 S.E. 390, 50 Ga.App. 859.
Ind.—Gwinn v. Hobbs, 141 N.E. 812, 83 Ind.App. 263, dissenting opinion 144 N.E. 648, 83 Ind.App. 263.
Mich.—Henderson v. Henderson, 172 N.W. 623, 206 Mich. 36.
Tex.—Bell v. Blackwell, Civ.App., 273 S.W. 866, reversed on other grounds, Com.App., 283 S.W. 765.
Vt.—In re Esterbrook, 75 A. 1, 83 Vt. 229.

Responsiveness of answers
A witness who testified to having been acquainted with decedent for many years, and that decedent had spent much time at his, the witness', banking house, and used to visit on the lawn until thirty or forty days before his death, was qualified to express an opinion as a nonexpert as to whether testator's statements and answers were responsive and in conformity with the matter witness was discussing.—In re Richardson's Will, 180 N.W. 639, 190 Iowa 586.

69. N.Y.—Weinberg v. Weinberg, 8 N.Y.S.2d 341, 255 App.Div. 366.
22 C.J. p 610 note 62.

70. Cal.—Holland v. Zollner, 36 P. 930, 37 P. 231, 102 Cal. 633.

71. Cal.—People v. Arrighini, 54 P. 591, 122 Cal. 121.

persons had a similar peculiarity.[72]

d. Sanity or Soundness of Mind

(1) Majority rule
(2) Minority rule

(1) Majority Rule
(a) In general
(b) Predicate for admission

(a) In General

As a general rule, the opinion of a nonexpert witness as to sanity or soundness of mind may, under certain conditions and when relevant, be received, but the opinion must not extend to matters requiring expert knowledge.

While there has been some contrary authority, see subdivision d (2) of this section, as a general rule the opinion of a lay or nonexpert witness, based on knowledge or observation of, or experience with, another person,[73] as to his sanity or insanity[74] or soundness or unsoundness of mind,[75] may be received where the case is a proper one for the reception of such evidence.[76]

Reasons for the general rule are found in the considerations that the facts showing insanity, in their entirety, frequently elude accurate, complete, and detailed statement[77] and consequently render it difficult to afford a satisfactory basis for the judgment of an expert;[78] that many witnesses can make a correct inference more readily than they can make a detailed statement;[79] that, as commonly presented to observation, insanity is readily detected, if carried beyond a certain point;[80] that an unskilled observer may be quite as able as an expert to make a clear mental comparison between the acts and conduct of a sane person and those of one who is laboring under mental disability;[81] and that to reject the inference of an observer with suitable opportunities and faculty for observation is to refuse to consider evidence which is frequently of the highest possible value.[82]

Conclusion requiring expert knowledge. A conclusion requiring expert knowledge of the subject of insanity may not be given by a nonexpert witness.[83]

Form of statement. The witness may state whether he observed anything indicating insanity.[84] Further, he may state that a person whose sanity is involved was "crazy;"[85] but it is not proper to ask a witness to state his opinion as to whether a testator was "rightminded."[86] Particular testimony may be such that it does not contain any expression of opinion as to sanity or insanity.[87]

72. Iowa.—State v. Winter, 34 N.W. 475, 72 Iowa 627.
22 C.J. p 604 note 92.

73. Ala.—National Life & Accident Ins. Co. v. Hannon, 118 So. 170, 22 Ala.App. 483, certiorari denied 118 So. 172, 218 Ala. 174.
N.C.—In re Brown's Will, 166 S.E. 72, 203 N.C. 347—Moore v. Jefferson Standard Life Ins. Co., 135 S.E. 456, 192 N.C. 580.
Tex.—Wigley v. Buzzard, Civ.App., 124 S.W.2d 898, error dismissed, judgment correct—Smith v. Thornhill, Civ.App., 12 S.W.2d 625, affirmed, Com.App., 25 S.W.2d 597, reversed on other grounds 34 S.W.2d 803—Adams v. Adams, Civ.App., 253 S.W. 605, error dismissed 278 S.W. 1114, 114 Tex. 582.
Vt.—In re Moxley's Will, 152 A. 713, 103 Vt. 100.

74. Ala.—Fountain v. Brown, 38 Ala. 72.
Idaho.—McGrath v. West End Orchard & Land Co., 251 P. 623, 43 Idaho 255.
Ky.—Fidelity Mut. Life Ins. Co. v. Cochran, 219 S.W. 172, 187 Ky. 430.
Pa.—William Schuette & Co. v. Swank, 109 A. 531, 265 Pa. 576.
Tex.—Cardinal v. Cardinal, Civ.App., 131 S.W.2d 1005, error dismissed—Adams v. Adams, Civ.App., 253 S.W. 605, error dismissed 278 S.W. 1114, 114 Tex. 582.
Wash.—Cameron v. Benefit Ass'n of Railway Employees, 107 P.2d 1096.
22 C.J. p 604 notes 2, 3.

When commitment is not at issue, laymen may testify to sanity or insanity.—U. S. v. Witbeck, 113 F.2d 185, 72 App.D.C. 231.

75. U.S.—In re Cottrill's Estate, D.C., 39 F.Supp. 689.
Ga.—Mosley v. Fears, 68 S.E. 804, 135 Ga. 71.
Ind.—Kenworthy v. Williams, 5 Ind. 375.
Ky.—Fidelity Mut. Life Ins. Co. v. Cochran, 219 S.W. 172, 187 Ky. 430.
Mo.—Mayes v. Mayes, 235 S.W. 100.

Reasonable construction of restrictive rule

Rule that restricts testimony of nonexpert witnesses on issue whether person is mentally unsound will not be construed so strictly as to make it appear wholly unreasonable.—Wigley v. Buzzard, Tex.Civ.App., 124 S.W.2d 898, error dismissed, judgment correct.

76. Ind.—Silver v. Newcomer, 140 N.E. 455, 80 Ind.App. 406.

77. Ga.—Choice v. State, 31 Ga. 424.
22 C.J. p 605 note 7.

78. Ohio.—Clark v. State, 12 Ohio 483, 40 Am.D. 481.
22 C.J. p 606 note 8.

79. Me.—Fayette v. Chesterville, 77 Me. 28, 52 Am.R. 741.
22 C.J. p 606 note 9.

80. Ohio.—Clark v. State, 12 Ohio 483, 40 Am.D. 481.
22 C.J. p 606 note 10.

81. D.C.—U. S. v. Witbeck, 113 F.2d 185, 72 App.D.C. 231.
22 C.J. p 606 note 11.

82. Ohio.—Clark v. State, 12 Ohio 483, 40 Am.D. 481.
22 C.J. p 606 note 12.

83. Ala.—Torrey v. Burney, 21 So. 348, 113 Ala. 496.

Senile dementia

Although a nonexpert can give an opinion as to the sanity of testator, based on his experience with and knowledge of him, he cannot express an opinion that deceased was suffering from senile dementia if he was not an expert on mental diseases.—Adams v. Adams, Civ.App., 253 S.W. 605, error dismissed 278 S.W. 1114, 114 Tex. 582.

84. Mo.—Buchholz v. Cunningham, 100 S.W.2d 446, 340 Mo. 302.
22 C.J. p 606 note 15.

85. N.C.—White v. Hines, 109 S.E. 31, 182 N.C. 275.

86. Ohio.—Baillie v. Heimsath, 151 N.E. 788, 20 Ohio App. 216.

Usual question is whether, in the opinion of the witness, the testator was a person of sound mind.—Baillie v. Heimsath, supra.

87. **Statement as to childishness**

Witness' statement that she thought testator was fulfillment of

Relevancy. The condition of mind sought to be proved must be relevant,[88] and the inference must relate to the time at which it is relevant.[89]

(b) Predicate for Admission
aa. In general
bb. Observation and opportunity therefor
cc. Discretion of court as to sufficiency

aa. In General

To justify the receipt of an opinion of a nonexpert witness as to sanity or soundness of mind, a proper foundation must be laid by showing, among other things, that the witness is qualified to express an opinion and generally by stating the facts and circumstances on which the opinion is based.

To warrant the reception of an opinion of a lay or nonexpert witness as to sanity or insanity, or soundness or unsoundness of mind, it is necessary, and sufficient that a proper predicate or foundation be laid.[90] It must be shown to the satisfaction of the court that the witness is qualified to express an opinion.[91]

Statement of facts. As a predicate for the admission of an opinion of a lay or nonexpert witness as to sanity or insanity or soundness or unsoundness of mind, it is generally necessary and sufficient to state the appearance, conduct, demeanor, or other facts and circumstances on which the opinion of the witness is based.[92] However, it is recognized that it is frequently impossible to reproduce in language all the circumstances on which an inference with respect to sanity is based, and the requirement of a detailed statement of facts is not invariably insisted on;[93] and according to some,[94] but not other,[95] authorities it is proper to dispense with it where the opinion or inference stated is that the observed person is sane or of sound mind, and this is true although in the particular jurisdiction such a statement may be required where the opinion testified to is that the observed person is insane or of unsound mind.[96]

Bible, once a man and twice a child, did not constitute opinion whether testator was sane or insane, but was merely a statement that testator's mind was enfeebled by age.—Heflin v. Fullington, Mo., 37 S.W.2d 931.

Testimony as to conduct of a person is only a statement of facts and not an opinion as to whether or not the person is insane.—Linscott v. Hughbanks, 37 P.2d 26, 140 Kan. 353.

88. Pa.—Commonwealth v. Buccieri, 26 A. 228, 153 Pa. 535.

89. Iowa.—Denning v. Butcher, 59 N.W. 69, 91 Iowa 425.
22 C.J. p 606 note 14.

90. Ala.—National Life & Accident Ins. Co. v. Hannon, 101 So. 892, 212 Ala. 184—Hingle v. Sims, 163 So. 459, 26 Ala.App. 546.
Ark.—Crocker's Heirs v. Crocker's Heirs, 246 S.W. 6, 156 Ark. 309.
Ill.—Passenheim v. Reinert, 1 N.E.2d 69, 362 Ill. 576.
Mo.—Rubinstein v. New York Life Ins. Co., App., 153 S.W.2d 760.
Ohio.—Ross v. Stewart, 32 Ohio Cir. Ct.,N.S., 217.

91. Ala.—McClelland v. Coston, 149 So. 697, 227 Ala. 267—Wainwright v. Wainwright, 137 So. 413, 223 Ala. 522—Sorter v. Austen, 129 So. 51, 221 Ala. 481—Tucker v. Houston, 112 So. 360, 216 Ala. 43.
Iowa.—Muller v. De Vries, 188 N.W. 885, 193 Iowa 1337.
Mo.—Ingram v. Hargis, App., 153 S.W.2d 389.
Neb.—In re Charles' Estate, 225 N.W. 869, 118 Neb. 634, 64 A.L.R. 1299.
Tex.—Bowie Sewerage Co. v. Chandler, Civ.App., 138 S.W.2d 585, error dismissed, judgment correct—Curtis v. Adams, Civ.App., 275 S.W. 206.
22 C.J. p 604 note 2.

Competency as to sanity or insanity
Rule as to competency to testify as to sanity is less exacting than with reference to testimony as to insanity.—Houston v. Grigsby, 116 So. 686, 217 Ala. 506.

92. U.S.—U. S. v. Los Angeles Soap Co., C.C.A.Cal., 83 F.2d 875.
Ala.—Equitable Life Assur. Soc. of U. S. v. Welch, 195 So. 554, 239 Ala. 453—Vaughn v. Vaughn, 116 So. 427, 217 Ala. 364—Bowling v. Bowling, 8 Ala. 538.
Del.—Duffield v. Robeson, 2 Harr. 375.
Ga.—Morgan v. Bell, 5 S.E.2d 897, 189 Ga. 432.
Ill.—Grantz v. Grantz, 145 N.E. 398, 314 Ill. 243—Chandler v. Fisher, 125 N.E. 324, 290 Ill. 440.
Iowa.—In re Fleming, 195 N.W. 242, 106 Iowa 639—In re Cooper's Estate, 194 N.W. 218, 196 Iowa 116—In re Armstrong's Estate, 183 N.W. 386, 191 Iowa 1210.
Kan.—Linscott v. Hughbanks, 37 P.2d 26, 140 Kan. 353.
Ky.—Wood v. Corcoran, 234 S.W. 440, 192 Ky. 774.
Mo.—Clark v. Commerce Trust Co., 62 S.W.2d 874, 882, 333 Mo. 243, citing **Corpus Juris.**
Neb.—In re Charles' Estate, 225 N.W. 869, 118 Neb. 634, 64 A.L.R. 1299.
Ohio.—Rutledge v. Inlow, 200 N.E. 204, 51 Ohio App. 207.
Okl.—Oklahoma Natural Gas Corporation v. Lay, 51 P.2d 580, 175 Okl. 75.
Tenn.—Pierce v. Pierce, 127 S.W.2d 791, 174 Tenn. 508—Melody v. Hamblin, 115 S.W.2d 237, 21 Tenn. App. 687—Fitch v. American Trust Co., 4 Tenn.App. 87.
Tex.—Bowie Sewerage Co. v. Chandler, Civ.App., 138 S.W.2d 585, error dismissed, judgment correct—Wigley v. Buzzard, Civ.App., 124 S.W.2d 898, error dismissed, judgment correct—Mills v. Kellahin, Civ. App., 91 S.W.2d 1097, error dismissed—Bryson v. Karslake, Civ. App., 71 S.W.2d 614, error dismissed.
Vt.—In re Moxley's Will, 152 A. 713, 103 Vt. 100—In re Clogston's Estate, 106 A. 594, 93 Vt. 46.
22 C.J. p 607 note 28.

Statement of conclusion
Witness should state facts, and not conclusions, in laying foundation for his opinion.—Rubinstein v. New York Life Ins. Co., Mo.App., 153 S.W.2d 760.

93. Iowa.—State v. Winter, 34 N.W. 475, 72 Iowa 627.
22 C.J. p 608 note 29.

94. U.S.—Boone v. Equitable Holding Co., D.C.W.Va., 32 F.Supp. 896, 900, citing **Corpus Juris,** and reversed on other grounds, C.C.A., Beckley Nat. Bank v. Boone, 115 F.2d 513.
Ala.—Ritchey v. Jones, 97 So. 736, 210 Ala. 204.
Iowa.—In re Mott's Estate, 205 N.W. 770, 200 Iowa 948.
Mo.—Lee v. Ullery, 140 S.W.2d 5—Buchholz v. Cunningham, 100 S.W.2d 446, 340 Mo. 302—Kaechelen v. Barringer, 19 S.W.2d 1033—In re Bearden, App., 86 S.W.2d 585.
22 C.J. p 608 note 30.

95. Ga.—Jenkins v. Lane, 115 S.E. 126, 154 Ga. 454.

96. U.S.—Boone v. Equitable Holding Co., D.C.W.Va., 32 F.Supp.

The facts stated must relate to a time which is sufficiently near to be relevant;[97] and, while it is not necessary that the inference of the witness should have been formed at the time when he saw the facts stated by him,[98] it is necessary that his opinion have reference to the time, or about the time, to which his testimony concerning observed facts relates, and not to a time long before or after his observation.[99]

The relevant opinion of a qualified lay witness as to sanity or insanity, or soundness or unsoundness of mind, is admissible where he states facts and circumstances which are sufficient, or amply sufficient, to constitute a reasonable basis for his opinion.[1] On the other hand, where the facts stated are not sufficient, in the opinion of the court,[2] to give a reasonable basis,[3] or any basis,[4] for the opinion or inference, or sufficient admissible facts are not clearly stated,[5] the witness may be rejected as incompetent and his opinion excluded,[6] or his evidence may be accorded little or no weight,[7] especially where he is interested.[8] Where the opinion sought is that a certain person is insane or of unsound mind, it is essential that the witness first state facts inconsistent with sanity, and where he does not do so the court may and should prevent him from expressing his opinion,[9] as his unsupported opinion has no weight or value[10] and, if received, may have a prejudicial effect.[11]

bb. Observation and Opportunity Therefor

To warrant the receipt of an opinion of a nonexpert witness as to sanity or soundness of mind of a person, it must satisfactorily appear that the opinion is based on the witness' own knowledge or observation and that he had sufficient opportunity to observe the person and to form an accurate opinion.

It is necessary and sufficient, to show the qualification of an ordinary or nonexpert witness to express an opinion that a person is or was sane or insane, or of sound or unsound mind, that it shall affirmatively appear, to the satisfaction of the court,[12]

896, reversed on other grounds, C.C.A., Beckley Nat. Bank v. Boone, 115 F.2d 513.
Ill.—Capner v. Holbrook, 273 Ill.App. 199.
Iowa.—In re Cooper's Estate, 194 N.W. 218, 196 Iowa 116—Haddock v. Jacobs, 171 N.W. 593, 185 Iowa 1057.
Mich.—In re Davis, 268 N.W. 822, 277 Mich. 88.
Mo.—Lee v. Ullery, 140 S.W.2d 5—Nute v. Fry, 111 S.W.2d 84, 341 Mo. 1138—Stevens v. Meadows, 100 S.W.2d 281, 340 Mo. 252—Clark v. Commerce Trust Co., 62 S.W.2d 874, 333 Mo. 243—Berkemeier v. Reller, 37 S.W.2d 430—Carpenter v. Kendrick, 252 S.W. 646, 299 Mo. 95—Kaechelen v. Barringer, 19 S.W.2d 1033—Ingram v. Hargis, App., 153 S.W.2d 389—In re Bearden, App., 86 S.W.2d 585.
Tex.—Chambers v. Winn, Civ.App., 133 S.W.2d 279, reversed on other grounds, Com.App., 154 S.W.2d 454.

97. Utah.—In re Hanson, 167 P. 256, 50 Utah 207.
22 C.J. p 608 note 31.
Remoteness
A witness, who based his opinion on business dealings and conversations with grantor on occasions not remote from date of deed, was competent to testify whether she was of sound mind in the year of its execution and at the date of the deed, although he did not see her on that particular day.—Gwinn v. Hobbs, 141 N.E. 812, 83 Ind.App. 263, dissenting opinion 144 N.E. 648, 83 Ind.App. 263.

98. Vt.—Hathaway v. National Life Ins. Co., 48 Vt. 335.

99. Ind.—Stewart v. Manship, 140 N.E. 543, 193 Ind. 694.

1. Ark.—First Nat. Bank v. Tribble, 244 S.W. 33, 155 Ark. 264.
Iowa.—Zander v. Cahow, 206 N.W. 90, 200 Iowa 1258.
Ky.—Wood v. Corcoran, 234 S.W. 440, 192 Ky. 774.
Mo.—Rubinstein v. New York Life Ins. Co., App., 153 S.W.2d 760.
Ohio.—Ross v. Stewart, 32 Ohio Cir. Ct.,N.S., 217.
Tex.—Colvard v. Goodwin, Civ.App., 24 S.W.2d 786, error dismissed.

2. Iowa.—In re Diver's Estate, 240 N.W. 622, 214 Iowa 497—Campfield v. Rutt, 235 N.W. 59, 211 Iowa 1077.
Mich.—In re Murray, 188 N.W. 381, 219 Mich. 70.
Tenn.—Fitch v. American Trust Co., 4 Tenn.App. 87, 102, citing **Corpus Juris.**
22 C.J. p 608 note 33.

3. Tenn.—Fitch v. American Trust Co., supra, citing **Corpus Juris.**
22 C.J. p 608 note 34.

4. Iowa.—In re Cooper's Estate, 194 N.W. 218, 196 Iowa 116.

5. Tenn.—Fitch v. American Trust Co., 4 Tenn.App. 87, 102, citing **Corpus Juris.**
22 C.J. p 609 note 35.

6. Md.—Smith v. Biggs, 189 A. 256, 171 Md. 528.
Tenn.—Fitch v. American Trust Co., 4 Tenn.App. 87, 102, citing **Corpus Juris.**
22 C.J. p 609 note 36.

7. Tenn.—Fitch v. American Trust Co., supra, citing **Corpus Juris.**
22 C.J. p 609 note 37.

8. Mich.—Wallace v. Harris, 32 Mich. 380.
22 C.J. p 609 note 38 [a].

9. Mich.—In re Murray, 188 N.W. 381, 219 Mich. 70—Blackman v. Andrews, 114 N.W. 218, 150 Mich. 322—Hillard v. Baker, 104 N.W. 399, 141 Mich. 124—Prentis v. Bates, 53 N.W. 153, 93 Mich. 234, 17 L.R.A. 494.
Mo.—Lee v. Ullery, 140 S.W.2d 5—Nute v. Fry, 111 S.W.2d 84, 341 Mo. 1138—Fields v. Luck, 74 S.W.2d 35, 335 Mo. 765—Clark v. Commerce Trust Co., 62 S.W.2d 874, 333 Mo. 243—Berkemeier v. Reller, 37 S.W.2d 430.
Facts showing or indicating abnormal state or condition of mind must be stated by a witness as a foundation for his opinion that the person observed is or was of unsound mind.
Ala.—Sorter v. Austen, 129 So. 51, 221 Ala. 481.
Iowa.—Campfield v. Rutt, 235 N.W. 59, 211 Iowa 1077—Zander v. Cahow, 206 N.W. 90, 200 Iowa 1258.
Facts tending to raise fair inference of insanity must be first recited by a nonexpert witness as a foundation for his opinion that a testator was insane.—In re Mott's Estate, 205 N.W. 770, 200 Iowa 918.

10. Mo.—Lee v. Ullery, 110 S.W.2d 5—Stevens v. Meadows, 100 S.W.2d 281, 340 Mo. 252—Loehr v. Starke, 56 S.W.2d 772, 332 Mo. 131—Berkemeier v. Reller, 37 S.W.2d 430.

11. Mo.—Lee v. Ullery, 110 S.W.2d 5.

12. Mich.—O'Connor v. Madison, 57 N.W. 105, 98 Mich. 183.
22 C.J. p 606 note 16.

that the witness had, through acquaintance and business dealings, social relations, or other contacts, sufficient opportunity to observe the designated person and to form an accurate opinion or judgment as to such person's sanity or insanity, or soundness or unsoundness of mind,[13] and that his testimony is based on his own knowledge or observation.[14]

It is, however, impossible to lay down any exact rule as to what opportunity for observation will qualify the witness, and each case must be determined according to its own circumstances.[15] The circumstances under which the observation took place are entitled to consideration.[16] Where a witness has had sufficient acquaintance to qualify him to express an opinion, the length of time the acquaintance existed[17] and the extent of his opportunity to observe and know the mental condition of the person in question[18] go only to the weight and value, and not to the admissibility, of his testimony. The opinion of a witness, which is specifically limited to the time when he saw and conversed with the person in question, is not objectionable, even though he had not seen and observed such person for two or three years prior to the time inquired about;[19] but a witness will not be permitted to state his opinion as to soundness or unsoundness of mind at a particular time by inference from what he observed long before or after that time.[20]

Intimate acquaintance. In some jurisdictions, sometimes as a result of statutory regulations, it is necessary[21] and sufficient,[22] to qualify a nonexpert witness to express an opinion as to the sanity or soundness of mind of a designated person, that the witness be intimately acquainted with such person.

What satisfies this requirement is a question of fact for the trial court to determine;[23] where the statutes are silent as to the degree of intimacy that is essential, there can be no fixed rule.[24] The court should consider the period of acquaintance and the opportunity for observation;[25] but where a witness has had an intimate acquaintance with a grantor or

13. Ala.—Equitable Life Assur. Soc. of U. S. v. Welch, 195 So. 554, 239 Ala. 453—McClelland v. Coston, 149 So. 697, 227 Ala. 267—Sorter v. Austen, 129 So. 51, 221 Ala. 481—Dobbs v. Pridgen, 124 So. 292, 220 Ala. 119—National Life & Accident Ins. Co. v. Hannon, 108 So. 575, 214 Ala. 663—Ritchey v. Jones, 97 So. 736, 210 Ala. 204.
Ill.—Peters v. Peters, 33 N.E.2d 425, 376 Ill. 237—Down v. Comstock, 149 N.E. 507, 318 Ill. 445—Simpson v. Anderson, 137 N.E. 88, 305 Ill. 172.
Iowa.—In re Mott's Estate, 205 N.W. 770, 200 Iowa 948—Morrison v. McLaughlin, 182 N.W. 671, 191 Iowa 474—Kerkhoff v. Monkemeier, 175 N.W. 762, 188 Iowa 103.
Kan.—Linscott v. Hughbanks, 37 P. 2d 26, 140 Kan. 353.
Miss.—Gathings v. Howard, 84 So. 240, 122 Miss. 355.
Mo.—State v. Jackson, 142 S.W.2d 45, 49, 346 Mo. 474, citing **Corpus Juris**—Lee v. Ullery, 140 S.W.2d 5.
N.C.—Branch Banking & Trust Co. v. Gear, 113 S.E. 507, 184 N.C. 612.
Okl.—Oklahoma Natural Gas Corporation v. Lay, 51 P.2d 580, 175 Okl. 75.
Tex.—Davis v. Williams, Civ.App., 144 S.W.2d 445, error dismissed, Sup., 146 S.W.2d 982—Chambers v. Winn, Civ.App., 133 S.W.2d 279, reversed on other grounds, Com.App., 154 S.W.2d 454—Small v. Taylor, Civ.App., 54 S.W.2d 151, 153, citing **Corpus Juris**.
Vt.—In re Moxley's Will, 152 A. 713, 103 Vt. 100.
Va.—Davis v. Alderson, 100 S.E. 541, 125 Va. 681.
Wash.—Halbach v. Luckenbach S. S. Co., 278 P. 178, 152 Wash. 492.
22 C.J. p 606 note 17.

14. Mo.—Fields v. Luck, 74 S.W.2d 35, 335 Mo. 765—Mayes v. Mayes, 235 S.W. 100.
22 C.J. p 607 note 18.

15. U.S.—Montana R. Co. v. Warren, Mont., 11 S.Ct. 96, 137 U.S. 348, 34 L.Ed. 681.
22 C.J. p 607 note 19.

General or partial insanity

Same degree of observation is not necessary to qualify nonexpert witness to testify to general insanity, as in case of partial derangement only.—National Life & Accident Ins. Co. v. Hannon, 108 So. 575, 214 Ala. 663.

16. Ill.—Emery v. Hoyt, 46 Ill. 258.
22 C.J. p 607 note 20.

17. Mo.—Kaechelen v. Barringer, 19 S.W.2d 1033.

18. Mo.—Lee v. Ullery, 140 S.W.2d 5.

19. Ind.—Folger v. Barnard, 125 N.E. 460, 73 Ind.App. 523.

20. Ind.—Stewart v. Manship, 140 N.E. 543, 193 Ind. 694.

21. Ala.—Houston v. Grigsby, 116 So. 686, 217 Ala. 506.
Cal.—Atkins Corporation v. Tourny, 57 P.2d 480, 6 Cal.2d 206.
22 C.J. p 599 note 41 [a], p 607 note 21.

Intimacy and opportunity

To admit testimony of nonexpert witness as to sanity of another, it must be shown that acquaintance of witness with such person is intimate and that witness has had sufficient opportunity for observation to enable him to form correct judgment.—National Life & Accident Ins. Co. v. Hannon, 101 So. 892, 212 Ala. 184.

22. Ala.—Hale v. Cox, 163 So. 335, 231 Ala. 22.
Cal.—In re Fisher's Estate, 259 P. 755, 202 Cal. 205—In re Perkins' Estate, 235 P. 45, 195 Cal. 699—In re Hill, 57 P.2d 155, 13 Cal.App.2d 326—In re Short's Estate, 47 P.2d 555, 7 Cal.App.2d 512—In re Alexander's Estate, 295 P. 53, 111 Cal. App. 1—In re Lenci's Estate, 288 P. 841, 106 Cal.App. 171—Horowitz v. Sacks, 265 P. 281, 89 Cal.App. 336.
Ind.—Folger v. Garnard, 125 N.E. 460, 73 Ind.App. 523.
Or.—In re Riggs' Estate, 250 P. 753, 120 Or. 38—In re Faling's Will, 208 P. 715, 105 Or. 365—In re Sturtevant's Estate, 178 P. 192, 92 Or. 269, rehearing denied 180 P. 595, 92 Or. 269.
22 C.J. p 607 note 21 [b].

23. Cal.—In re Perkins' Estate, 235 P. 45, 195 Cal. 699.
22 C.J. p 607 note 22.

24. Cal.—In re Lenci's Estate, 288 P. 841, 106 Cal.App. 171.

25. Cal.—In re Lenci's Estate, supra.

Long acquaintance

(1) A witness, although a nonexpert, who testified to long and intimate acquaintance with the person in question was properly permitted to give his opinion as to sanity.—Washam v. Beaty, 99 So. 163, 210 Ala. 635.

(2) A nonexpert witness may state his opinion of a testator's sanity where he had an acquaintance with the testator sufficiently long and in-

testator, the fact that the witness saw less of the grantor or testator during a certain period of time than during an earlier or later period goes to the weight or probative force, rather than to the admissibility, of his opinion as to sanity.[26] A mere casual acquaintance[27] or a short conversation with the person[28] is not sufficient, and it has been stated that a familiarity with the mental temperament of the person, the soundness of whose mind is in question, is essential.[29]

cc. Discretion of Court as to Sufficiency

It is within the discretion of the trial court to determine whether matters shown as a predicate for the reception of an opinion of a nonexpert witness as to sanity or soundness of mind are sufficient.

Whether a nonexpert witness is sufficiently shown to be competent or qualified,[30] as an intimate acquaintance[31] or as otherwise having sufficient opportunity for observation and the formation of an opinion,[32] and whether sufficient facts have been detailed,[33] to warrant the receipt of his opinion or inference as to sanity or soundness of mind rests largely and primarily in the sound discretion of the trial court, whose action will not ordinarily be reviewed, although it is subject to reversal in extreme cases where an improper exercise of discretion appears.[34]

(2) Minority Rule

In some jurisdictions a nonexpert witness may not state that a person is sane or insane, although he may make statements which indicate his opinion.

In some states a nonexpert witness has not been permitted to state his inference as to the sanity or insanity of a person,[35] the courts considering that the subject of insanity is one of a technical nature,[36] that the popular standard of insanity is not the same as the legal standard, and that special training is needed to appreciate the significance of the facts presented in evidence, while the inference of an observer is frequently colored by his prejudices.[37]

Even in these states, however, the rule excluding the inference is not favorably regarded,[38] and the tendency is to restrict it to the exclusion of a definite statement that the person in question is sane or insane,[39] and to receive statements falling short of this, but which, nevertheless, clearly indicate the opinion of the witness on the subject,[40] as, for instance, where an unskilled witness who has testified to observed facts is allowed to state whether, in his judgment, the acts and conversations testified to were rational or irrational, see subdivision c of this

timate to enable him to form a correct judgment.—Roberts v. Trawick, 13 Ala. 68.

26. Ala.—Houston v. Grigsby, 116 So. 686, 217 Ala. 506.
Cal.—In re Alexander's Estate, 295 P. 53, 111 Cal.App. 1.
22 C.J. p 607 note 21 [a].

Cessation of intimate association
The fact that witnesses were not in intimate association with the testatrix for some months or years before her death does not go to the exclusion, but only to the probative value, of their testimony as to her mental soundness.—Wood v. Corcoran, 234 S.W. 440, 192 Ky. 774.

27. Cal.—Huyck v. Rennie, 90 P. 929, 151 Cal. 411.

28. Mont.—State v. Penna, 90 P. 787, 35 Mont. 535.

29. Cal.—Matter of Budan, 104 P. 442, 156 Cal. 230.
22 C.J. p 607 note 25.

30. Ala.—Batson v. Batson, 117 So. 10, 217 Ala. 450—National Life & Accident Ins. Co. v. Hannon, 108 So. 575, 214 Ala. 663—Lewis v. Martin, 98 So. 635, 210 Ala. 401—Hingle v. Sims, 163 So. 459, 26 Ala. App. 546.
Ill.—Williams v. Prudential Ins. Co. of America, 271 Ill.App. 532.

31. Cal.—Atkins Corporation v. Tourny, 57 P.2d 480, 6 Cal.2d 206—In re Fisher's Estate, 259 P. 755, 202 Cal. 205—In re Perkins' Estate, 235 P. 45, 195 Cal. 699—In re Relph's Estate, 221 P. 361, 192 Cal. 451—In re Keegan's Estate, 72 P. 828, 139 Cal. 123—In re Wax's Estate, 39 P. 624, 106 Cal. 343—In re Ehle's Estate, 2 P.2d 398, 115 Cal. App. 656—In re Lenci's Estate, 288 P. 841, 106 Cal.App. 171.

32. Mo.—State v. Jackson, 142 S.W. 2d 45, 49, 346 Mo. 474, citing **Corpus Juris.**
Tex.—Davis v. Williams, Civ.App., 144 S.W.2d 445, error dismissed, Sup., 146 S.W.2d 982—Small v. Taylor, Civ.App., 54 S.W.2d 151, 153, citing **Corpus Juris**—Missouri Pac. R. Co. v. Baldwin, Civ.App., 261 S.W. 418, 419, citing **Corpus Juris**, and affirmed, Com.App., 273 S.W. 834, certiorari denied 46 S.Ct. 336, 270 U.S. 645, 70 L.Ed. 777.
Vt.—In re Moxley's Will, 152 A. 713, 103 Vt. 100.
22 C.J. p 609 note 39.

33. Iowa.—Campfield v. Rutt, 235 N.W. 59, 211 Iowa 1077.
Mo.—Fields v. Luck, 74 S.W.2d 35, 45, 335 Mo. 765, citing **Corpus Juris.**
22 C.J. p 603 note 86 [c], p 609 note 39.

34. Mo.—Fields v. Luck, 74 S.W.2d 35, 45, 335 Mo. 765, quoting **Corpus Juris.**
22 C.J. p 609 note 40.

Question of law
The trial court does not have the right to exercise a free discretion in the admission of testimony of lay witness as to his opinion of soundness of mind of a person, about whom an inquiry as to sanity is being made, but it becomes a question of law as to whether witness, who has had occasion to observe the acts, demeanor, statements, etc., of the person, has, by the detailing of such matters, qualified himself to give an opinion as to the sanity of person so observed.—Bowie Sewerage Co. v. Chandler, Tex.Civ.App., 138 S. W.2d 585, error dismissed, judgment correct.

35. Mass.—Gorham v. Moor, 54 N. E. 436, 197 Mass. 522.
22 C.J. p 610 note 55.

36. Me.—Fayette v. Chesterville, 77 Me. 28, 52 Am.R. 741.
22 C.J. p 610 note 56.

37. Me.—Fayette v. Chesterville, supra.

38. Mass.—Baxter v. Abbott, 7 Gray 71.
22 C.J. p 610 note 59.

39. Me.—Robinson v. Adams, 62 Me. 369, 16 Am.R. 473.
22 C.J. p 610 note 60.

40. Mass.—McCoy v. Jordan, 69 N. E. 358, 184 Mass. 575.
22 C.J. p 610 note 61.

section, where such a witness is permitted to state whether he observed any fact which led him to infer that there was any derangement of intellect[41] or noticed anything which indicated insanity,[42] or where it is permitted to elicit on cross-examination how the person in question impressed the witness in the matter of sanity.[43]

e. Mental Capacity or Competency

(1) In general
(2) Predicate for admission

(1) In General

A nonexpert witness ordinarily may express his opinion as to the mental capacity generally of a person; but there is a conflict of authority as to whether such a witness may express an opinion as to the mental capacity or competency of a person to perform a certain legal act.

Except in a few jurisdictions,[44] and except where the person in question is present as a witness and is fully examined in the presence of the jury, so that the inferences of other observers as to his mental capacity is unnecessary,[45] a nonexpert witness is permitted, after the laying of a proper foundation, see § 507 e (2) infra, to express his opinion as to the mental capacity generally of a designated person.[46] However, there is considerable conflict of authority on the question of whether, assuming that a sufficient predicate has been laid, a nonexpert witness, other than an attesting or subscribing witness, see § 507 f infra, should be allowed to express an opinion on the mental capacity or competency of a designated person to execute a particular kind of legal instrument or to perform a certain legal act.[47] Where such an opinion is rejected, the rejection is deemed necessary or warranted because the opinion involves legal capacity, or a mixed question of law and fact, and covers the precise point to be passed on by the court or jury.[48]

Capacity to execute instruments. In some states the opinion of a nonexpert witness as to testamentary capacity is received,[49] while, in other juris-

41. Mass.—Hewitt v. Taunton St. R. Co., 46 N.E. 106, 167 Mass. 483.
22 C.J. p 610 note 63.

42. N.Y.—People v. Krist, 60 N.E. 1057, 168 N.Y. 19, 15 N.Y.Cr. 532.

43. Mass.—Hogan v. Roche, 61 N.E. 57, 179 Mass. 510.

44. N.Y.—Paine v. Aldrich, 30 N.E. 725, 133 N.Y. 544—Weinberg v. Weinberg, 8 N.Y.S.2d 341, 255 App. Div. 366.

45. Iowa.—Sprague v. Atlee, 46 N.W. 756, 81 Iowa 1.
22 C.J. p 604 note 93.

46. Ala.—Tucker v. Houston, 112 So. 360, 216 Ala. 43.
Ark.—Zambie v. Namour, 132 S.W.2d 390, 198 Ark. 1104—Griffin v. Union Trust Co., 266 S.W. 289, 166 Ark. 347.
Ga.—McWilliam v. Pattilo, 161 S.E. 597, 173 Ga. 771—Merritt v. Wallace, 160 S.E. 610, 173 Ga. 435—Duncan v. Coleman, 144 S.E. 18, 166 Ga. 632—Pennington v. Perry, 118 S.E. 710, 156 Ga. 103.
Ill.—Down v. Comstock, 149 N.E. 507, 318 Ill. 445—Catt v. Robins, 137 N.E. 101, 305 Ill. 76.
Kan.—Gorman v. Hickey, 64 P.2d 587, 145 Kan. 54—Mingle v. Hubbard, 293 P. 513, 131 Kan. 844.
Ky.—Pfuelb v. Pfuelb, 122 S.W.2d 128, 275 Ky. 588—Hutchins v. Foley, 111 S.W.2d 586, 271 Ky. 104—Bodine v. Bodine, 44 S.W.2d 840, 241 Ky. 706—Moran's Ex'r v. Moran, 38 S.W.2d 207, 238 Ky. 403—Sabin v. Commonwealth, 26 S.W.2d 506, 233 Ky. 636—Tombragel v. Tombragel's Executor and Trustee, 23 S.W.2d 919, 232 Ky. 493—Doyle v. Schafer, 14 S.W.2d 413, 228 Ky. 83—Beatty v. Caldwell, 276 S.W. 547, 210 Ky. 559.
Minn.—In re Olson's Estate, 223 N.W. 677, 176 Minn. 360.
Miss.—Fortenberry v. Herrington, 196 So. 232, 188 Miss. 735.
Mo.—Erwin v. Railway Express Agency, App., 128 S.W.2d 1077—Carl v. Ellis, App., 110 S.W.2d 805—Smallwood v. St. Louis-San Francisco Ry. Co., 263 S.W. 550, 217 Mo.App. 208.
N.C.—Jones v. Metropolitan Life Ins. Co., 175 S.E. 162, 206 N.C. 916—In re Brown's Will, 140 S.E. 192, 194 N.C. 583.
Okl.—Campbell v. Dick, 176 P. 520, 71 Okl. 186.
Pa.—Patterson v. Snider, 157 Pa. 612, 305 Pa. 272.
Tex.—Small v. Taylor, Civ.App., 54 S.W.2d 151.
Va.—Ferguson v. Ferguson, 192 S.E. 774, 169 Va. 77—Forehand v. Sawyer, 136 S.E. 683, 147 Va. 105.
W.Va.—Graves v. Katzen, 164 S.E. 796, 112 W.Va. 467—McCary v. Monongahela Valley Traction Co., 125 S.E. 92, 97 W.Va. 306.

Mental disability
N.C.—Nelson v. Jefferson Standard Life Ins. Co., 154 S.E. 752, 199 N.C. 443.

47. **Explanation of divergent views**
A possible explanation of the discordant views may be found in the consideration that the opinion may, under some circumstances, be obviously merely the witness' way of expressing the mental condition observed and thus unobjectionable, while in other cases it may be clear that the witness is attempting to draw the ultimate conclusion and thus exceed his province.—Hayes v. Candee, 52 A. 826, 75 Conn. 131—22 C.J. p 602 note 82.

48. Ala.—Camp v. Dobson, 152 So. 38, 228 Ala. 32—Dersis v. Dersis, 98 So. 27, 210 Ala. 308.
Cal.—In re Perkins' Estate, 235 P. 45, 195 Cal. 699.
Ill.—Baddeley v. Watkins, 127 N.E. 725, 293 Ill. 394.
Ind.—Silver v. Newcomer, 140 N.E. 455, 80 Ind.App. 406.
Iowa.—Penn Mut. Life Ins. Co. v. Mulvaney, 265 N.W. 889, 221 Iowa 925—Hann v. Hann, 211 N.W. 495, 202 Iowa 807.
Kan.—Steiner v. Horejsi, 75 P.2d 219, 147 Kan. 139.
Ohio.—Rhoads v.
724, 29 Ohio App.
Fink, 26 Ohio Cir.Ct.,N.S., 106.
Or.—In re Stutevant's Estate, 178 P. 192, 92 Or. 269, rehearing denied 180 P. 595, 92 Or. 269.
Tex.—Pickering v. Harris, Com.App., 23 S.W.2d 316, reversing, Civ.App., 12 S.W.2d 686.
22 C.J. p 602 note 81.

49. Del.—In re Sharpley's Will, 120 A. 286, 2 W.W.Harr. 154—Ethridge v. Bennett, 9 Houst. 295, 31 A. 813.
Kan.—Gorman v. Hickey, 64 P.2d 587, 145 Kan. 54.
Ky.—Newcomb's Ex'rs v. Newcomb, 27 S.W. 997, 96 Ky. 120, 16 Ky.L. 376.
Md.—Cronin v. Kimble, 144 A. 698, 156 Md. 489.
N.C.—In re Hargrove's Will, 173 S.E. 577, 206 N.C. 307.
22 C.J. p 601 note 66.

Elements of testamentary capacity
A qualified witness may state his opinion as to whether the testator had mind enough to know the nature

dictions such evidence is excluded.[50] The opinion of a nonexpert witness as to capacity to execute a deed is admitted in some states,[51] and excluded in other states;[52] and in some,[53] but not in other,[54] states a nonexpert witness is permitted to express his opinion as to the mental capacity of a particular person to enter into a contract; and in still other states, while a witness is permitted in a will contest or other litigation to express his opinion as to the capacity of the testator or other designated person to execute a valid deed or contract,[55] the rule is confined to cases of general capacity or incapacity

and extent of his property, the objects of his bounty and his duty to them, and to dispose of his property according to a fixed purpose of his own.—Pfuelb v. Pfuelb, 122 S.W.2d 128, 275 Ky. 588—Lee v. Kirby, 217 S.W. 895, 186 Ky. 603—Tanner v. Grace, 214 S.W. 824, 185 Ky. 127.

In Michigan

(1) A nonexpert witness may state his opinion as to testamentary capacity.—Paul v. Paul's Estate, 286 N.W. 680, 289 Mich. 452—In re Moxon's Estate, 207 N.W. 924, 234 Mich. 170—Porter v. Throop, 11 N.W. 174, 47 Mich. 313.

(2) However, the contrary has also been held.—Page v. Beach, 95 N. W. 981, 134 Mich. 51.

In Pennsylvania

(1) There is authority in support of the text.—Wogan v. Small, 11 Serg. & R. 141.

(2) However, there is also authority to the contrary.—Stokes v. Miller, 10 Wkly.N.C. 241.

50. Ala.—Camp v. Dobson, 152 So. 38, 228 Ala. 32—Daggett v. Boomer, 99 So. 181, 210 Ala. 673—Dersis v. Dersis, 98 So. 27, 210 Ala. 308—Wear v. Wear, 76 So. 111, 200 Ala. 111.
Ill.—Simpson v. Anderson, 137 N.E. 88, 305 Ill. 172—Baddeley v. Watkins, 127 N.E. 725, 293 Ill. 394.
Mass.—Old Colony Trust Co. v. Whitney, 169 N.E. 513, 269 Mass. 519.
Mo.—Blackiston v. Russell, 44 S.W.2d 22, 328 Mo. 1164—Mayes v. Mayes, 235 S.W. 100—Hamon v. Hamon, 79 S.W. 422, 180 Mo. 685.
N.Y.—In re Jones' Estate, 278 N.Y. S. 887, 155 Misc. 49.
Ohio.—Runyan v. Price, 15 Ohio St. 1, 86 Am.D. 459—Shuey v. Fink, 26 Ohio Cir.Ct.,N.S., 106.
Or.—In re Allen's Estate, 241 P. 996, 116 Or. 467—In re Sturtevant's Estate, 178 P. 192, 92 Or. 269, rehearing denied 180 P. 595, 92 Or. 269.
Tenn.—Gibson v. Gibson, 9 Yerg. 329.
Utah.—In re Hanson's Estate, 52 P. 2d 1103, 87 Utah 580.
Vt.—In re Blood's Will, 19 A. 770, 62 Vt. 359.
22 C.J. p 601 note 71.

Elements of testamentary capacity

A witness should not be permitted to answer questions as to whether testator had sufficient mental capacity to know, understand, comprehend, and realize his property and the extent thereof, the natural objects of his bounty and the duty, if any, be owed to them, the nature of the act of making a will, and the effect the will would have on his property at his death.—Hann v. Hann, 211 N.W. 495, 202 Iowa 807.

In California

(1) The opinion of a nonexpert witness as to testamentary capacity may not be received.—In re Perkins' Estate, 235 P. 45, 195 Cal. 699—Taylor's Estate, 28 P. 603, 92 Cal. 564.

(2) There is, however, authority to the contrary.—In re De Graaf's Estate, 93 P.2d 199, 34 Cal.App.2d 120.

In Georgia

(1) On trial of an issue of devisavit vel non, whether alleged testatrix had mental capacity to make will at time of signing the paper, is for jury, and a nonexpert witness cannot testify as to such legal conclusion.—Morgan v. Bell, 5 S.E.2d 897, 189 Ga. 432—Smoot v. Alexander, 3 S.E.2d 593, 188 Ga. 203.

(2) In a prior case, however, it was held that testimony of witness that he did not think testator had mind enough to make a will disposing of property was not objectionable as a conclusion.—Dean v. Littleton, 131 S.E. 507, 161 Ga. 651.

(3) On an issue as to mental capacity to make a will, a witness may give in evidence his opinion as to whether the testator had sense enough to know who his children were.—Dyar v. Dyar, 131 S.E. 535, 161 Ga. 615.

In Texas

(1) A witness is not permitted to state his opinion as to the mental capacity of a testator to make a will.—Brown v. Mitchell, 31 S.W. 621, 88 Tex. 350, 36 L.R.A. 64—Cardinal v. Cardinal, Civ.App., 131 S.W.2d 1005, error dismissed—Hudson v. Fuson, Civ.App., 15 S.W.2d 166—Curtis v. Adams, Civ.App., 275 S.W. 206.

(2) Opinion of witness that testatrix was not of disposing mind is objectionable as stating conclusion.—Kennedy's Estate, v. Richardson, Civ. App., 41 S.W.2d 95.

(3) However, after the laying of a proper foundation, a lay witness may give his opinion as to whether the testator was mentally capable of knowing or understanding the nature and effect of his acts, as distinguished from an opinion as to whether the testator possessed the degree of intelligence to do what he did do.—Chambers v. Winn, Com.App., 154 S.W.2d 454, reversing, Civ.App., 133 S.W.2d 279—Campbell v. Campbell, Civ.App., 215 S.W. 134, error refused.

(4) Furthermore, testimony of a qualified witness that testator was capable of knowing, and knew, the objects of his bounty and his property and the extent thereof is admissible, it being regarded as only an opinion on mental condition and not a conclusion on the question of legal capacity to make a will.—Hudson v. Fuson, supra.

51. Ga.—Snell v. Snell, 142 S.E. 96, 165 Ga. 724.
22 C.J. p 601 note 65.

52. Mo.—Blackiston v. Russell, 44 S. W.2d 22, 328 Mo. 1164.
Tex.—Pickering v. Harris, Com.App., 23 S.W.2d 316, reversing, Civ.App., 12 S.W.2d 686—Cardinal v. Cardinal, Civ.App., 131 S.W.2d 1005, error dismissed—Dodson v. Kuykendall, Civ.App., 127 S.W.2d 318, error dismissed, judgment correct—Brito v. Slack, Civ.App., 25 S.W.2d 881.
22 C.J. p 601 note 69.

Capacity to understand nature of deed

Kan.—Steiner v. Horejsi, 75 P.2d 219, 147 Kan. 139.

53. Ga.—Compton v. Porterfield, 117 S.E. 464, 155 Ga. 180.
Ky.—Ham v. Miss C. E. Mason's School, The Castle, 61 S.W.2d 7, 249 Ky. 478.
Va.—Price's Ex'r v. Barham, 137 S. E. 511, 147 Va. 478.
22 C.J. p 601 note 64.

Mental capacity to understand seriousness of marriage contract

Nev.—McNee v. McNee, 237 P. 534, 49 Nev. 90.

54. Tex.—Harrison v. Davis, Civ. App., 58 S.W.2d 1025, error dismissed—McCleskey v. McCleskey, Civ.App., 286 S.W. 616.
22 C.J. p 601 note 72.

Capacity to understand nature of contract

Kan.—Steiner v. Horejsi, 75 P.2d 219, 147 Kan. 139.

55. Md.—Bowers v. Kutzleb, 131 A. 463, 149 Md. 308—Daugherty v. Robinson, 122 A. 124, 143 Md. 259—Harris v. Hipsley, 89 A. 852, 122 Md. 418—Line v. Line, 86 A. 1032, 119 Md. 403, Ann.Cas.1914D 192.

extending over a long period of time and does not extend to cases of temporary incapacity suddenly induced by physical causes.[56]

Other related holdings are that a lay or nonexpert witness may state his opinion as to the competency or mental capacity of a particular person to execute a note[57] or an assignment thereof,[58] but may not state his opinion as to capacity to execute a mortgage[59] or release.[60]

Capacity in business affairs or transactions. In some jurisdictions a nonexpert witness may state his opinion as to competency or mental capacity to transact business,[61] while in other states such an opinion is excluded.[62] Opinion testimony as to capacity to transact ordinary business is admitted in some states[63] and excluded in others;[64] some,[65] but not other,[66] courts receive the opinion of a witness as to the capacity or competency of a person to manage his business affairs; and in some,[67] but not in other,[68] states opinion testimony as to competency or capacity to care for property is received. Further, some courts admit the opinion of a nonexpert witness as to the mental capacity of a person to understand in a reasonable manner the nature and effect of business transactions,[69] while other courts exclude the opinion of such a witness as to competency or capacity to understand business dealings,[70] comprehend and understand transactions involving the disposition of property by will or otherwise,[71] or reason on a business proposition.[72]

The opinion of a witness as to the capacity of another person to understand important business matters[73] or transactions,[74] or large and complicated business transactions,[75] has been rejected.

Capacity to incur criminal liability. A nonexpert witness may not express an opinion as to the capacity of a person to incur criminal liability.[76] In some jurisdictions a nonexpert witness may express an opinion as to the capacity of a person to know or appreciate the difference between right and wrong,[77] but in other jurisdictions such an opinion is excluded.[78]

Other matters. Nonexpert witnesses may, it has been held, state their opinions that a certain person did not have mind enough to understand the nature of his act,[79] and that a person appeared unable to understand immediately what was being talked about;[80] but they have been refused permission to state opinions that a person was not capable of self-control or self-government,[81] as well as opinions as to the capacity of one person to treat another person properly[82] or to understand what a summons

56. Md.—Johnston v. Schmidt, 149 A. 283, 158 Md. 555—Struth v. Decker, 59 A. 727, 100 Md. 368.

57. Neb.—In re Bartmess' Estate, 258 N.W. 877, 128 Neb. 408.

58. Ariz.—Sapp v. Lifrand, 36 P.2d 794, 44 Ariz. 321.

59. Ill.—Stoutenborough v. Miller, 188 Ill.App. 220.

60. N.C.—Beard v. Southern R. Co., 55 S.E. 505, 143 N.C. 136.

61. Ga.—Winkles v. Drake, 141 S. E. 67, 165 Ga. 335—Hixon v. Georgia Southern & F. Ry. Co., 137 S. E. 260, 163 Ga. 734.
Okl.—Oklahoma Natural Gas Corporation v. Lay, 51 P.2d 580, 175 Okl. 75.
Wash.—Moffitt v. Goldcamp, 79 P.2d 695, 195 Wash. 75.
22 C.J. p 601 note 67.

Business not involving capacity to make will
Ohio.—Brockmeier v. Buck, 9 Ohio Dec. (Reprint) 353, 12 Cinc.L.Bul. 213.

62. Cal.—In re Soberanes' Estate, 189 P. 103, 182 Cal. 525.
22 C.J. p 602 note 74.

63. Ala.—Wear v. Wear, 76 So. 111, 200 Ala. 345, explaining Torrey v. Burney, 21 So. 348, 113 Ala. 496.
Iowa.—Liddle v. Salter, 163 N.W. 447, 180 Iowa 840.
Kan.—Steiner v. Horejsi, 75 P.2d 219, 147 Kan. 139—Funk v. Fish, 252 P. 256, 122 Kan. 294, rehearing denied 255 P. 645, 123 Kan. 207.
Ohio.—Baillie v. Heimsath, 151 N.E. 788, 20 Ohio App. 216.

In Illinois
(1) There are decisions supporting the text.—Speirer v. Curtis, 143 N.E. 427, 312 Ill. 152—Trubey v. Richardson, 79 N.E. 592, 224 Ill. 136.
(2) However, there is authority upholding the exclusion of such opinion evidence.—Bundy v. West, 130 N.E. 709, 297 Ill. 238.

64. Tex.—Brito v. Slack, Civ.App., 25 S.W.2d 881.

65. Okl.—In re Carney's Guardianship, 237 P. 111, 110 Okl. 165.

Capacity to look after financial affairs
Iowa.—Erwin v. Fillenwarth, 137 N. W. 502, 160 Iowa 210.

66. Ind.—Hamrick v. State, 34 N.E. 3, 134 Ind. 324—Silver v. Newcomer, 140 N.E. 455, 80 Ind.App. 406.

67. Okl.—In re Carney's Guardianship, 237 P. 111, 110 Okl. 165.

68. Vt.—Londonderry v. Fryor, 79 A. 46, 84 Vt. 294.

Capacity to manage property
Cal.—In re Coburn, 105 P. 924, 11 Cal.App. 604.
22 C.J. p 602 note 75.

69. Ala.—Equitable Life Assur. Soc. of U. S. v. Welch, 195 So. 554, 239 Ala. 453.

70. Cal.—In re Soberanes' Estate, 189 P. 103, 182 Cal. 525.

71. Iowa.—Penn Mut. Life Ins. Co. v. Mulvaney, 265 N.W. 889, 221 Iowa 925.

72. Cal.—In re Hill, 57 P.2d 155, 13 Cal.App.2d 326.

73. Ohio.—Niemes v. Niemes, 119 N.E. 503, 97 Ohio St. 145.

74. Tex.—Koppe v. Koppe, 122 S.W. 68, 57 Tex.Civ.App. 204.

75. Ohio.—Niemes v. Niemes, 26 Ohio Cir.Ct.,N.S., 513.

76. Vt.—Londonderry v. Fryor, 79 A. 46, 84 Vt. 294.
22 C.J. p 602 note 79.

77. Neb.—Pflueger v. State, 64 N. W. 1094, 46 Neb. 493.
22 C.J. p 601 note 68, p 602 note 79[a].
In criminal prosecutions see Criminal Law § 879.

78. Cal.—People v. O'Brien, 9 P.2d 902, 122 Cal.App. 147.

79. Ky.—Fidelity Mut. Life Ins. Co., v. Cochran, 219 S.W. 172, 187 Ky. 430.

80. Mo.—Roach v. Kansas City Rys. Co., App., 228 S.W. 520.

81. Tex.—Franklin v. Boone, 88 S. W. 262, 39 Tex.Civ.App. 597.

82. Tex.—Lindsey v. White, Civ. App., 61 S.W. 438.
22 C.J. p 602 note 80.

served was about.[83] It has been held, on the one hand, that it is proper for a witness to state his opinion as to the capacity of a certain person to hold a conversation like one testified to by another witness to have taken place,[84] and, on the other hand, that it is improper for a witness to state whether a certain person was able to converse intelligently on any particular subject for any length of time[85] or whether his ability to discuss current events was above the average.[86]

(2) Predicate for Admission

A proper predicate or foundation must be laid before the opinion of a nonexpert witness as to mental capacity may be received.

To warrant the reception in evidence of the opinion of a nonexpert witness as to another person's mental capacity generally, or his mental capacity to perform a certain legal act, if such opinion is allowed in evidence in the particular jurisdiction, see § 507 e (1) supra, it is necessary and sufficient that a proper foundation be laid.[87] The requisite predicate or foundation is generally considered laid when, and only when, it is shown that the witness is qualified to express an opinion[88] by reason of having had, through acquaintance,[89] adequate opportunity to observe the person in question[90] and to form an opinion as to his capacity;[91] it appears that the opinion of the witness is based on pertinent facts observed by him and within his knowledge;[92] the witness states the facts on which his opinion or conclusion is based;[93] and the facts narrated by the witness support or warrant, or legitimately tend to

83. Kan.—Dean v. Metcalf, 58 P.2d 1073, 144 Kan. 174.

84. Mich.—Beaubien v. Cicotte, 12 Mich. 459.

85. Neb.—Ames v. Ames, 106 N.W. 584, 75 Neb. 473.
22 C.J. p 601 note 58 [a].

86. Ill.—Bundy v. West, 130 N.E. 709, 297 Ill. 238.

87. Md.—Cronin v. Kimble, 144 A. 698, 156 Md. 489.
Mich.—Paul v. Paul's Estate, 286 N. W. 680, 289 Mich. 452—Fox v. Joslin, 196 N.W. 394, 225 Mich. 536.
Minn.—Ewert v. Chirpich, 211 N.W. 306, 169 Minn. 386.
Mo.—Smallwood v. St. Louis-San Francisco Ry. Co., 263 S.W. 550, 217 Mo.App. 208.

88. Ala.—Tucker v. Houston, 112 So. 360, 216 Ala. 43.
Md.—Cronin v. Kimble, 144 A. 698, 156 Md. 489—Scheller v. Schindel, 138 A. 415, 153 Md. 547—Daugherty v. Robinson, 122 A. 124, 143 Md. 259—Brashears v. Orme, 49 A. 620, 93 Md. 442.
Mich.—In re Dowell, 115 N.W. 972, 152 Mich. 194.
W.Va.—Graves v. Katzen, 164 S.E. 796, 112 W.Va. 467.

89. Cal.—In re Flatau's Estate, 76 P.2d 506, 10 Cal.2d 701.
Ill.—Lewis v. Deamude, 33 N.E.2d 440, 376 Ill. 219—Britt v. Darnell, 146 N.E. 510, 315 Ill. 385.
Ky.—Hutchins v. Foley, 111 S.W.2d 586, 271 Ky. 104—Bodine v. Bodine, 44 S.W.2d 840, 241 Ky. 706—Tombragel v. Tombragel's Executor and Trustee, 23 S.W.2d 919, 232 Ky. 493—Mullins v. Mullins, 16 S.W.2d 788, 229 Ky. 103—Irvine v. Greenway, 295 S.W. 445, 220 Ky. 388—Beatty v. Caldwell, 276 S.W. 547, 210 Ky. 559.
Md.—Daugherty v. Robinson, 122 A. 124, 143 Md. 259.
Mich.—Henderson v. Henderson, 172 N.W. 623, 206 Mich. 36.
Neb.—In re Bartmess' Estate, 258 N. W. 877, 128 Neb. 408.

90. Ky.—Hutchins v. Foley, 111 S. W.2d 586, 271 Ky. 104—Bodine v. Bodine, 44 S.W.2d 840, 241 Ky. 706—Beatty v. Caldwell, 276 S.W. 547, 210 Ky. 559.
Mo.—Lee v. Ullery, 140 S.W.2d 5.
Tex.—Small v. Taylor, Civ.App., 54 S.W.2d 151.
Wash.—Moffitt v. Goldcamp, 79 P.2d 695, 195 Wash. 75.

91. Ala.—Equitable Life Assur. Soc. of U. S. v. Welch, 195 So. 554, 239 Ala. 453.
Ill.—Britt v. Darnell, 146 N.E. 510, 315 Ill. 385.
Ky.—Hutchins v. Foley, 111 S.W.2d 586, 271 Ky. 104—Bodine v. Bodine, 44 S.W.2d 840, 241 Ky. 706—Beatty v. Caldwell, 276 S.W. 547, 210 Ky. 559.

92. Del.—In re Sharpley's Will, 120 A. 586, 2 W.W.Harr. 154.
Ga.—Merritt v. Wallace, 160 S.E. 610, 173 Ga. 435.
Kan.—Gorman v. Hickey, 64 P.2d 587, 145 Kan. 54.
Ky.—Pfuelb v. Pfuelb, 122 S.W.2d 128, 275 Ky. 588—Mullins v. Mullins, 16 S.W.2d 788, 229 Ky. 103—Doyle v. Schafer, 14 S.W.2d 413, 228 Ky. 83.
N.C.—In re Hargrove's Will, 173 S. E. 577, 206 N.C. 307.
Ohio.—Baillie v. Heimsath, 151 N.E. 788, 20 Ohio App. 216.
Pa.—Patterson v. Snider, 157 A. 612, 305 Pa. 272.
Va.—Forehand v. Sawyer, 136 S.E. 683, 147 Va. 105.
W.Va.—McCary v. Monongahela Valley Traction Co., 125 S.E. 92, 97 W.Va. 306.

Admissibility of testimony showing knowledge

A witness, when testifying as to mental capacity of a person, may state facts showing witness' knowledge of person.—Bryant v. Carrier, 198 S.E. 619, 214 N.C. 191.

93. Ala.—Equitable Life Assur. Soc. of U. S. v. Welch, 195 So. 554, 239 Ala. 453—Batson v. Batson, 117 So. 10, 217 Ala. 450—Murphree v Senn, 18 So. 264, 107 Ala. 424.
Del.—In re Sharpley's Will, 120 A. 586, 2 W.W.Harr. 154—Lodge v. Lodge's Will, 2 Houst. 418.
Ill.—Flanigon v. Smith, 169 N.E. 767, 337 Ill. 572—Jones v. Worth, 149 N.E. 793, 319 Ill. 235—Down v. Comstock, 119 N.E. 507, 318 Ill. 445—Catt v. Robins, 137 N.E. 101, 305 Ill. 76.
Iowa.—Kerkhoff v. Monkemeier, 175 N.W. 762, 188 Iowa 103—McElfresh v. McElfresh, 173 N.W. 259, 186 Iowa 994—In re Burgin's Estate, 171 N.W. 144, 186 Iowa 928—Williams State Bank v. Gish, 149 N.W. 600, 167 Iowa 526.
Ky.—Grand Lodge, Brotherhood of Railroad Trainmen v. Bush, 66 S. W.2d 25, 251 Ky. 826—Frazie's Ex'x v. Frazie, 217 S.W. 668, 186 Ky. 613.
Md.—Johnston v. Schmidt, 149 A. 283, 158 Md. 555—Wood v. Hankey, 105 A. 430, 133 Md. 389.
Mich.—Hake v. Younge, 236 N.W. 858, 254 Mich. 545—In re McCarbery, 219 N.W. 707, 243 Mich. 39—Fox v. Joslin, 196 N.W. 394, 225 Mich. 536—In re Ver Vaecke's Estate, 183 N.W. 1, 214 Mich. 281.
Minn.—Bird v. Johnson, 272 N.W. 168, 199 Minn. 252.
Miss.—Fortenberry v. Herrington, 196 So. 232, 188 Miss. 735—Ward v. Ward, 87 So. 153, 124 Miss. 697.
Mo.—Lee v. Ullery, 140 S.W.2d 5—Carl v. Ellis, App., 110 S.W.2d 805.
Neb.—In re Bartmess' Estate, 258 N.W. 877, 128 Neb. 408.
Ohio.—Baillie v. Heimsath, 151 N.E. 788, 20 Ohio App. 216.
Tenn.—Clarke v. Wilburn, 7 Tenn. App. 46.

support or justify, his opinion or conclusion.[94] Although the witness need not detail all of the facts and circumstances which he has observed and on which his opinion is based,[95] he must state some facts and circumstances which afford a logical and reasonable ground or basis for his opinion[96] and which indicate that his opinion is not a guess or the result of suspicion or speculation.[97]

In a few jurisdictions, while the opinion of a witness who had ample opportunity to observe the person in question and who states the facts on which his opinion is based, may and should be admitted,[98] it is not necessary that the witness state the facts on which his opinion is based where his testimony shows such an intimate and close relation between the person observed and himself as fairly to lead to the conclusion that his opinion will be justified by his opportunity for observation,[99] and it is not error to admit in evidence the opinion of a witness who states that he saw and conversed with the person in question but who fails to state the number, length,[1] subject matter, or substance of the conversations, or what was said by the person under consideration.[2]

With regard to the competency of the witness and the sufficiency of the facts on which he bases his opinion, the question of whether the evidence shows a foundation for the reception of his opinion is one for the trial court to decide[3] and is left largely to its discretion.[4]

Observations connected with business matters or transactions. Although a nonexpert witness has not observed a person transact any business, he may nevertheless state his opinion as to the mental capacity of such person where the condition of the mind of such person was not such as to permit him to attend to any business and he made no attempt to do so unassisted.[5] However, a witness may not express his opinion that a person lacked sufficient mental capacity to transact business where he ad-

Tex.—Duckels v. Dougherty, Civ. App., 226 S.W. 720.
22 C.J. p 553 note 60 [a].

Necessity of relating conversations
If contestant intended to rely on conversations between nonexpert witnesses and testatrix, as basis for witnesses' opinion concerning testatrix' lack of mental capacity, it was necessary for the witnesses to relate the conversations in order that the court could determine whether as a matter of law they were of such a nature as to be the basis of an opinion.—Lewis v. Deamude, 33 N.E.2d 440, 376 Ill. 219.

Admissibility of testimony as to facts
A witness, when testifying as to mental capacity of person, may state the conduct, conversations, or other facts showing basis for opinion.
N.C.—Bryant v. Carrier, 198 S.E. 619, 214 N.C. 191—In re Brown's Will, 140 S.E. 192, 194 N.C. 583—White v. Hines, 109 S.E. 31, 182 N.C. 275.
Vt.—In re Healy's Will, 109 A. 19, 94 Vt. 128.

94. Ill.—Flanigon v. Smith, 169 N.E. 767, 337 Ill. 572.
Iowa.—In re Paczoch's Estate, 211 N.W. 500, 202 Iowa 849—Hann v. Hann, 211 N.W. 495, 202 Iowa 807.
Ky.—Pfuelb v. Pfuelb, 122 S.W.2d 128, 275 Ky. 588—Young's Ex'r v. Toliver's Adm'r, 284 S.W. 389, 214 Ky. 769.
Md.—Acker v. Acker, 192 A. 327, 172 Md. 477—Smith v. Biggs, 189 A. 256, 171 Md. 528—Scheller v. Schindel, 138 A. 415, 153 Md. 547.
Mich.—In re Walker's Estate, 258 N.W. 206, 270 Mich. 33—Trombley v. King, 231 N.W. 79, 251 Mich. 117—In re McCarbery, 219 N.W. 707, 243 Mich. 39—Dolson v. Central Business Men's Ass'n, 209 N.W. 95, 235 Mich. 80—Gutt v. Walter's Estate, 184 N.W. 529, 215 Mich. 572—In re Ver Vaecke's Estate, 183 N.W. 1, 214 Mich. 281.
Mo.—Erwin v. Railway Express Agency, App., 128 S.W.2d 1077.
Ohio.—Baillie v. Heimsath, 151 N.E. 788, 20 Ohio App. 216.
Pa.—Kish v. Bakaysa, 199 A. 321, 330 Pa. 533.
Utah.—In re Hansen's Will, 177 P. 982, 52 Utah 554.

95. Kan.—Funk v. Fish, 252 P. 256, 122 Kan. 294, rehearing denied 255 P. 645, 123 Kan. 207.
Ky.—Sabin v. Commonwealth, 26 S.W.2d 506, 233 Ky. 636—Beatty v. Caldwell, 276 S.W. 547, 210 Ky. 559.
22 C.J. p 602 note 84 [a].

96. Ill.—Lewis v. Deamude, 33 N.E.2d 440, 376 Ill. 219—Morecraft v. Felgenhauer, 178 N.E. 877, 346 Ill. 415—Britt v. Darnell, 146 N.E. 510, 315 Ill. 385.
Ky.—Beatty v. Caldwell, 276 S.W. 547, 210 Ky. 559.
Mich.—Paul v. Paul's Estate, 286 N.W. 680, 289 Mich. 452—In re Ferguson's Estate, 215 N.W. 51, 239 Mich. 616.

97. Ill.—Lewis v. Deamude, 33 N.E.2d 440, 376 Ill. 219—Ginsberg v. Ginsberg, 198 N.E. 432, 361 Ill. 499.
Md.—Smith v. Biggs, 189 A. 256, 171 Md. 528.

98. Ark.—Zambie v. Namour, 132 S.W.2d 390, 198 Ark. 1104—Griffin v. Union Trust Co., 266 S.W. 289, 166 Ark. 347.
Ga.—Snell v. Snell, 142 S.E. 96, 165 Ga. 724—Dyar v. Dyar, 131 S.E. 535, 161 Ga. 615.
Okl.—Oklahoma Natural Gas Corporation v. Lay, 51 P.2d 580, 175 Okl. 75—In re Carney's Guardianship, 237 P. 111, 110 Okl. 165.

99. Ark.—Seeman v. Hilderbrand, 113 S.W.2d 724, 195 Ark. 677—Griffin v. Union Trust Co., 266 S.W. 289, 166 Ark. 347.

In Oklahoma
(1) The rule of the text has been followed.—Davis v. Dixon, 300 P. 378, 149 Okl. 274.
(2) In a prior case it was stated that the witness must state the facts on which his opinion is based.—Payton v. Shipley, 195 P. 125, 80 Okl. 145.

1. Ga.—Pennington v. Perry, 118 S.E. 710, 156 Ga. 103.

2. Ga.—McWilliam v. Pattillo, 161 S.E. 597, 173 Ga. 771.

3. Ill.—Flanigon v. Smith, 169 N.E. 767, 337 Ill. 572—Jones v. Worth, 149 N.E. 793, 319 Ill. 235.
Md.—Smith v. Biggs, 189 A. 256, 171 Md. 528.

4. Ala.—Tucker v. Houston, 112 So. 360, 216 Ala. 43.
Cal.—In re Cook, 210 P. 528, 59 Cal. App. 279.
Ill.—Catt v. Robins, 137 N.E. 101, 305 Ill. 76.
22 C.J. p 603 note 86 [a].

5. Minn.—Ewert v. Chirpich, 211 N.W. 306, 169 Minn. 386.

Testimony that others transacted business
Where the witness testifies that other persons transacted business for the person in question, he may state his opinion as to such person's mental capacity.—Ring v. Lawless, 60 N.E. 881, 190 Ill. 520.

mits that he had never transacted or discussed business with such person.[6]

Time of observation. Nonexpert witnesses must confine their opinions as to the capacity of a testator to a time when he was under their observation.[7] Where the incapacity of a testator resulted from illness and was of a varying, rather than a fixed and unchanging, nature, nonexpert witnesses are not qualified to express an opinion as to the testator's capacity to execute a will where such opinion is based merely on their observations made during visits before and after the execution of the will.[8] On the other hand, the opinions of nonexpert witnesses as to testamentary capacity are not rendered inadmissible by the fact that they were not present at the execution of the will and their opinions are based on observations made shortly before or after the execution of the will;[9] and even though a witness had not seen the testator for several months before and after the execution of the will, his opinion is admissible where he had full opportunity of observing the testator closely during other periods of time and the mental disease with which the testator was afflicted was a progressive one without lucid intervals.[10]

f. Opinions of Attesting or Subscribing Witnesses

Subscribing or attesting witnesses to a will or deed may express their opinion as to the mental condition or capacity of the testator or grantor at the time of the execution of the instrument; a foundation for the reception of such evidence is unnecessary.

The opinions of subscribing or attesting witnesses to a will or deed as to the mental condition or capacity, sanity, soundness of mind, or testamentary capacity of the testator or grantor at the time of the execution of the instrument may be received.[11] Such opinions may be received without the laying of a foundation;[12] it is not necessary that the witnesses state the facts on which their opinions are based,[13] or give reasons for their opinions,[14] or that they have

6. Ill.—Ginsberg v. Ginsberg, 198 N.E. 432, 361 Ill. 499.

7. Ohio.—Rogers v. Monroe, 26 Ohio Cir.Ct.,N.S., 193.

8. Md.—Birchett v. Smith, 133 A. 117, 150 Md. 369.

9. Del.—In re Sharpley's Will, 120 A. 586, 2 W.W.Harr. 154.
Ky.—Tanner v. Grace, 214 S.W. 824, 185 Ky. 127.

10. Va.—McComb v. Farrow, 104 S.E. 812, 128 Va. 455.

11. Ark.—Schirmer v. Baldwin, 32 S.W.2d 162, 182 Ark. 581—McDaniel v. Crosby, 19 Ark. 533.
Cal.—In re Short's Estate, 47 P.2d 555, 7 Cal.App.2d 512.
Colo.—Ashworth v. McNamee, 70 P. 156, 18 Colo.App. 85—In re D'Avignon's Will, 55 P. 936, 12 Colo.App. 489.
Del.—Duffield v. Robeson, 2 Harr. 375.
Ga.—Franklin v. First Nat. Bank, 200 S.E. 679, 187 Ga. 268—Griffin v. Barrett, 195 S.E. 746, 185 Ga. 443.
Ill.—Brownlie v. Brownlie, 191 N.E. 268, 357 Ill. 117, 93 A.L.R. 1041—James White Memorial Home v. Haeg, 68 N.E. 568, 204 Ill. 422—In re Robinson's Will, 60 N.E. 194, 190 Ill. 95.
Iowa.—Parsons v. Parsons, 21 N.W. 570, 66 Iowa 754, affirmed 24 N.W. 564, 66 Iowa 754.
Ky.—Sydner's Ex'r v. Cunningham, 16 S.W. 130, 13 Ky.L. 24.
Me.—Appeal of Martin, 179 A. 655, 133 Me. 422—In re Loomis' Will, 174 A. 38, 133 Me. 81—Appeal of Look, 152 A. 84, 129 Me. 359.
Md.—Johnston v. Schmidt, 149 A. 283, 158 Md. 555.
Mass.—Old Colony Trust Co. v. Di Cola, 123 N.E. 454, 233 Mass. 119—Hastings v. Rider, 99 Mass. 622.
Miss.—Fortenberry v. Herrington, 196 So. 232, 188 Miss. 735—Ward v. Ward, 87 So. 153, 124 Miss. 697.
N.Y.—Irving v. Bruen, 97 N.Y.S. 180, 110 App.Div. 558, affirmed 79 N.E. 1107, 186 N.Y. 605—In re Folk's Will, 24 N.Y.S. 1052, 71 Hun 492, 54 N.Y.St. 894—In re Martin's Will, 144 N.Y.S. 174, 82 Misc. 574, 11 Mills Surr. 295.
N.C.—Hampton v. Garland, 3 N.C. 147.
Or.—In re Riggs' Estate, 250 P. 753, 120 Or. 38—In re Faling's Will, 208 P. 715, 105 Or. 365.
Pa.—In re Plotts' Estate, 5 A.2d 901, 335 Pa. 81—Pidcock v. Potter, 68 Pa. 342, 8 Am.R. 181—Clime v. Watts, 21 Lanc.L.Rev. 177.
Va.—Young v. Barner, 27 Gratt. 96, 68 Va. 96.
22 C.J. p 601 note 66 [a], p 609 notes 42, 43.
Weight of opinion of subscribing witnesses see infra §§ 567–572.

In Alabama

(1) An attesting witness to a will may testify to testamentary capacity.—Lowery v. Lowery, 143 So. 556, 225 Ala. 376.

(2) An attesting witness may testify to mental capacity.—Vaughn v. Vaughn, 116 So. 427, 217 Ala. 364—Shirley v. Ezell, 60 So. 905, 180 Ala. 352.

(3) An attesting witness may express an opinion as to sanity or soundness of mind.—East v. Karter, 118 So. 547, 218 Ala. 366—Ritchey v. Jones, 97 So. 736, 210 Ala. 204—Miller v. Whittington, 80 So. 499, 202 Ala. 400—Walker v. Walker, 34 Ala. 469.

(4) However it has been held that an attesting witness to a will may not testify to testamentary capacity.—Miller v. Whittington, supra.

In Missouri

(1) The opinion of a subscribing witness to a will as to the testator's mental soundness at the time of the execution of the will has been held admissible.—Fields v. Luck, 74 S.W.2d 35, 42, 335 Mo. 765, quoting **Corpus Juris.**

(2) However, an attesting witness' testimony that testator was capable of understanding a business transaction, and had sufficient mind to understand the nature of the business in which he was engaged, the natural objects of his bounty, and the nature, character, and amount of his property has been held inadmissible.—Post v. Bailey, Mo., 254 S.W. 71.

12. Ill.—Brownlie v. Brownlie, 191 N.E. 268, 357 Ill. 117, 93 A.L.R. 1041.
Minn.—In re Olson's Estate, 223 N.W. 677, 176 Minn. 360.
Utah.—In re Hanson's Estate, 52 P.2d 1103, 87 Utah 580.

13. Ala.—Lowery v. Lowery, 143 So. 556, 225 Ala. 376.
Ga.—Morgan v. Bell, 5 S.E.2d 897, 189 Ga. 432—McWilliam v. Pattillo, 161 S.E. 597, 173 Ga. 771—Dyar v. Dyar, 131 S.E. 535, 161 Ga. 615.
Iowa.—Furlong v. Carraher, 79 N.W. 277, 108 Iowa 492.
Mo.—Fields v. Luck, 74 S.W.2d 35, 42, 335 Mo. 765, quoting **Corpus Juris.**
Tex.—Keding v. Kveton, Civ.App., 254 S.W. 612.
22 C.J. p 602 note 84 [c], p 610 note 44.

14. Ga.—Griffin v. Barrett, 195 S.E.

any special qualifications[15] in respect of knowledge, observation, or acquaintance or association affording opportunity for observation, other than the knowledge afforded by observation at the time of the execution of the instrument,[16] it being permissible for such witnesses to base their opinions on what they saw and heard when the instrument was attested.[17]

A witness to a will can state only his inference as to mental condition or capacity at the time of the execution of the will;[18] but an inference formed subsequently to the execution of the will may be stated[19] unless it is based on observation subsequent to such time.[20]

It is not necessary to the competency of the subscribing witness to a will that he should sustain the will.[21]

§ 508. Intoxication

A witness may state his conclusions as to the sobriety or inebriety of another.

A witness who had, and was able to improve, suitable opportunities for observation,[22] may state whether a person was or was not intoxicated[23] and, if the former, the extent of his intoxication;[24] and also as to whether he had been drinking[25] or was just recovering from a state of drunkenness;[26] but testimony of an unskilled witness as to the probable effect of liquor on an individual is rejected,[27] as is testimony that a person was an habitual drunkard or had the habit of getting drunk.[28] A witness may testify as to all the facts which he knows that tend to establish a habit of intemperance.[29]

746, 185 Ga. 443—Griffin v. Barrett, 187 S.E. 828, 183 Ga. 152.

15. Mont.—In re Cummings' Estate, 11 P.2d 968, 92 Mont. 185.

16. Ala.—Lowery v. Lowery, 143 So. 556, 225 Ala. 376—East v. Karter, 118 So. 547, 218 Ala. 366—Vaughn v. Vaughn, 116 So. 427, 217 Ala. 364—Ritchey v. Jones, 97 So. 736, 210 Ala. 204.
Mo.—Fields v. Luck, 74 S.W.2d 35, 42, 335 Mo. 765, quoting **Corpus Juris.**
Mont.—In re Sales' Estate, 89 P.2d 1043, 108 Mont. 202—In re Cummings' Estate, 11 P.2d 968, 972, 92 Mont. 185, citing **Corpus Juris.**
Vt.—In re Wood's Will, 115 A. 231, 95 Vt. 407.
22 C.J. p 610 note 45.

17. Ill.—Brownlie v. Brownlie, 191 N.E. 268, 357 Ill. 117, 93 A.L.R. 1041.
Mo.—Fields v. Luck, 74 S.W.2d 35, 335 Mo. 765.

18. Mass.—Williams v. Spencer, 23 N.E. 105, 150 Mass. 346, 15 Am.S.R. 206, 5 L.R.A. 790.
22 C.J. p 610 note 46.

19. Ohio.—Runyan v. Price, 15 Ohio St. 1, 86 Am.D. 459.

20. Mass.—Williams v. Spencer, 23 N.E. 105, 150 Mass. 346, 15 Am.S.R. 206, 5 L.R.A. 790.
22 C.J. p 610 note 48.

21. Md.—Williams v. Lee, 47 Md. 321.
Tex.—Garrison v. Blanton, 48 Tex. 299.

22. N.Y.—Molissani v. Commodore Laundry Service Corporation, 273 N.Y.S. 150, 152 Misc. 270.
Or.—Guedon v. Rooney, 87 P.2d 209, 216, 160 Or. 621, 120 A.L.R. 1298, citing **Corpus Juris.**
22 C.J. p 599 note 30.

Evidence held inadmissible in absence of observation as to alleged intoxicated person's condition.—Morris v. City Transfer & Yellow Taxi Co., 294 S.W. 1030, 220 Ky. 219.

23. Ala.—Southern Natural Gas Co. v. Davidson, 142 So. 63, 225 Ala. 171—Burke v. Tidwell, 101 So. 599, 211 Ala. 673—Stoudemire v. Davis, 94 So. 498, 208 Ala. 495.
Cal.—Finn v. Sullivan, 293 P. 639, 110 Cal.App. 38, citing **Corpus Juris.**
Ga.—Joiner v. State, 180 S.E. 911, 912, 51 Ga.App. 464, quoting **Corpus Juris.**
Ky.—W. F. Robinson & Son v. Jones, 72 S.W.2d 16, 254 Ky. 637—Murphy v. Phelps, 43 S.W.2d 1010, 241 Ky. 339.
Md.—Cumberland & Westernport Transit Co. v. Metz, 149 A. 4, 158 Md. 424, reargument denied 149 A. 565, 158 Md. 424, and appeal dismissed American Oil Co. v. Metz, 51 S.Ct. 40, 282 U.S. 801, 75 L.Ed. 720.
Mass.—Holton v. Boston Elevated Ry. Co., 21 N.E.2d 251, 303 Mass. 242.
Miss.—Hutson v. Continental Casualty Co., 107 So. 520, 142 Miss. 388.
Mont.—Meinecke v. Intermountain Transp. Co., 55 P.2d 680, 101 Mont. 315.
Neb.—McCulley v. Anderson, 227 N. W. 321, 119 Neb. 105.
N.J.—Searles v. Public Service Ry. Co., 126 A. 465, 100 N.J.Law 222—McHugh v. Borough of Hasbrouck Heights, Sup., 144 A. 799.
N.Y.—Donahue v. Meagley, 221 N. Y.S. 707, 220 App.Div. 469.
Or.—Guedon v. Rooney, 87 P.2d 209, 216, 160 Or. 621, 120 A.L.R. 1298, citing **Corpus Juris.**
Tex.—Henson v. Warren, Civ.App., 274 S.W. 185.
22 C.J. p 599 note 31.

Reasons for rule

(1) "Really, no other rule is practicable. If the witness must be confined to a simple narration of facts, how the person leered or grinned, how he winked his eyes, or squinted, how he wagged his head, etc., all of which drunken men do, you shut out, not only the ordinary, but the best mode of obtaining truth."
Ga.—Choice v. State, 31 Ga. 424, 467.
Mo.—Limbaugh v. Forum Lunch Co., App., 258 S.W. 451, 454.

(2) Further reasons.
Cal.—Holland v. Zollner, 36. P. 930, 37 P. 231, 102 Cal. 633.
Iowa.—State v. Cather, 96 N.W. 722, 121 Iowa 106.
22 C.J. p 599 note 31 [a] (2), (3).

Opinion as to sobriety

(1) It has been held that a witness may state that a person was sober.—Duke v. State, 134 S.W. 705, 61 Tex.Cr. 441.

(2) On the other hand, it has been stated that testimony that a person was sober was a mere "conclusion".—Klopp v. Benevolent Protective Order of Elks, Lodge No. 281, 33 N.E.2d 161, 309 Ill.App. 145.

Corpus Juris cited in support of statement of same rule in criminal prosecution.—State v. Jones, 2 A.2d 374, 376, 124 Conn. 664.

24. Iowa.—State v. Cather, 96 N. W. 722, 121 Iowa 106.
Tex.—St. Louis Southwestern R. Co. v. Wright, Civ.App., 84 S.W. 270.

25. Md.—Cumberland & Westernport Transit Co. v. Metz, 149 A. 4, 158 Md. 424, reargument denied 149 A. 565, 158 Md. 424, and appeal dismissed American Oil Co. v. Metz, 51 S.Ct. 40, 282 U.S. 801, 75 L.Ed. 720.
22 C.J. p 599 note 33.

26. N.Y.—People v. Packenham, 21 N.E. 1035, 115 N.Y. 200.

27. Neb.—Young v. Beveridge, 115 N.W. 766, 81 Neb. 180.

28. Ala.—O'Byrne v. O'Byrne, 100 So. 781, 211 Ala. 450.

29. U.S.—Northwestern Mut. Life

Facts on which the opinion is based should[30] or must[31] be stated so far as this is practicable, although there is authority holding such statement of facts unnecessary;[32] and inconsistent facts may be inquired for on cross-examination.[33]

A conclusion as to the capacity of the person in view of his condition should, according to some authorities, be rejected,[34] but, on the other hand, such evidence has been received.[35]

§ 509. Mental State of Animals

A witness may state his conclusions as to the mental state of an animal.

A witness who is shown to have had suitable opportunities to form a reasonable conclusion and the capacity to do so[36] may state the disposition of an animal,[37] as gentle, safe, and kind,[38] or sulky,[39] or testify as to whether an animal was, or was not, frightened,[40] or that an animal looked fierce.[41]

§ 510. Mental State of Persons

a. Mental state of witness
b. Mental state of other persons

a. Mental State of Witness

In a number of instances a witness has been permitted to testify as to his own mental state; but in other cases such testimony has been held inadmissible.

Numerous cases are to be found in which a witness has been permitted to testify as to his own mental state at a particular time,[42] as, for example, with respect to the absence of malice on his part;[43] his animus;[44] his being aware of something;[45] his belief as to a certain matter;[46] his judgment;[47] his consent;[48] his mental depression;[49] his feeling of dissatisfaction;[50] the existence or nonexistence of influence on his mind;[51] his expectation as to certain matters;[52] his good faith;[53] his feeling of hu-

Ins. Co. v. Muskegon Nat. Bank, N.Y., 7 S.Ct. 1221, 122 U.S. 501, 30 L.Ed. 1100.
Pa.—United Brethren Mut. Aid Soc. v. O'Hara, 13 A. 932, 120 Pa. 256.

30. N.Y.—Molissani v. Commodore Laundry Service Corporation, 273 N.Y.S. 150, 152 Misc. 270.
22 C.J. p 599 note 38.

31. Mo.—Limbaugh v. Forum Lunch Co., App., 258 S.W. 451.
Pa.—Laubach v. Colley, 129 A. 88, 283 Pa. 366.
Tex.—Lloyds Casualty Co. v. Buckner, Civ.App., 56 S.W.2d 658, error dismissed.

32. Iowa.—State v. Cather, 96 N.W. 722, 121 Iowa 106, 108.

33. Ky.—Campbell v. New York Fidelity & Casualty Co., 60 S.W. 492, 109 Ky. 661, 22 Ky.L. 1295.

34. Ala.—Faulkner v. Gilchrist, 143 So. 803, 225 Ala. 391.
22 C.J. p 599 note 36.

35. Wash.—State v. Dolan, 50 P. 472, 17 Wash. 499.

36. N.H.—Pattee v. Whitcomb, 56 A. 459, 72 N.H. 249.
Tex.—San Antonio v. Porter, 59 S.W. 922, 24 Tex.Civ.App. 444.
22 C.J. p 617 note 1.

37. N.H.—Whittier v. Franklin, 46 N.H. 23, 88 Am.D. 185.
22 C.J. p 617 note 2.

38. Conn.—Sydleman v. Beckwith, 43 Conn. 9.

39. N.H.—Whittier v. Franklin, 46 N.H. 23, 88 Am.D. 185.
22 C.J. p 617 note 4.

40. Okl.—Bartlesville Interurban R. Co. v. Quaid, 151 P. 891, 51 Okl. 166.
22 C.J. p 617 note 5.

41. Ala.—Mattison v. State, 55 Ala. 224.
Mich.—Robbins v. Magoon & Kimball Co., 159 N.W. 323, 193 Mich. 200.
22 C.J. p 617 note 6.

42. Ala.—Pollard v. Rogers, 173 So. 881, 885, 234 Ala. 92, citing **Corpus Juris.**
Iowa.—Rogers v. Jefferson, 275 N.W. 874, 224 Iowa 324—In re Maurer's Estate, 201 N.W. 327, 199 Iowa 899.
Mass.—White v. Beacon Trust Co., 177 N.E. 853, 277 Mass. 75.
Mich.—De Saddler v. Yellow Taxicab Co., 184 N.W. 419, 216 Mich. 45.
Or.—Coates v. Slusher, 222 P. 311, 109 Or. 612.
Tex.—McCleskey v. McCleskey, Civ. App., 286 S.W. 616.
22 C.J. p 611 note 66.
Relevancy and materiality generally of testimony as to mental state of persons see supra § 175.
On cross-examination such testimony may be allowed.—Knight Iron & Metal Co. v. Ardis, 199 So. 716, 240 Ala. 305, reversing 199 So. 712, 29 Ala.App. 600—Armour & Co. v. Cartledge, 176 So. 334, 234 Ala. 644—22 C.J. p 611 note 66 [a].
Remoteness
Testimony by which it is sought to prove a mental state must not be too remote in point of time to be relevant.—Sly v. Powell, 123 P. 881, 87 Kan. 142—22 C.J. p 174 note 50.

43. Iowa.—Granby v. Friedman, 186 N.W. 628.
W.Va.—Goodman v. Klein, 104 S.E. 726, 87 W.Va. 292.
22 C.J. p 611 note 67.

44. Vt.—Crawford v. Joslyn, 76 A. 108, 83 Vt. 361, Ann.Cas.1912A 428.

45. Ala.—Birmingham R. & Electric Co. v. Jackson, 34 So. 994, 136 Ala. 279.

46. U.S.—Deal v. U. S., C.C.A.Alaska, 11 F.2d 3, certiorari granted 46 S.Ct. 630, 271 U.S. 656, 70 L.Ed. 1135, reversed on other grounds 47 S.Ct. 613, 274 U.S. 277, 71 L.Ed. 1045.
Ga.—Spooner v. Cobb, 117 S.E. 320, 155 Ga. 458.
Ill.—Lion Oil Co. v. Sinclair Refining Co., 252 Ill.App. 92.
Iowa.—Alitz v. Minneapolis & St. L. R. Co., 193 N.W. 423, 196 Iowa 437.
Minn.—Henslin v. Eingen, 280 N.W. 281, 203 Minn. 166.
Mont.—Welch v. Thomas, 61 P.2d 404, 102 Mont. 591.
N.H.—Smith v. Boston & M. R. R., 177 A. 729, 87 N.H. 246.
Tenn.—Bank of Hendersonville v. Dozier, App., 142 S.W.2d 191.
Tex.—Davis v. Peck, Wright, Peck Inv. Co., Civ.App., 94 S.W.2d 1245, error dismissed—Dove v. Coleman, Civ.App., 234 S.W. 917.
22 C.J. p 611 note 70.

47. Wash.—Long v. Shirrod, 222 P. 482, 128 Wash. 258.

48. Ala.—Jones v. State, 16 So. 135, 104 Ala. 30.
22 C.J. p 611 note 71.

49. Tex.—Chicago R. I. & G. R. Co. v. Smith, Civ.App., 197 S.W. 614.

50. Ala.—Mobile Electric Lighting Co. v. Elder, 21 So. 983, 115 Ala. 138.

51. N.H.—Maxfield v. Pittsfield, 36 A. 609, 67 N.H. 104.
22 C.J. p 611 note 74.

52. Iowa.—In re Maurer's Estate, 201 N.W. 327, 199 Iowa 899.
N.H.—Jackson v. Smart, 5 A.2d 718, 90 N.H. 153.
22 C.J. p 611 note 75.

53. Cal.—MacGruer v. Denivelle, 297 P. 633, 113 Cal.App. 40.
Ga.—Davie v. Tanner, 105 S.E. 355, 150 Ga. 770.

miliation;[54] his intent or intention in a relevant connection;[55] his knowledge[56] or lack of knowledge[57] as to certain matters; his feeling of mortification;[58] his motive[59] and the influence thereof on him;[60] his purpose or lack thereof;[61] the reason for an act, omission, or statement on his part[62]

Or.—Linebaugh v. Portland Mortg. Co., 239 P. 196, 116 Or. 1.
Tex.—Kaiser v. Newsom, Civ.App., 108 S.W.2d 755, error dismissed—Brammer & Wilder v. Limestone County, Civ.App., 24 S.W.2d 99, error dismissed.
22 C.J. p 611 note 76.

54. Iowa.—Lint v. Lint, 139 N.W. 1081, 158 Iowa 444.
S.C.—Rowell v. Johnson, 170 S.E. 151, 170 S.C. 205.

55. U.S.—Chicago & N. W. Ry. Co. v. McKenna, C.C.A.Neb., 74 F.2d 155.
Cal.—Hirshfeld v. Dana, 223 P. 451, 193 Cal. 142—Brown v. Newby, 47 P.2d 1076, 8 Cal.App.2d 203—Howell v. Mays, 290 P. 898, 107 Cal. App. 751.
Colo.—McCaffrey v. Mitchell, 56 P.2d 926, 57 P.2d 900, 98 Colo. 467—Arkansas Valley Bank v. Esser, 224 P. 227, 75 Colo. 110.
Conn.—Carrano v. Shoor, 171 A. 17, 118 Conn. 86—Mentz v. Town of Greenwich, 171 A. 10, 118 Conn. 137—Lentine v. McAvoy, 136 A. 76, 105 Conn. 528—Van Guilder v. Van Guilder, 123 A. 19, 100 Conn. 142—Fox v. Shanley, 109 A. 249, 94 Conn. 350.
D.C.—Chaloner v. Washington Post Co., 6 F.2d 712, 56 App.D.C. 14.
Ga.—First Bancredit Corporation v. J. G. McKenzie Lumber Co., App., 16 S.E.2d 191—Alvaton Mercantile Co. v. Caldwell, 128 S.E. 781, 34 Ga.App. 151—Nichols v. Ward, 108 S.E. 832, 27 Ga.App. 501.
Hawaii.—Garcia v. Ichikawa, 34 Hawaii 748.
Ind.—Seymour Water Co. v. Lebline, 144 N.E. 30, 195 Ind. 481, rehearing overruled 145 N.E. 764, 195 Ind. 481—New York Life Ins. Co. v. Lahr, 137 N.E. 673, 192 Ind. 613.
Iowa.—Orr v. Hart, 258 N.W. 84, 219 Iowa 408—Hassett v. Foster, 193 N.W. 552, 195 Iowa 1173—Brannen v. State Exchange Bank of Parkersburg, 180 N.W. 886, 190 Iowa 630.
Kan.—Blitz v. Metzger, 241 P. 259, 119 Kan. 760, rehearing denied 245 P. 161, 120 Kan. 555.
Me.—Rand v. Michaud, 118 A. 893, 122 Me. 65.
Mass.—Lunn & Sweet Co. v. Wolfman, 167 N.E. 641, 268 Mass. 345—Powell v. Powell, 157 N.E. 639, 260 Mass. 505—Davis v. H. S. & M. W. Snyder, 143 N.E. 319, 248 Mass. 387.
Minn.—Henslin v. Wingen, 280 N.W. 281, 203 Minn. 166—Collins v. Joyce, 178 N.W. 503, 146 Minn. 233—Edwards v. Svea Fire & Life Ins. Co., 170 N.W. 206, 141 Minn. 285.
Mo.—Leimkuehler v. Wessendorf, 18 S.W.2d 445, 323 Mo. 64—Edie v Coleman, App., 141 S.W.2d 238.
Mont.—Welch v. Thomas, 61 P.2d 404, 102 Mont. 591.
Neb.—Merritt v. Ash Grove Lime & Portland Cement Co., 285 N.W. 97, 136 Neb. 52—First Nat. Bank v. Ernst, 219 N.W. 798, 117 Neb. 34.
N.H.—Hebert v. Boston & M. R. R., 8 A.2d 744, 90 N.H. 324.
N.Y.—Rodgers v. Bonner, 45 N.Y. 379, affirming 55 Barb. 9—Kahrs v. Eygabroad, 186 N.Y.S. 531, 114 Misc. 395.
N.D.—State v. Royal Indemnity Co., 175 N.W. 625, 44 N.D. 550
Tenn.—Hibernia Bank & Trust Co. v. Boyd, 48 S.W.2d 1084, 164 Tenn. 376—Bank of Hendersonville v. Dozier, App., 142 S.W.2d 191—Freeze v. The Continental Casualty Co., 5 Tenn.App. 261, 270, citing **Corpus Juris.**
Tex.—Atkins v. Dodds, Civ.App., 121 S.W.2d 1010, error granted—First Nat. Bank v. Willis, Civ.App., 58 S.W.2d 1065—Bevil v. Kirby Lumber Co., Civ.App., 58 S.W.2d 843—U. S. Fidelity & Guaranty Co. v Henderson, Civ.App., 53 S.W.2d 811—Brown v. Logan, Civ.App., 7 S.W.2d 189—Greene v. Waggoner Refining Co., Civ.App., 278 S.W. 492—Dove v. Coleman, Civ.App., 234 S.W. 917.
Wash.—Cannon v. Seattle Title Trust Co., 252 P. 699, 142 Wash. 213.
6 C.J. p 527 note 12 [a]—22 C.J. p 611 note 78.
Intent of corporation
Tex.—Pearson v. Black, Civ.App., 120 S.W.2d 1075—Bevil v. Kirby Lumber Co., Civ.App., 58 S.W.2d 843.
Corpus Juris cited in support of statement of same rule in criminal prosecution.—State v. Myers, 102 P. 2d 1023, 1026, 152 Kan. 56.

56. Ala.—Pacific Mut. Life Ins. Co. of California v. Edmonson, 179 So. 185, 235 Ala. 365.
Cal.—Mayer v. Malloy, 268 P. 453, 92 Cal.App. 464.
Ga.—Hartley v. Hartley, 179 S.E. 245, 50 Ga.App. 848.
Iowa.—Peterson v. McManus, 172 N.W. 460, 187 Iowa 522.
Kan.—Pellette v. Mann Auto Co., 225 P. 1067, 116 Kan. 16.
Mich.—City of Grand Rapids v. Kotvis, 222 N.W. 740, 245 Mich. 319.
Mo.—Roberts v. Roberts, 291 S.W. 485.
Mont.—Edquest v. Tripp & Dragstedt Co., 19 P.2d 637, 93 Mont. 446—Flint Creek Lodge, No. 11, A. F. & A. M., v. Brown, 264 P. 394, 81 Mont. 573.
N.C.—Singleton v. Roebuck, 100 S.E. 313, 178 N.C. 201.
Okl.—Penner v. International Harvester Co. of America, 41 P.2d 843, 171 Okl. 41.
Tex.—Davis v. Peck, Wright, Peck Inv. Co., Civ.App., 94 S.W.2d 1245, error dismissed.
22 C.J. p 612 note 79.

57. Mich.—Wyrwa v. Murray Corporation of America, 265 N.W. 497, 274 Mich. 670.
Mont.—Edquest v. Tripp & Dragstedt Co., 19 P.2d 637, 93 Mont. 446.
Or.—Boord v. Kaylor, 234 P. 263, 114 Or. 62.
Tex.—Texas & N. O. R. Co. v. Plummer, 122 S.W. 942, 57 Tex.Civ.App. 563.
Vt.—Merrihew v. Goodspeed, 147 A. 346, 102 Vt. 206, 66 A.L.R. 1109.

58. Iowa.—Lint v. Lint, 139 N.W. 1081, 158 Iowa 444.

59. U.S.—Chicago & N. W. Ry. Co. v. McKenna, C.C.A.Neb., 74 F.2d 155—Walter v. Rowlands, C.C.A. Cal., 28 F.2d 687.
Cal.—MacGruer v. Denivelle, 297 P. 633, 113 Cal.App. 49.
Minn.—Henslin v. Wingen, 280 N.W. 281, 203 Minn. 166.
Mont.—Welch v. Thomas, 61 P.2d 404, 102 Mont. 591.
Tenn.—Hibernia Bank & Trust Co. v. Boyd, 48 S.W.2d 1084, 164 Tenn. 376—Bank of Hendersonville v. Dozier, App., 142 S.W.2d 191.
Tex.—U. S. Fidelity & Guaranty Co. v. Henderson, Civ.App., 53 S.W.2d 811—Dove v. Coleman, Civ.App., 234 S.W. 917.
22 C.J. p 612 note 82.

60. Ala.—Linnehan v. State, 25 So. 6, 120 Ala. 293.
22 C.J. p 612 note 83.

61. Ala.—Inter-Ocean Casualty Co. v. Stallworth, 127 So. 850, 221 Ala. 71.
Kan.—Blitz v. Metzger, 241 P. 259, 119 Kan. 760, rehearing denied 245 P. 161, 120 Kan. 555.
Tenn.—Hibernia Bank & Trust Co. v. Boyd, 48 S.W.2d 1084, 164 Tenn. 376.
22 C.J. p 612 note 84.

62. U.S.—Central Trust Co. of Des Moines, Iowa, v. Fidelity Trust Co., C.C.A.Mo., 282 F. 233.
Ala.—Bennett v. Bennett, 140 So. 378, 224 Ala. 335.
Ariz.—International Harvester Co. of America v. Davotvich, 24 P.2d 375, 42 Ariz. 249.
Cal.—Rice Lands & Products Co. v. Blevins, 215 P. 402, 61 Cal.App. 536.
Conn.—Bishop v. Copp, 114 A. 682, 96 Conn. 571.

or jointly with another,[63] or for his belief as to certain matters;[64] his reliance on representations, promises, and the like;[65] what he thought[66] or understood[67] as to a particular matter; what was in his mind at a particular time;[68] or a state of willingness on his part;[69] although his testimony on these matters is not conclusive.[70]

On the other hand numerous reasons may exist for rejecting evidence of mental state. Thus the evidence may be irrelevant or immaterial,[71] or may tend to prove character[72] under circumstances where such proof is not admissible, as appears supra § 423; it may amount to a statement of a conclusion of law;[73] it may be possible to lay all the facts before the jury, thus enabling them to draw their own inference on the subject;[74] or the existence of the mental state asserted by the witness may be inconsistent with the facts stated by him, see supra § 486; and it has also been considered that such testimony is objectionable because of the impossibility of contradicting it, even though it may be untrue.[75] The result is that numerous cases are to be found in which courts have refused to permit a witness to testify as to his mental state,[76] as, for instance, his embarrassment[77] or humiliation;[78] the existence or nonexistence of malice on his part;[79]

Ga.—Blanchard & Calhoun Realty Co. v. Comer, 195 S.E. 420, 185 Ga. 448.
Ill.—Bolton v. Bolton, 138 N.E. 158, 306 Ill. 473.
Ind.—Pittsburgh, C., C. & St. L. R. Co. v. Edwards, 129 N.E. 310, 190 Ind. 57.
N.H.—Smith v. Boston & M. R. R., 177 A. 729, 87 N.H. 246.
Or.—Boord v. Kaylor, 234 P. 263, 114 Or. 62.
Tex.—Emerson-Brantingham Implement Co. v. Roquemore, Civ.App., 214 S.W. 679.
22 C.J. p 612 note 85.

63. Ala.—Lambert v. Southern Ry. Co., 108 So. 255, 214 Ala. 438.

64. Ga.—Thomas v. State, 27 Ga. 287.
N.C.—State v. Reitz, 83 N.C. 634.

65. Cal.—Harned v. Watson, 110 P. 2d 431, prior opinion, App., 102 P. 2d 368—Neher v. Kauffman, 242 P. 713, 197 Cal. 674.
Ga.—Barron G. Collier, Inc., v. Bailey, 120 S.E. 427, 31 Ga.App. 197.
Ind.—Chester v. American Trust & Savings Bank, 141 N.E. 10, 88 Ind. App. 105.
Iowa.—Thomas v. Wyckoff, 174 N.W. 26, 187 Iowa 148.
Ky.—Dennis v. Thomson, 43 S.W.2d 18, 240 Ky. 727.
Mass.—England Bros. v. Miller, 174 N.E. 483, 274 Mass. 239—Dixon v. Lamson, 136 N.E. 346, 242 Mass. 129.
Mich.—Steele v. Banninga, 196 N.W. 404, 225 Mich. 547.
Neb.—Rewick v. Dierks Lumber & Coal Co., 190 N.W. 875, 109 Neb. 300.
N.Y.—Carrington v. Miller, 207 N.Y. S. 154, 124 Misc. 169.
N.D.—Federal Surety Co. v. Midwest Const. Co., 228 N.W. 432, 58 N.D. 937.
Or.—Boord v. Kaylor, 234 P. 263, 114 Or. 62—City of Seaside v. Randles, 180 P. 319, 92 Or. 650.
22 C.J. p 612 note 87.

66. Ga.—Gay v. Smith, 181 S.E. 129, 51 Ga.App. 615.
Tex.—Panhandle & S. F. R. Co. v. Haywood, Civ.App., 227 S.W. 347, error refused.
22 C.J. p 612 note 88.

67. Vt.—Enos v. Owens Slate Co., 160 A. 185, 104 Vt. 329.
W.Va.—Cochran v. Craig, 106 S.E. 633, 88 W.Va. 281.
22 C.J. p 612 note 89.

68. Cal.—Perry v. McLaughlin, 297 P. 554, 212 Cal. 1.
Mass.—Long v. Athol, 82 N.E. 665, 196 Mass. 497, 17 L.R.A.,N.S., 96.
N.D.—Halliday v. Stambaugh, 204 N.W. 889, 52 N.D. 925.

69. Iowa—Stilwell v. Stilwell, 172 N.W. 177, 186 Iowa 177.
Mass.—Walker v. Russell, 134 N.E. 388, 240 Mass. 386.
N.Y.—Francis v. Campbell, 74 N.Y. S. 246, 68 App.Div. 287.

70. U.S.—Flynn v. Crume, C.C.A. Ind., 101 F.2d 661.
Ga.—Alvaton Mercantile Co. v. Caldwell, 128 S.E. 781, 34 Ga.App. 151 —Nichols v. Ward, 108 S.E. 832, 27 Ga.App. 501.
Ill.—Du Pont v. Miller, 141 N.E. 423, 310 Ill. 140, error dismissed 46 S. Ct. 17, 269 U.S. 528, 70 L.Ed. 395.
22 C.J. p 612 note 92.

71. Ala.—Sovereign Camp, W. O. W., v. Gibbs, 114 So. 915, 217 Ala. 108.
Ga.—Nichols v. Ward, 108 S.E. 832, 27 Ga.App. 501.
Md.—Hettleman v. Frank, 110 A. 715, 136 Md. 351.
Mich.—Radford v. Radford, 183 N.W. 182, 214 Mich. 545.
N.H.—Smith v. Boston & M. R. R., 177 A. 729, 87 N.H. 246.
22 C.J. p 613 note 93.

72. Va.—House v. House, 46 S.E. 299, 102 Va. 235.
22 C.J. p 613 note 94.

73. U.S.—Prentiss v. Chandler, C.C. A.Cal., 85 F.2d 733, certiorari denied 57 S.Ct. 431, 300 U.S. 654, 81 L.Ed. 864—Prentiss v. Times-Mirror Co., C.C.A.Cal., 85 F.2d 733, certiorari denied 57 S.Ct. 431, 300 U.S. 654, 81 L.Ed. 864.
Cal.—Pryor v. Industrial Accident Commission, 198 P. 1045, 186 Cal. 169—Spath v. Seager, 102 P.2d 350, 39 Cal.App.2d 10.
Iowa.—Schraeder v. Sears, 185 N.W. 110, 192 Iowa 604.
Mass.—Moskow v. Burke, 152 N.E. 321, 255 Mass. 563.
22 C.J. p 613 note 96.

74. Ala.—City of Birmingham v. Whitworth, 119 So. 841, 218 Ala. 603—Gadsden General Hospital v. Hamilton, 103 So. 553, 212 Ala. 531, 40 A.L.R. 294—Tea Java Coffee Co. v. Saxon China Co., 91 So. 885, 207 Ala. 33.
Ark.—Debin v. Texas Co., 81 S.W.2d 935, 190 Ark. 849.
Ind.—State v. Hullihan, 157 N.E. 282, 92 Ind.App. 78.
Ky.—Rodgers v. Flick, 7 Ky.Op. 22.
Mo.—Jordan v. Daniels, 27 S.W.2d 1052, 224 Mo.App. 749.
Tex.—Perkins v. Lightfoot, Civ.App., 10 S.W.2d 1030, error dismissed.
Admissibility of opinion evidence generally where all relevant facts may be laid before jury see supra § 445.

75. U.S.—Flowers v. Bush & Witherspoon Co., Tex., 254 F. 519, 166 C.C.A. 77.
Ala.—Alabama Fertilizer Co. v. Reynolds, 79 Ala. 497.

76. Ala.—Pollard v. Rogers, 173 So. 881, 234 Ala. 92—Pearce v. Hubbard, 135 So. 179, 182, 223 Ala. 231, citing **Corpus Juris**.
Cal.—Murphy v. Davids, 186 P. 143, 181 Cal. 706.
Ind.—Dietrich v. Smith, 177 N.E. 901, 93 Ind.App. 219, denying rehearing 176 N.E. 636, 93 Ind.App. 219.
Me.—Starkey v. Lewin, 105 A. 858, 118 Me. 87.
22 C.J. p 613 note 1.

77. Ala.—Interstate Amusement Co. v. Martin, 62 So. 404, 8 Ala.App. 481.

78. Ala.—Interstate Amusement Co. v. Martin, supra.

79. Ala.—Hamilton v. Maxwell, 24 So. 769, 119 Ala. 23.
Pa.—Eddyside Co. v. Seibel, 15 A.2d 691, 142 Pa.Super. 174.
22 C.J. p 613 note 4.

his good faith;[80] his intent or intention;[81] his reason for an act, omission, or statement;[82] the motive[83] or purpose[84] by which he was actuated; his mental operations,[85] mental suffering,[86] nervousness,[87] fear,[88] or fright;[89] his suppositions,[90] thoughts,[91] beliefs,[92] understanding,[93] wishes,[94] interests,[95] or expectations;[96] his reliance on representations;[97] his knowledge or lack of knowledge as to a particular matter;[98] or what was in his mind

80. Tenn.—Cleveland Nat. Bank v. Arnwine, 5 Tenn.App. 416.
22 C.J. p 613 note 5.

81. U.S.—Prentiss v. Chandler, C. C.A.Cal., 85 F.2d 733, certiorari denied 57 S.Ct. 431, 300 U.S. 654, 81 L.Ed. 864—Prentiss v. Times-Mirror Co., C.C.A.Cal., 85 F.2d 733, certiorari denied 57 S.Ct. 431, 300 U. S. 654, 81 L.Ed. 864.
Cal.—Crandall v. Schnouser, 279 P. 778, 207 Cal. 772—Fuller v. Everett, 280 P. 550, 100 Cal.App. 593.
Mass.—Phelan v. Atlantic Nat. Bank of Boston, 17 N.E.2d 697, 301 Mass. 463—Barbrick v. Huddell, 139 N.E. 629, 245 Mass. 428.
N.C.—Farm Supply Co. v. Davis, 161 S.E. 734, 202 N.C. 56.
Tenn.—Cleveland Nat. Bank v. Arnwine, 5 Tenn.App. 416.
Tex.—Breckenridge v. Coffield, Civ. App., 283 S.W. 310—Stephenson v. Glass, Civ.App., 276 S.W. 1110, error refused, 279 S.W. 260, 115 Tex. 192—First Nat. Bank v. Rush, Civ. App., 227 S.W. 378, modified on other grounds, Com.App., 246 S.W. 349.
22 C.J. p 613 note 6.

Undisclosed intent
U.S.—Flowers v. Bush & Witherspoon Co., Tex., 254 F. 519, 166 C.C.A. 77.
Ala.—Pollard v. Rogers, 173 So. 881, 234 Ala. 92—Corona Coal & Iron Co. v. Callahan, 81 So. 591, 202 Ala. 649—Norton-Crossing Co. v. Martin, 81 So. 71, 202 Ala. 569—Farmers' Bank of Luverne v. Gibson, 108 So. 628, 21 Ala.App. 389.
Conn.—Van Guilder v. Van Guilder, 123 A. 19, 100 Conn. 142.
Ga.—National Manufacture & Stores Corporation v. Dekle, 173 S.E. 408, 48 Ga.App. 515.
Iowa.—Leach v. Farmers' & Merchants' State Bank of Washington, Iowa, 215 N.W. 617, 204 Iowa 493—Valentine v. Andrew, 212 N.W. 674, 203 Iowa 463.
Tex.—American Ry. Exp. Co. v. Patterson Produce Co., Com.App., 12 S.W.2d 158, reversing Patterson Produce Co. v. American Ry. Express Co., Civ.App., 1 S.W.2d 456.

82. U.S.—Najera v. Bombardieri, C. C.A.N.M., 46 F.2d 281.
Ala.—Sovereign Camp, W. O. W., v. Gibbs, 114 So. 915, 217 Ala. 108—Corona Coal & Iron Co. v. Callahan, 81 So. 591, 202 Ala. 649.
Cal.—Livingstone v. MacGillivray, 36 P.2d 622, 1 Cal.2d 546—Richmond v. Moore, 284 P. 681, 103 Cal.App. 173—Brown v. Howard, 261 P. 732, 86 Cal.App. 532.
Ill.—Ross v. Chicago & A. R. Co., 225 Ill.App. 633.
Ind.—Rushville Nat. Bank of Rushville v. State Life Ins. Co., 1 N.E. 2d 445, 210 Ind. 492—Snyder v. Snyder, 131 N.E. 248, 76 Ind.App. 9.
Minn.—Quarfot v. Security Nat. Bank & Trust Co., 249 N.W. 668, 189 Minn. 451.
Mo.—Hankins v. St. Louis-San Francisco Ry. Co., App., 14 S.W.2d 674.
22 C.J. p 613 note 7.

83. Ala.—Armour & Co. v. Cartledge, 176 So. 334, 234 Ala. 644—Sovereign Camp, W. O. W., v. Gibbs, 114 So. 915, 217 Ala. 108—Pilcher v. City of Dothan, 93 So. 16, 207 Ala. 421.
22 C.J. p 613 note 8.

Undisclosed motive
Ala.—Corona Coal & Iron Co. v. Callahan, 81 So. 591, 202 Ala. 649—Farmers' Bank of Luverne v. Gibson, 108 So. 628, 21 Ala.App. 389.

84. Ala.—Armour & Co. v. Cartledge, 176 So. 334, 234 Ala. 644—Pilcher v. City of Dothan, 93 So. 16, 207 Ala. 421.
Ind.—State v. Hullihan, 157 N.E. 282, 92 Ind.App. 78.
S.D.—Shirley v. Madsen, 216 N.W. 601, 52 S.D. 43.
22 C.J. p 613 note 9.

Undisclosed purpose
Ala.—Cooke v. Embry, 123 So. 27, 219 Ala. 623—Farmers' Bank of Luverne v. Gibson, 108 So. 628, 21 Ala.App. 389.

85. Ala.—Armour & Co. v. Cartledge, 176 So. 334, 234 Ala. 644—Griswold v. Duke, 140 So. 427, 224 Ala. 402.
22 C.J. p 613 note 10.

86. Ala.—Standard Oil Co. v. Humphries, 96 So. 629, 209 Ala. 493—Walling v. Fields, 96 So. 471, 209 Ala. 389—Western Union Tel. Co. v. Cleveland, 53 So. 80, 169 Ala. 131, Ann.Cas.1912B 534.

87. Ala.—Standard Oil Co. v. Humphries, 96 So. 629, 209 Ala. 493.

88. Ala.—Armour & Co. v. Cartledge, 176 So. 334, 234 Ala. 644.

89. Ala.—Standard Oil Co. v. Humphries, 96 So. 629, 209 Ala. 493.

90. Mo.—Masonic Home of Missouri v. Windsor, 92 S.W.2d 713, 338 Mo. 877.
22 C.J. p 613 note 12.

91. Cal.—Winther v. Industrial Accident Commission of California, 60 P.2d 342, 16 Cal.App.2d 131.
Conn.—Town of Enfield v. Hamilton, 148 A. 353, 110 Conn. 319.
Ga.—Smeltzer v. Atlanta Coach Co., 176 S.E. 846, 49 Ga.App. 755.
Iowa.—Miller v. Mutual Fire & Tornado Ass'n of Cedar Rapids, 259 N.W. 572, 219 Iowa 689.
Mass.—Renwick v. Eastern Massachusetts St. Ry. Co., 175 N.E. 475, 275 Mass. 145—Costello v. Hayes, 144 N.E. 368, 249 Mass. 349.
Mo.—Masonic Home of Missouri v. Windsor, 92 S.W.2d 713, 338 Mo. 877—Duvall v. Brooklyn Cooperage Co., App., 275 S.W. 586.
Tenn.—Boyd v. Ducktown Chemical & Iron Co., 89 S.W.2d 360, 19 Tenn. App. 392.
Tex.—Sloan v. Sloan, Civ.App., 32 S. W.2d 513—W. T. Rawleigh Co. v. Fish, Civ.App., 290 S.W. 798.
22 C.J. p 613 note 13.

92. U.S.—U. S. v. O'Connell, D.C.N. Y., 43 F.2d 1005.
Cal.—Progressive Finance Corporation v. Vining, 1 P.2d 1004, 115 Cal.App. 423, setting aside 300 P. 979.
Me.—Hooper v. Bail, 179 A. 404, 133 Me. 412.
Md.—Hettleman v. Frank, 110 A. 715, 136 Md. 351.
Neb.—Wert v. Equitable Life Assur. Soc. of U. S., 283 N.W. 506, 135 Neb. 654.
Ohio.—Blackford v. Kaplan, 20 N.E. 2d 522, 135 Ohio St. 268.

Undisclosed belief
Ala.—Cooke v. Embry, 123 So. 27, 219 Ala. 623—Corona Coal & Iron Co. v. Callahan, 81 So. 591, 202 Ala. 649.

93. Mo.—Masonic Home of Missouri v. Windsor, 92 S.W.2d 713, 338 Mo. 877—Jordan v. Daniels, 27 S.W.2d 1052, 224 Mo.App. 749.
22 C.J. p 613 note 14.

94. Ala.—Gilley v. Denman, 64 So. 97, 185 Ala. 561—Barnewell v. Stephens, 38 So. 662, 142 Ala. 609.

95. Ala.—Cooke v. Embry, 123 So. 27, 219 Ala. 623.

96. Ala.—Putman v. White, 88 So. 355, 18 Ala.App. 15.
R.I.—Northway Motor Sales Co. v. Pugh, 116 A. 485.

97. Ala.—Utley v. Stevens, 130 So. 405, 221 Ala. 666—Sovereign Camp, W. O. W., v. Hutchinson, 114 So. 684, 217 Ala. 71—Tea Java Coffee Co. v. Saxon China Co., 91 So. 885, 207 Ala. 33.

98. Ala.—Lawrence v. Tennessee Valley Bank, 141 So. 664, 224 Ala. 692—Louisville & N. R. Co. v. Watson, 94 So. 551, 208 Ala. 319.
Cal.—Mah See v. North American Acc. Ins. Co. of Chicago, Ill., 213

at a particular time.[99]

b. Mental State of Other Persons

In many cases testimony of a witness as to the mental state of another, deduced from observation, has been received; but in other cases such evidence has been rejected.

Where the main ingredient in an inference as to the existence of a relevant[1] mental state is the intuitive induction from observed appearances, the testimony is admissible,[2] on a statement by the witness of such constituent facts as he is able to detail.[3] Thus a witness may be allowed to state that a person appeared to be, or impressed him as being, affectionate;[4] that one was afraid,[5] frightened,[6] or scared;[7] that a person was agitated,[8] confused,[9] excited,[10] incoherent,[11] nervous,[12] or surprised;[13] or, on the other hand, calm,[14] quiet,[15] or rational;[16] that a person was angry,[17] annoyed,[18] cross,[19] enraged,[20] or mad;[21] that one was anxious,[22] apprehensive,[23] distressed,[24] or worried;[25] that one was bitter;[26] that one was contented[27] or pleased,[28] or, on the other hand, disgusted,[29] hurt,[30] or humiliated;[31] that a person was despondent or the reverse;[32] that one was feeling pretty bad;[33] that one was friendly or hostile;[34] that one was interested[35] or indifferent;[36] that one was jesting or in earnest;[37] or that a person was joyous,[38] or sad.[39] A witness has al-

P. 42, 190 Cal. 421—Bramble v. McEwan, 104 P.2d 1054, 40 Cal. App.2d 400—Chapman v. Associated Transit Terminal Corporation, 10 P.2d 1023, 123 Cal.App. 157—King v. Cline, 194 P. 290, 49 Cal. App. 696.
Del.—Braderman v. Baltimore & P. R. Co., 134 A. 56, 3 W.W.Harr. 206.
Mass.—McNeil v. New York, N. H. & H. R. Co., 185 N.E. 471, 282 Mass. 575.
Mont.—Phelps v. Union Central Life Ins. Co. 71 P.2d 887, 105 Mont. 195.
N.D.—Bank of Valley City v. Lee, 175 N.W. 575, 43 N.D. 503.
R.I.—Zannelle v. Pettine, 155 A. 236, 51 R.I. 359.
S.D.—Coffey, Carr & Coffey v. Carlberg Co., 212 N.W. 496, 51 S.D. 117.

99. Wash. — Scandinavian-American Bank v. Long, 134 P. 913, 75 Wash. 270.
22 C.J. p 614 note 16.

1. S.C.—Thompkins v. Augusta & K. R. Co., 21 S.C. 420.
22 C.J. p 614 note 17.

2. Ala.—Pollard v. Rogers, 173 So. 881, 234 Ala. 92.
22 C.J. p 614 note 18.

3. Conn.—Sydleman v. Beckwith, 43 Conn. 9.
22 C.J. p 614 note 19.

4. Utah.—In re Miller, 102 P. 996, 36 Utah 228, 234.
22 C.J. p 614 note 20.

5. Neb.—Kubicek v. Slezak, 230 N. W. 248, 119 Neb. 542, 69 A.L.R. 1166.
22 C.J. p 614 note 21.

6. Tex.—Prim v. Farmers' Nat. Bank of Dublin, 28 S.W.2d 941, Civ.App., affirmed in part and reversed in part on other grounds Com.App., 44 S.W.2d 943, amended 51 S.W.2d 684.
22 C.J. p 614 note 22.

7. Ala.—State v. Houston, 78 Ala. 576, 56 Am.R. 59.
Mo.—State v. Ramsey, 82 Mo. 133.

8. N.H.—Hardy v. Merrill, 56 N. H. 227, 22 Am.R. 441.
Utah.—In re Miller, 102 P. 996, 36 Utah 228.

9. N.H.—Hardy v. Merrill, 56 N.H. 227, 22 Am.R. 441.

10. Utah.—In re Miller, 102 P. 996, 36 Utah 228.
22 C.J. p 614 note 26.

11. Mass.—O'Neil v. Hanscom, 56 N. E. 587, 175 Mass. 313.

12. Ala.—Disheroon v. Brock, 105 So. 899, 213 Ala. 637.
22 C.J. p 614 note 28.
Corpus Juris cited in support of statement of same rule in criminal prosecution.—Nichols v. U. S., C.C.A. Fla., 48 F.2d 46, 49.

13. Tex.—Jackson v. State, 70 S.W. 760, 44 Tex.Cr. 259.

14. Ill.—Dimick v. Downs, 82 Ill. 570.
S.C.—Shelton v. Southern R. Co., 67 S.E. 899, 86 S.C. 98.

15. Tex.—Duke v. State, 134 S.W. 705, 61 Tex.Cr. 441.

16. Ala.—Parke v. Dennard, 118 So. 396, 218 Ala. 209.
Cal.—People v. Bostic, 141 P. 380, 167 Cal. 754.

17. Kan.—White v. White, 90 P. 1087, 76 Kan. 82.
22 C.J. p 615 note 33.

18. Kan.—Brothers v. Adams, 107 P. 2d 757, 152 Kan. 675.

19. Iowa.—State v. Crafton, 56 N.W. 257, 89 Iowa 109.

20. Wis.—Schultz v. Frankfort Marine Accident & Plate Glass Ins. Co., 139 N.W. 386, 151 Wis. 537, 43 L.R.A.,N.S., 520.

21. Mo.—Troxell v. De Shon, App., 279 S.W. 438.
Tex.—Walker v. Kellar, Civ.App., 218 S.W. 792.
22 C.J. p 615 note 36.

22. Ala.—Cohn & Goldberg Lumber Co. v. Robbins, 48 So. 853, 159 Ala. 289.

23. Tex.—Galveston, H. & S. A. R. Co. v. Wesch, 22 S.W. 957, 85 Tex. 593.

24. Ala.—Lay v. Postal Tel. Cable Co., 54 So. 529, 171 Ala. 172.

25. Vt.—State v. Bradley, 24 A. 1053, 64 Vt. 466.
Not overly worried
Tex.—Houston Electric Co. v. Potter, Civ.App., 51 S.W.2d 754, error dismissed.

26. Utah.—In re Miller, 102 P. 996, 36 Utah 228.

27. Tex.—Morrison v. State, 51 S.W. 358, 40 Tex.Cr. 473.

28. N.H.—Hardy v. Merrill, 56 N. H. 227, 22 Am.R. 441.

29. Utah.—Fritz v. Western Union Tel. Co., 71 P. 209, 25 Utah 263.

30. Ala.—Barlow v. Hamilton, 44 So. 657, 151 Ala. 634.

31. Tex.—Prim v. Farmers' Nat. Bank of Dublin, Civ.App., 28 S.W. 2d 941, affirmed in part and reversed in part on other grounds Com.App., 44 S.W.2d 943, amended 51 S.W.2d 684.

32. Mass.—Culver v. Dwight, 6 Gray 444.
22 C.J. p 615 note 46.

33. Iowa.—State v. Hudson, 50 Iowa 157.
Minn.—Bannister v. George H. Hurd Realty Co., 155 N.W. 627, 131 Minn. 448.

34. Ind.—Fisher v. Carey, 119 N.E. 376, 67 Ind.App. 438.
22 C.J. p 615 note 48.

35. Tex.—Allen v. State, 8 Tex.App. 67.

36. Mass.—Commonwealth v. Piper, 120 Mass. 185.

37. Ala.—Ray v. State, 50 Ala. 104.
Tex.—Powers v. State, 5 S.W. 153, 23 Tex.App. 42.

38. Tex.—Morrison v. State, 51 S.W. 358, 40 Tex.Cr. 473.

39. Mass.—Culver v. Dwight, 6 Gray 444.
Tex.—Chicago, R. I. & G. R. Co. v. Smith, Civ.App., 197 S.W. 614.
22 C.J. p 615 note 53.

so been permitted to characterize a state of mind as natural,[40] or as related in a particular way to that of another person;[41] and to state that a person appeared to be listening;[42] that he exhibited such emotions as anguish,[43] attachment,[44] ferocity,[45] or grief,[46] or that he exhibited no sorrow.[47] Statements have been received that one's bearing was truculent,[48] overbearing,[49] or insolent;[50] that he had a sneer on his face;[51] that he had positive opinions;[52] that one's disposition was bright and cheerful;[53] that one impressed the witness as happy and contented;[54] and that one was in his usual frame of mind.[55] A witness has also been allowed to state the existence of more complicated mental states, as belief,[56] intention,[57] knowledge,[58] or the operation of undue or other influence.[59] A change or lack of change in habitual mental attitude may also be stated.[60]

On the other hand, a witness will not be permitted to testify as to the existence of a mental state in another where the inference is one which is conceived rather than perceived; where it is reached by the aid, in some substantial degree, of the reasoning faculty;[61] where the fact inferred is irrelevant;[62] or where the observer has or shows no sufficient basis for the inference which he proposes to state.[63] These considerations have led various courts to reject evidence of particular mental states,[64] as, for example, affection;[65] approval;[66] attachment;[67] belief;[68] bitterness;[69] dejection;[70] displeasure;[71] dis-

40. Iowa.—State v. Wright, 84 N.W. 541, 112 Iowa 436.

41. Mich.—Brownell v. People, 38 Mich. 732.
22 C.J. p 615 note 55.

42. N.C.—State v. Leak, 72 S.E. 567, 156 N.C. 643.

43. Tex.—St. Louis, S. F. & T. Ry. Co. v. Green, Civ.App., 22 S.W.2d 550, reversed on other grounds, Com.App., 37 S.W.2d 123.
22 C.J. p 615 note 57.

44. N.Y.—McKee v. Nelson, 4 Cow. 355, 15 Am.D. 384.
22 C.J. p 615 note 58.

45. Mo.—State v. Buchler, 15 S.W. 331, 103 Mo. 203.

46. Ind.—Hughes v. Nolte, 34 N.E. 745, 7 Ind.App. 526.

47. Tex.—Crowell v. State, 120 S. W. 897, 56 Tex.Cr. 480.

48. Mo.—White v. Metropolitan St. R. Co., 112 S.W. 278, 132 Mo.App. 339.

49. Wis.—Schultz v. Frankfort Marine Accident & Plate Glass Ins. Co., 139 N.W. 386, 151 Wis. 537, 43 L.R.A.,N.S., 520.

50. Wis.—Schultz v. Frankfort, Mar., etc., Ins. Co., supra.

51. Mo.—White v. Metropolitan St. R. Co., 112 S.W. 278, 132 Mo.App. 339.

52. Tex.—Prim v. Farmers' Nat. Bank of Dublin, 28 S.W.2d 941, Civ.App., affirmed in part and reversed in part on other grounds, Com.App., 44 S.W.2d 943, amended 51 S.W.2d 684.

53. Tex.—Pullman Co. v. Hoyle, 115 S.W. 315, 52 Tex.Civ.App. 534.

54. Tex.—Morrison v. State, 51 S.W. 358, 40 Tex.Cr. 473.

55. Iowa.—State v. Wright, 84 N.W. 541, 112 Iowa 436.

56. Or.—Spencer v. Peterson, 69 P. 519, 1108, 41 Or. 257.

57. Ind.—Seymour Water Co. v. Lebline, 144 N.E. 30, 195 Ind. 481, rehearing overruled 145 N.E. 764, 195 Ind. 481.
Iowa.—Trott's Estate v. Hanson, 294 N.W. 777.
Tenn.—McAdoo v. Dickson, 126 S.W. 2d 393, 23 Tenn.App. 74.
Tex.—Burke v. Burke, Civ.App., 233 S.W. 990.
22 C.J. p 616 note 70.

58. Mo.—Garnett v. S. S. Kresge Co., App., 85 S.W.2d 157.
22 C.J. p 616 note 71.

59. Ill.—Brownlie v. Brownlie, 191 N.E. 268, 357 Ill. 117, 93 A.L.R. 1041.
22 C.J. p 616 note 72.

60. Ala.—Johnson v. State, 17 Ala. 618.
Tex.—Prim v. Farmers' Nat. Bank of Dublin, Civ.App., 28 S.W.2d 941, affirmed in part and reversed in part on other grounds, Com.App., 44 S.W.2d 943, amended 51 S.W.2d 684—San Angelo Water, Light & Power Co. v. Baugh, Civ.App., 270 S.W. 1101.

61. Cal.—Tower v. Humboldt Transit Co., 169 P. 227, 176 Cal. 602.
22 C.J. p 616 note 74.

Deduction from appearance
In suit on life policy, where defense of suicide was set up, rejection of testimony, in answer to question regarding insured's appearance on day of death, that it looked as though insured was looking death right in face, was held not error, since involving conclusion.—Federal Life Ins. Co. v. Zebec, C.C.A.Ind., 82 F.2d 961, certiorari denied 57 S.Ct. 20, 299 U.S. 558, 81 L.Ed. 411.

62. Ala.—Ellard v. Goodall, 87 So. 196, 204 Ala. 644.
22 C.J. p 616 note 75.

63. U.S.—Shwab v. Doyle, C.C.A. Mich., 269 F. 321, reversed on other grounds 42 S.Ct. 391, 258 U.S. 529, 66 L.Ed. 747, 26 A.L.R. 1454.
Ala.—Ellard v. Goodall, 87 So. 196, 204 Ala. 644.
Md.—Brotherhood of Locomotive Firemen & Engineers v. Nash, 125 A. 441, 144 Md. 623.
22 C.J. p 616 note 76.

Mere surmise or guess is not admissible.—Cargall v. Riley, 95 So. 821, 209 Ala. 183.

64. Mass.—Blabon v. Hay, 169 N.E. 268, 269 Mass. 401.
Mo.—Foster v. Aubuchon, App., 221 S.W. 741.
N.J.—Fuld v. Adams, 156 A. 833, 108 N.J.Law 373.
S.C.—Goethe v. Browning, 143 S.E. 362, 146 S.C. 7.
Tex.—U. S. Fidelity & Guaranty Co. v. Henderson, Civ.App., 53 S.W.2d 811.
22 C.J. p 507 note 26, p 616 note 77.

Mental suffering
Testimony of witness, not expert, concerning decedent's apparent mental suffering after automobile accident, was held properly excluded.—Lawson's Adm'r v. Brandenburg, 41 S.W.2d 201, 240 Ky. 68.

65. Ind.—McVey v. Blair, 7 Ind. 590.

66. Ala.—Burns v. Campbell, 71 Ala. 271.

67. Pa.—Leckey v. Bloser, 24 Pa. 401.

68. Cal.—Central Heights Imp. Co. v. Memorial Parks, 105 P.2d 596, 40 Cal.App.2d 591.
Tex.—Davis v. Peck, Wright, Peck Inv. Co., Civ.App., 94 S.W.2d 1245, error dismissed—U. S. Fidelity & Guaranty Co. v. Henderson, Civ. App., 53 S.W.2d 811—Marchman v. McCoy Hotel Operating Co., Civ. App., 21 S.W.2d 552.
22 C.J. p 616 note 81.

69. Wash.—State v. Stockhammer, 75 P. 810, 34 Wash. 262.

70. Ala.—McAdory v. State, 59 Ala. 92.

71. Mich.—Fleckinger v. Taffee, 113 N.W. 311, 149 Mich. 678.

satisfaction;[72] fear;[73] fraud;[74] good or bad faith;[75] intent or intention;[76] knowledge, awareness, or notice;[77] malice;[78] motive;[79] purpose;[80] reliance;[81] understanding;[82] or wish or desire.[83] Testimony has also been rejected with respect to the nature of a person's disposition,[84] the extent of his will power,[85] the effect of undue or other influence on him,[86] his reasons for conduct, statements, or belief,[87] or what entered into his consciousness by means of hearing, vision, or other faculty.[88]

§ 511. Pecuniary Condition

A witness with knowledge of the facts generally may state his conclusion as to a person's pecuniary condition.

A witness possessing the necessary knowledge,[89]

72. Ky.—Combs v. Shields' Ex'r, 109 S.W.2d 601, 270 Ky. 232.
N.Y.—Metz v. Luckemeyer, 12 N.Y.S. 550, 59 N.Y.Super. 53, affirmed 29 N.E. 149, 128 N.Y. 682.

73. Ala.—Bell v. State, 37 So. 281, 140 Ala. 57.
22 C.J. p 616 note 85.

74. Tex.—Fleming-Stitzer Road Bldg. Co. v. Chastian, Civ.App., 241 S.W. 619.
22 C.J. p 616 note 86.

75. Tex.—Fleming-Stitzer Road Bldg. Co. v. Chastian, Civ.App., 241 S.W. 619.
Vt.—Johnson v. Hardware Mut. Casualty Co., 1 A.2d 817, 109 Vt. 481.
22 C.J. p 616 note 87.

76. Cal.—In re Boole's Estate, 277 P. 759, 98 Cal.App. 714.
Mass.—De Santis v. Massachusetts Bonding & Insurance Co., 194 N.E. 136, 289 Mass. 315—Falk v. Falk, 181 N.E. 715, 279 Mass. 530.
N.C.—Fenner v. Tucker, 196 S.E. 357, 213 N.C. 419.
Tex.—Davis v. Peck, Wright, Peck Inv. Co., Civ.App., 94 S.W.2d 1245, error dismissed—U. S. Fidelity & Guaranty Co. v. Henderson, Civ. App., 53 S.W.2d 811—McClory v. Schneider, Civ.App., 51 S.W.2d 738, error dismissed.
Utah.—Coop v. George A. Lowe Co., 263 P. 485, 71 Utah 145.
Wis.—Folding Furniture Works v. Wisconsin Labor Relations Board, 285 N.W. 851, 232 Wis. 170, rehearing denied 286 N.W. 875, 232 Wis. 170.
22 C.J. p 616 note 88.

Uncommunicated intent of another cannot be testified to by a witness.—Holmes v. Holmes, 103 So. 884, 212 Ala. 597.

77. Ala.—Lawrence v. Tennessee Valley Bank, 141 So. 664, 224 Ala. 692—Cargall v. Riley, 95 So. 821, 209 Ala. 183—Reliance Life Ins. Co. v. Russell, 94 So. 748, 208 Ala. 559—Massey v. Pentecost, 90 So. 866, 206 Ala. 411.
Ga.—Brown v. Mutual Life Ins. Co. of New York, 116 S.E. 559, 29 Ga. App. 794.
Ill.—Loftus v. Chicago Rys. Co., 127 N.E. 654, 293 Ill. 475, reversing 212 Ill.App. 659.
Iowa.—Hart v. Home Mut. Ins. Ass'n of Iowa, 226 N.W. 781, 208 Iowa 1030—Rinella v. Faylor, 180 N.W. 983, 190 Iowa 707.
Ky.—Louisville & N. R. Co. v. Philpot's Adm'r, 286 S.W. 1078, 215 Ky. 682—Louisville & N. R. Co. v. Scott's Adm'r, 220 S.W. 1066, 188 Ky. 99.
Mo.—American Trust Co. v. McDermott, App., 256 S.W. 105.
N.J.—James v. Pennsylvania R. Co., 146 A. 52, 105 N.J.Law 504.
Tex.—Davis v. Peck, Wright, Peck Inv. Co., Civ.App., 94 S.W.2d 1245, error dismissed—U. S. Fidelity & Guaranty Co. v. Henderson, Civ. App., 53 S.W.2d 811.
22 C.J. p 507 note 24, p 616 note 89.

78. Idaho.—Ross v. Kerr, 167 P. 654, 30 Idaho 492.
N.C.—Minton v. Ferguson, 181 S.E. 553, 208 N.C. 541.
Vt.—Johnson v. Hardware Mut. Casualty Co., 1 A.2d 817, 109 Vt. 481.

79. U.S.—Northern Trust Co. v. Commissioner of Internal Revenue, C.C.A., 116 F.2d 96.
Mass.—De Santis v. Massachusetts Bonding & Insurance Co., 194 N.E. 136, 289 Mass. 315—Sullivan v. Brabazon, 162 N.E. 312, 264 Mass. 276.
Pa.—In re Zellner's Estate, 172 A. 715, 316 Pa. 202.
Tex.—McClory v. Schneider, 51 S.W. 2d 738, Civ.App., error dismissed.
22 C.J. p 507 note 25, p 616 note 91.

80. Cal.—Dobbie v. Pacific Gas & Electric Co., 273 P. 630, 95 Cal. App. 781.
Ga.—Pierce v. Dennett, 136 S.E. 440, 163 Ga. 471.
Md.—Brotherhood of Locomotive Firemen & Engineers v. Nash, 125 A. 441, 144 Md. 623.
N.J.—Fuld v. Adams, 156 A. 833, 108 N.J.Law 373.
Tex.—El Paso Sash & Door Co. v. Crawford, Civ.App., 283 S.W. 232, error granted Crawford v. El Paso Sash & Door Co., 283 S.W. 754, 115 Tex. 508, reversed on other grounds, Com.App., 288 S.W. 169, modified 289 S.W. 994.
Wis.—Folding Furniture Works v. Wisconsin Labor Relations Board, 285 N.W. 851, 232 Wis. 170, rehearing denied 286 N.W. 875, 232 Wis. 170.
22 C.J. p 507 note 25, p 616 note 92.

81. U.S.—Twin Falls Salmon River Land & Water Co. v. Alexander, D.C.Idaho, 260 F. 270, affirmed, C. C.A., 267 F. 382.
22 C.J. p 617 note 93.

82. Cal.—Central Heights Imp. Co. v. Memorial Parks, 105 P.2d 596, 40 Cal.App.2d 591.
Idaho.—Colwell v. Bothwell, 89 P.2d 193, 60 Idaho 107.
22 C.J. p 617 note 94.

83. Ala.—Bevill v. Wilkins, 113 So. 28, 216 Ala. 299.
Ga.—Supreme Forest Woodmen Circle v. Newsome, 11 S.E.2d 480, 63 Ga.App. 550.
Tenn.—Bailey v. Bailey, 6 Tenn.App. 272.
Tex.—McClory v. Schneider, Civ. App., 51 S.W.2d 738, error dismissed.

84. Ga.—Bush v. State, 34 S.E. 298, 109 Ga. 120.
Ind.—Jackson v. Folsom, 118 N.E. 955, 187 Ind. 257.
22 C.J. p 617 note 95.

85. Ind.—Goodwin v. State, 96 Ind. 550.
22 C.J. p 617 note 96.

86. Ga.—Pennington v. Perry, 118 S.E. 710, 156 Ga. 103.
Ill.—Ray v. Koenigsmarck, 161 N.E. 124, 329 Ill. 588—Buerger v. Buerger, 148 N.E. 274, 317 Ill. 401.
Ky.—Whittaker v. Prater, 39 S.W.2d 248, 239 Ky. 173.
Miss.—Scally v. Wardlaw, 86 So. 625, 123 Miss. 857.
N.C.—In re Craig's Will, 135 S.E. 798, 192 N.C. 656.
Tex.—Jennings v. Jennings, Civ. App., 212 S.W. 772.
22 C.J. p 617 note 97.

87. Ga.—J. C. Lysle Milling Co. v. Whitfield Grocery Co., 106 S.E. 8, 26 Ga.App. 216.
Md.—Brotherhood of Locomotive Firemen & Engineers v. Nash, 125 A. 441, 144 Md. 623.
Or.—Fredenburg v. Horn, 218 P. 939, 108 Or. 672, 30 A.L.R. 1153.
Pa.—In re Zellner's Estate, 172 A. 715, 316 Pa. 202.
Tex.—El Paso Sash & Door Co. v. Crawford, Civ.App., 283 S.W. 232, error granted Crawford v. El Paso Sash & Door Co., 283 S.W. 754, 115 Tex. 508, reversed on other grounds, Com.App., 288 S.W. 169, modified 289 S.W. 994.
22 C.J. p 617 note 98.

88. Kan.—Handley v. Missouri Pac. R. Co., 59 P. 271, 61 Kan. 337.
Vt.—McCarthy v. Northfield, 91 A. 298, 89 Vt. 99, Ann.Cas.1918A 943.

89. U.S.—Brusselback v. Chicago Joint Stock Land Bank, C.C.A.Ill.,

may, provided he details the facts[90] so far as is possible under the circumstances,[91] be permitted to state his inference as to a person's financial condition,[92] as, for example, that he is, or was, destitute,[93] in need of assistance,[94] or solvent or insolvent,[95] or what is the probable amount of his professional income;[96] but a statement which purports to give the actual financial condition of the person in question rather than the inference of the witness with respect thereto is rejected as a mere conclusion.[97]

§ 512. Physical Condition of Animals

Evidence as to the physical condition of animals, based on suitable opportunity for examination, is admissible.

A witness who had suitable opportunity for observation may be permitted to state the apparent physical condition of an animal.[98]

§ 513. Physical Condition of Persons

a. Of witness
b. Of another person

a. Of Witness

While a nonexpert or lay witness may not give expert testimony as to his physical condition, he may state simple inferences drawn from his conscious subjective sensations concerning such condition.

While a nonexpert or lay witness may not testify as an expert and give expert testimony as to the character or extent of a personal injury which he has sustained,[99] or as to the effect of the inju-

85 F.2d 617, certiorari denied Gage v. Brusselback, 57 S.Ct. 320, 299 U.S. 615, 81 L.Ed. 454.
Ala.—Street v. Browning, 87 So. 527, 205 Ala. 110.
Ga.—Massachusetts Bonding & Insurance Co. v. Floyd County, 173 S.E. 720, 178 Ga. 595.
Ill.—Pruett v. Midkiff, 273 Ill.App. 142.
Ind.—National City Bank v. Kirk, 134 N.E. 772, 85 Ind.App. 120.
Mich.—Gloeser v. Moore, 278 N.W. 781, 284 Mich. 106.
Mo.—Jordan v. Daniels, 27 S.W.2d 1052, 224 Mo.App. 749.
22 C.J. p 617 note 13.

Evidence held inadmissible where necessary knowledge not shown.
Ark.—Mitchell v. Lindley, 228 S.W. 728, 148 Ark. 37.
Ga.—Williamson-Inman & Co. v. Thompson, 187 S.E. 194, 53 Ga. App. 821.
Ill.—Pruett v. Midkiff, 273 Ill.App. 142.
Pa.—William Schuette & Co. v. Swank, 109 A. 531, 265 Pa. 576.

90. Ga.—Hardin v. Rubin, 151 S.E. 31, 169 Ga. 608—Bennett v. American Bank & Trust Co., 134 S.W. 781, 162 Ga. 718—M. C. Kiser Co. v. Barbre, 129 S.E. 887, 34 Ga.App. 447.
Tex.—Jackson v. Steele, Com.App., 57 S.W.2d 95, affirming Jackson v. Oliver C. Steele Mfg. Co., Civ.App., 37 S.W.2d 762.

91. Ga.—Payne v. Allen, 110 S.E. 345, 28 Ga.App. 8, reversed on other grounds 116 S.E. 640, 155 Ga. 54.
Mich.—Gloeser v. Moore, 278 N.W. 781, 786, 284 Mich. 106, citing **Corpus Juris.**
N.J.—Brundred v. Paterson Mach. Co., 4 N.J.Eq. 294.

92. U.S.—Fidelity & Deposit Co. of Maryland v. Redfield, C.C.A.Idaho, 7 F.2d 800.
Iowa.—Beans v. Denny, 117 N.W. 1091, 141 Iowa 52.
Mo.—Jordan v. Daniels, 27 S.W.2d 1052, 224 Mo.App. 749.
22 C.J. p 617 note 15.

93. Mo.—Weniger v. Weniger, App., 32 S.W.2d 775.
22 C.J. p 617 note 16.

94. Ga.—Payne v. Allen, 110 S.E. 345, 28 Ga.App. 8, reversed on other grounds 116 S.E. 640, 155 Ga. 54.
N.Y.—Sloan v. New York Cent. R. Co., 45 N.Y. 125.

95. Ga.—Massachusetts Bonding & Insurance Co. v. Floyd County, 173 S.E. 720, 178 Ga. 595—Hardin v. Rubin, 151 S.E. 31, 169 Ga. 608—Bennett v. American Bank & Trust Co., 134 S.E. 781, 162 Ga. 718—M. C. Kiser Co. v. Barbre, 129 S.E. 887, 34 Ga.App. 447.
Ind.—National City Bank v. Kirk, 134 N.E. 772, 85 Ind.App. 120.
N.C.—Cheshire v. Parker, 177 S.E. 21, 207 N.C. 364.
22 C.J. p 617 note 18.

Necessity of definiteness
Where witness' statement was an indefinite general conclusion which might or might not have related to the question of insolvency at the time in question his testimony was not admissible.—Williamson-Inman & Co. v. Thompson, 187 S.E. 194, 53 Ga.App. 821.

Opinion based on hearsay
Expert cannot give opinion on solvency or insolvency based, not on examination of facts and records, but on mere hearsay.—Lucas v. Swan, C.C.A.W.Va., 67 F.2d 106.

96. Md.—State v. Cecil County, 54 Md. 426.
22 C.J. p 617 note 19.

97. Iowa.—Vacuum Oil Co. v. Carstens, 231 N.W. 380, 211 Iowa 1129—Polk County v. Owen, 174 N.W. 99, 187 Iowa 220.
Kan.—In re Trusteeship of Prager, 186 P. 1015, 106 Kan. 14.
Mich.—Gloeser v. Moore, 278 N.W. 781, 786, 284 Mich. 106, citing **Corpus Juris.**
22 C.J. p 617 note 20.

98. Ind.—Adams Express Co. v. Heagy, 122 N.E. 603, 69 Ind.App. 652.
22 C.J. p 622 note 84.

Comparative condition
The condition of an animal as compared to another or as compared to the condition of the same animal at a previous time may be stated by an observer.
Ala.—Jones v. Coley, 121 So. 24, 219 Ala. 23.
Tex.—Texas & P. R. Co. v. Stewart, 96 S.W. 106, 43 Tex.Civ.App. 399.

Evidence held inadmissible where suitable opportunity for observation was lacking.—Neely v. Texas & P. Ry. Co., 82 So. 745, 145 La. 671.

99. Idaho.—Call v. City of Burley, 62 P.2d 101, 57 Idaho 58.

Nature of bruise
Question to a witness with respect to a bruise, which, it was claimed, she had sustained, by which it was sought to have her state that the bruise was "a very marked" one was objectionable.—Bradford v. Birmingham Electric Co., 149 So. 729, 227 Ala. 285.

Workmen's compensation
(1) In compensation proceedings an injured employee is not permitted to express an opinion as to nature of his injuries.—Wilson v. State Industrial Accident Commission, 94 P.2d 129, 162 Or. 588.
(2) In proceeding for compensation for injury to an eye, claimant is not competent to testify to the probable extent of the injury, the matter being one for skilled or expert testimony.—Parson-Gibson Buick Corporation v. Fox, 4 P.2d 38, 152 Okl. 196.

Cause of condition
In an action by an employee to establish rights under an agreement with defendant employer, based on

ry,[1] a witness may state simple inferences drawn by him from his own conscious subjective sensations as to his physical condition,[2] and, according to some cases, may state his notion or feeling as to the character or extent of an injury and the personal results he has experienced therefrom.[3] So it has been held or recognized that it is permissible for a witness to state his physical symptoms;[4] the pain

the alleged fact that the employee had contracted lead poisoning while in the employ of defendant, in which plaintiff was asked how he felt at a particular time, his answer "the same thing, the effect of lead" was objectionable as being the conclusion of the witness.—Ingram v. Hammar Bros. White Lead Co., 273 Ill.App. 152.

1. Md.—Symington v. Graham, 169 A. 316, 165 Md. 441.

Effect on ulcerated condition of stomach

The injured person who is merely a layman is not competent to give an opinion that the injury aggravated or contributed to, or in any way affected or influenced, the condition of the ulceration of his stomach.—Southeastern Telephone Co. v. Payne, 69 S.W.2d 358, 253 Ky. 245.

Child-bearing capacity of female witness

Female plaintiff in an action for damages for an injury alleged to have been negligently done in a surgical operation, working malformation of some of her organs and general debility, is not competent to testify that by reason thereof she is incapable of childbearing.—Cook v. Coleman, 111 S.E. 750, 90 W.Va. 748.

Discharge from employment

On issue of exemplary damages for hotel manager's conduct when wrongfully discharging employee, permitting employee to testify that her mouth broke out with sores after her discharge was error.—Dallas Hotel Co. v. McCue, Tex.Civ.App., 56 S.W.2d 1106, error dismissed—Dallas Hotel Co. v. McCue, Tex.Civ.App., 25 S.W.2d 902.

Workmen's compensation

(1) In a proceeding under workmen's compensation act, the injured person's expression of an opinion as to the percentage of loss of the use of his legs, suffered on account of the injuries, was incompetent, that being an ultimate fact to be determined by the industrial commission. —Decatur Construction Co. v. Industrial Commission, 129 N.E. 738, 296 Ill. 290.

(2) The injured employee is not competent to express opinion as to the percentage of loss of use of injured eye and arms.—International Coal & Mining Co. v. Industrial Commission, 127 N.E. 703, 293 Ill. 524, 10 A.L.R. 1010.

(3) Testimony by an injured employee in proceedings for compensation that he had lost fifty per cent of his earning capacity is not competent.—Old Ben Coal Corporation v. Industrial Commission, 129 N.E. 772, 296 Ill. 229.

2. Ala.—Whiddon v. Malone, 124 So. 516, 220 Ala. 220.
Cal.—North Elk Oil Co. v. Industrial Accident Commission of California, 254 P. 582, 585, 81 Cal.App. 582, citing **Corpus Juris.**
Ill.—International Coal & Mining Co. v. Industrial Commission, 127 N.E. 703, 293 Ill. 524, 10 A.L.R. 1010.
Md.—Baltimore & L. Turnpike Co. v. Cassell, 7 A. 805, 66 Md. 419, 59 Am.R. 175.
N.D.—Nichols v. Kluver, 237 N.W. 640, 61 N.D. 42—Asch v. Washburn Lignite Coal Co., 186 N.W. 757, 48 N.D. 734.
Or.—Wilson v. State Industrial Accident Commission, 94 P.2d 129, 133, 162 Or. 588, citing **Corpus Juris.**
Pa.—Mirabella v. Metropolitan Life Ins. Co., 18 A.2d 474, 143 Pa.Super. 500.
Tenn.—Provident Life Ins. Co. v. Ivy, 73 S.W.2d 706, 710, 18 Tenn. App. 106, quoting **Corpus Juris**—Robbins v. New York Life Ins. Co., 72 S.W.2d 788, 791, 18 Tenn. App. 70, citing **Corpus Juris**—Louisville & N. R. Co. v. Hadley, 11 Tenn.App. 642, 648, quoting **Corpus Juris.**
Tex.—El Paso Electric Co. v. Cannon, Civ.App., 69 S.W.2d 532, reversed on other grounds 99 S.W.2d 907, 128 Tex. 613.
22 C.J. p 618 note 21.

Condition before and after accident

Plaintiff was competent to testify as to physical condition prior to and following a certain event.
Cal.—Latky v. Wolfe, 259 P. 470, 85 Cal.App. 332.
Ga.—New York Life Ins. Co. v. Bradford, 196 S.E. 92, 57 Ga.App. 657.

Condition before injury

In personal injury action, plaintiff could testify that she was in perfect health at time of accident.—Armour & Co. v. Tomlin, Tex.Civ.App., 42 S.W.2d 634, affirmed, Com.App., 60 S.W.2d 204.

Necessity of stating basic facts

A nonexpert witness may express an opinion as to his own physical condition without stating all the facts which constitute the basis of his opinion.—Texas Employers Ins. Ass'n v. Griffis, Tex.Civ.App., 141 S.W.2d 687—American Nat. Ins. Co. v. Walker, Tex.Civ.App., 81 S.W.2d 1061.

Whether witness was well

Question whether plaintiff was well at time he went back to work was not objectionable as calling for conclusion.—Birmingham Electric Co. v. Wood, 130 So. 786, 222 Ala. 103.

Workmen's compensation

(1) In compensation proceeding, claimant may testify as to his physical condition.—Central Illinois Public Service Co. v. Industrial Commission, 134 N.E. 124, 302 Ill. 27.

(2) The injured employee is a competent witness as to the state of his health with respect to maladies familiar to laymen.—Wilson v. State Industrial Accident Commission, 94 P.2d 129, 162 Or. 588.

3. Idaho.—Call v. City of Burley, 62 P.2d 101, 57 Idaho 58.

Cause of condition and reason for hospitalization

Although injured passenger in action for injuries sustained by slipping on bus step had not qualified as expert to testify to effect that injuries thus sustained caused subsequent diabetic upset, question, "What was the cause of your being taken to the hospital?" was properly allowed as calling simply for her understanding of the reason.—Sickmund v. Connecticut Co., 189 A. 876, 122 Conn. 375.

Workmen's compensation

(1) Testimony of an injured employee showing facts within his own knowledge, stating the character and nature of his injury and the immediate disability resulting therefrom, is admissible to prove injury. —Loffland Bros. v. Morgan, 5 P.2d 1067, 153 Okl. 295—Cromwell-Franklin Oil Co. v. Cox, 296 P. 446, 147 Okl. 226.

(2) Testimony of injured employee as to feeling strain and injury when lifting heavy concrete block, and that he became sick and faint and thereafter had hemorrhage, was admissible.—Cromwell-Franklin Oil Co. v. Cox, supra.

(3) Testimony of an applicant under workmen's compensation act as to the extent of his injury is proper for determining the effect of the injury on his capacity to work.—Peabody Coal Co. v. Industrial Commission, 139 N.E. 7, 308 Ill. 133.

4. Cal.—Latky v. Wolfe, 259 P. 470, 85 Cal.App. 332.
Ill.—Chicago W. D. R. Co. v. Lambert, 10 N.E. 219, 119 Ill. 255.
Ky.—Equitable Life Assur. Soc. of U. S. v. Davis, 96 S.W.2d 689, 265 Ky. 259.

which he suffered after an injury;[5] how he suffered, and the extent of his suffering, by reason of a personal injury;[6] the effect of injuries on his health or physical condition,[7] or of sickness or injuries on his ability to work[8] or on his earning capacity;[9] that after an accident he suffered from symptoms which he did not have prior to the accident;[10] and, according to other judicial deci-

Md.—Baltimore & L. Turnpike Co. v Cassell, 7 A. 805, 66 Md. 419, 59 Am.R. 175.
Mich.—Dunwoody v. Royal Indemnity Co., 188 N.W. 498, 218 Mich. 358.
N.D.—Asch v. Washburn Lignite Coal Co., 186 N.W. 757, 48 N.D. 734.
Okl.—Parson-Gibson Buick Corporation v. Fox, 4 P.2d 38, 152 Okl. 196.
Tenn.—Provident Life Ins. Co. v. Ivy, 73 S.W.2d 706, 710, 18 Tenn. App. 106, quoting **Corpus Juris**—Louisville & N. R. Co. v. Hadley, 11 Tenn.App. 642, 648, quoting **Corpus Juris.**
Tex.—El Paso Electric Co. v. Cannon, Civ.App., 69 S.W.2d 532, reversed on other grounds 99 S.W. 2d 907, 128 Tex. 613.

Characteristics of injury
The injured person is a competent witness to testify to all the characteristics of the injury, so far as the same are perceptible to the senses, and do not require the exercise of scientific skill and knowledge.—Asch v. Washburn Lignite Coal Co., 186 N.W. 757, 48 N.D. 734.

5. Ala.—Birmingham Electric Co. v. Wood, 130 So. 786, 222 Ala. 103—Whiddon v. Malone, 124 So. 516, 220 Ala. 220.
Ill.—International Coal & Mining Co. v. Industrial Commission, 127 N.E. 703, 293 Ill. 524, 10 A.L.R. 1010.
Md.—Symington v. Graham, 169 A. 316, 165 Md. 441.
N.D.—Asch v. Washburn Lignite Coal Co., 186 N.W. 757, 48 N.D. 734.
Okl.—Parson-Gibson Buick Corporation v. Fox, 4 P.2d 38, 152 Okl. 196.
Tenn.—Louisville & N. R. Co. v. Hadley, 11 Tenn.App. 642, 648, quoting **Corpus Juris.**
22 C.J. p 618 note 23.

6. Cal.—Latky v. Wolfe, 259 P. 470, 85 Cal.App. 332.
Tenn.—Louisville & N. R. Co. v. Hadley, 11 Tenn.App. 642, 648, quoting **Corpus Juris.**
22 C.J. p 618 note 24.

7. Ky.—Equitable Life Assurance Soc. of U. S. v. Davis, 96 S.W.2d 689, 265 Ky. 259.
Mo.—Coghill v. Quincy, O. & K. C. Ry. Co., App., 206 S.W. 912.
Pa.—Monongahela Water Co. v. Stewartson, 96 Pa. 436.
Tenn.—Louisville & N. R. Co. v. Hadley, 11 Tenn.App. 642, 648, quoting **Corpus Juris.**

Abnormal condition of pregnant woman
(1) Matron who had given birth to eight children was qualified to characterize pain and discomfort undergone during later pregnancy to show that gestation was not progressing in its natural course.—Symington v. Graham, 169 A. 316, 165 Md. 441.
(2) Plaintiff's testimony that other sensations were occasional pains, and her knowledge that she had not been right since jar through stomach and abdomen, was not objectionable as witness' opinion as to cause of pain, where pains and symptoms referred to were in evidence.—Symington v. Graham, supra.

8. Ala.—Ex parte Corona Coal Co., 105 So. 718, 213 Ala. 554, denying certiorari Corona Coal Co. v. Sexton, 105 So. 716, 21 Ala.App. 51.
Ky.—Equitable Life Assur. Soc. of U. S. v. Davis, 96 S.W.2d 689, 265 Ky. 259.
Mo.—Hensley v. Kansas City Rys. Co., App., 214 S.W. 287.
Tex.—St. Louis Southwestern R. Co. v. McDowell, Civ.App., 73 S.W. 974.
22 C.J. p 618 note 26.

Inability to work at usual occupation
(1) In general.—New York Life Ins. Co. v. Bradford, 196 S.E. 92, 57 Ga.App. 657.
(2) Plaintiff's negative answer to the question whether he would ever be able to resume his trade if his arm remained the same was not inadmissible on the ground that it was opinion evidence.—Stewart v. Barre & Montpelier Traction & Power Co., 111 A. 526, 94 Vt. 398.

Inability to find suitable work
In action by employee for injuries, plaintiff's testimony that after injury he never found work he could do was properly admitted.—St. Louis, S. F. & T. Ry. Co. v. Green, Tex. Civ.App., 22 S.W.2d 550, reversed on other grounds, Com.App., 37 S.W.2d 123.

Partial disability
Mo.—Berlau v. Metropolitan Life Ins. Co., 24 S.W.2d 686, 224 Mo. App. 938.
22 C.J. p 618 note 26 [b].

Insurance
(1) In an action to enforce a provision for total and permanent disability benefits, contained in a life insurance policy, the view has been taken that plaintiff may testify as to his inability to work.—Mirabella v. Metropolitan Life Ins. Co., 18 A. 2d 474, 143 Pa.Super. 500—Amrovcik v. Metropolitan Life Ins. Co., 180 A. 727, 119 Pa.Super. 176—Compare Rudy v. New York Life Ins. Co. of New York City, 46 Dauph. Co., Pa., 1.
(2) As to statement of another person regarding insured's disability see infra subdivision b(2) of this section.

Workmen's compensation
(1) In compensation case, employee's testimony that he had not been able to do labor or do things he had done was not objectionable as conclusion of witness.—Employers' Liability Assur. Corporation v. Williams, Tex.Civ.App., 293 S.W. 210.
(2) Claimant, after describing how injuries were received and effects thereof, could further testify that he had been unable to work since receiving injury.—Traders & General Ins. Co. v. Blancett, Tex. Civ.App., 96 S.W.2d 420, error dismissed.
(3) Injured employee could testify as to his physical inability to perform certain work which he had been able to procure.—Gulf Casualty Co. v. Fields, Tex.Civ.App., 107 S.W.2d 661, error dismissed.
(4) Applicant for compensation may testify as to whether his injuries caused pain in attempting to perform his usual duties, or affected his ability to perform such duties.—Central Illinois Public Service Co. v. Industrial Commission, 134 N.E. 124, 302 Ill. 27.

Detailed facts before jury
In an action for personal injury it was not error to permit plaintiff to testify that by reason of his injury his ability to do carpenter work had been decreased one-half, the facts as to nature, extent, and history of the injury and subsequent employment being before the jury.—Norris v. Elmdale Elevator Co., 185 N.W. 696, 216 Mich. 548.

9. **Preliminary statement of basic fact**
Injured party may testify as to his opinion of probable effect of injuries on his earning capacity after describing them and their effect on his nervous and physical condition.—Zurich General Accident & Liability Ins. Co. v. Kerr, Tex.Civ.App., 54 S.W.2d 349, error refused.

10. N.Y.—Pierpoint v. Fifth Ave. Coach Co., 135 N.Y.S. 322, 151 App. Div. 40, leave to appeal to court of appeals denied 135 N.Y.S. 1137.
Tenn.—Louisville & N. R. Co. v. Hadley, 11 Tenn.App. 642.

sions, that he was troubled with nervousness;[11] that he suffered from headaches in consequence of an injury to his back;[12] that he had a bad cold;[13] that he was cured of rupture;[14] that he was relieved from pain by medical treatment;[15] that her womb was[16] or was not[17] displaced; that his urinary organs were so affected as to function abnormally;[18] that his eyes were defective;[19] that he has lost vision in one eye;[20] that his hand got stiff;[21] that he has no use of his foot;[22] that he is unable to stand on his feet since an injury;[23] that he has less use of his hand than formerly;[24] that his ribs were broken;[25] that his breastbone was broken;[26] that his jaw was dislocated;[27] that his side was injured and hurt him badly;[28] that his leg was so injured as to require the use of a splint;[29] that his leg became dislocated during a course of treatment;[30] that a large lump was produced on his head;[31] that the broken bones in his leg were in the same position when placed in a cast as when a subsequent x-ray picture was taken;[32] that a hernia was not at the place where an earlier hernia had been;[33] and that his hair turned white shortly after the accident.[34]

According to some cases, however, a witness should be confined to testimony or statements relating to the outward appearance of his injuries and to the symptoms experienced by him, such as pain, suffering, and the like,[35] and should not be permitted to testify as to the nature of his injuries, the applicable medical terminology, and the like;[36] and the propriety of permitting a witness to give his opinion or conclusion as to his ability to work has been denied.[37]

11. Cal.—Latky v. Wolfe, 259 P. 470, 85 Cal.App. 332.
22 C.J. p 618 note 28.

Physical status involved

In action for damages for detention of patient in hospital for failure to pay bill, admission of her testimony that after her experience she had nightmares, was very nervous, and got excited and real nervous when at work, was not erroneous, since testimony concerned physical status and manifestations thereof, and therefore was not within rule that party may not testify to his uncommunicated mental status.—Gadsden General Hospital v. Hamilton, 103 So. 553, 212 Ala. 531, 40 A.L.R. 294.

Shock and continued nervous condition

Ala.—Lindsey v. Kindt, 128 So. 139, 221 Ala. 190.

Form of statement

Plaintiff was properly allowed to testify that since the accident he was nervous and did not like to drive in the nighttime, such testimony being nothing more than his way of describing the nervous condition in which the accident left him.—Thayer v. Glynn, 106 A. 834, 93 Vt. 257.

12. Mich.—Lindley v. Detroit, 90 N. W. 665, 131 Mich. 8.
22 C.J. p 618 note 29.

13. Minn.—Swadner v. Schefcik, 144 N.W. 958, 124 Minn. 269.

14. Iowa.—Wray v. Warner, 82 N. W. 455, 111 Iowa 64.

15. Okl.—St. Louis-San Francisco Ry. Co. v. Clark, 229 P. 779, 104 Okl. 24.

16. Mo.—Dolan v. Moberly, 17 Mo. App. 436.

17. Mich.—Holman v. Union St. R. Co., 72 N.W. 202, 114 Mich. 208.

18. Cal.—Latky v. Wolfe, 259 P. 470, 85 Cal.App. 332.

19. Tex.—Chicago, R. I. & G. R. Co. v. Evans, Civ.App., 143 S.W. 966—St. Louis Southwestern R. Co. v. McDowell, Civ.App., 73 S.W. 974.
22 C.J. p 618 note 34.

Workmen's compensation

Claimant in proceedings for compensation for injury to eye was competent to testify to facts showing normal use of eye, absence of defect in vision before accident, and symptoms, and the facts tending to show the limited distance of vision, thereafter.—Parson-Gibson Buick Corporation v. Fox, 4 P.2d 38, 152 Okl. 196.

20. Vt.—Emerson v. Hickens, 164 A. 381, 105 Vt. 197.
W.Va.—Sexton v. White Transp. Co., 125 S.E. 574, 97 W.Va. 568.

Workmen's compensation

Rule stated in the text has been recognized in a proceeding for compensation for injury to an eye.—Parson-Gibson Buick Corporation v. Fox, 4 P.2d 38, 152 Okl. 196.

21. Ala.—Central of Georgia R. Co. v. Stephenson, 66 So. 495, 189 Ala. 553.

22. Mich.—McDonald v. City Electric R. Co., 108 N.W. 85, 144 Mich. 379.

23. Mo.—Looff v. Kansas City Rys. Co., 246 S.W. 578.

24. **Workmen's compensation**

Employee claiming additional compensation for change of condition in use of hand was competent witness for purpose of establishing objective changes for the worse in his condition.—Southwestern Cotton Oil Co. v. Hall, 46 P.2d 455, 172 Okl. 644.

25. Iowa.—Ferguson v. Davis County, 10 N.W. 906, 57 Iowa 601.
Mo.—Bowles v. Wabash Ry. Co., App., 271 S.W. 851—Wise v. Wabash R. Co., 115 S.W. 452, 135 Mo. App. 230.

26. Iowa.—Kinner v. Boyd, 116 N. W. 1044, 139 Iowa 14.

27. Mo.—Hill v. Jackson, 290 S.W. 1012, 220 Mo.App. 1302—Hill v. Jackson, 265 S.W. 859, 218 Mo.App. 210.

28. Ala.—Central of Georgia R. Co. v. Campbell, 64 So. 540, 10 Ala. App. 288.

29. Cal.—Latky v. Wolfe, 259 P. 470, 85 Cal.App. 332.

30. Ark.—Dunman v. Raney, 176 S. W. 339, 118 Ark. 337.

31. Cal.—Latky v. Wolfe, 259 P. 470, 85 Cal.App. 332.

32. Ga.—Chapman v. Radcliffe, 162 S.E. 651, 44 Ga.App. 649.

33. **Workmen's compensation**

In compensation case, employee's testimony that hernia complained of was not at site of previous hernia was admissible where he gave facts on which he based statement.—Columbia Casualty Co. v. Ray, Tex.Civ. App., 5 S.W.2d 230, error dismissed.

34. Cal.—Latky v. Wolfe, 259 P. 470, 85 Cal.App. 332.

35. R.I.—Stuckey v. Rhode Island Co., 108 A. 581, 42 R.I. 450.

36. R.I.—Stuckey v. Rhode Island Co., supra.

Dislocated cartilage of knee

Plaintiff's testimony that she had a dislocated cartilage of the knee and that the doctor had said so was inadmissible.—Stuckey v. Rhode Island Co., 108 A. 581, 42 R.I. 450.

37. **Insurance**

(1) In Kentucky it has been held, in an action to enforce a provision for payment of total disability benefits, contained in a life insurance policy, that plaintiff could not testify as to his feelings relative to his

Statements of fact as to health and physical condition see supra § 467.

Future effect of injury. While the propriety of permitting an injured person to state his belief as to the probable permanency of his injuries has been recognized,[38] it has been held or recognized that the injured person may not give his opinion as to whether his injuries are permanent[39] or as to the future duration of his disability.[40]

Existence of particular disease and diagnosis. According to some cases a witness may not testify as to whether or not he had a particular disease[41] or was treated for a particular disease.[42] The testimony of a witness that he had a certain disease has been regarded as a mere conclusion of a layman and insufficient to establish the fact.[43] There is, however, authority for the view that a witness may state that he had never had a particular disease.[44]

disability to work.—Equitable Life Assurance Soc. v. Green, 83 S.W.2d 478, 259 Ky. 773.

(2) So certain testimony of insured which amounted to expressions of opinion as to disability has been regarded as incompetent.—Minnesota Life Ins. Co. v. Vire, 94 S.W.2d 667, 264 Ky. 257.

(3) It has been held, however, that it was not error to permit insured to testify concerning his condition and his disability to perform certain tasks in connection with his employment, where he related fully his condition and stated only facts presumably within his knowledge and testified that because of these things he was unable to do certain work in connection with his employment and how it affected him to attempt to do the work.—Travelers Ins. Co. v. Mahon, 117 S.W.2d 909, 273 Ky. 691.

(4) In an action by insured on a war risk insurance policy, in which was involved the question as to total and permanent disability, the view was taken that a statement of insured as to whether, since his discharge from the army, he had been physically able to follow any self-sustaining, gainful occupation, was properly excluded because it called for a conclusion or opinion as to the ultimate issues which were for the court and jury to determine.—Sprengel v. U. S., C.C.A.Tex., 47 F.2d 501.

(5) As to statement by another person as to insured's ability to work see infra subdivision b (2) of this section.

38. Cal.—Jones v. Key, 202 P. 478, 54 Cal.App. 677.

Use of arm

In an action for personal injuries, the admission in evidence of a statement of plaintiff that he did not believe he would ever recover full use of his arm and hand was proper.—Jones v. Key, supra.

39. Del.—Price v. Charles Warner Co., 42 A. 699, 17 Del. 462.

Ga.—Atlanta St. R. Co. v. Walker, 21 S.E. 48, 93 Ga. 462.

N.Y.—Pfau v. Alteria, 52 N.Y.S. 88, 23 Misc. 693.

Okl.—Shawnee-Tecumseh Tract. Co. v. Griggs, 151 P. 230, 50 Okl. 566.

W.Va.—Ward v. Liverpool Salt & Coal Co., 92 S.E. 92, 79 W.Va. 371.

22 C.J. p 618 note 42.

In Texas

(1) In workman's compensation case, employee's testimony that in his opinion he would not be able to perform physical or manual labor in future was inadmissible.—Texas Employers' Ins. Ass'n v. Brock, Tex. Com.App., 36 S.W.2d 704, vacating, Civ.App., 26 S.W.2d 322.

(2) In such a case the view was taken that an injured employee's testimony that he would be unable to work or earn money from the date of the trial for the balance of his natural life, on account of the injuries received, was not admissible, being the opinion of a nonexpert on the probable duration and effect in the future of injuries sustained.—Stowell v. Texas Employers' Ins. Ass'n, Tex.Civ.App., 259 S.W. 311.

(3) But in such a case testimony of claimant, over objection, that he did not think he would be able to do manual labor again because of injuries has been regarded as admissible.—Texas Employers' Ins. Ass'n v. Davies, Tex.Civ.App., 6 S.W.2d 792, reversed on other grounds Davies v. Texas Employers' Ins. Ass'n, Com.App., 16 S.W.2d 524, motion overruled 29 S.W.2d 987.

(4) Claimant, after describing injuries and effect thereof, could give opinion as to the probable effect of such injuries on his earning capacity in the future.—Petroleum Casualty Co. v. Bristow, Tex.Civ.App., 35 S.W. 2d 246, error dismissed.

(5) In personal injury action, plaintiff could testify that he thought he was permanently disabled because his side often hurt him and he could not eat as he did before he was stabbed, such testimony being statement of his physical symptoms and not a matter merely for expert medical testimony.—El Paso Electric Co. v. Cannon, Tex.Civ.App., 69 S.W.2d 532, reversed on other grounds 99 S. W.2d 907, 128 Tex. 613.

(6) A statement that the witness believed he was injured for life, one leg having become shorter than the other because of an injury, has been received.—Weatherford, M. W. & N. W. R. Co. v. White, 118 S.W. 799, 55 Tex.Civ.App. 32.

Injury subjective in nature

In a proceeding under workman's compensation act, employee was not competent to testify as to permanency of his disability caused by injury subjective in nature.—James I. Barnes Const. Co. v. Hargrove, 29 P. 2d 573, 167 Okl. 348.

Opinion

Injured person, as witness, may not give his opinion that the injury will be permanent.—International Coal & Mining Co. v. Industrial Commission, 127 N.E. 703, 293 Ill. 524, 10 A.L.R. 1010.

40. **Workmen's compensation**

(1) In a compensation case, testimony of the claimant employee as to the duration of the time in the future that he would be disabled to perform his duties without suffering pain was properly excluded as an opinion, claimant not being an expert on the subject.—Bishop v. Millers' Indemnity Underwriters, Tex.Civ. App., 254 S.W. 411.

(2) Claimant in compensation proceeding for injury to eye was not qualified to testify concerning probable duration of injury, such fact being matter for expert testimony.—Parson-Gibson Buick Corporation v. Fox, 4 P.2d 38, 152 Okl. 196.

41. Okl.—Kansas, O. & G. Ry. Co. v. Smith, 32 P.2d 302, 168 Okl. 190.

As affecting disability under a provision for disability benefits and waiver of payment of premiums in a life insurance policy, insured was not competent to state that she had Bright's disease.—New York Life Ins. Co. v. McCane, 124 S.W.2d 1057, 276 Ky. 712.

42. U.S.—U. S. v. McCreary, C.C.A. Or., 105 F.2d 297, reversing, D.C., McCreary v. U. S., 23 F.Supp. 385.

43. Ky.—Equitable Life Assur. Soc. of U. S. v. Arrowood, 69 S.W.2d 984, 253 Ky. 456.

44. Cal.—Frederick v. Federal Life Ins. Co., 57 P.2d 235, 13 Cal.App. 2d 585—North Elk Oil Co. v. Industrial Accident Commission of California, 254 P. 582, 81 Cal.App. 582

b. Of Another Person

(1) General considerations
(2) Matters concerning liability to insurers

(1) General Considerations

Subject to the general qualifications and limitations applicable affecting the testimony of a nonexpert or lay witness, such a witness usually may state the apparent physical condition or the apparent condition of health of another.

When the circumstances are such that all the facts cannot be placed before the jury with such clearness as to enable them to draw a correct inference,[45] and the province of the jury is not invaded,[46] and the inference is not one for the drawing of which special skill, knowledge, and experience are required,[47] an ordinary observer who has had suitable opportunity for observation[48] may state the apparent physical condition of another person,[49] or testify as to what are more distinctly in-

Venereal disease

Cal.—Frederick v. Federal Life Ins. Co., 57 P.2d 235, 13 Cal.App.2d 585—North Elk Oil Co. v. Industrial Accident Commission of California, 254 P. 582, 81 Cal.App. 582.

45. U.S.—Corrigan v. U. S., C.C.A. Idaho, 82 F.2d 106, 109, quoting **Corpus Juris.**

Hawaii.—Tsuruoka v. Lukens, 32 Hawaii 263, 264, citing **Corpus Juris.**

S.C.—Kirby v. Western Union Tel. Co., 58 S.E. 10, 77 S.C. 404, 122 Am. S.R. 580.

46. U.S.—Corrigan v. U. S., C.C.A. Idaho, 82 F.2d 106, 109, quoting **Corpus Juris.**

Hawaii.—Tsuruoka v. Lukens, 32 Hawaii 263, 264, quoting **Corpus Juris.**

Iowa.—Dunham v. Rix, 53 N.W. 252, 86 Iowa 300.

Invasion of province of jury by stating inference, conclusion, or judgment generally see supra § 446.

47. U.S.—Corrigan v. U. S., C.C.A. Idaho, 82 F.2d 106, 109, quoting **Corpus Juris.**

Hawaii.—Tsuruoka v. Lukens, 32 Hawaii 263, 264, quoting **Corpus Juris.**

22 C.J. p 618 note 45.

Testifying as experts; opinions

(1) Nonexpert or lay witnesses may not testify as experts, or give expert testimony concerning physical condition of another.—Travelers Ins. Co. v. Mahon, 117 S.W.2d 909, 273 Ky. 691—Equitable Life Assur. Soc. of U. S. v. Green, 83 S.W.2d 478, 258 Ky. 773—Aetna Life Ins. Co. of Hartford, Conn. v. Gullett, 69 S.W.2d 1068, 253 Ky. 544.

(2) Lay witnesses may not testify on matters of opinion and judgment as medical witnesses.—U. S. v. Monger, C.C.A.Wyo., 70 F.2d 361.

Workmen's compensation

In compensation case, lay witness was not qualified to testify whether employee was permanently incapacitated by stiffening of index finger and appendicitis operation.—Security Union Ins. Co. v. Gullett, Tex.Civ. App., 36 S.W.2d 1085, error dismissed.

Existence of epidemic

In action against city for death of resident from typhoid fever allegedly caused by drinking impure city water, witness who had lived at near-by camp with three hundred men for number of years was not qualified to testify as to whether there had been any epidemics of typhoid fever among such men.—Stoker v. Ogden City, 54 P.2d 849, 88 Utah 389.

Other matters not competent or admissible

(1) It was proper to refuse to permit a nonexpert witness to state that she thought that the pain suffered by another person was located in a certain part of his body.—Hunter v. Joplin & P. Ry. Co., 197 P. 1092, 109 Kan. 169.

(2) In an action against a railroad for damages by being struck in an automobile at a street crossing, it was erroneous to permit a layman to testify to the nature of plaintiff's injuries, that is, that certain bones which he could not see were broken and had not united.—Moody v. Canadian Northern Ry. Co., 194 N.W. 639, 156 Minn. 211.

(3) Nonexpert or lay witness is not competent to give an opinion that an injury aggravated or contributed to, or in any way affected or influenced, the condition of ulceration of the stomach of the injured person. —Southeastern Telephone Co. v. Payne, 69 S.W.2d 358, 253 Ky. 245.

(4) That nonexpert witness had experienced miscarriage did not qualify her to give opinion thereon as respects another.—Morris v. Union Depot Bridge & Terminal R. Co., 8 S.W.2d 11, 320 Mo. 371.

(5) Statement by witness in reference to the position of a patient during an operation, to the effect that the head was off the end of the table "so far back, it looked to me, as it possibly could be gotten" was a mere conclusion which should have been stricken.—Beckwith v. Boynton, 235 Ill.App. 469.

(6) It has been stated broadly that a lay witness may not give a detailed opinion as to injuries sustained by another or as to the suffering of such other.—Cincinnati Traction Co. v. McKim, 13 Ohio App. 108.

48. U.S.—Corrigan v. U. S., C.C.A. Idaho, 82 F.2d 106, 109, quoting **Corpus Juris.**

Hawaii.—Tsuruoka v. Lukens, 32 Hawaii 263, 264, quoting **Corpus Juris.**

Mont.—Fearon v. Mullins, 98 P. 650, 38 Mont. 45.

Opportunity lacking

In action on an accident insurance policy, where the defense was that insured threw himself from a second-story window of a hospital about 1 A. M., the opinion of a witness, who saw insured suspended from a window, but who did not have sufficient means of observation to enable him to form an intelligent opinion as to whether insured was unconscious, was inadmissible as conjecture.—Griffith v. Continental Casualty Co., 253 S.W. 1043, 299 Mo. 426.

49. U.S.—Equitable Life Assur. Soc. of U. S. v. Bomar, C.C.A.Ky., 106 F.2d 640—Cox v. U. S., C.C.A.Ill., 103 F.2d 133—Corrigan v. U. S., C.C.A.Idaho, 82 F.2d 106, 109, quoting **Corpus Juris.**

Ala.—Sovereign Camp, W. O. W. v. Clarke, 157 So. 259, 229 Ala. 382—Birmingham & A. Ry. Co. v. Campbell, 82 So. 546, 203 Ala. 296.

Ark.—Jewell Tea Co. v. McCrary, 122 S.W.2d 534, 535, 197 Ark. 294, quoting **Corpus Juris.**

Cal.—Latky v. Wolfe, 259 P. 470, 85 Cal.App. 332.

Hawaii.—Tsuruoka v. Lukens, 32 Hawaii 263, 264, quoting **Corpus Juris.**

Ind.—Western & Southern Life Ins. Co. v. Danciu, 26 N.E.2d 912, rehearing denied 27 N.E.2d 763.

Kan.—Smith v. Prudential Ins. Co. of America, 12 P.2d 793, 795, 136 Kan. 120, quoting **Corpus Juris.**

Ky.—Commonwealth Life Ins. Co. v. Ovesen, 92 S.W.2d 37, 263 Ky. 151—Ætna Life Ins. Co. v. Wyant, 61 S.W.2d 50, 249 Ky. 562.

Md.—Hendler Creamery Co. v. Miller, 138 A. 1, 153 Md. 264.

Mo.—Osborne v. Wells, App., 211 S. W. 887.

N.D.—Nichols v. Kluver, 237 N.W. 640, 61 N.D. 42—Halverson v. Zimmerman, 232 N.W. 754, 60 N.D. 113—Jentz v. National Casualty Co., 204 N.W. 344, 52 N.D. 688.

Or.—Hartley v. State Industrial Commission, 261 P. 71, 123 Or. 310.

Tex.—Shuffield v. Taylor, 83 S.W.2d 955, 959, 125 Tex. 601, citing **Corpus Juris**, and reversing Taylor v. Shuffield, Civ.App., 52 S.W.2d 788—St. Louis, S. F. & T. Ry. Co. v. Carter, Civ.App., 275 S.W. 224—San Angelo Water, Light & Power Co. v. Baugh, Civ.App., 270 S.W. 1101—Galveston, H. & S. A. Ry. Co. v. White, Civ.App., 216 S.W. 265—Yeatts v. St. Louis Southwestern R. Co. of Texas, Civ.App., 184 S.W. 636, error dismissed Yeates v. St. Louis Southwestern R. Co. of Texas, Com.App., 244 S.W. 503.

Wash.—Graham v. Police & Fireman's Ins. Ass'n, 116 P.2d 352.

W.Va.—Wilson v. City of Elkins, 103 S.E. 118, 86 W.Va. 379.

Wyo.—McCoy v. Clegg, 257 P. 484, 36 Wyo. 473.

22 C.J. p 619 note 47–p 620 note 49.

Reasons for admission

A nonexpert witness is competent to testify to person's physical appearance, condition, and acts both because of their probative value for jury and also for purpose of furnishing facts as basis for hypothetical questions to experts.—Cox v. U. S., C.C.A.Ill., 103 F.2d 133.

Other statements

(1) Nonexpert witness may testify as to another's apparent condition which is open to ordinary observation.—Peters v. Mutual Life Ins. Co. of New York, D.C.Pa., 26 F.Supp. 50, affirmed, C.C.A., 107 F.2d 9, certiorari denied 60 S.Ct. 582, 309 U.S. 663, 84 L.Ed. 1010.

(2) Layman may testify to thing within his knowledge concerning apparent conditions of another.—Ætna Life Ins. Co. of Hartford, Conn., v. Gullett, 69 S.W.2d 1068, 253 Ky. 544.

(3) If within his knowledge, a lay witness may testify as to the strength, vigor, and apparent physical condition of another.

Ind.—Western & Southern Life Ins. Co. v. Danciu, 26 N.E.2d 912, rehearing denied 27 N.E.2d 763.

Ky.—Greer v. Richards' Adm'r, 115 S.W.2d 568, 273 Ky. 91—Equitable Life Assur. Soc. of U. S. v. Obertate, 109 S.W.2d 1206, 270 Ky. 518—Inter-Southern Life Ins. Co. v. Stephenson, 56 S.W.2d 332, 246 Ky. 694—Prudential Ins. Co. of America v. Hodge's Adm'x, 22 S.W.2d 435, 232 Ky. 44—Grand Lodge, Brotherhood of Railroad Trainmen v. Johnson, 15 S.W.2d 499, 228 Ky. 669—Sovereign Camp, W. O. W., v. Morris, 278 S.W. 554, 212 Ky. 201.

(4) In somewhat different form, it has been stated that a nonexpert or lay witness may testify as to the apparent strength, vigor, and physical condition of another person if the testimony is confined to facts within the knowledge of the witness and does not extend to matters of opinion.—Prudential Ins. Co. of America v. Sisson, 124 S.W.2d 739, 276 Ky. 506—Travelers Ins. Co. v. Mahon, 117 S.W.2d 909, 273 Ky. 691—Equitable Life Assur. Soc. of U. S. v. Davis, 96 S.W.2d 689, 265 Ky. 259—Jefferson Standard Life Ins. Co. v. Pierce, 95 S.W.2d 579, 264 Ky. 698—Equitable Life Assur. Soc. of U. S v Spencer, 90 S.W.2d 704, 262 Ky. 478—Equitable Life Assur. Soc. of U. S. v. Green, 83 S.W.2d 478, 259 Ky. 773—Equitable Life Assur. Soc. of U. S. v. Fannin, 53 S.W.2d 703, 245 Ky. 474.

Detailing or stating facts

(1) Nonexpert witness may state his opinion as to the physical condition of another without stating all the facts which constitute the basis of the opinion.—Texas Employers Ins. Ass'n. v. Griffis, Tex.Civ.App., 141 S.W.2d 687—American Nat. Ins. Co. v. Walker, Tex.Civ.App., 81 S.W. 2d 1061.

(2) Where such witness details facts on which his judgment or opinion is based, he may testify as to the physical condition of another.

Ind.—New York Cent. R. Co. v. De Leury, 192 N.E. 125, 100 Ind.App. 140.

Tenn.—Stephens v. Clayton, 124 S.W. 2d 33, 22 Tenn.App. 449, citing **Corpus Juris**—Provident Life & Accident Ins. Co. v. Ivy, 73 S.W.2d 706, 710, 18 Tenn.App. 106, citing **Corpus Juris**—Louisville & N. R. Co. v. Hadley, 11 Tenn.App. 642, 649, citing **Corpus Juris**.

(3) Admission of witness's statement that another person's physical condition was "bad" was not error where the agent immediately explained factually what he meant by the quoted word.—Moyer v. Ætna Life Ins. Co., D.C.Pa., 39 F.Supp. 725.

Symptoms

(1) A lay or nonexpert witness who has made due observation may testify regarding the presence or absence of symptoms indicating disease.

U.S.—Cox v. U. S., C.C.A.Ill., 103 F. 2d 133—U. S. v. Monger, C.C.A. Wyo., 70 F.2d 361.

Ala.—American Nat. Ins. Co. v. Rosebrough, 93 So. 502, 207 Ala. 538.

Ind.—Western & Southern Life Ins. Co. v. Danciu, 26 N.E.2d 912, rehearing denied 27 N.E.2d 763.

Ky.—Greer v. Richard's Adm'r, 115 S.W.2d 568, 273 Ky. 91—Equitable Life Assur. Soc. v. Obertate, 109 S. W.2d 1206, 270 Ky. 518—Prudential Ins. Co. of America v. Hodge's Adm'x, 22 S.W.2d 435, 232 Ky. 44—Sovereign Camp, W. O. W. v. Morris, 278 S.W. 554, 212 Ky. 201—Illinois L. Ins. Co. v. De Lang, 99 S.W. 616, 124 Ky. 569, 30 Ky.L. 753.

(2) Such witness may testify as to well-known and recognized symptoms indicating disease.—Equitable Life Assur. Soc. v. Spencer, 90 S.W. 2d 704, 262 Ky. 478—Inter-Southern Life Ins. Co. v. Stephenson, 56 S.W. 332, 246 Ky. 694.

(3) In some cases, the rule has been stated in somewhat narrower terms recognizing the competency of a lay witness to testify regarding the presence or absence of symptoms indicating forms of disease so common as to be within the knowledge of a layman.—Prudential Ins. Co. of America v. Sisson, 124 S.W.2d 739, 276 Ky. 506—Travelers Ins. Co. v. Mahon, 117 S.W.2d 909, 273 Ky. 691—Jefferson Standard Life Ins. Co. v. Pierce, 95 S.W.2d 579, 264 Ky. 698—Equitable Life Assur. Soc. of U. S. v. Fannin, 53 S.W.2d 703, 245 Ky. 474.

(4) Admission of statement of witness that another person looked like a "fellow that has locomotor ataxia" was not error, where the witness promptly explained that he meant dragging feet, which was a condition recognizable by a layman.—Moyer v. Ætna Life Ins. Co., D.C.Pa., 39 F. Supp. 725.

Comparative condition

Ind.—Stephenson v. State, 11 N.E. 360, 110 Ind. 358, 59 Am.R. 216.

Mich.—Brownell v. People, 38 Mich. 732.

22 C.J. p 619 note 47 [g].

Bodily condition of pregnant woman

(1) In action for malpractice on account of physicians' failure to discover and remove second fetus after birth of child, testimony of deceased patient's husband as to movement in patient's abdomen was admissible over objection that it was nonexpert testimony.—Edwards v. West Texas Hospital, Tex.Civ.App., 89 S. W.2d 801, error dismissed.

(2) In such case husband and neighboring women could testify in malpractice case that there was a mass or knot left in wife's abdomen after birth of first child, that her skin was yellow, and that her abdomen was swelling.—Edwards v. West Texas Hospital, Tex.Civ.App., 89 S.W.2d 801, error dismissed.

Condition of dead body

Ala.—Brown Funeral Homes & Ins. Co. v. Baughn, 148 So. 154, 226 Ala. 661.

Tex.—Edwards v. West Texas Hospital, Civ.App., 89 S.W.2d 801, error dismissed.

Weight, not competency, affected

A nonexpert may testify concerning the appearance of a party as indicating the condition of his health, since such fact, while it may weaken the probative force of the testimony, does not destroy its competency.—Williams v. American Life & Accident Ins. Co., Mo.App., 112 S.W.2d 909.

Fact that witnesses were physicians did not disqualify them to tes-

ferences from animate bodily phenomena, as, for example, as to the apparent condition of health,[50] or the existence of a state of apparent sickness or disease,[51] as that a person had fever,[52] or was ruptured[53] or paralyzed.[54]

A nonexpert or lay witness may not, however, give expert testimony when referring to a disease or ailment,[55] and, in this connection, may not give evidence which amounts to a diagnosis;[56] accordingly, such a witness should not ordinarily be al-

tify that plaintiff walked with a limp, that she dragged her right foot, and that the toe of her right shoe was worn, matters that could have been testified to by lay witnesses.—Schmidt v. Chicago City R. Co., 88 N.E. 275, 239 Ill. 494, affirming 144 Ill.App. 512.

50. U.S.—Prudential Ins. Co. of America v. Bialkowski, C.C.A.Va., 85 F.2d 880—Corrigan v. U. S., C.C.A.Idaho, 82 F.2d 106, 109, quoting **Corpus Juris.**
Ala.—Prudential Ins. Co. v. Calvin, 148 So. 837, 227 Ala. 146—National Life and Accident Ins. Co. v. Stewart, 122 So. 621, 219 Ala. 490—American Nat. Ins. Co. v. Rains, 110 So. 606, 215 Ala. 378—Blackman v. Johnson, 35 Ala. 252—Barker v. Coleman, 35 Ala. 221.
Ark.—Modern Woodmen of America v. Whitaker, 293 S.W. 1045, 173 Ark. 921.
Cal.—Jordan v. Great Western Motorways, 2 P.2d 786, 213 Cal. 606—Walter v. England, 24 P.2d 930, 133 Cal.App. 676.
Ind.—Prudential Ins. Co. of America v. Diffenbaugh, 121 N.E. 301, 68 Ind.App. 699.
Kan.—Smith v. Prudential Ins. Co. of America, 12 P.2d 793, 136 Kan. 120.
Ky.—Prudential Ins. Co. of America v. Sisson, 124 S.W.2d 739, 276 Ky. 506—North American Acc. Ins. Co. v. Caskey's Adm'r, 292 S.W. 297, 218 Ky. 750.
Md.—Baltimore & Liberty Turnpike Co. v. Cassell, 7 A. 805, 66 Md. 419, 59 Am.R. 175.
Minn.—Fryklind v. Jackson, 252 N.W. 232, 190 Minn. 232.
Mo.—Steffen v. Southwestern Bell Telephone Co., 56 S.W.2d 47, 331 Mo. 574—Otto v. Metropolitan Life Ins. Co., 72 S.W.2d 811, 228 Mo. App. 742—Haney v. Security Ben. Ass'n of Topeka, Kan., 34 S.W.2d 1046, 225 Mo.App. 872—Winkler v. Terminal R. Ass'n of St. Louis, 227 S.W. 625, 206 Mo.App. 224.
Or.—Hartley v. State Industrial Accident Commission, 261 P. 71, 123 Or. 310.
Pa.—See Norvidas v. Metropolitan Life Ins. Co., 6 Sch.Reg. 292.
S.D.—Moberg v. Scott, 175 N.W. 559, 42 S.D. 372—Gartner v. Mohan, 170 N.W. 640, 141 S.D. 406.
Tex.—Shuffield v. Taylor, 83 S.W.2d 955, 959, 125 Tex. 601, citing **Corpus Juris,** and reversing Taylor v. Shuffield, Civ.App., 52 S.W.2d 788—Vann v. National Life & Accident Ins. Co., Com.App., 24 S.W.2d 347, reversing National Life & Accident Ins. Co. v. Vann, Civ.App., 11 S.W.2d 364—El Paso Electric Co. v. Buck, Civ.App., 143 S.W.2d 438, error dismissed, judgment correct—W. O. W. Life Ins. Soc. v. Dickson, Civ.App., 133 S.W.2d 243, error dismissed, judgment correct—General Life Ins. Co. v. Potter, Civ.App., 124 S.W.2d 409—St. Louis, S. F. & T. Ry. Co. v. Carter, Civ.App., 275 S.W. 224—Henson v. Warren, Civ.App., 274 S.W. 185.
Wash.—Graham v. Police & Fireman's Ins. Ass'n, 116 P.2d 352
Wis.—Stanislawski v. Metropolitan Life Ins. Co., 286 N.W. 10, 231 Wis. 572.
22 C.J. p 619 note 48.

Apparent absence of infirmity
On question whether a fall caused paralysis of plaintiff's limbs, evidence of persons with whom plaintiff had worked until two weeks before the fall, to the effect that he showed no want of use of his limbs and no infirmity from which he was ever seen to fall was competent.—Ensley Holding Co. v. Kelley, 158 So. 896, 229 Ala. 650.

Construction of statement
An answer of witness, "Well, he didn't seem to be a very well man," was not a conclusion, but a statement of how the person appeared to him.—Lilly v. Kansas City Rys. Co., Mo.App., 209 S.W. 969.

51. U.S.—Cox v. U. S., C.C.A.Ill., 103 F.2d 133—Corrigan v. U. S., C.C.A. Idaho, 82 F.2d 106, 109, quoting **Corpus Juris**—Moyer v. Ætna Life Ins. Co., D.C.Pa., 39 F.Supp. 725.
Ala.—Fraser v. State, 113 So. 289, 216 Ala. 426—Blackman v. Johnson, 35 Ala. 252—Barker v. Coleman, 35 Ala. 221.
Ark.—Southern Ice & Utilities Co. v. Bryan, 58 S.W.2d 920, 187 Ark. 186.
Ill.—Swanson v. Prudential Ins. Co. of America, 271 Ill.App. 309.
Ind.—Western & Southern Life Ins. Co. v. Ross, 171 N.E. 212, 91 Ind. App. 552.
S.D.—Gartner v. Mohan, 170 N.W. 640, 141 S.D. 406.
Tex.—Shuffield v. Taylor, 83 S.W.2d 955, 959, 125 Tex. 601, citing **Corpus Juris,** and reversing Taylor v. Shuffield, Civ.App., 52 S.W.2d 788—St. Louis, S. F. & T. Ry. Co. v. Carter, Civ.App., 275 S.W. 224—San Angelo Water, Light & Power Co. v. Baugh, Civ.App., 270 S.W. 1101—Yeatts v. St. Louis Southwestern R. Co., Civ.App., 184 S.W. 636, error dismissed Yeates v. St. Louis Southwestern R. Co. of Texas, Com.App., 244 S.W. 503.
22 C.J. p 620 note 49.

Detailing statement of basic facts
Nonexpert witness who had lived with, and waited on, another person may be permitted to state that such person has been sick over a certain period, where the witness gives a detailed statement of the facts on which the opinion is based.—El Paso Electric R. Co. v. Jennings, Tex.Civ.App., 224 S.W. 1113, dismissed for want of jurisdiction.

52. U.S.—Cox v. U. S., C.C.A.Ill., 103 F.2d 133.
Ala.—Sovereign Camp, W. O. W., v. Clarke, 157 So. 259, 229 Ala. 382—Wilkinson v. Moseley, 30 Ala. 562.
Iowa.—State v. McKnight, 93 N.W. 63, 119 Iowa 79.

53. N.Y.—Duntzy v. Van Buren, 5 Hun 648.

54. Tex.—Abee v. Bargas, Civ.App., 65 S.W. 489.

55. Ind.—Western & Southern Life Ins. Co. v. Danciu, 26 N.E.2d 912, rehearing denied 27 N.E.2d 763.
Ky.—Travelers Ins. Co. v. Mahon, 117 S.W.2d 909, 273 Ky. 691—Greer v. Richards' Adm'r, 115 S.W.2d 568, 273 Ky. 91—Jefferson Standard Life Ins. Co. v. Pierce, 95 S.W.2d 579, 264 Ky. 698—Minnesota Life Ins. Co. v. Vire, 94 S.W.2d 667, 264 Ky. 257—Equitable Life Assur. Soc. of U. S. v. Spencer, 90 S.W.2d 704, 262 Ky. 478—Equitable Life Assur. Soc. of U. S. v. Green, 83 S.W.2d 478, 258 Ky. 773—Inter-Southern Life Ins. Co. v. Stephenson, 56 S.W.2d 332, 246 Ky. 694—Equitable Life Assur. Soc. of U. S. v. Fannin, 53 S.W.2d 703, 245 Ky. 474—Sovereign Camp, W. O. W., v. Morris, 278 S.W. 554, 212 Ky. 201.

56. Ind.—Western & Southern Life Ins. Co. v. Danciu, 26 N.E.2d 912, rehearing denied 27 N.E.2d 763.
Ky.—Travelers Ins. Co. v. Mahon, 117 S.W.2d 909, 203 Ky. 691—Greer v. Richards' Adm'r, 115 S.W.2d 568, 273 Ky. 91—Equitable Life Assur. Soc. v. Obertate, 109 S.W.2d 1206, 270 Ky. 518—Jefferson Standard Life Ins. Co., 95 S.W. 579, 264 Ky. 698—Minnesota Life Ins. Co. v. Vire, 94 S.W.2d 667, 264 Ky. 257—Equitable Life Assur. Soc. of U. S. v. Spencer, 90 S.W.2d 701, 262 Ky. 478—Equitable Life Assur. Soc. of U. S. v. Green, 83 S.W.2d 478, 259 Ky. 773—Inter-Southern Life Ins. Co. v. Stephenson, 56 S.W.2d 332, 240 Ky. 694—Equitable Life Assur. Co. of U. S. v. Fan-

lowed to testify that a person had or had not a particular disease.[57] In regard to a disease which is readily recognized and is generally well known to ordinary observers, however, the propriety of permitting a nonexpert or lay witness who has made due observations to state whether another person has, or has not, had such disease has been recognized,[58] and in some jurisdictions the courts have apparently adopted a rather liberal rule in recognizing the admissibility of the opinion or conclusion of nonexpert witnesses in regard to the existence of a particular disease.[59] It has been held or recognized that an ordinary observer may state whether a person had consumption,[60] or died of that disease,[61] although, in regard to tuberculosis, the view has been taken that one who is without knowledge of the nature of the disease, and without some special experience in diagnosing it, may not express an opinion as to whether another person is, or was, suffering from the disease,[62] and that only experts are qualified to testify whether a given case of tuberculosis is incipient or has been arrested.[63] A witness other than an expert may not give an opinion as to whether an injury received by another will be permanent.[64]

While a general characterization of the health of another does not, under all circumstances, render the testimony incompetent,[65] generally it is not permissible to receive the mere opinion or conclusion of a nonexpert or lay witness as to the actual physical condition or health of another.[66] So a mere general characterization of the condition of another person by such a witness may be objectionable and incompetent,[67] also a characterization by the witness of the complaints of an injured per-

nin, 53 S.W.2d 703, 245 Ky. 474—Prudential Ins. Co. of America v. Hodges Adm'x, 22 S.W.2d 435, 232 Ky. 44—Sovereign Camp, W. O. W. v. Morris, 278 S.W. 554, 212 Ky. 201.

57. U.S.—Cox v. U. S., C.C.A.Ill., 103 F.2d 133.
Ala.—Mutual Life Ins. Co. of New York, 138 So. 265, 223 Ala. 679.
S.D.—Gartner v. Mohan, 170 N.W. 640, 141 S.D. 406.
22 C.J. p 622 note 81, p 620 note 49 [c].

Experience, knowledge, and training of expert required

A nonexpert witness may not testify as to the existence of a particular disease which is discoverable, or its nature or character determinable, only through the particular experience, knowledge, and training of an expert.—Peters v. Mutual Life Ins. Co. of New York, D.C.Pa., 26 F. Supp. 50, affirmed, C.C.A., 107 F.2d 9, certiorari denied 60 S.Ct. 582, 309 U.S. 663, 84 L.Ed. 1010.

Belief

Nonexpert witness cannot testify that he thought deceased person did not have pneumonia.—North American Acc. Ins. Co. v. Caskey's Adm'r, 292 S.W. 297, 218 Ky. 750.

Bright's disease

Ky.—New York Life Ins. Co. v. McCane, 124 S.W.2d 1057, 276 Ky. 712.

Disease of heart

Ky.—Sovereign Camp, W. O. W. v. Morris, 278 S.W. 554, 212 Ky. 201.

58. U.S.—Cox v. U. S., C.C.A.Ill., 103 F.2d 133.
Ind.—Western & Southern Life Ins. Co. v. Danciu, 26 N.E.2d 912, rehearing denied 27 N.E.2d 763.
Kan.—Smith v. Prudential Ins. Co. of America, 12 P.2d 793, 136 Kan. 120

59. Tex.—American Nat. Ins. Co. v. Walker, Civ.App., 81 S.W.2d 1061.

60. N.Y.—Donovan v. Colonial L. Ins. Co., 119 N.Y.S. 1078.

61. Mich.—Krapp v. Metropolitan L. Ins. Co., 106 N.W. 1107, 143 Mich. 369, 114 Am.S.R. 651.
N.Y.—Donovan v. Colonial L. Ins. Co., 119 N.Y.S. 1078.

62. U.S.—Cox v. U. S., C.C.A.Ill., 103 F.2d 133.

63. U.S.—U. S. v. McShane, C.C.A. Colo., 70 F.2d 991, certiorari denied McShane v. U. S., 55 S.Ct. 141, 293 U.S. 610, 79 L.Ed. 700.

64. Ala.—Dean v. State, 8 So. 38, 89 Ala. 46.

65. **"Good" or "bad" health**

(1) In an action for personal injuries, it was proper to permit a witness, not competent as an expert, but who had seen plaintiff almost daily for four years, to testify that her health was good before she was injured.—Van House v. Canadian Northern Ry. Co., 192 N.W. 493, 155 Minn. 57, 28 A.L.R. 357.

(2) Testimony of plaintiff's wife that condition of plaintiff's health had been bad since date of injury was not prejudicial, where wife from her testimony had every opportunity for observation.—Gasque v. City of Asheville, 178 S.E. 848, 207 N.C. 821.

Construction of statement

Testimony that a certain person was a healthy woman meant that she appeared to be in good health and was competent evidence.—Nelson v. Standard Life Ins. Co., Mo. App., 112 S.W.2d 901.

66. Ala.—Sovereign Camp, W. O. W. v. Hutchinson, 114 So. 684, 217 Ala 71.
Ky.—Travelers Ins. Co. v. Mahon, 117 S.W.2d 909, 273 Ky. 691—Equitable Life Assur. Soc. of U. S. v Green, 83 S.W.2d 478, 258 Ky. 77—Ætna Life Ins. Co. of Hartford, Conn., v. Gullett, 69 S.W.2d 1068, 253 Ky. 544.
Minn.—Fryklind v. Jackson, 252 N. W. 232, 190 Minn. 356.
22 C.J. p 619 notes 47 [f], 48 [b], p 620 note 49 [c].

67. **Particular statements inadmissible**

(1) An inexperienced lay witness who has not examined an injured person is not entitled to testify that, from seeing such person, he thought he was in a dangerous condition.—Frankfort v. Kirby, 161 S.W. 1115, 156 Ky. 741.

(2) Refusal to admit testimony of nonexpert witness, that plaintiff was in a "pretty bad condition" when witness visited plaintiff after the alleged accident, was not error, since the testimony of the witness was a mere opinion without any facts given on which to base the opinion.—Elliott v. Georgia Power Co., 197 S. E. 914, 58 Ga.App. 151.

(3) General statements of nonexpert witnesses, to the effect that plaintiff was not "normal" after her injury, were improper as too indefinite, since witnesses should state facts showing wherein plaintiff was different.—Capital Motor Lines v. Gillette, 177 So. 881, 235 Ala. 157.

(4) Witness' testimony that passenger was in perfect health at time of accident was erroneously admitted as opinion and conclusion.—Gulf, C. & S. F. Ry. Co. v. Baldwin, Tex. Civ.App., 2 S.W.2d 520.

(5) In personal injury action, objection to testimony as to plaintiff's apparent health and strength at the time of the trial, to the effect that it was "very poor," was properly sustained, being a conclusion of the witness concerning the then appearance of plaintiff, who was at the time before the jury.—Gricus v.

son may render evidence of such complaints inadmissible.[68]

In actions for personal injuries, the competency of an opinion of a witness as to whether plaintiff was feigning has been denied.[69]

Statements of fact as to health and physical condition see supra § 467.

Obvious conditions and effect; inferences from transient appearances. An ordinary observer who has had suitable opportunities for observation may, as a general rule, state the obvious condition,[70] and visible effect[71] of particular injuries, or state inferences from transient physical appearances,[72] as that a person was hurt or injured,[73] in pain or suf-

United Rys. Co. of St. Louis, 237 S.W. 763, 291 Mo. 582.

68. **"Complained dreadfully"**
In a personal injury action testimony of plaintiff's daughter that plaintiff complained "dreadfully" all night, characterized the complaining in a way justifying its exclusion, since she should have been required to state plain facts.—Johnston v. Warrant Warehouse Co., 99 So. 920, 211 Ala. 165.

69. Mich.—McCormick v. Detroit, G. H. & M. R. Co., 104 N.W. 390, 141 Mich. 17.
Tenn.—Nashville Ry. & Light Co. v. Owen, 11 Tenn.App. 19.

70. U.S.—Corrigan v. U. S., C.C.A. Idaho, 82 F.2d 106, 109, quoting **Corpus Juris**—Davis v. Hynde, C. C.A.Miss., 4 F.2d 656.
Ark.—Jewel Tea Co. v. McCrary, 122 S.W.2d 534, 535, 197 Ark. 294, quoting **Corpus Juris.**
Hawaii.—Tsuruoka v. Lukens, 32 Hawaii 263, 264, quoting **Corpus Juris.**
Neb.—Thomas v. Haspel, 253 N.W. 73, 126 Neb. 255.
Wyo.—McCoy v. Clegg, 257 P. 484, 36 Wyo. 473.
22 C.J. p 621 note 65.

Character and description of injury
Character of injury and full description thereof may be proved by lay witnesses.—Provident Life & Accident Ins. Co. of Chattanooga, Tenn., v. Diehlman, 82 S.W.2d 350, 259 Ky. 320.

Eyes
In an action for damages for injury to eyes, it was not error to permit a nonexpert witness, who observed plaintiff's eyes, to testify that pus ran therefrom, and that they were sore and swollen and appeared to be red and inflamed.—City of Pawhuska v. Martin, 1 P.2d 638, 151 Okl. 24.

Operative wound
Mother of patient in malpractice action was qualified to testify as to absence of evidence of stitches or of drain in operative wound.—Moore v. Holroyd, 122 So. 349, 219 Ala. 392.

Skilled and professional witnesses not required
Okl.—Letcher v. Skiver, 226 P. 1029, 99 Okl. 269.

71. U.S.—Corrigan v. U. S., C.C.A Idaho, 82 F.2d 106, 109, quoting **Corpus Juris.**
Ark.—Jewel Tea Co. v. McCrary, 122 S.W.2d 534, 535, 197 Ark. 294, quoting **Corpus Juris.**
Ga.—Georgia Ry. & Power Co. v. Howell, 113 S.E. 101, 28 Ga.App. 798.
Hawaii.—Tsuruoka v. Lukens, 32 Hawaii 263, 264, quoting **Corpus Juris.**
Md.—Baltimore & Liberty Turnpike Co. v. Cassell, 7 A. 805, 66 Md. 419, 59 Am.R. 175.
Mo.—Rainier v. Quincy, O. & K. C. R. Co., 271 S.W. 500—Fletcher v. Kansas City Rys. Co., App., 221 S.W. 1070.
Tex.—Karotkin Furniture Co. v. Decker, Civ.App., 32 S.W.2d 703, affirmed, Com.App., 50 S.W.2d 705—Payne v. Hill, Civ.App., 242 S.W. 302.
22 C.J. p 621 note 66.

Fresh bruises or contusions on body
Ky.—Life & Casualty Co. of Tennessee v. Gream, 68 S.W.2d 402, 252 Ky. 801.

Inability to leave bed
Nonexpert's testimony that plaintiff could not get out of bed after accident was admissible as mere description of what he saw, particularly in view of his prior statement as to his observations as to plaintiff's physical condition.—Stilson v. Ellis, 225 N.W. 346, 208 Iowa 1157.

Breathing naturally or with difficulty
Testimony as to whether an injured person, after the injury appeared to breathe naturally or with difficulty was competent.—Dombrenos v. Chicago, R. I. & P. Ry. Co., Iowa, 174 N.W. 596.

Duration of disability
Permitting mother to testify as to duration of disability resulting from injury to child in automobile accident was not error.—Ball v. Gessner, 240 N.W. 100, 185 Minn. 105.

Actions and conduct of injured person
In an action for personal injuries, court did not err in permitting witnesses for plaintiff to testify as to their observation of her actions and conduct after the date of her injuries and during a period of a year and a half, the witnesses merely testifying to matters of personal observation and not undertaking to testify as to any conclusions drawn by them therefrom as to the seriousness of her injury.—Williamson v. Hardy, 190 P. 646, 47 Cal.App. 377.

Necessity that nature, extent, and effect of injury be obvious
The opinion of a nonexpert witness concerning the physical condition of a person who has sustained injury is not admissible, unless the injury is such that its nature, extent, and effect will be obvious to the common mind, and the apparent condition of an injured person may not be the real condition, and testimony thereof by a nonexpert on the essential effect of appearances has very little, if any, tendency to disclose that the person injured was not injured as he claims to have been.—Carr v. Stern, 120 P. 35, 17 Cal.App. 397.

72. U.S.—Corrigan v. U. S., C.C.A. Idaho, 82 F.2d 106, 109, quoting **Corpus Juris.**
Ark.—Jewell Tea Co. v. McCrary, 122 S.W.2d 534, 535, 197 Ark. 294, quoting **Corpus Juris.**
Hawaii.—Tsuruoka v. Lukens, 32 Hawaii 263, 264, quoting **Corpus Juris.**

Want of pain
In proceedings under the Workmen's Compensation Act, a witness for the employer has been permitted to testify that, after observing claimant at work after his original injury, witness was of opinion that claimant was not suffering any pain.—Sears Roebuck & Co. v. Griggs, 173 S.E. 194, 48 Ga.App. 585.

Sleep
Witness may give testimony as to injured person's ability to sleep and as to how such person slept.—Mielke v. Dobrydnio, 138 N.E. 561, 244 Mass. 89.

73. U.S.—Corrigan v. U. S., C.C.A. Idaho, 82 F.2d 106, 109, quoting **Corpus Juris.**
Ark.—Jewel Tea Co. v. McCrary, 122 S.W.2d 534, 535, 197 Ark. 294, quoting **Corpus Juris.**
Hawaii.—Tsuruoka v. Lukens, 32 Hawaii 263, 264, quoting **Corpus Juris.**
Tex.—St. Louis & S. F. R. Co. v. Boyer, 97 S.W. 1070, 44 Tex.Civ. App. 311.

Appeared to be hurt
Ala.—Lindsey v. Kindt, 128 So. 139, 221 Ala. 190.

Seemed to be injured
Where a nonexpert witness states the facts on which his opinion is based, it seems that he may give testimony to the effect that another person seemed to be injured.—Ft.

fering,[74] tired,[75] feeble,[76] uneasy,[77] weak,[78] pale,[79] broken down,[80] crippled,[81] paralyzed,[82] conscious or unconscious,[83] and under the influence of drugs.[84]

Worth & D. C. Ry. Co. v. Kidwell, Civ.App., 249 S.W. 303, certified questions answered 245 S.W. 667, 112 Tex. 89.

Knowledge of injury

Testimony of insured's widow and son that they knew insured had sustained injury was not inadmissible as mere conclusions.—Railway Mail Ass'n v. Forbes, Tex.Civ.App., 49 S.W.2d 880, error dismissed.

Evidence rejected as conclusion

Evidence that an injured person, on the day following his injury, showed the witness where he had been hit was a mere conclusion and inadmissible.—Martin v. Travelers' Ins. Co., App., 247 S.W. 1024, certified 276 S.W. 380, 310 Mo. 411, 41 A.L.R. 1372.

74. U.S.—Corrigan v. U. S., C.C.A. Idaho, 82 F.2d 106, 109, quoting **Corpus Juris.**
Ala.—Prudential Ins. Co. v. Calvin, 148 So. 837, 227 Ala. 146—Louisville & N. R. Co. v. Parker, 138 So. 231, 223 Ala. 626, certiorari granted 52 S.Ct. 496, 286 U.S. 535, 76 L.Ed. 1275, certiorari dismissed 53 S.Ct. 94, 287 U.S. 569, 77 L.Ed. 501.
Cal.—Walter v. England, 24 P.2d 930, 133 Cal.App. 676.
Hawaii.—Tsuruoka v. Lukens, 32 Hawaii 263, 264, quoting **Corpus Juris.**
Ind.—New York Cent. R. Co. v. De Leury, 192 N.E. 125, 100 Ind.App. 140.
Kan.—Hunter v. Joplin & P. Ry. Co., 197 P. 1092, 109 Kan. 169.
Neb.—Thomas v. Haspel, 253 N.W. 73, 126 Neb. 255.
N.C.—Pridgen v. Holeman Produce Co., 155 S.E. 247, 199 N.C. 560.
N.D.—Jentz v. National Casualty Co., 204 N.W. 344, 52 N.D. 688.
Tex.—Edwards v. West Texas Hospital, Civ.App., 89 S.W.2d 801, error dismissed—Karotkin Furniture Co. v. Decker, Civ.App., 32 S.W.2d 703, affirmed, Com.App., 50 S.W.2d 795—St. Louis, S. F. & T. Ry. Co. v. Green, Civ.App., 22 S.W.2d 550, reversed on other grounds, Com.App., 37 S.W.2d 123—St. Louis, S. F. & T. Ry. Co. v. Carter, Civ.App., 275 S.W. 224.
22 C.J. p 622 note 68.

Appearance as to suffering

(1) Lay witness may state appearance of another as to whether such person is suffering.—Benson v. Smith, Mo.App., 38 S.W.2d 749.

(2) Evidence as to what witness noticed about injured person's appearance as to pain was admissible. —Mielke v. Dobrydnio, 138 N.E. 561, 244 Mass. 89.

(3) Where a nonexpert witness states the facts on which his opinion is based, it seems that he may give testimony to the effect that another person seemed to be in pain.—Ft. Worth & D. C. Ry. Co. v. Kidwell, Civ.App., 249 S.W. 303, certified questions answered 245 S.W. 667, 112 Tex. 89.

Extent of suffering

(1) In personal injury action, plaintiff's husband was competent to testify, from observation, as to extent of plaintiff's suffering.—Pridgen v. Holeman Produce Co., 155 S.E. 247, 199 N.C. 560.

(2) A nurse could testify to the extent of plaintiff's suffering without qualifying as an expert.—Kimball v. Northern Electric Co., 113 P. 156, 159 Cal. 225.

"Involuntary" groans

A witness may not testify that she heard the person injured groan involuntarily, having no means of knowing that the act was involuntary.—Pierson v. Illinois Cent. R. Co., 123 N.W. 576, 159 Mich. 110.

75. U.S.—Corrigan v. U. S., C.C.A. Idaho, 82 F.2d 106, 109, quoting **Corpus Juris.**
La.—State v. Marceaux, 24 So. 611, 50 La.Ann. 1137.

76. U.S.—Equitable Life Assur. Soc. of U. S. v. Bomar, C.C.A.Ky., 106 F.2d 640.
Tex.—Shuffield v. Taylor, 83 S.W.2d 955, 959, 125 Tex. 601, reversing Taylor v. Shuffield, Civ.App., 52 S.W.2d 788.

77. Tex.—Angus v. State, 14 S.W. 443, 20 Tex.App. 52.

78. U.S.—Corrigan v. U. S., C.C.A. Idaho, 82 F.2d 106, 109, quoting **Corpus Juris.**
22 C.J. p 622 note 72.

79. U.S.—Corrigan v. U. S., C.C.A. Idaho, 82 F.2d 106, 109, quoting **Corpus Juris.**
Ark.—Southern Ice & Utilities Co. v. Bryan, 58 S.W.2d 920, 187 Ark. 186.
22 C.J. p 622 note 73.

80. U.S.—Corrigan v. U. S., C.C.A. Idaho, 82 F.2d 106, 109, quoting **Corpus Juris.**
Mass.—O'Neil v. Hanscom, 56 N.E. 587, 175 Mass. 313.

81. Tex.—San Antonio Tract. Co. v. Flory, 100 S.W. 200, 45 Tex.Civ.App. 233.
22 C.J. p 622 note 75.

Appeared to be crippled

Tex.—St. Louis Southwestern R. Co. v. Brown, 69 S.W. 1010, 30 Tex.Civ.App. 57.

82. Ark.—Jewel Tea Co. v. McCrary, 122 S.W.2d 534, 535, 197 Ark. 294, quoting **Corpus Juris.**
Tex.—International & G. N. R. Co. v. Sandlin, 122 S.W. 60, 57 Tex.Civ.App. 151.
22 C.J. p 622 note 76.

Arm paralyzed

Wyo.—McCoy v. Clegg, 257 P. 484, 36 Wyo. 473.

83. Ala.—Dersis v. Dersis, 98 So. 27, 210 Ala. 308.
Ark.—Jewel Tea Co. v. McCrary, 122 S.W.2d 534, 535, 197 Ark. 294, quoting **Corpus Juris.**
Ky.—Life & Casualty Co. of Tennessee v. Gream, 68 S.W.2d 402, 252 Ky. 801.
Tex.—Ineeda Laundry v. Newton, Civ.App., 33 S.W.2d 208—Karotkin Furniture Co. v. Decker, Civ.App., 32 S.W.2d 703, affirmed, Com.App., 50 S.W.2d 795.
22 C.J. p 622 note 77.

Semiconscious

Testimony of nonexpert witness that injured person, following a collision, looked as if he was in a semiconscious condition, and that he talked but did not know what he was talking about, was admissible. —Jewel Tea Co. v. McCrary, 122 S.W.2d 534, 197 Ark. 294.

Statement of basic facts

(1) According to some cases, the facts on which the inference rests must first be stated.
Ind.—Pennsylvania Co. v. Newmeyer, 28 N.E. 860, 129 Ind. 401.
Mo.—Wightman v. Grand Lodge A. O. U. W., 98 S.W. 829, 121 Mo.App. 252.
Tex.—Galloway v. San Antonio & G. R. Co., Civ.App., 78 S.W. 32.

(2) However, in personal injury action, where defendant's doctor was called as witness for plaintiff, and testified that he found plaintiff unconscious, testimony of nonexpert witness to same effect was merely cumulative, and did not necessarily work reversal because such nonexpert witness was not first required to state acts, conduct, or language of plaintiff on which he based his opinion.—St. Louis & S. F. R. Co. v. Bateman, 240 P. 110, 112 Okl. 86.

84. Mass.—Burt v. Burt, 46 N.E. 622, 168 Mass. 204.
22 C.J. p 622 note 78.

Absence of knowledge of administration of drug

In a will contest, testimony that testatrix was under the influence of morphine "right before the will was made" was properly rejected where the witness had no knowledge of the administration of morphine and was not competent to give an opinion in the absence of such knowledge.—Tucker v. Houston, 112 So. 360, 216 Ala. 43.

While evidence of a nonexpert witness as to the apparent nervousness of another has been regarded as incompetent as the opinion of a nonexpert,[85] according to some cases, such a witness who has made due observations may testify whether another person appeared to be suffering from nervousness.[86]

Conclusions or statements of nonexpert witness who has made due observations as to whether a woman was pregnant have been regarded as competent,[87] but there is authority to the contrary.[88]

Change in, and impairment of, physical condition. An ordinary observer who has had suitable opportunity for observation may usually state a change in apparent condition,[89] whether the change is from sickness to health,[90] or from health to sickness,[91] or from bad to worse,[92] or from worse to bet-

85. Ky.—Cincinnati, N. O. & T. P. R. Co. v. Ross, 294 S.W. 460, 219 Ky. 824.

86. Neb.—Thomas v. Haspel, 253 N. W. 73, 126 Neb. 255.

In Pennsylvania

(1) The admissibility of a statement of a nonexpert witness as to another's nervousness or nervous condition, based on observation of external appearance, has been recognized.—Critzer v. Donovan, 137 A. 665, 289 Pa. 381.

(2) But a nonexpert may not give an opinion as to the actual physical state of the nerves—whether they were healthy or diseased.—Critzer v. Donovan, supra.

Construction of statement

In personal injury action, husband's statement as to wife's condition, that "you might call her a nervous wreck," was not an incompetent opinion or conclusion, but was a restatement of a prior statement that she had been very nervous.—Bradley v. Lewis, 100 So. 324, 211 Ala. 264.

Apparently seemed to be nervous

Witness seeing injured person at time of, or immediately after, accident may state that injured person appeared to be nervous.—Lindsey v. Kindt, 128 So. 139, 221 Ala. 190.

87. Ala.—Littleton v. State, 29 So. 390, 128 Ala. 31—Wilkinson v. Moseley, 30 Ala. 562.
Ind.—Miller v. Dill, 49 N.E. 272, 149 Ind. 326.
Mass.—Commonwealth v. Thompson, 36 N.E. 1111, 159 Mass. 56.

Pregnancy and relief of miscarriage

Nonexpert may testify as to physical appearance and condition as bearing on the question as to the pregnancy of another, and as to acts done to relieve alleged miscarriage.—Morris v. Union Depot Bridge & Terminal R. Co., 8 S.W.2d 11, 320 Mo. 371.

88. Me.—Boise v. McAllister, 12 Me. 308.

89. U.S.—Cox v. U. S., C.C.A.Ill., 103 F.2d 133—Corrigan v. U. S., C. C.A.Idaho, 82 F.2d 106, 109, quoting **Corpus Juris.**
Ala.—Stephens v. Williams, 147 So. 608, 226 Ala. 534—Gadsden General Hospital v. Hamilton, 103 So. 553, 212 Ala. 531, 40 A.L.R. 294.
Ky.—Greer v. Richards' Adm'r, 115 S.W.2d 568, 273 Ky. 91.
Mich.—La Due v. Lebanon Tp., 192 N.W. 636, 222 Mich. 301.
N.D.—Jentz v. National Casualty Co., 204 N.W. 344, 52 N.D. 688.
Or.—Hartley v. State Industrial Accident Commission, 261 P. 71, 123 Or. 310.
Tex.—Shuffield v. Taylor, 83 S.W.2d 955, 959, 125 Tex. 601, citing **Corpus Juris,** and reversing Taylor v. Shuffield, Civ.App., 52 S.W.2d 788—St. Louis Southwestern Ry. Co. v. Varnell, Civ.App., 97 S.W.2d 320—Henson v. Warren, Civ.App., 274 S.W. 185—San Angelo Water, Light & Power Co. v. Baugh, Civ. App., 270 S.W. 1101—Galveston, H. & S. A. Ry. Co. v. White, Civ. App., 216 S.W. 265—Galveston, H. & S. A. R. Co. v. Harling, Civ.App., 208 S.W. 207, affirmed, Com.App., 260 S.W. 1016—Yeatts v. St. Louis Southwestern R. Co., Civ. App., 184 S.W. 636, error dismissed Yeates v. St. Louis Southwestern R. Co. of Texas, Com.App., 244 S.W. 503.
Wash.—Truva v. Goodyear Tire & Rubber Co., 214 P. 818, 124 Wash. 445.
22 C.J. p 620 note 53.

Decreased strength, weight, or agility

(1) Wife of plaintiff, suing for personal injuries, may testify to his not being as strong after the accident as before.—La Due v. Lebanon Tp., 192 N.W. 636, 222 Mich. 301.

(2) In an action for personal injuries, the admission of testimony of nonexpert witnesses that plaintiff was not as stout or heavy as before the accident, that he did not move as quickly, and that he complained of severe headaches, was proper.—Alabama Great Southern R. Co. v. Molette, 93 So. 644, 207 Ala. 624.

Declining health

After testifying to facts on which opinion is based, a lay witness may give his opinion as to the declining health of another.—World Oil Co. v. Hicks, Civ.App., 75 S.W.2d 905, certified questions answered 103 S.W.2d 962, 129 Tex. 297.

Ability to walk

Tex.—Galveston, H. & S. A. R. Co. v. Harling, Civ.App., 208 S.W. 207, affirmed, Com.App., 260 S.W. 1016.
22 C.J. p 620 note 53 [d].

Comparative ability to work

U.S.—Corrigan v. U. S., C.C.A.Idaho, 82 F.2d 106.
Cal.—Majors v. Connor, 121 P. 371, 162 Cal. 131.

Recovery

There was no error in permitting witness to testify that injured person had recovered from a former accident some two years before the accident in question.—Parker v. Harrell, Tex.Civ.App., 212 S.W. 542.

90. U.S.—Corrigan v. U. S., C.C.A. Idaho, 82 F.2d 106, 109, quoting **Corpus Juris.**
Tex.—Yeatts v. St. Louis Southwestern R. Co., Civ.App., 184 S.W. 636, error dismissed Yeates v. St. Louis Southwestern R. Co. of Texas, Com.App., 244 S.W. 503.
22 C.J. p 620 note 54.

91. U.S.—Corrigan v. U. S., C.C.A. Idaho, 82 F.2d 106, 109, quoting **Corpus Juris.**
Tex.—San Angelo Water, Light & Power Co. v. Baugh, Civ.App., 270 S.W. 1101—Yeatts v. St. Louis Southwestern R. Co., Civ.App., 184 S.W. 636, error dismissed Yeates v. St. Louis Southwestern R. Co., Com.App., 244 S.W. 503.
22 C.J. p 620 note 55.

92. U.S.—Corrigan v. U. S., C.C.A. Idaho, 82 F.2d 106, 109, quoting **Corpus Juris**—U. S. v. Monger, C. C.A.Wyo., 70 F.2d 361—Yeatts v. St. Louis Southwestern R. Co., Civ.App., 184 S.W. 636, error dismissed Yeates v. St. Louis Southwestern R. Co. of Texas, Com. App., 244 S.W. 503.
22 C.J. p 621 note 56.

After treatment

Testimony of plaintiff's husband that, after treatment, plaintiff grew worse, was not mere conclusion, in view of witness' testimony describing plaintiff's condition and symptoms.—Hughes v. Weaver, 148 S.E. 12, 39 Ga.App. 597.

Weaker or worse

In action against a physician and surgeon for death following operation, testimony of patient's wife that during his last hours patient

ter.[93]

Such an observer may also infer and state that a person's ability to help himself,[94] or to work,[95] or his faculties,[96] or the use of his limbs[97] or other parts of his body,[98] or his earning capacity,[99] has or has not been impaired.

The conclusion or opinion of a nonexpert witness as to whether another person's physical condition after an alleged injury was such as to permit such other to work has, however, been regarded as incompetent under some circumstances,[1] and the admissibility of evidence estimating in direct terms

appeared to be growing weaker or worse was admissible.—Stephens v. Williams, 147 So. 608, 226 Ala. 534.

Workmen's compensation

In proceeding under the Workmen's Compensation Act for Compensation for the death of employee, testimony of lay witness, who was fellow workman, that after injury deceased "got worse" was admissible.—Hartley v. State Industrial Accident Commission, 261 P. 71, 123 Or. 310.

93. U.S.—Corrigan v. U. S., C.C.A. Idaho, 82 F.2d 106, 109, quoting **Corpus Juris.**
Ill.—Salem v. Webster, 61 N.E. 323, 192 Ill. 369.
Tex.—Yeatts v. St. Louis Southwestern R. Co., Civ.App., 184 S.W. 636, error dismissed Yeates v. St. Louis Southwestern R. Co., Com.App., 244 S.W. 503.
Utah.—Johnson v. Union Pac. R. Co., 100 P. 390, 35 Utah 285.

94. U.S.—Corrigan v. U. S., C.C.A. Idaho, 82 F.2d 106, 109, quoting **Corpus Juris.**
Ill.—Salem v. Webster, 61 N.E. 323, 192 Ill. 369.
Mo.—Osborne v. Wells, App., 211 S. W. 887.
Tex.—San Angelo Water, Light & Power Co., Civ.App., 270 S.W. 1101—Yeatts v. St. Louis Southwestern R. Co., Civ.App., 184 S.W. 636, error dismissed Yeates v. St. Louis Southwestern R. Co., Com.App., 244 S.W. 503.
Utah.—Johnson v. Union Pac. R. Co., 100 P. 390, 35 Utah 285.

Inability to move body

Tex.—Payne v. Hill, Civ.App., 242 S. W. 302.

95. U.S.—Corrigan v. U. S., C.C.A. Idaho, 82 F.2d 106, 109, quoting **Corpus Juris.**
D.C.—U. S. v. Woltman, 57 F.2d 418, 61 App.D.C. 52.
Ark.—Kansas City Southern Ry. Co. v. Cockrell, 277 S.W. 7, 169 Ark. 698.
Iowa.—Looney v. Parker, 230 N.W. 570, 210 Iowa 85.
Mass.—Mielke v. Dobrydnio, 138 N. E. 561, 244 Mass. 89.
Mo.—Benson v. Smith, App., 38 S.W. 2d 749.
Neb.—From v. General American Life Ins. Co., 273 N.W. 36, 38, 132 Neb. 73, citing **Corpus Juris.**
S.D.—Gartner v. Mohan, 170 N.W. 640, 41 S.D. 406.
Tex.—St. Louis Southwestern Ry. Co. v. Varnell, Civ.App., 97 S.W.2d 320—Henson v. Warren, Civ.App., 274 S.W. 185.
22 C.J. p 621 notes 59, 64.

Workmen's compensation

In a proceeding under the Workmen's Compensation Act, a witness for the employer has been permitted to testify that, after observing claimant at work after his original injury, witness was of the opinion that the working ability of claimant had apparently not been impaired.—Sears, Roebuck & Co. v. Griggs, 173 S.E. 194, 48 Ga.App. 585.

96. U.S.—Corrigan v. U. S., C.C.A. Idaho, 82 F.2d 106, 109, quoting **Corpus Juris.**
Tex.—San Angelo Water, Light & Power Co. v. Baugh, Civ.App., 270 S.W. 1101—Yeatts v. St. Louis Southwestern R. Co., Civ.App., 184 S.W. 636, error dismissed Yeates v. St. Louis Southwestern R. Co., Com.App., 244 S.W. 503.
22 C.J. p 621 note 60.

97. U.S.—Corrigan v. U. S., C.C.A. Idaho, 82 F.2d 106, 109, quoting **Corpus Juris.**
Mo.—Osborne v. Wells, App., 211 S. W. 887.
Tex.—San Angelo Water, Light & Power Co. v. Baugh, Civ.App., 270 S.W. 1101—Yeatts v. St. Louis Southwestern R. Co., Civ.App., 184 S.W. 636, error dismissed Yeates v. St. Louis Southwestern R. Co., Com.App., 244 S.W. 503.
22 C.J. p 621 note 61.

Arm

Mich.—Harris v. Detroit City R. Co., 42 N.W. 1111, 76 Mich. 227.
Mo.—Rainier v. Quincy, O. & K. C. R. Co., 271 S.W. 500.

Ability to walk

Mass.—Koch v. Lynch, 141 N.E. 677, 247 Mass. 459.
22 C.J. p 621, note 61 [b].

Ability to run

Tex.—Payne v. Hill, Civ.App., 242 S.W. 302.

Statement of conclusion or opinion properly rejected

Evidence of nurses and others that in their judgment the testator could not hold a pen or pencil, although they had not seen him try, was properly rejected in a case in which such witnesses were permitted to describe the condition of testator's hands, the extent to which they were swollen and the position and flexibility or stiffness of the fingers, from which testimony the court could draw a conclusion as to his ability to write, as accurately as the witnesses.—Craig v. Trotter, 96 N.E. 1003, 252 Ill. 228.

98. U.S.—Corrigan v. U. S., C.C.A. Idaho, 82 F.2d 106, 109, quoting **Corpus Juris.**
Tex.—San Angelo Water, Light & Power Co. v. Baugh, Civ.App., 270 S.W. 1101—Yeatts v. St. Louis Southwestern R. Co., Civ.App., 184 S.W. 636, error dismissed Yeates v. St. Louis Southwestern R. Co., Com.App., 244 S.W. 503.
22 C.J. p 621 note 62.

99. U.S.—Corrigan v. U. S., C.C.A. Idaho, 82 F.2d 106, 109, quoting **Corpus Juris.**
Tex.—San Angelo Water, Light & Power Co. v. Baugh, Civ.App., 270 S.W. 1101—Yeatts v. St. Louis Southwestern R. Co., Civ.App., 184 S.W. 636, error dismissed Yeates v. St. Louis Southwestern R. Co., Com.App., 244 S.W. 503.
22 C.J. p 621 note 63.

1. Ky.—Cincinnati, N. O. & T. P. R. Co. v. Ross, 294 S.W. 460, 219 Ky. 824.

Evidence not admissible

(1) Testimony that injured person had not been able to work in his office, profession, business, or occupation, and had been delicate, was inadmissible, as the conclusion of one not an expert, and invaded the province of the jury.—Texas & P. Ry. Co. v. Stivers, Tex.Civ.App., 211 S.W. 319.

(2) Question to nonexpert as to what his opinion would be as to injured employee's ability to work with any degree of profit or advantage on a farm was inadmissible, as calling for an opinion as to a matter of fact within the common knowledge and experience of the jurors.—Wilson v. Daniels, 145 N.E. 469, 250 Mass. 359.

(3) Opinion as to ability of seaman who had lost several fingers to perform the duties of a quartermaster was not admissible.—Eldridge v. Atlas SS. Co., 11 N.Y.S. 468, 58 Hun 96, affirmed 32 N.E. 66, 134 N.Y. 187.

Workmen's compensation

In proceeding for compensation, various rulings on evidence were considered and it was held that claimant was not entitled to complain.—McGrath v. Brown, 281 N. W. 73, 203 Minn. 326.

the percentage of loss of use of a bodily member has been denied.[2] So testimony of a nonexpert or lay witness as to whether another person has had the use of a bodily member since an accident may be incompetent if it amounts merely to an expression of opinion,[3] and testimony of such a witness that an injured person was not able to move or to turn over,[4] or to get up,[5] has been regarded as incompetent, as has testimony of such witness that an injured person needed physical assistance under certain circumstances.[6]

(2) Matters Concerning Liability to Insurers

In accordance with general rules and subject to applicable qualifications and limitations, in actions to determine or fix the liability of insurer for death or disability benefits under life insurance policies, a nonexpert or lay witness may testify concerning the apparent physical condition or state of health of insured.

In actions involving the liability of insurer on a life insurance policy, a nonexpert or lay witness, who is otherwise qualified, usually may testify as to the apparent physical condition or apparent state of health of insured at a particular time, where insured's physical condition or state of health at such time is in issue,[7] as, for example, at the time of or before the application for insurance,[8] or at the time of delivery, issuance, or date of the policy.[9] As a general rule, however, such a witness

2. **Action for personal injury**
In a personal injury action testimony that plaintiff had one hundred per cent use of legs and arms before accident and at time of trial had only seventy-five per cent use of his legs and arms, was inadmissible as against objection that it was opinion testimony by witness not qualified, and that facts on which opinion was based had not been stated by witness.—Houston & T. C. R. Co. v. Long, Tex.Civ.App., 219 S.W. 212.

Workmen's compensation
(1) The determination of the percentage of loss of the use of an eye and of the arms of the injured employee was an issue of ultimate fact for the arbitrator and commission, on which neither expert nor lay witnesses could express their beliefs.—International Coal & Mining Co. v. Industrial Commission, 127 N.E. 703, 293 Ill. 524, 10 A.L.R. 1010.

(2) Witness may not testify in direct terms that an injured employee has lost any stated per cent of the use of a member, but must limit the testimony to evidence of ability to use the member, from which the commission must make a conclusion or finding as to the percentage of loss of use.—Pocahontas Mining Co. v. Industrial Commission, 134 N.E. 160, 301 Ill. 462.

3. Md.—Zipus v. United Rys. & Electric Co. of Baltimore City, 108 A. 884, 135 Md. 297.

4. **Explanation of testimony**
In an action for personal injuries, statement of plaintiff's daughter that her reason for testifying that plaintiff could not "turn over" on the night of the injury, which testimony had been excluded on motion, was that witness had to help plaintiff over was inadmissible as a mere inference.—Johnston v. Warrant Warehouse Co., 99 So. 920, 211 Ala. 165.

5. Mo.—Gricus v. United Rys. Co. of St. Louis, 237 S.W. 763, 291 Mo. 582.

6. Mo.—Gricus v. United Rys. Co. of St. Louis, supra.

7. **Time of reinstatement or revival of policy**
(1) In general.—General Life Ins. Co. v. Potter, Tex.Civ.App., 124 S.W. 2d 409.

(2) In action on life policy, beneficiary was properly permitted to testify that insured took sick on a date subsequent to alleged revival and to tell about her condition and appearance with respect to her health at that time, although beneficiary was only a lay witness, since such testimony did not constitute an attempt to "diagnose" insured's condition.—Williams v. American Life & Accident Ins. Co., Mo.App., 112 S.W.2d 909.

Prior to accident causing death
In action to recover under accidental death benefit provision of life policy, testimony of lay witnesses that previous to his fall insured was apparently in good health, was competent.—Prudential Ins. Co. of America v. Bialkowski, C.C.A.Va., 85 F.2d 880.

8. Kan.—Smith v. Prudential Ins. Co. of America, 12 P.2d 793, 136 Kan. 120.
Ky.—Equitable Life Assur. Soc. v. Obertate, 109 S.W.2d 1206, 270 Ky. 518—Inter-Southern Life Ins. Co. v. Stephenson, 56 S.W.2d 332, 246 Ky. 694—Grand Lodge, Brotherhood of Railroad Trainmen v. Johnson, 15 S.W.2d 499, 228 Ky. 669.
Mo.—Nelson v. Standard Life Ins. Co., App., 112 S.W.2d 901—Otto v. Metropolitan Life Ins. Co., 72 S. W.2d 811, 228 Mo.App. 742—Haney v. Security Ben. Ass'n of Topeka, Kan., 34 S.W.2d 1046, 225 Mo.App. 872.
Pa.—Baldi v. Metropolitan Ins. Co., 18 Pa.Super. 599.
See Norvidas v. Metropolitan Life Ins. Co., 6 Sch.Reg. 292.
Tex.—W. O. W. Life Ins. Soc. v. Dickson, Civ.App., 133 S.W.2d 243, error dismissed, judgment correct —General Life Ins. Co. v. Potter, Civ.App., 124 S.W.2d 409.
37 C.J. p 624 note 78.

Meeting charge of uninsurability
Evidence of lay witnesses as to insured's healthy appearance at time of application was admissible to contradict charge in answer of defendant association that insured was weak, sick, diseased, and uninsurable at the time of the application for insurance and at the date of the delivery of the insurance certificate.—Haney v. Security Ben. Ass'n of Topeka, Kan., 34 S.W.2d 1046, 225 Mo.App. 872.

Showing want of good health or existence of disease
(1) It has been stated broadly that the existence of a disease at the time of the application could be established by the testimony of members of the family, and by the friends and acquaintances, of insured.—Mutual Life Ins. Co. of New York v. Owen, 164 S.W. 720, 111 Ark. 554.

(2) In action on life insurance policy in which defendant set up misrepresentations as to health in application, common-law wife living with insured for period of about three years before his death could properly give her conclusion that insured was not in good health during such period, especially where she gave facts underlying conclusion.—Maniatis v. Texas Mut. Life Ins. Co., Tex.Civ.App., 90 S.W.2d 936.

Showing absence or presence of symptoms of disease permissible
Ala.—American Nat. Ins. Co. v. Rosebrough, 93 So. 502, 207 Ala. 538.
Ky.—Prudential Ins. Co. of America v. Hodge's Adm'x, 22 S.W.2d 435, 232 Ky. 44.

9. Ala.—National Life & Accident Ins. Co. v. Stewart, 122 So. 621, 219 Ala. 490—American Nat. Ins. Co. v. Rains, 110 So. 606, 215 Ala. 378.
Ark.—Modern Woodmen of America v. Whitaker, 293 S.W. 1045, 173 Ark. 921.
Ill.—Swanson v. Prudential Ins. Co. of America, 271 Ill.App. 309.
Ind.—Western & Southern Life Ins. Co. v. Danciu, 26 N.E.2d 912, rehearing denied 27 N.E.2d 763—Pru-

may not state whether or not insured was afflicted with a certain disease,[10] or was in good or bad health,[11] although in some cases a rather broader rule in admitting evidence concerning the health of, or diseases contracted by, insured or members of his family has apparently been recognized or applied.[12] The opinion of a witness as to the effect of intemperance of insured at a certain time on his health several years later is not admissible.[13]

In an action to enforce or obtain the benefit of a provision of a life insurance policy for total and permanent disability benefits or to establish the existence of total and permanent disability of insured as otherwise affecting the obligation or liability of insurer, a nonexpert or lay witness who has made due observation may give evidence as to the apparent physical condition of insured bearing on such disability,[14] and, according to some cases, may state his judgment or conclusion as to in-

dential Ins. Co. of America v. Diffenbaugh, 121 N.E. 301, 68 Ind. App. 699.

Mo.—Poignee v. John Hancock Mut. Life Ins. Co., App., 147 S.W.2d 677—Kirk v. Metropolitan Life Ins. Co., App., 72 S.W.2d 185, transferred, see 81 S.W.2d 333, 336 Mo. 765.

Okl.—Duncan Life & Accident Ass'n v. Ross, 50 P.2d 690, 174 Okl. 389.

Tex.—W. O. W. Life Ins. Soc. v. Dickson, Civ.App., 133 S.W.2d 243, error dismissed, judgment correct—General Life Ins. Co. v. Potter, Civ.App., 124 S.W.2d 409.

Wis.—Stanislawski v. Metropolitan Life Ins. Co., 286 N.W. 10, 231 Wis. 572.

Contrary opinion by physicians

(1) Lay witnesses' testimony was competent on question of insured's apparent good health when application was signed and policy delivered, although physicians expressed contrary opinions.—Western & Southern Life Ins. Co. v. Ross, 171 N.E. 212, 91 Ind.App. 552.

(2) A like rule has been recognized as to testimony of laymen indicating apparent good health of insured when the policy was delivered, the contrary opinions of physicians being based partly on a recorded history of the case purporting to have been given by insured which may have been erroneous in part.—Western & Southern Life Ins. Co. v. Danciu, Ind., 26 N.E.2d 912, rehearing denied 27 N.E.2d 763.

Symptoms

Lay witness may testify to absence of symptoms indicating that insured had tuberculosis.

Ind.—Western & Southern Life Ins. Co. v. Danciu, 26 N.E.2d 912, rehearing denied 27 N.E.2d 763.

Ky.—Prudential Ins. Co. of America v. Hodge's Adm'x, 22 S.W.2d 435, 232 Ky. 44.

Construction of statement of witness

Admission of testimony of a son of insured that the health of insured "was pretty good" when the policy was delivered did not constitute error, on the theory that the statement was in effect the same as a statement that the health of insured seemed or appeared to be good and must have been so understood by the jury.—American Nat. Ins. Co. v. Rains, 110 So. 606, 215 Ala. 378.

10. Ky.—Sovereign Camp, W. O. W. v. Morris, 278 S.W. 554, 212 Ky. 201.

37 C.J. p 624 note 80.

Syphilis

Insured's wife was not competent to state as a fact or to express opinion that deceased husband did not have syphilis on specific date.—Mutual Life Ins. Co. of New York v. Mankin, 138 So. 265, 223 Ala. 679.

Conduct or action indicating ailment

Objection to question to nonexpert witness as to whether he had observed any conduct or action of insured which indicated to witness that insured had a certain ailment was properly sustained.—Taylor v. Modern Woodmen of America, 84 P. 867, 42 Wash. 304, 7 Ann.Cas. 607.

11. Ala.—Sovereign Camp, W. O. W. v. Hutchinson, 114 So. 684, 217 Ala. 71.

Ky.—Illinois L. Ins. Co. v. De Lang, 99 S.W. 616, 124 Ky. 569, 30 Ky.L. 753.

Condition prior to accident

In action to recover additional benefit for accidental death under provision of life policy, permitting insured's wife to testify that insured was in good health when he left home on morning of his death was reversible error as calling for opinion evidence of nonexpert.—Prudential Ins. Co. v. Calvin, 148 So. 837, 227 Ala. 146.

12. Mich.—Krapp v. Metropolitan L. Ins. Co., 106 N.W. 1107, 143 Mich. 369, 114 Am.S.R. 651.

N.Y.—Donovan v. Colonial L. Ins. Co., 119 N.Y.S. 1078.

Good health or absence of disease

(1) Permitting witness, not medical expert, who had lived with insured many years, to testify that insured was in good health during a certain period, so far as witness could tell, was not error.—Vann v. National Life & Accident Ins. Co., Tex.Com.App., 24 S.W.2d 347, reversing National Life & Accident Ins. Co. v. Vann, Civ.App., 11 S.W.2d 364.

(2) In action on double indemnity accident provisions of life policies, insured's wife who had lived with husband thirty-five years was competent to testify that husband had never suffered from or complained of heart trouble before accident that witness knew of.—American Nat. Ins. Co. v. Walker, Tex.Civ.App., 81 S.W. 2d 1061.

13. U.S.—Northwestern Mut. L. Ins. Co. v. Muskegon Nat. Bank, N.Y., 7 S.Ct. 1221, 122 U.S. 501, 30 L.Ed. 1100.

14. Fla.—Mutual Life Ins. Co. of New York v. Knight, 178 So. 898, 130 Fla. 783.

Ky.—Equitable Life Assur. Soc. v. Spencer, 90 S.W.2d 704, 262 Ky. 478.

Pa.—Amrovcik v. Metropolitan Life Ins. Co., 180 A. 727, 119 Pa.Super. 176.

On behalf of insurer

In action to recover disability benefits under life policy, refusal, on objection by insured, to permit lay witnesses to testify concerning insured's manner and method of doing business, general appearance, and activities shortly before and after date when insurer discontinued disability benefits, was abuse of discretion.—Columbian Mut. Life Ins. Co. v. Gunn, 163 So. 454, 173 Miss. 897.

War risk insurance

(1) Rule stated in the text applies in actions on war risk insurance policies.—Cox v. U. S., C.C.A.Ill., 103 F. 2d 133.

(2) Statement of witness that insured "was severe sick" was admissible.—Cox v. U. S., supra.

(3) It was proper to exclude, because in the form of an opinion, a statement that insured "was severe sick because" witness saw two men bring insured in house.—Cox v. U. S., supra.

(4) Nonexpert witness may testify as to the existence of symptoms indicating disease.—Cox v. U. S., supra—U. S. v. Monger, C.C.A.Wyo., 70 F.2d 361.

(5) Where the claim of disability was based on alleged fact that insured had tuberculosis, nonexpert witness was competent to testify that insured "sat around and coughed and spit, lots of times spit up blood."—Cox v. U. S., supra.

sured's ability to work or to carry on or pursue a business or occupation.[15] According to other cases, however, such witnesses may not state their opinion as to insured's ability to work.[16] A lay witness may not state his opinion as to whether insured is able to perform certain work, where the witness does not have knowledge of any facts on which to base the opinion.[17] As bearing on insured's disability, it has been held or recognized that a nonexpert or lay witness may not state that insured was suffering from a particular disease or ailment,[18] and may not express an opinion as to the

(6) In such case, nonexpert witness' testimony that insured "would get worse, and once or twice he broke loose with a hemorrhage," and that "he was rather thin, much thinner than when he left home," was admissible.—Cox v. U. S., supra.

(7) In such case testimony that witness did not know how much fever insured had, but knew he had fever because witness waited on insured a lot and found it out by lifting him, was admissible.—Cox v. U. S., supra.

15. Neb.—From v. General American Life Ins. Co., 273 N.W. 36, 132 Neb. 731.
N.C.—Leonard v. Pacific Mut. Life Ins. Co. of California, 193 S.E. 166, 212 N.C. 151—Gossett v. Metropolitan Life Ins. Co., 179 S.E. 438, 208 N.C. 152.
S.C.—Thompson v. Ætna Life Ins. Co. of Hartford, Conn., 180 S.E. 880, 177 S.C. 120.

Prior statement of basic facts

After testifying as to matters observed by the witness indicating the physical condition of insured, a nonexpert witness may give evidence as to whether insured was able to work or to carry on his business.
U.S.—Moyer v. Ætna Life Ins. Co., D.C.Pa., 39 F.Supp. 725.
Ala.—Sovereign Camp, W. O. W., v. Clarke, 157 So. 259, 229 Ala. 382.
Ga.—New York Life Ins. Co. v. Bradford, 196 S.E. 92, 57 Ga.App. 657.

Waiver of payment of premiums

In an action to enforce provision of a life insurance policy for waiver of payment of premiums during total and permanent disability, evidence of nonexpert witnesses, who were familiar with physical condition of insured before alleged disability and who outlived the reason for their opinion, to effect that, from their observations, insured was in such condition of suffering and disability as to make it impossible for him to perform normal and customary duties about his business, was admissible.—Metropolitan Life Ins. Co. v. Saul, 5 S.E.2d 214, 189 Ga. 1.

16. **In Kentucky**

(1) The rule stated in the text has been recognized.—Jefferson Standard Life Ins. Co. v. Pierce, 95 S.W.2d 579, 264 Ky. 698—Minnesota Life Ins. Co. v. Vire, 94 S.W.2d 667, 264 Ky. 257—Ætna Life Ins. Co. of Hartford, Conn., v. Prater's Adm'x, 83 S.W.2d 17, 259 Ky. 665—Ætna Life Ins. Co. of Hartford, Conn., v. Gullett, 69 S.W.2d 1068, 253 Ky. 544.

(2) The view has been taken that lay witnesses should not be permitted to state that, in their opinion, insured was unable to do her housework.—New York Life Ins. Co. v. McCane, 124 S.W.2d 1057, 276 Ky. 712.

(3) Opinions by witness, not a physician, respecting character, class and kind of work insured was able to perform, and comparison of insured's work before and after sickness, was inadmissible.—Equitable Life Assur. Soc. of U. S. v. Green, 83 S.W.2d 478, 259 Ky. 773.

(4) Statements of lay witnesses amounting to expressions of opinion that insured is totally disabled are incompetent in view of the fact that the question of total disability is ordinarily one directed to medical experts and is one to be determined by the jury from testimony of doctors and other facts which may be competently detailed by lay witnesses.—Minnesota Life Ins. Co. v. Vire, 94 S.W.2d 667, 264 Ky. 257.

(5) So the possibility that a lay witness was permitted to go too far in giving his opinion, based on his observation and knowledge of insured's condition, concerning the latter's ability to perform the tasks incident to his employment has been recognized.—Travelers Ins. Co. v. Mahon, 117 S.W.2d 909, 273 Ky. 691.

War risk insurance

(1) In actions in which it is sought to establish total and permanent disability under war risk insurance policies, it has been held that statements of others to the effect that insured was unable to work were not competent.—Parrigan v. U. S., D.C.Ky., 6 F.Supp. 333.

(2) So the view has been taken that a witness should not be permitted to give his opinion as to whether insured has been able to engage continuously in any gainful employment, on the ground that the question and answer in that regard were objectionable in that they invaded the province of the jury, as the ultimate question was as to insured's ability to follow continuously a substantially gainful employment.—U. S. v. Sauls, C.C.A.N.C., 65 F.2d 886.

(3) So evidence to the effect that insured was not able to do a good day's work was regarded as objectionable as invading the province of the jury.—U. S. v. McCreary, C.C.A.Or., 105 F.2d 297, reversing, D.C., McCreary v. U. S., 23 F.2d 385.

(4) It has been held that lay witness' testimony that insured worked when he should have been in bed and as to why he quit work was inadmissible, witness not being qualified to give expert opinion on such matters.—Connell v. U. S., C.C.A.Pa., 81 F.2d 639.

(5) It has been held that exclusion of testimony that witnesses did not consider insured able to perform any kind of labor except light work, and that witnesses thought insured's mind was affected to some extent did not necessarily constitute error, where witnesses were permitted to testify that insured's physical appearance was not good, that he complained and was assigned to light duties, that he "looked feeble like," that he "was in bad shape," that "his eyes were dim," that "he looked like he should have been in bed," and other similar statements.—Luke v. U. S., C.C.A.Ga., 84 F.2d 823.

(6) It has been held or recognized, however, that nonexpert or lay witnesses may state their opinion or conclusion, based on their observations as to insured's ability to work.
U.S.—Corrigan v. U. S., C.C.A.Idaho, 82 F.2d 106.
D.C.—U. S. v. Woltman, 57 F.2d 418, 61 App. D.C. 52.

(7) More specifically the propriety of receiving a statement of opinion as to insured's ability to follow a gainful occupation has been recognized.—U. S. v. Woltman, supra.

(8) In an action in which it was sought to recover on the policy after the death of insured and in which the question involved was whether insured was totally and permanently disabled, as a result of tuberculosis at the time that payment of premiums had ceased, it was held that a nonexpert witness could testify that insured could work only a short time without resting.—U. S. v. Monger, C.C.A.Wyo., 70 F.2d 361.

17. U.S.—Taylor v. U. S., C.C.A.Ala., 71 F.2d 76.

18. Ky.—New York Life Ins. Co. v. McCane, 124 S.W.2d 1057, 276 Ky. 712—Jefferson Standard Life Ins. Co. v. Pierce, 95 S.W.2d 579, 264 Ky. 698—Minnesota Life Ins. Co. v. Vire, 94 S.W.2d 667, 264 Ky. 257.

Bright's disease

Lay witness was not competent to state that insured had Bright's dis-

state of health of insured.[19]

§ 514. Possibility and Probability

a. Possibility
b. Probability

a. Possibility

Under certain circumstances a witness of suitable experience may state whether certain acts, consequences, events, or operations would be possible.

A witness of suitable experience,[20] who is competent to form a reasonable inference,[21] may state, as a result of his observation of facts[22] which cannot be placed fully before the jury,[23] whether certain acts,[24] consequences,[25] events,[26] or operations[27] would be possible; whether any other acts would have been possible,[28] and, if so, what acts;[29] or whether the consequences could have been produced in any other way.[30]

Such inference, however, will be rejected where it does not rest on a sufficient basis of fact,[31] where the jury are equally competent with the witness to draw the required inference,[32] and where the fact is one intimately connected in the particular case with their function.[33]

b. Probability

Under certain circumstances a witness may state his

ease, notwithstanding he stated also that he had obtained the history of insured's case from the latter's doctor.—New York Life Ins. Co. v. McCane, 124 S.W.2d 1057, 276 Ky. 712.

War risk insurance

(1) Nonexpert witness could not testify as to what insured's ailment was.—McConnell v. U. S., C.C.A.Pa., 81 F.2d 639.

(2) So such witness could not testify that insured had tuberculosis.—Cox v. U. S., C.C.A.Ill., 103 F.2d 133.

(3) A statement of a nonexpert witness relative to insured that "I say he had tuberculosis because" followed by a recital of symptoms was objectionable because in the form of an opinion.—Cox v. U. S., C.C.A.Ill., 103 F.2d 133.

19. Ky.—Ætna Life Ins. Co. of Hartford v. Praeter's Adm'x, 83 S.W.2d 17, 259 Ky. 665.

20. Ark.—Benefit Ass'n of Ry. Employees v. Jacklin, 294 S.W. 353, 173 Ark. 937.
Mo.—Ritz v. Cousins Lumber Co., 59 S.W.2d 1072, 227 Mo.App. 1167.
22 C.J. p 623 note 85.

21. Mo.—Wack v. F. E. Schoenberg Mfg. Co., 53 S.W.2d 28, 31, 331 Mo. 197, quoting **Corpus Juris.**
22 C.J. p 623 note 86.

22. Ind.—Chicago & E. R. Co. v. Lee, 46 N.E. 543, 17 Ind.App. 215.
22 C.J. p 623 note 87.

23. Ill.—Pulver v. Rochester German Ins. Co., 35 Ill.App. 24.
Vt.—Cavendish v. Troy, 41 Vt. 99.

24. Ark.—Benefit Ass'n of Ry. Employees v. Jacklin, 294 S.W. 353, 173 Ark. 937.
Mo.—Streicher v. Mercantile Trust Co., 62 S.W.2d 461—Sandry v. Hines, App., 226 S.W. 646, opinion quashed on other grounds State ex rel. Hines v. Bland, Sup., 237 S.W. 1018.
22 C.J. p 623 note 89.

Corpus Juris cited in holding that expert's view of possibility is often helpful and proper.—Kimmie v. Terminal R. R. Ass'n of St. Louis, 66 S.W.2d 561, 565, 334 Mo. 596.

25. Mo.—Wack v. F. E. Schoenberg Mfg. Co., 53 S.W.2d 28, 31, 331 Mo. 197, quoting **Corpus Juris**—Edwards v. Morehouse Stave & Mfg. Co., App., 221 S.W. 744.
22 C.J. p 623 note 90.

26. **Keeping seat during railroad accident**
Cal.—Healy v. Visalia & T. R. Co., 36 P. 125, 101 Cal. 585.

27. **Cutting off timber**
Vt.—Baker v. Sherman, 46 A. 57, 71 Vt. 439.

28. Mo.—Wack v. F. E. Schoenberg Mfg. Co., 53 S.W.2d 28, 31, 331 Mo. 197, quoting **Corpus Juris.**
22 C.J. p 623 note 93.

29. Tex.—Hines v. Collins, Civ.App., 227 S.W. 332.
22 C.J. p 623 note 94.

30. Ga.—Everett v. State, 62 Ga. 65.

31. Mo.—State ex rel. Jenkins v. Brown, 19 S.W.2d 483.
Stating facts on which opinion based see supra § 486.

Testimony of witness from examination of automobile tracks, that if plaintiff's car had not turned to the left it would not have been hit by defendant's car, should have been excluded as a conclusion without sufficient basis of fact.—Evans v. Kent, 110 S.E. 685, 28 Ga.App. 172.

32. Mo.—Zackwik v. Hanover Fire Ins. Co., App., 225 S.W. 135.
N.H.—Bridges v. Great Falls Mfg. Co., 156 A. 697, 85 N.H. 220.
N.D.—Drinkwater v. Nelson, 187 N.W. 152, 48 N.D. 871.
22 C.J. p 623 note 96.

Opinion of plaintiff's counsel that he could produce sufficient evidence of insured's death was inadmissible.—Karst v. Chicago Fraternal Life Ass'n, Mo.App., 22 S.W.2d 178.

Presumption of prejudice

Where the jury can make its own deductions, they cannot be made by those testifying; but where the witness gives fully and succinctly the facts on which he bases his conclusion, there is no presumption of prejudice.—Zuidema v. Bekkering, 239 N.W. 333, 256 Mich. 327.

33. N.C.—Broom v. Monroe Coca-Cola Bottling Co., 156 S.E. 152, 200 N.C. 55.
Tenn.—Wilson v. Nashville, C. & St. L. Ry., 65 S.W.2d 637, 16 Tenn. App. 695.
Tex.—Horton & Horton v. House, Civ. App., 13 S.W.2d 966, reversed on other grounds, Com.App., 29 S.W. 2d 984—Southwestern Gas & Electric Co. v. Grant, Civ.App., 223 S. W. 544, error refused.
22 C.J. p 623 note 97.
Invasion of province of jury see supra § 446.

Rejection of particular inferences

(1) Whether driver of vehicle could have avoided accident causing injuries for which action was brought.
Ala.—Alabama Power Co. v. Armour & Co., 92 So. 111, 207 Ala. 15.
Ariz.—Buehman v. Smelker, 68 P.2d 946, 50 Ariz. 18.
Ky.—Mann v. Woodward, 290 S.W. 333, 217 Ky. 491.
Mass.—Tyrrell v. Caruso, 168 N.E. 924, 269 Mass. 379.
Mo.—Gillis v. Singer, App., 86 S.W. 2d 352—Irvin v. Kelting, App., 46 S.W.2d 924—Brown v. Adams Transfer & Storage Co., App., 31 S. W.2d 117.
Va.—Ball v. Witten, 154 S.E. 547, 155 Va. 40.
Wash.—Truva v. Goodyear Tire & Rubber Co., 214 P. 818, 124 Wash. 445.
Wis.—Lang v. Baumann, 251 N.W. 461, 213 Wis. 258.

(2) Whether driver could have stopped the car sooner.
Ala.—Taylor v. Lewis, 89 So. 581, 206 Ala. 338.
Mich.—Stinson v. Payne, 203 N.W. 831, 231 Mich. 158.

(3) Whether the accident could have been anticipated.—Trowbridge v. Fleming, Mo., 269 S.W. 610.
Opinion evidence as to negligence see supra § 448.

Inference as to the probability of the occurrence of a definite event or result.

A witness, after stating the facts which are relevant as a basis of his inference and showing adequate familiarity with the subject,[34] may state the effect of these and other facts observed by him on the probability of the occurrence of a definite event[35] or result,[36] or what would probably happen on the application of a specified natural force.[37]

§ 515. Resemblance

a. In general
b. Signature by mark

a. In General

Ordinarily a witness may be permitted to state his inference on a question involving resemblance.

Resemblance, like identity, see § 504 supra, presents such necessity for coördinating the impressions caused by many, and often minute and subtle, phenomena as to require that a witness be permitted to state his inference.[38] Accordingly a witness may be permitted to state the resemblance between a person and his photograph[39] or bust,[40] or between a locality or object and a photograph thereof.[41] In all cases the witness should accompany his inference with a detailed statement of the facts observed by him so far as practicable;[42] and he should, as is stated § 455 supra, show suitable opportunities for observation and that they have been utilized.

The evidence is excluded where the persons or things whose resemblance is relevant are before the jury,[43] or where it is possible to give a description sufficient to enable the jury to draw their own inference.[44] The statement is limited to the witness' inference as to resemblance; he cannot state his inference as to an ultimate fact based on such resemblance.[45] It has been considered that the witness should not be allowed to state whether one track mark resembles another with sufficient closeness to deceive a person of ordinary intelligence,[46] although such evidence has been admitted apparently without objection.[47]

Proof of consanguineous relationship. As a rule, evidence of general resemblance of one individual to another is inadmissible to establish relationship by consanguinity.[48] Thus on a question as to paternity, inferences of witnesses as to resemblance between a child and his alleged father are usually rejected.[49]

Typewriting. It is possible that a typewritten letter, signed in the same manner, may have about

34. Ariz.—Cole v. Bean, 25 P. 538, 1 Ariz. 377.
22 C.J. p 623 note 98.
Familiarity with subject
One who had never visited Chicago stockyards and was unacquainted with their condition could not testify as to the probability of a horse shipped from such yards being infected with particular disease.—Adams Express Co. v. Heagy, 122 N.E. 603, 69 Ind.App. 652.

35. Ga.—Travelers' Ins. Co. v. Sheppard, 12 S.E. 18, 85 Ga. 751.
22 C.J. p 623 note 99.
Corpus Juris cited in holding that expert's view of probability is often helpful and proper.
Mo.—Kimmie v. Terminal R. R. Ass'n of St. Louis, 66 S.W.2d 561, 565, 334 Mo. 596.
Tex.—El Paso Electric Co. v. Beckman, Civ.App., 89 S.W.2d 470, 472.

36. Mich.—Lehigh v. Standard Tie Co., 112 N.W. 481, 149 Mich. 102.
22 C.J. p 623 note 1.

37. U.S.—Bram v. U. S., Mass., 18 S.Ct. 183, 168 U.S. 532, 42 L.Ed. 568.
22 C.J. p 623 note 2.

38. Idaho.—Basye v. Hayes, 76 P.2d 485, 58 Idaho 569.
Mo.—Schmidt v. Pitluck, App., 26 S.W.2d 859, 862, quoting **Corpus Juris.**
N.Y.—Heartwell v. Berliner, 207 N.Y.S. 737, 211 App.Div. 760.
22 C.J. p 623 note 4.
Resemblance between sounds see infra § 517 c.
Resemblance of documents
Cal.—Deacon v. Bryans, 263 P. 371, 88 Cal.App. 322.
22 C.J. p 623 note 4 (a) [1].

39. Ala.—Barnes v. Ingalls, 39 Ala. 193.
22 C.J. p 624 note 5.

40. N.Y.—Schwartz v. Wood, 21 N.Y.S. 1053, 67 Hun 648.

41. Cal.—Berkovitz v. American River Gravel Co., 215 P. 675, 191 Cal. 195.
22 C.J. p 624 note 7.

42. Conn.—Morse v. State, 6 Conn. 9.
Stating facts on which opinion based see supra § 486.

43. Mich.—Filer v. Smith, 55 N.W. 999, 96 Mich. 347, 35 Am.S.R. 603.
22 C.J. p 624 note 10.
Where jury themselves could make comparison between a piece of cloth and the material in a particular vest, it was, nevertheless, not error to permit a witness having no special knowledge of fabrics to testify that the piece of cloth resembled that of the vest.—House v. Pacific Greyhound Lines, 95 P.2d 465, 35 Cal.App.2d 336.

44. Mo.—Schmidt v. Pitluck, App., 26 S.W.2d 859.
22 C.J. p 624 note 11.

45. Cal.—Wolf v. Gall, 169 P. 1017, 176 Cal. 787.
22 C.J. p 624 note 12.

46. Tex.—Radam v. Capital Microbe Destroyer Co., 16 S.W. 990, 81 Tex. 122, 26 Am.S.R. 783.

47. U.S.—McLean v. Fleming, Mo., 96 U.S. 245, 24 L.Ed. 828.
Conn.—Williams v. Brooks, 50 Conn. 278, 47 Am.R. 642.

48. Neb.—In re O'Connor's Estate, 222 N.W. 57, 117 Neb. 636.
N.J.—In re Emery's Estate, 156 A. 130, 108 N.J.Eq. 601.
Evidence disclosing similarity of specific traits and particular or peculiarly marked physical characteristics is admissible.
Neb.—In re O'Connor's Estate, 222 N.W. 57, 117 Neb. 636.
N.J.—In re Emery's Estate, 156 A. 130, 108 N.J.Eq. 601.

49. Md.—Kasten v. Kasten, 150 A. 854, 855, 159 Md. 329, citing **Corpus Juris.**
N.Y.—In re Wendel's Estate, 262 N.Y.S. 41, 146 Misc. 260.
22 C.J. p 624 note 15.
In bastardy proceedings see Bastards § 92.

it such peculiarities as will enable one who has received several such letters, which he knows came from the one whose typewritten signature is attached thereto, to identify such letter.[50]

b. Signature by Mark

A witness may give his opinion as to the genuineness of a signature by mark based on his familiarity with the peculiarities of the mark made by the person whose signature is in question.

A witness familiar with the signature by mark of a person may state whether a particular signature of that nature was made by such person where the mark of such person is so constructed as to be distinguishable from ordinary marks.[51] If it is not so constructed, opinion evidence as to genuineness is not admissible.[52]

§ 516. —— Handwriting

a. In general
b. Qualifications of witness
c. Form of statement
d. Comparison of handwriting

a. In General

Witnesses familiar with a person's handwriting may state their opinion as to whether a particular writing was made by him, unless it appears that the writing, if made by him, was not in his accustomed handwriting.

When it becomes necessary to prove handwriting, a witness acquainted with the handwriting of the supposed writer may be permitted to state an opinion as to whether the writing in question was written or signed by him,[53] unless it appears that the writing, if made by him, was not in his usual and accustomed handwriting.[54]

b. Qualifications of Witness

(1) In general
(2) Seeing person write
(3) Receipt of documents
(4) Other experience
(5) Time or purpose of acquiring knowledge

(1) In General

In order that an ordinary witness may express an opinion regarding the handwriting of a particular person, he must be acquainted with the handwriting of such person.

In order that an ordinary witness may be permitted to state his opinion as to the genuineness of

50. Kan.—Huber Mfg. Co. v. Claudel, 80 P. 960, 71 Kan. 441.

51. Mich.—Meszaros v. Astolas' Estate, 276 N.W. 721, 282 Mich. 675—In re Astolas' Estate, 262 N.W. 766, 273 Mich. 189, 101 A.L.R. 760.
Or.—State v. Tice, 48 P. 367, 30 Or. 457.
"One who has frequently seen a party make his mark to deeds or other writings, and who can testify that he believes that he knows it, may . . . be permitted to prove the execution of a deed thus subscribed."—Strong's Ex'rs v. Brewer, 17 Ala. 706, 710.
Authorities reviewed
Colo.—Ausmus & Moon v. People, 107 P. 204, 47 Colo. 167, 19 Ann.Cas. 491.
Mich.—In re Astolas' Estate, 262 N.W. 766, 273 Mich. 189, 101 A.L.R. 760.
N.Y.—In re Hopkins' Will, 65 N.E. 173, 172 N.Y. 360, 65 L.R.A. 95, 92 Am.S.R. 746.

52. Mich.—In re Astolas' Estate, 262 N.W. 766, 273 Mich. 189, 101 A.L.R. 760.
22 C.J. p 624 note 18 [b].
Rule otherwise stated
"Where a mark, on inspection, appears to have nothing in its construction to distinguish it from the ordinary marks used by illiterate persons to authenticate their contracts, it is not the subject of this description of evidence."—Shinkle v. Crock, 17 Pa. 159, 162.

53. U.S.—Combs v. Eubank, C.C.A. Ark., 28 F.2d 459.
Ala.—Hughes v. Holsclaw, 143 So. 564, 225 Ala. 374.
Conn.—Phoenix State Bank & Trust Co. v. Whitcomb, 183 A. 5, 121 Conn. 32.
Del.—South Atlantic S. S. Co. of Delaware v. Munkacsy, 187 A. 600, 7 W.W.Harr. 580, certiorari denied 57 S.Ct. 233, 299 U.S. 607, 81 L.Ed. 448.
Ga.—Guthrie v. Harper, 146 S.E. 320, 167 Ga. 588—Henderson v. James, 139 S.E. 34, 164 Ga. 575—Wilson-Weesner-Wilkinson Co. v. Collier, 8 S.E.2d 171, 62 Ga.App. 457.
Ill.—Nagle v. Schnadt, 136 Ill.App. 417.
Iowa.—In re Work's Estate, 233 N.W. 28, 212 Iowa 31.
Ky.—Polley v. Cline's Ex'r, 93 S.W.2d 363, 263 Ky. 659—Pioneer Coal Co. v. Polly, 271 S.W. 592, 208 Ky. 548.
Md.—De Crette v. Mohler, 127 A. 639, 147 Md. 108.
Minn.—James v. Warter, 194 N.W. 754, 156 Minn. 247.
Miss.—McCarty v. Love, 110 So. 795, 145 Miss. 330.
N.C.—Owens v. Blackwood Lumber Co., 193 S.E. 219, 212 N.C. 133—Brown v. Town of Hillsboro, 117 S.E. 41, 185 N.C. 368.
N.D.—Farmers' Elevator Co. of Williston v. Weil, 180 N.W. 23, 46 N.D. 602.
Ohio.—Dinnie v. Schiele, 22 N.E.2d 917, 61 Ohio App. 511.
Pa.—William Schuette & Co. v. Swank, 109 A. 531, 265 Pa. 576.
Tex.—Abeel v. Weil, 283 S.W. 769, 115 Tex. 490—Askins, Inc. v. Sparks, Civ.App., 56 S.W.2d 279, error refused—Martini v. Power Banking Co., Civ.App., 33 S.W.2d 466, error dismissed—Kveton v. Keding, Civ.App., 286 S.W. 673.
Wash.—In re Zimmerli's Estate, 298 P. 326, 162 Wash. 243.
22 C.J. p 624 note 18, p 943 note 43.
Resemblance between:
Several pieces of typewriting see supra § 515 a.
Signatures by mark see supra § 515 b.
Effect of statute
The rule is not changed by a statute permitting specimens of handwriting or signature of a person, made before suit and admitted or proved to be genuine to be used for purpose of comparison.—Charvat v. Gildemeister, 192 N.W. 674, 222 Mich. 286.

54. **Signature affixed with another's aid**
Where witness to a purported will testified that she assisted testatrix in making her signature by guiding her hand, the opinion of nonexpert witnesses that from their familiarity with testatrix's handwriting the signature was her genuine signature was inadmissible, in view of the abnormal conditions showing that the signature, if made by testatrix, was not in her usual and accustomed handwriting.—McClure v. Redman, 107 A. 25, 263 Pa. 405.

a particular writing, it must be proved that the witness is acquainted with the handwriting of the supposed writer of the document in question,[55] and proof of this fact is sufficient to warrant reception of his testimony,[56] although he is not skilled in matters of handwriting.[57]

Qualification acquired in any proper way renders the witness competent, although differences in opportunities for observation or in study of the subject may affect the relative weight of the opinions of different witnesses.[58] A claim to knowledge of the handwriting is prima facie sufficient to show qualification,[59] but the fact of knowledge may appear otherwise than by the assertion of such a claim.[60] It has been held, however, that a disclaimer of knowledge renders the witness incompetent.[61] The basis of the witness' knowledge may be developed on cross-examination.[62]

Where it is claimed that a document is forged, a witness acquainted with the handwriting of the alleged forger may testify that it is in his writing, although he is not also acquainted with the handwriting of the person whose instrument it purports to be.[63]

Illiteracy of witness. Illiteracy of the witness, although it necessarily affects the weight of his testimony, does not render him incompetent.[64]

(2) Seeing Person Write

A witness whose knowledge of a person's handwriting was derived from having seen such person write may state an opinion as to whether a particular document was written by such person.

A witness whose knowledge as to the handwriting of a person was derived from having seen such person write may state an inference, formed from the standard thus created in his mind, as to wheth-

55. Ky.—Polley v. Cline's Ex'r, 93 S.W.2d 363, 263 Ky. 659—Sutton v. Russell's Ex'r, 33 S.W.2d 629, 236 Ky. 535—Pioneer Coal Co. v. Polly, 271 S.W. 592, 208 Ky. 548.
Okl.—Miller v. Thompson, 151 P. 192, 50 Okl. 643—Archer v. U. S., 60 P. 268, 9 Okl. 569.
Va.—Adams v. Ristine, 122 S.E. 126, 138 Va. 273, 31 A.L.R. 1413.
22 C.J. p 624 note 19.

Presumption of acquaintance
"Such acquaintance is not presumed, but must be shown by evidence."—Abeel v. Weil, 283 S.W. 769, 771, 115 Tex. 490.

Burden of proof is on party offering witness' testimony.—Abeel v. Weil, supra.

Determination of competency
Competency of nonexpert witness to testify as to handwriting is preliminary fact for determination of trial court.
Pa.—Ligo v. Dodson, 151 A. 694, 301 Pa. 124.
Vt.—Andrews v. Aldrich, 158 A. 676, 104 Vt. 235.

Knowledge shown
Vt.—In re Barron's Estate, 105 A. 255, 92 Vt. 460.

Knowledge not shown
N.C.—Arndt v. Jefferson Standard Life Ins. Co., 97 S.E. 631, 176 N.C. 652.
Vt.—Andrews v. Aldrich, 158 A. 676, 104 Vt. 235.
22 C.J. p 624 note 19 [e].

Knowledge limited to signature
Witness knowing testator's signature, but not familiar with his handwriting, could not give opinion as to will being in his handwriting.—Baker v. Eastis, 110 So. 705, 215 Ala. 402.

Failure to recognize genuine writing
Failure of witness testifying that he knew testator's handwriting to recognize genuine piece of testator's writing impaired value of his testimony, but did not render it inadmissible.—Stone v. Stone, 93 S.W.2d 617, 263 Ky. 732.

56. Ga.—Wilson-Weesner-Wilkinson Co. v. Collier, 8 S.E.2d 171, 62 Ga. App. 457.
Tex.—Tarwater v. Donley County State Bank, Civ.App., 277 S.W. 176.
22 C.J. p 625 note 20.

57. Conn.—Phœnix State Bank & Trust Co. v. Whitcomb, 183 A. 5, 121 Conn. 32.
Ga.—Bennett v. Cox, 146 S.E. 835, 167 Ga. 843.
Kan.—Burns v. Clark, 185 P. 27, 105 Kan. 454.
Miss.—McCarty v. Love, 116 So. 795, 145 Miss. 330.
Tex.—Burton v. Lowry, Civ.App., 77 S.W.2d 1059—Latham v. Houston Land & Trust Co., Civ.App., 62 S.W.2d 519, error dismissed—Askins, Inc. v. Sparks, Civ.App., 56 S.W.2d 279, error refused—Tarwater v. Donley County State Bank, Civ. App., 277 S.W. 176.
22 C.J. p 625 note 21.

Lack of skill as affecting weight
Lack of skill goes merely to the weight of the witness' testimony.—Frank v. Berry, 103 N.W. 358, 128 Iowa 223.
Weight of opinion evidence see infra §§ 567–572.

58. Ala.—Hughes v. Holsclaw, 143 So. 564, 225 Ala. 374.
Iowa.—McColl v. Jordan, 205 N.W. 838, 200 Iowa 961.
Wash.—In re Zimmerli's Estate, 298 P. 326, 162 Wash. 243.
22 C.J. p 625 note 27.

Extent of knowledge as controlling
"On the question of admissibility, the extent of the knowledge of the witness is not controlling. However limited it may be, he is entitled to express his opinion. Meagerness of knowledge or limitation of opportunity goes only to the weight of the evidence."—Johnston v. Bee, 100 S.E. 486, 489, 84 W.Va. 532, 7 A.L.R. 252.

Particular matters affecting weight only
(1) That witness' knowledge of handwriting of supposed writer of document in question was limited to certain documents.—Sovereign Camp, W. O. W. v. Graham, 107 So. 98, 214 Ala. 239.
(2) That witness was only fifteen years of age when supposed writer of questioned document died.—Glos v. Schildbach, 176 N.E. 65, 344 Ill. 23.

59. Ga.—Wilson-Weesner-Wilkinson Co. v. Collier, 8 S.E.2d 171, 62 Ga. App. 457.
22 C.J. p 625 note 23.

60. Ill.—Riggs v. Powell, 46 Ill.App. 75, affirmed 32 N.E. 482, 142 Ill. 453.

61. Ala.—Baker v. Eastis, 110 So. 705, 215 Ala. 402.
22 C.J. p 625 note 25.

Disclaimer of absolute knowledge of signature
A witness, who testifies he has seen a person write and knows his handwriting, may give his opinion that signature is that of such person, although witness disclaims absolute knowledge of his signature.—Huckaby v. McConnon & Co., 105 So. 886, 213 Ala. 631.

62. Colo.—Hinchman v. Keener, 38 P. 611, 5 Colo.App. 300.
22 C.J. p 625 note 29.
Cross-examination of ordinary witness stating opinion see infra § 548.

63. Va.—Brown v. Hall, 7 S.E. 182, 85 Va. 146.

64. Ky.—Pioneer Coal Co. v. Polly, 271 S.W. 592, 208 Ky. 548.
22 C.J. p 625 note 28.

er or not a particular document was written by such person.[65] The witness may be qualified, although he saw the person write on only a single occasion,[66] and then only his name,[67] a mark,[68] a cipher letter,[69] or the document in question.[70]

The mere fact of having seen the person in question write, however, is not sufficient to qualify a witness who does not profess to have any knowledge of the writing of such person.[71]

Necessity of having seen person write. To render a witness competent, it is not essential that he should have seen the person in question write.[72]

(3) Receipt of Documents

The ordinary witness may testify on the subject of a person's handwriting from a mental standard created by the receipt of documents from such person.

The ordinary witness is permitted to testify on the subject of a person's handwriting from a mental standard created by the receipt of letters or other documents from such person,[73] even though he never has seen such person.[74]

The genuineness of the documents received by the witness must be established;[75] the mere receipt of writings is not evidence that they are in the handwriting of the person from whom they come.[76] An admission, acquiescence, or equivalent action, on the point, by the person whose handwriting is in question will be sufficient,[77] and if the documents are of a business nature, it will as a rule be a sufficient acquiescence if they have been acted on as genuine by the person whose handwriting is involved,[78] although the case is stronger where both parties act on the documents constituting the standard.[79] Action by the receiver not shared by, or communicated to, the person whose handwriting the document received purports to bear does not furnish the requisite proof.[80]

The operation of the foregoing administrative

65. U.S.—In re Goldberg, C.C.A.N.Y., 91 F.2d 996.
Ala.—Huckaby v. McConnon & Co., 105 So. 886, 213 Ala. 631—American Trust & Savings Bank v. Montano, 89 So. 899, 18 Ala.App. 136, certiorari denied Montano v. American Trust & Savings Bank, 89 So. 923, 206 Ala. 700.
Conn.—Phoenix State Bank & Trust Co. v. Whitcomb, 183 A. 5, 121 Conn. 32.
Ill.—First Galesburg Nat. Bank & Trust Co. v. Federal Reserve Bank of Chicago, 15 N.E.2d 337, 295 Ill. App. 524.
Ky.—Pioneer Coal Co. v. Polly, 271 S.W. 592, 208 Ky. 548—Bates v. Hogg, 251 S.W. 620, 199 Ky. 465.
N.Y.—Ely v. Stone, 17 N.Y.S.2d 266, 173 Misc. 117.
N.C.—Owens v. Blackwood Lumber Co., 193 S.E. 219, 212 N.C. 133—Brown v. Town of Hillsboro, 117 S.E. 41, 185 N.C. 368.
Tex.—Latham v. Houston Land & Trust Co., Civ.App., 62 S.W.2d 519, error dismissed—Tarwater v. Donley County State Bank, Civ.App., 277 S.W. 176—Joffre v. Mynatt, Civ. App., 240 S.W. 319.
W.Va.—Poole v. Beller, 140 S.E. 534, 104 W.Va. 547, 58 A.L.R. 207.
22 C.J. p 625 note 32, p 626 notes 33, 34.

Specimens not produced
It is not material that the witness is basing his evidence on specimens of handwriting not produced.
N.Y.—Bruyn v. Russell, 4 N.Y.S. 784, 52 Hun 17.
Tex.—Pitts v. Thompson, Civ.App., 71 S.W.2d 368, error dismissed.

66. Tex.—Pitts v. Thompson, Civ. App., 71 S.W.2d 368, error dismissed.
22 C.J. p 626 note 35.

67. Tex.—Pitts v. Thompson, Civ. App., 71 S.W.2d 368, error dismissed.
Vt.—Andrews v. Aldrich, 158 A. 676, 104 Vt. 235—Redding v. Redding's Estate, 38 A. 230, 69 Vt. 500.
22 C.J. p 626 note 36.

68. Ala.—Strong v. Brewer, 17 Ala. 706.

69. Mass.—Commonwealth v. Nefus, 135 Mass. 533.

70. Ill.—Woodford v. McClenahan, 9 Ill. 85.

71. Ill.—Pate v. People, 8 Ill. 644.
22 C.J. p 627 note 41.

72. Conn.—Phœnix State Bank & Trust Co. v. Whitcomb, 183 A. 5, 121 Conn. 32.
Ky.—Stone v. Stone, 93 S.W.2d 617, 263 Ky. 732—Bates v. Hogg, 251 S.W. 620, 199 Ky. 465.
Miss.—Western Union Telegraph Co. v. Goodman, 146 So. 128, 166 Miss. 782.
Tex.—Askins, Inc., v. Sparks, Civ. App., 56 S.W.2d 279, error refused.
22 C.J. p 627 note 42.

In Pennsylvania
(1) The text rule has been followed.—Sgro v. Stuyvesant Ins. Co., 1 A.2d 554, 132 Pa.Super. 444.
(2) However, it has been held that one is not acquainted with the handwriting of a person unless he has seen that person write.—Popalis v. Yanchura, 173 A. 743, 114 Pa.Super. 204.

73. Ala.—Hendrix v. Pique, 185 So. 390, 395, 237 Ala. 49, citing Corpus Juris—Gilliland v. Dobbs, 174 So. 784, 234 Ala. 364.
Conn.—Phoenix State Bank & Trust Co. v. Whitcomb, 183 A. 5, 121 Conn. 32.
Ky.—Stone v. Stone, 93 S.W.2d 617, 263 Ky. 732.
N.Y.—Ely v. Stone, 17 N.Y.S.2d 266, 173 Misc. 117.
Pa.—Sgro v. Stuyvesant Ins. Co., 1 A.2d 554, 132 Pa.Super. 444.
Vt.—Andrews v. Aldrich, 158 A. 676, 104 Vt. 235—Redding v. Redding's Estate, 38 A. 230, 69 Vt. 500.
W.Va.—Poole v. Beller, 140 S.E. 534, 104 W.Va. 547, 58 A.L.R. 207.
22 C.J. p 627 note 43.

Production of letters or documents
Such letters or documents need not be produced, although their production may add to the credibility of the witness' testimony.—Stone v. Stone, 93 S.W.2d 617, 263 Ky. 732.

74. Miss.—Western Union Telegraph Co. v. Goodman, 146 So. 128, 166 Miss. 782.

75. N.Y.—Dunklin v. Riegelmann, 155 N.Y.S. 561.
22 C.J. p 627 notes 44, 45.

76. W.Va.—Flowers v. Fletcher, 20 S.E. 870, 40 W.Va. 103.
22 C.J. p 628 note 49.

77. W.Va.—Poole v. Beller, 140 S.E. 534, 104 W.Va. 547, 58 A.L.R. 207.
22 C.J. p 627 note 46.

78. Neb.—Violet v. Rose, 58 N.W. 216, 39 Neb. 660.
22 C.J. p 627 note 47.

79. Miss.—Western Union Telegraph Co. v. Goodman, 146 So. 128, 166 Miss. 782.
22 C.J. p 628 note 48.

80. N.Y.—Cunningham v. Hudson River Bank, 21 Wend. 557.
22 C.J. p 628 note 50.

rules as to the qualification of witnesses in this connection is illustrated in the course of ordinary business correspondence.[81] A letter which purports to come from a person in reply to a letter previously sent him, although from a different post office than the one to which the original letter was addressed,[82] is regarded as sufficiently acknowledged, by the person originally addressed, as his genuine handwriting.[83] However, a person who has received a letter purporting to come from a certain person and has answered it and has since received no reply to the answer is not competent to prove the handwriting of the person from whom the original letter purported to come.[84]

It is not indispensable that the witness should be the individual to whom the letters received were addressed; the essential requisite is that the disputed writing should be tested by its resemblance to a document in the genuineness of which the alleged writer has acquiesced.[85] Any person through whose hands the documents indorsed by the alleged writer as authentic have passed, as for instance a clerk, may testify,[86] and the qualification has even been extended to any person, although neither the receiver of the documents nor associated in business with him, provided he has seen such acknowledged documents, and thereby become familiar with the handwriting,[87] although there is authority for a refusal to extend the rule this far.[88] An unskilled witness cannot testify from a standard created by the receipt of documents said by persons other than the alleged writer to be genuine[89] or by seeing documents which are partly genuine and partly forged.[90]

(4) Other Experience

A witness, who in the course of official business or in any other way has acquired by experience a knowledge of a person's handwriting, may state his opinion as to whether a particular writing was made by such person.

While it has been stated in general terms that an unskilled observer who has never seen the individual write or corresponded with him is not competent to testify as to his handwriting,[91] such a rule is not invariably applied, but on the contrary it has been held that a witness who has, in the course of official business[92] or in any other way,[93] acquired by experience a knowledge of a person's handwriting which in the opinion of the judge makes it probable that he can draw a reasonable inference as to the genuineness of the writing in question from the mental standard so created which is calculated to aid the jury, may state the inference which he has formed. Thus a witness may be deemed sufficiently qualified if he has acquired knowledge of the handwriting of the person in question by having seen writings of such person admitted by him to be his, or with his knowledge acted on as his, or so adopted into the ordinary business of life as to create a reasonable presumption of genuineness.[94]

(5) Time or Purpose of Acquiring Knowledge

Ordinarily the time when a witness acquired knowl-

81. Me.—Page v. Homans, 14 Me. 478.

82. Neb.—Violet v. Rose, 58 N.W. 216, 39 Neb. 660.

83. Vt.—Andrews v. Aldrich, 158 A. 676, 104 Vt. 235—Redding v. Redding's Estate, 38 A. 230, 69 Vt. 500.
22 C.J. p 628 note 53.

84. Iowa.—Webb v. Mauro, Morr. 329.

85. Vt.—Andrews v. Aldrich, 158 A. 676, 104 Vt. 235—Redding v. Redding's Estate, 38 A. 230, 69 Vt. 500.
22 C.J. p 628 note 55.

86. W.Va.—Johnston v. Bee, 100 S.E. 486, 84 W.Va. 532, 7 A.L.R. 252.
22 C.J. p 628 note 56.

87. Vt.—Andrews v. Aldrich, 158 A. 676, 104 Vt. 235—Redding v. Redding's Estate, 38 A. 230, 69 Vt. 500.
22 C.J. p 628 note 57.

Family correspondence

(1) In case of correspondence in the family on family affairs, any member of the receiving family acquainted with the facts may testify from a standard formed by the receipt of such letters or other documents, acted on by all concerned.—Tuttle v. Rainey, 4 S.E. 475, 98 N.C. 513.

(2) Grandchildren who have obtained their knowledge of their grandmother's handwriting only by inspection and repeated readings of her letters to their mother, preserved by family for a long time, are qualified to testify to their opinions as to genuineness of grandmother's signature.—Johnston v. Bee, 100 S.E. 486, 84 W.Va. 532, 7 A.L.R. 252.

88. Pa.—Philadelphia & West Chester R. Co. v. Hickman, 28 Pa. 318.
22 C.J. p 628 note 58.

89. N.J.—Goldsmith v. Bane, 8 N.J. Law 87.

90. Mass.—Brigham v. Peters, 1 Gray 139.

91. Ga.—Gress Lumber Co. v. Georgia Pine Shingle Co., 48 S.E. 115, 120 Ga. 751.
22 C.J. p 628 note 61.

92. U.S.—Rogers v. Ritter, Cal., 12 Wall. 317, 20 L.Ed. 417.
22 C.J. p 628 note 62.

93. Conn.—Phoenix State Bank & Trust Co. v. Whitcomb, 183 A. 5, 121 Conn. 32.
22 C.J. p 628 note 63, p 629 notes 64–66.

94. Ky.—Bates v. Hogg, 251 S.W. 620, 199 Ky. 465—Fee v. Taylor, 83 Ky. 259.
Tex.—Latham v. Houston Land & Trust Co., Civ.App., 62 S.W.2d 519, error dismissed—Askins, Inc., v. Sparks, Civ.App., 56 S.W.2d 279, error refused.
W.Va.—Poole v. Beller, 140 S.E. 534, 104 W.Va. 547, 58 A.L.R. 207—Johnston v. Bee, 100 S.E. 486, 84 W.Va. 532, 7 A.L.R. 252.
22 C.J. p 628 note 63.

Acquisition of knowledge

(1) Knowledge may be acquired by paying out money on the signature of the person in question.—Gibson v. Mailhebuau, 274 P. 566, 96 Cal.App. 455.

(2) Knowledge may be obtained by seeing signature on notes and mortgages in ordinary course of business.—Ingebrightsen v. Hatcher, 288 P. 1023, 87 Mont. 482.

edge of a person's handwriting does not affect his competency except, in some jurisdictions, when knowledge is acquired after the controversy arose. Witnesses acquiring their knowledge for the express purpose of testifying are usually held incompetent.

The competency of a witness is not affected by the length of time which has elapsed since he saw the person in question write,[95] or by the fact that his knowledge of the handwriting of the person in question was not acquired until after the instrument in consideration was written,[96] although these matters are proper for consideration as bearing on the weight to be accorded to his testimony.[97] While it has been held that the mere fact that the witness acquired his knowledge of the person's handwriting after the controversy arose goes to the weight and not to the competency of his evidence,[98] there is authority for the view that it must affirmatively appear that the knowledge or standard of comparison was acquired before any dispute arose.[99]

Purpose of acquiring knowledge. Nonexpert witnesses who have acquired their knowledge of the handwriting of the person whose signature is disputed, for the express purpose of enabling them to testify, are usually held incompetent,[1] although it has been considered, that the mere fact that the witness induced the party to write for the purpose of obtaining a knowledge of his handwriting will not render him incompetent where the writer had no motive for disguising the handwriting.[2]

c. Form of Statement

In testifying as to handwriting certainty of statement is not essential, and while the witness may be required to state reasons for his opinion, he cannot be called on to pass on the genuineness of a writing other than the one in dispute.

In testifying as to handwriting, certainty of statement is not essential.[3] If the witness testifies to a belief,[4] an impression,[5] an opinion,[6] or even a thought,[7] or states that he perceives a resemblance,[8] his statement may be allowed to go to the jury, although he declines to swear positively with respect to the matter.[9] The witness must, however, direct his statement to whether or not the person claimed to have written the document in question did actually do so,[10] and if he cannot or will not state an inference one way or the other his testimony cannot aid the jury and should be rejected.[11]

The witness may be required to state the reasons for his opinion,[12] but he cannot be called on to pass on the genuineness of a writing other than the one in controversy,[13] or to pick out from a number of signatures those which he regards as genuine;[14] nor is it permissible to present imitated signatures to him to test his opinion.[15] If such improper tests are put to him, his answer cannot be shown to be incorrect.[16]

d. Comparison of Handwriting

To refresh his memory an ordinary witness may compare the disputed writing with other writings proved or admitted to be genuine.

While ordinarily, as appears in § 615 infra, a nonexpert witness is not permitted to express an opinion as to handwriting based on a comparison of the document in question with writings of the person claimed to have written such documents, which other writings are admitted or proved to be genuine, he may compare the disputed writing with other writings proved or admitted to be genuine to refresh his memory,[17] and if he is then able to tes-

95. N.Y.—Willson v. Betts, 4 Den. 201.
22 C.J. p 629 note 76.

96. Pa.—Steel v. Snyder, 144 A. 912, 295 Pa. 120.
22 C.J. p 629 note 77, p 943 note 43 [b].

97. Pa.—Wilson v. Van Leer, 17 A. 1097, 127 Pa. 371, 14 Am.S.R. 854
22 C.J. p 629 notes 76, 77.

98. Mass.—Keith v. Lothrop, 10 Cush. 453.
N.C.—Ratliff v. Ratliff, 42 S.E. 887, 131 N.C. 425, 63 L.R.A. 963.

99. Ill.—Union County Tp. 13 v. Misenheimer, 78 Ill. 22.
22 C.J. p 629 note 80.

1. Pa.—Reese v. Reese, 90 Pa. 89, 35 Am.R. 634.
22 C.J. p 630 note 81.

2. Ga.—Reid v. State, 20 Ga. 681.
22 C.J. p 630 note 82.

3. Ga.—Borders v. Macon, 89 S.E. 451, 18 Ga.App. 333.
N.Y.—Stevens v. Seibold, 5 N.Y.St. 258.

4. Iowa.—Schram v. Johnson, 225 N.W. 369, 208 Iowa 222.
22 C.J. p 630 note 84.

5. Me.—Hopkins v. Megquire, 35 Me. 78.
22 C.J. p 630 note 85.

6. Iowa.—Schram v. Johnson, 225 N.W. 369, 208 Iowa 222.
22 C.J. p 630 note 86.

7. Cal.—People v. Bidleman, 38 P. 502, 104 Cal. 608.

8. Pa.—Shitler v. Bremer, 23 Pa. 413.
22 C.J. p 630 note 88.
Contra Schram v. Johnson, 225 N.W. 369, 208 Iowa 222.

9. Mass.—Commonwealth v. Andrews, 8 N.E. 643, 143 Mass. 23.
22 C.J. p 630 note 89.

10. Va.—Burress v. Commonwealth, 27 Gratt. 934, 68 Va. 934.
22 C.J. p 630 note 90.

11. N.Y.—Farrell v. Manhattan R. Co., 82 N.Y.S. 334, 83 App.Div. 393, affirmed 70 N.E. 1098, 178 N.Y. 596.
22 C.J. p 630 note 91.

12. Ky.—Kendall v. Collier, 30 S.W. 1002, 97 Ky. 446, 17 Ky.L. 337.
22 C.J. p 630 note 92.

13. Mich.—Howard v. Patrick, 5 N.W. 84, 43 Mich. 121.
22 C.J. p 630 note 93.

14. U.S.—McArthur v. Citizens' Bank of Norfolk, N.C., 223 F. 1004, 139 C.C.A. 380.
Vt.—Wilmington Sav. Bank v. Waste, 57 A. 241, 76 Vt. 331.

15. Ky.—Andrews v. Hayden, 11 S.W. 428, 88 Ky. 455, 10 Ky.L. 1049.
22 C.J. p 630 note 95.

16. N.Y.—Van Wyck v. McIntosh, 14 N.Y. 439.
22 C.J. p 630 note 96.

17. Mont.—In re Miller's Estate, 229 P. 851, 71 Mont. 330, citing **Corpus Juris.**
22 C.J. p 630 note 98.

tify from his memory, as refreshed, his statement may be received.[18] Such a comparison may also be permitted in corroboration or substantiation of the witness' testimony.[19]

§ 517. Other Matters

a. In general
b. Necessity
c. Sound
d. Sufficiency
e. Utility

a. In General

An ordinary witness of suitable experience may be permitted to state an opinion on questions involving climate, odors, weather, and other matters.

In addition to the matters considered in §§ 485–516 supra, an ordinary witness of suitable experience has been permitted to give his opinion as to other matters where the facts on which his opinion is based are stated, so far as practicable,[20] and the subject matter is not one calling for expert testimony.[21] Thus he has been permitted to state an inference on questions involving odors,[22] climate,[23] weather,[24] and other particular matters considered in the following subdivisions of this section.

b. Necessity

A witness of adequate knowledge and experience may be permitted to state his opinion on various questions involving necessity.

A witness of adequate knowledge and experience may be permitted to state whether certain acts,[25] articles,[26] or services[27] were, or will be, necessary, or whether a given condition was necessary to a given result,[28] or is shown by a result to have occurred necessarily in a particular way.[29]

c. Sound

A witness may be permitted to state his opinion on various questions involving sound.

A witness may characterize a sound as faint, loud, and the like, and state the direction from which it appeared to come,[30] or state the cause,[31] emotion,[32] or mental state[33] from which he infers it to have arisen. The witness may also character-

18. Pa.—McNair v. Commonwealth, 26 Pa. 388.
Va.—Redford v. Peggy, 6 Rand. 316, 27 Va. 316.

19. Ind.—Clark v. Wyatt, 15 Ind. 271, 77 Am.D. 90.
22 C.J. p 631 note 1.

20. Ga.—Central of Georgia Ry. Co. v. Keating, 165 S.E. 873, 45 Ga. App. 811, reversed on other grounds 170 S.E. 493, 177 Ga. 345, conformed to mandate 170 S.E. 497, 47 Ga.App. 336.
Kan.—Smith v. Boyde, 232 P. 870, 117 Kan. 619.
Tex.—Johnson v. Frost, Civ.App., 229 S.W. 558.
Stating facts on which opinion based see supra § 486.

Other particular matters

(1) Capacity of certain machinery and canal to furnish water.—Wortman v. Young, Tex.Civ.App., 221 S. W. 660, reversed on other grounds, Com.App., 235 S.W. 559.

(2) Condition of road.—Granger v. National Convoy & Trucking Co., 7 S.E.2d 915, 62 Ga.App. 294.

(3) Nature and condition of inanimate object.—Vortriede v. St. Louis Public Service Co., Mo.App., 58 S.W. 2d 492.

(4) The skidding of a motorcycle. —Rice v. Shenk, 143 A. 231, 293 Pa. 524.

(5) Tendency of floor joists and flooring in collapsing building to break fall of merchandise therein.—Atlantic Mut. Fire Ins. Co. v. Pruitt, 8 S.E.2d 427, 62 Ga.App. 466.

(6) Whether a particular person was the employee of another.—Gay v. Smith, 181 S.E. 129, 51 Ga.App. 615.

(7) Testimony of individual members of public, of retailers, and of salesmen, is admissible, although seldom of controlling weight in determining whether public has come to recognize particular person or his goods, and whether right to enjoy such public recognition has been violated.—Premier-Pabst Corporation v. Elm City Brewing Co., D.C.Conn., 9 F.Supp. 754.

(8) In action on policy covering accidental death, nonexpert testimony that damage to wagon in which deceased suffered fall was fresh break is competent.—Life & Casualty Co. of Tennessee v. Gream, 68 S.W. 2d 402, 252 Ky. 801.

Effect of wind on gate

One familiar with the condition of a gate may testify as to the effect of wind on it.—Chicago, etc., R. Co. v. Truitt, 68 Ill.App. 76.

Opinion not resting on sufficient basis of fact will be rejected.—Wichita Falls, R. & F. W. Ry. Co. v. Cooper, Tex.Civ.App., 235 S.W. 927.

Opinion relating to mental and moral status of witness is properly rejected.—Louis Pizitz Dry Goods Co. v. House of Van Praag, 121 So. 701, 219 Ala. 183.

21. **Question whether waters from creek emitted disease germs** is one for expert, not lay, testimony.—Bowie Sewerage Co. v. Chandler, Tex.Civ. App., 138 S.W.2d 585, error dismissed, judgment correct.

22. **Emission of offensive odors from creek**

The testimony may relate to whether or not offensive odors were emitted from a particular creek and could be smelled by certain persons living near it.—Bowie Sewerage Co. v. Chandler, Tex.Civ.App., 138 S.W. 2d 585, error dismissed, judgment correct.

23. Iowa.—Peterson v. McManus, 172 N.W. 460, 187 Iowa 522.

24. **Extraordinary storm**

A witness may be asked whether a storm was extraordinary after he has testified to facts indicating that such was its character.—Thompson v. Illinois Cent. R. Co., 158 N.W. 676, 177 Iowa 328.

25. Mich.—Storrie v. Grand Trunk El. Co., 96 N.W. 569, 134 Mich. 297.
22 C.J. p 617 note 7.

26. Iowa.—Baker v. Oughton, 106 N.W. 272, 130 Iowa 35.
22 C.J. p 617 note 8.

27. Cal.—Martin v. Southern Pac. Co., 62 P. 515, 130 Cal. 285.
22 C.J. p 617 note 9.

28. Fla.—Jones v. State, 32 So. 793, 44 Fla. 74.
22 C.J. p 617 note 12 [a].

29. La.—State v. Williams, 35 So. 521, 111 La. 205.
22 C.J. p 617 note 11.

30. N.H.—State v. Shinborn, 46 N. H. 497, 88 Am.D. 224.

31. Mo.—Binsbacher v. St. Louis Transit Co., 82 S.W. 546, 108 Mo. App. 1.
22 C.J. p 631 note 3.

32. Tex.—Logan v. State, Cr., 53 S.W. 694.
22 C.J. p 631 note 4.

33. **Distress**

S.C.—State v. Taylor, 35 S.E. 729, 57 S.C. 483, 76 Am.S.R. 575.

ize a sound by stating that it had a resemblance to other sounds,[34] or he may state whether it seemed to have been made inside or outside of a house.[35] A witness has been permitted to illustrate, by his tone in testifying, the tone which he stated that he used on a certain occasion.[36]

The testimony cannot be received unless the witness is shown to be competent to draw the inference which he assumes to state.[37]

d. Sufficiency

In a proper case a witness may state his opinion on a question involving sufficiency.

An ordinary witness who is shown to have had suitable opportunities for observation[38] and to have improved them[39] may be permitted to state his inference as to the sufficiency or adequacy of means to an end[40] or provision for an object;[41] the sufficiency of light[42] or space;[43] or the sufficiency of opportunity[44] or time[45] for a certain act or occurrence.

On the other hand, such a statement will be rejected where the necessary facts can be otherwise proved,[46] where it improperly invades the province of the jury,[47] or where the subject matter is one calling for expert testimony.[48]

e. Utility

Generally a witness of adequate experience and knowledge may state an opinion on a question involving utility, provided the statement does not invade the province of the jury.

Generally a witness of adequate experience and knowledge[49] may state his inference as to the utility of certain articles,[50] or the suitability of particular animals for designated work,[51] provided such statement does not invade the province of the jury.[52]

2. Skilled Witness

§ 518. In General

A witness, of special knowledge or skill on a subject outside of the ordinary realm of human experience, may be permitted to state his inference, from facts observed by him, as to matters connected with his specialty.

34. Cal.—People v. Chin Hane, 41 P. 697, 108 Cal. 597.
22 C.J. p 631 note 6.
Resemblance generally see supra §§ 515, 516.

35. **Gunshot**
Cal.—People v. Clarke, 63 P. 138, 130 Cal. 642.

36. Mont.—Knuckey v. Butte Electric R. Co., 122 P. 280, 45 Mont. 106.
22 C.J. p 631 note 8.

37. Ala.—Jones v. State, App., 75 So. 830.
22 C.J. p 631 note 9.

38. Mo.—St. Louis v. McCully Constr. Co., App., 184 S.W. 939.
22 C.J. p 631 note 10.

39. Conn.—Chamberlain v. Platt, 35 A. 780, 68 Conn. 126.

40. Ky.—Brooks-Calloway Co. v. Carroll, 29 S.W.2d 592, 235 Ky. 41.
22 C.J. p 631 note 12.
Evidence may relate to
(1) Inadequacy of a hose to extinguish a fire.—Exporters' & Traders' Compress & Warehouse Co. v. Shaw, Tex.Civ.App., 20 S.W.2d 248.
(2) The quantity of explosives required for a particular operation.—Brooks-Calloway Co. v. Carroll, 29 S.W.2d 592, 235 Ky. 41.
(3) Other cases see Chicago & Alton R. Co. v. O'Brien, 34 Ill.App. 155.
22 C.J. p 631 note 12 [a].

41. Pa.—Campbell v. Wells Bros. Co., 100 A. 1050, 256 Pa. 446.
22 C.J. p 631 note 13.

42. Colo.—Colorado Mortg. & Inv. Co. v. Rees, 42 P. 42, 21 Colo. 435.
22 C.J. p 631 note 14.

43. Ind.—Brunker v. Cummins, 32 N.E. 732, 133 Ind. 443.
22 C.J. p 631 note 15.

44. Mass.—Jeddrey v. Boston & N. St. R. Co., 84 N.E. 316, 198 Mass. 232.
22 C.J. p 631 note 16.

45. Iowa.—Horan v. Chicago, St. P., M. & O. R. Co., 56 N.W. 507, 89 Iowa 328.
22 C.J. p 631 note 17.

46. Mass.—Campbell v. Russell, 1 N.E. 345, 139 Mass. 278.

47. Iowa.—Curl v. Chicago, R. I. & P. R. Co., 16 N.W. 69, 19 N.W. 308, 63 Iowa 417, 423.
22 C.J. p 632 note 19.
Invasion of province of jury see supra § 446.
Jury competent to draw inference
Where the jury are just as capable of exercising their judgment on the point as the witness, his statement will be rejected.—Sakach v. Antonoplos, 148 A. 58, 298 Pa. 130.
Particular statements rejected
(1) Statement as to sufficiency of light.—Unrein v. Oklahoma Hide Co., 244 S.W. 924, 295 Mo. 353.
(2) Statement as to sufficiency of steam to wet clothing.—Tash v. St. Louis-San Francisco Ry. Co., 76 S.W.2d 690, 335 Mo. 1148.
(3) Opinion as to sufficiency of gate fastenings.—Payne v. Kansas City, St. J. & C. B. R. Co., 33 N.W. 633, 72 Iowa 214.

48. **Sufficiency of pipe for drainage**
In action for compensation for construction of sewer, court properly sustained objection to question, "In your judgment is that pipe there as constructed sufficient to drain the surface water of the road?" where the witness had not qualified as an expert.—County Com'rs of Hartford County v. Bel Air Suburban Improvement Ass'n of Harford County, 107 A. 348, 134 Md. 548.

49. **Hand shoveler's opinion as to machine shovel**
Hand shoveler having no knowledge of, or experience with, machinery could not give his opinion as to the suitability of a machine shovel for a particular work.—Lake Superior Loader Co. v. Huttig Lead & Zinc Co., 264 S.W. 396, 305 Mo. 130.

50. Mont.—Lander v. Sheehan, 79 P. 406, 32 Mont. 25.
22 C.J. p 632 note 20.

51. Tex.—Big Valley Irr. Co. v. Hughes, Civ.App., 146 S.W. 715.

52. Ind.—Boss v. Deak, 169 N.E. 673, 675, 201 Ind. 446, 68 A.L.R. 788.
Invasion of province of jury see supra § 446.
Particular statements rejected
(1) Opinion as to utility of highway sought to be vacated.—Boss v. Deak, 169 N.E. 673, 201 Ind. 446, 68 A.L.R. 788.
(2) Opinion as to suitability of a given room for county treasurer's use as an office.—Buchanan v. Ralls County, 222 S.W. 1002, 283 Mo. 10.

A witness, of special knowledge or skill on a subject outside of the ordinary realm of human experience, may be permitted to state his inference, from facts observed by him, as to matters connected with his specialty,[53] not only because of the frequent difficulty of communicating the facts to the jury but also because, even if the facts could be fully laid before them, they would not possess the special knowledge or training necessary to coördinate and weigh the facts so as to draw the correct and proper inference therefrom.[54] Such a witness is frequently termed an expert,[55] but this is inaccurate, for the skilled witness testifies as to the result of his own observation, and occupies the same position as any other witness except that within certain lines he possesses a superior knowledge which enables him to understand, as one without such special knowledge could not, what he has observed,[56] although he may also be competent to testify as an expert on hypothetically stated facts.[57] It follows that a skilled witness cannot be permitted to state an inference which is not based on his own knowledge and observation.[58]

The admissibility of judgments of experts in general is considered in §§ 520–523 infra. However, the rules relating to the testimony of both expert witnesses and skilled observers as to their own observations, computations, and conclusions are essentially the same.[59]

Jury competent to draw inference. Where the jury are competent to draw a proper inference and all of the facts necessary therefor can be placed before them, the inference of the observer, even though specially skilled and experienced, is rejected.[60]

Particular subjects. The rules with respect to the subjects on which it is proper to receive the inferences of skilled observers and the judgments of experts are so similar that they are discussed together infra §§ 524–546.

§ 519. Stating Facts on Which Opinion Based

Usually a skilled observer who states inferences from sensation must state the facts on which his opinion is based so far as they permit of detailed enumeration.

It is usually held that a skilled observer who states inferences from sensation must, like an ordinary witness, and for similar reasons, state the facts on which his opinion is based so far as they permit of detailed enumeration.[61] Under certain circumstances, however, such a witness has been permitted to state his opinion without detailing the facts on which it is based, leaving these to be brought out on cross-examination,[62] and, under the decisions in

53. Ala.—Brown v. Mobile Electric Co., 91 So. 802, 207 Ala. 61.
Cal.—McStay v. Citizens' Nat. Trust & Savings Bank of Los Angeles, 43 P.2d 560, 5 Cal.App.2d 595.
Pa.—Diamond Alkali Co. v. Henderson Coal Co., 134 A. 386, 287 Pa. 232.
Utah.—Vecchio v. Industrial Commission, 22 P.2d 212, 82 Utah 128.
22 C.J. p 632 note 23.

Nature of evidence
"An opinion, when not a mere guess or conjecture but an inference drawn by one of requisite experiential capacity from adequate data, is evidence. . . . An inference drawn from given data by a person who is peculiarly qualified to do so by reason of his experience or special skill or learning is no less a fact. There is therefore no logical distinction between opinion testimony in the sense here used and so-called fact testimony."—Phares v. Century Electric Co., 82 S.W.2d 91, 95, 336 Mo. 961—Scanlon v. Kansas City, 28 S.W.2d 84, 95, 325 Mo. 125.

Opportunity for observation
An adequate opportunity for observation must appear where an expert witness undertaking to testify from personal knowledge of facts testifies as an observer rather than as an expert stating a judgment on hypothetical facts.—Blair v. Acacia Mut. Life Ins. Co., Mo.App., 121 S.W.2d 193.

54. Fla.—Fred Howland, Inc., v. Morris, 196 So. 472, 475, 143 Fla. 189, 128 A.L.R. 1013, quoting **Corpus Juris.**
Mont.—Irion v. Hyde, 105 P.2d 666, 671, 110 Mont. 570, quoting **Corpus Juris.**
22 C.J. p 633 note 24.

55. S.C.—State v. Johnson, 44 S.E. 58, 66 S.C. 23—State v. Martin, 25 S.W. 113, 47 S.C. 67.

56. Mont.—Irion v. Hyde, 105 P.2d 666, 671, 110 Mont. 570, quoting **Corpus Juris.**
Utah.—Vecchio v. Industrial Commission, 22 P.2d 212, 215, 82 Utah 128, quoting **Corpus Juris.**
22 C.J. p 634 note 26.

57. Utah.—Vecchio v. Industrial Commission, 22 P.2d 212, 215, 82 Utah 128, quoting **Corpus Juris.**
22 C.J. p 634 note 27.

58. N.Y.—New York County Nat. Bank v. Herman, 160 N.Y.S. 422, 173 App.Div. 814.

59. Mont.—Irion v. Hyde, 105 P.2d 666, 110 Mont. 570.

60. Ohio.—Baltimore & O. R. Co. v. Schultz, 1 N.E. 324, 43 Ohio St. 270, 54 Am.R. 805.
22 C.J. p 634 note 29.

61. U.S.—Peters v. Mutual Life Ins. Co. of New York, C.C.A.Pa., 107 F.2d 9, affirming. D.C., 26 F.Supp. 50, certiorari denied 60 S.Ct. 582, 309 U.S. 663, 84 L.Ed. 1010.
Ala.—Blakeney v. Alabama Power Co., 133 So. 16, 222 Ala. 394—Brown v. Mobile Electric Co., 91 So. 802, 207 Ala. 61.
Ill.—Scharlau v. Lombard State Bank, 278 Ill.App. 487.
Mont.—Irion v. Hyde, 105 P.2d 666, 671, 110 Mont. 570, quoting **Corpus Juris.**
22 C.J. p 634 note 31.
Statement of facts by ordinary witness see supra § 486.

Failure to state all facts on which the opinion is based is not fatal.
Ala.—Malone-McConnell Real Est. Co. v. J. B. Simpson Audit Co., 73 So. 369, 197 Ala. 677.
Iowa.—Blake v. Bedford, 151 N.W. 74, 170 Iowa 128.

62. **Voluminous and complicated facts**
Where the facts are voluminous and complicated, they need not be stated in the first instance, but complete inquiry concerning them is permissible on cross-examination.—Grison Oil Corporation v. Corporation Commission, 99 P.2d 134, 186 Okl. 548.

Mental condition
A medical expert testifying to the mental condition of a party, need not disclose in the first instance the par-

the cases listed below, no error is committed where the witness states his conclusion first, and immediately proceeds to state the facts on which it is based.[63]

E. JUDGMENT OF EXPERTS

§ 520. In General

Expert opinion evidence is admissible where the subject matter is such that a jury cannot be expected to draw correct inferences from the facts.

Every party has the right to put before the jury the scientific inferences properly deducible from such facts as the evidence tends to prove, provided, as discussed infra § 552, such facts be found by the jury to exist.[64] This doctrine of admissibility of expert opinion evidence constitutes an exception to the general rule, which is stated supra § 438, that the normal function of a witness is merely to state facts within his personal knowledge.[65] The necessity for such testimony arises where the subject matter of an inquiry is so far removed from the realm of common experience that the ordinary jury, even when the facts are fully placed before them, cannot fairly be expected to draw a correct inference therefrom, and at the same time no person competent to draw such an inference has personal knowledge of the facts. Under such circumstances the fact that a witness possessing the necessary skill would draw a certain inference from the facts possesses such probative force as justifies its reception as some evidence that such inference is the correct one,[66] and this rule applies unless

ticular facts on which his opinion is based.—Weibert v. Hanan, 95 N.E. 688, 202 N.Y. 328, reversing 121 N.Y.S. 35, 136 App.Div. 388—People v. Faber, 92 N.E. 674, 199 N.Y. 256, 20 Ann.Cas. 879—People v. Youngs, 45 N.E. 460, 151 N.Y. 210—In re Martin, 144 N.Y.S. 174, 82 Misc. 574.

Where facts not called for by litigants

N.Y.—People v. Woodbury, 123 N.Y.S. 592, 67 Misc. 481.

22 C.J. p 634 note 32 [c].

63. N.D.—Stockwell v. Brinton, 142 N.W. 242, 26 N.D. 1.

Changing opinion to statement of fact

That physician was permitted to testify as a fact that muscle over injured person's breast had been divided or cut after he had testified as to his opinion on the subject was not erroneous.—Carlson v. Kansas City, Clay County & St. Joseph Auto Transit Co., 282 S.W. 1037, 221 Mo. App. 537.

64. Mo.—Atkinson v. American School of Osteopathy, 202 S.W. 452, 199 Mo.App. 251.

65. Minn.—Wyatt v. Wyett, 273 N.W. 600, 200 Minn. 106.

Mo.—Mann v. Grim-Smith Hospital and Clinic, 147 S.W.2d 606—Cole v. Uhlmann Grain Co., 100 S.W.2d 311, 340 Mo. 277—Cole v. Empire Dist. Electric Co., 55 S.W.2d 434, 331 Mo. 824—Benjamin v. Metropolitan St. Ry. Co., 34 S.W. 590, 133 Mo. 274.

66. U.S.—Farris v. Interstate Circuit, C.C.A.Tex., 116 F.2d 409—Patrick v. Rice, C.C.A.Pa., 98 F.2d 550—Cropper v. Titanium Pigment Co., C.C.A.Mo., 47 F.2d 1038, 78 A.L.R. 737.

Del.—South Atlantic S. S. Co. of Delaware v. Munkacsy, 187 A. 600, 7 W.W.Harr. 580, certiorari denied 57 S.Ct. 223, 299 U.S. 607, 81 L.Ed. 448.

Ill.—Opp v. Pryor, 128 N.E. 580, 294 Ill. 538—Thompson v. Hughes, 121 N.E. 387, 286 Ill. 128, affirming 210 Ill.App. 462.

Ky.—Gibson v. Crawford, 83 S.W.2d 1, 7, 259 Ky. 708, citing **Corpus Juris.**

Me.—Johnson v. Bangor Ry. & Electric Co., 131 A. 1, 125 Me. 88.

Md.—Langenfelder v. Thompson, 20 A.2d 491—Industrial Service Co. v. State, to Use of Bryant, 6 A.2d 372, 376, 176 Md. 625, citing **Corpus Juris.**

Mass.—Flynn v. Growers Outlet, 30 N.E.2d 250, 307 Mass. 373.

Minn.—Westereng v. City of Morris, 285 N.W. 717, 205 Minn. 219—Golden v. Lerch Bros., 281 N.W. 249, 203 Minn. 211—Wyatt v. Wyett, 273 N.W. 600, 200 Minn. 106—Tracey v. City of Minneapolis, 241 N.W. 390, 185 Minn. 380—Noe v. Great Northern Ry. Co., 209 N.W. 905, 168 Minn. 259—Greer v. Great Northern Ry. Co., 132 N.W. 6, 115 Minn. 213—Anderson v. Fielding, 99 N.W. 357, 92 Minn. 42, 104 Am. S.R. 665.

Mo.—Cole v. Uhlmann Grain Co., 100 S.W.2d 311, 340 Mo. 277—Harrison v. St. Louis-San Francisco Ry. Co., 99 S.W.2d 841, 339 Mo. 821—Phares v. Century Electric Co., 82 S.W.2d 91, 95, 336 Mo. 961, citing **Corpus Juris**—Kimmie v. Terminal R. R. Ass'n of St. Louis, 66 S.W.2d 561, 564, 334 Mo. 596, citing **Corpus Juris**—Young v. Wheelock, 64 S.W.2d 950, 956, 333 Mo. 992, quoting **Corpus Juris,** and certiorari denied Wheelock v. Young, 54 S.Ct. 527, 291 U.S. 676, 78 L.Ed. 1064—Homan v. Missouri Pac. R. Co., 64 S.W.2d 617, 625, 334 Mo. 61, quoting **Corpus Juris,** and certiorari denied Missouri Pac. R. Co. v. Homan, 54 S.Ct. 561, 291 U.S. 683, 78 L.Ed. 1070—Scanlon v. Kansas City, 28 S.W.2d 84, 325 Mo. 125—Benjamin v. Metropolitan St. Ry. Co., 34 S.W. 590, 133 Mo. 274—Sparks v. Harvey, App., 214 S.W. 249—Atkinson v. American School of Osteopathy, 202 S.W. 452, 199 Mo. App. 251—Muff v. Wabash, St. L. & P. Ry. Co., 22 Mo.App. 584.

Mont.—Leybold v. Fox Butte Theater Corporation, 62 P.2d 223, 103 Mont. 232—Sellers v. Montana-Dakota Power Co., 41 P.2d 44, 99 Mont. 39—Moffett v. Bozeman Canning Co., 26 P.2d 973, 95 Mont. 347—Demarais v. Johnson, 3 P.2d 283, 90 Mont. 366, 77 A.L.R. 553—In re Miller's Estate, 229 P. 851, 71 Mont. 330—Copenhaver v. Northern Pac. R. Co., 113 P. 467, 42 Mont. 453.

Nev.—Deiss v. Southern Pac. Co., 53 P.2d 332, 338, 56 Nev. 169, citing **Corpus Juris.**

N.H.—Bill v. New England Cities Ice Co., 10 A.2d 662, 90 N.H. 453.

N.Y.—Dougherty v. Milliken, 57 N.E. 757, 163 N.Y. 527, 79 Am.S.R. 608—In re Wells' Will, 221 N.Y.S. 714, 129 Misc. 447.

Okl.—Beasley v. Bond, 48 P.2d 299, 173 Okl. 355—Tibbets & Pleasant v. Cook, 287 P. 1014, 143 Okl. 101—Independent Material & Supply Co. v. Marshall, 264 P. 830, 129 Okl. 295—Turner-Tulsa Co. v. H. Schnell & Co., 230 P. 918, 107 Okl. 125.

S.C.—Huggins v. Broom, 199 S.E. 903, 189 S.C. 15.

Tex.—Traders & General Ins. Co. v. Keahey, Civ.App., 119 S.W.2d 618, error dismissed—Gulf, C. & S. F. Ry. Co. v. Downs, Civ.App., 70 S.W.2d 318, error refused—Tokio Marine & Fire Ins. Co. v. Aldridge, 21 S.W.2d 547, error refused—City of Brownsville v. Crixell, Civ.App., 275 S.W. 430—Dunlap Hardware Co. v. E. F. Elmberg Co., Civ.App., 252 S.W. 1098, affirmed E. F. Elm-

the drawing of such inference is palpably absurd.[67] However, an expert witness in a manner discharges the functions of a juror, and his opinion evidence should never be admitted unless it is clear that the jurors themselves are not capable, from want of experience or knowledge of the subject, to draw correct conclusions from the facts proved;[68] in other words, evidence of the opinion of experts is admissible only when the subject matter of the controversy renders it necessary or proper to resort to opinion evidence.[69] It has been said that expert testimony on hypothetical questions which substitute inferences for facts ought to be received with caution, since litigants are entitled to the judgment of a jury on all the facts,[70] but there is a modern tendency to give as wide a scope as is reasonably possible to expert opinion evidence so as to afford the trial judge assistance.[71] Expert opinion evidence is not admissible when it has no legitimate bearing on the questions at issue.[72] The fact that the opinion evidence of a particular witness is in itself insufficient to sustain the party's case does not affect its admissibility.[73]

Time when opinion stated. The opinion of an

berg Co. v. Dunlap Hardware Co., Com.App., 267 S.W. 258.
Va.—Lawson v. Darter, 160 S.E. 74, 157 Va. 284.
Wash.—Thomas v. Inland Motor Freight, 68 P.2d 603, 190 Wash. 428—Hill v. Great Northern Life Ins. Co., 57 P.2d 405, 186 Wash. 167.
W.Va.—Norfolk & W. Ry. Co. v. Christian, 99 S.E. 13, 83 W.Va. 701.
Wyo.—McCoy v. Clegg, 257 P. 484, 76 Wyo. 473.

Tests

(1) A test of admissibility is whether the court or jury will be aided by receiving the evidence.
Mo.—Harrison v. St. Louis-San Francisco Ry. Co., 99 S.W.2d 841, 339 Mo. 821—Young v. Wheelock, 64 S.W.2d 950, 956, 333 Mo. 992, quoting **Corpus Juris,** and certiorari denied Wheelock v. Young, 54 S.Ct. 527, 291 U.S. 676, 78 L.Ed. 1064—Homan v. Missouri Pac. R. Co., 64 S.W.2d 617, 625, 334 Mo. 61, quoting **Corpus Juris,** and certiorari denied Missouri Pac. R. Co. v. Homan, 54 S.Ct. 561, 291 U.S. 683, 78 L.Ed. 1070.
Pa.—Baumer v. Baumer, 2 Monroe L. R. 63.
22 C.J. p 642 note 53.

(2) The true test of the admissibility of such testimony is not whether the subject matter is common or uncommon, or whether many persons or few have knowledge of the matter; but it is whether the witnesses offered as experts have any peculiar knowledge or experience, not common to the world, which renders their opinions founded on such knowledge or experience any aid to the court or the jury in determining the questions at issue.
Conn.—Taylor v. Monroe, 43 Conn. 36.
Tex.—Zurich General Accident & Liability Ins. Co. v. Kerr, Civ.App., 54 S.W.2d 349, error refused.

(3) The necessity for a course of previous study or acquired experience furnishes a rough test of admissibility.—Thomas v. Inland Motor Freight, 68 P.2d 603, 190 Wash. 428.
22 C.J. p 642 note 50 [a].

Automobile accident actions are within the rule.—Roberts v. Koons, Iowa, 296 N.W. 811.

Province of expert is to aid in understanding facts already in evidence.—Coca-Cola Co. v. Joseph C. Wirthman Drug Co., C.C.A.Mo., 48 F.2d 743.

Necessity of expert evidence

(1) When topic requiring experience of expert forms main issue in case, evidence on that issue must contain expert testimony.—Capolupo v. Wills, 163 A. 454, 116 Conn. 13—Slimak v. Foster, 138 A. 153, 106 Conn. 366.

(2) Claim that "nervous wreck" followed known physical cause, must be based on definite and competent expert proof.—Hardy-Burlingham Mining Co. v. Baker, C.C.A.Ky., 10 F.2d 277.

67. N.Y.—In re Well's Will, 221 N.Y.S. 714, 129 Misc. 447.
Va.—Lawson v. Darter, 160 S.E. 74, 157 Va. 284.

Inconsistency

Variance of the testimony of an expert witness in a second trial from his evidence in the first and from that of other experts does not render it inadmissible.—Browning v. Hoffman, 111 S.E. 492, 90 W.Va. 568.

68. U.S.—Farris v. Interstate Circuit, C.C.A.Tex., 116 F.2d 409—Benefit Ass'n of Railway Employees v. Bell, C.C.A.Ala., 46 F.2d 225.
Ala.—Capital Motor Lines v. Gillette, 177 So. 881, 235 Ala. 157.
D.C.—King v. Davis, 296 F. 986, 54 App.D.C. 239.
Ill.—Brewster v. Weir, 93 Ill.App. 588.
Me.—State v. Intoxicating Liquors, 117 A. 588, 121 Me. 438.
Md.—Langenfelder v. Thompson, 20 A.2d 491—Griffith v. Pullman Co., 121 A. 362, 142 Md. 514.
Mass.—Jackson v. Anthony, 185 N.E. 389, 282 Mass. 540.
Minn.—Westereng v. City of Morris, 285 N.W. 717, 205 Minn. 219—Wyatt v. Wyett, 273 N.W. 600, 200 Minn. 106—Tracey v. City of Minneapolis, 241 N.W. 390, 185 Minn. 380.
Mo.—Pedigo v. Roseberry, 102 S.W.2d 600, 340 Mo. 724—Cole v. Uhlmann Grain Co., 100 S.W.2d 311, 340 Mo. 277—Cole v. Empire Dist. Electric Co., 55 S.W.2d 434, 331 Mo. 824—Benjamin v. Metropolitan St. Ry. Co., 34 S.W. 590, 133 Mo. 274—Green v. Kansas City Southern R. Co., 125 S.W. 865, 870, 142 Mo. App. 67.
Mont.—Leybold v. Fox Butte Theater Corporation, 62 P.2d 223, 103 Mont. 232—Moffett v. Bozeman Canning Co., 26 P.2d 973, 95 Mont. 347—In re Miller's Estate, 229 P. 851, 71 Mont. 330—Copenhaver v. Northern Pac. R. Co., 113 P. 467, 42 Mont. 453.
Neb.—Moore v. Krejci, 297 N.W. 913.
N.Y.—Dougherty v. Milliken, 57 N.E. 757, 163 N.Y. 527, 79 Am.S.R. 608—Fiero v. Franklin Sav. Bank, 207 N.Y.S. 235, 124 Misc. 38.
N.C.—Shaw v. National Handle Co., 124 S.E. 325, 188 N.C. 222.
R.I.—Souza v. United Electric Rys. Co., 152 A. 419, 51 R.I. 124.
S.C.—Huggins v. Broom, 199 S.E. 903, 189 S.C. 15.

69. Fla.—Atlantic Coast Line R. Co. v. Shouse, 91 So. 90, 83 Fla. 156.
Ky.—Mann's Ex'r v. Leyman Motor Co., 28 S.W.2d 956, 234 Ky. 639.
Wash.—Thomas v. Inland Motor Freight, 68 P.2d 603, 190 Wash. 428.

70. Md.—Miller v. Leib, 72 A. 466, 109 Md. 414.
Mo.—Cole v. Empire Dist. Electric Co., 55 S.W.2d 434, 331 Mo. 824—Benjamin v. Metropolitan St. Ry. Co., 34 S.W. 590, 133 Mo. 274.

71. U.S.—Atlantic Life Ins. Co. v. Vaughan, C.C.A.Tenn., 71 F.2d 394, certiorari denied Vaughan v. Atlantic Life Ins. Co., 55 S.Ct. 104, 293 U.S. 589, 79 L.Ed. 684—The Domira, C.C.A.N.Y., 56 F.2d 585, affirming, D.C., 49 F.2d 324.
N.H.—Gardner v. Commercial Mach. Co., 111 A. 317, 79 N.H. 452.

72. U.S.—The Domira, C.C.A.N.Y., 56 F.2d 585, affirming, D.C., 49 F.2d 324.

73. U.S.—Groff v. Smith, D.C.Conn., 34 F.Supp. 319.

expert witness which must be considered as his opinion evidence is his final conclusion at the moment of testifying,[74] which rule has been applied specifically to medical witnesses as stated in § 534 infra.

§ 521. Basis of Judgment

The opinion of an expert witness must be based on facts in evidence, and cannot be based on opinions, conclusions, or inferences of others. However, the opinion may be based on facts testified to by others.

The party offering an expert is at liberty to reinforce his judgment, even before any attempt is made to discredit or impeach it, by showing the grounds on which it is based,[75] provided such facts are relevant[76] and admissible for the purpose;[77] but facts so stated do not become evidence in the case.[78] Where the evidence does not disclose the existence of sufficient data on which to base a reasonable judgment, the opinion is incompetent.[79] The witness may base his judgment in part on the result of experiments,[80] but otherwise cannot base his opinion on facts derived from other sources than the evidence in the case,[81] although, as stated in the title Appeal and Error § 1735, error in this respect is cured if the facts are subsequently proved. Further, the opinion of an expert cannot be predicated, either in whole or in part, on the opinions, inferences, and conclusions of others,[82] whether

Reason for rule

Such evidence carries the party part way toward his goal, and the party is entitled to proceed step by step, rather than be forced to prove his whole case by one witness.—Groff v. Smith, supra.

74. Mass.—Perangelo's Case, 177 N. E. 892, 297 Mass. 59.

75. Tex.—Commercial Standard Ins. Co. v. Robinson, Com.App., 151 S. W.2d 795, reversing, Civ.App., 126 S.W.2d 1026, conforming to mandate Robinson v. Commercial Standard Ins. Co., 123 S.W.2d 337, 132 Tex. 163, reversing Commercial Standard Ins. Co. v. Robinson, Civ. App., 91 S.W.2d 1147—Gulf, C. & S. F. Ry. Co. v. Downs, Civ.App., 70 S.W.2d 318, error refused.
22 C.J. p 639 note 31.

76. Pa.—Norvidas v. Metropolitan Life Ins. Co., 6 Sch.Reg. 292.
22 C.J. p 639 note 32.

77. Ill.—City of Chicago v. Chicago City Ry. Co., 134 N.E. 44, 302 Ill. 57.
Tex.—Anderson v. Caulk, Civ.App., 5 S.W.2d 816, affirmed Caulk v. Anderson, 37 S.W.2d 1008, 120 Tex. 253.
22 C.J. p 640 note 33.

Separation of admissible facts

If an expert witness has based his opinion in a material degree on elements which cannot legally be considered, without separating such elements from those which may legally be considered, the opinion is incompetent.—City of Chicago v. Chicago City Ry. Co., 134 N.E. 44, 302 Ill. 57.

78. Okl.—Chicago, R. I. & P. R. Co. v. Jackson, 162 P. 823, 63 Okl. 32.
22 C.J. p 640 note 34.

79. Cal.—Commercial Union Assur. Co. v. Pacific Gas & Electric Co., 31 P.2d 793, 220 Cal. 515.
Ga.—Evans v. Kent, 110 S.E. 685, 28 Ga.App. 172.
Md.—Fink v. Steele, 171 A. 49, 166 Md. 354.
N.Y.—In re Well's Will, 221 N.Y.S. 714, 129 Misc. 447.
Pa.—Norvidas v. Metropolitan Life Ins. Co., 6 Sch.Reg. 292.
22 C.J. p 640 note 35.

Facts, proved or assumed, sufficient to form a basis for an opinion must exist, and the opinion cannot be invoked to supply the substantial facts necessary to support that conclusion.—Hornby v. State Life Ins. Co., 184 N.W. 84, 106 Neb. 575, 18 A. L.R. 106.

An expert must base his opinion on the supposition that the jury will find the facts recited in the hypothetical question.—Brewer v. Ring, 99 S.E. 358, 177 N.C. 476.

80. Cal.—Christiansen v. Hollings, App., 112 P.2d 723.
Fla.—Depter v. Walker, 169 So. 660, 123 Fla. 862, 125 Fla. 189.
Mo.—Linstroth v. Peper, 218 S.W. 431, 203 Mo.App. 278.
22 C.J. p 640 note 36.
Experiments in support or explanation of expert opinion see infra § 589.

81. U.S.—Atlantic Life Ins. Co. v. Vaughan, C.C.A.Tenn., 71 F.2d 394, certiorari denied Vaughan v. Atlantic Life Ins. Co., 55 S.Ct. 104, 293 U.S. 589, 79 L.Ed. 684—U. S. v. Burns, C.C.A.Fla., 69 F.2d 636.
Ariz.—Middleton v. Green, 276 P. 322, 35 Ariz. 205—Security Ben. Ass'n v. Small, 272 P. 647, 34 Ariz. 458.
Cal.—McElligott v. Freeland, 33 P. 2d 430, 139 Cal.App. 143.
Ill.—Kanne v. Metropolitan Life Ins. Co., 34 N.E.2d 732, 310 Ill.App. 524.
Ky.—Wigginton v. Wigginton's Ex'r, 266 S.W. 245, 205 Ky. 613.
Md.—Fink v. Steele, 171 A. 49, 166 Md. 354.
Mo.—Cardinale v. Kemp, 274 S.W. 437, 309 Mo. 241.
N.Y.—Nazzaro v. Angelilli, 216 N.Y. S. 721, 217 App.Div. 415.
Pa.—Johnson v. Valvoline Oil Co., 200 A. 224, 131 Pa.Super. 266.
R.I.—Souza v. United Electric Rys. Co., 152 A. 419, 51 R.I. 124.
Vt.—Platt v. Shields, 119 A. 520, 96 Vt. 257.
Wis.—Dreher v. Order of United Commercial Travelers of America, 180 N.W. 815, 173 Wis. 173.
22 C.J. p 640 note 37.

Hearsay

(1) As a general rule expert opinion evidence which is based on hearsay is inadmissible.
Ariz.—Security Ben. Ass'n v. Small, 272 P. 647, 34 Ariz. 458.
Cal.—McElligott v. Freeland, 32 P.2d 430, 139 Cal.App. 143.
Pa.—Johnson v. Valvoline Oil Co., 200 A. 224, 131 Pa.Super. 266.
22 C.J. p 707 note 22 [c] (2).

(2) However, under the principles discussed supra § 193 that hearsay evidence is admissible when trustworthy, or practically unobtainable by other means, opinion evidence by a qualified expert is admissible even when resting wholly or in part on hearsay, if such hearsay evidence is trustworthy or necessary.—U. S. v. Aluminum Co. of America, D.C.N.Y., 35 F.Supp. 820.

(3) The necessity required is not that of total inaccessibility of first-hand evidence, but rather the existence of a great practical inconvenience in making the desired proof.—U. S. v. Aluminum Co. of America, supra.
Hypothetical question based on hearsay see infra § 551.

82. Md.—Mt. Royal Cab Co. v. Dolan, 179 A. 54, 168 Md. 633, 98 A.L. R. 1106.
Mo.—Dickens v. Heitzman, App., 141 S.W.2d 183.
N.Y.—Walsh v. Frankenthaler, 173 N.Y.S. 764, 186 App.Div. 62.
Pa.—Wissinger v. Valley Smokeless Coal Co., 115 A. 880, 271 Pa. 566.

Reasons for rule

(1) In so doing he passes on the credibility of the witnesses and thus invades the province of the jury.—Dickens v. Heitzman, Mo.App., 141 S. W.2d 183.

such opinions, inferences, and conclusions be that of other experts[83] or of lay witnesses,[84] although the opinion may be based on testimony of others which the witness has heard,[85] whether the witnesses be expert[86] or lay[87] witnesses. The fact that an expert's judgment is not based on all the facts of the case goes to its weight rather than to its competency.[88]

§ 522. Conjecture Excluded

Mere guess or conjecture cannot constitute a proper basis for expert opinion evidence.

While absolute certainty is not required of an expert,[89] it is necessary that the facts on which an expert relies for his opinion should afford a reasonably accurate basis for his conclusions.[90] Accordingly, no matter how skilled or experienced the witness may be, he will not be permitted to guess[91] or to state a judgment based on mere conjecture;[92] in other words, the factual foundation for the expert opinion must not be nebulous.[93] Evidence of this nature is widely distinguished from that of a

(2) It is not for the expert to assume the responsibility of determining the truth or falsity or the reliability or unreliability, of the testimony of other witnesses.—Evans v. Cavanagh, 73 P.2d 83, 58 Idaho 324.

Necessity of objection

Where no objection is made to an expert opinion based on the opinion of other witnesses, the impropriety is waived.—Dickens v. Heitzman, Mo. App., 141 S.W.2d 183.

83. U.S.—Corrigan v. U. S., C.C.A. Idaho, 82 F.2d 106, 107, citing **Corpus Juris.**
Cal.—Christiansen v. Hollings, App., 112 P.2d 723.
D.C.—Tri-State Broadcasting Co. v. Federal Communications Commission, 96 F.2d 564, 68 App.D.C. 292.
Md.—Mt. Royal Cab Co. v. Dolan, 179 A. 54, 168 Md. 633, 98 A.L.R. 1106—Quimby v. Greenhawk, 171 A. 59, 166 Md. 335.
Mo.—Cardinale v. Kemp, 274 S.W. 437, 309 Mo. 241.
N.Y.—Nazzaro v. Angelilli, 216 N.Y. S. 721, 217 App.Div. 415.
22 C.J. p 640 note 39.

84. Md.—Mt. Royal Cab Co. v. Dolan, 179 A. 54, 168 Md. 633, 98 A.L. R. 1106.

85. U.S.—Fleischmann Mfg. Co. v. Irwin, C.C.A.N.Y., 5 F.2d 167, affirming, D.C., 293 F. 267.
Md.—Thompson v. Standard Wholesale Phosphate & Acid Works, 13 A.2d 328, 178 Md. 305—Mt. Royal Cab Co. v. Dolan, 179 A. 54, 168 Md. 633, 98 A.L.R. 1106.
Pa.—Moseley v. Reading Co., 145 A. 293, 295 Pa. 342—Wissinger v. Valley Smokeless Coal Co., 115 A. 880, 271 Pa. 566.

86. Cal.—Christiansen v. Hollings, App., 112 P.2d 723.
Ky.—Louisville R. Co. v. Oppenheimer, 104 S.W. 720, 31 Ky.L. 1141.

87. Minn.—Backstrom v. New York Life Ins. Co., 259 N.W. 681, 194 Minn. 67.
Pa.—Lynch v. Meyersdale Electric Light, Heat & Power Co., 112 A. 58, 268 Pa. 337.

88. U.S.—Dunagan v. Appalachian Power Co., C.C.A.W.Va., 33 F.2d 876, 68 A.L.R. 1393, certiorari denied 50 S.Ct. 152, 280 U.S. 606, 74 L.Ed. 649.
Cal.—Matthiesen v. Smith, 60 P.2d 873, 16 Cal.App.2d 479.
22 C.J. p 640 note 41.

89. Ill.—Beveridge v. Illinois Fuel Co., 206 Ill App. 145.
S.D.—Housman v. Geiman, 252 N.W. 857, 62 S.D. 310.

90. Ill.—Stevens v. Illinois Cent. R. Co., 137 N.E. 859, 206 Ill. 370.
Kan.—Myers v. Shell Petroleum Corporation, 110 P.2d 810, 153 Kan. 287.
Mo.—Vitale v. Duerbeck, 92 S.W.2d 691, 338 Mo. 556.

91. Ill.—Kanne v. Metropolitan Life Ins. Co., 34 N.E.2d 732, 310 Ill.App. 524—O'Donnell v. Snyder, 231 Ill. App. 581—Ehrhardt v. Connecticut Fire Ins. Co., 219 Ill.App. 48.
Mo.—Vitale v. Duerbeck, 92 S.W.2d 691, 338 Mo. 556.
Pa.—Sweeney v. Blue Anchor Beverage Co., 189 A. 331, 334, 325 Pa. 216, quoting **Corpus Juris.**
S.D.—Housman v. Geiman, 252 N.W. 857, 62 S.D. 310.
22 C.J. p 640 note 43.

92. U.S.—Atlantic Life Ins. Co. v. Vaughan, C.C.A.Tenn., 71 F.2d 394, certiorari denied Vaughan v. Atlantic Life Ins. Co., 55 S.Ct. 104, 293 U.S. 589, 79 L.Ed. 684.
Ill.—Kanne v. Metropolitan Life Ins. Co., 34 N.E.2d 732, 310 Ill.App. 524—O'Donnell v. Snyder, 231 Ill.App. 581—Ehrhardt v. Connecticut Fire Ins. Co., 219 Ill.App. 48.
Iowa.—Roberts v. Koons, 296 N.W. 811.
Kan.—Hall v. Armour & Co., 113 P.2d 145, 148, 153 Kan. 656, citing **Corpus Juris**—Myers v. Shell Petroleum Corporation, 110 P.2d 810, 153 Kan. 287.
La.—Spears v. Stone & Webster Engineering Corporation, App., 161 So. 351, amended on other ground and rehearing refused 161 So. 905.
Mo.—Vitale v. Duerbeck, 92 S.W.2d 691, 338 Mo. 556.
Mont.—Moffett v. Bozeman Canning Co., 26 P.2d 973, 95 Mont. 347.
Or.—Vale v. State Industrial Accident Commission, 86 P.2d 956, 160 Or. 569.
Pa.—Sweeney v. Blue Anchor Beverage Co., 189 A. 331, 334, 325 Pa. 216, quoting **Corpus Juris.**
S.D.—Housman v. Geiman, 252 N.W. 857, 62 S.D. 310.
Tenn.—Standard Oil Co. of Louisiana v. Roach, 94 S.W.2d 63, 70, 19 Tenn.App. 661, citing **Corpus Juris.**
22 C.J. p 640 note 44, p 641 note 45.

Reason for rule

Where the facts on which the opinion of an expert is based are highly speculative and conjectural, the jury would not be relieved from the necessity of reaching an arbitrary conclusion.—Myers v. Shell Petroleum Corporation, 110 P.2d 810, 153 Kan. 287.

Especially when conflicting with conceded physical facts, expert opinion evidence does not rise to the dignity of evidence.—Atlantic Life Ins. Co. v. Vaughan, C.C.A.Tenn., 71 F.2d 394, certiorari denied Vaughan v. Atlantic Life Ins. Co., 55 S.Ct. 104, 293 U.S. 589, 79 L.Ed. 684.

Speculative opinion as to survivorship

Where two or more persons perish in common disaster, and question of survivorship is presented, proof of facts and circumstances concerning survival of one or of other must be adduced, and, in absence of such proof, testimony of expert is sheer speculation and must be disregarded.—In re Burza's Estate, 272 N.Y.S. 248, 151 Misc. 577.

93. U.S.—U. S. v. American Tobacco Co., D.C.Ky., 39 F.Supp. 957.

Failure to show particular features of evidence

The mere showing that a witness in formulating an expert opinion resting on a hypothetical basis considered documentary evidence brought into the case by other witnesses without definitely showing the particular points or features of the evidence on which expert opinion was predicated was insufficient to render such opinion testimony admissible, since it left the nature of the hypothesis on which the opinion was based so obscure that it was impossible to determine whether the opinion was based on facts or mere in-

definite judgment on ascertained facts where a different one is within the bounds of reason. Thus, an expert may testify as to what might have been a sufficient cause for an ascertained result,[94] and, where a definite course of conduct or dealing has become established, an expert may be asked what would probably happen, under a given set of circumstances, in a matter within its purview.[95]

§ 523. Range of Testimony

In general expert opinion evidence as to matters of art, science, or technical training is admissible, while such evidence as to the common affairs or daily life not usually the subject of correct conclusion by the ordinary jury is inadmissible.

The nature of the evidence which an expert witness may be permitted to give is governed and controlled by the court under well settled rules of procedure.[96] Instances in which the judgment of experts has been received as an aid to the jury are endless in variety.[97] It is, however, impossible to formulate any general rule as to the subjects on which such evidence will be received,[98] for while it is agreed broadly, on the one hand, that matters of art, science, or technical training are proper subjects for expert testimony,[99] and, on the other, that the common affairs of daily life are not,[1] all cases cannot fall within one or the other of these classifications because of the numerous matters which are to a certain extent familiar to most people, but with which all men are not presumably so conversant that they can draw, or readily be directed how to draw, a reasonable inference.[2] It has been said that the only proper course is to keep

ferences.—U. S. v. American Tobacco Co., supra.

94. Mo.—Hensley v. Kansas City Rys. Co., App., 214 S.W. 287.
22 C.J. p 641 note 46.

95. Tex.—Western Union Tel. Co. v. Mitchell, 44 S.W. 274, 91 Tex. 454, 66 Am.S.R. 906, 40 L.R.A. 209.
22 C.J. p 641 note 47.

96. Tex.—Southern Underwriters v. Blair, Civ.App., 144 S.W.2d 641.

97. Pa.—Graham v. Pennsylvania Co., 21 A. 151, 139 Pa. 149, 12 L.R. A. 293.
22 C.J. p 641 note 48.

98. Iowa.—Muldowney v. Illinois Cent. R. Co., 36 Iowa 462.
22 C.J. p 642 note 49.

99. U.S.—Claude Neon Electrical Products, Inc. v. Brilliant Tube Sign Co., D.C.Wash., 40 F.2d 708—U. S. v. Porter, D.C.Mich., 9 F.2d 153.
Cal.—Employers' Liability Assur. Corporation, Limited, of London, England, v. Industrial Accident Commission, App., 109 P.2d 716—Weaver v. Shell Co. of California, 94 P.2d 364, 34 Cal.App.2d 713.
Conn.—Taylor v. Monroe, 43 Conn. 36.
La.—Spears v. Stone & Webster Engineering Corporation, App., 161 So. 351, amended on other ground and rehearing refused 161 So. 905.
Me.—Mills v. Richardson, 137 A. 689, 126 Me. 244.
Mass.—Coulombe v. Horne Coal Co., 175 N.E. 631, 275 Mass. 226.
Mo.—Young v. Wheelock, 64 S.W.2d 950, 333 Mo. 992, certiorari denied Wheelock v. Young, 54 S.Ct. 527, 291 U.S. 676, 78 L.Ed. 1064—De Donato v. Wells, 41 S.W.2d 184, 328 Mo. 448, 82 A.L.R. 1331—O'Gorman v. Kansas City, App., 93 S.W.2d 1132, 1138, citing **Corpus Juris.**
N.H.—Dole v. Johnson, 50 N.H. 452—Jones v. Tucker, 41 N.H. 546.
N.Y.—Goldstein v. Equitable Life Assur. Soc. of U. S., 289 N.Y.S. 1064, 160 Misc. 364.
N.C.—Pridgen v. Gibson, 139 S.E. 443, 194 N.C. 289, 54 A.L.R. 855—Wood v. Sawyer, 61 N.C. 251.
Okl.—Oklahoma Wheat Pool Terminal Corporation v. Rodgers, 70 P.2d 1080, 1082, 180 Okl. 623, citing **Corpus Juris**—Margay Oil Corporation v. Jamison, 59 P.2d 790, 177 Okl. 433.
Pa.—Pastelak v. Glen Alden Coal Co., 164 A. 846, 108 Pa.Super. 89—Equitable Loan Soc. v. Harr, 49 Dauph. Co. 182.
Tenn.—National Life & Accident Ins. Co. v. Follett, 80 S.W.2d 92, 168 Tenn. 647.
Tex.—U. S. Fidelity & Guaranty Co. v. Rochester, Civ.App., 281 S.W. 306, affirmed 283 S.W. 135, 115 Tex. 404.
Wash.—Oyster v. Dye, 110 P.2d 863, 133 A.L.R. 720.
22 C.J. p 642 note 50.

Statutory rule
Cal.—Moore v. Norwood, 106 P.2d 939, 41 Cal.App.2d 359—McStay v. Citizens' Nat. Trust & Savings Bank of Los Angeles, 43 P.2d 560, 5 Cal.App.2d 595.
Ga.—Central of Georgia Ry. Co. v. Evans, 134 S.E. 122, 35 Ga.App. 438.
Mont.—Demarais v. Johnson, 3 P.2d 283, 90 Mont. 366, 77 A.L.R. 553—Copenhaver v. Northern Pac. R. Co., 113 P. 467, 42 Mont. 463.

1. U.S.—Farris v. Interstate Circuit, C.C.A.Tex., 116 F.2d 409—American Coal Co. of Allegany County v. De Wese, C.C.A.W.Va., 30 F.2d 349.
Ala.—Capital Motor Lines v. Gillette, 177 So. 881, 235 Ala. 157—Armour & Co. v. Cartledge, 176 So. 334, 339, 234 Ala. 644, citing **Corpus Juris.**
Cal.—Moore v. Norwood, 106 P.2d 939, 41 Cal.App.2d 359.
Ky.—Morton's Adm'r v. Kentucky-Tennessee Light & Power Co., 138 S.W.2d 345, 282 Ky. 174.
Md.—Blinder v. Monaghan, 188 A. 31, 171 Md. 77.
Mass.—Flynn v. Growers Outlet, 30 N.E.2d 250, 307 Mass. 373—Jackson v. Anthony, 185 N.E. 389, 282 Mass. 540.
Mont.—Leybold v. Fox Butte Theater Corporation, 62 P.2d 223, 226, 103 Mont. 232, citing **Corpus Juris**—In re Miller's Estate, 229 P. 851, 854, 71 Mont. 330, citing **Corpus Juris.**
Okl.—Rodgers v. Oklahoma Wheat Pool Terminal Corporation, 96 P. 2d 1040, 186 Okl. 171.
Or.—Goodrich v. May, 255 P. 464, 121 Or. 418.
Pa.—In re Culhane's Estate, 2 A.2d 567, 133 Pa.Super. 339, affirmed 5 A.2d 377, 334 Pa. 124—Yorkshire Worsted Mills v. National Transit Co., 28 Del.Co. 402.
Tenn.—Nashville Ry. & Light Co. v. Harrison, 5 Tenn.App. 22.
Utah.—Yowell v. Occidental Life Ins. Co., 110 P.2d 566.
Wis.—Tegen v. Chapin, 187 N.W. 185, 176 Wis. 410.
22 C.J. p 642 note 51.

2. Ala.—Norwood Clinic v. Spann, 199 So. 840, 240 Ala. 427—Raymond v. Pointer, 127 So. 153, 220 Ala. 593—Alabama Power Co. v. Talmadge, 93 So. 548, 207 Ala. 86, error dismissed 42 S.Ct. 463, 259 U.S. 575, 66 L.Ed. 1071—Stewart v. Sloss-Sheffield Steel & Iron Co., 54 So. 48, 170 Ala. 544.
Mo.—Young v. Wheelock, 64 S.W.2d 950, 33 Mo. 992, certiorari denied Wheelock v. Young, 54 S.Ct. 527, 291 U.S. 676, 78 L.Ed. 1064.
N.D.—Wishek v. U. S. Fidelity & Guaranty Co. of Baltimore, Md., 218 N.W. 488, 55 N.D. 321.
22 C.J. p 642 note 52.

Experience alone insufficient to justify expert testimony
That witness is more experienced than jurors does not of itself just-

the principles steadily in view and apply them to the circumstances of each case as it arises.[3] Particular subjects of expert testimony are discussed hereinafter in §§ 524–546.

F. SUBJECTS OF SKILLED INFERENCE OR EXPERT JUDGMENT

§ 524. Animals

A veterinary surgeon or any other person instructed by study and experience in animal pathology or the breeding and care of animals may state an inference or judgment with respect to animals.

A veterinary surgeon,[4] or any other person instructed by study and experience in animal pathology or the breeding and care of animals,[5] may state an inference or judgment with respect to animals. Thus such a witness may testify as to the cause of death;[6] the cause and effects of injuries observed;[7] whether an animal has a given disease or imperfection,[8] and the cause[9] or results[10] of disease; what would be the result on stock of certain acts or treatment,[11] or whether certain acts or treatment were proper;[12] the effect on animals of certain acts by them;[13] the cause[14] or effect[15] of certain other things; or whether certain phenomena

ify expert testimony.—Goodrich v. May, 255 P. 464, 121 Or. 418.

3. Pa.—Graham v. Pennsylvania Co., 21 A. 151, 139 Pa. 149, 12 L.R.A. 293.
22 C.J. p 642 note 54.

4. Wash.—Bradley v. Consolidated Silver Mountain Mines Co., 298 P. 324, 162 Wash. 198.
22 C.J. p 643 note 75.

5. Ind.—Adams Express Co. v. Heagy, 122 N.E. 603, 69 Ind.App. 652.
22 C.J. p 643 note 76, p 644 note 78 [a], [c].

6. **Slaughter or disease**
A skilled witness may state whether animals whose skins were produced were slaughtered or died of disease.—Clay v. State, 56 S.W. 629, 41 Tex.Cr. 653.

Persons who are not veterinarians
(1) Persons who are not licensed veterinarians may be competent to state an opinion as to the cause of death.—Nash & Windfohr Oil Corporation v. Johnson, Tex.Civ.App., 81 S.W.2d 749, error dismissed—22 C.J. p 643 note 76 [d].

(2) An experienced stockman, for example, who accompanied a shipment may be qualified to state whether in his opinion stock was killed by injury received in transit or died from other causes.—Gulf, C. & S. F. Ry. Co. v. Morris, Tex. Civ.App., 241 S.W. 235, affirmed, Com.App., 250 S.W. 1017.

7. Wis.—Kortendick v. Waterford, 125 N.W. 945, 142 Wis. 413.
3 C.J. p 116 note 72 [a] (1)—22 C.J. p 644 note 79.

Particular causes
(1) Rough handling in transportation.
Mo.—Thompson v. Chicago, R. I. & P. Ry. Co., 4 S.W.2d 894, 222 Mo. App. 725.
Pa.—Witmer v. Pennsylvania R. Co., 30 Pa.Dist. 112.
(2) Lack of food.
Conn.—State v. Cook, 53 A. 589, 75 Conn. 267.
Pa.—Karnofsky Bros. v. Delaware & Hudson Co., 123 A. 317, 278 Pa. 379—Karnofsky Bros. v. Delaware & Hudson Co., 117 A. 783, 274 Pa. 272.
(3) Salt water poisoning.—Indian Territory Illuminating Oil Co. v. Carter, 57 P.2d 864, 177 Okl. 1.

Experienced shipper who was first to see and unload stock was qualified to testify as to the cause of injuries to it.—Witmer v. Pennsylvania R. Co., 30 Pa.Dist. 112.

8. Tex.—Davis v. Cochran, Civ. App., 275 S.W. 423.
Vt.—Downing v. Wimble, 123 A. 433, 97 Vt. 390.
22 C.J. p 644 note 81.

Liberal rule must be applied in regard to evidence as to diseases in animals.—Alford v. Kruse, 235 N.W. 903, 905, 183 Minn. 158, citing Corpus Juris—Wilson v. Lynard, 202 N. W. 713, 162 Minn. 135—22 C.J. p 643 note 76 [b].

Contagious abortion
Farmers and dairymen, as well as technical experts or veterinarians, who are familiar with the disease of contagious abortion in cattle, may testify as to whether cattle observed by them had such disease.—Alford v. Kruse, 235 N.W. 903, 183 Minn. 158—Wilson v. Lynard, 202 N.W. 713, 162 Minn. 135.

Duration of disease is a proper subject of opinion evidence.—Housman v. Geiman, 252 N.W. 857, 62 S. D. 310—22 C.J. p 644 note 83 [a] (3).

Time of observation
A veterinarian's testimony that he treated an animal for rheumatism shortly after the time in question, and that in his opinion the animal at that time had been afflicted about two years, was not subject to objection that his observation had not been made at or near the time in question.—Long v. Myers, 80 So. 76, 202 Ala. 238.

9. **Infected pens**
Tex.—Hines v. Davis, Civ.App., 225 S.W. 862.
22 C.J. p 644 note 82.

10. Tex.—Hines v. Davis, supra.
22 C.J. p 644 note 83.

11. Tex.—Panhandle & S. F. Ry. Co. v. Sanderson, Civ.App., 218 S.W. 540, dismissed for want of jurisdiction.
22 C.J. p 644 notes 79 [a], 80.

Shrinkage as due to negligent care.—Panhandle & S. F. Ry. Co. v. Andrews, Tex.Civ.App., 278 S.W. 478.

Symptoms and appearance
A skilled or expert witness may explain the symptoms and appearance of stock which has died from want of proper care.—Stonam v. Waldo, 17 Mo. 489.

12. S.D.—Erickson v. Webber, 237 N.W. 558, 58 S.D. 446, 80 A.L.R. 914—Lerum v. Chicago, M. & St. P. Ry. Co., 172 N.W. 878, 42 S.D. 103.
22 C.J. p 645 note 88.

13. **Stampede** as affecting the general appearance and market value of fat stock.—Cooke v. Kansas City, Ft. S. & M. R. Co., 57 Mo.App. 471.

14. **Shrinkage in weight**
Md.—Bloecher & Schaaf v. Pennsylvania R. Co., 160 A. 281, 162 Md. 463.

15. **Effect of polluted water** on cattle.
U.S.—Manhattan Oil Co. v. Mosby, C.C.A.Mo., 72 F.2d 840, certiorari denied 55 S.Ct. 237, 293 U.S. 623, 79 L.Ed. 710.
Kan.—Todd v. Prairie Pipe Line Co., 196 P. 623, 108 Kan. 485.

Temperature in car
A witness having special knowledge of the subject may testify whether stock would freeze in a car at a temperature shown to have existed during transportation.—Colsch v. Chicago, M. & St. P. R. Co., 127 N.W. 198, 149 Iowa 176, 34 L.R.A., N.S., 1018, Ann.Cas.1912C 915.

would account for a given result.[16] Likewise, a stockman, or other witness with sufficient experience, may be permitted to state an inference as to such matters as the age,[17] size,[18] weight,[19] condition,[20] or character and habits[21] of animals with which he has had experience; whether an animal is carrying her young;[22] and various other matters.[23]

When inference or judgment rejected. A witness who is not shown to possess knowledge or skill sufficient to render his inference or judgment of value to the jury will not be permitted to state it.[24] A skilled or expert witness will not be permitted to state an inference or judgment where all the facts can be fully presented to the jury and are such that persons of ordinary experience and intelligence are capable of drawing the correct inferences from them,[25] and, generally speaking, a witness should not be permitted to state an inference or judgment as to the ultimate fact to be determined by the jury.[26] An inference or judgment may not be based

16. Iowa.—Lyons v. Farm Property Mut. Ins. Ass'n of Iowa, 176 N.W. 291, 188 Iowa 506.
22 C.J. p 645 note 86.

17. Iowa.—Moreland v. Mitchell County, 40 Iowa 394.
22 C.J. p 645 note 92.

18. Tex.—Lancaster v. Rogers & Adams, Civ.App., 235 S.W. 643, affirmed, Com.App., 248 S.W. 660.

19. Miss.—Robertson Bros. v. Mobile & O. R. Co., 124 So. 334, 155 Miss. 198.
Mo.—Carpenter v. Hines, App., 239 S.W. 593.
Tex.—Texas & P. Ry. Co. v. Moore, Civ.App., 7 S.W.2d 902, error dismissed—Atchison, T. & S. F. Ry. Co. v. Abercrombie, Civ.App., 283 S.W. 294—Lancaster v. Rogers & Adams, Civ.App., 235 S.W. 643, affirmed, Com.App., 248 S.W. 660.
22 C.J. p 645 note 93.

Particular questions

(1) Average weight.—Allender v. Chicago & N. W. Ry. Co., 230 N.W. 102, 119 Neb. 559.

(2) Weight at place of shipment as indicated by appearance at place of destination.—Westphalen v. Atlantic Northern & Southern R. Co., 132 N.W. 57, 152 Iowa 232.

(3) Probable gain in weight if kept in a certain place.
U.S.—Manhattan Oil Co. v. Mosby, C.C.A.Mo., 72 F.2d 840, certiorari denied 55 S.Ct. 237, 293 U.S. 623, 79 L.Ed. 710.
Iowa.—Ware Cattle Co. v. Anderson, 77 N.W. 1026, 107 Iowa 231.

(4) Shrinkage in weight.
Idaho.—Boulton v. Telfer, 12 P.2d 767, 52 Idaho 185, 83 A.L.R. 1341, certiorari denied Telfer v. Boulton, 53 S.Ct. 115, 287 U.S. 655, 77 L.Ed. 565.
Tex.—St. Louis, I. M. & S. R. Co. v. Dodson, Civ.App., 97 S.W. 523.

20. Ind.—Adams Express Co. v. Heagy, 122 N.E. 603, 69 Ind.App. 652.
Tex.—Lancaster v. Rogers & Adams, Civ.App., 235 S.W. 643, affirmed, Com.App., 248 S.W. 660.
22 C.J. p 644 note 78 [b], [d]; p 645 note 94.

Particular matters

(1) "Good" condition.—Ball v. Chicago, R. I. & P. Ry. Co., 181 N.W. 469, 190 Iowa 977.

(2) Condition to stand shipment.
Mo.—Cravens v. Hines, App., 218 S. W. 912.
Tex.—Ft. Worth & R. G. R. Co. v. Ellis, Civ.App., 225 S.W. 409, dismissed for want of jurisdiction.

(3) "Appearance."—Atchison T. & S. F. Ry. Co. v. Abercrombie, Tex. Civ.App., 283 S.W. 294.

21. **Dangerous character**
U.S.—Congress & Empire Spring Co. v. Edgar, N.Y., 99 U.S. 645, 25 L. Ed. 487.
3 C.J. p 88 note 23 [b].

Horses

(1) Generally.—Delfs v. Dunshee, 122 N.W. 236, 143 Iowa 381.

(2) Objects calculated to frighten horses.—Barber v. Manchester, 45 A. 1014, 72 Conn. 675—22 C.J. p 645 note 2.

(3) Whether a horse which had not run away for a year and a half would require no more care than formerly.—Donnelly v. Fitch, 136 Mass. 558.

22. Iowa.—Boyer v. Chicago, R. I. & P. R. Co., 98 N.W. 764, 123 Iowa 248.
22 C.J. p 645 note 87.

23. **Particular matters**

(1) What was the matter with horses alleged to have been injured by mistreatment and overdriving.
Mo.—Woolwine v. Bick, 39 Mo.App. 495.
Wash.—Welch v. Fransioli, 90 P. 644, 46 Wash. 530.

(2) Duration of wound on a horse. —Alabama Great Southern R. Co. v. Gewin, 59 So. 553, 5 Ala.App. 584.

(3) The capacity of a certain range to feed stock.—Mitchell v. Excelsior Water & Mining Co., 182 P. 326, 41 Cal.App. 240.

(4) The prospects of fattening stock in the locality of a certain pasture.—Tuttle v. Moody, Tex.Civ. App., 94 S.W. 134.

(5) The number of cattle of a particular brand on a certain range. —Albright v. Corley, 40 Tex. 106, 114—22 C.J. p 645 note 95.

(6) The sufficiency of the fence in question to turn ordinary cattle, or those not having unruly or breachy dispositions.—Trammell v. Turner, Tex.Civ.App., 82 S.W. 325.

(7) How a brand reads.
Colo.—Askew v. People, 48 P. 524, 23 Colo. 446.
Tex.—Gatlin v. State, 163 S.W. 428, 72 Tex.Cr. 516.
22 C.J. p 645 note 85.

(8) Proper method of instruction in horseback riding.—Brenner v. Menaker, D.C.N.Y., 36 F.Supp. 16.

24. Mo.—Marshall v. Bingle, 36 Mo. App. 122.
22 C.J. p 643 note 76 [e], p 644 notes 79 [b], 81 [h].

Particular qualifications held insufficient

(1) A physician and surgeon who had never qualified in veterinary science, had never treated cattle or animals, and knew nothing about the effect of the tuberculin test on cattle or other animals was not qualified to testify as to the effect of such test on cattle.—Buerkli v. Carstens Packing Co., 210 P. 798, 122 Wash. 458.

(2) A person employed three years by a sheepman is not qualified to testify as an expert regarding the impracticability of saving any considerable portion of lambs born during the winter.—McCurdy v. Aylor, 170 N.W. 523, 41 N.D. 187.

(3) Other decisions see 22 C.J. p 643 note 76 [f], [g].

25. W.Va.—Johnston v. Mack Mfg. Co., 64 S.E. 841, 65 W.Va. 544, 131 Am.S.R. 979, 24 L.R.A.,N.S., 1189.
3 C.J. p 116 note 72[a] (2).

Care of horses

It has been held that in a rural community a witness should not be allowed to state matters relating to the care of horses.
Ill.—Brink's Chicago City Express Co. v. Kinnare, 48 N.E. 446, 168 Ill. 643.
Vt.—Oakes v. Weston, 45 Vt. 430.

26. Ill.—Ehrhardt v. Connecticut Fire Ins. Co., 219 Ill.App. 48.
Iowa.—Crouch v. National Live

on facts which are neither in evidence nor known to the witness,[27] and a skilled witness must state the basis of his inference.[28]

§ 525. Cause and Effect

A witness may state an inference or judgment as to the cause or the effect of an observed particular occurrence where he possesses special skill or experience enabling him to estimate the matter more accurately than it would be possible for the jury to do.

It frequently happens that a witness, by reason of his special skill or experience along certain lines, is able to estimate more correctly than it would be possible for the jury to do, the cause of an observed phenomenon,[29] or the effect of a particular occurrence,[30] and in such circumstances the witness is permitted to state his inference or judgment. However, where the witness is not shown to possess the necessary skill and experience to render his inference of value,[31] or where the jury are competent to reach a correct conclusion, on facts stated to them,[32] the inference of the witness should be rejected. A mere surmise of the witness should be excluded,[33] and, hence, even a skilled witness cannot state what in his opinion might possibly ensue from a given state of facts, but is confined to those things which are reasonably probable.[34]

§ 526. Conduct of Business

A witness having special knowledge and experience may state an inference or judgment as to matters of business concerning which the jury could not fairly be expected to draw accurate conclusions for themselves.

A witness having special knowledge and experience in matters of business[35] may state an inference or judgment as to such matters of a nature concerning which the jury could not fairly be expected to draw accurate conclusions for themselves.[36] Thus, a qualified witness may state an inference or judgment as to whether a certain practice is good or bad business;[37] whether it would be practicable to carry on a particular business under given cir-

Stock Remedy Co., 217 N.W. 557, 205 Iowa 51.
N.C.—Nance v. Norfolk Southern R. Co., 127 S.E. 635, 189 N.C. 638.
Wis.—Tegen v. Chapin, 187 N.W. 185, 176 Wis. 410.

27. Ind.—Adams Express Co. v. Heagy, 122 N.E. 603, 69 Ind.App. 652.
Iowa.—Phillips v. Leuth, 204 N.W. 301, 200 Iowa 272.

28. Ga.—Crouch v. Spooner, 72 S. E. 61, 9 Ga.App. 695.
Tex.—San Antonio & A. P. R. Co. v. Barnett, 66 S.W. 474, 27 Tex. Civ.App. 498.

29. Ala.—Tennessee Coal, Iron & R. Co. v. Carson, 88 So. 650, 205 Ala. 518.
Mo.—Klohr v. Edwards, App., 94 S. W.2d 99—Mueller v. St. Louis Public Service Co., App., 44 S.W. 2d 875.
Mont.—Sellers v. Montana-Dakota Power Co., 41 P.2d 44, 48, 99 Mont. 39, quoting **Corpus Juris.**
Tex.—Montgomery Ward & Co. v. Levy, Civ.App., 136 S.W.2d 663, error dismissed, judgment correct—Gulf, C. & S. F. Ry. Co. v. Downs, Civ.App., 70 S.W.2d 318, error refused.
22 C.J. p 648 note 43.

Corpus Juris statement cited in support of a similar rule in criminal proceedings.—State v. Gore, 106 P. 2d 704, 707, 152 Kan. 551.

Cause of condition
Tenn.—National Life & Accident Ins. Co. v. Follett, 80 S.W.2d 92, 168 Tenn. 647.
Tex.—Commercial Standard Ins. Co. v. Robinson, Com.App., 151 S.W.2d 795, reversing, Civ.App., 126 S.W. 2d 1026, conforming to mandate Robinson v. Commercial Standard Ins. Co., 123 S.W.2d 337, 132 Tex. 163, reversing Commercial Standard Ins. Co. v. Robinson, Civ.App., 91 S.W.2d 1147.

30. U.S.—Massachusetts Protective Ass'n v. Mouber, C.C.A.Mo., 110 F. 2d 203.
Mo.—Scanlon v. Kansas City, 81 S. W.2d 939, 336 Mo. 1058—Kimmie v. Terminal R. R. Ass'n of St. Louis, 66 S.W.2d 561, 334 Mo. 596—Wack v. F. E. Schoenberg Mfg. Co., 53 S.W.2d 28, 331 Mo. 197—Fritz v. Manufacturers Ry. Co., App., 124 S.W.2d 603—Klohr v. Edwards, App., 94 S.W.2d 99—Mueller v. St. Louis Public Service Co., App., 44 S.W.2d 875.
Tex.—Gulf, C. & S. F. Ry. Co. v. Downs, Civ.App., 70 S.W.2d 318, error refused.
22 C.J. p 648 note 44.

31. Ala.—Lawrence v. Kaul Lumber Co., 55 So. 111, 171 Ala. 300.
22 C.J. p 648 note 66.

Qualification to negative a factor as cause does not necessarily qualify a witness to state an opinion as to what the cause was.—Katskee v. City of Omaha, 193 N.W. 752, 110 Neb. 380.

32. Cal.—Davis v. Connecticut Fire Ins. Co., 112 P. 549, 158 Cal. 766, 32 L.R.A.,N.S., 604.
22 C.J. p 648 note 67.

33. Ill.—Stevens v. Illinois Cent. R. Co., 137 N.E. 859, 306 Ill. 370.
Pa.—Sweeney v. Blue Anchor Beverage Co., 189 A. 331, 334, 325 Pa. 216, quoting **Corpus Juris.**
22 C.J. p 648 note 68.

34. Ill.—Stevens v. Illinois Cent. R. Co., 137 N.E. 859, 306 Ill. 370.
Pa.—Sweeney v. Blue Anchor Beverage Co., 189 A. 331, 334, 325 Pa. 216, quoting **Corpus Juris**—Snyder v. Rhoads, 8 Pa.Dist. & Co. 366, 22 Sch.Leg.Rec. 173.
Tex.—Houston & T. C. R. Co. v. Fox, Civ.App., 156 S.W. 922.

35. Md.—Eastern Shore Brokerage & Commission Co. v. Harrison, 118 A. 192, 141 Md. 91.
22 C.J. p 650 note 98, p 680 note 43.

Sufficiency of knowledge
(1) Knowledge of witness must be shown to have existed at a relevant time.—Erhardt v. Ballin, N.Y., 55 F. 968, 5 C.C.A. 363.

(2) Also it must be shown to have existed at a place relevant to the inquiry.—Jones v. Mechanics' Fire Ins. Co., 36 N.J.Law 29, 13 Am.R. 405.

(3) But change of employment after such knowledge was acquired does not disqualify a witness.—Bearss v. Copley, 10 N.Y. 93.

Business of corporation
Generally officers of corporation charged with conduct of its business are qualified to testify as experts on questions relating to such business.—Miller v. Puget Sound Bridge & Dredging Co., 250 P. 64, 140 Wash. 663.

36. Pa.—Marine Coal Co. v. Pittsburgh, M. & Y. R. Co., 92 A. 688, 246 Pa. 478.
22 C.J. p 649 note 97, p 680 notes 44, 45.

37. Ind.—Public Service Commission v. Frazee, 122 N.E. 328, 188 Ind. 573.

Witness held not qualified to state whether a bid was safe and in line.

cumstances;[38] whether a particular business would have produced a profit;[39] conditions essential to profitability;[40] the profits to be derived from a certain business;[41] reasonable and proper rate of capitalization or return on investment;[42] proper amount to be allowed for depreciation;[43] costs;[44] the solvency of a business with whose affairs the witness has become familiar;[45] the character of negotiable paper,[46] bank bills,[47] and certain other instruments;[48] a reasonable time for accepting or rejecting an order;[49] advertising;[50] markets;[51] and production capacity.[52] A qualified witness may also state an inference or judgment as to the condition, or matters affecting the condition, of articles pertaining to a certain business;[53] what articles would come under a trade designation;[54] whether articles are of the same quality;[55] whether the resemblance between certain articles is sufficiently great to deceive buyers of ordinary caution,[56] or whether the right of one, whose product has gained public recognition, to enjoy such recognition has been violated;[57] and various other matters.[58]

—Marrazzo v. Orino, 78 P.2d 181, 194 Wash. 364.

38. N.C.—Belding v. Archer, 24 S.E. 800, 131 N.C. 287.

Tex.—Meyers Bros. Drug Co. v. Madden-Graham, 99 S.W. 723, 45 Tex.Civ.App. 74.

39. N.Y.—Sparkill Realty Corporation v. State, 4 N.Y.S.2d 679, 254 App.Div. 78, motion denied 4 N.Y.S.2d 1023, 254 App.Div. 800, affirmed 18 N.E.2d 301, 279 N.Y. 656.

Witness not familiar with business

Person who did not know manufacturer's overhead and distributing costs could not testify as to probable profits.—Community Public Service Co. v. Gray, Tex.Civ.App., 107 S.W.2d 495.

40. **Witness held qualified** to state the number of customers necessary to make a certain operation profitable.—W. F. Boardman Co. v. Petch, 199 P. 1047, 186 Cal. 476.

41. Tex.—Osage Oil & Refining Co. v. Lee Farm Oil Co., Civ.App., 230 S.W. 518, error refused.

42. Hawaii.—In re Taxes Onomea Sugar Co., 31 Hawaii 769.

Ind.—Public Service Commission v. Frazee, 122 N.E. 328, 188 Ind. 573.

Turnpike

Ohio.—Cincinnati v. Scarborough, 6 Ohio Dec. (Reprint) 874, 8 Am. L.Rec. 562, 5 Cinc.L.Bul. 77.

43. U.S.—Mollohon Mfg. Co. v. U. S., Ct Cl., 8 F.Supp. 725.

44. **Cost of services**

Pa.—Sharon Herald Co. v. Mercer County, 200 A. 880, 132 Pa.Super. 245.

Increase of costs during a certain period.—Public Service Commission v. Frazee, 122 N.E. 328, 188 Ind. 573.

45. U.S.—Lucas v. Swan, C.C.A.W. Va., 67 F.2d 106.

Iowa.—State v. Boomer, 72 N.W. 424, 103 Iowa 106.

Mich.—Pearson v. Wallace, 170 N.W. 72, 203 Mich. 622.

Witnesses not sufficiently familiar

(1) Bookkeeper.—Stitzer Hotel Co. v. Beyer, C.C.A.N.J., 55 F.2d 620.

(2) State auditor who knew nothing about company except as shown by its books.—Wilson v. Guaranteed Securities Co., 23 P.2d 921, 82 Utah 224.

(3) Liquidating agent of bank who took charge five years after date of insolvency in question.—Austin v. Pool, Tex.Civ.App., 299 S.W. 935.

46. U.S.—Cochran v. U. S., Colo., 15 S.Ct. 628, 157 U.S. 286, 39 L.Ed. 704.

22 C.J. p 680 note 48.

47. Ill.—Keating v. People, 43 N.E. 724, 160 Ill. 480.

22 C.J. p 680 note 49.

48. **Character as corporate securities**

U.S.—Fidelity Inv. Ass'n v. U. S., Ct. Cl., 5 F.Supp. 19, certiorari denied U. S. v. Fidelity Investment Ass'n, 54 S.Ct. 560, 291 U.S. 685, 78 L.Ed. 1071.

49. **Witness held qualified** to state an opinion as to the matter stated in the text.—T. C. May Co. v. Menzies Shoe Co., 119 S.E. 227, 186 N.C. 144.

50. Pa.—Perry v. Jensen, 21 A. 866, 142 Pa. 125, 12 L.R.A. 393.

What constitutes suitable advertising

Pa.—Perry v. Jensen, supra.

22 C.J. p 680 note 52.

Desirability of sign locations

Ala.—Alabama Trunk & Luggage Co. v. Hauer, 108 So. 339, 214 Ala. 473.

51. **Particular matters**

(1) Whether a certain market tends to follow another market.—Lloyd v. Silvers, Tex.Civ.App., 274 S.W. 253.

(2) What stock market reports are trustworthy.—Henry v. Kopf, 131 A. 412, 104 Conn. 73.

(3) Application of rules of an exchange.—Lloyd v. Silvers, supra.

(4) Possibility of sale at market price at a particular time and place.—Sledge & Norfleet v. Bondurant, 5 Tenn.App. 319.

52. Iowa.—Paddock v. Bartlett, 25 N.W. 906, 68 Iowa 16.

22 C.J. p 680 note 53.

53. Ark.—General Fire Extinguisher Co. v. Beal-Doyle Dry Goods Co., 160 S.W. 889, 110 Ark. 49, Ann.Cas.1915D 79.

Ga.—Holtzendorf v. McNeil, 104 S.E. 919, 25 Ga.App. 792.

Deterioration of fruit

Minn.—Fruit Dispatch Co. v. Murphy, 96 N.W. 83, 90 Minn. 286.

N.Y.—Wilson v. F. C. Linde Co., 62 N.Y.S. 69, 47 App.Div. 327.

Effect of rain or other injury

S.C.—Sonneborn v. Southern R. Co., 44 S.E. 77, 65 S.C. 502.

22 C.J. p 680 note 57.

Condition when shipped

Expert may state whether articles arriving at their destination in given condition could have been in different condition when shipped.—Forcheimer v. Stewart, 32 N.W. 665, 35 N.W. 148, 73 Iowa 216—22 C.J. p 680 note 58.

Witness held qualified to express an opinion as to temperature to be maintained for preservation of certain articles.—Wilson v. F. C. Linde Co., 62 N.Y.S. 69, 47 App.Div. 327.

54. U.S.—Erhardt v. Ballin, N.Y., 55 F. 968, 5 C.C.A. 363.

22 C.J. p 680 note 54.

Witness not qualified

A witness with experience in the manufacture but not the sale of an article may not be competent to prove commercial designation regarding it.—Tower & Sons v. U. S., 11 Ct.Cust.App. 261.

55. Cal.—People v. Lovren, 51 P. 22, 638, 119 Cal. 88.

56. Conn.—Williams v. Brooks, 50 Conn. 278, 47 Am.R. 642.

57. U.S.—Premier-Pabst Corporation v. Elm City Brewing Co., D. C.Conn., 9 F.Supp. 754.

58. **Particular matters**

(1) Alteration of garments.—Moschcowitz v. Flint, 67 N.Y.S. 852, 33 Misc. 480.

(2) Other particular matters see 22 C.J. p 649 note 97 [a].

Witness held qualified to testify as expert as to the sufficiency of a single watchman for an establishment.—Cameron Compress Co. v. Jacobs, Tex.Civ.App., 10 S.W.2d 1040, error refused.

However, the inference or judgment of an observer is rejected where the facts may be fully placed before the jury and are such that it may fairly be assumed that persons of ordinary information and intelligence are capable of drawing the correct inference from them.[59] Generally speaking, also, a witness should not be permitted to state an inference or judgment as to the ultimate fact to be determined by the court or jury.[60]

Bookkeeping. An expert in bookkeeping matters, such as a bookkeeper or accountant, may testify as to the problems involved in a set of books submitted to him for examination,[61] or explain entries,[62] or state his conclusions from an examination of books, records, or reports;[63] and such a witness may explain the significance of matter in a contract for services to be rendered by an accountant.[64] An expert who examined the books is not, however, entitled, without proof of additional qualifications, to give his opinions as to matters not limited to bookkeeping;[65] nor may he give his opinion as to the ultimate fact to be decided where the trier of facts is equally able to reach a conclusion from the facts.[66]

§ 527. Construction, Condition, or Repair of Structures, Machinery, and Appliances

The special skill of a witness may qualify him to state an inference or judgment as to the construction or the condition or state of repair of structures, machinery, or appliances.

The special skill or experience of a witness may qualify him to state an inference or judgment as to the construction[67] or the condition or state of repair[68] of structures, machinery, or appliances. Thus such a witness may state an inference or judgment as to such matters as whether certain structures, machinery, or appliances are of proper design,[69] safe,[70] or defective;[71] whether they are

59. U.S.—Prentiss v. Chandler, C.C.A.Cal., 85 F.2d 733, certiorari denied 57 S.Ct. 431, 300 U.S. 654, 81 L.Ed. 864—Prentiss v. Times-Mirror Co., C.C.A.Cal., 85 F.2d 733, certiorari denied 57 S.Ct. 431, 300 U.S. 654, 81 L.Ed. 864.
N.Y.—Noah v. Bowery Sav. Bank, 122 N.E. 235, 225 N.Y. 284, reversing 155 N.Y.S. 1128, 171 App.Div. 912—Oakite Products v. Boritz, 293 N.Y.S. 399, 161 Misc. 807.
22 C.J. p 650 note 99.

60. U.S.—Continental Casualty Co. v. First Nat. Bank of Temple, C.C.A.Tex., 116 F.2d 885, certiorari denied First Nat. Bank of Temple v. Continental Casualty Co., 61 S.Ct. 1087, 313 U.S. 575, 85 L.Ed. 1533.
Tenn.—Gibson County v. Fourth & First Nat. Bank, 96 S.W.2d 184, 20 Tenn.App. 168.
Tex.—Mial v. Parkhill, Civ.App., 16 S.W.2d 1109.
Wis.—Knobel v. J. Bartel Co., 187 N.W. 188, 176 Wis. 393.

61. Cal.—Crusoe v. Clark, 59 P. 700, 127 Cal. 341.

62. N.C.—Bank of Vance v. Crowder, 139 S.E. 604, 194 N.C. 331.
Or.—Pacific Trading Co. v. Sun Ins. Office, 25 P.2d 1052, 145 Or. 211.

63. U.S.—Ætna Casualty & Surety Co. v. Commercial State Bank of Rantoul, D.C.Ill., 13 F.2d 474.
Ga.—Crawford v. Roney, 55 S.E. 499, 126 Ga. 763.

64. Pa.—O'Neill v. Atlas Automobile Finance Corporation, 11 A.2d 782, 139 Pa.Super. 346.

Accountant may testify on own behalf
Pa.—O'Neill v. Atlas Automobile Finance Corporation, supra.

65. **Reasonable minimum compensation** for company's executive officers is not within scope of testimony which expert who examined books may give, in absence of showing that he was qualified on the point, or that the examination of books covered sufficient time to make his evidence pertinent.—Beaman v. Gerrish, 126 N.E. 352, 235 Mass. 79.

66. Ill.—Scharlau v. Lombard State Bank, 278 Ill.App. 487.
Trial before court without jury
Ill.—Scharlau v. Lombard State Bank, supra.
Explanation of unambiguous account
U.S.—Blanchard v. Commercial Bank, Wash., 75 F. 249, 21 C.C.A. 319.
Tex.—Coe v. Nash, Civ.App., 40 S.W. 235.
Whether accounts can be kept in certain way
Tenn.—Fry v. Provident Sav. Life Assur. Soc., Ch.A., 38 S.W. 116.

67. Tenn.—Armstrong v. Bowman, 115 S.W.2d 229, 21 Tenn.App. 673.
Wis.—Coakley v. Prentiss-Wabers Stove Co., 195 N.W. 388, 182 Wis. 94.
22 C.J. p 650 note 1, p 658 note 64.
Construction, condition, or repair of buildings see infra § 546.

68. Ala.—Burgin v. Stewart, 114 So. 182, 216 Ala. 663—Yates v. Barnett, 112 So. 122, 215 Ala. 554.
Ariz.—Broderick v. Coppinger, 14 P.2d 714, 715, 40 Ariz. 524, citing **Corpus Juris.**
N.J.—Sutton v. Lerner Stores Corporation, 162 A. 645, 646, 10 N.J. Misc. 1126, citing **Corpus Juris.**
22 C.J. p 650 note 1, p 658 note 63, p 659 note 77 [b].

69. N.Y.—Glynne v. National Exhibition Co., 198 N.Y.S. 751, 204 App.Div. 757.
Tex.—Carlisle v. West Texas Fair Ass'n, Civ.App., 12 S.W.2d 599, error refused.

70. U.S.—Yarn v. Ft. Dodge, D. M. & S. R. Co., C.C.A.Iowa, 31 F.2d 717, certiorari denied Fort Dodge, D. M. & S. R. Co. v. Yarn, 50 S.Ct. 27, 280 U.S. 568, 74 L.Ed. 621.
Ala.—Standard Cooperage Co. v. Dearman, 86 So. 537, 204 Ala. 553—Marbury Lumber Co. v. Heinege, 85 So. 453, 204 Ala. 241.
Conn.—Sickmund v. Connecticut Co., 189 A. 876, 122 Conn. 375.
Ky.—Goodin, Brown & Co. v. Skaggs, 195 S.W. 427, 176 Ky. 285.
Mass.—Coulombe v. Horne Coal Co., 175 N.E. 631, 275 Mass. 226.
Mo.—Busch & Latta Paint Co. v. Woermann Const. Co., 276 S.W. 614, 310 Mo. 419.
22 C.J. p 660 note 81.
Witness held qualified
Mass.—Van Steenbergen v. Barrett, 190 N.E. 597, 286 Mass. 400.

71. Ga.—Southern R. Co. v. Cowan, 183 S.E. 331, 52 Ga.App. 360—Queen v. Patent Scaffolding Co., 167 S.E. 789, 46 Ga.App. 364.
Witnesses held qualified
Ala.—Commercial Inv. Trust v. Hurst Bros., 126 So. 886, 23 Ala.App. 454.
Ky.—E. M. F. Co. v. Davis, 142 S.W. 391, 146 Ky. 231.
N.J.—Clark v. Standard Sanitary Mfg. Co., 149 A. 828, 8 N.J.Misc. 284.

standard or such as are usually employed;[72] differences between certain structures;[73] whether certain construction is proper,[74] safe,[75] or economical,[76] or was done as rapidly as practicable,[77] or in compliance with a contract therefor;[78] the reasons for construction of a certain type;[79] whether a certain structure could have been built[80] or certain repairs could have been made;[81] whether certain repairs are necessary;[82] how a structure may be made safer;[83] the effect of defective construction[84] or of a certain process of repair;[85] the age of machinery;[86] whether a break in a machine was recent;[87] or the cost of structures[88] or machinery,[89] or of repairs[90] or reproduction.[91]

When inference or judgment rejected. A witness will not be permitted to state an inference or judgment where he lacks sufficient knowledge or skill to make his statement of value.[92] Likewise, a skilled inference or expert judgment is rejected where it is apparent that the facts can be fully presented to the jury and the circumstances are such that it may fairly be assumed that persons of ordinary information and intelligence are competent to draw the correct inference from such facts;[93] but the fact that testimony is in regard to a matter of common knowledge may not necessarily render its admission error.[94] Generally speaking, an inference or judgment as to the ultimate fact to be determined by the jury is excluded.[95] An opinion of an expert in respect of a matter which may be proved as a fact is inadmissible.[96] The admissibility of expert testimony does not depend on there being in evidence a standard by which to judge the testimony.[97]

§ 528. Damages

Damages as a subject of skilled inference or expert judgment are considered supra § 447.

§ 529. Due Care and Proper Conduct

A witness familiar with a particular business or

72. N.H.—Perreault v. Allen Oil Co., 179 A. 365, 87 N.H. 306.
Tex.—Carlisle v. West Texas Fair Ass'n, Civ.App., 12 S.W.2d 599, error refused.

73. Md.—Gwynn Oak Park v. Becker, 10 A.2d 625, 177 Md. 528.

74. Ga.—Southern R. Co. v. Cowan, 183 S.E. 331, 52 Ga.App. 360.
Mass.—Cushing v. Jolles, 197 N.E. 466, 292 Mass. 72.
Pa.—Muller v. A. B. Kirschbaum Co., 148 A. 851, 298 Pa. 560.
Tex.—Bell v. Mulkey, Civ.App., 248 S.W. 784.
22 C.J. p 646 notes 22 [a], 24 [a] (7), p 647 notes 26 [a] (2), (3), p 650 note 1, p 660 note 82.

75. Mich.—Beunk v. Valley City Desk Co., 87 N.W. 793, 128 Mich. 562.
22 C.J. p 658 note 67.
Witness held qualified
Mo.—Busch & Latta Paint Co. v. Woermann Const. Co., 276 S.W. 614, 310 Mo. 419.

76. U.S.—Campbell v. New York City, C.C.N.Y., 81 F. 182.

77. Wis.—Stiles v. Neillsville Milling Co., 58 N.W. 411, 87 Wis. 266.

78. Cal.—Fernholtz Machinery Co. v. Wilson, 5 P.2d 679, 118 Cal.App. 573.

79. N.Y.—Levine v. Russell Blaine Co., 7 N.E.2d 673, 273 N.Y. 386, reversing 284 N.Y.S. 79, 246 App. Div. 717.

80. **Witness held qualified**
Mo.—Probst v. St. Louis Basket & Box Co., 207 S.W. 891, 200 Mo.App. 568, affirmed State ex rel. St. Louis Basket & Box Co. v. Reynolds, 224 S.W. 401, 284 Mo. 372.

81. **Witness held qualified** to testify whether a certain machine could be repaired so as to operate properly for the purpose for which it was intended.—Wolff v. Hartford Fire Ins. Co., 223 S.W. 810, 204 Mo.App. 491.

82. Md.—Cooke v. England, 27 Md. 14, 92 Am.D. 618.

83. Ala.—Norwood Clinic v. Spann, 199 So. 840, 240 Ala. 427—Marbury Lumber Co. v. Heinege, 85 So. 453, 204 Ala. 241.

84. Tenn.—Armstrong v. Bowman, 115 S.W.2d 229, 21 Tenn.App. 673.

85. U.S.—American Pacific Whaling Co. v. Kristensen, C.C.A.Wash., 93 F.2d 17.

86. Ala.—Alabama Machinery & Supply Co. v. Caffey, 104 So. 509, 213 Ala. 260.

87. Mich.—Woods v. Chicago & G. T. R. Co., 66 N.W. 328, 108 Mich. 396.

88. Conn.—Bryan v. Branford, 50 Conn. 246.
22 C.J. p 646 note 13.

89. U.S.—Hunt Bros. Fruit Packing Co. v. Cassiday, Cal., 53 F. 257, 3 C.C.A. 525.
Ill.—Overall v. Chicago Motor Car Co., 183 Ill.App. 276.

90. Ill.—Peabody v. Lynch, 184 Ill. App. 78.
Md.—Mullan v. Belbin, 100 A. 384, 130 Md. 313.
Mich.—Wickes v. Swift Electric Light Co., 38 N.W. 299, 70 Mich. 322.
22 C.J. p 660 note 86.

91. N.H.—State v. Hampton Water Works Co., 18 A.2d 765, rehearing denied 19 A.2d 435.

92. U.S.—Ensign-Bickford Co. v. Reeves, C.C.A.Mo., 95 F.2d 190.
Del.—Mills Novelty Co. v. Transeau, 8 A.2d 93, 1 Terry 227.
Mo.—Wolff v. Hartford Fire Ins. Co., 223 S.W. 810, 204 Mo.App. 491.
Pa.—Pittsburgh Terminal Warehouse & Transfer Co. v. City of Pittsburgh, 198 A. 632, 330 Pa. 72.
22 C.J. p 658 note 58 [c].

93. D.C.—Walker v. Dante, 58 F.2d 1076, 61 App.D.C. 175.
Md.—Leland v. Empire Engineering Co., 108 A. 570, 135 Md. 208.
Tex.—American Nat. Ins. Co. v. Nussbaum, Civ.App., 230 S.W. 1102, 1107, dismissed for want of jurisdiction, citing **Corpus Juris.**
Vt.—Lucas v. Kelley, 147 A. 281, 102 Vt. 173.
22 C.J. p 651 note 2.

94. Ala.—Norwood Clinic v. Spann, 199 So. 840, 240 Ala. 427.

95. Ala.—Standard Cooperage Co. v. Dearman, 86 So. 537, 204 Ala. 553.
Cal.—McStay v. Citizens' Nat. Trust & Savings Bank of Los Angeles, 43 P.2d 560, 5 Cal.App.2d 595.
Ill.—Hairgrove v. City of Jacksonville, 8 N.E.2d 187, 366 Ill. 163.
N.J.—Krieg v. Timken, 131 A. 905, 102 N.J.Law 307.
N.Y.—Jean v. Algonquin Hotel Co., 7 N.Y.S.2d 412, 255 App.Div. 279.
Okl.—Oklahoma Wheat Pool Terminal Corporation v. Rodgers, 70 P. 2d 1080, 180 Okl. 623.
Tex.—American Nat. Ins. Co. v. Nussbaum, Civ.App., 230 S.W. 1102, dismissed for want of jurisdiction.

96. Or.—Cosgrove v. Tracey, 64 P. 2d 1321, 156 Or. 1.

97. N.H.—Bill v. New England Cities Ice Co., 10 A.2d 662, 90 N.H. 453.

particular operations may state an inference or judgment with respect to what is or is not due care or proper conduct in connection therewith.

A witness who is familiar with a particular business or particular operations may be permitted to state an inference or judgment with respect to what is or is not due care or proper conduct in connection therewith,[98] where, and only where, the matter is one so far removed from ordinary human experience that a jury will presumably not possess the skill or knowledge requisite to draw a proper inference from the facts.[99] A witness may not state such an inference or judgment where he has not sufficient knowledge to make his inference of value.[1]

§ 530. Electricity, Engineering, Manufacturing, and Mechanics

a. Electricity
b. Engineering
c. Manufacturing
d. Mechanics

a. Electricity

Persons skilled in matters relating to electricity may state inferences or judgments with respect to such matters.

Persons skilled in matters relating to electricity may state inferences or judgments with respect to such matters,[2] as, for example, whether certain electrical equipment is defective or unsafe;[3] the proper construction of electrical equipment;[4] whether certain construction was negligent;[5] whether certain equipment was maintained in accordance with the standards of practice;[6] the cause of a certain result;[7] the effect of certain occurrences;[8] and other matters.[9] A witness will not be permitted to state an inference or judgment where he lacks sufficient knowledge or skill to make his statement of value;[10] mere connection with a business in which electricity is used does not authorize a witness to speak as to matters not within his sphere of activity or knowledge.[11] An inference or judgment also will be excluded where the facts can be fully presented to

98. Ala.—Louisville & N. R. Co. v. Hall, 135 So. 466, 223 Ala. 338, certiorari denied 52 S.Ct. 37, 284 U.S. 661, 76 L.Ed. 560—Knowlton v. Central of Georgia Ry. Co., 68 So. 281, 192 Ala. 456.
22 C.J. p 652 note 32.
Inference as to negligence see supra § 448.

Particular matters

(1) Prevention of nuisance.—Hargrove v. Fort Worth Elevators Co., Tex.Civ.App., 262 S.W. 868.

(2) Provision of lateral support.—Knapp v. Siegley, 208 P. 13, 120 Wash. 478.

(3) Reasonableness of settlement of action for damages.—Kokusai Kisen Kabushiki Kaisha v. Columbia Stevedoring Co., D.C.N.Y., 23 F.Supp. 403, affirmed, C.C.A., 100 F.2d 1016.

99. D.C.—King v. Davis, 296 F. 986, 989, 54 App.D.C. 239, citing **Corpus Juris.**
22 C.J. p 653 note 33.

1. Ala.—Union Cemetery Co. v. Harrison, 101 So. 517, 20 Ala.App. 291.
22 C.J. p 653 note 34.

2. N.C.—Lynn v. Pinehurst Silk Mills, 179 S.E. 11, 208 N.C. 7.
22 C.J. p 653 note 38.
Effect on human body see infra §§ 534, 537.

Witness held qualified to state an inference or judgment as to:

(1) The condition of a transformer.—Blakeney v. Alabama Power Co., 133 So. 16, 222 Ala. 394.

(2) Characteristics of lightning.—U. S. Fidelity & Guaranty Co. v. Rochester, Civ.App., 281 S.W. 306, affirmed 283 S.W. 135, 115 Tex. 404.

(3) Other matters.
Ala.—Alabama Power Co. v. Williams, 130 So. 788, 222 Ala. 75.
Ky.—Kentucky Public Service Co. v. Topmiller, 263 S.W. 706, 204 Ky. 196.

3. S.C.—Eargle v. Sumter Lighting Co., 96 S.E. 909, 110 S.C. 560.
22 C.J. p 650 note 1 [a] (15), p 653 note 38 [a] (7).

Transformer

Tex.—City of Brownsville v. Crixell, Civ.App., 275 S.W. 430.
22 C.J. p 650 note 1 [a] (38).

4. **Particular equipment**

(1) Transmission system.
Okl.—Oklahoma Gas & Electric Co. v. Oliphant, 45 P.2d 1077, 172 Okl. 635.
Tenn.—Kingsport Utilities, Inc. v. Mort, 2 Tenn.App. 270.
22 C.J. p 650 note 1 [a] (14), (37).

(2) Insulation of wires.—Conowingo Power Co. v. State of Maryland, to Use of Marshall, C.C.A.Md., 120 F.2d 870.

(3) Attachment of switch to pole.—McCain v. Trenton Gas & Electric Co., 15 S.W.2d 970, 222 Mo.App. 1146.

5. **Transmission line**

Va.—Appalachian Power Co. v. Mitchell's Adm'x, 134 S.E. 558, 145 Va. 409.

6. **Transmission line**

Tenn.—Kingsport Utilities, Inc. v. Mort, 2 Tenn.App. 270.

7. **Particular results**

(1) Shock as indicating defective insulation.—Sudmeyer v. United Rys. Co. of St. Louis, Mo., 228 S.W. 64.

(2) Overheating of electrical side of refrigerator and consequent fire as due to failure properly to repair chemical side.—Sellers v. Montana-Dakota Power Co., 41 P.2d 44, 99 Mont. 39.

8. **Particular occurrences**

(1) Contact of primary and secondary wires.—Vessels v. Kansas City Light & Power Co., Mo., 219 S.W. 80.

(2) Contact of wires as starting a fire.—City of Brownsville v. Crixell, Tex.Civ.App., 275 S.W. 430.

(3) Contact of exposed wire with water or ground as causing short circuit.—Totten v. Smith Bros., Mo.App., 3 S.W.2d 740.

9. **Particular matters**

(1) Effect of controller on operation of an electrical device.—Republic Iron & Steel Co. v. Smith, 86 So. 908, 204 Ala. 607.

(2) Accuracy of volt meter.—Blakeney v. Alabama Power Co., 133 So. 16, 222 Ala. 394.

(3) Possibility of removal of equipment without injury to building.—Meeker Hotel Co. v. Forgan, 124 N.E. 505, 71 Ind.App. 199.

Explanation

Volt meter record showing continuous voltage readings was subject to explanation by one familiar therewith.—Blakeney v. Alabama Power Co., 133 So. 16, 222 Ala. 394.

10. Ky.—Beddow's Adm'r v. Barbourville Water, Ice & Light Co., 66 S.W.2d 821, 252 Ky. 267.
Pa.—Sinkovich v. Bell Telephone Co. of Pennsylvania, 133 A. 629, 286 Pa. 427.

11. N.Y.—Piehl v. Albany R. Co., 51

the jury and are such that persons of ordinary knowledge and intelligence are capable of drawing the correct inference from them,[12] and as a general rule an inference or judgment as to the ultimate fact to be determined by the jury should be excluded.[13] An opinion as to a matter which has been determined by statute will be excluded.[14] An inference or judgment based on facts which are not in evidence is not admissible.[15] Expert testimony may be admitted, however, although based only on facts as contended by one of the parties.[16] An inference or judgment will be excluded where it is contrary to the physical facts,[17] but a mere inconsistency between the testimony and facts in evidence does not destroy its competency.[18]

b. Engineering

An engineer or a person having engineering skill derived from practical experience may state an inference or judgment as to matters within the range of such knowledge or experience.

An engineer[19] or a person having engineering skill derived from practical experience[20] may state an inference or judgment as to matters within the range of such knowledge or experience,[21] as, for example, the condition of certain structures;[22] whether a certain structure, device, or appliance is safe[23] or defective,[24] or adapted to a certain use;[25] whether certain construction work is proper,[26] safe,[27] feasible,[28] or possible;[29] whether certain construction work is in compliance with the

N.Y.S. 755, 30 App.Div. 166, affirmed 57 N.E. 1122, 162 N.Y. 617.
22 C.J. p 654 note 39.

12. Mo.—Cole v. Empire Dist. Electric Co., 55 S.W.2d 434, 331 Mo. 824.
Tenn.—Nashville Ry & Light Co. v. Harrison, 5 Tenn.App. 22.

13. Ala.—Alabama Power Co. v. Williams, 130 So. 788, 222 Ala. 75.
Cal.—Lim Ben v. Pacific Gas & Electric Co., 281 P. 634, 101 Cal.App. 174.
Ky.—Morton's Adm'r v. Kentucky-Tennessee Light & Power Co., 138 S.W.2d 345, 282 Ky. 174.
N.Y.—Holden v. Village of Ilion, 175 N.Y.S. 129, 187 App.Div. 966.
Tex.—El Paso Electric Co. v. Buck, Civ.App., 143 S.W.2d 438, error dismissed, judgment correct.

14. Iowa.—Graves v. Interstate Power Co., 178 N.W. 376, 189 Iowa 227.

15. Ky.—Beddow's Adm'r v. Barbourville Water, Ice & Light Co., 66 S.W.2d 821, 252 Ky. 267.

16. U.S.—Dunagan v. Appalachian Power Co., C.C.A.W.Va., 33 F.2d 876, 68 A.L.R. 1393, certiorari denied 50 S.Ct. 152, 280 U.S. 606, 74 L.Ed. 649.

17. Ky.—Beddow's Adm'r v. Barbourville Water, Ice & Light Co., 66 S.W.2d 821, 252 Ky. 267.

18. N.C.—Kennedy v. Western Union Telegraph Co., 161 S.E. 396, 201 N.C. 756.

19. Va.—Arminus Chemical Co. v. Landrum, 73 S.E. 459, 113 Va. 7, 38 L.R.A.,N.S., 272, Ann.Cas.1913D 1075.
22 C.J. p 645 note 7 [a], (5), p 654 note 41.

20. Md.—Cahill v. Baltimore, 48 A. 705, 93 Md. 233.
Engineer's license unnecessary
Okl.—Howlett v. Mayo's Inc., 100 P. 2d 263, 186 Okl. 651.

21. Wash.—Patrick v. Smith, 134 P. 1076, 75 Wash. 407, 48 L.R.A., N.S., 740.
22 C.J. p 646 note 13 [b], p 647 note 28 [a] (1), p 654 note 44.

22. Ohio.—New York, C. & St. L. R. Co. v. Ellis, 13 Ohio Cir.Ct. 704, 6 Ohio Cir.Dec. 304.

23. Ala.—Alabama Power Co. v. Talmadge, 93 So. 548, 207 Ala. 86, error dismissed 42 S.Ct. 463, 259 U.S. 575, 66 L.Ed. 1071.
Witness held qualified to express an opinion as to the dangerous character of a portion of a street.—District of Columbia v. Chessin, 61 F.2d 523, 61 App.D.C. 260.

24. **Witness held qualified** to express an opinion as to defects in the design of a boiler.—U. S. Radiator Corporation v. Henderson, C.C.A. Colo., 68 F.2d 733, denying rehearing 68 F.2d 87 and certiorari denied 54 S.Ct. 860, 292 U.S. 650, 78 L.Ed. 1500.

25. **Particular structures, devices, or appliances**
(1) Sewer.—City of New Castle v. Smith-Jackson Co., 161 N.E. 692, 87 Ind.App. 418.
(2) Steam valve.—Vitale v. Duerbeck, 92 S.W.2d 691, 338 Mo. 556.
(3) Oil burner, as generator of steam.—May Oil Burner Corporation v. Munger, 152 A. 352, 159 Md. 605.
(4) Pipe, as air vent.—Vitale v. Duerbeck, 92 S.W.2d 691, 338 Mo. 556.
Witness held qualified to testify
(1) As to whether a bridge of certain specifications could support a certain load.—People v. Lang Transp. Corporation, Cal.App., 110 P. 2d 464.
(2) As to capacity of a heating plant.—Kynock v. Wilwin Co., 171 N. W. 415, 205 Mich. 452.
Any knowledge of subject on part of the witness has been held sufficient to warrant admission of his testimony as to the sufficiency of a structure.—Cromer v. Bridenbaugh, 123 N.E. 115, 188 Ind. 393.

26. Md.—Baltimore & S. P. R. Co. v. Hackett, 39 A. 510, 87 Md. 224.
22 C.J. p 654 note 45.
Particular construction work
(1) Bridge.—Edward De V. Tompkins, Inc., v. City of Bridgeport, 110 A. 183, 94 Conn. 659.
(2) Embankment.—Higgins v. Town of Carroll, 167 A. 270, 86 N. H. 312—22 C.J. p 654 note 45 [a] (2).
(3) Sewer.
Cal.—Kaufman v. Tomich, 280 P. 130, 208 Cal. 19.
Md.—Cahill v. Baltimore, 48 A. 705, 93 Md. 233.
22 C.J. p 650 note 1 [a] (33).
(4) Water diversion system.—Perkins v. Vermont Hydro-Electric Corporation, 177 A. 631, 106 Vt. 367.
Witness held qualified to testify
(1) As to proper construction of underground gas pipe line.—E. L. Chester Co. v. Wisconsin Power & Light Co., 247 N.W. 861, 211 Wis. 158.
(2) As to proper construction of an oxygen gas manifold.—Air Reduction Co. v. Philadelphia Storage Battery Co., C.C.A.Pa., 14 F.2d 734.
(3) As to whether designer of sewer should know type of soil through which sewer is to be built and design sewer accordingly.—City of Detroit v. Porath, 260 N.W. 114, 271 Mich. 42.

27. Wis.—Marsh Wood Products Co. v. Babcock & Wilcox Co., 240 N.W. 392, 207 Wis. 209—Venne v. Damrow Bros. Co., 212 N.W. 796, 192 Wis. 249.
22 C.J. p 658 note 67 [a].

28. **Piping of steam to outside of building**
Vt.—Cole v. North Danville Co-op. Creamery Ass'n, 151 A. 568, 103 Vt. 32.

29. **Road guard**
Mo.—Lang v. J. C. Nichols Inv. Co., 59 S.W.2d 63, 227 Mo.App. 1123.

contract therefor;[30] the meaning of provisions of a construction plan or contract;[31] the nature or quality of materials employed in certain construction;[32] the repair of structures;[33] the manner in which certain devices or appliances operate;[34] the cause of certain occurrences, such as the breaking of a structure or device,[35] and overflow or flooding of land,[36] and other matters;[37] the effect of certain construction work or structures,[38] or of defects in certain structures, devices, or appliances,[39] or the effect or result of other phenomena;[40] and various other matters.[41]

When inference or judgment rejected. A witness will not be permitted to state an inference or judg-

30. U.S.—City of Charlotte v. Atlantic Bitulithic Co., N.C., 228 F. 456, 143 C.C.A. 38.

Comparison between construction and that called for by the specifications.—Sioux City v. Western Asphalt Paving Corporation, 271 N.W. 624, 223 Iowa 279, 109 A.L.R. 608.

Waiver

A properly qualified witness may be permitted to state whether a specification in a contract properly would be regarded as waived in certain circumstances.—Edward De V. Tompkins, Inc., v. City of Bridgeport, 110 A. 183, 94 Conn. 659.

31. Mich.—City of Detroit v. Porath, 260 N.W. 114, 271 Mich. 42.
22 C.J. p 654 note 44 [a] (4).

Admission held not reversible error

The admission of an expert's testimony interpreting a survey map was not reversible error.—Stanton v. Morris Const. Co., 199 N.W. 104, 159 Minn. 380.

32. Iowa.—Sioux City v. Western Asphalt Paving Corporation, 271 N.W. 624, 223 Iowa 279, 109 A.L.R. 608.
22 C.J. p 646 note 23 [a].

33. **Determination of witness' qualification** to state an expert opinion as to the repair of a road was not erroneous as a matter of law.—Adams v. Town of Bolton, 9 N.E.2d 562, 297 Mass. 459, 111 A.L.R. 856.

34. **Gas heater**
Ala.—Alabama Power Co. v. Talmadge, 93 So. 548, 207 Ala. 86, error dismissed 42 S.Ct. 463, 259 U.S. 575, 66 L.Ed. 1071.

Saving of fuel effected by an appliance.—Vapor Vacuum Heating Co. v. Kaltenbach & Stephens, 111 A. 171, 94 N.J.Law 450.

35. **Steam cylinder**
Wis.—Suess v. J. S. Stearns Lumber Co., 128 N.W. 443, 143 Wis. 609.

Gas pipe or line
Mass.—Nugent v. Boston Consol. Gas Co., 130 N.E. 488, 238 Mass. 221.
Pa.—Lott v. People's Natural Gas Co., 188 A. 582, 324 Pa. 517.

Witness held qualified to testify as to the cause of breaking of a valve on a boiler.—Olsen v. New England Fuel & Transportation Co., 146 N.E. 656, 251 Mass. 389.

36. Tex.—Southwestern Portland Cement Co. v. Kezer, Civ.App., 174 S.W. 661.

Particular causes

(1) Natural causes.—Ohio & M. R. Co. v. Webb, 32 N.E. 527, 142 Ill. 404—Ohio & M. R. Co. v. Schmidt, 47 Ill.App. 383.

(2) Culvert.—Page v. City of Pittsburgh, 169 A. 104, 313 Pa. 211—22 C.J. p 654 note 48.

(3) Dam.—Texas & P. R. Co. v. Cochrane, 69 S.W. 984, 29 Tex.Civ. App. 383.

(4) Railway roadbed.—Galveston, H. & S. A. Ry. Co. v. Todd, Tex.Civ. App., 8 S.W.2d 1104, reversed on other grounds, Com.App., 16 S.W.2d 1115, and followed in Galveston H. & S. A. Ry. Co. v. Hawkins, Civ.App., 18 S.W.2d 1118.

(5) Faulty construction of a dam or embankment.
Ky.—Louisville & N. R. Co. v. Conn, 200 S.W. 952, 179 Ky. 478.
Md.—Baltimore & S. P. R. Co. v. Hackett, 39 A. 510, 87 Md. 224.
22 C.J. p 654 note 50.

(6) Improper handling of reservoirs.—Akin v. St. Croix Lumber Co., 92 N.W. 537, 88 Minn. 119.

37. **Particular matters**

(1) Lashing and bending of gas service line.— Lott v. People's Natural Gas Co., 188 A. 582, 324 Pa. 517.

(2) Boiler explosion.—O'Doherty v. Postal Tel. Cable Co., 99 N.Y.S. 351, 113 App.Div. 636, 18 N.Y.Ann.Cas. 449.

(3) Diversion of waters of stream. —Covert v. Brooklyn, 39 N.Y.S. 744, 6 App.Div. 73.

(4) Destruction of diversion system as resulting from water erosion.—Perkins v. Vermont Hydro-Electric Corporation, 177 A. 631, 106 Vt. 367.

(5) Erosion by water as made possible by improper or inadequate construction.—Perkins v. Vermont Hydro-Electric Corporation, supra.

Cause of event not seen by witness

The admission of a statement of an expert that it was not necessary to have seen a certain event in order to understand causes which might create it has been held not prejudicial error.—Vitale v. Duerbeck, 92 S.W.2d 691, 338 Mo. 556.

38. **Particular construction work or structures**

(1) Dam or reservoir of given height as affecting adjoining land.—Loloff v. Sterling, 71 P. 1113, 31 Colo. 102—22 C.J. p 654 note 52.

(2) Grading or embankment as resulting in flooding of land.—Perry v. McCraw, 147 So. 178, 226 Ala. 400 —22 C.J. p 648 note 57.

(3) Whether the removal of sand from a lake shore threatens a city with inundation or injures the harbor.—Clason v. Milwaukee, 30 Wis. 316.

Witness held qualified to express an opinion as to the effect of ponding water.—Knight v. Sullivan Power Co., 138 S.E. 818, 140 S.C. 296.

39. **Particular structures, devices, or appliances**

(1) Bridge.—Lawson v. Board of Com'rs of Sumner County, 61 P.2d 1365, 144 Kan. 450.

(2) Heating system.—Vitale v. Duerbeck, 92 S.W.2d 691, 338 Mo. 556.

Witness held qualified to express an opinion on the effect of a depression in a street on an automobile passing over the depression.—District of Columbia v. Chessin, 61 F. 2d 523, 61 App.D.C. 260.

40. **Particular phenomena**

(1) Draining of land.—Buffum v. Harris, 5 R.I. 243.

(2) How much more land water would cover if raised to a definitely higher level.—Phillips v. Terry, 3 Abb.Dec., N.Y., 607, 3 Keyes 313, 1 Transcr.A. 235, 5 Abb.Pr.,N.S., 327.

(3) Flow of water as resulting in erosion.—Perkins v. Vermont Hydro-Electric Corporation, 177 A. 631, 106 Vt. 367.

(4) Loosening of timbers bracing a bridge.—Bettys v. Denver Tp., 73 N.W. 138, 115 Mich. 228.

41. **Particular matters**

(1) Whether a bridge would have stood a strain on it if kept in repair. —Bonebrake v. Huntington County, 40 N.E. 141, 141 Ind. 62.

(2) Whether a bridge would have stood a strain when a defect in it began.—Washington, C. & A. Turnp. Co. v. Case, 80 A. 571, 80 Md. 36.

(3) Depression in street.—District of Columbia v. Chessin, 61 F.2d 523, 61 App.D.C. 260.

(4) Heat in a building.—West v. Phillips, 288 N.W. 625, 227 Iowa 612.

(5) Other matters see 22 C.J. p 654 note 44 [a].

ment where he lacks sufficient knowledge or experience to make his statement of value,[42] and a skilled inference or expert judgment is not admissible where the facts can be fully presented to the jury and are such that persons of ordinary experience and intelligence are capable of drawing the correct inference from them.[43] As a general rule,[44] although not in all cases,[45] an inference or judgment as to the ultimate fact to be determined by the jury should be excluded. An inference or judgment based on facts which are not properly in evidence is not admissible;[46] and the subject of the inquiry must, of course, be relevant.[47] A witness will not be permitted to express a conclusion as to a matter which under a contract between the parties is to be decided by specified persons.[48]

c. Manufacturing

A witness experienced in manufacturing may state his inference or judgment as to matters connected therewith.

A witness who is experienced in manufacturing may state his inference or judgment as to matters connected therewith,[49] as, for example, whether certain machinery was in good repair and reasonably adapted for the purpose for which it was used;[50] whether certain devices or appliances are defective;[51] the proper construction of devices or appliances;[52] the practicability of installing a certain device;[53] whether certain repairs are necessary;[54] where and how long certain machinery has been used;[55] whether there is a latent danger in the operation of certain machinery;[56] the cause of certain phenomena,[57] or the effect of certain occurrences;[58] the time required for,[59] cost of,[60] or amount of waste in,[61] the manufacturing of certain commodities; the liability of certain material to ignite under certain conditions;[62] and the extent of the depreciation of a plant.[63] A witness also may be permitted to state an inference or judgment as to matters of safety[64] or an inference or

42. Ind.—Cromer v. Bridenbaugh, 123 N.E. 115, 188 Ind. 393.
Ky.—Louisville Hydro-Electric Co. v. Coburn, 110 S.W.2d 445, 270 Ky. 624—Midkiff v. Carter, 222 S.W. 92, 188 Ky. 339.
Mo.—Fuchs v. St. Louis, 67 S.W. 610, 167 Mo. 620, 57 L.R.A. 136.
N.Y.—In re Board of Water Supply of City of New York, 177 N.Y.S. 852, 189 App.Div. 20, affirming Sands v. City of New York, 172 N.Y.S. 16, 104 Misc. 427.
22 C.J. p 654 notes 48 [a], 50 [a].

43. Minn.—Tracey v. City of Minneapolis, 241 N.W. 390, 185 Minn. 380.
R.I.—Fontaine v. Follett, 155 A. 363, 51 R.I. 413.
S.C.—Adams v. Wilkes, 109 S.E. 804, 118 S.C. 93.
Tex.—City of Abilene v. Luhn, Civ.App., 65 S.W.2d 370, error dismissed—Werner v. Trout, Civ.App., 2 S.W.2d 525, error refused.
22 C.J. p 651 note 2 [a] (4), (9), (12), p 654 note 44 [b].

44. Iowa.—Sioux City v. Western Asphalt Paving Corporation, 271 N.W. 624, 223 Iowa 279, 109 A.L.R. 608.
Ohio.—Tarian v. City of Alliance, 32 N.E.2d 578, 66 Ohio App. 423.
Okl.—Kaw Boiler Works v. Frymyer, 227 P. 453, 100 Okl. 81, opinion recalled and refiled on other grounds 231 P. 1059, 105 Okl. 177.

45. Pa.—Lott v. People's Natural Gas Co., 188 A. 582, 324 Pa. 517.

46. N.Y.—Hopper v. Empire City Subway Co., 79 N.Y.S. 907, 78 App. Div. 637, affirmed 70 N.E. 1100, 178 N.Y. 587.
Or.—Patterson v. Horsefly Irr. Dist., 69 P.2d 282, 157 Or. 1, rehearing denied 70 P.2d 86, 157 Or. 1.

47. N.Y.—Hopper v. Empire City Subway Co., 79 N.Y.S. 907, 78 App. Div. 637, affirmed 70 N.E. 1100, 178 N.Y. 587.

48. **Manner of doing work**
N.Y.—Uvalde Asphalt Paving Co. v. City of New York, 188 N.Y.S. 304, 196 App.Div. 740.
Cost
N.Y.—Uvalde Asphalt Paving Co. v. City of New York, supra.

49. Ala.—Nelson v. Wood, 62 Ala. 175.
22 C.J. p 657 note 39.

50. Ala.—Alabama Connellsville Coal & Iron Co. v. Pitts, 13 So. 135, 98 Ala. 285.

51. **Particular devices or appliances**
(1) Belts.—Jewell Belting Co. v. Hamilton Rubber Mfg. Co., 121 Ill. App. 13.
(2) Porcelain handle of faucet.—Clark v. Standard Sanitary Mfg. Co., 149 A. 828, 8 N.J.Misc. 284.

52. **Proper lacing of belts**
R.I.—McGar v. National & Providence Worsted Mills, 47 A. 1092, 22 R.I. 347.

53. **Witness held qualified** to testify as to the practicability of installing a mechanical exhaust.—Davis v. New Jersey Zinc Co., 182 A. 850, 116 N.J. Law 103.

54. Iowa.—Taylor v. French Lumbering Co., 47 Iowa 662.

55. Ohio.—Merchants' & Mfrs. Mut. Ins. Co. v. Washington Mut. Ins. Co., 1 Handy 408, 12 Ohio Dec. (Reprint) 209.

56. N.C.—Morrisett v. Elizabeth City Cotton Mills, 65 S.E. 514, 151 N.C. 31.
Pa.—Whitaker v. Campbell, 187 Pa. 113, 41 A. 38.

57. **Cause of defects**
(1) Cause of crookedness in belts.—Jewell Belting Co. v. Hamilton Rubber Mfg. Co., 121 Ill.App. 13.
(2) Brittleness of porcelain handle as caused by overbaking.—Clark v. Standard Sanitary Mfg. Co., 149 A. 828, 8 N.J.Misc. 284.
Witness held qualified to express an opinion as to the cause of throwing of molten metal.—Wright v. Berry Iron & Steel Co., 250 S.W. 942, 213 Mo.App. 599.

58. **Particular occurrences**
(1) Foreign substances going through a mill.—Sticht v. Buffalo Cereal Co., 87 N.E. 801, 195 N.Y. 70, reversing 107 N.Y.S. 1146, 123 App. Div. 911.
(2) Whether, when bottles exploded, they flew with such force as to inflict injury to the skin or body.—Ruck v. Milwaukee Brewery Co., 129 N.W. 414, 144 Wis. 404.

59. Tex.—Capitol Hotel Co. v. Rittenberry, Civ.App., 41 S.W.2d 697, error dismissed.

60. N.C.—Younce v. Broad River Lumber Co., 71 S.E. 329, 155 N.C. 239, Ann.Cas.1912C 107.

61. Wis.—Garton Toy Co. v. Buswell Lumber & Mfg. Co., 136 N.W. 147, 150 Wis. 341.

62. **Wool waste**
Wis.—Whitney v. Chicago & N. W. R. Co., 27 Wis. 327.

63. Mass.—Stein v. Strathmore Worsted Mills, 108 N.E. 1029, 221 Mass. 86.

64. Cal.—Mulholland v. Western Gas Constr. Co., 131 P. 110, 113, 21 Cal.App. 44.
22 C.J. p 657 note 50.

judgment as to matters of danger,[65] although it has been held that an expert cannot be permitted to state whether a certain practice is safe;[66] and a witness may apply standards of skill, as whether a given individual is a competent workman,[67] or a piece of work is well done.[68] However, a witness who lacks sufficient knowledge and experience to make his inference or judgment of value will not be permitted to state it,[69] nor can even an experienced witness state his judgment as to a matter which is within the range of the experience of mankind in general.[70] The fact that an otherwise proper opinion may constitute a practical affirmation or disaffirmation of a material issue in the case does not render the opinion inadmissible.[71]

d. Mechanics

A person having special knowledge or skill in matters of mechanics may state an inference or judgment as to such matters.

Although the point covered by the inference is precisely the one on which the tribunal is to pass,[72] the inference or judgment of one possessing special knowledge or skill,[73] although he has received only a practical training[74] in matters of mechanics, may be received where, and only where, the triers of fact are not competent to draw the correct inference from the facts.[75] Among inferences which have been regarded as receivable are the capacity of an engine or machine;[76] whether apparatus,[77] machinery,[78] materials,[79] mechanical devices,[80] tools,[81] or water power,[82] are capable of doing certain work, or adapted to a certain purpose;[83] the capability of a machine or contrivance for doing work in general,[84] and its relative effectiveness for the purpose as compared with another device;[85] the principles of operation of a machine or device and the forces involved;[86] the probable or possible operation of a mechanical device under given conditions;[87] the cause of certain results;[88] such as

65. Mass.—O'Brien v. Look, 50 N.E. 458, 171 Mass. 36.
22 C.J. p 657 note 51.

66. Pa.—Sweeney v. Blue Anchor Beverage Co., 189 A. 331, 325 Pa. 216.

67. Ga.—Doster v. Brown, 25 Ga. 24, 71 Am.D. 153.
22 C.J. p 657 note 52.

68. Mich.—B. F. Goodrich Rubber Co. v. Sewell Cushion Wheel Co., 163 N.W. 5, 196 Mich. 600.
N.Y.—Ward v. Kilpatrick, 85 N.Y. 413, 39 Am.R. 674.

69. U.S.—Epperson v. Midwest Refining Co., C.C.A.Wyo., 22 F.2d 622.
Pa.—Sweeney v. Blue Anchor Beverage Co., 189 A. 331, 325 Pa. 216.

Setting for machinery

A person without experience in manufacturing cannot state the proper setting for machinery.—Weber Wagon Co. v. Kehl, 40 Ill.App. 584, affirmed 29 N.E. 714, 139 Ill. 644.

70. Cal.—Kauffman v. Maier, 29 P. 481, 94 Cal. 269, 18 L.R.A. 124.
22 C.J. p 657 note 56.

71. Ala.—Connors-Weyman Steel Co. v. Harless, 80 So. 399, 202 Ala. 317.

72. Mass.—Burton v. Burton Car Stock Co., 50 N.E. 1029, 171 Mass. 437.
22 C.J. p 657 note 57.

73. Ala.—Blakeney v. Alabama Power Co., 133 So. 16, 222 Ala. 394—Raymond v. Pointer, 127 So. 153, 220 Ala. 593.
N.J.—Schnoor v. Palisades Realty & Amusement Co., 172 A. 43, 112 N.J.Law 506.
22 C.J. p 658 note 58.

Necessity of skill in operation

One may be qualified to testify as mechanical expert without actually being an expert in operation of particular machine.—Battle Creek Bread Wrapping Mach. Co. v. Paramount Baking Co., 39 P.2d 323, 88 Utah 67.

74. Vt.—Evarts v. Middlebury, 53 Vt. 626, 38 Am.R. 707.
22 C.J. p 658 note 59.

75. Mass.—Coulombe v. Horne Coal Co., 175 N.E. 631, 275 Mass. 226.
N.H.—Bridges v. Great Falls Mfg. Co., 156 A. 697, 85 N.H. 220.
Wis.—Tiemann v. May, 292 N.W. 612, 235 Wis. 100.
22 C.J. p 658 note 60.

76. Tex.—Street v. J. I. Case Threshing Mach. Co., Civ.App., 188 S.W. 725.

Power

Tex.—Ware v. Fairbanks-Morse Co. of Texas, Civ.App., 217 S.W. 211.
22 C.J. p 658 note 62.

Witness held qualified to testify as to the speed of which an automobile of a certain type is capable.—Hall v. Slaton, 144 S.E. 827, 38 Ga.App. 619, reversed on other grounds Slaton v. Hall, 148 S.E. 741, 168 Ga. 710, 73 A.L.R. 891, conformed to Hall v. Slaton, 149 S.E. 306, 40 Ga.App. 288.

77. Pa.—Harvey v. Susquehanna Coal Co., 50 A. 770, 201 Pa. 63, 88 Am.S.R. 800.
22 C.J. p 659 note 71.

78. N.Y.—Scattergood v. Wood, 79 N.Y. 263, 35 Am.R. 515.
22 C.J. p 659 note 72.

79. N.Y.—Daly v. Lee, 60 N.E. 1109, 167 N.Y. 537, affirmed 57 N.Y.S. 293, 39 App.Div. 188.

80. U.S.—Public Utilities Corporation of Arkansas v. Oliver, C.C.A. Ark., 64 F.2d 60.
22 C.J. p 659 note 74.

81. U.S.—U. S. v. Tarr, Pa., 28 F. Cas.No.16,434, 4 Phila. 105.
Minn.—State v. Minot, 81 N.W. 753, 79 Minn. 118.
22 C.J. p 659 note 75.

82. Pa.—Detweiler v. Groff, 10 Pa. 376.

83. Colo.—McGonigle v. Kane, 38 P. 367, 20 Colo. 292.
22 C.J. p 659 note 77.

84. N.J.—Read v. Barker, 30 N.J. Law 378, affirmed 32 N.J.Law 477.
22 C.J. p 659 note 78.

85. N.Y.—Scattergood v. Wood, 79 N.Y. 263, 35 Am.R. 515.
22 C.J. p 659 note 79.

86. Conn.—Wray v. Fairfield Amusement Co., 10 A.2d 600, 126 Conn. 221.
Tenn.—Armstrong v. Bowman, 115 S.W.2d 229, 21 Tenn.App. 673.

Incapacity to jerk in starting

Incapacity of a diesel engine to jerk in starting must be demonstrated by testimony of experts.—Alabama Great Southern R. Co. v. McBryar, Ga.App., 15 S.E.2d 563.

87. U.S.—Manchester v. Landry, N.H., 199 F. 882, 118 C.C.A. 330.
22 C.J. p 660 note 80.

Possibility of starting fire

A qualified witness may testify as to whether a certain machine or device could start a fire.
Ark.—Blanton v. Missouri Pac. R. Co., 31 S.W.2d 947, 182 Ark. 543.
Minn.—Automotive Co. v. National Fire Ins. Co. of Hartford, 202 N.W. 32, 162 Minn. 34.

88. Wash.—Patrick v. Smith, 134 P. 1076, 75 Wash. 407, 48 L.R.A.,N.S., 740.
22 C.J. p 660 note 83.

a break in a machine or device,[89] the particular operation of mechanical appliances,[90] or defective work by machinery;[91] the reason for an accident;[92] what certain effects indicate;[93] what is required in order to attain a given result;[94] the effect or results of certain things;[95] the strength of materials;[96] whether certain work required experienced workmen;[97] whether a person is competent or skillful;[98] how long certain operations would take;[99] whether a piece of work is well done;[1] whether a certain device is machinery;[2] what the specifications of a patent cover;[3] whether two patented mechanical contrivances are identical in principle[4] or differ only through the use of mechanical equivalents;[5] whether an invention is useful,[6] and what its advantages are;[7] the limits of skill or observation;[8] and, likewise, inferences which are

Particular results

(1) Damage to crankcase as caused by external force rather than internal breaking.—Yorkshire Ins. Co. v. Bunch-Morrow Motor Co., 103 So. 670, 212 Ala. 588.

(2) Explosion in air line as caused by mixture of natural gas in the air.—Jankey v. Hope Natural Gas Co., 112 S.E. 642, 91 W.Va. 308.

Witness held qualified

W.Va.—Jankey v. Hope Natural Gas Co., 112 S.E. 642, 91 W.Va. 308.

89. Ill.—Camp Point Mfg. Co. v. Bellou, 71 Ill. 417.

Particular devices

(1) Sewing machine needle.—McClaren v. Weber Bros. Shoe Co., Mass., 166 F. 714, 92 C.C.A. 386.

(2) Truck wheel, as caused by loose spokes.—Demarais v. Johnson, 3 P.2d 283, 90 Mont. 366, 77 A.L.R. 553.

Causes which jury are capable of determining are not a proper subject of opinion evidence.—Bridges v. Great Falls Mfg. Co., 156 A. 697, 85 N.H. 220.

Conjecture as to the cause of a break is inadmissible.—State v. Emerson & Morgan Coal Co., 133 A. 601, 150 Md. 429.

Witness held qualified to testify as to cause of breaking

(1) Of automobile trailer arm.—Montgomery Ward & Co. v. Levy, Tex.Civ.App., 136 S.W.2d 663, error dismissed, judgment correct.

(2) Of flywheel.—Lemley v. Doak Gas Engine Co., 180 P. 671, 40 Cal. App. 146.

90. Minn.—Owens v. Chicago Great Western R. Co., 128 N.W. 1011, 113 Minn. 49.

Particular operation

(1) Automatic movement.—Tennessee Coal, Iron & R. Co. v. Carson, 88 So. 650, 205 Ala. 518.

(2) Unexpected starting.

Ga.—Cochrell v. Langley Mfg. Co., 63 S.E. 244, 5 Ga.App. 317.

Mass.—Rivers v. Richards, 100 N. E. 745, 213 Mass. 515.

(3) Fall of elevator.

Cal.—Cowles v. Independent Elevator Co., 70 P.2d 711, 22 Cal.App.2d 109.

Tex.—Morten Inv. Co. v. Trevey, Civ.App., 8 S.W.2d 527, error dismissed.

91. U.S.—Chandler v. Tompson, C. C.N.C., 30 F. 38.

Ga.—Cochrell v. Langley Mfg. Co., 63 S.E. 244, 5 Ga.App. 317.

Mich.—Tufts v. Verkuyl, 82 N.W. 891, 124 Mich. 242.

22 C.J. p 660 note 88.

Witness held qualified to testify as to the cause of the defective operation of a steel roller.—Connors-Weyman Steel Co. v. Harless, 80 So. 399, 202 Ala. 317.

92. U.S.—Neidlinger v. Yoost, N.Y., 99 F. 240, 39 C.C.A. 494.

22 C.J. p 660 note 89.

Particular reasons

(1) Defective operation of device.—Trumann Cooperage Co. v. Dillard, Ark., 254 F. 693, 166 C.C.A. 191.

(2) Stopping of wheel resulting because of wearing of brake mechanism.—Thomas v. Inland Motor Freight, 81 P.2d 818, 195 Wash. 633.

93. Tex.—International, etc., R. Co. v. Mills, 78 S.W. 11, 34 Tex.Civ. App. 127.

22 C.J. p 660 note 3.

Particular indications

(1) Whether automobile brakes were holding evenly, as indicated by skid marks.—Ragan v. MacGill, 292 P. 1094, 134 Or. 408, 72 A.L.R. 860.

(2) Whether deflation of tire was sudden or gradual, as indicated by condition of tire.—Lestico v. Kuehner, 283 N.W. 122, 204 Minn. 125.

94. Ala.—Sloss-Sheffield Steel & Iron Co. v. Hutchinson, 40 So. 114, 144 Ala. 221.

22 C.J. p 660 note 84.

95. **Particular matters**

(1) Absence of guard on a device.—Zein v. Pickel Stone Co., Mo.App., 273 S.W. 165.

(2) Strain on winch after its jaws have become worn.—Frederick Leyland & Co. v. Hornblower, Mass., 256 F. 289, 167 C.C.A. 461.

(3) Loosening of one trailer arm as resulting in the breaking of the other.—Montgomery Ward & Co. v. Levy, Tex.Civ.App., 136 S.W.2d 663, error dismissed; judgment correct.

Witness held qualified to testify

(1) As to effect of absence of guard on a device.—Zein v. Pickel Stone Co., Mo.App., 273 S.W. 165.

(2) As to effects produced by equipment operating doors of bus.—Shaw v. New Orleans Public Service, La.App., 188 So. 187.

(3) As to whether fire from brake drums might explode gasoline in tank.—Automotive Co. v. National Fire Ins. Co. of Hartford, 202 N.W. 32, 162 Minn. 34.

Conjecture as to whether a certain result would follow is not admissible.—Atlantic Coast Line R. Co. v. Campbell, 139 So. 886, 104 Fla. 274.

96. Ind.—Louisville, N. A. & C. R. Co. v. Berkey, 35 N.E. 3, 136 Ind. 181.

22 C.J. p 660 note 93.

97. Ill.—Wordorski v. Illinois Steel Co., 160 Ill.App. 390.

98. Ala.—J. H. Burton & Sons Co. v. May, 103 So. 46, 212 Ala. 435.

Mo.—Brown v. Quercus Lumber Co., 209 S.W. 310, 202 Mo.App. 573.

22 C.J. p 660 note 94.

99. Mass.—Emerson v. Lowell Gas Light Co., 3 Allen 410.

22 C.J. p 660 note 2.

1. N.Y.—Ward v. Kilpatrick, 85 N. Y. 413, 39 Am.R. 674.

2. **Elbow pipe of dredge**

U.S.—Quinlivan v. Northwestern Fire & Marine Ins. Co., D.C.N.Y., 31 F.2d 149, reversed on other grounds, C.C.A., 37 F.2d 29.

3. Mass.—Burton v. Burton Stock-Car Co., 50 N.E. 1029, 171 Mass. 437.

N.Y.—McCaslin Mach. Co. v. McCaslin, 35 N.Y.S. 746, 90 Hun 388.

4. U.S.—Driskell v. Parish, C.C. Ohio, 7 F.Cas.No.4,088, 5 McLean 64.

Vt.—Tillotson v. Ramsay, 51 Vt. 309.

5. U.S.—Allen v. Blunt, C.C.Mass., 1 F.Cas.No. 216, 3 Story 742—Morris v. Barrett, C.C.Ohio., 17 F.Cas. No.9,827, 1 Bond 254.

6. U.S.—Page v. Ferry, C.C.Mich., 18 F.Cas.No.10,662, 1 Fish.Pat.Cas. 298.

7. Mass.—Burton v. Burton Stock-Car Co., 50 N.E. 1029, 171 Mass. 437.

8. U.S.—St. Louis & S. F. R. Co. v. Farr, Ind.T., 56 F. 994, 6 C.C.A. 211.

22 C.J. p 660 note 4.

regarded as receivable are whether an experiment is fair;[9] whether certain acts were possible[10] or proper;[11] whether it was practicable to guard certain machinery or mechanical devices;[12] what would be the dangers, if any, attending the use of particular machinery[13] in a particular way,[14] and whether such danger could be removed or modified[15] by adopting or installing particular contrivances or safeguards.[16] Whether a danger is obvious to an experienced person may be stated,[17] but whether a danger would be obvious to an ordinary and unskilled observer may[18] or may not[19] be a proper subject for expert testimony.

A skilled observer should state the facts on which he bases his inference so far as they are capable of detailed statement.[20]

§ 531. Handwriting

Opinions of handwriting experts as to the mental condition or state of a person at a certain time as evidenced by his handwriting at that time have been held admissible.

Opinions of handwriting experts as to the mental condition or state of a person at a certain time as evidenced by his handwriting at that time have been held admissible.[21] Resemblance of handwriting as a matter of inference by ordinary witness is discussed supra § 516, and proof of authenticity of handwriting by comparison generally infra §§ 612–622.

§ 532. Laws and Legal Matters

An attorney may state an inference or judgment as to legal matters concerning which persons of ordinary knowledge are not capable of drawing the correct conclusion.

An attorney may state an inference or judgment as to the law on a certain point at a given time,[22] the relief which was sought in a certain proceeding,[23] the nature of questions involved,[24] or the necessity for certain legal services;[25] and an expert in copyright law may state an opinion as to the validity of a copyright.[26] However, where the facts can be presented to the trier of fact and the matter is one as to which persons of ordinary experience and intelligence are capable of drawing the correct conclusion, expert testimony of an attorney is not admissible.[27] The exclusion of an opinion as to the difficulty of a particular case has been held proper,[28] and an opinion as to what would have been the result of a case if a certain attorney had been permitted to continue its prosecution is not admissible.[29]

Legal effect of documents. The opinion of an attorney as to the legal effect of a document is not admissible.[30]

Discovery of defects

(1) An expert may be permitted to testify whether a defect could be ascertained by certain methods.
Cal.—Pacheco v. Judson Mfg. Co., 45 P. 833, 113 Cal. 541—Cowles v. Independent Elevator Co., 70 P.2d 711, 22 Cal.App.2d 109.
Mont.—Demarais v. Johnson, 3 P.2d 283, 90 Mont. 366, 77 A.L.R. 553.

(2) He cannot testify, however, as to whether certain defects could be discovered by reasonable inspection where he has no special knowledge or skill rendering him more capable than the jury of drawing a correct conclusion regarding the matter.—Demarais v. Johnson, supra.

9. U.S.—Chicago v. Greer, Ill., 9 Wall. 726, 19 L.Ed. 769.

10. Mich.—Underfeed Stoker Co. v. Detroit Salt Co., 97 N.W. 959, 135 Mich. 431.
22 C.J. p 661 note 6.

11. Wis.—Zarkin v. C. Reiss Coal Co., 113 N.W. 752, 133 Wis. 290.
22 C.J. p 661 note 7.

12. Kan.—Hockman v. Sifers Candy Co., 178 P. 254, 104 Kan. 94.
22 C.J. p 661 note 9.

Witnesses held qualified
Mo.—Goodson v. Luce, App., 24 S.W. 2d 682—Hummel v. American Mfg. Co., App., 279 S.W. 202—Hermon v. American Car & Foundry Co., App., 245 S.W. 387.

13. Mo.—Helfenstein v. Medart, 36 S.W. 863, 37 S.W. 829, 38 S.W. 294, 136 Mo. 595.
22 C.J. p 661 note 10.

14. Ala.—Huggins v. Southern R. Co., 41 So. 856, 148 Ala. 153.
22 C.J. p 661 note 11.

15. Kan.—King v. King, 100 P. 503, 79 Kan. 584, 587.
22 C.J. p 661 note 12.

16. Pa.—King v. Darlington Brick & Mining Co., 131 A. 241, 284 Pa. 277.
22 C.J. p 661 note 13.

17. U.S.—Blumenthal v. Craig, Del., 81 F. 320, 26 C.C.A. 427.
22 C.J. p 661 note 14.

18. Tex.—Beaumont, S. L. & W. Ry. Co. v. Schmidt, 72 S.W.2d 899, 123 Tex. 580, affirming, Civ.App., 45 S. W.2d 734.

19. Mass.—Gilbert v. Guild, 12 N.E. 868, 144 Mass. 601.

20. S.C.—State v. Davis, 33 S.E. 449, 55 S.C. 339.
Vt.—James v. Hodsden, 47 Vt. 127.

21. Kan.—Smith v. Salthouse, 76 P. 2d 836, 147 Kan. 354—Gibbons v. Redmond, 49 P.2d 1035, 142 Kan. 417, 103 A.L.R. 893.

22. **Law of ejectment**
Md.—Armstrong v. Risteau, 5 Md. 256, 59 Am.D. 115.

23. Ala.—Kemp v. Donovan, 94 So. 168, 208 Ala. 289.

24. Mass.—Aldrich v. Brown, 103 Mass. 527.
6 C.J. p 762 note 17.

25. Ill.—Artz v. Robertson, 50 Ill. App. 27.
Or.—Shepherd v. Inman-Poulsen Lumber Co., 168 P. 601, 86 Or. 652.
Value of services see infra § 545.

26. N.C.—Landis Christmas Sav. Club v. Merchants' Nat. Bank, 100 S.E. 607, 178 N.C. 403.

27. **Amount of probable recovery** on the trial of a cause on a given state of facts has been held, under the rule stated in the text, not to be a proper subject of expert testimony.—Sterling Milk Products Co. v. Brown, 49 P.2d 68, 173 Okl. 452.

28. Mass.—Todd v. Pearce, 197 N. E. 156, 291 Mass. 455.

29. Ky.—Breathitt Coal, Iron & Lumber Co. v. Gregory, 78 S.W. 148, 25 Ky.L. 1507.

30. Mich.—Shields v. Weller, 257 N. W. 765, 766, 270 Mich. 7, citing **Corpus Juris.**

Conduct and duties of attorneys. In several cases the opinions of attorneys as to whether the conduct of a certain other attorney was that of a prudent, careful lawyer of ordinary capacity have been held admissible,[31] but there is authority apparently to the contrary.[32] Testimony of a witness as to his duties as a lawyer to his client,[33] or whether a certain arrangement was the best that could be made for his client's interest,[34] has been held inadmissible.

§ 533. Management and Operation of Vehicles, Machinery, and Appliances

a. In general
b. Motor vehicles

a. In General

A person specially qualified by skill or experience may state an inference or judgment as to matters connected with the management and operation of vehicles, machinery, and other appliances.

A person who is specially qualified by skill or experience[35] may state an inference or judgment as to matters connected with the management and operation of vehicles,[36] machinery,[37] and other appliances[38] concerning which the jury could not fairly be expected to draw accurate conclusions for themselves.[39] Vehicles, machinery, or appliances as to which a skilled inference or expert judgment has been regarded as receivable are an air receiver at the mouth of a mine,[40] a boiler,[41] a buzz planer,[42] chains,[43] a circular saw,[44] a clutch coupling on a shaft,[45] cotton spinning machinery,[46] a coupling device,[47] a derrick,[48] a drop for breaking scrap iron,[49] a dump car,[50] an edger saw,[51] an elevator,[52] an engine,[53] an engine shaft,[54] an exhaust fan,[55] a feed grinder,[56] gas pipes,[57] gin pole

31. Ill.—Olson v. North, 276 Ill.App. 457.
6 C.J. p 710 note 30.

32. N.Y.—Clussman v. Merkel, 16 N.Y.Super. 402.

33. Iowa.—Coughlon v. Pedelty, 233 N.W. 63, 211 Iowa 138.

34. Ala.—Goodman v. Walker, 30 Ala. 482, 68 Am.D. 134.

35. Ky.—Chess & Wymond Co. v. Gohagan, 105 S.W. 890, 32 Ky.L. 372.
22 C.J. p 656 note 98.

36. N.Y.—McRorie v. Monroe, 96 N.E. 724, 203 N.Y. 426, Ann.Cas.1913 B 94.
22 C.J. p 656 note 99.

37. Ind.—Knickerbocker Ice Co. v. Gray, 84 N.E. 341, 171 Ind. 395.
22 C.J. p 656 note 1.

Oiling while standing in a certain position.—Hassell v. Daniels, 103 S.E. 897, 180 N.C. 37.

38. Ark.—T. & C. Ins. Co. v. Fouke, 127 S.W. 461, 94 Ark. 358.
22 C.J. p 656 note 2.

Proper or negligent management or operation
Mass.—Winston v. Converse Rubber Shoe Co., 119 N.E. 799, 230 Mass. 449.
22 C.J. p 659 note 69.

39. Tex.—Dunlap Hardware Co. v. E. F. Elmberg Co., Civ.App., 252 S.W. 1098, affirmed E. F. Elmberg Co. v. Dunlap Hardware Co., Com.App., 267 S.W. 258.

Inferences or judgments held inadmissible
(1) Propriety of having a minor clean a certain type of machine.—Taylor v. Kevlin, 1 A.2d 433, 121 N.J.Law 142.
(2) Whether a certain manner of handling a machine or device is safe or dangerous.
Mass.—Randolph's Case, 141 N.E. 865, 247 Mass. 245.
Mo.—Harville v. Harrison Engineering & Construction Co., App., 7 S.W.2d 1032.
(3) Whether performance of certain operation without warning was proper.—Noe v. Great Northern Ry. Co., 209 N.W. 905, 168 Minn. 259.
(4) Whether due care was exercised in the management and operation of certain appliances.—Dunagan v. Appalachian Power Co., C.C.A.W.Va., 33 F.2d 876, 68 A.L.R. 1393, certiorari denied 50 S.Ct. 152, 280 U.S. 606, 74 L.Ed. 649.

40. Ala.—Alabama Cons. Coal & Iron Co. v. Heald, 53 So. 162, 168 Ala. 626.

41. Ala.—W. T. Adams Mach. Co. v. Turner, 50 So. 308, 162 Ala. 351, 136 Am.S.R. 28.

42. N.H.—Soucier v. Odell Mfg. Co., 88 A. 708, 77 N.H. 118.

43. Ky.—Louisville & N. R. Co. v. Goodwin, 151 S.W. 376, 151 Ky. 149.

44. Ky.—Lovell & Buffington Tobacco Co. v. Justice, 144 S.W. 1079, 147 Ky. 642.
22 C.J. p 656 note 7 [a].

45. Mo.—Turner v. Tyler Land & Timber Co., 174 S.W. 184, 188 Mo. App. 481, transferred, see 167 S.W. 973, 259 Mo. 15.

46. N.C.—Morrisett v. Elizabeth City Cotton Mills, 65 S.E. 514, 151 N.C. 31.

47. Wis.—Twentieth Century Co. v. Quilling, 117 N.W. 1007, 136 Wis. 481.

48. Mo.—Allen v. Quercus Lumber Co., 157 S.W. 661, 171 Mo.App. 492.
22 C.J. p 657 note 12.

49. Ill.—Supolski v. Ferguson & Lange Fdy. Co., 111 N.E. 544, 272 Ill. 82, affirming 193 Ill.App. 79.

50. **Proper method of operating**
U.S.—Central Iron & Coal Co. v. Massey, C.C.A.Ala., 268 F. 300.

51. **Control over assistant**
A qualified witness may testify whether a person operating an edger saw had control over an assistant.—Forbes v. Davidson, 41 So. 312, 147 Ala. 702.

52. Mich.—Reedy v. Cameron, 129 N.W. 27, 163 Mich. 638.
22 C.J. p 657 note 14.

53. Ala.—W. T. Adams Mach. Co. v. Turner, 50 So. 308, 162 Ala. 351, 136 Am.S.R. 28.
22 C.J. p 657 note 15.

54. Cal.—Stockton Iron Works v. Walters, 123 P. 240, 18 Cal.App. 373.

55. Ind.—Holliday & Wyon Co. v. O'Donnell, 101 N.E. 642, 54 Ind. App. 95.

56. **Difficulty of assembling**
A qualified witness may state an opinion that the difficulty of assembling feed grinders is similar to that encountered in assembling farm machinery generally.—Dunlap Hardware Co. v. E. F. Elmberg Co., Tex. Civ.App., 252 S.W. 1098, affirmed E. F. Elmberg Co. v. Dunlap Hardware Co., Com.App., 267 S.W. 258.
Witness held qualified to state whether feed grinder could be operated by an ordinary farmer with certain tools.—Dunlap Hardware Co. v. E. F. Elmberg Co., supra.

57. **Pressure**
A qualified witness may state his opinion as to what would be an efficient and safe pressure of gas in pipes for domestic consumption and as to the usage of well-conducted gas companies with regard to providing for the control of pressure in gas mains.—Alabama Power Co. v. Talmadge, 93 So. 548, 207 Ala. 86, error

and guy line,[58] a gravel washing machine,[59] hoisting machinery,[60] hooks,[61] a ladder,[62] loose pulleys,[63] a moving picture machine,[64] an organ,[65] an ox team,[66] a pinch bar,[67] pipes,[68] a pipe line,[69] a ripsaw,[70] shifting levers,[71] a sprinkling machine,[72] a sprocket wheel,[73] a stamping machine,[74] a towing hawser,[75] a traction engine,[76] tugs,[77] a waterworks system,[78] and a winding device on a ballast car.[79] Such an inference or judgment may not be based on facts which are not in evidence.[80]

b. Motor Vehicles

A person specially qualified by skill or experience may state an inference or judgment as to matters connected with the management and operation of motor vehicles.

A person who is specially qualified by skill or experience[81] may state an inference or judgment as to matters connected with the management and operation of motor vehicles[82] if the jury cannot fairly be expected to draw accurate, or as accurate, conclusions for themselves.[83] Particular infer-

dismissed 42 S.Ct. 463, 259 U.S. 575, 66 L.Ed. 1071.

58. **Sufficiency of number of employees** provided for the handling of a gin pole and guy line.—Beasley v. Bond, 48 P.2d 299, 173 Okl. 355.

59. U.S.—Stone & Webster Engineering Corp. v. Melovich, Wash., 202 F. 438, 120 C.C.A. 544.

60. U.S.—Alaska Treadwell Gold Min. Co. v. Cheney, Alaska, 162 F. 593, 89 C.C.A. 351.

61. U.S.—Manchester v. Landry, C.C.A.N.H., 199 F. 882, 118 C.C.A. 330.
22 C.J. p 657 note 20.

62. Tex.—Missouri, K. & T. R. Co. v. Hedric, Civ.App., 154 S.W. 633.

63. Iowa.—McCreery v. Union Roofing & Mfg. Co., 119 N.W. 738, 143 Iowa 303.

64. Iowa.—Miller v. Miloslowsky, 133 N.W. 357, 153 Iowa 135.

65. Wis.—Estey Organ Co. v. Lehman, 111 N.W. 1097, 132 Wis. 144, 122 Am.S.R. 951, 11 L.R.A.,N.S., 254.

66. Ala.—Cohn & Goldberg Lumber Co. v. Robbins, 48 So. 853, 159 Ala. 289.

67. Tex.—Gulf, C. & S. F. R. Co. v. Ford, Civ.App., 143 S.W. 943.

68. Md.—Harris v. Consolidation Coal Co., 73 A. 805, 111 Md. 209.

Capping

Testimony of expert that reasonable care required that pipes from gasoline tank be capped when pump was removed and gasoline tank was left in ground has been held properly received.—American Oil Co. v. Wells, 165 A. 298, 164 Md. 422.

69. Pa.—Southwest Pennsylvania Pipe Lines v. Rodgers Sand Co., 43 Pa.Super. 524.

70. Ala.—Yates v. Huntsville Hoop & Heading Co., 39 So. 647.

71. Wis.—Korn v. Pfister & Vogel Leather Co., 133 N.W. 586, 147 Wis. 526.

72. Ind.T.—Bolen-Darnall Coal Co. v. Williams, 104 S.W. 867, 7 Ind.T. 648.

Extinguishment of fires

Expert testimony concerning extinguishment of fires by automatic sprinkler is admissible without a showing that fires testified about were of kind and character of the fire in question.—Whittington v. Cameron Compress Co., Tex.Civ.App., 268 S.W. 216, affirmed Cameron Compress Co. v. Whitington, Com.App., 280 S.W. 527.

73. Wis.—Schweikert v. John R. Davis Lumber Co., 130 N.W. 508, 145 Wis. 632.

74. Wis.—Kaczmarek v. Geuder, Paeschke & Frey Co., 134 N.W. 348, 148 Wis. 46, 44 L.R.A.,N.S., 779, Ann.Cas.1913A 1139.
22 C.J. p 657 note 33.

75. Md.—American Towing & Lightering Co. v. Baker-Whiteley Coal Co., 75 A. 341, 111 Md. 504.
22 C.J. p 657 note 34.

76. Mich.—Underwood v. A. W. Stevens Co., 112 N.W. 487, 149 Mich. 39.

77. Cal.—Oakland Barge & Lighter Co. v. Foster, 143 P. 83, 25 Cal. App. 193.

78. Cal.—Luitweiler Pumping Engine Co. v. Ukiah Water & Improvement Co., 116 P. 707, 712, 16 Cal.App. 198.

79. Tex.—Texas Tract. Co. v. Morrow, Civ.App., 145 S.W. 1069.

80. Mo.—Harville v. Harrison Engineering & Construction Co., App., 7 S.W.2d 1032.

81. **Witnesses held not qualified to testify**

(1) As to effect of blow-outs, pull-outs and punctures on the operation of a vehicle.—Coppedge v. Blackburn, 15 Tenn.App. 587.

(2) As to probable course of vehicle after impact.—Fishman v. Silva, 2 P.2d 473, 116 Cal.App. 1.

(3) As to reaction time of drivers.—Moore v. Norwood, 106 P.2d 939, 41 Cal.App.2d 359.

(4) As to result of operation of a vehicle in a certain manner.
Mo.—Martin v. Kansas City, App., 224 S.W. 141.
Tenn.—Coppedge v. Blackburn, supra.

(5) As to whether a certain tire injury would result only from a certain manner of operation of the vehicle.—Coppedge v. Blackburn, supra.

(6) As to whether a person with certain ailment was a proper person to drive an automobile.—Armour & Co. v. Cartledge, 176 So. 334, 234 Ala. 644.

(7) As to whether ignition switch had been thrown off as result of collision.—Collins v. Atlantic Coast Line R. Co., 190 S.E. 817, 183 S.C. 284.

82. Iowa.—Vance v. Grohe, 274 N.W. 902, 223 Iowa 1109, 116 A.L.R. 332.
22 C.J. p 656 note 4.

83. Iowa.—Roberts v. Koons, 296 N.W. 811.
N.H.—Weiss v. Wasserman, 15 A.2d 861—McCarthy v. Souther, 137 A. 445, 83 N.H. 29.
S.C.—Collins v. Atlantic Coast Line R. Co., 190 S.E. 817, 183 S.C. 284.
Wis.—Williams v. Williams, 216 N.W. 322, 210 Wis. 301.
22 C.J. p 656 note 4 [b].

Reconstruction of collision as disfavored

Courts look with disfavor on expert testimony reconstructing automobile collisions from physical and mathematical facts, on the ground that knowledge and establishment of all the necessary elements on which the judgment should be based are impossible.—Moniz v. Bettencourt, 76 P.2d 535, 24 Cal.App.2d 718.

Inferences or judgments held inadmissible or not erroneously excluded

(1) Cause of overturning of a vehicle.—Douglas v. Boston & M. R. R., 138 N.E. 241, 244 Mass. 96.

(2) Probable course of vehicle after impact.—Linde v. Emmick, 61 P.2d 338, 16 Cal.App.2d 676—Fishman v. Silva, 2 P.2d 473, 116 Cal. App. 1.

(3) Manner in which collision occurred.—Moniz v. Bettencourt, 76 P.2d 535, 24 Cal.App.2d 718—Linde v. Emmick, supra—Johnston v. Peairs, 3 P.2d 617, 117 Cal.App. 208.

(4) Whether a certain grade of a street is dangerous.—Anderson v. Seattle Automobile Co., 265 P. 162, 147 Wash. 76.

ences or judgments which have been regarded as receivable are: What a driver should do in certain circumstances;[84] the most effective method of stopping an automobile;[85] the distance within which a motor vehicle traveling at a certain speed could be stopped[86] or turned in a certain manner;[87] the effect of driving a motor vehicle around a curve[88] or of turning across a paved street and street car tracks[89] at a certain speed under certain conditions; what would happen to approaching vehicles under certain conditions;[90] the manner in which vehicles in certain circumstances would come into contact;[91] the course which an automobile would be likely to take after sustaining a certain injury;[92] whether a certain condition of a roadway would change the course of an automobile;[93] the effect of application of brakes;[94] the functions of an emergency hand brake;[95] the safe method of loading a truck;[96] the probable effect on a truck of a load of a certain weight;[97] the effect on the motor of driving a new automobile at high speed;[98] and the danger of filling the gasoline tank while the motor is running.[99] Likewise a qualified witness may state an inference or judgment as to: Movements which were made by a motor vehicle;[1] the speed at which a motor vehicle was traveling,[2] as

(5) Whether a collision could have been avoided.—Moore v. Norwood, 106 P.2d 939, 41 Cal.App.2d 359.

(6) Whether damage could have resulted had driver been negligent.—Pybus v. Goldstein, 165 S.E. 866, 45 Ga.App. 669.

(7) Whether driving an a certain grade is negligence.—Andersen v. Seattle Automobile Co., supra.

(8) Whether a vehicle could have been operated in a certain manner.
Ala.—Capital Motor Lines v. Loring, 189 So. 897, 238 Ala. 260.
Cal.—Moore v. Norwood, supra.

(9) Whether a vehicle operated in a certain manner would overturn in a certain manner.—Martin v. Kansas City, Mo.App., 224 S.W. 141.

(10) Whether a vehicle was being driven in a prudent and safe manner.—Lee Moor Contracting Co. v. Blanton, 65 P.2d 35, 49 Ariz. 130.

(11) Whether the witness could have avoided a collision.—Meier v. Wagner, 150 P. 797, 27 Cal.App. 579.

(12) Whether the witness could have stopped the vehicle within a certain distance.—Meier v. Wagner, supra.

(13) Which vehicle struck the other.—Goodrich v. May, 255 P. 464, 121 Or. 418.

84. Cal.—Alameda County v. Tieslau, 186 P. 398, 44 Cal.App. 332.

85. Ala.—Armour & Co. v. Cartledge, 176 So. 334, 234 Ala. 644.

86. Cal.—Berkovitz v. American River Gravel Co., 215 P. 675, 191 Cal. 195.
Conn.—Friedler v. Hekeler, 112 A. 651, 96 Conn. 29.
Kan.—Birdsong v. Meyers, 40 P.2d 430, 141 Kan. 140.
Mass.—Foley v. Lord, 122 N.E. 393, 232 Mass. 368.
Or.—Johnson v. Ladd, 24 P.2d 17, 144 Or. 268.
Tex.—Zepeda v. Moore, Civ.App., 153 S.W.2d 212.
Utah.—Caperon v. Tuttle, 116 P.2d 402.
22 C.J. p 565 note 14 [a] (1), (2), p 656 note 4 [a] (3)—42 C.J. p 1226 notes 6, 7.

Showing of condition of vehicle as a foundation for such testimony is not necessary.—Brockman v. Robinson, Mo.App., 48 S.W.2d 128.

Practical experience with automobiles is sufficient to qualify an expert to testify as to the subject matter of the text.—Bozman v. State, to Use of Cronhardt, 9 A.2d 60, 177 Md. 151.

Witnesses held qualified

(1) Generally.—Brockman v. Robinson, Mo.App., 48 S.W.2d 128.

(2) Automobile mechanic.
Ark.—Roark Transp. v. Sneed, 68 S.W.2d 996, 188 Ark. 928.
Or.—Luster v. North Coast Transp. Co., 275 P. 666, 128 Or. 650.
W.Va.—Attelli v. Laird, 146 S.E. 882, 106 W.Va. 717.

(3) Driver.
Cal.—Bence v. Teddy's Taxi, 297 P. 128, 112 Cal.App. 636.
Mich.—Morris v. Montgomery, 201 N.W. 496, 229 Mich. 509.
Ohio.—Fightmaster v. Mode, 167 N.E. 407, 31 Ohio App. 273.

87. **Witness held qualified**
Mich.—Morris v. Montgomery, 201 N.W. 496, 229 Mich. 509.

88. Ky.—Cadle v. McHargue, 60 S.W.2d 973, 249 Ky. 385.

89. **Truck** weighing about four thousand pounds and being driven at a rapid speed.—Archer v. Ostemeier, 105 N.E. 522, 56 Ind.App. 385.

90. Wis.—Anderson v. Eggert, 291 N.W. 365, 234 Wis. 348.

91. Ky.—Powers' Adm'r v. Wiley, 44 S.W.2d 591, 241 Ky. 645.

92. Ky.—Crampton v. Daime, 6 S.W.2d 686, 224 Ky. 507.

93. **Loose sand**
Ga.—Seaboard Air Line Ry. Co. v Young, 148 S.E. 757, 40 Ga.App. 4.

94. Ala.—Morgan-Hill Paving Co v. Fonville, 140 So. 575, 224 Ala 383.

95. Ala.—Morgan-Hill Paving Co v. Fonville, supra.

96. U.S.—Ekblom v. G. O. Reed, Inc., C.C.A.Fla., 71 F.2d 399.

97. **Witness held qualified**
Tex.—Gulf, C. & S. F. Ry. Co. v. Young, Civ.App., 284 S.W. 664.

98. Ala.—Yates v. Barnett, 112 So. 122, 215 Ala. 554.

99. Ala.—Walker v. Stephens, 127 So. 668, 221 Ala. 18.

1. **As indicated by wheel marks**
Minn.—Carson v. Turrish, 168 N.W. 349, 140 Minn. 445, L.R.A.1918F 154.

2. Kan.—Birdsong v. Meyers, 40 P.2d 430, 141 Kan. 140.
Mass.—Harrington v. Travers, 192 N.E. 495, 288 Mass. 156.
Mo.—Roques v. Butler County R. Co., App., 264 S.W. 474.
Tex.—Zepeda v. Moore, Civ.App., 153 S.W.2d 212—Stamper v. Scholtz, Civ.App., 29 S.W.2d 883, error refused.

Qualification of witnesses

(1) Witnesses held qualified.—Schropshire v. Pickwick Stages, Northern Division, 258 P. 1107, 85 Cal.App. 216, followed in Crosby v. Pickwick Stages, Northern Division, 264 P. 346, 88 Cal.App. 799.

(2) Witnesses held not qualified.
Ky.—E. P. Barnes & Bro. v. Eastin, 227 S.W. 578, 190 Ky. 392.
Wash.—Oyster v. Dye, 110 P.2d 863, 133 A.L.R. 720.

(3) Under the rule that only an "expert" can state an opinion as to speed in terms of miles per hour, an "expert" is anyone who has by actual personal experience become familiar with operation and speed of automobile, whether knowledge was gained through personal operation of automobiles for business or pleasure, or as a traffic officer, or through experience in estimating speed of moving automobiles operated by others.—Peoples Drug Stores v. Windham, 12 A.2d 532, 178 Md. 172.

(4) Witness held qualified within the meaning of the rule stated in the preceding subdivision of this

indicated, for example, by such matters, in connection with other circumstances, as skid marks[3] or the sound of the motor;[4] whether a driver had a car under control[5] or did the most effective things to stop it;[6] whether a vehicle could have been handled in a certain manner;[7] what occurred at the time of a collision;[8] the manner in which vehicles came into contact;[9] whether a collision could have been avoided;[10] whether a certain act was necessary in order to avoid a collision;[11] whether an injury to a vehicle could have been or was caused by a collision or blow;[12] the cause of a vehicle leaving the highway;[13] whether brakes were set or locked;[14] whether a vehicle would have moved without the intervention of a human agency;[15] the manner in which tire marks were made;[16] whether a certain method of loading a truck was safe, sufficient, or proper;[17] the dangerous character of a certain place for purposes of driving;[18] and the cause of an explosion during the filling of a gasoline tank while the motor was running.[19] Such an inference or judgment may not be based on mere conjecture[20] or on facts which are not in evidence.[21]

§ 534. Medical, Surgical, or Physiological Matters

a. In general

b. Range of testimony

a. In General

Medical experts may be examined on questions relating to their particular science and such expert testimony is necessary where the case depends on medical knowledge; but opinion testimony of medical experts is rejected where it invades the province of the jury and the jury are capable of determining the issues without it.

It is competent to examine medical experts on questions relating to their particular science;[22] and

note.—Peoples Drug Stores v. Windham, supra.

3. Ala.—Jackson v. Vaughn, 86 So. 469, 204 Ala. 543.
Cal.—Linde v. Emmick, 61 P.2d 338, 16 Cal.App.2d 676.
Ill.—Fannon v. Morton, 228 Ill.App. 415.
Neb.—McKinney v. Wintersteen, 241 N.W. 112, 122 Neb. 679.
N.Y.—Saladow v. Keystone Transp. Co., 271 N.Y.S. 293, 241 App.Div. 161.
Wis.—Luethe v. Schmidt-Gaertner Co., 176 N.W. 63, 170 Wis. 590.
42 C.J. p 1226 note 88.
Skid marks alone, however, without a showing of the conditions under which they were made, do not furnish a sufficient basis for expert testimony.—Everart v. Fischer, 145 P. 33, 147 P. 189, 75 Or. 316.
Witness held qualified
Cal.—Linde v. Emmick, 61 P.2d 338, 16 Cal.App.2d 676.

4. **Witness held qualified**
Mo.—Murphy v. Cole, 88 S.W.2d 1023, 338 Mo. 13, 103 A.L.R. 505.

5. Ala.—Penton v. Penton, 135 So. 481, 223 Ala. 282.

6. Ala.—Armour & Co. v. Cartledge, 176 So. 334, 234 Ala. 644—Jones v. Keith, 134 So. 630, 223 Ala. 36.

7. **Trailer of hook and ladder truck**
Mo.—Raymore v. Kansas City Public Service Co., App., 141 S.W.2d 103.

8. Colo.—Ison v. Stewart, 94 P.2d 701, 105 Colo. 55.

9. Mass.—Jackson v. Anthony, 185 N.E. 389, 282 Mass. 540.
Particular matters
(1) Part of automobile which was struck in collision.
Colo.—Ison v. Stewart, 94 P.2d 701, 105 Colo. 55.
Conn.—Finch v. Weiner, 145 A. 31, 109 Conn. 616.
(2) Parts of vehicle which could have caused certain injuries to another vehicle in a collision.—Mann's Ex'r v. Leyman Motor Co., 28 S.W.2d 956, 234 Ky. 639.

10. Tex.—Huxford v. Kingsbury, Civ.App., 240 S.W. 1028, dismissed for want of jurisdiction.
Witness held not qualified to testify whether driver acted properly to avoid a collision.—Langley Bus Co. v. Messer, 133 So. 287, 222 Ala. 533.

11. Ala.—Hodges v. Wells, 147 So. 672, 226 Ala. 558.

12. Ky.—Crampton v. Daime, 6 S.W.2d 686, 224 Ky. 507.
Tex.—Stedman Fruit Co. v. Smith, Civ.App., 28 S.W.2d 622, error dismissed.
Impact against certain part
Kan.—Earhart v. Tretbar, 80 P.2d 4, 148 Kan. 42.
Collision at certain speed
Whether an injury to a vehicle resulting from a collision with another vehicle could have resulted from such cause if the latter vehicle had been traveling at only a certain speed is a subject for expert testimony.—Berkovitz v. American River Gravel Co., 215 P. 675, 191 Cal. 195.

13. Mo.—Sconce v. Jones, 121 S.W.2d 777, 343 Mo. 362.

14. Iowa.—Vance v. Grohe, 274 N.W. 902, 223 Iowa 1109, 116 A.L.R. 332.
Mass.—Foley v. Lord, 122 N.E. 393, 232 Mass. 368.

15. Mass.—Zandan v. Radner, 136 N.E. 387, 242 Mass. 503.

16. Mass.—Monaghan v. Keith Oil Corporation, 183 N.E. 252, 281 Mass. 129.
Testimony held properly excluded on the ground that the witness was not qualified to express an opinion which would be of aid to the jury.—Huggins v. Broom, 199 S.E. 903, 189 S.C. 15.

17. U.S.—Ekblom v. G. O. Reed, Inc., C.C.A.Fla., 71 F.2d 399.

18. **Chauffeurs held qualified** to testify as to the subject matter of the text.—Detroit Taxicab & Transfer Co. v. Callahan, C.C.A.Mich., 1 F.2d 911.

19. Ala.—Walker v. Stephens, 127 So. 668, 221 Ala. 18.

20. Wash.—Warren v. Hynes, 102 P.2d 691, 4 Wash.2d 128.
Changed conditions
An inference as to an occurrence during a collision is properly excluded where the observation from which it is drawn was not made until after a change of the conditions which existed immediately after the collision.—Collins v. Atlantic Coast Line R. Co., 190 S.E. 817, 183 S.C. 284.

21. U.S.—Hupp Motor Car Corporation v. Wadsworth, C.C.A.Mich., 113 F.2d 827.
Utah.—Caperon v. Tuttle, 116 P.2d 402.

22. Ala.—Steele-Smith Dry Goods Co. v. Blythe, 94 So. 281, 208 Ala. 288.
Colo.—C. S. Card Iron Works Co. v. Radovich, 30 P.2d 1108, 94 Colo. 426.
Ill.—Delling v. Lake View Hospital Ass'n and Training School for Nurses, 33 N.E.2d 915, 310 Ill.App. 155.

cases which depend on knowledge of the scientific effect of medicine, or of the result of surgery, must ordinarily be established by expert testimony of physicians and surgeons.[23]

The inference of the witness is rejected, however, where the facts can be placed before the jury with adequate fullness,[24] especially if the inference is on the precise point in issue,[25] the matter is of common knowledge,[26] and the jury are capable of determining the question before them without the aid of professional skill and experience,[27] although where the characteristics of the disease, and its effects, are such as to make it difficult for physicians to make them clear to the jury, opinion evidence

N.Y.—Purcell v. Jessup, 91 N.Y.S. 165, 99 App.Div. 556.
N.C.—Brewer v. Ring, 99 S.E. 358, 177 N.C. 476.
46 C.J. p 1306 note 81.
Statements of fact concerning medicine and surgery see supra § 480.

Matters calling for expert opinion
(1) That abortion claimed to have resulted from accident was something of a habit.—Alabama Power Co. v. Edwards, 121 So. 543, 219 Ala. 162.

(2) That during a radical mastoid operation it was possible for a surgeon exercising care and skill to sever the facial nerve.—Calhoun v. Fraser, 126 S.W.2d 381, 23 Tenn.App. 54.

(3) That if disease caused paralysis it would probably grow worse rather than improve as it did.—Ensley Holding Co. v. Kelley, 158 So. 896, 229 Ala. 650.

(4) That particular location of an apartment house would or would not be deleterious to health.—Hazen v. Hawley, 86 F.2d 217, 66 App.D.C. 266, certiorari denied 57 S.Ct. 315, 299 U.S. 613, 81 L.Ed. 452.

(5) That person with diabetes who keeps disease under control can live out life expectancy.—Metropolitan Life Ins. Co. v. Armstrong, C.C.A. Neb., 85 F.2d 187.

(6) That ruptured aorta could have started on a certain date and have ruptured all the way through on a later date.—Woelfle v. Connecticut Mut. Life Ins. Co. of Hartford, Conn., C.C.A.Mo., 103 F.2d 417.

(7) Testimony of dentist as to condition of tooth alleged to have been extracted by mistake.—Holtzendorf v. McNeil, 104 S.E. 919, 25 Ga. App. 792.

23. Ala.—Mobile Light & R. Co. v. Therrell, 88 So. 677, 680, 205 Ala. 553, citing **Corpus Juris.**
Cal.—General Accident, Fire & Life Assur. Corporation, Limited, of Perth, Scotland, v. Industrial Accident Commission, 288 P. 692, 106 Cal.App. 39.
Kan.—Hunter v. Joplin & P. Ry. Co., 197 P. 1092, 109 Kan. 169.
Neb.—O'Hara v. Wells, 15 N.W. 722, 14 Neb. 403.
N.Y.—Meiselman v. Crown Heights Hospital, 34 N.E.2d 367, 285 N.Y. 389, reversing 20 N.Y.S.2d 174, 259 App.Div. 840, appeal denied 20 N.Y.S.2d 669, 259 App.Div. 916.
Okl.—Southern Ice & Utilities Co. v. Barra, 62 P.2d 988, 178 Okl. 291.
22 C.J. p 661 note 18 [a].
Expert testimony in suits for malpractice see the C.J.S. title Physicians and Surgeons § 62 also 48 C. J. p 1150 note 37–p 1151 note 44.

Issues involving pathology of disease must be determined on testimony of qualified expert witnesses.—Standard Life Ins. Co. of the South v. Strong, 89 S.W.2d 367, 19 Tenn. App. 404.

Cause of miscarriage of pregnant woman
Okl.—Inter Ocean Oil Co. v. Marshall. 26 P.2d 399, 166 Okl. 118.

24. Mo.—Baptiste v. Boatmen's Nat. Bank of St. Louis, 148 S.W.2d 743.
22 C.J. p 679 note 34.

25. Ala.—Heralds of Liberty v. Collins, 110 So. 283, 216 Ala. 1—American Nat. Ins. Co. v. Rosebrough, 93 So. 502, 207 Ala. 538.
Ark.—Johnston v. Order of United Commercial Travelers of America, 33 S.W.2d 375, 182 Ark. 964.
Cal.—Thomason v. Hethcock, 46 P.2d 832, 7 Cal.App.2d 634—Sim v. Weeks, 45 P.2d 350, 7 Cal.App.2d 28.
Ga.—New York Life Ins. Co. v. Ittner, 8 S.E.2d 582, 62 Ga.App. 31.
Ill.—International Coal & Mining Co. v. Industrial Commission, 127 N.E. 703, 293 Ill. 524, 10 A.L.R. 1010—Phillips v. Brown, 2 N.E.2d 126, 285 Ill.App. 443—Fitch v. Monarch Accident Ins. Co., 239 Ill.App. 479.
Iowa.—Justis v. Union Mut. Casualty Co., 244 N.W. 696, 215 Iowa 109.
Mass.—Pappas v. U. S. Mut. Liability Ins. Co., 159 N.E. 635, 262 Mass. 51.
Mich.—De Haan v. Winter, 241 N.W. 923, 258 Mich. 293.
N.Y.—Broderick v. Brooklyn, Q. C. & S. R. Co., 174 N.Y.S. 571, 186 App. Div. 546.
N.C.—Potts v. Life Ins. Co. of Virginia, 174 S.E. 123, 206 N.C. 257.
N.D.—Halverson v. Zimmerman, 218 N.W. 862, 56 N.D. 607—Dolan v. O'Rourke, 217 N.W. 666, 56 N.D. 416.
Ohio.—Mitchell v. Industrial Commission of Ohio, 19 N.E.2d 769, 135 Ohio St. 110—Abercrombie v. Roof, 28 N.E.2d 772, 64 Ohio App. 365.
Or.—Patterson v. Howe, 202 P. 225, 102 Or. 275—Lehman v. Knott, 196 P. 476, 100 Or. 59.
22 C.J. p 679 note 32.

Evidence held inadmissible
(1) Effect of injuries on earning capacity.—Brown v. Schunk, 191 N.E. 886, 47 Ohio App. 344.

(2) Whether employee's death was caused by unreasonable refusal to submit to operation.—Utah Copper Co. v. Industrial Commission of Utah, 256 P. 397, 69 Utah 452.

26. Ala.—Armour & Co. v. Cartledge, 176 So. 334, 234 Ala. 644—Equitable Life Assur. Soc. of U. S. v. Davis, 164 So. 86, 231 Ala. 261—Hester v. Ford, 130 So. 203, 221 Ala. 592.
Utah.—Tremelling v. Southern Pac. Co., 257 P. 1066, 70 Utah 72.

27. U.S.—U. S. v. Bowman, C.C.A. Utah, 73 F.2d 716—Clauson v. U. S., C.C.A.S.D., 60 F.2d 694.
Ala.—Equitable Life Assur. Soc. of U. S. v. Davis, 164 So. 86, 231 Ala. 261—Landham v. Lloyd, 136 So. 815, 223 Ala. 487.
Cal.—Barham v. Widing, 291 P. 173, 210 Cal. 206.
Ill.—Frochter v. Arenholz, 242 Ill. App. 93.
Mich.—In re Elliott's Estate, 257 N.W. 919, 269 Mich. 677.
Mo.—Henson v. Kansas City, 210 S.W. 13, 277 Mo. 443.
Neb.—McGowan v. Dresher Bros., 183 N.W. 560, 106 Neb. 374.
N.H.—Vidal v. Town of Errol, 162 A. 232, 86 N.H. 1—L'Esperance v. Sherburne, 155 A. 203, 85 N.H. 103.
Okl.—Oklahoma Union Ry. Co. v. Bertrand, 264 P. 621, 129 Okl. 263.
Pa.—Rudy v. New York Life Ins. Co. of New York City, 46 Dauph. Co. 1.
Tex.—Great Atlantic & Pacific Tea Co. v. Walker, Civ.App., 104 S.W.2d 627, reversed on other grounds Walker v. Great Atlantic & Pacific Tea Co., 112 S.W.2d 170, 131 Tex. 57.
22 C.J. p 679 note 33.

Matters not calling for expert opinion
(1) That space allotted son's family in home of parents furnished sufficient rooms.—Polk County v. Owen, 174 N.W. 99, 187 Iowa 220.

(2) Whether physician's treatment of patient continued to within two years of commencement of malpractice action.—Schmit v. Esser, 236 N.W. 622, 183 Minn. 354, 74 A.L.R. 1312.

on the ultimate point in issue may be admitted where appropriate instructions as to the effect and weight of such evidence are given.[28]

Time as of which opinion stated. A medical witness should state the opinion which he entertains at the time when his testimony is given, rather than the opinion which he formed at the time when he attended the patient.[29]

b. Range of Testimony

(1) In general
(2) Cause
(3) Effect
(4) Treatment
(5) Mechanical or necessary inferences
(6) Probabilities

(1) In General

A wide range is allowed in the reception of the inferences and judgments of medical observers and experts; and their opinions as to physical condition, existence and nature of a disease or injury, its extent or stage of development, etc. are generally received.

In the field of medical knowledge, a wide range is necessarily allowed in the reception of the inferences of observers and the judgments of experts.[30] A person skilled in matters of medicine or physiology may state his inference or judgment with respect to the physical condition of another person,[31]

28. Ga.—Metropolitan Life Ins. Co. v. Saul, 5 S.E.2d 214, 189 Ga. 1.

29. Ohio.—Hubach v. Cole, 12 N.E.2d 283, 286, 133 Ohio St. 137, citing **Corpus Juris.**
22 C.J. p 675 note 79.

30. U.S.—Metropolitan Life Ins. Co. v. Armstrong, C.C.A.Neb., 85 F.2d 187—Corrigan v. U. S., C.C.A.Idaho, 82 F.2d 106, 108, quoting **Corpus Juris.**
Ala.—New York Life Ins. Co. v. Torrance, 153 So. 458, 26 Ala.App. 38, certiorari denied 153 So. 463, 228 Ala. 286.
22 C.J. p 661 note 17.

History of case
Reasonable latitude should be allowed in admission of doctor's testimony as to history of case concerning which he is testifying.—John v. Ætna Life Ins. Co. of Hartford, Conn., Mo.App., 100 S.W.2d 936.

Lapse of time between injury and examination of injured person by a medical expert affects weight, and not admissibility, of testimony.
U.S.—Champlin Refining Co. v. Thomas, C.C.A.Okl., 93 F.2d 133.
Fla.—Foster v. Thornton, 170 So. 459, 125 Fla. 699.
Mass.—Minns' Case, 190 N.E. 843, 286 Mass. 459.
Mo.—Phares v. Century Electric Co., App., 131 S.W.2d 879—Adams v. Carlo, App., 101 S.W.2d 753.
Pa.—McMinis v. Philadelphia Rapid Transit Co., 135 A. 722, 288 Pa. 377.
Tex.—Continental Casualty Co. v. McKinnon, Civ.App., 87 S.W.2d 548—S. H. Kress & Co. v. Jennings, Civ.App., 64 S.W.2d 1074, error dismissed.
22 C.J. p 677 note 2.

Lapse of time since observation
(1) Lapse of time since the witness made the observation on which his inference is based does not necessarily exclude his statement.—Missouri Pac. R. Co. v. Callahan, Tex., 12 S.W. 833—22 C.J. p 677 note 99.
(2) However, it may, in connection with other circumstances, have this effect.—Missouri Pac. R. Co. v. Lovelace, 45 P. 590, 57 Kan. 195—22 C.J. p 677 note 1.

31. U.S.—U. S. v. Aspinwall, C.C.A.Or., 96 F.2d 867—U. S. v. Russian, C.C.A.Pa., 73 F.2d 363—Moyer v. Ætna Life Ins. Co., D.C.Pa., 39 F.Supp. 725.
Ala.—Equitable Life Assur. Soc. of U. S. v. Davis, 164 So. 86, 231 Ala. 261—Macke v. Sutterer, 141 So. 651, 224 Ala. 681—New York Life Ins. Co. v. Torrance, 153 So. 458, 26 Ala.App. 38, certiorari denied 153 So. 463, 228 Ala. 286.
Ark.—Missouri Pac. Transp. Co. v. Sacker, 138 S.W.2d 371, 200 Ark. 92.
Ga.—Alabama Great Southern R. Co. v. McBryar, App., 15 S.E.2d 563.
Ky.—Horn's Adm'r v. Prudential Ins. Co. of America, 65 S.W.2d 1017, 252 Ky. 137.
Md.—Langenfelder v. Thompson, 20 A.2d 491—Salisbury Coca Cola Bottling Co. v. Lowe, 4 A.2d 440, 176 Md. 230—Mead v. Gilbert, 185 A. 668, 170 Md. 592—Ausherman v. Frisch, 163 A. 852, 164 Md. 78—Cumberland & Westernport Transit Co. v. Metz, 149 A. 4, 158 Md. 424, reargument denied 149 A. 565, 158 Md. 424, and appeal dismissed American Oil Co. v. Metz, 51 S.Ct. 40, 282 U.S. 801, 75 L.Ed. 720—Greer Transp. Co. v. Knight, 146 A. 851, 157 Md. 528.
Mass.—Menard v. Collins, 9 N.E.2d 387, 298 Mass. 40.
Miss.—New York Life Ins. Co. v. Burris, 165 So. 116, 174 Miss. 658.
Mo.—Gaty v. United Rys. Co., 251 S.W. 61—Haile v. Metropolitan Life Ins. Co., App., 96 S.W.2d 628—Young v. Metropolitan Life Ins. Co., 84 S.W.2d 1065, 229 Mo.App. 823, certiorari quashed State ex rel. Metropolitan Life Ins. Co. v. Allen, 100 S.W.2d 487, 339 Mo. 1156—Seeber v. City of Hannibal, App., 288 S.W. 974, 977, citing **Corpus Juris**—Pyle v. Kansas City Light & Power Co., App., 246 S.W. 979—Baldwin v. Kansas City Rys. Co., App., 231 S.W. 280.
N.J.—Cerami v. Zimmerman, 148 A. 154, 8 N.J.Misc. 24.
N.Y.—In re Roche's Will, 278 N.Y.S. 929, 244 App.Div. 756—Fluhr v. Manhattan R. Co., 64 N.Y.S. 296, 51 App.Div. 627.
Or.—Derrick v. Portland Eye, Ear, Nose & Throat Hospital, 209 P. 344, 105 Or. 90.
Pa.—Cover v. Hershey Transit Co., 139 A. 266, 290 Pa. 551—Troxell v. Shirk, 196 A. 899, 130 Pa.Super. 40.
Tenn.—Carter v. Kelsey Wheel Co., 77 S.W.2d 449, 168 Tenn. 262, citing **Corpus Juris.**
Tex.—Federal Underwriters Exchange v. Cost, 123 S.W.2d 332, 132 Tex. 299, affirming, Civ.App., 115 S.W.2d 706—Maniatis v. Texas Mut. Life Ins. Co., Civ.App., 90 S.W.2d 936—Zurich General Accident & Liability Ins. Co. v. Kerr, Civ.App., 54 S.W.2d 349, error refused.
Wash.—Hill v. Great Northern Life Ins. Co., 57 P.2d 405, 186 Wash. 167.
22 C.J. p 661 notes 18, 19—37 C.J. p 625 note 2—46 C.J. p 1306 note 81.
Qualifications of witness see infra § 537.

Physicians testifying as experts
When testifying as experts, physicians merely give their opinions, and do not testify about one's condition except to give their opinions.—Great Republic Life Ins. Co. v. Lankford, 127 S.W.2d 811, 198 Ark. 166.

Condition as of certain date
Whether employee, claiming compensation, was suffering from lead poisoning on certain date, is scientific question determinable by medical witnesses.—American Smelting & Refining Co. v. Industrial Commission, 187 N.E. 495, 353 Ill. 324.

and what certain observed conditions indicate;[32] what an ordinary physician of the locality holding himself out as able to read X-ray pictures could or should have seen in such pictures of an injury;[33] as to the existence of a disease[34] or injury,[35] or as to the nature[36] or extent[37] of an injury; but a witness will not be allowed to characterize the injuries observed by him, as that they are "very serious."[38]

A physician may state his diagnosis of a disease,[39] as of bodily[40] or nervous[41] symptoms, the occurrence of a change,[42] and the stage of development of a disease.[43] Whether certain conduct is consistent with having received certain injuries,[44] and whether a given operation was necessary,[45] may be stated by a sufficiently qualified witness.

Only the inference of the witness himself can be stated; a statement of the opinion of other physicians with whom he acted in the case is objectionable as hearsay.[46] However, in certain cases a

32. Ala.—Torrance v. Wells, 122 So. 322, 219 Ala. 384.
Colo.—Daly v. Lininger, 288 P. 633, 87 Colo. 401.
Ind.—Haskell & Barker Car Co. v. Erickson, 128 N.E. 466, 73 Ind.App. 657.
Ky.—Louisville & N. R. Co. v. McCoy, 87 S.W.2d 921, 261 Ky. 435.
Md.—Schiller v. Baltimore & O. R. Co., 112 A. 272, 137 Md. 235.
Pa.—Troxell v. Shirk, 196 A. 899, 130 Pa.Super. 40.
22 C.J. p 662 note 20.

Time of death

In action for death of pedestrian allegedly struck by train, a coroner with six or eight years' experience was properly allowed to give his opinion as to how long pedestrian had been dead when his body was found.—Atlanta & W. P. R. Co. v. Truitt, Ga.App., 16 S.E.2d 273.

33. Utah.—Baker v. Wycoff, 79 P.2d 77, 95 Utah 199.

34. U.S.—U. S. v. Rakich, C.C.A. Ark., 90 F.2d 137.
Mass.—Coddaire v. Sibley, 169 N.E. 797, 270 Mass. 41.
Mich.—Tregonning v. Castantini, 220 N.W. 171, 243 Mich. 233.
22 C.J. p 662 note 21.

35. Mich.—Rogers v. Youngs, 233 N.W. 365, 252 Mich. 420.
22 C.J. p 662 note 22.

36. Ark.—Guardian Life Ins. Co. v. Johnson, 57 S.W.2d 555, 186 Ark. 1019—Hines v. Patterson, 225 S.W. 642, 146 Ark. 367.
Ind.—Blair v. Washington, 134 N.E. 503, 77 Ind.App. 698, denying petition for rehearing 133 N.E. 392, 77 Ind.App. 698.
Kan.—Gilbreath v. Prairie Oil & Gas Co., 278 P. 707, 128 Kan. 618.
Mich.—Pearce v. Rodell, 276 N.W. 883, 283 Mich. 19.
Mo.—Gilchrist v. Kansas City Rys. Co., 254 S.W. 161—Roach v. Kansas City Rys. Co., App., 228 S.W. 520.
Mont.—DeVore v. Mutual Life Ins. Co. of New York, 64 P.2d 1071, 103 Mont. 599.
N.Y.—Meiselman v. Crown Heights Hospital, 34 N.E.2d 367, 285 N.Y. 389, reversing 20 N.Y.S.2d 174, 259 App.Div. 840, appeal denied 20 N.Y.S.2d 669, 259 App.Div. 916.
N.D.—Asch v. Washburn Lignite Coal Co., 186 N.W. 757, 48 N.D. 734.
Tenn.—Montesi v. Patton, 10 Tenn. App. 455.
Tex.—Federal Underwriters Exchange v. Cost, 123 S.W.2d 332, 132 Tex. 299, affirming, Civ.App., 115 S.W.2d 706.
Vt.—Catto v. Liberty Granite Co., 141 A. 684, 101 Vt. 143.
W.Va.—Barna v. Gleason Coal & Coke Co., 98 S.E. 158, 83 W.Va. 216.
22 C.J. p 662 note 23.

37. U.S.—Standard Oil Co. of New Jersey v. Sewell, C.C.A.Md., 37 F.2d 230—Southwest Metals Co. v. Gomez, C.C.A.Ariz., 4 F.2d 215, 39 A.L.R. 1416.
Ala.—Pope v. Ryals, 167 So. 721, 232 Ala. 260.
Ark.—Hines v. Patterson, 225 S.W. 642, 146 Ark. 367.
Iowa.—Bradley v. Interurban Ry. Co., 183 N.W. 493, 191 Iowa 1351.
Kan.—Seymour v. Kelso, 16 P.2d 958, 136 Kan. 543—Gilbreath v. Prairie Oil & Gas Co., 278 P. 707, 128 Kan. 618.
Ky.—Ætna Life Ins. Co. v. McCullagh, 241 S.W. 836, 195 Ky. 136.
Minn.—Hoch v. Byram, 230 N.W. 823, 180 Minn. 298—Fulmore v. St. Paul City R. Co., 75 N.W. 589, 72 Minn. 448.
N.D.—Newton v. Gretter, 236 N.W. 254, 60 N.D. 635—Asch v. Washburn Lignite Coal Co., 186 N.W. 757, 48 N.D. 734.
Pa.—Paul v. Atlantic Refining Co., 156 A. 94, 304 Pa. 360.
Tenn.—Goebel v. Fleming, 13 Tenn. App. 473.
Tex.—Zurich General Accident & Liability Ins. Co. v. Kerr, Civ. App., 54 S.W.2d 349, error refused.
Nature and extent of disability see § 534 b (3) infra.

Testimony that operation was serious was properly admitted to show extent of plaintiff's injuries.—Coates v. Bates, 164 N.E. 448, 265 Mass. 444.

Means of ascertaining extent

Physician's testimony respecting means of determining seriousness of brain concussion was held admissible as expert testimony.—Wack v. F. E. Schoenberg Mfg. Co., 53 S.W. 2d 28, 331 Mo. 197.

Effect of admission in pleadings

Where plaintiff as administrator sought to recover for the conscious mental and physical suffering visited on deceased, medical testimony as to injuries of deceased was admissible, although defendant admitted deceased died in manner petition alleged.—Marcus v. Huguley, Tex.Civ. App., 37 S.W.2d 1100, error dismissed.

Definiteness of testimony

Testimony that boy had "possibly" had brain concussion, should have been stricken out as too indefinite.—Mangione v. Snead, 195 A. 329, 173 Md. 33.

38. N.Y.—Stoothoff v. Brooklyn Heights R. Co., 64 N.Y.S. 243, 50 App.Div. 585.

39. Ala.—Tucker v. Graves, 88 So. 40, 17 Ala.App. 602.
Ill.—Powell v. Myers Sherman Co., 32 N.E.2d 663, 309 Ill.App. 12.
22 C.J. p 662 note 24.

40. Tenn.—Gulf Refining Co. v. Frazier, 83 S.W.2d 285, 19 Tenn.App. 76.
22 C.J. p 662 note 25.

41. U.S.—Corrigan v. U. S., C.C.A. Idaho, 82 F.2d 106, 108, quoting **Corpus Juris**.
22 C.J. p 662 note 27.
Mental condition see infra § 535.

42. Iowa.—Bomgardner v. Andrews, 8 N.W. 481, 55 Iowa 638.

43. U.S.—Corrigan v. U. S., C.C.A. Idaho, 82 F.2d 106, 108, quoting **Corpus Juris**.
22 C.J. p 663 note 29.

44. U.S.—New York Cent. R. Co. v. Johnson, C.C.A.Mo., 27 F.2d 699, certiorari granted 49 S.Ct. 27, 278 U.S. 590, 73 L.Ed. 523, reversed on other grounds 49 S.Ct. 300, 279 U. S. 310, 73 L.Ed. 706, amended 49 S.Ct. 417.
22 C.J. p 664 note 42.

45. Md.—Schiller v. Baltimore & O. R. Co., 112 A. 272, 137 Md. 235.
22 C.J. p 664 note 43.

46. Neb.—Ponca v. Crawford, 26 N. W. 365, 18 Neb. 551.

physician has been permitted to give in evidence statements or opinions of third persons.[47]

(2) Cause

A medical expert may state his opinion as to what might have caused, and in a large number of cases he has been permitted to state what in his opinion did cause, an injury or death, although such latter testimony is sometimes rejected as an invasion of the province of the jury.

A sufficiently qualified witness may testify as to whether certain detailed occurrences would be a natural,[48] sufficient,[49] probable,[50] or possible[51] cause of a certain physical result, or of death.[52] Further, a medical witness may state what would be a sufficient cause for a given result,[53] whether a given condition could have resulted from a specified injury[54] or could have resulted from a speci-

47. **Consensus of medical opinion as to value of drugs**
In a libel for misbranding packages of pills under food and drugs act, a physician may testify as to the consensus of medical opinions relative to therapeutic value of drugs.—U. S. v. Chichester Chemical Co., 298 F. 829, 54 App.D.C. 370.

Doctor's testimony, repeating plaintiff's statements concerning X-rays made by another physician and other physicians' statements to plaintiff, is competent as supporting grounds for diagnosis and treatment prescribed by witness.—Manuel v. Metropolitan Life Ins. Co., La.App., 139 So. 548.

Information from physician first treating patient
In action on accident policy to recover for death of insured, it was competent for physicians who treated insured before his death to testify as to what they learned from physician who first treated insured, in the history of insured's case, as to the manner in which fatal infection began.—Metropolitan Life Ins. Co. v. Osborne, 150 S.W.2d 479, 286 Ky. 301.

Information derived from report of physician
Permitting examination of attending physician as to what he gathered from report concerning reporting physician's opinion of patient's condition is not abuse of discretion.—Travelers' Ins. Co. of Hartford, Conn., v. Person, C.C.A.Neb., 58 F.2d 210.
Basis of inference or judgment see infra § 536.

48. Colo.—Curtis v. Farrar, 211 P. 386, 72 Colo. 355.
22 C.J. p 666 note 50.

49. Ill.—Davis v. East St. Louis & S. Ry. Co., 9 N.E.2d 254, 290 Ill. App. 540.
Iowa.—Pentony v. Dudley, 198 N.W. 78, 197 Iowa 744.
Minn.—Milliren v. Federal Life Ins. Co., 242 N.W. 290, 185 Minn. 614.
22 C.J. p 666 note 51.

50. Ga.—Great Atlantic & Pacific Tea Co. v. De Moran, 169 S.E. 247, 46 Ga.App. 764.
Md.—Mangione v. Snead, 195 A. 329, 334, 173 Md. 33, citing **Corpus Juris**—Marine v. Stewart, 168 A. 891, 165 Md. 698—Townsend Grace Co. v. Ackerman, 148 A. 122, 158 Md. 34.
Mo.—Hensley v. Kansas City Rys. Co., App., 214 S.W. 287.
Pa.—Connor v. Philadelphia Rapid Transit Co., 98 Pa.Super. 250.
22 C.J. p 666 note 52.

51. Ala.—Thaggard v. Vafes, 119 So. 647, 218 Ala. 609.
Cal.—Ward v. Read, 25 P.2d 821, 219 Cal. 65.
Conn.—Tappan v. Knox, 162 A. 7, 115 Conn. 508.
Mich.—De Groot v. Winter, 247 N.W. 69, 71, 261 Mich. 660, quoting **Corpus Juris**—Bishop v. Shurly, 211 N.W. 75, 237 Mich. 76.
Mo.—Meyers v. Wells, 273 S.W. 110—Gardner v. Ford Motor Co., App., 130 S.W.2d 201—Floyd v. A. Y. McDonald Mfg. Co., 46 S.W.2d 251, 255, 226 Mo.App. 444, citing **Corpus Juris**—Nelson v. Kansas City Public Service Co., App., 30 S.W.2d 1044—Stewart v. American Ry. Express Co., App., 18 S.W.2d 520—Keith v. Kansas City Rys. Co., App., 231 S.W. 1046—Baldwin v. Kansas City Rys. Co., App., 214 S.W. 274.
Or.—Spicer v. Benefit Ass'n of Railway Employees, 17 P.2d 1107, 142 Or. 574.
Tex.—National Mut. Casualty Co. v. Lowery, Civ.App., 135 S.W.2d 1044, affirmed, Sup., 148 S.W.2d 1089—Schaff v. Beale, Civ.App., 250 S.W. 757—El Paso Electric Ry. Co. v. Jennings, Civ.App., 224 S.W. 1113, dismissed for want of jurisdiction.
Utah.—Jackson v. Harries, 236 P. 234, 65 Utah 282.
22 C.J. p 665 note 46 [g], p 666 note 53, p 721 note 60.

Evidence held inadmissible
In compensation case, physician's testimony that compressed air used in ventilating chute in coal mine quite possibly raised blood pressure was held not to conform to requirements of expert testimony.—Howell v. St. Clair Coal Co., 95 Pa.Super. 310.

52. U.S.—Travelers Ins. Co. v. Drake, C.C.A.Cal., 89 F.2d 47.
Ind.—Haskell & Barker Car Co. v. Erickson, 128 N.E. 466, 73 Ind. App. 657.
Iowa.—Groves v. Webster City, 270 N.W. 329, 222 Iowa 849—Pentony v. Dudley, 198 N.W. 78, 197 Iowa 744.
Mich.—Bishop v. Shurly, 211 N.W. 75, 237 Mich. 76.
Or.—Spicer v. Benefit Ass'n of Railway Employees, 17 P.2d 1107, 142 Or. 574.
22 C.J. p 667 note 54.

53. Mich.—Van Der Bie v. Kools, 250 N.W. 268, 264 Mich. 468.
22 C.J. p 667 note 56.

54. Cal.—Schuh v. Oil Well Supply Co., 195 P. 703, 50 Cal.App. 588.
Ill.—Powell v. Myers Sherman Co., 32 N.E.2d 663, 309 Ill.App. 12—Davis v. East St. Louis & S. Ry. Co., 9 N.E.2d 254, 290 Ill.App. 540—Swalm v. City of Joliet, 219 Ill. App. 123.
Iowa.—Judd v. Rudolph, 222 N.W. 416, 207 Iowa 113, 62 A.L.R. 1174—Walmer-Roberts v. Hennessey, 181 N.W. 798, 191 Iowa 86.
Me.—Hamlin v. N. H. Bragg & Sons, 151 A. 197, 129 Me. 165.
Md.—Langenfelder v. Thompson, 20 A.2d 491.
Mo.—Scanlon v. Kansas City, 81 S.W.2d 939, 336 Mo. 1058—Feltz v. Terminal Railroad Ass'n of St. Louis, 81 S.W.2d 616, 336 Mo. 790—Meyers v. Wells, 273 S.W. 110—Maloney v. United Rys. Co. of St. Louis, 237 S.W. 509—Perringer v. Lynn Food Co., App., 148 S.W.2d 601—Fritz v. Manufacturers Ry. Co., App., 124 S.W.2d 603—Simon v. S. S. Kresge Co., App., 103 S.W.2d 523—Adams v. Carlo, App., 101 S.W.2d 753—Carroll v. Missouri Power & Light Co., 96 S.W.2d 1074, 231 Mo.App. 265—Klohr v. Edwards, App., 94 S.W.2d 99—Robinson v. Ross, App., 47 S.W.2d 122—Mueller v. St. Louis Public Service Co., App., 44 S.W.2d 875—McPherson v. Premier Service Co., App., 38 S.W.2d 277—Stevens v. Westport Laundry Co., 25 S.W.2d 491, 224 Mo.App. 955—Powers v. Kansas City, 18 S.W.2d 545, 224 Mo.App. 70—Tucker v. Kollias, 16 S.W.2d 649, 223 Mo.App. 367—Roberson v. Loose-Wiles Biscuit Co., App., 285 S.W. 127—Cecil v. Wells, 259 S.W. 844, 214 Mo.App. 193—Vogts v. Kansas City Rys. Co., App., 228 S.W. 526—Roach v. Kansas City Rys. Co., App., 228 S.W. 520.
Pa.—Shedlock v. Wyoming Valley Auto Bus Co., 34 Luz.L.Reg. 312, affirmed 17 A.2d 384, 340 Pa. 377.
Tenn.—Sanders v. Blue Ridge Glass Corporation, 33 S.W.2d 84, 161 Tenn. 535.
Tex.—Republic Underwriters v. How-

fied neglect,[55] or would be likely so to result,[56] or could have been caused by a certain weapon.[57] The witness may state what he should judge was the cause of certain symptoms under given circumstances;[58] and which among several possible causes was the probable[59] or proximate[60] one.

A medical expert may not, it has been held, state whether a given cause will or will not produce a given bodily result.[61] Where a physician, in an action for personal injuries, testified as to the condition of plaintiff three years after the injury, his testimony as to whether the condition described could result from a fall has been held inadmissible.[62]

Opinion as to actual cause. On the ground that the testimony would invade the province of the jury, it has been held in some cases that the witness may not testify what specific occurrences actually caused a particular condition;[63] whether a given cause produced a given bodily result in a given case;[64] or whether detailed circumstances actually produced the injury or death.[65]

On the other hand, it has been stated that the distinction made in cases which permit a doctor to state what might have caused plaintiff's injuries but do not permit him to state that, in his opinion, a particular accident caused his injury is of doubtful significance[66] and too fine and fanciful as a practical matter;[67] and in a large number of cases the expert has been permitted to state his inference as to the cause of certain injuries,[68] of an

ard, Civ.App., 69 S.W.2d 584, error dismissed.
Wis.—Sundquist v. Madison Rys. Co., 221 N.W. 392, 197 Wis. 83.
22 C.J. p 667 note 57, p 721 note 61 [b].

Condition arising from causes other than injury
Testimony that condition could have arisen from causes other than the injury complained of is admissible.—Bollinger v. Curtis & Co. Mfg. Co., Mo., 249 S.W. 907.

55. Ill.—Jones v. Walgreen Co., 265 Ill.App. 308.
Tex.—Western Union Tel. Co. v. Cooper, 9 S.W. 598, 71 Tex. 507, 10 Am.S.R. 772, 1 L.R.A. 728.

56. Cal.—Martin v. Siller, 61 P.2d 540, 17 Cal.App.2d 153.
Md.—Langenfelder v. Thompson, 20 A.2d 491.
Tenn.—National Life & Accident Ins. Co. v. Follett, 80 S.W.2d 92, 168 Tenn. 647.
3 C.J. p 123 note 62 [f] (1)—22 C.J. p 667 note 59, p 721 note 61 [a].

57. Tex.—Metropolitan L. Ins. Co. v. Wagner, 109 S.W. 1120, 50 Tex.Civ. App. 233.
22 C.J. p 667 note 60.

58. Mo.—Kidd v. Kansas City Light & Power Co., App., 239 S.W. 584.
22 C.J. p 667 note 61.

Elimination of theory as possibility
In personal injury action, medical witness' testimony that he did not think that a fracture of the sixth vertebra would cause trouble to the mastoid and result in the symptoms found in injured person was material and admissible as tending to eliminate one theory as a possibility and leaving only others for consideration. —Leavitt v. Bacon, 200 A. 399, 89 N. H. 383.

59. Wash.—Hill v. Great Northern Life Ins. Co., 57 P.2d 405, 186 Wash. 167.
22 C.J. p 668 note 62.

Either of two causes
In personal injury action, a physician's testimony that injuries could have been due to either traumatic neurosis or to labyrinthitis was admissible, where either traumatic neurosis or labyrinthitis could have been caused by the accident.—Leavitt v. Bacon, 200 A. 399, 89 N.H. 383.

Evidence held admissible
On an issue involving an issue as to whether gangrene was produced by constriction of bandages or by gas bacillus infection, the opinion of an expert as to the time in which gangrene of the former kind would ordinarily prove to be fatal is admissible. —Browning v. Hoffman, 111 S.E. 492, 90 W.Va. 568.

60. Ariz.—Hartford Accident & Indemnity Co. v. Industrial Commission of Arizona, 299 P. 1026, 38 Ariz. 307.
Conn.—Antel v. Poli, 123 A. 272, 100 Conn. 64.
Tex.—International-Great Northern R. Co. v. Cooper, Civ.App., 297 S. W. 638, affirmed, Com.App., 1 S.W. 2d 578.
Wyo.—Equitable Life Assur. Soc. of U. S. v. Gratiot, 14 P.2d 438, 45 Wyo. 1, 82 A.L.R. 1397.
22 C.J. p 668 note 63.

Primary cause of death
Minn.—Kieffer v. Sherwood, 238 N. W. 331, 184 Minn. 205.

61. N.Y.—Van Zandt v. Mutual Ben. L. Ins. Co., 55 N.Y. 169, 14 Am.R. 215, reversing 6 Alb.L.J. 96.
22 C.J. p 668 note 64.

62. N.Y.—Mackey v. Interurban St. R. Co., 101 N.Y.S. 439, 115 App.Div. 467.

63. U.S.—O'Brien v. Massachusetts Bonding & Insurance Co., C.C.A. Mo., 64 F.2d 33.
Iowa.—Justis v. Union Mut. Casualty Co., 244 N.W. 696, 215 Iowa 109.
22 C.J. p 679 note 28.

Opinion evidence on ultimate fact in issue see supra § 446.

64. Tenn.—Sanders v. Blue Ridge Glass Corporation, 83 S.W.2d 84, 161 Tenn. 535—Jett v. Life & Casualty Ins. Co., 109 S.W.2d 104, 21 Tenn.App. 266.
22 C.J. p 668 note 65.

65. U.S.—Harrison v. New York Life Ins. Co., C.C.A.Ohio, 78 F.2d 421.
Cal.—Sim v. Weeks, 45 P.2d 350, 7 Cal.App.2d 28.
Mich.—Kemp v. Aldrich, 286 N.W. 81, 286 Mich. 715, reversing 282 N.W. 833, 286 Mich. 591—Layton v. Cregan & Mallory Co., 252 N.W. 337, 265 Mich. 574—De Groot v. Winter, 247 N.W. 69, 71, 261 Mich. 660, quoting **Corpus Juris**—De Haan v. Winter, 241 N.W. 923, 258 Mich. 293.
22 C.J. p 667 note 55.

66. Mich.—Cord v. Pless, 184 N.W. 427, 216 Mich. 33.

67. Minn.—Piche v. Halvorson, 272 N.W. 591, 199 Minn. 526.

68. Iowa.—Parkill v. Bekin's Van & Storage Co., 151 N.W. 506, 169 Iowa 455.
Minn.—Piche v. Halvorson, 272 N.W. 591, 199 Minn. 526.
Okl.—Oklahoma Natural Gas Corporation v. Schwartz, 293 P. 1087, 146 Okl. 250.
Tex.—Federal Underwriters Exchange v. Carroll, Civ.App., 130 S. W.2d 1101—Zurich General Accident & Liability Ins. Co. v. Kerr, Civ.App., 54 S.W.2d 349, error refused—Railway Mail Ass'n v. Forbes, Civ.App., 49 S.W.2d 880, error dismissed—Fidelity Union Casualty Co. v. Martin, Civ.App., 45 S.W.2d 682, error dismissed.
W.Va.—Foose v. Hawley Corporation, 198 S.E. 138, 120 W.Va. 334.
Wyo.—McCoy v. Clegg, 257 P. 484, 36 Wyo. 473.
22 C.J. p 664 note 44.

observed physical condition,[69] or, according to the decisions on the subject, of the death of a per-

69. U.S.—U. S. v. Cannon, C.C.A. Mass., 116 F.2d 567—London Guarantee & Accident Co. v. Woelfle, C.C.A.Mo., 83 F.2d 325—Cropper v. Titanium Pigment Co., C.C.A.Mo., 47 F.2d 1038, 78 A.L.R. 737.
Ala.—Pacific Mut. Life Ins. Co. of California v. Edmonson, 179 So. 185, 235 Ala. 365—Louisville & N. R. Co. v. Jacobson, 118 So. 565, 218 Ala. 384—Central of Georgia Ry. Co. v. Grover, 118 So. 506, 218 Ala. 290.
Ga.—Pollard v. Page, 193 S.E. 117, 56 Ga.App. 503—Hughes v. Weaver, 148 S.E. 12, 39 Ga.App. 597—Bullard v. Metropolitan Life Ins. Co., 122 S.E. 75, 31 Ga.App. 641.
Ind.—Illinois Steel Co. v. Fuller, 23 N.E.2d 259.
Iowa.—Sterler v. Busch, 195 N.W. 369, 197 Iowa 231.
Ky.—Hines v. May, 230 S.W. 924, 191 Ky. 493.
Md.—Langenfelder v. Thompson, 20 A.2d 491—Armour & Co. v. Leasure, 9 A.2d 572, 177 Md. 393—Salisbury Coca Cola Bottling Co. v. Lowe, 4 A.2d 440, 176 Md. 230—Symington v. Graham, 169 A. 316, 165 Md. 441.
Mich.—Pearce v. Rodell, 276 N.W. 883, 283 Mich. 19.
N.J.—Martin v. De Young, 122 A. 813, 99 N.J.Law 284—Osbun v. De Young, 122 A. 809, 99 N.J.Law 204.
N.Y.—Meiselman v. Crown Heights Hospital, 34 N.E.2d 367, 285 N.Y. 389, reversing 20 N.Y.S.2d 174, 259 App.Div. 840, appeal denied 20 N.Y.S.2d 669, 259 App.Div. 916—Matteson v. New York Cent. R. Co., 62 Barb. 364, 377, affirmed 35 N.Y. 487, 91 Am.D. 67.
Okl.—Shawnee Gas & Electric Co. v. Hunt, 122 P. 673, 32 Okl. 368.
Or.—Goldfoot v. Lofgren, 296 P. 843, 135 Or. 533.
Pa.—Moseley v. Reading Co., 145 A. 293, 295 Pa. 342—McMinis v. Philadelphia Rapid Transit Co., 135 A. 722, 288 Pa. 377—Kulla v. Lehigh Valley Coal Co., 12 Pa.Dist. & Co. 216, 25 Sch.L.R. 74—Snyder v. Rhoads, 8 Pa.Dist. & Co. 366, 22 Sch.L.R. 173.
Tenn.—William White & Co. v. Lichter, 64 S.W.2d 542, 16 Tenn.App. 375.
W.Va.—Foose v. Hawley Corporation, 198 S.E. 138, 120 W.Va. 334.
22 C.J. p 664 note 45, p 721 note 63 [a].

Nervousness

Minn.—Hackett v. Palon, 210 N.W. 996, 169 Minn. 218.
22 C.J. p 664 note 45 [c] (8).

Source of disease

Okl.—Mashunkashey v. Brewer, 58 P.2d 564, 177 Okl. 253.

In Illinois

(1) It has been stated that an expert may not testify directly that a certain cause was responsible for the injury complained of.—Adamsen v. Magnelia, 280 Ill.App. 418.
22 C.J. p 668 notes 64, 65, Illinois cases.

(2) When the evidence is conflicting as to whether an injury was caused in the manner alleged, an expert may not state his opinion as to cause of the disability or death — Davis v. East St. Louis & S Ry. Co., 9 N.E.2d 254, 290 Ill.App. 540—Phillips v. Brown, 2 N.E.2d 126, 285 Ill. App. 443—Zbinden v. De Moulin Bros. & Co., 245 Ill.App. 248—Little v. Blue Goose Motor Coach Co., 244 Ill.App. 427—Swalm v. City of Joliet, 219 Ill.App. 123—Ehrhardt v. Connecticut Fire Ins. Co., 219 Ill. App. 48—22 C.J. p 667 note 55, Illinois cases.

(3) Where there is no conflict as to the cause or manner of injury, such evidence is admissible.
U.S.—Alexander v Missouri State Life Ins. Co., C.C.A.Ill., 68 F.2d 1, certiorari denied 54 S.Ct. 860, 292 U.S. 650, 78 L.Ed. 1499—Chicago R. Co. v. Kramer, Ill., 234 F. 245, 148 C.C.A. 147.
Ill.—Wolczek v. Public Service Co. of Northern Illinois, 174 N.E. 577, 342 Ill. 482—Hanrahan v. City of Chicago, 124 N.E. 547, 289 Ill. 400, affirming 209 Ill.App. 630—Chicago Union Tract. Co. v. Roberts, 82 N.E. 401, 229 Ill. 481, affirming 131 Ill.App. 476—Koch v. City of Chicago, 17 N.E.2d 411, 297 Ill.App. 103—Hallis v. Stover Co., 275 Ill. App. 44—Wargo v. Buske, 273 Ill. App. 28—Ehrhardt v. Connecticut Fire Ins. Co., 219 Ill.App. 48—Holcomb v. Magee, 217 Ill.App. 272.
22 C.J. p 664 note 45, Illinois cases.

(4) Where a physical condition is prima facie established, it should be inquired not as to what might have produced it, but as to what did produce the condition disclosed.—Fuhry v. Chicago City R. Co., 144 Ill.App. 521, affirmed 88 N.E. 221, 239 Ill. 548.

(5) Court did not err in permitting a physician to testify that plaintiff's umbilical hernia was due to an injury, the question and answer in no way determining whether the hernia was caused by the accident in question or some other violence.—Walsh v. Chicago Rys. Co., 135 N.E. 709, 303 Ill. 339, affirming 221 Ill.App. 654.

(6) In compensation proceeding, medical experts' evidence is admissible on question whether existing pathological cause or streptococcic infection occasioned by injury caused death.—Plano Foundry Co. v. Industrial Commission, 190 N.E. 255, 356 Ill. 186.

In Missouri

(1) Medical expert may state that there was causal connection between accident and injury or between injury and party's condition.—Wild v. Pitcairn, 149 S.W.2d 800—Webb v. Missouri-Kansas-Texas R. Co., 116 S.W.2d 27, 342 Mo. 394—Feltz v. Terminal Railroad Ass'n of St. Louis, 81 S.W.2d 616, 336 Mo. 790—Morton v. St. Louis-San Francisco Ry. Co., 20 S.W.2d 34, 323 Mo. 929—Hamilton v. Standard Oil Co. of Indiana, 19 S.W.2d 679, 323 Mo. 531—Schulz v. St. Louis-San Francisco Ry. Co., 4 S.W.2d 762, 319 Mo. 8—Kinchlow v. Kansas City, K. V. & W. Ry. Co., 264 S.W. 416—O'Leary v. Scullin Steel Co., 260 S.W. 55, 303 Mo. 363—Pokojski v. Union Electric Light & Power Co., App., 80 S.W.2d 679—Langeneckert v. St. Louis Sulphur & Chemical Co., App., 65 S.W.2d 648—Floyd v. A. Y. McDonald Mfg. Co., 46 S.W.2d 251, 255, 226 Mo. App. 444, citing **Corpus Juris**—Kirk v. Kansas City Terminal Ry. Co., App., 27 S.W.2d 739—Coy v. Dean, 4 S.W.2d 835, 222 Mo.App. 67—Seeber v. City of Hannibal, App., 288 S.W. 974—Simmer v. May Department Stores, App., 282 S.W. 117—Gallagher v. S. Z. Schutte Lumber Co., App., 273 S.W. 213—Lucius v. Wells, App., 263 S.W. 546.

(2) Prior to the decision in O'Leary v. Scullin Steel Co., 260 S.W. 55, 303 Mo. 363, a medical expert was not permitted to state the cause of a condition, injury, or death.—McNulty v. Atlas Portland Cement Co., App., 249 S.W. 730—McAuliffe v. United Rys. Co. of St. Louis, App., 237 S.W. 129—Merkel v. Railway Mail Ass'n, 226 S.W. 299, 205 Mo. App. 484—Ruch v. Pryor, App., 190 S.W. 1037—Edling v. Kansas City Baseball & Exhibition Co., 168 S.W. 908, 181 Mo.App. 327—Spaulding v. Edina, 97 S.W. 545, 122 Mo.App. 65—22 C.J. p 665 note 46 [g]—p 667 note 55, Missouri cases.

(3) However, as distinguished from cases in which witness was not an attending physician, a physician who had attended a person was allowed to testify as to the cause of his condition.—Clooney v. Wells, 252 S.W. 72—22 C.J. p 664 notes 41–46, Missouri cases.

(4) The O'Leary Case, supra, in no manner limits or restricts or prohibits the use of expert testimony as usually and ordinarily employed in a typical personal injury case. It does establish a pointed exception in respect of the weight and sufficiency of expert testimony on a given issue, which may be proved only by the evidence of men of science. In such a situation the testimony must be explicit and posi-

son,[70] particularly where an injury or disease is of such character as to require a person skilled in the science or practice of medicine to determine its cause.[71] Such expert may also be permitted to state his inference as to how recent a stated cause was,[72] or in what order stated causes occurred.[73]

(3) Effect

A medical expert may state the effect of injuries or of given conditions on the health of a person, or the extent and character of the disability resulting therefrom; and, according to some authorities, a medical expert may state whether a person is totally and permanently disabled.

The medical witness may state the effect of injuries,[74] and he is also permitted to state the effect of given conditions[75] or the effect of given hap-

tive, from cause to effect, that the stated injury did in fact cause the condition which followed.—Stevens v. Westport Laundry Co., 25 S.W.2d 491, 495, 224 Mo.App. 955.

(5) Expert evidence was not required to show that injuries to plaintiffs' children were caused by condition resulting from long-standing overflow from septic tank on defendant's adjoining property, and, where expert witness was used, his evidence was to be deemed cumulative and corroborative only, and it was not required or permitted that he testify that such conditions did in fact cause the injuries, but only that such conditions might or could or would have caused such injuries.—Kelly v. Kansas City Building & Loan Ass'n, 81 S.W.2d 440, 229 Mo. App. 686.

70. U.S.—Clay County Cotton Co. v. Home Life Ins. Co. of New York, C.C.A.Ark., 113 F.2d 856—Travelers Ins. Co. v. Drake, C.C. A.Cal., 89 F.2d 47—Svenson v. Mutual Life Ins. Co. of New York, C.C.A.S.D., 87 F.2d 441—New York Life Ins. Co. v. Doerksen, C.C.A. Kan., 64 F.2d 240.
Ala.—Thaggard v. Vafes, 119 So. 647, 218 Ala. 609
Colo.—Bickes v. Travelers' Ins. Co., 287 P. 859, 87 Colo. 297.
Ga.—Bullard v. Metropolitan Life Ins. Co., 122 S.E. 75, 31 Ga.App. 641.
Ky.—Agsten v. Brown-Williamson Tobacco Corporation, 113 S.W.2d 829, 272 Ky. 20—Hicks' Adm'x v. Harlan Hospital, 21 S.W.2d 125, 231 Ky. 60—Louisville & N.R. Co. v. Rowland's Adm'r, 14 S.W.2d 174, 227 Ky. 841.
Md.—Mt. Savage Mining Co. v. Baker, 150 A. 864, 159 Md. 380.
Mass.—Walker's Case, 137 N.E. 171, 243 Mass. 224.
Minn.—Albrecht v. Potthoff, 257 N. W. 377, 192 Minn. 557, 96 A.L.R. 471.
N.Y.—McMartin v. Fidelity & Casualty Co. of New York, 267 N.Y.S. 473, 239 App.Div. 296, reversed on other grounds 190 N.E. 414, 264 N. Y. 220, followed in Cirulnick v. Equitable Life Assur. Soc. of U. S., 273 N.Y.S. 404, 242 App.Div. 685, and reargument denied McMartin v. Fidelity & Casualty Co. of New York, 191 N.E. 619, 264 N. Y. 671.
N.C.—Martin v. P. H. Hanes Knitting Co., 127 S.E. 688, 189 N.C. 644—Shaw v. National Handle Co., 124 S.E. 325, 188 N.C. 222.
N.D.—Jacobson v. Mutual Ben. Health & Accident Ass'n, 296 N.W. 545, 555, citing **Corpus Juris.**
Pa.—Ripani v. Dittman, 146 A. 562, 297 Pa. 124.
Tex.—Texas Indemnity Ins. Co. v. Preslar, Civ.App., 298 S.W. 666—Texas Employers' Ins. Ass'n v. Jimenez, Civ.App., 267 S.W. 752.
22 C.J. p 665 note 46.

Which of two or more possible causes was the actual cause of death may be stated.—Metropolitan Life Ins. Co. v. Osborne, 150 S.W.2d 479, 286 Ky. 301—22 C.J. p 665 note 46 [c].

Marked contributing cause

Testimony of physician, treating injured employee during his last illness, that injury, in witness' professional opinion, was marked contributing cause of employee's death was held competent in proceeding for compensation under workmen's compensation act.—Swingle v. Mill Creek Coal Co., 176 A. 828, 116 Pa. Super. 97.

Presence of physician at death

Physician who treated injured employee need not have seen him at time of death in order to testify to its cause.—Georgia Casualty Co. v. Little, Tex.Civ.App., 281 S.W. 1092.

71. Md.—Langenfelder v. Thompson, 20 A.2d 491.

72. Wash.—Taylor v. Modern Woodmen of America, 84 P. 867, 42 Wash. 304, 7 Ann.Cas. 607.
22 C.J. p 666 note 47.

73. N.C.—State v. Harris, 63 N.C. 1.

74. U.S.—Corrigan v. U. S., C.C.A. Idaho, 82 F.2d 106, 108, quoting extensively from **Corpus Juris**—Chicago, B. & Q. R. Co. v. Conway, C.C.A.Mo., 29 F.2d 551.
Ala.—Pope v. Ryals, 167 So. 721, 232 Ala. 260—Macke v. Sutterer, 141 So. 651, 224 Ala. 681.
Cal.—Latky v. Wolfe, 259 P. 470, 85 Cal.App. 332.
Ill.—Powell v. Myers Sherman Co., 32 N.E.2d 663, 309 Ill.App. 12.
Kan.—Son v. Eagle-Picher Mining & Smelting Co., 58 P.2d 44, 144 Kan. 146—Nangle v. Cudahy Packing Co., 212 P. 108, 112 Kan. 289.
Minn.—Albrecht v. Potthoff, 257 N. W. 377, 162 Minn. 557, 96 A.L.R. 471.
Mo.—Baldwin v. Kansas City Rys. Co., App., 214 S.W. 274.
Okl.—Skelly Oil Co. v. Harrell, 103 P.2d 88, 187 Okl. 412.
Pa.—Harmon v. Knoll, 195 A. 448, 129 Pa.Super. 390.
Tex.—Zurich General Accident & Liability Ins. Co. v. Kerr, Civ. App., 54 S.W.2d 349, error refused.
Wash.—Poropat v. Olympic Peninsula Motor Coach Co., 299 P. 979, 163 Wash. 78.
22 C.J. p 663 note 35.

Future probabilities see § 534 b (6) infra.

Aggravation of disease and hastening death

Pa.—Lucas v. Haas Coal Co., 179 A. 876, 118 Pa.Super. 182—Bartlinski v. Northumberland Mining Co., 177 A. 518, 117 Pa.Super. 437—De Beaumont v. Brown, 158 A. 643, 104 Pa.Super. 158—Johnston v. E. E. Orcutt Garage, 157 A. 46, 103 Pa.Super. 507.

75. U.S.—U. S. v. Cannon, C.C.A. Mass., 116 F.2d 567.
Ark.—Great Republic Life Ins. Co. v. Lankford, 127 S.W.2d 811, 198 Ark. 166.
Cal.—Hartford Accident & Indemnity Co. v. Industrial Accident Commission, 35 P.2d 366, 140 Cal. App. 482.
Ky.—Horn's Adm'r v. Prudential Ins. Co. of America, 65 S.W.2d 1017, 252 Ky. 137.
Md.—Salisbury Coca Cola Bottling Co. v. Lowe, 4 A.2d 440, 176 Md. 230.
Mass.—Wallace v. Ludwig, 198 N.E. 159, 292 Mass. 251.
Minn.—Aubin v. Duluth St. Ry. Co., 211 N.W. 580, 169 Minn. 342—Golden v. Lerch Bros., 281 N.W. 249, 203 Minn. 211.
Mo.—Angle v. Fleming, App., 259 S. W. 143.
N.J.—Anderson v. Atlantic City Gas Co., 145 A. 238, 7 N.J.Misc. 297.
N.C.—Godfrey v. Western Carolina Power Co., 128 S.E. 485, 190 N.C. 24.
Tex.—Zurich General Accident & Liability Ins. Co. v. Kerr, Civ.App., 54 S.W.2d 349, error refused.
22 C.J. p 663 note 36.

penings or occurrences,[76] on the body,[77] mind,[78] or nervous system[79] of the person affected, or the extent and character of the disability resulting therefrom.[80]

Effect of loss of teeth
N.C.—Dulin v. Henderson-Gilmer Co., 135 S.E. 614, 192 N.C. 638, 49 A.L.R. 663.
22 C.J. p 663 note 36 [a] (1).

Effect of former disease
Ala.—Pacific Mut. Life Ins. Co. of California v. Edmonson, 179 So. 185, 235 Ala. 365.

Effect of different contacts of electrical current
Ala.—Blakeney v. Alabama Power Co., 133 So. 16, 222 Ala. 394.

Effect of pain in arm
Utah.—Colovos v. Home Life Ins. Co. of New York, 28 P.2d 607, 83 Utah 401.

Effect of debility resulting from injury or disease
Ala.—Equitable Life Assur. Soc. of U. S. v. Davis, 164 So. 86, 231 Ala. 261.

Effect of pendency of lawsuit
Testimony of physician that effect of pendency of lawsuit causes person to remain sick is properly excluded.—Stedman Fruit Co. v. Smith, Tex.Civ.App., 28 S.W.2d 622, error dismissed.

Effect of reading libelous article
Testimony of physician that effect on plaintiff of reading allegedly libelous article was that plaintiff "was considerably more agitated the next day after reading this article," is inadmissible, being a positive statement rather than a statement of opinion.—Bowerman v. Detroit Free Press, 272 N.W. 876, 279 Mich. 480.

76. U.S.—New York Cent. R. Co. v. Johnson, C.C.A.Mo., 27 F.2d 699, certiorari granted 49 S.Ct. 27, 278 U.S. 590, 73 L.Ed. 523, reversed on other grounds 49 S.Ct. 300, 279 U. S. 310, 73 L.Ed. 706, amended 49 S. Ct. 417.
Colo.—Curtis v. Farrar, 211 P. 386, 72 Colo. 355.
Ill.—Killilay v. Hawk, 250 Ill.App. 222.
Mont.—Bingham v. National Bank of Montana, 72 P.2d 90, 105 Mont. 159, 113 A.L.R. 315.
Neb.—Fellers v. Howe, 184 N.W. 122, 106 Neb. 495.
22 C.J. p 663 note 37—3 C.J. p 123 note 62 [f] (2).

77. Ala.—Blakeney v. Alabama Power Co., 133 So. 16, 222 Ala. 394.
Md.—Salisbury Coca Cola Bottling Co. v. Lowe, 4 A.2d 440, 176 Md. 230.
Minn.—Golden v. Lerch Bros., 281 N. W. 249, 203 Minn. 211—Aubin v. Duluth St. Ry. Co., 211 N.W. 580, 169 Minn. 342.
Or.—Lehman v. Knott, 196 P. 476, 100 Or. 59.
Pa.—Troxell v. Shirk, 196 A. 899, 130 Pa.Super. 40.
22 C.J. p 664 note 38.

Likelihood of injury to eye
In action against operator of barber shop for injuries to eye allegedly caused by negligent use of electric vibrator, expert testimony concerning likelihood of retinal detachment in eye from direct blow, pressure, or vibration was admissible.—Cornbrooks v. Terminal Barber Shops, 26 N.E.2d 25, 282 N.Y. 217, reversing 8 N.Y.S.2d 171, 255 App.Div. 522, mandate conformed to 19 N.Y.S. 2d 390, 259 App.Div. 375.

78. Ala.—Birmingham News Co. v. Payne, 162 So. 116, 230 Ala. 524.
Ill.—Killilay v. Hawk, 250 Ill.App. 222.
Md.—Mead v. Gilbert, 185 A. 668, 170 Md. 592.
Mo.—Schoenherr v. Stoughton, 78 S. W.2d 84, 87, 336 Mo. 290, citing Corpus Juris.
Neb.—Fellers v. Howe, 184 N.W. 122, 106 Neb. 495.
22 C.J. p 664 note 39.

79. Cal.—Harrison v. De Young, 39 P.2d 866, 3 Cal.App.2d 662.
Md.—Isaac Benesch & Sons v. Ferkler, 139 A. 557, 153 Md. 680.
Mont.—Bingham v. National Bank of Montana, 72 P.2d 90, 105 Mont. 159, 113 A.L.R. 315.
Neb.—Fellers v. Howe, 184 N.W. 122, 106 Neb. 495.
Or.—Wemmett v. Mount, 292 P. 93, 134 Or. 305.
22 C.J. p 664 note 40.

80. U.S.—Corrigan v. U. S., C.C.A. Idaho, 82 F.2d 106, 108, quoting Corpus Juris—U. S. v. Bowman, C. C.A.Utah, 73 F.2d 716.
Ark.—Great Republic Life Ins. Co. v. Lankford, 127 S.W.2d 811, 198 Ark. 166.
Fla.—Mutual Ben. Health & Accident Ass'n v. Bunting, 183 So. 321, 133 Fla. 646.
Ind.—Acme-Evans Co. v. Schnepf, 14 N.E.2d 561, 214 Ind. 394.
Kan.—Gilbreath v. Prairie Oil & Gas Co., 278 P. 707, 128 Kan. 618.
Ky.—Horn's Adm'r v. Prudential Ins. Co. of America, 65 S.W.2d 1017, 252 Ky. 137—Ætna Life Ins. Co. v. McCullagh, 241 S.W. 836, 195 Ky. 136.
Md.—Commercial Casualty Ins. Co. v. Zajic, 1 A.2d 903, 175 Md. 363—Travelers Ins. Co. v. Needle, 159 A. 216, 171 Md. 517.
N.J.—Doherty v. American Employers' Ins. Co. of Boston, Mass., 169 A. 652, 112 N.J.Law 52.
N.C.—Dempster v. Fite, 167 S.E. 33, 203 N.C. 697—Butler v. Armour Fertilizer Works, 142 S.E. 483, 195 N.C. 409.
Pa.—Becker v. Prudential Ins. Co. of America, 188 A. 400, 124 Pa. Super. 138—Zellner v. Haddock Mining Co., 6 Sch.Reg. 151—Rentschler v. Prudential Ins. Co., 39 Lack.Jur. 179.
Tex.—Federal Underwriters Exchange v. Cost, 123 S.W.2d 332, 132 Tex. 299, affirming, Civ.App., 115 S.W.2d 706—Coleman Mut. Aid Ass'n v. Muse, Civ.App., 67 S.W.2d 393, error refused.
Wash.—McKillips v. Railway Mail Ass'n, 116 P.2d 330.
22 C.J. p 664 note 41.
Nature and extent of injury see § 534 b (1) supra.

Inability to do manual labor
Mo.—Kirchof v. St. Louis United R. Co., 135 S.W. 98, 155 Mo.App. 70.
Okl.—Marland Refining Co. v. McClung, 226 P. 312, 102 Okl. 56.
Tex.—Southern Underwriters v. Knight, Civ.App., 107 S.W.2d 1097, error dismissed.

Loss in bodily function
Utah.—Silver King Coalition Mines Co. v. Industrial Commission of Utah, 69 P.2d 608, 92 Utah 511.

Inability to secure and retain work
In suit to set aside an award denying workmen's compensation, testimony of physicians that in their opinions claimant was not able to secure and retain employment and perform the usual tasks of a workman, was not objectionable as comprehending other factors than physical condition, such as the personality and individual ability of claimant and the economic situation in the community which might affect his ability to procure employment.—Federal Underwriters Exchange v. Cost, 123 S.W.2d 332, 132 Tex. 299, affirming, Civ.App., 115 S.W.2d 706.

Functional disability and industrial impairment distinguished
In compensation proceeding physicians may testify to amount of functional disability of bodily member of human being and impairment person would suffer in ordinary and common activities, but not to percentage of industrial or economic impairment consequent on loss of physical functions, unless it is clear that physicians know what bodily activities and functions a vocation or work embraces.—Silver King Coalition Mines Co. v. Industrial Commission of Utah, 69 P.2d 608, 92 Utah 511—Price v. Industrial Commission of Utah, 63 P. 2d 592, 91 Utah 152.

Testimony that injury had not incapacitated party was competent together with the facts on which such opinion was predicated.—Texas Employers' Ins. Ass'n v. Shilling, Tex. Civ.App., 259 S.W. 236.

Stating percentage of loss
(1) Testimony of medical expert.

Total and permanent disability. Where total and permanent disability is an ultimate fact to be determined by the jury, under the general rule, stated supra § 446, that experts are not allowed to state their conclusions or sum up the entire issues and determine the ultimate question for decision by the jury, a medical expert may not testify whether in his opinion a person is totally and permanently disabled.[81] However, a medical expert may testify as to what infirmities plaintiff has,[82] what activities would aggravate them,[83] whether they will likely continue,[84] whether plaintiff's physical impairment affects his ability to work,[85] what kind of work plaintiff is able to do,[86] or he may state that plaintiff's condition is such as to disable him from doing any kind of work[87] or certain kinds of work.[88]

On the other hand, under the rule that the opin-

that it was his opinion that employee had a twenty-five per cent permanent disability to his right leg, was competent.—Skelly Oil Co. v. Harrell, 103 P.2d 88, 187 Okl. 412.

(2) On the other hand, it has been held that while it is proper for an expert to testify as to whether or not a man's vision is normal or otherwise and as to the amount or extent of his vision as disclosed by scientific tests or examination, and as to the amount of movability or apparent use he has of an injured limb, he cannot answer in direct terms as to what per cent of loss he has sustained in the use of an eye or of a limb, as such conclusion or finding must be made from the legitimate evidence in the record.—Pocahontas Mining Co. v. Industrial Commission, 134 N.E. 160, 301 Ill. 462.

Explanation of "partially disabled"

In suit for disability benefits under accident policy, admitting testimony of doctor who stated in report of disability that insured was "partially disabled," as to what he meant by term was not error as against contention that words "partial" and "total" are unambiguous.—Parks v. Maryland Casualty Co., 91 S.W.2d 1186, 230 Mo.App. 383.

81. U.S.—U. S. v. Spaulding, Fla., 55 S.Ct. 273, 293 U.S. 498, 79 L.Ed. 617, reversing, C.C.A., 68 F.2d 656, certiorari granted 55 S.Ct. 86, 293 U.S. 540, 79 L.Ed. 646, and rehearing denied 55 S.Ct. 504, 294 U.S. 731, 79 L.Ed. 1261, followed in, C. C.A., Olsen v. U. S., 74 F.2d 1018—U. S. v. Ware, C.C.A.La., 110 F.2d 739—U. S. v. McCreary, C.C.A.Or., 105 F.2d 297, reversing, D.C., McCreary v. U. S., 23 F.Supp. 385—U. S. v. Nelson, C.C.A.Ark., 102 F.2d 515, certiorari denied Nelson v. U. S., 60 S.Ct. 81, 308 U.S. 550, 84 L.Ed. 462—Witmer v. U. S., C.C. A.Pa., 96 F.2d 745—U. S. v. Hibbard, C.C.A.Idaho, 83 F.2d 785—U. S. v. Craig, C.C.A.Ind., 83 F.2d 361—U. S. v. Cole, C.C.A Ind., 82 F.2d 655—U. S. v. Frost, C.C.A. Ariz., 82 F.2d 152—U. S. v. Noble, C.C.A.Mont., 79 F.2d 342—Stephenson v. U. S., C.C.A.Mo., 78 F.2d 355—U. S. v. White, C.C.A.Or., 77 F.2d 757—U. S. v. Chandler, C.C.A.Ala., 77 F.2d 452—U. S. v. Blumenthal, C.C.A.Okl., 77 F.2d 219—U. S. v. Cobb, C.C.A.Ala., 77 F.2d 138—Gray v. U. S., C.C.A.Ark., 76 F.2d 233—U. S. v. Sullivan, C.C.A.Idaho, 74 F.2d 799—U. S. v. National Bank of Commerce of Seattle, C.C.A. Wash., 73 F.2d 721—U. S. v. Bowman, C.C.A.Utah, 73 F.2d 716—U. S. v. Stephens, C.C.A.Idaho, 73 F. 2d 695—U. S. v. Young, C.C.A.Idaho, 73 F.2d 690, certiorari denied Young v. U. S., 55 S.Ct. 512, 295 U.S. 714, 79 L.Ed. 1248—Hamilton v. U. S., C.C.A.Ga., 73 F.2d 357—U. S. v. Matory, C.C.A.Ill., 71 F. 2d 798—Prevette v. U. S., C.C.A. N.C., 68 F.2d 112, certiorari denied 54 S.Ct. 633, 292 U.S. 622, 78 L. Ed. 1478—U. S. v. Bass, C.C.A.Ind., 64 F.2d 467.

Utah.—Price v. Industrial Commission of Utah, 63 P.2d 592, 91 Utah 152—Spencer v. Industrial Commission, 40 P.2d 188, 87 Utah 336, affirmed 48 P.2d 1120, 87 Utah 358—Kelly v. Industrial Commission of Utah, 12 P.2d 1112, 80 Utah 73.

Permanency or duration generally see § 534 b (6) infra.

Ability to follow gainful occupation

(1) A distinction has been taken between cases involving a visible disability such as the loss of an arm, leg, or eye, and cases where insured's disability results from impairment of an internal organ of the body little known or unknown to laymen. In the former case, opinion of a medical expert as to whether the injury renders one unable to follow continuously a substantially gainful occupation is inadmissible since the jury can determine that quite as well as the doctor; but in the latter case the evidence is admissible, since those skilled in medical science are the chief source to which a jury of laymen may turn for helpful information.—U. S. v. Bowman, C.C.A.Utah, 73 F.2d 716.

(2) Evidence held admissible.—Runkle v. U. S., C.C.A.Colo., 42 F.2d 804.

(3) Evidence held inadmissible.—McConnell v. U. S., C.C.A.Pa., 81 F. 2d 639—U. S. v. Sparks, C.C.A.Ind., 80 F.2d 392—U. S. v. Harris, C.C. A.Mont., 79 F.2d 341—Rackoff v. U. S., C.C.A.N.Y., 78 F.2d 671—U. S. v. Price, C.C.A.Ala., 77 F.2d 345—U. S. v. Provost, C.C.A.Fla., 75 F.2d 190—Deadrich v. U. S., C.C.A.Nev., 74 F.2d 619—Harris v. U. S., C.C. A.Va., 70 F.2d 889.

82. U.S.—U. S. v. Provost, C.C.A. Fla., 75 F.2d 190.

83. U.S.—U. S. v. Provost, supra.

84. U.S.—U. S. v. Provost, C.C.A. Fla., 75 F.2d 190.

Ala.—John Hancock Mut. Life Ins. Co. v. Schroder, 180 So. 327, 235 Ala. 655.

Probable duration see § 534 b (6) infra.

85. U.S.—U. S. v. Cannon, C.C.A. Mass., 116 F.2d 567—Corrigan v. U. S., C.C.A.Idaho, 82 F.2d 106—Hamilton v. U. S., C.C.A.Ga., 73 F. 2d 357.

Loss of vision

Under an allegation in the complaint in an action for personal injury that, as a result of the injury, the vision of one of plaintiff's eyes was permanently and totally destroyed, expert testimony, as to its effect on the ability of plaintiff to do ordinary work and earn a livelihood, was competent.—Southwest Metals Co. v. Gomez, 4 F.2d 215, 39 A.L.R. 1416.

86. U.S.—Corrigan v. U. S., C.C.A. Idaho, 82 F.2d 106—McConnell v. U. S., C.C.A.Pa., 81 F.2d 639.

87. U.S.—U. S. v. Calvey, C.C.A.Pa., 110 F.2d 327.

Ky.—Minnesota Life Ins. Co. v. Vire, 94 S.W.2d 667, 264 Ky. 257.

Evidence held admissible

(1) Physician's opinion that insured was totally disabled prior to the lapse of a war risk policy and that the disability had been continuous and would continue for life, the physician not being asked whether insured had suffered a total permanent disability within the meaning of the policy.—U. S. v. Cannon, C.C.A. Mass., 116 F.2d 567.

(2) Whether known symptoms at time war risk policy lapsed disclosed permanent disability.—U. S. v. Smith, C.C.A.N.Y., 68 F.2d 38—U. S. v. Wilfore, C.C.A.Vt., 66 F.2d 255—U. S. v. Clapp, C.C.A.Vt., 63 F.2d 793—Putney v. U. S., D.C.Colo., 4 F.Supp. 376.

88. Mont.—DeVore v. Mutual Life Ins. Co. of New York, 64 P.2d 1071, 103 Mont. 599.

ion of an expert on an issue to be decided by the jury may be elicited where such evidence will aid the jury in reaching a correct solution of the issues, it has been held proper for a medical expert to testify whether a person was totally and permanently disabled,[89] particularly where the jury are instructed that the evidence is not binding on them.[90]

(4) Treatment

A medical expert may testify as to the proper treatment to be administered or as to whether certain treatment was proper, necessary, or usual, although according to some cases he cannot testify whether a practitioner in a particular case exercised ordinary skill or care.

A medical expert may testify as to the proper treatment to be administered,[91] and the probable effect of a lack thereof;[92] or, it has been held, whether certain treatment was proper,[93] necessa-

89. Ala.—Life & Casualty Ins. Co. v. Bell, 180 So. 573, 235 Ala. 548.
Ky.—Wakenva Coal Co. v. Combs, 24 S.W.2d 275, 232 Ky. 546.
Miss.—Metropolitan Life Ins. Co. v. Wright, 199 So. 289, followed in Metropolitan Life Ins. Co. v. Larkin, 199 So. 293.
Mo.—Stearns v. Prudential Ins. Co. of America, App., 140 S.W.2d 766—Porter v. Equitable Life Assur. Soc. of U. S., App., 71 S.W.2d 766.
Pa.—Pearlman v. Metropolitan Life Ins. Co., 9 A.2d 432, 336 Pa. 444—Cooper v. Metropolitan Life Ins. Co., 186 A. 125, 323 Pa. 295, 111 A.L.R. 598—Ross v. Riffle, 164 A. 913, 310 Pa. 176—Becker v. Prudential Ins. Co. of America, 188 A. 400, 124 Pa.Super. 138—Becker v. Prudential Ins. Co. of America, 31 Luz.Leg.Reg. 269.
Tenn.—Principi v. Columbian Mut. Life Ins. Co., 84 S.W.2d 587, 169 Tenn. 276—Mutual Life Ins. Co. of New York v. McDonald, App., 150 S.W.2d 715—Lemarr v. Metropolitan Life Ins. Co., App., 143 S.W.2d 891.
Tex.—Brotherhood of Locomotive Firemen and Enginemen v. Raney, Civ.App., 101 S.W.2d 863, error dismissed—Metropolitan Life Ins. Co. v. Greene, Civ.App., 93 S.W.2d 1241—Bankers Lloyds v. Montgomery, Civ.App., 42 S.W.2d 285, reversed on other grounds, Com.App., 60 S.W.2d 201.

90. Ga.—Metropolitan Life Ins. Co. v. Saul, 5 S.E.2d 214, 189 Ga. 1.

91. U.S.—Corrigan v. U. S., C.C.A. Idaho, 82 F.2d 106, 108, quoting extensively from **Corpus Juris.**
Ala.—Torrance v. Wells, 122 So. 322, 219 Ala. 384.
Ariz.—Butler v. Rule, 242 P. 436, 29 Ariz. 405.
Conn.—Green v. Stone, 176 A. 123, 119 Conn. 300.
Kan.—Flentie v. Townsend, 30 P.2d 132, 139 Kan. 82—James v. Grigsby, 220 P. 267, 114 Kan. 627—Foreman v. Surber, 213 P. 667, 113 Kan. 42, quoting **Corpus Juris.**
Mo.—Wojciechowski v. Coryell, App., 217 S.W. 638.
N.Y.—Burch v. Greenwald, 286 N.Y.S. 661, 247 App.Div. 471.
Or.—Darling v. Semler, 27 P.2d 886, 145 Or. 259—Hamilton v. Kelsey, 268 P. 750, 126 Or. 26—Emerson v. Lumbermen's Hospital Ass'n, 198 P. 231, 233, 100 Or. 472, citing **Corpus Juris.**
Vt.—Domina v. Pratt, 13 A.2d 198, followed in 13 A.2d 204.
22 C.J. p 663 note 30, p 673 note 61.

Informing witness as to treatment given

In a malpractice case the opinion of medical men may be received in evidence as to what would be the proper treatment, but they should be informed as to what treatment was given the patient, or what the physician in attendance failed to do.—Emerson v. Lumbermen's Hospital Ass'n, 198 P. 231, 100 Or. 472.

92. Or.—Darling v. Semler, 27 P.2d 886, 145 Or. 259.
Tex.—Missouri, etc., R. Co. v. Graves, 122 S.W. 458, 57 Tex.Civ.App. 395.

93. Ala.—Hester v. Ford, 130 So. 203, 221 Ala. 592—Torrance v. Wells, 122 So. 322, 219 Ala. 384—Lester v. Gay, 117 So. 211, 217 Ala. 585, 59 A.L.R. 1561.
Ark.—Dorr, Gray & Johnston v. Headstream, 295 S.W. 16, 173 Ark. 1104.
Cal.—National Automobile Ins. Co. v. Industrial Accident Commission of California, 22 P.2d 568, 132 Cal. App. 373—Taylor v. De Vaughn, 266 P. 960, 91 Cal.App. 318.
D.C.—Carson v. Jackson, 281 F. 411, 52 App.D.C. 51.
Iowa.—Ramberg v. Morgan, 218 N.W. 492, 209 Iowa 474.
Kan.—Updegraff v. Gage-Hall Clinic, 264 P. 1078, 125 Kan. 518.
Mich.—De Groot v. Winter, 247 N.W. 69, 261 Mich. 660—Bockoff v. Curtis, 217 N.W. 750, 241 Mich. 553.
Mo.—Gottschall v. Geiger, 231 S.W. 87, 207 Mo.App. 89.
N.Y.—Meiselman v. Crown Heights Hospital, 34 N.E.2d 367, 285 N.Y. 389, reversing 20 N.Y.S.2d 174, 259 App.Div. 840, appeal denied 20 N.Y.S.2d 669, 259 App.Div. 916.
Or.—Hilgedorf v. Bertschinger, 285 P. 819, 821, 132 Or. 641, citing **Corpus Juris**—Lehman v. Knott, 196 P. 476, 479, 100 Or. 59, citing **Corpus Juris.**
Pa.—Gyulai v. Metropolitan Life Ins. Co., 4 A.2d 828, 135 Pa.Super. 82.
Va.—Hunter v. Burroughs, 96 S.E. 360, 123 Va. 113.
Wyo.—McCoy v. Clegg, 257 P. 484, 36 Wyo. 473.
22 C.J. p 663 note 32.

Whether operation was done in skillful manner

Ga.—Fincher v. Davis, 108 S.E. 905, 27 Ga.App. 494.

Standard of hypothetical doctor

An expert witness gives his opinion whether the doing or not doing of a certain thing conforms to what a hypothetical doctor, endowed with ordinary skill and learning and exercising ordinary care and prudence, practicing in the locality in question would or would not do.—Criss v. Angelus Hospital Ass'n of Los Angeles, 56 P.2d 1274, 13 Cal.App.2d 412.

Treatment according to standards in community

(1) Expert witness may testify whether treatment and care administered by dentist, as outlined in hypothetical question, was in conformity with that degree of care, skill, diligence, and knowledge which is ordinarily possessed by average members of his profession in good standing in same or similar localities.—Schamoni v. Semler, 31 P.2d 776, 147 Or. 353—Darling v. Semler, 27 P.2d 886, 145 Or. 259.

(2) In suit for malpractice in setting a broken leg, evidence of expert witnesses relating to customary use of X-ray pictures, the use of tension method of reducing a fractured limb, and the usual treatment of physicians in the locality in the reduction of a fractured limb, was admissible, where the witnesses qualified themselves to testify regarding customary practice in reducing and treating similar fractures in that vicinity.—Bickford v. Lawson, 81 P.2d 216, 27 Cal.App.2d 416.

(3) Physicians' testimony concerning standards of medical practice in community other than that of defendants charged with malpractice was incompetent where there was no showing that standards in both communities were the same.—McNamara v. Emmons, 97 P.2d 503, 36 Cal.App.2d 199.

ry,[94] usual,[95] or sanctioned by medical usage.[96]

According to some cases, however, the medical witness cannot testify as to whether the treatment used was the usual and ordinary practice of the profession at the place and time.[97] The witness can testify as to what constitutes skill in the profession in such a way as to create an adequate impression on the mind of the jury,[98] but, according to some cases, the witness is not at liberty to testify whether a practitioner in a particular case exercised ordinary skill[99] or care,[1] or whether a practitioner who has come under his observation is as a matter of fact skillful[2] or careful,[3] although if the witness has observed the treatment, he may state the actual mode and its effect.[4]

It has been stated that an expert cannot testify that the result of treatment was satisfactory, or good, or bad,[5] although such evidence has been admitted.[6]

(5) Mechanical or Necessary Inferences

A medical witness may state the result in his own mind of applying mechanical laws to the medical facts observed by him.

A medical witness may be permitted to state the result in his own mind of applying mechanical laws to the medical facts observed by him.[7] Accordingly such witnesses have been permitted to state inferences as to whether certain bruises on the head could have been made by one blow;[8] whether a wound was made by a blunt,[9] cutting,[10] or deadly[11] instrument, or with what kind of an instrument,[12] and how much force it would take to make it;[13] whether an injury resulted from a burn or a cut,[14] was made with a sharp instrument or was torn,[15] or could have been inflicted in a way described;[16] whether wounds were caused by a truck striking or passing over a person's body;[17] the course[18] and size[19] of a bullet causing an observed injury; whether an injury or a wound could have been[20] or was[21] self-inflicted, although such a statement is not admissible in all cases.[22]

94. Wis.—Reed v. Madison, 56 N.W. 182, 85 Wis. 667.
22 C.J. p 673 note 63.

Operation "probably" necessary
Testimony of plaintiff's regular physician that operation was "probably" made necessary by injuries received in fall was properly admitted, although whether operation was in fact made necessary by fall was for jury.—City of Maryville v. McConkey, 90 S.W.2d 951, 19 Tenn. App. 520.

95. Mass.—Kos v. Brault, 146 N.E. 16, 250 Mass. 467.
N.Y.—People v. Koerner, 48 N.E. 730, 154 N.Y. 355.

96. Cal.—Langford v. Kosterlitz, 290 P. 80, 107 Cal.App. 175.
Or.—Lehman v. Knott, 196 P. 476, 479, 100 Or. 59, citing **Corpus Juris.**
22 C.J. p 663 note 34.

Diagnosis
In action for malpractice it was competent to ask a medical expert whether in his opinion, on the facts stated in hypothetical question, diagnosis was made according to the approved practice and principles of the medical profession.—Brewer v. Ring, 99 S.E. 358, 177 N.C. 476.

97. Iowa.—Lemon v. Kessel, 209 N.W. 393, 202 Iowa 273.

Proper procedure
The proper procedure is for the witness to state what the ordinary practice is, and how the patient was treated, leaving the jury to draw its own conclusion.—Lemon v. Kessel, supra.

98. Ohio.—Abercrombie v. Roof, 28 N.E.2d 772, 64 Ohio App. 365.
22 C.J. p 679 note 30.

99. Md.—McClees v. Cohen, 148 A. 124, 158 Md. 60.

1. Minn.—Schmit v. Esser, 236 N.W. 622, 183 Minn. 354, 74 A.L.R. 1312.
N.D.—Halverson v. Zimmerman, 218 N.W. 862, 56 N.D. 607.
Ohio.—Abercrombie v. Roof, 28 N.E.2d 772, 64 Ohio App. 365.
Or.—Patterson v. Howe, 202 P. 225, 102 Or. 275—Lehman v. Knott, 196 P. 476, 100 Or. 59.
Contra Fincher v. Davis, 108 S.E. 905, 27 Ga.App. 494.

2. Or.—Boydston v. Giltner, 3 Or. 118.
22 C.J. p 679 note 30.

3. N.D.—Dolan v. O'Rourke, 217 N.W. 666, 56 N.D. 416.

4. Iowa.—Lemon v. Kessel, 209 N.W. 393, 202 Iowa 273.
22 C.J. p 679 note 31.

5. Iowa.—Lemon v. Kessel, supra.

6. Ala.—Hester v. Ford, 130 So. 203, 221 Ala. 592.

7. Ark.—Fort v. State, 11 S.W. 959, 52 Ark. 180, 20 Am.S.R. 163.
Iowa.—Morrow v. National Masonic Acc. Assoc., 101 N.W. 468, 125 Iowa 633.

8. Mass.—Commonwealth v. Piper, 120 Mass. 185.
N.Y.—People v. Rogers, 13 Abb.Pr. N.S. 370.

9. Wis.—Carthaus v. State, 47 N.W. 629, 78 Wis. 560.
22 C.J. p 672 note 31.

10. Iowa.—State v. Morphy, 33 Iowa 270, 11 Am.R. 122.
22 C.J. p 672 note 32.

11. Tex.—Hardin v. State, 103 S.W. 401, 51 Tex.Cr. 559.

12. Fla.—Clemons v. State, 37 So. 647, 48 Fla. 9.
22 C.J. p 672 note 34.

13. Ark.—Fort v. State, 11 S.W. 959, 52 Ark. 180, 20 Am.S.R. 163.
N.Y.—People v. Fish, 26 N.E. 319, 125 N.Y. 136.

14. Mo.—Jerome v. St. Louis United R. Co., 134 S.W. 107, 155 Mo. App. 202.

15. N.C.—State v. Clark, 34 N.C. 151.

16. N.Y.—Hunter v. Third Ave. R. Co., 46 N.Y.S. 1010, 21 Misc. 1.
22 C.J. p 668 note 68.

17. N.C.—Hester v. Horton Motor Lines, 14 S.E.2d 794, 219 N.C. 743.

18. Tex.—Roquemore v. State, 129 S.W. 1120, 59 Tex.Cr. 568.
22 C.J. p 672 note 36.

19. Cal.—People v. Wong Chuey, 49 P. 833, 117 Cal. 624.

20. Kan.—Malone v. New York Life Ins. Co., 83 P.2d 639, 148 Kan. 555.
22 C.J. p 672 note 38.

21. N.M.—Miera v. Territory, 81 P. 586, 13 N.M. 192.
22 C.J. p 668 note 69.

22. Ark.—Johnston v. Order of United Commercial Travelers of America, 33 S.W.2d 375, 182 Ark. 964.
La.—Bayles v. Jefferson Standard Life Ins. Co., App., 148 So. 465.
Ohio.—Mitchell v. Industrial Commission of Ohio, 19 N.E.2d 769, 135 Ohio St. 110.

In addition, medical witnesses may state how a wound was inflicted,[23] whether by a single blow,[24] or by a person standing near,[25] and if so, how near;[26] and the direction of a blow,[27] wound,[28] or flow of blood.[29]

Medical witnesses have also been permitted to state that a stain was made by human blood;[30] the appearance of a child, as related to the period of gestation,[31] or its age;[32] the competency of a nurse;[33] diminished earning capacity,[34] or inability to do certain acts[35] resulting from certain injuries; the existence of pain[36] and how long it continued;[37] danger of life;[38] the proportion of negro blood in a given person;[39] the results of an autopsy;[40] the symptoms observed by the witness;[41] a disposition to conceal the extent of actual injury;[42] and whether an examination was thorough or superficial.[43]

Further, medical witnesses may state whether symptoms are feigned,[44] or could have been feigned,[45] and whether an injured party's complaints were fanciful or real,[46] although there is authority excluding such evidence.[47]

Position of body. It has been considered that a physician's inference is not admissible to show the position of the body at the time a wound was received or the position of the person who inflicted

Tex.—Woodmen of the World v. Alexander, Civ.App., 239 S.W. 843.
22 C.J. p 668 note 70.

23. D.C.—Taylor v. U. S., 7 App.D.C. 27.
22 C.J. p 672 note 39.

24. Mass.—Commonwealth v. Piper, 120 Mass. 185.
N.Y.—People v. Schmidt, 61 N.E. 907, 168 N.Y. 568.

25. Kan.—State v. Asbell, 46 P. 770, 57 Kan. 398.

26. Cal.—People v. Hawes, 33 P. 791, 98 Cal. 648.
22 C.J. p 672 note 42.

27. Ga.—Perry v. State, 36 S.E. 781, 110 Ga. 234.
22 C.J. p 672 note 48.

28. N.C.—State v. Keene, 6 S.E. 91, 100 N.C. 509.
22 C.J. p 672 note 44.

29. Neb.—Dinsmore v. State, 85 N.W. 445, 61 Neb. 418.

30. Del.—State v. Miller, 32 A. 137, 14 Del. 564.
Pa.—Commonwealth v. Crossmire, 27 A. 40, 156 Pa. 304.

31. Ill.—People v. Johnson, 70 Ill. App. 634.
Mass.—Young v. Makepeace, 103 Mass. 50.

32. N.C.—State v. Smith, 61 N.C. 302.
Tex.—St. Louis Southwestern R. Co. v. Norvell, Civ.App., 115 S.W. 861.

33. N.Y.—Ward v. St. Vincent's Hospital, 79 N.Y.S. 1004, 78 App. Div. 317.

Nurse's testimony as to competency of another nurse

Testimony of nurse that another nurse who administered treatment was a splendid and conscientious nurse was not inadmissible.—Barrett v. City of Brunswick, 193 S.E. 450, 56 Ga.App. 575.

34. **Loss of foot by carpenter**
U.S.—Southern Pac. Co. v. Hall, Cal., 100 F. 760, 41 C.C.A. 50.

35. U.S.—Greer v. Hendrix, C.C.A. Ill., 69 F.2d 404.
Ark.—Great Republic Life Ins. Co. v. Lankford, 127 S.W.2d 811, 198 Ark. 166.
Cal.—People v. Brown, 13 P. 222, 2 Cal.Unrep.Cas. 701.
N.C.—Green v. Inter-Ocean Casualty Co. of Cincinnati, Ohio, 167 S.E. 38, 203 N.C. 767.
Utah.—Silver King Coalition Mines Co. v. Industrial Commission of Utah, 69 P.2d 608, 92 Utah 511—Price v. Industrial Commission of Utah, 63 P.2d 592, 91 Utah 152.

Housework
Mich.—Holman v. Union St. R. Co., 72 N.W. 202, 114 Mich. 208.
Tex.—Murphey v. Blankenship, Civ. App., 120 S.W.2d 309.

36. Ala.—Strickland v. Davis, 128 So. 233, 221 Ala. 247.
Ill.—Frochter v. Arenholz, 242 Ill. App. 93.
Minn.—Van House v. Canadian Northern Ry. Co., 192 N.W. 493, 155 Minn. 57, 28 A.L.R. 357.
Mo.—Young v. Metropolitan Life Ins. Co., 84 S.W.2d 1065, 229 Mo. App. 823, certiorari quashed State ex rel. Metropolitan Life Ins. Co. v. Allen, 100 S.W.2d 487, 339 Mo. 1156—Kirk v. Kansas City Terminal Ry. Co., App., 27 S.W.2d 739.
22 C.J. p 673 note 52.

However, physician's testimony that plaintiff suffered the pain he was complaining of has been held inadmissible, since only the person who experiences pain is competent to testify as to its existence.—Littman v. Bell Telephone Co. of Pennsylvania, 172 A. 687, 315 Pa. 370.

It also has been held that a question to a medical witness, who had testified that the effect of improper placing of splints and cast would be very painful, whether the patient could endure such pain without a sedative and without the loss of any weight, was objectionable, as calling for a conclusion.—Osnes v. Scanlon, 179 N.W. 869, 189 Iowa 1364.

37. Iowa.—Wilkins v. Missouri Valley, 96 N.W. 868.
Mo.—Young v. Metropolitan Life Ins. Co., 84 S.W.2d 1065, 229 Mo. App. 823, certiorari quashed State ex rel. Metropolitan Life Ins. Co. v. Allen, 100 S.W.2d 487, 339 Mo. 1156.

38. N.Y.—Rumsey v. People, 19 N.Y. 41.

39. Ga.—White v. Clements, 39 Ga. 232.

40. Mo.—Wright v. Penrod, Jurden & Clark Co., 88 S.W.2d 411, 229 Mo.App. 1147.
22 C.J. p 673 note 56.

Cause of death
Ala.—Simon v. State, 18 So. 731, 108 Ala. 27.
Ky.—Streipe v. Hubbuch Bros. & Wellendorf, 25 S.W.2d 358, 233 Ky. 194.

41. N.Y.—Pierson v. People, 18 Hun 239, affirmed 79 N.Y. 424, 35 Am. R. 524.

42. N.H.—Plummer v. Ossipee, 59 N.H. 55.

43. U.S.—Northern Pac. R. Co. v. Urlin, Mont., 15 S.Ct. 840, 158 U.S. 271, 39 L.Ed. 977.

44. Ark.—Great Western Land Co. v. Barker, 262 S.W. 650, 164 Ark. 587.
Mass.—Campanale v. Metropolitan Life Ins. Co., 194 N.E. 831, 290 Mass. 149, 97 A.L.R. 1282.
Minn.—Van House v. Canadian Northern Ry. Co., 192 N.W. 493, 155 Minn. 57, 28 A.L.R. 357.
22 C.J. p 673 note 58.

45. Mass.—Campanale v. Metropolitan Life Ins. Co., 194 N.E. 831, 290 Mass. 149, 97 A.L.R. 1282.
22 C.J. p 673 note 59.

46. Or.—Burrowes v. Skibbe, 29 P. 2d 552, 146 Or. 123.

47. Mich.—McCormick v. Detroit, G. H. & M. R. Co., 104 N.W. 390, 141 Mich. 17.
22 C.J. p 673 note 58 [d].

it,[48] as the fact is one as to which a jury may form a reasonable inference,[49] and which is often intimately connected with their function in the case;[50] but nevertheless such evidence has been received.[51]

(6) Probabilities

A medical witness may testify as to the probable effects of a disease or injury; he may testify with respect to the permanence of the conditions observed, their probable duration and liability to recurrence, but mere conjecture is not permitted.

Probabilities are proper to be considered in reference to an existing physical condition,[52] and a medical witness may be permitted to state the probable effects of disease, injury, or other conditions observed by him.[53] The statement may relate to such matters as the permanence of the conditions observed by the witness,[54] or their probable duration[55] and statement may relate to such

48. Ark.—Brown v. State, 18 S.W. 1051, 55 Ark. 593.
22 C.J. p 673 note 65.

49. Ky.—Parrott v. Commonwealth, 47 S.W. 452, 20 Ky.L. 761.
22 C.J. p 673 note 66.

50. Ark.—Brown v. State, 18 S.W. 1051, 55 Ark. 593.
22 C.J. p 673 note 67.

51. N.Y.—Johnson v. Steam-Gauge & Lantern Co., 40 N.E. 773, 146 N.Y. 152.
N.C.—George v. Winston-Salem Southbound Ry. Co., 3 S.E.2d 286, 215 N.C. 773—McManus v. Seaboard Air Line R. Co., 94 S.E. 455, 174 N.C. 735.
22 C.J. p 673 note 68.

52. Iowa.—Kime v. Owens, 182 N. W. 398, 191 Iowa 323.
Mass.—Menard v. Collins, 9 N.E.2d 387, 298 Mass. 40.
22 C.J. p 673 note 69.

Amount of injury difficult to state
In malpractice case, admission of expert testimony that it was difficult to state amount of injury which might be done was held not reversible error.—Reinhold v. Spencer, 26 P.2d 796, 53 Idaho 688.

53. Ala.—Landham v. Lloyd, 136 So. 815, 223 Ala. 487—Norwood Hospital v. Jones, 107 So. 858, 214 Ala. 314—Steele-Smith Dry Goods Co. v. Blythe, 94 So. 281, 208 Ala. 288.
Ark.—Arkansas Land & Lumber Co. v. Cook, 247 S.W. 1071, 157 Ark. 245.
Idaho.—Reinhold v. Spencer, 26 P.2d 796, 53 Idaho 688.
Mich.—Pearce v. Rodell, 276 N.W. 883, 283 Mich. 19—Rogers v. Youngs, 233 N.W. 365, 252 Mich. 420.
Mo.—Wild v. Pitcairn, 149 S.W.2d 800—Vogts v. Kansas City Rys. Co., App., 228 S.W. 526.
N.H.—Emerson v. Twin State Gas & Electric Co., 174 A. 779, 87 N. H. 108.
N.Y.—Meiselman v. Crown Heights Hospital, 34 N.E.2d 367, 285 N.Y. 389, reversing 20 N.Y.S.2d 174, 259 App.Div. 840, appeal denied 20 N. Y.S.2d 669, 259 App.Div. 916.
Or.—Barron v. Duke, 250 P. 628, 120 Or. 181.
Pa.—Cooper v. Metropolitan Life Ins. Co., 186 A. 125, 323 Pa. 295, 111 A.L.R. 598—Harmon v. Knoll, 195 A. 448, 129 Pa.Super. 390—Zellner v. Haddock Mining Co., 6 Sch.Reg. 151.
Wash.—Jacklin v. North Coast Transp. Co., 5 P.2d 325, 165 Wash. 236—McCreedy v. Fournier, 194 P. 398, 113 Wash. 351.
W.Va.—Graves v. Katzen, 164 S.E. 796, 112 W.Va. 467—Morris v. Baltimore & O. R. Co., 147 S.E. 759, 107 W.Va. 181.
22 C.J. p 673 note 70.
Effect of injuries generally see § 534 b (3) supra.

Probable expectancy of life of injured party
Cal.—Adams v. Kaiser, App., 285 P. 751.
Mass.—Fournier v. Zinn, 154 N.E. 268, 257 Mass. 575.

Probability of future aggravation or complication
Tex.—Zurich General Accident & Liability Ins. Co. v. Kerr, Civ. App., 54 S.W.2d 349, error refused.

Probable future history of disease
Cal.—General Accident, Fire & Life Assur. Corporation, Limited, of Perth, Scotland, v. Industrial Accident Commission, 288 P. 692, 106 Cal.App. 39.

Tendency to shorten life
Cal.—Adams v. Kaiser, App., 285 P. 751.
Wash.—Buell v. Park Auto Transp. Co., 231 P. 161, 132 Wash. 92.
22 C.J. p 673 note 70 [a] (10).

54. Ark.—Arkansas Land & Lumber Co. v. Cook, 247 S.W. 1071, 157 Ark. 245.
Ill.—Powell v. Myers Sherman Co., 32 N.E.2d 663, 309 Ill.App. 12—Killilay v. Hawk, 250 Ill.App. 222—Owens v. Guerney, 241 Ill.App. 477.
Iowa.—Bradley v. Interurban Ry. Co., 183 N.W. 493, 191 Iowa 1351.
Kan.—Seymour v. Kelso, 16 P.2d 958, 136 Kan. 543.
Ky.—Chesapeake & O. Ry. Co. v. Hay, 88 S.W.2d 318, 261 Ky. 566.
Md.—Commercial Casualty Ins. Co. v. Zajic, 1 A.2d 903, 175 Md. 368—Ericsson Line v. Hawkins, 198 A. 429, 174 Md. 223.
Mich.—Rogers v. Youngs, 233 N.W. 365, 252 Mich. 420—DeVries v. Owens, 295 N.W. 249, 295 Mich. 522—Pearce v. Rodell, 276 N.W. 883, 283 Mich. 19.
Minn.—Piche v. Halvorson, 272 N. W. 591, 592, 199 Minn. 526, citing **Corpus Juris.**
Mo.—Wild v. Pitcairn, 149 S.W.2d 800—Scheipers v. Missouri Pac. R. Co., 298 S.W. 51—Melican v. Whitlow Const. Co., 278 S.W. 361—Gilchrist v. Kansas City Rys. Co., 254 S.W. 161—Gaty v. United Rys. Co., 251 S.W. 61—Maloney v. United Rys. Co. of St. Louis, 237 S.W. 509—Golden v. Onerem, App., 123 S.W.2d 617—Corcoran v. Metropolitan Life Ins. Co., App., 93 S.W.2d 1027—Nance v. Lansdell, App., 73 S.W.2d 346—McPherson v. Premier Service Co., App., 38 S.W.2d 277—Oliver v. City of Vandalia, App., 28 S.W.2d 1044—Smith v. Wilson, App., 296 S.W. 1036—Agee v. Missouri Pac. R. Co., App., 288 S.W. 992—Seeber v. City of Hannibal, App., 288 S.W. 974—Miller v. Fleming, App., 259 S.W. 139—Grubb v. Kansas City Rys. Co., 230 S.W. 675, 207 Mo.App. 16—Dorton v. Kansas City Rys. Co., 224 S.W. 30, 204 Mo.App. 262—Baldwin v. Kansas City Rys. Co., App., 214 S.W. 274.
N.C.—Dempster v. Fite, 167 S.E. 33, 203 N.C. 697.
N.D.—Newton v. Gretter, 236 N.W. 254, 60 N.D. 635.
Okl.—Skelly Oil Co. v. Harrell, 103 P.2d 88.
Or.—Yarbrough v. Carlson, 202 P. 739, 102 Or. 422.
Tenn.—Gulf Refining Co. v. Frazier, 83 S.W.2d 285, 19 Tenn.App. 76.
Tex.—Coleman Mut. Aid Ass'n v. Muse, Civ.App., 67 S.W.2d 393, error refused—Zurich General Accident & Liability Ins. Co. v. Kerr, Civ.App., 54 S.W.2d 349, error refused—King v. Stamford Mut. Life Ins. Ass'n, Civ.App., 8 S.W.2d 560, error refused.
W.Va.—Barna v. Gleason Coal & Coke Co., 98 S.E. 158, 83 W.Va. 216.
22 C.J. p 674 note 71.
Total and permanent disability see § 534 b (3) supra.

55. U.S.—U. S. v. Cannon, C.C.A. Mass., 116 F.2d 567.
Kan.—Thompson v. General Machine & Tool Co., 11 P.2d 685, 135 Kan. 705.
Okl.—Oklahoma Natural Gas Corpo-

matters as liability to recurrence,[56] and the chance of recovery of the person affected.[57] A statement of a medical witness as to the probable result of a certain treatment also may be received.[58]

Form of statement. While absolute certainty of statement is not required in stating probabilities,[59] a mere conjecture or speculation of the medical witness is not permitted,[60] nor should he be allowed to state future apprehended conditions.[61]

§ 535. —— Mental Capacity or Condition

A medical witness may state his opinion as to the mental capacity or condition of a person observed by him, or he may testify in response to hypothetical questions; but in stating his opinion the medical witness may not apply legal tests.

A witness who is skilled in medical matters, such as the average attending physician,[62] is permitted to state an inference with respect to the mental capacity or condition of a person observed by him.[63]

ration v. Schwartz, 293 P. 1087, 146 Okl. 250—Jones v. Sechtem, 268 P. 201, 131 Okl. 155.
Or.—Barron v. Duke, 250 P. 628, 120 Or. 181.
Pa.—Harmon v. Knoll, 195 A. 448, 129 Pa.Super. 390.
Tex.—Cohen v. Hill, Civ.App., 286 S.W. 661.
22 C.J. p 675 note 72.

Speed of recovery
In an action for personal injuries sustained by a negro sixty years old, a medical witness could testify that a young negro would recover much more quickly from an injury than an old negro man of sixty.—Woodward Iron Co. v. Thompson, 95 So. 270, 209 Ala. 53.

56. R.I.—Ellis v. Rhode Island Co., 67 A. 428.
22 C.J. p 675 note 73.

57. Mich.—Pearce v. Rodell, 276 N.W. 883, 283 Mich. 19.
22 C.J. p 675 note 74.

58. Conn.—Green v. Stone, 176 A. 128, 119 Conn. 300.
Md.—Schiller v. Baltimore & O. R. Co., 112 A. 272, 137 Md. 235.
Mich.—Van Der Bie v. Kools, 250 N.W. 268, 264 Mich 468.
N.H.—Douzanis v. Boston & Maine Transp. Co., 7 A.2d 393.
22 C.J. p 675 note 75.

59. Or.—Barron v. Duke, 250 P. 628, 120 Or. 181.
22 C.J. p 675 note 76.

Relative certainty sufficient
Wash.—Crock v. Magnolia Milling Co., 266 P. 727, 147 Wash. 589.

60. Ill.—Stevens v. Illinois Cent. R. Co., 137 N.E. 859, 306 Ill. 370—O'Donnell v. Snyder, 231 Ill.App. 581.
Iowa.—Kime v. Owens, 182 N.W. 398, 191 Iowa 323.
Md.—Mt. Royal Cab Co. v. Dolan, 171 A. 854, 166 Md. 581.
N.H.—Emerson v. Twin State Gas & Electric Co., 174 A. 779, 87 N.H. 108—Ernshaw v. Roberge, 170 A. 7, 86 N.H. 451.
Or.—Barron v. Duke, 250 P. 628, 120 Or. 181.
Wash.—Crock v. Magnolia Milling Co., 266 P. 727, 147 Wash. 589.
W.Va.—Graves v. Katzen, 164 S.E. 796, 112 W.Va. 467.
22 C.J. p 675 note 77.

Possibility
Expert testimony of future consequence of subsisting injury as evidence of prospective damages must be in terms of the certain or probable and not of the possible.—Calder v. Levi, 177 A. 392, 168 Md. 260, 97 A.L.R. 880.

Reasonable certainty required
Mo.—Mahany v. Kansas City Rys. Co., 228 S.W. 821, 286 Mo. 601.
Ohio.—Leopold v. Williams, 8 N.E. 2d 476, 54 Ohio App. 540.

61. Ill.—Stevens v. Illinois Cent. R. Co., 137 N.E. 859, 306 Ill. 370.
22 C.J. p 675 note 78.

Evidence held admissible
(1) Statement that it would be hazardous guess to say how long nervous condition would persist.—Cohen v. Hill, Tex.Civ.App., 286 S.W. 661.
(2) Testimony that, if broken again, bone would not be as likely to heal as normal bone.—Ramsdell v. John B. Varick Co., 170 A. 12, 86 N.H. 457.

62. Cal.—Horowitz v. Sacks, 265 P. 281, 89 Cal.App. 336.
Iowa.—In re Cooper's Estate, 206 N.W. 95, 200 Iowa 1180.
Me.—Appeal of Martin, 179 A. 655, 133 Me. 422.
Md.—Mangione v. Snead, 195 A. 329, 173 Md. 33—Mead v. Gilbert, 185 A. 668, 170 Md. 592—Davidove v. Duvall, 153 A. 417, 160 Md. 345—Pennsylvania R. Co. v. Simmons, 150 A. 263, 159 Md. 114—Johnston v. Schmidt, 149 A. 283, 158 Md. 555—Love v. Love, 148 A. 814, 158 Md. 481.
Mass.—Murphy v. Donovan, 3 N.E. 2d 734, 295 Mass. 311—Neill v. Brackett, 135 N.E. 690, 241 Mass. 534.
Mich.—In re Walkey, 229 N.W. 485, 249 Mich. 653—Henderson v. Henderson, 172 N.W. 623, 206 Mich. 36.
Mo.—Fields v. Luck, 44 S.W.2d 18.
N.C.—Winborne v. Lloyd, 183 S.E. 756, 209 N.C. 483.
S.D.—Fetzer v. Aberdeen Clinic, 204 N.W. 364, 48 S.D. 308, 39 A.L.R. 1423.
22 C.J. p 668 note 72.
Qualifications of expert witnesses testifying as to mental capacity or condition see infra § 537 b.

63. U.S.—U. S. v. Cannon, C.C.A. Mass., 116 F.2d 567.
Ala.—Rhodes v. State, 168 So. 869, 871, 232 Ala. 509, citing **Corpus Juris**—Parke v. Dennard, 118 So. 396, 218 Ala. 209—Batson v. Batson, 117 So. 10, 217 Ala. 450—Vaughn v. Vaughn, 116 So. 427, 217 Ala. 364.
Ark.—Missouri Pac. Transp. Co. v. Sacker, 138 S.W.2d 371, 200 Ark. 92.
Ill.—Leideck v. City of Chicago, 248 Ill.App. 545.
Ky.—Jefferson Standard Life Ins. Co. v. Cheek's Adm'r, 80 S.W.2d 518, 258 Ky. 621—Dossenbach v. Reidhar's Ex'x, 53 S.W.2d 731, 245 Ky. 449.
Md.—Mitchell v. Slye, 111 A. 814, 137 Md. 89—Struth v. Decker, 59 A. 727, 100 Md. 368.
Mass.—Jenkins v. Weston, 86 N.E. 955, 200 Mass. 488.
Mich.—In re Lewandowski's Estate, 210 N.W. 314, 236 Mich. 136—In re Moxon's Estate, 207 N.W. 924, 234 Mich. 170.
Mo.—Gott v. Dennis, 246 S.W. 218, 296 Mo. 66—Roach v. Kansas City Rys. Co., App., 228 S.W. 520.
N.H.—Olgiati v. New England Box Co., 117 A. 735, 80 N.H. 399.
N.J.—Grant v. Stamler, 59 A. 890, 68 N.J.Eq. 555.
N.Y.—In re Roche's Will, 278 N.Y.S. 929, 244 App.Div. 756—People ex rel. Romano v. Thayer, 242 N.Y.S. 289, 229 App.Div. 687, followed in People ex rel. Guiseppi v. Thayer, 242 N.Y.S. 293, 229 App.Div. 820.
N.C.—Yates v. Thomasville Chair Co., 189 S.E. 500, 211 N.C. 200.
Or.—Reid v. Yellow Cab Co., 279 P. 635, 131 Or. 27, 67 A.L.R. 1.
S.C.—Thompson v. Bass, 166 S.E. 346, 167 S.C. 345.
Tenn.—Carter v. Kelsey Wheel Co., 77 S.W.2d 449, 168 Tenn. 262, citing **Corpus Juris**.
Tex.—Cardinal v. Cardinal, Civ.App., 131 S.W.2d 1005, error dismissed—Grice v. Herrick Hardware Co., Civ.App., 224 S.W. 533—Beasley v. Faust, Civ.App., 217 S.W. 179.
Va.—McComb v. Farrow, 104 S.E. 812, 128 Va. 455.
Wash.—Maitlen v. Hazen, 113 P.2d 1008.
22 C.J. p 668 note 73—46 C.J. p 1306 note 81 [b].

Corpus Juris cited in a case involving a criminal prosecution.—

It is also very usual practice to receive the judgments of medical experts, based on hypothetical questions, on this subject.[64]

A medical witness may state his diagnosis of a mental condition,[65] and the probable effect of certain occurrences in creating or developing such conditions,[66] or explain the distinctive peculiarities of a mind suffering from an insane delusion,[67] the symptoms of dementia,[68] or the effect of the excessive use of alcohol on the brain and nervous system.[69] The range of a probable witness is largely determined by the nature of the mental malady involved, as related to the experience and capacity of the proposed witness.[70]

Form of statement. It is permissible for a qualified witness to state whether a person was insane at a certain time,[71] and it has even been held that the question to the witness should be so framed as to

State v. McCann, Mo., 47 S.W.2d 95, 100.

Expert in mental diseases

Expert in mental diseases, who had known and consulted with testatrix, was competent to express opinion as to her sanity.—Tucker v. Houston, 112 So. 360, 216 Ala. 43.

Particular statements by witness

(1) Expert may express opinion as to effect of drugs on human mind.

Md.—Blinder v. Monaghan, 188 A. 31, 36, 171 Md. 77, citing **Corpus Juris**—Lyon v. Townsend, 91 A. 704, 124 Md. 163.

Nev.—Effinger v. Effinger, 239 P. 801, 48 Nev. 205.

(2) A physician has been held competent to state an inference that a person was mentally depressed.—Burns v. Brier, 90 N.E. 399, 204 Mass. 195.

(3) A physician may state that a person suffering from Bright's disease, probably in the last stages, was more susceptible to influence and suggestion than one in normal condition.—In re Hillman's Estate, 185 N.W. 684, 217 Mich. 142.

(4) Superintendent of hospital for insane who had patient in charge long enough to form opinion of patient's sanity and nature and extent of his disability, may state that, on patient's discharge from hospital, patient was still suffering from dementia praecox.—Lemarr v. Metropolitan Life Ins. Co., Tenn. App., 143 S.W.2d 891.

Subjects for medical opinion

(1) Testimony that plaintiff suing physician for indecent assault was neurasthenic and in passing out of faint would probably have hallucinations is subject for medical opinion.—Lester v. Gay, 117 So. 211, 217 Ala. 585, 59 A.L.R. 1561.

(2) In a will contest, the exclusion of expert testimony that discrimination in favor of illegitimate children against blood relatives of the testator would classify the testator as of erratic or disordered mind was not error, since this was not a proper matter for expert testimony.—Johnson v. Johnson, 91 So. 260, 206 Ala. 523.

64. U.S.—Fricke v. General Accident, Fire & Life Assur. Corporation, C.C.A.Mo., 59 F.2d 563, certiorari denied 53 S.Ct. 221, 287 U. S. 662, 77 L.Ed. 571.

Ala.—Batson v. Batson, 117 So. 10, 217 Ala. 450.

Cal.—In re Perkins' Estate, 235 P. 45, 195 Cal. 699—In re Russell's Estate, 210 P. 249, 189 Cal. 759.

Md.—Johnston v. Schmidt, 149 A. 283, 158 Md. 555.

Mass.—Lockhart v. Ferguson, 137 N.E. 355, 243 Mass. 226.

Mich.—Kempsey v. McGinniss, 21 Mich. 123.

Minn.—In re Weber's Estate, 204 N. W. 52, 163 Minn. 389.

Mo.—Rankin v. Rankin, 61 Mo. 295.

N.H.—Boardman v. Woodman, 47 N. H. 120.

N.J.—In re Andrews' Will, 33 N.J. Eq. 514.

N.Y.—Ivison v. Ivison, 80 N.Y.S. 1011, 80 App.Div. 599—In re Lawrence's Will, 62 N.Y.S. 673, 48 App. Div. 83, affirming 59 N.Y.S. 174, 27 Misc. 473, 1 Mills 105—In re Seagrist's Will, 37 N.Y.S. 496, 1 App.Div. 615, affirmed 48 N.E. 1107, 153 N.Y. 682—In re Lyddy's Will, 5 N.Y.S. 636, 2 Silv.Sup. 223, 53 Hun 629, affirming 4 N.Y.S. 468, —In re Connor's Will, 61 N.Y.S. 910, 29 Misc. 391, 1 Mills. 301—In re Kiedaisch's Will, 13 N.Y.S. 255, 2 Conn.Surr. 438.

Ohio.—Brown v. Jacoby, 9 N.E.2d 693, 55 Ohio App. 250.

22 C.J. p 668 note 76.

65. Ala.—Batson v. Batson, 117 So. 10, 217 Ala. 450.

N.C.—Graham v. Sandhill Power Co., 127 S.E. 429, 189 N.C. 381.

22 C.J. p 669 note 77.

66. U.S.—U. S. v. Cannon, C.C.A. Mass., 116 F.2d 567.

Md.—Mead v. Gilbert, 185 A. 668, 170 Md. 592.

Mo.—Schoenherr v. Stoughton, 78 S.W.2d 84, 336 Mo. 290.

22 C.J. p 669 note 78.

67. Conn.—Bishop v. Copp, 114 A. 682, 96 Conn. 571.

Ind.—Swygart v. Willard, 76 N.E. 755, 166 Ind. 25.

68. Ind.—Swygart v. Willard, 76 N. E. 755, 166 Ind. 25.

Senile dementia

In will contest proceedings it was error to exclude testimony by an expert witness that the marked deterioration in the handwriting of testator during the last few years of his life was an indication of senile dementia.—Adams v. Adams, Civ.App., 253 S.W. 605, error dismissed 278 S.W. 1114, 114 Tex. 582.

69. Ind.—Swygart v. Willard, 76 N. E. 755, 166 Ind. 25.

Neb.—In re Crosby's Estate, 253 N. W. 652, 126 Neb. 509.

However, it has been stated that the effect of intoxication on testator's capacity depends on common observation and facts of particular case and is not question for experts. Payne v. Chance, Tex.Civ.App., 4 S. W.2d 328.

70. Vt.—Fairchild v. Bascomb, 35 Vt. 398.

22 C.J. p 669 note 82.

Remoteness

Where employee's mental condition was at issue as bearing on his assumption of risk, the question whether medical opinion evidence given after an examination fourteen months subsequently to employee's accident was too remote was within the determination of the trial court.—Olgiati v. New England Box Co., 117 A. 735, 80 N.H. 399.

71. Ala.—Parke v. Dennard, 118 So. 396, 218 Ala. 209.

Ky.—Fidelity Mut. Life Ins. Co. v. Cochran, 219 S.W. 172, 187 Ky. 430

R.I.—Rynn v. Rynn, 181 A. 289, 55 R.I. 310.

Va.—Nugent v. Nugent, 159 S.E. 185, 156 Va. 753—McComb v. Farrow, 104 S.E. 812, 128 Va. 455.

22 C.J. p 669 note 83.

Mental deficiency

In action on war risk policy, excluding physician's testimony that, if insured was one-eighth mentally deficient when admited to hospital twelve days after entering military service and remained so until discharged shortly thereafter, it must have existed for years, was error.—U. S. v. Kaminsky, C.C.A.Ga., 64 F. 2d 735.

Handwriting as test of sanity

It is not error to permit an expert witness to testify whether the handwriting of a person is a satisfactory test of his sanity or insanity.—Entwistle v. Meikle, 54 N.E. 217, 180 Ill. 9.

require him to state the degree of the person's intelligence or incapacity in the best way he can.[72] A nurse of long experience may state, in comparison with other persons with whom she came in contact professionally, her opinion of the mental capacity and strength of a certain person.[73]

It is usually considered that the medical witness cannot apply legal tests,[74] and state whether a person was capable of making a contract,[75] deed,[76] or will,[77] or capable of resisting undue influence,[78] of transacting business,[79] of understanding and appreciating the nature and consequences of his acts,[80] or of taking care of himself and his affairs;[81] nor may the medical witness state whether a person was a competent witness,[82] although it is competent to show by expert testimony that a drug addict was not credible as a witness.[83]

On the other hand, a doctor may give an opinion respecting the testator's ability to comprehend those concrete facts, the understanding of which is a legal requisite to the execution of a will;[84] and, where the witness was not apparently attempting to usurp the functions of court or jury, but was merely stating, in his own way, an opinion as to mental condition, a medical witness has been allowed to state that a person was or was not capable of making a contract[85] or will,[86] of comprehending his moral obligations[87] or his matrimonial duties,[88] or whether the person observed had the usual and ordinary capacity for the transaction of business.[89]

72. Vt.—Fairchild v. Bascomb, 35 Vt. 398.

73. Ark.—Sloan v. Newman, 266 S. W. 257, 166 Ark. 259.

74. Cal.—In re Sexton's Estate, 251 P. 778, 199 Cal. 759.
Tex.—Jones v. Selman, Civ.App., 109 S.W.2d 1003, error dismissed.
22 C.J. p 669 note 85.

"Unsoundness of mind"
N.H.—Harvey v. Provandie, 141 A. 136, 83 N.H. 236.

Change of purpose at death as showing change in intellect
A question whether an unexplained change of a lifelong purpose by a testator on his deathbed indicates any change in intellect is not one for the opinions of experts.—Stockton v. Thorn, 39 N.W. 148, 39 Minn. 204.

75. Cal.—Coyne v. Pacific Mut. Life Ins. Co. of California, 47 P.2d 1079, 8 Cal.App.2d 104.
Ga.—Holland v. Hill, 111 S.E. 71, 28 Ga.App. 337.
Kan.—Brown v. Brown, 152 P. 646, 96 Kan. 510.

76. Md.—Mead v. Gilbert, 185 A. 668, 170 Md. 592.
Tex.—Jackson v. Watson, Com.App., 10 S.W.2d 977, reversing Watson v. Jackson, Civ.App., 294 S.W. 328—Harrison v. Davis, Civ.App., 58 S.W.2d 1025, error dismissed.—Cardinal v. Cardinal, Civ.App., 131 S.W.2d 1005, error dismissed.
22 C.J. p 669 note 87.

Matters of common knowledge
In action for injuries involving validity of release, physician's opinion that plaintiff was not in any condition to execute valid deed or contract, based partly on facts that plaintiff was dazed, shocked, and suffering great pain, which were within field of common knowledge, should have been excluded.—Blinder v. Monaghan, 188 A. 31, 171 Md. 77.

77. Ala.—Camp v. Dobson, 152 So. 38, 228 Ala. 32—Daggett v. Boomer, 99 So. 181, 210 Ala. 673—Dersis v. Dersis, 98 So. 27, 210 Ala. 308.
Cal.—In re Sexton's Estate, 251 P. 778, 199 Cal. 759.
Ga.—Morgan v. Bell, 5 S.E.2d 897, 189 Ga. 432—Smoot v. Alexander, 3 S.E.2d 593, 188 Ga. 203.
Mich.—In re Ferguson's Estate, 215 N.W. 51, 239 Mich. 616.
Mo.—Baptiste v. Boatmen's Nat. Bank of St. Louis, 148 S.W.2d 743, 744, citing **Corpus Juris**—Fields v. Luck, 44 S.W.2d 18.
Or.—McCracken v. McCracken, 219 P. 196, 109 Or. 83.
R.I.—Rynn v. Rynn, 181 A. 289, 55 R.I. 310.
Tex.—Cardinal v. Cardinal, Civ.App., 131 S.W.2d 1005, error dismissed.
22 C.J. p 669 note 88.

78. Tex.—Jones v. Selman, Civ. App., 109 S.W.2d 1003, error dismissed.

79. Ill.—Higgins v. Chicago Title & Trust Co., 143 N.E. 482, 312 Ill. 11.
Tex.—Curtis v. Adams, Civ.App., 275 S.W. 206—Stewart v. Miller, Civ. App., 271 S.W. 311—Grice v. Herrick Hardware Co., Civ.App., 224 S.W. 533—Williams v. Livingston, 113 S.W. 786, 52 Tex.Civ.App. 275.

Evidence bearing on ability to transact business
(1) In personal injury action by incompetent, who had signed release alleged to have been fraudulently procured, exclusion of physician's testimony whether there was anything in order of plaintiff's commitment indicating case was other than alcoholic case, offered to show that commitment as insane person did not necessarily mean plaintiff was incompetent to transact business was not error, since question was one of law.—Dingman v. J. E. French Co., 39 P.2d 826, 3 Cal.App. 2d 512.

(2) On issue as to capacity of defendant to attend to business, there was no error in excluding testimony of physician that, knowing of defendant's sickness and confinement to bed, and that she was being dragged about the house in a chair, he would not want her to attend to any business for him.—Brazell v. Hearn, 127 S.E. 479, 33 Ga.App. 490.

80. Tex.—Wright v. Matthews, Civ. App., 130 S.W.2d 413, error dismissed, judgment correct.

81. N.Y.—In re Rush, 53 N.Y.S. 581.

82. Ala.—Birmingham News Co. v. Payne, 162 So. 116, 230 Ala. 524.

83. Nev.—Effinger v. Effinger, 239 P. 801, 48 Nev. 205.

84. Cal.—In re Russell's Estate, 210 P. 249, 189 Cal. 759.
Neb.—In re Crosby's Estate, 253 N. W. 652, 126 Neb. 509.
Ohio.—Brown v. Jacoby, 9 N.E.2d 693, 55 Ohio App. 250.
R.I.—Rynn v. Rynn, 181 A. 289, 55 R.I. 310.
Tex.—Adams v. Adams, Civ.App., 253 S.W. 605, error dismissed 278 S.W. 1114, 114 Tex. 582.

85. Tex.—Smith v. Guerre, Civ. App., 175 S.W. 1093.
22 C.J. p 669 note 91.

86. Md.—Donnelly v. Donnelly, 143 A. 648, 156 Md. 81.
N.Y.—In re King's Will, 172 N.Y.S. 869.
22 C.J. p 669 note 92.

87. Mich.—Rivard v. Rivard, 66 N. W. 681, 109 Mich. 98, 63 Am.S.R. 566.
Mont.—State v. Peel, 59 P. 169, 23 Mont. 358, 75 Am.S.R. 529.

88. **Statement by attending physician**
Me.—St. George v. Biddeford, 76 Me. 593.

89. Mass.—Murphy v. Donovan, 3 N.E.2d 734, 295 Mass. 311.
Neb.—In re Crosby's Estate, 253 N. W. 652, 126 Neb. 509.
S.C.—Thompson v. Bass, 166 S.E. 346, 167 S.C. 345.

§ 536. —— Basis of Inference or Judgment

A medical expert may base his opinion on his own observation of the facts, on facts which the evidence tends to establish, or both, and a medical observer should be guided entirely by his professional training and experience.

A medical expert may base an opinion on his own observation of the facts,[90] on an assumed state of facts which the evidence tends to establish,[91] on competent evidence in the case,[92] or partly on facts within his own personal knowledge and partly on

Va.—Nugent v. Nugent, 159 S.E. 185, 156 Va. 753.
22 C.J. p 669 note 95.

Understanding nature and effect of acts

Testimony of physician that grantor had sufficient capacity to understand the nature and effect of his actions in transacting a business matter was properly admitted.—Kincheloe v. Kincheloe, Tex.Civ.App., 152 S.W.2d 851—Stewart v. Miller, Tex.Civ.App., 271 S.W. 311.

90. Ala.—Mutual Life Ins. Co. of New York v. Mankin, 138 So. 265, 223 Ala. 679—Benefit Ass'n of Ry. Employees v. Armbruster, 116 So. 164, 217 Ala. 282.
Ga.—Fincher v. Davis, 108 S.E. 905, 27 Ga.App. 494.
Ill.—Hallis v. Stover Co., 275 Ill. App. 44—Metz v. Yellow Cab Co., 248 Ill.App. 609—Reitz v. Yellow Cab Co., 248 Ill.App. 287.
Ind.—Illinois Steel Co. v. Fuller, 23 N.E.2d 259, 216 Ind. 180.
Kan.—Seymour v. Kelso, 16 P.2d 958, 136 Kan. 543.
Ky.—Agsten v. Brown-Williamson Tobacco Corporation, 113 S.W.2d 829, 272 Ky. 20—Equitable Life Assur. Soc. of U. S. v. Kazee, 79 S.W.2d 208, 257 Ky. 803—Ætna Life Ins. Co. v. McCullagh, 241 S.W. 836, 195 Ky. 136.
Md.—Langenfelder v. Thompson, 20 A.2d 491—Salisbury Coca Cola Bottling Co. v. Lowe, 4 A.2d 440, 176 Md. 230—Ericsson Line v. Hawkins, 198 A. 429, 174 Md. 223—Ausherman v. Frisch, 163 A. 852, 164 Md. 78.
Mass.—Perangelo's Case, 177 N.E. 892, 297 Mass. 59.
Mich.—Deiter v. Escanaba Paper Co., 286 N.W. 797, 289 Mich. 478—Steele v. Stahelin, 207 N.W. 822, 234 Mich. 307.
Minn.—Piche v. Halvorson, 272 N.W. 591, 199 Minn. 526—Paulos v. Koelsch, 263 N.W. 913, 195 Minn. 603—Van House v. Canadian Northern Ry. Co., 192 N.W. 493, 155 Minn. 57, 28 A.L.R. 357.
Mo.—Oesterle v. Kroger Grocery & Baking Co., 141 S.W.2d 780—Corbett v. Terminal R. Ass'n of St. Louis, 82 S.W.2d 97, 336 Mo. 972—Schoenherr v. Stoughton, 78 S.W.2d 84, 336 Mo. 290—Smarr v. Smarr, 6 S.W.2d 860, 319 Mo. 1153—Phares v. Century Electric Co., App., 131 S.W.2d 879—Prince v. Metropolitan Life Ins. Co., App., 129 S.W.2d 5—Golden v. Onerem, App., 123 S.W.2d 617—Blair v. Acacia Mut. Life Ins. Co., App., 121 S.W.2d 193—Rose v. National Lead Co., App., 94 S.W.2d 1047—Kelly v. Kansas City Building & Loan Ass'n, 81 S.W.2d 440, 229 Mo App. 686—Porter v. Equitable Life Assur. Soc. of U. S., App., 71 S.W.2d 766—Mueller v. St. Louis Public Service Co., App., 44 S.W.2d 875—Gallagher v. S. Z. Schutte Lumber Co., App., 273 S.W. 213—Miller v. Fleming, App., 259 S.W. 139—Adolf v. Brown, 255 S.W. 947, 213 Mo.App. 406.
Mont.—Irion v. Hyde, 105 P.2d 666, 110 Mont. 570.
Neb.—Kennedy v. Woods, 267 N.W. 390, 131 Neb. 217—Watkins v. Brunswick Restaurant, 242 N.W. 439, 123 Neb. 212.
N.J.—Chmielowicz v. Prudential Ins. Co. of America, 11 A.2d 741, 124 N.J.Law 317, affirmed 15 A.2d 759, 125 N.J.Law 271.
N.C.—Williams v. Charles Stores Co., 184 S.E. 496, 209 N.C. 591.
Okl.—Skelly Oil Co. v. Harrell, 103 P.2d 88, 187 Okl. 412.
Or.—Heider v. Barendrick, 39 P.2d 957, 149 Or. 220.
Pa.—Roberts v. Pitt Pub. Co., 198 A. 668, 330 Pa. 44—McMinis v. Philadelphia Rapid Transit Co., 135 A. 722, 288 Pa. 377—Harmon v. Knoll, 195 A. 448, 129 Pa.Super. 390—Slater v. Tri-City Freight Line, 28 Del.Co. 84—Naparava v. Glen Alden Coal Co., 32 Luz.Leg.Reg. 437.
Tenn.—Gulf Refining Co. v. Frazier, 15 Tenn.App. 662.
Tex.—Southern Underwriters v. Blair, Civ.App., 144 S.W.2d 641—Federal Underwriters Exchange v. Carroll, Civ.App., 130 S.W.2d 1101—Wininger v. Security Mut. Casualty Co., Civ.App., 120 S.W.2d 614—State Life Ins. Co. v. Barnes, Civ.App., 58 S.W.2d 189, error dismissed.

Basis of judgment of experts see supra, § 521.

Testimony of defendant's physician who examined plaintiff without objection in absence of her physician and attorney, is not incompetent.—Grimes v. Thompson, 289 S.W. 290, 217 Ky. 389.

91. U.S.—Peters v. Mutual Life Ins. Co. of New York, D.C.Pa., 26 F. Supp. 50, affirmed, C.C.A., 107 F.2d 9, certiorari denied 60 S.Ct. 582, 309 U.S. 663, 84 L.Ed. 1010.
Ala.—Benefit Ass'n of Ry. Employees v. Armbruster, 116 So. 164, 217 Ala. 282.
Ark.—Missouri Pac. R. Co. v. Sorrells, 146 S.W.2d 704, 201 Ark. 748.
Cal.—Nielsen v. Industrial Accident Commission, 29 P.2d 852, 220 Cal. 118, modified on other grounds 30 P.2d 995.
Ga.—Fincher v. Davis, 108 S.E. 905, 27 Ga.App. 494.
Iowa.—McDonald v. Robinson, 224 N.W. 820, 207 Iowa 1293, 62 A.L.R. 1419, followed in McDonald v. Padzensky, 224 N.W. 824—Younkin v. Yetter, 181 N.W. 793, 192 Iowa 279.
Ky.—Greer v. Richards' Adm'r, 115 S.W.2d 568, 273 Ky. 91—Agsten v. Brown-Williamson Tobacco Corporation, 113 S.W.2d 829, 272 Ky. 20.
Md.—Langenfelder v. Thompson, 20 A.2d 491.
Mass.—Miller v. Boston & M. R. R., 134 N.E. 368, 240 Mass. 461.
Mo.—Gillick v. Fruin-Colnon Const. Co., 65 S.W.2d 927, 334 Mo. 135—De Donato v. Wells, 41 S.W.2d 184, 328 Mo. 448, 82 A.L.R. 1331—Smarr v. Smarr, 6 S.W.2d 860, 319 Mo. 1153—Bollinger v. Curtis & Co. Mfg. Co., 249 S.W. 907—Prince v. Metropolitan Life Ins. Co., App., 129 S.W.2d 5—Kelly v. Kansas City Building & Loan Ass'n, 81 S.W.2d 440, 229 Mo.App. 686.
Mont.—Nicholson v. Roundup Coal Mining Co., 257 P. 270, 79 Mont. 358.
Neb.—Kennedy v. Woods, 267 N.W. 390, 131 Neb. 217.
N.J.—Birtwistle v. Public Service Ry. Co., 112 A. 193, 94 N.J.Law 407.
Okl.—Rogers v. Sells, 61 P.2d 1018, 178 Okl. 103—De Camp v. Comerford, 272 P. 475, 134 Okl. 145.
Pa.—Howarth v. Adams Express Co., 112 A. 536, 269 Pa. 280.
Tex.—Southern Underwriters v. Blair, Civ.App., 144 S.W.2d 641—Southern Underwriters v. Hoopes, Civ.App., 120 S.W.2d 924, error dismissed—Wininger v. Security Mut. Casualty Co., Civ.App., 120 S.W.2d 614.
Va.—Lawson v. Darter, 160 S.E. 74, 157 Va. 284.

92. U.S.—Travelers' Ins. Co. of Hartford, Conn. v. Person, C.C.A. Neb., 58 F.2d 210.
Ark.—Safeway Stores v. Ingram, 51 S.W.2d 985, 185 Ark. 1175.
Ky.—Equitable Life Assur. Soc. of U. S. v. McDonald, 87 S.W.2d 123, 261 Ky. 148.
Md.—Johnston v. Schmidt, 149 A. 283, 158 Md. 555.
Mo.—Oesterle v. Kroger Grocery & Baking Co., 141 S.W.2d 780—De

facts shown by the testimony of others;[93] but he should not base his opinion on facts that are not proved[94] or on assumptions of his own.[95]

A medical observer should be guided entirely by his professional training and experience in dealing with the observed phenomena,[96] and adequate opportunities for observation must appear where the witness testifies as an observer rather than as an expert stating a judgment on hypothetical facts.[97] A medical observer must base his opinion on objective rather than subjective symptoms,[98] but a medical expert should consider all of the facts stated in the hypothetical question, although they include subjective symptoms.[99]

A medical observer cannot use as facts in giving his inference the statements of others,[1] al-

Donato v. Wells, 41 S.W.2d 184, 328 Mo. 448, 82 A.L.R. 1331—Smarr v. Smarr, 6 S.W.2d 860, 319 Mo. 1153.
Pa.—Gyulai v. Prudential Ins. Co. of America, 4 A.2d 824, 135 Pa.Super. 73.
Questions "upon the evidence" see infra § 554.

93. U.S.—U. S. v. Cannon, C.C.A. Mass., 116 F.2d 567.
D.C.—U. S. v. Woltman, 57 F.2d 418, 61 App.D.C. 52.
Minn.—Milliren v. Federal Life Ins. Co., 242 N.W. 546, 186 Minn. 115.
Mo.—Oesterle v. Kroger Grocery & Baking Co., 141 S.W.2d 780—De Donato v. Wells, 41 S.W.2d 184, 328 Mo. 448, 82 A.L.R. 1331—Prince v. Metropolitan Life Ins. Co., App., 129 S.W.2d 5—Kelly v. Kansas City Building & Loan Ass'n, 81 S.W.2d 440, 229 Mo.App. 686.
N.Y.—Christastie v. Elmira Water, Light & R. Co., 195 N.Y.S. 156, 202 App.Div. 270.
R.I.—Conlon v. John Hancock Mut. Life Ins. Co., 183 A. 850, 56 R.I. 88.
Tex.—Southern Underwriters v. Blair, Civ.App., 144 S.W.2d 641—Texas Employers Ins. Ass'n v. Arnold, Civ.App., 105 S.W.2d 686.
22 C.J. p 640 note 37 [b].

94. U.S.—Young v. Travelers' Ins. Co., C.C.A.Okl., 68 F.2d 83, reversing, D.C., 2 F.Supp. 624—Equitable Life Assur. Soc. of U. S. v. Sieg, C.C.A.Ohio, 53 F.2d 318.
Ky.—Williams v. Tarter, 151 S.W.2d 783.
Md.—Mead v. Gilbert, 185 A. 668, 170 Md. 592.
Mo.—Oesterle v. Kroger Grocery & Baking Co., 141 S.W.2d 780.
Mont.—Irion v. Hyde, 105 P.2d 666, 110 Mont. 570.
Pa.—Howarth v. Adams Express Co., 112 A. 536, 269 Pa. 280.

Facts ascertained from persons out of court

Where medical expert's testimony disclosed that his opinion as to cause of death was based in part on facts ascertained from third parties out of court, but such facts were established by other evidence, his opinion was properly received.—Pete v. Lampi, 185 N.W. 653, 150 Minn. 423.

Evidence held sufficient

Mass.—Kramer v. New York Life Ins. Co., 200 N.E. 390, 293 Mass. 440.

95. U.S.—Young v. Travelers' Ins. Co., C.C.A.Okl., 68 F.2d 83, reversing, D.C., 2 F.Supp. 624.

Testimony held not objectionable

Mo.—Stelmach v. Saul, App., 50 S.W. 2d 721.

96. N.D.—Hintz v. Wagner, 140 N. W. 729, 25 N.D. 110.
22 C.J. p 669 note 96.

Opinions held admissible

Ill.—Schachner v. Employers' Liability Assur. Corporation, 268 Ill.App. 503.
N.C.—Williams v. Charles Stores Co., 184 S.E. 496, 209 N.C. 591.

97. Iowa.—In re Cooper's Estate, 206 N.W. 95, 200 Iowa 1180.
Ky.—Lawson's Adm'r v. Brandenburg, 41 S.W.2d 201, 240 Ky. 68.
Mo.—Blair v. Acacia Mut. Life Ins. Co., App., 121 S.W.2d 193, 199, citing **Corpus Juris.**
22 C.J. p 670 note 97, p 675 note 80 [a].

Availability of first hand information

"First hand information, when it is available, only is accepted."—Sovereign Camp, W. O. W., v. Brock, 148 So. 129, 131, 226 Ala. 579.

Knowledge of circumstances

Medical expert must know circumstances and character of injury in order to give opinion as to whether condition he found resulted from it. —Texas Indemnity Ins. Co. v. Wilson, Tex.Civ.App., 281 S.W. 289, error dismissed.

Surgeon, who did not see case, cannot testify as expert as to character of surgical work performed.—Cincinnati Traction Co. v. Gramont, 19 Ohio App. 272.

98. U.S.—Hardy-Burlingham Mining Co. v. Baker, C.C.A.Ky., 10 F.2d 277—Payne v. Daugherty, C.C.A. Neb., 283 F. 353.
Ill.—Madison Coal Corporation v. Industrial Commission, 150 N.E. 724, 320 Ill. 65—Wells Bros. Const. Co. v. Industrial Commission, 137 N.E. 791, 306 Ill. 191—Thomas v. Illinois Power & Light Corporation, 247 Ill. App. 378.
Mich.—DeVries v. Owens, 295 N.W. 249, 295 Mich. 522.
Tenn.—Mutual Life Ins. Co. of New York v. McDonald, App., 150 S.W. 2d 715, 720, citing **Corpus Juris**—Gulf Refining Co. v. Frazier, 83 S. W.2d 285, 19 Tenn.App. 76—Gulf Refining Co. v. Frazier, 15 Tenn. App. 662, 689, quoting **Corpus Juris.**
Tex.—Traders & General Ins. Co. v. Rhodabarger, Civ.App., 93 S.W. 2d 1180, error dismissed.
22 C.J. p 670 note 98.

Objective symptoms and self-serving declarations of patient

Opinion evidence is admissible when based on objective symptoms and examination of the patient independent of what the patient may have told witness, notwithstanding patient may have made self-serving declarations to the witness.
Mo.—Lach v. Buckner, 86 S.W.2d 954, 229 Mo.App. 1066.
Ohio.—Community Traction Co. v. Wandtke, 167 N.E. 701, 32 Ohio App. 207.
Tex.—Stayton v. Contreras, Civ.App., 150 S.W.2d 342, error dismissed, judgment correct—United Employers Casualty Co. v. Marr, Civ.App., 144 S.W.2d 973, error dismissed, judgment correct—Federal Underwriters Exchange v. Arnold, Civ. App., 127 S.W.2d 972—Wininger v. Security Mut. Casualty Co., Civ. App., 120 S.W.2d 614—Traders & General Ins. Co. v. Burns, Civ. App., 118 S.W.2d 391—Texas Employers' Ins. Ass'n v. Clack, Civ. App., 112 S.W.2d 526, affirmed 132 S.W.2d 399, 134 Tex. 151—Traders & General Ins. Co. v. Milliken, Civ. App., 110 S.W.2d 108—Brotherhood of Locomotive Firemen and Enginemen v. Raney, Civ.App., 101 S.W. 2d 863, error dismissed.

99. N.Y.—Pollack v. Equitable Life Assur. Soc. of U. S., 287 N.Y.S. 464, 159 Misc. 317.
22 C.J. p 670 note 99.

1. Ariz.—Security Ben. Ass'n v. Small, 272 P. 647, 34 Ariz. 458.
Pa.—Roberts v. Pitt Pub. Co., 198 A. 668, 330 Pa. 44—McMinis v. Philadelphia Rapid Transit Co., 135 A. 722, 288 Pa. 377.
Tenn.—Lemarr v. Metropolitan Life Ins. Co., App., 143 S.W.2d 891—Gulf Refining Co. v. Frazier, 15 Tenn.App. 662, 689, citing **Corpus Juris.**
Tex.—Spence v. National Life & Accident Ins. Co., Civ.App., 59 S.W. 2d 212—Fidelity Union Casualty

though such others are medical men[2] or members of the family,[3] unless such statements are shown to have been true;[4] nor can a medical expert base his judgment in part on conversations with,[5] reports made by,[6] or the conclusions of,[7] other experts. It has also been held that a medical observer should not use facts of which he is informed[8] or the history of the case;[9] although there is authority for

Co. v. Dapperman, Civ.App., 47 S.W.2d 408, error dismissed.
Va.—Life Ins. Co. of Virginia v. Brockman, 3 S.E.2d 480, 173 Va. 86.
22 C.J. p 670 note 1.

Unauthenticated hospital records

Iowa.—Foy v. Metropolitan Life Ins. Co. of New York, 263 N.W. 14, 220 Iowa 628.
Mo.—Hayes v. Equitable Life Assur. Soc. of U. S., App., 150 S.W.2d 1113.

Evidence based on hearsay and newspaper reports was irrelevant and immaterial.—Thompson v. Ammons, 129 S.E. 539, 160 Ga. 886.

When testimony admitted

(1) Where the incidents reported to the physician added little to his own observations.—U. S. v. Witbeck, 113 F.2d 185, 72 App.D.C. 231.

(2) Where attending physician stated that he based his opinion on opinions of nurses but later stated that what he meant was the information given by them as to the facts.—In re Sales' Estate, 89 P.2d 1043, 108 Mont. 202.

2. N.J.—Birtwistle v. Public Service Ry. Co., 112 A. 193, 94 N.J.Law 407.
Pa.—Howarth v. Adams Express Co., 112 A. 536, 269 Pa. 280.
Tenn.—Gulf Refining Co. v. Frazier, 15 Tenn.App. 662, 689, citing Corpus Juris.
Vt.—Wetherbee's Ex'rs v. Wetherbee's Heirs, 38 Vt. 454.
22 C.J. p 670 note 2.

When testimony admitted

Testimony is admissible, where witness stated that his answers were not altered by any information received from attending physician.—Al McCullough Transfer Co. v. Pizzulo, 5 N.E.2d 796, 53 Ohio App. 470.

In Maryland, although medical expert may base opinion on facts testified to by another expert, witness may not have submitted to him, as part of facts to be considered in formation of his conclusion, the opinion of such other expert. So, on issue as to testator's mental capacity, introduction by doctor, in explanation of reasons for opinion, of statement which family physician had made to him in reference to decedent's condition, was not error.—Quimby v. Greenhawk, 171 A. 59, 166 Md. 335.

3. Ariz.—Security Ben. Ass'n v. Small, 272 P. 647, 34 Ariz. 458.
Md.—Mangione v. Snead, 195 A. 329, 173 Md. 33.
N.J.—Altieri v. Public Service Ry. Co., 128 A. 547, 147 N.J.Law 241—Birtwistle v. Public Service Ry. Co., 112 A. 193, 94 N.J.Law 407.
22 C.J. p 670 note 3.

4. U.S.—Delaware, L. & W. R. Co. v. Roalefs, N.J., 70 F. 21, 16 C.C.A. 601.
Minn.—Thompson v. Bankers' Mut. Casualty Ins. Co., 151 N.W. 180, 128 Minn. 474, Ann.Cas.1916A 277.

5. Minn.—Miller v. St. Paul City R. Co., 64 N.W. 554, 62 Minn. 216.

6. Kan.—Lefebvre v. Western Coal & Mining Co., 289 P. 456, 131 Kan. 1.
Ky.—Equitable Life Assur. Soc. of U. S. v. Kazee, 79 S.W.2d 208, 257 Ky. 803.
Mich.—Rajkovich v. Oliver Iron Mining Co., 290 N.W. 365, 292 Mich. 162.
Tex.—Republic Underwriters v. Lewis, Civ.App., 106 S.W.2d 1113.

Technicians' reports

(1) Physician appointed by court to make examination of injured party may not testify as to extent of injury based solely on report of examination made to him by technician, although testimony of such examiner as to result of examination may be predicate for physician's opinion or examination.—Depfer v. Walker, 169 So. 660, 123 Fla. 862, 125 Fla. 189.

(2) Physician's testimony based on Wasserman test made by another, out of physician's presence, was inadmissible where tester did not himself testify.—Sovereign Camp, W. O. W. v. McDaniel, 64 S.W.2d 581, 251 Ky. 212.

(3) However, testimony of physician concerning diagnosis of plaintiff's hysterical paralysis, arrived at in reliance on report of hospital technicians, has been held competent, although persons making tests were not witnesses.—Sundquist v. Madison Rys. Co., 221 N.W. 392, 197 Wis. 83.

7. Md.—McComas v. Wiley, 108 A. 196, 134 Md. 572.
Pa.—Katora v. New Jersey Zinc Co. of Pennsylvania, 176 A. 762, 116 Pa.Super. 257.
S.C.—Ellis v. Kansas City Life Ins. Co., 197 S.E. 398, 187 S.C. 334.

Opinion not based on another expert's opinion

Ark.—Arkansas Baking Co. v. Wyman, 47 S.W.2d 45, 185 Ark. 310.
Md.—Prudential Ins. Co. of America v. Brookman, 175 A. 838, 167 Md. 616.
Mo.—Ambruster v. Levitt Realty & Investment Co., 107 S.W.2d 74, 341 Mo. 364.

8. U.S.—Peters v. Mutual Life Ins. Co. of New York, D.C.Pa., 26 F. Supp. 50, affirmed, C.C.A., 107 F.2d 9, certiorari denied 60 S.Ct. 582, 309 U.S. 663, 84 L.Ed. 1010.
22 C.J. p 670 note 6.

9. U.S.—U. S. v. Matory, C.C.A.Ill., 71 F.2d 798.
Ill.—Sanitary Dist. of Chicago v. Industrial Commission, 175 N.E. 372, 343 Ill. 236.
Kan.—Murphy v. Edgar Zinc Co., 278 P. 764, 128 Kan. 524, 65 A.L.R. 1213—Priest v. Kansas City Life Ins. Co., 227 P. 538, 541, 116 Kan. 421, citing Corpus Juris, and rehearing and modification of order denied 230 P. 529, 117 Kan. 1, and order reversed on other grounds on motion to recall mandate 237 P. 938, 119 Kan. 23, rehearing denied 239 P. 443, 119 Kan. 284.
Minn.—Faltico v. Minneapolis St. Ry. Co., 268 N.W. 857, 858, 198 Minn. 88, citing Corpus Juris.
Mo.—Adams v. Carlo, 101 S.W.2d 753—Hutchinson v. Missouri Pac. Ry. Co., App., 288 S.W. 91.
N.D.—Hunder v. Rindlaub, 237 N.W. 915, 926, 61 N.D. 389, citing Corpus Juris.
22 C.J. p 670 note 7.

Undisclosed history of case

U.S.—Peters v. Mutual Life Ins. Co. of New York, D.C.Pa., 26 F.Supp. 50, affirmed, C.C.A., 107 F.2d 9, certiorari denied 60 S.Ct. 582, 309 U.S. 663, 84 L.Ed. 1010.

Physician performing autopsy

Testimony of physician who performed autopsy regarding history of case as told him by another physician is inadmissible.—Fiander's Case, 199 N.E. 309, 293 Mass. 157.

When facts in evidence

Where the history of a patient is made up of facts which in themselves are competent evidence and are in evidence, a physician may base his opinion on the history, but where opinion is based partly on facts in evidence and partly on facts related by the patient to the physician which are not in evidence, the opinion is not competent.—Oesterle v. Kroger Grocery & Baking Co., Mo., 141 S.W.2d 780.

Testimony held not inadmissible as based on history of case.

Cal.—Rohner v. Cross, 9 P.2d 509, 121 Cal.App. 667.
Kan.—Murphy v. Edgar Zinc Co., 278 P. 764, 128 Kan. 524, 65 A.L.R. 1213.
Mo.—Cazzell v. Schofield, 8 S.W.2d 580, 319 Mo. 1169.
N.J.—Rein v. Travelers Ins. Co., 3 A.2d 599, 121 N.J.Law 565—Weh v.

the view that the history of the case, so far as it bears on the proper treatment, may be taken into consideration by him.[10]

The witness may regard the complaints[11] or statements[12] of his patient, where they were made for the purpose of treatment,[13] although they were made after suit has been brought;[14] but mere narrative statements of the patient[15] or statements made with a view to future litigation,[16] or acts and conduct of the patient which could be simulated[17] cannot be relied on.

Statement of facts. A medical observer should give, with such detail as he can, the facts,[18] including statements made to him by the patient as a basis for treatment,[19] on which he bases his inference, and the symptoms which he has observed.[20] He may, however, in the discretion of the court, be permitted to testify without first stating the facts, leav-

People's Rapid Transit Co., 162 A. 626, 109 N.J.Law 317.

10. Ala.—Taylor v. Atlantic Coast Line R. Co., 168 So. 181, 232 Ala. 378.
Fla.—Fred Howland, Inc., v. Morris, 196 So. 472, 143 Fla. 189, 128 A.L.R. 1013.
Ky.—Greer v. Richards' Adm'r, 115 S.W.2d 568, 273 Ky. 91.
Mont.—Kelley v. John R. Daily Co., 181 P. 326, 56 Mont. 63.
Pa.—Knisely v. Knisely, 182 A. 51, 120 Pa.Super. 140.
Tex.—American Nat. Ins. Co. v. Points, Civ.App., 131 S.W.2d 983, error dismissed, judgment correct —Wininger v. Security Mut. Casualty Co., Civ.App., 120 S.W.2d 614 —Traders & General Ins. Co. v. Burns, Civ.App., 118 S.W.2d 391.
Wis.—Sundquist v. Madison Rys. Co., 221 N.W. 392, 197 Wis. 83.
22 C.J. p 670 note 8.

11. Ala.—Louisville & N. R. Co. v. Sandlin, 28 So. 40, 125 Ala. 585.
22 C.J. p 670 note 9.

12. U.S.—Hardy-Burlingham Mining Co. v. Baker, C.C.A.Ky., 10 F.2d 277.
D.C.—District of Columbia v. White, 48 App.D.C. 44.
Mich.—Krzywosz v. Crummett, 282 N.W. 853, 286 Mich. 649.
Mo.—Berry v. Kansas City Public Service Co., 121 S.W.2d 825, 343 Mo. 474—Evans v. Missouri Pac. R. Co., 116 S.W.2d 8, 342 Mo. 420—Corbett v. Terminal R. Ass'n of St. Louis, 82 S.W.2d 97, 336 Mo. 972—Phares v. Century Electric Co., App., 131 S.W.2d 879—Adolf v. Brown, 255 S.W. 947, 213 Mo.App. 406.
Tex.—American Nat. Ins. Co. v. Points, Civ.App., 131 S.W.2d 983, error dismissed, judgment correct.
22 C.J. p 670 note 10.

Statements of facts in evidence
Testimony of physician concerning diagnosis based in part on unsworn statements of patient with reference to her experience in automobile accident was admissible where patient testified to facts she told physician. —Mader v. Boehm, 250 N.W. 854, 213 Wis. 55, followed in 250 N.W. 856, 213 Wis. 62.

Testimony as hearsay
Physician's testimony that blow plaintiff "told me she received" caused her nervous condition is not incompetent as hearsay.—Boyle v. Philadelphia Rapid Transit Co., 134 A. 446, 286 Pa. 536.

13. U.S.—Hardy-Burlingham Mining Co. v. Baker, C.C.A.Ky., 10 F.2d 277.
Ill.—Powers Storage Co. v. Industrial Commission, 173 N.E. 70, 340 Ill. 498—Kiewert v. Balaban & Katz Corporation, 251 Ill.App. 342.
Ky.—Chesapeake & O. Ry. Co. v. Hay, 88 S.W.2d 318, 261 Ky. 566.
Mo.—Curry v. Federal Life Ins. Co., 287 S.W. 1053, 221 Mo.App. 626.
N.Y.—McCready v. Staten Island R. Co., 51 App.Div. 338, 64 N.Y.S. 996.
Tex.—American Nat. Ins. Co. v. Points, Civ.App., 131 S.W.2d 983, error dismissed, judgment correct.
Wis.—Bell v. Milwaukee Electric Ry. & Light Co., 172 N.W. 791, 169 Wis. 408.
22 C.J. p 671 note 11.

Effect of failure to treat patient
Where physician testified that injured employee came to him for examination and treatment, that he did not prescribe any treatment because he did not know of any which would improve employee's condition did not make his opinion as to extent of incapacity inadmissible.—United Employers Casualty Co. v. Daniels, Tex.Civ.App., 142 S.W.2d 607.

14. Mass.—Cronin v. Fitchburg & L. St. R. Co., 63 N.E. 335, 181 Mass. 202, 92 Am.S.R. 408.
22 C.J. p 671 note 12.

15. Mo.—Oesterle v. Kroger Grocery & Baking Co., 141 S.W.2d 780 —Berry v. Kansas City Public Service Co., 121 S.W.2d 825, 343 Mo. 474—Magill v. Boatmen's Bank, 232 S.W. 448, 288 Mo. 489—Phares v. Century Electric Co., App., 131 S.W.2d 879—Mendenhall v. Springfield Traction Co., App., 26 S.W.2d 50—Curry v. Federal Life Ins. Co., 287 S.W. 1053, 221 Mo.App. 626.
22 C.J. p 671 note 13.

Evidence held not inadmissible as based on statements made to witness as to plaintiff's past condition. —Paepke v. Stadelman, 300 S.W. 845, 222 Mo.App. 346—Stephens v. Mobile & O. R. Co., Mo.App., 285 S.W. 151.

Testimony held incompetent to prove truth of narrative facts claimant asserted regarding things of which physicians had no personal knowledge.—Perangelo's Case, 177 N.E. 892, 297 Mass. 59.

16. Ill.—Salem v. Webster, 95 Ill. App. 120, affirmed 61 N.E. 323, 192 Ill. 369.
N.D.—Hintz v. Wagner, 140 N.W. 729, 25 N.D. 110.

17. Tenn.—Gulf Refining Co. v. Frazier, 83 S.W.2d 285, 19 Tenn.App. 76.

18. U.S.—Peters v. Mutual Life Ins. Co. of New York, C.C.A.Pa., 107 F.2d 9, affirming, D.C., 26 F.Supp. 50, certiorari denied 60 S.Ct. 582, 309 U.S. 663, 84 L.Ed. 1010—U. S. v. Sampson, C.C.A.Mont., 79 F.2d 131.
Ariz.—Illinois Bankers Life Ass'n v. Theodore, 55 P.2d 806, 47 Ariz. 314.
Ga.—Pollard v. Page, 193 S.E. 117, 56 Ga.App. 503.
Mass.—Hathorn v. King, 8 Mass. 371, 5 Am.D. 106.
Mont.—Irion v. Hyde, 105 P.2d 666, 110 Mont. 570.
22 C.J. p 671 note 15.

Facts held sufficiently stated
U.S.—Travelers' Ins. Co. of Hartford, Conn., v. Person, C.C.A.Neb., 58 F.2d 210—Ætna Life Ins. Co. v. Caffee, C.C.A.Fla., 286 F. 657.
Ala.—Landham v. Lloyd, 136 So. 815, 223 Ala. 487.
Ga.—Georgia Ry. & Power Co. v. Howell, 113 S.E. 101, 28 Ga.App. 798.

19. Ala.—Taylor v. Atlantic Coast Line R. Co., 168 So. 181, 232 Ala. 378.
Ariz.—Illinois Bankers Life Ass'n v. Theodore, 55 P.2d 806, 47 Ariz. 314.
Wyo.—Northwest States Utilities Co. v. Brouilette, 65 P.2d 223, 51 Wyo. 132, rehearing denied 69 P.2d 623, 51 Wyo. 132.
22 C.J. p 671 note 16.
Admissibility of statements on which opinion is based generally see supra § 241.

20. Ill.—Jacksonville Southeastern R. Co. v. Southworth, 32 Ill.App. 307.
Iowa.—Monahan v. Roderick, 166 N.W. 725, 183 Iowa 1.

ing these to be brought out later, as by cross-examination;[21] and where the person in question is before the jury, who may see an obvious physical characteristic which is in part the basis of the witness' statement, such characteristic need not othererwise be proved.[22]

Where the facts do not afford ground for a reasonable inference,[23] and a fortiori where they show that no such inference as that stated can properly be drawn,[24] the evidence will be rejected.

Examination for purpose of qualifying as witness. Testimony by a medical witness as to physical condition is not rendered incompetent by reason of the fact that the knowledge of the witrress was acquired at an examination made for the purpose of qualifying him to testify,[25] but in such case, although there is authority to the contrary,[26] the witness must base his testimony solely on the examination made by

21. Ala.—Birmingham Amusement Co. v. Norris, 112 So. 633, 216 Ala. 138, 53 A.L.R. 840.
Ariz.—Illinois Bankers Life Ass'n v. Theodore, 55 P.2d 806, 47 Ariz. 314.
Kan.—Gilbreath v. Prairie Oil & Gas Co, 278 P. 707, 128 Kan. 618.
Md.—Mangione v. Snead, 195 A. 329, 173 Md. 33—Davidove v. Duvall, 153 A. 417, 160 Md. 345—Johnston v. Schmidt, 149 A. 283, 158 Md. 555—Love v. Love, 148 A. 814, 158 Md. 481—Crockett v. Davis, 31 A. 710, 81 Md. 134.
Okl.—Payton v. Shipley, 195 P. 125, 80 Okl. 145.
22 C.J. p 671 note 18.

22. Okl.—Muskogee Electric Tract. Co. v. Bryant, 155 P. 879, 56 Okl. 75, 78.
22 C.J. p 671 note 19.

23. Ala.—Alabama Lumber & Building Material Ass'n v. Mason, 160 So. 232, 230 Ala. 168—Atlantic Pacific Stages v. Yandle, 140 So. 603, 224 Ala. 481.
Ill.—Bowman v. Woodway Stores, 177 N.E. 727, 345 Ill. 181—Kanne v. Metropolitan Life Ins. Co., 34 N.E.2d 732, 310 Ill.App. 524—Henninger v. Inter-Ocean Casualty Co., 217 Ill.App. 542.
Ind.—Hirst v. Chevrolet Muncie Division of General Motors Corporation, App., 33 N.E.2d 773.
Iowa.—De Moss v. Brown Cab Co., 254 N.W. 17, 218 Iowa 77.
Kan.—City of Ottawa v. Green, 83 P. 616, 72 Kan. 214.
Ky.—Dossenbach v. Reidhar's Ex'x, 53 S.W.2d 731, 245 Ky. 449.
Md.—Mangione v. Snead, 195 A. 329, 173 Md. 33—Mead v. Gilbert, 185 A. 668, 170 Md. 592—Scheller v. Schindel, 138 A. 415, 153 Md. 547.
Minn.—Plotke v. Metropolitan Life Ins. Co., 299 N.W. 216.
Mo.—Heflin v. Fullington, 37 S.W.2d 931—Kane v. Metropolitan Life Ins. Co., 73 S.W.2d 826, 228 Mo. App. 649, quashal of opinion denied State ex rel. Metropolitan Life Ins. Co. v. Allen, 85 S.W.2d 469, 337 Mo. 525.
N.Y.—In re Burza's Estate, 272 N.Y.S. 248, 151 Misc. 577.
Pa.—Kish v. Bakaysa, 199 A. 321, 330 Pa. 533—Johnson v. Valvoline Oil Co., 200 A. 224, 131 Pa. Super. 266—Troxell v. Shirk, 196 A. 899, 130 Pa.Super. 40.
Tenn.—Coca Cola Bottling Works v. Lewis, 9 Tenn.App. 485.
Tex.—Jones v. Selman, Civ.App., 109 S.W.2d 1003, error dismissed—Burchill v. Hermsmeyer, Civ.App., 262 S.W. 511.
W.Va.—Cooper v. Anheuser Busch, Inc., 13 S.E.2d 276.
22 C.J. p 671 note 20.

Sufficiency of facts

(1) Facts on which opinion of medical expert is based must, like facts sufficient to support verdict of jury, measure up to legal requirements.—Kimmie v. Terminal R. R. Ass'n of St. Louis, 66 S.W.2d 561, 334 Mo. 596—Hall v. Mercantile Trust Co., 59 S.W.2d 664, 332 Mo. 802.

(2) Where there was some foundation for physician's testimony, it was for the court to decide whether it was sufficient.
D.C.—Brosnan v. Brosnan, 294 F. 1004, 54 App.D.C. 73.
Mo.—Hall v. Mercantile Trust Co., 59 S.W.2d 664, 332 Mo. 802.

(3) Opinions based on percentages of alcohol in the blood and tests conducted for the purpose of determining degrees of intoxication are not sufficiently certain and accurate to make such opinions or deductions at all conclusive because of individuals' toleration to alcohol, but such evidence properly obtained should be admitted for jury's consideration, where issue of intoxication is raised.—Kuroske v. Ætna Life Ins. Co. of Hartford, Conn., 291 N.W. 384, 234 Wis. 394, 127 A.L.R. 1505.

(4) That physicians' opinions that compensation claimant's dermatitis was not caused by his work might be based on lack of confidence in claimant's statements, rather than purely medical reasons, affected only weight of physicians' testimony.—Perangelo's Case, 177 N.E. 892, 297 Mass. 59.

(5) Coroner's testimony, in answer to question as to what in his opinion caused cerebral hemorrhage, from which insured died, after witness was advised of physical examination and findings by another physician, that it was caused by shock resulting "probably from an accident," was admissible in action on accident policy, as against objection that witness did not have sufficient knowledge on which to base opinion.—Hill v. Great Northern Life Ins. Co., 57 P.2d 405, 186 Wash. 167.

Identity of examined specimens

(1) Sufficiently established.
Ill.—Parrillo v. Bernstein, 18 N.E.2d 106, 297 Ill.App. 648.
Ky.—Louisville & N. R. Co. v. McCoy, 87 S.W.2d 921, 261 Ky. 435.

(2) Insufficiently established.—Life & Casualty Co. v. Sanders, 292 S.W. 657, 173 Ark. 362.

Opinion based on opinion

Where medical expert first gave opinion based on facts stated in hypothetical question that decedent had tuberculosis before accident, answer to further question, in which it was assumed that deceased had tuberculosis at time of injury, by which expert gave opinion that deceased died as result of injury caused by accident, was not inadmissible as opinion based on opinion.—Kreutzwald v. Walters, 275 N.Y.S. 878, 242 App.Div. 479.

24. Mass.—Woodwell v. Sloman, 11 N.E.2d 454, 299 Mass. 17.
Mo.—Green v. American Life & Accident Ins. Co., App., 93 S.W.2d 1119.
Pa.—In re Trump's Estate, 47 Dauph.Co. 433.
Wash.—Eddy v. Speiger & Hurlbut, 201 P. 898, 117 Wash. 632.
22 C.J. p 671 note 21.

25. Ill.—Mattice v. Klawans, 228 Ill.App. 126, reversed on other grounds 143 N.E. 866, 312 Ill. 299.
Mo.—Phares v. Century Electric Co., App., 131 S.W.2d 879.
Neb.—Kennedy v. Woods, 267 N.W. 390, 131 Neb. 217.
Tex.—Federal Underwriters Exchange v. Rigsby, Civ.App., 114 S.W.2d 354—Texas Employers' Ins. Ass'n v. Moore, Civ.App., 46 S.W.2d 404, affirmed 70 S.W.2d 702, 123 Tex. 302.
22 C.J. p 671 note 22.

26. Me.—Johnson v. Bangor Ry. & Electric Co., 131 A. 1, 125 Me. 88.
Okl.—Yellow Cab Transit Co. v. Bethel, 81 P.2d 667, 183 Okl. 219—Sutherland Lumber Co. v. Roberts, 81 P.2d 581, 167 Okl. 646—Bartlett-Collins Glass Co. v. Washabaugh, 26 P.2d 420, 166 Okl. 90—Quality

him and not on statements in the nature of self-serving declarations made by the patient during his examination,[27] and acts of the person under examination, which may have been either voluntary or involuntary, cannot form part of the basis of the opinion.[28]

Result of X-ray examination. The result of an X-ray examination may be stated;[29] and one who qualifies as an expert[30] may explain or interpret X-ray photographs, properly identified and offered in evidence.[31] One who has made an external examination of an injury and also an X-ray of the

Ice Cream Co. v. Jones, 8 P.2d 751, 155 Okl. 197.

27. U.S.—U. S. v. Nickle, C.C.A.Mo., 60 F.2d 372—Hardy-Burlingham Mining Co. v. Baker, C.C.A.Ky., 10 F.2d 277—Baltimore & O. R. Co. v. Mangus, C.C.A.Ohio, 294 F. 761—Grand Trunk Pac. Ry. Co. v. Tollard, C.C.A.Minn., 286 F. 676.

Ill.—Sanitary Dist. of Chicago v. Industrial Commission, 175 N.E. 372, 343 Ill. 236—Lehigh Stone Co. v. Industrial Commission, 146 N.E. 583, 315 Ill. 431—Wells Bros. Const. Co. v. Industrial Commission, 137 N.E. 791, 306 Ill. 191—Gaydos v. Peterson, 20 N.E.2d 837, 300 Ill.App. 219—Thomas v. Illinois Power & Light Corporation, 247 Ill.App. 378—Kiewert v. Balaban & Katz Corporation, 251 Ill. App. 342—Told v. Madison Bldg. Co., 216 Ill.App. 29.

Kan.—Priest v. Kansas City Life Ins. Co., 227 P. 538, 541, 116 Kan. 421, citing **Corpus Juris**, and rehearing and modification of order denied 230 P. 529, 117 Kan. 1, and order reversed on other grounds on motion to recall mandate 237 P. 938, 119 Kan. 23, rehearing denied 239 P. 443, 119 Kan. 284.

Ky.—Greer v. Richards' Adm'r, 115 S.W.2d 568, 273 Ky. 91—Illinois Cent. R. Co. v. Townsend, 267 S.W. 161, 206 Ky. 329.

Mich.—Layton v. Cregan & Mallory Co., 257 N.W. 888, 269 Mich. 574.

Minn.—Preveden v. Metropolitan Life Ins. Co., 274 N.W. 685, 200 Minn. 523—Faltico v. Minneapolis St. Ry. Co., 268 N.W. 857, 858, 198 Minn. 88, citing **Corpus Juris.**

N.J.—Sandford v. Chanaz Co., 189 A. 670, 117 N.J.Law 485.

N.Y.—Belter v. Van Winkle, 254 N.Y.S. 529, 234 App.Div. 886, followed in 254 N.Y.S. 530, 234 App. Div. 886.

Ohio.—McAndrews v. McAndrews, 19 Ohio App. 262.

Or.—Watrous v. Salem Brewery Ass'n, 49 P.2d 375, 151 Or. 294.

Pa.—Lipstock v. Haddock Min. Co., 5 Sch.Reg. 338.

Tenn.—U. S. Rubber Products Co. v. Cannon, 113 S.W.2d 1184, 172 Tenn. 665—Lemarr v. Metropolitan Life Ins. Co., App., 143 S.W.2d 891.

Tex.—United Employers Casualty Co. v. Thornton, Civ.App., 151 S.W.2d 920, error refused—Southern Underwriters v. Blair, Civ.App., 144 S.W.2d 641—United Employers Casualty Co. v. Daniels, Civ.App., 142 S.W.2d 607—Federal Underwriters Exchange v. Wheeler, Civ. App., 108 S.W.2d 922, error dismissed—Republic Underwriters v. Lewis, Civ.App., 106 S.W.2d 1113—Traders & General Ins. Co. v. Chancellor, Civ.App., 105 S.W.2d 720, error dismissed—Brotherhood of Locomotive Firemen and Enginemen v. Raney, Civ.App., 101 S.W.2d 863, error dismissed—Traders & General Ins. Co. v. Rhodabarger, Civ.App., 93 S.W.2d 1180, error dismissed—Texas Employers' Ins. Ass'n v. Wallace, Civ. App., 70 S.W.2d 832.

Wis.—Schields v. Fredrick, 288 N.W. 241, 232 Wis. 595—Bell v. Milwaukee Electric Ry. & Light Co., 172 N.W. 791, 169 Wis. 408.

Wyo.—Northwest States Utilities Co. v. Brouillette, 65 P.2d 223, 51 Wyo. 132, rehearing denied 69 P.2d 623, 51 Wyo. 132.

22 C.J. p 671 note 23.

Testimony held admissible

Ill.—McKenna v. Chicago City Ry. Co., 129 N.E. 814, 296 Ill. 314.

Ky.—Edwards v. Druien, 32 S.W.2d 411, 235 Ky. 835.

Mo.—Roach v. Kansas City Rys. Co., App., 228 S.W. 520.

Tex.—Southern Underwriters v. Knight, Civ.App., 107 S.W.2d 1097, error dismissed.

28. Tenn.—Gulf Refining Co. v. Frazier, 83 S.W.2d 285, 19 Tenn.App. 76.

22 C.J. p 672 note 24.

29. Mich.—Pearce v. Rodell, 276 N.W. 883, 283 Mich. 19.

N.C.—Dempster v. Fite, 167 S.E. 33, 203 N.C. 697.

Or.—Vale v. Campbell, 263 P. 400, 123 Or. 632.

Pa.—Burchfield v. Borough of Conneaut Lake, 174 A. 668, 114 Pa. Super. 114.

Tenn.—Montesi v. Patton, 10 Tenn. App. 455.

Tex.—Gulf Casualty Co. v. Archer, Civ.App., 118 S.W.2d 976, error dismissed.

22 C.J. p 672 note 25.

Picture not before witness

(1) Allowing expert to testify as to X-ray picture which he had seen, without having it before him, has been held not error.

Ala.—Paschall v. Sharp, 110 So. 387, 215 Ala. 304.

Mo.—Bachman v. Quincy, O. & K. C. R. Co., 274 S.W. 764, 310 Mo. 48.

N.C.—Welch v. Independent Coach Line, 150 S.E. 717, 198 N.C. 130.

Tex.—Federal Underwriters Exchange v. Rigsby, Civ.App., 130 S.W.2d 1105, error dismissed, judgment correct.

(2) Admitting doctor's testimony in form of deposition as to his X-ray findings based on memorandum of his report rather than X-ray pictures which he failed to produce at taking of deposition was not error, where pictures were available to complaining party for examination before trial.—Arnold v. Metropolitan Life Ins. Co., Mo.App., 89 S.W.2d 81.

(3) However, permitting expert medical witness to testify over objection to matters shown by X-rays without introducing X-ray pictures in evidence has been held prejudicial error.—Gursslin v. Helenboldt, 21 N.Y.S.2d 269, 259 App.Div. 1064.

(4) Expert testimony, based largely on an excluded X-ray photograph, is inadmissible.—Walsh v. Frankenthaler, 173 N.Y.S. 764, 186 App.Div. 62.

X-ray of uninjured part

In an action against a city for injuries in a fall through a coalhole in its sidewalk, evidence of a medical witness as to what in his opinion, based on his examination of plaintiff, produced the abnormal condition he had testified existed in her left knee, competent on its face, was not rendered inadmissible because the witness had taken X-ray pictures of both knees of plaintiff, and had examined and considered both in forming his opinion as to the left knee.—City of Terre Haute v. O'Neal, 126 N.E. 26, 72 Ind.App. 485.

30. N.C.—Liles v. Hannah Pickett Mills, 150 S.E. 363, 197 N.C. 772.

Qualifications of witnesses to testify with respect to X-ray examinations or treatments see infra § 537 a.

31. Ala.—Pope v. Ryals, 167 So. 721, 232 Ala. 260.

Cal.—Sim v. Weeks, 45 P.2d 350, 7 Cal.App.2d 28.

Ill.—Garvey v. Chicago Rys. Co., 171 N.E. 271, 339 Ill. 276.

Ind.—Stamets v. Wilson, 164 N.E. 300, 89 Ind.App. 403.

Kan.—Jerobek v. Safeway Cab, Transfer & Storage Co., 73 P.2d 1097, 146 Kan. 859.

Miss.—Aponaug Mfg. Co. v. Carroll, 184 So. 63, 183 Miss. 793.

N.C.—Eaker v. International Shoe Co., 154 S.E. 667, 199 N.C. 379.

N.D.—Asch v. Washburn Lignite

injured parts may be permitted to compare the conditions as he found them on both examinations.[32]

Autopsy. An autopsy may afford a sufficient basis for a statement as to the cause of death;[33] and a coroner, who was also a physician, has been allowed to state an opinion, based on facts obtained at a post-mortem examination as to a testator's mental condition when he executed his will.[34]

§ 537. —— Qualifications of Witness

a. In general

b. Mental capacity or condition

a. In General

Any person learned in medical or physiological matters is qualified to testify as an expert thereon, and it is not essential that the witness be a medical practitioner.

To qualify a person as an expert on medical or physiological matters, it must be shown that the witness possesses learning and knowledge of the subject under inquiry sufficient to qualify him to speak with authority on the subject;[35] and in order that a witness may be allowed to state an inference from observation as to such matters, he must be a skilled observer; mere opportunity for observation, without the technical training necessary to coördinate the observations into a conclusion valuable to the jury is not sufficient.[36] Anyone who is shown to have special knowledge and skill in diagnosing and treating human ailments is qualified to testify as an expert, if his learning and training show that he is qualified to give an opinion on the particular questions in issue.[37] The question rests largely within the discretion of the trial court.[38]

Coal Co., 186 N.W. 757, 48 N.D. 734.
Okl.—Patrick & Tillman v. Matkin, 7 P.2d 414, 154 Okl. 232.
Vt.—Standish v. Newton, 152 A. 41, 103 Vt. 85.
Wash.—Manos v. James, 110 P.2d 887.
22 C.J. p 672 note 26.

Authenticity of picture
Testimony of medical witness based in whole or in part on X-ray is inadmissible, unless authentic character of picture is established.—Southwestern Cotton Oil Co. v. State Industrial Commission, 29 P.2d 122, 167 Okl. 294.

Picture taken by another
(1) Permitting physician to testify concerning X-ray picture taken by another, not witness, on order of physician, is not reversible error.
Kan.—Mercado v. Nelson, 235 P. 123, 118 Kan. 302.
Tex.—Federal Underwriters Exchange v. Rigsby, Civ.App., 130 S.W.2d 1105, error dismissed, judgment correct.

(2) However, testimony of expert concerning X-ray plate has been held inadmissible, where he did not take picture or examine plaintiff, and persons taking picture were not called.—Gastiger v. Horowitz, 221 N.Y.S. 481, 220 App.Div. 284.

(3) Admitting physician's testimony based solely on his interpretation of X-ray pictures is error where physician neither took nor supervised taking of pictures, was in room when some of pictures were taken, but did not know which ones, and had nothing to do with developing them.—Lake Shore Power Co. v. Meyer, 1 N.E.2d 1021, 51 Ohio App. 534.

Significance of lights and shadows in radiograph of injury is a proper subject for expert testimony.—Appleby v. Cass, 234 N.W. 477, 211 Iowa 1145—Daniels v. Iowa City, 183 N.W. 415, 191 Iowa 811.

32. N.J.—Casey v. Atlantic City & S. R. Co., 126 A. 293, 100 N.J.Law 376.

33. Cal.—People v. Durrant, 48 P. 75, 116 Cal. 179.
La.—Lado v. First Nat. Life Ins. Co., 162 So. 579, 182 La. 726, affirming, App., 158 So. 872.

Thoroughness of examination
Physicians are not disqualified from testifying as to cause of death because they had not examined deceased's skull or brain, where physicians had examined other vital organs and found evidence of cause of death in lungs.—Brase v. Williams Sanatorium, 256 N.W. 176, 192 Minn. 304.

34. Mo.—Lefever v. Stephenson, 193 S.W. 840.

35. U.S.—Clauson v. U. S., C.C.A. S.D., 60 F.2d 694.
Ala.—Reichert Milling Co. v. George, 162 So. 383, 26 Ala.App. 417, conforming to 162 So. 393, 230 Ala. 3, certiorari denied 162 So. 402, 230 Ala. 589.
Cal.—McGuire v. Baird, 70 P.2d 915, 9 Cal.2d 353—Warnock v. Kraft, 85 P.2d 505, 506, 30 Cal.App.2d 1—Bickford v. Lawson, 81 P.2d 216, 27 Cal.App.2d 416—Rasmussen v. Shickle, 41 P.2d 184, 4 Cal.App.2d 426.
Fla.—Depfer v. Walker, 169 So. 660, 123 Fla. 862, 125 Fla. 189.
Ohio.—Mosher v. Equitable Life Assur. Soc. of U. S., 14 N.E.2d 413, 57 Ohio App. 435.
Pa.—Rudy v. New York Life Ins. Co. of New York City, 46 Dauph. Co. 1.
Wis.—Zielsdorf v. Grotsky, 218 N.W. 186, 195 Wis. 253—Rost v. Roberts, 192 N.W. 38, 180 Wis. 207.

Waiver of objection
Objection that physicians were not qualified to testify as experts is waived, unless made when testimony is offered.
Idaho—Butler v. Anaconda Copper Mining Co., 268 P. 6, 46 Idaho 326.
Wis.—Rost v. Roberts, 192 N.W. 38, 180 Wis. 207.

36. Ala.—Mobile Light & R. Co. v. Therrell, 88 So. 677, 680, 205 Ala. 553, citing **Corpus Juris.**
N.Y.—Saas v. Hindmarsh, 184 N.Y.S. 467.
22 C.J. p 675 notes 80, 81.

37. Ill.—Voight v. Industrial Commission, 130 N.E. 470, 472, 297 Ill. 109.
Mo.—Jenkins v. Chase, 53 S.W.2d 21.

Chiropodist
Miss.—J. W. Sanders Cotton Mill v. Moody, 195 So. 683.

Optometrist
Conn.—Jackson v. Waller, 10 A.2d 763, 126 Conn. 294.
Ky.—Black Starr Coal Corporation v. Reeder, 128 S.W.2d 905, 278 Ky. 532.

Toxicologist
R.I.—Reynolds v. Davis, 179 A. 613, 55 R.I. 206.

38. Fla.—Depfer v. Walker, 169 So. 660, 123 Fla. 862, 125 Fla. 189.
Ga.—Williams v. McCranie, 109 S.E. 699, 27 Ga.App. 693.
Md.—General Automobile Owners' Ass'n v. State, 140 A. 48, 154 Md. 204.
Minn.—Berkholz v. Benepe, 190 N.W. 800, 153 Minn. 335.
Mo.—Wild v. Pitcairn, 149 S.W.2d 800.
Or.—Carnine v. Tibbetts, 74 P.2d 974, 158 Or. 21.
Pa.—Gordon v. Philadelphia Rapid Transit Co., 107 A. 811, 264 Pa. 461.

Discretion held not abused
Mass.—Carbonneau v. Lachance, 29 N.E.2d 696, 307 Mass. 153—Bian-

As a general rule, any practicing or duly qualified physician or surgeon is competent to state his inference or judgment,[39] but it is not essential that a person testifying on a question of health or physical condition should be a medical practitioner.[40] Neither is it necessary that the witness should be in full practice,[41] that he should have received a diploma,[42] or that he should be a graduate of a medical college;[43] nor need he have a license to practice,[44] or have been examined by a state board,[45] either for general practice or for some position requiring special skill,[46] unless such a requirement is established by statute.[47]

Although they may base their opinions on knowledge derived exclusively from practical experience,[48] medical experts are entitled to base their opinions on the teachings of medical science,[49] and are not limited to expressing opinions only as to subjects with which they are familiar through their own observation and experience,[50] as reading may qualify a witness to state an inference as to a specific subject,[51] if accompanied by general professional training.[52]

It is not essential that the witness should ever have treated the disease or injury in question,[53] or should

cucci v. Nigro, 141 N.E. 568, 247 Mass. 40.

N.C.—Ramsey v. Federal Life Ins. Co., 179 S.E. 5, 208 N.C. 819—Graham v. Sandhill Power Co., 127 S.E. 429, 189 N.C. 381.

Determination of question by a witness

In dentistry malpractice case, the court properly refused to allow a doctor, a witness for defendant, to answer, over plaintiff's objection, the question, "Would an ordinary medical practitioner that has never studied dentistry or had any experience in dentistry be qualified, in your judgment, to testify as an expert upon dental operations?" as the question related to the qualifications of another physician than the witness, and was a question of law for the court.—Patterson v. Howe, 202 P. 225, 102 Or. 275.

39. Ala.—Jordan v. Capers, 131 So. 557, 222 Ala. 197—State Realty Co. v. Ligon, 119 So. 672, 218 Ala. 541.

Ark.—McGough v. Zurich General Accident & Liability Ins. Co., 147 S.W.2d 994.

Cal.—In re Toomes' Estate, 54 Cal. 509, 35 Am.R. 53.

Del.—Drucker v. Philadelphia Dairy Products Co., 166 A. 796, 5 W.W. Harr. 437.

Ill.—Western Foundry Co. v. Industrial Commission, 132 N.E. 218, 298 Ill. 593.

Ind.—Iterman v. Baker, 15 N.E.2d 365, 214 Ind 308.

Kan.—O'Brien v. New England Mut. Life Ins. Co., 197 P. 1100, 109 Kan. 138.

Md.—Armour & Co. v. Leasure, 9 A.2d 572, 177 Md. 393—General Automobile Owners' Ass'n v. State, 140 A. 48, 154 Md. 204.

Mo.—Martin v. Springfield City Water Co., App., 128 S.W.2d 674—Bear v. Sovereign Camp, W. O. W., 230 S.W. 369, 207 Mo.App. 82—Roach v. Kansas City Rys. Co., App., 228 S.W. 520.

N.H.—Ricard v. Prudential Ins. Co. of America, 173 A. 375, 93 A.L.R. 784, 87 N.H. 31.

N.C.—Pridgen v. Gibson, 139 S.E. 443, 194 N.C. 289, 54 A.L.R. 855.

Tex.—United Employers Casualty Co. v. Bezdek, Civ.App., 146 S.W. 2d 473, error dismissed by agreement—Harris v. Sadler, Civ.App., 55 S.W.2d 173, error dismissed—Turner v. Stoker, Civ.App., 289 S. W. 190.

Utah.—Walkenhorst v. Kesler, 67 P. 2d 654, 92 Utah 312.

Vt.—Fairchild v. Bascomb, 35 Vt. 398.

22 C.J. p 676 note 82.

Witness' failure to answer certain technical questions, only went to the weight of his testimony concerning the extent of plaintiff's injuries.—Rogers v. Goforth, W.Va., 2 S.E.2d 903.

40. Ala.—Tullis v. Kidd, 12 Ala. 648.

Vt.—Fairchild v. Bascomb, 35 Vt. 398.

Ga.—Robertson v. Ætna Life Ins. Co., 141 S.E. 504, 37 Ga.App. 703.

W.Va.—Rogers v. Goforth, 2 S.E.2d 903.

22 C.J. p 676 note 83.

41. Ala.—Sovereign Camp, W. O. W. v. Screws, 119 So. 644, 218 Ala. 599.

Mo.—Gunter v. Whitener, App., 75 S. W.2d 588.

N.Y.—Roberts v. Johnson, 58 N.Y. 613.

42. N.Y.—People v. Rice, 54 N.E. 48, 159 N.Y. 400.

43. S.C.—State v. Merriman, 12 S.E. 619, 34 S.C. 16.

22 C.J. p 676 note 86.

44. Minn.—Berkholz v. Benepe, 190 N.W. 800, 153 Minn. 335.

Mo.—Meyers v. Wells, 273 S.W. 110.

Pa.—Clark v. Horowitz, 143 A. 131, 293 Pa. 441.

Tex.—City Nat. Bank v. Pigott, Civ. App., 270 S.W. 234.

22 C.J. p 676 note 87.

Failure of practicing physician to record license as required by statute, on removing from one county to another, did not affect his qualifications as expert.—Mississippi Cent. R. Co. v. Alexander, 152 So. 653, 169 Miss. 620.

Practitioners licensed in other states

Under statute where citizen in action against surgeons takes adequate steps to procure aid of Wisconsin doctors, but is unable to do so, he may call as witnesses practitioners licensed to practice in other states—Paulsen v. Gundersen, 260 N.W. 448, 218 Wis. 578.

45. N.C.—State v. Speaks, 94 N.C. 865.

46. **Examiner in lunacy**

Wis.—Lowe v. State, 96 N.W. 417, 118 Wis. 641.

47. La.—State v. Howard, 45 So. 260, 120 La. 311, 14 Ann.Cas. 692.

48. Del.—Drucker v. Philadelphia Dairy Products Co., 166 A. 796, 5 W.W.Harr. 437.

49. U.S.—Woelfle v. Connecticut Mut. Life Ins. Co. of Hartford, Conn., C.C.A.Mo., 103 F.2d 417.

50. U.S.—Woelfle v. Connecticut Mut. Life Ins. Co. of Hartford, Conn., supra.

22 C.J. p 676 note 94.

51. Ind.—Illinois Steel Co. v. Fuller, 23 N.E.2d 259.

N.Y.—Meiselman v. Crown Heights Hospital, 34 N.E.2d 367, 285 N.Y. 389, reversing 20 N.Y.S.2d 174, 259 App.Div. 840, appeal denied 20 N. Y.S.2d 669, 259 App.Div. 916.

22 C.J. p 676 note 91.

52. Iowa.—In re Harmsen, 167 N. W. 618.

Wis.—Soquet v. State, 40 N.W. 391, 72 Wis. 659.

Optometrist, who did no surgery on eye and had merely textbook knowledge on subject, is not qualified to give opinion whether operation would correct impaired vision.—Culver v. Prudential Ins. Co. of America, 179 A. 400, 6 W.W.Harr., Del., 582.

53. U.S.—Gray v. Pet Milk Co., C. C.A.Ill., 108 F.2d 974, certiorari denied Pet Milk Co. v. Gray, 60 S. Ct. 890, 309 U.S. 658, 84 L.Ed. 1031.

have been confronted, in his practice, with a situation exactly like that which was the subject of the litigation;[54] neither is it necessary that he be familiar with the method of treatment employed in the particular case,[55] that being a matter going to the weight, rather than to the competency, of the testimony.[56] The qualification must relate to the branch of the medical field involved in the case,[57] although it is not essential that the witness should be a specialist.[58]

To qualify an expert witness in a malpractice action, it must appear that he is familiar with the treatment and care and skill of practitioners in the locality in question,[59] although he need not have practiced or lived in the community.[60]

Electric shock. Practical experience with electricity may qualify one to state an inference as to the effect of an electric shock,[61] but one having a long experience in electrical work is not competent to give his opinion as to whether one could be permanently injured by a shock of electricity which did not manifest itself by a mark on the body.[62]

A medical witness who has suffered electric shocks and treated persons suffering therefrom may state whether in his judgment the conditions in which he found a person on a certain occasion might naturally and probably have been produced by an electric shock,[63] and a physician who has seen people who were electrocuted is competent to give an opinion whether a person could be electrocuted by

Ind.—Illinois Steel Co. v. Fuller, 23 N.E.2d 259.

N.H.—Douzanis v. Boston & Maine Transp. Co., 7 A.2d 393.

22 C.J. p 676 note 93.

54. Cal.—Valdez v. Percy, 96 P.2d 142, 35 Cal.App.2d 485.

Mich.—Sampson v. Veenboer, 234 N.W. 170, 252 Mich. 660.

Mo.—Langeneckert v. St. Louis Sulphur & Chemical Co., App., 65 S.W.2d 648.

Or.—Lehman v. Knott, 196 P. 476, 100 Or. 476.

55. Cal.—Valdez v. Percy, 96 P.2d 142, 35 Cal.App.2d 485—Kershaw v. Tilbury, 8 P.2d 109, 214 Cal. 679.

Or.—Keadle v. Padden, 20 P.2d 403, 143 Or. 350, rehearing denied 22 P.2d 892, 143 Or. 350.

56. Cal.—Kershaw v. Tilbury, 8 P.2d 109, 214 Cal. 679.

57. Ind.—McCoy v. Buck, 157 N.E. 456, 87 Ind.App. 433, rehearing denied 160 N.E. 46, 87 Ind.App. 433.

Ky.—Rawleigh v. Donoho, 38 S.W.2d 227, 238 Ky. 480.

22 C.J. p 676 note 95.

58. U.S.—Valmas Drug Co. v. Smoots, C.C.A.Mich., 269 F. 356.

Del.—Drucker v. Philadelphia Dairy Products Co., 166 A. 796, 5 W.W.Harr. 437.

Ga.—Brisendine v. Hunt, 158 S.E. 469, 43 Ga.App. 115.

N.J.—Crawford v. American Stores Co., 136 A. 715, 5 N.J.Misc. 413.

N.C.—Eaker v. International Shoe Co., 154 S.E. 667, 199 N.C. 379—Pridgen v. Gibson, 139 S.E. 443, 194 N.C. 289, 54 A.L.R. 855.

Tex.—Utilities Indemnity Exchange v. Burks, Civ.App., 7 S.W.2d 1112.

Vt.—Emerson v. Hickens, 164 A. 381, 105 Vt. 197.

Wash.—Kearney v. Washington Nat. Ins. Co., 52 P.2d 903, 184 Wash. 579.

22 C.J. p 677 note 96.

59. Cal.—McGuire v. Baird, 70 P.2d 915, 9 Cal.2d 353—Warnock v. Kraft, 85 P.2d 505, 30 Cal.App.2d 1—Bickford v. Lawson, 81 P.2d 216, 27 Cal.App.2d 416—Taylor v. Fishbaugh, 79 P.2d 174, 26 Cal.App.2d 300—Rasmussen v. Shickle, 41 P.2d 184, 4 Cal.App.2d 426—Soady v. Washburn, 299 P. 560, 114 Cal.App. 82.

Mich.—Sima v. Wright, 256 N.W. 349, 268 Mich. 352.

60. Conn.—Geraty v. Kaufman, 162 A. 33, 115 Conn. 563.

Tex.—Turner v. Stoker, Civ.App., 289 S.W. 190.

Presumption of difference in standards

As regards expert's qualifications, courts cannot assume that standards of medical practice in locality of expert's residence and locality of operation differ.—Tennant v. Barton, 2 P.2d 735, 164 Wash. 279.

Expert held qualified

(1) Experienced surgeon having performed similar operations as one involved in litigation, and having heard testimony in regard to practice of surgery in community.—Sampson v. Veenboer, 234 N.W. 170, 252 Mich. 660.

(2) Physician practicing at Hannibal, Mo., to testify to the usual and ordinary practice of physicians and surgeons in Keokuk, Iowa, and similar communities.—Kirchner v. Dorsey & Dorsey, 284 N.W. 171, 226 Iowa 283.

(3) Physician practicing in Los Angeles, to express an expert opinion with respect to degree of care and skill ordinarily possessed by physicians in Pasadena.—Warnock v. Kraft, 85 P.2d 505, 30 Cal.App.2d 1.

(4) Physicians from Los Angeles, to testify as to standard of care in Long Beach, California.—Lewis v. Johnson, 86 P.2d 99, 12 Cal.2d 558.

(5) Expert residing in Portland, Or., to testify as to practice in general locality of Longview, Wash.—Tennant v. Barton, 2 P.2d 735, 164 Wash. 279.

(6) Physician educated in Germany and practicing there until 1936, since which time he had practiced in New York, and who while practicing in Germany had become familiar through personal handling of hundreds of cases with treatment, and had also become familiar with treatment throughout world by reading literature on subject, to testify as to proper practice in America in 1932.—Meiselman v. Crown Heights Hospital, 34 N.E.2d 367, 285 N.Y. 389, reversing 20 N.Y.S.2d 174, 259 App.Div. 840, appeal denied 20 N.Y.S.2d 669, 259 App.Div. 916.

(7) Other cases see Holcomb v. Magee, 217 Ill.App. 272.

61. Or.—Crosby v. Portland R. Co., 100 P. 300, 101 P. 204, 53 Or. 496.

Testimony as to experience

In action for death of plaintiff's husband on ground that defendant had been negligent in permitting primary wire to sag and come into contact with secondary wire, involving question of whether deceased had been killed by the voltage normally carried in secondary lines, witnesses who had had years of experience in electrical work could testify that they had felt the passage through their own bodies of voltage normally carried by secondary lines and had seen deaths from higher voltage.—Vessels v. Kansas City Light & Power Co., Mo., 219 S.W. 80.

Sheet metal worker with daily experience with electrical current was competent to testify as expert respecting voltage necessary to kill human being.—Blakeney v. Alabama Power Co., 133 So. 16, 222 Ala. 394.

62. Tex.—Denison Light & Power Co. v. Patton, Civ.App., 135 S.W. 1040.

63. Md.—United R. & Electric Co. v. Corbin, 72 A. 606, 109 Md. 442.

coming in contact with a wire without leaving a burn.[64] However, a medical witness with no special electrical experience or training has been held incompetent to testify whether an illness was caused by an electric shock or by fright,[65] and where such witness did not profess to be an expert on electricity except as affecting the body, his testimony as to whether, where a live wire did not touch the body or clothing, a person could have received an electric current from it was properly excluded.[66]

Insurable condition. It has been held that a physician who is not an expert in the law of insurance is not competent to testify as to whether, with reference to different physical conditions, a person was insurable;[67] but a physician who for many years acted as medical examiner for insurance companies has been held qualified to express an opinion on the subject.[68]

An insurance agent may state whether a person was able to obtain insurance because of certain conditions or injuries.[69]

Premature birth. One who has stated that she was the mother of children, and knew the difference between a prematurely born child and a full-grown child, may testify as to whether a birth was premature.[70]

X-ray. The application of the X-ray to the human body may be explained by any person who possesses the requisite scientific knowledge to understand it,[71] and it is not necessary for one to be a physician in order to be qualified to testify as an expert with respect thereto.[72] Persons who follow the profession of making X-ray pictures usually are qualified to interpret them,[73] and so is the average physician,[74] although being a physician does not, in itself, qualify one as a competent interpreter of an X-ray picture.[75]

Dentist. A dentist can testify as to the condition of any matter or anything pertaining to his particular profession.[76] Thus he may state the character of dental work in the mouth of a person examined by him,[77] the effect of improper condition of teeth on the stomach,[78] the difference between pains caused by a dental condition and trigeminal neuralgia,[79] whether an injury to the jaw was permanent,[80] and whether it would take a light or heavy blow to leave the mouth in the condition in which he found it.[81]

A dentist, testifying that he knew the effect of arsenic on the human body, has been held qualified as an expert on such matter.[82]

Embalmer or undertaker. An embalmer or undertaker has been held qualified to give an opinion on the cause of a person's death,[83] and, as bearing on the issue of cause of death, to testify that there was no interference in inserting a trocar into an artery;[84] and such a witness has been allowed to testify that water bubbling from the mouth of a submerged body came from the lungs,[85] but not to express an opinion as to the time a body was in water.[86]

64. Ala.—Prudential Ins. Co. v. Calvin, 148 So. 837, 227 Ala. 146.

65. Md.—United R. & Electric Co. v. Corbin, 72 A. 606, 109 Md. 442.

66. Md.—United R. & Electric Co. v. Corbin, supra.

67. Mass.—Reagan v. Union Mut. L. Ins. Co., 92 N.E. 1025, 207 Mass. 79.

68. Ky.—New York Life Ins. Co. v. Long, 277 S.W. 978, 211 Ky. 656.

69. Ky.—Security Benefit Ass'n v. Kibby, 295 S.W. 164, 220 Ky. 330.
S.C.—Smoak v. Martin, 94 S.E. 869, 108 S.C. 472.

70. Ala.—Bessemer Coal, Iron & Land Co. v. Doak, 44 So. 627, 631, 152 Ala. 166, 12 L.R.A.,N.S., 889.

71. Minn.—Henslin v. Wheaton, 97 N.W. 882, 91 Minn. 219, 64 L.R.A. 126, 103 Am.S.R. 504, 1 Ann.Cas. 19.

72. Ark.—Dorr, Gray & Johnston v. Headstream, 295 S.W. 16, 173 Ark. 1104.
Ga.—Robertson v. Ætna Life Ins. Co., 141 S.E. 504, 37 Ga.App. 703.
Kan.—Ladlie v. American Glycerin Co., 223 P. 272, 115 Kan. 507.
N.D.—Ness v. Yeomans, 234 N.W. 75, 60 N.D. 368.
Ohio.—Aglor v. Schine Theatrical Co., 17 N.E.2d 118, 59 Ohio App. 68.

X-ray technician who was not a physician or surgeon, and who had never taken courses in anatomy, but who had fifteen years' experience in reading and interpreting X-ray pictures, was competent to testify that the pictures disclosed fractures of the vertebrae, although not competent to express an opinion as to what caused condition shown.—Aponaug Mfg. Co. v. Carroll, 184 So. 63, 183 Miss. 793.

73. Ga.—Robertson v. Ætna Life Ins. Co., 141 S.E. 504, 37 Ga.App. 703.
Idaho.—Call v. City of Burley, 62 P.2d 101, 57 Idaho 58.

74. Idaho.—Call v. City of Burley, supra.

75. Idaho.—Call v. City of Burley, supra.

Physician held qualified by experience
Miss.—Beard v. Turritin, 161 So. 688, 173 Miss. 206.

76. Ga.—Holtzendorf v. McNeil, 101 S.E. 919, 25 Ga.App. 792.

77. Kan.—Hoskinson v. Smyser, 148 P. 640, 95 Kan. 568.

78. S.D.—Thompson v. Reed, 135 N.W. 679, 29 S.D. 85.

79. Wash.—Sinclair v. Haven, 89 P. 2d 820, 198 Wash. 651.

80. Or.—Schairer v. Johnson, 272 P. 1027, 128 Or. 409.

81. Wis.—Glerczak v. Northwestern Fuel Co., 125 N.W. 436, 142 Wis. 207.

82. Ala.—Thaggard v. Vafes, 119 So. 647, 218 Ala. 609.

83. Minn.—Palmer v. Order of United Commercial Travelers of America, 253 N.W. 543, 191 Minn. 204.

84. Mo.—Ryan v. Sheffield Car & Equipment Co., App., 24 S.W.2d 166.

85. Minn.—Miller v. McCarthy, 270 N.W. 559, 198 Minn. 497.

86. Md.—New York Life Ins. Co. v. Rogers, 143 A. 651, 156 Md. 58.

Nurse. A nurse may[87] or may not[88] be qualified to state an inference as to a medical or surgical matter according to the extent of his or her training and experience and the subject of the inference.

Practitioners of particular schools. A physician of one school may be competent to give an opinion as to the correctness of a diagnosis[89] or treatment[90] of a physician of another school, but he cannot testify as to the treatment by a physician of another school, unless both employ the same treatment.[91] The mere fact that a physician of one school has studied a single textbook of another school will not qualify him to testify as to the standards of treatment of such other school.[92] Applying these rules to the circumstances of the particular case in actions for malpractice, it has been held that physicians and surgeons are competent in actions against osteopaths,[93] chiropractors,[94] or naturopaths;[95] that homeopaths are competent in actions against allopaths;[96] that chiropractors are competent in actions against physicians and surgeons;[97] and that osteopaths are competent in actions against medical physicians;[98] but under the circumstances of the particular case expert testimony of an osteopath has been excluded in an action against a doctor of medicine.[99]

An osteopath is competent to express an opinion as to injury or disease and the treatment thereof.[1]

A chiropractor is competent to testify with respect to injuries to the parts of the body with which his calling deals, and to the effect of such injuries on the general health of the injured party,[2] but he is

87. Ala.—Barfield v. South Highlands Infirmary, 68 So. 30, 191 Ala. 553, Ann.Cas.1916C 1097.
Cal.—In re Toomes' Estate, 54 Cal. 509, 35 Am.R. 53—Longuy v. La Société Francaise De Bienfaisance Mutuelle, 198 P. 1011, 52 Cal.App. 370.
Tex.—Texas Employers' Ins. Ass'n v. Drews, Civ.App., 297 S.W. 630—St. Louis, B. & M. Ry. Co. v. Davis, Civ.App., 262 S.W. 923.
Vt.—Fairchild v. Bascomb, 35 Vt. 398.
22 C.J. p 677 note 7.

88. Cal.—In re Flatau's Estate, 76 P.2d 506, 10 Cal.2d 701.
Miss.—Mississippi Power & Light Co. v. Jordan, 143 So. 483, 164 Miss. 174.
Mo.—Gates v. Dr. Nichols' Sanatorium, 55 S.W.2d 424, 331 Mo. 754, reversing, App., 34 S.W.2d 196.
22 C.J. p 677 note 7.

89. Mo.—Cazzell v. Schofield, 8 S.W.2d 580, 319 Mo. 1169—Grainger v. Still, 85 S.W. 1114, 187 Mo. 197, 70 L.R.A. 49.
Vt.—Williams v. Marini, 162 A. 796, 105 Vt. 11.

90. Fla.—Foster v. Thornton, 170 So. 459, 125 Fla. 699.
Mo.—Mann v. Grim-Smith Hospital and Clinic, 147 S.W.2d 606.
Neb.—Bellheimer v. Rerucha, 246 N.W. 867, 124 Neb. 399.
Or.—Wemmett v. Mount, 292 P. 93, 134 Or. 305.
Tex.—Berry v. State, Civ.App., 135 S.W. 631, error refused.
Vt.—Williams v. Marini, 162 A. 796, 105 Vt. 11.
Right of physician to have his treatment tested by principles of particular school he follows see the C.J.S. title Physicians and Surgeons § 44, also 48 C.J. p 1118 note 88.

91. Fla.—Foster v. Thornton, 170 So. 459, 463, 125 Fla. 699, citing **Corpus Juris.**
Mo.—Grainger v. Still, 85 S.W. 1114, 187 Mo. 197, 70 L.R.A. 49.
Pa.—Waldron v. Andrews, 113 A. 742, 270 Pa. 591.
Vt.—Williams v. Marini, 162 A. 796, 105 Vt. 11.
Wash.—Swanson v. Hood, 170 P. 135, 99 Wash. 506.
Refusal to permit showing of qualification held error
Mo.—Mann v. Grim-Smith Hospital and Clinic, 147 S.W.2d 606.

92. Minn.—Bush v. Cress, 233 N.W. 317, 181 Minn. 590.

93. Vt.—Williams v. Marini, 162 A. 796, 105 Vt. 11.

94. Cal.—Wallace v. La Vine, 97 P.2d 879, 36 Cal.App.2d 450—Dalton v. Los Angeles College of Chiropractic, 13 P.2d 546, 125 Cal.App. 196.
Ohio.—Willett v. Rowekamp, 16 N.E.2d 797, 58 Ohio App. 465, affirmed 16 N.E.2d 457, 134 Ohio St. 285.
Utah.—Walkenhorst v. Kesler, 67 P.2d 654, 92 Utah 312.
Allopath
In action for death of patient whom chiropractor was alleged to have negligently treated, testimony of allopath was admissible.—Abos v. Martyn, 88 P.2d 797, 31 Cal.App.2d 705.
Allopath, pathologist, and neurologist
Fla.—Foster v. Thornton, 170 So. 459, 125 Fla. 699.

95. Or.—Hilgedorf v. Bertschinger, 285 P. 819, 132 Or. 641.

96. Cal.—Hutter v. Hommel, 3 P.2d 554, 213 Cal. 677.

97. N.D.—Ness v. Yeomans, 234 N.W. 75, 60 N.D. 368.
Or.—Wemmett v. Mount, 292 P. 93, 134 Or. 305.

98. Mo.—Mann v. Grim-Smith Hospital and Clinic, 147 S.W.2d 606.
In suit against allopath
Wash.—Swanson v. Hood, 170 P. 135, 99 Wash. 506.

99. Ohio.—Forthofer v. Arnold, 21 N.E.2d 869, 60 Ohio App. 436.

1. U.S.—New York Cent. R. Co. v. Johnson, C.C.A.Mo., 27 F.2d 699, 702, citing **Corpus Juris,** and certiorari granted 49 S.Ct. 27, 278 U.S. 590. 73 L.Ed. 523, reversed on other grounds 49 S.Ct. 300, 279 U.S. 310, 73 L.Ed. 706, amended 49 S.Ct. 417.
Wyo.—Standard Oil Co. (Indiana) v. Ervin, 8 P.2d 447, 44 Wyo. 88.
22 C.J. p 677 note 8.
Injured osteopath is competent to testify to her knowledge of facts and matters of opinion, including permanency of alleged injury.—State Realty Co. v. Ligon, 119 So. 672, 218 Ala. 541.
Matters personally observed
Osteopath could properly express opinion in matter within domain of osteopathy regarding physical condition and nervous symptoms personally observed or ascertained by exploratory investigation.—Calder v. Levi, 177 A. 392, 168 Md. 260, 97 A.L.R. 880.

2. U.S.—Yelloway, Inc., v. Hawkins, C.C.A.Mo., 38 F.2d 731.
Cal.—Johnston v. Peairs, 3 P.2d 617, 117 Cal.App. 208.
Ill.—Voight v. Industrial Commission, 130 N.E. 470, 297 Ill. 109.
Kan.—Ladlie v. American Glycerin Co., 223 P. 272, 115 Kan. 507.
Md.—O'Dell v. Barrett, 163 A. 191, 163 Md. 342.
Mo.—Meyers v. Wells, 273 S.W. 110—Harder v. Thrift Const. Co., App., 53 S.W.2d 34.
N.D.—Ness v. Yeomans, 234 N.W. 75, 60 N.D. 368.
Okl.—Inter Ocean Oil Co. v. Mar-

not competent to express an opinion as to whether chiropractic adjustments are treatment of a disease.[3]

A naturopath physician is a competent witness in an action against another doctor of naturopathy for malpractice.[4]

b. Mental Capacity or Condition

An observing witness may testify as to mental capacity or condition if he has had adequate opportunities for observation; a practising physician, although without special training in mental diseases, ordinarily may testify as an expert.

An observing witness as to mental capacity or condition must have had adequate opportunities for observation,[5] but it is not necessary that he should be specially skilled in the subject of mental disorders.[6]

Whether a witness has sufficient knowledge, learning, and experience to state his opinion as to one's mental condition as an expert on mental diseases is largely for the discretion of the presiding judge.[7] With respect to experts, where the mental derangement is of a common type, the courts have shown an inclination to accept, as competent to testify, any practicing physician in good standing,[8] even though he may not have made a special study of mental diseases,[9] and he is not a specialist on the subject,[10] although special training may add weight to his judgment.[11] On the other hand, some decisions evidence a desire to escape a multitude of counselors by restricting the number of those regarded as qualified to testify as experts to persons who have made special studies in that line of medical research.[12] Insufficient training will render the witness incompetent,[13] and the evidence of a practicing physician of good standing and long experience has been rejected.[14]

shall, 26 P.2d 399, 166 Okl. 118—Oklahoma Natural Gas Corporation v. Schwartz, 293 P. 1087, 146 Okl. 250.

Or.—Carnine v. Tibbetts, 74 P.2d 974, 158 Or. 21.

Tex.—Maryland Casualty Co. v. Hill, Civ.App., 91 S.W.2d 391, error dismissed.

3. Ala.—Donovan v. State, 109 So. 290, 215 Ala. 55.

Reason for rule

The question is a legal one as to which the witness is incompetent.—Donovan v. State, supra.

4. N.C.—Hardy v. Dahl, 187 S.E. 788, 210 N.C. 530.

5. Ga.—Holland v. Hill, 111 S.E. 71, 28 Ga.App. 537.

22 C.J. p 678 notes 16, 17.

6. Mo.—Sanguinett v. May Department Stores Co., 65 S.W.2d 162, 228 Mo.App. 1161.

Tex.—Beasley v. Faust, Civ.App., 217 S.W. 179.

22 C.J. p 678 note 18.

Effect of referring patient to neurologist

Physician was not incompetent to testify because he referred patient to neurologist.—Sanguinett v. May Department Stores Co., 65 S.W.2d 162, 228 Mo.App. 1161.

Minister of gospel

One is qualified as an expert when it is shown that he is a priest and is daily required to exercise his judgment as to the mental condition of persons.—In re Toomes' Estate, 54 Cal. 509, 35 Am.R. 83.

7. Ill.—Williams v. Prudential Ins. Co. of America, 271 Ill.App. 532.

Mass.—Lockhart v. Ferguson, 137 N.E. 355, 243 Mass. 226—Old Colony Trust Co. v. Di Cola, 123 N.E. 454, 233 Mass. 119.

8. Ga.—Williams v. Trust Co. of Georgia, 178 S.E. 295, 180 Ga. 73.

Mass.—White v. McPherson, 67 N.E. 643, 183 Mass. 533.

N.H.—Olgiati v. New England Box Co., 117 A. 735, 80 N.H. 399.

N.J.—Polgar v. Kantor, 130 A. 732, 3 N.J.Misc. 1122.

Okl.—Baldridge v. Zigler, 229 P. 831, 103 Okl. 219.

Or.—In re Allen's Estate, 241 P. 996, 116 Or. 467.

22 C.J. p 678 note 19.

Mental condition as question for medical profession

Question of quality of mind is one peculiarly directed to medical profession.—Murphy v. Lester, 132 S.W.2d 542, 280 Ky. 51—McDonald's Ex'r v. Transylvania University, Lexington, 118 S.W.2d 171, 274 Ky. 168—McCutcheon v. Bichon, 103 S.W.2d 76, 267 Ky. 694.

Interne

Testimony of interne as to mental condition of injured pedestrian is admissible, as against contention he was not licensed physician.—Clark v. Horowitz, 143 A. 131, 293 Pa. 441.

9. Ark.—Crocker's Heirs v. Crocker's Heirs, 246 S.W. 6, 156 Ark. 309.

Mass.—Lewis v. Mason, 109 Mass. 169—Hastings v. Rider, 99 Mass. 622—Baxter v. Abbott, 7 Gray 71.

10. Tex.—Utilities Indemnity Exchange v. Burks, Civ.App., 7 S.W.2d 1112, error dismissed.

22 C.J. p 679 note 20.

11. Vt.—Hathaway v. National L. Ins. Co., 48 Vt. 335.

Permitting witness to state qualification of psychiatrist

Permitting superintendent of insane hospital to state that psychiatrist was better prepared to give expert opinion on mental disease than ordinary surgeon or general practitioner was not error.—Parke v. Dennard, 118 So. 396, 218 Ala. 209.

12. Mass.—Taylor v. Creeley, 152 N.E. 3, 257 Mass. 21—Old Colony Trust Co. v. Di Cola, 123 N.E. 454, 233 Mass. 119.

N.Y.—In re Lindou's Will, 270 N.Y.S. 771, 241 App.Div. 819.

22 C.J. p 679 note 22.

13. Ky.—Abbott v. Commonwealth, 55 S.W. 196, 107 Ky. 624, 21 Ky.L. 1372.

Tenn.—Ashby v. State, 139 S.W. 872, 124 Tenn. 684.

Attorney at law and stenographer in law office were not expert witnesses on mental capacity of testatrix, who engaged in conversation with them regarding terms of will at time that they attested her will.—Snodgrass v. Weaver, 199 S.E. 1, 120 W.Va. 441.

School principal

In action for injuries to school teacher resulting in "traumatic neurasthenia," permitting principal of school to answer whether teacher was "really capable of teaching school" was error as invading province of jury.—Capital Motor Lines v. Gillette, 177 So. 881, 235 Ala. 157.

Reading as qualifying witness

In order for reading to serve as a qualification, it must be along lines of medicine or the science of the mind.—Davis v. State, 35 Ind. 496, 9 Am.R. 760—22 C.J. p 679 note 27.

14. Md.—Mitchell v. Slye, 111 A. 814, 137 Md. 89.

Mass.—Old Colony Trust Co. v. Di Cola, 123 N.E. 454, 233 Mass. 119.

22 C.J. p 679 note 24.

Doctor who has merely treated a great many old people and is acquainted with the effects of pneumonia on them does not qualify to

It has been considered that a witness, who would be competent to testify as an expert on hypothetically stated facts may observe or examine the person in question either as a witness on the stand, or under other circumstances affording a suitable opportunity for forming an inference from the facts observed, and state this inference to the jury, together with the facts on which it is based;[15] but a contrary view has been asserted.[16]

§ 538. —— Statements Excluded

With respect to medical, surgical, or physiological matters, irrelevant statements and statements beyond the sphere of the witness are excluded as are opinions on the correctness of other doctors' opinions.

As shown supra § 534, only facts peculiarly within the knowledge of professional experts, and not facts which may be ascertained without the aid of science, are a proper subject for expert medical opinion. Irrelevant statements are excluded,[17] as are also statements beyond the sphere of the witness.[18]

Further, a witness may not give evidence in the nature of an argument in favor of a party,[19] or state an inference as to the effect of the conditions observed by him in some connection as to which he is not qualified, for example, as to the insurability of the life affected in a particular way,[20] or an expectancy of life not based on the use of mortality tables.[21] It is improper for a medical expert to express an opinion on the correctness of another doctor's opinion.[22]

§ 539. Mental State

Intent or mental conviction is not ordinarily a subject for expert opinion.

Intent is not a subject for expert opinion, at least where it is the ultimate issue in the case.[23] What a mentally normal man would do under assumed conditions is not a proper subject for expert testimony.[24] An opinion of an expert that nonpayment of a check should have created a conviction in the mind of the payee that the drawer was insolvent is not admissible.[25] It has also been considered that skilled witnesses cannot state opinions as to whether an electrical lineman knew the dangers incident to working on wires carrying a high current.[26]

Expert testimony as to mental condition as a medical or physiological matter is considered supra § 535.

§ 540. Mining and Excavation

The court in its discretion may receive expert opinions as to methods, causal relations, and other matters pertaining to mining and similar operations where the witness possesses special skill or experience.

The court may receive a statement of an inference or judgment as to the proper method of performing mining or similar operations,[27] and other

testify to the probable mental capacity to make a will of an old person suffering from that disease.—Lorts v. Wash, 75 S.W. 95, 175 Mo. 487.

15. Iowa.—Monahan v. Roderick, 166 N.W. 725, 183 Iowa 1.
22 C.J. p 679 note 25.

16. Me.—Fayette v. Chesterville, 77 Me. 28, 52 Am.R. 741.
22 C.J. p 679 note 26.

17. Ark.—Guardian Life Ins. Co. v. Johnson, 57 S.W.2d 555, 186 Ark. 1019.
Conn.—Schmeltz v. Tracy, 177 A. 520, 119 Conn. 492.
Ill.—Powers Storage Co. v. Industrial Commission, 173 N.E. 70, 340 Ill. 498—Williams v. Stearns, 256 Ill.App. 425.
Iowa.—Wildeboer v. Peterson, 203 N.W. 284, 201 Iowa 1202.
22 C.J. p 680 note 38, p 721 note 62 [a].

18. La.—Spears v. Stone & Webster Engineering Corporation, App., 161 So. 351, amended and rehearing refused 161 So. 905.
22 C.J. p 680 note 39.

Evidence held inadmissible

(1) Degree of care required, in X-ray treatment.—Butler v. Rule, 242 P. 436, 29 Ariz. 405.

(2) Whether shooting was accidental or intentional.—Bayles v. Jefferson Standard Life Ins. Co., La.App., 148 So. 465.

(3) What induced person to commit suicide.—Baber v. John C. Knipp & Sons, 163 A. 862, 164 Md. 55.

(4) How automobile lights act in fog.—Vidal v. Town of Errol, 162 A. 232, 86 N.H. 1.

(5) Whether insured was conscious that she had consumption prior to her application for insurance.—Knights and Ladies of Security v. Shepherd, Tex.Civ.App., 221 S.W. 696.

(6) Whether insured's employment was continuous and whether rewards for his labor had been or might be expected to be substantially gainful.—U. S. v. Stephens, C.C.A.Idaho, 73 F.2d 695.

19. N.D.—Hintz v. Wagner, 140 N.W. 729, 25 N.D. 110.

20. N.Y.—Rawls v. American L. Ins. Co., 36 Barb. 357, affirmed 27 N.Y. 282, 84 Am.D. 280.

21. Tex.—Chicago, R. I. & T. R. Co. v. Long, 65 S.W. 882, 26 Tex.Civ. App. 601.

22. Mich.—Sinclair v. Brunson, 180 N.W. 358, 212 Mich. 387, 12 A.L.R. 593.
Tenn.—Montesi v. Patton, 10 Tenn. App. 455.

23. U.S.—Holyoke Water Power Co. v. American Writing Paper Co., C.C.A.Mass., 68 F.2d 261.

Intent of lawmakers

A witness may not testify as to what a city council intended by a provision in an ordinance.—Arden Farms Co. v. City of Seattle, 99 P.2d 415, 2 Wash.2d 640.

24. U.S.—Metropolitan Life Ins. Co. v. Armstrong, C.C.A. Neb., 85 F. 2d 187.

25. U.S.—Patrick v. Rice, C.C.A.Pa., 98 F.2d 550.

26. Md.—Consolidated Gas, Electric Light & Power Co. v. State, 72 A. 651, 109 Md. 186.

27. Ala.—Birmingham Fuel Co. v. Taylor, 81 So. 630, 202 Ala. 674.
Mass.—Moraski v. T. A. Gillespie Co., 131 N.E. 441, 239 Mass. 44.
22 C.J. p 650 note 1 [a] (27), (40), p 680 note 69.
Statements of fact by skilled wit-

matters connected with such operations.[28] Receipt of such testimony generally rests in the discretion of the court,[29] although it must appear that the witness possesses the necessary skill and experience to render his inference of value.[30] A competent witness may state a relation of cause and effect in connection with mining or excavation and give his opinion as to the reason for given occurrences relating to such operations.[31] Persons who have experience in excavating and in protecting themselves against caving of the earth may acquire such a peculiar knowledge of the character of soils and of the best methods of protection as will warrant the reception of their inferences as to these matters.[32]

A witness skilled in mining matters may give an opinion relating thereto based on his own observations[33] or experiments;[34] and an expert's opinion in such matters may be based on personal observation combined with assumed facts supported by the evidence.[35] In the case of an observing witness the facts on which the inference rests should first be stated[36] and the inference should not be received where all the facts can be placed before the jury and properly coördinated by them.[37] A witness testifying as to a drilling operation may not state his conclusion on a mixed question of law and fact, thereby invading the province of the jury to pass on the controlling issue in the case.[38]

nesses as to mining matters see supra § 484.

Statements held admissible

(1) As to proper method of shoring a ditch.—Dowling v. L. H. Shattuck, Inc., N.H., 17 A.2d 529.

(2) As to whether roof was dangerous.—McMillan v. Bausch, Mo., 234 S.W. 835.

(3) As to respect in which a chute was defective.—P. J. Lewelling Const. Co. v. Longstreth, 246 S. W. 19, 156 Ark. 236.

(4) As to whether a post was too near the track for the safety of the workmen.—Birmingham Fuel Co. v. Taylor, 81 So. 630, 202 Ala. 674.

(5) As to whether well should be cased.—Raymond v. Pointer, 127 So. 153, 220 Ala. 593.

28. Ky.—Palmer Corporation v. Collins, 284 S.W. 95, 214 Ky. 838.
Ohio.—Weisant v. Follett, 17 Ohio App. 371.
Tex.—Texas Co. v. Brown, Civ.App., 82 S.W.2d 1101, error dismissed—Humble Oil & Refining Co. v. Strauss, Civ.App., 243 S.W. 528.
Utah.—Wooton v. Dragon Consol. Mining Co., 181 P. 593, 54 Utah 459.
22 C.J. p 650 note 1 [a] (27), (29), (40), p 681 note 70.

Statements held admissible

(1) As to cost of digging gas wells.—Fredonia Gas Co. v. Bailey, 94 P. 258, 77 Kan. 296.

(2) As to probable profits from drilling an oil well.—Osage Oil & Refining Co. v. Lee Farm Oil Co., Tex.Civ.App., 230 S.W. 518, error refused.

(3) As to efficiency of a lamp.—Williams v. Alabama Fuel & Iron Co., 102 So. 136, 212 Ala. 159.

29. U.S.—Hartford Fire Ins. Co. v. Empire Coal Mining Co., C.C.A. Colo., 30 F.2d 794.
22 C.J. p 680 note 68.

30. U.S.—Western Coal & Mining Co. v. Greeson, C.C.A.Ark., 284 F. 510.
Ala.—Birmingham Fuel Co. v. Taylor, 81 So. 630, 202 Ala. 674.
Ark.—P. J. Lewelling Const. Co. v. Longstreth, 246 S.W. 19, 156 Ark. 236.
N.H.—Dowling v. L. H. Shattuck, Inc., 17 A.2d 529.
Tex.—Portilla Drilling Co. v. Miller, Civ.App., 144 S.W.2d 936, error dismissed, judgment correct—Taubert v. Earle, Civ.App., 133 S. W.2d 145, error refused—Texas Co. v. Brown, Civ.App., 82 S.W.2d 1101, error dismissed.
22 C.J. p 681 note 71.

Experienced miners were held properly permitted as experts to give their opinions based on observations made and testified to by others and submitted to witnesses in hypothetical questions.—Gatliff Coal Co. v. Hill's Adm'r, 92 S.W.2d 56, 263 Ky. 309.

Acquaintance with particular place

A witness to be competent as an expert to testify as to the efficacy of a general method of finding loose rock in a mine need not, in absence of local peculiarity, be acquainted with the condition of the particular place in question.—Wooton v. Dragon Consol. Mining Co., 181 P. 593, 54 Utah 459.

"Entirely theoretical" knowledge has been rejected as a qualification.—Lineoski v. Susquehanna Coal Co., 27 A. 577, 157 Pa. 153.

31. U.S.—Empire Oil & Refining Co. v. Hoyt, C.C.A.Mich., 112 F.2d 356.
Ky.—City of Harlan v. Eversole, 58 S.W.2d 371, 248 Ky. 131.
22 C.J. p 650 note 1 [a] (27), p 681 note 70 [b].

Whether fire had been caused by explosion was held a proper subject for expert testimony.—Hartford Fire Ins. Co. v. Empire Coal Mining Co., C.C.A.Colo., 30 F.2d 794.

Proximity of trenches

A witness having special skill or experience may state an inference as to the effect of digging a small trench near another trench.—Ryan v. Oakland Gas, Light & Heat Co., 102 P. 558, 10 Cal.App. 484.

Lateral pressure

An expert may give testimony tending to prove that the weight of a building did not increase the lateral pressure of the soil and hence did not cause or contribute to the sliding of such soil into an excavation.—Smith v. Stolle, Mo.App., 77 S.W.2d 521.

32. Ill.—Degenhart v. Gent, 97 Ill. App. 145.
N.H.—Dowling v. L. H. Shattuck, Inc., 17 A.2d 529.

33. Ark.—P. J. Lewelling Const. Co. v. Longstreth, 246 S.W. 19, 156 Ark. 236.
Ky.—Gatliff Coal Co. v. Hill's Adm'r, 92 S.W.2d 56, 263 Ky. 309.

Method of extracting ore

An experienced miner familiar with the methods of extracting ore in a particular vicinity may testify thereto.—Page v. Savage, 246 P. 304, 42 Idaho 458.

34. U.S.—Empire Oil & Refining Co. v. Hoyt, C.C.A.Mich., 112 F.2d 356.

35. Pa.—Jackson v. U. S. Pipe Line Co., 191 A. 165, 325 Pa. 436.

36. Pa.—Wells v. Leek, 25 A. 101, 151 Pa. 431.

37. Colo.—Davis v. Shepherd, 72 P. 57, 31 Colo. 141.
22 C.J. p 681 note 74.

Poor lighting

Testimony that a mine was "poorly lighted" should not be received unless the witness qualifies as an expert; the nonexpert should merely state facts on which the jury might base a finding of improper lighting.—Texas & Pacific Coal Co. v. Sherbley, Tex.Civ.App., 212 S.W. 758, 761.

38. Tex.—Yaeger v. Long Bros. Drilling Co., Civ.App., 147 S.W.2d 276, error refused.

§ 541. Nature, Condition, and Qualities of Objects

Opinion evidence as to the properties of particular objects is admissible where the matter is one requiring special knowledge, but not where it is one of common knowledge.

Opinion evidence as to the nature, condition, or qualities of certain objects is admissible where the matter is such as to require special skill or experience in order to draw a correct inference.[39] The opinion may be expressed by a witness who has special knowledge thereof from experience or learning.[40] On the other hand, such evidence must be excluded where the matter is one of common knowledge or the inference is one which may be correctly drawn by the jury from the facts when presented,[41] or where the witness is not sufficiently qualified;[42] and it is also excluded where it consists merely of speculative views and criticisms.[43]

§ 542. Physical Facts

An inference as to physical facts may be stated by an expert or skilled witness where the inference is not one which the court or jury could draw without assistance.

An inference as to physical facts,[44] such as the properties of a given substance,[45] may be stated by skilled or expert witnesses where the matter is of

39. Cal.—McStay v. Citizens' Nat. Trust & Savings Bank of Los Angeles, 43 P.2d 560, 5 Cal.App.2d 595.
Ill.—Lyon & Healy v. Central States Hotel Co., 16 N.E.2d 155, 296 Ill. App. 245.
Md.—State v. Emerson & Morgan Coal Co., 133 A. 601, 150 Md. 429.
N.H.—Perreault v. Allen Oil Co., 179 A. 365, 87 N.H. 306.
22 C.J. p 681 note 75.

Condition or age of motor vehicle
Ala.—Scott v. Parker, 113 So. 495, 216 Ala. 321—Union Ins. Co. of Canton v. Sudduth, 103 So. 845, 212 Ala. 649—Chevrolet Motor Co. v. Caton, 116 So. 325, 22 Ala.App. 284, certiorari denied 116 So. 327, 217 Ala. 332.

Inherent danger of gas heater
Kan.—Fotopoulos v. Gas Service Co., 96 P.2d 666, 150 Kan. 738.

40. Ind.—Smith v. Hill, 165 N.E. 911, 200 Ind. 616.
Mo.—McCormick v. Lowe & Campbell Athletic Goods Co., App., 144 S.W.2d 866—Mummaw v. Southwestern Telegraph & Telephone Co., App., 208 S.W. 476.
N.H.—Bridges v. Great Falls Mfg. Co., 156 A. 697, 85 N.H. 220.

Dealer in trucks
Person shown to have expert knowledge as a user of, and dealer in, trucks, and to have knowledge of truck destroyed by fire, might testify that truck was "practically new," and statement was not objectionable as a conclusion.—Union Ins. Soc. of Canton v. Sudduth, 103 So. 845, 212 Ala. 649.

41. Mass.—Dillon v. Town of Framingham, 193 N.E. 54, 288 Mass. 511—Robbins v. Minute Tapioca Co., 128 N.E. 417, 236 Mass. 387.
Pa.—Delair v. McAdoo, 188 A. 181, 324 Pa. 392.
22 C.J. p 682 note 76.

Contradiction of well known fact
The commonly known fact that it is dangerous to pour kerosene on a newly kindled fire cannot be controverted by expert testimony.—Parton v. Phillips Petroleum Co., 107 S.W. 2d 167, 231 Mo.App. 585.

42. Ala.—Great Atlantic & Pacific Tea Co. v. Donaldson, 156 So. 859, 26 Ala.App. 179, certiorari denied 156 So. 865, 229 Ala. 276.
Tex.—German v. Continental Jewelry Co., Civ.App., 22 S.W.2d 341.

43. Mo.—American Paper Products Co. v. Morton Salt Co., App., 279 S.W. 761.

44. Cal.—City of Elsinore v. Temescal Water Co., 97 P.2d 274, 36 Cal.App.2d 116.
Tenn.—Standard Oil Co. of Louisiana v. Roach, 94 S.W.2d 63, 19 Tenn.App. 661—De Kalb County v. Tennessee Electric Power Co., 67 S.W.2d 555, 17 Tenn.App. 343.
Tex.—Southwestern Gas & Electric Co. v. Hutchins, Civ.App., 68 S.W. 2d 1085, error dismissed.
22 C.J. p 683 note 13, p 681 note 75 [a].

Type of liquor
A witness experienced in detecting concealed liquors could state that a certain liquor which he had smelled and tasted was whisky.—Midwest & Northern Realty Co. v. Standard Garage & Service Co., 200 N.W. 470, 160 Minn. 428.

Wind velocity
Evidence by a government meteorologist as to the velocity of the wind at the time was held competent, although the observations were made in a nearby town rather than at the place in question.—Ignaszak v. McCray Refrigerator Co., 190 N. W. 756, 221 Mich. 10.

Cause and effect; statements held admissible as to:
(1) Cause of decay in a shipment of peaches.—Western & A. R. Co. v. Summerour, 77 S.E. 802, 139 Ga. 545—Alabama Great Southern R. Co. v. McKenzie, 77 S.E. 647, 139 Ga. 410, 45 L.R.A.,N.S., 18.
(2) Cause of damage to cotton.—Houston & T. C. R. Co. v. Bath, 90 S.W. 55, 40 Tex.Civ.App. 270—22 C. J. p 648 note 53.
(3) Effect of alleged odors or smells.—Union Cemetery Co. v. Harrison, 101 So. 517, 20 Ala.App. 291.
(4) Effect of constant wear on a hard wood surface.—Acme Harvester Co. v. Chittick, 132 Ill.App. 611, affirmed 82 N.E. 647, 230 Ill. 558.
(5) Effect of storage of limes in railroad sheds.—American Ry. Express Co. v. Mobile Importing & Trading Co., 108 So. 238, 214 Ala. 420.
(6) Effect of water standing in a sewer on the lagging and on the foundation of an adjoining dwelling house.—Hanrahan v. Baltimore, 80 A. 312, 114 Md. 517.
(7) Causal relationships generally see supra § 525.

45. U.S.—Fleischmann Mfg. Co. v. Irwin, C.C.A.N.Y., 5 F.2d 167, affirming, D.C., 293 F. 267.
S.C.—Williams v. Standard Oil Co., 121 S.E. 363, 127 S.C. 430.
Tex.—Adkins-Polk Co. v. John Barkley & Co., Civ.App., 297 S.W. 757.
22 C.J. p 681 note 75 [a], p 683 note 13 [a].

Time of analysis
Expert testimony as to the composition of oil analyzed many years after its sale is admissible if the oil has remained untouched and in a condition which would show its ingredients as of the time in question.—Gutkind v. George Lueders & Co., 196 N.E. 201, 267 N.Y. 320, reversing 275 N.Y.S. 338, 242 App.Div. 764, and reargument denied 198 N. E. 429, 268 N.Y. 610.

Analysis by sample
An analysis of samples of a substance is not rendered inadmissible because of removal of a small quantity of the substance before the analysis was made, where the removal did not materially vary the composition; nor need it appear that the usual method of sampling was adopted where such method would have been inappropriate to establish the particular facts in issue.—Libby v. Woodman Potato Co., 195 A. 569, 135 Me. 305.

a technical nature. Thus the inference or judgment of a qualified witness has been held admissible as to whether particular substances were of good grade[46] or contaminated,[47] their condition when shipped,[48] and their explosive,[49] poisonous,[50] or porous[51] properties. An opinion as to the quality, composition, or utility of a material or substance,[52] or as to other physical facts,[53] may be given by one having special knowledge thereof from experience or learning.

An inference or opinion as to physical facts cannot be stated by a witness who is not shown to possess the necessary skill and experience[54] or who is unable to make a statement so definite as to be of value.[55] Further, an inference or opinion as to such facts, even by an expert or skilled witness, will not

Contractual stipulation

Where parties to a contract have stipulated that the analysis by the state chemist shall be "the best and only competent evidence of the contents" of certain merchandise, they cannot adduce other expert testimony contradicting the finding of the state chemist.—American Fertilizing Co. v. Thomas, 106 S.E. 835, 838, 181 N.C. 274.

46. Ala.—Jefferson v. Republic Iron & Steel Co., 93 So. 890, 208 Ala. 143.
Ind.—Smith v. Hill, 165 N.E. 911, 200 Ind. 616.
Tex.—Sugarland R. Co. v. Dew Bros., Civ.App., 212 S.W. 190, dismissed for want of jurisdiction.

47. Mass.—Flynn v. Growers Outlet, 30 N.E.2d 250, 307 Mass. 373.

Condition as apparent

Expert testimony is admissible on the question of whether it would have been reasonably easy for an experienced person to ascertain whether particular meat was in a fresh or tainted condition.—King v. Davis, 296 F. 986, 54 App.D.C. 239.

48. Ark.—C. H. Robinson Co. v. Hudgins Produce Co., 212 S.W. 305, 138 Ark. 500.
N.Y.—J. & H. Goodwin v. Dingfelder, 228 N.Y.S. 23, 223 App.Div. 742.
N.C.—Richardson v. Woodruff & Sons, 100 S.E. 173, 178 N.C. 46.

49. Ala.—Jefferson v. Republic Iron & Steel Co., 93 So. 890, 208 Ala. 143.
Mass.—Guinan v. Famous Players-Lasky Corporation, 167 N.E. 235, 267 Mass. 501.
Okl.—Selby v. Osage Torpedo Co., 241 P. 130, 112 Okl. 303, 44 A.L.R. 120.
Tenn.—Read Phosphate Co. v. Vickers, 11 Tenn.App. 146.

Explosion without extraneous cause

Testimony that nitroglycerine, unless properly washed, would sometimes explode without extraneous cause, is properly excluded, where there is no evidence in the case that it did so explode.—Bean v. Independent Torpedo Co., C.C.A.Okl., 4 F.2d 504.

50. Mo.—Cleaver v. Central States Life Ins. Co., 142 S.W.2d 474, 129 A.L.R. 1094—Brock v. American Cent. Life Ins. Co., App., 44 S.W. 2d 200.

51. Pa.—Capri v. Jafolla & Mark, 181 A. 448, 119 Pa.Super. 563.

52. Ark.—C. H. Robinson Co. v. Hudgins Produce Co., 212 S.W. 305, 138 Ark. 500.
Conn.—Katz v. Delohery Hat Co., 118 A. 88, 97 Conn. 665.
D.C.—King v. Davis, 296 F. 986, 54 App.D.C. 239.
Ind.—Smith v. Hill, 165 N.E. 911, 200 Ind. 616.
Md.—Peninsula Produce Exch. v. American Ry. Express Co., 128 A. 403, 147 Md. 424.
Mass.—Guinan v. Famous Players-Lasky Corporation, 167 N.E. 235, 267 Mass. 501.
Pa.—Capri v. Jafolla & Mark, 181 A. 448, 119 Pa.Super. 563.
Tenn.—Holland & Kerr v. Craven, 5 Tenn.App. 39.
Vt.—Holbrook Grocery Co. v. Armstrong, 122 A. 458, 97 Vt. 197.

Physicians were held competent to testify as to chemical reaction of sulphuric acid.—Associated Indemnity Corporation v. Baker, Tex.Civ. App., 76 S.W.2d 153, error dismissed.

Road engineer, and contractor who has improved road, may express their opinions as to whether gravel used on a road was a good quality paving material.—Smith v. Hill, 165 N.E. 911, 200 Ind. 616.

Experts on water

(1) One who was a physician and county health officer could state his opinion as to the fitness of water for domestic use; it does not require a bacteriologist to determine this question.—Joerger v. Pacific Gas & Electric Co., 276 P. 1017, 207 Cal. 8.

(2) An expert well driller could express opinion that well would have produced usable water.—Smith v. Patterson, Tex.Civ.App., 294 S.W. 984.

(3) Persons who have casually used water for drinking and washing do not qualify as experts on fitness of water for drinking or domestic purposes.—Tyrrell-Combest Realty Co. v. Adams, Tex.Civ.App., 291 S.W. 252.

53. Colo.—Ison v. Stewart, 94 P. 2d 701, 105 Colo. 55.

Witnesses held qualified to testify

(1) As to cause of condition of crop.—Hurley v. Illinois Cent. R. Co., 282 S.W. 97, 221 Mo.App. 478.

(2) As to possible use of land.—Vineyard Grove Co. v. Town of Oak Bluffs, 163 N.E. 888, 265 Mass. 270.

(3) As to productivity of destroyed trees.—Shell Pipe Line Corporation v. Svrcek, Tex.Civ.App., 37 S.W.2d 297.

54. Ala.—Herrin v. Burnett, 114 So. 406, 217 Ala. 23.
Ill.—Thompson v. Hughes, 121 N.E. 387, 286 Ill. 128, affirming 210 Ill. App. 462.
Iowa.—Slinger v. Farmers' Mut. Hail Ins. Ass'n of Iowa, 238 N.W. 101, 219 Iowa 329.
Mo.—Ambruster v. Levitt Realty & Investment Co., 107 S.W.2d 74, 341 Mo. 364.
Vt.—Shields v. Vermont Mut. Fire Ins. Co., 147 A. 352, 102 Vt. 224.
22 C.J. p 683 note 14.

Physicians

(1) A doctor, who testified that he knew nothing about the subject of death by electrocution, or the medical authorities concerning it, and had never examined, after death, a body known to have been electrocuted, was not qualified to express the opinion that a person was electrocuted because decomposition set in quickly.—Sesser Coal Co. v. Industrial Commission, 129 N.E. 536, 296 Ill. 11.

(2) Physician who was not shown to have had any experience in keeping cemeteries could not testify whether kind of burying ground which he inspected would have tendency to allow escape of noxious vapors and fumes from dead bodies.—Union Cemetery Co. v. Harrison, 101 So. 517, 20 Ala.App. 291.

Veterinarian was held not competent to give opinion as to whether serum was contaminated.—Murphy v. Sioux Falls Serum Co., 195 N.W. 835, 47 S.D. 44.

Effect of odors

Nonexpert testimony as to the effect of alleged odors or smells has been held inadmissible.—Union Cemetery Co. v. Harrison, 101 So. 517, 20 Ala.App. 291.

55. Md.—State v. Flanigan, 74 A. 818, 111 Md. 481.
22 C.J. p 683 note 15.

be admitted where to do so would raise collateral issues,[56] or where the matter is nontechnical and the inference is one which can be drawn by the court or jury from facts properly presented,[57] or where for some reason a proper foundation has not been laid,[58] as where the basis of the opinion rests on inadmissible hearsay statements.[59]

§ 543. Quantity or Capacity

An inference as to quantity or capacity, amounting to more than a mere guess, may be stated by specially qualified witnesses.

When special skill or experience is necessary to the drawing of a correct inference as to quantity or capacity, the inference of a witness possessing such skill and experience is competent,[60] and a liberal rule prevails in such cases.[61] Thus qualified witnesses may give their opinion or judgment as to the quantity of a crop[62] or other substance;[63] the acreage of a tract of land;[64] the weight of objects

56. Mich.—Porath v. Village of Highland Park, 179 N.W. 229, 211 Mich. 475.

57. U.S.—Wisconsin Alumni Research Foundation v. George A. Breon & Co., C.C.A.Mo., 85 F.2d 166, reversing, D.C., 12 F.Supp. 928, certiorari denied George A. Breon & Co. v. Wisconsin Alumni Research Foundation, 57 S.Ct. 191, 299 U.S. 598, 81 L.Ed. 441—U. S. v. Ten Cases, More or Less, Bred Spred, C.C.A.Iowa, 49 F.2d 87—Coca-Cola Co. v. Joseph C. Wirthman Drug Co., C.C.A.Mo., 48 F.2d 743.
Conn.—Frechette v. City of New Haven, 132 A. 467, 104 Conn. 83.
Ill.—Thompson v. Hughes, 121 N.E. 387, 286 Ill. 128, affirming 210 Ill. App. 462.
Mo.—Homan v. Missouri Pac. R. Co., 70 S.W.2d 869, 335 Mo. 30—Homan v. Missouri Pac. R. Co., 64 S.W. 2d 617, 334 Mo. 61, certiorari denied Missouri Pac. R. Co., 54 S.Ct. 561, 291 U.S. 683, 78 L.Ed. 1070—Kunkel v. Griffith, 29 S.W.2d 64, 325 Mo. 392.
Neb.—Moore v. Krejci, 297 N.W. 913.
N.J.—Bacon v. Standard Oil Co., 149 A. 335, 8 N.J.Misc. 203.
Tex.—Panhandle Grain & Elevator Co. v. Dowlin, Civ.App., 247 S.W. 873.

Arithmetical calculation
It is not error to exclude expert testimony as to how many feet would be covered in a given time by one walking at a specified rate.—Donovan v. Philadelphia Rapid Transit Co., 116 A. 807, 273 Pa. 152.

Danger of fall
Where the distance in feet from one floor to another has been shown, testimony of expert that it was a dangerous distance to fall, is not admissible.—Rodgers v. Oklahoma Wheat Pool Terminal Corporation, 96 P.2d 1040, 186 Okl. 171.

Skidding; effect of heavy load
Experts on truck brakes should not be permitted to testify on such elementary matters as whether truck wheels would skid more readily on wet pavement than on dry pavement, or that heavy load would put more strain on brakes than light load.—Thomas v. Inland Motor Freight, 68 P.2d 603, 190 Wash. 428.

Powder burns
"The matter of powder burns is of common knowledge and the result of everyday experience of the ordinary American citizen, and is not a matter for elucidation by experts."—Bear v. Sovereign Camp, W. O. W., 230 S.W. 369, 371, 207 Mo.App. 82.

"Unusual phenomenon"
A witness, however expert in the matter of incendiary fires, could not testify that the fire was an "unusual phenomenon."—Zackwik v. Hanover Fire Ins. Co., Mo.App., 225 S.W. 135, 138.

58. N.Y.—Shewan v. Sparks, 203 N. Y.S. 465, 208 App.Div. 397.

Insufficient identification of samples
U.S.—Weil Bros. v. Yazoo Yarn Mills, C.C.A.Miss., 36 F.2d 942.
Mass.—Country Club Soda Co. v. Arbuckle, 181 N.E. 256, 279 Mass. 121.

59. U.S.—U. S. v. Aluminum Co. of America, D.C.N.Y., 35 F.Supp. 820.
Wis.—Schumacher v. Carl G. Neumann Dredging & Improvement Co., 239 N.W. 459, 206 Wis. 220.

60. Mo.—Wilson v. Buchanan County, 298 S.W. 842, 318 Mo. 64.
22 C.J. p 684 note 24.
Estimates of quantity by ordinary witness see supra § 498.

61. Miss.—J. H. Leavenworth & Son v. Hunter, 116 So. 593, 150 Miss. 245.

62. Kan.—Reynolds v. Stimson, 247 P. 847, 121 Kan. 422.
Mo.—Smith v. Sickinger, App., 221 S.W. 779.
Tex.—Shell Pipe Line Corporation v. Svrcek, Civ.App., 37 S.W.2d 297.
22 C.J. p 684 note 24 [a].
Statement of facts as to agriculture by skilled witnesses see supra § 475.

Quantity of timber on, or cut from, land
Ala.—Granade v. U. S. Lumber & Cotton Co., 139 So. 409, 224 Ala. 185.
Miss.—J. H. Leavenworth & Son v. Hunter, 116 So. 593, 150 Miss. 245.
22 C.J. p 683 note 13 [a] (1).

Grain consumed by fire
Experienced fire insurance adjuster may testify as to amount of grain consumed by fire, where he has inspected ruins.—Wishek v. U. S. Fidelity & Guaranty Co. of Baltimore, Md., 213 N.W. 488, 55 N.D. 321.

Yield
Opinion evidence is admissible as to the amount of a crop that would have been produced if there had been no hail.
Colo.—Mayhew v. Glazier, 189 P. 843, 68 Colo. 350.
Iowa.—Slinger v. Farmers' Mut. Hail Ins. Ass'n of Iowa, 258 N. W. 101, 219 Iowa 329.

63. **Earth and rock excavated for grading purposes**
Kan.—Reynolds v. Stimson, 247 P. 847, 121 Kan. 422.
Mo.—Wilson v. Buchanan County, 298 S.W. 842, 318 Mo. 64.
Pa.—Faulkner v. Wynnewood Park Corporation, 57 Montg.Co. 124.

Clay
Testimony of experts who drilled holes through clay, and then estimated amount of clay in pit, was competent.—Gray v. Cooper, 274 S. W. 941, 217 Mo.App. 592.

Lumber in yards
Testimony of sales manager as to quantities of lumber in yards was admissible, although based in part on estimates and tallies prepared by others.—Hunt v. Stimson, C.C.A.Ky., 23 F.2d 447.

64. Kan.—Reynolds v. Stimson, 247 P. 847, 121 Kan. 422.
Mo.—Cash v. Wysocki, App., 229 S. W. 428.
Tex.—Black v. Boyer, Civ.App., 21 S.W.2d 1094, error dismissed.

Method of determination
The manner in which a qualified witness arrived at the acreage goes to the weight of the testimony rather than its admissibility.—Cash v. Wysocki, Mo.App., 229 S.W. 428.

Area of irregular tract
Where a lot is irregular and determination of its exact area involves a complicated mathematical computation, the court may allow a surveyor to aid the jury in making the computation.—Thurston v. Batchellor, 137 A. 199, 100 Vt. 334.

Acreage reduction benefits
The fact that tenant had previously received from government four checks under acreage reduction

or materials;[65] the accuracy of a mode of measurement;[66] the number of persons,[67] length of time,[68] or quantity of a substance[69] required for the performance of a task; or the capacity of particular contrivances or structures.[70] Such testimony is permitted even though actual measurements and weights might be more convincing evidence;[71] but when testimony of an expert on issue as to weight is offered against proof of actual weighing it must appear that his testimony is based on complete data as to the specific objects involved rather than on the weight of such objects generally.[72]

Testimony of a skilled witness as to a quantity of merchandise or other personal property may be based on his actual determination of the quantity of a sample.[73]

A witness need not be qualified in the highest degree, or in any particular degree, to make his opinion as to quantity admissible; it suffices that he has more knowledge of the subject matter than jurors ordinarily have.[74] On the other hand, an inference of a witness who is not qualified to judge quantity or capacity[75] and whose judgment in such respect amounts to a mere guess[76] is inadmissible. Testimony of an expert or skilled witness as to quantity is inadmissible where based on unreliable figures or on conclusions which can or should be drawn by the jury alone.[77]

§ 544. Railroads and Street Railroads

a. Railroads in general
b. Street railways

a. Railroads in General

(1) In general
(2) Qualifications of witnesses

(1) In General

An inference as to railroad matters which are not commonly known may be stated by persons having special knowledge or experience. Such matters include causal relations, stopping distances, and various facts pertaining to the condition or use of particular appliances.

Legitimate subjects for a skilled inference or expert judgment or opinion as to railroad matters include the cause of certain appearances[78] or occurrences,[79] and, according to the decisions listed

contract with respect to other property did not qualify him to express an opinion as to the amount of benefits he was entitled to as a tenant of the land from which he was evicted.—Stafford v. Powell, Tex. Civ.App., 148 S.W.2d 965.

65. Kan.—Reynolds v. Stimson, 247 P. 847, 121 Kan. 422.
Miss.—Robertson Bros. v. Mobile & O. R. Co., 124 So. 334, 155 Miss. 198.
R.I.—Mersky v. Leary, 134 A. 13.

Weight of a log of given size and species, and no longer in existence, must be shown by witnesses who have had such special experience as will make their opinion of distinct value.—Harris v. Pounds, 187 So. 891, 185 Miss. 688.

66. Mich.—Hennes v. Hebard, 135 N.W. 1073, 169 Mich. 670.

67. Miss.—Hardaway Contracting Co. v. Rivers, 180 So. 800, 181 Miss. 727.
Mo.—Bowman v. Kansas City Electric Light Co., App., 213 S.W. 161.
Tex.—Texas & P. Ry. Co. v. Edwards, Civ.App., 21 S.W.2d 754, reversed on other grounds, Com. App., 36 S.W.2d 477.

68. Vt.—Rutland Sash & Door Co. v. Gleason, 126 A. 577, 98 Vt. 215.

69. Utah.—Garner v. Anderson, 248 P. 496, 67 Utah 553.

70. Cal.—Schumann v. Karrer, 192 P. 849, 184 Cal. 50.
Idaho.—Albrethsen v. Wood River Land Co., 231 P. 418, 40 Idaho 49.
Pa.—Corbin v. Haws Refractories Co., 120 A. 811, 277 Pa. 126.
Tex.—Goode v. Ramey, Civ.App., 48 S.W.2d 719, error refused.

71. Kan.—Reynolds v. Stimson, 247 P. 847, 121 Kan. 422.
R.I.—Mersky v. Leary, 134 A. 13.

72. Miss.—Robertson Bros. v. Mobile & O. R. Co., 124 So. 334, 155 Miss. 198.

73. Cal.—Rosenberg v. Geo. A. Moore & Co., 263 P. 806, 203 Cal. 211.

74. W.Va.—Cochran v. Craig, 106 S.E. 633, 88 W.Va. 281.

Sufficient qualification shown
(1) To judge capacity of incinerator.—Goode v. Ramey, Tex.Civ.App., 48 S.W.2d 719, error refused.
(2) To judge number of persons in a grand stand.—Madison County Fair Ass'n v. Riggins, 105 So. 455, 21 Ala.App. 77.
(3) To judge quantity of timber.—Granade v. U. S. Lumber & Cotton Co., 139 So. 409, 224 Ala. 185.
(4) To judge yield of trees.—Shell Pipe Line Corporation v. Svrcek, Tex.Civ.App., 37 S.W.2d 297.

75. Mo.—Gash v. Mansfield, App., 28 S.W.2d 127.
N.Y.—Fried v. Coppins Transfer Co., 174 N.Y.S. 675.

76. Okl.—First Nat. Bank v. Gum, 293 P. 188, 146 Okl. 53.
Utah.—Garner v. Anderson, 248 P. 496, 67 Utah 553.

77. Ark.—C. A. Rees & Co. v. Road Improvement Dist. No. 1 of Clark County, 267 S.W. 770, 167 Ark. 383.
Pa.—Diamond Alkali Co. v. Henderson Coal Co., 134 A. 386, 287 Pa. 232—Quinn Coal Co. v. McDade, 34 Luz.Leg.Reg. 395.

Sufficiency of height of trestle
Whether a trestle was high enough to allow an ordinary truck to pass under without injury was not matter for expert opinion but a question strictly within the province of the jury.—Krause v. Southern Pac. Co., 295 P. 966, 135 Or. 310.

78. **Dents around drawhead**
Tex.—Galveston, H. & S. A. R. Co. v. Briggs, 23 S.W. 503, 4 Tex.Civ. App. 515—Galveston, H. & S. A. R. Co. v. Briggs, Civ.App., 30 S.W. 933.

79. Ill.—Herb v. Pitcairn, 29 N.E.2d 543, 306 Ill.App. 583, reversed on other grounds, Sup., 36 N.E.2d 555.
22 C.J. p 684 note 29.

Derailment
Mo.—Young v. Wheelock, 64 S.W.2d 950, 333 Mo. 992, certiorari denied Wheelock v. Young, 54 S.Ct. 527, 291 U.S. 676, 78 L.Ed. 1064.
N.H.—Bernardi Greater Shows v. Boston & Maine R. R., 1 A.2d 360, 89 N.H. 490, certiorari denied 59 S.Ct. 787, 306 U.S. 662, 83 L.Ed. 1059—Williams v. Boston & M. R. R., 1 A.2d 360, 89 N.H. 490, certiorari denied Boston & M. R. R. v. Williams, 59 S.Ct. 787, 306 U.S. 662, 83 L.Ed. 1058.
22 C.J. p 684 note 29 [a].

below, the possibility of preventing them,[80] and the necessity,[81] propriety,[82] possibility,[83] feasibility,[84] or effect[85] of particular operations or occurrences. Such subjects also include the purpose[86] and practical value[87] of certain appliances, the manner in which they operate,[88] and whether they are in common use;[89] the proper construction of

Jerk
Ala.—Southern Ry. Co. v. Smith, 128 So. 228, 221 Ala. 273.
Ga.—Southern Ry. Co. v. Wessinger, 124 S.E. 100, 32 Ga.App. 551.

Railroad wreck
S.C.—Nickles v. Seaboard Air Line R. Co., 54 S.E. 255, 74 S.C. 102.
Tex.—Southern Kansas R. Co. v. Sage, 94 S.W. 1074, 43 Tex.Civ. App. 38.
22 C.J. p 648 note 47.

80. N.C.—Mangum v. Atlantic Coast Line R. Co., 125 S.E. 549, 188 N.C. 689.
22 C.J. p 684 note 30.

81. Utah.—Graham v. Ogden Union Ry. & Depot Co., 6 P.2d 465, 79 Utah 1.
22 C.J. p 685 note 44.

82. Ala.—Southern Ry. Co. v. Dickson, 100 So. 665, 670, 211 Ala. 481, citing **Corpus Juris**.
Mo.—Grandstaff v. Wabash Ry. Co., App., 71 S.W.2d 174—Martin v. Union Pac. R. Co., 253 S.W. 513, 214 Mo.App. 307.
22 C.J. p 685 note 45.

Statements held admissible
(1) As to how definite technical acts should be performed.—Missouri, K. & T. R. Co. v. Merrill, 60 P. 819, 61 Kan. 671—22 C.J. p 687 note 83.

(2) As to proper manner of operating engines in yards.—Crecelius v. Chicago, M. & St. P. Ry. Co., 223 S.W. 413, 284 Mo. 26.

(3) As to proper method of inspecting handholds on a car.—San Antonio & A. P. R. Co. v. Beauchamp, 116 S.W. 1163, 54 Tex.Civ. App. 123—22 C.J. p 687 note 78.

(4) As to proper method of loading timber on flat cars for hauling.—Michigan Cent. R. Co. v. Schaffer, Mich. 220 F. 809, 136 C.C.A. 413—22 C.J. p 687 note 77.

(5) As to proper place for the rear brakeman of a mixed train as it is approaching a station.—Reeves v. Chicago, M. & St. P. R. Co., 123 N.W. 498, 24 S.D. 84.

(6) As to proper place of particular employees for performance of their duties.
Ala.—Southern Ry. Co. v. Dickson, 100 So. 665, 211 Ala. 481.
Mo.—Crecelius v. Chicago, M. & St. P. Ry. Co., 223 S.W. 413, 284 Mo. 26.
22 C.J. p 685 note 45 [a] (2).

(7) As to proper time or manner of loading or unloading cars.
Ala.—Edwards v. Southern Ry. Co., 169 So. 715, 233 Ala. 65, 106 A.L.R. 1133.
Ark.—Fort Smith Cotton Oil Co. v. Swift & Co., 124 S.W.2d 1, 197 Ark. 594.
Tex.—Fort Worth & Denver City Ry. Co. v. Motley, Civ.App., 87 S.W.2d 551, error dismissed.—Davis v. Sullivan & Opry, Civ.App., 242 S. W. 764, affirmed, Com.App., 258 S. W. 157.
22 C.J. p 685 note 45 [a] (4), (13), p 687 note 76.

(8) As to proper way to drive spikes.—Adams v. Quincy, O. & K. C. R. Co., 229 S.W. 790, 287 Mo. 535—Adkins v. Chicago, R. I. & P. Ry. Co., 292 S.W. 1075, 222 Mo.App. 578.

(9) As to whether a locomotive was properly managed.—Roach v. Blair, 155 N.W. 696, 190 Mich. 11.

(10) As to whether cars should have been shoved before coupling was tested.—Ross v. Duluth, M. & I. R. Ry. Co., 290 N.W. 566, 207 Minn. 157, followed in 291 N.W. 610, 207 Minn. 648, certiorari denied Duluth, M. & I. R. R. Co. v. Ross, 61 S.Ct. 9, 311 U.S. 656, 85 L.Ed. 420.

83. Cal.—Barrett v. Southern Pac. Co., 277 P. 481, 207 Cal. 154.
22 C.J. p 685 note 46.

Statements held admissible
(1) As to possibility of avoiding use of service brake on engine. Central of Georgia Ry. Co. v. Barnett, 134 S.E. 126, 35 Ga.App. 528.

(2) As to whether car wheels were "likely" or "liable" to slip off iron pipe used in raising wheels from floor.—Neely v. Chicago Great Western R. Co., Mo.App., 14 S.W.2d 972, 977, certiorari quashed, State ex rel. Chicago Great Western R. Co. v. Trimble, Sup., 14 S.W.2d 978.

(3) As to whether certain railroad construction could have been done unless prevented.—Louisville E. & St. L. R. Co. v. Donnegan, 12 N.E. 153, 111 Ind. 179.

(4) As to whether engine wheels would run over a nut and rocks.—Young v. Wheelock, 64 S.W.2d 950, 333 Mo. 992, certiorari denied Wheelock v. Young, 54 S.Ct. 527, 291 U.S. 676, 78 L.Ed 1064.

84. Cal.—Barrett v. Southern Pac. Co., 277 P. 481, 207 Cal. 154.

Statements held admissible
(1) As to feasibility of establishing a grade crossing over the tracks at a particular place.—Gulf, C. & S. F. R. Co. v. Belton, 122 S.W. 413, 57 Tex.Civ.App. 460.

(2) As to whether it would be practicable from an engineering standpoint to reduce the height or change the location of a signal.—Werner v. Illinois Cent. R. Co., 33 N.E.2d 121, 309 Ill.App. 292.

85. Del.—Philadelphia & R. Ry. Co. v. Green & Flinn, 119 A. 840, 2 W.W.Harr. 78.
22 C.J. p 686 note 47.

Statements held admissible
(1) As to confusion which telltales would tend to cause.—Crane v. Payne, C.C.A.Mo., 291 F. 551.

(2) As to effect of sudden reduction in speed.—McGraw v. Southern Ry. Co., 184 S.E. 31, 209 N.C. 432, certiorari denied Southern Ry. Co. v. McGraw, 57 S.Ct. 117, 299 U.S. 591, 81 L.Ed. 435—McGraw v. Southern Ry. Co., 175 S.E. 286, 206 N.C. 873.

(3) As to effect on earnings of a railroad when it is crossed by the line of another railroad.—Lake Shore & M. S. R. Co. v. Baltimore & O. & C. R. Co., 37 N.E. 91, 149 Ill. 272.

(4) As to effect of railroad tunnels as increasing the quantity of smoke cast on certain lands.—Baltimore Belt R. Co. v. Sattler, 59 A. 654, 100 Md. 306.

86. Mo.—Smith v. Fordyce, 88 S.W. 679, 190 Mo. 1.
22 C.J. p 685 note 43.

87. Ala.—Louisville & N. R. Co. v. Hall, 6 So. 277, 87 Ala. 708, 13 Am. S.R. 84, 4 L.R.A. 710.

88. **Statements held admissible**
(1) As to action of a locomotive blow-off pipe and injector in throwing off hot water and steam.—Gulf, C. & S. F. R. Co. v. Tullis, 91 S.W. 317, 41 Tex.Civ.App. 219.

(2) As to range of reflection of a locomotive headlight.—St. Louis, M. & S. E. R. Co. v. Shannon, 88 S.W. 851, 76 Ark. 166.
22 C.J. p 565 note 11.

(3) As to whether car couplers would have coupled by impact.
Ill.—Davis v. Michigan Cent. R. Co., 128 N.E. 539, 294 Ill. 355, affirming 213 Ill.App. 259.
Mo.—Williamson v. St. Louis-San Francisco Ry. Co., 74 S.W.2d 583, 335 Mo. 917.

(4) As to whether or not in certain circumstances a locomotive required steam to start it, or would move on the release of the brakes.—Galveston, H. & S. A. R. Co. v. Mitchell, 107 S.W. 374, 48 Tex.Civ.App. 381.

89. Wis.—Bonnell v. Chicago, St. P., M. & O. R. Co., 147 N.W. 1046, 158 Wis. 153.
22 C.J. p 686 note 68.

particular appliances or structures;[90] what would be the effect of a given defect in machinery or structures[91] and whether it could have been detected;[92] and whether the condition of cattle guards,[93] crossings,[94] culverts,[95] platforms,[96] premises,[97] rails,[98] roadbed,[99] rolling stock,[1] switches,[2] ties,[3] tracks,[4] or other appliances, or structures[5] was proper.

Among many other matters as to which such skilled observers or experts may testify may be mentioned the duties[6] or skill[7] of particular railroad employees; the number of men required for the performance of a particular task;[8] the proper constitution of a train crew;[9] what the usual railroad signals are and their meaning;[10] the customary manner of performing certain acts;[11] the operation of a railroad yard;[12] the speed of locomotives

90. **Statements held admissible**

(1) As to adequacy of the means employed for protecting stock of the owners of land abutting on the line. Ill.—See Kreeb v. Lake Erie & W. R. Co., 211 Ill.App. 630.

Kan.—Roman v. St. Louis & S. F. Ry. Co., 245 P. 115, 120 Kan. 585.

22 C.J. p 686 note 53.

(2) As to practical means of cleaning locomotive boiler tubes without causing the deposit of objectionable substances on adjoining land.—Vile v. Pennsylvania R. Co., 91 A. 1049, 246 Pa. 35.

(3) As to proper altitude of a curve.—Hines v. Kelley, Civ.App., 226 S.W. 493, reversed on other grounds, Com.App., 252 S.W. 1033.

(4) As to whether a car was constructed so as to produce proper refrigeration.—H. Rouw Co. v. American Ry. Express Co., 291 S.W. 1001, 173 Ark. 84.

91. Wis.—Brabbits v. Chicago & N. W. R. Co., 38 Wis. 289.

92. Tex.—San Antonio & A. P. R. Co. v. Beauchamp, 116 S.W. 1163, 54 Tex.Civ.App. 123—International & G. N. R. Co. v. Collins, 75 S.W. 814, 33 Tex.Civ.App. 58.

22 C.J. p 685 note 46 [b].

Statements held admissible

(1) As to danger not obvious to an unskilled person, attending the use of defective appliances.—Goins v. Chicago, R. I. & P. R. Co., 47 Mo. App. 173—22 C.J. p 687 note 82.

(2) As to whether a fissure could be discovered before rail broke.—Central of Georgia Ry. Co. v. Robertson, 91 So. 470, 206 Ala. 578.

93. Mich.—Johnson v. Detroit & M. R. Co, 97 N.W. 760, 135 Mich. 353.

22 C.J. p 685 note 32.

94. Mich.—Luttenton v. Detroit, J. & C. Ry., 176 N.W. 558, 209 Mich. 20.

N.C.—Vann v. Atlantic Coast Line R. Co., 109 S.E. 556, 182 N.C. 567.

S.C.—Douglass v. Southern R. Co., 62 S.E. 15, 63 S.E. 5, 82 S.C. 71.

95. N.C.—Emry v. Raleigh & G. R. Co., 9 S.E. 139, 102 N.C. 209, 11 Am.S.R. 727.

Tex.—Bonner v. Mayfield, 18 S.W. 305, 82 Tex. 234.

96. N.Y.—Hoffman v. Lehigh Valley R. Co., 177 N.Y.S. 140, 188 App. Div. 414.

22 C.J. p 685 note 35.

97. Mich.—Cross v. Lake Shore & M S. R. Co., 37 N.W. 361, 69 Mich. 363, 13 Am.S.R. 399.

98. Ky.—Louisville & N. R. Co. v. Johnson. 171 S.W. 847, 161 Ky. 824.

99. Ala.—Northern Alabama R. Co. v. Shea, 37 So. 796, 142 Ala. 119.

22 C.J. p 685 note 38.

1. Ark.—St. Louis Southwestern R. Co. v. Plumlee, 95 S.W. 442, 78 Ark. 147.

22 C.J. p 685 note 39.

2. Ala.—Birmingham R. & Electric Co. v. Baylor, 13 So. 793, 101 Ala. 488.

Tex.—San Antonio & A. P. R. Co. v. Waller, 65 S.W. 210, 27 Tex.Civ. App. 44.

3. Ind.—Jeffersonville R. Co. v. Lanham, 27 Ind. 171.

Mich.—Grand Rapids & I. R. Co. v. Huntley, 38 Mich. 537, 31 Am.R. 321.

4. U.S.—Norfolk & W. R. Co. v. Gillespie, Va., 224 F. 316, 139 C. C.A. 552.

22 C.J. p 685 note 42.

5. Ala.—Atlantic Coast Line R. Co. v. Hardwick, 193 So. 730, 239 Ala. 58—Edwards v. Southern Ry. Co., 169 So. 715, 233 Ala. 65, 106 A.L. R. 1133.

Iowa.—Dumbarton Realty Co. v. L. G. Everist, Inc., 174 N.W. 269.

Mo.—Jones v. Chicago, B. & Q. R. Co., 125 S.W.2d 5, 343 Mo. 1104, reversing, Civ.App., 100 S.W.2d 617—Colwell v. St. Louis-San Francisco Ry. Co., 73 S.W.2d 222, 335 Mo. 494—Martin v. St. Louis-San Francisco Ry. Co., 46 S.W.2d 149, 329 Mo. 729, certiorari denied St. Louis-San Francisco Ry. Co. v. Martin, 52 S.Ct. 644, 286 U.S. 562, 76 L.Ed. 1294.

N.C.—Bateman v. Brooks, 167 S.E. 627, 204 N.C. 176.

22 C.J. p 685 note 31.

6. **Statements held admissible**

(1) As to duty of shop engine crew foreman to see that cars on track were left in clear for switch movements.—Davis v. Sorrell, 104 So. 397, 213 Ala. 191.

(2) As to duty of switch train foreman to send out a flagman to protect a switch engine on the main track from an approaching train.—Galveston, H. & S. A. R. Co. v. Sample, Tex.Civ.App., 145 S.W. 1057.

(3) As to whose duty it is to watch the glass and keep a proper amount of water in locomotive boiler.—Temple v. Gilbert, 85 A. 380, 86 Conn. 335.

7. **Statements admitted**

(1) As to absolute or comparative ability of a certain person to do railroad work.—Louisville & N. R. Co. v. Davis, 12 So. 786, 99 Ala. 593—22 C.J. p 686 note 62.

(2) As to experience necessary to qualify for certain positions.—Peters v. Southern Pac. Co., 116 P. 400, 160 Cal. 48.

(3) As to whether a fellow servant is competent.—Houston & T. C. R. Co. v. Patton, Tex., 9 S.W. 175—22 C.J. p 686 note 63.

8. **Operation of hand-power derrick**

Ind.—Pittsburgh, C., C. & St. L. R. Co. v. Edwards, 129 N.E. 310, 190 Ind. 57.

9. N.C.—Stewart v. Raleigh & A. Air Line R. Co., 53 S.E. 877, 141 N.C. 253.

10. Ala.—Louisville & N. R. Co. v. Parker, 138 So. 231, 223 Ala. 626, certiorari granted 52 S.Ct. 496, 286 U.S. 535, 76 L.Ed. 1275, certiorari dismissed 53 S.Ct. 94, 287 U.S. 569, 77 L.Ed. 501.

22 C.J. p 686 note 64.

Absence of usual signals

Expert trainmen could state what conclusions or inferences they would have reached on failing to find the usual signals.—St. Louis, B. & M. Ry. Co. v. McLean, Tex.Com. App., 253 S.W. 248, reversing, Civ. App., 241 S.W. 1072.

11. **Statements held admissible**

(1) As to customary manner of running trains at a particular point. —Finnegan v. Missouri Pac. R. Co., 169 S.W. 969, 261 Mo. 481.

(2) As to number of spikes used to fasten rails at curves.—Central of Georgia Ry. Co. v. Grover, 118 So. 506, 218 Ala. 290.

(3) As to usual place of sounding a whistle.—Kidd v. Chicago, R. I. & P. Ry. Co., 274 S.W. 1079, 310 Mo. 1, certiorari denied Chicago, R. I. & P. Ry. Co. v. Kidd, 46 S.Ct. 119, 269 U.S. 582, 70 L.Ed. 424.

(4) As to usual practice of walking around steam escaping from a locomotive.—Kidd v. Chicago, R. I. & P. Ry. Co., supra.

12. N.Y.—Freemont v. Boston & M. R. Co., 98 N.Y.S. 179, 111 App.Div.

or trains;[13] the violence of a jerk or movement;[14] the emission of sparks from a locomotive[15] and the best method of preventing their escape;[16] whether an engine properly equipped and carefully operated will set a fire;[17] the reasonableness of rates;[18] what it will cost to complete a road;[19] and when a railroad is "completed."[20]

Matters pertaining to the stopping of a locomotive or train have been held proper subjects of skilled or expert testimony.[21] Among such matters are: The adequacy of the means employed for stopping trains;[22] the manner or methods of stopping a locomotive or train;[23] the time it would take a competent brakeman to stop a car rolling down an incline;[24] whether the engineer made a good stop;[25] the distance within which an engine or train can be stopped;[26] and whether it could have been stopped sooner than it was.[27]

Time of transportation. Qualified witnesses may testify as to the usual time required for transportation by railroad between two points.[28] There is also authority which permits expert testimony as to what constitutes a reasonable time of transportation;[29] but such testimony is rejected by other authorities.[30]

Rejection of skilled or expert opinions. The opinions of skilled and experienced witnesses are unnecessary and are rejected as to matters connected with the operation of a railroad which are well

831, affirmed 80 N.E. 1109, 187 N. Y. 571.

13. N.C.—McGraw v. Southern Ry. Co., 175 S.E. 286, 206 N.C. 873.
Tex.—St. Louis Southwestern Ry. Co. of Texas v. Inman, Civ.App., 283 S.W. 689, reversed on other grounds Inman v. St. Louis Southwestern Ry. Co. of Texas, Com. App., 288 S.W. 150, and set aside on other grounds St. Louis Southwestern Ry. Co. of Texas v. Inman, Civ.App., 293 S.W. 650.
22 C.J. p 687 note 74.

Statements held admissible

(1) As to rate of speed at which a locomotive would have to go in order to haul a train across a particular street.—Baltimore & O. R. Co. v. Connell, Pa., 137 F. 8, 69 C.C. A. 570.

(2) As to whether engineer could have materially reduced speed of train in a certain distance.—Alabama Great Southern R. Co. v. Sanders, 82 So. 17, 203 Ala. 57.

14. Ala.—Southern Ry. Co. v. Smith, 128 So. 228, 221 Ala. 273—Southern Ry. Co. v. Dickson, 100 So. 665, 211 Ala. 481.
Mo.—Harrison v. St. Louis-San Francisco Ry. Co., 99 S.W.2d 841, 339 Mo. 821.
N.C.—McGraw v. Southern Ry. Co., 175 S.E. 286, 206 N.C. 873.

Jerk as cause of fall

It was competent for an injured experienced brakeman to testify that a jerk of the engine would not have been sufficient to throw him from a sill step, but for the slickness of the step.—Davis v. Reynolds, C.C.A. Va., 280 F. 363, certiorari denied 42 S.Ct. 383, 258 U.S. 627, 66 L.Ed. 798.

15. Iowa.—Dumbarton Realty Co. v. L. G. Everist, Inc., 174 N.W. 269.
Mich.—Gorgol v. Michigan Cent. Ry. Co., 211 N.W. 50, 236 Mich. 646.
Ohio.—Breymann v. Pennsylvania, O. & D. R. Co., 183 N.E. 771, 43 Ohio App. 473.
22 C.J. p 686 note 69.

16. Tex.—Morgan v. Missouri, K. & T. R. Co., 110 S.W. 978, 50 Tex. Civ.App. 420.

17. Kan.—St. Louis & S. F. R. Co. v. Noland, 90 P. 273, 75 Kan. 691.

18. Tex.—Galveston Chamber of Commerce v. Texas R. Commn., Civ.App., 137 S.W. 737.
22 C.J. p 687 note 88.

19. Tex.—Waco Tap R. Co. v. Shirley, 45 Tex. 355.

20. Ind.—Hilton v. Mason, 92 Ind. 157.

21. N.Y.—Stewart v. Long Island R. Co., 59 N.E. 1130, 166 N.Y. 604.
22 C.J. p 686 note 48.

22. N.C.—Hanford v. Southern R. Co., 83 S.E. 470, 167 N.C. 277.
22 C.J. p 686 note 52.

23. Ala.—Walker v. Alabama, T. & N. R. Co., 70 So. 125, 194 Ala. 360.
Idaho.—Dedman v. Oregon Short Line R. Co., 63 P.2d 667, 57 Idaho 160.

24. Tex.—San Antonio, U. & G. R. Co. v. Galbreath, Civ.App., 185 S. W. 901.

25. N.H.—Morrison v. Boston & M. R. R., 164 A. 553, 86 N.H. 176.

26. U.S.—Pollard v. Nicholls, C.C.A. Ala., 99 F.2d 955.
Ga.—Southern Ry. Co. v. Tudor, 168 S.E. 98, 46 Ga.App. 563.
Ky.—Wimsatt's Adm'x v. Louisville & N. R. Co., 31 S.W.2d 729, 235 Ky. 405—Hurst v. Southern Ry. Co. in Kentucky, 212 S.W. 461, 184 Ky. 684.
Mo.—Lakin v. Chicago, R. I. & P. Ry. Co., 78 S.W.2d 481, 229 Mo. App. 461, rehearing denied 95 S.W. 2d 1245, 229 Mo.App. 461.
Tex.—El Paso & S. W. R. Co. v. Havens, Civ.App., 216 S.W. 444, error refused.
W.Va.—Byrd v. Virginian Ry. Co., 13 S.E.2d 273.
22 C.J. p 686 note 50—52 C.J. p 116 note 29 [a].

Air connection

An expert may state the stopping distance both with and without the air connected where, on the trial, the railroad has not yet revealed whether the air was connected.—Anderson v. St. Louis-San Francisco Ry. Co., Mo.App., 63 S.W.2d 182.

27. Ala.—Ex parte Hale, 142 So. 589, 225 Ala. 267, denying certiorari Hale v. Southern Ry. Co., 142 So. 587, 25 Ala.App. 111—Southern Ry. Co. v. Gantt, 98 So. 192, 210 Ala. 383.
Idaho.—Dedman v. Oregon Short Line R. Co., 63 P.2d 667, 57 Idaho 160.
22 C.J. p 686 note 49.

Form of inquiry

The proper inquiry is as to the time within which a reasonably skilled man acting under the circumstances could have stopped the train, and not that in which the skilled witness himself could have stopped it.—Dedman v. Oregon Short Line R. Co., supra.

28. Okl.—Chicago, R. I. & P. Ry. Co. v. Haskell, 245 P. 858, 117 Okl. 185.
Tex.—Texas & N. O. R. Co. v. East, Civ.App., 74 S.W.2d 1052—Wichita Valley Ry. Co. v. Anderson, Civ. App., 48 S.W.2d 361—Texas & P. Ry. Co. v. Bufkin, Civ.App., 46 S. W.2d 714, error dismissed—Fort Worth & D. C. Ry. Co. v. Helm, Civ.App., 30 S.W.2d 492—Baker v. Nance Bros., Civ.App., 294 S.W. 290—Hines v. Davis, Civ.App., 225 S.W. 862.
22 C.J. p 573 note 25 [f].

29. U.S.—Illinois Cent. R. Co. v. Horace Turner Corporation, C.C.A. Ala., 9 F.2d 6.
22 C.J. p 573 note 32.

30. Tex.—Texas & N. O. R. Co. v. East, Civ.App., 74 S.W.2d 1052—Wichita Valley Ry. Co. v. Anderson, Civ.App., 48 S.W.2d 361—Texas & P. Ry. Co. v. Bufkin, Civ. App., 46 S.W.2d 714, error dismissed.

known in the community generally,[31] or which can be readily understood and correctly interpreted by the jury when the facts can be fully laid before them.[32] Expert testimony as to the possibility of certain occurrences is inadmissible where sufficient competent proof of the facts on which the possibility rests has not been adduced.[33] Expert testimony as to the duty of a railroad employee is inadmissible to establish a duty owed by him contrary to the one imposed on him by law.[34]

(2) Qualifications of Witnesses

A person actually engaged in railroad operations, such as an engineer, is qualified to state opinions relating to his work where he has been so engaged for a sufficient period. Such actual experience is not, however, necessary if the witness has obtained sufficient knowledge elsewhere.

Sufficient knowledge or experience on the part of a witness to enable him to form a correct inference or judgment as to the particular matter concerning which he testifies must appear or his testimony cannot be admitted.[35] In this connection the qualifications of the witness are determined by considering the particular branch of the business in which he has been engaged, the length of time that he has served in a particular capacity, his opportunities for obtaining the requisite knowledge, skill, and experience, and the relationship between the branch of the service in which he has been engaged, and the question on which he is to testify.[36]

In a great variety of circumstances, particular witnesses have been held to possess adequate knowledge or experience in occupations connected with

31. U.S.—Spokane & I. E. R. Co. v. U. S., Wash., 36 S.Ct. 668, 241 U. S. 344, 60 L.Ed. 1037.
22 C.J. p 689 notes 20, 22.

32. Ala.—Central of Georgia Ry. Co. v. Thomas, 104 So. 559, 20 Ala.App. 617.
Cal.—Guyer v. Pacific Electric Ry. Co., 75 P.2d 550, 24 Cal.App.2d 499.
Ill.—Crane v. Railway Express Agency, 12 N.E.2d 672, 293 Ill.App. 328, modified on other grounds 15 N.E.2d 866, 369 Ill. 110—Gilberts v. Rockford & I. Ry. Co., 215 Ill. App. 324.
Ind.—Ohio Electric Co. v. Evans, 134 N.E. 519, 77 Ind.App. 669.
Iowa.—Barrett v. Chicago, M. & St. P. Ry. Co., 175 N.W. 950, 190 Iowa 509, rehearing denied 180 N.W. 670, 190 Iowa 509.
N.J.—Rendino v. Davis, 122 A. 757, 99 N.J.Law 213, 3 N.J.Misc. 100.
Utah.—Roberts v. Salt Lake & O. Ry. Co., 176 P. 856, 53 Utah 30.
22 C.J. p 689 notes 21, 22.

Expert testimony excluded
(1) As to manner of collision.—Missouri Pac. Ry. Co. v. Barry, 290 S.W. 942, 172 Ark. 729, certiorari denied 48 S.Ct. 21, 275 U.S. 529, 72 L. Ed. 409.
(2) As to whether steam would have been sufficient to wet plaintiff's clothing.—Tash v. St. Louis-San Francisco Ry. Co., 76 S.W.2d 690, 335 Mo. 1148.

33. Ky.—Chesapeake & O. Ry. Co. v. Prater's Adm'x, 106 S.W.2d 625, 269 Ky. 174.
Mo.—Turner v. Missouri-Kansas-Texas R. Co., 142 S.W.2d 455, 129 A.L.R. 829.
Pa.—Rex v. Lehigh Valley Transit Co., 199 A. 324, 330 Pa. 275.

Protrusion of levers
Expert testimony that certain levers sometimes protrude is inadmissible where there is no competent proof that plaintiff was struck by a projecting lever.—Turner v. Missouri-Kansas-Texas R. Co., Mo., 142 S.W.2d 455, 129 A.L.R. 829.

Stopping distance
Expert testimony as to the distance within which a train could be stopped is inadmissible where no competent evidence of the speed of the train has been adduced.—Chesapeake & O. Ry. Co. v. Prater's Adm'x, 106 S.W.2d 625, 269 Ky. 174.

34. Mo.—Voorhees v. Chicago, R. I. & P. Ry. Co., App., 7 S.W.2d 740.

35. Ky.—Wimsatt's Adm'x v. Louisville & N. R. Co., 31 S.W.2d 729, 235 Ky. 405—Hurst v. Southern Ry. Co. in Kentucky, 212 S.W. 461, 184 Ky. 684.
Mo.—Jones v. Chicago, B. & Q. R. Co., App., 100 S.W.2d 617, reversed on other grounds 125 S.W. 2d 5, 343 Mo. 1104—Dillen v. Wabash Ry. Co., App., 294 S.W. 439.
Tex.—Cobb v. Texas & N. O. R. Co., Civ.App., 107 S.W.2d 670, error dismissed.
22 C.J. p.688 notes 11, 13, p 689 note 17, p 685 note 32 [a], 38 [b] (1), p 686 note 69 [b], p 687 note 74 [b], p 573 note 23 [a].
Statement of facts as to railroad matters by:
Ordinary observer see supra § 470.
Skilled witness see supra § 481.

Experience or knowledge held insufficient to testify
(1) As to cause of lime gathering on stay bolts of railroad locomotive.—St. Louis-San Francisco Ry. Co. v. Curtis, 113 So. 54, 216 Ala. 296.
(2) As to character of stepladders in use on sleeping cars.—Griffith v. Pullman Co., 121 A. 362, 142 Md. 514.
(3) As to condition of railroad siding.—Erie Contracting & Engineering Corporation v. George A. Ohl & Co., 199 A. 389, 120 N.J.Law 263.
(4) As to distance within which train could be stopped.
U.S.—Pennsylvania R. Co. v. Swartzel, C.C.A.Ind., 38 F.2d 751.
Ill.—Genzel v. New York, C. & St. L. R. Co., 249 Ill.App. 164.
Ky.—Hurst v. Southern Ry. Co. in Kentucky, 212 S.W. 461, 184 Ky. 684.
Mo.—Grotjan v. Thompson, App., 140 S.W.2d 706.
Tex.—Cobb v. Texas & N. O. R. Co., Civ.App., 107 S.W.2d 670, error dismissed.
Va.—Wade v. Chesapeake & O. Ry. Co., 193 S.E. 491, 169 Va. 448.
W.Va.—Alford v. Kanawha & W. V. R. Co., 100 S.E. 402, 84 W.Va. 570.
(5) As to emission of steam by engine.—Graham v. Ogden Union Ry. & Depot Co., 6 P.2d 465, 79 Utah 1.
(6) As to possibility of sudden stop of train.—Hines v. Hendricks, 104 S.E. 520, 25 Ga.App. 682.
(7) As to possible effect of sanding of track on speed of train.—Dwinelle v. Union Pac. R. Co., 92 P.2d 741, 104 Colo. 545.
(8) As to rates.—Robert S. Armstrong & Bros. Co. v. Rowland, 118 So. 502, 22 Ala.App. 613.
(9) As to speed of train.—Grimes v. Pennsylvania R. Co., 137 A. 451, 289 Pa. 320.

Meaning of company's rules
In an action by the conductor of an electric interurban train for personal injuries sustained in a collision, opinion of a witness as to the meaning of defendant's rules, based on standard rules governing the operation of trains, which were different from those of defendant, was erroneous.—Richman v. San Francisco, N. & C. Ry., 181 P. 769, 180 Cal. 454.

36. Fla.—Florida East Coast R. Co. v. Lassiter, 52 So. 975, 59 Fla. 246.
22 C.J. p 688 note 14.

the operation of a railroad to qualify them to state an inference or judgment from facts observed by or submitted to them with respect to railroad matters.[37] Such competent witnesses have been held to include persons connected with the operating department, as, for instance, baggagemen,[38] brakemen,[39] conductors,[40] engineers,[41] firemen,[42] inspectors,[43] machinists,[44] mechanics,[45] motormen,[46] sec-

37. Ala.—Louisville & N. R. Co. v. Jacobson, 118 So. 565, 218 Ala. 384—Central of Georgia Ry. Co. v. Grover, 118 So. 506, 218 Ala. 290—Central of Georgia Ry. Co. v. Robertson, 91 So. 470, 206 Ala. 578.
Ill.—Werner v. Illinois Cent. R. Co., 33 N.E.2d 121, 309 Ill.App. 292.
Mo.—Harrison v. St. Louis-San Francisco Ry. Co., 99 S.W.2d 841, 339 Mo. 821—Adams v. Quincy, O. & K. C. R. Co., 229 S.W. 790, 287 Mo. 535.
N.Y.—Hoffman v. Lehigh Valley R. Co., 177 N.Y.S 140, 188 App.Div. 414.
Tex.—Lancaster v. Cox, Civ.App., 274 S.W. 200—Fort Worth & D. C. Ry. Co. v. Stovall, Civ.App., 272 S.W. 594, certiorari denied 46 S. Ct. 356, 270 U.S. 660, 70 L.Ed. 786.
22 C.J. p 684 note 27, p 685 note 45 [b].

Sufficient qualification shown to permit witness to testify as to:
(1) Action of air brakes.
Mo.—Hiatt v. Wabash Ry. Co., 69 S. W.2d 627, certiorari denied Wabash Ry. Co. v. Hiatt, 55 S Ct. 72, 293 U.S. 560, 79 L.Ed. 661.
N.H.—Carbone v. Boston & Maine R. R., 192 A. 858, 89 N.H. 12.
N.C.—Bateman v. Brooks, 167 S.E. 627, 204 N.C. 176.
W.Va.—Lambert v. Virginian Ry. Co., 122 S.E. 457, 96 W.Va. 158.

(2) Cause or violence of a jerk.
Ala.—Southern Ry. Co. v. Smith, 128 So. 228, 221 Ala. 273.
Ga.—Southern Ry. Co. v. Wessinger, 124 S.E. 100, 32 Ga.App. 551.

(3) Coupling of cars.
Minn.—Ross v. Duluth, M. & I. R. Ry. Co., 290 N.W. 566, 207 Minn. 157, followed in 291 N.W. 610, 207 Minn. 648, certiorari denied Duluth, M. & I. R. R. Co. v. Ross, 61 S.Ct. 9.
Mo.—Williamson v. St. Louis-San Francisco Ry. Co., 74 S.W.2d 583, 335 Mo. 917.

(4) Distance within which train could be stopped.
Ala.—Southern Ry. Co. v. Cunningham, 141 So. 561, 224 Ala. 642.
Idaho.—Hobbs v. Union Pac. R. Co., 108 P.2d 841.
Iowa.—Williams v. Mason City & Ft. D. Ry. Co., 214 N.W. 692, 205 Iowa 446.
Miss.—Mississippi Cent. R. Co. v. Aultman, 160 So. 737, 173 Miss. 622, appeal dismissed 56 S.Ct. 108, 296 U.S. 537, 80 L.Ed. 382.
Mo.—Robison v. Chicago Great Western R. Co., App., 66 S.W.2d 180—Owens v. Kansas City, C. C. & S. J. Ry. Co., App., 225 S.W. 234.
N.H.—Whipple v. Boston & Maine R. R., 7 A.2d 239, 90 N.H. 261.
Okl.—Kurn v. Margolin, 101 P.2d 818, 187 Okl. 135.
Utah.—Clark v. Los Angeles & S. L. R. Co., 275 P. 582, 73 Utah 486.
W.Va.—Byrd v. Virginian Ry. Co., 13 S.E.2d 273.

(5) Emission of sparks.
Del.—Philadelphia & R. Ry. Co. v. Green & Flinn, 119 A. 840, 2 W. W.Harr. 78.
Mich.—Gorgol v. Michigan Cent. Ry. Co., 211 N.W. 50, 236 Mich. 646.
Ohio.—Breymann v. Pennsylvania, O. & D. R. Co., 183 N.E. 771, 43 Ohio App. 473.

(6) Loading or unloading of cars.
Mo.—Martin v. Union Pac. R. Co., 253 S.W. 513, 214 Mo.App. 307.
Tex.—Fort Worth & Denver City Ry. Co. v. Motley, Civ.App., 87 S. W.2d 551, error dismissed.

(7) Manner of proceeding from one point on a train to another.—Chicago, R. I. & G. Ry. Co. v. Harris, Tex.Civ.App., 28 S.W.2d 611, error dismissed.

(8) Meaning of certain signals.—Louisville & N. R. Co. v. Parker, 138 So. 231, 223 Ala. 626, certiorari granted 52 S.Ct. 496, 286 U.S. 535, 76 L.Ed. 1275, certiorari dismissed 53 S.Ct. 94, 287 U.S. 569, 77 L.Ed. 501.

(9) Refrigeration.—American Ry. Express Co. v. Cole, 37 S.W.2d 699, 183 Ark. 557—H. Rouw Co. v. American Ry. Express Co., 291 S.W. 1001, 173 Ark. 84

(10) Speed of a train.
Ky.—Cincinnati, N. O. & T. P. Ry. Co. v. Owens, 11 S.W.2d 131, 226 Ky. 472.
Mo.—Grotjan v. Thompson, App., 140 S.W.2d 706.
Pa.—Mellon v. Lehigh Valley R. Co., 127 A. 444, 282 Pa. 39.
Tex.—Hines v. Kelley, Civ.App., 226 S.W. 493, reversed on other grounds, Com.App., 252 S.W. 1033.

(11) Whether any other means could have been employed to aid in stopping a train.—Hale v. Southern Ry. Co., 142 So. 587, 25 Ala.App. 111, certiorari denied Ex parte Hale, 142 So. 589, 225 Ala. 267.

38. Ill.—Lake Shore & M. S. R. Co. v. Lassen, 12 Ill.App. 659.

39. U.S.—Davis v. Reynolds, C.C.A. Va., 280 F. 363, certiorari denied 42 S.Ct. 383, 258 U.S. 627, 66 L.Ed. 798.
Iowa.—Williams v. Mason City & Ft. D. Ry. Co., 214 N.W. 692, 205 Iowa 446.
22 C.J. p 687 note 90.

40. Iowa.—Williams v. Mason City & Ft. D. Ry. Co., 214 N.W. 692, 205 Iowa 446.
22 C.J. p 687 note 91.

41. Ala.—Southern Ry. Co. v. Cunningham, 141 So. 561, 224 Ala. 642—Southern Ry. Co. v. Gantt, 98 So. 192, 210 Ala. 383—Alabama Great Southern R. Co. v. Sanders, 82 So. 17, 203 Ala. 57—Hale v. Southern Ry. Co., 142 So. 587, 25 Ala.App. 111, certiorari denied Ex parte Hale, 142 So. 589, 225 Ala. 267.
Ga.—Southern Ry. Co. v. Tudor, 168 S.E. 98, 46 Ga.App. 563—Southern Ry. Co. v. Wessinger, 124 S.E. 100, 32 Ga.App. 551.
Mich.—Gorgol v. Michigan Cent. Ry. Co., 211 N.W. 50, 236 Mich. 646.
Miss.—Mississippi Cent. R. Co. v. Aultman, 160 So. 737, 173 Miss. 622, appeal dismissed 56 S.Ct. 108, 296 U.S. 537, 80 L.Ed. 382.
Mo.—Robison v. Chicago Great Western R. Co., App., 66 S.W.2d 180—Anderson v. St. Louis-San Francisco Ry. Co., App., 63 S.W.2d 182.
N.H.—Carbone v. Boston & Maine R. R., 192 A. 858, 89 N.H. 12.
N.C.—Mangum v. Atlantic Coast Line R. Co., 125 S.E. 549, 188 N.C. 689.
Tex.—Lancaster v. Cox, Civ.App., 274 S.W. 200.
Utah.—Clark v. Los Angeles & S. L. R. Co., 275 P. 582, 73 Utah 486.
Va.—Chesapeake & O. Ry. Co. v. Meyer, 143 S.E. 478, 150 Va. 656.
W.Va.—Lambert v. Virginian Ry. Co., 122 S.E. 457, 96 W.Va. 158.
22 C.J. p 687 note 92.

42. Idaho.—Hobbs v. Union Pac. R. Co., 108 P.2d 841.
Utah.—Clark v. Los Angeles & S. L. R. Co., 275 P. 582, 73 Utah 486.
Va.—Chesapeake & O. Ry. Co. v. Meyer, 143 S.E. 478, 150 Va. 656.
W.Va.—Byrd v. Virginian Ry. Co., 13 S.E.2d 273.
22 C.J. p 688 note 93—52 C.J. p 116 note 29 [a].

43. Ala.—Edwards v. Southern Ry. Co., 169 So. 715, 233 Ala. 65, 106 A.L.R. 1133.

44. Mass.—Seaver v. Boston & M. R. Co., 14 Gray 466.
Okl.—Kurn v. Margolin, 101 P.2d 818, 187 Okl. 135.

45. Ala.—Central of Georgia Ry. Co. v. Grover, 118 So. 506, 218 Ala. 290.

46. Mich.—Luttenton v. Detroit, J.

tion hands,[47] station agents,[48] switchmen,[49] trackmen,[50] train dispatchers,[51] train hands,[52] and yardmasters.[53] It is not, however, necessary that the witness should be actually engaged in the business of railroading; and the courts have received the inference of an experienced traveler,[54] such as an express messenger[55] or railway mail clerk,[56] or of a shipper shown to have had experience and special knowledge in loading cars[57] or in other railroad operations.[58] A fortiori one who has formerly been engaged in railroading is competent, although he has ceased to follow that occupation.[59] It is also proper to receive the inference of a civil engineer,[60] or a person experienced with engines other than locomotives,[61] or a professor,[62] as to a matter within the scope of the knowledge and experience of the witness. On the other hand, mere connection with one department of a railroad will not qualify a witness to state an opinion as to matters concerning which the nature of his duties does not imply knowledge.[63] A newspaper reporter is not competent to state the cause of a railroad accident, although he has been at the scene of many accidents.[64]

The basis of the inference should be stated.[65]

b. Street Railways

Witnesses possessing special knowledge or experience may state inferences or judgments as to technical matters pertaining to street railways, such as speed, stopping distances, or the use of equipment.

With respect to matters relating to street railways, qualified persons may state inferences or judgments which their special knowledge or experience enables them to draw or to form,[66] and such testimony may be given by any persons who are shown to be sufficiently acquainted with the management, operation, or appliances of street railways.[67] The testimony may relate to such matters as the speed of a car;[68] likewise, the testimony may re-

& C. Ry., 176 N.W. 558, 209 Mich. 20.

47. Ark.—St. Louis Southwestern R. Co. v. Plumlee, 95 S.W. 442, 78 Ark. 147.
Mo.—Landers v. Quincy, O. & K. C. R. Co., 137 S.W. 605, 156 Mo.App. 580.

48. Mo.—Robinson v. St. Louis, I. M. & S. R. Co., 21 Mo.App. 141.

49. Ala.—Southern Ry. Co. v. Smith, 128 So. 228, 221 Ala. 273—Southern Ry. Co. v. Dickson, 100 So. 665, 211 Ala. 481.
Ill.—Herb v. Pitcairn, 29 N.E.2d 543, 306 Ill.App. 583, reversed on other grounds, Sup., 36 N.E.2d 555.
Mo.—Williamson v. St. Louis-San Francisco Ry. Co., 74 S.W.2d 583, 335 Mo. 917—Pipes v. Missouri Pac. R. Co., 184 S.W. 79, 267 Mo. 385.

50. Mo.—Adams v. Quincy, O. & K. C. R. Co., 229 S.W. 790, 287 Mo. 535.
22 C.J. p 688 note 97.

51. Mo.—Finnegan v. Missouri Pac. R. Co., 169 S.W. 969, 261 Mo. 481.
22 C.J. p 688 note 99.

52. N.C.—McGraw v. Southern Ry. Co., 184 S.E. 31, 209 N.C. 432, certiorari denied Southern Ry. Co. v. McGraw, 57 S.Ct. 117, 299 U.S. 591, 81 L.Ed. 435.
22 C.J. p 688 note 1.

53. Tex.—Houston Belt & Terminal R. Co. v. Stephens, 203 S.W. 41, 109 Tex. 185, answering certified questions, Civ.App., 155 S.W. 703.

54. Mo.—Farmer v. St. Louis, I. M. & S. R. Co., 161 S.W. 327, 178 Mo. App. 579.
22 C.J. p 688 note 3.

55. Okl.—Atchison, T. & S. F. R. Co. v. Baker, 130 P. 577, 37 Okl. 48.

56. Mo.—Farmer v. St. Louis, I. M. & S. R. Co., 161 S.W. 327, 178 Mo. App. 579.

57. Ark.—American Ry. Express Co. v. Cole, 37 S.W.2d 699, 183 Ark. 557.
Tex.—Fort Worth & Denver City Ry. Co. v. Motley, Civ.App., 87 S.W.2d 551, error dismissed.
22 C.J. p 688 note 6.

Presence of shipper on train

In shipper's action for damage to live stock during transportation by railroad, shipper and his employee, both of whom accompanied the train and who were not entirely without experience in such matters, were competent to testify as to negligent operation of train.—Bennington v. Northern Pac. Ry. Co., 192 P. 1073, 113 Wash. 1.

Transportation time

It has been held that one of large experience as a shipper between two points should be permitted to state the time required for making the trip.—Hines v. Davis, Tex.Civ.App., 225 S.W. 862—22 C.J. p 573 note 32.

58. Tex.—Baker v. Nance Bros., Civ.App., 294 S.W. 290.
22 C.J. p 688 note 7.

59. Del.—Philadelphia & R. Ry. Co. v. Green & Flinn, 119 A. 840, 2 W. W.Harr. 78.
Mo.—Robison v. Chicago Great Western R. Co., App., 66 S.W.2d 180.
22 C.J. p 688 note 8.

60. Mo.—Martin v. Union Pac. R. Co., 253 S.W. 513, 214 Mo.App. 307.
N.H.—Whipple v. Boston & Maine R. R., 7 A.2d 239, 90 N.H. 261.
22 C.J. p 688 note 9.

61. Mo.—Connecticut F. Ins. Co. v. Chester, P. & Ste. G. R. Co., 153 S. W. 544, 171 Mo.App. 70.
22 C.J. p 688 note 10.

62. Ohio.—Breymann v. Pennsylvania, O. & D. R. Co. 183 N.E. 771, 43 Ohio App. 473.

63. Mo.—Irwin v. St. Louis-San Francisco Ry. Co., 30 S.W.2d 56, 325 Mo. 1019.
22 C.J. p 688 notes 12, 13 [a], p 687 note 90 [a].

Familiarity with particular appliance

A pump engineer who was not qualified as an expert on Diesel engines could not testify that a Diesel engine could not cause a train to jerk.—Alabama Great Southern R. Co. v. McBryar, Ga.App., 15 S.E.2d 563.

64. N.Y.—Hoyt v. Long Island R. Co., 57 N.Y. 678.

65. Tex.—San Antonio & A. P. R. Co. v. Waller, 65 S.W. 210, 27 Tex. Civ.App. 44.

66. Mass.—Convery v. Eastern Massachusetts St. Ry. Co., 147 N. E. 824, 252 Mass. 418.
Minn.—State v. St. Paul City Ry. Co., 265 N.W. 434, 196 Minn. 456.
22 C.J. p 689 note 24.

67. Mass.—Convery v. Eastern Massachusetts St. Ry. Co., 147 N. E. 824, 252 Mass. 418.
22 C.J. p 689 note 23.

68. Mich.—Millette v. Detroit United R. Co., 153 N.W. 10, 186 Mich. 634.
22 C.J. p 689 note 25.

Qualifications shown

(1) Experienced motorist.
Mich.—Mills v. Michigan Electric Ry. Co., 212 N.W. 75, 237 Mich. 393.
Mo.—Hackleman v. Kansas City

late to such matters as the time[69] or distance[70] within which it could be stopped; whether it could have been stopped sooner than it was[71] and in time to prevent an accident;[72] the proper[73] or quickest[74] way to stop a car; the effect of the application of brakes[75] or the reversal of power;[76] the adaptation of electricity as a motive power;[77] the proper method of operating a car;[78] the proper equipment of street cars;[79] the adequacy of brakes;[80] whether certain appliances are safe;[81] how a passenger might receive an electric shock;[82] whether the noise and motion of a car were unusual;[83] or the construction and operation of the appliance by which electric current is transmitted to the moving mechanism of a car.[84] The evidence is rejected, however, where the facts can be fully laid before the jury and they may be assumed to be capable of drawing the correct inference therefrom,[85] or where the witness is not sufficiently qualified.[86]

§ 545. Value

a. In general
b. Qualifications of witness generally
c. Basis of opinion
d. Real property
e. Personal property
f. Services

a. In General

The estimates or conclusions of qualified witnesses

Rys. Co., 217 S.W. 618, 203 Mo. App. 125.

(2) Other persons.—Schmidbauer v. Omaha & C. B. St. Ry. Co., 177 N. W. 336, 104 Neb. 250.

Opportunity for observation

The fact that witness was driving at a high rate of speed and had to pay some attention to his own work simply went to the weight to be given his testimony, and did not prevent his testifying as to the street car's speed prior to the collision.—Hackleman v. Kansas City Rys. Co., 217 S.W. 618, 203 Mo.App. 125.

69. Ill.—Eckels v. Donohue, 137 Ill. App. 106.
Mich.—Bladecka v. Bay City Traction & Electric Co., 118 N.W. 963, 155 Mich. 253.
22 C.J. p 689 notes 26, 27½.

70. Mass.—Tuttle v. Connecticut Valley St. Ry. Co., 132 N.E. 360, 239 Mass. 553.
22 C.J. p 689 notes 27, 27½.

Qualifications shown

(1) Air brake repairer.—Austin St. R. Co. v. Calhoun, Tex.Civ.App., 240 S.W. 327, dismissed for want of jurisdiction.

(2) Conductor.—Goggin v. Wells, Mo.App., 249 S.W. 702—22 C.J. p 689 note 27½ [a] (1).

(3) Motorman.
U.S.—Porto Rico Ry., Light & Power Co. v. Cognet, C.C.A.Porto Rico, 3 F.2d 21, certiorari denied 45 S. Ct. 511, 268 U.S. 691, 69 L.Ed. 1159.
Mass.—Tuttle v. Connecticut Valley St. Ry. Co., 132 N.E. 360, 239 Mass. 553.
Mo.—Shields v. Kansas City Rys. Co., 264 S.W. 890—Phillips v. East St. Louis & S. Ry. Co., 226 S.W. 863—Spaulding v. Kansas City Public Service Co., App., 16 S.W.2d 1012—Carl v. East St. Louis & S. Ry. Co., App., 258 S.W. 72—Buzan v. Kansas City Rys. Co., App., 212 S.W. 905.
Tex.—El Paso Electric Co. v. Whitenack, Civ.App., 297 S.W. 258, affirmed, Com.App., 1 S.W.2d 594.
Utah.—Bryant v. Bingham Stage Line, 208 P. 541, 60 Utah 299.
22 C.J. p 689 note 27½ [a] (2).

(4) Other witnesses.
Mo.—Bode v. Wells, 15 S.W.2d 335, 322 Mo. 386—Phillips v. East St. Louis & S. Ry. Co., 226 S.W. 863.
Neb.—Schmidbauer v. Omaha & C. B. St. Ry. Co., 177 N.W. 336, 104 Neb. 250.
Utah.—Bryant v. Bingham Stage Line, 208 P. 541, 60 Utah 299.
Va.—Washington & O. D. Ry. v. Warner, 97 S.E. 799, 124 Va. 452.

Degree of knowledge

If a witness shows knowledge sufficient to permit his opinion of the stopping distance of a car to go to the jury, the degree of his knowledge goes more to the weight of his testimony than to its admissibility.—Darling v. Pacific Electric Ry., 242 P. 703, 197 Cal. 702.

71. Ala.—Wallace v. North Alabama Tract. Co., 40 So. 89, 145 Ala. 682.
Va.—Washington & O. D. R. Co. v. Warner, 97 S.E. 799, 124 Va. 452.

72. Va.—Washington & O. D. Ry. v. Warner, 97 S.E. 799, 124 Va. 452.

Street car motorman, with many years of experience, was qualified to speak as an expert as to whether it was possible for him to have stopped his car in time to have prevented a collision.—Washington & O. D. Ry. v. Warner, supra.

73. Neb.—McCann v. Omaha & Council Bluffs Street Ry. Co., 222 N.W. 633, 117 Neb. 786.
22 C.J. p 690 note 29.

74. Ala.—Birmingham R., Light & Power Co. v. Saxon, 59 So. 584, 179 Ala. 136.
22 C.J. p 690 note 29.

75. Ill.—McGrew v. Chicago & M. Electric R. Co., 142 Ill.App. 210.

76. Ill.—McGrew v. Chicago & M. Electric R. Co., supra.

77. Mass.—Nolan v. Newton St. R. Co., 92 N.E. 505, 206 Mass. 384.

78. Mass.—Convery v. Eastern Massachusetts St Ry. Co., 147 N. E. 824, 252 Mass. 418.
22 C.J. p 690 note 33.

79. Mich.—Mayer v. Detroit, Y., A. A. & J. R. Co., 116 N.W. 429, 152 Mich. 276.
Wis.—Fisher v. Waupaca Electric Light & R. Co., 124 N.W. 1005, 141 Wis. 515.
22 C.J. p 690 note 34.

80. Cal.—Grossetti v. Sweasey, 169 P. 687, 176 Cal. 793.
22 C.J. p 690 note 35.

81. Mo.—Glenn v. Metropolitan St. R. Co., 150 S.W. 1092, 167 Mo.App. 109.
Wis.—Fitts v. Cream City R. Co., 18 N.W. 186, 59 Wis. 323.
22 C.J. p 690 note 36.

82. Miss.—Hill v. Jackson Light & Traction Co., 70 So. 401, 110 Miss. 388.

83. N.Y.—Beers v. West Side R. Co., 91 N.Y.S. 957, 101 App.Div. 308.

84. Mass.—Nolan v. Newton St. R. Co., 92 N.E. 505, 206 Mass. 384.

85. R.I.—Souza v. United Electric Rys. Co., 152 A. 419, 51 R.I. 124.
22 C.J. p 690 note 40.

86. Ala.—Erwin v. Birmingham R., Light & Power Co., 76 So. 915—Birmingham R., Light & Power Co. v. Saxon, 59 So. 584, 179 Ala. 136.
Md.—Capital Tract. Co. v. Contner, 87 A. 904, 120 Md. 78.
Mo.—Marshall v. Kansas City R. Co., App., 205 S.W. 971.
N.Y.—Bliss v. United Tract. Co., 78 N.Y.S. 18, 75 App.Div. 235.
Va.—Norfolk & P. Tract. Co. v. Ellington, 61 S.E. 779, 108 Va. 245, 17 L.R.A.,N.S., 117.
22 C.J. p 689 notes 23 [a], [b], 24 [a], 27½ [c], p 690 note 29 [a] (2).

as to the value of property or services are admissible if such testimony will aid the jury, whether value be regarded as a matter of fact or of opinion.

Value is said by some authorities to be a matter of fact;[87] by others, to be a matter of opinion.[88] In any event, it is generally held that the estimate, conclusion, or opinion of a qualified witness as to the value of property or services is admissible to prove such value when such testimony will aid the jury.[89] Where the value can be readily estimated by the jury from facts presented to them, the opinion of a witness is excluded.[90] The determination whether the opinion or judgment of such a witness is calculated to aid the jury is within the discretion of the court,[91] which will not be reversed except in case of manifest error.[92]

Necessity and existence of market value. Opinions or estimates as to value are admissible irrespective of whether or not there are enough sales of similar property to establish a market.[93] Where, however, a market value exists, a qualified witness

87. Ill.—People ex rel. McDonough v. Goldberg, 188 N.E. 428, 354 Ill. 423—Illinois Power & Light Corporation v. Talbott, 152 N.E. 486, 321 Ill. 538—Sterling-Midland Coal Co. v. Great Lakes Coal & Coke Co., 266 Ill.App. 46.
Mass.—Sheffer v. Rudnick, 196 N.E. 864, 291 Mass. 205.

88. U.S.—Arkansas Natural Gas Co. v. Sartor, C.C.A.La., 78 F.2d 924, certiorari denied Sartor v. Arkansas Natural Gas Co., 56 S.Ct. 381, 296 U.S. 656, 80 L.Ed. 467—Union Trust Co. of Cleveland, Ohio v. Woodrow Mfg. Co., C.C.A.Mo., 63 F.2d 602.
Ala.—Kerlin-Patterson Lumber Co. v. Eufaula Hardware Co., 108 So. 508, 214 Ala. 602—Harvey v. Bodman, 103 So. 569, 212 Ala. 503.
Ark.—Ætna Ins. Co. v. Mills, 3 S.W.2d 999, 176 Ark. 684—Little Rock & H. S. R. Co. v. Evans, 88 S.W. 992, 76 Ark. 261.
Ga.—Gulf Refining Co. v. Smith, 139 S.E. 716, 164 Ga. 811.
Mo.—Lee v. Allen, App., 120 S.W.2d 172.
N.Y.—In re Board of Water Supply of City of New York, 177 N.Y.S. 852, 189 App.Div. 20, affirming Sands v. City of New York, 172 N.Y.S. 16, 104 Misc. 427.
Tex.—Gulf, C. & S. F. Ry. Co. v. Harrell, Civ.App., 270 S.W. 187.

Market value is usually a matter of opinion

Tex.—General Motors Acceptance Corporation v. Killingsworth, Civ. App., 54 S.W.2d 266, error dismissed—Early-Foster Co. v. Gottlieb, Civ.App., 214 S.W. 520, dismissed for want of jurisdiction.

Only when value has been liquidated does proof of value and cost become that of substantive facts.—Black v. Automatic Sprinkler Co. of America, 131 S.E. 548, 35 Ga.App. 8.

State of the market

While direct testimony as to market value is in the nature of opinion evidence, testimony as to the state of the market and the actual selling price of a certain commodity at a particular time and place is testimony as to a positive fact, and not opinion evidence.—Glynn Canning Co. v. E. L. Adams Co., 106 S.E. 207, 26 Ga.App. 365.

Testimony as to value is in the nature of opinion evidence

Ala.—Lincoln Reserve Life Ins. Co. v. Armes, 110 So. 818, 215 Ala. 407—Stark & Oldham Bros. Lumber Co. v. Burford, 109 So. 148, 215 Ala. 68—Louisville & N. R. Co. v. Whitley, 105 So. 661, 213 Ala. 525.
Ga.—Speir v. Westmoreland, 149 S.E. 422, 40 Ga.App. 302.

89. U.S.—U. S. v. Porter, D.C.Mich., 9 F.2d 153—The Rosalia, C.C.A. N.Y., 264 F. 285—Carpenter v. Robinson, C.C.R.I., 5 F.Cas.No.2,-481, Holmes 67.
Ala.—De Moville v. Merchants & Farmers Bank of Greene County, 170 So. 756, 761, 233 Ala. 204, citing **Corpus Juris.**
Colo.—Wigton v. Wigton, 216 P. 1055, 73 Colo. 337.
Ga.—Keener v. Addis, 5 S.E.2d 695, 61 Ga.App. 40—Walton County Bank v. Stanton, 144 S.E. 815, 38 Ga.App. 591, affirmed Stanton v. Walton County Bank, 149 S.E. 573, 169 Ga. 40—Globe & Rutgers Fire Ins. Co. v. Jewell-Loudermilk Co., 137 S.E. 286, 36 Ga.App. 538.
Mass.—James Millar Co. v. Commonwealth, 146 N.E. 677, 251 Mass. 457.
N.H.—Eames v. Southern New Hampshire Hydro-Electric Corporation, 159 A. 128, 85 N.H. 379—Marty v. Shaka, 143 A. 524, 83 N.H. 411.
Tex.—Texas & P. R. Co. v. Prunty, 230 S.W. 396, 111 Tex. 162, answers to certified questions conformed to, Civ.App., 233 S.W. 625—Crow v. Thompson, Civ.App., 131 S.W.2d 1064, error dismissed, judgment correct—Texas Interurban Ry. Co. v. Halford, Civ.App., 299 S.W. 277.
22 C.J. p 573 note 34, p 691 note 79.

Reasons for rule

(1) Such evidence is received because of the necessities of the case, this being as a practical matter the only available method of proof in a great many instances.
Ky.—Commonwealth v. Begley, 114 S.W.2d 127, 272 Ky. 289.
Vt.—Houghton v. Grimes, 151 A. 642, 103 Vt. 54.
22 C.J. p 574 note 35.

(2) The evidence is most freely received where the facts on which an estimate is based cannot be placed before the jury or are of a nature beyond ordinary experience, and where more cogent evidence is not available.—Lines v. Alaska Commercial Co., 69 P. 642, 29 Wash. 133.
22 C.J. p 575 note 36.

Absence of value may be shown by the inference of witnesses.—Security Finance Co. v. Kelly's Tire Shop, 114 So. 298, 216 Ala. 642—22 C.J. p 575 note 46.

Opinion as fact

Value may be proved by opinion evidence, although opinion expressed be a fact.—Gulf Refining Co. v. Smith, 139 S.E. 716, 164 Ga. 811.

Opinion excluded

In an action on a policy, agreeing to indemnify a mortgagee against liens and the noncompletion of a building operation, where the rights of the parties are determined by the actual value of the property as shown by a judicial sale on the enforcement of mechanics' liens, opinion evidence, tending to show that the market value of plaintiff's mortgage was less than its face value, or that the houses in question would have been worth less finished than they sold for at the sheriff's sales, was inadmissible.—Fox Chase Bank v. Wayne Junction Trust Co., 101 A. 979, 258 Pa. 273—62 C.J. p 1068 note 69.

90. Tex.—Johnson v. Ewing, Civ. App., 276 S.W. 784.
22 C.J. p 692 note 80, p 695 note 47.

91. Minn.—Carl Lindquist & Carlson v. Johanson, 235 N.W. 267, 182 Minn. 529.
22 C.J. p 573 note 34 [b], p 692 note 81.

92. Minn.—Carl Lindquist & Carlson v. Johanson, 235 N.W. 267, 182 Minn. 529.
22 C.J. p 692 note 82.

93. Tex.—Driscoll v. Nolan, Civ. App., 130 S.W.2d 400, set aside on other grounds 131 S.W.2d 1025.

may testify as to what it is[94] in any relevant market,[95] but a qualified witness may testify as to the value of property for which there is no established market or market value.[96] Where a market value exists, it has been held that the witness testifies to such value as a fact and may give an opinion as to value only where there is no market value.[97]

The estimate or opinion of the witness as to value should consist of his opinion or estimate as to market value,[98] for, even where there is no available market for the property, the estimate of the witness must be largely controlled by consideration of what would be a fair price if a market could be found;[99] but it has been held that a witness who testifies that no market exists for the property cannot testify to its market value.[1]

Where the property has no market value, its value should be established by laying a foundation for proof on some recognized theory or measure of value.[2]

Reasonable value may be stated by the witness where the property in question has no market value.[3]

Value to owner or witness. An opinion as to value to the owner or the witness is not admissible.[4]

Place and time of valuation. The opinion should be of the value of the property or services as of the place[5] and time[6] in issue. The evidence may properly relate to a time prior[7] or subsequent[8] to that

94. Ga.—Graham v. John Flannery Co., 124 S.E. 729, 32 Ga.App. 713.
22 C.J. p 700 notes 41, 42, p 701 notes 43, 48.

Market value is matter of knowledge, to be proved by witnesses acquainted with the facts.—Watjen v. Louisville Tobacco Warehouse Co., C.C.A.Ky., 29 F.2d 801.

Direct testimony as to market value is in nature of opinion evidence.
Ala.—Ruffin Coal & Transfer Co. v. Rich, 108 So. 600, 214 Ala. 622—Atlantic Coast Line R. Co. v. Enterprise Oil Co., 101 So. 605, 211 Ala. 676.
Ga.—Schumpert v. Carter, 166 S.E. 436, 175 Ga. 860.

95. Iowa.—Acrea v. Brayton, 38 N. W. 171, 75 Iowa 719.
22 C.J. p 701 note 49.

96. Idaho.—Beech v. American Surety Co. of New York, 51 P.2d 213, 216, 56 Idaho 159, citing **Corpus Juris**—Joyce Bros. v. Stanfield, 189 P. 1104, 33 Idaho 68.
22 C.J. p 700 note 39.

Absence of sales of like property
On the question of the value of a considerable tract of land abutting on the waters of New York Harbor, in the absence of sales of other like property in the vicinity and near the time, testimony of experts was held admissible.—U. S. v. Benedict, C.C.A.N.Y., 280 F. 76, affirming, D.C., Benedict v. U. S., 270 F. 267, and affirmed 43 S.Ct. 357, 261 U. S. 294, 67 L.Ed. 662.

97. N.Y.—Vroom v. Sage, 91 N.Y.S. 456, 100 App.Div. 285, affirmed 76 N.E. 1111, 184 N.Y. 542.

Market price; selling price
(1) While direct testimony as to market value is in the nature of opinion evidence, testimony as to the state of the market and the actual selling price of a certain commodity at a particular time and place is testimony as to a positive fact and not opinion evidence.—Southern Nursery Co. v. Montfort, 115 S.E. 150, 29 Ga.App. 328.

(2) Testimony that lumber sells for certain price at named place is evidence of fact, and not inadmissible as opinion.—Danville Lumber Co. v. McArthur, 137 S.E. 294, 36 Ga.App. 546.

98. Ala.—Alabama Great Southern R. Co. v. Sheffield, 104 So. 222, 213 Ala. 15.
N.C.—Nance v. King, 101 S.E. 212, 178 N.C. 574.
Okl.—Filson v. Terr., 67 P. 473, 11 Okl. 351.
Pa.—Westinghouse Air Brake Co. v. City of Pittsburgh, 176 A. 13, 316 Pa. 372—Miller v. Washington Mut. Fire Ins. Co., 7 Sch.Reg. 259.
R.I.—Burden v. Tax Assessors of City of Newport, 134 A. 9, 47 R. I. 473.
Tex.—Lancaster v. Rogers & Adams, Civ.App., 235 S.W. 643, affirmed, Com.App., 248 S.W. 660.
Utah.—Rich v. Utah Commercial & Savings Bank, 84 P. 1105, 30 Utah 334.
22 C.J. p 588 note 84 [a], p 701 note 43.

Estimate of value
On issue as to market value of land and buildings as a whole, testimony of a witness who expressly stated that he did not know anything about market values, but estimated value as he would in fire insurance losses, was incompetent.—Ringer v. Wilkin, 183 P. 986, 32 Idaho 330.

Necessity of definition
Witness testifying to market value need not define "market value." —Texas Public Utilities Co. v. Bass, Tex.Civ.App., 297 S.W. 301.

"Value" means "market value" unless the context shows that a different meaning was intended.—James v. Speer, 220 P. 535, 69 Mont. 100.

99. Okl.—Filson v. Territory, 67 P. 473, 11 Okl. 351.

The fact that there is no purchaser ready to buy at the moment does not exclude opinion evidence as to market value; such opinion may be based on potential demand.—Joint Highway Dist. No. 9 v. Ocean Shore R. Co., 18 P.2d 413, 128 Cal.App. 743.

1. Tex.—Ft. Worth & R. G R. Co. v. Bryson, Civ.App., 195 S.W. 1165.

2. Mont.—Durocher v. Myers, 274 P. 1062, 84 Mont. 225.

Unless there is no market value, a different standard of value cannot be applied.
N.J.—Albert v. Ford Motor Co., 157 A. 83, 9 N.J.Misc. 1170, affirmed 162 A. 589, 109 N.J.Law 353.
Tex.—Baden v. State, Cr., 74 S.W. 769.

3. Wis.—Allen v. Chicago & N. W. R. Co., 129 N.W. 1094, 145 Wis. 263.

4. Mo.—Shrum v. Brill, App., 230 S.W. 367.
Wash.—Ham, Yearsley & Ryrie v. Northern Pac. Ry. Co., 188 P. 527, 110 Wash. 467.

Value to witness same as market value
In tenant's action for damages to pianos by water due to defective drain, refusal to strike testimony of experienced piano trader as to what pianos were worth to him was held not error, where he testified that such value was his idea of market value also.—Longbotham v. Takeoka, 239 P. 105, 115 Or. 608, 43 A.L.R. 1285.

5. Tex.—Anderson v. Reichart, Civ. App., 116 S.W.2d 772, error dismissed.

6. Ga.—Parrish v. Barwick, 144 S. E. 735, 167 Ga. 214.

7. Del.—Mills Novelty Co. v. Transeau, 8 A.2d 93, 1 Terry 227.
22 C.J. p 575 note 37.

8. N.Y.—Merrill v. Grinnell, 30 N. Y. 594.
22 C.J. p 575 note 38, p 580 note 94.

involved in the controversy, provided the court regards the period as not too remote to be relevant, the length of the interval merely affecting the weight of the evidence;[9] but testimony of a witness whose knowledge was acquired post litem motam has been rejected.[10] Where the property is such that its value fluctuates a great deal, a witness whose knowledge is limited to a period substantially prior to the time in issue is not competent.[11] Knowledge of market value in one market does not qualify the witness to state what it is in another market,[12] unless the markets are so near or the prevailing conditions so similar that it may fairly be assumed that the value is the same in both markets.[13]

Guess or conjecture rejected. While absolute certainty is not required, the statement of the witness cannot be received where it amounts to nothing more than a mere guess or conjecture.[14] This rule has been applied to exclude opinion evidence as to the value of property which is of a highly speculative nature.[15]

An estimate of what would have been the value of certain property if certain events had occurred may be stated by a qualified witness.[16]

Change of value. One who knows such market value may testify as to the increase[17] or diminution[18] caused by certain occurrences; what the occurrences were which occasioned the change;[19] and how the market value will be affected by definite changes in the condition of the property.[20]

Hypothetical questions. Although it has been held that the value of certain types of property cannot be established by an answer to a hypothetical question,[21] it is generally held that a properly qualified witness may, in answer to a hypothetical question, give his opinion as to the value of property he

9. W.Va.—Millan v. Bartlett, 89 S. E. 711, 78 W.Va. 367.
22 C.J. p 575 note 39.

10. Mo.—Kansas City, N. & Ft. S. R. Co. v. Dawley, 50 Mo.App. 480.

11. Cal.—Le Baron v. Berryessa Cattle Co., 248 P. 779, 78 Cal.App. 536.

12. Mich.—Greeley v. Stilson, 27 Mich. 153.

13. Tex.—Houston Packing Co. v. Griffith, Civ.App., 164 S.W. 431.
22 C.J. p 702 note 61.

14. U.S.—Lyman v. Commissioner of Internal Revenue, C.C.A., 83 F. 2d 811.
Ill.—Inlet Swamp Drainage Dist. v. Gehant, 122 N.E. 127, 286 Ill. 558.
Iowa.—Randell v. Iowa State Highway Commission, 241 N.W. 685, 214 Iowa 1.
N.J.—Lindenthal v. Hatch, 39 A. 662, 61 N.J.Law 29.
Wyo.—Marcante v. Hein, 67 P.2d 196, 51 Wyo. 389.
22 C.J. p 693 note 95, p 698 note 5.

Conjecture as to facts

An opinion of market value, such as the market value of personalty wrongfully replevied, must be founded on facts and not on conjecture, and, where there is substantially no evidence on which to base such an opinion, then no opinion can be given, however competent the witness may be.—McGovern v. Michael, 6 A.2d 709, 62 R.I. 485, modified on other grounds 9 A.2d 274.

Characterization of judgment as "guess"

(1) In a trustee's action to recover a preference, where the bankrupt testified that he could tell the value of his stock of goods at date of the alleged preference only by "guess," the objection to his testimony as guesswork must be overruled, where as a whole it shows that he was not guessing at the value of the stock, but giving his best judgment, and he was the best qualified witness to express an opinion, and particularly, where his evidence was more favorable to defendant appellant than otherwise.—Slayton v. Drown, 107 A. 307, 93 Vt. 290.

(2) Where trial court sustained defendant's objection to witness' testimony that cash market value of gasoline pump struck by defendant's automobile was from one hundred ninety dollars to two hundred dollars on witness stating on cross-examination that his estimate was only a guess, and thereafter plaintiff's counsel further examined witness and witness stated that he knew cash market value of pump in question, trial court properly permitted witness to testify again that cash market value of pump was from one hundred ninety dollars to two hundred dollars.—Wilson v. Barbour, Tex.Civ.App., 135 S.W.2d 169, error dismissed.

15. Del.—Scotton v. Wright, 121 A. 180, 2 W.W.Harr. 192.

Agency contract

(1) Opinion evidence as to the value of an insurance agency contract is inadmissible.—Wallace v. American Life Ins. Co. of Des Moines, Iowa, 225 P. 192, 227 P. 465, 111 Or. 510.

(2) Opinion evidence as to value of the exclusive agency contract and the profits which might have been made, or on the amount of business it might have done under the agency if it had not been wrongfully terminated, is not admissible, since such opinion would be purely speculative and conjectural.—Miller v. Lerdo Land Co., 199 P. 1073, 52 Cal.App. 662.

Production of unfinished oil well

Opinion testimony as to value of oil that could have been produced, if well had been completed, was held admissible as to damages.—Julian Petroleum Corporation v. Courtney Petroleum Co., C.C.A.Cal., 22 F.2d 360.

16. Tex.—Houston & F. C. R. Co. v. Shirley, 31 S.W. 291, 89 Tex. 95.
22 C.J. p 695 note 43.

17. N.Y.—Milbank v. Dennistoun, 23 N.Y.Super. 382.

18. Ark.—General Fire Extinguisher Co. v. Beal-Doyle Dry Goods Co., 160 S.W. 889, 110 Ark. 49, Ann.Cas.1915D 791.
22 C.J. p 701 note 51.

19. N.Y.—Milbank v. Dennistoun, 23 N.Y.Super. 382.

20. Ill.—Pike v. Chicago, 40 N.E. 567, 155 Ill. 656.
22 C.J. p 701 note 53.

21. Ill.—City of Elmhurst v. Rohmeyer, 130 N.E. 761, 297 Ill. 430.

Land

Where the question is as to the value of realty, or whether it will be damaged or benefited by an improvement, and how much, expert witnesses testifying on such questions must do so from their own knowledge, and must first qualify by showing that they have such knowledge of the facts as will render their opinions valuable; it is not permissible to allow such witnesses to answer hypothetical questions.—City of Elmhurst v. Rohmeyer, supra.

has never seen.[22] The hypothetical question must contain sufficient facts to serve as the basis for an opinion as to value,[23] and there must be evidence tending to establish such facts.[24] A witness' answer to a hypothetical question which contains an erroneous statement of law is not admissible.[25] It has been held that only an expert in the strict sense may testify in response to hypothetical questions;[26] but this has been denied.[27]

Form of statement. It has been considered that a witness as to value must limit his estimate to a lump sum and cannot be permitted to appraise the various articles or items of the property concerning which he testifies;[28] but there is authority to the contrary.[29]

Invasion of province of jury. A witness as to value should not invade the province of the jury; he should not draw those ultimate conclusions of law and fact which it is the jury's function to make.[30]

22. U S.—Stuyvesant Ins. Co. v. Jacksonville Oil Mill, C.C.A.Tenn., 22 F.2d 515, certiorari denied 48 S. Ct. 420, 276 U.S. 634, 72 L.Ed. 743, and Globe & Rutgers Fire Ins. Co. v. Jacksonville Oil Mill, 48 S.Ct. 420, 276 U.S. 635, 72 L.Ed. 743—Barrett v. Fournial, C.C.A.N.Y., 21 F.2d 298.
Ala.—Alabama Great Southern R. Co. v. Sheffield, 104 So. 222, 213 Ala. 15—Alabama Great Southern R. Co. v. Mims, 92 So. 548, 207 Ala. 331—Sykes v. Wood, 91 So. 320, 206 Ala. 534.
Conn.—O'Loughlin v. Erwin M. Jennings Co., 140 A. 758, 107 Conn. 365.
Md.—Bresnan v. Weaver, 135 A. 584, 151 Md. 375.
Mass.—New York Cent. R. Co. v. Freedman, 133 N.E. 101, 240 Mass. 200.
Neb.—Masonic Bldg. Corporation v. Carlsen, 258 N.W. 44, 128 Neb. 108.
N.Y.—Bond Electric Corporation v. Gold Seal Electrical Co., 278 N.Y. S. 969, 244 App.Div. 206, reversed on other grounds 3 N.E.2d 594, 271 N.Y. 461.
N.D.—Bryan v. Northwest Beverages, 285 N.W. 689, 69 N.D. 274, 123 A.L.R. 717.
Pa.—Czerwinski v. National-Ben Franklin Fire Ins. Co. of Pittsburgh, 10 A.2d 40, 138 Pa.Super. 84—Uhr v. Davidyan, 76 Pa.Super. 548.
Tex.—Anderson v. Reichart, Civ. App., 116 S.W.2d 772, error dismissed.
22 C.J. p 692 note 90.

Weight, not competency, involved
Whether a witness testifies on the basis of his knowledge or in response to a hypothetical question goes to the weight, but not the competency, of his testimony.—Arizona Superior Mining Co. v. Anderson, 262 P. 489, 33 Ariz. 64, error dismissed 49 S.Ct. 177, 278 U.S. 578, 73 L.Ed. 516.

Services
(1) Expert testifying to personal knowledge of decedent, plaintiff's home, and charges for lodging, could state reasonable value of care, board, and room of person described in hypothetical question.—Fenton v. Askew, 165 N.E. 301, 119 Ohio St. 603.

(2) In representative suit to recover excessive salaries paid by corporation, trial court did not err in permitting certain witnesses to testify as to the value to the corporation of the services of certain defendants, where witnesses were experts, defendants in question had fully testified as to the character of the work done by them, and the basis of witnesses' opinions was explained.—Keough v. St. Paul Milk Co., 285 N.W. 809, 205 Minn. 96.

Value at time other than when examined
(1) Witness, if expert, may estimate past value of realty, given its location, use, possibilities, income, etc.—Mary Jane Stevens Co. v. First Nat. Bldg. Co., 57 P.2d 1099, 89 Utah 456.

(2) Expert witness may testify to value of automobile, although he had not seen it at precise time to which his evidence was directed.—Pollitt v. General Credit Corporation, 176 A. 607, 114 N.J.Law 432.

23. Minn.—Hafiz v. Midland Loan Finance Co., 287 N.W. 677, 206 Minn. 76.
N.Y.—Schwartz v. Northern Assur. Co., Limited, of London, England, 17 N.Y.S.2d 960.

24. Mass.—Raymond Syndicate v. American Radio & Research Corporation, 160 N.E. 821, 263 Mass. 147.
Tex.—Salyer v. Shropshire, Civ.App., 144 S.W.2d 618—Anderson v. Caulk, Civ.App., 5 S.W.2d 816, affirmed Caulk v. Anderson, 37 S.W. 2d 1008, 120 Tex. 253.

25. U.S.—Wagner v. Commissioner of Internal Revenue, C.C.A., 63 F. 2d 859.

26. Ga.—Hook v. Stovall, 30 Ga. 418.
Ill.—City of Elmhurst v. Rohmeyer, 130 N.E. 761, 297 Ill. 430.

27. Pa.—Czerwinski v. National-Ben Franklin Fire Ins. Co. of Pittsburgh, 10 A.2d 40, 138 Pa. Super. 84.

28. Miss.—Board of Levee Com'rs for Yazoo-Mississippi Delta v. Hendricks, 27 So. 613, 77 Miss. 483.
Vt.—Williams Mfg. Co. v. Insurance Co. of North America, 106 A. 657, 93 Vt. 161—Ide v. Boston & M. R. Co., 74 A. 401, 83 Vt. 66.

29. U.S.—Baltimore American Ins. Co. of New York v. Pecos Mercantile Co., C.C.A.N.M., 122 F.2d 143.

30. Ill.—City of Chicago v. Mayer, 124 N.E. 842, 290 Ill. 142.

Ultimate fact held called for
(1) On appeal to circuit court by domestic corporation from allegedly excessive assessment made by state tax commission fixing value of shares of stock for tax purposes, testimony whether commission's valuation of stock was, in the judgment of the witness, fair and reasonable, was properly excluded, since such question was the very factual issue for the court to decide.—State v. West Point Mfg. Co., 183 So. 449, 236 Ala. 467.

(2) In action on policy of insurance against theft of automobile, it was not error to refuse to permit witness, who had not qualified as expert, to answer question whether or not use of automobile for demonstration purposes is more hazardous or detrimental to its value than using it for pleasure purposes, especially where that is one of ultimate facts in issue.—Lord v. Lincoln Mutual Casualty Co., 231 Ill.App. 409.

(3) Making comparison by witness of building and land taken in condemnation proceedings with other farms for purpose of determining value is inadmissible as invading province of jury.—Hervey v. City of Providence, 133 A. 618, 47 R.I. 378.

(4) Testimony as to whether particular lots to supplemental assessments against which objections had been filed had increased in market value more than original assessments was held incompetent.—City of West Frankfort v. A. C. Marsh Lodge, No. 496, I. O. O. F., 145 N.E. 711, 315 Ill. 32.

(5) The value of an exclusive territorial contract to distribute motion picture films, for the purpose of determining damages for malicious interference therewith, is not a proper

b. Qualifications of Witness Generally

(1) In general

(2) Competency of owner generally

(1) In General

A witness as to value, to be qualified, must be better able to form a correct opinion with respect thereto than men in general, but he need not be a skilled or expert witness in the strict sense.

A qualified witness may testify to value;[31] an unqualified witness may not.[32]

There is no inflexible rule defining how much a witness must know in order to be qualified;[33] the knowledge required is necessarily dependent on the circumstances.[34] In proportion as the property is common in its nature the number of qualified witnesses will increase.[35] The rules governing the competency of witnesses are not as strictly applied to questions of value as to other subjects.[36]

While it has been said that only an expert or specially skilled witness may testify as to value,[37]

subject of opinion evidence, but is for the jury.—Glucksmann v. Gillespie, 204 N.Y.S. 354, 209 App.Div. 48.

(6) Testimony of real estate experts as to reasonable rental value was held inadmissible in a landlord's action for increased rent, such testimony usurping the function of the court and jury.—Hennessy Realty Co. v. Hayes, 193 N.Y.S. 571.

Ultimate fact held not called for

(1) In action against a railroad for damages to horses from rough handling in shipment, testimony by qualified witnesses as to what the reasonable market value of the horses at destination would have been if they had been handled with ordinary care and delivered in good condition was held admissible as against the contention that it invaded the province of the jury by stating conclusions on the issue to be determined by the jury.—Texas & P. R. Co. v. Prunty, 230 S.W. 396, 111 Tex. 162, answers to certified questions conformed to, Civ.App., 233 S.W. 625.

(2) In partition proceedings of quarry lands, in which a proper understanding of the values before and after division could not be had without the aid of those who had special knowledge on the matter, the court did not err in admitting testimony of a witness, who was allowed to give as his opinion that the land was worth more as an entire tract than divided into three parts of equal value, and to state his reasons for this conclusion, against the objection that the testimony covered the very issue in question, and therefore an opinion was not admissible.—Blanchard v. Cross, 123 A. 382, 97 Vt. 370.

(3) Witness' testimony concerning decline in price of ore, based on figures given by him, was held properly received, over objection that it was a conclusion.—Lake Superior Loader Co. v. Huttig Lead & Zinc Co., 264 S.W. 396, 305 Mo. 130.

(4) In action for damages caused by diversion of surface water from defendant's land onto plaintiff's land, plaintiff's testimony concerning the quantity and value of crops grown on land after they were affected by alleged nuisance was not inadmissible as a conclusion.—Keener v. Addis, 5 S.E.2d 695, 61 Ga. App. 40.

(5) In an action by the owner of goods, lost while in storage, against a hotel keeper, for their value, permitting the owner to testify that prices of the goods given in evidence by him were wholesale prices, over objection that question called for conclusion of witness, was not error.—Norman v. Utah Hotel Co., 206 P. 556, 60 Utah 52.

31. Ark.—Kempson v. Goss, 64 S.W. 224, 69 Ark. 451.
Cal.—Breznikar v. T. J. Topper Co., App., 116 P.2d 176.
Kan.—Hindman v. Askew Saddlery Co., 57 P. 1050, 9 Kan.App. 98.
Mo.—Robinson v. St. Joseph, 71 S.W. 465, 97 Mo.App. 503.
Neb.—Chicago, B. & Q. R. Co. v. Shafer, 68 N.W. 342, 49 Neb. 25.
Ohio.—Mowry v. Kirk & Cheever, 5 Ohio Dec., Reprint, 431, 5 Am.L.R. 587, reversed on other grounds 19 Ohio St. 375.
Pa.—Brechtel v. Cortright, 13 Pa. Super. 384.
Tex.—Rogers & Adams v. Lancaster, Com.App., 248 S.W. 660, 662, citing **Corpus Juris**, and affirming Lancaster v. Rogers & Adams, Civ.App., 235 S.W. 643.
Wash.—Weiffenbach v. Puget Sound Bridge & Dredging Co., 184 P. 321, 108 Wash. 455.
22 C.J. p 573 note 33.
Cross-examination as to qualifications see infra § 560.

Disqualification

Occupation or business of witness offering opinion evidence as to value of property does not per se disqualify him, nor does relationship by affinity or consanguinity to property owner make either witness or his evidence subject to legal objection.—Millard v. Northwestern Mfg. Co., 205 N.W. 979, 200 Iowa 1063.

32. Ill.—Gilbert v. Gallup, 76 Ill. App. 526.
Ky.—Insurance Co. of North America v. Creech Drug Store, 75 S.W.2d 552, 256 Ky. 56.
Mo.—State v. Fannon, 59 S.W. 75, 158 Mo. 149.
N.Y.—Teerpenning v. Corn Exch. Ins. Co., 43 N.Y. 279—Kaufman v. Abrams, 90 N.Y.S. 1068—Paige v. Hazard, 5 Hill 603.
Pa.—Baylor v. Stevens, 16 Pa.Super. 365.
Tex.—Humble Oil & Refining Co. v. McLean, Com.App., 280 S.W. 557, reversing, Civ.App., 268 S.W. 179—Chicago Fire & Marine Ins. Co. v. Harkness, Civ.App., 58 S.W.2d 171—Texas Power Corporation v. Kuehler, Civ.App., 34 S.W.2d 381, modified on other grounds, Com. App., 52 S.W.2d 76—Farmers' Mill & Elevator Co. v. Hodges, Civ. App., 248 S.W. 72, reversed on other grounds, Com.App., 260 S.W. 166.
22 C.J. p 692 note 87.

33. Mich.—Watrous v. Bialy's Estate, 192 N.W. 628, 631, 22 Mich. 137, quoting **Corpus Juris**.
Minn.—Quinn v. Zimmer, 239 N.W. 902, 184 Minn. 589.
N.D.—Hellstrom v. First Guaranty Bank, 209 N.W. 379, 385, 54 N.D. 332, citing **Corpus Juris**.
Or.—Patterson v. Babcock & Peets, 274 P. 903, 128 Or. 476.
22 C.J. p 578 note 83.

34. Pa.—Hoffman v. Berwind-White Coal Mining Co., 109 A. 234, 265 Pa. 476.

The knowledge must be adequate quoad the property involved in the inquiry.—Terre Haute, etc., R. Co. v. Jarvis, 36 N.E. 774, 9 Ind.App. 438—22 C.J. p 692 note 88.

35. Mich.—Stone v. Covell, 29 Mich. 359.
22 C.J. p 580 note 91.

36. Utah.—Salt Lake & U. R. Co. v. Schramm, 189 P. 90, 56 Utah 53—Salt Lake Inv. Co. v. Oregon Short Line R. Co., 148 P. 439, 46 Utah 203.

Considerable liberality is shown as to qualifications of witness to testify to value.—Gulf, C. & S. F. Ry. Co. v. Harrell, Tex.Civ.App., 270 S.W. 187.

37. N.J.—Hopper v. Public Service Coordinated Transport, 177 A. 430, 114 N.J.Law 468—Trenton & Mercer County Traction Corporation v. Mercer County Board of Taxation, 105 A. 222, 92 N.J.Law 398, reversing 102 A. 361, 91 N.J.Law 105.

the general rule is that witnesses are not required to be expert or skilled in the strict and severe sense of the term in order to give opinions on value.[38] However, for a witness to be qualified, it must be made to appear that he has had, and utilized, means superior to those available to the jurors or to men in general, for forming an intelligent opinion.[39] Generally, a person knowing the property and familiar with the value of that class of property is qualified.[40] It has been suggested that it might be advisable to admit the evidence of anyone acquainted with the property, leaving it for the jury to determine the weight of such evidence.[41]

Knowledge of facts. The witness must have had an opportunity to form a correct opinion;[42] he must have capacity from experience, knowledge of the standards of value, and knowledge of the object to be valued.[43]

The knowledge of the witness must be actual,[44] and must be commensurate with the estimate or judgment which he proposes to state.[45] The wit-

Pa.—Fantozzi v. Schappert, 192 A. 114, 326 Pa. 298.

38. U.S.—Morton Butler Timber Co. v. U. S., C.C.A.Tenn., 91 F.2d 884—Hays v. Harris, C.C.A.Ark., 78 F. 2d 66, certiorari denied 56 S.Ct. 134, 296 U.S. 613, 80 L.Ed. 435.
Ga.—Atlanta Title & Trust Co. v. Davis, 136 S.E. 164, 36 Ga.App. 257.
Ind.—State v. Reid, 185 N.E. 449, 204 Ind. 631, 86 A.L.R. 1442—Southern Surety Co. v. Calverly, 143 N.E. 626, 195 Ind. 247.
Mich.—Gloeser v. Moore, 278 N.W. 781, 284 Mich. 106—Watrous v. Bialy's Estate, 192 N.W. 628, 631, 222 Mich. 137, quoting **Corpus Juris.**
Miss.—Citizens Bank of Coldwater v. Callicott, 174 So. 78, 79, 178 Miss. 747, quoting **Corpus Juris**—Dyer v. Hobert, 117 So. 244, 150 Miss. 857, followed in Fountain v. McDonald, 132 So. 104.
Mo.—Lee v. Allen, App., 120 S.W.2d 172, 174, citing **Corpus Juris.**
N.D.—Hellstrom v. First Guaranty Bank, 209 N.W. 379, 385, 54 N.D. 322, citing **Corpus Juris.**
Pa.—William Schuette & Co. v. Swank, 109 A. 531, 265 Pa. 576—Hoffman v. Berwind-White Coal Mining Co., 109 A. 234, 236, 265 Pa. 476.
Tex.—Grayce Oil Co. v. Peterson, 98 S.W.2d 781, 128 Tex. 550, affirming Peterson v. Grayce Oil Co., Civ.App., 37 S.W.2d 367.
Wash.—State v. City of Hoquiam, 286 P. 286, 155 Wash. 678, modified on other grounds 287 P. 670, 155 Wash. 678.
22 C.J. p 578 note 82.
"Market value is not a question of science and skill upon which experts alone may give an opinion."—Hoffman v. Berwind-White Coal Mining Co., supra.

Estimating value is "on the border line between the domain of general and expert knowledge."—Ewing v. Goode, C.C.Ohio, 78 F. 442, 444.

Knowledge of facts

Value can be shown by opinion of any competent person having knowledge of facts, whether he is expert or ordinary witness.—Arkansas Natural Gas Co. v. Sartor, C.C.A.La., 78 F.2d 924, certiorari denied Sartor v. Arkansas Natural Gas Co., 56 S. Ct. 381, 296 U.S. 656, 80 L.Ed. 467.

When the witness knows the property, he need not be an expert to testify as to its value.—Alabama Great Southern R. Co. v. Mims, 92 So. 548, 207 Ala. 331.

Witness need not be a dealer in particular kind of property.—Atlantic Coast Line R. Co. v. Enterprise Oil Co., 101 So. 605, 211 Ala. 676.

39. U.S.—Welch v. Tennessee Valley Authority, C.C.A.Tenn., 108 F. 2d 95, certiorari denied Welch v. U. S. ex rel. and for Use of Tennessee Valley Authority, 60 S.Ct. 889, 309 U.S. 688, 84 L.Ed. 1030—Lewis v. Tennessee Valley Authority, C.C.A.Tenn., 108 F.2d 95, certiorari denied Lewis v. U. S. ex rel. and for Use of Tennessee Valley Authority, 60 S.Ct. 889, 309 U.S. 688, 84 L.Ed. 1030—Morton Butler Timber Co. v. U. S., C.C.A. Tenn., 91 F.2d 884—Union Trust Co. of Cleveland, Ohio v. Woodrow Mfg. Co., C.C.A.Iowa, 63 F.2d 602, 607, quoting **Corpus Juris.**
Ill.—Mauvaisterre Drainage & Levee Dist. v. Wabash Ry. Co., 132 N.E. 559, 299 Ill. 299, 22 A.L.R. 944.
Mich.—Watrous v. Bialy's Estate, 192 N.W. 628, 631, 222 Mich. 137, quoting **Corpus Juris.**
Mo.—Lee v. Allen, App., 120 S.W.2d 172, 174, citing **Corpus Juris.**
N.D.—Hellstrom v. First Guaranty Bank, 209 N.W. 379, 385, 54 N.D. 322, citing **Corpus Juris.**
Tex.—Grayce Oil Co. v. Peterson, 98 S.W.2d 781, 128 Tex. 550, affirming Peterson v. Grayce Oil Co., Civ. App., 37 S.W.2d 367—Lower Colorado River Authority v. Hughes, Civ.App., 122 S.W.2d 222, error dismissed.
Vt.—Houghton v. Grimes, 151 A. 642, 103 Vt. 54—Slayton v. Drown, 107 A. 307, 93 Vt. 290.
22 C.J. p 579 note 84.
"A witness need not be qualified in the highest degree, nor in any particular degree, to make his opinion on a question of value . . . admissible. . . . It suffices that he has some peculiar qualification, more knowledge of the subject than jurors are supposed ordinarily to have."—Cochran v. Craig, 106 S.E. 633, 639, 88 W.Va. 281.

40. Cal.—Willard v. Valley Gas & Fuel Co., 182 P. 32, 180 Cal. 561.
Ind.—Southern Surety Co. v. Calvery, 143 N.E. 626, 195 Ind. 247.
22 C.J. p 577 note 71, p 579 note 86.

41. Vt.—Houghton v. Grimes, 151 A. 642, 103 Vt. 54.
22 C.J. p 580 note 93.

42. Ala.—Stark & Oldham Bros. Lumber Co. v. Burford, 109 So. 148, 215 Ala. 68—Ruffin Coal & Transfer Co. v. Rich, 108 So. 600, 214 Ala. 622—Louisville & N. R. Co. v. Whitley, 105 So. 661, 213 Ala. 525—Atlantic Coast Line R Co. v. Enterprise Oil Co., 101 So. 605, 211 Ala. 676.
Colo.—City and County of Denver v. Lyttle, 103 P.2d 1, 106 Colo. 157—Hoover v. Shott, 189 P. 848, 68 Colo. 385.
Ga.—Speir v. Westmoreland, 149 S. E. 422, 40 Ga.App. 302—Wilson v. City of Bainbridge, 116 S.E. 543, 29 Ga.App. 692.

Such knowledge as would serve as a reasonable basis for an opinion must be shown.
Minn.—Quinn v. Zimmer, 239 N.W. 902, 184 Minn. 589.
Pa.—Westinghouse Air Brake Co. v. City of Pittsburgh, 176 A. 13, 316 Pa. 372.
Tex.—Lancaster v. Rogers & Adams, Civ.App., 235 S.W. 643, affirmed, Com.App., 248 S.W. 660.

Officer of shipper

In action against carrier for deterioration of peanuts on account of unreasonable delay, secretary-treasurer of shipper was held qualified to give his opinion as to market value of peanuts at destination in another state.—Atlantic Coast Line R. Co. v. Enterprise Oil Co., 101 So. 605, 211 Ala. 676.

43. Minn.—Apitz v. City of New Ulm, 248 N.W. 733, 189 Minn. 205.

44. Cal.—Converse v. Ferguson, 134 P. 977, 166 Cal. 1.
22 C.J. p 692 note 83.

45. N.Y.—Babcock v. Raymond, 2 Hilt. 61.

ness must know the value of property of the type or class involved,[46] and, unless he is testifying in response to a hypothetical question, he must have personal knowledge of the property to be valued,[47] particularly where the value of the property depends on something peculiar to itself.[48]

Where the witness testifies to the value of a class or type of property, rather than to the value of the particular property involved, he need not have personal knowledge of the property involved.[49]

The witness, to be qualified to testify as to the value of the personal property in issue, must know the market value of such property;[50] but he need not have personal knowledge of actual sales.[51] Participation in, presence at, or knowledge of, sales of similar property is, however, an element of qualification.[52]

Dealers. Generally a dealer in property such as that involved in the litigation is a qualified[53] and expert[54] witness as to its value; indeed, trading in such property is an element of qualification for any witness.[55]

Question for court. Whether or not a witness is qualified to testify as to value is a preliminary question for the trial court,[56] and the determination of the question rests largely in its discretion.[57]

Pa.—Bachert v. Lehigh Coal & Navigation Co., 57 A. 765, 208 Pa. 362.
22 C.J. p 692 note 85.

46. Ill.—Mauvaisterre Drainage & Levee Dist. v. Wabash Ry. Co., 132 N.E. 559, 299 Ill. 299, 22 A.L.R. 944.
N.Y.—In re Bradford's Estate, 300 N.Y.S. 92, 165 Misc. 520.
Or.—Patterson v. Babcock & Peets, 274 P. 903, 128 Or. 476.
Pa.—Miller v. Washington Mut. Fire Ins. Co., 7 Sch.Reg. 259.
Wis.—State v. Stauber, 207 N.W. 409, 190 Wis. 310.
22 C.J. p 579 note 86.

47. N.Y.—In re Bradford's Estate, 300 N.Y.S. 92, 165 Misc. 520.
Or.—Patterson v. Babcock & Peets, 274 P. 903, 128 Or. 476.
Wis.—State v. Stauber, 207 N.W. 409, 190 Wis. 310.

Knowledge of the value of that class of property is insufficient where it is not coupled with knowledge of the property to be valued. —Fowler v. National City Bank of Rome, 176 S.E. 113, 49 Ga.App. 435.

Extent of knowledge

"There can be no rule of law defining how much a witness must know of property before his opinion as to its value will be heard. He must be sufficiently acquainted with it to form some estimate as to its value."—Apitz v. City of New Ulm, 248 N.W. 733, 735, 189 Minn. 205.

Bank's assets

Admission of evidence as to insolvency of bank, based on conclusion that value of securities of bank was less than face value because of depressed value of each item of bank's assets, was held reversible error, where witness was without personal knowledge of values of assets, of which his knowledge was confined to information in data prepared by, and on information of, others.—Kerr v. Dorchester, Tex.Civ.App., 93 S.W.2d 758, error dismissed.

48. Tex.—Grayce Oil Co. v. Peterson, 98 S.W.2d 781, 128 Tex. 550, affirming Peterson v. Grayce Oil Co., Civ.App., 37 S.W.2d 367.

49. Cal.—Pann v. Barry, 4 P.2d 791, 118 Cal.App. 127.
Tex.—O'Brien v. McDow, Civ.App., 8 S.W.2d 561, error dismissed.
22 C.J. p 702 notes 56, 57.

50. Pa.—Lattavo v. Virginia Fire & Marine Ins. Co., 88 Pa.Super. 433.
22 C.J. p 580 note 89.

51. Neb.—Greeley County v. Gebhardt, 89 N.W. 753, 2 Neb. (Unoff.) 661.

52. Mich.—Continental Ins. Co. v. Horton, 28 Mich. 173.
N.J.—Ross v. Palisades Interstate Park Comrs., 101 A. 60, 90 N.J. Law 461.
22 C.J. p 578 notes 74, 75, p 586 note 67.

One who has merely heard of sales is not thereby qualified.—Thompson v. Moiles, 8 N.W. 577, 46 Mich. 42—22 C.J. p 577 note 71 [a].

53. Tex.—Chicago, R. I. & G. R. Co. v. Jones, Civ.App., 118 S.W. 759.
22 C.J. p 578 note 74 [b].

54. Cal.—Altschul v. Alexander, 224 P. 760, 65 Cal.App. 526.
Conn.—Ford v. H. W. Dubiske Co., 136 A. 560, 105 Conn. 572.
Mich.—Tatro v. Baker-Fisk-Hugill Co., 184 N.W. 449, 215 Mich. 623.
Tex.—Security Motor Co. v. Chestnut, Civ.App., 244 S.W. 385—Kansas City, M. & O. R. Co. of Texas v. O'Connell, Civ.App., 210 S.W. 757, dismissed for want of jurisdiction.
Wash.—Great Western Motors v. Hibbard, 192 P. 958, 112 Wash. 541.

55. Mo.—Harris v. A. P. Nichols Inv. Co., App., 25 S.W.2d 484.
22 C.J. p 580 note 90.

56. U.S.—Hays v. Harris, C.C.A. Ark., 78 F.2d 66, certiorari denied 56 S.Ct. 134, 296 U.S. 613, 80 L. Ed. 435—Union Trust Co. of Cleveland, Ohio, v. Woodrow Mfg. Co., C.C.A.Iowa, 63 F.2d 602.
Ala.—Hollingsworth v. Corbin, 101 So. 843, 212 Ala. 104.
Ga.—McDuffie County v. Gunn, 177 S.E. 363, 50 Ga.App. 198—Atlanta Title & Trust Co. v. Davis, 136 S.E. 164, 36 Ga.App. 257.
Idaho.—Thibadeau v. Clarinda Copper Mining Co., 272 P. 251, 47 Idaho 119.
Mass.—Goodyear Park Co. v. City of Holyoke, 11 N.E.2d 439, 298 Mass. 510—Sacks v. McKane, 183 N.E. 140, 281 Mass. 11.
Or.—State v. Mohler, 237 P. 690, 115 Or. 562, petition denied 239 P. 193, 115 Or. 562.
Pa.—Hoffman v. Berwind-White Coal Mining Co., 109 A. 234, 265 Pa. 476.
Vt.—Rutland Sash & Door Co. v. Gleason, 126 A. 577, 98 Vt. 215.
22 C.J. p 581 note 97.

The question of qualification to pass on value is one of fact, but the question of the sufficiency of the evidence to show qualification is one of law.—Wood v. Manufacturers & Merchants Mut. Ins. Co., 195 A. 667, 89 N.H. 213.

57. U.S.—Jones v. U. S., Or., 42 S.Ct. 218, 258 U.S. 40, 66 L.Ed. 453, affirming, C.C.A., 265 F. 235—Morton Butler Timber Co. v. U. S., C.C.A.Tenn., 91 F.2d 884—Pacific Live Stock Co. v. Warm Springs Irr. Dist., C.C.A.Or., 270 F. 555.
Ala.—Pryor v. Limestone County, 160 So. 700, 230 Ala. 295.
Ark.—Bridgman v. Baxter County, 148 S.W.2d 673.
Ill.—People ex rel. McDonough v. Goldberg, 188 N.E. 428, 354 Ill. 423.
Iowa.—Vanarsdol v. Farlow, 203 N.W. 794, 200 Iowa 495.
Me.—Grant v. Dolley, 163 A. 85, 131 Me. 500.
Mass.—Lajoie v. Milliken, 136 N.E. 419, 242 Mass. 508.
Minn.—Apitz v. City of New Ulm, 248 N.W. 733, 189 Minn. 205—Klaseus v. Meester, 217 N.W. 593, 173 Minn. 468.
Mo.—Rooney v. Yellow Cab & Bag-

Proof of qualification. Before a witness may testify as to value, a foundation must be laid by proof of his qualifications.[58]

Assertion of knowledge. The competency of a witness depends on his knowledge, not on his assertion of knowledge.[59] Nevertheless, the witness' claim to knowledge may be sufficient to establish prima facie his qualifications,[60] leaving the fact of actual knowledge to be tested on cross-examination.[61]

The extent of the knowledge, if sufficient knowledge is shown to render the testimony competent, affects only the weight of the testimony.[62]

Interested witness. That the witness is interested does not render his opinion inadmissible.[63]

gage Co., App., 269 S.W. 669, 673, citing **Corpus Juris.**
Pa.—Lutz v. Allegheny County, 195 A. 1, 327 Pa 587—Brewer v. Blue Mountain Consol. Water Co., 191 A. 403, 126 Pa.Super. 553.
R.I.—McGovern v. Michael, 6 A.2d 709, 62 R.I. 485, modified on other grounds 9 A.2d 274—Huff v. Knight, 192 A. 470, 58 R.I. 257.
Tenn.—Union Traction Co. v. Anderson, 242 S.W. 876, 146 Tenn. 476, 25 A.L.R. 1496.
Tex.—Foley Bros. Dry Goods Co. v. Settegast, Civ.App., 133 S.W.2d 228, error refused—Humphrey v. Stidham, Civ.App., 124 S.W.2d 921—General Motors Acceptance Corporation v. Killingsworth, Civ. App., 54 S.W.2d 266, error dismissed—International - Great Northern R. Co. v. Motley, Civ. App., 18 S.W.2d 782—Murray v. Morris, Civ.App., 17 S.W.2d 110, error dismissed—Humble Oil & Refining Co. v. McLean, Civ.App., 268 S.W. 179, reversed on other grounds, Com.App., 280 S.W. 557.
Utah.—Mary Jane Stevens Co. v. First Nat. Bldg. Co., 57 P.2d 1099, 89 Utah 456—Salt Lake & U. R. Co. v. Schramm, 189 P. 90, 56 Utah 53.
Wis.—In re Oklahoma Ave. in City of Milwaukee, 190 N.W. 1001, 179 Wis. 136.
Review of trial court's determination see Appeal and Error § 1644.

58. Cal.—Coast Counties Gas & Electric Co. v. Miller & Lux, 5 P. 2d 34, 118 Cal.App. 140.
Colo.—City and County of Denver v. Lyttle, 103 P.2d 1, 106 Colo. 157—Hoover v. Shott, 189 P. 848, 68 Colo. 385.
D.C.—Consumers' Ice Co. v. Burnet, 50 F.2d 341, 60 App.D.C. 191.
Ill.—City of Elmhurst v. Rohmeyer, 130 N.E. 761, 297 Ill. 430.
Minn.—Finberg v. St. Paul Gaslight Co., 170 N.W. 696, 141 Minn. 486.
Or.—In re Clymer's Estate, 85 P.2d 365, 160 Or. 359.
Pa.—Kriner v. Dinger, 147 A. 830, 297 Pa. 576—Di Foggi v. Commercial Union Assurance Co., 83 Pa.Super. 518—Long v. Myers' Estate, 22 West.Co.L.J. 82.
Tex.—Pioneer Building & Loan Ass'n v. Compton, Civ.App., 138 S.W.2d 884—Callihan v. Fort Worth Well Machinery & Supply Co., Civ.App., 88 S.W.2d 1057, error dismissed—Puckett v. Big Lake State Bank, Civ.App., 73 S.W.2d 893, error refused.
Utah.—Heywood v. Ogden Motor Car Co., 6 P.2d 171, 78 Utah 564.
Cross-examination as to qualifications see infra § 560.

Evidence as to the qualifications of the witness is admissible.
Md.—Knight v. Knight, 141 A. 706, 155 Md. 243.
Miss.—Town of Union v. J. R. Buchwalter Lumber Co., 101 So. 561, 136 Miss. 409.
Mo.—City of St. Louis v. Sheahan, 36 S.W.2d 951, 327 Mo. 305.
N.Y.—Kingston Braid Mills v. Aboff, 179 N.Y.S. 127.

Limitation on showing of qualification
In proceedings for condemnation of land in city of Decatur for park purposes, the limiting of the landowners in showing that their witnesses as to value were acquainted with history and development of the city was not abuse of discretion, as against contention jury might have given greater weight to testimony if landowners had been permitted to show at length all witnesses knew concerning the city.—Decatur Park Dist. v. Becker, 14 N. E.2d 490, 368 Ill. 442.

59. Ky.—Kentucky Hydroelectric Co. v. Reister, 287 S.W. 357, 216 Ky. 303.

60. Ala.—American Ins. Co. of Newark, N. J., v. Fuller, 140 So. 555, 556, 224 Ala. 387, quoting **Corpus Juris.**
Del.—Terry v. American Fruit Growers, 139 A. 259, 3 W.W.Harr. 497.
Iowa.—Millard v. Northwestern Mfg. Co., 205 N.W. 979, 200 Iowa 1063.
Mo.—Cities Service Gas Co. v. Peak, 54 S.W.2d 482, 227 Mo.App. 515.
Okl.—Chicago, R. I. & P. Ry. Co. v. Lawton Grain Co., 221 P. 1013, 94 Okl. 289.
Tex.—Moody v. Castleberry, Civ. App., 151 S.W.2d 960—Page v. Estes, Civ.App., 142 S.W.2d 292, error dismissed, judgment correct—North East Texas Motor Lines v. Hodges, Civ.App., 141 S.W.2d 386, error granted—Wilson v. Barbour, Civ.App., 135 S.W.2d 169, error dismissed—City of Trinity v. McPhail, Civ.App., 131 S.W.2d 803—McDaniel Bros. v. Wilson, Civ. App., 70 S.W.2d 618, error refused—Texas Pacific Coal & Oil Co. v. Taylor, Civ.App., 47 S.W.2d 1110—City of Waco v. Roberts, Civ. App., 12 S.W.2d 263, affirmed 48 S.W.2d 577, 121 Tex. 217—Fort Worth & D. S. P. Ry. Co. v. Judd, Civ.App., 4 S.W.2d 1032, error dismissed—Central State Bank of Coleman v. Henderson, Civ.App., 286 S.W. 518—Foster v. Burgin, Civ.App., 244 S.W. 244—Commercial Acceptance Trust v. Parmer, Civ.App., 241 S.W. 586—Payne v. White House Lumber Co., Civ. App., 231 S.W. 417.
Wash.—Wilson v. Pacific Power & Light Co., 17 P.2d 846, 171 Wash. 232.
Wyo.—Davis v. Graham, 225 P. 789, 794, 31 Wyo. 239, citing **Corpus Juris.**
22 C.J. p 580 note 95, p 700 note 41 [a].

Sufficient to invoke trial court's discretion
Unconditional statement of plaintiff that he knew values of second-hand trucks at particular time and place was sufficient to invoke discretion of trial court whether plaintiff should be permitted to testify as to cash market value of his truck before and after the collision, and weight to be given such testimony after its admission was for jury.—North East Texas Motor Lines v. Hodges, Tex.Civ.App., 141 S.W.2d 386, error granted—22 C.J. p 588 note 85 [b].

Insufficient assertion of knowledge
Witness who testified that he had some idea about the price of horses in his county was not qualified to state his opinion concerning market value of the plaintiff's horses.—Moody v. Castleberry, Tex.Civ.App., 151 S.W.2d 960.

61. Tex.—Moody v. Castleberry, supra.
22 C.J. p 580 note 96.

62. Ind.—Lowe v. Swafford, 199 N. E. 709, 209 Ind. 514, 103 A.L.R. 1222.
Pa.—Altman v. Lande, 84 Pa.Super. 399.
22 C.J. p 586 note 71.

63. Tex.—Willard v. Whitaker, Civ. App., 153 S.W.2d 878.

(2) Competency of Owner Generally

The owner is generally regarded as qualified to testify as to the value of his property.

Although there is some authority to the contrary,[64] it is generally held that an owner is qualified by the fact of ownership to testify to the value of his property,[65] and he is presumed to know its value.[66] The owner's competency extends to intangible property,[67] such as the good will of a business.[68]

The rule that an owner is qualified to testify to the value of his property does not rest on the fact that the owner has legal title,[69] but rather on the fact that ordinarily the owner of property knows the property intimately and is familiar with its value.[70]

Absence of knowledge. Where it appears that the owner does not know the value of the property, his opinion as to its value is not admissible;[71] but

64. Mont.—Roy v. Clark, 215 P. 232.

65. U.S.—Baltimore American Ins. Co. of New York v. Pecos Mercantile Co., C.C.A.N.M., 122 F.2d 143—Sacramento Suburban Fruit Lands Co. v. Soderman, C.C.A.Cal., 36 F.2d 934.
Cal.—Isenberg v. Sherman, 298 P. 1004, 212 Cal. 454, rehearing denied 299 P. 528, 212 Cal. 454, and motion denied 7 P.2d 1006, certiorari denied 52 S.Ct. 501, 286 U.S. 547, 76 L.Ed. 1283—Watterson v. Knapp, 95 P.2d 154, 35 Cal.App. 2d 283—Burns v. Osborne-Fitz-Patrick Finance Co., 282 P. 419, 101 Cal.App. 680.
Idaho.—Garrett v. Neitzel, 285 P. 472, 48 Idaho 727.
Ill.—Hebard v. Riegel, 67 Ill.App. 584.
Iowa.—Jeffries v. Snyder, 81 N.W. 678, 110 Iowa 359.
Kan.—Brenneisen v. Phillips, 45 P. 2d 867, 868, 142 Kan. 98, citing **Corpus Juris**—Lawson v. Southern Fire Ins. Co., 21 P.2d 387, 137 Kan. 591.
Me.—Kerr v. Great Atlantic & Pacific Tea Co., 149 A. 618, 129 Me. 48.
Md.—Bresnan v. Weaver, 135 A. 584, 151 Md. 375.
Mass.—Meyer v. Adams Express Co., 132 N.E. 672, 240 Mass. 94.
Mo.—Taylor v. St. Louis & H. R. Co., App., 256 S.W. 499.
Mont.—Rasmussen v. O. E. Lee & Co., 66 P.2d 119, 104 Mont. 278.
Ohio.—Village of Lebanon v. Loop, App., 32 N.E.2d 458.
Pa.—Westinghouse Air Brake Co. v. City of Pittsburgh, 176 A. 13, 316 Pa. 372.
Tenn.—Pruitt v. Williams, 106 S.W. 2d 892, 897, 21 Tenn.App. 171, citing **Corpus Juris.**
Wash.—Weber v. West Seattle Land & Improvement Co., 63 P.2d 418, 188 Wash. 512.

Owner who assigned his title before the action was instituted may give his opinion as to the value of the property.—Barber v. Motor Inv. Co., 298 P. 216, 136 Or. 361.

Buyer under conditional sales contract

The admissibility of the opinion as to value of the buyer in possession of the property under a conditional sales contract rests in the trial court's discretion.—Menici v. Orton Crane & Shovel Co., 189 N.E. 839, 285 Mass. 499.

Collateral matters

An owner may give his opinion as to the value of his property but he cannot give opinion evidence as to collateral matters unless a proper showing of his qualifications is first made as in the case of any other witness.—Los Angeles County v. Signal Realty Co., 261 P. 536, 86 Cal. App. 704.

Cost of repairs

Rule permitting owner to testify as to value of his property does not permit testimony respecting cost of repairs.—Le Brun v. Richards, 291 P. 825, 210 Cal. 308, 72 A.L.R. 336.

Owner's husband

Rule that owner may testify concerning value of goods covered by fire policy includes owner's husband who bought goods and is familiar with their cost, time of acquisition, and condition at time of fire.—Esper v. Northwestern Nat. Ins. Co. of Milwaukee, Wis., 173 A. 724, 113 Pa. Super. 243.

Possession and use

The owner's competency is said to be limited to property in his possession and use.—Shikany v. Salt Creek Transp. Co., 45 P.2d 645, 48 Wyo. 190.

Subsequent owner

In action for conversion of equipment and machinery, plaintiff's testimony as to value of equipment and machinery four days after conversion, at which time plaintiff became owner of equipment and machinery by bill of sale, was of probative force in determining value of equipment and machinery as of date of conversion.—Weber v. West Seattle Land & Improvement Co., 63 P.2d 418, 188 Wash. 512.

Surviving partner, not shown to have qualified as expert, should not have been permitted to testify as to market value of cattle belonging to partnership.—Dial v. Martin, Tex. Civ.App., 37 S.W.2d 166, reversed on other grounds Martin v. Dial, Com. App., 57 S.W.2d 75, 89 A.L.R. 571.

Village property

The president of a village council, having no special knowledge of nature or quality of materials entering into construction of bridge owned by village, is not within rule that owner of property may testify to its value.—McClure v. Village of Browns Valley, 173 N.W. 672, 143 Minn. 339, 5 A.L.R. 1168.

66. Cal.—Los Angeles County Flood Control Dist. v. Abbot, 76 P.2d 188, 24 Cal.App.2d 728.
Idaho.—Beech v. American Surety Co. of New York, 51 P.2d 213, 56 Idaho 159.
Kan.—Brenneisen v. Phillips, 45 P. 2d 867, 868, 142 Kan. 98, citing **Corpus Juris**—Lawson v. Southern Fire Ins. Co., 21 P.2d 387, 137 Kan. 591.
Mass.—Meyer v. Adams Express Co., 132 N.E. 672, 240 Mass. 94.
Wash.—Weber v. West Seattle Land & Improvement Co., 63 P.2d 418, 188 Wash. 512.

67. Ohio.—Brookins v. National Refining Co., 160 N.E. 97, 26 Ohio App. 546.

68. N.Y.—White v. Jones, 79 N.Y.S. 583, 79 App.Div. 373, 12 N.Y.Ann. Cas. 277.

69. Mass.—Menici v. Orton Crane & Shovel Co., 189 N.E. 839, 285 Mass. 499.

70. Mass.—Maher v. Commonwealth, 197 N.E. 78, 291 Mass. 343—Menici v. Orton Crane & Shovel Co., 189 N.E. 839, 285 Mass. 499.
Mo.—Finn v. Indemnity Co. of America, App., 297 S.W. 175.
Ohio.—Detroit and I. R. Co. v. Vogeley, 153 N.E. 86, 21 Ohio App. 88.
Wyo.—Shikany v. Salt Creek Transp. Co., 45 P.2d 645, 48 Wyo. 190.

Unusual property

"Where the property is not what may be fairly termed of the common usual and ordinary nature . . . the owner's relation to his property is such that it may be fairly regarded as creating in and of itself a species of special knowledge, with respect to its value."—Ligon v. Brooks, 196 A. 200, 201, 9 W.W. Harr., Del., 113.

71. Ala.—Sykes v. Wood, 91 So. 320, 206 Ala. 534.

it has been held that the owner's lack of knowledge of the value of his property goes to the weight, but not the competency, of his testimony.[72]

Property of corporation. It has been held that the rule that the owner is qualified applies to corporate as well as individual owners, and that the managing officer of a corporation may testify as to the value of property owned by the corporation;[73] but it has been held that a director or stockholder of a corporation is not by virtue of that fact competent to testify as to the value of the corporation's property.[74]

Proof of qualification. Although there is authority to the contrary,[75] it is generally held that an owner may testify to the value of his property without any foundation being laid other than the fact of his ownership.[76]

Qualification under general rules. In a number of cases, the general rules as to qualification to give an opinion as to value have been applied to owners, and they have been held competent to testify without special reference to their ownership.[77]

c. Basis of Opinion

Generally a witness as to value may base his opinion on all those sources of information to which business men usually resort in seeking to determine value, and he may state such of the data on which his opinion is based as are relevant and as to which he is competent to testify.

There is authority for the view that the testimony of a witness as to value should be limited on

Minn.—Foot v. Yorkshire Fire Ins. Co., 286 N.W. 400, 205 Minn. 478.

Conclusion based on experts' opinions

Where the owner's conclusion as to value is not based on his own knowledge, but on conferences with experts, his testimony is not admissible.—Maher v. Commonwealth, 197 N.E. 78, 291 Mass. 343.

Ownership as prima facie proof of qualification

General rule that owner of property may testify to his opinion of its value is presumptive only, does not dispense with proof of qualification, and accepts proof of ownership only as prima facie proof of qualification in the absence of negative circumstances.—Ryan v. Cooper, 205 N.W. 302, 201 Iowa 220.

Value of share in partnership

In partners' action against copartner, his wife, and another for conspiracy to defraud, partners were incompetent to testify as to what their share of the partnership was worth, since an answer to such question involved complicated questions as to the value of realty, machinery, and equipment, problems of depreciation, and ascertainment of indebtedness.—Novic v. Fenics, 11 A.2d 871, 337 Pa. 529.

Value of fur

In action for conversion of fur, testimony as to the reasonable price of such fur by owner, who testified that she had purchased fur in Vienna, and that she had gone to some stores in New York to try to buy a fur of the same size, quality, and appearance, but who did not pretend to be an expert, was incompetent.—Berthel v. Auspitz, 184 N.Y.S. 469.

72. Cal.—Isenberg v. Sherman, 298 P. 1004, 212 Cal. 454, rehearing denied 299 P. 528, 212 Cal. 454, and motion denied 52 S.Ct. 501, 286 U. S. 547, 76 L.Ed. 1283—Zeller v. Knapp, 26 P.2d 704, 135 Cal.App. 122.

Me.—Kerr v. Great Atlantic & Pacific Tea Co., 149 A. 618, 129 Me. 49.

Mo.—State ex rel. Terry v. Ace Storage & Moving Co., App., 135 S.W. 2d 363.

Wash.—Wicklund v. Allraum, 211 P. 760, 122 Wash. 546.

"The owner of an article, whether he is generally familiar with such value or not, is entitled to testify as to its worth."—Graham v. Cohen, 295 P. 46, 111 Cal.App. 131.

Disclosures made on cross-examination as to the basis of the opinion may affect the weight, but not the admissibility of the opinion.—Beech v. American Surety Co. of New York, 51 P.2d 213, 56 Idaho 159.

73. U.S.—Travelers Indemnity Co. v. Plymouth Box & Panel Co., C. C.A.N.C., 99 F.2d 218.

N.D.—Hellstrom v. First Guaranty Bank, 209 N.W. 212, 54 N.D. 166, 45 A.L.R. 1487.

Wash.—Weber v. West Seattle Land & Improvement Co., 63 P.2d 418, 188 Wash. 512.

74. N.D.—Company A, First Regiment, North Dakota National Guard Training School v. Hughes, 193 N.W. 144, 49 N.D. 626.

Pa.—Westinghouse Air Brake Co. v. City of Pittsburgh, 176 A. 13, 316 Pa. 372.

75. Cal.—McGowan v. Burg Bros., 210 P. 545, 59 Cal.App. 219.

76. Del.—Ligon v. Brooks, 196 A. 200, 9 W.W.Harr. 113.

Idaho.—Beech v. American Surety Co. of New York, 51 P.2d 213, 56 Idaho 159.

Minn.—Smith v. Travelers Ins. Co., 291 N.W. 516, 207 Minn. 349—Foot v. Yorkshire Fire Ins. Co., 286 N. W. 400, 205 Minn. 478.

N.D.—George v. Odenthal, 225 N.W. 323, 58 N.D. 209—Watson v. Nelson, 172 N.W. 823, 42 N.D. 102.

Prima facie proof of ownership is sufficient to qualify plaintiff to make an estimate of the reasonable value of the property.—Klind v. Valley County Bank of Hinsdale, 222 P 439, 69 Mont. 386.

Owner can testify without qualifying as expert

Tenn.—Pruitt v. Williams, 106 S. W.2d 892, 897, 21 Tenn.App. 171, citing **Corpus Juris.**

Wash.—State ex rel. Bremerton Bridge Co. v. Superior Court for Kitsap County, 77 P.2d 800, 194 Wash. 196.

77. Ga.—Bainbridge Power Co. v. Ivey, 144 S.E. 825, 38 Ga.App. 586.

Iowa.—Jones v. Automotive Ins. Co., 197 N.W. 448, 197 Iowa 513.

Kan.—Sternbock v. Consolidated Gas Utilities Corporation, 98 P.2d 162, 151 Kan. 81.

Mo.—Cothren v. Kansas City Laundry Service Co., App., 242 S.W. 167.

S.C.—South Carolina Public Service Authority v. Spearwant Liquidating Co., 13 S.E.2d 605, 196 S.C. 481.

Tex.—London & Lancashire Ins. Co. v. Higgins, Civ.App., 68 S.W.2d 1056, error dismissed—St. Mary's Oil Engine Co. v. Allen-Morrow Co., Civ.App., 20 S.W.2d 266—Texas Interurban Ry. Co. v. Halford, Civ.App., 299 S.W. 277—Sparrow v. Tillman, Civ.App., 283 S.W. 877—Humble Oil & Refining Co. v. Woods, Civ.App., 277 S.W. 152, reversed on other grounds Humble Oil & Refining Co. v. Wood, Com. App., 292 S.W. 200, rehearing denied 294 S.W. 197—Foster v. Burgin, Civ.App., 244 S.W. 244—Fort Worth & R. G. Ry. Co. v. Burns, Civ.App., 242 S.W. 295—Commercial Acceptance Trust v. Parmer, Civ.App., 241 S.W. 586—Davis v. Wilson, Civ.App., 241 S.W. 562—Gulf & Interstate Ry. Co. of Texas v. Stephenson, Civ.App., 212 S.W. 215.

Utah.—Salt Lake & U. R. Co. v. Schramm, 189 P. 90, 56 Utah 53.

direct examination to the establishment of his qualifications and the statement of his opinion as to value and should not include the basis or reasons for his opinion.[78] However, it is generally held that a witness as to value may, and should, so far as this is practicable, detail the facts on which his estimate, inference, conclusion, or judgment is based,[79] whether his testimony relates to the value of real[80] or personal[81] property or of services.[82] Indeed, it is held that the estimate should be rejected where the basis for a test as to its reliability is not furnished by a statement of facts on which it is based,[83] or where the basis of fact does not appear to be sufficient.[84]

On the other hand, it is held that the witness need not on direct examination testify as to the basis for his opinion,[85] and that his failure to do so goes to the weight, but not the competency, of his opinion.[86]

78. Ariz.—Viliborghi v. Prescott School, Dist. No. 1 of Yavapai County, 100 P.2d 178, 55 Ariz. 230.

79. Cal.—McElligott v. Freeland, 33 P.2d 430, 436, 139 Cal.App. 143, citing **Corpus Juris.**
Del.—Mills Novelty Co. v. Transeau, 8 A.2d 93, 1 Terry 227.
Ind.—New Jersey, I. & I. R. Co. v. Tutt, 80 N.E. 420, 168 Ind. 205.
Iowa.—Kukkuk v. City of Des Moines, 187 N.W. 209, 193 Iowa 444.
Ky.—City of Newport v. Dorsel Co., 136 S.W.2d 11, 15, 281 Ky. 372, quoting **Corpus Juris.**
Mich.—Gloeser v. Moore, 278 N.W. 781, 786, 284 Mich. 106, citing **Corpus Juris.**
Minn.—Keough v. St. Paul Milk Co., 285 N.W. 809, 205 Minn. 96.
Or.—L. B. Menefee Lumber Co. v. MacDonald, 260 P. 444, 449, 122 Or. 579, citing **Corpus Juris.**
Tex.—Wagner & Chisholm v. Dunham, Civ.App., 246 S.W. 1044.
22 C.J. p 575 note 49, p 594 note 52.

Opinion may be given first; no logic or law requires the witness to give the reasons and elements tending to support his opinion before stating his opinion.
Conn.—Lomas & Nettleton Co. v. City of Waterbury, 188 A. 433, 122 Conn. 228.
Mo.—Cities Service Gas Co. v. Peak, 54 S.W.2d 482, 227 Mo.App. 515.
Tex.—Early-Foster Co. v. Mid-Tex Oil Mills, Civ.App., 208 S.W. 224, error refused.

The elements of damage or of value may be stated.—Rodee v. Detroit F. & M. Ins. Co., 26 N.Y.S. 242, 74 Hun 146—22 C.J. p 576 notes 54, 55.

Evidence of average prices considered by witness giving opinion as to reasonable value of lumber held admissible.—L. B. Menefee Lumber Co. v. MacDonald, 260 P. 444, 122 Or. 579.

Illustration of working of tax valuation system
Where witnesses for both parties fixed value of land according to city's system of valuing property for tax purposes, permitting witness to illustrate working of system was held not error.—City of Houston v. Pillot, Tex.Civ.App., 73 S.W.2d 585, reversed on other grounds, Com. App., 105 S.W.2d 870.

Wide latitude is permitted the witness in stating facts and reasons in support of his opinion.—Abilene & S. Ry. Co. v. Herman, Tex.Civ. App., 47 S.W.2d 915, error dismissed.

80. Iowa.—Kukkuk v. City of Des Moines, 187 N.W. 209, 193 Iowa 444.
22 C.J. p 576 note 50.

81. Ala.—Bynum Bros. v. State, 112 So. 348, 216 Ala. 102.
Or.—L. B. Menefee Lumber Co. v. MacDonald, 260 P. 444, 122 Or. 579.
22 C.J. p 576 note 51.

82. N.Y.—Thames Building & Contracting Co. v. Iaccio, 220 N.Y.S. 376, 128 Misc. 845.
22 C.J. p 576 note 52.

83. Cal.—Miller & Lux v. Pinelli, 257 P. 573, 84 Cal.App. 42.
Idaho.—Nelson v. Bruce, 6 P.2d 140, 51 Idaho 378.
Iowa.—Otte v. James, 206 N.W. 613, 200 Iowa 1353—Smith v. Iowa State Live Stock Ins. Co., 191 N. W. 981, 195 Iowa 250.
Ky.—City of Newport v. Dorsel Co., 136 S.W.2d 11, 15, 281 Ky. 372, citing **Corpus Juris.**
22 C.J. p 576 note 64.

Market reports, price lists, etc.
In action for loss of grain during shipment, permitting witness to state market prices, not from his own knowledge or experience, but from reports, price lists, etc., without introducing such market reports in evidence or establishing their character, was improper.—Klingenberg v. Davis, 268 S.W. 99, 219 Mo.App. 1.

84. Ky.—City of Newport v. Dorsel Co., 136 S.W.2d 11, 15, 281 Ky. 372, quoting **Corpus Juris.**
22 C.J. p 577 note 65.

If factual basis given to support opinion is reasonably sufficient, one shown to be qualified may give testimony having probative value.
U.S.—Ramsay v. U. S., D.C.Mo., 55 F.2d 333.
Miss.—National Bank of Brunswick, Ga., v. Gorenflo, 160 So. 911, 173 Miss. 646.

85. D.C.—W. B. Moses & Sons v. Lockwood, 295 F. 936, 54 App.D.C. 115.

No objection made
Where a witness testified that he had investigated and found that certain lands subject to the lien of a judgment against the owner had increased in value, and no objections were made to the questions or answers, there was no necessity for showing what investigation he had made in order to render his opinion admissible.—Gunsul v. American Surety Co., 225 Ill.App. 76, affirmed 139 N.E. 620, 308 Ill. 312.

86. Vt.—Houghton v. Grimes, 151 A. 642, 103 Vt. 54.
"Where a witness testifies that he is acquainted with the value . . he may testify as to its value, without giving any data as the basis for his conclusion."—Southern Ry. Co. v. Thacker, 179 S.E. 225, 227, 50 Ga.App. 706.

Details forgotten by witness
(1) Testimony of witness as to market value of coal on certain dates was competent, although he testified on basis of present recollection of market prices, and cross-examination showed he had no present recollection, where he was shown competent as an expert to testify from market quotations as to market conditions and prices.—Kalamazoo Ice & Fuel Co. v. Gerber, C.C.A. Mich., 4 F.2d 235.

(2) Trial court did not err in permitting witness to testify as to size and value of an estate, although at time of trial witness did not remember particular items of estate, where witness had examined estate's securities, made list of them, and formed judgment as to value of estate at time of making list.—Hazelwood v. Woodward, 126 S.W.2d 857, 277 Ky. 447.

Expert's refusal to give underlying data by which he arrived at opinion with relation to value of labor performance did not render testimony incompetent.—Ohio Associated Telephone Co. v. Geiger, D.C. Ohio, 3 F.Supp. 997.

Elements to be considered. In reaching his opinion as to value the witness should consider all elements of value and all facts which a reasonable buyer or seller would consider.[87] An opinion, based on a consideration of only one element of value, such as net rental income,[88] the productivity of the property,[89] what owners of similar property were asking,[90] or its cost of production,[91] is not admissible; but, on the other hand, an opinion based solely on reproduction cost has been held competent although entitled to little weight.[92] The witness should consider only proper elements of value in reaching his opinion;[93] the consideration of an im-

87. U.S.—Anglo California Nat. Bank of San Francisco v. Lazard, C.C.A.Cal., 106 F.2d 693, certiorari denied 60 S.Ct. 379, 308 U.S. 624, 84 L.Ed. 521.
Ala.—Pickens County v. Jordan, 196 So. 121, 239 Ala. 589.
Cal.—Citron v. Fields, 85 P.2d 534, 30 Cal.App.2d 51.
Colo.—City and County of Denver v. Lyttle, 103 P.2d 1, 106 Colo. 157.
Ky.—Prestonsburg Superior Oil Gas Co. v. Vance, 284 S.W. 405, 215 Ky. 77, 47 A.L.R. 483.
Mass.—Trustees of Boston University v. Commonwealth, 190 N.E. 29, 286 Mass. 57.
Mo.—City of St. Louis v. Buselaki, 80 S.W.2d 853, 336 Mo. 693.
N.Y.—Sparkill Realty Corporation v. State, 4 N.Y.S.2d 679, 254 App.Div. 78, motion denied 4 N.Y.S.2d 1023, 254 App.Div. 800, affirmed 18 N.E.2d 301, 279 N.Y. 656—In re Board of Water Supply of City of New York, 1 N.Y.S.2d 62, 253 App. Div. 38, reversed on other grounds 14 N.E.2d 789, 277 N.Y. 452.
Pa.—Appeal of Stevens, 18 Pa.Dist. & Co. 698.
Tenn.—Mobile & O. R. Co. v. Keith, 6 Tenn.App. 18.
Utah.—Utah Assets Corporation v. Dooley Bros. Ass'n, 70 P.2d 738, 92 Utah 577.
22 C.J. p 587 note 79 [a].

Attorney's fee

In determining compensation to which attorneys were entitled upon a quantum meruit basis, other attorneys were properly permitted to give their opinions as to worth of services based upon amount which it appeared client would recover.—Board of Trustees of Lewis Prichard Charity Fund v. Avis & Angel, W.Va., 6 S.E.2d 9.

Capitalized net income

The testimony of expert witnesses who attempted to estimate value of stock by using test of capitalization of corporate net earnings was not applicable where business was actually a partnership although corporate in form, there were no significant net earnings over a period of years, salaries were always paid by mutual agreement among the three stockholders, and it did not appear that witnesses had had any personal experience in, or knowledge of, the kind of business under consideration on which to base their opinions of proper salaries in the circumstances.—Cook v. Dunbar, R. I., 18 A.2d 658.

Consideration of possible uses

(1) Opinions of market value given by experts who take into consideration adaptability of property for its highest available use are admissible, provided such use is not, as a matter of law, so highly speculative and conjectural as to have no relation to market value.—Metropolitan Water Dist. of Southern California v. Adams, Cal., 116 P.2d 7, prior opinion, App., 99 P.2d 659, rehearing denied 100 P.2d 357.

(2) Evidence that land was worth specified sum in view of suitability for bridge site or ferry site, was held admissible.—Desha v. Independence County Bridge Dist. No. 1, 8 S.W.2d 969, 176 Ark. 253.

(3) Testimony that best use of tract was to hold it for future subdivision purposes was held properly admitted.—Forest Preserve Dist. of Cook County v. Dearlove, 169 N. E. 753, 337 Ill. 555.

(4) Golf architect's testimony that tract was best adapted for use as golf course was held not objectionable as speculative.—Illinois Light & Power Co. v. Bedard, 175 N.E. 851, 343 Ill. 618.

Failure to deduct for obsolescence

That expert witness testifying as to value of property destroyed by fire made no deduction for obsolescence did not render his testimony incompetent.—Northwestern Ohio Natural Gas Co. v. First Congregational Church of Toledo, 184 N.E. 512, 126 Ohio St. 104.

Going value

An industrial plant should be valued as a going concern.—City of Newport v. Dorsel Co., 136 S.W.2d 11, 281 Ky. 372.

Income from property

Witness undertaking to express opinion as to market value of real property must consider income derived from such property.—People ex rel. McDonough v. Chicago Union Lime Works Co., 198 N.E. 1, 361 Ill. 304.

Reproduction cost

In an action for the destruction of plaintiff's cottage by fire, alleged to be due to the negligence of the servants of the gas company in connecting gas pipes, an estimate of a witness, based on reconstruction cost, as to the value of the property destroyed, was properly considered on question of amount of loss, where identity in construction of the cottage destroyed and of new cottage on the same site was first established.—Peterson v. Tidewater Power Co., 111 S.E. 8, 183 N.C. 243.

Schedules of fees and charges

(1) Architects may base opinion as to reasonable value of services on standard for charges made by American Institute of Architects.—Kent v. Darman, R.I., 137 A. 467.

(2) Evidence regarding rental value of contractor's machinery and equipment, based on schedule of costs for keeping equipment on the premises, promulgated by the Associated General Contractors of America, was not so indefinite or uncertain as to require its rejection. —Grand Trunk Western R. Co. v. H. W. Nelson Co., C.C.A.Mich., 116 F.2d 823, rehearing denied 118 F.2d 252.

Testimony based on books of corporation

In telephone rate case, testimony of expert based on company's books concerning annual allowance for reserve for actual depreciation, replacements, and general obsolescence was held competent.—Ohio Associated Telephone Co. v. Geiger, D.C. Ohio, 3 F.Supp. 997.

88. Ill.—People ex rel. McDonough v. Goldberg, 188 N.E. 428, 354 Ill. 423.
Pa.—Cunningham v. Ray, 106 A. 884, 263 Pa. 492—Forster v. Rogers, 93 A. 26, 247 Pa. 54.

89. Pa.—Tiffany v. Delaware, L. & W. R. Co., 105 A. 101, 262 Pa. 300.

90. Ky.—Commonwealth v. Begley, 114 S.W.2d 127, 272 Ky. 289.

91. R.I.—Walworth Bros. v. Guerin, 142 A. 613, 49 R.I. 329.

92. N.J.—Schetty v. Jersey City, 11 A.2d 18, 18 N.J.Misc. 37.

93. Mo.—State ex rel. State Highway Commission v. Pope, 74 S.W. 2d 265, 228 Mo.App. 888.
Pa.—Regina v. Monroe County, 179 A. 36, 319 Pa. 257.

Elements of damage recognized by law

Witnesses' opinion as to value of land not taken in condemnation proceedings must be based on elements of damage recognized by law.—East St. Louis Light & Power Co. v. Cohen, 164 N.E. 182, 333 Ill. 218.

proper element may[94] or may not[95] require the rejection of the opinion, depending on how prejudicial consideration of such element is. The opinion will not be rejected simply because one element of value was not considered,[96] some of the reasons advanced in support of the opinion are unsound,[97] or the witness considered certain speculative possibilities;[98] but an opinion based entirely on a purely speculative use of the land,[99] or on an incorrect standard of value,[1] will be rejected.

Valuation and sales of similar property. It has been held that the witness may fortify his opinion by testimony as to the value of similar property,[2] but it has been held that in the case of land the opinion of the expert must be confined to the land in question, his opinion as to other land in the neighborhood being irrelevant.[3] A witness may testify that his opinion is based on his knowledge as to sales of similar land.[4] The conflict, discussed infra § 593, as to whether evidence of the price

Possibility of locating business elsewhere

In a proceeding to condemn property, a witness cannot base his opinion as to its value upon the "possibility or impossibility of securing other locations" for the business conducted upon it.—Gauley & E. Ry. Co. v. Conley, 100 S.E. 290, 84 W.Va. 489, 7 A.L.R. 157.

Sentimental value should not be considered as an element of value.—Maher v. Commonwealth, 197 N.E. 78, 291 Mass. 343.

Theory as to book value

The testimony on value given by an expert witness, who included stockholders' salaries as officers as they appeared on corporation's records, determined that on date in issue market value of stock of certain other corporations deemed in some particulars fairly comparable to corporation involved averaged about two-thirds of amount of book value and net quick assets, and applied that formula to book value of corporation involved, was inapplicable.—Cook v. Dunbar, R.I., 18 A.2d 658.

Speculative matters

Elements affecting value that depend on events or combinations of occurrences which, while within realm of possibility, are not fairly shown to be reasonably probable should be excluded from consideration in determining market value of land, in eminent domain proceeding, since that would be to allow mere speculation to become a guide for the ascertainment of value.—Metropolitan Water Dist. of Southern California v. Adams, Cal., 116 P.2d 7, prior opinion, App., 99 P.2d 659, rehearing denied 100 P.2d 357.

94. Cal.—Temescal Water Co. v. Marvin, 9 P.2d 335, 121 Cal.App. 512.

Kan.—Russell v. State Highway Commission of Kansas, 77 P.2d 199, 147 Kan. 297, supplementing opinion Russell v. State Highway Commission, 78 P.2d 29, 146 Kan. 634.

Mo.—Missouri Power & Light Co. v. John Hancock Mut. Life Ins. Co., App., 58 S.W.2d 321—Missouri Power & Light Co. v. Creed, App., 32 S.W.2d 783, transferred, see 30 S.W.2d 605, 325 Mo. 1194.

Okl.—Oklahoma Gas & Electric Co. v. Miller Bros. 101 Ranch Trust, 46 P.2d 570, 173 Okl. 101.

"If a witness has based his opinion in a material degree upon elements which cannot legally be considered, without separating such elements from those which may legally be considered, such opinion is not competent."—City of Chicago v. Chicago City Ry. Co., 134 N.E. 44, 45, 302 Ill. 57.

95. Ill.—Chicago Sanitary Dist. v. Loughran, 43 N.E. 359, 160 Ill. 362—Wrenn v. Warble Storage & Furniture Co., 236 Ill.App. 601.

Pa.—Hickman, Williams & Co. v. Wayne Steel Co., 125 A. 306, 280 Pa. 540.

Consideration of an irrelevant matter affects weight, not admissibility, of opinion.

Ala.—Alabama Power Co. v. Berry, 130 So. 541, 222 Ala. 20.

N.Y.—Niagara, Lockport & Ontario Power Co. v. Horton, 247 N.Y.S. 761, 231 App.Div. 402, reversing In re Niagara Lockport & Ontario Power Co., 231 N.Y.S. 72, 133 Misc. 177.

Ohio.—Hickman v. Coshocton Real Estate Co., 15 N.E.2d 648, 58 Ohio App. 38.

96. Ill.—Department of Public Works and Buildings v. Diggins, 27 N.E.2d 826, 374 Ill. 11.

Wash.—Ham, Yearsley & Ryrie v. Northern Pac. Ry. Co., 197 P. 43, 115 Wash. 286, error dismissed Northern Pac. R. Co. v. Ham, Yearsley & Ryrie, 42 S.Ct. 588, 259 U.S. 591, 66 L.Ed. 1079.

97. Cal.—People v. McReynolds, 87 P.2d 734, 31 Cal.App.2d 219.

Mass.—Gray v. Tobin, 156 N.E. 30, 259 Mass. 113.

98. Mo.—Cities Service Gas Co. v. Peak, 54 S.W.2d 482, 227 Mo.App. 515.

99. Ga.—Central Georgia Power Co. v. Stone, 77 S.E. 565, 139 Ga. 416.

Ill.—West Chicago St. R. Co. v. Chicago, 50 N.E. 185, 172 Ill. 198.

1. Miss.—Mississippi State Highway Commission v. Hillman, 198 So. 565, 189 Miss. 850, overruling suggestion of error 195 So. 679.

2. Ky.—Commonwealth v. Begley, 114 S.W.2d 127, 272 Ky. 289.

Mich.—In re Brewster Street Housing Site in City of Detroit, 289 N.W. 493, 291 Mich. 313.

N.J.—In re Housing Authority of City of Newark, 17 A.2d 812, 126 N.J.Law 60—Jersey City v. Meyer, 150 A. 354, 106 N.J.Law 391.

22 C.J. p 577 notes 66–68.

Discretion of court

Allowing a witness who had placed a certain value on the land, for trespass on which the action was brought, to give his judgment of the value of another such piece of the same size in the vicinity, was within the court's discretion, witness having previously testified concerning the elements entering into the value of the property in the vicinity.—Oakland Water Front Co. v. Le Roy, C.C.A.Cal., 282 F. 385.

3. Mass.—City of Revere v. Revere Const. Co., 189 N.E. 73, 285 Mass. 243—McCabe v. City of Chelsea, 163 N.E. 255, 265 Mass. 494.

22 C.J. p 178 note 26.

Benefit from improvement

On objections of property owners to confirmation of drainage district assessment, opinions whether district as a whole would be benefited held incompetent inquiry being limited to benefit to particular land involved.—Beaver Pond Drainage Dist. v. Gray, 173 N.E. 115, 341 Ill. 66.

4. Pa.—Bridgman Realty Corporation v. City of Philadelphia, 177 A. 45, 317 Pa. 449.

Basis of opinion

(1) Since private sales, as a general rule, are not the best test of market value, and are of little weight, except as the terms, conditions, and circumstances were publicly made known an opinion based on such evidence is inadmissible.—Hall v. Delaware, L. & W. R. Co., 105 A. 98, 262 Pa. 292.

(2) Expert testimony as to value of property should not be excluded because not based on sales of other property in vicinity, witness claiming such sales not fairly representative of value.—Burden v. Tax Assessors of City of Newport, 134 A. 9, 47 R.I. 473.

realized on sales of similar land is admissible to prove the value of the land in issue, results in differing views as to whether the witness can on direct examination state the details, such as price, of the sales of similar property on which he bases his opinion of the value of the land in issue; some courts hold that he may,[5] others, that he may not.[6]

Matters not independently admissible. Facts and information which may not be independently admissible may be considered by the witness in reaching his conclusion as to value;[7] thus the witness may consider details as to the cost and price of the property,[8] the value or sale price of similar property,[9] the result of inquiries made of others,[10] commercial circulars,[11] correspondence,[12] or telegrams,[13] market quotations or reports,[14] price lists,[15] prices current,[16] and information derived from the other avenues of information to which business men customarily resort.[17]

Opinion and knowledge of others. The witness' opinion must be his own; he cannot act as a mere conduit for the opinions of others. Thus the opinion is incompetent where the witness has no general knowledge of his own, but is merely transmitting information received from others.[18]

Relevancy and competency of evidence as to basis.

5. Ky.—Commonwealth v. Begley, 114 S.W.2d 127, 272 Ky. 289.
Mich.—In re Brewster Street Housing Site in City of Detroit, 289 N. W. 493, 291 Mich. 313.
N.J.—Jersey City v. Meyer, 150 A. 354, 106 N.J.Law 391.

6. Cal.—City of Los Angeles v. Deacon, 7 P.2d 378, 119 Cal.App. 491—Fishel v. F. M. Ball & Co., 256 P. 493, 83 Cal.App. 128.
Mo.—Mantz v. Maguire, 52 Mo.App. 136.
N.Y.—Meehan v. Kaufman, 226 N.Y. S. 734, 222 App.Div. 456.
Pa.—Pittsburgh Terminal Warehouse & Transfer Co. v. City of Pittsburgh, 198 A. 632, 330 Pa. 72—Bridgman Realty Corporation v. City of Philadelphia, 177 A. 45, 317 Pa. 449.
22 C.J. p 576 note 63 [a], p 577 note 66 [a].

Sales of same or similar property
On direct examination, witnesses called to testify regarding value of certain real property may not testify as to particular transactions such as sales of similar or of the same property.—Thompson v. Stoakes, Cal.App., 115 P.2d 830.

7. Conn.—Vigliotti v. Campano, 133 A. 579, 104 Conn. 464.
The source of his information is relevant to the weight, but not the admissibility, of the opinion of a witness shown to be qualified.—Salt Lake & U. R. Co. v. Schramm, 189 P. 90, 56 Utah 53.

8. Ky.—Boston Ins. Co. v. Faulkner, 89 S.W.2d 332, 262 Ky. 25.
Pa.—City of Erie v. Public Service Commission, 123 A. 471, 278 Pa. 512.

9. Mass.—Davenport v. Haskell, 200 N.E. 409, 293 Mass. 454—Johnson v. City of Lowell, 134 N.E. 627, 240 Mass. 546.
Mich.—Commission of Conservation of Department of Conservation v. Hane, 227 N.W. 718, 248 Mich. 473—Thompson v. Moiles, 8 N.W. 577, 46 Mich. 42.
Mo.—St. Louis Terminal Ry. Co. v. Hieger, 40 S.W. 947, 139 Mo. 315.
Pa.—Pittsburgh Terminal Warehouse & Transfer Co. v. City of Pittsburgh, 198 A. 632, 330 Pa. 72.
Tex.—West v. State, Civ.App., 150 S. W.2d 363.
22 C.J. p 576 note 63, p 577 notes 66–68.

10. U.S.—Baltimore American Ins. Co. of New York v. Pecos Mercantile Co., C.C.A.N.M., 122 F.2d 143.
Cal.—McElliot v. Freeland, 33 P.2d 430, 436, 139 Cal.App. 143, citing **Corpus Juris**—Glantz v. Freedman, 280 P. 704, 705, 100 Cal.App. 611, quoting **Corpus Juris.**
D.C.—New Arcade Co. v. Owens, 258 F. 965, 49 App.D.C. 65.
Ky.—Boston Ins. Co. v. Faulkner, 89 S.W.2d 332, 262 Ky. 25.
Mass.—Johnson v. City of Lowell, 134 N.E. 627, 240 Mass. 546.
Okl.—Hartford Fire Ins. Co. of Hartford, Conn., v. Baker, 260 P. 6, 127 Okl. 166, 55 A.L.R. 796.
22 C.J. p 576 note 56, p 701 note 44.

11. Cal.—Glantz v. Freedman, 280 P. 704, 705, 100 Cal.App. 611, quoting **Corpus Juris.**
22 C.J. p 576 note 57.

12. Cal.—Glantz v. Freedman, supra, quoting **Corpus Juris.**
22 C.J. p 576 note 58.

13. Cal.—Glantz v. Freedman, supra, quoting **Corpus Juris.**
N.C.—Commander v. Smith, 134 S.E. 412, 192 N.C. 159.
22 C.J. p 576 note 59.

14. U.S.—Missouri Pac. R. Co. v. Henderson, 247 S.W. 1070, 157 Ark. 43, reversed on other grounds Davis v. Henderson, 45 S.Ct. 24, 266 U.S. 92, 69 L.Ed. 182.
D.C.—New Arcade Co. v. Owens, 258 F. 965, 49 App.D.C. 65.
Mo.—Howell v. Hines, 249 S.W. 924, 298 Mo. 282—Morrow v. Wabash Ry. Co., App., 276 S.W. 1030.
Tex.—King v. Shawyer, Civ.App., 30 S.W.2d 930—Houston Packing Co. v. Griffith, Civ.App., 144 S.W. 1139.
22 C.J. p 576 note 60, p 701 note 45.

Sole source of knowledge
A witness may testify as to the state of the market in a particular locality respecting a certain commodity during a certain period, when his knowledge is derived solely from the receipt of daily market quotations of the locality during that period.—Pilcher & Dillon v. Smith, 121 S.E. 701, 31 Ga.App. 606.

15. U.S.—Baltimore American Ins. Co. of New York v. Pecos Mercantile Co., C.C.A.N.M., 122 F.2d 143.
Md.—Morris v. Columbian Iron-Works & Dry Dock Co. of Baltimore City, 25 A. 417, 76 Md. 354, 17 L.R.A. 851.
Tex.—Security Motor Co. v. Chestnut, Civ.App., 244 S.W. 385.

Automobile dealers' manual
(1) In action for deceit in sale of automobile, evidence of values from "Red Book" which was not shown to be proper as scientific work on question of automobile values was not competent as basis of opinion evidence.—Kienle v. Mac Fulton, Inc., 174 A. 349, 12 N.J.Misc. 697.

(2) Opinion of dealer in used automobiles regarding car's value, partly based upon manual and partly upon experience, held competent. Conn.—Dressel v. Gregory, 157 A. 417, 114 Conn. 718.
Tex.—Southland Greyhound Lines v. Richards, Civ.App., 77 S.W.2d 272, error dismissed.

16. U.S.—Baltimore American Ins. Co. of New York v. Pecos Mercantile Co., C.C.A.N.M., 122 F.2d 143.
N.C.—Smith v. North Carolina R. Co., 68 N.C. 107.
22 C.J. p 701 note 46.

17. Ga.—Widincamp v. McCall, 104 S.E. 642, 25 Ga.App. 733.
Wyo.—Davis v. Graham, 225 P. 789, 31 Wyo. 239.
22 C.J. p 701 note 47.

Publication making business of reporting market on bonds could be made basis for testimony regarding market value of bonds involved.—King v. Shawver, Tex.Civ.App., 30 S.W.2d 930.

18. Conn.—Burn & Crump v. Metropolitan Lumber Co., 107 A. 609, 94 Conn. 1.

The witness, in giving the data underlying his opinion, is limited to relevant facts to which he is competent to testify;[19] he cannot under the guise of fortifying his opinion state facts which are inadmissible, because irrelevant, or to which he is not competent to testify, as where he lacks personal knowledge.[20] It has been held that where the witness bases his opinion entirely or chiefly on incompetent and inadmissible matters, his testimony must be rejected;[21] but the fact that the witness' knowledge as to market value is largely hearsay will not exclude his opinion,[22] provided the witness gives to such information the sanction of his own general experience and knowledge.[23]

Time and place of knowledge. The opinion may be based on the value of the property at a previous, if not too remote, period,[24] and witnesses have been permitted to testify regarding land values when their knowledge related to lands not in the immediate vicinity.[25]

Explanation of reasons and conclusion. The witness may explain the reasons for his opinion and show how his conclusion was reached.[26]

Mass.—Maher v. Commonwealth, 197 N.E. 78, 291 Mass. 343.
Mont.—Vukmanovich v. State Assur. Co. of Liverpool, England, 264 P. 933, 82 Mont. 52—Morgan v. Hines, 211 P. 778, 65 Mont. 306.
N.Y.—Palmer v. Everton, 180 N.Y.S. 730.
Tex.—Bull Dog Auto Ins. Co. v. Crowley, Civ.App., 281 S.W. 622—Montgomery v. Gallas, Civ.App., 225 S.W. 557.
Utah.—Mary Jane Stevens Co. v. First Nat. Bldg. Co., 57 P.2d 1099, 89 Utah 456.
W.Va.—Virginian Power Co. v. Brotherton, 110 S.E. 546, 90 W.Va. 155.

Discretion of court
On question of property values, court has discretion in determining whether witness is testifying as expert or is merely transmitting others' opinions.—Mary Jane Stevens Co. v. First Nat. Bldg. Co., 57 P.2d 1099, 89 Utah 456.

Opinion based solely on trade paper quotations is not admissible.—Guy v. Commissioner of Internal Revenue, C.C.A., 35 F.2d 139.

Mere inquiry in neighborhood
One is not a competent witness as to the value of a tract of land, with a crop of winter wheat growing thereon, when the only source of his information is from inquiries made in the neighborhood six months after the date the value was fixed.—Beck v. Spring, 193 N.W. 111, 110 Neb. 160, reversed on other grounds 195 N.W. 176, 110 Neb. 160.

Examination of public records
A witness having no direct knowledge of sales in the neighborhood of the land condemned could not testify as to the land's market value based on his examination of public records of conveyances in the neighborhood to ascertain consideration named in the deeds.—Tiffany v. Delaware, L. & W. R. Co., 105 A. 101, 262 Pa. 300.

Question as to another's knowledge
A question calling for the witness' opinion as to what some other person would know is properly excluded.—Jones v. White, 66 So. 605, 189 Ala. 622.

19. Colo.—City and County of Denver v. Quick, 113 P.2d 999.
Tex.—Wichita Falls, R. & F. W. Ry. Co. v. Cooper, Civ.App., 235 S.W. 927.

20. Colo.—City and County of Denver v. Quick, supra.
Mass.—Hunt v. Boston, 25 N.E. 82, 152 Mass. 168.
Or.—Howard v. Merrick, 27 P.2d 891, 145 Or. 573.
Tex.—Wichita Falls, R. & F. W. Ry. Co. v. Cooper, Civ.App., 235 S.W. 927.
"The fact that an expert may use hearsay as a ground of opinion does not make the hearsay admissible."—Johnson v. City of Lowell, 134 N.E. 627, 629, 134 N.E. 627, 240 Mass. 546.

Speculative matters
In proceeding for damages for taking of property for widening of street, court properly excluded testimony as to market value of office space of other buildings in vicinity, it being purely speculative and not having any substantial relevancy to market value of lot.—Greenfield v. City of Philadelphia, 127 A. 768, 282 Pa. 344.

21. Cal.—Metropolitan Water Dist. of Southern California v. Adams, 116 P.2d 7, prior opinion, App., 99 P.2d 659, rehearing denied 100 P.2d 357.
N.Y.—Huntington v. Attrill, 23 N.E. 544, 118 N.Y. 365.
Tex.—Eagle Star & British Dominions Ins. Co. of London, England, v. Head, Civ.App., 47 S.W.2d 625, motion dismissed 53 S.W.2d 768, 122 Tex. 147.
22 C.J. p 589 note 87 [d].

Opinion based on excluded contract
In action for balance of royalties alleged to be due under gas leases entitling lessors to receive as royalties one eighth of market price of all gas produced, exclusion of evidence as to market value of gas at well of witnesses whose only knowledge had been obtained by mere reading of term pipe line purchase contracts, which properly had been excluded was held not error.—Sartor v. United Gas Public Service Co., C.C.A.La., 84 F.2d 436.

22. Conn.—Vigliotti v. Campano, 133 A. 579, 104 Conn. 464.
Ga.—Gulf Refining Co. v. Smith, 139 S.E. 716, 164 Ga. 811.

Weight, not competency
Objection to opinion evidence of value as based on hearsay goes to weight, not admissibility.—Gulf Refining Co. v. Smith, 139 S.E. 716, 164 Ga. 811.

23. Mass.—Shaw v. Keown & McEvoy, 137 N.E. 258, 243 Mass. 221.
Where opinion of witness regarding value was his own, fact that it was formed in part by aid of expert, or of other contractors, did not require exclusion.—Davis v. Southern Surety Co., 153 A. 119, 302 Pa. 21.

24. Ill.—City of Chicago v. Chicago Title & Trust Co., 163 N.E. 17, 331 Ill. 322.
Iowa.—Dumbarton Realty Co. v. L. G. Everist, Inc., 174 N.W. 269.
Tex.—Southland-Greyhound Lines v. Cotten, Civ.App., 55 S.W.2d 1066, reversed on other grounds 91 S.W. 2d 326, 126 Tex. 596.
Utah.—Mary Jane Stevens Co. v. First Nat. Bldg. Co., 57 P.2d 1099, 89 Utah 456.
22 C.J. p 592 note 12.

25. Mass.—Amory v. Melrose, 39 N. E. 276, 162 Mass. 556.
22 C.J. p 592 note 13.

26. Colo.—City and County of Denver v. Quick, 113 P.2d 999.
Pa.—Appeal by Pennsylvania Co. for Insurance on Lives and Granting Annuities, 127 A. 441, 282 Pa. 69—Gardull v. Royal Ins. Co., 2 A.2d 504, 133 Pa.Super. 257.
22 C.J. p 692 note 89.

Reasons for making different statement
It was improper to permit witness who testified to value of certain property to give reasons why he had signed a paper fixing another valuation, since if the paper did not state the true valuation the witness could so testify, and state facts concerning the value fixed, permitting the jury to draw the conclusions.—Mor-

d. Real Property

(1) In general

(2) Qualifications of witness as to value of realty generally

(3) Owner of realty

(1) In General

The value of realty or a change in its value may be proved by the estimate, conclusion, or opinion of a qualified witness.

The value of real property may be proved by the estimate, conclusion, or opinion of a competent witness.[27] Such evidence is admissible to prove the value of an interest in realty,[28] the value of any particular element or part of the property,[29] its

rison v. Jackson, 85 So. 573, 17 Ala. App. 338.

27. U.S.—Welch v. Tennessee Valley Authority, C.C.A.Tenn., 108 F. 2d 95, certiorari denied Welch v. U. S. ex rel. and for Use of Tennessee Valley Authority, 60 S.Ct. 889, 309 U.S. 688, 84 L.Ed. 1030—Lewis v. Tennessee Valley Authority, C.C.A.Tenn., 108 F.2d 95, certiorari denied Lewis v. U. S. ex rel. and for Use of Tennessee Valley Authority, 60 S.Ct. 889, 309 U.S. 688, 84 L.Ed. 1030—Union Trust Co. v. Woodrow Mfg. Co., C.C.A.Iowa, 63 F.2d 602, 607, quoting **Corpus Juris**—U. S. v. Nickerson, C.C.A.Mass., 2 F.2d 502.

Colo.—Wassenich v. City and County of Denver, 186 P. 533, 67 Colo. 456.

Ky.—Kentucky & West Virginia Power Co. v. Saulsbury, 22 S.W.2d 281, 231 Ky. 788.

Mass.—Sheffer v. Rudnick, 196 N.E. 864, 291 Mass. 205.

N.J.—In re United New Jersey Railroad & Canal Co., 140 A. 450, 104 N.J.Law 385.

N.Y.—Argotsinger v. Vines, 82 N.Y. 308—Hirsch v. Weiner, 190 N.Y. S. 111, 116 Misc. 312.

N.C.—Nantahala Power & Light Co. v. Rogers, 178 S.E. 575, 207 N.C. 751—Lambeth v. City of Thomasville, 102 S.E. 775, 179 N.C. 452.

Pa.—Hughes v. Stevens, 36 Pa. 320—Brewer v. Blue Mountain Consol. Water Co., 191 A. 408, 126 Pa. Super. 553.

Tenn.—Green v. Arnold, App., 150 S. W.2d 1075.

Tex.—Humphrey v. Stidham, Civ. App., 124 S.W.2d 921, 924, citing **Corpus Juris**—Independent Shope Brick Co. v. Dugger, Civ.App., 281 S.W. 600, 604, citing **Corpus Juris**, and affirmed, Com.App., 285 S.W. 599.

22 C.J. p 587 note 79, p 696 note 51.

This is an exception to the general rule that witnesses are required to state facts, and not express opinions.—Bridgman v. Baxter County, Ark., 148 S.W.2d 673.

Accepted method of proof

Expert testimony based on all circumstances is accepted method of proving market value of land.—Fiorini v. City of Kenosha, 243 N.W. 761, 208 Wis. 496.

Usual method of proof

The usual way to ascertain market value of real estate is by permitting expert witnesses to state their several methods in ascertaining it.—Richey v. City of San Antonio, Tex.Civ.App., 217 S.W. 214, dismissed for want of jurisdiction.

The market value of realty may be established by the testimony of a competent witness.

Cal.—City of Los Angeles v. Deacon, 7 P.2d 378, 119 Cal.App. 491.

Pa.—Westinghouse Air Brake Co. v. City of Pittsburgh, 176 A. 13, 316 Pa. 372.

R.I.—Aspegren v. Tax Assessors of City of Newport, 125 A. 213.

22 C.J. p 588 note 84, p 701 note 54.

Intrinsic value may be established by estimate of competent witnesses. —Fort Worth & D. C. Ry. Co. v. Amason, Tex.Civ.App., 239 S.W. 359.

As to time long past

Opinion evidence as to value of property deeded was held competent, although given many years after transaction occurred.—Verner v. Mosely, 127 So. 527, 221 Ala. 36.

28. U.S.—Union Trust Co. v. Woodrow Mfg. Co., C.C.A.Iowa, 63 F.2d 602, 607, quoting **Corpus Juris**.

22 C.J. p 588 note 80, p 696 notes 49, 50.

Easement

Where a witness is shown to be qualified to value an easement in a city street, it is not necessary that he be qualified to value the easement as real estate, since the value of the easement does not depend on whether it is classed as real or personal property.—Baltimore City Cons. Gas Co. v. Baltimore, 65 A. 628, 105 Md. 43, 121 Am.S.R. 553.

Estate conveyed by mineral deed

Tex.—McMullen v. Parker, Civ.App., 45 S.W.2d 1011.

Mineral, oil, and gas leases

(1) Value may be proved by the estimate of a witness.

Okl.—Gypsy Oil Co. v. Karns, 236 P. 608, 610, 110 Okl. 156, citing **Corpus Juris**—Producers' Supply Co. v. Maple Leaf Oil Co., 229 P. 1037, 103 Okl. 224.

Tex.—Dial v. Martin, Civ.App., 37 S. W.2d 166, reversed on other grounds, Com.App., Martin v. Dial, 57 S.W.2d 75, 89 A.L.R. 571—Reese v. Carey Bros., Civ.App., 286 S.W. 307.

22 C.J. p 588 note 80 [a].

(2) Testimony as to value of lease by witness not shown to be qualified was properly excluded.—Dial v. Martin, supra.

(3) Witness is qualified to express an opinion as to market value of mineral leases without knowledge of any specific sale, if he has become generally advised as to value thereof.—Humble Oil & Refining Co. v. Woods, Tex.Civ.App., 277 S.W. 152, reversed on other grounds Humble Oil & Refining Co. v. Wood, Com. App., 292 S.W. 200, rehearing denied, 294 S.W. 197.

(4) Witness experienced in drilling oil wells and negotiating oil leases is qualified to testify to value of lands for oil lease purposes.—Pennebaker v. Kimble, 269 P. 981, 126 Or. 317.

Royalties on gas wells

U.S.—Hemler v. Hope Producing Co., C.C.A.La., 117 F.2d 231—Sartor v. United Gas Public Service Co., C.C.A.La., 84 F.2d 436.

Undivided interest

(1) A witness who is competent on real estate values as a whole may state the value of an undivided interest, although he is without experience in the sale of such interests.

Pa.—In re Smith, 104 A. 493, 261 Pa. 55.

Tex.—Humble Oil & Refining Co. v. Kishi, Civ.App., 299 S.W. 687, 690, quoting **Corpus Juris**.

(2) Witnesses qualified to testify as to market value of leasehold are competent to give opinion as to market value of three-fourths undivided interest therein where court had authority to find value of undivided interest from proof of value of entire leasehold.—Humble Oil & Refining Co. v. Kishi, Tex.Civ. App., 299 S.W. 687.

29. U.S.—Union Trust Co. v. Woodrow Mfg. Co., C.C.A.Iowa, 63 F. 2d 602, 607, quoting **Corpus Juris**.

22 C.J. p 588 note 81.

Grass

Mont.—Hill v. Chappel Bros. of Montana, 33 P.2d 819, 97 Mont. 305.

Tex.—Ft. Worth & D. C. Ry. Co. v. Hapgood, Civ.App., 210 S.W. 969—Quanah, A. & P. Ry. Co. v. Lancaster, Civ.App., 207 S.W. 606.

Minerals

Value of minerals in place is usually matter for expert testimony.—

rental value,[30] and the value of its use.[31] The estimate of a competent witness is admissible to prove the value of land[32] and buildings,[33] and such evidence has been admitted to prove the value of a barn,[34] licensed properties as auxiliaries to a brewing plant,[35] a business building,[36] a church,[37]

Thorn v. Dunn, Tex.Civ.App., 94 S.W.2d 1229.

Pasturage

Idaho.—Joyce Bros. v. Stanfield, 189 P. 1104, 33 Idaho 68.

Mo.—Reed v. Cullor, App., 32 S.W.2d 296.

Timber

(1) Permitting adverse claimants to timber land to testify as to values of timber thereon was held proper.—Aiken v. McMillan, 106 So. 150, 213 Ala. 494.

(2) Refusal to permit real estate broker to testify as expert as to value of standing timber was not erroneous.—Moise v. Hodges, 287 P. 878, 156 Wash. 591.

Trees, flowers, shrubs

N.Y.—In re Luzerne-Lake George County Highway No. 804, 261 N.Y.S. 894, 145 Misc. 736.

30. Colo.—Plains Loan, Realty & Investment Co. v. Hood, 230 P. 1008, 76 Colo. 322.

Ga.—Jones v. Laramore, 102 S.E. 526, 149 Ga. 825.

Iowa.—Holt v. Marshall, 191 N.W. 294.

Mich.—Merkel v. Consumers' Power Co., 189 N.W. 997, 220 Mich. 128.

N.Y.—Burkhard v. Morris, 201 N.Y.S. 225, 206 App.Div. 366—Hirsch v. Weiner, 190 N.Y.S. 111, 116 Misc. 312—Meteor Auto Tank Co. v. Brenner, 179 N.Y.S. 562.

Tex.—Bettis v. Bettis, Civ.App., 83 S.W.2d 1076.

22 C.J. p 575 note 45, p 588 note 82, p 696 note 51 [b].

Motion picture property

In action for damages for breach of contract to lease premises which plaintiffs were planning to use for moving picture show, witnesses who were unfamiliar with lease values of picture show houses were incompetent to testify concerning market lease value.—Hickman v. Coshocton Real Estate Co., 15 N.E.2d 648, 58 Ohio App. 38.

Nature and volume of lessee's business

In condemnation proceedings by lessee because of damage resulting from construction of viaduct, witnesses, acquainted with nature and volume of lessee's business, were competent to testify as to value of leasehold.—James Poultry Co. v. Nebraska City, 284 N.W. 273, 135 Neb. 787, rehearing denied and opinion supplemented 286 N.W. 337, 136 Neb. 456.

Witness held competent

(1) Witnesses who testified that they were acquainted with plaintiff's lands and with rental value of similar lands.—Gila Water Co. v. Gila Land & Cattle Co., 249 P. 751, 30 Ariz. 569.

(2) A witness whose testimony is based on knowledge of rental values derived from experience in handling and renting property.—Jones v. Schacter, 114 S.E. 59, 29 Ga.App. 132.

(3) Former lessee.—Terwilliger v. Browning, King & Co., 185 N.Y.S. 17, 193 App.Div. 628.

(4) One who had been in charge of the property.—Lummus Cotton Gin Co. v. Daggett, 40 S.W.2d 769, 184 Ark. 116.

Witness held incompetent

Witness having only knowledge obtained from tenant.—Alsabrook v. Bishop, Tex.Civ.App., 295 S.W. 646.

Evidence tending to show lack of knowledge

Where the entire testimony of a witness shows that he is qualified to testify to rental values of land, his testimony on that subject should not be excluded merely because some of his answers to questions tend to indicate a lack of necessary knowledge.—Unzicker v. Unzicker, 171 N.W. 903, 103 Neb. 314.

31. Kan.—Nance v. Mullikin, 19 P.2d 689, 137 Kan. 181.

22 C.J. p 588 note 83.

32. U.S.—Carter Coal Co. v. Nelson, C.C.A.Va., 91 F.2d 651.

Ky.—Kentucky-Tennessee Light & Power Co. v. Shanklin, 292 S.W. 790, 219 Ky. 279.

Pa.—Commonwealth Trust Co. v. Heh, 99 Pa.Super. 479.

Tex.—Independent Shope Brick Co. v. Dugger, Civ.App., 281 S.W. 600, affirmed, Com.App., 285 S.W. 599—Johnson v. Ewing, Civ.App., 276 S.W. 784.

33. Ala.—Alabama Power Co. v. Allen, 118 So. 662, 218 Ala. 416.

Cal.—Mosher v. Lack, 181 P. 813, 41 Cal.App. 23.

Ga.—Peterson v. Wilbanks, 137 S.E. 69, 163 Ga. 742.

Kan.—Brenneisen v. Phillips, 45 P.2d 867, 142 Kan. 98.

Tex.—Scott v. Wood, Civ.App., 145 S.W.2d 260.

22 C.J. p 584 note 32, p 696 note 60.

Carpenter

(1) A carpenter can testify to the value of a house.

U.S.—Sacramento Suburban Fruit Lands Co. v. Soderman, C.C.A.Cal., 36 F.2d 934.

N.Y.—Bedell v. Long Island R. Co., 44 N.Y. 367, 4 Am.R. 688.

(2) Witness need not be a carpenter to be qualified.—Cummins v. German-American Ins. Co., 43 A. 1016, 192 Pa. 359.

Houses

N.Y.—Bedell v. Long Island R. Co., 44 N.Y. 367, 4 Am.R. 688.

22 C.J. p 584 note 33.

Sample house

In an action for breach of a contract to construct for plaintiff a house similar to a specified sample house, a witness who qualified as to knowledge of the cost of building materials, but who stated that his only examination of the sample house was going around outside it, and that he did not know of the materials used therein, the finish, or equipment, was not qualified to give evidence of the value of the house to be constructed for plaintiff.—Phillips & Sager v. Kern, 271 F. 547, 50 App.D.C. 317.

Defects in building

(1) Expert evidence regarding value of defective house and cost to remedy defects was held admissible.—Walsh v. Cornwell, 172 N.E. 855, 272 Mass. 555.

(2) Architect and contractor and builder were qualified as to difference in value of building from defects, although not qualified as to knowledge of real estate values.—Mahan v. Springer, 283 P. 667, 155 Wash. 98.

Reasonable cost of construction

Architect charged with unskillfulness in underestimating cost of building was held qualified to express opinion that building was constructed at reasonable cost.—Capitol Hotel Co. v. Rittenberry, Tex.Civ.App., 41 S.W.2d 697, error dismissed.

Knowledge from inspection of ruins

A contractor and builder who had such knowledge of the details of a destroyed building as would necessarily be derived from inspection of the ruins might properly testify that it was a very low grade building.—Citizens' Sav. Bank & Trust Co. v. Fitchburg Mut. Fire Ins. Co., 86 A. 1056, 87 Vt. 23.

34. S.D.—Moulton v. Globe Mut. Ins. Co., 154 N.W. 830, 36 S.D. 339.

Tex.—Ft. Worth & D. C. R. Co. v. Arthur, Tex.Civ.App., 124 S.W. 213.

22 C.J. p 584 note 34.

35. Pa.—Stocker v. Schneider, 77 A. 437, 228 Pa. 149.

36. Vt.—Citizens' Sav. Bank & Trust Co. v. Fitchburg Mut. F. Ins. Co., 84 A. 970, 86 Vt. 267.

22 C.J. p 696 note 63.

37. Conn.—O'Keefe v. St. Francis' Church, 22 A. 325, 59 Conn. 551.

22 C.J. p 696 note 62.

a country estate,[38] farm lands,[39] fruit trees,[40] a grain elevator,[41] a ginhouse and machinery,[42] a manufacturing plant,[43] a mill,[44] a mining claim or location,[45] oil lands,[46] an orange grove,[47] a public utility,[48] and, likewise, to prove the value of a wa-

38. R.I.—Hall v. City of Providence, 121 A. 66, 45 R.I. 167.

39. Mo.—St. Louis-Southwestern Ry. Co. v. Hoyt, App., 63 S.W.2d 214.
N.C.—Ingle v. Green, 162 S.E. 476, 202 N.C. 116.
Tex.—Driscoll v. Nolan, Civ.App., 130 S.W.2d 400, set aside on other grounds 131 S.W.2d 1025—Johnson v. Ewing, Civ.App., 276 S.W. 784.
22 C.J. p 696 note 52.

Intelligent persons, properly qualified, may give opinion as to value of farm property.—Goldberg v. Willcox, 260 P. 777, 127 Okl. 263.

Farmers

(1) A farmer may state the value of farm lands with which he is acquainted.

Ky.—Saulsberry v. Kentucky & West Virginia Power Co., 10 S.W.2d 451, 226 Ky. 75.
N.Y.—Cole v. Ackerson, 25 N.Y.S.2d 891, 261 App.Div. 1041.
22 C.J. p 591 notes 97, 98, p 696 note 52 [b].

(2) "Farmers are interested in neighborhood farms. They know the character of the land and the nature of the improvements. . . . Their calling presumptively makes them familiar with their value; and so the law says that, having an opinion, they may give it without further foundation."—Grimm v. Grimm, 252 N.W. 231, 232, 190 Minn. 474.

Witness need not be a farmer to be competent to testify as to the value of farm land.—Robertson v. Knapp, 35 N.Y. 91, 33 How.Pr. 309—Van Deusen v. Young, 29 Barb. 9, reversed on other grounds 29 N.Y. 9.

Rental value of farm lands may be stated by witnesses well acquainted with the productive value of land in the neighborhood and one of whom has cultivated some of the land in question.—Ingham v. Mitchell, 176 Ill.App. 469.

40. N.Y.—Whitbeck v. New York Cent. R. Co., 36 Barb. 644.
22 C.J. p 696 note 67.

Fruit and shade trees

One who has lived on a farm and grown an orchard and shade trees is competent to testify as to the value of trees that have been injured or destroyed in that vicinity.—Watkins v. Mountain Home Co-operative Irr. Co., 197 P. 247, 33 Idaho 623.

41. Mich.—Close v. Ann Arbor R. Co., 135 N.W. 346, 169 Mich. 392.

42. Okl.—Philadelphia Fire Ass'n v. Farmers' Gin Co., 134 P. 443, 39 Okl. 162.

43. Wis.—State v. Windus, 243 N. W. 216, 208 Wis. 583.
22 C.J. p 696 note 54.

Knowledge of particular business

Testimony as to value of property used for manufacturing is not limited to persons knowing particular business.—Westmoreland Chemical & Color Co. v. Public Service Commission of Pennsylvania, 142 A. 867, 293 Pa. 326, followed in Westmoreland Chemical & Color Co. v. Public Service Commission, 144 A. 412, 293 Pa. 333, following 144 A. 407, 294 Pa. 451.

44. Vt.—Ide v. Boston & M. R. Co., 74 A. 401, 83 Vt. 66.

45. U.S.—Montana R. Co. v. Warren, Mont., 11 S.Ct. 96, 137 U.S. 348, 34 L.Ed. 681.
Mont.—Noyes v. Clifford, 94 P. 842, 37 Mont. 138.
22 C.J. p 696 note 64.

46. N.J.—Crosby v. Wells, 67 A. 295, 73 N.J.Law 790.
22 C.J. p 696 note 65.

47. Cal.—Mabry v. Randolph, 94 P. 403, 7 Cal.App. 421.

48. Cal.—Marin Water & Power Co. v. Railroad Commission of State of California, 154 P. 864, 171 Cal. 706, Ann.Cas.1917C 114.
Md.—Rumsey v. Livers, 77 A. 295, 112 Md. 546.

Railroad

Assistant to executive vice president of company by which railroad was leased was competent to testify as to value of railroad.—State Line & Sullivan R. Co. v. Phillips, C.C.A.Pa., 98 F.2d 651, 120 A.L.R. 441, affirming, D.C., 17 F.Supp. 607, and certiorari denied 59 S.Ct. 103, 305 U.S. 635, 83 L.Ed. 408.

Railroad right of way

Expert testimony as to value of right of way formerly used for railroad, based on potential demand for strip for future railroad purposes, may be competent under evidence, in proceeding to condemn strip for highway.—Joint Highway Dist. No. 9 v. Ocean Shore R. Co., 18 P.2d 413, 128 Cal.App. 743.

Accountant

(1) In telephone rate case, accountant of years of experience in valuation of telephone and public utility properties was competent to testify concerning annual allowance as reserve for actual depreciation, replacements, and general obsolescence.—Ohio Associated Telephone Co. v. Geiger, D.C.Ohio, 3 F.Supp. 997.

(2) A public accountant and auditor, who set up public utility company's bookkeeping system and was familiar with its plant, books, reports, accounts and property, was qualified to testify as to value of such property.—Tobacco River Power Co. v. Public Service Commission, 98 P.2d 886, 109 Mont. 521.

An assessor is generally competent to testify as to value of property within his taxing district, but where he has had no experience whatever in the building, maintenance or repair of public utility property or in the purchase or sale thereof, the probative weight of his testimony is negligible.—Hackensack Water Co. v. Township of North Bergen, 15 A.2d 899, 18 N.J.Misc. 627.

Auditor for public service commission

In electric utility company's suit to enjoin enforcement of public service commission's order reducing plaintiff's rates, exclusion of testimony of commission's auditor, who had general and utility accounting experience, and other witnesses as to value of plaintiff's property, was error requiring reversal of judgment for plaintiff.—Tobacco River Power Co. v. Public Service Commission, 98 P.2d 886, 109 Mont. 521.

Civil engineer

In proceeding to determine fair value of gas company's property for rate-making purposes, a civil engineer who had been long engaged in realty valuation work in municipality in which property was located was sufficiently qualified to testify on realty valuations as an expert. —State ex rel. City of St. Louis v. Public Service Commission, 110 S. W.2d 749, 341 Mo. 920, appeal dismissed Laclede Gas Light Co. v. Public Service Commission of Missouri, 58 S.Ct. 988, 304 U.S. 398, 82 L.Ed. 1422.

A writer and student of economics, public law, government, and sociology, holding degrees of Bachelor of Arts, Master of Arts, and Doctor of Philosophy, who was not an engineer, having never been employed by any street railway in any capacity, and having little experience in valuation of properties, was not shown to be qualified to testify as an expert as to valuation of a street tramway system for rate-making purposes.—Westinghouse Electric & Mfg. Co. v. Denver Tramway Co., D.C.Colo., 3 F.2d 285, appeal transferred City and County of Denver v. Stenger, 47 S.Ct. 343, 273 U.S. 657, 71 L.Ed. 826.

Personal knowledge

(1) In determining depreciation in rate case, experienced engineer may submit appraisement made on as-

ter plant,[49] wharf property,[50] and a warehouse.[51]

Unusual and speculative character of the property, as in the case of a quarry,[52] an ore bank or vein,[53] or an undeveloped "prospect" in mineral lands[54] does not preclude a statement by a witness as to value.

Change in value. The value of the property before and after an event, or at two different times, may be stated by a competent witness.[55] It is necessary that the witness stating change in value should have been acquainted with the land or other property prior to the change in condition,[56] but it has been held that a witness who states that he knew the value of certain property before a part of it was taken by a city may testify, although he does not know the value after such taking.[57]

The effect on value of certain circumstances or occurrences may be stated by a person of sufficient knowledge and experience.[58] Such statement may relate to the effect on remaining land of the taking of a part thereof under the power of eminent

sumption of correctness of records, exhibits, and evidence and need not have personal knowledge of the property of the utility company.—Idaho Power Co. v. Thompson, D.C. Idaho, 19 F.2d 547.

(2) In telephone rate case, witness specializing as engineer witness of utility commission was not incompetent to testify as to unit costs because he had never built a telephone plant.—Ohio Associated Telephone Co. v. Geiger, D.C.Ohio, 8 F.Supp. 997.

49. Wash.—State v. City of Hoquiam, 286 P. 286, 155 Wash. 678, modified on other grounds 287 P. 670, 155 Wash. 678.

50. R.I.—Adams v. John R. White & Son, Inc., 103 A. 230, 41 R.I. 157.

51. Or.—Burdick v. Tum-A-Lum Lumber Co., 179 P. 245, 91 Or. 417.

52. Ill.—Chicago Sanitary Dist. v. Loughran, 43 N.E. 359, 160 Ill. 362.

53. Colo.—Wilson v. Harnette, 75 P. 395, 32 Colo. 172.
22 C.J. p 591 note 3.

54. U.S.—Montana R. Co. v. Warren, 11 S.Ct. 96, 137 U.S. 348, 34 L.Ed. 681, affirming 12 P. 641, 6 Mont. 275.

55. Ala.—Alabama Power Co. v. Christian, 112 So. 763, 216 Ala. 160.
Ark.—St. Louis, K. & S. E. R. Co. v. Ballard, 287 S.W. 738, 172 Ark. 151.
Cal.—Miller & Lux v. Pinelli, 257 P. 573, 84 Cal.App. 42.
Ill.—Village of Marissa v. Jones, 158 N.E. 389, 327 Ill. 180—Wanless v. Peabody Coal Co., 13 N.E.2d 996, 294 Ill.App. 401.
Mass.—Gray v. Tobin, 156 N.E. 30, 259 Mass. 113.
Mo.—Newkirk v. City of Tipton, 136 S.W.2d 147, 234 Mo.App. 920—Funke v. St. Louis-San Francisco Ry. Co., 35 S.W.2d 977, 225 Mo. App. 347.
N.C.—Crisp v. Nantahala Power & Light Co., 158 S.E. 845, 201 N.C. 46.
S.C.—Perry v. Jefferies, 39 S.E. 515, 61 S.C. 292.
Utah.—Mary Jane Stevens Co. v. First Nat. Bldg. Co., 57 P.2d 1099, 89 Utah 456.
22 C.J. p 591 note 5, p 697 notes 72–84, p 698 notes 85–95.

Effect of a sluiceway
An ordinary observer cannot testify to an inference as to the probable effect of a sluiceway, where his testimony is based on a supposed knowledge of geographical conditions, rainfall, etc., over a large area of country.
Ark.—Kansas City, Ft. S. & M. R. Co. v. Cook, 21 S.W. 1066, 57 Ark. 387.
Kan.—Chicago, K. & W. R. Co. v. Donelson, 25 P. 584, 45 Kan. 18.

Effect of improvement
Witness, knowing improvement's effect on property's market value, may give opinion as to value, weight thereof being for court.—Bowling v. City of Bluefield, 140 S.E. 685, 104 W.Va. 589.

Effect of subjection to easement
Witness who, in court's judgment, is qualified, may give opinion of value of land before and after it is subjected to easement.
Mo.—Cities Service Gas Co. v. Peak, 54 S.W.2d 482, 227 Mo.App. 515.
Tex.—Texas Public Utilities Co. v. Bass, Civ.App., 297 S.W. 301—Houston Lighting & Power Co. v. Daily, Civ.App., 291 S.W. 317.

Community benefits and injuries
Opinion evidence as to difference in market value of residue of property before and after taking is not altogether invalidated by fact that opinion was based in part on "community" benefits or injuries.—State v. Carpenter, 89 S.W.2d 194, 126 Tex. 604, reversing, Civ.App., 55 S.W.2d 219, and rehearing denied 89 S.W.2d 979, 126 Tex. 604.

Percentage of decrease
Witness may give his judgment on decrease in value on percentage basis.—Alabama Power Co. v. Henson, 187 So. 718, 237 Ala. 561.

Witness held competent
(1) Opinion of witnesses predicated on personal examination of the property in 1916 was held relevant on the question of the value of the property injured in 1914 by the alteration in grade of the adjacent street through the building of a bridge by a railroad under authority of the city.—Powell v. Seaboard Air Line Ry. Co., 100 S.E. 424, 178 N.C. 243.

(2) Witness otherwise qualified could testify to market value of land not taken, although without experience respecting sale of land occupied by towers and transmission lines.—Ohio Public Service Co. v. Dehring, 172 N.E. 448, 34 Ohio App. 532.

56. Pa.—Shimer v. Easton R. Co., 55 A. 769, 205 Pa. 648.
22 C.J. p 592 note 9.

57. Pa.—Pittsburg First Presbyterian Church v. Pittsburg, 72 A. 347, 223 Pa. 165.

58. Ill.—Village of Marissa v. Jones, 158 N.E. 389, 327 Ill. 180.
22 C.J. p 697 notes 72, 81, p 698 notes 88, 89.

Comparative or absolute change may be shown.—Ryman v. West End Coal Co., 57 Pa.Super. 412—Mine Hill & S. H. R. Co. v. Zerbe, 2 Walk., Pa., 409.

Railroad siding
In suit against railroad which unlawfully maintained track on New York land, proof of fee or rental value of land without track should be founded on testimony as to other plots in neighborhood which were not encumbered by track, and expert could not testify to value of land without track, although he could testify as to value of land with track.—Fletcher v. Delaware, L. & W. R. Co., C.C.A.N.Y., 79 F.2d 306.

Personal opinion
Testimony as to whether witness thought that paved road increased value of abutting property was held properly excluded as only personal opinion.—Howell v. State Highway Department, 166 S.E. 129, 167 S.C. 217.

domain,[59] as for a highway,[60] pipe line,[61] railroad,[62] sewer,[63] or for the purpose of obtaining a water supply;[64] and what has been or would be the effect on value of a local improvement,[65] a ditch,[66] a burning[67] or overflowing,[68] the erection of a nuisance,[69] the diversion of the flow of a stream from the land,[70] the erection of an elevated railway,[71] the operation of a street railway,[72] the construction of a railroad embankment,[73] or raising the grade of a street.[74] A witness may also state how much the value of the land would have been increased if a contract had been performed,[75] if a railroad had been built,[76] if the land were drained,[77] and a witness has been permitted to state the cause of a general depreciation in value of real estate in a particular locality,[78] and the proper capitalization of a company owning certain real property or franchises.[79]

Form of statement. The witness may testify as to the value of land by the acre,[80] at least where there is definite proof as to the number of acres involved.[81] A witness who has expressed his opinion as to the value of premises may give his opinion as to the value of the land and the buildings separately.[82]

(2) Qualifications of Witness as to Value of Realty Generally

A witness, to be qualified to testify as to the value of realty, must know the property to be valued and the value of property in the vicinity, must understand the standard of value, and must be possessed of the ability to make a reasonable inference.

A qualified witness can testify as to the value of realty.[83] Under the decisions of the courts, an un-

59. Iowa.—Evans v. Iowa Southern Utilities Co. of Delaware, 218 N.W. 66, 205 Iowa 283.
Neb.—Wahlgren v. Loup River Public Power Dist., 297 N.W. 833.
Tex.—State v. Carpenter, 89 S.W.2d 194, 126 Tex. 604, reversing, Civ.App., 55 S.W.2d 219, and rehearing denied, 89 S.W.2d 979, 126 Tex. 604.
22 C.J. p 697 note 73.

Form of statement
In eminent domain proceeding, witnesses instead of merely stating their opinions as to percentage of depreciation alone in property by reason of the taking should have given their idea of the value in terms of money before taking as compared with such value thereafter.—Mississippi State Highway Commission v. Smith, 192 So. 448, 187 Miss. 613

60. Tex.—Naegelin v. State, Civ.App., 153 S.W.2d 269.
22 C.J. p 697 note 74.

61. Pa.—Mewes v. Crescent Pipe Line Co., 32 A. 1082, 170 Pa. 364—Michael v. Crescent Pipe Line Co., 28 A. 204, 159 Pa. 99.

62. Ark.—Texas & St. L. R. Co. v. Kirby, 44 Ark. 103.
22 C.J. p 697 note 77.

63. Ill.—Pike v. Chicago, 40 N.E. 567, 155 Ill. 656.
Mass.—Taft v. Com., 33 N.E. 1046, 158 Mass. 526.

64. Ga.—Flemister v. Central Georgia Power Co., 79 S.E. 148, 140 Ga. 511.
22 C.J. p 697 note 78.

65. Ark.—Lenon v. Street Improvement Dist. No. 512, 26 S.W.2d 572, 181 Ark. 318.
Idaho.—Amsbary v. City of Twin Falls, 200 P. 723, 34 Idaho 313.
Ill.—City of Chicago v. Van Schaack Bros. Chemical Works, 161 N.E. 486, 330 Ill. 264—Troutman v. City of Zeigler, 158 N.E. 355, 327 Ill. 251.

Jurisdiction of court
In action to enjoin city of New Haven from claiming assessment lien for public improvement benefits, opinion of real estate expert as to whether improvement benefited plaintiff's land was held properly excluded, since proof that plaintiff's property was not benefited would merely show that bureau of compensation committed error of law, not that it was acting without jurisdiction.—Thomas Bennett Estate v. City of New Haven, 166 A. 680, 117 Conn. 25.

66. Utah.—Christenson v. Nielsen, 54 P.2d 430, 88 Utah 336.

67. N.C.—Bradley v. Camp Mfg. Co., 98 S.E. 318, 177 N.C. 153, followed in Patillo v. Camp Mfg. Co., 98 S.E. 323, 177 N.C. 156.
22 C.J. p 697 note 79.

68. Tex.—Driscoll v. Nolan, Civ.App., 130 S.W.2d 400, set aside on other grounds 131 S.W.2d 1025.
22 C.J. p 697 note 80.

69. Mass.—Vandine v. Burpee, 13 Metc. 288, 46 Am.D. 733.
22 C.J. p 697 note 82.

70. N.Y.—Gallagher v. Kingston Water Co., 49 N.Y.S. 250, 25 App.Div. 82, affirmed 58 N.E. 1087, 164 N.Y. 602.

71. Ill.—Metropolitan West Side El. R. Co. v. White, 46 N.E. 978, 166 Ill. 375.
22 C.J. p 697 note 84.

72. Mo.—Tate v. Missouri, K. & T. R. Co., 64 Mo. 149.

73. Cal.—Santa Ana v. Harlin, 34 P. 224, 99 Cal. 538.
22 C.J. p 698 note 86.

74. W.Va.—Blair v. Charleston, 26 S.E. 341, 43 W.Va. 62, 64 Am.S.R. 837, 35 L.R.A. 852.

75. Minn.—Ironton Land Co. v. Butchart, 75 N.W. 749, 73 Minn. 39.
N.C.—Lambeth v. City of Thomasville, 102 S.E. 775, 179 N.C. 452.

76. Or.—Blagen v. Thompson, 31 P. 647, 23 Or. 239, 18 L.R.A. 315.

77. Ill.—Spear v. Drainage Comrs., 113 Ill. 632.

78. N.Y.—Gordon v. Kings County El. R. Co., 48 N.Y.S. 382, 23 App.Div. 51, affirmed 58 N.E. 1087, 164 N.Y. 563.

79. Ohio.—Cincinnati v. Scarborough, 6 Ohio Dec. (Reprint) 874, 8 Am.L.R. 562.

80. Ga.—Central Georgia Power Co. v. Stone, 77 S.E. 565, 139 Ga. 416.
22 C.J. p 592 note 14.

81. Iowa.—Ball v. Keokuk & N. W. R. Co., 32 N.W. 354, 71 Iowa 306.

82. N.J.—Morrell v. Preiskel, Sup., 74 A. 994.
Tex.—Independent Shope Brick Co. v. Dugger, Civ.App., 281 S.W. 600, affirmed, Com.App., 285 S.W. 599.

83. Colo.—City and County of Denver v. Lyttle, 103 P.2d 1, 106 Colo. 157.
Ga.—Parrish v. Barwick, 144 S.E. 735, 167 Ga. 214.
Ill.—Department of Public Works and Buildings v. Legg, 29 N.E.2d 515, 374 Ill. 306.
Iowa.—Holt v. Marshall, 191 N.W. 294.
N.J.—City of Paterson v. Baker, 139 A. 415, 5 N.J.Misc. 1068.
N.Y.—Rondout & O. R. Co. v. Deyo, 5 Lans. 298.
N.C.—Nobles v. Davenport, 111 S.E. 180, 183 N.C. 207, 26 A.L.R. 1086.
Or.—Fidelity Sec. Corporation v. Brugman, 1 P.2d 131, 137 Or. 38, 75 A.L.R. 1333—State v. Mohler, 237 P. 690, 115 Or. 562, petition denied 239 P. 193, 115 Or. 562.
R.I.—Burden v. Tax Assessors of City of Newport, 134 A. 9, 47 R.I. 473.

qualified witness cannot.[84] The qualifications of particular witnesses to testify as to the value of

Tex.—Massie v. City of Floydada, Civ.App., 112 S.W.2d 243.

Cross-examination as to qualifications see infra § 560.

Witnesses held qualified

(1) Civil engineer who had appraised estates within county.—People by State Department of Public Works v. Marblehead Land Co., 255 P. 553, 82 Cal.App. 289.

(2) Real estate assessor owning lands in same township, who had known land for thirty years and knew asking price.—Barron v. United Ry. Co., 93 Pa.Super. 555.

(3) Where witness testified he had been connected with real estate department of bank for six years, and had sold and appraised realty for sixteen years, and was well acquainted with property throughout state.—State v. Mohler, 237 P. 690, 115 Or. 562, petition denied 239 P. 193, 115 Or. 562.

(4) Surveyors and civil engineers living in vicinity of land taken and familiar with it.—Vineyard Grove Co. v. Town of Oak Bluffs, 163 N.E. 888, 265 Mass. 270.

(5) One who had knowledge of sales of land in the vicinity of tract, had taken mortgages on them, had carefully inspected the land under consideration, and has such acquaintance with property as enables him to form an intelligent estimate of its value.—Security Nat. Bank v. McCutchan, 208 P. 636, 111 Kan. 682.

Golf architect held qualified to testify in condemnation proceedings that land was best adapted for use as golf course.—Illinois Light & Power Co. v. Bedard, 175 N.E. 851, 343 Ill. 618.

"Shower" on "view"

Otherwise competent witness as to value was not incompetent because court had sent him with jury as "shower" when they viewed land in controversy.—Summers v. Lancaster County, 162 A. 256, 308 Pa. 379.

Qualified assertion of knowledge

Witnesses, giving qualified answer as to his knowledge of land value, was held qualified to testify.—Kentucky & West Virginia Power Co. v. George, 280 S.W. 949, 213 Ky. 164.

Value for particular purpose

(1) If a witness knows the market value of real property for one or more purposes, he is competent although he does not know its value for all purposes.

Cal.—City of Stockton v. Ellingwood, 275 P. 228, 96 Cal.App. 708.

Iowa.—Tracy v. Mt. Pleasant, 146 N.W. 78, 165 Iowa 435.

(2) If a witness understands adaptability of lands in question for particular purpose, and the demand for land for such purpose, he may state market value of land, although entirely unacquainted with other elements which would be considered by different buyers competing for same property.—Metropolitan Water Dist. of Southern California v. Adams, Cal., 116 P.2d 7, prior opinion, App., 99 P.2d 659, rehearing denied 100 P.2d 357—Joint Highway Dist. No. 9 v. Ocean Shore R. Co., 18 P.2d 413, 128 Cal.App. 743.

(3) Where land was available for a reservoir, a witness knowing the value of land for such purpose was competent although he did not know its value for farming.—Gearhart v. Clear Spring Water Co., 51 A. 891, 202 Pa. 292.

Conflicting statements as to knowledge

Where a witness testified to his familiarity with land, a part of which was sought to be condemned, and gave his opinion that it was worth two hundred dollars an acre, the testimony was admissible, although on cross-examination he testified that he did not know the value of land in that particular community.—Central Georgia Power Co. v. Stone, 77 S.E. 565, 139 Ga. 416.

84. Ala.—Hamrick v. Town of Albertville, 122 So. 448, 219 Ala. 465.

Cal.—Coast Counties Gas & Electric Co. v. Miller & Lux, 5 P.2d 34, 118 Cal.App. 140.

Colo.—City and County of Denver v. Lyttle, 103 P.2d 1, 106 Colo. 157—Denver Joint Stock Land Bank v. Board of Com'rs of Elbert County, 98 P.2d 283, 105 Colo. 366.

Ga.—Smith v. Alexander & Bland, 148 S.E. 98, 168 Ga. 382.

Idaho.—Bassett v. Swenson, 5 P.2d 722, 51 Idaho 256—Idaho Farm Development Co. v. Brackett, 257 P. 35, 44 Idaho 272.

Kan.—Saathoff v. State Highway Commission, 72 P.2d 74, 146 Kan. 465—Scarcy v. State Highway Commission, 67 P.2d 534, 145 Kan. 709.

Ky.—Shields v. Parsons, 18 S.W.2d 961, 230 Ky. 143.

Mass.—Mann v. Town of Scituate, 157 N.E. 656, 260 Mass. 592.

N.D.—Hedrick v. Stockgrowers' Credit Corporation, 250 N.W. 539, 64 N.D. 101.

Okl.—Muskogee Sand & Gravel Co. v. Hulbert, 9 P.2d 419, 156 Okl. 112.

Or.—In re Clymer's Estate, 85 P.2d 365, 160 Or. 359.

Pa.—Schuck v. West Side Belt R. Co., 128 A. 832, 283 Pa. 152—Jordan v. Clearfield County, 164 A. 98, 107 Pa.Super. 441—Lynn v. Borough of Dunmore, 80 Pa.Super. 590.

R.I.—Huff v. Knight, 192 A. 470, 58 R.I. 257.

Tex.—Knox v. Stephens County, Civ. App., 284 S.W. 691.

22 C.J. p 590 notes 94, 95.

The necessary knowledge to render his inference of value to the jury must be shown to be possessed by the witness, or his inference will not be received.—Thibadeau v. Clarinda Copper Mining Co., 272 P. 254, 47 Idaho 119—22 C.J. p 698 note 96.

One not having, nor claiming knowledge about the market value of land may not give an opinion thereon.—Public Service Co. of Northern Illinois v. Leatherbee, 143 N.E. 97, 311 Ill. 505.

Ability to "guess" only

In condemnation case involving land taken for national park, district court properly refused to permit witness who admitted on cross-examination that his testimony would be just a guess to express opinion concerning value of land.—Morton Butler Timber Co. v. U. S., C.C.A.Tenn., 91 F.2d 884.

Disinclination to claim knowledge

If a witness shows a disinclination to say outright that he has a knowledge of the market value of the property his testimony may be disregarded.—Eastern Texas R. Co. v. Eddings, 111 S.W. 777, 51 Tex. Civ.App. 166.

Attorney

Estimate of fair market value of property by attorney participating in few sales of realty and examining titles is properly excluded.—Burden v. Tax Assessors of City of Newport, 134 A. 9, 47 R.I. 473.

Experts in building construction are not qualified as such to testify as to value of real estate.—Ashton v. Tax Assessors of Town of Jamestown, 198 A. 786, 60 R.I. 388.

Hydraulic and water supply engineers are not qualified as such to testify to market value of land under condemnation.—Ringwood Co. v. North Jersey Dist. Water Supply Commission, 143 A. 369, 105 N.J.Law 165.

Witnesses held not qualified

(1) Insurance agent who had placed value on property solely for insurance, and secured knowledge from property owner's officers.—Westmoreland Chemical & Color Co. v. Public Service Commission of Pennsylvania, 142 A. 867, 293 Pa. 326, followed in Westmoreland Chemical & Color Co. v. Public Service Commission, 144 A. 412, 293 Pa. 333, following 144 A. 407, 294 Pa. 451.

particular types of or interests in realty are discussed supra subdivision e (1) of this section.

Although it has been said that a nonexpert cannot testify as to the value of realty,[85] it is ordinarily held that the witness need not be an expert in the strict sense of the term,[86] nor need he be a real estate dealer or broker.[87]

Elements and tests of qualification. A witness is qualified if he has such knowledge as enables him to form a better opinion than the jury or men in general.[88] The knowledge required is such as is demanded by the nature of the subject matter,[89] and such as can reasonably be expected in view of the circumstances.[90] Thus a higher standard of qualification is applied in large cities where real estate sales are frequent than where the property is located in a sparsely settled area where sales are infrequent.[91]

In order to qualify the witness, it must be shown that he had adequate opportunity to learn the value of the realty.[92] The witness must know the property to be valued,[93] and the value of property in the

(2) Witness who testified that he was engaged in general engineering, architectural, and appraisal work, but who did not indicate the kind of appraisals, or whether anyone had ever accepted one of his appraisals and who was unable to recall any other sales in the vicinity.—Commonwealth v. Begley, 114 S.W.2d 127, 272 Ky. 289.

(3) Witness learning of realty values by fourteen years' experience in city outside state, not having sold land within state, and gaining knowledge of land values from few sales in county.—W. J. Williams, Inc., v. Cummings, Tex.Civ.App., 65 S.W.2d 379.

(4) Witness living three hundred miles from land involved, who had seen it but once, who did not claim to be acquainted with value of land in his vicinity, and who made but one inquiry relative thereto of a man whom he did not know.—Vanarsdol v. Farlow, 203 N.W. 794, 200 Iowa 495.

(5) A farmer, who lived some distance from condemned land, had never visited condemned premises until being called as witness, and who did not know of sales of land similar to that condemned in the vicinity of condemned land.—People v. McReynolds, 87 P.2d 734, 31 Cal.App.2d 219.

(6) Witness not knowing market value is incompetent to testify as to adequacy of consideration.—Smith v. Loftis, Tex.Civ.App., 281 S.W. 604.

85. N.Y.—Berkowitz v. Iorizzo, 174 N.Y.S. 719, 106 Misc. 489.
R.I.—Greene v. State Board of Public Roads, 149 A. 596, 50 R.I. 489.

86. Cal.—City of Stockton v. Ellingwood, 275 P. 228, 96 Cal.App. 708—People by State Department of Public Works v. Marblehead Land Co., 255 P. 553, 82 Cal.App. 289.
Ga.—Livsey v. Walton County, 170 S.E. 268, 47 Ga.App. 211.
Kan.—Security Nat. Bank v. McCutchan, 208 P. 636, 111 Kan. 682.
Mich.—In re Brewster Street Housing Site in City of Detroit, 289 N.W. 493, 291 Mich. 313—City of Detroit v. Hartwick, 171 N.W. 405, 204 Mich. 635.
Pa.—Summers v. Lancaster County, 162 A. 256, 308 Pa. 379—Hoffman v. Berwind-White Coal Mining Co., 109 A. 234, 265 Pa. 476.
S.C.—Howell v. State Highway Department, 166 S.E. 129, 133, 167 S.C. 217, citing **Corpus Juris.**
Tenn.—Lebanon & Nashville Turnpike Co. v. Creveling, 17 S.W.2d 22, 159 Tenn. 147, 65 A.L.R. 440.
Tex.—Driscoll v. Nolan, Civ.App., 130 S.W.2d 400, set aside on other grounds 131 S.W.2d 1025—Massie v. City of Floydada, Civ.App., 112 S.W.2d 243—West Texas Hotel Co. v. City of El Paso, Civ.App., 83 S.W.2d 772, error dismissed.
Utah.—Mary Jane Stevens Co. v. First Nat. Bldg. Co., 57 P.2d 1099, 89 Utah 456.
22 C.J. p 588 note 85 [f].
"The question of the market value of land is not . . . a question of art or science, which must be shown by the testimony of experts."—Illinois Power & Light Corporation v. Talbott, 152 N.E. 486, 488, 321 Ill. 538.

Basis of opinion
Nonexperts may testify to value of real property after stating facts on which opinion is based, and every witness need not have all-inclusive information of elements affecting value.—Lebanon & Nashville Turnpike Co. v. Creveling, 17 S.W.2d 22, 159 Tenn. 147, 65 A.L.R. 440.

87. Ill.—City of Chicago v. Chicago City Ry. Co., 141 N.E. 141, 309 Ill. 448.
Pa.—Wissinger v. Valley Smokeless Coal Co., 115 A. 880, 271 Pa. 566.
Tex.—Fort Worth & D. S. P. Ry. Co. v. Judd, Civ.App., 4 S.W.2d 1032, error dismissed.
Utah.—Mary Jane Stevens Co. v. First Nat. Bldg. Co., 57 P.2d 1099, 89 Utah 456.

88. Cal.—People by State Department of Public Works v. Marblehead Land Co., 255 P. 553, 82 Cal. App. 289.
Tex.—Massie v. City of Floydada, Civ.App., 112 S.W.2d 243—Fort Worth & D. S P. Ry. Co. v. Judd, Civ.App., 4 S.W.2d 1032, error dismissed.

89. Md.—Baltimore v. Park Land Corp., 95 A. 33, 126 Md. 358.
22 C.J. p 590 note 94.

Beach-front hotel
To qualify witness to testify to value of large beach-front hotel, it must be shown that he had some experience with buildings of such size and character.—Stitzer Hotel Co. v. Beyer, C.C.A.N.J., 55 F.2d 620.

Value for purpose for which used
In a proceeding by a levee district to condemn an easement over the right of way of a railroad, farmers, and others having no knowledge of value of land for railroad purposes, were not competent to testify as to the value of the land taken.—Mauvaisterre Drainage & Levee Dist. v. Wabash Ry. Co., 132 N.E. 559, 299 Ill. 299, 22 A.L.R. 944.

90. Pa.—Whitekettle v. New York Underwriters' Ins. Co., 143 A. 129, 293 Pa. 385—Wissinger v. Valley Smokeless Coal Co., 115 A. 880, 271 Pa. 566—Integrity Trust Co. v. Fell, 17 Pa.Dist. & Co. 97—In re Shelmire's Estate, 56 Montg.Co. 260.

91. Pa.—Whitekettle v. New York Underwriters' Ins. Co., 143 A. 129, 293 Pa. 385—Wissinger v. Valley Smokeless Coal Co., 115 A. 880, 271 Pa. 566.
Tex.—Carver v. Moore, Civ.App., 275 S.W. 90, rehearing denied 275 S.W. 682, reversed on other grounds, Com.App., 288 S.W. 156.

92. Ga.—Livsey v. Walton County, 170 S.E. 268, 47 Ga.App. 211.
Neb.—Beebe & Runyan Furniture Co. v. Board of Equalization of Douglas County, 296 N.W. 764.
N.C.—Lambeth v. City of Thomasville, 102 S.E. 775, 179 N.C. 452.
22 C.J. p 589 note 87.

93. Ind.—Northern Indiana Power Co. v. Castor, 156 N.E. 571, 88 Ind. App. 339.
Ky.—Commonwealth v. Smith, 17 S.W.2d 203, 229 Ky. 345.

vicinity,[94] or of the same class;[95] he must understand the standard of value,[96] and must be possessed of the ability to make a reasonable inference.[97]

A witness who knows the property and the value of real estate in the vicinity is competent.[98] It has

Mich.—City of Detroit v. Hartwick, 171 N.W. 405, 204 Mich. 635.
Mo.—State ex rel. State Highway Commission of Missouri v. Craighead, App., 65 S.W.2d 145.
22 C.J. p 589 note 86.

General knowledge of real estate values is insufficient; the witness must possess special knowledge as to the realty to be valued.—People v. McReynolds, 87 P.2d 734, 31 Cal. App.2d 219.

One who had never seen the property is not qualified.
Iowa.—Vanarsdol v. Farlow, 203 N. W. 794, 200 Iowa 495.
Mich.—Patrons' Mut. Fire Ins. Co. of Michigan v. Perl, 200 N.W. 286, 228 Mich. 493.
22 C.J. p 589 note 86 [a].

That witness had no direct knowledge of land, at time of sale, affected weight rather than competency. —Sacramento Suburban Fruit Lands Co. v. La Gue, C.C.A.Cal., 40 F.2d 897.

Time property examined

(1) Witness as to value of land at stated periods should show himself familiar with property at those periods.—Healdton Oil & Gas Co. v. Regnier, 39 P.2d 973, 170 Okl. 271.

(2) Inspection of property after date as of which it is to be valued may furnish sufficient knowledge of the property if its condition has not changed.
Ind.—Muir v. Robinson, 186 N.E. 289, 205 Ind. 293.
Or.—Pennebaker v. Kimble, 269 P. 981, 126 Or. 317.

(3) Witness who had not seen farm for ten or twelve years was held competent to testify to value thereof, where witness knew what farm was and had been acquainted with it since childhood.—Peterson v. Schober, 256 N.W. 308, 192 Minn. 315.

(4) That sewer ditch across land was not completed at time witness made observation of land did not render incompetent his estimate of value before and after construction of completed sewer, based on such observation.—City of Greensboro v. Garrison, 130 S.E. 203, 190 N.C. 577.

(5) Witness other than real estate expert, who stated that he knew value of property generally in and about city involved, but did not know value of property in controversy until year after period in question, was not competent witness concerning value.—Mary Jane Stevens Co. v. First Nat. Bldg. Co., 57 P.2d 1099, 89 Utah 456.

Use of road passing land

In action for damages caused by oil draining on to plaintiff's land, witness who passed land number of times, but had not been on it until day before trial, was held not competent to testify regarding value before and after damage was caused thereto, especially where only portion of farm involved was not close to road.—Healdton Oil & Gas Co. v. Regnier, 39 P.2d 973, 170 Okl. 271.

Inquiry of other persons as to value

(1) One personally examining realty located in another city and inquiring of qualified persons concerning its value is competent to testify as to present value thereof.
Iowa.—Heineman v. Young, 197 N. W. 1001.
Mo.—Brayton v. Gunby, App., 267 S.W. 450.
Utah.—Mary Jane Stevens Co. v. First Nat. Bldg. Co., 57 P.2d 1099, 89 Utah 456.

(2) In a suit for breach of contract to convey land, a witness who testified he had been in the city frequently, and had made much investigation regarding lots there, and had seen the lots in question was held qualified to testify as to their market value.—Daniels v. Garrett, Tex.Civ.App., 239 S.W. 1118.

94. Cal.—People v. McReynolds, 87 P.2d 734, 31 Cal.App.2d 219—Layne v. Malmgren, 279 P. 670, 99 Cal. App. 742.
Mich.—City of Detroit v. Hartwick, 171 N.W. 405, 204 Mich. 635.
Pa.—Westinghouse Air Brake Co. v. City of Pittsburgh, 176 A. 13, 316 Pa. 372.
22 C.J. p 588 note 85, p 589 note 90.

Mere familiarity with land is not enough; witness must know land values in the neighborhood.
Md.—Webster v. Archer, 4 A.2d 434, 176 Md. 245.
Tex.—Grayce Oil Co. v. Peterson, 98 S.W.2d 781, 128 Tex. 550, affirming, Peterson v. Grayce Oil Co., Civ.App., 37 S.W.2d 367.
22 C.J. p 589 note 89 [a].

95. Colo.—Wassenich v. City and County of Denver, 186 P. 533, 67 Colo. 456.
Iowa.—Millard v. Northwestern Mfg. Co., 205 N.W. 979, 200 Iowa 1063.
22 C.J. p 577 note 72, p 588 note 85.

An acquaintance with other land not necessarily presenting elements of value similar to the land in controversy is not a qualification.
Ill.—Metropolitan West Side El. R. Co. v. Dickinson, 43 N.E. 706, 161 Ill. 22.

N.D.—Keeney v. Fargo, 105 N.W. 93, 14 N.D. 423.

Land subject to an easement

The experience of a witness that purchasers of real estate have a prejudice against deeds that except easements does not qualify him to give an opinion on what will be the value of a given tract after construction of a railroad tunnel two hundred feet below the surface.—Pennsylvania, N. J. & N. Y. R. Co. v. Schwarz, 70 A. 134, 75 N.J.Law 801.

96. Cal.—Temescal Water Co. v. Marvin, 9 P.2d 335, 121 Cal.App. 512.

97. Iowa.—Arnd v. Aylesworth, 111 N.W. 407, 136 Iowa 297.
22 C.J. p 589 note 89.

98. U.S.—Welch v. Tennessee Valley Authority, C.C.A.Tenn., 108 F. 2d 95, certiorari denied Welch v. U. S. ex rel. and for Use of Tennessee Valley Authority, 60 S.Ct. 889, 309 U.S. 688, 84 L.Ed. 1030—Lewis v. Tennessee Valley Authority, C.C.A.Tenn., 108 F.2d 95, certiorari denied Lewis v. U. S. ex rel. and for Use of Tennessee Valley Authority, 60 S.Ct. 889, 309 U. S. 688, 84 L.Ed. 1030.
Cal.—Layne v. Malmgren, 279 P. 670, 99 Cal.App. 742—People by State Department of Public Works v. Marblehead Land Co., 255 P. 553, 82 Cal.App. 289.
Ga.—Livsey v. Walton County, 170 S.E 268, 47 Ga.App. 311.
Ill.—Williamson County v. Brock, 10 N.E.2d 654, 367 Ill. 159.
Ind.—Northern Indiana Power Co. v. Castor, 156 N.E. 571, 88 Ind. App. 339.
Ky.—Commonwealth v. Smith, 17 S. W.2d 203, 229 Ky. 343—Himlar Coal Co. v. Kirk, 6 S.W.2d 480, 481, 224 Ky. 383, quoting **Corpus Juris.**
Mich.—City of Detroit v. Hartwick, 171 N.W. 405, 204 Mich. 635.
Mo.—Alexander v. Llewellyn, App., 70 S.W.2d 115.
Pa.—Summers v. Lancaster County, 162 A. 256, 308 Pa. 379—Westmoreland Chemical & Color Co. v. Public Service Commission of Pennsylvania, 142 A. 867, 293 Pa. 326, followed in Westmoreland Chemical & Color Co. v. Public Service Commission, 144 A. 412, 293 Pa. 333, following 144 A. 407, 294 Pa. 451.
Utah.—Mary Jane Stevens Co. v. First Nat. Bldg. Co., 57 P.2d 1099, 89 Utah 456.
22 C.J. p 580 note 87, p 588 note 85, p 589 note 90.

been stated that one acquainted with the property is qualified to testify as to its value.[99]

Knowledge of purchases and sales. Knowledge of,[1] or participation in,[2] sales of similar property is an element in the qualification of a witness as to value. Indeed in some jurisdictions it is held that a witness is not competent unless he has participated in or knows of sales of land in the vicinity;[3] but it is generally held that it is not necessary that the witness' opinion be fortified by knowledge of actual sales in the vicinity,[4] by actual purchases or sales on the part of the witness,[5] or by knowledge of sales anywhere of precisely such tracts.[6]

Business or official qualifications. Generally a

A lay witness may testify in a condemnation proceeding as to the value of the land if he has seen the land and has some knowledge of the value of other land in the immediate vicinity.—In re Brewster Street Housing Site in City of Detroit, 289 N.W. 493, 291 Mich. 313.

Witnesses who had visited farm and had witnessed sales of land in same vicinity, and stated in substance that they were acquainted in general way with values of land in that part of Texas, were competent to testify as to value of farm.—Chipman v. Flege, 263 S.W. 348, 203 Ky. 796.

Degree of experience not matter of competency

In condemnation proceeding, any one who is acquainted with the property and has knowledge of values either in the sale or ownership of property nearby is competent to testify regarding value, and the question of degree of his experience is one of weight, not of competency, of his testimony.—Department of Public Works and Buildings v. Diggins, 27 N.E.2d 826, 374 Ill. 11.

General knowledge

Witnesses having but a general knowledge of a particular situation and surrounding conditions may testify to the value of and damages to real estate.—In re Oklahoma Ave. in City of Milwaukee, 190 N.W. 1001, 179 Wis. 136.

99. Ala.—Union Fire Ins. Co. of Paris, France, v. Ryals, 145 So. 503, 25 Ala.App. 300.

Ga.—Atlanta Title & Trust Co. v. Davis, 136 S.E. 164, 36 Ga.App. 257—City of Gainesville v. Robertson, 103 S.E. 853, 25 Ga.App. 632.

Ill.—People ex rel. McDonough v. Goldberg, 188 N.E. 428, 354 Ill. 423—City of West Frankfort v. A. C. Marsh Lodge, No. 496, I. O. O. F., 145 N.E. 711, 315 Ill. 32.

Ind.—Click v. Arnold, 149 N.E. 178, 197 Ind. 350.

Pa.—Zimmerman v. Union Paving Co., 6 Sch.Reg. 102.

W.Va.—Virginian Power Co. v. Brotherton, 110 S.E. 546, 90 W.Va. 155.

22 C.J. p 589 note 90, p 695 note 48.

"Any person who is acquainted with the land is a competent witness as to its value."—Illinois Power & Light Corporation v. Talbott, 152 N.E. 486, 488, 321 Ill. 538.

Familiar with larger tract

In an action of revindication for a small tract of land included within a larger tract, the testimony of a witness, who was familiar with the larger tract and was in control of similar land in the vicinity, planted to a like crop, as to the character of the soil and the value of the crop thereon, was admissible, although he did not know the boundaries of the tract in controversy.—Goico v. Russell & Co., C.C.A.Puerto Rico, 4 F.2d 7.

1. Pa.—In re Kemble's Estate, 124 A. 694, 280 Pa. 441.

"Some familiarity with sales of, or offers to buy, the property or comparable neighboring property must be shown."—Wood v. Manufacturers & Merchants Mut. Ins. Co., 195 A. 667, 668, 89 N.H. 213.

"General value-rumor"

Knowledge of sale prices based on "general value-rumor" is sufficient; actual participation in sales is not necessary.—State v. Windus, 243 N.W. 216, 208 Wis. 583.

2. N.H.—Eames v. Southern New Hampshire Hydro-Electric Corporation, 159 A. 128, 85 N.H. 379.

22 C.J. p 589 note 88.

3. N.J.—Farrell v. New Jersey Power & Light Co., 170 A. 25, 111 N.J.Law 526—In re Proceedings to Acquire Lands, etc., for Public Park, 150 A. 387, 107 N.J.Law 110.

Proof of sales

Knowledge of other sales sufficient to qualify witness on land values must be such as would be competent if testified to by such witness or be substantiated by competent evidence of others.—Farrell v. New Jersey Power & Light Co., 170 A. 25, 111 N.J.Law 526—In re Proceedings to Acquire Lands, etc., for Public Park, 150 A. 387, 107 N.J.Law 110.

4. Ky.—Himlar Coal Co. v. Kirk, 6 S.W.2d 480, 481, 224 Ky. 383, quoting **Corpus Juris**—Sandy Valley & E. R. Co. v. Bentley, 171 S.W. 178, 161 Ky. 555.

N.Y.—King v. Daru, 298 N.Y.S. 982, 252 App.Div. 767.

Tex.—Texas Pacific Coal & Oil Co. v. Taylor, Civ.App., 47 S.W.2d 1110—Rankin v. Parker, Civ.App., 4 S.W.2d 227—Central State Bank of Coleman v. Henderson, Civ.App., 286 S.W. 518, 519, citing **Corpus Juris**—Humble Oil & Refining Co. v. Woods, Civ.App., 277 S.W. 152, reversed on other grounds Humble Oil & Refining Co. v. Wood, Com. App., 292 S.W. 200, rehearing denied 294 S.W. 197—Ft. Worth & D. C. Ry. Co. v. Hapgood, Civ.App., 210 S.W. 969.

22 C.J. p 589 note 87 [c], p 590 note 91.

Absence or scarcity of sales of land in the area does not preclude the reception of opinion evidence as to the value of realty.

U.S.—Holmberg v. Southern Minnesota Joint Stock Land Bank of Minneapolis, D.C.Minn., 10 F.Supp. 795.

Ky.—Paintsville Nat. Bank v. Conley, 78 S.W.2d 313, 257 Ky. 425—Commonwealth v. Smith, 17 S.W. 2d 203, 229 Ky. 345.

Pa.—Westinghouse Air Brake Co. v. City of Pittsburgh, 176 A. 13, 316 Pa. 372.

Tex.—Driscoll v. Nolan, Civ.App., 130 S.W.2d 400, set aside 131 S.W. 2d 1025.

No other leases during period

Admission on cross-examination of expert testifying as to value of certain lease that no leases were taken in field during period covered by his testimony did not affect admissibility of such testimony.—Solberg v. Sunburst Oil & Gas Co., 246 P. 168, 76 Mont. 254.

5. Ill.—City of Chicago v. Chicago City Ry. Co., 141 N.E. 141, 309 Ill. 448.

Ky.—Himlar Coal Co. v. Kirk, 6 S. W.2d 480, 481, 224 Ky. 383, quoting **Corpus Juris.**

Neb.—Beebe & Runyan Furniture Co. v. Board of Equalization of Douglas County, 296 N.W. 764.

Wis.—State v. Windus, 243 N.W. 216, 208 Wis. 583.

22 C.J. p 590 note 92.

Dealings in general vicinity

Witness testifying regarding property values need not have dealt in land in immediate vicinity if he has dealt in land in general vicinity.—Mary Jane Stevens Co. v. First Nat. Bldg. Co., 57 P.2d 1099, 89 Utah 456.

6. Ind.—Frankfort & K. R. Co. v. Windsor, 51 Ind. 238.

Mass.—Cochrane v. Com., 56 N.E. 610, 175 Mass. 299, 78 Am.S.R. 491.

person engaged in a business[7] or holding a public office[8] which requires a knowledge of real estate values is a competent witness as to the value of land with which he is familiar. Thus experienced real estate dealers, brokers, and agents are competent witnesses as to the value of realty[9] located in the area where they have carried on their business;[10] and a real estate broker has been permitted to state his inference of value, although he does not live in the neighborhood of the land in question[11] and has never made a sale there.[12]

Owners or residents in vicinity. Persons who for a substantial period have owned land in the vicinity are generally held competent.[13] Moreover,

7. Md.—Preske v. Carroll, 16 A.2d 291, 178 Md. 543.
Tex.—City of Corpus Christi v. McLaughlin, Civ.App., 147 S.W.2d 576, error dismissed.

8. N.J.—Hackensack Water Co. v. Township of North Bergen, 15 A.2d 899, 18 N.J.Misc. 627.
Wis.—State v. Windus, 243 N.W. 216, 208 Wis. 583.
22 C.J. p 580 note 87 [a], p 588 note 85 [a].

Chairman of board of tax assessors
R.I.—Burden v. Tax Assessors of City of Newport, 134 A. 9, 47 R.I. 473.

County assessor
Neb.—Beebe & Runyan Furniture Co. v. Board of Equalization of Douglas County, 296 N.W. 764.

Federal government appraisers
(1) In condemnation proceeding, testimony of land appraiser of long experience in United States department of agriculture, and who was shown to have made a thorough and careful study of the land sought to be condemned, was admissible over objection that witness was not familiar with the land values in the community, since the objection went to the weight rather than to the admissibility of the testimony.—State v. Harr, Tenn.App., 143 S.W.2d 893.

(2) An appraiser of the Home Owners' Loan Corporation, who had been such since 1934 and had appraised approximately forty thousand pieces of property in the state and who testified that he had appraised the particular property involved, was qualified to express an opinion as to the present fair and reasonable cash market value thereof.—In re Cole, D.C.Wash., 37 F. Supp. 860.

Former assessor
One who has been, for a number of years, assessor of the county in which land is situated, and subsequently has been engaged in appraising real property, and has seen and examined the land in question is qualified to express an opinion as to its value.—Portland & D. C. R. Co. v. Sanders, 167 P. 564, 86 Or. 62.

State inheritance tax appraiser
Cal.—People v. Pacific Gas & Electric Co., 81 P.2d 584, 27 Cal.App.2d 725.

Knowledge based on purchases
A city official whose knowledge of real estate values is based solely on purchases of land made by a city to obviate condemnation proceedings is not competent, in condemnation proceedings by a city, to testify to value of land, but the opposite is true where he has studied real estate values carefully for four years and has consulted the largest real estate people in connection with his duties.—City of Baltimore v. Himmel, 107 A. 522, 135 Md. 65.

Where improper matter brought in
Permitting district assessor to testify as expert witness in proceedings to condemn land for school sites and other municipal purposes held erroneous as necessarily bringing to jury attention of jury the assessment which is not admissible.—Johnson & Wimsatt v. Reichel-Derfer, 50 F.2d 336, 60 App.D.C. 186.

9. Cal.—People by State Department of Public Works v. Marblehead Land Co., 255 P. 553, 82 Cal. App. 289.
Colo.—City and County of Denver v. Lyttle, 103 P.2d 1, 106 Colo. 157.
Idaho.—Palmer v. Highway Dist. No. 1, Bonner County, 290 P. 393, 49 Idaho 596.
Ill.—Department of Public Works and Buildings v. Foreman State Trust & Savings Bank, 1 N.E.2d 75, 363 Ill. 13.
Ind.—Muir v. Robinson, 186 N.E. 289, 205 Ind. 293.
Md.—Preske v. Carroll, 16 A.2d 291, 178 Md. 543.
Mass.—Old Silver Beach Corporation v. Town of Falmouth, 165 N.E. 1, 266 Mass. 224.
Mich.—In re Dillman, 239 N.W. 883, 256 Mich. 654.
Minn.—Apitz v. City of New Ulm, 248 N.W. 733, 189 Minn. 205—In re Delinquent Real Estate Taxes in Kanabec County, 204 N.W. 640, 164 Minn. 522.
Mo.—State ex rel. Luechtefeld v. Arnold, App., 149 S.W.2d 384, transferred, see, Sup., 144 S.W.2d 60.
N.J.—Ennever v. Borough of Bergenfield, 144 A. 809, 105 N.J.Law 419—City of Hoboken v. Greenberg, 128 A. 266, 101 N.J.Law 403, 404, 405, 406, 407, 408, 2 N.J.Misc. 505—Robinson v. Borough of Edgewater, 119 A. 7, 98 N.J.Law 205—City of Paterson v. Baker, 139 A. 413, 5 N.J.Misc. 1075.
Pa.—Summers v. Lancaster County, 162 A. 256, 308 Pa. 379.
Tex.—Texas Interurban Ry. Co. v. Halford, Civ.App., 299 S.W. 277—Johnson v. Ewing, Civ.App., 276 S.W. 784—Daniels v. Garrett, Civ. App., 239 S.W. 1118.
Va.—Chandler v. Russell, 180 S.E. 313, 164 Va. 318.
22 C.J. p 698 note 97.

Witnesses having general experience in sale of real estate and knowing general trend of values and uses to which property was put could testify as to value of property condemned.—Kankakee Park Dist. v. Heidenreich, 159 N.E. 289, 328 Ill. 198.

10. Mass.—Maher v. Commonwealth, 197 N.E. 78, 291 Mass. 343.

11. Mass.—Lyman v. Boston, 41 N.E. 127, 164 Mass. 99.

12. Mass.—Amory v. Melrose, 39 N.E. 276, 162 Mass. 556.

13. U.S.—Brown v. Town of Eustis, Fla., D.C.Fla., 293 F. 197.
Cal.—Sternes v. Sutter Butte Canal Co., 278 P. 921, 99 Cal.App. 465.
Colo.—City and County of Denver v. Lyttle, 103 P.2d 1, 106 Colo. 157.
Ill.—Pittsburgh, C., C. & St. L. Ry. Co. v. Gage, 121 N.E. 582, 286 Ill. 213.
Iowa.—Evans v. Iowa Southern Utilities Co. of Delaware, 218 N.W. 66, 205 Iowa 283.
Ky.—Saulsberry v. Kentucky & West Virginia Power Co., 10 S.W. 2d 451, 226 Ky. 75.
Neb.—Meister v. Krotter, 278 N.W. 483, 134 Neb. 293.
Or.—City of La Grande v. Rumelhart, 246 P. 707, 118 Or. 166.
Tex.—Humphrey v. Stidham, Civ. App., 124 S.W.2d 921—Texas Power & Light Co. v. Jones, Civ.App., 293 S.W. 885—Central State Bank of Coleman v. Henderson, Civ. App., 286 S.W. 518.
"A man who lives in the vicinity and is a property owner may be presumed to know the value of property."—Himlar Coal Co. v. Kirk, 6 S.W.2d 480, 481, 224 Ky. 353.

One who owns similar land will not be presumed to be qualified; his qualifications must be established.—People v. McReynolds, 87 P.2d 734, 31 Cal.App.2d 219.

Witness held not competent
Witness owning property in neighborhood who admitted that he was not expert on values and had known

persons who have resided in the neighborhood for a long time have been held competent,[14] although the fact that the witness does not reside in the vicinity will not disqualify him.[15]

Discretion of court. The determination of the sufficiency of the witness' qualifications rests in large measure in the discretion of the trial court.[16]

(3) Owner of Realty

It is generally held that the owner of real property is competent to testify as to its value.

Although there is some authority to the contrary,[17] it is generally held that the owner of realty is competent to testify as to its value;[18] and his estimate is received although his knowledge on the subject is not such as would qualify him to testify if he were not the owner.[19] Under this rule an

of but a few sales of property, and showed he knew very little as to neighborhood values, was held not qualified to testify as to value of abutting owner's property.—Brown, for Use of McArdle v. Borough of Castle Shannon, 178 A. 678, 318 Pa. 363.

14. Cal.—People v. Willis, 86 P.2d 670, 30 Cal.App.2d 419.
Ga.—Livsey v. Walton County, 170 S.E. 268, 47 Ga.App. 211.
Kan.—Burger v. City of Wichita, 294 P. 670, 132 Kan. 105.
La.—Louisiana Highway Commission v. Treadaway, App., 173 So. 209, affirmed Louisiana Highway Commission v. Treadway, 175 So. 94.
Mo.—Union Elevator Co. v. Kansas City Suburban Belt R. Co., 36 S. W. 1071, 135 Mo. 353.
Okl.—Goldberg v. Wilcox, 260 P. 777, 127 Okl. 263.
Pa.—Wissinger v. Valley Smokeless Coal Co., 115 A. 880, 271 Pa. 566.
Tex.—Lower Colorado River Authority v. Hughes, Civ.App., 122 S. W.2d 222, error dismissed—Quanah, A. & P. Ry. Co. v. Lancaster, Civ.App., 207 S.W. 606.
Wash.—Kriegler v. Spokane Merchants' Ass'n, 189 P. 1004, 111 Wash. 179.
"The standard of qualifications for persons living in the immediate vicinity may not be quite as rigid as it is for an expert, but they should know generally the value of property in the vicinity."—Westinghouse Air Brake Co. v. City of Pittsburgh, 176 A. 13, 15, 316 Pa. 372.

More or less familiar with land values

In action for injury to land persons living in the community who are more or less familiar with land values are competent to testify as to value before and after injury.—Harke v. Ewald, 200 N.W. 1009, 51 N.D. 828.

15. U.S.—Pacific Live Stock Co. v. Warm Springs Irr. Dist., C.C.A. Or., 270 F. 555.
22 C.J. p 588 note 85 [e].

16. U.S.—Morton Butler Timber Co. v. U. S., C.C.A.Tenn., 91 F.2d 884—Pacific Live Stock Co. v. Warm Springs Irr. Dist., C.C.A.Or., 270 F. 555.
Ala.—Pryor v. Limestone County, 160 So. 700, 230 Ala. 295.
Ark.—Bridgman v. Baxter County, 148 S.W.2d 673.
Cal.—People v. McReynolds, 87 P.2d 734, 31 Cal.App.2d 219.
Iowa.—Burgess v. Bremer County, 178 N.W. 389, 189 Iowa 168.
Minn.—In re Judicial Ditch No. 2, 175 N.W. 102, 144 Minn. 257.
Mo.—State ex rel. State Highway Commission v. Bailey, 115 S.W.2d 17, 234 Mo.App. 168—State ex rel. Highway Commission of Missouri v. Williams, 51 S.W.2d 538, 227 Mo.App. 196.
N.J.—Overbridge Realty Corporation v. City of Hackensack, 180 A. 666, 13 N.J.Misc. 702.
Tex.—Foley Bros. Dry Goods Co. v. Settegast, Civ.App., 133 S.W.2d 228, error refused—Central State Bank of Coleman v. Henderson, Civ.App., 286 S.W. 518.
Wash.—Ham, Yearsley & Ryrie v. Northern Pac. Ry. Co., 188 P. 527, 110 Wash. 467.
22 C.J. p 695 note 48 [b].

Exclusion of broker's evidence

It was in trial judge's discretion to exclude testimony of experienced real estate broker and agent as to market value of private way containing sewer and drain subject to easements, where it did not appear that he had ever sold land with sewers or drains laid in it, or was familiar with cost or value of materials, or the cost of laying them or the extent, if any, to which they would add value to the land.—Beals v. Inhabitants of Brookline, 139 N.E. 492, 245 Mass. 20

17. R.I.—Greene v. State Board of Public Roads, 149 A. 596, 50 R.I. 489.

18. Cal.—Chamberlain v. Chamberlain, 300 P. 100, 114 Cal.App. 591.
Colo.—Universal Ins. Co. v. Arrigo, 44 P.2d 1020, 96 Colo. 531.
Ind.—State v. Hamer, 199 N.E. 589, 595, 211 Ind. 570, citing **Corpus Juris.**
Ky.—Bank v. Conley, 78 S.W.2d 313, 257 Ky. 425.
Miss.—City of Clarksdale v. Stuart, 185 So. 588, 184 Miss. 179.
Or.—Moss v. People's California Hydro-Electric Corporation, 293 P. 606, 610, 134 Or. 227, citing **Corpus Juris.**
Okl.—Gypsy Oil Co. v. Karns, 236 P. 608, 609, 110 Okl. 156, citing **Corpus Juris.**
Pa.—Barron v. United Ry. Co., 93 Pa.Super. 555.
Tex.—Gulf & Interstate Ry. Co. of Texas v. Stephenson, Civ.App., 212 S.W. 215.
Wash.—Lyle v. Ginnold, 24 P.2d 449, 450, 174 Wash. 104, citing **Corpus Juris.**
22 C.J. p 586 note 72.

Former owners

Persons who owned the property prior to the time as of which it is to be valued are not thereby qualified to testify as to value.—Dexter v. Aronson, 184 N.E. 455, 282 Mass. 124—Johnston v. Cassidy, 181 N.E. 748, 279 Mass. 593—Phillips v. Vorenberg, 156 N.E. 61, 259 Mass. 46.

Owner at time testimony given

A witness was competent to testify as to value of realty where it appeared at time of giving of testimony that he was an owner thereof.—Winklemen v. Sides, 88 P.2d 147, 31 Cal. App.2d 387.

Value at time of purchase

Admission of evidence by purchaser of farm as to its value in its condition at time of purchase, he having moved on farm shortly thereafter and cropped it four seasons before giving his testimony, was not in excess of court's discretion.—Zimmerman v. Mendelkow, 200 N.W. 297, 160 Minn. 330, reversed on other grounds Zimmerman v. Mandelkow, 201 N.W. 289, 160 Minn. 330.

Part owner and occupier of land is competent to give testimony as to value of land.—Union Joint Stock Land Bank of Louisville v. Knox County, 97 S.W.2d 842, 20 Tenn.App. 273.

One member of partnership, as an owner of improvements erected with partnership funds, was qualified in proceeding on dissolution of partnership, to testify concerning value of improvements.—Minikin v. Hendrix, 101 P.2d 473, 15 Cal.2d 338.

19. Cal.—McGowan v. Burg Bros., 210 P. 545, 59 Cal.App. 219.
Ind.—State v. Hamer, 199 N.E. 589, 595, 211 Ind. 570, citing **Corpus Juris.**
Okl.—Gypsy Oil Co. v. Karns, 236 P. 608, 609, 110 Okl. 156, citing **Corpus Juris.**
22 C.J. p 587 note 73.

owner has been permitted to testify not only as to the value of farm land,[20] but as to the value of realty of unusual character,[21] such as a spring.[22] The rule extends to receiving the statement of the owner as to the value of the right to use the property.[23] He may testify as to the value of improvements,[24] and may, where the matter is one of mere subtraction or easy calculation, state the damage or cost of repair.[25] He may also state the effect on value of a taking or other change in condition,[26] or the value if certain work on the land had been properly performed.[27]

However ownership alone does not qualify one who has no knowledge of value or who is not familiar with the location, quality, or value of his real estate.[28]

e. Personal Property

(1) In general
(2) Qualifications of witness as to value of personalty generally
(3) Owner of personalty

(1) In General

The opinion of a qualified witness may be admissible as evidence of the value of personal property, or of the value of its use.

The value of personal property[29] and the value of the right to use personal property[30] may be proved by the estimate, conclusion, or opinion of a qualified witness. Such evidence is admissible to prove the value of animals.[31] Likewise, such evidence,

"An owner may not be familiar with the general prices of property in the neighborhood, nor may he possess all the qualifications that would be required of others who testify as to value. Nevertheless, because he is an owner with a general knowledge of his property, he is a competent witness."—Westinghouse Air Brake Co. v. City of Pittsburgh, 176 A. 13, 15, 316 Pa. 372.

20. Minn.—Smith v. Travellers Ins. Co., 291 N.W. 516, 207 Minn. 349.

21. Ala.—Hudson v. State, 61 Ala. 333.
22 C.J. p 587 note 74.

22. Idaho.—Thibadeau v. Clarinda Copper Mining Co., 272 P. 254, 47 Idaho 119.

23. Mass.—Ryder v. Town of Lexington, 21 N.E.2d 382, 303 Mass. 281.
Wash.—Lyle v. Ginnold, 24 P.2d 449, 450, 174 Wash. 104, citing **Corpus Juris.**
22 C.J p 587 note 75.

24. Cal.—Mosher v. Lack, 181 P. 813, 41 Cal.App. 23.
Pa.—Chauvin v. Superior Fire Ins. Co., 129 A. 326, 283 Pa. 397.

25. Ind.—Terre Haute & L. R. Co. v. Walsh, 38 N.E. 534, 11 Ind.App. 13.
22 C.J. p 587 note 77.

26. Cal.—Richards v. Silveria, 275 P. 478, 97 Cal.App. 166.
Ga.—Atlantic Coast Line R. Co. v. Atkins Dairy Co., 152 S.E. 303, 41 Ga.App. 212.
Mass.—Davenport v. Haskell, 200 N. E. 409, 293 Mass. 454.
Tex.—Driscoll v. Nolan, Civ.App., 130 S.W.2d 400, set aside 131 S.W.2d 1025.
22 C.J. p 587 note 76.

27. Minn.—Carl Lindquist & Carlson v. Johanson, 235 N.W. 267, 182 Minn. 529.

28. Tex.—Chicago, R. I. & G. Ry. Co. v. Martin, Civ.App., 37 S.W.2d 207.
22 C.J. p 587 note 78.

29. U S.—Hemler v. Hope Producing Co., C.C.A.La., 117 F.2d 231—The Waalhaven, D.C.N.Y., 1 F.Supp. 396, affirmed, C.C.A., 64 F.2d 25, certiorari denied The Waalhaven v. Potash Importing Corporation of America, 53 S.Ct. 696, 289 U.S. 752, 77 L.Ed. 1497.
Cal.—Pye v. Eagle Lake Lumber Co., 227 P. 193, 66 Cal.App. 584.
Md.—Maryland Casualty Co. v. East Baltimore Driving Ass'n, 108 A. 517, 135 Md. 105.
Mo.—Taylor v. St. Louis & H. R. Co., App., 256 S.W. 499.
Pa.—Worthington v. Adams Express Co., 72 Pa.Super. 292.
R.I.—McGovern v. Michael, 6 A.2d 709, 62 R.I. 485, modified on other grounds 9 A.2d 274.
Tex.—Thompson v. Schletze, Civ. App., 126 S.W.2d 1044—Bell v. Mulkey, Civ.App., 248 S.W. 784.
22 C.J. p 583 note 23, p 693 note 97.

A person having special knowledge of the value of machinery, mechanical appliances, and other personal property may be permitted to testify to their cost and value, although he may not be technically an expert, since his familiarity with the particular articles or with the trade or business for which they were prepared, sold, or used enables him to estimate the value given in a way others could not do.—Wilhelm v. Uttenweiler, 112 A. 94, 271 Pa. 451.

The market value of personal property may be proved by the testimony of a competent witness.—Kerlin-Patterson Lumber Co. v. Eufaula Hardware Co., 108 So. 508, 214 Ala. 602—22 C.J. p 701 note 55.

Proper method of proving value of chattels is by expert opinion if they have no market value.—Sultan v. London Assur. Corporation, 135 A. 58, 4 N.J.Misc. 947.

Value of extracted tooth

The testimony of a dentist, stating as an expert the condition of a tooth which it is alleged was extracted by mistake, followed by his opinion as to its value, was admissible.—Holtzendorf v. McNeil, 104 S.E. 919, 25 Ga.App. 792.

Assets of insolvent banks

State liquidating officer, in charge of insolvent bank, is qualified to express opinion as to value of equity in securities.—Federal Reserve Bank of San Francisco v. Idaho Grimm Alfalfa Seed Growers' Ass'n, C.C.A. Idaho, 8 F.2d 922, certiorari denied 46 S.Ct. 347, 270 U.S. 646, 70 L.Ed. 778.

30. Ala.—Curb v. Dabbs & Tannehill, 97 So. 109, 19 Ala.App. 149, certiorari denied Ex parte Curb, 97 So. 111, 210 Ala. 45.
22 C.J. p 584 note 25.

31. Mont.—Klind v. Valley County Bank of Hinsdale, 222 P. 439, 69 Mont. 386.
N.Y.—Holsapple v. Rome, W. & O. R. Co., 86 N.Y. 275.
22 C.J. p 584 note 26, p 693 note 98.

Cattle

(1) In general.
Mo.—Lee v. Butler County R. Co., App., 227 S.W. 1061.
Mont.—Morgan v. Hines, 211 P. 778, 65 Mont. 306.
Tex.—Panhandle & S. F. Ry. Co. v. Montgomery, Civ.App., 140 S.W.2d 241—Texas & P. Ry. Co. v. Moore, Civ.App., 7 S.W.2d 902, error dismissed—Gulf, C. & S. F. Ry. Co. v. Morris, Civ.App., 241 S.W. 235, affirmed, Com.App., 250 S.W. 1017.
22 C.J. p 693 note 99, p 584 note 26 [a], p 701 note 55 [a] (2).

(2) Experienced cattle buyer, having seen cattle immediately prior to delivery, was competent to testify as to market value.—Allender v. Chicago & N. W. Ry. Co., 230 N.W. 102, 119 Neb. 559.

consisting of estimate, conclusion, or opinion, is admissible to prove value of automobiles.[32] Likewise,

(3) Experienced cattle dealer personally auctioning cattle was competent to testify as to market value.—Allender v. Chicago & N. W. Ry. Co., 230 N.W. 102, 119 Neb. 559.

(4) Witness engaged in cattle business fifteen years, who knew herd in question twelve years, and who had been through it week before time value was in question, was qualified to testify as to value.—Harding v. Henderson, 255 P. 969, 123 Kan. 533.

(5) Person who frequently saw herd of cattle and is acquainted with market value may say what average market value is per head.—Hale v. Lehigh Valley R. Co., 87 Pa.Super. 489.

(6) A witness who has raised, bought, sold, and handled cattle practically all of his life, and resided in a country where the cattle business is one of the principal industries, is a competent witness to testify as to the value of cattle in such locality.—Payne v. Parsons, 223 P. 618, 97 Okl. 168.

(7) Permitting veterinary to testify as expert regarding value of cow warranted to be in sound health was not erroneous.—Bond v. Berson, 146 A. 773, 50 R.I. 192.

(8) Excluding testimony of a witness in the nature of that of an expert as to the value of the animal was not error, where the witness admitted he had never raised pure-bred Jersey cattle, and admitted he had not informed himself in such matters, and stated that he could not tell anything about the pedigree of the animal in question, and that he was not familiar with pedigrees.—Union Traction Co. v. Anderson, 242 S.W. 876, 146 Tenn. 476, 25 A.L.R. 1496.

(9) In action for value of bull killed by train, witness engaged in cattle business, but not familiar with market for Holstein cattle, and not knowing of any sales thereof, was not qualified to testify either as to market value of registered Holstein bull or as to its intrinsic or actual value.—Texas & N. O. R. Co. v. Moore, Tex.Civ.App., 271 S.W. 126.

(10) That a witness had been at a certain town only twice did not destroy the effect of his testimony as to the market value of cattle there, since he might know such market value, although he had never visited the place.—San Antonio & A. P. Ry. Co. v. Miller, Tex.Civ.App., 137 S.W. 1194.

Dogs

(1) In general.—Mendenhall v. Struck, 224 N.W. 95, 207 Iowa 1094—3 C.J. p 161 note 98, p 162 note 99—22 C.J. p 693 note 1, p 584 note 26 [b].

(2) One need not be an expert or dealer in dogs to be qualified to testify as to their value, if he has had opportunity to form correct opinion.—Louisville & N. R. Co. v. Whitley, 105 So. 661, 213 Ala. 525.

(3) In an action for the killing of a foxhound, witnesses who testified to the qualities and value of the dog were properly permitted to qualify by showing they had been fox hunters, and had owned or observed fox dogs and their actions for twenty-five or forty years.—Louisville & N. R. Co. v. Watson, 94 So. 551, 208 Ala. 319.

(4) It has been held that the opinions of witnesses as to the value of a dog which has no market value are incompetent.—Brown v. Hoburger, 52 Barb., N.Y., 15.

3 C.J. p 162 note 1.

Foxes

Idaho.—Basye v. Hayes, 76 P.2d 435, 58 Idaho 569.

Hogs

S.D.—State v. Montgomery, 97 N.W. 716, 17 S.D. 500.

Tex.—Trahan v. Smith, Civ.App., 239 S.W. 345.

22 C.J. p 694 note 7.

Horses

(1) In general.—Holland v. Huston, 49 P. 390, 20 Mont. 84—22 C.J. p 693 note 2, p 584 note 26 [d].

(2) Race horses.—Gulf, C. & S. F. R. Co. v. Peacock, 128 S.W. 463, 60 Tex.Civ.App. 250—22 C.J. p 694 note 4.

(3) Stallions.—Harris v. Panama R. Co., 36 N.Y.Super. 373, affirmed 58 N.Y. 660.

22 C.J. p 694 note 6.

Jacks

Tex.—Gulf, C. & S. F. Ry. Co. v. Hines, Civ.App., 4 S.W.2d 641—Texas & P. R. Co. v. Virginia Ranch, Land & Cattle Co., Tex., 7 S.W. 341.

Mules

(1) In general.—Rogers & Adams v. Lancaster, Tex.Com.App., 248 S.W. 660, affirming Lancaster v. Rogers & Adams, Civ.App., 235 S.W. 643—Davis v. Morgan, Tex.Civ.App., 251 S.W. 310—22 C.J. p 694 note 3.

(2) Witness familiar with mule in controversy was not required to be expert to testify to value.—Powell v. Benefield, 156 So. 764, 229 Ala. 226.

(3) Experienced stock shipper may testify to value of mule which died in transit, basing opinion on commission company's bulletins.—Dillen v. Wabash Ry. Co., Mo.App., 294 S.W. 439.

(4) Witness who had seen mule in question, had bought and used mules, and was acquainted with prices received for them was qualified to state market value of mule.—International-Great Northern R. Co. v. Motley, Tex.Civ.App., 18 S.W. 2d 782.

Rams

Iowa.—State v. McKeavitt, 77 N.W. 325, 106 Iowa 748.

Sheep

Witnesses experienced in sheep business are qualified to testify concerning value of sheep.—Hobbs v. Whitelock, 231 N.W. 904, 57 S.D. 198.

Reasonable experience in raising, dealing in, and handling live stock is sufficient to qualify a witness to estimate the reasonable value of live stock.—Klind v. Valley County Bank of Hinsdale, 222 P. 439, 69 Mont. 386.

32. Ala.—Scott v. Parker, 113 So. 495, 216 Ala. 321—Mobile Light & R. Co. v. R. O. Harris Grocery Co., 88 So. 55, 17 Ala.App. 659.

Idaho.—Garrett v. Neitzel, 285 P. 472, 48 Idaho 727.

Iowa.—Anderson v. U. S. R. R. Administration, 211 N.W. 872, 203 Iowa 715—Gay v. Shadle, 176 N. W. 635.

Kan.—Kersting v. Reese, 255 P. 74, 123 Kan. 277—Barshfield v. Vucklich, 197 P. 205, 108 Kan. 761.

N.H.—Canney v. Emerson, 136 A. 139, 82 N.H. 487.

Okl.—Midland Valley R. Co. v. Lawhorn, 198 P. 586, 81 Okl. 288.

Tex.—Kansas City, M. & O. R. Co. of Texas v. O'Connell, Civ.App., 210 S.W. 757, dismissed for want of jurisdiction.

Wash.—Morgan v. Union Automobile Ins. Co., 273 P. 527, 150 Wash. 443.

22 C.J. p 584 note 27, p 695 note 36.

42 C.J. p 1296 notes 89–99.

Collective fact

Market or rental value of automobile is a collective fact, provable by any person possessing the requisite knowledge of conditions that influence such values.—Pratt Cons. Coal Co. v. Morton, 68 So. 1015, 14 Ala. App. 194—46 C.J. p 811 notes 60, 61.

Hypothetical question

(1) The market value of an automobile may be testified to by an expert witness on a hypothetical question, provided such witness can show that he is familiar with market value of like automobiles and provided testimony is given of the condition of the automobile.

Mo.—Jones v. West Side Buick Auto Co., 93 S.W.2d 1083, 231 Mo.App. 187.

Pa.—Cullen v. Hartford Accident & Indemnity Co., 164 A. 67, 108 Pa. Super. 19—Rodgers v. Studebaker Sales Co., 157 A. 6, 102 Pa.Super. 402.

Tenn.—Wilson v. Bryant, 67 S.W.2d 133, 167 Tenn. 107.

such evidence, is admissible to prove the value of a bank's assets,[33] bicycles,[34] bills and notes,[35]

Tex.—Anderson v. Reichart, Civ. App., 116 S.W.2d 772, error dismissed—Home Service Finance Co. v. White, Civ.App., 86 S.W.2d 815, error dismissed.

(2) Testimony of adjuster that automobile of certain model and make that had been driven approximately eighteen thousand to twenty thousand miles had been used twelve to thirteen months, and was worth twenty-five to thirty per cent less than its stated original cost was admissible as witness' opinion of market value.—Keene v. Lumbermen's Mut. Ins. Co., 5 S.E.2d 379, 60 Ga.App. 864.

Lay witnesses can testify as to value of automobiles.—Parker v. Taylor, 124 So. 199, 220 Ala. 68.

Expert knowledge not involved

Testimony as to automobile's value before collision does not involve expert knowledge.—Teets v. Hahn, 140 A. 427, 104 N.J.Law 357, reversing 137 A. 559, 5 N.J.Misc. 538—42 C.J. p 1296 note 94.

Persons experienced in dealing in automobiles are sufficiently qualified to give opinions as to values of used automobiles.—Rucker v. Campbell, 71 P.2d 718, 180 Okl. 580.

Opinion based on "Blue Book"

Testimony of witness as to difference in value of automobile before and after collision, who relied on certain "Blue Book" in which market values were set forth, is admissible where witness had, from long experience, knowledge of market values and knew that values set forth in book were correct.—Cincinnati St. Ry. Co. v. Waterman, 198 N.E. 494, 50 Ohio App. 380.

Value at a later date

The testimony of a witness who had examined the vehicle in question, as to its value at a subsequent time, on the assumption that it was in good running condition, is admissible.—Canney v. Emerson, N.H., 136 A. 139.

Parts of automobile

Tex.—Northern Texas Traction Co. v. Armour & Co., Civ.App., 290 S.W. 544, certified question answered 288 S.W. 145, 116 Tex. 176.

Repairs to automobile

Mechanic repairing automobile can testify to actual cost of work, although he contracted for such work with another person not under his immediate supervision and employ.—McCabe v. Rutter, 89 Pa.Super. 257.

Rental value

Only an expert can testify to the rental value of an automobile.—W. B. Moses & Sons v. Lockwood, 295 F. 936, 54 App.D.C. 115.

Witness held qualified to testify as to value of automobile

(1) Experts on automobile values. Ga.—Lamon v. Perry, 125 S.E. 907, 33 Ga.App. 248.

N.J.—New Jersey Mfrs.' Ass'n Fire Ins. Co. v. Galowitz, 150 A. 408, 106 N.J.Law 493.

(2) Dealers in automobiles.

Ga.—Southeastern Express Co. v. Nightingale, 126 S.E. 915, 33 Ga. App. 515.

Mo.—Weaver v. Stephens, App., 78 S.W.2d 903—Campbell v. National Fire Ins. Co. of Hartford, Conn., App., 269 S.W. 645—Barnes v. Elliott, App., 251 S.W. 488.

Tex.—Cisco & N. E. Ry. Co. v. Wood, Civ.App., 244 S.W. 834.

42 C.J. p 1296 notes 90, 97–99.

(3) Witnesses with experience in repairing and dealing in secondhand automobiles, some of whom had previously negotiated with plaintiff with a view to buying his machine.—Cottam v. Oregon Short Line R. Co., 187 P. 827, 55 Utah 330.

(4) Witness, who had conducted motor vehicle repair shop for over twenty years and sold used automobiles and some small trucks.—James E. Watkins Co. v. Peterson Motor Express, 188 A. 461, 88 N.H. 476.

(5) Experienced mechanic testifying as to considerable experience with automobiles of same make as that damaged.—Whigham v. Seacoast Finance Corporation, 145 A. 240, 7 N.J.Misc. 305.

(6) One skilled in repairing automobiles and acquainted with their general mechanism, with knowledge of current prices and values of particular make of car.—Foutty v. Chalmax Sales Co., 128 S.E. 389, 99 W.Va. 300.

(7) Witness with experience in purchase of automobiles.—Ross v. Nevin Bus Lines, 154 A. 198, 9 N. J.Misc. 412.

(8) Witness who had used the car, knew the cars being bought and sold in the community, and the prices involved, and had operated automobiles for seven years.—Quinn v. Zimmer, 239 N.W. 902, 184 Minn. 589.

(9) Witness who had driven automobiles for seven years, and was familiar with them.—Alabama Power Co. v. Armour & Co., 92 So. 111, 207 Ala. 15.

(10) One who is qualified from his proved experience to be a judge of the amount ordinarily charged, at the usual and market rates, for the work and material necessary to repair a motor vehicle, and who supervised the making of repairs on the vehicle in question, is a competent witness as to the reasonable cost thereof.—Peabody v. Lynch, 184 Ill. App. 78.

(11) The fact that automobile dealer testifying as to value of automobile prior to collision, although he had seen it only after collision, admitted on cross-examination that he had not inspected specific parts of automobile, went to weight of his testimony, but did not render it inadmissible.—Drake v. Emhoff, Pa. Super., 21 A.2d 492.

Witness held incompetent

(1) In action for conversion of automobile purchased from defendant by plaintiff for use in plaintiff's business of selling magazines through subagents, plaintiff was not qualified to testify as to value of automobile after its operation by him.—Universal Credit Co. v. O'Neal, Tex.Civ.App., 140 S.W.2d 596.

(2) Mere experience in repairing motor vehicles does not render one competent to testify as to value, in the absence of expert knowledge of motor vehicles generally or experience with vehicles similar to the one in question.—Rittenhouse-Winterson Auto. Co. v. Kissner, 98 A. 361, 129 Md. 102.

(3) Where witness had never seen the automobile, his opinion as to its value was properly excluded.—Abbott v. Zirpolo, 171 A. 251, 132 Me. 368.

Refreshing recollection

A witness testifying as to the reasonable cost or value of repairs may refresh his recollection from a memorandum made by him at the time of making the repairs, and from a printed catalogue of prices issued for the use of the trade generally by the manufacturing company which is the exclusive source of supply for parts and replacements.—Wilbur v. Buckingham, 132 N.W. 960, 153 Iowa 194, Ann.Cas.1913E 210—42 C.J. p 1297 note 24.

33. Kan.—Stoutimore v. Hershner, 267 P. 19, 126 Kan. 39.

34. Iowa.—Tuttle v. Cone, 79 N.W. 267, 108 Iowa 468.

35. N.Y.—Vroom v. Sage, 91 N.Y. S. 456, 100 App.Div. 285, affirmed 76 N.E. 1111, 184 N.Y. 542.

22 C.J. p 695 note 38.

Accountant

(1) Experience and information of accountant concerning business conditions, and concerning general opinion of trade as to bankrupt's debtor, qualified him to form opinion as to fair value of debtor's notes in determining solvency of bankrupt when alleged preferential transfers were made.—Irving Trust Co. v. Jacob Weckstein & Sons, C.C.A.N.Y., 64 F.2d 333.

boats,[36] bonds,[37] books,[38] bottles,[39] a business,[40] certificates of interest in a syndicate,[41] cigarettes or tobacco,[42] cloth and other materials,[43] coal,[44] commissions,[45] corporate stock,[46] and such evidence is ad-

(2) Certified public accountant who had been employed to make audit of corporation's books and had directed and supervised making of audit is qualified to testify that note listed by corporation as asset had no value.—McElligott v. Freeland, 33 P.2d 430, 139 Cal.App. 143.

36. Mich.—Leder v. National Union Fire Ins. Co., 141 N.W. 646, 175 Mich. 470.

37. Mich.—Pearson v. Wallace, 170 N.W. 72, 203 Mich. 622.
Minn.—Ebacher v. First State Bank of Cuyuna, 246 N.W. 903, 188 Minn. 268.
Va.—Wadley v. Commonwealth, 35 S.E. 452, 98 Va. 803.

Government bonds

On executor's accounting, permitting witness having read reliable journals containing market quotations to testify regarding market value of government bonds was not abuse of discretion.—In re Manning's Estate, 244 N.W. 860, 215 Iowa 746.

Municipal bonds

Wis.—Murray v. Norwood, 46 N.W. 499, 77 Wis. 405.

Railroad bonds

N.Y.—Smith v. Frost, 42 N.Y.Super. 87, affirmed 70 N.Y. 65.

Witness, who had been in banking business and had made investigations through market publication, could testify that bonds delivered to plaintiff were worthless.—King v. Shawver, Tex.Civ.App., 30 S.W.2d 930.

Where witness showed familiarity with bonds and their market value, his testimony regarding value thereof was held competent.—Fiedler v. Allen, 4 P.2d 292, 117 Cal.App. 622.

38. Ala.—Lincoln Reserve Life Ins. Co. v. Armes, 110 So. 818, 215 Ala. 407.

39. Mass.—Vandercook v. O'Connor, 52 N.E. 444, 172 Mass. 301.
N.Y.—Glickstein & Terner v. Sheffield Glass Bottle Co., 212 N.Y.S. 444, 214 App.Div. 626.

40. Ala.—Walker v. Graham, 172 So. 655, 233 Ala. 539.
Tex.—Cochran v. Hamblen, Civ.App., 215 S.W. 374, dismissed for want of jurisdiction—Western Union Telegraph Co. v. Dorough, Civ. App., 213 S.W. 282, dismissed for want of jurisdiction.

Mercantile partnership

Permitting witnesses, who testified that they were familiar with properties of mercantile partnership, to testify that values set out in financial statements of certain years were approximately correct was not error.—Hays v. Harris, C.C.A.Ark., 78 F.2d 66, certiorari denied 56 S.Ct. 134, 296 U.S. 613, 80 L.Ed. 435.

An accountant who has examined the books of a business is competent to testify as to the value of the business.—Sharon v. Kansas City Granite & Monument Co., 125 S.W. 2d 959, 233 Mo.App. 547.

41. Mich.—Gloeser v. Moore, 278 N. W. 781, 284 Mich. 106.

42. U.S.—The Rosalia, C.C.A.N.Y., 264 F. 285.
22 C.J. p 585 notes 37, 38.

43. N.Y.—Browning v. Long Island R. Co., 2 Daly 117.

44. Tex.—Payne v. White House Lumber Co., Civ.App., 231 S.W. 417.
Ky.—Harlan Gas Coal Co. v. Henseley, 3 S.W.2d 640, 223 Ky. 221.

Treasurer, director, and general manager of seller is competent to testify as to value of coal at plant which was sold, where witness had seen coal, estimated its quantity, had seen bill for coal, and had been doing business at that place for three years.—Graustein v. H. P. Hood & Sons, 200 N.E. 14, 293 Mass. 207.

45. N.M.—Kiker v. Bank Sav. Life Ins Co., 23 P.2d 366, 37 N.M. 346.

46. U.S.—Clarke v. Welch, D.C.Cal., 46 F.2d 563.
Ga.—Owen v. Anderson, 186 S.E. 864, 54 Ga.App. 53—Speir v. Westmoreland, 149 S.E. 422, 40 Ga.App. 302.
Kan.—Hotchkiss v. Fischer, 31 P.2d 37, 139 Kan. 333.
N.J.—Clark v. Commercial Trust Co. of New Jersey, 181 A. 269, 119 N. J.Eq. 133.
Pa.—Petry v. Harwood Electric Co., 124 A. 302, 280 Pa. 142, 33 A.L.R. 1249.
Tex.—Cattle Raisers' Loan Co. v. Sutton, Civ.App., 271 S.W. 233.
22 C.J. p 585 note 39, p 694 note 10.

In absence of market value for corporation's stock, opinion evidence as to value of its property was admissible to show value of stock.
Mich.—Watrous v. Bialy's Estate, 192 N.W. 628, 222 Mich. 137.
Pa.—Jarvis v. Bell, 146 A. 153, 296 Pa. 568.

Restricted market

Opinions of experienced men are admissible to show fair value of stock sold in restricted market, for income tax purposes.—Heiner v. Crosby, C.C.A.Pa., 24 F.2d 191, affirming, D.C., Crosby v. Heiner, 12 F. 2d 604.

Bank stock

A national bank examiner who had been in banking business in Oklahoma from 1908 to 1925, and who had been a national bank examiner in the tenth federal reserve district since 1925, and who had made an examination of national bank in Oklahoma from Aug. 31, 1933, to Sept. 26, 1933, in the course of which he examined each asset of bank, was qualified to state whether he had an opinion, based on his examination, as to value of stock of such bank.—Foster v. Commissioner of Internal Revenue, C.C.A., 112 F.2d 109.

Closely held stock

(1) Expert opinion as to value of closely held stock, by witnesses knowing corporation's reputation and testifying as to its assets and liabilities is competent.—Heller v. Speier, 230 N.W. 835, 119 Neb. 787.

(2) Expert testimony as to market value of stock in close corporation is relevant on assessment of estate tax.—In re Flickinger's Estate, 28 N.Y.S.2d 118, 176 Misc. 604.

Improper theory of valuation

The testimony of expert witnesses who attempted to estimate value of stock by using test of capitalization of corporate net earnings was not applicable where business was actually a partnership, although corporate in form, there were no significant net earnings over a period of years, salaries were always paid by mutual agreement among the three stockholders, and it did not appear that witnesses had had any personal experience in, or knowledge of, the kind of business under consideration on which to base their opinions of proper salaries in the circumstances.—Cook v. Dunbar, R. I., 18 A.2d 658.

Value of each asset

Until a witness had shown qualification to estimate the value of items of property constituting corporate assets, he should not have been permitted to give his opinion as to the aggregate value of such assets.—Hawkins v. Mellis, 149 N.W. 663, 127 Minn. 393, Ann.Cas.1916C 640.

Effect of putting large block of stock on market

Broker's testimony regarding effect of throwing large blocks of stock on market is competent as expert testimony to show error in appraiser's accepting market price of few shares as basis for valuing large block for fixing inheritance tax.—In re Clabby's Estate, 162 A. 207, 308 Pa. 287, 83 A.L.R. 936.

Competent witnesses

(1) Person connected with business and having personal knowledge of its affairs.—Elliott School Dist. No. 23 v. Gorder, 223 N.W. 694, 57 N.D. 668.

missible to prove value of crops or growing crops or produce,[47] dairy products,[48] dry goods,[49] dyes,[50] eggs,[51] estate of a deceased person,[52] farm implements and machinery,[53] fixtures for office,[54] store,[55] theater[56] or saloon,[57] foreign money,[58] franchises,[59] fruits,[60] fur coats,[61] furnaces,[62] good will,[63] guns,[64] household goods[65] and such evidence is admissible

(2) Director of unincorporated association controlling corporation.—Houghton v. Grimes, 151 A. 642, 103 Vt. 54.

(3) Dealer in such stock.—Johnson v. Niles Invisible Door Check Co., 222 Ill.App. 65—22 C.J. p 694 note 10 [a] (4).

(4) Vice president of corporation basing his opinion on knowledge of corporation's business.—National Bank of Brunswick, Ga., v. Gorenflo, 160 So. 911, 173 Miss. 646.

(5) Other witnesses held competent see 22 C.J. p 694 note 10 [a].

Incompetent witness

Mere fact that witness attempting to testify to value of shares of stock in corporation was one of its original incorporators was not sufficient to qualify him to testify, and his testimony should, on objection, have been excluded.—Alexander, for Use of Tobey Furniture Co., v. Live Stock Nat. Bank of Chicago, 282 Ill. App. 315.

47. Tex.—Corn v. McNutt, Civ.App., 230 S.W. 1052, dismissed for want of jurisdiction.
22 C.J. p 584 note 36, p 694 note 14, p 696 notes 68, 69, p 701 note 55 [a] (3).

Corn

Mo.—Reed v. Cullor, App., 32 S.W. 2d 296.
22 C.J. p 584 note 36 [a].

Grass

Colo.—Chicago, R. I. & P. R. Co. v. Larsen, 34 P. 477, 19 Colo. 71.
22 C.J. p 584 note 36 [b], p 694 note 15.

Hay

(1) In general.—Walter v. Echanis, 95 P.2d 979, 163 Or. 148—22 C.J. p 584 note 36 [c], p 694 note 15.

(2) Witness was incompetent to state the value of the hay at the place of its original destination, which was more than one hundred miles from his residence.—Rhodes v. Smith, Tex.Civ.App., 230 S.W. 227.

Potatoes

(1) In general.—Ferebee v. Berry, 84 S.E. 262, 168 N.C. 281.

(2) Expert's lack of experience in raising and harvesting potatoes did not disqualify him from testifying as to value of crop with which he was familiar.—Joe Chung v. Louie Fong Co., 226 P. 726, 130 Wash. 154.

Wheat

Okl.—Chicago, R. I. & P. Ry. Co. v. Lawton Grain Co., 221 P. 1013, 94 Okl. 289.
Tex.—Hilker v. Agricultural Bond & Credit Corporation, Civ.App., 96 S.W.2d 544, error dismissed.

A farmer engaged in raising the same type crops is competent.
Ark.—Missouri Pac. R. Co. v. Nichols, 279 S.W. 354, 170 Ark. 1194.
Mo.—Reed v. Cullor, App., 32 S.W. 296.
Neb.—Watkins v. Union Pac. R. Co., 170 N.W. 358, 103 Neb. 75.
Or.—Laam v. Green, 211 P. 791, 106 Or. 311.
Tex.—San Jacinto Rice Co. v. Ulrich, Civ.App., 214 S.W. 777.
22 C.J. p 694 note 14 [a], p 696 note 70.

A market gardener is competent.—Tretter v. Chicago & G. W. R. Co., 134 N.W. 626, 154 Iowa 280.

Witness engaged in grain business and thoroughly familiar with grain prices was held competent to testify as to market value of grain.—Be rd v. Stephens, 228 N.W. 212, 58 N.D. 812.

48. Mont.—Roy v. King's Estate, 179 P. 821, 55 Mont. 567.

49. Tex.—Orient Ins. Co. v. Moffatt, 39 S.W. 1013, 15 Tex.Civ.App. 385.

50. Mass.—Meyer v. Adams Express Co., 132 N.E. 672, 240 Mass. 94.

51. Tex.—Hosmer v. New York Buyers' Ass'n, Civ.App., 258 S.W. 853.

52. Ga.—George v. McCurdy, 157 S.E. 219, 42 Ga.App. 614.

53. Tex.—Ft. Worth & D. C. R. Co. v. Arthur, Civ.App., 124 S.W. 213.
22 C.J. p 585 note 41, p 694 note 13.

54. Or.—Bond v. Graf, 96 P.2d 1091, 163 Or. 264.

55. Pa.—Esper v. Northwestern Nat. Ins. Co. of Milwaukee, Wis., 173 A. 724, 113 Pa.Super. 243.
R.I.—Combination Fountain Co. v. Millard, 144 A. 883, 50 R.I. 50.
22 C.J. p 585 note 54.

56. R.I.—Forbes v. Howard, 4 R.I. 364.

General building contractor for seventeen years is qualified to testify to values of heating plant, plumbing, and electric wiring, wrongfully removed from leased theater by lessee.—Slane v. Curtis, 286 P. 372, 41 Wyo. 402, 69 A.L.R. 906, rehearing denied 288 P. 12, 41 Wyo. 402, 69 A.L.R. 906.

57. Neb.—Connelly v. Edgerton, 34 N.W. 76, 22 Neb. 82.

Rental value of fixtures

The general manager of a company dealing in bar fixtures, who had been engaged in that business for twenty-five years, and had handled ninety per cent of that business in the community immediately preceding the trial, was sufficiently qualified so that it was not an abuse of the court's discretion to permit him to state his opinion of rental value of fixtures replevied.—Wellman v. Forster, 189 P. 128, 46 Cal.App. 359.

58. Mich.—Comstock v. Smith, 20 Mich. 338.
22 C.J. p 585 note 42.

59. Fla.—Sullivan v. Lear, 2 So. 846, 23 Fla. 463, 11 Am.S.R. 388.

Other method of establishing value available

The value of franchises cannot be estimated by witnesses where the business has been in operation for a long time and the value of the franchises could be ascertained under the net earnings rule.—People v. State Bd. Tax Comrs., 144 N.Y.S. 74, 159 App.Div. 136, affirmed 106 N.E. 1040, 212 N.Y. 606, 607.

60. Ga.—Ayers v. John B. Daniel Co., 133 S.E. 878, 35 Ga.App. 511.
N.Y.—Smith v. Anchor Lines, 255 N.Y.S. 622, 143 Misc. 326.
22 C.J. p 701 note 55 [a] (1).

61. Pa.—O'Malley, to Use of National Union Fire Ins. Co. of Pittsburgh, v. Penn Athletic Club, 181 A. 370, 119 Pa.Super. 584.

62. Ill.—Frederick v. Case, 28 Ill. App. 215.

Witness who rebuilt the oven could testify as to its value before and after being rebuilt.—Sturm v. Williams Oven Mfg. Co., 193 N.Y.S. 852, 201 App.Div. 113.

63. Or.—Sturtevant v. Dowson, 222 P. 294, 110 Or. 155, reversing 219 P. 802, 110 Or. 155.

Accountant who examined defendant's books and records was competent to state rule adopted by his profession on which to calculate value of good will, and to state that value.—Sharon v. Kansas City Granite & Monument Co., 125 S.W.2d 959, 233 Mo.App. 547.

64. Mass.—Beecher v. Denniston, 13 Gray 354.
Miss.—Cooper v. State, 53 Miss. 393.
22 C.J. p 694 note 24.

65. Cal.—Willard v. Valley Gas & Fuel Co., 182 P. 32, 180 Cal. 561.
Ill.—McCracken v. Farmers' Grain Co., 215 Ill.App. 551.
Mo.—Taylor v. St. Louis & H. R. Co., App., 256 S.W. 499.
Tex.—Continental Ins. Co. of New York v. Guerson, Civ.App., 93 S.W.2d 591, error dismissed—Fidelity & Guaranty Fire Corporation v.

to prove value of furniture,[66] ice,[67] jewelry,[68] literary productions,[69] locomotives,[70] logging outfits,[71] lumber or timber,[72] machinery,[73] mercantile

Ormand, Civ.App., 62 S.W.2d 675, error dismissed.
22 C.J. p 585 note 45, p. 694 note 17.

Bedspread
Mo.—Monahan v. Scott Cleaning Co., App., 241 S.W. 956.

Housekeeper, who has bought household goods, is competent to testify as to the value of such goods.
Ill.—Mayer v. Miller, 213 Ill.App. 279.
Mont.—Matoole v. Sullivan, 177 P. 254, 55 Mont. 363.

Householder is presumed to have general knowledge of value of household goods, and may state opinion as to fair cash market value.—Wrenn v. Warble Storage & Furniture Co., 236 Ill.App. 601.

Rental value
In detinue for household goods retained by carrier, a witness familiar with the different items was properly allowed to testify as to their valuation and also concerning the rental value.—Louisville & N. R. Co. v. James, 93 So. 701, 208 Ala. 6.

66. Colo.—Staten v. Famularo, 253 P. 1066, 81 Colo. 121.
Mo.—Walton v. A. B. C. Fireproof Warehouse Co., 124 S.W.2d 584, 233 Mo.App. 693.
Or.—Patterson v. Babcock & Peets, 274 P. 903, 128 Or. 476.
22 C.J. p 585 note 46, p 694 note 17.

Dealer
(1) A dealer in household furniture, and familiar with the rugs in question, was qualified to give his opinion as to their value.—Altman v. Lande, 84 Pa.Super. 399.

(2) Testimony as to value of furniture, observed by witness two years before becoming second-hand furniture dealer, was properly admitted.—Marty v. Shaka, 143 A. 524, 83 N.H. 411.

(3) Furniture dealer acquainted with market value of both new and secondhand furniture generally was qualified to testify as to value of converted hotel furniture, where dealer had inspected furniture in issue.—Wutke v. Yolton, Tex.Civ.App., 71 S.W.2d 549, error refused.

Insurance adjuster, who had adjusted losses and knew value of secondhand furniture, was competent to testify regarding value of hotel furniture involved in fire.—Feder v. Bryson, 295 P. 546, 111 Cal.App. 448.

Shipping clerk in furniture store for many years and an upholsterer, was qualified to estimate value of used furniture which he had seen repeatedly, although not an expert on such value.—Langland v. Kraemer, 202 N.W. 1007, 230 Mich. 449.

Furniture not examined
Experienced furniture men, thoroughly acquainted with the value of furniture, were properly permitted to testify as to the value of furniture which they did not see, each piece of furniture being numbered, and such witnesses being able to identify each piece by its number and definitely give its value.—Steinburg v. Levy, Mo.App., 236 S.W. 909.

Clocks
N.Y.—Whiton v. Snyder, 88 N.Y. 299.

Pianos
Ind.—Fredericks v. Sault, 49 N.E. 909, 19 Ind.App. 604.
Iowa.—Daly v. W. W. Kimball Co., 24 N.W. 756, 67 Iowa 132.
22 C.J. p 585 note 46 [a].

67. Me.—Washington Ice Co. v. Webster, 68 Me. 449.

68. Ga.—Central R. Co. v. Wolff, 74 Ga. 664.
22 C.J. p 694 note 20.

Trafficker in diamonds
Witness who had traveled for a grocery house, but had bought and sold diamonds over a period of four to six years and showed knowledge as to method of valuing diamonds, was qualified to testify concerning value of diamonds.—New Amsterdam Casualty Co. v. James, 166 So. 813, 122 Fla. 710.

69. N.Y.—Babcock v. Raymond, 2 Hilt. 6.

70. Vt.—Lamoille Valley R. Co. v. Bixby, 57 Vt. 548.
22 C.J. p 585 note 49.

71. Minn.—Meyers v. McAllister, 103 N.W. 564, 94 Minn. 510.

72. Ala.—McLeod Lumber Co. v. Neighbors, 114 So. 176, 22 Ala.App. 204.
Cal.—Pye v. Eagle Lake Lumber Co., 227 P. 193, 66 Cal.App. 584.
Mo.—Wentzel v. Lake Lotawana Development Co., 48 S.W.2d 185, 226 Mo.App. 960.
Or.—L. B. Menefee Lumber Co. v. MacDonald, 260 P. 444, 122 Or. 579.
Pa.—Thompson v. W. P. Zartman Lumber Co., 55 Pa.Super. 302.
22 C.J. p 694 note 22.

Dealer
Persons dealing in timber and knowing its value may testify thereto.—Saulsberry v. Kentucky & West Virginia Power Co., 10 S.W.2d 451, 226 Ky. 75.

Estimate
Permitting witness to state the approximate value of certain lumber, the subject of the suit, was not erroneous, since expert witnesses to value rarely state exact values, but usually give estimates.—Sibley v. Wallrich, 226 P. 152, 75 Colo. 421.

Fence posts
Md.—Maryland Casualty Co. v. East Baltimore Driving Ass'n, 108 A. 517, 135 Md. 105.

Logs
Mich.—Gadell v. Michigan Iron, Land & Lumber Co., 198 N.W. 242, 222 Mich. 482.
22 C.J. p 694 note 21.

Standing trees
Kan.—Hoffer v. Emporia Gas Co., 175 P. 393, 103 Kan. 354.
Pa.—Ribblett v. Cambria Steel Co., 96 A. 649, 251 Pa. 253.

Witness not competent
Plaintiff, in action for breach of contract to deliver lumber, who had distinctly said that he was not familiar with the price in May, 1917, and that he bought very little secondhand lumber, and could only tell the value of it "for his purposes," was not competent to testify to value on that date, or to value of lumber on the ground or in defendant's buildings.—Carlin v. Biddison, 109 A. 316, 135 Md. 458.

73. Del.—Mills Novelty Co. v. Transeau, 8 A.2d 93, 1 Terry 227.
Miss.—Pittman v. Eberhart Dental Supply Co., 150 So. 813, 168 Miss. 23.
Or.—Northwest Door Co. v. Lewis Inv. Co., 180 P. 495, 92 Or. 186.
Pa.—Davis v. Southern Surety Co., 153 A. 119, 302 Pa. 21.
22 C.J. p 585 note 51, p 694 note 26.

Brewery equipment
In trespass against a junk dealer to recover value of stolen brass and copper parts of brewery equipment, a witness who had twenty-four years' experience in the brewing business as brewmaster and in purchasing brewing machinery and appurtenances, and who had kept in touch with the market value of such equipment, was qualified to testify as to the value of the stolen parts.—Wilhelm v. Uttenweiler, 112 A. 94, 271 Pa. 451.

Oil drilling derrick
Witness in oil field business twenty years could testify as to value of oil-drilling derrick when blown down by storm.—Stidham v. Lewis, Tex. Civ.App., 23 S.W.2d 851.

Competent witnesses
(1) Experienced manufacturer.—Albert v. Ford Motor Co., 157 A. 83, 9 N.J.Misc. 1170, affirmed 162 A. 589, 109 N.J.Law 353.

(2) Electrical engineer.—Famous v. Thomas Yearsley Co., 80 Pa.Super. 58.

(3) A dealer in Fordson tractors, with knowledge of their wholesale cost and freight charges, can qualify as a witness on their market value at a certain place, without knowledge of individual sales there.—

goods,[74] millinery goods,[75] mortgages,[76] motion picture films,[77] museum curiosities,[78] oil,[79] paint,[80] paintings,[81] patents and patent rights,[82] pigeons,[83] pipes,[84] potash,[85] radios,[86] railroad ties,[87] rugs,[88] seed,[89] ships and vessels,[90] shoes,[91] stocks of goods,[92] sugar,[93] turkeys,[94] and is admissible to

Hubb-Diggs Co. v. Mitchell, Tex.Civ. App., 256 S.W. 702.

(4) In action against electric company by manufacturer of carbonated water beverage for damage sustained when bottle filling machine broke down after meter was changed, admission of testimony of manufacturer as to market value of machine before and after breakdown in community in which machine was located, was not abuse of discretion if machine had market value in such community at such time.—Community Public Service Co. v. Gray, Tex. Civ.App., 107 S.W.2d 495.

(5) Other witnesses see 26 C.J. p 694 note 26 [a].

Incompetent witness

In suit for conversion of a cotton press, where in depositions witnesses stated they had never been in the county, and did not know the condition of the press as to wear and tear, nor what it could be sold for, there was no error in refusing their depositions to establish market value. —Southern Round Bale Press Co. v. Behrend, Tex.Civ.App., 257 S.W. 655.

74. Tex.—Reynolds v. Weinman, Civ. App., 40 S.W. 560.
22 C.J. p 695 note 28.

75. Okl.—St. Louis & S. F. R. Co. v. Crowell, 127 P. 1063, 33 Okl. 773.
22 C.J. p 695 note 27.

76. Minn.—Caldwell v. First Nat. Bank, 205 N.W. 282, 164 Minn. 401.

77. Tex.—Alderete v. Cabello, Civ. App., 278 S.W. 950.

78. Mich.—Richter v. Harper, 54 N. W. 768, 95 Mich. 221.

79. U.S.—Arkansas Natural Gas Co. v. Sartor, C.C.A.La., 78 F.2d 924, certiorari denied Sartor v. Arkansas Natural Gas Co., 56 S.Ct. 381, 296 U.S. 656, 80 L.Ed. 467.
Iowa.—Coad v. Pennsylvania Ry. Co., 175 N.W. 344, 187 Iowa 1025.
Tex.—Dale Oil & Refining Co. v. City of Tulia, Civ.App., 25 S.W.2d 671.

Oil contracted for

Witness selling oil for plaintiff over wide territory and familiar with market value and territory is qualified to testify as expert regarding market value of oil defendant contracted for.—Dale Oil & Refining Co. v. City of Tulia, Tex.Civ.App., 25 S.W.2d 671.

80. Ala.—Curb v. Stewart, Adams & Co., 98 So. 24, 210 Ala. 341.

81. Tex.—Houston & T. C. R. R. Co. v. Burke, 55 Tex. 323, 40 Am. R. 808.
22 C.J. p 695 note 30.

82. U.S.—General Paint Corporation v. Kramer, C.C.A.Okl., 68 F.2d 40, certiorari denied 54 S.Ct. 628, 292 U.S. 623, 78 L.Ed. 1478—Standard Brands v. Federal Yeast Corporation, D.C.Md., 38 F.2d 314.
22 C.J. p 695 note 31.

Attorney

In action for money value of privilege, granted defendant by oral contract, to use inventions covered by plaintiff's applications for patents, patent attorney's expert testimony as to reasonable or market value of rights, enjoyed and used by defendant, in such applications, was admissible.—Matthews v. Continental Roll & Steel Foundry Co., C.C.A. Pa., 121 F.2d 594, affirming, D.C., 37 F.Supp. 738.

Basis of qualification as expert on value of patents for purpose of determining exhaustion allowance in income tax, case is knowledge of values placed on similar property by persons dealing therewith.—B. F. Sturtevant Co. v. Commissioner of Internal Revenue, C.C.A., 75 F.2d 316.

83. N.J.—Chmiel v. Yatsko, 13 A.2d 219, 124 N.J.Law 508.

84. Tex.—Town of West University Place v. Anderson, Civ.App., 60 S. W.2d 528.

85. U.S.—The Waalhaven, C.C.A.N. Y., 64 F.2d 25, affirming, D.C., 1 F.Supp. 396, and certiorari denied The Waalhaven v. Potash Importing Corporation of America, 53 S. Ct. 696, 289 U.S. 752, 77 L.Ed. 1497.

86. Ala.—Security Finance Co. v. Kelly's Tire Shop, 114 So. 298, 216 Ala. 642.

87. Mich.—Lehigh v. Standard Tie Co., 112 N.W. 481, 149 Mich. 102.

88. Ill.—Wiegert v. Davis Cleaning & Dyeing Co., 254 Ill.App. 63.

Housewife may give fair opinion of value of ordinary rug.—Wiegert v. Davis Cleaning & Dyeing Co., supra.

89. Ill.—Kidd & Co. v. North American Provision Co., 249 Ill.App. 28.
Tex.—Merchants' Cotton Oil Co. v. Acme Gin Co., Civ.App., 284 S.W. 680.

Dealer was properly permitted to testify as expert as to market value of clover seed on date of seller's breach.—Scaramelli & Co. v. Courteen Seed Co., 217 N.W. 298, 194 Wis. 520.

90. Md.—Gossage v. Philadelphia, B. & W. R. Co., 61 A. 692, 101 Md. 698.

91. Tex.—Graham-Brown Shoe Co. v. Snodgrass, Civ.App., 257 S.W. 632.

92. U.S.—Kaiserman v. U. S., D.C. Ill., 51 F.2d 395.
Cal.—Burt v. Philadelphia Shoe Co., 4 P.2d 612, 118 Cal.App. 50.
Ky.—Insurance Co. of North America v. McCraw, 75 S.W.2d 518, 255 Ky. 839.
Tex.—Graham-Brown Shoe Co. v. Snodgrass, Civ.App., 257 S.W. 632.
22 C.J. p 585 note 53.

Pharmacist; drug store stock

That witness was registered pharmacist entitled him to qualify as expert as to damaged value of drug store stock.—Insurance Co. of North America v. Creech Drug Store, 75 S. W.2d 552, 256 Ky. 56.

Witness need not be a merchant

Ala.—Sussex Fire Ins. Co. v. Barton, 144 So. 439, 225 Ala. 570.

Competent witnesses

(1) Witness testifying that during past eight years he had inventoried approximately two hundred eighty stores.—Turk v. Wilson, 31 P.2d 558, 168 Okl. 68.

(2) Where witnesses' experience with mercantile business was fully shown, along with their opportunities for having familiarized themselves with extent and value of insured's stock of goods, their testimony as to value of insured's goods was admissible.—Miller v. Great American Ins. Co. of New York, Mo. App., 61 S.W.2d 205.

Incompetent witnesses

(1) Witnesses who had frequently been in store and had seen stock of goods should not have been permitted to give an opinion concerning its value unless it was reasonably made to appear that witnesses by inspection and observations had some knowledge of quantity and quality and value of different kinds of merchandise carried in store.—Prestonsburg Water Co. v. Great Savings Store, 111 S.W.2d 664, 271 Ky. 246.

(2) In action on fire policy, testimony of unqualified witnesses expressing opinions tending to establish value of merchandise was incompetent.—New York Underwriters' Ins. Co. v. Mullins, 52 S.W.2d 697, 244 Ky. 788.

(3) Witnesses entirely without experience and knowledge of drugs and drug business failed to qualify sufficiently to express opinions as to sound or damaged value of drugs after fire.—Insurance Co. of North America v. Creech Drug Store, 75 S. W.2d 552, 256 Ky. 56.

93. U.S.—Lamborn v. Northern Jobbing Co., C.C.A.Ill., 15 F.2d 897.

94. U.S.—Armour & Co. v. Bassel Bros., C.C.A.Tex., 22 F.2d 728, cer-

prove value of typewriters,[95] vehicles,[96] watches,[97] wearing apparel,[98] whisky,[99] wood,[1] and wool.[2]

Solvency or insolvency may be established by opinion evidence.[3] A witness has been permitted to state the value of ordinary board,[4] or of support and clothing.[5]

Change in value. The value of personal property at different times, or a change in value occasioned by an injury or otherwise, may be testified to by a qualified witness.[6] A witness who examined the property after it was damaged may be competent, although he did not see the property before it was injured.[7]

(2) Qualifications of Witness as to Value of Personalty Generally

A witness, to be qualified to testify as to the value of personal property, must know the property and the value of that class of property.

A witness' testimony as to the value of personalty is admissible only if it appears that the witness is properly qualified; an unqualified witness cannot give such evidence.[8] The qualifications of particu-

tiorari denied 48 S.Ct. 420, 276 U.S. 635, 72 L.Ed. 743.

95. Tex.—St. Louis & S. F. R. Co. v. Ewing, Civ.App., 126 S.W. 625.
22 C.J. p 695 note 34.

96. Tex.—Texas & P. R. Co. v. Wilson Hack Line, 101 S.W. 1042, 46 Tex.Civ.App. 38.
22 C.J. p 584 note 28, p 695 note 35.

Buggies
Ill.—Maiss v. Metropolitan Amusement Assoc., 146 Ill.App. 196, affirmed 89 N.E. 236, 241 Ill. 177.

97. Ala.—Vendegrift v. State, 43 So. 852, 151 Ala. 105.

98. N.J.—Precipio v. Insurance Co. of State of Pennsylvania, 137 A. 549, 103 N.J.Law 589.
Tex.—Fidelity & Guaranty Fire Corporation v. Ormand, Civ.App., 62 S.W.2d 675, error dismissed.
22 C.J. p 585 note 58, p 701 note 55 [a] (4).

99. Colo.—Thatcher v. Kaucher, 2 Colo. 698.

1. Or.—Brown v. Truax, 115 P. 597, 58 Or. 572.

2. Tex.—Carlton v. Adams, Civ. App., 54 S.W.2d 1073, error refused.

3. Ky.—Harlin v. Calvert's Adm'x, 70 S.W.2d 524, 253 Ky. 752.

To qualify a witness for the purpose of expressing his opinion on solvency or insolvency, it is only necessary that he show some knowledge as to the existence and ownership of property.—Harlin v. Calvert's Adm'x, 70 S.W.2d 524, 253 Ky. 752.

Bank examiner, liquidating state bank, was competent witness as to value of assets, amount of liabilities, and necessity of assessment on stockholders.—Merchants' & Mfrs.' State Bank of Minneapolis by Veigel v. Dyste, 217 N.W. 483, 173 Minn. 436.

4. N.Y.—Sands v. Sparling, 31 N.Y.S. 251, 82 Hun 401.

5. N.Y.—Borst v. Crommie, 19 Hun 209.

6. N.Y.—Sturm v. Williams Oven Mfg. Co., 193 N.Y.S. 852, 201 App. Div. 113.
Pa.—Czerwinski v. National Ben Franklin Fire Ins. Co., 14 Northumb.Leg.J. 10.
22 C.J. p 586 notes 64, 65, p 695 notes 39–42.
Form of statement of difference in value see supra § 447.

Animals
Tex.—Texas & N. O. R. Co. v. Stumberg, Civ.App., 115 S.W.2d 1126—Fort Worth & D. C. Ry. Co. v. Helm, Civ.App., 30 S.W.2d 492—Schaff v. Holmes, Civ.App., 215 S.W. 864.
22 C.J. p 586 note 63.

Automobiles
(1) Generally.
Ala.—Central of Georgia Ry. Co. v. Nolen Land & Livestock Co., 97 So. 828, 210 Ala. 274—Alabama Power Co. v. Armour & Co., 92 So. 111, 207 Ala. 15.
Iowa.—Gay v. Shadle, 176 N.W. 635.
Mo.—Barnes v. Elliot, App., 251 S.W. 488.
N.H.—James E. Watkins Co. v. Peterson Motor Express, 188 A. 461, 88 N.H. 476.
N.J.—New Jersey Mfrs.' Ass'n Fire Ins. Co. v. Galowitz, 150 A. 408, 106 N.J.Law 493—Ross v. Nevin Bus Lines, 154 A. 198, 9 N.J.Misc. 412.
Tex.—Stedman Fruit Co. v. Smith, Civ.App., 45 S.W.2d 804.

(2) Expert who saw truck before and after accident was competent to testify to depreciation in value.—Struse v. Philadelphia Rapid Transit Co., 87 Pa.Super. 46.

(3) In action for damages to automobile sustained in collision, fact that automobile dealer who testified as to value of automobile prior to collision had not seen automobile at that time, but had merely inspected it after collision, did not render his testimony inadmissible.—Drake v. Emhoff, Pa.Super., 21 A.2d 492.

Business
Ala.—Walker v. Graham, 172 So. 655, 233 Ala. 539.

Crops
Ga.—Keener v. Addis, 5 S.E.2d 695, 61 Ga.App. 40.

Value if delivered when it should have been may be testified to.—Gatewood v. Fort Worth & D. C. Ry. Co., 232 S.W. 493, 111 Tex. 291, affirming Ft. Worth & D. C. Ry. Co. v. Gatewood, Civ.App., 185 S.W. 932—Fort Worth & D. C. Ry. Co. v. Helm, Tex.Civ.App., 30 S.W.2d 492—Houston & T. C. R. Co. v. Clement Grain Co., Tex.Civ.App., 10 S.W.2d 400—Schaff v. Holmes, Tex.Civ.App., 215 S.W. 864.

Inspection only after fire
Rejection of testimony of adjuster who first saw articles which were not totally destroyed, two or three days after the fire, who was not familiar with their condition before fire, who had not heard testimony of insured during the trial, and whose entire knowledge of values of such household goods was acquired as an adjuster, was a proper exercise of discretion.—Czerwinski v. National-Ben Franklin Fire Ins. Co. of Pittsburgh, 10 A.2d 40, 138 Pa.Super. 84.

7. Iowa.—Ball v. Chicago, R. I. & P. Ry. Co., 181 N.W. 469, 190 Iowa 977.

8. Cal.—Rose v. Tilden Lumber & Mill Co., 14 P.2d 137, 125 Cal.App. 740.
Mass.—Kevorkian v. Bemis, 155 N.E. 452, 258 Mass. 456—Jackson v. Innes, 121 N.E. 489, 231 Mass. 558.
Mo.—Hockaday v. Gilham, 226 S.W. 991, 206 Mo.App. 132.
Neb.—Trennt v. Chicago, B. & Q. R. Co., 186 N.W. 322, 107 Neb. 406.
Pa.—McWilliams v. Altemus, 135 A. 856, 288 Pa. 277.
Tex.—Hartford Fire Ins. Co. v. Galveston, H. & S. A. Ry. Co., Com. App., 239 S.W. 919, reversing Galveston, H. & S. A. Ry. Co. v. Hartford Fire Ins. Co., Civ.App., 220 S.W. 781—Marshall v. White, Civ. App., 41 S.W.2d 87, error dismissed—Bingham v. Johnson, Civ. App., 7 S.W.2d 665.
Wis.—State v. Stauber, 207 N.W. 409, 190 Wis. 310.
22 C.J. p 583 note 24, p 695 note 44.
Cross-examination as to qualifications see infra § 560.

One conducting public sales
(1) Deputy sheriff, who conducted

lar persons to testify as to the value of particular types of personal property are considered supra in subdivision e (1) of this section.

A witness need not be an expert in the strict sense of the term to testify as to value,[9] nor need he be a dealer in chattels such as that to be valued.[10] However, he must have greater knowledge of the value of such property than the jury or men in general.[11]

The witness must have had an opportunity to form a correct opinion as to the value of the personalty,[12] and he must have a fair knowledge of the property and its value at the time and place in issue.[13] He must know the value of that class of property.[14] While the element calling for skill in the estimation of market value lies in classification, grading as to quality, and the like,[15] the witness must possess the necessary knowledge to render his inference of value or it will not be received.[16] A witness is qualified if he knows the property and knows the market value of that class or type of property.[17]

execution sale, and who stated he knew nothing personally as to values of goods sold, is not qualified to testify as to value of such goods.—Antes v. Consumers' Consol. Coal Co., 210 N.W. 767, 203 Iowa 485.

(2) Constable who had conducted many sales of similar chattels is qualified to testify as to value at time of sale.—Manna v. Industrial Credit Corporation, 162 A. 559, 10 N.J.Misc. 1098.

(3) Excluding auctioneer's opinion evidence as to value of peanut roaster which he had seen but had not examined was not abuse of discretion.—C. Cretors & Co. v. Licht, 141 A. 466, 49 R.I. 198.

Mere personal opinion

Testimony respecting value of electric plant, being mere personal opinion gathered from conversations of others, observation and the like, by witness not qualifying as expert, was properly excluded.—Clarke v. Hot Springs Electric Light & Power Co., C.C.A.Wyo., 55 F.2d 612, certiorari denied 53 S.Ct. 19, 287 U.S. 619, 77 L.Ed. 537.

Necessity of examination of property

Where a witness as to the value of lumber had never seen the same and did not know the various grades or their percentages; his opinion testimony as to value should not have been admitted, and when his disqualification appeared should have been stricken, and so will not support judgment.—Morrison v. Walker, 103 S.E. 139, 179 N.C. 587.

Value of accounts receivable

Evidence of value of installment accounts of corporation, is inadmissible, in absence of showing that witnesses had knowledge of value of particular accounts, and where witnesses had merely knowledge of general value of installment accounts of similar corporations and under existing economic conditions.—Fowler v. National City Bank of Rome, 176 S.E. 113, 49 Ga.App. 435.

9. Ala.—Ruffin Coal & Transfer Co. v. Rich, 108 So. 600, 214 Ala. 622—Louisville & N. R. Co. v. Whitley, 105 So. 661, 213 Ala. 525—Davis v. Morgan County, 96 So. 473, 209 Ala. 343.

Ga.—Speir v. Westmoreland, 149 S.E. 422, 40 Ga.App. 302—Blaylock v. Walker County Bank, 136 S.E. 924, 36 Ga.App. 377.

Ky.—Svea Fire & Life Ins. Co. v. Walker, 56 S.W.2d 967, 247 Ky. 273.

Mo.—Brunke v. Salinger, 8 S.W.2d 88.

Mont.—Morgan v. Hines, 211 P. 778, 780, 65 Mont. 306, citing **Corpus Juris.**

R.I.—McGovern v. Michael, 6 A.2d 709, 62 R.I. 485, modified on other grounds 9 A.2d 274.

Tex.—Wilson v. Barbour, Civ.App., 135 S.W.2d 169, error dismissed.

22 C.J. p 586 note 66, p 695 note 45.

Chattels in common use

Rules of evidence are not so technical as to require expert witnesses to prove the reasonable or market value of chattels such as household furniture in common use, where it is apparent that the value of the articles is within the knowledge of persons of ordinary intelligence and experience.—Federal Storage & Van Co. v. Davis, 41 P.2d 113, 171 Okl. 93—McKiver v. Katsiolis, 217 P. 422, 93 Okl. 49.

10. Ala.—Lincoln Reserve Life Ins. Co. v. Armes, 110 So. 818, 215 Ala. 407—Ruffin Coal & Transfer Co. v. Rich, 108 So. 600, 214 Ala. 622—Louisville & N. R. Co. v. Whitley, 105 So. 661, 213 Ala. 525.

Ga.—Speir v. Westmoreland, 149 S.E. 422, 40 Ga.App. 302—Blaylock v. Walker County Bank, 136 S.E. 924, 36 Ga.App. 377.

11. Idaho.—Basye v. Hayes, 76 P.2d 435, 58 Idaho 569.

R.I.—McGovern v. Michael, 6 A.2d 709, 62 R.I. 485, modified on other grounds 9 A.2d 274.

12. Ga.—Blaylock v. Walker County Bank, 136 S.E. 924, 36 Ga.App. 377.

13. Mo.—Morrow v. Wabash Ry. Co., 276 S.W. 1030, 220 Mo.App. 518.

Okl.—Pate v. Smith, 261 P. 189, 128 Okl. 29.

Tex.—Tull v. Turley, Civ.App., 36 S.W.2d 1101, error dismissed—Ross v. Wilkerson, Civ.App., 277 S.W. 425—Farmers Mill & Elevator Co. v. Hodges, Civ.App., 248 S.W. 72, reversed on other grounds, Com.App., 260 S.W. 166.

Inquiries of persons engaged in buying in market at time as of which property is to be valued held sufficient to qualify witness.—Golly v. Northland Elevator Co., 207 N.W. 438, 53 N.D. 564.

Intimate knowledge

It was error to permit witnesses to appraise engravings without showing intimate knowledge of them.—Patterson v. Union Transfer Co., 87 Pa.Super. 257.

14. Wis.—State v. Stauber, 207 N.W. 409, 190 Wis. 310.

22 C.J. p 577 note 73.

15. U.S.—Missouri, K. & T. R. Co. v. Truskett, Ind.T., 104 F. 728, 44 C.C.A. 179, affirmed 22 S.Ct. 943, 186 U.S. 480, 46 L.Ed. 1259.

16. Cal.—Converse v. Ferguson, 134 P. 977, 166 Cal. 1.

22 C.J. p 702 note 59.

17. Ala.—Mobile Light & R. Co. v. R. O. Harris Grocery Co., 88 So. 55, 17 Ala.App. 659.

Kan.—Barshfield v. Vucklich, 197 P. 205, 108 Kan. 761.

Tex.—Hilker v. Agricultural Bond & Credit Corporation, Civ.App., 96 S.W.2d 544, error dismissed.

Utah.—Norman v. Utah Hotel Co., 206 P. 556, 60 Utah 52.

22 C.J. p 580 note 88.

Shippers who followed daily quotations could express opinion respecting market value on certain day.—Carlton v. Adams, Tex.Civ.App., 54 S.W.2d 1073, error refused.

Witness who had charge of personal property for upward of four years, immediately prior to taking by another, who had seen property frequently during that time, had checked it over a number of times, who had knowledge of its condition, its state of repair, its usability, its serviceability, cost of replacements, who knew or had informed himself of cost of such property, and who testified he knew reasonable value of property at time and place of

Personal knowledge. It has been held that the witness must have personal knowledge of the property;[18] but there is authority that a witness who is familiar with the value of property of the same character, although he has never seen the particular property in question, is competent.[19]

Qualification by occupation. A person engaged in a business which requires a knowledge of the value of property such as that to be valued is competent.[20] A dealer in such property is a qualified witness.[21] Practical men, trained in the business to which the inquiry relates, are qualified.[22] One who has seen the property and has had experience in selling similar property is qualified.[23]

Discretion of court. The determination of whether a witness is sufficiently qualified to testify to the value of personalty rests in the discretion of the trial court.[24]

(3) Owner of Personalty

It is generally held that one is competent to testify to the value of personal property which he owns.

The mere fact of ownership of personal property is usually regarded as sufficient to qualify one to state his estimate of its value,[25] at least in the case

taking thereof, was competent and qualified, after such facts are laid before jury, to testify to reasonable value of such property.—Company A, First Regiment, North Dakota National Guard Training School, v. Hughes, 205 N.W. 722, 53 N.D. 291.

18. Ga.—Fowler v. National City Bank of Rome, 176 S.E. 113, 49 Ga. App. 435.
Wis.—State v. Stauber, 207 N.W. 409, 190 Wis. 310.

19. Mich.—Tatro v. Baker-Fisk-Hugill Co., 184 N.W. 449, 451, 215 Mich. 623, citing **Corpus Juris.**
Ohio.—Dixon v. Millhorn, 9 N.E.2d 183, 55 Ohio App. 193.
Tenn.—Wilson v. Bryant, 67 S.W.2d 133, 167 Tenn. 107.
22 C.J. p 695 note 46.

Inspection of sample
(1) A witness was properly per-

Cal.—Maris v. H. Crummey, Inc., 204 P. 259, 55 Cal.App. 573.
Md.—Bresnan v. Weaver, 135 A. 584, 151 Md. 375.

Deputy sheriff was not a competent witness on the issue of market value of the dry goods in question, on showing that he had in the past sold at auction two or three stores containing similar dry goods, after first inquiring as to the market value of the property from others, and that he had seen dry goods of similar character in other stores and had purchased certain unidentified articles which were dry goods.—McGovern v. Michael, 6 A.2d 709, 62 R. I. 485, modified 9 A.2d 274.

21. Conn.—Ford v. H. W. Dubiske Co., 136 A. 560, 105 Conn. 572.
Ill.—Johnson v. Niles Invisible Door Check Co., 222 Ill.App. 65.

Mich., 116 F.2d 823, rehearing denied 118 F.2d 252.
Colo.—Thomas v. Beirne, 30 P.2d 863, 94 Colo. 429—Merrick v. Morelock, 215 P. 133, 73 Colo. 245.
Pa.—Czerwinski v. National-Ben Franklin Fire Ins. Co. of Pittsburgh, 10 A.2d 40, 138 Pa.Super. 84—Altman v. Lande, 84 Pa.Super. 399.
R.I.—Bond v. Berson, 146 A. 773, 50 R.I. 192.
Tex.—Gulf, C. & S. F. Ry. Co. v. Morris, Civ.App., 241 S.W. 235, affirmed Com.App., 250 S.W. 1017—Early-Foster Co. v. Gottlieb, Civ. App., 214 S.W. 520, dismissed for want of jurisdiction.

25. Ark.—Missouri Pac. R. Co. v. Fowler, 34 S.W.2d 1071, 183 Ark. 86.
Cal.—Branch v. Bekins Van & Storage Co., 290 P. 146, 106 Cal.App.

of common classes of personal property[26] or commodities in general daily use.[27] The chattels or kinds of personal property whose value the owner has been held qualified to testify to include airplane hangars,[28] animals,[29] automobiles,[30] or other vehicles;[31] beer coolers,[32] bicycles,[33] boats,[34] books,[35] building materials,[36] a business,[37] canned fruit,[38]

N.D.—Watson v. Nelson, 172 N.W. 823, 42 N.D. 102.
Wyo.—Shikany v. Salt Creek Transp. Co., 45 P.2d 645, 652, 48 Wyo. 190, citing **Corpus Juris.**
22 C.J. p 581 note 98.

Reasonableness of testimony

When owner of personal property testifies in reasonable way as to value, testimony is competent.—Vukmanovich v. State Assur. Co. of Liverpool, England, 264 P. 933, 82 Mont. 52.

Ownership of similar property

Owner is competent to testify to value of chattel where his valuation is based on ownership of similar property, cost of particular property, and value of like property owned by another.—Hartford Fire Ins. Co. v. Smith, 284 P. 624, 141 Okl. 90.

Former owner

(1) One not an expert may testify as to value of a horse which he has owned and knows well.—Newsome v. Louisville & N. R. Co., 102 So. 61, 20 Ala.App. 349.

(2) Former owner was not qualified to testify as to value of soda fountain as of a time subsequent to his ownership, where he did not know its condition at that time.—Bankers' & Shippers' Ins. Co. of New York v. Sharber Grocery Co., Tex.Civ.App., 297 S.W. 474.

26. Okl.—Chase v. MacDonell, 7 P. 2d 465, 154 Okl. 165.

27. Mont.—Matoole v. Sullivan, 177 P. 254, 55 Mont. 363.

28. Kan.—Lawson v. Southern Fire Ins. Co., 21 P.2d 387, 137 Kan. 591.

29. Del.—Ligon v. Brooks, 196 A. 200, 9 W.W.Harr. 113.
Idaho.—Beech v. American Surety Co. of New York, 51 P.2d 213, 56 Idaho 159.
22 C.J. p 581 note 99.

Owner, as such, is not qualified to testify to value of a dog.—Campoli v. Brenner, 16 N.Y.S.2d 610, reversed on other grounds 25 N.Y.S.2d 200, 261 App.Div. 901.

30. Cal.—Berg v. Traeger, 292 P. 495, 210 Cal. 323.
Del.—Ligon v. Brooks, 196 A. 200, 9 W.W.Harr. 113.
Iowa.—Gay v. Shadle, 176 N.W. 635.
Md.—Bailey v. Ford, 135 A. 835, 151 Md. 664.
Mich.—Kavanagh v. St. Paul Fire & Marine Ins. Co., 221 N.W. 119, 244 Mich. 391.
Mo.—Hellums v. Randol, 40 S.W.2d 500, 225 Mo.App. 1092—Finn v. Indemnity Co. of America, App., 297 S.W. 175—Grath v. Wilson Motor Car Co., App., 253 S.W. 776—Klein v. St. Louis Motor Car Co., App., 237 S.W. 848.
N.J.—Ackerman v. Somerset Bus Co., 174 A. 343, 12 N.J.Misc. 660.
Ohio.—Detroit & I. R. Co. v. Vogeley, 153 N.E. 86, 21 Ohio App. 88.
Okl.—Midland Valley R. Co. v. Lawhorn, 198 P. 586, 81 Okl. 288.
22 C.J. p 581 note 1—42 C.J. p 1296 notes 1–6.

Owner is expert witness on value

Colo.—Startzell v. Bowers, 292 P. 601, 88 Colo. 135.

A former owner of a motor vehicle is a competent witness as to its value.—Paterson v. Chicago, M. & St. P. R. Co., 103 N.W. 621, 95 Minn. 57.

Value of use

The owner may testify as to the value of the use of an automobile.
Ala.—Scott v. Parker, 113 So. 495, 216 Ala. 321.
Mont.—Rasmussen v. O. E. Lee & Co., 66 P.2d 119, 104 Mont. 278.

Evidence of the character of his use of the motor vehicle and the care taken of it may ordinarily be shown in connection with his testimony to indicate the weight to be given it.—Bailey v. Ford, 135 A. 835, 151 Md. 664.

Value before and after injury

(1) The owner may testify as to the value of his automobile before and after it was damaged.
Ga.—National-Ben Franklin Fire Ins. Co. v. Darby, 172 S.E. 74, 48 Ga.App. 394.
N.J.—Ross v. Nevin Bus Lines, 154 A. 198, 9 N.J.Misc. 412—Anderson v. Electric Laundry Co., 146 A. 683, 7 N.J.Misc. 567.
Wash.—Wicklund v. Allraum, 211 P. 760, 122 Wash. 546.

(2) The opinion of the owner of an automobile damaged by collision as to the value of the car before and after the accident is admissible when he states the facts on which he bases such opinion.—Foster v. Burgin, Tex.Civ.App., 244 S.W. 244.

Value at time of purchase

Court properly permitted buyer to testify to value of automobile at time of purchase.
Minn.—Saunders v. Commercial Credit Trust, 256 N.W. 142, 192 Minn. 272—Hoffman v. Piper, 233 N.W. 313, 181 Minn. 603.
Neb.—Cox v. Greenlease-Lied Motors, 277 N.W. 819, 134 Neb. 1.

Owner held incompetent

(1) Where, in an action of conversion of a car, plaintiff could not describe and did not know the condition of the car when purchased or on date of its conversion and could not enumerate new parts purchased, repairs made, and costs of either, and did not know the cost of a new car of like kind, it was error to permit her to give her opinion of its value.—Roy v. Clark, Mont., 215 P. 232.

(2) An owner who is not an expert is not competent to testify that his motor vehicle depreciated in value merely by reason of having been injured, when all the injuries proved have been fully repaired.—Stevens v. Adams Express Co., 55 Pa.Super. 366.

In New Jersey

(1) Owner, who was stenographer and had owned two other automobiles, was held incompetent to testify as to market value of her automobile before or after accident.—Hopper v. Public Service Coordinated Transport, 177 A. 430, 114 N.J. Law 468.

(2) However, it has been held that the nonexpert testimony of owner of automobile as to value thereof before collision is admissible in action for damages.—Teets v. Hahn, 140 A. 427, 104 N.J.Law 357, reversing 137 A. 559, 5 N.J.Misc. 538.

(3) Owner of automobile was properly permitted to testify as to value of car before and after accident.—Ross v. Nevin Bus Lines, 154 A. 198, 9 N.J.Misc. 412—Anderson v. Electric Laundry Co., 146 A. 683, 7 N.J.Misc. 567.

31. Mass.—Shea v. Hudson, 42 N.E. 114, 165 Mass. 43.
22 C.J. p 581 note 2.

32. Pa.—Betz v. Hummel, 13 A. 938, 10 Pa.Cas. 313.

33. Tex.—Osborne v. State, Cr., 56 S.W. 53.

34. Mass.—Jackson v. Innes, 121 N. E. 489, 231 Mass. 558.

Value of use

Mass.—Jackson v. Innes, supra.

35. Cal.—Willard v. Valley Gas & Fuel Co., 151 P. 286, 171 Cal. 9.
22 C.J. p 582 note 6.

36. Del.—Ligon v. Brooks, 196 A. 200, 9 W.W.Harr. 113.
N.Y.—Thorn v. Sutherland, 25 Hun 435.

37. Tex.—Burford Oil Co. v. Wadley, Civ.App., 41 S.W.2d 689, error refused.

38. Ark.—Kesterson v. Hays, 209 S. W. 721, 137 Ark. 592.

carvings,[39] clothing,[40] corporate stock,[41] crops, whether standing or severed,[42] farm implements,[43] household goods,[44] household furniture,[45] jewelry,[46] machinery,[47] personal belongings,[48] sewing machines,[49] stocks of goods,[50] and, likewise, include

39. Mich.—Ruppel v. Adrian Mfg. Co., 55 N.W. 995, 96 Mich. 455.
22 C.J. p 582 note 8.

40. Md.—Bresnan v. Weaver, 135 A. 584, 151 Md. 375.
22 C.J. p 582 note 9.

Fur coat
Tex.—Dallas Hotel Co. v. Blanchette, Civ.App., 246 S.W. 1065.

41. Cal.—Zeller v. Knapp, 26 P.2d 704, 135 Cal.App. 122.

Where owners were familiar with stock and affairs of corporation, judge was justified in deciding they were qualified to give testimony regarding market value of stock.—Blabon v. Hay, 169 N.E. 268, 269 Mass. 401.

Where stockholder gives facts on which he bases his opinion, he is competent to give opinion of value of common stock of his company.—Ferguson v. Bank of Dawson, 179 S.E. 236, 50 Ga.App. 604, conforming to answer 177 S.E. 694, 179 Ga. 861.

Investigation at time of purchase
Where a buyer of corporate shares in a business enterprise makes some investigation of their value at the time of purchase and later finds that the concern has failed, there is a sufficient foundation for admitting his testimony regarding the value of the shares.—Vrba v. Krall, 175 N.W. 4, 187 Iowa 1221.

Owner held incompetent
(1) Where there was no showing of qualification other than that of ownership of stock by virtue of purchase.—Ryan v. Cooper, 205 N.W. 302, 201 Iowa 220.

(2) Where his only knowledge of its value was based on certain efforts he had made to sell his own stock in the same corporation, and he was not a stockbroker, nor did he show any knowledge of market quotations, or that the stock had a market value.—Anderson Sav. Bank v. Hopkins, 192 N.W. 824, 195 Iowa 655.

42. Idaho.—Kellar v. Sproat, 205 P. 894, 35 Idaho 273.
22 C.J. p 582 note 10.

Owner held incompetent
Owner who attempted to testify as to the value of wheat grown on the land, but who did not live in the vicinity thereof, and was wholly unacquainted with the value of the land and knew nothing of the growing of the wheat, was incompetent to testify to the value thereof.—Beck v. Spring, 193 N.W. 111, 110 Neb. 160, reversed on other grounds 195 N.W. 176, 110 Neb. 160.

43. Tex.—McElwrath & Rogers v. Alexander, Civ.App., 250 S.W. 1051.
22 C.J. p 582 note 11.

A farmer who was accustomed to automobiles and had owned and operated a certain tractor for several years, and had more or less experience with the operation of another tractor, was competent to testify to the reasonable market value of his old tractor and a new one for which he gave the old one in part payment.—Daugherty v. Advance-Rumely Thresher Co., 180 N.W. 277, 190 Iowa 424.

44. U.S.—National Fire Ins. Co. of Hartford, Conn., v. Renier, C.C.A. Wis., 22 F.2d 671—Barrett v. Fournial, C.C.A.N.Y., 21 F.2d 298—Thomas v. National Delivery Ass'n, D.C.Pa., 24 F.Supp. 171, 173, citing **Corpus Juris.**
Ky.—Davis v. Rhodes, 266 S.W. 1091, 206 Ky. 340.
Mo.—Taylor v. St. Louis & H. R. Co., App., 256 S.W. 499.
Neb.—Sprague v. Allied Mills, 261 N.W. 892, 129 Neb. 394.
N.J.—Lehr v. Satsky, 124 A. 67, 99 N.J.Law 512.
Okl.—McIver v. Katsiolis, 217 P. 422, 93 Okl. 49.
Pa.—Czerwinski v. National-Ben Franklin Fire Ins. Co. of Pittsburgh, 10 A.2d 40, 138 Pa.Super. 84.
Wyo.—Shikany v. Salt Creek Transp. Co., 45 P.2d 645, 652, 48 Wyo. 190, citing **Corpus Juris.**

Expert knowledge not required
Owner is qualified to testify as to his estimate of value of household goods; expert knowledge not being required to give opinion as to the value of such property.—Butts v. People's Storage & Transfer Co., Mo. App., 272 S.W. 998.

Oriental rug
Wyo.—Shikany v. Salt Creek Transp. Co., 45 P.2d 645, 652, 48 Wyo. 190, citing **Corpus Juris.**

Silverware
Pa.—Denney v. Fenton Storage Co., 188 A. 92, 124 Pa.Super. 81.

In Texas
(1) In action for destruction of secondhand household goods owner was held entitled to testify to value of property without predicate having been laid therefor, and without offering proof to show that property had no market value or actual value.—Demeritt v. Bade, Tex.Civ.App., 98 S.W.2d 219.

(2) But it has been held that insured's testimony on value of furniture articles immediately before and immediately after fire was erroneously admitted, where insured failed to qualify on question of value.—Reliance Ins. Co. v. Bowen, Tex.Civ. App., 54 S.W.2d 597.

(3) Insured was held qualified to give testimony as to value of her household goods damaged or destroyed by fire, under the circumstances.—American Equitable Assur. Co. of New York v. Martin, Tex.Civ. App., 33 S.W.2d 287, error dismissed.

(4) Insured may testify to the value of her household goods where she has shown that during many years as a housewife she had dealings in furniture and was acquainted with the reasonable value of furniture of the same character as hers.—Fidelity & Guaranty Fire Corporation v. Ormand, Tex.Civ. App., 62 S.W.2d 675, error dismissed.

(5) Owner testifying that she knew value of household goods damaged could give her opinion of value.—City of Wichita Falls v. Mauldin, Tex.Civ.App., 23 S.W.2d 771, affirmed, Com.App., 39 S.W.2d 859.

45. Mich.—Langland v. Kraemer, 202 N.W. 1007, 230 Mich. 449.
22 C.J. p 582 note 12.

46. Ala.—F. W. Blomberg & Co. v. Norton, 93 So. 837, 208 Ala. 117.

Owner held incompetent
Where, in an action of detinue for a ring, plaintiff stated that he had no knowledge of its value, his opinion as to the value was inadmissible, although a jeweler had told him what the quality and value were.—Sykes v. Wood, 91 So. 320, 206 Ala. 534.

47. Del.—Ligon v. Brooks, 196 A. 200, 9 W.W.Harr. 113.
22 C.J. p 582 note 13.

48. U.S.—National Fire Ins. Co. of Hartford, Conn. v. Renier, C.C.A. Wis., 22 F.2d 671—Barrett v. Fournial, C.C.A.N.Y., 21 F.2d 298—Thomas v. National Delivery Ass'n, D.C.Pa., 24 F.Supp. 171, 173, citing **Corpus Juris.**
Del.—Ligon v. Brooks, 196 A. 200, 9 W.W.Harr. 113.
Md.—Bresnan v. Weaver, 135 A. 584, 151 Md. 375.
Wyo.—Shikany v. Salt Creek Transp. Co., 45 P.2d 645, 652, 48 Wyo. 190, citing **Corpus Juris.**

49. Colo.—Sandberg v. Borstadt, 109 P. 419, 48 Colo. 96.

50. Neb.—Gilbert v. Rothe, 184 N. W. 119, 106 Neb. 549.
22 C.J. p 582 note 15.

Owner not competent
Owner was not qualified to testify as to the market value of the insured stock of merchandise, where he had no knowledge concerning the mer-

telegraph poles,[51] and wine.[52]

The competency of the owner is not affected by the fact that his knowledge is recently acquired,[53] and is based in part on the result of inquiries made of experts and others.[54] It may, however, happen that the owner of property is ignorant of the value thereof and in such case he is incompetent.[55]

An owner cannot be allowed to state a special value which the property has to him,[56] or the amount at which he valued the property, as distinguished from its real value.[57]

f. Services

(1) In general

(2) Qualifications of witness as to value of services generally

(3) Person performing the services

(1) In General

The value of services may be proved by the estimate, conclusion, or opinion of a qualified witness.

The value of services may be proved by the estimate, conclusion, or opinion of a qualified witness,[58] unless the services are of such character that such testimony will not aid the jury.[59] The services, the value of which such evidence is admissible to prove, include advertising;[60] agricultural,[61] as services of a farmer;[62] agency;[63] brokerage,[64] as selling[65] or leasing[66] property or procuring a loan;[67] building or construction;[68] and, likewise, according to the

chandise which another had purchased in job lots and from which sales had been made by such other.—Foot v. Yorkshire Fire Ins. Co., 286 N.W. 400, 205 Minn. 478.

51. Minn.—Itasca Cedar & Tie Co. v. McKinley, 144 N.W. 768, 1135, 124 Minn. 183.

52. Mo.—State ex rel. and to Use of Higgins v. Stanton, 296 S.W. 190, 220 Mo.App. 919.

53. N.Y.—Merrill v. Grinnell, 30 N. Y. 594.

54. N.Y.—Merrill v. Grinnell, 30 N. Y. 594.
Wis.—Whiting v. Mississippi Valley Mfg. Mut. Ins. Co., 45 N.W. 672, 76 Wis. 592.

55. Ala.—Sykes v. Wood, 91 So. 320, 206 Ala. 534.
Minn.—Foot v. Yorkshire Fire Ins. Co., 286 N.W. 400, 205 Minn. 478.
22 C.J. p 582 note 20.

56. Wyo.—Shikany v. Salt Creek Transp. Co., 45 P.2d 645, 651, 48 Wyo. 190, citing **Corpus Juris.**
22 C.J. p 582 note 21.

57. Utah.—Gleason v. San Pedro, L. A. & S. L. R. Co., 164 P. 484, 49 Utah 405, 409.
22 C.J. p 582 note 22.

58. Ga.—Western & A. R. R. v. Townsend, 135 S.E. 439, 36 Ga.App. 70.
Ky.—Clark v. Hale, 273 S.W. 39, 209 Ky. 496.
N.J.—Smith v. Paine, 130 A. 371, 3 N.J.Misc. 990.
N.Y.—Winch v. Warner, 174 N.Y.S. 819, 186 App.Div. 710.
Pa.—Winters v. Schmitz, 36 Pa.Super. 496.
Wash.—Le Doux v. Seattle North Pac. Shipbuilding Co., 195 P. 1006, 114 Wash. 632.
22 C.J. p 575 note 43.

Rule as to general statement of damages

The rule which precludes a witness in an action for death from proving the amount of damages by a mere general statement does not exclude testimony as to the annual value of decedent's services, where the witness, who was subject to cross-examination, went into details as to the facts on which his opinion was based.—Williams v. McCranie, 109 S.E. 699, 27 Ga.App. 693.

Where there is express contract as to fees, opinion evidence as to value of the services is of course inadmissible.—Matter of D'Adamo, 157 N.Y.S. 374, 94 Misc. 1.

59. N.C.—Rice v. Norfolk Southern R. Co., 82 S.E. 1034, 167 N.C. 1.
22 C.J. p 593 note 27 [c], p 699 note 17 [a].

Services of child

In an action for wrongful death, it is error to permit plaintiff, the parent of deceased, to give his opinion as to the value of his child's services to him and his family, that being a question for the jury on the evidence.—Cincinnati Tract. Co. v. Stephens, 79 N.E. 235, 75 Ohio St. 171—22 C. J. p 699 note 17 [a].

60. Ohio.—Brookins v. National Refining Co., 160 N.E. 97, 26 Ohio App. 546.

61. Tex.—Chicago, R. I. & G. Ry. Co. v. Hanna, Civ.App., 273 S.W. 280.
22 C.J. p 699 note 11.

Farm workers

(1) Farmer, who employs labor eight months of year, and whose information as to wages during other four months is given him by others, may testify to common rate of pay for those months.—Vigliotti v. Campano, 133 A. 579, 104 Conn. 464.

(2) Testimony of farmer employers of labor and farm laborers as to value of farm labor in vicinity is admissible.—McCarthy v. Paris, 267 P. 232, 46 Idaho 165.

62. Md.—Provident Trust Co. of Philadelphia v. Massey, 125 A. 821, 146 Md. 34.
22 C.J. p 593 note 29.

63. Mo.—Beebe v. Columbia Axle Co., 117 S.W.2d 624, 233 Mo.App. 212.
2 C.J. p 951 notes 54, 55.

64. Md.—Reinhart v. Cunningham, 157 A. 896, 162 Md. 698.
Mass.—Walker v. Russell, 134 N.E. 388, 240 Mass. 386.
22 C.J. p 699 note 12.

Broker, who had been in the real estate business for over twelve years and in the business of selling and buying wood lots, was qualified to testify what a fair and reasonable commission for selling wood lots would be.—Walker v. Russell, supra.

65. Tex.—Page v. Estes, Civ.App., 142 S.W.2d 292, error dismissed, judgment correct.
22 C.J. p 699 note 13.

66. Tex.—Floore v. Burgher, Civ. App., 128 S.W. 1152.

67. N.Y.—Boyd v. Vale, 82 N.Y.S. 932, 84 App.Div. 414.
22 C.J. p 699 note 15.

68. Mo.—Nelson v. Massman Const. Co., 91 S.W.2d 623, 231 Mo.App. 1, certiorari denied Massman Const. Co. v. Nelson, 57 S.Ct. 32, 299 U.S. 569, 81 L.Ed. 419, rehearing denied 57 S.Ct. 114, 299 U.S. 621, 81 L.Ed. 457.
Pa.—Rieseck v. Costa, 157 A. 803, 103 Pa.Super. 51.
22 C.J. p 699 note 16.

Cleaning and removing brick

Ark.—St. Paul Fire & Marine Ins. Co. v. Green, 29 S.W.2d 304, 181 Ark. 1096.

Leveling land

In an action on a quantum meruit for work done in leveling certain land, it was proper to prove reasonable value of the labor performed by opinions of qualified experts.—Laiblin v. San Joaquin Agr. Corporation, 213 P. 529, 60 Cal.App. 516.

Cost of excavation

Witnesses, by being permitted to give opinion as experts respecting reasonable value of making certain excavations, did not usurp functions

decisions, include designing;[69] domestic,[70] as board and care,[71] housekeeping,[72] nursing,[73] or acting as companion;[74] entertainment,[75] as an actor,[76] or magician;[77] hospital;[78] installing a pump;[79] janitor;[80] manual,[81] as of a carpenter,[82] or worker in a livery stable;[83] manufacturing;[84] mercantile,[85]

of jury.—Porter Const. Co. v. Berry, 298 P. 179, 136 Or. 80.

69. N.Y.—Phœnix Auto & Raincoat Co. v. Joseph, 203 N.Y.S. 79, 122 Misc. 465.

70. Minn.—Olstad v. Fahse, 282 N. W. 694, 204 Minn. 118.
22 C.J. p 593 note 30, p 594 note 32, p 699 note 17.

Housewives are qualified to testify as to value of housework.—In re Anderson's Estate, 239 N.W. 602, 184 Minn. 648.

Husband

A husband was qualified to express an opinion as to the value of his wife's household services.—Murphey v. Blankenship, Tex.Civ.App., 120 S. W.2d 309—22 C.J. p 593 note 30 [a].

71. Mich.—In re Moon's Estate, 188 N.W. 457, 219 Mich. 104.
22 C.J. p 699 note 18.

Admissibility questioned

"It is extremely doubtful if the value of board and lodging is a proper subject for expert testimony." —Entzminger v. Seigler, 195 S.E. 244, 247, 186 S.C. 194.

Knowledge assumed

In overruling an objection that a witness to the value of board and lodging had not been qualified, the court said: "We think it may be assumed that persons by their common experience and observation gain some knowledge of the value here in question; such knowledge does not depend upon professional skill or experience as a boarding house keeper." —Moore v. Robinson, 108 So. 233, 234, 214 Ala. 412.

Physician

That witness was physician did not qualify or disqualify him from testifying as expert on reasonable value of care and lodging.—Fenton v. Askew, 165 N.E. 301, 119 Ohio St. 603.

Care of negro

(1) A witness was competent to testify as to value of board and lodging allegedly received by plaintiff, where witness testified that she had experience with people of plaintiff's race, especially in neighborhood in which plaintiff lived, and that witness paid board herself and had knowledge of what people charged for board.—Entzminger v. Seigler, 195 S.E. 244, 186 S.C. 194.

(2) In action to recover amount to which grantor was entitled under deed requiring grantee, as part of consideration, to care for grantor, who was an old negro woman, for balance of her life, persons operating boarding houses for whites were incompetent to testify concerning cost of such care.—Quarles v. Quarles, La.App., 179 So. 512.

72. Mo.—Schwanenfeldt v. Metropolitan St. R. Co., 174 S.W. 143, 187 Mo.App. 588.
22 C.J. p 594 note 33.

Chambermaid not competent

A witness, who had been a chambermaid for a quarter of a century and a housewife and farm hand on farm ever since, did not have such experience as would qualify her to give an expert opinion as to value of services rendered in furnishing board, doing washing, and furnishing other service for an elderly man.—Westerfeld v. Reed, Tex.Civ.App., 107 S.W.2d 640.

73. Iowa.—In re Dvorak's Estate, 236 N.W. 66, 213 Iowa 250.
Mo.—Wandling v. Broaddus, 10 S.W. 2d 651.
22 C.J. p 594 notes 34, 35, p 699 note 20.

Qualifications required

(1) Facts in respect to services and for support of one who had to be waited on much like an invalid and knowledge of value thereof are such as come within general experience and observation of all sensible persons, and witness need not be skilled or expert to give testimony in regard thereto.—First Nat. Bank v. Owen, 171 So. 4, 177 Miss. 339.

(2) Persons who from their situation, occupation, and experience have some idea as to the fair and reasonable value of services rendered in nursing and caring for a man who was old and feeble may testify thereto, although they are not shown to be thoroughly acquainted with the usual prices regularly charged therefor in that community.—Shrum v. Brill, Mo. App., 230 S.W. 367.

(3) The testimony of witnesses with only the common experience derived from a familiarity with living conditions, and observation of services of the character alleged to have been performed for an intestate, was competent as to the value of these services in the community in which the witnesses lived.—Landreth v. Morris, 200 S.E. 378, 214 N. C. 619.

(4) Woman who had taken care of father-in-law as nurse for specified compensation was not qualified to testify as expert to value of similar services performed by claimant for deceased.—In re Myers' Estate, 157 A. 916, 103 Pa.Super. 249.

Practical nurse

In daughter's action for services rendered deceased, including nursing, testimony of practical nurse, whose experience was confined to another county, as to value of such services was properly excluded.—Love v. Richardson, Mo.App., 61 S. W.2d 220.

Comparison with benefits received

In claim against estate by niece who had lived with aged couple since birth for services since attaining her majority, question calling for comparison of benefits received before attaining majority with value of services rendered thereafter, was properly refused, as calling for expert opinion without proper qualification of witness, even if subject of expert testimony, and because comparison of such kind was not permissible to witness, as it could be answered without disclosing basis of his opinion or value which he put on either factor of comparison.—Spicer v. Spicer's Adm'r, 202 N.W. 604, 201 Iowa 99.

74. Mich.—Lathrop v. Sinclair, 68 N. W. 248, 110 Mich. 329.

Jury competent

Care and companionship rendered to aged person are services whose value is matter of common knowledge which jury were competent to determine.—Mussinon's Adm'r v. Herrin, 67 S.W.2d 710, 252 Ky. 495.

75. Cal.—Meyers v. Nolan, 63 P.2d 1216, 18 Cal.App.2d 319.
Pa.—McCullough v. Holland Furnace Co., 141 A. 631, 293 Pa. 45.

76. Cal.—Meyers v. Nolan, 63 P.2d 1216, 18 Cal.App.2d 319.

77. Pa.—McCullough v. Holland Furnace Co., 141 A. 631, 293 Pa. 45.

78. Ind.—Walter v. Pence, 12 N.E.2d 367, 104 Ind.App. 532.

79. Cal.—Krogh Mfg. Co. v. Churchill, 191 P. 74, 47 Cal.App. 785.

80. Wash.—Wilkins v. Knox, 253 P. 797, 142 Wash. 571.

81. N.J.—Maisto v. Maisto, 8 A.2d 810, 123 N.J.Law 401, affirmed 12 A.2d 890, 124 N.J.Eq. 565.

82. Pa.—Worden v. Connell, 46 A. 298, 196 Pa. 281.
22 C.J. p 594 note 37.

83. Vt.—Stone v. Tupper, 5 A. 387, 58 Vt. 409.

84. Ga.—Eagle & Phœnix Mfg. Co. v. Browne, 58 Ga. 240, 245.
22 C.J. p 594 note 39.

85. N.Y.—Windmuller v. New York Cent. R. Co., 297 N.Y.S. 250, 251 App.Div. 902.
Pa.—Apfelbaum v. Markley, 3 A.2d 975, 134 Pa.Super. 392.
22 C.J. p 699 note 21.

as bookkeeping,[86] selling goods,[87] or preparing patent medicine;[88] notary;[89] professional,[90] as of an accountant,[91] architect,[92] attorney,[93] engineer,[94] physician,[95] nurse,[96] or tax expert;[97] repairing a ship;[98] sewing and dressmaking;[99] and transportation.[1]

(2) Qualifications of Witness as to Value of Services Generally

A witness who has observed the services and has sufficient familiarity with services of that nature to form a reasonable inference as to value is qualified.

A qualified person may testify as to the value of services;[2] an unqualified witness may not.[3] The

86. Mass.—Shattuck v. Train, 116 Mass. 296.
22 C.J. p 594 note 41.

87. Ind.—Jenney Electric Co. v. Branham, 41 N.E. 448, 145 Ind. 314, 33 L.R.A. 395.
22 C.J. p 594 note 42.

88. Nev.—Alt v. California Fig Syrup Co., 7 P. 174, 19 Nev. 118.

89. Mo.—State ex rel. Johnson v. Weinberg, App., 151 S.W.2d 134.

90. Cal.—Meyers v. Nolan, 63 P. 2d 1216, 18 Cal.App.2d 319.
22 C.J. p 699 note 23.

91. N.Y.—Kipp v. Scott, 16 N.Y.S. 948.
22 C.J. p 594 note 41 [b].

92. Wis.—Brust v. First Nat. Bank, 198 N.W. 749, 184 Wis. 15.
22 C.J. p 699 note 24.

93. U.S.—Kline v. Blackwell, C.C.A. Fla., 63 F.2d 897, certiorari denied 54 S.Ct. 54, 290 U.S. 636, 78 L.Ed. 553.
Ark.—Ætna Life Ins. Co. v. Heiden, 42 S.W.2d 392, 184 Ark. 291.
Cal.—Libby v. Kipp, 262 P. 68, 87 Cal.App. 538.
Iowa.—In re Chesmore's Estate, 189 N.W. 770, 194 Iowa 300.
Mich.—Behr v. Baker, 238 N.W. 473, 255 Mich. 607.
Miss.—Moss v. Mississippi Live Stock Sanitary Board, 122 So. 776, 154 Miss. 765, followed in Gray v. Mississippi Live Stock Sanitary Board, 122 So. 783, and Turnage v. Mississippi Live Stock Sanitary Board, 122 So. 783, and Adams v. Mississippi Live Stock Sanitary Board, 126 So. 204.
N.Y.—Blackwell v. Finlay, 187 N.Y. S. 880, 196 App.Div. 436, modified on other grounds 135 N.E. 600, 233 N.Y. 361.
Tex.—Hodges v. Hodges, Civ.App., 111 S.W.2d 779.
22 C.J. p 594 note 45, p 699 note 25.
Qualifications required see infra subdivision f (2) of this section.

Expert testimony is not necessary where the other evidence in the case is sufficient to form a basis for determining the value of the services.
Cal.—Mitchell v. Towne, 87 P.2d 908, 31 Cal.App.2d 259.
Ky.—Noftzger v. Moffett, 65 P. 670, 63 Kan. 354.

94. U.S.—Page Steel & Wire Co. v. Blair Engineering Co., C.C.A.N.J., 22 F.2d 403, certiorari denied 48 S. Ct. 303, 276 U.S. 623, 72 L.Ed. 737.
Neb.—McDonald v. Dodge County, 60 N.W. 366, 41 Neb. 905.
22 C.J. p 594 note 49.

Lawyer with some experience in development of property and financing propositions, including patents, was not competent to express an opinion as to the value of services rendered by a mechanical engineer in passing on the value of patents for a mechanical device and in conducting and making reports of tests of the machine.—Fast v. Austin, 107 A. 540, 135 Md. 1.

95. N.Y.—Sweeney v. Banham, 191 N.Y.S. 186.
Wash.—Terrill v. Fotheringham, 173 P. 748, 103 Wash. 34.
22 C.J. p 699 note 27.
Qualifications required see infra subdivision f (2) of this section.

Common knowledge
Common knowledge indicates that doctor's charge of six dollars for two visits is reasonable, and expert testimony on the point is unnecessary.—Britling Cafeteria Co. v. Shotts, 173 So. 61, 233 Ala. 590.

96. Colo.—Craig v. Toteve, 110 P. 2d 1117.
22 C.J. p 699 note 20.

Physician acquainted with the duties of nurses and accustomed to hire them is a competent witness as to the value of their services.—Beringer v. Dubuque St. R. Co., 91 N.W. 931, 118 Iowa 135—22 C.J. p 699 note 20 [a].

Nurse may state an opinion as to the value of such services.—Craig v. Toteve, Colo., 110 P.2d 1117—22 C.J. p 699 note 20 [b].

97. Wash.—Miller v. Puget Sound Bridge & Dredging Co., 250 P. 64, 140 Wash. 663.

98. U.S.—Southern Shipyard Corporation v. The Tugboat Summitt, C.C.A.Va., 294 F. 284.

99. Mo.—Schwartz v. Mercantile Trust Co., App., 279 S.W. 253.

1. Md.—Public Service Commn. of Maryland v. Baltimore & Ohio R. Co., 90 A. 119, 122 Md. 393.
22 C.J. p 594 note 50, p 699 note 22.

2. Cal.—Kurokawa v. Saroyan, 273 P. 613, 95 Cal.App. 772.
Colo.—Stevens v. Walton, 68 P. 834, 17 Colo.App. 440.
Ga.—Western & A. R. R. v. Townsend, 135 S.E. 439, 36 Ga.App. 70.
Iowa.—Rudd v. Dewey, 96 N.W. 973, 121 Iowa 454.
Minn.—Keough v. St. Paul Milk Co., 285 N.W. 809, 205 Minn. 96.
N.Y.—Jenny v. Lacy, 60 N.Y.S. 1033, 45 App.Div. 630.
22 C.J. p 593 note 27, p 699 note 9.
Cross-examination as to qualifications see infra § 560.

Claim against estate of decedent
Although it is an elementary rule of public policy that evidence to establish a claim against the estate of decedent should be clear, certain, and satisfactory, this rule does not render objectionable opinion evidence as to the value of services rendered by claimant to decedent, since in the very nature of such claim the only evidence available to corroborate or rebut plaintiff's testimony concerning the value of such services must consist of the opinions of persons qualified to testify as to their value.—Franklin v. Northup, 215 P. 494, 107 Or. 537.

Value of information
Expert witness familiar with all kinds of services rendered in making collections, and compensation paid for such services where based on recovery made, is competent to answer hypothetical questions as to value of plaintiff's information to bank concerning overpayment of depositor.—Stewart v. Fourth Nat. Bank, 39 P.2d 915, 141 Kan. 175.

Qualified witnesses
(1) In an action for breach of agreement to convey land in return for services rendered by plaintiff, who became a member of defendant's household when a boy, a neighboring farmer was qualified to give an opinion of the value of services of a young person of plaintiff's age and capacity on a farm.—Matteson v. Blaisdell, 182 N.W. 442, 148 Minn. 352.

(2) Testimony of one familiar with work, in which employee seeking compensation was injured, that work of such nature could not exist for as much as one year in one county and as to wages paid for such work, was admissible.—Fidelity & Casualty Co. of New York v. Branton, Tex.Civ.App., 70 S.W.2d 780, error dismissed.

3. Ala.—Duggar v. Pitts, 39 So. 905, 145 Ala. 358, 8 Ann.Cas. 146—Baker v. Green, 84 So. 545, 17 Ala. App. 290.
Ky.—Daniel v. Bullitt County, 74 S. W. 1057, 115 Ky. 741, 25 Ky.L. 159.

qualifications of particular witnesses to testify as to the value of particular services are considered supra subdivision f (1) of this section.

The witness need not be an expert in the strict sense of the term;[4] nor need he be familiar with the value of such services in more than a general way.[5] However, the witness must be better equipped to determine the value of the services than the jury or men in general;[6] a witness not possessed of special skill, training, or knowledge, is not competent.[7]

A witness who has observed the rendition of the services[8] and has a sufficient familiarity with services of that nature to form a reasonable inference as to value[9] is qualified.

Persons engaged in performing services of the same character as those to be valued are generally held competent.[10] A witness who has knowledge of the business in which the services have been rendered, and of their value, may give his opinion as to the value of the services.[11]

Attorney's services. An attorney is competent to testify as to the value of the services rendered by another attorney,[12] particularly where he has had

Md.—Parker v. Tilghman V. Morgan, Inc., 183 A. 224, 170 Md. 7—Owings v. Dayhoff, 151 A. 240, 159 Md. 403—Washington, B. & A. Electric R. Co. v. Moss, 100 A. 86, 130 Md. 198.
Mass.—W. H. Ballard Co. v. Lipp, 192 N.E. 492, 288 Mass. 163—Beaman v. Gerrish, 126 N.E. 352, 235 Mass. 79.
Mich.—Gloeser v. Moore, 278 N.W. 781, 284 Mich. 106.

Unqualified witnesses

(1) That witness and associate had spent a million and a half dollars in business section did not qualify witness as expert on value of services in constructing subdivision in residential section.—Schwarz v. Lou-Ala Inv. Co., 127 So. 786, 23 Ala.App. 498.

(2) In an action to recover for plaintiff's services in taking care of decedent, plaintiff's husband, who had given only general testimony as to the nature of the services rendered, and had testified to a knowledge of the amounts paid for services in taking complete care of the person, was not qualified to state his opinion as to the lump sum value of plaintiff's services, there being no contention that she took sole care of decedent.—Smith v. Burhyte, 189 N.Y.S. 728, 197 App.Div. 725.

4. Ky.—Mussinon's Adm'r v. Herrin, 67 S.W.2d 710, 252 Ky. 495.
Mo.—Weisenborn v. Rutledge, 121 S.W.2d 309, 233 Mo.App. 464.
Pa.—McCullough v. Holland Furnace Co., 141 A. 631, 293 Pa. 45.

5. Pa.—McCullough v. Holland Furnace Co., 141 A. 631, 632, 293 Pa. 45, citing **Corpus Juris.**
22 C.J. p 698 note 8.

6. Tex.—Westerfeld v. Reed, Civ. App., 107 S.W.2d 640.

7. Pa.—McCullough v. Holland Furnace Co., 141 A. 631, 293 Pa. 45.
22 C.J. p 700 note 38.

8. Cal.—Warder v. Hutchison, 231 P. 563, 69 Cal.App. 291.
Idaho.—McCarthy v. Paris, 267 P. 232, 233, 46 Idaho 165, quoting **Corpus Juris.**
Ind.—Masters v. Stewart, 198 N.E. 800, 101 Ind.App. 243.
Minn.—Olstad v. Fahse, 282 N.W. 694, 204 Minn. 118.
Pa.—Baxter v. Philadelphia & R. Ry. Co., 107 A. 881, 264 Pa. 467, 9 A.L.R. 504.
Wash.—Miller v. Puget Sound Bridge & Dredging Co., 250 P. 64, 65, 140 Wash. 663, quoting **Corpus Juris.**
23 C.J. p 593 note 25.

9. Idaho.—McCarthy v. Paris, 267 P. 232, 233, 46 Idaho 165, quoting **Corpus Juris.**
Pa.—McCullough v. Holland Furnace Co., 141 A. 631, 293 Pa. 45.
Vt.—Enos v. Owens Slate Co., 160 A. 185, 104 Vt. 329.
Tex.—Page v. Estes, Civ.App., 142 S.W.2d 292, error dismissed, judgment correct.
Wash.—Miller v. Puget Sound Bridge & Dredging Co., 250 P. 64, 65, 140 Wash. 663, quoting **Corpus Juris.**
22 C.J. p 593 note 26.

10. Ark.—Cypress Drainage Dist. of Perry and Conway Counties v. Blair, 245 S.W. 310, 156 Ark. 130.

Author is a competent witness as to the value of a literary production.—Babcock v. Raymond, 2 Hilt., N.Y., 61.

11. N.D.—Bryan v. Northwest Beverages, 285 N.W. 689, 69 N.D. 274, 123 A.L.R. 717.

12. Ala.—Fuller v. Stevens, 39 So. 623.
Ark.—Ætna Life Ins. Co. v. Heiden, 42 S.W.2d 392, 184 Ark. 291.
Colo.—Wilson v. Union Distilling Co., 16 Colo.App. 429.
Ill.—Lee v. Lomax, 76 N.E. 377, 219 Ill. 218—Jevne v. Osgood, 57 Ill. 340.
Ind.—Covey v. Campbell, 52 Ind. 157.
Iowa.—Klass v. Iowa Mut. Liability Ins. Co., 230 N.W. 314, 210 Iowa 78—Graham v. Dillon, 121 N.W. 47, 144 Iowa 82.
Kan.—Ottawa University v. Parkinson, 14 Kan. 159—Anthony v. Stinson, 4 Kan. 211.
Ky.—Maynard v. Maynard's Adm'r, 64 S.W.2d 567, 251 Ky. 246, 91 A.L.R. 697—Daly v. Power, 33 S.W.2d 305, 236 Ky. 426.
La.—Hunt v. Hill, 70 So. 522, 138 La. 583.
Md.—Wingert v. Bowie, 128 A. 274, 147 Md. 610—Friedenwald v. Burke, 91 A. 461, 123 Md. 511.
Mich.—Chamberlain v. Rodgers, 79 Mich. 219—Turnbull v. Richardson, 69 Mich. 400.
Miss.—Johnson v. Howard, 141 So. 573, 167 Miss. 475—Humphreys County v. Cashin, 90 So. 888, 128 Miss. 236—New Orleans, J. & G. N. R. Co. v. Allbritton, 38 Miss. 242.
Mo.—Brown v. Huffard, 69 Mo. 305—State v. Flarsheim, 119 S.W. 17, 137 Mo.App. 1.
N.J.—De Lear v. Wolansky, 154 A. 425, 9 N.J.Misc. 455.
N.Y.—Harnett v. Garvey, 66 N.Y. 641—Gall v. Gall, 50 N.Y.S. 563, 27 App.Div. 173—Bramble v. Hunt, 68 Hun 204—Jackson v. New York Cent. R. Co., 2 Thomps. & C. 653—Clussman v. Merkel, 3 Bosw. 402—In re D'Adamo, 94 Misc. 1, 157 N.Y.S. 374.
Okl.—In re Pitman's Guardianship, 250 P. 1015, 120 Okl. 199.
Pa.—Goldbacher v. Cooley, 5 Pa. Dist. & Co. 34.
S.D.—Frye v. Ferguson, 6 S.D. 392.
Wash.—Isham v. Parker, 29 P. 835, 3 Wash. 755, 771.
22 C.J. p. 656 notes 91, 92, p 700 note 29—6 C.J. p 762 note 15.

One who had been master in chancery of the court was competent to judge from the knowledge so obtained what would be the usual and customary solicitor's fees in that county for the work indicated by the files.—Farmer v. Fowler, 123 N.E. 550, 288 Ill. 494.

That attorney is interested in the litigation does not render him incompetent.—Baker v. Hall-Dodds Co., 276 N.W. 518, 282 Mich. 463.

Services must be legal services as distinguished from mere business transactions.—Warder v. Seitz, 57 S.W. 537, 157 Mo. 140—6 C.J. p 763 note 22.

experience in the same type of practice;[13] but an attorney is competent even though he has not had such experience,[14] or although he is not engaged in active practice.[15] Generally, an attorney is not a competent witness as to the value of legal services rendered in another locality,[16] in the absence of special circumstances,[17] or special knowledge as to the value of legal services in such locality.[18]

An attorney who has no personal knowledge of the legal services rendered may testify to their value in response to a hypothetical question.[19]

According to some authorities, only an attorney is competent to testify to the value of legal services;[20] but this view is opposed by other cases in which lay witnesses have been allowed to state their opinions of the value of an attorney's services.[21]

The opinion must be as to the value of the particular services rendered, and not as to the general value of such services.[22]

Physician's services. A physician is competent to testify as to the value of a physician's services,[23] provided he is familiar with the value of such services in the locality where they were performed.[24] Indeed, it has been held that only a physician is competent,[25] but other authorities hold that a layman may be qualified.[26]

Discretion of court. The determination of whether a witness is qualified to testify as to value rests largely in the discretion of the trial court.[27]

(3) Person Performing the Services

Generally, the person who performed the services is competent to testify as to their value.

In consonance with the rule stated supra subdivision b (2) of this section that an owner is deemed qualified to testify as to the value of his property,

13. Ark.—Bayou Meto Drainage Dist. v. Chapline, 220 S.W. 807, 143 Ark. 446.

14. U.S.—Coco-Cola Co. v. Moore, Ark., 256 F. 640, 168 C.C.A. 34.
Tex.—Scales v. Wynne & Wynne, Civ.App., 242 S.W. 515.
22 C.J. p 700 note 29 [a].

That attorney never drew particular legal instrument sued for does not disqualify him from testifying as to reasonable value of services for drawing instrument.—Klass v. Iowa Mut. Liability Ins. Co., 230 N.W. 314, 210 Iowa 78.

15. Ind.—Blizzard v. Applegate, 61 Ind. 368.

16. Mo.—State v. Seavey, 119 S.W. 17, 137 Mo.App. 1.
6 C.J. p 763 note 21—22 C.J. p 700 note 29 [d].

17. **Trade-mark, unfair competition litigation**

In an action by attorneys for services rendered defendant company in suit to restrain unfair trade competition by another firm, testimony of three lawyers, experts in the field of trade-mark and unfair competition, and possessed of large experience in courts where such litigation is carried on, was admissible on behalf of defendant company, although the attorneys knew nothing about the customary fees charged at the local bar of the small city where the case was tried.—Coco-Cola Co. v. Moore, Ark., 256 F. 640, 168 C.C.A. 34.

Parties resident, retainer made in witness' city

Chicago attorneys were qualified to testify to value of attorney's services rendered in Michigan where all parties are residents of Chicago and contract of employment was made there.—Alexander v. Stern, 252 Ill.App. 286.

Same size city

Expert testimony of Detroit attorney, through whom his client retained Boston attorney to bring suit in Boston, that latter attorney was paid fee which was reasonable and customary in cities comparable in size with Boston and Detroit, was admissible in Boston attorney's action for additional compensation, although witness was not particularly familiar with fees charged in Boston.—Baker v. Hall-Dodds Co., 276 N.W. 518, 282 Mich. 463.

18. Conn.—Slade v. Harris, 135 A. 570, 105 Conn. 436.
6 C.J. p 763 note 21—22 C.J. p 700 note 29 [d].

19. Ala.—McCord v. Bridges, 100 So. 469, 211 Ala. 295.
R.I.—McLyman v. Miller, 166 A. 548—Brown v. Campbell, 155 A. 403.
Wash.—Tucker v. Mehlhorn, 248 P. 376, 140 Wash. 283.

20. U.S.—Coco-Cola Co. v. Moore, Ark., 256 F. 640, 168 C.C.A. 34.
Nev.—Martin v. Duncan Automobile Co., 296 P. 24, 53 Nev. 212.
22 C.J. p 700 note 31—6 C.J. p 763 note 20.

21. Ky.—Kentucky & West Virginia Power Co. v. Howes, 56 S.W.2d 539, 246 Ky. 843.
22 C.J. p 700 note 33, p 594 note 45 [b], [c]—6 C.J. p 763 note 20.

Where attorney's services were not strictly of legal nature, layman experienced in employing able attorneys for similar services was properly permitted to testify as to reasonable value of attorney's services.—Kentucky & West Virginia Power Co. v. Howes, 56 S.W.2d 539, 246 Ky. 843.

22. Mo.—Southgate v. Atlantic & Pac. R. Co., 61 Mo. 89.
N.Y.—Barker v. Cairo & F. R. Co., 3 Thomps. & C. 328.
6 C.J. p 763 note 23.

23. N.J.—Mulligan v. Clappis, 1 A.2d 414, 121 N.J.Law 119.
Or.—Mount v. Riechers, 13 P.2d 335, 140 Or. 267.
48 C.J. p 1168 note 19—22 C.J. p 700 note 30.

24. Cal.—Citron v. Fields, 85 P.2d 534, 30 Cal.App.2d 51.
Conn.—Stressman v. Vitiello, 158 A. 879, 114 Conn. 370.
Tex.—Salyer v. Shropshire, Civ.App., 144 S.W.2d 618.
Wis.—In re Watzek's Estate, 247 N.W. 330, 211 Wis. 50.

25. Ala.—Wood v. Brewer, 57 Ala. 515.
22 C.J. p 700 note 32.

26. Iowa.—Wood v. Branning, 244 N.W. 658, 215 Iowa 59.
Mo.—Quirk v. Metropolitan St. Ry. Co., 210 S.W. 106, 200 Mo.App. 593, certiorari quashed State ex rel. Metropolitan St. Ry. Co. v. Ellison, Sup., 224 S.W. 820.
22 C.J. p 700 note 34.

27. Ariz.—Arizona Superior Mining Co. v. Anderson, 262 P. 489, 33 Ariz. 64, error dismissed 49 S.Ct. 177, 278 U.S. 578, 73 L.Ed. 516.
Conn.—Stressman v. Vitiello, 158 A. 879, 114 Conn. 370.
Md.—Wingert v. Bowie, 128 A. 274, 147 Md. 610.
Minn.—In re Anderson's Estate, 239 N.W. 602, 184 Minn. 648.
N.J.—Maisto v. Maisto, 12 A.2d 890, 124 N.J.Law 565, affirming 8 A.2d 810, 123 N.J.Law 401.
Or.—Porter Const. Co. v. Berry, 298 P. 179, 136 Or. 80.
Wash.—Wilkins v. Knox, 253 P. 797, 142 Wash. 571.

it is generally held that the person who performed the services is competent to testify as to their value.[28] This rule has been applied in the case of agricultural services, as those of a farmer;[29] domestic services, as those of a housekeeper[30] or nurse;[31] literary services, as those of an author;[32] professional services, as those of an attorney[33] or physician;[34] mercantile services, as those of a bookkeeper,[35] or an executive or manager;[36] and the services of one as a bartender in his own saloon.[37] However, it has been held that one should not be allowed to testify as to the value of his services in procuring a lease for a railroad company,[38] and that a witness who has no regular occupation or salary should not be permitted to state the "fair and reasonable value of his time."[39] In any event, where the person who performed the services is without knowledge as to their value, he is not competent.[40]

§ 546. Other Matters Involving Scientific or Other Special Knowledge

a. Agriculture
b. Chemistry and physics
c. Construction, condition, or repair of buildings
d. Documents
e. Firearms
f. Insurance
g. Nautical matters
h. Photography
i. Surveying
j. Transportation
k. Miscellaneous matters

a. Agriculture

Rules governing the admissibility of expert opinion evidence generally have been applied to matters relating to agriculture.

A witness, provided he is properly qualified by experience in agricultural matters,[41] and has had adequate opportunities for observation,[42] may be permitted to state his inferences from observed agricultural phenomena,[43] such as the effect of specified treatment or conditions on particular land;[44]

28. Cal.—Citron v. Fields, 85 P.2d 534, 30 Cal.App.2d 51.
Kan.—Millspaugh v. McKnab, 7 P.2d 51, 134 Kan. 579.
Mass.—Rizzo v. Cunningham, 20 N.E.2d 471, 303 Mass. 16.
Minn.—Guin v. Mastrud, 288 N.W. 716, 206 Minn. 382.
Mont.—Doane v. Marquisee, 206 P. 426, 63 Mont. 166—Matoole v. Sullivan, 177 P. 254, 55 Mont. 363.
Or.—McGilchrist v. F. W. Woolworth Co., 7 P.2d 982, 138 Or. 679—Franklin v. Northup, 215 P. 494, 500, 107 Or. 537, citing **Corpus Juris.**
Tex.—Franzen Motor Co. v. Wentz, Civ.App., 122 S.W.2d 236.
Wash.—Wilkins v. Knox, 253 P. 797, 142 Wash. 571.
22 C.J. p 592 note 16, p 699 notes 11 [a], 23 [a].

Husband has proprietary interest in wife's services and is therefore competent to testify to their value.—Moran v. Moran, 246 N.W. 711, 124 Neb. 379.

Invasion of jury's province
The rule that in an action for personal injury plaintiff cannot prove by a general statement the amount of his damage will not preclude his testimony, subject to cross-examination, as to the annual value of his personal services prior to and after the injury, especially where he goes into full details as to the facts on which his opinion is based.—Central of Georgia Ry. Co. v. Hartley, 103 S.E. 259, 25 Ga.App. 110.

Familiarity with value in neighborhood
In an action against decedent's estate for services rendered decedent and his wife by their niece, the niece could testify to the value of her services, although she testified also that she was not familiar with the value of such services in the neighborhood.—Nelson v. Ballestad, 176 N.W. 766, 171 Wis. 162.

29. Ark.—Arkansas Midland R. Co. v. Griffith, 39 S.W. 550, 63 Ark. 491.
22 C.J. p 592 note 17.

30. Mass.—Matloff v. City of Chelsea, 31 N.E.2d 518, 308 Mass. 134.
22 C.J. p 592 note 18.

Lack of knowledge admitted
In action to establish claim against estate of deceased for washing, boarding, and care, it was error to admit testimony for plaintiff as to worth of claimants' services, where, on examination as to qualifications, witness said she had never kept boarding house and did not know what was reasonable worth of services.—Seddon v. Richardson, 205 N.W. 307, 200 Iowa 763.

31. Neb.—Missouri Pac. R. Co. v. Palmer, 76 N.W. 169, 55 Neb. 559.
22 C.J. p 592 note 19.

32. N.Y.—Babcock v. Raymond, 2 Hilt. 61.

33. Fla.—Baruch v. Giblin, 164 So. 831, 122 Fla. 59.
Ga.—Deutsch v. Haas, 190 S.E. 637, 55 Ga.App. 463.
Iowa.—Reynolds & Heitsman v. Henry, 185 N.W. 67, 193 Iowa 164.
Minn.—Detroit Lakes Realty Co. v. McKenzie, 284 N.W. 60, 204 Minn. 490.
Tex.—Hawkins v. Black, Civ.App., 23 S.W.2d 755.

34. Cal.—Citron v. Fields, 85 P.2d 534, 30 Cal.App.2d 51.
R.I.—Scanlon v. Anderson, 144 A. 146, 49 R.I. 470—Brooks v. Aldrich, 107 A. 100.
Tex.—Owl Taxi Service v. Saludis, Civ.App., 122 S.W.2d 225, error dismissed.

Opinion based on patient's wealth
Testimony of physician suing estate for services, as to reasonable charge, based on deceased patient's wealth, was inadmissible.—Anderson v. Caulk, Civ.App., 5 S.W.2d 816, affirmed Caulk v. Anderson, 37 S.W.2d 1008, 120 Tex. 253.

35. Mo.—Nesbit v. Shisler, 158 S.W. 419, 175 Mo.App. 565, 567.
22 C.J. p 592 note 21.

36. Cal.—Coogan Finance Corporation v. Beatcher, 7 P.2d 695, 120 Cal.App. 278.

37. Ill.—Schlumbrecht v. Chicago City R. Co., 153 Ill.App. 254.

38. Md.—Washington, B. & A. Electric R. Co. v. Moss, 100 A. 86, 130 Md. 198, 210.
22 C.J. p 593 note 23.

39. Mass.—Whipple v. Rich, 63 N.E. 5, 180 Mass. 477.

40. Ala.—Hollingsworth v. Corbin, 101 So. 843, 212 Ala. 104.

41. Cal.—Thayer v. Tyler, 147 P. 979, 169 Cal. 671.
22 C.J. p 643 note 57.

42. Tex.—Ætna Ins. Co. v. Collins, Civ.App., 134 S.W.2d 709.

43. Cal.—Santa Cruz v. Enright, 30 P. 197, 95 Cal. 105.
22 C.J. p 643 note 59.

44. S.D.—Nebraska & D. Land &

whether a certain course of treatment of crops is proper;[45] whether farm was cultivated in workmanlike manner according to approved farming practices;[46] the injury resulting from certain acts or conditions;[47] the cause of failure of, or damage to, crops or trees;[48] the cost of necessary operations;[49] the availability of land for general farming purposes[50] or for the raising of particular crops,[51] the probable yield of a piece of property;[52] whether milk looked and tasted as if it had been adulterated by adding water;[53] the duties of a farmer and the necessary physical abilities for the performance thereof;[54] whether farm buildings are suitable for a given purpose.[55]

It has been held, however, that in rural communities, where farm operations may be assumed to be within the experience of the average juror, witnesses should not be allowed to state such matters as the quality and probable quantity of farm crops,[56] the sufficiency of fences,[57] and the safe nature of certain acts customary on a farm,[58] or the proper times for firing fallow[59] or brush.[60]

b. Chemistry and Physics

Rules governing the admissibility of expert opinion evidence generally have been applied to matters in the field of chemistry and physics.

A chemist, whose legitimate profession is to inquire into the nature and properties of matter and of a combination or union between the elements of which different substances are composed,[61] is logically the most competent witness regarding the constituents of compounds,[62] and his opinion may be received, although based entirely on experiments in his laboratory,[63] unless such experiments would not qualify him to draw the inference which he proposes to state.[64] However, a chemist is not qualified as an expert witness as to matters not in the field of chemistry,[65] or, although within the field of chemistry, not within that branch with which the

Livestock Co. v. Burris, 73 N.W. 919, 10 S.D. 430.
22 C.J. p 643 note 60.

45. Mich.—Van Werden v. Winslow, 76 N.W. 87, 117 Mich. 564.

46. Tex.—Texas Rural Communities v. Avary, Civ.App., 113 S.W.2d 597, error dismissed.

Witnesses held qualified
Experienced farmers and county agent, who graduated from state agricultural college and had seventeen years' experience in extension work.—Texas Rural Communities v. Avary, supra.

47. Ky.—Madisonville, H. & E. R. R. Co. v. Renfro, 127 S.W. 508.
22 C.J. p 643 note 62.

Effect of weather on crop
Mich.—Ecklesdafer v. Obets, 189 N. W. 53, 219 Mich. 591.

Witness held qualified
(1) Witness who had taken University agriculture course and had studied formation of soil and effect of chemicals could testify as to effect of salt water and oil from adjoining lands.—Gypsy Oil Co. v. Brightwell, 49 P.2d 800, 174 Okl. 519.

(2) A witness who had engaged in wheat farming and had planted and harvested as many as ten or twelve wheat crops of his own, and during his experience as a farmer had occasion to observe wheat crops which had been damaged by hail, and had observed condition of insured's wheat during time he was on ground and engaged in cutting wheat, was qualified in action on hail policy to express an opinion that insured's wheat was damaged by hail, even though his opinion was based on examination and observation made over month after the alleged hail.—Ætna Ins. Co. v. Collins, Tex.Civ. App., 134 S.W.2d 709.

48. Ark.—Lutes v. Lerner, 32 S.W. 2d 439, 182 Ark. 713.
Ga.—Alabama Great Southern R. Co. v. McKenzie, 77 S.E. 647, 139 Ga. 410, 45 L.R.A.,N.S., 18.
Ill.—Clark v. Public Service Co., 278 Ill.App. 426.

49. Or.—Wade v. Amalgamated Sugar Co., 142 P. 350, 71 Or. 75.
22 C.J. p 643 note 64.

50. Iowa.—Bean v. Bickley, 174 N. W. 675, 187 Iowa 689.
22 C.J. p 643 note 65.

51. Mo.—Shoemaker v. Crawford, 82 Mo.App. 487.
Or.—Farmers' & Traders' Nat. Bank v. Woodell, 61 P. 837, 65 P. 520, 38 Or. 294.
22 C.J. p 643 note 66.

52. Cal.—Cornell Tractor Co. v. Humphrey, 290 P. 486, 107 Cal. App. 434—Meer v. Cerati, 200 P. 501, 53 Cal.App. 497.
Colo.—Mayhew v. Glazier, 189 P. 843, 68 Colo. 350.
Or.—Walter v. Echanis, 95 P.2d 979, 163 Or. 148.
22 C.J. p 643 note 67.

53. N.Y.—Lane v. Wilcox, 55 Barb. 615.

54. Ark.—Equitable Life Assur. Soc. of U. S. v. Barton, 96 S.W.2d 480, 192 Ark. 984.

55. Minn.—Armstrong v. Chicago, M. & St. P. R. Co., 47 N.W. 459, 45 Minn. 85.
22 C.J. p 643 note 69.

Witness held not qualified
Real estate dealer was not competent to testify what would be "proper improvements" on land especially adapted to raising fruit.—Sacramento Suburban Fruit Lands Co. v. Tatham, C.C.A.Cal., 40 F.2d 894, certiorari denied Tatham v. Sacramento Suburban Fruit Lands Co., 51 S.Ct. 79, 282 U.S. 874, 75 L.Ed. 772.

56. Ala.—Baker v. Coiney, 38 So. 131, 142 Ala. 566.
22 C.J. p 643 note 70.

57. Cal.—Enright v. San Francisco & San Jose R. Co., 33 Cal. 230.
Minn.—Sowers v. Dukes, 8 Minn. 23.

58. Iowa.—Bills v. Ottumwa, 35 Iowa 107.
22 C.J. p 643 note 72.

59. Mass.—Higgins v. Dewey, 107 Mass. 494, 4 Am.R. 63.
22 C.J. p 643 note 73.

60. Minn.—Krippner v. Biebe, 9 N. W. 671, 28 Minn. 139.
N.H.—Wells v. Eastman, 61 N.H. 507.

61. Hawaii.—Cook v. Hollister Drug Co., 13 Hawaii 681.
N.Y.—Hartung v. People, 4 Park Cr. 319, reversed on other grounds 22 N.Y. 95.

62. U.S.—Badische Anilin & Soda Fabrik v. Klipstein & Co., C.C.N. Y., 125 F. 543.
22 C.J. p 649 note 71.

63. U.S.—Bradford Glycerine Co. v. Kizer, Ohio, 113 F. 894, 51 C.C.A. 483.
22 C.J. p 649 note 72.

64. Ill.—Shufeldt v. Searing, 59 Ill.App. 341.
22 C.J. p 649 note 73.

65. S.C.—Housand v. Armour & Co., 175 S.E. 516, 173 S.C. 268.

Bacteriology
Chemist is not competent to testify as to result of bacteriological

witness is familiar;[66] but where a chemist is familiar with the qualities of a particular chemical he will not be disqualified by the mere fact that he has had no practical experience with it.[67] An individual familiar with a particular chemical reaction or physical phenomenon because of long experience therewith may be competent as an expert as to such matters, even though he is not a chemist or physicist.[68]

A qualified witness may give his opinion on various matters in the field of chemistry or physics,[69] such as matters relating to explosive[70] or inflammable[71] compounds; the effect on land of gases and noxious scums resulting from industrial operations;[72] or the effects of drugs or poisons on the human system.[73] A chemist experienced in metallurgical analysis is competent to testify concerning the condition of a tool manufactured from steel which he has subjected to chemical and microscopical tests.[74] However, an expert witness may not testify as to matters related to chemistry or physics which the tribunal would be just as competent to decide.[75]

Chemical analysis. The facts ascertained by chemical analysis[76] of the blood of human be-

analysis at which he assisted.—Housand v. Armour & Co., supra.

66. Tex.—San Marcos Oil Mill v. Soyars, Civ.App., 265 S.W. 173.

Effect of certain poison on animals
Tex.—San Marcos Oil Mill v. Soyars, supra.

Particular plating process
Chemist has been held incompetent to testify as to effect of use of gasoline in cleansing in process of silver plating, when he had already stated that he had never seen gasoline so used, and that for same purpose he had always used, and had always seen used, concentrated lye.—Fraim v. National F. Ins. Co., 32 A. 613, 170 Pa. 151, 50 Am.S.R. 753.

67. Okl.—Selby v. Osage Torpedo Co., 241 P. 130, 112 Okl. 303, 44 A.L.R. 120.

68. Kan.—London Sun Ins. Office v. Western Woolen-Mill Co., 82 P. 513, 72 Kan. 41.

Court's discretion
The qualifications of a witness to testify as to the color and composition of candy were to be determined by the trial judge in the exercise of sound judicial discretion.—Parker v. S. G. Shaghalian & Co., 138 N.E. 236, 244 Mass. 19.

Spontaneous combustion in wool
Witness having special skill or experience may state inference as to effect of water on large mass of wool and probability of spontaneous combustion.—London Sun Ins. Office v. Western Woolen-Mill Co., 82 P. 513, 72 Kan. 41.

69. **Opinion may relate to**
(1) Chemical value of agricultural products.—Wolf v. Edmunson, Or., 240 F. 53, 153 C.C.A. 89.

(2) Fitness of guano as fertilizer. —Wilcox v. Hall, 53 Ga. 635—22 C. J. p 649 note 85.

(3) Ordinary properties of matter in its various forms.—Logansport & W. Val. Natural Gas Co. v. Coate, 64 N.E. 638, 29 Ind.App. 299.

(4) Whether goods were damaged by evaporation of spirits.—Turner v. Black Warrior, C.C.Cal., 24 F.Cas.No. 14,253, McAll. 181.

(5) Whether damage to fruit stored in warehouse was due to insufficient refrigeration.—Miller v. John Repp Ice & Cold Storage Co., 148 A. 641, 106 N.J.Law 214.

(6) Whether lager beer is fermented liquor.—Merkle v. State, 37 Ala. 139.

22 C.J. p 649 note 90.

70. Okl.—Selby v. Osage Torpedo Co., 241 P. 130, 112 Okl. 303, 44 A.L.R. 120.

Camphene
Mass.—Bierce v. Stocking, 11 Gray 174.

Gas generated by gun discharge
Qualified witness may testify as to volume, explosion pressure, and effect of gas generated by discharge of gun.—Long v. Travellers' Ins. Co., 85 N.W. 24, 113 Iowa 259.

Nitroglycerine
Okl.—Selby v. Osage Torpedo Co., 241 P. 130, 112 Okl. 303, 44 A.L.R. 120.

71. Mo.—Mooney v. Monark Gasoline & Oil Co., 298 S.W. 69, 317 Mo. 1255.

Retention of gasoline vapor in apparently dry clothing may be subject of opinion testimony.—Mooney v. Monark Gasoline & Oil Co., supra.

Witness held not qualified
Mass.—Guinan v. Boston Elevated Ry. Co., 167 N.E. 247, 267 Mass. 526.

72. Mass.—Lincoln v. Taunton Copper Mfg. Co., 9 Allen 181.

Assistant to chemist
In action for damages to orchard from fumes of smelting plant, a witness who merely assisted a chemist in determining the effect of fumes on the surroundings, and who had no technical training, was not qualified as an expert.—St. Louis Smelting & Refining Co. v. Henke, C.C.A.Ill., 277 F. 665.

73. Mich.—Fox v. Peninsular White Lead & Color Works, 52 N.W. 623, 92 Mich. 243.

22 C.J. p 649 note 92.

Horticulturist held not competent to answer question whether human being could live if he remained for eight days in concentration of illuminating gas of one to five hundred parts of air.—Northern Indiana Public Service Co. v. W. J. & M. S. Vesey, 200 N.E. 620, 210 Ind. 338.

Misbranding
On issue of misbranding as to curative powers of commercial concentrated mineral water, opinion of one learned in chemistry or regularly admitted to practice medicine, having knowledge of the drug elements and their efficiency or lack thereof as curative agents, separately or in combination, is competent, regardless of witness having had actual experience or observation of the effect of use of such drugs in the exact form in question.—Goodwin v. U. S., C.C.A. Ohio, 2 F.2d 200.

Effect of monoxide gas
Wis.—Zielsdorf v. Grotsky, 218 N.W. 186, 195 Wis. 253—In re Butt's Estate, 193 N.W. 988, 181 Wis. 141.

74. Mich.—Potvin v. West Bay City Shipbuilding Co., 120 N.W. 613, 156 Mich. 201.

75. Pa.—Sweeney v. Blue Anchor Beverage Co., 189 A. 331, 325 Pa. 216.

Effect of mesh covering on bottle
In purchaser's action for injuries caused by alleged explosion of carbonated beverage bottle which was tipped over on concrete floor, refusing to permit expert witness to give opinion as to what would be effect of wicker or wire mesh covering if bottle containing charged beverage was broken or exploded was not error, since tribunal was as competent as witness to answer question.—Sweeney v. Blue Anchor Beverage Co., supra.

76. Ill.—Chicago Cosmetic Co. v. City of Chicago, 29 N.E.2d 495, 374 Ill. 384.

22 C.J. p 649 note 74.

ings[77] or animals,[78] of organs of the body,[79] of pus,[80] of drugs,[81] or of portions of food or medicine[82] alleged to have been used as the vehicle of poison,[83] may be stated, either by a competent chemist,[84] or by a person accustomed to make accurate analyses of the substance involved in the inquiry,[85] provided the article analyzed is satisfactorily identified.[86] However, the results of an analysis may be stated only by the person who made the analysis.[87]

c. Construction, Condition, or Repair of Buildings

Rules governing the admissibility of expert opinion evidence generally have been applied to matters relating to the construction, condition, or repair of buildings.

A witness experienced in a building trade,[88] and who is shown to have had sufficient opportunity for observation,[89] and to be adequately qualified to form a judgment as to the matter of which he undertakes to speak,[90] may testify as to his inferences or judg-

Witness held qualified

Chemist in charge of city's chemical laboratory was properly permitted to state the result of analysis made at the laboratory by him or under his supervision, where the chemist had testified fully as to his qualifications and experience.—Chicago Cosmetic Co. v. City of Chicago, 29 N.E.2d 495, 374 Ill. 384.

Contents of dust

N.J.—Davis v. New Jersey Zinc Co., 182 A. 850, 116 N.J.Law 103.

Interpretation of analysis report

Witness who had acted as city chemist in analysis of water for more than two years and had taken short course in water analysis and understood abbreviations in records of water analysis in state department of health was competent to explain meaning of abbreviations in such records.—Town of Sentinel v. Boggs, 61 P.2d 654, 177 Okl. 623—Town of Sentinel v. Riley, 43 P.2d 742, 171 Okl. 533.

77. Me.—State v. Knight, 43 Me. 11.
22 C.J. p 649 note 75.

78. Idaho.—State v. Rice, 66 P. 87, 7 Idaho 762.
N.Y.—Linsday v. People, 63 N.Y. 143.
22 C.J. p 649 note 76.

79. Mo.—State v. Thompson, 42 S.W. 949, 141 Mo. 408.
22 C.J. p 649 note 77.

80. Ky.—U. S. Health & Accident Ins. Co. v. Jolly, 118 S.W. 281.

81. Ind.—Epps v. State, 1 N.E. 491, 102 Ind. 539.
22 C.J. p 649 note 79.

82. Tex.—San Marcos Oil Mill v. Soyars, Civ.App., 265 S.W. 173.

83. N.Y.—People v. Williams, 2 Cow. Cr. 13, 3 Park.Cr. 84.
N.C.—State v. Best, 15 S.E. 930, 111 N.C. 638.

84. Md.—Jackson v. Shawinigan Electro Products Co., 103 A. 453, 132 Md. 128.
22 C.J. p 649 note 82.

85. Mass.—Davis v. Mills, 40 N.E. 852, 163 Mass. 481.
22 C.J. p 649 note 83.

86. N.C.—State v. Best, 15 S.E. 930, 11 N.C. 638.
22 C.J. p 649 note 84.

87. N.Y.—People v. McDermott Dairy Co., 132 N.Y.S. 329.
22 C.J. p 649 note 81.

88. Ala.—Gray v. Wood, 127 So. 148, 220 Ala. 587.
Fla.—Fred Howland, Inc. v. Morris, 196 So. 472, 475, 143 Fla. 189, 128 A.L.R. 1013, quoting **Corpus Juris.**
22 C.J. p 645 note 7.

Witnesses held qualified

(1) Architect and construction engineer.—Goldman v. Regan, 142 N.E. 701, 247 Mass. 492.

(2) Experienced contractor.—Tokio Marine & Fire Ins. Co. v. Aldridge, Tex.Civ.App., 21 S.W.2d 547, error refused.

Witnesses held not qualified

Theater employee was not qualified to testify that theater lighting was standard lighting customarily used in best theaters, and building manager without technical skill could not testify that he considered theater building reasonably safe for use as theater.—Farris v. Interstate Circuit, C.C.A.Tex., 116 F.2d 409.

89. Fla.—Fred Howland, Inc. v. Morris, 196 So. 472, 475, 143 Fla. 189, 128 A.L.R. 1013, quoting **Corpus Juris.**
22 C.J. p 646 note 8.

Witness held qualified

Builder and contractor who had estimated cost of repairing buildings could testify as expert concerning safety of proposed new material.—Emery v. Tilo Roofing Co., 195 A. 409, 89 N.H. 165.

Witnesses held not qualified

(1) Witness' testimony as to length of time it would reasonably have taken to complete hotel was properly excluded where witness was not present and knew nothing of circumstances.—Capitol Hotel Co. v. Rittenberry, Tex.Civ.App., 41 S.W. 2d 697, error dismissed.

(2) Witness was held not qualified, from his experience as contractor, and his examination of building in 1930, to give his opinion as to condition of building in 1927, particularly where there was other evidence as to prior condition of building.—South Park Com'rs v. Livingston, 176 N.E. 546, 344 Ill. 368.

90. Fla.—Fred Howland, Inc. v. Morris, 196 So. 472, 475, 143 Fla. 189, 128 A.L.R. 1013, quoting **Corpus Juris.**
22 C.J. p 646 note 9.

Proof of qualifications

In action for breach of oral contract to employ plaintiffs as architects for erection of theater building, architects' testimony as to their qualifications and experience was admissible to show their competency to give their judgment as to the cost plaintiffs would have incurred in carrying out the contract and other like matters.—Gaffney v. Switow, 277 S.W. 453, 211 Ky. 232.

Witnesses held qualified

(1) Opinions of building inspector, fire chief and fire marshal, and of experienced carpenter and brick mason concerning condition of building were admissible as against contention that those witnesses had not been qualified as experts, particularly where no complaint was made of similar testimony of other witnesses.—Wachholder v. Kitchens, Tex.Civ.App., 126 S.W.2d 519.

(2) A witness who had been actively engaged in construction business for some twenty-two years and was familiar with type of construction being used by contractor and with concrete forms through which inspector fell, and had visited scene of accident shortly after its occurrence and made minute inspection of materials involved, was qualified to testify as a "skilled witness."—Fred Howland, Inc., v. Morris, 196 So. 472, 143 Fla. 189, 128 A.L.R. 1013.

Witnesses held not qualified

(1) Witness having long experience as auditor, but not as contractor, was not qualified to give expert testimony on subject of cost of completing road improvement contract. —Powers v. Central Surety & Insurance Corporation, 298 P. 1027, 113 Cal.App. 735.

(2) Interest in real estate business is not sufficient to qualify one as expert on whether frigidaire could be removed without damage.—Hugh Cooper Co. v. American Nat. Exchange Bank of Dallas, Tex.Civ. App., 30 S.W.2d 364.

(3) Where witness with thirty-six years' experience in tiling work testified that he had never installed

ment as to matters in his particular department.[91]

The statement may relate to various matters connected with the construction, condition, or repair of buildings,[92] such as the cost of a house[93] or other building,[94] or of repairs thereto,[95] or of other work in connection therewith,[96] or of materials required therefor,[97] especially if the witness has seen the plans;[98] whether certain work conforms to the contract or plans;[99] the amount of material used;[1] whether a piece of work is well done,[2] made of good

any tiling like that involved and had never seen any specifications calling for that type of installation, he was not qualified to give opinion as to practicability of such installation.—Milwaukee County v. H. Neidner & Co., 263 N.W. 468, 220 Wis. 185, modified on other grounds 265 N.W. 226, 220 Wis. 185, motion denied 266 N.W. 238, 220 Wis. 185.

(4) In action for damages resulting from an alleged nuisance created by manufacturer, the exclusion of evidence of opinion of witness who was shown to have been general contractor for thirty years and had examined property damaged by vibrations and had testified as an expert in other litigations, as to whether described vibration was sufficient to have demolished the key of the plaster work in the property owners' homes, could be justified technically on the ground that witness had not qualified himself to express opinion as to what character or what amount of vibration would demolish the key of the plaster work. —Grzelka v. Chevrolet Motor Car Co., 281 N.W. 568, 286 Mich. 141.

(5) Testimony of lawyer who was also president of plaintiff contracting company, that work for defendant had been done in accordance with contract and specifications, was properly excluded, he being concededly not an expert and without actual knowledge.—Lohmuller Building Co. of Baltimore City v. Barrett, 127 A. 482, 146 Md. 617.

Familiarity with details not shown

Before contractor could testify whether building was constructed according to plans and specifications, contractor's familiarity with details thereof should be established; and the fact that he saw plans and specifications for remodeling building was not to establish knowledge of details qualifying him to testify concerning manner of performance.—Hammaker v. Schleigh, 147 A. 790, 157 Md. 652, 65 A.L.R. 1285.

Limiting opinion to witness' knowledge

Where contractor was shown to be familiar with plans and specifications, his testimony should be limited to question of compliance with plans and specifications, and he should not be permitted to give opinion as to substantial performance.—Hammaker v. Schleigh, supra.

91. Fla.—Fred Howland, Inc. v. Morris, 196 So. 472, 475, 143 Fla. 189, 128 A.L.R. 1013, quoting **Corpus Juris.**

22 C.J. p 646 note 10.

Witness held qualified

Witness who had large experience in construction of walls for various buildings could testify concerning proper construction of walls of mausoleum, although witness had never constructed mausoleum.—Seitz v. Zukowski, 215 N.W. 939, 194 Wis. 78.

Witness held not qualified

(1) Architect with no experience in plans for theatre buildings could not testify that floor plans were of standard design and construction.—Farris v. Interstate Circuit, C.C.A. Tex., 116 F.2d 409.

(2) Building contractor was erroneously permitted to express opinion, in answer to hypothetical question, that holes in window casing in their existing condition were not adequate to hold screen under ordinary usage, since witness had no special knowledge in that field.—Aubry v. Ashland Realty Co., 7 N.Y.S. 2d 127, 255 App.Div. 205.

92. Mass.—Goldman v. Regan, 142 N.E. 701, 247 Mass. 492.

Construction, condition, or repair of structures generally see supra § 527.

Opinion may relate to

(1) Proportion of work done at particular time.—Scheerer v. Deming, 97 P. 155, 154 Cal. 138.

(2) Time building superintendent should spend on building in order to earn full compensation.—Ferry v. Henderson, 32 App.D.C. 41.

(3) What work was necessary to repair house.—Goldman v. Regan, 142 N.E. 701, 247 Mass. 492.

(4) Whether certain structure would be called brick house.—Mead v. Northwestern Ins. Co., 7 N.Y. 530.

(5) Whether fence obstructing street was necessary to construction of building.—American Constr. Co. v. Caswell, Tex.Civ.App., 141 S.W. 1013.

(6) Whether particular person is good workman.—Major v. Spies, 66 Barb., N.Y., 576.

(7) Whether particular work belonged to the class of plumbing.—Gitlin v. Stone, 126 N.Y.S. 88.

(8) Whether verandas on building are suitable.—Pratt v. Dunlap, 82 A. 195, 85 Conn. 180.

(9) Effect of water standing in a sewer on the foundation of an adjoining dwelling house.—Hanrahan v. Baltimore, 80 A. 312, 114 Md. 517.

93. Iowa.—Enix v. Iowa Cent. R. Co., 83 N.W. 805, 111 Iowa 748.

22 C.J. p 646 note 11.

94. Conn.—O'Keefe v. St. Francis' Church, 22 A. 325, 59 Conn. 551.

22 C.J. p 646 note 12.

95. Ga.—McMillan v. Tucker, 113 S.E. 391, 154 Ga. 154.

Utah.—Mary Jane Stevens Co. v. First Nat. Bldg. Co., 57 P.2d 1099, 89 Utah 456.

22 C.J. p 646 note 14.

96. Md.—Hammaker v. Schleigh, 147 A. 790, 157 Md. 652, 65 A.L.R. 1285.

22 C.J. p 646 note 15.

97. Idaho.—American Bonding Co. v. State Univ., 81 P. 604, 11 Idaho 163.

22 C.J. p 646 note 16.

98. Ohio.—C. C., C. & St. L. R. Co. v. McKelvey, 12 Ohio Cir.Ct. 426, 5 Ohio Cir.Dec. 561.

Tex.—Joske v. Pleasants, 39 S.W. 586, 15 Tex.Civ.App. 433, 440.

22 C.J. p 646 note 17.

99. Conn.—Schaefer v. Ely, 80 A. 775, 84 Conn. 501, Ann.Cas.1912D 899.

N.Y.—Manhattan Roofing Co. v. Hagedorn, 180 N.Y.S. 816, 110 Misc. 657.

Standard of work and material

Qualified witness may testify whether work or material was up to standard prescribed by contract. —Goode v. Ramey, Tex.Civ.App., 48 S.W.2d 719, error refused—22 C.J. p 646 note 25.

Whether building was complete, as provided by contract.—Jemison & Co. v. Ensey, 154 So. 553, 228 Ala. 599.

That contract was in evidence, together with plans and specification, does not bar opinion as to meaning thereof, where plans and specifications were voluminous and involved considerable detail.—Housing Authority of New Orleans v. Henry Ericsson Co., 2 So.2d 195, 197 La. 732.

1. Ill.—Colp v. First Baptist Church of Murphysboro, 260 Ill.App. 269, affirmed 173 N.E. 67, 341 Ill. 73, 71 A.L.R. 106.

Mich.—Stephens Lumber Co. v. Townsend-Stark Corporation, 199 N.W. 706, 228 Mich. 182, modified on other grounds 201 N.W. 213, 228 Mich. 182.

2. Ark.—Faulkinbury v. Shaw, 39 S.W.2d 708, 183 Ark. 1019.

material,[3] of sufficient strength for a given purpose,[4] or otherwise properly constructed;[5] whether a building was safe;[6] the effect,[7] propriety,[8] practicability,[9] or safety[10] of, or the time required for,[11] a particular operation or construction; the strength of particular forms of construction,[12] and their sufficiency for an intended use;[13] what would be or was the cause of a stated effect;[14] and what would be or was the effect of a stated cause or condition.[15]

However, a witness cannot state an inference or opinion as to a matter respecting buildings which is within the range of common knowledge or experience,[16] or which is the ultimate fact for the jury to decide.[17]

d. Documents

Rules governing the admissibility of expert opinion evidence generally have been applied to inferences from the appearance of documents and related matters.

A person who is skilled in the handling[18] and inspection[19] of documents may state his inference

N.H.—N. E. Redlon Co. v. Franklin Square Corporation, 195 A. 348, 89 N.H. 137, affirmed 197 A. 329, 89 N.H. 137.
22 C.J. p 646 note 22.

Demolition of wall
Wash.—Amann v. City of Tacoma, 16 P.2d 601, 170 Wash. 296.

3. N.H.—N. E. Redlon Co. v. Franklin Square Corporation, 195 A. 348, 89 N.H. 137, affirmed 197 A. 329, 89 N.H. 137.
22 C.J. p 646 note 23.

4. N.Y.—Fox v. Buffalo Park, 57 N.E. 1109, 163 N.Y. 559.
22 C.J. p 646 note 24.

5. Ala.—Crawford Johnson & Co. v. Pryor Motor Co., 121 So. 388, 219 Ala. 108.
Ohio.—Trame v. Orpheum Theatre Co., 21 N.E.2d 178, 60 Ohio App. 323.
Tex.—Tokio Marine & Fire Ins. Co. v. Aldridge, Civ.App., 21 S.W.2d 547, error refused—Dupuy v. Shilling, Civ.App., 298 S.W. 934.
22 C.J. p 647 note 26.

Lighting system
Pa.—Smith v. Penn Federal Corporation, 172 A. 147, 315 Pa. 20.
Tex.—Cooke v. Loew's Houston Co., Civ.App., 130 S.W.2d 869.

Roof
Ala.—Crawford Johnson & Co. v. Pryor Motor Co., 121 So. 388, 219 Ala. 108.
Okl.—Independent Material & Supply Co. v. Marshall, 264 P. 830, 129 Okl. 295.

Scaffolding
N.Y.—Metzroth v. City of New York, 208 N.Y.S. 744, 212 App.Div. 253, modified on other grounds 150 N.E. 519, 241 N.Y. 470.

6. Ala.—Gray v. Wood, 127 So. 148, 220 Ala. 587.

7. Conn.—Huber v. H. R. Douglas, Inc., 108 A. 727, 94 Conn. 167.
Iowa.—Oscar Ruff Drug Co. v. Western Iowa Co., 181 N.W. 408, 191 Iowa 1035, 15 A.L.R. 962.
22 C.J. p 647 note 27.

Impairment of structural strength
Whether proposed changes or alterations in leased premises will "impair structural strength" of building is generally question for expert testimony by competent engineers.—Western Bldg. Co. v. J. C. Penney Co., 245 N.W. 909, 60 S.D. 630.

8. Conn.—Huber v. H. R. Douglas, Inc., 108 A. 727, 94 Conn. 167.
N.Y.—Slater v. Barnes, 202 N.Y.S. 107, 207 App.Div. 413.
22 C.J. p 647 note 28.

9. Mo.—Oakley v. Richards, 204 S. W. 505, 275 Mo. 266.

10. Ky.—Louisville & N. R. Co. v. Deering, 223 S.W. 1095, 188 Ky. 708.
Wis.—Allison v. Wm. Doerflinger Co., 242 N.W. 558, 208 Wis. 206.
22 C.J. p 647 note 30.

Whether walls should have been braced
Tex.—Snelling v. Harper, Civ.App., 137 S.W.2d 222, error dismissed, judgment correct.

11. Md.—Pennsylvania Steel Co. v. Nace, 77 A. 1121, 113 Md. 460, 45 L.R.A.,N.S., 281.
22 C.J. p 647 note 31.

12. Mass.—Prendible v. Connecticut River Mfg. Co., 35 N.E. 675, 160 Mass. 131.
22 C.J. p 647 note 32.

13. Tenn.—City of Clarksville v. Deason, 9 Tenn.App. 274, 282, citing **Corpus Juris.**
22 C.J. p 647 note 33.

14. Fla.—Fred Howland, Inc. v. Morris, 196 So. 472, 143 Fla. 189, 128 A.L.R. 1013.
Mass.—Goldman v. Regan, 142 N.E. 701, 247 Mass. 492.

Bulge in building
In proceeding against borough for damages for change in grade of highway, expert evidence was admissible on question whether bulge in abutting building was caused by construction of highway fill.—Brown, for Use of McArdle, v. Borough of Castle Shannon, 178 A. 678, 318 Pa. 363.

Collapse of roof
Ala.—Crawford Johnson & Co. v. Pryor Motor Co., 121 So. 388, 219 Ala. 108.

15. Conn.—Reynolds v. Land Mortgage & Title Co., 159 A. 282, 114 Conn. 447.
22 C.J. p 647 note 39.

16. U.S.—MacLaughlin v. Hull, C.C. A.Wash., 87 F.2d 641.
Ind.—Wolf Hotel Co. v. Parker, 158 N.E. 294, 87 Ind.App. 333.
Mass.—Young v. Kaplan, 166 N.E. 638, 267 Mass. 152.
Okl.—Kenyon v. Jenkins, 40 P.2d 675, 170 Okl. 351.
Wash.—Amann v. City of Tacoma, 16 P.2d 601, 170 Wash. 296.
Wis.—Bent v. Jonet, 252 N.W. 290, 213 Wis. 635, 126 A.L.R. 1245.

Cost of building erected in accordance with contract is factual question, and not matter of opinion for expert testimony.—Arkansas Fuel Oil Co. v. Andrews Point Co., 13 S. E.2d 738, 64 Ga.App. 595.

Manner of holding cellar doors apart
In action for injuries sustained when pedestrian fell on slippery sidewalk, pulling down iron cellar doors on top of him, "expert" testimony, that if doors were properly constructed they would have been held apart with a rigid rod instead of being connected with chain, was properly excluded.—Jacob v. City of Philadelphia, 5 A.2d 176, 333 Pa. 584.

Safety of swinging doors
Mont.—Leybold v. Fox Butte Theater Corporation, 62 P.2d 223, 103 Mont. 232.

17. Kan.—Darling v. Franklin Fire Ins. Co. of Philadelphia, Pa., 253 P. 245, 122 Kan. 620.
However, in action for injuries from falling down marble stairway, expert's opinion testimony that construction of stairs was not proper was admissible, even though involving main issue on which defendant's liability rested.—Goldstein v. United Amusement Corporation, 169 A. 587, 86 N.H. 402.

Cause of collapse of roof
Kan.—Darling v. Franklin Fire Ins. Co. of Philadelphia, Pa., 253 P. 245, 122 Kan. 620.

18. Ala.—Glover v. Gentry, 16 So. 38, 104 Ala. 222.
N.J.—State v. Crivelli, 98 A. 250, 89 N.J.Law 259.
22 C.J. p 651 note 6.

19. Iowa.—Eisfield v. Dill, 32 N.W. 420, 71 Iowa 442.
22 C.J. p 651 notes 5, 6.

from appearances observed by him; as, for instance, whether a writing is recent,[20] and in general as to its age;[21] whether it was written entirely at one time,[22] or with the same ink,[23] or with a pen,[24] or other means,[25] or on particular paper;[26] the order of additions to the paper;[27] whether certain words were altered,[28] canceled,[29] erased,[30] or added after execution,[31] or after a paper was folded;[32] whether a figure has been changed;[33] whether a handwriting is natural or feigned;[34] whether a document was written by an intoxicated person[35] or by a person who was nervous and whose hand was unsteady;[36] or whether a document is genuine or forged.[37]

Such a witness may also state the meaning of abbreviations,[38] and of obscure[39] or elliptical[40] entries or figures;[41] and whether a set of figures, letters, marks, or writings contain an arrangement in cipher, and, if so, what they mean.[42]

It is a condition of the admissibility of this class of evidence that the jury should not be equally able to draw the inferences properly for themselves;[43] and the witness is required to state the facts which the inference is based.[44]

e. Firearms

Rules governing the admissibility of expert opin evidence generally have been applied to matters relat to firearms.

A person especially acquainted or experien with firearms may give his opinion as to matt relating to firearms,[45] such as the kind of gun which a wound was inflicted;[46] how lately a ca ridge[47] or gun[48] has been fired; the cause of explosion of a gun;[49] that a piece of newspa looked like wadding;[50] that a particular bullet ca out of a particular cartridge;[51] or that a bullet peared as if fired through a particular kind of fle.[52]

A qualified witness may testify as to the range a bullet;[53] the result of experiments as to the h singeing[54] and powder marking[55] produced by fi arms at given distances, and how closely a gun v carry shot at given distances.[56]

20. Neb.—Cheney v. Dunlap, 29 N. W. 925, 20 Neb. 265, 57 Am.R. 828.
22 C.J. p 651 note 8.

21. Iowa.—Eisfield v. Dill, 32 N.W. 420, 71 Iowa 442.
22 C.J. p 651 note 9.

22. Pa.—Fulton v. Hood, 34 Pa. 365, 75 Am.D. 664.
22 C.J. p 651 note 10.

23. Ala.—Glover v. Gentry, 16 So. 38, 104 Ala. 222.
22 C.J. p 651 note 11.

24. Mass.—Commonwealth v. Webster, 5 Cush. 295, 52 Am.D. 711.

25. Cal.—Lester v. Fairbairn, 89 P. 2d 1091, 32 Cal.App.2d 411.

Indelible pencil

In election contest, refusal to permit contestee to offer testimony of experts on question whether part of absentee ballots were in fact marked by indelible pencil as required by statute was error.—Lester v. Fairbairn, supra.

26. N.Y.—Dubois v. Baker, 40 Barb. 556, affirmed 30 N.Y. 355.

27. N.Y.—Hadcock v. O'Rourke, 6 N.Y.S. 549, affirmed 28 N.E. 256, 127 N.Y. 681.

28. Mich.—Vinton v. Peck, 14 Mich. 287.
22 C.J. p 651 note 15.

29. W.Va.—Beach v. O'Riley, 14 W. Va. 55.

30. Ala.—Birmingham Nat. Bank v. Bradley, 30 So. 546.
22 C.J. p 651 note 17.

31. Ill.—Rass v. Sebastian, 43 N.E. 708, 160 Ill. 602, affirming 57 Ill. App. 417.
22 C.J. p 652 note 18.

32. Mass.—Bacon v. Williams, 13 Gray 525.

33. Ind.—Nelson v. Johnson, 18 Ind. 329.

34. Pa.—In re Fuller, 70 A. 1005, 222 Pa. 182.
22 C.J. p 652 note 21.

35. N.C.—McLeod v. Bullard, 84 N. C. 515.

36. Kan.—Scott v. Thrall, 95 P. 563, 77 Kan. 688, 127 Am.S.R. 449, 17 L.R.A.,N.S., 184.
22 C.J. p 652 note 23.

37. Ind.—Miller v. Dill, 49 N.E. 272, 149 Ind. 326.
22 C.J. p 652 note 24.

38. N.Y.—Sheldon v. Benham, 4 Hill 129, 40 Am.D. 271.

39. Tex.—New York Mut. L. Ins. Co. v. Baker, 31 S.W. 1072, 10 Tex. Civ.App. 515.
22 C.J. p 652 note 26.

40. N.Y.—Sheldon v. Benham, 4 Hill 129, 40 Am.D. 271.
22 C.J. p 652 note 27.

41. Mass.—Stone v. Hubbard, 7 Cush. 595.
22 C.J. p 652 note 28.

42. Vt.—State v. Wetherell, 40 A. 728, 70 Vt. 274.

43. N.Y.—Phœnix F. Ins. Co. v. Philip, 13 Wend. 81, 84.
22 C.J. p 652 note 30.

44. Ga.—May v. Dorsett, 30 Ga. 116.

45. Ala.—Sovereign Camp, W. O. W. v. Gunn, 140 So. 410, 224 Ala. 444.

Witnesses held not qualified

(1) Unskilled witness cannot testify whether bullet holes in door were made from inside or outside.—Gelson v. State, 26 So. 975, 124 A 8.

(2) Witness whose experience limited to modern firearms can testify as to recoil of short sing barreled shot gun.—Wise v. State, So. 128, 11 Ala. 72.

(3) Single experiment does qualify witness to testify as to fect of pistol shots.—Brownell People, 38 Mich. 732.

46. Ky.—Franklin v. Commonweal 48 S.W. 986, 105 Ky. 237, 20 Ky 1137.

47. Ala.—Orr v. State, 23 So. 6 117 Ala. 69.

48. Ga.—Moughon v. State, 57 102.
S.C.—State v. Davis, 33 S.E. 449, S.C. 339.
Tex.—Meyers v. State, 14 Tex.A 35.
22 C.J. p 654 note 61.

49. N.C.—Keith v. Gregg, 188 S 849, 210 N.C. 802.

Wrong gauge shell

N.C.—Keith v. Gregg, supra.

50. N.Y.—People v. Manke, 78 N 611.

51. Ala.—Sovereign Camp, W. O. v. Gunn, 140 So. 410, 224 Ala. 4

52. Mass.—Commonwealth v. B 62 N.E. 748, 180 Mass. 492.

53. Ala.—Mathis v. State, 73 122, 15 Ala.App. 245.

54. Kan.—State v. Asbell, 46 P. 7 57 Kan. 398.

55. Kan.—State v. Asbell, supra.

56. Kan.—State v. Jones, 21 P. 2 41 Kan. 309.

However, an expert on firearms may not state his opinion where to do so would constitute an invasion of the province of the jury.[57]

f. Insurance

Rules governing the admissibility of expert opinion evidence generally have been applied to matters related to insurance.

Rules governing the admissibility of expert opinion evidence have been applied to matters connected with insurance.[58] Thus, a witness of special experience in such matters may state his inference or judgment as to matters connected with insurance which are not within the range of common knowledge and experience,[59] as, for instance, how, in the case of fire insurance, differences or changes in conditions or use of property, where the difference in danger is not obvious, would affect the risk,[60] and hence, where such facts are communicated, whether the premium rates would be affected thereby;[61] the premium at which a given risk could have been placed;[62] the value of renewal premiums;[63] the materiality of a particular fact to a marine insurance risk;[64] or the extent of the loss suffered from a fire.[65]

On the other hand, a witness cannot state an inference or judgment as to matters which, although connected with insurance, are within the range of common knowledge and experience,[66] such as what obviously constitutes an increase of fire risk,[67] as leaving a building unoccupied,[68] inclosing a boiler previously detached from the building,[69] putting up adjacent buildings,[70] or a change in use;[71] or whether certain suppressed facts were material to the risk.[72]

Physician familiar with shotguns

Where defense was set up that insured, who had been shot through head with shotgun, had committed suicide, physicians who testified with reference to their personal familiarity with shotguns, one of whom stated that he had made other examinations of gunshot wounds and powder burns, were qualified to testify concerning size of hole discharge would make at varying distances, spread of charge, and distance gun was from insured's head at time of discharge.—Malone v. New York Life Ins. Co., 83 P.2d 639, 148 Kan. 555.

57. Mo.—Parker v. Ætna Life Ins. Co., 232 S.W. 708, 289 Mo. 42.

Conjecture

Witness cannot conjecture as to distance from which gun had been fired, where all facts are before jury, and jury could tell as accurately as could witness.—Parker v. Ætna Life Ins. Co., supra.

58. Iowa.—Nelson v. National Accident Soc. of New York, 237 N.W. 341, 212 Iowa 989.

Conjecture

Opinion of expert is not admissible on insurance matter where, under circumstances, opinion could have been no more than conjecture. —Nelson v. National Accident Soc. of New York, supra.

59. La.—Champagne v. Unity Industrial Life Ins. Co., App., 161 So. 52, rehearing denied 161 So. 783.
Pa.—Purcell v. Metropolitan Life Ins. Co., 3 A.2d 340, 332 Pa. 535.
22 C.J. p 655 note 71.

Legibility of application

(1) Where the fact is in doubt and it is not obvious whether the application could be read by one with normal eyesight under normal conditions, expert evidence as to that question is admissible.—New York Life Ins. Co. v. Wolf, C.C.A.S.D., 85 F.2d 162, certiorari denied 57 S.Ct. 316, 299 U.S. 614, 81 L.Ed. 453.

(2) But expert evidence is inadmissible where the type is obviously so legible.—New York Life Ins. Co. v. Wolf, supra—First Trust Co. of St. Paul v. Kansas City Life Ins. Co., C.C.A.Minn., 79 F.2d 48.

Loss of wood in fire

Qualified witness may testify whether certain quantity of wood could have been burned in certain fire.—Welch v. Franklin Ins. Co., 23 W.Va. 288.

Mortality tables

In death action, testimony with respect to what insurance companies used table on which witness based his estimate of decedent's life expectancy, and that table on which witness based his estimate of decedent's life expectancy was a standard recognized table, was admissible over objection of immateriality.—Marendino v. Spitz, 3 A.2d 601, 121 N.J. Law 556.

Negligence in position of steamer

Opinion evidence is admissible as to whether it was negligent to put burning steamer close to tall and inflammable building during prevalence of very strong wind blowing against building.—Milwaukee & St. P. R. Co. v. Kellogg, Iowa, 94 U.S. 469, 24 L.Ed. 256.

Adequacy of protection against fire

Tex.—Exporters' & Traders' Compress & Warehouse Co. v. Shaw, Civ.App., 20 S.W.2d 248.

60. Mo.—Indiahoma Refining Co. v. National Fire Ins. Co. of Hartford, Conn., App., 242 S.W. 710.
N.Y.—Mihalcho v. Massachusetts Fire & Marine Ins. Co., 242 N.Y.S. 640, 229 App.Div. 813.
Wis.—Millard v. North River Ins. Co., 228 N.W. 746, 201 Wis. 69.
26 C.J. p 527 note 14.

61. Wis.—Millard v. North River Ins. Co., 228 N.W. 746, 748, 201 Wis. 69, citing **Corpus Juris.**
22 C.J. p 655 note 73—26 C.J. p 527 note 15.

62. N.J.—Martin v. Franklin Fire Ins. Co., 42 N.J.Law 46.

63. Ind.—Ætna Life Ins. Co. v. Nexsen, 84 Ind. 347, 43 Am.R. 91.

64. U.S.—McLanahan v. Universal Ins. Co., Md., 1 Pet. 170, 7 L.Ed. 98.
N.Y.—Leitch v. Atlantic Mut. Ins. Co., 66 N.Y. 100.

65. Tex.—Home Ins. Co. v. Collins, Civ.App., 55 S.W.2d 898.

That vessel was total loss

N.Y.—McLain v. British & Foreign Marine Ins. Co., 38 N.Y.S. 77, 16 Misc. 336.

66. U.S.—Milwaukee & St. P. R. Co. v. Kellogg, Iowa, 94 U.S. 469, 24 L.Ed. 256.
22 C.J. p 655 note 80.

67. Md.—Planters' Mut. Ins. Co. v. Rowland, 7 A. 257, 66 Md. 236.
22 C.J. p 655 note 81—26 C.J. p 527 note 16.

68. Me.—Cannell v. Phœnix Ins. Co., 59 Me. 582.
22 C.J. p 655 note 82—26 C.J. p 527 note 17.

69. N.Y.—Jefferson Ins. Co. v. Cotheal, 7 Wend. 72, 22 Am.D. 567.

70. Pa.—Franklin Fire Ins. Co. v. Gruver, 100 Pa. 266.
Tex.—Merchants' Ins. Co. v. Dwyer, 1 Tex.Unrep.Cas. 441.

71. Wis.—Kircher v. Milwaukee Mechanics' Mut. Ins. Co., 43 N.W. 487, 74 Wis. 470, 5 L.R.A. 779.

72. Ga.—Life Ins. Co. v. Fitzgerald, 85 S.E. 913, 143 Ga. 725.
22 C.J. p 655 note 86.

Similarly, an expert witness may not give his opinion on a matter related to insurance which, under the circumstances of the case, is the ultimate fact to be decided,[73] such as whether the risk would be increased by facts and circumstances which are clearly detailed and described in the testimony of other witnesses;[74] whether a misrepresentation increased the moral hazard of the risk;[75] whether or not witness would have issued policy had he known true facts;[76] whether building was fireproof or semi-fireproof;[77] whether deceased was in good standing as member of fraternal insurance society;[78] or whether books of insured were so kept as to show exact loss suffered by burglary.[79] While, in determining the extent of loss from fire, a witness may not testify as to whether a prudent owner would use the remnants of the house after the fire for rebuilding purposes,[80] he may, if qualified, express an opinion as to whether the building could be safely repaired.[81]

Construction of policies. While a qualified witness may give testimony as to the construction of insurance policies otherwise unclear,[82] he cannot state what an unambiguous insurance policy means,[83] or give testimony tending to contradict the meaning of such a policy.[84]

False statements in life policies; materiality. Where all the facts are before the jury, it is improper to permit the examining doctor to state his opinion as to whether the statements in an application for life insurance were true or false.[85] While it has been held proper for a qualified expert to testify as to the materiality of false statements in the application and whether a policy would have been granted had it been known they were false,[86] other authorities hold such testimony inadmissible, on the ground that the question of the materiality of the false answers is a question for the jury;[87] but a qualified expert may generally testify as to whether the statements would be regarded as material according to the custom and usage of insurance companies generally,[88] although there are some

73. Wis.—Max L. Bloom Co. v. U. S. Casualty Co., 210 N.W. 689, 191 Wis. 524.

Mistake in policy

In action on policy of title insurance, testimony of experts in such insurance as to what they would have done under similar circumstances, as to custom of other title insurance companies in such cases, and as to legal conclusion that policy should have been different in form, is incompetent to show that policy issued was result of mistake.—Trenton Potteries Co. v. Title Guarantee & Trust Co., 68 N.E. 132, 176 N.Y. 65.

74. Ga.—Southern Mut. Ins. Co. v. Hudson, 42 S.E. 60, 115 Ga. 638.

75. La.—Rickerfor v. Westchester Fire Ins. Co. of New York, App., 186 So. 109, reinstated 187 So. 676.

76. Minn.—Romain v. Twin City Fire Ins. Co., 258 N.W. 289, 193 Minn. 1—Mack v. Pacific Mutual Life Ins. Co., 208 N.W. 410, 167 Minn. 53.

77. Tex.—Camden Fire Ins. Ass'n v. Brown, Civ.App., 109 S.W.2d 280, error dismissed.

78. Ala.—Woodmen of the World v. Alford, 89 So. 528, 206 Ala. 18.

79. Wis.—Max L. Bloom Co. v. U. S. Casualty Co., 210 N.W. 689, 191 Wis. 524.

80. Tex.—Republic Ins. Co. v. Hale, 99 S.W.2d 909, 128 Tex. 616, reversing, Civ.App., 69 S.W.2d 482—Phœnix Assur. Co. of London v. Stobaugh, 94 S.W.2d 428, 127 Tex. 308, modifying Phœnix Ins. Co. of London v. Stobaugh, Civ.App., 62 S.W.2d 678—Commercial Union Assur. Co., Limited, of London, England, v. Everidge, Civ.App., 72 S.W.2d 311—Chicago Fire & Marine Ins. Co. v. Foley, Civ.App., 58 S.W.2d 174—Reliance Ins. Co. of Philadelphia v. Nichols, Civ.App., 56 S.W.2d 479.

81. Mo.—Lux v. Milwaukee Mechanics' Ins. Co., App., 30 S.W.2d 1090.

Owner held qualified

Mo.—Lux v. Milwaukee Mechanics' Ins. Co., supra.

82. Ill.—Edgar S. Kiefer Tanning Co. v. Alliance Ins. Co. of Philadelphia, 266 Ill.App. 362.

Witness held not qualified

In an action by a beneficiary against insurer on a rider attached to a policy making it insure against death from septic poisoning, testimony by an officer of defendant company as to the class of persons the rider was intended to cover was properly excluded, since the official had not qualified himself to testify on this subject.—Dunwoody v. Royal Indemnity Co., 188 N.W. 498, 218 Mich. 358.

83. N.Y.—Slocovich v. Oriental Mut. Ins. Co., 14 N.E. 802, 108 N.Y. 56.

22 C.J. p 655 note 88.

84. N.Y.—Home Ins. Co. v. Continental Ins. Co., 73 N.E. 65, 180 N. Y. 389, 105 Am.S.R. 772.

Effect of parol evidence rule see infra § 908.

85. Ky.—Commonwealth Life Ins. Co. v. Goodknight's Adm'r, 280 S. W. 123, 212 Ky. 763.

86. Ind.—New York Life Ins. Co. v. Kuhlenschmidt, 33 N.E.2d 340.

Who are qualified

(1) Local agent was held not qualified.

Ind.—New York Life Ins. Co. v. Kuhlenschmidt, supra.

Ohio.—Metropolitan Life Ins. Co. v. Adams, 195 N.E. 489, 49 Ohio App. 159.

(2) Local medical examiner was held not qualified.—Metropolitan Life Ins. Co. v. Adams, supra.

(3) Physician not necessarily acquainted with insurance practices may testify that concealed disability would not lead to serious physical impairment or death, as affecting reasonableness of insurer's action and of its employees' testimony that they would not have issued policy if they had known the facts.—New York Life Ins. Co. v. Kuhlenschmidt, supra.

87. U.S.—Stewart v. American Life Ins. Co., C.C.A.Kan., 89 F.2d 743.

Cal.—Boyer v. U. S. Fidelity & Guaranty Co., 274 P. 57, 206 Cal. 273.

Ky.—Commonwealth Life Ins. Co. v. Goodknight's Adm'r, 280 S.W. 123, 212 Ky. 763.

22 C.J. p 655 note 87—37 C.J. p 628 notes 33–35.

88. Cal.—Boyer v. U. S. Fidelity & Guaranty Co., 274 P. 57, 206 Cal. 273.

Ky.—Pacific Mut. Life Ins. Co. v. Arnold, 90 S.W.2d 44, 262 Ky. 267.

37 C.J. p. 628 note 36.

Who are qualified

(1) Local agent is not qualified.—New York Life Ins. Co. v. Long, 250 S.W. 812, 199 Ky. 133.

(2) Physicians who have acted for some time as medical examiners for insurance companies are qualified.—

decisions to the contrary.[89]

g. Nautical Matters

Rules governing the admissibility of expert opinion evidence generally have been applied to nautical matters.

Persons skilled in maritime affairs[90] may testify as to their inference or judgment regarding nautical matters,[91] such as matters relating to the construction,[92] condition,[93] or repair[94] of vessels; operation of vessels,[95] as in towing;[96] the storage, handling, and protection of cargo;[97] the transportation of passengers;[98] and such as matters relating

Pacific Mut. Life Ins. Co. v. Arnold, 90 S.W.2d 44, 262 Ky. 267—Penick v. Metropolitan Life Ins. Co., 295 S.W. 900, 220 Ky. 626.

89. N.Y.—Rawls v. American Mut. Life Ins. Co., 27 N.Y. 282, 84 Am. D. 280—Louis v. Connecticut Mut. Life Ins. Co., 68 N.Y.S. 683, 58 App.Div. 137, affirmed 65 N.E. 1119, 172 N.Y. 659.

90. U.S.—Union Ins. Co. v. Smith, Ohio, 8 S.Ct. 534, 124 U.S. 405, 31 L.Ed. 497.
22 C.J. p 682 note 77.

91. N.C.—Sikes v. Paine, 32 N.C. 280, 51 Am.D. 389.
22 C.J. p 682 note 78.

Opinion may relate to

(1) From what direction blow came.—The Clipper v. Logan, 18 Ohio 375.

(2) Meaning of certain lights in nautical terms.—Townsend v. McLean Constr. Co., 75 S.E. 715, 159 N.C. 503—22 C.J. p 682 note 92.

(3) Tonnage of barge.—Flandreau v. Elsworth, 45 N.E. 853, 151 N.Y. 473.

(4) Whether machinery in steamboat was properly placed.—Clark v. Detroit Locomotive Works, 32 Mich. 348.

(5) Whether ship had full cargo.—Ogden v. Parsons, N.Y., 23 How 167, 16 L.Ed. 410.

(6) Whether vessel could become unmanageable under certain conditions.—Hines v. Eastern S. S. Lines, 139 N.E. 823, 245 Mass. 385.

92. U.S.—Maibrunn v. Hamburg-American S. S. Co., C.C.A.N.Y., 77 F.2d 304.
22 C.J. p 682 note 79.

Necessity of bracing

Ala.—J. H. Burton & Sons Co. v. May, 103 So. 46, 212 Ala. 435.

93. U.S.—Union Ins. Co. v. Smith, Ohio, 8 S.Ct. 534, 124 U.S. 405, 31 L.Ed. 497.

Seaworthiness

U.S.—Union Ins. Co. v. Smith, supra.
22 C.J. p 682 note 84.

Cause of condition

(1) Cause of leaking.—Parsons v. Manufacturers' Ins. Co., 16 Gray, Mass., 463.

(2) Cause of opening of seam.—Paddock v. Commercial Ins. Co., 104 Mass. 521.

(3) Whether boats of certain character, when loaded, usually leak and require daily use of pumps to keep them free from water.—Western Ins. Co. v. Tobin, 32 Ohio St. 77.
22 C.J. p 682 note 96.

Whether certain defects were obvious
Mass.—Cook v. Castner, 63 Mass. 266.
22 C.J. p 682 note 88.

94. U.S.—The Umbria, D.C.N.Y., 148 F. 283, affirmed 153 F. 851, 83 C.C. A. 33.

Cost of repairs

(1) In general.—The Umbria, supra—22 C.J. p 682 note 81.

(2) Reasonableness of wharfage charges.—Perth Amboy Dry Dock Co. v. Crawford, 135 A. 897, 103 N.J.Law 440.

Failure to repair as effecting diminution in value.—Sikes v. Paine, 32 N.C. 280, 51 Am.D. 389.

95. Md.—Baltimore Elevator Co. v. Neal, 5 A. 338, 65 Md. 438.

Opinion may relate to

(1) Whether vessel was skillfully handled.—Baltimore Elevator Co. v. Neal, supra—22 C.J. p 682 note 87.

(2) Whether collision could have been avoided.—Lambert v. La Conner Trading & Transportation Co., 79 P. 608, 37 Wash. 113—22 C.J. p 682 note 90.

(3) Whether vessel carried proper lights.—Weaver v. Alabama Coal Min. Co., 35 Ala. 176.

(4) Necessity for jettison.—Price v. Hartshorn, 44 N.Y. 94, 4 Am.R. 645, affirming 44 Barb. 655—Walsh v. Washington Marine Ins. Co., 32 N.Y. 427.

(5) Whether vessel was safely moored.—Moore v. Westervelt, 22 N.Y.Super. 558, affirmed 27 N.Y. 234, 25 How.Pr. 277—22 C.J. p 683 note 3.

(6) Good seamanship of leaving a barge moored when tide is falling.—Leary v. Woodruff, 19 Alb.L.J., N.Y., 337.

96. Md.—Baltimore Elevator Co. v. Neal, 5 A. 338, 65 Md. 438.

Opinion may relate to

(1) Proper time and mode of changing fastenings of towboats, and whether it is safe and prudent to stop them while sea is running.—Delaware & Chesapeake Steam Towboat Co. v. Starrs, 69 Pa. 36—22 C.J. p 683 note 5.

(2) Method of conveying hawser to tow.—Stahlin v. Lehigh Valley R. Co., 15 A.2d 344, 125 N.J.Law 211.

(3) Whether tug captain's handling of vessel in tow indicated him to be skillful.—Baltimore Elevator Co. v. Neal, 5 A. 338, 65 Md. 438.

(4) Whether it was good seamanship for tug, disabled while towing vessels, to pass two ports before putting in.—Union Ins. Co. v. Smith, Ohio, 8 S.Ct. 534, 124 U.S. 405, 31 L. Ed. 497.

(5) Whether it was safe to tug three boats abreast while towing on wide water with high wind.—Eastern Transp. Line v. Hope, Pa., 95 U.S. 297, 24 L.Ed. 477.

97. U.S.—The Rangoon Maru, C.C. A.N.Y., 27 F.2d 722.

Amount of cargo

Opinion of shipmaster or other skilled witnesses may be received with respect to amount of cargo with which vessel may safely be laden.
U.S.—Weston v. Foster, C.C.Mass., 29 F.Cas.No.17,452, 2 Curt. 119.
Mo.—St. Louis & Tennessee River Packet Co. v. Nowland, 215 S.W. 11, 279 Mo. 500.
22 C.J. p 682 note 98.

Stowing of cargo

(1) Opinions of experienced stowage men, and not opinions of chemists, control in determining negligence in stowing cargo.—The Rangoon Maru, C.C.A.N.Y., 27 F.2d 722.

(2) Underwriters have been permitted to testify that unusual method of stowage is fact material to risk.—Leitch v. Atlantic Mut. Ins. Co., 66 N.Y. 100—22 C.J. p 683 note 2.

(3) Safety of carrying cotton on deck.—Lapham v. Atlas Ins. Co., 24 Pick., Mass., 1.

(4) Whether marble was properly stowed.—Price v. Powell, 3 N.Y. 322.
22 C.J. p 683 note 1.

Handling of cargo, as in loading or unloading.—J. H. Burton & Sons Co. v. May, 103 So. 46, 212 Ala. 435.

Protection of cargo

U.S.—U. S. v. Los Angeles Soap Co., C.C.A.Cal., 83 F.2d 875.

98. U.S.—Maibrunn v. Hamburg-American S. S. Co., C.C.A.N.Y., 77 F.2d 304.

Number of people that could safely be carried under given conditions.—Corbin v. Haws Refractories Co., 120 A. 811, 277 Pa. 126.

Whether proper precautions were taken for protection of passengers.—Maibrunn v. Hamburg-American S. S. Co., C.C.A.N.Y., 77 F.2d 304.

to water conditions.[99]

However, the statement should be rejected where the nautical experience of the witness is not such as to enable him to draw the inference or form the judgment which he proposes to state;[1] where the facts can be fully placed before and comprehended by the jury;[2] where the opinion would not have aided the jury;[3] where the subject of the testimony is the ultimate fact in issue;[4] where there is no evidence on which the expert could base his opinion;[5] or where the opinion is on a question as to which there is direct proof.[6]

h. Photography

Rules governing the admissibility of expert opinion evidence generally have been applied to photographs, including X-ray photographs.

A witness skilled in photography may testify as to questions connected with the technical aspects of photography,[7] and may explain a photograph so as to identify the matters depicted therein;[8] but, in explaining or interpreting a photograph, he may not give his opinion as to matters for which no special skill or experience is needed.[9] A witness who has sufficient knowledge of the subject of a photograph may testify that the photograph is a faithful representation thereof;[10] but one who has never seen a sitter cannot testify from an examination of photographs of him that a certain bust is a good likeness.[11]

X-ray photograph. A person experienced in the use of X-ray machines may state an opinion, based on the result produced, as to whether a machine was operated in a proper manner.[12] It is proper for an expert to explain an X-ray photograph in such particulars as are not understood by a layman;[13] but what the jury can see and understand about the matter is not a subject of expert testimony.[14]

i. Surveying

Rules governing the admissibility of expert opinion evidence generally have been applied to matters relating to surveying.

A surveyor, or other person skilled and experienced in that field, may testify as to matters related to surveying, and may ordinarily state his inference

99. Tex.—Smith v. Sabine & E. T. R. Co., 13 S.W. 165, 76 Tex. 63.

Navigability of stream

U.S.—U. S. v. Appalachian Electric Power Co., D.C.Va., 23 F.Supp. 83, affirmed, C.C.A., 107 F.2d 769, certiorari granted 60 S.Ct. 608, 309 U.S. 646, 84 L.Ed. 999, reversed on other grounds 61 S.Ct. 291, 311 U.S. 377, 85 L.Ed. 243, rehearing denied 61 S.Ct. 548, 312 U.S. 712, 85 L.Ed. 1143.

Cal.—Chico Bridge Co. v. Sacramento Transp. Co., 55 P. 780, 123 Cal. 178.

Waves

(1) Experienced river navigators who knew both boats have been allowed to testify as to probable effect on one boat of waves or swells caused by another.—Western Ins. Co. v. Tobin, 32 Ohio St. 77.

(2) Effect of wind with respect to size of waves may also be stated. —Smith v. Sabine & E. T. R. Co., 13 S.W. 165, 76 Tex. 63.

1. Mont.—State v. Martin, 219 P. 632, 68 Mont. 392.

22 C.J. p 683 note 11.

Boatswain who ordered seaman to wash ventilators was held not "expert" in absence of evidence as to his age, general experience at sea, and particular experience as boatswain, as respects admissibility of testimony involving his opinion in seaman's action for injuries sustained in fall from ventilator.—South Atlantic S. S. Co. of Delaware v. Munkacsy, 187 A. 600, 7 W.W. Harr., Del., 580, certiorari denied 57 S.Ct. 233, 299 U.S. 607, 81 L.Ed. 448.

2. Md.—Baltimore, C. & A. R. Co. v. Moon, 84 A. 536, 118 Md. 380.

Mo.—Rosenheim v. American Ins. Co., 33 Mo. 230.

22 C.J. p 683 note 12.

3. N.C.—Bryant v. Stone, 100 S.E. 578, 178 N.C. 291.

4. Ala.—J. H. Burton & Sons Co. v. May, 103 So. 46, 212 Ala. 435.

Unloading of barge

Expert may not state his opinion as to whether barge was properly unloaded, but may only state whether it was unloaded in the manner generally used by careful and prudent men skilled in that line of business.—J. H. Burton & Sons Co. v. May, supra.

5. Miss.—Quackenboss v. Insurance Co. of North America of Philadelphia, 50 So. 444, 95 Miss. 872.

6. U.S.—The Domira, C.C.A.N.Y., 56 F.2d 585, affirming, D.C., 49 F.2d 324.

7. Ala.—Barnes v. Ingalls, 39 Ala. 193.

22 C.J. p 683 note 16.

Workmanship

(1) Witness may state whether photographic reproduction is good specimen of work by particular process.—Marston v. Dingley, 34 A. 414, 88 Me. 546—22 C.J. p 683 note 17.

(2) Witness may testify as to skill of another photographer with whose work he is familiar.—Stevens v. Walton, 68 P. 834, 17 Colo.App. 440.

Rate of production

Witness may state number of photographs of fair quality which could be produced in month.—Barnes v. Ingalls, 39 Ala. 193.

8. S.C.—Huggins v. Broom, 199 S.E. 903, 189 S.C. 15.

9. S.C.—Huggins v. Broom, supra.

Obscene photograph

Photographer will not be allowed to state his opinion as to whether or not certain kind of photograph is obscene.—People v. Muller, 96 N.Y. 408, 48 Am.R. 635.

10. Cal.—Miller v. Silvester, 35 P.2d 387, 140 Cal.App. 345.

11. N.Y.—Schwartz v. Wood, 21 N.Y.S. 1053.

12. Minn.—Holt v. Ten Broeck, 159 N.W. 1073, 134 Minn. 458, Ann.Cas. 1918E 256.

13. Or.—Vale v. Campbell, 263 P. 400, 123 Or. 632.

Explanation of results of X-ray examination see supra § 536.

Distinguishing bone from flesh

One who knows theory of taking X-ray photographs is competent to testify that bone can be distinguished from flesh in X-ray photograph, and that bone will make a heavier shade than muscles.

Iowa.—Daniels v. Iowa City, 183 N.W. 415, 191 Iowa 811.

Tex.—Missouri, K. & T. R. Co. v. Coker, Civ.App., 143 S.W. 218.

14. Iowa.—Daniels v. Iowa City, 183 N.W. 415, 191 Iowa 811.

from the facts.[15] Thus it has been held proper for a surveyor to state that a particular map is correct,[16] in accordance with a survey made by him;[17] that a particular map is a government survey, where he is familiar with government surveys;[18] that a certain line is shown by the marks to have been run by government surveyors;[19] that a line run by him was a true line according to government surveys;[20] that marks were fresh and easily identified and utilized;[21] that certain stakes are surveyor's stakes;[22] that the field notes of a survey closed;[23] the area of a given piece of land;[24] that the corner of a survey was not marked on the ground, but was a mere office call;[25] that the meanderings of a stream shown by a former survey would fit only one particular part of a stream;[26] or whether the property described by field notes in a petition was embraced within the metes and bounds given in deeds examined by him.[27] A surveyor may interpret the field notes of another surveyor, where a proper foundation is laid for the introduction of such notes.[28] So, also, testimony of surveyors as to the true location of the lands and boundaries has been held admissible.[29]

However, a surveyor may not state his conclusions on matters related to surveying which are for the court or jury to decide,[30] and which the jury are as competent as the expert is to decide;[31] and this limitation has been held to mean that a surveyor may not give his opinion as to the true location of land or lines in controversy,[32] although the identification of a monument or corner is not affected by this limitation.[33]

15. Ala.—Shook v. Pate, 50 Ala. 91.
22 C.J. p 690 note 41—9 C.J. p 287 note 2.

Witness held qualified

Testimony of one who had been county surveyor and deputy county surveyor, who knew the location of the land, that land described in judgment against plaintiff and its grantor, failure of title to which was alleged, included the land described in the deed, was not inadmissible on ground that witness was not qualified.—Wigham v. Wilson, Tex.Civ.App., 211 S.W. 469.

Title searcher may properly locate lot on sketch and testify to whom such lot was distributed.—Byard v. Hoelscher, 151 A. 351, 112 Conn. 5.

Facts not proved

Opinion of surveyor is inadmissible where it is based on map whose authenticity was not established.—In re Eastern Boulevard in Borough of the Bronx, City of New York, 243 N.Y.S. 57, 230 App.Div. 52.

Method of running straight line

Surveyor may testify that straight line cannot be run without aid of instruments.—Holden v. Cantrell, 84 S.E. 826, 100 S.C. 265.

Reliability of survey

Testimony by surveyor as to result of survey is not inadmissible because he declines to say that it was absolutely correct, where he affirms that it was reliable.—Aldrich Min. Co. v. Pearce, 68 So. 900, 192 Ala. 195.

16. Ala.—Barrett v. Kelly, 30 So. 824, 131 Ala. 378.
Tex.—Olsen v. Gulf Production Co., Civ.App., 111 S.W.2d 784, error refused.

17. Ala.—Ford v. Bradford, 103 So. 549, 212 Ala. 515.
Mo.—Von Eime v. Fuchs, 8 S.W.2d 824, 320 Mo. 746.

18. Mo.—Von Eime v. Fuchs, supra.

19. Ala.—Brantly v. Swift, 24 Ala. 390.

20. Ala.—Smith v. Bachus, 70 So. 261, 195 Ala. 8.

21. Mont.—Bramlett v. Flick, 57 P. 869, 23 Mont. 95.

22. Conn.—McGann v. Hamilton, 19 A. 376, 58 Conn. 69.

23. Tex.—Matkins v. State, Cr., 62 S.W. 911.

24. N.C.—Belding v. Archer, 42 S.E. 800, 131 N.C. 287.

25. Tex.—Petroleum Producers Co. v. Stolley, Civ.App., 137 S.W.2d 207, error dismissed, judgment correct.

26. Tex.—Camp v. League, Civ. App., 92 S.W. 1062.

27. Tex.—Camp v. League, supra.

28. Ala.—Hodges v. Sanderson, 105 So. 652, 213 Ala. 563.
N.Y.—Wightman v. Campbell, 112 N.E. 184, 217 N.Y. 479, Ann.Cas.1917 E 673, affirming 146 N.Y.S. 666, 161 App.Div. 49.

29. Ala.—Burleson v. Gillam, 89 So. 36, 205 Ala. 673—Smith v. Bachus, 70 So. 261, 195 Ala. 8—Chappelle v. Roberts, 43 So. 489, 150 Ala. 457.
N.C.—Berry v. Richmond Cedar Works, 113 S.E. 772, 184 N.C. 187.

30. N.C.—Benton v. Montgomery Lumber Co., 142 S.E. 229, 195 N.C. 363—Pace v. McAden, 131 S.E. 629, 191 N.C. 137.
9 C.J. p 288 notes 5, 6.

Whether land is within description

Testimony of surveyor, to effect that his conclusion from evidence in case was that metes and bounds described in deeds under which plaintiff claimed included land in controversy, was mere conclusion and not evidence.—Griggs v. Brown, 102 S.E. 212, 126 Va. 556.

Methods of surveying

Surveyor may ordinarily testify as to what are accepted methods of surveying and whether he used such methods, except where circumstances are such that testimony as to methods becomes in fact an opinion as to question which jury must decide, or involves application of rules of law.—Southern Pine Lumber Co. v. Whiteman, Tex.Civ.App., 104 S.W.2d 635, error dismissed.

31. N.H.—Salisbury Beach Associates v. Littlefield, 200 A. 777, 89 N.H. 447.
W.Va.—Adkins v. Downing Gas Co., 198 S.E. 131, 120 W.Va. 401.

Similarity of meanderings

Testimony of surveyor that his meanderings of river corresponded with those of certain field notes is inadmissible where the two sets of meanderings are introduced in evidence, and leave no room for expression of opinion as to their correspondence, unless some question arises as to identity or comparative identity of calls, in which event surveyor may testify.—Goodson v. Fitzgerald, 90 S.W. 898, 40 Tex.Civ.App. 619.

32. Tex.—Olsen v. Gulf Production Co., Civ.App., 111 S.W.2d 784, error refused—Southern Pine Lumber Co. v. Whiteman, Civ.App., 104 S.W.2d 635, error dismissed—Kirby Lumber Co. v. Adams, Civ.App., 291 S.W. 279—Land v. Dunn, Civ. App., 226 S.W. 801.
W.Va.—Adkins v. Downing Gas Co., 198 S.E. 131, 120 W.Va. 401—State v. West Virginia Pulp & Paper Co., 152 S.E. 197, 199, 108 W.Va. 553, citing **Corpus Juris**.
9 C.J. p 287 note 1.

33. W.Va.—Adkins v. Downing Gas Co., 198 S.E. 131, 120 W.Va. 401—Curtis v. Meadows, 99 S.E. 286, 84 W.Va. 94.

j. Transportation

Rules governing the admissibility of expert opinion evidence generally have been applied to matters relating to transportation.

One who is shown to be suitably qualified[34] may state his opinion with respect to matters relating to transportation,[35] such as the transportation of live stock;[36] time of, or delay in, transportation;[37] the proper conduct of the carrier under given circumstances;[38] and the circumstances under which a given transportation could have taken place in safety.[39]

However, an expert witness may not give his opinion on a question regarding transportation which the jury must decide,[40] or on a question of law,[41] or on a matter which a jury would know as much about as the expert.[42]

k. Miscellaneous Matters

Rules governing the admissibility of expert opinion evidence have been applied to numerous and miscellaneous subjects in addition to those previously discussed.

In addition to the subjects considered in the preceding subdivisions of this section, and in §§ 524–545 supra, the rules governing the admissibility of expert opinion evidence have been applied to numerous other subjects,[43] such as matters related to avi-

34. Okl.—Chicago, R. I. & P. Ry. Co. v. Lawton Grain Co., 221 P. 1013, 94 Okl. 289.
22 C.J. p 691 note 61.

35. Ark.—Covington v. St. Francis County, 91 S.W. 186, 77 Ark. 258.

Opinion may relate to

(1) Reasonableness of rates.—Covington v. St. Francis County, 91 S.W. 186, 77 Ark. 258.

(2) Whether certain transaction amounted to C. O. D. shipment.
Tex.—Davidson v. State, Cr., 73 S. W. 808.
Wash.—Tacoma v. Bonnell, 109 P. 60, 58 Wash. 593.

(3) Whether certain goods were properly packed.
Minn.—Shriver v. Sioux City, etc., R. Co., 24 Minn. 506, 31 Am.R. 353.
Tex.—Ft. Worth & D. C. R. Co. v. Harlan, Civ.App., 62 S.W. 971.

(4) Whether certain goods were properly iced.—Ft. Worth & D. C. R. Co. v. Harlan, supra.

36. U.S.—Southern Pac. Co. v. Arnett, Utah, 111 F. 849, 50 C.C.A. 17.

Opinion may relate to

(1) Cause of observed injuries to live stock.—Schaeffer v. Philadelphia & R. R. Co., 31 A. 1088, 168 Pa. 209, 47 Am.S.R. 884—22 C.J. p 691 note 71.

(2) Whether cattle were in suitable condition for shipment.
U.S.—Southern Pac. Co. v. Arnett, Utah, 111 F. 849, 50 C.C.A. 17.
Tex.—Chicago, R. I. & T. R. Co. v. Carroll, 81 S.W. 1020, 36 Tex.Civ. App. 359.

(3) Number of cattle or hogs which could be placed in car without overcrowding.
Ill.—Wabash, St. Louis & Pacific R. Co. v. Pratt, 15 Ill.App. 177.
Iowa.—Colsch v. Chicago, M. & St. P. R. Co., 153 N.W. 327, 171 Iowa 78.

(4) Usual percentage of loss in shipping of cattle.—True Bros. v. St. Louis, B. & M. R. Co., Tex.Civ.App., 143 S.W. 298.

(5) Normal shrinkage of hogs resulting from shipment.—Southern Kansas R. Co. v. Hughey, Tex.Civ. App., 182 S.W. 361.

37. Okl.—Chicago, R. I. & P. Ry. Co. v. Lawton Grain Co., 221 P. 1013, 94 Okl. 289.

Opinion may relate to

(1) Whether certain delay was reasonable.—Chicago, R. I. & T. R. Co. v. Kapp, 83 S.W. 233, 37 Tex. Civ.App. 203—Chicago, etc., R. Co. v. Carroll, 81 S.W. 1020, 36 Tex.Civ. App. 359.

(2) Time ordinarily consumed in certain character of shipment.
Okl.—Chicago, R. I. & P. Ry. Co. v. Lawton Grain Co., 221 P. 1013, 94 Okl. 289.
Tex.—Texas & N. O. R. Co. v. East, Civ.App., 74 S.W.2d 1052.
22 C.J. p 691 note 74.

Witnesses held not qualified

Witness whose information as to time for shipment of perishable foods between two points was acquired more than year before is not qualified to give opinion as to negligent delay; nor is witness qualified whose opinion is based solely on knowledge of how railroads handle cars, rather than on experience in such shipments.—Rudy v. Cleveland, C., C. & St. L. R. Co., Mo.App., 278 S.W. 814.

38. Minn.—Lindsley v. Chicago, M. & St. P. R. Co., 33 N.W. 7, 36 Minn. 539, 1 Am.S.R. 692.
22 C.J. p 691 note 65.

39. Ala.—Louisville & N. R. Co. v. Landers, 33 So. 482, 135 Ala. 504.
22 C.J. p 691 note 72.

40. Fla.—Atlantic Coast Line R. Co. v. Cowart, 190 So. 546, 140 Fla. 596.

41. Tex.—Texas & N. O. R. Co. v. East, Civ.App., 74 S.W.2d 1052.

What constitutes reasonable time for shipment of goods has been held mixed question of law and fact, and opinion is not admissible.—Texas & N. O. R. Co. v. East, supra—Ft. Worth & D. C. R. Co. v. Gatewood, Civ.App., 185 S.W. 932.

42. Tex.—Guarantee Mercantile Co. v. Jefferson Farmers' Union Cotton Warehouse Co., Civ.App., 247 S.W. 601.

Probability of injury to cotton under stated conditions.—Guarantee Mercantile Co. v. Jefferson Farmers' Union Cotton Warehouse Co., supra.

What constitutes proper covering
N.Y.—Schwinger v. Raymond, 11 N. E. 952, 105 N.Y. 648.

43. **Evidence held admissible as to**

(1) Ichthyology.—Cottrill v. Myrick, 12 Me. 222.

(2) Life expectancy and sum required to purchase annuity.
Mass.—Leave v. Boston Elevated Ry. Co., 28 N.E.2d 483, 306 Mass. 391.
N.J.—Harris v. Johnson, 152 A. 182, 8 N.J.Misc. 842.

(3) Percentage of patrons who attended theater because of attractions other than feature picture.—Sheldon v. Moredall Realty Corporation, D. C.N.Y., 29 F.Supp. 729.

(4) Professional skill and competence.—Appeal of Conley, 30 Pa. Dist. & Co. 593.

(5) Racial characteristics.
Ga.—White v. Clements, 39 Ga. 232.
Ind.—Nave v. Williams, 22 Ind. 368.
N.C.—State v. Jacobs, 51 N.C. 284.
22 C.J. p 684 note 26.

(6) Reasonableness of tax.—City of Spokane v. Spokane Gas & Fuel Co., 26 P.2d 1034, 175 Wash. 103.

(7) Tanning of leather.
Ala.—Nelson v. Wood, 62 Ala. 175.
N.Y.—Bearss v. Copley, 10 N.Y. 93.
22 C.J. p 691 notes 57, 58.

(8) Traffic hazards.—General Outdoor Advertising Co. v. Department of Public Works, 193 N.E. 799, 289 Mass. 149, appeal dismissed General Outdoor Advertising Co. v. Callahan, 56 S.Ct. 495, 297 U.S. 725, 80 L.Ed. 1008, General Outdoor Advertising Co. v. Hoar, 56 S.Ct. 495, 297 U.S. 725, 80 L.Ed. 1008, and Brink v. Callahan, 56 S.Ct. 496, 297 U.S. 725, 80 L.Ed. 1008.

ation;[44] the cost of maintenance and support of children;[45] the dangerous character of particular premises or a particular situation;[46] the distance a moving body had gone,[47] or the distance within which it could be stopped;[48] earning capacity;[49] economic conditions;[50] explosions, and their cause and effect;[51] and such as matters related to fires,

(9) Whether converting street to one-way street would result in substantial loss to bus company.—Eighth Avenue Coach Corporation v. City of New York, 10 N.Y.S.2d 170, 170 Misc. 243, affirmed 20 N.Y.S.2d 402, 259 App.Div. 870, appeal granted 20 N.Y.S.2d 986, 259 App.Div. 1002.

(10) Whether mortgage was properly recorded.—Inashima v. Wardall, 258 P. 839, 145 Wash. 77.

(11) Other matters.
U.S.—Groff v. Smith, D.C.Conn., 34 F.Supp. 319.
Cal.—Dyer v. Superior Court of California, 271 P. 113, 94 Cal.App. 260.
22 C.J. p 654 note 58, p 680 note 67.

Evidence held inadmissible as to

(1) Availability, for filling station, of sites other than one in issue, permit for which had been denied.—Coulthard v. Board of Adjustment of City of Neligh, 265 N.W. 530, 130 Neb. 543.

(2) Probability that a certain person prepared and wrote a purported will.—In re Miller's Estate, 229 P. 851, 71 Mont. 330.

(3) Sufficiency of screening to protect spectators at baseball game.—Kavafian v. Seattle Baseball Club Ass'n, 177 P. 776, 105 Wash. 215, reversed on other grounds 181 P. 679, 105 Wash. 215.

(4) Whether specified sums were taxable.—Hatch v. U. S., C.C.A.Iowa, 34 F.2d 436, certiorari denied 50 S. Ct. 246, 281 U.S. 731, 74 L.Ed. 1147.

(5) Other matters.
Mass.—Barbrick v. Huddell, 139 N. E. 629, 245 Mass. 428—Attorney General v. Tufts, 132 N.E. 322, 239 Mass. 458, 17 A.L.R. 274.

Witness held not qualified

(1) Witness connected with accident insurance company and familiar with records of causes of accidents was held not competent as to whether particular obstruction constituted traffic hazard.—General Outdoor Advertising Co. v. Department of Public Works, 193 N.E. 799, 289 Mass. 149, appeal dismissed General Outdoor Advertising Co. v. Callahan, 56 S.Ct. 495, 297 U.S. 725, 80 L.Ed. 1008, General Outdoor Advertising Co. v. Hoar, 56 S.Ct. 495, 297 U.S. 725, 80 L.Ed. 1008, and Brink v. Callahan, 56 S.Ct. 496, 297 U.S. 725, 80 L.Ed. 1008.

(2) In action for false representations in sale of stock, testimony that after witness examined prospectus he could not recommend it as sound investment was improperly admitted.—Graff v. Tinkham, 231 N. W. 593, 202 Wis. 141.

(3) Other cases.
Tex.—Eakin v. Glenn, Civ.App., 141 S.W.2d 420.
Vt.—Shields v. Vermont Mut. Fire Ins. Co., 147 A. 352, 102 Vt. 224.

44. Evidence held admissible

A witness, who had flown over eleven thousand hours during twenty-two years, had visited numerous air fields, and had supervised preparation and operation of several air fields, was qualified to state opinion whether particular field was a safe place for planes to land, and to draw inference from wheel tracks, although he lacked technical training and could not claim familiarity with laws relative to maintenance of airports.—Beck v. Wings Field, D.C. Pa., 35 F.Supp. 953, modified on other grounds, C.C.A., 122 F.2d 114.

Witness held not qualified to testify as to flying conditions.—Seaman v. Curtis Flying Service, 247 N.Y.S. 251, 231 App.Div. 867.

45. Evidence held admissible

(1) Opinion of housewife and mother has been held admissible.—Jaffe v. Deckard, Tex.Civ.App., 261 S.W. 390.

(2) However, it has also been held that expert testimony as to the cost of rearing and educating children is inadmissible, such matters being properly determinable by the jury rather than by the varying ideas of expert parents.—St. Louis, B. & M. Ry. Co. v. Watkins, Tex.Civ.App., 245 S.W. 794.

46. Evidence held admissible

(1) Where danger is not obvious and would be difficult for jury to appreciate.—Magyar v. Pennsylvania R. Co., 144 A. 765, 294 Pa. 585.

(2) Whether individual in kayak loaded with supplies could descend certain river without being drowned.—Sargent v. Massachusetts Accident Co., 29 N.E.2d 825, 307 Mass. 246.

Evidence held inadmissible

(1) Where all facts have been presented to jury and situation is simple and understandable.
Ind.—Del-Mar Garage v. Boden, 179 N.E. 729, 95 Ind.App. 317.
Ky.—Morton's Adm'r v. Kentucky-Tennessee Light & Power Co., 138 S.W.2d 345, 282 Ky. 174.
Pa.—Smith v. Penn Federal Corporation, 172 A. 147, 315 Pa. 20—Magyar v. Pennsylvania R. Co., 144 A. 765, 294 Pa. 585.

(2) Whether deceased should have known that elevator was descending by difference in floor level and by noise of elevator is question which jury, not expert, must decide.
Mo.—Unrein v. Oklahoma Hide Co., 244 S.W. 924, 295 Mo. 353.

(3) Whether it was safe for children to play on lumber piled in manner described was held question not requiring judgment of expert.—Branan v. Wimsatt, 298 F. 833, 54 App. D.C. 374, certiorari denied 44 S.Ct. 639, 265 U.S. 591, 68 L.Ed. 1195.

47. Evidence held admissible

Ala.—Louisville & N. R. Co. v. Pearce, 39 So. 72, 142 Ala. 680.
Ark.—St. Louis, etc., R. Co. v. Brown, 35 S.W. 225, 62 Ark. 254.
22 C.J. p 565 note 13.

48. Evidence held admissible

Neb.—Blado v. Draper, 132 N.W. 410, 89 Neb. 787.
22 C.J. p 565 note 14.

Evidence held inadmissible

U.S.—Hoagland v. Canfield, C.C.N. Y., 160 F. 146.
22 C.J. p 565 note 14 [b].

49. Evidence held admissible

Person engaged in particular line of business has been held competent to state inference as to earning capacity of one engaged in such business.—Mangano v. Marston, 10 N.E. 2d 90, 298 Mass. 133—22 C.J. p 653 note 35.

Evidence held inadmissible

Pa.—Goodhart v. Pennsylvania R. Co., 35 A. 191, 177 Pa. 1, 55 Am.S. R. 705.

Essential qualifications of witness

To testify as to loss of claimant's earning power, an expert should have reasonable knowledge of mental and physical ability of employee to work and character of work employee could perform in his impaired condition, wages earned before accident and unaffected by accident, and state of labor market in vicinity at time.—Zellner v. Haddock Mining Co., 10 A.2d 918, 139 Pa.Super. 16.

50. Evidence held inadmissible

Pa.—Holgate Bros. Co. v. Bashore, 45 Dauph.Co. 274.

51. Evidence held admissible

(1) In general.—Crockett v. Troyk, Tex.Civ.App., 78 S.W.2d 1012—22 C. J. p 648 notes 45, 56.

(2) Cause of break in gas pipe.—Nugent v. Boston Consol. Gas Co., 130 N.E. 488, 238 Mass. 221.

(3) Opinion of persons familiar with rock formation in vicinity was held admissible on question whether blasting caused drying up of spring.—Ingram v. Great Lakes Pipe Line Co., Mo.App., 153 S.W.2d 547.

and their cause and effect;[52] logging and lumber;[53] the obscenity of a particular work;[54] patents and their construction;[55] radio;[56] time required for certain occurrences or acts;[57] typewriting;[58] weather conditions;[59] and working conditions.[60]

(4) Whether stone could possibly have come from blast in direction of place where plaintiff was injured.—Haeussler v. Consolidated Stone & Sand Co., 127 A. 602, 3 N.J.Misc. 159.

Evidence held inadmissible

Where evidence failed to show whether bottle of carbonated beverage was upset with sufficient force to cause breakage of bottle, expert evidence as to whether bottle broke from fall or from explosion was not admissible.—Sweeney v. Blue Anchor Beverage Co., 189 A. 331, 325 Pa. 216.

Witness held not qualified

(1) In general.—Indian Territory Illuminating Oil Co. v. Rainwater, Tex.Civ.App., 140 S.W.2d 491, error dismissed.

(2) Machinist and welder was held properly disqualified as expert to give opinion whether bulging of metal drum taken from cellar of premises destroyed by fire was result of containing kerosene which exploded.—Furdock v. Washington Mut. Fire & Storm Ins. Co., 169 A. 385, 111 Pa.Super. 61.

52. **Evidence held admissible**

(1) In general.

Cal.—Gallichotte v. California Mut. Building & Loan Ass'n, 74 P.2d 535, 23 Cal.App.2d 570, supplementing 74 P.2d 73, 23 Cal.App.2d 570.

Mass.—Gechijian v. Richmond Ins. Co., 25 N.E.2d 191, 305 Mass. 132—Edward Rose Co. v. Globe & Rutgers Fire Ins. Co., 160 N.E. 306, 262 Mass. 469.

Pa.—Mayer v. Hornberger, 28 Pa. Dist. & Co. 714, 29 Berks.Co. 172.

Wash.—Hinckley v. Shell Co. of California, 221 P. 594, 127 Wash. 630.

(2) Experienced volunteer fireman and fire chief could testify as to reason for intensity and extent of fire.—Sellers v. Montana-Dakota Power Co., 41 P.2d 44, 99 Mont. 39.

(3) Experienced volunteer fireman could testify as to result and effect on fire of fire apparatus.—Luedeke v. Chicago & N. W. Ry. Co., 231 N. W. 695, 120 Neb. 124, 71 A.L.R. 912.

(4) Former national forestry service employee could testify as to forest fire prevention.—Conrad v. Cascade Timber Co., 7 P.2d 19, 166 Wash. 369.

(5) Forest service lookout could testify as to accuracy with which he could locate fire in forest.—Feather River Lumber Co. v. U. S., C.C.A.Cal., 30 F.2d 642, affirming, D. C., U. S. v. Feather River Lumber Co., 23 F.2d 936.

(6) Expert testimony concerning extinguishing of fires by automatic sprinklers held admissible.—Cameron Compress Co. v. Whitington, Tex. Commn.App., 280 S.W. 527.

Evidence held inadmissible

(1) In general.—Cameron Compress Co. v. Jacobs, Tex.Civ.App., 10 S.W.2d 1040, error refused.

(2) Where opinion must have been mere conjecture.—Adams v. Wilkes, 109 S.E. 804, 118 S.C. 93.

Witness held not qualified

Member of the fire department cannot testify as to incendiary origin of fire, in the absence of any showing that he knows anything about incendiary fires, or has ever seen one.—Zackwik v. Hanover Fire Ins. Co., Mo.App., 225 S.W. 135.

53. **Evidence held admissible**

(1) In general.

Ala.—Aiken v. McMillan, 106 So. 150, 213 Ala. 494.

Cal.—Davenport v. National Reserve Ins. Co. of Illinois, Dubuque, Iowa, 267 P. 132, 91 Cal.App. 460.

Idaho.—Dewar v. Taylor, 249 P. 773, 43 Idaho 111.

Mo.—Duvall v. Brooklyn Cooperage Co., App., 275 S.W. 586.

N.H.—Paquette v. Connecticut Valley Lumber Co., 109 A. 836, 79 N. H. 288.

22 C.J. p 656 note 97.

(2) As to cause of stain on lumber.—Oden-Elliott Lumber Co. v. Daniel-Gaddis Lumber Co., 110 So. 607, 215 Ala. 392.

(3) As to estimates of quantity of lumber.

Ala.—Hopper v. Pennington, 110 So. 389, 215 Ala. 266.

Mass.—Davenport v. Haskell, 200 N. E. 409, 293 Mass. 454.

(4) As to relative freshness of two cuttings.

Ala.—Murray v. Fowler, 88 So. 849, 205 Ala. 597.

(5) Whether a tide was a "floating tide" within meaning of log-driving contract.—Kentucky River Timber & Coal Co. v. Mosely, 210 S. W. 180, 183 Ky. 696.

(6) Whether weight of lumber would be affected by green or dry condition.—Cooper v. Kulp, 107 So. 808, 214 Ala. 286.

54. **Evidence held admissible**

In determining whether an imported book is subject to confiscation and destruction as obscene, expert opinions of psychologists and sociologists may be considered.—Parmelee v. U. S., 113 F.2d 729, 72 App. D.C. 203.

Evidence held inadmissible

Obscenity has been held not matter for opinion of experts, but solely for jury.—People v. Muller, 96 N. Y. 408, 48 Am.R. 635.

55. **Evidence held admissible**

Where patent contains technical terms or terms of art.

U.S.—U. S. Industrial Chemicals v. Carbide & Carbon Chemicals Corporation, C.C.A.Md., 121 F.2d 665, affirming, D.C., Carbide & Carbon Chemicals Corporation v. U. S. Industrial Chemicals, 34 F.Supp. 813.

56. **Witness held not qualified**

The communications commission, in passing on application for permit for construction of radio station, improperly considered as expert testimony the testimony of applicant who had engaged in publishing business and had had no experience in radio except as a listener, a performer, and as one interested in acquiring a radio station.—Tri-State Broadcasting Co. v. Federal Communications Commission, 96 F.2d 564, 68 App.D.C. 292.

57. **Evidence held admissible**

(1) In general.—Biggers v. Catawba Power Co., 51 S.E. 882, 72 S. C. 264—22 C.J. p 573 notes 24, 25.

(2) Time for delivery of telegram.

S.C.—Kirby v. Western Union Tel. Co., 58 S.E. 10, 77 S.C. 404, 122 Am.S.R. 580.

Tex.—Western Union Tel. Co. v. Drake, 38 S.W. 632, 14 Tex.Civ. App. 601.

(3) That excessive amount of time was consumed.—St. Louis, S. F. & T. R. Co. v. Gilliam, Tex.Civ.App., 166 S.W. 706—22 C.J. p 573 note 26.

Witness held not qualified

To testify to the time it would take for a growth of roots to collect in a sewer.—Town of Salisbury v. Camden Sewer Co., 118 A. 662, 141 Md. 254.

58. **Evidence held admissible**

Skilled typist has been permitted to state inference that two pages of minute book of corporation were written by different typists using different machines.—Bartholomew v. Walsh, 157 N.W. 575, 191 Mich. 252.

Witness held not qualified

N.Y.—Millman v. Drew, 229 N.Y.S. 336, 223 App.Div. 691.

59. **Evidence held admissible**

Vt.—Davis v. Raymond, 152 A. 806, 103 Vt. 195.

60. **Evidence held admissible**

Opinion of experienced union officers as to whether seniority rights of members was being violated.—George T. Ross Lodge No. 831, Brotherhood of Railroad Trainmen v. Brotherhood of Railroad Trainmen, 254 N.W. 590, 191 Minn. 373.

G. EXAMINATION OF WITNESSES

1. Ordinary Observers

§ 547. In General

The examination of nonexpert witnesses to elicit their opinion should be proper in form and subject matter.

The general rules as to the examination of witnesses, discussed in the C.J.S. title Witnesses §§ 315–367, also 70 C.J. p 473 note 12–p 611 note 32, with such modifications as the character of the testimony renders necessary, apply to the examination of witnesses giving opinion evidence.[61] Proper foundation of fact should first be established before the witness is questioned as to his opinion.[62] A witness who has stated that he has no opinion should not be pressed to give an opinion.[63]

Questions asked the witness in eliciting his opinion should be fair,[64] and proper in form,[65] and a question which is misleading[66] or indefinite[67] should not be permitted.

Questions as to bodily condition should be carefully worded to call for conditions observed, or not observed, by the witness about which he would be competent to answer.[68]

Testimony as to mental condition. The examination of a nonexpert witness testifying as to mental capacity should be full and ample,[69] and while the

61. Ky.—Webb v. Kentucky & West Virginia Power Co., 287 S.W. 232, 216 Ky. 64.
N.Y.—Foote v. Charles Burke, Inc., 173 N.Y.S. 496.
22 C.J. p 702 note 64.

Handwriting
Va.—Adams v. Ristine, 122 S.E. 126, 138 Va. 273, 31 A.L.R. 1413.

Speed of car
(1) Witness may testify as to whether it was possible to stop automobile in time to avoid collision by questions as to rate of speed of automobiles and in what distance they could have been stopped under circumstances.—Ritz v. Cousins Lumber Co., 59 S.W.2d 1072, 227 Mo. App. 1167.

(2) Sustaining objection to question asked defendant relative to speed of plaintiff's car colliding with defendant's was not error, where no avowal was made and witness stated speed.—Crampton v. Daime, 6 S.W. 2d 686, 224 Ky. 507.

Teeth
A qualified witness may express an opinion with respect to whether teeth burn, but he cannot on direct examination give specific instances. —Ensign v. Travelers' Ins. Co. of Hartford, Conn., 184 N.Y.S. 7, 193 App.Div. 369, affirmed 135 N.E. 901, 233 N.Y. 521.

Duration of buildings
Where, after a witness had testified that the limit for age for frame buildings considering ordinary repairs was thirty years, and that such limit was based on the general experience of engineers, builders, and architects, it was proper to sustain an objection to the further question whether there were tables on that subject which were accepted by builders, engineers, and architects the same as mortuary tables are accepted by insurance companies and others.—West Chicago Park Comrs. v. Boal, 83 N.E. 824, 232 Ill. 248.

Questions held improper
Tex.—Gulf, C. & S. F. R. Co. v. Steed, Civ.App., 209 S.W. 772, affirmed Steed v. Gulf, C. & S. F. Ry. Co., Com.App., 231 S.W. 714.

62. Ark.—Watkins v. Metropolitan Life Ins. Co., 250 S.W. 350, 158 Ark. 386.
Md.—State v. Emerson & Morgan Coal Co., 133 A. 601, 150 Md. 429.

63. N.Y.—Matter of Smart, 145 N.Y.S. 838, 84 Misc. 336.
22 C.J. p 702 note 65.

64. N.D.—Dowd v. McGinnity, 152 N.W. 524, 30 N.D. 308.

Demeanor
Question as to whether plaintiff's demeanor on the witness stand was different from that when the witness met him at a certain time has been excluded as unfair.—Dowd v. McGinnity, supra.

65. Ala.—Barlow v. Hamilton, 44 So. 657, 151 Ala. 634.

Handwriting
Asking witness if and how she recognized handwriting was not proper proof of handwriting; but witness should have been asked if she had ever seen So and So write, and, if reply were in affirmative, next question should be, "In whose handwriting is this and that?"—Horton v. Horton, 130 A. 24, 2 N.J.Misc. 683.

Injured feelings
Where, in an action for assault, a witness who saw the assault testified that he supposed plaintiff's feelings were hurt, that it would have hurt witness' feelings, a question "[Plaintiff] didn't look like he was hurt, did he?" was proper in form.—Barlow v. Hamilton, 44 So. 657, 151 Ala. 634.

66. Md.—Jacobs v. Disharoon, 77 A. 258, 113 Md. 92.
22 C.J. p 702 note 66.

67. U.S.—Denny v. U. S., C.C.A.Ill., 103 F.2d 960.
Md.—Great Eastern Stages v. W. T. Cowan, Inc., 176 A. 613, 167 Md. 690.
22 C.J. p 702 note 67.

Injury
Where issue is whether "material" injury to building would be caused by removal of sprinkler system, it is improper to ask witness whether "any" injury would be caused.—Independent Ætna Sprinkler Corporation v. Morris, 175 A. 102, 114 N.J. Law 23.

68. Ga.—Laney v. Barr, 6 S.E.2d 99, 61 Ga.App. 145.
Utah.—Braddock by Smith v. Pacific Woodmen Life Ass'n, 54 P.2d 1189, 89 Utah 75, rehearing denied and modified on other grounds 58 P.2d 765, 89 Utah 92.

Intoxication
Question to witness as to apparent condition of defendant at time of accident with reference to being intoxicated or otherwise was held not improper.—Finn v. Sullivan, 293 P. 639, 110 Cal.App. 38.

69. Ala.—Johnston v. Johnston, 57 So. 450, 174 Ala. 220.
Ind.—Griffith v. Thrall, App., 29 N.E.2d 345.
70 C.J. p 544 note 98.

Subscribing witnesses to will are subject to examination at length on essential questions of mental competency of testator.—In re Plotts' Estate, 5 A.2d 901, 335 Pa. 81.

Examination held proper
(1) Question, "What condition did you find the sick man (testator) in then?"—Dersis v. Dersis, 98 So. 27, 210 Ala. 308.

(2) That nonexperts, giving opinions of testator's sanity, did not re-

trial court has some discretion as to the form of questions concerning mental unsoundness, its refusal to exercise such discretion furnishes no legal ground for complaint.[70] A question as to mental capacity, without sufficient foundation being laid therefor, is improper.[71] A nonexpert witness cannot give his opinion regarding sanity based on an abstract hypothetical question,[72] and a question assuming facts to which the witness had not testified is erroneous.[73]

A question calling for a witness' opinion as to a testator's mental capacity prior to a specified date,[74] or without reference to any date,[75] is objectionable for indefiniteness as to time, but an answer that a witness considered testatrix of sound and disposing mind "at that time" has been held not objectionable for failure to fix the time, it being fairly inferable that "that time" referred to the time of making the will.[76] Questions as to whether witness had noticed any failure of memory, or anything to indicate that testator was not of sound mind, are competent,[77] but questions calling for a nonexpert witness' opinion as to whether testatrix was of sound mind, from witness' knowledge of what she observed of testatrix on a certain day and from what the witness had learned, have been held objectionable.[78]

Testimony as to value. Examination of a witness as to value should be so conducted as to call for the witness' opinion only as to such matters as he would be competent to answer;[79] but improper examination will not be held reversible error unless clearly prejudicial.[80] A nonexpert testifying as to the value of property may and should give his estimate in single or gross amounts for the entire property,[81] but a witness who has stated what the property in question was worth, as a whole, may be asked to state the value of different parts thereof,

peat conversations, but only stated subject matter, did not affect question of admissibility.—In re Moxley's Will, 152 A. 713, 103 Vt. 100.

(3) Permitting bank officer testifying as to testatrix's mental capacity to state amount of bank's deposit account was not error as unduly impressing jury with importance of witness.—Tucker v. Houston, 112 So. 360, 216 Ala. 43.

(4) It has been held not error to permit a nonexpert witness, testifying that testatrix, although stricken with paralysis, had capacity to make a will, to state what he had observed as to the mental condition of his father, who suffered for many years from paralysis, where the court charged that the observation of the witness of the condition of his father was merely to aid the jury in considering the weight of his testimony.—Moffitt v. Smith, 69 S.E. 224, 153 N.C. 292.

Examination held improper

(1) Question whether grantor was capable of transacting business in ordinary affairs was too general in testing grantor's mental capacity to execute deed.—Brito v. Slack, Tex. Civ.App., 25 S.W.2d 881.

(2) Other cases see Whisner v. Whisner, 89 A. 393, 122 Md. 195.

Subsequent statement of facts

Examination of witnesses was not improperly limited where facts originally objected to were brought out from witnesses in later examination and cross-examination by state.—People v. Bennett, 249 P. 212, 79 Cal. App. 249.

70. Iowa.—Spiers v. Hendershott, 120 N.W. 1058, 142 Iowa 446.

71. Md.—Kelley v. Stanton, 118 A. 863, 141 Md. 380.
Mich.—In re Hayes' Estate, 238 N. W. 245, 255 Mich. 338.

72. Ala.—Sorter v. Austen, 129 So. 51, 221 Ala. 481.
N.J.—Sheean v. Holman, 141 A. 170, 6 N.J.Misc. 346.

73. Md.—Cronin v. Kimble, 144 A. 698, 156 Md. 489.

Actions and language

Question as to mental condition based on witness' observations of testator's actions and his language during period that witness knew testator, without limiting witness to facts to which witness had testified, was properly excluded.—Rynn v. Rynn, 181 A. 289, 55 R.I. 310—Di Orio v. Cenci, 173 A. 537, 54 R.I. 441.

74. Cal.—Huyck v. Rennie, 90 P. 929, 151 Cal. 411.

75. Md.—Bell v. Wolfkill, 137 A. 35, 152 Md. 407.
Tex.—Brito v. Slack, Civ.App., 25 S. W.2d 881.

76. Iowa.—Spiers v. Hendershott, 120 N.W. 1058, 142 Iowa 446.

77. Mass.—McCoy v. Jordan, 69 N. E. 358, 184 Mass. 575.

78. Cal.—In re Dolbeer, 86 P. 695, 149 Cal. 227, 9 Ann.Cas. 795.

79. Ala.—Zimmern v. Southern Ry. Co., 92 So. 437, 207 Ala. 169.
Mich.—City of Kalamazoo v. Balkema, 233 N.W. 325, 252 Mich. 308.

Examination held proper

(1) Testimony as to market value of goods taken by sheriff under sequestration writs as of time of seizure was properly admitted as against contention that witness did not lay proper predicate for market value nor stipulate time as to which he was testifying.—De George v. Rodgers-De Long Hotel Co., Tex.Civ. App., 126 S.W.2d 79, error dismissed.

(2) In an action for damages to property caused by the maintenance of a nuisance incident to the construction and operation of a railroad, evidence that the market value of the property had depreciated fifty per cent by reason of such nuisance is admissible, although witness is unable to state in dollars and cents the amount of depreciation.—St. Louis, S. F. & T. R. Co. v. Payne, 104 S.W. 1077, 47 Tex. Civ.App. 194.

Examination held improper

(1) Where witness had expressed his opinion as to the damage to certain land, it was error to permit the witness to make a comparison between the damage done to such land and the damage to land of a third party.—Department of Public Works and Buildings v. Griffin, 137 N.E. 523, 305 Ill. 585.

(2) It is not error to refuse to permit a witness who has testified as to market price to state as to whether he knew whether the goods could be obtained for less than such price.—Zimmern v. Southern Ry. Co., 92 So. 437, 207 Ala. 169.

(3) On trial of the right of property levied on under execution, where the question for the jury is the reasonableness of the price paid by claimants for the goods assigned by the execution defendant, a question asked a witness, as to whether in his opinion the amount paid was reasonable, was properly excluded, the proper question being, "What in your opinion was the value of the stock of goods?"—Lightman v. Epstein, 51 So. 164, 164 Ala. 660.

80. Iowa.—Walters v. Iowa Electric Co., 212 N.W. 886, 203 Iowa 467.

81. U.S.—Chicago & E. R. Co. v. Ohio City Lumber Co., Ohio, 214 F. 751, 131 C.C.A. 57.
Pa.—McSorley v. School Dist. of Avalon Borough, 139 A. 848, 291 Pa. 252.

as of the farm land, woodland, etc.[82] It is competent to inquire of witnesses what was the market value of crops at the time of the destruction, without specially incorporating into the question put to such witness the proposition as to whether or not such crops might or might not mature.[83]

The witness' answer as to his opinion should be competent and proper in form,[84] and should be responsive to the question asked.[85]

§ 548. Cross-Examination

a. In general
b. Witnesses as to particular matters

a. In General

Cross-examination legitimately tending to test the accuracy and truthfulness of a witness and the value of his testimony as to his opinion is proper, subject to the court's discretion, and it is also proper to question a witness on redirect examination as to statements made on cross-examination.

A witness testifying as to his opinion may be cross-examined as to the facts and grounds on which his opinion is based,[86] and generally cross-examination legitimately tending to test the accuracy and truthfulness of the witness[87] and the value of his testimony,[88] should be permitted, although not until after the direct examination of the witness has been concluded.[89] The cross-examination must be confined to the scope of the examination in chief,[90] and a question based on an assumption not

82. Ill.—Reinke v. Chicago Sanitary Dist., 103 N.E. 236, 260 Ill. 380.

83. Ill.—Chicago & N. W. R. Co. v. Stroud, 129 Ill.App. 348.

84. Ill.—McKenna v. Chicago City Ry. Co., 129 N.E. 814, 296 Ill. 314.

Speed of car

Answer of witness that car was running "faster than they are supposed to" was improper, but her subsequent answer "faster than I ever seen them go," was proper, being her way of stating that the car was running fast.—McKenna v. Chicago City Ry. Co., supra.

Jumbled answer

Permitting owners to testify in jumbled way respecting cost of driving trespassing horses off and of keeping them from coming on premises was improper.—Hill v. Chappel Bros. of Montana, 18 P.2d 1106, 93 Mont. 92.

85. N.C.—In re Hargrove's Will, 173 S.E. 577, 206 N.C. 307.

Answers held unresponsive

(1) Plaintiff's testimony as to exact quantity of slate of different sizes hauled by him was not responsive to question as to his estimate of quantity hauled.—Enos v. Owens Slate Co., 160 A. 185, 104 Vt. 329.

(2) Answer, "It was going about 25 miles an hour," was not responsive to question whether witness had observed speed of automobile.—Dice v. Johnson, 199 N.W. 346, 198 Iowa 1093.

86. Ala.—Dersis v. Dersis, 98 So. 27, 210 Ala. 308.
Ark.—Malvern & O. R. R. Co. v. Smith, 26 S.W.2d 1107, 181 Ark. 626.
Cal.—Lusardi v. Prukop, 2 P.2d 870, 116 Cal.App. 506.
Mo.—Edwards v. Morehouse Stave & Mfg. Co., App., 221 S.W. 744.
Okl.—DeMatte v. Clark, 50 P.2d 342, 174 Okl. 297.
22 C.J. p 703 note 83.

Fast or slow speed

(1) Nonexpert witness giving testimony relating to speed of automobiles may be cross-examined as to his experience, accuracy, and means of knowledge touching speed of automobiles.—Kleckamp v. Lautenschlaeger, 266 S.W. 470, 305 Mo. 538.

(2) Where witnesses testified whether train or automobile was running fast or slow or the number of miles per hour as it appeared to them, the meaning of running slow or fast could be drawn out on cross-examination.—Davis v. Smitherman, 96 So. 208, 209 Ala. 244.

Question calling for opinion

Cross-examination of nonexpert as to whether kodak pictures showed pin lifter rod to be inclosed called for opinion as to what pictures showed, not statement of fact.—Bright v. Wheelock, 20 S.W.2d 684, 323 Mo. 840, 66 A.L.R. 263.

87. Ala.—Alabama Power Co. v. Herzfeld, 114 So. 49, 216 Ala. 671—Washington v. Spriggs, 105 So. 811, 213 Ala. 622—Dersis v. Dersis, 98 So. 27, 210 Ala. 308.
Ind.—National City Bank v. Kirk, 134 N.E. 772, 85 Ind.App. 120.
Mass.—Dwyer v. Boston Elevated Ry. Co., 172 N.E. 71, 272 Mass. 294.
Minn.—Flor v. Buck, 248 N.W. 743, 189 Minn. 131.
Mo.—State ex rel. State Highway Commission v. Graham, App., 74 S.W.2d 493, 495, citing **Corpus Juris.**
22 C.J. p 703 note 84.

Cross-examination held proper

(1) Witnesses testifying to distances along road within common knowledge could be cross-examined as to knowledge and method of estimating distances.—Baird v. Webb, 294 P. 1000, 160 Wash. 157.

(2) Cross-examining automobile passenger, who testified to speed of automobile at time of accident, as to whether witness had noticed speedometer was proper.—Jordan v. Capers, 131 So. 557, 222 Ala. 197.

88. Ala.—Granade v. U. S. Lumber & Cotton Co., 139 So. 409, 224 Ala. 185—Alabama Power Co. v. Herzfeld, 114 So. 49, 216 Ala. 671.
Ark.—Malvern & O. R. R. Co. v. Smith, 26 S.W.2d 1107, 181 Ark. 626.
Fla.—New Amsterdam Casualty Co. v. J. H. Blackshear, Inc., 156 So. 695, 116 Fla. 289.
Ky.—City of Catlettsburg v. Davis' Adm'r, 74 S.W.2d 341, 255 Ky. 382.
N.C.—Riverview Milling Co. v. State Highway Commission, 130 S.E. 724, 190 N.C. 692—Rutledge v. A. T. Griffin Mfg. Co., 111 S.E. 774, 183 N.C. 430.
Tex.—Texas Reciprocal Ins. Ass'n v. Smith, Civ.App., 68 S.W.2d 295.
Wash.—Hatcher v. Globe Union Mfg. Co., 35 P.2d 32, 178 Wash. 411.
22 C.J. p 703 note 85.

Competency unaffected

Where the court ruled that a witness was competent to testify as to certain matters, witness' answer on cross-examination showing that his opinions were purely speculative did not affect his competency, but merely affected the weight to be given thereto.—Capital Garage Co. v. Powell, 122 A. 423, 97 Vt. 204, petition dismissed 123 A. 200, 97 Vt. 328.

89. Mo.—Cities Service Gas Co. v. Peak, 54 S.W.2d 482, 227 Mo.App. 515.
Ohio.—Moore v. Caldwell, 27 Ohio Cir.Ct. 449.

90. Ga.—Hixon v. Georgia Southern & F. Ry. Co., 137 S.E. 260, 163 Ga. 734.
Idaho.—Erickson v. Edward Rut-

warranted by the evidence is inadmissible.[91]

The rule concerning the right of lay witnesses to give their opinion is the same whether the questions are asked on direct or cross-examination,[92] but a witness who testifies as to facts cannot be impeached by interrogation on cross-examination as to prior contradictory expressions of opinion.[93] Where a witness on cross-examination is pressed to state the reasons for his conclusion, his answer, although not strictly responsive, is properly admitted.[94] In an action for injuries to property from the discharge of smoke and burning cinders from engines, where plaintiff had stated the facts inducing him to believe that cinders had set fire to his stable, such testimony could not be excluded because on cross-examination he declined to state that in his own knowledge the burning of the stable was caused by cinders from defendant's engines.[95]

The extent to which cross-examination shall go is a matter resting largely in the discretion of the trial court,[96] which will not be controlled by an appellate court unless an abuse thereof is shown;[97] but it has been said that a wide range should be allowed in the cross-examination of nonexperts who testify as to mental capacity.[98]

On redirect examination, a witness who has testified as to his opinion may be called on to explain statements given on cross-examination.[99] However, where the opinion of the witness as to certain matters was not brought out on examination in chief and was not called for by anything brought out on cross-examination, it could not properly be elicited on reëxamination.[1]

b. Witnesses as to Particular Matters

The rules as to permissible cross-examination of a witness testifying to his opinion apply to witnesses as to such particular matters as handwriting and mental condition.

The extent of permissible cross-examination of a nonexpert witness to handwriting is a matter for the court's discretion,[2] and while not as extensive as that of an expert witness, it may comprehend

ledge Timber Co., 203 P. 1078, 34 Idaho 754.
Or.—Gano v. Zidell, 10 P.2d 365, 140 Or. 11, rehearing denied 12 P.2d 1118, 140 Or. 11.
Pa.—Westinghouse Air Brake Co. v. City of Pittsburgh, 176 A. 13, 316 Pa. 372.
Wash.—Space v. Tacoma Durant Co., 296 P. 822, 161 Wash. 232.
22 C.J. p 704 note 87.

91. Conn.—Daily v. Spann, 147 A. 807, 110 Conn. 312.
22 C.J. p 704 note 88.

92. Ill.—Stoutenborough v. Miller, 188 Ill.App. 220.
Iowa.—Pugh v. Queal Lumber Co., 188 N.W. 1, 193 Iowa 924.

Related matters
Where witness has testified as to facts, it is discretionary with court whether to permit cross-examination as to opinions as to related matters. —Healy v. Moore, 187 A. 679, 108 Vt. 324, followed in 187 A. 692, 108 Vt. 351.

Questions requiring expert opinion cannot be put on cross-examination to one not called as an expert witness on the subject.—Farmers' Store & Warehouse Ass'n v. Barlow, 182 N.W. 447, 148 Minn. 377.

93. Mo.—Goldsberry v. Farmers Mut. Fire & Lightning Ins. Co. of Polk County, App., 86 S.W.2d 578.

94. Ala.—Southern Bitulitthic Co. v. Perrine, 67 So. 601, 191 Ala. 411.

95. Md.—Baltimore Belt R. Co. v. Sattler, 62 A. 1125, 64 A. 507, 102 Md. 595.

96. Ala.—Alabama Power Co. v. Shaw, 111 So. 17, 215 Ala. 436—Pettus v. Louisville & N. R. Co., 106 So. 807, 214 Ala. 187.
Cal.—Wulferdinger v. Pickwick Stages System, 288 P. 93, 105 Cal. App. 509.
Mo.—Kleckamp v. Lautenschlaeger, 266 S.W. 470, 305 Mo. 528.
Pa.—Henry v. Somerset County, 161 A. 881, 105 Pa.Super. 441.
Va.—Adams v. Ristine, 122 S.E. 126, 138 Va. 273, 31 A.L.R. 1413.
22 C.J. p 704 note 2.

Examination held proper
Pa.—In re Pusey's Estate, 184 A. 844, 321 Pa. 248, certiorari denied Lavely v. Young Women's Christian Ass'n of Pittsburg, 57 S.Ct. 36, 299 U.S. 572, 81 L.Ed. 422, rehearing denied 57 S.Ct. 114, 299 U.S. 621, 81 L.Ed. 458.

Questions properly excluded
Ala.—Ruffin Coal & Transfer Co. v. Rich, 108 So. 596, 214 Ala. 633.

97. Iowa.—Brown v. Palo Alto County Drain. Dist. No. 48, 143 N.W. 1077, 163 Iowa 290.
Mo.—Kleckamp v. Lautenschlaeger, 266 S.W. 470, 305 Mo. 528.

98. Ill.—Snell v. Weldon, 87 N.E. 1022, 239 Ill. 279.

99. Ind.—Griffith v. Thrall, App., 29 N.E.2d 345.
N.C.—Elizabeth City v. Gregory, 164 S.E. 354, 202 N.C. 759.

Assumed facts
Where witness for plaintiff was asked on cross-examination his opinion as to the grantor's sanity, assuming certain facts as true, plaintiff was properly permitted in reply to ask the witness for his opinion if the facts were otherwise.—Boone v. Sykes, 106 S.E. 456, 181 N.C. 143.

Basis of opinion
Where owner was cross-examined to show that he stated before a commission that lot condemned was worth more than he was claiming in court, without confining the evidence to the question of credibility, he should have been allowed on redirect examination to state as the basis of that opinion of value that he had been offered such amount.—Dean v. County Board of Education, 97 So. 741, 210 Ala. 256.

1. Ind.—Silver v. Newcomer, 140 N.E. 455, 80 Ind.App. 406.
Mass.—Mahoney v. Gooch, 141 N.E. 605, 246 Mass. 567.

2. Va.—Adams v. Ristine, 122 S.E. 126, 138 Va. 273, 31 A.L.R. 1413.

Mere abstract questions or questions involving scientific knowledge may not be put to a nonexpert witness on cross-examination.—Adams v. Ristine, supra.

Comparison of signatures
Where witness in a will contest testified that he had seen testator sign a prior will, admitted to be genuine, and certain checks, one of which was paid to witness, and that in his opinion the alleged signature of testator to the proposed will was not genuine, because in making an "R" in the proposed will the tail of the letter came down like a "y," which was not the case in the signature to the prior will, it was not error for the court to refuse to permit proponent, on further cross-examination of the witness, to show, after he had identified the check executed by testator to him, that the

questions involving the extent of his knowledge or observation, or his fairness, or bias or prejudice.[3] A witness who is asked whether the signatures to certain documents, not in evidence, are genuine, may decline to answer unless he is permitted to examine the documents.[4]

Mental condition. Witnesses testifying as to the mental condition of another may be cross-examined as to matters bearing on the credibility and weight of their testimony.[5] It has been held that on cross-examination of a witness who has testified to sanity or insanity of testator, he may be asked as to testator's capacity to make a will in order to test the witness, but not to establish the fact;[6] but on the other hand it has been considered that testimony of attesting witnesses, that testatrix at the time of the execution of the will was of disposing memory received without objection, gave contestant no right to ask, on cross-examination of a nonexpert for proponent, for his opinion whether testatrix was of a disposing mind.[7] Nonexpert witnesses who give their opinion as to whether another person was of sound mind cannot be asked hypothetical questions on cross-examination,[8] but there is authority apparently to the contrary.[9]

Value. Cross-examination of a witness as to value is considered infra § 560.

2. Skilled Observers and Experts

§ 549. In General

The testimony of a skilled or expert witness must be confined to matters of special knowledge and must be based on facts in evidence or admitted to be true, but generally the scope and conduct of the examination is a matter for judicial discretion and the witness may be permitted to testify with respect to a model, sketch, or chart.

Examination of a skilled or expert witness for the purpose of eliciting his opinion should ordinarily be confined to such matters as to which the witness has special skill or knowledge,[10] and should not extend to matters solely within the province of the court or jury.[11] Where a skilled witness testifies as to his inferences from sensation, the questions

tail of the "R" in the signature to the check was the same as in the signature to the proposed will.—Griffin v. Working Woman's Home Ass'n, 44 So. 605, 151 Ala. 597.

3. Va.—Adams v. Ristine, 122 S.E. 126, 138 Va 273, 31 A.L.R. 1413.

Fairness of test

While it was an unfair test of knowledge and observation of witness to require him to testify as to whose handwriting was shown in enlarged photographs of handwriting, witness, who had given his opinion that alleged forged writing was genuine could be asked on cross-examination to look at genuine writings of person in question and of the alleged forger and say whether it was in the handwriting of one or the other.—Adams v. Ristine, supra.

4. Mich.—Taylor v. Taylor, 101 N. W. 832, 138 Mich. 658.

5. Ala.—Washam v. Beaty, 99 So. 163, 210 Ala. 635.

Ind.—Griffith v. Thrall, App., 29 N. E.2d 345.

Iowa.—Ayres v. Nopoulos, 216 N.W. 258, 204 Iowa 881.

Md.—Mitchell v. Slye, 111 A. 814, 137 Md. 89.

Questions held proper

(1) Whether witness heard reports of mental unsoundness.—Ayres v. Nopoulos, 216 N.W. 258, 204 Iowa 881.

(2) Inquiry as to what testator said or did or what the witness observed in the action or conduct of testator which indicated unsoundness of mind.—Gregory v. Richey, 138 N.E. 669, 307 Ill. 219.

(3) When attesting witness testified that testator was of sound mind when will was made, question if condition was the same as later when under guardianship.—In re Olson's Estate, 223 N.W. 41, 54 S.D. 184.

Questions held improper

Where, in a suit to set aside the probate of a will on the ground of testator's incapacity, witnesses expressed opinions that testator was not of sound mind, questions on their cross-examination whether they had not transacted ordinary business with testator, and why they had done so, were improper, as whether a transaction amounted to ordinary business could not be determined by the witnesses, and their motives were immaterial.—Healea v. Kennan, 91 N.E. 646, 244 Ill. 484.

Period of life

A party has the right to examine a witness as to a given period of the life of the person claimed to be insane without subjecting that witness to cross-examination as to another and different period.—In re Dunning, 211 Ill.App. 633.

6. Ala.—Councill v. Mayhew, 55 So. 314, 172 Ala. 295.

7. Vt.—In re Bean, 82 A. 734, 85 Vt. 452.

8. Iowa.—Lang v. Lang, 135 N.W. 604, 157 Iowa 300.

9. **In Georgia,** where a nonexpert witness has testified on direct examination to the effect that he considered a certain person sane or insane, it is permissible on cross-examination to test his fairness and accuracy by asking for an opinion of the witness on the same issue, in view of a hypothetical statement based on facts testified to by other witnesses.—Taylor v. Warren, 166 S.E. 225, 175 Ga. 800.

Contra Thompson v. Ammons, 129 S.E. 539, 541, 160 Ga. 886, citing **Corpus Juris.**

10. Md.—Prudential Ins. Co. of America v. Brookman, 175 A. 838, 167 Md. 616.

Mont.—Moffett v. Bozeman Canning Co., 26 P.2d 973, 95 Mont. 347.

11. Md.—Prudential Ins. Co. of America v. Brookman, 175 A. 838, 167 Md. 616.

Acceptability as evidence

In action on fire policy, question asking accountant whether invoices were acceptable as evidence of purchases was objectionable, it being court's province to determine whether documents were admissible.—Detroit Fire & Marine Ins. Co. v. Gagliardi, 32 P.2d 832, 94 Colo. 453, followed in Eagle Fire Co. of New York v. Gagliardi, 32 P.2d 840, 94 Colo. 474.

Question held proper

Iowa.—Latham v. Des Moines Electric Light Co., 296 N.W. 372.

propounded to him, and his answers thereto, must be based on facts previously stated by him,[12] or his personal knowledge or experience on the subject.[13] Where the witness testifies as an expert the questions and his answers may and should be based on the assumed existence of facts, of the actual existence of which some evidence has been given,[14] or whose existence has been agreed on or assumed as true hypothetically;[15] but as appears infra § 550, an expert witness' opinion may be elicited without a hypothetical presentation of the facts where it is based on facts within his personal knowledge or observation.

In testifying as to his opinion, an expert witness should be left untrammeled and not told to exclude a cause or causes which to the trained mind is material in arriving at an ultimate conclusion.[16] The witness may give his testimony with reference to a model, sketch, or plat produced in the court room,[17] and he may use a chart or a plat and figures thereon to refresh his memory if after doing so he testifies from his own knowledge and not from information secured from the writing so used.[18] On the other hand, it has been held that a witness testifying as to his reading of a certain machine or instrument may do so without also producing such machine or instrument in evidence,[19] although it has also been held that an expert may not testify to what is shown by an electrocardiogram without producing it in court and submitting it to the opposing party.[20]

Discretion of court. The general rule that matters pertaining to the examination of witnesses rest largely within the discretion of the trial court, applies in the case of skilled or expert witnesses who testify as to matters of opinion.[21] However, such discretion must not be so exercised as to deny to one party that which is permitted to another.[22]

§ 550. Questions

The questions asked an expert or skilled witness must be proper in form and subject matter, and should

12. U.S.—Peters v. Mutual Life Ins. Co. of New York, C.C.A.Pa., 107 F.2d 9, affirming, D.C., 26 F. Supp. 50, and certiorari denied 60 S.Ct. 582, 309 U.S. 663, 84 L.Ed. 1070.
Mont.—Irion v. Hyde, 105 P.2d 666, 110 Mont. 570.
N.D.—Hunder v. Rindlaub, 237 N.W. 915, 61 N.D. 389.
22 C.J. p 704 note 5.

13. Mo.—DeDonato v. Wells, 41 S.W.2d 184, 328 Mo. 448, 82 A.L.R. 1331.
Okl.—Roxana Petroleum Corporation v. City of Pawnee, 7 P.2d 663, 155 Okl. 141.
Tex.—Missouri Pac. R. Co. v. Guest, Civ.App., 280 S.W. 611.
22 C.J. p 705 note 6.

14. Iowa.—Pentony v. Dudley, 198 N.W. 78, 197 Iowa 744.
Ky.—Gatliff Coal Co. v. Hill's Adm'r, 92 S.W.2d 56, 58, 263 Ky. 309, citing **Corpus Juris.**
Md.—Mangione v. Snead, 195 A. 329, 173 Md. 33—Acker v. Acker, 192 A. 327, 172 Md. 477—May Oil Burner Corporation v. Munger, 152 A. 352, 159 Md. 605—Scheller v. Schindel, 138 A. 415, 153 Md. 547.
Mich.—Bosch v. Damm, 296 N.W. 669, 296 Mich. 522.
N.C.—Hill & Brooks v. Louisville & N. R. Co., 119 S.E. 884, 186 N.C. 475.
N.D.—Hunder v. Rindlaub, 237 N.W. 915, 61 N.D. 389.
Or.—Cosgrove v. Tracey, 64 P.2d 1321, 156 Or. 1.
R.I.—King v. Wiesel, 21 A.2d 262.
22 C.J. p 705 note 7.

Actual knowledge of the facts forming the basis of the testimony is unnecessary.—Farris v. Interstate Circuit, C.C.A.Tex., 116 F.2d 409.

Witness need not have heard all evidence on the subject.—Swanson v. Mellon, 69 N.W. 620, 66 Minn. 486.

15. N.D.—Hunder v. Rindlaub, 237 N.W. 915, 61 N.D. 389.
Or.—Cosgrove v. Tracey, 64 P.2d 1321, 156 Or. 1.
22 C.J. p 705 note 8.

16. Mo.—De Donato v. Wells, 41 S.W.2d 184, 328 Mo. 448, 82 A.L.R. 1331.

17. S.C.—Howell v. State Highway Department, 166 S.E. 129, 167 S.C. 217.
Tex.—Lancaster v. Cox, Civ.App., 274 S.W. 200.

Human skull
Minn.—Backstrom v. New York Life Ins. Co., 259 N.W. 681, 194 Minn. 67.

Radiographs
Defendant cannot complain that witness was permitted to testify from radiographs held in his hands, since defendant was privileged to offer such radiographs in evidence on cross-examination.—Lafayette St. Ry. v. Ullrich, 166 N.E. 257, 92 Ind. App. 202, rehearing denied 168 N.E 709, 92 Ind.App. 202.

18. Mo.—Gray v. Cooper, 274 S.W. 941, 217 Mo.App. 592.

Hospital chart
Doctor, when testifying, may refresh his recollection from hospital chart identified by him as one made during his treatment of plaintiff at the hospital.—Draxten v. Brown, 267 N.W. 498, 197 Minn. 511.

19. Or.—Burrowes v. Skibbe, 29 P. 2d 552, 146 Or. 123.

20. Kan.—Lefebvre v. Western Coal & Mining Co., 289 P. 456, 131 Kan. 1.

21. Ark.—Arkebauer v. Falcon Zinc Co., 12 S.W.2d 916, 178 Ark. 943.
Cal.—Hill v. Morrison, 263 P. 573, 88 Cal.App. 405.
Del.—In re Barnes' Will, Super., 18 A.2d 433.
La.—State v. Allemand, 96 So. 552, 153 La. 741.
Me.—Foster v. Congress Square Hotel Co., 145 A. 400, 128 Me. 50, 67 A.L.R. 239.
Mass.—Cushing v. Jolles, 197 N.E. 466, 292 Mass. 72—King v. Belmore, 142 N.E. 911, 248 Mass. 108.
Mo.—Cole v. Uhlmann Grain Co., 100 S.W.2d 311, 340 Mo. 277.
Okl.—Missouri State Life Ins. Co. v. Everett, 29 P.2d 575, 167 Okl. 350.
22 C.J. p 705 note 11.

Particular matters for discretion
(1) Whether time should be allowed expert witness for purpose of estimating probability of duration of joint lives of deceased and wife.—Diemer v. Shepard, 140 A. 578, 6 N.J.Misc. 186.

(2) Refusal of plaintiff's request to have witness calculate value of property within right of way, where witness had given his opinion of value per acre, and number of acres was agreed on.—Alabama Power Co. v. Henson, 187 So. 718, 237 Ala. 561.

(3) Permitting physician to give opinion as to judgment shown by defendant without repeating hypothetical question previously asked to obtain witness' opinion regarding defendant's skill or care.—Britton v. Hartshorn, 156 A. 48, 113 Conn. 484.

22. Mo.—Porter v. Hetherington, 158 S.W. 469, 172 Mo.App. 502.
22 C.J. p 705 note 12.

embody the factual basis for the opinion asked for, as by being premised on the witness' personal observation or knowledge or by resting on a state of facts as to which some evidence has been received and which is assumed to be true.

As a general rule, the questions asked an expert or skilled witness to elicit his opinion should be proper in form and subject matter,[23] and numerous cases, treated in the notes have adjudicated the propriety of particular questions.[24] The questions

23. Ala.—Sovereign Camp, W. O. W., v. Hutchinson, 114 So. 684, 217 Ala. 71—Brown v. Kevorkian, 107 So. 228, 21 Ala.App. 252.
Cal.—Weaver v. Shell Co. of California, 94 P.2d 364, 34 Cal.App.2d 713.
Ky.—Gatliff Coal Co. v. Hill's Adm'r, 92 S.W.2d 56, 58, 263 Ky. 309, citing **Corpus Juris.**
Md.—Winslow v. Atz, 177 A. 272, 168 Md. 230.
Mass.—Costello v. Hayes, 144 N.E. 368, 249 Mass. 349.
Mo.—Colby v. Thompson, App., 207 S.W. 73.
N.Y.—In re Cashman's Will, 289 N. Y.S. 328, 159 Misc. 881, affirmed 297 N.Y.S. 150, 250 App.Div. 871, affirmed 21 N.E.2d 193, 280 N.Y. 681.
Pa.—Bisk Candy Co. v. Stout, 137 A. 612, 289 Pa. 369.
22 C.J. p 705 note 14.

Witness as to value

(1) There is no stereotyped form of question to be addressed to a witness shown to have knowledge of value, to enable witness to express his judgment.—Pickens County v. Jordan, 196 So. 121, 239 Ala. 589.

(2) After expert is examined as to competency and knowledge, only other question in chief is as to his opinion of value in entirety.—McSorley v. School Dist. of Avalon Borough, 139 A. 848, 291 Pa. 252.

Terms construed

As used in a question to a physician, as to what in his opinion would be the probable effects of the wounds on the future health of the injured party, "probable" means the same as "likely."—O'Brien v. New York, N. H. & H. R. Co., 13 N.Y.S. 305, 59 Hun 623.

Leading questions

(1) It has been considered permissible to ask a skilled witness a leading question when his opinion is sought on a matter about which, by reason of his professional knowledge, he has peculiar information.
La.—State v. Allemand, 96 So. 552, 153 La. 741—Dees v. Louisiana Oil Refining Corporation, App., 162 So. 597.
Mo.—Sanguinett v. May Department Stores Co., 65 S.W.2d 162, 228 Mo. App. 1161.

(2) Other decisions have regarded such questions as improper.—Missouri, K. & T. R. Co. v. Johnson, Tex.Civ.App., 193 S.W. 728.

(3) Questions are not objectionable as leading or suggestive.—Rose v. National Lead Co., Mo.App., 94 S.W.2d 1047.

24. **Questions held proper**

(1) Question to a medical witness whether his experience was sufficient for him to form an opinion as to the effect of a particular injury. —Stefanacci v. Bordens Farms Products Co., 125 A. 129, 100 N.J.Law 160.

(2) Question to physician whether alleged accident could reasonably and properly account for the condition that physician found claimant in on examining him on the following day, as against contention that the question called for an opinion based on possibilities rather than probabilities.—Texas Employers Ins. Ass'n v. Griffis, Tex.Civ.App., 141 S. W.2d 687.

(3) Question asked a medical witness whether his reading and study entered into an opinion he had given. —Stefanacci v. Bordens Farms Products Co., supra.

(4) Asking expert witness to base opinion on experience in observing similar cases.—Cattania v. Fleckenstein, 143 A. 315, 105 N.J.Law 174.

(5) Where issue related to value of defendant's services as manager, question as to value of "a man as manager" was not objectionable as calling for evidence on collateral issue.—Coogan Finance Corporation v. Beatcher, 7 P.2d 695, 120 Cal.App. 278.

(6) Opinion of witness that he should "judge this train was going about fifty miles per hour," was not rendered incompetent by his statement on cross-examination that he did not know it was fifty miles.—Alitz v. Minneapolis & St. L. R. Co., 193 N.W. 423, 196 Iowa 437.

(7) Admission, in connection with testimony of expert, of his typewritten appraisal of value of damaged plant, was not error.—North Bend Lumber Co. v. City of Seattle, 266 P. 156, 147 Wash. 330.

(8) Other illustrations of proper questions.
U.S.—Hall v. Ætna Life Ins. Co., C.C.A.Ark., 85 F.2d 447—The Redwood, C.C.A.Wash., 81 F.2d 680—U. S. v. Francis, C.C.A.Mont., 64 F.2d 865—Brumberger v. Burke, C.C.A.N.J., 56 F.2d 54.
Ala.—Louisville & N. R. Co. v. Hall, 135 So. 466, 223 Ala. 338, certiorari denied 52 S.Ct. 37, 284 U.S. 661, 76 L.Ed. 560.
Conn.—Morris Joseloff Co. v. Spirt, 117 A. 523, 97 Conn. 447.
Fla.—Deleware Securities Corporation v. Kahn, 175 So. 779, 129 Fla. 26.
Ill.—Frochter v. Arenholz, 242 Ill. App. 93.
Iowa.—Kirchner v. Dorsey & Dorsey, 284 N.W. 171, 226 Iowa 283.
Ky.—King v. Ohio Valley Fire & Marine Ins. Co., 280 S.W. 127, 212 Ky. 770.
Md.—Manor Coal Co. v. Balchumas, 199 A. 534, 174 Md. 453—Greer Transp. Co. v. Knight, 146 A. 851, 157 Md. 528.
Mass.—Convery v. Eastern Massachusetts St. Ry. Co., 147 N.E. 824, 252 Mass. 418.
Mo.—Vitale v. Biando, App., 52 S.W. 2d 24, certiorari quashed State ex rel. Biando v. Haid, Sup., 60 S.W. 2d 38—Quinn v. Berberich, App., 51 S.W.2d 153, quashed on other grounds State ex rel. Berberich v. Haid, 64 S.W.2d 667, 333 Mo. 1224 —Pyle v. Kansas City Light & Power Co., App., 246 S.W. 979.
N.J.—Simnler v. Woolman, 155 A. 768, 9 N.J.Misc. 718.
Tex.—Davis v. Simmons, Civ.App., 240 S.W. 970, dismissed for want of jurisdiction.
Utah.—Mary Jane Stevens Co. v. First Nat. Bldg. Co., 57 P.2d 1099, 89 Utah 456.
Vt.—Hassam v. Safford, 74 A. 197, 82 Vt. 444.
22 C.J. p 705 note 14 [d].

Questions held improper

(1) Question whether negligence in moving patient to chair would be "intervening cause" of loss of leg.—Elder v. Ralls Sanitarium, 122 So. 41, 219 Ala. 298.

(2) In action on disability policy, question addressed to physician, "In your opinion as a physician, would you say" that insured "is or is not totally and permanently disabled," was incomplete for failure to ask what insured was disabled from doing.—Metropolitan Life Ins. Co. v. Wright, Miss., 199 So. 289, followed in Metropolitan Life Ins. Co. v. Larkin, 199 So. 293.

(3) Question asked expert witness by plaintiff's counsel in malpractice suit as to what methods of cleaning wound might be used according to present standard of care and skill and state of medical science was improper as not including limitation to either particular community or similar communities.—Coon v. Shields, 39 P.2d 348, 88 Utah 76.

(4) Exclusion of questions put to expert of the most vague and general kind or relating to matters clear

must relate to the material issues of the case,[25] and should be specific and definite in nature so as to be confined to such issues;[26] if necessary, a proper foundation must be laid establishing the connection of the sought for testimony with the material issues.[27] Further, the questions should be complete and intelligible,[28] should not be misleading,[29] and should not be so framed as to call for speculation or conjecture,[30] or to elicit an opinion amounting to a truism;[31] and an objection to a question is properly sustained where the witness has indicated that he is not able to give an opinion on the matter,[32] or has already given the opinion sought by the question in answer to a previous question.[33]

Questions to an expert witness must of course include all essential facts,[34] and a question is improper if it fails to give the factual basis for the opinion asked for.[35] However, if a question properly seeks to elicit the witness' opinion on certain facts, it may not be excluded on the ground that it fails to take into account other evidence which may be subsequently introduced.[36] The requirement that

enough from documentary proof to be dealt with by court without expert aid was not error.—Tillman v. National City Bank of New York, C.C.A.N.Y., 118 F.2d 631.

(5) In action for malpractice against a specialist, another specialist who had testified that he might have used the same solution used by defendant in treatment of plaintiff's eye, with additional treatment, might not be asked as to what additional treatment he would have used. —Wood v. Vroman, 184 N.W. 520, 215 Mich. 449.

(6) A question to a physician witness calling for the history of the accident given him by plaintiff more than a year after the accident is properly excluded, where the inquiry is under the pretext of offering evidence of the foundation of the physician's opinion for the purpose of violating general rule excluding prior statements of the party.—Boulanger v. McQuestin & Lewis, 106 A. 492, 79 N.H. 175.

(7) Other illustrations of improper questions.
U.S.—Crow v. Continental Oil Co., C.C.A.Tex., 115 F.2d 740.
Ala.—Commercial Casualty Ins. Co. v. Hudgens, 160 So. 106, 230 Ala. 182—State v. Brintle, 93 So. 429, 207 Ala. 500.
Cal.—Commercial Union Assur. Co. v. Pacific Gas & Electric Co., 31 P.2d 793, 220 Cal. 515.
Ky.—Axton v. Vance, 269 S.W. 534, 207 Ky. 580.
La.—Dees v. Louisiana Oil Refining Corporation, App., 162 So. 597.
Md.—Mitchell v. Slye, 122 A. 555, 143 Md. 418.
N.Y.—Application of Grade Crossing and Terminal Station Commission of City of Buffalo, 8 N.Y.S.2d 424, 255 App.Div. 342.
Or.—Green Mountain Log Co. v. Columbia & N. R. R. R., 30 P.2d 1047, 146 Or. 461.
Pa.—Lipstock v. Haddock Min. Co., 5 Sch.Reg. 338.
Utah.—Coon v. Shields, 39 P.2d 348, 88 Utah 76.
22 C.J. p 705 note 14 [e].

25. U.S.—Corrigan v. U. S., C.C.A. Idaho, 82 F.2d 106.
Ariz.—Illinois Bankers Life Ass'n v. Theodore, 55 P.2d 806, 47 Ariz. 314.
Cal.—Coogan Finance Corporation v. Beatcher, 7 P.2d 695, 120 Cal.App. 278.
Ill.—Frochter v. Arenholz, 242 Ill. App. 93.
Iowa.—Wilcox v. Crumpton, 258 N.W. 704, 219 Iowa 389.
Md.—May Oil Burner Corporation v. Munger, 152 A. 352, 159 Md. 605.
Mass.—Callaghan v. R. H. White Co., 22 N.E.2d 10, 303 Mass. 413.
N.J.—Independent Ætna Sprinkler Corporation v. Morris, 175 A. 102, 114 N.J.Law 23—Dumphy v. Thompson, 130 A. 639, 3 N.J.Misc. 1086.
Ohio.—Hager v. Cleveland Trust Co., 163 N.E. 46, 29 Ohio App. 32.

26. Ala.—O'Rear v. Richardson, 81 So. 865, 17 Ala.App. 87.

Questions held improper

(1) Question what market value of property was before and what property was worth after taking was properly excluded because not indicating in either instance quantum referred to.—Napier Hat Mfg. Co. v. Essex County Park Commission, 164 A. 484, 110 N.J.Law 213.

(2) Question to testatrix' attending physician, "what did you find in connection with her condition?" was too broad and inclusive; word "find" permitting witness to testify to or base conclusions on what he discovered or ascertained by search, study, or special effort.—In re Cashman's Will, 289 N.Y.S. 328, 159 Misc. 881, affirmed 297 N.Y.S. 150, 250 App.Div. 871, affirmed 21 N.E.2d 193, 280 N.Y. 681.

27. Ill.—State v. Ajster, 149 N.E. 297, 318 Ill. 230.

Size or nature of object

Before an expert may testify as to the size or nature of a certain object, it must be shown that such object was the same as the one in question.—Perreault v. Allen Oil Co., 179 A. 365, 87 N.H. 306—42 C.J. p 1226 note 8.

28. Ala.—Heralds of Liberty v. Collins, 110 So. 283, 216 Ala. 1.

29. Or.—Carnine v. Tibbetts, 74 P.2d 974, 158 Or. 21.

30. N.Y.—Supreme Finance Corporation v. Burnee Corporation, 262 N.Y.S. 147, 146 Misc. 374.

Question held proper

Question as to what medical witness had observed in his practice as the result of a blow on the head sufficient to raise a bump or cause contusion, without breaking skin, such as plaintiff had, was proper, as not calling for speculation or conjecture. —El Paso Electric Co. v. Beckman, Tex.Civ.App., 89 S.W.2d 470, error dismissed.

31. Ala.—Brilliant Coal Co. v. Barton, 87 So. 830, 205 Ala. 89.

32. Md.—Calder v. Levi, 177 A. 392, 168 Md. 260, 97 A.L.R. 880.
Or.—Coos Bay Logging Co. v. Barclay, 79 P.2d 672, 159 Or. 272.

33. Conn.—Worden v. Gore-Meenan Co., 78 A. 422, 83 Conn. 642.
22 C.J. p 706 note 18.

34. Wyo.—Quealy Land & Live Stock Co. v. George, 18 P.2d 253, 45 Wyo. 254.

Facts necessarily implied

A question to an expert need not expressly state facts which are necessarily implied.—Clark v. Ellsworth, 73 N.W. 1023, 104 Iowa 442.

35. Cal.—Peppercorn v. Murphy, 299 P. 762, 114 Cal.App. 101.
Me.—State v. Intoxicating Liquors, 117 A. 588, 121 Me. 438.
R.I.—Rynn v. Rynn, 181 A. 289, 55 R.I. 310.

Conclusions not based on stated conditions are not admissible, even from an expert.—Hunt v. Johnson, 19 N.Y.S.2d 191, 259 App.Div. 292.

Question held improper

Permitting physician, without showing he heard testimony describing assault, or assumed facts characterizing it, to give opinion as to effect of assault, was held error.—Kirschbaum v. Lowrey, 218 N.W. 461, 174 Minn. 107.

36. Md.—Baber v. John C. Knipp & Sons, 163 A. 862, 164 Md. 55.

the question indicate the factual basis for the opinion of the witness may be met in two ways: (1) The witness may be asked to premise his conclusion on facts within his personal knowledge or observation, without a hypothetical statement of the facts,[37] provided, according to some decisions, that the facts within his personal knowledge be first disclosed to the jury.[38] (2) He may testify on a specified state of facts, assumed in the question to be true, as to which some evidence has been received.[39] A question which calls for an opinion on a state of facts not known to the witness or stated hypothetically in the question should be excluded.[40]

37. Ala.—Watson v. Hardaway-Covington Cotton Co., 137 So. 33, 223 Ala. 443—Jones v. Keith, 134 So. 630, 223 Ala. 36—Birmingham Amusement Co. v. Norris, 112 So. 633, 216 Ala. 138, 53 A.L.R. 840.
Ark.—First Nat. Bank v. Tribble, 244 S.W. 33, 155 Ark. 264.
Ill.—Metz v. Yellow Cab Co., 248 Ill.App. 609.
Iowa.—Martin v. Chase, 189 N.W. 958, 194 Iowa 407.
Kan.—Stayton v. Stayton, 81 P.2d 1, 148 Kan. 172.
Ky.—Hicks' Adm'x v. Harlan Hospital, 21 S.W.2d 125, 231 Ky. 60.
Md.—Langenfelder v. Thompson, 20 A.2d 491—Prudential Ins. Co. of America v. Brookman, 175 A. 838, 167 Md. 616—Berman v. Brown, 141 A. 498, 154 Md. 698.
Mich.—O'Donnell v. Oliver Iron Mining Co., 262 N.W. 728, 273 Mich. 27.
Mo.—Oesterle v. Kroger Grocery & Baking Co., 141 S.W.2d 780—De Donato v. Wells, 41 S.W.2d 184, 328 Mo. 448, 82 A.L.R. 1331—Prince v. Metropolitan Life Ins. Co., App., 129 S.W.2d 5—Cities Service Gas Co. v. Peak, 54 S.W.2d 482, 227 Mo.App. 515.
N.J.—Cattania v. Fleckenstein, 143 A. 315, 105 N.J.Law 174.
N.M.—Kandelin v. Lee Moor Contracting Co., 24 P.2d 731, 37 N.M. 479.
N.Y.—Christastie v. Elmira Water, Light & R. Co., 195 N.Y.S. 156, 202 App.Div. 270.
N.C.—Keith v. Gregg, 188 S.E. 849, 210 N.C. 802.
Okl.—Roxana Petroleum Corporation v. City of Pawnee, 7 P.2d 663, 155 Okl. 141.
Or.—Carnine v. Tibbetts, 74 P.2d 974, 158 Or. 21—Heider v. Barendrick, 39 P.2d 957, 149 Or. 270—Foott v. Lindstrom & Feigenson, 22 P.2d 321, 143 Or. 309—Lippold v. Kidd, 269 P. 210, 126 Or. 160, 59 A.L.R. 875.
Pa.—Jackson v. U. S. Pipe Line Co., 191 A. 165, 325 Pa. 436.
Va.—Lawson v. Darter, 160 S.E. 74, 157 Va. 284.
Wis.—E. L. Chester Co. v. Wisconsin Power & Light Co., 247 N.W. 861, 211 Wis. 158.
22 C.J. p 706 note 15.

"In the examination of an expert there are two proper methods of interrogation: (1) Where the expert is familiar with the facts by personal observation and so testifies, he may be asked directly for his opinion, without stating the facts upon which it is based. (2) Where the expert is not familiar with the facts upon which his opinion is based, they must be stated to him hypothetically, and upon the assumption of the facts so stated he must base his opinion."—Christastie v. Elmira Water, Light & R. Co., 195 N.Y.S. 156, 157, 202 App.Div. 270.

Necessity of prior disclosure of facts

In some jurisdictions it is apparently held that, before an expert or a skilled witness may give his opinion based partly on his knowledge of the subject matter and partly on hypotheses stated in the question, he must first testify fully on the result of any examination made by him or knowledge acquired in any other way of the subject matter; but this, we think, goes largely to the weight to be given to such opinion evidence rather than its admissibility. These matters may be brought out fully by cross-examination, either before or after the expression of the opinion.
Md.—Langenfelder v. Thompson, 20 A.2d 491.
Okl.—Roxana Petroleum Corporation v. City of Pawnee, 7 P.2d 663, 155 Okl. 141.

Cause of condition

Where there is no dispute regarding the nature of the accident and the manner in which plaintiff was injured, but the sole question is whether a certain condition is the result of the injury, then there is no impropriety in directly asking the attending physician to state what in his opinion caused the condition without first requiring him to testify as to the facts.—Langenfelder v. Thompson, Md., 20 A.2d 491.

38. Ala.—Blakeney v. Alabama Power Co., 133 So. 16, 222 Ala. 394.
Mont.—Irion v. Hyde, 105 P.2d 666, 110 Mont. 570.
W.Va.—Perkins v. Monongahela Valley Traction Co., 95 S.E. 797, 81 W.Va. 781.

Facts not in record

Question calling for expert opinion of physician, based in part on facts not contained in record, is improper although facts were personally known to physician.—Hunder v. Rindlaub, 237 N.W. 915, 61 N.D. 389.

39. Ala.—Watson v. Hardaway-Covington Cotton Co., 137 So. 33, 223 Ala. 443—Jones v. Keith, 134 So. 630, 223 Ala. 36.
Cal.—Peppercorn v. Murphy, 299 P. 762, 114 Cal.App. 101.
Mo.—Oesterle v. Kroger Grocery & Baking Co., 141 S.W.2d 780.
N.Y.—Christastie v. Elmira Water, Light & R. Co., 195 N.Y.S. 156, 202 App.Div. 270.
N.C.—Keith v. Gregg, 188 S.E. 849, 210 N.C. 802.
Or.—Carnine v. Tibbetts, 74 P.2d 974, 158 Or. 21.
22 C.J. p 706 note 16.
Hypothetical questions see infra § 551.

Formal hypothesis unnecessary

Question received and treated as hypothetical in form was not improperly admitted so as to constitute prejudicial error, notwithstanding that formal hypothetical question was not prepared and presented to witness.—Kersting v. Reese, 255 P. 74, 123 Kan. 277.

40. Ark.—Arkansas Baking Co. v. Wyman, 47 S.W.2d 45, 185 Ark. 310.
Md.—Calder v. Levi, 177 A. 392, 168 Md. 260, 97 A.L.R. 880.
N.Y.—Nazzaro v. Angelilli, 216 N.Y.S. 721, 217 App.Div. 415.
Or.—Cosgrove v. Tracey, 64 P.2d 1321, 156 Or. 1—Heider v. Barendrick, 39 P.2d 957, 149 Or. 220.
Pa.—Wissinger v. Valley Smokeless Coal Co., 115 A. 880, 271 Pa. 566.
Tex.—Capitol Hotel Co. v. Rittenberry, Civ.App., 41 S.W.2d 697, error dismissed.
22 C.J. p 706 note 17.

Facts not within knowledge

Where expert's opinion was based on his own knowledge of facts, material facts not within his knowledge should have been supplied to him by hypothetical questions.
Ala.—J. H. Burton & Sons Co. v. May, 103 So. 46, 212 Ala. 435.
Or.—Lippold v. Kidd, 269 P. 210, 126 Or. 160, 59 A.L.R. 875.

Judging credibility

In action for damages by fire set by defendant's threshing machine engine, it was not error to exclude opinion evidence not in response to hypothetical questions but to questions which would have required the experts to judge of the credibility of the other witnesses.—Anderson v. Jacobson, 172 N.W. 64, 42 N.D. 87.

§ 551. —— Hypothetical Questions

a. In general
b. Form and scope of question

a. In General

An expert witness may be examined by means of a hypothetical question based on facts supported by competent evidence and claimed to be proved, thereby eliciting the witness' opinion as to the inferences properly deducible from such facts, and such a question is the only way an expert may be examined if the facts are not within his personal knowledge or observation.

It is proper to interrogate an expert witness by means of a hypothetical question based on facts claimed to be proved, thereby eliciting the witness' opinion as to the inferences properly deducible from such facts.[41] Indeed, it has been said that assumption of facts in putting a question may be regarded as a test of whether a witness is being examined as an expert.[42] The expert, properly so called, is asked what would be his judgment on all[43] or any prescribed part[44] of the facts, which, according to the

41. U.S.—New York Cent. R. Co. v. Johnson, C.C.A.Mo., 27 F.2d 699, certiorari granted 49 S.Ct. 27, 278 U.S. 590, 73 L.Ed. 523, reversed on other grounds 49 S.Ct. 300, 279 U. S. 310, 73 L.Ed. 706, amended 49 S.Ct. 417—Moyer v. Ætna Life Ins. Co., D.C.Pa., 39 F.Supp. 725.
Ala.—Pearson v. Central of Georgia Ry. Co., 110 So. 5, 215 Ala. 239.
Colo.—Riss & Co. v. Galloway, 114 P.2d 550.
Ga.—Morgan v. Bell, 5 S.E.2d 897, 189 Ga. 432—Fincher v. Davis, 108 S.E. 905, 27 Ga.App. 494.
Ill.—Delling v. Lake View Hospital Ass'n and Training School for Nurses, 33 N.E.2d 915, 310 Ill.App. 155—Olson v. North, 276 Ill.App. 457.
Iowa.—Meeker v. Meeker, 37 N.W. 773, 74 Iowa 352, 7 Am.S.R. 489.
Kan.—Tovey v. Geiser, 92 P.2d 3, 150 Kan. 149—Updegraff v. Gage-Hall Clinic, 264 P. 1078, 125 Kan. 518.
Ky.—Springfield Fire & Marine Ins. Co. v. Ramey, 53 S.W.2d 560, 245 Ky. 367—Security Benefit Ass'n v. Kibby, 295 S.W. 164, 220 Ky. 330.
Md.—State, for Use of Kalives, v. Baltimore Eye, Ear and Throat Hospital, 10 A.2d 612, 177 Md. 517—Standard Oil Co. of New Jersey v. Stern, 173 A. 205, 167 Md. 211.
Minn.—Rice v. New York Life Ins. Co., 290 N.W. 798, 207 Minn. 268.
Mo.—Oesterle v. Kroger Grocery & Baking Co., 141 S.W.2d 780—Bode v. Wells, 15 S.W.2d 335, 322 Mo. 386—Prince v. Metropolitan Life Ins. Co., App., 129 S.W.2d 5—Kelly v. Kansas City Building & Loan Ass'n, 81 S.W.2d 440, 229 Mo.App. 686—Eidson v. Metropolitan St. R. Co., App., 209 S.W. 575.
Neb.—Chambers v. Chicago, B. & Q. R. Co., 293 N.W. 338—Shotwell v. First Nat. Bank, 256 N.W. 508, 127 Neb. 676—Jacobson v. Skinner Packing Co., 226 N.W. 321, 118 Neb. 711.
N.H.—James E. Watkins Co. v. Peterson Motor Express, 188 A. 461, 88 N.H. 476—L'Esperance v. Sherburne, 155 A. 203, 85 N.H. 103.
N.J.—Woodrow v. Travelers Ins. Co., 1 A.2d 447, 121 N.J.Law 170—Kingsley v. Welcher, 185 A. 531, 14 N.J.Misc. 428.
N.C.—Riggs v. Norfolk-Southern R. Co., 124 S.E. 749, 188 N.C. 366.
Ohio.—City of Mingo Junction v. Birch, 3 N.E.2d 624, 52 Ohio App. 201—Ford Motor Co. v. Dillon, 200 N.E. 525, 51 Ohio App. 278.
Or.—Cobb v. Spokane, P. & S. Ry. Co., 44 P.2d 731, 150 Or. 226.
Pa.—Winters v. State Workmen's Ins. Fund, 7 A.2d 112, 136 Pa.Super. 293.
Tex.—Anderson v. Reichart, Civ.App., 116 S.W.2d 772, error dismissed—Zurich General Accident & Liability Ins. Co. v. Wood, Civ.App., 10 S.W.2d 760, error dismissed—Morten Inv. Co. v. Trevey, Civ. App., 8 S.W.2d 527, error dismissed—San Angelo Water, Light & Power Co. v. Baugh, Civ.App., 270 S.W. 1101.
Utah.—Mary Jane Stevens Co. v. First Nat. Bldg. Co., 57 P.2d 1099, 89 Utah 456.
W.Va.—Cook v. Coleman, 111 S.E. 750, 90 W.Va. 748.
36 C.J. p 235 notes 62, 66–68.

Elements

Hypothetical question involves two distinct elements, namely, premise and inference or conclusion based on premise.—Hunder v. Rindlaub, 237 N. W. 915, 61 N.D. 389.

Personal observation

Where the evidence is conflicting or complicated by many details, or where the grounds on which the witness is to base his opinion are not fully understood, it is proper for the trial court to require the facts to be submitted to the witness hypothetically, even though he had personal observation.—Langenfelder v. Thompson, Md., 20 A.2d 491.

42. Cal.—Dameron v. Ansbro, 178 P. 874, 39 Cal.App. 289.
Idaho.—Evans v. Cavanagh, 73 P.2d 83, 58 Idaho 324.
S.C.—Ellis v. Kansas City Life Ins. Co., 197 S.E. 398, 400, 187 S.C. 334, quoting **Corpus Juris.**
Tex.—Fidelity Union Casualty Co. v. Dapperman, Civ.App., 47 S.W.2d 408, 417, error dismissed, quoting **Corpus Juris.**
22 C.J. p 706 note 19.

"The purpose of a hypothetical cr supposititious question, and the only reason for its allowance, is to obtain the opinion of an expert witness as to probabilities under a given case, the facts of which recited in the question are supposed to be established."—Atlantic Coast Line R. Co. v. Shouse, 91 So. 90, 93, 83 Fla. 156.

43. U.S.—Mason & Hanger Co. v. Burnam, C.C.A.Ky., 36 F.2d 330—New York Cent. R. Co. v. Johnson, C.C.A.Mo., 27 F.2d 699, certiorari granted 49 S.Ct. 27, 278 U. S. 590, 73 L.Ed. 523, reversed on other grounds 49 S.Ct. 300, 279 U.S. 310, 73 L.Ed. 706, amended 49 S.Ct. 417.
Cal.—Matthiesen v. Smith, 60 P.2d 873, 16 Cal.App.2d 479.
Ind.—McCoy v. General Glass Corporation, 17 N.E.2d 473, 106 Ind. App. 116.
Minn.—Rice v. New York Life Ins. Co., 290 N.W. 798, 207 Minn. 268.
Tex.—Fidelity & Casualty Co. of New York v. Van Arsdale, Civ.App., 108 S.W.2d 550, error dismissed.
Utah.—Smith v. Payne, 206 P. 715, 60 Utah 89.
22 C.J. p 706 note 20.

"A hypothetical question should be so framed as to recite all the facts in evidence relevant to the formation of an opinion, and then, assuming the facts to be true, the witness should be asked, if able to form an opinion therefrom, to state such opinion."—Shuffield v. Taylor, 83 S. W.2d 955, 960, 125 Tex. 601, reversing Taylor v. Shuffield, Civ.App., 52 S.W.2d 788.

44. U.S.—New York Cent. R. Co. v. Johnson, C.C.A.Mo., 27 F.2d 699, certiorari granted 49 S.Ct. 27, 278 U.S. 590, 73 L.Ed. 523, reversed on other grounds 49 S.Ct. 300, 279 U.S. 310, 73 L.Ed. 706, amended 49 S.Ct. 417.
Ark.—Missouri Pac. R. Co. v. Hampton, 112 S.W.2d 428, 195 Ark. 335—Coop v. Moore, 76 S.W.2d 675, 190 Ark. 32—Arkansas Baking Co. v. Wyman, 47 S.W. 45, 185 Ark. 310.
Cal.—Matthiesen v. Smith, 60 P.2d 873, 16 Cal.App.2d 479—Anderson v. Rindge Co., 270 P. 262, 93 Cal. App. 725.
Neb.—Prince v. Pathfinder Life Ins. Co., 276 N.W. 661, 133 Neb. 705.
Pa.—McMinis v. Philadelphia Rapid Transit Co., 135 A. 722, 288 Pa. 377—Lucas v. Haas Coal Co., 179 A. 876, 118 Pa.Super. 182.
Tex.—Humble Oil & Refining Co. v. Strauss, Civ.App., 243 S.W. 528.

decisions of the courts as listed below, are fairly and | reasonably supported by evidence[45] competent for

Utah.—Braddock by Smith v. Pacific Woodmen Life Ass'n, 54 P.2d 1189, 89 Utah 75, rehearing denied and modified on other grounds 58 P.2d 765, 89 Utah 92—Johanson v. Huntsman, 209 P. 197, 60 Utah 402—Smith v. Payne, 206 P. 715, 60 Utah 89.

22 C.J. p 707 note 21.

"Since the inference or conclusion rests upon certain premises of fact, these premises must be true; and in order that premises considered may be known and their truth or falsity be ascertained by the jury or the court, these premises must be expressly and particularly stated. For this reason the admissibility of a hypothetical question primarily depends on whether it furnishes the tribunal with the means of knowing upon what premises of fact the conclusion is based."—Mangione v. Snead, 195 A. 329, 335, 173 Md. 33—Quimby v. Greenhawk, 171 A. 59, 61, 166 Md. 335.

45. U.S.—Dairymen's Milk Co. of Pittsburgh v. McCormick Co., C.C.A.Pa., 114 F.2d 736—Ætna Life Ins. Co. v. McAdoo, C.C.A.Ark., 106 F.2d 618—Travelers Ins. Co. v. Drake, C.C.A.Cal., 89 F.2d 47—Metropolitan Life Ins. Co. v. Armstrong, C.C.A.Neb., 85 F.2d 187—New York Life Ins. Co. v. Doerksen, C.C.A.Kan., 75 F.2d 96—Virginia Beach Bus Line v. Campbell, C.C.A.N.C., 73 F.2d 97, certiorari denied 55 S.Ct. 637, 294 U.S. 727, 79 L.Ed. 1258—The Domira, D.C.N.Y., 49 F.2d 324, affirmed, C.C.A., 56 F.2d 585—South Carolina Asparagus Growers' Ass'n v. Southern Ry. Co., C.C.A.S.C., 46 F.2d 452.

Ala.—Armour & Co. v. Cartledge, 176 So. 334, 234 Ala. 644—Prudential Ins. Co. v. Calvin, 148 So. 837, 227 Ala. 146—S. H. Kress & Co. v. Barratt, 147 So. 386, 226 Ala. 455—Birmingham Electric Co. v. Ryder, 144 So. 18, 225 Ala. 369—Birmingham Electric Co. v. Glenn, 141 So. 537, 224 Ala. 620—Birmingham Amusement Co. v. Norris, 112 So. 633, 216 Ala. 138, 53 A.L.R. 840—Alabama Great Southern R. Co. v. Cornett, 106 So. 242, 214 Ala. 23.

Ark.—McGough v. Zurich General Accident & Liability Ins. Co., 147 S.W.2d 994.

Cal.—Commercial Union Assur. Co. v. Pacific Gas & Electric Co., 31 P.2d 793, 220 Cal. 515—Kershaw v. Tilbury, 8 P.2d 109, 214 Cal. 679—Treadwell v. Nickel, 228 P. 25, 194 Cal. 243—Linde v. Emmick, 61 P.2d 338, 16 Cal.App.2d 676—Rudat v. Carithers, 30 P.2d 435, 137 Cal.App. 92—Barnett v. Atchison, T. & S. F. Ry. Co., 278 P. 443, 99 Cal.App. 310—Johnson v. Clarke, 276 P. 1052, 98 Cal.App. 358—Snow v. Harris, 181 P. 676, 41 Cal.App. 34.

Conn.—Jackson v. Waller, 10 A.2d 763, 126 Conn. 294—Gruskay v. Simenauskas, 140 A. 724, 107 Conn. 380.

Del.—In re Barnes' Will, Super., 18 A.2d 433.

Fla.—Mutual Ben. Health & Accident Ass'n v. Bunting, 183 So. 321, 133 Fla. 646.

Ill.—Inlet Swamp Drainage Dist. v. Gehant, 122 N.E. 127, 286 Ill. 558.

Iowa.—Peckinpaugh v. Engelke, 247 N.W. 822, 215 Iowa 1248—Stickling v. Chicago, R. I. & P. Ry. Co., 232 N.W. 677, 212 Iowa 149—Boston v. Keokuk Electric Co., 221 N.W. 508, 206 Iowa 753.

Ky.—Graefenhan v. Rakestraw, 130 S.W.2d 66, 279 Ky. 228—Sovereign Camp, W. O. W., v. Alcock, 117 S.W.2d 938, 273 Ky. 734—Rueff v. Light, 114 S.W.2d 506, 272 Ky. 449—Helton v. Gunn Coal Mining Co., 79 S.W.2d 695, 258 Ky. 168—Stacy v. Williams, 69 S.W.2d 697, 253 Ky. 353—McGraw v. Ayers, 58 S.W.2d 378, 248 Ky. 166—Security Benefit Ass'n v. Kibby, 295 S.W. 164, 220 Ky. 330—Cincinnati, N. O. & T. P. Ry. Co. v. Ross, 279 S.W. 1075, 212 Ky. 619—New York Life Ins. Co. v. Long, 277 S.W. 978, 211 Ky. 656.

Md.—Takoma Park Bank v. Abbott, 19 A.2d 169—Snyder & Blankfard Co. v. Farmers Bank of Tifton, 16 A.2d 837, 178 Md. 601—Langenfelder v. Jones, 13 A.2d 623, 178 Md. 421, motion denied 15 A.2d 422, 178 Md. 421—Thompson v. Standard Wholesale Phosphate & Acid Works, 13 A.2d 328, 178 Md. 305—Mathiesen Alkali Works v. Redden, 10 A.2d 699, 177 Md. 560—State, for Use of Kalives, v. Baltimore Eye, Ear and Throat Hospital, 10 A.2d 612, 177 Md. 517—Baber v. John C. Knipp & Sons, 163 A. 862, 164 Md. 55—Hazelwood v. Bittinger, 150 A. 713, 159 Md. 262—Baltimore & O. R. Co. v. Brooks, 148 A. 276, 158 Md. 149—Scheller v. Schindel, 138 A. 415, 153 Md. 547—Slocum v. Jolley, 138 A. 244, 153 Md. 343.

Mass.—Sullivan v. Brabazon, 162 N.E. 312, 264 Mass. 276—Miller v. Boston & M. R. R., 134 N.E. 368, 240 Mass. 461.

Mich.—Kephart v. Horvath, 248 N.W. 598, 263 Mich. 211—De Haan v. Winter, 241 N.W. 923, 258 Mich. 293—In re Cottrell's Estate, 209 N.W. 842, 235 Mich. 627.

Minn.—Rice v. New York Life Ins. Co., 290 N.W. 798, 207 Minn. 268.

Mo.—Schulz v. St. Louis-San Francisco Ry. Co., 4 S.W.2d 762, 319 Mo. 8—Rock v. Keller, 278 S.W. 759, 312 Mo. 458—Roberts v. Woodmen Accident Co., 129 S.W.2d 1053, 233 Mo.App. 1058—McGuire v. Springfield Traction Co., App., 30 S.W.2d 794—Smith v. Creve Cœur Drayage & Motorbus Co., 296 S.W. 457, 220 Mo.App. 1122—Very v. Willi, App., 293 S.W. 500—Seewald v. Gentry, 286 S.W. 445, 220 Mo.App. 367—McNulty v. Atlas Portland Cement Co., App., 249 S.W. 7[illegible].

N.J.—Schweers v. Elizabeth-Union-Hillside-Irvington Line, 178 A. 68, 13 N.J.Misc. 188, affirmed 182 A. 842, 116 N.J.Law 179.

N.Y.—Harden v. Fahrenkopf & Reufle, 240 N.Y.S. 645, 229 App.Div. 1.

N.D.—Nelson v. Auch, 245 N.W. 819, 62 N.D. 594.

Ohio.—H. Belmer Co. v. Newton Tea & Spice Co., 14 Ohio App. 200.

Or.—Wise v. State Industrial Accident Commission, 35 P.2d 242, 148 Or. 461—Gillilan v. Portland Cremation Ass'n, 249 P. 627, 120 Or. 286.

Pa.—Jackson v. U. S. Pipe Line Co., 191 A. 165, 325 Pa. 436—Rudolph v. Shannopin Coal Co., 18 A.2d 329, 142 Pa.Super. 389—Brown v. Moss, 182 A. 777, 120 Pa.Super. 336—Harrison v. Watkins, to Use of Watkins, 170 A. 454, 112 Pa. Super. 87.

S.D.—Bennett v. Murdy, 249 N.W. 805, 61 S.D. 471.

Tex.—Prather v. McClelland, 13 S.W. 543, 76 Tex. 574—Texas Employers' Ins. Ass'n v. Fitzgerald, Com.App., 296 S.W. 509, reversing, Civ.App., 292 S.W. 925—Moore v. Rice, Civ.App., 110 S.W.2d 973—Southland-Greyhound Lines v. Cotten, Civ.App., 55 S.W.2d 1066, reversed on other grounds 91 S.W.2d 326, 126 Tex. 596—Taylor v. Shuffield, Civ.App., 52 S.W.2d 788, reversed on other grounds Shuffield v. Taylor, 83 S.W.2d 955, 125 Tex. 601—Fidelity Union Casualty Co. v. Dapperman, Civ.App., 47 S.W.2d 408, 417, error dismissed, quoting **Corpus Juris**—Texas Employers' Ins. Ass'n v. Mints, Civ.App., 10 S.W.2d 220—Norwich v. Union Indemnity Co., Civ.App., 293 S.W. 932.

Utah.—Braddock by Smith v. Pacific Woodmen Life Ass'n, 54 P.2d 1189, 89 Utah 75, rehearing denied and modified on other grounds 58 P.2d 765, 89 Utah 92.

Wash.—Jones v. McQuesten, 20 P.2d 838, 172 Wash. 480—Aronson v. City of Everett, 239 P. 1011, 136 Wash. 312—Levine v. Barry, 195 P. 1003, 114 Wash. 623.

Wis.—Delap v. Liebenson, 208 N.W. 937, 190 Wis. 73.

22 C.J. p 707 note 22.

Establishment of facts stated see infra § 552.

True state of facts

(1) Hypothetical questions pro-

consideration,[46] or which have been admitted,[47] assuming that such facts are true.[48] Of course there must be a sufficient number of facts assumed to enable the witness to give an intelligent opinion, see infra subdivision b(1) of this section.[49]

The witness having no facts in mind as the result of observation, it is only by a hypothetical question based on the evidence that a proper basis for a reasonable judgment can be furnished,[50] and the witness cannot add to the hypothetical questions facts

pounded to experts must reflect the true state of facts in evidence.
Ky.—Rueff v. Light, 114 S.W.2d 506, 272 Ky. 449.
Mo.—Thompson v. A. Morgan Hauling & Express Co., App., 26 S.W. 2d 807.
S.C.—Ellis v. Kansas City Life Ins. Co., 197 S.E. 398, 187 S.C. 334.

(2) So a question distorting instead of reflecting evidence should not be permitted.—New York Life Ins. Co. v. Doerksen, C.C.A.Kan., 75 F.2d 96.

Actual names permitted

It is not objectionable that the question contains the actual names of the persons involved where this is necessary to a clear statement of the assumed facts.—Jackson v. Waller, 10 A.2d 763, 126 Conn. 294—22 C.J. p 707 note 22 [f].

46. Ind—Abendroth v. Fidelity & Deposit Co. of Maryland, 124 N.E. 714, 73 Ind.App. 50.
Wash.—Blomskog, Erickson & Cotton v. City of Seattle, 182 P. 571, 107 Wash. 471.
22 C.J. p 707 note 22.

Incompetent witness

Question based chiefly on facts appearing in testimony of one who was incompetent as witness was improper.
Mich.—In re Doty's Estate, 180 N. W. 608, 212 Mich. 346.
Ohio.—Davis v. Rawson, 200 N.E. 536, 51 Ohio App. 274.

Hearsay and opinion excluded

(1) A hypothetical question based wholly or in part on hearsay evidence is improper.
Cal.—In re Russell's Estate, 210 P. 249, 189 Cal. 759.
Md.—Scheller v. Schindel, 138 A. 415, 153 Md. 547.
N.Y.—Belter v. Van Winkle, 254 N. Y.S. 529, 234 App.Div. 886, followed in 254 N.Y.S. 530, 234 App. Div. 886.
Pa.—Roberts v. Pitt Pub. Co., 198 A. 668, 330 Pa. 44.

(2) So it has been held that information given by party or others to a physician, other than during the course of treatment, cannot be made the basis of a hypothetical question.
Iowa.—Mitchell v. Montgomery Ward & Co., 285 N.W. 187, 226 Iowa 956.
Mo.—Aronovitz v. Arky, 219 S.W. 620—Borowski v. Loose-Wiles Biscuit Co., App., 229 S.W. 424.
N.Y.—Belter v. Van Winkle, supra.

(3) It has been held, however, that if plaintiff stated the fact of his unconsciousness at the time he was admitted to hospital to his physician it could have been used in a hypothetical question since such statements by a patient to a doctor are a necessary variant of the hearsay rule.—Roberts v. Pitt Pub. Co., supra.

(4) Also statements of witnesses as to what they observed concerning plaintiff's physical condition after accident could have been properly incorporated in hypothetical question propounded to physician.—Roberts v. Pitt Pub. Co., supra.

(5) Also the fact that question to expert was based on subjective symptoms to which party had testified went to weight of his answer, not to its admissibility.—Johnston v. Selfe, 251 N.W. 525, 190 Minn. 269.

History of case

(1) A witness offered as an expert cannot testify on a hypothetical question, using as the basis of his opinion, in addition to the facts enumerated, "the history of the case."
Mo.—Aronovitz v. Arky, 219 S.W. 620.
N.D.—Hunder v. Rindlaub, 237 N.W. 915, 61 N.D. 389.
22 C.J. p 702 note 22 [d].

(2) It has been held, however, that an expert medical witness may properly express opinion in answer to hypothetical question based partly on history of case.—Maulsbury v. Shure, 170 A. 41, 12 N.J.Misc. 137.

(3) Question asking doctor's opinion based on actual examination of party and not on history of case was not inadmissible because witness had previously stated that it would be necessary for him to consider history of case in answering question.—Adams v. Carlo, Mo.App., 101 S.W.2d 753.

47. Neb.—Morrill v. Tegarden, 26 N.W. 202, 19 Neb. 534.

48. Idaho.—Evans v. Cavanagh, 73 P.2d 83, 58 Idaho 324.
Ind.—McCoy v. General Glass Corporation, 17 N.E.2d 473, 106 Ind. App. 116.
Md.—Langenfelder v. Jones, 13 A. 2d 623, 178 Md. 421, motion denied 15 A.2d 422, 178 Md. 421—Owings v. Dayhoff, 151 A. 240, 159 Md. 403—Wood v. Hankey, 105 A. 430, 133 Md. 389.
Mass.—Kramer v. New York Life Ins. Co., 200 N.E. 390, 293 Mass. 440.
Mich.—In re Lewandowski's Estate, 210 N.W. 314, 236 Mich. 136.
Miss.—Beard v. Turritin, 161 So. 688, 689, 173 Miss. 206, citing **Corpus Juris.**
N.C.—Dempster v. Fite, 167 S.E. 33, 203 N.C. 697.
Or.—Bailey v. Loyal Protective Life Ins. Co., 105 P.2d 523.
Pa.—McMinis v. Philadelphia Rapid Transit Co., 135 A. 722, 288 Pa. 377.
Tex.—Fidelity & Casualty Co. of New York v. Van Arsdale, Civ. App., 108 S.W.2d 550, error dismissed.
22 C.J. p 707 note 24.

Question held proper

Question detailing part of testimony and concluding with request for physician's opinion "under that state of facts" was sufficient assumption of facts.—Maryland Casualty Co. v. Allen, Tex.Civ.App., 22 S.W.2d 329.

49. U.S.—New York Cent. R. Co. v. Johnson, C.C.A.Mo., 27 F.2d 699, certiorari granted 49 S.Ct. 27, 278 U.S. 590, 73 L.Ed. 523, reversed on other grounds 49 S.Ct. 300, 279 U.S. 310, 73 L.Ed. 706, amended 49 S.Ct. 417.
Cal.—Peppercorn v. Murphy, 299 P. 762, 114 Cal.App. 101.
Ky.—Axton v. Vance, 269 S.W. 534, 207 Ky. 580.
Md.—Gordon v. Opalecky, 137 A. 299, 152 Md. 536.
N.J.—Schwartz v. Howard Sav. Inst., 187 A. 171, 117 N.J.Law 180.
22 C.J. p 707 note 25.

50. U.S.—Dunagan v. Appalachian Power Co., C.C.A.W.Va., 33 F.2d 876, 68 A.L.R. 1393, certiorari denied 50 S.Ct. 152, 280 U.S. 606, 74 L.Ed. 649.
Ala.—Newman v. Louisville & N. R Co., 103 So. 856, 212 Ala. 580—Jefferson v. Republic Iron & Steel Co., 93 So. 890, 208 Ala. 143—Brown v. Mobile Electric Co., 91 So. 802, 207 Ala. 61.
Idaho.—Evans v. Cavanagh, 73 P.2d 83, 58 Idaho 324.
Ky.—Gatliff Coal Co. v. Hill's Adm'r, 92 S.W.2d 56, 58, 263 Ky. 309, citing **Corpus Juris.**
Md.—Gordon v. Opalecky, 137 A. 299, 152 Md. 536.
Mass.—Betts v. Rendle, 128 N.E. 790, 236 Mass. 441.
Mich.—In re Elliott's Estate, 257 N. W. 919, 269 Mich. 677.
Mo.—Foman v. Liberty Life Ins. Co., 51 S.W.2d 212, 227 Mo.App. 70—Security Printing Co. v. Liverpool

within his own knowledge and not in evidence.[51] The requirement of an assumption of facts in evidence continues throughout the examination of the expert, so far as the attempt to elicit affirmative facts is concerned,[52] and applies equally to cross-examination as to direct, and to the redirect as to the original case, see infra § 560.

Different hypotheses may be submitted to the witnesses for different parties, provided the facts embraced in each hypothesis have some support in the evidence,[53] but where a party's contention merely denies the truth of his opponent's position no basis for a hypothetical question is furnished.[54]

b. Form and Scope of Question

(1) In general
(2) Facts to be assumed
(3) Other particular elements
(4) Harmless error
(5) Illustrative cases

(1) In General

The form and scope of hypothetical questions are largely matters of judicial discretion, but generally such questions should be fairly and clearly framed to reflect the theory of the party as shown by the facts admitted or proved, and should confine the opinion to a judgment reasonably deducible from the facts and relevant to the issues of the case.

The form of hypothetical questions and the facts to be embraced therein are matters resting largely in the sound discretion of the trial court;[55] but the right and duty of properly framing a hypothetical question rests primarily on the counsel by whom the question is asked,[56] and he should not be permitted to frame an improper question and then cast the burden of supplying its deficiencies on the opposing counsel,[57] although it is not necessary that

& London & Globe Ins. Co., App., 263 S.W. 454.
N.Y.—Green v. Globe & Rutgers Fire Ins. Co., 192 N.Y.S. 770, 200 App. Div. 343.
Or.—Lippold v. Kidd, 269 P. 210, 126 Or. 160, 59 A.L.R. 875.
Pa.—McMinis v. Philadelphia Rapid Transit Co., 135 A. 722, 288 Pa. 377—In re Hoy's Estate, 73 Pa.Super. 512—Klinger v. Hersker, 5 Sch. Reg. 96.
Tex.—Capitol Hotel Co. v. Rittenberry, Civ.App., 41 S.W.2d 697, error dismissed.
W.Va.—Keyser Canning Co. v. Klots Throwing Co., 128 S.E. 280, 98 W. Va. 487.
22 C.J. p 708 note 26.

51. N.Y.—Davis v. Maxwell, 96 N.Y. S. 45, 208 App.Div. 128, 17 N.Y. Ann.Cas. 356.
N.D.—Hunder v. Rindlaub, 237 N.W. 915, 61 N.D. 389.
S.C.—Ellis v. Kansas City Life Ins. Co., 197 S.E. 398, 400, 187 S.C. 334, quoting **Corpus Juris.**
Tex.—Fidelity Union Casualty Co. v. Dapperman, Civ.App., 47 S.W.2d 408, 417, error dismissed, quoting **Corpus Juris.**
22 C.J. p 708 note 27.

52. N.C.—Keith v. Gregg, 188 S.E. 849, 210 N.C. 802.
S.C.—Ellis v. Kansas City Life Ins. Co., 197 S.E. 398, 400, 187 S.C. 334, quoting **Corpus Juris.**
Tex.—Fidelity Union Casualty Co. v. Dapperman, Civ.App., 47 S.W.2d 408, 417, error dismissed, quoting **Corpus Juris.**
22 C.J. p 708 note 28.

53. Ala.—Louis Pizitz Dry Goods Co. v. Cusimano, 91 So. 779, 206 Ala. 689.
Idaho.—Cochran v. Gritman, 203 P. 289, 34 Idaho 654.
S.C.—Ellis v. Kansas City Life Ins. Co., 197 S.E. 398, 400, 187 S.C. 334, quoting **Corpus Juris.**
22 C.J. p 708 note 31.

54. Cal.—Yaeger v. Southern California R. Co., 51 P. 190, 5 Cal. Unrep.Cas. 870.

55. U.S.—U. S. v. Aspinwall, C.C.A. Or., 96 F.2d 867—Travelers Ins. Co. v. Drake, C.C.A.Cal., 89 F.2d 47—Metropolitan Life Ins. Co. v. Armstrong, C.C.A.Neb., 85 F.2d 187—U. S. v. Sessin, C.C.A.Kan., 84 F.2d 667—New York Life Ins. Co. v. Doerksen, C.C.A.Kan., 75 F.2d 96—New York Cent. R. Co. v. Johnson, C.C.A.Mo., 27 F.2d 699, certiorari granted 49 S.Ct. 27, 278 U.S. 590, 73 L.Ed. 523, reversed on other grounds 49 S.Ct. 300, 279 U.S. 310, 73 L.Ed. 706, amended 49 S.Ct. 417—Laughlin v. Christensen, C.C.A. Mo., 1 F.2d 215—Napier v. Greenzweig, N.Y., 256 F. 196, 167 C.C.A. 412.
Ala.—J. H. Burton & Sons Co. v. May, 103 So. 46, 212 Ala. 435—Alabama Power Co. v. Bruce, 96 So. 346, 348, 209 Ala. 423, citing **Corpus Juris**—Brown v. Mobile Electric Co., 91 So. 802, 207 Ala. 61—Louis Pizitz Dry Goods Co. v. Cusimano, 91 So. 779, 206 Ala. 689.
Ark.—Missouri Pac. R. Co. v. Hampton, 112 S.W.2d 428, 195 Ark. 335.
Cal.—Bickford v. Lawson, 81 P.2d 216, 27 Cal.App.2d 416—Cowles v. Independent Elevator Co., 70 P.2d 711, 22 Cal.App.2d 109.
Md.—Thompson v. Standard Wholesale Phosphate & Acid Works, 13 A.2d 328, 178 Md. 305—Quimby v. Greenhawk, 171 A. 59, 166 Md. 335.
Mass.—Sullivan v. Brabazon, 162 N.E. 312, 264 Mass. 276—Taylor v. Creeley, 152 N.E. 3, 257 Mass. 21.
Mich.—In re Stephens' Estate, 222 N. W. 128, 244 Mich. 547.
Okl.—Mead Bros. v. Watts, 273 P. 207, 135 Okl. 23.
Or.—Cobb v. Spokane, P. & S. Ry. Co., 44 P.2d 731, 150 Or. 226.
S.D.—Bennett v. Murdy, 249 N.W. 805, 808, 61 S.D. 471, citing **Corpus Juris**—Dean v. Seeman, 176 N.W. 649, 651, 42 S.D. 577.
22 C.J. p 708 note 33.
"The propriety of allowing hypothetical questions rests largely in the discretion of the trial court, and, where such questions are allowable, it is the duty of the trial court to see that they are properly framed, that they are responsive to the issues in question, and that they assume only such facts as are supported by some evidence in the record."—Dean v. Seeman, supra.
There is no exclusive form in which a hypothetical question is required to be framed.—Fidelity & Casualty Co. of New York v. Van Arsdale, Tex.Civ.App., 108 S.W.2d 550, error dismissed.
Rules not finical
Rules of evidence are not finical as to form of hypothetical questions, it being sufficient if the question is, in substance, propounded as a hypothesis.—Stresenreuter Bros. v. Bowes, 233 Ill.App. 143.
Whether foundation has been laid for hypothetical question is within court's discretion.—Stickling v. Chicago, R. I. & P. Ry. Co., 232 N.W. 677, 212 Iowa 149.

56. Mich.—In re Stephens' Estate, 222 N.W. 128, 244 Mich. 547.
Questions should be carefully framed where it appears that jury must depend largely upon the answers.—Dameron v. Ansbro, 178 P. 874, 39 Cal.App. 289.

57. Minn.—Frigstad v. Great Northern R. Co., 111 N.W. 838, 101 Minn. 40.

he submit his question to the inspection of the other side.[58] The question may and should be so framed as to reflect the theory of the party propounding it, as shown by the facts admitted or proved,[59] and must confine the opinion given to the likely or probable result of the combination or circumstances assumed.[60]

Purely abstract or theoretical questions[61] and those too vague or indefinite to permit the witness to form a judgment of any value[62] should be excluded. The same course is proper where the question is obviously unfair[63] or misleading;[64] when it is ambiguous[65] or unintelligible,[66] or shows misconception;[67] where it is complicated, involved, or ob-

58. Vt.—State v. Doherty, 48 A. 658, 72 Vt. 381, 82 Am.S.R. 951.

59. U.S.—Travelers Ins. Co. v. Drake, C.C.A.Cal., 89 F.2d 47—New York Cent. R. Co. v. Johnson, C.C. A.Mo., 27 F.2d 699, certiorari granted 49 S.Ct. 27, 278 U.S. 590, 73 L. Ed. 523, reversed on other grounds 49 S.Ct. 300, 279 U.S. 310, 73 L. Ed. 706, amended 49 S.Ct. 417.
Ala.—Alabama Power Co. v. Bruce, 96 So. 346, 348, 209 Ala. 423, citing **Corpus Juris.**
Cal.—Forbis v. Holzman, 55 P.2d 201, 5 Cal.2d 407—Treadwell v. Nickel, 228 P. 25, 194 Cal. 243—Christiansen v. Hollings, App., 112 P.2d 723—Weaver v. Shell Co. of California, 94 P.2d 364, 34 Cal.App.2d 713—Coyne v. Pacific Mut. Life Ins. Co. of California, 47 P.2d 1079, 8 Cal. App.2d 104—Coogan Finance Corporation v. Beatcher, 7 P.2d 695, 120 Cal.App. 278.
Fla.—Southern Utilities Co. v. Murdock, 128 So. 430, 99 Fla. 1086—Atlantic Coast Line R. Co. v. Shouse, 91 So. 90, 83 Fla. 156.
Mo.—Cole v. Uhlmann Grain Co., 100 S.W.2d 311, 340 Mo. 277—Evans v. Partlow, 16 S.W.2d 212, 218, 322 Mo. 11, citing **Corpus Juris**—Zeller v. Wolff-Wilson Drug Co., App., 51 S.W.2d 881.
Neb.—Landis & Schick v. Watts, 121 N.W. 980, 84 Neb. 671, 117 N.W. 705, 82 Neb. 359.
N.J.—Schnoor v. Palisades Realty & Amusement Co., 172 A. 43, 112 N.J. Law 506—Molnar v. Hildebrecht Ice Cream Co., 164 A. 300, 110 N.J. Law 246—Birtwistle v. Public Service Ry. Co., 112 A. 193, 94 N. J.Law 407.
Or.—Sherrard v. Werline, 91 P.2d 344, 162 Or. 135.
S.D.—Bennett v. Murdy, 249 N.W. 805, 61 S.D. 471.
Tex.—Montgomery Ward & Co. v. Levy, Civ.App., 136 S.W.2d 663, error dismissed, judgment correct.
Utah.—Mary Jane Stevens Co. v. First Nat. Bldg. Co., 57 P.2d 1099, 89 Utah 456.
Vt.—Woodhouse v. Woodhouse, 130 A. 758, 99 Vt. 91.
Wash.—Wilson v. Pacific Power & Light Co., 17 P.2d 846, 171 Wash. 232.

"It is the privilege of counsel to assume any state of facts which there is any testimony tending to prove, and to have the opinion of the expert based on the facts assumed. But the testimony should tend to establish the facts embraced in the question."—Lehman v. Knott, 196 P. 476, 479, 100 Or. 59.

Ordinary method of treatment

A hypothetical question, put to a medical expert witness as to the usual and ordinary method of treating a fracture was not objectionable because it assumed that there was only one usual and ordinary method, this being plaintiff's theory and defendant having a right to show otherwise.—Dean v. Seeman, 176 N.W. 649, 42 S.D. 577.

60. Iowa.—Stutsman v. Des Moines City R. Co., 163 N.W. 580, 180 Iowa 524.
Md.—Globe Indemnity Co. of New York v. Reinhart, 137 A. 43, 152 Md. 439.

"The question must be so framed as to show some relation between the facts assumed in the question and the theory supposed to be supported by them so that the answer or judgment of the expert will be something more than a mere guess."—Southern Utilities Co. v. Murdock, 128 So. 430, 99 Fla. 1086.

Probability and possibility

(1) Hypothetical questions asked a doctor should not call for his opinion merely as to possibility of injury from certain causes, but should require him to state whether, in his opinion, such injuries would result with a reasonable certainty.—Duvall v. Brooklyn Cooperage Co., Mo.App., 275 S.W. 586.

(2) Questions asked an expert as to the probable and possible future effects of injury, which were answered by opinions based on probability, not possibility, were not error.—Kime v. Owens, 182 N.W. 398, 191 Iowa 323.

Absence of connection

Hypothetical question separating statement of facts from interrogation and disclosing no connection between them is defective in form.—Gordon v. Opalecky, 137 A. 299, 152 Md. 536.

61. Md.—Scheller v. Schindel, 138 A. 415, 153 Md. 547—Daugherty v. Robinson, 122 A. 124, 143 Md. 259.
22 C.J. p 709 note 37.

62. U.S.—Harrison v. U. S., D.C.Pa., 49 F.2d 948.
Idaho.—Evans v. Bannock County, 83 P.2d 427, 59 Idaho 442.
Ill.—Goldblatt v. Dering, 2 N.E.2d 386, 284 Ill.App. 654.
Iowa.—McClary v. Great Northern Ry. Co., 227 N.W. 646, 209 Iowa 67.
Mass.—Callaghan v. R. H. White Co., 22 N.E.2d 10, 303 Mass. 413.
Minn.—Yates v. Gamble, 268 N.W. 670, 198 Minn. 7.
Tex.—American Glycerin Co. v. Kenridge Oil Co., Civ.App., 295 S.W. 633—Norwich Union Indemnity Co. v. Davis, Civ.App., 293 S.W. 932.
W.Va.—Hazelrigs v. City of Huntington, 182 S.E. 877, 116 W.Va. 757.
22 C.J. p 709 note 38.

Question as to testamentary capacity was improper where assumed facts were insufficient to form basis for opinion and question was not so related in point of time to date of execution of will as to have any probative force.—Rudersdorf v. Bowers, Civ.App., 112 S.W.2d 784, error dismissed.

63. Cal.—Johnson v. Clarke, 276 P. 1052, 98 Cal.App. 358.

64. Cal.—Treadwell v. Nickel, 228 P. 25, 194 Cal. 243—In re Gould's Estate, 205 P. 457, 188 Cal. 353—Hill v. Peres, 28 P.2d 946, 136 Cal.App. 132—Johnson v. Clarke, 276 P. 1052, 98 Cal.App. 358.
Colo.—Enyart v. Orr, 238 P. 29, 78 Colo. 6.
Ind.—New York Life Ins. Co. v. Kuhlenschmidt, 33 N.E.2d 340.
Ky.—Illinois Cent. R Co. v. Townsend, 267 S.W. 161, 206 Ky. 329.
Md.—Bloecher & Schaaf v. Pennsylvania R. Co., 160 A. 281, 162 Md. 463—Scheller v. Schindel, 138 A. 415, 153 Md. 547.
Pa.—Sweeney v. Blue Anchor Beverage Co., 189 A. 331, 325 Pa. 216.
Tex.—Adams v. Adams, Civ.App., 253 S.W. 605, error dismissed 278 S.W. 1114, 114 Tex. 582.
22 C.J. p 709 note 39.

65. U.S.—Harrison v. U. S., D.C.Pa., 49 F.2d 948.
Tex.—Adams v. Adams, Civ.App., 253 S.W. 605, error dismissed 278 S.W. 1114, 114 Tex. 582.
W.Va.—Hazelrigs v. City of Huntington, 182 S.E. 877, 116 W.Va. 757.
22 C.J. p 709 note 40.

66. Iowa.—Thayer v. Smoky Hollow Coal Co., 96 N.W. 718, 121 Iowa 121.
Pa.—Kunkel v. Allentown Portland Cement Co., 94 A. 450, 249 Pa. 104.
22 C.J. p 709 note 41.

67. U.S.—Harrison v. U. S., D.C. Pa., 49 F.2d 948.

scure;[68] when it is argumentative;[69] when it calls for mere conjecture;[70] when it calls for an expression of opinion that is irrelevant to the issues or not sufficiently confined thereto;[71] where it assumes a disputed fact as an absolute fact in the case;[72] where it is so framed as to require a single answer to several distinct propositions;[73] where it calls for a categorical answer and the witness says he cannot answer it,[74] or where it is based on an assumption which is false.[75] A question is ordinarily improper where it does not present sufficient facts to afford ground for a reasonable conclusion;[76] but it has been said that it is for the witness, and not the court, to determine whether from the facts stated he is able to express a scientific opinion.[77] If counsel disclaim an intention of relying on the theory of the case on which a question is framed it should be rejected.[78]

Illustrative questions may be permitted.[79]

A mere statement introductory to a hypothetical question as to what the examiner intends to state in the question, adding nothing to the facts stated, does not render the question improper.[80]

Use of a medical text book by counsel merely to aid him in forming a question to be propounded to an expert witness is proper.[81]

(2) Facts to Be Assumed

A hypothetical question may and should contain a full and fair recital of all relevant and material facts already in evidence bearing on the theory of the party propounding it, including undisputed facts; but the question need not embrace all the facts in the case or state the other party's contentions on disputed matters

Md.—Safe-Deposit & Trust Co. of Baltimore v. Berry, 49 A. 401, 93 Md. 560.

68. Md.—Thompson v. Standard Wholesale Phosphate & Acid Works, 13 A.2d 328, 178 Md. 305.
22 C.J. p 709 note 43.

Confusing amendments
Admission of expert's response to question which by successive amendments was calculated to confuse jury as to what expert was supposed to answer was error.—Thompson v. Standard Wholesale Phosphate & Acid Works, 13 A.2d 328, 178 Md. 305.

69. Tex.—Houston & T. C. R. Co. v. Johnson, Civ.App., 118 S.W. 1150.

70. Ala.—Landham v. Lloyd, 136 So. 815, 223 Ala. 487—Sovereign Camp, W. O. W., v. Gibbs, 114 So. 915, 217 Ala. 108.
Iowa.—McClary v. Great Northern Ry. Co., 227 N.W. 646, 209 Iowa 67.
Ky.—McGraw v. Ayers, 58 S.W.2d 378, 248 Ky. 166.
Md.—Baber v. John C. Knipp & Sons, 163 A. 862, 164 Md. 55—Gordon v. Opalecky, 137 A. 299, 152 Md. 536.
Mass.—Callaghan v. R. H. White Co., 22 N.E.2d 10, 303 Mass. 413.
Mich.—Leitch v. Getz, 267 N.W. 581, 275 Mich. 645.
Mo.—Crockett v. City of Mexico, 77 S.W.2d 464, 336 Mo. 145—Perkins v. Wilcox, 242 S.W. 974, 294 Mo. 700.
N.Y.—Sparkill Realty Corporation v. State, 197 N.E. 192, 268 N.Y. 192, reversing 275 N.Y.S. 766, 242 App. Div. 862, and reargument denied 198 N.E. 529, 268 N.Y. 632.
Or.—Spicer v. Benefit Ass'n of Railway Employees, 17 P.2d 1107, 142 Or. 574.
Pa.—Sweeney v. Blue Anchor Beverage Co., 189 A. 331, 325 Pa. 216.
Utah.—Tremelling v. Southern Pac. Co., 257 P. 1066, 70 Utah 72.
22 C.J. p 709 note 45.

Questions held proper
Or.—Spicer v. Benefit Ass'n of Railway Employees, 17 P.2d 1107, 142 Or. 574.

71. Cal.—Carroll v. Central Counties Gas Co, 273 P. 875, 96 Cal.App. 161, followed in Cobbs v. Central Counties Gas Co., 273 P. 878, 96 Cal.App. 782, rehearing denied Carroll v. Central Counties Gas Co., 274 P. 594, 96 Cal.App. 161.
N.M.—Horton v. Atchison, T. & S. F. Ry. Co., 288 P. 1065, 34 N.M. 594.
Pa.—Sweeney v. Blue Anchor Beverage Co., 189 A. 331, 325 Pa. 216.
W.Va.—Hazelrigs v. City of Huntington, 182 S.E. 877, 116 W.Va. 757.

Question not objectionable as not within pleadings
Mo.—Mooney v. Monark Gasoline & Oil Co., 298 S.W. 69, 317 Mo. 1255.

72. Mass.—Chalmers v. Whitmore Mfg. Co., 42 N.E. 98, 164 Mass. 532.
Mo.—Castanie v. United R. Co., 155 S.W. 38, 249 Mo. 192, L.R.A.1915A 1056.
N.Y.—Causa v. Kenny, 141 N.Y.S. 98, 156 App.Div. 134.

73. Cal.—Kahn v. Triest-Rosenberg Cap Co., 73 P. 164, 139 Cal. 340.

74. N.Y.—Quinn v. O'Keeffe, 41 N.Y.S. 116, 9 App.Div. 68, appeal dismissed 45 N.E. 1134, 151 N.Y. 633.

75. Iowa.—Grell v. Lumsden, 220 N.W. 123, 206 Iowa 166.
Tex.—American Glycerin Co. v. Kenridge Oil Co., Civ.App., 295 S.W. 633.
22 C.J. p 709 note 50.

76. Ala.—Hill v. Almon, 141 So. 625, 224 Ala. 658—J. H. Burton & Sons Co. v. May, 103 So. 46, 212 Ala. 435—Alabama Power Co. v. Bruce, 96 So. 346, 209 Ala. 423.
Cal.—Citron v. Fields, 85 P.2d 534, 30 Cal.App.2d 51—Bickford v. Lawson, 81 P.2d 216, 27 Cal.App.2d 416—Jensen v. Findley, 62 P.2d 430, 17 Cal.App.2d 536—Rudat v. Carithers, 30 P.2d 435, 137 Cal.App. 92.
Ill.—Vaughn v. Director General of Railroads, 218 Ill.App. 595.
Iowa.—Pentony v. Dudley, 198 N.W. 78, 197 Iowa 744.
Md.—Bozman v. State, to Use of Cronhardt, 9 A.2d 60, 177 Md. 151—Mangione v. Snead, 195 A. 329, 173 Md. 33—Gordon v. Opalecky, 137 A. 299, 152 Md. 536.
Mo.—Bennett v. Punton Sanitarium Ass'n, 249 S.W. 666, 213 Mo.App. 363.
Neb.—Berliner v. Director General of Railroads, 184 N.W. 914, 106 Neb. 801.
N.J.—Schwartz v. Howard Sav. Inst., 187 A. 171, 117 N.J.Law 180.
N.Y.—Hunt v. Johnson, 19 N.Y.S.2d 191, 259 App.Div. 292—Peck v. Cudahy Packing Co., 8 N.Y.S.2d 778, 255 App.Div. 431.
Pa.—Sweeney v. Blue Anchor Beverage Co., 189 A. 331, 325 Pa. 216.
S.D.—In re Hosmer's Estate, 196 N.W. 545, 47 S.D. 147.
Utah.—Tremelling v. Southern Pac. Co., 257 P. 1066, 70 Utah 72.
Wash.—Thomas v. Inland Motor Freight, 68 P.2d 603, 190 Wash. 428.
22 C.J. p 709 note 48.

77. U.S.—Metropolitan Life Ins. Co. v. Armstrong, C.C.A.Neb., 85 F.2d 187.

78. Ind.—Cincinnati, H. & I. R. Co. v. Jones, 12 N.E. 113, 111 Ind. 259.

79. Mich.—Kraatz v. Brush Electric Light Co., 46 N.W. 787, 82 Mich. 457, 464.
22 C.J. p 709 note 55.

80. Okl.—Shawnee Gas & Electric Co. v. Hunt, 122 P. 673, 32 Okl. 368.

81. Mo.—Dean v. Wabash R. Co., 129 S.W. 953, 229 Mo. 425.
Mont.—Emerson v. Butte Electric R. Co., 129 P. 319, 46 Mont. 454.
22 C.J. p 709 note 58.

of fact, and it should not include the opinions of another expert witness which are in evidence.

While considerable latitude must be allowed a party in the choice of facts constituting the basis of a hypothetical question,[82] the question should place before the witness sufficient facts to enable him to give a judgment which will be of value to the jury.[83] Indeed, it has been regarded as necessary that the question should assume all material facts relating to the subject on which the judgment of the expert is sought,[84] even though some of such facts are detrimental to proponent's case;[85] and a ques-

82. U.S.—U. S. v. Aspinwall, C.C.A. Or., 96 F.2d 867—Virginia Beach Bus Line v. Campbell, C.C.A.N.C., 73 F.2d 97, certiorari denied 55 S. Ct. 637, 294 U.S. 727, 79 L.Ed. 1258.
Cal.—Forbis v. Holzman, 55 P.2d 201, 5 Cal.2d 407—Treadwell v. Nickel, 228 P. 25, 194 Cal. 243.
"The party framing such questions should be allowed a fairly wide latitude, so long as he keeps within reasonable bounds as to his theory of the case and the evidence supporting such theory"—Dean v. Seeman, 176 N.W. 649, 651, 42 S.D. 577.

83. Ala.—Hill v. Almon, 141 So. 625, 224 Ala. 658—Batson v. Batson, 117 So. 10, 217 Ala. 450—J. H. Burton & Sons Co. v. May, 103 So. 46, 212 Ala. 435—Alabama Power Co. v. Bruce, 96 So. 346, 209 Ala. 423—Louis Pizitz Dry Goods Co. v. Cusimano, 91 So. 779, 206 Ala. 689—Zimmern v. Standard Motor Car Co., 88 So. 743, 205 Ala. 580.
Cal.—McCullough v. Langer, 73 P.2d 649, 23 Cal.App.2d 510—Peppercorn v. Murphy, 299 P. 762, 114 Cal.App. 101—Dameron v. Ansbro, 178 P. 874, 39 Cal.App. 289.
Conn.—Di Biase v. Garnsey, 136 A. 871, 106 Conn. 86.
Idaho.—Hobbs v. Union Pac. R. Co., 108 P.2d 841.
Ill.—Sanitary Dist. of Chicago v. Industrial Commission, 175 N.E. 372, 343 Ill. 236.
Ind.—McCoy v. General Glass Corporation, 17 N.E.2d 473, 106 Ind. App. 116.
Iowa.—Pentony v. Dudley, 198 N.W. 78, 197 Iowa 744.
Md.—Mathiesen Alkali Works v. Redden, 10 A.2d 699, 177 Md. 560—Slacum v. Jolley, 138 A. 244, 153 Md. 343—Gordon v. Opalecky, 137 A. 299, 152 Md. 536.
Mich.—In re Stephens' Estate, 222 N.W. 128, 244 Mich. 547.
Mo.—Roberts v. Woodmen Acc. Co., 129 S.W.2d 1053, 233 Mo.App. 1058—Bennett v. Punton Sanitarium Ass'n, 249 S.W. 666, 213 Mo.App. 363.
Ohio.—Manley v. Coleman, 19 Ohio App. 284.
Or.—In re Riggs' Estate, 250 P. 753, 120 Or. 38.
Pa.—Harrison v. Watkins, to Use of Watkins, 170 A. 454, 112 Pa.Super. 87.
Tex.—Shuffield v. Taylor, 83 S.W.2d 955, 125 Tex. 601, reversing Taylor v. Shuffield, Civ.App., 52 S.W.2d 788—Gulf Casualty Co. v. Archer, Civ.App., 118 S.W.2d 976, error dismissed.
W.Va.—Blair v. Clark Coal & Coke Co., 148 S.E. 849, 850, 107 W.Va. 507, citing **Corpus Juris.**
Wis.—Hoffman v. Regling, 258 N.W. 347, 117 Wis. 66.
22 C.J. p 710 note 72.
"The chief test of the competency of a hypothetical question . . . is whether it is a full and fair recital of all the essential evidence disclosed by the record on the particular issue which is involved. Where the question assumes facts in direct conflict with the undisputed evidence, or omits material facts upon which a determination of the problem depends, the hypothetical question becomes misleading and it is then likely to lead the witness to a false conclusion."—Bickford v. Lawson, 81 P.2d 216, 222, 27 Cal. App.2d 416.

Facts stated by inference

Question was not objectionable, as not stating certain fact, where all circumstances from which such fact, which was not directly testified to, could be inferred, were stated.—Carter v. Standard Acc. Ins. Co., 238 P. 259, 65 Utah 465, 41 A.L.R. 1495.

Hearing of testimony

It was held not necessary to insert in question to expert every material element of hypothesis founded on evidence, if he was present and heard testimony.—Baltimore & O. R. Co. v. Brooks, 148 A. 276, 158 Md. 149.

84. U.S.—Dairymen's Milk Co. of Pittsburgh v. McCormick Co., C. C.A.Pa., 114 F.2d 736—Ætna Life Ins. Co. of Hartford, Conn., v. Maxwell, C.C.A.W.Va., 89 F.2d 988—Clauson v. U. S., C.C.A.S.D., 60 F.2d 694—Payne v. Cohlmeyer, C.C. A.Ill., 275 F. 803.
Ala.—Batson v. Batson, 117 So. 10, 217 Ala. 450.
Ark.—McGough v. Zurich General Accident & Liability Ins. Co., 147 S.W.2d 994.
Cal.—Bickford v. Lawson, 81 P.2d 216, 27 Cal.App.2d 416—Linde v. Emmick, 61 P.2d 338, 16 Cal.App. 2d 676—Hibernia Savings & Loan Soc. v. Ellis Estate Co., 22 P.2d 806, 132 Cal.App. 408—Lawrence v. Butler, 249 P. 840, 79 Cal.App. 436.
Ill.—Wolczek v. Public Service Co. of Northern Illinois, 174 N.E. 577, 342 Ill. 482—Peterson v. Cochran & McCluer Co., 31 N.E.2d 825, 308 Ill.App 348.
Ky.—Graefenhan v. Rakestraw, 130 S.W.2d 66, 279 Ky. 228—Sovereign Camp, W. O W., v. Alcock, 117 S. W.2d 938, 273 Ky. 734—Rueff v. Light, 114 S.W.2d 506, 272 Ky. 449—Hicks' Adm'x v. Harlan Hospital, 21 S.W.2d 125, 231 Ky. 60—New York Life Ins. Co. v. Long, 277 S.W. 978, 211 Ky. 656—Axton v. Vance, 269 S.W. 534, 207 Ky. 580.
Md.—Takoma Park Bank v. Abbott, 19 A.2d 169—Langenfelder v. Jones, 13 A.2d 623, 178 Md. 421, motion denied 15 A.2d 422, 178 Md. 421—Mathiesen Alkali Works v. Redden, 10 A.2d 699, 177 Md. 560—Bozman v. State, to Use of Cronhardt, 9 A.2d 60, 177 Md. 151—Hazelwood v. Bittinger, 150 A. 713, 159 Md. 262—Scheller v. Schindel, 138 A. 415, 153 Md. 547—Slacum v. Jolley, 138 A. 244, 153 Md. 343—Gordon v. Opalecky, 137 A. 299, 152 Md. 536—Washington, B. A. Electric R. Co. v. Kimmey, 118 A. 648, 141 Md. 243.
Mass.—Wellman v. Carter, 190 N.E. 493, 286 Mass. 237.
Mich.—In re Stephens' Estate, 222 N.W. 128, 244 Mich. 547—In re Cottrell's Estate, 209 N.W. 842, 235 Mich. 627.
Minn.—Harju v. Allen, 177 N.W. 1015, 146 Minn. 23.
Mo.—De Donato v. Wells, 41 S.W.2d 184, 328 Mo. 448, 82 A.L.R. 1331—Seelig v. Missouri, K. & T. Ry. Co., 230 S.W. 94, 287 Mo. 343—Carroll v. Missouri Power & Light Co., 96 S.W.2d 1074, 231 Mo.App. 265.
N.J.—Schwartz v. Howard Sav. Inst., 187 A. 171, 117 N.J.Law 180.
Pa.—Roberts v. Pitt Pub. Co., 198 A. 668, 330 Pa. 44—McMinis v. Philadelphia Rapid Transit Co., 135 A. 722, 288 Pa. 377—Rudolph v. Shannopin Coal Co., 18 A.2d 329, 142 Pa.Super. 389.
S.D.—In re Hosmer's Estate, 196 N. W. 545, 47 S.D. 147.
Utah.—Mary Jane Stevens Co. v. First Nat. Bldg. Co., 57 P.2d 1099, 89 Utah 456.
Va.—Tugman v. Riverside & Dan River Cotton Mills, 132 S.E. 179, 144 Va. 473.
Wis.—Jensen v. Town of Oconto Falls, 202 N.W. 676, 186 Wis. 386.
22 C.J. p 710 note 73.

85. Ill.—Opp v. Pryor, 128 N.E. 580, 294 Ill. 538.

tion which does not contain all the facts essential to some theory within the range of the evidence should be excluded,[86] provided the objection thereto specifically points out the imperfections.[87] However, where a question is proper under the evidence at the time when it is propounded, an objection on the ground that it does not include testimony that may be subsequently given is unavailing.[88]

Undisputed facts, when material, must always be assumed,[89] but when the facts are disputed, either party may put to the expert questions embodying the disputed facts as his construction of the evidence would show them to be.[90] It is not usually required that each question should embrace every fact which it might be contended should affect the judgment of

86. Ala.—Louis Pizitz Dry Goods Co. v. Cusimano, 91 So. 779, 206 Ala. 689.
Cal.—Commercial Union Assur. Co. v. Pacific Gas & Electric Co, 31 P.2d 793, 220 Cal. 515—Bickford v. Lawson, 81 P.2d 216, 27 Cal. App.2d 416.
Conn.—Di Biase v. Garnsey, 136 A. 871, 106 Conn. 86.
Ky.—Rueff v. Light, 114 S.W.2d 506, 272 Ky. 449.
Md.—Mathiesen Alkali Works v. Redden, 10 A.2d 699, 177 Md. 560—Bozman v. State, to Use of Cronhardt, 9 A.2d 60, 177 Md. 151—Gordon v. Opalecky, 137 A. 299, 152 Md. 536—City of Baltimore v. State, 126 A. 130, 146 Md. 440.
Mo.—Streeter v. Washington Fidelity Nat. Ins. Co., 68 S.W.2d 889, 229 Mo.App. 33.
N.J.—Schwartz v. Howard Sav. Inst., 187 A. 171, 117 N.J.Law 180.
Pa.—McMinis v. Philadelphia Rapid Transit Co., 135 A. 722, 288 Pa. 377.
Va.—Tugman v. Riverside & Dan River Cotton Mills, 132 S.E. 179, 144 Va. 473.
W.Va.—Byrd v. Virginian Ry. Co., 13 S.E.2d 273—Blair v. Clark Coal & Coke Co., 148 S.E. 849, 850, 107 W.Va. 507, citing **Corpus Juris.**
22 C.J. p 710 note 74.

87. Mass.—Taylor v. Creeley, 152 N.E. 3, 257 Mass. 21.
Mo.—Zeller v. Wolff-Wilson Drug Co., App., 51 S.W.2d 881.
Pa.—Kazeroski v. Susquehanna Collieries Co, 193 A. 356, 127 Pa. Super. 259.
W.Va.—Byrd v. Virginian Ry. Co., 13 S.E.2d 273.
22 C.J. p 711 note 75.

Supplying facts

Objection that questions did not contain necessary elements or facts on which an expert could base an opinion was properly overruled, where defendant did not supply the facts that it deemed essential in these questions.—Coy v. Dean, 4 S.W.2d 835, 222 Mo.App. 67—Jackson v. Kansas City Rys. Co., Mo.App., 232 S.W. 752.

88. U.S.—Campbell v. Preferred Accident Ins. Co. of New York, C.C.A. N.Y., 98 F.2d 53.
Ky.—Stewart v. Douglass, 29 S.W.2d 637, 235 Ky. 121—Madison Coal Corporation v. Altmire, 284 S.W. 1068, 215 Ky. 283—Axton v. Vance, 269 S.W. 534, 207 Ky. 580.
Ohio.—Berndt v. Bonacker, 153 N.E. 234, 21 Ohio App. 516.
Or.—Sherrard v. Werline, 91 P.2d 344, 162 Or. 135.
22 C.J. p 711 note 76.

Proof by other party

Hypothetical questions may be based on plaintiff's proof alone, and, if defendant desires benefit of subsequent proof, it should be incorporated in proper question.—Gatliff Coal Co. v. Hill's Adm'r, 92 S.W.2d 56, 263 Ky. 309—Louisville & N. R. Co. v. Rowland's Adm'r, 14 S.W.2d 174, 227 Ky. 841—Madison Coal Corporation v. Altmire, 284 S.W. 1068, 215 Ky. 283.

89. Ark.—Arkansas Baking Co. v. Wyman, 47 S.W.2d 45, 185 Ark. 310—Crocker's Heirs v. Crocker's Heirs, 246 S.W. 6, 156 Ark. 309.
Cal.—Lawrence v. Butler, 249 P. 840, 79 Cal.App. 436.
Idaho.—Cochran v. Gritman, 203 P. 289, 34 Idaho 654.
Ill.—Sanitary Dist. of Chicago v. Industrial Commission, 175 N.E. 372, 343 Ill. 236—Peterson v. Cochran & McCluer Co., 31 N.E.2d 825, 308 Ill.App. 348.
Kan.—Stecher v. London Guarantee & Accident Co., Limited, of London, England, 298 P. 754, 133 Kan. 89.
Mass.—Taylor v. Creeley, 152 N.E. 3, 257 Mass. 21.
Minn.—Harju v. Allen, 177 N.W. 1015, 146 Minn. 23.
Mo.—De Donato v. Wells, 41 S.W.2d 184, 188, 328 Mo. 448, 82 A.L.R. 1331, quoting **Corpus Juris.**
R.I.—Caporicci v. United Electric Rys. Co., 136 A. 11.
Tex.—Taylor v. Shuffield, Civ.App., 52 S.W.2d 788, reversed on other grounds Shuffield v. Taylor, 83 S.W.2d 955, 125 Tex. 601.
Utah.—Braddock by Smith v. Pacific Woodmen Life Ass'n, 54 P.2d 1189, 89 Utah 75, rehearing denied and modified on other grounds 58 P.2d 765, 89 Utah 92.
22 C.J. p 711 note 77.

Reason for rule

"If counsel selects from the undisputed facts those which are most favorable to his party and obtains an opinion thereon, the jury may forget the partial nature of the premises and adopt the opinion of the witness on the partial statement."—Opp v. Pryor, 128 N.E. 580, 583, 294 Ill. 538.

90. U.S.—New York Life Ins. Co. v. Doerksen, C.C.A.Kan., 75 F.2d 96.
Ala.—Capital Motor Lines v. Loring, 189 So. 897, 238 Ala. 260—Brown v. Mobile Electric Co., 91 So. 802, 207 Ala. 61.
Ark.—Missouri Pac. Transp. Co. v. Robinson, 86 S.W.2d 913, 191 Ark. 428.
Fla.—Union Bus Co. v. Smith, 140 So. 631, 104 Fla. 569.
Idaho.—Cochran v. Gritman, 203 P. 289, 34 Idaho 654.
Ill.—Monark Battery Co. v. Industrial Commission, 188 N.E. 413, 354 Ill. 494—Sanitary Dist. of Chicago v. Industrial Commission, 175 N.E. 372, 343 Ill. 236—Opp v. Pryor, 128 N.E. 580, 294 Ill. 538.
Kan.—Linscott v. Hughbanks, 37 P.2d 26, 140 Kan. 353—Stecher v. London Guarantee & Accident Co., Limited, of London, England, 298 P. 754, 133 Kan. 89.
Ky.—Guardian Life Ins. Co. v. Robison, 129 S.W.2d 192, 278 Ky. 678—Axton v. Vance, 269 S.W. 534, 207 Ky. 580.
Md.—Smith v. Dolan, 185 A. 453, 170 Md. 654.
Mich.—O'Donnell v. Oliver Iron Mining Co., 262 N.W. 728, 273 Mich. 27—McCord v. McCord, 220 N.W. 710, 243 Mich. 309.
Minn.—Jorstad v. Benefit Ass'n of Ry. Employees, 265 N.W. 814, 196 Minn. 568.
Miss.—Beard v. Turritin, 161 So. 688, 689, citing **Corpus Juris.**
Mo.—Cole v. Uhlmann Grain Co., 100 S.W.2d 311, 340 Mo. 277—Zeller v. Wolff-Wilson Drug Co., App., 51 S.W.2d 881—Frost v. Central Business Men's Ass'n, App., 246 S.W. 628.
Neb.—Prince v. Pathfinder Life Ins. Co., 276 N.W. 661, 133 Neb. 705.
Ohio.—Community Traction Co. v. Wandtke, 167 N.E. 701, 32 Ohio App. 207.
Or.—Sherrard v. Werline, 91 P.2d 344, 162 Or. 135.
S.D.—Bennett v. Murdy, 249 N.W. 805, 809, 61 S.D. 471, citing **Corpus Juris.**
Tex.—Liner v. U. S. Torpedo Co., Com.App., 12 S.W.2d 552, reversing U. S. Torpedo Co. v. Liner, Civ. App., 300 S.W. 641, and affirmed Liner v. U. S. Torpedo Co., Com. App., 16 S.W.2d 519—Montgomery

the expert.[91] The party offering the testimony may predicate the question on a fair statement of any portion of the facts which the evidence tends to establish and which presents his claim or theory,[92] and different hypotheses may be put to the witness so as to elicit his judgment as to different groups of fact covering any reasonable theory of the case.[93] The fact that a question is not founded on

Ward & Co. v. Levy, Civ.App., 136 S.W.2d 663, error dismissed, judgment correct.
W.Va.—Cook v. Coleman, 111 S E. 750, 90 W.Va. 748—Fairview Fruit Co. v. H. P. Brydon & Bro., 102 S.E. 231, 85 W.Va. 609.
22 C.J. p 711 note 78.

91. U.S.—Metropolitan Life Ins. Co. v. Armstrong, C.C.A.Neb., 85 F.2d 187—New York Life Ins. Co. v. Doerksen, C.C.A.Kan., 75 F.2d 96—Napier v. Greenzweig, N.Y., 256 F. 196, 167 C.C.A. 412.
Ala.—J. H. Burton & Sons Co. v. May, 103 So. 46, 212 Ala. 435—Louis Pizitz Dry Goods Co. v. Cusimano, 91 So. 779, 206 Ala. 689—Zimmern v. Standard Motor Car Co., 88 So. 743, 205 Ala. 580.
Ark.—Missouri Pac. R. Co. v. Hampton, 112 S.W.2d 428, 195 Ark. 335.
Cal.—Treadwell v. Nickel, 228 P. 25, 194 Cal. 243—Christiansen v. Hollings, App., 112 P.2d 723—Coyne v. Pacific Mut. Life Ins. Co. of California, 47 P.2d 1079, 8 Cal.App. 2d 104.
Conn.—Jackson v. Waller, 10 A.2d 763, 126 Conn. 294.
Idaho.—Cochran v. Gritman, 203 P. 289, 34 Idaho 654.
Ill.—Stresenreuter Bros. v. Bowes, 233 Ill.App. 143.
Iowa.—Diesing v. Spencer, 266 N.W. 567, 221 Iowa 1143.
Kan.—Stecher v. London Guarantee & Accident Co., Limited, of London, England, 298 P. 754, 133 Kan. 89.
Ky.—Axton v. Vance, 269 S.W. 534, 207 Ky. 580.
Md.—Hutchins v. Hutchins, 109 A. 121, 135 Md. 401.
Mich.—Bishop v. Gaudio, 253 N.W. 292, 266 Mich. 267—In re Rosa's Estate, 178 N.W. 23, 210 Mich. 628.
Mo.—Dillard v. East St. Louis Ry. Co., App., 150 S.W.2d 552—Kirk v. Kansas City Terminal Ry. Co., App., 27 S.W.2d 739—Frost v. Central Business Men's Ass'n, App., 246 S.W. 628.
Mont.—Kelley v. John R. Daily Co., 181 P. 326, 56 Mont. 63.
N.J.—Maulsbury v. Shure, 170 A. 41, 12 N.J.Misc. 137.
N.C.—Godfrey v. Western Carolina Power Co., 128 S.E. 485, 190 N.C. 24.
Or.—Cobb v. Spokane, P. & S. Ry. Co., 44 P.2d 731, 150 Or. 226.
Tenn.—Tennessee Cent. Ry. Co. v. Gleaves, 2 Tenn.App. 549.
Tex.—Shuffield v. Taylor, 83 S.W.2d 955, 125 Tex. 601, reversing Taylor v. Shuffield, Civ.App., 52 S.W. 2d 788—Gulf Casualty Co. v. Archer, Civ.App., 118 S.W.2d 976, error dismissed.
Utah.—Johanson v. Huntsman, 209 P. 197, 60 Utah 402.
W.Va.—Byrd v. Virginian Ry. Co.. 13 S.E.2d 273.
Wyo.—Branson v. Roelofsz, 70 P.2d 589, 52 Wyo. 101.
22 C.J. p 711 note 79.

"Considerable latitude must be allowed in the choice of facts as the basis of hypothetical questions, and if the question is fair, and understandable by the witness, it is not to be excluded because it does not comprehend all of the important facts in the case."—Dameron v. Ansbro, 178 P. 874, 878, 39 Cal.App. 289.

Correction by cross-examination

(1) On cross-examination the opposing party may supply such additional facts as he deems material.
U.S.—U. S. v. Sessin, C.C.A.Kan., 84 F.2d 667.
Ala.—Louis Pizitz Dry Goods Co. v. Cusimano, 91 So. 779, 206 Ala. 689.
Pa.—Kazeroski v. Susquehanna Collieries Co., 193 A. 356, 127 Pa.Super. 259.
Tex.—Shuffield v. Taylor, 83 S.W.2d 955, 960, 125 Tex. 601, citing **Corpus Juris**, and reversing Taylor v. Shuffield, Civ.App., 52 S.W.2d 788—Traders & General Ins. Co. v. Weatherford, Civ.App., 124 S.W.2d 423, error dismissed, judgment correct.
22 C.J. p 711 note 79 [b].

(2) So the admission of expert's testimony in answer to imperfectly framed question, not sufficiently specific as to detail and omitting reference to some facts in evidence, was held not error, since opposing counsel had right to show on cross-examination of witness that consideration of all facts would alter his opinion.—Virginia Beach Bus Line v. Campbell, C.C.A.N.C., 73 F.2d 97, certiorari denied 55 S.Ct. 637, 294 U.S. 727, 79 L.Ed. 1258.

(3) Cross-examination of expert witness generally see infra § 560.

92. U.S.—Metropolitan Life Ins. Co. v. Armstrong, C.C.A.Neb., 85 F.2d 187.
Ark.—McGough v. Zurich General Accident & Liability Ins. Co., 147 S.W. 2d 994—Crocker's Heirs v. Crocker's Heirs, 246 S.W. 6, 156 Ark. 309.
Cal.—Christiansen v. Hollings, App., 112 P.2d 723—Snow v. Harris, 181 P. 676, 41 Cal.App. 34.
Ind.—Smith v. Kemerly, 150 N.E. 65, 84 Ind.App. 398.
Kan.—Linscott v. Hughbanks, 37 P.2d 26, 140 Kan. 353.
Ky.—Axton v. Vance, 269 S.W. 534, 207 Ky. 580.
Mich.—In re Rosa's Estate, 178 N.W. 23, 210 Mich. 628.
Minn.—Lee v. Woolsey, 246 N.W. 25, 187 Minn. 659—In re Weber's Estate, 204 N.W. 52, 163 Minn. 389.
Mo.—Dillard v. East St. Louis Ry. Co., App., 150 S.W.2d 552—Krug v. Mutual Life Ins. Co. of New York, App., 149 S.W.2d 393—Kirk v. Kansas City Terminal Ry. Co., App., 27 S.W 2d 739.
Mont.—Kelley v. John R. Daily Co., 181 P. 326, 56 Mont. 63.
Neb.—Prince v. Pathfinder Life Ins. Co., 276 N.W. 661, 133 Neb. 705.
Nev.—Van Fleet v. O'Neil, 192 P. 384, 44 Nev. 216.
Tenn.—Standard Oil Co. of Louisiana v. Roach, 94 S.W.2d 63, 19 Tenn. App. 661.
Wash.—McEachran v. Rothschild & Co., 237 P. 711, 135 Wash. 260, modified on other grounds 241 P. 969, 135 Wash. 260.
W.Va.—Byrd v. Virginian Ry. Co., 13 S.E.2d 273.

Facts held properly included

Conn.—De Cicco v. Mason, 136 A. 869, 106 Conn. 99.

93. U.S.—Laughlin v. Christensen, C.C.A.Mo., 1 F.2d 215, 219, citing **Corpus Juris.**
Ala.—Louis Pizitz Dry Goods Co. v. Cusimano, 91 So. 779, 206 Ala. 689.
Ark.—Missouri Pac. R. Co. v. Hampton, 112 S.W.2d 428, 195 Ark. 335.
Cal.—Treadwell v. Nickel, 228 P. 25, 194 Cal. 243—Weaver v. Shell Co. of California, 94 P.2d 364, 34 Cal. App.2d 713.
Conn.—Jackson v. Waller, 10 A.2d 763, 126 Conn. 294.
Fla.—Mutual Ben. Health & Accident Ass'n v. Bunting, 183 So. 321, 133 Fla. 646.
Kan.—Son v. Eagle-Picher Mining & Smelting Co., 58 P.2d 44, 144 Kan. 146—Stecher v. London Guarantee & Accident Co., Limited, of London, England, 298 P. 754, 133 Kan. 89.
Ky.—Guardian Life Ins. Co. v. Robison, 129 S.W.2d 192, 278 Ky. 678—Gatliff Coal Co. v. Hill's Adm'r, 92 S.W.2d 56, 263 Ky. 309.
Mich.—Bosch v. Damm, 296 N.W. 669, 296 Mich. 522—Bishop v. Gaudio, 253 N.W. 292, 266 Mich. 267.
Mo.—Dillard v. East St. Louis Ry. Co., App., 150 S.W.2d 552—Kirk v. Kansas City Terminal Ry. Co., App., 27 S.W.2d 739—Standefer v. Fleming, App., 298 S.W. 134—Frost v. Central Business Men's Ass'n, App., 246 S.W. 628.
Neb.—Malcolm v. Evangelical Lutheran Hospital Ass'n of York, Se-

sufficient facts has been said to go to the weight of the witness' evidence rather than to its competency.[94]

Testimony of other experts. Generally, a hypothetical question which includes with other facts the opinion of another expert is improper.[95] However, facts testified to by another expert witness may be incorporated in a hypothetical question,[96] as in the case of an expert's description, from his own observation or knowledge, of symptoms, malady or physical condition, whether such description is in technical or lay terms.[97]

Conflicting facts should not be incorporated in one question,[98] but the attention of the witness should be called to their opposing tendencies, and if his skill or knowledge can furnish the explanation which harmonizes them he is at liberty to state it.[99] However, it has been regarded as not objectionable to permit the witness in answering a question assuming the existence of certain facts of which there is evidence to assume also the existence of other facts also in evidence, and which therefore might properly have been embraced in the questions,[1] or to ask an expert whether the facts testified by opposing witnesses, assuming both sets of facts to have been correctly stated, are inconsistent with the existence of a particular fact.[2]

Irrelevant or immaterial facts. Irrelevant[3] or immaterial[4] facts need not be included, and it is also proper to exclude facts having only a remote bearing,[5] a fortiori those which have none.[6]

(3) Other Particular Elements

While the length of a question or the fact of its coloring or exaggeration does not render it improper unless it is misleading, and the exact language of the witnesses need not be followed, a question which repeats all the evidence in the case or permits the witness to usurp the function of the jury is improper.

The exact language of the witness who gave evidence of a fact need not be followed in stating such fact in the hypothetical question; it is sufficient if the question imports substantially what the evidence shows.[7]

ward, Hamilton and Other Counties, 185 N.W. 330, 107 Neb. 101.
N.J.—Ivins v. Andres, 187 A. 385, 117 N.J.Law 311.
Or.—Sherrard v. Werline, 91 P.2d 344, 162 Or. 135.
Tex.—Shuffield v. Taylor, 83 S.W. 2d 955, 125 Tex. 601, reversing Taylor v. Shuffield, Civ.App., 52 S.W.2d 788.
Utah.—Johanson v. Huntsman, 209 P. 197, 60 Utah 402.
Wyo.—Phifer v. Baker, 244 P. 637, 34 Wyo. 415.
22 C.J. p 712 note 80.

94. Cal.—Kershaw v. Tilbury, 8 P. 2d 109, 214 Cal. 679.
Tex.—American General Ins. Co. v. Webster, Civ.App., 118 S.W.2d 1082, error dismissed.

95. U.S.—Corrigan v. U. S., C.C.A. Idaho, 82 F.2d 106—Laughlin v. Christensen, C.C.A.Mo., 1 F.2d 215, 219, citing **Corpus Juris.**
Ga.—Kuttner v. Swanson, 2 S.E.2d 230, 59 Ga.App. 818.
Md.—Thompson v. Standard Wholesale Phosphate & Acid Works, 13 A.2d 328, 178 Md. 305—Mt. Royal Cab Co. v. Dolan, 179 A. 54, 168 Md. 633, 98 A.L.R. 1106—Scheller v. Schindel, 138 A. 415, 153 Md. 547.
Mo.—Aronovitz v. Arky, 219 S.W. 620—Carroll v. Missouri Power & Light Co., 96 S.W.2d 1074, 231 Mo.App. 265.
N.D.—Hunder v. Rindlaub, 237 N.W. 915, 61 N.D. 389.
Or.—Wise v. State Industrial Accident Commission, 35 P.2d 242, 148 Or. 461.
Pa.—Lipstock v. Haddock Min. Co., 5 Sch.Reg. 338.
S.C.—Ellis v. Kansas City Life Ins. Co., 197 S.E. 398, 400, 187 S.C. 334, quoting **Corpus Juris.**
22 C.J. p 709 note 52, p 712 note 86.

Physician's diagnosis based on party's statement as to cause of injury is merely an expression of physician's opinion, so as to preclude it from being incorporated into hypothetical question to be propounded to another physician.—Wise v. State Industrial Accident Commission, 35 P. 2d 242, 148 Or. 461.

96. Ark.—Missouri State Life Ins. Co. v. Fodrea, 46 S.W.2d 638, 185 Ark. 155.

97. Cal.—Christiansen v. Hollings, App., 112 P.2d 723.
Minn.—Ivanesovich v. North American Life & Casualty Co., 176 N.W. 502, 145 Minn. 175.
Or.—Wise v. State Industrial Accident Commission, 35 P.2d 242, 148 Or. 461.

98. Cal.—In re Gould's Estate, 205 P. 457, 188 Cal. 353.
Idaho.—Cochran v. Gritman, 203 P. 289, 34 Idaho 654.

99. Vt.—Fairchild v. Bascomb, 35 Vt. 398.

1. Ark.—Ince v. State, 93 S.W. 65, 77 Ark. 426.
Vt.—Hathaway v. National Life Ins. Co., 48 Vt. 335.

2. Mich.—Prentis v. Bates, 53 N.W. 153, 93 Mich. 234, 17 L.R.A. 494, denying rehearing 50 N.W. 637, 88 Mich. 567.
Minn.—Milliren v. Federal Life Ins. Co., 242 N.W. 290, 185 Minn. 614.

3. Neb.—Jacobson v. Skinner Packing Co., 226 N.W. 321, 118 Neb. 711.
N.J.—Ivins v. Andres, 187 A. 385, 117 N.J.Law 311.
Tex.—Norwich Union Indemnity Co. v. Davis, Civ.App., 293 S.W. 932.
22 C.J. p 712 note 82.

4. U.S.—Travelers Ins. Co. v. Drake, C.C.A.Cal., 89 F.2d 47—Union Trust Co. of Cleveland, Ohio, v. Woodrow Mfg. Co., C.C.A.Iowa, 48 F.2d 194.
Ark.—Erwin v. Milligan, 67 S.W.2d 592, 188 Ark. 658.
Cal.—Treadwell v. Nickel, 228 P. 25, 194 Cal. 243.
Conn.—Appeal of Gilman, 161 A. 845, 115 Conn. 724.
Or.—Cobb v. Spokane, P. & S. Ry. Co., 44 P.2d 731, 150 Or. 226.
22 C.J. p 712 note 83.

Confused statement of immaterial fact did not render hypothetical question improper where witness undertook only to give answer as to competent matter.—Wilson v. Bryant, 67 S.W.2d 133, 167 Tenn. 107.

5. U.S.—Matthews v. Continental Roll & Steel Foundry Co., C.C.A. Pa., 121 F.2d 594, affirming, D.C., 37 F.Supp. 738.
Ark.—Coop v. Moore, 76 S.W.2d 675, 190 Ark. 32.
N.Y.—Capitula v. New York Cent. R. Co., 192 N.Y.S. 745, 200 App.Div. 247.
22 C.J. p 712 note 84.

6. Ill.—Forest Preserve Dist. of Cook County v. Sauer, 182 N.E. 813, 350 Ill. 116.
Mass.—Clapp v. American Express Co., 125 N.E. 162, 234 Mass. 174.
22 C.J. p 712 note 85.

7. Tex.—Texas Employers Ins. Ass'n v. Wright, Civ.App., 118 S.W.2d 433, error dismissed.

Length of question. The length of the hypothetical question is not a controlling consideration, and it is no objection that the question is lengthy, provided it has been reduced to writing and embraces the whole situation in a connected manner,[8] even though the question may be somewhat complicated and not entirely grammatical.[9] The court has, however, authority to require a question to be modified in these particulars,[10] or a long question may be excluded in the discretion of the judge if deemed misleading, as not disclosing its hypothetical nature.[11] No more specific rule in this respect can be laid down than that the question should concisely state the facts on which the opinion of the expert is to be given, and it is improper to detail all the evidence introduced on the trial.[12]

Coloring, exaggeration, or partisanship. The fact that the hypothetical question contains a certain coloring favorable to the examining party, by way of characterization,[13] or even an exaggeration,[14] is not necessarily fatal; but coloring[15] or exaggerating[16] to the extent of misleading requires the exclusion of the question. It is not a sufficient ground for objection to a question that it is of a partisan nature.[17]

Leading questions to an expert have been disapproved,[18] but there is also authority for the view that such questions may be permitted.[19]

Question invading province of jury. The form of the question should be so shaped as to give the witness no occasion or opportunity to decide on the evidence.[20] Accordingly, the question should not call for his opinion as to the credibility of the witnesses who testified with respect to the facts hypothesized.[21]

(4) Harmless Error

The admission of a hypothetical question which is somewhat inaccurate or improper in form is not error in the absence of prejudice to the other party.

The admission of a question which is in some respects inaccurate or improperly formed without being misleading is not error,[22] and the same is true of a question the only objection to which is that certain additional facts might have been proved which would assist witnesses in giving more satisfactory answers.[23] So, also, where the answer to a single improperly formed question could not have misled

W.Va.—Dudley v. Grace Hospital, 164 S.E. 670, 672, 112 W.Va. 461, citing **Corpus Juris.**
22 C.J. p 709 note 56.

8. U.S.—Forsyth v. Doolittle, Ill., 7 S.Ct. 408, 120 U.S. 73, 30 L.Ed. 586.
22 C.J. p 710 note 60.

9. Okl.—Shawnee Gas & Electric Co. v. Hunt, 122 P. 673, 32 Okl. 368.

10. U.S.—Forsyth v. Doolittle, Ill., 7 S.Ct. 408, 120 U.S. 73, 30 L.Ed. 586.

11. Ill.—Haish v. Payson, 107 Ill. 365.

12. N.Y.—Matter of Martin, 144 N.Y.S. 174, 82 Misc. 574.
Wis.—Hoffman v. Regling, 258 N.W. 347, 117 Wis. 66.

13. Wyo.—Phifer v. Baker, 244 P. 637, 650, 34 Wyo. 415, citing **Corpus Juris.**
22 C.J. p 710 note 67.

14. Ala.—Kansas City, M. & B. R. Co. v. Webb, 11 So. 888, 97 Ala. 157.
22 C.J. p 710 note 68.

15. Md.—Beck v. Hanline, 89 A. 377, 122 Md. 68.
22 C.J. p 710 note 69.

16. Md.—Washington, B. A. Electric R. Co. v. Kimmey, 118 A. 648, 141 Md. 243.
Or.—Lehman v. Knott, 196 P. 476, 100 Or. 59.
W.Va.—Blair v. Clark Coal & Coke Co., 148 S.E. 849, 850, 107 W.Va. 507, citing **Corpus Juris.**
22 C.J. p 710 note 70.

17. Mass.—Murphy v. Marston Coal Co., 67 N.E. 342, 183 Mass. 385.

18. Tex.—St. Louis Southwestern R. Co. v. Hall, Civ.App., 81 S.W. 571.
22 C.J. p 710 note 65.

19. U.S.—Alaska United Gold Min. Co. v. Keating, Alaska, 116 F. 561, 53 C.C.A. 655.
Wash.—Edwards v. Burke, 78 P. 610, 36 Wash. 107.

20. U.S.—U. S. v. Stephens, C.C.A. Idaho, 73 F.2d 695.
Or.—Lehman v. Knott, 196 P. 476, 100 Or. 59.

Calling for conclusions
Hypothetical questions in will contest were, however, held not prejudicial because questions called for conclusions of witnesses instead of their opinions, since expert's opinion is his conclusion from facts stated to him.—Gibson v. Crawford, 83 S.W.2d 1, 259 Ky. 708.

Meaning of statements
A hypothetical question directed to a physician should not call on the witness to interpret the meaning of statements which should be interpreted by the jury.—Dameron v. Ansbro, 178 P. 874, 39 Cal.App. 289.

Question held not to invade jury's province
Iowa.—Sterler v. Busch, 195 N.W. 369, 197 Iowa 231.
Kan.—Linscott v. Hughbanks, 37 P.2d 26, 140 Kan. 353.

21. Ala.—Sloss-Sheffield Steel & Iron Co. v. Sharp, 47 So. 279, 156 Ala. 284.

22. U.S.—U. S. v. Sessin, C.C.A.Kan., 84 F.2d 667.
Cal.—Treadwell v. Nickel, 228 P. 25, 194 Cal. 243.
D.C.—Shapiro v. Pennsylvania R. Co., 83 F.2d 581, 65 App.D.C. 324.
Mo.—Carroll v. Missouri Power & Light Co., 96 S.W.2d 1074, 231 Mo. App. 265.
Utah.—Mary Jane Stevens Co. v. First Nat. Bldg. Co., 57 P.2d 1099, 89 Utah 456—Smith v. Payne, 206 P. 715, 60 Utah 89.
22 C.J. p 709 note 53.

Reference to testimony
Reference in hypothetical question to fact that witness had heard another medical witness testify as to treatment he had prescribed for plaintiff was not error, where reference to such fact was only casual and things prescribed by previous medical witness had theretofore been accurately hypothesized by counsel.—Adams v. Carlo, Mo.App., 101 S.W.2d 753.

23. U.S.—Virginia Beach Bus Line v. Campbell, C.C.A.N.C., 73 F.2d 97, certiorari denied 55 S.Ct. 637, 294 U.S. 727, 79 L.Ed. 1258—New York Cent. R. Co. v. Johnson, C.C.A.Mo., 27 F.2d 699, certiorari granted 49 S.Ct. 27, 278 U.S. 590, 73 L.Ed. 523, reversed on other grounds 49 S.Ct. 300, 279 U.S. 310, 73 L.Ed. 706, amended on other grounds 49 S.Ct. 417.

the jury[24] or prejudiced the complaining party,[25] or where the question is admitted de bene before the evidence on which it is based and no request is made later that the answer be excluded or modified, or its effect controlled by instructions,[26] or where a part of an answer fails to strengthen the contention of the party who asks the question,[27] a new trial will not be ordered because of error in permitting the question. Likewise the admission of a question is not prejudicial error where the facts allegedly omitted from the hypothetical question are subsequently added to the question,[28] or are presented to the witness for his opinion on cross-examination.[29] The omission of a certain fact from a question does not render it improper where the question put in such form is more favorable to the objecting party than if such fact were included.[30]

(5) Illustrative Cases

The propriety of particular hypothetical questions has been adjudicated in numerous cases.

Reference is made in the notes to a number of illustrative cases in which particular hypothetical questions have been held proper, as in compliance with,[31] or improper because of failure to comply

Iowa.—Hendershott v. Western Union Tel. Co., 87 N.W. 288, 114 Iowa 415.

24. Neb.—Hewitt v. Eisenhart, 55 N. W. 252, 36 Neb. 794.

25. Cal.—Treadwell v. Nickel, 228 P. 25, 194 Cal. 243.
Kan.—Son v. Eagle-Picher Mining & Smelting Co., 58 P.2d 44, 144 Kan. 146.
Md.—Stewart & Co. v. Howell, 110 A. 899, 136 Md. 423.
N.C.—Flood v. Deschamps Motor Co., 167 S.E. 76, 203 N.C. 794.
Vt.—Foster v. Dickerson, 24 A. 253, 64 Vt. 233.

Inclusion in question of immaterial facts does not render its admissibility error where witness did not consider such immaterial facts in arriving at his opinion.—Stone v. Grainger, Tex.Civ.App., 66 S.W.2d 484.

26. Iowa.—Crouch v. National Live Stock Remedy Co., 217 N.W. 557, 205 Iowa 51.
22 C.J. p 713 note 93.

27. Iowa.—State v. Wright, 84 N.W. 541, 112 Iowa 436.

28. Mich.—Sampson v. Veenboer, 234 N.W. 170, 252 Mich. 660.
Mo.—Colburn v. Krenning, 220 S.W. 934—Gorman v. A. R. Jackson Kansas City Showcase Works Co., App., 19 S.W.2d 559.
Wis.—Naus v. Chicago & M. Electric Ry. Co., 201 N.W. 281, 185 Wis. 178.

29. U.S.—Campbell v. Preferred Accident Ins. Co. of New York, C. C.A.N.Y., 98 F.2d 53.
Iowa.—Diesling v. Spencer, 266 N.W. 567, 221 Iowa 1143.
Pa.—Rudolph v. Shannopin Coal Co., 18 A.2d 329, 142 Pa.Super. 389.
Utah.—Johanson v. Huntsman, 209 P. 197, 60 Utah 402.

30. N.J.—Ivins v. Andres, 187 A. 385, 117 N.J.Law 311.

31. U.S.—Metropolitan Life Ins. Co. v. Armstrong, C.C.A.Neb., 85 F.2d 187—Eastern Grain, Mill & Elevator Corporation v. Buffalo S. S. Co., D.C.N.Y., 15 F.2d 714.
Ala.—Capital Motor Lines v. Loring, 189 So. 897, 238 Ala. 260—Torrance v. Wells, 122 So. 322, 219 Ala. 384—Dersis v. Dersis, 98 So. 27, 210 Ala. 308—Montevallo Mining Co. v. Little, 93 So. 873, 208 Ala. 131—Gulf, M. & N. R. Co. v. Fowler, 96 So. 87, 19 Ala.App. 163.
Ark.—Mississippi River Fuel Corporation v. Senn, 43 S.W.2d 255, 184 Ark. 554—Masonic Mut. Acc. Co. v. Campbell, 245 S.W. 307, 156 Ark. 109—Kansas City Southern R. Co. v. Akin, 210 S.W. 350, 138 Ark. 10.
Cal.—Parker v. James E. Granger, Inc., 52 P.2d 226, 4 Cal.2d 668, appeal dismissed and certiorari denied 56 S.Ct. 958, 298 U.S. 644, 80 L.Ed. 1375—Criss v. Angelus Hospital Ass'n of Los Angeles, 56 P. 2d 1274, 13 Cal.App.2d 412—Vedder v. Bireley, 267 P. 724, 92 Cal. App. 52.
Colo.—Riss & Co. v. Galloway, 114 P.2d 550—Louden Irrigating Canal & Reservoir Co. v. Neville, 227 P. 562, 75 Colo. 536.
Del.—Philadelphia & R. Ry. Co. v. Green & Flinn, 119 A. 840, 2 W.W. Harr. 78.
Ill.—Armour & Co. v. Industrial Commission, 11 N.E.2d 949, 367 Ill. 471.
Iowa.—Boston v. Keokuk Electric Co., 221 N.W. 508, 206 Iowa 753—Osnes v. Scanlon, 179 N.W. 869, 189 Iowa 1364—Haddock v. Jacobs, 171 N.W. 593, 185 Iowa 1057.
Kan.—Stayton v. Stayton, 81 P.2d 1, 148 Kan. 172—Linscott v. Hughbanks, 37 P.2d 26, 140 Kan. 353—Bell v. Newkirk, 12 P.2d 733, 136 Kan. 111—Updegraff v. Gage-Hall Clinic, 264 P. 1078, 125 Kan. 518.
Ky.—Horn's Adm'r v. Prudential Ins. Co. of America, 65 S.W.2d 1017, 252 Ky. 137.
Md.—Standard Oil Co. of New Jersey v. Stern, 173 A. 205, 167 Md. 211—Peninsula Produce Exch. v. American Ry. Express Co., 128 A. 403, 147 Md. 424—Stewart & Co. v. Howell, 110 A. 899, 136 Md. 423.
Mass.—Adams v. Town of Bolton, 9 N.E.2d 562, 297 Mass. 459, 111 A. L.R. 856—Baker v. Town of Arlington, 171 N.E. 462, 271 Mass. 415—Hines v. Eastern S. S. Lines, 139 N.E. 823, 245 Mass. 385.
Mich.—O'Brien v. Union Telephone Co., 199 N.W. 671, 228 Mich. 156.
Mo.—Baxter v. Bank of Belle, Belle Maries County, 104 S.W.2d 265, 340 Mo. 952—Gately v. St. Louis-San Francisco Ry. Co., 56 S.W.2d 54, 332 Mo. 1—Morton v. St. Louis-San Francisco Ry. Co., 20 S.W. 2d 34, 323 Mo. 929—Schulz v. St. Louis-San Francisco Ry. Co., 4 S. W.2d 762, 319 Mo. 8—Crockett v. Kansas City Rys. Co., 243 S.W. 902—Aronovitz v. Arky, 219 S.W. 620—McCaffery v. St. Louis & M. R. R. Co., 192 Mo. 144, 90 S.W. 816—Adams v. Carlo, App., 101 S. W.2d 753—Taylor v. Kelder, 88 S. W.2d 436, 229 Mo.App. 1117—De Moss v. Baudo, App., 79 S.W.2d 766—Stelmach v. Saul, App., 50 S. W.2d 721—Whitley v. Stein, App., 34 S.W.2d 998—Vance v. Tootle-Campbell Dry Goods Co., App., 295 S.W. 517—Williams v. Fleming, 267 S.W. 6, 218 Mo.App. 563—Hensley v. Kansas City Rys. Co., App., 214 S.W. 287—Buzan v. Kansas City Rys. Co., App., 212 S.W. 905.
Nev.—Berrum v. Georgetta, 93 P.2d 525, 60 Nev. 1, affirmed 98 P.2d 479, 60 Nev. 1.
N.C.—Munden v. Metropolitan Life Ins. Co., 196 S.E. 872, 213 N.C. 504—Eaker v. International Shoe Co., 154 S.E. 667, 199 N.C. 379—Godfrey v. Western Carolina Power Co., 128 S.E. 485, 190 N.C. 24.
N.D.—Finger v. Massad, 240 N.W. 917, 61 N.D. 754.
Ohio.—Industrial Commission of Ohio v. Holman, 179 N.E. 192, 40 Ohio App. 426—City Ice & Fuel Co. v. Karlinsky, 168 N.E. 475, 33 Ohio App. 42.
Or.—Bailey v. Loyal Protective Life Ins. Co., 105 P.2d 523—Cobb v. Spokane, P. & S. Ry. Co., 44 P.2d 731, 150 Or. 226—Goldfoot v. Lofgren, 296 P. 843, 135 Or. 533—Hamilton v. Kelsey, 268 P. 750, 126 Or. 26.
Pa.—Schueller v. Armour & Co., 176 A. 527, 116 Pa.Super. 323.

with,[32] the rules stated supra subdivisions b (1)–(4) of this section.

§ 552. —— Establishment of Facts Stated

The facts included in a hypothetical question must be supported by evidence reasonably tending to establish them, but the facts need not be uncontroverted or clearly proved and the court may permit the inclusion of facts as to which the party intends subsequently to offer proof.

As a rule hypothetical questions must be based on facts as to which there is such evidence that a jury might reasonably find that they are established;[33] but the governing consideration is only as

Tex.—Wilson v. Barbour, Civ.App., 135 S.W.2d 169, error dismissed—American Nat. Ins. Co. v. Points, Civ.App., 131 S.W.2d 983, error dismissed, judgment correct—Maryland Casualty Co. v. Allen, Civ.App., 22 S.W.2d 329—Southern Casualty Co. v. Hernandez, Civ. App., 297 S.W. 544—El Paso Electric Co. v. Gambrell, Civ.App., 292 S.W. 577—St. Louis Southwestern Ry. Co. of Texas v. Inman, Civ. App., 283 S.W. 689, reversed on other grounds Inman v. St. Louis Southwestern Ry. Co. of Texas, Com.App., 288 S.W. 150, and vacated on other grounds St. Louis Southwestern Ry. Co. of Texas v. Inman, Civ.App., 293 S.W. 650—San Angelo Water, Light & Power Co. v. Baugh, Civ.App., 270 S.W. 1101—Texas Employers' Ins. Ass'n v. Jimenez, Civ.App., 267 S.W. 752—Jackson v. Wallace, Civ.App., 239 S.W. 698, affirmed, Com.App., 252 S.W. 745—Texas & P. Ry. Co. v. Shaw, Civ.App., 218 S.W. 814, dismissed for want of jurisdiction.

Utah.—Mary Jane Stevens Co. v. First Nat. Bldg. Co., 57 P.2d 1099, 89 Utah 456.

Vt.—Perkins v. Vermont Hydro-Electric Corporation, 177 A. 631, 106 Vt. 367.

22 C.J. p 713 note 95.

Particular questions held proper

(1) In personal injury action, hypothetical question describing occurrence and inquiring if the condition "might, could, or would, in your opinion, result from the circumstances I have described," was properly submitted, the words "might, could, or would" being proper in connection with a hypothetical question of this kind.—Eidson v. Metropolitan St. R. Co., Mo.App., 209 S.W. 575.

(2) Question as to whether condition was such that testatrix understood value of property and natural objects of bounty was held to indicate proper standard of testamentary capacity.—Rock v. Keller, 278 S.W. 759, 312 Mo. 458.

32. U.S.—U. S. v. Stephens, C.C.A. Idaho, 73 F.2d 695.

Ala.—Johnson v. Johnson, 91 So. 260, 206 Ala. 523.

Cal.—Coyne v. Pacific Mut. Life Ins. Co. of California, 47 P.2d 1079, 8 Cal.App.2d 104—Rudat v. Carithers, 30 P.2d 435, 137 Cal.App. 92.

Ky.—Cincinnati, N. O. & T. P. Ry. Co. v. Duvall, 92 S.W.2d 363, 263 Ky. 387.

Mo.—De Donato v. Wells, 41 S.W.2d 184, 328 Mo. 448, 82 A.L.R. 1331—Sparks v. Harvey, App., 214 S.W. 249.

N.D.—Koffel v. Rhud, 191 N.W. 464, 49 N.D. 194.

Utah.—Tremelling v. Southern Pac. Co., 257 P. 1066, 70 Utah 72.

Wyo.—Morrison v. Cottonwood Development Co., 266 P. 117, 38 Wyo. 190.

22 C.J. p 713 note 96.

33. U.S.—Hupp Motor Car Corporation v. Wadsworth, C.C.A.Mich., 113 F.2d 827—Limbeck v. Interstate Power Co., C.C.A.Iowa, 69 F. 2d 249—U. S. v. American Tobacco Co., D.C.Ky., 39 F.Supp. 957—Philadelphia & R. Ry. Co. v. Cannon, C.C.A.Pa., 296 F. 302—Napier v. Greenzweig, N.Y., 256 F. 196, 167 C.C.A. 412.

Ala.—Southern Ry. Co. v. Simmons, 186 So. 566, 237 Ala. 246—Camp v. Dobson, 152 So. 38, 228 Ala. 32—Prudential Ins. Co. v. Calvin, 148 So. 837, 227 Ala. 146—Thaggard v. Vafes, 119 So. 647, 218 Ala. 609—J. H. Burton & Sons Co. v. May, 103 So. 46, 212 Ala. 435—Hilburn v. McKinney, 96 So. 61, 209 Ala. 229—Wilson Bros. v. Mobile & O. R. Co., 92 So. 246, 207 Ala. 171—Brown v. Mobile Electric Co., 91 So. 802, 207 Ala. 61—Zimmern v. Standard Motor Car Co., 88 So. 743, 205 Ala. 580.

Ark.—Payne v. Thurston, 230 S.W. 561, 148 Ark. 456.

Cal.—In re Phillips' Estate, 261 P. 709, 202 Cal. 490—Citron v. Fields, 85 P.2d 534, 30 Cal.App.2d 51—Bickford v. Lawson, 81 P.2d 216, 27 Cal.App.2d 416—Barnett v. Atchison, T. & S. F. Ry. Co., 278 P. 443, 99 Cal.App. 310—Lawrence v. Butler, 249 P. 840, 79 Cal.App. 436—Snow v. Harris, 181 P. 676, 41 Cal.App. 34.

Colo.—Enyart v. Orr, 238 P. 29, 34, 78 Colo. 6, quoting **Corpus Juris.**

Conn.—Livingstone v. City of New Haven, 3 A.2d 836, 125 Conn. 123—Acme Upholstery Co. v. Garber, 147 A. 561, 110 Conn. 166.

Fla.—Atlantic Coast Line R. Co. v. Shouse, 91 So. 90, 83 Fla. 156.

Ga.—Elliott v. Georgia Power Co., 197 S.E. 914, 58 Ga.App. 151.

Idaho.—Evans v. Bannock County, 83 P.2d 427, 59 Idaho 442.

Ill.—Reese v. Guarantee Trust Mutual, 25 N.E.2d 838, 303 Ill.App. 657—Schultz v. Chicago & A. R. Co., 213 Ill.App. 628

Ind.—Griffith v. Thrall, App., 29 N. E.2d 345—Warren v. Indiana Telephone Corporation, App., 24 N.E. 2d 426, affirmed, Sup., 26 N.E.2d 399—McCoy v. General Glass Corporation, 17 N.E.2d 473, 106 Ind. App. 116—Mounsey v. Bower, 136 N.E. 41, 78 Ind.App. 647.

Iowa.—Stickling v. Chicago, R. I. & P. Ry. Co., 232 N.W. 677, 212 Iowa 149—Hall v. Chicago, R. I. & P. R. Co., 199 N.W. 491, 199 Iowa 607.

Ky.—Sovereign Camp, W. O. W., v. Alcock, 117 S.W.2d 938, 273 Ky. 734—Great American Ins. Co. of New York v. Clayton, 99 S.W.2d 172, 266 Ky. 409—Stacy v. Williams, 69 S.W.2d 697, 253 Ky. 353—Madison Coal Corporation v. Altmire, 284 S.W. 1068, 215 Ky. 283—New York Life Ins. Co. v. Long, 277 S.W. 978, 211 Ky. 656—Axton v. Vance, 269 S.W. 534, 207 Ky. 580—Illinois Cent. R. Co. v. Townsend, 267 S.W. 161, 206 Ky. 329—Gay v. Gay, 209 S.W. 11, 183 Ky. 238.

Md.—Takoma Park Bank v. Abbott, 19 A.2d 169—Mangione v. Snead, 195 A. 329, 173 Md. 33—Baltimore & O. R. Co. v. Brooks, 148 A. 276, 158 Md. 149—Slacum v. Jolley, 138 A. 244, 153 Md. 343.

Mass.—Flynn v. Growers Outlet, 30 N.E.2d 250, 307 Mass. 373—Miller v. Boston & M. R. R., 134 N.E. 368, 240 Mass. 461.

Mich.—Bosch v. Damm, 296 N.W. 669, 296 Mich. 522—In re Evans' Estate, 277 N.W. 893, 283 Mich. 275—Steele v. Stahelin, 207 N.W. 822, 234 Mich. 307.

Minn.—Christopherson v. Custom Laundry Co., 229 N.W. 136, 179 Minn. 325.

Mo.—Frank v. Greenhall, 105 S.W.2d 929, 340 Mo. 1228—Henson v. St. Louis-San Francisco Ry. Co., 256 S.W. 771, 301 Mo. 415—Kuenzel v. City of St. Louis, 212 S.W. 876, 278 Mo. 277—Streeter v. Washington Fidelity Nat. Ins. Co., 68 S.W. 2d 889, 229 Mo.App. 33—McGuire v. Springfield Traction Co., App., 30 S.W.2d 794—Bennett v. Myres, App., 21 S.W.2d 943—Vance v. Tootle-Campbell Dry Goods Co., App., 295 S.W. 517.

Mont.—Green v. Milwaukee Mechanics' Ins. Co., 252 P. 310, 77 Mont. 505.

Neb.—Jacobson v. Skinner Packing Co., 226 N.W. 321, 118 Neb. 711.

N.J.—Schweers v. Elizabeth-Union-

to the existence of any evidence tending to prove the facts hypothesized and not as to the weight of the evidence,[34] and therefore it is not necessary that the facts stated should be uncontroverted[35] or even that they should be clearly proved,[36] and a question may be allowed even though there is a strong pre-

Hillside-Irvington Line, 178 A. 68, 13 N.J.Misc. 188, affirmed 182 A 842, 116 N.J.Law 179.

N.Y.—Laitas v. Brooklyn Edison Co, 277 N.Y.S. 513, 243 App.Div. 739—General Motors Acceptance Corporation v. Dunham, 275 N.Y.S. 349, 242 App.Div. 307—Harden v. Fahrenkopf & Reufle, 240 N.Y.S. 645, 229 App.Div. 1.

N.C.—Flood v. Deschamps Motor Co., 167 S.E. 76, 203 N.C. 794—Brewer v. Ring, 99 S.E. 358, 177 N.C. 476.

Ohio.—Community Traction Co. v. Wandtke, 167 N.E. 701, 32 Ohio App. 207.

Okl.—Cities Service Gas Co. v. Eggers, 98 P.2d 1114, 186 Okl. 466, 126 A.L.R. 1278—Goodlett v. Williamston, 65 P.2d 472, 179 Okl. 238—Oklahoma Gas & Electric Co. v. Oliphant, 45 P.2d 1077, 1080, 172 Okl. 635, citing **Corpus Juris**—Mead Bros. v. Watts, 273 P. 207, 135 Okl. 23.

Or.—Hefling v. Heints, 72 P.2d 44, 157 Or. 542—Cosgrove v. Tracey, 64 P.2d 1321, 156 Or. 1—Mount v. Riechers, 13 P.2d 335, 140 Or. 267—Lehman v. Knott, 196 P. 476, 100 Or. 59.

Pa.—Roberts v. Pitt Pub. Co., 198 A. 668, 330 Pa. 44—Winters v. State Workmen's Ins. Fund, 7 A.2d 112, 136 Pa.Super. 293—Miller v. Pittsburgh Coal Co., 195 A. 151, 129 Pa.Super. 1—Martin v. Prudential Ins. Co. of America, 33 Luz.L.Reg. 257.

S D.—Bennett v. Murdy, 249 N.W. 805, 61 S.D. 471.

Tex.—Fidelity Union Casualty Co. v. Dapperman, Civ.App., 47 S.W.2d 408, error dismissed—Texas Indemnity Ins. Co. v. Gannon, Civ. App., 38 S.W.2d 181, error dismissed—Maryland Casualty Co. v. Allen, Civ.App., 22 S.W.2d 329—Texas Employers' Ins. Ass'n v. Mints, Civ.App., 10 S.W.2d 220—Norwich Union Indemnity Co. v. Davis, Civ.App., 293 S.W. 932.

Utah.—Mary Jane Stevens Co. v. First Nat. Bldg. Co., 57 P.2d 1099, 89 Utah 456—Diaz v. Industrial Commission of Utah, 13 P.2d 307, 80 Utah 77—Tremelling v. Southern Pac. Co., 257 P. 1066, 70 Utah 72.

W.Va.—Blair v. Clark Coal & Coke Co., 148 S.E. 849, 850, 107 W.Va. 507, citing **Corpus Juris.**

Wis.—Landoski v. Mueller, 214 N. W. 329, 193 Wis. 570—Schnetzky v. Zanto, 182 N.W. 751, 174 Wis. 160.

22 C.J. p 714 note 97—42 C.J. p 1220 note 49.

Corpus Juris rule held valid but inapplicable with respect to sustaining expert's opinion as to ultimate fact for jury to decide.—Oklahoma Wheat Pool Terminal Corp. v. Rodgers, 70 P.2d 1080, 1082, 180 Okl. 623.

Proof or offer of proof

Generally, facts constituting predicate for question as to expert witness' opinion should be in evidence when question is asked or question should be accompanied by definite offer to prove such facts.—Mangione v. Snead, 195 A. 329, 173 Md. 33.

Evidence held to justify hypothetical question

(1) Generally.

U.S.—Metropolitan Life Ins. Co. v. Armstrong, C.C.A.Neb., 85 F.2d 187.

Ala.—Ensley Holding Co. v. Kelley, 158 So. 896, 229 Ala. 650—Coffee County v. Marsh, 96 So. 891, 209 Ala. 566.

Ark.—Great Atlantic & Pacific Tea Co. v. Gwilliams, 87 S.W.2d 581, 191 Ark. 650.

Cal.—Albaugh v. Mt. Shasta Power Corporation, 73 P.2d 217, 9 Cal.2d 751.

Iowa.—Peckinpaugh v. Engelke, 247 N.W. 822, 215 Iowa 1248.

Ky.—Great American Ins. Co. of New York v. Clayton, 57 S.W.2d 467, 247 Ky. 612—Pennsylvania R. Co. v. P. Bannon Pipe Co., 280 S. W. 951, 213 Ky. 257.

Mo.—Hamilton v. Standard Oil Co. of Indiana, 19 S.W.2d 679, 323 Mo. 531—Bain v. Missouri-Kansas-Texas R. Co., App., 141 S.W.2d 577—Whitley v. Stein, App., 34 S.W. 2d 998—Howard v. Lewin Metals Corporation, App., 22 S.W.2d 84, certiorari quashed State ex rel. St. Louis Bridge & Terminal Rys. Co. v. Haid, 29 S.W.2d 714, 325 Mo. 532.

Tenn.—Standard Oil Co. of Louisiana v. Roach, 94 S.W.2d 63, 19 Tenn.App. 661.

Vt.—Perkins v. Vermont Hydro-Electric Corporation, 177 A. 631, 106 Vt. 367.

(2) Testimony that witness' father wiped his forehead justified hypothetical question assuming that he wiped perspiration off his forehead.—Texas Employer's Ins. Ass'n v. Lovett, Tex.Civ.App., 19 S.W.2d 397, error refused.

(3) Hypothetical question including episode occurring during trial in court's and jury's presence was not improper as including element not disclosed by evidence.—Kraettli v. North Coast Transp. Co., 6 P.2d 609, 166 Wash. 186, 80 A.L.R. 1520.

Testimony by laymen

Where testimony given by laymen as to treatment by defendant physician was sufficiently definite for experts to base thereon their opinion as to whether the treatment conformed to the required standards, it was not error to permit hypothetical questions to be asked experts based on such testimony.—Carson v. Jackson, 281 F. 411, 52 App.D.C. 51.

Evidence held too indefinite and speculative to constitute predicate for question.—Mangione v. Snead, 195 A. 329, 173 Md. 33.

34. Colo.—Enyart v. Orr, 238 P. 29, 34, 78 Colo. 6, quoting **Corpus Juris.**

Ind.—Smith v. Kemerly, 150 N.E. 65, 84 Ind App. 398.

Miss.—Birchett v. Hundermark, 110 So. 237, 145 Miss. 683.

Mo.—Carroll v. Missouri Power & Light Co., 96 S.W.2d 1074, 231 Mo App. 265—Loughlin v. Marr-Bridger Grocer Co., App., 10 S.W.2d 75.

S.D.—Bennett v. Murdy, 249 N.W. 805, 61 S.D. 471.

22 C.J. p 715 note 98.

Best evidence unnecessary

A hypothetical question should not be excluded because it is not framed on the best evidence; it is proper and should be permitted to be answered if supported by evidence tending to prove the facts therein enumerated.—McFarland v Clark, 8 Ohio App. 326, affirmed Clark v. McFarland, 124 N.E. 164, 99 Ohio St. 100.

Greater weight of evidence

Hypothetical question propounded to expert was held not fatally defective as not based on hypothesis that jury should find facts were true by greater weight of evidence.—Dempster v. Fite, 167 S.E. 33, 203 N.C. 697.

35. U.S.—Fidelity & Casualty Co. of New York v. McKay, C.C.A. Tex., 73 F.2d 828.

Cal.—Stuart v. Preston, 38 P.2d 155, 2 Cal.App.2d 310, rehearing denied 39 P.2d 441.

Colo.—Enyart v. Orr, 238 P. 29, 34, 78 Colo. 6, quoting **Corpus Juris.**

Ill.—Chicago City Ry. Co. v. Rothschild & Co., 213 Ill.App. 178.

Ind.—Mounsey v. Bower, 136 N.E. 41, 78 Ind.App. 647.

Miss.—Beard v. Turritin, 161 So. 688, 173 Miss. 206.

W.Va.—Fairview Fruit Co. v. H. P. Brydon & Bro., 102 S.E. 231, 85 W. Va. 609.

22 C.J. p 715 note 99.

36. U.S.—Metropolitan Life Ins. Co.

ponderance of evidence against the facts assumed,[37] it being for the jury, in determining what weight will be given to the testimony of the expert, to consider whether the facts stated in the question have been established by a clear preponderance of evidence.[38]

Since the only requirement is that the testimony must tend to prove the material facts assumed, rational inferences deducible from the testimony, as well as positive testimony itself, may form the basis for a hypothetical question.[39] It is proper to include in a hypothetical question facts of which the existence has been admitted in the pleadings or in any other legal form,[40] or which have been testified to by the adverse party.[41] Immaterial facts need not be covered by evidence.[42]

Facts inadmissible of themselves cannot be proved as a basis for the opinion of an expert.[43]

Order of evidence. As the order of evidence is an administrative function, the judge may permit an examining counsel at any stage to include in a hypothetical question facts of which he proposes to furnish evidence,[44] the answer being received subject to be stricken out in case the necessary evidence is not furnished.[45] However, it is ordinarily the rule that the facts on which a hypothetical question is based must be proved before the question is asked,[46] and accordingly it is equally within the judge's discretion to refuse to allow the question to be put until the foundation in the evidence is actually laid.[47]

§ 553. —— Knowledge of Witness as Basis of Hypothetical Question

A witness examined as an expert may also be the witness establishing in whole or in part, as the result of scientific knowledge or personal observation, the facts hypothetically assumed; but a mixture of unspecified knowledge and what the witness has heard of testimony does not constitute a suitable hypothesis.

It is not unusual that the witness examined as an "expert" should also be a witness establishing in whole or in part, as the result of scientific knowledge or personal observation, the facts hypothetically assumed.[48] There is no inherent objection to allowing a skilled observer also to testify as an expert,[49] and indeed the importance to be attached to the judgment of an expert may be increased by reason of his having had opportunity for personal observation.[50] Where the facts observed by the

v. Armstrong, C.C.A.Neb., 85 F. 2d 187.
Ind.—Mounsey v. Bower, 136 N.E. 41, 78 Ind.App. 647.
Okl.—Oklahoma Gas & Electric Co. v. Oliphant, 45 P.2d 1077, 1080, 172 Okl. 635, citing **Corpus Juris**—Mead Bros. v. Watts, 273 P. 207. 135 Okl. 23.
Tex.—Texas Employer's Ins. Ass'n v. Lovett, Civ.App., 19 S.W.2d 397, error refused.
22 C.J. p 716 note 1.

37. Ind.—Mounsey v. Bower, 136 N.E. 41, 78 Ind.App. 647.
22 C.J. p 716 note 2.

38. U.S.—Metropolitan Life Ins. Co. v. Armstrong, C.C.A.Neb., 85 F.2d 187.
Ind.—Public Utilities Co. v. Handorf, 112 N.E. 775, 185 Ind. 254—Griffith v. Thrall, App., 29 N.E.2d 345.

39. Mo.—Krug v. Mutual Life Ins. Co. of New York, App., 149 S.W.2d 393—Frost v. Central Business Men's Ass'n, App., 246 S.W. 628.
Okl.—Teeters v. Frost, 292 P. 356, 145 Okl. 273, 71 A.L.R. 179.

Existence on certain day

Hypothetical question assuming facts testified to as existing before and after particular day, and thus presumptively existing on such day, was proper.—Cavanaugh v. People's Gas & Electric Co., 254 N.Y.S. 835, 234 App.Div. 402.

40. Ark.—Williams v. Cantwell, 170 S.W. 250, 114 Ark. 542.
Cal.—Connan v. Loewenthal, 61 P. 940, 129 Cal. 197.

41. Mo.—State v. Dunn, 77 S.W. 848, 179 Mo. 95.

42. D.C.—Shapiro v. Pennsylvania R. Co., 83 F.2d 581, 65 App.D.C. 324.
22 C.J. p 716 note 9.

43. Mass.—Jewett v. Boston El. R. Co., 107 N.E. 433, 219 Mass. 528.
22 C.J. p 716 note 10.

44. U.S.—Proechel v. U. S., C.C.A. Minn., 59 F.2d 648, certiorari denied 53 S.Ct. 122, 287 U.S. 658, 77 L.Ed. 568.
Iowa.—Crouch v. National Live Stock Remedy Co., 217 N.W. 557, 205 Iowa 51.
Md.—Grill v. O'Dell, 77 A. 984, 113 Md. 984.
Mo.—Martin v. Springfield City Water Co., App., 128 S.W.2d 674, 678, quoting **Corpus Juris.**
22 C.J. p 716 note 4.

45. Mo.—Martin v. Springfield City Water Co., supra, quoting **Corpus Juris.**
Or.—Cosgrove v. Tracey, 64 P.2d 1321, 156 Or. 1.
22 C.J. p 716 note 5.

46. Ala.—Snow v. Allen, 151 So. 468, 227 Ala. 615.
Mo.—Martin v. Springfield City Water Co., App., 128 S.W.2d 674.

Failure to recall witness

Exclusion of hypothetical questions based on evidence not yet in record was not error, where counsel failed to recall witness after offering testimony on which questions were based.—Helmig v. Kramer, 192 N.E. 388, 48 Ohio App. 71.

47. Ohio.—Helmig v. Kramer, supra.
22 C.J. p 716 note 6.

48. Iowa.—Martin v. Chase, 189 N. W. 958, 194 Iowa 407.
Mo.—Adams v. Carlo, App., 101 S.W. 2d 753.
Okl.—Roxana Petroleum Corporation v. City of Pawnee, 7 P.2d 663, 666, 155 Okl. 141, quoting **Corpus Juris.**
Or.—Cobb v. Spokane, P. & S. Ry. Co., 44 P.2d 731, 150 Or. 226.
Tex.—Shuffield v. Taylor, 83 S.W.2d 955, 125 Tex. 601, reversing Taylor v. Shuffield, Civ.App., 52 S.W.2d 788.
22 C.J. p 716 note 11.

Party's condition

Where medical expert previously testified to plaintiff's condition, embodying such condition in hypothetical question was held not necessary. —Standefer v. Fleming, Mo.App., 298 S.W. 134.

49. Iowa.—Rulison v. Victor X-Ray Corporation, 223 N.W. 745, 207 Iowa 895.
Okl.—Roxana Petroleum Corporation v. City of Pawnee, 7 P.2d 663, 666, 155 Okl. 141, quoting **Corpus Juris.**
22 C.J. p 716 note 12.

50. Mo.—Adams v. Carlo, App., 101 S.W.2d 753.

witness are few or simple, they may be made a part of the hypothetical question,[51] such of the facts as permit of individual statement being first detailed,[52] or the facts may be permitted to constitute the basis of the question[53] or the witness may be asked a question based in part on his observation and in part on the testimony of certain other witnesses.[54]

The hypothesis may include facts disclosed to the witness by real evidence; as where a witness is asked whether in his opinion a boy present in court was a proper person to put to work on a machine exhibited to the witness,[55] or where use is made of articles present in court;[56] but a mixture of unspecified knowledge and what the witness has heard of testimony,[57] or facts partly within his observation or knowledge and partly derived from others,[58] or of facts in evidence and also the custom of a business[59] does not constitute a suitable hypothesis.

§ 554. —— Questions "Upon the Evidence"

a. In general
b. When rejected

a. In General

In some jurisdictions the practice is sometimes permitted, although ordinarily disapproved, of dispensing with a recital of assumed facts and eliciting the witness' opinion on all of the testimony or a specified part thereof, which the witness has heard or read and assumes to be true, where the facts are undisputed.

A desire to economize time has led a number of courts to sanction the practice, in cases where the facts are undisputed, of dispensing with a recital of facts in a hypothetical question and asking the witness to state his judgment "upon the evidence,"[60] or even on such a part of it as is material to the inquiry,[61] although it is conceded to be the better practice to proceed in the regular manner and frame a hypothetical question,[62] one objection to the ques-

Okl.—Roxana Petroleum Corporation v. City of Pawnee, 7 P.2d 663, 666, 155 Okl. 141, quoting **Corpus Juris.**
22 C.J. p 716 note 13.

51. Iowa.—Rulison v. Victor X-Ray Corporation, 223 N.W. 745, 207 Iowa 895.
Mo.—Adams v. Carlo, App., 101 S.W. 2d 753.
Or.—Cobb v. Spokane, P. & S. Ry. Co., 44 P.2d 731, 150 Or. 226—Foott v. Lindstrom & Feigenson, 22 P.2d 321, 143 Or. 309.
22 C.J. p 716 note 14.

52. Ind.—Chicago, I. & L. R. Co. v. Gorman, 106 N.E. 897, 58 Ind.App. 381.

53. Cal.—In re Flint, 34 P. 863, 100 Cal. 391.

54. D.C.—Gunning v. Cooley, 30 F.2d 467, 58 App.D.C. 304, certiorari granted 49 S.Ct. 263, 279 U.S. 828, 73 L.Ed. 979, affirmed 50 S.Ct. 231, 281 U.S. 90, 74 L.Ed. 720.
Idaho.—Cochran v. Gritman, 203 P. 289, 34 Idaho 654.
Iowa.—Rulison v. Victor X-Ray Corporation, 223 N.W. 745, 207 Iowa 895.
Minn.—Masteller v. Great Northern Ry. Co., 114 N.W. 757, 103 Minn. 244.
Mo.—Oesterle v. Kroger Grocery & Baking Co., 141 S.W.2d 780—Prince v. Metropolitan Life Ins. Co., App., 129 S.W.2d 5—Adams v. Carlo, App., 101 S.W.2d 753.
N.Y.—Christastie v. Elmira Water, Light & R. Co., 195 N.Y.S. 156, 202 App.Div. 270.
N.C.—Dulin v. Henderson-Gilmer Co., 135 S.E. 614, 192 N.C. 638, 49 A. L.R. 663.
Okl.—Roxana Petroleum Corporation v. City of Pawnee, 7 P.2d 663, 666, 155 Okl. 141, quoting **Corpus Juris.**
Or.—Carnine v. Tibbetts, 74 P.2d 974, 158 Or. 21—Cobb v. Spokane, P. & S. Ry. Co., 44 P.2d 731, 150 Or. 226.
Pa.—Jackson v. U. S. Pipe Line Co., 191 A. 165, 325 Pa. 436.
22 C.J. p 717 note 17.

Repetition of prior testimony
Physician having testified to patient's condition, such information need not be again embodied in subsequent hypothetical question to physician as expert.—Cobb v. Spokane, P. & S. Ry. Co., 44 P.2d 731, 150 Or. 226.

55. Mass.—McJuerty v. Hale, 36 N. E. 682, 161 Mass. 51.

56. Mass.—Murphy v. Marston Coal Co., 67 N.E. 342, 183 Mass. 385.
22 C.J. p 717 note 19.

57. Colo.—Johns v. Shinall, 86 P.2d 605, 103 Colo. 381.
Md.—Pennsylvania R. Co. v. Lord, 151 A. 400, 159 Md. 518—Scheller v. Schindel, 138 A. 415, 153 Md. 547.
22 C.J. p 717 note 20.

58. Md.—Scheller v. Schindel, supra.
22 C.J. p 717 note 21.

59. Iowa.—Centerville Independent School Dist. v. Swearngin, 94 N.W. 206, 119 Iowa 702.

60. Ark.—Arkansas Baking Co. v. Wyman, 47 S.W.2d 45, 185 Ark. 310.
Colo.—Callahan v. Feldman, 11 P.2d 217, 218, 90 Colo. 540, citing **Corpus Juris.**
Md.—Langenfelder v. Jones, 13 A.2d 623, 178 Md. 421, motion denied 15 A.2d 422, 178 Md. 421—Industrial Service Co. v. State, to Use of Bryant, 6 A.2d 372, 176 Md. 625—Mt. Royal Cab Co. v. Dolan, 179 A. 54, 168 Md. 633, 98 A.L.R. 1106—Quimby v. Greenhawk, 171 A. 59, 166 Md. 335—Gordon v. Opalecky, 137 A. 299, 152 Md. 536—Daugherty v. Robinson, 122 A. 124, 143 Md. 259.
Mo.—Wojciechowski v. Coryell, App., 217 S.W. 638.
Or.—Carnine v. Tibbetts, 74 P.2d 974, 158 Or. 21.
Pa.—Laudenslager v. Pennsylvania Power & Light Co., 167 A. 778, 312 Pa. 169—McMinis v. Philadelphia Rapid Transit Co., 135 A. 722, 288 Pa. 377—Kelly v. Watson Coal Co., 115 A. 885, 272 Pa. 39.
22 C.J. p 717 note 23.

Bill of particulars
Permitting expert witnesses to answer hypothetical questions based on bill of particulars and earlier testimony was not error.—McLyman v. Miller, R.I., 166 A. 548.

61. Colo.—Callahan v. Feldman, 11 P.2d 217, 90 Colo. 540.
Pa.—Bowles v. City of Pittsburgh, 20 A.2d 783—McMinis v. Philadelphia Rapid Transit Co., 135 A. 722, 288 Pa. 377.
R.I.—Henderson v. Dimond, 110 A. 388, 43 R.I. 60.
22 C.J. p 718 note 24.

62. Ark.—Arkansas Baking Co. v. Wyman, 47 S.W.2d 45, 185 Ark. 310.
Del.—In re Barnes' Will, 18 A.2d 433.
Md.—Quimby v. Greenhawk, 171 A. 59, 166 Md. 335.
N.D.—Hunder v. Rindlaub, 237 N.W. 915, 61 N.D. 389.
R.I.—Robinson v. Puritan Stores, 136 A. 243, 48 R.I. 131—Henderson v. Dimond, 110 A. 388, 43 R.I. 60.
22 C.J. p 718 note 25.

tion on the evidence being that the witness may not be able to remember all the testimony, and to allow him to proceed on what he chances to recollect deprives the parties of any knowledge as to the real basis of his inference.[63] The witness must, of course, have heard the evidence,[64] or be familiar with it,[65] and the question must require him to assume that it is true.[66]

To make the evidence more specific some courts have permitted the expert to assume the facts or such of the facts as are material[67] to be as testified to by a party[68] or some other witness[69] or set of witnesses,[70] provided it is made to appear that the witness has heard the former testimony;[71] or at all events such portion of it as is material,[72] or sufficient to put him into possession of the essential facts,[73] or that the testimony has been read to,[74] or by,[75] the witness.

b. When Rejected

In some jurisdictions the practice of allowing an expert witness to ascertain facts directly from the evidence instead of from a hypothetical question has generally been disallowed, and even where it is permitted the witness cannot do so if the facts are complicated or are in dispute, or where the question requires the witness to pass on matters of fact, credibility of witnesses, or the merits of the case.

In some jurisdictions the practice of allowing an expert witness to ascertain the facts directly from the evidence, instead of their being embodied in a hypothetical question, has been condemned and generally disallowed,[76] and even where the practice is allowed it is subject to limitation, and even to curtailment, in the discretion of the court.[77] A question "upon the evidence" should never be permitted where the facts are in dispute,[78] and the testimony is voluminous and complicated,[79] for the reason that such a practice necessarily involves an invasion of the province of the jury,[80] whereas the function of

63. U.S.—Southwest Metals Co. v. Gomez, C.C.A.Ariz., 4 F.2d 215, 218, 39 A.L.R. 1416, quoting **Corpus Juris.**
Del.—In re Barnes' Will, 18 A.2d 433.
Mich.—In re Elliott's Estate, 257 N.W. 919, 269 Mich. 677.
22 C.J. p 718 note 26.

64. Md.—Thompson v. Standard Wholesale Phosphate & Acid Works, 13 A.2d 328, 178 Md. 305—Pennsylvania R. Co. v. Lord, 151 A. 400, 159 Md. 518—Scheller v. Schindel, 138 A. 415, 153 Md. 547.
Pa.—Bowles v. City of Pittsburgh, 20 A.2d 783.
22 C.J. p 718 note 27, p 720 note 51.

65. Md.—Pennsylvania R. Co. v. Lord, 151 A. 400, 159 Md. 518.
22 C.J. p 718 note 28.

66. Del.—In re Barnes' Will, 18 A.2d 433.
Pa.—Bowles v. City of Pittsburgh, 20 A.2d 783.
22 C.J. p 718 note 29.

67. Md.—Davis v. State, 38 Md. 15.
Mass.—Nolan v. Newton St. R. Co., 92 N.E. 505, 206 Mass. 384—Hand v. Brookline, 126 Mass. 324.

68. Conn.—Slade v. Harris, 135 A. 570, 105 Conn. 436.
N.D.—Burdick v. Mann, 236 N.W. 340, 60 N.D. 710, 82 A.L.R. 1443.
Or.—Carnine v. Tibbetts, 74 P.2d 974, 158 Or. 21.
R.I.—Robinson v. Puritan Stores, 136 A. 243, 48 R.I. 131.
22 C.J. p 718 note 31.

69. Ark.—Safeway Stores v. Ingram, 51 S.W.2d 985.
N.D.—Burdick v. Mann, 236 N.W. 340, 60 N.D. 710, 82 A.L.R. 1443.
R.I.—Henderson v. Dimond, 110 A. 388, 43 R.I. 60.
22 C.J. p 718 note 32.

70. Conn.—Di Biase v. Garnsey, 136 A. 871, 106 Conn. 86.
Mo.—Perryman v. Missouri Pac. R. Co., 31 S.W.2d 4, 326 Mo. 176.
N.D.—Burdick v. Mann, 236 N.W. 340, 60 N.D. 710, 82 A.L.R. 1443.
22 C.J. p 718 note 33.

71. Md.—Pennsylvania R. Co. v. Lord, 151 A. 400, 159 Md. 518.
Pa.—McMinis v. Philadelphia Rapid Transit Co., 135 A. 722, 288 Pa. 377.
22 C.J. p 718 note 34.

72. Md.—Baber v. John C. Knipp & Sons, 163 A. 862.
22 C.J. p 718 note 35.

73. Md.—Baber v. John C. Knipp & Sons, supra.
22 C.J. p 718 note 36.

74. Mo.—State v. Meyers, 12 S.W. 516, 99 Mo. 107.
N.Y.—McCann v. People, 3 Park.Cr. 272, reversed on other grounds 16 N.Y. 58.
Vt.—Gilman v. Strafford, 50 Vt. 723.
Wis.—McKeon v. Chicago, M. & St. P. R. Co., 69 N.W. 175, 94 Wis. 477, 59 Am.S.R. 910, 35 L.R.A. 252.
22 C.J. p 718 note 37.

75. Vt.—Gilman v. Strafford, 50 Vt. 723.

76. U.S.—Southwest Metals Co. v. Gomez, C.C.A.Ariz., 4 F.2d 215, 39 A.L.R. 1416.
Idaho.—Evans v. Cavanagh, 73 P.2d 83, 58 Idaho 324.
22 C.J. p 719 note 39.

77. Conn.—Bagre v. Daggett Chocolate Co., 13 A.2d 757, 126 Conn. 659—Trasacco v. New York, N. H. & H. R. Co., 155 A. 493, 113 Conn. 355—Di Biase v. Garnsey, 136 A. 871, 106 Conn. 86.

Limited discretion

Court's discretion to permit expert's opinion on facts testified to by other witnesses whom he heard must be sparingly employed.—Di Biase v. Garnsey, supra.

78. Ark.—Arkansas Baking Co. v. Wyman, 47 S.W.2d 45, 185 Ark. 310.
Ill.—Maton Bros. v. Central Illinois Public Service Co., 191 N.E. 321, 356 Ill. 584, affirming 269 Ill.App. 99.
Kan.—Shouse, Doolittle & Morelock v. Consolidated Flour Mills Co., 294 P. 657, 660, 132 Kan. 108, citing **Corpus Juris.**
Md.—Thompson v. Standard Wholesale Phosphate & Acid Works, 13 A.2d 328, 178 Md. 305—Mangione v. Snead, 195 A. 329, 173 Md. 33—Mead v. Gilbert, 185 A. 668, 170 Md. 592—Mt. Royal Cab Co. v. Dolan, 179 A. 54, 168 Md. 633, 98 A.L.R. 1106—Quimby v. Greenhawk, 171 A. 59, 166 Md. 335.
Mich.—In re Elliott's Estate, 257 N.W. 919, 269 Mich. 677—O'Donnell v. Oliver Iron Mining Co., 247 N.W. 720, 262 Mich. 470.
N.D.—Hunder v. Rindlaub, 237 N.W. 915, 61 N.D. 389.
Pa.—Bowles v. City of Pittsburgh, 20 A.2d 783—Wissinger v. Valley Smokeless Coal Co., 115 A. 880, 271 Pa. 566—De Rosa v. Westmoreland Coal Co., 15 A.2d 388, 141 Pa.Super. 537.
S.C.—Ellis v. Kansas City Life Ins. Co., 197 S.E. 398, 400, 187 S.C. 334, quoting **Corpus Juris.**
22 C.J. p 719 note 40.

79. Mich.—In re Elliott's Estate, 257 N.W. 919, 269 Mich. 677—O'Donnell v. Oliver Iron Mining Co., 247 N.W. 720, 262 Mich. 470.
22 C.J. p 718 note 26 [a].

80. Ill.—Maton Bros. v. Central Illinois Public Service Co., 191 N.E.

the witness is not to decide on the facts but to assume their truth,[81] and for the further reason that, as the answer of the witness would disclose nothing as to his view of the facts, it would be impossible to tell what facts were used by him in forming his judgment.[82]

A fortiori, the witness cannot properly be asked for his judgment as to disputed matters of fact,[83] or as to the credibility of a witness;[84] neither can the witness be asked to comment on the evidence,[85] to testify as to the merits of the case,[86] or to include his "understanding"[87] or "recollection"[88] of the evidence of another witness.

A witness who has not heard all the material testimony cannot testify from what he has heard,[89] from what he has seen and heard,[90] or from what he has heard and a newspaper account of the evidence at a former trial of the same case which he has read,[91] and evidence elicited by these forms of question has accordingly been rejected,[92] even where the evidence of a witness is incorporated with facts hypothetically stated.[93]

§ 555. Answers

General rules with respect to the propriety of answers by a witness generally apply, with such modifications as the nature of the case requires, to the answers of a skilled observer or expert witness.

The general rules with respect to the propriety of answers by a witness generally, which are discussed in the C.J.S. title Witnesses §§ 352–355, also 70 C.J. p 568 note 90–p 577 note 38, apply, with such modifications as the nature of the testimony requires, to the answer of one who is examined as a skilled observer or expert witness.[94] Accordingly the answer of such a witness must be responsive to the question,[95] must not be conjectural[96] or too general,[97] and must have a basis in the evidence.[98] However, the fact that an expert volunteers an irresponsive statement before answering a question does not require an exclusion of his evidence or

321, 356 Ill. 584, affirming 269 Ill. App. 99.
Md.—Thompson v. Standard Wholesale Phosphate & Acid Works, 13 A.2d 328, 178 Md. 305—Calder v. Levi, 177 A. 392, 168 Md. 260, 97 A.L.R. 880.
Mich.—In re Elliott's Estate, 257 N. W. 919, 269 Mich. 677.
S.C.—Ellis v. Kansas City Life Ins. Co., 197 S.E. 398, 400, 187 S.C. 334, quoting **Corpus Juris.**
22 C.J. p 719 note 41.

81. Ill.—Maton Bros. v. Central Illinois Public Service Co., 191 N.E. 321, 356 Ill. 584, affirming 269 Ill. App. 99.
Mich.—In re Elliott's Estate, 257 N. W. 919, 269 Mich. 677.
N.D.—Hunder v. Rindlaub, 237 N.W. 915, 61 N.D. 389.
22 C.J. p 720 note 42.
Preponderance of evidence
Questions should be so framed as not to call on witness to pass on preponderance of evidence.—McCoy v. General Glass Corporation, 17 N.E. 2d 473, 106 Ind.App. 116.

82. Mich.—In re Elliott's Estate, 257 N.W. 919, 269 Mich. 677.
22 C.J. p 720 note 43.

83. U.S.—U. S. v. Stephens, C.C.A. Idaho, 73 F.2d 695, 703, citing **Corpus Juris.**
Ala.—Benefit Ass'n of Ry. Employees v. Armbruster, 116 So. 164, 217 Ala. 282.
Ind.—McCoy v. General Glass Corporation, 17 N.E.2d 473, 106 Ind.App. 116.
Md.—Thompson v. Standard Wholesale Phosphate & Acid Works, 13 A.2d 328, 178 Md. 305.
N.D.—Hunder v. Rindlaub, 237 N.W. 915, 61 N.D. 389—Anderson v. Jacobson, 172 N.W. 64, 42 N.D. 87.
Or.—Cosgrove v. Tracey, 64 P.2d 1321, 156 Or. 1—Lehman v. Knott, 196 P. 476, 100 Or. 59.
22 C.J. p 720 note 45.

84. U.S.—U. S. v. Stephens, C.C.A. Idaho, 73 F.2d 695, 703, citing **Corpus Juris**—U. S. v. Sauls, C.C.A. N.C., 65 F.2d 886, 887, citing **Corpus Juris.**
Md.—Thompson v. Standard Wholesale Phosphate & Acid Works, 13 A.2d 328, 178 Md. 305.
N.D.—Hunder v. Rindlaub, 237 N.W. 915, 61 N.D. 389—Anderson v. Jacobson, 172 N.W. 64, 42 N.D. 87.
22 C.J. p 720 note 46.

85. Tex.—Gulf, C. & S. F. R. Co. v. Bell, 58 S.W. 614, 24 Tex.Civ. App. 579.
22 C.J. p 720 note 47.

86. Mo.—Tingley v. Cowgill, 48 Mo. 291.

87. Mich.—People v. Bowen, 130 N. W. 706, 165 Mich. 231—Detzur v. B. Stroh Brewing Co., 77 N.W. 948, 119 Mich. 282, 44 L.R.A. 500.

88. Ind.—Bedford Belt R. Co. v. Palmer, 44 N.E. 686, 16 Ind.App. 17.

89. Md.—Pennsylvania R. Co. v. Lord, 151 A. 400, 159 Md. 518—Scheller v. Schindel, 138 A. 415, 153 Md. 547.
Pa.—McMinis v. Philadelphia Rapid Transit Co., 135 A. 722, 288 Pa. 377.
22 C.J. p 720 note 51.

90. Ga.—Flanagan v. State, 32 S.E. 80, 106 Ga. 109.

91. Tex.—Williams v. State, 39 S.W. 687, 37 Tex.Cr. 348.
22 C.J. p 720 note 53.

92. Md.—Pennsylvania R. Co. v. Lord, 151 A. 400, 159 Md. 518.
Mich.—In re Elliott's Estate, 257 N. W. 919, 269 Mich. 677.
22 C.J. p 720 note 54.

93. Conn.—Barber's App., 27 A. 973, 63 Conn. 393, 22 L.R.A. 90.

94. Md.—Western Union Tel. Co. v. Rasche, 99 A. 991, 130 Md. 126.
22 C.J. p 720 note 57.

95. Ky.—Dossenbach v. Reidhar's Ex'x, 53 S.W.2d 731, 245 Ky. 449.
Tex.—Shuffield v. Taylor, 83 S.W. 2d 955, 125 Tex. 601, reversing Taylor v. Shuffield, Civ.App., 52 S.W.2d 788.
Answer too broad
Ind.—Northern Indiana Public Service Co. v. W. J. & M. S. Vesey, 200 N.E. 620, 210 Ind.App. 338.
Answer held responsive
Md.—Brown v. Hebb, 175 A. 602, 167 Md. 535, 97 A.L.R. 366.

96. Ill.—Erhardt v. Connecticut Fire Ins. Co., 219 Ill.App. 48.
Answers not objectionable as conjectural or speculative.—Housman v. Geiman, 252 N.W. 857, 62 S.D. 310.

97. Mo.—Gricus v. United Rys. Co. of St. Louis, 237 S.W. 763, 291 Mo. 582.
Answers not objectionable
Tex.—Thompson v. Schletze, Civ. App., 126 S.W.2d 1044.

98. Ky.—Cincinnati, N. O. & T. P. R. Co. v. Owsley, 231 S.W. 210, 191 Ky. 661.
Answer not objectionable
Tex.—Texas Employers' Ins. Ass'n v. Fitzgerald, Civ.App., 292 S.W. 925, reversed on other grounds, Com.App., 296 S.W. 509.

render its consideration error;[99] and where the answer has a bearing on the case the court may let it stand, although not responsive to the question.[1] While the answer of an expert should be so definite and unequivocal as to amount to an expression of professional opinion,[2] it is not essential that the witness state in exact words that it is his "professional opinion,"[3] but such expressions as "I think,"[4] "I imagine,"[5] or "I guess"[6] have been held tantamount to such a statement. Before a witness is permitted to express an opinion on a particular matter the facts on which the opinion is founded should be before the court.[7] If, however, the witness has personal knowledge of the subject of the inquiry, he may give his opinion thereon without detailing to the jury all that he has observed.[8] An expert witness may be properly permitted to explain a previous answer[9] or to complete an uncompleted answer;[10] and it is no objection that the predicate for his answer was not put before the jury.[11] An expert should not, however, be permitted to classify a matter as "standard" without defining the term "standard."[12]

Categorical answers. An expert may not be required to answer a question categorically where the nature of the question is not such as to make such an answer appropriate.[13]

§ 556. —— Statement as to Cause and Effect

Statements as to cause and effect must have a sufficient predicate, must be responsive to the question, must constitute a definite expression of opinion, and must not be speculative.

In addition to having a sufficient predicate[14] and being responsive to the question,[15] the answers of a skilled observer or expert witness as to cause and effect must be such as to constitute a definite expression of opinion.[16] Such answers should not be contradictory;[17] and, when they relate to future consequences, should indicate that the consequences are reasonably certain to appear[18] and are probabilities rather than mere possibilities.[19] While

99. Ind.—Swing v. Kokomo Steel & Wire Co., 125 N.E. 471, 75 Ind. App. 124.

1. Vt.—Douglass v. Morrisville, 95 A. 810, 89 Vt. 393.

Answer not strictly responsive was not erroneous.—Sovereign Camp, W. O. W., v. Screws, 119 So. 644, 218 Ala. 599.

2. Pa.—Di Fazio v. J. G. Brill Co., 3 A.2d 216, 133 Pa.Super. 576.

Answers held proper or sufficient
Colo.—Riss & Co. v. Galloway, 114 P.2d 550.
Mo.—Roberson v. Loose-Wiles Biscuit Co., App., 285 S.W. 127.

3. Pa.—Elonis v. Lytle Coal Co., 3 A.2d 995, 134 Pa.Super. 264.

4. Pa.—Dewees v. Day & Zimmerman, 140 A. 345, 291 Pa. 379—Jones v. Philadelphia & Reading Coal & Iron Co., 132 A. 122, 285 Pa. 317—Lambert v. Barry, 96 Pa. Super. 221.
Tex.—Atchison, T. & S. F. Ry. Co. v. Abercrombie, Civ.App., 283 S. W. 294.

5. Tex.—Atchison, T. & S. F. Ry. Co. v. Abercrombie, supra.

6. Tex.—Atchison, T. & S. F. Ry. Co. v. Abercrombie, supra.

7. N.H.—Salisbury Beach Associates v. Littlefield, 200 A. 777, 89 N.H. 447.

Solvency
State auditor who examined records of securities company could not express opinion as to its solvency until facts on which his opinion was founded were before court to determine whether facts justified opinion expressed.—Wilson v. Guaranteed Securities Co., 23 P.2d 921, 82 Utah 224.

8. Ala.—Birmingham Amusement Co. v. Norris, 112 So. 633, 216 Ala. 138, 53 A.L.R. 840.

Hypothetical statement of the data need not be made in giving an expert opinion, except by witnesses not having personal observation of the data for their opinion, and in such case opposing party may bring out facts on cross-examination.—Lemley v. Doak Gas Engine Co., 180 P. 671, 40 Cal.App. 146.

9. Md.—Cumberland & Allegany Gas Co. v. Caler, 146 A. 750, 157 Md. 596.

10. Tex.—United Employers Casualty Co. v. Marr, Civ.App., 144 S. W.2d 973, error dismissed, judgment correct.

11. Tex.—El Paso Electric Co. v. Gambrell, Civ.App., 292 S.W. 577.

12. Md.—S. J. Van Lill Co. v. Frederick City Packing Co., 141 A. 898, 155 Md. 303.

13. Tex.—United Employers Casualty Co. v. Marr, Civ.App., 144 S. W.2d 973, error dismissed, judgment correct.

14. **Sufficient predicate shown**
Ala.—Feore v. Trammel, 102 So. 529, 212 Ala. 325.

15. **Answers held responsive**
Ark.—Wilson & Co. v. Smith, 278 S. W. 31, 169 Ark. 1054.
Iowa.—Latham v. Des Moines Electric Light Co., 296 N.W. 372.
Kan.—Son v. Eagle-Picher Mining & Smelting Co., 58 P.2d 44, 144 Kan. 146.

Answers held irresponsive
N.H.—Bridges v. Great Falls Mfg. Co., 156 A. 697, 85 N.H. 220.
Vt.—Twombly v. Piette, 134 A. 700, 99 Vt. 499.

16. Mo.—Floyd v. A. Y. McDonald Mfg. Co., 46 S.W.2d 251, 226 Mo. App. 444.
Pa.—Rice v. Hill, 172 A. 289, 315 Pa. 166—Di Fazio v. J. G. Brill Co., 3 A.2d 216, 133 Pa.Super. 576—Carey v. Schwartz, 3 A.2d 203, 133 Pa.Super. 604.

Answer held expression of opinion
Pa.—Rice v. Stevens Coal Co., 181 A. 516, 120 Pa.Super. 15.

17. **Answer not objectionable** as contradictory.—Ballance v. Dunnington, 224 N.W. 434, 246 Mich. 36.

18. Ill.—Metz v. Yellow Cab Co., 248 Ill.App. 609—Ehrhardt v. Connecticut Fire Ins. Co., 219 Ill.App. 48—Told v. Madison Bldg. Co., 216 Ill.App. 29.
Wash.—Crock v. Magnolia Milling Co., 266 P. 727, 147 Wash. 589.

Necessity of objection
A party may be precluded from objecting to an answer as speculative where he fails to insist that it be stricken and that the question be framed so as to call for an opinion based on reasonable certainty.—Metz v. Yellow Cab Co., 248 Ill.App. 609.

19. **Answers held proper or not objectionable** as conjectural or speculative.—Terre Haute, I. & E. Traction Co. v. Stevenson, 123 N.E. 785, 189 Ind. 100, rehearing denied 126 N.E. 3, 189 Ind. 100.

Answers held improper or objectionable as conjectural or speculative.

statements by a skilled or expert witness that a certain cause could or might have produced a stated effect,[20] or, conversely, that a stated cause could not or might not have produced a certain effect,[21] have been held not objectionable as speculative or stating possibilities rather than probabilities, such statements are not of themselves sufficient to show a connection between an alleged cause and a certain result.[22] An expert testifying as to the permanent effect of an injury need not include in his answer all the facts on which he bases his opinion, where he has already testified as to such facts.[23]

§ 557. —— Answers to Hypothetical Questions

The answer to a hypothetical question must be based on the hypothesis stated and must be responsive to the question. It should also indicate the facts on which the opinion is based, and should not be argumentative, conjectural, or indefinite.

The answer to a hypothetical question must be based on the hypothesis stated,[24] and must be responsive to the question.[25] It should also indicate on what facts the witness' opinion is based,[26] and should not be argumentative,[27] conjectural,[28] or indefinite,[29] although a tendency to prove certain matters may be stated as the judgment of the witness on a hypothetical case.[30] The answer should not assume the point in dispute[31] or facts not properly in evidence;[32] but an answer is not objectionable merely because it includes facts in evidence

Ill.—Told v. Madison Bldg. Co., 216 Ill.App. 29.
Pa.—Rice v. Hill, 172 A. 289, 315 Pa. 166.
Wash.—Crock v. Magnolia Milling Co., 266 P. 727, 147 Wash. 589.

20. Md.—Wickman v. Bohle, 196 A. 326, 173 Md. 694.
Tex.—El Paso Electric Ry. Co. v. Jennings, Civ.App., 224 S.W. 1113, dismissed for want of jurisdiction.

21. Tex.—Galveston, H. & S. A. R. Co. v. Harris, Civ.App., 172 S.W. 1129.
22 C.J. p 721 note 61.

22. Pa.—McCrosson v. Philadelphia Rapid Transit Co., 129 A. 568, 283 Pa. 492—Fink v. Sheldon Axle & Spring Co., 113 A. 666, 270 Pa. 476—Di Fazio v. J. G. Brill Co., 3 A.2d 216, 133 Pa.Super. 576—Carey v. Schwartz, 3 A.2d 203, 133 Pa.Super. 604.

Fall of bridge
"It is not sufficient for an expert to say simply that the fall of the bridge might have resulted from the assigned cause; he must go further and testify at least that . . . it is his professional opinion that the result most probably came from the cause assigned."—Freedom Oil Works Co. v. Beaver County, 148 A. 67, 69, 298 Pa. 174, 68 A.L.R. 600.

"Reasonably certain probable cause"
It is not proper to allow an expert to testify as to the "reasonably certain probable" cause of a condition, as such testimony falls far short of reasonable certainty.—Ehrhardt v. Connecticut Fire Ins. Co., 219 Ill. App. 48.

23. Iowa.—Martin v. Chase, 189 N. W. 958, 194 Iowa 407.

24. U.S.—Chicago, B. & Q. R. Co. v. Schrimpf, Minn., 236 F. 200, 149 C. C.A. 390.
22 C.J. p 721 note 65.

Answers held proper or not objectionable
Minn.—Pete v. Lampi, 203 N.W. 447, 162 Minn. 497.
Tex.—Petroleum Casualty Co. v. Bristow, Civ.App., 35 S.W.2d 246, error dismissed.

25. Idaho.—Evans v. Cavanagh, 73 P.2d 83, 58 Idaho 324.
Ill.—Ellefson v. Miller, 24 N.E.2d 755, 303 Ill.App. 226.
"His opinion should be exact upon a hypothetical statement of fact."—Lehman v. Knott, 196 P. 476, 479, 100 Or. 59.

Answers held responsive
Iowa.—Latham v. Des Moines Electric Light Co., 296 N.W. 372.

26. Conn.—Di Biase v. Garnsey, 136 A. 871, 106 Conn. 86.

Answer held sufficient
Ala.—Birmingham Electric Co. v. Glenn, 141 So. 537, 224 Ala. 620.

27. Ark.—Taylor v. McClintock, 112 S.W. 405, 87 Ark. 243.
N.D.—Hintz v. Wagner, 140 N.W. 729, 25 N.D. 110.

Testimony not objectionable as argumentative.—Commercial Standard Ins. Co. v. McGee, Tex.Civ.App., 40 S.W.2d 1105.

28. Fla.—Southern Utilities Co. v. Murdock, 128 So. 430, 99 Fla. 1086.
Ill.—Wallace v. Yudelson, 244 Ill. App. 320.
Mo.—Floyd v. A. Y. McDonald Mfg. Co., 46 S.W.2d 251, 226 Mo.App. 444.
Tex.—Fidelity & Casualty Co. of New York v. Van Arsdale, Civ. App., 108 S.W.2d 550, error dismissed.
22 C.J. p 721 note 67.

Hypothetical form as not curing error
Putting of expert opinion which was mere conjecture, and not based on scientific knowledge, in hypothetical form did not render it admissible.—Hartford Fire Ins. Co. v. Mellon, 220 N.W. 331, 206 Iowa 182.

Possible consequences of impotency
A physician testifying to the possible consequences of sexual impotence cannot state that it might go on for years and possibly terminate in something serious.—Bucher v. Wisconsin Cent. R. Co., 120 N. W. 518, 139 Wis. 597.

Answer dependent on atmospheric conditions
The answer of an expert witness as to the distance to which sparks could be thrown from a certain type of locomotive is not incompetent because it must depend to a degree on atmospheric conditions and the inflammability of the combustible matter referred to, which considerations must have occurred to the jury in weighing the evidence.—Saunders v. Atchison, T. & S. F. R. Co., 119 P. 552, 86 Kan. 56.

Answers not objectionable as conjectural or speculative.
Ill.—Wolczek v. Public Service Co. of Northern Illinois, 174 N.E. 577, 342 Ill. 482.
Mo.—Kirk v. Kansas City Terminal Ry. Co., App., 27 S.W.2d 739.
22 C.J. p 721 note 67 [a].

29. Mo.—Strother v. Dunham, App., 193 S.W. 882.

Opinion sufficiently expressed
Testimony of an expert that a person was not a normal individual and was incompetent, and that witness personally would not take his conclusion or judgment as being sound, sufficiently expressed the witness' opinion that such person was of unsound mind.—Philpott v. Jones, 146 N.W. 859, 164 Iowa 730.

30. Mich.—Peoples v. Detroit Post & Tribune Co., 20 N.W. 528, 54 Mich. 457.

31. Neb.—Ames v. Ames, 106 N.W. 584, 75 Neb. 473.

32. U.S.—Dairymen's Milk Co. of Pittsburgh v. McCormick Co., C. C.A.Pa., 114 F.2d 736—Ocean Accident & Guarantee Corporation v.

which might have been made part of the question.[33] An answer which involves a conclusion rather than an opinion is improper,[34] but if the answer really expresses an opinion it is not necessarily objectional because stated in the form of a conclusion;[35] but an answer based partly on facts gleaned apart from the trial and not included in the question should be stricken.[36] Where the answer is responsive to the question asked, the court may stop the witness from continuing and stating reasons not asked for to reinforce the answer,[37] but it is not improper to allow an expert witness, in giving an opinion in answer to a hypothetical question, to make an explanation of the reasons on which he bases his conclusion, unless he introduces matters not within the purview of the question.[38]

Experts are not confined to a statement of a general rule, but may state recognized exceptions thereto.[39] They must accept as true every asserted fact stated in the question.[40] However, the jury cannot consider the answers of experts unless it is found by the jury that the evidence establishes the truth of all the asserted facts.[41] Where the question is "upon the evidence," the witness may recapitulate the evidence in his answer.[42] Where a hypothetical question is based on improper or incompetent evidence the answer thereto is also incompetent.[43]

Categorical answers. It is erroneous to require a categorical answer to a hypothetical question where the question cannot be accurately answered in such a manner.[44]

§ 558. —— Matters Proper for Consideration in Answering

The matters proper for consideration in answering vary according to the facts and circumstances of the individual case. Photographs and personal knowledge may be considered in some circumstances.

The matters proper for consideration by a skilled observer or expert witness in forming his answer vary according to the facts and circumstances of the individual case.[45] In answering a hypothetical

Southwestern Bell Telephone Co., C.C.A.Mo., 100 F.2d 441, 122 A.L.R. 133, certiorari denied 59 S.Ct. 775, 306 U.S. 658, 83 L.Ed. 1056—Coca-Cola Bottling Co. of Henderson v. Munn, C.C.A.N.C., 99 F.2d 190—U. S. v. American Tobacco Co., D.C. Ky., 39 F.Supp. 957.
Ky.—Axton v. Vance, 269 S.W. 534, 207 Ky. 580.
Mo.—Hild v. St. Louis Car Co., App., 259 S.W. 838.
Neb.—Jacobson v. Skinner Packing Co., 226 N.W. 321, 118 Neb. 711.
N.H.—Nadeau v. Stevens, 111 A. 749, 79 N.H. 502.

Answers not objectionable
Mo.—Vitale v. Biando, App., 52 S. W.2d 24, certiorari quashed State ex rel. Biando v. Haid, Sup., 60 S. W.2d 38—Feitz v. Kahler, Mo.App., 285 S.W. 788.
22 C.J. p 721 note 71 [a].

33. N.H.—McCarthy v. Souther, 137 A. 445, 83 N.H. 29.
22 C.J. p 721 note 72.

34. Ky.—Madison Coal Corporation v. Altmire, 284 S.W. 1068, 215 Ky. 283—Axton v. Vance, 269 S.W. 534, 207 Ky. 580.
Mo.—Thomas v. Metropolitan St. R. Co., 100 S.W. 1121, 125 Mo.App. 131.

35. Ala.—Briggs v. Birmingham R., Light & Power Co., 69 So. 926, 194 Ala. 273.

36. Pa.—Theopholis v. Glen Falls Indemnity Co., 13 Pa.Dist. & Co. 639, 641, citing **Corpus Juris.**
22 C.J. p 721 note 75.

37. Pa.—Kunkel v. Allentown Portland Cement Co., 94 A. 450, 249 Pa. 104.

38. Tex.—Gulf, W. T. & P. R. Co. v. Abbott, Civ.App., 146 S.W. 1078.

39. N.Y.—Thompson v. Peterson, 137 N.Y.S. 635, 152 App.Div. 667.

40. Idaho.—Evans v. Cavanagh, 73 P.2d 83, 58 Idaho 324.
Mich.—Ballance v. Dunnington, 217 N.W. 329, 241 Mich. 383, 57 A.L.R. 262.

41. Mich.—Ballance v. Dunnington, supra.

42. La.—State v. Baptiste, 26 La. Ann. 134.

43. U.S.—The Domira, D.C.N.Y., 49 F.2d 324, affirmed, C.C.A., 56 F.2d 585.
Mich.—In re Doty's Estate, 180 N.W. 608, 212 Mich. 346.

Deposition stating opinion as to value of legal services rendered by plaintiff was properly excluded as drawn from incomplete statement of plaintiff's services in latter's deposition more than two months before trial.—Axton v. Vance, 269 S.W. 534, 207 Ky. 580.

No evidence
Testimony of medical expert in response to hypothetical question, based on no facts tending to show testator's mental incompetency, that testator was mentally incompetent was not evidence.—In re Sachs' Estate, 236 N.W. 805, 254 Mich. 358.

44. Cal.—McGuire v. Baird, 70 P.2d 915, 9 Cal.2d 353, prior opinion 62 P.2d 184.

45. U.S.—Southern Bell Telephone & Telegraph Co. v. Railroad Commission of South Carolina, D.C. S.C., 5 F.2d 77.
Cal.—People v. Lang Transp. Corporation, App., 110 P.2d 464.
N.H.—Dowling v. L. H. Shattuck, Inc., 17 A.2d 529.
Utah.—Mary Jane Stevens Co. v. First Nat. Bldg. Co., 57 P.2d 1099, 89 Utah 456.

Capabilities of workers
An expert, in giving an opinion as to the proper method of setting a telephone pole, in an action for injury to an employee caused by the swinging of a pole, may take into account the judgment he has formed of the capabilities of the men engaged in the work from seeing them as witnesses.—Barrett v. New England Tel. & Tel. Co., 87 N.E. 565, 201 Mass. 117.

Past performances
In an action against a carrier for injuries to a race horse during transportation, a witness testifying to the value of the horse is properly permitted to base his estimate on the races the horse has won.—Galveston, H. & S. A. R. Co. v. Crippen, Tex.Civ.App., 147 S.W. 361.

Subsequent occurrences
A witness giving opinion evidence as to the probable loss of cattle in a certain shipment, if handled in the usual manner, may testify to the condition of other cattle shipped a few days later, other evidence tending to show that they were just such cattle as those in controversy, having been taken from the same herd and range at about the same time.—True Bros. v. St. Louis, B. & M. R. Co., Tex.Civ.App., 143 S.W. 298.

Matters influencing buyer
In proceedings to condemn a right of way over oil fields, an expert may testify as to matters which would

question, such a witness may, of course, draw on his own general knowledge and experience.[46] His answer should, however, be given on the basis of the particular facts stated in the question and without recourse to other facts within his personal knowledge,[47] unless such other facts have already been testified to by him.[48]

Photographs may be used by an expert witness as the basis of his conclusions in a proper case.[49]

§ 559. —— Stating Reasons for Opinion

An expert or skilled observer may state the reasons for his opinion, but may not state matters not properly admissible in evidence.

An expert or skilled observer should be allowed to state his reasons for the opinion expressed by him or how his conclusion was reached,[50] but cannot under guise of giving such reason state matters which are not properly admissible in evidence.[51]

Illustrations. The extent to which an expert witness will be permitted to illustrate his testimony rests largely within the discretion of the court.[52]

§ 560. Cross-Examination and Redirect Examination

a. Cross-examination
b. Redirect examination

a. Cross-Examination

(1) In general
(2) Value

(1) In General

General rules govern the cross-examination of skilled and expert witnesses.

influence him from the standpoint of a contemplating buyer in determining the market value of the land in an oil bearing territory, the number of wells which could be economically placed on the amount of land taken, and ordinary losses therefrom, and the general relation of outlay to income, and such testimony is not objectionable as conjectural and speculative.—Southern Pac. R. Co. v. San Francisco Sav. Union, 79 P. 961, 146 Cal. 290, 106 Am.S.R. 36, 70 L.R.A. 221, 2 Ann.Cas. 962.

Statements as not affecting admissibility

Statements of expert witness concerning various elements entering into his opinion with respect to the number of miles the tires on automobile had been run did not render opinion so without reasonable basis that the trial court might not admit it in its discretion.—Nichols v. Nichols, 13 A.2d 591, 126 Conn. 614.

46. N.Y.—Taft v. Brooklyn Heights R. Co., 35 N.Y.S. 1042, 14 Misc. 390.

Experience in handling buildings, etc.

A witness, qualified as an expert, in answering a hypothetical question as to the value of a building, may use and include his experience in handling buildings and drawing plans and specifications and giving estimates, for it is the experience thus gained which enables him to become an expert, and to exclude its application to a given state of facts would be to eliminate the value of expert testimony entirely.—Leonard v. Standard Aero Corporation of New York, 112 A. 252, 95 N.J.Law 235.

47. Fla.—Atlantic Coast Line R. Co. v. Shouse, 91 So. 90, 83 Fla. 156.

Kan.—Murphy v. Edgar Zinc Co., 278 P. 764, 128 Kan. 524, 65 A.L.R. 1213.

Ohio.—Cincinnati Traction Co. v. McKim, 13 Ohio App. 108.

Tex.—Fidelity & Casualty Co. of New York v. Van Arsdale, Civ. App., 108 S.W.2d 550, error dismissed.

"It is elemental that, in answering a hypothetical question, a witness can take into consideration no facts within his own knowledge and not in evidence—certainly not when the facts within his own knowledge which he takes into consideration are facts about which he is wholly incompetent to testify, and which were not made a part of the hypothetical question."—Mounsey v. Bower, 136 N.E. 41, 43, 78 Ind.App. 647.

Answer not objectionable

Mo.—Gillick v. Fruin-Colnon Const. Co., 65 S.W.2d 927, 334 Mo. 135.

48. Minn.—Masteller v. Great Northern R. Co., 114 N.W. 757, 103 Minn. 244.

N.Y.—Christastie v. Elmira Water, Light & R. Co., 195 N.Y.S. 156, 202 App.Div. 270—Kidney v. Gray, 154 App.Div. 193, 138 N.Y.S. 834.

Or.—Cobb v. Spokane, P. & S. Ry. Co., 44 P.2d 731, 150 Or. 226.

W.Va.—Perkins v. Monongahela Valley Traction Co., 95 S.E. 797, 81 W.Va. 781.

49. N.H.—Dowling v. L. H. Shattuck, Inc., 17 A.2d 529.

50. Colo.—Gavin v. Kniffen, 261 P. 6, 9, 82 Colo. 448, citing **Corpus Juris.**

Me.—Johnson v. Bangor Ry. & Electric Co., 131 A. 1, 125 Me. 88.

Mass.—Coulombe v. Horne Coal Co., 175 N.E. 631, 275 Mass. 226—Keith v. Lothrop, 10 Cush. 453.

Minn.—Millıren v. Federal Life Ins. Co., 242 N.W. 290, 292, 185 Minn. 614, citing **Corpus Juris.**

Mo.—Scanlon v. Kansas City, 81 S. W.2d 939, 336 Mo. 1058—Pyle v. Kansas City Light & Power Co., App., 246 S.W. 979.

Neb.—McGuire v. Rix, 225 N.W. 120, 118 Neb. 434.

Tex.—Gulf, C. & S. F. Ry. Co. v. Downs, Civ.App., 70 S.W.2d 318, error refused.

22 C.J. p 722 note 88.

Right of expert testifying as to value to give reasons for his judgment see supra § 545.

Citing or reading law on which testimony based

Testimony of inspector of state board of tenement house supervision that because of public garage and apartments for four families property constituted a violation of statute was not incompetent because inspector failed to cite or read pertinent provision of the statute, where inspector stated that statute prohibited public garage from being maintained in a tenement house, and stated what the law was, and in detail pointed out circumstances which prevented use of property for tenement house purposes.—Kaplen v. Labor Nat. Bank of Jersey City, 14 A.2d 263, 125 N.J.Law 63.

Reasons for unsatisfactory opinion

In a proper case an expert may explain the reasons for his failure to have a satisfactory opinion as to a particular matter.—Buckner v. Black Mountain Ry. Co., 143 S.E. 216, 195 N.C. 654.

51. U.S.—Mutual Life Ins. Co. of New York v. Savage, C.C.A.Miss., 31 F.2d 35.

22 C.J. p 722 note 89.

52. Ga.—Augusta & S. R. Co. v. Dorsey, 68 Ga. 228.

22 C.J. p 721 note 76 [a] (3), (4).

The rules governing the cross-examination of witnesses generally, which are considered in the C. J.S. title Witnesses §§ 368–416, 429, also 70 C.J. p 611 note 33–697 note 33, p 716 note 6–p 717 note 20, apply also, with such modifications as the character of the testimony makes necessary, to the cross-examination of skilled witnesses and experts.[53] The manner,[54] as well as the scope and extent,[55] of such cross-examination are, of course, matters resting largely within the discretion of the trial court, the exercise of which will not be reviewed unless abuse thereof appears.[56] While the

53. Ind.—Ailes v. Ailes, 11 N.E.2d 73, 104 Ind.App. 302.
Md.—Isaac Benesch & Sons v. Ferkler, 139 A. 557, 153 Md. 680.
Or.—Smith v. Dunn, 107 P.2d 985.
22 C.J. p 722 note 91.

Purpose of cross-examination of expert witness is to test his accuracy and reliability.—Seibert v. Ritchie, 21 P.2d 272, 173 Wash. 27.

Eliciting facts for own case

Thus, in courts where a cross-examining counsel cannot elicit facts for his own case, the same limitation applies to the cross-examination of a skilled or expert witness.—Hofacre v. City of Monticello, 103 N.W. 488, 128 Iowa 239—22 C.J. p 723 note 92.

Proper cross-examination

U.S.—American Pacific Whaling Co. v. Kristensen, C.C.A.Wash., 93 F. 2d 17—Travelers' Ins. Co. of Hartford, Conn., v. Person, C.C.A.Neb., 58 F.2d 210.
Ala.—Louisville & N. R. Co. v. Martin, 198 So. 141, 240 Ala. 124—London & Scottish Assur. Corporation of London, England, v. Smith, 158 So. 892, 229 Ala. 556—Parke v. Dennard, 118 So. 396, 218 Ala. 209—Alabama Great Southern R. Co. v. Cornelt, 106 So. 242, 214 Ala. 23—Southern Ry. Co. v. Dickson, 100 So. 665, 211 Ala. 481—Atlanta & St. A. B. Ry. Co. v. Knight, 100 So. 233, 211 Ala. 213—Alabama Power Co. v. Bruce, 96 So. 346, 209 Ala. 423.
Cal.—Anderson v. Southern Pac. Co., 18 P.2d 703, 129 Cal.App. 206—State Compensation Insurance Fund v. Lamb, 273 P. 1080, 96 Cal. App. 236—Krogh Mfg. Co. v. Churchill, 191 P. 74, 47 Cal.App. 785—Dameron v. Ansbro, 178 P. 874, 39 Cal.App. 289.
Conn.—Dwyer v. Connecticut Co., 131 A. 838, 103 Conn. 678—Antel v. Poli, 123 A. 272, 100 Conn. 64.
Ind.—Griffith v. Thrall, App., 29 N. E.2d 345—Terre Haute, I. & E. Traction Co. v. Hickey, 124 N.E. 412, 72 Ind App. 423.
Minn.—Ivanesovich v. North American Life & Casualty Co., 176 N.W. 502, 145 Minn. 175.
Mo.—Wack v. F. E. Schoenberg Mfg. Co., 53 S.W.2d 28, 331 Mo. 197—Tinsley v. Washington Nat. Ins. Co., App., 97 S.W.2d 874—Robison v. Chicago Great Western R. Co., App., 66 S.W.2d 180—Rogers v. St. Avit, App., 60 S.W.2d 698—Gallagher v. S. Z. Schutte Lumber Co., App., 273 S.W. 213—Moran v. Kansas City Rys. Co., App., 232 S.W 1111—Roy v. Kansas City, 224 S. W. 132, 204 Mo.App. 332.
N.H—Bridges v. Great Falls Mfg. Co., 156 A. 697, 85 N.H. 220.
N.J.—Keber v. American Stores Co., 184 A. 795, 116 N.J.Law 437.
Or.—Stotts v. Wagner, 295 P. 497, 135 Or. 243.
Tex.—Travelers' Ins. Co. v. Lancaster, Civ.App., 71 S.W.2d 318, error dismissed—Maryland Casualty Co. v. Sledge, Civ.App., 46 S.W.2d 442.
22 C.J. p 722 note 91 [a].

Improper cross-examination

Conn.—Geraty v. Kaufman, 162 A. 33, 115 Conn. 563.
D.C.—Labofish v. Berman, 55 F.2d 1022, 60 App.D.C. 397.
Ill.—Department of Public Works and Buildings v. Legg, 29 N.E.2d 515, 374 Ill. 306.
Md.—Realty Improvement Co. v. Consolidated Gas Electric Light & Power Co. of Baltimore, 144 A. 710, 156 Md. 581—Great Eastern Casualty Co. v. Schwartz, 122 A. 647, 143 Md. 452.
Mo.—Bowles v. Wabash Ry. Co., App., 271 S.W. 851—Summers v. Tarpley, App., 208 S.W. 266.
Wash.—Rae v. Nelson, 277 P. 75, 152 Wash. 10.
Wis.—Schumacher v. Carl G. Neumann Dredging & Improvement Co., 239 N.W. 459, 206 Wis. 220.
22 C.J. p 722 note 91 [b].

54. **Leading questions**

The question of propounding leading questions to expert witnesses is entirely within trial court's discretion.—Wilkinson v. Phœnix Ry. Co. of Arizona, 236 P. 704, 28 Ariz. 216.

Questioning by court

If it appears to the court that further questions to a witness may aid the jury, the court may ask such questions.—Tom Reed Gold Mines Co. v. Brady, 99 P.2d 97, 55 Ariz. 133, 127 A.L.R. 905.

Explaining answer

An expert witness may be permitted to explain an answer given on cross-examination where such answer might otherwise give rise to unfavorable inferences.—Packard v. Moore, 71 P.2d 922, 9 Cal.2d 571.

55. U.S.—Cropper v. Titanium Pigment Co., C.C.A.Mo., 47 F.2d 1038, 78 A.L.R. 737.
Ariz.—Middleton v. Green, 276 P. 322, 35 Ariz. 205.
Ark.—Arkebauer v. Falcon Zinc Co., 12 S.W.2d 916, 178 Ark. 943.
Cal.—MacCoy v. Gage, 177 P. 296, 38 Cal.App. 672.
Iowa.—Dean v. State, 233 N.W. 36, 211 Iowa 143—Olson v. Shuler, 221 N.W. 941, 208 Iowa 70.
Md.—Donnelly v. Donnelly, 143 A. 648, 156 Md. 81.
Mass.—Costello v. Hayes, 144 N.E. 368, 249 Mass. 349.
Minn.—Schaedler v. New York Life Ins. Co., 276 N.W. 235, 201 Minn. 327—State v. Horman, 247 N.W. 4, 188 Minn. 252—In re County Ditch No. 33, Marshall County, 184 N.W. 374, 150 Minn. 69.
Mo.—Wild v. Pitcairn, 149 S.W.2d 800—Rath v. Knight, 55 S.W.2d 682.
Or—McCauley v. Pacific Atlantic S. S. Co., 115 P.2d 307.
Pa.—Bridgman Realty Corporation v. City of Philadelphia, 177 A. 45, 317 Pa. 449—Haughney v. Gannon, 118 A. 427, 274 Pa. 443.
Tex.—Grocers Supply Co. v. Stuckey, Civ.App., 152 S.W.2d 911.
22 C.J. p 723 note 95.

56. Cal.—Handley v. Lombardi, 9 P.2d 867, 122 Cal.App. 22.
Kan.—Werth v. Minnesota Mut. Life Ins. Co., 47 P.2d 76, 142 Kan. 255.
Ky.—Sweazy v. King, 58 S.W.2d 659, 248 Ky. 432.
Md.—Panitz v. Webb, 130 A. 913, 149 Md. 75.
Mass.—Gerber v. New York Cent. R. R., 192 N.E. 837, 288 Mass. 318.
Mich—In re Watson's Estate, 226 N.W. 650, 247 Mich. 667.
Miss.—Columbian Mut. Life Ins. Co. v. Gunn, 163 So. 454, 173 Miss. 897.
Mo.—Rath v. Knight, 55 S.W.2d 682—Hart v. Kansas City Public Service Co., App., 142 S.W.2d 348—Kane v. Metropolitan Life Ins. Co., 73 S.W.2d 826, 228 Mo App. 649, quashal of opinion denied State ex rel. Metropolitan Life Ins. Co. v. Allen, 85 S.W.2d 469, 337 Mo. 525—Seewald v. Gentry, 286 S.W. 445, 220 Mo.App. 367.
Mont.—Tanner v. Smith, 33 P.2d 547, 97 Mont. 229.
Neb.—Sweeney v. Midwest Life Ins. Co., 262 N.W. 47, 129 Neb. 521.
N.J.—Donovan v. Limouze, 158 A. 423, 108 N.J.Law 494.
Or.—McCauley v. Pacific Atlantic S. S. Co., 115 P.2d 307.
Pa.—Becker v. Saylor, 177 A. 804, 317 Pa. 573—Thompson v. American Steel & Wire Co., 175 A. 541, 317 Pa. 7—Wyatt v. Russell, 162 A. 256, 308 Pa. 366.
Vt.—Perkins v. Vermont Hydro-

trial court may properly limit any inquiry into irrelevant, collateral, or immaterial matters,[57] it cannot deny or unduly restrict the cross-examination;[58] and, generally speaking, a wide range of inquiry should be allowed.[59]

As a general rule, subject, however, to a proper exercise of the trial court's discretion, a cross-examining counsel may bring out any fact which is within the general scope of cross-examination and which is relevant on any issue,[60] including that of damages.[61] The cross-examination may be directed to the qualifications of the witness,[62] such as his

Electric Corporation, 177 A. 631, 106 Vt. 367.
Wash.—Poropat v. Olympic Peninsula Motor Coach Co., 299 P. 979, 163 Wash. 78.
22 C.J. p 723 note 96.

57. Ala.—Blakeney v. Alabama Power Co., 133 So. 16, 222 Ala. 394—Allen v. Southern Coal & Coke Co., 87 So. 562, 205 Ala. 363.
Cal.—Keller v. Cleaver, 67 P.2d 131, 20 Cal.App.2d 364—McCollum v. Barr, 176 P. 463, 38 Cal.App. 411.
Kan.—Simpson v. Schiff, 197 P. 857, 109 Kan. 9.
Mo.—Pandjiris v. Oliver Cadillac Co., 98 S.W.2d 969, 339 Mo. 711—Pogue v. Metropolitan Life Ins. Co., App., 107 S.W.2d 144—Granberg v. King Candy Co., App., 81 S.W.2d 981.
Nev.—Van Fleet v. O'Neil, 192 P. 384, 44 Nev. 216.
Okl.—Etchen v. Texas Co., 199 P. 212, 82 Okl. 62.
Pa.—Mackin v. Patterson, 112 A. 738, 270 Pa. 107.
Wash.—Poropat v. Olympic Peninsula Motor Coach Co., 299 P. 979, 163 Wash. 78.

Cross-examination not objectionable as immaterial and irrelevant.—London & Scottish Assur. Corporation of London, England, v. Smith, 158 So. 892, 229 Ala. 556—Prudential Ins. Co. v. Calvin, 148 So. 837, 227 Ala. 146.

58. Ariz.—Middleton v. Green, 276 P. 322, 35 Ariz. 205.
Ga.—Richards v. Harpe, 155 S.E. 85, 42 Ga.App. 123.
Iowa.—Dean v. State, 233 N.W. 36, 211 Iowa 143.
Mo.—Wells v. City of Jefferson, 132 S.W.2d 1006, 345 Mo. 239—Gallagher v. S. Z. Schutte Lumber Co., App., 273 S.W. 213.
N.J.—Baus v. Trenton & Mercer County Traction Co., 126 A. 473, 100 N.J.Law 364.
N.Y.—Springer v. Van Dorn, 288 N.Y.S. 312, 247 App.Div. 436, amendment of decision denied 290 N.Y.S. 547, 248 App.Div. 797.
Pa.—Patanyi v. Davis, 9 A.2d 430, 336 Pa. 476.
Tex.—Hartford Accident & Indemnity Co. v. Harris, Civ.App., 138 S.W.2d 277.
W.Va.—Cook v. Coleman, 111 S.E. 750, 90 W.Va. 748.
Wis.—Delap v. Liebenson, 208 N.W. 937, 190 Wis. 73.

Physician appointed by court

The fact that physician was appointed by court on application of defendant to examine plaintiff did not preclude plaintiff from right to cross-examine physician.—Golden v. Onerem, Mo.App., 123 S.W.2d 617.

59. U.S.—Cropper v. Titanium Pigment Co., C.C.A.Mo., 47 F.2d 1038, 78 A.L.R. 737.
Ala.—Louisville & N. R. Co. v. Martin, 198 So. 141, 240 Ala. 124.
Cal.—People v. Pacific Gas & Electric Co., 81 P.2d 584, 27 Cal.App.2d 725—Forrest v. Fink, 234 P. 860, 71 Cal.App. 34.
Ill.—Mowat v. Sandel, 262 Ill.App. 395.
Iowa.—Dean v. State, 233 N.W. 36, 211 Iowa 143—Olson v. Shuler, 221 N.W. 941, 201 Iowa 70.
Mo.—Schide v. Gottschick, 43 S.W.2d 777, 329 Mo. 64—Granberg v. King Candy Co., App., 81 S.W.2d 981—Duncan v. City Ice Co., App., 25 S.W.2d 536.
Pa.—Haughney v. Gannon, 118 A. 427, 274 Pa. 443—Stemons v. Turner, 117 A. 922, 924, 274 Pa. 228, 26 A.L.R. 727, citing **Corpus Juris.**
Tex.—Grocers Supply Co. v. Stuckey, Civ.App., 152 S.W.2d 911.
22 C.J. p 723 note 94.

Liberality favored

Cross-examination of expert should be liberalized rather than restricted.
Ariz.—Middleton v. Green, 276 P. 322, 35 Ariz. 205.
Wash.—Levine v. Barry, 195 P. 1003, 114 Wash. 623.

Reasonable latitude is allowed on cross-examination of expert witness.—Brown v. Moss, 182 A. 777, 120 Pa. Super. 336.

60. U.S.—Ulm v. Moore-McCormack Lines, C.C.A.N.Y., 115 F.2d 492, rehearing denied 117 F.2d 222, and certiorari denied 61 S.Ct. 941.
Ark.—Seaman Store Co. v. Bonner, 113 S.W.2d 1106, 195 Ark. 563—E. L. Bruce Co. v. Corbett, 69 S.W.2d 270, 188 Ark. 962.
Cal.—Inyo Chemical Co. v. City of Los Angeles, 55 P.2d 850, 5 Cal.2d 525—Dameron v. Ansbro, 178 P. 874, 39 Cal.App. 289.
Conn.—Petrelli v. City of New Haven, 163 A. 759, 116 Conn. 144.
D.C.—Labofish v. Berman, 55 F.2d 1022, 60 App.D.C. 397.
Md.—Hazelwood v. Bittinger, 150 A. 713, 159 Md. 262.
Mich.—Bathrick v. Detroit Post & Tribune Co., 16 N.W. 172, 50 Mich. 629, 45 Am.R. 63.
N.H.—Laird v. Boston & M. R. R., 117 A. 591, 80 N.H. 377.
Okl.—Enghlin v. Pittsburg County Ry. Co., 36 P.2d 32, 169 Okl. 106, 94 A.L.R. 1180.
Pa.—McSorley v. School Dist. of Avalon Borough, 139 A. 848, 291 Pa. 252—Graybill v. Pullman Motorcar Co., 71 Pa.Super. 129.
S.C.—Williams v. Standard Oil Co., 121 S.E. 363, 127 S.C. 430.
Utah.—Mary Jane Stevens Co. v. First Nat. Bldg. Co., 57 P.2d 1099, 89 Utah 456.
22 C.J. p 725 note 21.

General credibility or veracity of the witness may be attacked, provided the inquiry is relevant.—Grocers Supply Co. v. Stuckey, Tex.Civ. App., 152 S.W.2d 911—22 C.J. p 725 notes 25, 26.

61. N.Y.—Barry v. Second Ave. R. Co., 20 N.Y.S. 871, 1 Misc. 502.

62. U.S.—Deakter v. Mutual Life Ins. Co., D.C.Pa., 12 F.Supp. 182.
Ala.—Blakeney v. Alabama Power Co., 133 So. 16, 222 Ala. 394.
N.H.—Hughes v. Cavanaugh, 109 A. 48, 79 N.H. 362.
Tex.—Grocers Supply Co. v. Stuckey, Civ.App., 152 S.W.2d 911.
22 C.J. p 723 note 97, p 724 note 7.

Purpose of such a line of interrogation is to show the reasonableness or unreasonableness of the opinion expressed, and to test its value.
Ill.—Chicago v. Rosenbaum, 126 Ill. App. 93.
Ind.—American Steel Foundries v. Sech, 122 N.E. 347, 69 Ind.App. 538.
N.J.—Richards v. Watson Flagg Engineering Co., 160 A. 500, 109 N.J.Law 128, affirming 156 A. 113, 9 N.J.Misc. 955.
22 C.J. p 724 notes 6, 7.

Procedure

Party desiring to cross-examine expert witness as to his qualification should make formal request for permission so to do and take exceptions if refused.—Lavan v. Menaker, 124 A. 743, 280 Pa. 591.

Testimony as not affecting correctness of court's ruling

The correctness of court's ruling that witness has been shown qualified to express an opinion as an expert is not affected by testimony of witness on cross-examination.—Lyons v. Farm Property Mut. Ins.

skill, knowledge, and experience,[63] his interest in the litigation, if any,[64] or matters tending to show a possible bias;[65] and he may be asked as to the basis of his opinion,[66] including statements on which he has relied,[67] or whether authorities on the subject do not lay down doctrines opposed to his opinion.[68] Where the expert has testified in answer to a hypothetical question the facts stated in the hypothetical question which are deemed unimportant may be sifted out;[69] and if the cross-examining counsel is of the opinion that material facts were not included in the question he may incorporate those facts in questions asked on cross-examination,[70] and may also frame questions involving a consideration of facts which he contends are established by the evidence.[71]

Ass'n of Iowa, 176 N.W. 291, 188 Iowa 506.

63. U.S.—Limbeck v. Interstate Power Co., C.C.A.Iowa, 69 F.2d 249—Jacoby v. Kelley, C.C.A.N.J., 296 F. 590.
Ala.—Sovereign Camp, W. O. W., v. Stewart, 172 So. 278, 233 Ala. 421—J. H. Burton & Sons Co. v. May, 103 So. 46, 212 Ala. 435.
Cal.—Reynolds v. Struble, 18 P.2d 690, 128 Cal.App. 716.
Ill.—Connecticut Mut. L. Ins. Co. v. Ellis, 89 Ill. 516.
Ind.—Griffith v. Thrall, App., 29 N.E.2d 345—Stoll v. Rich, 165 N.E. 67, 88 Ind.App. 639.
Iowa.—Dean v. State, 233 N.W. 36, 211 Iowa 143.
Mich.—Dembicki v. Melin, 225 N.W. 508, 247 Mich. 361.
N.H.—Bill v. New England Cities Ice Co., 10 A.2d 662, 90 N.H. 453.
Pa.—Lavan v. Menaker, 124 A. 743, 280 Pa. 591.
Tex.—Grocers Supply Co. v. Stuckey, Civ.App., 152 S.W.2d 911—Texas Coca-Cola Bottling Co. v. Lovejoy, Civ.App., 138 S.W.2d 254, error refused.
Vt.—Twombly v. Piette, 134 A. 700, 99 Vt. 499.
Wash.—Meagher v. Wagner Tug Boat Co., 11 P.2d 245, 168 Wash. 253, certiorari denied Wagner Tug Boat Co. v. Meagher, 53 S.Ct. 120, 287 U.S. 657, 77 L.Ed. 567.
22 C.J. p 723 note 98.

64. U.S.—Eppinger & Russell Co. v. Sheely, C.C.A.Fla., 24 F.2d 153.
Cal.—Moniz v. Bettencourt, 76 P.2d 535, 24 Cal.App.2d 718—Coursault v. Schwebel, 5 P.2d 77, 118 Cal.App. 259.
Ill.—City of Chicago v. Van Schaack Bros. Chemical Works, 161 N.E. 486, 330 Ill. 264.
Mass.—Bilodeau v. Fitchburg & L. St. Ry. Co., 128 N.E. 872, 236 Mass. 526—Dempsey v. Goldstein Bros. Amusement Co., 121 N.E. 429, 231 Mass. 461.
Mich.—De Haan v. Winter, 251 N.W. 391, 265 Mich. 101—De Haan v. Winter, 247 N.W. 151, 262 Mich. 192.
Minn.—State v. Horman, 247 N.W. 4, 188 Minn. 252.
Mo.—Schide v. Gottschick, 43 S.W.2d 777, 329 Mo. 64—Hall v. Fulton Iron Works Co., 31 S.W.2d 81, 326 Mo. 20, affirming, App., 296 S.W. 851—Schuler v. St. Louis Can Co., 18 S.W.2d 42, 322 Mo. 765—Lammert v. Wells, 13 S.W.2d 547, 321 Mo. 952—Huhn v. Ruprecht, 2 S.W.2d 760—Rogers v. St. Avit, App., 60 S.W.2d 698—Carlson v. Kansas City, Clay County & St. Joseph Auto Transit Co., 282 S.W. 1037, 221 Mo.App. 537.
Pa.—Duffy v. Griffith, 4 A.2d 170, 134 Pa.Super. 447.
Tex.—Russell v. Martin, 49 S.W.2d 699, 121 Tex. 488—Grocers Supply Co. v. Stuckey, Civ.App., 152 S.W.2d 911.
22 C.J. p 723 note 99.

Evidence not showing interest
Evidence that physician testifying as expert in personal injury case was frequently called as expert was held not to show his interest.—Murero v. Reinhart Lumber Co., 259 P. 494, 85 Cal.App. 385.

65. Cal.—Moniz v. Bettencourt, 76 P.2d 535, 24 Cal.App.2d 718—Anderson v. Southern Pac. Co., 18 P.2d 703, 129 Cal.App. 206.
Miss.—Central Lumber Co. v. Porter, 103 So. 506, 139 Miss. 66, 42 A.L.R. 221.
Mo.—Schide v. Gottschick, 43 S.W.2d 777, 329 Mo. 64—Schuler v. St. Louis Can Co., 18 S.W.2d 42, 322 Mo. 765—Lammert v. Wells, 13 S.W.2d 547, 321 Mo. 952.
Neb.—Lyons v. Joseph, 246 N.W. 859, 124 Neb. 357.
Tex.—Grocers Supply Co. v. Stuckey, Civ.App., 152 S.W.2d 911.
22 C.J. p 724 note 1.

66. U.S.—Ulm v. Moore-McCormack Lines, C.C.A.N.Y., 115 F.2d 492, rehearing denied 117 F.2d 222, and certiorari denied 61 S.Ct. 941—Salkin v. Erie R. Co., C.C.A.N.J., 23 F.2d 677.
Ariz.—Viliborghi v. Prescott School Dist. No. 1 of Yavapai County, 100 P.2d 178, 55 Ariz. 230—Middleton v. Green, 276 P. 322, 35 Ariz. 205.
Cal.—People v. Pacific Gas & Electric Co., 81 P.2d 584, 27 Cal.App.2d 725—Lemley v. Doak Gas Engine Co., 180 P. 671, 40 Cal.App. 146.
Ill.—Mowat v. Sandel, 262 Ill.App. 395, 400, citing **Corpus Juris.**
Mich.—McCord v. McCord, 220 N.W. 710, 243 Mich. 309.
N.H.—Bill v. New England Cities Ice Co., 10 A.2d 662.
N.Y.—Schwab v. McElligott, 26 N.Y.S.2d 364, 175 Misc. 840.
Okl.—Grison Oil Corporation v. Corporation Commission, 99 P.2d 134, 186 Okl. 548.
Pa.—Stemons v. Turner, 117 A. 922, 924, 274 Pa. 228, 26 A.L.R. 727, citing **Corpus Juris**—Appeal of Kiebler, 30 Pa Dist. & Co. 620.
Vt.—Raithel v. Hall, 124 A. 586, 97 Vt. 469.
22 C.J. p 724 note 2, p 726 note 39.

67. Ky.—Pittsburgh, C., C. & St. L. R. Co. v. Austin, 133 S.W. 780, 141 Ky. 722.
22 C.J. p 724 note 3.

68. U.S.—Yarn v. Ft. Dodge, D. M. & S. R. Co., C.C.A.Iowa, 31 F.2d 717, certiorari denied Fort Dodge, D. M. & S. R. Co. v. Yarn, 50 S.Ct. 27, 280 U.S. 568, 74 L.Ed. 621.
22 C.J. p 724 note 4.
Use of standard treatises on cross-examination generally see infra § 574.

69. Pa.—Stemons v. Turner, 117 A. 922, 924, 274 Pa. 228, 26 A.L.R. 727, citing **Corpus Juris.**
22 C.J. p 724 note 9.

70. Ark.—Missouri Pac. R. Co. v. Hampton, 112 S.W.2d 428, 195 Ark. 335.
D.C.—Labofish v. Berman, 55 F.2d 1022, 60 App.D.C. 397.
Mont.—Morrill v. Hershfield, 47 P. 997, 19 Mont. 245.
Or.—Cobb v. Spokane, P. & S. Ry. Co., 44 P.2d 731, 150 Or. 226.
Pa.—Stemons v. Turner, 117 A. 922, 924, 274 Pa. 228, 26 A.L.R. 727, citing **Corpus Juris**—Albert v. Philadelphia Rapid Transit Co., 97 A. 680, 252 Pa. 527—Rudolph v. Shannopin Coal Co., 18 A.2d 329, 142 Pa.Super. 389—Kazeroski v. Susquehanna Collieries Co., 193 A. 356, 127 Pa.Super. 259.
Tex.—Shuffield v. Taylor, 83 S.W.2d 955, 960, 125 Tex. 601, citing **Corpus Juris,** and reversing Taylor v. Shuffield, Civ.App., 52 S.W.2d 788—Grocers Supply Co. v. Stuckey, Civ.App., 152 S.W.2d 911.
22 C.J. p 724 note 8.

71. Iowa.—Richardson v. Richardson, 250 N.W. 897, 217 Iowa 127—In re Austin's Estate, 191 N.W. 73, 194 Iowa 1217.
Pa.—Albert v. Philadelphia Rapid Transit Co., 97 A. 680, 252 Pa. 527—Rudolph v. Shannopin Coal Co., 18 A.2d 329, 142 Pa.Super. 389—Kazeroski v. Susquehanna Col-

While a question asked an expert on cross-examination should state the facts hypothetically,[72] and should not be argumentative[73] or misleading,[74] it is not essential that it should be framed with strict regard to the usual form of hypothetical question,[75] or that it include all the facts the evidence tends to prove.[76] The requirement that hypothetical questions shall be based on the evidence, which is discussed supra § 552, is not usually applied with strictness to questions asked upon cross-examination,[77] and where the office and purpose of the examination is to elicit the reason on which the expert based the opinion expressed by him on his examination in chief, or to ascertain the extent of his learning and knowledge of the particular subject upon which he assumes to be an expert, the court may permit cross-examination on purely imaginary or abstract questions assuming facts or theories not in evidence.[78] Nevertheless hypothetical questions on cross-examination assuming facts not in evidence have been regarded as improper,[79] or at least subject to exclusion in the discretion of the court;[80] and it has been considered proper to exclude a purely conjectural question,[81] or an assumption of facts not pertinent to the question being tried and which would not be admissible in evidence in the case.[82] While it has been held that a skilled witness whose direct testimony was based on facts observed by him may be asked hypothetical questions on cross-examination,[83] this has also been denied.[84]

Limitation to scope of direct examination. The cross-examination should ordinarily be confined within the general scope of the direct examination.[85] However, when a general subject is opened up on direct examination, the cross-examination may go into any and all details of that subject.[86]

lieries Co., 193 A. 356, 127 Pa. Super. 259.
Tex.—Shuffield v. Taylor, 83 S.W.2d 955, 960, 125 Tex. 601, citing **Corpus Juris,** and reversing Taylor v. Shuffield, Civ.App., 52 S.W.2d 788 —Grocers Supply Co. v. Stuckey, Civ.App., 152 S.W.2d 911.
22 C.J. p 725 note 19.

72. Mich.—Stowell v. Standard Oil Co., 102 N.W. 227, 139 Mich. 18.

73. Md.—Riley v. Naylor, 16 A.2d 857.
Wash.—Rae v. Nelson, 277 P. 75, 152 Wash. 10.

74. U.S.—Kline v. Blackwell, C.C.A. Fla., 63 F.2d 897, certiorari denied 54 S.Ct. 54, 290 U.S. 636, 78 L.Ed. 553.
Ohio.—Equitable Life Assur. Soc. of U. S. v. Burton, 4 N.E.2d 706, 53 Ohio App. 241.

75. Md.—Struth v. Decker, 59 A. 727, 100 Md. 368.

76. Mo.—Dillard v. East St. Louis Ry. Co., App., 150 S.W.2d 552.
N.H.—Bridges v. Great Falls Mfg. Co., 156 A. 697, 85 N.H. 220.

77. Conn.—Livingstone v. City of New Haven, 8 A.2d 836, 125 Conn. 123.
Ind.—Yellow Cab Co. v. Kruszynski, 196 N.E. 136, 101 Ind.App. 187.
Mo.—Crews v. Bogy, App., 285 S. W. 549, 551, citing **Corpus Juris**—Sparks v. Harvey, App., 214 S.W. 249.
Wash.—Levine v. Barry, 195 P. 1003, 114 Wash. 623.
Wis.—Delap v. Liebenson, 208 N.W. 937, 190 Wis. 73.
22 C.J. p 724 notes 11, 12.

78. Cal.—Reynolds v. Struble, 18 P. 2d 690, 128 Cal.App. 716.
Conn.—Livingstone v. City of New Haven, 8 A.2d 836, 125 Conn. 123.
Iowa.—In re Austin's Estate, 191 N. W. 73, 194 Iowa 1217.
Minn.—Schaedler v. New York Life Ins. Co., 276 N.W. 235, 201 Minn. 327.
Mo.—Whitley v. Stein, App., 34 S. W.2d 998—Crews v. Bogy, App., 285 S.W. 549, 551, citing **Corpus Juris**—Sparks v. Harvey, App., 214 S.W. 249.
Or.—McCauley v. Pacific Atlantic S. S. Co., 115 P.2d 307.
Tex.—Grocers Supply Co. v. Stuckey, Civ.App., 152 S.W.2d 911.
Wash.—Seibert v. Ritchie, 21 P.2d 272, 173 Wash. 27—Levine v. Barry, 195 P. 1003, 114 Wash. 623.
Wis.—Delap v. Liebenson, 208 N.W. 937, 190 Wis. 73.
22 C.J. p 724 note 13, p 725 note 14.

Answer not retraction
Expert's answer to hypothetical question on cross-examination constitutes no retraction, particularly where some of additional hypothetical facts were without foundation in evidence.—U. S. v. Jensen, C.C.A. Idaho, 66 F.2d 19.

79. Cal.—MacCoy v. Gage, 177 P. 296, 38 Cal.App. 672.
Pa.—Brown v. Moss, 182 A. 777, 120 Pa.Super. 336.
22 C.J. p 708 note 29, p 725 note 15.

Question not presenting correct evidence
Permitting counsel on cross-examination to ask of a physician a hypothetical question, which did not present the correct evidence and required the physician to give an opinion on opinions attributed by the question to another physician, was error.—Ellis v. Kansas City Life Ins. Co., 197 S.E. 398, 187 S.C. 334.

80. Ala.—Wilson Bros. v. Mobile & O. R. Co., 92 So. 246, 207 Ala. 171.
Mo.—Gately v. St. Louis-San Francisco Ry. Co., 56 S.W.2d 54, 332 Mo. 1—Seewald v. Gentry, 286 S. W. 445, 220 Mo.App. 367.
Pa.—Haughney v. Gannon, 118 A. 427, 274 Pa. 443—Brown v. Moss, 182 A. 777, 120 Pa.Super. 336.
Vt.—Standish v. Newton, 152 A. 41, 103 Vt. 85.
22 C.J. p 708 note 29, p 725 note 16.

81. Mass.—Root v. Boston El. R Co., 67 N.E. 365, 183 Mass. 418.

82. Ill.—Chicago Sanitary Dist. v Corneau, 100 N.E. 517, 257 Ill. 93.

83. Pa.—Bricker v. Lightner, 40 Pa. 199.

84. Conn.—Dunbaun's App., 27 Conn. 192.
D.C.—Lewis v. American Security & Trust Co., 289 F. 916, 53 App.D.C. 258.

85. Conn.—Roberts v. New York, N. H. & H. R. Co., 142 A. 455, 107 Conn. 681.
Nev.—Deiss v. Southern Pac. Co., 47 P.2d 928, 56 Nev. 151, rehearing denied 53 P.2d 332, 56 Nev. 151.
N.J.—Reilly v. Lobdell, 134 A. 834, 103 N.J.Law 200.
Pa.—Bridgman Realty Corporation v. City of Philadelphia, 177 A. 45, 317 Pa. 449—Snyder v. Philadelphia & R. Ry. Co., 130 A. 398, 284 Pa. 59.
22 C.J. p 723 note 93.

86. Ala.—Louisville & N. R. Co. v. Martin, 198 So. 141, 240 Ala. 124.
Ind.—Stoll v. Rich, 165 N.E. 67, 88 Ind.App. 639.
Mo.—Perringer v. Lynn Food Co., App., 148 S.W.2d 601.
N.H.—Heilman v. Whalley, 6 A.2d 168, 90 N.H. 215.
Pa.—Valentine v. Federal Life Ins. Co., 169 A. 387, 111 Pa.Super. 311.
Tex.—Texas Employers' Ins. Ass'n v. Jimenez, Civ.App., 267 S.W. 752.

Documents or writings may be admitted or used on cross-examination of a skilled or expert witness where a proper foundation has been laid.[87] The use of a newspaper clipping has, however, been held improper;[88] and the court may properly refuse to permit a document to be read into evidence before it has been shown to the witness and offered and received in evidence.[89] Documents used on cross-examination merely to show mental operations of a testator are admissible, without producing or accounting for the originals thereof.[90] Where, however, a witness is directed to produce his books and records for use on cross-examination he should not be permitted to use a memorandum made therefrom without producing the originals.[91]

(2) Value

The scope of cross-examination as to value rests largely within the discretion of the trial court. Generally, a wide latitude is permitted.

The scope of cross-examination of a witness as to value is largely a matter within the discretion of the presiding justice.[92] Generally speaking, a wide latitude is permitted,[93] but it should not include irrelevant and immaterial matters.[94] Cross-examination cannot be used to develop, as affirmative evidence of value, facts which neither party could present on direct examination.[95]

A witness testifying as to value may be cross-examined as to matters affecting the competency and weight of his opinion,[96] such as his qualifications

Wash.—Shandrow v. City of Tacoma, 73 P.2d 733, 192 Wash. 329.

87. Ind.—Western & Southern Life Ins. Co. v. Danciu, 27 N.E.2d 763, denying rehearing 26 N.E.2d 912.
Mo.—Dodd v. Independence Stove & Furnace Co., 51 S.W.2d 114, 330 Mo. 662.

Books, records, and accounts

In an action on a county treasurer's bond for an alleged shortage during his first term, the treasurer could use on cross-examination of the county's expert accountant the books, records, and accounts relating to his second term to show that the accountant had made mistakes in his reports and that they were incorrect.—King County v. Whittlesey, 100 P. 320, 52 Wash. 206.

88. U.S.—Halsey, Stuart & Co. v. Farmers' Bank of McSherrystown, C.C.A.Pa., 37 F.2d 476.

89. Cal.—Atchison, T. & S. F. Ry. Co. v. Southern Pac Co., 57 P.2d 575, 13 Cal.App.2d 505.

90. Ala.—Councill v. Mayhew, 55 So. 314, 172 Ala. 295.

91. **Use of memorandum not prejudicial**
Ariz.—Keen v. Clarkson, 108 P.2d 573.

92. Ala.—Alabama Power Co. v. Henson, 187 So. 718, 237 Ala. 561.
Minn.—State v. Horman, 247 N.W. 4, 188 Minn. 252.
Mo.—State ex rel. State Highway Commission v. Hoffmann, App., 132 S.W.2d 27.
N.J.—Maisto v. Maisto, 12 A.2d 890, 124 N.J.Law 565, affirming 8 A.2d 810, 123 N.J.Law 401.
Pa.—Bridgman Realty Corporation v. City of Philadelphia, 177 A. 45, 317 Pa. 449.
Tex.—Capitol Hotel Co. v. Rittenberry, Civ.App., 41 S.W.2d 697, error dismissed.
22 C.J. p 595 note 55.

93. Ala.—Alabama Power Co. v. Henson, 187 So. 718, 237 Ala. 561.
Cal.—Metropolitan Water Dist. of Southern California v. Adams, 116 P.2d 7, prior opinion, App., 99 P.2d 659, rehearing denied 100 P.2d 357—People v. Pacific Gas & Electric Co., 81 P.2d 584, 27 Cal.App.2d 725.
Ill.—City of Mt. Olive v. Braje, 7 N.E.2d 851, 366 Ill. 132.
Mo.—State ex rel. State Highway Commission v. Hoffmann, App., 132 S.W.2d 27.
Tex.—Terrell v. General Motors Acceptance Corporation, Civ.App., 59 S.W.2d 442, error refused.

Conflicting statements

In action on fire policy, court's refusal to permit further cross-examination of plaintiff's expert respecting value of building, where witness made conflicting statements respecting value, and after dispute arose between defendant's counsel and court as to what witness said, was error.—Patriotic Ins. Co. of America v. Franciscus, C.C.A.Mo., 55 F.2d 844.

94. Ala.—Alabama Power Co. v. Allen, 118 So. 662, 218 Ala. 416.
Mo.—State ex rel. State Highway Commission v. Hoffmann, App., 132 S.W.2d 27.
Pa.—Snowiss v. Firemen's Ins. Co. of Newark, N. J., 185 A. 260, 322 Pa. 161.
22 C.J. p 595 note 56 [a].

Collateral issue

Where expert gave opinion evidence as to fair market values, exclusion, on cross-examination, of question how building compared for rental purposes with building as originally contemplated was proper.—Maryland Casualty Co. v. Dunlap, C.C.A.Mass., 68 F.2d 289.

Limitation to testimony

Where a witness for the owners qualified as an expert by testifying he had been engaged in the building business for fifty years, and testified to the value of the work of the contractors, a question on cross-examination as to whether he had succeeded in business was too broad, and should not have been permitted, but the inquiry should have been confined to whether the witness had previously made any serious mistakes in such estimates as those about which he had testified.—Warren v. Goodrich, 112 S.E. 687, 133 Va. 366.

Necessity of services

In attorneys' action for services in defending for defendant's wife his cross action for divorce, where an attorney, as witness for plaintiffs, had testified to the value of plaintiffs' services, it was not proper cross-examination to ask him, "Do you think it was necessary in this action for divorce, on the cross-petition of which you have testified, that the attorneys should spend a week briefing up the law on cruel and inhuman treatment on this cross-petition?"—Reynolds & Heitsman v. Henry, 185 N.W. 67, 193 Iowa 164.

95. Pa.—Serals v. West Chester Borough School Dist., 140 A. 632, 292 Pa. 134.

96. Ala.—Alabama Power Co. v. Herzfeld, 114 So. 49, 216 Ala. 671—Kershaw Mining Co. v. Lankford, 105 So. 896, 213 Ala. 630—J. H. Burton & Sons Co. v. May, 103 So. 46, 212 Ala. 435—Dean v. County Board of Education, 97 So. 741, 210 Ala. 256—Motor Sales Corporation v. Wisdom, 96 So. 68, 209 Ala. 242—Napier v. May, 102 So. 596, 20 Ala.App. 433.
Ark.—Malvern & O. R. R. Co. v. Smith, 26 S.W.2d 1107, 181 Ark. 626—Desha v. Independence County Bridge Dist. No. 1, 3 S.W.2d 969, 176 Ark. 253.
Cal.—East Bay Municipal Utility Dist. v. Kieffer, 278 P. 476, 99 Cal. App. 240, rehearing denied 279 P. 178, 99 Cal.App. 240.
Ga.—Swain v. Georgia Power & Light Co., 169 S.E. 249, 46 Ga.App. 794.
Ill.—Illinois Power & Light Corporation v. Talbott, 152 N.E. 486, 321 Ill. 538.

to testify,[97] the extent of his knowledge,[98] the reasons for his opinion,[99] and the facts and considerations on which the opinion is based.[1] The separate elements of value which unite to constitute the basis of his estimate may be investigated.[2]

Iowa.—Anderson v. U. S. R. R. Administration, 211 N.W. 872, 203 Iowa 715—Turner v. Hartford Fire Ins. Co., 172 N.W. 166, 185 Iowa 1363.

Minn.—Minneapolis-St. Paul Sanitary Dist. v. Fitzpatrick, 277 N.W. 394, 201 Minn. 442, 124 A.L.R. 897.

N.C.—Boone v. Sykes, 106 S.E. 456, 181 N.C. 143.

Pa.—Brown, for Use of McArdle, v. Borough of Castle Shannon, 178 A. 678, 318 Pa. 363—Tiffany v. Delaware, L. & W. R. Co., 105 A. 101, 262 Pa. 300—Dunbar Furnace Co. v. Fairchild, 15 A. 656, 121 Pa. 563, 22 Wkly.N.C. 560—Henry v. Somerset County, 161 A. 881, 105 Pa. Super. 441.

S.D.—Smith v. Gable, 230 N.W. 28, 56 S.D. 604.

Tex.—Crespi v. City of Waco, Civ. App., 277 S.W. 400—Ft. Worth & D. C. Ry. Co. v. Hapgood, Civ.App., 210 S.W. 969.

Utah.—Salt Lake & U R. Co. v. Schramm, 189 P. 90, 56 Utah 53.

Incompetent evidence inadmissible

Much latitude is allowable in cross-examination of witness testifying as to value, but such latitude does not permit admission of incompetent testimony.—City of Mt. Olive v. Braje, 7 N.E.2d 851, 366 Ill. 132.

Questions held proper

(1) Elements considered by witnesses in giving opinions as to market value of lands.

Cal.—City of Stockton v. Ellingwood, 275 P. 228, 96 Cal.App. 708.

N.J.—Napier Hat Mfg. Co. v. Essex County Park Commission, 164 A. 484, 110 N.J.Law 213.

Utah.—Mary Jane Stevens Co. v. First Nat. Bldg. Co., 57 P.2d 1099, 89 Utah 456.

(2) Questions concerning collateral subjects which prospective purchaser might ask.—Los Angeles County v. Signal Realty Co., 261 P. 536, 86 Cal.App. 704.

(3) Questions as to value of farm and number and value of live stock sworn to before tax assessor; distance of farm from market and kind of road thereto.—Welton v. Iowa State Highway Commission, 233 N. W. 876, 211 Iowa 625.

(4) When witness gives opinion as to market value of property not capable of being shown by public sales, private sales may be shown on cross-examination, to test value of opinion, but not as affirmative evidence for party calling him.—Luchs v. Goldman, 181 N.Y.S. 355.

Examination held improper

(1) Cross-examination of witness as to value in street improvement assessment proceeding as to how much realty he had in city was improper.—Hamrick v. Town of Albertville, 122 So. 448, 219 Ala. 465.

(2) Court's limitation on cross-examination of witness regarding market value of services was held proper where witness had already answered that she did not know such market value.—In re Stencil's Estate, 248 N. W. 18, 215 Iowa 1195.

(3) Other instances.

Ala.—Alabama Power Co. v. Scott, 104 So. 873, 21 Ala.App. 27.

Cal.—Blake v. Bennett, 1 P.2d 513, 115 Cal.App. 207.

N.J.—Greenberg v. O'Brodsky, 177 A. 131, 13 N.J.Misc. 184.

Okl.—Grand River Dam Authority v. Bomford, 111 P.2d 182.

Pa.—Wissinger v. Valley Smokeless Coal Co., 115 A. 880, 271 Pa. 566.

Value of land and power site

Refusal to permit cross-examination of witness testifying to value of land as power site, relative to whether flood rights had been acquired was erroneous; but refusal to permit cross-examination as to protesting tax assessment was not erroneous, in absence of showing assessment did not exceed that of later year.—Alabama Power Co. v. Herzfeld, 114 So. 49, 216 Ala. 671.

97. D.C.—Loughran v. U. S., 64 F. 2d 555, 62 App.D.C. 57.

98. Mich.—In re Parkside Housing Project-Connor and Warren Avenue, Detroit, 287 N.W. 571, 290 Mich. 582.

99. Mass.—Harvard Trust Co. v. City of Cambridge, 169 N.E. 74, 270 Mass. 403.

Mich.—In re Parkside Housing Project-Connor and Warren Ave., Detroit, 287 N.W. 571, 290 Mich. 582.

1. Ariz.—Viliborghi v. Prescott School Dist. No. 1 of Yavapai County, 100 P.2d 178, 55 Ariz. 230.

Ark.—Desha v. Independence County Bridge Dist. No. 1, 3 S.W.2d 969, 176 Ark. 253.

Cal.—Hibernia Savings & Loan Soc. v. Ellis Estate Co., 22 P.2d 806, 132 Cal.App. 408.

Mass.—City of Revere v. Revere Const. Co., 189 N.E. 73, 285 Mass. 243.

Pa.—Lutz v. Allegheny County, 195 A. 1, 327 Pa. 587.

Wash.—Madden v. Nippon Auto Co., 206 P. 569, 119 Wash. 618.

22 C.J. p 595 notes 63–65, p 724 note 2 [b].

Any question which tends to control basis of fact on which witness is grounding his estimate or judgment is competent to discredit his sincerity in testifying as he has done. —Pierce v. Boston, 41 N.E. 227, 164 Mass. 92—22 C.J. p 595 notes 65, 66.

Purchase price

Question whether witness knew defendant paid for farm, timber, and all, a sum less than its alleged value when sold to plaintiff was proper cross-examination, since answer either way, unexplained, would tend to lessen weight of his testimony.—Raithel v. Hall, 124 A. 586, 97 Vt. 469.

Subsequent selling price

An expert witness, who has given an opinion as to the market value of an automobile at a certain date, may properly be asked on cross-examination to give the price at which he sold the same car a few days thereafter.—Guilford v. Brown, 191 N.W. 915, 154 Minn. 518.

Comparative cost

In bill to reduce tax assessment on an estate, cross-examination of witness on relative cost of the buildings after he had testified as to value of another estate and compared it with estate in question was proper, since witness could answer without giving opinion as to actual cost of either. —Goelet v. Tax Assessors of City of Newport, 172 A. 896, 54 R.I. 306.

Attorney; duplication of work

Refusal to permit an attorney, testifying as to reasonable attorney's fee to be allowed plaintiff, to state on cross-examination that he would make a concession against his suggested fee, in view of fact that same attorney was to represent plaintiff in a similar pending case, was error.—Robinson v. Ætna Life Ins. Co., Tex.Com.App., 276 S.W. 900, affirming Ætna Life Ins. Co. v. Robinson, Civ.App., 262 S.W. 118, motion overruled Robinson v. Ætna Life Ins. Co., Com.App., 277 S.W. 629.

Rental value

One who has testified as to value may be asked as to rental value.—Minnesota Belt-Line R. Transfer Co. v. Gluek, 48 N.W. 194, 45 Minn. 463.

2. Cal.—People v. Pacific Gas & Electric Co., 81 P.2d 584, 27 Cal. App.2d 725.

Iowa.—Welton v. Iowa State Highway Commission, 233 N.W. 876, 211 Iowa 625.

Mo.—State ex rel. State Highway Commission v. Graham, 74 S.W.2d 493, 495, citing **Corpus Juris**.

Utah.—Mary Jane Stevens Co. v. First Nat. Bldg. Co., 57 P.2d 1099, 89 Utah 456.

22 C.J. p 595 note 54, p 704 note 96.

Value of part of property

(1) In testing expert's knowledge concerning value of farm before and

The witness may be asked what price he paid,[3] received,[4] would take,[5] offered,[6] or would offer,[7] for the property. The witness may be asked whether he has not made inconsistent statements at another time;[8] but where a witness in condemnation proceedings has stated the element of damages to the land not taken, as a basis for the opinion expressed, it is improper to ask him why he stated that the damage was a certain amount per acre, rather than other larger or smaller amounts.[9] Questions as to value must be fixed as to time and place.[10]

Value and sales of other property. A witness as to the value of land may be examined as to his knowledge of the value of land in the vicinity,[11] and as to whether he knows of the sales of such land.[12] According to some authorities, he can be questioned as to the price realized and other details of such sales.[13] Other authorities hold that the witness can be questioned as to price where his opinion was based in part on such sale,[14] but not otherwise.[15]

after taking of highway right of way, defendants had right to question expert concerning value of separate tracts in farm.—Dean v. State, 233 N.W. 36, 211 Iowa 143.

(2) In bill to reduce tax assessment, cross-examination of witness on the price that stables, constituting part of estate sought to be taxed, would bring, if sold with one half the land, was properly denied, since entire estate was to be valued and not part thereof.—Goelet v. Tax Assessors of City of Newport, 172 A. 896, 54 R.I. 306.

Prior and subsequent sales

Where expert witness testified as to market value on a certain day, but admitted he knew of no sales on that day, cross-examination as to the market immediately before and after that day should be allowed, to ascertain the soundness of his conclusion and test his general accuracy and reliability.—Levant American Commercial Co. v. W. Wells & Co., 174 N.Y.S. 303, 186 App.Div. 497.

Strength of opinion

On cross-examination of a witness, the grounds of his opinion as to value and the degree of conviction with which it was entertained may be inquired into.—Coffee County v. Marsh, 96 So. 891, 209 Ala. 566.

3. N.C.—Palmer v. North Carolina State Highway Commission, 141 S.E. 338, 195 N.C. 1.

22 C.J. p 595 note 60.

4. N.Y.—Dorrity v. Russell, 20 N.Y. Super. 539.

5. Tex.—Eastern Texas R. Co. v. Scurlock, 78 S.W. 490, 97 Tex. 305, reversing, Civ.App., 75 S.W. 366.

6. N.C.—Lloyd v. Venable, 84 S.E. 855, 168 N.C. 531.

7. N.C.—Ward v. Town of Waynesville, 154 S.E. 322, 199 N.C. 273.

8. Mass.—Phillips v. Marblehead, 19 N.E. 547, 148 Mass. 326.

Amount of award

On landowner's appeal from award of commissioners appointed by district court to appraise land condemned by highway commission, commissioner's testimony as to amount of award was not admissible on cross-examination to test commissioner's credibility, where commissioner's evaluation as witness was identical with amount of award.—Searcy v. State Highway Commission, 67 P.2d 534, 145 Kan. 709.

Value for tax purposes

Where the owner of condemned property fixed its value, cross-examination to show that he valued it at much less for taxation purposes was proper, not for the purpose of showing the value of the land, but as an admission against interest, testing his credibility, judgment of value, and memory.—Dean v. County Board of Education, 97 So. 741, 210 Ala. 256.

9. Ill.—Illinois, I. & M. R. Co. v. Freeman, 71 N.E. 444, 210 Ill. 270.

10. Minn.—Northern Rock Island Plow Co. v. Hackett-Gates-Hurty Co., 206 N.W. 446, 165 Minn. 282.

Reasonable period

Court did not abuse discretion in confining cross-examination of witness to value at period reasonably near date in issue.—City of Los Angeles v. Morris, 241 P. 409, 74 Cal.App. 473.

11. Ala.—Bynum Bros. v. State, 112 So. 348, 216 Ala. 102.

Iowa.—Snouffer v. Chicago & N. W. R. Co., 75 N.W. 501, 105 Iowa 681.

Neb.—Lowell v. Buffalo County, 242 N.W. 452, 123 Neb. 194.

Tex.—West v. State, Civ.App., 150 S.W.2d 363.

Wash.—Bingaman v. City of Seattle, 245 P. 411, 139 Wash. 68.

22 C.J. p 595 note 57.

12. Ala.—Dean v. County Board of Education, 97 So. 741, 210 Ala. 256.

Cal.—Hibernia Savings & Loan Soc. v. Ellis Estate Co., 22 P.2d 806, 132 Cal.App. 408—City of Beverly Hills v. Anger, 15 P.2d 867, 127 Cal.App. 223.

Mo.—State ex rel. State Highway Commission v. Deutschman, 142 S.W.2d 1025.

Pa.—Serals v. West Chester Borough School Dist., 140 A. 632, 292 Pa. 134.

Denial of existence of sales on direct examination

Cross-examination of witnesses, who testified there were no sales in vicinity, as to their knowledge of particular sales, was proper in condemnation suits.—Morrison v. Cottonwood Development Co., 266 P. 117, 38 Wyo. 190.

13. U.S.—Graf v. Holcombe, C.C.A. Neb., 277 F. 687.

Cal.—Atchison, T. & S. F. Ry. Co. v. Southern Pac. Co., 57 P.2d 575, 13 Cal.App.2d 505—East Bay Municipal Utility Dist. v. Kieffer, 278 P. 476, 99 Cal.App. 240, rehearing denied 279 P. 178, 99 Cal.App. 240—Los Angeles Gas & Electric Corporation v. Etienne, 257 P. 123, 83 Cal.App. 645—Palladine v. Imperial Valley Farm Lands Ass'n, 225 P. 291, 65 Cal.App. 727.

Iowa.—Maxwell v. Iowa State Highway Commission, 271 N.W. 883, 223 Iowa 159, 118 A.L.R. 862.

Md.—Pumphrey v. Tabler, 2 A.2d 668, 175 Md. 498.

Neb.—Lowell v. Buffalo County, 242 N.W. 452, 123 Neb. 194.

Tex.—West v. State, Civ.App., 150 S.W.2d 363.

22 C.J. p 762 note 63 [a].

General selling price may be inquired into on cross-examination in Ohio, although questions with reference to other sales in which the sales price is stated in the question are properly excluded.—Cincinnati Union Terminal Co. v. Banning, 27 Ohio N.P.,N.S., 548.

14. Pa.—Pittsburgh Terminal Warehouse & Transfer Co. v. City of Pittsburgh, 198 A. 632, 330 Pa. 72—Serals v. West Chester Borough School Dist., 140 A. 632, 292 Pa. 134—Pennsylvania Co. for Insurances on Lives and Granting Annuities v. City of Philadelphia, 112 A. 76, 268 Pa. 559—Llewellyn v. Sunny Side Coal Co., 99 A. 869, 225 Pa. 291—Roberts v. City of Philadelphia, 86 A. 926, 239 Pa. 339.

15. D.C.—Loughran v. U. S., 64 F.2d 555, 62 App.D.C. 57.

Pa.—Pittsburgh Terminal Warehouse & Transfer Co. v. City of Pittsburgh, 198 A. 632, 330 Pa. 72—Serals v. West Chester Borough School Dist., 140 A. 632, 292 Pa. 134—Wissinger v. Valley Smokeless Coal Co., 115 A. 880, 271 Pa. 566.

Hypothetical questions. The witness may be required to answer hypothetical questions,[16] provided the question does not make assumptions contrary to the conceded facts.[17]

b. Redirect Examination

General rules govern the redirect examination of skilled and expert witnesses.

The rules governing the redirect examination of witnesses generally, which are discussed in the C.J.S. title Witnesses §§ 417–428, also 70 C.J. p 697 note 35–p 716 note 4, apply also, with such modifications as the nature of the case requires, to the redirect examination of skilled and expert witnesses.[18] Accordingly an expert or skilled witness may be properly reëxamined as to matters concerning which he was cross-examined.[19] Thus such a witness may be permitted to explain his testimony given on cross-examination;[20] and his opinion may be supported by reference to other authorities.[21] Whether a leading question shall be permitted is largely within the discretion of the trial court.[22] A question which contains more than one proposition,[23] or which is so framed as to invite idle and meaningless conjecture[24] should, however, be excluded. While it has been held that a witness who has testified on direct examination as a skilled observer cannot testify on redirect examination as an expert,[25] such a practice has been permitted.[26] The fact that no hypothesis is distinctly stated on redirect examination does not necessarily render the examination improper, since the facts of the particular case may justify the assumption that the original hypothesis is continued.[27]

Value. The scope of redirect examination of a witness as to value rests largely within the discretion of the trial court.[28] In the exercise of such discretion, the nature and extent of the cross-examination are proper matters for consideration;[29] and the nature of the cross-examination may justify an inquiry on redirect examination into matters which could not be brought out on the examination in chief.[30] A matter not gone into on cross-exam-

16. Mo.—Crews v. Bogy, App., 285 S.W. 549.
Wash.—Le Doux v. Seattle North Pac. Shipbuilding Co., 195 P. 1006, 114 Wash. 632.

Question too general
An expert, who on direct examination had testified as to what would be a reasonable fee for taking deposition under recited circumstances, may not, on cross-examination, be asked as to what would ordinarily be a reasonable per diem fee for taking a deposition in an ordinary case, the question being too general to have elicited testimony that would have affected his answer to the hypothetical question.—Van Fleet v. O'Neil, 192 P. 384, 44 Nev. 216.

17. Ala.—Grissom v. J. B. Colt & Co., 118 So. 580, 218 Ala. 336.

18. Mo.—Rockenstein v. Rogers, 31 S.W.2d 792, 326 Mo. 468—O'Gorman v. Kansas City, 93 S.W.2d 1132, 233 Mo.App. 124.
N.J.—Davis v. New Jersey Zinc Co., 182 A. 850, 116 N.J.Law 103.
22 C.J. p 725 note 30.

19. Ill.—Rehthaler v. Crane Co., 218 Ill.App. 267.
Iowa.—Wildeboer v. Petersen, 175 N.W. 349, 187 Iowa 1169.
Mass.—Leave v. Boston Elevated Ry. Co., 28 N.E.2d 483, 306 Mass. 391—Mitchell v. Walton Lunch Co., 25 N.E.2d 151, 305 Mass. 76.
Mo.—Kelso v. W. A. Ross Const. Co., 85 S.W.2d 527, 337 Mo. 202.
Tenn.—Hager v. Hager, 66 S.W.2d 250, 17 Tenn.App. 143.
W.Va.—Collins v. Equitable Life Ins. Co., 8 S.E.2d 825, 130 A.L.R. 287.
22 C.J. p 725 note 30 [a].

Details and surrounding circumstances of transaction elicited on cross-examination may be brought out on redirect examination.—Rockenstein v. Rogers, 31 S.W.2d 792, 326 Mo. 468.

20. U.S.—Mansfield Hardwood Lumber Co. v. Horton, C.C.A.Ark., 32 F.2d 851.
Idaho.—Hayhurst v. Boyd Hospital, 254 P. 528, 43 Idaho 661.
N.Y.—McMartin v. Fidelity & Casualty Co. of New York, 267 N.Y.S. 473, 239 App.Div. 296, reversed on other grounds 190 N.E. 414, 264 N.Y. 220, followed in Cirulnick v. Equitable Life Assur. Soc. of U. S., 273 N.Y.S. 404, 242 App.Div. 685, and reargument denied McMartin v. Fidelity & Casualty Co. of New York, 191 N.E. 619, 264 N.Y. 671.
Tex.—Citizens' Mut. Life Ass'n v. Kennedy, Civ.App., 57 S.W.2d 265.

21. U.S.—Yarn v. Ft. Dodge, D. M. & S. R. Co., C.C.A.Iowa, 31 F.2d 717, certiorari denied Fort Dodge, D. M. & S. R. Co. v. Yarn, 50 S.Ct. 27, 280 U.S. 568, 74 L.Ed. 621.

22. **Leading question properly excluded**
Conn.—Hulk v. Aishberg, 11 A.2d 380, 126 Conn. 360.

23. N.J.—Van Allen v. Lobel, 8 A.2d 608, 123 N.J.Law 273.

24. Md.—Mangione v. Snead, 195 A. 329, 173 Md. 33.

25. Ill.—O'Shaugnnessy v. Chicago City R. Co., 144 Ill.App. 174.
Mich.—Sagar v. Hogmire, 66 N.W. 327, 108 Mich. 410.

26. Vt.—Titus v. Gage, 39 A. 246, 70 Vt. 13.

27. Mich.—McGinnis v. Kempsey, 27 Mich. 363.

28. Ala.—Alabama Power Co. v. Berry, 130 So. 541, 222 Ala. 20.

29. Pa.—McSorley v. School Dist. of Avalon Borough, 139 A. 848, 291 Pa. 252.

Opportunity to explain statement made on cross-examination
In action on fire policy under which insurer was liable to extent of actual cash value of property at time of loss or damage not exceeding amount which it would cost to repair or replace property with material of like kind and quality, denial to insured's witness of opportunity to explain what he had meant by statement on cross-examination that if building was not rented it would not be worth anything was error.—Gardull v. Royal Ins. Co., 2 A.2d 504, 133 Pa.Super. 257.

Particular sales
Where a witness has on cross-examination been made to answer as to a very low sale of land in the neighborhood, it is proper to ask him on reëxamination as to a particularly high-priced sale of land in the neighborhood.—Lorain St. R. Co. v. Sinning, 17 Ohio Cir.Ct. 649, 5 Ohio Cir.Dec. 753.

Question not warranted by cross-examination
Testimony on cross-examination that land became more valuable in direction away from land taken did not authorize opinion on redirect as to value of lot not taken.—McCabe v. City of Chelsea, 163 N.E. 255, 265 Mass. 494.

30. Mass.—Anonik v. Ominsky, 158 N.E. 267, 261 Mass. 65.

ination cannot be investigated on redirect examination.[31] It has been held that a witness as to the value of realty cannot be questioned as to the facts of particular sales, even though he was questioned as to such matters on cross-examination.[32]

H. TESTS OF OPINION EVIDENCE

§ 561. In General

The jury may properly apply in part, to opinion evidence, the same tests which the judge adopted in permitting the witness to testify.

The jury may properly apply in part, to the statement of facts, inference, conclusion or judgment, the same tests which the judge adopted in permitting the witness to testify.[33] So far as the element of fact enters into the statement the opportunities and ability of the witness to observe or otherwise cognize the fact are important. Mental capacity for forming a correct inference, conclusion, or judgment is the important factor in testing the element of reasoning.[34]

§ 562. Inference

An inference may be wrong because of the nonexistence of the facts on which it is based or because the facts when ascertained do not support the inference.

An inference may be wrong because the facts on which it is based either do not exist or are qualified in their operation by other facts which are not given proper weight, or because the facts when ascertained do not support the inference.[35]

§ 563. —— Accuracy of Observation

The enumeration of facts observed by the witness as part of the basis of his inference furnishes a test of his powers of observation.

The enumeration of facts observed by the witness as part of the basis of his inference furnishes a practicable and valuable test of the accuracy of the witness' powers of observation.[36] The existence of the constituent facts relied on may therefore be disproved; and when these facts are disputed the jury will be instructed to give weight to the inference itself if, and in proportion as, they find the facts themselves to exist.[37] It may be claimed, and evidence offered to show, that the witness could not have observed correctly on account of his own condition, as because of intoxication[38] or because not properly qualified to observe carefully and with discrimination,[39] and as bearing on this it may be proved that the witness at first attached little or no importance to facts on which he now strongly relies.[40]

§ 564. —— Facts or Premises Supplied

A skilled witness may generalize from his experience after stating such facts as permit of detailed statement.

After stating such facts furnished by his training and experience as permit of detailed statement, a skilled witness may give a generalization of his experience.[41]

§ 565. —— Correctness of Reasoning

The correctness of a witness' conclusion must be tested by the concrete facts to which he testifies.

The correctness of a witness' conclusion must be tested by the concrete facts to which he testifies.[42] It may occur that, even where the facts are correctly observed and accurately stated by the witness, they do not lead to the conclusion which he deduces from them.[43]

§ 566. Judgment of Expert

Every proper test should be applied to ascertain the value of the judgment of an expert.

Since the judgment of an expert is of value precisely in accordance with what there is back of it, every proper test should be applied.[44] Generally

Pa.—Pittsburgh Terminal Warehouse & Transfer Co. v. City of Pittsburgh, 198 A. 632, 330 Pa. 72.

31. Mo.—State ex rel. State Highway Commission v. Bengal, App., 124 S.W.2d 687.
Pa.—Pittsburgh Terminal Warehouse & Transfer Co. v. City of Pittsburgh, 198 A. 632, 330 Pa. 72.

32. Cal.—City of Los Angeles v. Deacon, 7 P.2d 378, 119 Cal.App. 491.
22 C.J. p 725 note 30.

33. Cal.—Oakland v. Adams, 174 P. 947, 37 Cal.App. 614.
22 C.J. p 726 note 35.

34. Iowa.—Hall v. Polk, 165 N.W. 119, 181 Iowa 828—Rolfs v. Mullins, 162 N.W. 783, 179 Iowa 1223.
22 C.J. p 726 note 36.

35. Mo.—Porter v. Hetherington, 158 S.W. 469, 172 Mo.App. 502.
Ohio.—Clark v. State, 12 Ohio 483, 40 Am.D. 481.

36. Ind.—Hammond, Whiting & E. C. Electric R. Co. v. Spyzehalski, 46 N.E. 47, 17 Ind.App. 7.
N.Y.—Levison v. Oes, 162 N.Y.S. 1043—In re Carpenter, 145 N.Y.S. 365.

37. Mich.—Frost v. Milwaukee, etc., R. Co., 56 N.W. 19, 96 Mich. 470.
22 C.J. p 726 note 41.

38. N.Y.—Sisson v. Conger, 1 Thomps. & C. 564.

39. Cal.—In re Mullin, 42 P. 645, 110 Cal. 252.

40. N.H.—Cote v. Grand Trunk R. Co., 49 A. 567, 70 N.H. 620.

41. Conn.—Clinton v. Howard, 42 Conn. 294.
22 C.J. p 727 note 51.

42. Tex.—Homesteaders' Life Ass'n v. Booth, Civ.App., 285 S.W. 889.

43. Mont.—Irion v. Hyde, 105 P.2d 666, 671, quoting **Corpus Juris.**

44. Cal.—In re Waite's Guardianship, 97 P.2d 238, 14 Cal.2d 727, superseding, App., 91 P.2d 617.
22 C.J. p 727 note 58.

Consistency and reasonableness
In considering testimony of medi-

speaking, the testimony of an expert is subject to the same tests that are applied to the evidence of other witnesses.[45] However, it is often first necessary to ascertain so far as possible what facts the expert has mentally added to those hypothetically stated,[46] especially as to the general scientific propositions on which, as ultimate major premises, the induction will be found finally to rest.[47]

On cross-examination the tests usually applied are the usual weapons of a cross-examining counsel;[48] and a favorite line of attack on the expert is in testing the process of reasoning employed in deducing his conclusion,[49] an opportunity for doing which cannot properly be denied.[50]

I. WEIGHT OF OPINION

§ 567. In General

The weight of opinion evidence is for the trier of the facts, and as a general rule it is not conclusive. The value of the opinion ordinarily depends on the competency or qualification of the witness and the facts and circumstances on which the opinion is based. A conclusion of law has no probative force.

The weight to be given to opinion evidence is, within the bounds of reason,[51] entirely a question for the determination of the jury, the court when trying a question of fact, or other trier of the facts,[52] and, as a general rule, subject in some jurisdictions to an exception where the matter is such that the jury cannot be assumed to be able to form a correct opinion of their own, see infra § 569, opinion evidence is not conclusive,[53] even

cal experts, court should apply test of consistency and reasonableness, having reference to all other testimony which opinions may corroborate or contradict.—In re Loomis' Will, 174 A. 38, 133 Me. 81.

45. Ill.—Lyon v. Oliver, 147 N.E. 251, 316 Ill. 292, reversing 227 Ill.App. 511.

La.—Johnson v. Hillyer, Deutsch, Edwards Inc., App., 185 So. 652, rehearing denied 186 So. 365.

N.C.—Hedgpeth v. Coleman, 111 S.E. 517, 183 N.C. 309, 24 A.L.R. 232.

46. Cal.—In re Mullin, 42 P. 645, 110 Cal. 252.

22 C.J. p 728 note 64.

47. N.Y.—Clark v. Baird, 9 N.Y. 183.

48. Ky.—Gatliff Coal Co. v. Hill's Adm'r, 92 S.W.2d 56, 58, 263 Ky. 309, citing **Corpus Juris.**

22 C.J. p 728 note 67.

49. Ill.—Danville & I. H. R. Co. v. Tidrick, 137 Ill.App. 553.

22 C.J. p 728 note 68.

50. Mass.—Dickenson v. Fitchburg, 13 Gray 546.

Vt.—Titus v. Gage, 39 A. 246, 70 Vt. 13.

51. N.Y.—Tubiola v. Baker, 233 N.Y.S. 373, 225 App.Div. 420—Weaver v. Scripture, 211 N.Y.S. 593, 125 Misc. 741, affirmed 211 N.Y.S. 940, 214 App.Div. 852.

22 C.J. p 728 note 72.

52. U.S.—U. S. v. Alger, C.C.A.Idaho, 68 F.2d 592.

Ala.—Beatty v. Palmer, 71 So. 422, 196 Ala. 67.

Ark.—American Bauxite Co. v. Dunn, 178 S.W. 934, 120 Ark. 1, Ann.Cas. 1917C 625.

Cal.—Waizman v. Black, 281 P. 1087, 101 Cal.App. 610.

Ill.—Libre v. Brotherhood of American Yeomen, 168 Ill.App. 328.

Ind.—National City Bank v. Kirk, 134 N.E. 772, 85 Ind.App. 120.

Mo.—Dillinder v. Weeks, App., 50 S.W.2d 152—Wolff v. Scullin Steel Co., App., 217 S.W. 571.

N.Y.—Tubiola v. Baker, 233 N.Y.S. 373, 225 App.Div. 420—Weaver v. Scripture, 211 N.Y.S. 593, 125 Misc. 741, affirmed 211 N.Y.S. 940, 214 App.Div. 852—In re King's Will, 172 N.Y.S. 869.

Okl.—Dalton v. Bilbo, 258 P. 274, 126 Okl. 139.

Or.—Babcock v. Gray, 107 P.2d 846—Laam v. Green, 211 P. 791, 106 Or. 311.

Pa.—Smith v. Penn Federal Corporation, 172 A. 147, 315 Pa. 20—Davis v. Southern Surety Co., 153 A. 119, 302 Pa. 21—Sorensen v. Quaker City Poster Advertising Co., 130 A. 432, 284 Pa. 209.

Tex.—Carter v. Myers, Civ.App., 149 S.W.2d 248—Octane Oil Refining Co. v. Blankenship-Antilley Implement Co., Civ.App., 117 S.W.2d 885—Transcontinental Ins. Co. of New York v. Frazier, Civ.App., 60 S.W.2d 268—Gulf, C. & S. F. Ry. Co. v. Davis, Civ.App., 225 S.W. 773.

22 C.J. p 728 notes 70, 73, p 734 note 8.

53. U.S.—Ciba Pharmaceutical Products v. Abbott Laboratories, Cust. & Pat.App., 121 F.2d 551—Louisville & N. R. Co. v. Williamson, C.C.A.Ga., 87 F.2d 34—U. S. v. Best & Co., Cust. & Pat.App., 86 F.2d 23—Boggs & Buhl v. Commissioner of Internal Revenue, C.C.A., 34 F.2d 859—Pittsburgh Taxicab Co. v. U. S., C.C.A.Ohio, 281 F. 669, 24 A.L.R. 1125, affirming, D.C., U. S. v. One W. W. Shaw Automobile Taxi and 186 Quarts of Penwick Whisky, 272 F. 491.

Cal.—Thomas Haverty Co. v. Jones, 197 P. 105, 185 Cal. 285—Wilkinson v. Standard Accident Ins. Co. of Detroit, Mich., 180 P. 607, 180 Cal. 252—Fanning v. Merchants' Nat. Trust & Savings Bank, 275 P. 967, 97 Cal.App. 676—Wardrobe v. Miller, 200 P. 77, 53 Cal.App. 370.

Ga.—Southern Ry. Co. v. Abercrombie, 165 S.E. 901, 45 Ga.App. 623.

Ind.—Hubbard Steel Foundry Co. v. Remiszewski, 132 N.E. 691, 76 Ind. App. 619.

Miss.—Leavenworth v. Board of Mississippi Levee Commissioners, 140 So. 518, citing **Corpus Juris.**

Mo.—Koehler v. Wells, 20 S.W.2d 31, 323 Mo. 892—Clingenpeel v. Citizens' Trust Co. of Boonville, Mo., 240 S.W. 177, 185, citing **Corpus Juris**—White v. Meiderhoff, App., 281 S.W. 101—Harrison v. Chicago & A. R. Co., 239 S.W. 871, 209 Mo.App. 526.

N.H.—Ballas v. F. W. Woolworth Co., 10 A.2d 233, 90 N.H. 428—Mooney v. Chapdelaine, 10 A.2d 220, 90 N.H. 415, affirmed 11 A.2d 713.

N.Y.—Tooley v. State, 252 N.Y.S. 278, 141 Misc. 4, affirmed 255 N.Y.S. 846, 235 App.Div. 656, affirmed 182 N.E. 223, 259 N.Y. 658.

Or.—Paine v. Meier & Frank Co., 27 P.2d 315, 146 Or. 40, rehearing denied 29 P.2d 531, 146 Or. 40—Littlepage v. Security Savings & Trust Co., 3 P.2d 752, 753, 137 Or. 559, citing **Corpus Juris.**

Tenn.—Groveland Banking Co. v. City Nat. Bank, 234 S.W. 643, 144 Tenn. 520.

Tex.—Simmonds v. St. Louis, B. & M. Ry. Co., 91 S.W.2d 332, 334, 127 Tex. 23, quoting **Corpus Juris,** and modifying St. Louis, B. & M. Ry. Co. v. Simmonds, Civ.App., 50 S.W.2d 343—Octane Oil Refining Co. v. Blankenship-Antilley Implement Co., Civ.App., 117 S.W.2d 885.

though uncontroverted[54] and unanimous.[55] Opinion evidence, under the circumstances of the case, may be of probative value,[56] and it may be sufficient to support a verdict or finding.[57] In determining the value of an opinion, factors for consideration are the extent to which the witness is competent or qualified to express the opinion, with regard to his knowledge, training, experience, powers of observation, and the degree of attention he gave to the matter,[58] and the existence of any natural bias due to circumstances.[59] A conclusion by a witness who is not qualified to form an opinion with a proper basis is entitled to little or no weight,[60] and opinions of laymen on technical subjects are not considered as substantive evidence.[61] Opinion evidence is entitled to weight only when consistent with probability and reason,[62] and a conclusion contrary to reason or to common knowledge

Wis.—Tegen v. Chapin, 187 N.W. 185, 176 Wis. 410.

22 C.J. p 729 note 77, p 730 note 78, p 731 note 81.

Opinions on benefit of zoning restrictions

Laymen's opinions that zoning ordinance restriction on use of property is in the interest of public good are not final.—State Bank & Trust Co. v. Village of Wilmette, 193 N.E. 131, 358 Ill. 311, 96 A.L.R. 1327—Forbes v. Hubbard, 180 N.E. 767, 348 Ill. 166.

Opinions on necessity for bus line

On appeal from an order of the railroad commission denying an application for a certificate of convenience and necessity to operate a bus line, the opinion of witnesses testifying before the commission on the ultimate fact to be decided, that is, the existence or nonexistence of a public necessity for the bus line, cannot be substituted for the opinion of the commission thereon.—Railroad Commission of Texas v. Shupee, Civ.App., 57 S.W.2d 295, affirmed Shupee v. Railroad Commission of Texas, 73 S.W.2d 505, 123 Tex. 521.

Report by newspaper

In action on accident policy involving the issue of whether insured accidentally shot himself or committed suicide, the fact that newspapers reported that he had committed suicide was not conclusive on such issue, being merely an inference.—Wilkinson v. Standard Accident Ins. Co. of Detroit, Mich., 180 P. 607, 180 Cal. 252.

Prima facie proof

In action against surety company on guaranty bond, testimony that local manager of company had verified validity of bond and letter of confirmation did not establish "prima facie" the execution of the bond.—Coen v. American Surety Co. of New York, C.C.A.Mo., 120 F.2d 393.

54. Iowa.—Wood v. Wood, 262 N.W. 773, 220 Iowa 441.

N.Y.—Shabotzky v. Equitable Life Assur. Soc., 12 N.Y.S.2d 848, 257 App.Div. 257, reargument denied 14 N.Y.S.2d 279, 257 App.Div. 957.

Tex.—Commercial Standard Ins. Co. v. First State Bank of Vernon, Civ.App., 142 S.W.2d 621, error dismissed.

22 C.J. p 729 note 76.

Opinion of interested witness

Uncontroverted opinions of interested witness cannot be relied on to take issue from jury in absence of corroboration.—Wichita Falls & S. R. Co. v. Holbrook, Civ.App., 50 S.W.2d 428, affirmed 78 S.W.2d 938, 125 Tex. 184, certiorari denied 56 S.Ct. 139, 296 U.S. 618, 80 L.Ed. 439.

55. Ark.—Pearl City Packet Co. v. Towery, 43 S.W.2d 1086, 184 Ark. 966.

22 C.J. p 729 note 75.

56. Ill.—Moustgaard v. Industrial Commission, 122 N.E. 49, 287 Ill. 156.

Mo.—Collins v. Leahy, 146 S.W.2d 609.

Corroboration of opinion

In passenger's action for injuries sustained from jerking of street car, testimony that street car gave unusual jerk was held sufficiently corroborated by evidence that passenger was thrown over backwards to take case to jury.—Lutzenberger v. Milwaukee Electric Railway & Light Co., 271 N.W. 409, 224 Wis. 44.

57. N.Y.—Menick v. Bruckman, 19 N.E.2d 91, 279 N.Y. 795, reversing 7 N.Y.S.2d 332, 255 App.Div. 810.

Okl.—Texas Co. v. Alred, 28 P.2d 556, 167 Okl. 128.

22 C.J. p 732 note 97.

Objection to statement as conclusion

A statement objected to as a conclusion has been held sufficient under the circumstances of the case to sustain a finding on an issue.

Cal.—Bank of Italy Nat. Trust & Savings Ass'n v. Bettencourt, 7 P. 2d 174, 214 Cal. 571.

Ill.—Swanson v. Kohout, 136 N.E. 656, 304 Ill. 606.

58. U.S.—Anderson v. American Smelting & Refining Co., D.C.Utah, 265 F. 928.

Iowa.—Pearl v. Omaha & St. L. R. Co., 88 N.W. 1078, 115 Iowa 535.

Kan.—Todd v. Prairie Pipe Line Co., 196 P. 623, 108 Kan. 485.

Ky.—Commonwealth v. Begley, 114 S.W.2d 127, 272 Ky. 289.

Mo.—Long v. Mild, 149 S.W.2d 853.

Wyo.—Davis v. Graham, 225 P. 789, 31 Wyo. 239.

22 C.J. p 729 note 74.

Opinion as to nonexistence of person

The extent of the search affects the weight of the opinion of a witness testifying as to the nonexistence of a person.—Morris v. Equitable Life Assur. Soc. of U. S., 191 N. W. 190, 109 Neb. 348.

59. U.S.—Anderson v. American Smelting & Refining Co., D.C.Utah, 265 F. 928.

60. Ky.—United Carbon Co. v. Spence, 148 S.W.2d 1038, 285 Ky. 568.

La.—Neely v. Texas & P. Ry. Co., 82 So. 745, 145 La. 671.

Mo.—Hall v. Wilkerson, App., 84 S. W.2d 1063.

61. U.S.—Ætna Life Ins. Co. of Hartford, Conn., v. Kelley, C.C.A. Mo., 70 F.2d 589, 93 A.L.R. 471—Simmons v. Farley, D.C.D.C., 18 F. Supp. 758, reversed on other grounds Farley v. Simmons, 99 F. 2d 343, 69 App.D.C. 110, certiorari denied Simmons v. Farley, 59 S.Ct. 244, 305 U.S. 651, 83 L.Ed. 422, rehearing denied 59 S.Ct. 356, 305 U.S. 676, 83 L.Ed. 438.

Mo.—Brown v. Metropolitan Life Ins. Co., App., 151 S.W.2d 499.

Construction of will

The opinions of persons who have no technical knowledge of the construction of wills have been held to be of trivial value.—Ligon v. Bolinger's Ex'r, 238 S.W. 180, 194 Ky. 76.

Title

The opinion of a lay witness on a question of title involving considerations of great technical importance is insufficient to support a verdict or decree.

Ala.—Mulcahy v. Mulcahy, 84 So. 752, 203 Ala. 521.

Ill.—Young v. Ebersohl, 159 N.E. 235, 328 Ill. 273.

Change of possession

A conclusion of a lay witness that he gave "possession" of insured property to another was held insufficient, on the issue of "change of possession," to avoid a fire policy.—Evans v. London Assur. Corporation, 151 A. 613, 107 N.J.Law 183.

62. Me.—Rogers v. Kendall, 119 A. 616, 122 Me. 248.

and experience has no probative force[63] and is insufficient to support a verdict.[64] Likewise a conclusion which cannot be true as a matter of law affords no basis for a judgment.[65] An opinion may be disregarded where the question at issue is not a subject for opinion evidence.[66]

The value of opinion evidence ordinarily depends on the particular facts and circumstances on which the opinion is based,[67] at least where the witness is not an expert,[68] and the opinion is entitled to no greater weight than the facts justify.[69] Mere opinions or conclusions of an unskilled witness, without adequate supporting facts, possess little or no probative value,[70] and have been held insufficient to authorize or sustain a verdict, decree, award, or finding,[71] or to warrant submission of the issue to

Mo.—Grawe v. Schmidt's Estate, 293 S.W. 375.

Wis.—Tegen v. Chapin, 187 N.W. 185, 176 Wis. 410.

63. Colo.—Snowden v. Taggart, 17 P.2d 305, 91 Colo. 525.

64. Iowa.—Spaulding v. Miller, 264 N.W. 8, 220 Iowa 1107.

W.Va.—Simms v. Charleston Interurban R. Co., 161 S.E. 8, 111 W.Va. 180.

65. Tex.—Texas & N. O. Ry. Co. v. Jeff Chaison Townsite Co., Com. App., 298 S.W. 399, affirming in part and reversing in part, Civ. App., 290 S.W. 892.

66. U.S.—Union Gas & Oil Co. v. Adkins, C.C.A.Ky., 278 F. 854.

67. U.S.—Gessell v. Commissioner of Internal Revenue, C.C.A., 41 F. 2d 20.

Ga.—Lane v. Happ Bros. Co., 162 S. E. 519, 44 Ga.App. 577.

Me.—Syde's Case, 142 A. 777, 127 Me. 214—Rogers v. Kendall, 119 A. 616, 122 Me. 248.

Minn.—In re County Ditch No. 67, Murray County, 186 N.W. 711, 151 Minn. 292.

Mo.—Clevinger v. St. Louis-San Francisco Ry. Co., 109 S.W.2d 369, 341 Mo. 797, certiorari denied 58 S.Ct. 366, 302 U.S. 760, 82 L.Ed. 588.

22 C.J. p 732 note 90.

68. Tenn.—Pierce v. Pierce, 127 S. W.2d 791, 174 Tenn. 508—Securities Inv. Co. v. White, 91 S.W.2d 581, 19 Tenn.App. 540.

69. U.S.—U. S. v. Nelson, C.C.A. Ark., 102 F.2d 515, certiorari denied Nelson v. U. S., 60 S.Ct. 81, 308 U.S. 550, 84 L.Ed. 462.

Cal.—Messner v. Board of Dental Examiners of California, 262 P. 58, 87 Cal.App. 199.

Mich.—In re Astolas' Estate, 262 N. W. 766, 273 Mich. 189, 101 A.L.R. 760—In re McCarbery, 219 N.W. 707, 243 Mich. 39.

Mont.—Irion v. Hyde, 105 P.2d 666, 110 Mont. 570.

N.Y.—In re St. Lawrence Transmission Co., 244 N.Y.S. 508, 137 Misc. 608.

70. U.S.—U. S. v. Nelson, C.C.A. Ark., 102 F.2d 515, certiorari denied Nelson v. U. S., 60 S.Ct. 81, 308 U.S. 550, 84 L.Ed. 462—Everglades Drainage Dist. v. Florida Ranch & Dairy Corporation, C.C.A. Fla., 74 F.2d 914, rehearing denied 75 F.2d 1013.

Colo.—Larson v. Wahl, 223 P. 19, 74 Colo. 465—McKee Live Stock Co. v. Menzel, 201 P. 52, 70 Colo. 308.

Ga.—Dougherty v. Dougherty, 112 S.E. 454, 153 Ga. 487—Haygood v. E. B. Clark Co., 107 S.E. 379, 27 Ga.App. 101—Blanchard, Humber & Co. v. Hagan Gas Engine & Mfg. Co., 106 S.E. 604, 26 Ga.App. 538.

Ill.—Goddard Tool Co. v. Crown Electrical Mfg. Co., 219 Ill.App. 34.

Ky.—Norfolk & W. Ry. Co. v. McCoy, 77 S.W.2d 392, 257 Ky. 32—Guthrie v. Foster, 76 S.W.2d 927, 256 Ky. 753—Springfield Fire & Marine Ins. Co. v. Ramey, 53 S.W. 2d 560, 245 Ky. 367—Commonwealth v. Combs, 50 S.W.2d 497, 244 Ky. 204.

La.—Martin v. Martin, 92 So. 46, 151 La. 530.

Mich.—Stevenson v. Antrim Iron Co., 283 N.W. 632, 287 Mich. 418.

Mo.—Elliott v. Chicago, M. & St. P. Ry. Co., 236 S.W. 17—Patrum v. St. Louis & S. F. R. Co., 129 S.W. 1041, 146 Mo.App. 332.

Mont.—Phelps v. Union Central Life Ins. Co., 71 P.2d 887, 105 Mont. 195—Bray v. Cove Irr. Dist., 284 P. 539, 86 Mont. 562.

N.Y.—Second United Cities Realty Corporation v. Price & Schumacher Co., 242 N.Y. 120, 151 N.E. 150, reversing 210 N.Y.S. 918, 214 App. Div. 806—Stutson v. Atchison, T. & S. F. R. Co., 183 N.Y.S. 417, 192 App.Div. 482—Lanyon's Detective Agency v. Cochrane, 199 N.Y.S. 482.

Tex.—Webb v. Reynolds, Com.App., 207 S.W. 914, reversing, Civ.App., 160 S.W. 152—People's Ice Co. v. Glenn, Civ.App., 8 S.W.2d 735.

Va.—Gutshall v. Hamilton, 114 S.E. 595, 134 Va. 416.

22 C.J. p 733 note 3.

Scintilla evidence

Opinions of nonexpert witnesses, not predicated on facts of probative value, do not constitute scintilla evidence.—Thompson v. Jordan, 2 S.W.2d 640, 222 Ky. 788.

Effect of cumulation of unsupported opinions

Mere cumulation of unsupported opinions, based on isolated and disconnected facts without probative weight, does not give probative force to evidence.—Dossenbach v. Reidhar's Ex'x, 53 S.W.2d 731, 245 Ky. 449.

Possession

(1) It is extremely doubtful whether testimony in hæc verba that a party was in possession of lands is of any weight, since possession may often be a matter of opinion. —Horton v. Smith-Richardson Inv. Co., 87 So. 905, 81 Fla. 255.

(2) Witness' testimony, as collective fact, that he is in possession, is sufficient evidence of possession, if cross-examination does not show that statement was mere conclusion without the required supporting fact.—Morris v. Card, 135 So. 340, 223 Ala. 254.

Conclusion as to making of contract

A contract is not proved by evidence of a conversation in which one party states mere conclusions as to the making of the contract.—In re Culhane's Estate, 2 A.2d 567, 133 Pa.Super. 339, affirmed 5 A.2d 377, 334 Pa. 124.

71. Cal.—Wright v. Salzberger & Sons, 254 P. 671, 81 Cal.App. 690 —Tashjian v. Krikorian, 202 P. 956, 55 Cal.App. 160.

Ga.—Worthy v. Williams, 12 S.E.2d 139, 64 Ga.App. 47.

Iowa.—Co-operative Sales Co. v. Van der Beek, 259 N.W. 586, 219 Iowa 974.

Ky.—Insurance Co. of North America v. Creech Drug Store, 94 S.W. 2d 654, 264 Ky. 364—Witt v. Witt, 220 S.W. 1065, 188 Ky. 45.

La.—Williams v. Brown, App., 181 So. 679.

Mich.—Rice v. J. F. Braun & Son, 261 N.W. 84, 271 Mich. 532.

Miss.—Harris v. Pounds, 187 So. 891, 185 Miss. 688—Columbus & G. R. Co. v. Coleman, 160 So. 277, 172 Miss. 514.

N.Y.—Kline v. Kleenan, 185 N.Y.S. 113.

Pa.—Stybr v. Walter, 116 A. 159, 272 Pa. 202—Riebel v. Land Title Bank & Trust Co., 17 A.2d 742, 143 Pa.Super. 136.

R.I.—Scott v. Smith, 135 A. 327, 48 R.I. 66.

S.C.—Murrell v. Charleston & W. C. R. Co., 105 S.E. 350, 115 S.C. 228.

Tex.—Phillips v. Texas & P. Ry. Co., Com.App., 296 S.W. 877, reversing Texas & P. Ry. Co. v. Phillips, Civ.App., 289 S.W. 697—Smith v. Lynn, Civ.App., 152 S.W.2d 838

the jury.[72] So an opinion based on speculation or conjecture is of no probative force[73] and is insufficient to support a verdict or finding.[74]

A conclusion of law has no probative force.[75]

§ 568. Inference

a. In general
b. Damages
c. Distance and space
d. Identity and correspondence
e. Mental condition or capacity
f. Physical condition
g. Speed
h. Value
i. Other matters

a. In General

Generally, the evidence of a skilled observer is entitled to more weight than that of one who is unskilled. A proper inference is of equal value with fact testimony, and an opinion based on observation has been held to be entitled to greater weight than an opinion by a nonobserver.

Generally, as between the evidence of a skilled and that of an unskilled witness of phenomena of a technical nature, the greater weight lies with the skilled observer.[76] An inference which is drawn by one with requisite experience from adequate data is evidence of equal value with so-called fact testimony,[77] and an opinion or inference based on observation has been held to be entitled to greater weight than an opinion by a nonobserver.[78]

b. Damages

An estimate of damages is not conclusive but its weight is for the trier of the facts. It may form a sufficient basis for a judgment provided it is supported by a statement of the facts on which it is based.

An estimate of damages by a nonexpert witness is not binding or conclusive,[79] even though uncontradicted,[80] but its weight is for the jury or other

—Watson v. Tamez, Civ.App., 136 S.W.2d 645—Kempner v. Huntsville State Bank, Civ.App., 282 S.W. 325.

Va.—Mullins v. Sutherland, 109 S.E. 420, 131 Va. 547.

Wis.—Lutzenberger v. Milwaukee Electric Railway & Light Co., 271 N.W. 409, 224 Wis. 44.

72. U.S.—Norfolk & W. Ry. Co. v. Hall, C.C.A.W.Va., 49 F.2d 692.

Ky.—Insurance Co. of North America v. Creech Drug Store, 94 S.W. 2d 654, 264 Ky. 364—Norfolk & W. Ry. Co. v. McCoy, 77 S.W.2d 392, 257 Ky. 32—Springfield Fire & Marine Ins. Co. v. Ramey, 53 S.W.2d 560, 245 Ky. 367—Chesapeake & O. Ry. Co. v. Coleman, 210 S.W. 947, 184 Ky. 9.

73. U.S.—Consolidated Gas Utilities Corporation v. Thompson, D.C.Tex., 14 F.Supp. 318, affirmed Thompson Consolidated Gas Utilities Corporation, 57 S.Ct. 364, 300 U.S. 55, 81 L.Ed. 510.

Ky.—Commonwealth v. Combs, 60 S.W.2d 497, 244 Ky. 204.

Or.—Warner v. Synnes, 235 P. 305, 114 Or. 451, affirming 230 P. 362, 114 Or. 451.

Vt.—Goodwin v. Gaston, 154 A. 772, 103 Vt. 357.

Not controlling

Where witness testified no goods were sold at factory, testimony that, if any were so sold, he would make freight allowance from price, was speculation and not controlling.—U. S. v. Traders' Paper Co., 14 Ct.Cust. App. 293.

Probable bid after completion of work

Engineers' testimony as to what they would have bid on sewer contract was held of little value in suit involving payment for extras.—Peabody v. Sanitary Dist. of Chicago, 235 Ill.App. 265.

74. Ky.—Hensley v. Braden, 91 S.W.2d 34, 262 Ky. 672.

75. Cal.—Pryor v. Industrial Acc. Commission, 198 P. 1045, 186 Cal. 169.

Tex.—Watson v. Tamez, Civ.App., 136 S.W.2d 645—Wilhoit v. Iverson Tool Co, Civ.App., 119 S.W.2d 709, error dismissed by agreement—Bourland v. Huffhines, Civ.App., 269 S.W. 184, affirmed Huffhines v. Bourland, Com.App., 280 S.W. 561.

22 C.J. p 733 note 4.

Change of legal relation by conclusion

A litigant cannot, by testifying to a legal conclusion, change the legal relations of the parties.—Pettett v. Cooper, 24 N.E.2d 299, 62 Ohio App. 377.

Bigamous marriage

The bare statement by one of parties to marriage contract that marriage was bigamous was conclusion on part of party making assertion rather than proof of such fact.—Linado v. Linado, 15 N.Y.S.2d 570, 172 Misc. 782.

Community property

An opinion of either spouse as to whether property is separate or community property is of no weight.

Cal.—In re Pepper's Estate, 112 P. 62, 158 Cal. 619.

Nev.—In re Wilson's Estate, 53 P. 2d 339, 56 Nev. 353, rehearing denied 56 P.2d 1207, 56 Nev. 500—Barrett v. Franke, 208 P. 435, 46 Nev. 170.

Legal effect of statute

Witness' opinion as to legal effect of statute is neither controlling nor material, construction being for court.—U. S. v. A. W. Faber, Inc., 16 Ct.Cust.App. 467.

Authority to accept service for corporation

A mere expression of opinion by an unnamed telephone girl at a foreign corporation's office, or the secretary of one served on behalf of the foreign corporation, that such person could accept service is insufficient to show that he was a managing agent or other person who could properly be served.—Stollman v. Olmsted, 196 N.Y.S. 689, 203 App. Div. 476.

76. Cal.—In re Thomas, 101 P. 798, 155 Cal. 488.

22 C.J. p 733 note 6.

77. Mo.—Pedigo v. Roseberry, 102 S.W.2d 600, 340 Mo. 724.

78. Ark.—Atwood v. Ballard, 287 S.W. 1001, 172 Ark. 176.

Colo.—In re Stitzer's Estate, 68 P. 2d 561, 100 Colo. 521.

Ga.—Western & A. R. Co. v. Robinson, 46 S.E. 425, 119 Ga. 331.

22 C.J. p 734 note 9.

79. Ind.—State v. Reid, 185 N.E. 449, 204 Ind. 631, 86 A.L.R. 1442.

Iowa.—Curtis v. Town of Dunlap, 210 N.W. 800, 202 Iowa 588.

S.D.—Bracken v. Bracken, 217 N. W. 192, 52 S.D. 252.

Tex.—Nassos v. Duke, Civ.App., 241 S.W. 547—Quanah, A. & P. Ry. Co. v. Bone, Civ.App., 208 S.W. 709, error refused.

Wis.—Jewell v. Wisconsin-Minnesota Light & Power Co., 194 N.W. 31, 181 Wis. 56.

80. Colo.—Mooney v. Van Kleeck Mortgage Co., 245 P. 348, 79 Colo. 252.

trier of the facts.[81] When the witness is sufficiently qualified, an estimate of damages may form a sufficient basis for a judgment,[82] but to be of probative force the estimate must be supported by a statement of the facts on which it is based,[83] and without this statement the estimate is not sufficient to support a judgment,[84] or to present an issue for the jury.[85] An opinion should be considered only when it is based on evidence of lawful elements of damage.[86]

c. Distance and Space

The weight of an estimate as to distance or space is for the trier of the facts, and it is not conclusive. To be entitled to weight the opinion must be more than mere conjecture.

The weight of an estimate as to distance or space is for the jury or other trier of the facts,[87] and it is not necessarily conclusive.[88] To be entitled to weight the opinion must be more than mere conjecture.[89]

d. Identity and Correspondence

The weight of testimony as to personal recognition depends greatly on the opportunity and attention of the witness, the lapse of time since the person was seen, and his change of features. The final determination as to identity or correspondence is for the jury.

The weight of testimony as to personal recognition depends greatly on the opportunity of the witness for observation of the person, and the probability that he took accurate notice,[90] as well as the lapse of time since the person was last seen,[91] and his change of features in the meanwhile.[92] The testimony is received with caution when it is inconsistent with other evidence in the case,[93] and the testimony of a witness making a contradictory statement regarding identity has been considered of no probative force.[94] Difficulty in identifying particular articles similar to many in common use merely affects the weight of the evidence.[95] In any event the final inference as to identity or correspondence is for the jury.[96]

e. Mental Condition or Capacity

Opinions as to mental condition or capacity expressed by qualified lay witnesses may possess substantial evidentiary value, but their weight is for the trier of the facts, and they are to be considered in connection with the credibility, capacity to form an opinion, and intelligence of the witness, and his opportunities for observation. Ordinarily the weight of an opinion is dependent on the facts and reasons supporting it.

Opinions as to the mental condition or capacity of a person, expressed by qualified lay witnesses, may possess substantial evidentiary value,[97] superi-

Mich.—In re Harper Ave., 213 N.W. 74, 237 Mich. 684.

81. Colo.—Mooney v. Van Kleeck Mortgage Co., 245 P. 348, 79 Colo. 252.
Ind.—State v. Reid, 185 N.E. 449, 204 Ind. 631, 86 A.L.R. 1442.

82. La.—Max Barnett Furniture Co. v. Hock, 118 So. 771, 9 La.App. 18.
Miss.—Dyer v. Hobert, 117 So. 244, 150 Miss. 857, followed in Fountain v. McDonald, 132 So. 104.
Tex.—Dempsey Oil Co. v. Torrans, Civ.App., 244 S.W. 855—Panhandle & S. F. Ry. Co. v. Arnett, Civ.App., 219 S.W. 232, dismissed for want of jurisdiction.

83. Ark.—Franks v. Rogers, 245 S. W. 311, 156 Ark. 120.
Tex.—Lancaster v. Whittle, Civ. App., 210 S.W. 334.
Utah.—Bingham Coal & Lumber Co. v. Board of Education of Jordan School Dist. of Salt Lake County, 211 P. 981, 61 Utah 149.

84. Tex.—Beaumont Gaslight Co. v. Rutherford, Civ.App., 223 S.W. 245.

85. Ga.—Atlantic Coast Line R. Co. v. Atkins Dairy Co., 152 S.E. 303, 41 Ga.App. 212.

86. Ill.—Super-Power Co. of Illinois v. Sommers, 186 N.E. 476, 352 Ill. 610—Illinois Power & Light Corporation v. Talbott, 152 N.E. 486, 321 Ill. 538.

87. Ala.—Southern Ry. Co. v. Sherrill, 167 So. 731, 232 Ala. 184.
Mass.—Nicholas v. Lewis Furniture Co., 198 N.E. 753, 292 Mass. 500.

Correction of answer as affecting credibility
Amendment of answer, changing from feet to yards alleged distance from which defendant first saw approaching automobile, was held not to affect his credibility as witness. —Kennedy v. Opdenweyer, 121 So. 636, 11 La.App. 532, rehearing denied 123 So. 906, 11 La.App. 532.

88. Mo.—Kirk v. Kansas City, App., 128 S.W.2d 1128.
Tex.—Texas & N. O. Ry. Co. v. New, Civ.App., 95 S.W.2d 170, error dismissed.
Va.—Norfolk & W. Ry. Co. v. Henderson, 111 S.E. 277, 132 Va. 297.

89. Cal.—Barnett v. Atchison, T. & S. F. Ry. Co., 278 P. 443, 99 Cal. App. 310.

Distance of car at night
The testimony of a witness as to the distance of a car coming directly toward him at night, only the headlights of the car being seen, is entitled to but little weight in determining the exact distance of the car.—Andrews v. Armour & Co., 178 A. 359, 119 Conn. 651.

90. Ark.—Fidelity & Guaranty Fire Corporation v. Goforth, 63 S.W.2d 976, 187 Ark. 1098.
22 C.J. p 599 note 24.

Comparative facilities
The evidence of those who testify from an inspection with the person before them is entitled to greater weight than the testimony of those who state identifying marks.—Brack v. Wood, 11 La.Ann. 512.

91. Ohio.—Sperry v. Tebbs, 10 Ohio Dec., Reprint, 318, 20 Cinc.L.Bul. 181.

92. Pa.—Sheehan's Est., 20 A. 1003, 139 Pa. 168.
22 C.J. p 599 note 26.

93. Cal.—Taylor v. McCowen, 99 P. 351, 154 Cal. 798.
22 C.J. p 599 note 27.

94. Philippine.—U. S. v. Gregorio, 4 Philippine 443.

95. Ala.—Gady v. State, 3 So. 429, 83 Ala. 51.
22 C.J. p 597 note 92 [o].

96. Ark.—Fidelity & Guaranty Fire Corporation v. Goforth, 63 S.W.2d 976, 187 Ark. 1098.
22 C.J. p 599 note 29.

97. Idaho.—Kelly v. Perrault, 48 P. 45, 5 Idaho 221.
Ind.—Rice v. Rice, 175 N.E. 540, 92 Ind.App. 640.

Draftsman of will
(1) Testimony of reputable attorney, who drafted will, concerning testator's mental capacity is entitled to great weight.—Forehand v. Sawyer, 136 S.E. 683, 147 Va. 105.
(2) However, it has also been held that the interest of the attorney who drafted the will in upholding it

or to the testimony of medical experts,[98] and may be sufficient to take the question to the jury,[99] but they are usually of little weight because of a limited extent of observation and the indefinite and inconclusive character of the testimony itself.[1] The weight of an opinion is for the determination of the jury, court, or other trier of the facts.[2] The opinion is not conclusive,[3] and it is to be considered in connection with the credibility, capacity to form an opinion, and intelligence of the witness, and his opportunities for observation.[4] Ordinarily, the weight of the opinion is dependent on,[5] and is no stronger than,[6] the facts and reasons on which it is based; without reasons or facts sufficient to justify or to afford a basis for the conclusion an opinion is of no probative value,[7] or at most it is enti-

could be considered in determining weight to be given attorney's testimony that testator was mentally competent.—In re Faucett's Estate, 295 P. 118, 160 Wash. 295.

(3) The testimony of a draftsman of the will was held entitled to unusual weight where he was also the county clerk with long court experience which made him familiar with wills and with their legal requirements.—Jenkins v. Trice, 147 S. E. 251, 152 Va. 411.

98. U.S.—In re Ward, N.J., 194 F. 89, 114 C.C.A. 167, affirming, D.C., 194 F. 174.
Ill.—Rutherford v. Morris, 77 Ill. 397.
Pa.—In re Kane, 55 A. 917, 206 Pa. 204.

99. Ill.—Williams v. Prudential Ins. Co. of America, 271 Ill.App. 532.
68 C.J. p 1083 note 95.

Consideration with expert testimony
The testimony of nonexpert witnesses when considered with expert testimony may be sufficient to take the case to the jury.—Russell v. Russell's Ex'x, 25 S.W.2d 54, 233 Ky. 105—Tombragel v. Tombragel's Executor and Trustee, 23 S.W.2d 919, 232 Ky. 493.

1. Va.—Price's Ex'r v. Barham, 137 S.E. 511, 147 Va. 478.

Particular insanity not preventing rational conversation
Where the question is whether a person was afflicted with a particular form of insanity which frequently does not prevent rationality in conversation, testimony by lay witnesses that they never saw anything wrong with him may be considered as of little evidentiary value.—Harmsen v. Gretten, Iowa, 179 N.W. 840.

2. Ark.—Zambie v. Namour, 132 S. W.2d 390, 198 Ark. 1104.
Cal.—In re Holloway's Estate, 235 P. 1012, 195 Cal. 711—In re Lenci's Estate, 288 P. 841, 106 Cal.App. 171.
Ill.—Britt v. Darnell, 146 N.E. 510, 315 Ill. 385—Speirer v. Curtis, 143 N.E. 427, 312 Ill. 152—Barnes v. Odum, 136 N.E. 700, 304 Ill. 624.
Iowa.—In re Shields' Will, 224 N.W. 69, 208 Iowa 607—In re Armstrong's Estate, 183 N.W. 386, 191 Iowa 1210.
Mont.—In re Bright's Estate, 300 P. 229, 89 Mont. 394.
Neb.—In re Steininger's Estate, 297 N.W. 159—Davidson v. First American Ins. Co., 261 N.W. 144, 129 Neb. 184—Kehl v. Omaha Nat. Bank, 254 N.W. 397, 126 Neb. 695.
Vt.—In re Moxley's Will, 152 A. 713, 103 Vt. 100—In re Wood's Will, 115 A. 231, 95 Vt. 407.
22 C.J. p 728 note 73 [b].

3. Mo.—Clingenpeel v. Citizens' Trust Co. of Boonville, Mo., 240 S.W. 177.
Mont.—Sommerville v. Greenhood, 210 P. 1048, 65 Mont. 101.
N.J.—In re Halton's Estate, 161 A. 809, 111 N.J.Eq. 143.
Or.—In re Faling's Will, 208 P. 715, 105 Or. 365—Lassas v. McCarty, 84 P. 76, 47 Or. 474.
Tex.—Krumb v. Porter, Civ.App., 152 S.W.2d 495.

Subscribing witness
The inference of a subscribing witness is not conclusive.
Me.—Cilley v. Cilley, 34 Me. 162.
W.Va.—Farnsworth v. Noffsinger, 33 S.E. 246, 46 W.Va. 410.

4. Ark.—Atwood v. Ballard, 287 S. W. 1001, 172 Ark. 176.
Ill.—Johnson v. Lane, 15 N.E.2d 710, 369 Ill. 135—Britt v. Darnell, 146 N.E. 510, 315 Ill. 385.
Ky.—Wood v. Corcoran, 234 S.W. 440, 192 Ky. 774.
Mo.—Lee v. Ullery, 140 S.W.2d 5—Lee v. Lee, 167 S.W. 1030, 258 Mo. 599.
Mont.—In re Sales' Estate, 89 P.2d 1043, 108 Mont. 202.
Neb.—Davidson v. First American Ins. Co., 261 N.W. 144, 129 Neb. 184—Kehl v. Omaha Nat. Bank, 254 N.W. 397, 126 Neb. 695.
N.Y.—In re Amend, 193 N.Y.S. 211, 200 App.Div. 346.
Vt.—In re Moxley's Will, 152 A. 713, 103 Vt. 100.
22 C.J. p 729 note 74 [c].

Observation at remote time
Opinion as to testator's mental incapacity given by witness who had not seen him for five and one half years before will was executed was too remote to have probative force.—Deery v. Hall, 175 N.E. 141, 96 Ind.App. 683.

Interest of witness
In proceeding to probate will, testimony of disinterested witnesses as to testamentary capacity is of far greater weight than that of interested witnesses.—Succession of Price, 134 So. 907, 172 La. 606.

5. U.S.—Newton v. Carbery, D.C., 18 Fed.Cas.No.10,189, 5 Cranch C.C. 626.
Ark.—St. Louis Southwestern Ry. Co. v. Braswell, 127 S.W.2d 637, 198 Ark. 143.
Cal.—In re Russell's Estate, 210 P. 249, 189 Cal. 759—American Trust Co. v. Dixon, 78 P.2d 449, 26 Cal. App.2d 426.
Del.—In re Sharpley's Will, 120 A. 586, 2 W.W.Harr. 154.
Ky.—Hutchins v. Foley, 111 S.W.2d 586, 271 Ky. 104—Russell v. Russell's Ex'x, 25 S.W.2d 54, 233 Ky. 105—Tombragel v. Tombragel's Executor and Trustee, 23 S.W.2d 919, 232 Ky. 493—Broyles v. Able, 271 S.W. 1040, 208 Ky. 672—Hudson v. Adams' Adm'r, 49 S.W. 192, 20 Ky.L. 1267.
Mo.—Stevens v. Meadows, 100 S.W.2d 281, 340 Mo. 252—Frohman v. Lowenstein, 260 S.W. 460, 303 Mo. 339—Hughes v. Rader, 82 S.W. 32, 183 Mo. 630.
N.Y.—In re Amend, 193 N.Y.S. 211, 200 App.Div. 346.
Okl.—Payton v. Shipley, 195 P. 125, 80 Okl. 145.
Pa.—Browne v. Molliston, 3 Whart. 129.
Utah.—In re Hanson's Estate, 52 P. 2d 1103, 87 Utah 580.
Va.—Thornton v. Thornton's Ex'rs, 126 S.E. 69, 141 Va. 232—Davis v. Alderson, 100 S.E. 541, 125 Va. 681.
W.Va.—Ward v. Brown, 44 S.E. 488, 53 W.Va. 227.

6. Cal.—In re Flint's Estate, 177 P. 451, 179 Cal. 552—In re Nolan's Estate, 78 P.2d 456, 25 Cal.App. 2d 738—In re Smethurst's Estate, 59 P.2d 830, 15 Cal.App.2d 322—In re Short's Estate, 47 P.2d 555, 7 Cal.App.2d 512—In re Carson's Estate, 239 P. 364, 74 Cal.App. 48.
Ind.—Potter v. Emery, 26 N.E.2d 554, 107 Ind.App. 628.
Iowa.—Bishop v. Scharf, 241 N.W. 3, 214 Iowa 644—Bailey v. Cherokee State Bank of Cherokee, 227 N.W. 129, 208 Iowa 1265—In re Richardson's Will, 202 N.W. 114, 199 Iowa 1320.
Ky.—Clark v. Johnson, 105 S.W.2d 576, 268 Ky. 591—Jackson's Ex'r v. Semones, 98 S.W.2d 505, 266 Ky. 352—Franzman's Ex'rs v. Nalty, 271 S.W. 1034, 208 Ky. 686.

7. Ark.—Hill v. Hopkins, 133 S.W. 2d 634, 198 Ark. 1049—Pernot v. King, 110 S.W.2d 539, 194 Ark. 896

tled to but little weight,[8] and is insufficient to take the issue to the jury.[9] However, where the facts cannot be fully and accurately described in words,[10] particularly where the witness is testifying that a person is of sound mind,[11] it has been held that an opinion without detailed supporting facts may constitute substantial evidence. The opinions of subscribing or attesting witnesses are entitled to more weight than those of passive witnesses,[12] but it has also been held that no special weight attaches thereto.[13] Testimony of the drawer of a will and of the subscribing witnesses that they believed the testator was of unsound mind is subject to scrutiny and suspicion.[14]

f. Physical Condition

A layman's testimony as to physical condition or appearance may possess evidentiary value but its weight is for the trier of the facts.

A layman's testimony as to physical condition or appearance may possess evidentiary value,[15] sufficient to support a verdict.[16] Its weight is for the jury or other trier of the facts,[17] but, where a disease is discoverable only by a skilled physician, lay testimony that a person appeared to be in good health has no probative force.[18]

g. Speed

An estimate of speed expressed by a qualified observer may possess probative force but its weight is for the trier of the facts. The value of the testimony

—Puryear v. Puryear, 94 S.W.2d 695, 192 Ark. 692.
Ill.—Quathamer v. Schoon, 19 N.E.2d 750, 370 Ill. 606—Hart v. Hart, 125 N.E. 366, 290 Ill. 476.
Ky.—Hutchins v. Foley, 111 S.W.2d 586, 271 Ky. 104—Mays v. Mays, 92 S.W.2d 827, 263 Ky. 546—Middleton v. Skaggs, 91 S.W.2d 1016, 263 Ky. 81—Smith v. Smith, 47 S.W.2d 1036, 243 Ky. 240—Centers v. Jones, 43 S.W.2d 512, 241 Ky. 154—Moran's Ex'r v. Moran, 38 S.W.2d 207, 238 Ky. 403—Roberts v. Owens, 281 S.W. 525, 213 Ky. 580—Wigginton's Ex'r v. Wigginton, 239 S.W. 455, 194 Ky. 385—Langford's Ex'r v. Miles, 225 S.W. 246, 189 Ky. 515.
Mich.—Gutt v. Walter's Estate, 194 N.W. 481, 224 Mich. 211.
Mo.—Walter v. Alt, 152 S.W.2d 135—Lee v. Ullery, 140 S.W.2d 5—Platt v. Platt, 123 S.W.2d 54, 343 Mo. 745—Nute v. Fry, 111 S.W.2d 84, 341 Mo. 1138—Loehr v. Starke, 56 S.W.2d 772, 332 Mo. 131—Shapter v. Boyd, 37 S.W.2d 542, 327 Mo. 397—Berkemeier v. Reller, 37 S.W.2d 430—Messick v. Warren, 217 S.W. 94—Wood v. Carpenter, 66 S.W. 172, 166 Mo. 465.
N.J.—Loveridge v. Brown, 129 A. 131, 98 N.J.Eq. 381.
N.Y.—In re Hayden's Will, 24 N.Y.S. 2d 608, 261 App.Div. 103.
Ohio.—Dinnie v. Schiele, 22 N.E.2d 917, 61 Ohio App. 511.
Or.—Bowman v. Wade, 103 P. 72, 54 Or. 347.
Pa.—Esenwein v. Esenwein, 167 A. 350, 312 Pa. 77, affirming 161 A. 425, 105 Pa.Super. 261.

8. U.S.—Boone v. Equitable Holding Co., D.C.W.Va., 32 F.Supp. 896, reversed on other grounds, C.C.A., Beckley Nat. Bank v. Boone, 115 F.2d 513.
Conn.—Maroncelli v. Starkweather, 133 A. 209, 104 Conn. 419.
Ill.—Flanigon v. Smith, 169 N.E. 767, 337 Ill. 572—Hart v. Hart, 125 N.E. 366, 290 Ill. 476—Chandler v. Fisher, 125 N.E. 324, 290 Ill. 440.
Ky.—Creech v. Creech, 272 S.W. 36, 208 Ky. 845—Gilbert v. Osenton, 258 S.W. 99, 201 Ky. 653—Riley v. Albertson, 11 Ky.Op. 316, 3 Ky.L. 391.
Va.—Forehand v. Sawyer, 136 S.E. 683, 147 Va. 105.
Wis.—In re Emerson's Will, 198 N.W. 441, 183 Wis. 437.

9. Ky.—Jackson's Ex'r v. Semones, 98 S.W.2d 505, 266 Ky. 352—Godman v. Aulick, 87 S.W.2d 612, 261 Ky. 268—Dossenbach v. Reidhar's Ex'x, 53 S.W.2d 731, 245 Ky. 449—Moran's Ex'r v. Moran, 38 S.W.2d 207, 238 Ky. 403—Young's Ex'r v. Toliver's Adm'r, 284 S.W. 389, 214 Ky. 769.
Mich.—Gutt v. Walter's Estate, 194 N.W. 481, 224 Mich. 211.
Mo.—Walter v. Alt, 152 S.W.2d 135.
Mont.—Sommerville v. Greenhood, 210 P. 1048, 65 Mont. 101.
Tenn.—Melody v. Hamblin, 115 S.W. 2d 237, 21 Tenn.App. 687.
68 C.J. p 1082 note 93.

10. Ind.—Barr v. Sumner, 107 N.E. 675, 109 N.E. 193, 183 Ind. 402.

11. Mo.—Shapter v. Boyd, 37 S.W. 2d 542, 327 Mo. 397.

12. Cal.—In re McDonough's Estate, 251 P. 916, 200 Cal. 57—In re Holloway's Estate, 235 P. 1012, 195 Cal. 711.
Va.—Price's Ex'r v. Barham, 137 S.E. 511, 147 Va. 478.

Notary public with knowledge of mental diseases

The inference of a notary public before whom a deed was executed is of great weight where he is also a physician who had devoted special study to mental diseases.—Farnsworth v. Noffsinger, 33 S.E. 246, 46 W.Va. 410.

Subscribing witnesses unacquainted with testator

The opinions of subscribing witnesses who had no previous acquaintance with the testator and were not selected by him, where nothing was said by him at the time to indicate his mental condition, were held not entitled to the weight they would otherwise have.—Forehand v. Sawyer, 136 S.E. 683, 147 Va. 105.

Draftsman's opinion supported by subscribing witnesses

Where draftsman of will is attorney acquainted with testator, and his opinion of capacity is supported by subscribing witnesses, it makes case for proponent of will which requires strong evidence to overcome.—Aggas v. Munnell, 152 A. 840, 302 Pa. 78.

13. Ala.—Burney v. Torrey, 14 So. 685, 100 Ala. 157, 46 Am.S.R. 33.

14. Cal.—In re Wright's Estate, 60 P.2d 434, 7 Cal.2d 348.
Va.—Young v. Barner, 27 Gratt. 96, 103, 68 Va. 96, 103.

15. Mo.—Allen v. American Life & Accident Ins. Co, App., 83 S.W.2d 192—Smiley v. John Hancock Mut. Life Ins. Co. of Boston, Mass., App., 52 S.W.2d 12.
Wash.—Graham v. Police & Firemen's Ins. Ass'n, 116 P.2d 352.

16. Mass.—Dodge v. Sawyer, 193 N.E. 15, 288 Mass. 402.

17. Ala.—Whiddon v. Malone, 124 So. 516, 220 Ala. 220.
Tenn.—Black Diamond Collieries v. Gibbs, 32 S.W.2d 1041, 161 Tenn. 413.

Testimony by subject of injury

Testimony of an injured person as to severe shock and continued nervous condition is some evidence, but it must be weighed with caution by the jury.—Lindsey v. Kindt, 128 So. 139, 221 Ala. 190.

18. U.S.—Ætna Life Ins. Co. of Hartford, Conn. v. Kelley, C.C.A. Mo., 70 F.2d 589, 93 A.L.R. 471.
Mo.—Brown v. Metropolitan Life Ins. Co., App., 151 S.W.2d 499.

is measured by the experience, observation, and capacity of the witness and the consistency of the estimate with known physical laws.

An estimate of speed expressed by a qualified observer may possess probative value,[19] although the witness is not an expert.[20] The weight of the estimate is for the jury or other trier of the facts,[21] and it is not necessarily conclusive.[22] The value of the testimony is measured by the experience, observation, and capacity of the witness,[23] and the consistency of the estimate with known physical laws.[24] Where the witness has but little opportunity and no manner of judging speed, his opinion is entitled to but little weight,[25] and is insufficient of itself to support a finding,[26] and, where the witness has paid no attention or has had no opportunity for observation, his opinion is of no probative value.[27] In determining the weight of opinions, the jury may consider that noise of the vehicle may accentuate the idea of speed.[28]

h. Value

The weight of opinion evidence as to value is for the determination of the triers of the facts in the light of their own experience and knowledge and the knowledge, experience, and capability of the witness. The probative value depends on the facts on which the opinion is based. A statement as to the known market price is not an opinion and it is binding on the jury if believed.

The weight of opinion evidence as to value is for the jury, court, or other triers of the facts to determine[29] in the light of their own experience and

19. Cal.—Hosking v. Danforth, 36 P.2d 427, 1 Cal.App.2d 178.
Mass.—Faulkner v. Eastern Massachusetts St. Ry. Co., 178 N.E. 527, 277 Mass. 291.
N.H.—Bissonnette v. Cheverette, 176 A. 285, 87 N.H. 211.

20. Md.—United Rys. & Electric Co. of Baltimore v. State, 163 A. 90, 163 Md. 313.
Pa.—Murphy v. Altoona & Logan Valley Electric Ry. Co., 81 Pa. Super. 504.

21. U.S.—Denver Omnibus & Cab Co. v. Krebs, Colo., 255 F. 543, 166 C.C.A. 611.
Ala.—Southern Ry. Co. v. Sherrill, 167 So. 731, 232 Ala. 184.
Cal.—Smith v. Pacific Greyhound Corporation, 35 P.2d 169, 139 Cal. App. 696—Schropshire v. Pickwick Stages, Northern Division, 258 P. 1107, 85 Cal.App. 216, followed in Crosby v. Pickwick Stages, Northern Division, 264 P. 346, 88 Cal. App. 799.
Colo.—Larson v. Long, 219 P. 1066, 74 Colo. 152.
Md.—United Rys. & Electric Co. of Baltimore v. State, 163 A. 90, 163 Md. 313.
Mich.—Luttenton v. Detroit, J. & C. Ry., 176 N.W. 558, 209 Mich. 20.
Mo.—Marlow v. Nafziger Baking Co., 63 S.W.2d 115, 333 Mo. 790—Kleckamp v. Lautenschlaeger, 266 S.W. 470, 305 Mo. 528.
Tex.—McMath Co. v. Staten, Civ.App., 42 S.W.2d 649, error dismissed—Louisiana Ry. & Nav. Co. of Texas v. Humphreys, Civ.App., 285 S.W. 869, reversed on other grounds Humphries v. Louisiana Ry. & Irr. Co. of Texas, Com.App., 291 S.W. 1094.
Wis.—Benedict v. Berg, 281 N.W. 650, 229 Wis. 1.

Effect of alternative expression

An estimate that an automobile traveled twelve or fifteen miles an hour does not establish a speed beyond the alternative of twelve miles.—Rich v. Eldredge, 147 A. 384, 106 N.J.Law 181.

22. U.S.—Andruss v. Nieto, C.C.A. Cal., 112 F.2d 250.
Cal.—Gackstetter v. Market St. Ry. Co., 285 P. 409, 104 Cal.App. 89.
Iowa.—Fraser v. Brannigan, 293 N. W. 50—Cerny v. Secor, 234 N.W. 193, 211 Iowa 1232.
Tex.—Texas & N. O. Ry. Co. v. New, Civ.App., 95 S.W.2d 170, error dismissed.

23. Ala.—Payne v. Roy, 90 So. 605, 206 Ala. 432.
Md.—Peoples Drug Stores v. Windham, 12 A.2d 532, 178 Md. 172.
Mo.—Kleckamp v. Lautenschlaeger, 266 S.W. 470, 305 Mo. 528—Robinson v. Ross, App., 47 S.W.2d 122—Osborn v. Wabash R. Co., 166 S.W. 1118, 179 Mo.App. 245.
N.Y.—Gibson v. Nassau Electric R. Co., 173 N.Y.S. 198, 185 App.Div. 320.
Or.—Johnson v. Underwood, 203 P. 879, 102 Or. 680.

Opinion necessarily approximate

An estimate by a witness of the speed of a moving automobile "as so much per hour" is necessarily approximate, since without mechanical aid it is impossible for anyone, expert or nonexpert, to estimate precisely the speed of a moving object.—Peoples Drug Stores v. Windham, 12 A.2d 532, 178 Md. 172.

24. Md.—Peoples Drug Stores v. Windham, supra.

25. Cal.—Petersen v. Petersen, 67 P. 2d 759, 20 Cal.App.2d 680.
Conn.—Andrews v. Armour & Co., 178 A. 359, 119 Conn. 651—Martino v. Connecticut Co., 147 A. 20, 109 Conn. 559—Swayne v. Connecticut Co., 85 A. 634, 86 Conn. 439.

26. Cal.—Gackstetter v. Market St. Ry. Co., 20 P.2d 93, 130 Cal.App. 316.
Neb.—Carnes v. Deklotz, 291. N.W. 490, 137 Neb. 787—Bergendahl v. Rabeler, 276 N.W. 673, 133 Neb. 699.
N.Y.—Gibson v. Nassau Electric R. Co., 173 N.Y.S. 198, 185 App.Div. 320.
Pa.—Bradley v. Rhodes, 188 A. 564, 124 Pa.Super. 161.

27. Md.—Upton v. United Rys. & Electric Co. of Baltimore, 110 A. 484, 136 Md. 212.
Wis.—Wobosel v. Lee, 243 N.W. 425, 209 Wis. 51.

Automobile traveling in opposite direction

No reliance could be placed on estimates of speed of automobile made by witnesses in another automobile traveling in opposite direction.—Stout v. Nehi Bottling Co., La.App., 146 So. 720—Mutti v. McCall, 130 So. 229, 14 La.App. 504, followed in Mutti v. McCall, 130 So. 233, 14 La. App. 511.

Estimate based on skid marks

In automobile collision case, opinion testimony as to speed of one of automobiles based on length of skid marks was of no effect.—Young v. Swartz, Ohio App., 34 N.E.2d 795.

28. Cal.—Zolkover v. Pacific Electric Ry. Co., 254 P. 926, 81 Cal.App. 772.

29. U.S.—Storley v. Armour & Co., C.C.A.N.D., 107 F.2d 499—Travelers Indemnity Co. v. Plymouth Box & Panel Co., C.C.A.N.C., 99 F.2d 218—Union Trust Co. of Cleveland, Ohio, v. Woodrow Mfg. Co., C.C.A. Iowa, 63 F.2d 602.
Colo.—Mooney v. Van Kleeck Mortgage Co., 245 P. 348, 79 Colo. 252.
Ga.—McDuffie County v. Gunn, 177 S.E. 363, 50 Ga.App. 198—Anderson v. Anderson, 108 S.E. 907, 27 Ga. App. 513, transferred, see 107 S.E. 334, 151 Ga. 518.
Ill.—McCracken v. Farmers' Grain Co., 215 Ill.App. 551.
Iowa.—Cory v. State, 242 N.W. 100, 214 Iowa 222.
Ky.—Lawson's Adm'r v. Brandenburg, 41 S.W.2d 201, 202, 240 Ky. 68, quoting Corpus Juris.
Mo.—Cities Service Gas Co. v. Peak,

knowledge of like subjects,[30] and the knowledge, experience, and capability of the witness to draw a sound conclusion.[31] An opinion is not conclusive[32]

54 S.W.2d 482, 227 Mo.App. 515—Hellums v. Randol, 40 S.W.2d 500, 225 Mo.App. 1092—Harris v. A. P. Nichols Inv. Co., App., 25 S.W.2d 484.
Mont.—Silfvast v. Asplund, 42 P. 2d 452, 99 Mont. 152.
R.I.—Barry v. Kettelle, 139 A. 664, 49 R.I. 50, reargument denied 140 A. 3.
Tex.—Rogers & Adams v. Lancaster, Com.App., 248 S.W. 660, affirming Lancaster v. Rogers & Adams, Civ. App., 235 S.W. 643—North East Texas Motor Lines v. Hodges, Civ. App., 141 S.W.2d 386, error granted—Crow v. Thompson, Civ.App., 131 S.W.2d 1064, error dismissed, judgment correct—McElwrath v. Dixon, Civ.App., 49 S.W.2d 995—Independent Shope Brick Co. v. Dugger, Civ.App., 281 S.W. 600, affirmed, Com.App., 285 S.W. 599—Gulf, C. & S. F. Ry. Co. v. Morris, Civ.App., 241 S.W. 235, affirmed, Com.App., 250 S.W. 1017—Ft. Worth & D. C. Ry. Co. v. Hapgood, Civ.App., 210 S.W. 969.
Utah.—Norman v. Utah Hotel Co., 206 P. 556, 60 Utah 52.
Wash.—Wicklund v. Allraum, 211 P. 760, 122 Wash. 546.
W.Va.—Virginian Power Co. v. Brotherton, 110 S.E. 546, 90 W.Va. 155.
22 C.J. p 595 note 68.

The board of tax appeals, in determining deficiencies in income taxes, could consider those values which taxpayers themselves put on the shares for use in assessing estate taxes.—Rogers v. Helvering, C.C.A., 107 F.2d 394.

Refusal to testify positively

On the issue of market value the weight of testimony of a witness who refuses to testify positively to the fact is for the jury to determine.—Wagner & Chisholm v. Dunham, Tex.Civ.App., 246 S.W. 1044.

30. U.S.—Welch v. Tennessee Valley Authority, C.C.A.Tenn., 108 F. 2d 95, certiorari denied Welch v. U. S. ex rel. and for Use of Tennessee Valley Authority, 60 S.Ct. 889, 309 U.S. 688, 84 L.Ed. 1030—Lewis v. Tennessee Valley Authority, C.C.A.Tenn., 108 F.2d 95, certiorari denied Lewis v. U. S. ex rel. and for Use of Tennessee Valley Authority, 60 S Ct. 889, 309 U.S. 688, 84 L.Ed. 1030.
Ga.—Birmingham Paper Co. v. Holder, 101 S.E. 692, 24 Ga.App. 630.
22 C.J. p 596 note 73.

31. U.S.—In re Gustav Schaefer Co., C.C.A.Ohio, 103 F.2d 237, certiorari denied Wells v. Boyle, 60 S.Ct. 96, 308 U.S. 579, 84 L.Ed. 485—Halvy v. Webb, D.C.Cal., 36 F.Supp. 243.
Ga.—Anderson v. Anderson, 108 S.E. 907, 27 Ga.App. 513, transferred, see 107 S.E. 334, 151 Ga. 518.
Kan.—Stoutimore v. Hershner, 267 P. 19, 126 Kan. 39.
Ky.—Commonwealth v. Begley, 114 S.W.2d 127, 272 Ky. 289.
La.—Louisiana Highway Commission v. Grey, 2 So.2d 654, 197 La. 942.
Tex.—Driscoll v. Nolan, Civ.App., 130 S.W.2d 400, set aside on other grounds 131 S.W.2d 1025.
22 C J. p 580 note 92, p 596 note 75, p 729 note 74 [b].

Amount of sales in neighborhood as affecting testimony

The amount for which sales of land in the neighborhood have been made is a factor, but it is not the only factor in determining the weight of testimony as to value since the witness may in forming his opinion take into consideration his own knowledge of the surroundings and the use and capabilities of the property.
Ill.—Illinois, I & M. R. Co. v. Humiston, 69 N.E. 880, 208 Ill. 100.
Pa.—Matteson v. New York Central & H. R. R. Co., 40 Pa.Super. 234.

32. U.S.—Storley v. Armour & Co., C.C.A.N D., 107 F.2d 499—Kinney's Estate v. Commissioner of Internal Revenue, C.C.A., 80 F.2d 568—Wessel v. U. S., C.C.A.Neb., 49 F. 2d 137.
Ala.—Housing Authority of Phenix City v. Stillwell, 3 So.2d 55—Galloway Coal Co. v. Bessemer Coal, Iron & Land Co., 98 So. 779, 210 Ala. 537—State v. Brintle, 93 So. 429, 207 Ala. 500—Headley v. McCall, 87 So. 355, 205 Ala. 108—U. S. v. Goodloe, 86 So. 546, 204 Ala. 484—H. Curjel & Co. v. Hallett Mfg. Co., 73 So. 938, 198 Ala. 609.
Ariz.—State Tax Commission v. United Verde Extension Mining Co., 4 P.2d 395, 39 Ariz. 136, rehearing denied 6 P.2d 889, 39 Ariz. 331—Malcolm v. Valley Bank, 250 P. 363, 31 Ariz. 60, rehearing denied 252 P. 190, 31 Ariz. 284.
Cal.—Rose v. State, 105 P.2d 302, superseding, App., 94 P.2d 1058, followed in Bettencourt v. State, Sup., 105 P.2d 316, superseding, App., 94 P.2d 1066, followed in Brandon v. State, Sup., 105 P.2d 316, superseding, App., 94 P.2d 1066, followed in Jones v. State, Sup., 105 P.2d 317, superseding, App., 94 P.2d 1066, followed in Laughlin v. State, Sup., 105 P.2d 317, superseding, App., 94 P.2d 1067—In re Pomin's Estate, 92 P. 2d 479, 481, 33 Cal.App.2d 544, citing **Corpus Juris**—Birkhofer v. Krumm, 81 P.2d 609, 27 Cal.App. 2d 513, certiorari denied Krumm v. Birkhofer, 59 S Ct. 249, 305 U.S. 653, 83 L.Ed. 423—Spellmire v. Buttress & McClellan, Limited, 44 P.2d 649, 6 Cal.App.2d 550—East Bay Municipal Utility Dist. v. Kieffer, 278 P. 476, 99 Cal.App. 240, rehearing denied 279 P. 178, 99 Cal.App. 240.
Ga.—Central of Georgia Ry. Co. v. J. S. Cowart & Son, 144 S.E. 213, 38 Ga.App. 426—Black v. Automatic Sprinkler Co. of America, 131 S. E. 543, 35 Ga.App. 8—Lee v. Brandenburg, 122 S.E. 247, 31 Ga.App. 794—Maynard v. American Ry. Express Co., 115 S.E. 35, 29 Ga.App. 329—Anderson v. Anderson, 108 S. E. 907, 27 Ga.App. 513, transferred, see 107 S.E. 334, 151 Ga. 518—Hines v. Mizell, 105 S.E. 736, 26 Ga.App. 151—Widincamp v. McCall, 104 S.E. 642, 25 Ga.App. 733.
Ill.—Illinois Power & Light Corporation v. Talbott, 152 N.E. 486, 321 Ill. 538.
Iowa.—Sheehy v. Nordyke, 188 N.W. 882—Keister v. Mitchellville Telephone Co., 180 N.W. 754—Hollingshead v. Watkins, 173 N.W. 4, 186 Iowa 582.
Kan.—Smith v. Tri-County Light & Power Co., 241 P. 1090, 120 Kan. 123, motion overruled 243 P. 331, 120 Kan. 354—Bushey v. Coffman, 201 P. 1103, 109 Kan. 652.
Miss.—City of Clarksdale v. Stuart, 185 So. 588, 184 Miss. 179—Leavenworth v. Board of Mississippi Levee Commissioners, 140 So. 517.
Mo.—In re Sixth Street, 207 S.W. 503, 276 Mo. 158—Pritchard v. Hooker, 90 S.W. 415, 114 Mo.App. 605.
Mont.—Silfvast v. Asplund, 42 P.2d 452, 99 Mont. 152.
Neb.—Jones v. Hartford Fire Ins. Co., 178 N.W. 611, 104 Neb. 735.
N.Y.—Peters v. Berkeley, 219 N.Y. S. 709, 219 App.Div. 261.
N.C.—McDonald v. Lingle, 153 S.E. 848, 199 N.C. 219—Midgett v. Eastern Carolina Transp. Co., 104 S. E. 32, 180 N.C. 71.
Okl.—Wintermute v. State, 19 P.2d 1075, 163 Okl. 3—Wintermute v. State, 16 P.2d 557, 160 Okl. 192.
Or.—Hasbrook v. Lynch, 30 P.2d 358, 146 Or. 363—Paine v. Meier & Frank Co., 27 P.2d 315, 317, 146 Or. 40, citing **Corpus Juris**, and rehearing denied 29 P.2d 531, 146 Or. 40—Littlepage v. Security Savings & Trust Co., 3 P.2d 752, 137 Or. 559.
Tenn.—Brady v. Correll, 97 S.W.2d 448, 20 Tenn.App. 224.
Tex.—Crow v. Thompson, Civ.App., 131 S.W.2d 1064, error dismissed, judgment correct—Kibby v. Kessler, Civ.App., 225 S.W. 277, dismissed for want of jurisdiction.
Wis.—Harvey v. Wheeler Transfer & Storage Co., 277 N.W. 627, 227

even though uncontradicted,[33] but should be weighed by the trier of the facts and judged in view of all the evidence,[34] including, in the case of land, a view, if any was afforded.[35] Probative value depends on the facts on which the opinion is based[36] and if devoid of substantial factual support the opinion is entitled to little or no[37] weight,[38] and will be insufficient to support a verdict or finding or to take the issue to the jury.[39] So an opinion based on a mere guess or conjecture is without probative force,[40] and will not sustain a verdict.[41] Opinion evidence as to value must not be arbitrarily disregarded and a valuation fixed which is unsupported by the evidence.[42] Under the circumstances of the case opinion evidence may constitute prima facie proof of value,[43] and it may be sufficient to take the issue to the jury,[44] and to support a verdict or finding.[45] The effect of contra-

Wis. 36—Maas v. Chicago & N. W. Ry. Co., 145 N.W. 176, 156 Wis. 44.
22 C.J. p 596 note 70.

Acceptance and rejection of part
The trier of the facts need not accept or reject all the evidence of a witness who testifies to several items of value, but it may accept one valuation and reject others.
Cal.—Union Hollywood Water Co. v. City of Los Angeles, 195 P. 55, 184 Cal. 535.
W.Va.—State Road Commission v. Riley, 173 S.E. 783, 114 W.Va. 705.

Average estimates
In fixing the value of land, the jury is not bound to take the average of estimates of witnesses.—Heal v. Stoll, 185 N.W. 242, 176 Wis. 137.

33. U.S.—Staudenmaier v. Johnson, C.C.A.Wis., 117 F.2d 397, affirming, D.C., 30 F.Supp. 341.
Ala.—Dean v. County Board of Education, 97 So. 741, 210 Ala. 256—Obear-Nester Glass Co. v. Mobile Drug Co., 95 So. 13, 208 Ala. 618.
Colo.—Mooney v. Van Kleeck Mortgage Co., 245 P. 348, 79 Colo. 252.
Ga.—McLendon v. City of La Grange, 171 S.E. 307, 47 Ga.App. 690—Birmingham Paper Co. v. Holder, 101 S.E. 692, 24 Ga.App. 630.
Iowa.—Thompson v. Clausen, 186 N. W. 20.
Ky.—Lawson's Adm'r v. Brandenburg, 41 S.W.2d 201, 240 Ky. 68.
Tenn.—Stevens v. Moore, App., 139 S.W.2d 710.
Tex.—Octane Oil Refining Co. v. Blankenship-Antilley Implement Co., Civ.App., 117 S.W.2d 885—Buchanan v. Bowles, Civ.App., 218 S.W. 652.
22 C.J. p 596 note 69.

34. Or.—Hasbrook v. Lynch, 30 P. 2d 358, 359, 146 Or. 363, citing **Corpus Juris**—Paine v. Meier & Frank Co., 27 P.2d 315, 317, 146 Or. 40, citing **Corpus Juris**.
22 C.J. p 596 note 71.

35. U.S.—Shoemaker v. U. S., D.C., 13 S.Ct. 361, 147 U.S. 282, 37 L. Ed. 170.
N.Y.—Matter of Guilford, 83 N.Y.S. 312, 85 App.Div. 207.
22 C.J. p 596 note 72.

36. U.S.—Welch v. Tennessee Valley Authority, C.C.A.Tenn., 108 F. 2d 95, certiorari denied Welch v. U. S. ex rel. and for Use of Tennessee Valley Authority, 60 S.Ct. 889, 309 U.S. 688, 83 L.Ed. 1030—Lewis v. Tennessee Valley Authority, C.C.A.Tenn., 108 F.2d 95, certiorari denied Lewis v. U. S. ex rel. and for Use of Tennessee Valley Authority, 60 S.Ct. 889, 309 U.S. 688, 84 L.Ed. 1030—In re Gustav Schaefer Co., C.C.A.Ohio, 103 F.2d 237, certiorari denied Wells v. Boyle, 60 S.Ct. 96, 308 U.S. 579, 84 L.Ed. 485.
Del.—Allied Chemical & Dye Corporation v. Steel & Tube Co. of America, 122 A. 142, 14 Del.Ch. 64, 117.
Ky.—Bringardner Lumber Co. v. Knuckles, 108 S.W.2d 511, 269 Ky. 567—Norfolk & W. Ry. Co. v. McCoy, 61 S.W.2d 1080, 250 Ky. 190—Kentucky & West Virginia Power Co. v. Saulsbury, 22 S.W.2d 281, 231 Ky. 788.
La.—Louisiana Highway Commission v. Grey, 2 So.2d 654, 197 La. 942.
N.Y.—Campoli v. Brenner, 16 N.Y.S. 2d 610, reversed on other grounds 25 N.Y.S. 200, 261 App.Div. 901.
Pa.—Miller v. Washington Mut. Fire Ins. Co., 7 Sch.Reg. 259.

37. U.S.—Welch v. Tennessee Valley Authority, C.C.A.Tenn., 108 F. 2d 95, certiorari denied Welch v. U. S. ex rel. and for Use of Tennessee Valley Authority, 60 S.Ct. 889, 309 U.S. 688, 84 L.Ed. 1030—Lewis v. Tennessee Valley Authority, C.C.A.Tenn., 108 F.2d 95, certiorari denied Lewis v. U. S. ex rel. and for Use of Tennessee Valley Authority, 60 S.Ct. 889, 309 U. S. 688, 84 L.Ed. 1030.
Del.—Allaun v. Consolidated Oil Co., 147 A. 257, 16 Del.Ch. 318.
Iowa.—Smith v. Iowa State Live Stock Ins. Co., 191 N.W. 981, 195 Iowa 250.
Ky.—Commonwealth v. Combs, 50 S. W.2d 497, 244 Ky. 204—City of Hazard v. Eversole, 35 S.W.2d 313, 237 Ky. 242—Kentucky Hydroelectric Co. v. Reister, 287 S.W. 357, 216 Ky. 303.
La.—Louisiana Highway Commission v. Grey, 2 So.2d 654, 197 La. 942.
R.I.—McGovern v. Michael, 6 A.2d 709, modified on other grounds 9 A.2d 274.
Tex.—Glenn v. Hollums, Civ.App., 73 S.W.2d 1068.

38. Ark.—St. Louis-San Francisco Ry. Co. v. Spradley, 133 S.W.2d 5, 199 Ark. 174.
Ky.—Commonwealth v. Begley, 114 S.W.2d 127, 272 Ky. 289.
Tex.—Wichita Royalty Co. v. City Nat. Bank of Wichita Falls, Civ. App., 36 S.W.2d 1057.
Wis.—Graff v. Tinkham, 231 N.W. 593, 202 Wis. 141.

An opinion based on hearsay and statements of others is insufficient to support a judgment.—Neyland v. Brammer, Tex.Civ.App., 73 S.W.2d 884, error dismissed.

39. Pa.—McCaulif v. Griffith, 168 A. 536, 110 Pa.Super. 522.

40. Md.—Webster v. Archer, 4 A. 2d 434, 176 Md. 245.

Contingent possibility
An opinion based on a contingent possibility is too speculative and remote to be entitled to much weight.—Masser v. Foxworthy, 281 P. 360, 86 Colo. 313.

41. Wis.—Graff v. Tinkham, 231 N. W. 593, 202 Wis. 141.

42. Iowa.—Henderson v. City of Des Moines, 257 N.W. 566.
La.—Louisiana Highway Commission v. Grey, 2 So.2d 654, 197 La. 942.
Or.—Nicolai-Neppach Co. v. Smith, 58 P.2d 1016, 154 Or. 450, 107 A. L.R. 1124, adhered to 60 P.2d 979, 154 Or. 450, 107 A.L.R. 1124.
Tex.—Wolforth v. A. J. Deer Co., Civ. App., 293 S.W. 590.
22 C.J. p 596 note 74.

43. Iowa.—Pickett v. Comstock, 229 N.W. 249, 209 Iowa 968.

44. Mo.—Lee v. Allen, App., 120 S. W.2d 172.

45. Cal.—City of Los Angeles v. Morris, 241 P. 409, 74 Cal.App. 473.
Ga.—Nashville, C. & St. L. Ry. v. Bass, 123 S.E. 729, 32 Ga.App. 457.
Ill.—Hungerford v. Behrends, 139 N. E. 422, 308 Ill. 406—Wrenn v. Warble Storage & Furniture Co., 236 Ill.App. 601.
Iowa.—Walters v. Iowa Electric Co., 212 N.W. 884, 203 Iowa 471.
Neb.—Moran v. Moran, 246 N.W. 711, 124 Neb. 379—Gibbons v. Chicago, B. & Q. Ry. Co., 154 N.W. 226, 98 Neb. 696.
Pa.—Fedas v. Insurance Co. of State

dictions in the testimony of a witness is for the trier of the facts,[46] and a cross-examination showing insufficient knowledge goes to the weight of the testimony or the credibility of the witness.[47] The situation and conditions surrounding property are to be considered in ascertaining the weight to be given witnesses' opinion on the question of the amount of enhancement in value of property by local improvements,[48] and that assessors intend to charge the property proportionately to the cost may be considered in testing the credibility of their opinions.[49] An estimate of the value of property destroyed made at or near the time of its destruction is preferable to an estimate made years afterward from memory of its condition.[50]

Market price. A statement as to the known market price is not an opinion and it is binding on the jury if believed.[51]

i. Other Matters

Estimates as to quantity may constitute substantial evidence but they are not necessarily to be accepted as precisely accurate, and if unsupported by facts they are entitled to no weight. The probative value of an estimate as to age or time is for the jury.

Estimates as to quantity by qualified witnesses having knowledge of the facts constitute substantial evidence,[52] which may be sufficient to support a finding,[53] but they are not necessarily to be accepted as precisely accurate,[54] and if unsupported by detailed facts on which they are based they are entitled to no weight.[55] The probative value of an estimate of a witness as to age,[56] or as to time,[57] is for the determination of the jury. The existence of competition is a fact disclosed by observation rather than by logic and when officers of corporations skilled in the business assert that there is no real competition with respect to a particular product their testimony is to be weighed like that with respect to other matters of fact, and where there is no testimony to the contrary and no reason for doubting their accuracy of observation or credibility their statements should be accepted as true.[58]

The weight of opinion evidence as to handwriting is considered infra § 621.

Handwriting. The general rules governing the weight of opinion evidence ordinarily apply in determining the weight to be given to the opinions of witnesses who testify as to handwriting.[59]

of Pennsylvania, 151 A. 285, 300 Pa. 555.
Tex.—Wright Titus, Inc., v. Swafford, Civ.App., 133 S.W.2d 287, error dismissed, judgment correct—Coulter v. Gulf, C. & S. F. Ry. Co., Civ. App., 248 S.W. 788—Lancaster v. Smith, Civ.App., 244 S.W. 1076, affirmed, Com.App., 262 S.W. 74, error dismissed 46 S.Ct. 202, 269 U.S. 541, 70 L.Ed. 402—Fort Worth & D. C. Ry. Co. v. Amason, Civ. App., 239 S.W. 359—Trahan v. Smith, Civ.App., 239 S.W. 345—Dallas Hotel Co. v. Neely, Civ. App., 227 S.W. 695.
Wash.—Kriegler v. Spokane Merchants' Ass'n, 189 P. 1004, 111 Wash. 179.

46. Mo.—Joyce v. St. Paul Fire & Marine Ins. Co., App., 211 S.W. 390.

47. Tex.—Ft. Worth & D. C. Ry. Co. v. Hapgood, Civ.App., 210 S.W. 969.

48. Ark.—Kelley Trust Co. v. Paving Dist. No. 46 of Ft. Smith, 43 S.W.2d 71, 184 Ark. 408.

49. Ark.—Kelley Trust Co. v. Paving Dist. No. 46 of Ft. Smith, supra.

50. U.S.—Campbell v. U. S., 8 Ct. Cl. 240.

51. Ala.—H. Curjel & Co. v. Hallett Mfg. Co., 73 So. 938, 198 Ala. 609.
Ga.—Southern Nursery Co. v. Montfort, 115 S.E. 150, 29 Ga.App. 328.

52. N.M.—Springer Ditch Co. v. Wright, 247 P. 270, 31 N.M. 457.

53. Mich.—Stephens Lumber Co. v. Townsend-Stark Corporation, 199 N.W. 706, 228 Mich. 182, modified on other grounds 201 N.W. 213, 229 Mich. 159.

54. Ala.—Wilkes v. Teague, 140 So. 347, 224 Ala. 283.

55. Mont.—Irion v. Hyde, 105 P.2d 666, 110 Mont. 570.

56. Ga.—Dixie Mfg. Co. v. Ricks, 110 S.E. 454, 28 Ga.App. 160.

57. Ala.—Southern Ry. Co. v. Sherrill, 167 So. 731, 232 Ala. 184.

58. U.S.—International Shoe Co. v. Federal Trade Commission, 50 S.Ct. 89, 280 U.S. 291, 74 L.Ed. 431, reversing, C.C.A., 29 F.2d 518, certiorari denied 49 S.Ct. 346, 279 U.S. 849, 73 L.Ed. 993, and certiorari granted 49 S.Ct. 478, 279 U.S. 832, 73 L.Ed. 982.

59. Ala.—American Trust & Savings Bank v. Montano, 89 So. 899, 18 Ala.App. 136, certiorari denied Montano v. American Trust & Savings Bank, 89 So. 923, 206 Ala. 700.
Weight of testimony of witness comparing handwritings see infra § 621.

Question for jury
Ala.—American Trust & Savings Bank v. Montano, 89 So. 899, 18 Ala.App. 136, certiorari denied Montano v. American Trust & Savings Bank, 89 So. 923, 206 Ala. 700.

Entitled to little weight
(1) The testimony of nonexpert witnesses that signature on purported letter was the same as signature on insurance policy was of little weight.—Hartford Fire Ins. Co. v. Webb, 135 S.W.2d 883, 281 Ky. 276.

(2) Opinions of nonexpert illiterate witnesses as to the genuineness of a signature with which they are familiar has very little weight, and of itself will amount only to a scintilla.—Pioneer Coal Co. v. Polly, 271 S.W. 592, 208 Ky. 548.

Opportunities for observation as affecting weight
(1) The weight is necessarily affected by the frequency of the witness' opportunities for observation. U.S.—In re Goldberg, C.C.A.N.Y., 91 F.2d 996.
Tex.—Pitts v. Thompson, Civ.App., 71 S.W.2d 368, error dismissed—Joffre v. Mynatt, Civ.App., 240 S.W. 319.
W.Va.—Johnston v. Bee, 100 S.E. 486, 84 W.Va. 532, 7 A.L.R. 252. 22 C.J. p 625 note 27 [b], p 627 note 40.

(2) Weight of testimony of witnesses testifying as to whether will was wholly written by testator varies in exact ratio to their opportunity to become acquainted with and to know handwriting of alleged testator.—Stone v. Stone, 93 S.W.2d 617, 263 Ky. 732.

§ 569. Judgment of Expert

a. In general
b. Factors determinative of weight
c. Opinions of physicians or medical experts generally
d. Cause and effect
e. Damages
f. Due care and proper conduct
g. Laws of other states or countries
h. Mental condition or capacity
i. Nature, condition, and relation of objects
j. Value
k. Other matters

a. In General

The credibility of expert witnesses and the weight of their testimony are matters for the determination of the trier of the facts. Opinions are not necessarily conclusive except where the subject is one for experts or skilled witnesses alone and concerns matters of which a layman can have no knowledge, in which case, according to some authorities, expert opinion evidence in which no conflict exists may be conclusive. Under the usual circumstances opinion evidence is to be considered like other testimony and cannot be arbitrarily disregarded although under particular circumstances courts have characterized expert opinion evidence unfavorably. Generally expert testimony is not necessary unless the case involves a subject of special technical science of which the trier of the facts is not presumed to be specially informed.

The credibility of expert witnesses[60] and the weight of their testimony[61] are matters for the de-

Time at which writing made

Testimony of testator's son, called not as subscribing witness but to identify testator's signature, has probative force as to such identification, although son did not know time of signature.—Evans v. Evans, 101 S.W.2d 435, 193 Ark. 585.

Evidence held sufficient

In suit to establish title to corporate stock, testimony of witness, who was familiar with defendant's handwriting, that signature on assignment from defendant to plaintiff's testate was similar to other signatures of defendant, and testimony of a bank employee, whose duty it was to examine signatures on checks drawn on the account of corporation of which defendant was an officer, that the signature resembled a large number of the same name signed on checks as an officer of the corporation, was sufficient to support inference that the signature on the assignment was that of defendant.—Moreau v. Loveren, 200 A. 513, 89 N.H. 470.

Comparison of methods of proving handwriting

(1) Where witnesses have testified about the genuineness of a signature, both from comparison and from familarity with the signature of the alleged subscriber, it is proper to charge that, "evidence of this character being in fact the result only of a comparison of the controverted signature with the genuine signature of defendant, as the same is remembered and impressed on the mind of the witness whose opinion is so given, or with the other signatures proved to be those of defendant, it is regarded by the law as unsatisfactory, and such as ought not to overthrow the positive and direct testimony of a credible witness, who testifies from personal knowledge."—Jackson v. Adams, 69 N.W. 427, 100 Iowa 163.

(2) Testimony of attesting witness that he saw deceased attesting witness sign is better proof of genuineness of signature of deceased than testimony of those testifying from acquaintance with deceased's signature.—Polley v. Cline's Ex'r, 93 S.W.2d 363, 263 Ky. 659.

(3) After testimony of witness who saw attesting witness make signature, next best testimony as to genuineness of signature is that of witnesses who have seen party whose writing is in controversy write or have had access to or possession of his writing, so as to impress character of writing on their mind and to permit formation of opinion by comparing impression of writing on mind with that submitted for examination.—Polley v. Cline's Ex'r, supra.

60. U.S.—U. S. v. Francis, C.C.A. Mont., 64 F.2d 865.
Ala.—Crawford Johnson & Co. v. Pryor Motor Co., 121 So. 388, 219 Ala. 108.
Ark.—Seaman Store Co. v. Bonner, 113 S.W.2d 1106, 195 Ark. 563.
Ky.—Commercial Union Assur. Co. v. Howard, 76 S.W.2d 246, 256 Ky. 363.
Mass.—Gately v. Taylor, 97 N.E. 619, 211 Mass. 60, 39 L.R.A.,N.S., 472—Sullivan v. Reed Foundry Co., 93 N.E. 576, 207 Mass. 280.
Mich.—O'Donnell v. Oliver Iron Mining Co., 262 N.W. 728, 273 Mich. 27—Sampson v. Veenboer, 234 N. W. 170, 252 Mich. 660—Pawlicki v. Detroit United Ry., 158 N.W. 162, 191 Mich. 536.
Pa.—Koller v. Metropolitan Life Ins. Co., 41 Pa.Super. 48.
S.C.—O'Kelley v. Mutual Life Ins. Co. of New York, 14 S.E.2d 582.
22 C.J. p 731 note 83.

61. U.S.—Empire Oil & Refining Co. v. Hoyt, C.C.A.Mich., 112 F.2d 356—U. S. v. Washington Dehydrated Food Co., C.C.A.Mo., 89 F.2d 606—Svenson v. Mutual Life Ins. Co. of New York, C.C.A.S.D., 87 F.2d 441.
Ala.—Metropolitan Life Ins. Co. v. Chambers, 146 So. 524, 226 Ala. 192—Crawford Johnson & Co. v. Pryor Motor Co., 121 So. 388, 219 Ala. 108—Sovereign Camp, W. O. W., v. Screws, 119 So. 644, 218 Ala. 599.
Ariz.—Middleton v. Green, 276 P. 322, 35 Ariz. 205.
Ark.—Western Union Telegraph Co. v. Byrd, 122 S.W.2d 569, 197 Ark. 152—Nelon v. Nelon, 284 S.W. 743, 171 Ark. 505.
Cal.—Arais v. Kalensnikoff, 74 P.2d 1043, 10 Cal.2d 428, 115 A.L.R. 163—Kershaw v. Tilbury, 8 P.2d 109, 214 Cal. 679—Treadwell v. Nickel, 228 P. 25, 194 Cal. 243—Hirshfeld v. Dana, 223 P. 451, 193 Cal. 142—Bennett v. Hardy, 291 P. 903, 108 Cal.App. 473—Waizman v. Black, 281 P. 1087, 101 Cal.App. 610—May v. Ferrell, 271 P. 789, 94 Cal.App. 703.
Colo.—McWilliams v. Garstin, 197 P. 246, 70 Colo. 59, citing **Corpus Juris.**
Conn.—Bishop v. Copp, 114 A. 682, 96 Conn. 571.
Del.—Hendrickson v. Continental Fibre Co., 140 A. 659, 3 W.W.Harr. 564.
Ga.—Payne v. Franklin County, 116 S.E. 627, 155 Ga. 219—Alabama Great Southern R. Co. v. McKenzie, 77 S.E. 647, 139 Ga. 410, 45 L.R.A., N.S., 18—Savannah Electric & Power Co. v. Horton, 162 S.E. 299, 44 Ga.App. 578—U. S. Casualty Co. v. Matthews, 133 S.E. 875, 35 Ga. App. 526.
Ind.—Illinois Steel Co. v. Fuller, 23 N.E.2d 259, 216 Ind. 180.
Iowa.—Cutler v. State, 278 N.W. 327, 224 Iowa 686—Foy v. Metropolitan Life Ins. Co. of New York, 263 N. W. 14, 220 Iowa 628—Martin v. Bankers' Life Co. of Des Moines, 250 N.W. 220, 216 Iowa 1022—Lang v. Lang, 135 N.W. 604, 157 Iowa 300, petition overruled 139 N.W. 567, 157 Iowa 300.
Kan.—Myers v. Shell Petroleum Corporation, 110 P.2d 810, 153 Kan. 287.
Ky.—Whinery v. Crawford, 116 S.W. 2d 631, 273 Ky. 325—Commercial Union Assur. Co. v. Howard, 76 S.W.2d 246, 256 Ky. 363.

termination of the jury or other trier of the facts, and opinions of experts, although on the precise point to be determined, do not relieve the tribunal of the power and consequent responsibility of deciding,[62] but where an expert's testimony is uncontradicted and unimpeached, and is founded on established facts fairly warranting the conclusions reached, the issue does not become a jury question simply because it is supported only by the testimony of an expert.[63] Opinions of experts are not necessarily conclusive,[64] even when uncontrovert-

Me.—Johnson v. Bangor Ry. & Electric Co., 131 A. 1, 125 Me. 88.

Md.—Langenfelder v. Thompson, 20 A.2d 491.

Mass.—Coddaire v. Sibley, 169 N.E. 797, 270 Mass. 41.

Mich.—Turnbull v. Richardson, 37 N.W. 499, 69 Mich. 400.

Mo.—Phares v. Century Electric Co., 82 S.W.2d 91, 95, 336 Mo. 961, citing **Corpus Juris**—Schoenherr v. Stoughton, 78 S.W.2d 84, 87, 336 Mo. 290—Kimmie v. Terminal R. R. Ass'n of St. Louis, 66 S.W.2d 561, 564, 334 Mo. 596, citing **Corpus Juris**—Spencer v. Quincy, O. & K. C. R. Co., 297 S.W. 353, 317 Mo. 492—Foster v. Kansas City Rys. Co., 235 S.W. 1070.

N.J.—Robbins v. Thies, 189 A. 67, 117 N.J.Law 389.

N.Y.—Kenny v. Douglas Manor Ass'n, 299 N.Y.S. 384, 252 App.Div. 780—Wiesner v. City of Albany, 229 N.Y.S. 622, 224 App.Div. 239, affirmed 166 N.E. 320, 250 N.Y. 551—Wineburgh v. Seeman Bros., 21 N.Y.S.2d 180.

N.D.—Jacobson v. Mutual Ben. Health & Accident Ass'n, 296 N.W. 545, 555, 70 N.D. 566, citing **Corpus Juris.**

Okl.—Voightlander v. State ex rel. Barnett, 52 P.2d 60, 175 Okl. 165—Gypsy Oil Co. v. Brightwell, 49 P.2d 800, 174 Okl. 519.

Pa.—Grebe v. Kligerman, 164 A. 796, 310 Pa. 60.

S.C.—O'Kelley v. Mutual Life Ins. Co. of New York, 14 S.E.2d 582.

Tex.—Texas Independence Life Ins. Co. v. Pickens, Civ.App., 153 S.W.2d 884—Norris Bros. v. Mattinson, Civ.App., 145 S.W.2d 204—Texas Employers' Ins. Ass'n v. Humphrey, Civ.App., 140 S.W.2d 313, error refused—Edwards v. West Texas Hospital, Civ.App., 89 S.W.2d 801, error dismissed—Texas & P. Ry. Co. v. Moore, Civ. App., 7 S.W.2d 902, error dismissed—Houston E. & W. T. Ry. Co. v. Southern Pine Lumber Co., Civ. App., 6 S.W.2d 418—American Nat. Ins. Co. v. McKellar, Civ.App., 295 S.W. 628—City of Brownsville v. Crixell, Civ.App., 275 S.W. 430.

Va.—Lawson v. Darter, 160 S.E. 74, 157 Va. 284—Barnard Bus Lines v. Weeks, 158 S.E. 870, 156 Va. 465—Chesapeake & O. Ry. Co. v. Hunter's Adm'r, 91 S.E. 181, 120 Va. 699.

Wash.—Griggs v. Wayne, 171 P. 230, 100 Wash. 459.

W.Va.—Browning v. Hoffman, 111 S.E. 492, 90 W.Va. 568.

22 C.J. p 728 note 71, p 732 notes 91–94.

Existence of rule of law determining sufficiency

There is no rule of law which determines whether testimony of duly qualified expert is sufficient to form basis of fact finding.—Bill v. New England Cities Ice Co., 10 A.2d 662, 90 N.H. 453.

Disregard of expert testimony

The court or jury is not required to disregard expert testimony.

U.S.—Smith v. U. S., D.C.Mass., 16 F.Supp. 393.

Ala.—Brown Funeral Homes & Insurance Co. v. Baughn, 148 So. 154, 226 Ala. 661.

Testimony as to existence of facts

It is the jury's sole province to form conclusion from expert testimony as to existence of particular facts not of common knowledge, but peculiarly within knowledge of men whose experience or study enables them to speak with authority.—Hill v. Great Northern Life Ins. Co., 57 P.2d 405, 186 Wash. 167.

62. U.S.—Baltimore & O. R. Co. v. Groeger, C.C.A.Ohio, 288 F. 321, certiorari granted 44 S.Ct. 33, 263 U.S. 693, 68 L.Ed. 509, and reversed on other grounds 45 S.Ct. 169, 266 U.S. 521, 69 L.Ed. 419.

Ala.—Commonwealth Life Ins. Co. v. Harmon, 153 So. 755, 228 Ala. 377.

22 C.J. p 731 note 84.

63. Vt.—Central Vermont Ry. Co. v. Bowers, 134 A. 608, 100 Vt. 26.

64. U.S.—Hecht, Levis & Kahn v. New Zealand Ins. Co., C.C.A.N.Y., 121 F.2d 442—Ætna Life Ins. Co. v. Moyer, C.C.A.Pa., 113 F.2d 974—Storley v. Armour & Co., C.C.A.N.D., 107 F.2d 499—U. S. v. Washington Dehydrated Food Co., C.C.A. Mo., 89 F.2d 606—Wisconsin Alumni Research Foundation v. George A. Breon & Co., C.C.A.Mo., 85 F.2d 166, reversing, D.C., 12 F.Supp. 928, certiorari denied George A. Breon Co. v. Wisconsin Alumni Research Foundation, 57 S.Ct. 191, 299 U.S. 598, 81 L.Ed. 441—Tracy v. Commissioner of Internal Revenue, C.C.A., 53 F.2d 575, certiorari denied 53 S.Ct. 83, 287 U.S. 632, 77 L.Ed. 548—Kintner v. Atlantic Communication Co., D.C.N.Y., 51 F.2d 109—U. S. v. Gower, C.C.A.Okl., 50 F.2d 370—Brashear Freight Lines v. Public Service Commission of Missouri, D.C.Mo., 23 F.Supp. 865, appeal dismissed Public Service Commission of Missouri v. Brashear Freight Lines, 59 S.Ct. 480, 306 U.S. 204, 83 L.Ed. 1063, rehearing denied Public Service Commission of State of Missouri v. Brashear Freight Lines, 59 S.Ct. 784, 306 U.S. 669, 83 L.Ed. 608—Smith v. U. S., D.C.Mass., 16 F.Supp. 393—U. S. v. Sheepshearers Merchandise & Commission Co., 20 C.C.P.A. (Customs) 327—Martin v. U. S., 86 Ct.Cl. 311—Converse v. U. S., 69 Ct.Cl. 670.

Ala.—Pacific Mut. Life Ins. Co. of California v. Edmonson, 179 So. 185, 235 Ala. 365—Birmingham Trust & Savings Co. v. Hightower, 169 So. 878, 233 Ala. 39—Atlantic Coast Line R. Co. v. Jackson, 144 So. 813, 225 Ala. 652—Batterton v. City of Birmingham, 119 So. 13, 218 Ala. 489—Metropolitan Life Ins. Co. v. Shaw, 112 So. 179, 22 Ala.App. 54.

Ark.—Arkansas Power & Light Co. v. Bollen, 134 S.W.2d 585, 199 Ark. 566—Missouri Pac. R. Co. v. Hall, 53 S.W.2d 432, 186 Ark. 270.

Cal.—Arais v. Kalensnikoff, 74 P.2d 1043, 10 Cal.2d 428, 115 A.L.R. 163—Burns v. Osborne-Fitz-Patrick Finance Co., 282 P. 419, 101 Cal. App. 680—Pine Grove Consol. Mines v. Metson, 100 P.2d 794, 38 Cal. App.2d 170—National Automobile Ins. Co. v. Industrial Accident Commission of California, 22 P.2d 568, 132 Cal.App. 373—Nylund v. Madsen, 271 P. 374, 94 Cal.App. 441—First Nat. Bank v. Caldwell, 258 P. 411, 84 Cal.App. 438.

Ky.—Wright's Ex'r v. Simpson, 22 S.W.2d 583, 232 Ky. 148—Louisville & N. R. Co. v. Rowland's Adm'r, 14 S.W.2d 174, 227 Ky. 841.

La.—Bernard v. Francez, 117 So. 565, 166 La. 487.

Minn.—Moehlenbrock v. Parke, Davis & Co., 176 N.W. 169, 145 Minn. 100.

Miss.—Robinson v. McShane, 140 So. 725, 726, 163 Miss. 626, citing **Corpus Juris.**

Mo.—Tuepker v. Sovereign Camp, W. O. W., App., 226 S.W. 1002—Bradford v. City of St. Joseph, App., 214 S.W. 281, certiorari quashed State ex rel. City of St. Joseph v. Ellison, Sup., 223 S.W. 671.

N.M.—State v. Moore, 76 P.2d 19, 34, 42 N.M. 135, citing **Corpus Juris.**

N.Y.—Wineburgh v. Seeman Bros., 21 N.Y.S.2d 180—Gallagher v. New York Dock Co., 19 N.Y.S.2d 789.

R.I.—James v. Rhode Island Audito-

ed[65] and unanimous,[66] and all or part of an opinion may be accepted or rejected as it appeals to the judgment and conscience of the trier of the facts;[67] but where the subject is one for experts or skilled witnesses alone and concerns a matter of science or specialized art or other matters of which a layman can have no knowledge the rule has been recognized that expert opinion evidence in which no conflict exists is conclusive,[68] at least if the jury or other trier of the facts believes the witness or wit-

rium, 199 A. 293, 60 R.I. 405—Ashton v. Tax Assessors of Town of Jamestown, 198 A. 786, 790, 60 R.I. 388, citing **Corpus Juris**—Barry v. Kettelle, 139 A. 664, 49 R.I. 50, reargument denied 140 A. 3.
S.C.—Thompson v. Atlantic Coast Line R. Co., 102 S.E. 11, 113 S.C. 261.
Tex.—Federal Underwriters Exchange v. Cost, 123 S.W.2d 332, 132 Tex. 299, affirming, App., 115 S.W. 2d 706—Texas Employers Ins. Ass'n v. Reed, Civ.App., 150 S.W. 2d 858, error dismissed, judgment correct—Luck v. Buffalo Lakes, Civ.App., 144 S.W.2d 672, error dismissed, judgment correct—Texas Employers Ins. Ass'n v. Griffis, Civ. App., 141 S.W.2d 687, 690, citing **Corpus Juris**—Texas Employers' Ins. Ass'n v. Humphrey, Civ.App., 140 S.W.2d 313, error refused—Crow v. Thompson, Civ.App., 131 S.W.2d 1064, error dismissed, judgment correct—Traders & General Ins. Co. v. Ray, Civ.App., 128 S. W.2d 80, error dismissed, judgment correct—Hodges v. Hodges, Civ. App., 111 S.W.2d 779—Southern Underwriters v. Sanders, Civ.App., 110 S.W.2d 1258, 1260, citing **Corpus Juris**—Universal Life & Accident Ins. Co. v. Nanes, Civ.App., 92 S.W.2d 473, error dismissed—Edwards v. West Texas Hospital, Civ. App., 89 S.W.2d 801, error dismissed—National Life & Accident Co. v. Muckelroy, Civ.App., 40 S. W.2d 1115, 1117, citing **Corpus Juris**—Texas Indemnity Ins. Co. v. Preslar, Civ.App., 298 S.W. 666.
Utah.—Kelly v. Industrial Commission of Utah, 12 P.2d 1112, 1113, 80 Utah 73, citing **Corpus Juris**.
W.Va.—Webb v. Chesapeake & O. Ry. Co., 144 S.E. 100, 105 W.Va. 555, certiorari denied Chesapeake & O. Ry. Co. v. Webb, 49 S.Ct. 82, 278 U.S. 646, 73 L.Ed. 559.
Wis.—Washburn v. Skogg, 233 N.W. 764, 204 Wis. 29, rehearing denied 235 N.W. 437, 204 Wis. 29.
22 C.J. p 729 note 77.

65. U.S.—The S. C. L. No. 9, C.C.A. Pa., 114 F.2d 964, affirming, D.C., 37 F.Supp. 386—Wenatchee Bottling Works v. Henricksen, D.C. Wash., 31 F.Supp. 763.
Ala.—Warrior Stone & Contracting Co. v. De Foor, 2 So.2d 430—Pollard v. Treadwell, 176 So. 452, 234 Ala. 615—Commonwealth Life Ins. Co. v. Harmon, 153 So. 755, 757, 228 Ala. 377, quoting **Corpus Juris**.
Ark.—Western Union Telegraph Co. v. Turner, 77 S.W.2d 633, 190 Ark. 97.
Cal.—Layne & Bowler Corporation v. Grogan, 204 P. 252, 56 Cal.App. 31.
Colo.—McWilliams v. Garstin, 197 P. 246, 70 Colo. 59, citing **Corpus Juris**.
N.Y.—Ensign v. Travelers' Ins. Co. of Hartford, Conn., 184 N.Y.S. 7, 193 App.Div. 369, affirmed 135 N.E. 901, 233 N.Y. 521.
Okl.—Johnson Oil Refining Co. v. Elledge, 42 P.2d 840, 842, 171 Okl. 398, citing **Corpus Juris**.
Tex.—Commercial Standard Ins. Co. v. First State Bank of Vernon, Civ.App., 142 S.W.2d 621, error dismissed—Guinn v. Coates, Civ.App., 67 S.W.2d 621, 623, citing **Corpus Juris**.
22 C.J. p 729 note 76.

66. Ala.—Pollard v. Treadwell, 176 So. 452, 234 Ala. 615—Commonwealth Life Ins. Co. v. Harmon, 153 So. 755, 757, 228 Ala. 377, quoting **Corpus Juris**.
Ark.—Western Union Telegraph Co. v. Turner, 77 S.W.2d 633, 190 Ark. 97.
N.Y.—Cornish v. Farm Bldg. F. Ins. Co., 74 N.Y. 295, affirming 10 Hun 466.
Tex.—Guinn v. Coates, Civ.App., 67 S.W.2d 621, 623, citing **Corpus Juris**.

67. U.S.—Anderson v. Baltimore & O. R. Co., C.C.A.N.Y., 96 F.2d 796.
Ala.—Warrior Stone & Contracting Co. v. De Foor, 2 So.2d 430.
Ark.—Western Union Telegraph Co. v. Byrd, 122 S.W.2d 569, 197 Ark. 152—Home Indemnity Co. of New York v. Jelks, 59 S.W.2d 1028, 187 Ark. 370.
Del.—Culver v. Prudential Ins. Co. of America, 179 A. 400, 6 W.W.Harr. 582.
Mo.—Adams v. Moberly Light & Power Co. of Moberly, App., 237 S.W. 162.
N.Y.—In re Sebring, 264 N.Y.S. 379, 238 App.Div. 281—In re Dupignac's Estate, 204 N.Y.S. 273, 123 Misc. 21, affirmed 207 N.Y.S. 833, 211 App.Div. 862.
Okl.—Johnson Oil Refining Co. v. Elledge, 42 P.2d 840, 842, 171 Okl. 398, citing **Corpus Juris**.
Pa.—Pennsylvania Power & Light Co. v. Convoy, Inc., 14 Northumb.Leg. J. 172.
Tex.—Hodges v. Hodges, Civ.App., 111 S.W.2d 779.
22 C.J. p 730 note 78.

Power of commission to reject testimony

Power of industrial accident commission to reject testimony of experts is same as that of court or jury in court.—William Simpson Const. Co. v. Industrial Accident Commission of California, 240 P. 58, 74 Cal.App. 239.

Advisory character of opinion

(1) Expert testimony is advisory in character in the sense that the jury may regard or disregard it.
Mo.—Adams v. Moberly Light & Power Co. of Moberly, App., 237 S.W. 162—Tuepker v. Sovereign Camp, W. O. W., App., 226 S.W. 1002.
N.Y.—In re Sebring, 264 N.Y.S. 379, 238 App.Div. 281.
22 C.J. p 730 note 77 [b].

(2) It is no more advisory than any other competent testimony.—Phares v. Century Electric Co., 82 S.W.2d 91, 336 Mo. 961.

(3) The testimony of an expert, as to his opinion, is not evidence of a fact in dispute, but is advisory only, to assist the triers of fact to understand and apply other evidence.—Nistad v. Winton Lumber Co., Idaho, 99 P.2d 52—Evans v. Cavanagh, 73 P.2d 83, 58 Idaho 324.

68. Cal.—Peters v. Sacramento City Employees' Retirement System, 80 P.2d 179, 27 Cal.App.2d 10—William Simpson Const. Co. v. Industrial Accident Commission, 240 P. 58, 74 Cal.App. 239.
Minn.—Moehlenbrock v. Parke, Davis & Co., 176 N.W. 169, 145 Minn. 100—Moratsky v. Wirth, 76 N.W. 1032, 74 Minn. 146.
Miss.—Kramer Service v. Wilkins, 186 So. 625, 628, 184 Miss. 483, citing **Corpus Juris**.
Mo.—Kane v. St. Louis Refrigerator Transit Co., App., 83 S.W.2d 593, 596, quoting **Corpus Juris**.
Neb.—Hinnenkamp v. Metropolitan Life Ins. Co., 279 N.W. 784, 134 Neb. 846.
Tenn.—American Nat. Ins. Co. v. Smith, 74 S.W.2d 1078, 18 Tenn. App. 222—Vaughan v. Oliver, 3 Tenn.App. 559.
22 C.J. p 731 note 79.

Limitation of rule

(1) The rule does not apply where there is a conflict in the opinion of experts.—Hinnenkamp v. Metropolitan Life Ins. Co., 279 N. W. 784, 134 Neb. 846.

(2) Nor does it apply where common knowledge and experience may be used to ascertain the facts or

nesses,[69] and the testimony must be accepted and acted on as other undisputed evidence.[70]

Under the usual circumstances expert opinion evidence is to be considered or weighed by the triers of the facts like other testimony,[71] in the light of their own general knowledge and experience in the subject of inquiry;[72] the triers of the facts cannot arbitrarily disregard the testimony of experts or skilled witnesses,[73] and make an unsupported finding contrary to the opinion.[74] Expert testimony is of no weight and must be disregarded when it is contrary to common sense,[75] common knowledge,[76] undisputed facts,[77] or physical laws,[78] and when of such a nature it will not support a verdict.[79]

determine the matter in inquiry.
Cal.—National Automobile Ins. Co. v. Industrial Accident Commission of California, 22 P.2d 568, 132 Cal. App. 373.
Minn.—Bloomquist v. Sanders, 202 N.W. 496, 162 Minn. 296.
Neb.—Hinnenkamp v. Metropolitan Life Ins. Co., 279 N.W. 784, 134 Neb. 846.
Tenn.—Vaughan v. Oliver, 3 Tenn. App. 559.

69. Ala.—Pollard v. Treadwell, 176 So. 452, 234 Ala. 615—Commonwealth Life Ins. Co. v. Harmon, 153 So. 755, 228 Ala. 377.

Necessity for belief
Expert testimony is conclusive on the jury only if they believe it to be true.—Atlantic Coast Line R. Co. v. Jackson, 144 So. 813, 225 Ala. 652.

Distinction between opinion and statement of existence of fact
There is a distinction between the expression of an opinion by an expert and that of testimony by an expert as to the existence of a given fact to be tested and proved solely by scientific processes, methods, and knowledge, and so declared by the witness as an established scientific fact. If the fact is one concerning which there is no room for the exercise of common knowledge and experience to ascertain and observe, the uncontroverted scientific ascertainment will be taken as true if the witness is found by the jury to be worthy of belief.—Commonwealth Life Ins. Co. v. Harmon, 153 So. 755, 228 Ala. 377.

70. Miss.—Kramer Service v. Wilkins, 186 So. 625, 184 Miss. 483.

71. U.S.—U. S. v. Porter, D.C.Mich., 9 F.2d 153.
Ark.—Western Union Telegraph Co. v. Byrd, 122 S.W.2d 569, 197 Ark. 152—Mutual Benefit Health & Accident Ass'n v. Moore, 119 S.W.2d 499, 196 Ark. 667.
Cal.—Rolland v. Porterfield, 191 P. 913, 183 Cal. 466.
Ill.—Madison County Mining Co. v. Industrial Commission, 138 N.E. 211, 306 Ill. 591—Peabody Coal Co. v. Industrial Commission, 124 N.E. 566, 289 Ill. 449.
Mo.—Schoenherr v. Stoughton, 78 S.W.2d 84, 336 Mo. 290—Scanlon v. Kansas City, 28 S.W.2d 84, 325 Mo. 125—High v. Quincy, O. & K. C. R. Co., 300 S.W. 1102, 318 Mo. 444—Spencer v. Quincy, O. & K. C. R. Co., 297 S.W. 353, 317 Mo. 492—Morrow v. Missouri Gas & Electric Service Co., 286 S.W. 106, 315 Mo. 367—Taylor v. Cawood, 211 S.W. 47—Thompson v. Chicago, R. I. & P. Ry. Co., 4 S.W.2d 394, 222 Mo.App. 725.
R.I.—Ashton v. Tax Assessors of Town of Jamestown, 198 A. 786, 60 R.I. 388.
S.C.—O'Kelley v. Mutual Life Ins. Co. of New York, 14 S.E.2d 582.
W.Va.—Webb v. Chesapeake & O. Ry. Co., 144 S.E. 100, 105 W.Va. 555, certiorari denied Chesapeake & O. R. Co. v. Webb, 49 S.Ct. 82, 278 U.S. 646, 73 L.Ed. 559.
Wis.—In re Butt's Estate, 193 N.W. 988, 181 Wis. 141.

72. Iowa.—Cutler v. State, 278 N.W. 327, 224 Iowa 686.
La.—Succession of Butterworth, 196 So. 39, 195 La. 115.
N.C.—Hedgpeth v. Coleman, 111 S.E. 517, 183 N.C. 309, 24 A.L.R. 232.
N.D.—Butler v. Ætna Ins. Co. of Hartford, Conn., 256 N.W. 214, 217, 64 N.D. 764, citing **Corpus Juris**—Axford v. Gaines, 195 N.W. 555, 50 N.D. 341.
Tex.—Simmonds v. St. Louis, B. & M. Ry. Co., 91 S.W.2d 332, 127 Tex. 23, modifying St. Louis, B. & M. Ry. Co. v. Simmonds, Civ. App., 50 S.W.2d 343.

73. Cal.—Herbert v. Lankershim, 71 P.2d 220, 9 Cal.2d 409.
La.—Succession of Butterworth, 196 So. 39, 195 La. 115.
Mo.—Chillicothe Trust Co. v. French, 241 S.W. 984, 211 Mo.App. 214.
N.D.—Axford v. Gaines, 195 N.W. 555, 50 N.D. 341.
R.I.—Ashton v. Tax Assessors of Town of Jamestown, 198 A. 786, 60 R.I. 388.
Wis.—In re Butt's Estate, 193 N.W. 988, 181 Wis. 141.
22 C.J. p 733 note 99.

Duty to consider all expert testimony
Where the question is one to be determined by expert witnesses it is the duty of the trier of the facts to give consideration to the testimony of all expert witnesses.—Chico Well Drilling Co. v. Givens, 274 P. 966, 206 Cal. 468.

74. U.S.—Diamond Alkali Co. v. Heiner, C.C.A.Pa., 60 F.2d 505, modifying, D.C., 39 F.2d 645, and certiorari granted Heiner v. Diamond Alkali Co., 53 S.Ct. 221, 287 U.S. 593, 77 L.Ed. 517, reversed on other grounds 53 S.Ct. 413, 288 U.S. 502, 77 L.Ed. 921.
Ky.—Jackson Purchase Rural Electric Co-op. Corporation v. Burns, 146 S.W.2d 340, 285 Ky. 61.
Wis.—In re Butt's Estate, 193 N.W. 988, 181 Wis. 141.

75. U.S.—Svenson v. Mutual Life Ins. Co. of New York, C.C.A.S.D., 87 F.2d 441—Wisconsin Alumni Research Foundation v. George A. Breon & Co., C.C.A.Mo., 85 F.2d 166, reversing, D.C., 12 F.Supp. 928, certiorari denied George A. Breon Co. v. Wisconsin Alumni Research Foundation, 57 S.Ct. 191, 299 U.S. 598, 81 L.Ed. 441.
Mass.—Ruschetti's Case, 13 N.E.2d 34, 299 Mass. 426.
Mont.—Irion v. Hyde, 105 P.2d 666, 671, 110 Mont. 570, quoting **Corpus Juris.**

76. U.S.—Svenson v. Mutual Life Ins. Co. of New York, C.C.A.S.D., 87 F.2d 441.
Mass.—Ruschetti's Case, 13 N.E.2d 34, 299 Mass. 426—Pastrick v. S. S. Kresge Co., 192 N.E. 485, 288 Mass. 194.

77. U.S.—U. S. v. Hill, C.C.A.Ark., 62 F.2d 1022.
Ga.—Gem City Life Ins. Co. v. Stripling, 168 S.E. 20, 176 Ga. 288.

78. U.S.—Svenson v. Mutual Life Ins. Co. of New York, C.C.A.S.D., 87 F.2d 441.
Cal.—Hendricks v. Industrial Accident Commission of California, 78 P.2d 189, 25 Cal.App.2d 534.
Mass.—Ruschetti's Case, 13 N.E.2d 34, 299 Mass. 426.
N.Y.—Higgins v. Mason, 235 N.Y.S. 441, 226 App.Div. 426.

79. U.S.—U. S. v. Hill, C.C.A.Ark., 62 F.2d 1022, 1026, quoting **Corpus Juris.**
Ga.—Gem City Life Ins. Co. v. Stripling, 168 S.E. 20, 22, 176 Ga. 288, quoting **Corpus Juris.**
N.Y.—Higgins v. Mason, 235 N.Y.S. 441, 226 App.Div. 426.
22 C.J. p 733 note 1.

Finding contrary to reason
The court should not permit the jury to be influenced by evidence on which they could not, within the laws of correct reasoning, make a finding.
Mo.—Sayre v. Princeton Univ., 90 S.W. 787, 192 Mo. 95.
Mont.—Irion v. Hyde, 105 P.2d 666,

Opinions of experts on subjects of common knowledge or on subjects requiring no special training have no greater probative value than opinions of nonexperts,[80] and they may be disregarded.[81] The jury must consider the testimony of an expert witness as a whole and the fact that his cross-examination testimony is inconsistent with his testimony in chief does not necessarily destroy the effectiveness of his opinions.[82]

The general uncertainty and persistent disagreement of authority on many lines of professional and scientific inquiry,[83] the fact that this class of evidence deals so largely with the problematical and the conjectural,[84] and the consideration that there are other elements of unreliability arising from human frailty,[85] bias,[86] loyalty to one's employer,[87] pride of opinion,[88] self-interest,[89] or the heat engendered by controversy,[90] which more or less unconsciously warp the mind of the witness, even without the more vulgar elements of venality[91] and the absence of any efficient punishment for perjury,[92] have caused courts of the highest eminence to feel that experts are frequently rather the hired advocates of the parties than men of science placing their special experience at the service of the cause of justice.[93] These considerations have caused the courts under particular circumstances of the case to characterize this class of evidence unfavorably[94] as unreliable,[95] not of great probative force,[96] weakest and most unreliable,[97] the weakest character of testimony,[98] the lowest order of evidence,[99] the lowest grade of evidence that ever comes into a court of justice,[1] the most unsatisfactory character of evidence,[2] the weakest evidence known to law,[3] wholly worthless for any judicial purpose,[4] and of less than no value;[5] and to rule that such evidence should be received and weighed with caution,[6] with narrow scrutiny and with much caution,[7] that it should be scrutinized with care,[8] and that it should never be received at all except when absolutely necessary.[9] So it has been stated

671, 110 Mont. 570, quoting **Corpus Juris.**
Pa.—In re Klein, 56 A. 422, 207 Pa. 191.

80. Iowa.—Van Norman v. Modern Brotherhood of America, 121 N.W. 1080, 143 Iowa 536.
Ky.—Davis' Ex'r v. Laughlin, 183 S.W.2d 544, 280 Ky. 422—Equitable Life Assur. Soc. of U. S. v. Burns, 71 S.W.2d 1009, 254 Ky. 487—Dossenbach v. Reidhar's Ex'x, 53 S.W.2d 731, 245 Ky. 449.

81. W.Va.—Liberty Coal Co. v. Bassett, 150 S.E. 745, 108 W.Va. 293.

82. Conn.—Naveckas v. Jack, 152 A. 580, 112 Conn. 407.
Or.—Armishaw v. Kan, 260 P. 1011, 123 Or. 69.

83. Ky.—Kentucky Traction & Terminal Co. v. Humphrey, 182 S.W. 854, 168 Ky. 611.

84. Ky.—Kentucky Traction & Terminal Co. v. Humphrey, supra.

85. Ky.—Kentucky Traction & Terminal Co. v. Humphrey, supra.

86. Ky.—Agsten v. Brown-Williamson Tobacco Corporation, 113 S.W.2d 829, 272 Ky. 20.
22 C.J. p 735 note 16.

87. Cal.—Grigsby v. Clear Lake Water Works Co., 40 Cal. 396.
Ky.—Kentucky Traction & Terminal Co. v. Humphrey, 182 S.W. 854, 168 Ky. 611.
Tenn.—Bateman v. Ryder, 64 S.W. 48, 106 Tenn. 712, 82 Am.S.R. 910.

88. Ky.—Kentucky Traction & Terminal Co. v. Humphrey, 182 S.W. 854, 168 Ky. 611.

89. U.S.—Winans v. New York & E. R. Co., N.Y., 21 How. 88, 16 L.Ed. 68.
Ky.—Kentucky Traction & Terminal Co. v. Humphrey, 182 S.W. 854, 168 Ky. 611.

90. Ky.—Kentucky Traction & Terminal Co. v. Humphrey, supra.

91. Ky.—Kentucky Traction & Terminal Co. v. Humphrey, supra.
22 C.J. p 735 note 21.

92. Ky.—Kentucky Traction & Terminal Co. v. Humphrey, supra.

93. Ky.—Kentucky Traction & Terminal Co. v. Humphrey, supra.
N.Y.—Roberts v. New York El. R. Co., 28 N.E. 486, 128 N.Y. 455, 13 L.R.A. 499.
22 C.J. p 735 note 23.

94. Iowa.—Miller v. Paulson, 169 N.W. 203, 185 Iowa 218.
Ky.—Kentucky Traction & Terminal Co. v. Humphrey, 182 S.W. 854, 168 Ky. 611.
22 C.J. p 735 note 24.

95. U.S.—North America Acc. Ass'n v. Woodson, Ill., 64 F. 689, 12 C.C.A. 392.
Wis.—Bucher v. Wisconsin Cent. R. Co., 120 N.W. 518, 139 Wis. 597.

96. N.Y.—Francey v. Rutland R. Co., 153 N.Y.S. 151, 167 App.Div. 488.

97. N.Y.—Dobie v. Armstrong, 50 N.Y.S. 801, 27 App.Div. 520, affirmed 55 N.E. 302, 160 N.Y. 584.

98. Ky.—Kentucky Traction & Terminal Co. v. Humphrey, 182 S.W. 854, 168 Ky. 611.

99. Iowa.—Howe v. Richards, 83 N.W. 909, 112 Iowa 220—Whitaker v. Parker, 42 Iowa 585.

1. Pa.—Dawson v. Pittsburgh, 28 A. 171, 159 Pa. 317.

2. Iowa.—Whitaker v. Parker, 42 Iowa 585.

3. Ky.—Whinery v. Crawford, 116 S.W.2d 631, 273 Ky. 325—Security Finance Co. v. A. L. Cook & Son, 3 S.W.2d 187, 223 Ky. 124.

4. N.Y.—Roberts v. New York El. R. Co., 28 N.E. 486, 128 N.Y. 455, 474, 13 L.R.A. 499.

5. Ill.—Rutherford v. Morris, 77 Ill. 397.

6. Ky.—Louisville & N. R. Co. v. Rowland's Adm'r, 14 S.W.2d 174, 227 Ky. 841.
Or.—Wallace v. American Life Ins. Co. of Des Moines, Iowa, 225 P. 192, 111 Or. 510, petition for further opinion 227 P. 465, 111 Or. 510.
22 C.J. p 735 note 34.

Discrimination
Expert testimony must be weighed and considered with discrimination.—Wisconsin Alumni Research Foundation v. George A. Breon & Co., C.C.A.Mo., 85 F.2d 166, reversing, D.C., 12 F.Supp. 928, certiorari denied George A. Breon Co. v. Wisconsin Alumni Research Foundation, 57 S.Ct. 191, 299 U.S. 598, 81 L.Ed. 441.

7. Cal.—Grigsby v. Clear Lake Water Works Co., 40 Cal. 396.
Ky.—Kentucky Traction & Terminal Co. v. Humphrey, 182 S.W. 854, 168 Ky. 611.

8. Ky.—Louisville & N. R. Co. v. Rowland's Adm'r, 14 S.W.2d 174, 227 Ky. 841.
Va.—Lawson v. Darter, 160 S.E. 74, 157 Va. 284.

9. Ky.—Kentucky Traction & Terminal Co. v. Humphrey, 182 S.W. 854, 168 Ky. 611.

that expert testimony is ordinarily accorded but slight weight,[10] and is generally accorded less weight than is given to other types of evidence,[11] and that the statement of an inference or judgment is inferior in probative effect to a statement of fact.[12] It has been suggested that the court should itself select the experts.[13] However, it has also been held that a statement that the testimony of an expert is to be received and weighed with great caution and narrow scrutiny is not an accurate statement of the rule,[14] and whether expert testimony is to be considered like other evidence or received with caution may depend on the circumstances of the case.[15] Under the particular circumstances of the case an expert's opinion may be of probative value,[16] it may be of great value,[17] it may be sufficient to satisfy the burden of proof,[18] and it may be sufficient to warrant or sustain a finding or verdict.[19] An opinion as to matter which is not pertinent to the issue is of no probative value.[20]

Necessity. Expert testimony is not required to be offered in all cases where it is relevant,[21] and it can never be regarded as legally necessary to sustain a jury's inference from proved basic facts,[22] but expert testimony is essential in cases which involve a subject of special technical science of which the members of the jury or the trial court are not presumed to be specially informed.[23]

b. Factors Determinative of Weight

Factors determinative of the weight of expert opinion evidence are the experience and knowledge of the witness, his opportunity for observation and the attention given to the matter, his bias or interest, his manner while testifying, the reasons assigned for the opinion, the facts on which it is based, and corroboration of the testimony. It is within the function of the jury to decide whether the facts on which the answer of an expert is based actually exist.

It may be stated as a general rule that the value of an opinion given by an expert depends on the experience and knowledge which he has and evinces concerning the matter about which he testifies,[24]

N.Y.—Roberts v. New York El. R. Co., 28 N.E. 486, 128 N.Y. 455, 13 L.R.A. 499.
22 C.J. p 736 note 36.

10. Ky.—Nugent v. Nugent's Ex'r, 135 S.W.2d 877, 281 Ky. 263—Louisville & N. R. Co. v. Rowland's Adm'r, 14 S.W.2d 174, 227 Ky. 841.

11. Ky.—Agsten v. Brown-Williamson Tobacco Corporation, 113 S.W. 2d 829, 272 Ky. 20.

12. U.S.—In re Ward, N.J., 194 F. 89, 114 C.C.A. 167.
Miss.—Illinois Cent. R. Co. v. Emmerson, 44 So. 928, 91 Miss. 230.
Pa.—In re Draper, 64 A. 520, 215 Pa. 314.

13. Cal.—In re Dolbeer's Estate, 86 P. 695, 149 Cal. 227—Grigsby v. Clear Lake Water Works Co., 40 Cal. 396.

14. Vt.—Central Vermont Ry. Co. v. Bowers, 134 A. 608, 100 Vt. 26.

15. N.C.—Hedgpeth v. Coleman, 111 S.E. 517, 183 N.C. 309, 24 A.L.R. 232.

16. U.S.—U. S v. Bailey, Green & Elger, 24 C.C.P.A.(Customs) 196.
Ill.—Peabody Coal Co. v. Industrial Commission, 124 N.E. 566, 289 Ill. 449.
Ky.—Whinery v. Crawford, 116 S.W. 2d 631, 273 Ky. 325.
Mo.—Phares v. Century Electric Co., 82 S.W.2d 91, 336 Mo. 961.
Ohio.—Village of Celina v. Public Utilities Commission of Ohio, 157 N.E. 72, 116 Ohio St. 596.
Pa.—Appeal of Kiebler, 30 Pa.Dist. & Co. 620.
22 C.J. p 736 note 40.

Substantive evidence

Experts' opinions, when founded on known scientific facts, are substantive evidence.—Elliott Works v. Frisk, D.C.Iowa, 58 F.2d 820.

17. Ill.—Lyon v. Oliver, 147 N.E. 251, 316 Ill. 292, reversing 227 Ill. App. 511.

18. U.S.—Groff v. Smith, D.C.Conn., 34 F.Supp. 319.

19. U.S.—Catton, Neill & Co. v. U. S., 11 Ct.Cust.App. 278.
Idaho.—Glenn v. Salih, 256 P. 947, 44 Idaho 370.
La.—Banta v. McSpadden, 86 So. 287, 147 La. 847.

20. N.Y.—Clark v. Fleischmann Vehicle Co., 187 N.Y S. 807.

21. Cal.—Arais v. Kalensnikoff, 74 P.2d 1043, 10 Cal.2d 428, 115 A.L.R. 163.

22. Ala.—Pollard v. Treadwell, 176 So. 452, 234 Ala. 615—Commonwealth Life Ins. Co. v. Harmon, 153 So. 755, 757, 228 Ala. 377, quoting **Corpus Juris.**
Okl.—Chicago, R. I. & P. R. Co. v. Gilmore, 152 P. 1096, 52 Okl. 296.

23. Cal.—Thomsen v. Burgeson, 79 P.2d 136, 26 Cal.App.2d 235.
Conn.—Sickmund v. Connecticut Co., 189 A. 876, 122 Conn. 375.
Okl.—Griesel v. Fabian, 84 P.2d 634, 184 Okl. 42.
Pa.—Dewees v. Day & Zimmerman, 140 A. 345, 291 Pa. 379.
Wash.—Peddicord v. Lieser, 105 P.2d 5, 5 Wash.2d 190—Jordan v. Skinner, 60 P.2d 697, 187 Wash. 617.

Facts ascertained by ordinary use of senses

(1) The rule requiring expert testimony does not apply to facts which may be ascertained by ordinary use of senses of nonexpert.—Thomsen v. Burgeson, 79 P.2d 136, 26 Cal.App.2d 235.

(2) Nor does it prevent a layman from testifying to facts in connection with his injury which as a layman he is capable of observing.—Griesel v. Fabian, 85 P.2d 634, 184 Okl. 42.

Necessity for medical testimony in malpractice cases is considered in the C.J.S. title Physicians and Surgeons § 62, also 48 C.J. p 1150 note 37—p 1151 note 39.

24. Cal.—Longuy v. La Société Francaise De Bienfaisance Mutuelle, 198 P. 1011, 52 Cal.App. 370.
Del.—Culver v. Prudential Ins. Co. of America, 179 A. 400, 6 W.W. Harr. 582.
Ill.—Madison County Mining Co. v. Industrial Commission, 138 N.E. 211, 306 Ill. 591—Voight v. Industrial Commission, 130 N.E. 470, 297 Ill. 109—Peabody Coal Co. v. Industrial Commission, 124 N.E. 566, 289 Ill. 449.
Ind.—Cromer v. Bridenbaugh, 123 N. E. 115, 188 Ind. 393.
Mo.—Jones v. Chicago, B. & Q. R. Co., 125 S.W.2d 5, 343 Mo. 1104, reversing App., 100 S.W.2d 617.
Mont.—Schumacher v. Murray Hospital, 193 P. 397, 58 Mont. 447.
N.H.—Bill v. New England Cities Ice Co., 10 A.2d 662, 90 N.H. 453.
N.Y.—Meiselman v. Crown Heights Hospital, 34 N.E.2d 367, 285 N.Y. 389, reversing 20 N.Y.S.2d 174, 259 App.Div. 840, appeal denied 20 N. Y.S.2d 669, 259 App.Div. 916.
Va.—Barnard Bus Lines v. Weeks, 158 S.E. 870, 156 Va. 465.
22 C.J. p 736 note 41, p 522 note 84 [b].

the opportunity for observation or the degree of attention given to the matter,[25] and the reasons which he assigns for his opinion.[26] The state of mind, bias, or interest of the witness,[27] his manner while testifying,[28] and corroboration of his testimony[29] are other factors for consideration, but the amount of compensation received by a witness does not necessarily discredit his testimony.[30] A mere guess or conjecture has no evidential value,[31] and will not support a verdict in conformity therewith.[32] That an expert admits the possibility of his being in error does not destroy the effect of his testimony,[33] and a conclusion drawn by an expert in interpreting subsidiary facts if probably true may have evidentiary force, even though it is not certain.[34] The fact that the testimony of an expert is based on his reading and not on his personal experience is not a sufficient reason for attaching a low value to his statement.[35]

Facts forming basis for judgment. It is within the special function of the jury to decide whether the facts on which the answer of the expert is based actually exist.[36] The value or weight of the opinion of the expert is dependent on,[37] and is no

Reason for probative force

The opinion of an expert witness has probative force by reason of his unusual and expert knowledge of subject, gained by study, experience, and observation.—Peninsula Produce Exch. v. American Ry. Express Co., 128 A. 403, 147 Md. 424.

25. Ill.—Madison County Mining Co. v. Industrial Commission, 138 N.E. 211, 306 Ill. 591—Peabody Coal Co. v. Industrial Commission, 124 N.E. 566, 289 Ill. 449.
Va.—Barnard Bus Lines v. Weeks, 158 S.E. 870, 156 Va. 465.

26. Del.—Culver v. Prudential Ins. Co. of America, 179 A. 400, 6 W. W.Harr. 582.
Iowa.—Lindeken v. Lowden, 295 N. W. 112.
Md.—Langenfelder v. Thompson, 20 A.2d 491.
Mo.—Kimmie v. Terminal R. R. Ass'n of St. Louis, 66 S.W.2d 561, 334 Mo. 596.
Pa.—Steel v. Snyder, 144 A. 912, 295 Pa. 120.
22 C.J. p 736 note 42.

Basing decision on unreasonable opinion

Grounds on which expert's opinion rests may be so unreasonable as to make it error to base decision on such opinion.—Kulak v. Landers, Frary & Clark, 181 A. 720, 120 Conn. 306.

27. Cal.—National Automobile Ins. Co. v. Industrial Accident Commission of California, 22 P.2d 568, 132 Cal.App. 373.
Ill.—Madison County Mining Co. v. Industrial Commission, 138 N.E. 211, 306 Ill. 591—Voight v. Industrial Commission, 130 N.E. 470, 297 Ill. 109—Peabody Coal Co. v. Industrial Commission, 124 N.E. 566, 289 Ill. 449.
Mont.—Worden v. Alexander, 90 P. 2d 160, 108 Mont. 208.

Stockholder

However, in guardian's accounting proceeding, weight of evidence of expert real estate appraiser was held not lessened by fact that he was stockholder in trust company which was accounting guardian.—In re Staten Island Nat. Bank & Trust Co., 282 N.Y.S. 163, 156 Misc. 330.

Statute concerning credibility of employee

Where a statute provides that the fact that a witness is in the employ of a party may diminish the extent of his credibility, the diminution is far greater when such witness is called on to express an opinion based on hypothetical questions than when he is testifying to matters of fact.—Allen v. Louisiana Highway Commission, La.App., 150 So. 98.

28. Cal.—National Automobile Ins. Co. v. Industrial Accident Commission of California, 22 P.2d 568, 132 Cal.App. 373.
Pa.—Steel v. Snyder, 144 A. 912, 295 Pa. 120.

29. Pa.—Steel v. Snyder, supra.

30. Ill.—Lyon v. Oliver, 147 N.E. 251, 316 Ill. 292, reversing 227 Ill. App. 511.

31. U.S.—Svenson v. Mutual Life Ins. Co. of New York, C.C.A.S.D., 87 F.2d 441—Petroleum Rectifying Co. of California v. Reward Oil Co., D.C.Cal., 260 F. 183, reversed on other grounds 260 F. 177, 171 C.C.A. 213, in which certiorari is denied Reward Oil Co. v. Petroleum Rectifying Co. of California, 40 S.Ct. 119, 251 U.S. 554, 64 L.Ed. 411.
Mass.—Callaghan v. R. H. White Co., 22 N.E.2d 10, 303 Mass. 413.
22 C.J. p 735 note 24 [a].

32. Ga.—Hulme v. Mutual Benefit Health & Accident Ass'n, 13 S.E. 2d 689, 64 Ga.App. 466.
Minn.—Susnik v. Oliver Iron Mining Co., 286 N.W. 249, 205 Minn. 325.

33. Iowa.—Shepard v. Carnation Milk Co., 262 N.W. 110, 220 Iowa 466.

34. Mass.—Ruschetti's Case, 13 N. E.2d 34, 299 Mass. 426.

35. U.S.—Perkins v. U. S., S.C., 228 F. 408, 142 C.C.A. 638.

36. U.S.—Travelers Ins. Co. v. Drake, C.C.A.Cal., 89 F.2d 47.
Cal.—Treadwell v. Nickel, 228 P. 25, 194 Cal. 243.
Idaho.—Evans v. Cavanagh, 73 P.2d 83, 58 Idaho 324.
Ill.—Chaney v. Baker, 136 N.E. 804, 304 Ill. 362.
Ind.—Ailes v. Ailes, 11 N.E.2d 73, 104 Ind. 302.
Iowa.—Martin v. Bankers' Life Co. of Des Moines, 250 N.W. 220, 216 Iowa 1022.
Mont.—Kelley v. John R. Daily Co., 181 P. 326, 56 Mont. 63.
Okl.—Johnson Oil Refining Co. v. Elledge, 42 P.2d 840, 842, 171 Okl. 398, citing **Corpus Juris.**
22 C.J. p 731 note 86.

37. Cal.—Treadwell v. Nickel, 228 P. 25, 194 Cal. 243.
Ill.—Madison County Mining Co. v. Industrial Commission, 138 N.E. 211, 306 Ill. 591.
Kan.—Myers v. Shell Petroleum Corporation, 110 P.2d 810, 153 Kan. 287.
Ky.—Mutual Life Ins. Co. of New York v. Dause, 76 S.W.2d 233, 256 Ky. 448.
Mont.—Schumacher v. Murray Hospital, 193 P. 397, 58 Mont. 447.
N.Y.—Hahn v. Duveen, 234 N.Y.S. 185, 133 Misc. 871.
Tenn.—Haskins v. Howard, 16 S.W. 2d 20, 159 Tenn. 86—Woodward v. Iowa L. Ins. Co., 56 S.W. 1020, 104 Tenn. 49—Standard Oil Co. of Louisiana v. Roach, 94 S.W.2d 63, 19 Tenn.App. 661.
22 C.J. p 727 note 59.

Opinion based on another's opinion or testimony

(1) Issue is not supported by opinion of expert witness when vital assumption in his hypothetical interrogation is based on opinion of another.—Crotty v. Virginian Ry. Co., 177 S.E. 609, 115 W.Va. 558.

(2) Expert testimony, predicated on hypothetical question based on observations and testimony of interested, nonexpert witness, is of slight probative value.—In re Linville's Estate, 300 P. 505, 137 Or. 145.

Opinion based on facts not incorporated in question

Value of expert's testimony depends, among other things, on expert confining himself to facts in-

stronger than,[38] the facts on which it is predicated, and the opinion has no probative force if such facts do not exist in the case or if the jury do not accept such facts as true.[39] If any fact assumed in a hypothetical question is untrue, it has been held that the jury cannot be permitted to decide what facts were material in securing the opinion and to what extent a variance in the facts would have changed the opinion, and they must disregard the entire opinion,[40] but there is other authority to the effect that an opinion is not wholly valueless because of some variance between assumed and actually proved facts.[41] Even though the facts hypothetically stated are found by the jury to exist, they may still refuse to credit the judgment which the expert has formed from them,[42] and they may find that the facts are true and the reasoning false, or that while the facts justify his inference they are equally consistent with another.[43] The answer to a hypothetical question based on one side's theory of the case is not as satisfactory or as persuasive as it would be if a fairer or more complete statement of the actual facts appeared in the question.[44] Where an observer presents to the tribunal his inference because he cannot state all the facts to the jury with the fullness necessary to enable them to draw an accurate inference, a fortiori such facts cannot be placed hypothetically before the expert so fully as to make his inference from them of any value to the jury.[45]

c. Opinions of Physicians or Medical Experts Generally

Opinions of physicians or medical experts may constitute substantial evidence but the weight thereof is for the trier of the facts. Ordinarily an opinion is not conclusive even though uncontradicted unless it concerns a matter of science or specialized art of which a layman can have no knowledge. A medical opinion cannot stand when opposed to actual facts, physical laws, or matters of common knowledge. It is entitled to no value if it has no substantial basis or if it is based on an incorrect assumption of the facts.

The opinions of physicians or medical experts may constitute substantial evidence,[46] sufficient to

corporated in question propounded to him, and his testimony is worthless if he does not assume such facts to be true and base his answer thereon.—Evans v. Cavanagh, 73 P. 2d 83, 58 Idaho 324.

38. Cal.—Blankenfeld v. Industrial Accident Commission, 98 P.2d 584, 36 Cal.App.2d 690—Mark v. Industrial Accident Commission of California, 84 P.2d 1071, 29 Cal.App.2d 495.

39. U.S.—Vincennes Water Supply Co. v. Public Service Commission of Indiana, C.C.A.Ind., 34 F.2d 5, certiorari denied Public Service Commission of Indiana v. Vincennes Water Supply Co., 50 S.Ct. 26, 280 U.S. 567, 74 L.Ed. 621—Balaban & Katz Corporation v. Commissioner of Internal Revenue, C. C.A., 30 F.2d 807.
Cal.—Giannini v. Southern Pac. Co., 276 P. 618, 98 Cal.App. 126.
Ind.—Griffith v. Thrall, App., 29 N. E.2d 345.
Mass.—Barr v. Warren, 12 N.E.2d 64, 299 Mass. 60.
Mich.—Thornton v. Berry, 244 N.W. 152, 259 Mich. 529.
N.Y.—Nazzaro v. Angelilli, 216 N. Y.S. 721, 217 App.Div. 415—Blank v. Goodman, 173 N.Y.S. 485.
Okl.—Johnson Oil Refining Co. v. Elledge, 42 P.2d 840, 171 Okl. 398.
Wash.—Prentice Packing & Storage Co. v. United Pac. Ins. Co., 106 P. 2d 314, 5 Wash.2d 144.
22 C.J. p 731 note 87, p 732 note 89.

Submission of issue to jury
Opinions of expert witnesses which were not supported by facts were insufficient to authorize submission of issue to jury or sustain verdict or judgment.—Insurance Co. of North America v. Creech Drug Store, 94 S.W.2d 654, 264 Ky. 364.

40. Iowa.—Wilcox v. Crumpton, 258 N.W. 704, 219 Iowa 389—Madden v. Saylor Coal Co., 111 N.W. 57, 133 Iowa 699—Stutsman v. Sharpless, 101 N.W. 105, 125 Iowa 335—Kirsher v. Kirsher, 94 N.W. 846, 120 Iowa 337.
Mich.—De Haan v. Winter, 241 N.W. 923, 258 Mich. 293—Ballance v. Dunnington, 217 N.W. 329, 241 Mich. 383.

41. Cal.—Treadwell v. Nickel, 228 P. 25, 194 Cal. 243, disapproving Hallawell v. Union Oil Co. of California, 173 P. 177, 36 Cal.App. 672.
Conn.—In re Anderson's Appeal, 66 A. 7, 79 Conn. 535.
Ind.—Guetig v. State, 66 Ind. 94, 32 Am.R. 99—Ailes v. Ailes, 11 N.E. 2d 73, 104 Ind.App. 302—Thomas v. Dabblemont, 67 N.E. 463, 31 Ind.App. 146.

42. Ill.—Chicago Union Tract. Co. v. Roberts, 82 N.E. 401, 229 Ill. 481.
Md.—Baltimore v. Smith, etc., Brick Co., 31 A. 423, 80 Md. 458.
22 C.J. p 727 notes 60–62.

43. Neb.—Schlencker v. State, 1 N. W. 857, 9 Neb. 241.

44. U.S.—Baltimore & O. R. Co. v. Tindall, C.C.A.Ind., 47 F.2d 19.

45. Conn.—Porter v. Pequonnoc Mfg. Co., 17 Conn. 249.
N.Y.—Cadwell v. Arnheim, 46 N.E. 310, 152 N.Y. 182.
22 C.J. p 734 note 7.

46. U.S.—U. S. v. Nelson, C.C.A. Ark., 102 F.2d 515, certiorari denied Nelson v. U. S., 60 S.Ct. 81, 308 U.S. 550, 84 L.Ed. 462.
Ala.—Bennett v. Fail, 26 Ala. 605.
Cal.—Sheehan v. Board of Police Com'rs of City and County of San Francisco, 239 P. 844, 197 Cal. 70.
Ill.—Kinkaid v. Kinkaid, 168 Ill.App. 333.
Kan.—Tovey v. Geiser, 92 P.2d 3, 150 Kan. 149.
Ky.—Equitable Life Assur. Soc. of U. S. v. Spencer, 90 S.W.2d 704, 262 Ky. 478.
Mo.—Phares v. Century Electric Co., 82 S.W.2d 91, 336 Mo. 961—Kimmie v. Terminal R. R. Ass'n of St. Louis, 66 S.W.2d 561, 334 Mo. 596—Schmitz v. Sellers & Marquis Roofing Co., App., 117 S.W.2d 623—Allen v. American Life & Accident Ins. Co., App., 83 S.W.2d 192.
Or.—Langford v. Jones, 22 P. 1064, 18 Or. 307.
Va.—Bristol Builders' Supply Co. v. McReynolds, 162 S.E. 8, 157 Va. 468.
W.Va.—Maxwell v. Howell, 174 S.E. 553, 114 W.Va. 771.

Opinion as to age
(1) Medical opinion evidence as to age of person is not so unreliable as necessarily not to be dependable.—U. S. ex rel. Chin Cheung Nai v. Corsi, D.C.N.Y., 55 F.2d 360, affirmed C.C.A., 64 F.2d 1022.

(2) Opinion of qualified medical experts as to age of Chinese boy. seeking admission as son of American citizen, could be given weight by immigration officials.—U. S. ex rel. Chung Yuen Poy v. Corsi, D.C.N.Y., 2 F.Supp. 260, affirmed, C.C.A., 62 F. 2d 777.

support a finding, verdict, or judgment,[47] but their credibility,[48] and the weight of their testimony[49] is for the jury or other trier of the facts. Ordinarily an opinion is not conclusive[50] although uncontradicted,[51] but within the rule considered in subdivision a of this section, supra, where the subject is one for experts or skilled witnesses alone and concerns a matter of science or specialized art or other matters of which a layman can have no knowledge, the unanimous opinion of medical experts on particular subjects may be conclusive,[52] even if contradicted by lay witnesses,[53] although where uncontroverted medical opinions are merely deductions drawn from certain symptoms the final conclusion remains with the jury.[54] A medical opinion cannot be arbitrarily disregarded,[55] but on the other hand it cannot stand in the face of actual facts to the contrary,[56] or when opposed to physical laws and matters of common knowledge.[57] The jury must consider the testimony of a medical expert as a

47. Cal.—Kershaw v. Tilbury, 8 P.2d 109, 214 Cal. 679—McLennan v. Holder, 36 P.2d 448, 1 Cal.App.2d 305.
Ky.—Equitable Life Assur. Soc. of U. S. v. Reynolds, 82 S.W.2d 509, 259 Ky. 504.
Minn.—Brase v. Williams Sanatorium, 256 N.W. 176, 192 Minn. 304.
Mo.—Erwin v. Railway Express Agency, App., 128 S.W.2d 1077.
N.J.—Union Central Life Ins. Co. v. Elizabeth Trust Co., 183 A. 181, 119 N.J.Eq. 505—Willhart v. Fort, 145 A. 7, 7 N.J.Misc. 191.
Wash.—Senske v. Washington Gas & Electric Co., 4 P.2d 523, 165 Wash. 1.
Wis.—Marsh Wood Products Co. v. Babcock & Wilcox Co., 240 N.W. 392, 207 Wis. 209.

48. N.D.—Jacobson v. Mutual Ben. Health & Accident Ass'n, 296 N.W. 545.

49. U.S.—Coyner v. U. S., C.C.A.Ill., 103 F.2d 629—U. S. v. Bodge, C.C.A.Kan., 85 F.2d 433—Metropolitan Life Ins. Co. v. Armstrong, C.C.A.Neb., 85 F.2d 187—Putney v. U. S., D.C.Colo., 4 F.Supp. 376.
Conn.—Naveckas v. Jack, 152 A. 580, 112 Conn. 467.
Ind.—Aeme-Evans Co. v. Schnepf, 14 N.E.2d 561, 214 Ind. 394.
Ky.—Jefferson Standard Life Ins. Co. v. Hurt, 72 S.W.2d 20, 254 Ky. 603.
Mo.—Phares v. Century Electric Co., 82 S.W.2d 91, 336 Mo. 961—Kimmie v. Terminal R. R. Ass'n of St. Louis, 66 S.W.2d 561, 334 Mo. 596.
N.H.—Giroux v. New York Life Ins. Co., 159 A. 142, 85 N.H. 355.
N.D.—Jacobson v. Mutual Ben. Health & Accident Ass'n, 296 N.W. 545.
Or.—Carnine v. Tibbetts, 74 P.2d 974, 158 Or. 21.
Pa.—Mincy v. Washington Nat. Ins. Co., 196 A. 893, 130 Pa.Super. 285.
Tex.—Texas Independence Life Ins. Co. v. Pickens, Civ.App., 153 S.W.2d 884.
Wash.—Pellerin v. Washington Veneer Co., 2 P.2d 653, 163 Wash. 555.
Wis.—Bell v. Milwaukee Electric Ry. & Light Co., 172 N.W. 791, 169 Wis. 408.

Physicians appointed by court

Physicians, who were appointed by court to examine plaintiff under legislative act, and who gave evidence for defendant, became witnesses for defendant and their testimony was same as any other expert testimony.—Bowing v. Delaware Rayon Co., Del., 192 A. 598, 8 W.W. Harr. 339.

50. U.S.—Coyner v. U. S., C.C.A.Ill., 103 F.2d 629—U. S. v. Bowman, C.C.A.Utah, 73 F.2d 716.
Ala.—Sovereign Camp of Woodmen of the World v. Keefe, 84 So. 810, 203 Ala. 636—Booker T. Washington Burial Ins. Co. v. Williams, 173 So. 269, 27 Ala.App. 393.
Ark.—Progressive Life Ins. Co. v. Hulbert, 118 S.W.2d 268, 196 Ark. 352.
Cal.—May v. Ferrell, 271 P. 789, 94 Cal.App. 703.
Ga.—Life & Casualty Ins. Co. v. Smith, 187 S.E. 288, 53 Ga.App. 838.
Ind.—Funk v. Bonham, 183 N.E. 312, 204 Ind. 170—Blair v. Washington, 134 N.E. 503, 77 Ind.App. 698, denying petition 133 N.E. 392, 77 Ind.App. 698.
Iowa.—Kirchner v. Dorsey & Dorsey, 284 N.W. 171, 226 Iowa 283.
Mass.—Hurwitz' Case, 182 N.E. 832, 280 Mass. 477.
Mo.—Allen v. American Life & Accident Ins. Co., App., 83 S.W.2d 192.
Pa.—Hatfield v. Sovereign Camp, W. O. W., 196 A. 904, 129 Pa.Super. 570.
Tex.—Southern Underwriters v. Stubblefield, Civ.App., 108 S.W.2d 557—Universal Life & Accident Ins. Co. v. Nanes, Civ.App., 92 S.W.2d 473, error dismissed—American Nat. Ins. Co. v. Park, Civ.App., 55 S.W.2d 1088, error refused—National Life & Accident Co. v. Muckelroy, Civ.App., 40 S.W.2d 1115.
Va.—Virginia Electric & Power Co. v. Decatur, 3 S.E.2d 172, 173 Va. 153, dissenting opinion 4 S.E. 294, 173 Va. 153.

51. Mass.—Dodge v. Sawyer, 193 N.E. 15, 288 Mass. 402—Smardon v. Metropolitan Life Ins. Co., 137 N.E. 742, 243 Mass. 599.

52. Cal.—National Automobile Ins. Co. v. Industrial Accident Commission of California, 22 P.2d 568, 132 Cal.App. 373—Nicholas v. Jacobson, 298 P. 505, 113 Cal.App. 382—General Accident, Fire & Life Assur. Corporation, Limited, of Perth, Scotland, v. Industrial Accident Commission, 288 P. 692, 106 Cal.App. 39—Johnson v. Clarke, 276 P. 1052, 98 Cal.App. 358—William Simpson Const. Co. v. Industrial Accident Commission of California, 240 P. 58, 74 Cal.App. 239—Pearson v. Crabtree, 232 P. 715, 70 Cal. App. 52.
Miss.—Kramer Service v. Wilkins, 186 So. 625, 184 Miss. 483.
Mo.—Kane v. St. Louis Refrigerator Transit Co., App., 83 S.W.2d 593.
Tenn.—American Nat. Ins. Co. v. Smith, 74 S.W.2d 1078, 18 Tenn.App. 222.

53. Cal.—Callahan v. Hahnemann Hospital, 35 P.2d 536, 1 Cal.2d 447—Rasmussen v. Shickle, 41 P.2d 184, 4 Cal.App.2d 426—General Accident, Fire & Life Assur. Corporation, Limited, of Perth, Scotland, v. Industrial Accident Commission, 288 P. 692, 106 Cal.App. 39—William Simpson Const. Co. v. Industrial Accident Commission of California, 240 P. 58, 74 Cal. App. 239.

54. Ala.—New York Life Ins. Co. v. Torrance, 153 So. 463, 228 Ala. 286, denying certiorari 153 So. 458, 26 Ala.App. 38.

55. Kan.—Forsyth v. Church, 42 P.2d 975, 141 Kan. 687.
N.Y.—Levey v. Minott, 211 N.Y.S. 883, 214 App.Div. 192.

56. Pa.—Hamilton v. Fay, 128 A. 837, 283 Pa. 175.

Permanent disability while employed

In action on disability clause of life policy, testimony of physician that insured was totally and permanently disabled was held without probative value where insured regularly and continuously was engaged in customary employment during period in which disability was claimed.—Stewart v. Pioneer Pyramid Life Ins. Co., 180 S.E. 889, 177 S.C. 132.

57. U.S.—U. S. v. Elmore, C.C.A.Fla., 68 F.2d 551.
Cal.—Hendricks v. Industrial Acci-

whole and the fact that his testimony on cross-examination is inconsistent with his testimony in chief does not necessarily destroy the effectiveness of his opinions.[58] The testimony of a physician who has examined the subject is entitled to more weight than a nonexamining physician.[59] The bias of an expert goes to the weight of his testimony,[60] and the testimony of a professional medical expert who makes a business of giving testimony in personal injury cases is entitled to but little weight.[61] The fact that the witness was originally called to treat the party for the purpose of testifying,[62] that he refreshes his recollection by reference to records,[63] that he admits a possibility of error,[64] that he fails to use a better method of diagnosis,[65] or that his credibility may be subject to attack,[66] affects the weight of his testimony but does not destroy its probative force. A medical opinion which has no substantial basis,[67] or which is based on an incorrect assumption of facts[68] is entitled to no value, but the fact that all of the symptoms on which a physician bases his opinion are not proved does not render his entire opinion valueless.[69] Medical opinions as to total and permanent disability of the insured before the lapse of a war risk policy years before have been held to be without weight.[70]

The necessity and weight of medical testimony in malpractice actions is considered in the C.J.S. title Physicians and Surgeons § 62. See also 48 C.J. p 1150 note 37–p 1151 note 44.

d. Cause and Effect

The weight of an opinion as to cause or effect is for the trier of the facts, and ordinarily it is not necessarily conclusive unless the subject under consideration is one within the knowledge of experts only. To be entitled to weight the testimony must be reasonably definite and consistent, and it must be more than a statement that a certain cause or effect is possible. The facts forming the basis for the opinion must actually exist.

dent Commission of California, 78 P.2d 189, 25 Cal.App.2d 534.

Ability to speak after fatal shock

A physician's professional opinion that a man might be able to speak and walk after receiving an electric shock sufficient to kill him is speculative, opposed to laws of nature and common experience, and of no probative value.—Elcomb Coal Co. v. Gray's Adm'x, 115 S.W.2d 1056, 273 Ky. 230.

No immediate effect after piercing heart

In action on life policy where insurer contended insured had committed suicide by shooting, testimony of physician as expert witness to effect that heart could be pierced without any serious immediate effect could be considered by jury in light of common experience of race.—Ancient Order of United Workmen of Kansas v. Duensing, 95 S.W.2d 900, 192 Ark. 919.

58. Conn.—Naveckas v. Jack, 152 A. 580, 112 Conn. 407.

Pa.—Cox v. Woodlands Cemetery Co., 2 A.2d 565, 133 Pa.Super. 313.

Final expression of view

Where replies of a medical witness to questions were definitely adhered to by him as the truth, he and the jury, so far as they gave him credence, were bound to accept them as his final expression of view, although he finally stated he did not want court or jury to understand his testimony as any stronger than a variant form of question and answer. —Leland v. Order of United Commercial Travelers of America, 124 N.E. 517, 233 Mass. 558.

Effect of different testimony at former trial

On second trial of a case, testimony of a physician is not objectionable because it differs materially from that given by him at a former hearing, for time may have disclosed conditions which the physician, at the earlier hearing, could not foresee.—Cincinnati Traction Co. v. Woodmansee, 16 Ohio App. 314.

59. La.—Virgin v. Dawson, 15 La. Ann. 532—Forsyth v. Despierris, 15 La. 215.

Mo.—Highfill v. Missouri Pac. R. Co., 93 Mo.App. 219.

60. Mo.—Bollinger v. Curtis & Co. Mfg. Co., 249 S.W. 907.

61. Pa.—Nickolls v. Personal Finance Co., 185 A. 286, 322 Pa. 67 —Murphy v. Pennsylvania R. Co., 140 A. 867, 292 Pa. 213.

62. Tex.—St. Louis Southwestern Ry. Co. of Texas v. Horne, 145 S. W. 1186, 105 Tex. 135, affirming, Civ.App., 130 S.W. 1025.

63. Mo.—Freese v. St. Louis Public Service Co., App., 58 S.W.2d 758.

64. Mo.—Roderick v. Metropolitan Life Ins. Co., App., 98 S.W.2d 983.

65. Mo.—Kimmie v. Terminal R. R. Ass'n of St. Louis, 66 S.W.2d 561, 334 Mo. 596.

66. Mo.—Adams v. Carlo, App., 101 S.W.2d 753.

67. U.S.—U. S. v. Doublehead, C.C. A.Okl., 70 F.2d 91—U. S. v. Burns, C.C.A.Fla., 69 F.2d 636—U. S. v. Howard, C.C.A.Fla., 64 F.2d 533, followed in U. S. v. Dunaway, 64 F. 2d 535—Lando v. Equitable Life Assur. Soc. of U. S., D.C.Cal., 11 F.Supp. 729, affirmed, C.C.A., 84 F. 2d 640.

Ark.—Progressive Life Ins. Co. v. Hulbert, 118 S.W.2d 268, 196 Ark. 352.

Ind.—Delano v. Frisinger Const. Co., 198 N.E. 123, 101 Ind.App. 68.

N.C.—Justice v. Southern Ry. Co., 13 S.E.2d 553, 219 N.C. 273.

Opinion based on plaintiff's statements

In patron's action against operator of cafeteria for injuries from eating sea scallops which allegedly were unfit for human consumption, physician's testimony that patron suffered acute poisoning due to sea food was insufficient to establish that scallops were unwholesome and unfit for human consumption, where testimony was based on what patron told physician had been eaten and not on examination or analysis of contents of stomach.—Frankes, Inc., v. Bennett, Ark., 146 S.W.2d 163.

68. La.—Bayles v. Jefferson Standard Life Ins. Co., App., 148 So. 465 —Grober v. Grace Logging Co., 137 So. 613, 18 La.App. 185.

69. N.Y.—People v. Benham, 55 N. E. 11, 160 N.Y. 402, 14 N.Y.Cr. 188.

70. U.S.—U. S. v. Spaulding, Fla., 55 S.Ct. 273, 293 U.S. 498, 79 L. Ed. 617, rehearing denied 55 S.Ct. 504, 294 U.S. 731, 79 L.Ed. 1261— U. S. v. Brewer, C.C.A.Miss., 97 F.2d 899—U. S. v. Rakich, C.C.A. Ark., 90 F.2d 137—Wilner v. U. S., C.C.A.Ill., 87 F.2d 164, certiorari denied 57 S.Ct. 783, 301 U.S. 683, 81 L.Ed. 1341—U. S. v. Driscoll, C.C. A.Ind., 80 F.2d 59, certiorari denied Driscoll v. U. S., 56 S.Ct. 599, 297 U.S. 719, 80 L.Ed. 1004—U. S. v. Krueger, C.C.A.Ind., 77 F.2d 171 —U. S. v. Shashy, C.C.A.Fla., 75 F.2d 422—U. S. v. Baker, C.C.A. Idaho, 73 F.2d 691—Miller v. U. S., C.C.A.Ga., 71 F.2d 361, certiorari granted 55 S.Ct. 212, 293 U.S. 551, 79 L.Ed. 654, affirmed 55 S.Ct. 440, 294 U.S. 435, 79 L.Ed. 977,

As a general rule the weight to be given the opinion of a medical or other expert witness as to the cause or effect of a happening, condition, situation, or circumstance is for the jury or other trier of the facts,[71] and the opinion is not conclusive,[72] but when the subject under consideration is one within the knowledge of experts only, and there is no reason for the exercise of common knowledge, undisputed expert testimony which is based on scientific processes, methods, or knowledge is to be accepted as conclusive by the trier of the facts,[73] provided the credibility of the witness or witnesses is accepted.[74] An expert opinion as to cause or effect may constitute substantial evidence,[75] sufficient to support a finding in accordance with the opinion.[76] Expert evidence as to causal connection is not nec-

rehearing denied 55 S.Ct. 635, 294 U.S. 734, 79 L.Ed. 1262.

71. Cal.—Sim v. Weeks, 45 P.2d 350, 7 Cal.App.2d 28.
Ga.—Hughes v. Weaver, 148 S.E. 12, 39 Ga.App. 597.
Ind.—Abendroth v. Fidelity & Deposit Co. of Maryland, 124 N.E. 714, 73 Ind.App. 50.
Iowa.—Brower v. Chicago, R. I. & P. Ry. Co., 252 N.W. 755, 218 Iowa 317.
Mich.—Ballance v. Dunnington, 224 N.W. 434, 246 Mich. 36.
Neb.—Luedeke v. Chicago & N. W. Ry. Co., 231 N.W. 695, 120 Neb. 124, 71 A.L.R. 912.
N.C.—Keith v. Gregg, 188 S.E. 849, 210 N.C. 802.
Pa.—Schlichtkrull v. Mellon-Pollock Oil Co., 152 A. 832, 301 Pa. 560.
Tex.—Ætna Ins. Co. v. Collins, Civ. App., 134 S.W.2d 709—Gulf, C. & S. F. Ry. Co. v. Young, Civ.App., 284 S.W. 664.
Wash.—Kearney v. Washington Nat. Ins. Co., 52 P.2d 903, 184 Wash. 579.
Wyo.—Northwest States Utilities Co. v. Brouilette, 65 P.2d 223, 51 Wyo. 132, rehearing denied 69 P.2d 623, 51 Wyo. 132.

Opinion as to cause of death

U.S.—Clay County Cotton Co. v. Home Life Ins. Co. of New York, C.C.A.Ark., 113 F.2d 856.
Ind.—Abendroth v. Fidelity & Deposit Co. of Maryland, 124 N.E. 714, 73 Ind.App. 50.
Mich.—Dunwoody v. Royal Indemnity Co., 188 N.W. 498, 218 Mich. 358.
N.C.—Shaw v. National Handle Co., 124 S.E. 325, 188 N.C. 222.
Pa.—Real Estate Trust Co. of Philadelphia v. Metropolitan Life Ins. Co., 17 A.2d 416, 340 Pa. 533.
Tex.—Travelers Ins. Co. v. Culpepper, Civ.App., 82 S.W.2d 1054, error dismissed—Metropolitan Life Ins. Co. v. Funderburk, Civ.App., 81 S.W.2d 132, error dismissed.

Negative testimony

In action, based on statute, for injuries pedestrian sustained in fall when she caught her foot on rail of street railroad's track, testimony of city construction foreman that it was his opinion that depressions by rails were not due to any structural defects in highway was held not to sustain charge that railroad was negligent in construction, management, or use of its tracks.—Bickford v. Boston Elevated Ry. Co., 7 N.E.2d 276, 296 Mass. 580.

72. Ala.—New York Life Ins. Co. v. Horton, 180 So. 277, 235 Ala. 626—Louisville & N. R. Co. v. Jacobson, 118 So. 565, 218 Ala. 384—American Nat. Ins. Co. v. Reed, 160 So. 543, 26 Ala.App. 350, certiorari denied 160 So. 546, 230 Ala. 221.
Cal.—Bennett v. Brady, 61 P.2d 530, 17 Cal.App.2d 114—William Simpson Const. Co. v. Industrial Accident Commission of California, 240 P. 58, 74 Cal.App. 239.
Ga.—Blanchard v. Savannah River Lumber Co., 149 S.E. 793, 40 Ga. App. 416.
Iowa.—Younkin v. Yetter, 181 N.W. 793, 192 Iowa 279.
Ky.—Kentucky Cent. Life & Accident Ins. Co. v. Jones, 57 S.W.2d 72, 247 Ky. 432—Pacific Mut. Life Ins. Co. v. Cash, 6 S.W.2d 239, 224 Ky. 292.
Mass.—Coddaire v. Sibley, 169 N.E. 797, 270 Mass. 41.
Minn.—Posch v. Payne, 186 N.W. 132, 151 Minn. 111—Villicott v. Sovereign Camp of Woodmen of the World, 177 N.W. 356, 145 Minn. 349.
Mo.—Thomas v. Modern Woodmen of America, 260 S.W. 552, 218 Mo.App. 10.
N.H.—Simoneau v. Prudential Ins. Co. of America, 200 A. 385, 89 N.H. 402.
N.Y.—New York Canners v. Milbourne, 160 N.E. 914, 247 N.Y. 460, reversing 215 N.Y.S. 891, 217 App. Div. 714.
Wis.—Millard v. North River Ins. Co., 228 N.W. 746, 201 Wis. 69—McCarthy v. Industrial Commission, 215 N.W. 824, 194 Wis. 198.

73. Cal.—Hines v. Industrial Accident Commission, 8 P.2d 1021, 215 Cal. 177—William Simpson Const. Co. v. Industrial Accident Commission of California, 240 P. 58, 74 Cal.App. 239.
Tenn.—Prudential Ins. Co. of America v. Davis, 78 S.W.2d 358, 18 Tenn.App. 413.
Wis.—Gerber v. Wloszczynski, 206 N.W. 206, 188 Wis. 344.

74. Ala.—New York Life Ins. Co. v. Horton, 180 So. 277, 235 Ala. 626—Ætna Life Ins. Co. v. Norfleet, 169 So. 225, 232 Ala. 599—Alabama Power Co. v. Sides, 155 So. 686, 229 Ala. 84.
Md.—Armour & Co. v. Leasure, 9 A. 2d 572, 177 Md. 393.
Mo.—Wills v. Berberich's Delivery Co., 134 S.W.2d 125, 345 Mo. 616—Conduitt v. Trenton Gas & Electric Co., 31 S.W.2d 21, 326 Mo. 133—Krug v. Mutual Life Ins. Co. of New York, App., 149 S.W.2d 393.
Tex.—Metropolitan Life Ins. Co. v. Funderburk, Civ.App., 81 S.W.2d 132, error dismissed.
Va.—Barnard Bus Lines v. Weeks, 158 S.E. 870, 156 Va. 465.
Wash.—Graham v. Police & Firemen's Ins. Ass'n, 116 P.2d 352.

Medical opinion as to effect of injuries

(1) Medical expert opinions of conditions naturally to be expected and to follow from given personal injuries are of great value.—Posch v. Payne, 186 N.W. 132, 151 Minn. 111.

(2) Court must be guided by medical experts' advice in determining whether trauma, by setting lurking diseases into action, may cause serious results which would not otherwise have occurred.—Brooks v. Lewis-Chambers Const. Co., 128 So. 321, 13 La.App. 402.

75. Ark.—Payne v. Thurston, 230 S. W. 561, 148 Ark. 456.

76. U.S.—Champlin Refining Co. v. Thomas, C.C.A.Okl., 93 F.2d 133.
Cal.—Sim v. Weeks, 45 P.2d 350, 7 Cal.App.2d 28—Kerby v. Elk Grove Union High School Dist., 36 P.2d 431, 1 Cal.App.2d 246.
Conn.—Quackenbush v. Vallario, 159 A. 893, 114 Conn. 652.
Mass.—Blosck's Case, 179 N.E. 223, 277 Mass. 451.
Ohio.—Nath v. S. S. Kresge Co., 7 N.E.2d 4, 54 Ohio App. 315.
Okl.—Skelly Oil Co. v. Collins, 74 P.2d 619, 181 Okl. 428.
Pa.—Curry v. J. M. Willson & Sons, 152 A. 746, 301 Pa. 467—Johnston v. Payne-Yost Const. Co., 141 A. 481, 292 Pa. 509—Rice v. Stevens Coal Co., 181 A. 516, 120 Pa.Super. 15—Younch v. Pittsburgh Terminal Coal Corporation, 180 A. 30, 118 Pa.Super. 396—Wallace v. Allen, 175 A. 878, 115 Pa.Super. 347—Evans v. Younkin, 31 Pa.Dist. & Co. 535.
S.C.—Sweeney v. Southern Ry. Co., 163 S.E. 838, 165 S.C. 380.
Tex.—Holt v. Lowden, Civ.App., 140 S.W.2d 318—Western Telephone Corporation of Texas v. McCann, Civ.App., 126 S.W.2d 1004, error dismissed, judgment correct.
Wash.—Cleveland v. Grays Harbor

essary where facts are testified to by lay witnesses with sufficient clearness that laymen in ordinary affairs of life can infer cause from effect,[77] but, where an injury is of such a character as to require skilled and professional men to determine the cause thereof, the question is one of science which must be proved by the testimony of skilled and professional men.[78]

Necessity and weight of expert testimony in proceedings for workmen's compensation is considered in the C.J.S. title Workmen's Compensation Acts § 555, also 71 C.J. p 1117 note 52–p 1118 note 68.

Possibility and probability. To be entitled to weight the testimony must be reasonably definite and consistent,[79] and it must show that in the expert's opinion the certain cause or effect does or will exist,[80] or at least that a reasonable certainty as to its existence is present in his mind.[81] Testimony that a certain cause or effect is possible, conceivable, or reasonable does not constitute substantial evidence,[82] but testimony that a relation of cause and effect probably exists may be sufficient,[83] and the recognition of the possibility of another cause does not wholly destroy the probative force of expert evidence specifying a certain cause.[84] A statement of an expert that a result from a certain cause is scientifically possible is of some aid to the jury.[85]

Facts and reasons supporting opinion. For the opinion to be of weight the facts on which it is based must be shown to exist.[86] An opinion based on assumed facts which vary materially from the actual facts is without probative force,[87] and is

Dairy Products, 74 P.2d 909, 193 Wash. 122.

Wis.—Kortendick v. Waterford, 125 N.W. 945, 142 Wis. 413.

77. Pa.—Procz v. American Steel & Wire Co. of New Jersey, 178 A. 689, 318 Pa. 395.

78. Okl.—Griesel v. Fabian, 84 P.2d 634, 184 Okl. 42.

79. Md.—Slacum v. Jolley, 138 A. 244, 153 Md. 343.

Pa.—Mudano v. Philadelphia Rapid Transit Co., 137 A. 104, 289 Pa. 51.

80. Pa.—Johnston v. Payne-Yost Const. Co., 141 A. 481, 292 Pa. 509—Di Fazio v. J. G. Brill Co., 3 A.2d 216, 133 Pa.Super. 576—Carey v. Schwartz, 8 A.2d 203, 133 Pa. Super. 604—Varner v. Lorain Steel Co., 96 Pa.Super. 336.

Manner of expression

(1) Expert professional opinion need not be expressed in any particular words to warrant the trier of the facts in basing conclusion on such opinion.—Curry v. J. M. Willson & Sons, 152 A. 746, 301 Pa. 467—Swingle v. Mill Creek Coal Co., 176 A. 828, 116 Pa.Super. 97.

(2) Statements such as "I think" or "I feel" are sufficient.

Pa.—Swingle v. Mill Creek Coal Co., supra.

Wash.—Stevich v. Department of Labor and Industries, 47 P.2d 32, 182 Wash. 401.

Opinion based on experience

A statement by a physician testifying as to the nature of plaintiff's injury, and its probable duration, that he was speaking just from his experience, manifestly was intended to refer to his experience as a physician, and added weight to, instead of detracting from, his testimony, and therefore did not reduce his opinion to the value only of that of a layman.—American Ry. Express Co. v. Lancaster, 251 S.W. 670, 199 Ky. 584.

81. N.Y.—McLaughlin v. Curtis Quillen Co., 227 N.Y.S. 712, 223 App.Div. 208.

82. U.S.—Massachusetts Protective Ass'n v. Mouber, C.C.A.Mo., 110 F. 2d 203.

Ariz.—Western Truck Lines v. Berry, 87 P.2d 484, 53 Ariz. 216.

Iowa.—Shepard v. Carnation Milk Co., 262 N.W. 110, 220 Iowa 466.

Ky.—Provident Life & Accident Ins. Co. of Chattanooga, Tenn., v. Diehlman, 82 S.W.2d 350, 259 Ky. 320—Equitable Life Assur. Soc. of U. S. v. Burns, 71 S.W.2d 1009, 254 Ky. 487—Consolidated Coach Corporation v. Eckler, 58 S.W.2d 582, 248 Ky. 309.

Mass.—Halnan v. New England Telephone & Telegraph Co., 5 N.E.2d 209, 296 Mass. 219—De Filippo's Case, 188 N.E. 245, 284 Mass. 531.

Miss.—Teche Lines v. Bounds, 179 So. 747, 182 Miss. 638.

Mo.—Hunt v. Armour & Co., 136 S.W.2d 312, 345 Mo. 677—Scanlon v. Kansas City, 81 S.W.2d 939, 336 Mo. 1058—Fritz v. Manufacturers Ry. Co., App., 124 S.W.2d 603.

N.Y.—Wood v. W. E. Joyce Co., 239 N.Y.S. 110, 228 App.Div. 729—McLaughlin v. Curtis Quillen Co., 227 N.Y.S. 712, 223 App.Div. 208.

Pa.—Sullivan v. Baltimore & O. R. Co., 116 A. 369, 272 Pa. 429, certiorari denied Baltimore & O. R. Co. v. Sullivan, 42 S.Ct. 272, 258 U.S. 621, 66 L.Ed. 795—Dell v. State Workmen's Ins. Fund, 179 A. 889, 118 Pa.Super. 541—Waleski v. Susquehanna Collieries Co., 164 A. 355, 108 Pa.Super. 342.

Vt.—Howley v. Kantor, 163 A. 628, 105 Vt. 128.

Wis.—Gerber v. Wloszczynski, 206 N.W. 206, 188 Wis. 344.

"Extremely possible"

The testimony of an expert that it is "extremely possible and likely" that a pain or disease resulted from an injury is not equivalent to an assertion of a professional opinion that in fact it actually did so.—Di Fazio v. J. G. Brill Co., 3 A.2d 216, 133 Pa. Super. 576.

83. Ky.—Provident Life & Accident Ins. Co. of Chattanooga, Tenn., v. Diehlman, 82 S.W.2d 350, 259 Ky. 320.

Mass.—De Filippo's Case, 188 N.E. 245, 284 Mass. 531.

84. Mass.—Blanchard's Case, 178 N.E. 606, 277 Mass. 413.

Inability to testify positively

Physician's testimony is sufficient, if, in his opinion, causal connection exists between injury and disease, although he declared no one could tell positively whether plaintiff's condition might not have occurred in absence of injury.—Curry v. J. M. Willson & Sons, 152 A. 746, 301 Pa. 467.

85. Mo.—Kimmie v. Terminal R. R. Ass'n of St. Louis, 66 S.W.2d 561 334 Mo. 596—Lewis v. National Bellas Hess, App., 152 S.W.2d 671.

86. N.Y.—Mallory v. International Ry. Co., 231 N.Y.S. 385, 224 App. Div. 455.

Pa.—Lubowicki v. Metropolitan Life Ins. Co., 174 A. 649, 114 Pa.Super. 596.

87. Ind.—Benefit Ass'n of Ry. Employees v. Hulet, 26 N.E.2d 548, 107 Ind.App. 633.

Tex.—Steed v. Gulf, C. & S. F. Ry. Co., Com.App., 231 S.W. 714, affirming Gulf, C. & S. F. Ry. Co. v. Steed, Civ.App., 209 S.W. 772—Lone Star Gas Co. v. Lazzara, Civ. App., 152 S.W.2d 824.

Wis.—Alberti v. Gordon, 272 N.W. 352, 224 Wis. 439.

insufficient to warrant submission of the issue to the jury[88] or to sustain a verdict.[89] Mere conjecture or speculation has no probative force,[90] and is insufficient to sustain a verdict.[91]

e. Damages

The weight of expert testimony as to damages is for the trier of the facts. The opinion may constitute substantial evidence but it must be founded on a proper basis.

The weight of expert testimony as to the extent of injury or the amount of damages is for the jury, trial court, or other triers of the facts,[92] and it is not conclusive,[93] but undisputed testimony cannot be arbitrarily disregarded, and a verdict given which is not supported by evidence.[94] The testimony may constitute substantial evidence[95] sufficient to support a verdict or finding.[96] An opinion based on an assumption which is contrary to the actual facts must be disregarded,[97] and, where the opinion is not founded on a reasonable basis for computing damages, or on sufficient supporting facts, it will be insufficient to support a verdict as to damages.[98] That a qualified witness states he is using his private opinion as to damages only affects his credibility as a witness.[99]

f. Due Care and Proper Conduct

The weight of opinions as to due care and proper conduct are for the trier of the facts and, although they cannot be arbitrarily disregarded, they are not conclusive. An opinion may be sufficient to support a verdict or finding, but not if it has no foundation in fact.

The weight of opinions as to matters pertaining to due care and proper conduct are for the jury, court, or other triers of the facts,[1] and such opinions are not conclusive,[2] but the trier of the facts cannot arbitrarily disregard such testimony.[3] An opinion may be entitled to great weight,[4] and it may be sufficient to authorize the submission of the question of due care to the jury,[5] and to authorize a

88. U.S.—Mutual Life Ins. Co. of New York v. Gregg, C.C.A.Ohio, 32 F.2d 567.

89. Kan.—Kelsey v. Armour & Co., 241 P. 453, 119 Kan. 837.

90. Ky.—Prudential Ins. Co. of America v. Howard's Assignee, 80 S.W.2d 21, 258 Ky. 366.
Mont.—Moffett v. Bozeman Canning Co., 26 P.2d 973, 95 Mont. 347.
Pa.—Clark v. Pennsylvania Power & Light Co., 6 A.2d 892, 336 Pa. 75.
Wis.—Dreher v. Order of United Commercial Travelers of America, 180 N.W. 815, 173 Wis. 173.

Value in proportion to conjecture
The value and probative force diminishes in proportion as the evidence clearly indicates to the practical lay mind a professional entry for support into the field of conjecture and theoretical uncertainties and doubts.—Pesch v. Payne, 186 N. W. 132, 151 Minn. 111.

Logical sequence of events
Conclusions of expert must follow logical and natural sequence of events, and are strengthened by what actually happened.—Curry v. J. M. Willson & Sons, 152 A. 746, 301 Pa. 467.

91. Minn.—Mageau v. Great Northern R. Co., 119 N.W. 200, 106 Minn. 375.

92. U.S.—Blanton v. Great Atlantic & Pacific Tea Co., C.C.A.Ga., 61 F. 2d 427, certiorari denied 53 S.Ct. 405, 288 U.S. 609, 77 L.Ed. 984.
Mich.—In re Dillman, 248 N.W. 894, 263 Mich. 542—Danielski v. Lukomski, 169 N.W. 887, 204 Mich. 304.
Mo.—Bumgardner v. St. Louis Public Service Co., 102 S.W.2d 594, 340 Mo. 521—Mallette v. City of St. Louis, 236 S.W. 63.

93. Conn.—McGrath v. City of Waterbury, 149 A. 783, 111 Conn. 237.
N.Y.—Adirondack Power & Light Corporation v. Evans, 235 N.Y.S. 569, 226 App.Div. 490—In re School Site on Fifth Ave. Adjoining Public School 171 in City of New York, 227 N.Y.S. 239, 223 App.Div. 63—Hawley v. Village of Elmira Heights, 297 N.Y.S. 732, 163 Misc. 787.

94. U.S.—The B. F. Guinan, D.C.N.Y., 40 F.2d 277—Watjen v. Louisville Tobacco Warehouse Co., C.C.A.Ky., 29 F.2d 801.

95. Mo.—Bumgardner v. St. Louis Public Service Co., 102 S.W.2d 594, 340 Mo. 521.

96. U.S.—Whipple v. U. S., D.C. Mass., 25 F.2d 520.
Cal.—Albaugh v. Mt. Shasta Power Corporation, 73 P.2d 217, 9 Cal.2d 751.
La.—Madison Lumber Co. v. Alson, 138 So. 469, 18 La.App. 638.
Md.—Ericsson Line v. Hawkins, 198 A. 429, 174 Md. 223.
Mo.—Hillin v. La Fayette Land Farming Co., App., 296 S.W. 243—Hutton v. Metropolitan St. R. Co., 150 S.W. 722, 166 Mo.App. 645.

97. N.Y.—In re Ft. Schuyler Road in City of New York, 204 N.Y.S. 161, 209 App.Div. 25.
Tenn.—Black v. Smith, 84 S.W.2d 593, 19 Tenn.App. 195.

98. Ky.—Cincinnati, N. O. & T. P. Ry. Co. v. Gano & Burgess, 284 S.W. 423, 215 Ky. 49.
Pa.—Western Show Co. v. Mix, 162 A. 667, 308 Pa. 215.

99. Tex.—Wichita Valley Ry. Co. v. Martin & Walker, Civ.App., 219 S. W. 559.

1. Cal.—Jewell v. Bell, 8 P.2d 223, 120 Cal.App. 682.
Ind.—Pittsburgh, C., C. & St. L. R. Co. v. Edwards, 129 N.E. 310, 190 Ind. 57.
Mich.—Finch v. W. R. Roach Co., 295 N.W. 324, 295 Mich. 589.
N.C.—Hardy v. Dahl, 187 S.E. 788, 210 N.C. 530.

Pouring oil on fire
Evidence of an expert that oil may be poured on fire in a stove without producing an explosion does not tend to disprove common knowledge that it is not an act of safety.—Olena v. Standard Oil Co., 135 A. 27, 82 N.H. 408.

2. Cal.—Southern Pac. Co. v. City of Los Angeles, 55 P.2d 847, 5 Cal. 2d 545.
Mass.—Neiss v. Burwen, 191 N.E. 654, 287 Mass. 82.
Neb.—Harris v. Central Power Co., 191 N.W. 711, 109 Neb. 500.
Wyo.—Jackson v. Hansard, 17 P.2d 659, 45 Wyo. 201.

3. Cal.—Hutchinson v. Miller & Lux, 212 P. 394, 60 Cal.App. 1.

4. U.S.—Maloney v. U. S., D.C.N.Y., 7 F.Supp. 14.

Opinion of mariner of long experience
In determining whether seaman's death was caused by negligence of those in command, what master, a mariner of long experience, deemed good seamanship and reasonably safe operation for the crew, was held to carry weight in absence of situation clearly indicating the contrary.—Maloney v. U. S., supra.

5. Pa.—Muller v. A. B. Kirschbaum Co., 148 A. 851, 298 Pa. 560.

finding of negligence.[6] An expert opinion which has no foundation in fact cannot support a verdict or finding.[7]

g. Laws of Other States or Countries

An expert's uncontroverted statement of the law of another state or country is to be accepted as true by the court unless the authority on which the statement is based is made accessible to the court. An expert's opinion as to the meaning or effect of a foreign law which is in evidence is not conclusive but it should not be arbitrarily disregarded.

An expert's uncontroverted statement of the law of another state or country, in the absence of the statute or authority on which the statement is based, is to be accepted as true by the court,[8] but, where the authority on which the witness bases his statement is presented or made accessible by reference, the court is not bound by the construction which the witness places on the authority, but it may determine the law for itself.[9] The opinion of an expert as to the meaning or effect of a foreign law which is in evidence is not conclusive on the court, and the court may use its own judgment in the construction thereof,[10] but uncontradicted testimony should not be arbitrarily disregarded,[11] and, in the absence of judicial decisions, where the proper construction of a statute is open to reasonable doubt, the opinion of an expert should not be ignored unless clearly obnoxious to the written law.[12] The weight of an opinion that a foreign law is applicable depends on the reasons advanced and authorities cited.[13]

h. Mental Condition or Capacity

The weight of expert opinions as to mental condition or capacity is for the trier of the facts and they are not ordinarily conclusive or binding even though uncontradicted. An opinion may possess probative force but it is entitled to no weight as against positive facts to the contrary. The reasons and facts supporting the opinion, and examination or observation by the witness, are factors determinative of weight.

In accordance with the general rule, the weight of expert opinions as to mental condition or capacity is for the jury or other trier of the facts,[14]

6. U.S.—U. S. Radiator Corporation v. Henderson, C.C.A.Colo., 68 F.2d 733, denying rehearing 68 F.2d 87 and certiorari denied 54 S.Ct. 860, 292 U.S. 650, 78 L.Ed. 1500.
N.H.—Bill v. New England Cities Tce Co., 10 A.2d 662, 90 N.H. 453.

7. U.S.—Thonnesen v. Montgomery Ward & Co., D.C.N.Y., 33 F.Supp. 81.
Md.—Lowenthal v. Backus Motor Co., 116 A. 834, 140 Md. 33.
W.Va.—Crotty v. Virginian Ry. Co., 177 S.E. 609, 115 W.Va. 558.

8. Ky.—J. T. Morgan Lumber Co. v. Williams, 136 S.W. 131, 143 Ky. 115.
22 C.J. p 733 note 99 [d].
Statement accepted as true
N.Y.—Stern v. S. S. Steiner, Inc., 12 N.Y.S.2d 44.

9. Ky.—Central Consumers' Co. v. Ralston, 259 S.W. 67, 202 Ky. 94—Pittsburg, C., C. & St. L. Ry. Co. v. Austin's Adm'r, 133 S.W. 780, 141 Ky. 722.

10. U.S.—Merinos Viesca Y Compania v. Pan American Petroleum & Transport Co., C.C.A.N.Y., 83 F. 2d 240, certiorari denied 57 S.Ct. 10, 299 U.S. 547, 81 L.Ed. 403.
La.—H. T. Cottam & Co., v. Comision Reguladora del Mercado de Henequen, 90 So. 392, 149 La. 1026.
Mass.—Martin v. Otis, 124 N.E. 294, 233 Mass. 491, 6 A.L.R. 1340.
N.Y.—Moscow Fire Ins. Co. v. Bank of New York & Trust Co., 20 N. E.2d 758, 280 N.Y. 286, affirming 3 N.Y.S.2d 653, 253 App.Div. 644, affirming 294 N.Y.S. 648, 161 Misc. 903, affirmed 1 N.Y.S.2d 640, 253 App.Div. 710, and 1 N.Y.S.2d 641, 253 App.Div. 710, appeal dismissed Moscow Fire Ins. Co. v. Bank of New York & Trust Co., 16 N.E.2d 854, 278 N.Y. 709, and reargument denied 21 N.E.2d 890, 280 N.Y. 848, certiorari granted U. S. v. Moscow Fire Ins. Co., 60 S.Ct. 129, 308 U.S. 542, 84 L.Ed. 456, rehearing denied 60 S.Ct. 706, 309 U.S. 697, 84 L.Ed. 1036, and motion denied Moscow Fire Ins. Co. v. Bank of New York & Trust Co., 24 N. E.2d 487, 281 N.Y. 818, affirmed U. S. v. Moscow Fire Ins. Co., 60 S.Ct. 725, 309 U.S. 624, 84 L.Ed. 986—Masocco v. Schaaf, 254 N.Y. S. 439, 234 App.Div. 181.
S.C.—Rauton v. Pullman Co., 191 S. E. 416, 183 S.C. 495.
Tex.—Russek v. Angulo, Civ.App., 236 S.W. 131, error refused.
Judicial notice of federal statutes
Evidence within the text rule is not conclusive where the matter is dependent on federal statutes of which the court must take judicial notice.—Western Union Tel. Co. v. White, Tex.Civ.App., 162 S.W. 905.
Construction of state statute by federal court
A federal court is not bound to accept the conclusions of inferior court judges of a state, testifying as to what may be done under a statute of that state, but may examine for itself the statute and decisions of the courts of that state.—City of Jamestown v. Pennsylvania Gas Co., C.C. A.N.Y., 1 F.2d 871, modifying, D.C., 263 F. 437, 264 F. 1009.
Opinion based on erroneous assumption
Opinion that corporate personality of Russian bank had terminated was unavailing because founded on erroneous assumption that decrees of Soviet government had force of law.—Petrogradsky Mejdunarodny Kommerchesky Bank v. National City Bank of New York, 170 N.E. 479, 253 N.Y. 23, reversing 235 N.Y.S. 862, 226 App.Div. 866, which affirmed Banque Internationale De Commerce De Petrograd v. National City Bank of New York, 233 N.Y.S. 255, 133 Misc. 527, and reargument denied Petrogradsky Mejdunarodny Kommercheskу Bank v. National City Bank of New York, 173 N.E. 867, 254 N.Y. 563, certiorari denied National City Bank of New York v. Petrogradsky Mejdunarodny Kommerchesky Bank, 51 S.Ct. 82, 282 U.S. 878, 75 L.Ed. 775.

11. U.S.—Elkins v. Commissioner of Internal Revenue, C.C.A., 91 F.2d 534, certiorari granted Helvering v. Elkins, 58 S.Ct. 147, 302 U.S. 677, 82 L.Ed. 523, reversed on other grounds 58 S.Ct. 379, 302 U.S. 573, 82 L.Ed. 431—Biddle v. Commissioner of Internal Revenue, C.C.A., 86 F.2d 718, certiorari granted 58 S.Ct. 10, 302 U.S. 664, 82 L.Ed. 512, affirmed 58 S.Ct. 379, 302 U.S. 573, 82 L.Ed. 431.

12. S.C.—Rauton v. Pullman Co., 191 S.E. 416, 183 S.C. 495.

13. N.Y.—Robert Reis & Co. v. New York Trust Co., 239 N.Y.S. 568, 136 Misc. 141.

14. U.S.—U. S. v. Cannon, C.C.A. Mass., 116 F.2d 567.
Ala.—Grabove v. Mutual Ben. Health & Accident Ass'n, 1 So.2d 297.
Ark.—Nelon v. Nelon, 284 S.W. 743, 171 Ark. 505.
Cal.—In re Sandman's Estate, 8 P.2d 499, 121 Cal.App. 9.

and they are not ordinarily conclusive or binding,[15] even though uncontradicted.[16] An opinion may possess evidentiary weight or probative force[17] sufficient to take the question of mental capacity to the jury,[18] but it is entitled to little or no weight as against positive facts to the contrary.[19] The attending physician's testimony is entitled to great weight[20] and when uncontradicted it may, under the circumstances of the case, be given conclusive force.[21] Expert testimony which bears no rational relation to the subject involved is of no weight.[22] The opinion of medical experts whose testimony does not differentiate between a medically sound mind and a legally sound mind is entitled to weight only when the other evidence shows that it applies to legal unsoundness, as a mind legally sound may be medically unsound.[23]

Reasons and facts supporting opinion. The reasons given in support of the opinions rather than the abstract opinions are of importance,[24] and the opinion is of no greater value than the reasons given in its support.[25] If no rational basis for the opinion appears, or if the facts from which the opinion was derived do not justify it, the opinion is of no probative force,[26] and it does not constitute evidence sufficient to authorize submission of the issue to the jury[27] or to sustain a finding or verdict,[28] but an opinion may be sufficient to take a

Ind.—Ailes v. Ailes, 11 N.E.2d 73, 104 Ind.App. 302.
Nev.—Effinger v. Effinger, 239 P. 801, 48 Nev. 205.
Ohio.—Ross v. Stewart, 15 Ohio App. 339—Moore v. Caldwell, 27 Ohio Cir.Ct. 449.
Wis.—In re Jones' Will, 70 N.W. 685, 96 Wis. 427, rehearing denied 71 N.W. 883, 96 Wis. 427.

15. Ariz.—Sapp v. Lifrand, 36 P.2d 794, 44 Ariz. 321.
Cal.—In re Sandman's Estate, 8 P. 2d 499, 121 Cal.App. 9.
Mo.—Berkemeier v. Reller, 296 S.W. 739, 317 Mo. 614.
N.J.—In re Halton's Estate, 161 A. 809, 111 N.J.Eq. 143.
Va.—Jenkins v. Trice, 147 S.E. 251, 152 Va. 411.
Wash.—Sumerlin v. Department of Labor and Industries, 111 P.2d 603.

Opinions as to intoxication

(1) Opinions based on percentages of alcohol in the blood and tests conducted for the purpose of determining degrees of intoxication are not sufficiently certain and accurate to make such opinions or deductions at all conclusive because of individuals' tolerance of alcohol.—Kuroske v. Ætna Life Ins. Co. of Hartford, Conn., 291 N.W. 384, 234 Wis. 394, 127 A.L.R. 1505.

(2) Opinions of physicians based on smell of liquor on employee's vomitus after accident as to employee's inability from intoxication to drive car was held not to sustain employer's burden to show employee's intoxication.—Evans v. Louisiana Gas & Fuel Co., 140 So. 245, 19 La.App. 529.

16. Mo.—Clingenpeel v. Citizens' Trust Co. of Boonville, Mo., 240 S. W. 177.

17. Cal.—In re Christin's Estate, 17 P.2d 1068, 128 Cal.App. 625.
Ky.—Centers v. Jones, 43 S.W.2d 512, 241 Ky. 154.
Mich.—In re Slepski's Estate, 235 N. W. 176, 253 Mich. 340.
Wash.—In re Dawson's Estate, 220 P. 764, 127 Wash. 205.

18. Ky.—Franzman's Ex'rs v. Nalty, 271 S.W. 1034, 208 Ky. 686—Humphrey v. Neal, 251 S.W. 637, 199 Ky. 498.
Md.—Davidove v. Duvall, 153 A. 417, 160 Md. 345.
68 C.J. p 1082 note 90.

19. Mo.—Rankin v. Rankin, 61 Mo. 295.
N.Y.—In re Hewitt's Will, 64 N.Y.S. 571, 31 Misc. 81.
Pa.—In re Morgan's Estate, 68 A. 953, 219 Pa. 355—In re Klein, 56 A. 422, 207 Pa. 191.

20. Va.—Price's Ex'r v. Barham, 137 S.E. 511, 147 Va. 478—Forehand v. Sawyer, 136 S.E. 683, 147 Va. 105—Shacklett v. Roller, 34 S.E. 492, 97 Va. 639—Montague v. Allan's Ex'r, 78 Va. 592, 49 Am.R. 384.
Wash.—In re Riley's Estate, 300 P. 159, 163 Wash. 119.
W.Va.—Ward v. Brown, 44 S.E. 488, 53 W.Va. 227—Kerr v. Lunsford, 8 S.E. 493, 31 W.Va. 659, 2 L.R.A. 668—Nicholas v. Kershner, 20 W. Va. 251—Jarrett v. Jarrett, 11 W. Va. 584.

21. Md.—Livingston v. Safe Deposit & Trust Co. of Baltimore, 146 A. 432, 157 Md. 492.

22. Ky.—Dossenbach v. Reidhar's Ex'x, 53 S.W.2d 731, 245 Ky. 449.

23. Me.—In re American Foreign Mission Com'rs, 66 A. 215, 102 Me. 72.

24. Cal.—American Trust Co. v. Dixon, 78 P.2d 449, 26 Cal.App.2d 426.

25. Cal.—In re Nolan's Estate, 78 P. 2d 456, 25 Cal.App.2d 738.

26. U.S.—New York Life Ins. Co. v. King, C.C.A.Mo., 93 F.2d 347.
Ark.—Puryear v. Puryear, 94 S.W. 2d 695, 192 Ark. 692.
Iowa.—In re Hook's Will, 178 N.W. 357, 189 Iowa 287.
Ky.—Dossenbach v. Reidhar's Ex'x, 53 S.W.2d 731, 245 Ky. 449.
Md.—Mangione v. Snead, 195 A. 329, 173 Md. 33—Acker v. Acker, 192 A. 327, 172 Md. 477.

Testimony based on use of intoxicants

It being contended that testatrix' inordinate use of alcohol for several years before death caused testamentary incapacity, testimony based on hypothetical questions addressed to specialists in nervous and mental diseases who did not know testatrix is of little or no value, since the effect of intoxicants on the physical and nervous system varies greatly in different individuals.—Fernstrom v. Taylor, 145 So. 208, 107 Fla. 490.

Facts not recognized by law as showing incapacity

(1) An opinion based on facts which the law does not recognize as showing incapacity to make a will is of no substantial value on the issue of testamentary capacity.
Mo.—Stevens v. Meadows, 100 S.W. 2d 281, 340 Mo. 252—Sayre v. Trustees of Princeton University, 90 S.W. 787, 192 Mo. 95.
Pa.—In re Cookson's Estate, 188 A. 904, 325 Pa. 81—In re Phillips' Estate, 149 A. 719, 299 Pa. 415.

(2) Thus a physician's opinion that testator lacked testamentary capacity, based on witness' opinion that testator was a miser, was held without probative value.—Dossenbach v. Reidhar's Ex'x, 53 S.W.2d 731, 245 Ky. 449.

27. Ky.—Godman v. Aulick, 87 S.W. 2d 612, 261 Ky. 268.
68 C.J. p 1082 note 91.

28. Cal.—In re Waite's Guardianship, 97 P.2d 238, 14 Cal.2d 727, superseding, App., 91 P.2d 617.
Ky.—Godman v. Aulick, 87 S.W.2d 612, 261 Ky. 268—Newman v. Dixon Bank & Trust Co., 265 S.W. 456, 205 Ky. 31.
Mo.—Nute v. Fry, 111 S.W.2d 84, 341 Mo. 1138—Rex v. Masonic Home of Missouri, 108 S.W.2d 72, 341 Mo. 589—Hall v. Mercantile Trust Co., 59 S.W.2d 664, 332 Mo. 802.
Wis.—Dahlberg v. Jones, 285 N.W. 841, 232 Wis. 6.

case to the jury although some of the facts related do not support the opinion.[29] An abstract opinion as to mental capacity is of no weight when the facts on which it is based are not stated.[30] An opinion based on hypothetical facts which are at variance with the facts in evidence is of little or no value,[31] and is insufficient to raise an issue for the jury[32] or to support a verdict or finding.[33]

The opinion of one who has examined or observed the subject is entitled to greater weight than the opinion of a witness who has not done so.[34] The testimony of medical experts based on knowledge, observation, or treatment may properly be accorded more weight than the testimony of nonprofessional witnesses,[35] but it is not necessarily entitled to more weight,[36] and testimony based merely on hypothetical questions is not necessarily superior to an ordinary observer's opinion.[37] The opinion of an alienist or medical expert who has never seen the subject and who testifies in answer to hypothetical questions has been held to be weak and unsatisfactory evidence,[38] of little probative force,[39] and it has been stated that it should be received with caution and carefully scrutinized.[40] An opinion based on observations at a time which is remote from the time at which mental incompetency is alleged is of little or no probative value.[41]

i. Nature, Condition, and Relation of Objects

The weight of testimony of experts as to the nature, condition, or relation of objects is to be determined by the trier of the facts in the light of common knowledge and experience. An opinion of a well qualified witness may be entitled to considerable weight and it must not be arbitrarily disregarded.

The weight of the testimony of experts as to the nature, condition, or relation of objects is to be determined by the trier of the facts,[42] and it may be considered in the light of common knowledge and experience.[43] Where the witness is well qualified

29. Ky.—Humphrey v. Neal, 251 S.W. 637, 199 Ky. 498.

30. N.J.—Loveridge v. Brown, 129 A. 131, 98 N.J.Eq. 381.
Pa.—In re Olshefski's Estate, 11 A.2d 487, 337 Pa. 420.

31. Ark.—Taylor v. McClintock, 112 S.W. 405, 87 Ark. 243.
Ill.—Pendarvis v. Gibb, 159 N.E. 353, 328 Ill. 282.
Ind.—Ailes v. Ailes, 11 N.E.2d 73, 104 Ind.App. 302—Deery v. Hall, 175 N.E. 141, 96 Ind.App. 683.
Iowa.—Howe v. Richards, 83 N.W. 909, 112 Iowa 220.
Kan.—Pierce v. Pierce, 64 P.2d 576, 145 Kan. 14.
Ky.—Rueff v. Light, 114 S.W.2d 506, 272 Ky. 449.
Md.—Horner v. Buckingham, 64 A. 41, 103 Md. 556.
Mo.—Berkemeier v. Reller, 37 S.W.2d 430.
N.J.—Grant v. Stamler, 59 A. 890, 68 N.J.Eq. 555—In re Andrews' Will, 33 N.J.Eq. 514.
N.Y.—Ivison v. Ivison, 80 N.Y.S. 1011, 80 App.Div. 599—In re Lawrence's Will, 62 N.Y.S. 673, 48 App. Div. 83—In re Seagrist's Will, 37 N.Y.S. 496, 1 App.Div. 615, 73 N.Y.St. 188, affirmed 48 N.E. 1107, 153 N.Y. 682—In re Wendel's Will, 89 N.Y.S. 543, 43 Misc. 571, 4 Mills Surr. 325—In re Hewitt's Will, 64 N.Y.S. 571, 31 Misc. 81, 1 Mills Surr. 513—In re Conner's Will, 61 N.Y.S. 910, 29 Misc. 391, 1 Mills Surr. 301—In re Lawrence's Will, 59 N.Y.S. 174, 27 Misc. 473, 1 Mills Surr. 105, affirmed 62 N.Y.S. 673, 48 App.Div. 83—In re Kiedaisch's Will, 13 N.Y.S. 255, 2 Conn.Surr. 438—In re Lyddy's Will, 4 N.Y.S. 468, 17 N.Y.St. 2, affirmed 5 N.Y.S. 636, 53 Hun 629, 2 Silv.Sup. 223.
Pa.—In re Draper's Estate, 64 A. 520, 215 Pa. 314—In re Richmond's Estate, 55 A. 970, 206 Pa. 219.
Philippine.—Samson v. Quintin, 44 Philippine 573.

Application to testimony based on personal observation

Rule that medical experts' opinions, based on hypothetical questions, may be disregarded when facts hypothesized are without reasonable foundation, is inapplicable to physician's testimony, based on information obtained while treating patient, as to latter's mental incapacity.—Clark v. Commerce Trust Co., 62 S.W.2d 874, 333 Mo. 243.

32. Neb.—In re Kajewski's Estate, 279 N.W. 185, 134 Neb. 485.
68 C.J. p 1082 note 91.

33. Cal.—In re Gould's Estate, 205 P. 457, 188 Cal. 353—In re Collins' Estate, 164 P. 1110, 174 Cal. 663.

34. U.S.—In re Ward, N.J., 194 F. 89, 114 C.C.A. 167, affirming, D.C., 194 F. 174—Harrison v. Rowan, C. C.N.J., 11 F.Cas.No.6,141, 3 Wash. C.C. 580.
Ark.—Atwood v. Ballard, 287 S.W. 1001, 172 Ark. 176.
Colo.—In re Stitzer's Estate, 68 P. 2d 561, 100 Colo. 521.
N.Y.—In re Phillips' Will, 69 N.Y.S. 1011, 34 Misc. 442.
Pa.—In re Kane, 55 A. 917, 206 Pa. 204.

35. Ala.—Rhodes v. State, 168 So. 869, 871, 232 Ala. 509, citing **Corpus Juris.**
Del.—Rodney v. Burton, 86 A. 826, 27 Del. 171.
Iowa.—In re Winslow's Will, 122 N.W. 971, reversed on other grounds 124 N.W. 895, 146 Iowa 67, Ann. Cas.1912B 663—Blake v. Rourke, 38 N.W. 392, 74 Iowa 519.
W.Va.—Ward v. Brown, 44 S.E. 488, 53 W.Va. 227.
22 C.J. p 733 note 6 [b].

36. Ill.—Austin v. Austin, 103 N.E. 268, 260 Ill. 299, Ann.Cas.1914D 336.

37. N.C.—In re Peterson's Will, 48 S.E. 561, 136 N.C. 13.

38. Cal.—In re Collins' Estate, 164 P. 1110, 174 Cal. 663—In re O'Keefe's Estate, Myr.Prob. p 154.
Wash.—In re Miller's Estate, 116 P. 2d 526.

39. N.Y.—In re Kimball's Will, 281 N.Y.S. 605, 156 Misc. 338.

40. Md.—Grove v. Taylor, 121 A. 923, 143 Md. 184.

41. Ky.—Dossenbach v. Reidhar's Ex'x, 53 S.W.2d 731, 245 Ky. 449.
N.Y.—Broat v. Broat, 18 N.Y.S.2d 709.

Comparative weight as to attesting witnesses

The testimony of experts as to a testator's mental condition several years prior to the execution of the will is not entitled to more weight than the testimony of disinterested lay attesting witnesses.—Matter of Schober, 154 N.Y.S. 309, 90 Misc. 230.

42. Cal.—Brandes v. Rucker-Fuller Desk Co., 282 P. 1009, 102 Cal.App. 221.
Ky.—Elkhorn Coal Corporation v. Butler, 238 S.W. 372, 194 Ky. 183.
Or.—Albrecht v. Safeway Stores, 80 P.2d 62, 159 Or. 331.

Safety of stairway

An expert's opinion that a stairway was unsafe at night was held to be no proof that it was inherently unsafe.—Rietzel v. Cary, R.I., 19 A.2d 760, adhered to 21 A.2d 5.

43. N.J.—Kelly v. Loft, Inc., 11 A. 2d 58, 124 N.J.Law 185.

his opinion may be entitled to considerable weight,[44] sufficient to make a prima facie case,[45] to justify submission of an issue to the jury,[46] and to support a verdict or finding.[47] The opinion must not be arbitrarily disregarded,[48] and it should be considered with other facts and circumstances.[49] Testimony of a chemist as to ingredients of a substance is of little value where he has made no analysis thereof,[50] and when he bases his testimony as to condition of a substance on the description by other witnesses, the testimony is entitled to no greater weight than that of the other witnesses.[51]

j. Value

(1) In general
(2) Services

(1) In General

The weight of expert testimony as to value is for the trier of the facts and it is not conclusive although it cannot be arbitrarily disregarded. The value of the opinion depends on the expert's intelligence, knowledge, and experience, and the reasons and facts on which the opinion is based. Expert testimony has been held to be unnecessary if plaintiff is qualified to testify.

The weight to be accorded the judgment of experts as to value is for the jury, the court, or other triers of the facts,[52] in view of all the evidence,[53] and in the light of their own knowledge and experience.[54] The opinions are not binding or conclusive,[55] and this is true even though such

Danger from sloping floors
In store patron's action against store owner to recover for fall allegedly caused by faulty construction of floor, expert's testimony that incline of floor from store entrance to level of main floor was dangerous, which opinion was based on theory that all store floors should be level, was not entitled to much consideration in light of common knowledge that stores as well as other places of public use very frequently have sloping floors.—Kelly v. Loft, Inc., supra.

44. U.S.—U. S. v. Furuya, 11 Ct. Cust.App. 551.
Cal.—Stella v. Smith, 293 P. 656, 109 Cal.App. 409.
Ga.—Collins & G. R. Co. v. Beasley, 136 S.E. 167, 36 Ga.App. 241.

Opinions of war department engineers
The opinions of chief and district engineers of the war department familiar with conditions on particular river were entitled to much weight in determining whether the river was navigable, although such opinions were not conclusive.—U. S. v. Appalachian Electric Power Co., C.C.A.Va., 107 F.2d 769, affirming, D.C., 23 F.Supp. 83, certiorari granted 60 S.Ct. 608, 309 U.S. 646, 84 L.Ed. 999, reversed on other grounds 61 S.Ct. 291, 311 U.S. 377, 85 L.Ed. 243, rehearing denied 61 S.Ct. 548, 312 U.S. 712, 85 L.Ed. 1143.

45. U.S.—Kubie & Co. v. U. S., 12 Ct.Cust.App. 468.

46. Ohio.—City of Hamilton v. Haferkamp, 4 N.E.2d 995, 53 Ohio App. 381.

47. Cal.—Brugger v. Lee Yim, 55 P.2d 564, 12 Cal.App.2d 38.
Mass.—Adams v. Town of Bolton, 9 N.E.2d 562, 297 Mass. 459, 111 A.L.R. 856.
Tex.—Floboots Corporation v. Teas, Civ.App., 110 S.W.2d 180, error dismissed.
Wis.—Marsh Wood Products Co. v. Babcock & Wilcox Co., 240 N.W. 392, 207 Wis. 209.

48. Cal.—Hutchinson v. Miller & Lux, 212 P. 394, 60 Cal.App. 1.

Estimate of distance by surveyor
In boundary line dispute, opinion of surveyor, experienced in both estimating and measuring distances, as to distance from quarter corner to river cannot be utterly ignored, although he did not measure distance.—Fehrman v. Bissell Lumber Co., 204 N.W. 582, 188 Wis. 82, rehearing denied 205 N.W. 905, 188 Wis. 82, and error dismissed Bissell Lumber Co. v. Fehrman, 47 S.Ct. 589, 274 U.S. 720, 71 L.Ed. 1324.

49. U.S.—Idawa Gold Mining Co. v. Cahill, C.C.A.Utah, 52 F.2d 70—Atlantic, Gulf & Pacific Co. v. Wood, C.C.A.Ala., 288 F. 148.

50. N.Y.—Shewan v. Sparks, 203 N.Y.S. 465, 208 App.Div. 397.

51. La.—Orange Nat. Bank v. Southern Pac. Co., 110 So. 329, 162 La. 223, 56 A.L.R. 1167.

52. U.S.—Bull v. Smith, C.C.A. Conn., 119 F.2d 490—Oxford Paper Co. v. U. S., Ct.Cl., 56 F.2d 895, supplementing 52 F.2d 1008.
Ala.—Alabama Power v. Henson, 187 So. 718, 237 Ala. 561.
Cal.—People v. McReynolds, 87 P.2d 734, 31 Cal.App.2d 219.
Ill.—Peoples Gas Light & Coke Co. v. Slattery, 25 N.E.2d 482, 373 Ill. 31, certiorari denied Peoples Gas & Coke Co. v. Hart, 60 S.Ct. 724, 309 U.S. 634, 84 L.Ed. 991.
Iowa.—Bean v. Bickley, 174 N.W. 675, 187 Iowa 689.
Mich.—In re Dillman, 248 N.W. 894, 263 Mich. 542—Gitson v. Yale Land Co., 180 N.W. 593, 212 Mich. 292.
N.Y.—Tubiola v. Baker, 233 N.Y.S. 373, 225 App.Div. 420—Weaver v. Scripture, 211 N.Y.S. 593, 125 Misc. 741, affirmed 211 N.Y.S. 940.
Or.—Patterson v. Babcock & Peets, 274 P. 903, 128 Or. 476.
Pa.—Wilhelm v. Uttenweiler, 112 A. 94, 271 Pa. 451.
R.I.—Burden v. Tax Assessors of City of Newport, 134 A. 9, 47 R.I. 473.
Tex.—Wilson v. Barbour, Civ.App., 135 S.W.2d 169, error dismissed—Crow v. Thompson, Civ.App., 131 S.W.2d 1064, error dismissed, judgment correct—General Motors Acceptance Corporation v. Killingsworth, Civ.App., 54 S.W.2d 266, error dismissed—City of Waco v. Roberts, Civ.App., 12 S.W.2d 263, affirmed 48 S.W.2d 577, 121 Tex. 217.
22 C.J. p 693 note 96.

Agreement as discrediting witness
Whether real estate expert was discredited because he examined property with another witness and agreed with him was for jury.—Kansas City v. Jones Store Co., 28 S.W.2d 1008, 325 Mo. 226, certiorari denied Jones Store Co. v. Kansas City, Mo., 51 S.Ct. 78, 282 U.S. 873, 75 L.Ed. 771.

53. U.S.—Grand Trunk Western R. Co. v. H. W. Nelson Co., C.C.A. Mich., 116 F.2d 823, rehearing denied 118 F.2d 252.
Ala.—State v. Woodward, 93 So. 826, 208 Ala. 31.
N.D.—Butler v. Ætna Ins. Co. of Hartford, Conn., 256 N.W. 214, 64 N.D. 764.

54. La.—City of New Orleans, by and through Public Belt Railroad Commission for City of New Orleans v. Atkinson, 158 So. 363, 180 La. 992.
N.D.—Butler v. Ætna Ins. Co. of Hartford, Conn., 256 N.W. 214, 64 N.D. 764.

55. U.S.—Dayton Power & Light Co. v. Public Utilities Commission of Ohio, 54 S.Ct. 647, 292 U.S. 290. 78 L.Ed. 1267, affirming 187 N.E. 18, 127 Ohio St. 137—Weicker v.

opinions of experts are uncontradicted,[56] but on the other hand they cannot be arbitrarily disregarded.[57] The honest opinions of well qualified experts

Howbert, C.C.A.Colo., 103 F.2d 105—Emerald Oil Co. v. Commissioner of Internal Revenue, C.C.A., 72 F.2d 681—Plant v. Walsh, D.C.Conn., 43 F.2d 256—Greencastle Water Works Co. v. Public Service Commission of Indiana, D.C.Ind., 31 F.2d 600—U. S v. Certain Lands in Town of Highlands, Orange County, Southern Dist. of New York, D.C.N.Y., 36 F.Supp. 968—U. S. v. Certain Lands in Town of Highlands, Orange County, Southern Dist. of New York, D.C.N.Y., 36 F.Supp. 971—Pacific Gas & Electric Co. v. Railroad Commission of California, D.C.Cal., 26 F.Supp. 507, conforming to mandate Railroad Commission of California v. Pacific Gas & Electric Co., 58 S.Ct. 334, 302 U.S. 388, 82 L.Ed. 319, reversing Railroad Commission of State of California v. Pacific Gas & Electric Co., 57 S.Ct. 935, 301 U.S. 669, 81 L.Ed. 1333, affirming, D.C., Pacific Gas & Electric Co. v. Railway Commission of California, 13 F.Supp. 931, rehearing denied 16 F.Supp. 884, rehearing denied Railroad Commission of State of California v. Pacific Gas & Electric Co., 58 S.Ct. 3, 302 U.S 771, 82 L.Ed. 598—Cravens v. Welch, D.C.Cal., 10 F.Supp. 94.

Ala.—Housing Authority of Phenix v. City of Stillwell, 3 So.2d 55—State v. Woodward, 93 So. 826, 208 Ala. 81—State v. Brintle, 93 So. 429, 207 Ala. 500.

Cal.—Rose v. State, 105 P.2d 302, superseding, App., 94 P.2d 1058, followed in Bettencourt v. State, Sup., 105 P.2d 316, superseding, App., 94 P.2d 1066, followed in Brandon v. State, Sup., 105 P.2d 316, superseding, App., 94 P.2d 1066, followed in Jones v. State, Sup., 105 P.2d 317, superseding, App., 94 P.2d 1066, followed in Laughlin v. State, Sup., 105 P.2d 317, superseding, App., 94 P.2d 1067—Benner v. Hooper, 296 P. 660, 112 Cal.App. 53.

Ga.—Odum v. Cotton States Fertilizer Co., 142 S.E. 470, 38 Ga.App. 46—Black v. Automatic Sprinkler Co. of America, 131 S.E. 543, 35 Ga.App. 8.

Ill.—People v. Process Corporation, 35 N.E.2d 341, 377 Ill. 65—Horn v. J. O. Nessen Lumber Co., 236 Ill. App. 187.

Iowa.—Stovern v. Town of Calmar, Winneshiek County, 216 N.W. 112, 204 Iowa 983.

Miss.—Robinson v. McShane, 140 So. 725, 163 Miss. 626.

Mo.—In re Sixth Street, 207 S.W. 503, 276 Mo. 158.

N.Y.—In re Board of Water Supply of City of New York, 1 N.Y.S.2d 62, 253 App.Div. 38, reversed on other grounds 14 N.E.2d 789, 277 N.Y. 452—In re Smith St. Bridge in City of Rochester, 255 N.Y.S. 801, 234 App.Div. 583—In re School Site on West 187th St., Borough of Manhattan, City of New York, 226 N.Y.S. 536, 222 App.Div. 554, affirmed In re Lands North of West 187th St. in Borough of Manhattan, City of New York, 166 N.E. 335, 250 N.Y. 588—A. C. & H. M. Hall Realty Co. v. Moos, 192 N.Y.S. 530, 200 App.Div. 66, affirming 188 N.Y.S. 858, 115 Misc. 506—People ex rel. Gorham Mfg. Co. v. State Tax Commission, 189 N.Y.S. 241, 197 App.Div. 852—Application of Board of Sup'rs of Chenango County for Appointment of Com'rs of Appraisal in Condemnation Proceeding, 261 N.Y.S. 76, 145 Misc. 353—Goodovitch v. Reiss, 220 N.Y.S. 42, 129 Misc. 152.

Pa.—In re Ott's Estate, 158 A. 286, 103 Pa.Super. 55—Home Owners' Loan Corporation v. O'Connor, 40 Lack.Jur. 11—Pennsylvania Power & Light Co. v. Convoy, Inc., 14 Northumb.Leg.J. 172.

Tex.—Willard v. Whitaker, Civ.App., 153 S.W.2d 878—Crow v. Thompson, Civ.App., 131 S.W.2d 1064, error dismissed, judgment correct.

22 C.J. p 730 note 78 [b].

Commissioner of internal revenue in determining taxpayer's deductible loss need not accept opinions of taxpayer's experts.—Fidelity Title & Trust Co. v. Commissioner of Internal Revenue, C.C.A., 64 F.2d 52.

Secretary of agriculture

In stockyards rate proceeding, secretary of agriculture was not compelled to accept expert opinion as to going concern value as final.—St. Joseph Stock Yards Co. v. U. S., D.C.Mo., 11 F.Supp. 322, affirmed 56 S.Ct. 720, 298 U.S. 38, 80 L.Ed. 1033.

Board of tax appeals is not bound by the opinions of experts, and it may reach a conclusion in accordance with its own knowledge, experience, and judgment.—Rogers v. Helvering, C.C.A., 107 F.2d 394—Tex-Penn Oil Co. v. Commissioner of Internal Revenue, C.C.A., 83 F.2d 518, certiorari granted Helvering v. Tex-Penn Oil Co., 57 S.Ct. 28, 299 U.S. 529, 81 L.Ed. 390, affirmed 57 S.Ct. 569, 300 U.S. 481, 81 L.Ed. 755—Benedum v. Commissioner of Internal Revenue, C.C.A., 83 F.2d 518, certiorari granted Helvering v. Benedum, 57 S.Ct. 28, 299 U.S. 529, 81 L.Ed. 390, affirmed 57 S.Ct. 569, 300 U.S. 481, 81 L.Ed. 755—Parriott v. Commissioner of Internal Revenue, C.C.A., 83 F.2d 518, certiorari granted Helvering v. Parriott, 57 S.Ct. 28, 299 U.S. 529, 81 L.Ed. 390, affirmed 57 S.Ct. 569, 300 U.S. 481, 81 L.Ed. 755—Gloyd v. Commissioner of Internal Revenue, C.C.A., 63 F.2d 649, certiorari denied 54 S.Ct. 52, 290 U.S. 633, 78 L.Ed. 551—Pittsburgh Hotels Co. v. Commissioner of Internal Revenue, C.C.A., 43 F.2d 345—Anchor Co. v. Commissioner of Internal Revenue, C.C.A., 42 F.2d 99.

Valuation of railroad property for tax purposes

(1) The railroad tax statutes vest an authoritative status in the personal knowledge and judgment of the state tax commissioner in the valuation of railroad property, and that valuation is not to be superseded by the judgment of professional valuation experts offered as witnesses by appealing railroad companies.—Central R. of New Jersey v. Martin, 20 A.2d 330, 19 N.J. Misc. 427.

(2) Members of state board of equalization in assessing railroad's properties were not required to accept the testimony of railroad's witnesses as to the system value and as to the value of the properties to be deducted as conclusive, but it was the duty of the board to consider such testimony together with all other pertinent facts that had been brought to the board's attention or were within the board's knowledge, and to exercise its honest and independent judgment in making its determination.—Northern Pac. Ry. Co. v. State, N.D., 299 N.W. 696.

56. U.S.—Staudenmaier v. Johnson, C.C.A.Wis., 117 F.2d 397, affirming, D.C., 30 F.Supp. 341—Friend v. Commissioner of Internal Revenue, C.C.A., 102 F.2d 153—Baltimore & O. R. Co. v. Commissioner of Internal Revenue, C.C.A., 78 F.2d 460—Brooklyn Union Gas Co. v. Prendergast, D.C.N.Y., 7 F.2d 628, modified on other grounds Ottinger v. Brooklyn Union Gas Co., 47 S.Ct. 199, 272 U.S. 579, 71 L.Ed. 421.

Minn.—Remington v. Savage, 182 N.W. 524, 148 Minn. 405.

N.J.—Spalding v. Martin, 183 A. 281, 119 N.J.Eq. 603.

N.Y.—Commercial Casualty Ins. Co. v. Roman, 199 N.E. 658, 269 N.Y. 451, reversing 279 N.Y.S. 170, 244 App.Div. 306, remittitur amended 200 N.E. 319, 270 N.Y. 563.

Tenn.—Stevens v. Moore, App., 139 S.W.2d 710.

Tex.—Pickrell v. Imperial Petroleum Co., Civ.App., 231 S.W. 412, error dismissed.

57. U.S.—Welch v. Tennessee Valley Authority, C.C.A.Tenn., 108 F.2d 95, certiorari denied Welch v. U. S. ex rel. and for Use of Ten-

are to be considered,[58] and they may be entitled to great weight;[59] the testimony may constitute substantial evidence as to value,[60] sufficient to support a finding or verdict.[61] The value of the expert's opinion depends on his intelligence and the knowledge and experience in such matters which he possesses,[62] and where the witness has had little knowledge or experience as to the particular matter, his opinion is entitled to but little weight.[63] The weight of the opinion is also affected by the reasons and facts on which it is based,[64] and the absence of a substantial basis for the opinion ren-

nessee Valley Authority, 60 S.Ct. 889, 309 U.S. 688, 84 L.Ed. 1030—Lewis v. Tennessee Valley Authority, C.C.A.Tenn., 108 F.2d 95, certiorari denied Lewis v. U. S. ex rel. and for Use of Tennessee Valley Authority, 60 S.Ct. 889, 309 U. S. 688, 84 L.Ed. 1030—Emerald Oil Co. v. Commissioner of Internal Revenue, C.C.A., 72 F.2d 681—Westinghouse Electric & Mfg. Co. v. Denver Tramway Co., D.C.Colo., 3 F.2d 285, transferred see City and County of Denver v. Stenger, 47 S.Ct. 343, 273 U.S. 657, 71 L. Ed. 826—International Ry. Co. v. Prendergast, D.C.N.Y., 1 F.Supp. 623.

Ala.—O'Neill v. City of Birmingham, 130 So. 87, 221 Ala. 580.

Ark.—Wilkinson v. James, 262 S.W. 319, 164 Ark. 475.

Iowa.—Ege v. Born, 236 N.W. 75, 212 Iowa 1138.

La.—City of New Orleans, by and through Public Belt Railroad Commission for City of New Orleans, v. Atkinson, 158 So. 363, 180 La. 992.

N.Y.—Yonkers R. Co. v. Maltbie, 274 N.Y.S. 535, 242 App.Div. 319, motion granted 195 N.E. 191, 266 N. Y. 542.

N.D.—Butler v. Ætna Ins. Co. of Hartford, Conn., 256 N.W. 214, 64 N.D. 764.

Tex.—Thorn v. Dunn, Civ.App., 94 S. W.2d 1229.

Department rule

Department rule, fixing arbitrary tonnage value for vessels, cannot be followed by court, as against testimony of competent witnesses.—Elliott v. U. S., D.C.Me., 16 F.2d 164.

Board of tax appeals may not arbitrarily ignore or discredit the opinions of expert witnesses but should weigh their testimony in light of the other facts developed in the case.—Friend v. Commissioner of Internal Revenue, C.C.A., 102 F.2d 153—Bryant v. Commissioner of Internal Revenue, C.C.A., 76 F.2d 103—Boggs & Buhl v. Commissioner of Internal Revenue, C.C.A., 34 F.2d 859.

58. U.S.—Bryant v. Commissioner of Internal Revenue, C.C.A., 76 F. 2d 103—Greencastle Water Works Co. v. Public Service Commission of Indiana, D.C.Ind., 31 F.2d 600—Benedict v. U. S., D.C.N.Y., 270 F. 267, affirmed conditionally, C.C.A., U. S. v. Benedict, 280 F. 76, affirmed 43 S.Ct. 357, 261 U.S. 294, 67 L.Ed. 662.

Tex.—Crow v. Thompson, Civ.App., 131 S.W.2d 1064, error dismissed, judgment correct.

Wash.—Kelly v. Merritt, 191 P. 404, 111 Wash. 426.

Affidavits

Ex parte affidavits of sales commissioners have some value in determining adequacy of partition sale price.—Dunn v. Silk, 155 S.E. 694, 155 Va. 504, 71 A.L.R. 667.

59. U.S.—Planters' Operating Co. v. Commissioner of Internal Revenue, C.C.A., 55 F.2d 583—United Fuel Gas Co. v. Public Service Commission of West Virginia, D. C.W.Va., 14 F.2d 209, affirmed 49 S.Ct. 157, 278 U.S. 322, 73 L.Ed. 402—Westinghouse Electric & Mfg. Co. v. Denver Tramway Co., D.C.Colo., 3 F.2d 285, transferred, see City and County of Denver v. Stenger, 47 S.Ct. 343, 273 U.S. 657, 71 L.Ed. 826.

Mich.—Gifford v. Hartson, 225 N.W. 578, 247 Mich. 217.

N.Y.—In re St. Lawrence Transmission Co., 244 N.Y.S. 508, 137 Misc. 603.

W.Va.—Tierney v. United Pocahontas Coal Co., 109 S.E. 339, 89 W. Va. 402.

60. Mont.—Solberg v. Sunburst Oil & Gas Co., 246 P. 168, 76 Mont. 254.

61. U.S.—Wood v. U. S., Ct.Cl., 29 F.Supp. 853.

Cal.—Maddalena v. LeDuc, 84 P.2d 254, 29 Cal.App.2d 211—City and County of San Francisco v. Sattan, 248 P. 274, 78 Cal.App. 115—Ward v. Massachusetts Bonding & Insurance Co., 228 P. 363, 67 Cal.App. 792.

D.C.—Fidelity Storage Co. v. Foster, 51 F.2d 439, 60 App.D.C. 277.

Idaho.—Palmer v. Highway Dist. No. 1, Bonner County, 290 P. 393, 49 Idaho 596.

Mass.—Sheffer v. Rudnick, 196 N.E. 864, 291 Mass. 205.

N.Y.—In re Flickinger's Estate, 28 N.Y.S.2d 118, 176 Misc. 604—In re St. Lawrence Transmission Co., 244 N.Y.S. 508, 137 Misc. 603.

Okl.—Producers' Supply Co. v. Maple Leaf Oil Co., 229 P. 1037, 103 Okl. 224.

Tex.—Citizens Industrial Bank of Austin v. Oppenheim, Civ.App., 92 S.W.2d 312, error dismissed.

Wash.—Kingston v. Anderson, 99 P. 2d 630, 3 Wash.2d 21—Kilgren v. Seattle Leasehold Co., 252 P. 540, 142 Wash. 101.

Wis.—Ullman v. Bee Hive Department Store, 214 N.W. 349, 193 Wis. 350, 53 A.L.R. 281.

62. U.S.—Grand Trunk Western R. Co. v. H. W. Nelson Co., C.C.A. Mich., 116 F.2d 823, rehearing denied 118 F.2d 252.

Ark.—Bridgman v. Baxter County, 148 S.W.2d 673.

Conn.—Morris Joseloff Co. v. Spirt, 117 A. 523, 97 Conn. 447.

Ill.—Geohegan v. Union El. R. Co., 107 N.E. 786, 266 Ill. 482, Ann.Cas. 1916B 762.

Iowa.—Klass v. Iowa Mut. Liability Ins. Co., 230 N.W. 314, 210 Iowa 78.

Tex.—City of Trinity v. McPhail, Civ.App., 131 S.W.2d 803—Kansas City, M. & O. R. Co. of Texas v. O'Connell, Civ.App., 210 S.W. 757, dismissed for want of jurisdiction.

Real estate dealers from another locality

Testimony by residents of a community relative to the value of real estate situated therein will be given more weight than that given by real estate dealers from another locality.—In re Apple's Estate, 31 Pa.Dist. & Co. 445, 52 York Leg.Rec. 18.

Testimony gained from inadmissible sources

Expert witness' testimony in proceedings to review decision of equalization board was held entitled to credit, although gained from inadmissible sources, because of added sanction of expert's general experience.—Hammond Lumber Co. v. Los Angeles County, 285 P. 896, 104 Cal. App. 235.

63. N.J.—Hackensack Water Co. v. Township of North Bergen, 15 A. 2d 899, 18 N.J.Misc. 627.

N.Y.—Okyle v. Highbridge Family Laundry Service, 16 N.Y.S.2d 229, 258 App.Div. 238.

64. Cal.—People v. McReynolds, 87 P.2d 734, 31 Cal.App.2d 219.

La.—Louisiana Highway Commission v. Grey, 2 So.2d 654, 197 La. 942.

Tex.—Railroad Commission of Texas v. Humble Oil & Refining Co., Civ.App., 101 S.W.2d 614, reversed on other grounds Humble Oil & Refining Co. v. Railroad Commission of Texas, 128 S.W.2d 9, 133 Tex. 330.

Refusal to disclose data

In telephone rate case, expert's refusal to give underlying data by

ders it of little value.[65] So testimony which is merely speculative or conjectural is of no value,[66] and is insufficient to support a finding.[67] The fact that an expert witness does not consider all factors in estimating value does not render his testimony valueless as a matter of law,[68] although it goes to the weight of the testimony.[69] That an opinion is shown to be wrong in part affects the credibility of the witness.[70] Where a witness testified to the value of land per acre, the fact that he had in mind one hundred acres instead of fifty acres, which was the area of the land in question, would not affect the value of his testimony.[71]

Necessity. Expert testimony to establish value has been held to be unnecessary if plaintiff is qualified to testify.[72]

(2) Services

Expert testimony as to the value of services rendered, including medical and legal services, is not conclusive even though uncontradicted, but the testimony is not to be arbitrarily disregarded. The experience of the witness is a factor to be considered. Expert testimony as to the value of legal services is not necessary when there is evidence of the services rendered, the character of the litigation, and the results obtained sufficient to form a basis for determining the value of such services.

Expert testimony as to the value of services rendered is not conclusive[73] even though uncontradicted,[74] but the trier of the facts may follow expert opinions if not plainly at variance with the facts.[75] An opinion as to the value of services of a person with other qualifications than the person concerned in the suit is of no probative value.[76]

Medical services. Expert opinions as to value of medical services furnished are evidence of reasonable value,[77] but, in accordance with the general rule, such evidence is not conclusive,[78] although uncontradicted.[79] However, neither the court nor the jury can consider the views of persons unfamiliar with the subject as a proper basis for findings as against uncontradicted or unimpeached testimony of qualified expert witnesses.[80]

Legal services. Testimony of expert witnesses as to the value of an attorney's services is not conclusive on the court, jury, or other trier of the facts,[81] and this is true even though such expert

which he arrived at opinion in relation to value of labor performance might affect weight of testimony.—Ohio Associated Telephone Co. v. Geiger, D.C.Ohio, 3 F.Supp. 997.

Testimony based on actual sales

The testimony of expert witnesses who base their opinions on actual sales is entitled to more weight than the testimony of other experts who disregard said sales and stamp them as distress sales regardless of the facts.—Appeal of Baldwin, Pa., 29 Erie Co. 98.

65. U.S.—Mobile Gas Co. v. Patterson, D.C.Ala., 293 F. 208, modified on other grounds Patterson v. Mobile Gas Co., 46 S.Ct. 445, 271 U.S. 131, 70 L.Ed. 870—Wise v. U. S., D.C.Ky., 38 F.Supp. 130.
N.J.—City of Plainfield v. Board of Tax Appeals, 19 A.2d 195, 19 N.J.Misc. 313.

Opinion based on price lists of little value

That expert in market values based testimony on price lists of little value does not entirely deprive testimony of credit.—Fishel v. F. M. Ball & Co., 256 P. 493, 83 Cal.App. 128.

66. N.Y.—In re Board of Water Supply of City of New York, 1 N.Y.S.2d 62, 253 App.Div. 38, reversed on other grounds 14 N.E.2d 789, 277 N.Y. 452—Alabama Holding Corporation v. Conrey, 190 N.Y.S. 511, 116 Misc. 657, affirmed 194 N.Y.S. 515, 201 App.Div. 565.

67. U.S.—Los Angeles Gas & Electric Corporation v. Railroad Commission of California, Cal., 53 S.Ct. 637, 289 U.S. 287, 77 L.Ed. 1180, affirming, D.C., 58 F.2d 256.

68. Mass.—Inhabitants of Town of Westport v. County Com'rs of Bristol County, 141 N.E. 591, 246 Mass. 556.
Wash.—Ham, Yearsley & Ryrie v. Northern Pac. Ry. Co., 197 P. 43, 115 Wash. 286, error dismissed Northern Pac. R. Co. v. Ham, Yearsley & Ryrie, 42 S.Ct. 588, 259 U.S. 591, 66 L.Ed. 1079.

69. Ill.—Department of Public Works and Buildings v. Diggins, 27 N.E.2d 826, 374 Ill. 11.
N.J.—Schetty v. Jersey City, 11 A.2d 18, 18 N.J.Misc. 37.

70. U.S.—The Rosalia, C.C.A.N.Y., 264 F. 285.

71. Ala.—Tennessee Coal, Iron & R. Co. v. McMillion, 49 So. 880, 161 Ala. 130.

72. Ala.—Seymour v. Sweet, 156 So. 848, 229 Ala. 299.

73. Cal.—Lundberg v. Katz, App., 111 P.2d 917—In re Pomin's Estate, 92 P.2d 479, 33 Cal.App.2d 544—Kimes v. Davidson Inv. Co., 281 P. 639, 101 Cal.App. 382.
Ky.—Bartlett v. Louisville Trust Co., 277 S.W. 250, 212 Ky. 13.

74. N.Y.—Harris Structural Steel Co. v. Chapman, 295 N.Y.S. 413, 162 Misc. 709.

Architect's services

Cal.—Clark v. Conley School Dist. of Kern County, 261 P. 721, 86 Cal.App. 523.

Extraordinary services of executor

Cal.—In re Pomin's Estate, 92 P.2d 479, 33 Cal.App.2d 544.

Undertaker's services

Ky.—Burgess & Walter v. Thomas' Adm'r, 292 S.W. 1085, 219 Ky. 399.

75. La.—Henry v. Pelican Cold Storage & Warehousing Co., App., 160 So. 843.

76. Tex.—Kuhlmann's Estate v. Poss, Civ.App., 220 S.W. 564.

77. Cal.—Caulfield v. Market St. Ry. Co., 66 P.2d 752, 20 Cal.App.2d 220.

Necessity of reliance on opinions

Courts must of necessity to a very great extent rely on the opinions of reputable members of the medical profession as to the value and character of services rendered by physicians.—Young Bros. v. Succession of Von Schoeler, 91 So. 551, 151 La. 73.

78. Cal.—Caulfield v. Market St. Ry. Co., 66 P.2d 752, 20 Cal.App.2d 220.
N.Y.—Marsh v. Richer, 125 N.Y.S. 245, 68 Misc. 587—Sweeney v. Banham, 191 N.Y.S. 186.

79. R.I.—Scanlon v. Anderson, 144 A. 146, 49 R.I. 470.

80. Wis.—In re Watzek's Estate, 247 N.W. 330, 211 Wis. 50.

81. U.S.—Wickwire v. Martin, C.C.A.Okl., 63 F.2d 64—Federal Oil Marketing Corporation v. Cravens, C.C.A.Ark., 46 F.2d 938—Tracy v. Spitzer-Rorick Trust & Savings Bank, C.C.A.Ark., 12 F.2d 755, followed in 12 F.2d 758—Greeff v. Miller, C.C.N.Y., 87 F. 33.
Ala.—Derzis v. Cox, 137 So. 306, 223

witness' testimony is uncontradicted,[82] but the court[83] or jury[84] may exercise its own judgment in the matter, although it cannot arbitrarily disregard the testimony.[85] The testimony is to be considered,[86] and it may be entitled to great weight,[87] sufficient to support a verdict.[88] The experience of the witness concerning the type of services for which compensation is asked is a factor to be considered in determining the weight to be given his testimony.[89]

Expert testimony as to the value of legal service rendered is not necessary when there is evidence of the services rendered, the character of the litigation, and the results obtained sufficient to form a

Ala. 517—Riddle v. Street, 117 So. 653, 218 Ala. 97.
Ark.—Metropolitan Life Ins. Co. v. Leach, 129 S.W.2d 588, 198 Ark. 531—St. Paul Fire & Marine Ins. Co. v. Green, 29 S.W.2d 304, 181 Ark. 1096—Shackleford v. Arkansas Baptist College, 26 S.W.2d 124, 181 Ark. 363.
Cal.—Kirk v. Culley, 261 P. 994, 202 Cal. 501—Pine Grove Consol. Mines v. Metson, 100 P.2d 794, 38 Cal.App.2d 170—Mitchell v. Towne, 87 P.2d 908, 31 Cal.App.2d 259, superseding 83 P.2d 959—Lady v. Ruppe, 298 P. 859, 113 Cal.App. 606—Cullinan v. McColgan, 263 P. 353, 87 Cal.App. 684—Libby v. Kipp, 262 P. 68, 87 Cal.App. 538—Kendrick v. Gould, 197 P. 681, 51 Cal.App. 712—Title Insurance & Trust Co. v. Gould, 191 P. 556, 47 Cal.App. 533.
Conn.—Taft v. Valley Oil Co., 9 A. 2d 822, 126 Conn. 154—Gruskay v. Simenauskas, 140 A. 724, 107 Conn. 380.
Fla.—Baruch v. Giblin, 164 So. 831, 122 Fla. 59—R. E. L. McCaskill Co. v. Deckle, 102 So. 252, 88 Fla. 285—McGill v. Cockrell, 101 So. 199, 88 Fla. 54—Evors v. Bryan, 81 So. 513, 77 Fla. 399.
Ill.—In re Information to Discipline Certain Attorneys of Sanitary Dist. of Chicago, 184 N.E. 332, 351 Ill. 206—Wright v. Upson, 135 N. E. 209, 303 Ill. 120.
Iowa.—In re Dehner's Estate, 298 N. W. 656—In re Chesmore's Estate, 189 N.W. 770, 194 Iowa 300.
Kan.—Shouse v. Consolidated Flour Mills Co., 277 P. 54, 128 Kan. 174, 64 A.L.R. 606.
Ky.—Maynard v. Maynard's Adm'r, 64 S.W.2d 567, 251 Ky. 246, 91 A. L.R. 697—Baxter v. Hubbard, 47 S.W.2d 743, 242 Ky. 751—Maynard v. Steele, 47 S.W.2d 738, 242 Ky. 745—Daly v. Power, 38 S.W.2d 305, 236 Ky. 426.
La.—Stumpf v. Lopes, App., 154 So. 496—Titche v. Hiller, 5 La.App. 375.
Minn.—In re Fitzgerald's Estate, 285 N.W. 285, 205 Minn. 57.
Miss.—Brown v. Franklin, 145 So. 752, 166 Miss. 899—Johnson v. Howard, 141 So. 573, 167 Miss. 475—Moss v. Mississippi Live Stock Sanitary Board, 122 So. 776, 154 Miss. 765, followed in Gray v. Mississippi Live Stock Sanitary Board, 122 So. 783, Turnage v. Mississippi Live Stock Sanitary Board, 122 So. 783, and Adams v. Mississippi Live Stock Sanitary Board, 126 So. 204—Humphreys County v. Cashin, 90 So. 888, 128 Miss. 236.
Mo.—Sterrett v. Delmar Ave. & C. R. Co., 84 S.W. 150, 108 Mo.App. 650.
N.M.—Jamison v. Shelton, 289 P. 593, 35 N.M. 34.
N.Y.—In re Nebenzahl's Estate, 294 N.Y.S. 553, 162 Misc. 366—In re Scher's Estate, 264 N.Y.S. 579, 147 Misc. 791—In re Owen's Estate, 259 N.Y.S. 892, 144 Misc. 688—Weaver v. Scripture, 211 N.Y.S. 593, 125 Misc. 741, affirmed 211 N. Y.S. 940, 214 App.Div. 852.
Ohio.—Prather v. First Presbyterian Society, 13 Ohio N.P., N.S., 169.
Okl.—In re Schwint's Estate, 83 P. 2d 161, 183 Okl. 439.
Or.—Officer v. Cummings, 272 P. 273, 127 Or. 320.
Pa.—In re Bank of Auburn, 33 Pa. Dist. & Co. 313.
R.I.—Barba v. Cassano, 163 A. 880.
Tex.—Hodges v. Hodges, Civ.App., 111 S.W.2d 779—Texas Co. v. Schriewer, Civ.App., 38 S.W.2d 141, modified on other grounds Smith v. Texas Co., Com.App., 53 S.W.2d 774, followed in Smith v. G. B. Johnson Hardware Co., 53 S.W.2d 779, and Smith v. Jacksboro Stone Products Co., 53 S.W.2d 780, affirming, Civ.App., 41 S.W.2d 347.
Va.—Maupin v. Maupin, 164 S.E. 557, 158 Va. 663.
Wis.—In re Willing's Will, 209 N. W. 602, 190 Wis. 406.
6 C.J. p 763 notes 24, 25.

A master is not bound by the opinion of other lawyers as to the value of an attorney's services.—Wickwire v. Martin, C.C.A.Okl., 63 F. 2d 64—Taintor v. Franklin Nat. Bank of New York, C.C.N.Y., 107 F. 825.

82. Ala.—Lowe v. Reed, 92 So. 467, 207 Ala. 278.
Ind.—Dunn v. Deitschel, 169 N.E. 529, 204 Ind. 269.
Ky.—Erdman's Adm'r v. Erdman's Adm'r, 21 S.W.2d 258, 231 Ky. 219.
Minn.—Pye v. Diebold, 283 N.W. 487, 204 Minn. 319.
Mont.—Reser v. Ziebarth, 195 P. 98, 59 Mont. 7.
N.M.—Jamison v. Shelton, 289 P. 593, 35 N.M. 34.
N.Y.—Weaver v. Scripture, 211 N.Y. S. 593, 125 Misc. 741, affirmed 211 N.Y.S. 940, 214 App.Div. 852.

83. Conn.—Taft v. Valley Oil Co., 9 A.2d 822, 126 Conn. 154—Gruskay v. Simenauskas, 140 A. 724, 107 Conn. 380.
Ky.—Barlett v. Louisville Trust Co., 277 S.W. 250, 212 Ky. 13.
Miss.—Brown v. Franklin, 145 So. 752, 166 Miss. 899.

Court as expert

(1) The court is itself an expert on the question of the value of an attorney's services.—Federal Oil Marketing Corporation v. Cravens, C.C.A.Ark., 46 F.2d 938—6 C.J. p 763 note 24 [a].

(2) Trial and appellate courts are competent to speak on value of legal services.—Envart v. Orr, 238 P. 29, 78 Colo. 6.

Services rendered in court's presence

Court may fix amount of attorney's fee for services performed in court's presence without reference to attorneys' expert opinions.—Sigrest v. Federal Ins. Co., 129 So. 379, 14 La.App. 55.

84. N.Y.—Weaver v. Scripture, 211 N.Y.S. 593, 125 Misc. 741, affirmed 211 N.Y.S. 940, 214 App.Div. 852.
6 C.J. p 763 note 25 [a].

85. Ky.—Robbins v. Jones' Ex'rs, 277 S.W. 333, 211 Ky. 211.
Pa.—In re Wood's Estate, 115 A. 865, 272 Pa. 8—In re Bank of Auburn, 33 Pa.Dist. & Co. 313.

Factual testimony

In determining amount of attorney's fees, the trial court could not ignore the factual testimony as to the extent and nature of the services.—In re Dehner's Estate, Iowa, 298 N.W. 656.

86. La.—Stumpf v. Lopes, App., 154 So. 496.
Tex.—Hodges v. Hodges, Civ.App., 111 S.W.2d 779.
6 C.J. p 763 note 26.

87. Ala.—Dent v. Foy, 107 So. 210, 214 Ala. 243.

88. Cal.—Matthiesen v. Smith, 60 P.2d 873, 16 Cal.App.2d 479.
Ill.—Farmer v. Fowler, 213 Ill.App. 581, affirmed 123 N.E. 550, 288 Ill. 494.
Or.—O'Day v. Spencer, 189 P. 394, 96 Or. 73.

89. U.S.—Coco-Cola Co. v. Moore, Ark., 256 F. 640, 168 C.C.A. 34.

basis for determining the value of such services.[90]

k. Other Matters

The rule that expert opinions are not conclusive but that their weight is for the determination of the trier of the facts has been applied, among other matters, to opinions as to condition of animals, benefits of zoning ordinances, location of a boundary line, quantity or amount, reasonable time, rate of speed, title, and interpretation of a written instrument.

The rule that expert opinions are not conclusive but that their weight is for the determination of the jury, court, or other trier of the facts has been applied to opinions as to condition of animals,[91] benefits of zoning ordinances,[92] location of a boundary line,[93] quantity or amount,[94] reasonable time for performing a contract,[95] and rate of speed.[96] A good faith opinion respecting title expressed by well qualified attorneys may be considered by the court[97] but it is not controlling.[98] Likewise expert testimony as to the interpretation of a written instrument may be helpful to the court,[99] but it is not binding or conclusive.[1]

The weight of opinion evidence as to handwriting as based on comparison is considered infra § 621, and the weight of inferences as to handwriting supra § 568 i.

§ 570. Supporting Opinion

A party is entitled to support the testimony of his expert witnesses by proof of facts which tend to show its accuracy. The authorities are not in accord as to whether such testimony can be enhanced by testimony of the scientific and professional attainments of the expert witness.

A party is entitled to confirm the judgment of his expert witnesses by proof of facts which tend to show its accuracy,[2] but it is not proper to bolster and support an expert witness' testimony on cross-examination concerning collateral matter.[3] It has been held that a party who introduces expert testimony is entitled to show that experiments confirm[4] or demonstrate[5] its correctness, although there is also authority for the contrary view.[6] The witness may be asked whether he is satisfied with the accuracy of his conclusion,[7] but not as to whether a jury would be justified in finding a verdict on his evidence;[8] nor can a witness as to quality or values be permitted to narrate the facts and circumstances of a special transaction, outside of the case on trial, for the purpose of enabling the jury to compare the facts and results of such transaction with those of the case on trial, the object being to impress the jury with the soundness of the witness' opinion or judgment.[9] It has been held that the weight of the expert's judgment may be enhanced

90. Cal.—Mitchell v. Towne, 87 P.2d 908, 31 Cal.App.2d 259, superseding 83 P.2d 959.
Okl.—McClintock v. Parish, 180 P. 689, 72 Okl. 260.

91. S.D.—Housman v. Geiman, 252 N.W. 857, 62 S.D. 310.
Wash.—Bradley v. Consolidated Silver Mountain Mines Co., 298 P. 324, 162 Wash. 198.

Opinion without adequate data
Veterinary's guess that shipment of hogs was diseased was held insufficient proof of fact, where he had never seen hogs and had no adequate data on which to base opinion.—Bloecher & Schaaf v. Pennsylvania R. Co., 160 A. 281, 162 Md. 463.

92. Ill.—State Bank & Trust Co. v. Village of Wilmette, 193 N.E. 131, 358 Ill. 311, 96 A.L.R. 1327—Forbes v. Hubbard, 180 N.E. 767, 348 Ill. 166.

93. Conn.—Byard v. Hoelscher, 151 A. 351, 112 Conn. 5.

94. Mass.—Davenport v. Haskell, 200 N.E. 409, 293 Mass. 454.
Mo.—Cash v. Wysocki, App., 229 S.W. 428.

95. Colo.—McWilliams v. Garstin, 197 P. 246, 70 Colo. 59.

96. Ala.—Hosking v. Danforth, 36 P.2d 427, 1 Cal.App.2d 178.

97. Neb.—Robinson v. Bressler, 240 N.W. 564, 122 Neb. 461.

98. Neb.—Robinson v. Bressler, supra.
Tex.—Kitchen v. Lloyd, Civ.App., 14 S.W.2d 335—Bourland v. Huffhines, Civ.App., 269 S.W. 184, affirmed Huffhines v. Bourland, Com.App., 280 S.W. 561.

99. U.S.—U. S. v. Best & Co., 24 C.C.P.A.(Customs) 220.

1. U.S.—U. S. for Use of W. E. Foley & Bro. v. U. S. Fidelity & Guaranty Co., D.C.N.Y., 28 F.Supp. 443, modified on other grounds, C.C.A., 113 F.2d 888—U. S. v. Best & Co., 24 C.C.P.A.(Customs) 220—Bakelite Corporation v. U. S., 16 Ct.Cust.App. 378.
Or.—Security & Investment Co. of Oregon City v. Oregon City, 90 P.2d 467, 161 Or. 421.

Books kept on accrual basis
Accountant's testimony that taxpayer's books were kept on the accrual basis was held without probative value, where the books were excluded.—Greengard v. Commissioner of Internal Revenue, C.C.A. 29 F.2d 502.

2. N.C.—Ramsey v. Federal Life Ins. Co., 179 S.E. 5, 208 N.C. 819.
22 C.J. p 736 note 44.

Prior illness
In action no disability policy, evidence that insured had undergone operation year before alleged disability occurred was competent to corroborate witnesses who testified that insured was sick.—Ramsey v. Federal Life Ins. Co., supra.

Corroboration not shown
In action on war risk policy, admission in evidence of depositions of physicians was not error, as against contention that, under stipulation, depositions were superseded by commissioner's summary, and that to read both operated to corroborate physicians' evidence, where the stipulation provided only that the summary might be used in lieu of the depositions, not that it must be so used.—Demeter v. U. S., 66 F.2d 188, 62 App.D.C. 208.

3. Ark.—Seaman Store Co. v. Bonner, 113 S.W.2d 1106, 195 Ark. 563.

4. Tex.—McGrew v. St. Louis, S. F. & T. Ry. Co., Civ.App., 74 S.W. 816.
22 C.J. p 736 note 45.

5. Mass.—Donahoe v. New York & N. E. R. Co., 34 N.E. 87, 159 Mass. 125.

6. Ala.—Evans v. State, 19 So. 535, 109 Ala. 11.

7. Tex.—Missouri, K. & T. R. Co. v. Sledge, Civ.App., 30 S.W. 1102.
22 C.J. p 736 note 48.

8. Mich.—Strudgeon v. Sand Beach, 65 N.W. 616, 107 Mich. 496.

9. Neb.—Bollman v. Lucas, 36 N.W. 465, 22 Neb. 796.

by the evidence of another qualified witness as to his scientific or professional attainments,[10] at least where they have been attacked by the opposite party,[11] but there is also authority to the effect that evidence of this character is not admissible,[12] at least when the skill or professional reputation of the witness has not been assailed.[13] A party giving opinion evidence in his own behalf should be permitted to state where he has lived and what business he has followed so as to give the jury a better idea of the weight to be attached thereto.[14] It has been said that corroboration cannot be had by reciting the judgment of others on the subject,[15] but where defendant has cross-examined the witness with respect to the authorities plaintiff may use them to support the credit of his witness.[16]

Where the witness has formed an opinion he may be asked on examination in chief what he did in pursuance of it.[17] It has been held that a doctor's testimony as to the disease or condition of a person at a specified time may be corroborated by evidence of the prescription for such person by the doctor at that time,[18] but there is other authority which holds that a doctor's prescription showing for what specific disease or condition a person was treated by the doctor is not admissible to bolster the testimony of the doctor that such person was at that time suffering from a specified disease or condition.[19] On redirect examination any impairment in weight or clearness resulting from the cross-examination may be remedied.[20] Evidence that the speedometer on an automobile registered a certain speed after an accident is inadmissible to corroborate other witnesses as to the speed of the automobile at the time of the accident, when there is no testimony in the record to show what happened to the speedometer when the accident occurred or as to what kind of a speedometer it was or how it operated.[21]

§ 571. Impairment or Impeachment of Opinion

The opinion of an expert or skilled witness may be impaired or impeached by qualifications or retractions in the testimony of the witness, or by contradictory evidence, or by evidence showing that he is interested or biased or inconsistent, or that the factors on which he bases his opinion are incorrect or inapplicable, or that the witness himself is not qualified to express an opinion.

The weight to be given the judgment of a skilled witness may be impaired by the various methods employed in the case of other testimony, considered in the C.J.S. title Witnesses §§ 458–651, also *70 C.J. p 759 note 9–p 1189 note 62*. In general evidence may be introduced to impeach a skilled or expert witness or to lessen the weight of his expert opinion,[22] or qualifications or retractions on

10. Mo.—Thompson v. Ish, 12 S.W. 510, 99 Mo. 160, 17 Am.S.R. 552.
Pa.—Laros v. Commonwealth, 84 Pa. 200.
However, it has been held that it is not error for the court to refuse to admit evidence of a witness as to whether a physician who testified for the party is a reputable physician where his reputation has not been questioned and his character stands unimpeached before the court.—Dean v. Wabash R. Co., 129 S.W. 953, 229 Mo. 425.

11. N.C.—Belshe v. Seaboard Air Line Ry. Co., 119 S.E. 492, 186 N.C. 246, certiorari denied Seaboard Air Line Ry. Co. v. Belshe, 44 S.Ct. 229, 263 U.S. 720, 68 L.Ed. 524, and error dismissed 45 S.Ct. 229, 267 U.S. 608, 69 L.Ed. 811.

12. Ala.—Equitable Life Assur. Soc. of U. S. v. Welch, 195 So. 554, 557, 239 Ala. 453, citing **Corpus Juris**—Louisville & N. R. Co. v. Elliott, 52 So. 28, 166 Ala. 419—Washington v. Cole, 6 Ala. 212.
Ga.—Hexter v. Burgess, 184 S.E. 769, 52 Ga.App. 819.
22 C.J. p 736 note 52.

13. Ala.—De Phue v. State, 44 Ala. 32.
Tex.—Gulf, C. & S. F. Ry. Co. v. Baldwin, Civ.App., 2 S.W.2d 520—Missouri, K. & T. Ry. Co. of Texas v. Burk, Civ.App., 162 S.W. 457.

14. Ky.—Mussellam v. Cincinnati, N. O. & T. P. Ry. Co., 104 S.W. 337, 126 Ky. 500, 31 Ky.L. 908.

15. Ind.—Indiana Natural & Illuminating Gas Co. v. Anthony, 58 N.E. 868, 26 Ind.App. 307.

16. N.H.—McCourt v. Travers, 175 A. 865, 87 N.H. 185.

17. Eng.—Stephenson v. River Tyne Impr. Comrs., 17 Wkly.Rep. 590.

18. N.C.—In re Coffield's Will, 4 S.E.2d 870, 216 N.C. 285.

19. Ala.—Metropolitan Life Ins. Co. v. Usher, 146 So. 809, 226 Ala. 314.

20. N.Y.—Moyer v. New York Cent. & H. R. R. Co., 98 N.Y. 645.

21. Ill.—Jones v. Traver, 275 Ill. App. 181.

22. Pa.—Pilvelis v. Township of Plains, 34 Luz.Leg.Reg. 29, reversed on other grounds 14 A.2d 557, 140 Pa.Super. 561.
Extent of inquiry on cross-examination see supra § 560.

Party entitled to impeach witness

(1) Although it was improper for plaintiff's physician to have talked about plaintiff's injury to defendant's attorney, this by itself was insufficient ground for plaintiff to impeach physician's testimony.—Gallagher v. S. Z. Schutte Lumber Co., Mo.App., 273 S.W. 213.

(2) Record did not show that plaintiff's physician was hostile witness, so as to entitle plaintiff to impeach him by cross-examination as to his conduct, and plaintiff's examination of physician as to his employment by several employers' liability insurance companies was improper.—Gallagher v. S. Z. Schutte Lumber Co., supra.

(3) Question asked own medical expert, as to whether injured persons did not generally improve after lawsuit was over was objectionable as cross-examination of own witness.—Quillin v. Colquhoun, 247 P. 740, 42 Idaho 522.

Witness

Commissioner appointed to appraise land in condemnation proceedings, who became witness, could be impeached.—City of Greensboro v. Bishop, 150 S.E. 495, 197 N.C. 748.

Competency

(1) In personal injury action in which doctor testified that before the accident plaintiff had the flu, which caused his heart condition, testimony of plaintiff in rebuttal that he had taken out insurance after illness was incompetent.—Bowles

the direct, cross, or redirect examination may be such as to impair its value;[23] but qualifications by a witness of his testimony[24] or isolated statements[25] are not necessarily sufficient to destroy the value of

v. Wabash Ry. Co., Mo.App., 271 S. W. 851.

(2) In action for malpractice in which defendant contended that plaintiff was suffering from a rare disease and offered medical testimony as to the treatment of such disease, defendant's witness should not be allowed to testify that a medical publication or journal reported only three or four cases of such disease in the city where plaintiff's expert testified to treating many such cases, where no foundation was laid showing the accuracy of the publication, the purpose of such testimony being to show that plaintiff's witness had been confused and was talking about an entirely different disease.—Sinclair v. Brunson, 180 N.W. 358, 212 Mich. 387, 12 A.L.R. 593.

Subsequent repairs

In action against owner for injuries to invitee, evidence that defendant, after accident, did some act intended to make place safer for such use as plaintiff was making of it, is admissible to contradict or impeach witness or lessen weight of his expert opinion.—Norwood Clinic v. Spann, 199 So. 840, 240 Ala. 427—Bedgood v. T. R. Miller Mill Co., 80 So. 364, 202 Ala. 299—Going v. Alabama Steel & Wire Co., 37 So. 784, 141 Ala. 537—Frierson v. Frazier, 37 So. 825, 142 Ala. 232.

Facts held not to impeach testimony

Expert opinion as to highwater mark, of a river was not impeached by showing that large trees grew below that point, where experts testified that such trees could grow below high water.—State ex rel. O'Connor v. Sorenson, 271 N.W. 234, 222 Iowa 1248.

23. Neb.—In re Kajewski's Estate, 279 N.W. 185, 134 Neb. 485.

Inconsistency does not destroy total effect of testimony

As respects sufficiency of evidence to support verdict for plaintiff in death action, statement by doctor that he did not know cause of death did not destroy effect of his other testimony concerning probable cause of death.—McGrady v. Brink, 81 P. 2d 800, 195 Wash. 626.

Correction of mistake

Mistake of medical witness on direct examination in statement that right rather than left ankle had been injured, necessitating correction of testimony on redirect, did not destroy substantial value of testimony although it may have affected weight.—Adams v. Carlo, Mo.App., 101 S.W.2d 753.

Impairment held shown

That physician testified that testator had no lucid intervals was insufficient to establish lack of testamentary capacity, where physician admitted that testator might have remembered brother and sister, might have entertained idea of giving away house, that he knew he had money in bank, and would have been able on some days to have known what he wanted to do with property "if his judgment was good."—In re Moore's Estate, 176 A. 241, 317 Pa. 42.

Impairment not shown

(1) Testimony of plaintiff's physician, that physician did not think plaintiff's injury was permanent, did not nullify such physician's testimony that plaintiff "will" suffer pain for maybe a month and maybe for many years.—Taylor v. Terminal R. Ass'n of St. Louis, Mo.App., 112 S.W.2d 944.

(2) Physician's opinion that acute appendicitis caused death was not invalidated by his testimony that he would almost be willing to swear that acute appendicitis caused death, where, by such testimony, he meant that he was willing to swear that such was fact instead of opinion.—Gillick v. Fruin-Colnon Const. Co., 65 S.W.2d 927, 334 Mo. 135.

(3) Physicians' declarations that injury caused tuberculosis was not destroyed, as matter of law, by their testimony that no one could tell positively whether plaintiff would not have been tubercular anyway.—McMinis v. Philadelphia Rapid Transit Co., 135 A. 722, 288 Pa. 377.

(4) Physician's testimony that septicæmia could have been caused by infected foot did not invalidate his opinion that infected foot did not cause septicæmia in case involved.—Gillick v. Fruin-Colnon Const. Co., supra.

(5) Physician's testimony that it was possible, but not probable, that lymphangitis could cause or aggravate acute appendicitis, was of no probative force, where physician positively testified that lymphangitis did not do so in case involved.—Gillick v. Fruin-Colnon Const. Co., supra.

(6) Testimony of witness regarding truck's speed was not withdrawn by answer to cross-examination question as to whether he was certain that looking out of a lighted room at 8:30 at night he was able to observe the speed of the truck of "Well, not exactly; it is usual that it is going over thirty miles though," for his answer is susceptible to the construction that he could not estimate the speed with accuracy.—Hepner v. Libby, McNeill & Libby, 300 P. 830, 114 Cal. App. 747.

(7) Testimony of section hand that ties being unloaded along a main line track were to be used in the track was a statement of fact necessarily within knowledge of witness, and was conclusive, notwithstanding subsequent answer of doubtful meaning to involved question.—Louisville & N. R. Co. v. Brandenburg, 270 S.W. 1, 207 Ky. 689.

Value

(1) In action for conversion of automobile, plaintiff's testimony that reasonable cash market value of automobile was five hundred and fifty dollars or six hundred dollars and that he thought he got a bargain in the automobile was not rendered unworthy of belief because plaintiff paid only five hundred and thirty-five dollars for automobile, but such fact merely affected his credibility and was matter for jury to determine.—Wright Titus, Inc., v. Swafford, Tex.Civ.App., 133 S.W.2d 287, error dismissed, judgment correct.

(2) In action for conversion, plaintiff's testimony that second-hand silverware which was in automobile at time of conversion had no market value and that an investigation showed that it would cost more than one hundred dollars to replace, supported jury's finding of seventy-five dollars actual value of silverware, notwithstanding plaintiff's testimony on cross-examination that some of pieces of silverware had market value.—Wright Titus, Inc., v. Swafford, supra.

24. Conn.—Appeal of Cohen, 166 A. 747, 117 Conn. 75.

Extent of qualification

Where witness testified positively on direct examination that the roadway was not over fifteen feet wide, his statement on cross-examination, that he would not swear to such fact positively as he had never measured it, could be understood as qualifying his previous testimony only to the extent of disclaiming his ability to swear with mathematical exactness to a distance which had not been measured.—Golding v. Parrish, 106 S.E. 743, 26 Ga.App. 495.

Values

Testimony of expert witness as to land values is not destroyed by qualification that increased value from improvements will not be immediately realized.—Appeal of Cohen, 166 A. 747, 117 Conn. 75.

25. La.—Shaffer v. Southern Bell Telephone & Telegraph Co., 165 So. 651, 184 La. 158, annulling, App., 160 So. 439.

his testimony as a whole. He may be contradicted by others in his own class or by any competent witness,[26] or by the use of exhibits;[27] or the weight of his testimony may be impaired by showing that he is interested[28] or biased;[29] that others have at a prior time refused to accept the opinion expressed;[30] that he made inconsistent statements at another time,[31] provided a proper foundation is laid

Cause of death

Physician's statement on stand that he did not know what caused decedent's death was insufficient to discredit physician's testimony as to cause of death, in view of physician's other testimony, and court's refusal, on objection, to allow physician to explain statement.—Shaffer v. Southern Bell Telephone & Telegraph Co., supra.

26. Tex.—Texas & N. O. R. Co. v. Glass, Civ.App., 107 S.W.2d 924, error dismissed.

22 C.J. p 737 note 58.

Extent of testimony

Admission of statement of plaintiff's expert that he had found malaria-bearing mosquitoes breeding on still waters of defendants' lake and other places, in rebuttal of testimony of defendants' expert that malaria-bearing mosquitoes did not breed in defendants' lake, was not erroneous because not restricted to a compass of one and a half miles from plaintiff's house, where defendants' expert testified that his investigation included entire area of the lake and places outside or beyond it.—Godfrey v. Western Carolina Power Co., 128 S.E. 485, 190 N.C. 24.

Experience of layman

Where testimony of experts runs contrary to common experience of laymen, testimony of laymen concerning their experiences is usually admissible to refute opinions of experts.—Texas & N. O. R. Co. v. Glass, Tex.Civ.App., 107 S.W.2d 924, error dismissed.

Opinion based on facts not in evidence

It is proper to sustain objection to hypothetical question based on assumed facts not in evidence which was asked for the purpose of contradicting the opinion of a witness given in answer to a similar hypothetical question.—State, for Use of Kalives, v. Baltimore Eye, Ear and Throat Hospital, 10 A.2d 612, 177 Md. 517.

Witnesses of same party

Attending physician was not incompetent to express opinion at variance with that of another attending physician called by same litigant.—Schlossstein v. Bernstein, 142 A. 324, 293 Pa. 245.

Not rendered incompetent

Expert opinion evidence is not made incompetent by fact that other experts may have reached another conclusion.—Lawson v. Darter, 160 S.E. 74, 157 Va. 284.

27. Or.—City of Seaside v. Randles 180 P. 319, 92 Or. 650.

Medical charts

Charts which contain notations of patient's condition and medicines administered may be used to test credibility or accuracy of testimony of nurses making such notations, or physicians, if it is shown that physicians examined charts at time they were made or shortly thereafter.—Flynn v. Troesch, 26 N.E.2d 91, 373 Ill. 275.

28. U.S.—Dayton Power & Light Co. v. Public Utilities Commission of Ohio, 54 S.Ct. 647, 292 U.S. 290, 78 L.Ed. 1267, affirming 187 N.E. 18, 127 Ohio St. 137.

Cal.—National Automobile Ins. Co. v. Industrial Accident Commission of California, 22 P.2d 568, 132 Cal. App. 373.

Mich.—De Haan v. Winter, 247 N.W. 151, 262 Mich. 192.

N.Y.—In re Snelling's Will, 32 N.E. 1006, 136 N.Y. 515.

Okl.—Carey v. Corporation Commission of Oklahoma, 33 P.2d 788, 168 Okl. 487.

Pa.—Pilvelis v. Township of Plains, 34 Luz.Leg.Reg. 29, reversed on other grounds 14 A.2d 557, 140 Pa. Super. 561.

22 C.J. p 737 note 59.

29. U.S.—Dayton Power & Light Co. v. Public Utilities Commission of Ohio, 54 S.Ct. 647, 292 U.S. 290, 78 L.Ed. 1267, affirming 187 N.E. 18, 127 Ohio St. 137.

Ala.—Louisville & N. R. Co. v. Martin, 198 So. 141, 240 Ala. 124.

Cal.—National Automobile Ins. Co. v. Industrial Accident Commission of California, 22 P.2d 568, 132 Cal. App. 373.

Okl.—Carey v. Corporation Commission of Oklahoma, 33 P.2d 788, 168 Okl. 487.

22 C.J. p 737 note 60.

Employment

In personal injury action where court, on application of defendant, appointed physician to examine plaintiff, jury was entitled to know whether physician so appointed was in fact employee of defendant.—Golden v. Onerem, Mo.App., 123 S.W. 2d 617.

Discharge

In action for death of pedestrian struck by train, denying railroad's cross-examination to show that locomotive engineer, who testified as an expert for plaintiff, had been discharged by two railroads, for purpose of showing witness' bias against railroads in general was error.—Louisville & N. R. Co. v. Martin, 198 So. 141, 240 Ala. 124.

30. N.C.—Charleston & W. C. Ry. Co. v. Spartanburg Bonded Warehouse, 149 S.E. 236, 151 S.C. 542.

Appraisal

Landowner in condemnation proceedings could discredit opinion of member of civic committee who appraised tract involved and others by showing appraisals were not accepted by landowners.—Charleston & W. C. Ry. Co. v. Spartanburg Bonded Warehouse, supra.

31. Ala.—Independent Life Ins. Co. v. Carroll, 130 So. 402, 222 Ala. 34—Moore v. Smith, 111 So. 918, 215 Ala. 592.

Minn.—Jensen v. Molgaard, 240 N. W. 656, 185 Minn. 284.

N.Y.—In re Snelling, 32 N.E. 1006, 136 N.Y. 515.

22 C.J. p 737 note 61.

Palpable error in inconsistent statement

Where employee entered hospital on March 18, 1934, and remained there until he died, variance between doctor's testimony, that he treated employee two days before employee went to hospital, and certificate stating that employee was treated from April 1, 1934, until his admission to hospital was immaterial, in view of palpable error in certificate.—Brown v. Moss, 182 A. 777, 120 Pa.Super. 336.

Not substantive evidence

(1) Testimony of an inconsistent statement by the witness, although it may be admissible to impeach his credibility as an expert witness is not substantive evidence.

Ala.—Moore v. Smith, 111 So. 918, 215 Ala. 592.

Ky.—Bayless v. Hughes' Ex'rs, 278 S.W. 162, 212 Ky. 56.

(2) Where physician on direct examination testified that first time insured had ever consulted him was in 1932, a statement, signed by physician, that physician had first seen insured in about 1926 and had continued to take care of insured up to present time, was pertinent only for purpose of impeaching testimony of physician, and could not be considered as evidence in chief.—New York Life Ins. Co. v. White, 23 N.Y. S.2d 57, 260 App.Div. 901.

(3) In compensation case, testimony with reference to contents of death certificate made by expert witness if admissible could not be accepted as proof of substantive facts, but could serve only as an "im-

therefor;[32] that he formed a different opinion at another time;[33] that he did not express the opinion testified to at a time when such an expression might reasonably have been expected;[34] or that he changed sides in the case.[35] Also articles written by the expert or in collaboration with others are admissible for purposes of impeachment.[36] It may be shown that the inferences are erroneous, as where another sufficient cause will explain the phenomena,[37] or that the witness is mistaken in a portion of his testimony,[38] or that an occurrence said to be impossible has occurred,[39] or where the treatment stated to be the proximate cause of death has been administered in other instances without fatal results.[40] The actual selling price of properties of which a witness testifying as to value claims to know the sale price may be shown.[41]

The inclusion[42] or exclusion[43] by the expert of factors or elements which should, or should not, be considered in the determination of his opinion is to be considered in determining the weight to be attached to his testimony. It may be proved that the facts assumed as the basis of the question do not exist,[44] or are not established by the evidence,[45] or that the factors which the witness used as the basis of his opinion do not correspond to the actual facts.[46]

An opinion which subsequent facts and occurrences show to have been erroneous is entitled to no weight.[47]

peachment".—Baker v. Graniteville Co., 14 S.E.2d 367, 197 S.C. 21.

32. Mo.—Bowles v. Wabash Ry. Co., App., 271 S.W. 851.

Waiver

That usual foundation for impeachment of witness was not laid is waived by objection to testimony as wholly immaterial.—Jablonowski v. Modern Cap Mfg. Co., 279 S.W. 89, 312 Mo. 173, affirming, App., 251 S. W. 477.

33. Mass.—Perangelo's Case, 177 N. E. 892, 297 Mass. 59.

22 C.J. p 737 note 62.

Limited to impeachment purposes

The former contrary opinion of the witness is limited to impeachment purposes and is not admissible as substantive proof.—Perangelo's Case, supra.

Foundation for proof

Refusal to permit impeachment of expert's testimony respecting value of land by use of tax records allegedly showing witness' assessment of land as an official appraiser was not error where successive proffers of proof were made seeking to inquire if witness had made assessments in a certain year and how he could explain differences in his valuation as an expert and his valuation as an assessor, and the proffers were not accompanied with identification of their having been made by witness in his official capacity and as his independent act.—Mayor and City Council of Havre de Grace v. Maxa, 9 A.2d 235, 177 Md. 168.

Mental capacity

(1) In will contest, physician's testimony as to mental incapacity of testator was without probative force, where physician never examined testator, was glad to have testator's business in bank of which physician was president, and considered testator's note to be good.—Acker v. Acker, 192 A. 327, 172 Md. 477.

(2) In action to invalidate deeds on ground of undue influence, opinions of witnesses that grantor lacked mental capacity were entitled to little weight, where those witnesses were themselves willing to enter into important business transactions with grantor at the time deeds were executed.—Mullens v. Lilly, W.Va., 13 S.E.2d 634.

Total and permanent disability

In action for disability benefits under war risk policy, medical testimony that insured became totally and permanently disabled before policy lapsed was without weight, where, for period of approximately four years subsequent to date policy lapsed, witness, on diagnosis disclosing easily understood condition, had found that insured was not totally and permanently disabled.—U. S. v. Nelson, C.C.A.Ark., 102 F.2d 515, certiorari denied Nelson v. U. S., 60 S.Ct. 81, 308 U.S. 550, 84 L.Ed. 462.

34. Tex.—Modern Brotherhood of America v. Chandler, Civ.App., 146 S.W. 626.

22 C.J. p 737 note 63.

35. U.S.—Steinfur Patents Corporation v. Philip Singer & Bro., D. C.N.Y., 44 F.2d 226.

Loyalty a requirement

Loyalty pendente lite is an obvious requirement from an expert witness, and an expert who deserts the party first engaging him in a case and goes over to the opposing party destroys to a large extent his value as an expert in such case.—Steinfur Patents Corporation v. Philip Singer & Bro., supra.

36. S.C.—LaCount v. General Asbestos & Rubber Co., 192 S.E. 262, 184 S.C. 232.

37. Mass.—Lincoln v. Taunton Copper Mfg. Co., 9 Allen 181.

22 C.J. p 737 note 65.

38. Ala.—Jones v. State, 57 So. 31, 174 Ala. 53.

Iowa.—Kirsher v. Kirsher, 94 N.W. 846, 120 Iowa 337.

Slight error

A slight error in a physician's testimony as to the time after the accident within which he examined the injured party is immaterial.—Atherley v. Market St. Ry. Co., Cal.App., 108 P.2d 927.

39. Mass.—Commonwealth v. Leach, 30 N.E. 163, 156 Mass. 99.

40. Ala.—Supreme Lodge of the World, Loyal Order of Moose, v. Gustin, 80 So. 84, 202 Ala. 246.

41. N.Y.—City of Binghamton v. Taft, 211 N.Y.S. 683, 125 Misc. 411.

42. Conn.—Appeal of Cohen, 166 A. 747, 117 Conn. 75.

43. Conn.—Appeal of Cohen, supra.

44. N.D.—Reichert v. Northern Pac. R. Co., 167 N.W. 127, 39 N.D. 114.

Wis.—Quinn v. Higgins, 24 N.W. 482, 63 Wis. 664, 53 Am.R. 305.

45. N.Y.—In re Gedney, 142 N.Y.S. 157—Bristed v. Weeks, 5 Redf. Surr. 529.

Establishment of facts stated in hypothetical question see supra § 552.

46. Mich.—Pearson v. Wallace, 170 N.W. 72, 203 Mich. 622.

Subject to proof

If the actual facts of the case are different from those on which the witness based his opinion the difference is a fact to be proved.—Pearson v. Wallace, supra.

Existence of disease

It may be shown that the witness does not have a disease as indicated in a written report by the doctor testifying and from which he testified.—Kraft-Phenix Cheese Corporation v. Spelce, 113 S.W.2d 476, 195 Ark. 407.

47. Md.—Acker v. Acker, 192 A. 327, 172 Md. 477.

Tex.—Associated Indemnity Corporation v. McGrew, Civ.App., 142 S. W.2d 567, error granted.

It has been held that a board of tax appeals which has experience and knowledge on which it may predicate a judgment may ignore the opinions of expert witnesses as to values.[48]

Texts and authorities. The qualifications and truthfulness of the expert may be tested by the use of authorities that the witness himself says he is familiar with, are standard, and so recognized by the members of his profession,[49] as by showing that a scientific treatise which he relies on as the basis of his opinion does not sustain him,[50] or that a standard work asserts that a theory which he has stated is not supported by any of the authorities.[51] He may not, however, be impeached by works on which he has not relied as authority for his testimony.[52]

Collateral matter. Evidence is not admissible to break down an expert witness' testimony on cross-examination concerning collateral matter.[53]

Propriety of test or examination. Where a witness states an opinion formed as the result of certain specified tests or investigations which it appears are inappropriate, inaccurate, and not a proper basis for determination, his opinion is of no probative value,[54] and another skilled witness may be asked whether the tests applied were fair or proper;[55] but evidence as to what constitutes a proper test or examination is not admissible to impeach testimony that an examination was made and diagnosis based thereon, without any attempt to describe the nature of the examination.[56] Also it may be shown that a physician testifying as an expert is not a member of a specified medical association and that the association condemns his method of diagnosis.[57]

Qualification of witness. Lack of qualification may be proved,[58] but the evidence offered for this purpose must be relevant and admissible;[59] hear-

Subsequent facts held not to overthrow former opinion

In action on war risk insurance policy, court was justified in accepting diagnosis, on date previous to lapse of policy, that insured's tuberculosis was healed, notwithstanding developments subsequent to lapse, including insured's suffering from active chronic tuberculosis.—Young v. U. S., C.C.A.Cal., 111 F.2d 823.

48. U.S.—Old Mission Portland Cement Co. v. Commissioner of Internal Revenue, C.C.A., 69 F.2d 676, certiorari granted Old Mission Portland Cement Co. v. Helvering, 55 S.Ct. 79, 293 U.S. 544, 79 L.Ed. 649, affirmed 55 S.Ct. 158, 293 U.S. 289, 79 L.Ed. 367.

49. Or.—Kern v. Pullen, 6 P.2d 224, 138 Or. 222, 82 A.L.R. 434.

50. N.Y.—City of Binghampton v. Taft, 211 N.Y.S. 683, 125 Misc. 411.
N.C.—Tilgham v. Seaboard Air Line Ry., 89 S.E. 71, 171 N.C. 652.
22 C.J. p 737 note 64.

51. Neb.—Oliverius v. Wicks, 187 N.W. 73, 107 Neb. 821.

Not as substantive proof

The authority is received, not as substantive proof, but to impeach and discredit the witness by showing a mistake in his statement.—Oliverius v. Wicks, supra.

52. U.S.—E. I. Du Pont de Nemours & Co. v. White, C.C.A.N.J., 8 F.2d 5—Western Union Telegraph Co. v. Ammann, C.C.A.N.J., 296 F. 453.

53. Ark.—Seaman Store Co. v. Bonner, 113 S.W.2d 1106, 195 Ark. 563.
Mo.—Hart v. Kansas City Public Service Co., App., 142 S.W.2d 348.

Employment

The question as to whether physician appointed by court on application of defendant to examine plaintiff was in fact employee of defendant was collateral one, and answers given by physician were conclusive on that subject.—Golden v. Onerem, Mo.App., 123 S.W.2d 617.

54. Mont.—Irion v. Hyde, 105 P.2d 666, 110 Mont. 570.

Basis of opinion held improper

(1) Testimony of skilled witness as to volume of two hundred and seventy-five pot holes in creek bed based on measurement of four of the holes picked at random after looking at one hundred and nineteen of the holes constituted no evidence of the contents of the pot holes, since the method of computation was obviously incorrect.—Irion v. Hyde, supra.

(2) Testimony of electrical engineer as to maximum flow of creek, which was computed by engineer on measurements made at point where he found what he called "trash marks" indicating the high-water mark, constituted no evidence as to maximum flow of creek, where there was no proof that place measured was typical of the stream as a whole, or that the high water at such point was result entirely of present flow, since method of computation was incorrect as a matter of law.—Irion v. Hyde, supra.

55. Wash.—Rowe v. Whatcom County R. & Light Co., 87 P. 921, 44 Wash. 658.

Samples

Testimony of expert witness that opponent's witness, whose testimony as to the condition of the soil had been admitted, had taken the poorest sections of the irrigation districts in question from which to select his samples should have been admitted.—Stinson Canal & Irrigation Co. v. Lemoore Canal & Irrigation Co., 188 P. 77, 45 Cal.App. 241.

56. Ky.—Etter v. National Life & Accident Ins. Co., 53 S.W.2d 967, 245 Ky. 543.

57. Mo.—Clark v. Commerce Trust Co., 62 S.W.2d 874, 333 Mo. 243.

58. Mo.—Buckman v. Missouri, K. & T. Ry. Co., 73 S.W. 270, 100 Mo. App. 30.
Qualifications of witness giving opinion evidence see supra §§ 454–458.

Mere insufficiency of knowledge on the part of an expert on which to base an opinion affects the weight rather than the competency of the opinion.—Holliday & Wyon Co. v. O'Donnell, 101 N.E. 642, 54 Ind.App. 95.

Acknowledged incapacity

(1) Plaintiff's evidence as to speed of car and manner of approach was without weight in view of her acknowledgment on cross-examination that she was poor judge of time and distance.—Elliott v. Market St. Ry. Co., 40 P.2d 547, 4 Cal.App.2d 292.

(2) Opinion of expert appraiser as to value of mortgaged realty was of no evidentiary value where appraiser, upon cross-examination, testified that appraisal made was assuming clear property, and that he did not believe appraisal could be made on property with such mortgage on it.—Ellwood v. Niedermeyer, 56 P.2d 279, 12 Cal.App.2d 699.

59. Ill.—Chicago & E. I. R. Co. v. Schmitz, 71 N.E. 1050, 211 Ill. 446.
22 C.J. p 737 note 70.

say,[60] including reputation,[61] other cases in which the experts were mistaken in their opinion,[62] and opinion,[63] being excluded. It may be proved that the faculties of the witness have been impaired by disease.[64]

§ 572. Conflict of Evidence

In general a conflict between opinion evidence, whether expert or lay, and other opinion or other evidence is for the trier of fact to decide. However, consideration should be given to the training and experience of the witnesses and whether their opinion is based on personal knowledge of the subject involved or on hypothetical facts, or is merely the result of a theory. Proof of facts will usually outweigh opinions and estimates contrary thereto.

In case of a conflict between opinion evidence, whether that of an ordinary witness,[65] or of a skilled or expert witness,[66] and other evidence in

60. Ind.—Adams v. Sullivan, 100 Ind. 8.

61. Ind.—Adams v. Sullivan, supra.

Falsehood to obtain professional standing

In personal injury action, excluding cross-examination of plaintiff's medical witness relating to false statements in his application for license to practice medicine was not error.—Bertke v. Hoffman, 50 S.W. 2d 107, 330 Mo. 584.

62. Wash.—In re Gunderson's Estate, 24 P.2d 1070, 174 Wash. 462.
22 C.J. p 737 note 70 [b] (1).

63. N.Y.—Carley v. New York, O. & W. Ry. Co., 1 N.Y.S. 63.
22 C.J. p 737 note 73.

64. Vt.—Fairchild v. Bascomb, 35 Vt. 398.

65. U.S.—Whitlow v. Commissioner of Internal Revenue, C.C.A., 82 F. 2d 569—In re Cottrill's Estate, D. C.D.C., 39 F.Supp. 689.

Where witness exhibits lack of candor

Court is not required to accept unsupported estimate by motorist of rate of speed at which he was driving at time of accident, in view of shifty and unsatisfactory manner in which he testified and his frequent lack of candor, particularly where physical facts led to a different conclusion.—Andruss v. Nieto, C.C.A. Cal., 112 F.2d 250.

Opinion as to effect of contract as against written evidence

When a witness, instead of stating the words uttered or used by the parties to an alleged oral agreement, simply gives his conclusion concerning the effect of such words, the trial judge did not err in treating the testimony accordingly, and he was not obliged to credit such testimony against written evidence in the case.—Germantown Trust Co. v. Risser, 112 A. 443, 269 Pa. 286.

In conflict with admission

That evidence contradicting admissions against interest in proofs of death furnished under life policy came from lay witnesses did not render evidence without probative value.—Rush v. Metropolitan Life Ins. Co., Mo.App., 63 S.W.2d 453.

In conflict with certificate of death

Testimony of lay witness that deceased was in good health at specified time is of evidentiary value, although contradictory of certificate of death.—Scott v. National Life & Accident Ins. Co., Mo.App., 281 S.W. 67.

Testimony held insufficient as against conflicting evidence

Testimony of witnesses that land had been in adverse possession of designated person for over thirty years was insufficient to establish title by adverse possession, where so much of their testimony as was not by way of conclusion was controverted either by circumstances pointing to the contrary, or directly. —Dortch's Ex'r v. Willoughby, 113 S.W.2d 832, 272 Ky. 231.

66. U.S.—Bull v. Smith, C.C.A. Conn., 119 F.2d 490—Adams v. U. S., C.C.A.Ill., 116 F.2d 199—Ariel Realty Co. v. Commissioner of Internal Revenue, C.C.A., 115 F.2d 659—Gamble v. Commissioner of Internal Revenue, C.C.A., 101 F.2d 565, certiorari denied 59 S.Ct. 790, 306 U.S. 664, 83 L.Ed. 1061—Old Mission Portland Cement Co. v. Commissioner of Internal Revenue, C.C.A., 69 F.2d 676, certiorari granted Old Mission Portland Cement Co. v. Helvering, 55 S.Ct. 79, 293 U.S. 544, 79 L.Ed. 649, affirmed 55 S.Ct. 158, 293 U.S. 289, 79 L.Ed. 367.
Cal.—In re Arnold's Estate, Cal., 107 P.2d 25, prior opinion 99 P.2d 376.
La.—Rogers v. Union Indemnity Co., App., 146 So. 505.
Mo.—Berkemeier v. Reller, 296 S.W. 739, 317 Mo. 614.
Mont.—Watts v. Billings Bench Water Ass'n, 253 P. 260, 266, 78 Mont. 199, citing **Corpus Juris**.
N.J.—State Highway Commission v. Mayor and Board of Aldermen of Town of Dover, 162 A. 749, 109 N. J.Law 303.
N.Y.—Commercial Casualty Ins. Co. v. Roman, 199 N.E. 658, 269 N.Y. 451, reversing 279 N.Y.S. 170, 244 App.Div. 306, remittitur amended 200 N.E. 319, 270 N.Y. 563—Shabotzky v. Equitable Life Assur. Soc., 12 N.Y.S.2d 848, 257 App.Div. 257, reargument denied 14 N.Y.S.2d 279, 257 App.Div. 957—In re Kimball's Will, 281 N.Y.S. 605, 156 Misc. 338—Harding v. Harding, 22 N.Y.S.2d 810, affirmed 25 N.Y.S.2d 526, 261 App.Div. 924.
Pa.—Kent v. General Chemical Co., 131 A. 588, 285 Pa. 34—City of Erie v. Quinn, 20 Erie Co. 130.
Tex.—Metropolitan Life Ins. Co. v. Funderburk, Civ.App., 81 S.W.2d 132, error dismissed.
22 C.J. p 738 note 78.

Conclusiveness

(1) Testimony based on X-ray photographs should not be taken as conclusive against other testimony showing only facts and injury—Whitton v. United Gas Public Service Co., La.App., 187 So. 806.

(2) In determining permanent total disability under insurance policy, ability to perform labor is not such exclusively technical question as to give expert testimony conclusive effect.—Bulluck v. Mutual Life Ins. Co. of New York, 158 S.E. 185, 200 N.C. 642.

(3) Testimony of expert witnesses based on autopsy was for the referee and workmen's compensation board to consider with opposing evidence offered by claimant, as against contention that such testimony was conclusive because based on autopsy.—Johnson v. Valvoline Oil Co., 200 A. 224, 131 Pa.Super. 266.

Conflict with factual testimony

The demonstration of the truth of issues before a court by any means which are generally accepted as tending to prove the facts in dispute is encouraged, but when there is a conflict between scientific testimony and testimony as to facts, the jury or trial court must determine the relative weight of the evidence.—Arais v. Kalensnikoff, 74 P. 2d 1043, 10 Cal.2d 428, 115 A.L.R. 163.

Conflict with government bulletin

Court need not accept opinions in government bulletin indicating temperatures in warehouse storing apples was excessive as against warehouse foreman's opinion based on practical experience.—Crystal Ice & Cold Storage Co. v. Renschler Produce Co., 278 P. 874, 99 Cal.App. 417.

Conflict with testimony of party as to suffering

No rule of law exists whereby testimony of injured plaintiff respecting his sufferings, if believed, should outweigh physicians' opinions.—Blanton v. Great Atlantic & Pacific Tea Co., C.C.A.Ga., 61 F.2d

the case, the jury, or the court trying a question of fact, is not, as a general rule, bound to accept the opinion evidence in preference to the other, but may judge the weight of each and determine the issue of fact as it deems proper; and, in general, the same rule applies where there is a conflict between the opinions of different experts or skilled witnesses,[67] or where there is a conflict between or-

427, certiorari denied 53 S.Ct. 405, 288 U.S. 609, 77 L.Ed. 984.

Distinction between expert and other evidence

The law makes no distinction between expert testimony and evidence of other character in so far as the weight to be given each is concerned, and weight to be given is limited to that which each is entitled to in the particular case.—Arais v. Kalensnikoff, 74 P.2d 1043, 10 Cal.2d 428, 115 A.L.R. 163—Rolland v. Porterfield, 191 P. 913, 183 Cal. 466—McFeely v. Industrial Accident Commission of State of California, 223 P. 413, 65 Cal.App. 45.

Expert testimony and other evidence of same party

It is the province of the jury to decide a conflict between the testimony of an expert and that of eyewitnesses who testified on behalf of the same party.—Western Union Telegraph Co. v. Byrd, 122 S.W.2d 569, 197 Ark. 152.

Opinion and circumstantial evidence

Relative weight between conflicting scientific testimony and circumstantial evidence as to facts is to be determined by jury or trial court.—McGrath v. Basich Bros. Const. Co., 46 P.2d 981, 7 Cal.App.2d 573.

Admissions

(1) On appeal from assessment of benefits from sewer improvement, testimony of objecting property owner's expert witnesses as to amount of benefits was not controlling, in view of letter of owner admitting before construction of sewer that it deemed fair cost as not in excess of benefits.—North View Land Co. v. City of Cedar Rapids, 169 N.W. 644, 185 Iowa 1032.

(2) In action for fraud based on vendor's false representation that property was served by good irrigating stream and held growth of timber capable of yielding four thousand cords worth fifty cents per cord, opinion evidence that property was worth the purchase price of two thousand dollars was insufficient to overcome admission that the property, studded with stumps and without supply of water would not be worth two thousand dollars, which admission resulted from fact that the representations were made.—Selman v. Shirley, 91 P.2d 312, 161 Or. 582, 124 A.L.R. 16, adhering to former opinion 85 P.2d 384, 161 Or. 582, 124 A.L.R. 1.

Observation of exhibits

In determining whether two marks or designs are so similar as to be likely to cause confusion and result in unfair competition, the judgment of the eye on comparison of the two is more satisfactory evidence than the opinions of witnesses.—M. C. Peters Milling Co. v. International Sugar Feed No. 2 Co., C.C.A.Tenn., 262 F. 336.

Disregard of evidence

(1) The testimony of experts may not be arbitrarily rejected, but, like the evidence of every other witness, is to be weighed by the jurors, who are at liberty to disregard it according to its importance in view of all the facts and circumstances in the case.—Drew v. U. S., C.C.A. Tenn., 104 F.2d 939.

(2) Opinions of expert witnesses could not be disregarded by trial justice nor treated as binding on him, irrespective of other evidence and reasonable inferences therefrom, but opinions had to be carefully weighed and considered in conjunction with all the other evidence.—Levy v. Zura, 199 A. 291, 60 R.I. 399.

(3) Generally, where a witness is permitted to state his views of care or fault, the trier of facts may disregard them and draw his own conclusion based on all the relevant evidence, although he may not have the benefit of special learning and knowledge helpful in reaching a correct verdict.—Hood v. City of Nashua, 13 A.2d 726, 91 N.H. 98.

Opinion not based on facts in evidence

In action for price of machine installed, where defense was that machine did not have capacity contracted for, testimony of expert, in answer to hypothetical question not based on contract conditions, could not be substituted for evidence of performance.—Alex G. Goethel Sheet Metal Works Co. v. American Lace Paper Co., 251 N.W. 474, 213 Wis. 248.

Mental condition

(1) Where plaintiff at the trial eight months after execution of lease and deed was able to relate clearly transactions concerning the lease and deed, and her evidence was corroborated by the other party to the lease and deed, and disinterested witnesses who had known plaintiff for years testified as to plaintiff's statements to the same effect at the time of the execution of the lease and deed, the testimony of medical experts that plaintiff was of unsound mind and incapable of entering into a contract was overcome.—Smith v. Smith, 233 S.W. 183, 289 Mo. 405.

(2) Evidence held to support jury's finding of mental competency.—Jenkins v. Trice, 147 S.E. 251, 152 Va. 411.

(3) Opinion of notary as to mental capacity of grantor whose acknowledgment he takes may be overcome by clear and unquestionable evidence.—Lindsay v. Buchanan, 164 S.E. 794, 112 W.Va. 289.

Value

(1) Expert testimony concerning current market value of stock on date of purchase was not sufficient to show that market value was less than par, where purchaser valued such stock at par in transaction with corporation, and stock continued to earn and pay full dividends.—Brink v. U. S., D.C.Mass., 20 F.Supp. 849.

(2) The valuation of an appraiser as to bonds owned by decedent's estate for the assessment of a transfer tax, based on the average of the bid and asked prices of the bonds for a reasonable time before and after decedent's death, would not prevail over evidence by an expert as to their market value at decedent's death.—In re Seixas' Estate, 173 N.Y.S. 766.

(3) In proceedings to condemn land for municipal market, evidence showed that owner's valuation was more nearly correct than that of city's experts.—In re Certain Lands on North Shore of Harlem River in City of New York, 217 N.Y.S. 544, 127 Misc. 710.

(4) Opinion of real estate expert as to value of realty assessed for taxation could not prevail over evidence of value as shown by fairly conducted public sale.—Appeal of Sailer, 181 A. 854, 120 Pa.Super. 69.

67. U.S.—Gamble v. Commissioner of Internal Revenue, C.C.A., 101 F. 2d 565, certiorari denied 59 S.Ct. 790, 306 U.S. 664, 83 L.Ed. 1061—Great Lakes Boat Bldg. Corporation v. Smith, C.C.A.Ill., 87 F.2d 796—U. S. v. Alger, C.C.A.Idaho, 63 F.2d 592—U. S. v. Dudley, C.C.A. Idaho, 64 F.2d 743—The Hisko, C.C.A.N.Y., 54 F.2d 540.

Ala.—New York Life Ins. Co. v. Torrance, 153 So. 463, 228 Ala. 286, denying certiorari 153 So. 458, 26 Ala.App. 38.

Ark.—Arkansas Power & Light Co. v. Gantt, 136 S.W.2d 180, 199 Ark. 893—Reiff v. Interstate Business Men's Acc. Ass'n of Des Moines, Iowa, 192 S.W. 216, 127 Ark. 254.

Cal.—City of Elsinore v. Temescal Water Co., 97 P.2d 274, 36 Cal.

App.2d 116—Sim v. Weeks, 45 P.2d 350, 7 Cal.App.2d 28.
Colo.—Gold, Silver & Tungsten v. Wallace, 91 P.2d 975, 104 Colo. 273, certiorari denied 60 S.Ct. 179, 308 U.S. 612, 84 L.Ed. 512, rehearing denied 60 S.Ct. 298, 308 U.S. 639, 84 L.Ed. 530.
Conn.—Britton v. Hartshorn, 156 A. 48, 113 Conn. 484—Naveckas v. Jack, 152 A. 580, 112 Conn. 407.
Ill.—Sutter v. Massachusetts Bonding & Ins. Co., 215 Ill.App. 341.
Iowa.—Crouch v. National Livestock Remedy Co., 231 N.W. 323, 210 Iowa 849.
Ky.—Security Mut. Life Ins. Co. v. Little, 162 S.W. 1131, 157 Ky. 276.
La.—Ardoin v. Robinson, App., 176 So. 228.
Md.—Armour & Co. v. Leasure, 9 A. 2d 572, 177 Md. 393.
Mass.—Vigneault v. Dr. Hewson Dental Co., 15 N.E.2d 185, 300 Mass. 223, 129 A.L.R. 95.
Mich.—Dailey v. Shaffer, 146 N.W. 192, 178 Mich. 574.
Neb.—Lincoln Telephone & Telegraph Co. v. Smith, 238 N.W. 319, 121 Neb. 711.
N.H.—Rogers v. U. S. Rubber Co., 20 A.2d 626—State v. Hampton Water Works Co., 18 A.2d 765, rehearing denied 19 A.2d 435.
Okl.—Carey v. Corporation Commission of Oklahoma, 33 P.2d 788, 168 Okl. 487.
Ohio.—Springfield Gas Co. v. Herman, 188 N.E. 733, 46 Ohio App. 309.
Pa.—Watson v. Lehigh Coal & Navigation Co., 116 A. 889, 273 Pa. 251—McKown v. State Mut. Life Assur. Co. of Worcester, Mass., 191 A. 621, 127 Pa.Super. 117.
S.D.—State ex rel. Jensen v. Wells, 281 N.W. 357, 66 S.D. 269.
Tex.—Davis v. Cochran, Civ.App., 275 S.W. 423.
Utah.—Lee v. New York Life Ins. Co., 82 P.2d 178, 95 Utah 445.
Vt.—Domina v. Pratt, 13 A.2d 198, followed in 13 A.2d 204.
Wash.—John Davis Estate v. Rochelle, 42 P.2d 788, 181 Wash. 81—Kieburtz v. City of Seattle, 146 P. 400, 84 Wash. 196.
W.Va.—Webb v. Chesapeake & O. Ry. Co., 144 S.E. 100, 103, 105 W. Va. 555, certiorari denied Chesapeake & O. R. Co. v. Webb, 49 S. Ct. 82, 278 U.S. 646, 73 L.Ed. 559, citing **Corpus Juris**.
Wis.—E. L. Chester Co. v. Wisconsin Power & Light Co., 247 N.W. 861, 211 Wis. 158—Chippewa Falls Hotel Co. v. Employers' Liability Assur. Corporation, Limited, of London, England, 241 N.W. 380, 208 Wis. 86—Acme Body Works v. Koepsel, 234 N.W. 756, 204 Wis. 493, supplemented 236 N.W. 378, 204 Wis. 493—Poneitowcki v. Harres, 228 N.W. 126, 200 Wis. 504.
22 C.J. p 731 note 85, p 738 note 79.

Accuracy of scientific article

Where experts disputed the correctness of a scientific article which stated that a certain product contained thirty-one hundredths percent silicon and five and thirty-nine hundreths percent silicon, one expert stating that the double mention of silicon was a blunder, it was proper to accept the article as written.—Aluminum Co. of America v. Thompson Products, D.C.Ohio, 25 F.Supp. 175, modified on other grounds, C.C. A., 122 F.2d 796.

Conflict as proof of fraud

In partners' suit on fire policies, fact that one partner and his expert witnesses, in testifying regarding value of furs and garments involved, with which they were familiar, placed higher valuation thereon than did insurers' witnesses did not necessarily show fraud.—Weininger v. Metropolitan Fire Ins. Co., 195 N.E. 420, 359 Ill. 584, 98 A. L.R. 169.

Conflict between party's witnesses

(1) Where plaintiff's own experts present irreconcilable views as to proper inferences from evidence, he fails to sustain the burden of proof which the law casts on him.—Knopf v. Delaware County, 140 A. 903, 292 Pa. 237.

(2) However, where there is evidence other than conflicting medical testimony of plaintiff's experts, right to recover is not defeated by such conflict.—Plunkett v. Pittsburgh Rys. Co., 161 A. 885, 105 Pa.Super. 600.

(3) Also the rule as to neutralization of testimony by conflict between experts of the same party has no application to a conflict between the testimony of a witness called as an expert by plaintiff and another witness called merely to testify as to facts within his knowledge and not as an expert, whose conflicting opinion was brought out on cross-examination, the situation in such case being the same as if two experts had been called, one by plaintiff and the other by defendant.—Borovski v. Philadelphia & Reading Coal & Iron Co., 101 Pa.Super. 304.

Credibility of conflicting opinions

A conflict in the testimony of various doctors with respect to source of alleged automobile accident victim's injuries did not show that testimony of one of the doctors was incredible.—Cherry-Burrell Co. v. Thatcher, C.C.A.Mont., 107 F.2d 65.

Expert appointed by court

In action to rescind purchase of horse because of defect in which there was conflicting testimony by equal number of experts as to cause of such defect, testimony of veterinarian appointed by the court which corroborated one party's experts is conclusive, especially where it appears to be the most reasonable explanation.—Magnus v. Perkins, 6 La. App. 6.

Meaning of statute

Meaning of statute of foreign jurisdiction is for court not jury, notwithstanding conflicting testimony of experts.—Merinos Viesca Y Compania v. Pan American Petroleum & Transport Co., C.C.A.N.Y., 83 F.2d 240, certiorari denied 57 S.Ct. 10, 299 U.S. 547, 81 L.Ed. 403—Scheer v. Rockne Motors Corporation, C.C.A. N.Y., 68 F.2d 942.

Neutralization of opinions

(1) Opinions of plaintiff's experts as to whether ulcerated condition of heel was caused by accident were held so inconsistent as to preclude consideration of either's testimony.—Mudano v. Philadelphia Rapid Transit Co., 137 A. 104, 289 Pa. 51.

(2) Testimony of two eminent alienists as to sanity of testatrix which was hopelessly conflicting was held without weight.—Kuehmsted v. Turnwall, 155 So. 847, 115 Fla. 692.

Rejection

In gas rate proceeding, state public utilities commission and state supreme court were free in their discretion to reject as unsatisfactory conflicting opinions of experts friendly to gas company.—Dayton Power & Light Co. v. Public Utilities Commission of Ohio, 54 S.Ct. 647, 292 U.S. 290, 78 L.Ed. 1267, affirming 187 N.E. 18, 127 Ohio St. 137.

Resort to other evidence

(1) When conflicting opinions exist between the experts, the court is compelled to consult the other evidence.—Rogers v. Union Indemnity Co., La.App. 146 So. 505.

(2) Where medical testimony is conflicting as to whether employee is suffering from fractures of vertebræ due to trauma or from scoliosis, lay testimony as to previous condition of employee's health would be of assistance.—Bearman v. Fuller Const. Co., La.App., 148 So. 720.

Status as conflict of evidence

A conflict between opinions of two experts constitutes a conflict in the evidence.—Southern California Edison Co. v. Gemmill, 85 P.2d 500, 30 Cal.App.2d 23.

Taking average

Court on appeal from assessment need not average values where expert opinions vary widely, but must determine market value from all expert testimony.—Appeal of 222 South Nineteenth St. Corporation, 170 A. 266, 314 Pa. 132, followed in Appeal of Ferrier, 170 A. 267, 314 Pa. 133.

Wide variations

In gas rate proceeding, wide variations of millions of dollars in estimates of experts as to market value of gas leases were sufficient of themselves to disprove existence of a market in strict or proper sense.—

dinary witnesses,[68] or between a skilled or expert witness and a lay witness,[69] or between skilled or expert witnesses and other skilled or expert witnesses and lay witnesses,[70] it being then for the triers of fact to decide which witnesses they will believe or rely on, or even to adopt a conclusion between those reached by the different witnesses.[71]

However, the determination of the trier of fact should not be mere arbitrary decision or guess work, and where testimony or other evidence is of such a character as to merit more weight than contradictory evidence, the decision should be in accordance therewith.

The value of conflicting expert testimony is not determined by the numerical weight thereof.[72] Con-

Dayton Power & Light Co. v. Public Utilities Commission of Ohio, 54 S.Ct. 647, 292 U.S. 290, 78 L.Ed. 1267, affirming 187 N.E. 18, 127 Ohio St. 137.

68. Ill.—Jennings v. Glover's Estate, 214 Ill.App. 359.

Good faith

Good faith of conclusion of lessee's superintendent that gas well under lease requiring production of oil or gas in paying quantities, was paying proposition, although marketing had been discontinued because of insufficient pressure, was not overthrown by lessor's opinion to contrary.—Smith v. McGill, C.C.A.Okl., 12 F.2d 32.

Witnesses of same party

Motorcycle driver suing for injuries was not estopped by testimony of his own witnesses as to speed and overtaking truck, where other testimony showed he had not violated law.—Quitslund v. Barton & Co., 255 P. 666, 143 Wash. 444.

69. Ill.—Nadenik v. Nadenik, 24 N.E.2d 346, 372 Ill. 408, affirming 19 N.E.2d 765, 299 Ill.App. 613—Jennings v. Glover's Estate, 214 Ill.App. 359.

Kan.—Mingle v. Hubbard, 293 P. 513, 131 Kan. 844.

Mich.—Jelusich v. Wisconsin Land & Lumber Co., 255 N.W. 920, 267 Mich. 313—Johnson v. Pearson, 249 N.W. 865, 264 Mich. 319—Dailey v. Shaffer, 146 N.W. 192, 178 Mich. 574.

Mo.—Allen v. American Life & Accident Ins. Co., App., 83 S.W.2d 192—Wollums v. Mutual Ben. Health & Accident Ass'n, 46 S.W.2d 259, 226 Mo.App. 647.

22 C.J. p 731 note 85.

Credibility of lay witness not destroyed

Expert witnesses' testimony does not necessarily destroy credibility of other testimony.—Webb v. Chesapeake & O. Ry. Co., 144 S.E. 100, 105 W.Va. 555, certiorari denied Chesapeake & O. R. Co. v. Webb, 49 S.Ct. 82, 278 U.S. 646, 73 L.Ed. 559.

Numerical basis

Probative weight of evidence is not measured by numerical basis, and medical testimony may be totally rejected, where in conflict with other testimony.—Baltimore & O. R. Co. v. Clark, D.C.Md., 56 F.2d 212, affirmed in part and reversed in part on other grounds, C.C.A., 59 F.2d 595.

Condition of health

Testimony of lay witness in regard to insured's health at given time is not without evidentiary value, even though contradictory of expert medical testimony.—Johnson v. Missouri Ins. Co., Mo.App., 46 S.W.2d 959.

Condition of step

In action for death of department store patron who fell on leaving step leading to sidewalk, the opinion of an architect regarding condition of iron slab covering step was not entitled to greater weight and was not to be regarded as more expert than that of any lay witness since anyone who saw slab and walked over it was fully able to judge its condition.—Lawson v. D. H. Holmes Co., La.App., 200 So. 163.

Handwriting

Testimony by experts that in their opinion a will was not in the handwriting of deceased was sufficient to sustain a finding to that effect, notwithstanding acquaintances of decedent familiar with his handwriting testified that in their opinion the entire document was in his handwriting.—In re Nelson's Estate, 216 P. 368, 191 Cal. 280.

Land elevation

Where a civil engineer testifies that a topographical survey made by him reveals that land at one point is higher than at another, and such testimony is in conflict with testimony of eyewitnesses, who testify that the same body of water covered the point shown by the survey to be higher, but did not reach or cover the point shown by the survey to be lower, such conflict is for the jury.—Western Union Telegraph Co. v. Byrd, 122 S.W.2d 569, 197 Ark. 152.

Mental capacity

Physician's testimony on subject of mental capacity is entitled to no greater weight than that of a layman of good common sense and judgment.—Nadenik v. Nadenik, 24 N.E.2d 346, 372 Ill. 408, affirming 19 N.E.2d 765, 299 Ill.App. 613—Wharton v. Meyers, 21 N.E.2d 772, 371 Ill. 546—Kasbohm v. Miller, 9 N.E.2d 216, 366 Ill. 484.

Water necessary for irrigation

In determining amount of water necessary for irrigation, trial court was not bound to disregard testimony of practical farmers who were familiar with character of lands and its needs and rely solely on testimony of irrigation engineers.—Worden v. Alexander, 90 P.2d 160, 108 Mont. 208.

70. Wash.—Gordon v. Bartell, 46 P.2d 1063, 182 Wash. 268—Greene v. Union Pac. Stages, 45 P.2d 611, 182 Wash. 143.

71. U.S.—U. S. ex rel. and for Use of Tennessee Valley Authority v. Powelson, C.C.A.N.C., 118 F.2d 79, modifying, D.C., U. S. ex rel. Tennessee Valley Authority v. Southern States Power Co., 33 F.Supp. 519.

Okl.—Carey v. Corporation Commission of Oklahoma, 33 P.2d 788, 168 Okl. 487.

R.I.—Ashton v. Tax Assessors of Town of Jamestown, 198 A. 786, 60 R.I. 388.

22 C.J. p 738 note 80.

Based on all the evidence

In suit to condemn lands of power company, in which company's experts placed an excessive value on property for power purposes and petitioners' experts placed no value at all thereon for such purposes, lower court was not bound to accept the estimates of either, but was called on to exercise its best judgment as to value on basis of all the facts in evidence, including evidence of other sales of property similarly situated.—U. S. ex rel. and for Use of Tennessee Valley Authority v. Powelson, C.C.A.N.C., 118 F.2d 79, modifying, D.C., U. S. ex rel. Tennessee Valley Authority v. Southern States Power Co., 33 F.Supp. 519.

72. Ill.—Monark Battery Co. v. Industrial Commission, 188 N.E. 413, 354 Ill. 494.

Iowa.—Ramberg v. Morgan, 218 N.W. 492, 209 Iowa 474.

La.—Johnson v. Hillyer, Deutsch, Edwards, Inc., App., 185 So. 652, rehearing denied 186 So. 365.

Wash.—Ferguson v. Department of Labor and Industries of Washington, 85 P.2d 1072, 197 Wash. 524, reversed on other grounds 90 P.2d 280, 197 Wash. 524—Samuel-

sideration should be given of the opportunity afforded the different experts to obtain facts on which their opinions were based,[73] and of the care and accuracy with which the contrasted experts have determined the data on which they based their conclusions;[74] and the testimony which is the more complete and definite[75] and most consistent with reason[76] is entitled to the greater weight. As between experts with different experience and qualifications, the testimony of the one with the greatest experience and the more specialized knowledge of the question involved is entitled to the greater weight,[77] although it will not necessarily prevail.[78] More weight should be given to the testimony of one who testifies from first-hand knowledge than to that of one who testifies alone on a hypothetical state of facts;[79] and more weight should be given to the testimony of a witness based on facts within his own knowledge and experience than to the testimony of a witness which is largely the assertion of a theory.[80] So, the testimony of experts who have a more intimate knowledge of the actual

son v. Taylor, 235 P. 113, 160 Wash. 363.

Preponderance of opinions

(1) The court is not bound to follow preponderance of opinions expressed by experts.—Putman v. Murden, 184 N.E. 796, 97 Ind.App. 313.

(2) In action against landlords by tenant who allegedly fell through flooring on rear gallery and sustained leg injury which tenant claimed resulted in "osteogenic sarcoma," which is cancer of the bone, medical expert evidence preponderated to the effect that tenant's condition was of long standing and was due to syphilis.—Piper v. Spiro, La.App., 188 So. 665.

Other things being equal

However, it has been held that where a question is to be determined by the testimony of men of great scientific attainments, other things being equal, the greater number would carry the greater weight.—Spensley v. Lancashire Ins. Co., 22 N.W. 740, 62 Wis. 443.

73. La.—Wall v. Ætna Casualty & Surety Co., App., 167 So. 903.

74. U.S.—North Dakota v. Minnesota, 44 S.Ct. 138, 263 U.S. 365, 68 L.Ed. 342.

La.—Holley v. Louisiana Ry. & Nav. Co., 165 So. 703, 184 La. 175.

75. La.—Curry v. Ohio Oil Co., 129 So. 563, 14 La.App. 550.

76. Va.—Bristol Builders' Supply Co. v. McReynolds, 162 S.E. 8, 157 Va. 468.

With general purview

In considering testimony offered by experts on each side with inevitable differences, that must be accepted which accords more perfectly with the general purview and matches with other accumulated evidence.—Quinn Coal Co. v. McDade, 34 Luz.Leg.Reg. 395.

In light of experience, observation, and reflection

It is the duty of the jury to weigh conflicting medical testimony in the light of their knowledge and judgment derived from their experience, observation, and reflection.—Sutter v. Massachusetts Bonding & Ins. Co., 315 Ill.App. 341.

77. U.S.—Benedict v. U. S., D.C.N.Y., 270 F. 267, affirmed, C.C.A., U. S. v. Benedict, 280 F. 76, affirmed 43 S.Ct. 357, 261 U.S. 294, 67 L.Ed. 662.

La.—Burton v. Norwich Union Indemnity Ins. Co., App., 146 So. 897—Linn v. Terrell Compress & Warehouse Co., App., 142 So. 193.

Miss.—Teche Lines v. Bounds, 179 So. 747, 182 Miss. 638.

Osteopath as compared with physician

Opinion of osteopath as to whether operation for hernia would be more than ordinarily unsafe is not to be discounted in comparison with that of physician.—American Indemnity Co. v. Green, Tex.Civ.App., 281 S.W. 895.

78. Okl.—Skelly Oil Co. v. Rose, 55 P.2d 1019, 176 Okl. 313.

Testimony based on hearsay

In proceeding to value newspaper stock for inheritance tax purposes, court could accept testimony of expert witness for tax commission, although part thereof was based wholly on hearsay, and give it greater weight than testimony of experienced newspapermen.—In re Nieman's Estate, 283 N.W. 452, 230 Wis. 23.

Physician and surgeon as against roentgenologist

Relative weight to be given to interpretation of X-rays by medical expert as compared with contrary interpretations of roentgenologists, with claimed greater training and experience, was for jury.—Sim v. Weeks, 45 P.2d 350, 7 Cal.App.2d 28.

General medical practitioner as against specialist

Testimony of general medical practitioner on medical subject with which he possesses sufficient familiarity to formulate opinion is entitled to consideration, although general practitioner's knowledge and experience are more limited than that of specialist, and his testimony is opposed by testimony of specialists.—Skelly Oil Co. v. Rose, 55 P.2d 1019, 176 Okl. 313.

79. Idaho.—Fackenthall v. Eggers Pole & Supply Co., 108 P.2d 300.

Not necessarily controlling

Where testimony of experts is properly admissible, their conclusions may be sufficient to support a finding or verdict, even if based on properly assumed facts and opposed by expert testimony based on personal examination.—Yowell v. Occidental Life Ins. Co., Utah, 110 P.2d 566.

Depreciation

Testimony of competent valuation engineers based on actual inspection as to depreciation of utility's property is preferred to testimony based on theoretical calculation of service life in determining fairness of rates. —McCardle v. Indianapolis Water Co., Ind., 47 S.Ct. 144, 272 U.S. 400, 71 L.Ed. 316—Pacific Gas & Electric Co. v. City and County of San Francisco, Cal., 44 S.Ct. 537, 265 U.S. 403, 68 L.Ed. 1075—Michigan Bell Telephone Co. v. Odell, D.C.Mich., 45 F. 2d 180.

80. U.S.—Stentor Electric Mfg. Co. v. Klaxon Co., D.C.Del., 30 F.Supp. 425, affirmed, C.C.A., 115 F.2d 268, certiorari granted Klaxon Co. v. Stentor Electric Mfg. Co., 61 S.Ct. 734, 312 U.S. 674, 85 L.Ed. 1115, reversed on other grounds 61 S.Ct. 1020, 313 U.S. 487, 85 L.Ed. 1477.

W.Va.—Cummins v. Virginian Ry. Co., 130 S.E. 258, 99 W.Va. 511.

As against mere expert opinion

Testimony of farmers from nearly every section of the irrigation districts in question, and their superintendents, ditch tenders, and others, who testified from their observation, experience, and knowledge as to the character of soil, excessive irrigation, etc., was of a higher quality than the mere opinion of an expert.—Stinson Canal & Irrigation Co. v. Lemoore Canal & Irrigation Co., 188 P. 77, 45 Cal.App. 241.

Cause of fire

Positive and direct testimony that the fire which destroyed plaintiff's property started on the railroad track immediately after a locomotive passed prevails over a theory that an oil burning locomotive could not start a fire, shown to be not be-

conditions involved is entitled to greater weight and credibility than the testimony of other experts.[81] A doctor's testimony as to a person's condition, based on personal knowledge, observation, and treatment, is entitled to more weight than that of one without personal knowledge of the individual involved.[82] Evidence of a physician who attended a person at the time has more weight on the question of the seriousness of his injury or disability at that time than that of a physician who attended him after a considerable period of time.[83] Also, an expert's opinion which is supported by definite reasons therefor,[84] such as a doctor's opinion which is supported by evidence showing a definite cause for the injury involved,[85] is entitled to greater weight than one which is not so supported; before the unanimous opinion of experts can be modified or rejected there should be some substantial basis therefor, resting on testimony in the record.[86] An expert's qualification of his direct testimony, on

yond dispute, and therefore merely an opinion.—Hopkins v. Louisiana Ry. & Nav. Co., 92 So. 717, 152 La. 13.

81. U.S.—The Denali, D.C.Wash., 23 F.Supp. 145, reversed on other grounds, C.C.A., 105 F.2d 413, adhered to 112 F.2d 952, certiorari denied Alaska S. S. Co. v. Pacific Coast Coal Co., 61 S.Ct. 65, 311 U. S. 687, 85 L.Ed. 444.

Preferable to mere calculations

(1) On question of depreciation of public utility's properties, testimony of competent valuation experts who have examined property is preferable to mere calculations based on averages and assumed probabilities. —McCardle v. Indianapolis Water Co., Ind., 47 S.Ct. 144, 272 U.S. 400, 71 L.Ed. 316.

(2) However, while the testimony of competent valuation engineers, who examine water company's property and make estimates respecting its condition, must be preferred to mere calculations, based on averages and assumed probabilities, in determining value thereof for rate-making purposes, testimony of water company's expert, making limited and spotty examinations of inside of company's pipe at two railroad crossings and several cuts therein at other points where it rested in earth trench, was not within such rule.—New Jersey Suburban Water Co. v. Board of Public Utility Com'rs, 8 A.2d 350, 123 N.J.Law 303, affirming 4 A.2d 47, 122 N.J.Law 54, certiorari denied McGregor v. Board of Public Utility Com'rs, 60 S.Ct. 582, 309 U.S. 663, 84 L.Ed. 1010.

Expert with actual experience

Expert testimony of one doing work every day is entitled to greater weight as to value of work than by one never doing work.—Cohn v. Casayon, 5 La.App. 352.

Testamentary capacity

In will contest on ground of testamentary incapacity, testimony of physician, who had treated testatrix for nine days before execution of codicil to will, was held far less convincing than that of scrivener, who drew up codicil and who had for long period of time been testatrix' agent, where physician's opinion was based primarily on physical condition of testatrix.—In re Cookson's Estate, 188 A. 904, 325 Pa. 81.

Rental value

In determining reasonable rental value of tract of land in a particular locality, evidence of witnesses living in locality familiar with the land and possessing knowledge of rental values of lands in such locality obtained through experience in buying, selling, or renting land in such locality, is of greater probative value than that of witnesses who profess general knowledge of land and rental values thereof, obtained through appraising, buying, selling, and renting of land over wide area, but who are not familiar with conditions that exist in the locality in question or of particular tracts of land.—First Carolinas Joint Stock Land Bank of Columbia v. Knotts, 190 S.E. 114, 183 S.C. 68.

82. Conn.—Quackenbush v. Vallario, 159 A. 893, 114 Conn. 652.

La.—Arrender v. Grant Timber & Mfg. Co., 119 So. 498, 9 La.App. 132.

N.Y.—Dimitroff v. State, 13 N.Y.S.2d 458, 171 Misc. 635.

Cause of death

Opinion of physician who personally attended deceased is entitled to more weight as to cause of death than that of physicians who never saw deceased.—Allen v. Louisiana Highway Commission, La.App., 150 So. 98.

Mental condition

Testimony of doctor as to mental condition of person, based on hypothetical questions, is not of as great weight as testimony of doctor, or doctor and nurse, who attended such person at the time involved.

Fla.—Adams v. Saunders, 191 So. 312, 139 Fla. 730—Mason v. State Bank of Orlando & Trust Co., 113 So. 664, 94 Fla. 132.

Iowa.—Bishop v. Scharf, 241 N.W. 3, 214 Iowa 644.

Ky.—Smith v. Gilligan's Adm'r, 124 S.W.2d 798, 276 Ky. 533.

Or.—In re De Lin's Estate, 294 P. 600, 135 Or. 8.

Probability of recovery

Testimony of state's medical witnesses as to probability of insane person's recovery based on personal examinations and personal contact with him and with his hospital record was entitled to more weight and favorable consideration than that of witness who made general statement on question of likelihood of recovery without personal knowledge of his mental condition.—Dimitroff v. State, 13 N.Y.S.2d 458, 171 Misc. 635.

83. U.S.—Rentfrow v. U. S., C.C.A. Okl., 67 F.2d 747.

La.—Rickerson v. Minden, 53 So. 667, 127 La. 407.

84. Neb.—Maul v. Iowa-Nebraska Light & Power Co., 288 N.W. 532, 137 Neb. 128, modified on other grounds and rehearing denied 289 N.W. 767, 137 Neb. 128.

Cogent reasons

Cogent reasons that strengthen an expert witness' opinion as to a scientific fact in issue and tend to weaken opposite expert opinions not so supported may determine the issue.—Maul v. Iowa-Nebraska Light & Power Co., supra—Welsh v. Platte Valley Public Power and Irr. Dist., 282 N.W. 385, 135 Neb. 441—McGuire v. Kansas City Bridge Co., 270 N.W. 669, 132 Neb. 1—Montgomery v. Milldale Farm & Live Stock Improvement Co., 246 N.W. 734, 124 Neb. 347—Flesch v. Phillips Petroleum Co., 244 N.W. 925, 124 Neb. 1.

85. La.—Joiner v. Texas & P. Ry. Co., 55 So. 670, 128 La. 1050—Sherwood v. Ticheli, 120 So. 107, 10 La.App. 280.

Neb.—Flesch v. Phillips Petroleum Co., 244 N.W. 925, 124 Neb. 1.

86. U.S.—The B. F. Guinan, D.C. N.Y., 40 F.2d 277.

Finding must be based on evidence

While jury can disregard opinion evidence as to value of an automobile, jury must find value for themselves from something which legitimately appears in the case.—American Ins. Co. v. Keene, 7 S.E.2d 427, 61 Ga.App. 754.

Cause of death

Unanimous medical testimony that injuries employee received by fall from employer's wagon and his death from lobar pneumonia five months later had no causal relationship, opposed by testimony of lay

cross-examination, to such an extent that it, as qualified, concurs in the opinions and conclusions of opposing witnesses nullifies its value as in conflict with that of other experts.[87]

Expert opinion will not necessarily prevail over that of a nonexpert or over other competent evidence,[88] unless it is within the rule, stated supra § 569, that the unanimous opinion of experts on subjects concerning a matter of science or specialized art, in which a layman can have no knowledge, is conclusive.[89] However, although it has been said that there is no rule requiring the testimony of an expert witness to be given greater weight than that of a nonexpert witness,[90] as a general rule the testimony of a lay witness, who is not testifying as to actual facts within his knowledge, is not as weighty as that of a skilled or expert witness who is testifying to matters within the field of his specialized training;[91] but the rule is otherwise where the expert or skilled witness is testifying as to matters concerning which his training and skill gives him no superior insight or knowledge.[92] The testimony of a witness especially trained in a branch of science which gives his judgment or conclusion as an expert, and is based on facts within his personal knowledge, cannot be controverted by the opinion of a lay witness;[93] and, where a disease or disability is of such a character as to require skilled professional men to determine its existence, or cause, or whether it has ceased, expert testimony thereon must prevail over the testimony of nonexperts.[94] However, expert testi-

witnesses that employee's health was normal before accident and thereafter progressively worse until death precluded compensation for employee's death.—Jones v. Bartholomew, La.App., 150 So. 389.

Expert testimony held superior

Where no claim for loss of sexual powers was made in original complaint and claim therefor was made in amendment, but expert testimony was practically unanimous that injuries complained of would not impair employee's sexual powers, plaintiff's evidence would not sustain allowance therefor in computing damages.—Safeway Stores v. Phelps, 145 S.W.2d 337, 201 Ark. 495.

Inconsistent statement in record

That death certificate covering death of police officer contained recital "Death due to natural causes" was not sufficient to sustain retirement board's decision denying officer's widow a pension, where physician who made entry, and who was the only medical expert to testify, testified that the walking decedent was required to do in performing foot patrol duties hastened his death.—Naughton v. Retirement Board of San Francisco, Cal.App., 110 P.2d 714.

Insanity

Finding of jury, approved by court, that prisoner in state hospital had regained sanity, did not overcome unanimous expert testimony of physicians and alienists, supported by prisoner's "case book" that he was a paranoiac, since a person suffering from such form of insanity may appear normal.—Benson v. Burdick, 212 N.Y.S. 220, 215 App.Div. 163.

87. Ky.—Great Northern Life Ins. Co. v. Cazner's Committee, 139 S.W.2d 424, 282 Ky. 515.

88. Ark.—Arkansas Power & Light Co. v. Bollen, 134 S.W.2d 585, 199 Ark. 566.

89. Cal.—Callahan v. Hahnemann Hospital, 35 P.2d 536, 1 Cal.2d 447—Rasmussen v. Shickle, 41 P.2d 184, 4 Cal.App.2d 425—General Accident, Fire & Life Assur. Corporation, Limited, of Perth, Scotland v. Industrial Accident Commission, 288 P. 692, 106 Cal.App. 39—William Simpson Const. Co. v. Industrial Accident Commission of California, 240 P. 58, 74 Cal.App. 239.

90. Iowa.—Lang v. Lang, 135 N.W. 604, 157 Iowa 300, petition overruled 139 N.W. 567.

91. U.S.—Watts v. U. S., D.C.Miss., 24 F.Supp. 969.

Not deprived of substance

The fact that the opinion of an expert is in conflict with the opinions of others who are not experts does not deprive it of substance.—Farley v. Heininger, 105 F.2d 79, 70 App.D.C. 200, certiorari denied Heininger v. Farley, 60 S.Ct. 110, 308 U.S. 587, 84 L.Ed. 491.

Value

(1) In suit to annul execution sale because of inadequate price complainant's testimony as to what the property cost him was insufficient to establish the alleged market value thereof as against testimony of an experienced real estate broker, who was familiar with the property and had bought another property in the immediate neighborhood, and the assessed valuation.—Roberto v. Catino, 116 A. 873, 140 Md. 38.

(2) In action for conversion of automobile after it had been repaired with used parts, trial court was not warranted in accepting as correct value of automobile the estimate of plaintiff who placed its value at same figure which he claimed automobile was worth before the collision necessitating repairs, but should have accepted testimony of qualified expert on value of used automobiles.—Ragland v. Cone, Tex.Civ.App., 114 S.W.2d 620.

92. La.—Lett v. Smith, 6 La.App. 248.

Matters of general observation

Physician's testimony as to time patient was exposed to X-ray and distance of machine from patient's body has no more weight than that of a layman.—Lett v. Smith, supra.

Testamentary capacity

It has been held that the opinion of physicians on the question of testamentary capacity is entitled to no greater weight than that of other witnesses.—Carpenter v. Calvert, 83 Ill. 62.

93. Ind.—Western & Southern Life Ins. Co. v. Ross, 171 N.E. 212, 91 Ind.App. 552.

Existence of symptoms of disease

In action against hospital and doctor employed by it for death of patient following childbirth, although there was evidence from lay witnesses that symptoms of a disease associated with pregnancy were present, where doctor testified to the contrary, the jury had a right to believe him.—Hansch v. Hackett, 66 P.2d 1129, 190 Wash. 97.

94. Okl.—Marland v. Forrester, 28 P.2d 542, 167 Okl. 140.

Limitation of rule

Where no examination of the injured person has been made by the expert witness for more than five months before giving his testimony, and the last examination made by him was at a time when it was admitted that the existing disability was a result of the accidental injury, the expert's opinion that the cause of the disability at the time of the hearing is due to other causes is not as a matter of law binding, but may be overcome by the presumption in favor of the injured that his continued disability is due

mony based, not on scientific knowledge, but on speculation is not conclusive as against the opinion of lay witnesses, the question under such circumstances being for the jury,[95] and the testimony of a person as to his physical condition may be considered as against conflicting testimony of a doctor.[96]

Although in some jurisdictions when there is a conflict between scientific testimony and testimony as to facts, the trier of the facts must determine the relative weight,[97] as a general rule proof of facts will outweigh opinions or estimates contrary thereto;[98] and opinion evidence must give way to

to the original injury.—Channing v. Payton, 4 P.2d 1, 152 Okl. 153.

Matters pertaining to his profession

Testimony of expert on matters pertaining to his profession are necessarily entitled to more weight than that of layman without knowledge of such matters.—Lett v. Smith, 6 La.App. 248.

Diseased condition

(1) The testimony of trained physicians, who examine and treat a patient and testify that by their own examination they discovered a diseased condition, is not to be controverted by the opinion of a lay witness.—Western & Southern Life Ins. Co. v. Danciu, Ind., 26 N.E.2d 912, rehearing denied 27 N.E.2d 763—National Life & Accident Ins. Co. v. Martin, 14 N.E.2d 1018, 214 Ind. 218.

(2) In action on life policy, testimony of insured's wife denying that insured had syphilis, gonorrhea, and heart disease was only testimony of a layman, and was not entitled to any weight as against medical expert testimony.—Adams v. Manhattan Life Ins. Co., Ind.App., 141 S.W.2d 930.

(3) Testimony of witnesses who had known deceased that he had apparently been in good health up to time of last illness is insufficient to prevail over opinion of expert pathologist based on autopsy which he personally performed that death resulted from syphilis.—Lado v. First Nat. Life Ins. Co., App., 158 So. 872, affirmed 162 So. 579, 182 La. 726.

(4) Evidence of lay witnesses that insured's loss of sight of eye was not caused by preëxisting disease was of no weight where physicians testified that loss of sight was caused by preëxisting disease.—Ardoin v. Fireside Mut. Benev. Ass'n, App., 153 So. 60, refusing rehearing Ardoin v. Fireside Mut. Aid Ass'n, 151 So. 248, affirmed 156 So. 363, 180 La. 309.

95. Ind.—Western & Southern Life Ins. Co. v. Ross, 171 N.E. 212, 91 Ind.App. 552.

96. N.J.—Barbato v. Prudential Ins. Co. of America, 165 A. 872, 11 N.J.Misc. 355.

Tex.—El Paso Electric Co. v. De Garcia, Civ.App., 10 S.W.2d 426.

Doctor's testimony advisory only

Testimony of physicians is not binding on jury, but is advisory only, where injured party himself testifies.—Gulf Casualty Co. v. Bostick, Tex.Civ.App., 116 S.W.2d 915, error dismissed.

97. Cal.—McFeely v. Industrial Accident Commission of State of California, 223 P. 413, 65 Cal.App. 45.

Autopsy

Positive testimony of physicians who made autopsy that decedent's lungs were normal and free from disease, and that death resulted from cancer in vertebra, was not conclusive against opinions of other physicians who examined X-ray pictures of decedent, but were not present at the autopsy, that death resulted from cancer in lungs.—McFeely v. Industrial Accident Commission of State of California, supra.

98. U.S.—Grant v. U. S., C.C.A.Tex., 74 F.2d 302, certiorari denied 55 S.Ct. 651, 295 U.S. 735, 79 L.Ed. 1683—U. S. v. Ingalls, C.C.A.N.M., 67 F.2d 593—U. S. v. Donahue, C.C.A.Minn., 66 F.2d 838.

Iowa.—Tegtmeyer v. Byram, 216 N.W. 613, 204 Iowa 1169—Rickabaugh v. Ferrick, 200 N.W. 315, 198 Iowa 868.

Ky.—Barrowman v. Prudential Ins. Co. of America, 98 S.W.2d 912, 266 Ky. 249.

La.—Succession of Ford, 92 So. 61, 151 La. 571.

Minn.—Larsen v. Northern Pac. Ry. Co., 241 N.W. 312, 185 Minn. 313.

Mo.—Luettecke v. City of St. Louis, 140 S.W.2d 45.

Neb.—City of Lincoln v. Jordan, 270 N.W. 508, 131 Neb. 879.

N.Y.—In re Bromley's Estate, 219 N.Y.S. 701, 128 Misc. 662.

Ohio.—Hocking Valley Ry. Co. v. Public Utilities Commission, 158 N.E. 648, 117 Ohio St. 304.

Pa.—In re Geist's Estate, 191 A. 29, 325 Pa. 401—Guarantee Trust & Safe Deposit Co. of Shamokin v. Heidenreich, 138 A. 764, 290 Pa. 249—In re Wertheimer's Estate, 133 A. 144, 286 Pa. 155—Commonwealth v. Zeller, 26 North.Co. 354.

W.Va.—Webb v. Chesapeake & O. Ry. Co., 144 S.E. 100, 103, 105 W. Va. 555, certiorari denied Chesapeake & O. R. Co. v. Webb, 49 S. Ct. 82, 278 U.S. 646, 73 L.Ed. 559.

22 C.J. p 738 note 82.

Choice between probabilities

Ordinarily, a proved fact cannot be rebutted by a probability, but the principle has no application where medical opinion must rest to some degree on a choice between probabilities.—Baumeister v. Baugh & Sons Co., 16 A.2d 424, 142 Pa.Super. 346.

Conclusion

(1) Witness' conclusion, contradicted by facts shown, must yield thereto.—Lechner v. Peters, 46 S.W.2d 527, 329 Mo. 891.

(2) Statements of witness that receivers sold merchandise to person advancing money used by receivers to pay for merchandise, and that such person afterward sold it back to the receivers, were mere conclusions of the witness on issuable facts and could not prevail as against evidentiary facts showing the contrary.—Blanke v. C. F. Blanke Tea & Coffee Co., Mo.App., 124 S.W.2d 568.

Conjecture

Opinion of expert may be reduced to mere conjecture by proof of physical facts completely inconsistent therewith.—Standard Oil Co. of Louisiana v. Roach, 94 S.W.2d 63, 19 Tenn.App. 661.

Negative conclusions and probabilities

Witness' statements of conclusions and probabilities of information having been given cannot be considered as a substantial contradiction of positive testimony that it was not given, so as to sustain a finding that it was given.—Newell-Murdoch Realty Co. v. Wickham, 190 P. 359, 183 Cal. 39.

Control by experience

In patent infringement suit, expert testimony, to be of value on question of reasonable royalty to be allowed as damages under statute, must yield to, or agree with, actual experience of patentee and other users of patented device.—Horvath v. McCord Radiator & Mfg. Co., C.C.A. Mich., 100 F.2d 326, certiorari denied Carrier Engineering Corporation v. Horvath, 60 S.Ct. 101, 308 U.S. 581, 84 L.Ed. 486, rehearing denied 60 S.Ct. 171, 308 U.S. 636, 84 L.Ed. 529.

Plan and physical facts

Building inspector's testimony that plans filed showed radial steps in stairway complied with statutes did not alter proof of physical fact which showed that step was not of the requisite width on the inside edge.—Erlicht v. Boser, 18 N.Y.S.2d

797, 259 App.Div. 269, reargument denied 20 N.Y.S.2d 222, 259 App.Div. 675.

Capability of driver

Testimony based on observing driver at time of accident cannot be accepted as preponderance of evidence on question of driver's experience based on positive knowledge as to length of time he had been driving.—Shepard v. Reed, C.C.A.Tenn., 26 F.2d 19.

Cost of repairs

Where libelant paid bill for repair of damage done by collision which reputable shipyard charged it, and bill corresponded, within reasonable limits, with yard's offer made in advance of repairs which surveyors approved, libelant was entitled to award of amount paid shipyard, notwithstanding conflicting expert testimony as to what charge should have been, especially where such testimony was disputed.—Navigazione Libera Triestina Societa Anonima v. Newtown Creek Towing Co., C.C.A.N.Y., 98 F.2d 694, rehearing denied The Russell No. 3, 99 F.2d 826.

Distance within which vehicle can be stopped

Expert testimony as to distance within which electric car could be stopped is insufficient to contradict established physical fact that car did not stop within such distance.—Kentucky Traction & Terminal Co. v. Brackett, 276 S.W. 828, 210 Ky. 756.

Disability

(1) Opinions of medical witnesses that work impaired insured's health were without weight as to insured's total and permanent disability before lapse of war risk policy, where there was substantial evidence that insured did in fact work, to extent of establishing his ability to work with reasonable regularity.—Roberts v. U. S., D.C.Idaho, 17 F.Supp. 641.

(2) Medical testimony of total and permanent disability of person claiming such disability has no probative value as against undisputed evidence of the physical fact that such person was able, after he was alleged to be disabled, to perform work that he had been accustomed to perform.

S.C.—Kizer v. Sovereign Camp, W. O. W., 7 S.E.2d 220, 192 S.C. 465—Ellis v. Kansas City Life Ins. Co., 197 S.E. 398, 187 S.C. 334—Hickman v. Ætna Life Ins. Co. of Hartford, Conn., 164 S.E. 878, 166 S.C. 316.

Tenn.—Lemarr v. Metropolitan Life Ins. Co., App., 143 S.W.2d 891.

(3) However, the utmost extent to which it is held that opinion testimony by doctors as to total and permanent disability of insured, founded on theory, has no probative value is only in the sense that it will not be allowed to override positive evidence that person claiming total and permanent disability was, at time covered by theoretical testimony of doctor, actually doing his accustomed work in substantially his accustomed way.—Etters v. Equitable Life Assur. Soc. of U. S., 178 S.E. 610, 175 S.C. 142.

(4) In action on war risk policy, medical expert's retroactive diagnosis of veteran was speculative and without probative value where refuted by inconsistent acts of veteran.—U. S. v. Becker, C.C.A.Ind., 86 F.2d 818.

(5) Injured employee's testimony as to disability since removal of spleen was not overcome by medical testimony.—Crooks v. Brown Paper Mill Co., 6 La.App. 821.

(6) In action on group policy, testimony of insured's physician that insured would never be able to work and that disability was permanent was sufficient to show that insured was totally and permanently disabled, notwithstanding that insured sang in church for one dollar a week.—Allison v. Ætna Life Ins. Co., La.App., 158 So. 389, modified on other grounds, La.App., 161 So. 645.

Payment of living expenses

Testimony in compensation proceedings that contributions of deceased son were used for family living expenses, without giving details, did not constitute evidence as against established facts.—Neubauer v. Levy, 233 N.W. 209, 252 Mich. 83.

Speed of vehicle

The immediate results of street car's collision with an auotmobile, such as distance the automobile was thrown by impact, the damage to both vehicles, and distance the street car traveled after the collision, furnished better evidence than an observer's estimate as to street car's speed.—Maritzky v. Shreveport Rys. Co., 81 So. 253, 144 La. 692.

Testamentary capacity

(1) As against evidence establishing facts disclosing testamentary capacity, opinions of medical experts based on hypothetical statements are unavailable.—In re Stern's Will, 256 N.Y.S. 54, 235 App.Div. 60, affirming In re Stern's Estate, 244 N.Y.S. 250, 137 Misc. 668, affirmed In re Stern's Will, 185 N.E. 762, 261 N.Y. 617, reargument denied 188 N.E. 47, 262 N.Y. 522.

(2) Expert medical opinions as to testamentary capacity are of little weight when based on insufficient facts or erroneous conception of testamentary capacity, and should be entirely disregarded when contrary to established facts revealing mental capacity.—In re Cookson's Estate, 188 A. 904, 325 Pa. 81.

(3) As against evidence that testator successfully carried on large business affairs both before and after making his will, opinions of physicians that he lacked testamentary capacity were held valueless, because opposed to esablished facts.—In re Snyder's Estate, 123 A. 663, 279 Pa. 63.

(4) Physician's theory as to whether mentality of man suffering from testator's afflictions would be permanently affected was of no probative value on issue of testator's mental capacity, where testator was a competent, capable, and reasonably active businessman while so suffering.—Acker v. Acker, 192 A. 327, 172 Md. 477.

(5) Witnesses' opinions as to testator's inability to make will are not of great force in face of fact that he made intelligent disposition of estate.—Aggas v. Munnell, 152 A. 840, 302 Pa. 78.

Valuation

(1) Valuation of appraisers based on concrete knowledge of what the property was and its value at the time in question may be accepted in preference to the opinions of witnesses based on general observation.—Matthews v. Concrete Engineering Co., Iowa., 292 N.W. 64.

(2) Award was properly based on actual cost of building determined by construction contract awarded after competitive bidding rather than on conflicting and speculative expert testimony.—In re Chrystie St., etc., in City of New York, 258 N.Y.S. 243, 236 App.Div. 321, motion denied 258 N.Y.S. 1036, 236 App.Div. 784, affirmed 184 N.E. 102, 260 N.Y. 583, motion denied 184 N.E. 134, 260 N.Y. 658.

(3) The testimony of a real estate expert as to the value of real estate based on its frontage and number of square feet in the building and not on the sale in the neighborhood is insufficient to sustain an assessment as against evidence that shortly before the assessment was made the property was sold for a sum substantially below the amount of the assessment, at a sale fairly conducted after extensive public notice, and that there was no change in the market value of the real estate from that date until the assessment.—In re Smiths' Estate, 20 Erie Co. 23.

(4) Evidence, in action by corporation to recover dividends paid, on the theory that they were taken out of capital instead of earnings, consisting of testimony of expert bookkeeper, who, without any knowledge of the company's business or the value of its patent rights or other property, arbitrarily set down a figure for depreciation, there being no showing as to what the actual de-

uncontroverted physical facts contrary thereto,[99] and should not be regarded as sufficient to create a substantial conflict in the evidence.[1] Accordingly, a statement of the result of actual measurement carries more weight than an estimate,[2] at least where conflicting estimates and measurements are offered by the same person,[3] or of chemical, laboratory, or other tests,[4] although it will not necessarily prevail.[5] Also, the opinion of the doctor who attended at the time of the injury, as to the perma-

preciation was, if any, nor of any valuation of the assets at any time, was held not to overcome actual cash balances, and not to sustain plaintiff's theory.—Dielmore Valve Co. v. McLaren, 222 P. 498, 128 Wash 242.

99. Utah.—Yowell v. Occidental Life Ins. Co., 110 P.2d 566.

Conflict not created

Opinion does not create conflict with undisputed physical facts which demonstrate beyond all reasonable doubt that expressed opinion was merely an erroneous guess. —Hosking v. Danforth, 36 P.2d 427, 1 Cal.App.2d 178—Waizman v. Black, 281 P. 1087, 101 Cal.App. 610.

1. Idaho.—Albrethsen v. Wood River Land Co., 231 P. 418, 40 Idaho 49.

2. Idaho.—Albrethsen v. Wood River Land Co., supra.

La.—Fletcher v. Nugent & McLaughlin, 7 La.App. 429.

Md.—Storrs v. Hink, 173 A. 66, 167 Md. 194.

Mich.—Brown v. Detroit United Ry., 185 N.W. 707, 216 Mich. 582.

Miss.—Hardaway Contracting Co. v. Rivers, 180 So. 800, 181 Miss. 727 —S. H. Kress & Co. v. Sharp, 126 So 650, 651, 156 Miss. 693, 68 A. L.R. 167, citing **Corpus Juris.**

Mont.—Casey v. Northern Pac. Ry. Co., 198 P. 141, 60 Mont. 56.

Neb.—Cunningham v. Scott, 191 N. W. 673, 109 Neb. 586.

N.Y.—Trudnowski v. New York Cent. R. Co., 221 N.Y.S. 686, 220 App. Div. 503.

Pa.—Wright v. Pittsburgh Rys. Co., 181 A. 476, 320 Pa. 40—Lunzer v. Pittsburgh & L. E. R. Co., 145 A. 907, 296 Pa. 393—Kuntz v. City of Pittsburgh, 187 A. 287, 123 Pa. Super. 394.

Wis.—Van Dunk v. Chicago & N. W. Ry. Co., 206 N.W. 852, 188 Wis. 476.

22 C.J. p 738 note 83.

Extent of rule

The extent to which the rule has been carried is to hold that uncertain estimates cannot prevail over actual measurements by competent witnesses.—Kuntz v. City of Pittsburgh, 187 A. 287, 123 Pa.Super. 394.

As shown by survey and map

In action for property taken by city for street, if no evidence but witnesses' opinions is offered showing dimensions of strip taken, then dimensions as shown by survey and map introduced should control.—City of Hazard v. Eversole, 85 S.W.2d 313, 237 Ky. 242.

Measurement during progress of work

Measurements and cross sections made during progress of road construction work by project engineer, in absence of fraud or gross mistake, are best evidence of quantity and character of materials removed, and expert evidence, based on measurements taken after completion of work, is incorrect, secondary, and incompetent.—Peterson v. State, 209 N.W. 221, 114 Neb. 612, reversing 203 N.W. 1002, 113 Neb. 546.

Speed determined by computation

Opinion of witness, about fifty feet from track, regarding speed of train, was held insufficient to require finding contrary to computation of speed based on distance actually traversed by train in three minutes. —Goodwin v. Gaston, 154 A. 772, 103 Vt. 357.

Rule inapplicable

(1) In action against theater owner for injuries suffered in fall on lobby step, rule that, where plaintiff could have made measurements uncertain or conjectural estimates by plaintiff's witnesses cannot prevail over actual measurements made by defendant, was inapplicable where defendant produced no evidence of actual measurements.—Copelan v. Stanley Co. of America, 17 A.2d 659, 142 Pa.Super. 603.

(2) Testimony that elevation of sidewalk was only one and one eighth inches by actual measurement was not conclusive as against estimates of one and one half to two inches by plaintiff's witnesses, where measurements were made about two and one half years after accident, since elevation may have changed during interval.—Kuntz v. City of Pittsburgh, 187 A. 287, 123 Pa.Super. 394.

3. Mo.—Maxwell v. Kansas City, 52 S.W.2d 487, 227 Mo.App. 234.

4. Ill.—Schoellkopf v. City of Chicago, 216 Ill.App. 52, affirmed 128 N.E. 337, 294 Ill. 110.

Expert opinion

An expert's positive testimony based on a broad investigation controls an opinion in direct conflict with his experiment.—Rogers v. Kendall, 119 A. 616, 122 Me. 248.

Tests from observation and experience

Tests from observation and experience are competent evidence against scientific measurements and theories, and are often more satisfactory, when the two are brought in conflict.—Holcomb v. Alpena Power Co., 184 N.W. 587, 215 Mich. 382.

Existence of disease

Where a disease is one the existence of which, at a given stage of it, is not discoverable, even by a skilled physician, except by ascertaining existing symptoms and making examination of the blood of the person in question, a finding by a physician, based on such an examination, that the person has such disease, is not put in issue or impeached by a finding of the absence of disease by another physician, who made no such examination, and from whom the symptoms suggesting it were concealed, nor by testimony. based only on observation of such person's outward appearance, that he then seemed to be in good health. —Scharlach v. Pacific Mut. Life Ins. Co., C.C.A.Tex., 16 F.2d 245.

Visibility

Lighting expert's testimony that, under hypothetical facts stated, automobile driver could not see train on crossing until automobile was ninety-five feet therefrom, was not controlling as against actual tests made by approaching crossing in automobile under same or similar conditions.—Dimond v. Terminal R. Ass'n of St. Louis, Mo., 141 S.W.2d 789.

5. Ga.—Hansberger Motor Transp. Co. v. Pate, 181 S.E. 796, 51 Ga. App. 877.

22 C.J. p 739 note 84.

Authenticity of signature

(1) Testimony by a witness that she saw decedent execute and deliver certain notes is not conclusive, and may be overcome by testimony of handwriting experts and those familiar with decedent's handwriting, to the effect that in their judgment he did not sign same.—Castner v. Castner, 245 S.W. 281, 196 Ky. 660.

(2) Notwithstanding witnesses to will testified to its execution, handwriting experts' testimony that will was forgery was held properly admitted and to raise fact issue of forgery for jury.—In re Harris' Estate, 244 N.W. 502, 260 Mich. 358.

Estimate based on paced measurement

Where plaintiff testified he paced the distance in issue, and a witness for defendant testified to measuring it, the testimony of plaintiff was

nency of the injury and the extent of disability, is of little or no value as against proof of the actual disability which existed thereafter and up to the time of trial.[6] Testimony substantiated by contemporary records, compiled in the regular course of business, is to be preferred over and is more reliable than that which rests only either on opinion or on recollection, however competent or reputable the witnesses may be.[7] Expert testimony may be sufficient to destroy an inference arising from facts shown,[8] but a mere opinion or conclusion of a witness which is contrary to and irreconcilably opposed to the clear and undisputed facts on which it is founded raises no conflict with the stated facts.[9]

Value of medical services. It has been held that, where medical witnesses disagree as to the value of medical services, the correct rule is to allow the lowest estimate.[10]

Positive and negative or ambiguous testimony. The rule that positive testimony is generally speaking entitled to more weight than negative testimony, considered infra § 1037, applies to expert testimony.[11] The testimony of impartial expert wit

not entirely without probative value and it was a question for the jury what the distance was.—Schneider v. St. Joseph Ry., Light, Heat & Power Co., Mo., 238 S.W. 468.

Jury question

Where witness gave opinion as to distance between two points, notwithstanding another witness testified as to different distance as found by him on actual measurement, question of distance was for jury, since weight of evidence and credibility of witnesses are for jury.—Hansberger Motor Transp. Co. v. Pate, 181 S.E. 796, 51 Ga.App. 877.

6. La.—Simmonds v. Austin Oil Co., 2 La.App. 535.

7. U.S.—The Blandon, D.C.N.Y., 39 F.2d 933, affirmed, C.C.A., 42 F.2d 1013.

8. **Negligence**

Expert testimony that proper methods were used in operation destroyed any inference of negligence because gauze pack-off was left in abdominal cavity.—Blackburn v. Baker, 237 N.Y.S. 611, 227 App.Div. 588.

9. Ala.—Hill Grocery Co. v. Ligon, 164 So. 219, 231 Ala. 141, reversing 164 So. 216, 26 Ala.App. 584—Ætna Explosives Co. v. Schaeffer, 95 So. 351, 209 Ala. 77.

Mo.—Turner v. Missouri-Kansas-Texas R. Co., 142 S.W.2d 455, 129 A.L.R. 829.

Conclusion not controlling

Where plaintiff testified to the circumstances under which she and her husband were riding in an automobile of another, which collided with a railroad train, her statement that they and the driver were engaged in a joint undertaking was a conclusion which did not establish that fact, where the circumstances showed the contrary.—Chicago, R. I. & G. Ry. Co. v. Johnson, Tex.Civ. App., 224 S.W. 277.

Destruction of effect of facts

Conclusion of witness from facts previously related could not destroy effect of previous testimony, where facts related did not justify conclusion.—Davis v. Sullivan Gold Mining Co., 62 P.2d 1292, 103 Mont. 452.

Yielding to facts

Plaintiff's statement that he signed note for bank is a mere conclusion, yielding to proof by plaintiff's witnesses that cashier of bank signed the note and received proceeds.—Tevault v. Citizens' State Bank, Mo. App., 183 S.W. 358.

Facts stated on cross-examination

Witness' opinion or conclusion in direct examination can have no weight against facts stated in cross-examination, which are necessarily opposed to such opinion.—Waizman v. Black, 281 P. 1087, 101 Cal.App. 610.

Location of vehicle

Where there was no dispute that tire marks of plaintiff's truck were on left of center line of highway, such physical facts could not be overcome by conclusions of witnesses that plaintiff operated truck on right side of road.—Hunter v. Sirianni Candy Co., Wis., 288 N.W. 766.

Quality of false teeth

Opinion testimony of dental experts that dentures supplied by one engaged in selling false teeth through the mail could not achieve the perfection of utility and fit claimed for them constituted substantial evidence in support of fraud order, although allegedly controverted by physical facts disclosed by statements of those wearing such dentures, where alleged physical facts consisted merely of opinions of those using the dentures and the actual physical facts as revealed by letters from which favorable excerpts for testimonials were extracted confirmed opinions of the experts.—Farley v. Heininger, 105 F.2d 79, 70 App.D.C. 200, certiorari denied Heininger v. Farley, 60 S.Ct. 110, 308 U.S. 587, 84 L.Ed. 491.

Settlement of account

Witnesses' volunteered conclusion that corporation manager's delivery to assignor of partial money payment and manager's individual note for balance of account did not liquidate account was held not conflicting as to disputed question of payment.—Gallaher v. Theilbar Realties, 18 P.2d 1101, 93 Mont. 421.

10. La.—Duclos' Succ., 11 La.Ann. 406.

11. Idaho.—Fackenthall v. Eggers Pole & Supply Co., 108 P.2d 300—Soran v. McKelvey, 67 P.2d 906, 57 Idaho 483—Beaver v. Morrison-Knudsen Co., 41 P.2d 605, 55 Idaho 275, 97 A.L.R. 1399.

La.—Womack v. New Orleans Public Service, Inc., 5 La.App. 71.

Limitation of rule

The rule that positive expert testimony will prevail over negative expert testimony does not imply that negative expert testimony may not be considered by triers of facts.—Fackenthall v. Eggers Pole & Supply Co., Idaho, 108 P.2d 300.

Showing of injury by X-ray

Expert testimony that sprain will not necessarily show in X-ray picture prevails over testimony of another that sprain will always show.—Taylor v. Southern Engineering Const. Co., 125 So. 877, 13 La.App. 292.

Conflict not shown by failure to remember

Defendant's statement that she did not remember signing contract and note cannot be construed as denial of execution, in view of positive testimony of plaintiff that she executed them and identification of her signature by experts.—J. B. Colt Co. v. Robinson, 135 S.E. 312, 137 S.C. 224.

Testimony as to signs of life not within rule

Testimony as to whether there were any signs of life when a person's badly crushed body was removed from an automobile wreck is opinion evidence, and the testimony of those witnesses who claimed to have observed signs of life is not entitled as affirmative testimony to greater weight than that of other witnesses unable to discover such signs.—Graybill v. Brown, 189 N.W. 726, 194 Iowa 290.

nesses who describe the process by which they arrive at their estimates, which estimates are not unreasonable or unlikely, should be accepted as against the testimony of another witness who merely expresses the opinion that the question cannot be determined.[12] Also uncertain or ambiguous statements will not overcome definite uncontradicted testimony.[13]

J. STANDARD TREATISES IN CONNECTION WITH OPINION

§ 573. On Direct Examination

In general counsel may use medical or other scientific works in framing his questions, but as a general rule, although there is some authority to the contrary, extracts from such authorities may not be read and the opinion of the witness asked thereon, nor may the opinion of the witness be reinforced by such works. However, the expert may refresh his knowledge by referring to standard works, and may base his testimony thereon.

As a general rule, although there is some authority to the contrary,[14] counsel, in framing questions to be asked an expert or skilled witness testifying on behalf of his client, may use medical or other scientific books and include extracts therefrom in the questions asked.[15] It is also held, conformably to the general rule as to the admissibility of mortality and annuity tables, considered infra § 719, that an expert may use some standard mortality or annuity table, such as the Carlisle Tables of Mortality, for the purpose of showing the average expectancy of human life,[16] or the present value of the alleged loss of income based on that expectancy.[17] However, as appears infra § 718, medical or other scientific books of an inductive nature, or extracts therefrom, are not admissible as independent evidence of the matters stated therein, and, in accordance with the rule that matters of fact cannot be proved by showing that certain authors do so declare,[18] it is generally held that extracts from standard treatises cannot be read[19] and the opinion of the witness asked thereon;[20] nor can the witness be asked what a specified book says on a certain matter;[21] neither, on offering the expert witness, can he reinforce the latter's evidence by such extracts,[22] even while the witness is on the stand,[23] or allow the witness so to do,[24] although he be the

12. U.S.—Export S. S. Corporation v. American Ins. Co., Newark, N. J., C.C.A.N.Y., 106 F.2d 9, reversing, D.C., 26 F.Supp. 79, adhered to, C.C.A., 108 F.2d 1013, certiorari denied American S. S. Owners Mut. Protection and Indemnity Ass'n v. Export S. S. Corporation and American Export Lines, 60 S. Ct. 809, 309 U.S. 686, 84 L.Ed. 1029.

13. **Rate of speed**
The uncertain use of the adjective "fast," without setting a rate of speed or statement whether train which struck automobile at grade crossing was merely "fast" within the yard rules, which would mean traveling at the full authorized speed of fifteen miles per hour was insufficient to overcome the definite uncontradicted testimony of the engine operatives that the train was going fifteen miles an hour, especially where train was close to the point where it was to stop and back up.—Missouri Pac. R. Co. v. Baldwin, C. C.A.Ark., 117 F.2d 510.

14. Mont.—Schumacher v. Murray Hospital, 193 P. 397, 58 Mont. 447.
Vt.—Baldwin v. Gaines, 102 A. 338, 92 Vt. 61.

15. Cal.—Reynolds v. Struble, 18 P.2d 690, 128 Cal.App. 716.
22 C.J. p 739 note 93.

16. N.J.—Auer v. Sinclair Refining Co., 137 A. 555, 103 N.J.Law 372, 54 A.L.R. 623.
Need not introduce table in evidence
In death action, testimony of witness as to life expectancy of deceased was not incompetent because mortality table on which witness' computation was based was not produced and received in evidence.—Marendino v. Spitz, 8 A.2d 601, 121 N.J.Law 556.

17. N.J.—Auer v. Sinclair Refining Co., 137 A. 555, 103 N.J.Law 372, 54 A.L.R. 623.

18. Iowa.—Ingwersen v. Carr & Brannon, 164 N.W. 217, 180 Iowa 988.
22 C.J. p 739 note 86.

19. U.S.—Mississippi Power & Light Co. v. Whitescarver, C.C.A.Miss., 68 F.2d 928, 931, citing Corpus Juris, and affirming, D.C., Whitescarver v. Mississippi Power & Light Co., 5 F.Supp. 948.
Tex.—St. Louis, A. & T. Ry. Co. v. Jones, 14 S.W. 309.
22 C.J. p 739 note 87.
Irrelevant material
In action for employee's death from lightning transmitted over employer's wires, copy of National Electric Code, which refers to other varieties of electrical installation than that concerned with in the case, and testimony thereof was properly excluded.—Grant v. Libby, McNeill & Libby, 295 P. 139, 160 Wash. 138.

20. N.Y.—In re Mason, 14 N.Y.S. 434, 60 Hun 46.
Okl.—Clinton & O. W. Ry. Co. v. Dunlap, 181 P. 312, 75 Okl. 64, affirming 79 P. 749, 75 Okl. 64.
Tex.—St. Louis, A. & T. Ry. Co. v. Jones, 14 S.W. 309.
Works on inductive science
A party calling an expert cannot read from medical works on inductive science, and ask his expert whether he agrees with the statements of the author, or whether they accord with his experience.—Matter of Hock, 129 N.Y.S. 196, 74 Misc 15.
Mere agreement with text-writer
Evidence of expert, which did not express direct opinion of witness in accordance with his own qualifications, but merely expressed general agreement with writer on subject of mental competency of victim of paralysis is inadmissible.—Thompson v. Ammons, 129 S.E. 539, 160 Ga. 886.

21. Tex.—Dallas Ry. & Terminal Co. v. Curtis, Civ.App., 53 S.W.2d 85, error refused.

22. Mich.—Fox v. Peninsular White Lead & Color Works, 48 N.W. 203, 84 Mich. 676.
22 C.J. p 739 note 88.

23. Vt.—Baldwin v. Gaines, 102 A. 338, 92 Vt. 61.
22 C.J. p 739 note 89.

24. N.Y.—In re Mason, 14 N.Y.S. 434, 60 Hun 46.
22 C.J. p 739 note 90.
Government reports
Where employee allegedly was injured by inhalation of carbon monoxide gas while working in ashpit, medical testimony concerning gov-

author himself.[25] Is it not proper for a witness to express his opinion of an article or book dealing with the question in issue,[26] nor can he use such authority in his argument.[27] On the other hand, there is authority which holds that the expert may add weight to his testimony by showing that his position is sustained by writers and authorities on the subject,[28] and that a witness may be asked to read indicated portions of a book of authority on the subject, and having done so, or having listened to a reading of the extracts, may be asked whether he agrees to or dissents from the statements therein,[29] or that he may be asked what the standard medical authorities prescribe with regard to a specified matter.[30] The evidence of the expert must be his own, independent of the books.[31] He may not give testimony based solely on information obtained from a book or pamphlet, and not on his own experience, knowledge or training.[32] However, he may refresh his knowledge by referring to standard works;[33] he may base his testimony on information found therein,[34] and may state that his opinion is based on information derived from books.[35] He can testify as to the necessity to use textbook material as data in making the computations on which his opinion is based.[36] In testifying as to the fitness of materials for the purpose for which they were used, an expert may use as the basis of his opinion approved specifications of a recognized association,[37] and, in examining witnesses as to the weight of specified articles, commonly recognized and customarily used books or tables on such weights may be used.[38] So also physicians may describe the symptoms of a complaint in issue as given by accepted medical authorities.[39]

§ 574. On Cross-Examination

An expert witness may be asked to name the authorities on which he bases his opinion and generally interrogated as to his knowledge of the authoritative opinions on the subject involved. If he bases his opinion on a specific authority he may be interrogated thereon, including specific extracts read therefrom; but if he bases his opinion solely on his own experience or in whole or in part on the authorities generally the cases are not in accord as to the right to cross-examine him by reference to standard treatises and the matters stated therein.

On cross-examination an expert witness may be asked to name the authorities on which he relies,[40] or the names of authorities which support the proposition to which he testified,[41] and in some jurisdictions may be interrogated as to whether or not he recognizes a certain work as a standard authority.[42] Also he may be asked the position of authorities on the particular subject in hand,[43] and whether they do not express opinions different from those expressed by him.[44] Textbooks relied on by

ernment reports respecting effect of monoxide gas on soldiers in trenches during World War was inadmissible.—Louisville & N. R. Co. v. McCoy, 87 S.W.2d 921, 261 Ky. 435.

Support by the authorities

An expert witness should not be allowed to state whether his opinion of the proper treatment of an injury was sustained by the authorities, since that is an indirect way of obtaining statements from medical books.—Link v. Sheldon, 18 N.Y.S. 815, affirmed 32 N.E. 696, 136 N.Y. 1.

25. N.Y.—Mix v. Staples, 17 N.Y.S. 775.

26. Fla.—Vaughan's Seed Store v. Stringfellow, 48 So. 410, 56 Fla. 708.

27. N.C.—Huffman v. Click, 77 N.C. 55.

28. Or.—Scott v. Astoria R. Co., 72 P. 594, 43 Or. 26, 99 Am.S.R. 710, 62 L.R.A. 543.
22 C.J. p 740 note 98, p 739 note 90 [b].

29. Tex.—San Antonio Public Service Co. v. Alexander, Civ.App., 270 S.W. 199, affirmed, Com.App., 280 S.W. 753.
22 C.J. p 740 note 94.

30. Iowa.—Brodhead v. Wiltse, 35 Iowa 429.

31. N.C.—Huffman v. Click, 77 N.C. 55.

32. Iowa.—Evans v. Iowa Southern Utilities Co. of Delaware, 218 N.W. 66, 205 Iowa 283.

33. N.C.—Huffman v. Click, 77 N.C. 55.
22 C.J. p 740 note 97.

34. Mass.—Finnegan v. Fall River Gas Works Co., 34 N.E. 523, 159 Mass. 311.
N.H.—Carbone v. Boston & Maine R. R., 192 A. 858, 89 N.H. 12.

Use of statistics from standard books

The fact that engineer who testified concerning action of air brakes and their effect in stopping train took his figures as to speed and distances from standard textbooks did not render testimony inadmissible, since testimony based on statistics found in standard authorities is admissible.—Carbone v. Boston & Maine R. R., supra.

35. Cal.—Healy v. Visalia & T. R. Co., 36 P. 125, 101 Cal. 585.

36. Ill.—Central Illinois Public Service Co. v. Deterding, 162 N.E. 865, 331 Ill. 277.

37. Cal.—People v. Lang Transp. Corporation, App., 110 P.2d 464.

Specifications not approved until after materials were used

A metallurgist's expert testimony as to test of iron in bridge to determine its fitness for its particular use was not inadmissible because of his use of tentative specifications of American Society for Testing Materials, in view of testimony that such specifications had become standard in year during which action was tried.—People v. Lang Transp. Corporation, supra.

38. Miss.—Harris v. Pounds, 187 So. 891, 185 Miss. 688.

39. Ky.—Chesapeake & O. R. Co. v. Wiley, 121 S.W. 402, 134 Ky. 461.

40. Ill.—Wilcox v. International Harvester Co. of America, 116 N.E. 151, 278 Ill. 465.
22 C.J. p 740 note 3.

41. Ill.—Chicago Union Traction Co. v. Ertrachter, 81 N.E. 816, 228 Ill. 114.
Vt.—Baldwin v. Gaines, 102 A. 338, 92 Vt. 61.

42. Tex.—Texas & P. Ry. Co. v. Hancock, Civ.App., 59 S.W.2d 313, error refused.

43. N.C.—Lynch v. Rosemary Mfg. Co., 83 S.E. 6, 167 N.C. 98.
22 C.J. p 740 note 5.

44. Ill.—Donnelly v. Chicago City R. Co., 163 Ill.App. 7.

an expert witness may be used as a foundation of impeaching cross-examination.[45] He may be cross-examined on the theory of the authorities on which he claims to have based his opinion,[46] and, as appears infra § 575, when the witness assumes to base his opinion on a particular treatise it may be read in evidence to contradict him. Also, where the witness mentions a specific authority in a manner such as to indicate its approval of the opinion he expressed, it is proper on cross-examination to show by the book itself that the author does not so approve, not for the mere purpose of showing that the author disagrees with him, but to contradict and discredit him by showing that the book did not warrant his statement;[47] and where on cross-examination a doctor volunteers a statement as to the treatment prescribed by a specified authority it is not improper to cross-examine him thereon.[48]

Where the witness has based his opinion solely on his own observation and experience, or in whole or in part on the authorities generally, and not on any specific authority, the cases are not in accord as to the right to cross-examine the witness with reference to the authorities, or, if allowed, as to the use which may be made of them or the extent of inquiry permitted. There is a distinction between the use of medical or other scientific books for the purpose of cross-examination merely and to test the knowledge and reading and accuracy of the witness who is on the stand and the use of such books by reading them directly or indirectly to the jury on cross-examination, not for the purpose of testing the learning, reading, or accuracy of the witness, but in order to get their contents and the opinions of their authors before the jury.[49] In some jurisdictions it is held generally that an expert witness may be cross-examined as to medical or other scientific books on the subject testified about,[50] which are recognized and accepted as authority;[51] and may be interrogated by means of questions framed by the use of quotations from or reading from standard treatises,[52] whether he is familiar with them or not,[53] where he did not base his opinion on a particular authority,[54] or where he based his opinion on the authorities generally, but not on a particular authority,[55] or where he relied in whole or in part on specified authorities,[56] or even though in his testimony in chief he did not

N.Y.—In re Hock's Will, 129 N.Y.S. 196, 74 Misc. 15.

45. Cal.—Lewis v. Johnson, 86 P.2d 99, 12 Cal.2d 558.

Improper to deny use

It is improper to refuse to permit cross-examination of witness by use of book on which he testified his opinion was in part based.—Lewis v. Johnson, supra.

46. N.D.—Brown v. Inter-State Business Men's Acc. Ass'n of Des Moines, Iowa, 224 N.W. 894, 57 N.D. 941—Chezik v. Minneapolis, St. P. & S. S. M. Ry. Co., 218 N. W. 217, 56 N.D. 553.

47. Mich.—City of Detroit v. Porath, 260 N.W. 114, 271 Mich. 42.
Vt.—Baldwin v. Gaines, 102 A. 338, 92 Vt. 61.

48. Mich.—Van Der Bie v. Kools, 250 N.W. 268, 264 Mich. 468.

49. N.D.—State v. Brunette, 150 N. W. 271, 28 N.D. 539, Ann.Cas.1916E 340.

50. Neb.—Fonda v. Northwestern Public Service Co., 292 N.W. 712—Winters v. Rance, 251 N.W. 167, 125 Neb. 577.

51. Tex.—Gulf, C. & S. F. R. Co. v. Farmer, 115 S.W. 260, 102 Tex. 235, reversing, Civ.App., 108 S.W. 729—William Cameron Co. v. Downing, Civ.App., 147 S.W.2d 963—Hicks v. Brown, Civ.App., 128 S. W.2d 884, affirmed in part and reversed in part on other grounds, Com.App., 151 S.W.2d 790—Cisco & N. E. Ry. Co. v. Proctor, Civ. App., 272 S.W. 308, affirmed Proctor v. Cisco & N. E. Ry. Co., Com. App., 277 S.W. 1047—Fort Worth & R. G. Ry. Co. v. Woodward, Civ. App., 254 S.W. 227—Gulf, C. & S. F. Ry. Co. v. Dooley, 131 S.W. 831, 62 Tex.Civ.App. 345.

Proof of authenticity

Proof by any competent doctor that medical book is used and recognized by the medical profession is sufficient proof of authenticity of such book to warrant its use in cross-examining physician.—William Cameron Co. v. Downing, Tex. Civ.App., 147 S.W.2d 963.

52. U.S.—American Pacific Whaling Co. v. Kristensen, C.C.A.Wash., 93 F.2d 17, 21, citing **Corpus Juris.**
Ill.—Connecticut Mut. L. Ins. Co. v. Ellis, 89 Ill. 516.
Minn.—Ruud v. Hendrickson, 222 N. W. 904, 176 Minn. 138.
Mo.—Ganz v. Metropolitan St. Ry. Co., 220 S.W. 490—Robison v. Chicago Great Western R. Co., App., 66 S.W.2d 180—Whitley v. Stein, App., 34 S.W.2d 998.
Neb.—Winters v. Rance, 251 N.W. 167, 125 Neb. 577.
Or.—Kern v. Pullen, 6 P.2d 224, 138 Or. 222, 82 A.L.R. 434.
Tex.—William Cameron Co. v. Downing, Civ.App., 147 S.W.2d 963—Texas & P. Ry. Co. v. Hancock, Civ.App., 59 S.W.2d 313, error refused.
22 C.J. p 740 note 2.

Pictures

Expert witness' knowledge and qualification may be tested by accepted authorities on subject testified about, including pictures in textbook, as well as written text.—Hess v. Millsap, Tex.Civ.App., 72 S. W.2d 923.

Agreement with author unnecessary

Counsel for plaintiff in cross-examining defendant's expert witness was not required, before propounding question to determine whether witness agreed with certain statements in medical text which counsel held in his hand, to ascertain whether witness agreed with the author.—Cooper v. Atchison, T. & S. F. R. Co., Mo., 148 S.W.2d 773, certiorari denied Atchison, T. & S. F. R. Co. v. Cooper, 61 S.Ct. 1116, 313 U.S. 591, 85 L.Ed. 1546.

Name of author

The name of the author of the treatise used may be stated.—Gulf, C. & S. F. R. Co. v. Farmer, 115 S. W. 260, 102 Tex. 235, reversing, Civ. App., 108 S.W. 729.

53. Idaho.—Osborn v. Cary, 152 P. 473, 28 Idaho 89.
Tenn.—Sale v. Eichberg, 59 S.W. 1020, 105 Tenn. 333, 52 L.R.A. 894.

54. Ark.—Scullin v. Vining, 191 S. W. 924, 127 Ark. 124.

55. Ind.—Hess v. Lowery, 23 N.E. 156, 122 Ind. 225, 7 L.R.A. 90, 17 Am.S.R. 355.

56. Mo.—Whitley v. Stein, App., 34 S.W.2d 998.

rely on the writings of any authorities but solely on his own experience, at least as to those he admits are authorities;[57] or the witness may be asked as to the opinion expressed by a specified author and his own opinion with regard thereto.[58] A witness who bases his opinion on his actual experience and knowledge cannot be cross-examined with reference to a work which he refuses to recognize as an authority,[59] nor can he be asked if he is familiar with a passage, reading it, from an authority he does not recognize;[60] and it is not error to deny cross-examination with respect to the writings of an author on whom the witness did not rely on his direct examination and concerning whom the witness testified he did not know what the author had stated with reference to the matter under discussion.[61] In other jurisdictions it is held that an expert witness cannot be cross-examined with respect to his knowledge of a particular subject by reference to medical or other scientific works upon which he has not relied as authority for his testimony,[62] particularly where the witness expressly states that he has not read the treatises and does not base his opinion on them.[63] In still other jurisdictions, where the witness bases his opinion in whole or in part on the authorities generally and not solely on his own personal experience and observation, he may be interrogated with regard to the teachings of recognized authorities and what they hold,[64] and asked as to his opinion of the statements of various standard authorities on the subject matter involved;[65] but a witness who has not relied on the authorities generally, or on any particular authority, may not be interrogated as to what a particular treatise states,[66] or asked to give a summary of what the books teach on a particular subject,[67] or questioned as to specific extracts from, or the contents of, standard authorities;[68] and in still other jurisdictions, even though the witness has referred to the authorities generally,[69] the reading of an extract from a treatise on which the witness has not relied as authority in his testimony will not be allowed,[70] nor may he be asked as to what a particular author on whom he has not relied states on the subject involved.[71]

57. Mo.—Ganz v. Metropolitan St. R. Co., 220 S.W. 490—Wurst v. American Car & Foundry Co., App., 103 S.W.2d 6—Whitley v. Stein, App., 34 S.W.2d 998.
Wash.—Cameron v. Benefit Ass'n of Railway Employees, 107 P.2d 1096.

58. Or.—Kern v. Pullen, 6 P.2d 224, 138 Or. 222, 82 A.L.R. 434.
Tex.—Gulf, C. & S. F. Ry. Co. v. Dooley, 131 S.W. 831, 62 Tex.Civ. App. 345.

59. Tex.—Northern Texas Traction Co. v. Bryan, Civ.App., 299 S.W. 325, conforming to answers 294 S. W. 527, 116 Tex. 479.

60. Wis.—Bell v. Milwaukee Electric Ry. & Light Co., 172 N.W. 791, 169 Wis. 408.

61. U.S.—Woelfle v. Connecticut Mut. Life Ins. Co. of Hartford, Conn., C.C.A.Mo., 103 F.2d 417.

62. U.S.—E. I. Du Pont de Nemours & Co. v. White, C.C.A.N.J., 8 F.2d 5.
Colo.—Denver City Tramway Co. v. Gawley, 129 P. 258, 23 Colo.App. 332.
Mass.—Percoco's Case, 173 N.E. 515, 273 Mass. 429.

Evidence admitted without objection
Where physician testified without objection that picture of colon appearing in a certain book was in a different position from that of plaintiff, and was then asked if the book was a regular book for enlightenment of physicians and surgeons, and was allowed over objection to answer, "Yes," and without objection plaintiff's counsel read from the book, and an objection was then made and overruled, but counsel did not read further from the book, the evidence was not erroneously admitted.—Western Union Telegraph Co. v. Ammann, C.C.A.N.J., 296 F. 453.

63. Colo.—Denver City Tramway Co. v. Gawley, 129 P. 258, 23 Colo. App. 332.
Del.—Drucker v. Philadelphia Dairy Products Co., 166 A. 796, 5 W.W. Harr. 437.

64. Iowa.—Morton v. Equitable Life Ins. Co. of Iowa, 254 N.W. 325, 218 Iowa 846, 96 A.L.R. 315—Cronk v. Wabash R. Co., 98 N.W. 884, 123 Iowa 349.
Minn.—Ruud v. Hendrickson, 222 N. W. 904, 176 Minn. 138—Wittenberg v. Onsgard, 81 N.W. 14, 78 Minn. 342, 47 L.R.A. 141.

65. Ill.—Connecticut Mut. L. Ins. Co. v. Ellis, 89 Ill. 516.
N.H.—McCourt v. Travers, 175 A. 865, 87 N.H. 185—Laird v. Boston & M. R. R., 117 A. 591, 80 N.H. 377.

Limitation
A cross-examination of a medical expert which permits a showing of the contents of standard medical books is permissible only to show what the authors thereof have declared on the subject, when the expert has based his opinion wholly or in part on his reading of medical books, and then only when the statements in such books are not in harmony with his testimony.—Griffith v. Los Angeles Pac. Co., 111 P. 107, 14 Cal.App. 145.

Opinion on quoted extracts
Extracts from different standard authors who treat of the matter involved may be read to the witness and his opinion asked thereon.—Connecticut Mut. L. Ins. Co. v. Ellis, 89 Ill. 516.

66. Iowa.—Wilcox v. Crumpton, 258 N.W. 704, 219 Iowa 389.
Vt.—Baldwin v. Gaines, 102 A. 338, 92 Vt. 61.

67. Iowa.—Wilcox v. Crumpton, 258 N.W. 704, 219 Iowa 389.

68. Ill.—Ullrich v. Chicago City Ry. Co., 106 N.E. 828, 265 Ill. 338, Ann. Cas.1916A 793—Neiner v. Chicago City Ry. Co., 181 Ill.App. 449—Weyh v. Chicago City Ry. Co., 148 Ill.App. 165.

69. Mich.—In re Du Bois, 128 N.W. 1092, 164 Mich. 8.

70. Mich.—City of Detroit v. Porath, 260 N.W. 114, 271 Mich. 42—Foley v. Grand Rapids & I. Ry. Co., 121 N.W. 257, 157 Mich. 57—Hall v. Murdock, 72 N.W. 150, 114 Mich. 233.
N.C.—Lynch v. Rosemary, 83 S.E. 6, 167 N.C. 98.
S.C.—Mitchell v. Leech, 48 S.E. 290, 69 S.C. 413, 104 Am.S.R. 811, 66 L.R.A. 723.

Reason for rule
If allowed it would constitute an indirect method of getting the extract into evidence.—Marshall v. Brown, 15 N.W. 55, 50 Mich. 148.

71. Mich.—De Haan v. Winter, 247 N.W. 151, 262 Mich. 192—De Haan v. Winter, 241 N.W. 923, 258 Mich. 293.

The scope of the cross-examination authorized is largely within the sound discretion of the trial court.[72] It must be confined to legitimate impeachment of what the witness has testified to,[73] to showing such deficiency in the knowledge of the expert as to the science about which he is testifying as is calculated to impair the weight of his testimony;[74] and should be directed to the extent of his knowledge and his familiarity with the accredited standard authorities of his profession on the subject about which he has testified.[75] Great care should always be taken by the court to confine such cross-examination within reasonable limits, and to see that quotations read to the witness are so fairly selected as to present the author's views on the subject of the examination.[76] However, a question as to whether the author of a scientific work did not state a conclusion contrary to that of the witness should not be so framed as to appear to be a quotation from such work.[77] An expert witness cannot be required to examine a treatise submitted to him by cross-examining counsel to enable him to point out some portion that might support or contradict his testimony,[78] and it has been held improper to ask a witness on cross-examination to read over to himself a certain paragraph and state what it says.[79]

In cross-examining witnesses as to the weight of specified articles, commonly recognized and customarily used books or tables on such weights may be used.[80]

Purpose of cross-examination. In situations where it is proper to cross-examine an expert witness as to the authorities it is in order to test his knowledge,[81] accuracy,[82] learning,[83] and the weight to be given to his testimony,[84] or to make the question clearly intelligible to the witness.[85]

§ 575. For Purpose of Contradiction

Standard treatises cannot be read in evidence to contradict an expert or skilled witness, unless he bases his opinion on such treatises.

Standard treatises cannot be read in evidence,[86] either directly or indirectly,[87] to contradict an expert or skilled witness who has testified from his own experience and observation alone, and has not based his opinions on any specific authorities or on the authorities generally;[88] but when the witness assumes to base his opinion on a particular treatise it may be read in evidence to contradict him,[89] and where he testifies as to what the author-

N.C.—Tilghman v. Seaboard Air Line R. Co., 89 S.E. 71, 171 N.C. 652.

72. U.S.—Woelfle v. Connecticut Mut. Life Ins. Co. of Hartford, Conn., C.C.A.Mo., 103 F.2d 417.
Ill.—Connecticut Mut. L. Ins. Co. v. Ellis, 89 Ill. 516.
Neb.—Fonda v. Northwestern Public Service Co., 292 N.W. 712.

73. Minn.—Hill v. Ross, 269 N.W. 396, 198 Minn. 199.

Cross-examination held improper
In action for injuries received in school bus when one of rear wheels came up through floor, wherein plaintiff claimed damages for lumbo-sacral sprain and calcification between fifth lumbar vertebra and sacrum, cross-examination of plaintiff's specialist as to whether it was common condition to find six lumbar vertebra instead of five, and reading from medical authority to that effect, was improper.—Hill v. Ross, supra.

74. Tex.—Gulf, C. & S. F. R. Co. v. Farmer, 115 S.W. 260, 102 Tex. 235, reversing, Civ.App., 108 S.W. 729.

75. Neb.—Fonda v. Northwestern Public Service Co., 292 N.W. 712.

76. Ill.—Connecticut Mut. L. Ins. Co. v. Ellis, 89 Ill. 516.

77. Ill.—Mann v. Blair, 195 Ill.App. 254.

78. U.S.—Hoffschlaeger Co. v. Fraga, C.C.A.Hawaii, 290 F. 146.

79. Tenn.—Byers v. Nashville, C. & St. L. R. Co., 29 S.W. 128, 94 Tenn. 345.

80. Miss.—Harris v. Pounds, 187 So. 891, 185 Miss. 688.

81. U.S.—American Pacific Whaling Co. v. Kristensen, C.C.A.Wash., 93 F.2d 17.
Idaho.—Osborn v. Cary, 152 P. 473, 28 Idaho 89.
Ind.—Louisville, N. A. & C. Ry. Co. v. Howell, 45 N.E. 584, 147 Ind. 266.
Tenn.—Sale v. Eichberg, 59 S.W. 1020, 105 Tenn. 333, 52 L.R.A. 894.
Tex.—Fort Worth & R. G. Ry. Co. v. Woodward, Civ.App., 254 S.W. 227.

82. U.S.—American Pacific Whaling Co. v. Kristensen, C.C.A.Wash., 93 F.2d 17, 21, citing **Corpus Juris.**
Tenn.—Sale v. Eichberg, 59 S.W. 1020, 105 Tenn. 333, 52 L.R.A. 894.
22 C.J. p 740 note 7.

83. Mo.—Ganz v. Metropolitan St. Ry. Co., 220 S.W. 490.
22 C.J. p 740 note 8.

84. Ark.—Scullin v. Vining, 191 S. W. 924, 127 Ark. 124.
Tex.—Fort Worth & R. G. Ry. Co. v. Woodward, Civ.App., 254 S.W. 227.
22 C.J. p 740 note 9.

85. Conn.—Tompkins v. West, 16 A. 237, 56 Conn. 478.

86. Ill.—Ullrich v. Chicago City Ry. Co., 106 N.E. 828, 265 Ill. 338, Ann.Cas.1916A 793.
Mass.—Percoco's Case, 173 N.E. 515, 273 Mass. 429.
N.C.—Tilgham v. Seaboard Air Line Ry., 89 S.E. 71, 171 N.C. 652.
N.D.—Brown v. Inter-State Business Men's Acc. Ass'n of Des Moines, Iowa, 224 N.W. 894, 57 N.D. 941.
Vt.—Baldwin v. Gaines, 102 A. 338, 92 Vt. 61.
22 C.J. p 741 note 17.

87. Mich.—Marshall v. Brown, 15 N.W. 55, 50 Mich. 148.
Vt.—Baldwin v. Gaines, 102 A. 338, 92 Vt. 61.

88. Mich.—Hall v. Murdock, 72 N. W. 150, 114 Mich. 233.
Vt.—Baldwin v. Gaines, 102 A. 338, 92 Vt. 61.

89. U.S.—E. I. Du Pont de Nemours & Co. v. White, C.C.A.N.J., 8 F.2d 5.
Mich.—City of Detroit v. Porath, 260 N.W. 114, 271 Mich. 42—De Haan v. Winter, 247 N.W. 151, 262 Mich. 192—De Haan v. Winter, 241 N. W. 923, 258 Mich. 293—Hall v. Murdock, 72 N.W. 150, 114 Mich. 233—Pinney v. Cahill, 12 N.W. 862, 48 Mich. 584.
Neb.—Winters v. Rance, 251 N.W. 167, 125 Neb. 577.
Vt.—Baldwin v. Gaines, 102 A. 338, 92 Vt. 61.

ities show, or bases an opinion in whole or in part on what they advocate, even though he mentions no particular author, a standard authority may be used to contradict his testimony.[90] Also such a work may be read in evidence to contradict a statement as to what the authorities do not say.[91]

XIII. RES INTER ALIOS

§ 576. In General

Under the rule known as "res inter alios acta" a litigant cannot be affected by the words or acts of others with whom he is in no way connected, and for whose words or acts he is not responsible.

Under the general rule, known as "res inter alios acta," a litigant cannot be affected by the words or acts of others with whom he is in no way connected, and for whose words or acts he is not legally responsible.[92] The rule is one merely of auxiliary policy authorizing a trial judge to exclude evidence which unduly multiplies issues.[93] It is sometimes extended to cover proof of relevant facts, which, not being subject to direct cognition by the senses, can be proved only by showing manifestations which circumstantially indicate their existence. Of this nature are the mental states, knowledge, motive, intent, etc., which may be necessary to the existence of a claim or liability.[94]

Wis.—City of Ripon v. Bittel, 30 Wis. 614.
22 C.J. p 741 note 18.

Provided reference made thereto on cross-examination

When expert giving opinion cites treatise as authority, treatise may be offered in evidence or impeachment, provided it has been referred to on cross-examination.—Conn v. Seaboard Air Line Ry. Co., 159 S.E. 331, 201 N.C. 157, 77 A.L.R. 641—Tilgham v. Seaboard Air Line Ry., 89 S.E. 71, 171 N.C. 652.

Basis of opinion discovered on cross-examination

Where medical expert testifies for first time on cross-examination that his opinion is based on what he has read, he may be interrogated as to authorities on which he relies and then be contradicted by those authorities.—Wilcox v. International Harvester Co. of America, 116 N.E. 151, 278 Ill. 465, affirming 198 Ill. App. 33.

90. Minn.—Wittenberg v. Onsgard, 81 N.W. 14, 78 Minn. 342, 47 L.R.A. 141.
Vt.—Baldwin v. Gaines, 102 A. 338, 92 Vt. 61.

91. Wis.—Bruins v. Brandon Canning Co., 257 N.W. 35, 216 Wis. 387.

92. U.S.—General Motors Corporation v. Blackmore, C.C.A.Mich., 53 F.2d 725—Long v. Rasmussen, D. C.Mont., 281 F. 236.
Ala.—Equitable Life Assur. Soc. of U. S. v. Welch, 195 So. 554, 239 Ala. 453—Pounders v. Nix, 130 So. 537, 222 Ala. 27—Rains v. Ethridge-Atkins Motor Co., 127 So. 905, 221 Ala. 160—Bynum Bros. v. State, 112 So. 348, 216 Ala. 102—Mosely v. Verner, 110 So. 895, 215 Ala. 420—Deal v. Hubert, 95 So. 349, 209 Ala. 18, followed in Bell v. Hubert, 95 So. 350, 209 Ala. 22—Byars v. James, 94 So. 536, 208 Ala. 390—Goldstein v. Harris, 130 So. 313, 24 Ala.App. 3, certiorari denied 130 So. 315, 221 Ala. 612—Brenard Mfg. Co. v. Sullivan, 104 So. 887, 21 Ala.App. 44—Randle v. Walker, 84 So. 551, 17 Ala.App. 211.
Ark.—Jernigan v. Browne, 121 S.W. 2d 520, 197 Ark. 1—Royal Neighbors of America v. McCullar, 222 S.W. 708, 144 Ark. 447.
D.C.—Boosalis v. Crawford, 99 F.2d 374, 69 App.D.C. 141.
Ga.—National Ben Franklin Fire Ins. Co. v. Purvis, 7 S.E.2d 296, 61 Ga.App. 674.
Idaho.—Chamberlain v. Amalgamated Sugar Co., 247 P. 12, 42 Idaho 604.
Ill.—In re Moorhouse's Estate, 249 Ill.App. 432.
La.—New Orleans Ry. & Light Co. v. United States Fidelity & Guaranty Co., 82 So. 372, 145 La. 364.
Mass.—Wright v. Fisher, 125 N.E. 172, 234 Mass. 70.
N.C.—Smith v. Pilot Life Ins. Co., 4 S.E.2d 321, 216 N.C. 152—Stanley v. Whiteville Lumber Co., 114 S. E. 385, 184 N.C. 302—Cherry v. L. J. Upton & Co., 103 S.E. 912, 180 N.C. 1—Bryant v. Bryant, 100 S.E. 178, 178 N.C. 77—West v. A. F. Messick Grocery Co., 50 S.E. 565, 566, 138 N.C. 166.
N.D.—Wm. H. White & McCulloch Lumber Co. v. Weichers, 196 N.W. 98, 99, 50 N.D. 394, citing **Corpus Juris.**
Or.—Boord v. Kaylor, 197 P. 296, 100 Or. 366.
Pa.—McCabe v. Cannoe, 156 A. 77, 304 Pa. 497—Nowalk v. Hileman, 180 A. 93, 118 Pa.Super. 322.
S.C.—Chapman v. Metropolitan Life Ins. Co., 173 S.E. 801, 172 S.C. 250.
Tex.—White v. Erwin, Civ.App., 67 S.W.2d 1090, error dismissed—Stowe v. Wooten, Civ.App., 37 S. W.2d 1055, affirmed, Com.App., 62 S.W.2d 67—Tull v. Turley, Civ. App., 36 S.W.2d 1101, error dismissed—Davey v. Coleman, Civ. App., 6 S.W.2d 227, error dismissed—Roberts v. Nowlin, Civ. App., 290 S.W. 800.
Vt.—Belock v. State Mut. Fire Ins. Co., 185 A. 100, 108 Vt. 252, followed in Belock for Benefit of Cramton v. Union Mut. Fire Ins. Co., 185 A. 106, 108 Vt. 264, and Belock for Benefit of Cramton v. Vermont Mut. Fire Ins. Co., 185 A. 106, 108 Vt. 265.
W.Va.—Levine Bros. v. Mantell, 111 S.E. 501, 90 W.Va. 166.
22 C.J. p 741 note 19.

Evidence held not res inter alios acta

(1) In general.
U.S.—U. S. v. Mammoth Oil Co., C. C.A.Wyo., 14 F.2d 705, reversing, D.C., 5 F.2d 330, and certiorari granted Mammoth Oil Co. v. U. S., 47 S.Ct. 332, 273 U.S. 686, 71 L. Ed. 840, affirmed 48 S.Ct. 1, 275 U. S. 13, 72 L.Ed. 137.
Ala.—Coffee County v. Marsh, 96 So. 891, 209 Ala. 566.
D.C.—Boosalis v. Crawford, 99 F.2d 374, 69 App.D.C. 141.
Mo.—Hart v. Brown, App., 216 S.W. 552.
N.C.—Nance v. Western Union Telegraph Co., 98 S.E. 838, 177 N.C. 313.
S.C.—Chandler v. People's Nat. Bank of Greenville, 138 S.E. 888, 140 S. C. 433.

(2) Although a record is inadmissible to prove the truth of facts therein set out, except between parties and privies, yet, where the mere existence of such a record is material to be proved, it is evidence of that fact against everyone, and the res inter alios acta rule does not apply.—Falls v. Gamble, 66 N. C. 455.

93. D.C.—Boosalis v. Crawford, 99 F.2d 374, 69 App.D.C. 141.

94. Tex.—St. Louis Southwestern R. Co. v. Duncan, Civ.App., 164 S.W. 1087.
22 C.J. p 742 note 21.

§ 577. Relevancy

Evidence may be excluded as res inter alios acta whether it is relevant or irrelevant to the issues in the case.

The rule excluding evidence on the ground that it is res inter alios acta has been held applicable to evidence which is relevant[95] or irrelevant[96] to the issues in the case. There is authority, however, that evidence which is res inter alios acta is admissible when relevant to the issues in the case.[97]

XIV. SIMILAR ACTS OR OCCURRENCES

A. IN GENERAL

§ 578. Introductory Statement

The general rule is that the admission of evidence of similar acts or occurrences as proof that a particular act was done, or that a certain occurrence happened, rests largely in the discretion of the trial court.

The admissibility of evidence of similar acts, conditions or occurrences as probative of the commission or existence of a particular act, condition, or occurrence depends on the facts of each case.[98] The courts have realized that the admission of such evidence involves the practical inconvenience of trying collateral issues[99] and protracting the trial,[1] and that it may occasion surprise[2] or other prejudice[3] to litigants, and that it may bewilder and mislead a jury.[4] There is no rule of law, however, which prevents the trial of collateral issues, since the objection thereto is purely a practical one,[5] and the general rule is that the admission of evidence of similar acts or occurrences as proof that a particular act was done or that a certain occurrence happened, rests largely in the discretion of the trial court,[6] provided the conditions are substantially the same.[7] In the exercise of such discretion, the court must consider the extent of the similarity, the presence or absence of modifying circumstances, and the presence or absence of the same essential conditions.[8] It has been held, however, that, where the fact sought to be shown, even though independent of the litigated fact, nevertheless has an actual and substantial tendency to establish or disprove such fact, it must be admitted.[9]

B. SIMILAR ACTS

§ 579. Rule Stated

The law will not consider evidence that a person has done a certain act at a particular time as probative of a contention that he has done a similar act at another time.

Evidence of similar acts or transactions is inadmissible when irrelevant to the issues in the case.[10]

95. D.C.—Boosalis v. Crawford, 99 F.2d 374, 69 App.D.C. 141.

96. Ala.—Rattray v. W. P. Brown & Sons Lumber Co., 192 So. 285, 29 Ala.App. 93, certiorari denied 192 So. 288, 238 Ala. 548.
Ill.—Chicago & E. I. R. Co. v. Schmitz, 71 N.E. 1050, 211 Ill. 446.
S.C.—Carter v. American Fruit Growers, 134 S.E. 292, 136 S.C. 389.
Vt.—Gero v. John Hancock Mut. Life Ins. Co., 18 A.2d 154, 111 Vt. 462.
22 C.J. p 742 note 28.

97. N.Y.—McAvoy v. Schramme, 264 N.Y.S. 181, 238 App.Div. 225, affirmed 189 N.E. 691, 263 N.Y. 548.
22 C.J. p 743 note 30.

98. Mass.—Emerson v. Lowell Gas Light Co., 3 Allen 410.
22 C.J. p 744 note 34.

99. Tex.—Stowe v. Wooten, Civ. App., 37 S.W.2d 1055, 1058, citing **Corpus Juris**, and affirmed, Com. App., 62 S.W.2d 67.
22 C.J. p 744 note 34.

1. Vt.—Foster v. Dickerson, 24 A. 253, 64 Vt. 233.

2. N.J.—Trenton Temperance Hall Ass'n v. Giles, 33 N.J.Law 260.
22 C.J. p 744 note 36.

3. Mo.—Popejoy v. Hydraulic Press Brick Co., 186 S.W. 1133, 193 Mo. App. 612.
22 C.J. p 744 note 37.

4. Mass.—Guidara & Terenzio v. R. Guastavino Co., 190 N.E. 716, 286 Mass. 502.
22 C.J. p 744 note 38.

5. Mass.—Reeve v. Dennett, 11 N.E. 938, 145 Mass. 23.
22 C.J. p 744 note 41.

6. U.S.—Jones v. U. S., Or., 42 S. Ct. 218, 258 U.S. 40, 66 L.Ed. 453, affirming, C.C.A., 265 F. 235.
Minn.—Schmitt v. U. S. Fidelity & Guaranty Co., 210 N.W. 846, 169 Minn. 106—Chrysler v. Randolph Sand & Gravel Co., 193 N.W. 677, 155 Minn. 297.
Mo.—Lake Superior Loader Co. v. Huttig Lead & Zinc Co., 264 S.W. 396, 305 Mo. 130—Green v. Terminal R. Ass'n of St. Louis, App., 135 S.W.2d 652, 656, citing **Corpus Juris.**
Or.—Ragan v. MacGill, 292 P. 1094, 134 Or. 408, 72 A.L.R. 860.
Wash.—Woods v. Desmond, 286 P. 856, 156 Wash. 359.
22 C.J. p 744 notes 39, 42.
Corpus Juris cited as stating the general rule.—S. J. Van Lill Co. v. Frederick City Packing Co., 141 A. 898, 903, 155 Md. 303.

7. Or.—Ragan v. MacGill, 292 P. 1094, 134 Or. 408, 72 A.L.R. 860.

8. Mo.—Green v. Terminal R. Ass'n of St. Louis, App., 135 S.W.2d 652.

9. Md.—S. J. Van Lill Co. v. Frederick City Packing Co., 141 A. 898, 155 Md. 303.

10. U.S.—Peoples Trust & Savings Bank v. Hubbell, C.C.A.Kan., 102 F.2d 754—American S. S. Co. v. Wickwire Spencer Steel Co., D.C. N.Y., 42 F.2d 886, affirmed, C.C.A., 49 F.2d 766—Bader Coal Co. v. Quemahoning Coal Co., C.C.A.Pa., 14 F.2d 743—U. S. v. Union Pac. R. Co., D.C.Mo., 34 F.Supp. 4, modified on other grounds Union Pac. R. Co. v. U. S., 61 S.Ct. 1064, 313 U.S. 450, 85 L.Ed. 1453—Northern Assur. Co. v. Del Moral, C.C.A.

Thus the law will not consider evidence that a person has, or has not, done a certain act at a particular time as probative of a contention that he has, or has not, done a similar act at another time.[11]

Puerto Rico, 300 F. 513—Lamson Bros. & Co. v. Turner, C.C.A.Neb., 27? F. 680—Esteve Bros. & Co. v. Harrell, C.C.A.La., 272 F. 382—Flowers v. Bush & Witherspoon Co., Tex., 254 F. 519, 166 C.C.A. 77—The Whisper, C.C.A.Tenn., 268 F. 464.
Ala.—Harduval v. Mitchell, 127 So. 168, 220 Ala. 595—Nixon & Phillips v. Grant, 124 So. 216, 220 Ala. 84—Southern Ry. Co. v. Morris, 98 So. 387, 210 Ala. 463—Schwarz v. Lou-Ala Inv. Co., 127 So. 786, 23 Ala.App. 498.
Ark.—Merchants' Bank of Kansas City v. Searcy Wholesale Grocer Co., 265 S.W. 961, 166 Ark. 153—Davison v. Harris, 265 S.W. 67, 165 Ark. 518—Mastell v. Salo, 215 S.W. 583, 140 Ark. 408.
Cal.—Hind v. Overseas Agencies, 208 P. 110, 189 Cal. 319—Whepley Oil Co. v. Associated Oil Co., 44 P.2d 670, 6 Cal.App.2d 94—Provensal v. Michel, 265 P. 580, 89 Cal.App. 594—Miller v. Lerdo Land Co., 199 P. 1073, 52 Cal.App. 662.
Colo.—Wood v. Hazelet, 237 P. 151, 77 Colo. 442—Western Live Stock Loan Co. v. Creaghe, 206 P. 795, 71 Colo. 334.
Ga.—Georgia State Sav. Ass'n v. Wilson, 5 S.E.2d 14, 189 Ga. 21—Deckner-Willingham Lumber Co. v. Turner, 155 S.E. 1, 171 Ga. 240—Bank of Emanuel v. Smith, 124 S.E. 114, 32 Ga.App. 606—Mendel v. Converse & Co., 118 S.E. 586, 30 Ga.App. 549—Mackle Const. Co. v. Hotel Equipment Co., 102 S.E. 868, 25 Ga.App. 137.
Idaho.—Curtis v. Western Reporting & Credit Co., 230 P. 771, 39 Idaho 784.
Ill.—Independent Oil Men's Ass'n v. Fort Dearborn Nat. Bank, 142 N.E. 458, 311 Ill. 278, affirming 226 Ill.App. 570.
Ind.—Shell Petroleum Corporation v. Earnest, 187 N.E. 211, 97 Ind.App. 483—Feichter v. Swift, 132 N.E. 662, 77 Ind.App. 427.
Iowa.—Coughlon v. Pedelty, 233 N.W. 63, 211 Iowa 138—Bohen v. North American Life Ins. Co. of Chicago, 177 N.W. 706, 188 Iowa 1349.
Md.—Smart v. Graham, 20 A.2d 574—James L. Kernan Co. v. Cook, 159 A. 256, 162 Md. 137—Hettleman v. Frank, 110 A. 715, 136 Md. 351—Martin Fertilizer Co. v. Thomas & Co., 109 A. 458, 135 Md. 633—Davison Chemical Co. v. Baugh Chemical Co., 106 A. 269, 134 Md. 24.
Mass.—W. H. Ballard Co. v. Lipp, 192 N.E. 492, 288 Mass. 163—Rothwell v. First Nat. Bank, 190 N.E. 812, 286 Mass. 417—Childs, Jeffries & Co. v. Bright, 186 N.E. 571, 283 Mass. 283—Holyoke Nat. Bank v. Proulx, 167 N.E. 521, 267 Mass. 296—Davis-Hill Co. v. Wells, 149 N.E. 693, 254 Mass. 118—Raymond Syndicate v. American Radio & Research Corporation, 160 N.E. 821, 263 Mass. 147—Henry J. Perkins Co. v. City of Springfield, 143 N.E. 329, 248 Mass. 447—Allen v. Abramson, 139 N.E. 648, 245 Mass. 321.
Mich.—W. T. Rawleigh Co. v. Peters, 207 N.W. 813, 233 Mich. 565.
Minn.—Schmitt v. U. S. Fidelity & Guaranty Co., 210 N.W. 846, 169 Minn. 106.
Miss.—Rex Motor Car Mfg. Co. v. Dupont, 96 So. 684, 132 Miss. 504.
Mo.—Gillioz v. State Highway Commission, 153 S.W.2d 18—Rice v. Lammers, App., 65 S.W.2d 151—Farmers' State Bank v. Barnes, App., 276 S.W. 93—Broughton v. Hunter's Bank, App., 264 S.W. 469—Pattonsburg Sav. Bank v. Koch, App., 255 S.W. 580—Lion Match Co. v. Hess, App., 253 S.W. 108.
N.J.—Gurtman v. Harris, 156 A. 329, 9 N.J.Misc. 1064.
N.Y.—Siegel v. Huebshman, 176 N.Y.S. 71, 187 App.Div. 548—Jawitz v. Reitman, 217 N.Y.S. 480, 128 Misc. 20.
N.C.—Brittain v. Atlantic & Y. Ry. Co., 9 S.E.2d 416, 217 N.C. 737—North Carolina Cotton Growers' Co-op. Ass'n v. Tillery, 160 S.E. 767, 201 N.C. 531.
N.D.—Wilkins v. National Union Fire Ins. Co. of Pittsburgh, Pa., 189 N.W. 317, 48 N.D. 1295.
Okl.—Mid-Continent Petroleum Corporation v. Poage, 112 P.2d 166—Wolverine Oil Co. v. Parks, 193 P. 624, 79 Okl. 318.
Or.—Seabrook v. Foley Box Factory 259 P. 890, 122 Or. 511.
Pa.—Steinberg v. M. Nathan & Bro., 150 A. 899, 300 Pa. 496—Newbold v. Mead, 57 Pa. 487—Caulfield v. Ætna Life Ins. Co. of Hartford, Conn., 19 A.2d 575, 144 Pa.Super. 257—Stern v. Hess, 78 Pa.Super. 413.
S.C.—Jordan v. Hudgens, 143 S.E. 811, 146 S.C. 209—Livingston v. Reid-Hart-Parr Co., 109 S.E. 106, 117 S.C. 391.
Tex.—Stowe v. Wooten, Com.App., 62 S.W.2d 67, affirming, Civ.App., 37 S.W.2d 1055—Albright v. Smith, Com.App., 288 S.W. 178, affirming Smith v. Allbright, Civ.App., 279 S.W. 852, and reversed on other grounds Allbright v. Smith, Com.App., 5 S.W.2d 970—McCaskill v. Davis, Civ.App., 134 S.W.2d 738—Coe v. Widener, Civ.App., 122 S.W.2d 258—Houston & West Texas Oil Co. v. Storey, Civ.App., 117 S.W.2d 832, error dismissed—American Nat. Ins. Co. v. Meneses, Civ.App., 42 S.W.2d 1047, followed in American Nat. Ins. Co. v. Castillo, Civ.App., 42 S.W.2d 1048—Alexander v. Good Marble & Tile Co., Civ.App., 4 S.W.2d 636, error refused—Reese v. Carey Bros., Civ App., 286 S.W. 307—National Life & Accident Ins. Co. v. Sanchez, Civ.App., 281 S.W. 891—L. B. Price Mercantile Co. v. Moore, Civ.App., 263 S.W. 657, error dismissed National Compress Co. v. Hamlin, 269 S.W. 1024, 114 Tex. 375—Smith v. Roberts, Civ.App., 218 S.W. 27—Williams v. Gardner, Civ.App., 215 S.W. 981.
Utah.—Guaranty Mortg. Co. v. Ellison, 239 P. 29, 66 Utah 1.
Wash.—Johnson v. Associated Oil Co. of California, 17 P.2d 44, 170 Wash. 634—David P. Eastman, Inc., v. Northwestern Mut. Life Ins. Co., 13 P.2d 488, 169 Wash. 125—Hahn v. Brickell, 237 P. 305, 135 Wash. 189, reversing 229 P. 739, 131 Wash. 212—May v. Roberts, 219 P. 55, 126 Wash. 645—Great Western Motors v. Hibbard, 192 P. 958, 112 Wash. 541.
W.Va.—Hill v. Ansted Nat. Bank, 123 S.E. 417, 95 W.Va. 649.
Wis.—Sachs v. North American Life Ins. Co. of Chicago, 230 N.W. 612, 201 Wis. 537.
39 C.J. p 53 notes 62–64—41 C.J. p 8 note 64.

11. U.S.—Johnstown Tribune Pub. Co. v. Briggs, C.C.A.Pa., 76 F.2d 601—U. S. v. Bighorn Sheep Co., D.C.Wyo., 9 F.2d 192.
Ariz.—California State Life Ins. Co v. Fuqua, 10 P.2d 958, 40 Ariz. 148.
Cal.—Sun Oil Co. of California v. Union Drilling & Petroleum Co., 280 P. 535, 208 Cal. 114—Larson v. Larsen, 236 P. 979, 72 Cal.App. 169—Walberg v. Underwood, 183 P. 254, 41 Cal.App. 679.
Conn.—Henry v. Kopf, 131 A. 412, 104 Conn. 73.
Fla.—McKee v. First Nat. Bank & Trust Co. in Orlando, 159 So. 669, 118 Fla. 505.
Ga.—Duncan v. Bailey, 134 S.E. 87, 162 Ga. 457—E. Frederics, Inc., v. Felton Beauty Supply Co., 198 S.E. 324, 58 Ga.App. 320—Summer v. Hogsed, 152 S.E. 260, 41 Ga.App. 207.
Ill.—Stephens v. Collison, 161 N.E. 68, 330 Ill. 48—Lamb v. Fidelity & Deposit Co. of Maryland, 257 Ill. App. 262.
Iowa.—Meredith v. Carl Youngstrom Co., 205 N.W. 749—Streblow v. Sylvester, 191 N.W. 788, 195 Iowa 168.
Kan.—Prymek v. Herink, 289 P. 412, 413, 131 Kan. 77, quoting **Corpus Juris.**
Ky.—Fowlkes v. Ohio Valley Tie Co., 271 S.W. 576, 208 Ky. 535—John-

One vice or moral dereliction cannot be proved as a circumstance to show the existence of another not necessarily or vitally connected with it as cause or effect.[12] It is even clearer that a person cannot be shown to have done an act by evidence that another person has done a similar act,[13] although both persons are under the control of a single management.[14]

§ 580. When Admitted

Evidence as to the commission of acts similar to that involved may be relevant as bearing on the probability that the act in issue has been committed.

Evidence of similar acts or transactions is admissible when relevant to prove an issue in the case,[15] or when it goes to the corroboration of evidence al-

son v. Wyan, 258 S.W. 949, 202 Ky. 33—Rakestraw v. Sebree Deposit Bank, 225 S.W. 506, 189 Ky. 668.

La.—Turner v. Item Co., 6 La.App. 270.

Md.—Kremis v. Kremis, 161 A. 255, 163 Md. 223—Davison Chemical Co. v. Baugh Chemical Co., 106 A. 269, 134 Md. 24.

Mich.—Stranahan v. Genesee County Farmers' Mut. Fire Ins. Co., 218 N.W. 688, 242 Mich. 413—Bay State Milling Co. v. Saginaw Baking Co., 196 N.W. 204, 225 Mich. 557.

Mo.—Funsch v. Stevenson, 223 S.W. 593—Lorie v. Lumbermen's Mut. Casualty Co., App., 8 S.W.2d 81—Pyrtle v. International Shoe Co., App., 291 S.W. 172—McKeehan v. McNealey, App., 282 S.W. 1048—Bailey-Ball-Pumphrey Co. v. German, 247 S.W. 483, 213 Mo.App. 11—Turner v. King, App., 224 S.W. 91—Bovard v. Merganthaler Linotype Co., App., 209 S.W. 965.

N.J.—Schaffer v. Hurd, 130 A. 228, 98 N.J.Eq. 143—Schotland v. Hirsch, 155 A. 21, 9 N.J.Misc. 600.

N.Y.—Breslow v. Manchester, Robertson, Allison, 191 N.Y.S. 885, 199 App.Div. 457—Kelly v. Home Mut. Fire Ins. Co. of Broome County, 180 N.Y.S. 657, 190 App.Div. 764.

N.C.—Robbins v. Alexander, 14 S.E. 2d 425, 219 N.C. 475—Nance v. Western Union Telegraph Co., 98 S.E. 838, 177 N.C. 313.

N.D.—Piechotta v. Fried, 181 N.W. 602, 46 N.D. 620.

Okl.—National Surety Co. v. Slover, 269 P. 354, 132 Okl. 104—Concordia Fire Ins. Co. v. Wise, 246 P. 595, 114 Okl. 254—Hunt v. Jones, 224 P. 354, 98 Okl. 99—Claggett v. Hampton, 221 P. 707, 94 Okl. 252.

Pa.—Roney v. Clearfield County Grange Mut. Fire Ins. Co., 3 A. 2d 365, 332 Pa. 447—Jamestown Iron & Metal Co. v. Knofsky, 154 A. 15, 302 Pa. 483—Reifsnyder v. Dougherty, 152 A. 98, 301 Pa. 328—In re Leadenham's Estate, 137 A. 247, 289 Pa. 216—Listie Coal Co. v. Farmers' National Bank of Somerset, 135 A. 105, 287 Pa. 337—Baumeister v. Baugh & Sons Co., 16 A.2d 424, 142 Pa.Super. 346—Keiter v. Miller, 170 A. 364, 111 Pa.Super. 594.

R.I.—Pontes v. United Electric Rys. Co., 170 A. 674, 54 R.I. 139, citing **Corpus Juris.**

S.C.—Williams v. Atlantic Coast Lumber Corporation, 134 S.E. 390, 394, 136 S.C. 423, citing **Corpus Juris.**

Tex.—Houston Electric Co. v. McLeroy, Civ.App., 153 S.W.2d 617, error granted—Traders & General Ins. Co. v. Boysen, Civ.App., 123 S.W.2d 1016, error dismissed, judgment correct—Beckner v. Barrett, Civ.App., 81 S.W.2d 719, error dismissed—San Antonio Cotton Mills v. De Latte, Civ.App., 43 S.W.2d 486—Scales v. Lindsay, Civ.App., 43 S.W.2d 286, error dismissed—Stowe v. Wooten, Civ.App., 37 S.W. 2d 1055, 1058, quoting **Corpus Juris,** affirmed, Com.App., 62 S.W.2d 67—Davidson v. Swanson, Civ. App., 24 S.W.2d 776—Houston E. & W. T. Ry. Co. v. Mathews, Civ. App., 1 S.W.2d 754, reversed on other grounds, Com.App., 12 S.W. 2d 163—Webb v. Smith, Civ.App., 288 S.W. 624—Connellee v. Oil Belt Pub. Co., Civ.App., 263 S.W. 633—Petrolia Supply Co. v. Hemphill, Civ.App., 258 S.W. 861—Singer Sewing Mach. Co. v. Kaltwasser, Civ.App., 255 S.W. 631—Linthicum v. Richardson, Civ.App., 245 S.W. 713—Smith v. Smith, Civ.App., 234 S.W. 419, dismissed for want of jurisdiction—Smith v. Fleming, Civ.App., 231 S.W. 136, motion overruled 231 S.W. 1117—Ware v. Campbell, Civ.App., 229 S.W. 593—Richmond v. Hog Creek Oil Co., Civ.App., 229 S.W. 563, error dismissed, Com.App., 239 S.W. 904—Goree v. Uvalde Nat. Bank, Civ. App., 218 S.W. 620, dismissed for want of jurisdiction—Hall v. Hayter, Civ.App., 209 S.W. 436.

Utah.—Ogden Commission Co. v. Campbell, 244 P. 1029, 66 Utah 563.

Vt.—H. M. Farnham & Sons v. Wark, 134 A. 603, 99 Vt. 446.

Va.—W. S. Forbes & Co. v. Southern Cotton Oil Co., 108 S.E. 15, 130 Va. 245.

Wash.—May v. Roberts, 219 P. 55, 126 Wash. 645—Washington Co-op. Egg & Poultry Ass'n v. Taylor, 210 P. 806, 122 Wash. 466.

Wis.—Steppe v. Farber, 236 N.W. 530, 205 Wis. 80—Markgraf v. Columbia Bank of Lodi, 233 N.W. 782, 203 Wis. 429—Wiesner v. Kosiedowski, 193 N.W. 374, 182 Wis. 521, affirmed 197 .N.W. 208, 182 Wis. 521—Wisconsin Auto Sales Co. v. Frint Motor Car Co., 192 N. W. 468, 180 Wis. 137—Industrial Co-op. Union v. Lewis, 182 N.W. 861, 174 Wis. 466.

22 C.J. p 744 note 43.

Animals

Although it might be considered that the presumption that animals would always act in the same manner under substantially similar circumstances would be much stronger than in the case of human beings, such evidence has been rejected.—East Kingston v. Towle, 48 N.H. 57, 97 Am.D. 575, 2 Am.R. 174—22 C.J. p 746 note 51 [a].

12. Ala.—Supreme Lodge K. L. H. v. Baker, 50 So. 958, 163 Ala. 518.

13. Idaho.—Franklin v. Wooters, 45 P.2d 804, 807, 55 Idaho 619, citing **Corpus Juris.**

Ill.—Manufacturers' State Bank of East Moline, Ill., v. American Surety Co. of N. Y., 230 Ill.App. 474.

Ky.—Grote v. Blakely, 264 S.W. 1055, 204 Ky. 410.

La.—Royal Indemnity Co. v. Shreveport Macaroni Mfg. Co., 137 So. 753, 18 La.App. 275.

Okl.—Hill Bros. v. Pierce, 35 P.2d 883, 169 Okl. 2.

Tex.—Daniels v. Wallace, Civ.App., 298 S.W. 649.

Wis.—Markgraf v. Columbia Bank of Lodi, 233 N.W. 782, 203 Wis. 429.

22 C.J. p 746 note 49.

14. Ky.—Eskridge v. Cincinnati, N. O. & T. P. R. Co., 12 S.W. 580, 89 Ky. 367, 11 Ky.L. 557.

22 C.J. p 746 note 50.

15. U.S.—Mendota Coal & Coke Co. v. Eastern Ry. & Lumber Co., C. C.A.Wash., 53 F.2d 77—Maloney-Tank Mfg. Co. v. Mid-Continent Petroleum Corporation, C.C.A.Okl., 49 F.2d 146.

Ala.—Indemnity Co. of America v. Pugh, 132 So. 165, 222 Ala. 251—Brotherhood of Railroad Trainmen v. Barnhill, 108 So. 456, 214 Ala. 565, 47 A.L.R. 270.

Ariz.—Kjerschow v. Daggs, 207 P. 1089, 24 Ariz. 207.

Cal.—Katz v. Helbing, 271 P. 1062, 205 Cal. 629, 62 A.L.R. 825—Fidler v. Board of Trustees of Roseville Union High School, 296 P. 912, 112 Cal.App. 296—Milwaukee Bldg. Co. v. Wetzel, 270 P. 382, 93 Cal.App. 775—J. B. Colt Co. v. Freitas, 244 P. 916, 76 Cal.App. 278—Lew U. Fon v. Chambers, 228.

ready received.[16] Thus the commission of acts similar to that involved may be relevant as bearing on the probability that the act in issue has been committed.[17] Likewise evidence of similar acts may frequently be relevant, especially in actions based on fraud and deceit, because of the light which it throws on the state of mind of a person,[18] as, for example, his knowledge,[19] or motive or intent.[20]

P. 865, 68 Cal.App. 244—Ricioli v. Lynch, 223 P. 88, 65 Cal.App. 53—Pacific Feed Co. v. Kennel, 218 P. 274, 63 Cal.App. 108.

Ill.—Du Bois v. People, 65 N.E. 658, 200 Ill. 157, 93 Am.S.R. 183—Tarasek v. Kosciuszko Building & Loan Ass'n No. 3 of Chicago, 218 Ill. App. 487.

Iowa.—Olson v. Shuler, 221 N.W. 941, 208 Iowa 70—Babb v. Herring Motor Co., 186 N.W. 672, 193 Iowa 794.

Kan.—Atchison Sav. Bank v. Potter, 179 P. 319, 104 Kan. 373.

Md.—Bracey v. McGary, 106 A. 627, 134 Md. 279.

Mass.—Kavolsky v. Kaufman, 173 N.E. 499, 273 Mass. 418—Landfield v. Albiani Lunch Co., 168 N.E. 160, 268 Mass. 528.

Mich.—J. B. Colt Co. v. Reade, 190 N.W. 672, 221 Mich. 92.

Minn.—Cashman v. Bremer, 262 N.W. 216, 195 Minn. 195—Fraser v. Farmers' Co-op. Co., 209 N.W. 33, 167 Minn. 369, reargument denied 209 N.W. 913, 167 Minn. 369.

Mo.—Krech v. Pacific R. Co., 64 Mo. 172—Fischer v. Western & Southern Indemnity Co., 110 S.W.2d 811, 233 Mo.App. 885—Bailey-Ball-Pumphrey Co. v. German, 247 S.W. 483, 213 Mo.App. 11—Boyajian Bros. v. Reinheimer, App., 229 S.W. 441, affirmed Sup., 250 S.W. 364.

Mont.—W. T. Rawleigh Co. v. Miller, 73 P.2d 552, 105 Mont. 456.

N.H.—Weston v. Ball, 116 A. 99, 80 N.H. 275.

N.Y.—Steindler v. Meehan, 250 N.Y.S. 61, 140 Misc. 160—Figueira v. Eagle Savings & Loan Co., 176 N.Y.S. 845, 107 Misc. 101.

N.C.—Anderson v. Reidsville Amusement Co., 195 S.E. 386, 213 N.C. 130—Bank of Varina v. Sherron, 119 S.E. 497, 186 N.C. 297.

Pa.—Laney v. Columbia Natural Gas Co., 158 A. 266, 305 Pa. 527.

R.I.—Screw Mach. Products Corporation v. Cutter & Wood Supply Co., 117 A. 659, 44 R.I. 409.

S.C.—Dowling v. Fenner, 126 S.E. 432, 131 S.C. 62.

Tenn.—Armstrong v. Bowman, 115 S.W.2d 229, 21 Tenn.App. 673—Dark Tobacco Growers' Co-op. Ass'n v. Mason, 263 S.W. 60, 150 Tenn. 228.

Tex.—Reese v. Carey Bros., Civ.App., 286 S.W. 307—C. W. Hahl Co. v. Cunningham & Hardy, Civ.App., 246 S.W. 108—Hartt v. Yturria Cattle Co., Civ.App., 210 S.W. 612, appeal dismissed, Com.App., 228 S.W. 551—Ft. Worth & D. C. Ry. Co. v. Strickland, Civ.App., 208 S.W. 410.

Wash.—Sunset Motor Co. v. Woodruff, 228 P. 519, 130 Wash. 516.

22 C.J. p 746 notes 53, 55, 56, p 763 note 67—39 C.J. p 53 notes 65–67.

16. Tex.—Wrather v. Parks, Civ. App., 227 S.W. 513.

22 C.J. p 746 note 54.

17. Cal.—Lobree v. L. E. White Lumber Co., 199 P. 821, 53 Cal. App. 85.

Ga.—Meeks v. Withers, 184 S.E. 604, 181 Ga. 787.

Iowa.—Hayden v. Latch, 182 N.W. 868, 191 Iowa 469.

Kan.—Moreland v. National Council of Security Ben. Ass'n, 212 P. 93, 112 Kan. 587.

Md.—Reinhart v. Cunningham, 157 A. 896, 162 Md. 698—Conservation Co. v. Stimpson, 110 A. 495, 136 Md. 314.

Mass.—Bianconi v. Crowley, 152 N.E. 305, 256 Mass. 187—Feinberg v. Pooryu, 143 N.E. 824, 249 Mass. 88—Metropolitan Trust Co. v. Federal Trust Co., 122 N.E. 413, 232 Mass. 363.

Minn.—Baltrusch v. Braulick, 236 N.W. 924, 183 Minn. 470.

Mo.—Essey v. Bushakra, 252 S.W. 459, 299 Mo. 147—Texas Co. v. First Bank & Trust Co., App., 106 S.W.2d 28—American Mfg. Concern v. Manufacturers' Printery, App., 6 S.W.2d 984.

Mont.—O'Neill v. Wall, 62 P.2d 672, 103 Mont. 388.

N.Y.—In re Booth's Will, 218 N.Y.S. 684, 215 App.Div. 516—Brendan Realty Co. v. Ellerstein, 173 N.Y.S. 378.

Okl.—Drummond v. Corbin, 77 P.2d 692, 182 Okl. 338.

Tenn.—Southern Ry. Co. v. Forrest, 13 Tenn.App. 547.

Vt.—Hendrickson v. International Harvester Co. of America, 135 A. 702, 100 Vt. 161.

Wash.—Beeler v. Pacific Fruit & Produce Co., 233 P. 4, 133 Wash. 116.

W.Va.—Dickinson Fuel Co. v. Glenn Coal Co., 137 S.E. 539, 103 W.Va. 366—Gibbard v. Evans, 106 S.E. 37, 87 W.Va. 650.

22 C.J. p 746 note 57.

18. Ala.—Ex parte Messer, 152 So. 244, 245, 228 Ala. 16, citing **Corpus Juris**—Great American Ins. Co. v. Dover, 130 So. 335, 221 Ala. 612.

Cal.—Larson v. Larsen, 236 P. 979, 72 Cal.App. 169—Walberg v. Underwood, 183 P. 254, 41 Cal.App. 679.

Ga.—Deckner-Willingham Lumber Co. v. Turner, 155 S.E. 1, 171 Ga. 240.

Mich.—Milwaukee Tank Works v. East Jordan Co-Op. Ass'n, 218 N.W. 650, 242 Mich. 266.

Mo.—Farmers' Bank of Billings v. Schmidt, 25 S.W.2d 525, 223 Mo. App. 1098.

N.Y.—Zinman v. Lockwood, 245 N.Y.S. 696, 138 Misc. 592.

Okl.—Claggett v. Hampton, 221 P. 707, 94 Okl. 252.

Vt.—Land Finance Corporation v. Sherwin Electric Co., 146 A. 72, 102 Vt. 73, 75 A.L.R. 1025.

Va.—Ely v. Gray, 100 S.E. 660, 125 Va. 708.

W.Va.—Miles F. Bixler Co. v. Dunsmore, 156 S.E. 72, 109 W.Va. 727.

22 C.J. p 747 note 58.

19. Iowa.—Farmers' Nat. Bank of Kingsley v. Pratt, 186 N.W. 924, 193 Iowa 406.

N.C.—Bank of Varina v. Sherron, 119 S.E. 497, 186 N.C. 297.

Ohio.—Gaff Estate Co. v. Grote, 153 N.E. 919, 22 Ohio App. 44.

Or.—Union Central Life Ins. Co. v. Kerron, 264 P. 453, 456, 128 Or. 70, quoting **Corpus Juris**—Second Northwestern Finance Corporation v. Mansfield, 252 P. 400, 121 Or. 236, rehearing denied 254 P. 1022, 121 Or. 236.

Pa.—Baumeister v. Baugh & Sons Co., 16 A.2d 424, 142 Pa.Super. 346.

Tex.—Great Southern Sulphur Co. v. Mills, Civ.App., 267 S.W. 528—Wrather v. Parks, Civ.App., 227 S.W. 513.

Wash.—May v. Roberts, 219 P. 55, 126 Wash. 645.

22 C.J. p 748 note 61.

20. U.S.—Richardson v. Smith, C.C. A.Conn., 102 F.2d 697, 125 A.L.R. 774—National Labor Relations Board v. Pacific Greyhound Lines, C.C.A., 91 F.2d 458, certiorari granted 58 S.Ct. 270, 302 U.S. 679, 82 L.Ed. 524, reversed on other grounds 58 S.Ct. 577, 303 U.S. 272, 82 L.Ed. 838—U. S. v. 169 Bales Containing Wool, C.C.A.N.Y., 56 F. 2d 736, certiorari denied 169 Bales Containing Wool, etc., v. U. S., 52 S.Ct. 502, 286 U.S. 552, 76 L.Ed. 1287.

Ark.—Myers v. Martin, 272 S.W. 856, 168 Ark. 1028.

Cal.—Atkins Corporation v. Tourny, 57 P.2d 480, 6 Cal.2d 206—Rosenberg v. Geo. A. Moore & Co., 229 P. 34, 194 Cal. 392—Adams v. Harrison, 93 P.2d 237, 34 Cal.App.2d 288—Liberty Bank v. Nonnenmann, 274 P. 568, 96 Cal.App. 478—Larson v. Larsen, 236 P. 979, 72 Cal. App. 169.

Ga.—Deckner-Willingham Lumber

§ 581. —— Course of Conduct or Dealing

Evidence of a course of conduct or dealing followed by a person may be admitted to prove that he acted in accordance with it on a given occasion.

Evidence of a course of conduct or dealing may be admitted where pertinent to an issue in the case.[21] When, in the opinion of the court, a course of conduct or dealing on the part of a given individual is established as to render its continuance to the time involved in the issue probable, its existence may be used as evidence that he acted in accordance with it on a particular occasion,[22] provided such course of conduct is shown to have been continuous and systematic.[23] There are, however, a number of cases in which evidence tending to show a course of conduct has been rejected as not sufficiently probative of the doing, on a particular occasion, of an act in accordance therewith.[24]

§ 582. —— Habit

Evidence of the existence of a habit on the part of an animal or person may, where the evidence is conflicting, be admitted to prove that he acted in accordance with it on a given occasion.

Evidence of habit is frequently rejected when offered for the purpose of showing that a person acted in accordance with such habit on a particular occasion,[25] especially where direct evidence is or can be produced,[26] or the act is otherwise fully proved.[27] On the other hand it has been felt that the existence of a habit, causing a more or less settled or automatic reaction to physical or mental stimulus, presents a stronger relevancy as to what happened on a particular occasion than would the mere doing of an isolated act of a similar nature at another time.[28] Accordingly, proof of the existence of a habit may be received where this is the only fact obtainable which is relevant to the point,[29] or where the evidence is conflicting.[30] Where the existence of a habit is probative for some reason other than that it renders probable the fact that the person acted in accordance with it

Co. v. Turner, 155 S.E. 1, 171 Ga. 240—Eberhardt v. Bennett, 137 S.E. 64, 163 Ga. 796.
Ill.—Smith v. National Life & Accident Ins. Co., 4 N.E.2d 128, 286 Ill.App. 566—Nusbaum v. Retail Clerks' International Protective Ass'n, 227 Ill.App. 206.
Iowa.—Larson v. Stanton State Bank, 208 N.W. 726, 202 Iowa 333—Lambertson v. National Investment & Finance Co., 202 N.W. 119, 200 Iowa 527—Anthon State Bank v. Bernard, 201 N.W. 59, 198 Iowa 1345—Barks v. Kleyne, 200 N.W. 439, 198 Iowa 793, followed in 201 N.W. 602—Farmers' Nat. Bank of Kingsley v. Pratt, 186 N.W. 924, 193 Iowa 406—Harper & Ward v. Kurtz, 175 N.W. 45, 188 Iowa 1047.
Kan.—Pioneer Nat. Life Ins. Co. v. Nall, 67 P.2d 518, 145 Kan. 785.
Ky.—National Council of Knights and Ladies of Security v. Rowell, 123 S.W.2d 1041, 276 Ky. 335.
Mich.—Gower v. Wieser, 256 N.W. 603, 269 Mich. 6—Radloff v. Ruggles Motor Truck Co., 201 N.W. 200, 229 Mich. 139.
Miss.—Lizana v. Edward Motor Sales Co., 141 So. 295, 163 Miss. 266.
Mo.—Rice v. Lammers, App., 65 S.W.2d 151.
N.H.—Land Finance Corporation v. Grafton County Electric Light & Power Co., 144 A. 845, 83 N.H. 518.
N.Y.—Plath v. Kline, 45 N.Y.S. 951, 18 App.Div. 240.
N.C.—Seminole Phosphate Co. v. Johnson, 124 S.E. 859, 188 N.C. 419.
N.D.—Marlatt v. Couture, 169 N.W. 582, 41 N.D. 127.
Okl.—International News Service v. News Pub. Co. of Enid, 247 P. 87, 118 Okl. 113.
Pa.—Baumeister v. Baugh & Sons Co., 16 A.2d 424, 142 Pa.Super. 346.
S.C.—Sun Ins. Office v. Foil, 197 S.E. 683, 187 S.C. 183.
Tex.—Goree v. Uvalde Nat. Bank, Civ.App., 218 S.W. 620, dismissed for want of jurisdiction—Smith v. Roberts, Civ.App., 218 S.W. 27—Puckett v. Wilson Bros. Mercantile Co., Civ.App., 211 S.W. 642.
Va.—Ely v. Gray, 100 S.E. 660, 125 Va. 708.
Wash.—May v. Roberts, 219 P. 55, 126 Wash. 645.
22 C.J. p 748 notes 59, 60.

21. Minn.—Brown v. California & Western Land Co., 177 N.W. 774, 145 Minn. 432.
N.Y.—Steinberg v. Seidenbach, 196 N.Y.S. 498.
47 C.J. p 1237 note 58 [d].

22. U.S.—Thatenhorst v. U. S., C.C.A.Kan., 119 F.2d 567.
Del.—Spain v. Rossiter, 120 A. 746, 2 W.W.Harr. 168.
Md.—Winakur v. Sapourn, 145 A. 342, 156 Md. 662.
Mass.—Prudential Trust Co. v. Coghlin, 144 N.E. 283, 249 Mass. 184—Barbrick v. Huddell, 139 N.E. 629, 245 Mass. 428—Guaranty Sec. Corporation v. Eastern S. S. Co., 134 N.E. 364, 241 Mass. 120.
Mont.—Lundquist v. Jennison, 214 P. 67, 66 Mont. 516.
Pa.—Pennsylvania Co. for Insurances on Lives and Granting Annuities v. Philadelphia Electric Co., 200 A. 18, 331 Pa. 125.
S.C.—Carter v. American Fruit Growers, 125 S.E. 641, 130 S.C. 280.
Utah.—Jordan v. Madsen, 279 P. 499, 74 Utah 280.
22 C.J. p 748 note 63—41 C.J. p 8 note 63.

23. Mass.—Noyes v. Boston & M. R. Co., 99 N.E. 457, 213 Mass. 9.

24. Ala.—Utley v. Stevens, 130 So. 405, 408, 221 Ala. 666, citing **Corpus Juris**—Wright v. W. S. Wiles & Son, 125 So. 64, 23 Ala.App. 328.
Iowa.—Schram v. Johnson, 225 N.W. 369, 208 Iowa 222.
N.Y.—Anschelewitz v. Rosenbloom, 173 N.Y.S. 100.
Pa.—Baumeister v. Baugh & Sons Co., 16 A.2d 424, 142 Pa.Super. 346.
Utah.—Utah Ass'n of Creditmen v. Buller, 194 P. 127, 57 Utah 270.
22 C.J. p 748 note 62, p 749 note 65.

25. N.C.—Moore v. Jefferson Standard Life Ins. Co., 135 S.E. 456, 192 N.C. 580.
22 C.J. p 749 note 66.

26. Cal.—Fishback v. J. C. Forkner Fig Gardens, 30 P.2d 586, 137 Cal. App. 211.
S.C.—Holcombe v. W. N. Watson Supply Co., 171 S.E. 604, 606, 171 S.C. 110, quoting **Corpus Juris.**
22 C.J. p 749 note 67.

27. Minn.—State v. Fitchette, 92 N.W. 527, 88 Minn. 145.

28. Cal.—Shearer v. Pacific Gas & Electric Co., App., 110 P.2d 690.
22 C.J. p 750 notes 69, 72, 74.

29. N.C.—Outlaw v. Hurdle, 46 N.C. 150.
22 C.J. p 750 note 70.

30. Or.—McMillan v. Montgomery, 253 P. 879, 121 Or. 28.
22 C.J. p 750 note 71.

on a particular occasion, the evidence should be received.[31]

Habits of animals, being a matter of instinct rather than of reason, and hence more invariable in their operation, may be proved as tending to show that on a particular occasion an animal acted in accordance therewith,[32] and a course of conduct habitual to a certain species of animal has been received as tending to throw light on the conduct of a member of that species on a particular occasion.[33]

Proof of habit. In the case of a human being, habit cannot be shown by evidence of how the individual acted on particular occasions,[34] but a habit of animals may be proved by showing specific instances of its operation.[35]

C. SIMILAR OCCURRENCES

§ 583. In General

In the absence of a showing that the essential conditions were the same, an issue as to the existence or occurrence of a particular fact, condition, or event, cannot be proved by evidence as to the existence or occurrence of other facts, conditions, or events, although they be, in some respects, similar.

Evidence of similar facts, conditions, or occurrences is inadmissible where not pertinent to the issues in the case.[36] Thus, in the absence of a showing that the essential conditions were the same, an issue as to the existence or occurrence of a particular fact, condition, or event cannot be proved by evidence as to the existence or occurrence of other facts, conditions, or events, although they be, in some respects, similar.[37]

§ 584. Similarity in Essential Conditions

An issue as to the existence or occurrence of a particular fact, condition, or event, may be proved by evidence as to the existence or occurrence of similar facts, conditions, or events, under the same, or substantially similar, circumstances.

Since the observed uniformity of nature raises

31. Cal.—Townsend v. Briggs, 34 P. 116, 99 Cal. 481.
22 C.J. p 750 note 75.

32. Wyo.—Boatman v. Miles, 199 P. 933, 27 Wyo. 481.
22 C.J. p 750 note 76.

33. N.H.—Folsom v. Concord & M. R. Co., 38 A. 209, 68 N.H. 454.

34. Iowa.—Dalton v. Chicago, R. I. & P. R. Co., 86 N.W. 272, 114 Iowa 257.
Mass.—Commonwealth v. Ryan, 134 Mass. 223.

35. Mass.—Lynch v. Moore, 28 N.E. 277, 154 Mass. 335.
22 C.J. p 750 note 79.

36. U.S.—Beck v. Wings Field, D.C.Pa., 35 F.Supp. 953, modified on other grounds, C.C.A., 122 F.2d 114—Ellenbogen v. James Nelson, Limited, C.C.A.N.J., 285 F. 563.
Ala.—Louisville & N. R. Co. v. Finlay, 185 So. 904, 237 Ala. 116.
Cal.—McLaughlin v. Los Angeles Ry. Corporation, 182 P. 44, 180 Cal. 527.
D.C.—Small v. Pennsylvania R. Co., 80 F.2d 704, 65 App.D.C. 112, certiorari denied 56 S.Ct. 669, 297 U.S. 724, 80 L.Ed. 1008.
Ga.—Hines v. Moore, 148 S.E. 162, 168 Ga. 451.
Ill.—Forest Preserve Dist. of Cook County v. Barchard, 127 N.E. 878, 293 Ill. 556—Lathrop-Paulson Co. v. Perksen, 229 Ill.App. 400.
Iowa.—Slinger v. Farmers' Mut. Hail Ins. Ass'n of Iowa, 258 N.W. 101, 219 Iowa 329—Phillips v. Leuth, 204 N.W. 301, 200 Iowa 272.
Ky.—J. B. Colt Co. v. Asher, 39 S.W.2d 263, 239 Ky. 235—J. B. Colt Co. v. Baker, 9 S.W.2d 516, 225 Ky. 526—Moors v. Kentucky Electrical Co., 208 S.W. 15, 182 Ky. 825.
Minn.—In re Belt Line, Phalen, and Hazel Park Sewer Assessment, 222 N.W. 522, 176 Minn. 62.
Mo.—E. C. Robinson Lumber Co. v. Lansdell, 253 S.W. 24, 215 Mo.App. 357.
N.Y.—Gouge v. Roberts, 53 N.Y. 619—Cantor v. National Surety Co., 204 N.Y.S. 35, 208 App.Div. 370—Doyle v. Levy, 35 N.Y.S. 434, 89 Hun 350.
Okl.—Stevens v. Ponder, 41 P.2d 59, 170 Okl. 537.
Tex.—Longenecker v. Ward County Water Improvement Dist. No. 3, Civ.App., 8 S.W.2d 306—Prairie Pipe Line Co. v. Dalton, Civ.App., 243 S.W. 619.
Utah.—Battle Creek Bread Wrapping Mach. Co. v. Paramount Baking Co., 39 P.2d 323, 83 Utah 67.
Vt.—Thayer v. Glynn, 106 A. 834, 93 Vt. 257.

37. Ga.—Hathcox v. Atlanta Coca-Cola Bottling Co., 178 S.E. 404, 405, 50 Ga.App. 410, quoting **Corpus Juris.**
Ill.—Sanitary Dist. of Rockford v. Johnson, 174 N.E. 862, 343 Ill. 11.
Iowa.—Standard Oil Co. (Indiana) v. Stubbs-Auckland Oil Co., 265 N.W. 121, 221 Iowa 489—Crouch v. National Live Stock Remedy Co., 217 N.W. 557, 205 Iowa 51.
Ky.—Phelps v. Home Owned Stores, 46 S.W.2d 1090, 242 Ky. 531.
Md.—S. J. Van Lill Co. v. Frederick City Packing Co., 141 A. 898, 902, 155 Md. 303, citing **Corpus Juris**—Metal Package Corporation of New York v. Osborn, 125 A. 752, 145 Md. 371—Great Eastern Casualty Co. v. Schwartz, 122 A. 647, 143 Md. 452—W. H. Edgar & Son v. Imperial Ice Cream Co., 116 A. 461, 139 Md. 630.
Mass.—Guidara & Terenzio v. R. Guastavino Co., 190 N.E. 716, 286 Mass. 502.
Mo.—Lake Superior Loader Co. v. Huttig Lead & Zinc Co., 264 S.W. 396, 305 Mo. 130.
N.J.—Spence v. Hutchinson, 130 A. 612, 102 N.J.Law 131.
N.C.—Doyle v. Whitley, 200 S.E. 888, 214 N.C. 814—Enloe v. Charlotte Coca-Cola Bottling Co, 180 S.E. 582, 584, 208 N.C. 305, citing **Corpus Juris**—McCord v. Harrison-Wright Co., 153 S.E. 406, 198 N.C. 742.
N.D.—Cretors v. Troyer, 247 N.W. 558, 63 N.D. 231.
Pa.—Nusbaum v. Hartford Fire Ins. Co., 132 A. 177, 285 Pa. 332.
S.D.—McMonies v. Geiman, 219 N.W. 262, 52 S.D. 548—Housman v. Geiman, 213 N.W. 19, 51 S.D. 214.
Tex.—Houston Electric Co. v. McLeroy, Civ.App., 153 S.W.2d 617, error granted—Tyrrell-Combest Realty Co. v. Adams, Civ.App., 291 S.W. 252—Swann v. Mills, Civ.App., 219 S.W. 850, dismissed for want of jurisdiction.
Va.—Monroe & Monroe v. Cowne, 112 S.E. 848, 133 Va. 181.
Wash.—Los Angeles Olive Growers' Ass'n v. Pacific Grocery Co., 205 P. 375, 119 Wash. 293.
22 C.J. p 750 note 80.

an inference that like causes will produce like results, even though there may be some dissimilarity of conditions in respect to a matter which cannot reasonably be expected to have affected the result,[38] an issue as to the existence or occurrence of a particular fact, condition, or event, may be proved by evidence as to the existence or occurrence of similar facts, conditions, or events, under the same, or substantially similar, circumstances.[39] The burden rests on the party offering the evidence to satisfy the court that the necessary similarity of conditions exist,[40] and the action of the court in admitting such evidence involves no finding with respect thereto except that sufficient similarity has been shown to warrant its reception.[41]

§ 585. Continuing Facts

The existence of a fact at a particular time may, under some circumstances, be shown by evidence of its existence at another time.

Since there is a presumption, as shown supra § 124, of the continued existence of a fact or condition of a continuous nature, it follows that such a fact may, within the limits of relevancy, be shown to have existed at a particular time by proof of its existence at a prior time,[42] and its existence at a subsequent time may be shown where the interval is short as compared with the natural permanent nature of the fact or condition in question.[43] Likewise, the existence, at a particular time, of a fact or condition of a temporary nature may be proved by evidence of their existence at another time, provided it is shown that they did not change during the interval;[44] but, in the absence of such a showing, the evidence is inadmissible.[45]

38. Kan.—Wiggins v. Missouri-Kansas-Texas R. Co., 276 P. 63, 64, 128 Kan. 32,. quoting **Corpus Juris.**
N.C.—Perry v. Pelford Coca-Cola Bottling Co., 146 S.E. 805, 196 N.C. 690.
Tex.—City of Marlin v. Criswell, Civ.App., 293 S.W. 910, 912, quoting **Corpus Juris.**
22 C.J. p 752 note 83.

39. U.S.—Hadley v. Baltimore & O. R. Co., C.C.A.Pa., 120 F.2d 993—Carter Oil Co. v. McQuigg, D.C. Ill., 27 F.Supp. 182, affirmed, C. C.A., 112 F.2d 275.
Ala.—Winter-Loeb Grocery Co. v. Boykin, 82 So. 437, 203 Ala. 187.
Ga.—McCrea v. Georgia Power Co., 167 S.E. 540, 542, 46 Ga.App. 276, citing **Corpus Juris**—E. T. Comer Co. v. Joyner, 124 S.E. 356, 32 Ga. App. 661.
Iowa.—Peterson v. McManus, 172 N. W. 460, 187 Iowa 522.
Md.—Schenuit v. International Finance Corporation, 130 A. 331, 148 Md. 403.
Mass.—Edward Rose Co. v. Globe & Rutgers Fire Ins. Co., 160 N.E. 306, 262 Mass. 469.
Mich.—McNamara v. E. W. Ross Co., 196 N.W. 336, 225 Mich. 335.
Minn.—Moehlenbrock v. Parke, Davis & Co., 176 N.W. 169, 145 Minn. 100.
Miss.—Mississippi Power Co. v. Ballard, 153 So. 874, 876, 170 Miss. 479, citing **Corpus Juris.**
Mo.—Brendel v. Union Electric Light & Power Co., 252 S.W. 635—Cunningham v. City of Springfield, 31 S.W.2d 123, 226 Mo.App. 23, certiorari quashed State ex rel. City of Springfield v. Cox, 36 S. W.2d 112, 327 Mo. 152.
N.C.—Enloe v. Charlotte Coca-Cola Bottling Co., 180 S.E. 582, 584, 208 N.C. 305, citing **Corpus Juris**—McCord v. Harrison-Wright Co., 153 S.E. 406, 198 N.C. 742—Perry v. Kelford Coca-Cola Bottling Co., 146 S.E. 805, 196 N.C. 690, quoting **Corpus Juris**—Swift & Co. v. Aydlett, 135 S.E. 141, 192 N.C. 330—Godfrey v. Western Carolina Power Co., 128 S.E. 485, 190 N.C. 24—Standard Paint & Lead Works v. Spruill, 118 S.E. 891, 186 N.C. 68—Nance v. Western Union Telegraph Co., 98 S.E. 838.
N.D.—Rohlik v. Farmers' Ins. Co., 191 N.W. 347, 49 N.D. 235.
R.I.—Union Paint & Varnish Co. v. Dean, 137 A. 469, 48 R.I. 288.
Tex.—Gulf, C. & S. F. Ry. Co. v. Downs, Civ.App., 70 S.W.2d 318, error refused—Jones' Unknown Heirs v. Dorchester, Civ.App., 224 S.W. 596, dismissed for want of jurisdiction.
Va.—Monroe & Monroe v. Cowne, 112 S.E. 848, 133 Va. 181.
Wash.—Johnson v. Ben Olson Co., 278 P. 699, 152 Wash. 646, 66 A.L. R. 77—Wilson v. Miller Flour Mills, 256 P. 777, 144 Wash. 60—Sporsem v. First Nat. Bank, 233 P. 641, 133 Wash. 199, 40 A.L.R. 854—Los Angeles Olive Growers' Ass'n v. Pacific Grocery Co., 205 P. 375, 119 Wash. 293.
22 C.J. p 751 note 81, p 752 note 82, p 753 note 84.

40. Ga.—Hathcox v. Atlanta Coca-Cola Bottling Co., 178 S.E. 404, 405, 50 Ga.App. 410, quoting **Corpus Juris**—Standard Paint & Lead Works v. Powell, 109 S.E. 513, 27 Ga.App. 691.
Mo.—Cunningham v. City of Springfield, 31 S.W.2d 123, certiorari quashed State ex rel. City of Springfield v. Cox, 36 S.W.2d 112, 327 Mo. 152.
Utah.—Zimmerman v. Auerbach, 17 P.2d 251, 253, 81 Utah 554, citing **Corpus Juris.**
22 C.J. p 753 note 85.

41. N.C.—Conrad v. Shuford, 94 S. E. 424, 174 N.C. 719.
22 C.J. p 753 note 87.

42. Ky.—Thompson v. Thompson, 273 S.W. 522, 209 Ky. 677.
Mont.—Murphy v. La Chapelle, 24 P.2d 131, 95 Mont. 36.
N.C.—Mangum v. Brown, 156 S.E. 535, 200 N.C. 296.
22 C.J. p 754 note 92.

43. Ala.—Alabama Power Co. v. Owens, 181 So. 283, 236 Ala. 96.
Conn.—Johnson v. Charles William Palomba Co., 157 A. 902, 114 Conn. 108, 80 A.L.R. 441.
Ky.—Appalachian Stave Co. v. Pickard, 86 S.W.2d 685, 260 Ky. 720.
Minn.—Short v. Great Northern Life Ins. Co., 228 N.W. 440, 179 Minn. 19.
Mo.—Long v. Mild, 149 S.W.2d 853.
N.C.—Mangum v. Brown, 156 S.E. 535, 200 N.C. 296.
S.C.—Tate v. Mauldin, 154 S.E. 431, 157 S.C. 392.
Utah.—Gibson v. Equitable Life Assur. Soc. of U. S., 36 P.2d 105, 84 Utah 452.
Wash.—Roscoe v. City of Everett, 239 P. 831, 136 Wash. 295.
22 C.J. p 755 note 93.

44. U.S.—Klas v. Yellow Cab Co., C. C.A.Ill., 106 F.2d 935—Murdie v. Maryland Casualty Co., D.C.Nev., 52 F.2d 888, appeal dismissed, C. C.A., Maryland Casualty Co. v. Murdie, 57 F.2d 1081.
Mo.—State on Inf. of McKittrick v. Graves, 144 S.W.2d 91.
N.Y.—In re New York Title & Mortgage Co. (Series B-K), 21 N.Y.S.2d 575.
Vt.—Wellman v. Mead, 107 A. 396, 93 Vt. 322.

45. Ala.—Alabama Power Co. v.

§ 586. Experiments

The powers and duties of the court to permit demonstrations, experiments, and tests during the course of the trial are considered in the C.J.S. title Trial § 46, also 64 C.J. p 85 note 99–p 87 note 22.

§ 587. —— Admissibility of Evidence

The conditions of an occurrence may be artifically created in an experiment, the results of which are admissible in evidence when relevant to prove an issue in the case.

The conditions of an occurrence may be artificially created in an experiment, the results of which are admissible in evidence when relevant to prove an issue in the case;[46] but such evidence is inadmissible where it has no legitimate bearing on the issues,[47] or where it is inconclusive,[48] or raises a number of collateral issues,[49] or where it seems to the court not to promise results justifying the use of the time required to hear it.[50] In accordance with the fundamental principle that the object of all evidence is the ascertainment of the truth with reference to the existence or nonexistence of the facts in controversy, the criterion for the admissibility of evidence of experiments is whether such evidence tends to enlighten the jury and enable them more intelligently to consider the issues presented.[51] Where one party introduces evidence of an experiment in support of his theory or hypothesis, the opposite party may give in proof evidence of a similar experiment with a different result from that claimed by his opponent.[52]

The testimony of witnesses as to experiments may be competent, although the experiments were made with a view to the introduction of such evidence on the trial of the cause,[53] but this circum-

Owens, 181 So. 283, 236 Ala. 96—Bradley v. Deaton, 94 So. 767, 208 Ala. 582.
Conn.—Johnson v. Charles William Palomba Co., 157 A. 902, 114 Conn. 108, 80 A.L.R. 441.
Ky.—Appalachian Stave Co. v. Pickard, 86 S.W.2d 685, 260 Ky. 720.
Mich.—Hulett v. Great Atlantic & Pacific Tea Co., 299 N.W. 807, 299 Mich. 59.
N.Y.—Brown v. Lo Grasso, 196 N.Y.S. 349, 203 App.Div. 50.
N.C.—Nance v. King, 101 S.E. 212, 178 N.C. 574.
22 C.J. p 755 note 94.

46. U.S.—Gaillard v. Boynton, C.C.A.N.H., 70 F.2d 552.
Ala.—Atlantic Coast Line R. Co. v. Jackson, 144 So. 813, 225 Ala. 652.
Cal.—Martin v. Angel City Baseball Ass'n, 40 P.2d 287, 3 Cal.App 2d 586—Ley v. Bishopp, 263 P. 369, 88 Cal.App. 313.
D.C.—Capital Traction Co. v. Lyon, 24 F.2d 262, 57 App.D.C. 396.
Ind.—Chicago, St. L. & P. R. Co. v. Champion, 36 N.E. 221, 9 Ind.App. 510, 53 Am.S.R. 357, rehearing denied 37 N.E. 21, 9 Ind.App. 510, 53 Am.S.R. 357.
Kan.—Torgeson v. Missouri-Kansas-Texas R. Co., 262 P. 564, 124 Kan. 798, 55 A.L.R. 1335.
Me.—Eastport Water Co. v. E. A. Holmes Packing Co., 117 A. 311, 121 Me. 345.
Mass.—McCarthy v. Curry, 134 N.E. 339, 240 Mass. 442—Lincoln v. Taunton Copper Mfg. Co., 9 Allen 181.
Mich.—Clark v. Lawrence Baking Co., 215 N.W. 337, 240 Mich. 352.
Neb.—Falkinburg v. Prudential Ins. Co. of America, 273 N.W. 478, 132 Neb. 831.
N.C.—Simpson v. American Oil Co., 14 S.E.2d 638, 219 N.C. 595.
S.C.—Adams v. Wilkes, 109 S.E. 804, 118 S.C. 93.
Tex.—Dallas Ry. & Terminal Co. v. Darden, Com.App., 38 S.W.2d 777, affirming, Civ.App., 23 S.W.2d 739—Baker v. Loftin, Civ.App., 198 S.W. 159, reversed on other grounds, Com.App., 222 S.W. 195.
Vt.—Thayer v. Glynn, 106 A. 834, 93 Vt. 257.
Wis.—Warrichaiet v. Standard Oil Co., 252 N.W. 187, 213 Wis. 619.
22 C.J. p 755 notes 96, 98—42 C.J. p 1229 note 85.

Facts already established

Where evidence of experiments is offered to prove a fact or theory already established by the testimony, it seems that neither its rejection nor its admission is an error of which either party can complain.—Stockwell v. Chicago, C. & D. R. Co., 43 Iowa 470—22 C.J. p 756 note 14.

Corpus Juris cited or quoted in application of text rule to evidence in criminal case.—State v. Holland, 6 S.E.2d 217, 219, 216 N.C. 610—State v. McLamb, 166 S.E. 507, 510, 203 N.C. 442.

47. U.S.—Richardson Co. v. Hood Rubber Co., C.C.A.Mass., 22 F.2d 501, affirming, D.C., 16 F.2d 785.
Ill.—Libby, McNeill & Libby v. Scherman, 34 N.E. 801, 146 Ill. 540, 37 Am.S.R. 191.
Ind.—Northern Indiana Public Service Co. v. W. J. & M. S. Vesey, 200 N.E. 620, 210 Ind. 338.
22 C.J. p 756 note 15.

In absence of injury to the complaining party a judgment will not be reversed because such evidence was admitted.—Pennsylvania Coal Co. v. Kelly, 156 Ill. 9.

48. Ky.—Louisville Gas & Electric Co. v. Duncan, 31 S.W.2d 915, 235 Ky. 613.
Va.—Neice v. Norfolk & W. Ry. Co., 154 S.E. 563, 155 Va. 211.
22 C.J. p 756 note 9, p 757 note 23.

49. Ill.—Libby, McNeill & Libby v. Scherman, 34 N.E. 801, 146 Ill. 540, 37 Am.S.R. 191.
Okl.—Ruth Fuel Co. v. Nichter, 51 P.2d 502, 505, 174 Okl. 601, citing **Corpus Juris.**
22 C.J. p 756 note 10.

50. Ala.—Atlantic Coast Line R. Co. v. Jackson, 144 So. 813, 815, 225 Ala. 652, quoting **Corpus Juris.**
22 C.J. p 756 note 11.

51. Ala.—Atlantic Coast Line R. Co. v. Jackson, supra, quoting **Corpus Juris**—Great Atlantic & Pacific Tea Co. v. Donaldson, 156 So. 859, 26 Ala.App. 179, certiorari denied 156 So. 865, 229 Ala. 276.
Ind.—Swanson v. Slagal, 8 N.E.2d 993, 212 Ind. 394.
Mich.—Smith v. Grange Mut. Fire Ins. Co. of Michigan, 208 N.W. 145, 147, 234 Mich. 119, quoting **Corpus Juris.**
Or.—Erickson's Dairy Products Co. v. Northwest Baker Ice Machine Co., 109 P.2d 53.
22 C.J. p 755 note 8.

52. Ill.—R. A. Watson Orchards, Inc., v. New York, C. & St. L. R. Co., 263 Ill.App. 397.
Tex.—Houston E. & W. T. Ry. Co v. Sherman, Com.App., 42 S.W.2d 241, reversing, Civ.App., 10 S.W.2d 243.
22 C.J. p 758 note 29.

53. Iowa.—Burg v. Chicago, R. I. & P. R. Co., 57 N.W. 680, 90 Iowa 106, 117, 48 Am.S.R. 419.
22 C.J. p 757 note 20.

Corpus Juris cited in application of text rule to evidence in criminal case.
Idaho.—State v. Copenbarger, 16 P.2d 383, 390, 52 Idaho 441.

stance may be considered as affecting the weight of such evidence.[54] Indeed evidence of experiments made under such circumstances has been denounced as "manufactured evidence."[55]

The fact that experiments, evidence of which is sought to be introduced, were made ex parte, and without notice to the adverse litigant, does not render the evidence incompetent;[56] and evidence of experiments should not be excluded because they were such as were wholly within the power of one party to make, and wholly without the power of the other party.[57]

Discretion of court. Whether or not evidence of experiments is admissible is, under the circumstances of each case, a preliminary question for the determination of the court in the exercise of its discretion, which will not be interfered with by an appellate tribunal unless an abuse is made clearly to appear.[58]

§ 588. —— Object or Purpose of Experiment in General

Evidence of experiments has been held admissible, among other purposes, to show the degree of visual or aural perception prevailing under certain conditions, and to show the distance within which a vehicle could have been stopped while being operated at a certain speed.

Evidence of experiments has been held admissible, among other purposes, to show the degree of visual[59] or aural[60] perception that existed at a certain place or under certain conditions, or to show the distance within which a vehicle could have been stopped while being operated at a certain speed,[61] or the qualities of particular goods or materials,[62]

Ky.—Maxey v. Commonwealth, 74 S.W.2d 336, 339, 255 Ky. 330.

54. Tenn.—Byers v. Nashville, C. & St. L. R. Co., 29 S.W. 128, 94 Tenn 345.
22 C.J. p 757 note 21.
Weight of evidence generally see infra § 592.

55. Mich.—Ulrich v. People, 39 Mich. 245.
22 C.J. p 757 note 22.

56. Okl.—Sinclair Oil & Gas Co. v. Albright, 18 P.2d 540, 544, 161 Okl. 272, citing **Corpus Juris.**
22 C.J. p 756 note 17.

57. Tenn.—Byers v. Nashville, C. & St. L. R. Co., 29 S.W. 128, 94 Tenn. 345.
22 C.J. p 756 note 19 [a].

58. U.S.—Travelers' Ins. Co. v. Wilkes, C.C.A.Fla., 76 F.2d 701, certiorari denied Hirsig v. Travelers Ins. Co., 56 S.Ct. 120, 296 U.S. 604, 80 L.Ed. 428.
Ala.—Mobile Light & Railroad Co. v. Nicholas, 167 So. 298, 232 Ala. 213—Atlantic Coast Line R. Co. v. Jackson, 144 So. 813, 815, 225 Ala. 652, citing **Corpus Juris.**
Cal.—Ortega v. Pacific Greyhound Lines, 67 P.2d 702, 20 Cal.App.2d 596—Flury v. Beeskau, 33 P.2d 1033, 139 Cal.App. 398—Vedder v. Bireley, 267 P. 724, 92 Cal.App. 52—Ley v. Bishopp, 263 P. 369, 88 Cal.App. 313—Western Soil Bacteria Co. v. O'Brien Bros., 194 P. 72, 49 Cal.App. 707.
Iowa.—Langham v. Chicago, R. I. & P. Ry. Co., 198 N.W. 525, 197 Iowa 1118.
Mass.—Guinan v. Famous Players-Lasky Corporation, 167 N.E. 235, 267 Mass. 501—Raymond Syndicate v. American Radio & Research Corporation, 160 N.E. 821, 263 Mass. 147—McCarthy v. Curry, 134 N.E. 339, 240 Mass. 442.
Minn.—Ruud v. Minneapolis St. Ry. Co., 279 N.W. 224, 202 Minn. 480—Lewis v. Chicago Great Western R. Co., 193 N.W. 695, 155 Minn 381.
Mo.—Lynch v. Missouri-Kansas-Texas R. Co., 61 S.W.2d 918, 333 Mo. 89—Kerby v. Schindell, App., 146 S.W.2d 670.
Ohio.—St. Paul Fire & Marine Ins Co. v. Baltimore & O. R. Co., 195 N.E. 861, 864, 129 Ohio St. 401, citing **Corpus Juris.**
Okl.—Sinclair Oil & Gas Co. v. Albright, 18 P.2d 540, 544, 161 Okl. 272, citing **Corpus Juris.**
Or.—Erickson's Dairy Products Co. v. Northwest Baker Ice Machine Co., 109 P.2d 53—Adskim v. Oregon-Washington R. & Nav. Co., 294 P. 605, 134 Or. 574—Ragan v. MacGill, 292 P. 1094, 134 Or. 408, 72 A.L.R. 860.
Vt.—Davis v. Raymond, 152 A. 806, 103 Vt. 195.
Wash.—American Products Co. v. Villwock, 109 P.2d 570, 132 A.L.R. 1010—Washington v. City of Seattle, 16 P.2d 597, 170 Wash. 371, 86 A.L.R. 113.
22 C.J. p 756 notes 12, 13.
Corpus Juris cited and quoted in application of text rule to evidence in criminal case.
N.C.—State v. McLamb, 166 S.E. 507, 510, 203 N.C. 442.
Vt.—State v. Simonds, 182 A. 185, 186.

59. Ala.—Mobile Light & Railroad Co. v. Nicholas, 167 So. 298, 232 Ala. 213.
Cal.—Ortega v. Pacific Greyhound Lines, 67 P.2d 702, 20 Cal.App.2d 596.
N.Y.—Havecker v. Weiss, 261 N.Y.S. 494, 237 App.Div. 856, resettled 262 N.Y.S. 907, 238 App.Div. 787.
Ohio.—Weaver v. Liberty Cabs, App., 33 N.E.2d 853.
Or.—Meaney v. Portland Electric Power Co., 282 P. 113, 131 Or. 140.
Tenn.—L. & N. R. Co. v. Johnson, 7 Tenn.Civ.A. 458.
Vt.—Davis v. Raymond, 152 A. 806, 103 Vt. 195.
Wash.—American Products Co. v. Villwock, 109 P.2d 570, 132 A.L.R. 1010.
22 C.J. p 755 notes 99, 1, p 757 notes 26, 27 [a].
Knowledge of experimenter that he is going to see the particular object may make him more alert than one whose duty requires him to be constantly on the lookout for any object, but this difference of condition will not exclude the experiment.
Mo.—Griggs v. Kansas City Rys. Co., 228 S.W. 508.
Va.—Norfolk & W. Ry. Co. v. Henderson, 111 S.E. 277, 132 Va. 297.

60. Md.—Gambrill v. Schooley, 52 A. 500, 95 Md. 260, 63 L.R.A. 427.
22 C.J. p 755 notes 2, 3, p 757 note 27 [b].

61. Ariz.—Broderick v. Coppinger, 14 P.2d 714, 40 Ariz. 524.
Cal.—Flury v. Beeskau, 33 P.2d 1033, 139 Cal.App. 398.
Ind.—Clevenger v. Kern, 197 N.E. 731, 100 Ind.App. 581.
Mich.—Siegel v. Detroit Cab Co., 225 N.W. 601, 246 Mich. 620.
Or.—Ragan v. MacGill, 292 P. 1094, 134 Or. 408, 72 A.L.R. 860.
Va.—R. F. Trant, Inc. v. Upton, 165 S.E. 404, 159 Va. 355.
Wash.—Truva v. Goodyear Tire & Rubber Co., 214 P. 818, 124 Wash. 445.
42 C.J. p 1229 note 85.

62. Ga.—Taber Mill v. Southern Brighton Mills, 175 S.E. 665, 49 Ga.App. 390.
Mass.—Guinan v. Famous Players-Lasky Corporation, 167 N.E. 235, 267 Mass. 501.
Neb.—State v. Commercial Casualty Ins. Co., 248 N.W. 807, 125 Neb. 43, 88 A.L.R. 790.

or the cause or manner in which a fire[63] or a death[64] occurred.

§ 589. —— In Support or Explanation of Opinion Evidence

An expert witness may testify as to experiments which form the basis of his opinion.

It is very generally held that a skilled observer or an expert witness who has given his opinion in evidence may also be permitted to testify as to the grounds of the opinion expressed, which frequently includes evidence of experiments made during the course of his investigation of the subject to which his testimony relates.[65] It has, however, been intimated that where the opinion of a witness is not admissible because of lack of sufficient qualification, evidence of experiments offered in support of it will not be received.[66]

§ 590. —— Similarity of Conditions

Evidence of an experiment is inadmissible unless the circumstances under which it was made were substantially similar to the circumstances prevailing at the time of the occurrence involved in the controversy.

Where a party alleges that a certain result did or did not follow from certain conditions, it is permissible for him, in support of the assertion, to introduce evidence of experiments made under substantially similar conditions;[67] but in order that an experiment shall possess sufficient probative value to warrant the admission of evidence thereof, it is necessary that the circumstances under which the experiment is made shall have been similar to the circumstances prevailing at the time of the occurrence involved in the controversy,[68] especially if the conditions were more favorable to the party offering the evidence.[69] It is not necessary, however, that the conditions should be exactly identical,[70] and the lack of exact identity affects only

63. Ohio.—St. Paul Fire & Marine Ins. Co. v. Baltimore & O. R. Co., 195 N.E. 861, 129 Ohio St. 401.

64. Fla.—Mutual Life Ins. Co. of New York v. Bell, 3 So.2d 487.

65. U.S.—Air Reduction Co. v. Philadelphia Storage Battery Co., C.C. A.Pa., 14 F.2d 734.
Cal.—Rancho Santa Margarita v. Vail, 81 P.2d 533, 11 Cal.2d 501.
Ill.—Chicago Cosmetic Co. v. City of Chicago, 29 N.E.2d 495, 374 Ill. 384.
Mo.—Linstroth v. Peper, 218 S.W. 431, 203 Mo.App. 278.
Tex.—Norris Bros. v. Mattinson, Civ. App., 145 S.W.2d 204.
22 C.J. p 758 note 30.

66. Ala.—Tesney v. State, 77 Ala. 33.
22 C.J. p 758 note 31.

67. Ark.—Bona v. S. R. Thomas Auto Co., 208 S.W. 306, 137 Ark. 217.
Conn.—McPheters v. Loomis, 7 A.2d 437, 125 Conn. 526.
Ill.—Thomas v. Buchanan, 277 Ill. App. 393—R. A. Watson Orchards v. New York, C. & St. L. R. Co., 263 Ill.App. 397.
Me.—Heal v. International Agr. Corporation, Buffalo Fertilizer Works, 126 A. 644, 124 Me. 138.
N.H.—Chatman v. Maine Cent. R. R., 167 A. 559, 86 N.H. 317.
Tenn.—Mauldin v. Otto Schwill & Co., 1 Tenn.App. 347.
Tex.—Houston E. & W. T. Ry. Co. v. Sherman, Com.App., 42 S.W.2d 241, reversing, Civ.App., 10 S.W.2d 243.
22 C.J. p 755 notes 5, 6, p 757 notes 24, 25, 27.

68. U.S.—New York Life Ins. Co. v. Alman, C.C.A.Ala., 22 F.2d 98, certiorari denied Alman v. New York Life Ins. Co., 48 S.Ct. 433, 277 U.S. 586, 72 L.Ed. 1000.
Ala.—Birmingham Stove & Range Co. v. Vanderford, 116 So. 334, 217 Ala. 342—Great Atlantic & Pacific Tea Co. v. Donaldson, 156 So. 859, 26 Ala.App. 179, certiorari denied 156 So. 865, 229 Ala. 276.
Ariz.—Broderick v. Coppinger, 14 P. 2d 714, 715, 40 Ariz. 524, citing **Corpus Juris.**
Cal.—Collins v. Graves, 61 P.2d 1198, 17 Cal.App.2d 288—Martin v. Angel City Baseball Ass'n, 40 P.2d 287, 3 Cal.App.2d 586—Western Soil Bacteria Co. v. O'Brien Bros., 194 P. 72, 49 Cal.App. 707.
Colo.—Potts v. Bird, 27 P.2d 745, 93 Colo. 547.
Ga.—City of Manchester v. Beavers, 144 S.E. 11, 38 Ga.App. 337.
Ill.—Thomas v. Buchanan, 277 Ill. App. 393—R. A. Watson Orchards v. New York, C. & St. L. R. Co., 250 Ill.App. 22—Johnson v. Gustafson, 233 Ill.App. 216.
Ind.—Chicago, St. L. & P. R. Co. v. Champion, 36 N.E. 221, 9 Ind.App. 570, rehearing denied 37 N.E. 21, 9 Ind.App. 510, 53 Am.S.R. 357.
Iowa.—Langham v. Chicago, R. I. & P. Ry. Co., 198 N.W. 525, 197 Iowa 1118.
Mo.—Lynch v. Missouri-Kansas-Texas R. Co., 61 S.W.2d 918, 333 Mo. 89—James v. Bailey Reynolds Chandelier Co., 30 S.W.2d 118, 325 Mo. 1054—Ballman v. H. A. Lueking Teaming Co., 219 S.W. 603, 281 Mo. 342—Cook v. St. Joseph Ry., Light, Heat & Power Co., 106 S.W. 2d 38, 232 Mo.App. 313—Klenk v. Klenk, App., 282 S.W. 153—Bretall v. Missouri Pac. R. Co., App., 239 S.W. 597.
N.Y.—Kratche v. New York Cent. R. Co., 240 N.Y.S. 443, 228 App.Div. 820.
Ohio.—Weaver v. Liberty Cabs, App., 33 N.E.2d 853—Bickley v. Sears, Roebuck & Co., 23 N.E.2d 505, 62 Ohio App. 180—Mutual Life Ins. Co. of Baltimore, Md., v. Kelly, 197 N.E. 235, 49 Ohio App. 319.
Or.—Erickson's Dairy Products Co. v. Northwest Baker Ice Machine Co., 109 P.2d 53—Adskim v. Oregon-Washington R. & Nav. Co., 294 P. 605, 134 Or. 574—Ragan v. MacGill, 292 P. 1094, 134 Or. 408, 72 A.L.R. 860—Hall v. Brown, 202 P. 719, 102 Or. 389—Horn v. Elgin Warehouse Co., 190 P. 151, 96 Or. 403.
Pa.—Snowiss v. Firemen's Ins. Co. of Newark, N. J., 185 A. 260, 322 Pa. 161.
S.C.—Housand v. Armour & Co., 175 S.E. 516, 173 S.C. 268.
Tenn.—Holland & Kerr v. Craven, 5 Tenn.App. 39.
Tex.—Long v. Galveston Electric Co., Civ.App., 59 S.W.2d 228, error dismissed.
22 C.J. p 758 note 32, p 759 note 33.

Similar result under different conditions

It has been held competent for defendant to introduce evidence of experiments going to show a similar result under different conditions, or under conditions existing at the time of the inquiry complained of and for which he is not responsible.—Lincoln v. Taunton Copper Mfg. Co., 9 Allen, Mass., 181.

69. Wash.—Halverson v. Seattle Electric Co., 77 P. 1058, 35 Wash. 600.

70. Cal.—Ortega v. Pacific Greyhound Lines, 67 P.2d 702, 20 Cal. App.2d 596.

the weight and not the competency of the evidence,[71] provided always that there is such a degree of similarity that evidence of the experiments made will accomplish the desideratum of assisting the jury to an intelligent consideration of the issues of fact presented.[72] The burden is on the party offering the evidence to show similarity in essential conditions,[73] and preliminary proof of identity of conditions should, of course, be received.[74] It is for the court to determine whether the conditions are sufficiently similar to warrant admission of the evidence.[75]

§ 591. —— Mode of Proof

Evidence must be adduced to show that the conditions were the same and the result of the test or experiment may be proved by a competent witness although he did not take part therein.

The best method of proof is to show by competent witnesses that the object which has been tested has at all times been in the possession of the witnesses so that it would be impossible for the conditions to be changed;[76] but this extent of proof is not absolutely necessary.[77] A bystander who saw an experiment made, although he did not assist in making it, may testify as to its result, if he had knowledge of all conditions, and the experiment was one involving no special technical knowledge, or was such that its result could be seen and understood by a person of ordinary judgment.[78]

§ 592. —— Weight of Evidence

All the circumstances under which experiments were made may be considered in determining the weight to be attached to them.

The jury is at liberty to give what weight it sees fit to evidence of experiments.[79] All the circumstances under which experiments were made may be considered in determining the weight to be attached to them,[80] including the similarity existing between them and the actual occurrence, the facts of which are under investigation.[81]

Conn.—Wray v. Fairfield Amusement Co., 10 A.2d 600, 126 Conn. 221.
Kan.—Leinbach v. Pickwick Greyhound Lines, 10 P.2d 33, 38, 135 Kan. 40, citing **Corpus Juris.**
La.—Tassin v. New Orleans Public Service, 139 So. 695, 19 La.App. 456.
Mich.—Smith v. Grange Mut. Fire Ins. Co. of Michigan, 208 N.W. 145, 148, 234 Mich. 119, quoting **Corpus Juris.**
Mo.—James v. Bailey Reynolds Chandelier Co., 30 S.W.2d 118, 325 Mo. 1054.
Ohio.—Breymann v. Pennsylvania, O. & D. R. Co., 183 N.E. 771, 43 Ohio App. 473.
Okl.—Enghlin v. Pittsburg County Ry. Co., 36 P.2d 32, 37, 169 Okl. 106, 94 A.L.R. 1180, quoting **Corpus Juris.**
Or.—Erickson's Dairy Products Co. v. Northwest Baker Ice Machine Co., 109 P.2d 53—Kohlhagen v. Cardwell, 184 P. 261, 93 Or. 610, 8 A.L.R. 11.
Vt.—Davis v. Raymond, 152 A. 806, 103 Vt. 195.
Va.—Norfolk & W. Ry. Co. v. Henderson, 111 S.E. 277, 132 Va. 297.
22 C.J. p 759 note 35.

Corpus Juris cited in application of text rule to evidence in criminal case.—Shepherd v. State, 300 P. 421, 424, 51 Okl.Cr. 209.

71. Ariz.—Broderick v. Coppinger, 14 P.2d 714, 40 Ariz. 524.
Idaho.—Kelly v. Troy Laundry Co., 267 P. 222, 46 Idaho 214.
Mo.—Cook v. St. Joseph Ry., Light, Heat & Power Co., 106 S.W.2d 38, 232 Mo.App. 313.
Ohio.—St. Paul Fire & Marine Ins Co. v. Baltimore & O. R. Co., 195 N.E. 861, 864, 129 Ohio St. 401, citing **Corpus Juris.**
Tex.—Baker v. Walston, Civ.App., 141 S.W.2d 409, error dismissed, judgment correct—Panhandle & S. F. Ry. Co. v. Haywood, Civ.App., 227 S.W. 347, 351, citing **Corpus Juris,** error refused.
22 C.J. p 759 note 36.

72. Kan.—Pool v. Day, 53 P.2d 912, 915, 143 Kan. 226, quoting **Corpus Juris.**
22 C.J. p 759 note 37.

73. Cal.—Collins v. Graves, 61 P.2d 1198, 17 Cal.App.2d 288.
Neb.—Hershiser v. Chicago, B. & Q R. Co., 170 N.W. 177, 102 Neb. 820.
Okl.—Skelly Oil Co. v. Jordan, 96 P. 2d 524, 525, 186 Okl. 130, citing **Corpus Juris**—Enghlin v. Pittsburg County Ry. Co., 36 P.2d 32, 169 Okl. 106, 94 A.L.R. 1180.
22 C.J. p 759 note 38—42 C.J. p 1229 note 86.

Corpus Juris cited in application of text rule to evidence in criminal case.—Abdell v. Commonwealth, 2 S.E.2d 293, 300, 173 Va. 458, citing **Corpus Juris.**

74. Wash.—Amsbary v. Grays Harbor R. & Light Co., 139 P. 46, 78 Wash. 379, 8 A.L.R. 1.

75. Idaho.—Kelly v. Troy Laundry Co., 267 P. 222, 46 Idaho 214.
Iowa.—Chicago Telephone Supply Co. v. Marne & E. Tel. Co., 111 N.W. 935, 134 Iowa 252.
Mass.—Guinan v. Famous Players-Lasky Corporation, 167 N.E. 235, 267 Mass. 501.
Or.—Horn v. Elgin Warehouse Co., 190 P. 151, 96 Or. 403.
Tex.—Panhandle & S. F. Ry. Co. v. Haywood, Civ.App., 227 S.W. 347, 351, citing **Corpus Juris,** error refused.
22 C.J. p 759 note 40.

76. Ariz.—Broderick v. Coppinger, 14 P.2d 714, 40 Ariz. 524.

77. Ariz.—Broderick v. Coppinger, supra.

78. Cal.—Hallawell v. California Union Oil Co., 173 P. 177, 36 Cal. App. 672.
Mass.—Graustein v. Wyman, 145 N. E. 450, 250 Mass. 290.

79. Mo.—Hurley v. Illinois Cent. R. Co., 282 S.W. 97, 221 Mo.App. 478.

Circumstance to be considered with other evidence

A test or experiment, the result of which is introduced in evidence, is merely a circumstance to be considered in connection with other evidence.—Ortega v. Pacific Greyhound Lines, 67 P.2d 702, 20 Cal.App.2d 596.

80. Tenn.—Moore v. State, 33 S.W. 1046, 96 Tenn. 209—Byers v. Nashville, C. & St. L. R. Co., 29 S.W. 128, 94 Tenn. 345.

Ex parte experiments

(1) Little weight will be given to evidence of ex parte demonstrations, especially in the matter of experiments with chemicals.—Donner v. Walgreen Co., D.C.Ill., 44 F.2d 637.

(2) The infirmity of such evidence does not extend to experiments ante litem motam, when there is no motive to fabricate.—Health Products Corporation v. Ex-Lax Mfg. Co., C. C.A.N.Y., 22 F.2d 286, affirming, D. C., 24 F.2d 245.

81. Neb.—Jay Burns Baking Co. v. McKelvie, 189 N.W. 383, 108 Neb. 674, 26 A.L.R. 24, error dismissed

§ 593. On Issue as to Value

a. In general
b. Realty
c. Personalty
d. Services and earnings

a. In General

On an issue as to the value of property, evidence of the value of other property may be admitted, provided there is such similarity as renders it probable that the values are also similar.

On an issue as to the value of property, evidence of the value of other property may be admissible when there is such similarity as renders it probable that the values are also similar,[82] but should be rejected in the absence of such similarity.[83] Whether or not such evidence should be admitted in any particular case is a matter resting within the discretion of the court under the circumstances presented.[84]

b. Realty

(1) In general
(2) Prices paid or offered for other land

(1) In General

Evidence of the value of other lands, or interests in realty, may be admitted where relevant to prove the value of the realty in question.

Evidence as to the value of other lands, or interests in realty, may be admitted to prove the value of the realty in question;[85] but such evidence is inadmissible where the other land or interest is not similar, or where the evidence is otherwise irrelevant for the purpose.[86]

(2) Prices Paid or Offered for Other Land

The value of lands or interests in realty at a particular time may, as a general rule, be proved by evidence of voluntary sales of similar property in the vicinity made at or about the same time.

It has been said that on no other rule of evidence has there been a greater divergence of opinion among the courts than on the question whether evidence as to sales of similar property is admissible as substantive proof of the value of a particular tract of land or interest in realty.[87] In some jurisdictions evidence as to specific sales of similar property is inadmissible as substantive proof of the value of the realty in question,[88] although, as shown

43 S.Ct. 625, 67 L.Ed. 833, motion granted 43 S.Ct. 433, 261 U.S. 608, 67 L.Ed. 824 and reversed on other grounds 44 S.Ct. 412, 264 U.S. 504, 68 L.Ed. 813, 32 A.L.R. 661.
Va.—Norfolk & W. Ry. Co. v. Henderson, 111 S.E. 277, 286, 132 Va. 297, quoting **Corpus Juris.**
22 C.J. p 759 note 42.

82. U.S.—North American Telegraph Co. v. Northern Pac. Ry. Co., Minn., 254 F. 417, 166 C.C.A. 49, certiorari denied 39 S.Ct. 290, 249 U.S. 607, 63 L.Ed. 799.
Mont.—Smith v. Fergus County, 39 P.2d 193, 98 Mont. 377.
Tex.—Ft. Worth & D. C. Ry. Co. v. Hapgood, Civ.App., 210 S.W. 969.
22 C.J. p 760 note 43, p 763 notes 68–70.
Opinion evidence to prove value see supra § 545.
Relevancy and materiality generally of evidence to prove value see supra §§ 181–184.

83. Ala.—Brown v. Leek, 149 So. 854, 25 Ala.App. 497, certiorari denied 149 So. 855, 227 Ala. 312.
Ga.—Inman Grocery Co. v. Williams, 119 S.E. 341, 30 Ga.App. 753.
Mass.—National Wholesale Grocery Co. v. Mann, 146 N.E. 791, 251 Mass. 238.
Mich.—Veley v. Burt, 218 N.W. 801, 242 Mich. 253.
Pa.—Patterson v. Union Transfer Co., 87 Pa.Super. 257.
Tex.—Moseley v. Fikes, Civ.App., 126 S.W.2d 589, error granted—Forehand v. International & G. N. R. Co., Civ.App., 60 S.W.2d 830—B. & H. Motor Co. v. Tucker, Civ. App., 299 S.W. 949.
Vt.—Martin v. Rutledge, 110 A. 222, 94 Vt. 258.
Wis.—Monture v. Regling, 122 N.W. 1129, 140 Wis. 407.
22 C.J. p 760 note 44.

84. N.C.—City of Greensboro v. Bishop, 150 S.E. 495, 197 N.C. 748.
22 C.J. p 760 note 45.

85. Ala.—Waller v. Harris, 128 So. 606, 221 Ala. 313—Penney v. State, 128 So. 596, 221 Ala. 230—Bynum Bros. v. State, 112 So. 348, 216 Ala. 102—International Agricultural Corp. v. Abercrombie, 68 So. 873, 192 Ala. 50.
Ariz.—Brooks v. McDevitt, 11 P.2d 826, 40 Ariz. 221.
Ark.—Missouri Pac. R. Co. v. Fowler, 34 S.W.2d 1071, 183 Ark. 86.
D.C.—Loughran v. U. S., 64 F.2d 555, 62 App.D.C. 57.
Ga.—Hurt v. City of Atlanta, 28 S.E. 65, 100 Ga. 274—Bell v. Tucker, 139 S.E. 573, 37 Ga.App. 254—Smith v. City of Atlanta, 96 S.E. 334, 22 Ga.App. 511.
Ky.—Bishop v. People's Bank & Trust Co., 291 S.W. 718, 218 Ky. 508, 51 A.L.R. 1258.
Me.—Warren v. Wheeler, 21 Me. 484.
N.J.—Blum v. Parsons Mfg. Co., 112 A. 848, 95 N.J.Law 471.
Tex.—Driscoll v. Nolan, Civ.App., 130 S.W.2d 400, set aside on other grounds 131 S.W.2d 1025—Ft. Worth v. Charbonneau, Civ.App., 166 S.W. 387.
22 C.J. p 763 notes 68, 70.

86. Ala.—State v. Donaldson, 96 So. 617, 209 Ala. 400.
Fla.—Doty v. City of Jacksonville, 142 So. 599, 106 Fla. 1.
Ill.—People ex rel. McDonough v. Goldberg, 188 N.E. 428, 354 Ill. 423—Chicago Sanitary Dist. v. Pittsburgh, Ft. W. & C. R. Co., 75 N.E. 248, 216 Ill. 575—Baker v. Ellis, 244 Ill.App. 330.
Tenn.—Parmelee v. T. L. Herbert & Sons, 13 Tenn.App. 101.
Tex.—Dennis v. Dallas, C. & S. W. R. Co., Civ.App., 94 S.W. 1092—Gulf, C. & S. F. Ry. Co. v. Burger, Civ.App., 45 S.W. 613.
Utah.—Weber County v. Ritchie, 96 P.2d 744, 98 Utah 272.
22 C.J. p 177 note 98.
Evidence held inadmissible
Ala.—State v. Brintle, 93 So. 429, 207 Ala. 500.
N.Y.—Hoard v. Luther, 13 N.Y.S.2d 748, 257 App.Div. 1027.

87. Iowa.—Hubbell v. City of Des Moines, 147 N.W. 908, 166 Iowa 581.
Mich.—Commission of Conservation v. Hane, 227 N.W. 718, 248 Mich. 473.

88. Cal.—City of Los Angeles v. Hughes, 262 P. 737, 202 Cal. 731—Central Pac. R. Co. v. Pearson, 35 Cal. 247—Thompson v. Stoakes, App., 115 P.2d 830—Atchison, T. & S. F. Ry. Co. v. Southern Pac. Co., 57 P.2d 575, 13 Cal.App.2d 505—Hibernia Savings & Loan Soc. v. Ellis Estate Co., 22 P.2d 806, 132 Cal.App. 408—Merchants'

supra § 545, evidence as to such sales may be brought out in the cross-examination of a witness who has expressed an opinion as to the value of the land in question, for the purpose of testing his knowledge and competency. It is the general rule, however, that the value of lands, or interests in realty, at a particular time, may be proved by evidence of voluntary sales of similar property in the vicinity, made at or about the same time,[89] and

Trust Co. v. Hopkins, 284 P. 1072. 103 Cal.App. 473—Dickey v. Dunn, 252 P. 770, 80 Cal.App. 724—Palladine v. Imperial Valley Farm Lands Ass'n, 225 P. 291, 65 Cal. App. 727—Reclamation Dist. No. 730 v. Inglin, 160 P. 1098, 31 Cal. App. 495.

Iowa.—Maxwell v. Iowa State Highway Commission, 271 N.W. 883, 223 Iowa 159, 118 A.L.R. 862—Hubbell v. Des Moines, 147 N.W. 908, 166 Iowa 581, Ann.Cas.1916E 592—Watkins v. Wabash R. Co., 113 N.W. 924, 137 Iowa 441.

Contra Town of Cherokee v. Sioux City, & I. F. Town Lot & Land Co., 3 N.W. 42, 52 Iowa 279.

Mich.—Petition of Dillman, 237 N. W. 552, 255 Mich. 152—Commission of Conservation of Department of Conservation v. Hane, 227 N.W. 718, 248 Mich. 473.

Minn.—Minneapolis-St. Paul Sanitary Dist. v. Fitzpatrick, 277 N. W. 394, 201 Minn. 442, 124 A.L.R. 897—Board of Education of City of Minneapolis v. Heywood Mfg. Co., 192 N.W. 102, 154 Minn. 486.

Neb.—State v. Wright, 181 N.W. 539, 105 Neb. 617—Union Pac. R. Co. v. Stanwood, 91 N.W. 191, 98 N.W. 656, 71 Neb. 150.

Pa.—Broomall v. Pennsylvania R. Co., 145 A. 703, 296 Pa. 132—Pennsylvania Co. for Insurances on Lives and Granting Annuities v. City of Philadelphia, 112 A. 76, 268 Pa. 559—Stone v. Delaware, L. & W. R. C., 101 A. 813, 257 Pa. 456—Roberts v. Philadelphia, 86 A. 926, 239 Pa. 339—Rea v. Pittsburg & C. R. Co., 78 A. 73, 229 Pa. 106, 140 Am.S.R. 721—Neely v. Western Allegheny R. Co., 68 A. 829, 219 Pa. 349—Gorgas v. Philadelphia, H. & P. R. Co., 64 A. 680, 215 Pa. 501, 114 Am.S.R. 974—Pennsylvania Schuylkill Valley R. Co. v. Ziemer, 17 A. 187, 124 Pa. 560—Pittsburgh, V. & C. R. Co. v. Vance, 8 A. 764, 115 Pa. 325—Pittsburgh & W. R. Co., v. Patterson, 107 Pa. 461—Pennsylvania & N. Y. R. & Canal Co. v. Bunnell, 81 Pa. 414—East Pennsylvania R. Co. v. Hiester, 40 Pa. 53—Miller v. Western Allegheny R. Co., 47 Pa.Super. 613.

In New York

(1) The text rule has been followed.—Eno v. New York El. R. Co., 53 N.E. 1125, 158 N.Y. 730—Witmark v. New York El., R. Co., 44 N.E. 78, 149 N.Y. 393—Jamieson v. Kings County El. R. Co., 41 N.E. 693, 147 N.Y. 322—In re Thompson, 28 N.E. 389, 127 N.Y. 463, 14 L.R.A. 52—Huntington v. Attrill, 23 N.E. 544, 118 N.Y. 365—Matter of East 161st St., 144 N.Y.S. 717, 159 App.Div. 662—In re New York, W. & B. R. Co., 135 N.Y.S. 234, 151 App.Div. 50—Matter of Crotona Park, 127 N.Y.S. 379, 142 App.Div. 665—Douglas v New York El. R. Co., 43 N.Y.S. 847, 14 App.Div. 471.

(2) But evidence as to sales of similar lands has been held admissible to prove the value of the land in question, at least where the difficulty of otherwise proving value is very great.—In re West 205th St. in City of New York, 147 N.E. 361, 240 N.Y. 68, reversing 206 N.Y.S. 796, 211 App.Div. 33, motion denied In re City of New York, 148 N.E. 725, 240 N.Y. 608—Hart v. Langau, 39 N.E. 643, 144 N.Y. 563—Langdon v. New York, 31 N.E. 98, 133 N.Y. 628—In re School Site on West 187th St., Borough of Manhattan, City of New York, 226 N.Y.S. 536, 222 App. Div. 554, affirmed In re Lands North of West 187th St. in Borough of Manhattan, City of New York, 166 N.E. 335, 250 N.Y. 588—In re Jennings St. in Borough of Bronx, City of New York, 201 N.Y.S. 799, 207 App.Div. 170—Manhattan R. Co. v. Stuyvesant, 111 N.Y.S. 222, 126 App. Div. 848—Maitland v. Kerrigan, 187 N.Y.S. 495—In re Manhattan Terminal, 120 N.Y.S. 465.

22 C.J. p 762 note 64.

89. U.S.—U. S. v. Meyer, C.C.A.Ill., 113 F.2d 387—North American Telegraph Co. v. Northern Pac. Ry. Co., Minn., 254 F. 417, 166 C. C.A. 49, certiorari denied 39 S.Ct. 290, 249 U.S. 607, 63 L.Ed. 799.

Ark.—Sewer and Water Works Improvement Dist. No. 1 v. McClendon, 60 S.W.2d 920, 187 Ark. 510.

Conn.—Campbell v. City of New Haven, 125 A. 650, 101 Conn. 173.

Colo.—Wassenich v. City and County of Denver, 186 P. 533, 67 Colo. 456.

D.C.—Washington Home for Incurables v. Hazen, 70 F.2d 847, 63 App.D.C. 185.

Ill.—Rhodes v. Davis, 28 N.E.2d 113, 374 Ill. 65—Department of Public Works and Buildings v. Diggins, 27 N.E.2d 826, 374 Ill. 11—Forest Preserve Dist. of Cook County v. Eckhoff, 24 N.E.2d 52, 372 Ill. 391—City of Mt. Olive v. Braje, 7 N. E.2d 851, 366 Ill. 132—Forest Preserve Dist. of Cook County v. Dearlove, 169 N.E. 753, 337 Ill. 555—Kankakee Park Dist. v. Heidenreich, 159 N.E. 289, 328 Ill. 198—Forest Preserve Dist. of Cook County v. Wing, 137 N.E. 139, 305 Ill. 194—Forest Preserve Dist. of Cook County v. Barchard, 127 N. E. 878, 293 Ill. 556—Lambert v. Giffin, 100 N.E. 496, 257 Ill. 152—Crosby v. Dorward, 94 N.E. 78, 248 Ill. 471, 140 Am S.R. 230.

Ind.—Illinois Cent. R. Co. v. Howard, 147 N.E. 142, 143, 196 Ind. 323, citing **Corpus Juris**, and rehearing denied 148 N.E. 413, 196 Ind. 323.

Kan.—Wood v. Syracuse School Dist. No. 1, 193 P. 1049, 108 Kan. 1.

Ky.—Miller v. King, 128 S.W.2d 621, 278 Ky. 151—Norfolk & W. Ry. Co. v. McCoy, 124 S.W.2d 777, 276 Ky. 573—Commonwealth v. Begley, 114 S.W.2d 127, 272 Ky. 289—Big Sandy & K. R. Ry. Co. v. Stafford, 268 S.W. 1071, 207 Ky. 272—Coleman v. Louisville & N. R. Co., 226 S.W. 360, 190 Ky. 17—Paducah v. Allen, 63 S.W. 981, 111 Ky. 361, 23 Ky.L. 701, 98 Am.S.R. 422.

Md.—Pumphrey v. Tabler, 2 A.2d 668, 175 Md. 498.

Mass.—Wright v. Commonwealth, 190 N.E. 593, 286 Mass. 371—Sheehy v. Inhabitants of Weymouth, 164 N.E. 819, 266 Mass. 165—Vineyard Grove Co. v. Town of Oak Bluffs, 163 N.E. 888, 265 Mass. 270—McCabe v. City of Chelsea, 163 N.E. 255, 265 Mass. 494—Bartlett v. City of Medford, 147 N.E. 739, 252 Mass. 311—Fourth Nat. Bank v. Commonwealth, 98 N.E. 686, 212 Mass. 66.

Mo.—City of St. Louis v. Buselaki, 80 S.W.2d 853, 336 Mo. 693—Kansas City & G. Ry. Co. v. Haake, 53 S.W.2d 891, 331 Mo. 429, 84 A.L.R. 1477—Kansas City v. Boruff, 243 S.W. 167, 295 Mo. 28.

N.H.—Eames v. Southern New Hampshire Hydro-Electric Corporation, 159 A. 128, 85 N.H. 379.

Philippine.—Manila v. Estrada, 25 Philippine 208.

R.I.—Aspegren v. Tax Assessors of City of Newport, 125 A. 213.

Tenn.—Union Joint Stock Land Bank of Louisville v. Knox County, 97 S.W.2d 842, 20 Tenn.App. 273—Edgington v. Kansas City, M. & B. R. R. Co., 10 Tenn.App. 685.

Tex.—Joyce v. Dallas County, Civ. App., 141 S.W.2d 745—City of Houston v. Pillot, Civ.App., 73 S.W.2d 585, reversed on other grounds, Com.App., 105 S.W.2d 870—Houston Independent School Dist. v. Reader, Civ.App., 38 S.W.2d 610—Gulf & Interstate Ry. Co. of Texas v. Stephenson, Civ.App., 212 S. W. 215.

such evidence has even been highly regarded,[90] although it does not furnish an unerring test.[91] It is incumbent on the party offering such evidence to show, as a foundation for its admissibility, that the lands sold were similar in locality, quality, character, and usefulness to the land in question,[92] and that the sales were made freely and without compulsion[93] under such circumstances that they reflect ordinary present value; hence, it must be shown to the reasonable satisfaction of the court, that the property was similar in all essential particulars,[94] and where these facts do not appear, or are shown not to exist, the evidence is inadmissible for the purpose.[95] Accordingly, such evidence is inadmissible where the lands are dissimilar,[96] or where the sales of the other land were not free

Va.—Seaboard Air Line R. v. Chamblin, 60 S.E. 727, 108 Va. 42.
Wash.—Finch v. Grays Harbor County, 209 P. 833, 121 Wash. 486, 24 A.L.R. 644.
W.Va.—Shaw v. Monongahela Ry. Co., 157 S.E. 170, 110 W.Va. 155—Mingo County Court v. Chattaroy Coal Co., 142 S.E. 430, 105 W.Va. 321—Crowl v. Buckhannon & N. R. Co., 114 S.E. 521, 92 W.Va. 188—Virginian Power Co. v. Brotherton, 110 S.E. 546, 90 W.Va. 155.
Wis.—In re State Road and Bridge Commission, 192 N.W. 380, 180 Wis. 45.
Wyo.—Morrison v. Cottonwood Development Co., 266 P. 117, 38 Wyo. 190.
22 C.J. p 760 note 47.

Oil and gas leases
Kan.—Reeser v. Hammond, 253 P. 233, 122 Kan. 695.
22 C.J. p 763 note 68.

Evidence held admissible on cross-examination.
Ill.—Chicago v. Mullin, 120 N.E. 785, 285 Ill. 296.
Tex.—Goldforb v. Gulf, C. & S. F. Ry. Co., Civ.App., 243 S.W. 707.

Where limited to corroboration of the statement of witness as to the value of the land in question, evidence of price, for which similar land was sold, was admissible.—Town of Ayden v. Lancaster, 150 S. E. 40, 197 N.C. 556.

In Ohio
(1) When the value of land is in issue, evidence of actual sales of other lands, and prices for which they were sold, is competent, if they are similar in their situation, relative position, and other circumstances relating to value, and such sales are fair and open in the market.—Naftzger v. State, 156 N.E. 614, 24 Ohio App. 183.
(2) The proper test, however, is the general selling price of land in the neighborhood, and evidence of the price paid at a particular sale of other property is inadmissible.—W. M. Southern Realty Co. v. Schmidt, 19 Ohio Cir.Ct.,N.S., 488—Morison v. Cleveland, 17 Ohio Cir. Ct.,N.S., 427—Cleveland T. & V. R. Co. v. Gorsuch, 28 Ohio Cir.Ct. 468, affirmed 76 Ohio St. 609, 81 N.E. 1186.

90. Mo.—St. Louis, etc., R. Co. v. Clark, 25 S.W. 192, 906, 121 Mo. 169, 26 L.R.A. 751.
N.H.—Thornton v. Campton, 18 N.H. 20.

91. Md.—Moale v. Baltimore, 5 Md. 314, 61 Am.D. 276.

92. Ill.—Forest Perserve Dist. of Cook County v. Collins, 181 N.E. 345, 348 Ill. 477—Forest Preserve Dist. of Cook County v. Chilvers, 176 N.E. 720, 344 Ill. 573—Chicago, N. S. & M. R. Co. v. Chicago Title & Trust Co., 160 N.E. 226, 328 Ill. 610—Forest Preserve Dist. of Cook County v. Caraher, 132 N.E. 211, 299 Ill. 11.
Ky.—City of Hazard v. Eversole, 35 S.W.2d 313, 237 Ky. 242.
22 C.J. p 761 notes 52–54, p 762 notes 55–59.

93. Ill.—City of Mt. Olive v. Braje, 7 N.E.2d 851, 366 Ill. 132.
Mass.—Wright v. Commonwealth, 190 N.E. 593, 286 Mass. 371.
Miss.—State Highway Commission v. Buchanan, 166 So. 537, 175 Miss. 157.

94. Ill.—Kankakee Park Dist. v. Heidenreich, 159 N.E. 289, 328 Ill. 198.
Kan.—Yagel v. Kansas Gas & Electric Co., 291 P. 768, 773, 131 Kan. 267, citing **Corpus Juris.**
W.Va.—Monongahela West Penn Public Service Co. v. Monongahela Development Co., 132 S.E. 380, 101 W.Va. 165.
22 C.J. p 761 notes 50, 51.

95. U.S.—U. S. ex rel. and for Use of Tennessee Valley Authority v. Bailey, C.C.A.Ala., 115 F.2d 433—Pennsylvania Co. v. U. S., Mich., 223 F. 759, 139 C.C.A. 289.
Colo.—City and County of Denver v. Lyttle, 103 P.2d 1, 106 Colo. 157.
Ill.—Forest Preserve Dist. of Cook County v. Wing, 137 N.E. 139, 305 Ill. 194.
Ky.—Commonwealth v. Combs, 17 S. W.2d 748, 229 Ky. 627.
La.—Louisiana Highway Commission v. Guidry, 146 So. 1, 176 La. 389.
Md.—Pumphrey v. Tabler, 2 A.2d 668, 175 Md. 498—Kenly v. Washington County R. Co., 98 A. 232, 129 Md. 1.
Mass.—Johnson v. City of Lowell, 134 N.E. 627, 240 Mass. 546.
Miss.—State Highway Commission v. Buchanan, 166 So. 537, 175 Miss. 157.
Mo.—School Dist. of Kansas City v. Phœnix Land & Improvement Co., 249 S.W. 51, 297 Mo. 332.
N.D.—Village of Reeder v. Hanson, 213 N.W. 492, 55 N.D. 331.
Okl.—Durell v. Public Service Co. of Oklahoma, 51 P.2d 517, 174 Okl. 549.
Philippine.—Manila v. Estrada, 25 Philippine 208.
Tex.—Houston Independent School Dist. v. Reader, Civ.App., 38 S.W. 2d 610.
W.Va.—Mingo County Court v. Chattaroy Coal Co., 142 S.E. 430, 105 W.Va. 321.
Wis.—In re State Road and Bridge Commission, 192 N.W. 380, 180 Wis. 45.

Evidence held inadmissible
Tex.—Dickey's Estate v. Houston Independent School Dist., Civ.App., 300 S.W. 250—Humble Oil & Refining Co. v. Kishi, Civ.App., 299 S.W. 687.
Wis.—O'Day v. Meyers, 133 N.W. 605, 147 Wis. 549.

96. U.S.—U. S. v. River Rouge Improvement Co., C.C.A.Mich., 285 F. 111, reversed on other grounds 46 S.Ct. 144, 269 U.S. 411, 70 L.Ed. 339.
Ill.—Forest Preserve Dist. of Cook County v. Chilvers, 176 N.E. 720, 344 Ill. 573—Department of Public Works and Buildings v. Keck, 161 N.E. 55, 330 Ill. 39—Chicago, N. S. & M. R. Co. v. Chicago Title & Trust Co., 160 N.E. 226, 328 Ill. 610—Forest Preserve Dist. of Cook County v. Wallace, 132 N.E. 444, 299 Ill. 476.
Ky.—Norfolk & W. Ry. Co. v. McCoy, 124 S.W.2d 777, 276 Ky. 573—Kentucky Hydroelectric Co. v. Woodard, 287 S.W. 985, 988, 216 Ky. 618, citing **Corpus Juris.**
Mass.—Wright v. Commonwealth, 190 N.E. 593, 286 Mass. 371—James Millar Co. v. Commonwealth, 146 N.E. 677, 251 Mass. 457.
N.H.—Eames v. Southern New Hampshire Hydro-Electric Corporation, 159 A. 128, 85 N.H. 379.
N.J.—In re Housing Authority of City of Newark, 17 A.2d 812, 126 N.J.Law 60—W. A. Manda v. City of Orange, 82 A. 869, 82 N.J.Law 686, Ann.Cas.1913D 581.
N.Y.—In re Block Bounded by Avenue A, etc., 122 N.Y.S. 321, 66 Misc. 488.
22 C.J. p 761 notes 53, 54, p 762 notes 55–59.

and voluntary,[97] or were made at a remote time[98] or under such circumstances that they do not reflect ordinary value.[99] Considerable latitude must be allowed in determining similarity.[1] Mere proximity is not a test,[2] and the fact that other land is seven miles away does not establish, as a matter of law, that the lands are in different localities.[3]

Discretion of court. No general rules can be laid down as to the degree of similarity required to exist between the properties, and as to the nearness in respect of time and distance, since these are matters resting largely in the discretion of the trial judge;[4] and the evidence may in such discretion be rejected,[5] especially when other and better evidence can be or has been produced at the hearing;[6] and the discretion of the court does not extend to the admission of evidence which will be of no aid to the jury in determining the question of value,[7] and the court should exclude evidence of similar sales, when its admission would not compensate for the disadvantage arising from a confusion of issues.[8]

Manner of proof. The price for which such sales were made should be shown by means of sworn

97. Ill.—City of Mt. Olive v. Braje, 7 N.E.2d 851, 366 Ill. 132.
Ohio.—Naftzger v. State, 156 N.E. 614, 24 Ohio App. 183.
Or.—Coos Bay Logging Co. v. Barclay, 79 P.2d 672, 159 Or. 272.

Sale under decree of court is not necessarily forced or compulsory.—Forest Preserve Dist. of Cook County v. Dearlove, 169 N.E. 753, 337 Ill. 555.

Evidence held admissible to show that sale was not voluntary.—West Skokie Drainage Dist. v. Dawson, 90 N.E. 377, 243 Ill. 175, 17 Ann.Cas. 776.

98. Ala.—Stovall v. City of Jasper, 110 So. 317, 215 Ala. 300.
Ill.—Forest Preserve Dist. of Cook County v. Collins, 181 N.E. 345, 348 Ill. 477—St. Louis & I. B. Ry. v. Guswelle, 86 N.E. 230, 236 Ill. 214.
Tex.—Isaac v. City of Houston, Civ. App., 60 S.W.2d 543, error dismissed—Dickey's Estate v. Houston Independent School Dist., Civ. App., 300 S.W. 250.
22 C.J. p 761 note 50.

99. Ill.—Jefferson Park Dist. v. Sowinski, 168 N.E. 370, 336 Ill. 390—Kankakee Park Dist. v. Heidenreich, 159 N.E. 289, 328 Ill. 198—Sanitary Dist. of Chicago v. Boening, 107 N.E. 810, 267 Ill. 118.
Mass.—Iris v. Town of Hingham, 22 N.E.2d 13, 303 Mass. 401.
Tex.—Wichita Falls, R. & F. W. Ry. Co. v. Cooper, Civ.App., 235 S.W. 927.
22 C.J. p 761 note 51.

1. R.I.—Hervey v. City of Providence, 133 A. 618, 47 R.I. 378.

2. Ill.—Forest Preserve Dist. of Cook County v. Chilvers, 176 N.E. 720, 344 Ill. 573—Chicago, N. S. & M. R. Co. v. Chicago Title & Trust Co., 160 N.E. 226, 328 Ill. 610.

Adjacency

Land must present a similarity in all essential conditions, although it need not be adjacent.
U.S.—In re Graves, D.C.Vt., 182 F. 443.
Me.—Warren v. Wheeler, 21 Me. 484.
Pa.—Brown v. Corey, 43 Pa. 495.

3. Ark.—Sewer and Water Works Improvement Dist. No. 1 v. McClendon, 60 S.W.2d 920, 187 Ark. 510.

4. U.S.—U. S. v. Nickerson, C.C.A. Mass., 2 F.2d 502.
Conn.—Portland Silk Co. v. City of Middletown, 4 A.2d 422, 125 Conn. 172.
Colo.—Wassenich v. City and County of Denver, 186 P. 533, 67 Colo. 456.
D.C.—Loughran v. U. S., 64 F.2d 555, 62 App.D.C. 57.
Ill.—Forest Preserve Dist. of Cook County v. Eckhoff, 24 N.E.2d 52, 372 Ill. 391—Forest Preserve Dist. of Cook County v. Collins, 181 N. E. 345, 348 Ill. 477—South Park Com'rs v. Livingston, 176 N.E. 546, 344 Ill. 368—Forest Preserve Dist. of Cook County v. Dearlove, 169 N.E. 753, 337 Ill. 555—Chicago, N. S. & M. R. Co. v. Chicago Title & Trust Co., 160 N.E. 226, 328 Ill. 610—Kankakee Park Dist. v. Heidenreich, 159 N.E. 289, 328 Ill. 198—Forest Preserve Dist. of Cook County v. Wing, 137 N.E. 139, 305 Ill. 194—Forest Preserve Dist. of Cook County v. Wallace, 132 N.E. 444, 299 Ill. 476—Forest Preserve Dist. of Cook County v. Caroher, 132 N.E. 211, 299 Ill. 11—Forest Preserve Dist. of Cook County v. Kean, 131 N.E. 117, 298 Ill. 37—Forest Preserve Dist. of Cook County v. Barchard, 127 N.E. 878, 293 Ill. 556—McCoy v. Union Elevated R. Co., 111 N.E. 517, 271 Ill. 490, affirmed 38 S.Ct. 504, 247 U.S. 354, 62 L.Ed. 1156, rehearing granted 38 S.Ct. 581—Chicago & W. I. R. Co. v. Heidenreich, 98 N.E. 567, 254 Ill. 231, Ann.Cas. 1913C 266—St. Louis & I. B. Ry. v. Guswelle, 86 N.E. 230, 236 Ill. 214.
Md.—Marchant v. City of Baltimore, 126 A. 884, 146 Md. 513.
Mass.—Iris v. Town of Hingham, 22 N.E.2d 13, 303 Mass. 401—Wright v. Commonwealth, 190 N.E. 593, 286 Mass. 371—McCabe v. City of Chelsea, 163 N.E. 255, 265 Mass. 494—Johnson v. City of Lowell, 134 N.E. 627, 240 Mass. 546—Suburban Land Co. v. Inhabitants of Town of Arlington, 107 N.E. 432, 219 Mass. 539.
N.J.—W. A. Manda Co. v. City of Orange, 82 A. 869, 82 N.J.Law 686, Ann.Cas.1913D 581—State Highway Commission v. Lally, Sup., 147 A. 487, followed in State Highway Commission v. O'Hearn, 147 A. 488.
Ohio.—Muccino v. Baltimore & O. R. Co., 168 N.E. 752, 33 Ohio App. 102.
R.I.—Hervey v. City of Providence, 133 A. 618, 47 R.I. 378.
S.C.—Charleston & W. C. Ry. Co. v. Spartanburg Bonded Warehouse, 149 S.E. 236, 151 S.C. 542.
Tenn.—Polk v. City of Memphis, 15 Tenn.App. 73.
Tex.—City of Houston v. Pillot, Civ. App., 73 S.W.2d 585, 591, citing **Corpus Juris,** reversed on other grounds, Com.App., 105 S.W.2d 870.
Wash.—In re Seward Parke Ave. in City of Seattle, 165 P. 971, 96 Wash. 698—In re Northlake Ave., 165 P. 113, 96 Wash. 344.
22 C.J. p 578 note 79, p 763 note 65.

5. N.Y.—Huntington v. Attrill, 23 N.E. 544, 118 N.Y. 365.

6. Kan.—Atchison & N. R. Co. v. Harper, 19 Kan. 529.
Neb.—Fahey v. Updike El. Co., 166 N.W. 622, 102 Neb. 249.

7. Ill.—Chicago, N. S. & M. R. Co. v. Chicago Title & Trust Co., 160 N.E. 226, 328 Ill. 610—East Side Levee and Sanitary Dist. v. Jerome, 138 N.E. 192, 306 Ill. 577—Forest Preserve Dist. of Cook County v. Caraher, 132 N.E. 211, 299 Ill. 11—Forest Preserve Dist. of Cook County v. Kean, 131 N.E. 117, 298 Ill. 37.

8. Ill.—Kankakee Park Dist. v. Heidenreich, 159 N.E. 289, 328 Ill. 198.
N.H.—Eames v. Southern New Hampshire Hydro-Electric Corporation, 159 A. 128, 85 N.H. 379.
R.I.—Hervey v. City of Providence, 133 A. 618, 47 R.I. 378.

evidence from witnesses having a knowledge of the transactions,[9] and evidence as to the amount of revenue stamps which had been placed on the deeds involved in such transactions is not admissible for the purpose.[10]

Offers to buy or sell. Although there is contrary authority,[11] it has been held that evidence of mere offers to sell,[12] or even to buy,[13] similar land is not admissible to show the value of the land in question; but evidence that such tracts as those in suit are not in demand has been held admissible.[14]

Condemnation value of similar land. The general rule is that evidence as to the amount of compensation paid to the owners of similar lands by persons who exercised, or could have exercised, the power of eminent domain against such lands is not admissible to show the value of realty.[15] There is authority, however, that such evidence, although not always controlling, is entitled to some consideration,[16] at least where it represents the only sales of lands in the neighborhood within recent years;[17] and it has been held that evidence of a sale of similar lands to a condemnor is admissible to prove the value of realty, unless the trial court finds that the contract of sale was not freely made.[18]

Common injury or taking. Prices paid in settlement of claims for damage caused to property by a common injury or taking are the resultant of too many variable considerations to be competent on the question as to what damage has been suffered by similar property from the same cause;[19] although the amount to be paid was reached by agreement,[20] arbitration,[21] or the verdict of a jury.[22] This is still more clearly the rule where the two pieces of property are in different conditions.[23]

c. Personalty

(1) In general
(2) Proof of market value

(1) In General

The value of personal property may be proved by evidence as to the valuation placed on property of the same

9. R.I.—Aspegren v. Tax Assessors of City of Newport, 125 A. 213.

10. R.I.—Aspegren v. Tax Assessors of City of Newport, supra.

11. Ill.—Kankakee Park Dist. v. Heidenreich, 159 N.E. 289, 328 Ill. 198.

12. Ala.—Penney v. State, 128 So. 596, 221 Ala. 230.
Mo.—Kansas City & G. Ry. Co. v. Haake, 53 S.W.2d 891, 331 Mo. 429, 84 A.L.R. 1477.
Mont.—Helena Power Transmission Co. v. McLean, 99 P. 1061, 38 Mont. 388.
N.J.—In re Housing Authority of City of Newark, 17 A.2d 812, 126 N.J.Law 60—Montclair R. Co. v. Benson, 36 N.J.Law 557.
Tex.—West v. State, Civ.App., 150 S.W.2d 363—Dickey's Estate v. Houston Independent School Dist., Civ.App., 300 S.W. 250.
22 C.J. p 179 note 49.

13. Mass.—Suburban Land Co. v. Inhabitants of Town of Arlington, 107 N.E. 432, 219 Mass. 539.
Mo.—Kansas City & G. Ry. Co. v. Haake, 53 S.W.2d 891, 331 Mo. 429, 84 A.L.R. 1477.

14. Mo.—St. Louis, K. & N. W. R. Co. v. St. Louis Union Stock Yards Co., 25 S.W. 399, 120 Mo. 541.

15. U.S.—U. S. ex rel. and for Use of Tennessee Valley Authority v. Reynolds, C.C.A.Ala., 115 F.2d 294—Wise v. U. S., D.C.Ky., 38 F. Supp. 130—U. S. v. Beaty, D.C. Va., 198 F. 284, reversed on other grounds, Beatty v. U. S., 203 F. 620, 122 C.C.A. 16.
Ala.—Housing Authority of Phenix City v. Stillwell, 3 So.2d 55—Housing Authority of Phenix City v. Harris, 3 So.2d 54—Pickens County v. Jordan, 196 So. 121, 239 Ala. 589—Alabama Power Co. v. Sides, 103 So. 859, 212 Ala. 687.
D.C.—Shoemaker Co. v. Munsey, 37 App.D.C. 95.
Ill.—Mauvaisterre Drainage & Levee Dist. v. Wabash Ry. Co., 132 N.E. 559, 299 Ill. 299, 22 A.L.R. 944—Chicago & A. R. Co. v. Scott, 80 N.E. 404, 225 Ill. 352.
Kan.—Searcy v. State Highway Commission, 67 P.2d 534, 145 Kan. 709.
Ky.—Adams v. Commonwealth ex rel. State Highway Commission, 146 S.W.2d 7, 285 Ky. 38—Commonwealth, by State Highway Commission v. Crutchfield, 87 S.W.2d 598, 261 Ky. 272—Kentucky-West Virginia Gas Co. v. Hays, 37 S.W.2d 17, 238 Ky. 189.
Md.—Marchant v. City of Baltimore, 126 A. 884, 146 Md. 513—Bonaparte v. Baltimore, 101 A. 594, 131 Md. 80.
Miss.—Dantzler v. Mississippi State Highway Commission, 199 So. 367.
Mo.—City of St. Louis v. Rossi, 55 S.W.2d 946.
Or.—Coos Bay Logging Co. v. Barclay, 79 P.2d 672, 159 Or. 272—Oregon R. & Navigation Co. v. Eastlack, 102 P. 1011, 54 Or. 196, 20 Ann.Cas. 692.
Utah.—Weber County v. Ritchie, 96 P.2d 744, 98 Utah 272.
Va.—Seaboard Air Line R. Co. v. Chamblin, 60 S.E. 727, 108 Va. 42.
Wash.—State v. Spokane County Super. Ct., 104 P. 148, 55 Wash. 64—Port Townsend Southern R. Co. v. Barbare, 89 P. 710, 46 Wash. 275.
W.Va.—Buckhannon & N. R. Co. v. Great Scott Coal & Coke Co., 83 S.E. 1031, 75 W.Va. 423.

16. La.—Texas Pacific-Missouri Pac. Terminal R. R. of New Orleans v. Elliott, 117 So. 275, 166 La. 347—Manson v. Board of Levee Com'rs, Orleans Levee Dist., 98 So. 555, 154 La. 995—Louisiana R. & Nav Co. v. Morere, 41 So. 236, 116 La. 997—Louisiana Highway Commission v. Merchant, App., 174 So. 696—New Orleans v. Cotonio, 1 La.A., Orleans, 156.

17. S.C.—Charleston & W. C. Ry. Co. v. Spartanburg Bonded Warehouse, 149 S.E. 236, 151 S.C. 542—Wateree Power Co. v. Rion, 102 S.E. 331, 113 S.C. 303.

18. N.H.—Eames v. Southern New Hampshire Hydro-Electric Corporation, 159 A. 128, 85 N.H. 379.

19. Ga.—State Highway Board v. Georgia Railroad & Banking Co., 171 S.E. 176, 179, 47 Ga.App. 652, quoting **Corpus Juris.**
22 C.J. p 180 note 65.

20. Mass.—Providence & W. R. Co. v. City of Worcester, 29 N.E. 56, 155 Mass. 35.
22 C.J. p 181 note 66.

21. Mass.—White v. Fitchburg R. Corp., 4 Cush. 440.

22. Mass.—Howe v. Howard, 33 N.E. 528, 158 Mass. 278.

23. N.Y.—In re Thompson, 28 N.E. 389, 127 N.Y. 463, 14 L.R.A. 52, affirming 5 N.Y.S. 370, 1 Silv.Sup. 389, In re New York, W. & B. R. Co., 135 N.Y.S. 234, 151 App.Div. 50.

kind in the open market, provided such valuation is not too remote as to time or place.

Evidence as to the value of other property may be admitted where relevant to prove the value of personalty;[24] but such evidence is inadmissible where the other property is not substantially similar, or where it is otherwise irrelevant or incompetent for the purpose.[25] Thus the value of personal property may be proved by evidence as to the valuation placed on property of the same kind in the open market,[26] provided such valuation is not too remote as to time[27] or place.[28] The value of ordinary commodities having a market value may be proved by showing the value of articles of the same kind in the market, without showing that those in controversy are of the same quality,[29] and the evidence should not be limited to the market value of such commodities from the usual source of supply of one of the parties, but evidence as to the market value from any source of supply is admissible.[30]

Property without market value. Where the property has no market value in the ordinary sense, its value may be proved by evidence as to the price paid for similar property at or about the same time.[31] Although second hand[32] or unrefined[33] articles or materials may have no market value, evidence as to the market value of new or refined

24. U.S.—The Cushing, D.C.N.Y., 285 F. 617, modified on other grounds, C.C.A., 292 F. 560, certiorari granted Standard Oil Co. of New Jersey v. Southern Pac. Co., 44 S.Ct. 133, 263 U.S. 696, 68 L.Ed. 511, order granting certiorari modified 44 S.Ct. 135, 263 U. S. 681, 68 L.Ed. 504, and motion for leave to take additional testimony granted 44 S.Ct. 458, 265 U. S. 569, 68 L.Ed. 1184. Affirmed 45 S.Ct. 465, 268 U.S. 146, 69 L.Ed. 890.
Fla.—New Amsterdam Casualty Co. v. James, 166 So. 813, 122 Fla. 710.
Mo.—Grace v. Missouri, K. & T. Ry. Co., App., 212 S.W. 41.
S.D.—Axtell v. American Live Stock Ins. Co., 194 N.W. 652, 46 S.D. 498.
Corporate stock
U.S.—Oxford Paper Co. v. U. S., Ct. Cl., 52 F.2d 1008, supplemented 56 F.2d 895—Hodgman v. Atlantic Refining Co., D.C.Del., 2 F.2d 893—Groff v. Smith, D.C.Conn., 34 F. Supp. 319.
D.C.—Moran v. Lucas, 36 F.2d 546, 59 App.D.C. 142.
22 C.J. p 183 note 15.

25. U.S.—Arkansas Natural Gas Co. v. Sartor, C.C.A.La., 78 F.2d 924, certiorari denied Sartor v. Arkansas Natural Gas Co., 56 S.Ct. 381, 296 U.S. 656, 80 L.Ed. 467—St. Paul Fire & Marine Ins. Co. v. Pure Oil Co., C.C.A.N.Y., 63 F.2d 771, reversing, D.C., 58 F.2d 393—Groff v. Smith, D.C.Conn., 34 F. Supp. 319—Jenkins v. Smith, D.C. Conn., 21 F.Supp. 251—Wells Fargo Bank & Trust Co. v. McLaughlin, D.C.Cal., 8 F.Supp. 1009, reversed on other grounds, C.C.A., Wells Fargo Bank & Union Trust Co. v. McLaughlin, 78 F.2d 934, certiorari denied 56 S.Ct. 172, 296 U.S. 638, 80 L.Ed. 453.
Ala.—F. W. Bromberg & Co. v. Norton, 93 So. 837, 208 Ala. 117.
Ill.—Toledo, St. L. & W. R. Co. v. Wilson, 134 Ill.App. 462.
Iowa.—Galliers v. Chicago, B. & Q. R. Co., 89 N.W. 1109, 116 Iowa 319.
Kan.—Sunflower Truck & Tractor Co. v. United Warehouse Co., 220 P. 243, 114 Kan. 496.
Mich.—Loud v. Solomon, 154 N.W. 73, 188 Mich. 7.
Mo.—J. T. Fargason & Co. v. Coleman, App., 272 S.W. 1003—Harris v. Weber Motor Car Co., 251 S.W. 121, 212 Mo.App. 107.
N.Y.—De Groot v. Fulton F. Ins. Co., 27 N.Y.Super. 504—Goldberg v. James, 177 N.Y.S. 157.
Pa.—Popkin Bros. v. Dunlap, 196 A. 586, 130 Pa.Super. 50.
Tenn.—Memphis Commercial Appeal Co. v. Landis, 126 S.W.2d 318, 174 Tenn. 424.
Tex.—Neyland v. Benson, Civ.App., 292 S.W. 251, mandamus denied Benson v. Jones, Com.App., 296 S. W. 865.
Wis.—Lozon v. Leamon Bakery Co., 202 N.W. 296, 186 Wis. 84.
22 C.J. p 183 note 16, p 763 note 73.

26. Colo.—Hoover v. Shott, 189 P. 848, 68 Colo. 385.
Idaho.—Lessman v. Anschustigui, 215 P. 460, 37 Idaho 127.
Iowa.—Westphalen v. Atlantic Northern & Southern R. Co., 132 N.W. 57, 152 Iowa 232.
Ky.—Brandenberg v. Addison, 298 S.W. 1091, 221 Ky. 442.
Corporate stock
Proof of the market value of a small number of shares is obviously no criterion to establish the value of a block of shares twice the number of those then on the market.—Cleary v. Higley, 277 N.Y.S. 63, 154 Misc. 158, affirmed 284 N.Y.S. 989, 246 App.Div. 698.

27. Ariz.—Atlantic Nat. Bank of Boston v. Korrick, 242 P. 1009, 29 Ariz. 468, 43 A.L.R. 1184.
Ga.—American Ry. Express Co. v. Dubois Bros., 111 S.E. 70, 28 Ga. App. 274.
Mo.—Campbell v. National Fire Ins. Co. of Hartford, Conn., App., 269 S.W. 645.
N.Y.—Sinclair Refining Co. v. Unadilla Motor & Supply Co., 213 N.Y. S. 81, 126 Misc. 292.
Tex.—Gerhart v. Harris County, Civ. App., 244 S.W. 1103, affirmed Harris County v. Gerhart, 283 S.W. 139, 115 Tex. 449.
Wis.—Lozon v. Leamon Bakery Co., 202 N.W. 296, 186 Wis. 84.

28. Ill.—McKee v. Trisler, 143 N.E. 69, 311 Ill. 536, 33 A.L.R. 1298, affirming 229 Ill.App. 285.
Mo.—J. T. Fargason & Co. v. Coleman, App., 272 S.W. 1003—Bailey-Ball-Pumphrey Co. v. German, 247 S.W. 483, 213 Mo.App. 11.
Tex.—Puckett v. Patton, Civ.App., 16 S.W.2d 856—St. Louis, B. & M. Ry. Co. v. Lane, Civ.App., 248 S. W. 59.
Value in controlling market may always be shown even though that market is a considerable distance away.—Shipler v. Potomac Copper Co., 220 P. 1097, 69 Mont. 86.

29. N.Y.—Ebenreiter v. Dahlman, 42 N.Y.S. 867, 19 Misc. 9.
Tex.—Houston Packing Co. v. Griffith, Civ.App., 164 S.W. 431.

30. Mich.—Frolich v. Independent Glass Co., 139 N.W. 5, 173 Mich. 428.

31. Mass.—Woonsocket Machine & Press Co. v. New York, N. H. & H. R. Co., 131 N.E. 461, 239 Mass. 211.
Or.—Dolph v. Speckart, 186 P. 32, 94 Or. 550.
Pa.—Allen v. Adams Express Co., 77 Pa.Super. 174.
Natural gas
U.S.—Arkansas Natural Gas Co. v. Sartor, C.C.A.La., 78 F.2d 924, certiorari denied Sartor v. Arkansas Natural Gas Co., 56 S.Ct. 381, 296 U.S. 656, 80 L.Ed. 467.

32. Minn.—Guilford v. Brown, 191 N.W. 915, 154 Minn. 518.
Tex.—Dallas Hotel Co. v. Blanchette, Civ.App., 246 S.W. 1065.

33. La.—Young v. Fireman's Fund Ins. Co., 107 So. 108, 160 La. 275.

products of the same kind may be considered in determining their actual value. Where corporate stock has no market value, its actual value may be shown by proof of transactions in the particular stock, and the prices at which it has been sold or optioned,[34] provided such transactions were bona fide,[35] and the conditions under which they occurred were substantially the same as those prevailing at the time in question.[36]

(2) Proof of Market Value
(a) In general
(b) Price lists and market reports

(a) In General

Voluntary sales of similar property, in the same locality and reasonably near in point of time to the date in question, and the prices at which such sales were made, are generally held admissible to prove the market value of personalty.

The market value of personal property may be proved by evidence which is relevant and competent for the purpose.[37] Voluntary sales of similar property, in the same locality and reasonably near in point of time to the date in question, and the prices at which such sales were made, are admissible in evidence to prove market value.[38] It does not require a great number of sales to establish market value in a particular locality,[39] and it has been held that even a single sale may be shown where the time is sufficiently near and the conditions sufficiently similar to render the evidence helpful,[40] although, on the other hand, it has been said that evidence of isolated sales is not admissible to establish market value.[41]

Where market reports are available, however, evidence as to individual sales is inadmissible without a showing that such sales were made at the prevailing market price;[42] and it has been held that where prices in an open market are properly shown by authentic publications or trade bulletins, which are generally accepted by dealers in such markets, the testimony of a dealer as to individual transactions in such market is not admissible.[43] Likewise the market value of personalty cannot be proved by evidence of sales of similar property which were made under special circumstances or conditions,[44] or which were made in different quantities[45] or

34. Nev.—Page v. Walser, 213 P. 107, 46 Nev. 390.

35. Nev.—Page v. Walser, supra.

36. U.S.—Nolting v. Tait, D.C.Md., 3 F.Supp. 686.

37. Mo.—Gordon v. Andrews, 2 S. W.2d 809, 222 Mo.App. 609.
Neb.—Trennt v. Chicago, B. & Q. R. Co., 186 N.W. 322, 107 Neb. 406.
N.D.—Golly v. Northland Elevator Co., 207 N.W. 438, 53 N.D. 564.

Natural gas
U.S.—Hemler v. Hope Producing Co., C.C.A.La., 117 F.2d 231—Union Producing Co. v. Pardue, C.C.A.La., 117 F.2d 225, affirming, D.C., Pardue v. United Gas Public Service Co., 28 F.Supp. 847—Sartor v. United Gas Public Service Co., C. C.A.La., 84 F.2d 436.

Oil
U.S.—Texas Co. of Mexico, S. A., v. Roos, C.C.A.Tex., 43 F.2d 1, certiorari denied Roos v. Texas Co. of Mexico, S. A., 51 S.Ct. 216, 282 U.S. 902, 75 L.Ed. 794.

38. U.S.—The Blandon, D.C.N.Y., 39 F.2d 933, affirmed, C.C.A., 42 F.2d 1013—Sawyer v. Eaton, C.C.A.Me., 293 F. 898.
Ark.—Missouri Pac. R. Co. v. Green, 288 S.W. 908, 172 Ark. 423.
Cal.—Dwight v. Callaghan, 199 P. 838, 53 Cal.App. 132.
Conn.—Goralnik Hat Co. v. Delohery Hat Co., 120 A. 283, 285, 98 Conn. 560, quoting **Corpus Juris.**
Miss.—Simmons v. Bainter, 125 So. 338, 155 Miss. 804.
N.J.—Clark v. Commercial Trust Co. of New Jersey, 181 A. 269, 119 N.J.Eq. 133.
Okl.—Kilbourne v. McAllister, 65 P. 2d 516, 179 Okl. 267.
Pa.—Seward v. Pennsylvania Salt Mfg. Co., 78 Pa.Super. 319, 327, citing **Corpus Juris.**
Wash.—Hershey v. Hanauer, 185 P. 627, 108 Wash. 498.
22 C.J. p 187 note 10.

In New York
(1) It has been held that the market value of personalty may not be proved, in the first instance, by a showing of the prices obtained on particular sales.
U.S.—The Oceanica, D.C.N.Y., 156 F. 306, stating New York rule.
N.Y.—Luchs v. Goldman, 181 N.Y.S. 355.

(2) There is authority, however, that in determining the market price of commodities of fluctuating value dealt in on a recognized exchange, the courts receive as evidence proof of the actual sales made on such exchange, for these prices are the best possible evidence of market value.—Peschke v. Wright, 156 N.Y.S. 773, 93 Misc. 154.

(3) In order to prove the fair market value of goods at a time when there was no market available for them, recourse may be had to sales made within a reasonable range of time before and after that date.—Melzer v. Zimmerman, 194 N. Y.S. 222, 118 Misc. 407.

39. Tex.—St. Louis, etc., R. Co. v. Droddy, Civ.App., 132 S.W. 946.

40. N.Y.—Blanchard v. New Jersey Steamboat Co., 59 N.Y. 292.
22 C.J. p 188 note 13.

41. Idaho.—Basye v. Hayes, 76 P.2d 435, 438, 58 Idaho 569, citing **Corpus Juris.**
Tex.—Alba-Malakoff Lignite Co. v. Hercules Powder Co., Civ.App., 219 S.W. 554, reversed on other grounds, Com.App., 235 S.W. 547.
22 C.J. p 188 note 14.

42. N.D.—Weigel v. Powers Elevator Co., 194 N.W. 113, 49 N.D. 867.

43. Neb.—Fahey v. Updike El. Co., 166 N.W. 622, 102 Neb. 249.

44. Ala.—Oden-Elliott Lumber Co. v. Daniel-Gaddis Lumber Co., 98 So. 730, 210 Ala. 582.
Ga.—Ladd Lime & Stone Co. v. MacDougald Const. Co., 124 S.E. 551, 32 Ga.App. 709.

Secret sales of corporate stock at extraordinary prices to rival interests seeking to obtain control of the corporation do not establish the market value of the stock.—State v. Dickson, 111 S.W. 817, 213 Mo. 66.

45. Ill.—Smothers v. Cosgrove-Meehan Coal Co., 264 Ill.App. 488—Penn Plate Glass Co. v. Jas. H. Rice Co., 117 Ill.App. 356, affirmed 75 N.E. 246, 216 Ill. 567.
Pa.—Seward v. Pennsylvania Salt Mfg. Co., 109 A. 617, 266 Pa. 457.
Tex.—Gerhart v. Harris County, Civ. App., 244 S.W. 1103, affirmed Harris County v. Gerhart, 283 S.W. 139, 115 Tex. 449.

which were made at a remote time[46] or at a remote place.[47]

Offers to buy and sell. The prices stated in bona fide offers by dealers having similar articles for sale,[48] or in bidding for their purchase,[49] at a time near enough to be relevant,[50] have been held competent on the question of market value, although it has also been held that evidence of isolated offers is not admissible.[51]

(b) Price Lists and Market Reports

Standard price lists and market reports which are shown to be in general circulation and relied on by those engaged in the trade may ordinarily be received as evidence of the market value of personalty.

Market value cannot be established by hearsay evidence,[52] and published quotations and market reports have been held to be incompetent to prove market value, at least where the persons from whom the information was obtained are available as witnesses.[53] The general rule, however, is that standard price lists and market reports which are shown to be in general circulation and relied on by those engaged in the trade may be received as evidence of market value,[54] especially when accredited by the party against whom they are offered.[55] Thus such lists and reports have been held admissible when published in newspapers,[56] or in financial[57] or trade[58] journals, reports, or booklets. Such lists or reports are inadmissible, however, unless it is shown that they have been obtained from authoritative or reliable sources in the usual course of business,[59] that they represent transactions actually consummated or proposed in good faith,[60] and that they are recognized and relied on by persons dealing in the commodity involved.[61] Evidence which

46. Cal.—Fishel v. F. M. Ball & Co., 256 P. 493, 83 Cal.App. 128.
Mich.—Armstrong v. Rachow, 171 N.W. 389, 205 Mich. 168.
N.D.—Schnitz Bros. v. Bolles & Rogers Co., 186 N.W. 96, 48 N.D. 673.

47. Mo.—Nugent v. Armour Packing Co., App., 81 S.W. 506, affirmed 106 S.W. 648, 208 Mo. 480.
22 C.J. p 762 note 61.

48. N.Y.—Harrison v. Glover, 72 N.Y. 451.
22 C.J. p 187 note 5.

49. Ga.—Peninsular Naval Stores Co. v. State, 93 S.E. 159, 20 Ga. App. 501.
22 C.J. p 187 note 6.

50. Ga.—Peninsular Naval Stores Co. v. State, supra.

51. Tex.—Waldrop v. Goltzman, Civ. App., 202 S.W. 335.
22 C.J. p 184 note 39 [c], p 187 note 8.

52. U.S.—Union Pac. R. Co. v. Perrine, C.C.A.Neb., 267 F. 657.
Fla.—Chesebro Bros. & Robbins v. Merrow, 136 So. 665, 102 Fla. 964.
Miss.—Johnson v. Tootle, 88 So. 406, 126 Miss. 21.
R.I.—National Cash Register Co. v. Underwood, 185 A. 909, 56 R.I. 379.
Utah.—Baglin v. Earl-Eagle Mining Co., 184 P. 190, 54 Utah 572.

53. Mass.—Doherty v. Harris, 119 N.E. 863, 230 Mass. 341.
22 C.J. p 189 notes 24, 25.

54. Cal.—Meer v. Cerati, 200 P. 501, 53 Cal.App. 497.
Iowa.—Wilbur v. Buckingham, 132 N.W. 960, 153 Iowa 194, Ann.Cas. 1913E 210.
N.C.—Commander v. Smith, 134 S.E. 412, 413, 192 N.C. 159, citing **Corpus Juris.**
22 C.J. p 188 notes 18, 20.

Mere private lists are not admissible to show market value.—Brown Co. v. Borst, 165 N.E. 115, 266 Mass. 350.

Corpus Juris cited in application of text rule to evidence in criminal case, Holmes v. State, 72 S.W.2d 1092, 1095, 126 Tex.Cr. 587.

55. Kan.—Ray v. Missouri, K. & T. R. Co., 133 P. 847, 90 Kan. 244.
Tex.—Western Wool Commn. Co. v. Hart, 20 S.W. 131.

56. U.S.—Baush Mach. Tool Co. v. Aluminum Co. of America, C.C.A. Conn., 79 F.2d 217.
Ariz.—Bank of Boston v. Moore, 241 P. 601, 604, 29 Ariz. 346, citing **Corpus Juris.**
S.C.—Kirkpatrick v. Hardeman, 115 S.E. 905, 123 S.C. 21.
22 C.J. p 188 note 19.

57. Conn.—Henry v. Kopf, 131 A. 412, 104 Conn. 73.
Ill.—Bushnell v. Curtis, 236 Ill.App. 89.

"Bid and asked" quotations from financial journal held admissible in action involving value of corporate stock.—Rice v. Eisner, C.C.A.N.Y., 16 F.2d 358, certiorari denied 47 S.Ct. 477, 273 U.S. 764, 71 L.Ed. 880.

58. U.S.—The Blandon, D.C.N.Y., 39 F.2d 933, affirmed, C.C.A., 42 F.2d 1013.
Ill.—Bushnell v. Curtis, 236 Ill.App. 89—Pass v. Briggs & Turivas, 231 Ill.App. 214.
Kan.—Webber v. Umback, 263 P. 786, 787, 125 Kan. 117, citing **Corpus Juris**—Nelson v. Union Pac. R. Co., 225 P. 1065, 1066, 116 Kan. 35, citing **Corpus Juris.**
Mich.—Jordan v. Miller, 204 N.W. 708, 232 Mich. 8.
Minn.—Whitcomb v. Automobile Ins. Co. of Hartford, 209 N.W. 27, 167 Minn. 362.
Miss.—Yazoo & M. V. R. Co. v. M. Levy & Sons, 106 So. 525, 141 Miss. 199.
Neb.—Pierce v. Miller, 187 N.W. 105, 107, 107 Neb. 851, quoting **Corpus Juris**—Trennt v. Chicago, B. & Q. R. Co., 186 N.W. 322, 107 Neb. 406.
N.M.—California Sugar & White Pine Co. v. Whitmer, Jackson & Co., 263 P. 504, 33 N.M. 117.
N.Y.—Watts v. Phillips-Jones Corporation, 207 N.Y.S 493, 211 App. Div. 523, reargument denied 152 N.E. 425, 242 N.Y. 557, which is denied in 152 N.E. 445, 242 N.Y. 601—Burns Mfg. Co. v. Clinchfield Products Corporation, 178 N.Y.S. 483, 189 App.Div 569.
Wash.—Cron & Dehn v. Chelan Packing Co., 290 P. 999, 158 Wash. 167—Marden, Orth & Hastings Corporation v. Trans-Pacific Corporation, 186 P. 884, 109 Wash. 296.

59. Ariz.—Atlantic Nat. Bank of Boston v. Moore, 241 P. 601, 29 Ariz. 346.
N.J.—E. Clemens Horst Co. v. Peter Breidt City Brewery, 109 A. 727, 94 N.J.Law 230—Crowley v. E. Homan Co., 130 A. 372, 3 N.J.Misc. 968.
N.D.—Schnitz Bros. v. Bolles & Rogers Co., 186 N.W. 96, 48 N.D. 673.
22 C.J. p 189 note 23.

60. Ariz.—Atlantic Nat. Bank of Boston v. Korrick, 242 P. 1009, 1010, 29 Ariz. 468, 43 A.L.R. 1184, citing **Corpus Juris.**
22 C.J. p 188 note 22.

61. Ariz.—Atlantic Nat. Bank of Boston v. Korrick, supra.
Cal.—Fishel v. F. M. Ball & Co., 256 P. 493, 83 Cal.App. 128.
Ky.—Perry v. Reuss, 264 S.W. 750, 204 Ky. 359.
Neb.—Pierce v. Miller, 187 N.W. 105, 107 Neb. 851.

is relevant to make such a showing is, of course, admissible.[62]

d. Services and Earnings

There is authority that the value of services rendered may be proved by evidence of the charges or compensation customarily made or received for such work

Evidence of the value of similar services is inadmissible to prove the value of the services in question where it is incompetent or irrelevant for the purpose,[63] or where its admission would involve the case on trial in collateral issues.[64] There is authority, however, that the value of services may be proved by evidence of what the person rendering them has received or is accustomed to receive for similar services[65] or by evidence of the charges or compensation which are customarily made or received by others for similar work.[66] In order to determine earning capacity, recourse may be had to the general value belonging to things of a given class, in order to determine the worth of a particular member of that class.[67]

XV. ATTENDANT CIRCUMSTANCES

§ 594. Capability

Evidence of other acts or occurrences may be received where it tends to establish capability for doing the acts or producing the result in question.

Evidence of acts or occurrences which were done or which occurred at times other than that to which the inquiry relates may be received, where the doing of such acts or the happening of such occurrences tends to establish capability for doing the acts or producing the result in question,[68] or the possibility that the act in question might have been done.[69] Such evidence may be received on an inquiry as to whether a machine is capable of doing certain work,[70] or whether a horse can attain a certain speed,[71] or whether a structure[72] or steam whistle[73] is liable to frighten horses.

§ 595. Skill

Possession of the skill necessary to do a certain act may be an attendant circumstance of probative value in identifying the doer of the act.

Possession of the skill necessary to do a certain act may be an attendant circumstance of probative value in identifying the doer of the act. Existence of such skill may be shown by prior acts indicative of its possession,[74] but skill shown at a later period does not establish it at a time earlier by an appreciable interval.[75] Where the act in question shows lack of skill or was done in a bungling manner, evidence that the party claimed to have done the act is so unskilled that he would have done it in that way, if at all, has been regarded as competent.[76]

§ 596. Presence at Given Locality

Acts done at a time other than that in question may be competent to show that a person was present at a particular place at a given time.

Acts done at a time other than that in question

62. Cal.—Fishel v. F. M. Ball & Co., 256 P. 493, 83 Cal.App. 128.

63. Ky.—Keene's Ex'x v. Newton, 232 S.W. 71, 192 Ky. 6.
Md.—Bregel v. Cooper, 157 A. 719, 161 Md. 416.
Mo.—Shrum v. Brill, App., 230 S.W. 367.
Nev.—Nelson v. Reinhart, 219 P. 554, 47 Nev. 246, rehearing denied 221 P. 521, 47 Nev. 246.
22 C.J. p 191 notes 60–63, 68.

64. U.S.—Coco-Cola Co. v. Moore, Ark., 256 F. 640, 168 C.C.A. 34.
Mass.—Rooney v. Porter Milton Ice Co., 175 N.E. 485, 275 Mass. 254.

65. Iowa.—Olson v. Shuler, 210 N. W. 453, 203 Iowa 518.
Tex.—Brown & Root v. Hausenfluck, Civ.App., 293 S.W. 842.
22 C.J. p 191 note 65.

66. Kan.—United Iron Works v. L. J. Smith Const. Co., 227 P. 369, 116 Kan. 482.
Miss.—Simmons v. Bainter, 125 So. 338, 155 Miss. 804.
Mo.—Beebe v. Columbia Axle Co., 117 S.W.2d 624, 233 Mo.App. 212.
N.Y.—Horn v. City of Jamestown, 7 N.Y.S.2d 62, 255 App.Div. 824.
Tex.—Ford v. Wichita Falls & S. Ry. Co., Civ.App., 253 S.W. 932.
Wash.—McGee v. Wilson Fisheries Co., 208 P. 1090, 121 Wash. 196.
22 C.J. p 191 notes 66, 67.

67. Pa.—McCullough v. Holland Furnace Co., 141 A. 631, 293 Pa. 45.

Probable earning capacity of child may be proved by evidence of the earnings of children in the same locality.—Neidlinger v. Haines, 200 A. 581, 331 Pa. 529.

Partnership profits

In an action by one partner against a copartner to recover his share of the net profits of the partnership during a certain year, evidence as to the profits or loss of the business during another year has been held inadmissible.—Hatzfeld v. Walsh, 120 S.W. 525, 55 Tex.Civ.App. 573.

68. Ky.—Beaver Dam Coal Co. v. Brashear, 54 S.W.2d 609, 246 Ky. 69.
22 C.J. p 763 note 74, p 764 note 80.

69. Ill.—Blalock v. Randall, 76 Ill. 224.
Mo.—Turner v. Missouri-Kansas-Texas R. Co., 142 S.W.2d 455, 462, 129 A.L.R. 829, citing **Corpus Juris**.
Tex.—Williams v. Gardner, Civ.App., 215 S.W. 981.

70. Ind.—Baber v. Rickart, 52 Ind. 594.
Mass.—Waters' Patent Heating Co. v. Smith, 120 Mass. 444.

71. Mass.—Whitney v. Leominster, 136 Mass. 25.

72. Conn.—House v. Metcalf, 27 Conn. 631.
22 C.J. p 764 note 78.

73. Me.—Crocker v. McGregor, 76 Me. 282, 49 Am.R. 611.

74. Ky.—Paducah First Nat. Bank v. Wisdom, 63 S.W. 461, 111 Ky. 135, 23 Ky.L. 530.
22 C.J. p 764 note 82 [a].

75. N.H.—Leighton v. Sargent, 31 N.H. 119, 64 Am.D. 323.
22 C.J. p 764 note 83.

76. Ky.—Clark v. Commonwealth, 63 S.W. 740, 111 Ky. 443, 23 Ky.L. 1029.

may be competent to show that a person was present at a particular place at a given time.[77]

§ 597. System of Coördinate Action

Evidence of attendant circumstances may be admissible to prove that the act in question was done as a necessary part of a general scheme or plan to attain a definite object.

An attendant circumstance of highly probative value may in some cases be found in the existence of such a series or system of coördinated or corelated facts as lead to the inference that the particular act which is under investigation must have been done as a necessary part of a general plan to attain a definite object and that it was done by the person to whose real or supposed interest the particular act would redound. The acts or other facts constituting such an attendant circumstance may be shown to indicate the existence of a systematized plan or comprehensive design;[78] but such evidence is not admissible to prove a general scheme or plan where the intent, purpose, or motive behind the act in question is not an issue in the case.[79] If several acts or representations are so connected that they form an inseparable part of the act or representation on which the suit is based, and a complete account of the latter cannot be given without detailing the particulars of the former, then evidence concerning the former may be received.[80]

XVI. CAUSATION ESTABLISHED BY INDUCTION

§ 598. Results Where Alleged Cause Present

Evidence of the persistent recurrence of a given result, when one antecedent alone remains constant, is admissible to prove that this antecedent is the cause of the result.

Evidence of the persistent recurrence of a given result when one antecedent alone remains constant is received and regarded as highly probative that this antecedent is the cause of the result.[81] This rule is not limited in its application to the inanimate or brute animal; and the same principle of cause and effect may be used to derive an inference that human conduct has fallen short of required standards.[82] Such evidence has been held relevant where it is claimed that the occurrence out of which the action arose was due to a defect in a hedge,[83] a highway,[84] machinery,[85] or a roadbed;[86] to an improper system of directing the affairs of a municipal corporation;[87] or to the frightening of a horse or other animal by a particular structure,[88] or by a steam whistle.[89]

On the other hand, it is entirely relevant to prove instances where the alleged cause was present and the result failed to follow,[90] provided the other conditions are shown to be sufficiently similar to render the evidence relevant.[91] Remoteness of the other occurrences merely goes to the weight of the evidence.[92]

§ 599. Results Where Alleged Cause Absent

On an issue whether a result was the effect of a specified cause, it may be relevant to show that, where the cause specified was not present in a combination of

77. Mo.—State v. Spray, 74 S.W. 846, 174 Mo. 569.
22 C.J. p 764 note 85.

78. Ark.—McCaskey Register Co. v. McCurry, 26 S.W.2d 1108, 181 Ark. 649—National Novelty Import Co. v. Ellis, 220 S.W. 467, 143 Ark. 413.
Kan.—Pioneer Nat. Life Ins. Co. v. Nall, 67 P.2d 518, 145 Kan. 785.
Md.—Home Credit Co. v. Fouch, 142 A. 515, 155 Md. 384.
Minn.—Albrecht v. Rathai, 185 N.W. 259, 150 Minn. 256.
N.Y.—Altman v. Ozdoba, 142 N.E. 591, 237 N.Y. 218, 33 A.L.R. 422, reversing 198 N.Y.S. 898, 206 App. Div. 610.
Ohio.—Hayes v. Lindquist, 153 N.E. 269, 22 Ohio App. 58.
Tex.—Massirer v. Milam, Civ.App., 223 S.W. 302.
W.Va.—Shingleton Bros. v. Lasure, 6 S.E.2d 252—Hill v. Ansted Nat. Bank, 123 S.E. 417, 95 W.Va. 649.
22 C.J. p 764 notes 86–89.

79. Tex.—Lott v. Dashiell, Civ.App., 233 S.W. 1103, modified on other grounds Dashiel v. Lott, Com.App., 243 S.W. 1072.
Wash.—May v. Roberts, 219 P. 55, 126 Wash. 645—Great Western Motors v. Hibbard, 192 P. 958, 112 Wash. 541.

80. Wash.—May v. Roberts, 219 P. 55, 126 Wash. 645.

81. S.C.—Willcox, Ives & Co. v. Jeffcoat, 133 S.E. 463, 135 S.C. 149.
Tex.—Gulf, C. & S. F. Ry. Co. v. Downs, Civ.App., 70 S.W.2d 318, error refused.
22 C.J. p 765 note 91.

82. U.S.—Hadley v. Baltimore & O. R. Co., C.C.A.Pa., 120 F.2d 993.

83. N.Y.—Rogers v. Trustees of New York & Brooklyn Bridge, 54 N.E. 1094, 159 N.Y. 556.

84. U.S.—District of Columbia v. Arms, D.C., 2 S.Ct. 840, 107 U.S. 519, 27 L.Ed. 618.
22 C.J. p 765 note 93.

85. Ga.—Georgia Cotton Oil Co. v. Jackson, 37 S.E. 873, 112 Ga. 620.
22 C.J. p 765 note 94.

86. N.Y.—Wilder v. Metropolitan St. R. Co., 41 N.Y.S. 931, 10 App. Div. 364, affirmed 57 N.E. 1128, 161 N.Y. 665.

87. Ga.—Augusta v. Hafers, 61 Ga. 48, 34 Am.R. 95.

88. Conn.—House v. Metcalf, 27 Conn. 631.
22 C.J. p 765 note 97.

89. Me.—Crocker v. McGregor, 76 Me. 282, 49 Am.R. 611—Hill v. Portland & R. R. Co., 55 Me. 438, 92 Am.D. 601.

90. N.Y.—H. F. Bindseil & Son v. Aaron Littman & Co., 182 N.Y.S. 176, 111 Misc. 624.
22 C.J. p 765 note 1.

91. Mass.—Hawks v. Charlemont, 110 Mass. 110—Standish v. Washburn, 21 Pick. 237.
22 C.J. p 765 note 2.

92. Ohio.—Lake Shore, & M. S. R. Co. v. Beall, 13 Ohio Cir.Ct. 605, 6 Ohio Cir.Dec. 250.

antecedents otherwise similar, the result did, or did not, occur.

It is competent, as tending to fix the cause of a certain result, to show other instances where the specified cause was not present in a combination of antecedents otherwise similar, and the result did not follow,[93] or, on the other hand, as tending to refute a contention that a result was the effect of a certain cause, to show other instances where the alleged cause was not present but the same result nevertheless followed.[94]

§ 600. Results Indicating a Different Cause

Where a certain cause is claimed to have produced a particular result, it may be proper to show other occurrences on other occasions which indicate that there was another cause for the result.

It has been considered that where a certain cause is claimed to have produced a particular result it is competent to show other occurrences on other occasions which indicate that there was another cause for the result,[95] although evidence of this character has been rejected as introducing new and unnecessary issues into the case.[96] It is further possible logically to contend that, where a new element is added, other conditions remaining constant, a variation in result is due to the operation of the new element.[97]

XVII. DEMONSTRATIVE OR REAL EVIDENCE; INSPECTION

A. IN GENERAL

§ 601. General Statement

Demonstrative or real evidence is evidence addressed directly to the senses without the intervention of witnesses, as by actual sight, hearing, or taste.

The tribunal of fact receives evidence through three channels: Inspection; documents; and witnesses.[98]

Demonstrative or real evidence, or evidence by inspection, is such evidence as is addressed directly to the senses of the court or jury without the intervention of the testimony of witnesses,[99] as where various things are exhibited in open court.[1] Such evidence is not confined to that which is perceived by the sense of vision, but other applications are found in cases where the triers of fact ascertain something through the sense of hearing[2] or taste.[3]

§ 602. Power and Duty of Court

The admission or rejection of demonstrative or real evidence rests largely in the discretion of the trial court.

What the court will allow the jury to see for itself is largely within the administrative function of the judge who will permit the use of the court room for deviations from the usual routine of trials only when satisfied that the interests of substantial justice warrant him in so doing.[4] It is part of his function to decide necessary preliminary questions of fact,[5] such as the identity of articles offered in evidence;[6] and, having reached the conclusion that the information to be gained by inspection is relevant, the court decides, for example, whether the jury shall be granted or refused a view of real

93. Mich.—Waterman - Waterbury Co. v. Wyoming Tp. School Dist. No. 2, 148 N.W. 673, 182 Mich. 498, 501, L.R.A.1915B 626.
22 C.J. p 765 note 5.

94. Pa.—Vautier v. Atlantic Refining Co., 79 A. 814, 231 Pa. 8.
22 C.J. p 765 note 6.

95. Del.—Wilmington Dental Mfg. Co. v. Adams Express Co., 32 A. 250, 13 Del. 329.
22 C.J. p 765 note 7.

96. Mass.—Hathaway v. Tinkham, 19 N.E. 18, 148 Mass. 85.
22 C.J. p 766 note 8 [a].

97. Mass.—Finn v. Clark, 12 Allen 522.

98. Okl.—Reed v. Terr., 98 P. 583, 1 Okl.Cr. 481, 129 Am.S.R. 861.

99. N.Y.—Garbarsky v. Simkin, 73 N.Y.S. 199, 36 Misc. 195.
Vt.—Riggie v. Grand Trunk Ry. Co., 107 A. 126, 93 Vt. 282, error dismissed 41 S.Ct. 5, 254 U.S. 658, 65 L.Ed. 461.
22 C.J. p 766 note 11.

1. Mich.—Finch v. W. R. Roach Co., 295 N.W. 324, 295 Mich. 589.
22 C.J. p 766 note 11.
Corpus Juris cited in holding that action of trial court in viewing premises was not prejudicial.—Watt v. Lee, 191 So. 628, 633, 238 Ala. 451.
View and inspection by:
Court see the C.J.S. title Trial § 588, also 64 C.J. p 1201 note 50 et seq.
Jury see the C.J.S. title Trial § 47, also 64 C.J. p 87 note 23—p 90 note 73.

2. U.S.—Reed v. Carusi, C.C.Md., 20 F.Cas.No.11,642, Taney 72.
22 C.J. p 766 note 13.
Corpus Juris cited as to right to play records in the presence of the jury in a criminal prosecution.—Commonwealth v. Clark, 187 A. 237, 240, 123 Pa.Super. 277.

3. Mich.—People v. Kinney, 83 N.W. 147, 124 Mich. 486.
22 C.J. p 766 note 14.

4. Mo.—Perringer v. Lynn Food Co., App., 148 S.W.2d 601—Carlson v. Kansas City, Clay County & St. Joseph Auto Transit Co., 282 S.W. 1037, 221 Mo.App. 537.
22 C.J. p 766 note 15.
Use of articles for comparison
Trial court which has permitted exhibition of articles in dispute may refuse to permit, for purposes of comparison, exhibition of other articles not shown to be of the same character as those in dispute.—Harrild v. Spokane School Dist., 192 P. 1, 112 Wash. 266, 19 A.L.R. 811.

5. U.S.—J. R. Hanify Co. v. Westberg, C.C.A.Or., 16 F.2d 552, 554, citing **Corpus Juris.**
Preliminary questions as to photographs see infra § 716.

6. U.S.—J. R. Hanify Co. v. Westberg supra, citing **Corpus Juris.**
22 C.J. p 766 note 17.

or personal property.[7] The court may, in its discretion, refuse to compel a party to submit articles to the inspection of the jury.[8] Demonstrative or inspection evidence should be received where it is both relevant and highly probative, and better evidence cannot reasonably be expected, and the dangers of its use are small in comparison to the advantages.[9]

Demonstrative evidence should be admitted only where it is of real assistance and it will not likely be given undue weight by the jury.[10] It should not be admitted merely to arouse feeling,[11] as by unduly exciting antipathy[12] or sympathy.[13] Inspection may be refused where, in the opinion of the court, the evidence would be likely to mislead the jury,[14] or bewilder them with a number of preliminary[15] or collateral[16] issues; where the fact sought to be proved is insufficiently[17] or only remotely[18] connected with the issues; where it is not deemed necessary to run the dangers incidental to the use of this class of evidence, because the party has a better grade of evidence which he can produce,[19] or the articles are so cumbrous that their exhibition would impede the ordinary administration of justice;[20] or where the exhibition would be indecent[21] or offensive to the sensibilities[22] without compensating advantages.

Review. It has been stated that the discretionary action of the trial court in admitting or rejecting demonstrative evidence is not subject to review,[23] and the usual practice of appellate courts is to decline such review.[24] It may be doubted, however, whether in point of law any discretion exists in these connections which would not equally be applicable to the evidence furnished by witnesses;[25] and an unreasonable exercise of discretion has been held to constitute error.[26]

The practical difficulty in securing a review is that the evidence gained by inspection cannot easily be reported for consideration by an appellate court.[27]

§ 603. Amplification or Explanation of Evidence

Use of the body, articles, furniture, etc., by the witness or counsel may be permitted to illustrate or explain the evidence.

A witness may use his own body,[28] or a member of his body,[29] or an article,[30] to illustrate or explain

7. Ill.—Tudor Iron Works v. Weber, 21 N.E. 1078, 129 Ill. 535, 538.
22 C.J. p 767 note 19.
View and inspection by jury see the C.J.S. title Trial § 47, also 64 C.J. p 87 note 23 et seq.

8. Mich.—Withey v. Pere Marquette R. Co., 104 N.W. 773, 141 Mich. 412, 113 Am.S.R. 533, 1 L.R.A.,N.S., 352, 7 Ann.Cas. 57.
22 C.J. p 767 note 32.

9. Ky.—South Covington & C. St. R. Co. v. Finan's Adm'x, 155 S.W. 742, 153 Ky. 340.
Mass.—Commonwealth v. Holliston, 107 Mass. 232.

10. Conn.—Sellew v. City of Middletown, 185 A. 67, 121 Conn. 331.

11. Or.—Patterson v. Howe, 202 P. 225, 102 Or. 275.

12. **Photograph**
Wis.—Selleck v. Janesville, 80 N.W. 944, 104 Wis. 570, 76 Am.S.R. 892, 47 L.R.A. 691.

13. Ala.—Louisville & N. R. Co. v. Pearson, 12 So. 176, 97 Ala. 211.
22 C.J. p 767 note 23.

14. U.S.—Republic Iron, etc., Co. v. Yanuszka, C.C.A.Ohio, 166 F. 684, 92 C.C.A. 280.
22 C.J. p 767 note 21.

15. W.Va.—Hood v. Bloch, 11 S.E. 910, 29 W.Va. 244.

16. Ill.—Tudor Iron-Works v. Weber, 21 N.E. 1078, 129 Ill. 535.
22 C.J. p 767 note 25.

17. N.J.—Calabrese v. Calabrese, 135 A. 499, 5 N.J.Misc. 38.
22 C.J. p 767 note 26.

18. U.S.—Osborne v. Detroit, C.C. Mich., 32 F. 36, reversed on other grounds 10 S.Ct. 1012, 135 U.S. 492, 34 L.Ed. 260.

19. Ind.—Hagee v. Grossman, 31 Ind. 223.
22 C.J. p 767 note 28.

20. Tenn.—Jackson v. Pool, 19 S. W. 324, 91 Tenn. 448.
22 C.J. p 767 note 29.

21. Iowa.—Garvik v. Burlington, C. R. & N. R. Co., 100 N.W. 498, 124 Iowa 691.
22 C.J. p 767 note 30.

22. Conn.—Knowles v. Crampton, 11 A. 593, 55 Conn. 336.

23. Conn.—Knowles v. Crampton, supra.
22 C.J. p 767 note 34.
Review of rulings of trial court with respect to reception of evidence see Appeal and Error, § 1604.

24. Conn.—Harris v. Ansonia, 47 A. 672, 73 Conn. 359.
Mo.—Carlson v. Kansas City, Clay County & St. Joseph Auto Transit Co., 282 S.W. 1037, 1040, 221 Mo.App. 537, citing **Corpus Juris.**
Utah.—Balle v. Smith, 17 P.2d 224, 234, 81 Utah 179, citing **Corpus Juris.**

25. N.Y.—People v. Gonzalez, 35 N. Y. 49.

26. Tex.—Hays v. Gainesville St. R. Co., 8 S.W. 491, 70 Tex. 602, 8 Am. S.R. 624.
22 C.J. p 767 note 37.

27. Ind.—Ihinger v. State, 53 Ind. 251—Stephenson v. State, 28 Ind. 272.

28. Iowa.—Horan v. Chicago, St. P., M. & O. R. Co., 56 N.W. 507, 89 Iowa 328.
Pa.—Byers v. Baltimore & O. R. Co., 72 A. 245, 222 Pa. 547.

29. Tenn.—Arkansas River Packet Co. v. Hobbs, 58 S.W. 278, 105 Tenn. 29.
22 C.J. p 767 note 40.

30. Wash.—Buckley v. Massachusetts Bonding & Insurance Co., 192 P. 924, 113 Wash. 13.
22 C.J. p 767 note 41.
Test shells
In action on life policy wherein defense was suicide, exclusion of test shells used by insurer's witnesses in performing experiments to determine method of discharge of insured's gun was abuse of discretion, where shells used in experiments performed by plaintiff's witnesses had been admitted on same issue.—Falkinburg v. Prudential Ins. Co. of America, 273 N.W. 478, 132 Neb. 831.
Trolley rail was properly used for illustrative purposes, although not obtained from the track in question or exactly like its rails.—Ireland v. Connecticut Co., 150 A. 520, 111 Conn. 521.

the evidence. In the same way counsel, to show its meaning on their theory of the case, may make any use of the court room[31] or furniture;[32] and it has also been held permissible to use the furniture from the room where a crime was committed, arranged so as to illustrate the testimony of a witness.[33]

It has been held, however, that illustrations of counsel by the use of models, mechanical apparatus, and the like do not furnish evidence, although made in the presence of the jury.[34]

Photographs. The use of photographs is considered infra §§ 709–716.

§ 604. —— Casts

Casts of relevant objects may be exhibited.

Casts of relevant objects[35] made in plaster,[36] sand,[37] or other suitable substances may be exhibited to the jury.

§ 605. —— Duplicates

Duplicates of an article, or similar articles, may be admitted in evidence if they are of aid to the jury.

In any case where the nature and properties of an article require consideration, it is proper to submit a duplicate or facsimile conveying a correct impression.[38]

Likewise an article similar[39] in principle[40] to the one in issue is admissible; but the trial court may exclude an article similar to the one in question where its admission would not aid the jury.[41]

§ 606. —— Models

In a proper case the court may, in its discretion, admit properly authenticated models.

In cases where the things they represent are relevant, models, when properly identified and authenticated,[42] are admissible as a species of real evidence of the things which they represent.[43] They are admissible for illustration in connection with testimony,[44] or to give more accurate information of objects which cannot be conveniently shown or described to the jury,[45] or for any other relevant

31. **Wall and door**
Cal.—Peo. v. Chin Han, 41 P. 697, 108 Cal. 597.

32. **Chairs and tables**
Tenn.—Louisville & N. R. Co. v. Ray, 46 S.W. 554, 101 Tenn. 1.

33. Tenn.—Hughes v. State, 148 S.W. 543, 126 Tenn. 40, Ann.Cas. 1913D 1262.

34. **Hydraulics**
Pa.—Hoffman v. Bloomsburg & S. R. Co., 22 A. 823, 143 Pa. 503.

35. N.Y.—Berlin v. Miller, 194 N.Y.S. 787.
22 C.J. p 768 note 47.
Artificial teeth
N.Y.—Berlin v. Miller, supra.

36. Ill.—Dinwiddie v. Siefkin, 20 N.E.2d 130, 299 Ill.App. 316.
22 C.J. p 768 note 48.

37. N.J.—Johnson v. State, 37 A. 949, 39 A. 646, 59 N.J.Law 535, 38 L.R.A. 373, reversing 35 A. 787, 59 N.J.Law 271.

38. Cal.—Smith v. McClary, 82 P.2d 712, 28 Cal.App.2d 468.
N.H.—Land Finance Corporation v. Grafton County Electric Light & Power Co., 144 A. 845, 83 N.H. 518.
N.C.—Williams v. Charles Stores Co., 184 S.E. 496, 209 N.C. 591.
Or.—Murray v. Firemen's Ins. Co. of Newark, N.J., 254 P. 817, 818, 121 Or. 165, quoting **Corpus Juris.**
Wash.—Toole v. Franklin Inv. Co., 291 P. 1101, 158 Wash. 696.
22 C.J. p 768 note 50.
Production of part of article
Where defendants offered in evidence a lid to a can, which was identical with the lid of the can involved, it was not necessary for defendants to produce the can which the lid fitted to entitle them to introduce the lid.—Smith v. McClary, 82 P.2d 712, 28 Cal.App.2d 468.

39. Cal.—Johnston v. Peairs, 3 P.2d 617, 117 Cal.App. 208.
Mo.—Page v. Unterreiner, App., 106 S.W.2d 528.
N.Y.—Cuebas v. Klein, 61 N.Y.S. 823.
22 C.J. p 767 note 41 [b], [c].

40. N.H.—Bridges v. Great Falls Mfg. Co., 156 A. 697, 85 N.H. 220.

41. Mo.—Perringer v. Lynn Food Co., App., 148 S.W.2d 601.
Composition of article not in question
In action for injuries sustained by slipping in water which had been spilled and which employee had attempted to wipe up with a burlap or gunny sack, exclusion from evidence of a sack similar to the one used by the employee was not error, where sack had been described to jury and question was not the kind of material used to wipe up the water, but the care used in wiping it up.—Perringer v. Lynn Food Co., supra.

42. Ky.—Cincinnati, N. O. & T. P. Ry. Co. v. Duvall, 92 S.W.2d 363, 366, 263 Ky. 387, quoting **Corpus Juris.**
22 C.J. p 768 note 51.
Bust of deceased
Bust prepared from pictures of deceased by so-called method of "dynamic symmetry" is incompetent to show resemblance to one claiming as his son.—In re Wendel's Estate, 262 N.Y.S. 41, 146 Misc. 260.
Determination of preliminary question
(1) "The trial court determines within discretionary limits the preliminary question of whether the model is a fair representation of the ultimate fact."—Finch v. W. R. Roach Co., 295 N.W. 324, 326, 295 Mich. 589.
(2) When correctness of illustrative representation of ultimate fact by model introduced in evidence is disputed, and there is room for finding in favor of party offering it, trial court may admit it, and submit such question to jury for ultimate determination.—Finch v. W. R. Roach Co., supra.

43. Ala.—Pettus v. Louisville & N. R. Co., 106 So. 807, 214 Ala. 187.
Ky.—Cincinnati, N. O. & T. P. Ry. Co. v. Duvall, 92 S.W.2d 363, 366, 263 Ky. 387, quoting **Corpus Juris.**
Neb.—Falkinburg v. Prudential Ins. Co. of America, 273 N.W. 478, 482, 132 Neb. 831, citing **Corpus Juris.**
22 C.J. p 768 note 52.

44. Colo.—Small v. Clark, 263 P. 933, 83 Colo. 211.
Ill.—Gerrard v. Porcheddu, 243 Ill. App. 562.
Tex.—Davis v. Callen, Civ.App., 250 S.W. 305.

45. Ill.—The Central Illinois Public Service Co. v. Deterding, 162 N.E. 865, 331 Ill. 277.
Mich.—Finch v. W. R. Roach Co., 295 N.W. 324, 326, 295 Mich. 589.
Nonverbal mode of expressing testimony
A model is used as a nonverbal mode of expressing the testimony of

purpose,[46] although their admission in any particular case is a matter resting in the discretion of the trial court.[47] Thus a model of a machine,[48] a mechanical device,[49] or a bridge[50] may be submitted to the jury to aid them in understanding how an event occurred or might have been prevented.

A model may be used even though it is not a facsimile in every detail.[51]

§ 607. Articles in General

Articles relevant to the issues may be introduced for inspection if they are satisfactorily identified and in substantially the same condition as at the time in controversy.

Any article or substance made important by the evidence or by the nature of the investigation may be introduced for inspection.[52] Inspection evidence of this character may range over any line of human activity, as building[53] or mechanical[54] trades, the medical or surgical profession,[55] or nautical affairs.[56] Application of the rule is found in the production of the tools or implements with which a certain act was, or is claimed to have been, done,[57] or the clothing which was worn or which is claimed to have been worn by a person at the time of an occurrence in controversy.[58]

In order that an article may be so introduced it must be satisfactorily identified,[59] and it must also

a witness.—Finch v. W. R. Roach Co., supra.

The aid furnished by it must be sponsored by a witness who uses the model to relate his personal knowledge or scientific skill and understanding.—Finch v. W. R. Roach Co., supra.

46. Wash.—Moran Bros. Co. v. Snoqualmie Falls Power Co., 69 P. 759, 29 Wash. 292.
22 C.J. p. 768 note 53.

47. U.S.—New York Life Ins. Co. v. Gamer, C.C.A.Mont., 106 F.2d 375, certiorari denied 60 S.Ct. 294, 308 U.S. 621, 84 L.Ed. 518.
Cal.—San Mateo County v. Christen, 71 P.2d 88, 22 Cal.App.2d 375.
22 C.J. p 768 note 54.

48. Ill.—Pennsylvania Coal Co. v. Kelly, 40 N.E. 938, 156 Ill. 9.
Or.—Burroughs v. Curtiss Lumber Co., 114 P. 103, 58 Or. 270.

49. Tex.—Davis v. Callen, Civ.App., 250 S.W. 305.
22 C.J. p 768 note 56.

50. N.Y.—Coolidge v. New York, 90 N.Y.S. 1078, 99 App.Div. 175, affirmed 77 N.E. 1192, 185 N.Y. 529.

51. Mich.—Finch v. W. R. Roach Co., 295 N.W. 324, 295 Mich. 589.
22 C.J. p 768 note 51 [b].

52. U.S.—Pilot Life Ins. Co. v. Wise, C.C.A.Ga., 61 F.2d 481, 483, citing **Corpus Juris**—Atles v. U. S., C.C.A.N.J., 50 F.2d 808, 78 A.L.R. 435.
Ark.—Coca-Cola Bottling Co. v. Hill, 90 S.W.2d 210, 192 Ark. 154.
Ind.—Walker Hospital v. Pulley, 127 N.E. 559, 74 Ind.App. 659, rehear-denied 128 N.E. 933, 74 Ind.App. 659.
Md.—Town of Salisbury v. Camden Sewer Co., 118 A. 662, 141 Md. 254.
Minn.—Noetzelman v. Webb, 283 N. W. 481, 204 Minn. 26.
Mo.—Morrow v. Missouri Gas & Electric Service Co., 286 S.W. 106, 117, 315 Mo. 367, citing **Corpus Juris.**
Neb.—Thamann v. Merritt, 186 N.W. 1003, 107 Neb. 602.
Okl.—Greis v. Mitchell, 90 P.2d 894, 185 Okl. 136.
Pa.—Heller v. Equitable Gas Co., 3 A.2d 343, 333 Pa. 433.
22 C.J. p 769 note 64.

Dust

In action against employer for illness resulting from poisoning, jars of dust collected from room where employee worked were admissible.—Davis v. New Jersey Zinc Co., 182 A. 850, 116 N.J.Law 103.

Objects showing excessive electricity

In action for death from electric shock, broken glasses and lamp globes were admissible to show excessive current.—Tucson Gas, Electric Light & Power Co. v. Doe, 236 P. 464, 28 Ariz. 140.

53. Tex.—Linch v. Paris Lumber & Grain Elevator Co., 15 S.W. 208, 80 Tex. 23.
22 C.J. p 770 note 66.

Time of detachment of fragments of building

In action for death of window cleaner, stone fragments were improperly admitted, in absence of proof indicating time when they had become detached from window ledge.—Andross v. Trustees of Columbia University in City of New York, 23 N.Y.S.2d 285, 260 App.Div. 941.

54. Ill.—Pennsylvania Coal Co. v. Kelly, 40 N.E. 938, 156 Ill. 9.
22 C.J. p 770 note 67.

55. Iowa.—Evans v. Roberts, 154 N.W. 923, 172 Iowa 653.
22 C.J. p 770 note 68.

Surgical instruments and appliances

(1) Surgical instruments and appliances may be produced for inspection.—Evans v. Roberts, 154 N. W. 923, 172 Iowa 653—22 C.J. p 770 note 68 [a], [b].

(2) However, they should not be exhibited and described unnecessarily.—McHale v. McQuigg, 236 Ill. App. 295.

56. Mich.—Stevenson v. Michigan Log Towing Co., 61 N.W. 536, 103 Mich. 412.
22 C.J. p 770 note 69.

57. Tex.—U. S. Torpedo Co. v. Liner, Civ.App., 300 S.W. 641, reversed on other grounds Liner v. U. S. Torpedo Co., Com.App., 12 S.W.2d 552, affirmed 16 S.W.2d 519.
22 C.J. p 770 note 70.

58. Kan.—Stone v. City of Pleasanton, 223 P. 312, 115 Kan. 378.
Md.—O'Neill & Co. v. Crummitt, 190 A. 763, 172 Md. 53.
Mo.—Kirkpatrick v. Wells, 51 S.W. 2d 36—Carlson v. Kansas City, Clay County & St. Joseph Auto Transit Co., 282 S.W. 1037, 221 Mo.App. 537.
Tenn.—Roddy Mfg. Co. v. Dixon, App., 105 S.W.2d 513, 519, quoting **Corpus Juris.**
Tex.—Booth Termite & Chemical Co. v. Manuel, Civ.App., 138 S.W.2d 857, error dismissed, judgment correct—Jaffe v. Deckard, Civ. App., 261 S.W. 390—Texas & N. O. R. Co. v. Spencer, Civ.App., 244 S. W. 1089.
22 C.J. p 770 note 71.

Shoes

Colo.—Southern Colorado Power Co. v. Pestana, 251 P. 224, 80 Colo. 375.
Ill.—Wagner v. Chicago, R. I. & P. R. Co., 115 N.E. 201, 277 Ill. 114—Woodruff v. Mutual Life Ins. Co. of New York, 229 Ill.App. 213.
Ind.—Propst v. Spitznagle, 19 N.E. 2d 263, 215 Ind. 402.

Second production of clothing of injured passenger showing rents and blood stains was not erroneous where it was made in connection with proper cross-examination.—Carlson v. Kansas City, Clay County & St. Joseph Auto Transit Co., 282 S.W. 1037, 221 Mo.App. 537.

59. U.S.—Pilot Life Ins. Co. v. Wise, C.C.A.Ga., 61 F.2d 481, 483, citing **Corpus Juris**—Davis v. Reynolds, C.C.A.Va., 280 F. 363,

be shown to the satisfaction of the court that no such substantial change in the article exhibited as to render the evidence misleading has taken place.[60] However, it is not necessary that the article be identically the same as at the time in controversy.[61] It is unnecessary to show an absence of tampering on the part of every person through whose hands the article has passed;[62] as long as the article can be identified it is immaterial in how many or in whose hands it has been.[63] A direct statement that the article was in the same condition at the time of an occurrence as at a subsequent time is not required if it sufficiently appears that it must have been in substantially the same condition.[64]

Samples. Samples are admissible on an issue as to the properties or qualities of the substance or articles involved in the case.[65] The samples must be sufficiently identified[66] as to their source,[67] and must reflect the condition of the substance or articles as of the time involved in the issues.[68] Where

certiorari denied 42 S.Ct. 383, 258 U.S. 627, 66 L.Ed. 798.
22 C.J. p 771 note 72.

Identification held sufficient
(1) Bottles.
U.S.—Chapman v. Alton R. Co., C.C.A.Ill., 117 F.2d 669.
Ala.—Coca-Cola Bottling Co. v. Barksdale, 88 So. 36, 17 Ala.App. 606.

(2) Nail found in food.—Wilson v. Deschner, 167 A. 670, 11 N.J.Misc. 609.

(3) Pieces of pipe.—Heller v. Equitable Gas Co., 3 A.2d 343, 333 Pa. 433.

(4) Plank.—Norton v. Anderson, 2 P.2d 266, 164 Wash. 55.

(5) Rim of wheel.—Chicago, R. I. & P. Ry. Co. v. Murphy, 86 P.2d 629, 184 Okl. 240.

(6) Steel fragment from water tank.—Suko v. Northwestern Ice & Cold Storage Co., Or., 113 P.2d 209.

(7) Stones thrown by blasting.—Colyer v. James, 30 S.W.2d 882, 235 Ky. 197.

(8) Traveler ring.—Brazeale v. Piedmont Mfg. Co., 193 S.E. 39, 184 S.C. 471.

(9) Wooden pin used to hold wire.—Robbins v. Thies, 189 A. 67, 117 N.J.Law 389.

(10) Other cases see 22 C.J. p 771 note 72 [a].

Identification held insufficient
(1) Branch of tree.—Anstead v. Pacific Gas & Electric Co., 265 P. 487, 203 Cal. 634.

(2) Bullet.—McCarthy v. Anaconda Copper Mining Co., 225 P. 391, 70 Mont. 309.

(3) Ends of cross-ties.—Bush v. Moore, 95 So. 62, 19 Ala.App. 88.

(4) Liquor bottles.
U.S.—Pilot Life Ins. Co. v. Wise, C.C.A.Ga., 61 F.2d 481.
Wash.—Dyer v. Missouri State Life Ins. Co., 232 P. 346, 132 Wash. 378, affirmed 236 P. 807, 135 Wash. 693.

(5) Piece of steel.—Scottish Nav. Co. v. Munson S. S. Line, D.C.N.Y., 60 F.2d 101, affirmed, C.C.A., 10 F.2d 708.

(6) Sill step.—Davis v. Reynolds, C.C.A.Va., 280 F. 363, certiorari denied 42 S.Ct. 383, 258 U.S. 627, 66 L.Ed. 798.

Prima facie identification
Where a party positively identifies an article as the one involved in the case, such identification is prima facie sufficient to admit it in evidence, leaving to the jury the ultimate fact of its identification.—Burris v. American Chicle Co., C.C.A.N.Y., 120 F.2d 218, affirming, D.C., 33 F.Supp. 104.

60. U.S.—Pilot Life Ins. Co. v. Wise, C.C.A.Ga., 61 F.2d 481, 483, citing **Corpus Juris.**
22 C.J. p 771 note 73.

Same condition held sufficiently shown
(1) Bottle and contents.
Ala.—Alabama Coca-Cola Bottling Co. v. Pope, 166 So. 682, 232 Ala. 32.
Ark.—Anheuser-Busch, Inc., v. Southard, 84 S.W.2d 89, 191 Ark. 107—Coca-Cola Bottling Co. of Arkansas v. Adcox, 74 S.W.2d 771, 189 Ark. 610.

(2) Rim of wheel.—Chicago, R. I. & P. Ry. Co. v. Murphy, 86 P.2d 629, 184 Okl. 240.

Same condition not shown
Ga.—Louisville & N. R. Co. v. Studdard, 130 S.E. 532, 34 Ga.App. 570.
22 C.J. p 771 note 73 [a].

Rebuttal evidence
Although certain grass was not admissible as evidence in chief because it was taken from the land on the day of trial and was not shown to be in the same condition as at the time of its damage, the grass was admissible to rebut testimony as to its condition a short time before trial.—Carter Oil Co. v. Holloway, 267 P. 274, 130 Okl. 272.

61. Ark.—Coca-Cola Bottling Co. v. Davidson, 102 S.W.2d 833, 193 Ark. 825.

Slight changes
An article need not be excluded for slight or immaterial changes which are pointed out.
Ill.—Geiken v. Chicago Great Western R. Co., 6 N.E.2d 690, 289 Ill. App. 45.
Ky.—Louisville & N. R. Co. v. Jackson's Adm'r, 61 S.W.2d 1104, 250 Ky. 92.

62. Minn.—Lestico v. Kuehner, 283 N.W. 122, 204 Minn. 125.
22 C.J. p 771 note 73 [b].

63. Minn.—Lestico v. Kuehner, supra.

64. Cal.—Basye v. Craft's Golden State Shows, App., 111 P.2d 746.

65. Conn.—Sellew v. City of Middletown, 185 A. 67, 121 Conn. 331.
Kan.—Board of Com'rs of Trego County v. Topeka Bridge & Iron Co., 198 P. 954, 109 Kan. 223.
Mich.—International Shoe Co. v. C. G. Fleckenstein Co., 202 N.W. 942, 229 Mich. 686.
Miss.—Illinois Cent. R. Co. v. Humphries, 155 So. 421, 170 Miss. 840.
Mo.—Asbury v. Fidelity Nat. Bank & Trust Co., 100 S.W.2d 946, 231 Mo.App. 437.
N.D.—Andrieux v. Kaeding, 181 N. W. 59, 47 N.D. 17.
Okl.—Ranney-Davis Mercantile Co. v. Morris, 223 P. 887, 88 Okl. 13.
Or.—City of Seaside v. Randles, 180 P. 319, 92 Or. 650.

66. Mass.—Flynn v. First National Stores, 6 N.E.2d 814, 296 Mass. 521.

Sale by sample
Where goods were to be delivered according to sample, plaintiff was properly permitted to introduce in evidence certain articles which he claimed were identical with the samples, the original samples having disappeared, and there being no question at the time of such introduction as to the similarity of those presented to the original.—Gustave Fox Co. v. T. F. Hunt Mfg. Co., R. I., 121 A. 382.

67. Ark.—Addington v. Jones, 234 S.W. 24, 149 Ark. 669.
Ky.—Kentucky Independent Oil Co. v. Schnitzler, 271 S.W. 570, 208 Ky. 507, 39 A.L.R. 979.
Minn.—McGuire v. Chambers, 180 N. W. 1013, 148 Minn. 57.

Exclusion until identified
Glass samples, which witness said were not from glass furnished defendants by plaintiff, were properly excluded until identified.—T. N. Glass Corporation v. Adolph Aron & Son, R.I., 147 A. 667.

68. Ill.—Yohalem v. Matalone, 225 Ill.App. 221.

offered to prove the nature of a large amount of a substance, the samples offered must appear to be representative of the whole.[69]

§ 608. Animals

Inspection of animals may be permitted unless the conditions are so different that the result might be misleading.

In a proper case animals may be produced in court for the inspection of the jury[70] or inspected by the jury outside the court room,[71] unless the conditions are so different that the result might be misleading.[72]

There is, however, authority for the opinion that a view of personalty, such as a mule, should be denied in the absence of any statute authorizing it.[73]

§ 609. Persons

The triers of fact may determine the age, color, intelligence, and other characteristics of a person by observation. The authorities do not agree as to whether paternity may be determined by observation.

The jury or the court trying an issue of fact may be allowed to judge of the age,[74] color,[75] credibility,[76] intelligence,[77] identity,[78] race,[79] and sex[80] of persons in court by observation of such persons.

According to some authorities, the triers of fact may by observation determine the existence of the relation of father and child between two persons.[81] A child born as the result of illicit intercourse may be exhibited in a subsequent civil action[82] to show its resemblance to the putative father,[83] or as corroborative evidence of the fact of intercourse and its results;[84] at least the child may be exhibited on a question of race or color.[85] According to other authorities, exhibition of a child is not permissible to prove resemblance to its alleged father;[86] and, where the question of race or color was not involved, the right to make a comparison to show resemblance has been denied in the case of an infant so young that its features and physiognomy were undeveloped.[87]

The examination and cross-examination of a party before the jury are equivalent to exhibiting him before the jury and an offer of such person as an exhibit is properly refused.[88]

§ 610. —— Exhibition of Injuries

In a proper case the court, in its discretion, may permit an injured person to exhibit his personal injuries.

Where an issue as to personal injuries or disability is involved, the injured person may be permitted to exhibit to the jury the wound or injury,[89] or the member or portion of his body on which such

69. **Representative sample shown**
U.S.—Pennsylvania R. Co. v. Fox & London, C.C.A.N.Y., 93 F.2d 669, certiorari denied Fox & London v. Pennsylvania R. Co., 58 S.Ct. 949, 304 U.S. 566, 82 L.Ed. 1532.
Representative sample not shown
Ill.—Santa Rosa-Vallejo Tanning Co. v. Charles Kronauer & Co., 228 Ill.App. 236—Yohalem v. Matalone, 225 Ill.App. 221.
Ind.—Piggly-Wiggly Stores v. Lowenstein, 147 N.E. 771, 197 Ind. 62.

70. N.Y.—Bender v. Applebaum, 108 N.Y.S. 318, 123 App.Div. 563.
22 C.J. p 768 note 60.

71. **Horse**
Miss.—Dillard v. State, 58 Miss. 368.
View and inspection by jury see the C.J.S. title Trial § 47, also 64 C. J. p 87 note 23 et seq.

72. Pa.—Blake v. Hunsberger, 46 Pa.Super. 32.
22 C.J. p 769 note 62.

73. Ga.—Peterson v. Lott, 75 S.E. 834, 11 Ga.App. 536.
22 C.J. p 769 note 63.

74. U.S.—U. S. ex rel. Fong On v. Day, C.C.A.N.Y., 54 F.2d 990, followed in U. S. ex rel. Chin Ming Gee v. Corsi, 61 F.2d 1043.
Ga.—Louisville & N. R. Co. v. Bean, 174 S.E. 209, 211, 49 Ga.App. 4, citing **Corpus Juris.**
N.Y.—Garbarsky v. Simkin, 73 N.Y.S. 199, 36 Misc. 195.
Wash.—Shephard v. Smith, 88 P.2d 601, 604, 198 Wash. 395, citing **Corpus Juris.**
22 C.J. p 787 note 62.

75. Miss.—Garvin v. State, 52 Miss. 207.
N.C.—Warlick v. White, 76 N.C. 175.

76. Ga.—Mitchell v. State, 34 S.E. 576, 110 Ga. 272.
22 C.J. p 787 note 64.

77. Mich.—Benson v. Raymond, 105 N.W. 870, 108 N.W. 660, 142 Mich. 357.
22 C.J. p 787 note 65.

78. U.S.—Williams' Case, D.C.Pa., 29 F.Cas.No.17,709, Crabbe 243.

79. Miss.—Garvin v. State, 52 Miss. 207.
22 C.J. p 787 note 67.

80. Wis.—Hermann v. State, 41 N. W. 171, 73 Wis. 248, 9 Am.S.R. 789.

81. S.C.—Rumler v. Gantt, 113 S.E. 581, 121 S.C. 117.
22 C.J. p 788 note 69.
Exhibition of child in bastardy proceedings see Bastards § 92.

82. Ala.—Phillips v. Ashworth, 124 So. 519, 220 Ala. 237.
Ga.—Morris v. Stanford, 199 S.E. 773, 58 Ga.App. 726.

83. S.C.—Rumler v. Gantt, 113 S.E. 581, 121 S.C. 117.
Testimony as to likeness
In action for damages for seduction, permitting mother to exhibit the child and to point out physical likeness to alleged parent was not error.—Bishop v. Webster, 153 S.E. 832, 154 Va. 771, rehearing denied 155 S.E. 828, 154 Va. 771.

84. Ala.—Shadix v. Brown, 113 So. 581, 216 Ala. 516.

85. Tex.—Jaffe v. Deckard, Civ.App., 261 S.W. 390.

86. N.Y.—In re Wendel's Estate, 262 N.Y.S. 41, 146 Misc. 260.
22 C.J. p 788 note 69 [b].

87. Me.—Clark v. Bradstreet, 15 A. 56, 80 Me. 454.

88. Iowa.—Ferguson v. Ferguson, 167 N.W. 471, 183 Iowa 519.
22 C.J. p 788 note 70.

89. Mich.—Zelhaver v. Koepke, 245 N.W. 490, 260 Mich. 428.
Mo.—Riepe v. Green, App., 65 S.W. 2d 667.
Or.—Sears v. Goldsmith, 298 P. 219, 221, 136 Or. 151, citing **Corpus Juris.**
Pa.—Goldberg v. Philadelphia Rapid Transit Co., 149 A. 104, 107, 299 Pa. 79, quoting **Corpus Juris.**
Tex.—Panhandle & S. F. Ry. Co. v. Jones, Civ.App., 105 S.W.2d 443—Union Indemnity Co. v. Drake,

wound or injury was inflicted,[90] at least if exhibition of the injured member is not calculated to prejudice the jury.[91] Thus the court has permitted the exhibition of an ankle,[92] a knee,[93] a foot,[94] a leg,[95] an arm,[96] a hand,[97] an eyesocket,[98] and various other parts of the body.[99] A similar exhibition may be made where the injury has resulted in the death of the injured person or the loss of a member or part of his body.[1]

Discretion of court. Whether an exhibition of injuries shall be allowed is a matter resting largely in the discretion of the trial court,[2] which will not be interfered with except in case of abuse.[3]

Extent and limitations of rule. The court may

Civ.App., 42 S.W.2d 839, 841, citing **Corpus Juris.**
22 C.J. p 788 note 71.
Demonstration of injuries see the C.J.S. title Trial § 46, also 64 C.J. p 86 note 11—p 87 note 19.

Hernia
Tex.—Kansas City, M. & O. Ry. Co. of Texas v. Foster, Civ.App., 38 S.W.2d 391.

90. Ind.—Hess v. Lowrey, 23 N.E. 156, 122 Ind. 225, 17 Am.S.R. 355, 7 L.R.A. 90.
Mo.—Evans v. General Explosives Co., 239 S.W. 487, 493, 293 Mo. 364, citing **Corpus Juris.**
Okl.—Jewel Tea Co. v. Ransdell, 69 P.2d 69, 180 Okl. 203.
Or.—Sears v. Goldsmith, 298 P. 219, 221, 136 Or. 151, citing **Corpus Juris**—Patterson v. Howe, 202 P. 225, 102 Or. 275.
Pa.—Goldberg v. Philadelphia Rapid Transit Co., 149 A. 104, 107, 299 Pa. 79, quoting **Corpus Juris.**
S.D.—Cass v. Pacific Mut. Life Ins. Co. of California, 253 N.W. 626, 62 S.D. 509, followed in 256 N.W. 120, 63 S.D. 23.
22 C.J. p 788 note 72—64 C.J. p 86 note 13.

91. U.S.—Sun Oil Co. v. Rhodes, C.C.A.Ark., 15 F.2d 790.
Or.—Lampa v. Hakola, 55 P.2d 13, 152 Or. 626.

Youth and comeliness of plaintiff
Court may allow plaintiff to exhibit injured parts to jury as against objection that such exhibition would incite jury's sympathy unduly because of witness' youth and comeliness.—Zeller v. Mayson, 179 A. 179, 168 Md. 663.

92. Mo.—Willis v. Browning, 143 S.W. 516, 161 Mo.App. 461.
Or.—Sears v. Goldsmith, 298 P. 219, 221, 136 Or. 151, citing **Corpus Juris.**

93. Md.—Zeller v. Mayson, 179 A. 179, 168 Md. 663.
Tenn.—Arkansas River Packet Co. v. Hobbs, 58 S.W. 278, 105 Tenn. 29.

94. Or.—Sears v. Goldsmith, 298 P. 219, 221, 136 Or. 151, citing **Corpus Juris.**
22 C.J. p 788 note 75.

95. Ky.—Stacy v. Williams, 69 S.W.2d 697, 253 Ky. 353—Metropolitan Life Ins. Co. v. Stanley, 6 S.W.2d 682, 224 Ky. 529.
Mo.—Turnbow v. Kansas City Rys. Co., 211 S.W. 41, 277 Mo. 644.
Pa.—Goldberg v. Philadelphia Rapid Transit Co., 149 A. 104, 107, 299 Pa. 79, quoting **Corpus Juris**—Fowler v. Sergeant, 1 Grant 355.
22 C.J. p 788 note 76.

96. Idaho.—Roy v. Oregon Short Line R. Co., 42 P.2d 476, 478, 55 Idaho 404, citing **Corpus Juris.**
Iowa.—Olson v. Tyner, 257 N.W. 538, 219 Iowa 251.
Ky.—Davis v. Antol, 278 S.W. 573, 212 Ky. 149.
22 C.J. p 788 note 77.

97. Mo.—Sampson v. St. Louis & S. F. R. Co., 138 S.W. 98, 156 Mo. App. 419.
22 C.J. p 789 note 78.

98. Mo.—Orscheln v. Scott, 90 Mo. App. 352.
22 C.J. p 789 note 79.

Removal of glass eye
Plaintiff may be permitted to remove an artificial eye in the jury's presence and exhibit the empty eye socket.
Okl.—Shell Petroleum Corporation v. Perrin, 64 P.2d 309, 179 Okl. 142.
Or.—Bowerman v. Columbia Gorge Motor Coach System, 284 P. 579, 132 Or. 106.
Tex.—Davis v. Christmas, Civ.App., 248 S.W. 126.

99. Or.—Patterson v. Howe, 202 P. 225, 102 Or. 275.
22 C.J. p 789 note 80.

Hip
U.S.—Moore v. Tremelling, C.C.A. Idaho, 100 F.2d 39.
Ind.—Citizens' St. R. Co. v. Willoeby, 33 N.E. 627, 134 Ind. 563.

Jaw
Or.—Patterson v. Howe, 202 P. 225, 102 Or. 275.

Throat
N.Y.—Dietz v. Aronson, 279 N.Y.S. 66, 244 App.Div. 746.

1. Ky.—Davis v. Antol, 278 S.W. 573, 212 Ky. 149—Williams v. Nally, 45 S.W. 874, 20 Ky.L. 244.
Mo.—Turnbow v. Kansas City Rys. Co., 211 S.W. 41, 277 Mo. 644.
22 C.J. p 789 note 81.

Skull
Exhibition of parts of the skull and brain is permissible, particularly where facts relating thereto are controverted.—Johnston v. Selfe, 251 N.W. 525, 190 Minn. 269—Lund v. Olson, 234 N.W. 310, 182 Minn. 204, 75 A.L.R. 371.

2. Cal.—Leonard v. Hume, 41 P.2d 965, 5 Cal.App.2d 41.
Fla.—Florida Motor Lines v. Bradley, 164 So. 360, 363, 121 Fla. 591, quoting **Corpus Juris.**
Ill.—Minnis v. Friend, 196 N.E. 191, 360 Ill. 328—Walsh v. Chicago Rys. Co., 135 N.E. 709, 303 Ill. 339, affirming 221 Ill.App. 654—Dinwiddie v. Siefkin, 20 N.E.2d 130, 299 Ill.App. 316—Barnstable v. Calandro, 270 Ill.App. 57.
Kan.—Malone v. New York Life Ins. Co., 83 P.2d 639, 643, 148 Kan. 555, citing **Corpus Juris.**
Md.—Zeller v. Mayson, 179 A. 179, 168 Md. 663.
Mich.—Roach v. Petrequin, 208 N.W. 695, 234 Mich. 551—Rohrer v. Schreiber, 193 N.W. 905, 223 Mich. 355.
Mo.—Smith v. Thompson, 142 S.W. 2d 70—Mahmet v. American Radiator Co., 294 S.W. 1014—Evans v. General Explosives Co., 239 S.W. 487, 293 Mo. 364—Meeker v. Union Electric Light & Power Co., 216 S.W. 933—Riepe v. Green, App., 65 S.W.2d 667.
Neb.—Wilson v. Thayer County Agricultural Soc., 213 N.W. 966, 115 Neb. 579, 52 A.L.R. 1393.
N.J.—Sharkey v. Herman Bros., 127 A. 525, 3 N.J.Misc. 126, affirmed Same v. Heymann Bros., 130 A. 920, 102 N.J.Law 224.
N.D.—Sullivan v. Minneapolis, St. P. & S. S. M. Ry. Co., 213 N.W. 841, 55 N.D. 353.
Or.—Sears v. Goldsmith, 298 P. 219, 221, 136 Or. 151, citing **Corpus Juris.**
Pa.—Goldberg v. Philadelphia Rapid Transit Co., 149 A. 104, 299 Pa. 79.
S.D.—Cass v. Pacific Mut. Life Ins. Co. of California, 253 N.W. 626, 627, 62 S.D. 509, citing **Corpus Juris**, and followed in 256 N.W. 120, 63 S.D. 23.
Tex.—Kansas City, M. & O. Ry. Co. of Texas v. Foster, 38 S.W.2d 391, 392, citing **Corpus Juris.**
22 C.J. p 789 note 86.

3. Fla.—Florida Motor Lines v. Bradley, 164 So. 360, 363, 121 Fla. 591, quoting **Corpus Juris.**
Neb.—Wilson v. Thayer County Agricultural Soc., 213 N.W. 966, 115 Neb. 579, 52 A.L.R. 1393.
Or.—Sears v. Goldsmith, 298 P. 219, 221, 136 Or. 151, citing **Corpus Juris.**
22 C.J. p 789 note 87.

permit the exhibition of injuries in any case where the personal view will aid the jury in understanding the evidence,[4] even though the fact and nature of the injury are conceded.[5] Nevertheless, the court may, in its discretion, refuse to permit an exhibition where the fact and extent of the injuries are not controverted;[6] and, indeed, it has been held improper to permit exhibition of an injured limb where there is no dispute as to the nature, location, or extent of the injury or as to the extent of the recovery.[7]

Relevancy requires that the exhibition shall be preceded by a showing that the injury or wound resulted from the cause alleged as a basis of the action,[8] and precludes the exhibition of an injury or a member other than that involved in the action.[9]

Exhibition of injuries should not be permitted where conditions have changed to such an extent that the exhibition might be misleading,[10] or where there are no injuries that can be seen,[11] or where the exhibition will not tend to throw light on any issues in the case.[12] Further, exhibition should not be permitted where it is apparently designed merely to excite pity and commiseration;[13] and an abuse of the privilege by exhibiting injuries or a condition in such manner as to prejudice or inflame the jury is improper and is ground for a new trial.[14]

Indecency of the exhibition excludes the evidence[15] unless the exhibition is necessary[16] and stays within the legitimate bounds for placing the actual facts in the case before the jury.[17]

Subsequent exhibitions. Whether a second exhibition of an injury should be permitted is a matter primarily lodged in the sound discretion of the trial court.[18] A plaintiff who has once exhibited the injured part of his body to the jury should not be permitted to exhibit it again in conjunction with a doctor's testimony unless the later exhibition is necessary to enable the doctor to testify intelligently.[19]

During argument of counsel. Exhibition of an injured part of the body during the argument of counsel has been held improper.[20]

B. DOCUMENTS

§ 611. In General

The jury may examine a document for alterations, erasures, etc., and skilled witnesses may aid them in this connection.

By inspection of a document, the jury may be aided in determining whether it is genuine or written in a counterfeited hand;[21] whether it contains an alteration,[22] erasure,[23] or mutilation;[24] or

4. Ill.—Barnstable v. Calandro, 270 Ill.App. 57.

5. Ill.—Minnis v. Friend, 196 N.E. 191, 360 Ill. 328—Barnstable v. Calandro, 270 Ill.App. 57.

6. Ill.—Whittenberg v. Weber, 230 Ill.App. 315.

7. S.D.—Dean v. Seeman, 176 N.W. 649, 42 S.D. 577.
22 C.J. p 789 note 89 [a].

8. Neb.—McKennan v. Omaha & C. B. St. R. Co., 146 N.W. 1014, 95 Neb. 643, 149 N.W. 826, 97 Neb. 281.
22 C.J. p 789 note 84.

9. Ill.—Grand Lodge B. R. T. v. Randolph, 57 N.E. 882, 186 Ill. 89.
22 C.J. p 789 note 85.

Stranger with like condition
On an issue as to the cause of plaintiff's condition, it is improper for defendant to produce a stranger having a like condition and to show that the stranger's condition is the result of some other cause.—Moss v. May Department Stores Co., Mo.App., 31 S.W.2d 566.

10. Mich.—Carstens v. Hanselman, 28 N.W. 159, 61 Mich. 426, 1 Am.S.R. 606.
22 C.J. p 789 note 88.

Explanation of change
In a malpractice action, the mere fact that the condition of the injured part at the time of trial differs from that immediately after the alleged malpractice does not prevent its exhibition, since any changes are subject to description and explanation by the witnesses.—Powell v. Galloway, 16 S.W.2d 489, 229 Ky. 37.

11. Minn.—Landro v. Great Northern R. Co., 135 N.W. 991, 117 Minn. 306, Ann.Cas.1913D 244.

12. N.H.—Nebonne v. Concord R. Co., 44 A. 521, 68 N.H. 296.

13. Minn.—Evans v. Chicago, M. & St. P. R. Co., 158 N.W. 335, 133 Minn. 293.
22 C.J. p 767 note 23, p 789 note 90.

14. N.Y.—Bardelli v. Pittsburg Contracting Co., 148 N.Y.S. 389, 163 App.Div. 45.
22 C.J. p 790 note 94.
Grounds for new trial see the C.J.S. title New Trial §§ 13–114, also 46 C.J. p 80 note 60 et seq.

Exclamations of pain
(1) The privilege of exhibiting plaintiff's diseased joints was abused where, while physician was manipulating joints, plaintiff winced as though with pain and made exclamations.—Cass v. Pacific Mut. Life Ins. Co. of California, 253 N.W. 626, 62 S.D. 509, followed in 256 N.W. 120, 63 S.D. 23.
(2) However, exhibition of plaintiff's injured leg in course of which attempt to cause knee to bend made plaintiff cry out was held not error.—Florida Motor Lines v. Bradley, 164 So. 360, 121 Fla. 591.

15. Wis.—Brown v. Swineford, 44 Wis. 282, 28 Am.R. 582.
22 C.J. p 790 note 92.

16. Wash.—Dunkin v. Hoquiam, 105 P. 149, 56 Wash. 47, 53.
22 C.J. p 790 note 93.

17. N.D.—Sullivan v. Minneapolis, St. P. & S. S. M. Ry. Co., 213 N.W. 841, 55 N.D. 353.

18. Tex.—Missouri, K. & T. R. Co. of Texas v. O'Hare, Civ.App., 39 S.W.2d 939, error dismissed.

19. Tex.—Missouri, K. & T. R. Co. of Texas v. O'Hare, supra.

20. Ky.—Huber & Huber Motor Express v. Martin's Adm'r, 96 S.W.2d 595, 265 Ky. 228—Stacy v. Williams, 69 S.W.2d 697, 253 Ky. 353.

21. D.C.—Kimbro v. Washington First Nat. Bank, 8 D.C. 415.
22 C.J. p 771 note 75.

22. Ala.—Birmingham Nat. Bank v. Bradley, 19 So. 791, 108 Ala. 205.
22 C.J. p 771 note 76.

23. N.Y.—Dubois v. Baker, 30 N.Y. 355.

24. N.Y.—Taylor v. Crowninshield, 5 N.Y.Leg.Obs. 209.

whether it was written on the same typewriting machine as another document;[25] or the jury may be asked to determine from inspection which of two words was written over the other.[26] In such cases the jury may receive additional assistance from the inferences of skilled witness.[27]

§ 612. Comparison of Handwritings

Comparison of handwritings is a mode of proof of the genuineness of a writing, and in the technical sense, means an actual production and comparison in court of two or more writings.

Comparison of handwritings is a mode of proof of the authenticity or genuineness of a writing, by comparing the handwriting thereof with a specimen proved or admitted to have been written by the person whose authorship of the questioned document is in controversy.[28] In a broad sense all evidence of handwriting, except where the witness saw the document written, is in its nature comparison, inasmuch as a witness called on to testify as to whether a document is in the handwriting of a particular person must necessarily arrive at his conclusion by a comparison of the writing in question with other writing proved or admitted to be that of such person, or with an exemplar of such writing in his own mind, derived from previous knowledge;[29] but in a strict or technical sense comparison of handwritings means an actual production and comparison in court of two or more instruments or signatures as a means of ascertaining whether they were written by the same person.[30]

There is some diversity of opinion as to whether a trained observer or expert may be permitted to state, from a mere comparison of two or more specimens of handwriting, an inference as to whether or not they were made by the same person, and also as to whether such a comparison may be made by the jury or court.[31] The rules followed in the various jurisdictions are considered infra § 613 et seq.

§ 613. —— Rule in Absence of Statute

a. In general
b. Irrelevant writings

a. In General

Comparison of handwritings by the jury, court, or experts ordinarily is permissible without statutory authority, although some courts have refused to permit comparison by witnesses, even of relevant writings in evidence.

In the absence of statute, or at least without express reference to statute, it has been held by many authorities that on an issue as to the authorship of a disputed signature or writing, other writings established as genuine may be admitted or compared,[32] and that the comparison may be made by the jury,[33] or by the court or a referee trying the

25. Me.—Grant v. Jack, 102 A. 38, 116 Me. 342.
N.Y.—People v. Risley, 108 N.E. 200, 214 N.Y. 75, Ann.Cas.1916D 775.

26. Mich.—Morse v. Blanchard, 75 N.W. 93, 117 Mich. 37.

27. Ala.—Lindsey v. Lindsey, 158 So. 522, 229 Ala. 578.
La.—Succession of McCay, 117 So. 772, 166 La. 681.
N.Y.—Chinsky v. Perlman, 194 N.Y. S. 530.
N.D.—Farmers' Elevator Co. of Williston v. Weil, 180 N.W. 23, 46 N. D. 602.
Or.—Watrous v. Salem Brewery Ass'n, 49 P.2d 375, 151 Or. 294.
Pa.—Kline v. Yeager, 33 Luz.Leg. Reg. 253.
22 C.J. p 771 note 81.

Defacing marks; erasures
(1) Handwriting experts may testify as to whether defacing strokes or lines on a will were made by the testator.—Carrithers v. Jean's Ex'r, 81 S.W.2d 857, 259 Ky. 20—Carrithers v. Jean's Ex'r, 61 S.W.2d 323, 249 Ky. 695.

(2) "Expert testimony in the case of erasures may be considered in corroboration of positive testimony and surrounding circumstances tending to establish the authenticity of the erasures."—Succession of Butterworth, 196 So. 39, 42, 195 La. 115.

Payment of fees to expert
That professional handwriting expert is employed and paid by parties for whom he testifies goes to weight of testimony, and not to admissibility.—Lindsey v. Lindsey, 158 So. 522, 229 Ala. 578.

Circumstantial evidence
Expert testimony on subject of handwriting is circumstantial evidence.—In re Parvin's Estate, 270 N. W. 470, 131 Neb. 853.

28. Pa.—Travis v. Brown, 43 Pa. 9, 82 Am.D. 540.
22 C.J. p 771 note 82.

29. Tex.—Joffre v. Mynatt, Civ. App., 240 S.W. 319.
22 C.J. p 771 note 83.

30. Ind.—Burdick v. Hunt, 43 Ind. 381.
22 C.J. p 771 note 84.

31. Ala.—Griffin v. Working Women's Home Ass'n, 44 So. 605, 151 Ala. 597.
22 C.J. p 771 note 86.

32. Fla.—Boyd v. Gosser, 82 So. 758, 78 Fla. 64, 6 A.L.R. 500.
Ind.—Kipfer v. Kipfer, 12 N.E.2d 507, 213 Ind. 321.
Kan.—Trustees of Baker University v. Farrar, 8 P.2d 343, 134 Kan. 722.
Mich.—Stevens v. Burgess, 248 N.W. 560, 263 Mich. 98.
Miss.—Harrison v. Eagle Lumber & Supply Co., 119 So. 203, 152 Miss. 466.
Tex.—Crawford v. Ramsey, Civ.App., 73 S.W.2d 1064—Shell Pipe Line Corporation v. Coston, Civ.App., 35 S.W.2d 1056—In re Mateer's Estate, Civ.App., 296 S.W. 907.
Va.—Keister's Ex'rs v. Philips' Ex'x, 98 S.E. 674, 124 Va. 585.

33. Ala.—Webb v. Bryant, 96 So. 907, 209 Ala. 659.
Iowa.—In re Work's Estate, 233 N. W. 28, 212 Iowa 31—Butman v. Christy, 198 N.W. 314, 197 Iowa 661.
Miss.—Harrison v. Eagle Lumber & Supply Co., 119 So. 203, 152 Miss. 466.
Mo.—Sharon v. Kansas City Granite & Monument Co., 125 S.W.2d 959, 233 Mo.App. 547.
N.H.—Ernshaw v. Roberge, 170 A. 7, 86 N.H. 451.
S.D.—Corsica State Bank v. Heezen, 222 N.W. 671, 54 S.D. 113.
22 C.J. p 772 note 95.

Comparison without aid of expert testimony
Although unaided by expert testi-

case without a jury,[34] or by expert witnesses.[35] Ordinarily, the comparison may be made not only with other writings which are relevant to the issues in the cause and in evidence,[36] but also where they are otherwise before the court as part of the record in the case,[37] as in the case of bail bonds,[38] appeal bonds,[39] appearance bonds,[40] applications for continuances and for attachments,[41] signatures to affidavits,[42] depositions,[43] and, according to some authorities, pleadings,[44] although there is also authority for the view that a party's signature to his pleadings should not be permitted to go to the jury for comparison with a disputed signature or writing because this would be permitting the party to make evidence for himself.[45]

On the other hand, some decisions have followed the rule of the common law excluding proof of handwriting by the inference of a witness from a mere comparison of the disputed writing with other writings, even where the other writings are relevant to the issues in the cause and are already in evidence.[46] It has also been held that comparison by witnesses or the jury, whether of writings which are relevant and in evidence or irrelevant, should not be allowed as independent proof, but may be allowed in aid or corroboration of other evidence of the falsity or genuineness of the disputed writing.[47]

b. Irrelevant Writings

In the absence of statute, irrelevant writings are generally inadmissible for the mere purpose of making a comparison, unless, among other things, the genuineness of such writings is established or admitted or the other party is estopped to deny their genuineness.

In the absence of statute, the general rule is that irrelevant writings cannot be introduced in evidence for the mere purpose of making a comparison.[48] However, even irrelevant writings offered

mony, the jury may compare a disputed signature with other signatures admitted in evidence or otherwise properly before them.—W. T. Carter & Bro. v. Rhoden, Tex.Civ. App., 72 S.W.2d 620, error dismissed—Commercial Standard Ins. Co. v. McGee, Tex.Civ.App., 40 S.W.2d 1105.

34. Idaho.—In re Fisher's Estate, 279 P. 291, 293, 47 Idaho 668, citing **Corpus Juris.**
Ky.—Sowards v. Sowards, 61 S.W.2d 609, 249 Ky. 742.
Tenn.—Baskett v. Chuckey Banking Co., 2 Tenn.App. 31.
22 C.J. p 772 note 96.

35. U.S.—Toll v. Monitor Binding & Printing Co., C.C.A.Mo., 26 F.2d 51.
Ala.—Phillips v. Catts, 124 So. 884, 220 Ala. 332.
Ark.—Murphy v. Murphy, 222 S.W. 721, 144 Ark. 429.
Iowa.—Brien v. Davidson, 281 N.W. 150, 225 Iowa 595, rehearing denied 282 N.W. 480, 225 Iowa 595—In re Iwers' Estate, 280 N.W. 579, 225 Iowa 389—In re Work's Estate, 233 N.W. 28, 212 Iowa 31.
Ky.—Ellis v. Moss, 77 S.W.2d 377, 257 Ky. 168.
Mass.—Preston v. Peck, 171 N.E. 54, 271 Mass. 159.
Miss.—Harrison v. Eagle Lumber & Supply Co., 119 So. 203, 152 Miss. 466.
Neb.—In re Parvin's Estate, 270 N. W. 470, 131 Neb. 853.
Pa.—Campbell v. Campbell, Super., 21 A.2d 476.
S.D.—State v. Cummins, 229 N.W. 302, 56 S.D. 439.
Wash.—In re Zimmerli's Estate, 298 P. 326, 162 Wash. 243.
22 C.J. p 775 note 25.

Sufficiency of opportunity to examine

Alleged insufficiency of time and opportunity of expert to compare genuine and disputed writings does not affect admissibility of his testimony.—Land Finance Corporation v. Menzies, 160 A. 168, 114 Conn. 694.

Signature by cross or mark

The genuineness of a signature which consists of a cross or mark is not a subject of opinion of experts whose only knowledge of mark in question has been obtained by comparison.—In re Astolas' Estate, 262 N.W. 766, 273 Mich. 189, 101 A. L.R. 760.

36. Tex.—Burton v. Lowry, Civ. App., 77 S.W.2d 1059—Tarwater v. Donley County State Bank, Civ. App., 277 S.W. 176.
22 C.J. p 772 note 97, p 775 note 25.

Reason for rule

The reason assigned for permitting such comparison with writings already in evidence is that inasmuch as such papers are already before the jury and the jurors are entitled to examine them as a part of the evidence, it is practically impossible to prevent their making the comparison between them and the disputed writing, and it is therefore better to permit them to use such papers for this purpose also, under proper instructions, than to embarrass them with impracticable distinctions as to their use.—Major v. Garrott, 163 S. W. 463, 157 Ky. 468—22 C.J. p 773 note 8.

37. U.S.—Dunlop v. Silver, D.C., 8 F.Cas.No.4,169, 1 Cranch C.C. 27, 1 Cranch appendix 367, 2 L.Ed. 139.
22 C.J. p 773 note 98, p 776 note 26.

38. U.S.—Dunlop v. Silver, supra.

39. La.—Sauve v. Dawson, 2 Mart. 202.
Mich.—Vinton v. Peck, 14 Mich. 287.

40. N.C.—State v. Noe, 25 S.E. 812, 119 N.C. 849.

41. Tex.—Williams v. State, 11 S. W. 481, 27 Tex.App. 466.

42. Mo.—State v. David, 33 S.W. 28, 131 Mo. 380.
22 C.J. p 773 note 4.
Contra Kernin v. Hill, 37 Ill. 209.

43. Kan.—Abbott v. Coleman, 22 Kan. 250, 31 Am.R. 186.
Tex.—Smith v. Chiles, 1 Tex.A.Civ. Cas. § 124.

44. Fla.—Korabeck v. Shannon, 135 So. 131, 101 Fla. 598.
22 C.J. p 773 note 6.

45. Mo.—Springer v. Hall, 83 Mo. 693, 53 Am.R. 598.
22 C.J. p 773 note 7.

46. U.S.—Strother v. Lucas, Mo., 6 Pet. 763, 8 L.Ed. 573.
22 C.J. p 775 note 24.

47. Pa.—In re Porter's Estate, 19 A.2d 731, 341 Pa. 476—Dick v. Miller, 2 Pa.Dist. & Co. 41.
22 C.J. p 775 note 17.

Proof of forgery by comparison alone

The testimony of handwriting experts would not of itself warrant a finding of forgery.—De Silver v. Pennsylvania Trust Co. of Pittsburgh, Pa., 20 A.2d 761.

48. Fla.—Thompson v. Freeman, 149 So. 740, 111 Fla. 433.
Ind.—Plymouth Savings & Loan Ass'n No. 2 v. Kassing, 125 N.E. 488, 72 Ind.App. 1.
Tex.—W. T. Carter & Bro. v. Rhoden, Civ.App., 72 S.W.2d 620, error dismissed—Texas State Bank of Ft. Worth v. Scott, Civ.App., 225 S.W. 571—Campbell v. Campbell, Civ.App., 215 S.W. 134, error refused.
22 C.J. p 773 note 10, p 777 note 30.

Where authenticity is not conceded, irrelevant writings may not be introduced.

in evidence merely for the purpose of comparison by a witness with the disputed writing have been received in a number of cases;[49] and numerous courts have held that irrelevant writings may be introduced for the purpose of comparison where their genuineness is conceded,[50] or where the other party is estopped to deny their genuineness,[51] or has previously introduced the writing in evidence,[52] or consents to the comparison;[53] and there is support for the view that irrelevant writings may be admitted for the mere purpose of comparison when their genuineness is satisfactorily proved,[54] or the comparison is merely in corroboration of other evidence as to the genuineness or falsity of the writing in question,[55] or for some other reason no collateral issues can be raised by the introduction of such papers.[56]

The reasons usually assigned for refusing to admit for purposes of comparison papers not in evidence and otherwise irrelevant are: (1) That the admission of such papers would probably raise collateral issues respecting the genuineness of the signatures thereto which might be spun out indefinitely and confuse the jury. (2) Opportunity might be given to the party offering the papers to obtain an improper advantage by making an unfair selection of the test signatures.[57] The danger suggested in the first reason is minimized by requiring clear proof by witnesses who testify directly and positively to the genuineness of the standards;[58] and in answer to the second reason it has been observed that the danger there envisaged may be overcome by other evidence and by the intelligent judgment of the court or jury, as in the case of all unfair or misleading evidence.[59] Thus the tendency is toward admission of irrelevant writings as a basis of comparison, as appears not only in the decisions of the courts,[60] but also in the statutory enactments, see infra § 614.

§ 614. —— Rule under Statutes

Where permitted by statute, genuine writings, whether irrelevant or relevant, may be introduced for the purpose of comparison with a disputed writing.

Under the statutes in many jurisdictions, on an issue as to the authenticity of a disputed signature or writing, other genuine writings may be used for the purpose of comparison,[61] whether such other

N.D.—Board of Education of City of Edmore v. Anderson, 243 N.W. 817, 62 N.D. 364.
Tex.—Martini v. Power Banking Co., Civ.App., 33 S.W.2d 466, error dismissed—Tarwater v. Donley County State Bank, Civ.App., 277 S.W. 176.

49. Miss.—Harrison v. Eagle Lumber & Supply Co., 119 So. 203, 205, 152 Miss. 466, quoting **Corpus Juris.**
22 C.J. p 776 note 28.

50. S.D.—Corsica State Bank v. Heezen, 222 N.W. 671, 54 S.D. 113.
Tex.—Latham v. Jordan, Com.App., 17 S.W.2d 805, reversing, Civ.App., 3 S.W.2d 555—Latham v. Houston Land & Trust Co., Civ.App., 62 S.W.2d 519, error dismissed—Gadberry v. Home Mut. Life Ass'n, Civ.App., 57 S.W.2d 370—Kveton v. Keding, Civ.App., 286 S.W. 673.
Va.—Adams v. Ristine, 122 S.E. 126, 138 Va. 273, 31 A.L.R. 1413.
22 C.J. p 774 notes 11, 16, p 777 note 32.

51. Tex.—Gadberry v. Home Mut. Life Ass'n, Civ.App., 57 S.W.2d 370—Kveton v. Keding, Civ.App., 286 S.W. 673—Tarwater v. Donley County State Bank, Civ.App., 277 S.W. 176.
22 C.J. p 774 note 12, p 777 note 33.

52. Tex.—Gadberry v. Home Mut. Life Ass'n, Civ.App., 57 S.W.2d 370—Tarwater v. Donley County State Bank, Civ.App., 277 S.W. 176.

53. Ala.—Moon v. Crowder, 72 Ala. 79.
22 C.J. p 774 note 13, p 777 note 34.
Introduction without objection
Consent sufficiently appears if the papers are admitted without objection.
Ala.—Moon v. Crowder, 72 Ala. 79.
Mich.—People v. Gale, 15 N.W. 99, 50 Mich. 237.

54. S.D.—Corsica State Bank v. Heezen, 222 N.W. 671, 54 S.D. 113.
Tex.—Askins, Inc., v. Sparks, Civ. App., 56 S.W.2d 279, error refused—Kveton v. Keding, Civ.App., 286 S.W. 673.
Va.—Adams v. Ristine, 122 S.E. 126, 138 Va. 273, 31 A.L.R. 1413.
22 C.J. p 774 note 16.

55. S.C.—Graham v. Nesmith, 24 S.C. 285—Benedict v. Flanigan, 18 S.C. 506, 44 Am.R. 583.

56. Kan.—Macomber v. Scott, 10 Kan. 335.
N.D.—Cochrane v. National El. Co., 127 N.W. 725, 20 N.D. 169.

57. Tex.—Gadberry v. Home Mut. Life Ass'n, Civ.App., 57 S.W.2d 370.
22 C.J. p 775 note 18.

58. Ohio.—Calkins v. State, 14 Ohio St. 222.
Pa.—Baker v. Haines, 6 Whart. 284, 36 Am.D. 224.

59. Minn.—Morrison v. Porter, 29 N.W. 54, 35 Minn. 425, 59 Am.R. 331.

60. Wash.—Moore v. Palmer, 44 P. 142, 14 Wash. 134.
22 C.J. p 775 note 21.

61. U.S.—Citizens' Bank & Trust Co. of Middlesboro, Ky., v. Allen, C.C.A.Va., 43 F.2d 549.
Ala.—Bridgeforth v. Sharpe, 124 So 416, 220 Ala. 188.
Fla.—Thompson v. Freeman, 149 So. 740, 111 Fla. 433.
Ga.—Gibson v. Gibson, 187 S.E. 155, 54 Ga.App. 187—Waddell v. J. R. Watkins Medical Co., 104 S.E. 250, 25 Ga.App. 657.
Idaho.—In re Fisher's Estate, 279 P. 291, 293, 47 Idaho 668, citing **Corpus Juris.**
Ill.—Waggoner v. Clark, 127 N.E. 436, 293 Ill. 256—Southwestern Milling Co. v. Fernstrom, 226 Ill. App. 468—In re Hayhurst's Estate, 215 Ill.App. 315—Jennings v. Glover's Estate, 214 Ill.App. 359.
Neb.—Harrington v. Vogle, 173 N.W. 699, 103 Neb. 677.
N.Y.—Turnure v. Breitung, 186 N.Y.S. 620, 195 App.Div. 200, affirmed 135 N.E. 955, 233 N.Y. 649.
N.C.—In re Williams' Will, 1 S.E.2d 857, 215 N.C. 259.
Tenn.—Baskett v. Chuckey Banking Co., 2 Tenn.App. 31.
Tex.—Gibralter Colorado Life Co. v. Taylor, 123 S.W.2d 318, 132 Tex. 328, reversing, Civ.App., 99 S.W.2d 1084.
W.Va.—Nixon v. Shaver, 176 S.E. 849, 115 W.Va. 469.
22 C.J. p 777 note 36–p 779 note 56.
Admission without objection
Checks admitted in evidence without objection afforded proper standards of comparison under statute.—In re Goldberg, C.C.A.N.Y., 91 F.2d 996.

writings are irrelevant or relevant.[62] Such other writings may, under some statutes, be compared by qualified witnesses,[63] or by the court or jury.[64]

Statutes permitting the introduction of genuine writings for the purpose of comparison are valid,[65] but since they are in derogation of the common law they must be strictly construed.[66] Even where statutes permit the introduction of any writing as a standard, an instrument containing irrelevant matter likely to prejudice the jury should be excluded.[67]

§ 615. —— Qualifications of Witness

To be competent to testify to the genuineness of a writing or signature by comparison, a witness ordinarily must possess peculiar knowledge and skill, although he need not be a professional handwriting expert.

In order that a witness may be allowed to compare two writings or signatures and state an inference as to whether or not they were written by the same person, it must be shown[68] to the reasonable satisfaction of the court[69] that the witness is sufficiently qualified as a skilled observer or expert to make his inference an aid to the jury.[70]

To qualify as a skilled observer or expert, the witness need not be a professional handwriting student, critic, or expert,[71] but it is sufficient to show that in some way he has acquired peculiar knowledge and skill in determining the genuineness of written instruments and signatures.[72] This may be done not only by showing that he has made a special study of handwriting,[73] or has given instruction in the art,[74] but also by proof that he has had

62. Ala.—Kirby v. Brooks, 111 So. 235, 215 Ala. 507.
Tex.—Alexander v. State, Civ.App., 115 S.W.2d 1122, error refused.
22 C.J. p 778 note 38.

63. Ala.—Martin v. Davis, 141 So. 667, 224 Ala. 648
Ill.—Jennings v. Glover's Estate, 214 Ill.App. 359.
Iowa.—Kruidenier's Estate v. Bankers' Trust Co., 209 N.W. 452, 203 Iowa 776—Butman v. Christy, 198 N.W. 314, 197 Iowa 661.
Ky.—Polley v. Cline's Ex'r, 93 S.W. 2d 363, 263 Ky. 659—Crawford v. Hargis Bank & Trust Co., 35 S. W.2d 324, 237 Ky. 279—Hartzell v. Dee's Ex'rs, 280 S.W. 972, 213 Ky. 206.
Md.—Citizens' Nat. Bank of Pocomoke City v. Custis, 138 A. 261, 15 Md. 235, 53 A.L.R. 1165.
Neb.—Bank of Commerce of Louisville v. McCarty, 231 N.W. 34, 119 Neb. 795—In re O'Connor's Estate, 179 N.W. 401, 105 Neb. 88, 12 A. L.R. 199, certiorari denied O'Connor v. Slaker, 41 S.Ct. 450, 256 U. S. 690, 65 L.Ed. 1173.
N.Y.—Davis v. Bickle, 245 N.Y.S. 488, 230 App.Div. 580—Rosenberger v. Johnson, 206 N.Y.S. 286, 210 App.Div. 319.
Tenn.—Baskett v. Chuckey Banking Co., 2 Tenn.App. 31.
Tex.—C. I. T. Corporation v. McLeod, Civ.App., 103 S.W.2d 387.
22 C.J. p 778 note 43 [b].

64. U.S.—Smythe v. Inhabitants of New Providence Tp., Union County, C.C.A.N.J., 263 F. 481, reversing, D.C., Smythe v. Inhabitants of New Providence Tp., 253 F. 824.
Ga.—Gibson v. Gibson, 187 S.E. 155, 54 Ga.App. 187.
Ill.—Jennings v. Glover's Estate, 214 Ill.App. 359.
Iowa.—Kruidenier's Estate v. Bankers' Trust Co., 209 N.W. 452, 203 Iowa 776—In re Richardson's Estate, 208 N.W. 374, 202 Iowa 328—McColl v. Jordan, 205 N.W. 838, 200 Iowa 961.
Ky.—Hartzell v. Dee's Ex'rs, 280 S. W. 972, 213 Ky. 206.
La.—Vickers v. Coburn, 7 La.App. 206.
Md.—Citizens' Nat. Bank of Pocomoke City v. Custis, 138 A. 261, 15 Md. 235, 53 A.L.R. 1165.
N.C.—Newton v. Newton, 108 S.E. 336, 182 N.C. 54.
22 C.J. p 778 note 53 [a].

Comparison without aid of expert testimony

(1) Genuine writings are, under some statutes, properly received in evidence for comparison by the jury, without aid of expert testimony.—Keister's Ex'rs v. Philips' Ex'x, 98 S.E. 674, 124 Va. 585.

(2) Under other statutes comparison by the jury is permitted only in connection with expert testimony.—Glenn v. Roosevelt, C.C.N.Y., 62 F. 550.
22 C.J. p 778 note 51 [d].

65. N.Y.—People v. Molineux, 61 N. E. 286, 168 N.Y. 264, 62 L.R.A. 193.
22 C.J. p 779 note 57.

66. Mo.—Cook v. Strother, 75 S.W. 175, 100 Mo.App. 622.
Tenn.—Franklin v. Franklin, 16 S. W. 557, 90 Tenn. 44.

67. Ind.—Plymouth Savings & Loan Ass'n No. 2 v. Kassing, 125 N.E. 488, 72 Ind.App. 1.

68. Neb.—Box Butte County First Nat. Bank v. Hedgecock, 127 N.W. 171, 87 Neb. 220.
22 C.J. p 779 note 61.

69. N.C.—State v. Cofer, 172 S.E. 176, 205 N.C. 653.
22 C.J. p 779 note 62.

Discretion

Whether a witness is qualified to testify as a handwriting expert is a matter largely within the discretion of the trial court.

Idaho.—Lowe v. Skaggs Safeway Stores, 286 P. 616, 49 Idaho 48.
Mo.—Vanausdol v. Bank of Odessa, 5 S.W.2d 109, 222 Mo.App. 91.
N.C.—State v. Cofer, 172 S.E. 176, 205 N.C. 653.
22 C.J. p 779 note 62 [a].

70. Mont.—In re Miller's Estate, 229 P. 851, 71 Mont. 330.
22 C.J. p 779 note 63.

Nonexpert witness

(1) A nonexpert witness is not permitted to express an opinion as to handwriting based on a comparison of the document in question with writings of the person claimed to have written such documents, which other writings are admitted or proved to be genuine.
Mont.—In re Miller's Estate, 229 P. 851, 71 Mont. 330.
W.Va.—Johnston v. Bee, 100 S.E. 486, 84 W.Va. 532, 7 A.L.R. 252.
22 C.J. p 630 note 97.

(2) However, under some statutes a comparison may be made by an expert or by a witness who is shown to be familiar with the handwriting of the person whose handwriting is in question.—Kirby v. Brooks, 111 So. 235, 215 Ala. 507—Brown v. Welch, 96 So. 610, 209 Ala. 518—Willis v. Hovater, 118 So. 766, 22 Ala.App. 633.

71. Ala.—Roberts v. Davis, 160 So. 718, 230 Ala. 272.
W.Va.—Johnston v. Bee, 100 S.E. 486, 84 W.Va. 532, 7 A.L.R. 252.
22 C.J. p 780 note 68 [a].

72. W.Va.—Johnston v. Bee, supra.

73. Tex.—Rhea v. Cook, Civ.App., 174 S.W. 892.
22 C.J. p 779 note 64.

74. Hawaii.—Goo Kim Fook v. Hee Fat, 27 Hawaii 491.
Ill.—First Galesburg Nat. Bank & Trust Co. v. Federal Reserve Bank of Chicago, 15 N.E.2d 337, 295 Ill. App. 524.
22 C.J. p 779 note 65.

a large experience in examining handwritings or signatures in the course of his profession or business.[75] While the qualification of a witness will often result from the business or calling in which he is engaged,[76] qualification does not depend on the particular calling of the witness,[77] but on his intelligence and means of knowledge.[78]

To qualify, the witness need not claim in express terms to be an expert; it is sufficient if he states facts showing that from his experience he is competent to express an opinion as to handwriting.[79] The calling or experience of the witness may be sufficient to qualify him although he is somewhat modest in stating his qualifications.[80] It has been held however, that a disclaimer of skill in comparison requires the rejection of the witness.[81]

It is not necessary that an expert on handwriting should have actually seen the person write,[82] or should have had any previous knowledge of the handwriting of the person whose handwriting is in question,[83] although such knowledge does not disqualify him from making the comparison.[84]

§ 616. —— Production of Disputed Writing

To prove the handwriting on a written instrument, the instrument itself should be produced if available, although where the writing has been lost or destroyed, comparison based on the recollection of a witness is sometimes permitted.

Where the handwriting of a written instrument is to be proved, the instrument itself should be produced in court wherever this is practicable,[85] and according to some decisions a production of the disputed writing is necessary to authorize any testimony as to genuineness based on a comparison,[86] particularly where the statute providing for comparison expressly or impliedly so requires.[87] Many authorities, however, are in favor of admitting the testimony of a witness from a comparison of handwritings where the writing in dispute has been lost or destroyed, or for any other reason cannot be produced at the trial, but the witness has seen the

75. Ark.—Connor v. Bowers, 41 S.W.2d 977, 184 Ark. 102.
Idaho.—Lowe v. Skaggs Safeway Stores, 286 P. 616, 49 Idaho 48.
Mo.—Vanausdol v. Bank of Odessa, 5 S.W.2d 109, 222 Mo.App. 91.
Pa.—Popalis v. Yanchura, 173 A. 743, 114 Pa.Super. 204.
Tex.—Gulf Casualty Co. v. Fields, Civ.App., 107 S.W.2d 661, error dismissed—Garrison v. Garrison, Civ.App., 66 S.W.2d 451, error dismissed.
22 C.J. p 780 note 66.

Nature of business experience
The extent and nature of a person's business experience rather than whether it was different in character from that of other business men is the proper inquiry.—Roberts v. Davis, 160 So. 718, 230 Ala. 272.

Sufficiency of experience
(1) A person who has engaged in business which has frequently required him to pass on verity of signatures for many years, or such length of time as appears sufficient for him to become reasonably proficient in such matters, is qualified to give expert testimony.—Roberts v. Davis, supra.

(2) A witness was not qualified as an expert on handwriting, where it appeared that he had made a study of the subject some twenty years before, but had not kept abreast of developments in such science.—Keys v. Keys, 129 S.W.2d 1108, 23 Tenn. App. 188.

(3) Attorney who had had several cases involving question of handwriting and had served as circuit court clerk was not qualified to testify as expert on handwriting.—Strong v. Abner, 105 S.W.2d 599, 268 Ky. 502.

76. Va.—Updike v. Texas Co., 136 S.E. 591, 147 Va. 208.
22 C.J. p 780 note 67.

Qualification held shown
(1) Assistant treasurer of trust company.—Popalis v. Yanchura, 173 A. 743, 114 Pa.Super. 204.

(2) Bank employees or officials.
Ala.—Bridgeforth v. Sharpe, 124 So. 416, 220 Ala. 188—Kirby v. Brooks, 111 So. 235, 215 Ala. 507.
Ark.—Connor v. Bowers, 41 S.W.2d 977, 184 Ark. 102.
Cal.—In re Newell's Estate, 243 P. 33, 75 Cal.App. 554.
La.—Ivey v. Bailey, 143 So. 52, 175 La. 211.
N.C.—State v. Cofer, 172 S.E. 176, 205 N.C. 653.
Pa.—Ritter v. Henry, 17 Pa.Dist. & Co. 528—In re Reed's Estate, 23 Erie Co. 246.
Tex.—Garrison v. Garrison, Civ.App., 66 S.W.2d 451, error dismissed.
Va.—Updike v. Texas Co., 136 S.E. 591, 147 Va. 208—Adams v. Ristine, 122 S.E. 126, 138 Va. 273, 31 A.L.R. 1413.
W.Va.—Johnson v. Bee, 100 S.E. 486, 84 W.Va. 532, 7 A.L.R. 252.
22 C.J. p 780 note 67 [a] (1)–(5).

(3) Commissioner of registration and his assistants.—Fenias v. Reichenstein, 11 A.2d 10, 124 N.J.Law 196.

(4) Other cases see 22 C.J. p 780 note 67 [a] (6)–(14), [b]–[e].

77. Ill.—First Galesburg Nat. Bank & Trust Co. v. Federal Reserve Bank of Chicago, 15 N.E.2d 337, 295 Ill.App. 524.
Mo.—Vanausdol v. Bank of Odessa, 5 S.W.2d 109, 222 Mo.App. 91.
22 C.J. p 780 note 68.

78. Iowa.—Hyde v. Woolfolk, 1 Iowa 159.
Mo.—Vanausdol v. Bank of Odessa, 5 S.W.2d 109, 118, 222 Mo.App. 91, citing **Corpus Juris.**

79. Mo.—Vanausdol v. Bank of Odessa, supra, citing **Corpus Juris.**
N.J.—Fenias v. Reichenstein, 11 A.2d 10, 124 N.J.Law 196.
22 C.J. p 780 note 70.

80. N.C.—State v. Cofer, 172 S.E. 176, 205 N.C. 653.

81. Cal.—Goldstein v. Black, 50 Cal. 462.
22 C.J. p 780 note 71.

82. Conn.—Land Finance Corporation v. Menzies, 160 A. 168, 114 Conn. 694.

83. R.I.—Providence Municipal Ct. v. Kirby, 67 A. 8, 28 R.I. 287.
22 C.J. p 780 note 72.

84. Ala.—Venable v. Venable, 51 So. 833, 165 Ala. 621.
22 C.J. p 780 note 73.

85. Tex.—Mugg v. Adams, 13 S.W. 330, 76 Tex. 448.
Production of standard of comparison see infra § 617 a.

86. Fla.—Thompson v. Freeman, 149 So. 740, 111 Fla. 433.
22 C.J. p 773 note 9, p 781 note 75.

87. U.S.—Simonson v. Typer, C.C.A. Wyo., 285 F. 240.
Tex.—Gibralter Colorado Life Co. v. Taylor, 123 S.W.2d 318, 132 Tex. 328, reversing, Civ.App., 99 S.W.2d 1084.
22 C.J. p 781 note 75 [b].

writing and his testimony is based on a comparison of his recollection of it with the specimen admitted or proved to be genuine.[88]

§ 617. —— The Specimen or Standard

a. In general
b. Genuineness
c. Time and circumstances of preparation
d. Writings of third persons
e. Copies
f. Notice and submission to opposite party

a. In General

Standards of comparison to determine the genuineness of a handwriting, the number of which rests in the court's discretion, may be furnished by either party and should be produced in court.

In inquiries as to the authenticity of handwriting, a standard of comparison is not of itself evidence as to the genuineness of the handwriting, but merely a measure by which that genuineness is determined.[89]

The right to produce standards for comparison under statutes permitting the introduction of any genuine writing is equally open to both parties.[90] The signature alone on an instrument may be offered for comparison where the contents of the instrument are foreign to any issue in the case.[91] A genuine signature may be admitted in evidence and compared with another signature to impeach a witness as to the facts surrounding the execution of an instrument, even though there is no issue of forgery.[92]

Character of writing. There is no rule of evidence which prohibits the use of a genuine lead pencil signature for the purpose of comparison.[93] A paper on which only proper names were written has been held admissible as a standard as against the objection that it could not be fairly used for comparison with a letter.[94]

Number. It is within the discretion of the trial court to limit the number of standard signatures admitted for comparison.[95]

Production in court. It is essential, in order that there may be a comparison of handwriting in the technical sense, that the standard of comparison should be produced in court[96] and placed before the court and jury;[97] but there is also authority for the view that where the standard of comparison is admitted to be genuine, it is not necessary to put it in evidence in order to permit a witness to testify from a comparison.[98]

b. Genuineness

The genuineness of a standard of comparison must be preliminarily and satisfactorily established and the discretionary action of the trial court in admitting or rejecting the standard will not ordinarily be disturbed.

In order to authorize a comparison of handwritings, either by witnesses or by the court or jury, the genuineness of the document offered as a standard for comparison must be established.[99] It is generally considered that the requirements as to es-

Secondary evidence of disputed signature
Under statute, genuineness of disputed signature, not before court, cannot be proved by comparison of secondary evidence of disputed signature with genuine signature.—Thompson v. Freeman, 149 So. 740, 111 Fla. 433.

88. Wash.—O'Brien v. McKelvey, 109 P. 337, 59 Wash. 115.
22 C.J. p 781 note 76.

89. Ind.—Ashwell v. Miller, 103 N. E. 37, 54 Ind.App. 381.
"Test paper" is the term sometimes applied to the writing used as a test or standard by which to determine the genuineness of a signature or other writing.—Baker v. Haines, 6 Whart., Pa., 284—62 C.J. p 824 note 47.

90. Ill.—Shinn v. Settle, 222 Ill. App. 463.
Ind.—Plymouth Savings & Loan Ass'n No. 2 v. Kassing, 125 N.E. 488, 72 Ind.App. 1.
22 C.J. p 778 note 44 [a].

91. Ala.—Vickery v. Baggett, 101 So. 102, 20 Ala.App. 143, reversed on other grounds Ex parte Baggett, 101 So. 104, 211 Ala. 610.

92 Ill.—Crescio v. Crescio, 6 N.E. 2d 628, 365 Ill. 393.
Execution of will
Comparison of signature on will with admittedly genuine specimens is proper even where the will is not contested for forgery, where such evidence affects the credibility of witness to execution who testified he steadied hand of testator when testator executed will.—Crescio v. Crescio, supra.

93. Pa.—Groff v. Groff, 59 A. 65, 209 Pa. 603.

94. Del.—Phillips v. Conant, 180 A. 593, 7 W.W.Harr. 97.

95. S.D.—Corsica State Bank v. Heezen, 222 N.W. 671, 54 S.D. 113.

96. Fla.—Thompson v. Freeman, 149 So. 740, 111 Fla. 433.
La.—Parker v. Bascle, 98 So. 628, 154 La. 1027.
22 C.J. p 781 note 78.
Production of disputed writing see supra § 616.

97. Pa.—McClure v. Redman, 107 A. 25, 263 Pa. 405.
22 C.J. p 781 note 79.
Cross-examination
Under some statutes handwriting witnesses cannot be cross-examined as to the genuineness of the signature on a document which is not in evidence.—Alesch v. Haave, 189 N. W. 155, 178 Wis. 19.
Use of unidentified signatures
The conclusion of an expert based on a comparison of proved signatures is not rendered incompetent, as based on signatures not in evidence, by the fact that he also examined some unidentified signatures and testified that such examination did not disprove his conclusion.—Steel v. Snyder, 144 A. 912, 295 Pa. 120.

98. N.C.—Abernathy v. Yount, 50 S. E. 696, 138 N.C. 337—Fuller v. Fox, 7 S.E. 589, 101 N.C. 119, 9 Am.S. R. 27.

99. U.S.—Citizens' Bank & Trust Co. of Middlesboro, Ky., v. Allen, C.C.A.Va., 43 F.2d 549.

tablishing the genuineness of the standard apply with full force to proof of handwriting on cross-examination as well as on direct examination,[1] although there is authority for a relaxation of the requirements on cross-examination.[2]

Preliminary question for court; discretion. The question of the authenticity of a standard of comparison is for the trial court in the first instance,[3] particularly under statutes permitting comparison of a disputed handwriting with any writing proved to the satisfaction of the court to be genuine,[4] although ultimately the question may be one of fact for the jury.[5] The trial judge should admit all evidence which tends to establish the genuineness of the standard; he should determine whether the proof is sufficient to establish the authenticity of such standard; and if authenticity is established to his satisfaction, the standard should be admitted to be used by the experts as well as by the jurors.[6]

The action of the court in admitting or rejecting a specimen as a standard, is a matter of discretion.[7] Its action is final and conclusive[8] unless based on an error of law,[9] or on evidence which is, as a matter of law, insufficient to justify its finding,[10] or on a manifest failure to apply the exercise of reason to the facts presented.[11]

Sufficiency of proof. There is some difference of opinion as to what amounts to satisfactory proof of the genuineness of a standard of comparison.[12] The genuineness of the proposed standard may be established by an admission of the party against whom it is sought to be used,[13] or by an estoppel which precludes him from denying its genuineness,[14] as where he claims under the document.[15]

Further, according to some cases, the genuineness of the proposed standard may be proved by the testimony of witnesses who saw the standard written[16] or to whom or in whose hearing the person sought

Ga.—Cocroft v. Cocroft, 124 S.E. 346, 158 Ga. 714.
Ind.—Kipfer v. Kipfer, 12 N.E.2d 507, 213 Ind. 321—Plymouth Savings & Loan Ass'n No. 2 v. Kassing, 125 N.E. 488, 72 Ind.App. 1.
Neb.—Schreiner v. Shanahan, 181 N.W. 536, 105 Neb. 525.
N.Y.—Turnure v. Breitung, 186 N.Y.S. 620, 195 App Div. 200, affirmed 135 N.E. 955, 233 N.Y. 649.
R.I.—First Nat. Bank v. Goldman, 128 A. 206, 46 R.I. 354.
Tex.—Pitts v. Thompson, Civ.App., 71 S.W.2d 368, error dismissed.
22 C.J. p 781 note 81.

Signatures stand in same position
as any other handwriting in this respect.—Richardson v. Newcomb, 21 Pick., Mass., 315—22 C.J. p 782 note 82.

Death of writer
Proof of genuineness of the standard is not dispensed with because the writer is dead.—McVicker v. Conkle, 24 S.E. 23, 96 Ga. 584.

1. Mo.—Rose v. Springfield First Nat. Bank, 3 S.W. 876, 91 Mo. 399, 60 Am.R. 258.
22 C.J. p 784 note 99.

2. Iowa.—Browning v. Gosnell, 59 N.W. 340, 91 Iowa 448.
22 C.J. p 784 note 1.

3. U.S.—Citizens' Bank & Trust Co. of Middlesboro, Ky., v. Allen, C.C.A.Va., 43 F.2d 549.
Ind.—Plymouth Savings & Loan Ass'n No. 2 v. Kassing, 125 N.E. 488, 72 Ind.App. 1.
Mass.—Davis v. Meenan, 169 N.E. 145, 270 Mass. 313—Taylor-Wharton Iron & Steel Co. v. Earnshaw, 156 N.E. 855, 259 Mass. 554.

4. Colo.—Wilson v. Scroggs, 277 P. 784, 85 Colo. 537.
N.C.—Newton v. Newton, 108 S.E. 336, 182 N.C. 54.
22 C.J. p 783 note 90 [a] (2).

Effect of dispute as to genuineness
Under such a statute, the fact that the genuineness of the signature offered as a basis for comparison is disputed does not prevent admission of the standard in evidence, since the statute requires only that genuineness be proved to the satisfaction of the court.—Wilson v. Scroggs, 277 P. 784, 85 Colo. 537.

5. Ind.—Plymouth Savings & Loan Ass'n No. 2 v. Kassing, 125 N.E. 488, 72 Ind.App. 1.
22 C.J. p 779 note 57 [a].

6. Colo.—Wilson v. Scroggs, 277 P. 784, 85 Colo. 537.

7. Del.—Phillips v. Conant, 180 A. 593, 7 W.W.Harr. 97.
Me.—Williams v. Williams, 85 A. 43, 109 Me. 537.

8. Pa.—Shannon v. Castner, 21 Pa. Super. 294.
22 C.J. p 783 note 95.

9. Mass.—Taylor-Wharton Iron & Steel Co. v. Earnshaw, 156 N.E. 855, 259 Mass. 554.
22 C.J. p 783 note 96.

10. Mass.—Taylor-Wharton Iron & Steel Co. v. Earnshaw, supra.

11. Me.—State v. Thompson, 13 A. 892, 80 Me. 194, 6 Am.S.R. 172.
22 C.J. p 783 note 97.

12. Ind.—Plymouth Savings & Loan Ass'n No. 2 v. Kassing, 125 N.E. 488, 72 Ind.App. 1.

13. Ga.—Waddell v. J. R. Watkins Medical Co., 104 S.E. 250, 25 Ga. App. 657.
Ind.—Plymouth Savings & Loan Ass'n No. 2 v. Kassing, 125 N.E. 488, 72 Ind.App. 1.
S.D—Corsica State Bank v. Heezen, 222 N.W. 671, 54 S.D. 113.
22 C.J. p 782 note 83.

Obtaining admission on cross-examination
Ordinarily, party against whom writing is sought to be used as standard may be required for purpose of establishing its genuineness to testify on cross-examination as to whether he wrote it.—Nixon v. Shaver, 176 S.E. 849, 115 W.Va. 469.

14. Tex.—Gadberry v. Home Mut. Life Ass'n, Civ.App., 57 S.W.2d 370.
22 C.J. p 782 note 84.

Circumstances constituting estoppel
(1) Plaintiff suing administratrix on note of decedent and proving that she was the duly qualified administratrix is estopped to deny the genuineness of the signature to will, so that will is properly admitted in evidence to compare signature thereto with signature to note.—Barnes v. Barnes, Tex.Civ.App., 261 S.W. 485.
(2) Other cases see 22 C.J. p 774 note 12 [b].

15. Ill.—Himrod v. Gilman, 35 N.E. 373, 147 Ill. 293, affirming 44 Ill. App. 516.

16. Ind.—Plymouth Savings & Loan Ass'n No. 2 v. Kassing, 125 N.E. 488, 72 Ind.App. 1.
Tex.—Kveton v. Keding, Civ.App., 286 S.W. 673.
22 C.J. p 782 note 89 [e].

Actual observation of execution
If witnesses testify that the standard was signed in their presence, and that no one else was present at the time, it is not necessary that they should have actually watched the pen as it passed over the paper.—Roloson's Estate, 79 Pa. Super. 124.

to be charged acknowledged the writing thereof,[17] or by evidence showing that the reputed writer of the standard acquiesced in or recognized it,[18] or adopted and acted on it in his business transactions or other concerns.[19] While it has been considered that the genuineness of the standard, unless it is an ancient document, must be established by admission or estoppel,[20] or by direct or positive evidence,[21] and that a standard cannot be proved by opinion evidence or by comparison with another writing,[22] in many cases it has been held that the genuineness of the standard may be established by circumstantial or other competent evidence, including proof other than by admission or estoppel.[23] While some authorities hold that the standard itself cannot be authenticated by an inference of a witness drawn from its resemblance to a mental standard which he has formed by reason of knowledge of the handwriting of the person whose authorship of the questioned document is in dispute,[24] others permit such authentication.[25]

The proof of genuineness must be clear and positive,[26] and must satisfy the court on this subject.[27] A standard of comparison should be admitted where its genuineness is established by uncontradicted evidence.[28]

Ancient documents. Comparison of handwritings is almost universally allowed in case of documents at least thirty years old; and such documents are admitted in evidence, without further proof of genuineness, as standards for comparison,[29] when they were accompanied by possession of the property to which they relate.[30] The authenticity of an ancient document may be established by the evidence of skilled observers testifying from resemblance to a mental standard created by juxtaposition or comparison.[31]

c. Time and Circumstances of Preparation

The time at which a standard for purposes of comparison of handwriting was made may affect its value as a standard; a standard written by a person after the controversy arose ordinarily may not be offered in his own favor.

The time at which a specimen or standard for

17. Ind.—Plymouth Savings & Loan Ass'n No. 2 v. Kassing, 125 N.E. 488, 72 Ind.App. 1.
Tex.—Kveton v. Keding, Civ.App., 286 S.W. 673.

18. Ind.—Plymouth Savings & Loan Ass'n No. 2 v. Kassing, 125 N.E. 488, 72 Ind.App. 1.

Canceled checks

That canceled checks were found among the papers of an absentee, or were returned by a bank as being his checks, is not sufficient proof to authorize their admission as a standard.—Plymouth Savings & Loan Ass'n No. 2 v. Kassing, supra.

19. Ind.—Plymouth Savings & Loan Ass'n No. 2 v. Kassing, supra.
Mass.—Taylor-Wharton Iron & Steel Co. v. Earnshaw, 156 N.E. 855, 259 Mass. 554.

20. Tex.—Pitts v. Thompson, Civ. App., 71 S.W.2d 368, error dismissed.
22 C.J. p 782 note 87.

21. Okl.—Miller v. Thompson, 151 P. 192, 50 Okl. 643.
Tex.—Pitts v. Thompson, Civ.App., 71 S.W.2d 368, error dismissed.

22. Ind.—Plymouth Savings & Loan Ass'n No. 2 v. Kassing, 125 N.E. 438, 72 Ind.App. 1.
Ky.—Pioneer Coal Co. v. Polly, 271 S.W. 592, 208 Ky. 548.
Okl.—Miller v. Thompson, 151 P. 192, 193, 50 Okl. 643.

23. Mass.—Davis v. Meenan, 169 N. E. 145, 270 Mass. 313.
Pa.—Popalis v. Yanchura, 173 A. 743, 114 Pa.Super. 204.
Vt.—In re Barron's Estate, 105 A. 255, 92 Vt. 460.
22 C.J. p 782 note 88, 89 [f].

Acknowledgment before notary public

If a person whose name is on a deed acknowledges it before a notary public, the inference is warranted that he signed it.—Davis v. Meenan, 169 N.E. 145, 270 Mass. 313.

Letters

(1) The mere fact that a letter has been received is not enough to admit it as a standard of the writing of the one who purported to be the writer, although a finding that a letter is authentic, and that the signature thereon offered as a standard is genuine, may be warranted by the surrounding circumstances and conduct of the parties.—Taylor-Wharton Iron & Steel Co. v. Earnshaw, 156 N.E. 855, 259 Mass. 554—22 C.J. p 782 note 89 [i].

(2) The genuineness of the signature to a reply letter may be shown prima facie by circumstantial evidence, but the reply letter must purport to be signed by the person claimed to be the author thereof.—Gibralter Colorado Life Co. v. Taylor, 123 S.W.2d 318, 132 Tex. 328, reversing, Civ.App., 99 S.W.2d 1084.

24. Ga.—Gress Lumber Co. v. Georgia Pine Shingle Co., 48 S.E. 115, 120 Ga. 751.
22 C.J. p 783 note 92.

25. Del.—Phillips v. Conant, 180 A. 593, 7 W.W.Harr. 97.
Ill.—Cook v. Moecker, 217 Ill.App. 479.
22 C.J. p 783 note 93.

26. Tex.—Pitts v. Thompson, Civ. App., 71 S.W.2d 368, error dismissed.
Va.—Keister's Ex'rs v. Philips' Ex'x, 98 S.E. 674, 124 Va. 585.
22 C.J. p 782 note 89.

27. Ind.—Ashwell v. Miller, 103 N. E. 37, 54 Ind.App. 381.
22 C.J. p 783 note 90.

Proof as matter of fact or law

(1) Proof "to the satisfaction of the court" as required under some statutes, should be construed to call for that degree of competent proof of genuineness which would require the court to find genuineness as a fact.
Colo.—Wilson v. Scroggs, 277 P. 784, 785, 85 Colo. 537.
Ill.—Cook v. Moecker, 217 Ill.App. 479, 484.

(2) The proof must satisfy the court to such an extent that it can rule, as a matter of law, that the document which it is proposed to use as a standard is genuine.—Sankey v. Cook, 47 N.W. 1077, 82 Iowa 125.

28. Ind.—Plymouth Savings & Loan Ass'n No. 2 v. Kassing, 125 N.E. 488, 72 Ind.App. 1.

29. W.Va.—Johnston v. Bee, 100 S. E. 486, 84 W.Va. 532, 7 A.L.R. 252.
22 C.J. p 784 note 2.
Admissibility of ancient documents see infra §§ 743–752.

30. Ga.—Goza v. Browning, 23 S. E. 842, 96 Ga. 421.

31. Tex.—Gadberry v. Home Mut. Life Ass'n, Civ.App., 57 S.W.2d 370.
22 C.J. p 784 note 4.

purposes of comparison of handwriting was made may affect its value as a standard of comparison but does not necessarily render it inadmissible.[32]

Writings after controversy arose. The general rule seems to be well settled that where the genuineness of a person's handwriting is in dispute he cannot offer in his own favor other specimens of his writing made after the controversy arose, and for the purpose of being so used, as standards with which to compare the disputed writing; he is confined to the production for this purpose of papers written by him before the controversy commenced, or of those subsequently written by him in the usual course of business and under such circumstances as to negative all idea that they were written for the purpose of being used as evidence in his own favor.[33] However, it has been held that the fact that the paper was written after the controversy arose is not alone sufficient to exclude its use.[34] Pleadings purporting to be signed by a party have been held admissible as standards of comparison with the handwriting of other documents alleged to have been written by him,[35] although there is authority against such use of pleadings.[36]

Where the standard is produced by the party adverse to the writer, it is no objection that it was written after the commencement of the controversy.[37]

Writings made at trial. The person whose handwriting is in question cannot be permitted to write something at the trial and offer the specimen so prepared as a standard.[38] It has been stated that the court will not, as a rule, order the person whose writing is in question to write in court,[39] but it has power to make such an order,[40] in which case the standard so obtained may be used;[41] and where a witness has denied what purports to be his handwriting, he may on cross-examination be called on to write in order that such writing may be compared with the disputed writing for the purpose of contradicting him.[42] Where a signature has been written in open court by the person in question at the request of the opposite party, the party calling for the writing may introduce it in evidence.[43]

d. Writings of Third Persons

Writings of third persons as a standard of comparison may or may not be admissible depending primarily on the provisions of local statutes.

Under some statutes the writing to be used as a standard must be the genuine handwriting of the person purporting to be the writer of the disputed document, and writings made by other persons, as by the person alleged to have forged the disputed paper, although proved to be genuine, are not admissible.[44] Other statutes permit the introduction of other genuine writings of any person charged with the authorship of the disputed writing,[45] and hence permit introduction and comparison of other genuine writings of the alleged forger,[46] although before such standards of comparison are admitted there should be something to connect their author with the disputed writing.[47]

Without reference to statute it has also been held that other writings of an alleged forger are admissible to show their similarity with a disputed sig-

32. Iowa.—Butman v. Christy, 198 N.W. 314, 197 Iowa 661.

Standard made before disputed writing
Iowa.—Butman v. Christy, supra.

Standard made after disputed writing
The mere fact that the standard was made since the writing in dispute affects only its credibility.
Iowa.—Singer Mfg. Co. v. McFarland, 5 N.W. 739, 53 Iowa 540.
S.D.—Greenwald v. Ford, 109 N.W. 516, 21 S.D. 28.

33. Del.—Phillips v. Conant, 180 A. 593, 7 W.W.Harr. 97.
Ill.—Shinn v. Settle, 222 Ill.App. 463.
22 C.J. p 784 note 6.

34. Ind.—Ashwell v. Miller, 103 N.E. 37, 54 Ind.App. 381.
22 C.J. p 778 note 44 [a].

35. Iowa.—Frank v. Berry, 103 N.W. 358, 128 Iowa 223.

36. Mo.—Springer v. Hall, 83 Mo. 693, 53 Am.R. 598.
22 C.J. p 784 note 10.

37. N.Y.—People v. Molineux, 61 N.E. 286, 168 N.Y. 264, 62 L.R.A. 193.
22 C.J. p 784 note 11.

38. Ill.—First Galesburg Nat. Bank & Trust Co. v. Federal Reserve Bank of Chicago, 15 N.E.2d 337, 343, 295 Ill.App. 524, citing **Corpus Juris.**
22 C.J. p 785 note 12.

39. Ill.—First Galesburg Nat. Bank & Trust Co. v. Federal Reserve Bank of Chicago, supra, citing **Corpus Juris.**
22 C.J. p 785 note 13.

40. Ill.—First Galesburg Nat. Bank & Trust Co. v. Federal Reserve Bank of Chicago, supra, citing **Corpus Juris.**
22 C.J. p 785 note 14.

41. U.S.—Citizens' Bank & Trust Co. of Middlesboro, Ky., v. Allen, C.C.A.Va., 43 F.2d 549.
22 C.J. p 785 note 15.

42. Ill.—First Galesburg Nat. Bank & Trust Co. v. Federal Reserve Bank of Chicago, 15 N.E.2d 337, 343, 295 Ill.App. 524, citing **Corpus Juris.**
22 C.J. p 774 note 13 [a], p 785 note 16.

43. N.D.—State v. Gordon, 155 N.W. 59, 32 N.D. 31, Ann.Cas.1918A 442.
22 C.J. p 785 note 17.

44. Ky.—Strong v. Abner, 105 S.W.2d 599, 268 Ky. 502.
22 C.J. p 778 notes 51 [e], 54 [a], p 784 note 5.

45. Colo.—Wilson v. Scroggs, 277 P. 784, 85 Colo. 537.
Ill.—Cook v. Moecker, 217 Ill. App. 479.

46. Ill.—Cook v. Moecker, supra.
Iowa.—Kruidenier's Estate v. Bankers' Trust Co., 209 N.W. 452, 203 Iowa 776.

47. Colo.—Wilson v. Scroggs, 277 P. 784, 85 Colo. 537.
Ill.—Cook v. Moecker, 217 Ill.App. 479.

nature and their dissimilarity from the true signature of the person sought to be held liable on the disputed document.[48]

e. Copies

As a standard of comparison, accurate photographs of genuine handwritings or signatures may be used, although they are excluded by some authorities where the originals are available.

In some cases it has been held that photographic copies and photographic enlarged copies of the genuine handwritings or signatures may be used as aids in making the comparison by the court, jury, or witnesses;[49] but by other authorities similar evidence is rejected,[50] at least where the originals are available.[51] In any event, photographic copies must be shown to be exact copies of the originals.[52]

Traced copies,[53] magnified drawings,[54] or letterpress copies[55] cannot be used; but carbon copies have been held admissible.[56]

f. Notice and Submission to Opposite Party

Notice of intention to introduce a standard of comparison, and submission of the proposed standard to the opposite party, are sometimes required.

Reasonable notice of an intention to use a standard of comparison and submission of the proposed standard to the opposite party before it is introduced in evidence are sometimes required by statute;[57] and it has been held without reference to statutory authority that the court may order a party to submit to his adversary writings intended to be offered on the subject of handwriting so that the adversary may have an opportunity of examining them,[58] but it is proper to proceed to trial without the production of such writings where the adversary fails to exercise his right to inspect.[59]

§ 618. —— Mode of Comparison

In making a comparison of writings, magnifying glasses and other means of enlargement may be used.

As aids in making a comparison of writings the court, jury, or witnesses may use magnifying glasses, microscopes, and photographic copies or enlargements.[60] A projectoscope may be used by a handwriting expert to illustrate his testimony.[61]

An expert witness as to handwriting may make illustrations before the jury on a blackboard or a paper for the purpose of explaining his testimony and rendering it more intelligible to them.[62] How-

48. Okl.—Miller v. Picou, 45 P.2d 478, 172 Okl. 456.

49. Va.—Adams v. Ristine, 122 S.E. 126, 138 Va. 273, 31 A.L.R. 1413.
W.Va.—Hancock v. Snider, 133 S.E. 131, 134, 101 W.Va. 535, citing **Corpus Juris.**
22 C.J. p 785 note 19.

Dynamic characteristics in photostatic copy
Photostatic copies could be used as a basis for comparison of signatures, subject to a limitation in identification, admitted by the expert who made the comparison, that the dynamic characteristics of the writing could not be produced in the photostatic copy.—Moncur v. Western Life Indemnity Co., 112 A. 476, 269 Pa. 213.

50. Mich.—Maclean v. Scripps, 17 N.W. 815, 18 N.W. 209, 52 Mich. 214.
22 C.J. p 785 note 20.

51. Md.—Hensel v. Smith, 136 A. 900, 152 Md. 380.
22 C.J. p 785 note 21.

Comparison must be made with originals where originals are available.—Hensel v. Smith, 136 A. 900, 152 Md. 380.

Lost document
Photographic copy of lost or missing document cannot be used to test genuineness unless it has first acquired, by proper reëstablishment proceedings, same effect as original document.—Thompson v. Freeman, 149 So. 740, 111 Fla. 433.

52. Md.—Hensel v. Smith, 136 A. 900, 152 Md. 380.
22 C.J. p 785 notes 19 [a], [b], 20 [a] [b].

53. Tex.—Howard v. Russell, 12 S.W. 525, 75 Tex. 171.

54. Pa.—Ulmer v. Gentner, 3 Pennyp. 453.

55. Cal.—Spottiswood v. Weir, 6 P. 381, 66 Cal. 525.
22 C.J. p 786 note 24.

56. Tex.—Askins, Inc., v. Sparks, Civ.App., 56 S.W.2d 279, error refused.
22 C.J. p 786 note 25.

Initials
That carbon copies of signatures were party's initials, and not his full name, did not render them inadmissible.—Askins, Inc., v. Sparks, supra.

57. Ga.—Ginn v. Ginn, 83 S.E. 118, 142 Ga. 420—Walters v. Josey, 73 S.E. 653, 137 Ga. 475.
Ill.—Fekete v. Fekete, 154 N.E. 209, 323 Ill. 468—Shinn v. Settle, 222 Ill.App. 463.
22 C.J. p 778 note 43 [a].

Acknowledgment of genuineness
Although writings offered for comparison are acknowledged as genuine, the opposite party is entitled to know, under statute, that evidence for comparison of signatures may be resorted to, and is entitled to have the writing submitted to him, before he announces ready for trial.—Marietta Fertilizer Co. v. Gary, 96 S.E. 711, 22 Ga.App. 604.

Writings in evidence for other purposes
Where writings have already been put in evidence for some purpose other than comparison, the fact that the jury may use them for comparison does not render their admission erroneous for failure to give the statutory notice.—Major v. Garrott, 163 S.W. 463, 157 Ky. 468.

Previous impanelment of jury
Where reasonable notice was given to a party, and such party, his attorney, and his witnesses examined the proposed standards before any evidence was introduced, it is immaterial that the jury had been previously impaneled.—Southwestern Milling Co. v. Fernstrom, 226 Ill. App. 468.

58. Kan.—Burns v. Clark, 185 P. 27, 105 Kan. 454.

59. Kan.—Burns v. Clark, supra.

60. Tex.—Shell Pipe Line Corporation v. Coston, Civ.App., 35 S.W.2d 1056.
Va.—Adams v. Ristine, 122 S.E. 126, 138 Va. 273, 31 A.L.R. 1413.
22 C.J. p 785 note 19, p 786 note 27.
Photographic copies of standard see supra § 617 e.

61. Nev.—State v. Kuhl, 175 P. 190, 42 Nev. 185.

62. Ill.—Wolf v. People's Bank, 255 Ill.App. 127.
22 C.J. p 786 note 28.

ever, the witness may not write a copy of a disputed signature on a blackboard and then, by alleged copies of authentic writings, institute a comparison between them and the copy of the alleged forged signature,[63] nor may he make a facsimile of a signature and then have such facsimile and a genuine signature submitted to the jury for the purpose of showing how easily the genuine signature could be counterfeited.[64]

§ 619. —— Mode of Testifying

In making a comparison of handwritings, the witness should state the basis of his inference and may give reasons, but he may not testify positively as to the author of the disputed writing or draw conclusions as to matters not appearing from the face of the writing.

In making a comparison of handwritings, the witness should state the basis of his inference,[65] and may give reasons for his opinion[66] on his examination in chief.[67] He is limited, however, to stating his inference and cannot go further and testify positively as to who wrote the disputed writing,[68] nor can he be permitted, by argument or inference, to draw conclusions as to matters not appearing on the face of the writing.[69]

Where, on an issue of similarity of certain handwriting, experts testified on cross-examination that both the writings in controversy showed an apparent attempt at disguise, it was proper to show by such witnesses that attempts at disguise in handwriting did not eradicate from the product those peculiarities which indicate the producer.[70] An expert called by the court may testify that one of several signatures is not in the same handwriting as the others, without stating which are genuine.[71]

§ 620. —— Cross-Examination

A witness who has made a comparison of handwritings may be cross examined as to any subject which, in the opinion of the court, will throw light on the weight to be given to his testimony.

A witness who has made a comparison of handwritings may be cross-examined.[72] The cross-examination must serve a legitimate purpose.[73]

The scope and extent of the cross examination rests largely within the discretion of the trial court[74] and the court, in the interest of truth and justice, usually permits a wide latitude in the cross examination.[75] The witness may be cross-examined as to his experience or qualifications,[76] his method of investigation,[77] his opportunities for examining the disputed writing,[78] the reasons for his opinion,[79] the characteristics of the questioned writing[80] and how they differ from the genuine,[81] the difference between his opinion and that of other experts who have testified,[82] and as to other subjects that will throw light on the weight to be given to his testimony.[83]

63. Pa.—Groff v. Groff, 59 A. 65, 209 Pa. 603.

64. Tenn.—Fisher v. Travelers' Ins. Co., 138 S.W. 316, 124 Tenn. 450, Ann.Cas.1912D 1246.
Tex.—Thomas v. State, 18 Tex.App. 213.

65. Ohio.—Koons v. State, 36 Ohio St. 195.
22 C.J. p 786 note 32.

66. Colo.—Gavin v. Kniffen, 261 P. 6, 82 Colo. 448.
22 C.J. p 722 note 88 [a] (1), p 786 note 33.

Reasons based on memoranda
An expert may not give reasons which are based on the improper use of memoranda.—In re Iwers' Estate, 280 N.W. 579, 225 Iowa 389.

67. Colo.—Gavin v. Kniffen, 261 P. 6, 82 Colo. 448.
22 C.J. p 786 note 34.

68. N.Y.—People v. Severance, 22 N.Y.S. 91, 67 Hun 182.

69. Ohio.—Marshall v. Thomas, 31 Ohio Cir.Ct. 363.

70. Conn.—McGarry v. Healey, 62 A. 671, 78 Conn. 365.

71. Mo.—Wade v. Wade, App., 229 S. W. 432.

72. Va.—Adams v. Ristine, 122 S.E. 126, 138 Va. 273, 31 A.L.R. 1413.

73. Iowa.—Keeney v. Arp De La Gardee, 235 N.W. 745, 212 Iowa 45.

Improper cross-examination
It was not error to refuse to allow a handwriting expert to be cross-examined as to the genuineness of the signatures of a person other than the person as to whose signature he was examined in chief, where the genuineness of such other signatures was to be established by the cross-examining party, and he might have made the witness his own.—Schreiner v. Shanahan, 181 N. W. 536, 105 Neb. 525.

74. Cal.—Hirshfeld v. Dana, 223 P. 451, 193 Cal. 142.
Mass.—Commonwealth v. Pettes, 114 Mass. 307.
N.C.—In re Williams' Will, 1 S.E.2d 857, 215 N.C. 259.
Va.—Adams v. Ristine, 122 S.E. 126, 138 Va. 273, 31 A.L.R. 1413.

75. Va.—Adams v. Ristine, supra.

76. Ark.—Wagley v. Roberts, 73 S. W.2d 463, 189 Ark. 507.
Va.—Adams v. Ristine, 122 S.E. 126, 138 Va. 273, 31 A.L.R. 1413.

77. Va.—Adams v. Ristine, supra.

Judgment predicated on other signatures
If a witness called to prove the genuineness of a signature predicates his judgment in whole or in part on other signatures which he saw the person in question make, and the latter signatures differ from the signature in question, this fact may be brought out on the cross-examination.—Bevan v. Atlanta Nat. Bank, 31 N.E. 679, 142 Ill. 302, 308, reversing 39 Ill.App. 577—22 C.J. p 786 note 43.

78. Md.—Herrick v. Swomley, 56 Md. 439.
22 C.J. p 786 note 39.

79. Colo.—Gavin v. Kniffen, 261 P. 6, 82 Colo. 448.
Va.—Adams v. Ristine, 122 S.E. 126, 138 Va. 273, 31 A.L.R. 1413.

80. Ark.—Wagley v. Roberts, 73 S. W.2d 463, 189 Ark. 507.
Iowa.—Keeney v. Arp De La Gardee, 235 N.W. 745, 212 Iowa 45.
Va.—Adams v. Ristine, 122 S.E. 126, 138 Va. 273, 31 A.L.R. 1413.

81. Va.—Adams v. Ristine, supra.

82. Va.—Adams v. Ristine, supra.

83. Va.—Adams v. Ristine, supra.
Weight of evidence see infra § 621.

Fees of expert
Iowa.—Butman v. Christy, 198 N.W. 314, 197 Iowa 661.

Possibility of forgery
Where a handwriting expert testified that, after comparison of testatrix's signature with that of an

The weight to be attached to an expert's opinion may be impaired by showing on cross-examination that he reached a contrary conclusion on another occasion.[84] The expert may be tested by showing him part of a writing, concealing the rest, and asking him in whose handwriting is the part shown,[85] or by showing him other specimens of handwriting and asking for his inference as to the writer,[86] or by asking whether, assuming such other specimens to be genuine, or it being admitted or proved that they are, he still is of the same mind as before.[87] It has been held that the witness may be asked to distinguish between a genuine and a false signature,[88] or to give his opinion as to the genuineness of other signatures prepared for the purpose;[89] but it has also been held that the witness cannot be handed a number of slips containing writing and asked whether they were all written by the same person or by different persons.[90] A writing which is inadmissible as a standard of comparison because it is irrelevant is inadmissible on cross-examination of a witness to test his knowledge and good faith.[91]

§ 621. —— Weight of Evidence

The authorities have expressed divergent views as to the value and weight to be accorded to expert testimony based on a comparison of handwritings.

Many divergent views have been expressed as to the value and weight to be given to expert testimony based on a comparison of handwritings.[92] The value of the witness' opinion will depend on the clearness with which he demonstrates its correctness[93] and the circumstances of the particular case.[94] The probative force of the evidence is ordinarily a question for the jury, or other triers of facts,[95] who are not required to follow the opinion of experts,[96] and whose action is not controlled by the action of the court in admitting the standard

admitted signature on a note, the signature to the will was genuine, and it was shown that the admitted signature had been in proponent's possession, it is proper to ask on cross-examination whether a person having possession of the admitted signature could become expert in writing testatrix's name.—Mills v. Mills, Tex.Civ.App., 253 S.W. 542.

84. Ga.—Ray v. State, 83 S.E. 518, 142 Ga. 655.
N.Y.—Hoag v. Wright, 66 N.E. 579, 174 N.Y. 36, 63 L.R.A. 163.

85. Ala.—Kirksey v. Kirksey, 41 Ala. 626.
Pa.—Groff v. Groff, 59 A. 65, 209 Pa. 603.

86. Ind.—Thomas v. State, 2 N.E. 808, 103 Ind. 419.
N.Y.—People v. Murphy, 17 N.Y.S. 427.

87. Md.—Chester County Nat. Bank v. Armstrong, 6 A. 584, 66 Md. 113, 59 Am.R. 156.

88. Mich.—Johnston Harvester Co. v. Miller, 40 N.W. 429, 72 Mich. 265, 16 Am.S.R. 536.

89. Iowa.—Browning v. Gosnell, 59 N.W. 340, 91 Iowa 448.
N.Y.—Hornellsville First Nat. Bank v. Hyland, 6 N.Y.S. 87, 53 Hun 108, affirmed 26 N.E. 755, 125 N.Y. 711.

90. Conn.—State v. Griswold, 34 A. 1046, 67 Conn. 290, 33 L.R.A. 227.

91. Tex.—Texas State Bank of Ft. Worth v. Scott, Civ.App., 225 S.W. 571.

92. Utah.—In re Yowell's Estate, 285 P. 285, 75 Utah 312.

93. Neb.—In re O'Connor's Estate, 179 N.W. 401, 105 Neb. 88, 12 A.L.R. 199, certiorari denied O'Connor v. Slaker, 41 S.Ct. 450, 256 U.S. 690, 65 L.Ed. 1173.
22 C.J. p 786 note 48.
Weight of opinion evidence generally see supra § 567.

Reasoning
Expert's opinion on handwriting, without the reasoning on which it is based, is of little value.—In re Varney, D.C.Ky., 22 F.2d 230, affirmed, C.C.A., Rutherford v. Elliott, 23 F.2d 250.

94. Ill.—Fekete v. Fekete, 154 N.E. 209, 323 Ill. 468.

Testimony that signatures looked alike
Evidence that signature to notice of rejection of insurance application looked like applicant's signature did not conclusively establish genuineness of signature where the witness states that he "would not swear it." —Metropolitan Life Ins. Co. v. Busby, 157 S.E. 354, 42 Ga.App. 808.

Time occupied in comparison
The length of time and opportunity which experts had to compare genuine and disputed writings may be considered in determining the weight to be given to their testimony.—Land Finance Corporation v. Menzies, 160 A. 168, 114 Conn. 694.

95. Ala.—Roberts v. Davis, 160 So. 718, 230 Ala. 272—Martin v. Davis, 141 So. 667, 224 Ala. 648.
Cal.—Dozier v. Hillman, 287 P. 116, 105 Cal.App. 127.
Mich.—Domzalski v. Jozefiak, 241 N.W. 259, 257 Mich. 273.
Mont.—Grosfield v. First Nat. Bank, 236 P. 250, 73 Mont. 219.
N.J.—Fenias v. Reichenstein, 11 A.2d 10, 124 N.J.Law 196.
Utah.—In re Yowell's Estate, 285 P. 285, 294, 75 Utah 312, citing Corpus Juris.
Wash.—In re Zimmerli's Estate, 298 P. 326, 162 Wash. 243.
22 C.J. p 786 note 49.

96. U.S.—In re Paris, D.C.N.Y., 4 F. Supp. 878.
Iowa.—In re Richardson's Estate, 208 N.W. 374, 202 Iowa 328.
La.—White System of Shreveport v. Theus, App., 182 So. 394.
Mont.—Grosfield v. First Nat. Bank, 236 P. 250, 73 Mont. 219.
N.Y.—Fiero v. Franklin Sav. Bank, 207 N.Y.S. 235, 124 Misc. 38.
S.D.—City Nat. Bank of Lincoln v. O'Leary, 190 N.W. 1016, 46 S.D. 101.
Tenn.—Baskett v. Chuckey Banking Co., 2 Tenn.App. 31.
Wis.—Ninoff v. Hazel Green State Bank, 183 N.W. 673, 174 Wis. 560.
22 C.J. p 787 note 50, p 728 note 73 [d].

Errors of expert
Where a handwriting expert is in error in many instances, the court will not act on his testimony alone. —In re Initiative Petition No. 142, State Question No. 205, 82 P.2d 803, 183 Okl. 343—In re Referendum Petition No. 71, State Question No. 216, 65 P.2d 985, 179 Okl. 381.

Right to disregard entirely
(1) Even though expert testimony as to handwriting is unsatisfactory in character and should be received and acted upon with great care and caution, it cannot be discarded altogether as evidence.—Joffre v. Mynatt, Tex.Civ.App., 240 S.W. 319.

(2) Testimony of expert witnesses could not be arbitrarily ignored by jury where the opposing testimony of a single witness as to execution of instrument contained within itself such weaknesses as to render it inherently improbable.—Herbert

as genuine.[97] The court may, however, properly reject evidence not of sufficient probative weight to enable a jury to give a reasonable inference.[98]

Some authorities consider that less weight should be given to inferences from comparison, than to direct and credible testimony of witnesses as to matters within their personal observation, and such a feeling is active in the decisions of the court.[99] Indeed, it is often considered that inferences from comparison are far from satisfactory and should be received with great care and caution, not only because of the exactness with which handwriting may be imitated, but also on account of the dissimilarities to be found in different specimens of the handwriting of the same person executed at different times and under different circumstances.[1] Nevertheless this species of evidence has its advocates,[2] particularly where the reasoning of the expert is unimpeached,[3] it being well recognized that a person's handwriting, however it may be changed or affected by time or circumstances, will ordinarily exhibit certain distinctive peculiarities by which it may be recognized.[4]

§ 622. —— On Issue of Identity of Persons

On an issue of identity of persons, writings purporting to be written by different persons may be compared to determine whether they were in fact written by the same person.

There is authority for the view, that on a question of identity of persons, two writings purporting to be written by different persons may be compared for the purpose of ascertaining and deciding whether or not they were written by the same person.[5]

v. Lankershim, 71 P.2d 220, 9 Cal.2d 409.

97. N.H.—State v. Hastings, 53 N. H. 452.
22 C.J. p 787 note 51.
Determination of genuineness of standard by court see supra § 617 b.

98. N.Y.—Matter of Smart, 145 N. Y.S. 838, 84 Misc. 336.
22 C.J. p 787 note 52.

99. Pa.—In re Porter's Estate, 19 A.2d 731, 341 Pa. 476—In re De Laurentiis' Estate, 186 A. 359, 323 Pa. 70—In re Henry's Estate, 120 A. 454, 276 Pa. 511.
22 C.J. p 787 notes 54, 55.

Inference overcome by denial of signature
Testimony of a witness, who had seen the signature to a lost instrument, that it resembled the signature written by plaintiff while on the stand, if admitted, would have been but an inference, and would have been overcome by plaintiff's positive testimony that he never signed such instrument.—Simonson v. Typer, C.C.A.Wyo., 285 F. 240.

1. U.S.—Toll v. Monitor Binding & Printing Co., C.C.A.Mo., 26 F.2d 51.
Ky.—Polley v. Cline's Ex'r, 93 S.W. 2d 363, 263 Ky. 659—Strode v. Strode, 240 S.W. 368, 194 Ky. 665, 27 A.L.R. 313.
La.—D'Angelo v. Nicolosi, 2 So.2d 216, 197 La. 797.
22 C.J. p 787 notes 56, 57.

Corpus Juris cited to indicate viewpoint of authorities supporting the rule stated in the text.—Domzalski v. Jozefiak, 241 N.W. 259, 260, 257 Mich. 273.

Evidence of lowest order
The jury may be instructed that expert handwriting testimony is of the "lowest order" and "the most unsatisfactory."—Keeney v. Arp De La Gardee, 235 N.W. 745, 748, 212 Iowa 45.

Weak and unsatisfactory evidence
"Opinions as to the genuineness of handwriting are, at best, weak and unsatisfactory evidence. There is much room for error and great temptation to form opinions favorable to the party calling the witness."—Fekete v. Fekete, 154 N.E. 209, 215, 323 Ill. 468.

2. Tenn.—Flanary v. Lannom, 12 Tenn.App. 236.
22 C.J. p 787 note 58.

Assistance to jury
"The opinion of handwriting experts may be of great assistance to the jury. Their experience and studies have so qualified them that from the comparison of the disputed writing with other writings admitted to be genuine they can detect peculiarities in the writing which might escape the observation of those less experienced."—Murphy v. Murphy, 222 S.W. 721, 723, 144 Ark. 429.

Evidence as opinion evidence
(1) A detailed statement of facts relating to a questioned signature is more than mere opinion evidence where the facts are revealed by the use of mechanical instruments and are scientifically established to the degree of demonstration.—Boyd v. Gosser, 82 So. 758, 78 Fla. 64, 70, 6 A.L.R. 500.

(2) Facts proved by microscopic inspection, magnified photographs, and chemical tests may become substantive evidence rather than expert opinion.—Keeney v. Arp De La Gardee, 235 N.W. 745, 212 Iowa 45.

Evidence held sufficient
Testimony of handwriting expert that names signed to deeds and indorsed on check were written by same person supported finding that person executing deeds indorsed check.—Ryan v. Bank of Italy Nat. Trust & Savings Ass'n, 289 P. 863, 106 Cal.App. 690.

3. U.S.—In re Varney, D.C.Ky., 22 F.2d 230, affirmed, C.C.A., Rutherford v. Elliott, 23 F.2d 250.

Experts preferred to other handwriting testimony
Expert opinions based on scientific skill and sound reasons generally has more weight than the mere opinion of witnesses who testify alone from familiarity with a signature.—Bank of Commerce of Louisville v. McCarty, 231 N.W. 34, 119 Neb. 795—In re O'Connor's Estate, 179 N.W. 401, 105 Neb. 88, 12 A.L.R. 199, certiorari denied O'Connor v. Slaker, 41 S.Ct. 450, 256 U.S. 690, 65 L.Ed. 1173.

4. Ala.—Jones v. Hough, 77 Ala. 437.
22 C.J. p 787 note 59.

5. Ga.—Travelers' Ins. Co. v. Sheppard, 12 S.E. 18, 85 Ga. 751.
Ohio.—Bell v. Brewster, 10 N.E. 679, 44 Ohio St. 690.
Use of writings of third persons as standards see supra § 617 d.

XVIII. DOCUMENTARY EVIDENCE

A. IN GENERAL

§ 623. Definition and Nature

Documentary evidence is evidence supplied by written instruments, inscriptions, and documents.

Documentary evidence is that furnished by written instruments, inscriptions, and documents of all kinds.[6] The term "documentary evidence" is broad enough to include every form of writing,[7] and the term applies to both public and private documents.[8]

Private documents. In the law of evidence, private documents include deeds, wills, agreements, and the like.[9]

Public documents. In the law of evidence, a public document is one recording facts which may have been inquired into or taken notice of for the benefit of the public by an agent authorized and accredited for the purpose,[10] and may include records generally, registers of births, baptisms, marriages, deaths and other registers, such as immigration, citizenship, election, and license.[11]

§ 624. Determination as to Admissibility

The admissibility of documentary evidence rests in the sound discretion of the trial court.

The admissibility of documentary evidence is a question to be determined by the trial court[12] in the exercise of a sound discretion[13] and in the light

6. Black L.D.
Photographs and other pictures as documentary evidence see infra §§ 709–716.
Inanimate objects may be regarded as "documentary" evidence in contradistinction to "oral" evidence, or that delivered by human beings viva voce.—Black L.D.

7. Mo.—Shaw v. American Ins. Union, App., 33 S.W.2d 1052, 1055.
Any written instrument
"Documentary evidence" may be any written instrument to which the plaintiff did or did not affix his signature, and from which written instrument evidence material to the issues is supplied.—Woltin v. Metropolitan Life Ins. Co., 4 N.Y.S.2d 296, 300, 167 Misc. 382.
Books, papers, accounts, and the like
U.S.—In re Shepard, C.C.N.Y., 3 F. 12, 13, 18 Blatchf. 225.
R.I.—Arnold v. Pawtuxet Valley Water Co., 26 A. 55, 18 R.I. 189, 192, 19 L.R.A. 602.

8. Ind.—Patterson v. Churchman, 22 N.E. 662, 23 N.E. 1082, 122 Ind. 379, citing Sweet L.D.

9. Ind.—Patterson v. Churchman, supra, quoting Sweet L.D.
Private and public documents see 27 C.J.S. p 1312.

10. N.Y.—Woltin v. Metropolitan Life Ins. Co., 4 N.Y.S.2d 296, 300, 167 Misc. 382, quoting **Corpus Juris.**
22 C.J. p 791 note 14 [a].

11. N.Y.—Woltin v. Metropolitan Life Ins. Co., supra.

12. U.S.—Cook-O'Brien Const. Co. v. Crawford, C.C.A.Ariz., 26 F.2d 574, 575, citing **Corpus Juris** and certiorari denied 49 S.Ct. 29, 278 U.S. 630, 73 L.Ed. 548.
Cal.—Sim v. Weeks, 45 P.2d 350, 7 Cal.App.2d 28—Creighton v. Creighton, 43 P.2d 1104, 6 Cal.App.2d 270—Duggan v. Forderer, 249 P. 533, 79 Cal.App. 339.
Conn.—Crowell v. Middleton Sav. Bank, 189 A. 172, 122 Conn. 362—Voltz v. Orange Volunteer Fire Ass'n, 172 A. 220, 118 Conn. 307.
Okl.—Provident Life & Accident Ins. Co. of Chattanooga, Tenn., v. Everett, 61 P.2d 679, 177 Okl. 588.
Or.—Radtke v. Taylor, 210 P. 863, 105 Or. 559, 27 A.L.R. 1423.
Pa.—Institute of Protestant Deaconesses of Allegheny County v. Lingenfelser, 146 A. 123, 296 Pa. 493.
22 C.J. p 967 note 73.
Introduction of documentary evidence see the C.J.S. title Trial §§ 61–63, also 64 C.J. p 114 note 80 et seq.
Necessity of disclosing nature or basis of objection to admission of documentary evidence see the C.J.S. title Trial § 124, also 64 C.J. p 184 note 80.

13. U.S.—Sprinkle v. Davis, C.C.A. Va., 111 F.2d 925, 128 A.L.R. 1101—St. Paul Fire & Marine Ins. Co. v. American Food Products Co., C.C.A.Ark., 21 F.2d 733, certiorari denied 48 S.Ct. 560, 277 U.S. 597, 72 L.Ed. 1006.
Ala.—Harrison v. Mobile Light & Railroad Co., 171 P. 742, 233 Ala. 393.
Ariz.—Humphrey v. Atchison, T. & S. F. Ry. Co., 70 P.2d 319, 50 Ariz. 167.
Ark.—Dermott Grocery & Commission Co. of Eudora v. Meyer, 101 S.W.2d 443, 193 Ark. 591.
Conn.—Jackiewicz v. United Illuminating Co., 138 A. 147, 106 Conn. 302—Murray v. Gagliardi, 135 A. 293, 105 Conn. 392.
Ind.—Central Indiana Ry. Co. v. Mitchell, 199 N.E. 439, 102 Ind.App. 121—Haven v. Snyder, 176 N.E. 149, 93 Ind.App. 54.
Iowa.—In re Cheney's Estate, 274 N.W. 5, 223 Iowa 1076—Gose v. True, 198 N.W. 528, 197 Iowa 1094.
Kan.—Lutz v. People's State Bank of Minneola, 9 P.2d 997, 135 Kan. 115.
Me.—Penley v. Teague & Harlow Co., 140 A. 374, 126 Me. 583.
Md.—State, for Use of Emerson, v. Poe, 190 A. 231, 171 Md. 584—Kirsch v. Ford, 183 A. 240, 170 Md. 90—State v. United Railways & Electric Co. of Baltimore, 159 A. 916, 162 Md. 404, 83 A.L.R. 1307.
Mass.—Swart v. City of Boston, 193 N.E. 360, 288 Mass. 542—Bruce v. Hanks, 178 N.E. 728, 277 Mass. 268—Byam v. Carlisle-Ayer Co., 172 N.E. 113, 272 Mass. 176—Morrissey v. Connecticut Valley St. Ry. Co., 124 N.E. 435, 233 Mass. 554.
Mich.—Rogers v. City of Detroit, Department of Street Railways, 286 N.W. 167, 289 Mich. 86—Amedo v. Grand Rapids & I. R. Co., 183 N.W. 929, 215 Mich. 37.
Minn.—Young v. Yeates, 201 N.W. 421, 161 Minn. 278.
Mo.—Home Ins. Co. of New York v. Savage, 103 S.W.2d 900, 231 Mo. App. 569.
N.H.—Cross v. Berlin Mills Co., 105 A. 411, 79 N.H. 116.
N.J.—Ellis v. Rosenberg, 188 A. 499, 15 N.J.Misc. 37—Dumphy v. Thompson, 130 A. 639, 3 N.J.Misc. 1086.
N.Y.—Boyarsky v. G. A. Zimmerman Corporation, 270 N.Y.S. 134, 240 App.Div. 361.
N.C.—Pearson v. Luther, 193 S.E. 739, 212 N.C. 412.
Ohio.—Kalovsky v. Meyer Dairy Products Co., 164 N.E. 370, 30 Ohio App. 118.
Okl.—Schaff v. Coyle, 249 P. 947, 121 Okl. 228.
Pa.—Trexler Lumber Co. v. Allemannia Fire Ins. Co. of Pittsburg, 136 A. 856, 289 Pa. 13—Amberlav-

of all the circumstances of the particular case.[14]

It is for the trial court to decide preliminary questions of fact bearing on the admissibility of documents,[15] to determine the competency of documentary evidence,[16] to admit it or to reject it as unnecessary to a proper understanding of the case.[17] It is for the trial court to determine whether a sufficient foundation has been laid for the introduction of documentary evidence,[18] to rule on the sufficiency of the preliminary proofs to warrant its admission,[19] as with respect to the sufficiency of the proofs to authenticate, verify, or identify the document offered.[20] The rule that, where preliminary proof is necessary, the sufficiency of such proof is for the trial court applies to the introduction of any kind of documentary evidence.[21] However, the application of the rule to particular kinds of documents is considered under appropriate headings in following sections in connection with the discussion of the admissibility of such documents.

§ 625. —— Proof of Execution and Identity

In order that a document may be received in evidence it is usually necessary to establish preliminarily its due execution and identity.

In order that a document may be admitted in evidence it is essential that a proper foundation be laid.[22] Generally there should be preliminary proof of the genuineness, authenticity or identity of the document,[23] proof of its execution,[24] and of the ver-

age v. Lehigh Valley Coal Co., 8 Sch.Reg. 143.
R.I.—James C. Goff Co. v. Lunn, 143 A. 673, 49 R.I. 455.
Vt.—Hutchison v. Knowles, 184 A. 705, 108 Vt. 195, followed in 184 A. 711, 108 Vt. 208.
Wash.—Keseleff v. Sunset Highway Motor Freight Co., 60 P.2d 720, 187 Wash. 642.
22 C.J. p 967 note 73.
Review of ruling admitting or rejecting evidence see Appeal and Error § 1604.

14. Ohio.—Kalovsky v. Meyer Dairy Products Co., 164 N.E. 370, 30 Ohio App. 118.
22 C.J. p 967 note 73.

15. Mass.—McGaffigan v. Kennedy, 18 N.E.2d 344, 302 Mass. 12.
22 C.J. p 967 note 77.

Conclusiveness of decision
The trial court's decision is conclusive unless it saves the question for revision, or counsel bring up the question on a bill of exceptions which contains a statement of the evidence.—Gorton v. Hadsell, 9 Cush., Mass., 508.

16. Pa.—Ehmling v. D. L. Ward Co., 124 A. 181, 279 Pa. 527.

17. Pa.—Adamczuk v. Holloway, 13 A.2d 2, 338 Pa. 263.

18. U.S.—Metropolitan Life Ins. Co. v. Armstrong, C.C.A.Neb., 85 F.2d 187.
Minn.—Kouri v. Olson-Keogh Produce Co., 253 N.W. 98, 191 Minn. 101—Topinka v. Minnesota Mut. Life Ins. Co., 248 N.W. 660, 189 Minn. 75, 95 A.L.R. 739—Garbisch v. American Ry. Express Co., 225 N.W. 432, 177 Minn. 494.
Foundation as essential to admission of documents see infra § 625.

19. Cal.—Duggan v. Forderer, 249 P. 533, 79 Cal.App. 339.
Colo.—Wold v. City of Boulder, 9 P.2d 931, 91 Colo. 44.

20. U.S.—Stone v. Chicago, M., St. P. & P. R. Co., C.C.A.Iowa, 53 F.2d 813.
Conn.—Bisnovich v. British American Assur. Co., 123 A. 339, 100 Conn. 240.
Minn.—Lundgren v. Union Indemnity Co., 213 N.W. 553, 171 Minn. 122, 52 A.L.R. 580.
Mo.—Clark v. Reising, 107 S.W.2d 33, 341 Mo. 282.
N.H.—Williams v. Williams, 182 A. 172, 87 N.H. 430.
Or.—State ex rel. Kunz v. Woodmansee, 69 P.2d 298, 156 Or. 607.
Pa.—Brenner v. Lesher, 2 A.2d 731, 332 Pa. 522—Marcinkiewiez v. Kutawich, 87 Pa.Super. 260.
Wash.—Quayle v. Knox, 27 P.2d 115, 175 Wash. 182.

Competency of verifying witness is for trial court.—Adamczuk v. Holloway, 13 A.2d 2, 338 Pa. 263.

Requiring additional identification, where there is doubt as to the genuineness of a signature on a document, before admitting it is within the trial court's discretion.—Missouri State Life Ins. Co. v. West, C.C.A.Okl., 67 F.2d 468.

21. Cal.—Webster v. San Pedro Lumber Co., 35 P. 871, 101 Cal. 329—Duggan v. Forderer, 249 P. 533, 79 Cal.App. 339.

22. Ga.—Cosmopolitan Life Ins. Co. v. Head, 98 S.E. 124, 23 Ga.App. 216.
Ill.—Western Electric Co. v. Industrial Commission, 181 N.E. 638, 349 Ill. 139.
Mo.—Karr & Conn v. Cade School Co-op. Drainage District, App., 297 S.W. 730.
Neb.—Carson v. Hunt, 204 N.W. 813, 113 Neb. 727.
N.Y.—Hogan v. National Sellers, 10 N.Y.S.2d 204, 256 App.Div. 951.
N.D.—State v. Board of Com'rs of City of Fargo, 245 N.W. 887, 63 N.D. 33.

23. U.S.—U. S. v. Chandler, C.C.A. Ala., 87 F.2d 356—Esnault-Pelterie v. Chance Vought Corporation, D.C.N.Y., 56 F.2d 393, affirmed, C. C.A., 66 F.2d 474.
Ill.—Buerger v. Buerger, 148 N.E. 274, 317 Ill. 401.
Iowa.—Shippley v. Gremmels, 185 N.W. 922, 192 Iowa 801.
Md.—Ruth v. Durendo, 170 A. 582, 166 Md. 83.
Mo.—Johnson v. American Ry. Express Co., App., 245 S.W. 1071—Wisconsin & Arkansas Lumber Co. v. Buschow Lumber Co., App., 236 S.W. 410.
N.H.—St. Louis v. Boston & Maine R. R. Co., 145 A. 263, 83 N.H. 538.
N.J.—Sullivan v. Coast Cities Coaches, 19 A.2d 442, 126 N.J.Law 300.
N.Y.—Jackson v. Dickman, 9 N.Y.S.2d 688, 256 App.Div. 925, reargument denied 11 N.Y.S.2d 557, 256 App.Div. 1003—Brady v. Comprehensive Omnibus Corporation, 5 N.Y.S.2d 781.
N.C.—Carpenter v. First Nat. Bank, 191 S.E. 329, 211 N.C. 740.
Ohio.—Netzel v. Todd, 165 N.E. 47, 30 Ohio App. 300.
Okl.—Columbian Nat. Life Ins. Co. v. Wirthle, 176 P. 406, 73 Okl. 302.
Tex.—Texas Pipe Line Co. v. Sheffield, Civ.App., 99 S.W.2d 684—Panhandle & S. F. Ry. Co. v. Reynolds, Civ.App., 33 S.W.2d 249.
W.Va.—Woodrum Home Outfitting Co. v. Adams Express Co., 110 S.E. 549, 90 W.Va. 161.

24. Ala.—Zion v. Hart, 152 So. 44, 228 Ala. 24—First Nat. Life Ins. Co. of America v. Simpson, 140 So. 766, 25 Ala.App. 72.
Cal.—Ten Winkel v. Anglo California Securities Co., 81 P.2d 958, 11 Cal.2d 707.
Ga.—Club Aluminum Co. v. Woodard, 158 S.E. 616, 43 Ga.App. 307—Commercial Credit Co. v. Grant, 125 S.E. 382, 33 Ga.App. 31.
Ky.—Cherry Bros. v. Tennessee Cent. Ry. Co., 299 S.W. 1099, 222 Ky. 79.
N.D.—In re Markus' Estate, 249 N.W. 310, 63 N.D. 566.
Tex.—Abeel v. Weil, 283 S.W. 769, 115 Tex. 490—Porter v. Rogers, Civ.App., 293 S.W. 577—Browning v. Hinerman, Civ.App., 224 S.W. 236.

ity or correctness of the document,[25] unless such proof is waived,[26] or by rule of law, statutory provision, or admission of the parties such facts are deemed established as to render preliminary proof unnecessary.[27] The application of these rules to particular documents is discussed in the following sections under specific headings.

Where there is adequate proof of the execution and identify of the document offered it may, in an otherwise proper case, be admitted.[28] As to the sufficiency of the proof of the execution of a document, the rule has been laid down that the party offering it is only required to make out a prima facie case to render it admissible.[29] When there is a discrepancy between the description of a document in an offer thereof as evidence and the document itself, the question of admissibility must be determined from the document rather than from the offer.[30]

If the evidence wholly fails to show its genuineness, identity, or execution the court should exclude the document,[31] but if there is a reasonable probability established that the document is what it purports to be, the question then becomes one for the jury, and the document ought to go before them, with the evidence impeaching its genuineness, and with proper instructions.[32]

Where a writing has been properly received under the evidence when offered, the fact that subsequent evidence attacks the identity and genuineness thereof does not affect the ruling.[33] The admission of the instrument on preliminary proof of its execution does not relieve the party of the burden of proving to the jury its due and valid execution,[34] and questions as to its genuineness, the weight to be accorded to it, and the like, are for the jury.[35]

B. PUBLIC RECORDS AND DOCUMENTS

§ 626. In General

Relevant public records and documents may be admitted in evidence.

As a general rule, where some enactment or rule of law requires or authorizes a public official to make a certificate or written statement as to some

Wis.—In re Dick's Estate, 235 N.W. 401, 204 Wis. 89.

"The general rule of the common law is that to render an instrument in writing competent evidence it is necessary that some proof should be given from which the jury can legally infer that it was executed by the party."—Robertson v. Burstein, 146 A. 355, 105 N.J.Law 375, 65 A.L.R. 324, reversing 141 A. 92, 104 N.J.Law 218.

25. Fla.—Dixie Fire Ins. Co. v. Hillsborough Dry Goods Co., 81 So. 446, 77 Fla. 250.
Ill.—Wright v. Upson, 135 N.E. 209, 303 Ill. 120.
Mo.—Kirkpatrick v. American Creosoting Co., 37 S.W.2d 996, 225 Mo. App. 774.
N.H.—Williams v. Williams, 182 A. 172, 87 N.H. 430.
N.Y.—Dougherty v. Kalbach, 175 N.Y.S. 837.
R.I.—Budlong v. Budlong, 136 A. 308, 48 R.I. 144.
Tex.—Texas & N. O. R. Co. v. West, Civ.App., 97 S.W.2d 712—Panhandle & S. F. Ry. Co. v. Clarendon Grain Co., Civ.App., 215 S.W. 866.
Admissibility of unsworn statements and admissions see supra §§ 192–383.

Although the authenticity of records was not questioned, they were properly excluded where there was no evidence of their correctness, such records being offered on the issue of mental capacity.—In re Sach's Estate, 236 N.W. 805, 254 Mich. 358.

Unsworn documents

Documents offered by defendant, not verified by any witness nor correctly sworn to, are properly excluded.—Stewart Bros. Cotton Co. v. Dufilho, 133 So. 521, 16 La.App. 148.

26. Cal.—Ley v. Babcock, 5 P.2d 620, 118 Cal.App. 525.

27. Ark.—Springfield Life Ins. Co. v. King, 51 S.W.2d 859, 185 Ark. 1189.
Cal.—Knaugh v. Baender, 257 P. 606, 84 Cal.App. 142.
Md.—Board of Education for Washington County v. Cearfoss, 166 A. 732, 165 Md. 178.
Mo.—Keener v. Williams, 271 S.W. 489, 307 Mo. 682.
Okl.—Posey v. Brown, 37 P.2d 633, 169 Okl. 466.
Tex.—Sovereign Camp, Woodmen of the World, v. Wernette, Civ.App., 216 S.W. 669.

Statute making signed, written instruments automatic proof of execution

Minn.—Burnetti v. Duluth & I. R. Ry. Co., 209 N.W. 879, 168 Minn. 136.

28. Ala.—McClelland v. Coston, 149 So. 697, 227 Ala. 267.
Ga.—Bell v. Mobley, 187 S.E. 876, 183 Ga. 198—Modern Order of Prætorians v. Blackburn, 157 S.E. 331, 42 Ga.App. 690.
Mass.—Cosmopolitan Trust Co. v. Cirâce, 142 N.E. 914, 248 Mass. 98.

29. Conn.—Max Ams Mach. Co. v. Bridgeport Lodge No. 30 I. A. M., 102 A. 706, 92 Conn. 297.
22 C.J. p 967 note 80.

30. Md.—Hammond v. O'Hara, 2 Harr. & G. 111.
22 C.J. p 967 note 76.

31. Colo.—Olson v. Kelsey, 157 P. 194, 61 Colo. 331.
22 C.J. p 967 note 81.

32. Ga.—Gaskin v. Guthrie, 132 S.E. 764, 162 Ga. 103.
Tex.—Porter v. Rogers, 293 S.W. 577, 579, citing **Corpus Juris.**
22 C.J. p 967 note 82.

Delivery

Where there is a substantial conflict in the evidence respecting delivery of an instrument sought to be introduced, proof of delivery being essential to admissibility, it is erroneous for the trial court to determine preliminarily that delivery has not been proved and exclude the instrument, but on such conflicting evidence the question of delivery should be submitted to the jury.—Roberts v. Cyr, 1 A.2d 281, 136 Me. 39.

Writings properly admitted

Ga.—Miller v. Everett, 14 S.E.2d 449.
22 C.J. p 967 note 82 [d].

33. Tex.—Southern Kansas R. Co. v. Barnes, Civ.App., 173 S.W. 880.

34. Ill.—Scott v. Delany, 87 Ill. 146.
22 C.J. p 968 note 83.

35. Ark.—Johnston v. Order of United Commercial Travelers of America, 33 S.W.2d 375, 182 Ark. 964.
Ky.—Coleman v. McIntosh, 211 S.W. 872, 184 Ky. 370.
22 C.J. p 968 note 84.

matter or fact pertaining to and as a part of his official duty, such writing is competent evidence of the matter or fact therein recited.[36] The general rules governing the relevancy, competency, and materiality of evidence, which have been discussed supra §§ 158–191, apply to public documents, which may be admitted[37] or rejected[38] in accordance with the application of such rules to the document offered in evidence. Books and records required by law to be kept by designated public officials are not open to the objection that they are hearsay, and in otherwise proper cases they are admissible as public records.[39]

The test of the admissibility of an official record or document is its public character,[40] and where the records are essentially private in character they may not be admitted as public records,[41] as where they were not kept by a public officer in the regular course of business.[42] The rule admitting public documents in evidence does not sanction admission of records not made under authority of law for the benefit of all persons,[43] and, in order to be admissible, a report or document prepared by a public official must contain facts and not conclusions involving the exercise of discretion or opinion.[44] It has been further held that the subject matter must relate to facts of a public nature, that the record must be retained for the benefit of the public, and that there must be express statutory authority to compile the report.[45]

The contents of a public record may be proved in any court by the original record itself,[46] and the fact that duly authenticated or certified transcripts or copies may be admissible, as discussed infra §§ 649–675, does not render the originals incompetent;[47] nor is the competency of the original record impaired by the fact that its removal was improper.[48] When a formal record is not required by law or has not yet been made up, those entries, such as the files and the entries in the minute books, which are permitted to stand in the place of it, are admissible in evidence as the record.[49]

The record or document must be produced from or in the proper custody,[50] and its identity,[51] authenticity, and genuineness[52] must be established.

36. Conn.—Gett v. Isaacson, 120 A. 156, 158, 98 Conn. 539, citing **Corpus Juris.**
Pa.—Laginsky v. McCollough, 124 A. 431, 433, 280 Pa. 286, citing **Corpus Juris.**
22 C.J. p 791 note 18.

37. U.S.—U. S., for Use of Wadeford Electric Co., v. E. J. Biggs Const. Co., C.C.A.Ill., 116 F.2d 768.
Ala.—Disheroon v. Brock, 105 So. 899, 213 Ala. 637.
Conn.—City of New London v. Pequot Point Beach Co., 152 A. 136, 112 Conn. 340.
22 C.J. p 791 note 18.

38. Cal.—Pann v. Fay Fruit Co., 294 P. 733, 110 Cal.App. 726.
N.J.—Central R. Co. of New Jersey v. State Tax Department, 169 A. 489, 112 N.J.Law 5, affirming Central R. Co. of New Jersey v. State Board of Tax Appeals, 162 A. 889, 109 N.J.Law, 395, and certiorari denied Central R. Co. of New Jersey v. State Tax Commission, 55 S. Ct. 79, 293 U.S. 568, 79 L.Ed. 667.

39. Kan.—Board of Com'rs of Ford County v. Robb, 64 P.2d 69, 145 Kan. 125.
Pa.—Laginsky v. McCollough, 124 A. 431, 280 Pa. 286.
Declarations as to matters of public and general interest as hearsay see supra §§ 233–237.

"Bedside notes" of interne
Attending interne's "bedside notes" are not hearsay but competent as public record on issue of condition of patient in state hospital, since law required record.—Dallas Coffee & Tea Co. v. Williams, Tex.Civ.App., 45 S.W.2d 724, error dismissed.

40. Mo.—F. B. Chamberlain Co. v. Kane, App., 264 S.W. 24.

41. Mo.—F. B. Chamberlain Co. v. Kane, supra.

Analyses kept of record by city chemist were not admissible as public documents where they were made and preserved of record for the sole benefit of a private person.—F. B. Chamberlain Co. v. Kane, supra.

Records of private insane asylum, embracing period both before and after enactment of L.1874 c 446 § 4, and Insanity L. § 70 (L.1896 c 545) (re-enacted as Consol.L. c 27 § 90), are not admissible, in a will contest on the issue of insanity of the testatrix, as public records, since they were not records required to be kept during at least part of that time.—In re Barney's Will, 174 N.Y.S. 242, 185 App.Div. 782.

42. R.I.—Budlong v. Budlong, 136 A. 308, 48 R.I. 144.

Entries by unknown persons
Entry in books of poor asylum, made by unknown person, not in regular course of entrant's business, as to date of child's birth and name of mother, is inadmissible to prove pedigree.—Budlong v. Budlong, supra.

43. Wash.—Steel v. Johnson, 115 P.2d 145.

Subject matter not "public facts"
A report, relating to a subject matter which cannot be called state acts or public facts because not made under authority of law for benefit of all persons, is not admissible as a "public document".—Steel v. Johnson, supra.

44. Wash.—Steel v. Johnson, supra.

45. Wash.—Steel v. Johnson, supra.

46. N.C.—Cox v. Wright, 11 S.E.2d 158, 218 N.C. 342—McClamroch v. Colonial Ice Co., 6 S.E.2d 850, 217 N.C. 106—Blalock v. Whisnant, 5 S.E.2d 130, 216 N.C. 417.

47. N.C.—Blalock v. Whisnant, supra—Riley & Co. v. Carter, 81 S.E. 414, 165 N.C. 334.
22 C.J. p 793 note 23.

48. La.—Priou v. Adams, 5 Mart. N.S. 691.
22 C.J. p 793 note 24.

49. U.S.—Philadelphia, W. & B. R. Co. v. Howard, Md., 13 How. 307, 14 L.Ed. 157.
22 C.J. p 792 note 19.

50. Ky.—Harbison & Walker Co. v. White, 114 S.W. 250.
22 C.J. p 792 note 20.

51. U.S.—Runkle v. U. S., C.C.A. Colo., 42 F.2d 804.
Ala.—McDowell v. Hutto, 135 So. 322, 223 Ala. 307.
22 C.J. p 792 note 21.

52. U.S.—U. S. v. Chandler, C.C.A. Ala., 87 F.2d 356.
Md.—Ruth v. Durendo, 170 A. 582, 166 Md. 83.
N.J.—Kiely v. MacMurray, 139 A. 343, 5 N.J.Misc. 1091.
22 C.J. p 793 note 22.
Authentication of:
Judicial records and proceedings see infra §§ 634, 635.
Official registers and documents see infra § 643.

§ 627. State Papers

State papers, such as those published under authority of congress, are ordinarily admissible as evidence of the public matters therein contained.

Government gazettes, registers, and state papers generally are admissible as evidence of the proclamations issued by the executive and of all acts of government or matters of state therein contained,[53] but they are not admissible to prove facts of a private nature.[54]

The American state papers, published by order of congress, and the copies which they contain of legislative and executive documents, are, if they contain the required authentication, admissible in evidence without further proof;[55] and a volume of public documents printed by authority of the United States senate, containing letters to and from various officers of state, communicated by the president to the senate, has been considered to be as competent evidence as the original documents themselves.[56]

§ 628. Laws

Documentary evidence of laws may not be introduced where the court takes judicial notice of such laws, but the law of a foreign state may be proved by the decisions of its courts.

In accordance with the general rule that a party may not introduce evidence respecting matters of which the court will take judicial notice, see supra § 13, the court will exclude documentary evidence of acts and regulations of a governmental department of which it takes judicial notice.[57]

Evidence relative to ordinances and statutes is discussed in the C.J.S. titles Municipal Corporations §§ 445–448, also 43 C.J. p 579 note 55–p 583 note 66, and Statutes §§ 450–459, also 59 C.J. p 1208 note 26–p 1216 note 15.

Law of foreign state. The law of a foreign state may be proved by the decisions of its courts.[58]

§ 629. Judicial Records and Proceedings

Judicial proceedings in a former cause in the same or in another court ordinarily may be shown by the original record or by a copy of the record, of such proceedings.

As a general rule, whenever it is competent for judicial proceedings to be given in evidence in a subsequent cause or proceeding, the record of those proceedings duly authenticated is legitimate and proper evidence.[59] The records of courts of another state are competent to prove the proceedings had therein.[60]

Where the proceedings were void, however, the record thereof is inadmissible,[61] but it is otherwise

53. Iowa.—McPeek v. Western Union Tel. Co., 78 N.W. 63, 107 Iowa 356, 70 Am.S.R. 205, 43 L.R.A. 214.
Mo.—Priddy v. Rice, 99 S.W. 1055, 201 Mo. 309, 119 Am.S.R. 762, 9 L.R.A.,N.S., 718, 9 Ann.Cas. 874.
Okl.—Lawless v. Raddis, 129 P. 711, 36 Okl. 616.
22 C.J. p 793 note 25.
Admissibility of documents of state, federal, and municipal officials or departments see infra § 638.

54. N.J.—Del Hovo v. Brundred, 20 N.J.Law 328.
22 C.J. p 793 note 26.

55. U.S.—Gregg v. Forsyth, Ill., 24 How. 179, 16 L.Ed. 731.
22 C.J. p 793 note 28.

56. Mass.—Whiton v. Albany City R. Co., 109 Mass. 24.

57. Cal.—Parker v. James E. Granger, Inc., 52 P.2d 226, 4 Cal.2d 668, appeal dismissed and certiorari denied Parker v. James Granger, Inc., 56 S.Ct. 958, 298 U.S. 644, 80 L.Ed. 1375.
Regulations of department of United States as having force of laws see the C.J.S. title United States § 81, also 65 C.J. p 1272 notes 88, 92.
Document issued by federal department of commerce purporting to contain copies of its official acts and regulations as to licensing of aircraft and rules of air traffic is properly excluded.—Parker v. James E. Granger, Inc., supra.

58. Ala.—Equitable Life Assur. Soc. of U. S. v. Brandt, 198 So. 595, 240 Ala. 260.
Admissibility of reports of decisions see infra § 722.
To prove the construction of statutes of another state, decisions of its appellate courts should be introduced in evidence.—Duryea v. Sunlight Gas Mach. Co., 132 N.Y.S. 407, 74 Misc. 440.

59. U.S.—Martinez v. Mendez, Puerto Rico, 256 F. 596, 167 C.C.A. 626.
Ala.—Williams v. Oates, 102 So. 712, 212 Ala. 396.
Ga.—Fleming v. Patterson, 153 S.E. 37, 170 Ga. 495—Hightower v. Hightower, 127 S.E. 103, 159 Ga. 769—Moore v. McAfee, 106 S.E. 274, 151 Ga. 270—Benton v. Maddox, 184 S.E. 788, 52 Ga.App. 813.
Idaho.—State v. Sedam, 107 P.2d 1065, 1069, citing **Corpus Juris.**
Ind.—Ross v. Felter, 123 N.E. 20, 71 Ind.App. 58.
Iowa.—Dinning v. Krapfel, 232 N.W. 490, 211 Iowa 888.
Minn.—Independent School Dist. No. 35 v. Oliver Mining Co., 208 N.W. 952, 169 Minn. 15, affirmed 210 N.W. 856, 169 Minn. 15—Lee v. Lee, 184 N.W. 954, 150 Minn. 526.
Mo.—Willgues v. Pennsylvania R. Co., 298 S.W. 817, 318 Mo. 28.
N.Y.—In re Baylies' Estate, 279 N.Y.S. 415, 155 Misc. 431, affirmed 288 N.Y.S. 931, 248 App.Div. 217.
N.C.—Carstarphen v. Carstarphen, 137 S.E. 658, 193 N.C. 541.
Pa.—Greiner v. Commonwealth, 6 A.2d 67, 334 Pa. 299.
S.C.—Wright v. Barringer, 158 S.E. 737, 160 S.C. 359.
22 C.J. p 794 note 39.
Authentication of judicial records see infra § 634.
Same parties, actions, and property
Where the parties, the property, and the actions are the same, the record and proceedings in a former suit are properly read in evidence in the subsequent suit.—Case v. Sipes, 217 S.W. 306, 289 Mo. 110.
Payment
Judicial records bearing on the issue of payment are admissible.—Pasley v. Bromley, 9 S.E. 40, 32 W. Va. 21—48 C.J. p 720 note 28.

60. Ill.—Shultz v. Hamilton, 223 Ill. App. 64.
Iowa.—Wilson v. Prettyman, 192 N.W. 413, 195 Iowa 598.
Pa.—Kean v. Rice, 12 Serg. & R. 203.

61. Or.—Kerns v. Couch, 12 P.2d 1011, 141 Or. 147, adhered to 17 P.2d 323, 141 Or. 147.
22 C.J. p 796 note 45.

in case of mere irregularity.[62] A judicial record is not admissible where it is not relevant to any issue made by the pleadings in the action in which it is sought to be used,[63] or where it lacks probative value in respect of the issue on which it is tendered,[64] or where it is sought to be used as against one not a party or privy to the former proceedings;[65] and it has been held not error to exclude a petition filed in another court where it was substantially the same as the petition on which the case was being tried and contained no admissions not found in the latter.[66] A judicial record should not be received where its effect might be to influence the jury improperly.[67]

Original record or copy. The contents of a judicial record may be proved in the same court in which the record is entered by the original record itself,[68] and this is true notwithstanding statutory rules as to proof of official and court records by certified or exemplified copies, made primary evidence under conditions provided in the statutes.[69]

It is usually held that an original judicial record properly verified will, if it can be produced, be admissible in any court, although a certified copy might also be admissible,[70] and although it was improper to remove the records from the office of the custodian;[71] but in some states the proof, in a court other than that where the record is, can be only by an authenticated copy, and the original record cannot be received,[72] and it has also been held that the introduction of the original complaint in an action in another court should not be permitted without proof or permission from the latter court to withdraw the complaint from its files.[73]

Inferior courts. To be admissible in evidence, records of inferior courts must contain the necessary ingredients, at least in an informal way, although irregularities in nonessential details are not fatal.[74]

Void injunction
Or.—Kerns v. Couch, supra.

62. Ky.—Slade v. Eckler, 3 Ky.Op. 347.

Relevant evidence disclosed by fraudulent document
Documentary evidence relative to setting aside of year's support, when relevant, was not inadmissible because judgment setting aside the year's support was based on fraudulent agreement, as relevant evidence will not be excluded because disclosed by fraudulent or void writing.—Waldrop v. Chandler, 118 S.E. 745, 155 Ga. 829.

63. U.S.—Rinehart & Dennis Co. v. Childress & Taylor, Va., 257 F. 37, 168 C.C.A. 249.
Ala.—Williams v. Shows, 73 So. 99, 197 Ala. 596.
Ga.—Hightower v. Keaton, 144 S.E. 759, 167 Ga. 94.
Me.—Susi v. Davis, 177 A. 610, 133 Me. 354, 97 A.L.R. 1222.
Minn.—Ebacher v. First State Bank of Cuyuna, 246 N.W. 903, 188 Minn. 268—Independent School Dist. No. 35 v. Oliver Mining Co., 208 N.W. 952, 169 Minn. 15, affirmed 210 N.W. 856, 169 Minn. 15.
N.Y.—Shulman v. Wolkenberg, 262 N.Y.S. 287, 237 App.Div. 514.
Or.—Kerns v. Couch, 12 P.2d 1011, 141 Or. 147, adhered to 17 P.2d 323, 141 Or. 147.
Tenn.—Parmelee v. T. L. Herbert & Sons, 13 Tenn.App. 101.
22 C.J. p 796 note 47.

Record of federal court in state court
Memorandum of federal court's opinion and order remanding case to state court is inadmissible in latter court, where not relevant to any fact in case.—Robison v. Chicago Great Western R. Co., Mo.App., 66 S.W.2d 180.

64. Cal.—Shimpones v. Stickney, 28 P.2d 673, 219 Cal. 637.

Fraud
Files in prior case against plaintiffs in action to quiet title are inadmissible on issue of fraud of attorney involved therein, on theory files would show that attorney made false affidavit of service where the matter in such files had no legitimate evidentiary value to show the fraud claimed.—Shimpones v. Stickney, supra.

65. N.J.—Centreville Building & Loan Ass'n v. Gollin, 176 A. 356, 117 N.J.Eq. 412.
Tenn.—Security Finance Co. v. Duncan, 5 Tenn.App. 631.
22 C.J. p 796 note 48.

Identity of parties
Admission in action to establish title to land of copy of copy of adjudication in bankruptcy was improper, there being no showing that defendant in case at bar and bankrupt were same person.—Jackson v. Burnham, 152 A. 56, 129 Me. 344.

66. Ohio.—Cincinnati Gas & Electric Co. v. Coffelder, 31 Ohio Cir. Ct. 26.

67. N.C.—Cobb v. Atlantic Coast Line R. Co., 95 S.E. 92, 175 N.C. 130.
22 C.J. p 796 note 50.

68. Fla.—Florida Land Inv. Co. v. Williams, 92 So. 876, 84 Fla. 157, 26 A.L.R. 171.
Ga.—Sellers v. Page, 56 S.E. 1011, 127 Ga. 633.
22 C.J. p 795 note 40.

Genuineness of court's records
Records of trial court are sufficient evidence of their genuineness.—Divide Creek Irr. Dist. v. Hollingsworth, C.C.A.Colo., 72 F.2d 859, 96 A.L.R. 937.

69. Ga.—Woods v. Travelers Ins. Co., 186 S.E. 467, 53 Ga.App. 429.

Pleadings and judgment in same court
In action for disability benefits of group policy, admission of original pleadings and judgment in former suit, filed and entered in same court in support of plea of res judicata, is not error as against objection that certified copies were best evidence.—Woods v. Travelers Ins. Co., supra.

70. Fla.—Huddleston v. Graham, 74 So. 414, 73 Fla. 350.
N.C.—Blalock v. Whisnant, 5 S.E.2d 130, 216 N.C. 417.
22 C.J. p 795 note 41.

Court of foreign state
(1) The best proof of the proceedings of a foreign court is the original records, but, as they ordinarily cannot be produced, the usual method is to prove such records by sworn or exemplified copies.—Spaulding v. Vincent, 24 Vt. 501.

(2) Proof by copies see infra §§ 652–657, 675.

71. Ind.—McFadden v. Ferris, 32 N.E. 107, 6 Ind.App. 454.
22 C.J. p 796 note 42.

72. Ga.—Hartley v. Sanders, 164 S.E. 232, 45 Ga.App. 273.
22 C.J. p 796 note 43.

73. Ark.—Missouri & N. A. R. Co. v. Johnson, 171 S.W. 478, 115 Ark. 448.

74. Conn.—Banach v. Bohinski, 139 A. 688, 107 Conn. 156.

Certificate of fact or conclusion from record. In the absence of a statute authorizing the admission of such evidence,[75] the certificate of a clerk, judge, or other officer of a court as to the existence, purport, and effect of a recorded judgment or other legal proceedings is inadmissible, the record itself or a duly authenticated copy being required.[76] It follows that a certificate of the clerk of a court is not evidence of the character or legal effect of the paper to which it is appended, as, for instance, that it is a copy of a judgment roll, but only that it is a true copy of the original on file in his office.[77]

§ 630. —— Records of Courts of Probate

Records of courts of probate on all matters within their jurisdiction and required to be recorded are evidence of matters to which they relate.

The records of courts of probate on all matters within their jurisdiction and required to be recorded are evidence of matters to which they relate, as in the case of other courts of record.[78] The appointment of an administrator, for example, may be shown by the original record without the production of the letters of administration or accounting for their nonproduction,[79] and, on an alleged heir's application for partial distribution of the estate, orders, decrees, and documentary evidence of the probate court may be introduced for the limited purpose of showing that such heir had never been a party to prior probate proceedings nor mentioned therein.[80] Records of an ordinary or probate court have also been held admissible as proclamations of the result of an election,[81] and as evidence bearing on a widow's election;[82] and to throw light on an issue of insanity it has been held proper to admit a probate court record of lunacy proceedings.[83]

Records of:
Courts of probate see infra § 630.
Justices' courts see infra § 631.

75. Wis.—Bitof v. Hoppe, 202 N.W. 699, 186 Wis. 409.
22 C.J. p 841 note 40.

Certificate in improper form

An alleged certificate. consisting merely of a letter written by clerk of court merely reciting that certain judgments against prior owner of plaintiffs' farm were still unsatisfied of record, which letter had no proper certificate or seal attached, was not admissible, under St. 1923 § 4140, for purpose of showing other liens on plaintiffs' farm in addition to specified mortgage liability which defendant was to assume under contract for exchange of real property. —Bitof v. Hoppe, supra.

76. Tex.—Burton v. Perry, Civ. App., 53 S.W.2d 795, error refused.
22 C.J. p 841 note 41.

In Alabama

(1) In suit by husband to annul marriage on ground that wife was without capacity to contract marriage at time of purported marriage because she was lawful wife of another, a paper certified to by clerk of Georgia court, which was mere statement of clerk with quoted excerpts, as to what record showed or did not show in divorce proceeding filed by wife against her first husband, was not a verified transcript of the record and proceeding of the court, but was "hearsay", and proved nothing.—Ex parte McLendon, 195 So. 733, 239 Ala. 564.

(2) Duly certified transcript of judgment itself, not certificate made by clerk for registration in office of judge of probate, is proper evidence of judgment.—Boasberg v. Cooke, 136 So. 797, 223 Ala. 389.

(3) By express provision of Code 1907 § 5987 subd 5, the certificate of affirmance or reversal thereby required to be sent down by the clerk of the supreme court is evidence in any cause of the facts set forth as thereby provided.—Kemp v. Donovan, 84 So. 412, 17 Ala.App. 190.
22 C.J. p 841 note 40 [a].

77. U.S.—Alexander v. Knox, C.C. Or., 1 F.Cas.No.170, 6 Sawy. 54.

78. U.S.—Matheson v. National Surety Co., C.C.A.Alaska, 41 F.2d 155.
Ill.—Follett v. Illinois Cent. R. Co., 209 Ill.App. 81.
N.C.—Cos v. Wright, 11 S.E.2d 158, 218 N.C. 342.
Pa.—Fayette Title & Trust Co. v. Nelson, 174 A. 599, 114 Pa.Super. 402.
Tex.—Harris v. Hubbert, Civ.App., 82 S.W.2d 726, error refused—Dial v. Martin, Civ.App., 37 S.W.2d 166, reversed on other grounds Martin v. Dial, Com.App., 57 S.W. 2d 75, 89 A.L.R. 571.
22 C.J. p 796 note 52.

Return not made part of judgment

Documentary evidence concerning partition of land sought to be recovered was properly excluded, where return was not made the judgment of the ordinary.—Hightower v. Keaton, 144 S.E. 759, 167 Ga. 94.

79. Ga.—Roe v. Sellars, 46 Ga. 559.
S.C.—Browning v. Huff, 18 S.C.L. 174.
22 C.J. p 796 note 53.

Relevancy of record

Record of appointment of administrator is admissible as relevant in suit to enjoin application for year's support by widow claiming child's part in estate.—Federal Land Bank of Columbia v. Henson, 144 S.E. 728, 166 Ga. 857.

80. Cal.—In re Bell's Estate, 243 P. 423, 198 Cal. 32.

81. Ga.—Kimsey v. Mickel, 12 S.E. 2d 567, 191 Ga. 158.

Effect of court exceeding its authority

An order of the ordinary stating facts showing adoption of stock law at county-wide election was admissible in evidence as a proclamation of the result, even if ordinary exceeded his authority by declaring that the law would go into effect on a stated date.—Kimsey v. Mickel, supra.

82. Ga.—Maxwell v. Citizens' Bank, 139 S.E. 864, 165 Ga. 125.

Report of appraisers showing election

Where appraisers set aside a certain sum of money as a year's support for a widow and minor children, which the return of the appraisers showed the widow elected to take in described lands, such election in effect constituted a purchase of the lands with the sum set aside, and the report of the appraisers showing the election was properly admitted to show the full transaction.—Maxwell v. Citizens' Bank, supra.

83. Kan.—Witt v. Heyen, 222 P. 120, 115 Kan. 334, denying rehearing 221 P. 262, 114 Kan. 869.

Insanity as defense to breach of promise

The original or a correct copy of the statement of lunacy made by the probate judge, in committing an insane person to the asylum, as required by L.1870, c. 20 § 2, Gen.St. 1889 § 3724, is admissible in evidence in an action for breach of the marriage promise, where one of the defenses was insanity in plaintiff's family, precluding her marriage under Gen.St.1915 §§ 6155,

The record of a probate court is not, however, evidence of matters which are not required to be recorded.[84]

§ 631. —— Justices' Records

Records, dockets, or minutes of the proceedings in courts of justices of the peace, where properly authenticated and proved, may be received in evidence.

The records, dockets, or minutes of the proceedings in the courts of justices of the peace, if properly authenticated and proved, have been held to be admissible,[85] although authenticated copies thereof would also have been admissible.[86]

Such evidence has been admitted whether the keeping of a justice's docket was required by statute[87] or not;[88] but it has been held, as shown infra § 632, that where the law requires a docket to be kept by a justice it will be evidence of nothing not required or authorized to be entered thereon.

§ 632. —— Docket Entries, Minutes, Original Papers, Etc.

Docket entries, minutes, and original papers may be admissible where they are relevant to the issues on which they are offered.

Subject to the rules governing best and secondary evidence of judicial records, see infra § 809, docket entries, minutes and original papers may be admissible where they are relevant and material to the issues on which they are offered.[89] Where the judgment entry, as made in the minutes, is by statute made a part of the final record in the case, it is admissible in evidence as such.[90] Where a formal record is not required to be kept by law, docket entries which are permitted as a substitute for a formal record may be received.[91] Moreover, the rule supported by numerous authorities is that until the record is fully extended the docket is the record and the files, minutes, and entries therein are admissible,[92] although a certified copy of the same is obtainable.[93] A formal permanent entry of judgment on the judgment book has been held to be the original record, and therefore evidence of the judgment without the filing of the judgment roll.[94]

Such entries, minutes, and papers should be excluded where they are irrelevant,[95] or where they are pure hearsay without official status;[96] and docket entries or entries in a judgment book constituting mere memoranda of the judgment and proceedings may be excluded where they do not rise to the dignity of a record, are incomplete, or are not the best evidence available.[97] It has also been

6157, as amended by L.1919 c. 230.—Witt v. Heyen, supra.

84. Mo.—State v. Henderson, 88 S.W.2d 893, 907, 230 Mo.App. 1, citing **Corpus Juris.**
22 C.J. p 797 note 54.

85. Idaho.—State v. Sedam, 107 P.2d 1065, 1069, citing **Corpus Juris.**
N.Y.—Koland v. Van Aken, 290 N.Y.S. 768, 248 App.Div. 918.
22 C.J. p 797 note 55.
Admissibility of record on trial de novo see the C.J.S. title Justices of The Peace § 204, also 35 C.J. p 838 notes 74–79.
Authentication of justice's records see infra § 635.
When produced and sworn to the original record of a justice's court is admissible.—Kean v. Rice, 12 Serg. & R. Pa. 203.

86. Ga.—Harrell v. Kelley, 94 S.E. 830, 21 Ga.App. 525.
22 C.J. p 797 note 56.

87. Ind.—Reed v. Whitton, 78 Ind. 579.
22 C.J. p 797 note 57.

88. Minn.—Chapman v. Dodd, 10 Minn. 350.

89. Ala.—McNeil v. Ritter Dental Mfg. Co., 104 So. 230, 213 Ala. 24—Brown v. Shelby County, 85 So. 416, 204 Ala. 252.
Ga.—Parrish v. Barwick, 144 S.E. 735, 167 Ga. 214—Oliver v. O'Kelley, 173 S.E. 232, 48 Ga.App. 762.
Mo.—La Crosse Lumber Co. v. Powell, App., 247 S.W. 1022.
Okl.—Healdton Oil & Gas Co. v. Regnier, 39 P.2d 973, 170 Okl. 271.
Docket entries
(1) In an action by conditional vendor to replevin a silo from land that had been sold under execution, docket entries in a claimant's suit in the same court from which the writ of fieri facias issued under which the farm was sold was admissible as tending to show notice of plaintiff's rights by defendant, who purchased the farm under the writ of fieri facias.—Lewis v. E. F. Schlichter Co., 112 A. 282, 137 Md. 217.

(2) The execution dockets and fee books used by the clerks of the court, by which a judgment was rendered for several years, after the rendition of the judgment, are admissible to show, by the absence of notations therein, that no execution had been issued on the judgment.—Jackson v. Wallace, Tex.Com.App., 252 S.W. 745, affirming, Civ.App., 239 S.W. 698.

Minutes of common pleas court offered to show that court record did not disclose that tax deed under which defendant claimed title was acknowledged in open court was competent.—Carns v. Matthews, 162 A. 501, 106 Pa.Super. 582.

90. Ala.—Hale v. Helms, 81 So. 840, 17 Ala.App. 62.

91. U.S.—Philadelphia, W. & B. R. Co. v. Howard, Md., 13 How. 307, 331, 14 L.Ed. 157.
22 C.J. p 797 note 63.

92. Mass.—Heard v. Turner, 125 N.E. 596, 234 Mass. 526.
22 C.J. p 798 note 64.

93. Mass.—Luce v. Dexter, 135 Mass. 23.

94. Minn.—Williams v. McGrade, 13 Minn. 46.

95. Wyo.—Housley v. Tobin, 286 P. 383, 41 Wyo. 419.

96. Mass.—Shapiro v. Park Trust Co., 149 N.E. 313, 253 Mass. 383.
Calendar entry by judge without jurisdiction
Where, in an action for vendors' breach of contract to clear land sold, the defense of settlement was interposed, a calendar entry in the handwriting of a judge, who did not have jurisdiction to try the case that it was settled was properly excluded.—Golos v. Worzalla, 190 N.W. 114, 178 Wis. 414.

97. Ariz.—Bailey v. Kenagy, 144 P. 636, 16 Ariz. 272.
Miss.—Lehr v. Hall, 6 Miss. 54.
Okl.—Bouquot v. Aard, 153 P. 1104, 54 Okl. 55.

considered that docket entries required by law showing that there is a judgment are not admissible in connection with the judgment.[98]

Minutes and notes. The judge's minutes or notes have been held not to be evidence,[99] although there is also authority for the contrary view,[1] and it has been held that such minutes, although no part of the record, are admissible in the absence of a record as tending to show the judgment actually rendered.[2]

Notes made by a grand jury during its investigations have been held incompetent as evidence in an action on a fire policy,[3] and entries on a police blotter are not competent evidence in a civil suit to prove the conviction of a person for crime.[4]

On the trial of an issue of nul tiel record in the same court where the alleged record is kept, it is not necessary to produce a formal record of the alleged proceedings, but it is sufficient to have the docket entries and original entries laid before the court for its inspection.[5]

Original detached papers. The original detached papers in a suit, on file in the office where the court records are kept, may be used in evidence if the complete record has not been made up,[6] and it has even been held that the original separate papers in an inferior court may be received in evidence in a superior court.[7]

When a formal or technical judgment roll has been made up, however, it and not the original papers or docket entries is the legal evidence to establish what the record contains,[8] at least in the absence of evidence that the record has been lost or destroyed.[9] On proof of the loss or destruction of an original paper, regular docket entries with relation thereto[10] or other memoranda kept by the clerk[11] may be received. However, an execution itself is the best evidence of its existence and contents, and its loss or destruction must be shown to render the secondary evidence admissible.[12]

Use of abbreviations in docket entries. The fact that abbreviations are used in docket entries does not render them inadmissible if the meaning of such abbreviations is apparent.[13]

Docket of justice. It has been held that, where the law requires a docket to be kept by a justice, it is evidence of nothing not required or authorized to be kept thereon.[14]

§ 633. —— Matters Included in Record

a. In general
b. Pleadings

a. In General

Every part of a judicial record is admissible to prove that which it legitimately sets forth.

Since a judicial record as a whole imports verity, every part of it is admissible to prove that which it legitimately sets forth.[15] All entries and papers

Vt.—Gibson v. Holmes, 62 A. 11, 78 Vt. 110, 4 L.R.A.,N.S., 451.

22 C.J. p 797 note 62.

Entry as proof of rendition of judgment

A judgment entry alone, unaccompanied by any other part of the record of such judgment, or any sufficient explanation of its absence, when offered in evidence for a purpose other than to show the fact of its rendition, is inadmissible if reasonably objected to, a rule not qualified by the fact that the judgment offered is from a court of general jurisdiction, nor by the fact that it may contain general recitals of jurisdiction.—Short v. Blair & Hughes Co., Tex.Civ.App., 230 S.W. 427.

Judicial record showing an entry by the prothonotary that the sheriff had acknowledged a certain deed amounts to nothing more than an abstract of the deed. It is not even a copy, and is secondary evidence which, where the title is in issue, cannot be introduced in evidence unless the original deed is produced or its absence satisfactorily explained.—Lodge v. Berrier, 16 Serg. & R. Pa. 297.

98. Md.—Shipley v. Fox, 16 A. 275, 69 Md. 572.

99. Ill.—McCormick v. Wheeler, 36 Ill. 114, 85 Am.D. 388.

22 C.J. p 798 note 70.

Corpus Juris cited in case involving a criminal prosecution.—Calvert v. State, 155 So. 389, 390, 26 Ala. App. 189.

1. N.Y.—Haddow v. Lundy, 59 N.Y. 320.

22 C.J. p 798 note 71.

2. Iowa.—Mahaska County v. Bennett, 129 N.W. 838, 150 Iowa 216.

3. Ala.—Great American Ins. Co. v. Pearson, 127 So. 233, 220 Ala. 664.

Admissibility of grand jury's minutes in criminal prosecution see Criminal Law § 846.

4. Wis.—Rissling v. Milwaukee Electric Ry. & Light Co., 234 N. W. 879, 203 Wis. 554.

5. Md.—Lerian v. Rohr, 5 A. 867, 66 Md. 95.

6. Cal.—Sharp v. Lumley, 34 Cal. 611.

22 C.J. p 798 note 73.

7. N.C.—Lash v. Thomas, 86 N.C. 313.

22 C.J. p 798 note 74.

8. Iowa.—Baxter v. Pritchard, 85 N.W. 633, 113 Iowa 422.

22 C.J. p 798 note 75.

9. Conn.—Waterbury Lumber & Coal Co. v. Hinckley, 52 A. 739, 75 Conn. 187.

10. Ill.—Ellis v. Huff, 29 Ill. 449.

22 C.J. p 799 note 77.

11. Va.—Brown v. Campbell, 33 Gratt. 402, 74 Va. 402.

22 C.J. p 799 note 78.

12. Ala.—Ayers v. Roper, 20 So. 460, 111 Ala. 651.

22 C.J. p 799 note 80.

13. U.S.—Baskin v. U. S., Ill., 209 F. 740, 126 C.C.A. 464.

14. N.J.—Hunt v. Boylan, 6 N.J. Law 211.

22 C.J. p 797 note 59.

15. N.J.—Nugent v. Lindsley, 116 A. 790, 97 N.J.Law, 268, citing **Corpus Juris.**

22 C.J. p 799 note 81.

Incomplete judicial record see **infra** § 647.

legitimately forming a part of the record may be admitted,[16] such as a clerk's appointment of deputies,[17] or a master's report,[18] at least where such evidence is material and otherwise competent,[19] although evidence of this character should be excluded where it is not relevant and material.[20]

The rule admitting records applies, however, only to such matters as are legitimately a part of the record and not to mere collateral papers incidentally connected with the proceedings.[21] Thus bills of exceptions have been held not to form a part of the record so as to entitle them to admission.[22]

Assignment of judgment. An assignment of a judgment of a United States court is not a judicial proceeding, within the meaning of the act of congress giving faith and credit to the judicial proceedings of any court of the United States attested by the clerk thereof, and certified by the judge, and hence is not admissible in evidence, without proper proof of its execution.[23]

Opinion of court. An opinion of the court has been held not admissible in evidence,[24] at least where not authenticated.[25] On the other hand, an opinion which served the purpose of findings has been held admissible to prove the ground on which the decree proceeded;[26] and in an action to recover an attorney's fee which was contingent on securing a decision of the supreme court sustaining the validity of certain municipal bonds, the published official report of the court's opinion has been held admissible to show the holding.[27]

Writs and returns. An execution or other writ and the return of a sheriff or other officer thereon, made pursuant to law, are, when filed, a part of the record of the court, and admissible as such,[28] and the records of a clerk's office may be admissible to

16. Ala.—Brown v. Shelby County, 85 So. 416, 204 Ala. 252.
Tenn.—Ridley v. Haiman, 47 S.W.2d 750, 164 Tenn. 239.
22 C.J. p 799 note 83.

Sheriff's deed; carelessly kept docket
Exclusion of a sheriff's deed from evidence, in view of the careless manner in which the execution docket was kept, was error notwithstanding there was no entry in the execution docket of the issue of writ of venditioni exponas.—W. T. Carter & Bro. v. Bendy, Tex.Civ.App., 251 S.W. 265.

17. Mo.—Whalen v. Buchanan County, 111 S.W.2d 177, 342 Mo. 83.

Explanatory of order
In action by chief deputy county clerk for balance of salary, written appointment by county clerk naming plaintiff as chief deputy and others as class A deputies, addressed to county court and on file in archives of that body, which approved the appointments by its order of record referring to such writing, was admissible as explanatory of order of record and a part thereof.—Whalen v. Buchanan County, supra.

18. Tex.—Forman v. Irby, Civ.App., 115 S.W.2d 1229, error refused.

Term report rendered in foreclosure proceeding
In suit to remove as a cloud on title an oil and gas lease executed by one of two mortgage underwriters who after having sold mortgage notes obtained title to the land under foreclosure decree, the term report of the master which included receipts from noteholders for their distributive shares of purchase money from foreclosure sale was properly admitted as a part of foreclosure proceeding on which lessee based its title.—Warford v. McQueen, 31 N.E.2d 599, 375 Ill. 372.

19. Pa.—Numbers v. Shelly, 78 Pa. 426.
22 C.J. p 799 note 84.

20. Colo.—Howard v. Fisher, 283 P. 1042, 86 Colo. 493.

21. Mo.—See Wahl v. Cunningham, 56 S.W.2d 1052, 1059, 332 Mo. 21, citing **Corpus Juris.**
N.C.—Gauldin v. Town of Madison, 102 S.E. 851, 179 N.C. 461, 10 A.L.R. 1497.
22 C.J. p 799 note 86.

Officer's complaint charging theft
In a suit on a policy to recover damages to a car from theft, complaint made by patrolman charging party with theft of car in question was not evidential.—Smith v. National Union Fire Ins. Co., 130 A. 371, 3 N.J.Misc. 994.

22. U.S.—May v. International L. & T. Co., Tex., 92 F. 445, 34 C.C.A. 448.
22 C.J. p 800 note 87.

Object of bill
The sole object of a bill of exceptions is to certify the facts embodied therein to an appellate tribunal and to enable the appellate court to revise the proceedings of the inferior court.—Shotwell v. Hamblin, 23 Miss. 156, 55 Am.D. 83—Robinson v. Lane, 22 Miss. 161.

23. Mo.—Wonderly v. Lafayette County, 51 S.W. 745, 150 Mo. 635, 73 Am.S.R. 474, 45 L.R.A. 386.

24. Cal.—Wixson v. Devine, 7 P. 776, 67 Cal. 341.
Ill.—Cullen v. Higgins, 138 Ill.A. 168.
Wash.—Regenvetter v. Ball, 229 P. 321, 131 Wash. 155.
Decisions of courts of other states as proof of law thereof see supra § 628

Municipal court opinion as part of record
Opinion of appellate division of municipal court of Boston was no part of record and was inadmissible in evidence.—Jones v. Cella, 187 N.E. 294, 284 Mass. 154.

Statement of facts in opinion
Condensed statement of maker's business dealings taken from a summary appearing in court opinion is properly excluded in action against payee indorser.—Grenda v. Kitchen, 170 N.E. 619, 270 Mass. 559.

Trial not resulting in judgment
Opinion of judge on issues of fact in trial which did not result in a judgment is not admissible in evidence on a second trial before another court.—Eckerson v. Archer, 41 N.Y.S. 802, 10 App.Div. 344.

25. Cal.—Wixson v. Devine, 7 P. 776, 67 Cal. 341.
Authentication of records see infra §§ 634, 635.

26. N.Y.—Cahill v. Liverpool Standard Marine Ins. Co., 97 N.E. 486, 204 N.Y. 190, affirming 124 N.Y.S. 496, 139 App.Div. 780.

27. Colo.—Keeler v. Hoyt, 140 P. 191, 57 Colo. 120.

28. U.S.—Shoup v. Marks, Alaska, 128 F. 32, 62 C.C.A. 540.
22 C.J. p 799 note 85.

Garnishment
In action on note wherein defendant sought to offset value of pledged stock which had allegedly been converted by plaintiff, petition and garnishment writ in prior action between same parties on note was properly admitted to show amicable adjustment and absence of any claim of conversion up to that time, especially where defendant had testified to prior suit, and referred to contents of petition.—Bateman v.

show the validity of proceedings for a writ of attachment.[29]

b. Pleadings

For certain purposes pleadings may be admissible in evidence.

Under the rules discussed in subdivision a of this section the pleadings in a suit or action are admissible for some purposes,[30] as in the case of verified pleadings in former actions involving one or more of the parties to a suit,[31] provided the pleadings are relevant and material.[32] The original pleadings may be admissible, although copies might have been introduced.[33] In a proper case a pleading may be introduced to corroborate[34] or contradict[35] a witness, to rebut an inference,[36] or to establish an admission against interest,[37] or to show various matters, such as the cancellation[38] or construction[39] of a contract, the character of personal relations,[40] the history of a transaction,[41] or who were attorneys for a particular person.[42]

On the other hand, pleadings may and should be excluded where they are irrelevant or immaterial to the issues of the case at bar,[43] as where the pleading contains no admissions bearing on the matters in issue,[44] or is incompetent because essentially self-serving,[45] or where its authenticity or genuineness is not shown.[46] Aside from the question of admissions, pleadings in the same or a different suit do not constitute evidence of the truth of the facts

Daniel, Tex.Civ.App., 90 S.W.2d 276, error dismissed.

Ex parte statement as to issuance and levy

An ex parte statement filed in the county clerk's office stating that an execution was issued against a party and levied on his interest in certain land is no evidence some eleven years later in a subsequent suit involving such land that such or any lien exists against the land, nor is it competent evidence that such an execution was issued or was levied or that such a lien ever existed in fact.—Whittaker v. Chenault, 232 S. W. 391, 192 Ky. 81.

29. S.D.—Stokes v. Christenson, 213 N.W. 950, 51 S.D. 365, reversing 209 N.W. 338, 50 S.D. 230.

Inconsistent statements

That clerk's file contains conflicting statements does not affect its admissibility.—Stokes v. Christenson, supra.

30. Ala.—Jones v. Woodward Iron Co., 82 So. 26, 203 Ala. 66.
Ind.—McKern v. Beck, 126 N.E. 641, 73 Ind.App. 92.
Mo.—Everhardt v. Garner, App., 100 S.W.2d 71.
N.C.—Potts v. Carter-Cobb Motor Co., 131 S.E. 739, 191 N.C. 821.
Pa.—Buehler v. Philadelphia & R. Ry. Co., 124 A. 325, 280 Pa. 92.
S.D.—In re Common School Dist. in Highmore Independent School Dist. of Highmore, Hyde County, 222 N.W. 690, 54 S.D. 146.
Tex.—Bateman v. Daniel, Civ.App., 90 S.W.2d 276, error dismissed.
22 C.J. p 799 note 82.

31. Minn.—Farmers' Co-op. Exch. Co. of Good Thunder v. Fidelity & Deposit Co. of Maryland, 182 N.W. 1008, 149 Minn. 171.
Pa.—Charles v. Arrington, 167 A. 428, 110 Pa.Super. 173.

Acknowledgement of facts averred

Verified former pleadings between same parties concerning same controversy, but when position of parties was reversed, are admissible at least as acknowledgements of the facts therein contained, although bill was dismissed by consent, particularly where no objection was made to offer in evidence.—Charles v. Arrington, supra.

32. Tex.—Hines v. Bost, Civ.App., 224 S.W. 698, dismissed for want of jurisdiction.

Verified pleading

A pleading, made and verified by a party in another action, is competent evidence, so far as relevant, in an action to which he is a party.—Farmers' Co-op. Exch. Co. of Good Thunder v. Fidelity & Deposit Co. of Maryland, 182 N.W. 1008, 149 Minn. 171.

Determination of relevancy and materiality

The relevancy and materiality of pleadings are to be determined by the rules governing the admissibility of other testimony.—Hines v. Bost, Tex.Civ.App., 224 S.W. 698, dismissed for want of jurisdiction.

33. Ala.—Walker County v. Burdeshaw, 169 So. 227, 232 Ala. 621.

Original voluntary petition in bankruptcy

Ga.—Myers v. Wright, 123 S.E. 740, 158 Ga. 418.

34. Cal.—MacPherson v. West Coast Transit Co., 271 P. 509, 94 Cal.App. 463.
Corroboration and impeachment of witnesses see the C.J.S. title Witnesses § 458 et seq., also 70 C.J. p 759 note 9 et seq.

35. Wash.—Regenvetter v. Ball, 229 P. 321, 131 Wash. 155.

36. Cal.—MacPherson v. West Coast Transit Co., 271 P. 509, 94 Cal. App. 463.

37. Tex.—Houston, E. & W. T. Ry. Co. v. Walt, 70 S.W. 531, 96 Tex. 121.
Mode of proving admissions see supra § 372.

38. Iowa.—Pierce v. Lichtenstein, 242 N.W. 59, 214 Iowa 315.

39. Tex.—Jackson v. Thompson, Civ.App., 74 S.W.2d 1055.

40. Ill.—Powell v. Bechtel, 172 N. E. 765, 340 Ill. 330.
Or.—Stone v. First Nat. Bank, 197 P. 304, 100 Or. 528, affirmed 198 P. 244, 100 Or. 528.

Where relations formerly subsisting between testator and his son become material on a will contest, a bill of complaint filed by testator to recover land theretofore conveyed to the son is admissible as bearing on the character of their relations.—Powell v. Bechtel, 172 N.E. 765, 340 Ill. 330.

41. Or.—Stone v. First Nat. Bank, 197 P. 304, 100 Or. 528, affirmed 198 P. 244, 100 Or. 528.

42. Mo.—Rhoades v. Robinson's Estate, 6 S.W.2d 1007, 222 Mo.App. 912.

43. Cal.—Miles v. Rosenthal, 266 P. 320, 90 Cal.App. 390.
Ill.—Fuchs v. Par Kar Amusement Co., 236 Ill.App. 487.

44. Minn.—Jeddeloh v. Altman, 247 N.W. 512, 188 Minn. 404.
Pa.—Popalis v. Yanchura, 173 A. 743, 114 Pa.Super. 204.

45. Tex.—Freeman v. Hawkins, 14 S.W. 364, 77 Tex. 498—Corn v. Crosby County Cattle Co., Com. App., 25 S.W.2d 290, affirming Crosby County Cattle Co. v. Corn, Civ.App., 25 S.W.2d 283, and rehearing denied Corn v. Crosby County Cattle Co., Com.App., 29 S.W.2d 999.
Self-serving declarations see supra, § 216.

46. Ill.—Gavin v. Keter, 278 Ill. App. 308.
Authentication of:
Judicial records generally see infra § 634.
Justice's records see infra § 635.

therein alleged,[47] and it has been held that the pleadings on which the case is tried are not admissible in evidence because such pleadings are before the court and it is its duty to construe them.[48] It has also been stated that the pleadings in a case determine the issues and primarily are not evidence for any purpose unless made so by statute,[49] and it has been held that a fact averred in the statement of claim and not specifically denied in the affidavit of defense, is an admitted fact but does not become so unless put before the jury in an approved manner,[50] but that a plaintiff may properly prove his case by putting into evidence averments of a statement of claim and corresponding averments of his opponent's affidavit of defense which fail effectively to deny such averments.[51]

Where, under statute, the failure of defendant's answer to deny the allegations of the complaint raises a presumption of the truth of such allegations, it may be permissible to introduce plaintiff's bill of particulars.[52]

Abandoned pleadings. Abandoned pleadings of either plaintiff or defendant may be admissible against him.[53]

Interrogatories and answers. Interrogatories and answers have been held to be evidential only in the case to which they relate, and it is improper to admit them in evidence in another case.[54]

§ 634. —— Authentication of Records Generally

A court may on inspection of its own records dispense with proof of their authenticity, but the authenticity of records of another court must be satisfactorily established.

The book of records of a court proves itself when offered in evidence in the same court, since a court will take judicial notice of its own records,[55] and this principle extends to different parts or sections of the same court.[56]

47. Ky.—Hogle's Guardian v. Wolfzorn, 58 S.W.2d 577, 248 Ky. 396—Clover Farm Dairy Co. of Memphis, Tenn., v. Gillum, 299 S.W. 1065, 222 Ky. 20.
N.J.—Scott-Newcomb, Inc. v. Marron, 17 A.2d 611, 125 N.J.Law 628.
Tex.—Roadway Express v. Gaston, Civ.App., 90 S.W.2d 874—Citizens' Nat. Bank of Waco v. Del Rio Bank & Trust Co., Civ.App., 11 S.W.2d 242.
Wash.—Regenvetter v. Ball, 229 P. 321, 131 Wash. 155.
Conclusiveness and effect of pleadings see infra § 772.

Declaration in intervening petition that there was no administration of decedent's estate or necessity therefor is mere hearsay and not competent evidence of the facts declared.—Lawrie v. Miller, Tex.Com.App., 45 S.W.2d 172, reversing Miller v. Lowrie, Civ.App., 25 S.W.2d 984.

Plea in abatement
In shipper's action against insurer for insured's negligence in transporting furniture, plea in abatement alleging that policy, if any, contained no provision which would permit shipper to sue is not competent to show existence of liability policy.—Sun Ins. Office v. Dunn, Tex.Civ.App., 79 S.W.2d 1109.

Verified petition in another suit is not competent evidence of facts stated therein.—Neblett & Norman v. Goukas, Tex.Civ.App., 40 S.W.2d 1113.

Unverified allegations
Allegations of amended petition of plaintiffs and interveners not sworn to which were expressly denied constituted no proof of title of timber.—Davis v. Shelby, Tex.Civ. App., 283 S.W. 212.

48. Mo.—Everhardt v. Garner, App., 100 S.W.2d 71—Wilson v. Frankel, App., 61 S.W.2d 363—Wesner v. St. Louis & S. F. R. Co., 163 S.W. 298, 177 Mo.App. 117.

49. Pa.—Buehler v. U. S. Fashion Plate Co., 112 A. 632, 269 Pa. 428—Skillman v. Magill, 98 Pa.Super. 72.

Affidavit of value in replevin action is not part of pleadings which determines issues in controversy and is not admissible evidence of facts therein contained.—Ladner v. Forman, 163 A. 359, 107 Pa.Super. 245.

Unoffered averments
Averments in affidavit of defense which are not offered will not be considered as part of evidence.—Yorkshire Worsted Mills v. Braman, 175 A. 726, 115 Pa.Super. 333.

50. Pa.—Buehler v. U. S. Fashion Plate Co., 112 A. 632, 269 Pa. 428.

Three ways of putting admitted fact before jury are: First, statement by presiding judge to the official stenographer in the presence of counsel that certain facts averred and not denied must be treated as admitted; second, direction of counsel that there be placed on the notes of trial certain facts which he admits; or third, offering in evidence of appropriate portions of the statement of claim and the affidavit of defense and having the facts thus sought to be established placed on the notes of trial.—Buehler v. U. S. Fashion Plate Co., supra.

51. Pa.—Seaman v. Tamaqua Nat. Bank, 147 A. 56, 297 Pa. 294.

52. Idaho.—A. C. White Lumber Co. v. McDonell, 258 P. 555, 44 Idaho 620.

53. Mo.—Everhardt v. Garner, App., 100 S.W.2d 71.
Tex.—Hines v. Bost, Civ.App., 224 S. W. 698, dismissed for want of jurisdiction.

Superseded portion of answer
Permitting introduction of part of defendants' original answer which had been superseded by an amended pleading from which part introduced had been omitted is not error, since allegations in pleadings are admissible in evidence to be considered by jury.—Miller v. Hooper, Tex.Civ. App., 94 S.W.2d 230.

54. N.J.—Cook v. Soden, 171 A. 558, 12 N.J.Misc. 337.

Unanswered interrogatories
In will proponent's suit to annul for fraud and collusion, decree denying probate, a contestant's interrogatories to proponent are not evidence of contestant's purposes in conduct of case, where, by agreement, they were never answered.—Harris v. Harris, 99 So. 913, 211 Ala. 144.

55. Tex.—Indemnity Co. of America v. Pitts, Civ.App., 38 S.W.2d 883, affirmed, Com.App., 58 S.W.2d 53—Short v. Blair & Hughes Co., Civ.App., 230 S.W. 427.
22 C.J. p 800 note 93.
Judicial notice of court's own records see supra § 50.

Simple inspection as sufficient
Records of case on trial are before the court, and may be admitted in evidence on simple inspection by court without further proof of authenticity.—Wahl v. Cunningham, 56 S.W.2d 1052, 332 Mo. 21.

56. Ga.—Hill v. George, 170 S.E. 326, 47 Ga.App. 272.

It is necessary, however, before any original record can be received in evidence in another court that the court be satisfied by legal and competent evidence that the alleged record is what it purports to be.[57] This may be shown by producing in court either the keeper of the records,[58] or his deputy,[59] and ascertaining from him on oath that it is a record of his office, or, it is said, by his certificate to the same effect under the seal of court.[60] It has also been held that an original record may be proved to be such by any person who can identify it,[61] and that original files in judicial proceedings, when offered in evidence merely to show that they exist, may be admitted on any satisfactory evidence of their identity.[62] Where the records of another court are produced from proper custody and appear on their face to be court records, they may be admitted on the theory that there is at least a prima facie proof of their identity, authenticity, and genuineness.[63]

It has been held unnecessary for a party offering in evidence unappealed orders of a court of probate to be sworn.[64]

Foreign records. In the absence of a state statute covering the matter, the authentication of records of courts of other states is controlled by the federal constitution and statutes.[65]

Different sections of municipal court
Original court documents and records from municipal court of Atlanta, Fulton section, including judgment in claim case, advertisement with entries thereon, forthcoming bond, and fieri facias, are admissible in municipal court of Atlanta, De Kalb section, without exemplification thereof, since there is only one municipal court of Atlanta and the records of one section do not have to be proved for introduction in another section of the single court.—Hill v. George, supra.

57. Ala.—McDowell v. Hutto, 135 So. 322, 223 Ala. 307.
Ill.—Gavin v. Keter, 278 Ill.App. 308.
Ky.—Brown v. Brown, 268 S.W. 801, 207 Ky. 133.
Md.—Ruth v. Durendo, 170 A. 582, 166 Md. 83.
N.J.—Keller v. Linsenmyer, 139 A. 33, 101 N.J.Eq. 664.
Okl.—Kuykendall v. Caldwell, 179 P. 463, 74 Okl. 67.
Tex.—Jackson v. Piper, Civ.App., 28 S.W.2d 240.
22 C.J. p 800 note 94.
Unauthenticated opinion of court see supra § 633.
Unauthenticated pleadings see supra § 633 b.

"Notice of subrogation"
In death action, paper designated as notice of subrogation, found among files of action, in which indemnity company claimed to be subrogated to extent of compensation payments made by it to widow of deceased to any right of plaintiff in action, was inadmissible, where no attempt was made to prove genuineness of instrument, or truth of matters contained therein.—Kerr v. Basham, 264 N.W. 187, 64 S.D. 27.

Unmarked præcipe
In ejectment by holder of tax deed, præcipe of purported decree confirming state's alleged title to land for alleged nonpayment of taxes was not competent where præcipe bore no mark of approval by chancellor.—Burton v. Callis, 82 S.W.2d 34, 190 Ark. 906.

Validity of master's report
In suit to cancel subscription for stock in insurance company, validity of report of master in chancery appointed in receivership proceeding to determine amount of claims against company and order confirming report were properly established so as to be admissible as evidence of unsatisfied claims against company by showing that orders provided for and recognized notice to all parties in interest, in absence of showing that subscriber reserved exception to master's report or confirmation thereof.—Forman v. Irby, Tex.Civ.App., 115 S.W.2d 1229, error refused.

Determination of admissibility of pleadings
Where plaintiff did not reply to pleading of release of liability by plaintiff's agent, interpretation of such pleading, as respects whether agency was sufficiently pleaded to make averments admissible in evidence where no reply was filed, was for court.—Heather v. New Spartan Building & Loan Ass'n, 190 A. 659, 126 Pa.Super. 245.

58. Ky.—Harbison & Walker Co. v. White, 114 S.W. 250.
22 C.J. p 800 note 95.

Clerk's identification
Sufficient foundation is laid for introducing court's records, by clerk's identification thereof as files of his office.—Stokes v. Christenson, 213 N.W. 950, 51 S.D. 365, reversing 209 N.W. 338, 50 S.D. 230.

Effect of possession by attorney
The fact that records have been in the hands of an attorney pending return to the clerk does not necessitate any further foundation for their admission than the customary identification by the clerk.—Stokes v. Christenson, 213 N.W. 950, 51 S.D. 365, reversing 209 N.W. 338, 50 S.D. 230.

59. Va.—Ballard v. Thomas, 19 Gratt. 14, 60 Va. 14.

60. S.C.—Perry v. Mays, 20 S.C.L. 76.

61. Mich.—McLeod v. Crosby, 87 N.W. 883, 128 Mich. 641.
22 C.J. p 800 note 98.

62. Conn.—Phelps v. Hunt, 43 Conn. 194.

63. N.C.—Cox v. Wright, 11 S.E.2d 158, 218 N.C. 342.

Presumptions as to records and orders of commissioners' courts
(1) In suit by state of Texas in its own behalf and in behalf of subdivisions of Willacy County to foreclose a tax lien, permitting extracts from minutes of commissioners' court to be read in evidence without first showing that such minutes had been signed by judge and attested by clerk, as required by statute, was not error, where there was no evidence that minutes were not in proper form, such fact being presumed.—Landa v. State, Tex.Civ.App., 131 S.W.2d 321, error dismissed, judgment correct.

(2) An order of commissioners' court declaring result of consolidation elections in school districts was admissible to show consolidated district's corporate existence, without showing validity of acts culminating in such order, unless order showed on its face that attempted consolidation was void.—Crocker v. Santo Consol. Independent School Dist., Tex.Civ.App., 116 S.W.2d 750, error dismissed.
Presumptions attending judicial proceedings see supra § 145.

64. U.S.—Matheson v. National Surety Co., C.C.A.Alaska, 41 F.2d 155.

65. N.Y.—H. G. Bittleston Law & Collection Agency v. Fontaine, 215 N.Y.S. 796, 127 Misc. 284.
Authentication of copies of foreign records see infra §§ 665, 675.

Deposition not proved part of record
Deposition taken in alleged previous suit in another state was improperly admitted, where there was no showing that deposition was made part of record in such previ-

An original fieri facias from a United States circuit court will, in a contest arising thereunder, be recognized by the state courts without proof other than intrinsic proof of its genuineness.[66]

§ 635. —— Authentication of Justice's Records

The docket of a justice is evidence per se when offered before him; in other courts his records must be duly authenticated.

The docket of a justice is evidence per se where it is offered in a cause before the same justice.[67]

The original records of justices of the peace and other inferior tribunals are admissible in other courts if their authenticity is established;[68] but as a general rule there must be some proof of the identity and authenticity of the record other than the record itself.[69] The record may be authenticated by the oath of the justice himself,[70] or, it has been held, by the oath of any competent witness who can identify the record,[71] or the handwriting of the justice.[72] A distinction has been asserted, to the effect that, where the records of a justice are offered in proof of the facts which they purport to state, they must, if originals, be brought into court by the official custodian of them, who can testify as to their character, but that, when they are offered in evidence merely to show that they exist, they may be admitted on any satisfactory evidence of their identity.[73]

§ 636. —— Of What Record Is Evidence

A judicial record is admissible to show the fact and time of rendition of a judgment and its terms and effect, but not to establish the existence of the facts on which the judgment was predicated.

A judicial record is always admissible to prove the fact that a judgment has been rendered, the time of its rendition, and the terms and effect of the judgment,[74] for the mere fact that a judgment was given, this being a thing done by public authority, can never be considered as res inter alios acta, nor can the legal consequences of the rendition of such

ous suit.—Davis v. Davis, 13 P.2d 1109, 54 Nev. 267.

Discharge in bankruptcy in federal court must be certified when offered in state court.—McClain v. Madry, 6 Tenn.App. 75.

Existence of foreign court

Court improperly admitted deposition purporting to have been taken in superior court of another state, where there was no evidence that there was superior court in such state.—Davis v. Davis, 13 P.2d 1109, 54 Nev. 267.

66. Ga.—Thomas v. Parker, 69 Ga. 283.

67. N.Y.—Groff v. Griswold, 1 Den. 432—Smith v. Frost, 5 Hill 431.

68. Cal.—Kriste v. International Sav. etc., Bank, 119 P. 666, 17 Cal. App. 301.
22 C.J. p 800 note 2.

69. Conn.—Banach v. Bohinski, 139 A. 688, 107 Conn. 156.
22 C.J. p 800 note 3.

Justice's minutes of testimony

In the absence of a statute authorizing proof in this manner, a justice's minutes of the testimony of a party in a case before him are not admissible for the purpose of proving such testimony.—Eggett v. Allen, 96 N.W. 803, 119 Wis. 625—Zitske v. Goldberg, 38 Wis. 216.

Stenographer's minutes

In action for injuries sustained in automobile accident, excluding stenographer's minutes of a hearing in a magistrate's court was not error, where the minutes had not been properly proved.—Jackson v. Dickman, 9 N.Y.S.2d 688, 256 App.Div. 925, reargument denied 11 N.Y.S.2d 557, 256 App.Div. 1003.

Summons issued by justice

A summons purporting to have been issued by a justice, but not in any way authenticated or certified, is inadmissible in evidence.—Chapman v. Duffy, 79 P. 746, 20 Colo.App. 471.

70. Colo.—Grimes v. Greenblatt, 107 P. 1111, 47 Colo. 495, 19 Ann. Cas. 608.
22 C.J. p 801 note 4.

71. Colo.—Grimes v. Greenblatt, 107 P. 1111, 47 Colo. 495, 19 Ann. Cas. 608.
22 C.J. p 801 note 5.

72. Pa.—Dennison v. Otis, 2 Rawle 9.
22 C.J. p 801 note 6.

73. Conn.—Phelps v. Hunt, 43 Conn. 194.

74. U.S.—Diamond v. New York Life Ins. Co., C.C.A.Ill., 50 F.2d 884, affirming D.C., 42 F.2d 910, and certiorari denied 52 S.Ct. 25, 284 U.S. 647, 76 L.Ed. 549.
Okl.—Mechanics' & Traders' Ins. Co. of New Orleans v. Local Building & Loan Ass'n, 261 P. 170, 173, 128 Okl. 71, citing Corpus Juris.
Or.—Traver v. Naylor, 268 P. 75, 126 Or. 193.
Tex.—Short v. Blair & Hughes Co., Civ.App., 230 S.W. 427.
22 C.J. p 801 note 9.
Admissibility of judicial records of civil cases in criminal prosecutions see Criminal Law § 846.
Records of courts of probate as evidence of matters such as appointment of administrator, widow's election, etc. see supra § 630.

Cause of death

Judgment and verdict in murder prosecution showing insured's execution was competent to establish fact that death resulted from violation of law, and not from accidental causes, in an action at law to recover double indemnity provided for in an insurance policy.—Diamond v. New York Life Ins. Co., C.C.A.Ill., 50 F.2d 884, affirming, D.C., 42 F.2d 910, and certiorari denied 52 S.Ct. 25, 284 U.S. 647, 76 L.Ed. 549.

Divorce decree showing custody of children

Decree in divorce suit is admissible, in action for alienation of wife's affections only to show that husband did not have custody of either of his children.—Regenvetter v. Ball, 229 P. 321, 131 Wash. 155.

Insolvency

In depositor's action to enforce stockholders' statutory liability, judgment roll containing record of receivership proceedings of bank is competent to show its insolvency.—Wright v. Barringer, 158 S.E. 737, 160 S.C. 359.

Ownership

In an action against a bank by a beneficial owner of a note for proceeds collected on a note and paid by the bank to the payee named therein, a judgment roll in another case by plaintiff against the payee was admissible in evidence to show that plaintiff was the owner of the note.—Bell v. German-American Trust & Savings Bank, 185 P. 217, 43 Cal. App. 402.

judgment be so considered.[75] The record is not, however, evidence of any matter which can only be inferred from it by argument,[76] and the record may not be introduced to establish the facts on which a judgment was based.[77]

The question of the admissibility of a judgment in evidence generally is considered in the C.J.S. title Judgments § 839, also 34 C.J. p 1067 notes 74–78. A judgment as evidence against a stranger to the judgment is discussed in the C.J.S. title Judgments § 821, 34 C.J. p 1050 note 13–p 1055 note 63; the conclusiveness of a criminal judgment in a civil suit is treated in the C.J.S. title Judgments § 754, also 34 C.J. p 970 note 3–p 972 note 23.

Lack of jurisdiction. A judicial record is proper and legitimate evidence for the purpose of showing that in the case involved the court was without jurisdiction of the parties or of the subject matter.[78]

Recital as to pendency of suit. The recital in the record of a suit pending in another state, that it appeared to the court that a nonresident defendant had notice of the pendency of the suit, is not prima facie evidence that such defendant was served with notice within the state where the suit was pending.[79]

§ 637. Official Registers and Documents

A record or document kept by a person whose public duty it is to record truly the facts stated therein is ordinarily admissible in evidence.

Subject to the general rules of evidence,[80] a record or document kept or prepared by a person whose public duty it is to record truly the facts stated therein is, when relevant, admissible as prima facie evidence of such facts,[81] although the statements therein were made extrajudicially by a person not under oath and not subject to cross-examination,[82] and the person who made the record may have had no personal knowledge of the matters recited,[83] provided it was made originally with the intent that it should be kept as a memorial to be referred to and used as evidence.[84] The original

75. Mo.—Jones v. Talbot, 9 Mo. 121.
Okl.—Mechanics' & Traders' Ins. Co. of New Orleans v. Local Building & Loan Ass'n, 261 P. 170, 173, 128 Okl. 71, citing **Corpus Juris.**

76. Ala.—McCravey v. Remson, 19 Ala. 430, 54 Am.D. 194.

77. Or.—Traver v. Naylor, 268 P. 75, 126 Or. 193.
Tex.—Jones v. Teat, Civ.App., 57 S. W.2d 617, affirmed Teat v. Jones, 89 S.W.2d 987, 126 Tex. 480—Smith v. Bryson, Civ.App., 33 S. W.2d 268, error dismissed.

78. Colo.—Venner v. Denver Union Water Co., 63 P. 1061, 15 Colo.App. 495.
Invalidity of order of sale, etc.
The record may be introduced for the purpose of showing lack of jurisdiction and that consequently an order of sale, a sale of the property in question, and the deeds following the sale, were nullities.—Venner v. Denver Union Water Co., supra.

79. N.H.—Downer v. Shaw, 22 N.H. 277.

80. Ariz.—Mutual Ben. Health & Accident Ass'n v. Neale, 33 P.2d 604, 43 Ariz. 532.
Papers in files of Interstate Commerce Commission are not always evidence in a case and are not a part of the record unless introduced in evidence.—U. S. v. Abilene & S. Ry. Co., Kan., 44 S.Ct. 565, 265 U.S. 274, 68 L.Ed. 1016, affirming, D.C., Abilene & S. Ry. Co. v. U. S., 288 F. 102.

81. U.S.—Gilmore v. U. S., C.C.A. Miss., 93 F.2d 774, certiorari denied 58 S.Ct. 1039, 304 U.S. 569, 82 L.Ed. 1534—U. S. v. Mid-Continent Petroleum Corporation, C.C.A.Okl., 67 F.2d 37, certiorari denied Hosey v. Mid-Continent Petroleum Corporation, 54 S.Ct. 346, 290 U.S. 702, 78 L.Ed. 603—Wausau Sulphate Fibre Co. v. Commissioner of Internal Revenue, C.C.A., 61 F.2d 879.
Ark.—Washington Fidelity Nat. Ins. Co. v. Anderson, 63 S.W.2d 535, 537, 187 Ark. 974, citing **Corpus Juris.**
Kan.—Board of Com'rs of Ford County v. Robb, 64 P.2d 69, 71, 145 Kan. 125, citing **Corpus Juris.**
Mo.—Wheeler v. Fidelity & Casualty Co. of New York, 251 S.W. 924, 931, 298 Mo. 619, quoting **Corpus Juris**—Knickerbocker v. Athletic Tea Co., App., 285 S.W. 797—Galli v. Wells, 239 S.W. 894, 209 Mo. App. 460.
Neb.—State v. Bass, 269 N.W. 68, 131 Neb. 592.
N.C.—Braddy v. Pfaff, 186 S.E. 340, 210 N.C. 248.
Okl.—Higbee v. City of Bartlesville, 294 P. 168, 169, 147 Okl. 49, citing **Corpus Juris**—First Nat. Bank v. Elam, 258 P. 892, 126 Okl. 93.
Pa.—Laginsky v. McCollough, 124 A. 431, 280 Pa. 286.
Tex.—Simpson v. Whitesboro Nat. Bank, Civ.App., 120 S.W.2d 462—Houston Life Ins. Co. v. Dabbs, Civ.App., 95 S.W.2d 484, 489, citing **Corpus Juris**—Dallas Coffee & Tea Co. v. Williams, Civ.App., 45 S.W.2d 724, 729, quoting **Corpus Juris.**
Wash.—Grant v. Fisher Flouring Mills Co., 68 P.2d 210, 190 Wash. 356.
22 C.J. p 801 note 14.

82. Mo.—Wheeler v. Fidelity & Casualty Co. of New York, 251 S.W. 924, 931, 298 Mo. 619, quoting **Corpus Juris.**
Tex.—Dallas Coffee & Tea Co. v. Williams, Civ.App., 45 S.W.2d 724, 729, quoting **Corpus Juris.**
22 C.J. p 802 note 15.
Exception to hearsay rule
The admission of official records and documents constitutes an exception to the hearsay rule.
Cal.—Ames v. Empire Star Mines Co., 110 P.2d 13, prior opinion, App., 93 P.2d 635.
Iowa.—In re Clark's Estate, 290 N. W. 13.
N.H.—Abbott v. Prudential Ins. Co. of America, 195 A. 413, 89 N.H. 149.
Pa.—Pennsylvania R. Co. v. Driscoll, 9 A.2d 621, 336 Pa. 310.
Wash.—Grant v. Fisher Flouring Mills Co., 68 P.2d 210, 190 Wash. 356.
Hearsay rule see supra § 192 et seq.

83. Mo.—Wheeler v. Fidelity & Casualty Co. of New York, 251 S.W. 924, 931, 298 Mo. 619, quoting **Corpus Juris.**
Tex.—Dallas Coffee & Tea Co. v. Williams, Civ.App., 45 S.W.2d 724, 729, quoting **Corpus Juris.**
22 C.J. p 802 note 16.

84. Mo.—Wheeler v. Fidelity & Casualty Co. of New York, 251 S.W. 924, 931, 298 Mo. 619, quoting **Corpus Juris.**
Tex.—Dallas Coffee & Tea Co. v.

records are admissible although certified copies might also be used,[85] and such records are admissible without express statutory permission.[86]

While the view has been asserted that the rule applies only to records which some statute requires to be kept,[87] generally a statutory direction or authority is not necessary, but it is sufficient if the record is kept in the discharge of a public duty and is a convenient and appropriate mode of discharging that duty.[88] Thus a record has been held admissible if it was kept by the direction of superior officers and in accordance with the rules and practices of the office,[89] or made in the usual course of business,[90] and it is not necessary that the nature of the office should render the keeping of such record indispensable.[91] A public record need not be kept by a public officer himself, if the entries are made under his direction by a person authorized by him.[92]

A record is not admissible unless it is made by or under the direction of an officer,[93] for public use,[94] authorized either by express statute or by the nature of his duties to make it,[95] especially where it relates to a matter of which the person making the record has no personal knowledge;[96] and even though a record is required to be kept, it is evidence only of such matters as are authorized to be recorded.[97]

Interest of person making records. Ordinarily the person who makes official records has no interest in the matters recorded, but such records are admissible, although the entries are in favor of the person making them,[98] and a fortiori an entry which was, at the time when it was made, against the interest of the person by whom it was made should be received.[99]

Opinions offered as public record. In so far as documents set forth the mere opinions or conclusions of public officials, they are inadmissible as official records or documents,[1] although the inclusion of opinions in an official report of facts does

Williams, Civ.App., 45 S.W.2d 724, 729, quoting **Corpus Juris.**
22 C.J. p 802 note 17.

85. Ala.—Sims v. Kent, 130 So. 213, 221 Ala. 589—Ramage, Parks & Co. v. Folmar, 121 So. 504, 219 Ala. 142.
Ga.—Moody v. Board of Com'rs of Roads and Revenues of Appling County, 113 S.E. 103, 29 Ga.App. 21.
Ind.—Paul v. Walkerton Woodlawn Cemetery Ass'n, 184 N.E. 537, 204 Ind. 693.

86. Mo.—Galli v. Wells, 239 S.W. 894, 209 Mo.App. 460.
However, it has been held, in an action by beneficiary on an insurance policy, that an unsworn written report of autopsy findings, made by the county surgeon to the coroner on insured's death, was inadmissible as hearsay on the ground that there was no statute expressly making such records admissible.—Ogilvie v. Ætna Life Ins. Co. of Hartford, Conn., 209 P. 26, 189 Cal. 406, 26 A. L.R. 116.

87. S.D.—McKinnon v. Fuller, 146 N. W. 910, 33 S.D. 582.
22 C.J. p 802 note 20.

88. Ill.—People v. Dime Sav. Bank, 183 N.E. 604, 350 Ill. 503.
Mo.—State v. Thompson, 64 S.W.2d 277, 285, 330 Mo. 1069, quoting **Corpus Juris.**
Tex.—Houston Life Ins. Co. v. Dabbs, Civ.App., 95 S.W.2d 484, 489, citing **Corpus Juris.**
22 C.J. p 802 note 21.

Book kept as office convenience
Bond register kept by a clerk in the office of the treasurer of a school fund, to show details respecting the purchase of bonds for the fund, is admissible in a suit against the treasurer and his clerk for alleged defalcations, even though such bond register was not what might properly be called an official record required to be kept by law but was merely an office convenience.—State v. Bass, 269 N.W. 68, 131 Neb. 592.

89. U.S.—White v. U. S., Ala., 17 S. Ct. 38, 164 U.S. 100, 41 L.Ed. 365.
22 C.J. p 802 note 22.

90. Cal.—Hesser v. Rowley, 73 P. 156, 139 Cal. 410.

91. Ill.—People v. Dime Sav. Bank, 183 N.E. 604, 350 Ill. 503.

92. N.D.—Northern Trust Co. v. Buffalo First Nat. Bank, 156 N.W. 212, 33 N.D. 1.
22 C.J. p 802 note 24.

93. Mont.—Steiner v. McMillan, 195 P. 836, 59 Mont. 30.
22 C.J. p 803 note 25.

94. R.I.—Budlong v. Budlong, 136 A. 308, 48 R.I. 144.

95. D.C.—Estes v. Nicola, 13 F.2d 287, 56 App.D.C. 315.
Mass.—Cawley v. Northern Waste Co., 132 N.E. 365, 239 Mass. 540.
Mo.—F. B. Chamberlain Co. v. Kane, App., 264 S.W. 24—Gass v. United Rys. Co. of St. Louis, App., 232 S.W. 160.
Mont.—Steiner v. McMillan, 195 P. 836, 59 Mont. 30.
N.J.—Home Owners' Loan Corporation v. Grundy, 4 A.2d 784, 122 N. J.Law 301.
Utah.—Wilson v. Guaranteed Securities Co., 23 P.2d 921, 82 Utah 224.
22 C.J. p 803 note 26.

Flood control report as state document
Admission in eminent domain proceeding of flood control report, on theory that witness had referred to maps and tabulations therein, was error, where report was not a state document, and no section of Political Code makes report by subordinate officer to his superior a public document, admissible in controversies between independent parties.—City of Stockton v. Vote, 244 P. 609, 76 Cal.App. 369.

Interdepartmental report as "record required to be kept"
Request by war risk insurance bureau to adjutant general's office for information as to ex-veteran, which was returned with statement that no disability existed at time of discharge and that no medical record was found was not "record" required to be kept, within rule permitting introduction in evidence of such record, the only record required to be kept being the original medical report.—U. S. v. Bass, C.C.A.Ind., 64 F.2d 467.

96. D.C.—Estes v. Nicola, 13 F.2d 287, 56 App.D.C. 315.
Mich.—Hale v. Cole, 217 N.W. 898, 241 Mich. 624.
22 C.J. p 803 note 27.

97. Mich.—Fox v. Peninsular White Lead & Color Works, 52 N.W. 623, 92 Mich. 243.
22 C.J. p 803 note 28.

98. N.H.—Shattuck v. Gilson, 19 N. H. 296.
22 C.J. p 802 note 18.

99. Ga.—Field v. Boynton, 33 Ga. 239.
N.Y.—Livingston v. Arnoux, 56 N. Y. 507.

1. Mass.—Finnegan v. Checker Taxi Co., 14 N.E.2d 127, 300 Mass. 62—Flander's Case, 199 N.E. 309, 293 Mass. 157.

not render the report inadmissible.[2] Documents containing the opinions of experts may be admissible.[3]

Probative value as affecting admissibility. Since an official record is evidence only of what it purports to show,[4] it is inadmissible where the fact shown has no probative value or relevancy to the issue on which it is offered.[5]

Secret records. Where statutes and rules of public policy require that certain official records be kept secret, such records are not deemed "public" within the rule admitting public documents;[6] they are admissible only on order of the court.[7]

§ 638. —— Particular Records and Documents

a. In general
b. Certificates and records as to birth, death, and marriage
c. Tax receipts and records

a. In General

The records and documents of various public agencies may be admitted under the rule allowing official documents and records in evidence.

The rule admitting official records, registers, and documents, see supra § 637, applies to the official entries of clerks of court[8] or county clerks,[9] and to the records and reports generally of federal departments and officials,[10] including government phy-

N.Y.—Kahle v. Mount Vernon Trust Co., 22 N.Y.S.2d 454.
Ohio.—Heiser Bros. Co. v. City of Cleveland, 186 N.E. 620, 44 Ohio App. 560, affirmed Hoare v. City of Cleveland, 186 N.E. 710, 126 Ohio St. 625.
Okl.—Kansas City Life Ins. Co. v. Meador, 98 P.2d 20, 186 Okl. 397—Arnold v. Board of Com'rs of Creek County, 254 P. 31, 124 Okl. 42.
Wash.—Steel v. Johnson, 115 P.2d 145.
Admissibility of judicial opinions see supra § 633.
Admissibility of official certificates as to facts or conclusions see infra § 640.
Rule excluding opinion evidence see supra § 438 et seq.

"Arguments, deductions, inferences, and conclusions of law, incorporated in such (official) report, are incompetent, and the admission in evidence as a whole of a report containing such incompetent evidence is erroneous."—Heiser Bros. Co. v. City of Cleveland, 186 N.E. 620, 44 Ohio App. 560, affirmed Hoare v. City of Cleveland, 186 N.E. 710, 126 Ohio St. 625.

Letters written by state insurance commissioner to insured, setting forth commissioner's opinions and conclusions that life policy under which she sought to recover under alleged total disability annuity clause in rider allegedly removed by insurer, could have contained no such clause were inadmissible as part of the "public records" of his office.—Kansas City Life Ins. Co. v. Meador, 98 P.2d 20, 186 Okl. 397.

Report stating cause of collision
A report of the marine inquiry board as to the cause of a collision is not admissible to prove negligence.—Ortiz v. Compañia Maritima, 7 Philippine 507.

2. Cal.—Richardson v. Michel, App., 113 P.2d 916.

3. U.S.—U. S. v. Appalachian Electric Power Co., D.C.Va., 23 F.Supp. 83, affirmed, C.C.A., 107 F.2d 769, certiorari granted 60 S.Ct. 608, 309 U.S. 646, 84 L.Ed. 999, reversed on other grounds 61 S.Ct. 291, 311 U.S. 377, 85 L.Ed. 243, rehearing denied 61 S.Ct. 548, 312 U.S. 712, 85 L.Ed. 1143.

4. U.S.—Third Nat. Bank & Trust Co. v. U. S., C.C.A.Ohio, 53 F.2d 599.

5. U.S.—Third Nat. Bank & Trust Co. v. U. S., supra—Fong Lum Kwai v. U. S., C.C.A.Hawaii, 49 F. 2d 19.
Ga.—Manry v. Farmers' Bank of Forsyth, 170 S.E. 30, 177 Ga. 37.
Idaho.—Call v. City of Burley, 62 P.2d 101, 57 Idaho 58.
Mo.—Aldridge v. Reavis, App., 88 S.W.2d 265.
38 C.J. p 1181 note 33 [a] (3).

Relevancy of blood record
In action against physician for negligent burns with X-ray machine, in absence of showing that proffered testimony pertained to blood specimen of plaintiff, it was inadmissible, regardless of its admissibility as public record under code provisions.—Unger v. Grimsley, 103 So. 341, 138 Miss. 591.

6. Ala.—Wilson v. Brown, 1 So.2d 914.

Appraiser's confidential report
Confidential report made by an appraiser to Home Owners' Loan Corporation regarding value of property prior to execution of mortgage thereon was not a "record, return or report of a public nature" made under competent authority in matter of public interest so as to be admissible, notwithstanding hearsay evidence rule, in the corporation's action on bond for deficiency arising on foreclosure of mortgage.—Home Owners' Loan Corporation v. Grundy, 4 A.2d 784, 122 N.J.Law 301.

Jury roll and jury box
The jury roll and jury box are not "public records" subject to inspection by members of the public, but are matters which the statutes and rules of public policy require to be kept secret for the use of the jury commission and its clerk and cannot be produced in evidence except on the order of the court.—Wilson v. Brown, Ala., 1 So.2d 914.

7. Ala.—Wilson v. Brown, supra.

8. Colo.—Cooper v. People, 63 P. 314, 28 Colo. 87.
22 C.J. p 805 note 38.

Certificate as evidence of nonexistence of orders
Clerk's certificate to probate court records in guardianship proceeding is incompetent to prove nonexistence of orders not certified in wards' action against surety on deceased guardian's bonds.—U. S. Fidelity & Guaranty Co. v. Inman, Tex.Civ.App., 65 S.W.2d 339.

9. Tex.—Valentine v. Sweatt, 78 S. W. 385, 34 Tex.Civ.App. 135.
22 C.J. p 805 note 39.

10. U.S.—U. S. v. Harbanuk, C.C.A. Conn., 62 F.2d 759.
Iowa.—In re Clark's Estate, 290 N. W. 13.
La.—Fegan v. Lykes Bros. S. S. Co., App., 195 So. 392, cause remanded 199 So. 635, 196 La. 541, mandate conformed to, App., 199 So. 680, modified on other grounds, Sup., 3 So.2d 632.
22 C.J. p 805 note 52—38 C.J. p 1181 note 33 [a] (1), (2).
State papers as evidence of public matters see supra § 627.

Senate documents
U.S.—U. S. v. Aluminum Co. of America, D.C.N.Y., 1 F.R.D. 71.

Treasury department
Printed books of treasury department, kept pursuant to requirements of constitution and statute, presumptively containing a record of all payments made, are admissible in evi-

sicians,[11] and of state,[12] county,[13] municipal[14] departments, and to the records and reports generally

dence as public records.—Chesapeake & Delaware Canal Co. v. U. S., Del., 39 S.Ct. 407, 250 U.S. 123, 63 L.Ed. 889, affirming 240 F. 903, 153 C.C.A. 589.

War department reports on matters of navigation have been held admissible.—U. S. v. Appalachian Electric Power Co., D.C.Va., 23 F. Supp. 83, affirmed, C.C.A., 107 F.2d 769, certiorari granted 60 S.Ct. 608, 309 U.S. 646, 84 L.Ed. 999, reversed on other grounds 61 S.Ct. 291, 311 U. S. 377, 85 L.Ed. 243, rehearing denied 61 S.Ct. 548, 312 U.S. 712, 85 L.Ed. 1143.

Brief filed in proceedings before interstate commerce commission

In proceeding to establish railroad rates before state corporation commission, extract from brief filed by involved railroads before interstate commerce commission in proceeding also involving them is admissible so far as pertinent to issues.—Norfolk & W. Ry. Co. v. Commonwealth ex rel. Mathieson Alkali Works, 174 S.E. 85, 162 Va. 314.

Indian agency

Application by county board of commissioners to establish highway over Indian land and consent to and approval thereof by superintendent of Indian agency are admissible in evidence as original documents in action to enjoin obstruction of such road, even if not admissible as county documents.—Peasley v. Trosper, 64 P.2d 109, 103 Mont. 401.

Certificates of consuls

(1) Statutes requiring consuls to furnish names of naturalized citizens who have taken permanent residence within their jurisdictions and making their statements, duly certified, admissible in evidence on the question of permanent residence abroad of naturalized citizens, invade the law against hearsay evidence, and are not to be extended by implication.—U. S. v. Knight, D. C.Mont., 291 F. 129, affirmed, C.C.A., 299 F. 571.

(2) Such statutes should however, receive a reasonable construction. While the competency of the certificate does not cover everything that consul incorporates, it does cover that which would be relevant, material, and competent if he were testifying on oath as to the facts it is his duty to report.—U. S. v. Knight, supra.

11. U.S.—Gilmore v. U. S., C.C.A. Miss., 93 F.2d 774, certiorari denied 58 S.Ct. 1039, 304 U.S. 569, 82 L. Ed. 1534—U. S. v. Bass, C.C.A.Ind., 64 F.2d 467—U. S. v. Blackburn, C.C.A.Wash., 53 F.2d 19—Runkle v. U. S., C.C.A.Colo., 42 F.2d 804.

Diagnosis and prognosis

Reports of physicians of veterans' bureau examining claimant for disability compensation, so far as they relate to observations and diagnosis, are admissible as public record; but such reports are inadmissible so far as they relate to prognosis and physician's opinion as to service origin of disease and extent of disability.—Long v. U. S., C.C.A.S.C., 59 F.2d 602.

Veteran's health record on discharge

In action on war risk policy, involving issue of whether insured became permanently and totally disabled before policy lapsed for nonpayment of premium, admission of records of war department pertaining to insured's health on his discharge and general plan or routine followed in making examinations of veterans at the time of their discharge was not erroneous.—Thatenhorst v. U. S., C.C.A.Kan., 119 F.2d 567.

Original or duly authenticated copy

Where proof of record of adjutant general's office as to medical record of ex-veteran is desired to be made, either original record or duly authenticated copy must be produced. —U. S. v. Bass, C.C.A.Ind., 64 F.2d 467.

12. Ark.—Marable v. State, 2 S.W.2d 690, 175 Ark. 589.

Minn.—St. Anthony & Dakota Elevator Co. v. Great Northern R. Co., 149 N.W. 471, 127 Minn. 299.

Okl.—Arnold v. Board of Com'rs of Creek County, 254 P. 31, 124 Okl. 42.

22 C.J. p 805 note 53.

Memorandum of highway department employee

In action for death of automobilist at railroad grade crossing, written records made by employee of state highway department in the usual course of business, relating to repair of railroad crossing signs, was admissible as corroborative of testimony.—Gelbin v. New York, N. H. & H. R. Co., C.C.A.N.Y., 62 F.2d 500.

Report of state agricultural society which was required by statute to collect information and statistics, is admissible.—Vallejo & N. R. Co. v. Reed Orchard Co., 147 P. 238, 169 Cal. 545.

Stenographer's minutes of hearing before state commission

On issue whether state corporation commission made order in another hearing approving rates put into effect by railroads and sought to be reduced by shipper, extracts from official stenographer's minutes of such other hearing are admissible.—Norfolk & W. Ry. Co. v. Commonwealth ex rel. Mathieson Alkali Works, 174 S.E. 85, 162 Va. 314.

Record for state fire marshal

Fire chief's record, on which he based report to state fire marshal, of cause of fire was inadmissible where no statute provided for its admission and where the record was made on the reports of others and not on the personal knowledge of the chief.—Hale v. Cole, 217 N.W. 898, 241 Mich. 624.

13. Ga.—Parks v. Ash, 149 S.E. 207, 168 Ga. 868.

Kan.—Board of Com'rs of Ford County v. Robb, 64 P.2d 69, 71, 145 Kan. 125, citing **Corpus Juris.**

W.Va.—Brooke County Court v. U. S. Fidelity & Guaranty Co. of Baltimore, Md., 121 S.E. 422, 95 W.Va. 439.

22 C.J. p 805 note 54.

County treasurer

(1) Statement of a county treasurer, kept in the office of the state treasurer, and certified by him to be correct, is admissible in evidence. —Harper v. Marion County, Tex. Civ.App., 77 S.W. 1044.

(2) County treasurer's records are inadmissible unless competent and relevant to prove issues.—Snyder v. Ryan, 270 P. 1072, 39 Wyo. 266, rehearing denied 275 P. 127, 39 Wyo. 266.

Minutes of county commissioners' clerk

Minutes of clerk of board are competent on appeal to district court from order of county commissioners fixing salaries of county officials.—Etter v. Board of Com'rs of Twin Falls County, 255 P. 1095, 44 Idaho 192.

Monthly statements of pharmacist filed in the county auditor's office, as required by statute, are admissible.—State v. Smith, 38 N.W. 492, 74 Iowa 580.

14. U.S.—Nolte v. Hudson Nav. Co., C.C.A.N.Y., 16 F.2d 182.

Ala.—State ex rel. Kinney v. Town of Steppville, 168 So. 433, 232 Ala. 407.

Me.—City of Portland v. Sivovlos, 1 A.2d 179, 136 Me. 4.

Tex.—City of Houston v. Anderson, Civ.App., 115 S.W.2d 732, error dismissed—Pease v. State, Civ. App., 228 S.W. 269, error refused.

22 C.J. p 806 note 56.

Authenticity and genuineness

"Where records are kept of municipal acts and proceedings, the law is clearly defined that the same are receivable in evidence of the truth of the facts recited; and it would seem to be a rule that when so produced they establish themselves, because they are made by accredited agents, are of a public nature and notoriety, and are usually made under the sanction of an oath." —Kansas City v. Brown, 227 S.W. 89, 94, 286 Mo. 1—Delmar Inv. Co. v. Lewis, 196 S.W. 1137, 1139, 271 Mo.

of town or townships[15] officials or departments.

Among the particular documents which may be admissible are an airplane pilot's log book,[16] applications for licenses,[17] ballots and election returns,[18] bank examiners' reports,[19] bankruptcy appraisements and inventories,[20] census returns,[21] custom's appraisements and invoices,[22] official reports and inventories of the representatives of decedents' estates,[23] drainage board records,[24] foresters' reports,[25] inspection bureau's reports,[26] letters[27] and

317—State v. Heffernan, 148 S.W. 90, 93, 243 Mo. 442.

Claim filed by mayor

In action against city to quiet a claimed right to use of creek water, record of document filed by mayor of alleged claim to water was properly admitted to show nature and extent of claim made by city, notwithstanding city could not divest property owners of right to use of water by recordation of document. —Richfield Cottonwood Irr. Co. v. City of Richfield, 34 P.2d 945, 84 Utah 107.

Minutes of city council

(1) In action against city to quiet claimed right to use of creek water, minutes of city council with respect to water were properly admitted as evidence of facts therein recited, where law required such minutes to be kept.—Richfield Cottonwood Irr. Co. v. City of Richfield, supra.

(2) In action against a citizens' committee for electrical equipment alleged as furnished by plaintiff, where the defensive theory was that the equipment was purchased by individual property owners who agreed to pay their proportionate share, minutes of the city council were admissible in proof thereof.—Northwestern Electric Equipment Co. v. Leighton, 213 P. 1094, 66 Mont. 529.

(3) Minutes of a meeting of a city council which have no bearing on any issue are inadmissible.—Call v. City of Burley, 62 P.2d 101, 57 Idaho 58.

15. Ala.—State ex rel. Kinney v. Town of Steppville, 168 So. 433, 232 Ala. 407.

Mass.—Vinal v. Inhabitants of Town of Nahant, 122 N.E. 295, 232 Mass. 412.

22 C.J. p 806 note 55.

Records showing committee's authority

In action by architect against town to recover for services in regard to new town hall building, records of town were competent as showing extent of authority of committee, its right to contract with architect, conduct of town respecting his plans, and its liability to him.—Vinal v. Inhabitants of Town of Nahant, supra.

16. Ohio.—Ogden v. Transcontinental Airport of Toledo, 177 N.E. 536, 39 Ohio App. 301.

17. Ohio.—Lisk v. Hora, 148 N.E. 545, 109 Ohio St. 519.

18. Nev.—State ex rel. Springmeyer v. Baker, 126 P. 345, 35 Nev. 1.

19. U.S.—Jeffreys v. O'Neal, C.C.A N.C., 64 F.2d 284.

Wash.—Richardson v. Michel, 113 P. 2d 916.

Prima facie evidence of correctness of contents

The report of a national bank examiner made in the course of his official duties three months before the execution of a contract for the sale of the assets of the bank examined, and supplemented by his testimony as to its accuracy, was admissible and made at least a prima facie case of the correctness of the matters set forth therein, and was properly used by the master in classifying assets as collectible or doubtful, as provided by the contract.—American Nat. Bank of Portsmouth v. Ames, 194 S.E. 784, 169 Va. 711, certiorari denied 58 S.Ct. 1046, 304 U.S. 577, 82 L.Ed. 1540.

Transcript of testimony before banking superintendent

In action by depositor against bank on certificates of deposit issued to him, transcript of testimony taken under authority of superintendent of banks in same inquiry within his department, from witness who was not introduced at trial, nor party thereto, was not admissible in evidence under statutes making reports of such officer admissible.—Bank of Emanuel v. Hall, 126 S.E. 728, 33 Ga.App. 358.

20. U.S.—Kay v. Federal Rubber Co., C.C.A.Pa., 60 F.2d 454.

21. Iowa.—In re Clark's Estate, 290 N.W. 13.

22 C.J. p 805 note 46.

22. U.S.—Buckley v. U. S., Pa., 4 How. 251, 11 L.Ed. 961—The Rosalia, C.C.A.N.Y., 264 F. 285.

23. N.C.—Braddy v. Pfaff, 186 S.E. 340, 210 N.C. 248.

22 C.J. p 805 note 42.

24. Iowa.—Wilson Subdrainage Dist. of Harrison-Pottawattamie Drainage Dist. No. 1 v. Richardson, 190 N.W. 384, 195 Iowa 345.

Minute book of board of directors of drainage district, setting out attorney's employment, is admissible in attorney's action on contract.—Central Clay Drainage Dist. v. Hunter, 295 S.W. 19, 174 Ark. 293.

25. U.S.—Feather River Lumber Co. v. U. S., C.C.A.Cal., 30 F.2d 642, affirming, D.C., U. S. v. Feather River Lumber Co., 23 F.2d 936.

Incidental papers in the nature of correspondence and memoranda on file in a forest supervisor's office are not admissible in evidence as public records.—Steiner v. McMillan, 195 P. 836, 59 Mont. 30.

26. Ohio.—Graves v. Board of Education of Sylvania Village School Dist., 157 N.E. 766, 24 Ohio App. 428.

Findings of bureau

Only findings in report of bureau of inspection of public offices are admissible in evidence under statute. —Hoare v. City of Cleveland, 186 N. E. 710, 126 Ohio St. 625, affirming Heiser Bros. Co. v. City of Cleveland, 186 N.E. 620, 44 Ohio App. 560.

Labor and industry department inspectors

In action for injuries allegedly received by flour mill employee as result of mill's violation of factory act by failing to provide proper ventilation, reports of department of labor and industries inspectors stating that ventilation in flour mill was good, were admissible as unusually trustworthy sources of evidence because of official character of their contents.—Grant v. Fisher Flouring Mills Co., 68 P.2d 210, 190 Wash. 356.

27. Ill.—Carlin v. Chicago & W. I. R. Co., 130 N.E. 371, 297 Ill. 184.

22 C.J. p 803 note 29.

Addressee as material

A letter purporting to have been written by the assistant to the attorney general, the form of which disclosed that when he signed, the assistant was engaged in performance of his official duties was admissible in evidence as an "official document" regardless of fact that the letter did not show on its face that it was addressed to anybody.—U. S. v. Aluminum Co. of America, D.C. N.Y., 1 F.R.D. 71.

Capacity in which signed

Whether a letter is admissible in evidence as an "official document" depends on who signed it and capacity in which he acted.—U. S. v. Aluminum Co. of America, supra.

Carbon copy

Where there is nothing to show that a carbon copy of a letter found in the files of a state department of health is a record required by law to be kept, it is properly excluded from evidence.—Newkirk v. City of Tipton, 136 S.W.2d 147, 234 Mo.App. 920.

Telegram

If, in an action by the buyer of corporate stock for the seller's fraud,

maps[28] of an official character, military records,[29] postal records,[30] prison books,[31] private accident reports required by regulations of a public body,[32] public school reports and records,[33] receiver's credentials,[34] religious bodies' records,[35] reports filed with an industrial board,[36] sheriffs' deeds[37] or other official deeds,[38] and sheriff's records,[39] surveyors' reports and returns,[40] United States coast and

occasion arises to prove any action of the Michigan securities commission, it should be done by producing the original or a certified copy of the proceedings, and a mere telegram from a member of the commission will be excluded as hearsay.—Armstrong v. Rachow, 171 N.W. 389, 205 Mich. 168.

28. U.S.—U. S. v. Meyer, C.C.A.Ill., 113 F.2d 387.
22 C.J. p 803 note 30.
Land office surveys and maps see infra § 639.

Certified government topographic map of general locality was inadmissible in ejectment to show premises involved were marsh lands as against objections that witness testifying had not made map, that map was not offered as record of witness' past recollection, and that map would not be safe guide to show that premises were marsh, and that statute had no bearing on copies of records, originals of which were not admissible.—Doe v. Roe, 162 A. 515, 5 W.W.Harr., Del., 229.

Pamphlet attached to certified government topographic map was inadmissible in ejectment to show disputed premises were marsh lands, as against objections pamphlet was not written by witness testifying regarding it and was not offered as record of witness' past recollection, that pamphlet merely contained what author deemed was correct general description of lands involved, and that it was too general to be of assistance in determining character of premises involved.—Doe v. Roe, supra.

29. N.H.—Shattuck v. Gilson, 19 N.H. 296.
22 C.J. p 805 note 44.

Army discharge

(1) In action for seaman's injuries in 1937, allegedly causing emphysema and other chest involvements, wherein employers asserted that seaman's emphysema was congenital, a portion of seaman's army discharge of 1919 which certified that seaman was apparently in good health was properly admitted in rebuttal, since the discharge was a record made in performance of an officer's duty, and it is immaterial whether duty is imposed by statute or arises under well-established official practice or custom.—Armit v. Loveland, C.C.A.Pa., 115 F.2d 308.

(2) An army discharge is inadmissible to show that a man's health was "good" at time of discharge where the discharge was seven years before the date of the injury.—Ivanhoe v. Buda Co., 247 Ill.App. 336.

Service record

Army service record of alien applying for naturalization is official public record and admissible in evidence as such.—U. S. v. Harbanuk, C.C.A.Conn., 62 F.2d 759.

30. Ala.—Miller v. Boykin, 70 Ala. 469.
22 C.J. p 805 note 45.

31. U.S.—White v. U. S., Ala., 17 S. Ct. 38, 164 U.S. 100, 41 L.Ed. 365.
22 C.J. p 805 note 40.

32. Pa.—Pennsylvania R. Co. v. Driscoll, 9 A.2d 621, 336 Pa. 310.

Railroad reports required by interstate commerce commission

In suit by railroad to enjoin enforcement of the Full Crew Act of 1937, on ground of unconstitutionality, private accident reports which railroad was required to keep by regulations of the interstate commerce commission, subject to its inspection, were admissible as official records, as an exception to the hearsay rule.—Pennsylvania R. Co. v. Driscoll, supra.

33. Ill.—People v. Hartquist, 146 N.E. 140, 315 Ill. 228.
Miss.—Stokes v. Newell, 165 So. 542, 174 Miss. 629.
Pa.—Laginsky v. McCollough, 124 A. 431, 433, 280 Pa. 286, citing **Corpus Juris.**
22 C.J. p 804 note 37.

Financial records

Pa.—McNulty v. Throop Borough School Dist., 149 A. 741, 299 Pa. 465.
22 C.J. p 804 note 37 [b].

Evidence of age

(1) School records have been admitted to prove age.
Ky.—Bertram v. Witherspoon, 127 S.W. 533, 138 Ky. 116, Ann.Cas. 1912A 1217.
Mo.—Levels v. St. Louis & H. R. Co., 94 S.W. 275, 196 Mo. 606.
22 C.J. p 804 note 37 [c], [d].

(2) School records of a pupil's age, when required to be kept by law, like other official records, such as census returns and like enumeration lists, are evidence of the facts thus required to be recorded.—Price v. Price, 185 N.Y.S. 570, 194 App. Div. 158, affirming 178 N.Y.S. 561.

(3) In action against employer under Child Labor Act, L.1917 p 511, for death of minor under sixteen years of age illegally employed, school record was incompetent to show minor's age when employed.—Rost v. F. H. Noble & Co., 147 N.E. 258, 316 Ill. 357, reversing 232 Ill. App. 430.

34. Ill.—Lyons v. Ernst's Estate, 265 Ill.App. 127.

35. Me.—Nason v. First Bangor Christian Church, 66 Me. 100.
22 C.J. p 807 note 64.

36. Ind.—Frazer v. McMillin & Carson, 179 N.E. 564, 94 Ind.App. 431.

Employer's report of accident

In compensation proceeding, employer's report of accident filed with industrial board, being prima facie evidence of facts and admissions therein set out, is properly read in evidence.—Frazer v. McMillin & Carson, supra.

37. Ala.—Williams v. Oates, 102 So. 712, 212 Ala. 396.
22 C.J. p 804 note 33.
Laying foundation for admission of sheriff's deed see infra § 643.

38. Ga.—Terrell County v. City of Dawson, 158 S.E. 47, 172 Ga. 403.

Informalities as fatal to admission

(1) Deed by county commissioners to dispensary commissioners showing individuals acted officially was not inadmissible because not signed by county.—Terrell County v. City of Dawson, supra.

(2) Informal deed by county commissioners to dispensary commissioners was not inadmissible in city's action against county for rent because not made to dispensary commissioners in corporate name.—Terrell County v. City of Dawson, supra.

39. Miss.—Albrecht v. State, 62 Miss. 516.
22 C.J. p 804 note 32.

40. Ala.—Hamrick v. Town of Albertville, 122 So. 448, 219 Ala. 465.
Pa.—Laidley v. Rowe, 119 A. 474, 275 Pa. 389.
Tex.—Findlay v. State, Civ.App., 238 S.W. 956, rehearing overruled 239 S.W. 996, affirmed 250 S.W. 651, 113 Tex. 30.
22 C.J. p 804 note 31.

Charts based on field notes

In action by city against contractors and their sureties for alleged breach of contract in constructing sewer, where surveyor's field notes had been properly admitted, charts prepared from such notes, being merely result of mathematical computations based on notes, were properly admitted.—City of Detroit v. Porath, 260 N.W. 114, 271 Mich. 42.

Scale bills duly certified by a public surveyor or inspector are ordinarily regarded as competent evidence.—Lindsay & Phelps Co. v.

geodetic survey charts,[41] and voters' lists.[42] Weather reports may be admitted,[43] although a report, based on weather conditions too remote as to time and place, may be excluded.[44]

Administrative decisions. The admissibility of administrative decisions of a governmental department, such as the Veterans' Bureau, is subject to rules of evidence relating to pertinency and probative value.[45]

Police records. Even if not strictly public records, police books kept in the usual course of duty have been held admissible,[46] although a police sergeant's report to his department has been held inadmissible,[47] and where no proper foundation is laid police blotters may be excluded.[48] A mere memorandum of one officer left for another has been held not admissible as an entry in a register required to be kept.[49]

Records of boaras of health and of public hospitals. Reports and records of a health official or department are ordinarily admissible,[50] although health department records are not admissible merely because they are public records required to be kept by law, and may be excluded in the absence of a proper foundation.[51] Data and records as to vital statistics, such as births, marriages, and deaths, see subdivision b of this section, may be admissible as "public documents" or "official statements,"[52] but information gathered and recorded for the preservation of health and prevention of disease which is not always open to public inspection is not admissible as a public document or official statement.[53]

Records of a public hospital are competent as to matter required by law to be recorded.[54]

b. Certificates and Records as to Birth, Death, and Marriage

Certificates and records as to birth, death, and marriage may be admissible where they are regarded as public documents or records.

Mullen, Minn., 20 S.Ct. 325, 176 U.S. 126, 44 L.Ed. 400—38 C.J. p 201 note 33.

When excluded from evidence

(1) In trespass to try title, report and map made and certified to by county surveyor and filed in general land office was not admissible as an archive of that office, it not appearing that report or map was a result of work authorized by law and relating to public lands of the state.—Falls County v. Young, Tex. Civ.App., 77 S.W.2d 912, error dismissed.

(2) Collusion on part of deputy county surveyor destroyed official character of his report of survey made on application to purchase land on theory of vacancy, as regards admissibility of report to establish boundary line.—Blaffer v. State, Tex. Civ.App., 31 S.W.2d 172, error refused.

41. Cal.—Oakland v. Wheeler, 168 P. 23, 34 Cal.App. 442.

42. Okl.—In re Referendum Petition No. 71, State Question No. 216, 65 P.2d 985, 179 Okl. 381.

Accurately kept lists

Proceeding to determine sufficiency of referendum petition, exclusion by referee of evidence of lists of registered voters required by law was error where they were accurately kept.—In re Referendum Petition No. 71, State Question No. 216, supra.

43. U.S.—The Winneconne, C.C.A. La., 59 F.2d 660.
Mo.—Wheeler v. Fidelity & Casualty Co. of New York, 251 S.W. 924, 298 Mo. 619.
22 C.J. p 805 note 47.

Humidity charts

Or.—Silver Falls Timber Co. v. Eastern & Western Lumber Co., 40 P. 2d 703, 149 Or. 126.

Rainfall and temperature

Testimony as to rainfall and temperature at certain places, based on United States Weather Bureau Reports properly compiled and kept, is competent.—Hurley v. Illinois Cent. R. Co., 282 S.W. 97, 221 Mo.App. 478.

44. Ill.—See Handfelder v. East Side Levee & Sanitary District, 194 Ill.App. 262.
Ky.—City of Madisonville v. Nisbet's Adm'r, 109 S.W.2d 593, 270 Ky. 248.

Thirty to forty miles distant

United States weather report, made at point thirty or forty miles distant, was inadmissible to show velocity of wind at place of accident, in action for injuries from contact with fallen electric wire.—Southern Utilities Co. v. Murdock, 128 So. 430, 99 Fla. 1086.

45. U.S.—Third Nat. Bank & Trust Co. v. U. S., C.C.A.Ohio, 53 F.2d 599.

46. Conn.—Harris v. Schuerer, 138 A. 442, 106 Conn. 506.
22 C.J. p 806 note 56 [b].

Character of marks in police register

That mark opposite defendant's name in police register, to show absence or presence of officer on particular date, was shorter and darker than other marks does not render book inadmissible.—Harris v. Schuerer, supra.

Officer's report at time of accident admissible

Ill.—Koch v. Pearson, 219 Ill.App. 468.

47. N.J.—Bethanis v. Siegel, 152 A. 459, 9 N.J.Misc. 21.

48. Mass.—Killard v. Hohmann, 175 N.E. 743, 275 Mass. 344.
N.Y.—Amsden v. Washington Bridge Express Lines, 287 N.Y.S. 855, 248 App.Div. 645.
22 C.J. p 806 note 56 [d].

49. Mo.—Martin v. Woodlea Inv. Co., 226 S.W. 650, 206 Mo.App. 33.

50. Mass.—Commonwealth v. Collins, 154 N.E. 266, 257 Mass. 580.
22 C.J. p 806 note 57.

Water analysis

Reports of analysis of water made and kept in office of state board of health are admissible.—Town of Sentinel v. Riley, 43 P.2d 742, 171 Okl. 533.

51. Okl.—National Life & Accident Ins. Co. v. Roberson, 36 P.2d 479, 169 Okl. 136.

52. Pa.—In re Marks, 183 A. 432, 121 Pa.Super. 181.

53. Pa.—In re Marks, supra.

54. U.S.—Ulm v. Moore-McCormack Lines, C.C.A.N.Y., 115 F.2d 492, rehearing denied 117 F.2d 222, certiorari denied 61 S.Ct. 941, 313 U.S. 567, 85 L.Ed. 1525.
Mass.—Raymond v. Flint, 114 N.E. 811, 225 Mass. 521.
Mo.—Knickerbocker v. Athletic Tea Co., App., 285 S.W. 797—Galli v. Wells, 239 S.W. 894, 209 Mo.App. 460.
Records of private hospitals see infra § 728.

Admission dependent on statute

Hospital records do not become admissible as general public records to extent other than permitted by statute.—Kelley v. Jordan Marsh Co., 179 N.E. 299, 278 Mass. 101.

Statements in official records of birth, death, and marriage are not without probative effect,[55] and such records may be allowed in evidence under the rule admitting documents and records made by public authority and under the sanction of official duty.[56] However, there is authority for the view that statutes requiring records of births, marriages, and deaths, including the causes of death, to be kept by city boards of health are mere police regulations, and the records being required for special and local purposes, namely, to assist the board of health in the conduct of the affairs of that office, are not public records in such a sense as make them evidence between private parties of the facts recorded,[57] and a general statute authorizing their use as prima facie evidence has been held to apply only to controversies involving public rights.[58] Moreover, statutes making certificates of birth, death, or marriage admissible as presumptive evidence have been construed as relating only to facts as contained in such certificates and not to any statement therein which is clearly an opinion or conclusion and necessarily founded on hearsay.[59]

Birth certificates and records. Under the general rules discussed supra § 637 and infra § 640, a birth certificate or record may be admissible,[60] as competent evidence of the facts recited therein,[61] and an official birth certificate is ordinarily competent on the issue of the fact of birth.[62]

On the other hand, birth certificates or records have been held inadmissible.[63] They are inadmissible where there exists no express judicial or statutory authority for making them,[64] and they are incompetent to establish parentage,[65] or to show matters as to which no satisfactory inquiry was made prior to the making of the certificate or record.[66] A certificate that the records fail to show the birth of a designated person at a designated place has been held inadmissible.[67]

Death certificates and records. There is considerable difference of opinion among the authorities

55. U.S.—Casals v. Fernandez, C.C. A.Puerto Rico, 40 F.2d 831, certiorari denied 51 S.Ct. 36, 282 U.S. 863, 75 L.Ed. 763.

Official certificates generally see infra § 640.

56. Ill.—Dailey v. Grand Lodge, Brotherhood of Railroad Trainmen, 142 N.E. 478, 311 Ill. 184.

22 C.J. p 806 note 58.

Antiquity of rule

"The records of births, deaths, and marriages, when properly kept as required by law, have, from time immemorial, been recognized as public records, and, as such, were admissible in evidence for certain purposes."—Bozicevich v. Kenilworth Mercantile Co., 199 P. 406, 407, 58 Utah 458, 17 A.L.R. 346.

Marriage records

(1) Registers of marriages, made pursuant to a state statute, are competent evidence on the issue of age where recitals as to age are contained therein.—Dailey v. Grand Lodge, Brotherhood of Railroad Trainmen, 142 N.E. 478, 311 Ill. 184—22 C.J. p 806 note 58 [a].

(2) Where, however, there is no evidence of any provision of law for keeping a marriage registry, so as to show that it was an official record or document, it may be excluded.—Dailey v. Grand Lodge, Brotherhood of Railroad Trainmen, supra.

(3) Documentary proof of fact of marriage, including proof by official records, see the C.J.S. title Marriage § 44, also 38 C.J. p 1333 note 21–p 1335 note 34.

57. Neb.—Sovereign Camp W. W. v. Grandon, 89 N.W. 448, 64 Neb. 39.

22 C.J. p 807 note 60.

58. N.Y.—Beglin v. Metropolitan L. Ins. Co., 66 N.E. 102, 173 N.Y. 371, reversing 66 N.Y.S. 206, 32 Misc. 254.

22 C.J. p 807 note 61.

59. Iowa.—Morton v. Equitable Life Ins. Co., 254 N.W. 325, 218 Iowa 846, 96 A.L.R. 315.

60. Mass.—Taylor v. Whittier, 138 N.E. 6, 240 Mass. 514.

22 C.J. p 809 note 97 [a] (3), p 810 note 98 [a].

Certificate of illegitimate birth

In a suit for divorce the birth certificate and copy of baptismal record of an illegitimate child of the husband are admissible against the husband, in connection with the testimony of the physician and priest who made the entries in accordance with the husband's directions.—Borda v. Borda, 117 A. 362, 44 R.I. 337.

Where birth certificate is made under authority of law, and the facts stated therein are required to be stated on the best information obtainable by the attending physician, it may be admissible.—Hellman v. Karp, 105 A. 678, 93 Conn. 317.

61. N.Y.—In re Bartowicz' Estate, 3 N.Y.S.2d 764, 254 App.Div. 705—George v. Galani, 219 N.Y.S. 24, 218 App.Div. 840.

62. N.Y.—In re Strong's Estate, 6 N.Y.S.2d 300, 168 Misc. 716, affirmed In re Strong's Will, 11 N.Y. S.2d 225, 256 App.Div. 971.

63. Mo.—White v. Missouri Motors Distributing Co., 47 S.W.2d 245, 226 Mo.App. 453.

22 C.J. p 811 note 4 [a] (3).

64. Conn.—Russo v. Metropolitan Life Ins. Co., 3 A.2d 844, 125 Conn. 132.

Improper form of certified copy

An instrument, reciting that official of Italian civil state "hereby certifies that (named person) was born on" certain date, was not admissible in evidence as certified copy of record of such person's birth.—Russo v. Metropolitan Life Ins. Co., supra.

65. N.Y.—In re Strong's Estate, 6 N.Y.S.2d 300, 168 Misc. 716, affirmed In re Strong's Will, 11 N.Y.S.2d 225, 256 App.Div. 971.

66. N.J.—Kiely v. MacMurray, 139 A. 343, 5 N.J.Misc. 1091.

Age of parent

Birth certificate of his child, giving police chief's age, which he had not furnished, was not evidential as to his age on question of retirement. —Kiely v. MacMurray, supra.

67. U.S.—U. S. v. Bukis, D.C.Pa., 17 F.Supp. 77.

Mode of proving that birth not in records

In proceeding for cancellation of naturalization certificate on ground of fraud in that alien falsely stated in naturalization petition that he was born in designated German city, certificate of civil registrar of such city that his records did not show that alien was born there was inadmissible, since proof that something is not to be found in records cannot be made by mere certificate of custodian, but is matter of fact which must be shown by testimony of person who has searched the records, with opportunity to cross-examine.—U. S. v. Bukis, supra.

respecting the admissibility of death certificates or records, such difference arising in part from the state of the statutory law, the nature of the particular death certificate offered, and the fact or matter on which it is offered. Generally, where death certificates are made under statutory authority and under conditions assuring the accuracy of the recitals of fact therein contained, they may be allowed in evidence under the rule admitting public documents or records,[68] and are not to be excluded as mere police regulations;[69] but where the maker of the death certificate could not have had personal knowledge of the facts as to which the certificate is offered as evidence, the certificate is inadmissible to show such facts and should as to those matters be excluded as hearsay.[70]

Where death certificates and records are public documents, as under statutes making them prima facie evidence of the facts therein recited, they ordinarily are admissible,[71] as in the case of coroners' inquests;[72] and in a proper case a death certificate may be introduced to show the fact,[73] time,[74] and cause[75] of death. Coroners' certificates

68. D.C.—Labofish v. Berman, 55 F. 2d 1022, 60 App.D.C. 397.
S.C.—Williams v. Metropolitan Life Ins. Co., 108 S.E. 110, 116 S.C. 277.

69. D.C.—Labofish v. Berman, 55 F. 2d 1022, 60 App.D.C. 397.

70. S.C.—Williams v. Metropolitan Life Ins. Co., 108 S.E. 110, 116 S. C. 277.

Duration of disease
In action on life policy, medical certificate signed by physician who attended insured in his last illness was not admissible to establish duration of the disease where the certificate showed that such fact could not have been within such physician's knowledge.—Williams v. Metropolitan Life Ins. Co., supra.

Statements in physician's certificate of death not based on his own knowledge are inadmissible, as in the case of the physician's statements in the death certificate as to prior health of decedent; the death certificate is competent evidence only of the cause and fact of death. —Swanson v. Prudential Ins. Co. of America, 271 Ill.App. 309.

71. U.S.—Hunter v. Derby Foods, C.C.A.N.Y., 110 F.2d 970—Cropper v. Titanium Pigment Co., C.C.A. Mo., 47 F.2d 1038, 78 A.L.R. 737.
Ariz.—Sovereign Camp, W. O. W., v. Sandoval, 54 P.2d 557, 47 Ariz. 167 —California State Life Ins. Co. v. Fuqua, 10 P.2d 958, 40 Ariz. 148.
Cal.—In re Lenci's Estate, 288 P. 841, 106 Cal.App. 171.
Ill.—Hamer v. Globe Mut. Life Ins. Co., 243 Ill.App. 109.
Minn.—In re Olson's Estate, 223 N. W. 677, 176 Minn. 360.
Tex.—American Nat. Ins. Co. v. Hernandez, Civ.App., 104 S.W.2d 525.
22 C.J. p 810 note 98 [b], p 809 note 97 [a] (4).

Certificate showing age
Death certificate attested by secretary of commonwealth of Virginia showing insured's age at death was properly admitted in action on death benefit certificate.—Hardy v. State Mut. Ben. Soc., 170 A. 704, 111 Pa. Super. 336.

72. Ill.—Foster v. Shepherd, 101 N. E. 411, 258 Ill. 164, 45 L.R.A.,N.S., 167, Ann.Cas.1914B 572.
22 C.J. p 804 note 34.
Admissibility of verdict of coroner's jury in actions for death see Death §§ 81, 82.

73. D.C.—Labofish v. Berman, 55 F. 2d 1022, 60 App.D.C. 397.
Miss.—McLeod v. Bridges, 178 So. 321, 180 Miss. 585.
Pa.—Allegheny Trust Co. v. State Life Ins. Co., of Indianapolis, Ind., 167 A. 251, 110 Pa.Super. 37.
17 C.J. p 1178 notes 67, 68.

Coroner's inquest, or death certificate based thereon, is ordinarily admissible to show the fact of death. —Johnson v. Sundbery, La.App., 150 So. 299.

74. D.C.—Labofish v. Berman, 55 F. 2d 1022, 60 App.D.C. 397.

75. Colo.—Occidental Life Ins. Co. v. U. S. Nat. Bank of Denver, 53 P.2d 1180, 98 Colo. 126.
D.C.—Labofish v. Berman, 55 F.2d 1022, 60 App.D.C. 397.
N.J.—Nestico v. Delaware, L. & W. R. Co., 133 A. 83, 4 N.J.Misc. 418.
Utah.—Bozicevich v. Kenilworth Mercantile Co., 199 P. 406, 58 Utah 458, 17 A.L.R. 346.

Records made of certificates of physicians as to the cause of death, required to be filed in the office of the board of health or other authorities, are admissible.—Branford Trust Co. v. Prudential Ins. Co. of America, 129 A. 379, 102 Conn. 481, 42 A. L.R 1450—22 C.J. p 806 note 59.

Accidental character of death
In action on accident policy for death of insured who died from burns sustained in scalding water in bathtub, admission of death certificate from records of city clerk which as cause of death contained statement: "Burns of body and legs. Accident. Exposed to scalding water in bath tub," was not error, since such record was prima facie evidence of facts recorded and word "accident" was properly included in record as part of cause and manner of death, which, under statute, medical examiner was required to report to city clerk.—Dow v. U. S. Fidelity & Guaranty Co., 7 N.E.2d 426, 297 Mass. 34.

Cause of amputation resulting in death
The admission in evidence of a death certificate stating that the amputation resulting in death was due to a street car accident was not error as permitting evidence which invaded the province of the jury or which cut off the right of cross-examination.—Simpson v. Wells, 237 S.W. 520, 292 Mo. 301.

Death from finger scratch received while at work
Recitals in death certificate of employee that death was caused by scratch on finger received "while at work" were admissible as "public record" constituting prima facie evidence in compensation suit and supporting award to claimant, notwithstanding negative evidence that fellow employees did not hear employee complain of receiving scratch. —Milwaukee Electric Railway & Light Co. v. Giardina, 267 N.W. 62, 222 Wis. 111.

Full statement as to cause
Where there was no eyewitness to tenant's alleged accident, and the death certificate under the heading "cause of death" read "Fractured Skull Fall downstairs in Boston on Sept. 23, 1935 Accident T. Leary.", it was error to exclude from evidence all such portion of the death certificate except the words "fractured skull."—Walcott v. Sumner, 32 N.E. 2d 685, 308 Mass. 413.

Immediate cause
Medical certificate of death is admissible to prove prima facie immediate cause as well as fact of death. —In re Olson's Estate, 223 N.W. 677, 176 Minn. 360.

Medical examiner's death certificate
Under statutes making death certificates prima facie evidence of the facts recorded, a medical examiner's death certificate, filed in the office of the city clerk, and stating that the cause of death was cerebral hemorrhage, and that a blow on the forehead probably had no direct effect in producing the hemorrhage, and that the excitement that followed was

of death have been held admissible under statutes providing for admission of certificates made in the regular course of business.[76]

On the other hand, death certificates have by some authorities been held inadmissible to show the cause of death.[77] Such certificates have been rejected where the cause of death is regarded as a mere opinion and not a fact.[78] The authorities differ as to what constitutes a "fact"; some courts hold that where the statute requires a coroner's certificate to state whether a death was accidental, suicidal, or homicidal, such opinion when expressed in the certificate is to be regarded as a "fact" and the certificate is admissible as evidence of such "fact,"[79] and death certificates have been held admissible to affirm[80] or to negative[81] suicide, while other authorities regard a statement as to suicide as one of inference or opinion and exclude the certificate as evidence.[82] It has also been held that a death certificate filled out by an attending physician in an ex parte manner is not admissible as a public document and in a controversy between individuals it has no direct evidentiary value on the issue of the cause of death and its recitals on such issue must be disregarded.[83]

Statutes providing that death certificates are prima facie evidence of the facts recited therein are in derogation of the common law and should be strictly construed,[84] and such certificates are not admissible in cases beyond the purview of the statute,[85] nor where they fail to comply with material statutory requirements.[86] It has also been held that

probably a contributing factor was admissible.—Broadbent's Case, 134 N.E. 632, 240 Mass. 449.

Caution in use of certificate

Copy of city medical examiner's certificate of death, made out, as required by Gen.St.1918 § 228, on blank furnished by state health department under sections 2375, 2376, stating cause of death as illuminating gas poisoning, and concluding with remark "suicidal," in compliance with Pub.Acts 1919 c 45, requiring that cause of death be so defined as to be classified under international list, is admissible as evidence of all facts required to be stated therein, in action on life insurance policy limiting insurer's liability in case of suicide to amount of premiums paid, but jury should be warned not to permit examiner's conclusion to take place of its own. —Branford Trust Co. v. Prudential Ins. Co. of America, 129 A. 379, 102 Conn. 481, 42 A.L.R. 1450.

76. U.S.—Hunter v. Derby Foods, C.C.A.N.Y., 110 F.2d 970.

77. U.S.—U. S. v. Johnson, C.C.A. Neb., 72 F.2d 614—U. S. v. Blackburn, C.C.A.Wash., 33 F.2d 564.
La.—Johnson v. Sundbery, App., 150 So. 299.
N.Y.—Cirrincioni v. Metropolitan Life Ins. Co., 228 N.Y.S. 354, 223 App.Div. 461.
Pa.—Heffron v. Prudential Ins. Co. of America, 8 A.2d 491, 137 Pa. Super. 69—Allegheny Trust Co. v. State Life Ins. Co. of Indianapolis, Ind., 167 A. 251, 110 Pa.Super. 37.

Admission as affected by absence of medical examination

Death certificate to prove cause of death is not inadmissible in action on life policy on ground that medical examination was not exacted by insurer.—Clay v. Liberty Industrial Life Ins. Co., La.App., 157 So. 838.

78. Iowa.—Morton v. Equitable Life Ins. Co., 254 N.W. 325, 218 Iowa 846, 96 A.L.R. 315.

Nonprofessional opinion of physician in certificate

In suit on life policy, physician's certificate stating that cause of insured's death was "apparently gas asphyxiation" was properly excluded, where physician's opinion was not a professional one and jury was given benefit of facts known to, and observed by, physician on which opinion had been based.—Life Ins. Co. of Virginia v. Brockman, 3 S.E. 2d 480, 173 Va. 86.

Report as to cause of fatal injury

A statute, providing that any writing or record made in regular course of business as a memorandum of any act shall be admissible if it was in regular course to make such memorandum, did not render admissible that portion of coroner's office record which stated that employee received injuries when he fell off ladder at employer's establishment, such portion being pure hearsay.—Sadjak v. Parker-Wolverine Co., 274 N.W. 719, 281 Mich. 84.

79. Ariz.—California State Life Ins. Co. v. Fuqua, 10 P.2d 958, 40 Ariz. 148.

80. Cal.—Bryson v. Manhart, 54 P. 2d 778, 11 Cal.App.2d 691.
Mo.—Griffith v. Continental Casualty Co., 253 S.W. 1043, 299 Mo. 426.

81. Mo.—Simpson v. Wells, 237 S. W. 520, 292 Mo. 301.

82. D.C.—New York Life Ins. Co. v. Miller, 81 F.2d 263, 65 App.D.C. 129.

Coroner's death certificate reciting death by suicide is not admissible because it is mere opinion based on statements of others.—Life Ins. Co, of Virginia v. Brockman, 3 S.E. 2d 480, 173 Va. 86.

Medical certificate

Under a statute making death certificates prima facie evidence of the facts of death, a medical certificate of death was admissible to show that death resulted from a gunshot wound, which was a fact and not in dispute, but was inadmissible to show that such death was caused by suicide, as death by suicide was merely an inference or opinion of the maker of the certificate.—Backstrom v. New York Life Ins. Co., 236 N.W. 708, 183 Minn. 384.

83. Neb.—Omaha & C. B. St. Ry. Co. v. Johnson, 191 N.W. 691, 109 Neb. 526.

84. Fla.—Mutual Life Ins. Co. of New York v. Bell, 3 So.2d 487.

85. Pa.—Heffron v. Prudential Ins. Co. of America, 8 A.2d 491, 137 Pa. Super. 69.

86. Ill.—Hodge v. Globe Mut. Life Ins. Co., 274 Ill.App. 31.
Mo.—Thrower v. Life & Casualty Ins. Co. of Tennessee, App., 141 S. W.2d 192.

Issuance by attending physician

Where the statute requires that the death certificate be issued or signed by the attending physician, the certificate is inadmissible where it was signed by a coroner instead of the attending physician.
Mich.—Bishop v. Shurly, 211 N.W. 75, 237 Mich. 76.
Mo.—O'Donnell v. Wells, 21 S.W.2d 762, 323 Mo. 1170—Thrower v. Life & Casualty Ins. Co. of Tennessee, App., 141 S.W.2d 192—Muller v. Mutual Benefit Health & Accident Ass'n, 68 S.W.2d 873, 228 Mo.App. 492.

Omission of "probably"

A death certificate stating cause of death as suicide, without using word "probably" as required by statute, was inadmissible in action on double indemnity clause of life policy wherein insurer claimed that insured's death was suicidal.—Mutual Life Ins. Co. of New York v. Bell, 3 So.2d 487.

statutes providing for death certificates to be made by attending physicians or coroners, and making such certificates prima facie evidence of the facts recited therein do not change the statutory or common-law rules of evidence in controversies between private parties growing out of contracts nor render such a certificate admissible in an action on a life insurance policy to show suicide.[87] Death certificates should be excluded where they are irrelevant or immaterial to the issues on which offered.[88] The death certificate of an undertaker has been held inadmissible,[89] and a consular certificate of death has been held not to be evidence of that fact.[90]

c. Tax Receipts and Records

Relevant tax receipts and records ordinarily are admissible as public documents.

Under the general rule discussed in subdivision a of this section, tax receipts and records are generally admissible as public documents,[91] including books of assessors.[92]

Such books and records may be excluded, however, where they are incorrectly kept,[93] or where they are not pertinent to the issue,[94] or are privileged.[95] Assessor's records may be excluded where they are not competent evidence of the matters on which they are offered,[96] and an assessor's book, showing the valuation of land, has been held inadmissible where the owner himself did not list the lands.[97] In litigation involving a municipality's title to land, tax records of the municipality may be

87. Okl.—Oklahoma Aid Ass'n v. Thomas, 256 P. 719, 125 Okl. 190.

88. Pa.—Szczygielski v. Travelers' Ins. Co., 174 A. 662, 114 Pa.Super. 352.

Remoteness

(1) Where question raised in action on certificate of group insurance was whether insured had been discharged or merely temporarily laid off prior to death, certificate of bureau of vital statistics showing cause of death on November 14, 1931, to be delirium tremens was properly excluded as too remote to show that insured was discharged on October 7, 1931, and not merely laid off because of excessive drinking.—Szczygielski v. Travelers' Ins. Co., 174 A. 662, 114 Pa.Super. 352.

(2) Mere statement in certificate of physician, not called to testify, was not evidence of fact that insured's fall eight months previously did or could cause illness of which she died.—Childers v. National Life & Accident Ins. Co., Mo.App., 37 S.W.2d 490.

89. U.S.—U. S. v. Harrison, C.C.A. W.Va., 49 F.2d 227.

90. Me.—Morton v. Barrett, 19 Me. 109.

91. Ala.—Morris v. Waldrop, 105 So. 172, 213 Ala. 435—Daniel v. Wade, 83 So. 99, 203 Ala. 355.
Cal.—Miller v. Murphy, 248 P. 934, 78 Cal.App. 751.
Ill.—People v. Dime Sav. Bank, 183 N.E. 604, 350 Ill. 503.
Iowa.—Bennett v. Greenwalt, 286 N.W. 722, 226 Iowa 1113.
Tex.—Steusoff v. Liberty County, Civ.App., 34 S.W.2d 643, error refused.
22 C.J. p 804 note 35.

Day book

County treasurer's day book, in which taxes collected and deposited in bank were entered by deputy, are admissible as official record.—People v. Dime Sav. Bank, 183 N.E. 604, 350 Ill. 503.

Deed book

In ejectment against defendant claiming under tax deed, treasurer's deed book would have been competent on issue of treasurer's acknowledgment of deed in open court, but where not offered in evidence it could not be considered.—Carns v. Matthews, 162 A. 501, 106 Pa.Super. 582.

Reports and tabulations of state tax commission

In support of a taxpayer's claim that other property in the county had been systematically undervalued, reports and tabulations by the state tax commission printed under the authority of the state were admissible, since, when it is the duty of officials under their oath of office to certify official facts, their returns are generally received as evidence.—People v. Chicago, B. & Q. R. Co., 133 N.E. 325, 300 Ill. 399.

92. Fla.—Gautier v. Town of Crescent City, 189 So. 842, 138 Fla. 573.
22 C.J. p 804 note 36.

Income tax assessment roll was competent, where it was proved it came from proper custody, was regular on face, showed necessary entries, and purported to be signed by commissioner.—Tameling v. Commissioner of Internal Revenue, C.C.A., 43 F.2d 814.

93. Ga.—Miller County v. Bush, 110 S.E. 515, 28 Ga.App. 130.

Noncompliance with mandatory provisions of law

Where a tax collector failed to comply with the mandatory provisions of the law as to how his books should be kept, and did not keep correct books, they were not admissible in a proceeding between the county and the collector and his sureties.—Miller County v. Bush, supra.

94. Iowa.—Board of Trustees of, and Ex Officio Board of Review of, Highland Tp., Washington County, v. Board of Review of Washington County, 244 N.W. 855, 215 Iowa 876.
N.J.—Michael A. Scatuorchio, Inc., v. New York, S. & W. R. Co., 159 A. 704, 10 N.J.Misc. 528.

95. Mass.—Leave v. Boston Elevated Ry. Co., 28 N.E.2d 483, 306 Mass. 391.

State income tax return

The legislature, when it amended the law relative to the disclosure of information contained in income tax returns by striking out the words "or by proper judicial order" in provision prohibiting disclosure of information contained in any such return except in proceedings to collect the tax or by proper judicial order, intended to affect the possible evidential character of a return; and in personal injury action, the trial judge did not err in excluding questions asking plaintiff in substance if he was willing to give defendant's attorney permission to obtain a copy of his state income tax return to make it available to the judge and jury and whether he filed accurate returns for certain years.—Leave v. Boston Elevated Ry. Co., supra.

96. Pa.—City of Philadelphia v. Brady, 162 A. 173, 308 Pa. 135, affirming 157 A. 694, 104 Pa.Super. 79.

Classification of property as showing character of property

An assessor's book showing classification of property as rural or urban, offered to show the rural or urban character of the property, is properly excluded.—City of Philadelphia v. Brady, supra.

97. Ky.—Louisville & N. R. Co. v.

excluded where they are not public documents.[98]

Tax lists are admissible as circumstantial evidence that the person making the return at a particular time claimed[99] or did not claim[1] to own certain property, where the question of his ownership thereof at such time is in issue.

§ 639. —— Land Office Records and Proceedings

a. In general
b. Patents and grants
c. Surveys and maps
d. Official correspondence
e. Certificates of land officers

a. In General

Public land office records are ordinarily admissible as evidence of their contents.

Public land office records are intended for the preservation of the evidence of the transactions of the land department and are admissible to prove the facts recited therein,[2] and the facts proved by these records must be received as prima facie evidence of the right of the person at whose instance they were recorded, and as conclusive in regard to such things as the law requires to be recorded.[3]

Record of evidence introduced in land office. In a suit to establish water rights, the record of the evidence introduced in the United States land office, in proof of the entries on the land, has been held mere evidence in an ex parte proceeding, and therefore inadmissible to show the time when settlement or entry was actually made under the homestead or preëmption laws.[4]

b. Patents and Grants

Patents or grants for public lands are admissible in evidence.

A patent or grant for public land is admissible in evidence,[5] without proof of execution,[6] record,[7] delivery,[8] or title in the United States or state,[9] or any preliminary showing as to the proceedings on which the issuance of the patent or grant was based.[10]

Lease of school lands. A lease of school lands has been held admissible in evidence.[11]

c. Surveys and Maps

Official surveys and maps of public lands are ad-

Vandiver, 38 S.W.2d 965, 238 Ky. 846.

98. S.C.—Intendant and Wardens of Town of Port Royal v. Charleston & W. C. Ry. Co., 134 S.E. 497, 136 S.C. 525.

Offered on tax purchase by town
In action involving town's title to land, town's tax books were not admissible to show sale of land for taxes and purchase by town.—Intendant and Wardens of Town of Port Royal v. Charleston & W. C. Ry. Co., supra.

99. Ind.—Lefever v. Johnson, 79 Ind. 554.
22 C.J. p 306 note 18.

1. Ind.—Lefever v. Johnson, 79 Ind. 554.
Miss.—Whitfield v. Whitfield, 40 Miss. 352.

2. Ark.—Marsh v. Erwin, 244 S.W. 441, 155 Ark. 371.
Cal.—Ames v. Empire Star Mines Co., 110 P.2d 13, prior opinion 93 P.2d 635.
Mo.—Jones v. Himmelberger-Harrison Lumber Co., 223 S.W. 63.
Tex.—Southwestern Settlement & Development Co. v. Village Mills Co., Civ.App., 245 S.W. 975.
22 C.J. p 807 note 65.

Entries from register's and receiver's books, showing that land was purchased from a county, were admissible against objection that they were not public land records authorized to be kept by law.—Laster v. Cunningham Land & Improvement Co., Mo., 213 S.W. 89.

Swamp lands
The authenticated report of sales of swamp lands made by board of police, under L.1857 c 18 § 5, is the only competent evidence to show passing of title to purchaser.—Harmon v. Cox, 84 So. 183, 122 Miss. 221.

Admission to show absence of record of document
The records of the land office are admissible to show that they contain no record of certain documents which had to be recorded in such records.—Reichley v. Mellott, 13 Pa. Dist. & Co. 164.

Documents constituting archives of public land office
An original duplicate copy of a testimonio of Mexican land in Texas was the private property of the grantee or his assignee, and neither it nor a copy thereof became an archive of the land office, by reason of its being filed in such office.—Ross v. Sutter, Tex.Civ.App., 223 S.W. 273.

3. U.S.—Galt v. Galloway, Ohio, 4 Pet. 332, 7 L.Ed. 876.
Philippine.—Ravago v. Bacud, 10 Philippine 60.

4. S.D.—Driskell v. Rebbe, 117 N.W. 135, 22 S.D. 242.

5. Cal.—Saecker v. Cohn, 179 P. 890, 180 Cal. 151—People v. Power, 175 P. 803, 38 Cal.App. 181.
22 C.J. p 807 note 68.

Official documents proving existence and location of claims
Patent records containing abstracts of title to mining claims, recitals concerning location of claims in ancient deeds, verified statements concerning location and possession of mines, copy of articles of incorporation of early mining corporation, certified copy of minutes of meetings of miners, descriptions of claims by metes and bounds, registrar's final certificate of entry of patent, and field notes of survey and report of United States deputy mineral surveyor were "records kept in the usual course of business" by the General Land Office and were admissible as "official documents" to prove proper location and existence of mining claims.—Ames v. Empire Star Mines Co., Cal., 110 P.2d 13, prior opinion 93 P.2d 635.

6. Tex.—Huling v. Moore, Civ.App., 194 S.W. 188.
22 C.J. p 808 note 69.

7. Mo.—Callaway v. Fash, 50 Mo. 420.

8. Cal.—Downer v. Smith, 24 Cal. 114.
La.—Lavergne v. Elkins, 17 La. 220.

9. Ala.—Knabe v. Burden, 7 So. 92, 88 Ala. 436.
22 C.J. p 808 note 72.

10. Kan.—Mathews v. Buckingham, 22 Kan. 166.

11. Tex.—Trimble v. Borroughs, 95 S.W. 614, 41 Tex.Civ.App. 554.

missible, but their official status should sufficiently appear.

Official surveys of public lands[12] and maps or plats thereof[13] are admissible in evidence on the certificate of the commissioner, without further evidence of authenticity.[14] However, in order to be admissible, a survey should be duly approved and recorded in accordance with the practice in the office of the surveyor-general,[15] and the authority under which it was made must also be shown.[16] A survey never returned to the land office is not evidence of an adverse title without a warrant or other evidence of one.[17] With respect to a map, a showing as to its official character is necessary.[18]

The field notes and plats of a survey of the public lands are competent evidence,[19] and have been considered to have the force of a deposition.[20] The record of a certificate in the Spanish language, properly translated, shown to be made by the original surveyor of grant under which defendant claimed, which stated the location of a point designated on a map, has been held not admissible.[21]

d. Official Correspondence

Official correspondence of the land office is admissible, but unofficial letters are not admitted.

The official correspondence of the commissioner of the general land office and of the register and receiver of the United States land offices is admissible in evidence to prove the official acts of those officers;[22] but their unofficial letters, unauthenticated as legal certificates,[23] merely expressing opinions on questions of law,[24] are not admissible.

e. Certificates of Land Officers

The certificate of a land officer is ordinarily receivable as evidence of the facts required to be certified, but such certificate is not evidence as to conclusions drawn by such official.

The certificate of a land officer to any fact of the existence of which he is required by law to give a certificate is receivable as evidence of the existence of that fact.[25] In some states such certificates have been made evidence by express statutory enactment,[26] and it has been held that they are not evidence unless expressly made so by state statutes or act of congress.[27]

Only such certificates as the land officer is authorized by statute or regulation of the department to make are admissible in evidence,[28] and it is necessary that the certificate should be either to a copy of a paper or a statement of a fact contained in a paper which is a record of that office, and the original of which would be evidence in the case.[29] Mere certificates of the register or receiver as to his conclusions drawn from an examination of the records cannot be received as evidence.[30]

A receipt issued by a receiver of the United States for entry of land has been held admissible to

12. Tex.—Sullivan v. Solis, 114 S. W. 456, 52 Tex.Civ.App. 464.
22 C.J. p 808 note 75.

13. Ill.—People v. Hatch, 183 N.E. 610, 350 Ill. 586.
22 C.J. p 808 note 76.
Townsite plat, certified by the proper officer under statute, is competent evidence to prove the streets and roadways provided for in the dedication of the townsite.—Null v. Board of Com'rs of Latimer County, 224 P. 159, 98 Okl. 16.
Map of resurvey
In an action to quiet title, in which plaintiff claimed under a patent issued pursuant to a grant from the United States to the Southern Pacific Railroad under Acts Cong. July 27, 1866 § 18, and March 3, 1871 § 23, a map of a resurvey under Act Cong. March 3, 1909, U.S. Comp.St. § 4824, was competent to prove the section in which the land was situated, where the map was made for the purpose of ascertaining the tracts listed for patent under such grant, and where defendants' only claim was under a desert entry shown to have been canceled.—Southern Pac. Land Co. v. Meserve, 198 P. 1055, 186 Cal. 157.

14. Tex.—Smith v. Hughes, 23 Tex. 248.

15. Mo.—Gamache v. Piquignot, 17 Mo. 310.

16. Cal.—Rose v. Davis, 11 Cal. 133.
22 C.J. p 808 note 79.

17. Pa.—Kester v. Rockel, 2 Watts & S. 365.

18. La.—In re Moran, 1 La.App. (Orleans) 118.
22 C.J. p 808 note 80.
Unofficial map publicly recognized
Evidence sufficiently showed public recognition of unofficial map made in 1845 to render it competent in suit involving title to lots.—Westbrook v. City of Jackson, 145 So. 86, 165 Miss. 660.

19. Ill.—Cooney v. A. Booth Packing Co., 48 N.E. 406, 169 Ill. 370.
22 C.J. p 808 note 81.

20. U.S.—Kirby v. Lewis, C.C.Ark., 39 F. 66.

21. Tex.—Dunn v. Land, Civ.App., 193 S.W. 698.

22. Pa.—Fothergill v. Stover, 1 Dall. 6, 1 L.Ed. 13.
22 C.J. p 808 note 84.

23. Mo.—State v. Thompson, 64 S. W.2d 277, 285, 333 Mo. 1069, citing **Corpus Juris**.
22 C.J. p 808 note 85.

24. Tex.—Hanrick v. Dodd, 62 Tex. 75.
22 C.J. p 809 note 86.

25. Or.—Davis v. Chamberlain, 98 P. 154, 51 Or. 304.
Tex.—Lewis v. Heath, Civ.App., 12 S.W.2d 641, error dismissed.
22 C.J. p 809 note 88.
Official certificates generally see infra § 640.

26. Iowa—Acord v. Mitchell, 149 N. W. 839, 167 Iowa 652.
22 C.J. p 809 note 89.

27. Tex.—Lott v. King, 15 S.W. 231, 79 Tex. 292.
22 C.J. p 809 note 90.

28. Cal.—Murphy v. Sumner, 16 P. 3, 74 Cal. 316.
22 C.J. p 809 note 91.

29. Tex.—Fisher v. Ullman, 22 S. W. 523, 3 Tex.Civ.App. 322.
22 C.J. p 809 note 92.

30. Wis.—Reed v. Chicago, M. & St. P. R. Co., 37 N.W. 225, 71 Wis. 399.
22 C.J. p 809 note 93.

show the equitable title to land,[31] but inadmissible to show the legal title.[32]

§ 640. —— Official Certificates

In the absence of statutory authority, an official certification of a fact gathered from a public record is inadmissible, although official certificates which are public documents may be admissible.

To prove a fact of record without the production of the record itself, a duly authenticated copy of the record or so much thereof as relates to the fact in question is required.[33] Without statutory authority the custodian of a public record may not certify anything less than the entire and literal terms of the original;[34] an official certification of a fact drawn or gathered from a public record is a mere legal conclusion or opinion of the certifying official and is inadmissible,[35] unless its admission is authorized by statute.[36]

On the other hand, certificates made by a public officer intrusted with authority for that purpose have been treated as public documents and as such they are competent evidence as against all persons of the facts which he is empowered to certify,[37] this rule being established in some states by express stat-

31. Ill.—Pullman Car & Mfg. Corporation v. Stroh, 182 N.E. 399, 349 Ill. 492.

32. Ill.—Pullman Car & Mfg. Corporation v. Stroh, supra.

33. Ark.—Pekin Cooperage Co. v. State ex rel. Pike County, 122 S.W.2d 468, 470, 197 Ark. 468, quoting **Corpus Juris.**
Conn.—Russo v. Metropolitan Life Ins. Co., 3 A.2d 844, 125 Conn. 132.
Admission of authenticated copies of public records and documents see infra §§ 649–651, 664.

34. Conn.—Russo v. Metropolitan Life Ins. Co., 3 A.2d 844, 125 Conn. 132.
Certification that copy is full and complete see infra § 665.
Official should copy the record verbatim and certify that the copy is an accurate transcript of the original in order to render the certificate admissible in evidence.—U. S. Slicing Mach. Co. v. Wolf, Sayer & Heller, D.C.Ill., 243 F. 412, affirmed 257 F. 93, 168 C.C.A. 305.

35. U.S.—U. S. Slicing Mach. Co. v. Wolf, Sayer & Heller, supra.
Ark.—Pekin Cooperage Co. v. State ex rel. Pike County, 122 S.W.2d 468, 470, 197 Ark. 341, citing **Corpus Juris.**
Conn.—Russo v. Metropolitan Life Ins. Co., 3 A.2d 844, 125 Conn. 132.
D.C.—Guettler v. Alfsen, 289 F. 613, 53 App.D.C. 215.
Ill.—Gross v. Thornson's Estate, 121 N.E. 600, 286 Ill. 185, reversing 208 Ill.App. 600—Piot v. Chartrand, 237 Ill.App. 117.
La.—Powell-Myers Lumber Co. v. Tremont & Gulf Ry. Co., 2 La.App. 164.
Mo.—State v. Hendrix, 56 S.W.2d 76, 80, 331 Mo. 605, citing **Corpus Juris.**
N.C.—Midgett v. Nelson, 192 S.E. 854, 212 N.C. 41.
Tex.—Gordon v. Mortgage Realty Co., Civ.App., 153 S.W.2d 707.
W.Va.—Simmons v. Yoho, 115 S.E. 851, 92 W.Va. 703.
22 C.J. p 838 note 89.
Certificates of:
Birth, marriage, and death see supra § 638 b.
Land officers see supra § 639 e.
Certificate as to tariffs on file
Under statutes providing that a freight tariff or schedule may be proven by the original or by a copy certified by the legal keeper thereof, a certificate by the public service commission setting forth the tariffs on file is not admissible to prove such tariffs, since the statutory method of proof is exclusive.—Weil Bros. v. Southern Ry. Co., 107 So. 38, 21 Ala.App. 245.
Foreign certificates
(1) In proceeding by public administrator to pay distributable estate into city treasury for account of unknown distributees, alleged certificates executed in foreign country to effect that certain foreign subject was a brother of deceased were inadmissible where such certificates were not copies of records and merely certified officer's version of what original record seemed to indicate.—In re Asterio's Estate, 16 N.Y.S.2d 943, 172 Misc. 1081.
(2) Certificate of municipal officer of Italy, as to what in his opinion is shown by records of his town, is not admissible under treaty providing for admission in evidence of "official documents of all kinds, whether originals, copies or translations duly authenticated," unless such certificate is an official document by the law of Italy, for proof must be by duly exemplified copy of the "official documents."—Santomassimo v. New York, S. & W. R. Co., 105 A. 14, 92 N J.Law 10.
(3) In proceeding for distribution of portion of decedent's estate, certificate of Swedish rector, who kept official vital statistics in Sweden, certifying in conformity with ministerial records and "with other documents" the nature of which was not revealed, regarding offspring of marriage of deceased's alleged parents together with the dates of their respective births and marriages, their offspring and dates of their emigration to North America and the like, was inadmissible, since it was not a "copy of a public foreign record" and was not "evidence" within statute regarding proof of foreign records.—In re Johnson's Estate, 16 N.Y.S.2d 855, 172 Misc. 1075.

36. Ark.—Pekin Cooperage Co. v. State ex rel. Pike County, 122 S.W.2d 468, 470, 197 Ark. 468, quoting **Corpus Juris.**
22 C.J. p 838 note 90.

37. U.S.—U. S. v. One Ford Truck, D.C.Pa., 23 F.Supp. 605—Agency of Canadian Car & Foundry Co. v. American Can Co., D.C.N.Y., 253 F. 152, reversed on other grounds 258 F. 363, 169 C.C.A. 379, 6 A.L.R. 1182.
Cal.—Bryson v. Manhart, 54 P.2d 778, 11 Cal.App.2d 691.
Fla.—Ryan v. State, by Knott, 180 So. 10, 131 Fla. 486.
Iowa.—Wertheimer & Degen v. Parsons, 229 N.W. 829, 209 Iowa 1241.
Mass.—Dow v. U. S. Fidelity & Guaranty Co., 7 N.E.2d 426, 297 Mass. 34.
Mo.—Woods v. National Aid Life Ass'n, App., 87 S.W.2d 698.
N.M.—In re Proposed Middle Rio Grande Conservancy Dist., 242 P. 683, 31 N.M. 188.
N.Y.—In re Bartowiez' Estate, 3 N.Y.S.2d 764, 254 App.Div. 705—George v. Galani, 219 N.Y.S. 24, 218 App.Div. 840.
Pa.—H. L. Braham & Co. v. Surrell, 176 A. 64, 115 Pa.Super. 365.
R.I.—Borda v. Borda, 117 A. 362, 44 R.I. 337.
22 C.J. p 809 note 97.
Certificates of inspection or reports of inspector's are admissible as public documents made and kept as required by law.
Tex.—Davis v. Standard Rice Co., Civ.App., 293 S.W. 593.
Wash.—Grant v. Fisher Flouring Mills Co., 68 P.2d 210, 190 Wash. 356.
Commissioner of labor's certificate
Certificate of commissioner of labor, such as certificate showing that corporation carries workmen's compensation insurance, is admissible

utes authorizing such admission.[38] In order to render the certificate admissible the official character of the person by whom it was made must be established.[39] A certificate by a public official is admissible as evidence of the truth of the facts certified only where there is shown an express authority, judicial or statutory, for the making of the certificate,[40] although in a number of cases official certificates have been admitted without any showing that there was any statute expressly directing such certificate to be made.[41] As a further prerequisite it must appear that the record made by the official was of a fact which it was his duty to ascertain and record.[42]

Official certificates may be excluded where they, or the record to which they relate, are pure hearsay without reasonable provision for accuracy in recording the facts,[43] or where they are not made in conformity with statutory requirements,[44] or where the certificate is irrelevant or immaterial to the issue on which it is offered.[45] Certificates made by officers in pursuance of a requirement of law have sometimes been held inadmissible to prove the facts recited therein on the ground that the certificates were required for a special purpose and not to serve as evidence.[46]

The authority to make certified copies will not authorize a certification as to facts not appearing of record,[47] or will not authorize a certification as

under statute, if duly authenticated.—Copeland v. Cherry, 95 S.W.2d 1275, 20 Tenn.App. 122.

Consular invoice

Under St.1917 §§ 4148, 4164, consular invoice covering shipping from Germany to this country, issued and certified by the American consul general in Germany, pursuant to Act Congr. June 10, 1880, § 4, U.S.Comp. St. § 5542, and Rev.St. §§ 2855, 2862, is admissible in evidence in action by consignee against initial carrier by rail in this country for damages to goods in transit.—Vogel v. Delaware, L. & W. R. Co., 171 N.W. 198, 168 Wis. 567.

Custodians' certificates are admissible to show preparation of voting machines for use and their due examination and testing.—Manley v. Northumberland County, D.C.Pa., 32 F.Supp. 775.

Landing certificate

In habeas corpus to prevent deportation, landing certificate taken from Ellis Island records was admissible to show petitioner's birth in Syria, such certificate being admissible as an official record kept in the due performance of public business.—U. S. ex rel. Esshoc v. Fluckey, C.C.A.Ohio, 19 F.2d 64.

Ordinary's certificate is competent on question whether applicant for exemption from license fee is disabled or indigent resident soldier within exemption statute.—Webb v. Mayor and Aldermen of Savannah, 175 S.E. 470, 179 Ga. 160.

Sputum certificate

In action on life policy covering disability benefits for disability resulting from pulmonary tuberculosis, report on specimen of sputum which was properly taken, mailed, examined by state board of health, and certified to have been found "positive" was properly admitted.—Mutual Life Ins. Co. of New York v. Knight, 178 So. 898, 130 Fla. 733.

Weigher's certificate authorized by regulations

Under Acts 36th Leg.1919 c 76 § 8, authorizing the commissioner of markets and warehouses to prescribe forms of weight certificates by public weighers, a certificate in the form prescribed by a ruling of the market and warehouse department, as to the amount of excess moisture in cotton sold by a pledgee, was admissible to establish its claim for an amount paid the purchaser for loss of weight, although the statute did not in terms require such data.—Taylor v. Hemphill, Tex.Civ.App., 238 S.W. 986, dismissed for want of jurisdiction.

38. Mass.—Superintendent of Banks of New York v. Hubbard, 2 N.E.2d 557, 294 Mass. 525—Taylor v. Whittier, 138 N.E. 6, 240 Mass. 514.
22 C.J. p 810 note 98.

Extraterritorial effect of statute

The statutes of the state of North Dakota on the subject of the registration of cattle marks or brands, the issuance of certificates thereof, and providing that the certificate shall be deemed evidence of ownership of cattle so branded or marked, constitute a rule of evidence applicable in that state only; it has no extraterritorial force or effect, and is inadmissible in this state as evidence of title.—Moore v. Lillehaugen, 185 N.W. 958, 150 Minn. 492.

39. Mo.—Lucas v. Current River Land, etc., Co., 85 S.W. 359, 186 Mo. 448.
22 C.J. p 810 note 99.

40. Conn.—Russo v. Metropolitan Life Ins. Co., 3 A.2d 844, 125 Conn. 132.
Ga.—Mutual Life Ins. Co. of New York v. Burson, 179 S.E. 390, 50 Ga.App. 859.
22 C.J. p 810 note 1.

41. Md.—Harwood v. Marshall, 9 Md. 83.
22 C.J. p 811 note 2.

42. Conn.—Russo v. Metropolitan Life Ins. Co., 3 A.2d 844, 125 Conn. 132.
Ill.—St. Louis Pressed Steel Co. v. Schorr, 135 N.E. 766, 303 Ill. 476.
Wyo.—McDonald v. Mulkey, 210 P. 940, 29 Wyo. 99.
22 C.J. p 811 note 3.

43. N.J.—Kiely v. MacMurray, 130 A. 343, 5 N.J.Misc. 1091.
N.Y.—Hyman Goldman Plumbing & Heating Corporation v. Nesbit, 267 N.Y.S. 889, 149 Misc. 606.

Admission of notarial certificates as to acts done by notary

The statutes authorizing a notary's certificate to be read and received in evidence of the facts therein certified, contemplate and intend that what the notary certifies to shall have been done by him.—Bell v. Anderson, 17 A.2d 647, 143 Pa.Super. 56.

44. Miss.—Swift & Co. v. Sones, 107 So. 881, 142 Miss. 660.

Depositions in place of inadmissible certificate

Where samples of fertilizers are not drawn and forwarded as required by statute, certificate of state chemist is not admissible in evidence, but it is necessary to take depositions of state chemist and others.—Swift & Co. v. Sones, supra.

45. Mo.—Reutner, Klaus & Co. v. Nelson Chesman & Co., App., 9 S.W.2d 655.

Remoteness

Certificates that certain companies were authorized fraternal benefit societies was not competent evidence to prove status fifteen years previous.—Watts v. Gibson, Tex.Civ.App., 33 S.W.2d 777.

46. Mich.—Clark v. Detroit Locomotive Works, 32 Mich. 348.
22 C.J. p 811 note 4 [a].

47. Ark.—Pekin Cooperage Co. v. State ex rel. Pike County, 122 S.W.2d 468, 470, 197 Ark. 341, quoting **Corpus Juris**.
Okl.—Kansas City Life Ins. Co. v.

to facts improperly inserted therein,[48] or as to the purport of papers that are missing from the record.[49] So, in the absence of a statute, a negative certificate by an officer will not be evidence of the nonappearance of a fact on the records or of the absence of any entry, paper, or document from the records of his office,[50] it being said that such negative proof requires oral testimony under oath of a search made and of its results.[51] However, the mere fact that a certificate contains matter of a negative character will not exclude it as evidence of its contents of a positive character,[52] and the negative certificate of a recorder that a deed cannot be found has been received in evidence as part of the proof made to let in secondary evidence of the contents.[53]

A certificate of the custodian of records is admissible to show the mere fact of recording[54] or registration;[55] and certificates as to the time of filing or recording a document have been held admissible when introduced with copies of the record.[56] The custodian of a record, having authority to certify a transcript thereof, has authority to specify in his certificate the particular record from which the transcript is taken,[57] and, in a case where certified copies from the record of a board of supervisors were objected to as not containing all of the record of the day or session of the board, it was held competent to prove by the testimony of the county clerk that the copies contained all proceedings with relation to the matter in issue.[58]

Certificates of deputies. Certificates of deputies and assistants are sometimes admitted where the certificates of their principals would be admissible.[59]

§ 641. —— Records of Private Writings

Records of deeds or other private writings have been received in evidence under certain circumstances.

Records of deeds or other private writings have been held admissible for certain purposes,[60] despite the failure of the recording officer to add a recording certificate to the instrument or to spread the recording certificate on the record.[61]

An original record book containing a deed or oth-

Meador, 98 P.2d 20, 22, 186 Okl. 399, citing **Corpus Juris.**
Tex.—Burton v. Perry, Civ.App., 53 S.W.2d 795, 797, citing **Corpus Juris,** error refused.
22 C.J. p 838 note 91.

48. Ark.—Pekin Cooperage Co. v. State ex rel. Pike County, 122 S.W.2d 468, 470, 197 Ark. 341, quoting **Corpus Juris.**
22 C.J. p 838 note 92.

49. Ark.—Pekin Cooperage Co. v. State ex rel. Pike County, supra, quoting **Corpus Juris.**
La.—Briggs v. Campbell, 19 La. 524.
Tex.—Burton v. Perry, Civ.App., 53 S.W.2d 795, 797, citing **Corpus Juris,** error refused.

50. U.S.—U. S. v. Bass, C.C.A.Ind., 64 F.2d 467—U. S. v. Bukis, D.C. Pa., 17 F.Supp. 77.
Ark.—Pekin Cooperage Co. v. State ex rel. Pike County, 122 S.W.2d 468, 470, 197 Ark. 341, quoting **Corpus Juris.**
Okl.—Kansas City Life Ins. Co. v. Meador, 98 P.2d 20, 22, 186 Okl. 397, citing **Corpus Juris.**
Tex.—World Oil Co. v. Hicks, Civ. App., 75 S.W.2d 905, certified questions answered, Com.App., 103 S.W. 2d 962—U. S. Fidelity & Guaranty Co. v. Inman, Civ.App., 65 S.W.2d 339—Burton v. Perry, Civ.App., 53 S.W.2d 795, 797, citing **Corpus Juris,** error refused—Watson v. Texarkana Pipe Works, Civ.App., 257 S.W. 1003.
22 C.J. p 839 note 94.

Statute making certificate presumptive evidence
A letter from the secretary of state to the effect that a foreign corporation had not been admitted to do business in the state was inadmissible, although Comp.L.1915 § 12510 makes the custodian's certificate that records cannot be found in his office presumptive evidence, the common-law rule giving such custodian no authority to make such a certificate.—Hallet & Davis Piano Co. v. Droste, 182 N.W. 123, 213 Mich. 381.

51. Ark.—Pekin Cooperage Co. v. State ex rel. Pike County, 122 S.W. 2d 468, 470, 197 Ark. 341, quoting **Corpus Juris.**
Ill.—Boyd v. Chicago, B. & Q. R. Co. 103 Ill.App. 199.

52. Pa.—Struthers v. Reese, 4 Pa. 129.

53. Pa.—Ruggles v. Gaily, 2 Rawle 232.

54. Wash.—Garneau v. Port Blakely Mill Co., 36 P. 463, 8 Wash. 467.
22 C.J. p 839 note 98.

55. La.—Hanna v. His Creditors, 12 Mart. 32.

56. Mass.—Orne v. Barstow, 55 N.E. 896, 175 Mass. 193.
22 C.J. p 839 note 1.

57. Fla.—Mansfield v. Johnson, 40 So. 196, 51 Fla. 239, 120 Am.S.R. 159.
22 C.J. p 839 note 2.

58. Mich.—Hoffman v. Pack, 71 N. W. 1095, 114 Mich. 1.

59. La.—State v. Clark, 16 So. 374, 46 La.Ann. 1409.
22 C.J. p 811 note 5.

60. Ala.—Daniel v. Wade, 83 So. 99, 203 Ala. 355.
Ga.—Griffin v. Garrett Motor Co., 153 S.E. 74, 41 Ga.App. 308.
Ky.—Culton v. Simpson, 127 S.W.2d 826, 277 Ky. 808.
La.—Schultz v. Kellar, 136 So. 220, 17 La.App. 651.
Mo.—Settles v. Scott, 211 S.W. 35.
Ohio.—Vance v. Lyons, 19 Ohio App. 225.
Philippine.—Mendoza v. Fulgencio, 8 Philippine 243.
Tex.—Houston Oil Co. of Texas v Niles, Com.App., 255 S.W. 604, reversing Niles v. Houston Oil Co. of Texas, Civ.App., 191 S.W. 748—Jackson v. Langford, Civ.App., 60 S.W.2d 265.
Admission of authenticated copies of record of private writings see infra §§ 659–662.

Under common-law principles
Record book more than thirty years old, in which deeds were copied, is admissible under the principles of common law, independent of code provisions, although not admissible as an ancient document, its age not affecting its character.—Wilson v. Moseley, 102 S.E. 330, 113 S.C. 278.

Mechanics' lien claim sufficiently signed to entitle it to be filed, and filed, is admissible in evidence as a "public record" under the rule admitting private writings which may become public records by recording under statute.—D. I. Nofziger Lumber Co. v. Solomon, 110 P. 474, 476, 13 Cal.App. 621.

61. Ky.—Culton v. Simpson, 127 S. W.2d 826, 277 Ky. 808.

er private writing is, when properly identified or verified, admissible to prove the fact of registration,[62] and in some jurisdictions the record of a deed or other instrument is admissible as primary evidence to show the execution and contents of the instrument,[63] where the original is not in the possession or under the control of the party desiring to offer it.[64] Under statutes providing that the record of a conveyance or instrument duly acknowledged or proved may be read in evidence with the same effect as the original instrument, without further proof, such record may be introduced without proof of loss of the original conveyance.[65] Even apart from express statutory provision, records of deeds of realty[66] or of the manumission of a slave,[67] if they are within reach and can be produced, have been held admissible without accounting for the nonproduction of the original. However, subject to such modifications as may be introduced by statutes, the record of a deed or other instrument is usually admissible only as secondary evidence of its contents.[68]

If a deed is void for failure sufficiently to describe the property intended to be conveyed, the record of such deed is inadmissible.[69]

Transfer of records to another book. Where records are transferred by the proper officers from a temporary book where they were originally recorded into another which is recognized as a public record, and it is shown that the original book has been lost, the book into which the records were transferred is admissible.[70]

Defective or unauthorized records. As a general rule a record not made in accordance with the law relating to the recording of instruments is not competent evidence to prove the original.[71] The record is not admissible if the recording of the particular instrument is not required or authorized,[72] unless statutory provision is made for admission thereof,[73] or unless the instrument has been in actual use so as to be admissible as an instrument referred to;[74] and it has been also held that, where an instrument is so defective with respect to execution and acknowledgment as to render the record thereof a nullity, such record cannot be received in evidence.[75] However, where an originally invalid record has been cured by subsequent legislation, a properly authenticated copy of a deed from such records is admissible.[76]

A mutilated record of a deed is admissible in evidence if enough of the record is left clearly to identify the land.[77]

62. Ala.—Denton v. Foster, 70 So. 152, 195 Ala. 53.
22 C.J. p 811 note 6.

63. Wis.—Blaha v. Borgman, 124 N. W. 1047, 142 Wis. 43.
22 C.J. p 811 note 7.

64. Ala.—Williams v. Oates, 102 So. 712, 212 Ala. 396—Jones v. Spear, 85 So. 471, 204 Ala. 110.
22 C.J. p 812 note 8.

65. Cal.—Myran v. Smith, 4 P.2d 219, 117 Cal.App. 355.

66. U.S.—Peltz v. Clarke, C.C.D.C., 19 F.Cas.No.10,914, 2 Cranch C.C. 703, affirmed 5 Pet. 481, 8 L.Ed. 199.
22 C.J. p 812 note 9.

67. U.S.—Thomas v. Magruder, C.C. D.C., 23 F.Cas.No.13,904, 4 Cranch C.C. 446.

68. U.S.—Carter Oil Co. v. McQuigg, D.C.Ill., 27 F.Supp. 182, affirmed, C.C.A., 112 F.2d 275—Foamite-Childs Corporation v. Pyrene Mfg. Co., D.C.Del., 288 F. 416.
Iowa.—Jaffray v. Thompson, 21 N. W. 659, 65 Iowa 323.
Kan.—Jackman v. Lawrence Drilling & Development Co., 187 P. 258, 106 Kan. 59.
S.C.—Wilson v. Moseley, 102 S.E. 330, 113 S.C. 278.
22 C.J. p 812 notes 11, 12.
Record as primary or secondary evidence see infra § 648.

Homestead papers

Original homestead papers are primary evidence and the record of the clerk of the court is secondary.—Caraker v. Brown, 111 S.E. 51, 152 Ga. 677—Pritchett v. Davis, 28 S.E. 666, 101 Ga. 236, 65 Am.S.R. 298.

Variance between original and record

If a variance appear between the original instrument filed with the register of deeds for record and the record, the original instrument prevails.—Jackman v. Lawrence Drilling & Development Co., 187 P. 258, 106 Kan. 59.

Where the statute makes the record prima facie evidence, the rule that copies are secondary evidence and inadmissible does not exclude the record of an instrument.—Coffey v. The Maccabees, 86 Pa.Super. 46—22 C.J. p 1022 note 45.

69. Cal.—Smith v. California Portland Cement Co., 25 P.2d 1013, 134 Cal.App. 630.

70. U.S.—Belk v. Meagher, Mont., 104 U.S. 279, 26 L.Ed. 735.
22 C.J. p 812 note 13.

71. Cal.—Central Pac. R. Co. v. Droge, 151 P. 663, 171 Cal. 32.
22 C.J. p 812 note 14.

72. Mich.—Nelson v. Scofield, 189 N.W. 185, 219 Mich. 595.
22 C.J. p 812 note 15.

Filing of accident report by insurance carrier

In compensation proceeding, report of accident prepared by insurance carrier should not be received in evidence, since not authorized by statute.—Frazer v. McMillin & Carson, 179 N.E. 564, 94 Ind.App. 431.

Curative act as rendering record admissible

The record of a defectively executed contract for the sale of land is not admissible under the curative act, as notice of the agreement between vendor and vendee, to establish plaintiffs' title, no question of notice being involved.—Nelson v. Scofield, 189 N.W. 185, 219 Mich. 595.

73. Minn.—Lamberton v. Windom, 18 Minn. 506.
22 C.J. p 812 note 16.

74. Fla.—Lester v. Schutt, 174 So. 583, 128 Fla. 302.

Defective plat from which deeds made

Even where plat is so defective as not to be entitled to record, where deeds have been made according to it for years, it is admissible as an instrument referred to.—Lester v. Schutt, supra.

75. Colo.—Trowbridge v. Addoms, 48 P. 535, 23 Colo. 518.
22 C.J. p 812 note 17.

76. Tex.—Houston Oil Co. of Texas v. Niles, Com.App., 255 S.W. 604, reversing Niles v. Houston Oil Co. of Texas, Civ.App., 191 S. W. 748.

77. Tex.—Ryle v. Davidson, 116 S.

§ 642. —— Other Official Records or Documents

Examine Pocket Parts for later cases not germane to the preceding specific section headings.

§ 643. —— Authentication of Document

a. In general
b. Official deeds
c. Documents from another state or country

a. In General

To be admissible, official records or documents must be properly authenticated.

Although properly authorized official records and documents import verity,[78] and may be introduced without first verifying their accuracy,[79] to be admissible it must appear that they are what they purport to be,[80] as in the case of official maps, plats and surveys,[81] official certificates,[82] and public health or hospital records.[83] The authenticity and genuineness of a paper offered as a public document must be established either by evidence appearing on its face, as by the proper official verification,[84] or by extrinsic evidence, as by showing the custody from which it comes.[85]

The authenticity of a paper offered as a public document may sufficiently appear, at least prima facie, from its custody and its regularity on its face,[86] or in some instances from the mere appear-

W. 823, certified questions answered 115 S.W. 28, 102 Tex. 227, reversed on other grounds 124 S.W. 616, 103 Tex. 209, rehearing denied 125 S.W. 881, 103 Tex. 209.

78. Pa.—Mullen v. City of Altoona, 162 A. 218, 308 Pa. 258.

79. Ky.—Hines v. May, 230 S.W. 924, 191 Ky. 493.

Production of party making statements

Public documents or official written statements are admissible, even though party who made statements therein contained is not produced in court, on theory that officer will do his duty.—Steel v. Johnson, Wash., 115 P.2d 145—Grant v. Fisher Flouring Mills Co., 68 P.2d 210, 190 Wash. 356.

Presumption of accuracy

There is a presumption that public records and documents correctly represent the facts, and that the officer who prepared them and whose duty it was to make them accurate properly performed his duty, and it is the constant practice to introduce such public records without first verifying their accuracy by the one who made them.—Hines v. May, 230 S.W. 924, 191 Ky. 493.

Presumption of regularity of official acts and proceedings see supra § 146.

Records as "establishing themselves"

Every intendment is to be made in favor of the acts and proceedings of a municipality, and where records are kept of municipal acts and proceedings, they are receivable in evidence of truth of the facts recited, and, when so produced, they establish themselves.—Kansas City v. Brown, 227 S.W. 89, 286 Mo. 1.

80. U.S.—U. S. v. Chandler, C.C.A. Ala., 87 F.2d 356—U. S. v. Smart, C.C.A.Ala., 87 F.2d 1—Milleson v. U. S., C.C.A.Mo, 78 F.2d 60—U. S. v. Timmons, C.C.A.Fla., 68 F. 2d 654—Esnault-Pelterie v. Chance Vought Corporation, D.C.N.Y., 56 F.2d 393, affirmed, C.C.A., 66 F.2d 474—Runkle v. U. S., C.C.A.Colo., 42 F.2d 804.
Ill.—Trakas v. Cokins, 224 Ill.App. 327.
Mo.—Wisconsin & Arkansas Lumber Co. v. Buschow Lumber Co., App., 236 S.W. 410.
Mont.—Steiner v. McMillan, 195 P. 836, 59 Mont. 30.
N.Y.—Lash, Inc., v. A. C. Ogden Milk Co., 297 N.Y.S. 1008, 163 Misc. 407.
N.D.—In re Markhus' Estate, 249 N. W. 310, 63 N.D. 566.
Pa.—Mullen v. City of Altoona, 162 A. 218, 308 Pa. 258—McNulty v. Throop Borough School Dist., 149 A. 741, 742, 299 Pa. 465, citing **Corpus Juris.**
R.I.—Budlong v. Budlong, 136 A. 308, 48 R.I. 144.
Tex.—Risk v. City of Shamrock, Civ. App., 61 S.W.2d 153—Harlan-Elzy-Randall Co. v. American Fruit Growers, Civ.App., 7 S.W.2d 132, error dismissed American Fruit Growers v. Harlan-Elzey-Randall Co., Com.App., 16 S.W.2d 261.
Va.—McGuire v. Atlantic Coast Line R. Co., 118 S.E. 225, 136 Va. 382.
22 C.J. p 813 note 19.

Competency of person to identify record

Officer who made neither alleged arrest of motorist, involved in collision with street car, nor alleged entries on precinct record, was incompetent to identify such record.—Rissling v. Milwaukee Electric Ry. & Light Co., 234 N.W. 879, 203 Wis. 554.

Unsworn and uncertified statement

The statement of a person holding an official position if not under oath or under certificate is insufficient to authenticate a document offered in evidence.—National Bank of Decatur v. City of Gibson, 261 Ill.App. 190.

Certainty of identification

In action on life insurance certificate, physician's testimony that he found uncertified document, purporting to be record of insured's tuberculosis examination by state health department, among files in county health office, but did not know who made examination or put document in files, was too uncertain and indefinite identification of document to justify its admission in evidence.—Woodmen of the World Life Ins. Soc. v. Guyton, 194 So. 655, 239 Ala. 216.

81. Ala.—Hamrick v. Town of Albertville, 122 So. 448, 219 Ala. 465—Wright v. Louisville & N. R. Co., 82 So. 132, 203 Ala. 118.
22 C.J. p 813 note 19 [a].

82. Cal.—Mah See v. North American Acc. Ins. Co. of Chicago, Ill., 213 P. 42, 190 Cal. 421, 26 A.L.R. 123.
Ill.—In re Saunders' Petition, 245 Ill.App. 423.
Iowa.—Putnam v. Bussing, 266 N.W. 559, 221 Iowa 871.

Baptismal certificate is inadmissible where not properly authenticated.—Kiely v. MacMurray, 139 A. 343, 5 N.J.Misc. 1091.

Necessity of seal

Official certificate made within state need not have seal to be introduced in evidence, under Code 1923 § 7681.—Macon County Lumber Co. v. Jones, 110 So. 1, 215 Ala. 157.

83. U.S.—U. S. v. Chandler, C.C.A. Ala., 87 F.2d 356.

84. Wash.—Seattle v. Parker, 43 P. 369, 13 Wash. 450.
22 C.J. p 813 note 21.

85. N.Y.—Tully v. Lewitz, 98 N.Y. S. 829, 50 Misc. 350.
22 C.J. p 813 note 23.

86. U.S.—Tameling v. Commissioner of Internal Revenue, C.C.A., 43 F.2d 814.

Absence of specific objection

Where an objection to the introduction of documents stated generally that they were not authenti-

ance of the document itself,[87] and where the proof of authenticity, genuineness, and identity is sufficient the paper becomes admissible.[88] If the record is produced in court and identified by the custodian thereof, no further proof of its authenticity is usually required.[89] As a general rule, however, a public record is not required to be identified by the custodian thereof, but its identity may be shown by any competent witness who knows the fact.[90] The admissibility of public records depends on custody and authenticity and is not governed by handwriting or the original entry rule.[91] In some jurisdictions the rule is laid down in general terms that, where by statute an officer is authorized to make certificates, a certificate in the form prescribed by law and signed by a person professing to act in an official capacity is prima facie evidence without proof of the officer's handwriting or other proof of the genuineness of the paper.[92]

Admission of authenticity. An admission of authenticity by the party against whom a public record or document is sought to be used dispenses with the necessity of proof on the subject.[93]

Identification of tax rolls by testimony of witness. Irrespective of the absence of indorsements authenticating tax rolls and assessments, they may be admitted where they are duly verified by the testimony of the proper officials.[94]

United States land office register. It has been held that the certificate of the register of the United States land office needs no authentication;[95] but there are also decisions to the contrary.[96]

b. Official Deeds

In the absence of statute or waiver, an official deed is inadmissible as a muniment of title without preliminary proof of the authority of the officer to execute the deed.

An official deed is ordinarily inadmissible without preliminary proof of the power of the officer to execute the deed,[97] although in the absence of ob-

cated in the manner prescribed by statute, without pointing out any specific lack of authentication, and where such papers appeared to be regular official documents issued by competent authorities, the court committed no error in admitting them, since, in the admission of record evidence, rules of convenience may often be applied by courts in cases where documents bear every appearance of regularity and the seal of officials of a state are offered in evidence.—Curtis v. North American Indian, Inc., C.C.A.Wash., 277 F. 909.

87. Iowa.—First-Trust Joint Stock Land Bank of Chicago, Ill. v. McNeff, 264 N.W. 105, 220 Iowa 1225.

Certificate of notary which is in due and legal form is admissible without further proof.—First-Trust Joint Stock Land Bank of Chicago, Ill., v. McNeff, supra.

Document purportedly printed by government

Authenticity of an official document is sufficiently established when a copy of it is offered in evidence, which purports to have been printed by authority of the government.—U. S. v. Aluminum Co. of America, D.C.N.Y., 1 F.R.D. 71.

88. U.S.—U. S., for Use of Wadeford Electric Co v. E. J. Biggs Const. Co., C.C.A.Ill., 116 F.2d 768—Ulm v. Moore-McCormack Lines, C.C.A.N.Y., 115 F.2d 492, rehearing denied 117 F.2d 222, and certiorari denied 61 S.Ct. 941.

Ala.—Alabama Great Southern R. Co. v. Grauer, 102 So. 125, 212 Ala. 197.

Cal.—Richardson v. Michel, App., 113 P.2d 916.

Okl.—Biggerstaff v. City of Altus, 243 P. 751, 114 Okl. 98.

Tex.—First Baptist Church v. City of Fort Worth, Com.App., 26 S.W.2d 196, affirming, Civ.App., 17 S.W.2d 130—Rees v. State, Civ.App., 149 S.W.2d 184, error dismissed, judgment correct—Joy v. City of Terrell, Civ.App., 143 S.W.2d 704, error dismissed, judgment correct—St. Louis, B. & M. Ry. Co. v. Cole, Civ.App., 4 S.W.2d 1019, affirmed, Com.App., 14 S.W.2d 1024, rehearing denied 16 S.W.2d 534—Galveston, H. & S. A. R. Co. v. Harling, Civ.App., 208 S.W. 207, affirmed, Com.App., 260 S.W. 1016.

State sanitary code

La.—City of New Orleans v. Ernst, 99 So. 391, 155 La. 426 followed in City of New Orleans v. Poulet, 99 So. 394, 155 La. 435, City of New Orleans v. Hartman, 99 So. 394, 155 La. 436, and City of New Orleans v. Compagnet, 99 So. 395, 155 La. 437.

89. Ohio.—Lisk v. Hora, 143 N.E. 545, 109 Ohio St. 519.

Wyo.—Campbell v. Wyoming Development Co., 100 P.2d 124, 136, 55 Wyo. 347, citing **Corpus Juris**, and rehearing denied 102 P.2d 745, 55 Wyo. 347.

22 C.J. p 813 note 24.

90. Cal.—Rogers Bros. Co. v. Beck, 184 P. 515, 43 Cal.App. 110.

22 C.J. p 814 note 25.

Identification by deputy clerk

Under Rev.St. c 64 § 37, the town records themselves are the evidence, and they may be identified by any competent witness, it not being necessary that the town clerk in person identify them, so that the town record of a marriage identified by the town clerk's wife, who acted as his deputy in his absence, was admissible.—Audibert v. Michaud, 111 A. 305, 119 Me. 295.

91. Pa.—Laginsky v. McCollough, 124 A. 431, 280 Pa. 286.

92. Neb.—Davis v. Watkins, 76 N. W. 575, 56 Neb. 288.

22 C.J. p 814 note 26.

93. Pa.—Miller v. Hale, 26 Pa. 432.

S.C.—Ex p. Steen, 37 S.E. 829, 59 S.C. 220.

94. Tex.—Republic Ins. Co. v. Highland Park Independent School District, Civ.App., 123 S.W.2d 784, error dismissed, 125 S.W.2d 270, 133 Tex. 545—Rachford v. City of Port Neches, Civ.App., 96 S.W.2d 167, error refused.

Authentication by city secretary and assessor

In suit by city against directors and stockholders of dissolved corporation for 1936 taxes, the 1936 city tax roll, although not certified to by assessor-collector, was sufficiently authenticated by testimony of city secretary and assessor on the witness stand as to be admissible and a prima facie case of valid assessment and tax liability was shown.—Joy v. City of Terrell, Tex.Civ.App., 143 S.W.2d 704, error dismissed, judgment correct.

95. Ark.—Floyd v. Ricks, 14 Ark. 286, 58 Am.D. 374.

22 C.J. p 809 note 94.

96. Fla.—Yellow River R. Co. v. Harris, 17 So. 568, 35 Fla. 385.

22 C.J. p 809 note 95.

97. Ga.—Fordham v. Dixon, 110 S. E. 8, 152 Ga. 369.

Idaho.—Jorgensen v. McAllister, 202 P. 1059, 34 Idaho 182.

jection the deed may be admitted without prior proof of the judgment,[98] and preliminary proof is unnecessary when dispensed with by statute.[99]

The rule that preliminary proof of the judgment is prerequisite to the admission of an official deed has been applied in connection with deeds of sheriffs,[1] constables,[2] commissioners or masters in chancery,[3] and receivers,[4] and the deeds of these or other officers cannot be given in evidence to support title without producing the record of the decree, judgment, and execution under the authority of which the sale was made,[5] or without proper secondary evidence thereof in case the records cannot be produced.[6] To render an official deed admissible it is not necessary to produce more than the decree authorizing the same and the proceedings in conformity therewith,[7] although sufficient of the record should be produced to show the essential facts.[8]

Deeds of executors or administrators. A party producing an executor's or administrator's deed must show that its execution was authorized,[9] and hence the appointment of the executor or administrator,[10] and the judicial proceedings under the authority of which the sale purported to have been made[11] must usually be shown. It is sometimes made necessary, in order that an administrator's deed be admissible as a muniment of title, that it should be accompanied by the order of sale,[12] but the deed, accompanied by the order, is admissible as a muniment of title without production of the letters of administration, since the granting of the order of sale is in itself an adjudication that the applicant was the administrator and authorized as such to sell.[13]

Tax deed. A tax deed is usually held not admissible in evidence unless accompanied by some proof of the proceedings on which it is founded, or of compliance with the prerequisites of the law authorizing the sale;[14] but it has been held that a tax deed, not void on its face, is of itself prima facie evidence of everything necessary to its own validity.[15]

c. Documents from Another State or Country

Public documents of another state or country may be proved by authenticated, but not by unauthenticated, originals.

While the usual practice is to prove foreign documents of a public character by properly authenticated copies thereof, as considered infra §§ 673, 675, the public records or documents of a foreign country may be proved by the original records themselves if they can be produced and are properly authenticated,[16] although unauthenticated documents of a foreign country[17] or unauthenticated docu-

Tex.—Toplitz v. Porter, Civ.App., 102 S.W.2d 482.
22 C.J. p 930 note 90 [a].

98. Cal.—Root v. Conlin, 223 P. 1023, 65 Cal.App. 241.

99. Ala.—Williams v. Oates, 102 So. 712, 212 Ala. 396.

Retroactive effect

Gen.Acts 1923 p 629, authorizing sheriff's deed properly executed to be received without independent proof of proceedings recited therein is retroactive, affecting pending suits.—Williams v. Oates, supra.

Statute as denying substantial right

Gen.Acts 1923 p 629, authorizing sheriff's deed properly executed to be received without independent proof of proceedings recited therein does not, in establishing a prima facie rule of evidence, deny any substantive right.—Williams v. Oates, supra.

1. Idaho.—Jorgensen v. McAllister, 202 P. 1059, 1061, 34 Idaho 182, citing **Corpus Juris.**
Tex.—Adcock v. Shell, Civ.App., 273 S.W. 900—Flenniken v. Foote, Civ. App., 270 S.W. 903.
22 C.J. p 932 note 27.

2. Tex.—Toplitz v. Porter, Civ.App., 102 S.W.2d 482.
22 C.J. p 933 note 28.

3. Miss.—Nixon v. Porter, 34 Miss. 697, 69 Am.D. 408.
22 C.J. p 933 note 29.

4. Ga.—Fordham v. Dixon, 110 S.E. 8, 152 Ga. 369.
W.Va.—Hagan v. Holderby, 57 S.E. 289, 62 W.Va. 106, 125 Am.S.R. 960.

5. Idaho.—Jorgensen v. McAllister, 202 P. 1059, 1061, 34 Idaho 182, citing **Corpus Juris.**
22 C.J. p 933 note 31.

6. Ga.—Irby v. Gardner, 56 Ga. 643.
22 C.J. p 933 note 32.

7. W.Va.—Furbee v. Foggin, 124 S.E. 828, 97 W.Va. 262.

8. W.Va.—Furbee v. Foggin, supra.

Details which should be shown

Where defendant in ejectment was stranger to suit in which special commissioner's deed was authorized and made, all the record must be produced, or enough thereof to show that parties holding title and land itself were before the court, and that land was decreed sold, was sold, sale confirmed, and deed authorized.—Furbee v. Foggin, supra.

9. Idaho.—Jorgensen v. McAllister, 202 P. 1059, 1061, 34 Idaho 182, citing **Corpus Juris.**
Mich.—Chapman v. Crooks, 2 N.W. 924, 41 Mich. 595.

10. Ga.—Bryan v. Morris, 84 S.E. 120, 143 Ga. 70.
22 C.J. p 932 note 25.

11. Idaho.—Jorgensen v. McAllister, 202 P. 1059, 1061, 34 Idaho 182, citing **Corpus Juris.**
22 C.J. p 932 note 26.

12. Ga.—Hilton & Dodge Lumber Co. v. Alwood, 81 S.E. 1119, 141 Ga. 653.

13. Ga.—Bunger v. Grimm, 83 S.E. 200, 142 Ga. 448, Ann.Cas.1916C 173.

14. Ill.—Anderson v. McCormick, 21 N.E. 803, 129 Ill. 308.
22 C.J. p 933 note 33.

15. Kan.—Bowman v. Cockrill, 6 Kan. 311.

16. U.S.—Williams v. Conger, Tex., 8 S.Ct. 933, 125 U.S. 397, 31 L.Ed. 778.
22 C.J. p 854 note 33.

17. U.S.—Montemayor e Hijos v. U. S., 24 C.C.P.A.(Customs) 7.

Translation unauthenticated and document irrelevant

In suit for specific performance of oral contract to lease oil and mineral rights underlying Cuban land, certificate of registrar in Cuba and English translation thereof was inadmissible to show interest of defendant in lands involved, where translation of foreign language was

ments of a state[18] should be excluded.

§ 644. —— Of What Record Is Evidence

A public record is evidence of matters properly recorded therein, but is not evidence of matters improperly in the record or incidentally noted thereon.

A public record is evidence of those matters which are properly incorporated therein,[19] and in proper cases may be introduced to show financial condition,[20] ownership,[21] or other facts indicated.[22] A public record is not, however, evidence of matters incidentally noted therein, or not properly belonging in the record,[23] nor may a report embodying conclusions of public officers be admitted as evidence of facts.[24]

Under a statute providing that the town clerk's record of a birth, marriage, or death shall be prima facie evidence of the fact, the common-law rule that admits official records as prima facie evidence of all facts required by law to be reported still prevails, and such records are not evidence merely of the single fact of birth, marriage, or death, but may be admitted as evidence of time, place, or other details required to be reported in connection with such events.[25]

§ 645. —— Explanation of Document by Custodian

A public record or document offered in evidence may be explained by its custodian.

Where a public record or document is offered in evidence, the custodian thereof may tell the jury, ore tenus, what is the true entry, if the writing cannot be easily read, or, by the custom of the office, some sign is used to supply the place of an omitted word.[26]

§ 646. Incomplete or Altered Records

Incomplete public records and mere extracts are generally inadmissible, although such incomplete records may be admissible where the whole record is available to the other party.

As a general rule mere extracts or partial or incomplete public records are inadmissible; the entire record or a duly authenticated copy thereof must be produced.[27] However, it is no objection that extracts only are read from a public record offered in evidence, where the entire record is produced or is available and open to the use of the objecting party;[28] and, in a case where a judgment authorized a commissioner to make a conveyance, a deed by the commissioner bearing the court's approval was held to be properly admitted in evidence without a copy of the order approving the deed.[29] A permit regular on its face may be admissible without production of other documents relating to its issuance.[30]

Altered documents. Where a record offered in evidence is interlined, erased, or mutilated, the interlineations or erasures should as a general rule be

not properly authenticated or proved, instrument was not offered in compliance with any law of state, question of defendant's title was not involved, and interest claimed by defendant was not derived from Cuban government.—Alexander v. Bess, 167 So. 533, 123 Fla. 713.

18. W.Va.—Cunningham v. Donelson, 143 S.E. 345, 105 W.Va. 536.

19. Conn.—Gett v. Isaacson, 120 A. 156, 158, 98 Conn. 539, citing **Corpus Juris**.
N.H.—Hoban v. Bucklin, 184 A. 362, 88 N.H. 73, modified on other grounds 186 A. 8, 88 N.H. 73.
Tex.—Yakey v. Chapman Milling Co., Civ.App., 74 S.W.2d 148, error dismissed.
22 C.J. p 814 note 29.

20. Ind.—Mooresville Bldg., Savings & Loan Ass'n v. Thompson, 9 N.E.2d 101, 212 Ind. 306.

21. D.C.—Curry v. Stevenson, 26 F.2d 534, 58 App.D.C. 162.

Automobile license records
In an action for injuries sustained in an automobile accident, a witness having testified to the license number of the car, the automobile commissioner's records are admissible in evidence to show the ownership of such car.—East Baltimore Transfer Co. v. Goeb, 118 A. 74, 140 Md. 534.

22. **Date of mailing**
Post office receipts may be introduced to show date of mailing matter.—Atwell Printing & Binding Co. v. Prairie Farmer Pub. Co., 246 Ill. App. 100.

Protest of note
Record book kept by notary public was properly admitted to show note had been duly protested, in view of Const.Amendm. art 4, entries being deemed original acts.—Prudential Trust Co. v. Coghlin, 144 N.E. 283, 249 Mass. 184.

23. Mich.—Michigan Bankers' Ass'n v. Ocean Accident & Guarantee Corporation, 264 N.W. 868, 274 Mich. 470.
N.J.—Kiely v. MacMurray, 139 A. 343, 5 N.J.Misc. 1091.
22 C.J. p 814 note 30.

Applications for driver's license were not evidential as to age of police chief sought to be retired.—Kiely v. MacMurray, supra.

24. Ind.—Barr v. Bennington, 192 N.E. 441, 207 Ind. 268.
N.Y.—Kahle v. Mount Vernon Trust Co., 22 N.Y.S.2d 454.

25. N.H.—Abbott v. Prudential Ins. Co. of America, 195 A. 413, 89 N.H. 149.

26. N.C.—Springs v. Schenck, 11 S.E. 646, 106 N.C. 153.
22 C.J. p 814 note 31.
Parol or extrinsic evidence affecting writings see infra §§ 851–1015.

27. U.S.—U. S. v. Cummings, D.C. Pa., 25 F.Cas.No.14,900.
Me.—Hammatt v. Emerson, 27 Me. 308, 46 Am.D. 598.
N.J.—Myers v. Clark, 41 N.J.Law 486.
22 C.J. p 814 note 32.

28. Ill.—Valuch v. Rawson, 270 Ill. App. 583.
Mass.—Davis v. Mason, 4 Pick. 156.

29. Ky.—Conley v. Breathitt Coal, Iron & Lumber Co., 113 S.W. 504.

30. Ga.—W. A. Gaines & Co. v. Holmes, 114 S.E. 327, 154 Ga. 344, 27 A.L.R. 98.

Permits for transportation of liquor
On application for interlocutory injunction to restrain confiscation and destruction of whisky seized while in transit in interstate commerce, federal permits for its purchase and transportation under Volstead Act tit 2 § 3, were erroneously excluded because not accompanied by other documents, such as the applications therefor.—W. A. Gaines & Co. v. Holmes, supra.

fully and satisfactorily explained,[31] especially where it is sought by the record in such condition to contradict a certified copy, which appears to have been formally and regularly transcribed.[32] However, it has been held that the rule which excludes papers on account of an unexplained alteration applies to papers in possession of the party to be injured or benefited thereby, but not to official documents, not in the custody or under the control of the party;[33] and it has also been held that, where a public document, prepared by a sworn officer, is produced by him to whose custody the law intrusts it, the party offering it in evidence is not required to explain an alteration appearing to have been made at the same time and by the same hand as the obliterated letters and figures, there being no room for presumption that the document had been fraudulently altered.[34]

A public record book should not be excluded from the consideration of the jury merely by reason of the fact that two leaves have been cut out of the book, where there are no other suspicious circumstances and no evidence is offered tending to show whether the absent leaves contained any part of the records or were entirely blank when taken from the book.[35]

§ 647. —— Judicial Records

a. In General

The whole record of a judicial proceeding should be introduced, unless only a portion, complete in itself, is pertinent to the matter in issue.

Where judicial proceedings are offered in evidence, the whole record, or a duly authenticated copy thereof, must be produced or accounted for where the whole is essential and material, so that the court may determine the legal effect of the whole, which may differ from that of only a portion.[36] To the extent, however, that a portion of the record is complete in itself it may be admitted without production of the whole.[37] If the whole of the record cannot have any bearing on the matter in issue, the material and relevant portions of the record are admissible alone,[38] as, for instance, pleadings or depositions in the cause offered to show admissions by the parties.[39] Indeed in some of the decisions the rule has been broadly stated that a party is required to introduce in evidence so much of the record only as is necessary to sustain the issues in his behalf,[40] at least if the record is divisible into distinct parts.[41]

Where one party has introduced a part of a record, it is open to the other party to introduce the remainder if it contains matter material to his

31. N.M.—Coler v. Santa Fe County, 27 P. 619, 6 N.M. 88.
22 C.J. p 815 note 35.

Record explaining erasure

A judgment is properly admitted in evidence in a suit to enforce it, notwithstanding the names of two defendants who were dismissed from the case before judgment were erased from the title of the cause, where the erasure is explained by the record.—Reeves v. Mercer, 155 Ill.App. 57.

32. Or.—Dolph v. Barney, 5 Or. 191

33. N.Y.—Devoy v. Mayor, etc., of N. Y., 35 Barb. 264, 22 How.Pr. 226, affirmed 36 N.Y. 449.

Oath of clerk of police court is not inadmissible for lack of explanation of an alteration in the date of the jurat.—Devoy v. Mayor, etc., of N. Y., supra.

34. Wyo.—Campbell v. Wyoming Development Co., 100 P.2d 124, 136, citing **Corpus Juris**, and rehearing denied 102 P.2d 745, 55 Wyo. 347.
22 C.J. p 815 note 37.

35. Ill.—People v. Hancock County, 21 Ill.App. 271.

36. Ga.—Joiner v. Southern Land Sales Corporation, 124 S.E. 518, 158 Ga. 752.
Ky.—Watkins v. Northern Coal & Coke Co., 119 S.W. 225, 132 Ky. 700, 116 S.W. 1192.
Mich.—Plat v. Stewart, 10 Mich. 260.
22 C.J. p 815 note 39.

Parol evidence to explain nonproduction of record

Where the whole record cannot be produced because lost, the court should admit parol evidence in explanation of the failure to offer the whole record.—Joiner v. Southern Land Sales Corporation, 124 S.E. 518, 158 Ga. 752.

37. Ind.—Closson v. Bligh, 83 N.E. 263, 41 Ind.App. 14.
22 C.J. p 815 note 40.

38. Conn.—Baker v. Paradiso, 169 A. 272, 117 Conn. 539—Appeal of Gilman, 161 A. 845, 115 Conn. 724.
Mont.—Ragsdale v. Bothman, 263 P. 972, 975, 81 Mont. 408, citing **Corpus Juris**.
22 C.J. p 816 note 41.

"If the record offered in evidence is complete, that is to say, if in itself it tends to prove the point in issue without reference to, or aid from, other parts of the record, and it is properly identified and authenticated, it should be admitted."—Ragsdale v. Bothman, supra.

Where only a few papers are relevant, and they may be secured for use on the trial and understood without seeing the remainder of the record, the entire record should not be admitted.—Sands v. Saltsman, 139 N.Y.S. 862—22 C.J. p 796 note 51.

Appointment and decree admissible without remainder of record

In will contest, admitting in evidence, as bearing on testamentary capacity, copy of testator's appointment as committee of sister's person and property and decree accepting his final account, is not erroneous, although whole record of proceedings was not offered.—Appeal of Gilman, 161 A. 845, 115 Conn. 724.

39. Ala.—Gay v. Rogers, 20 So. 37, 109 Ala. 624.
N.C.—Wade v. McLean Contracting Co., 62 S.E. 919, 149 N.C. 177.
22 C.J. p 816 note 42.

40. Mont.—Ragsdale v. Bothman, 263 P. 972, 975, 81 Mont. 408, citing **Corpus Juris**.
22 C.J. p 816 note 43.

41. Kan.—Haynes v. Cowen, 15 Kan. 637.
Mont.—Ragsdale v. Bothman, 263 P. 972, 975, 81 Mont. 408, citing **Corpus Juris**.

side of the case.[42] It has been held that a record which does not contain a writ, or show a service or an appearance of the party, or any issue, or any act done by attorney, is not admissible, although it states that "the parties appeared by their attorneys."[43]

b. Judgments and Verdicts

Under certain circumstances the complete record of a judgment must be introduced, but in other cases the judgment alone is sufficient. A verdict is not evidence without the judgment, but the verdict alone may be admissible as evidence of the existence of a suit and the fact that a verdict was obtained.

Where a judgment is relied on as an estoppel, as an adjudication on the subject matter, or as establishing any particular state of facts of which it is the judicial result, it can be proved only by offering in evidence a complete record or a duly authenticated copy of the entire proceedings in which the judgment was rendered;[44] but when the evidence is sought to be used for a collateral purpose only, and the only relevant fact in issue is whether a judgment has in fact been rendered, it being desired merely to prove the existence and contents of a judgment, nothing need be produced but the judgment entry if the court is a court of record possessing general original jurisdiction,[45] especially if there is enough on the record produced to show a valid judgment after service of process or the appearance of the parties.[46] Thus, in an action on an injunction bond, the decree or other extracts from the record of the injunction cause are admissible to show either pendency or decision of the cause,[47] although it has been held that the whole record must be produced in order to show dissolution of an injunction.[48] The rule has also been applied in an action brought on a judgment of another court,[49] and it has been held not necessary to produce the entire record where the object is merely to show a decree which ex proprio vigore vests title to property,[50] or which directs a deed to be made, if sufficiently describing the land.[51]

It has also been held not necessary to produce the entire record where the object is to show a judgment to support an execution in favor of the purchaser at the execution sale,[52] although there is authority for the contrary view.[53] Where it is only necessary for a party to show that he has been made liable to pay a sum of money in the character of executor or administrator by a judgment or decree, the record of such judgment or decree or a duly authenticated copy thereof is sufficient;[54] and a judgment entry has been held sufficient to establish the rendition of a judgment for the purpose of showing a devastavit in an action on an administrator's bond.[55]

Inferior court. In order to render the judgment or decree of a court of inferior or limited jurisdiction admissible, the record must be sufficiently complete to show that the court had jurisdiction of the subject matter and of the parties.[56]

Unattested judgment. A statute requiring attestation of judgments by the clerk of the court has been held not to render inadmissible an unattested judgment filed and docketed prior to its enactment.[57]

Verdicts. While the rule is sometimes stated that a verdict is not evidence without showing a judgment upon it, because it cannot appear but that the verdict has been set aside or the judgment arrested,[58] and that without the judgment the verdict is not evidence of the facts found by it,[59] yet the mere record of a verdict has been held admissible as evidence of the existence of a suit and the fact that

42. Ind.—Bryan v. Reiff, 150 N.E. 800, 84 Ind.App. 516.
Mont.—Ragsdale v. Bothman, 263 P. 972, 81 Mont. 408.
Philippine.—Matias v. Alvarez, 10 Philippine 398, 6 Off.Gaz. 666.
22 C.J. p 816 note 45.

43. U.S.—Buford v. Hickman, Ark., 4 F.Cas.No.2,114a, Hempst. 232.

44. Colo.—McLaughlin v. Reichenbach, 122 P. 47, 52 Colo. 437.
Ga.—Joiner v. Southern Land Sales Corporation, 124 S.E. 518, 158 Ga. 752.
22 C.J. p 816 note 47.
Proof of judgment as bar or estoppel by record or by extrinsic evidence see the C.J.S. title Judgments § 838, also 34 C.J. p 1068 note 87–p 1069 note 91.

45. Tex.—Jones v. Watkins, Civ. App., 97 S.W.2d 1027, error dismissed.
22 C.J. p 817 note 48.

46. Ill.—Phillips v. Webster, 85 Ill. 146.
22 C.J. p 817 note 49.

47. Ala.—Adams v. Olive, 62 Ala. 418.
Va.—White v. Clay, 7 Leigh 68, 34 Va. 68.

48. Tenn.—King v. Cox, 151 S.W. 58, 126 Tenn. 553.

49. Ga.—Little Rock Cooperage Co. v. Hodge, 37 S.E. 743, 112 Ga. 521.
22 C.J. p 817 note 52.

50. Ark.—Wilson v. Spring, 39 Ark. 181.

51. W.Va.—Guinn v. Bowers, 29 S. E. 1027, 44 W.Va. 507.
22 C.J. p 817 note 54.

52. Miss.—Cockerel v. Wynn, 20 Miss. 117.
22 C.J. p 817 note 55.

53. Cal.—Harper v. Rowe, 53 Cal. 233.
22 C.J. p 817 note 56.

54. Ky.—Chinn v. Caldwell, 4 Bibb 543.

55. Ky.—Chinn v. Caldwell, supra

56. Wis.—Wells v. American Express Co., 11 N.W. 537, 12 N.W. 441, 55 Wis. 23, 42 Am.R. 695.
22 C.J. p 817 note 59.

57. S.D.—La Penotiere v. Kellar. 137 N.W. 382, 29 S.D. 496.

58. Ga.—Mitchell v. Mitchell, 40 Ga. 11.
Ky.—Donaldson v. Jude, 2 Bibb 57.

59. Tex.—Fowler v. Stonum, 6 Tex. 60.

a verdict was obtained, apart from any question of the facts adjudicated.[60]

c. Executions

To be admissible, an execution should ordinarily be accompanied by the judgment on which it is founded, although there may be cases in which the execution is admissible without the judgment.

While it has been laid down as a general rule that an execution is inadmissible in evidence unless it is accompanied by the judgment upon which it is founded,[61] it has been held that, on a trial of the right of property between a claimant and a plaintiff in execution, it does not devolve upon the latter to produce the judgment on which the execution issued, but the production of the execution is sufficient.[62] It has also been held that where an officer sues a stranger for taking goods from his possession which he had seized by virtue of an execution, the production of the execution without the judgment is sufficient to support his right of action,[63] and that in an action against an officer by a person against whom an execution has been levied, the officer may justify his act done in obedience to the writ of execution by producing the writ without the judgment.[64]

It has been held that an execution should not be offered in evidence without a proper return attached thereto.[65]

d. Effect of Recitals in Judgment

The absence of an entire record may be supplied by recitals in the judgment or decree of all of the essential facts.

It has been held that the absence of an entire record may be supplied by recitals in the judgment or decree of all the essential facts, jurisdictional or otherwise.[66] Thus, where the judgment or decree on which the party adducing it in a collateral action relies as a muniment of title or as a link in a chain of title recites all essential facts, jurisdictional or otherwise, with regard to the proceedings in which it was rendered, the record of such judgment or decree, or a duly authenticated copy thereof, is admissible as prima facie evidence at least, without producing a complete record or transcript of the proceedings.[67] Recitals, in the decree of a court of inferior or limited jurisdiction, of the facts necessary to give jurisdiction are evidence of these facts, subject, however, to contradiction.[68]

§ 648. Character of Record as Primary or Secondary Evidence

Ordinarily judicial and other public records are the best, or primary, evidence of the matters therein contained, although there may be cases in which such records are admissible as secondary evidence.

It is obvious from the nature and characteristics of judicial and other public records that they must, as a general rule, be the best, or primary, evidence of the matters which are therein set forth;[69] but there may be cases in which such records are admissible as secondary evidence,[70] although, where a record is produced by a party to prove a particular fact, the opposite party is not entitled to avail himself of it as proof of other facts, as to which he could not otherwise have used it as primary evidence.[71]

C. AUTHENTICATED TRANSCRIPT OR COPIES

§ 649. Public Records and Documents Generally

A copy of a public record, when properly authenticated, and not otherwise, is admissible equally with the original, and is generally regarded as primary evidence.

It is a well established rule that, in view of the

60. Mich.—McLeod v. Crosby, 87 N. W. 883, 128 Mich. 641.
22 C.J. p 818 note 62.

Verdict to show payment of costs
Verdict in a former ejectment suit for the same land, brought by persons to whom the present parties are privies, is admissible, although no judgment had been entered, to establish the fact of payment of costs in that suit and to account for defendant coming into possession, and of plaintiff's acquiescence in the adverse title.—Shaeffer v. Kreitzer, 6 Binn. (Pa.) 430.

61. U.S.—Campbell v. Strong, Ark. Super., 4 F.Cas.No.2,367a, Hempst. 265.
22 C.J. p 818 note 63.

62. Ala.—Carlton v. King, 1 Stew. & P. 472, 23 Am.D. 295.
Ga.—Deloach v. Myrick, 6 Ga. 410.

63. N.Y.—Spoor v. Holland, 8 Wend. 445, 24 Am.D. 37.
22 C.J. p 818 note 65.

64. Ga.—Deloach v. Myrick, 6 Ga. 410.
S.C.—Hunter v. McElhany, 4 S.C.L. 103.

65. S.D.—Black Hills Brewing Co. v. Middle West F. Ins. Co., 141 N. W. 358, 140 N.W. 687, 31 S.D. 318.

66. Cal.—Simmons v. Threshour, 50 P. 312, 118 Cal. 100.
22 C.J. p 818 note 69.

67. U.S.—Koons v. Bryson, C.C.A. N.C., 69 F. 297, 16 C.C.A. 227.
22 C.J. p 818 note 70.

68. Wyo.—Campbell v. Wyoming Development Co., 100 P.2d 124, 135, 55 Wyo. 347, citing Corpus Juris, and rehearing denied 102 P.2d 745, 55 Wyo. 347.
22 C.J. p 818 note 71.

69. Mo.—Gosnell v. Camden Fire Ins. Ass'n of Camden, App., 109 S.W.2d 59.
Mont.—Spencer v. Spencer, 79 P. 320, 31 Mont. 631.
22 C.J. p 818 note 73.
Records of private writings as primary evidence see supra § 641.

70. U.S.—Ariasi v. Orient Ins. Co., C.C.A.Cal., 50 F.2d 548.
22 C.J. p 819 note 74.

71. Ala.—Herndon v. Givens, 16 Ala. 261.

obvious impropriety of allowing public records to be removed from the care of their proper custodian, or from their usual place of deposit, whenever they are needed for use as evidence,[72] the contents of a public record or document may be proved by a properly authenticated copy thereof,[73] whenever the original record or document would be evidence if produced.[74] However, an unauthenticated copy of a public record or document is not admissible.[75]

Grade of evidence. Although it has been asserted that copies of a public record are in the nature of secondary evidence,[76] it has also been held that properly authenticated copies are admissible without producing or accounting for the original;[77] and the general rule is, sometimes by express statute,[78] that a duly certified copy of a public record is of the same dignity as the original and is to be regarded as the best evidence or primary evidence.[79]

Superfluous matter. The fact that a transcript contains matter irregularly there will not vitiate it so as to require its entire exclusion,[80] except where the superfluous matter is incompetent and is so intermingled as to be inseparable.[81]

72. Tex.—Texas & P. R. Co. v. Graham, Civ.App., 174 S.W. 297.
22 C.J. p 819 note 76.

73. U.S.—State of New Mexico v. State of Texas, 48 S.Ct. 126, 275 U S. 279, 72 L.Ed. 280, modified on other grounds 48 S.Ct. 344, 276 U.S. 558, 72 L.Ed. 699—U. S. v. Bass, C.C.A.Ind., 64 F.2d 467.
Ala.—Hamrick v. Town of Albertville, 122 So. 448, 219 Ala. 465.
Ind.—Bates Motor Transport Lines v. Mayer, 14 N.E.2d 91, 213 Ind. 664.
N.J.—Katz v. New York Life Ins. Co., 19 A.2d 830, 126 N.J.Law 370, affirming 15 A.2d 898, 125 N.J.Law 358—State v. Hutchinson, 10 N.J. Law 242.
Okl.—In re State Question No. 236, Referendum Petition No. 73, 82 P.2d 1017, 183 Okl. 355.
Tex.—Harding v. Raymondville Independent School Dist., Civ.App., 51 S.W.2d 826, error dismissed—Texas Employers' Ins. Ass'n v. Perry, Civ.App., 35 S.W.2d 1087, error refused.
Va.—P. R. Smith Motor Sales v. Lay, 3 S.E.2d 190, 173 Va. 117.
22 C.J. p 819 note 77.

Report of accident filed with road department
In action for injuries sustained by pedestrian who was struck by automobile at street intersection, authenticated copy of report of accident filed with road department pursuant to statute was properly admitted.—Carnahan v. Monroe, 185 S. E. 234, 117 W.Va. 279.

Use of copy on motion
Authentication is as necessary for a document used on a motion as for one offered as evidence on a trial.—Martens v. Martens, 31 N.E.2d 489, 284 N.Y. 363, reversing 20 N.Y.S.2d 206, 260 App.Div. 30, and reargument denied 33 N.E.2d 542.

74. Okl.—Ross v. Ross, 54 P.2d 611, 613, 175 Okl. 633, citing **Corpus Juris.**
22 C.J. p 820 note 78.

Inadmissibility of original
(1) Where original would be inadmissible, copy is inadmissible.
N.J.—Michael v. Scatuorchio, Inc., v. New York, S. & W. R. Co., 159 A. 704, 10 N.J.Misc. 528.
Wis.—In re Porter's Will, 190 N.W. 473, 178 Wis. 556.

(2) The federal statute making admissible in evidence authenticated copies of any public record or public document in any of the executive departments was not intended to abolish all rules against admitting hearsay evidence or to make admissible opinions formed by executive officers from their hearing of testimony in an ex parte proceeding in which the person condemned was not afforded an opportunity to be present in person or represented by counsel.—Fegan v. Lykes Bros. S. S. Co., 199 So. 635, 196 La. 541, remanding cause, App., 195 So. 392, mandate conformed to 199 So. 680, modified on other grounds, Sup., 3 So.2d 632.

(3) Under statute providing that carrier's report of accident shall not be admissible in any suit for damages arising from such accident, copy of such report is a fortiori inadmissible.—Louisville & N. R. Co. v. Grant, 27 S.W.2d 980, 234 Ky. 276.

(4) In quo warranto to test title to office of sheriff to which defendant had been declared elected, photostatic copy of private document prepared by deputy county clerk which was claimed to be a résumé of missing poll books was held inadmissible. where clerk was neither required nor authorized to prepare such document.—Behrendt v. Wilcox, 269 N.W. 155, 277 Mich. 232.

75. Ala.—Ratliff v. City of Bessemer, 88 So. 208, 17 Ala.App. 632.
D.C.—Arnold v. Thompson & Spear Co., 279 F. 307, 51 App.D.C. 325.
Ky.—Gus Datillo Fruit Co. v. Illinois Cent. R. Co., 299 S.W. 1089, 222 Ky. 41.
La.—District Grand Lodge No. 21, G. U. O. O. F. of Louisiana v. Edwards, App., 161 So. 206.
Tex.—Great American Indemnity Co. v. Dabney, Civ.App., 128 S.W.2d 496, error dismissed, judgment correct—Kerr v Dorchester, Civ. App., 93 S.W.2d 758, error dismissed.
22 C.J. p 820 note 81.

Printed copies of bulletins issued by United States health service and not certified were inadmissible in compensation proceeding.—Creamery Package Mfg. Co. v. Industrial Commission, 248 N.W. 140, 211 Wis. 326.

76. N.Y.—Matter of Webster, 94 N. Y.S. 1050, 106 App.Div. 360, affirmed 79 N.E. 1118, 186 N.Y. 549.
N.D.—Sykes v. Beck, 96 N.W. 844, 12 N.D. 242.
22 C.J. p 823 note 3.

Carbon copy of ordinance
In suit by village, court properly excluded offer in evidence of carbon copy of an alleged original ordinance of village, where records of village board were available.—Village of Deshler v. Southern Nebraska Power Co., 277 N.W. 77, 133 Neb. 778.

Copy of tax receipt
Tex.—Linden Lumber Co. v. Johnston, Civ.App., 128 S.W.2d 121. Error dismissed.

77. Kan.—Metzger v. Burnett, 48 P. 599, 5 Kan.App. 374.
Tex.—Van Sickle v. Catlett, 13 S. W. 31, 75 Tex. 404.

78. Ind.—State Board of Tax Com'rs v. McDaniel, 160 N.E. 347, 199 Ind. 708.
22 C.J. p 823 note 5.

79. Okl.—Hynds v. Walker, 299 P. 905, 149 Okl. 195.
R.I.—Michaels-Bauer v. Doughty, 124 A. 253, 45 R.I. 510.
22 C.J. p 823 note 4.

80. U.S.—U. S. v. Pierson, Colo., 145 F. 814, 76 C.C.A. 390.
22 C.J. p 823 note 1.

81. Me.—Pike v. Crehore, 40 Me. 503.

Part unauthenticated
Where there are, in document sought to be introduced, papers which are not legally authenticated, and which are consequently incompetent, and these papers are offered with others in document to which

Copy of part of record. Where public records are contained in a record book, copies of so much of the records as relates to the subject matter in litigation or as constitutes a distinct and independent record are admissible.[82]

Obliteration or illegibility of part of a record does not preclude the admission of a certified copy.[83]

§ 650. —— Sworn or Examined Copies

Ordinarily public records or documents may be proved by sworn or examined copies.

In the absence of statute making certified copies the only method of proof, proof of public records or documents may be made by examined copies sworn to by the custodian of the record or any competent witness,[84] especially where the officer is not allowed to produce the original or to furnish copies.[85] Such evidence is not excluded by a statute making certified copies admissible.[86] An examined copy can be authenticated only by proof of comparison with the original, and not by proof of comparison with some other copy.[87]

§ 651. —— Certified Copies

In general, under or apart from statute, properly certified copies of public records or documents are admissible in evidence equally with the original. Authorities differ as to whether such copies are admissible to prove the facts stated therein.

Under statutes so providing, properly certified copies of public records or documents are receivable in evidence, either generally or in certain specified instances;[88] and while some authorities have held that a certified copy is not receivable in evi-

objection might not apply, in such manner that they must all go to jury together, without anything to indicate which are and which are not proper for consideration, the whole document is properly excluded.—Pike v. Crehore, supra.

82. N.H.—Woods v. Banks, 14 N.H. 101.
22 C.J. p 821 note 83.

83. N.H.—Willey v. Portsmouth, 35 N.H. 303.
Pa.—Jones v. Hollopeter, 10 Serg. & R. 326.
22 C.J. p 821 note 82.

84. N.M.—Anthony Doll & Co. v. Hogan, 53 P.2d 649, 650, 40 N.M. 55, citing **Corpus Juris.**
Okl.—In re State Question No. 236, Referendum Petition No. 73, 82 P.2d 1017, 183 Okl. 355.
Tex.—Hanover Fire Ins. Co. v. Slaughter, Civ.App., 111 S.W.2d 362, 366, citing **Corpus Juris**—Von Schoech v. Herald News Co., Civ.App., 237 S.W. 651, dismissed for want of jurisdiction.
22 C.J. p 821 note 84.

85. Kan.—State v. Schaeffer, 86 P. 477, 74 Kan. 390.
22 C.J. p 821 note 85.

86. Okl.—In re State Question No. 236, Referendum Petition No. 73, 82 P.2d 1017, 183 Okl. 355.
22 C.J. p 821 note 86.

87. Tex.—Grimes v. Bastrop, 26 Tex. 310.
22 C.J. p 821 note 87.

88. Ala.—Walker County v. Burdeshaw, 169 So. 227, 232 Ala. 621——Sims v. Kent, 130 So. 213, 221 Ala. 589—Butler Cotton Oil Co. v. Brooks, 94 So. 518, 208 Ala. 386—Stewart Bros. v. Ransom, 87 So. 89, 204 Ala. 589—Young v. Koonce, 162 So. 680, 26 Ala.App. 491.
Cal.—Stokes v. Watkinson, 201 P. 134, 53 Cal.App. 764.
Fla.—Semi-Tropical Land Co. v. City of Jacksonville, 162 So. 692, 120 Fla. 425—Gwynn v. Hardee, 110 So. 343, 92 Fla. 543.
Idaho.—Ferguson Fruit & Land Co. v. Goodding, 258 P. 557, 44 Idaho 76.
Ill.—Kern v. Chicago Co-op. Brewing Ass'n, 40 Ill.App. 356, affirmed 29 N.E. 1035, 140 Ill. 371.
Ind.—State Board of Tax Com'rs v. McDaniel, 160 N.E. 347, 199 Ind. 708.
Iowa.—Bristow v. Lange, 266 N.W. 808, 811, 221 Iowa 904, quoting **Corpus Juris.**
Kan.—State v. France, 72 P.2d 1001, 146 Kan. 651.
Ky.—Huffman v. National Surety Co., 51 S.W.2d 950, 244 Ky. 714.
Mo.—Herrington v. Hoey, 139 S.W.2d 477, 345 Mo. 1108—Little River Drainage Dist. v. Houck, App., 137 S.W.2d 656.
Mont.—Kibble v. Morris, 53 P.2d 1150, 101 Mont. 308.
Okl.—Long v. Brown, 98 P.2d 28, 186 Okl. 407—Kansas City Life Ins. Co. v. Meador, 98 P.2d 20, 186 Okl. 397—In re State Question No. 236, Referendum Petition No. 73, 82 P.2d 1017, 183 Okl. 355—Holmes v. Nelson, 76 P.2d 1076, 182 Okl. 166.
S.C.—State v. Bowen, 98 S.E. 864, 112 S.C. 165.
S.D.—J. F. Anderson Lumber Co. v. National Surety Co., 207 N.W. 53, 49 S.D. 235.
Tex.—Baldwin v. Chambers, Civ.App., 36 S.W.2d 531—Texas Employers' Ins. Ass'n v. Pierce, Civ.App., 254 S.W. 1019—Findlay v. State, Civ.App., 238 S.W. 956, rehearing overruled 239 S.W. 996, affirmed 250 S.W. 651, 113 Tex. 30—Golden Rod Oil Co. No. 1 v. Noble, Civ.App., 233 S.W. 524, dismissed for want of jurisdiction.
Wash.—Grant v. Fisher Flouring Mills Co., 68 P.2d 210, 190 Wash. 356.
22 C.J. p 822 note 89.

Statute as repealing prior statute

An act authorizing admission of copy of charity hospital record in evidence impliedly repeals act exempting public hospital records from provisions of another act designating public records available for public use.—Sampson v. Life & Casualty Ins. Co. of Tennessee, La.App., 175 So. 148.

What constitutes "public document"

(1) The term "document", as used in such statute, means any matter expressed or described on any substance by means of letters, figures, or marks, or by more than one of these means, intended to be used for purpose of recording that matter.—In re Kostohris' Estate, 29 P.2d 829, 96 Mont. 226.

(2) "A register kept by a drawtender, even if he is required by revised ordinances of the city to make certain entries by way of comment in the nature of a ship's log, is not a public document" within the meaning of the statute.—Butchers' Slaughtering & Melting Ass'n v. City of Boston, 101 N.E. 426, 427, 214 Mass. 254.

Filing and notice

Where statute authorizes admission of certified copies in evidence provided they are filed and specified notice given, such statutory requirements must be complied with in order to render copies admissible.—Lamar v. State, 95 S.W. 509, 49 Tex. Cr. 563—22 C.J. p 823 note 98.

Right of court to demand original

Under statute containing proviso to that effect, court or judge may require party offering certified copy to produce or account for original.—Thomas v. Williamson, 40 So. 831, 51 Fla. 332—22 C.J. p 823 note 99.

dence, unless by virtue of a statute permitting the certification,[89] or making such certified copy admissible,[90] it is commonly held that the same rule prevails apart from or without reference to statute.[91] Generally, the admissibility of a certified copy of a public record depends on the admissibility of the original, and the copy is not admissible where the original would not be.[92] Thus a certified copy of

Federal records and documents

(1) Under federal statute to that effect copies of books, records, papers, or documents in any federal executive department, properly authenticated, are admissible equally with the originals.
U.S.—Sprencel v. U. S., C.C.A.Tex., 47 F.2d 501—Bowling v. U. S., C.C.A.Okl., 299 F. 438—Cassarello v. U. S., D.C.Pa., 271 F. 486, affirmed, C.C.A., 279 F. 396.
Ark.—Caldwell v. St. Louis Joint Stock Land Bank, 62 S.W.2d 39, 187 Ark. 832.
22 C.J. p 822 note 89 [b].

(2) A similar rule prevails in many states under similar statutes.
Miss.—Mobile & O. R. Co. v. Jensen, 139 So. 840, 162 Miss. 741.
N.D.—First Nat. Holding Co. of Lisbon v. Moore, 232 N.W. 310, 60 N. D. 27.
Okl.—In re McDade's Estate, 218 P. 532, 95 Okl. 120.

(3) However, this rule does not apply to documents or papers incidentally lodged in executive department and forming no part of official records required to be kept under governing statutes and regulations.—U. S. v. Johnson, C.C.A. Neb., 72 F.2d 614.

(4) Moreover, since admissibility of certified copies of public documents is based on general principles, and is not dependent on statute, certified copies of documents of bodies other than executive departments are also admissible.—Lembeck v. U. S. Shipping Board Emergency Fleet Corporation, C.C.A.N.Y., 9 F.2d 558.

(5) Evidence of report for publication issued by United States government was held admissible, where it purported to give data taken from records of department of interior, and plaintiff agreed that it should be treated as a copy of the original, duly certified by such department.—American Sulphur Royalty Co. of Texas v. Freeport Sulphur Co., Civ. App., 276 S.W. 448, affirmed 6 S.W.2d 1039, 117 Tex. 439, 60 A.L.R. 890.

Particular records or documents

(1) Birth certificate.
Miss.—Life & Casualty Ins. Co. v. Walters, 177 So. 47, 180 Miss. 384.
N.J.—Katz v. New York Life Ins. Co 19 A.2d 830, 126 N.J.Law 370, affirming 15 A.2d 898, 125 N.J.Law 358.

(2) Constitution and by-laws of benefit society.—Beason v. Sovereign Camp, W. O. W., 94 So. 123, 208 Ala. 276.

(3) Delinquent tax rolls.—Texas Land & Cattle Co. v. City of Fort Worth, Tex.Civ.App., 73 S.W.2d 860, error refused, appeal dismissed 55 S. Ct. 658, 295 U.S. 716, 79 L.Ed. 1672, rehearing denied 55 S.Ct. 913, 295 U.S. 769, 79 L.Ed. 1710.

(4) Government checks or vouchers covering compensation payments to war veteran's guardian.—In re Kostohris' Estate, 29 P.2d 829, 96 Mont. 226.

(5) Health department record as to examination of certain person.—Woodmen of the World Life Ins. Soc. v. Guyton, 194 So. 655, 239 Ala. 216—National Life & Accident Ins. Co. v. Blanchard, 196 So. 171, 29 Ala. App. 372.

(6) Maps properly prepared and filed pursuant to statute.
Cal.—Miller v. Murphy, 248 P. 934, 78 Cal.App. 751.
Tex.—Fenzl v. City of Houston, Civ. App., 63 S.W.2d 729, error refused.

(7) Proceedings before county commissioners.—Massachusetts Bonding & Insurance Co. v. State, 131 N.E. 398, 191 Ind. 595.

(8) Tax returns.
Ark.—Cannon v. Hope Fertilizer Co., 2 S.W.2d 1100, 176 Ark. 435.
Ga.—Bowman v. Givens, 9 S.E.2d 833, 190 Ga. 522—Jett v. Hart, 109 S.E. 654, 152 Ga. 266.

(9) Other records and documents see 22 C.J. p 822 note 89 [a].

89. N.J.—Francis v. Newark, 33 A. 853, 58 N.J.Law 522.
22 C.J. p 823 note 92.
However, it has been held, in a case in which court was unable to determine whether copy was certified or not, that a copy, properly certified, of a resolution of board of commissioners would be admissible.—Long v. Daly, 141 A. 787, 6 N.J. Misc. 495, affirmed 144 A. 588, 105 N. J.Law 492.

90. N.D.—Sykes v. Beck, 96 N.W. 844, 12 N.D. 242.
22 C.J. p 823 note 93 [a].

91. U.S.—U. S. v. Ware, C.C.A.La., 110 F.2d 739—Mosier v. Goodcell, D.C.Cal., 49 F.2d 391.
Fla.—Johns v. State, 197 So. 791.
Idaho.—Owen v. Nampa and Meridian Irr. Dist., 285 P. 464, 48 Idaho 680.
Iowa.—Bristow v. Lange, 266 N.W. 808, 811, 221 Iowa 904, quoting **Corpus Juris.**
Ky.—Louisville & N. R. Co. v. Perry Ice & Bottling Co., 10 S.W.2d 1091, 226 Ky. 286.
Mass.—American Surety Co. of New York v. 14 Canal St., 176 N.E. 785, 276 Mass. 119.
Miss.—K. C. Lumber Co. v. Moss, 80 So. 638, 119 Miss. 185.
Tex.—Zurich General Accident & Liability Ins. Co. v. Thompson, Civ. App., 47 S.W.2d 663, error dismissed.
Wash.—Bracy v. United Retail Merchants, 63 P.2d 491, 189 Wash. 162.
22 C.J. p 821 note 88, p 823 note 94.

In Georgia

(1) It has been held, apart from or without reference to statute, that a certified copy of an extract from the wild land digest is admissible.—Gordon v. Ransom & Lomax Lumber Co., 106 S.E. 176, 151 Ga. 181.

(2) It has similarly been held that a certified copy of the minutes of the mayor and board of aldermen of a city is admissible.—Western & Atlantic R. R. v. Swigert, 195 S.E. 230, 57 Ga.App. 274.

(3) However, it has also been held that a certified copy is not admissible in the absence of statute so providing.—Taylor v. Simmons, 75 Ga. 13, 14.
22 C.J. p 823 note 93.

Irregularity in copy

Omission of notary's seal from copy of public instrument held mere irregularity and immaterial, particularly where pleadings admitted that instrument was proper.—Stokes v. Watkinson, 201 P. 134, 53 Cal.App. 764.

Particular records or documents

(1) Birth certificate.—Yekcha v. Texas Co., 275 P. 312, 135 Okl. 214.

(2) Report of public utility to public service commission.—Oaktown Telephone Co. v. Miller, 194 N. E. 741, 101 Ind.App. 108, followed in Bruceville Telephone Co. v. Miller, 194 N.E. 775, 101 Ind.App. 701, and Freelandville Telephone Co. v. Miller, 194 N.E. 775, 101 Ind.App. 701.

(3) Other records or documents see 22 C.J. p 821 note 88 [a].

92. U.S.—U. S. ex rel. Esshoc v. Fluckey, C.C.A.Ohio, 19 F.2d 64.
Ala.—Fidelity-Phenix Fire Ins. Co. of New York v. Murphy, 166 So. 604, 231 Ala. 680, certiorari denied 57 S.Ct. 19, 299 U.S. 557, 81 L.Ed. 410.
Iowa.—Putnam v. Bussing, 266 N. W. 559, 221 Iowa 871.
N.Y.—Cirrincioni v. Metropolitan Life Ins. Co., 228 N.Y.S. 354, 223 App.Div. 461.
Okl.—Holmes v. Nelson, 76 P.2d 1076, 182 Okl. 166.
Tex.—Risk v. City of Shamrock, Civ. App., 61 S.W.2d 153—Commercial Standard Ins. Co. v. Noack, Civ. App., 45 S.W.2d 798, reversed on

a record will not be admissible where the record is not authorized by law,[93] or where it is not made in the manner prescribed by law,[94] or where the record contains no certificate of acknowledgment or other proof of the execution of the original.[95] As appears in § 649 supra, a duly certified copy is regarded as primary evidence.

Purpose of admission. While a certified copy of a public record or document is admissible to prove the existence of the original document,[96] and matters which may be inferred therefrom,[97] it is not ordinarily admissible to establish, as facts, the statements and figures contained in the document or record,[98] although there are some exceptions to this rule,[99] in some instances under statutes expressly so providing.[1] By statute in several states copies of records of articles of incorporation or consolidation properly certified by the secretary of state are admissible in evidence to prove the incorporation or consolidation.[2]

Copies of death certificates. In general, a certified copy of a death certificate is admissible either under a statute providing that such copy shall be admissible with the same effect as the original,[3] or under a statute providing that a certified copy shall be prima facie evidence of all facts contained therein.[4] Under the latter statute, while the copy of the certificate is not admissible to prove facts which are not required to be reported,[5] it is admissible to prove all the facts which are required to appear,[6]

other grounds, Com.App., 62 S.W. 2d 72.
22 C.J. p 823 note 95.

Sufficiency of birth certificate
Certified copy of birth certificate, subscribed and sworn to, was not inadmissible because signed by mark. —Yekcha v. Texas Co., 275 P. 312, 135 Okl. 214.

93. U.S.—Cruse v. McCauley, C.C. Mont., 96 F. 369.
Tex.—Southwestern Surety Ins. Co. v. Anderson, 155 S.W. 1176, 106 Tex. 46.
22 C.J. p 823 note 96.

94. Iowa.—Putnam v. Bussing, 266 N.W. 559, 221 Iowa 871.
22 C.J. p 823 note 97.

95. Mont.—Kibble v. Morris, 53 P.2d 1150, 101 Mont. 308.

City ordinance
(1) Failure to prove authentic original ordinance adopted by corporate actions of city authorized refusal to admit alleged copy of ordinance in evidence.—Harrison v. Central of Georgia Ry. Co., 160 S.E. 694, 44 Ga.App. 167.
(2) A document purporting to be a certified copy of a city ordinance is inadmissible where it was taken from the minutes of a city ordinance book of acts and it does not appear that the book of acts was ever adopted by the city authorities.—Western & Atlantic R. R. v. Swigert, 195 S. E. 230, 57 Ga.App. 274.

Copy of part of report
Certified photostatic copies of separate pages of report were held admissible under statute so providing as to copies of reports that had been sworn to, even though it was not affirmatively shown that report was sworn to, since propriety of report is presumed, and oath may have appeared on other page.—Commonwealth Irr. Co. v. Rio Grande Canal Water Users' Ass'n, 45 P.2d 622, 96 Colo. 478.

96. U.S.—Mohawk Condensed Milk Co., v. U. S., Ct.Cl., 48 F.2d 682.
Tex.—Traders & General Ins. Co. v. Milliken, Civ.App., 87 S.W.2d 503.

Shows existence and date of filing
of document.—Zurich General Accident & Liability Ins. Co. v. Thompson, Tex.Civ.App., 47 S.W.2d 663, error dismissed.

97. Tex.—Hurley v. Hirsch, Civ. App., 66 S.W.2d 387, error dismissed.

Ownership of taxicab
In an action against a taxicab company for the loss of services of plaintiff's minor child injured by a taxicab, a certified copy of defendant's application for registration of the taxicab bearing the plate number of the one involved was admissible to show ownership by defendant.—Pratt v. Detroit Taxicab & Transfer Co., 195 N.W. 691, 225 Mich. 147.

98. U.S.—Mohawk Condensed Milk Co. v. U. S., Ct.Cl., 48 F.2d 682—Diego v. Rovira, Puerto Rico, 254 F. 19, 165 C.C.A. 429.

Proof of issuance of policy
In suit for workmen's compensation, certified copy of notice that employer had become subscriber, offered in jury's absence to show jurisdiction, was incompetent to supply required proof that defendant had issued policy to claimant's employer covering claimant's injury.—Traders & General Ins. Co. v. Milliken, Tex.Civ.App., 87 S.W.2d 503.

99. Conn.—Gett v. Isaacson, 120 A. 156, 98 Conn. 539.

Automobile registration
Under statute giving certified copy same effect as original would have, certified copy of automobile registration is admissible to prove ownership at time of accident, whether vehicle was registered at time of accident, and whether owner had place of abode in state prior to accident.—Avila v. Du Pont, 180 N.E. 124, 278 Mass. 83.

Document filed by bonding company
Under statute giving certified copies same effect as original would have, certified copy of documents filed by foreign bonding company in office of insurance commissioner was admissible to show authority of agent signing bond and assenting to discharge of codefendant under interlocutory decree.—Brown v. London & Lancashire Indemnity Co. of America, 144 N.E. 395, 249 Mass. 511.

1. N.J.—Bodner v. Phoenix Indemnity Co., 168 A. 442, 111 N.J.Law 264.

City assessment roll
Fla.—Semi-Tropical Land Co. v. City of Jacksonville, 162 So. 692, 120 Fla. 425.

Motor vehicle registration
N.J.—Bodner v. Phœnix Indemnity Co., 168 A. 442, 111 N.J.Law 264.

2. Kan.—McCune Min. Co. v. Adams, 10 P. 468, 35 Kan. 193.
22 C.J. p 822 note 90.

3. Ark.—Washington Fidelity Nat. Ins. Co. v. Anderson, 63 S.W.2d 535, 187 Ark. 974.

4. Ky.—Metropolitan Life Ins. Co. v. Cleveland's Adm'r, 11 S.W.2d 434, 226 Ky. 621.
Md.—State, to Use of Schiller, v. Hecht Co., 169 A. 311, 165 Md. 415.
Tex.—American Nat. Ins. Co. v. Valencia, Civ.App., 91 S.W.2d 832, error dismissed.
However, exclusion was held proper where some of the matter contained in certificate was of little evidential value, would have been highly prejudicial, and was inseparable from rest of the matter.—New England Trust Co. v. Farr, C.C.A.Mass., 57 F.2d 103, certiorari denied 53 S. Ct. 14, 287 U.S. 612, 77 L.Ed. 532.

5. Miss.—Clegg v. Johnson, 143 So. 848, 164 Miss. 198.

6. Mo.—Bailey v. Metropolitan Life Ins. Co., App., 115 S.W.2d 151, certiorari quashed State ex rel. Metropolitan Life Ins. Co. v. Shain, 121 S.W.2d 789, 343 Mo. 435.

such as the time of death,[7] and the cause or manner of death.[8] While it has been held that the copy is admissible to prove the cause or manner of death, even though the statement as to the cause is hearsay,[9] or is merely an opinion or conclusion,[10] it has also been held to be inadmissible to prove the cause of death where it states a mere conclusion,[11] or where it contains the unsworn statements of persons who are not authorized to certify as to such matters, and who, because of lack of personal knowledge, would not have been qualified to testify on the trial.[12] At any rate, a copy of a death certificate is not admissible if it is not properly authenticated,[13] or if the original certificate is not shown to be authentic.[14]

Alteration of certified copy. Whether an alteration will affect the admissibility of a certified copy of a public document depends on the purpose of such alteration and the effect on the document.[15]

§ 652. Judicial Records

In general, properly authenticated copies of judicial records are admissible in evidence.

Authenticated copies of judicial records are admissible in evidence the same as such copies of other public records;[16] and apart from the records themselves such copies are the only admissible evidence to prove what the records contain.[17]

Particular courts. Records of probate, surrogates', and orphans' courts are very generally held to be within the rule making a duly authenticated copy of a judicial record admissible in evidence,[18]

7. Mo.—Bailey v. Metropolitan Life Ins. Co., supra.

8. Ariz.—Sovereign Camp, W O. W., v. Sandoval, 54 P.2d 557, 47 Ariz. 167.
Ill.—O'Kane v. National Council of Knights and Ladies of Security, 227 Ill.App. 369.
Miss.—Life & Casualty Ins. Co. v. Walters, 177 So. 47, 180 Miss. 384.
Mo.—Loughlin v. Marr-Bridger Grocer Co., App., 10 S.W.2d 75.
N.H.—Abbott v. Prudential Ins. Co. of America, 195 A. 413, 89 N.H. 149.
Utah.—Bozicevich v. Kenilworth Mercantile Co., 199 P. 406, 58 Utah 458, 17 A.L.R. 346.

Self-inflicted gunshot wound
Excluding authenticated copy of attending physician's death certificate reciting that insured's death resulted from self-inflicted gunshot wound was error.—Massachusetts Mut. Life Ins. Co. v. Bush, 33 S.W.2d 851, 236 Ky. 400.

9. Mo.—Key v. Cosmopolitan Life, Health & Accident Ins. Co., App.. 102 S.W.2d 797.

10. N.J.—Van Bodegon v. Standard Coated Products Corporation, 14 A.2d 760, 18 N.J.Misc. 486.

11. Va.—Life Ins. Co. of Virginia v. Brockman, 3 S.E.2d 480, 173 Va. 86.

Statement of probability
Certified copy of record which consists in part of coroner's report as to cause of death is not admissible to establish cause of death, since, by statute, such matter is stated as a probability rather than a fact, and represents merely coroner's opinion.—Langlitz v. American Nat. Ins Co., Tex.Civ.App., 146 S.W.2d 484, error dismissed, judgment correct.

12. Pa.—Heffron v. Prudential Ins. Co. of America, 8 A.2d 491, 137 Pa. Super. 69.

Statutory requirements
Where statute requires certificate to be signed by attending physician, certified copy of certificate signed by coroner is inadmissible.
Mo.—Gilpin v. Ætna Life Ins. Co., 132 S.W.2d 686, 234 Mo.App. 566.
Pa.—Heffron v. Prudential Ins. Co of America, 8 A.2d 491, 137 Pa. Super. 69.

Undertaker's report as surplusage
Where certified copy of death certificate containing undertaker's report and physician's certificate of cause of death was only required to contain physician's certificate, it was nevertheless admissible where undertaker's report contained nothing prejudicial.—O'Kane v. National Council of Knights and Ladies of Security, 227 Ill.App. 369.

13. Ky.—Elam's Adm'r v. Botkin, 13 S.W.2d 507, 227 Ky. 517.
Md.—Mayor and City Council of Baltimore City v. State, for Use of Blueford, 195 A. 571, 173 Md. 267.
W.Va.—Collins v. Equitable Life Ins. Co., 8 S.E.2d 825, 130 A.L.R. 257.

14. Ga.—Bankers' Health & Life Ins. Co. v. Nichols, 162 S.E. 151, 44 Ga.App. 536.

15. Tex.—Hoya v. Woden Independent School Dist., Civ.App., 292 S. W. 942.

Mere spoliation
Where statute creating independent school district admittedly showed intention that district embrace territory in common school district, changing description of boundaries in certified copy did not affect copy's admissibility, such change by stranger being mere spoliation not affecting admissibility, original terms plainly appearing.—Hoya v. Woden Independent School Dist., Tex.Civ. App., 292 S.W. 942.

16. U.S.—Seymour v. Du Bois, C.C. Pa., 145 F. 1003, error dismissed Du Bois v. Seymour, 152 F. 600, 81 C.C.A. 590, 11 Ann.Cas. 656.
22 C.J. p 824 note 6.

Rule is based on general principle of public convenience that documents of great moment may not be ambulatory and subject to loss that might be incurred if they were removable.—Mansfield v. Johnson, 40 So. 196, 51 Fla. 239, 120 Am.S.R 159 —22 C.J. p 824 note 7.

Independent description in copy
Independent description by city clerk in a transcript of assessment proceedings did not render transcript inadmissible as a whole.—Cabaniss v. City of Huntsville, 117 So. 316, 217 Ala. 678.

Carbon copy signed by judge as authenticated copy
Where attorney presented to county court order for signature, and, at same time, carbon copy thereof, which was signed by judge and retained by attorney, such copy is neither order nor authenticated copy of order of county court, and is not admissible to prove that such order was made.—Lowe v. Cravens, 240 P. 638, 112 Okl. 190.

17. U.S.—Freeman-Sweet Co. v. Luminous Unit Co., C.C.A.Ill., 264 F. 107, modifying, D.C., Luminous Unit Co. v. Freeman-Sweet Co., 249 F. 876, and certiorari denied 40 S.Ct. 482, 253 U.S. 486, 64 L.Ed. 1025.
Ky.—Jones v. Hodgkins, 26 S.W.2d 19, 233 Ky. 491.
Utah.—Larsen v. Ryan, 180 P. 178, 54 Utah 250.
22 C.J. p 824 note 8.

18. Ala.—Boasberg v. Cooke, 136 So. 797, 223 Ala. 389.
Cal.—Bacon v. Kessel, 87 P.2d 857, 31 Cal.App.2d 245.
22 C.J. p 825 note 22.

Statutory requirements must be met
Ala.—Goodwin v. Georgia Loan & Trust Co., 81 So. 611, 202 Ala. 655.

where such records are relevant.[19] Thus the issuance of letters testamentary or of administration may be proved by certified copies of the record,[20] or by production of the letters themselves, which are regarded as being in the nature of exemplification of the record, and admissible as such without showing the decree of the probate court making the appointment.[21] So, also, under statutes to that effect in most jurisdictions, a will disposing of either realty or personalty may be proved by duly certified copies,[22] provided it appears that the original was regularly probated and recorded,[23] although at common law the probate of a will before an ecclesiastical court or an exemplification thereof was not competent evidence in a court of law on an issue involving the title to land.[24]

In some jurisdictions sworn copies of the entries in the docket of a justice of the peace have been held admissible as primary evidence;[25] but in other jurisdictions sworn copies of justices' judgments have been held admissible as secondary evidence only.[26] While under various statutory provisions transcripts from justices' records certified by the justice himself or the proper custodian of the record have been held admissible,[27] it has been held that in the absence of statute a justice's record can be proved only by production of the original or by a sworn copy, and not by a certified copy.[28]

Particular matters as part of record. In order that a copy of an order or judgment of a court be admissible in evidence in another court, the original must have been entered of record.[29]

Since a writ of execution, when returned to the court from which it issued, becomes a record of the court, a duly certified[30] or sworn[31] copy thereof may be used in evidence in the same way as copies of other parts of the record. Certified copies of entries in an execution docket have been held admissible,[32] although it has been also considered that an execution issued by a justice of the peace cannot be proved by a transcript from the docket, but the execution itself or a certified copy thereof must be produced.[33]

Stenographic notes are not public records within the meaning of a statute providing for the admission in evidence of copies of public records when properly certified;[34] and in the absence of a statutory provision for the certification of judicial proceedings by a court stenographer, his transcript of the testimony of a witness, although duly certified by him, is inadmissible as documentary evidence.[35] A transcript of a stenographer's notes is, however,

Matters not of record

(1) Certified copies of proceedings had before probate judge, which were not an exercise of probate jurisdiction, and record of which was not required to be kept in probate court, are not admissible.
Kan.—Bowersock v. Adams, 41 P. 971, 55 Kan. 681.
Tex.—League v. Henecke, Civ.App., 26 S.W. 729.

(2) But in a proper case jurisdiction may be presumed.—Owings v. Beall, 1 Litt. Ky., 257.

(3) In proceeding by surety on administrator's bond for order directing judgment nunc pro tunc releasing it from liability, purported certified copy of judgment of probate court, not appearing in record, is not admissible for any purpose.—In re Fulsome, Mo.App., 193 S.W. 618.

19. Ga.—Guthrie v. Harper, 146 S. E. 320, 167 Ga. 588.

Certified copy of pleadings

Copy of pleadings before ordinary refusing probate of nuncupative will was held properly admitted in proceeding to probate written will proved by witnesses testifying to nuncupative will.—Guthrie v. Harper, supra.

20. Ga.—Heatley v. Long, 68 S.E. 783, 135 Ga. 153.
22 C.J. p 825 note 23.

21. D.C.—Mackey v. Baltimore & P. R. Co., 19 D.C. 282, affirmed 15 S.Ct. 491, 157 U.S. 72, 39 L.Ed. 624.
22 C.J. p. 825 note 24.

22. Ala.—McGregor v. Shipp, 189 So. 740, 238 Ala. 221.
22 C.J. p 825 note 26.

23. Fla.—Coffee v. Groover, 20 Fla. 64.
22 C.J. p 825 note 27.

24. N.H.—Farnsworth v. Briggs, 6 N.H. 561.
22 C.J. p 825 note 25.

25. Pa.—Welsh v. Crawford, 14 Serg. & R. 440.
22 C.J. p 826 note 31.

26. N.Y.—Pratt v. Peckham, 25 Barb. 195.
S.C.—Cherry v. McCants, 7 S.C. 224.

Carbon copies

Wash.—Green v. Fuller, 294 P. 1037, 159 Wash. 691.

27. Kan.—Muir v. Campbell, 202 P. 844, 110 Kan. 110.
Tex.—McDermott v. Steck Co., Civ. App., 138 S.W.2d 1106, error refused.
22 C.J. p 826 note 33.

28. Pa.—Miller v. Brink, 14 Pa. Dist. & Co. 292, 79 Pittsb.Leg.J. 86, 12 Erie Co. 316.
22 C.J. p 826 note 34.

Record of trial by two justices

It has been held that a copy of the record of a trial by two justices, constituting examining court, certified as a copy by one justice, should not be received in evidence without proof that it is an examined copy.—Geohegan v. Eckles, 4 Bibb, Ky., 5.

29. Tex.—Tourtelot v. Booker, Civ. App., 160 S.W. 293.
22 C.J. p 827 note 49.

30. Vt.—Reed v. Whitham, 181 A. 129, 107 Vt. 482.
22 C.J. p 826 note 38.

Sufficiency of return immaterial

N.J.—Dean v. Thatcher, 32 N.J.Law 470.

31. Ala.—Bettis v. Taylor, 8 Port. 564.
22 C.J. p 826 note 39.

32. Tex.—Schleicher v. Markward, 61 Tex. 99—Portis v. Ennis, 27 Tex. 574.
22 C.J. p 826 note 40.

33. Ind.—Snyder v. Norris, 6 Blackf. 33.

34. Ga.—Hardeman v. English, 5 S. E. 70, 79 Ga. 387.
Neb.—Smith v. State, 60 N.W. 585, 42 Neb. 356.

35. Ga.—Hardeman v. English, 5 S. E. 70, 79 Ga. 387.
22 C.J. p 826 note 43.

sometimes made admissible by statute.[36]

Copy of copy or transcript. As a general rule a certified copy of an official copy or other transcript of a record is not admissible in evidence.[37] However, it has also been held that a transcript filed in the court to which a cause has been removed becomes a record of that court, and a duly certified transcript thereof is competent as evidence,[38] that a copy of an officially certified copy of a judgment may be admissible as secondary evidence, where the original records of the court have all been destroyed and where there is no evidence of the existence of the certified copy,[39] and that the copy of an official transcript of lost papers preserved in the office of the clerk of the court, duly certified, is competent and sufficient evidence of their contents.[40]

Where it is provided by statute that a copy of a lost original paper may be established by court, and that thereafter the copy shall have all the force of the original, a certified copy of the established copy is admissible to the same extent as would be a certified copy of the original.[41]

§ 653. —— Exemplified Copies

An exemplified copy of a judicial record is admissible to prove such record.

An exemplified copy of a judicial record is admissible to prove such record,[42] where relevant.[43]

§ 654. —— Office Copies

As a general rule, certified or office copies of judicial records duly certified by the clerk or custodian of the record are admissible, where otherwise competent, to the same extent as the original records.

The general rule in the United States, founded either on immemorial usage or on statutes expressly making such copies of judicial records admissible in evidence, or requiring the custodian of such records to furnish copies, is that certified or office copies of judicial records duly certified by the clerk or custodian of the record are admissible in evidence in any cause or court in the same jurisdiction where the records themselves would be admissible,[44] to the extent that they are material, relevant, and otherwise competent.[45] However, on an issue of nul tiel record it has been held that the

36. Okl.—Oklahoma R. Co. v. Boles, 120 P. 1104, 30 Okl. 764.

37. W.Va.—Carmichael v. Reed, 86 S.E. 662, 76 W.Va. 672.
22 C.J. p 826 note 45.

38. Mo.—Bettis v. Logan, 2 Mo. 2.

39. Iowa.—Sternburg v. Callanan, 14 Iowa 251.
22 C.J. p 827 note 47.

40. Ga.—Mize v. Harber, 8 S.E.2d 1, 189 Ga. 737—Eagle & Phenix Mfg. Co. v. Bradford, 57 Ga. 249.

41. Ga.—McLanahan v. Blackwell, 45 S.E. 785, 119 Ga. 64.
22 C.J. p 1020 note 27 [e].

42. Vt.—Cootey v. Remington, 189 A. 151, 108 Vt. 441—Lowry v. Cady, 4 Vt. 504, 24 Am.D. 628.

Procedure in obtaining exemplification

(1) At common law an exemplified copy was obtained by removing the record into the court of chancery by certiorari; the great seal was attached to a copy, which was transmitted by a mittimus to the court in which it was used as evidence.
Ill.—Virgin v. Hermanny, 199 Ill. App. 189.
N.J.—State v. Board of Public Works, 30 A. 581, 57 N.J.Law 313, affirmed 33 A. 966, 58 N.J.Law 362.

(2) In this country it has been said, the great seal being usually if not always kept by the secretary of state, a different course prevails; and an exemplified copy under the seal of the court is usually admitted, even on a plea of nul tiel record, as sufficient evidence.—Weaver v. Tuten, 74 S.E. 835, 138 Ga. 101—22 C.J. p 824 note 10.

(3) And a writ of certiorari or mittimus is unnecessary to authorize or compel production of copy.
N.Y.—Vail v. Smith, 4 Cow. 71.
S.C.—Brown v. Winn, 4 S.C.L. 297.

43. Ga.—Massell Realty Co. v. Hanbury, 141 S.E. 653, 165 Ga. 534.

44. Cal.—Powell v. Mohr, 230 P. 27, 68 Cal.App. 639.
Iowa.—Harvey v. Phillips, 186 N.W. 910, 193 Iowa 231.
Ky.—Lowther Oil & Gas Co. v. McGuire, 225 S.W. 718, 189 Ky. 681.
Tex.—Loving County v. Higginbotham, Civ.App., 115 S.W.2d 1110, error dismissed.
Utah.—Larsen v. Ryan, 180 P. 178, 54 Utah 250.
22 C.J. p 824 note 14.

Primary or secondary evidence

(1) It has been held that certified copy of court record is admissible as secondary evidence of contents of marriage contract, both parties to which were dead, and which administratrix testified could not be found.—Beall v. Francis, 137 S.E. 251, 163 Ga. 894.

(2) However, it has also been held that certified copies of court records are admissible as primary evidence.—Hartley v. Sanders, 164 S.E. 232, 45 Ga.App. 273.

Nature of office copies at common law

(1) At common law certified copies made by officer having custody of judicial records, were known as office copies.—State v. Board of Public Works, 30 A. 581, 57 N.J.Law 313, affirmed 33 A. 966, 58 N.J.Law 362.

(2) It has been considered that at common law an office copy is, in the same court and in the same cause equivalent to the record, but in another court or in another case in the same court the copy must be proved.—Kellogg v. Kellogg, 6 Barb., N.Y., 116.
22 C.J. p 824 note 13.

Transcript of grand jury docket

Grand jury docket, being by statute made part of court's records, a transcript thereof, properly certified, is admissible.—Sims v. Kent, 130 So. 213, 221 Ala. 589—Morgan v. Baird, 121 So. 526, 219 Ala. 225.

Copy of decree alone

Under statute so providing, certified copies of judgments or decrees may be used as evidence without entire record, except when judgment or decree is directly attacked.
Tenn.—Clements v. Holmes, 120 S.W. 2d 988, 22 Tenn.App. 230.
Tex.—Burge v. Broussard, Civ.App., 258 S.W. 502.

45. Del.—Town of Seaford v. Eastern Shore Public Service Co., Ch., 2 A.2d 258, sustained Eastern Shore Public Service Co. v. Town of Seaford, Sup., 2 A.2d 265, appeal dismissed 59 S.Ct. 483, 306 U.S. 616, 83 L.Ed. 1024, rehearing denied 59 S.Ct. 589, 306 U.S. 668, 83 L.Ed. 1063.
Ga.—Smith v. Satilla Pecan Orchard

original record is necessary even in the same court.[46]

The admissibility of a certified copy of a judgment does not depend on proof of entry of judgment or the giving of notice thereof;[47] and a statute requiring certified copies of instruments filed in the county clerk's office to be filed in court a specified time before trial has been held not to apply to judicial records.[48]

§ 655. —— Examined or Sworn Copies

An examined or sworn copy of a judicial record, which is a copy made by the witness, or compared by him with the original, is usually admissible as primary evidence.

The third kind of authenticated copy is an examined or sworn copy, which is a copy made by the witness, or compared by him with the original, either directly or by following while another person reads the original.[49] Such a copy is usually held admissible without proof that the original cannot be produced,[50] although it has also been held that such copy is a species of secondary evidence ranking next to a duly attested copy.[51] In order that copies may be admissible as examined copies, some legal evidence of examination and comparison must be produced,[52] and an examined copy is inadmissible unless it appears that the original was in the proper place of deposit or in the hands of the officer in whose custody the records are kept.[53]

§ 656. —— Incomplete Copies

Since the rules with respect to the admissibility of incomplete copies of judicial records, or copies of parts of the record only, are the same as those with respect to the admissibility of the record itself, decisions as to such copies have been treated, together with those relating to the original records, in § 647 supra.

§ 657. —— Errors or Omissions in Transcript

Various errors and omissions have been held not to render inadmissible a copy of a judicial record otherwise admissible.

Errors and omissions which have been held not to render inadmissible a copy of a judicial record otherwise admissible include clerical error, either in making out the original record or in transcribing it, if the context clearly shows the purport of the document;[54] the omission to copy the seal to an original execution,[55] especially if a seal to the original was not required by law;[56] the omission of the signature of the judge,[57] especially if such signature was not necessary to the validity of the original record;[58] and the omission to add the title of the judge's office.[59]

Correction of errors. An obvious error in the copy, which is within the knowledge of a witness, may be corrected, without the necessity of compar-

& Stock Co., 110 S.E. 303, 152 Ga. 538.
22 C.J. p 824 note 14.

Certified copies held inadmissible
U.S.—Dayton Engineering Laboratories Co. v. U. S., D.C.Ohio, 3 F. Supp. 351.
Ga.—Metropolitan Life Ins. Co. v. Hand, 102 S.E. 647, 25 Ga.App. 90.
N.J.—Smith v. National Union Fire Ins. Co., 130 A. 371, 3 N.J.Misc. 994.

Necessity of copies
Certified copies of former convictions of defendants for violating liquor laws were held unnecessary, in suit to enjoin liquor nuisance, brought on theory that defendants had violated liquor statute, rather than theory that they had been convicted.—Levy v. State, 152 N.E. 873, 86 Ind.App. 666.

Where previous judgment was not denied, exclusion of certified copy of judgment was not error.—Fitzpatrick v. Sletten, 242 P. 1114, 117 Or. 173.

46. Va.—Anderson v. Dudley, 5 Call 529, 9 Va. 529.
22 C.J. p 825 note 16.

47. Cal.—Powell v. Mohr, 230 P. 27, 68 Cal.App. 639.

48. Tex.—Jackson v. First Nat. Bank, Civ.App., 290 S.W. 276, error dismissed—Burge v. Broussard, Civ.App., 258 S.W. 502, error refused—James v. Midland Grocery & Dry Goods Co., Civ.App., 146 S. W. 1073.

49. N.J.—Commercial Nat. Trust & Savings Bank of Los Angeles v. Hamilton, 137 A. 403, 404, 101 N.J. Eq. 249, citing **Corpus Juris**, and affirming 133 A. 703, 99 N.J.Eq. 492.
Tex.—Biddy v. State, 107 S.W. 814, 52 Tex.Cr. 412.
22 C.J. p 825 note 17.

50. Mass.—Abington v. North Bridgewater, 23 Pick. 170.
22 C.J. p 825 note 18.
However, it has been held that conviction of criminal offense cannot be proved by unofficial copy of clerk's docket supported by oath of copyist.—Commonwealth v. Brooks, 9 Gray, Mass., 299.

51. Ind.—Hitt v. Carr, 162 N.E. 409, 201 Ind. 17.

52. Tex.—Biddy v. State, 107 S.W. 814, 52 Tex.Cr. 412.
22 C.J. p 825 note 20.

53. Tex.—Biddy v. State, supra.
22 C.J. p 825 note 21.

54. Ga.—Daniel v. State, 40 S.E. 805, 114 Ga. 533.
N.Y.—Gustavus v. Dahlmer, 163 N. Y.S. 132, 98 Misc. 462.
22 C.J. p 827 note 51.

55. N.C.—Dowdle v. Stalcup, 25 N. C. 45.

Copy held sufficient
Where clerk's attestation states that seal of court was affixed to original judicial record, and transcript bears scroll with word "seal" inclosed, it is sufficient.—State v. Bailey, 7 Iowa 390.

56. Tex.—Earle v. Thomas, 14 Tex. 583.

57. Wyo.—Campbell v. Wyoming Development Co., 100 P.2d 124, 136, 55 Wyo. 347, quoting **Corpus Juris**, and rehearing denied 102 P. 2d 745, 55 Wyo. 347.
22 C.J. p 827 note 55.

58. Wyo.—Campbell v. Wyoming Development Co., supra, quoting **Corpus Juris**.
22 C.J. p 827 note 56.

59. N.Y.—Elliott v. Cronk, 13 Wend. 35.

ing the corrected copy with the record after the change.[60]

§ 658. Public Grants and Land Office Records

Duly certified copies of matters properly recorded in the land office are admissible in evidence, generally equally with the originals.

Duly certified copies of land office records are admissible in evidence,[61] generally in all cases in which the originals would be evidence,[62] provided the record was one which was authorized by law.[63] Ir is usually held that such copies may be read in evidence without producing or accounting for the originals,[64] although there is authority for a contrary view.[65]

Particular records. Certified copies of patents or grants, on file in the land office, are, where otherwise competent, admissible in evidence,[66] sometimes by virtue of express statute;[67] but this rule is subject to the limitation that the patentees or grantees, or those claiming under them, who would be entitled to possession of the originals cannot use such a copy without showing the loss of the original or accounting for its absence.[68] Where the recording statute of a state has no reference to United States land patents a certified copy of the record of such a patent is not evidence.[69]

A certified copy of a map or survey on file in the land office is usually held admissible in evidence,[70] with the same effect as the original,[71] provided the original has been so approved and recorded as to become a record of that office.[72]

Certified copies of official letters on record in the land office are admissible under a statute providing that duly certified copies of land office records shall be received in evidence equally with the originals;[73] and where the official character of the letter is apparent on its face it is unnecessary for the certifying officer to state in his certificate that it is the copy of an official letter.[74] A certified copy

60. Vt.—State v. Grace, 86 A. 162 86 Vt. 470.

61. Miss.—De Lashment v. McClelland, 118 So. 904, 152 Miss. 781
22 C.J. p 827 note 59.

Archives

(1) Where an official document constitutes an archive of the land office, a certified copy thereof is admissible in evidence.—Southwestern Settlement & Development Co. v. Village Mills Co., Tex.Civ.App., 245 S.W. 975.

(2) Thus a list of orders of survey made out as they were issued by a commissioner, and a certified copy of the order of survey were held admissible under statute recognizing such documents as "archives."—Southwestern Settlement & Development Co. v. Village Mills Co., supra.

(3) So also affidavits for duplicate certificate filed to meet statutory requirements and approved by the land commissioner, who issued a duplicate certificate thereon, became archives of the land office, and certified copies thereof were as admissible in evidence as the originals.—Magee v. Paul, 221 S.W. 254, 110 Tex. 470, answering certified questions, Civ.App., 159 S.W. 325, and answers conformed to 224 S.W. 1118.

Minutes of proceedings of board of land commissioners.—Nemitz v. Reckards, 38 P.2d 980, 98 Mont. 229.

Certified photographic copy of purchaser's account in land office must be assumed correct reproduction, at date on certificate, of all prior entries.—Gattison v. Meyer, Tex.Civ. App., 297 S.W. 900.

62. U.S.—Penn v. Hartman, Pa., 2 Dall. 230, 1 L.Ed. 360.
22 C.J. p 827 note 60.

63. U.S.—Carrington v. Potter, C.C Mo., 37 F. 767.
Ala.—Stephenson v. Reeves, 8 So. 695, 92 Ala. 582.

Private papers in land office

Certificate of commissioner of general land office will not give legal authenticity to papers which are mere private property, and which do not belong to the archives of his office.—Rogers v. Pettus, 15 S.W. 1093, 80 Tex. 425—22 C.J. p 829 note 77.

Second copy of title, issued to interested party for his protection and to serve him as evidence of his title, was not designed to be in official custody of commissioner of general land office, and therefore certified copy of it, from general land office, was not admissible.—Paschal v. Perez, 7 Tex. 348.

Record not authorized

Under Missouri statutes relating to sale of swamp lands by a county, providing for issuance in triplicate of certificate of purchase by the register, one to be filed by him, that on presentation of a copy to the receiver and payment he should issue a receipt, on which patent should be issued by the county court, a certified copy of a record of a certificate from the books of the register is not admissible to prove title in the purchaser, there being no provision for such record, nor authority to convey title, except on the receiver's receipt.—McGrew v. Byrd, Mo., 255 F. 759, 168 C.C.A. 196, rehearing denied 257 F. 66, 168 C.C.A. 278.

64. U.S.—Patterson v. Winn, Ga., 5 Pet. 233, 8 L.Ed. 108.
22 C.J. p 828 note 62.

65. Ark.—Boynton v. Ashabranner, 88 S.W. 566, 1011, 91 S.W. 20, 75 Ark. 415.
22 C.J. p 828 note 63.

66. Mo.—Settles v. Scott, 211 S.W. 35.
22 C.J. p 828 note 64.

67. Cal.—Eltzroth v. Ryan, 26 P. 647, 89 Cal. 135.
22 C.J. p 828 note 65.

68. N.C.—Candler v. Lunsford, 20 N.C. 142.
22 C.J. p 828 note 66.

69. Iowa.—Curtis v. Hunting, 6 Iowa 536.

70. Me.—Jackson v. Burnham, 152 A. 56, 57, 129 Me. 344, citing **Corpus Juris.**
22 C.J. p 828 note 68.

Surveyor's written report

Certified copy of surveyor's written report explaining survey and field notes, and filed with survey, was held admissible as against objections that such report was hearsay, ex parte, unverified, contained conclusions, and deprived objecting party of cross-examination.—Weatherly v. Jackson, 71 S.W.2d 259, 123 Tex. 213, reversing, Civ.App., 46 S W.2d 1030.

71. Kan.—Rierson v. St. Louis & S. F. R. Co., 51 P. 901, 59 Kan. 32.
Me.—Jackson v. Burnham, 152 A. 56, 57, 129 Me. 344, citing **Corpus Juris.**

72. Me.—Jackson v. Burnham, supra, citing **Corpus Juris.**
Tex.—Patrick v. Nance, 26 Tex. 298.

73. Ala.—Holmes v. State, 18 So. 529, 108 Ala. 24.
22 C J. p 829 note 71.

74. Kan.—Darcy v. McCarthy, 12 P. 104, 35 Kan. 722.

of a letter received by the register or receiver of the United States land office has been held admissible;[75] but it has also been held that certified copies of letters written to the land commissioners are not competent evidence in the absence of proof that the letter from which a copy was made was written by the person by whom it purports to have been written.[76]

Copies of assignments of land claims, filed in the general land office and certified by the land commissioner, are admissible in evidence,[77] provided such assignments constitute a portion of the records of that office.[78]

Sufficiency of copy. In general, in order that a certified copy of a land office record be admissible, it must be complete and accurate,[79] and should contain whatever the law requires to be recorded as a part of the instrument.[80] It is therefore necessary that a signature in some form should appear.[81] However, the seal is no part of the patent and need not be copied;[82] nor is a copy of a patent inadmissible without a map to which the patent refers, where the land may be identified without reference to the map;[83] nor does a variance as to date between a patent and a certified copy thereof affect the admissibility of the latter, since the question of its identity is to be determined under all the evidence.[84] In the absence of evidence to the contrary it must be presumed that the copy discloses the instrument as it exists in the land office.[85]

A duplicate patent[86] or receipt,[87] or a second original,[88] has also been held to be of as high authority as the original and therefore admissible as a copy.

A certified extract from a paper in the land office is usually held admissible,[89] if it appears to contain all that relates to the subject in controversy; nor is it necessary that it should show by whom, or when, it was made, the presumption being in favor of its regularity.[90] There is, however, authority for the contrary view,[91] and where a negative use is intended to be made of such an extract it is properly rejected.[92]

§ 659. Records of Private Writings

Copies of private writings are admissible only if properly authenticated.

Copies of records of private writings are admissible in evidence only if they are properly authenticated.[93]

The admissibility of certified copies or office copies is considered infra § 660, and of sworn or examined copies infra § 661. Under what circumstances abstracts of title are admissible is considered infra § 662.

§ 660. —— Certified Copies

Certified copies of records of private writings are generally admissible, in some instances, as primary evidence, in others, where a proper foundation has been laid, as secondary evidence. The original copy must ordinarily have been properly executed and recorded, and the copy must be complete and accurate.

75. Okl.—Hibbard v. Craycraft, 121 P. 198, 32 Okl. 160.

76. Tex.—Flynt v. Taylor, Civ.App., 91 S.W. 864, reversed on other grounds 93 S.W. 423, 100 Tex. 60.

77. Tex.—Day Land & Cattle Co. v. New York & Texas Land Co., Civ. App., 25 S.W. 1089.
25 C.J. p 829 note 75.

78. Tex.—Lott v. King, 15 S.W. 231, 79 Tex. 292—Halbert v. Carroll, Civ.App., 25 S.W. 1102.
22 C.J. p 829 note 76.

79. N.C.—Richards v. W. M. Ritter Lumber Co., 73 S.E. 485, 158 N.C. 54, Ann.Cas.1913D 313.
22 C.J. p 828 note 64 [e].

A certified copy of a copy is not admissible in evidence.
La.—Lawrence v. Grout, 12 La.Ann. 835.
Tex.—State v. Cardinas, 47 Tex. 250.

80. Ky.—Hedden v. Overton, 4 Bibb 406.

81. Fla.—Liddon v. Hodnett, 22 Fla. 442.
22 C.J. p 829 note 88.

82. Ill.—Jackson v. Berner, 48 Ill. 203.
22 C.J. p 829 note 89.

Presumption as to seal
W.Va.—William James' Sons Co. v. Crouch, 79 S.E. 815, 72 W.Va. 794.
22 C.J. p 828 note 64 [d].

83. N.Y.—New York Cent. & H. R. R. Co. v. Brockway Brick Co., 41 N.Y.S. 762, 10 App.Div. 287.
22 C.J. p 829 note 90.

84. Tex.—Hill v. Smith, 25 S.W. 1079, 6 Tex.Civ.App. 312.

85. Tex.—Hooks v. Colley, 53 S.W. 56, 22 Tex.Civ.App. 1.

86. Ill.—Reich v. Berdel, 11 N.E. 912, 120 Ill. 499.
22 C.J. p 829 note 83.

87. Iowa.—Stone v. McMahan, 4 Greene 72—Burlerson v. Teeple, 2 Greene 542.

88. U.S.—McPhaul v. Lapsley, Tex., 20 Wall. 264, 22 L.Ed. 344.
22 C.J. p 829 note 85.

89. U.S.—Polk v. Wendell, 5 Wheat. 293, 5 L.Ed. 92, reversing, C.C., 19 F.Cas.No.11,251, Brunn.Coll.Cas. 168, 2 Overt. (Tenn.) 433.
22 C.J. p 829 note 78.

90. Pa.—Farr v. Swan, 2 Pa. 245.

91. U.S.—Griffith v. Evans, Pa., 11 F.Cas.No.5,822, Pet.C.C. 166.
22 C.J. p 829 note 81.

92. U.S.—Polk v. Wendell, Tenn., 5 Wheat. 293, 5 L.Ed. 92.

93. Ill.—Dailey v. Grand Lodge, Brotherhood of Railroad Trainmen, 142 N.E. 478, 311 Ill. 184.

Authentication of baptismal certificate
In an action on a benefit certificate, exclusion of a certified copy of deceased's baptismal record was not error, where such paper was tendered as a certified copy, since it does not come within the provisions of the act on evidence and depositions authorizing the admission of certified copies, although such copy would have been admissible as an examined copy, if sworn to by a credible witness and accompanied by proof that the record was found in the custody of the officer whose duty it was to keep and preserve it.—Dailey v. Grand Lodge, Brotherhood of Railroad Trainmen, supra.

In a number of jurisdictions, under statutes to that effect, certified copies of recorded private writings,[94] such as deeds or other instruments affecting land,[95] or chattel mortgages,[96] or bills of sale,[97] are admissible as primary evidence of the execution and contents of the original, at least, in the absence of a ruling of the court requiring the production of the original.[98]

While certified copies of recorded instruments affecting lands have even been received as primary evidence apart from statute,[99] the general rule is that except by virtue of some statutory provision, a certified copy of a recorded deed[1] or other private writing,[2] is not admissible as evidence of the execution and contents of the original unless the proper foundation for its admission as secondary evidence is laid by accounting for the nonproduction of the original. Conversely, the authorities are generally agreed that where the record of a private writing is authorized a certified copy is admissible as secondary evidence of the execution and contents of the writing if a proper predicate is laid,[3] as by proof that the original is lost or destroyed,[4] or is outside of the jurisdiction of the court,[5] or that the person in possession refuses to surrender it.[6] So in a number of jurisdictions the broad rule is laid down either under statute or on common-law principles that a deed or other writing affecting realty may be proved by a certified copy of the record, on showing generally that the original is not within the custody or control of the person wishing to use it;[7] and it has even been held that a certified

94. Wis.—Weston v. Dahl, 155 N.W. 949, 162 Wis. 32, Ann.Cas.1918C 932.
22 C.J. p 830 note 1, p 1022 note 44.

Assignment of motor vehicle

Certified copy of record of filing of certificate of title to automobile and assignment with secretary of state is admissible on question of ownership.—Hayes v. Ogle, 21 P.2d 223, 143 Or. 1.

Assessment on bank stock

Ark.—Berlin v. Rainwater, 294 S.W. 368, 174 Ark. 66.

Articles of incorporation

(1) Certified copy of corporate charter was held admissible to prove existence of corporation.—Hacker v. Goldberg, 263 Ill.App. 73.

(2) In injunction suit by town against light and power company to enforce twenty-year limitation on town's consent to company's use of public streets and the like, certified copies of certificate of incorporation were admissible for the limited purpose of showing that predecessor claimed that it had consent in perpetuity to use streets and that such claim was sold to another predecessor.—Town of Seaford v. Eastern Shore Public Service Co., Del.Ch., 2 A.2d 258, sustained Eastern Shore Public Service Co. v. Town of Seaford, 2 A.2d 265, appeal dismissed Eastern Shore Public Service Co. v. Town of Seaford, 59 S.Ct. 483, 306 U.S. 616, 83 L.Ed. 1024, rehearing denied 59 S.Ct. 589, 306 U.S. 668, 83 L.Ed. 1063.

95. U.S.—Penix v. Sloan, C.C.A.Tex., 3 F.2d 258.
Ky.—Cherry Bros. v. Tennessee Cent. Ry. Co., 299 S.W. 1099, 222 Ky. 79—Bowling v. Turner, 225 S.W. 149, 189 Ky. 526.
N.J.—Meadow Realty Corporation v. Atlantic City Sewerage Co., 12 A.2d 855, 127 N.J.Eq. 284, affirming 7 A.2d 808, 126 N.J.Eq. 44.
22 C.J. p 830 notes 99, 4.

Oil and gas lease

Tex.—Mooers v. Hunter, Civ.App., 45 S.W.2d 387, error dismissed, Com. App., 67 S.W.2d 860.

96. Tex.—Malchoff v. Austin-Morris Co., Civ.App., 52 S.W.2d 682—Smith v. Citizens' Nat. Bank of Lubbock, Civ.App., 246 S.W. 407.
22 C.J. p 830 note 2.

97. La.—Sampson v. Noble, 14 La. Ann. 347.
22 C.J. p 830 note 3.

98. N.C.—Woodlief v. Woodlief, 135 S.E. 612, 192 N.C. 634.

99. Va.—Baker v. Preston, 21 Va. 235.
22 C.J. p 831 note 5.

1. Fla.—Kight v. American Eagle Fire Ins. Co. of New York, 170 So. 664, 125 Fla. 608.
22 C.J. p 831 note 7.

2. U.S.—Carter Oil Co. v. McQuigg, D.C.Ill., 27 F.Supp. 182, affirmed, C.C.A., 112 F.2d 275.
Fla.—Kight v. American Eagle Fire Ins. Co. of New York, 170 So. 664, 125 Fla. 608.
N.Y.—Wiggins v. Russel, 236 N.Y.S. 657, 227 App.Div. 742—Tickner v. Mesel, 195 N.Y.S. 234.
22 C.J. p 831 note 6.

Conditional sales contract

Mont.—Angell v. Lewistown State Bank, 232 P. 90, 72 Mont. 345.

Record as secondary; homestead papers

Where record of homestead papers is regarded as secondary evidence, the original papers being primary evidence, certified copy of such record is similarly secondary evidence.—Brown v. Driggers, 60 Ga. 114.

3. Ga.—Chattahoochee Fertilizer Co. v. Quinn, 151 S.E. 496, 169 Ga. 801—Keen v. Georgia Trading & Development Co., 99 S.E. 888, 149 Ga. 264.
La.—White v. White, 100 So. 442, 156 La. 324.
Tex.—Bendy v. W. T. Carter & Bros., Com.App., 269 S.W. 1037, affirming W. T. Carter & Bro. v. Bendy, Civ. App., 251 S.W. 265.

Articles of partnership

Since there is no law requiring or authorizing record of articles of partnership, certified copy of declaration of trust, creating general partnership, is inadmissible, although original was lost.—Abilene Christian College v. Wright, Tex.Civ.App., 1 S.W.2d 720, error refused.

4. Ga.—Campbell v. Sims, 131 S.E. 483, 161 Ga. 517.
Mo.—Kline v. Groeschner, 219 S.W. 648, 280 Mo. 599.
22 C.J. p 831 note 8.

Effect of evidence of indorsement of transfer

A duly certified copy of record, shown by evidence, of lost mortgage, transfer of which to plaintiff in ejectment was indorsed on back of, and offered in evidence separately and apart from, such copy, was properly admitted.—Jordan v. Ogden, 188 So. 235, 237 Ala. 626.

Who has burden

Use plaintiff as real plaintiff must account for loss of deed as predicate for certified copy.—Peninsular Naval Stores Co. v. Mathers, 119 So. 333, 96 Fla. 620.

5. Conn.—Halsey v. Fanning, 2 Root 101.
22 C.J. p 831 note 9.

6. Ala.—Foxworth v. Brown, 24 So. 1, 120 Ala. 59.
22 C.J. p 831 note 10.

7. Ala.—Jones v. Spear, 85 So. 471, 204 Ala. 110.
22 C.J. p 831 note 11.

Cross-examination of maker of affidavit

Where affidavit made in compliance with statute for purpose of introducing certified copy of record of deed is positive in its terms and meets all requirements of statute, adverse party is not entitled to cross-exam-

copy will be admitted without accounting for the original where the circumstances are such as to raise a presumption that the party introducing the copy does not have possession of the original.[8]

In any event, where the recording of a private writing is authorized by statute, a certified copy of the record is admissible to show the fact that the instrument is of record,[9] and this, although the instrument has not been so executed or acknowledged as to make a certified copy evidence of its contents.[10] So, also, since it is the duty of a recorder by reason of the nature of his office and without special statutory direction to note when the record is made, a certified copy of such memorandum is competent evidence to prove the date of registration of a deed.[11] It has been held that a copy is also evidence of the existence of the original[12] and admissible to show that the original instrument was sealed;[13] but there is also authority for the view that the rule that copies of records of deeds may be received in evidence when the originals are lost applies only to cases where it is made to appear aliunde that there was in fact an original deed executed and delivered.[14]

Execution of original and proof thereof. It has been held that, where the party offering a certified copy of a deed does not have custody or control of the original, the copy is admissible without proving execution of the original, even if such execution is denied in the pleading.[15] However, it is more commonly held that, while such a copy is admissible without proof of execution where execution is not denied,[16] where execution is denied, as by an affidavit of forgery, the execution of the original document must be proved, in order that the copy be admissible.[17]

A certified copy of the record of a deed or other private writing is not admissible to show the execution and contents of the original, where the writing was not executed, proved, or acknowledged in the manner required by law to entitle it to be admitted to record,[18] unless some statute makes such copies admissible notwithstanding defects of exe-

ine maker of affidavit as to its truth —Glos v. Garrett, 76 N.E. 373, 219 Ill. 208.

8. Tenn.—Hill v. Hill, 9 Tenn.App. 507.

Particular circumstances

(1) A deed is presumed to remain in custody of grantee, and grantor may introduce certified copy.—Williams v. Oates, 102 So. 712, 212 Ala. 396.

(2) A stranger to the deed is presumed not to have custody or control thereof.

Ala.—Florence Land, Min. & Mfg. Co. v. Warren, 9 So. 384, 91 Ala. 533.

Kan.—Eby v. Winters, 33 P. 471, 51 Kan. 777.

(3) Accordingly in some states the rule is laid down apart from statute that a party to an action, after proof of his title, may use office copies of deeds to which he is not a party, but which constitute part of his chain of title, as prima facie evidence of their execution and contents without accounting for the nonproduction of the original.—Dawson v. Orange, 61 A. 101, 78 Conn. 96—22 C.J. p 832 note 12.

(4) Plaintiff has been permitted to introduce a certified copy of a deed in defendant's only line of title, for purpose of limiting defendant's claim.—Holton v. Hassam, 111 A. 389, 94 Vt. 324.

(5) Where a conveyance of real estate which is required to be recorded is made to a stranger to the suit, it is competent to prove the execution and contents of such original by a certified copy without laying a foundation for such proof by accounting for the nonproduction of the original.—Colchester Sav. Bank v. Brown, 52 A. 316, 75 Conn. 69—22 C.J. p 832 note 13.

(6) But where person offering evidence is party to deed and may be presumed to have it in his possession, he cannot use an office copy until loss of the original is shown. —Southerin v. Mendum, 5 N.H. 420.

(7) Rule admitting office copies of recorded instruments in evidence does not apply to deeds which are presumed to be in the possession or control of the opposite party, without notice to him to produce the original.—Draper v. Hatfield, 124 Mass. 53—22 C.J. p 832 note 15.

9. N.Y.—Tickner v. Mesel, 195 N.Y. S. 234.

22 C.J. p 830 note 93.

10. U.S.—Stebbins v. Duncan, Ill., 2 S.Ct. 313, 108 U.S. 32, 27 L.Ed. 641.

Tex.—Southwestern Surety Ins. Co. v. Anderson, Civ.App., 152 S.W. 816.

11. U.S.—Stebbins v. Duncan, Ill., 2 S.Ct. 313, 108 U.S. 32, 27 L.Ed. 641.

Iowa.—Laird v. Kilbourne, 30 N.W. 9, 70 Iowa 83.

12. Ga.—Sims v. Scheussler, 58 S. E. 693, 2 Ga.App. 466.

13. U.S.—Gillespie v. Reed, C.C.Ill., 10 F.Cas.No.5,436, 3 McLean 377.

14. Me.—McCleery v. Lewis, 70 A. 540, 104 Me. 33, 19 L.R.A.,N.S., 438.

15. Fla.—Atlantic Land & Improvement Co. v. Lee, 112 So. 549, 93 Fla. 579.

16. Or.—Hanson v. Johnson, 23 P. 2d 333, 143 Or. 532.

Tex.—Adams v. Houston Nat. Bank, Com.App., 1 S.W.2d 878, affirming in part and reversing in part Houston Nat. Bank v. Adams, Civ. App., 295 S.W. 198.

17. Ga.—Campbell v. Sims, 131 S. E. 483, 161 Ga. 517—Bentley v. McCall, 46 S.E. 645, 119 Ga. 530.

La.—Parker v. Bascle, 98 So. 628, 154 La. 1027.

22 C.J. p 831 note 11 [g].

Objection by party not charged

Chattel mortgage must be proved as at common law, where certified copy is objected to by party not sought to be charged thereon.—Adams v. Houston Nat. Bank, Tex. Com.App., 1 S.W.2d 878, affirming in part and reversing in part Houston Nat. Bank v. Adams, Civ.App., 295 S.W. 198.

Rebuttal evidence

(1) An office copy of a private writing may be rebutted by any evidence which would have been admissible to disprove execution of original instrument if it had been produced.—Flynn v. Sullivan, 40 A. 136, 91 Me. 355—22 C.J. p 834 note 37.

(2) But the delivery of a deed acknowledged and recorded, and bearing the usual attestation, cannot be contradicted without calling, or accounting for, the attesting witnesses.—Stout v. Kean, 3 Del. 82.

18. Mont.—Kroehnke v. Gold Creek

cution or acknowledgment or recording,[19] or unless a statutory presumption of legal proof and acknowledgment arises from the fact that the instrument had been of record for a prescribed period.[20] A certified copy of the record of a defective instrument has, however, been admitted as secondary evidence,[21] or to show execution of the instrument;[22] and the record of a mortgage and foreclosure under a power, although invalid, has been held admissible as showing how a person purchased the land in controversy.[23] It has also been held that the record of a deed registered on a defective probate is competent to aid the description in a later deed in terms conveying the land conveyed by the earlier deed, and referring to such registration therefor.[24]

Sufficiency of record. In order that a certified copy of the record may be admissible in evidence, the registry of the original must have been authorized or required.[25] Thus where a deed has never been registered and the registration of a copy is unauthorized a certified copy of a registered copy is not admissible.[26] A copy of a lost deed improperly recorded has, however, been held admissible in connection with other evidence of the execution of the original.[27]

Moreover, the instrument must have been recorded within the time prescribed by law therefor,[28] in a place in which such instruments are, by law, required or permitted to be recorded.[29] Thus in the case of a certified copy of a deed or other instrument relating to land, it must appear to have been duly recorded in the county or registry district in which the land conveyed was situated at the time of registration,[30] and in the proper office.[31] However, it has been held that where a deed was originally recorded at an improper place, but a certified copy thereof was subsequently recorded in the proper county, such copy was admissible in evidence, both as proof of the original deed and to show the record in the proper county.[32]

Obliteration of part of the record will not bar the admission of a certified copy.[33]

Mining Co., 51 P.2d 640, 100 Mont. 571.
22 C.J. p 833 note 19.

19. S.C.—Lamar v. Raysor, 41 S.C.L. 509.
22 C.J. p 833 note 20.

20. U.S.—Webb v. Weatherhead, Tenn., 17 How. 576, 15 L.Ed. 35.
22 C.J. p 833 note 21.

Necessity of valid execution
It has been held that statutory presumption as to valid acknowledgment applies only to validly executed instruments.—Aiken v. McMillan, 106 So. 150, 213 Ala. 494—Berow v. Brown, 94 So. 772, 208 Ala. 476.

Before expiration of period prescribed, certified copy of deed without valid certificate of acknowledgment is inadmissible.—First State Bank in Caldwell v. Stubbs, Tex.Civ. App., 48 S.W.2d 446.

Records prior to statute
Statute creating presumption applies to deeds recorded before its enactment.—Berow v. Brown, 94 So. 772, 208 Ala. 476.

21. Mich.—Post v. Rich, 36 Mich. 16.
Mo.—Crispen v. Hannavan, 72 Mo. 548.
22 C.J. p 833 note 22.

22. Tex.—Guinn v. Musick, Civ. App., 41 S.W. 723.
22 C.J. p 833 note 23.

23. Minn.—Groff v. Ramsey, 19 Minn. 44.

24. N.C.—Smathers v. Jennings, 87 S.E. 534, 170 N.C. 601.

25. Ala.—Aiken v. McMillan, 106 So. 150, 213 Ala. 494.
N.C.—Woodlief v. Woodlief, 135 S.E. 612, 192 N.C. 634.
Tex.—Verschoyle v. Holifield, 123 S. W.2d 878, 132 Tex. 516, modifying Civ.App., 90 S.W.2d 907.
22 C.J. p 832 note 16.

Baptismal certificates
Since records of baptismal certificates are not required to be kept by public officials as part of their public duty, such certificates are not provable by certified copies, but rather by sworn or examined copies. —Dailey v. Grand Lodge, Brotherhood of Railroad Trainmen, 142 N.E. 478, 311 Ill. 184.

26. Minn.—Lund v. Rice, 9 Minn. 230.
22 C.J. p 833 note 17.

27. Ohio.—Webster v. Harris, 16 Ohio 490.
Tex.—Cox v. Rust, Civ.App., 29 S. W. 807.

28. N.J.—Jones v. Crowley, 30 A. 871, 57 N.J.Law 222.
22 C.J. p 834 note 31.

29. Ky.—Spurr v. Trimble, 1 A.K. Marsh. 278.
22 C.J. p 833 note 26.

30. U.S.—Virginia & West Virginia Coal Co. v. Charles, D.C.Va., 251 F. 83.
22 C.J. p 833 note 27.

Subsequent subdivision of county
Where conveyance was made before subdivision of county, copy thereof was admissible in absence of filing date of conveyance as against objection that it was not recorded in new subdivision.—Aiken v. McMillan, 106 So. 150, 213 Ala. 494.

Land situated in two jurisdictions
(1) It has been held that an office copy of a deed conveying lands in two counties and recorded in one only is admissible in evidence even as to the lands in the county in which the deed is not recorded, on the ground that, as the instrument is legally recorded in one county, its entire contents become legal evidence.—McKeen v. Delancy's Lessee, Pa., 5 Cranch 22, 3 L.Ed. 25—22 C.J. p 834 note 28.

(2) A deed recorded in another state has been held, under similar circumstances, admissible.—Van Guden v. Virginia Coal & Iron Co., Va., 52 F. 838, 3 C.C.A. 294.

(3) However, there is also authority for the contrary view.—Bagley v. Kennedy, 20 S.E. 105, 94 Ga. 651.
22 C.J. p 834 note 29.

31. Va.—Matney v. Yates, 108 S.E. 578, 131 Va. 208.

Office of secretary of state
Certified copy of lease executed under statute authorizing railroad incorporated within state to lease its roads and franchises to connecting railroads, and requiring filing with secretary of state, was held admissible in action of ejectment by railroad, notwithstanding lease was not filed for recordation among land records of municipality where land was situated, since question of whether property was appurtenant to operation of railroad is question of fact.—Pennsylvania R. Co. v. Robert S. Green, Inc., 187 A. 877, 171 Md. 63.

32. Tex.—Moody v. Ogden, 72 S.W. 253, 31 Tex.Civ.App. 395—Logan v. Logan, 72 S.W. 416, 31 Tex.Civ. App. 295.

33. Fla.—Peninsular Naval Stores

Sufficiency of copy. In order that a certified copy of the record of a deed or other private writing be admissible in evidence, the copy must be complete and accurate.[34] Thus, a copy of a copy of the original instrument is not admissible;[35] nor is a mere conclusion as to the effect of the original document.[36] The copy of the entire deed should be offered, and it is improper to offer a copy which omits the description of lands other than those embraced in the controversy.[37]

The certificate of proof or acknowledgment and registration recorded with the deed must be transcribed and certified.[38] However, it is usually considered that an attested copy of a recorded deed is not inadmissible in evidence because the seal of the grantor or of the officer who took the acknowledgment does not appear therein, where the certificate recites that the seal was actually attached,[39] although there is also authority for the contrary view.[40]

Certification; filing and notice. In order that a copy of a recorded private writing be admissible in evidence, it must have been certified as required by the statute providing for such admission.[41]

Under statute so providing, a certified copy of a chattel mortgage is admissible if the copy is filed with the trial papers before trial,[42] and not otherwise.[43] Under a similar statute, a certified copy of a deed,[44] or, it has been held, any recorded instrument,[45] is inadmissible, at least it is not admissible without proof of execution of the original,[46] unless the copy is filed a specified time before trial, with an affidavit that the original is not available, and notice given to the opposite party, although it has been held to be sufficient that the opposite party gave notice and filed the copies.[47]

§ 661. —— Sworn or Examined Copies

Authorities differ as to the admissibility of sworn or examined copies of recorded private writings.

Sworn or examined copies of recorded private writings have been admitted as primary evidence,[48] although there is also authority for the view that such copies should be excluded.[49] It has also been held that a copy of a written contract, although not properly certified, is admissible on the testimony of the person who made it that it is correct, where the objection that the original should be produced is overcome or waived.[50]

An examined copy can be proved only by proof of comparison with the original, and not by proof of comparison with some other copy, and hence a copy verified by examination with a certified copy of the record of a deed is not admissible.[51]

Translations. Under a statute requiring a record-

Co. v. Mathers, 119 So. 333, 96 Fla. 620.

Furnishing obliterated information
To supplement certified copy of mutilated record in order to show grantor's surname in certificate of acknowledgment, resort may be had to copy of entire deed, to impaired record, and to testimony of witnesses.—Peninsular Naval Stores Co. v. Mathers, supra.

34. Ala.—Aiken v. McMillan, 106 So. 150, 213 Ala. 494.
Iowa.—Fidelity Deposit Co. v. Ryan, 282 N.W. 721, 225 Iowa 1260.

Translation
In order that translation of recorded deed be admissible, there must be some evidence that translation is correct.—Smith v. California Portland Cement Co., 25 P.2d 1013, 134 Cal.App. 630.

35. Ala.—Aiken v. McMillan, 106 So. 150, 213 Ala. 494.

Even under statute creating presumption of acknowledgment as to instruments recorded for specified period, a certified copy of recorded translation or copy is not admissible.—Aiken v. McMillan, supra.

36. Ala.—Aiken v. McMillan, supra.

37. Fla.—East Coast Lumber Co. v. Ellis-Young Co., 45 So. 826, 55 Fla. 256, 270, 272.
22 C.J. p 834 note 33.

38. Ky.—Hunt v. Owings, 4 T.B. Mon. 20.

39. Fla.—East Coast Lumber Co. v. Ellis-Young Co., 45 So. 826, 55 Fla. 256.
22 C.J. p 834 note 34.

40. Iowa.—Switzer v. Knapps, 10 Iowa 72, 74 Am.D. 375.
Vt.—Williams v. Bass, 22 Vt. 352.

41. Ark.—Robert v. Brown, 247 S. W. 1058, 157 Ark. 230.
Tex.—Grand United Order of Odd Fellows v. Jones, Civ.App., 85 S. W.2d 662.

Copies of constitution and by-laws of insurer not certified, offered on testimony of witness not secretary of insurer, were incompetent.—Supreme Lodge Woodmen of Union of U. S. v. Montgomery, 8 S.W.2d 446, 177 Ark. 865.

42. Tex.—Smith v. Citizens' Nat. Bank of Lubbock, Civ.App., 246 S. W. 407—Morris v. Moon, Civ.App., 120 S.W. 1063.

43. Tex.—Safe Cabinet Co. v. Southwestern Life Ins. Co., Civ.App., 16 S.W.2d 940, error dismissed—Thos. W. Blake Lumber Co. v. Guaranty State Bank of Woodville, Civ.App., 290 S.W. 187, error dismissed.

44. Tex.—Firebaugh v. Ward, 51 Tex. 409—Ury v. Houston, 36 Tex. 260—Gamage v. Trawick, 19 Tex. 58—Henry v. Bounds, Civ.App., 46 S.W. 120.
22 C.J. p 831 note 11 [f] (1).

45. Tex.—Valentine v. Sweatt, 78 S.W. 385, 34 Tex.Civ.App. 135.

46. Tex.—Miller v. Unsicker, Civ. App., 5 S.W.2d 624.

47. Tex.—Ludtke v. Murray, Civ. App., 199 S.W. 321.

48. Conn.—Barber v. International Co., 48 A. 758, 73 Conn. 587.
22 C.J. p 834 notes 39, 41.

Baptismal certificate
Ill.—Dailey v. Grand Lodge, Brotherhood of Railroad Trainmen, 142 N.E. 478, 311 Ill. 184.

Bills of sale of personalty
Mich.—Pierce v. Rehfuss, 35 Mich. 53.
22 C.J. p 834 note 40.

49. Ga.—Dyson v. Knight, 61 S.E. 468, 130 Ga. 573, 124 Am.S.R. 179.
Ill.—Judson v. Freutel, 107 N.E. 207, 266 Ill. 24.
22 C.J. p 835 note 42.

50. Wis.—Kollock v. Parcher, 9 N. W. 67, 52 Wis. 393.

51. Tex.—Lasater v. Van Hook, 14 S.W. 270, 77 Tex. 650.

ed deed in a foreign language to be accompanied by a sworn English translation, an unsworn translation is not admissible in evidence.[52]

§ 662. —— Abstracts of Title

In general, a properly prepared and authenticated abstract of title has been held admissible under or apart from statute.

Under statute so providing, a properly prepared and certified abstract of title is admissible as evidence of the facts recited therein.[53] While it has been held that apart from statute an abstract of title is no evidence of title, its sole function being to enable a purchaser to pass readily on the state of the title,[54] it has also been held, apart from or without reference to statute, that a properly authenticated abstract of title is admissible,[55] at least where its admission was authorized by stipulation,[56] or where no objection was made,[57] although it is not conclusive as to the facts shown thereby.[58]

In order that an abstract of title be admissible in evidence it must appear that the abstractor is qualified under the law, and he must certify that the abstract is a true and correct abstract of the documents appearing on the official records.[59] An abstract of title made by the custodian of the records and certified by him to have been taken from the records of deeds in his office has been held admissible in evidence;[60] but a mere abstract of title made by a title examiner is not a copy of the entries of abstract books which, when attested by the custodian thereof, is made admissible by statute as a substitute for public records destroyed by fire.[61] While it has been held that an abstract of title prepared by an abstract company is a private record, and that rules applicable to the admission of public records are inapplicable thereto,[62] it has also been held, under statute to that effect, that an abstract issued by a title company is admissible even though signed in the firm name.[63] A certified copy of an abstract of title, showing the contents of private books of the parties who made them, which books are not public records required by law to be kept, is inadmissible.[64]

§ 663. Certification or Exemplification

Authentication of judicial or other public records of a state for use in the same state is considered infra §§ 664, 665. Authentication of such records for use in the courts of another state is treated

52. Mo.—Noble v. Cates, 130 S.W. 302, 230 Mo. 189.

53. N.M.—Jackson v. Gallegos, 30 P.2d 719, 38 N.M. 211.

Copies of abstracts have been held admissible in certain circumstances under statute to that effect.—Ellison v. Glos, 93 N.E. 763, 248 Ill. 275.

Secondary evidence; proof of genuineness

Under statute, purpose of which is to make abstracts of record available as secondary evidence, an abstract is admissible without other proof of genuineness where the records were destroyed, and where such abstract shows the record of an instrument which, if not destroyed, could have been introduced without other proof of its genuineness, and which would have raised a prima facie presumption of its genuineness.—Mercantile Trust Co. of San Francisco v. All Persons Claiming, 191 P. 691, 183 Cal. 369.

Clerical error; excepting "conflicts"

In quiet title suit between parties claiming under conflicting land grants, certified title abstract was held admissible and entitled to evidentiary value accorded by statute, although certificate excepted any "conflicts" with other grants and, through inadvertence, referred to records of wrong county.—Jackson v. Gallegos, 30 P.2d 719, 38 N.M. 211.

54. Iowa.—Dimon v. Wright, 214 N. W. 673, 206 Iowa 693.

22 C.J. p 835 note 47.

55. Wash.—Adams v. Mignon, 84 P. 2d 1016, 197 Wash. 293.

To supplement mutilated deed

Abstract of title may be introduced to supplement certified copy of record of deed mutilated by fire. —Peninsular Naval Stores Co. v. Mathers, 119 So. 333, 96 Fla. 620.

Under shopbook rule

(1) In order for abstract of title to be admissible under shopbook rule, it must have been part of res gestæ or made in due course of business in a transaction between one of the parties and a third person.—Hitt v. Carr, 109 N.E. 456, 62 Ind. App. 80.

(2) Shopbook rule see infra § 682.

Abstract held irrelevant

Wash.—Godefroy v. Reilly, 250 P. 59, 140 Wash. 650.

56. Tex.—Thomas v. Smith, Civ. App., 60 S.W.2d 514, error dismissed.

Subsequent repudiation of stipulation

Tex.—Thomas v. Smith, supra.

57. Neb.—Bresee v. Seberger, 130 N.W. 264, 88 Neb. 632.

58. Wash.—Adams v. Mignon, 84 P.2d 1016, 197 Wash. 293.

59. Idaho.—Jorgensen v. McAllister, 202 P. 1059, 34 Idaho 182.

Not exact copies

Entries in abstracts of title which were not exact copies were inadmissible.—Hitt v. Carr, 162 N.E. 409, 201 Ind. 17.

60. Tex.—Mortimer v. Jackson, Com.App., 206 S.W. 510—Frugia v. Trueheart, 106 S.W. 736, 48 Tex. Civ.App. 513.

22 C.J. p 835 note 46.

Abstract signed by deputy

Abstracts of title by county recorder of deeds was not incompetent because signature was attached by one of deputies, where evidence showed his authority to do so.—Rzesutko v. Hooper, 153 N.E. 617, 322 Ill. 519.

61. Mo.—Lampel Land & Improvement Co. v. Spelling, 139 S.W. 345, 236 Mo. 33.

62. Ind.—Hitt v. Carr, 109 N.E. 456, 62 Ind.App. 80.

63. Ill.—Rzesutko v. Hooper, 153 N. E. 617, 322 Ill. 519.

Copy signed by partner

Certified copy of abstract with certificate in firm name was held properly admitted on evidence that signature was in handwriting of one of partners.—Rzesutko v. Hooper, supra.

64. Mo.—Whitman v. Giesing, 123 S.W. 1052, 224 Mo. 600.

infra §§ 669, 670; and for use in the federal courts, in § 674.

Examine Pocket Parts for later cases.

§ 664. —— Public Records Generally

a. In general
b. Authority of officer to certify
c. Mode and form of authentication

a. In General

Copies of public records must be properly authenticated to be admissible in evidence.

In order that a copy of a public record should be admissible in evidence, it is necessary that it should be exemplified by the certificate of the proper officer or otherwise authenticated,[65] unless any objection based on the lack of such authentication is waived.[66]

Translated copies of land office records must be certified by both the translator and the commissioner or register.[67]

b. Authority of Officer to Certify

Ordinarily, copies of records, including land office records, should be authenticated by their custodian.

Where certified copies of public records are offered, it should appear that the officer by whom they purport to be certified had the right to the custody of the records and had authority to furnish authenticated copies;[68] and ordinarily it is sufficient if such facts appear.[69] This rule applies to land office records,[70] as to which certification by the commissioner or register of the land office,[71] or his deputy,[72] or a surveyor general[73] is sufficient; but a copy certified by a clerk in the land office[74] or by the recorder of a county[75] is not entitled to be received in evidence, unless it is so provided by statute.[76]

c. Mode and Form of Authentication

Authentication must be in the proper form and manner, and in substantial compliance with applicable statutes. No particular words are required if the terms used show that the copy is accurate. A seal is generally necessary.

Copies of public records or documents purporting to be exemplifications or certified copies must be authenticated in the proper form and manner,[77] and in compliance with statutory requirements as to authentication which have been enacted by congress and the various state legislatures.[78] It is usually considered that substantial compliance with the re-

65. Iowa.—Putnam v. Bussing, 266 N.W. 559, 221 Iowa 871.
Tex.—Standard Paving Co. v. Pyle, Civ.App., 131 S.W.2d 200.
22 C.J. p 835 note 54.

66. Minn.—St. Anthony & Dakota Elevator Co. v. Great Northern R. Co., 149 N.W. 471, 127 Minn. 299.
Vt.—Davenport v. Davenport, 68 A. 49, 80 Vt. 400.
Waiver by failure to object see the C.J.S. title Trial § 115, also 64 C.J. p 170 note 11.

67. Tex.—Spillars v. Curry, 10 Tex. 143—Swift v. Herrera, 9 Tex. 263.

68. U.S.—Reidy v. Myntti, C.C.A. Alaska, 116 F.2d 725, 730, quoting **Corpus Juris.**
Iowa.—Putnam v. Bussing, 266 N.W. 559, 562, 221 Iowa 871, quoting **Corpus Juris.**
Miss.—Witherspoon v. State, 103 So. 134, 138 Miss. 310.
Mo.—State v. Hendrix, 56 S.W.2d 76, 80, 331 Mo. 658, citing **Corpus Juris.**
Tex.—Standard Paving Co. v. Pyle, Civ.App., 131 S.W.2d 200.
22 C.J. p 835 note 58.

69. Ala.—Stewart Bros. v. Ransom, 87 So. 89, 204 Ala. 589.
22 C.J. p 835 note 58 [a]–[d].

Death record
In Minnesota a copy of a record of death may be certified by the state registrar.—Pete v. Lampi, 185 N.W. 653, 150 Minn. 423.

Records of motor vehicles
Chief clerk of motor vehicle department has been held proper party to make certified transcripts of its records for use as evidence.—Macon County Lumber Co. v. Jones, 110 So. 1, 215 Ala. 157.

Tax returns
The tax receiver may certify copies of tax returns in Georgia; the certification need not be by the tax collector.—Jett v. Hart, 109 S.E. 654, 152 Ga. 266.

Rules of live stock commission
A copy of the rules and regulations of the live stock sanitary commission may be certified by the acting secretary of state in Texas; certification by a member of the commission is not required.—Lewis v. Harrison, Tex.Civ.App., 229 S.W. 691.

Workmen's compensation proceedings
In Texas, copies of papers, documents, and awards in proceedings before the industrial accident board may be certified by the secretary of the board.—Federal Underwriters Exchange v. Rigsby, Tex.Civ.App., 130 S.W.2d 1105, error dismissed, judgment correct—Southern Underwriters v. Subblefield, Tex.Civ.App., 130 S.W.2d 385—Federal Underwriters Exchange v. Ener, Tex.Civ.App., 126 S.W.2d 769, error dismissed, judgment correct—Traders & General Ins. Co. v. Holtzclaw, Tex.Civ.App., 111 S.W.2d 759, error dismissed—Traders & General Ins. Co. v. Nunley, Tex. Civ.App., 82 S.W.2d 715.

70. Tenn.—State v. Cooper, Ch.A., 53 S.W. 391.
22 C.J. p 836 note 59.

71. Ala.—Woodstock Iron Co. v. Roberts, 6 So. 349, 87 Ala. 436.
22 C.J. p 836 note 60.

72. S.C.—Barino v. Gourdine, 16 S. C.L. 221.
22 C.J. p 836 note 61.

73. S.D.—Kellogg v. Finn, 119 N.W. 545, 22 S.D. 578, 133 Am.S.R. 945, 18 Ann.Cas. 363.
22 C.J. p 836 note 62.

74. Ky.—Sampson v. Overton, 4 Bibb 409.

75. U.S.—Lyell v. Maynard, C.C. Mich., 15 F.Cas.No.8,619, 6 McLean 15.

76. Wis.—Lally v. Rossman, 51 N. W. 1132, 82 Wis. 147.

77. Iowa.—Putnam v. Bussing, 266 N.W. 559, 221 Iowa 871.
22 C.J. p 836 note 66.

78. Ky.—Baker v. Kelly, 10 S.W.2d 467, 226 Ky. 1.
Tex.—J. I. Case Co. v. Laubhan, Civ. App., 77 S.W.2d 578.
22 C.J. p 836 note 67.

Attestation as copy
Under statutes permitting the use of attested copies it is not sufficient for an official to write "attest" and sign his name; the paper must be attested as a copy.—Baker v. Kelly, 10 S.W.2d 467, 226 Ky. 1.

quired form of certification or authentication is sufficient,[79] but there is also authority for the view that, whc-e copies are made evidence by statute, the mode of authentication prescribed must be strictly pursued,[80] at least if the making of such copies evidence is in derogation of the common law.[81] It is generally required, both under or apart from statute, that it shall appear from the certificate that the paper is a true and complete copy of the original,[82] although it has also been held that a certification may be as to a pertinent part of a document.[83] Certification of the fact of comparison of the copy with the original is required under some statutes.[84] Copies of several documents ordinarily may be united under a single certificate.[85]

It is not necessary that particular words be used to make effective a certificate attesting a paper as a certified copy.[86] On principle, the certificate need state no more than that the paper bearing it is a copy of a specified document in the certifier's custody.[87] Thus, in the absence of statutory requirement it is not necessary that a copy should be expressly certified as a "true copy;" the word "copy" attested by the proper officer is sufficient, since a copy authenticated by one authorized to do so will be taken as a true copy.[88]

It has been held that the date of certification must appear,[89] and that recorders certifying to the recording of acts in their offices should state the dates of the recording as well as the books in which the recording was made.[90]

Seal. An unsealed certificate is generally insufficient,[91] particularly where the statute expressly requires a seal for certified copies of public records,[92] or where a seal of office is established by law for the authentication of documents from a particular public office.[93] However, a seal is unnecessary where not required by the governing statutes.[94] Thus it has been held that in the absence of any special requirement a copy of a land office record, duly certified by the register is admissible in evidence, although the certificate is without any seal;[95] and an office copy of a survey, certified by one as deputy surveyor general, without a seal, has been held admissible, where no seal was established by law for such office and the original was not in the office.[96]

The fact that the seal is in the wrong place does not require exclusion of the copy.[97]

79. Iowa.—Putnam v. Bussing, 266 N.W. 559, 221 Iowa 871.
Mont.—In re Kostohris' Estate, 29 P. 2d 829, 835, 96 Mont. 226, citing **Corpus Juris.**
22 C.J. p 836 note 68.

Sufficient compliance
Copies of deeds certified by county recorder as "true and correct" are properly admitted in evidence as substantially complying with a statute requiring certificate to be a "true and complete" copy.—Donner v. Griffith, 122 N.E. 23, 25, 71 Ind.App. 693.

80. U.S.—U. S. v. Harrill, C.C.Cal., 26 F.Cas.No.15,310, McAll. 243.
22 C.J. p 837 note 69.

81. U.S.—Smith v. U. S., Mo., 5 Pet. 292, 8 L.Ed. 130.
22 C.J. p 837 note 70.

82. Iowa.—Putnam v. Bussing, 266 N.W. 559, 221 Iowa 871.
Mich.—In re Corby's Estate, 203 N. W. 877, 231 Mich. 235.
Mont.—In re Kostohris' Estate, 29 P.2d 829, 96 Mont. 226.
22 C.J. p 837 note 71.
Certificate of fact or conclusion from record see supra § 640.

Entire literal terms
Authority to certify copy of record implies that terms set forth by officer as representing original record in his custody must be literal copy, not merely substance or effect, of original's terms, so that custodian thereof has no authority to certify any less than entire literal terms of original, in absence of statute.—Russo v. Metropolitan Life Ins. Co., 3 A.2d 844, 125 Conn. 132.

Mere summary of a record is inadmissible as a certified copy of the original record.—In re Kostohris' Estate, 29 P.2d 829, 96 Mont. 226.

Decree as to water rights
Copies of decrees of the board of control relating to water rights, certified by board's clerk as being true and correct copies, were held admissible in evidence.—Campbell v. Wyoming Development Co., 100 P.2d 124, 55 Wyo. 347, rehearing denied 102 P.2d 745, 55 Wyo. 347.

83. Mont.—In re Kostohris' Estate, 29 P.2d 829, 96 Mont. 226.

84. Wis.—Stevens v. Clark County, 43 Wis. 36.
22 C.J. p 837 note 72.
Certification of a copy as "true and correct" implies that it has been compared with the original.—In re Corby's Estate, 203 N.W. 877, 878, 231 Mich. 235.

85. Mont.—In re Kostohris' Estate, 29 P.2d 829, 96 Mont. 226.
22 C.J. p 837 note 71 [d].

86. Cal.—Harting v. Cebrian, 51 P. 2d 195, 10 Cal.App.2d 10.
11 C.J. p 78 note 26 [a]—22 C.J. p 836 notes 66 [a], 68 [c], p 837 note 71 [a], [b].
"To 'certify' means merely to vouch for a thing in writing; a certificate is an authoritative attestation, and any form which affirms the fact in writing is sufficient."—In re Kostohris' Estate, 29 P.2d 829, 834, 96 Mont. 226.

87. Mont.—In re Kostohris' Estate, supra.

88. Tex.—Copelin v. Shuler, 6 S.W. 668.
W.Va.—Robinson v. Lowe, 40 S.E. 454, 50 W.Va. 75.

89. Ala.—Louisville & N. R. Co. v. Boggs, 74 So. 337, 199 Ala. 225.

90. La.—Trellieu Cypress Lumber Co. v. Albert Hansen Lumber Co., 46 So. 699, 121 La. 700.

91. Ga.—Central of Georgia R. Co. v. Bond, 36 S.E. 299, 111 Ga. 13.
22 C.J. p 837 note 79.

92. Mont.—Chambers v. Jones, 42 P. 758, 17 Mont. 156.
22 C.J. p 837 note 77.

93. Ky.—Wickliffe v. Hill, 3 Litt. 330.
22 C.J. p 837 note 78.

94. Ala.—Macon County Lumber Co. v. Jones, 110 So. 1, 215 Ala. 157.

95. Ala.—Stewart v. Trenier, 49 Ala. 492.
Tenn.—State v. Cooper, Ch., 53 S.W. 391.
22 C.J. p 837 note 80.

96. U.S.—Masters v. Shute, Pa., 2 Dall. 81, 1 L.Ed. 298.

97. Ind.—Cleveland, C. C. & St. L. R. Co. v. Gannon, 112 N.E. 411, 63 Ind.App. 289.

Signature and recital of official character. An alleged certified copy of an instrument is inadmissible where it has not been signed by the certifier, although the instrument in its body purports to be made by an officer.[98] A copy of a marginal entry on a record is not required to be separately signed.[99]

It has been held that the recital in a certificate to a copy of a document as to the official character of the officer as the legal custodian of it is prima facie proof of that fact,[1] and that it is unnecessary to call witnesses to prove the identity of the custodian or his signature.[2] Further, it has been held unnecessary for the certificate to recite the official character of the person by whom it is signed.[3] Where the same person holds two offices, his certificate to copies of records properly in his custody is not vitiated by the fact that he appends to his signature the designation of the office other than that by virtue of which he has custody of the records.[4]

Verification. A copy of a public record, if authenticated by the seal and signature of the proper officer is, as a general rule, admissible without supplementary proof or verification by the oath of the officer or other testimony.[5] An instrument in the form of an affidavit is sufficient if it contains the appropriate wording of a certificate.[6]

§ 665. —— Judicial Records

a. In general
b. Justices' records

a. In General

(1) Necessity and authority
(2) Form of attestation or certification

(1) Necessity and Authority

Copies of judicial records must be authenticated to be admissible. This should be done by their keeper, such as the clerk of the court or his deputy, and not ordinarily by the judge.

A copy of a judicial record, like a copy of any other public record, must be properly authenticated in order to be admissible in evidence.[7] As a general rule the officer who is required to keep a judicial record is authorized, and is the only person authorized, to give certified copies thereof.[8] Usually the clerk of the court is competent to certify copies;[9] and it is not necessary that the copy should be further authenticated by the signature of the judge before whom the judicial proceedings took place.[10] A copy attested and signed by a deputy clerk is admissible,[11] at least where it is indicated either in the certificate, or by initials attached to the signature, or in some other sufficient manner, that the person signing is an authorized deputy clerk.[12]

The clerk of one court cannot certify copies of

98. Minn.—Citizens State Bank v. Bonness, 78 N.W. 875, 76 Minn. 45.
Ohio.—State v. Hinkelman, 32 Ohio Cir.Ct. 1.

99. Tex.—Texas Packing Co. v. St. Louis Southwestern R. Co., Civ. App., 204 S.W. 120.

Forfeiture of franchise

A certified copy of records showing that a corporate franchise tax had not been paid, with an entry on the margin showing that the franchise had been forfeited for such nonpayment, was admissible, although the marginal entry had not been signed by the secretary of state. —Texas Packing Co. v. St. Louis Southwestern R. Co., supra.

1. Ga.—Weeks v. Hosch Lumber Co., 66 S.E. 168, 133 Ga. 472, 134 Am.S.R. 213.
22 C.J. p 838 note 86.

Corpus Juris cited in holding that "a transcript, in due form, purporting to come from the proper office and to be certified by the person having the lawful custody thereof, is admissible without further proof." —Macon County Lumber Co. v. Jones, 110 So. 1, 2, 215 Ala. 157.

2. Ala.—Macon County Lumber Co. v. Jones, supra.

3. Ky.—Barret v. Godshaw, 12 Bush 592.

4. Ill.—People v. Lyons, 168 Ill. App. 396.
22 C.J. p 838 note 85.

5. La.—Surget v. Newman, 9 So. 561, 43 La.Ann. 873.
Mass.—Commonwealth v. Chase, 6 Cush. 248.
Pa.—Snyder v. Bowman, 4 Watts 132.

6. Mont.—In re Kostohris' Estate, 29 P.2d 829, 96 Mont. 226.

7. Ill.—Carroll v. Krause, 280 Ill. App. 52.
Ky.—Brown v. Brown, 268 S.W. 801, 207 Ky. 133.
Utah.—Larsen v. Ryan, 180 P. 178, 54 Utah 250.
22 C.J. p 839 note 5.

Authentication held sufficient

Tenn.—Hull v. Vaughn, 107 S.W.2d 219, 171 Tenn. 642.

8. Vt.—Reed v. Whitham, 181 A. 129, 107 Vt. 482.
22 C.J. p 839 note 6.

County clerk

Where a judgment is docketed in the county clerk's office, and the judgment creditor seeks to redeem land of the debtor which was sold under the judgment of another creditor, a copy of the docket is properly certified by the clerk of the county in which the judgment is docketed.—Woolsey v. Saunders, 3 Barb., N.Y., 301.

9. Vt.—Reed v. Whitham, 181 A. 129, 107 Vt. 482.
22 C.J. p 839 note 7.

Proof of identity

A certificate appearing to be regularly signed by the clerk of a court has been held sufficient without independent proof of his identity since, in the absence of contrary proof, it is conclusively presumed that he was in fact the clerk and keeper of the records.—Clements v. Holmes, 120 S.W.2d 988, 22 Tenn.App. 230.

In Texas "there is . . . no statutory authority for the clerk of a court to make, certify, and deliver a transcript of the proceedings in a cause for use as evidence in another cause in some other court."—Burton v. Perry, Tex.Civ.App., 53 S.W.2d 795, 797, error refused.

10. Wis.—Arndt v. Burghardt, 162 N.W. 317, 165 Wis. 312.
22 C.J. p 839 note 8.

11. La.—Downes v. Tarkington, 3 La.Ann. 247.

12. Ky.—Moore v. Farrow, 3 A. K. Marsh. 41.
Va.—Hurley v. Charles, 72 S.E. 689, 112 Va. 706.

the records of another court.[13] A judge has no authority to certify copies of the record of his own court,[14] unless he is ex officio clerk of his court, in which case he has such authority.[15] Where one court becomes the successor of another and receives from the other all its records, copies of such records certified by the clerk of the former are entitled to be received in evidence the same as if they were copies of its own records.[16]

(2) Form of Attestation or Certification

The attestation must identify the copy and show that it is a correct copy of the original. A seal is sometimes required.

It is the usual practice for clerks of court in certifying judicial records to append to the copy, immediately before the official signature, a clause or phrase attesting the correctness of the copy, and such attestation is required by statute in some jurisdictions.[17] Apart from statutory provision to the contrary, an attestation in the words, "A true copy. Attest," or similar language, is sufficient.[18] Indeed, if there is no statute prescribing a particular form of attestation, a copy authenticated by a duly authorized officer need not be attested as a true copy; but an attestation in the words, "A copy, Attest," is sufficient, since a copy authenticated by one authorized to do so must be taken to be a true copy;[19] and a certificate that the copy is full and complete is not required if the record appears on the face of the copy to be complete.[20] Where by statute, the clerk or other officer is required to make certification as to the completeness of the copy, the certificate need not as a general rule be formal or technical; it is sufficient if on a reasonable construction it affirms that the transcript contains a full, true, and correct copy of all the proceedings.[21]

An exemplification from the record of the proceedings in a court of probate relating to the administration of an estate is not to be rejected because the verification is embraced in one certificate, where the entire record is competent.[22] The court may permit a clerical error in the certificate to be corrected.[23]

Seal of court. In some jurisdictions copies of judicial records are required to be certified under the seal of the court if there be one;[24] but the rule in other jurisdictions is that a copy of a record of a court certified to be used as evidence in another court in the state need not be exemplified under the seal of the court, and that it is sufficient if the copy is attested by the clerk or other proper officer.[25] Where the seal is required, it is usually considered to be sufficiently affixed by making an impression on the paper with the seal, without the use of either wax or a paper wafer,[26] but, where the statute requires the seal to be impressed in wax or some like substance, a mere scrawl is not sufficient.[27] Where the copy is authenticated by the proper officer under the seal of the court, no further authentication is in general needed for its introduction in another court in the same state, since the seal of a court of record proves itself within the state.[28]

Recital of official character. It has been held not necessary that in addition to his signature the clerk state his official character, it being sufficient if the date or other facts stated in the body of the certificate show that the copy was made during the official term of the officer or was otherwise made in an official capacity.[29] It has also been held sufficient if the clerk indicates his official capacity by initials merely.[30] Where, in the certificate to a transcript of a record in the court of ordinary, the ordinary described himself as "ordinary and ex of-

13. Kan.—Bowersock v. Adams, 41 P. 971, 55 Kan. 681.
Neb.—Comstock v. Kerwin, 77 N.W. 387, 57 Neb. 1.

14. Conn.—Dibble v. Morris, 26 Conn. 416.
La.—Reynolds v. Mahle, 12 La. 424.

15. Ga.—Phillips v. Babcock Bros. Lumber Co., 63 S.E. 808, 5 Ga. App. 634.
22 C.J. p 839 note 14.

16. R.I.—Clarke v. Rice, 23 A. 301, 15 R.I. 132.
22 C.J. p 839 note 11.

17. Ala.—Cofer v. Schening, 13 So. 123, 98 Ala. 338.
22 C.J. p 840 note 16.
Certificate of fact or conclusion from record see supra § 629.
Sufficient certificate
Transcript of proceedings in former action between same parties was properly authenticated, where certificate of clerk stated that it contained "full, true, correct, and complete copies, of all papers and record entries and the final judgment in that cause."—Bereolos v. Roth, 145 N.E. 545, 548, 195 Ind. 425.

18. Ga.—Harden v. Webster, 29 Ga. 427.
22 C.J. p 840 note 17.

19. Mass.—Commonwealth v. Quigley, 48 N.E. 782, 170 Mass. 14.

20. Ky.—Radcliff v. Ship, Hard. 292.
22 C.J. p 840 note 19.

21. Ind.—Chicago & S. E. R. Co. v. Grantham, 75 N.E. 265, 165 Ind. 279.
22 C.J. p 840 note 20.

22. Ga.—Weaver v. Tuten, 74 S.E. 835, 138 Ga. 101.
22 C.J. p 840 note 21.

23. Iowa.—Davenport Sav. Bank v. Chicago R. I. & P. R. Co., 158 N.W. 737, 176 Iowa 745.
22 C.J. p 840 note 22.

24. Ind.—Brunt v. State, 36 Ind. 330.
Vt.—Parish v. Pearsons, 27 Vt. 621.
22 C.J. p 840 note 23.

25. S.C.—Fant v. McDaniel, 3 S.C. L. 173, 2 Am.D. 660.
22 C.J. p 840 note 24.

26. N.J.—Hunt v. Hunt, Ch., 9 A. 690.

27. Mo.—Gates v. State, 13 Mo. 11.

28. Wyo.—Brophy v. Brunswick, 2 Wyo. 86.
22 C.J. p 841 note 27.

29. Tenn.—Donohoo v. Brannon, 1 Overt. 327.

30. Va.—Wynn v. Harman, 5 Gratt. 157, 46 Va. 157.

ficio clerk of said court of ordinary in said county," and signed the certificate in the same manner, there was a sufficient statement that the ordinary and the clerk were the same person to admit the transcript in evidence.[31]

Detached papers. The mere fact that papers composing a record are certified separately has been held insufficient to require their rejection, if the papers taken together make a complete record,[32] although a contrary opinion has been indicated,[33] and the rule has been held to be otherwise if the papers do not show an entire record of the proceedings.[34] Where only one certificate is made and the record is composed of several distinct papers, they should be attached, that the court may be enabled to see that the clerk's certificate applies to all of them, and may import verity thereto.[35]

Identification of record certified. If the transcript fails to show to what court the record belongs,[36] or otherwise fails to identify the papers or record intended to be authenticated[37] it will be inadmissible. It has been held, however, that a county clerk's certificate to the record of an abstract of a judgment is not rendered inadmissible because the page of the record of the judgment is not given therein.[38]

Verification. Duly certified exemplifications or copies of the proceedings of one court within a state will be admissible in the other courts of the same state without being sworn to.[39]

b. Justices' Records

A justice of the peace may, as a rule, authenticate copies of his own records if he is legal custodian thereof, although under some statutes further authentication is required. The copy must be certified as a true one, and in some jurisdictions a seal is required.

It has been laid down as a rule founded on common-law principles that the person by whom a justice's record is certified must appear from the certificate or otherwise to have been the legal custodian of the record.[40] Under the statutes in many jurisdictions certification of justices' records may be executed by the justice himself,[41] or by another justice who as successor or otherwise may have the legal custody of the record,[42] provided it appears from the certificate[43] or other proof[44] that the person certifying had such legal custody. Under some statutory provisions further authentication of the certified copy of the justice is required, as, for example, by the certification of the clerk of court of the county in which the justice resides, or by the filing of the justice's transcript in the clerk's office and the issuance of certified copies by the clerk;[45] but apart from statute the certificate of a clerk as to the official character of the justice is not required.[46] While the transcript of a justice under his hand and seal has been held admissible without proof of his handwriting,[47] it has also been held that the signature of a justice must be authenticated.[48]

Mode and form of certification. A paper purporting to be a true copy of proceedings before a justice must, in order to be admissible, be certified to be a copy of matters of record or on file in the justice's office.[49] Under statute in some jurisdictions the justice is required to certify to the correctness or completeness of the copy,[50] but as a general rule no particular form of language is re-

31. Ga.—Weeks v. Hosch Lumber Co., 66 S.E. 168, 133 Ga. 472, 134 Am.S.R. 213.

32. Cal.—Goldstone v. Davidson, 18 Cal. 41.

33. Pa.—Susquehanna & W. V. R. & Coal Co. v. Quick, 68 Pa. 189.

34. Fla.—Stark v. Billings, 15 Fla. 318.

35. Wis.—Sherburne v. Rodman, 8 N.W. 414, 51 Wis. 474.
22 C.J. p 841 note 34.

36. Vt.—Parish v. Pearsons, 27 Vt. 621.

37. Ala.—Clements v. Taylor, 65 Ala. 363.
Me.—Pike v. Crehore, 40 Me. 503.

38. Tex.—Weinert v. Simang, 68 S. W. 1011, 29 Tex.Civ.App. 435.

39. S.C.—Anonymous, 3 S.C.L. 173

40. Wyo.—Stamper v. Gay, 23 P. 69, 3 Wyo. 322.

41. N.Y.—Maynard v. Thompson, 8 Wend. 393.
22 C.J. p 842 note 44.

Loss of original

A paper, certified by a justice of the peace to be a copy of a record of a case before him, has been held admissible in evidence, although made by him after the loss of the original, and pending a trial in which he had testified to its contents.—Tillotson v. Warner, 3 Gray, Mass., 574.

42. W.Va.—Cunningham v. Birch River Lumber Co., 109 S.E. 251, 89 W.Va. 326.
22 C.J. p 842 note 45.

43. W.Va.—Cunningham v. Birch River Lumber Co., supra.
22 C.J. p 842 note 46.

44. W.Va.—Cunningham v. Birch River Lumber Co., supra.
22 C.J. p 842 note 47.

45. Ark.—State v. Crow, 11 Ark. 642.
22 C.J. p 842 note 48.

46. Ky.—Talbott v. Bradford, 2 Bibb 316.

Official character at particular time

It is not a valid objection to the admissibility of a certified copy of a judgment of a justice of the peace that there is not appended thereto a certificate of the clerk of the county court of the county in which the judgment was rendered that the justice who rendered it was at the time of its rendition a justice of the peace in such county.—Schwartz v. Massy, 3 Tex.A.Civ.Cas. § 470.

47. N.J.—Miller v. Miller, 5 N.J.Law 508.

48. U.S.—Wagner v. Frederick County, Md., 91 F. 969, 34 C.C.A. 147.

49. Conn.—Candy v. Twichel, 2 Root 123.

50. Mich.—Goodsell v. Leonard, 23 Mich. 374.
22 C.J. p 842 note 53.

quired,[51] and, in the absence of express statutory provision, where the document purporting to be a copy comprises on its face all the essentials of a sufficient record, it is sufficient if it is certified by the justice to be "a true copy."[52] Transcripts of two judgments of a justice of the peace, written on the same sheet of paper, may be authenticated by a single certificate of the justice, which includes both transcripts in its terms.[53] The justice must sign the certificate in his official capacity.[54]

Seal. In some jurisdictions it has been held that a transcript of the proceedings of a justice of the peace not authenticated under seal is not evidence;[55] but on the other hand it has been held that a seal is not necessary,[56] and that any necessity for a seal may be obviated by swearing the justice as a witness to the correctness of the transcript.[57]

§ 666. Federal Records

a. Proof in state courts
b. Proof in federal courts

a. Proof in State Courts

(1) In general
(2) Judicial records

(1) In General

Copies of federal records should be authenticated by their legal custodian under a proper seal. The copy should be a reproduction of the entire record and not a mere summary.

Copies of federal records are inadmissible in a state court unless properly authenticated.[58] The mode of authenticating documents of the departments and public offices of the United States is governed by the laws of the United States, and no authentication of such documents will ordinarily be required in the state courts other than what would be sufficient in the federal courts.[59] Generally, certification or authentication is sufficient if made by the legal custodian of the records under the proper official seal.[60] An abstract or summary of a federal record is not a "copy" thereof or admissible as such.[61] While the use of particular words is not required to effect a proper certification of a federal record,[62] the words used must indicate an identity of subject matter between the copy and the original on file, and the identity of the person who has custody of the original record.[63]

(2) Judicial Records

The weight of authority holds that copies of federal

51. Ind.—Yeager v. Wright, 13 N.E. 707, 112 Ind. 230—Steel v. Pope, 6 Blackf. 176.

52. Me.—Wheeler v. Lothrop, 16 Me. 18.
Vt.—Starbird v. Moore, 21 Vt. 529.

53. Ind.—Remington v. Henry, 6 Blackf. 63.

54. W.Va.—Jackson v. Conrad, 14 W.Va. 526.
22 C.J. p 842 note 57.

55. Ky.—Geohegan v. Eckles, 4 Bibb 5.
22 C.J. p 842 note 58.

56. Mass.—Commonwealth v. Downing, 4 Gray 29.

Effect of official attestation
Where a justice of the peace is his own clerk and has no seal, his official attestation placed on a copy of a record made by himself is legally equivalent to the attestation placed on a copy of a record of a judgment rendered by a superior court by the clerk thereof with its seal affixed and the certificate of the judge to the genuineness of the seal and of the clerk's signature.—O'Connell v. Hotchkiss, 44 Conn. 51.

57. Ill.—Greenberg v. People, 125 Ill.App. 626.
22 C.J. p 842 note 61.

58. Tex.—Taylor v. McLennan County, Civ.App., 120 S.W.2d 134.
22 C.J. p 835 note 54 [a].

Absence of a seal on a certified copy of a record of the department of the interior was held to render it inadmissible.—Langford v. Newsom, Tex.Com.App., 220 S.W. 544, affirming Newsom v. Langford, Civ. App., 174 S.W. 1036.

Records used as originals
Books printed from written public records of the treasury department by authority of law, and produced from the custody of such department, where they were used as original records in the transaction of the daily business thereof, have been held not to require certification as copies to be admissible in evidence —Chesapeake & Delaware Canal Co v. U. S., Del., 39 S.Ct. 407, 250 U.S. 123, 63 L.Ed. 889, affirming, C.C.A., 240 F. 903.

59. Ala.—Jenkins v. Noel, 3 Stew. 60.
22 C.J. p 843 note 64.

Interstate tariffs
In view of the impossibility of procuring authentication of interstate tariffs in the manner required by Code 1919 § 6206, since federal officers would have no authority to make the certificate required by the Virginia law, a tariff filed with the interstate commerce commission, which is authenticated in the manner prescribed by U.S.Comp.St. § 8584 (12), is admissible in the state courts, in a suit involving interstate commerce.—McGuire v. Atlantic Coast Line R. Co., 118 S.E. 225, 136 Va. 382.

60. Mont.—Welch v. All Persons, etc., 278 P. 110, 85 Mont. 114.
N.D.—First Nat. Holding Co. of Lisbon v. Moore, 232 N.W. 310, 60 N.D. 27.

Appointment of receiver
A copy of the appointment of a receiver for a national bank may be certified by the acting comptroller of the currency.—First Nat. Holding Co. of Lisbon v. Moore, supra.

Pension declaration
Copies of declaration for widow's pension may be authenticated by commissioner of pensions.—Welch v. All Persons, etc., 278 P. 110, 85 Mont. 114.

61. U.S.—Dowling v. Jones, C.C.A. N.Y., 67 F.2d 537.
Mont.—In re Kostohris' Estate, 29 P. 2d 829, 96 Mont. 226.

62. Cal.—Harting v. Cebrian, 51 P. 2d 195, 10 Cal.App.2d 10.
Mont.—In re Kostohris' Estate, 29 P.2d 829, 96 Mont. 226.

Wording held sufficient
A certification consisting simply of the word "Certified" followed by the name of the certifier and a proper seal has been held sufficient.—Harting v. Cebrian, 51 P.2d 195, 10 Cal.App.2d 10.

63. N.J.—Ehrlich v. Mulligan, 140 A. 463, 104 A. 463, 465, 104 N.J. Law 375, 57 A.L.R. 596.

"True copy"
Authenticating a document as a "true copy" has been held insufficient on the ground that such a copy is not a "certified copy."—Ehrlich v. Mulligan, supra.

court records may be authenticated for use in state courts by the clerk, under seal of the court, without attestation by a judge of the clerk's certificate. A referee in bankruptcy may certify copies of papers in his custody.

Copies of the records of federal courts, to be admissible in evidence in state courts, must be properly authenticated.[64] Some early cases have held that the judgments of the courts of the United States must be deemed to be embraced in the act of congress providing for the mode of authentication of judicial proceedings of one state for admissibility in evidence in the courts of another state,[65] or must be classed as foreign judgments,[66] and that when offered as evidence in the state courts, authentication of the certificate is necessary in each case. The weight of authority, however, is to the effect that the courts of the United States are not foreign to the state courts and that the act of congress prescribing the mode of proving the judicial proceedings of one state in the courts of another has no application to the proceedings of the federal courts.[67] Hence as a general rule a copy of the record of a federal court will be admitted in evidence in the state courts if it is certified by the clerk under the seal of the court;[68] and this is particularly so where the record is offered in a state court situated in the same state wherein the federal court is located,[69] although by many authorities the rule is applied whether or not the state in whose courts the evidence is adduced belongs to the judicial district or circuit from which the copy is brought.[70] A fortiori, authentication in the manner provided by the federal statutes is sufficient to render a record of a federal court admissible in evidence in the state and territorial courts.[71] In jurisdictions where statutes have been enacted prescribing the mode of authenticating records of the federal courts so as to render them admissible in the state courts, authentication in the prescribed mode is sufficient.[72]

A paper certified by a United States circuit court commissioner, with his seal and signature, as a true copy of the original record in a proceeding within his jurisdiction is admissible without oath in a court of the state in which the federal court sits.[73]

A paper purporting to be a copy of a decree of a federal court is not admissible in evidence in a state court where neither the instrument itself nor the certificate of the clerk shows by what court the decree was rendered,[74] or where the certificate fails to show that the instrument is a true copy of the original decree.[75]

Bankruptcy records. A certified copy of a bankruptcy record is admissible in a state court[76] as original evidence;[77] and it is not necessary to produce the entire record of a bankruptcy proceeding in order to prove a single order or act of the court of bankruptcy,[78] although a certificate of the clerk is not sufficient to prove a discharge.[79] A transcript or copy of a bankruptcy record may be certified by the clerk of the district court under seal of the court,[80] without a further certification by the judge of the court that the attestation is in due form.[81] As the custody of all papers in bankruptcy proceedings, after reference, is in the referee, such papers may be certified by the referee,[82] and his

64. N.J.—Ehrlich v. Mulligan, 140 A. 463, 104 A. 463, 104 N.J.Law 375, 57 A.L.R. 596.

Judgment as copy of lost paper

Where a judgment of a federal court was offered as an exhibit and attached to a deposition as a copy of a lost paper, it was held not necessary for it to be certified under the act of congress.—Cleveland, C., C. & St. L. Ry. Co. v. Hazard Blue Grass Coal Co., 10 Tenn.App. 590.

65. La.—Heard v. Patton, 27 La. Ann. 542.
22 C.J. p 843 note 65.
Mode of authentication under such act see infra § 670.

66. Miss.—Dorsey v. Maury, 10 Miss. 298.

67. Okl.—Carter v. Barry, 7 P.2d 448, 450, 154 Okl. 145, citing **Corpus Juris.**
22 C.J. p 843 note 67.

68. Cal.—Harting v. Cebrian, 51 P. 2d 195, 10 Cal.App.2d 10.
Okl.—Carter v. Barry, 7 P.2d 448, 450, 154 Okl. 145, citing **Corpus Juris.**
22 C.J. p 843 note 67.

69. Okl.—Wilson v. Crutcher, 56 P. 2d 416, 176 Okl. 481.

Reason for rule

Under such circumstances, the federal court is a domestic court.—Carter v. Barry, 7 P.2d 448, 154 Okl. 145, followed in Carter v. Barry, 8 P.2d 50, 155 Okl. 161 and Carter v. Barry, 8 P.2d 51, 155 Okl. 162.

70. Cal.—Harting v. Cebrian, 51 P. 2d 195, 10 Cal.App.2d 10.
22 C.J. p 843 note 67.

71. U.S.—Buford v. Hickman, Super. Ark., 4 F.Cas.No.2,114a, Hempst. 232.
Ala.—Womack v. Dearman, 7 Port. 513.

72. W.Va.—Dickinson v. Chesapeake & O. R. Co., 7 W.Va. 390.
22 C.J. p 843 note 71.

73. Me.—Frost v. Holland, 75 Me. 108.

74. Tex.—Intertype Corp. v. Sentinel Pub. Co., Civ.App., 206 S.W. 548.

75. Tex.—Intertype Corp. v. Sentinel Pub. Co., supra.

76. Ill.—Laskowski v. Cowen, 15 N. E.2d 59, 295 Ill.App. 615.
Tex.—Kraker v. Bettman-Kleinhauser Clothing Co., Civ.App., 12 S.W.2d 247.
22 C.J. p 843 note 72.

77. S.C.—Fales & Jenks Mach. Co. v. Browning, 46 S.E. 545, 68 S.C. 13.

78. Ill.—Heath v. Hyde, 87 Ill. 91.
22 C.J. p 843 note 74.

79. Tenn.—Hamon v. Foust, 150 S. W. 418, 127 Tenn. 32, Ann.Cas. 1914A 1103.
22 C.J. p 843 note 75.

80. Ga.—Venable v. Venable, 112 S. E. 891, 153 Ga. 689.
Iowa.—Bagley v. Bates, 276 N.W. 797, 224 Iowa 637.

81. Ga.—Venable v. Venable, 112 S. E. 891, 153 Ga. 689.

82. Ga.—Myers v. Wright, 123 S.E. 740, 158 Ga. 418—Bank of Manchester v. Birmingham Trust & Savings Co., 119 S.E. 603, 156 Ga. 486.
Tex.—Clifton Mercantile Co. v. Conway, Civ.App., 264 S.W. 192, 194, citing **Corpus Juris.**
22 C.J. p 843 note 76.

certificate need not be under seal, at least where no provision has been made for such a seal.[83]

b. Proof in Federal Courts

A copy of a federal court record may be certified by the clerk, under seal of the court, without any attestation by the judge.

The record of a judgment or proceeding of a federal court, to be admissible in other federal courts, need not be authenticated in the mode prescribed by the act of congress for authenticating the records and judicial proceedings of the state courts; each court of the United States is presumed to know the seal of every other federal court, and hence the record of one may be proved in any other by the certificate of the clerk under the seal of the court, without a certificate of the judge that the attestation is in due form.[84] However, while the statute does not in terms include the record and judicial proceedings of the federal courts, its requirements are sometimes followed as a matter of practice in authenticating the records of those courts, and such authentication is deemed sufficient.[85]

The report of a federal board may be proved in the federal courts by a properly authenticated copy.[86] While a copy of the records of a United States commissioner certified by him may be sufficient to render the copy admissible in evidence in a federal court, a certificate certifying in a general way that he did certain things and made certain adjudications, but not amounting to a certified copy, is not admissible.[87]

§ 667. Public Documents and Records of Other States

Proof of judicial records of other states by means of authenticated copies is treated infra §§ 668–672. Proof of the statutes of sister states by this means is considered in the C.J.S. title Statutes § 457, also 59 C.J. p 1212 note 68–p 1213 note 87.

Public records which are neither judicial nor legislative are considered infra § 673.

§ 668. —— Judicial Records in General

Unless a state court was without jurisdiction, authenticated copies of its records are admissible in the courts of sister states to the same extent that the originals would be.

The contents of a judicial record of one state may be proved in another state by a properly authenticated copy.[88] However, a copy of a judicial record of a court of another state, although certified, is inadmissible where it is apparent that the court was without jurisdiction,[89] or where the original would not be admissible,[90] as, for example, where its contents are not relevant to the issues in the pending cause.[91]

Where a court was abolished during the pendency of an action therein, and the proceedings were transferred, pursuant to statute, to another court, it was held no objection to a certified transcript of a judgment rendered in such action that some of the proceedings appeared to have been taken in one court and some in the other.[92]

§ 669. —— Authentication of Judicial Records Generally

Copies of judicial records of sister states may be authenticated in any mode permitted by the law of the forum, even though such mode would be insufficient under federal statute; but a state may not add conditions to those prescribed by federal statute.

As indicated infra § 670, copies of judicial records of a sister state may be authenticated as prescribed by federal statutory provisions. The states cannot require more proof of judicial records of

83. Ga.—Bank of Manchester v. Birmingham Trust & Savings Co., 119 S.E. 603, 156 Ga. 486.

84. U.S.—Soo Hoo Yee v. U. S., C.C. A.Vt., 3 F.2d 592.
22 C.J. p 844 note 79.

85. U.S.—O'Hara v. Mobile & O. R. Co., Mo., 76 F. 718, 22 C.C.A. 512—Buford v. Hickman, Super. Ark., 4 F.Cas.No.2,114a, Hempst. 232.

86. U.S.—Chang Sim v. White, C.C. A.Cal., 277 F. 765.

87. U.S.—U. S. v. Lew Pay Dew, D.C.N.Y., 119 F. 786.

88. Ind.—Applegate v. Applegate, 11 N.E.2d 515, 104 Ind.App. 599.
Mass.—Goodrich v. Stevens, 116 Mass. 170.
N.H.—Folsom v. Blood, 58 N.H. 11.
N.C.—Smathers v. Jennings, 87 S.E. 534, 170 N.C. 601.
Okl.—Uphoff v. Meier, 87 P.2d 960, 184 Okl. 378.

Necessity of filing

It is unnecessary in an action on a judgment rendered in another state to file a certified copy of such judgment with the court prior to its introduction in evidence.—Severson v. Dickinson, 259 S.W. 518, 216 Mo.App. 572.

Entry in judgment book

Certified transcript of judgment roll in action brought in court of a sister state was held admissible to show entry of judgment in that action, since entry of judgment in judgment book as required by statute would be presumed from certificate of clerk.—Jones v. Grady, 266 N.W. 889, 66 N.D. 479.

89. Tex.—Wren v. Howland, 75 S. W. 894, 33 Tex.Civ.App. 87.
22 C.J. p 844 note 91.

Justice's court

In order that a transcript of a record of a justice of the peace of another state may be received in evidence it must appear that the justice had jurisdiction of the subject matter and of the parties.
Ill.—Trader v. McKee, 2 Ill. 558.
Pa.—Perry v. Northern Ins. Co., 5 Phila. 188.

90. Mo.—Holdridge v. Marsh, 30 Mo.App. 352.

91. Tex.—Maunders v. Hanks, Civ. App., 278 S.W. 507.

92. U.S.—Bohlander v. Heikes, Ala., 168 F. 886, 94 C.C.A. 298.

other states than is provided by the act of congress,[93] but the general mode of authentication of judicial records prescribed by such act is not exclusive, and does not abrogate any other mode of authentication known to the common law or which the courts of a particular state may deem expedient according to established principles.[94] An examined or sworn copy, for example, may be admitted.[95] It has been held that judicial proceedings which by reason of their nature cannot be proved in the manner prescribed by the act of congress, such as proceedings containing matters resting in parol, are nevertheless entitled to full faith and credit under the constitution, and are to be proved in accordance with the rule of the common law.[96] A copy of the record of a proceeding in another state is inadmissible where not properly authenticated.[97]

In many of the states provision is made by statute for the admission in evidence of copies of judicial records of sister states; and such copies may be admitted if authenticated in accordance with the state statute[98] although they do not meet the requirements of the federal statute.[99] Such a state statute does not contravene the federal constitution or the federal statute, provided the state statute does no more than dispense with some of the requirements of the federal statute and does not have the effect of excluding a record authenticated according to the requirements of the federal statute.[1] When it is sought to introduce a copy of a judicial record of a sister state by virtue of a state statute, the provisions of such statute must be complied with[2] substantially,[3] but where there is such compliance the record may be admitted, although it may not be authenticated in accordance with the statutory requirements of the state from which it comes.[4]

Certificate. A statement in the certificate of a judge that the certificate of the clerk is "entitled to full faith and credit" sufficiently supplies an omission to state, as required by state statute, that the attestation of the clerk "is in due form."[5] Individual items which make up the judicial record of an-

93. Ariz.—Clark v. Wesendorf, 275 P. 925, 35 Ariz. 172.
22 C.J. p 848 note 45, p 844 note 90 [a].

94. Mo.—State v. Hendrix, 56 S.W. 2d 76, 79, 331 Mo. 658, citing **Corpus Juris**—Etz v. Wheeler, 23 Mo.App. 449.
N.M.—Anthony Doll & Co. v. Hogan, 53 P.2d 649, 650, 40 N.M. 55, citing **Corpus Juris.**
22 C.J. p 848 note 46.

95. Mo.—Johnson v. Johnson, App., 56 S.W.2d 1069.
N.M.—Anthony Doll & Co. v. Hogan, 53 P.2d 649, 40 N.M. 55.
22 C.J. p 848 note 48.

96. S.C.—Campbell v. Home Ins. Co., 1 S.C. 158.
22 C.J. p 851 note 81.

97. Md.—Winslow v. Atz, 177 A. 272, 168 Md. 230.
N.H.—Slocinski v. Radwan, 144 A. 787, 83 N.H. 501, 63 A.L.R. 543.
N.J.—Pan American Securities Corporation of New York v. Fried, Krupp Aktiengesellschaft, 198 A. 770, 16 N.J.Misc. 225.
Utah.—Cooke v. Cooke, 248 P. 83, 67 Utah 371.

Docket entries of justice's court
In the absence of proper authentication, a copy of entries of a docket of a justice of the peace of a sister state is inadmissible.—Rigler v. McClure, 175 S.W. 256, 189 Mo. App. 710.

Exhibit attached to pleading
A transcript of a judgment of a court of another state which is merely attached to a pleading as an exhibit, and not offered as proof, need not be authenticated.

Ill.—Cherry v. Chicago Life Ins. Co., 190 Ill.App. 70, affirmed Chicago Life Ins. Co. v. Cherry, 37 S.Ct. 492, 244 U.S. 25, 61 L.Ed. 966.
Kan.—White v. Treon, 25 Kan. 484.

98. Cal.—Flickinger v. McKesson, 183 P. 195, 41 Cal.App. 577.
Ga.—Sullivan v. Douglas Gibbons, Inc., 2 S.E.2d 89, 187 Ga. 764, affirming 199 S.E. 554, 58 Ga.App. 708—White v. First Nat. Bank of Claxton, 162 S.E. 701, 174 Ga. 281.
Mass.—Portland Maine Pub. Co. v. Eastern Tractors Co., 193 N.E. 888, 289 Mass. 13.
Minn.—Spielman v. Molitor, 210 N.W. 15, 168 Minn. 280.
Neb.—Chamberlain v. Vanderhoof, 206 N.W. 10, 114 Neb. 47.

99. Ill.—Gradler v. Johnson, 22 N. E.2d 946, 372 Ill. 137.

Authentication of clerk's certificate
The clerk's certificate need not be authenticated by that of the judge where the state statutes omit such requirement.
Ariz.—Clark v. Wesendorf, 275 P. 925, 35 Ariz. 172.
Mass.—Portland Maine Pub. Co. v. Eastern Tractors Co., 193 N.E. 888, 289 Mass. 13.

1. Ariz.—Clark v. Wesendorf, 275 P. 925, 35 Ariz. 172.
Cal.—Parke v. Williams, 7 Cal. 247.
22 C.J. p 848 note 49.

2. Colo.—Hammitt v. Porter, 208 P. 452, 71 Colo. 511.
Ga.—Buckner v. Endicott-Johnson Corporation, 6 S.E.2d 123, 61 Ga. App. 163.
Ky.—Hazelwood v. Woodward, 126 S. W.2d 857, 277 Ky. 447.
Neb.—National Surety Co. v. Love, 178 N.W. 917, 105 Neb. 38, vacated on other grounds 182 N.W. 490, 105 Neb. 855.
Okl.—Baker v. Farmers' & Merchants' State Bank of Tonganoxie, Kan., 245 P. 555, 117 Okl. 93.
22 C.J. p 849 note 50.

Statement as to keeper of records
Under some statutes a certificate which discloses that it was made by the proper officer need not state that such person had charge of the records.—Clark v. Wesendorf, 275 P. 925, 35 Ariz. 172.

3. Okl.—McIntire v. Torrance, 90 P. 2d 17, 185 Okl. 19.

Omission of date
A copy of the judicial record of a sister state, authenticated as provided by state statute, is not rendered inadmissible by the omission of the date on which it was signed by the clerk, where the recitals show that it was signed after entry of judgment and issuance of execution. —Portland Maine Pub. Co. v. Eastern Tractors Co., 193 N.E. 888, 289 Mass. 13.

Authentication held sufficient
Iowa.—Wilson v. Prettyman, 192 N. W. 413, 195 Iowa 598.

4. Iowa.—Morrison Mfg. Co. v. Rimerman, 104 N.W. 279, 127 Iowa 719.
22 C.J. p 849 note 51.

5. S.D.—Davis v. Davis, 124 N.W. 715, 24 S.D. 474.
22 C.J. p 847 note 26.

other state may be certified separately; they need not be compiled under one certificate.[6] The fact that the transcript and certificate are on different sheets of paper is not an objection to admission thereof, where all the sheets are fastened together in an ordinary and usual manner.[7] Further, the fact that a certificate was not attached to the judgment roll with a brad or clip was held not to preclude admission of the roll in evidence where the certificate had been kept and presented with the roll and plainly referred to the proceedings included therein.[8] Erasures on a clerk's certificate authenticating a judicial record of a sister state do not necessarily render the record inadmissible, particularly where the matter erased is mere surplusage in so far as the sufficiency of the certificate is concerned.[9]

§ 670. —— Authentication of Judicial Records under Federal Statutes

a. In general
b. Attestation by clerk
c. Certificate as to form of attestation

a. In General

By federal statute, copies of judicial records of one state are admissible in the others if authenticated as therein prescribed. Upon abolition of a court its records may be authenticated by the court which succeeds to its jurisdiction.

Copies of judicial records of the courts of one state may be authenticated for use in another under an act of congress enacted pursuant to the full faith and credit clause of the federal constitution and prescribing that the records and judicial proceedings of the courts of any state or territory or of any country subject to the jurisdiction of the United States "shall be proved and admitted in any other court within the United States by the attestation of the clerk and the seal of the court annexed if there be a seal, together with a certificate of the judge, chief justice, or presiding magistrate that the said attestation is in due form;" records so authenticated must be received as evidence,[10] and are entitled to full faith and credit.[11] In order that a copy of a judicial record of a sister state may be admissible under the federal statute, there must be a compliance with the requirements of such statute as to the form and mode of authentication,[12] and it is for the court in which the copies are offered to determine whether the requirements have been met.[13] Substantial compliance is usually considered sufficient,[14] although it has been said that "the importance of strict adherence to the act of congress on the authentication of records is quite apparent."[15] The fact that the authentication embraces more than is strictly necessary under the federal statute, by including superfluous matter either in the attestation or certification, does not impair its validity if it is otherwise in compliance with the act.[16] The certificates of the clerk and judge must show that they are the clerk and judge of the court in which the judgment was rendered.[17]

Records transferred from one court to another. The federal statutes contemplate that the certificate should be from the judge and clerk of the same court in which a judgment was rendered, if such

6. Mo.—Lincoln Safe Deposit Co. v. Continental Life Ins. Co., 249 S.W. 677, 213 Mo.App. 561.

7. Ga.—Little Rock Cooperage Co. v. Hodge, 37 S.E. 743, 112 Ga. 521.
22 C.J. p 848 note 42.

8. Kan.—Smith v. Hawkins, 243 P. 1018, 120 Kan. 518.
Authentication under federal statute as requiring attachment of certificate see infra § 670 c.

9. Cal.—Flickinger v. McKesson, 183 P. 195, 41 Cal.App. 577.

10. Ala.—Baskin v. Taylor, 93 So. 336, 18 Ala.App. 462, certiorari denied Ex parte Baskin, 93 So. 921, 208 Ala. 695.
Ga.—Sullivan v. Douglas Gibbons, Inc., 2 S.E.2d 89, 187 Ga. 764, affirming 199 S.E. 554, 58 Ga.App. 708—White v. First Nat. Bank of Claxton, 162 S.E. 701, 174 Ga. 281—McAllister v. Singer Mfg. Co., 64 Ga. 622.
Mo.—Harrington v. Harrington, 121 S.W.2d 291, 233 Mo.App. 390.
N.C.—Kinsley v. Rumbough, 2 S.E. 174, 96 N.C. 193.
Okl.—McIntire v. Torrance, 90 P.2d 17, 185 Okl. 19.
S.C.—Flourenoy v. Durke, 2 Brev. 256.
Wash.—Allard v. La Plain, 266 P. 688, 147 Wash. 497.
22 C.J. p 844 notes 83–86.
Scope of statute
This statute "relates to 'judicial records' of the courts of other states, where there are no provisions by statute or judicial decision under the common law making them admissible."—Bristow v. Lange, 266 N.W. 808, 810, 221 Iowa 904.

11. Ga.—Clein v. Diamond, 87 S.E. 1101, 17 Ga.App. 652.
Ky.—Montgomery v. Consolidated Boat Store Co., 72 S.W. 816, 115 Ky. 156, 24 Ky.L. 2004, 103 Am.S.R. 302.

12. Ky.—Hazelwood v. Woodward, 126 S.W.2d 857, 277 Ky. 447.
Okl.—Baker v. Farmers' & Merchants' State Bank of Tonganoxie, Kan., 245 P. 555, 117 Okl. 93.
Tex.—Mauritz v. Schwind, Civ.App., 101 S.W.2d 1085, 1089, error dismissed, quoting **Corpus Juris**—Maunders v. Hanks, Civ.App., 278 S.W. 507.
22 C.J. p 845 note 95.

13. Mont.—Adams v. Stenehjem, 146 P. 469, 50 Mont. 232.

14. Ga.—Drake v. Drake, 1 S.E.2d 573, 576, 187 Ga. 423, quoting **Corpus Juris.**
22 C.J. p 845 note 96.

15. Miss.—Verhallen v. Laveochia, 30 So. 710, 79 Miss. 370, 372.

16. Ala.—Forbes v. Davis, 65 So. 516, 187 Ala. 71.
22 C.J. p 848 note 40.

17. Tex.—Harper v. Nichol, 13 Tex. 151—Mauritz v. Schwind, Civ.App., 101 S.W.2d 1085, error dismissed.
Proof of clerk's capacity
A record simply certified by the clerk without proof, except by parol evidence, of his capacity is not authenticated in the mode prescribed by the federal statute.—Herrington v. Herrington, 127 So. 617, 170 La. 249.

court exists, but if the court has been abolished and its records and jurisdiction have been transferred to another, the judge and clerk of the substituted court are the proper certifying officers,[18] and it has been held that the abolition of the old court and the transfer of jurisdiction to the new may be shown by the certificate of the judge[19] or of the clerk,[20] and proof of the law by which the transfer was made is not essential.[21]

b. Attestation by Clerk

The federal statute does not require the clerk's certificate to be in a particular form; but it must be under seal, unless the court has no seal. The authorities disagree on whether the certificate may be made by a deputy clerk.

The act of congress does not prescribe the form of certificate by which the clerk of a court in a sister state shall certify the record to make it evidence in another state or indeed that any certificate shall be made by that officer.[22] All that is required is that the attestation of the record shall be in conformity with the form used in the state whence it comes, and the exclusive and conclusive evidence of this fact is the certificate of the presiding judge of that court.[23] Thus the federal statute does not require that the clerk shall certify the transcript to be a full and complete copy of the whole proceedings; any certificate by the clerk certified by the proper judicial officer will be sufficient, provided the transcript as certified does not disclose defects in the original record or incompleteness in the transcript as a copy;[24] nor does the statute require that the clerk's certificate or attestation shall show that he has charge of the records of the court[25] or that the court is a court of record.[26]

Authority to make attestation. Some authorities hold that the attestation may be made by a deputy in the name of the clerk,[27] and is sufficient, at least when accompanied by the certificate of the judge that the certificate is in due form.[28] Others assert that the attestation must be made by the clerk in person and cannot be made by a deputy or other person acting as a substitute for the clerk,[29] that an attestation by a deputy is not cured by a certificate of the judge stating that the attestation is made by the proper officer,[30] and that this rule is not affected by a statute of the state from which the record comes enabling deputies to perform the duties of the principal.[31] Where a certificate is signed by a deputy clerk and the judge certifies only to the official character of the clerk, the certificate is not sufficient.[32]

While an attestation by a judge will not, as a general rule, be sufficient,[33] the fact that the judge is also ex officio clerk does not render a judicial proceeding incapable of exemplification under the federal statute,[34] especially if his attestation and certificate are supported by a certificate of the governor as to his official capacity.[35] Where, however, the offices of judge and clerk are combined in one person, he must certify in each capacity,[36] although

18. N.H.—Taylor v. Barron, 35 N.H. 484.
22 C.J. p 848 note 36.

19. Mass.—Capen v. Emery, 5 Metc. 436.

20. Ky.—Thomas v. Tanner, 6 T.B. Mon. 52.
22 C.J. p 848 note 38.

21. Ala.—McRae v. Stokes, 3 Ala. 401, 37 Am.D. 698.

22. Ala.—White v. Strother, 11 Ala. 720.

23. Ala.—Andrews v. Flack, 6 So. 907, 88 Ala. 294.
Ga.—Buckner v. Endicott-Johnson Corporation, 6 S.E.2d 123, 61 Ga. App. 163.
Ill.—Gundry v. Hancock, 147 Ill.App. 49.
22 C.J. p 845 note 99.

24. U.S.—Ferguson v. Harwood, D. C., 7 Cranch 408, 3 L.Ed. 386.
22 C.J. p 845 note 1.

25. Mass.—Kingman v. Cowles, 103 Mass. 283.
Wash.—Ritchie v. Carpenter, 28 P. 380, 2 Wash. 512, 26 Am.S.R. 877.

26. Mo.—The Thames v. Erskine, 7 Mo. 213.
Necessity that copies be those of court of record see infra § 671.

27. Utah.—Steinke v. Graves, 52 P. 386, 16 Utah 293.
22 C.J. p 845 note 5.

28. Iowa.—Young v. Thayer, 1 Greene 196, 198, followed in Greasons v. Davis, 9 Iowa 219.
22 C.J. p 846 note 6.

29. Pa.—Ensign v. Kindred, 30 A. 274, 163 Pa. 638.
22 C.J. p 846 note 7.

Certification by "secretary"
Whether the record may be certified by a "secretary" depends on the facts and circumstances since "clerk" and "secretary" are sometimes used synonymously.—Mauritz v. Schwind, Tex.Civ.App., 101 S.W.2d 1085, 1090, error dismissed.

Prothonotary
It has been presumed, in the absence of evidence as to the powers of the prothonotary of a court of common pleas in Pennsylvania, that he is the chief clerk of that court, and therefore authorized to attest copies of its judgments.—Trebilcox v. McAlpine, 46 Hun 469, 11 N.Y.St. 847.

30. Mass.—Willock v. Wilson, 59 N.E. 757, 178 Mass. 68.
N.Y.—Morris v. Patchin, 24 N.Y. 394, 82 Am.D. 311.
22 C.J. p 846 note 8.

31. Pa.—Lothrop v. Blake, 3 Pa. 483.

Reason for rule
To hold otherwise would permit the several states to alter and control an act of congress.—Lothrop v. Blake, supra.

32. Mo.—McDonnell v. Hawkeye Life Ins. Co. of Des Moines, App., 64 S.W.2d 748, 751, citing **Corpus Juris.**
22 C.J. p 846 note 10.

33. Miss.—Stuart v. Swanzy, 20 Miss. 684.

34. Wis.—Keith v. Stiles, 64 N.W. 860, 65 N.W. 860, 92 Wis. 15.
22 C.J. p 846 note 13.

35. S.C.—Sally v. Gunter, 47 S.C.L. 72.

36. Iowa.—Rowe v. Barnes, 70 N.W. 197, 101 Iowa 302.
22 C.J. p 846 note 15.

it has been held to be a matter of form rather than of substance whether the certification shall be by two separate certificates or comprised in one.[37]

Seal of court. The seal of the court, if there is one, must be annexed to the clerk's attestation of the copy of the record;[38] it is not sufficient that it be annexed to the certificate of the judge authenticating the attestation of the clerk.[39] Where the court whose record is certified has no seal, this fact should appear either in the certificate of the clerk or in that of the judge;[40] and if the lack of a seal appears from the attestation clause, and the judge certifies that the attestation is in due form of law, the absence of a seal or the use of a private seal is not a fatal defect.[41]

c. Certificate as to Form of Attestation

The clerk's attestation must be certified by the judge as being in due form. If there is more than one judge, the presiding judge ordinarily must execute the certificate.

Attestation by the clerk alone is not sufficient, as the federal statute requires that the copy of a judicial record of another state shall be accompanied by a certificate of the judge that the attestation of the clerk is in due form.[42] It is not, however, necessary that the certificate of the judge should set out the form of the attestation.[43] It has been considered that the judge is not required or even authorized to state that the person who makes attestation of the record is the clerk of the court, or that the seal attached by him is the seal of the court,[44] or that such person was the clerk at the time of attestation;[45] but, on the other hand, a transcript of a foreign judgment has been held inadmissible where the certificate of the judge did not state that the clerk who attested the transcript was a clerk of the court in which the judgment was rendered, the court considering that such defect was not cured by a further recital in the judge's certificate that the attestation is "in due form."[46]

Authority to certify. The certificate cannot be made by any judge of any court, but it must as a general rule appear from the certificate that it was made by the judge of the court from which the record comes, or, if there is more than one judge of such court, by the chief justice or presiding magistrate,[47] and he must possess that character at the time he gives the certificate.[48] It is not necessary, however, that the certificate shall use the precise language of the act of congress, provided that when different language is adopted it is not equivocal or capable of bearing a different meaning from the language used in the act.[49] The certificate authenticating a copy of a judgment need not be made by the judge who rendered the original judgment.[50] Thus, when the judges are commissioned for the state at large and not for any particular portion of the state and preside in turn, it has been held to be a strict compliance with the act of congress for the judge who in his turn is presiding to make the certificate.[51]

The chief justice or presiding magistrate must sign only if the court has more than one judge.[52] Where the fact that a judge is the presiding or sole judge of the court appears from the record, the failure of the certificate to recite the fact is imma-

37. Miss.—Jordan v. Thomas, 31 Miss. 557.
Wis.—Keith v. Stiles, 64 N.W. 860, 65 N.W. 860, 92 Wis. 15.

38. Ga.—Mason v. Nashville, C. & St. L. R. Co., 70 S.E. 225, 135 Ga. 741, 33 L.R.A.,N.S., 280.
22 C.J. p 846 note 17.

39. U.S.—Turner v. Waddington, C.C.Pa., 24 F.Cas.No.14,263, 3 Wash. C.C. 126.
Wis.—Kirschner v. State, 9 Wis. 140.

40. U.S.—Craig v. Brown, C.C.Pa., 6 F.Cas.No.3,328, Pet.C.C. 352.
Iowa.—Simons v. Cook, 29 Iowa 324.

41. Iowa.—Simons v. Cook, supra.
Ky.—Strode v. Churchill, 2 Litt. 75.

42. Colo.—Hammitt v. Porter, 208 P. 452, 453, 71 Colo. 511, citing **Corpus Juris.**
Ga.—Buckner v. Endicott-Johnson Corporation, 6 S.E.2d 123, 61 Ga. App. 163.
Ky.—Allen v. Commonwealth, 114 S.W.2d 757, 762, 272 Ky. 533, citing **Corpus Juris.**
Tex.—Mauritz v. Schwind, Civ.App., 101 S.W.2d 1085, error dismissed—Maunders v. Hanks, Civ.App., 278 S.W. 507—Nease v. Broadwater Mercantile Co., Civ.App., 206 S.W. 692.
22 C.J. p 846 note 21.

43. Del.—Regan v. McCormick, 4 Del. 435.

44. Ala.—Linch v. McLemore, 15 Ala. 632.
22 C.J. p 847 note 23.

45. Ala.—Merriwether v. Garvin, 2 Port. 199, 27 Am.D. 650.
Kan.—Haynes v. Cowen, 15 Kan. 637.

46. N.Y.—Huie v. Devore, 123 N.Y.S. 12, 138 App.Div. 677.

47. Ga.—Symmes v. Rollins, 146 S.E. 42, 39 Ga.App. 53.
22 C.J. p 847 note 27.
The chairman of a "commission" may execute the certificate as a "presiding magistrate" if the "commission" is shown to be a court.—Mauritz v. Schwind, Tex.Civ.App., 101 S.W.2d 1085, 1091, error dismissed.

48. Ky.—Stephenson v. Bannister, 3 Bibb 369.
22 C.J. p 847 note 28.

49. Mo.—Williams v. Williams, 53 Mo.App. 617.
22 C.J. p 847 note 29.

50. Tex.—Andrews v. Hedrick Sav. Bank of Hedrick, Civ.App., 103 S.W.2d 838.

51. Ala.—Taylor v. Kilgore, 33 Ala. 214.
Rotation of judges
Judgment signed by a certain judge was held properly authenticated by another judge of the same court in view of method of rotating judges of such court.—Heinemann Dry Goods Co. v. Schiff, 268 S.W. 596, 167 Ark. 422.

52. Tex.—Andrews v. Hedrick Sav. Bank of Hedrick, Civ.App., 103 S.W.2d 838.

terial.[53] Moreover, when there is nothing on the face of the record to show that the court is composed of more than one judge, it is generally held immaterial that the judge's certificate does not recite that he is the sole judge.[54] It has been held that, if it appears from the certificate itself or the record that there are other judges of the same court, the judge's certificate must show that he is the chief justice or presiding magistrate,[55] although in several cases, where there appeared to be more than one judge, but no chief justice, all of the judges beng placed on an equality as to authority, the federal statute has been liberally construed and a certificate by one of the judges[56] or by all of them[57] held to be a sufficient compliance therewith.

Attaching certificates to transcript. A certificate of the judge on a separate paper has been held insufficient.[58]

§ 671. —— Subject Matter of Authentication of Judicial Records

a. In general
b. Records of particular courts

a. In General

All records of a proper court, and not only its judgments, are embraced by the federal statute; but the statute does not extend to records of an administrative body.

The federal statute is not restricted to judgment records, but extends to everything properly embraced in the term "judicial proceedings,"[59] including all the proceedings, whether in open court or not, which constitute in law the records of a cause.[60] Deeds or other instruments that have become judicial records are, when properly authenticated, admissible under the act of congress,[61] although when a deed or other matter not prima facie of record is the subject of exemplification under the act making provision for the authentication of judicial records, the law authorizing the deed or other matter to be filed as a judicial record must be shown.[62]

Copies of records of an administrative body of a sister state should not be certified in the manner provided by federal statutes for the certification of judicial records.[63]

b. Records of Particular Courts

(1) In general
(2) Probate and similar courts
(3) Justices' courts

(1) In General

Some authorities attach significance to the question of whether the records offered are those of a court of record; but others do not. The federal statute has been said to be inapplicable to courts having no clerk or of limited judisdiction.

Some authorities, in determining the admissibility under federal[64] or state[65] statutes of authenticated records of a court of another state, seem to attach significance to the question of whether such court is one of record; however, records authenticated

53. Ky.—Mudd v. Beauchamp, Litt. Sel.Cas. 142.
Pa.—State of Ohio v. Hinchman, 27 Pa. 479.

54. Mass.—Willock v. Wilson, 59 N.E. 757, 178 Mass. 68.
22 C.J. p 847 note 31.

55. N.Y.—Morris v. Patchin, 24 N.Y. 394, 82 Am.D. 311.
22 C.J. p 847 note 32.

56. Ga.—Drake v. Drake, 1 S.E.2d 573, 187 Ga. 423.
22 C.J. p 847 note 33.

57. Ga.—Brown v. Beckner, 5 S.E.2d 409, 60 Ga.App. 827—Brown v. Beckner, 193 S.E. 356, 56 Ga.App. 662, citing **Corpus Juris.**
S.C.—Arnold v. Frazier, 36 S.C.L. 33.

58. S.C.—McFarlane v. Harrington, 2 S.C.L. 555.
Tex.—Norwood v. Cobb, 20 Tex. 588.

Attachment to part of record

(1) It has been held that, where the offered proof of the record of an action in another state purported to be a certified copy of the petition, answer, replication, and "journal entry," attached to each of which was a certificate of the clerk, a certificate signed by the judge, and added to the "journal entry," to the effect that the certificate of the clerk was in due form, applied also to the prior certificates of the clerk on the petition, answer, and replication.—Davis v. Davis, 124 N.W. 715, 24 S.D. 474.

(2) Where the records of two suits in another state, sewed together, were duly certified by the clerk on succeeding days, and the judge certified, at the end of the second record, to the official character of the person acting as clerk on those days, the judge's certificate was held sufficient, there being no proof of fraud in attaching the records together.—West v. McConnell, 5 La. 424, 25 Am.D. 191.

59. U.S.—In re Rooney, D.C.N.J. 20 F.Cas.No.12,032.
Tex.—Whited v. Johnson, Civ.App., 167 S.W. 812.
22 C.J. p 849 note 52.

60. Tenn.—Coffee v. Nealy, 2 Heisk. 304.

61. Ky.—Strode v. Churchill, 2 Litt. 75.
La.—Virginia v. Himel, 10 La.Ann. 185.

62. Md.—De Riesthal v. Walton, 8 A. 462, 66 Md. 470.
22 C.J. p 849 note 55.

Copy of assignment of judgment of court of sister state was held admissible as against contention that there was no proof authorizing such an instrument to be recorded in the court record, where the law of the sister state in this respect was presumed to be the same as that of the forum.—Andrews v. Hedrick Sav. Bank of Hedrick, Iowa, Tex.Civ.App., 103 S.W.2d 838.

63. Tex.—Mauritz v. Schwind, Civ. App., 101 S.W.2d 1085, error dismissed.

Whether "commission" constitutes court rather than mere administrative body must be established by the laws applicable and not by the mere statement of its secretary in a purported certificate.—Mauritz v. Schwind, supra.

64. Ark.—Heinemann Dry Goods Co. v. Schiff, 268 S.W. 596, 167 Ark. 422.
22 C.J. p 850 note 68 [a].

65. Minn.—Spielman v. Molitor, 210 N.W. 15, 168 Minn. 280.

in the manner prescribed by the federal statute have been held admissible as against the contention that the court whose records were offered did not appear to be a court of record.[66] In any event where a court of a sister state has a presiding judge, a clerk, and a seal, it will be prima facie presumed to be a court of record,[67] and its records duly authenticated will be evidence not only of its acts but prima facie evidence of its jurisdiction of the subject matter and of the parties.[68]

The federal statute has been said to be inapplicable to records of a court which has only limited jurisdiction,[69] or which has no clerk;[70] but with these assertions should be contrasted the authorities which hold that records of justices' courts are admissible, see infra this section, subdivision b(3), and also the cases considered generally in §§ 670, 671, in which judicial records were admitted without express reference to the nature of the court's jurisdiction but in which the particular court involved was one of apparently limited jurisdiction.

Decree of a court of chancery is within the constitution and the act of congress respecting the mode of authentication and the effect of the records and judicial proceedings of the courts of the respective states when offered in evidence in the courts of any other state.[71]

(2) Probate and Similar Courts

Proceedings of probate and similar courts are embraced in the federal statute; but records thereof may also be authenticated by other modes.

The proceedings of courts of probate are judicial proceedings within the meaning of the act of congress, and transcripts thereof, when properly authenticated, are admissible in evidence;[72] but compliance with the mode of authentication prescribed by the act of congress is essential,[73] unless the transcript is introduced as a copy certified in accordance with the statutes of the state in which it is to be adduced as evidence,[74] or as a sworn or examined copy,[75] or is authenticated in some other manner known to the common law.[76] The probate of a will in another state is a judicial proceeding within the meaning of the act of congress, and a record pertaining thereto, when properly authenticated under the act, is admissible in the courts of the several states,[77] without formal proof of the statute giving the foreign probate court jurisdiction.[78] This rule has been applied to the probate of wills disposing of lands in the state where the evidence is sought to be introduced, although the will has not been probated or recorded in the latter state;[79] but there is also authority for a contrary view, which is placed on the ground that the lands are subject to the laws of the state in which they are situated.[80] Where records are sought to be introduced pursuant to state statutes providing for the admission in evidence of certified copies of the foreign probate of wills, or for the registration of duly authenticated copies thereof and the admission of certified copies of such registry, it is necessary, but sufficient, to follow the statutory requirements.[81]

(3) Justices' Courts

Records of justices' courts may be proved by copies authenticated in accordance with the common law or state statutes, and, according to some authorities, in the mode prescribed by the federal statute.

The authorities are not uniform as to whether judgments of justices of the peace are covered by the provisions of the act of congress, discussed supra in § 670, which prescribes the mode of authenticating judicial records and proceedings. Some authorities, proceeding on the view that the court whose proceedings are to be authenticated under the act of congress must be so constituted as to have the officers named in the act, have laid down the rule that the adjudications of justices of the peace who do not record their proceedings through

66. Ga.—Brown v. Beckner, 5 S.E. 2d 409, 60 Ga.App. 827.

67. Ind.—Old Wayne Mut. Life Assoc. v. McDonough, 73 N.E. 703, 164 Ind. 321.
22 C.J. p 844 note 89.

68. Okl.—Block v. Schafer, 162 P. 456.
22 C.J. p 844 note 90.

69. Mass.—Warren v. Flagg, 2 Pick. 448.
N.D.—Strecker v. Railson, 111 N.W. 612, 16 N.D. 68, 8 L.R.A.,N.S., 1099.

70. Ga.—Sloan v. Wolfsfeld, 35 S.E. 344, 110 Ga. 70—Brown v. Beckner, 5 S.E.2d 409, 60 Ga.App. 827.

71. Va.—Burtners v. Keran, 24 Gratt. 42, 65 Va. 42.
22 C.J. p 849 note 56.

72. N.C.—Smathers v. Jennings, 87 S.E. 534, 170 N.C. 601.
22 C.J. p 849 note 57, p 825 note 23 [a].

73. U.S.—Gatlin v. Underhill, C.C. Ind., 5 F.Cas.No.2,523, 4 McLean 199.
22 C.J. p 849 note 58.

74. Ky.—Smith v. Roach. 7 B.Mon. 17.
W.Va.—Wilson v. Phoenix Powder Mfg. Co., 21 S.E. 1035, 40 W.Va. 413, 52 Am.S.R. 890.

75. Ky.—Bowman v. Bartlet, 3 A. K.Marsh 86.
Tex.—Grimes v. Smith, 8 S.W. 33, 70 Tex. 217.

76. Va.—Ex parte Povall, 3 Leigh 816, 30 Va. 816.

77. Ala.—Jemison v. Smith, 37 Ala. 185.
22 C.J. p 849 note 62.

78. Ala.—Puryear v. Beard, 14 Ala. 121.
Pa.—Ripple v. Ripple, 1 Rawle 386.

79. Ga.—White v. First Nat. Bank, 162 S.E. 701, 174 Ga. 281.
22 C.J. p 850 note 64.

80. Ky.—Carmichael v. Elmendorf, 4 Bibb 484.
22 C.J. p 850 note 65.

81. N.Y.—Friedberg v. Mechanics' Bank of Brooklyn, 237 N.Y.S. 378, 135 Misc. 194.
22 C.J. p 850 note 66.

a clerk are not within the act of congress, and that the mode of their authentication is to be governed by the laws of the state where the copy or transcript is to be adduced in evidence.[82] Other authorities hold that where courts of justices of the peace are courts of record, copies of their records are properly authenticated under the federal statute if the justice attests to them and certifies that the attestation is in due form, and also certifies that he is the presiding magistrate, that he has no seal or clerk, and that he acts as clerk of his own court.[83] Of course, where authentication under the federal statute is relied on, its requirements must be met.[84]

While it has been held that where the proceedings of a justice's court are duly certified by the justice, with an additional certificate of the clerk of the county as to the official character of the justice, the copy is admissible,[85] this mode of certification is generally regarded as insufficient, apart from statutory authority in the state in which the evidence is sought to be introduced,[86] at least where it does not appear that by the laws of the state where the proceeding was had the clerk was the proper person to give copies.[87]

It is generally agreed that proceedings in a justice's court may be proved by a sworn or examined copy,[88] or by a copy authenticated in the same manner as foreign judgments,[89] or in some other manner known to the common law.[90] Provision is made by statute in many of the states for the admission of certified copies of records of justices of the peace of other states, and compliance with such provisions suffices;[91] but in the absence of such a statute it has been held that a judgment of a justice of the peace of a sister state cannot be proved by a certified transcript of the proceedings, and that it must be proved by the production of the original minutes, or by the oath of witnesses who have compared the copy produced in evidence.[92] It has been held that where a transcript of a judgment of a justice in a foreign state has been filed with the clerk of the district court in the county where rendered, it cannot be proved by an authenticated copy of the records of the district court,[93] but there is also authority for the contrary view.[94]

§ 672. —— Defective or Incomplete Judicial Records or Copies

Defective or incomplete copies of judicial records are generally inadmissible; but a judgment or other distinct part of a record is admissible if the fact sought to be established sufficiently appears therefrom. Clerical errors are not fatal.

Where the complete record must be examined in order to determine a particular fact, a transcript or copy which does not purport to contain a complete copy of the proceedings, or which shows a defective record on its face, will be inadmissible, whether or not the mode of authentication is a proper one.[95] Thus a duly authenticated copy of a judgment only is inadmissible to establish the facts adjudicated,[96] although it has been held otherwise where the evidence is introduced collaterally for the mere purpose of showing a fact ascertainable from the judgment itself, as, for example, the fact of its rendition.[97] Where a record is divisible into distinct parts so that each part is substantially a record of itself, a copy of any distinct portion thereof may be introduced in evidence without introduc-

82. Del.—Graham v. Grigg & Meredith, 3 Harr. 408.
N.M.—Anthony Doll & Co. v. Hogan, 53 P.2d 649, 650, 40 N.M. 55, citing **Corpus Juris.**
22 C.J. p 850 note 68.

83. Conn.—Bissell v. Edwards, 5 Day 363, 5 Am.D. 166.
22 C.J. p 850 note 69.

84. N.Y.—Huie v. Devore, 123 N.Y.S. 12, 138 App.Div. 677.

85. Ohio.—Pelton v. Platner, 13 Ohio 209, 42 Am.D. 197.
22 C.J. p 850 note 70.

86. Mo.—Duvall v. Ellis, 13 Mo. 203.
S.C.—Lawrence v. Gaultney, 25 S.C.L. 7.

87. N.H.—Mahurin v. Bickford, 6 N.H. 567.
22 C.J. p 850 note 72.

88. N.M.—Anthony Doll & Co. v. Hogan, 53 P.2d 649, 40 N.M. 55.
22 C.J. p 850 note 73.

89. Mo.—Duvall v. Ellis, 13 Mo. 203.
22 C.J. p 850 note 74.

90. Mo.—Rigler v. McClure, 175 S.W. 256, 189 Mo.App. 110.
Pa.—Kean v. Rice, 12 Serg. & R. 203.

91. Cal.—Banister v. Campbell, 71 P. 504, 703, 138 Cal. 455.
22 C.J. p 851 note 77.

Authentication held insufficient to meet requirements of state statute.—Huie v. Devore, 123 N.Y.S. 12, 138 App.Div. 677.

92. Ark.—Albright v. Mickey, 137 S.W. 568, 99 Ark. 147.

93. N.D.—Strecker v. Railson, 111 N.W. 612, 16 N.D. 68, 8 L.R.A.,N.S., 1099.

94. Pa.—Rowley v. Carron, 11 A. 435, 117 Pa. 52, affirming 2 Pa.Co. 539.
22 C.J. p 851 note 80.

95. N.H.—Slocinski v. Radwan, 144 A. 787, 83 N.H. 501, 68 A.L.R. 543.
22 C.J. p 851 note 82.

Parts of records attached to form whole

Parts of the record of a judgment may be attested and certified at the same time, or at different times, and those parts may be attached together, attested, and certified as a true copy of the whole record, without recopying the same.
La.—Dismukes v. Musgrove, 2 La. 335.
Pa.—Erb v. Scott, 14 Pa. 20.

96. Mo.—Crone v. Dawson, 19 Mo. App. 214.
N.C.—State v. Misenheimer, 31 S.E. 852, 123 N.C. 758.

97. D.C.—Catalog Ass'n v. A. Eberly's Sons, 50 F.2d 981, 60 App. D.C. 216.
22 C.J. p 851 note 84.
Completeness of record as affecting admissibility of foreign judgment in actions thereon see the C.J.S. title Judgments § 884, also 34 C.J. p 1121 note 93—p 1122 note 2.

ing the other portion of the record.[98] If the copy is authenticated according to the requirements of the act of congress, the authentication is prima facie evidence of the correctness and completeness of the record,[99] and a recital of completeness in the certificate has the same effect.[1]

It need not appear that the record was prepared with the formality and accuracy required in the records of the courts in which the evidence is sought to be introduced; but it will be enough if the record is sufficient in substance and contains all the essential requisites of a judicial record.[2] An authenticated copy of the judgment of a court of another state should not be excluded merely because all the papers and entries preceding the judgment have not been included;[3] it is enough that it shows the subject matter of the suit, jurisdiction over the parties, and the final judgment of the court.[4] Further, it has been held that the mere fact that it does not appear from the transcript that the original record was signed by the judge or other officer will not render the copy inadmissible,[5] although a contrary view has been asserted;[6] nor is it material that the reasons on which the court founded the judgment are not set forth.[7] On the other hand whatever the courts of another state have certified as a part of the record must as a general rule be received as such, and no part can be excluded because it would not have been certified as a part of the record in the state where the evidence is introduced;[8] or, at any rate the fact that the transcript contains matters which do not belong to the record is no ground for excluding the entire transcript.[9]

Clerical errors in the transcript do not render it inadmissible.[10] A clerical mistake in the Christian name of a party does not vitiate the clerk's certificate.[11] An attestation has been held sufficient, although there was a blank where the words "record" or "judicial proceedings" should have been inserted.[12]

§ 673. —— Documents and Records Not Legislative or Judicial

a. In general
b. Necessity and mode of authentication

a. In General

Copies of nonjudicial records of a public nature kept in a sister state under authority of law are generally admissible, unless incompetent in the sister state.

Nonjudicial records kept in accordance with, and admissible under the laws of, a state, ordinarily may be proved in the courts of another state by properly authenticated copies.[13] Copies of records of other states, although sworn to, are not evidence, until it is shown that the records themselves were kept under authority of law.[14] Thus, it must appear that the laws of a state where an instrument is filed or recorded require or authorize such registry, before an office copy thereof can be admitted in evidence in the courts of another state.[15] It has

98. Kan.—Haynes v. Cowen, 15 Kan. 637.
N.Y.—Hirschfeldt v. Fanton, Anth. N.P. 361.
22 C.J. p 851 note 85.

99. Ill.—McMillen v. Lovejoy, 4 N.E. 772, 115 Ill. 498.
22 C.J. p 851 notes 86, 84 [a].

1. Mass.—Wells v. Wells, 95 N.E. 845, 209 Mass. 282, 35 L.R.A.,N.S., 56.
22 C.J. p 851 note 87.

2. Minn.—Bowman v. St. Paul German Ins. Co., 59 N.W. 943, 58 Minn. 176.
22 C.J. p 851 notes 88, 82 [a] (2).

3. Ind.—Mansfield v. Hinckle, 139 N.E. 700, 81 Ind.App. 6.
La.—Voorhies v. Voorhies, 166 So. 121, 184 La. 406.
Mass.—Portland Maine Pub. Co. v. Eastern Tractors Co., 193 N.E. 888, 289 Mass. 13.
Okl.—Maney v. Boise Title & Trust Co., 276 P. 179, 136 Okl. 107.

Absence of pleadings
The fact that authenticated transcript of decree rendered in sister state did not contain pleadings and issues tendered was not sufficient reason for exclusion of such transcript.—Applegate v. Applegate, 11 N.E.2d 515, 104 Ind.App. 599.

4. Mass.—Portland Maine Pub. Co. v. Eastern Tractors Co., 193 N.E. 888, 289 Mass. 13.

Service of process
Certificate of clerk of foreign court reciting that defendant was served was held prima facie evidence of service and warranted admission of copy of record in evidence.—Portland Maine Pub. Co. v. Eastern Tractors Co., supra.

5. Ga.—Sullivan v. Douglas Gibbons, Inc., 2 S.E.2d 89, 187 Ga. 764, affirming 199 S.E. 554, 58 Ga.App. 708.
22 C.J. p 852 note 89.

6. N.Y.—Morris v. Patchin, 24 N.Y. 394, 82 Am.D. 311.

7. La.—West Feliciana R. Co. v. Thornton, 12 La.Ann. 736, 68 Am.D. 778.

8. Conn.—Barber v. Mexico International Co., 48 A. 758, 73 Conn. 587.
22 C.J. p 852 note 92.

9. Ala.—Gunn v. Howell, 35 Ala. 144, 73 Am.D. 484.

10. Mass.—Wells v. Wells, 95 N.E. 845, 209 Mass. 282, 35 L.R.A.,N.S., 561.

11. Ga.—Conley v. Chapman, 74 Ga. 709.

12. S.C.—Schoonmaker v. Lloyd, 43 S.C.L. 173.

13. Idaho.—Gorges v. Gorges, 245 P. 691, 42 Idaho 357.
S.C.—Hildritch v. Equitable Life Assur. Soc. of U. S., 191 S.E. 900, 184 S.C. 142.

Records outside court's jurisdiction
Properly authenticated copies of records of another state showing license to marry and marriage are admissible without showing that the original record is out of court's jurisdiction.—Parkey v. Arthur, 53 S.W.2d 921, 245 Ky. 525.

14. Ohio.—Richmond v. Patterson, 3 Ohio 368.
Tex.—Newsom v. Langford, Civ. App., 174 S.W. 1036.

15. Ill.—Dailey v. Grand Lodge, Brotherhood of Railroad Trainmen, 142 N.E. 478, 311 Ill. 184.
Ind.—National Surety Co. of New

been held necessary to show as a basis for the introduction in evidence of a certified copy of the record of the incorporation of a corporation in another state, that the laws of such state authorized its incorporation[16] and required the articles of incorporation to be kept or recorded by the officer certifying the copy.[17]

Copies of records of other states have frequently been excluded from evidence where they were clearly inadmissible under the laws of the state in which the record was made or where the law on the subject in such state did not appear from the evidence.[18] Thus where by the laws of the state in which the record was made the registry is required merely for the purpose of giving notice and not to preserve evidence, a certified copy thereof is inadmissible in another state.[19]

Federal statute. By act of congress enacted pursuant to the full faith and credit clause of the federal constitution, copies of nonjudicial records of a state or territory are admissible in the courts of the other states if attested by their keeper, under seal, and if the governor, secretary of state, keeper of the seal of the state, or other designated official certifies that the attestation is in due form and by the proper officer.[20] Under these provisions the record is regarded as prima facie proof of the facts recorded.[21] To render authenticated copies of nonjudicial records from another state competent evidence under the act of congress two preliminary facts must be proved: (1) That the record is one required to be kept by the law of that state. (2) That a certified copy of the record would there be received in evidence.[22]

As a general rule, all documents of a public nature which cannot be conveniently removed from their proper place of custody and which the party has the right to inspect are "records" within the meaning of the constitutional and statutory provisions referred to, and may be proved by duly authenticated copies.[23] Copies from other states of records of conveyances and mortgages of lands,[24] transfers of personalty,[25] and other private writings[26] are admissible in evidence if authenticated in accordance with the act of congress. If the instruments are properly recorded, copies of such records duly authenticated will have in another state the effect as evidence to which they are entitled by the laws of the state where the record is made, see infra § 773, and will accordingly be admitted as either primary[27] or secondary[28] evidence.

b. Necessity and Mode of Authentication

Copies of nonjudicial records must ordinarily be authenticated under a seal. Various modes of authentication are permitted. Under the federal statute authentication by a clerk alone is insufficient.

Copies of nonjudicial records of another state are inadmissible if not properly authenticated.[29] The attestation of the custodian of the record must be under his seal of office,[30] unless it appears that no seal of office is established by law.[31] The certificate of the secretary of state of another state that the original of the copy certified is a record in his office is, when attested by the seal of state, competent evidence[32] without proof of a statute constituting him the custodian of the record.[33]

York v. State, 136 N.E. 569, 192 Ind. 412.
22 C.J. p 853 note 15.

16. Mont.—Harvey E. Mack Co. v. Ryan, 261 P. 283, 80 Mont. 524—Milwaukee Gold Extraction Co. v. Gordon, 95 P. 995, 37 Mont. 209.

17. Mo.—Florsheim v. Fry, 84 S.W. 1023, 109 Mo.App. 487.

18. Minn.—Wilcox v. Bergman, 104 N.W. 955, 96 Minn. 219, 5 L.R.A., N.S., 938.
22 C.J. p 853 note 12.

19. U.S.—Griffin v. Reynolds, Miss., 17 How. 609, 15 L.Ed. 229.
Tenn.—Saunders v. Harris, 5 Humphr. 345.

20. Mont.—Milwaukee Gold Extraction Co. v. Gordon, 95 P. 995, 37 Mont. 209.
N.Y.—Straub v. Becker, 127 N.Y.S. 310.

21. N.D.—Miller v. Northern Pac. R. Co., 118 N.W. 344, 18 N.D. 19, 19 Ann.Cas. 1215.

22. Me.—Reed v. Stevens, 113 A. 712, 120 Me. 290.
Mass.—Bay State Wholesale Drug Co. v. Whitman, 182 N.E. 361, 280 Mass. 188.

23. Mich.—People v. Perriman, 40 N.W. 425, 72 Mich. 184.
22 C.J. p 852 note 1.

24. Tex.—Houston Oil Co. of Texas v. Niles, Com.App., 255 S.W. 604, reversing Niles v. Houston Oil Co. of Texas, Civ.App., 191 S. W. 748.
22 C.J. p 852 note 6.

25. Md.—Bruce v. Smith, 3 Harr. & J. 499.
Miss.—James v. Kirk, 29 Miss. 206.

26. Tex.—Skinner v. Vaughan, Civ. App., 150 S.W.2d 260, error dismissed, judgment correct.
22 C.J. p 853 note 8.

27. N.J.—Chase v. Caryl, 31 A. 1024, 57 N.J.Law 545.
22 C.J. p 853 note 10.

28. Ala.—Whaun v. Atkinson, 4 So. 681, 84 Ala. 592.

29. Idaho.—Kleinschmidt v. Scribner, 30 P.2d 362, 54 Idaho 185.
Ky.—Ledford v. Ledford, 130 S.W.2d 788, 279 Ky. 340.
Tex.—Gordon v. Mortgage Realty Co., Civ.App., 153 S.W.2d 707.
Wis.—Jesse v. Tinkham, 239 N.W. 455, 207 Wis. 49.

Opportunity to cross-examine
Certificate containing an oath and purporting to be copy of records of town of another state was held inadmissible where notice of taking and opportunity to cross-examine were not given as required by statute.—Bay State Wholesale Drug Co. v. Whitman, 182 N.E. 361, 280 Mass. 188.

30. Tex.—Empire Gas & Fuel Co. v. Muegge, 143 S.W.2d 763, 769, 135 Tex. 520, reversing, Civ.App., 116 S.W.2d 758, citing **Corpus Juris.**
22 C.J. p 853 note 20.

31. Tenn.—Hackney v. Williams, 6 Yerg. 340.

32. Mass.—Commonwealth v. Whitman, 121 Mass. 361.

33. N.C.—Barcello v. Hapgood, 24 S.E. 124, 118 N.C. 712.

In order to authorize the admission of office copies under federal statutory provisions, it is necessary, but sufficient, to pursue the mode of authentication prescribed therein.[34] Thus, a copy of a record which, although attested by a clerk, does not have a certificate of the secretary of state, presiding judge, or other designated official stating that the attestation of the clerk is in due form and made by the proper officer, cannot be received as evidence;[35] and this certificate must be under the seal of state or the proper seal of office.[36] Where the certificate of due form is given by the presiding justice of a court, the certificate of the clerk of such court that the justice is duly commissioned and qualified is essential.[37]

The act of congress does not exclude other modes of authentication[38] or abrogate any principle of evidence previously established.[39] Thus, copies of nonjudicial records of another state, although not authenticated as prescribed by the federal statute, may nevertheless be otherwise sufficiently authenticated to be admissible in evidence,[40] as, for example, where they meet the requirements set forth by statute in some of the states for the receipt in evidence of copies of public records in sister states when certified and authenticated in a designated manner.[41] A nonjudicial record of another state may be proved by a sworn copy.[42] Copies of nonjudicial records need not be certified in the mode prescribed by the federal statute for judicial records,[43] and, indeed, it has been held that they may not be so certified.[44]

§ 674. State Records Offered in Federal Courts

State records may be proved in the federal courts by duly authenticated copies.

The rule has been laid down in the federal courts that when the copy of an instrument on record in a public office of a state is certified to by the officer whose duty it is by law to keep the original on file in his office, it must be received as evidence of the original.[45] It has been held that the record of a judgment of a state court is not admissible in evidence in a federal court sitting in another state, unless it is authenticated in the manner provided by the federal statute prescribing the mode of authenticating state judicial records generally for use outside the state;[46] but it has also been asserted that the provisions of this statute do not apply in such a case,[47] and that in an action on a judgment of a state court, an exemplification which is a tran-

34. U.S.—In re Hartman, D.C.Pa., 17 F.Supp. 718.
N.J.—North Jersey Discount Co. v. Ætna Ins. Co., 13 A.2d 226, 125 N.J.Law 7.
S.C.—Armitage v. Seaboard Air Line Ry. Co., 164 S.E. 169, 166 S.C. 21.
Tex.—Houston Oil Co. of Texas v. Niles, Com.App., 255 S.W. 604, reversing Niles v. Houston Oil Co. of Texas, Civ.App., 191 S.W. 748.
22 C.J. p 853 note 17.
Substantial compliance suffices.—Skinner v. Vaughan, Tex.Civ.App., 150 S.W.2d 260, error dismissed, judgment correct.

35. Me.—Reed v. Stevens, 113 A. 712, 120 Me. 290.
Mass.—Portland Maine Pub. Co. v. Eastern Tractors Co., 193 N.E. 888, 289 Mass. 13—Bay State Wholesale Drug Co. v. Whitman, 182 N.E. 361, 280 Mass. 188.
22 C.J. p 853 note 19.

36. Mont.—Milwaukee Gold Extraction Co. v. Gordon, 95 P. 995, 37 Mont. 209.
22 C.J. p 853 note 22.

37. Ga.—Taylor v. McKee, 45 S.E. 672, 118 Ga. 874.

38. Me.—Reed v. Stevens, 113 A. 712, 120 Me. 290.
Mass.—Portland Maine Pub. Co. v. Eastern Tractors Co., 193 N.E. 888, 289 Mass. 13.
Mo.—State v. Hendrix, 56 S.W.2d 76, 79, 331 Mo. 605, citing **Corpus Juris.**
22 C.J. p 853 note 23.
Corpus Juris cited on question of whether admission of copies not authenticated under the federal statute was prejudicial.—Empire Gas & Fuel Co. v. Muegge, Tex.Civ.App., 116 S.W.2d 758, 761.

39. Mo.—Karr v. Jackson, 28 Mo. 316, 318.
22 C.J. p 853 note 23.

40. Cal.—Rosenberg v. J. C. Penney Co., 86 P.2d 696, 30 Cal.App.2d 609.
Mass.—Portland Maine Pub. Co. v. Eastern Tractors Co., 193 N.E. 888, 289 Mass. 13.
Tex.—Producers Pipe & Supply Co. v. Hammonds, Civ.App., 143 S.W.2d 412.

41. Mo.—Macan v. Missouri Mut. Ass'n, App., 60 S.W.2d 402, certiorari quashed State ex rel. Missouri Mut. Ass'n v. Allen, 78 S.W.2d 862, 336 Mo. 352.
S.C.—Armitage v. Seaboard Air Line Ry. Co., 164 S.E. 169, 166 S.C. 21.
22 C.J. p 854 note 24.

42. Me.—Reed v. Stevens, 113 A. 712, 120 Me. 290.
Wis.—Jesse v. Tinkham, 239 N.W. 455, 207 Wis. 49.
22 C.J. p 854 note 25.

43. Iowa.—Bristow v. Lange, 266 N.W. 808, 221 Iowa 904.

44. Tex.—Mauritz v. Schwind, Civ. App., 101 S.W.2d 1085, error dismissed.
Records of administrative body
Tex.—Mauritz v. Schwind, supra.

45. U.S.—Logansport Gaslight & Coke Co. v. Knowles, C.C.Minn., 15 F.Cas.No.8,466.
22 C.J. p 854 note 26.
Death certificate
A certified copy of a death certificate filed by a physician as required by state law is admissible only as a public record reciting the fact and cause of death, and the statements therein cannot be regarded as testimony of the physician.—Krug v. Mutual Ben. Health & Accident Ass'n, C.C.A.Mo., 120 F.2d 296.

46. U.S.—U. S. v. Biebusch, C.C.Mo., 1 F. 213, 1 McCrary 42—Gardner v. Lindo, C.C.D.C., 9 F.Cas.No.5,231, 1 Cranch C.C. 78, reversed on other grounds 1 Cranch 343, 2 L.Ed. 130.
Mode of authentication under such statute see supra § 670.

47. U.S.—Bennett v. Bennett, D.C. Or., 3 F.Cas.No.1,318, Deady 299.
Agreement as to mode of authentication
A record certified under the seal of a state court has been admitted in a federal court in pursuance of an agreement of the members of the bar "that copies of records of any state court should be received in evidence if certified and authenticated

script of the "complete record" of the proceedings, made up according to the practice in the courts of the state, is sufficient when it shows that the court had jurisdiction of the subject matter and the parties, and that the judgment was in fact rendered.[48] When the record of a judgment rendered in a state court is offered in evidence in a federal court sitting within the same state where the judgment was rendered, an authentication in accordance with the federal statute is not required; the certificate of the clerk and the seal of the court is sufficient.[49]

§ 675. Foreign Documents or Records

a. In general
b. Judicial records

a. In General

The records of foreign countries kept under authority of law, such as those pertaining to vital statistics, may be proved by authenticated copies. The mode of authentication may be that prescribed by statute or by the common law.

The public records or documents of a foreign country may be proved by duly authenticated copies since, as a general rule, the original records cannot be produced;[50] and thus copies of foreign registers of birth, baptism, marriage, and death, duly authenticated, have frequently been held to be admissible either under or apart from statute.[51] Copies of foreign records should be rejected in the absence of proof that the laws of the country from which the copies come require or permit the keeping of such records, or of any evidence showing that they are there entitled to any degree of credence.[52] They should also be rejected where it appears that they are unreliable and contain numerous untruths.[53] It has been considered that copies of records of vital statistics, however well authenticated, are not prima facie evidence of the facts recited, unless it is made to appear that the laws of the foreign country required such registry to be made and kept,[54] and also, under statutes, that it must appear not only by the certificate of the custodian, but also by evidence distinct therefrom, that the fact was registered "in due form."[55] Ordinarily the copy of a foreign record must be an exact reproduction of the original.[56]

Proof of the statutes of foreign countries by means of authenticated copies is treated in the C.J.S. title Statutes § 457, also 59 C.J. p 1213 note 88 –p 1214 note 96.

Mode of authentication. The statutes of some jurisdictions make provision for the mode of authenticating official copies of records and documents generally or of specified classes of records found in foreign registries or public offices, and compliance with such provisions suffices.[57] On the other hand, failure to follow the requirements of such a statute renders the copy of a foreign record inad-

in such manner as would make them evidence in courts of the state from whence they are brought."—Smallwood v. Violet, D.C., 22 F.Cas.No.12,-962, 1 Cranch C.C. 516.

48. U.S.—Woodbridge & Turner Engineering Co. v. Ritter, C.C.Pa., 70 F. 677.

49. U.S.—Mewster v. Spalding, C.C. Mich., 17 F.Cas.No.9,513, 6 McLean 24.
Tex.—Edwards v. Smith, Civ.App., 137 S.W. 1161.

50. N.Y.—In re Asterio's Estate, 16 N.Y.S.2d 943, 172 Misc. 1081.
22 C.J. p 854 note 34.
Book of registration of titles of doctors sufficiently shown to be a public record of Mexico may be provable by an examined copy.—Von Schoech v. Herald News Co., Tex. Civ.App., 237 S.W. 651, dismissed for want of jurisdiction.

51. U.S.—New York Life Ins. Co. v. Aronson, D.C.Pa., 38 F.Supp. 687.
Mich.—Boyce v. McKenna, 178 N.W. 701, 211 Mich. 204.
22 C.J. p 854 note 35.

52. Mass.—In re Derinza, 109 N.E. 942, 229 Mass. 135.
Antenuptial agreement
Notary public in France is required to keep antenuptial agreements on file, and hence properly authenticated copies thereof are admissible; common-law proof of the genuineness of the signatures is not required where identity of the parties has been established.—Strebler v. Wolf, 273 N.Y.S. 653, 152 Misc. 859.

53. N.Y.—Maher v. Empire L. Ins. Co., 96 N.Y.S. 496, 110 App.Div. 723.
22 C.J. p 854 note 34 [a].

54. U.S.—Duncan v. United States, C.C.A.Cal., 68 F.2d 136, 141, quoting **Corpus Juris.**
22 C.J. p 854 note 36, p 855 note 39 [d].

55. Ky.—Royal Neighbors of America v. Hayes, 150 S.W. 845, 150 Ky. 626.

56. D.C.—Guettler v. Alfsen, 289 F. 613, 53 App.D.C. 215.
N.Y.—In re Asterio's Estate, 16 N.Y.S.2d 943, 172 Misc. 1081—In re Johnson's Estate, 16 N.Y.S.2d 855, 172 Misc. 1075.
Certificate stating conclusion of certifying official see supra § 640.
"Due conformity"
In a patent interference proceeding a certification that a specification and drawing annexed thereto are in "due conformity" with the original specification and the drawing which accompanied a foreign application for patent does not show that the reproduction was an exact copy of the specification and drawing, since "conformity" is defined as "correspondence in form, manner, or use; agreement; harmony; congruity"; and such copy is, therefore, inadmissible in evidence.—Guettler v. Alfsen, 289 F. 613, 615, 53 App.D.C. 215.

57. U.S.—New York Life Ins. Co. v. Aronson, D.C.Pa., 38 F.Supp. 687.
N.Y.—Strebler v. Wolf, 273 N.Y.S. 653, 152 Misc. 859.
22 C.J. p 855 note 38.
Materiality and cure of defects
Where the mode of authentication prescribed by federal statute has been pursued, technical defects in the certificate of a consul of the United States as to the authority of the foreign officer who authenticated the record may be cured by a subsequent certificate; and the fact that the "Ministry" is certified as custodian rather than the "Minister" is unimportant.—Banco de Espana v. Federal Reserve Bank of New York, D.C.N.Y., 28 F.Supp. 958, affirmed, C.C.A., 114 F.2d 438.

missible thereunder,[58] and strict compliance has been held required.[59] In the absence of some such statutory provision, the proper mode of authentication of foreign records or documents other than foreign laws or judicial records must be determined under the guidance furnished by the rules of the common law or the usages of nations; and any evidence is in general sufficient that legitimately tends to prove that the document offered is in fact certified by the official custodian of the original and that he has due authority to make such certification.[60] Examined or sworn copies of foreign records have been held admissible.[61] A copy certified under the great seal of state is admissible,[62] without further authentication.[63] It has been held to be one of the proper and essential functions of consuls under the rules of international law to aid in the authentication of foreign documents for use in their country, and that for this purpose the courts will take notice of their seals of office.[64]

b. Judicial Records

Copies of judicial records of foreign countries are admissible if authenticated by the proper officials. Generally, a clerk's certificate alone is not sufficient. Translations must be shown to be accurate.

Since the original records of proceedings of a foreign court cannot ordinarily be produced, resort may usually be had to authenticated copies.[65] A foreign judgment may be proved by a copy thereof duly authenticated by the properly authenticated certificate of the clerk of the court or other officer authorized by law to give a copy.[66] Thus, it has been held that the clerk or prothonotary of a court is presumed to possess authority to make and certify copies of the records of the court in his keeping, that such copies are duly authenticated by his certificate over his official signature and the seal of the court, and that his official signature and the seal are duly authenticated by the great seal of the foreign state or government affixed to the certificate of the keeper thereof.[67] Generally, in the case of foreign courts, the certificate of the clerk or other officer under seal of the court is not alone sufficient but must itself be properly authenticated;[68] and it must also appear that the original paper was made of record and put in the custody of the proper official.[69] In the case of a foreign court which has no seal, its records are sufficiently proved by producing a copy certified by a clerk having the custody of the records and proving his handwriting, especially where it is proved further that the record is authenticated in the usual form of those sent to be used as evidence in a foreign country.[70]

A foreign judgment may be evidenced by a copy proved to be true by a witness who has personally compared it with the original record in the proper custody;[71] but a copy of a copy cannot be admitted as a sworn copy.[72] Another mode of authenti-

58. Or.—In re Braun's Estate, 90 P.2d 484, 161 Or. 503.

59. N.Y.—In re Johnson's Estate, 16 N.Y.S.2d 855, 172 Misc. 1075.
22 C.J. p 855 note 39 [a].

60. Mich.—Boyce v. McKenna, 178 N.W. 701, 211 Mich. 204.
22 C.J. p 855 note 39.

61. Tex.—Kellogg v. Southwestern Lumber Co. of New Jersey, Civ. App., 44 S.W.2d 742, error refused —Von Schoech v. Herald News Co., Civ.App., 237 S.W. 651, dismissed for want of jurisdiction.
22 C.J. p 855 note 44.

62. U.S.—Church v. Hubbart, Mass., 2 Cranch 187, 2 L.Ed. 249.
22 C.J. p 855 note 40.

63. Ohio.—Stanglein v. State, 17 Ohio St. 453.
22 C.J. p 855 note 41.

64. Conn.—Barber v. Mexico International Co., 48 A. 758, 73 Conn. 587.
22 C.J. p 855 note 42.

65. U.S.—Cruz v. O'Boyle, D.C.Pa., 197 F. 824.
22 C.J. p 855 notes 47, 48.

"Public writing"
Duly authenticated copy of German court record wherein an individual acknowledged himself to be father of illegitimate child and obligated himself to pay for maintenance of child was held admissible in evidence as "public writing."—In re Wehr's Estate, 29 P.2d 836, 839, 96 Mont. 245.

Patent litigation
Copies of foreign decrees in infringement actions on foreign patents, if properly authenticated, are admissible in evidence.—Esnault-Pelterie v. Chance Vought Corporation, D.C.N.Y., 56 F.2d 393, affirmed, C.C.A., 66 F.2d 474.

It is only an examined copy of a correct and legally authentic copy of a foreign tribunal that is admissible in evidence.—Arkansas Road Const. Co. v. Thomas & Ratliff, Tex.Civ. App., 245 S.W. 743.

66. U.S.—Indian Refining Co. v. Valvoline Oil Co., C.C.A.Ill., 75 F. 2d 797.
Me.—Collette v. Hanson, 174 A. 466, 133 Me. 146.
22 C.J. p 856 note 59, p 855 note 48 [a].

Sufficiency of signatures
Signatures on certificates by a registrar and a judge consisting of their entire surnames, but the initial only of their first names, are sufficient, where the vice consul has vouched for the signature of the judge, and the judge in turn has vouched for that of the registrar.—Farmer v. Orme, 21 P.2d 977, 131 Cal.App. 628.

67. Minn.—Gunn v. Peakes, 30 N. W. 466, 36 Minn. 177, 1 Am.S.R. 661.
22 C.J. p 856 note 60.

68. U.S.—Catlett v. Pacific Ins. Co., C.C.N.Y., 5 F.Cas.No.2,517, 1 Paine 594.
22 C.J. p 857 note 61.

Oath of judge
Judge's certificate is not sufficient proof of authority of deputy registrar to exemplify foreign judgment, in absence of showing that the notary who administered the judge's oath to the certificate had statutory authority so to do.—Collette v. Hanson, 174 A. 466, 133 Me. 146.

69. Utah.—Cooke v. Cooke, 248 P. 83, 67 Utah 371.
22 C.J. p 856 note 59 [a].

70. N.Y.—Packard v. Hill, 7 Cow. 434.

71. Me.—Collette v. Hanson, 174 A. 466, 133 Me. 146.
22 C.J. p 856 note 53.

72. N.Y.—Lincoln v. Battelle, 6 Wend. 475.

cating foreign judgments is by an exemplification under the great seal of state,[73] and a copy authenticated by the great seal is sufficient, although unaccompanied by any certificate of its being a copy under the official signature of any officer of the court, or by other evidence of its genuineness.[74] However, it has been held that a copy certified under the private seal of the secretary of state for foreign affairs of a foreign government,[75] or under the seal of a foreign minister[76] is not admissible.

The act of congress providing the mode of authenticating judicial records of one state for use in another state, see supra § 670, is not applicable to the authentication of judicial proceedings in a foreign country;[77] but in a number of states provision has been made by statute for the authentication of judgments or other records of the courts of foreign countries so as to authorize their reception in evidence, and compliance with such provisions suffices.[78] Copies sought to be introduced pursuant to such statutes are inadmissible where the mode of authentication therein prescribed has not been followed.[79]

Completeness of transcript. It has been held that the mere transcript of an order of a foreign court containing no previous proceedings on which the order rested and no copy of the judgment roll other than said order is inadmissible on the ground of the incompleteness of the record in the absence of proof of a procedure in the foreign country making such evidence sufficient;[80] but it has also been held that, where an exemplification of written proceedings in the courts of Great Britain is certified both by the court and the shorthand writer as proceedings at the trial, and is authenticated by an American consul, it is admissible in evidence without any certificate that it is an entire record of the proceedings in question.[81]

A translation of a foreign judicial record is inadmissible where no one testifies under oath or affirmation that it is correct.[82] So, a translation of a foreign judgment certified by a consul has been held not admissible, for the reason that the translation of a consul not under oath can have no greater validity than that of any other responsible person.[83] A certification by a "translator," without a showing that he is the custodian of the court records, or even that he is a translator of the court from which the records come, is insufficient.[84]

Alterations and interlineations in a record of a court noted and verified by the clerk of the court, have been held no ground of objection to its admission in evidence without some evidence of their being made improperly and in bad faith.[85]

Admiralty records. Since a court of admiralty acts under the law of nations, its proceedings are sufficiently proved by the certificate of a deputy register under the seal of the court, the certificate of the judge, and the certificate of a notary.[86] Indeed it has been held that a copy of a decree of a court of admiralty certified by the deputy register under the seal of the court is sufficiently authenticated, the seal of a court of admiralty being deemed evidence of itself.[87] Furthermore, a copy of the sentence of a court of admiralty under the seal of the court, signed by the actuary in the absence of the register, accompanied by a deposition of a witness proving the seal and signature, has been held sufficiently authenticated.[88] A sentence of a court of admiralty has been held sufficient evidence of a condemnation without showing the previous proceedings.[89] A purported copy of an admiralty decree which is not certified under seal cannot be read in evidence.[90]

73. Me.—Collette v. Hanson, 174 A. 466, 133 Me. 146.
22 C.J. p 856 note 49.

74. Conn.—Griswold v. Pitcairn, 2 Conn. 85.

75. U.S.—Church v. Hubbart, Mass., 2 Cranch 187, 2 L.Ed. 249.
N.Y.—Vandervoort v. Smith, 2 Cai. 155.

76. U.S.—Stein v. Bowman, La., 13 Pet. 209, 10 L.Ed. 129.
N.Y.—Vandervoort v. Smith, 2 Cai. 155, 163.
22 C.J. p 856 note 52.

77. U.S.—American Surety Co. v. Sandberg, D.C.Wash., 225 F. 150.

78. Cal.—Farmer v. Orme, 21 P.2d 977, 131 Cal.App. 628.
Kan.—In re Hanna's Estate, 186 P. 1010, 106 Kan. 40.
22 C.J. p 857 note 69.

79. Neb.—Boehmer v. Heinen, 293 N.W. 237.
N.Y.—Martens v. Martens, 31 N.E.2d 489, 284 N.Y. 363, reversing 20 N.Y.S.2d 206, 260 App.Div. 30, reargument denied 33 N.E.2d 542.
Utah.—Cooke v. Cooke, 248 P. 83, 67 Utah 371.

80. Cal.—Wickersham v. Johnston, 38 P. 89, 104 Cal. 407, 43 Am.S.R. 118.
22 C.J. p 856 note 55.

81. Pa.—Thompson v. Fitzgerald, 82 A. 212, 233 Pa. 242.

82. Ill.—Kreda v. Kreda, 255 Ill. App. 462.

83. U.S.—Church v. Hubbart, Mass., 2 Cranch 187, 2 L.Ed. 249.
N.Y.—Vandervoort v. Smith, 2 Cai. 155.

84. U.S.—Esnault-Pelterie v. Chance Vought Corporation, D.C.N.Y., 56 F.2d 393, affirmed, C.C.A., 66 F.2d 474.

85. N.Y.—Lazier v. Westcott, 26 N. Y. 146, 82 Am.D. 404.

86. U.S.—Yeaton v. Fry, D.C., 5 Cranch 335, 3 L.Ed. 117.

87. Conn.—Thompson v. Stewart, 3 Conn. 171, 8 Am.D. 168.

88. N.Y.—Gardere v. Columbian Ins. Co., 7 Johns. 514.

89. N.Y.—Gardere v. Columbian Ins. Co., supra.

90. Pa.—Thurston v. Murray, 3 Binn. 326.
38 C.J. p 1183 note 71 [b].

D. PRIVATE OR UNOFFICIAL DOCUMENTS

1. IN GENERAL

§ 676. Admissibility in General

General rules as to relevancy and competency apply to the admissibility of private or unofficial documents.

The general principles of evidence with respect to relevancy, see supra §§ 158–185, and competency, see supra §§ 186–191, are applicable to private writings, which are admitted or rejected according as they are or are not relevant, competent, and material.[91]

Notice. Notice to the opposite party that one will introduce private writings into evidence may be required by statute or rule of court,[92] the rule not being applicable, however, where the paper to be introduced is substantially stated in the pleadings.[93]

§ 677. Recitals

Recitals in a private writing are competent under some circumstances, particularly as against parties to the instrument and their privies, but are not usually admissible as against strangers.

Whether or not a recital in a written instrument has any probative value depends largely on whether or not the person against whom it is sought to be used is estopped to deny its truth, or has thereby made an admission of some kind from which it results that, while such recitals are competent evidence[94] against parties to the instrument, or their privies,[95] they are not competent as against strangers.[96] An exception to the general rule of exclu-

91. Ala.—Blackmon v. Engram, 116 So. 307, 22 Ala.App. 396.
Iowa.—Weinhart v. Smith, 233 N.W. 26, 211 Iowa 242.
Tex.—Eastland County v. Davisson, Civ.App., 277 S.W. 779, reversed on other grounds Davisson v. Eastland County, Com.App., 287 S.W. 901—First Nat. Bank of Amarillo v. Rush, Civ.App., 227 S.W. 378, modified on other grounds, Com. App., 246 S.W. 349, motion granted 249 S.W. 183.
22 C.J. p 857 note 73—38 C.J. p 201 notes 33–41—48 C.J. p 720 notes 24, 25.

Copy of incompetent writing is itself incompetent.—Isbell v. Whalen, 127 N.W. 476, 25 S.D. 445.

Discretion of court
Trial court is vested with discretionary power in determining admissibility of private records.—Lutz v. People's State Bank of Minneola, 9 P.2d 997, 135 Kan. 115.

Need not constitute admission
To render document admissible in evidence, it need not constitute admission of party adverse to one offering it.—Arnold v. Brotherhood of Locomotive Firemen and Enginemen, 106 S.W.2d 32, 232 Mo.App. 325.

Records required by law to be kept are generally admissible if properly identified.—Kirkpatrick v. Wells, 6 S.W.2d 591, 319 Mo. 1040.

92. R.I.—La Brosse Realty Corporation v. Sabre, 148 A. 314, 50 R.I. 400.
Tex.—Hinton v. Uvalde Paving Co., Civ.App., 77 S.W.2d 783, error refused.

Time of presentation
Counsel bringing check books to court in compliance with demand of opposing counsel should have given notice as to time of their presentation.—Couch v. Thompson, 142 A. 280, 293 Pa. 237.

93. R.I.—Beebe v. Greene, 82 A. 796, 34 R.I. 171.

94. Ark.—Arkmo Lumber Co. v. Cantrell, 252 S.W. 901, 159 Ark. 445.
Cal.—Carpenter v. Smallpage, 29 P. 2d 841, 220 Cal. 129, modified on other grounds 30 P.2d 995—Sorensen v. Hall, 28 P.2d 667, 219 Cal. 680.
Ga.—Pennington v. Palmer, 176 S.E. 697, 49 Ga.App. 540, conforming to Palmer v. Pennington, 175 S.E. 380, 179 Ga. 76.
Idaho.—Joslin v. Idaho Times Pub. Co., 91 P.2d 386, 60 Idaho 235.
Iowa.—Holmes v. Curl, 178 N.W. 406, 189 Iowa 246.
Ky.—Christopher v. United Oil Co., 14 S.W.2d 750, 228 Ky. 209—Jagoe v. Jagoe, 238 S.W. 185, 194 Ky. 101—Prewitt v. Wilborn, 212 S.W. 442, 184 Ky. 638—Fontaine v. Dunlap, 82 Ky. 321.
Mo.—South Side Buick Auto Co. v. Bejach, App., 44 S.W.2d 870—McConnon & Co. v. Kennon, App., 281 S.W. 450—Little Bros. Co. v. G. Mathes Iron & Metal Co., App., 223 S.W. 952.
N.H.—Tuftonboro v. Willard, 197 A. 404, 89 N.H. 253.
N.C.—Baggett v. Lanier, 100 S.E. 254, 178 N.C. 129.
Tex.—Southland Lumber Co. v. Boyd, Com.App., 244 S.W. 119, reversing Boyd v. Johnson, Civ.App., 234 S. W. 235, which reversed 233 S.W. 864—Havard v. Smith, Civ.App., 13 S.W.2d 743—Morrison v. Bennette, Civ.App., 228 S.W. 307.
Vt.—Smith v. Vermont Marble Co., 133 A. 355, 99 Vt. 384.
22 C.J. p 859 note 3—18 C.J. p 265 notes 90–97.

Recitals of consideration and payment
N.Y.—Petition of Danaher, 222 N.Y. S. 463, 221 App.Div. 228, affirmed In re Ball's Ex'r, 161 N.E. 171, 247 N.Y. 533.
Or.—Fletcher v. Yates, 211 P. 179, 105 Or. 680—North American Securities Co. v. Cole, 118 P. 1032, 61 Or. 1.
Pa.—Roberts v. Friedman, 96 Pa. Super. 530.
Tex.—Gillespie v. Gillespie, Civ.App., 110 S.W.2d 89, error dismissed—Matthews v. Houston Oil Co. of Texas, Civ.App., 299 S.W. 450.
22 C.J. p 859 note 3 [a].

To show intention of parties
N.C.—In re Freeman's Heirs at Law, 128 S.E. 404, 189 N.C. 790.
Admissions see supra §§ 270–383.
Estoppel to deny truth of recitals see Estoppel §§ 37–40.

95. Ky.—Jagoe v. Jagoe, 238 S.W. 185, 194 Ky. 101.
N.C.—In re Freeman's Heirs at Law, 128 S.E. 404, 189 N.C. 790.
Tex.—Lampier v. Loy, Civ.App., 113 S.W.2d 955, error dismissed.
22 C.J. p 859 note 4.

96. U.S.—General Motors Acceptance Corporation v. Mid-West Chevrolet Co., C.C.A.Okl., 66 F.2d 1—In re Wilson, D.C.Minn., 18 F. 2d 108.
Ala.—Lamar v. Lincoln Reserve Life Ins. Co., 131 So. 223, 222 Ala. 60—Georgia Loan & Trust Co. v. Butler, 107 So. 863, 214 Ala. 390—McDermond v. Hamby, 88 So. 848, 205 Ala. 522.
Ark.—Rhine v. Mack, 108 S.W.2d 1079, 194 Ark. 606.

sion is, however, generally recognized in the case of ancient documents, the recitals of which are held evidence even against strangers,[97] at least with respect to such matters as pedigree, birth, marriage, death, and the like,[98] but there is authority to the contrary.[99]

§ 678. Void or Defective Instruments

Private writings which are valid and operative may be admitted in evidence notwithstanding defects; instruments which are so defective that the court is able to say as a matter of law that they are invalid will be excluded.

As a general rule a deed, will, or other writing relied on as a muniment of title, as embodying a contract, or as otherwise establishing by its terms a claim or right, will be excluded from the jury if it is so defective, either in substance or in form, that the court is able to say as a matter of law that it is an invalid instrument.[1] If, however, the instrument, although it may be defective, is nevertheless valid and operative, it will be admitted,[2] al-

Cal.—Huntington v. Donovan, 192 P. 543, 547, 183 Cal. 746, citing Corpus Juris.
Ga.—Gamble v. Brooks, 153 S.E. 759, 170 Ga. 662.
Idaho.—Washington County v. First Nat. Bank, 206 P. 1054, 35 Idaho 438.
Iowa.—Lawless v. Stamp, 79 N.W. 365, 108 Iowa 601.
Ky.—Rice v. Kelly, 10 S.W.2d 1112, 226 Ky. 347.
Mo.—Wall v. Mays, 210 S.W. 871.
Neb.—State v. Wright, 181 N.W. 539, 105 Neb. 617.
Okl.—Lauderdale v. O'Neill, 177 P. 113, 74 Okl. 119.
Or.—North American Securities Co. v. Cole, 118 P. 1032, 61 Or. 1.
Tenn.—Scott v. Mangrum, 7 Tenn. App. 437.
Tex.—Texas Co. v. Lee, 157 S.W.2d 628, reversing, Civ.App., 135 S.W. 2d 180—Brown v. Connor, Civ.App., 140 S.W.2d 495—Williams v. South Texas Development Co., Civ.App., 138 S.W.2d 605, error refused—Wilder v. American Produce Co., Civ.App., 106 S.W.2d 1073—Roberts v. Waddell, Civ.App., 94 S.W. 2d 211—Summerlin v. Smith, Civ. App., 279 S.W. 284—Clark v. Scott, Civ.App., 212 S.W. 728—Morrison v. Bennette, Civ.App., 228 S.W. 307.
Va.—Keppler v. City of Richmond, 98 S.E. 747, 124 Va. 592.
22 C.J. p 859 note 5—18 C.J. p 265 notes 95–97.
Unauthorized recital in sheriff's deed as to authority of officer see infra § 732.

97. Cal.—Garbarino v. Noce, 183 P. 532, 181 Cal. 125, 6 A.L.R. 1433.
Conn.—McMahon v. Stratford, 76 A. 983, 83 Conn. 386.
Pa.—Brock v. Atlantic Refining Co., 116 A. 552, 273 Pa. 76.
Ancient documents generally see infra §§ 743–752.

98. Cal.—Garbarino v. Noce, 183 P. 532, 181 Cal. 125, 6 A.L.R. 1433.
Pa.—Brock v. Atlantic Refining Co., 116 A. 552, 273 Pa. 76.
Tex.—Dittman v. Cornelius, Civ.App., 218 S.W. 109, reversed on other grounds, Com.App., 234 S.W. 880.
22 C.J. p 859 note 7.

99. N.Y.—In re Marsh, 272 N.Y.S. 807, 152 Misc. 454.

1. Ala.—Denson v. Kirkpatrick Drilling Co., 144 So. 86, 225 Ala. 473.
22 C.J. p 859 note 8.

Delivery

Invalidity for want of delivery may require exclusion of an instrument.—Sunburst Oil & Gas Co. v. Neville, 257 P. 1016, 79 Mont. 550.

Description of property

Defects in the description of property to be conveyed by particular deeds have been held such as to require the exclusion of such instruments.
Ark.—St. Louis-San Francisco Ry. Co. v. Francis, 299 S.W. 745, 175 Ark. 475.
Fla.—Carson v. Palmer, 190 So. 720, 139 Fla. 570.
Ga.—Farrar Lumber Co. v. Brindle, 151 S.E. 923, 170 Ga. 37—Head v. Lane, 112 S.E. 892, 153 Ga. 688—Lane v. Head, 97 S.E. 852, 148 Ga. 650.

Unsigned or unattested instruments

La.—Bodcaw Lumber Co. of Louisiana v. Walker, 136 So. 191, 17 La. App. 373.
Neb.—First Trust Co. of Lincoln v. Blore, 266 N.W. 628, 130 Neb. 785.
22 C.J. p 859 note 8 [a].

Deed of married woman is not admissible in evidence if not properly executed.
U.S.—Meegan v. Boyle, Mo., 19 How. 130, 15 L.Ed. 577.
Pa.—McConnell v. Carey, 48 Pa. 345.

2. Cal.—Motor Inv. Co. v. Breslauer, 221 P. 700, 64 Cal.App. 230.
Colo.—Scofield v. Scofield, 224 P. 230, 75 Colo. 105.
Ga.—Jewell v. Walker, 34 S.E. 337, 109 Ga. 241.
La.—Louisiana Oil Refining Corporation v. Gandy, 121 So. 183, 168 La. 37, appeal dismissed and certiorari denied Gandy v. Louisiana Oil Refining Corporation, 50 S.Ct. 65, 280 U.S. 516, 74 L.Ed. 587—Reeves v. Southern Kraft Corporation, App., 1 So.2d 824.
Mo.—Endsley v. Strock, 50 Mo. 508—Renfro v. Lazerine, App., 298 S.W. 1067.
N.J.—Superior Finance Corporation v. John A. McCrane Motors Co., 169 A. 31, 111 N.J.Law 350.
N.C.—Sears v. Braswell, 149 S.E. 846, 197 N.C. 515.
Tenn.—Stegall v. City of Chattanooga, 66 S.W.2d 266, 16 Tenn.App. 124.
Tex.—Powell v. Dyer, Civ.App., 227 S.W. 731.
22 C.J. p 859 note 9.

Absence of stamp

Ark.—Bank of Dyer v. Cole, 249 S.W. 32, 157 Ark. 583.
22 C.J. p 859 note 9 [a].

Clerical mistakes consisting of a substitution of the name of one party for the other in an instrument is not such a defect as to render the instrument inadmissible.—Brilliant v. Silk, 195 N.E. 737, 290 Mass. 537.

Defects as to signing

Cal.—Roome v. Real Estate Inv. Co., 21 P.2d 599, 131 Cal.App. 496.
Pa.—Schmidt v. Campbell, 7 A.2d 554, 136 Pa.Super. 590.
S.C.—Adams v. Wilkes, 109 S.E. 804, 118 S.C. 93.
Tex.—Peacock v. Aug. A. Busch & Co., Civ.App., 231 S.W. 447.
Wis.—Schultz v. Williams, 240 N.W. 844, 207 Wis. 122.

Delivery

(1) Where delivery of instrument is not required to make it valid and effective, it may be introduced into evidence irrespective of the question whether it was actually delivered.—Brenner v. Lesher, 2 A.2d 731, 332 Pa. 522.

(2) Deed properly executed and recorded is properly admitted on behalf of grantee although it came from grantor's possession, the question of its actual delivery being one of fact.—Barnes v. Downing Co., 114 S.E. 223, 154 Ga. 363.

(3) It is improper for the court on its own determination to exclude an instrument on the ground of nondelivery where evidence as to that fact is in substantial conflict, determination of such preliminary fact being for the jury.—Roberts v. Cyr, 1 A.2d 281, 136 Me. 39.

Description

(1) Description of grantor held not so defective as to render deed inadmissible.—Long v. Nadawah Lumber Co., 81 So. 25, 202 Ala. 523.

though it has been considered that extrinsic evidence to explain or remedy the defects is a prerequisite to admission of the writing.[3]

An instrument, although invalid as an operative instrument, may be admitted in connection with and by way of inducement for other evidence on which a right is predicated,[4] or as containing an admission,[5] as creating an estoppel,[6] as showing the terms of a contract,[7] as showing the hostility and extent of adverse possession,[8] as evidence of the mere fact of its execution,[9] or for some other collateral purpose.[10]

Where the entire contract between the parties is in two parts on separate sheets of paper, the court may properly refuse to admit into evidence one part without the other.[11]

Altered instruments. An altered instrument may or may not be admissible in evidence according as to whether or not the alteration is such as to invalidate the writing.[12]

§ 679. Documents in Foreign Language

Private writings in a foreign language may be introduced into evidence.

Instruments written in a foreign language may be admitted in evidence[13] in connection with a showing of their meaning in English,[14] but are not admissible without a translation into English,[15] at least where the party offering the instrument has had an opportunity to have a translation made.[16] It is sometimes required by statute that the translation be sworn to.[17]

Instruments partly in a foreign language are ad-

(2) Description of subject matter in particular instruments held not so defective as to require their exclusion.
Ala.—Ellenburg v. Barksdale, 97 So. 54, 210 Ala. 11—Davis v. Morgan, 91 So. 318, 206 Ala. 576—McMillan v. Aiken, 88 So. 135, 205 Ala. 35—City of Birmingham v. Kircus, 99 So. 780, 19 Ala.App. 614.
Ga.—Stanaland v. Horne, 142 S.E. 142, 165 Ga. 685—Southern Timber Co. v. Newport Land Co., 106 S.E. 103, 151 Ga. 150—Edenfield v. Brinson, 100 S.E. 373, 149 Ga. 377.
Mo.—Schroer v. Brooks, 224 S.W. 53, 204 Mo.App. 567, transferred, see, Sup., 200 S.W. 1068.
N.H.—Tuftonboro v. Willard, 197 A. 404, 89 N.H. 253.
Tex.—Cochran v. William M. Rice Institute for Advancement of Literature, Science and Art, Civ.App., 123 S.W.2d 359, error refused.

Injunction
Existence of injunction restraining officers of a corporation from disposing of corporate assets which are applicable to payment of its debts does not preclude introduction of a deed by a receiver of such corporation executed under order of court.—Walton v. Morton, 159 S.E. 259, 172 Ga. 789.

Unacknowledged instruments
N.M.—Sandoval County Board of Education v. Young, 94 P.2d 508, 43 N.M. 397.
22 C.J. p 859 note 8 [e].

Undated instrument
Tex.—First State Bank of Jacksonville v. Smith, Civ.App., 85 S.W.2d 760.

3. Ala.—Swindall v. Ford, 63 So. 651, 184 Ala. 137.
22 C.J. p 860 note 10.

4. Ky.—Mussinon's Adm'r v. Herrin, 67 S.W.2d 710, 713, 252 Ky. 495, citing **Corpus Juris.**
Mo.—Hinkle v. Hinkle, 236 S.W. 30.
22 C.J. p 860 note 11.

5. Ky.—Mussinon's Adm'r v. Herrin, 67 S.W.2d 710, 713, 252 Ky. 495, citing **Corpus Juris.**
N.C.—Sears v. Braswell, 149 S.E. 846, 197 N.C. 515.
22 C.J. p 860 note 12.

6. N.C.—Riley v. Carter, 81 S.E. 414, 165 N.C. 334.
S.C.—Smith v. Williams, 139 S.E. 625, 141 S.C. 265, 54 A.L.R. 964.
Tex.—Johnson v. Tunstall, Com.App., 25 S.W.2d 828, reversing Tunstall v. Johnson, Civ.App., 13 S.W.2d 240.

7. Cal.—Los Angeles Furniture Co. v. Hansen, 188 P. 292, 46 Cal.App. 5.
Colo.—Galvin v. Stokes, 191 P. 117, 68 Colo. 376.
Kan.—Lewis v. Hunter, 40 P.2d 344, 141 Kan. 206.
N.H.—McCrillis v. American Heel Co., 155 A. 410, 85 N.H. 165.

8. Tex.—Smith v. Victory, Civ.App., 69 S.W.2d 483, error refused.
22 C.J. p 860 note 14.

9. Iowa.—Singer v. Sheldon, 9 N.W. 298, 56 Iowa 354.
Mo.—German Evangelical B. Church of Concordia v. Reith, 39 S.W.2d 1057, 1065, 327 Mo. 1098, 76 A.L.R. 605, citing **Corpus Juris.**

10. N.J.—Guilder v. Boonton-Pine Brook-New York Bus Co., 164 A. 316, 110 N.J.Law 103—Reider v. Slockbower, 153 A. 604, 107 N.J. Law 331.
22 C.J. p 860 note 16.

To fix date of payment
Mo.—Schroer v. Brooks, 224 S.W. 53, 204 Mo.App. 567, transferred, see, App., 200 S.W. 1068.

To fix price of article
U.S.—Tucker v. Traylor Engineering & Mfg. Co., C.C.A.Okl., 48 F.2d 783.

11. Mich.—Dinnan v. Bloomfield Hills Land Co., 181 N.W. 986, 214 Mich. 54.

12. Ga.—American Surety Co. of New York v. Citizens' Bank of Colquitt, 172 S.E. 801, 48 Ga.App. 448.
Ill.—Genslinger v. New Illinois Athletic Club of Chicago, 252 Ill.App. 298, reversed on other grounds 171 N.E. 514, 339 Ill. 426.
Pa.—Schmidt v. Campbell, 7 A.2d 554, 136 Pa.Super. 590.
22 C.J. p 860 note 17, p 934 note 43—2 C.J. p 1194 note 81 [b], p 1211 note 24 [c], p 1229 note 54 [d].

Defaced exhibit
If exhibit, consisting of business papers, to deposition is produced by party and shown to have been in his possession at all times, burden is not on adverse party to show how exhibit became defaced.—John P. Mills Organization v. Bell, 37 S.W.2d 680, 225 Mo.App. 685.

Hospital record
(1) A hospital record, bearing indications of alterations, is not admissible in evidence without satisfactory explanation of the alterations.—Franklin v. Atlantic & C. Air Line R. Co., 54 S.E. 578, 74 S.C. 333.
(2) Admissibility of hospital records generally see infra § 728.

13. Tex.—Ross v. Sutter, Civ.App., 223 S.W. 273.
22 C.J. p 860 note 18.

14. Ill.—Loehde v. Glos, 106 N.E. 940, 265 Ill. 401.
22 C.J. p 860 note 19.

15. Tex.—Lacoma v. Canto, Civ. App., 236 S.W. 1013.
22 C.J. p 861 note 20.

16. Porto Rico.—Franceschi v. Jones, 8 Porto Rico Fed. 472.

17. Mo.—Noble v. Cates, 130 S.W. 302, 230 Mo. 189.

missible at least to the extent of the English words which they contain.[18]

§ 630. Recording or Failure to Record

In absence of statute so requiring, failure to record a private writing does not preclude its introduction into evidence.

The failure to record a written instrument[19] or to record it within a particular time[20] does not render it inadmissible in evidence unless a different rule is established by statute;[21] and even if the statute requires recording in order that the instrument shall be evidence it is sufficient that the instrument be recorded before it is offered and it is not necessary that it shall have been recorded before the commencement of the action in which it is sought to be used.[22] A paper referred to and described as "recorded in the clerk's office" of a certain county may be read in evidence in connection with the instrument making such reference, although it was improperly spread on the record.[23]

§ 681. Collateral Writings

Collateral writings are admissible in explanation of an instrument which refers to them and under certain circumstances should be introduced.

Collateral writings expressly referred to and made a part of an instrument introduced in evidence are admissible in explanation of the latter,[24] although the collateral writing is between third persons.[25] Indeed it is held that an instrument made subject to another writing or expressly referring thereto for the ascertainment of the terms of the entire contract will not be received without the introduction of the writing referred to;[26] but this rule is inapplicable to an instrument which, although subject to or referring to another, is complete in itself.[27]

2. Book Entries

§ 682. In General

While the mere fact that unofficial statements are in the form of written entries will not necessarily render them admissible, such entries are frequently received in evidence because of necessity when the circumstances under which they are made tend to guarantee their trustworthiness.

The mere fact that unofficial statements of third persons, or of a party in his own favor, are in the form of written entries will not render them admissible unless a foundation is laid for their admission under some recognized rule of law.[28] As, however, such entries are frequently made at a time when there is no motive to misrepresent or to make false entries, and under such circumstances as to

18. Tex.—Lawrence v. Cananea Consol. Copper Co., S. A., Civ.App., 237 S.W. 959, dismissed for want of jurisdiction.

19. U.S.—Pond v. Goldstein, C.C.A. Alaska, 41 F.2d 76.
Cal.—Motor Inv. Co. v. Breslauer, 221 P. 700, 64 Cal.App. 230.
Ga.—Singer Sewing Mach. Co. v. Wardlaw, 116 S.E. 207, 29 Ga.App. 626.
Ind.—Hawkins v. Motor Bank of Denver, Colo., 150 N.E. 118, 84 Ind. App. 122.
Ky.—Culton v. Simpson, 127 S.W.2d 826, 277 Ky. 808.
La.—State ex rel. Adema v. Meraux, 184 So. 825, 191 La. 202.
N.C.—Proffitt v. State Mutual Fire Ins. Co., 97 S.E. 635, 176 N.C. 680.
Tex.—De Ramirez v. De Ramirez, Civ. App., 29 S.W.2d 872, error refused.
Va.—F. D. Cummer & Son Co. v. R. M. Hudson Co., 127 S.E. 171, 141 Va. 271.
22 C.J. p 861 note 23.

20. Ala.—Turner v. Davis, 64 So. 958, 186 Ala. 77.

21. Ga.—E. E. Forbes Piano Co. v. Oliver, 74 S.E. 713, 11 Ga.App. 65.
Philippine.—Ravago v. Bacud, 10 Philippine 60.
Tex.—Goode v. Martinez, Civ.App., 237 S.W. 576.

Proof of recordation
The original of a South Carolina chattel mortgage which was acknowledged and in proper form for recording was properly received in evidence, where there was evidence that mortgage was given to proper officer for recordation and was recorded in his presence, notwithstanding proof of recordation was not in accordance with the Virginia statutes.—P. R. Smith Motor Sales v. Lay, 3 S.E.2d 190, 173 Va. 117.

Statute inapplicable
A statute relating to record of instruments has no application to the introduction in evidence of an instrument in writing executed long prior to the adoption of such statute.—Ross v. Sutter, Tex.Civ.App., 223 S.W. 273.

22. U.S.—U. S. v. 7,405.3 Acres of Land in Macon, Clay and Swain Counties, C.C.A.N.C., 97 F.2d 417.
Ala.—Patterson v. Johnson, 143 So. 560, 225 Ala. 401.
N.C.—Pennell v. Brookshire, 136 S E. 257, 193 N.C. 73—Royal v. Pope & Parish, 98 S.E. 599, 177 N.C. 206.
22 C.J. p 861 note 26.

23. W.Va.—Goad v. Walker, 80 S. E. 873, 73 W.Va. 431.

24. Mo.—Robertson v. Kochtitzky, App., 217 S.W. 543.
22 C.J. p 861 note 28.

Necessity of preliminary proof
In action on insurance policy which referred to manual, excluding manual as evidence was proper, where it had not been proved.—Wanner v. Columbia Casualty Co., 147 A. 196, 7 N.J.Misc. 753.

25. Pa.—Blair v. Hum, 2 Rawle 104.
S.C.—Lee v. Unkefer, 65 S.E. 989, 67 S.E. 246, 85 S.C. 199.

26. Md.—Hammond v. Norris, 2 Harr. & J. 130.
Mich.—Chapman v. Crooks, 2 N.W. 924, 41 Mich. 595.

27. Tex.—Oakland Cemetery Lot Owners' Ass'n v. Castleberry, Civ. App., 25 S.W.2d 639.
22 C.J. p 861 note 31.

28. Ala.—Coleman v. Adkins, 168 So. 184, 232 Ala. 351.
Mo.—Cromeens v. Sovereign Camp, W. O. W., 233 S.W. 287, 208 Mo. App. 11.
Pa.—Commonwealth Trust Co. of Pittsburgh v. Hugo, 194 A. 904, 328 Pa. 116—Keiber v. Keiber, 98 Pa. Super. 172.
Tex.—Hearon v. Jackson, Civ.App., 109 S.W.2d 230, error dismissed.
22 C.J. p 861 note 32.

be of a reliable character, and as they frequently form the only available evidence of the facts stated, the rule is subject to modifications under which such entries are admitted in many cases.[29]

§ 683. Entries in Regular Course of Business

a. In general
b. Regular entry rule
c. Res gestæ
d. Books of particular persons

a. In General

As a general rule books of account of a party are admissible in his favor to show the transactions recorded when a proper foundation is laid.

A very generally established rule, adopted by statute in some jurisdictions and sometimes spoken of as "the shopbook rule," is that books of account of a party, or entries therein, are admissible in his favor to show the recorded transactions when a proper foundation is laid and the requisites to admissibility considered in §§ 684–690 infra have been met.[30] Such books of account or book entries are received as an exception to the hearsay rule[31] largely because of necessity[32] and because their normal import speaks for truthfulness and completeness.[33]

29. Mich.—Hartford Fire Ins. Co. v. Baker, 241 N.W. 871, 257 Mich. 651.
Utah.—Newton v. Tracy Loan & Trust Co., 40 P.2d 204, 88 Utah 547, reversed on other grounds 56 P.2d 624, 88 Utah 568.
22 C.J. p 862 note 33.

To admit book entries as exception to hearsay rule, there must appear: First, practical necessity for their introduction; and second, circumstantial guaranty that the transactions occurred as recorded.—Cub Fork Coal Co. v. Fairmont Glass Co., C.C.A.Ind., 19 F.2d 273.

Guaranty of trustworthiness

In a suit involving a complexity of transactions by large business concerns, if an entry be offered in evidence which is proved as part of a regular system, and is substantially contemporaneous, and concerning which no motive for falsification and no probability of negligent error is observed, there exists that reasonable guaranty of trustworthiness which warrants its reception in evidence.—The Spica, C.C.A.N.Y., 289 F. 436.

Agreement to use ledger in settlement

In action against corporation on note, where issue was whether note was included in a particular settlement, evidence as to agreement of parties to use corporation's ledger and to base settlement thereon made pages of corporation's ledger admissible.—City Nat. Bank & Trust Co. of Chicago v. Oberheide Coal Co., 30 N.E.2d 753, 307 Ill.App. 519.

30. Ala.—Hartford Fire Ins. Co. v. Owen, 116 So. 310, 22 Ala.App. 414.
Ariz.—School Dist. No. 1, Apache County, v. Whiting, 107 P.2d 1075—Condos v. Andalft, 206 P. 594, 24 Ariz. 38.
Cal.—Patrick v. Tetzlaff, 189 P. 115, 46 Cal.App. 243.
Conn.—T. Barbour Brown & Co. v. Canty, 161 A. 91, 115 Conn. 226, 83 A.L.R. 801—MacFayden v. Paul, 128 A. 650, 102 Conn. 243.
Del.—Edsall v. Rockland Paper Co., 194 A. 115, 8 W.W.Harr. 495—Remington Mach. Co. v. Wilmington Candy Co., 66 A. 465, 22 Del. 288.
Ga.—Farley v. Groover, 3 S.E.2d 135, 60 Ga.App. 169.
Minn.—Meyers v. Barrett & Zimmerman, 264 N.W. 769, 196 Minn. 276.
Miss.—Greene v. Greene, 110 So. 218, 145 Miss. 87, 49 A.L.R. 565.
N.H.—Doe v. Lucy, 139 A. 750, 83 N.H. 160.
N.Y.—Warner Quinlan Co. v. Ben Charat, Inc., 257 N.Y.S. 722, 725, 143 Misc. 443, citing **Corpus Juris.**
N.D.—Baldwin Piano Co. v. Wylie, 247 N.W. 397, 63 N.D. 216.
Okl.—Oklahoma Natural Gas Co. v. McFarland, 229 P. 216, 103 Okl. 6.
Or.—Pacific Trading Co. v. Sun Ins. Office, 25 P.2d 1052, 145 Or. 211—Pacific Trading Co. v. Sun Ins. Office, 13 P.2d 616, 140 Or. 314—Warren Const. Co. v. Grant, 299 P. 686, 137 Or. 410, rehearing denied 2 P.2d 1118, 137 Or. 410.
Pa.—Pringle v. Neff, 172 A. 26, 112 Pa.Super. 547—In re Barclay's Estate, 20 Pa.Dist. & Co. 626—In re Walker's Estate, 53 York Leg.Rec. 1.
R.I.—Sandsea v. No-Kap Closures, 14 A.2d 655.
S.C.—Empire Buggy Co. v. Moss, 151 S.E. 788, 154 S.C. 424—W. T. Rawleigh Co. v. Thompson, 114 S.E. 702, 122 S.C. 43.
Tex.—Thaxton v. Bailey-Moline Hardware Co., Civ.App., 61 S.W.2d 134—Coon v. Ewing, Civ.App., 275 S.W. 481—First Nat. Bank v. Rush, Civ.App., 227 S.W. 378, modified on other grounds, Com.App., 246 S.W. 349, motion granted 249 S.W. 183.
Utah.—Clayton v. Metropolitan Life Ins. Co., 85 P.2d 819, 823, 96 Utah 331, 120 A.L.R. 1117.
Va.—Ratliff v. Jewell, 149 S.E. 409, 153 Va. 315, 67 A.L.R. 1541.
Wyo.—Sneider v. Big Horn Milling Co., 200 P. 1011, 1015, 28 Wyo. 40, citing **Corpus Juris.**
22 C.J. p 862 note 34.

Admissibility of miscellaneous papers, instruments, and records made in regular course of business generally see infra § 732.

Historical development of rule

N.Y.—Warner Quinlan Co. v. Ben Charat, Inc., 257 N.Y.S. 722, 143 Misc. 443.
Or.—Radtke v. Taylor, 210 P. 863, 105 Or. 559, 27 A.L.R. 1423.

Admissibility not regulated by statute

In Oregon there is no statute regulating the use of shopbooks as evidence.—Radtke v. Taylor, supra.

Not the only evidence admissible

Books of original entry of a merchant are not the only evidence that may be presented in support of a running account.—Vondersmith v. Kloidt, 17 A.2d 706, 143 Pa.Super. 170.

Shopbook rule applies only to account books, in a strict sense, of the parties to the action.—Tiedt v. Larson, 219 N.W. 905, 174 Minn. 558.

Rule in England

Or.—Radtke v. Taylor, 210 P. 863, 105 Or. 559, 27 A.L.R. 1423.
22 C.J. p 864 note 47.

Rule repudiated

(1) In Louisiana, under a statute so providing, the books of merchants cannot be given in evidence in their favor.—Royal Products v. Johnson, La.App., 191 So. 329—22 C.J. p 864 note 48.

(2) The statute, however, has been relaxed in numerous cases.—Royal Products v. Johnson, supra.

(3) Thus, as appears in § 692 c infra, book entries made by clerks unavailable as witnesses may in certain cases be admitted.

31. Ky.—Hopkins' Ex'x v. Osborne, 128 S.W.2d 575, 278 Ky. 229.
Mont.—Meagher v. Harrington, 254 P. 432, 78 Mont. 457.

32. Del.—Edsall v. Rockland Paper Co., 194 A. 115, 8 W.W.Harr. 495.
Ky.—Hopkins' Ex'x v. Osborne, 128 S.W.2d 575, 278 Ky. 229.
Mont.—Meagher v. Harrington, 254 P. 432, 78 Mont. 457.

33. Minn.—Meyers v. Barrett & Zim-

The rule was originally sanctioned because the common-law rule, rendering parties and interested persons incompetent to testify in their own behalf, required such an exception in order to prevent a failure of justice, since the business of tradesmen was often carried on without clerks on whose testimony they might rely, and since many of their transactions, on account of their variety and minuteness, were necessarily not in the presence of witnesses;[34] but the statutory rule permitting parties and interested persons to testify in their own behalf does not abrogate the rule under discussion, so that even where parties are competent as witnesses they may nevertheless introduce their books of account in evidence.[35]

Secondary evidence. Some of the cases proceed on the theory that account books are in the nature of secondary evidence,[36] and are admissible only after it is made apparent that it is not within the power of the party to produce better evidence,[37] but it has been said on the other hand that the use of one's own books, verified by his oath, is not secondary evidence,[38] and that the existence of other testimony does not prevent the admission of such books under the shopbook rule.[39]

Distinguished from other rules. The shopbook rule should not be confused with the rule permitting the use of book entries to refresh memory, see the C.J.S. title Witnesses § 358, also 70 C.J. p 586 note 54–p 587 note 63; nor with the rule permitting the reception of book entries as admissions against interest, see §§ 694–695 infra; nor with any rule which permits the use of book entries to corroborate or contradict the testimony of a witness, see the C.J.S. title Witnesses §§ 639, 648, also 22 C.J. p 892 note 62–p 893 note 64, and 70 C.J. p 1175 note 75 and p 1182 note 72–p 1183 note 79. These rules are to be distinguished from the shopbook rule which possesses characteristics, historical and inherent, which serve at all times to differentiate it.[40]

Under the Uniform Business Records As Evidence Act, and similar statutes, authorizing the admission of records of transactions and events made in the regular course of business, books of account, and entries therein, are admissible in evidence when the statutory requirements are complied with.[41] One of the purposes for the enactment of these statutes was to simplify the rules relating to the admissibility of books of account,[42] and it has been held that such a statute must be interpreted in the light of the shopbook rule to which it is related.[43]

Corroboration of books. A party may corroborate accounts shown by books admitted in evidence by testifying to the facts recorded in such books from his own personal knowledge.[44]

b. Regular Entry Rule

Regular entries made in the course of business by one no longer available as a witness are admissible in evidence.

In addition to the shopbook rule, another very generally established rule, adopted by statute in some jurisdictions and sometimes spoken of as "the regular entry rule," is that regular entries made in the course of business by one no longer avail-

merman, 264 N.W. 769, 196 Minn. 276.

Rebutting suggestion of fraud
Payments entered in books of company in regular course of business, intermingled with other daily entries, spread over period of years, have strong probative force and tend to overcome presumption or suggestion of fraud in entry thereof.—Blum v. Sexton, 172 A. 333, 116 N.J. Eq. 16, affirmed 176 A. 158, 117 N.J. Eq. 417.

34. N.Y.—Shmargon v. Rosenstein, 182 N.Y.S. 343, 192 App.Div. 143—Warner Quinlan Co. v. Ben Charat, Inc., 257 N.Y.S. 722, 143 Misc. 443.
Or.—Radtke v. Taylor, 210 P. 863, 105 Or. 559, 27 A.L.R. 1423.
22 C.J. p 863 note 36.

35. N.Y.—Warner Quinlan Co. v. Ben Charat, Inc., 257 N.Y.S. 722, 143 Misc. 443.
Or.—Radtke v. Taylor, 210 P. 863, 105 Or. 559, 27 A.L.R. 1423.
22 C.J. p 863 note 38.

36. Wash.—Hull v. Seattle, R. & S. R. Co., 110 P. 804, 60 Wash. 162.
22 C.J. p 864 note 45.

37. Ga.—Bracken v. Dillon, 64 Ga. 243, 37 Am.R. 70.
22 C.J. p 864 note 45.

38. Mass.—Mathes v. Robinson, 8 Metc. 269, 41 Am.D. 505.
22 C.J. p 864 note 46.

39. Conn.—Peck v. Abbe, 11 Conn. 207.
Del.—Edsall v. Rockland Paper Co., 194 A. 115, 8 W.W.Harr. 495.
Or.—Radtke v. Taylor, 210 P. 863, 105 Or. 559, 27 A.L.R. 1423.
22 C.J. p 864 note 46.

That witness has testified to facts in issue in connection with plaintiff's books is not ground for excluding plaintiff's ledger sheets.—Cushing v. Riddell, Tex.Civ.App., 255 S.W. 479.

40. Or.—Radtke v. Taylor, 210 P. 863, 105 Or. 559, 27 A.L.R. 1423.

41. N.Y.—Johnson v. Lutz, 170 N.E. 517, 253 N.Y. 124, affirming 234 N.Y.S. 328, 226 App.Div. 772—Warner Quinlan Co. v. Ben Charat. Inc., 257 N.Y.S. 722, 143 Misc. 443.
Pa.—Williams v. Caples, 20 A.2d 302.
R.I.—Albert S. Eastwood Lumber Co. v. Britto, 155 A. 354, 51 R.I. 406.

42. N.Y.—Johnson v. Lutz, 170 N.E. 517, 253 N.Y. 124, affirming 234 N.Y.S. 328, 226 App.Div. 772—Roge v. Valentine, 7 N.Y.S.2d 958, 255 App.Div. 475, reargument denied 9 N.Y.S.2d 900, 256 App.Div. 817, reversed on other grounds 20 N.E.2d 751, 280 N.Y. 268, reargument denied 21 N.E.2d 695, 280 N.Y. 809—Warner Quinlan Co. v. Ben Charat, Inc., 257 N.Y.S. 722, 143 Misc. 443.

43. N.Y.—Roge v. Valentine, 7 N.Y.S.2d 958, 255 App.Div. 475, reargument denied 9 N.Y.S.2d 900, 256 App.Div. 817, reversed on other grounds 20 N.E.2d 751, 280 N.Y. 268, reargument denied 21 N.E.2d 695, 280 N.Y. 809.

44. Cal.—Shields v. Rancho Buena Ventura, 203 P. 114, 187 Cal. 569.

able as a witness,[45] as in the case of death,[46] are admissible in evidence when a proper foundation is laid. While this rule is closely related in principle to the shopbook rule, the two rules are not the same,[47] the difference being that the regular entry rule permits the admission of regular entries made in the course of business, the entrant being no longer available as a witness, whereas the shopbook rule sanctions the admission of a narrower class of regular entries made by a party to the suit whether available as a witness or not.[48]

c. Res Gestæ

In some instances book entries have been considered to be part of the res gestae of the transaction to which they relate and to be admissible as such.

In some cases it has been considered that book entries are a part of the res gestæ of the transaction to which they relate and are admissible for that reason;[49] but it has also been asserted that the theory on which books of account are admitted in evidence is not founded on the principle that the entries are part of the res gestæ, but, as has been seen, on necessity;[50] and certainly the res gestæ rule is not applicable to a mere entry of a fact by a party apart from any act which it is calculated to elucidate,[51] or to an entry which covers the entire transaction, that is, the principal fact in issue, and does not relate merely to contemporaneous facts leading up to the main issue.[52]

d. Books of Particular Persons

Ordinarily the books of all persons practicing in a regular craft or occupation which makes it necessary for books to be kept as the record of transactions are admissible in evidence to prove the usual subjects of book charges in such business.

The general rule has been laid down that the books of all persons practicing in a regular craft or occupation which makes it necessary for books to be kept as the record of transactions are admissible in evidence to prove the usual subjects of book charges in such business;[53] but the books of account of those who are not engaged in regular business are not admissible to prove an account.[54] The rule has been applied so as to admit the books of attorneys;[55] banks,[56] farmers or planters;[57] keepers of gristmills[58] or sawmills;[59] merchants;[60]

45. Del.—Edsall v. Rockland Paper Co., 194 A. 115, 8 W.W.Harr. 495.
Entries by clerks or third persons unavailable as witnesses see infra § 692 c.

46. Ala.—Tucker v. Tucker, 133 So. 714, 222 Ala. 595.
Cal.—Warren v. Hiltscher, 295 P. 536, 111 Cal.App. 318.
Mass.—Doane v. Doane, 130 N.E. 484, 238 Mass. 106.
Or.—Radtke v. Taylor, 210 P. 863, 105 Or. 559, 27 A.L.R. 1423—O'Day v. Spencer, 189 P. 394, 96 Or. 73.
Entries by amanuenses
The fact that entries in the book of account of deceased were made by third persons did not render the book inadmissible in evidence, where such persons wrote in the presence of deceased and pursuant to his orders, acting as mere amanuenses, to relieve him of the distasteful labor of writing.—Dameron v. Harris, 219 S.W. 954, 281 Mo. 247.

47. Del.—Edsall v. Rockland Paper Co., 194 A. 115, 8 W.W.Harr. 495.

48. Del.—Edsall v. Rockland Paper Co., supra.
Ky.—Gus Dattilo Fruit Co. v. Louisville & N. R. Co., 37 S.W.2d 856, 238 Ky. 322.
N.Y.—Warner Quinlan Co. v. Ben Charat, Inc., 257 N.Y.S. 722, 143 Misc. 443.
Or.—Radtke v. Taylor, 210 P. 863, 105 Or. 559, 27 A.L.R. 1423.

49. Ga.—Eley v. Holden, 172 S.E. 75, 48 Ga.App. 152—Smith v. Marbut-Williams Lumber Co., 139 S.E. 590, 37 Ga.App. 239.
Ind.—Catherwood v. Ford, 156 N.E. 567, 86 Ind.App. 228.
Mo.—Roland v. Gassman, App., 44 S.W.2d 658—Welch-Sandler Cement Co. v. Mullins, App., 31 S.W.2d 86—Gordon & Koppel Clothing Co. v. New York Cent. R. Co., App., 285 S.W. 755—Jungkind Photo Supply Co. v. Yates, App., 257 S.W. 820.
N.D.—Fargo Mercantile Co. v. Johnson, 181 N.W. 953, 47 N.D. 304.
Pa.—In re Hanna's Estate, 81 Pa. Super. 159.
Tex.—Hartford Accident & Indemnity Co. v. Shaw, Civ.App., 8 S.W.2d 196, error dismissed.
Wash.—Timewell Inv. Co. v. Beckwith, 198 P. 735, 116 Wash. 102.
22 C.J. p 863 note 42, p 885 note 91.

50. Ala.—Sharp v. Blanton, 69 So. 889, 194 Ala. 460.
22 C.J. p 864 note 43.

51. N.H.—Leighton v. Sargent, 31 N.H. 119, 64 Am.D. 323—Batchelder v. Sanborn, 22 N.H. 325.

52. R.I.—McKeen v. Providence County Sav. Bank, 54 A. 49, 24 R.I. 542.
22 C.J. p 886 note 92.

53. Mo.—Davis v. McClelland, 170 S.W. 691, 185 Mo.App. 130, 136.
22 C.J. p 866 note 71.

54. Ga.—Blanchard v. Johnson, 83 S.E. 104, 142 Ga. 447.
N.Y.—In re Pappalau's Estate, 27 N.Y.S.2d 787, 261 App.Div. 705.
Particular books held inadmissible
Where bequest to son was subject to payment of specified sum to other son, son's entries of payments made to other son, in book relating to son's personal affairs, did not relate to any "business" within terms of statute authorizing admission in evidence of records made in regular course of business.—Sullivan v. Sullivan, 31 N.E.2d 165, 66 Ohio App. 315.

55. Cal.—Kains v. First Nat. Bank, 86 P.2d 935, 30 Cal.App.2d 447.
22 C.J. p 866 note 73.

56. Mo.—Kegan v. Park Bank of St. Joseph, 8 S.W.2d 858, 320 Mo. 623, modified on other grounds 15 S.W.2d 333, 320 Mo. 623.
Private banker's books of original entry, kept by himself and his clerk in regular course of business, where entrants have personal knowledge of transactions and identify them and authenticate the entries, are admissible, without judicial reflection on their authenticity and evidentiary value.—Di Bacco v. Benedetto, 95 S.E. 601, 82 W.Va. 84.

57. N.Y.—Tomlinson v. Borst, 30 Barb. 42.
22 C.J. p 866 note 74.

58. S.C.—Exum v. Davis, 44 S.C.L. 357.

59. S.C.—Gordan v. Arnold, 12 S.C.L. 517.

60. Tex.—Thaxton v. Bailey-Moline Hardware Co., Civ.App., 61 S.W.2d 134.
22 C.J. p 866 note 77.

physicians;[61] printers;[62] schoolmasters,[63] and tradesmen and mechanics;[64] but it has been held not to extend to books of a keeper of a billiard table;[65] a gambler;[66] a peddler;[67] a scrivener;[68] a journeyman shoemaker;[69] or the accounts of a guardian kept with his ward.[70] Under some statutes the privilege of introducing account books in evidence is extended to either party in all suits and actions, whether or not the parties are merchants.[71]

§ 684. —— Requisites to Admissibility in General

a. In general
b. Suppletory oath and proof of handwriting
c. Identification of books
d. Keeping clerk
e. Proof of correctness of accounts
f. Proof of delivery of goods or performance of services
g. Nature of business in which books kept

a. In General

In order that the books of a party may be received in his favor a proper foundation must be laid by proof of their character, authenticity, correctness, and regularity, unless the adverse party admits these matters.

In order that the books of a party may be received in his favor, a foundation must be laid by proof of their character, authenticity, correctness, and regularity,[72] unless the adverse party admits these matters;[73] and if there is a statute governing the admissibility of such books, the foundation prescribed by it must be laid.[74] The mere fact that a book of accounts has been admitted on a previous trial of a case does not dispense with the necessity of laying a proper foundation when it is sought to introduce it at a subsequent trial.[75]

Relevancy and materiality. To be admissible in

61. Pa.—In re Walker's Estate, 53 York Leg.Rec. 1.
22 C.J. p 866 note 78.

Statute repealed by implication
A statute providing generally for the admission of books of accounts of various persons including physicians has been held to supersede an earlier statute providing for the admissibility of books of account of physicians only.—Jones v. Belue, Ala., 200 So. 886.

62. S.C.—Thomas v. Dyott, 11 S.C.L. 186.

63. N.J.—Oliver v. Phelps, 21 N.J. Law 597.
22 C.J. p 866 note 80.

64. Minn.—Woolsey v. Bohn, 42 N.W. 1022, 41 Minn. 235.
22 C.J. p 866 note 81.

65. S.C.—Boyd v. Ladson, 15 S.C.L. 76, 17 Am.D. 707.

66. Ohio.—Worland v. McGill, 160 N.E. 478, 26 Ohio App. 442.

67. S.C.—Thayer v. Deen, 20 S.C.L. 677.

68. S.C.—Watson v. Bigelow, 3 S.C.L. 127—Slade v. Teasdale, 2 S.C.L. 172.

69. Ga.—Schall v. Elsner, 58 Ga. 190.

70. N.Y.—Fowler v. Hebbard, 57 N.Y.S. 531, 40 App.Div. 108.

71. Fla.—Dunbar v. Wright, 20 Fla. 446.
22 C.J. p 866 note 87.

72. U.S.—Hagan Coal Mines v. New State Coal Co., C.C.A.N.M., 30 F.2d 92, 93, citing **Corpus Juris.**
Miss.—Greene v. Greene, 110 So. 218, 145 Miss. 87, 49 A.L.R. 565.
Mo.—Lee v. Armour Bldg. Co., App., 18 S.W.2d 102—Gordon & Koppel Clothing Co. v. New York Cent. R. Co., App., 285 S.W. 755, 756, citing **Corpus Juris.**
Mont.—Meagher v. Harrington, 254 P. 432, 78 Mont. 457.
N.J.—Glen v. Marcus, 177 A. 439, 13 N.J.Misc. 213.
Ohio.—Worland v. McGill, 160 N.E. 478, 26 Ohio App. 442.
Tex.—J. M. Radford Grocery Co. v. Porter, Civ.App., 17 S.W.2d 145, error dismissed.
W.Va.—Martufi v. Daniels, 129 S.E. 709, 99 W.Va. 673.
22 C.J. p 864 note 50.
Foundation required as to book entries offered as admissions see infra § 694.
Proof of correctness generally see infra § 684 e.

Preliminary proof held sufficient
(1) In general.
Ala.—Monk v. Stuart, 86 So. 529, 204 Ala. 562.
Cal.—Warren v. Hiltscher, 295 P. 536, 111 Cal.App. 318.
Iowa.—Strohmeier v. Anderson, 192 N.W. 811, 195 Iowa 828.
R.I.—P. D. Cecca & Co. v. Antonelli, 154 A. 87, 51 R.I. 280.
22 C.J. p 864 note 50 [a].
(2) Sufficient foundation for admission of plaintiff's account book was laid by showing that it was in his handwriting, that he kept it in the ordinary course of his employment, and that the entries were correct and made by him from time to time as the transactions took place.—Wasley v. Dryden, 212 P. 491, 66 Mont. 17.

Preliminary proof held insufficient
Cal.—Creighton v. Creighton, 43 P.2d 1104, 6 Cal.App.2d 270.

73. Ala.—Wise v. Fuller, 66 So. 827, 11 Ala.App. 427.
Tex.—Counts v. Quin, Civ.App., 9 S.W.2d 394.

74. Ala.—Hatcher v. Lammons, 112 So. 120, 215 Ala. 548—Garnett v. Pierce, 85 So. 510, 204 Ala. 186.
Ariz.—Condos v. Andalft, 206 P. 594, 24 Ariz. 38.
Ga.—Kennedy & Pike v. Phillips, 128 S.E. 779, 34 Ga.App. 166.
Ill.—In re Weiss' Estate, 20 N.E.2d 177, 299 Ill.App. 620.
Iowa.—In re Cummins' Estate, 286 N.W. 409, 226 Iowa 1207—Alquist v. Thompson, 251 N.W. 509—Thompson v. Burnsmeyer, 171 N.W. 584.
Mass.—Gold v. Marshall, 157 N.E. 699, 260 Mass. 492—Rockport Granite Co. v. Plum Island Beach Co., 142 N.E. 834, 248 Mass. 290.
N.D.—Baldwin Piano Co. v. Wylie, 247 N.W. 397, 63 N.D. 216.
Okl.—Oklahoma Natural Gas Co. v. McFarland, 229 P. 216, 103 Okl. 6.
22 C.J. p 864 note 50.

Extent of preliminary proof required
Where the statute so provides, entries in books of account are admissible on proof that they were made in the usual course of business of the party whose accounts are in question.—Oil Field Operating Co. v. Eureka Tool Co., 74 P.2d 377, 181 Okl. 393—Jones v. Sinclair Crude Oil Purchasing Co., 266 P. 439, 130 Okl. 182—Clover v. Neely, 243 P. 758, 116 Okl. 155—Hemisphere Oil & Gas Co. v. Oil Well Supply Co., 230 P. 245, 104 Okl. 83.

75. N.J.—Linberger v. Latourette, 5 N.J.Law 949.
Tex.—Brown v. Williams, Civ.App., 31 S.W. 225.

evidence books of account, of course, must be material and relevant to the issues involved.[76]

Liberal construction of rules. Modern business conditions require a liberal construction of the rules governing the introduction in evidence of book entries made in regular course of business.[77]

b. Suppletory Oath and Proof of Handwriting

Ordinarily, in order to be admissible, books of account must be supported by the suppletory oath of the party making the entries unless he is unavailable as a witness, as in the case of death, in which event the books may generally be received on proof of handwriting.

Under ordinary circumstances mere proof of handwriting is not sufficient to admit books of account,[78] but the books must be supported by the suppletory oath of the party by whom the entries were made.[79] The circumstances may, however, be such as to render it proper to admit the books on mere proof of handwriting, without the suppletory oath of the person by whom the entries were made.[80] Thus the books of account of a deceased person are competent evidence in favor of his executor or administrator if supported by the oath of the personal representative,[81] or if they proved by a competent witness to be in decedent's handwriting;[82] and a similar rule is applied where the party since making the charges has become insane, the books being offered by his guardian.[83] However, it has been held that the fact that a party whose entries are sought to be introduced is absent from the state will not render them admissible on proof of his handwriting.[84]

Partnership books. A member of a partnership, who kept the books, is competent to make the suppletory oath for their admission in evidence.[85] Where one of several copartners who made the entries is dead[86] or is out of the jurisdiction of the court,[87] the other copartner may swear to the handwriting in the books; but if the partner making the entry is alive and can be produced his testimony only is receivable,[88] except where a contrary provision is made by statute.[89] The books of a partnership have been admitted on the oaths of two partners who coöperated in making entries,[90] but it has been held that where partnership books are kept partly by one partner and partly by another, one will not be allowed to testify as to entries made by the other, unless he knows that the sales were actually made or can show in some other way that the entries speak the truth.[91] So, also, where partnership books were kept, during a part of the time involved in the suit by one partner, who did not testify, and during the remainder of the time by the other partner, whose testimony showed them to be incomplete, and no one testified to their correctness, they were held inadmissible.[92]

c. Identification of Books

To be admissible the books must be shown to be the account books of the party on whose behalf they are offered.

In order that books may be received in evidence it must be made to appear that they are the ac-

76. Okl.—Sharp v. Pawhuska Ice Co., 217 P. 214, 90 Okl. 211.
Or.—In re Steele's Estate, 52 P.2d 207, 152 Or. 49.
22 C.J. p 869 note 29 [c].

77. U.S.—St. Paul Fire & Marine Ins. Co. v. American Food Products Co., C.C.A.Ark., 21 F.2d 733, certiorari denied 48 S.Ct. 560, 277 U.S. 597, 72 L.Ed. 1006.

78. Ohio.—Riddle v. Riddle, 175 N.E. 757, 38 Ohio App. 132.
22 C.J. p 865 note 54.
As to entries by clerks or third persons see infra § 693 b (3).

79. Ark.—Bush v. Taylor, 207 S.W. 226, 136 Ark. 554.
Me.—Mansfield v. Gushee, 114 A. 296, 120 Me. 333.
Mo.—Bedwell v. Capitol Mut. Ass'n, App., 66 S.W.2d 155, 156, quoting **Corpus Juris.**
22 C.J. p 865 note 55.
As to entries by clerks or third persons see infra § 693 b (2) (a).

80. R.I.—James C. Goff Co. v. Lunn, 143 A. 673, 49 R.I. 455.
22 C.J. p 865 note 56.

81. N.H.—Sheehan v. Hennessey, 18 A. 652, 65 N.H. 101.
22 C.J. p 865 note 57.
It is competent for personal representative to introduce the books of decedent and identify them, but, not having any personal knowledge of the facts recorded therein, he cannot testify as to their accuracy.—Cain v. Campbell's Adm'x, 98 S.W.2d 17, 265 Ky. 843.

82. Ala.—Tucker v. Tucker, 133 So. 714, 222 Ala. 595.
Colo.—McMahon v. Williams, 250 P. 560, 80 Colo. 249.
Mo.—Bedwell v. Capitol Mut. Ass'n, App., 66 S.W.2d 155, 156, citing **Corpus Juris**—Gordon & Koppel Clothing Co. v. New York Cent. R. Co., App., 285 S.W. 755—In re Greenwood's Estate, 268 S.W. 635, 201 Mo.App. 39.
Or.—O'Day v. Spencer, 189 P. 394, 96 Or. 73.
Pa.—Foster v. Wehr, 173 A. 712, 114 Pa.Super. 101.
22 C.J. p 865 note 58.

83. Mass.—Holbrook v. Gay, 6 Cush. 215.

84. S.C.—Douglass v. Hart, 15 S.C.L. 257, distinguishing Spence v. Sanders, 1 S.C.L. 119, and Foster v. Sinkler, 1 S.C.L. 40.

85. Ill.—Miller v. Pratz, 179 Ill. App. 204.

86. Me.—Leighton v. Manson, 14 Me. 208.
22 C.J. p 865 note 62.

87. Conn.—New Haven & Northampton Co. v. Goodwin, 42 Conn. 230.
22 C.J. p 865 note 63.

88. Iowa.—Karr v. Stivers, 34 Iowa 123.
S.C.—Walker v. Parkham, 14 S.C.L. 295.

89. Minn.—Webb v. Michener, 19 N.W. 82, 32 Minn. 48.

90. Me.—Mitchell v. Belknap, 23 Me. 475.
Mass.—Smith v. Sanford, 12 Pick. 139, 22 Am.D. 415.

91. Ala.—Horton v. Miller, 4 So. 370, 84 Ala. 537.

92. Tex.—American F. Ins. Co. v. First Nat. Bank, Civ.App., 30 S.W. 384.

count books of the party on whose behalf they are offered.[93]

d. Keeping Clerk

Although there is contrary authority, ordinarily, where entries in an account book are made by the party himself, the mere fact that he had a clerk does not render the book inadmissible.

While, in the absence of contrary statute, it is frequently laid down as a general rule that, in order that a book of account may be admissible under the shopbook rule, it must appear that the party offering the book had no clerk,[94] it has also been held that, where the entries were as a matter of fact made by the party, the mere fact that he had a clerk is immaterial,[95] at least where the clerk is dead.[96] In order to exclude books on the ground that the party kept a clerk, the employee must be one who has something to do with and has knowledge generally of the business of his employer as to goods sold or work done, so that he can testify on the subject.[97] Thus it is held that one whose business is simply to keep the books is not a clerk within the meaning of the rule.[98]

e. Proof of Correctness of Accounts

To render books of account admissible, there must be a showing that the party kept clear and correct accounts.

In order to render books of account admissible, there must be a showing that the party kept clear and correct accounts,[99] which showing must, it has been held, be by the testimony of third persons who have dealt with him.[1] It has been held further that the witness must be able to identify the books and to testify to settlements made from the books and based on an examination of the items contained therein;[2] and it is not sufficient for him to testify to having made settlements with the party from bills presented.[3] However, under a statute requiring, as a prerequisite to receiving books of account, proof by customers that the party usually kept correct books, it has been held that it is not essential that such customers shall have actually examined the books and compared their accounts with them, but it is sufficient if it is shown by customers that, during a period of years, they have always found their accounts as tendered correct, and there is testimony that such accounts were taken from the books in question.[4] It has also been held, however, that the correctness of books may be certified to by the party himself, since the removal of the disqualification of parties.[5]

Where a party has established by the testimony of customers the probity of his shopbooks he need not go further and show by evidence aliunde that the particular charges against the adverse party are usual and reasonable.[6]

Where a debtor admits[7] or is estopped to deny[8] the correctness of the account books of the creditor, such books are admissible without further proof of correctness.

93. U.S.—Greengard v. Commissioner of Internal Revenue, C.C.A., 29 F.2d 502.
Mo.—Gordon & Koppel Clothing Co. v. New York Cent. R. Co., App., 285 S.W. 755—In re Greenwood's Estate, 208 S.W. 635, 201 Mo.App. 39.
N.Y.—In re Clodgo's Estate, 227 N.Y.S. 690, 131 Misc. 490.
22 C.J. p 866 note 70.

94. N.Y.—In re Clodgo's Estate, 227 N.Y.S. 690, 131 Misc. 490.
22 C.J. p 866 note 88.

Reason for rule
"If the party kept a clerk, who knew the facts or could verify the accounts as correct entries, direct testimony was available, so that no necessity arose to justify the use of the secondary evidence of the writings of the disqualified party."—Shmargon v. Rosenstein, 182 N.Y.S. 343, 345, 192 App.Div. 143.

95. Or.—Radtke v. Taylor, 210 P. 863, 105 Or. 559, 27 A.L.R. 1423.
22 C.J. p 866 note 89.

96. Ga.—Martin v. Fyffe, Dudl. 16.

97. N.Y.—Shmargon v. Rosenstein, 182 N.Y.S. 343, 192 App.Div. 143—In re Clodgo's Estate, 227 N.Y.S. 690, 131 Misc. 490.
22 C.J. p 866 note 91.

98. N.Y.—In re Clodgo's Estate, supra.
22 C.J. p 867 note 92.

99. U.S.—Greengard v. Commissioner of Internal Revenue, C.C.A., 29 F.2d 502.
Cal.—Davis v. Edmonds, 23 P.2d 289, 291, 218 Cal. 355, citing **Corpus Juris.**
Ill.—Le Roy State Bank v. J. Keenan's Bank, 169 N.E. 1, 337 Ill. 173, reversing 253 Ill.App. 51.
Mont.—Meagher v. Harrington, 254 P. 432, 78 Mont. 457.
Okl.—Sharp v. Pawhuska Ice Co., 217 P. 214, 90 Okl. 211.
Tex.—J. M. Radford Grocery Co. v. Porter, Civ.App., 17 S.W.2d 145, error dismissed—Hartford Accident & Indemnity Co. v. Shaw, Civ.App., 8 S.W.2d 196, error dismissed, citing **Corpus Juris**—Warren v. North American Car Co., Civ.App., 294 S.W. 301—Fite v. First Nat. Bank, Civ.App., 279 S.W. 581.
22 C.J. p 867 note 95.

Further evidence of correctness was held properly rejected after books had been shown to be competent and admitted in evidence.—Tucker v. Tucker, 133 So. 714, 222 Ala. 595.

1. N.Y.—In re Clodgo's Estate, 227 N.Y.S. 690, 131 Misc. 490.
22 C.J. p 867 note 96.

2. Ga.—Bower v. Smith, 8 Ga. 74.
22 C.J. p 867 note 97.

3. Mich.—Jackson v. Evans, 8 Mich. 476.
22 C.J. p 867 note 98.

4. N.M.—Radcliffe v. Chaves, 110 P. 699, 15 N.M. 258.

5. Ill.—In re Voislowsky, 264 Ill. App. 398.
Or.—Radtke v. Taylor, 210 P. 863, 105 Or. 559, 27 A.L.R. 1423.
22 C.J. p 867 notes 2, 93, 94.

6. Ga.—Bailey v. Barnelly, 23 Ga. 582.

7. Ala.—Wise v. Fuller, 66 So. 827, 11 Ala.App. 427.

8. Ill.—House v. Beak, 30 N.E. 1065, 141 Ill. 290, 33 Am.S.R. 307.
22 C.J. p 867 note 5.

f. Proof of Delivery of Goods or Performance of Services

It has been held that to render a party's books of account admissible he must prove that the articles were delivered or the services actually rendered; but there is also authority to the contrary.

Although there is authority to the contrary,[9] the rule is sometimes laid down that to render a party's books of account admissible he must make oath or in some way prove that the articles were delivered or the services actually performed.[10] However, it has also been asserted that the requirement is that there shall be proved that some of the articles or work charged for were delivered or performed;[11] and the proof necessary is merely that the party had dealings with the person charged.[12]

g. Nature of Business in Which Books Kept

In order that books of account may be admitted, it must appear that they are kept in a business of a character in which it is proper or customary to keep such books.

In order that books may be received in evidence under the shopbook rule, it must appear that the business in connection with which they are kept is of a character in which it is proper or customary to keep such books.[13]

§ 685. —— Form and Regularity of Accounts

a. In general
b. Ledgers
c. Entries on separate sheets of paper
d. Diaries and memoranda of accounts
e. Check book stubs
f. Suspicious appearances or circumstances
g. Certainty and particularity of charges
h. Completeness of accounts
i. Requirement of original entries

a. In General

In order that an account book may be received in evidence the entries therein must have been made in the regular course of business and under such circumstances as to import trustworthiness. It is not essential, however, that it be kept in any particular form or mode.

In order that a book of account may be received in evidence, the entries therein, both under the common law and under the statutes adopted in many jurisdictions, must appear to have been made in the regular course of business[14] as a part of the party's system of keeping his accounts,[15] and under such circumstances as to import trustworthiness;[16] and the book must be in such shape that it may be presumed to be the register of the daily business transactions of the party offering it.[17] Under some stat-

9. "The admissibility of the books does not depend upon independent evidence of delivery, although the lack of such independent evidence may affect the weight of the books." —Radtke v. Taylor, 210 P. 863, 872, 105 Or. 559, 27 A.L.R. 1423.

Books of physician

In a case where a physician, suing his patient's administrator for professional services, was incompetent to testify, it was held that he might introduce his books, which were apparently fair and unobjectionable, supported by his suppletory oath, and with a key to explain them, without any preliminary proof that the visits charged for were ever made.—Bookout v. Shannon, 59 Miss. 378.

10. Fla.—Hooker v. Johnson, 6 Fla. 730.
22 C.J. p 867 note 6.

11. N.Y.—In re Clodgo's Estate, 227 N.Y.S. 690, 131 Misc. 490.
22 C.J. p 867 note 7.

12. Ga.—Martin v. Fyffe, Dudl. 16.
N.Y.—Titus v. Spencer, 145 N.Y.S. 40.

13. Cal.—Chan Kiu Sing v. Gordon, 151 P. 657, 171 Cal. 28—Burke v. John E. Marshall, Inc., App., 108 P.2d 738—Kains v. First Nat. Bank, 86 P.2d 935, 30 Cal.App.2d 447—Warren v. Hiltscher, 295 P. 536, 111 Cal.App. 318.
Nev.—Home Lumber & Coal Co. v. Hartford Mining Co., 81 P.2d 1063, 58 Nev. 361, rehearing denied 83 P.2d 1049, 58 Nev. 361.

14. Ala.—Grist v. Carswell, 165 So. 102, 231 Ala. 442.
Cal.—Burke v. John E. Marshall, Inc., App., 108 P.2d 738—Kains v. First Nat. Bank, 86 P.2d 935, 30 Cal.App.2d 447—Warren v. Hiltscher, 295 P. 536, 111 Cal.App. 318.
Colo.—Haines v. Christie, 66 P. 883, 28 Colo. 502.
Del.—Edsall v. Rockland Paper Co., 194 A. 115, 8 W.W.Harr. 495.
Ill.—See In re Brock's Estate, 3 N.E.2d 151, 285 Ill.App. 601.
Ky.—O'Connor v. Commonwealth, 48 S.W.2d 819, 822, 243 Ky. 401, citing **Corpus Juris.**
Mo.—Nall v. Brennan, 23 S.W.2d 1053, 324 Mo. 565, 68 A.L.R. 684—No Dust O Co. v. Home Trust Co., App., 46 S.W.2d 203, 205, citing **Corpus Juris**—Jungkind Photo Supply Co. v. Yates, App., 257 S.W. 820.
Nev.—Home Lumber & Coal Co. v. Hartford Mining Co., 81 P.2d 1063, 58 Nev. 361, rehearing denied 83 P.2d 1049, 58 Nev. 361.
N.Y.—In re Pappalau's Estate, 27 N.Y.S.2d 787, 261 App.Div. 705—Hughes v. Eastern Cont. Co., 297 N.Y.S. 272, 164 Misc. 318.
Okl.—Sharp v. Pawhuska Ice Co., 217 P. 214, 90 Okl. 211.
Or.—Pacific Trading Co. v. Sun Ins. Office, 25 P.2d 1052, 145 Or. 211—Radtke v. Taylor, 210 P. 863, 105 Or. 559, 27 A.L.R. 1423.
Pa.—In re Brown's Estate, 22 Pa. Dist. & Co. 671—In re Ewing's Estate, 3 Fay.L.J. 161.
Tex.—J. M. Radford Grocery Co. v. Porter, Civ.App., 17 S.W.2d 145, error dismissed—Warren v. North American Car Co., Civ.App., 294 S.W. 301.
Va.—Ratliff v. Jewell, 149 S.E. 409, 153 Va. 315, 67 A.L.R. 1541.
W.Va.—Di Bacco v. Benedetto, 95 S.E. 601, 82 W.Va. 84.
22 C.J. p 868 note 10.

15. Va.—Ratliff v. Jewell, 149 S.E. 409, 153 Va. 315, 67 A.L.R. 1541.

16. Ky.—O'Connor v. Commonwealth, 48 S.W.2d 819, 822, 243 Ky. 401, citing **Corpus Juris.**
Mass.—Cali v. Caliri, 150 N.E. 323, 254 Mass. 488.
Pa.—Cox v. Cox, 29 Del.Co. 435.
22 C.J. p 868 note 10.

17. Ky.—O'Connor v. Commonwealth, 48 S.W.2d 819, 822, 243 Ky. 401, citing **Corpus Juris.**

utes the book must show a continuous dealing with persons generally, or several items of charges at different times against the other party in the same book.[18] Accordingly, a single charge of a sale or other transaction in a book will not render it a book of accounts within the rule;[19] and it has been held that a book containing charges only against a single person cannot be admitted.[20]

It is not, however, essential that the book or account should have been kept regularly in the manner of a daybook,[21] or in any particular form or mode,[22] the material, form, and construction of the book offered in evidence being unimportant provided it is capable of perpetuating a record of events and the entries are made in conformity with the general rules governing the admissibility of such evidence.[23] The book must, however, be a registry of business actually done, and not of orders, executory contracts, and things to be done subsequent to the entries.[24]

It is no objection to a party's book of account that the entries are made in pencil,[25] and indeed marks on a shingle,[26] a board,[27] or a notched stick[28] have been admitted under the shopbook rule. Records of a cash register have, however, been held not admissible as books of account.[29]

Whether or not the books or accounts are kept in such form as to render their reception in evidence proper is a question for the court.[30] The question of admissibility must be determined by the appearance and character of the book, regard being had to the degree of education of the party, the nature of his employment, the manner of his charges against other people, and all the circumstances of the case,[31] and books which are deficient in many respects may be admitted since it does not follow that before plaintiff can fairly ask a verdict he may not be compelled to supply deficiencies in the evidence which his book affords.[32] So the mere existence of errors does not necessarily render the books inadmissible in the absence of evidence that they were fraudulently falsified.[33]

b. Ledgers

Books of account are admissible even though kept in the form of a ledger. Where a ledger is made up from a daybook the authorities differ as to whether one is admissible without the production of the other.

Books of account are admissible, even though kept in ledger form, that is, where all the charges against the adverse party are entered on the same leaf of the book with no intervening charges against

Va.—Ratliff v. Jewell, 149 S.E. 409, 153 Va. 315, 67 A.L.R. 1541.
22 C.J. p 868 note 11.

18. Iowa.—Arney v. Meyer, 65 N.W. 337, 96 Iowa 395.
22 C.J. p 868 note 12.

19. Ky.—Martin v. Taylor's Ex'x, 147 S.W.2d 70, 285 Ky. 128—O'Connor v. Commonwealth, 48 S W.2d 819, 822, 243 Ky. 401, citing **Corpus Juris.**
22 C.J. p 868 note 13.

20. Ky.—O'Connor v. Commonwealth, supra, citing **Corpus Juris.**
Pa.—In re Ewing's Estate, 3 Fay. L.J. 161.
22 C.J. p 868 note 14.

21. Mass.—Cogswell v. Dolliver, 2 Mass. 217, 3 Am.D. 45.
22 C.J. p 868 note 15.

22. Cal.—Waring v. Pitcher, 27 P. 2d 397, 135 Cal.App. 493.
Ill.—In re Martine's Estate, 233 Ill. App. 94—See Hirsch v. Automatic Canteen Co. of America, 15 N.E.2d 888, 296 Ill.App. 638.
R.I.—Farber Sheet Metal & Roofing Co. v. Merola, 128 A. 450.
22 C.J. p 868 note 16.
"Book accounts are not rendered incompetent as evidence because they are kept under any special system of bookkeeping; but if the entries therein are otherwise competent, they will not be rejected because of the particular system of keeping them."—Sharp v. Pawhuska Ice Co., 217 P. 214, 90 Okl. 211.

Cost record
In an action for labor and materials furnished in printing booklets, a shop record of plaintiff, showing the cost to him of the production of the article, the value of which was in issue, may be received.—Thoele v. La Vallee Law Book Co., 193 N.W. 469, 155 Minn. 340.

Book consisting of figures only may be admissible.—Burford v. Richards & Conover Hardware Co., 77 P.2d 1145, 182 Okl. 402.

Time books held admissible.—Warren v. Hiltscher, 295 P. 536, 111 Cal.App. 318—22 C.J. p 868 note 16 [a].

23. Vt.—Stockwell v. Stockwell's Estate, 105 A. 30, 92 Vt. 489.
22 C.J. p 869 note 17.

24. Wash.—Hewitt v. Jones, 271 P. 76, 77, 149 Wash. 360, citing **Corpus Juris.**
22 C.J. p 869 note 18.

Order blank held inadmissible as book of accounts.—Dorr v. Massachusetts Title Ins. Co., 131 N.E. 191, 238 Mass. 490.

25. W.Va.—Deitz v. McVey, 87 S.E. 926, 77 W.Va. 601.
22 C.J. p 869 note 19.

26. Me.—Kendall v. Field, 14 Me. 30, 30 Am.D. 728.
22 C.J. p. 869 note 20.

27. Pa.—Pallman v. Smith, 19 A. 891, 135 Pa. 188.
22 C.J. p 869 note 21.

28. Del.—Rowland v. Burton, 2 Del. 288.

29. N.Y.—Cullinan v. Moncrief, 85 N.Y.S. 745, 90 App.Div. 538.

30. Or.—Radtke v. Taylor, 210 P. 863, 105 Or. 559, 27 A.L.R. 1423.
22 C.J. p 869 note 24.

31. Conn.—Wilcox v. Downing, 91 A. 262, 88 Conn. 368.
22 C.J. p 869 note 25.

32. Mass.—Platt v. White, 132 Mass. 477.
22 C.J. p 869 note 26.

Whether system of accounting adopted is perfect or imperfect is immaterial.—Hemisphere Oil & Gas Co. v. Oil Well Supply Co., 230 P. 245, 104 Okl. 83—22 C.J. p 869 note 26 [a].

Amended books
Ledger sheets were held admissible with additions made to them from cashbook and journal to explain the payments shown originally merely by dates and amounts of debit and credit.—White Sewing Mach. Co. v. Gilmore Furniture Co., 105 S.E. 134, 128 Va. 630.

33. Minn.—Levine v. Lancashire Ins. Co., 68 N.W. 855, 66 Minn. 138.
22 C.J. p 869 note 27.

others,[34] provided the ledger entries constitute the original entries of the transaction in question, see subdivision i of this section infra.

Necessity of production of ledger. It has been held that, when it appears from marks on a daybook that entries therein have been transferred to a ledger, the ledger should be produced in connection with the daybook,[35] but there is also authority for the view that it is no objection to the admission of a book of original entries that the charges contained therein have been posted in a ledger which is not produced.[36] Where it does not affirmatively appear from the daybook that any of the accounts have been posted or credits entered in the ledger, it is not necessary to produce the ledger without previous notice.[37]

Necessity of production of daybook. While it has been held that when it appears that entries in a daybook or other similar book have been carried into a ledger, the ledger is inadmissible when not accompanied by the daybook or anything corresponding thereto,[38] there is also authority for the view that the ledger may be admissible without the production of the daybook.[39]

c. Entries on Separate Sheets of Paper

Although there is authority to the contrary, as a general rule it is not material that the entries are made on a separate sheet or sheets of paper; and this rule has been applied to "loose-leaf" books of account.

It has been considered not material that the entries are made on a separate sheet or sheets of paper,[40] or even on scraps of paper;[41] but it has also been held that entries made on loose or unconnected sheets of paper do not amount to books of account, since they cannot be presumed to be the daily minutes of business transactions.[42]

"Loose-leaf" books. In view of the growth in modern times of the system of using "loose-leaf" books of account, it would seem clear that leaves from such books should be competent, and they are held to be so.[43]

34. Ill.—W. T. Rawleigh Co. v. Ulm, 268 Ill.App. 248.
Ind.—Polus v. Conner, 176 N.E. 234, 92 Ind.App. 465.
Iowa.—State v. Peck, 291 N.W. 439, 443, 228 Iowa 1061, citing **Corpus Juris.**
Pa.—Foster v. Wehr, 173 A. 712, 114 Pa.Super. 101.
22 C.J. p 869 note 29.
Loose-leaf ledgers see infra subdivision c of this section.
Ledger admissible as furnishing corroboration of daybook.—Stickle v. Otto, 86 Ill. 161—Hughes v. Clark, 109 Ill.App. 107.

35. N.H.—Eastman v. Moulton, 3 N.H. 156.
22 C.J. p 870 note 37.

36. Pa.—Stokes v. Fenner, 10 Phila. 14.

37. Me.—Hervey v. Harvey, 15 Me 357.
N.J.—Tindall v. McIntyre, 24 N.J. Law 147.

38. N.J.—Campanella v. Bono, 200 A. 544, 120 N.J.Law 435.

39. Ala.—Moundville Lumber Co. v. Warren, 83 So. 479, 203 Ala. 488.

40. Ga.—Crump v. Bank of Toccoa, 153 S.E. 531, 532, 41 Ga.App. 505, citing **Corpus Juris.**
Iowa.—Edwards v. Cooper, 222 N.W. 376.
Pa.—In re Walker's Estate, 53 York Leg.Rec. 1.
22 C.J. p 870 note 40.
Sales tickets
(1) Sales tickets may be received to establish items of account under single entry bookkeeping system.
Ala.—Powell v. Pickett, 121 So. 23, 219 Ala. 18.
Ariz.—Douglas v. Parker Commercial Co., 235 P. 148, 28 Ariz. 47.
Ark.—Planters' Cotton Oil Co. v. Galloway, 280 S.W. 999, 170 Ark. 712.
Neb.—Redding v. Posten, 190 N.W. 488, 109 Neb. 197.
22 C.J. p 868 note 16 [d].
(2) So, under a statute providing that entries in account books are admissible where certain requirements are met, sales tickets of a regular permanent nature, which are made in usual course of business at time of transactions to which they relate, are admissible.—Oil Field Operating Co. v. Eureka Tool Co., 74 P.2d 377, 181 Okl. 393—Maney v. Cherry, 41 P.2d 82, 170 Okl. 469.
Delivery slips
(1) Delivery slips constituting original entries made in the regular course of business may be received.
N.J.—Betz Market v. Hillman, 157 A. 388, 10 N.J.Misc. 10.
Tex.—Lake v. Jones Lumber Co., Civ.App., 233 S.W. 1011.
(2) Delivery slips may be received under a statute authorizing the admission of records of acts or transactions when made in the regular course of business at or near the time of such acts or transactions.—Albert S. Eastwood Lumber Co. v. Britto, 155 A. 354, 51 R.I. 406.

41. U.S.—Wisconsin Steel Co. v. Maryland Steel Co., Wis., 203 F. 403, 121 C.C.A. 507.
22 C.J. p 870 note 41.

42. N.H.—Jones v. Jones, 21 N.H. 219.
22 C.J. p 870 note 42.

43. Ala.—Reed v. Robinson, 104 So. 130, 213 Ala. 14—Loveman, Joseph & Loeb v. McQueen, 82 So. 530, 203 Ala. 280—E. T. Gray & Sons v. Ralston Purina Co., 136 So. 861, 24 Ala.App. 475.
Conn.—T. Barbour Brown & Co. v. Canty, 161 A. 91, 92, 115 Conn. 226, 83 A.L.R. 801, citing **Corpus Juris.**
Ga.—Crump v. Bank of Toccoa, 153 S.E. 531, 41 Ga.App. 505.
Ind.—Polus v. Conner, 176 N.E. 234, 92 Ind.App. 465.
Iowa.—State v. Peck, 291 N.W. 439, 443, 228 Iowa 1061, citing **Corpus Juris.**
Ky.—Gus Dattilo Fruit Co. v. Louisville & N. R. Co., 37 S.W.2d 856, 238 Ky. 322.
N.D.—Fargo Mercantile Co. v. Johnson, 181 N.W. 953, 47 N.D. 304.
Okl.—Maney v. Cherry, 41 P.2d 82, 83, 170 Okl. 469, quoting **Corpus Juris.**
Pa.—In re Stuard's Estate, 24 Pa. Dist. & Co. 468, 469 quoting **Corpus Juris.**
22 C.J. p 871 note 43.
"Loose-leaf" books as "account books"
(1) Entries on loose leaves or cards used in modern bookkeeping practices are just as truly entries in "books of account" within meaning of statute regarding admissibility of book entries as though leaves were bound into volume.—Maney v. Cherry, 41 P.2d 82, 170 Okl. 469.
(2) Term "account books" may now include modern book of detachable leaves, but leaves must be of such appropriate uniformity of material as reasonably to constitute leaves of account book in which they

A card index record has been held to be admissible when duly authenticated.[44]

Shop or time cards showing the time worked by employees during a particular day may be received in evidence,[45] particularly when the employees by whom the cards are kept have no independent recollection of the subject matter of such cards.[46]

d. Diaries and Memoranda of Accounts

The mere fact that entries are made in diaries or memorandum books is immaterial if they are in proper form referring to proper matters of book account and are not memoranda merely.

While entries in proper form referring to proper matters of book account do not lose their character as independent evidence by the fact that they are made in diaries or memorandum books rather than in regular account books,[47] the general rule is that loose memoranda or entries in diaries or memorandum books, which are memoranda merely, are inadmissible as independent evidence in favor of the party making them.[48] Whether a particular book is a mere private memorandum book or an account book kept in the regular course of business is a question of fact for the court's determination.[49]

e. Check Book Stubs

It is generally held that check book stubs do not constitute books of account and are inadmissible to show cash transactions or indebtedness, although there is authority to the contrary.

A blank check book from which checks when filled are cut out and in which a memorandum is entered in the margin, opposite to each check cut out, of the name of the drawee, the amount, date, etc., is not a book of accounts to which the party can swear;[50] and such books or stubs are generally held inadmissible to show cash transactions or indebtedness,[51] although there is authority for a contrary view.[52]

f. Suspicious Appearances or Circumstances

As a general rule suspicious circumstances appearing on the face of a book of account or otherwise proved against it must be explained before it can be admitted.

Books of account, to be admissible, must appear to have been fairly and honestly kept.[53] Accordingly, suspicious circumstances appearing on the face of a book of accounts or otherwise proved against it must be explained before it can be ad-

are contained.—W. T. Raleigh Co. v. Rotenberry, 164 So. 5, 174 Miss. 319.

44. Okl.—Maney v. Cherry, 41 P. 2d 82, 83, 170 Okl. 469, quoting **Corpus Juris.**
Pa.—In re Stuard's Estate, 24 Pa. Dist. & Co. 468, 469, quoting **Corpus Juris.**
S.D.—Haley & Lang Co. v. Del Vecchio, 153 N.W. 898, 36 S.D. 64, L. R.A.1916B 631.

45. Mass.—Charles R. Gow Co. v. Marden, 160 N.E. 319, 262 Mass. 545.
Okl.—Maney v. Cherry, 41 P.2d 82, 83, 170 Okl. 469, quoting **Corpus Juris.**
Pa.—Johnson v. Kusminsky, 135 A. 220, 287 Pa. 425.
22 C.J. p 871 note 45.

46. Okl.—Maney v. Cherry, 41 P.2d 82, 83, 170 Okl. 469, quoting **Corpus Juris.**
22 C.J. p 871 note 45.

47. Vt.—Gleason v. Kinney, 27 A. 208, 65 Vt. 560.
22 C.J. p 871 note 50.
Memoranda generally see infra §§ 696–697.
Entries held admissible
Vt.—Stockwell v. Stockwell's Estate, 105 A. 30, 92 Vt. 489.
22 C.J. p 871 note 49.

48. Me.—Richardson v. Lalumiere, 184 A. 392, 393, 134 Me. 224, quoting **Corpus Juris.**
N.J.—Lindenthal v. Hatch, 39 A. 662, 61 N.J.Law 29.
Vt.—O'Rourke v. Cleary, 163 A. 583, 105 Vt. 85.
Wash.—State v. Coffey, 112 P.2d 989, 991, 9 Wash.2d 339, citing **Corpus Juris.**
22 C.J. p 871 note 50.
Entries held inadmissible
Ill.—In re Teehan's Estate, 4 N.E. 2d 513, 287 Ill.App. 58.
Iowa.—In re Cummins' Estate, 286 N.W. 409, 226 Iowa 1207.
Mo.—Eastin v. Bank of Harrisonville, 246 S.W. 991, 213 Mo.App. 130.
Pa.—In re Brown's Estate, 22 Pa. Dist. & Co. 671.
Vt.—O'Rourke v. Cleary, 163 A. 583, 105 Vt. 85—Stockwell v. Stockwell's Estate, 105 A. 30, 92 Vt. 489.
22 C.J. p 871 note 48.
Rule applied to loan and collection registers.
Idaho.—Prudential Ins. Co. of America v. Folsom, 283 P. 609, 612, 48 Idaho 538, citing **Corpus Juris.**
22 C.J. p 871 note 48 [a].
Mere private memorandum will be excluded.—In re Pappalau's Estate, 27 N.Y.S.2d 787, 261 App.Div. 705—Hughes v. Eastern Cont. Co., 297 N.Y.S. 272, 164 Misc. 318.
Ordinary desk pad on which notations of the usual character made on such pads were made from time to time was not a book of account within the meaning of Cahill's St. c 51 par 3.—In re Martine's Estate, 233 Ill.App. 94.

49. Cal.—Creighton v. Creighton, 43 P.2d 1104, 6 Cal.App.2d 270.

50. Ala.—McWhorter v. Tyson, 83 So. 330, 203 Ala. 509.
22 C.J. p 871 note 51.

51. N.J.—Skinner v. Reinhardt, 163 A. 632, 634, 108 N.J.Eq. 24, citing **Corpus Juris.**
Ohio.—Aftel v. Cound, 167 N.E. 402, 403, 32 Ohio App. 270, citing **Corpus Juris.**
Pa.—Lemont v. Meindle, 69 Pa.Super. 536—Ramble v. Pennsylvania Coal Co., 53 Pa.Super. 438.
22 C.J. p 871 note 52.
Inadmissible under statute
Notations on check stubs concerning gratuities allegedly paid to a police officer were not a "record of any act, transaction, occurrence or event . . . made in the regular course of any business," under statutes, making such records admissible in evidence.—Roge v. Valentine, 7 N.Y.S.2d 958, 255 App.Div. 475, reargument denied 9 N.Y.S.2d 900, 256 App.Div. 817, reversed on other grounds 20 N.E.2d 751, 280 N.Y. 268, reargument denied 21 N.E.2d 695, 280 N.Y. 809.

52. Ark.—Rose v. King, 279 S.W. 373, 170 Ark. 209.
22 C.J. p 871 note 53.

53. Del.—Edsall v. Rockland Paper Co., 194 A. 115, 8 W.W.Harr. 495.
N.Y.—In re Clodgo's Estate, 227 N. Y.S. 690, 131 Misc. 490—Feinberg v. Ipp, 188 N.Y.S. 662.
Or.—Radtke v. Taylor, 210 P. 863, 105 Or. 559, 27 A.L.R. 1423.

mitted in evidence.[54] Thus a book of original entries bearing manifest and suspicious marks of erasure or alteration in a material point will be ordinarily rejected unless the alteration is satisfactorily explained;[55] and it has even been held that the explanation must be made by a disinterested person, the explanation of the party being deemed insufficient.[56] Alterations which are satisfactorily explained and do not affect the apparent honesty of the book do not preclude its admission,[57] and the same has been held to be true with respect to alterations which are immaterial to the issue[58] or which, in the absence of indications of fraud, are inconsequential;[59] and some cases go so far as to assert that alterations and erasures do not render the books inadmissible, but go merely to their credibility.[60]

Mutilated books, as a general rule, are not entitled to credit in favor of the owner,[61] unless the mutilation is properly explained,[62] although it has been held that the effect of the mutilation is confined to impairing credibility and does not render the book incompetent.[63] The fact that books of account have become shopworn from use, and the covers and some outside leaves lost, does not render entries therein incompetent, where there is nothing to indicate any fraud or purpose to destroy entries.[64]

g. Certainty and Particularity of Charges

(1) In general
(2) Lumping charges
(3) Dates

(1) In General

A book charge, to be admissible in evidence, must show with sufficient certainty and particularity the nature of the claim asserted.

While, as has been seen in subdivision a of this section supra, there is no particular form in which a book charge must be made in order that it may be admissible in evidence, it must be made in such a manner as to show of itself a charge against the adverse party and the nature of the charge, so that in connection with a party's oath as to requisite preliminary matters it will show the nature of the claim without further evidence from the party to interpret the meaning of arbitrary characters or terms intelligible only to himself.[65] In this respect, however, some latitude is allowed, depending on the nature of the case,[66] and charges need not be such as to be understood by the general public if they are intelligible to persons in the profession or business, although where they are not intelligible to the common understanding it would seem to be necessary to support them by other evidence as to their meaning and character.[67]

The entries must be sufficient to show to a reasonable certainty what article or thing is made the basis of the charge,[68] and it has been held that the entries to be admissible must contain the price or

54. Mo.—No Dust O Co. v. Home Trust Co., App., 46 S.W.2d 203, 205, citing **Corpus Juris.**
Or.—Radtke v. Taylor, 210 P. 863, 105 Or. 559, 27 A.L.R. 1423.
22 C.J. p 871 note 54.

55. Idaho.—State v. Brassfield, 197 P. 559, 33 Idaho 660.
Ky.—Hopkins' Ex'x v. Osborne, 128 S.W.2d 575, 278 Ky. 229.
La.—Jones v. Davis, App., 155 So. 269.
Nev.—Sagardia v. Stockgrowers' & Ranchers' Bank of Reno, 274 P. 811, 51 Nev. 299.
Or.—Radtke v. Taylor, 210 P. 863. 105 Or. 559, 27 A.L.R. 1423.
22 C.J. p 872 note 55.

56. Cal.—Caldwell v. McDermit, 17 Cal. 464.

57. Tex.—Maverick v. Maury, 15 S. W. 686, 79 Tex. 435.
22 C.J. p 872 note 57.

58. Ky.—Boston Ins. Co. v. Faulkner, 89 S.W.2d 332, 262 Ky. 25.
Nev.—Sagardia v. Stockgrowers' & Ranchers' Bank of Reno, 274 P. 811, 51 Nev. 299.
Pa.—Buch & Myers v. Good, 21 Pa. Dist. & Co. 474, 44 Lanc.L.Rev. 257.
22 C.J. p 872 note 58.

59. Ky.—Boston Ins. Co. v. Faulkner, 89 S.W.2d 332, 262 Ky. 25.

60. Del.—Gosewich v. Zebley, 5 Del. 124.
Vt.—Sargeant v. Pettibone, 1 Aik. 355.
Wash.—Robertson v. O'Neill, 120 P. 884, 67 Wash. 121.
22 C.J. p 872 note 59.

61. Mich.—Robinson v. Hoyt, 39 Mich. 405.
22 C.J. p 872 note 60.

62. Ky.—Hopkins' Ex'x v. Osborne, 128 S.W.2d 575, 278 Ky. 229.
Or.—Radtke v. Taylor, 210 P. 863, 105 Or. 559, 27 A.L.R. 1423.

63. N.Y.—Hudson Milling Co. v. Higgins, 88 A. 1079, 85 N.J.Law 268.
22 C.J. p 872 note 61.

64. Ill.—Weigle v. Brautigam, 74 Ill.App. 285.
22 C.J. p 872 note 62.

65. N.H.—Cummings v. Nichols, 13 N.H. 420, 38 Am.D. 501.
22 C.J. p 872 note 64.
Entries held too indefinite
Mich.—Munroe, Boyce & Co. v. Ward, 174 N.W. 285, 207 Mich. 369.
Mo.—Nall v. Brennan, 23 S.W.2d 1053, 324 Mo. 565, 68 A.L.R. 684.

66. N.J.—Bay v. Cook, 22 N.J.Law 343.
22 C.J. p 872 note 65.

67. Pa.—Fulton's Estate, 35 A. 880, 178 Pa. 78, 35 L.R.A. 133.
22 C.J. p 872 note 66.

68. Colo.—Gilmore v. Weisser, 187 P. 521, 68 Colo. 205.
Iowa.—Younker Bros. v. Meredith, 253 N.W. 58, 217 Iowa 1130.
Miss.—W. T. Raleigh Co. v. Rotenberry, 164 So. 5, 6, 174 Miss. 319, citing **Corpus Juris.**
Mo.—No Dust O Co. v. Home Trust Co., App., 46 S.W.2d 203, 205, citing **Corpus Juris.**
N.J.—Benfrey Dress Co. v. Irving Gale, Inc., 177 A. 432, 13 N.J.Misc. 212.
Pa.—Mehrkam v. Schlegel & Williamson, Inc., 5 Pa.Dist. & Co. 668, 10 Lehigh Co.L.J. 368, 39 York Leg.Rec. 28.
Tex.—J. M. Radford Grocery Co. v. Porter, Civ.App., 17 S.W.2d 145, error dismissed—Warren v. North

value of the goods sold or services rendered;[69] but in other jurisdictions entries to which the price or value of the goods or services is not affixed are admitted when accompanied by other proof of the price or value;[70] and where the price or value is fixed by law a mere statement of the quantity or amount of goods delivered or services rendered is clearly sufficient.[71] The mere fact that the measure, weight, and quantity are not given in connection with the items will not render the accounts inadmissible.[72]

(2) Lumping Charges

As a general rule charges must be specific and particular; lumping accounts renders them inadmissible.

Charges must, as a general rule, be specific and particular; lumping accounts renders them inadmissible;[73] but in this respect, it has been held, some latitude is allowed, depending on the nature of the case, and the matter must rest to a great extent in the discretion of the court.[74] Accordingly, single charges for services extending over several days,[75] or for goods delivered during a similar period, especially if delivered under a single order,[76] have been admitted.

(3) Dates

The authorities differ as to whether or not the entries must be accompanied with dates.

While it has been held that a book of accounts is not to be rejected because the accounts are without date, as the date may be established by other evidence,[77] other cases assert the view that there must be dates to the entries,[78] although it is not necessary that the precise day of the month should be affixed to the charge in all cases, if the month is given and the books appear to be regular in other respect.[79] Accounts dated on a Sunday have been held inadmissible.[80]

h. Completeness of Accounts

In order to entitle books of account to be received as evidence, it must appear that the entries therein are designed at least to embrace all the items of the account between the parties.

In order to entitle books of account to be received as evidence, it must appear that the entries therein are designed at least to embrace all the items of the account between the parties which are proper subjects of entry,[81] and the entire account between the parties must be introduced.[82]

i. Requirement of Original Entries

(1) In general

(2) Charges transferred from memoranda

(1) In General

To be admissible, an account book must appear to contain the party's original entries or the first permanent records of the transactions.

In order to be admitted in evidence, an account book must appear to contain the party's original entries or the first permanent records of the transactions, and when the contrary is discoverable upon

American Car Co., Civ.App., 294 S. W. 301.
22 C.J. p 873 note 67.

Entry of word "merchandise" is meaningless as defining the articles sold.
Ala.—Brown v. Grayson, 86 So. 121, 17 Ala.App. 463.
N.J.—Glen v. Marcus, 177 A. 439, 13 N.J.Misc. 213.

Loss of book in which article entered
Where the date and price of goods bought from a merchant were entered in his book, and the date, article, and price were entered in the customer's pass book, which latter book had been negligently lost, the merchant's book was held competent evidence of the balance due.—In re Mohr, 32 Pittsb.Leg.J., Pa., 438.

69. Me.—Witherell v. Swan, 32 Me. 247.
N.J.—Hagaman v. Case, 4 N.J.Law 370.

70. Mass.—Morris v. Briggs, 3 Cush. 342.
22 C.J. p 873 note 69.

71. Me.—Witherell v. Swan, 32 Me. 247.

72. Md.—Adkins v. Hastings, 114 A. 288, 291, 138 Md. 454, quoting Corpus Juris.
22 C.J. p 873 note 71.

73. Cal.—Argue v. Monte Regio Corporation, 2 P.2d 54, 115 Cal. App. 575.
Ill.—Bartolucci v. Dal Bianco, 228 Ill.App. 113.
Ind.—Bank of Poneto v. Kimmel, 168 N.E. 604, 91 Ind.App. 325.
Va.—Ratliff v. Jewell, 149 S.E. 409, 153 Va. 315, 67 A.L.R. 1541.
W.Va.—Martufi v. Daniels, 129 S.E. 709, 99 W.Va. 673.
22 C.J. p 873 note 73.

74. N.H.—Cummings v. Nichols, 13 N.H. 420, 38 Am.D. 501.
Pa.—In re Walker's Estate, 53 York Leg.Rec. 1.

That some of items in account are not itemized does not render the account inadmissible.—Morgan v. King, 91 So. 30, 128 Miss. 401.

75. N.H.—Cummings v. Nichols, 13 N.H. 420, 38 Am.D. 501.
N.J.—Bay v. Cook, 22 N.J.Law 343.

76. Cal.—Le Franc v. Hewitt, 7 Cal. 186.

77. Ga.—Doster v. Brown, 25 Ga. 24, 71 Am.D. 153.

78. Pa.—Dowie's Estate, 19 A. 936, 135 Pa. 210—Marsh's Estate, 28 Pa.Co. 190.

79. Ky.—Little v. Berry, 113 S.W. 902.
N.H.—Cummings v. Nichols, 13 N.H. 420, 38 Am.D. 501.

80. Pa.—Walton's Estate, 4 Kulp 487.

81. Ark.—Telle v. Nash, 298 S.W. 195, 174 Ark. 1180.
Ill.—Atwell Printing & Binding Co. v. Prairie Farmer Pub. Co., 246 Ill.App. 100.
Mich.—McCannan v. Talfree, 198 N. W. 197, 227 Mich. 15—Munroe Boyce & Co. v. Ward, 174 N.W. 285, 207 Mich. 369.
22 C.J. p 873 note 81.

Entries held sufficiently complete
Idaho.—Basye v. Hayes, 76 P.2d 435, 58 Idaho 569.

82. Mo.—Mulloy v. Mulloy, 111 S W. 843, 131 Mo.App. 654.
22 C.J. p 873 note 82.

the face of the books, or comes out upon the examination of the party, or otherwise, the book should be rejected.[83] Conversely, books of original entry are admissible, notwithstanding the entries therein have been transferred to other books.[84] It is usually held not to be a valid objection to the admission in evidence of original entries that they are in a book which contains other charges admitted not to be original,[85] although it has also been held that a ledger to which accounts from other books are transferred is not a book of original entry, even as to an entry made in it and nowhere else, and that it is inadmissible in evidence to prove the fact shown by such entry.[86]

If a charge is made in duplicate by means of the use of carbon paper on blanks provided for that purpose, both copies are originals and are competent.[87]

Copies of destroyed originals. An account purporting to be drawn out by the party himself from his original and daily minutes is not as a general rule admissible in evidence, even though the book from which such statement might have been copied has been burnt or destroyed by accident;[88] but it has been held that the transcript is admissible if there is proof that the items of the account drawn out actually existed in the party's book or records where his daily transactions were minuted, and that the transcript has been duly taken therefrom.[89]

(2) Charges Transferred from Memoranda
(a) In general
(b) Memoranda furnished by another
(c) Mode of proving entries

(a) In General

The mere fact that a temporary entry is first made will not deprive the subsequent entry made as the permanent record of the transaction of its character as an original entry.

It is not an objection to the competency of a party's book that the entries therein were tran-

83. Ala.—Boutwell v. Spurlin Mercantile Co., 83 So. 481, 203 Ala. 482—L. D. King Store Co. v. Thomas, 134 So. 822, 24 Ala.App. 324.
Cal.—Burke v. John E. Marshall, Inc., App., 108 P.2d 738—Kains v. First Nat. Bank, 86 P.2d 935, 30 Cal.App.2d 447—Warren v. Hiltscher, 295 P. 536, 111 Cal.App. 318.
Del.—Edsall v. Rockland Paper Co., 194 A. 115, 8 W.W.Harr. 495.
Ky.—Gus Dattilo Fruit Co. v. Louisville & N. R. Co., 37 S.W.2d 856, 238 Ky. 322.
Miss.—Ellis v. Ellis, 134 So. 150, 160 Miss. 345.
Mo.—Kliethermes Motor Co. v. Cole Motor Service, App., 102 S.W.2d 819, 823, citing **Corpus Juris**—No Dust O Co. v. Home Trust Co., App., 46 S.W.2d 203, 205, citing **Corpus Juris**—Welch-Sandler Cement Co. v. Mullins, App., 31 S.W.2d 86, 89, quoting **Corpus Juris**—Gordon & Koppel Clothing Co. v. New York Cent. R. Co., App., 285 S.W. 755.
Nev.—Home Lumber & Coal Co. v. Hartford Mining Co., 81 P.2d 1063, 58 Nev. 361, rehearing denied 83 P. 2d 1049, 58 Nev. 361.
Ohio.—William Taylor Sons & Co. v. Burton, 188 N.E. 874, 46 Ohio App. 398—Aftel v. Coúnd, 167 N.E. 402, 32 Ohio App. 270.
Okl.—Sharp v. Pawhuska Ice Co., 217 P. 214, 90 Okl. 211.
Or.—Radtke v. Taylor, 210 P. 863, 105 Or. 559, 27 A.L.R. 1423.
Pa.—In re Gutekunst's Estate, 9 Som. Leg.J. 179.
Tex.—J. M. Radford Grocery Co. v. Porter, Civ.App., 17 S.W.2d 145, error dismissed—Warren v. North American Car Co., Civ.App., 294 S. W. 301, 305, citing **Corpus Juris**—Johnson v. Cox, Civ.App., 270 S.W. 892.
Wash.—Lincoln v. Kuskokwin Fishing & Transportation Co., 203 P. 62, 118 Wash. 137.
W.Va.—Martufi v. Daniels, 129 S.E. 709, 99 W.Va. 673—Di Bacco v. Benedetto, 95 S.E. 601, 82 W.Va. 84.
22 C.J. p 873 note 83.

An original entry is one intended, when made, to be the permanent evidence of the transaction.—Shea v. Biddle Improvement Co., 176 N.W. 948, 188 Iowa 952.

Proof that an account book was the only one kept by a party is equivalent to proof that it is a book of original entry.
Cal.—Sugar Loaf Orange Growers' Ass'n v. Skewes, 190 P. 1076, 47 Cal.App. 470.
Ill.—People v. Dime Sav. Bank, 183 N.E. 604, 350 Ill. 503.
Ind.—Polus v. Conner, 176 N.E. 234, 92 Ind.App. 465.
22 C.J. p 873 note 83 [e].

Ledgers
(1) Ledgers in order to be admissible must be the original books of entry.
Ala.—Boutwell v. Spurlin Mercantile Co., 83 So. 481, 203 Ala. 482.
Iowa.—Younker Bros. v. Meredith, 253 N.W. 58, 217 Iowa 1130.
Tex.—Devlin v. Heid Bros., Civ.App., 47 S.W.2d 383, error dismissed—Fite v. First Nat. Bank, Civ.App., 279 S.W. 581—Johnson v. Cox, Civ. App., 270 S.W. 892.
22 C.J. p 870 notes 30, 31.

(2) Ledgers held books of original entry.
Colo.—Rocky Mountain Beverage v. Walter Brewing Co., 108 P.2d 885.
Ind.—Polus v. Conner, 176 N.E. 234, 92 Ind.App. 465.
Ohio.—William Taylor Sons & Co. v. Burton, 188 N.E. 874, 46 Ohio App. 398.

84. Ala.—Donaldson v. Wilkerson, 54 So. 234, 170 Ala. 507.
Mo.—Welch-Sandler Cement Co. v. Mullins, App., 31 S.W.2d 86, 89, quoting **Corpus Juris.**

85. Ala.—McGrath v. Stein, 42 So. 454, 148 Ala. 370.
22 C.J. p 874 note 85.

86. Iowa.—Fitzgerald v. McCarty, 8 N.W. 646, 55 Iowa 702.

87. Ill.—R. Wurlitzer Co. v. Dickinson, 153 Ill.App. 36, affirmed 93 N. E. 132, 247 Ill. 27.
Ky.—Gus Dattilo Fruit Co. v. Louisville & N. R. Co., 37 S.W.2d 856, 238 Ky. 322.
Pa.—John Wanamaker, Philadelphia, v. Chase, 81 Pa.Super. 201.

Copy delivered to purchaser
In an action on account, wherein plaintiff testified that the original charge tickets were delivered to defendant while plaintiff kept carbon copies, it was error to admit in evidence charge tickets made out in lead pencil which had been retained in plaintiff's possession.—Jungkind Photo Supply Co. v. Yates, Mo.App., 257 S.W. 820.

88. Ga.—Creamer v. Shannon, 17 Ga. 65, 63 Am.D. 226.
Mass.—Prince v. Smith, 4 Mass. 455.

89. Mo.—Mueller v. Rock, App., 249 S.W. 435.
22 C.J. p 874 note 90.

scribed from a slate, card, slips of paper, or memorandum book in which they were first entered for a temporary purpose. In such cases the entry of the charges in the first instance is regarded as a memorandum preparatory to permanent evidence of the transactions, and the entry in the regular book of accounts of the party is deemed to be the first and original entry, and as such competent proof, with the oath of the party, of the charges therein made.[90] Especially is this true where the original entries or memoranda are incomplete and the final entries contain the first entries of the charges in their entirety.[91] Original entries transferred from a slate to a daybook and from a daybook to a ledger may be proved by the slate, daybook, and ledger, where the entries in neither are complete in themselves.[92] A "loss report," which was a summary of what was contained in tickets made at the time of sales by persons not within the jurisdiction of the court, has been held admissible, although it was not made up directly from the tickets, but from books of original entry which were made up from the tickets, where the tickets themselves, which were numerous and voluminous, were in court and were offered for inspection.[93]

(b) Memoranda Furnished by Another

Book entries may be admitted even though made by a party from temporary memoranda furnished by his employees.

It is not necessary, in the case of entries made from temporary memoranda, that the temporary memoranda should have been made by the party himself; they may be made by his servant or employee, and afterward entered by the party in his book of original entries.[94]

(c) Mode of Proving Entries

In proving an entry made by a party from temporary memoranda made by another, generally the testimony of the entrant must be supplemented by that of the person furnishing the information if he is available as a witness.

In order to entitle a book of account made up of entries transcribed from temporary memoranda to be read in evidence, such book must be supported not only by the suppletory oath of the party who made the entries, as appears supra § 684 b, but, where the temporary memoranda were made by another, it is usually held necessary that the person who made such memoranda must also be called to prove that, on or about the time when the charges were made, articles were delivered or services performed of a character similar to those charged in the book, at least unless he is dead or his absence is otherwise satisfactorily accounted for;[95] but a contrary rule has been asserted in a few ju-

90. U.S.—Metropolitan Casualty Ins. Co. v. Smith & Smith, C.C.A.Wash., 58 F.2d 699—Cub Fork Coal Co. v. Fairmont Glass Co., C.C.A.Ind., 19 F.2d 273.
Cal.—Jan Wai v. Smith-Riddell Co., 202 P. 952, 55 Cal.App. 59—Sugar Loaf Orange Growers' Ass'n v. Skewes, 190 P. 1076, 47 Cal.App. 470.
Ill.—People v. Dime Sav. Bank, 183 N.E. 604, 350 Ill. 503—Bartolucci v. Dal Bianco, 228 Ill.App. 113.
Iowa.—Shea v. Biddle Improvement Co., 176 N.W. 948, 188 Iowa 952.
Minn.—Banner Grain Co. v. Burr Farmers' Elevator & Supply Co., 202 N.W. 740, 162 Minn. 334.
Mo.—Dameron v. Harris, 219 S.W. 954, 281 Mo. 247—Bedwell v. Capitol Mut. Ass'n, App., 66 S.W.2d 155, 156, quoting **Corpus Juris**—Welch-Sandler Cement Co. v. Mullins, App., 31 S.W.2d 86, 89, quoting **Corpus Juris.**
Neb.—Nye-Schneider-Fowler Co. v. Chicago & N. W. Ry. Co., 179 N.W. 503, 506, 105 Neb. 151, citing **Corpus Juris.**
N.D.—Spies v. Stang, 218 N.W. 860, 56 N.D. 674—Fargo Mercantile Co. v. Johnson, 181 N.W. 953, 47 N.D. 304.
Ohio.—William Taylor Sons & Co. v. Burton, 188 N.E. 874, 46 Ohio App. 398.
Pa.—City of Philadelphia v. Stange, 159 A. 7, 306 Pa. 177—John Wanamaker, Philadelphia, v. Chase, 81 Pa.Super. 201.
Tex.—Watson Co. v. Lone Star Service Station, Civ.App., 16 S.W.2d 151, 153, error dismissed, citing **Corpus Juris**—Griffin v. Berry, Civ.App., 6 S.W.2d 183, 185, error dismissed, citing **Corpus Juris.**
Wash.—Gourley v. Hatten, 84 P.2d 1014, 197 Wash. 305.
22 C.J. p 870 notes 32, 33, p 874 note 91.

Both entries regarded as original

Or.L. § 791, which provides that, when an entry is repeated in the regular course of business, one copied from another, at or near the time of the transaction, all entries are equally regarded as originals, is general in its scope, and applies to entries in shopbooks as well as to other entries within its embrace.—Radtke v. Taylor, 210 P. 863, 105 Or. 559, 27 A.L.R. 1423—Raski v. Wise, 107 P. 984, 56 Or. 72.

Particular books held books of original entry

(1) Books of bank made up from deposit slips and checks.—Crump v. Bank of Toccoa, 153 S.E. 531, 41 Ga. App. 505.

(2) Ledger posted from duplicate sales slips, no daybook or journal being used.
Colo.—Rocky Mountain Beverage v. Walter Brewing Co., 108 P.2d 885.
Okl.—Cassil v. Carter, 223 P. 685, 98 Okl. 49.

(3) Sales book consisting of entries made at close of each day from memorandum tickets.—Watson Co. v. Lone Star Service Station, Tex.Civ. App., 16 S.W.2d 151, error dismissed.

91. Kan.—State v. Stephenson, 76 P. 905, 69 Kan. 405, 105 Am.S.R. 171.

A ledger is admissible as a book of original entries where the daybook entries are incomplete.—Breslin v. Dobosh, 62 Pa.Super. 397.

92. N.Y.—McGoldrick v. Traphagen, 88 N.Y. 334.

93. Mo.—Cudahy Packing Co. v. Chicago & N. W. R. Co., App., 201 S.W. 596.

94. Mo.—Bedwell v. Capitol Mut. Ass'n, App., 66 S.W.2d 155, 156, quoting **Corpus Juris**—Welch-Sandler Cement Co. v. Mullins, App., 31 S.W.2d 86, 89, quoting **Corpus Juris.**
Tex.—Watson Co. v. Lone Star Service Station, Civ.App., 16 S.W.2d 151, error dismissed.
22 C.J. p 875 note 95.

95. Mo.—Bedwell v. Capitol Mut. Ass'n, App., 66 S.W.2d 155, 156, quoting **Corpus Juris.**
22 C.J. p 875 note 97, p 876 note 98.

risdictions,[96] and daily time cards of a workman have been held admissible as corroborative of book entries made therefrom without proof of handwriting of the workman.[97]

§ 686. —— Subject Matter of Entry

a. In general
b. Goods delivered and services performed
c. Collateral matters

a. In General

Entries in books of account, to be admissible, must relate to the business carried on by the person for whom the books are kept.

Entries in books of account, to be admissible, must relate to the business carried on by the person for whom the books are kept and not to matters in no way connected with the business;[98] and entries, even though made in a regular book of accounts, are not evidence of the casual sale of an article not in the line of the party's business;[99] but the competency of an account book as to matters properly entered therein is not affected by the fact that it also contains an entry not connected with the business.[1]

b. Goods Delivered and Services Performed

The ordinary and usual matters for entry in account books are charges for goods sold and delivered and services rendered.

Where a party's books of account are admissible in his favor, they are very generally received for the purpose of proving charges for goods or articles delivered and services performed.[2] This rule applies although the sale was founded on a written order;[3] and after an order to deliver goods or render services is proved by competent evidence aliunde, see subdivision c (2) of this section infra, the fact[4] and the date[5] of delivery or performance may be proved by the books and suppletory oath of the party. A book of account has been regarded as prima facie evidence of the price of goods sold,[6] but it has also been held that entries which furnish nothing by which the propriety of the price charged for goods or labor can be tested or criticized by witnesses familiar with the subject are inadmissible.[7] It has frequently been asserted that the shopbook rule is confined to entries relating to goods delivered and services performed,[8] although there is also authority for the view that cash items entered in the regular course of business are within the rule, see subdivision c (4) of this section infra.

An account of credits and not of charges, kept by the purchaser of goods[9] or of the employer for whom labor or services have been performed,[10] is not admissible in his favor.

c. Collateral Matters

(1) In general
(2) To whom credit given
(3) Special agreements
(4) Cash items or dealings

(1) In General

As a general rule the account books of a party are not admissible to prove any matter collateral to the issue of debit and credit between the parties.

96. Pa.—Curren v. Crawford, 4 Serg. & R. 3.
22 C.J. p 876 note 99.

97. U.S.—Wisconsin Steel Co. v. Maryland Steel Co., Wis., 203 F. 403, 121 C.C.A. 507.

98. Wis.—Wallschlaeger v. Wallschlaeger's Estate, 205 N.W. 402, 187 Wis. 640.
22 C.J. p 876 note 2.

99. Pa.—Shoemaker v. Kellogg, 11 Pa. 310.
22 C.J. p 876 note 3.

1. Cal.—Schneider v. Oakman Cons. Min. Co., 176 P. 177, 38 Cal.App. 338.
22 C.J. p 876 note 4.

2. Ariz.—Douglas v. Parker Commercial Co., 235 P. 148, 28 Ariz. 47.
Idaho.—Basye v. Hayes, 76 P.2d 435, 58 Idaho 569.
N.Y.—Warner Quinlan Co. v. Ben Charat, Inc., 257 N.Y.S. 722, 725, 143 Misc. 443, citing **Corpus Juris.**
Ohio.—Krueger v. Frazier, 166 N.E. 151, 31 Ohio App. 28.
Or.—Radtke v. Taylor, 210 P. 863, 105 Or. 559, 27 A.L.R. 1423.
Pa.—Buch & Myers v. Good, 21 Pa. Dist. & Co. 474, 44 Lanc.L.Rev. 257—In re Walker's Estate, 53 York Leg.Rec. 1.
R.I.—Sandsea v. No-Kap Closures, 14 A.2d 655.
Wis.—Wallschlaeger v. Wallschlaeger's Estate, 205 N.W. 402, 187 Wis. 640.
22 C.J. p 876 note 5.

3. Pa.—Valee Bros. Electrical Co. v. North Penn Iron Co., 32 Pa.Super. 111.

4. Conn.—MacFayden v. Paul, 128 A. 650, 102 Conn. 243.
Pa.—Oswald Machinery Co. v. Farnsworth, 101 Pa.Super. 506.
R.I.—Sandsea v. No-Kap Closures, 14 A.2d 655.
22 C.J. p 877 note 8.

5. Mass.—Costello v. Crowell, 133 Mass. 352.

6. Ariz.—Douglas v. Parker Commercial Co., 235 P. 148, 28 Ariz. 47.
Pa.—Ducoign v. Schreppel, 1 Yeates 347.
R.I.—Lewis Mears Co. v. Norfolk County Creamery, 137 A. 149, 48 R. I. 221.

7. Pa.—McGarry's Estate, 9 Pa.Dist. 172.

8. Tex.—Luttrell v. Parry, 129 S.W. 865, 61 Tex.Civ.App. 508.
22 C.J. p 877 note 12.

Charges of damages

Charges which are not in their nature liquidated sums, but damages which can be rendered certain only by convention or judicial decision, are not matters of book account.—Katsonas v. W. M. Sutherland Bldg. & Const. Co., 132 A. 553, 104 Conn. 54—22 C.J. p 877 note 12 [b].

9. Wash.—Goldsworthy v. Oliver, 160 P. 4, 93 Wash. 67.
22 C.J. p 877 note 14.

10. Mass.—Morse v. Potter, 4 Gray 292.
22 C.J. p 877 note 15.

The account books of a party are not, as a general rule, admissible to prove any matter collateral to the issue of debit and credit between the parties;[11] and any facts aside from the sale and delivery of goods or the performance of work and labor which are necessary to make out a party's case must be proved by evidence independent of his books.[12] There are, however, cases in which this rule has been somewhat relaxed.[13]

(2) To Whom Credit Given

It has been held that account books are inadmissible to show to whom credit was given when that fact is in issue, but there is also authority to the contrary.

It is usually held that books of account are inadmissible to show to whom credit was given when that fact is in issue,[14] and are therefore not evidence to charge a defendant with goods delivered to a third person or for services performed for a third person,[15] or admissible to prove charges for cash paid to a third person on the order of the adverse party;[16] but there is authority for the view that account books are admissible for the purpose of showing to whom credit was given,[17] although they are not conclusive on that question.[18]

(3) Special Agreements

Ordinarily books of account are not admissible, except for limited purposes, when there are special terms or provisions to the contract on which the recorded charges are based.

Books of account are not admissible to prove the terms or contents of a special agreement,[19] or as evidence of a sum of money due under such an agreement.[20] This rule has been extended so as to hold that the delivery of goods, the performance of services, or the payment of money under a special agreement is not provable by books of account, since by an agreement of this kind the transaction is taken out of the usual course of business dealings and the performance or nonperformance of the contract is susceptible of other proof;[21] but it has also been

11. N.H.—Doe v. Lucy, 139 A. 750, 83 N.H. 160.
22 C.J. p 877 note 16.

In actions for an accounting, books of account are admissible in evidence.—Breneman Co. v. Cunningham, 175 S.E. 829, 207 N.C. 77.

12. N.J.—Locke & Smith Co. v. Mechler, 79 A. 1059, 81 N.J.Law 232.
22 C.J. p 877 note 17.

Fact of payment

(1) In claim against estate on account, claimant's books of account were admissible only as showing sum due, but not as evidence of payments on account that would toll statute of limitations, since books of account would be purely hearsay and self-serving as evidence of payments.—Botti v. Horton's Estate, 5 N.Y.S. 2d 284, 254 App.Div. 889.

(2) A book account of a debtor of the date when the debt fell due, showing a balance in his favor, equal to a second instalment of plaintiff's debt, is not admissible to prove payment of that instalment.—Clark v. Wells, 5 Gray, Mass., 69.

Expenditures

In action by retail merchant for breach of warranty, account books showing expenditures of merchant, as taken from invoices and vouchers, are not admissible to show damage, being transactions in which defendant had no part and of which it was ignorant, and therefore entitled to testimony furnishing basis for cross-examination.—General Motors Truck Co. v. Shepard Co., 129 A. 825, 47 R. I. 88, motions denied General Motors Truck Co. v. Shepard Co., 130 A. 593, 47 R.I. 153.

13. **Books of account held admissible** to prove particular collateral matters:

(1) Ownership of drafts.—Heid Bros. v. Commercial Nat. Bank of Hutchinson, Tex.Com.App., 240 S.W. 908, reversing Commercial Nat. Bank of Hutchinson v. Heid Bros., Civ. App., 226 S.W. 806.

(2) Other matters see 22 C.J. p 877 note 18.

With consent of adverse party, lessee, suing for wrongful eviction, may prove loss of profits for unexpired portion of term by correct book entries made from original accounts showing receipts and expenses before eviction.—Kenney v. Braun, 201 N.W. 641, 113 Neb. 12.

14. R.I.—Atlas Sheet Metal Works v. Campbell, 136 A. 439, 48 R.I. 160.
22 C.J. p 878 note 19.

15. Me.—Mansfield v. Gushee, 114 A. 296, 120 Me. 333.
22 C.J. p 878 note 20.

Where defendant admits the correctness of plaintiff's accounts, however, the fact that delivery was made to a third person does not render plaintiff's books inadmissible to show charges against defendant.—James C. Goff Co. v. Lunn, 137 A. 879, 48 R.I. 416.

16. Iowa.—Lyman v. Bechtel, 7 N. W. 673, 55 Iowa 437.
22 C.J. p 878 note 21.
Cash items or dealings generally see infra subdivision c (4) of this section.

17. Ala.—Ziliak & Schafer Milling Co. v. Moore, 131 So. 798, 222 Ala. 254.
Ariz.—Douglas v. Parker Commercial Co., 235 P. 148, 28 Ariz. 47.
Conn.—MacFayden v. Paul, 128 A. 650, 102 Conn. 243.
Ga.—Haygood v. E. B. Clark Co., 107 S.E. 379, 27 Ga.App. 101.
Wyo.—Sneider v. Big Horn Milling Co., 200 P. 1011, 28 Wyo. 40.
22 C.J. p 878 note 22.

In Massachusetts

(1) Under Gen.L. c 233 § 78, relating to the admissibility of book entries, account books are admissible to show to whom the account is charged.—Standard Oil Co. of New York v. Malaguti, 168 N.E. 535, 269 Mass. 126—Taylor v. Harrington, 137 N.E. 350, 243 Mass. 210.

(2) The contrary rule prevailed prior to the enactment of the statute.—Kaiser v. Alexander, 12 N.E. 209, 144 Mass. 71.
22 C.J. p 878 notes 19, 20.

18. Wis.—Champion v. Doty, 31 Wis. 190.

19. Colo.—Weston v. Wilkes, 176 P. 470, 65 Colo. 422.
Del.—Edsall v. Rockland Paper Co., 194 A. 115, 8 W.W.Harr. 495.
Ohio.—Hunt v. Krebs, 194 N.E. 34, 48 Ohio App. 279.
Pa.—Sokolove v. Hirsch, 95 Pa.Super. 606.
S.C.—Green v. McDaniel, 168 S.E. 197, 168 S.C. 533, quoting **Corpus Juris.**
22 C.J. p 878 note 24.

20. Del.—Edsall v. Rockland Paper Co., 194 A. 115, 8 W.W.Harr. 495.
Pa.—Jacob v. Bleiberg's Ex'rs, 23 West.Co.L.J. 77.
Wis.—Wallschlaeger v. Wallschlaeger's Estate, 205 N.W. 402, 187 Wis. 640.
22 C.J. p 878 note 25.

21. Pa.—Crew Levick Co. v. Gibbon, 176 A. 27, 115 Pa.Super. 595—

held that, although a book of accounts may be incompetent to prove the performance of a special contract, yet where services are rendered or goods are delivered from time to time in the performance of the contract it is proper to charge them on the book, and such charges are competent evidence, not of the performance of the contract, but of the fact of the delivery of the goods and the rendition of the services and their amount;[22] and account books have been received to show that a credit was given as agreed between the parties.[23]

(4) Cash Items or Dealings

As a general rule, in the absence of contrary statute, books of account are not admissible to prove cash items or dealings between the parties unless the charges are in fact made in the ordinary course of business.

Although there is authority to the contrary, sometimes by virtue of statutory enactment,[24] the general rule, in the absence of contrary statute, is that the books of account of a party are not admissible in his own favor to prove charges for "money paid" or "money lent," or cash items or dealings between the parties generally, since these charges are not usually such as are made in the ordinary course of business, and since other and better evidence of the transaction to which such an entry relates usually exists or might reasonably be called for by the party making the advance.[25] This rule has, however, been modified by some decisions, to the extent that where money charges are made in the banking business, or otherwise as a matter of fact in the ordinary course of business, the accounts of the party making such charges will be admissible under the shopbook rule.[26] Moreover, the effect of the decisions in some jurisdictions is to extend the rule permitting proof of the delivery of goods sold and the performance of labor by shopbooks so as to include charges of sums of money not exceeding a certain amount,[27] or small sums not definitely fixed.[28] When an account book is thus received it is evidence only of the fact of payment and not that the payment was made on a particular debt.[29]

§ 687. —— Absence of Entry as Proof of Negative

Ordinarily, in the absence of a contrary statute, book entries are not admissible to establish a negative by showing the absence of affirmative entries.

It is generally held that books of account or book entries generally are not admissible to establish a negative by showing the absence of affirmative entries.[30] This rule, however, is not universally followed. In some instances book entries have been

Pringle v. Neff, 172 A. 26, 112 Pa. Super. 547.
22 C.J. p 878 note 26.

22. Del.—Edsall v. Rockland Paper Co., 194 A. 115, 8 W.W.Harr. 495.
22 C.J. p 878 note 27.

23. Cal.—Ross v. Brusie, 11 P. 760, 70 Cal. 465.
Or.—Moore v. Knott, 12 P. 59, 14 Or. 35.

24. La.—Bland v. Paradice Colonization Co., App., 146 So. 778.
22 C.J. p 878 note 29.

25. Del.—Edsall v. Rockland Paper Co., 194 A. 115, 8 W.W.Harr. 495.
Ill.—In re Martine's Estate, 233 Ill. App. 94. See White v. Parish, 23 N.E.2d 939, 302 Ill.App. 172.
Ind.—Bank of Poneto v. Kimmel, 168 N.E. 604, 91 Ind.App. 325.
Iowa.—In re Cummins' Estate, 286 N.W. 409, 226 Iowa 1207.
N.J.—Hodgson v. Harris, 149 A. 830, 8 N.J.Misc. 188.
N.Y.—Purick v. Port Jefferson Electric Light Co., 174 N.Y.S. 285, 186 App.Div. 214—Hughes v. Eastern Cont. Co., 297 N.Y.S. 272, 164 Misc. 318—In re Clodgo's Estate, 227 N.Y.S. 690, 131 Misc. 490.
Ohio.—Sullivan v. Sullivan, 31 N.E. 2d 165, 66 Ohio App. 315—Krueger v. Frazier, 166 N.E. 151, 31 Ohio App. 28.
Pa.—Buch & Myers v. Good, 21 Pa. Dist. & Co. 474, 44 Lanc.L.Rev. 257.
Tex.—Fite v. First Nat. Bank of Seymour, Civ.App., 279 S.W. 581.
22 C.J. p 879 note 30.

Another reason for the rule is that entries of cash transactions may be fabricated with much greater safety and with less chance of the fraud being discovered than entries of goods sold or delivered, or of services rendered.—Smith v. Rentz, 30 N.E. 54, 131 N.Y. 169, 15 L.R.A. 138, reversing 14 N.Y.S. 255—In re De Simone's Estate, 270 N.Y.S. 618, 151 Misc. 87.

Receipt of money

Generally a party's book is not testimony in his own favor touching the receipt of money by him.—Barbera v. John Hancock Mut. Life Ins. Co., N.J.Sup., 21 A.2d 222.

By express statutory provisions in some jurisdictions cash items are not properly chargeable in a book account under the shopbook rule.—Edsall v. Rockland Paper Co., Del., 194 A. 115, 8 W.W.Harr. 495.

Books of account held incompetent to prove large loans.—Cross v. Amoretti, 9 P.2d 147, 44 Wyo. 175, 84 A.L.R. 140.

26. Ga.—Crump v. Bank of Toccoa, 153 S.E. 531, 532, 41 Ga.App. 505, citing **Corpus Juris.**
Hawaii.—Schuman Carriage Co. v. Paxson, 27 Hawaii 161.
Iowa.—In re Cummins' Estate, 286 N.W. 409, 226 Iowa 1207.
22 C.J. p 879 note 31.

27. Me.—Waldron v. Priest, 51 A. 235, 96 Me. 36.
22 C.J. p 879 note 32.

28. Wyo.—Lewis v. England, 82 P. 869, 14 Wyo. 128, 2 L.R.A.,N.S., 401.
22 C.J. p 879 note 33.

29. N.H.—Bailey v. Harvey, 60 N.H. 152.

30. Ala.—American Trust & Savings Bank v. Montano, 89 So. 899, 18 Ala.App. 136, certiorari denied Montano v. American Trust & Savings Bank, 89 So. 923, 206 Ala. 700.
Ky.—Lawyers' Realty Co. v. Bank of Ludlow, 76 S.W.2d 920, 256 Ky. 675.
22 C.J. p 169 note 33, p 879 note 35.
Negative evidence generally see supra § 165.

Nonpayment

A book of account is generally held inadmissible to prove, from the absence of an entry therein, that certain money was not paid.
Cal.—Lewis v. McNeal, 207 P. 1021, 58 Cal.App. 70.
Mass.—Mackintosh v. Cioppa, 139 N.E. 445, 245 Mass. 152.
48 C.J. p 720 note 26.

admitted for such a purpose,[31] and in some jurisdictions their reception for this purpose is expressly authorized by statute.[32] In any event it seems that books of account would be clearly admissible where the fact to be proved is that a particular item had not been entered therein.[33]

§ 688. —— Person Charged; Intent

As a general rule books of account, to be admissible, must contain charges by one party to the action against the other and the entries must be made with an intent to make a charge. Such books may be received to prove accounts against two or more persons jointly.

Although it has been held that where accounts between a party to the action and third persons are material, his books containing such accounts are admissible,[34] the general rule is that in order to be admissible under the shopbook rule, the book must contain charges by one party to the action against the other[35] and the entry must be made with intent to make a charge.[36] Thus books of entries of work done have been held inadmissible where the primary object of the entries was to enable the party to settle with his employees in the work and not to charge the work against the adverse party.[37]

Charge against agent. A charge in a book of original entries against an agent may be given in evidence in a suit against the principal on proof aliunde of the agency and that the transaction was made in the course of the principal's business.[38]

Charges against two or more persons jointly. Shopbooks are admissible to prove accounts against two or more persons jointly,[39] if the joint liability is established by evidence aliunde.[40] The evidence of the joint liability need not precede the admission of the books, but may be subsequently introduced.[41]

§ 689. —— Amount Charged

Charges may be of such magnitude as to be improper subjects of book accounts.

Under some statutes books of account are competent evidence to prove an account only when it does not exceed a sum specified,[42] and indeed it has been intimated apart from statute that charges may be of such magnitude as to be improper subjects of book accounts.[43]

§ 690. —— Time of Making Entry

Book entries, to be admissible, must have been made at or near the time of the transaction recorded; and entries prematurely made are generally held inadmissible.

In order to be admitted in evidence under the common-law rule admitting books of account or under the statutory provisions on that subject, the entries must appear to have been contemporaneous with,[44] or to have been made at or near, the time

31. Pa.—Klein v. F. W. Woolworth Co., 163 A. 532, 309 Pa. 320.
22 C.J. p 880 note 36.

"Where book accounts are shown to be otherwise competent, and the entries therein to be material, relevant, and evidentiary as to the issue, they are then equally competent for the purpose of proving either the negative or the affirmative of such issue."—Sharp v. Pawhuska Ice Co., 217 P. 214, 90 Okl. 211.

To show nonpayment
S.D.—Union School Furniture Co. v. Mason, 52 N.W. 671, 3 S.D. 147.
22 C.J. p 880 note 36 [a] (1)—48 C.J. p 720 note 27.

A bank's ledger sheets are admissible to show that certain checks had not been charged against defendant's account.—Veneri v. Draper, C.C.A.W.Va., 22 F.2d 33, certiorari denied 48 S.Ct. 339, 276 U.S. 633, 634, 72 L.Ed. 742.

32. Mich.—Crowley v. Atkinson's Estate, 296 N.W. 864, 297 Mich. 15.

33. Mo.—Ellsworth Coal Co. v. Quade, 28 Mo.App. 421.
22 C.J. p 880 note 37.

34. Minn.—Coleman v. Retail Lumbermen's Ins. Assoc., 79 N.W. 588, 77 Minn. 31.
22 C.J. p 880 note 38.

Where not material, such books are inadmissible.—Clabots v. Ballweber, 158 N.W. 621, 133 Minn. 400.

35. Ohio.—Petterson v. Lake, 26 N.E.2d 763, 136 Ohio St. 481.
22 C.J. p 880 note 39—30 C.J. p 1023 note 10 [b].

Books not charging defendant
A book which does not charge or purport to charge defendant is not admissible on behalf of plaintiff.—Wall v. Dovey, 60 Pa. 212—Pringle v. Neff, 172 A. 26, 112 Pa.Super. 547—In re Brown's Estate, 22 Pa.Dist. & Co. 671.

Entries held sufficient to charge defendant
(1) Ledger entries not charging defendant in his true name but in the name under which he conducts his business.—Rodehaver v. Mankel, 61 P.2d 61, 16 Cal.App.2d 597.
(2) Book account headed "Dr. Hoffman Job at Emerald Lake."—Bailey v. Hoffman, 278 P. 498, 99 Cal. App. 347.
(3) Other entries.—Woolsey v. Bohn, 42 N.W. 1022, 41 Minn. 235.

36. Neb.—Van Every v. Fitzgerald, 31 N.W. 264, 21 Neb. 36, 59 Am.R. 835.
22 C.J. p 880 note 39.

37. Neb.—Van Every v. Fitzgerald, 31 N.W. 264, 21 Neb. 36, 59 Am.R. 835.
22 C.J. p 880 note 40.

38. N.H.—Davis v. Dyer, 60 N.H. 400.
22 C.J. p 881 note 41.

39. Mass.—Box v. Welch, Quincy p 227.
Pa.—Bowers v. Still, 49 Pa. 65.
S.C.—Exum v. Davis, 44 S.C.L. 357.
22 C.J. p 881 note 42.

40. Pa.—Bowers v. Still, 49 Pa. 65.
22 C.J. p 881 note 43.

41. Pa.—Bowers v. Still, supra.

42. N.C.—Bland v. Warren, 65 N.C. 372.
22 C.J. p 881 note 45.

43. Mass.—Bustin v. Rogers, 11 Cush. 346.
Pa.—Corr v. Seller, 100 Pa. 169, 49 Am.R. 370.

44. Ala.—Brett v. Dean, 196 So. 881, 239 Ala. 675.
Ark.—Bush v. Taylor, 207 S.W. 226, 136 Ark. 554.
Cal.—Argue v. Monte Regio Corporation, 2 P.2d 54, 115 Cal.App. 575.
Mo.—Kliethermes Motor Co. v. Cole

of[45] the transaction to be proved. The entries, however, need not be made at the exact time of the occurrence to which they relate, or even on the same day,[46] but it is sufficient if they are made within a reasonable time thereafter,[47] in the ordinary course of the business of the party making them.[48] They must be in the nature of res gestæ,[49] or at least written soon enough after the event to render it unlikely that they were the result of a design to defraud, concocted by the entrant after the occurrence.[50] While some early cases asserted that the entries must be made not later than the day after the transaction in order to be admissible,[51] this view is opposed by other cases in which a longer delay has been held not fatal,[52] and the generally accepted view is that the law does not fix any precise time within which the entries must be made in order to be admissible as original entries, but every case must depend on its own peculiar facts, regard being had to the situation of the parties, the kind of business, the mode of conducting it, the time and manner of making the entry, and the other circumstances of the case,[53] and the determination of the question of admissibility must necessarily be left largely to the judgment and discretion of the trial judge.[54]

With respect to transcribed entries the rule is the same as with respect to original entries, and it is sufficient if the transfer was made within a reasonable time so that it may appear to have taken place while the memory of the facts was recent or the source from which a knowledge thereof was derived was unimpaired.[55]

Where a transaction is continuous, extending over several days, an entry made on its completion is admissible.[56]

Premature entries. The entry of a charge of the price of goods is not as a general rule admissible if made before the sale was completed,[57] and accordingly entries made before the delivery of the goods to which they relate, although at the time of

Motor Service, App., 102 S.W.2d 819—Gordon & Koppel Clothing Co. v. New York Cent. R. Co., App., 285 S.W. 755, 756, citing **Corpus Juris**—Jungkind Photo Supply Co. v. Yates, App., 257 S. W. 820—In re Greenwood's Estate, 208 S.W. 635, 201 Mo.App. 39.
Pa.—Cox v. Cox, 29 Del.Co. 435.
22 C.J. p 881 note 47.

45. Ala.—Grist v. Carswell, 165 So. 102, 231 Ala. 442.
Cal.—Warren v. Hiltscher, 295 P. 536, 111 Cal.App. 318.
Del.—Edsall v. Rockland Paper Co., 194 A. 115, 8 W.W.Harr. 495.
Ind.—Equitable Life Assur. Soc. of the U. S. v. Campbell, 150 N.E. 31, 85 Ind.App. 450, rehearing denied 151 N.E. 682, 85 Ind.App. 450.
Iowa.—Shea v. Biddle Improvement Co., 176 N.W. 948, 188 Iowa 952.
Mo.—Dameron v. Harris, 219 S.W. 954, 281 Mo. 247—In re Greenwood's Estate, 208 S.W. 635, 201 Mo.App. 39.
Nev.—Home Lumber & Coal Co. v. Hartford Mining Co., 81 P.2d 1063, 58 Nev. 361, rehearing denied 83 P.2d 1049, 58 Nev. 361.
N.J.—Swing v. Sparks, 7 N.J.Law 59.
Ohio.—Worland v. McGill, 160 N.E. 478, 26 Ohio App. 442.
Okl.—Sharp v. Pawhuska Ice Co., 217 P. 214, 90 Okl. 211.
Or.—Pacific Trading Co. v. Sun Ins. Office, 25 P.2d 1052, 145 Or. 211—Radtke v. Taylor, 210 P. 863, 105 Or. 559, 27 A.L.R. 1423.
Pa.—Foster v. Wehr, 173 A. 712, 114 Pa.Super. 101—Willert v. Amthor, 22 Erie Co. 1.
Tex.—J. M. Radford Grocery Co. v. Porter, Civ.App., 17 S.W.2d 145, error dismissed—Warren v. North American Car Co., Civ.App., 294 S.W. 301.
Va.—Ratliff v. Jewell, 149 S.E. 409, 153 Va. 315, 67 A.L.R. 1541.
Wash.—Hewitt v. Jones, 271 P. 76, 77, 149 Wash. 360, citing **Corpus Juris.**
W.Va.—Martufi v. Daniels, 129 S.E. 709, 99 W.Va. 673—Di Bacco v. Benedetto, 95 S.E. 601, 82 W.Va. 84.
22 C.J. p 881 note 48.

Entries in gross covering a considerable period of time are not within the shopbook rule since such entries are not regularly made at the time the transaction recorded took place.—Edsall v. Rockland Paper Co., 194 A. 115, 8 W.W.Harr., Del., 495.

Delay held too great
(1) Eighteen months.—Bartolucci v. Dal Bianco, 228 Ill.App. 113.
(2) Two months.—In re Greenwood's Estate, 208 S.W. 635, 201 Mo. App. 39.

46. Iowa.—Shea v. Biddle Improvement Co., 176 N.W. 948, 188 Iowa 952.
22 C.J. p 881 note 50.

47. Iowa.—Shea v. Biddle Improvement Co., supra.
Mo.—In re Greenwood's Estate, 208 S.W. 635, 201 Mo.App. 39.
Okl.—Sharp v. Pawhuska Ice Co., 217 P. 214, 90 Okl. 211.
22 C.J. p 881 note 51.

48. U.S.—Burley v. German American Bank, N.Y., 4 S.Ct. 341, 111 U. S. 216, 28 L.Ed. 406.
Pa.—Walter v. Bollman, 8 Watts 544.
22 C.J. p 882 note 52.

49. Mo.—Dameron v. Harris, 219 S. W. 954, 281 Mo. 247—Kliethermes Motor Co. v. Cole Motor Service, App., 102 S.W.2d 819.
22 C.J. p 882 note 53.

50. Mo.—Dameron v. Harris, 219 S. W. 954, 281 Mo. 247.

51. Fla.—Grady v. Thigpin, 6 Fla. 668.
22 C.J. p 882 note 54.

52. N.J.—Bay v. Cook, 22 N.J.Law 343.
22 C.J. p 882 note 55.

53. Mo.—Dameron v. Harris, 219 S. W. 954, 281 Mo. 247—Kliethermes Motor Co. v. Cole Motor Service, App., 102 S.W.2d 819—In re Greenwood's Estate, 208 S.W. 635, 201 Mo.App. 39.
22 C.J. p 882 note 56.

54. Mass.—Barker v. Haskell, 9 Cush. 218.

55. Iowa.—Shea v. Biddle Improvement Co., 176 N.W. 948, 188 Iowa 952.
Kan.—Stanley v. Wickam, 211 P. 1117, 1118, 112 Kan. 628, citing **Corpus Juris.**
Mo.—Jungkind Photo Supply Co. v. Yates, App., 257 S.W. 820.
Pa.—Willert v. Amthor, 22 Erie Co. 1.
22 C.J. p 882 note 58.

Thirty days lapse of time held not too great.—Stanley v. Wickam, 211 P. 1117, 112 Kan. 628.

56. Cal.—Le Franc v. Hewitt, 7 Cal. 186.
Pa.—Bolton's Appeal, 3 Grant 204.
22 C.J. p 882 note 59.

57. Pa.—Laird v. Campbell, 100 Pa. 159.
22 C.J. p 882 note 60.

the sale, have been held not competent;[58] but it has also been held that when the entry in a daybook is made at the time when the articles ordered are finished and ready for delivery, although they are not delivered until afterward, such book and entry may be used as evidence.[59] An entry with respect to goods sold, made when the purchaser has selected the articles and had them set aside to be sent or called for, is admissible,[60] and entries made by the vendor of goods to be delivered at a distance, at the time when they are delivered to the carrier to be delivered by it, are competent evidence of the sale and delivery.[61] It has been held that an entry begun when goods are ordered, but while their quantity and value are yet uncertain, and filled up after the particulars have been ascertained and the goods delivered, is admissible.[62] The book of a tailor to whom cloth was delivered to make a garment has been held admissible in evidence, where he testified that it was his book of original entries, and that the several entries were made at the time of the date affixed thereto, although such entries were made immediately after he had cut out the work and delivered it to his journeyman for completion.[63]

§ 691. —— Impeachment of Credit of Books

The credit of books of account may be impeached by competent evidence.

It has been laid down that one who swears to his original books of entry puts in issue his general character for truth and veracity[64] and the general character of his books for honesty and accuracy,[65] and invites attack on either or both. Where books were kept by one who is absent from the jurisdiction at the time when the books are offered in evidence the character of such person with respect to honesty may, it has been held, be proved;[66] but evidence to show that the general moral character of the party whose books are sought to be introduced is bad cannot be received for the purpose of discrediting the books;[67] and it has also been held that evidence is not admissible to show that the party is generally reputed to keep inaccurate, false, and fraudulent accounts,[68] although there is some authority for a contrary view.[69] On a question as to the correctness of books, testimony as to the drinking habits of the party's bookkeeper has been held admissible.[70] The party against whom a book of account is admitted in evidence may show the general character of the book by pointing to charges and entries affecting other persons and calling witnesses to prove that these entries are false and fraudulent.[71] Direct evidence of inaccuracy in making book entries destroys their credibility,[72] and if book accounts are shown to have been irregularly and inaccurately kept, and fail to disclose known credits, they are insufficient to support a judgment for the amount shown by them to be due.[73]

§ 692. Entries by Clerks and Third Persons

a. By clerks of party litigant in general
b. By third persons in general
c. By clerk or third person not available as witness

a. By Clerks of Party Litigant in General

As a general rule a party's books of account may be admitted in evidence even though the entries therein are made by his clerks, provided a proper foundation is laid.

As a general rule, and under statutes adopted in many jurisdictions, a party's books of account may be received as evidence in his favor even though the entries therein were made by his clerks, provided a proper foundation for their admission is laid.[74]

58. Pa.—Rhoads v. Gaul, 4 Rawle 404, 27 Am.D. 277.
22 C.J. p 882 note 61.

59. Pa.—Wollenweber v. Ketterlinus, 17 Pa. 389.

60. Pa.—Parker v. Donaldson, 2 Watts & S. 9.

61. Pa.—Keim v. Rush, 5 Watts & S. 377.

62. Pa.—Benners v. Maloney, 3 Phila. 57.
But there is also authority for the exclusion of such an entry.—Shannon v. Starkey, 5 Phila., Pa., 153.

63. Pa.—Kaughley v. Brewer, 16 Serg. & R. 133, 16 Am.D. 554.

64. Pa.—Funk v. Ely, 45 Pa. 444.
22 C.J. p 883 note 68.

65. Pa.—Barber v. Bull, 7 Watts & S. 391.
22 C.J. p 883 note 69.

66. Pa.—Crouse v. Miller, 10 Serg. & R. 155—White's Est., 11 Phila. 100.

67. N.Y.—Tomlinson v. Borst, 30 Barb. 42.
Wis.—Nickerson v. Morin, 3 Wis. 243.

68. Conn.—Roberts v. Ellsworth, 11 Conn. 290.
Vt.—Hitt v. Slocum, 37 Vt. 524.

69. Ohio.—Sheridan v. Tenner, 5 Ohio Cir.Ct. 19, 3 Ohio Cir.Dec. 10.

70. Tex.—Seiber v. Johnson Mercantile Co., 90 S.W. 516, 40 Tex. Civ.App. 600.

71. Minn.—First Nat. Bank v. Schroder, 221 N.W. 62, 64, 175 Minn. 341 citing Corpus Juris.
22 C.J. p 883 note 75.

72. Pa.—McGarry's Est., 9 Pa.Dist. 172.

73. Va.—Barnes v. Barnes, 56 S.E. 172, 106 Va. 319.

74. Ala.—Bolling v. Fannin, 12 So. 59, 97 Ala. 619—Hartford Fire Ins. Co. v. Owen, 116 So. 310, 22 Ala. App. 414.
Cal.—Patrick v. Titzlaff, 189 P. 115, 46 Cal.App. 243.
Ky.—Johnson's Adm'r v. Pigg, 47 S.W.2d 63, 242 Ky. 631.
W.Va.—Di Bacco v. Benedetto, 95 S.E. 601, 82 W.Va. 84.

Account kept by agent

(1) In lessor's action for rent, original ledger kept by agent managing lessor's property, in regular course of business, is admissible under statute authorizing admission of records made in the regular course of business.—Funk v. Modo Lora

Indeed under the early common law the books of a party, to be admissible, must have been kept by a clerk or other disinterested party; and if the entries were made by the party himself the books were inadmissible.[75]

b. By Third Persons in General

Under the modern tendency, book entries made by a third person in the regular course of business may be received in evidence to show the facts recorded after a proper foundation has been laid.

While the general rule is that book entries of a third person of transactions between such third person and others not parties to the litigation, or one of the parties litigant, are not admissible because they are hearsay and res inter alios acta,[76] the rule is subject to exceptions[77] and the modern tendency is to widen the door so as to permit the admission of such entries when made in the regular course of business.[78] Thus it is generally held that book entries made by a third person in the regular course of business may be received in evidence to show the facts thus recorded after a proper foundation has been laid,[79] at least where the party against whom the entries are sought to be admitted is shown to have some connection with, or knowledge of, the entries,[80] and this is particularly true when the

Realty, 260 N.Y.S. 844, 145 Misc. 805.

(2) But books over which a party had no control are not admissible as shopbooks of such party kept by his agent, even though the person by whom they were kept was actually the agent of the party.—McKeen v. Providence County Sav. Bank, 54 A. 49, 24 R.I. 542.

Admissible in connection with entrant's testimony

Book entries made by clerks are very generally held admissible in connection with the testimony of the clerk making the entries.—Riddle v. Riddle, 175 N.E. 757, 38 Ohio App. 132—22 C.J. p 885 note 88.

75. Or.—Radtke v. Taylor, 210 P. 863, 105 Or. 559, 27 A.L.R. 1423.

This rule prevails in Maryland

Md.—Deland Min. & Mill Co. v. Hanna, 76 A. 850, 112 Md. 528.

22 C.J. p 864 note 48.

76. Colo.—Hobbs v. Breen, 220 P. 997, 74 Colo. 277.

Ky.—Gus Dattilo Fruit Co. v. Louisville & N. R. Co., 37 S.W.2d 856, 238 Ky. 322.

Mont.—Kommers v. Palagi, 108 P.2d 208, 111 Mont. 293.

Or.—Radtke v. Taylor, 210 P. 863, 105 Or. 559, 27 A.L.R. 1423.

Pa.—William Zoller Co. v. Hartford Fire Ins. Co., 116 A. 359, 272 Pa. 386.

22 C.J. p 861 note 32.

Res inter alios generally see supra §§ 576–577.

77. Ky.—Gus Dattilo Fruit Co. v. Louisville & N. R. Co., 37 S.W.2d 856, 238 Ky. 322.

Or.—Radtke v. Taylor, 210 P. 863, 105 Or. 559, 27 A.L.R. 1423.

78. Pa.—William Zoller Co. v. Hartford Fire Ins. Co., 116 A. 359, 272 Pa. 386.

79. Ala.—Little v. Thomas, 85 So. 490, 204 Ala. 66.

Colo.—Hobbs v. Breen, 220 P. 997, 74 Colo. 277.

Ky.—Baskett v. Rudy, 217 S.W. 112, 186 Ky. 208.

Mo.—Short v. White, 133 S.W.2d 1039, 234 Mo.App. 499.

Pa.—Knina v. Levine & Son, 86 Pa. Super. 92.

"Independent of and in addition to the 'shop book' rule of common law and statute, which applies only to the account books in a strict sense of parties to the action, there is another, not confined to 'account books,' which admits in evidence entries made by a stranger to the action, in the regular course of business, for the purpose of recording the facts of transactions as they occur and under circumstances making for accuracy."—Tiedt v. Larson, 219 N.W. 905, 174 Minn. 558.

"Records and books of account of third persons are competent as evidence where they are material, relate to the subject matter of the action, and after proof has been submitted that such records are correct, and were made at or near the time of the transaction to which they relate."—Shefts Supply v. Cole, 36 P. 2d 754, 169 Okl. 259.

Entries in books of certain corporations when kept in course of ordinary business are admissible on issues between third persons.—Gus Dattilo Fruit Co. v. Louisville & N. R. Co., 37 S.W.2d 856, 238 Ky. 322.

Particular books of third persons held admissible.

(1) Book showing number of trees cut and counted by third person and assistants.—J. H. Leavenworth & Son v. Hunter, 116 So. 593, 150 Miss. 245.

(2) Deed book.—Stonum v. Schultz, Tex.Civ.App., 138 S.W.2d 825.

(3) Mill book.—Gardner v. Wilber, 44 N.W. 628, 75 Wis. 601.

(4) Register of bills receivable and payable.—Tiedt v. Larson, 219 N.W. 905, 174 Minn. 558.

(5) Weekly earning cards.—Jennings v. U. S., C.C.A.Ga., 73 F.2d 470.

Admissible in connection with entrant's testimony

Entries by third persons are very generally held admissible in connection with the testimony of the persons making them.—International & G. N. R. Co. v. Startz, 94 S.W. 207, 42 Tex.Civ.App. 85—22 C.J. p 885 note 82.

Rule not followed

In a consignee's action against a carrier for loss during transit, regular book entries of the shipper as to material matters involved in the dispute are inadmissible.—Coad v. Pennsylvania Ry. Co., 175 N.W. 344, 187 Iowa 1025.

80. **Connection or knowledge sufficiently shown**

In election contest involving allegedly excessive expenditures by nominee for office of sheriff, where nominee paid for some of items included in account kept by brewery, beer was delivered to places at which nominee was present, and most of beer was ordered and received by nominee's deputies, the ledger sheets forming the account were not inadmissible as "hearsay".—Kommers v. Palagi, 108 P.2d 208, 111 Mont. 293.

Connection or knowledge not shown

(1) In proceedings for dismissal of policeman for receiving gratuities for recommending clients to a lawyer, entries made by the lawyer or his clerk on cards kept as office records and notations on check stubs were inadmissible under statute authorizing admission in evidence of records of transactions and events made in regular course of business in absence of showing that policeman had connection with, or knowledge of, the entries.—Roge v. Valentine, 7 N.Y.S.2d 958, 255 App.Div. 475, reargument denied 9 N.Y.S.2d 900, 256 App.Div. 817, reversed on other grounds 20 N.E.2d 751, 280 N.Y. 268, reargument denied 21 N.E.2d 695, 280 N.Y. 809.

(2) In action for price of goods, which defendant claimed were ordered for another company, ledger of credit clearing house, showing its receipt from plaintiff of claim in same amount against latter company, was properly excluded, in ab-

entrant is unavailable as a witness, see infra subdivision c of this section, or where the entries constitute declarations against interest, see infra § 695.

Books of particular persons. The rule permitting book entries made by a third person in the regular course of business to be received in evidence has been applied, among other instances, to the books of a bank,[81] broker,[82] carrier,[83] college,[84] and stockyard company.[85]

c. By Clerk or Third Person Not Available as Witness

Ordinarily book entries made by a clerk of a party litigant or any third person in the ordinary course of business are competent evidence of the facts thus recorded, after a proper foundation is laid, where the entrant is unavailable as a witness.

The general rule is well settled that an entry made contemporaneously with the transaction by a clerk of a party to the cause, or by any third person in the ordinary course of his business or vocation, with no interest to misrepresent, before any controversy or question has arisen, and in a book produced from the proper custody, is competent evidence, after the death of the person who made the entry of the facts thus recorded.[86] A similar rule has been applied where the person who made the entry has since become insane,[87] or is beyond the jurisdiction of the court, at least if his absence is permanent and not temporary,[88] or generally, it has been said, where it has become impossible to procure his testimony, the cause of such impossibility being immaterial.[89] Such entries are received as an exception to the hearsay rule because of necessity, the entrant being unavailable as a witness,[90] and because of their circumstantial trustworthiness.[91] Under this rule it is immaterial whether the entry was made in the course of the entrant's personal business or while engaged in the performance of the business of another.[92] The fact that the entry was made in the performance of a duty to another, however, is strong evidence of its truthfulness.[93]

Statute prohibiting admission of books. Notwithstanding a statute prohibiting the admission of a merchant's books in his own favor, it has been held that book entries made by a merchant's clerk or employee who has since become incapable of giving testimony, as by reason of death or insanity, may be received in evidence.[94]

§ 693. —— Requisites to Admissibility

a. In general
b. Mode of proving entries

a. In General

In order to lay a foundation for the admission of

sence of competent evidence that plaintiff sent in claim against such company for collection, and offer to connect it with account sued on.—Bluff City Shoe Co. v. Levy, Mo. App., 273 S.W. 1086.

81. Colo.—Hobbs v. Breen, 220 P. 997, 74 Colo. 277.
Mich.—Union Trust Co. v. Tighe, 241 N.W. 878, 258 Mich. 201.
Miss.—Hayes v. National Surety Co., 153 So. 515, 169 Miss. 676.
Mo.—Lyons v. Corder, 162 S.W. 606, 253 Mo. 539—Short v. White, 133 S.W.2d 1039, 234 Mo.App. 499.
N.C.—Edgerton v. Perkins, 158 S.E 197, 200 N.C. 650.
Okl.—Harsha v. Mock, 281 P. 763, 139 Okl. 181.
Tex.—Ellis v. Haynes, Civ.App., 216 S.W. 249.

82. Ill.—In re Moorhouse's Estate, 249 Ill.App. 432.
Mo.—Prebe v. Quincy, O. & K. C. R. Co., App., 260 S.W. 816.

83. U.S.—E. I. Du Pont de Nemours & Co. v. Tomlinson, C.C.A.N.C., 296 F. 634—Whitehurst v. U. S., C.C. A.Va., 272 F. 46.
Colo.—Hobbs v. Breen, 220 P. 997, 74 Colo. 277.
Pa.—William Zoller Co. v. Hartford Fire Ins. Co., 116 A. 359, 272 Pa. 386—Pinkerton's Nat. Detective Agency v. Rosedale Silk Co., 184 A. 282, 121 Pa.Super. 496.

84. Cal.—In re Bell's Estate, 243 P 423, 198 Cal. 32.

85. Pa.—William Zoller Co. v. Hartford Fire Ins. Co., 116 A. 359, 272 Pa. 386.

86. Ky.—Gus Dattilo Fruit Co. v. Louisville & N. R. Co., 37 S.W.2d 856, 238 Ky. 322.
N.H.—Lebrun v. Boston & M. R. R., 142 A. 128, 83 N.H. 293.
N.Y.—In re Barney's Will, 174 N.Y. S. 242, 185 App.Div. 782.
Tex.—Lancaster v. Norris, Civ.App., 271 S.W. 401, reversed on other grounds Norris v. Lancaster, Com. App., 280 S.W. 574.
22 C.J. p 883 note 78.

Such entries are not primary evidence, but are treated as secondary evidence of the acts or facts recorded.—Grossman v. Delaware Electric Power Co., 155 A. 806, 4 W.W.Harr., Del., 521.

87. Del.—Grossman v. Delaware Electric Power Co., supra.
22 C.J. p 884 note 79.

88. Del.—Grossman v. Delaware Electric Power Co., supra.
Ky.—Gus Dattilo Fruit Co. v. Louisville & N. R. Co., 37 S.W.2d 856, 238 Ky. 322.
22 C.J. p 884 note 80.

89. Del.—Grossman v. Delaware Electric Power Co., 155 A. 806, 4 W.W.Harr. 521.
R.I.—James C. Goff Co. v. Lunn, 148 A. 673, 49 R.I. 455.
Tex.—Lancaster v. Norris, Civ.App., 271 S.W. 401, reversed on other grounds Norris v. Lancaster, Com. App., 280 S.W. 574.
22 C.J. p 884 note 81.

Whereabouts of entrant unknown
Ky.—Gus Dattilo Fruit Co. v. Louisville & N. R. Co., 37 S.W.2d 856, 238 Ky. 322.
22 C.J. p 884 note 81 [a].

90. N.H.—Lebrun v. Boston & M. R. R., 142 A. 128, 83 N.H. 293.

91. **The regularity of a record entry** constitutes one circumstance acceptable as presumptive evidence of its truthfulness and as a practical substitute for the conventional test of cross-examination.—Lebrun v. Boston & M. R. R., supra.

92. N.H.—Lebrun v. Boston & M. R. R., supra.
But it has also been held that the rule relates only to entries made by an agent in the discharge of his duty toward his principal and does not apply to entries made by a principal. —Watts v. Shewell, 31 Ohio St. 331.

93. N.H.—Lebrun v. Boston & M. R. R., 142 A. 128, 83 N.H. 293.

94. La.—Royal Products v. Johnson, App., 191 So. 329.
22 C.J. p 883 note 78.

entries by clerks and third persons in the regular course of business, the facts required by law as requisites to admissibility must be established.

In order to lay a foundation for the admission of entries by clerks and third persons in the regular course of business, the facts required by law as requisites to admissibility must be established.[95] Accordingly it is usually required that the entries be properly identified or authenticated,[96] and generally their completeness[97] and correctness,[98] as

95. Mo.—Bedwell v. Capitol Mut. Ass'n, App., 66 S.W.2d 155.
N.C.—Branch v. Ayscue, 119 S.E. 201, 186 N.C. 219.
N.D.—Baldwin Piano Co. v. Wylie, 247 N.W. 397, 63 N.D. 216.
Philippine.—U. S. v. Dayutal, 4 Philippine 93.
Tex.—Warren v. North American Car Co., Civ.App., 294 S.W. 301, 304, quoting **Corpus Juris**.
22 C.J. p 886 note 95.

Sufficiency of proof question for court

(1) The sufficiency of the preliminary proof to justify the admission of the book entries is a question for the court to determine.—Fargo Mercantile Co. v. Johnson, 181 N.W. 953, 47 N.D. 304.

(2) In the determination of this question the court has a large discretion.
U.S.—St. Paul Fire & Marine Ins. Co. v. American Food Products Co., C.C.A.Ark., 21 F.2d 733, certiorari denied 48 S.Ct. 560, 277 U.S. 597, 72 L.Ed. 1006.
Ark.—St. Louis, I. M. & S. R. Co. v. Henderson, 21 S.W. 878, 57 Ark. 402.
Minn.—Young v. Yeates, 201 N.W. 421, 161 Minn. 278.
Pa.—Ehmling v. D. L. Ward Co., 124 A. 181, 279 Pa. 527.

Preliminary proof held sufficient
Ala.—Atlanta Life Ins. Co. v. Bolden, 194 So. 653, 239 Ala. 231—Elliott v. Standard Oil Co. of Louisiana, 167 So. 295, 232 Ala. 142—National Surety Co. v. Julian, 150 So. 474, 227 Ala. 472—Denson v. Kirkpatrick Drilling Co., 144 So. 86, 225 Ala. 473—Warren Webster & Co. v. Zac Smith Stationery Co., 130 So. 545, 222 Ala. 41—Bull v. O'Riley, 112 So. 437, 216 Ala. 73—Slaughter v. Green, 87 So. 358, 205 Ala. 250.
Ariz.—School Dist. No. 1, Apache County, v. Whiting, 107 P.2d 1075.
Cal.—Koeberle v. Friganza, 226 P. 85, 66 Cal.App. 323.
Ga.—Crump v. Bank of Toccoa, 153 S.E. 531, 41 Ga.App. 505.
Ill.—Stresenreuter Bros. v. Bowes, 233 Ill.App. 143.
Mich.—Siewek v. F. Joseph Lamb Co., 241 N.W. 807, 257 Mich. 670—Master Spark Co. v. Hickerson, 179 N.W. 232, 211 Mich. 411.
Mo.—Kansas City Wholesale Grocery Co. v. H. T. Poindexter & Sons Merchandise Co., 107 S.W.2d 841, 232 Mo.App. 378—Reutner, Klaus & Co. v. Nelson Chesman & Co., App., 9 S.W.2d 655.
N.C.—Breneman Co. v. Cunningham, 175 S.E. 829, 207 N.C. 77—Edgerton v. Perkins, 158 S.E. 197, 200 N.C. 650.
Okl.—Gravelle v. Pollock Stores Co. of Talihina, 267 P. 473, 131 Okl. 20.
Pa.—Davis Mill Work Co. v. North Sales Co., 35 Luz.Leg.Reg. 80.
Tex.—Stonum v. Schultz, Civ.App., 138 S.W.2d 825—Chapman v. Nieman, Civ.App., 276 S.W. 302.
Utah.—G. S. Wood Mercantile Co. v. Dougall, 114 P.2d 202.
Wash.—Gourley v. Hatten, 84 P.2d 1014, 197 Wash. 305.

Preliminary proof held insufficient
Ala.—Woodmen of the World v. Maynor, 96 So. 352, 209 Ala. 143—Brown v. Grayson, 86 So. 121, 17 Ala. App. 463.
Ga.—Eatonton Oil & Auto Co. v. Greene County, 185 S.E. 296, 53 Ga.App. 145, conforming to certified question 181 S.E. 758, 181 Ga. 47.
Ky.—Baskett v. Rudy, 217 S.W. 112, 186 Ky. 208.
N.H.—Mason v. Dover, S. & R. St. Ry., 109 A. 841, 79 N.H. 300.
N.Y.—Roge v. Valentine, 20 N.E.2d 751, 280 N.Y. 268, reversing 7 N.Y.S.2d 958, 255 App.Div. 475, reargument denied 9 N.Y.S.2d 900, 256 App.Div. 817, and reargument denied 21 N.E.2d 695, 280 N.Y. 809.

96. Ga.—Georgia State Bank v. Harden, 124 S.E. 68, 32 Ga.App. 300.
Md.—Cohen v. Bogatzky, 131 A. 31, 149 Md. 134.
Mo.—Gordon & Koppel Clothing Co. v. New York Cent. R. Co., App., 285 S.W. 755.
Philippine.—Nolan v. Salas, 7 Philippine 1.
Vt.—Ravine House Co. v. Bradstreet, 148 A. 481, 102 Vt. 370.

Identification or authentication held sufficient
Miss.—Hayes v. National Surety Co., 153 So. 515, 169 Miss. 676.
Okl.—Cassil v. Carter, 223 P. 685, 98 Okl. 49—Blackert v. Lankford, 176 P. 532, 74 Okl. 61.
Tex.—American Surety Co. of New York v. West State Bank, Civ.App., 4 S.W.2d 312, error refused.

Extraneous evidence not required
Where the book of deceased agent, on an inspection thereof, sufficiently discloses the purpose for which it was kept and the entries therein made, it is not necessary to prove by extraneous evidence that the book is the account book of the agent.—Dow v. Sawyer, 29 Me. 117.

97. Mich.—McCannan v. Tolfree, 198 N.W. 197, 227 Mich. 15.

98. Ill.—Le Roy State Bank v. J. Keenan's Bank, 169 N.E. 1, 337 Ill. 173, reversing 253 Ill.App. 51—Harris v. Young, 131 N.E. 670, 298 Ill. 319, reversing 215 Ill.App. 489.
Md.—Cohen v. Bogatzky, 131 A. 31, 149 Md. 134.
Mich.—Collateral Liquidation v. Lippman, 263 N.W. 747, 273 Mich. 586—McCannan v. Tolfree, 198 N.W. 197, 227 Mich. 15.
Minn.—Mendota State Bank v. Riley, 281 N.W. 767, 203 Minn. 409.
Mo.—Short v. White, 133 S.W.2d 1039, 234 Mo.App. 499—Kliethermes Motor Co. v. Cole Motor Service, App., 102 S.W.2d 819—Bedwell v. Capitol Mut. Ass'n, App., 66 S.W.2d 155, 157, citing **Corpus Juris**—Gordon & Koppel Clothing Co. v. New York Cent. R. Co., App., 285 S.W. 755—Rodeman v. Smith, 245 S.W. 1087, 211 Mo.App. 697—Miller v. Quincy, O. & K. C. R. Co., 225 S.W. 116, 205 Mo.App. 463.
Mont.—Spurgeon v. Imperial Elevator Co., 43 P.2d 891, 99 Mont. 432—Meagher v. Harrington, 254 P. 432, 78 Mont. 457.
N.H.—Williams v. Williams, 182 A. 172, 87 N.H. 430.
N.Y.—Shmargon v. Rosenstein, 182 N.Y.S. 343, 192 App.Div. 143.
Okl.—Shefts Supply v. Cole, 36 P.2d 754, 169 Okl. 259—Schaap v. Williams, 225 P. 910, 99 Okl. 21.
Tex.—Devlin v. Heid Bros., Civ.App., 21 S.W.2d 746, error dismissed—J. M. Radford Grocery Co. v. Porter, Civ.App., 17 S.W.2d 145, error dismissed—Warren v. North American Car Co., Civ.App., 294 S.W. 301, 304, quoting **Corpus Juris**—Midkiff v. Benson, Civ.App., 235 S.W. 292—Lake v. Jones Lumber Co., Civ.App., 233 S.W. 1011—Panhandle & S. F. Ry. Co. v. Arnett, Civ.App., 219 S.W. 232, dismissed for want of jurisdiction.
Vt.—Ravine House Co. v. Bradstreet, 148 A. 481, 102 Vt. 370.
Wis.—In re Kayser's Estate, 208 N.W. 895, 190 Wis. 189.
22 C.J. p 885 note 88 [c], p 886 note 97.

Correctness presumed
Where the clerk of plaintiff testified that he made practically all the sales and made all the entries coincident with the sales, and cross-examination brought out nothing to show that he made false entries, it will be presumed that the entries were correct.—Adkins v. Hastings, 114 A. 288, 138 Md. 454.

well as the method of making them,[99] must be established. Moreover, it must appear that they were regularly and fairly made[1] at or near the time of the transactions recorded[2] by one authorized to make them;[3] that they were made in the usual course of business,[4] and if made by a clerk, in the performance of his duty;[5] that the business in which they were made is of a character in which it is proper and customary to make such entries;[6] that the person making the entry had no motive or interest to misrepresent the facts;[7] and that the entries were made by a person having knowledge of the facts entered,[8] or that information was com-

Proof of absolute correctness not required

Where the original character of the books is proved, and it is shown that they have been regularly kept following the usual course of business of the person producing them, an affirmative oath that they are absolutely correct is not required to render them admissible.—Patrick v. Tetzlaff, 189 P. 115, 46 Cal.App. 243.

Correctness of transcription

Where entries are transcribed from memoranda, direct testimony of the correctness of the transcription is not required if correctness can fairly be inferred from the testimony of the bookkeeper making the transcription.—Dean v. Thames, 175 So. 257, 234 Ala. 388.

Justness of entries

Evidence showing the entries to be correct is sufficient to satisfy a statutory requirement that the entries be shown to be just.—Blumer Brewing Corporation v. Mayer, 269 N.W. 693, 222 Wis. 540, 111 A.L.R. 1087.

99. Mo.—Bedwell v. Capitol Mut. Ass'n, App., 66 S.W.2d 155—Jungkind Photo Supply Co. v. Yates, App., 257 S.W. 820.

When entry was made must be shown.—Bedwell v. Capitol Mut. Ass'n, Mo.App., 66 S.W.2d 155, 157, citing **Corpus Juris**—22 C.J. p 886 note 98.

1. Mo.—Gordon & Koppel Clothing Co. v. New York Cent. R. Co., App., 285 S.W. 755.
Tex.—J. M. Radford Grocery Co. v. Porter, Civ.App., 17 S.W.2d 145, error dismissed—Warren v. North American Car Co., Civ.App., 294 S. W. 301—Lancaster v. Norris, Civ. App., 271 S.W. 401, reversed on other grounds Norris v. Lancaster, Com.App., 280 S.W. 574.
22 C.J. p 886 note 3.

Part of entries not regularly made

The admissibility of entries regularly made is not affected by the fact that the book may contain other entries which do not appear to have been so made.—Armstrong v. Landers, 42 A. 617, 17 Del. 449.

2. Cal.—Storm & Butts v. Lipscomb, 3 P.2d 567, 117 Cal.App. 6.
Ill.—Harris v. Young, 131 N.E. 670 298 Ill. 319, reversing 215 Ill.App. 489.
Ind.—Equitable Life Assur. Soc. of the U. S. v. Campbell, 150 N.E. 31, 85 Ind.App. 450, rehearing denied 151 N.E. 682, 85 Ind.App. 450.
Md.—Cohen v. Bogatzky, 131 A. 31, 149 Md. 134.
Mich.—Collateral Liquidation v. Manning, 283 N.W. 691, 287 Mich. 568—Collateral Liquidation v. Lippman, 263 N.W. 747, 273 Mich. 586.
Mo.—Short v. White, 133 S.W.2d 1039, 234 Mo.App. 499—Kliethermes Motor Co. v. Cole Motor Service, App., 102 S.W.2d 819—Bedwell v. Capitol Mut. Ass'n, App., 66 S.W. 2d 155—Gordon & Koppel Clothing Co. v. New York Cent. R. Co., App., 285 S.W. 755—Chemical Bldg. Bar Co. v. Werbe, App., 263 S.W. 1035 —Jungkind Photo Supply Co. v. Yates, App., 257 S.W. 820.
Nev.—Home Lumber & Coal Co. v. Hartford Mining Co., 81 P.2d 1063, 58 Nev. 361, rehearing denied 83 P. 2d 1049, 58 Nev. 361.
Okl.—Shefts Supply v. Cole, 36 P. 2d 754, 169 Okl. 259—Schaap v. Williams, 225 P. 910, 99 Okl. 21—Cassil v. Carter, 223 P. 685, 98 Okl. 49.
Tex.—J. M. Radford Grocery Co. v. Porter, Civ.App., 17 S.W.2d 145, error dismissed—Warren v. North American Car Co., Civ.App., 294 S. W. 301—Panhandle & S. F. Ry. Co. v. Arnett, Civ.App., 219 S.W. 232, dismissed for want of jurisdiction.
Wis.—In re Kayser's Estate, 208 N. W. 895, 190 Wis. 189.
22 C.J. p 886 note 2.

3. Tex.—J. M. Radford Grocery Co. v. Porter, Civ.App., 17 S.W.2d 145, error dismissed—Warren v. North American Car Co., Civ.App., 294 S.W. 301.

4. Cal.—Burke v. John E. Marshall, Inc., App., 108 P.2d 738—Kains v. First Nat. Bank, 86 P.2d 935, 30 Cal.App.2d 447—Storm & Butts v. Lipscomb, 3 P.2d 567, 117 Cal.App. 6.
Mich.—Collateral Liquidation v. Lippman, 263 N.W. 747, 273 Mich. 586.
Mo.—Short v. White, 133 S.W.2d 1039, 234 Mo.App. 499—Gordon & Koppel Clothing Co. v. New York Cent. R. Co., App., 285 S.W. 755.
Okl.—Schaap v. Williams, 225 P. 910, 99 Okl. 21.
Tex.—J. M. Radford Grocery Co. v. Porter, Civ.App., 17 S.W.2d 145, error dismissed—Warren v. North American Car Co., Civ.App., 294 S. W. 301.
Wis.—In re Kayser's Estate, 208 N. W. 895, 190 Wis. 189.
22 C.J. p 888 note 13.

5. Tex.—Panhandle & S. F. Ry. Co. v. Arnett, Civ.App., 219 S.W. 232, dismissed for want of jurisdiction.
22 C.J. p 888 notes 13, 15.

Special memorandum records

The rule making books of account admissible in evidence does not extend to special memorandum records kept by some employee for himself, although he makes the entries at the time he performs his work.—Coad v. Pennsylvania Ry. Co., 175 N. W. 344, 187 Iowa 1025.

6. Cal.—Burke v. John E. Marshall, Inc., App., 108 P.2d 738—Kains v. First Nat. Bank, 86 P.2d 935, 30 Cal.App.2d 447—Storm & Butts v. Lipscomb, 3 P.2d 567, 117 Cal.App. 6.

7. N.H.—Lebrun v. Boston & M. R. R., 142 A. 128, 83 N.H. 293.
Pa.—Cox v. Cox, 29 Del.Co. 435.
22 C.J. p 888 note 18.

This requirement does not extend so far as to make it necessary that the entries should have been against the interest of the person making them.—Augusta v. Windsor, 19 Me. 317—22 C.J. p 888 note 19.

8. Ala.—Pan American Petroleum Corporation v. Mullack, 167 So. 728, 232 Ala. 271—Brown v. Grayson, 86 So. 121, 17 Ala.App. 463.
Cal.—Burke v. John E. Marshall, Inc., App., 108 P.2d 738—Kains v. First Nat. Bank, 86 P.2d 935, 30 Cal.App.2d 447—Storm & Butts v. Lipscomb, 3 P.2d 567, 117 Cal.App. 6—Warren v. Hiltscher, 295 P. 536, 111 Cal.App. 318—Sugar Loaf Orange Growers' Ass'n v. Skewes, 190 P. 1076, 47 Cal.App. 470.
Ill.—Roeder v. Pipe, 235 Ill.App. 89.
Ind.—Equitable Life Assur. Soc. of the U. S. v. Campbell, 150 N.E. 31, 85 Ind. 450, rehearing denied 151 N.E. 682, 85 Ind.App. 450.
Mich.—Union Trust Co. v. Tighe, 241 N.W. 878, 258 Mich. 201.
Nev.—Home Lumber & Coal Co. v. Hartford Mining Co., 81 P.2d 1063, 58 Nev. 361, rehearing denied 83 P. 2d 1049, 58 Nev. 361.
N.Y.—Maryanov v. Janowitch, 226 N. Y.S. 570, 222 App.Div. 494.
Or.—Radtke v. Taylor, 210 P. 863, 105 Or. 559, 27 A.L.R. 1423.
Pa.—Cox v. Cox, 29 Del.Co. 435.
Tex.—J. M. Radford Grocery Co. v. Porter, Civ.App., 17 S.W.2d 145, er-

municated to the person by whom the entries were made by some person engaged in the business whose duty it was to transact the particular business and make report thereof for entry on the books.[9]

Original entries required. The entries must be shown to be original entries or the first permanent entries.[10] The mere fact, however, that a temporary entry is first made on a slate, tally board, slips of paper, by chalk score, or in a memorandum book, for the purpose of convenience and aiding the memory until a permanent book entry can be made, will not operate to deprive the subsequent entry of its character as an original entry,[11] and this is so even though the temporary entry may have been made

ror dismissed—Warren v. North American Car Co., Civ.App., 294 S. W. 301.
W.Va.—Di Bacco v. Benedetto, 95 S.E. 601, 82 W.Va. 84.
22 C.J. p 888 note 16.

Knowledge sufficiently shown
Ark.—Alexander v. Williams-Echols Dry Goods Co., 256 S.W. 55, 161 Ark. 363.
Md.—Adkins v. Hastings, 114 A. 288, 138 Md. 454.

Absence of personal knowledge held immaterial where no objection was made to any item of account.—Rocky Mountain Beverage v. Walter Brewing Co., Colo., 108 P.2d 885.

9. Cal.—Burke v. John E. Marshall, Inc., App., 108 P.2d 738—Kains v. First Nat. Bank, 86 P.2d 935, 30 Cal.App.2d 447—Storm & Butts v. Lipscomb, 3 P.2d 567, 117 Cal. App. 6—Warren v. Hiltscher, 295 P. 536, 111 Cal.App. 318—Sugar Loaf Orange Growers' Ass'n v. Skewes, 190 P. 1076, 47 Cal.App. 470.
Ind.—Equitable Life Assur. Soc. of the U. S. v. Campbell, 150 N.E. 31, 85 Ind.App. 450, rehearing denied 151 N.E. 682, 85 Ind.App. 450.
Mo.—Bedwell v. Capitol Mut. Ass'n. App., 66 S.W.2d 155.
Nev.—Home Lumber & Coal Co. v. Hartford Mining Co., 81 P.2d 1063, 58 Nev. 361, rehearing denied 83 P. 2d 1049, 58 Nev. 361.
Tex.—J. M. Radford Grocery Co. v. Porter, Civ.App., 17 S.W.2d 145, error dismissed—Warren v. North American Car Co., Civ.App., 294 S.W. 301.
22 C.J. p 888 notes 17, 20 [b].

Information derived from strangers
A statute authorizing the admission of records of transactions and events made in the regular course of business is not intended to permit the receipt in evidence of entries based on voluntary hearsay statements made by third parties not engaged in the business or under any duty in relation thereto.—Johnson v. Lutz, 170 N.E. 517, 253 N.Y. 124, affirming 234 N.Y.S. 328, 226 App.Div. 772—In re Pappalau's Estate, 27 N. Y.S.2d 787, 261 App.Div. 705.

10. U.S.—The Spica, C.C.A.N.Y., 289 F. 436.
Cal.—Burke v. John E. Marshall, Inc., App., 108 P.2d 738—Kains v. First Nat. Bank, 86 P.2d 935, 30 Cal.App. 2d 447—Storm & Butts v. Lipscomb, 3 P.2d 567, 117 Cal.App. 6—Patrick v. Tetzlaff, 189 P. 115, 46 Cal.App. 243.
Ill.—People v. Dime Sav. Bank, 183 N.E. 604, 350 Ill. 503—Harris v. Young, 131 N.E. 670, 298 Ill. 319, reversing 215 Ill.App. 489—Moore v. David J. Molloy Co., 222 Ill.App. 295.
Ind.—Polus v. Conner, 176 N.E. 234, 92 Ind.App. 465—Equitable Life Assur. Soc. of the U. S. v. Campbell, 150 N.E. 31, 85 Ind.App. 450, rehearing denied 151 N.E. 682, 85 Ind.App. 450.
Ky.—Gus Dattilo Fruit Co. v. Louisville & N. R. Co., 37 S.W.2d 856, 238 Ky. 322.
Md.—Cohen v. Bogatzky, 131 A. 31, 149 Md. 134.
Mich.—Collateral Liquidation v. Lippman, 263 N.W. 747, 273 Mich. 586.
Mo.—Kliethermes Motor Co. v. Cole Motor Service, App., 102 S.W.2d 819—Bedwell v. Capitol Mut. Ass'n, App., 66 S.W.2d 155, 157, citing **Corpus Juris**—Welch-Sandler Cement Co. v. Mullins, App., 31 S.W. 2d 86—Gordon & Koppel Clothing Co. v. New York Cent. R. Co., App., 285 S.W. 755.
Nev.—Home Lumber & Coal Co. v. Hartford Mining Co., 81 P.2d 1063, 58 Nev. 361, rehearing denied 83 P. 2d 1049, 58 Nev. 361.
Ohio.—William Taylor Sons & Co. v. Burton, 188 N.E. 874, 46 Ohio App. 398.
R.I.—Edward Wilkinson & Co. v. Universal Safety Ash Tray Co., 133 A. 658.
Tex.—J. M. Radford Grocery Co. v. Porter, Civ.App., 17 S.W.2d 145, error dismissed—Warren v. North American Car Co., Civ.App., 294 S. W. 301.
Utah.—Ogden Packing & Provision Co. v. Tooele Meat & Storage Co., 124 P. 333, 41 Utah 92.
22 C.J. p 887 note 5.

Daybook or blotter has been held to be a permanent record of business transactions which cannot be superseded as evidence by a ledger or other book which is transcribed from it.
N.Y.—Clark v. Bullock, 2 N.Y.S. 408.
Pa.—Breinig v. Meitzler, 23 Pa. 156.

Part of entries not original
The fact that a book of accounts introduced in evidence contains some entries which are not original entries constitutes no objection to receiving the book as evidence of other entries which are regularly made, it appearing that the entries generally have been properly made.
Ill.—Chisholm v. Beaman Mach. Co., 43 N.E. 796, 160 Ill. 101.
Pa.—Wollenweber v. Ketterlinus, 17 Pa. 389.

Mere reports of employees of work done or materials furnished, which are never entered on a daybook or other similar records of original entry are not, standing alone, entitled to be admitted in evidence as books of original entry.—Hamilton v. Fiesco Constr. Co., 94 A. 50, 87 N.J.Law 62.

Evidence of mere direction to another person to make an entry is not admissible, no entry having been in fact made.—Horine v. New York Life Ins. Co., 87 S.W. 274, 27 Ky.L. 893.

11. U.S.—Cub Fork Coal Co. v. Fairmont Glass Co., C.C.A.Ind., 19 F.2d 273.
Ala.—Fields v. First Nat. Bank, 113 So. 298, 299, 216 Ala. 381, citing **Corpus Juris.**
Cal.—M. Kanter Silk Corporation v. Cramer, 30 P.2d 53, 136 Cal.App. 755—Storm & Butts v. Lipscomb, 3 P.2d 567, 117 Cal.App. 6.
Colo.—Rocky Mountain Beverage v. Walter Brewing Co., 108 P.2d 885.
Ga.—Crump v. Bank of Toccoa, 153 S.E. 531, 41 Ga.App. 505.
Ill.—People v. Dime Sav. Bank, 183 N.E. 604, 350 Ill. 503—First Nat. Bank v. Vaughan, 240 Ill.App. 50.
Ky.—Johnson's Adm'r v. Pigg, 47 S. W.2d 63, 242 Ky. 631.
Minn.—Banner Grain Co. v. Burr Farmers' Elevator & Supply Co., 202 N.W. 740, 162 Minn. 334—Lampert Lumber Co. v. Fleisher, 171 N.W. 309, 142 Minn. 150.
Mo.—Bedwell v. Capitol Mut. Ass'n, App., 66 S.W.2d 155—Chemical Bldg. Bar Co. v. Werbe, App., 263 S.W. 1035.
Mont.—Kommers v. Palagi, 108 P.2d 208, 111 Mont. 293—Smith v. Sullivan, 190 P. 228, 58 Mont. 77.
Neb.—Nye-Schneider-Fowler Co. v. Chicago & N. W. Ry. Co., 179 N.W. 503, 506, 105 Neb. 151, citing **Corpus Juris.**
Ohio.—William Taylor Sons & Co. v. Burton, 188 N.E. 874, 46 Ohio App. 398.
Okl.—Cassil v. Carter, 223 P. 685, 98 Okl. 49.
Pa.—John Wanamaker, Philadelphia, v. Chase, 81 Pa.Super. 201—In re

by an employee or clerk other than the one making the subsequent entry.[12] The temporary memoranda need not be produced;[13] but it may be received in connection with the account books made up therefrom,[14] when a proper preliminary foundation is laid,[15] although mere extracts from such memoranda should be rejected.[16]

Relevancy and materiality. The general principles of evidence with respect to relevancy and materiality apply to book entries made by clerks or third persons.[17] Thus the connection of the entry with the subject matter of the controversy must be shown.[18]

b. Mode of Proving Entries

(1) In general
(2) By whom entries proved
(3) Proof of handwriting

(1) In General

If the mode of proving book entries made by clerks or third persons is prescribed by statute, compliance with the statute is requisite and sufficient. To make the entries intelligible explanatory evidence may be received.

In some jurisdictions the method of making book entries competent as evidence is prescribed by statute, in which case a compliance with the statute is requisite and sufficient to render entries by clerks or third persons admissible.[19] Thus where the statute so provides entries may be admitted on proof that they were made in the usual course of business.[20]

Explaining entries. For the purpose of making the entries intelligible it is proper to introduce explanatory evidence as a part of the preliminary foundation.[21]

(2) By Whom Entries Proved
(a) In general
(b) Supervising officer or employee
(c) Effect of coöperation in making entry

(a) In General

Ordinarily, in the absence of contrary statute, book entries should be proved or corroborated by the clerk or other person making them if he is available as a witness.

Ordinarily, book entries made by clerks or third persons should be proved or corroborated by some person having personal knowledge of the facts entered[22] and who knows that they were correctly entered in the usual course of business.[23] Indeed, the general rule established at common law and adopted by statute in many jurisdictions, with slight modifications in some instances, is that book entries may,[24] and, in the absence of contrary statute, ordi-

Orr's Estate, 5 Pa.Dist. & Co. 634, affirmed 129 A. 565, 283 Pa. 476.
Utah.—Welsh, Driscoll & Buck v. Buck, 232 P. 911, 64 Utah 579.
Wash.—Gourley v. Hatten, 84 P.2d 1014, 197 Wash. 305.
22 C.J. p 887 note 8.

Form of transcription
It has been held that the fact that workmen's daily time cards showed the time the workman was employed on each particular job, while the book entries made therefrom were in terms of money and not of time, constituted no objection to the admission of such books in evidence.—Wisconsin Steel Co. v. Maryland Steel Co., Wis., 203 F. 403, 121 C.C.A. 507.

12. Neb.—Nye-Schneider-Fowler Co. v. Chicago & N. W. Ry. Co., 179 N. W. 503, 105 Neb. 151.
Okl.—Cassil v. Carter, 223 P. 685, 98 Okl. 49.

13. Ky.—Johnson's Adm'r v. Pigg, 47 S.W.2d 63, 242 Ky. 631.
Minn.—Banner Grain Co. v. Burr Farmers' Elevator & Supply Co., 202 N.W. 740, 162 Minn. 334—Lampert Lumber Co. v. Fleisher, 171 N.W. 309, 142 Minn. 150.
N.J.—Corkran v. Rutter, 69 A. 954, 76 N.J.Law 375.

14. Ala.—Denson v. Kirkpatrick Drilling Co., 144 So. 86, 225 Ala. 473—Fields v. First Nat. Bank, 113 So. 298, 299, 216 Ala. 381, citing **Corpus Juris.**
Mo.—Citizens' State Bank of Atlanta, Kan., v. Ferson, App., 208 S.W. 136.
N.J.—Autocar Sales & Service Co. v. Scheuer, 117 A. 596, 97 N.J.Law 560.
22 C.J. p 887 note 10.

Yard tickets from which journal is made may be received in evidence.—Dunman v. South Texas Lumber Co., Tex.Civ.App., 252 S.W. 274.

15. **Preliminary proof held sufficient**
Ala.—Denson v. Kirkpatrick Drilling Co., 144 So. 86, 225 Ala. 473.

16. Mo.—Sonnenfeld v. Rosenthal, 152 S.W. 321, 247 Mo. 238.

17. N.C.—Peebles v. Idol, 150 S.E. 665, 198 N.C. 56.

18. Pa.—Samuel v. Pennsylvania R. Co., 45 Pa.Super. 395.
Tex.—Warren v. North American Car Co., Civ.App., 294 S.W. 301, 304, quoting **Corpus Juris.**

19. Ariz.—School Dist. No. 1, Apache County, v. Whiting, 107 P.2d 1075.
Okl.—Shefts Supply v. Cole, 36 P.2d 754, 169 Okl. 259.

20. Okl.—Shefts Supply v. Cole, 36 P.2d 754, 169 Okl. 259—Consolidated Pipe Line Co. v. British American Oil Co., 21 P.2d 762, 163 Okl. 171—State v. Banta, 299 P. 479, 148 Okl. 239—Harsha v. Mock, 281 P. 763, 139 Okl. 181—Clover v. Neely, 243 P. 758, 116 Okl. 155—Hemisphere Oil & Gas Co. v. Oil Well Supply Co., 230 P. 245, 104 Okl. 83.

21. Ind.—Equitable Life Assur. Soc. of the U. S. v. Campbell, 150 N.E. 31, 85 Ind.App. 450, rehearing denied 151 N.E. 682, 85 Ind.App. 450.

22. Ark.—Bush v. Taylor, 207 S.W. 226, 136 Ark. 554.
Hawaii.—Clarke v. Ward, 34 Hawaii 875.
Mo.—Short v. White, 133 S.W.2d 1039, 234 Mo.App. 499.

23. Ill.—People v. Small, 150 N.E. 435, 319 Ill. 437.

24. **In Oklahoma,** by virtue of statute, one method of making book entries competent as evidence is by proving by the person making the entries that they are correct and were timely made.—Shefts Supply v. Cole, 36 P.2d 754, 169 Okl. 259—Schaap v. Williams, 225 P. 910, 99 Okl. 21.

Entrant competent witness
(1) The correctness of books may be certified to by the clerk who kept them.—House v. Beak, 30 N.E. 1065,

narily should,[25] be proved or corroborated by the clerk, employee, or other person making them, if he is available as a witness. Where he is not available, the offeror of the entries may be excused from producing him,[26] and the entries may then be authenticated by other evidence.[27] Thus book entries may be admitted without the supplemental testimony of the actual entrant where he is not available because of death,[28] insanity,[29] physical disability,[30] absence from the jurisdiction,[31] or other sufficient reason,[32] or where the burden of producing the actual entrants, particularly where they are numerous, is unduly heavy;[33] but before such entries may be received in evidence, unauthenticated by the oath of the person making them, the latter's absence, it is generally held, must be satisfactorily accounted for.[34]

Statutory modification of rule. In some jurisdictions by virtue of statute it is no longer necessary to authenticate book entries by the suppletory oath of the person who actually made them, even though such persons may be available as witnesses.[35]

141 Ill. 290, 33 Am.S.R. 307—22 C.J. p 867 note 1.

(2) Bookkeeper held competent witness under statute.—Rocky Mountain Beverage v. Walter Brewing Co., Colo., 108 P.2d 885.

Entries made by several persons

(1) One of several persons making book entries may testify as to the entries made by himself.—Herriott v. Kersey, 28 N.W. 468, 69 Iowa 111—22 C.J. p 889 note 25.

(2) But entries made by others may not be proved by him.—Herriott v. Kersey, supra—22 C.J. p 889 note 26.

25. Ark.—Bush v. Taylor, 207 S.W. 226, 136 Ark. 554.
Ky.—Carter v. Vine Grove State Bank, 32 S.W.2d 973, 236 Ky. 191—Baskett v. Rudy, 217 S.W. 112, 186 Ky. 208.
Mo.—Bedwell v. Capitol Mut. Ass'n, App., 66 S.W.2d 155.
Nev.—Home Lumber & Coal Co. v. Hartford Mining Co., 81 P.2d 1063, 58 Nev. 361, rehearing denied 83 P.2d 1049, 58 Nev. 361.
N.J.—D & L Oil Station Co. v. Foltzer, 144 A. 805, 105 N.J.Law 391.
N.Y.—New York, N. H. & H. R. Co. v. Baldwin Universal Consol. Co., 220 N.Y.S. 401, 219 App.Div. 578, reversing 207 N.Y.S. 799, 124 Misc. 651—Shmargon v. Rosenstein, 182 N.Y.S. 343, 192 App.Div. 143.
Ohio.—Hunt v. Krebs, 194 N.E. 34, 48 Ohio App. 279.
Or.—Radtke v. Taylor, 210 P. 863, 105 Or. 559, 27 A.L.R. 1423.
S.C.—W. T. Rawleigh Co. v. Thompson, 114 S.E. 702, 122 S.C. 43.
Tex.—Panhandle & S. F. Ry. Co. v. Arnett, Civ.App., 219 S.W. 232, dismissed for want of jurisdiction.
Wis.—In re Kayser's Estate, 208 N.W. 895, 190 Wis. 189.
22 C.J. p 884 note 85, p 885 note 86.

Reason for rule

Inasmuch as the object of rules of evidence is to require a witness as nearly as possible to state matters of personal knowledge, on which he may be cross-examined, to warrant the admission of a book entry, the original entrant must be produced, if possible.—The Spica, C.C.A. N.Y., 289 F. 436.

Composite oath held sufficient

Where the suppletory oath made by plaintiff's bookkeeper was that part of the entries in the books were made by him, and that the others were written by clerks, and it was agreed by counsel that the testimony of the other clerks would be of like character, such suppletory oath was sufficient.—Mansfield v. Gushee, 114 A. 296, 120 Me. 333.

26. Or.—Radtke v. Taylor, 210 P. 863, 105 Or. 559, 27 A.L.R. 1423.

27. Ill.—Le Roy State Bank v. J. Keenan's Bank, 169 N.E. 1, 337 Ill. 173, reversing 253 Ill.App. 51—People v. Small, 150 N.E. 435, 319 Ill. 437.

28. U.S.—The Spica, C.C.A.N.Y., 289 F. 436.
Ky.—Carter v. Vine Grove State Bank, 32 S.W.2d 973, 236 Ky. 191—Baskett v. Rudy, 217 S.W. 112, 186 Ky. 208.
Me.—Mansfield v. Gushee, 114 A. 296, 120 Me. 333.
Mo.—Bedwell v. Capitol Mut. Ass'n, App., 66 S.W.2d 155.
Or.—Radtke v. Taylor, 210 P. 863, 105 Or. 559, 27 A.L.R. 1423.

29. U.S.—The Spica, C.C.A.N.Y., 289 F. 436.
Me.—Mansfield v. Gushee, 114 A. 296, 120 Me. 333.
Or.—Radtke v. Taylor, 210 P. 863, 105 Or. 559, 27 A.L.R. 1423.

30. Me.—Mansfield v. Gushee, 114 A. 296, 120 Me. 333.
Or.—Radtke v. Taylor, 210 P. 863, 105 Or. 559, 27 A.L.R. 1423.

31. U.S.—The Spica, C.C.A.N.Y., 289 F. 436.
Ky.—Carter v. Vine Grove State Bank, 32 S.W.2d 973, 236 Ky. 191—Baskett v. Rudy, 217 S.W. 112, 186 Ky. 208.
Me.—Mansfield v. Gushee, 114 A. 296, 120 Me. 333.
Or.—Radtke v. Taylor, 210 P. 863, 105 Or. 559, 27 A.L.R. 1423.

32. Ky.—Carter v. Vine Grove State Bank, 32 S.W.2d 973, 236 Ky. 191—Baskett v. Rudy, 217 S.W. 112, 186 Ky. 208.
Me.—Mansfield v. Gushee, 114 A. 296, 120 Me. 333.

Court has large discretion in determining the circumstances under which book entries not authenticated by the oath of the person making them may be admitted in evidence.—Massachusetts Bonding & Insurance Co. v. Norwich Pharmacal Co., C.C.A.N.Y., 18 F.2d 934—The Spica, C.C.A.N.Y., 289 F. 436.

Mere inability by reasonable effort to find person who can speak with personal knowledge may be sufficient excuse for nonproduction.—Massachusetts Bonding & Insurance Co. v. Norwich Pharmacal Co., C.C.A.N.Y., 18 F.2d 934—The Spica, C.C.A.N.Y., 289 F. 436.

33. U.S.—Massachusetts Bonding & Insurance Co. v. Norwich Pharmacal Co., C.C.A.N.Y., 18 F.2d 934.

"If the practical inconvenience resulting from the production of numerous persons outweighs the probable utility of doing so, the offerer of the books may be excused from producing such numerous persons."—Radtke v. Taylor, 210 P. 863, 872, 105 Or. 559, 27 A.L.R. 1423.

34. Ky.—Carter v. Vine Grove State Bank, 32 S.W.2d 973, 236 Ky. 191—Baskett v. Rudy, 217 S.W. 112, 186 Ky. 208.
Mo.—Short v. White, 133 S.W.2d 1039, 1044, 234 Mo.App. 499, citing **Corpus Juris.**
Mont.—Gallatin County Farmers' Alliance v. Flannery, 197 P. 996, 59 Mont. 534.
Ohio.—Hunt v. Krebs, 194 N.E. 34, 48 Ohio App. 279.
Or.—Radtke v. Taylor, 210 P. 863, 105 Or. 559, 27 A.L.R. 1423.
22 C.J. p 884 note 82.

35. Ariz.—School Dist. No. 1, Apache County, v. Whiting, 107 P. 2d 1075.
Minn.—Webb v. Michener, 19 N.W. 82, 32 Minn. 48.
Okl.—Oil Field Operating Co. v. Eureka Tool Co., 74 P.2d 377, 181 Okl. 393.
22 C.J. p 885 note 86 a.

In Alabama

(1) Under Code 1923, § 7701 subd 3, the merchant, his manager, or an

Memory of entrant as to transaction. In proving book entries it is not essential that the entrant, when testifying, shall at that time have an independent recollection of the transactions entered, but it is sufficient if he is able to say that when the entries were made he had personal knowledge of the transactions and that the entries were made correctly and in conformity with such knowledge.[36]

(b) Supervising Officer or Employee

In some instances the books of original entry of an establishment may be admitted where they are verified by a supervising officer or employee, it being unnecessary to call as witnesses the subordinates actually making the entries.

In the case of modern business establishments, it frequently happens that the books of original entry of the establishment are made up by many employees some of whom may no longer be connected with the establishment and whose presence as witnesses to verify the entries would be difficult, impossible, or impracticable to procure. In view of this condition, it is frequently held that the books of original entry of an establishment may be received in evidence where they are verified by a supervising officer or employee who knows them to be the books of regular entries kept in that establishment, it being unnecessary to call as witnesses the subordinates actually making the entries.[37] This rule is particularly applicable where the clerks making the entries are no longer available as witnesses.[38] It has been held, however, that while a supervising officer may vouch the authenticity of the books under his control, he cannot vouch the accuracy of entries therein if without personal knowledge of their correctness.[39]

(c) Effect of Coöperation in Making Entry

Where one without personal knowledge of the transaction recorded makes an entry from data furnished by another, it is generally essential in proving the entry that the testimony of the entrant be supplemented by that of the person furnishing the data if he is available.

Where one person makes an entry from memoran-

officer of a company, may give the evidence prescribed, even though the entries were made by his employees, and it is not necessary to call such employees even though available.—Elliott v. Standard Oil Co. of Louisiana, 167 So. 295, 232 Ala. 142—Powell v. Pickett, 121 So. 23, 219 Ala. 18—Morris v. Bessemer Lumber Co., 116 So. 528, 217 Ala. 441—Booker v. Benson Hardware Co., 113 So. 256, 216 Ala. 398.

(2) Under this statute it is not essential that the witness shall have personal knowledge or memory of the transactions recorded.—Booker v. Benson Hardware Co., supra.

(3) Rule prior to amendment of statute.—Gray v. Ozier, 92 So. 610, 207 Ala. 398—Loveman, Joseph & Loeb v. McQueen, 82 So. 530, 203 Ala. 280.

36. Ky.—Baskett v. Rudy, 217 S.W. 112, 186 Ky. 208—Merrill v. Ithaca & O. R. Co., 16 Wend. 586, 30 Am. D. 130.

Or.—Radtke v. Taylor, 210 P. 863, 105 Or. 559, 27 A.L.R. 1423.

Time slips

In suit on an open account for labor and materials, the trial court properly admitted in evidence certain time slips from which the items of the account were made up, plaintiff's foreman having testified that, although he had no personal knowledge at the time of the suit of the items recorded, he would not have signed the slips and turned them in at the office unless he had known at the time that such slips, in their charges of hours of labor, were accurate.—Mardez Lumber Co. v. Lufkin Foundry & Machine Co., Tex. Civ.App., 216 S.W. 493.

37. U.S.—Jennings v. U. S., C.C.A. Ga., 73 F.2d 470—E. I. Du Pont de Nemours & Co. v. Tomlinson, C.C.A.N.C., 296 F. 634—Jacob Dold Packing Co. v. U. S., 66 Ct.Cl. 525.

D.C.—Shapiro v. Pennsylvania R. Co., 83 F.2d 581, 65 App.D.C. 324.

Mo.—Bedwell v. Capitol Mut. Ass'n, App., 66 S.W.2d 155, 157, citing **Corpus Juris.**

Mont.—Kommers v. Palagi, 108 P.2d 208, 111 Mont. 293.

N.H.—Williams v. Williams, 182 A. 172, 87 N.H. 430.

Pa.—Willert v. Amthor, 22 Erie Co. 1.

Tex.—Indemnity Ins. Co. of North America v. Jago, Civ.App., 49 S.W. 2d 943, error dismissed—Joy v. Fakes Furniture & Carpet Co., Civ.App., 286 S.W. 611.

Wash.—People's Bank & Trust Co. v. Douglas, 282 P. 838, 154 Wash. 450—A. W. Hartman Shoe Co. v. Hanson, 238 P. 17, 135 Wash. 512.

22 C.J. p 885 note 87.

Books of bank may be received in evidence without calling as witnesses the employees actually making the entries when the books are verified by the bank's:

(1) Cashier.

Ga.—Crump v. Bank of Toccoa, 153 S.E. 531, 41 Ga.App. 505.

Ill.—People v. Small, 150 N.E. 435, 319 Ill. 437—First Nat. Bank v. Vaughan, 240 Ill.App. 50.

N.C.—Flowers v. Spears, 130 S.E. 710, 190 N.C. 747.

Tex.—Heid Bros. v. Commercial Nat. Bank of Hutchinson, Kan., Com. App., 240 S.W. 908, 24 A.L.R. 904, reversing Commercial Nat. Bank of Hutchinson, Kan. v. Heid Bros., Civ.App., 226 S.W. 806—Flynn v. Citizens' Nat. Bank of Waco, Civ. App., 31 S.W.2d 485, error refused.

22 C.J. p 885 note 86 b.

(2) Head bookkeeper.—Smith Detective Agency v. Security Nat. Bank, Tex.Civ.App., 260 S.W. 273.

(3) Other officer or employee exercising general supervision over the bank's books.—Heid Bros. v. Commercial Nat. Bank of Hutchinson, Kan., supra—Cushing v. Riddell, Civ.App., 255 S.W. 479.

Entries made in part by others

Where person in charge of books identifies them and knows that entries therein are correct, books are properly identified even though person did not make all entries therein.—Welch-Sandler Cement Co. v. Mullins, Mo.App., 31 S.W.2d 86.

Some entrants available

Ledger of company was held admissible when properly identified and authenticated by its president and general manager, although the entries relative to the transactions in suit were made by a number of bookkeepers, two of whom the president named, both living in the state, and one within the immediate jurisdiction of the trial court.—White Sewing Mach. Co. v. Gilmore Furniture Co., 105 S.E. 134, 128 Va. 630.

38. U.S.—McConnell v. U. S., C.C.A. Pa., 81 F.2d 639.

Ky.—Baskett v. Rudy, 217 S.W. 112, 186 Ky. 208.

Pa.—Ehmling v. D. L. Ward Co., 124 A. 181, 279 Pa. 527.

39. W.Va.—Motor Car Supply Co. v. Nicholas Hardware & Furniture Co., 161 S.E. 31, 111 W.Va. 252.

da or information furnished by another, or two or more persons have otherwise coöperated in making an entry, the entry will be admissible in connection with the testimony of all the parties participating.[40] Indeed, in the absence of contrary statute, the general rule is that where the clerk who makes the entries has no knowledge of their correctness, but makes them as the items furnished by another, as for instance where entries are made by a bookkeeper from reports made by a foreman, it is essential that, in addition to the oath of the party making the entry, the party furnishing the items should testify to their correctness, at least if he is available,[41] or that satisfactory proof thereof, such as the transactions are reasonably susceptible of, from other sources should be produced.[42] If, however, the person or persons furnishing the information or memoranda for the entries cannot be produced,[43] or if the practical inconvenience of producing such persons, as where they are numerous, would outweigh the probable utility of doing so,[44] the entries are admissible when supported by the testimony of the person making them, especially if supplemented by proof of the correctness of the memoranda. Moreover, in some jurisdictions statutes have been enacted dispensing with the necessity of calling all persons connected with the making of an entry,[45] and, independent of statute, it has been held discretionary with the court to receive in evidence entries without the production of the persons furnishing the data on which they are based.[46]

(3) Proof of Handwriting

Under certain circumstances, it may be proper to admit book entries made by clerks or third persons on proof of handwriting.

Since book entries generally should be proved by the testimony of the person making them, see supra subdivision b 2 (a) of this section, under ordinary circumstances and in the absence of contrary statute mere proof of handwriting is not sufficient to establish the verity and authenticity of book entries made by a clerk, servant, or other person.[47] The circumstances, however, may be such as to render it proper to admit the entries on proof of handwriting, if, on inspection, they appear to have been regularly made,[48] as where the entrant is not available as a witness[49] because of death,[50] insanity,[51] physical disability,[52] or absence from the jurisdiction of

40. Ala.—Moundville Lumber Co. v. Warren, 83 So. 479, 203 Ala. 488.
Cal.—Shields v. Rancho Buena Ventura, 203 P. 114, 187 Cal. 569.
Ky.—Johnson's Adm'r v. Pigg, 47 S.W.2d 63, 242 Ky. 631.
N.Y.—Litchfield Const. Co. v. City of New York, 155 N.E. 116, 244 N.Y. 251, modifying 215 N.Y.S. 450, 216 App.Div. 517, motion denied 155 N.E. 898, 244 N.Y. 563.
22 C.J. p 888 note 20.

41. U.S.—E. I. Du Pont de Nemours & Co. v. Tomlinson, C.C.A.N.C., 296 F. 634.
Md.—Cohen v. Bogatzky, 131 A. 31, 149 Md. 134.
Mo.—Bedwell v. Capitol Mut. Ass'n, App., 66 S.W.2d 155, 157, citing **Corpus Juris.**
Or.—Radtke v. Taylor, 210 P. 863, 105 Or. 559, 27 A.L.R. 1423.
22 C.J. p 889 note 21.

42. S.D.—Arneson v. Nerger, 147 N.W. 982, 34 S.D. 201, 202.
22 C.J. p 889 note 22.
Authentication by supervising officer see supra subdivision b (2) (b) of this section.

43. U.S.—St. Paul Fire & Marine Ins. Co. v. American Food Products Co., C.C.A.Ark., 21 F.2d 733, certiorari denied 48 S.Ct. 560, 277 U.S. 597, 72 L.Ed. 1006.
22 C.J. p 889 note 23.
But it has also been held that the entries cannot be admitted without the testimony of the person furnishing the data, even though it appears that he cannot be found.—Chicago Lumbering Co. v. Hewitt, Mich., 64 F. 314, 12 C.C.A. 129.
When production of transactor excused
If the person who makes the report for entry is unavailable because of death, insanity, physical disability, or permanent absence from the jurisdiction, the offerer of a shopbook may be excused from producing him.—Radtke v. Taylor, 210 P. 863, 105 Or. 559, 27 A.L.R. 1423.

44. Pa.—Oswald Machinery Co. v. Farnsworth, 101 Pa.Super. 506—In re Walker's Estate, 53 York Leg.Rec. 1.
Tex.—Watson Co. v. Lone Star Service Station, Civ.App., 16 S.W.2d 151, error dismissed.
Wash.—Pacific Tel. & Tel. Co. v. Huetter, 123 P. 607, 68 Wash. 442.

45. N.Y.—Johnson v. Lutz, 170 N.E. 517, 253 N.Y. 124, affirming 234 N.Y.S. 328, 226 App.Div. 772.

46. Mont.—Smith v. Sullivan, 190 P. 288, 58 Mont. 77.

47. Ohio.—Riddle v. Riddle, 175 N.E. 757, 38 Ohio App. 132.

48. S.C.—W. T. Rawleigh Co. v. Thompson, 114 S.E. 702, 122 S.C. 43.

49. Me.—Mansfield v. Gushee, 114 A. 296, 120 Me. 333.
Where entrant cannot be found, entries may be admitted on proof of handwriting.—James C. Goff Co. v. Lunn, 143 A. 673, 49 R.I. 455.
Quantum of proof required to show nonavailability rests largely in trial court's discretion.—James C. Goff Co. v. Lunn, supra.
Absence of direct evidence
Under a statute permitting proof of handwriting in the absence of direct evidence of execution, testimony that the witness knew a certain party's handwriting and that entries in a daybook were in his handwriting made the book admissible, especially where it was shown that such party was the clerk whose duty it was to keep the daybook.—Haygood v. E. B. Clark Co., 107 S.E. 379, 88 W.Va. 167.

50. Ala.—Sovereign Camp, W. O. W. v. Bass, 85 So. 273, 204 Ala. 28.
Ark.—Bush v. Taylor, 207 S.W. 226, 136 Ark. 554.
Me.—Mansfield v. Gushee, 114 A. 296, 120 Me. 333.
Mo.—Bedwell v. Capitol Mut. Ass'n, App., 66 S.W.2d 155.
Or.—Radtke v. Taylor, 210 P. 863, 105 Or. 559, 27 A.L.R. 1423.
Utah.—G. S. Wood Mercantile Co. v. Dougall, 114 P.2d 202.
Rule established by statute
Okl.—Shefts Supply v. Cole, 36 P.2d 754, 169 Okl. 259—Schaap v. Williams, 225 P. 910, 99 Okl. 21.

51. Ark.—Bush v. Taylor, 207 S.W. 226, 136 Ark. 554.
Me.—Mansfield v. Gushee, 114 A. 296, 120 Me. 333.
Or.—Radtke v. Taylor, 210 P. 863, 105 Or. 559, 27 A.L.R. 1423.

52. Me.—Mansfield v. Gushee, 114 A. 296, 120 Me. 333.

the court.[53] Indeed preliminary proof of the handwriting of the entrant is generally essential where he is not available as a witness.[54]

Under some statutes books of account may be authenticated by proof of the handwriting of the entrant even though he is available as a witness.[55]

§ 694. Book Entries as Admissions

a. In general
b. As against adverse party

a. In General

A statement contained in a book entry may constitute an admission in which case it is admissible as such after a proper foundation has been laid.

A statement contained in a book entry may amount to an admission,[56] in which case, if material to the issue,[57] it, like other admissions, is admissible as competent evidence against the party by whom,[58] or under whose direction,[59] the entry was made, and also against those claiming under

Or.—Radtke v. Taylor, 210 P. 863, 105 Or. 559, 27 A.L.R. 1423.

53. Me.—Mansfield v. Gushee, 114 A. 296, 120 Me. 338.
Or.—Radtke v. Taylor, 210 P. 863, 105 Or. 559, 27 A.L.R. 1423.
Pa.—William Zoller Co. v. Hartford Fire Ins. Co., 116 A. 359, 272 Pa. 386.
R.I.—James C. Goff Co. v. Lunn, 143 A. 673, 49 R.I. 455.

Absence from county
Under a statute so providing, proof may be made by handwriting where the entrant is absent from the county.—Shefts Supply v. Cole, 36 P.2d 754, 169 Okl. 259—Consolidated Pipe Line Co. v. British American Oil Co., 21 P.2d 762, 163 Okl. 171—Schaap v. Williams, 225 P. 910, 99 Okl. 21.

54. Del.—Grossman v. Delaware Electric Power Co., 155 A. 806, 4 W.W.Harr. 521.
22 C.J. p 884 note 84.

55. Ariz.—School Dist. No. 1, Apache County, v. Whiting, 107 P. 2d 1075.
Minn.—Webb v. Michener, 19 N.W. 82, 32 Minn. 48.

56. Cal.—Arocena v. Sawyer, 213 P. 523, 526, 60 Cal.App. 581, quoting **Corpus Juris.**
Ky.—Head's Adm'x v. Commonwealth for Use and Benefit of Dawson, 72 S.W.2d 60, 62, 254 Ky. 687, quoting **Corpus Juris.**
Mass.—Worthen v. Burgess, 173 N. E. 530, 273 Mass. 437.
Mo.—No Dust O Co. v. Home Trust Co., App., 46 S.W.2d 203.
N.Y.—Island Trading Co. v. Berg Bros., 146 N.E. 345, 239 N.Y. 229, affirming 204 N.Y.S. 523, 209 App. Div. 63.
N.D.—Roth v. Provident Life Ins. Co., 274 N.W. 849, 851, 67 N.D. 529, citing **Corpus Juris.**
22 C.J. p 889 note 27.
Admissions generally see supra §§ 270–383.
Admissibility against surety of statements in principal's account books see supra § 366.

To whom credit given
Entries in books of person furnishing goods, prima facie, are admissions that goods were furnished on credit of person to whom the charge was made.—Clayton Coal Co. v. King, Colo., 113 P.2d 672—Wagner v. Hallack, 3 Colo. 176.

Entries held not to constitute an admission
Minn.—Kregel v. Cirkler, 198 N.W. 664, 158 Minn. 175.

Impeachment of books
A utility is in no position to impeach its own books.—Wisconsin Telephone Co. v. Public Service Commission, 287 N.W. 122, 232 Wis. 274, rehearing denied 287 N.W. 593, 232 Wis. 274, certiorari denied Public Service Commission of Wisconsin v. Wisconsin Telephone Co., 60 S.Ct. 514, 309 U.S. 657, 84 L.Ed. 1006.

57. N.D.—Rott v. Provident Life Ins. Co., 274 N.W. 849, 67 N.D. 529.

58. U.S.—In re Glassberg, D.C.N.Y., 59 F.2d 209—Schock v. Malloy, C. C.A.Okl., 26 F.2d 621—In re Margolis, D.C.N.Y., 23 F.Supp. 735.
Ariz.—Carrillo v. Murray & Layne Co., 216 P. 689, 25 Ariz. 308.
Cal.—Arocena v. Sawyer, 213 P. 523, 526, 60 Cal.App. 581, quoting **Corpus Juris**—Wallace v. Oswald, 207 P. 51, 57 Cal.App. 333.
Idaho.—Sarvis v. Childs Bond & Mortgage Co., 286 P. 914, 49 Idaho 79.
Ky.—Head's Adm'x v. Commonwealth for Use and Benefit of Dawson, 72 S.W.2d 60, 62, 254 Ky. 687, quoting **Corpus Juris.**
La.—Consolidated Co. v. Spinella, App., 181 So. 42.
Me.—Perlin v. Rosen, 164 A. 625, 131 Me. 481.
Mich.—Munroe, Boyce & Co. v. Ward, 174 N.W. 285, 207 Mich. 369.
Neb.—State v. Bass, 269 N.W. 68, 131 Neb. 592.
N.Y.—Roge v. Valentine, 20 N.E.2d 751, 280 N.Y. 268, reversing 7 N. Y.S.2d 958, 255 App.Div. 475, reargument denied 9 N.Y.S.2d 900, 256 App.Div. 817, reargument denied 21 N.E.2d 695, 280 N.Y. 809.
N.D.—Baird v. National Surety Co. of New York, 209 N.W. 204, 54 N. D. 9.
Ohio.—McNaughton v. Presbyterian Church of Coshocton County, 172 N.E. 561, 562, 35 Ohio App. 443, citing **Corpus Juris.**
Tex.—Webb v. Smith, Civ.App., 288 S.W. 624, 626, citing **Corpus Juris.**
Wash.—Hewitt v. Jones, 271 P. 76, 149 Wash. 360.
22 C.J. p 889 note 29, p 880 note 38 [d].

59. Ala.—Polytinsky v. Johnston, 99 So. 839, 841, 211 Ala. 99, citing **Corpus Juris.**
Cal.—Arocena v. Sawyer, 213 P. 523, 526, 60 Cal.App. 581, quoting **Corpus Juris.**
Ill.—Roeder v. Pipe, 235 Ill.App. 89.
Ky.—Head's Adm'x v. Commonwealth for Use and Benefit of Dawson, 72 S.W.2d 60, 62, 254 Ky. 687, quoting **Corpus Juris.**
Mass.—Blackall v. Duthie-Strachan, 155 N.E. 604, 258 Mass. 551.
Neb.—Utilities Ins. Co. v. Stuart, 278 N.W. 827, 134 Neb. 413—State v. Bass, 269 N.W. 68, 131 Neb. 592.
N.Y.—Roge v. Valentine, 20 N.E.2d 751, 280 N.Y. 268, reversing 7 N.Y. S.2d 958, 255 App.Div. 475, reargument denied 9 N.Y.S.2d 900, 256 App.Div. 817, reargument denied 21 N.E.2d 695, 280 N.Y. 809—Herman Apfelbaum, Inc. v. Abraham Keizer & Bro., 233 N.Y.S. 587, 133 Misc. 722—In re Brown's Estate, 190 N.Y.S. 184, 116 Misc. 483.
Tex.—Webb v. Smith, Civ.App., 288 S.W. 624, 626, citing **Corpus Juris.**
22 C.J. p 890 note 30.

Pass books
(1) A bank's pass book given to a depositor, the entries in which were made by an officer of the bank, is admissible against the bank.—Atlanta Trust & Banking Co. v. Close, 42 S.E. 265, 115 Ga. 939—7 C.J. p 863 note 39—22 C.J. p 890 note 30 [b].

(2) So a pass book of a building and loan association may be received against it when properly authenticated.—Ross v. Prudential Guarantee Building & Loan Ass'n, 35 P.2d 176, 140 Cal.App. 148.

(3) But a pass book manifestly erased or altered in a material particular is not admissible in the absence of a satisfactory explanation of such alteration.—Sagardia v. Stockgrowers' & Ranchers' Bank of Reno, 274 P. 811, 51 Nev. 299.

(4) Failure to show that the deposit book was of form used and

him,[60] provided it was voluntarily made.[61] The same rule is frequently applied in the case of admissions by accounts rendered.[62] A book entry, however, is not competent as an admission against one who neither made nor directed the entry and is not responsible for the act of the person by whom it was made.[63]

Form of books or entries. Where a book containing entries against interest is shown to belong to the party, he will not be heard to object to the form of the book or the manner in which it was kept.[64] So, although entries in books of account may not have been so made as to have been competent to furnish presumptions of delivery of goods sold, yet when offered against the keeper they may be competent as admissions.[65]

Partnership books. Entries in partnership books, made in the regular course of business during the continuance of a firm, by either of the partners or their authorized clerks, are admissible evidence against and bind all the partners having access thereto in controversies to which a stranger is a party as well as in controversies between the partners themselves.[66] However, entries in one partner's books by his employees are not evidence against the other partners, in an action between the partners, without proof that they correctly recorded partnership transactions;[67] and in a suit against the partners entries in the partnership books, of course, do not bind a third person who has no access to the books.[68]

As against joint tort-feasor. Where defendants who dealt with an insolvent brokerage company, were joint tort-feasors with it with respect to certain securities, the books of the brokerage company were held to be competent evidence against defendants in an action for an accounting involving certain stocks held by defendants.[69]

Preliminary proof. Before one party may offer in evidence the book entries of his adversary as admissions of the latter, it is essential that a proper foundation for their reception should have been laid.[70] Ordinarily it is sufficient if it is shown that the books offered are the books of the adverse party regularly kept in his business,[71] it being unnecessary to lay the preliminary foundation required in instances where a party offers his own books in his favor.[72] Accordingly it is not necessary to pro-

issued by bank renders it inadmissible.—Blacher v. National Bank of Baltimore, 135 A. 383, 151 Md. 514, 49 A.L.R. 1366.

60. Cal.—Wallace v. Oswald, 207 P. 51, 57 Cal.App. 333.
Ky.—Head's Adm'x v. Commonwealth for Use and Benefit of Dawson, 72 S.W.2d 60, 62, 254 Ky. 687, quoting Corpus Juris.
N.Y.—In re Brown's Estate, 190 N.Y.S. 184, 116 Misc. 483.
Ohio.—McNaughton v. Presbyterian Church of Coshocton County, 172 N.E. 561, 35 Ohio App. 443.
22 C.J. p 890 note 31.

61. **Entries prescribed by commission**
Entries in books of railroads in accordance with classification established by interstate commerce commission did not constitute a "voluntary admission" on part of railroads.—Joliet & C. R. Co. v. U. S., C.C.A. Ill., 118 F.2d 174.

62. Mo.—Welch-Sandler Cement Co. v. Mullins, App., 31 S.W.2d 86.
22 C.J. p 890 note 32.

63. N.Y.—Kittredge v. Grannis, 140 N.E. 730, 236 N.Y. 375, reversing Kittredge v. Lawrence, 197 N.Y.S. 923, 204 App.Div. 870, and reargument denied 142 N.E. 315, 236 N.Y. 637—Coplay Cement Mfg. Co. v. Loeb, 207 N.Y.S. 659, 124 Misc. 640, affirmed 213 N.Y.S. 784, 215 App.Div. 805.
Tex.—Webb v. Smith, Civ.App., 288 S.W. 624.
22 C.J. p 890 note 34.

64. Cal.—Arocena v. Sawyer, 213 P. 523, 526, 60 Cal.App. 581, quoting Corpus Juris.
Ill.—McClurg v. Williams, 180 Ill. App. 699.
Philippine.—Behn v. Rosatzin, 5 Philippine 660.
22 C.J. p 891 note 39.

Time of making entries
Under Code Civ.Proc. § 1853, and § 1870 subd 2, entries made by a decedent in account books were admissible against his executor and successors in interest, although not made at or near the time of the transaction, § 1946, requiring entries to be made at or near the time of the transaction, applying only to entries by strangers.—Wallace v. Oswald, 207 P. 51, 57 Cal.App. 333.

65. Ill.—Adair v. H. G. Adair Printing Co., 162 Ill.App. 511.

66. Cal.—Lopez v. Richard, 53 P.2d 191, 11 Cal.App.2d 154—Arocena v. Sawyer, 213 P. 523, 60 Cal.App. 581.
22 C.J. p 891 note 37—47 C.J. p 998 note 50.

67. N.Y.—Sligo Furnace Co. v. Quinn, 153 N.Y.S. 109, 169 App. Div. 906, rehearing denied 154 N.Y.S. 1145, 169 App.Div. 969.

68. Md.—Folk v. Wilson, 21 Md. 538, 83 Am.D. 599.
Pa.—Williams v. Caples, 20 A.2d 302.
Partnership books are not admissible per se against third persons.—Matson v. Matson, 190 P. 943, 56 Utah 394.

69. Mich.—Austin v. Hayden, 142 N.W. 563, 176 Mich. 331.

70. Ill.—See In re Weiss' Estate, 20 N.E.2d 177, 299 Ill.App. 620.
N.D.—Rott v. Provident Life Ins. Co., 274 N.W. 849, 67 N.D. 529.

Identification required
In absence of evidence establishing that book contained former executor's actual account, pages of book were inadmissible to establish that former executor had not properly accounted for estate's funds.—Varga v. U. S. Fidelity & Guaranty Co., 245 N.W. 765, 215 Iowa 499.

71. Minn.—Wentz v. Guaranteed Sand & Gravel Co., 287 N.W. 113, 205 Minn. 611—Lindeke v. Scott County Co-op. Co., 148 N.W. 459, 126 Minn. 464.
Neb.—State v. Bass, 269 N.W. 68, 131 Neb. 592.

Foundation held sufficient
In a proceeding on a claim against deceased's estate, testimony introducing a book of entries that witness had never seen the inside of the book before and that he had no knowledge of what accounts were kept in it, but that he knew the handwriting in the book to be deceased's and that deceased kept his books correctly, constituted sufficient foundation for its introduction as an exhibit.—O'Neill v. O'Neill, 188 P. 603, 45 Cal. App. 772.

72. Minn.—Wentz v. Guaranteed Sand & Gravel Co., 287 N.W. 113, 205 Minn. 611—Lindeke v. Scott

duce the person who actually made the entry[73] or who furnished the data from which the entry was made.[74]

Effect of admission. If the books of a party are called for and introduced in evidence by his adversary, all entries touching the subject matter as to which they are introduced are admissible, even though they be self-serving,[75] but the fact that a book containing admissions has been received against a party will not render admissible in his favor another book having no relation to the first.[76]

b. As Against Adverse Party

Entries in the books of account of one party may be received as admissions of the adverse party where their correctness has been assented to by the latter.

Entries in the books of account of one party may be received as admissions of the adverse party where their correctness has been assented to by the latter,[77] as for example where the entries were made by such party,[78] where they were made or read in his presence[79] or inspected by him[80] without objection on his part, or where they have been used by the parties as the basis of settlement of their accounts.[81] Under such circumstances, it is not necessary that the person by whom the entry was made should be produced as a witness,[82] or that other preliminary proof required by statute for the admission of books of account in favor of the party by or for whom they were kept should be adduced.[83] If the correctness of the entries is admitted, they are admissible, even though they are not original[84] or not regularly kept,[85] and even though the items are not the subject of book charge under the shopbook rule;[86] and, where plaintiff relies on evidence that defendant has admitted and promised to pay a particular account, and the books of the former are produced to show what that account contains, it is not necessary to produce the ledger, although the items appear to have been posted.[87]

Books of account kept by a clerk or agent are admissible to show admissions made by him in his principal's favor, in an action against the clerk or agent or his sureties,[88] and entries by a clerk in his favor have also been held admissible against his employer.[89] In an action on a bond given to an insurance company by its agent, conditioned that he

County Co-Op. Co., 148 N.W. 459, 126 Minn. 464.
Neb.—State v. Bass, 269 N.W. 68, 131 Neb. 592.
Preliminary proof under shopbook rule see supra § 684.

73. Mass.—Watson v. Phoenix Bank, 8 Metc. 217, 41 Am.D. 500.

74. N.Y.—Coplay Cement Mfg. Co. v. Loeb, 207 N.Y.S. 659, 124 Misc. 640, affirmed 213 N.Y.S. 784, 215 App.Div. 805.

75. N.Y.—Dewey v. Hotchkiss, 30 N.Y. 497.
W.Va.—Rowan v. Chenoweth, 38 S.E. 544, 49 W.Va. 287, 87 Am.S.R. 796.

76. Mass.—Bentley v. Ward, 116 Mass. 333.
22 C.J. p 891 note 42.

77. Hawaii.—Schuman Carriage Co. v. Paxson, 27 Hawaii 161.
Mo.—Welch-Sandler Cement Co. v. Mullins, App., 31 S.W.2d 86.
Pa.—Commonwealth v. Grotzner, 189 A. 495, 496, 125 Pa. 305, quoting **Corpus Juris.**
Wash.—Burnham v. Rowley, 191 P. 811, 111 Wash. 656.
22 C.J. p 891 note 44.

As part of res gestae

In sister's action against deceased brother's estate for brother's support, book entry made by sister, after calculating time and amount due, entering it in book in brother's presence, who agreed to its correctness and promised to pay on his return from trip, was admissible as part of res gestæ of that transaction under count charging an account stated.—Coleman v. Adkins, 168 So. 184, 232 Ala. 351.

78. Tex.—W. T. Wilson Grain Co. v. Central Nat. Bank, Civ.App., 139 S.W. 996.
22 C.J. p 892 note 45.

79. N.C.—Wilkins-Ricks Co. v. McPhail, 86 S.E. 502, 169 N.C. 558.
22 C.J. p 892 note 46.

80. Wash.—Foy v. Pacific Power & Light Co., 188 P. 514, 110 Wash. 248.

81. Ind.—Powers v. Hamilton, 6 Blackf. 293.
22 C.J. p 892 note 47.

82. N.H.—Stetson v. Godfrey, 20 N.H. 227.

83. Ala.—Howell v. Smith, 91 So. 496, 206 Ala. 646.
Ga.—Becker v. Donalson, 75 S.E. 1122, 138 Ga. 634—Eley v. Holden, 172 S.E. 75, 48 Ga.App. 152.
Iowa.—Crist v. Tallman, 179 N.W. 522, 190 Iowa 1248.
Mass.—Annawan Mills v. Mangene, 130 N.E. 77, 237 Mass. 451.
Pa.—Commonwealth v. Grotzner, 189 A. 495, 496, 125 Pa. 305, quoting **Corpus Juris.**

84. Iowa.—Crist v. Tallman, 179 N.W. 522, 190 Iowa 1248.
Pa.—Commonwealth v. Grotzner, 189 A. 495, 496, 125 Pa. 305, quoting **Corpus Juris.**
22 C.J. p 892 note 50.

Entries in a mill book by a sawyer from figures made by the scaler are admissible in evidence, although the original figures made by the scaler are not produced, where the other party to the contract indorsed the accuracy of the figures from the mill book by paying for sawing the amount of lumber which they indicated.—Gardner v. Wilber, 44 N.W. 628, 75 Wis. 601.

85. Mo.—Earhart v. A. O. Thompson Lumber Co., App., 140 S.W.2d 750.

86. Pa.—Darlington v. Taylor, 3 Grant 195.

87. N.H.—Stetson v. Godfrey, 20 N.H. 227.

88. Philippine.—Behn v. Rosatzin, 5 Philippine 660.
22 C.J. p 892 note 53.

89. Miss.—Garner v. Sperry, 161 So. 703, 704, 173 Miss. 11, citing **Corpus Juris.**
22 C.J. p 892 note 54.

In an action on assigned claims for services brought against a surviving partner by the foreman of the partnership, books of account containing statements of amounts due for such services, kept by plaintiff as defendant's agent, were admissible against defendant as admissions.—Arocena v. Sawyer, 213 P. 523, 60 Cal.App. 581.

Entries by plaintiff in defendant's books

In action for services allegedly performed for intestate, entries in intestate's books of account, made by plaintiff, were admissible to show nature of services performed.—

should "keep true and correct books of account," a book kept by him containing entries of the business of the company only is competent evidence against him and his sureties, although the entries were made by clerks in the employ of a firm of which he is a member.[90]

§ 695. Entries by Third Persons against Interest

Entries by third persons against interest, the entrant being dead or unavailable as a witness, are admissible.

If a person having peculiar means of knowing a fact makes a written entry thereof which is against his interest at the time when it is made, and such person would, if available as a witness, be competent to testify as to such fact, the entry is, after his death, competent evidence of the fact even as between third persons;[91] and the same is true where the entrant, although not dead, is unavailable as a witness.[92] Under such circumstances it is not necessary that the entry should have been made at the time of the transaction.[93]

3. Memoranda and Statements

§ 696. Memoranda

As a general rule, mere private memoranda are not admissible as purely independent evidence.

As is shown in the C.J.S. title Witnesses §§ 358–360, also 70 C.J. p 580 note 80–p 597 note 14, private memoranda may under certain conditions be used by a witness to refresh his recollection, and this according to the generally accepted rule, even in a case where the witness has no present independent recollection of the facts, if he recollects that when the memorandum was made he knew it to be true and hence can swear that it was correctly made; and under such generally accepted rule a memorandum is, according to many decisions, admissible or allowed to go before the jury[94] on a sufficient foundation being laid.[95] Memoranda in-

Baumgarten v. Lafayette Nat. Bank of Brooklyn in New York, 2 N.Y.S.2d 561, 253 App.Div. 916.

90. Mass.—Williamsburg City F. Ins. Co. v. Frothingham, 122 Mass. 391.

91. Ky.—Gus Dattilo Fruit Co. v. Louisville & N. R. Co., 37 S.W.2d 856, 238 Ky. 322.
Or.—Carpenter v. Carpenter, 56 P.2d 305, 153 Or. 584, 105 A.L.R. 386, modified on other grounds and rehearing denied 57 P.2d 1098, 153 Or. 584, 105 A.L.R. 386, rehearing denied and decree supplemented 58 P.2d 507, 153 Or. 584, 105 A.L.R. 386—Radtke v. Taylor, 210 P. 863, 105 Or. 559, 27 A.L.R. 1423.
S.C.—Wimberly v. Sovereign Camp, W. O. W., 2 S.E.2d 532, 534, 190 S.C. 158, quoting **Corpus Juris.**
22 C.J. p 892 notes 57–59.
Declarations against interest generally see supra §§ 217–224.

92. Ky.—Gus Dattilo Fruit Co. v. Louisville & N. R. Co., 37 S.W.2d 856, 238 Ky. 322.

93. S.C.—Wimberly v. Sovereign Camp, W. O. W., 2 S.E.2d 532, 534, 190 S.C. 158, quoting **Corpus Juris.**
22 C.J. p 892 note 60.

94. Ala.—Armour Fertilizer Works v. Kinney, 114 So. 41, 216 Ala. 547—Evans Bros. Const. Co. v. Steiner Bros., 94 So. 361, 208 Ala. 306—Central of Georgia Ry. Co. v. Graves, 107 So. 716, 21 Ala.App. 280.
Fla.—Squires v. Kilgore, 111 So. 113, 115, 92 Fla. 1001, citing **Corpus Juris.**
Iowa.—Farmers' Trust & Savings Bank of Spencer v. De Wolf, 233 N.W. 524, 525, 212 Iowa 312, citing **Corpus Juris.**
Mich.—Guardian Depositors' Corporation of Detroit v. Keller, 282 N. W. 194, 286 Mich. 403.
Minn.—Force Bros. v. Gottwald, 183 N.W. 356, 149 Minn. 268.
N.J.—Henry C. McCandless, Inc., v. Schaffer, 142 A. 566, 103 N.J.Eq. 170.
N.Y.—Phoenix Coal Co. v. Pennsylvania R. Co., 180 N.Y.S. 283, 190 App.Div. 665.
Okl.—Hodges v. Reynolds, 40 P.2d 1025, 170 Okl. 345—First Nat. Bank of Enid v. Yeoman, 78 P. 388, 14 Okl. 626.
S.C.—Gwathmey v. Foor Hotel Co., 113 S.E. 688, 121 S.C. 237.
S.D.—Hobbs v. Whitelock, 231 N.W. 904, 908, 57 S.D. 198, citing **Corpus Juris.**
Wash.—Cooley v. Ben Paris Sporting Goods & Recreation Co., 105 P.2d 820, 5 Wash.2d 415, amended on other grounds and rehearing denied 107 P.2d 347.
22 C.J. p 893 note 67—70 C.J. p 600 note 58.

Particular memoranda or writings admissible

(1) Writings based on telephonic communications.—Phœnix Coal Co. v. Pennsylvania R. Co., 180 N.Y.S. 283, 190 App.Div. 665.

(2) Other memoranda or writings see 22 C.J. p 893 note 67 [a].

Necessity for introduction of memorandum

Where witness had no recollection of inspection independent of memorandum made at time, refusal to permit such memorandum to be read into record was not error, the memorandum itself not being offered for examination of jury or opposing counsel.—Davis v. Associated Fruit Co., 238 P. 629, 135 Wash. 614.

95. U.S.—In re Messenger, D.C.Pa., 32 F.Supp. 490.
Wash.—Cooley v. Ben Paris Sporting Goods & Recreation Co., 105 P.2d 820, 5 Wash.2d 415, amended on other grounds and rehearing denied 107 P.2d 347.
22 C.J. p 893 notes 67, 68.

Knowledge of truthfulness

(1) Knowledge on the part of the person who made the memorandum, at the time it was made, that the statements or entries therein were correct must be shown.—Cooley v. Ben Paris Sporting Goods & Recreation Co., supra.

(2) Where a witness recognized his signature on a statement but did not recall having signed it, or having made the statement, nor did he recall any of the facts recited therein, and declined to testify that at the time he made the statement he knew the facts therein stated to be true, it was error to admit the statement on his negative reply to the question whether prior to the accident to him he did ever affix his signature to any paper which did not contain the true facts within his own knowledge.—Hodas v. Davis, 196 N. Y.S. 801, 203 App.Div. 297.

Want of recollection

(1) Want of present recollection should be shown.
Ill.—Wiedow v. Carpenter, 34 N.E.2d 82, 310 Ill.App. 342.
Okl.—Hodges v. Reynolds, 40 P.2d 1025, 170 Okl. 345.

troduced in cases where the witness has no present recollection of the fact, but is able to swear only to the correctness of the entries when made, have sometimes been regarded as independent evidence,[96] or as original[97] or substantive[98] evidence, but in other cases such evidence has been considered not as independent evidence but as admissible in connection with the oral testimony of the witness,[99] and in some cases such evidence is referred to as past recollection recorded.[1]

With the foregoing explanation it may be laid down as a general rule that mere private memoranda are inadmissible as independent evidence, that is, apart from oral testimony,[2] unless they form

(2) Writing, which witness testified was an accurate summary of party's statements on a particular occasion, was not admissible without showing that witness lacked present recollection of such statements.—In re Messenger, D.C.Pa., 32 F.Supp. 490.

(3) Admission of written memorandum of license number by person since deceased, correctness of which was vouched for by several witnesses who saw the memorandum made and compared it with the license plate, was not error where the witness denied that he had any present recollection of the number but no further attempt was made to show whether his recollection could be refreshed by the paper, especially in view of the absence of a specific objection.—Pardo v. Sender Bros. Trucking Co., 257 N.Y.S. 798, 144 Misc. 68.

Foundation not sufficiently established

Cal.—McEwen v. New York Life Ins. Co., 201 P. 577, 187 Cal. 144.

96. Conn.—Curtis v. Bradley, 31 A. 591, 65 Conn. 99, 48 Am.S.R. 177, 28 L.R.A. 143.

22 C.J. p 894 note 68.

97. Conn.—Papas v. Ætna Ins. Co., 150 A. 310, 111 Conn. 415.

98. N.H.—Lawrence v. Farwell, 163 A. 115, 86 N.H. 59.

Rule discussed

Memoranda and other documents are used, not to refresh one's memory when one has no memory as to past events, but as substantive evidence of facts stated therein when one has made a memorandum of an event at the time of its occurrence.—Bartis v. Warrington, N.H., 20 A.2d 642.

99. Okl.—Hodges v. Reynolds, 40 P. 2d 1025, 170 Okl. 345.

22 C.J. p 894 note 69.

Supplying details

Memorandum is admissible in such case, not as independent proof but to supply the details of what the witness has sworn to generally.—Hodges v. Reynolds, 40 P.2d 1025, 170 Okl. 345—First Nat. Bank of Enid v. Yeoman, 78 P. 388, 14 Okl. 626.

Denial of independent recollection

A witness, denying any independent recollection of matters on which he was called to testify, could not be permitted to read to jury tally sheets identified by him, since the tally sheets were not evidence of themselves.—Patterson v. Allen, 197 S.E. 168, 213 N.C. 632.

1. N.J.—Cottentin v. Meyer, 76 A. 341, 80 N.J.Law 52.

22 C.J. p 894 note 69.

Discussion of rule

(1) In civil cases, memorandum of past recollection recorded is admissible where witness who made memorandum or directed it to be made testifies that he at one time had personal knowledge of the facts, that memorandum was, when made, an accurate record of the event, and that after seeing memorandum he has not sufficient present independent recollection of the facts to testify accurately in regard thereto.—Kinsey v. State, 65 P.2d 1141, 49 Ariz. 201.

(2) Memoranda of past recollection, contemporaneously made with the facts therein recited, although not constituting regular entries in the usual course of business, in the absence of independent present recollection are receivable in evidence provided their correctness is guaranteed by the person making them.—Hodas v. Davis, 196 N.Y.S. 801, 203 App.Div. 297.

Materialman's sales slips of original entry to prove lien claim were admissible as past recollections recorded, although there was no testimony that materialman kept correct accounts, where entrants of slips were produced on witness stand.—Hot Springs Plumbing & Heating Co. v. Wallace, 27 P.2d 984, 38 N.M. 3.

Memoranda not made by witness

Memoranda representing personal knowledge and recollection of witness when memoranda were made are generally admissible as past recollection recorded, although not actually made by witness himself.—Grossman v. Delaware Electric Power Co., 155 A. 806, 4 W.W.Harr., Del., 521.

Production of original memorandum

Original memorandum must be produced, if available, ordinarily to make sure that record offered is in fact embodiment of past recollection of witness.—Grossman v. Delaware Electric Power Co., supra.

2. Ala.—Armour Fertilizer Works v. Kinney, 114 So. 41, 216 Ala. 547.

Minn.—Sullivan v. Minneapolis St. Ry. Co., 200 N.W. 922, 161 Minn. 45.

Mo.—Newkirk v. City of Tipton, 136 S.W.2d 147, 234 Mo.App. 920.

Pa.—See In re Mengel's Estate, 33 Berks Co.L.J. 127.

Tex.—Durham v. Foust, Civ.App., 64 S.W.2d 1027.

Wash.—State v. Coffey, 112 P.2d 989, 991, citing **Corpus Juris.**

Wis.—Markgraf v. Columbia Bank of Lodi, 233 N.W. 782, 203 Wis. 429.

22 C.J. p 894 note 70.

Affidavit

Affidavit made by witness a month after the event involved, which was based on another writing not in evidence, was not admissible, witness having no recollection of the transaction involved.—Copeland Co. v. Davis, 119 S.E. 19, 125 S.C. 449.

Memorandum of interview

Mere making of written memorandum immediately after interview does not make memorandum affirmative intrinsic proof of things said or transacted.—Springer v. Labow, 155 A. 476, 108 N.J.Law 68.

Scale tickets

(1) Scale tickets issued by weighers of grain elevator company, not a party to the action, are not admissible as independent evidence of amount of grain weighed, but only when they have been authenticated by proof that they correctly stated facts, and were correctly kept as records.—Locke v. Wallingford, Tex. Civ.App., 265 S.W. 1086.

(2) In action by assignee of lease of farm against lessor, where lease contract did not bind parties to deposit wheat in elevator, and there was no agreement that scale tickets should be issued, or that they could bind parties, such scale tickets were not competent evidence for or against either party.—Locke v. Wallingford, supra.

(3) Other cases.—Oklahoma Hay & Grain Co. v. T. D. Randall & Co., 168 P. 1012, 66 Okl. 277—22 C.J. p 894 note 70 [b].

Stenographic notes

The record of dictation of a letter to a stenographer in the form of stenographic notes is not admissible as a memorandum or an entry made in the ordinary course of business by a clerk or bookkeeper.—Mercantile Trust & Deposit Co. v. Rode, 112 A. 574, 137 Md. 362.

part of a transaction which they tend to characterize and explain and thus become a part of the res gestæ;[3] the fact that the maker of the memorandum or written statement is a witness does not of itself authorize the admission of such memorandum or statement.[4] In some cases, however, certain memoranda or written statements have been admitted on the ground that they were made in the usual course of business,[5] or are in the nature of an

Other memoranda, statements, or entries held inadmissible

(1) Broker's memorandum slip which was written in lead pencil, contained alterations, was not signed by person sought to be charged as customer, and was not the original paper from which book entry was made.—Hunt v. Krebs, 194 N.E. 34, 48 Ohio App. 279.

(2) Credit slips or "memos" made by bank employees, in action on fidelity bond of bank officers, where books contained no corresponding credit entries.—Andrew v. Hartford Accident & Indemnity Co., 223 N.W. 529, 207 Iowa 652.

(3) Entry in book kept by claimant against estate of deceased person, for own use, not amounting to admission against interest or account between claimant and deceased.—In re Patterson's Estate, 230 N.W. 137, 201 Wis. 362.

(4) Loading slip, not identified by the person who made it or by one who knew the facts purported to be shown by it.—Reed v. David Stott Flour Mills, 185 N.W. 715, 216 Mich. 616.

(5) Recital of value in a salesman's memorandum of the order given for goods, in the absence of proof that the value shown therein is the reasonable value at the time in question.—Converse Rubber Shoe Co. v. Rozen, 185 N.W. 977, 192 Iowa 1053.

(6) Typewriting on the cover of an agreement between the parties, which formed no part of the instrument.—Boggs v. Boggs, 114 A. 474, 138 Md. 42.

(7) Unexplained pencil notations on letter from school building contractor to subcontractor, suing for extra services rendered.—Venezia v. Town of Fairfield, 172 A. 90, 118 Conn. 325.

(8) In a suit on an insurance policy for damages from theft of car, envelope memorandum, used in prosecutor's office in working on case against thief.—Smith v. National Union Fire Ins. Co., 130 A. 371, 3 N.J.Misc. 994.

(9) Other cases.
D.C.—Demeter v. U. S., 66 F.2d 188, 62 App.D.C. 208.
Okl.—Hodges v. Reynolds, 40 P.2d 1025, 170 Okl. 345.
22 C.J. p 894 note 70 [a].

Effect of use on cross-examination

Notes taken by witness at the time of the occurrence involved were not rendered competent as independent evidence by cross-examining counsel reading statements from such notes.—Renwick v. Eastern Massachusetts St. Ry. Co., 175 N.E. 475, 275 Mass. 145.

Where fact otherwise shown

In an action on promissory notes, in which was involved the authority of plaintiff payee to indorse on the notes certain credits, exclusion of a memorandum, offered in behalf of defendant maker of notes for the purpose of showing that the parties put some of their accounts in writing, was not erroneous, in view of plaintiff's admission that she kept an account book.—Madison v. White, 54 F.2d 440, 60 App.D.C. 329.

3. Mich.—Rogers v. Krumrei, 106 N.W. 279, 143 Mich. 15.
22 C.J. p 895 note 71.

Evidence held admissible

(1) In an action by a household servant to recover a legacy conditioned on such servant being in testator's employ at the time of his death, an envelope (containing the will) with a signed statement inscribed thereon, in the handwriting of the testator, made on the day he permanently closed his house, to the effect that such servant that day left his employ, was admissible in evidence.—Kelly v. Pitney, 121 A. 593, 98 N.J.Law 773.

(2) A memorandum made by the shipper of potatoes as to the weight of each load as announced by the weighmaster, which was thereafter compared with the records kept by the weighmaster and found to be correct, was admissible in an action against a railroad for damages to the shipment.—Durnford v. Chicago, B. & Q. R. Co., 246 S.W. 973, 213 Mo. App. 93.

Entry at or near time of occurrence of facts entered

Entry of certain facts made at or near time of occurrence by one whose duty it was to make them, and truth of which was known to him, may, on proper identification, be admitted as proof thereof, but entries not meeting these requirements are inadmissible.—Graham v. John Flannery Co., 124 S.E. 729, 32 Ga.App. 713.

Written memoranda made in the course of business are generally admissible.—Capitol Hotel Co. v. Rittenberry, Tex.Civ.App., 41 S.W.2d 697, error dismissed.

4. N.J.—Springer v. Labow, 155 A. 476, 108 N.J.Law 68.

Memoranda or statements held inadmissible

(1) In action against warehouse company for value of goods lost in transit, exclusion of a memorandum made by warehouseman's employee, who was a witness, at time he gave rates and charges to shipper, was proper where it was not shown to have been made in the presence of shipper and was not made in the usual or regular course of defendant's business.—Walton v. A. B. C. Fireproof Warehouse Co., Mo.App., 151 S.W.2d 494.

(2) In husband's action for alienation of wife's affections, exclusion of notes taken by eavesdropper of telephone conversations between wife and defendant was proper, especially where eavesdropper was permitted to tell jury what the conversations were.—Fry v. Lebold, Ohio App., 31 N.E.2d 257.

(3) Where, at close of last day bank was open, its funds were sufficient to meet demands of cestuis que trust, private memorandum kept by official of the bank, who was a witness, was not admissible to show that at one time during the last day the trust fund was exhausted, it not refreshing his recollection or enabling him to testify from memory.—Scully v. Pacific States Savings & Loan Co., C.C.A.Cal., 88 F.2d 384, certiorari denied Ellingson v. Pacific States Savings & Loan Co., 57 S.Ct. 937, 301 U.S. 704, 81 L.Ed. 1358.

(4) Other cases.
Ill.—Wiedow v. Carpenter, 34 N.E.2d 83, 310 Ill.App. 342.
Mass.—Hutchinson v. Plant, 105 N.E. 1017, 218 Mass. 148.
Tex.—Harper v. Highway Motor Freight Lines, Civ.App., 89 S.W.2d 448, error dismissed.

5. Tex.—Bauder v. Johnson, Civ. App., 36 S.W.2d 1112.
22 C.J. p 893 note 67.

Dray tickets

Tenn.—A. J. Cook & Co. v. Seaton, 6 Tenn.App. 81.

Deposit slip

In action to enjoin sale of land under power of sale contained in security deed and to cancel the deed, copy of deposit slip showing that money borrowed was deposited in bank to credit of grantor was admissible in behalf of defendant where witness testified that he was present and saw the deposit slip made and that the deposit slip introduced was a copy of the original, over the objection that witness did not himself

original entry.[6]

Where a witness has a distinct recollection of the circumstances surrounding the transaction as to which he testifies, written memoranda of the facts made by him at the time of the occurrence should not be admitted,[7] although a memorandum prepared under the supervision of the witness has been received for the purpose of explaining certain questions propounded to the witness and answers made by him,[8] and a memorandum when verified by the witness as being correct may be received under certain circumstances.[9]

Memoranda or written statements may be admissible as containing admissions of the parties[10] or as amounting to a contemporaneous record of a transaction agreed on by the parties,[11] and certain memoranda or written statements which may not

make the deposit slip or the copy.—Williamson v. Walker, 1 S.E.2d 718, 187 Ga. 603.

Memorandum or statement of third person

In an action by a buyer based on alleged fraudulent representations as to age of automobile sold and mileage operated, card in witness' handwriting showing mileage operated at time of greasing while the automobile was formerly owned by another was properly admitted in behalf of plaintiff where it was found in the automobile and it was the custom of a service station to place such a card in automobiles greased at that station.—Bauder v. Johnson, Tex.Civ.App., 36 S.W.2d 1112.

6. Va.—Davenport v. Kendrick, 139 S.E. 295, 148 Va. 479.

7. D.C.—Gunning v. Cooley, 30 F.2d 467, 58 App.D.C. 304, certiorari granted 49 S.Ct. 263, 279 U.S. 828, 73 L.Ed. 979, affirmed 50 S.Ct. 231, 281 U.S. 90, 74 L.Ed. 720—Sechrist v. Atkinson, 81 App.D.C. 1.

Fla.—Squires v. Kilgore, 111 So. 113, 115, 92 Fla. 1001, citing **Corpus Juris.**

Md.—Riley v. Naylor, 16 A.2d 357.

Eyewitness

Written statement of what eyewitness of accident saw, made, signed, and delivered to plaintiff's attorney shortly after accident, was not admissible where witness had already testified regarding what he had seen and certain distances.—Garrison v. Pearlstein, 229 P. 348, 68 Cal.App. 326.

Propriety of reading record or statement

In an action against a physician based on alleged malpractice, it was error to permit plaintiff to read in detail the nurses' records covering a long period of treatment of plaintiff following an operation which was performed to relieve plaintiff of a condition which might or might not have been caused by defendant's negligence, since the nurses could have testified to all that was competent, using the records to refresh memory if necessary.—Bowman v. Coyle, 260 P. 643, 124 Kan. 492.

8. Minn.—Coyne v. Bearman Fruit Co., 224 N.W. 146, 176 Minn. 480.

9. **Facts obtained by witness transcribed by another**

In an action for personal injuries, memorandum containing measurements and distances taken by plaintiff, but transcribed by his attorney, which plaintiff read and verified as being correct, was admissible.—Hines v. May, 230 S.W. 924, 191 Ky. 493.

Memorandum of lost goods

On witness identifying a memorandum as a list of the goods in his lost trunk, made by him practically contemporaneously with the loss, and vouching for its correctness, it was admissible in evidence.—Gwathmey v. Foor Hotel Co., 113 S.E. 688, 121 S.C. 237.

Engineers' notes

(1) Where issue in action for breach of contract concerned cubic contents of dikes, and there was testimony showing uniform slope or angle of repose of embankments so that measurement of height made possible computation of base, engineers' field notes recording only center heights of dikes were properly admitted in connection with testimony of qualified engineers that the notes were in their handwriting, were accurate, and contained sufficient data for correct computation.—Barnard Curtiss Co. v. Minneapolis Dredging Co., 274 N.W. 229, 200 Minn. 327.

(2) Exhibits consisting of engineers' notes and tabulations made from such notes were properly admitted in evidence as against objection that they were not sufficiently authenticated.—St. Joseph Loan & Trust Co. v. Studebaker Corporation, C.C.A.Ind., 66 F.2d 151, certiorari denied 54 S.Ct. 209, 290 U.S. 699, 78 L.Ed. 601.

Memorandum of tests made by assistant to witness

Exhibit consisting of memoranda of analyses of samples of oil received, made by chemist's assistant and referred to in chemist's deposition, was competent in behalf of defendant buyer in action for price of oil, in which defense was that oil did not have guaranteed phenol content.—Gutkind v. George Lueders & Co., 196 N.E. 201, 267 N.Y. 320, reversing 275 N.Y.S. 338, 242 App.Div. 764, and reargument denied 198 N.E. 429, 268 N.Y. 610.

Application for insurance

Duplicate application for accident and health insurance, based on statements made by applicant to witness who filled out the application, which witness knew to be accurate when made was admissible with his testimony as memorandum as against applicant.—Worez v. Des Moines City Ry. Co., 156 N.W. 867, 175 Iowa 1.

10. Ill.—Blodgett v. Blodgett, 266 Ill.App. 517, transferred, see 175 N.E. 777, 343 Ill. 569.

22 C.J. p 896 note 77.

Evidence held admissible

(1) Statement of agent of proprietor of grain elevator as to dockage was admissible against such proprietor.—O'Laughlin v. St. Anthony & Dakota Elevator Co., 192 N.W. 356, 155 Minn. 88.

(2) In action to recover for failure to furnish live stock cars, a written statement of freight rates delivered to plaintiffs by defendant's agent, with whom, according to plaintiff's claim, the contract was made, and prepared by clerk in agent's office was admissible in behalf of plaintiff, although not actually prepared by agent himself.—Southern Pac. Co. v. Stevens, Ariz., 258 F. 165, 169 C.C.A. 233.

(3) In an action for personal injuries under Rev.St.1919 § 6786, relating to guarding machinery, record of plaintiff's inspection report on the condition of defendant's machinery and testimony relating thereto were properly admitted over plaintiff's objection to show whether the machinery in question was dangerous to workers while employed thereon or thereabouts.—Shoemaker v. Adair County Coal Co., Mo.App., 255 S.W. 350.

(4) Other cases.

Ala.—Reed v. Banister, 80 So. 410, 202 Ala. 328.

Minn.—Hector Const. Co. v. Butler, 260 N.W. 496, 194 Minn. 310.

11. Mass.—Meyer v. Reichardt, 112 Mass. 108.

22 C.J. p 896 note 77.

Performance under contract of sale

In an action for balance due for logs sold, adding machine slips showing quantity scaled and giving other

be evidence of the truth of the recitals or statements contained therein are sometimes competent with respect to other matters.[12] Statements, otherwise incompetent and inadmissible, are not rendered competent and admissible merely because they are contained in a memorandum which may contain matter which is competent and admissible,[13] and a memorandum which purports to contain mere conclusions of the person who made it may be excluded.[14]

Statutory regulations. In some jurisdictions statutes provide for the admission, under certain conditions, of a memorandum of an act, transaction, occurrence, or event in proof of such act, transaction, occurrence or event, if it was made in the regular course of business.[15] Such statutes have been held valid.[16]

Except as otherwise specifically provided, such statutes do not change the rules of substantive evidence;[17] they do not change the rules of competency or relevancy with respect to recorded facts, but merely provide a method of proof of an admissible act, transaction, occurrence, or event.[18] Such statutes do not render admissible evidence concerning matters which are otherwise inadmissible,[19] as, for example, reports and records of particular facts as to which oral testimony would not be admissible.[20] Only such memoranda, records, or entries as come within the purview of the statute may be admitted.[21]

information were competent, in view of the provisions of the contract for scalers of buyer to join with seller in scaling and of the fact that the seller and scaler for buyer joined in preparing the adding machine slips. —Atkin v. Long Lake Lumber Co., 292 P. 104, 159 Wash. 27.

Transaction between mortgagor and mortgagee

In an action in which a mortgagor set up a claim that there was due him from the holder of a second mortgage a certain amount, statements in the form of orders, addressed to the holders of the first and second mortgage, charging them with the amount of the mortgages, and authorizing them to make certain payments to designated persons, were admissible in behalf of the mortgagor where such statements were given to him by the holder of the second mortgage.—Votta v. De Pasquale, R. I., 136 A. 841.

12. Conn.—Gray v. Greenblatt, 155 A. 707, 113 Conn. 535.

Ability and readiness to perform contract

In an action to recover damages for alleged breach of contract for exchange of real property, adjustment sheets were admissible to show plaintiff was ready, able, and willing to carry out exchange agreement, although not evidence of the truth of statements therein made.—Gray v. Greenblatt, supra.

Memorandum taken by an insurance adjuster from the books of insured was admissible to show at what point he ceased his investigations, although not of the correctness of his itemization.—Chamberlain v. Shawnee F. Ins. Co., 58 So. 267, 177 Ala. 516.

Memorandum of third person

In action by broker for balance due for purchase and sale of wheat for defendant in which defendant set up as a defense that the alleged purchases and sales were mere pretended transactions and that the transactions were void, memorandum made by an employee of a third person who had bought wheat for defendant at plaintiff's request was admissible, there being no dispute as to quantity or price.—Rothschild v. Sabath, 17 N.E.2d 354, 297 Ill.App. 638.

13. Ala.—Deal v. Hubert, 95 So. 349, 209 Ala. 18, followed in Bell v. Hubert, 95 So. 350, 209 Ala. 22.

14. Tex.—American Nat. Ins. Co. v. Valencia, Civ.App., 91 S.W.2d 832, error dismissed.

Conclusions as to provisions of proposed contract

Ill.—Boone v. Pickard, 125 Ill.App. 438.

15. Mich.—Wilson v. Prudential Insurance Co. of America, 275 N.W. 242, 281 Mich. 541.

Purpose of statutes

The purpose of the legislature was to permit a writing or record made in the regular course of business to be received in evidence, without the necessity of calling as witnesses all of the persons who had any part in making it, provided the record was made as a part of the duty of the person making it, or on information imparted by persons who were under a duty to import such information.—Johnson v. Lutz, 170 N.E. 517, 253 N.Y. 124.

16. Mich.—Kelly v. Ford Motor Co., 273 N.W. 737, 280 Mich. 378—Gile v. Hudnutt, 272 N.W. 706, 279 Mich. 358.

17. Mich.—Wilson v. Prudential Insurance Co. of America, 275 N.W. 242, 281 Mich. 541.

18. Mich.—Wilson v. Prudential Insurance Co. of America, supra—Kelly v. Ford Motor Co., 273 N.W. 737, 280 Mich. 378.

Self-serving records

Except within limits of well-established exceptions to hearsay rule, the statute does not permit introduction of hearsay evidence under guise of self-serving records made by or in behalf of a litigant.—Wilson v. Prudential Insurance Co. of America, 275 N.W. 242, 281 Mich. 541.

19. N.Y.—Poses v. Travelers Ins. Co., Hartford, Conn., 281 N.Y.S. 126, 245 App.Div. 304.

20. Mich.—Wilson v. Prudential Insurance Co. of America, 275 N.W. 242, 281 Mich. 541—Kelly v. Ford Motor Co., 273 N.W. 737, 280 Mich. 378.

Voluntary hearsay

Statutes do not authorize the receipt in evidence of entries based on voluntary hearsay statements made by third persons not engaged in the business or under any duty with relation thereto.—Johnson v. Lutz, 170 N.E. 517, 253 N.Y. 124.

Report of injury to employee

(1) In a workman's compensation case, records of employer showing employee's version of claim of accident and injury as told to and recorded by other employees were not admissible, as evidence of the fact of an accident.—Kelly v. Ford Motor Co., 273 N.W. 737, 280 Mich. 378.

(2) Employee's claim of accident and injury as told to and recorded by others could only be admitted as evidence of the fact of an accident, where adopted and offered as an admission by the employer.—Kelly v. Ford Motor Co., supra.

(3) Records of employer showing employee's version of an accident and injury as recorded by others were admissible to show notice to the employer of a claim of accident.—Kelly v. Ford Motor Co., supra.

21. Mich.—Wilson v. Prudential Insurance Co. of America, 275 N.W. 242, 281 Mich. 541.

Entries containing mere opinions

Entries of deceased physician containing opinions which were not records of any act, transaction, or event made in course of physician's profession, were not admissible under Civ.

Memorandum by person since deceased. It has been considered that a written memorandum or statement, otherwise incompetent as evidence, does not become competent merely because the person who made it has since died,[22] as, for example, where the memorandum is offered in favor of his personal representative.[23] In some cases, however, a memorandum or statement of a deceased person has been received,[24] especially when it was made in the course of his business or the performance of his duties,[25] and memoranda of a decedent are sometimes made admissible by statute.[26]

Use of memoranda to corroborate witness. Under certain circumstances, memoranda or written statements are admissible in corroboration of oral testimony.[27] Written memoranda made at or about

Prac.Act § 374-a.—Goodkin v. Brooklyn & Queens Transit Corporation, 269 N.Y.S. 809, motion denied 270 N.Y.S. 975, 241 App.Div. 758, affirmed 193 N.E. 422, 265 N.Y. 638.

22. Me.—Arnold v. Hussey, 88 A. 724, 111 Me. 224, Ann.Cas.1916C 715, 51 L.R.A.,N.S., 813.

22 C.J. p 895 note 72.

Ex parte survey of vessel

A writing found among the papers of a deceased surveyor, purporting to be a survey of a vessel made at the request of one only of the parties to a suit, was not admissible in evidence.—The Nettie Moore, D. C.Md., 270 F. 1005.

23. N.Y.—Burke v. Baker, 80 N.E. 1033, 188 N.Y. 561, affirming 97 N.Y.S. 768, 111 App.Div. 422.

22 C.J. p 895 note 72.

24. Mo.—German Evangelical Bethel Church of Concordia v. Reith, 39 S. W.2d 1057, 327 Mo. 1098, 76 A.L.R. 604.

22 C.J. p 895 note 73.

Want of proper identification

In action on accident policy, excluding written statement, alleged to have been made by deceased beneficiary, for lack of proper identification was not abuse of discretion.—Missouri State Life Ins. Co. v. West, C.C.A.Okl., 67 F.2d 468.

25. Ky.—Gus Dattilo Fruit Co. v. Louisville & N. R. Co., 37 S.W.2d 856, 238 Ky. 322.

Neb.—Kehl v. Omaha Nat. Bank, 254 N.W. 397, 126 Neb. 695.

N.H.—Lebrun v. Boston & M. R. R., 142 A. 128, 83 N.H. 293.

22 C.J. p 895 note 74.

Particular writings admissible

(1) Prescription given by physician.—Phœnix Refining Co. v. Walker, Tex.Civ.App., 108 S.W.2d 323, error dismissed.

(2) Entry by attorney, since deceased, in regular and customary course of business in his memorandum book which was part of office records and in daily use.—Jameson v. First Savings Bank & Trust Co. of Albuquerque, 55 P.2d 743, 40 N. M. 133, 103 A.L.R. 1492.

26. Conn.—Brown v. Goodwin, 147 A. 673, 110 Conn. 217.

22 C.J. p 895 note 75.

Admission of declarations of deceased person under statutes see supra §§ 205, 216.

Purpose of statutes

The purpose of some statutes is to remove the disparity in advantage previously possessed by living litigants as against the representatives of deceased persons.—Doyle v. Reeves, 152 A. 882, 112 Conn. 521.

Document in form of will

(1) In action for services rendered decedent, draft of new will not written or signed by decedent was not admissible as memorandum of deceased under Gen.St.1930 § 5608. —Doyle v. Reeves, 152 A. 882, 112 Conn. 521.

(2) Document in handwriting of decedent and signed by him, purporting to be his will, which was neither witnessed nor offered for probate as a will, is admissible.—Brown v. Goodwin, 147 A. 673, 110 Conn. 217.

"Professional capacity"

(1) In will contest, memorandum which deceased attorney, who drew will, made during conversation with testator, which bore names of beneficiaries and the words "without bonds," and which was identified by attorney's stenographer, who, with attorney, attested will, was inadmissible, notwithstanding statute providing for admission of professional entries of deceased in a position to know facts therein stated.—In re Iwers' Estate, 280 N.W. 579, 225 Iowa 389.

(2) Other cases.—Cummings v. Pennsylvania F. Ins. Co., 134 N.W. 79, 153 Iowa 579, 37 L.R.A.,N.S., 1169, Ann.Cas.1913E 235—22 C.J. p 895 note 75 [c].

Testimony by adverse party

In an action against an executor for breach of an oral contract of agency with decedent, a memorandum made by decedent before his death, containing a full statement of the matter in controversy, and a bill to perpetuate testimony, was not admissible under Code 1919 § 6209, providing that, if an adverse party testifies, all entries, memoranda, and declarations by the party incapable of testifying, made while capable, are admissible, no adverse party having testified.—Robertson's Ex'r v. Atlantic Coast Realty Co., 106 S. E. 521, 129 Va. 494.

In California

(1) In view of Code Civ.Proc. § 1946 providing as to what entries or writings of a decedent may be used as evidence, a private memorandum book in the handwriting of decedent showing payments by decedent to another was not admissible in behalf of decedent's estate.—Thompson v. Orena, 66 P. 24, 134 Cal. 26.

(2) As bearing on the good health of decedent prior to an injury, court erred in admitting a private memorandum of decedent to show that medicine received by him before the injury had been for his father, such memorandum not being admissible under Code Civ.Proc. § 1946.—Ensign v. Southern Pac. Co., 223 P. 953, 193 Cal. 311.

(3) Where the issue was whether deed by deceased was delivered, memoranda found among his effects, tending to show his interest in property, was admissible on behalf of defendant executor.—Belser v. American Trust Co., 13 P.2d 951, 125 Cal.App. 344.

(4) Time book kept by decedent is admissible in behalf of decedent's personal representative.—Warren v. Hiltscher, 295 P. 536, 111 Cal.App. 318.

In Massachusetts

(1) Mass.Gen.L. c. 233 § 65 does not authorize the admission of a written memorandum or statement made by a person, since deceased, to the effect that a party to the action has made to such person an admission against interest, as, for example, an entry by the adverse party's attorney, since deceased, in such attorney's diary.—Small v. Heywood-Wakefield Co., D.C.Mass., 13 F.Supp. 825, affirmed, C.C.A., Heywood Wakefield Co. v. Small, 87 F.2d 716, certiorari denied 57 S.Ct. 925, 301 U.S. 698, 81 L.Ed. 1353.

(2) Such statement of the deceased attorney was not admissible notwithstanding the statute, because such statement did not purport to disclose what the party said to the deceased attorney but actually amounted to a conclusion of law on the part of such attorney.—Small v. Heywood-Wakefield Co., supra.

27. Ala.—Chamberlain v. Shawnee Fire Ins. Co., 58 So. 267, 177 Ala. 516.

22 C.J. p 896 note 78.

Particular writings admissible

(1) Where a party to the action

the time of the transaction to which they relate are sometimes admitted in evidence to corroborate the testimony of the person by whom they were made;[28] and, according to some cases, memoranda with which a witness has refreshed his memory may be used to corroborate his testimony.[29]

The testimony of a witness may not, however, be corroborated under all circumstances by a written statement made wholly by him,[30] and according to some cases, where the witness has testified independently of,[31] or after his memory has been refreshed by,[32] the memorandum, the memorandum is not admissible in corroboration; and it has been held that a statute permitting a witness to refresh his memory by memoranda does not authorize the introduction of memoranda in evidence to corroborate what the witness has testified to without the aid thereof,[33] and that a bank register is not admissible to corroborate defendant's claim that the bank, and not the payee, was the owner of a note, where the bank was a private one of which defendant was part owner and cashier, and the entry in the bank register was made by himself.[34]

§ 697. —— In Explanation of Parol Contract

A memorandum which has been approved or assented to by the parties to a parol contract is competent as evidence tending to establish the terms of the contract.

A memorandum relating to the terms of a parol contract made at the time by one of the parties negotiating the contract and read over to the other without dissent, or made by a third person under circumstances showing an assent thereto by the parties, or otherwise made under such circumstances as to indicate mutual assent, although not in itself a valid written contract, may be competent as substantive evidence tending to establish, in connection with other evidence, the terms of the contract.[35] However, the memorandum is not admis-

in his evidence particularly described certain items of expense incurred by him, it was not error to fail to exclude certain written memoranda containing the amounts of these items on the ground that in such memoranda these items were not particularly described.—Malsby & Co. v. Widincamp, 102 S.E. 178, 24 Ga.App. 737.

(2) In action by lessee to compel specific performance of lease contract, certain interdepartmental letters of lessee and approvals of expenditures relating to contemplated leasing of property, which were admitted through a witness who was an employee of lessee, were properly admitted as writings incident to lessee's participation in transaction, as relevant to issue of whether there was intent to make a lease which would be immediately binding and as corroboratory of oral testimony of witness.—Socony-Vacuum Oil Co. v. Elion, 11 A.2d 5, 126 Conn. 310.

28. Ga.—Athens Mfg. Co. v. Malcolm, 68 S.E. 329, 134 Ga. 600.
22 C.J. p 896 note 78.

Time book

In action for damage to property from relocation of railway track, time book containing entries made by track foreman in charge of relocation of track, showing total number of hours of labor devoted to the work, was admissible as corroborative of track foreman's testimony relating to time that relocation was completed.—Southern Ry. Co. v. Leonard, 199 S.E. 433, 58 Ga.App. 574.

29. Vt.—Nelson & Wallace v. Gibson, 98 A. 1006, 90 Vt. 423.
70 C.J. p 599 note 55.

30. **Corroboration of evidence as to conflicting statements**

Where contradictory statements made by a witness are introduced by the opposing counsel, the latter cannot be permitted to corroborate conflicting statements by a written statement made wholly by his witness.—Hinrichs v. Texas & N. O. R. Co., Tex.Civ.App., 153 S.W.2d 859.

31. N.J.—Springer v. Labow, 155 A. 476, 108 N.J.Law 68.

32. D.C.—Gunning v. Cooley, 30 F. 2d 467, 58 App.D.C. 304, certiorari granted 49 S.Ct. 263, 279 U.S. 828, 73 L.Ed. 979, affirmed 60 S.Ct. 231, 281 U.S. 90, 74 L.Ed. 720.
Mo.—Walton v. A.B.C. Fireproof Warehouse Co., App., 151 S.W.2d 494.
N.J.—Springer v. Labow, 155 A. 476, 108 N.J.Law 68.

33. Cal.—People v. Allen, 174 P. 374, 37 Cal.App. 180.

34. Mich.—Conroy v. Haffner, 148 N.W. 969, 182 Mich. 289.

35. Fla.—Squires v. Kilgore, 111 So. 113, 115, 92 Fla. 1001, quoting **Corpus Juris.**
Ga.—Lanier v. Council, 176 S.E. 614, 179 Ga. 568.
Ill.—Central Mut. Ins. Co. of Chicago v. St. Paul Mercury Indemnity Co. of St. Paul, 9 N.E.2d 355, 291 Ill.App. 50—Komorowski v. Boston Store of Chicago, 263 Ill.App. 88.
Kan.—Hines v. Roberts Bros., 232 P. 1050, 117 Kan. 589.
Mo.—Burkhardt v. Decker, 295 S.W. 838, 221 Mo.App. 1066—Smith v. Nicholson, 289 S.W. 349, 221 Mo. App. 428, certiorari quashed State ex rel. Bradley v. Trimble, 289 S. W. 922, 316 Mo. 97.
Tex.—Givens v. Featherstone, Civ. App., 12 S.W.2d 613, 614, quoting **Corpus Juris.**
22 C.J. p 896 note 81.

Contract for exchange of property

Unsigned memoranda of verbal agreement for exchange of lands were admissible to show terms thereof beyond doubt.—Givens v. Featherstone, Tex.Civ.App., 12 S.W. 2d 613.

Contract for transfer of insurance

In action on fire policy in which the insurer claimed that the insurance had been transferred from the building in which the insured goods had been located at the time of the fire to another building, pursuant to agreement with insured, the office copy of the policy in possession of the insurer, on which the transfer was entered, was admissible, in corroboration of testimony as to insurer's performance of the transfer agreement.—First Nat. Bank v. Home Ins. Co., 118 A. 17, 274 Pa. 129.

Executory contract

Deposit slip bearing words, "Contract to be arranged as per agreement" and "Notes $7,700," handed plaintiff when making contract, was admissible to show agreement was executory.—Hoover v. Northern States Life Ins. Co., 215 N.W. 921, 56 N.D. 87.

Modification of contract

In action against city water commissioners to recover on dam construction contract, memorandum of corporation counsel stating conversation which took place at conference at which were present contractors and their attorney, corporation counsel, and general manager of waterworks was admissible where action was based on agreement made

sible if it was not made under the direction of both the parties or subsequently approved by them.[36]

§ 698. Statements Prepared for Use at Trial

Written statements prepared for use at the trial usually are not admissible, but such statements are sometimes received where they are summaries of other evidence which has been admitted.

Written statements prepared for use at a trial are not ordinarily admissible in evidence.[37] However, they may be received where they are merely in the nature of summaries of voluminous records which are in evidence,[38] or which are available;[39] and an itemized statement of account or of loss, or the like, has been received in evidence under certain circumstances.[40]

between manager and contractors purporting to modify terms of original contract.—Blakeslee v. Board of Water Com'rs of City of Hartford, 183 A. 887, 121 Conn. 163.

36. Fla.—Squires v. Kilgore, 111 So. 113, 115, 92 Fla. 1001, quoting **Corpus Juris.**
22 C.J. p 896 note 82.

37. Ill.—Poreba v. Illinois Midland Coal Co., 156 Ill.App. 140.
Kan.—Kelley v. Stevens, 50 P. 595, 58 Kan. 569.
Taking or sending to jury room papers and articles not in evidence see C.J.S. title Trial § 467, also 64 C.J. p 1029 note 28—p 1030 note 42.

Statements or documents not admissible

(1) Excluding tables showing calculations made by witness, not on his own knowledge, but on the testimony of others, and on conclusions he had drawn therefrom, was not error.—Bader Coal Co. v. Quemahoning Coal Co., C.C.A.Pa., 14 F.2d 743.

(2) Salesman conducting transaction with defendants could not deprive defendant of right of cross-examination by having report of transaction made by salesman to his employer introduced in evidence.—Security Finance Co. v. A. L. Cook & Son, 3 S.W.2d 187, 223 Ky. 124.

(3) In action for breach of contract, invoices, offered in behalf of plaintiff, which were prepared after suit was commenced and which were not exhibited to defendant, were properly excluded.—Hass v. Alpert, 295 P. 66, 111 Cal.App. 26.

(4) In action by a subcontractor against a contractor, sworn statement of defendant contractors' bookkeeper respecting expenses and revenue from subcontract was not evidence in behalf of defendant, in absence of supporting testimony.—Lynch v. Stephens, 14 S.W.2d 257, 179 Ark. 118.

(5) Paper containing recapitulation of driller's daily reports of progress in digging hole on coal lands was not admissible in action for work done.—Denson v. Kirkpatrick Drilling Co., 144 So. 86, 225 Ala. 473.

(6) In action against gas company to enforce a rate order of the railroad commission, the trial court erred in refusing to exclude on objection an exhibit containing written arguments and self-serving and hearsay declarations of an expert witness for defendant in support of estimates, calculations, and comparisons.—Lone Star Gas Co. v. State, Tex., 153 S.W.2d 681, modifying State v. Lone Star Gas Co., Civ.App., 129 S.W.2d 1164.

(7) Other statements or documents.—Cooley v. Ben Paris Sporting Goods & Recreation Co., 105 P.2d 820, 5 Wash.2d 415, amended on other grounds and rehearing denied 107 P.2d 347—22 C.J. p 896 note 83 [a].

38. Wis.—Jordan v. Warner, 83 N. W. 946, 107 Wis. 539.
22 C.J. p 896 note 84.

Discussion of rule

When documents introduced in evidence are voluminous and of such character as to render it difficult for jury to comprehend material facts without schedules containing abstracts thereof, it is within discretion of judge to admit such schedules provided they are based on facts in evidence, verified by testimony of person by whom they were prepared, and provided that adverse party is permitted to examine them to test their correctness and to cross examine on them before case is submitted to jury.—Public Operating Corporation v. Weingart, 13 N.Y.S.2d 182, 257 App. Div. 379.

Tabulation or computation

(1) In action by members against cooperative association for breach of marketing contract, tabulations were admissible where constituting mere computations or summaries based on evidence.—Wheelwright v. Pure Milk Ass'n, 240 N.W. 769, 208 Wis. 40, motion denied 242 N.W. 486, 208 Wis. 40.

(2) On hearing before county court of common pleas of property owners' appeal from assessments of assessment commissioners admission of a certain exhibit being a schedule which was a recapitulation by some clerk of the figures adopted by various witnesses, put in tabular form, not offered or used as primary evidence, but only as mere convenience, was not improper.—City of Hoboken v. Greenberg, 128 A. 266, 101 N.J. Law 403, 404, 405, 406, 407, 408, 2 N. J.Misc. 505.

(3) Other cases.
U.S.—Bader Coal Co. v. Quemahoning Coal Co., C.C.A.Pa., 14 F.2d 743.
Ga.—Elder v. Atlanta-Southern Dental College, 189 S.E. 254, 183 Ga. 634.

Necessity for introduction of original sources

Statement by an agent for the collection of rents of a building, showing the number, amount, and dates of leases, the amount collected and the unexpired portion uncollected, is admissible if the accounts are complicated, provided the records or documents from which the statement is made are produced in court for inspection and introduced in evidence.—Bood v. Barsaloux, 261 Ill.App. 321.

39. U.S.—Northern Pac. R. Co. v. Keyes, C.C.N.D., 91 F. 47.

40. **Opportunity of adverse party to verify statement**

The admission in evidence of statement of account on behalf of plaintiff who testified that it was taken from his ledger and was correct to his personal knowledge was not error where court continued case for almost two months to permit defendant's attorney to examine and inspect original books and attorney did make such examination.—Lucas v. Panos, 68 P.2d 617, 190 Wash. 402.

Memorandum of oral testimony

(1) Although an itemized statement of account was not formally offered in evidence, there was no error in submitting it to the jury as a mere memorandum of the facts to which witnesses had testified.—Heard v. Burton-Boyd Mercantile Co., 80 So. 40, 202 Ala. 218.

(2) Statement of account made from original charge tickets, which were available, was admissible as memorandum of testimony of plaintiff having personal knowledge of correctness of items.—Powell v. Pickett, 121 So. 23, 219 Ala. 18.

(3) Party, after testifying to correctness of each item, may introduce in evidence statement of debits and credits prepared by him, in the absence of an objection that the original book entries of the debits and credits are the primary and best evidence.—Ramey v. Baker, 34 S.W. 2d 461, 182 Ark. 1043.

4. BOOKS AND RECORDS OF CORPORATIONS, ASSOCIATIONS, AND SOCIETIES

§ 699. Corporate Books and Records

As a general rule the books and records of a corporation are competent evidence to show its organization and existence, its acts and proceedings, and various other matters.

As a general rule books and records of a corporation are competent evidence to prove its existence and the preliminary proceedings showing its organization under its charter or a general law,[41] and the corporate acts and proceedings generally.[42]

Summaries of books

Schedules which were summaries of what certain books showed, which had been prepared by an expert witness, were admissible, in view of the fact that the books and vouchers were most voluminous.—San Pedro Lumber Co. v. Reynolds, 53 P. 410, 121 Cal. 74.

Statement of loss

(1) In an action on a fire insurance policy a statement of loss may be helpful to the jury in considering the verdict, but the statement must be a statement of loss proved, for purposes of calculation, and must not contain an item as to which there is no competent evidence.—Lattavo v. Virginia Fire & Marine Ins. Co., 88 Pa.Super. 433.

(2) In action against mutual company on fire policy, permitting plaintiff to read to jury memorandum, prepared pending trial, showing items of loss, written down from recollection, was not error.—Stone v. Safe Ins. Co., 156 S.E. 106, 109 W.Va. 739.

(3) Whether or not a memorandum containing a long list of articles and their values may be used by a witness to enable him to state with accuracy the details of the items therein set forth from recollection depends on the circumstances of the particular case.—Stone v. Safe Ins. Co., supra.

Admission of statement under statutes

(1) Under some statutes a verified itemized statement is competent in action to recover sum due for goods sold and delivered.—Busick v. Collins, 151 S.E. 191, 198 N.C. 817.

(2) Verified itemized statement of account by officer of plaintiff corporation, made from separate invoices, is properly admitted to show sale of goods and amount due.—Wright Co. v. Green, 145 S.E. 16, 196 N.C. 197.

(3) In an action involving breach of a manufacturing contract, where party's summary of expenditures, admitted in behalf of such party under Code Civ.Proc. § 1855 subd 5, because the original consisted of numerous accounts, which could not be examined without great loss of time, was made from original bills, of the payment of which such party had personal knowledge, he was competent to testify to the correctness thereof, his bookkeeper's testimony as to correctness being unnecessary.—Globe Mfg. Co. v. Harvey, 196 P. 261, 185 Cal. 255.

Sufficiency of foundation

Where witness for defendant did not himself sell to plaintiff the items attempted to be set off, and his only knowledge as to the account was derived from the books, the correctness of the account was not sufficiently proved and the itemized statement attached to the interrogatories was properly excluded.—J. I. Case Threshing Mach. Co. v. Binns, 97 S. E. 443, 23 Ga.App. 46.

Proof by verified account in action on account see Account, Action of § 17.

41. Conn.—Lane v. Brainerd, 30 Conn. 565.
Ind.—Vawter v. Franklin College, 53 Ind. 88.
Ky.—Kelley-Koett Mfg. Co. v. Goldenberg, 270 S.W. 15, 207 Ky. 695.
22 C.J. p 896 note 85.
Corporate records as evidence see Corporations § 191 e.

42. U.S.—In re Independent Distillers of Kentucky, D.C.Ky., 34 F.Supp. 724.
Kan.—Spena v. Goffe, 212 P. 1093, 1096, 112 Kan. 693, quoting **Corpus Juris.**
Me.—Whitman v. Proprietors of Granite Church, 24 Me. 236.
Mich.—Pearson v. Wallace, 170 N.W. 72, 203 Mich. 622.
22 C.J. p 897 note 86, p 899 note 96.

Books kept by assistant secretary

The fact that books of a corporation showing the issuance of stock were kept by the assistant secretary, and the entries made by him rather than the secretary, was immaterial, and such books were competent.—Kaye v. Metz, 198 P. 1047, 186 Cal. 42.

Meeting of stockholders or directors

(1) Ordinarily, records of corporation regularly kept by its proper officer constitute evidence of proceedings at meeting of its stockholders.—Commissioner of Banks v. Cosmopolitan Trust Co., 148 N.E. 609, 253 Mass. 205, 41 A.L.R. 668.

(2) What is resolved on at a meting of the directors of a private corporation may be shown by the record of the proceedings if one is kept and the proceedings have been entered.—Ten Eyck v. Pontiac, O. & P. A. R. Co., 41 N.W. 905, 74 Mich. 226, 16 Am.S.R. 633, 3 L.R.A. 378.

Minute book

(1) Minute book of corporation when identified is competent evidence of recitals therein.—Grand Nat. Bank of St. Louis v. Taylor, 1 S.W.2d 818, 176 Ark. 1.

(2) Minute book is the proper evidence by which to prove corporate action.—Alabama Lime & Stone Co. v. Adams, 119 So. 853, 218 Ala. 647.

(3) Minute book is competent evidence of transaction at meeting recited in such book.—Lisbon Town Fire Ins. Co. v. Tracy, 296 N.W. 126, 236 Wis. 651.

(4) Typewritten recital of subject matter of resolution and adoption thereof, together with handwritten statement as to making and seconding of motion, found in minute book, constituted competent evidence of adoption of resolution.—Lisbon Town Fire Ins. Co. v. Tracy, supra.

(5) Directors' minute book was admissible against directors with regard to what was done at meetings of board.—Johnson v. Canfield-Swigart Co., 126 N.E. 608, 292 Ill. 101, affirming 211 Ill.App. 423.

Indebtedness of corporation to officer

A resolution of stockholders of corporation was admissible to prove indebtedness of corporation to its secretary, treasurer, and general manager, since deceased, even though the resolution appeared in the minute book in the handwriting of such secretary, treasurer, and general manager, when supported by evidence of a stockholder who was present at meeting, although possibly with some reserve by reason of intimate relations between corporation and its secretary, whom resolution was to serve.—Purick v. Port Jefferson Electric Light Co., 174 N.Y.S. 285, 186 App.Div. 214.

Improper declaration of dividends

(1) The books of a corporation are admissible in evidence on behalf of a receiver of the corporation in his suit against the directors to recover dividends paid by them from the capital of the corporation.—Hodde v. Nobbe, 221 S.W. 130, 204 Mo.App. 109.

(2) On a bill to enforce personal liability of directors of insolvent corporation who had declared dividends out of capital, the corporate books were properly admitted in be-

This rule has been recognized or applied not only as between the corporation and its members[43] and between members,[44] but also, under some circumstances, between strangers and the corporation[45] or its members or officers.[46]

Matters of private nature. In the absence of statute, the rule generally prevailing is that corporate books or records are not admissible in matters of a private nature to establish or support a right or claim of the corporation or its members against a stranger,[47] or even against a stockholder, director, or officer with relation to a matter in which the corporation and the stockholder, director, or officer stand as strangers to each other,[48] except as memoranda in connection with the evidence of a witness who has testified from personal knowledge,[49] or except where like books or records of others would be admissible under rules applicable to documentary evidence.[50] The books of a corporation may not be admitted to prove ordinary business transactions ex-

half of plaintiff.—Fell v. Pitts, 106 A. 574, 263 Pa. 314.

Disposal of stock in another corporation

Record of special meeting of stockholders to ratify escrow and option agreement regarding stock of another corporation held by corporation was admissible as evidence of act of corporation in taking steps to part with stock.—Houghton v. Grimes, 151 A. 642, 103 Vt. 54.

43. Wash.—Rockwell v. Peyran, 20 P.2d 841, 172 Wash. 434.

22 C.J. p 897 note 87, p 899 note 96.

Stock certificate book

In an action by a subscriber to stock against the corporation, in which alleged failure of corporation to issue stock certificate was involved, the stub of a stock certificate book in the handwriting of one of the two officers of the company at the time it purported to have been written was admissible as tending to prove the issuance of a certificate of stock.—Davis v. Lime Cola Bottling Works, 93 So. 328, 18 Ala.App. 562.

Election of director

In action by subscriber to stock to recover money paid on subscription induced by fraud of promoter, minutes of meeting of promoters showing that promoter was elected a director of the proposed corporation were admissible although meeting took place before organization of defendant corporation.—Buckman v. Bankers' Mortg. Co., Mo.App., 263 S.W. 1046, 1053, 1054.

44. Kan.—Royce v. Farmers' Life Ins. Co., 191 P. 581, 107 Kan. 245.

Pa.—Commonwealth v. Woelper, 3 Serg. & R. 29, 8 Am.D. 628.

22 C.J. p 897 note 87, p 899 note 96.

Division of assets on dissolution

In litigation between stockholders over the proper division of the assets of a corporation on dissolution, an entry in its record book purporting to set out the proceedings at a stockholders' meeting was competent evidence thereof.—Spena v. Goffe, 212 P. 1093, 112 Kan. 693.

Connection of defendant stockholder with corporation

In action for fraud in inducing purchase of corporate stock, record of the proceedings of the board of directors relating to defendant stockholder and his connection with corporation was admissible.—Dennis v. Thomson, 43 S.W.2d 18, 240 Ky. 727.

45. Mo.—White v. McCoy Land Co., 87 S.W.2d 672, 229 Mo.App. 1019, affirmed White v. Scarritt, Sup., 111 S.W.2d 18.

N.J.—North River Meadow Co. v. Christ Church at Shrewsbury, 22 N.J.Law 424, 53 Am.R. 258.

22 C.J. p 898 note 88.

Annual report filed in public office

In tort action against corporation and its employee in which exemplary damages were sought, annual reports of corporation filed in county clerk's office showing defendant corporation's wealth and name of its directors was admissible to establish identity of corporation's officers.—Edquest v. Tripp & Dragstedt Co., 19 P.2d 637, 93 Mont. 446.

46. Me.—Hudson v. Carman, 41 Me. 84.

22 C.J. p 898 note 88.

Breach of trust induced by officers

In action, in which a trustee corporation was charged with a breach of trust, against officers of such corporation for having directed conduct resulting in breach, and for not having diligently protected beneficiary, minutes of meetings of directors and stockholders of corporation were competent, in behalf of plaintiff, to show method by which such corporation transacted its business and who transacted it.—Masonic Bldg. Corporation v. Carlsen, 258 N.W. 44, 128 Neb. 108.

47. Ill.—Von Oven v. Chicago, B. & Q. R. Co., 148 N.E. 32, 317 Ill. 334.

Kan.—Royce v. Farmers' Life Ins. Co., 191 P. 581, 107 Kan. 245.

Md.—Hager v. Cleveland, 36 Md. 476.

Pa.—Listie Coal Co. v. Farmers' National Bank of Somerset, 135 A. 105, 287 Pa. 337.

W.Va.—Mack Realty Co. v. Beckley Hardware & Supply Co., 148 S.E. 122, 124, 107 W.Va. 290, citing Corpus Juris.

22 C.J. p 898 note 89.

Applicability of statute

Statute providing that authenticated records of corporation are admissible in evidence as acts of corporation has no application to transactions or contracts of corporation evidencing its ordinary dealings or contracts with third parties so as to authorize admission of such evidence in behalf of the corporation.—Taylor-Link Oil Co. v. Anderson, Tex.Civ.App., 92 S.W.2d 499, error dismissed.

48. Ill.—Trainor v. German-American Savings, Loan & Building Assoc., 68 N.E. 650, 204 Ill. 616.

Md.—Hager v. Cleveland, 36 Md. 476.

N.Y.—Reilly v. Freeman, 82 N.Y.S. 929, 84 App.Div. 433.

22 C.J. p 899 note 90.

Termination of tenure as directors

In action for deceit in sales of corporate securities without permit of commissioner of corporations, minutes of directors' meetings after individual defendants had ceased to be directors were not admissible against such defendants.—Blythe v. Doheny, C.C.A.Cal., 73 F.2d 799.

Recitals in minutes of directors' meeting

In an action by a stockholder against stockholders who were directors, recitals in the minutes of a directors' meeting were not binding on plaintiff.—Gallagher v. Perot, 202 N.Y.S. 441, 122 Misc. 845.

49. W.Va.—Chesapeake & O. R. Co. v. Deepwater R. Co., 50 S.E. 890, 57 W.Va. 641.

50. U.S.—Southwestern Bell Telephone Co. v. City of San Antonio, C.C.A.Tex., 75 F.2d 880, setting aside, D.C., 2 F.Supp. 611, affirmed 4 F.Supp. 570, and certiorari denied City of San Antonio v. Southwestern Bell Telephone Co., 55 S.Ct. 835, 295 U.S. 754, 79 L.Ed. 1698.

Nev.—Farmers & Merchants Nat. Bank of Eureka v. Eureka Land & Stock Co., 49 P.2d 354, 56 Nev. 218.

N.D.—Dakota Coffee Co. v. Johnson, 178 N.W. 291, 45 N.D. 430.

22 C.J. p 898 note 88, p 899 note 92.

Contract providing for keeping records

Records of insurance company were admissible in its behalf in an action by it on contract of reinsurance which contained a provision that such records be kept, from which defendant should obtain in-

cept where the books of an individual would be admissible under like circumstances.[51]

As a general rule, in matters of a private nature entries in corporate books are not necessarily admissible against a stockholder in the absence of a showing that he had knowledge of, and assented to, such entries.[52] In some jurisdictions, however, books of the corporation are received in evidence against stockholders or officers on the ground that they have access to the books.[53]

formation.—Columbian Nat. Fire Ins. Co. v. Pittsburgh Fire Ins. Co., 210 N.W. 258, 236 Mich. 243.

Claim of title

(1) Record entries of church organization, which had attempted to incorporate, showing establishment of boundary line would not be competent evidence of church's adverse possession without proof of church's possession of specified property.—Delaware Land & Development Co. v. First and Central Presbyterian Church of Wilmington, Del., 147 A. 165, 16 Del.Ch. 410.

(2) In such case, record entries showing line to which possession extended were competent to establish church's adverse possession, where line substantially corresponded with that recognized by deed from adjoining owner to third person.—Delaware Land & Development Co. v. First and Central Presbyterian Church of Wilmington, Del., supra.

Financial condition, and value of stock, of corporation

(1) In action based on alleged fraud of defendants in inducing plaintiff to purchase shares of corporate stock, corporation's books, after proper identification, were admissible against defendant to establish financial condition and trace proceeds of sale of stock.—Faust v. Parker, Iowa, 213 N.W. 794, opinion supplemented 215 N.W. 235.

(2) In an action by an employee of a company against the officers and stockholders for misrepresentations inducing the purchase of stock, where a defendant had used an annual statement of the company in representing its financial condition, such statement was admissible in evidence against him.—Smith v. Martin, 106 A. 666, 93 Vt. 111.

(3) In an action against an officer of a corporation for fraud in sale of corporation's stock, record books and history of corporation, both before and after the time in question, may be received as bearing upon value of stock.—Watson v. Gardner, 236 N.W. 213, 183 Minn. 233.

(4) In an action by one who has been induced to accept stock of a bank in exchange for land against an officer of the bank to avoid the exchange, the books of the bank and statements of its condition, made by, or under, the direction of such officer, are competent evidence of the value of its stock.—Ludowese v. Amidon, 144 N.W. 965, 124 Minn. 288.

(5) In an action on a note given for corporate stock, brought by the transferee of the note, wherein the maker defended on the ground that he had been induced to sign the note by false representations, the books of the corporation showing the assets of the company were admissible, notwithstanding the bookkeeper testified that she had no personal knowledge of the truthfulness of the entries.—Farmers' Nat. Bank of Kingsley v. Pratt, 186 N.W. 924, 193 Iowa 406.

(6) Documents executed by corporation or its officers many months after defendants delivered certificates of stock of such corporation in payment for deeds alleged to have been fraudulently obtained by defendants were, however, incompetent to prove value of stock at time of transfer.—Brown v. Featherstone, 163 S.E. 558, 202 N.C. 569.

Previous sale of stock

In action based on alleged fraud of defendants in inducing plaintiff to purchase shares of corporate stock, books of corporation were admissible to show that stock sold to plaintiff as belonging to corporation was previously sold to its agents.—Faust v. Parker, Iowa, 213 N.W. 794, opinion supplemented 215 N.W. 235.

Absence of entry or record

(1) In suit against hotel corporation for purchase price of goods sold to alleged resident manager of hotel, where alleged manager testified that notation of his employment had been made in minutes of stockholders' meeting, excluding on ground of irrelevancy, minutes offered by defendant to show that no notation had been made, was error.—Germalene Chemical Co. v. Virginia Hotel Co., La.App., 157 So. 762.

(2) Testimony of the secretary of defendant fraternal corporation, who had the records of the corporation with him, that such records did not contain any evidence of authority of the trustee of the corporation to bind it in any manner was admissible in an action on a promissory note.—World Amusement Service Ass'n v. Fond du Lac Lodge No. 281, L. O. O. M., 220 N.W. 180, 196 Wis. 397.

By-laws

The by-laws of a corporation are admissible in evidence to support a contention that its general manager had no authority to bind the corporation on a contract to furnish electric service to a territorial addition.—Wichita Falls Electric Co. v. Huey, Tex.Civ.App., 246 S.W. 692.

Record of fraternal insurance corporation

W.Va.—Chambers v. Great State Council I. O. R. M., 86 S.E. 467, 76 W.Va. 614.

Other evidence admissible in behalf of corporation

(1) In action between stockholder and corporation, corporate minutes tending to support corporation's theory of transaction.—Rockwell v. Peyran, 20 P.2d 841, 172 Wash. 434.

(2) Bank records to show what was done with certain securities, in connection with other evidence tending to show authority of officer charged with stealing securities, provided memoranda on records were authenticated as part of records.—Kegan v. Park Bank of St. Joseph, 8 S.W.2d 858, 320 Mo. 623, modified on other grounds 15 S.W.2d 333, 320 Mo. 623.

(3) Records of grain elevator company, sued for price of rye and flax.—Kittelson v. Farmers' Elevator & Mercantile Co., 208 N.W. 190, 166 Minn. 478.

(4) Minutes of stockholders' meeting, it appearing that adverse party was present and knew, or could be held to have known, what occurred at meeting.—Dakota Coffee Co. v. Johnson, 178 N.W. 291, 45 N. D. 430.

51. U.S.—Glenn v. Liggett, C.C.Mo., 47 F. 472, reversed on other grounds 51 F. 381, 2 C.C.A. 286.
Ill.—Trainor v. German-American Savings, Loan & Building Assoc., 68 N.E. 650, 204 Ill. 616.
22 C.J. p 899 note 93.
Books of account generally see supra § 682 et seq.

52. N.D.—Hughes v. Wachter, 238 N.W. 776, 61 N.D. 513.
22 C.J. p 899 note 90.

Method of acquiring stock

It has been held, however, that entries in the corporation's books and records, including the transfer stock ledger, could be considered in determining whether defendant was the original purchaser of stock or whether he purchased stock from a previous purchaser.—Strong v. Turner, Mo.App., 122 S.W.2d 71.

53. **In Pennsylvania**

(1) The rule stated in the text obtains.
U.S.—Guggenheim v. Bielau, C.C.A. Pa., 90 F.2d 326, affirming and dismissing appeal, D.C., Buffalo Col-

Books of a corporation may be competent evidence against the corporation where like books of others would be admissible under rules generally applicable to documentary evidence.[54] Entries in the books of the corporation have been admitted in favor of a third person against the corporation to show that the corporation authorized one of its officers to use corporate funds for his individual purposes.[55]

The books or records of a corporation may, under some circumstances, be competent evidence in actions in which the corporation and its stockholders and officers are not parties if like books or records of others would be admissible.[56] It has been considered that corporate books may be admitted to prove the claim of a creditor of the corporation as against other creditors where it is shown that they were correctly kept and the circumstances support the entries as to their verity.[57]

Admissions. Entries or statements in corporate books or records may be competent as admissions against interest of the corporation itself[58] or its

orograph Corporation v. General Products Corporation, 19 F.Supp. 443.

Pa.—Fell v. Pitts, 106 A. 574, 263 Pa. 314—Miller v. Dilkes, 95 A. 935, 251 Pa. 44, Ann.Cas.1917D 555 —Montgomery v. Exchange Bank of Waynesburg, 6 A. 133, 3 Sad. 461.

(2) In proceeding on reference to special master of exceptions to account of corporate receivers, wherein corporate officer and stockholder filed claim against corporation, corporate book entries relating to claim were admissible against claimant.—Guggenheim v. Bielau, supra.

(3) However, where corporation engaged in selling stock of another corporation, to keep up sales, paid out of proceeds of stock sold an unauthorized dividend, and charged fund so paid in accounting for proceeds of stock, statement and books kept by corporations did not, as to minority stockholders of corporation whose stock was so sold, constitute evidence of that corporation's participation in, and ratification of, such illegal dividend payment.—White v. Phœnix Iron Works Co., 129 A. 71, 283 Pa. 205.

54. Iowa.—Cormac v. Western White Bronze Co., 41 N.W. 480, 77 Iowa 32.

Entries made by adverse party

That entries in corporation's books were made by adverse party as an officer of the corporation did not of itself prevent the admission of the books, in behalf of such party, against the corporation.—Cormac v. Western White Bronze Co., supra.

Record of stock subscriptions

In action against corporation by one repudiating subscription agreement because of alleged fraud of promoters, a book kept by promoters showing plaintiff's subscription account, which was in possession of defendant and used by it in its business, was a record of defendant's business transactions relative to stock subscriptions and admissible in behalf of plaintiff.—Buckman v. Bankers' Mortg. Co., Mo.App., 263 S. W. 1046, 1053, 1054.

Financial condition of corporation

Corporation's books and documents were competent to impeach verity of its statements to secretary of state and in circular relating to its financial condition, in action on case for deceit against the corporation by purchaser of stock.—McRoberts v. Combination Fountain Co., 147 N.E. 785, 317 Ill. 165.

55. N.Y.—Ferdinand Ehrlich, Inc. v. Levine, 144 N.Y.S. 818, 83 Misc. 136.

56. U.S.—Battaglia v. U. S., D.C. Ill., 9 F.Supp. 360.

Ky.—Gus Dattilo Fruit Co. v. Louisville & N. R. Co., 37 S.W.2d 856, 238 Ky. 322.

Pa.—Laidley v. Rowe, 119 A. 474, 275 Pa. 389.

Wash.—Bohlke v. Wright, 93 P.2d 321, 200 Wash. 374.

22 C.J. p 898 note 88, p 899 note 92.

Bank's records

In action on tax collector's bond, records of bank made in course of business, showing large deposits in collector's personal account were admissible.—American Indemnity Co. v. Mexia Independent School Dist., Tex. Civ.App., 47 S.W.2d 682, error dismissed.

Carrier's records

In an action between individuals for goods sold and delivered, the books of a common carrier may be received in evidence if they are verified on the stand by a superior officer of the carrier company, who knew them to be the books of regular entries kept in the course of business.—Burke Electric Co. v. Pennsylvania Light & Power Co., 61 Pa.Super. 374.

Records of corporation employing plaintiff

In a suit for an accounting for money advanced by plaintiff to defendant, consisting mostly of wages received by plaintiff as a railroad employee, records of the railroad company were admissible to show the amount earned by plaintiff, under the rule which admits in evidence entries by third persons in the regular course of business.—Hobbs v. Breen, 220 P. 997, 74 Colo. 277.

Financial condition, and extent of business, of corporation

In an action to recover for fraudulent representations of value of corporate bonds received by plaintiff in exchange for land, it was proper to introduce in evidence the company's books showing all receipts and disbursements, and corporate meetings, and what was there done to show the condition of the corporation and the extent of its business. —Pearson v. Wallace, 170 N.W. 72, 203 Mich. 622.

Assets of corporation

Books of bank may be admissible to determine value of its assets.—Chicago Title & Trust Co. v. Central Trust Co. of Illinois, 144 N E 165, 312 Ill. 396, reversing 224 Ill. App. 474.

Contest between creditors

In an action by a creditor of a banking corporation to set aside a conveyance by the corporation to another creditor, the official minutes of board of directors are as competent as any other records of bank to show condition of bank and action of officials in management of bank's affairs in so far as they are relevant to questions under judicial investigation.—Mooresville Bldg., Savings & Loan Ass'n v. Thompson, 9 N.E.2d 101, 212 Ind. 306.

57. La.—New Orleans Canal & Banking Co. v. Leeds & Co., 21 So. 168, 49 La.Ann. 123.

58. U.S.—Northern Pac. Ry. Co. v. Helvering, C.C.A., 83 F.2d 508.

Cal.—Lawrence v. Premier Indemnity Assur. Co., 182 P. 431, 180 Cal. 688.

22 C.J. p 899 note 96.

Assets of partnership taken over by corporation

Trial balance of a partnership, prepared by corporation which took over business, property, and assets, and assumed liabilities, of partnership, and journal of corporation were admissible against corporation, their contents being in the nature of admissions against interest.—Chicago Smelting & Refining Corporation v. Sullivan, 246 Ill.App. 538.

Required reports

Reports made by agents or em-

members,[59] and against the directors or managing officers of the corporation who are presumed to have notice thereof.[60] Entries in the books of the corporation may not, it has been held, be treated as admissions by the stockholder with regard to the value of the stock.[61]

Requirement of relevancy. Books or records of a corporation are not admissible where they do not have any tendency to prove or disprove any fact in issue.[62]

§ 700. —— Mode of Proof

a. In general
b. Copies

a. In General

To authorize the admission of corporate books and records in evidence they must be duly authenticated and identified.

In order to render the books and records of a corporation admissible in evidence, they must be duly authenticated[63] and, likewise, they must be

ployees of a railroad company engaged in interstate commerce are admissible against such company where such reports were prepared and kept in accordance with requirements of the interstate commerce commission.
U.S.—Baltimore & O. R. Co. v. Flechtner, C.C.A.Ohio, 300 F. 318. certiorari denied 45 S.Ct. 95, 266 U.S. 613, 69 L.Ed. 468.
Ala.—St. Louis-San Francisco Ry. Co. v. Curtis, 113 So. 54, 216 Ala. 296.

Fraternal benefit society

Under the rule that corporation books and records may be admissible against the corporation as admissions against interest, the minute book of a subordinate lodge or guild of a fraternal benefit society, kept by the secretary of such lodge or guild, was admissible against the society.—Plattdeutsche Grot Gilde v. Ross, 117 Ill.App. 247.

59. Ill.—Hood v. Commonwealth Trust & Savings Bank, 34 N.E.2d 414, 376 Ill. 413.
22 C.J. p 899 note 96.

Minutes

(1) Minutes of meeting of board of directors were admissible as evidence against defendant stockholders present when minutes were presented, and signed by secretary.—Teiser v. Swirsky, 2 P.2d 920, 137 Or. 595, rehearing denied 4 P.2d 322, 137 Or. 595.

(2) Under the facts involved, minutes of meeting of board of directors were receivable in evidence, and recitals therein chargeable against defendant stockholder who did not attend such meeting.—Teiser v. Swirsky, 4 P.2d 322, 137 Or. 595, denying rehearing 2 P.2d 920, 137 Or. 595.

60. Ala.—Hall v. Henderson, 28 So. 531, 126 Ala. 449, 85 Am.S.R. 53, 61 L.R.A. 621.

Recital in minutes of release by officer

Corporation minutes, reciting that officer would release another on notes and settle them with third officer, were competent as admissions —Kushner v. Knopf, 288 S.W. 1027, 217 Ky. 35.

61. **Valuation for inheritance tax**

In proceedings to fix value of stock owned by decedent for inheritance tax purposes, the books of the corporation are not admissible to prove the actual value of the stock, since the entries do not constitute an admission of the stockholder, and, not having been made under oath, are mere hearsay.—In re Porter's Will, 190 N.W. 473, 178 Wis. 556—State ex rel. Pabst Brewing Co. v. Carpenter. 108 N.W. 641, 129 Wis. 180, 8 L.R.A., N.S., 788.

62. Ind.—Baltimore & O. R. Co. v. Sliger, 143 N.E. 282, 194 Ind. 442, overruling rehearing 141 N.E. 467, 194 Ind. 442.

Evidence held inadmissible

Where issue existed as to whether furnishing of money by plaintiff to deceased was loan for which plaintiff took stock for security or was outright purchase of stock of company of which deceased was president, stock transfer books of company showing that stock transferred to plaintiff was personal stock of deceased were properly excluded.—Wooster v. National Bank of America, 32 P.2d 235, 139 Kan. 429.

Remoteness

Where plaintiff agreed to install machinery to come up to certain tests, to promote efficiency of plant, defendant corporation's records, made two years before new machinery was supplied, showing the relative efficiency of the plant at that time, were properly excluded, when offered in its behalf, as too remote.—Morehead Mfg. Co. v. Alaska Refrigerator Co., 170 N.W. 19, 203 Mich. 43.

63. U.S.—In re Independent Distillers of Kentucky, D.C.Ky., 34 F. Supp. 724.
Iowa.—Home State Bank of Humeston v. Ratcliffe, 220 N.W. 36, 206 Iowa 201—Helberg v. Zuck, 208 N. W. 209, 201 Iowa 860.
Me.—Whitman v. Proprietors Granite Church, 24 Me. 236.
22 C.J. p 900 notes 98, 1.

By-laws

(1) By-law of loan association, to be accepted as prima facie evidence, must be authenticated.—Watson v Alice Anna St. Loan & Savings Ass'n of Baltimore City, 148 A. 420, 158 Md. 339.

(2) Under Crawford & M.Dig. § 6097, requiring fraternal benefit societies to file with the insurance department a certified copy of amendments of their by-laws, but making copies of the constitution and by-laws as amended when certified to by the secretary of the society prima facie evidence of the legal adoption, an amended by-law properly certified is admissible in evidence without affirmative proof that a copy thereof had been filed with the insurance department.—Sovereign Camp, W. O. W., v. Barnes, 243 S.W. 55, 154 Ark. 486.

Minutes of meeting

U.S.—Baush Mach. Tool Co. v. Aluminum Co. of America, C.C.A. Conn., 79 F.2d 217.

Discretion of court

Whether there has been a proper authentication of corporate books and records rests largely within the discretion of the trial court.—Topinka v. Minnesota Life Ins. Co., 248 N.W. 660, 189 Minn. 75, 95 A.L.R. 739—Farmington State Bank v. Delaney, 209 N.W. 311, 167 Minn. 394, 46 A.L.R. 1495.

Authentication held sufficient

(1) A sufficient foundation was laid for the introduction of a balance sheet of a corporation where the president who was also a director of the corporation testified that the balance sheet was a document prepared and kept by the corporation in the usual course of its business and that, according to his knowledge and belief, it correctly represented the financial condition of the corporation.—Cooper v. Nutt, 254 Ill.App. 445.

(2) In action by receiver of bank on official bonds of bank president and cashier, books and records purporting to be those of bank, and found in possession of president and cashier and identified as those examined by deputy state examiner at different times, were admissible against defendant president and cashier.—Baird v. National Surety

duly identified[64] as such, and it must be made to appear that they are the books of the corporation, kept as such by the proper officer, or some other person authorized in his absence.[65]

The secretary, or the person performing the duties of secretary, being usually the proper custodian of the books and records of a corporation, is generally the proper person by whom to prove their authenticity;[66] but authentication by some other officer[67] or even by a person who saw the entries in question made[68] has been regarded as sufficient and according to some cases, for purposes of identification or verification, the witness need not have personal knowledge of the facts recorded,[69] and corporate records and papers may be admissible when produced by one properly in control of them, even though they were not made by him.[70] Certain rec-

Co. of New York, 209 N.W. 204, 54 N.D. 91.

(3) A receipt book required and provided by an incorporated mutual benefit insurance society to be used in making payment of premiums was admissible on predicate showing such fact, and that the beneficiary had probably transmitted it to the society with proof of the assured's death, and that it was produced at the trial by the counsel for the society.—Sovereign Camp, W. O. W., v. Reed, 94 So. 910, 208 Ala. 457.

(4) A book purporting to be proprietary records of a corporation, in the handwriting of the clerk, found among his papers after his death; and remaining in the hands or under the control of his executor, was sufficiently authenticated to authorize its admission, where it appeared that there was no other book and no other clerk.—Brackett v. Persons Unknown, 53 Me. 228.

(5) Other cases.

U.S.—Glenn v. Liggett, C.C.Mo., 47 F. 472, reversed on other grounds 51 F. 381, 2 C.C.A. 286.

Ark.—Grand Nat. Bank of St. Louis v. Taylor, 1 S.W.2d 818, 176 Ark. 1.

Neb.—Masonic Bldg. Corporation v. Carlsen, 258 N.W. 44, 128 Neb. 108.

Officer's name signed by another

That resolution authorizing bank officers to effect loans was attested by cashier for president did not affect its admissibility, if, in fact, the resolution was a genuine action of the board of directors.—Grand Nat. Bank of St. Louis v. Taylor, 1 S.W. 2d 818, 176 Ark. 1.

Incorporated beneficial association

The records of an incorporated fraternal beneficial association must be proved in the same manner as the books and records of other private corporations.—Yonda v. Royal Neighbors of America, 148 N.W. 926, 96 Neb. 730.

Necessity for proof of correctness of audit

In action on corporate note, testimony of corporate auditors as to correctness of audits showing note as liability in favor of plaintiff was not a condition precedent to admission of audits on issue whether corporate officers were advised of existence of note which was alleged to have been fraudulently concealed from corporation.—Williams Yellow Pine Co. v. Williams, 193 So. 1, 187 Miss. 425.

64. U.S.—Nettles v. Tillson, C.C.A. Fla., 87 F.2d 770.

Colo.—Hobbs v. Breen, 220 P. 997, 998, 74 Colo. 277, citing **Corpus Juris.**

Me.—Whitman v. Proprietors Granite Church, 24 Me. 236.

27 C.J. p 900 notes 99, 1.

Showing as to original record

Book, known as the Ohio Company's Record, was not admissible in the absence of proof that it actually was the original record of that company.—Vance v. Lyons, 19 Ohio App. 225.

Identification held sufficient

U.S.—Glenn v. Liggett, C.C.Mo., 47 F. 472, reversed on other grounds 51 F. 381, 2 C.C.A. 286.

65. Colo.—Expansion Gold Mining & Leasing Co. v. Campbell, 163 P. 968, 62 Colo. 410.

22 C.J. p 900 note 1.

66. Miss.—Smith v. Natchez Steamboat Co., 2 Miss. 479.

22 C.J. p 900 note 2.

Record book of fraternal insurance company

Record book of an officer of a fraternal insurance corporation, which by the terms of the contract was made prima facie evidence of the financial standing of the member and of the financial standing of his local lodge, the entries in which were duly proved by such officer to have been made with his knowledge and under his direction in his office, by his private secretary or assistant, was admissible in evidence, although the entries were not also proved by such private secretary or assistant.—Chambers v. Great State Council, I. O. R. M., 86 S.E. 467, 76 W.Va. 614.

As against secretary

In action against former secretary of corporation, book which he testified he believed to be corporate record was sufficiently authenticated or identified.—Helberg v. Zuck, 208 N. W. 209, 201 Iowa 860.

Rebuttal

Testimony by a witness that he became bookkeeper for a corporation at a time when it had no minute book, that he wrote up, in a certain book, minutes of meetings of directors, purporting to have been held in previous years, from memoranda and dictation furnished by the president, and that he did not know of such meetings, although he would have known of them if they were held, and was satisfied that they were not held, is not admissible to rebut, when offered by the corporation, evidence from the book, which is identified by the corporation's secretary as the only book in which records of the directors' meetings are kept, of what purports to be a record of a certain meeting of the directors.—McIlhenny v. Binz, 13 S.W. 655, 80 Tex. 1, 26 Am.S.R. 705, error dismissed 12 S.Ct. 982, 989, 145 U. S. 641, 36 L.Ed. 854.

Identification by first secretary of corporation

Books of corporation were properly received where a witness stated that he was the first secretary of the corporation and identified the books as the books of the corporation during the time he was secretary, the books presumptively continuing to be those of the corporation until shown to be otherwise.—Zierath v. Claggett, 188 P. 837, 46 Cal.App. 15.

67. Ill.—Illinois Conference Evangelical Assoc. of North America v. Plagge, 53 N.E. 76, 177 Ill. 431, 69 Am.S.R. 252, affirming 76 Ill. App. 468.

22 C.J. p 897 note 86 [b], p 900 note 3.

Auditor

Corporate minute books which showed that defendant was active as a director were sufficiently identified by testimony of former auditor and director of corporation.—Johnson v. Burmeister, 234 N.W. 590, 182 Minn. 385.

68. N.Y.—St. Lawrence Mut. Ins. Co. v. Paige, 1 Hilt 430.

Attorney

Mich.—Bradway v. Netzorg, 298 N. W. 501, 298 Mich. 198.

69. Colo.—Hobbs v. Breen, 220 P. 997, 74 Colo. 277.

Pay rolls

Colo.—Hobbs v. Breen, supra.

70. U.S.—Battaglia v. U. S., D.C.Ill., 9 F.Supp. 360.

Corporation disinterested

This is especially the case where the corporation is wholly disinter-

ords or documents of a corporation may be admissible notwithstanding the person who made them does not testify to their accuracy,[71] and, according to some cases, the record books of banks and financial corporations subject to the supervision of the superintendent of banks, when shown to be the regular record books of such a corporation, are admissible without further proof of the correctness of the entries therein.[72] In order to permit the admission of corporate records as records made in the regular course of business, which speak for themselves, there should be a sufficient showing of the business organization, and the method of keeping records, of the corporation.[73]

It is not sufficient to prove the book to be in the handwriting of a person who is stated in the book itself to be the secretary, but who is not otherwise shown to be the proper officer to make or keep the record.[74] The fact that a minute book is unsigned does not affect its competency as evidence of matters therein recited if it is otherwise duly identified.[75]

b. Copies

Corporate records may be proved by authenticated copies.

In some jurisdictions statutes have been enacted rendering copies of corporate records admissible, when properly authenticated, with the same effect as the originals,[76] and it has been considered that, even apart from any statutory provision, copies of the articles of incorporation or by-laws or acts and proceedings generally of a corporation, if duly authenticated, may be received in evidence without requiring the production of the originals before the court.[77]

If a supposed original statement of a corporation would not be admissible because of want of sufficient foundation, a copy of such statement is inadmissible.[78]

§ 701. Books and Records of Unincorporated Associations

Books and records of an unincorporated association

ested and the official in charge and control of the records or papers has been subpœnaed to produce them.—Pinkerton's Nat. Detective Agency v. Rosedale Silk Co., 184 A. 282, 121 Pa. Super. 496.

Making of entry not seen by witness

Telephone company's slip containing a notation made by telephone operator that a certain call was made was properly admitted in evidence as a part of company's records on identification by company's divisional manager, although manager had not seen the notation made.—Bohlke v. Wright, 93 P.2d 321, 200 Wash. 374.

Authentication by former officer

In suit by bank on note as holder, admission of evidence of former cashier, identifying certain slips and documents relative to sale to bank of note and deposit slip in favor of payee, which were identified by witness as being original slips touching transaction and which were made under his immediate direction, although they were not made out by him personally, was proper.—Farmers' State Bank v. Barnes, Mo.App., 276 S.W. 93.

71. U.S.—Battaglia v. U. S., D.C. Ill., 9 F.Supp. 360.

Admissible against corporation

Ill.—Chicago Smelting & Refining Corporation v. Sullivan, 246 Ill. App. 538.

Corporation not a party

In an action to which the corporation was not a party, office records, documents, and memoranda showing work record of one of the parties to the action were admissible, without testimony of persons who made entries, where officer in charge of the records, documents, and memoranda testified that entries were made in usual course of business, were true and correct, were those relied on in the business, and had not been tampered with.—Battaglia v. U. S., D.C.Ill., 9 F.Supp. 360.

72. Minn.—Watson v. Gardner, 236 N.W. 213, 183 Minn. 233.

73. Pa.—Hartig v. American Ice Co., 137 A. 867, 290 Pa. 21.

74. N.Y.—Highland Turnp. v. McKean, 10 Johns. 154, 16 Am.D. 324.

75. Ark.—Grand Nat. Bank of St. Louis v. Taylor, 1 S.W.2d 818, 176 Ark. 1.

76. Ind.—Paul v. Walkerton Woodlawn Cemetery Ass'n, 184 N.E. 537, 204 Ind. 693.

Tenn.—Allen v. Grand Lodge, K. P., State of Tennessee, 95 S.W.2d 65, 20 Tenn.App. 43.

22 C.J. p 900 notes 6, 7 [e] (2).

Authenticated copy of records of Ohio Company

Ohio.—Vance v. Lyons, 19 Ohio App. 225.

Verification of copy

President of incorporated cemetery was competent to make sworn copy, admissible in evidence, of minutes of directors' meeting showing assessment on lots, under Burns St.Annot. 1926 § 526.—Paul v. Walkerton Woodlawn Cemetery Ass'n, 184 N.E. 537, 204 Ind. 693.

Sufficiency of authentication

(1) In respect of the authentication of the constitution and by-laws of an incorporated mutual benefit society, they must be certified by the proper officer in his own handwriting, and admission of printed copies, with clerk's name printed thereon, was erroneous.—Sovereign Camp, W. O. W., v. Carrell, 101 So. 914, 20 Ala. App. 340.

(2) Admission of purported printed copies of constitution and bylaws, on testimony of local clerk of such society, who was not shown to have knowledge of correctness thereof, was erroneous.—Sovereign Camp, W. O. W., v. Carrell, supra.

Admissibility of original

Statute allowing admission of a copy does not render the original inadmissible.—Green v. Indianapolis, 25 Ind. 490.

77. U. S.—Zimmerman v. Masonic Aid Assoc. of Dakota, C.C.Neb., 75 F. 236, appeal dismissed 90 F. 832, 32 C.C.A. 613.

22 C.J. p 900 note 7.

Authentication of copy insufficient

Where alleged resolution of directors of corporation authorizing purchase of stock issued by another corporation was not contained in minute book and existence of resolution was not authenticated in any other way, resolution was not rendered competent by certificate of secretary of corporation that resolution was true copy of legally adopted resolution, without secretary being offered as a witness.—In re Independent Distillers of Kentucky, D.C.Ky., 34 F.Supp. 724.

78. Iowa.—Helberg v. Zuck, 208 N. W. 209, 201 Iowa 860.

are competent to show its organization, existence, and acts.

The books and records of unincorporated associations are subject to the same rules as apply to corporate books and records with respect to admissibility,[79] and are therefore competent to prove its existence and organization and corporate acts and proceedings generally.[80]

§ 702. Records of Secret Societies

Records of a secret society, not required by law to be kept, are competent to show the actions of the society, but they have been held to be inadmissible to prove matters affecting the members individually.

The records of a secret society which are not required by law to be kept are inadmissible, unless brought within some exception to the hearsay rule, to prove facts, such as the age of a member, which are susceptible of proof in the ordinary way.[81] However, such records have been considered as competent when offered to show the actions of the body itself,[82] and in some cases the records have been admitted to prove facts which apparently were not connected with an action of the society affecting its interests.[83]

5. Letters, Telegrams, and Other Correspondence

§ 703. In General

As respects their admissibility, letters and telegrams are subject to the general rules of evidence; they may be excluded as irrelevant or immaterial, as hearsay, as self-serving, etc.

As respects their admissibility, letters and telegrams are subject to the general principles of evidence, and to various rules relating to documentary evidence.[84] Thus letters and telegrams may be

79. Mass.—Sharon First Baptist Church v. Harper, 77 N.E. 778, 191 Mass. 196.

80. Vt.—Tarbell v. Gifford, 72 A. 921, 82 Vt. 222, 17 Ann.Cas. 1143. 22 C.J. p 901 note 9.

Minute and other books

(1) Minute book of an unincorporated association is competent evidence of action taken by the association at a meeting.—Francis v. Peary, 144 N.Y.S. 167, 82 Misc. 271.

(2) In action by executor of deceased sexton to impress trust on money deposited with congregation defendant as security for proper discharge of sexton's duties, minute book and cash book of congregation were improperly excluded in view of Civ.Pract.Act § 374-a.—Zinaman v. Stivelman, 285 N.Y.S. 20, 246 App. Div. 851, affirmed 4 N.E.2d 813, 272 N.Y. 580.

Copy of resolution as showing notice

Certified copy of resolution of lodge, if in fact recorded on minutes of lodge, was admissible to show notice to members of lodge of deed to defendant.—Skipper v. Alexander, 158 S.E. 32, 172 Ga. 246.

Authentication

(1) Records of a labor organization, containing printed reports of conferences between representatives of the organization and of employers, stenographically taken, and the correctness of which was testified to by officers of the organization and conferees, were sufficiently authenticated to be admissible in evidence.—United Mine Workers of America v. Coronado Coal Co., Ark., 258 F. 829, 169 C.C.A. 549, reversed on other grounds 42 S.Ct. 570, 259 U.S. 344, 66 L.Ed. 975, 27 A.L.R. 762, certiorari denied and leave to present petition for rehearing granted 42 S.Ct. 587.

(2) Under statute, articles of association are admissible to prove the existence of the association without proving the signatures of the purported members until after such member or members deny, under oath, the signing of the articles.—Pennsylvania Ins. Co. v. Murphy, 5 Minn. 36.

81. U.S.—Connecticut Mut. L. Ins. Co. v. Schwenk, 94 U.S. 593, 24 L. Ed. 294.

82. Tex.—Leach v. Dodson, 64 Tex. 185.

83. **Records held admissible**

(1) Recital that certain person attended a meeting as bearing on identification.—Howard v. Russell, 12 S. W. 525, 75 Tex. 171.

(2) Resolution stating date of death of certain person.—Wiener v. Zweib, Tex.Civ.App., 128 S.W. 699.

84. U.S.—Harper v. Wilson, C.C.A. Wyo., 46 F.2d 785.
Ala.—Ziliak & Schafer Milling Co. v. Moore, 131 So. 798, 222 Ala. 254.
Cal.—Feraud v. Anaheim Inv. Co., 31 P.2d 1092, 138 Cal.App. 227.
Colo.—Anderson v. Sterling Lumber & Investment Co., 256 P. 10, 81 Colo. 452.
Fla.—Munck v. Manatee River Bank & Trust Co., 165 So. 57, 122 Fla. 193.
Ga.—Morton v. Wallace, 171 S.E. 720, 177 Ga. 856.
Ill.—Rosene v. Murphy, 268 Ill.App. 70.
Ind.—Watts v. Geisel, 194 N.E. 502, 100 Ind.App. 92.
Iowa.—State v. One Certain Buick Sedan, 229 N.W. 178, 209 Iowa 791.
Mass.—Farina v. Vitti, 186 N.E. 236, 282 Mass. 532—First Nat. Bank v. Swift, 155 N.E. 606, 258 Mass. 573—Christopher v. Musolino, 135 N.E. 124, 241 Mass. 202.
Mich.—Wilson v. Prudential Ins. Co. of America, 275 N.W. 242, 281 Mich. 541.
Mo.—Morris v. Davis, 66 S.W.2d 883, 334 Mo. 411—Smith v. Ohio Millers' Mut. Fire Ins. Co., 6 S.W.2d 920, 320 Mo. 146—Kaimann v. Spivak, App., 17 S.W.2d 599.
N.J.—Edwin Burhorn Co. v. Miner D. Woodling Heating & Ventilating Co., 160 A. 410, 10 N.J.Misc. 773—Simone v. Frobisher, 152 A. 669, 9 N.J.Misc. 30.
N.Y.—Enders Sales Co. v. A. C. Penn, Inc., 206 N.Y.S. 268, 210 App. Div. 471.
N.C.—Winborne v. Lloyd, 183 S.E. 756, 209 N.C. 483.
N.D.—Gillespie v. Common School Dist. No. 8, McLean County, 216 N.W. 564, 56 N.D. 194—Halliday v. Stambaugh, 204 N.W. 889, 52 N.D. 925.
Or.—In re Berger's Estate, 25 P.2d 138, 144 Or. 631.
Pa.—Smith v. Smith, 144 A. 290, 294 Pa. 347—Moxey v. Goldstein, 156 A. 589, 102 Pa.Super. 168—Woroniak v. Federal Life Ins. Co., 17 Lehigh Co.L.J. 358.
R.I.—Cooper v. Ceco Mfg. Co., 155 A. 590, 51 R.I. 487—Moore v. Budlong, 143 A. 602, 49 R.I. 392.
S.C.—Leonard v. People's Tobacco Warehouse Co., 122 S.E. 678, 128 S.C. 155.
Tex.—Paschall v. Gulf, C. & S. F. Ry. Co., Civ.App., 100 S.W.2d 183, modified on other grounds Campbell v. Paschall, 121 S.W.2d 593, 132 Tex. 226—Weidmer v. Stott, Civ.App., 48 S.W.2d 389, error refused—Cowsar v. Rhodes, Civ.App., 41 S.W.2d 115—City of Port Arthur v. Young,

excluded where they are irrelevant or immaterial;[85] they may be rejected when they constitute hearsay

Civ.App., 37 S.W.2d 385, error refused—Whiteman v. Burkey, Civ. App., 286 S.W. 350, conforming to answer 282 S.W. 788, 115 Tex. 400.
Utah.—Baker v. Glenwood Mining Co., 21 P.2d 889, 82 Utah 100.
Va.—J. Maury Dove Co. v. New River Coal Co., 143 S.E. 317, 150 Va. 796—Powell v. John E. Hughes Orphanage, 138 S.E. 637, 148 Va. 331.
Wash.—Wilson v. Washington Concrete Pipe Co., 35 P.2d 71, 178 Wash. 545—Leach v. Erickson, 297 P. 738, 161 Wash. 473.
22 C.J. p 903 note 39.

Court rule requiring notice

Under Superior Court Rules, rule 32, excluding from evidence certain papers unless notice of intention to offer them is given to the opposite party, a letter is admissible where the opposite party's attorney has had an opportunity to read the letter.—Cooper v. Ceco Mfg. Co., 155 A. 590, 51 R.I. 487.

85. Ark.—Plant v. White River Lumber Co., C.C.A.Ark., 76 F.2d 155—Neugen v. Associated Chautauqua Co., C.C.A.Kan., 70 F.2d 605.
Ala.—Woody v. Tucker, Willingham & Co., 110 So. 465, 215 Ala. 278—Norwood Hospital v. Jones, 107 So. 858, 214 Ala. 314—Perry v. Marbury Lumber Co., 103 So. 580, 212 Ala. 542.
Ark.—Martin v. Martin, 272 S.W. 660, 168 Ark. 1168—U. S. Express Co. v. Long, 150 S.W. 576, 105 Ark. 130.
Cal.—In re Janvier's Estate, 46 P.2d 792, 7 Cal.App.2d 624—Los Angeles County v. Farnsworth, 41 P. 2d 577, 4 Cal.App.2d 516—Dryden v. Western Pac. R. Co., 36 P.2d 394, 1 Cal.App.2d 49—Nineteenth Realty Co. v. Diggs, 25 P.2d 522, 134 Cal.App. 278.
Colo.—Eltzroth v. Murphy, 223 P. 760, 75 Colo. 5.
Conn.—Venezia v. Town of Fairfield, 172 A. 90, 118 Conn. 325.
D.C.—U. S. v. Securities Corporation General, 4 F.2d 619, 55 App.D.C. 256, affirmed White v. Mechanics' Securities Corporation, 46 S.Ct. 116, 269 U.S. 283, 70 L.Ed. 275.
Ga.—Shadburn Banking Co. v. Streetman, 179 S.E. 377, 180 Ga. 500, 99 A.L.R. 854—Langran v. Hodges, 4 S.E.2d 489, 60 Ga.App. 567—Electric Paint & Varnish Co. v. Lunsford, 176 S.E. 816, 49 Ga.App. 840—Burt v. Gooch, 139 S.E. 912, 37 Ga.App. 301.
Ind.—Rowlett v. Cockrill, 156 N.E. 181, 86 Ind.App. 92.
Kan.—Rooney v. McDermott, 246 P. 183, 121 Kan. 93.
Mass.—Freese v. Spaulding, 151 N.E. 91, 255 Mass. 243.
Mo.—Beckerleg v. Locomotive Engineers' Mut. Life & Accident Ins Ass'n, App., 274 S.W. 917.
N.J.—General Lumber Co. of New Jersey v. Jefferson Building & Loan Ass'n, 182 A. 843, 116 N.J. Law 148.
N.M.—Kiker v. Bank Sav. Life Ins. Co., 23 P.2d 366, 37 N.M. 346.
Pa.—Listie Coal Co. v. Farmers' National Bank of Somerset, 135 A. 105, 287 Pa. 337—Auch v. Susquehanna Pipe Line Co., 45 Dauph.Co 120.
Wash.—Katzer v. Cron & Dehn, 48 P.2d 204, 183 Wash. 215.
22 C.J. p 903 note 39.

Necessity to show relevancy and materiality

Relevancy and materiality must be shown in order to render letters admissible.
Cal.—Miles v. A. Arena & Co., 73 P. 2d 1260, 23 Cal.App.2d 680.
N.Y.—Material Men's Mercantile Ass'n v. Material Men's Credit Agency, 180 N.Y.S. 801, 191 App. Div. 73.

Letters held admissible

(1) In actions on tornado policies, where question was whether another policy covering same property was for specific insurance or monthly reporting insurance, correspondence passing between insurance brokers effecting policy in dispute, both before and after loss, was admissible to show course of business, although some correspondence made no specific reference to such policy.—Federal Intermediate Credit Bank of Baltimore v. Globe & Rutgers Fire Ins. Co., D.C.Md., 7 F.Supp. 56.

(2) Copies of letters from landlord to tenant were admissible as bearing on probability of consent to surrender of leasehold.—Callahan v. Roberts, 140 A. 687, 127 Me. 21.

(3) Letters between reorganized corporation and plaintiff, suing corporation on interest coupons detached from mortgage bonds, tending to show that payment thereon had been refused, that new bonds had been issued in lieu of old bonds which the then alleged owner refused to deposit, etc., were properly admitted.—Tillotson v. Independent Breweries Co., 268 S.W. 425, 216 Mo. App. 412.

(4) In action for breach of warranty in sale of automobile, where plaintiff took up note given for balance due after commencement of foreclosure proceedings, and evidence was conflicting as to whether plaintiff had made complaint on the car prior to foreclosure, exclusion of letters between defendant's agent and plaintiff's attorney relative to taking up the note as immaterial was prejudicial error, since they tended to support defendant's claim and render plaintiff's less probable.—Berkley v. Burlington Cadillac Co., 131 A. 16, 99 Vt. 227.

(5) Other cases.
Ariz.—Dover Copper Mining Co. v. Doenges, 12 P.2d 288, 40 Ariz. 349.
Cal.—Cowan v. Tremble, 296 P. 91, 111 Cal.App. 458.
Del.—Nye Odorless Incinerator Corporation v. Felton, 162 A. 504, 5 W.W.Harr. 236.
Ill.—Sheffield Steel & Iron Co. v. Jos. Joseph & Bros. Co., 238 Ill. App. 45.
Me.—Wilkins v. Waldo Lumber Co., 153 A. 191, 130 Me. 5.
Mass.—Kennedy Bros. v. Bird, 192 N. E. 73, 287 Mass. 477.
N.J.—Fuld v. Adams, 156 A. 833, 108 N.J.Law 373.

Letters held inadmissible

(1) In broker's action against lessee for commission in procuring loan, letters between lessor and lessee antedating loan contract, and having no reference thereto, were inadmissible.—Donaghey v. Remmel & McCarroll, 34 S.W.2d 1085, 183 Ark. 67.

(2) In buyer's action to recover payment on timothy seed, admitting buyer's letter complaining of defective quality of previous carload, was error.—Appel v. Carr, 246 N.W. 608, 216 Iowa 64.

(3) In action to recover price of stock plaintiff purchased for defendant, letters written by plaintiff to another in which affairs of corporation were discussed but nothing said about transaction sued on were properly excluded.—Laird v. Frick, 18 P. 2d 1029, 142 Or. 639.

(4) Letters, written and received by blind person prior to injuries sustained in automobile accident, as to intention to study for concert stage, were inadmissible as uncertain and speculative of damages.—Weinstein v. Wheeler, 271 P. 733, 127 Or. 406, 62 A.L.R. 574.

(5) In buyer's action against seller for failure to deliver merchantable goods, buyer's letter respecting replacement of another shipment not involved in contracts in litigation was properly excluded.—United Fig & Date Co. v. Falkenburg, 28 P.2d 287, 176 Wash. 122.

Remoteness in time does not necessarily render a letter or telegram inadmissible.
U.S.—Butland v. Maine Cent. R. Co., C.C.A.N.H., 84 F.2d 357—Federal Reserve Bank of San Francisco v. Idaho Grimm Alfalfa Seed Growers' Ass'n, C.C.A.Idaho, 8 F.2d 922, certiorari denied 46 S.Ct. 347, 270 U.S. 646, 70 L.Ed. 778.
Cal.—Moiola v. Paggi, 42 P.2d 331, 5 Cal.App.2d 279.

evidence,[86] as when they are written by third persons under circumstances not rendering them binding on the party against whom they are offered and they are offered to prove the truth of the recitals therein.[87] They may be excluded as self-serving,[88] as where they are offered in evidence by writer thereof,[89] especially where they are addressed to a third person with whom the adverse party is in no wise connected.[90] A letter may be excluded where it contains mere legal conclusions.[91]

Particular grounds of admission. Letters and telegrams may be admitted on the ground that they constitute admissions or contain statements inconsistent with, or contradictory to, the writer's present position,[92] on the ground that they are part of the res gestæ,[93] or on the ground that they tend to cor-

Mont.—Murphy v. La Chapelle, 24 P.2d 131, 95 Mont. 36.

86. U.S.—U. S. ex rel. Esshoc v. Fluckey, C.C.A.Ohio, 19 F.2d 64.
Ark.—Chicago, R. I. & P. Ry. Co. v. Greer, 58 S.W.2d 424, 187 Ark. 101.
Cal.—Miles v. A. Arena & Co., 73 P.2d 1260, 23 Cal.App.2d 680.
Iowa.—Lozier Automobile Exch. v. Interstate Casualty Co., 195 N.W. 885, 197 Iowa 935—Coad v. Pennsylvania Ry. Co., 175 N.W. 344, 187 Iowa 1025.
Mich.—Wilson v. Prudential Insurance Co. of America, 275 N.W. 242, 281 Mich. 541.
Mo.—United Factories v. Brigham, App., 117 S.W.2d 662, certiorari quashed State ex rel. United Factories v. Hostetter, 126 S.W.2d 1173, 344 Mo. 386—Nevil v. Wahl, 65 S.W.2d 123, 228 Mo.App. 49.
N.J.—General Lumber Co. of New Jersey v. Jefferson Building & Loan Ass'n, 182 A. 843, 116 N.J.Law 148.
Tex.—Keystone Pipe & Supply Co. v. Osborne, Civ.App., 73 S.W.2d 120.
Vt.—Sargent v. Robertson, 160 A. 182, 104 Vt. 412.
General rule as to inadmissibility of unsworn written statements see supra § 194.

87. Ariz.—Brooks v. Neer, 47 P.2d 452, 46 Ariz. 144.
Ark.—Chicago, R. I. & P. Ry. Co. v. Greer, 58 S.W.2d 424, 187 Ark. 101.
Ky.—Haralambo's Ex'r v. Christopher, 21 S.W.2d 983, 231 Ky. 550.
Mich.—Hanson v. Fletcher Auto Sales Co., 214 N.W. 187, 239 Mich. 118.
Minn.—Dacey v. Dacey, 229 N.W. 868, 179 Minn. 520.
Mont.—Fryburg v. Brinck, 12 P.2d 757, 92 Mont. 294.
Ohio.—Rogers v. Garford, 159 N.E. 334, 26 Ohio App. 244.
Tex.—Texas Employers' Ins. Ass'n v. Lynch, Civ.App., 29 S.W.2d 899.
Vt.—Sargent v. Robertson, 160 A. 182, 104 Vt. 412—Conn Boston Co. v. Griswold, 157 A. 57, 104 Vt. 89.
W.Va.—Shaver v. Consolidation Coal Co., 151 S.E. 326, 108 W.Va. 365.

From public official

A letter from the secretary of state to the effect that a foreign corporation had not been admitted to do business in the state was inadmissible.—Hallet & Davis Piano Co. v. Droste, 182 N.W. 123, 213 Mich. 381.

Letter as architect's certificate

A letter written by the architect to the president of the owner of a building, stating that the contractor had stopped work, is not admissible as a certificate by the architect, under a provision of the contract authorizing him to certify that the contractor had failed to prosecute the work with diligence.—Chelsea Cong. Ohab Shalom v. Hathaway, 104 N.E. 379, 216 Mass. 539.

88. U.S.—Franklin Sugar Refining Co. v. Luray Supply Co., C.C.A.Va., 6 F.2d 218.
Ala.—Sovereign Camp, W. O. W. v. Waller, 167 So. 563, 566, 232 Ala. 170, citing **Corpus Juris**—Sovereign Camp, W. O. W. v. Harris, 153 So. 870, 874, 228 Ala. 417, citing **Corpus Juris.**
Ga.—Electric Paint & Varnish Co. v. Lunsford, 176 S.E. 816, 49 Ga.App. 840.
Self-serving declarations see supra § 216.

Letter by third person at party's request

A presumption against a writer arising from letters proved to be written by him cannot be rebutted by showing letters written to the same addressee by other persons acting under his advice or at his request, since this in effect would permit defendant to make evidence in his own behalf.—Lewis v. Post, 1 Ala. 65.

Letters containing mere reports from agents to their principals are incompetent to prove the facts recited in the letters against third persons in the principal's favor.—Insurance Co. of North America v. Guardiola, N.Y., 9 S.Ct. 425, 129 U.S. 642, 32 L.Ed. 802.

89. Mich.—Wilson v. Prudential Ins. Co. of America, 275 N.W. 242, 281 Mich. 541.
Tex.—Keystone Pipe & Supply Co. v. Osborne, Civ.App., 73 S.W.2d 120.
Wash.—Fleishbein v. Thorne, 74 P.2d 880, 193 Wash. 65.
22 C.J. p 904 note 44.

90. Conn.—Thelin v. Downs, 145 A. 50, 109 Conn. 662.
22 C.J. p 904 note 45.

Correspondence between party's agents

Where insurance on steamship was obtained by insurance brokers acting through a second brokerage firm in another city, in action on policy, correspondence between the two brokers not communicated to the insurer was properly excluded.—Bella S. S. Co. v. Insurance Co. of North America, C.C.A.Md., 5 F.2d 570, affirming, D.C., 290 F. 992.

91. **Conclusion as to powers of corporation**

Letter from secretary of state disclosing merely legal conclusion that corporation was unauthorized to become surety is improper evidence.—Lincoln Inv. Co. v. Metros, 241 N.W. 166, 257 Mich. 215.
Opinion evidence see supra §§ 438–575.

92. U.S.—Old Mission Portland Cement Co. v. Commissioner of Internal Revenue, C.C.A., 69 F.2d 676, certiorari granted Old Mission Portland Cement Co. v. Helvering, 55 S.Ct. 79, 293 U.S. 544, 79 L.Ed. 649, affirmed 55 S.Ct. 158, 293 U.S. 289, 79 L.Ed. 367.
Cal.—Hinton v. Welch, 177 P. 282, 179 Cal. 463.
Idaho.—McLaughlin's Store v. Copeman, 294 P. 523, 525, 50 Idaho 214, citing **Corpus Juris.**
Iowa.—Redfern v. Redfern, 236 N.W. 399, 212 Iowa 454.
Minn.—Zimmerman v. Mandelkow, 201 N.W. 289, 160 Minn. 330, reversing Zimmerman v. Mendelkow, 200 N.W. 297, 160 Minn. 330.
Mo.—Irons v. American Ry. Express Co., 300 S.W. 283, 318 Mo. 318.
N.Y.—Bintz v. Mid-City Park Corporation, 229 N.Y.S. 390, 223 App.Div. 533—Reichbart v. Smith-Eisemann Corporation of America, 210 N.Y.S. 414, 213 App.Div. 178—Weiss v. New Jersey Fidelity & Plate Glass Ins. Co., 228 N.Y.S. 314, 131 Misc. 836.
N.C.—Storey v. Stokes, 100 S.E. 689, 178 N.C. 409.
Pa.—Sokoloff v. Fidelity & Casualty Co. of New York, 135 A. 746, 288 Pa. 211.
Tex.—Metro-Goldwyn-Mayer Distributing Corporation v. Cocke, Civ. App., 41 S.W.2d 645, error refused —Calvin Coal Co. v. First Nat. Bank, Civ.App., 286 S.W. 901.
22 C.J. p 905 note 49.
Written extrajudicial admissions see supra §§ 282–284.

93. Ala.—Denson v. Kirkpatrick Drilling Co., 144 So. 86, 225 Ala. 473.

roborate other evidence in the case, whether they were written by a third person,[94] or to a third person by the party offering them,[95] or by one party to the other.[96]

Letters which may not be admissible to show the truth of recitals therein may be admitted for their independent relevancy.[97] Letters may, to the extent that such facts are relevant and material, be admitted to show that the statements therein were made,[98] as where the making of such statements constitutes a verbal act;[99] they may be admitted to show that they were sent,[1] and to show any facts which the making of statements and the sending or receipt of letters containing them tend to prove.[2] A letter or telegram may be admitted as evidence of a notice or demand,[3] due diligence,[4] laches,[5] misrepresentations,[6] a denial of liability,[7] knowledge of a particular matter,[8] the existence of a particular

Conn.—Filosi v. Crossman, 149 A. 774, 111 Conn. 178.
La.—Hussmann v. Westfeldt Bros., 120 So. 623, 167 La. 995.
Mass.—Narragansett Amusement Co. v. Riverside Park Amusement Co., 157 N.E. 532, 260 Mass. 265.
Minn.—Garbisch v. American Ry. Express Co., 225 N.W. 432, 177 Minn. 494.
R.I.—Johnson v. Kile & Morgan Co., 140 A. 3, 49 R.I. 99.
Tenn.—Hood Rubber Products Co. v. Malone, 8 Tenn.App. 456.
Tex.—Thomas v. Murphy, Civ.App., 91 S.W.2d 810—Johnsen v. Haynie, Civ.App., 70 S.W.2d 602—Kansas City Life Ins. Co. v. Elmore, Civ. App., 226 S.W. 709.
22 C.J. p 904 notes 42, 43.
Form of statement admissible as res gestæ see supra § 415.

Disappearance of insured
Insured's letters to wife suing on life policy just prior to final disappearance is admissible as part of res gestæ.—Northwestern Mut. Life Ins. Co. (Milwaukee, Wis.) v. Rutledge, 51 P.2d 521, 174 Okl. 639.

94. Ala.—Phillips v. Catts, 124 So. 884, 220 Ala. 332.

95. U.S.—Davis v. Livingston, C.C. A.Cal., 13 F.2d 605.

96. U.S.—Tallapoosa County Bank v. Kreis, C.C.A.Ala., 45 F.2d 382.
Ala.—Sovereign Camp, W. O. W. v. Adams, 86 So. 737, 204 Ala. 667.

Corroboration of objecting party's evidence
Letter offered by plaintiff, objected to by defendant, is competent, being corroborative of defendant's exhibit.—Stewart v. Pen Argyl Nat. Bank, 161 A. 327, 307 Pa. 328.

97. Ala.—Williams v. Dent, 170 So. 202, 233 Ala. 109.
Mo.—Smith v. Simpson, 288 S.W. 69, 221 Mo.App. 550.
Tex.—Austin v. Conner & McRae, Civ. App., 288 S.W. 552.

Letters held admissible
(1) To show basis of opinion.—Smalley v. Mountain States Life Ins. Co., 37 P.2d 498, 1 Cal.App.2d 747.
(2) To show intention or intent. U.S.—U. S. v. 169 Bales Containing Wool, C.C.A.N.Y., 56 F.2d 736, certiorari denied 169 Bales Containing Wool, etc., v. U. S., 52 S.Ct. 502, 286 U.S. 552, 76 L.Ed. 1287.
Ark.—Kavanaugh v. Morgan, 287 S. W. 1022, 172 Ark. 11.
(3) To show knowledge.—Mutual Ben. Health & Accident Ass'n v. Neale, 33 P.2d 604, 43 Ariz. 532.
(4) To show reason or motive.
Cal.—Jones v. Southern Pac. Co., 239 P. 429, 74 Cal.App. 10.
Wash.—Williamson v. Williamson, 48 P.2d 588, 183 Wash. 71, adhered to 54 P.2d 1215, 185 Wash. 707.

98. Ala.—Navco Hardwood Co. v. Becks, 134 So. 4, 222 Ala. 631.
N.H.—McCrillis v. American Heel Co., 155 A. 410, 85 N.H. 165.

99. Okl.—Northwestern Mut. Life Ins. Co. (Milwaukee, Wis.) v. Rutledge, 51 P.2d 521, 174 Okl. 639.
Or.—Security Savings & Trust Co. v. Commercial Casualty Ins. Co., 32 P.2d 582, 147 Or. 193, 93 A.L.R. 409.

Attempt to corrupt witness
A letter constituting an attempt to corrupt a witness is admissible.—Stevenson v. Avery Coal & Mining Co., 143 Ill.App. 397—22 C.J. p 905 note 58.

1. Me.—Lamson v. Dirigo Fish Co., 147 A. 655, 128 Me. 364.
Tex.—James v. Lasco Laundry Supply Co., Civ.App., 84 S.W.2d 901.

2. Ark.—J. H. Phipps Lumber Co. v. Phipps, 3 S.W.2d 685, 176 Ark. 642.
Ga.—McClure v. Cochran, 151 S.E. 495, 169 Ga. 741.
Mo.—Weaver Bros. v. Smith, App., 13 S.W.2d 578.
Mont.—Parsons v. Rice, 264 P. 396, 81 Mont. 509.

To show making of inquiries
Letters identified as written by insured's mother were properly admitted to show that wife suing on life policy after insured's absence for more than seven years had made inquiries concerning his whereabouts.—Rodskier v. Northwestern Mut. Life Ins. Co. of Milwaukee, Wis., 248 N.W. 295, 216 Iowa 121.

To show efforts to sell
In action for commissions, letters written to plaintiff by superintendent of schools were admissible to show efforts made by plaintiff to sell heating and plumbing supplies.—Buhrmester v. Independent Plumbing & Heating Supply Co., Mo.App., 151 S.W.2d 509.

3. U.S.—Harris v. Gurley, C.C.A. Tex., 80 F.2d 744—Southern Pac. Co. v. Stevens, Ariz., 258 F. 165, 169 C.C.A. 233.
Ala.—Brotherhood of Railroad Trainmen v. Barnhill, 108 So. 456, 214 Ala. 565, 47 A.L.R. 270.
Colo.—Johnson Oil & Refining Co. v. Elder, 42 P.2d 610, 96 Colo. 314.
Ill.—Kesner v. Faroll, 268 Ill.App. 531—Bayfield v. Deffenbacher, 266 Ill.App. 385.
Ind.—Farmers Loan & Trust Co. v. Mock, 2 N.E.2d 235, 238, 102 Ind. App. 270, citing **Corpus Juris.**
Me.—Lamson v. Dirigo Fish Co., 147 A. 655, 128 Me. 364.
Mass.—Johnson v. Von Scholley, 106 N.E. 17, 218 Mass. 454.
Mo.—Scullin Steel Co. v. Mississippi Valley Iron Co., 273 S.W. 95, 308 Mo. 453.
N.J.—New Jersey Bell Telephone Co. v. Kramer, 152 A. 186, 8 N.J.Misc. 854.
N.Y.—Klein v. Smith, 187 N.Y.S. 422, 195 App.Div. 870, motion denied 188 N.Y.S. 930, 196 App.Div. 955.
Pa.—Moxey v. Goldstein, 156 A. 589, 102 Pa.Super. 168.
S.C.—J. A. Fay & Egan Co. v. Mims, 149 S.E. 246, 151 S.C. 484.
Va.—Kentucky Virginia Stone Co. v. Fortner, 165 S.E. 401, 159 Va. 234.
22 C.J. p 905 note 54.

4. U.S.—Southern Pac. Co. v. Stevens, Ariz., 258 F. 165, 169 C.C.A. 233.

5. Cal.—Hinton v. Welch, 177 P. 282, 179 Cal. 463.

6. Ark.—Galion Iron Works & Mfg. Co. v. Otto V. Martin Const. Co., 3 S.W.2d 310, 176 Ark. 448.

7. Md.—Prudential Ins. Co. v. Devoe, 56 A. 809, 98 Md. 584.

8. U.S.—American Credit-Indemnity Co. of New York v. E. R. Apt Shoe Co., C.C.A.N.H., 74 F.2d 345, 97 A.L.R. 1640—Federal Reserve Bank of San Francisco v. Idaho Grimm Alfalfa Seed Growers' Ass'n, C.C.A. Idaho, 8 F.2d 922, certiorari denied 46 S.Ct. 347, 270 U.S. 646, 70 L.Ed. 778.
Me.—Wilkins v. Waldo Lumber Co., 153 A. 191, 130 Me. 5.
S.C.—Galphin v. Pioneer Life Ins. Co., 154 S.E. 855, 157 S.C. 469.
Tex.—Central Bank & Trust Co. v. Hill, Civ.App., 160 S.W. 1099.

intention on the part of the writer at the time of writing,[9] the whereabouts of the writer at a particular time,[10] or the pendency of certain negotiations.[11]

Letters and telegrams may be admissible in evidence to prove the existence of a legal instrument or to show certain other legal consequences.[12] Thus letters may be admissible for the purpose of proving a contract, or part of a contract and its terms and conditions;[13] and letters are admissible to show an anticipatory breach of contract,[14] a cancellation of a contract,[15] or a refusal to rescind a contract.[16]

Mutual correspondence. Letters and telegrams between the parties may be admitted as part of a mutual correspondence,[17] or as part of a conversation between them;[18] and a letter written in the regular course of business and calculated to elicit a reply, to which no reply is made, is admissible against the addressee, although under other circumstances it might be self-serving.[19]

9. Or.—Security Savings & Trust Co. v. Commercial Casualty Ins. Co., 32 P.2d 582, 147 Or. 193, 93 A.L.R. 409.
22 C.J. p 905 note 62.

10. Ill.—Hunter v. Hanson, 151 Ill. App. 446.
22 C.J. p 905 note 59.

11. Kan.—Gulliford v. McQuillen, 89 P. 927, 75 Kan. 454.
Pa.—Wallace v. Dorris, 67 A. 858, 218 Pa. 534.

12. U.S.—Shaw v. Indio Cattle Co., C.C.A.Tex., 40 F.2d 835.

Architect's letter showing disapproval

In action against building contractors for breach of contract to purchase insulation materials which stipulated that order was given with understanding that contractors get approval from architects, architects' letter to superintendent of building construction, stating that no more substitutions would be allowed, was not inadmissible because it was ex parte statement of architects and because it was not made with reference to contract in suit.—Young & Pratt v. Southwest Insulation & Packing Co., Tex.Civ.App., 94 S.W.2d 276, error dismissed.

Letter acknowledging receipt of goods

A letter, showing the terms of an agreement signed by defendant and acknowledging receipt of sugar to be kept in storage for defendant's account until he was billed for it, did not have to be signed by plaintiff also to render it admissible in an action for conversion of sugar, nor was it objectionable simply because it was a warehouse receipt.—American Grocery Co. v. Union Sugar Co., Tex.Civ.App., 246 S.W. 418.

Letters showing waiver

Ill.—Davis v. Home Ins. Co., 233 Ill. App. 566.

13. Mo.—Boland v. L. H. Prentice Co., App., 249 S.W. 95.
22 C.J. p 904 note 41.

Contract of employment

Letter written by deceased urging plaintiff to return and work for her was admissible, in action for services rendered deceased, although prejudicial to defendant administrator.—Arazo v. Walker, R.I., 133 A. 620.

Corporate seal need not be affixed to letters from defendant corporation's general manager to plaintiff and corporation president to render them admissible to prove agreement to pay plaintiff.—Davis v. Pacific Studios Corporation, 258 P. 440, 84 Cal.App. 611.

14. Tex.—Hooser v. Thraves, Civ. App., 25 S.W.2d 678, affirmed Thraves v. Hooser, Com.App., 44 S. W.2d 916.

15. N.Y.—Cristall v. Gerst, 169 N. Y.S. 64.

Cancellation of agency contract

In action by seller of wholesale oil agency on notes given for purchase price where seller and buyer had made contract providing for cancellation of unmatured notes if oil company canceled agency for other reason than dishonesty, insubordination, or violation of rules, letter advising defendant of company's intention to cancel agency was competent to establish cancellation of agency agreement.—Rodgers v. Skow, 84 S. W.2d 611, 191 Ark. 266.

Cancellation of insurance policy

A letter from an insurance company canceling a policy for failure to pay the premium, which was shown to the agent who had accepted a note for the premium and agreed to pay the amount to the company, was admissible in evidence against him in an action against him by the policyholder for damages.—Newman v. Tarwater, Tex.Civ.App., 159 S.W. 495.

16. Miss.—Swann v. West, 41 Miss. 104.

17. Ill.—Kesner v. Faroll, 268 Ill. App. 531.
Minn.—Caldwell v. First Nat. Bank, 205 N.W. 282, 164 Minn. 401.
N.C.—Storey v. Stokes, 100 S.E. 689, 178 N.C. 409.
Or.—De Vol v. Citizens' Bank, 179 P. 282, 92 Or. 696, rehearing denied 181 P. 985, 92 Or. 606—Frame v. Oregon Liquor Co., 85 P. 1009, 86 P. 791, 48 Or. 272.

Replies to letters

(1) A letter by one party in reply to a letter from the other is generally admissible.
Mass.—Frank Herskovitz, Inc., v. Dorn, 157 N.E. 593, 260 Mass. 532—Eveland v. Lawson, 132 N.E. 719, 240 Mass. 99.
Minn.—Garbisch v. American Ry. Express Co., 225 N.W. 432, 177 Minn. 494.

(2) A reply to a letter received in due course of mail and referred to a third person who answered it was admissible in evidence over the objection of the person by whom it was referred.—Murray v. Bailey, 193 N.W. 259, 110 Neb. 114.

(3) Letter written by defendant's attorney answering a letter written by plaintiff's attorney was not admissible because the letter written by plaintiff's attorney was in evidence where the latter letter was introduced by codefendant, was irrelevant, and afterward withdrawn.—Maasdam v. Blokland, 261 P. 66, 123 Or. 128.

Between attorneys or agents of parties

Letters between attorneys and agents of the respective parties are admissible on the same basis as letters between the parties.
Ark.—Dierks Lumber & Coal Co. v. Kull, 4 S.W.2d 926, 176 Ark. 966.
N.J.—Adamucci v. Pennsylvania-Reading Seashore Lines, 182 A. 895, 14 N.J.Misc. 137.

18. Cal.—Turano v. Bailey, 260 P. 841, 86 Cal.App. 402.
Utah.—In re Blodgett's Estate, 70 P. 2d 742, 93 Utah 1.
W.Va.—McDaniel v. Coogle, 130 S.E. 465, 100 W.Va. 381.

Letter sent at request of opposite party

In action for price of produce sold, letter sent to defendant, in response to telephonic conversation between parties, setting forth plaintiff's claim, was admissible in plaintiff's behalf.—Beeler v. Pacific Fruit & Produce Co., 233 P. 4, 133 Wash. 116.

19. Me.—Callahan v. Roberts, 140 A. 687, 127 Me. 21—Duff v. Holland System, 119 A. 808, 122 Me. 297.
22 C.J. p 905 notes 51, 52.

In an action for attorney's services, letters written by plaintiff to defendant, containing counsel and advice to her, are admissible.[20]

Unsigned letter. An unsigned letter may be received in evidence[21] where its authenticity is established, see infra § 706, but an anonymous letter does not, it has been said, "even rise to the dignity of hearsay evidence," and is incompetent for any purpose.[22]

Undated letter. Where the date is not material, an undated letter may be admitted,[23] but where the time is material, such a letter will be excluded in the absence of proof of the time when it was written or sent.[24]

Marginal memorandum. A memorandum in writing on the margin of a typewritten letter does not affect the admissibility of the letter where it is not proposed to offer the memorandum in evidence or to read it.[25]

§ 704. Parts of Letters

The admissible parts of a letter may be received in evidence while the inadmissible parts may be excluded, and where part of a letter is missing, the residue may be admitted under certain conditions.

Where part of a letter is admissible and other parts are inadmissible, the admissible part may be received in evidence,[26] and the inadmissible part excluded;[27] but if a letter partly admissible and partly inadmissible is offered as a whole, it may be excluded in its entirety.[28]

Where part of a letter is missing, the remaining part may be admitted against the writer if it is sufficiently identified or its authorship admitted or not denied,[29] provided the part offered is sufficient to show the complete meaning thereof;[30] and this is particularly true where opportunity is afforded the writer to explain the missing parts.[31]

Part of a letter not properly identified as having been written by the person claimed to be the writer is inadmissible, at least where it does not appear that the remainder of the letter is missing.[32] However, where there is no question of identification, part of a letter may be offered and received as an admission,[33] and when a letter is in evidence, either party may read from it so far as relevant.[34]

§ 705. Admission of Correspondence in Entirety

A letter of the adverse party containing an admission is admissible without an offer of the entire correspondence; but a letter offered by the writer to prove a contract and purporting to be a reply to a letter from his adversary is inadmissible unless the adversary's letter is produced or, if it is shown to be lost, its contents proved.

As appears supra § 190, where one party introduces in evidence part of a correspondence, the other party is entitled to introduce the remainder, so far as it is relevant. Moreover, the rule has been laid down that a party who attempts to establish a contract by correspondence will not be allowed to put in evidence a letter from himself to the adverse party which purports on its face to answer a letter from the adverse party, without producing the previous communication, or if the previous letter is lost or beyond his control, without showing this fact and then proving its contents.[35] However, a party

20. Tex.—Curtsinger v. McGown, Civ.App., 149 S.W. 303.

21. Tenn.—La Follette v. State, 64 S.W.2d 857, 16 Tenn.App. 404.
22 C.J. p 905 note 64.
Typewritten signature
Letters introduced to prove contract and plaintiff's damages were admissible, although signed on typewriter.—Buswell v. Turner, Mo.App., 11 S.W.2d 1088.

22. Ill.—Lodge v. Hampton, 116 Ill. App. 414.

23. N.J.—Diamond Rubber Co. v. Feldstein, 166 A. 710, 11 N.J.Misc. 457, affirmed 171 A. 815, 112 N.J. Law 514.

24. Iowa.—Walker v. Speeder Machinery Corporation, 240 N.W. 725, 213 Iowa 1134.

25. La.—State v. Hoffman, 45 So. 951, 120 La. 949.

26. Ky.—Parrish v. Karr, 74 S.W. 2d 937, 255 Ky. 573.
Part of letter read in conversation
Where extracts from letters were read in conversation testified to and such conversation itself was material, such parts only, not parts of letter which were not included in conversation, would be admissible.—In re Blodgett's Estate, 70 P.2d 742, 93 Utah 1.
Letterheads
The admission in evidence of letter heads used by an alleged partnership, in proof of the existence of the partnership, was not erroneous, although on the paper were written letters which were not offered or introduced in evidence.—American Cotton College v. Atlanta Newspaper Union, 74 S.E. 1084, 138 Ga. 147.

27. Ala.—Joyner v. McMurphy, 163 So. 533, 26 Ala.App. 549.

28. Ala.—Miller v. McGuire, 80 So. 433, 202 Ala. 351.

29. Ga.—Greer v. Andrew, 75 S.E. 1050, 138 Ga. 663.
Ill.—Geraghty v. Geraghty, 167 N.E. 117, 335 Ill. 494.

30. Or.—Hanson v. Johnson, 23 P.2d 333, 143 Or. 532.
Wyo.—Kamp v. Kamp, 254 P. 689, 36 Wyo. 310.

31. Ill.—Geraghty v. Geraghty, 167 N.E. 117, 335 Ill. 494.
N.Y.—Van Vechten v. Van Vechten, 20 N.Y.S. 140, 65 Hun 215.

32. Mo.—Wheat v. Wheat, App., 279 S.W. 755.

33. Ga.—Lester v. Piedmont & Arlington Life Ins. Co., 55 Ga. 475.
Introduction of remainder
The adverse party has the right to introduce the remainder.—Lester v. Piedmont & Arlington Life Ins. Co., supra.

34. Ill.—Raphael v. Hartman, 87 Ill. App. 634.

35. Pa.—Hershey v. Love, 122 A. 225, 227, 278 Pa. 161, quoting Corpus Juris.
Wash.—Fleishbein v. Thorne, 74 P.2d 880, 883, 193 Wash. 65, citing Corpus Juris.
22 C.J. p 906 note 70.

may give in evidence against the adverse party any letters of the adverse party containing admissions material to the questions in issue without putting in the whole correspondence between them,[36] at least where the letter offered in evidence as an admission is fairly self-explanatory.[37]

A reply is admissible as evidence of notice to the adverse party to whom it was addressed without producing the letter to which it referred.[38]

§ 706. Authentication

a. In general
b. Relaxation of rule

a. In General

A letter or telegram alleged to have been received from a particular source ordinarily is not admissible until its authenticity and genuineness have been sufficiently shown.

A letter alleged to have been received from a particular source ordinarily is not admissible until its authenticity and genuineness have been sufficiently shown.[39] There must be sufficient proof that the letter was written by the person by whom it purports and is claimed to have been written,[40] or under the authority of the person claimed to have authorized it.[41]

Proof of the genuineness of the signature is sufficient authentication to warrant the admission of the letter.[42] The genuineness of a letter or of the signature thereto may be sufficiently established by proof of the handwriting,[43] but other evidence may

36. Me.—North Berwick Co. v. New England F. & M. Ins. Co., 52 Me. 336.
22 C.J. p 906 note 71.

37. Iowa.—Brayley v. Ross, 33 Iowa 505.
Neb.—New Hampshire Trust Co. v. Korsmeyer Plumbing & Heating Co., 78 N.W. 303, 57 Neb. 784.

38. Mass.—Crary v. Pollard, 14 Allen 284.

39. U.S.—Harper v. Wilson, C.C.A. Wyo., 46 F.2d 785.
Ala.—American Standard Life Ins. Co. v. Tolliver, 146 So. 625, 25 Ala. App. 363.
Fla.—Mallory v. Edgar, 175 So. 863, 128 Fla. 812.
Ga.—Deaderick v. Deaderick, 185 S. E. 89, 182 Ga. 96—Cocroft v. Cocroft, 124 S.E. 346, 158 Ga. 714—Owen v. Anderson, 186 S.E. 864, 54 Ga.App. 53.
Ill.—Vollbracht v. Western Union Telegraph Co., 219 Ill.App. 563.
Minn.—Lundgren v. Union Indemnity Co., 213 N.W. 553, 171 Minn. 122, 52 A.L.R. 580.
Mo.—Lentz v. New York Life Ins. Co., App., 100 S.W.2d 588, 590, citing **Corpus Juris**—Welch v. Fraternal Aid Union, 253 S.W. 187, 214 Mo.App. 443.
N.Y.—Material Men's Mercantile Ass'n v. Material Men's Credit Agency, 180 N.Y.S. 801, 191 App. Div. 73—Todd Protectorgraph Co. v. Wells Fargo & Co. Express, 181 N.Y.S. 128, 111 Misc. 282—Madden v. Stern, 173 N.Y.S. 373.
N.C.—Morrison v. Southern States Finance Co., 148 S.E. 458, 197 N. C. 322.
S.C.—Nelson v. Parson, 192 S.E. 358, 184 S.C. 335—Freeman v. Chavis, 101 S.E. 849, 113 S.C. 326.
Tex.—Western Union Telegraph Co. v. Sorenson, Civ.App., 90 S.W.2d 890—Sloan v. Sloan, Civ.App., 32 S. W.2d 513, 517, citing **Corpus Juris**—Hart v. Wilson, Civ.App., 281 S. W. 339, reversed on other grounds, Com.App., 288 S.W. 133—Denby Motor Truck Co. v. Mears, Civ. App., 229 S.W. 994, dismissed for want of jurisdiction.
W.Va.—Maynard v. Bailey, 102 S. E. 480, 85 W.Va. 679, 9 A.L.R. 981.
22 C.J. p 906 note 77.
Authentication and proof of execution of documentary evidence generally see infra §§ 733–742.

40. U.S.—Jones v. Mencik, C.C.A.N. J., 286 F. 890.
Ala.—American Standard Life Ins. Co. v. Tolliver, 146 So. 625, 25 Ala. App. 363.
Idaho.—Beloit v. Green, 251 P. 621, 43 Idaho 265.
Mo.—United Factories v. Brigham, App., 117 S.W.2d 662, certiorari quashed State ex rel. United Factories v. Hostetter, 126 S.W.2d 1173, 344 Mo. 386.
22 C.J. p 906 note 76.

41. Ala.—American Standard Life Ins. Co. v. Tolliver, 146 So. 625, 25 Ala.App. 363.
Ariz.—Lightning Delivery Co. v. Matteson, 39 P.2d 938, 45 Ariz. 92.
Ark.—Bankers' Reserve Life Co. v. Harper, 64 S.W.2d 327, 188 Ark. 81.
Cal.—Palladine v. Imperial Valley Farm Lands Ass'n, 225 P. 291, 65 Cal.App. 727.
Ga.—Saunders & McMullen v. Hudson, 119 S.E. 535, 30 Ga.App. 732.
Neb.—O'Brien v. Coon, 174 N.W. 513, 103 Neb. 836.
Tex.—Western Union Telegraph Co. v. Sorenson, Civ.App., 90 S.W.2d 890—Castello v. Castello, Civ.App., 89 S.W.2d 1033, 1034, citing **Corpus Juris**—Sloan v. Sloan, Civ. App., 32 S.W.2d 513, 517, citing **Corpus Juris.**
22 C.J. p 908 note 84.

Mere designation by writer
The fact that the writer of a letter designated himself as assistant to the bureau of yards and docks does not establish his authority to speak for the bureau, so as to make a copy of the letter admissible.—Arnold v. Thompson & Spear Co., 279 F. 307, 51 App.D.C. 325.

Presumption of attorney's authority
Letter from defendant's attorney of record is assumed to have been sent with defendant's authority.—Gillen v. Coconut Grove Bank & Trust Co., 159 S.E. 282, 172 Ga. 908.

42. Ark.—Davis v. Falls, 288 S.W. 723, 172 Ark. 314.
Cal.—Risinger v. Anderson, 51 P.2d 1119, 10 Cal.App.2d 455.
Tex.—Denby Motor Truck Co. v. Mears, Civ.App., 229 S.W. 994, dismissed for want of jurisdiction.

Proof of genuineness of signature as essential
"As a general rule, a letter that is offered in evidence must be authenticated by proving the genuineness of the signature of the writer."—Barham v. Delight Bank, 126 S.W. 394, 396, 94 Ark. 158, 27 L.R. A.,N.S., 439.

43. Ga.—Bennett v. Cox, 146 S.E. 835, 167 Ga. 843—Cocroft v. Cocroft, 124 S.E. 346, 158 Ga. 714.
Pa.—Kern v. Kern, 93 Pa.Super. 500.
W.Va.—Maynard v. Bailey, 102 S.E. 480, 85 W.Va. 679, 9 A.L.R. 981.
22 C.J. p 907 note 78.

Comparison of handwritings
(1) The signature on the letter may be proved by comparison with the undisputed signature of the alleged writer appearing on other writings in evidence.—Flickema v. Henry Kraker Co., 233 N.W. 362, 252 Mich. 406, 72 A.L.R. 1046.

(2) It can be proved by the testimony of the witness to the effect that numerous letters received by him over a considerable period in the usual course of business were all signed in same way and, in witness' opinion, by the same person who had signed the letters in ques-

be resorted to for this purpose.[44] Thus a letter not in the handwriting of the alleged sender, or not shown to be in his handwriting, may itself furnish internal evidence of the source from which it came, as for instance the fact that it relates to matters which are known only to the alleged sender,[45] although it has been said that internal evidence alone is not sufficient authentication.[46]

A telegram, like a letter, is not admissible in the absence of proof of its authenticity either by proof of the handwriting, where the original message is offered, or by other evidence of its genuineness;[47] and where the admission of the telegram depends on the authority given to the actual sender by another person, such authority must be shown.[48]

If a letter or telegram has been admitted on a promise to show authority of the writer, it should be stricken out where such authority is not shown.[49]

Sufficiency of proof. It is not necessary that it should be proved beyond a reasonable doubt that the letter or telegram is that of the alleged author, but evidence which, if uncontradicted, would satisfy a reasonable mind of that fact is sufficient to authorize the admission of the communication.[50]

tion.—Sgro v. Stuyvesant Ins. Co., 1 A.2d 554, 132 Pa.Super. 444.

(3) Comparison of handwritings see supra §§ 612–622.

Unsigned letter may be sufficiently identified by the handwriting.—La Follette v. State, 64 S.W.2d 857, 16 Tenn.App. 404.

44. W.Va.—Harris v. Welch, 104 S.E. 277, 87 W.Va. 154.
22 C.J. p 907 note 79.

Reason for rule

"If this were not true, there might be a failure of justice in every instance in which a controlling document has not been written or signed by the author thereof in his own handwriting, and in every instance in which it is impossible to produce a witness to the handwriting. Men might escape their obligations by mere disguises of their handwriting."—Maynard v. Bailey, 102 S.E. 480, 481, 85 W.Va. 679, 9 A.L.R. 981.

Circumstantial evidence may be sufficient.
Ga.—Deaderick v. Deaderick, 185 S.E. 89, 182 Ga. 96—Cocroft v. Cocroft, 124 S.E. 346, 158 Ga. 714.
Minn.—Lundgren v. Union Indemnity Co., 213 N.W. 553, 171 Minn. 122, 52 A.L.R. 580.
Tex.—Denby Motor Truck Co. v. Mears, Civ.App., 229 S.W. 994, dismissed for want of jurisdiction.

Corporate certificate

A statute permitting the records of a private corporation to be proved by certificate does not apply to actions in which the corporation is not involved, so as to render admissible in such action certified copies of letters in the corporation's possession without proof of their execution by their alleged author.—In re Healea's Estate, 254 Ill.App. 334.

Letter referred to in writer's testimony

Letter of vendor referred to in his testimony was admissible, without proof of signature or further authentication, especially in view of other correspondence introduced.—Hart v. Wilson, Tex.Civ.App., 281 S.W. 339, reversed on other grounds, Com.App., 288 S.W. 133.

45. Or.—State ex rel. Kunz v. Woodmansee, 69 P.2d 298, 301, 156 Or. 607, quoting Corpus Juris.
22 C.J. p 907 note 80.

Typewritten letter and signature

The authenticity or origin of a typewritten letter, signed in typewriting, may be shown by the character of the paper and envelope used, the place and circumstances of its mailing, the postmarks, the direction for its return in case of nondelivery, and the manifest probability that its contents were known only to the apparent writer and the person to whom it was written and mailed.—Maynard v. Bailey, 102 S.E. 480, 85 W.Va. 679, 9 A.L.R. 981.

Recipient without knowledge of handwriting

Recipient of letters not shown to know handwriting cannot swear to writer, unless something assures him in responsible way of their genuineness.—Beloit v. Green, 251 P. 621, 43 Idaho 265.

46. Mo.—United Factories v. Brigham, App., 117 S.W.2d 662, certiorari quashed State ex rel. United Factories v. Hostetter, 126 S.W.2d 1173, 344 Mo. 386.

Probability that proof may all be internal

"It is conceivable but not probable that it [the proof] may all be internal, that is that a writing may be self-authenticating."—Lundgren v. Union Indemnity Co., 213 N.W. 553, 554, 171 Minn. 122, 52 A.L.R. 580.

47. Ala.—Western Union Telegraph Co. v. Mathis, 110 So. 399, 215 Ala. 282.
Ill.—Vollbracht v. Western Union Telegraph Co., 219 Ill.App. 563.
Ky.—McLellan v. Threlkeld, 129 S.W.2d 977, 279 Ky. 114.
Minn.—Lundgren v. Union Indemnity Co., 213 N.W. 553, 171 Minn. 122, 52 A.L.R. 580.
Tex.—Houston Electric Co. v. Potter, Civ.App., 51 S.W.2d 754, error dismissed—Harlan-Elzy-Randall Co. v. American Fruit Growers, Civ.App., 7 S.W.2d 132, error dismissed American Fruit Growers v. Harlan-Elzey-Randall Co., Com.App., 16 S.W.2d 261.
22 C.J. p 907 note 81.

Circumstantial evidence

(1) The authenticity of telegrams may be shown by circumstantial evidence.—Lundgren v. Union Indemnity Co., 213 N.W. 553, 171 Minn. 122, 52 A.L.R. 580.

(2) The authenticity of telegrams may be found from the fact that the alleged sender does not deny that he sent them, and that he knew their contents, and acted in accordance with instructions contained therein.—Dierks Lumber & Coal Co. v. Kull, 4 S.W.2d 926, 176 Ark. 966.

48. Ky.—McLellan v. Threlkeld, 129 S.W.2d 977, 279 Ky. 114.
Mass.—Morrison v. Tremont Trust Co., 147 N.E. 870, 252 Mass. 383.
Minn.—Lundgren v. Union Indemnity Co., 213 N.W. 553, 171 Minn. 122, 52 A.L.R. 580.

49. Ill.—Frorer v. Landon, 130 Ill. App. 93.
Provisional or conditional admission of evidence see the C.J.S. title Trial § 85, also 64 C.J. p 136 note 85 et seq.

50. Minn.—Lundgren v. Union Indemnity Co., 213 N.W. 553, 555, 171 Minn. 122, 52 A.L.R. 580, quoting Corpus Juris.
Mo.—O'Donnell v. Kansas City Life Ins. Co., App., 277 S.W. 973, 976, quoting Corpus Juris.
22 C.J. p 907 note 82.

Conflict of evidence

That there is a conflict of evidence does not justify exclusion of the letter.—Hendrix v. Pique, 185 So. 390, 237 Ala. 49.

Evidence held sufficient

(1) To show that letters were written under the authority of the purported sender.
Ariz.—Buerger Bros. Supply Co. v. El Rey Furniture Co., 32 P.2d 1029, 43 Ariz. 472.
N.J.—Fuld v. Adams, 156 A. 833, 108 N.J.Law 373.

Whether a sufficient foundation has been laid for the admission of the evidence is a matter addressed to the discretion of the trial court,[51] although the final question of its genuineness, assuming a sufficient foundation has been laid, is for the jury.[52]

b. Relaxation of Rule

Proof of the authenticity of a letter or telegram may be dispensed with under various circumstances, as where its genuineness is admitted or where the letter is in reply to a letter sent to the writer.

Proof of authenticity may be dispensed with where the letter in question has been acted on as genuine,[53] or where there is an admission of the facts stated therein.[54] It has also been held that such proof is unnecessary where the letter is offered on a purely collateral issue.[55]

Admissions of genuineness. An admission as to a writing is like an admission of any other fact, and a foundation for the introduction of a letter or telegram may be laid by proving that the party against whom it is offered has admitted its genuineness,[56] even though such letter is not in his handwriting.[57] Where a witness produces a letter which the sender admits to be genuine, such

Tex.—Runnels v. La Fitte, Civ.App., 61 S.W.2d 585.
Wash.—Skibsaktieselskapet Bestum III v. Duke, 230 P. 650, 131 Wash. 467.

(2) To show that telegrams were sent under the authority of the purported sender.
U.S.—Essanay Film Mfg. Co. v. Lerche, C.C.A.Cal., 267 F. 353.
Wash.—Skibsaktieselskapet Bestum III v. Duke, supra.

(3) In action on life policies, typewritten letters from insured to beneficiary, which on their face showed that they were part of correspondence between parties, were sufficiently identified to warrant admission in evidence.—Metropolitan Life Ins. Co. v. Armstrong, C.C.A.Neb., 85 F.2d 187.

(4) Evidence that woman wrote letter to wife reporting certain conduct of husband and on same day told husband that she had written letter, and that husband called wife by long-distance telephone telling her to ignore letter, was sufficient proof of genuineness to authorize admission of letter in evidence.—Deaderick v. Deaderick, 185 S.E. 89, 182 Ga. 96.

(5) Where practicing attorney testified that he had a great deal of correspondence with claim department of defendant railroad, and in answer to his letters he always received letters from J M, and signature on letter introduced in evidence was same as that which was on letters he received, and that he knew that such was his signature, and that he was claim agent of defendant, authentication of signature was sufficient.—Galveston, H. & S. A. Ry. Co. v. Booth, Tex.Civ.App., 209 S.W. 198.

(6) Other cases.
Ark.—Dierks Lumber & Coal Co. v. Kull, 4 S.W.2d 926, 176 Ark. 966.
Ga.—McClure v. Cochran, 151 S.E. 495, 169 Ga. 741—Bennett v. Cox, 146 S.E. 835, 167 Ga. 843.
Mich.—Flickema v. Henry Kraker Co., 233 N.W. 362, 252 Mich. 406, 72 A.L.R. 1046.
Mo.—Gosney v. Costigan, 33 S.W.2d 947, 326 Mo. 1215—Porter v. Equitable Life Assur. Soc. of U. S, App., 71 S.W.2d 766—Burkhardt v. Decker, 295 S.W. 838, 221 Mo.App. 1066.
Pa.—Sgro v. Stuyvesant Ins. Co., 1 A. 2d 554, 132 Pa.Super. 444—Payne v. Adams, 9 Pa.Dist. & Co. 397, 15 West.Co.L.J. 18.
Tex.—Denby Motor Truck Co. v. Mears, Civ.App., 229 S.W. 994, dismissed for want of jurisdiction.
W.Va.—Harris v. Welch, 104 S.E. 277, 87 W.Va. 154.
22 C.J. p 907 note 82 [a].

Evidence held insufficient
Ga.—Cocroft v. Cocroft, 124 S.E. 346, 158 Ga. 714.
Ill.—McKaig v. Appleton, 124 N.E. 596, 289 Ill. 301.
Tex.—Plunkett v. Simmons, Civ.App., 63 S.W.2d 313, error dismissed.

51. U.S.—Metropolitan Life Ins. Co. v. Armstrong, C.C.A.Neb., 85 F.2d 187.
Mass.—Doehler Die-Casting Co. v. Bankers' Sec. Corporation, 150 N. E. 1, 254 Mass. 229.
Minn.—Lundgren v. Union Indemnity Co., 213 N.W. 553, 171 Minn. 122, 52 A.L.R. 580.
Mo.—O'Donnell v. Kansas City Life Ins. Co., App., 277 S.W. 973, 976, quoting **Corpus Juris.**
Or.—State ex rel. Kunz v. Woodmansee, 69 P.2d 298, 156 Or. 607.
22 C.J. p 908 note 83.

52. Ky.—Coleman v. McIntosh, 211 S.W. 872, 184 Ky. 370.

Reply letter
If the genuineness of a reply is denied, it then becomes a question of fact for the jury to determine whether or not the letter is genuine.—Barham v. Delight Bank, 126 S.W. 394, 94 Ark. 158, 27 L.R.A.,N.S., 439.

53. U.S.—Harrison v. U. S., Ohio, 200 F. 662, 19 C.C.A. 78.
22 C.J. p 908 note 86.

Official letters
Treasury department's original official letters, embodying its rulings in pending proceeding for assessment of deficiency income tax against recipient, who accepted and acted on them and forwarded them to his attorney for action thereon as authentic papers, never questioned their authenticity during such proceeding, and paid part of attorney's fee and acknowledged liability for balance on faith thereof, were admissible as evidence in attorney's action for such balance as against contention that they were not authenticated.—Weinshenk v. Sullivan, Mo. App., 100 S.W.2d 66.

54. S.C.—Spellman v. Richmond & D. R. Co., 14 S.E. 947, 35 S.C. 475, 20 Am.S.R. 858.
22 C.J. p 908 note 88.

55. S.C.—Kindle v. First Nat. Bank, 195 N.W. 829, 46 S.D. 645.

56. Cal.—Harland v. Mitchell, 7 P.2d 1113, 120 Cal.App. 421.
22 C.J. p 908 note 91.

Failure to deny
(1) The failure of the opposite party to deny the genuineness of a letter pleaded or made the basis of an action dispenses with the necessity of authenticating the letter as a prerequisite to its admission.—Osborne v. Victor Dairies, Inc., 10 A. 2d 129, 138 Pa.Super. 117—22 C.J. p 908 note 91 [a].

(2) Under a statute providing in effect that, in the absence of a denial under oath or by pleading, letters are themselves presumptive evidence that they have been signed by the person whose signature appears thereon, such presumption does not extend to a document purporting to have been signed by a person deceased at the time of trial.—Jones v. Citizens' Savings & Trust Co., 171 N.W. 648, 168 Wis. 646.

(3) A similar statute has been held applicable only to such writings as are themselves the basis of an action or defense, and any other letters or telegrams must be authenticated, even though their genuineness is not denied.—Lundgren v. Union Indemnity Co., 213 N.W. 553, 171 Minn. 122, 52 A.L.R. 580.

57. U.S.—Dunbar v. U. S., Or., 15 S. Ct. 325, 156 U.S. 185, 39 L.Ed. 390, affirming, D.C., 60 F. 75.

witness may testify that a second letter, the genuineness of which is denied, was signed in the same way, and came through the mails from the same post office as the first letter.[58]

Letters or telegrams received in reply. A letter received in the due course of mail purporting to be written by a person in answer to another letter proved to have been sent to him is prima facie genuine, and is admissible in evidence without proof of the handwriting or other proof of its authenticity,[59] especially where the alleged writer admits that he received and replied to a letter of the character claimed to have been written to him.[60] The rule is usually applied also to a telegram purporting to be sent by a person in reply to a letter or telegram sent to him,[61] although it has been held inapplicable where both message and reply were by telegram.[62]

In order that a reply letter may be admitted without proof of its authenticity, it is necessary that there should be independent proof of the existence of the prior letter,[63] and that it was sent to the person alleged to have replied,[64] or to have authorized the reply;[65] and it has been held that where secondary evidence of letters was improperly admitted it was error to receive the originals of letters written in reply thereto, without sufficient proof of their genuineness, on the theory that they were part of the correspondence.[66]

The presumption of genuineness of a letter received in reply is rebuttable.[67] To rebut the presumption, it must be shown not only that the purported author did not sign it, but that he did not

58. Pa.—Comerer v. Patrons' Mut. Fire Ins. Co., 53 Pa.Super. 516.

59. U.S.—J. W. Ringrose Co. v. W. & J. Sloane, D.C.Pa., 262 F. 545.
Ala.—Reliance Life Ins. Co. v. Russell, 94 So. 748, 752, 208 Ala. 559, citing **Corpus Juris**—Hulsey v. M. C. Kiser Co., 105 So. 913, 21 Ala. App. 123.
Cal.—Fielding v. Iler, 179 P. 519, 39 Cal.App. 559.
Ga.—Holland v. Bullock, 190 S.E. 877, 55 Ga.App. 605.
Me.—Bowker Fertilizer Co. v. Cluskey, 130 A. 209, 124 Me. 384.
Minn.—Lundgren v. Union Indemnity Co., 213 N.W. 553, 171 Minn. 122, 52 A.L.R. 580.
Mo.—United Factories v. Brigham, App., 117 S.W.2d 662, certiorari quashed State ex rel. United Factories v. Hostetter, 126 S.W.2d 1173, 344 Mo. 386.
N.J.—Leunis Co. v. Singer, 130 A 457, 458, 102 N.J.Law 68, citing **Corpus Juris.**
N.Y.—Todd Protectograph Co. v. Wells Fargo & Co. Express, 181 N.Y.S. 128, 111 Misc. 282.
N.C.—Mahoney-Jones Co. v. Osborne, 127 S.E. 533, 189 N.C. 445.
Okl.—Lewis v. Couch, 65 P.2d 988, 989, 179 Okl. 418, citing **Corpus Juris**—Williamson v. Davis, 177 P. 567, 74 Okl. 174.
S.D.—Kindle v. First Nat. Bank, 195 N.W. 829, 46 S.D. 645.
Tex.—General Missionary Soc. of German Baptist Churches of North America v. Real Estate Land Title & Trust Co., 136 S.W.2d 599, 134 Tex. 564, reversing Real Estate Land Title & Trust Co. v. General Missionary Soc. of German Baptist Churches of North America, Civ.App., 115 S.W.2d 466—National Mut. Acc. Ins. Co. v. Davis, Civ. App., 46 S.W.2d 351, 352, quoting **Corpus Juris**—Sloan v. Sloan, Civ. App., 32 S.W.2d 513, 517, citing **Corpus Juris**—Western Union Telegraph Co. v. Sharp, Civ.App., 5 S. W.2d 567, 569, citing **Corpus Juris**—Sealy Cotton Co. v. Gustafson & Spencer, Civ.App., 258 S.W. 911.
22 C.J. p 908 note 94.

Death of writer
The rule as to a reply letter received in due course, being admissible as prima facie authentic, is not affected by death, a few days after its date, of the purported writer.—Reliance Life Ins. Co. v. Russell, 94 So. 748, 208 Ala. 559.

Proof of authority
Where a letter in reply to another purports to have been written under the authority of the alleged sender, proof of such authority is unnecessary.
U.S.—J. W. Ringrose Co. v. W. & J. Sloane, D.C.Pa., 262 F. 545.
Ala.—Reliance Life Ins. Co. v. Russell, 94 So. 748, 752, 208 Ala. 559, citing **Corpus Juris.**
Mo.—United Factories v. Brigham. App., 117 S.W.2d 662, certiorari quashed State ex rel. United Factories v. Hostetter, 126 S.W.2d 1173, 344 Mo. 386.
Tex.—General Missionary Soc. of German Baptist Churches of North America v. Real Estate Land Title & Trust Co., 136 S.W.2d 599, 134 Tex. 564, reversing Real Estate Land Title & Trust Co. v. General Missionary Soc. of German Baptist Churches of North America, Civ.App., 115 S.W.2d 466.
22 C.J. p 909 note 1.

60. S.D.—Tilden v. Smith, 124 N.W 841, 24 S.D. 576.

61. Ill.—Eastman v. United Marble Companies, 224 Ill.App. 256.
Me.—Morneault v. Cohen, 120 A. 915, 122 Me. 543.
Minn.—Lundgren v. Union Indemnity Co., 213 N.W. 553, 171 Minn. 122, 52 A.L.R. 580—Halstead v. Minnesota Tribune Co., 180 N.W. 556, 147 Minn. 294.
22 C.J. p 909 note 96.

62. Md.—Smith v. Easton, 54 Md. 138, 39 Am.S.R. 355.

63. U.S.—Consolidated Grocery Co. v. Hammond, Fla., 175 F. 641, 99 C. C.A. 195.
22 C.J. p 909 note 2.

64. U.S.—Consolidated Grocery Co. v. Hammond, supra.
Minn.—Kvale v. Keane, 168 N.W. 74, 39 N.D. 560.

Presumption of receipt
Evidence of mailing sufficient to raise the presumption of receipt by the addressee of the original letter must be produced to warrant the admission of his reply.—Kvale v. Keane, supra.
Presumptions relating to mailing and delivery see supra § 136.

65. Tex.—General Missionary Soc. of German Baptist Churches of North America v. Real Estate Land Title & Trust Co., 136 S.W.2d 599, 134 Tex. 564, reversing Real Estate Land Title & Trust Co. v. General Missionary Soc. of German Baptist Churches of North America, Civ.App., 115 S.W.2d 466.

66. Ill.—Cook v. Augustus, 201 Ill. App. 195.

Proper proof of contents of original letter is an essential prerequisite to the admission of a letter allegedly in reply thereto.—Peters Branch of International Shoe Co. v. Jones, 56 S.W.2d 994, 247 Ky. 193.

67. Ala.—Reliance Life Ins. Co. v. Russell, 94 So. 748, 208 Ala. 559—Hulsey v. M. C. Kiser Co., 105 So. 913, 21 Ala.App. 123.
N.Y.—Todd Protectograph Co. v. Wells Fargo & Co. Express, 181 N.Y.S. 128, 111 Misc. 282.

authorize another to formulate and send it.[68]

§ 707. Proof of Delivery

To be admissible against the addressee, it must be shown that a letter or telegram or a copy thereof was received by him, although no proof of delivery is required where the letter is offered as an admission.

In order to render a letter or telegram or a copy thereof admissible against the addressee, it must be shown that it was received by him,[69] or duly sent or delivered for transmission to him through the mails so as to raise the presumption, considered supra § 136, that it was received by him,[70] or that it came to his attention.[71] Similarly a letter addressed to one other than the party sought to be charged with knowledge of its contents cannot be admitted without sufficient proof that the contents were communicated to him.[72]

Where a letter was actually received, it is immaterial how it was received, whether by mail or oth-

68. Ala.—Reliance Life Ins. Co. v Russell, 94 So. 748, 208 Ala. 559
22 C.J. p 909 note 1 [a].

69. S.C.—Lemons v. Pilot Life Ins Co., 13 S.E.2d 278, 196 S.C. 297.
22 C.J. p 909 note 5.

Letters relied on to establish gift from testatrix were admissible under evidence that letters were written by testatrix and that donee had them shortly after her death.—Gosney v. Costigan, 33 S.W.2d 947, 326 Mo. 1215.

70. U.S.—U. S. v. Meakins, C.C.A. Mont., 96 F.2d 751.
Ill.—Bayfield v. Defenbacher, 266 Ill. App. 385—Vollbracht v. Western Union Telegraph Co., 219 Ill.App. 563.
Mo.—Darby v. Northwestern Mut. Life Ins. Co., 264 S.W. 372—Kregain v. Blake, 239 S.W. 495, 292 Mo. 498.
N.Y.—Bond Stores v. Overland Package Freight Service, 13 N.Y.S.2d 928, 171 Misc. 135.
N.D.—State Bank of Finley v. Dronen, 197 N.W. 150, 50 N.D. 583.
Pa.—Harrison v. Welsh, 10 Pa.Dist. & Co. 541, affirmed 145 A. 507, 295 Pa. 501.
Tex.—Farmers' State Bank & Trust Co. of Gorman v. Central State Bank of Dallas, Civ.App., 281 S. W. 632—Forrest v. Hull, Civ.App., 267 S.W. 308.
Wash.—Fishbein v. Thorne, 74 P.2d 880, 193 Wash. 65.
W.Va.—Phœnix Ins. Co. v. Thomas, 138 S.E. 381, 382, 103 W.Va. 574, citing **Corpus Juris.**
Wyo.—Kamp v. Kamp, 254 P. 689, 36 Wyo. 310.
22 C.J. p 909 note 5.

Proof of mailing

(1) To be properly "mailed" a letter must be addressed, stamped, and deposited in the proper place for the receipt of mail, and evidence that these things were done is sufficient to warrant its admission.—Dawson Farmers' Elevator Co. v. Opp, 223 N. W. 350, 57 N.D. 598.

(2) Since the word "mailed" implies the doing of the foregoing things, a general statement that a letter was "mailed" is sufficient.
N.D.—Dawson Farmers' Elevator Co. v. Opp, supra.
Tenn.—W. E. Richmond & Co. v. Security Nat. Bank, 64 S.W.2d 863, 16 Tenn.App. 414.
Vt.—Barnet v. Norton, 99 A. 238, 90 Vt. 544.

(3) Evidence that letters were "sent," in the absence of proof to the contrary or any inquiry as to the mode, is sufficient.—Oregon S. S. Co. v. Otis, 3 N.E. 485, 100 N.Y. 446, 53 Am.R. 221—Williamson v. Seeley, 48 N.Y.S. 196, 22 App.Div. 389—Cooke v. McAleena, 41 N.Y.S. 479, 18 Misc. 219.

Ordinary course of business

(1) Mailing is sufficiently proved where it is shown that the letter, properly addressed, was placed in the channels in which, according to custom and usage, all letters of the sender were placed and subsequently mailed in the usual course of business.
U.S.—Myers v. Moore-Kile Co., C.C. A.Tex., 279 F. 233.
Tex.—Smith v. F. W. Heitman Co, 98 S.W. 1074, 44 Tex.Civ.App. 358.

(2) A sufficient foundation was laid for the introduction of a carbon copy of a letter when a witness stated that he mailed the letter to the addressee thereof, and based such testimony on his invariable habit of mailing all such letters.—Hughes v. Pacific Wharf & Storage Co., 205 P. 105, 188 Cal. 210.

(3) According to some cases, proof of the writing or dictating of a letter and of an office custom respecting mailing is insufficient without proof of the observance of the custom in the instance involved.
Cal.—Ford v. Cunningham, 25 P. 403, 87 Cal. 209.
Mo.—Collins v. Hoover, 218 S.W. 940, 205 Mo.App. 93—Sills v. Burge, 124 S.W. 605, 141 Mo.App. 148—Hardin v. Missouri Pac. Ry. Co., 96 S.W. 681, 120 Mo.App. 203—Ward v. Morr Transfer & Storage Co., App., 95 S.W. 964—Goucher v. Carthage Novelty Co., App., 91 S. W. 447.
N.Y.—Gardam v. Batterson, 91 N.E. 371, 198 N.Y. 175, 139 Am.S.R. 806, 19 Ann.Cas. 649—Commercial Cable Bldg. Co. v. McKenna, 171 N.Y.S. 403.
Pa.—Mankin v. Parry, 70 Pa.Super. 558.
Wis.—Federal Asbestos Co. v. Zimmerman, 177 N.W. 881, 171 Wis. 594.

(4) The testimony of plaintiff's witness that letter, which defendants denied receiving, was mailed in ordinary course of business is a conclusion merely, which did not warrant admission of letter in evidence. —James E. Cashman, Inc. v. Spellman, 251 N.Y.S. 240, 233 App.Div. 45.

Receipts for registered letters

(1) A post office return receipt of registered letter, which was delivered to, and signed by, the addressee or his purported agent, will be received as evidence of receipt of notice contained in the letter, unless sufficient evidence is furnished that agent signing for addressee was not authorized to receive and receipt for the letter.—McCaskey Register Co. v. Lumpkin, La.App., 197 So. 640, denying rehearing 195 So. 852.

(2) Receipts for registered letters and return receipts do not prove themselves; they must be properly authenticated in order to serve as proof of receipt of the letters.—Central Trust Co. v. City of Des Moines, 218 N.W. 580, 205 Iowa 742.

71. U.S.—American Credit-Indemnity Co. of New York v. E. R. Apt Shoe Co., C.C.A.N.H., 74 F.2d 345, 97 A.L.R. 1460.
Mass.—Christopher v. Musolino, 185 N.E. 124, 241 Mass. 202.
Pa.—Kern v. Kern, 93 Pa.Super. 500.

Finding letter among decedent's effects

The finding of a letter among the effects of a testator does not establish that it was ever received by or read to him, particularly where the proof discloses that mail addressed to him was generally received by his attendant and nurse, who was charged with undue influence.—McKaig v. Appleton, 124 N.E. 596, 289 Ill. 301.

72. U.S.—U. S. v. Meakins, C.C.A. Mont., 96 F.2d 751.
Vt.—Niles v. Danforth, 122 A. 498, 97 Vt. 88.

erwise,[73] and hence evidence establishing the receipt of a letter, accompanied by proof of the date on which it was written, dispenses with the necessity of providing in detail the addressing, stamping, and deposit thereof, where there is no objection to the form in which the evidence is introduced.[74] The postmark on the envelope which contained a letter, or the date of the letter itself, is admissible for the purpose of showing the date on which the communication was mailed and received.[75] The fact that the addressee denies receipt of the letter does not render proof of its mailing inadmissible;[76] and despite such denial the question of whether or not he received it is for the jury.[77]

Letters containing admissions. Where a letter proved to have been written by the party against whom it is sought to be used in evidence is offered as containing an admission or declaration against interest no proof of delivery of the letter is required.[78]

Reply by addressee. Where a letter has been answered by the addressee, it must be presumed that it was received, and hence a copy of such letter may be admitted in evidence without proper proof of the mailing or the delivery of the original.[79]

§ 708. Address or Direction

Regardless of how a letter was addressed or directed, is admissible against the writer, and against the party charged with its receipt if he actually received it.

Where a letter is shown to have actually come into the possession of the party against whom it is offered, it may be received, although it was incorrectly addressed,[80] or was addressed or sent to a third person.[81] A relevant letter may be received against the writer although it was not addressed to anyone,[82] or was directed to a person other than the one for whom the evidence shows it to have been intended.[83]

6. PHOTOGRAPHS AND OTHER PICTURES

§ 709. In General

As a general rule, whenever the appearance of a person, place, or object is relevant, a photograph or picture thereof which is practically instructive is admissible to explain the evidence and aid in its application and to assist the court or jury in understanding the case.

Photographs and pictures, it is said, stand on the same footing as diagrams, maps, plans, etc.,[84] and as a general rule whenever it is relevant to describe a person, place, or thing, photographs or pictures are admissible for the purpose of explaining and applying the evidence and assisting the court or jury in understanding the case.[85] Indeed it has been said that the practice of admitting photographs in evidence in all proper cases should be encouraged, as such evidence usually clarifies some issue and gives the jury and the court a clearer comprehension of the physical facts than could be obtained

73. Ill.—North American Acc. Ins. Co. v. Williamson, 118 Ill.App. 670.
Mo.—Sills v. Burge, 124 S.W. 605, 141 Mo.App. 148.
Refusal to accept letter
In action to recover for purchase price of cloth sold, where defendant, after he had notified plaintiff over phone that he rejected the goods, sent a registered letter giving the reason for the rejection, and it was proved by the letter carrier that he presented the letter to plaintiff and that plaintiff refused to receive it, court erred in refusing to receive the letter in evidence, and only allowing the envelope to be marked in evidence.—Klein v. Smith, 187 N.Y.S. 422, 195 App.Div. 870, motion denied 188 N.Y.S. 930, 196 App.Div. 955.

74. W.Va.—Campbell v. Beard, 50 S.E. 747, 57 W.Va. 501.

75. Ga.—Rylee v. Statham Bank, 67 S.E. 383, 7 Ga.App. 489.

76. Ala.—Corinth Bank & Trust Co. v. Cochran, 121 So. 66, 219 Ala. 81.

77. U.S.—Myers v. Moore-Kile Co., C.C.A.Tex., 279 F. 233.
Mass.—Barry v. MacNeill, 143 N.E. 901, 249 Mass. 279.

78. Ga.—Austin v. Long, 57 S.E. 964, 1 Ga.App. 258, 259.
22 C.J. p 910 note 10.
To whom written admissions must be made see supra § 282.

79. S.C.—Willis v. Hammond, 19 S.E. 310, 41 S.C. 153.

80. N.J.—Gurtman v. Harris, 156 A. 329, 9 N.J.Misc. 1064.
Va.—Kentucky Virginia Stone Co. v. Fortner, 165 S.E. 401, 159 Va. 234.
22 C.J. p 910 note 11.

81. Neb.—Eldridge v. Hargreaves, 46 N.W. 923, 30 Neb. 638.

82. Ark.—Armistead v. Brooke, 18 Ark. 521.
22 C.J. p 910 note 13.

83. Vt.—Wilkins v. Burton, 5 Vt. 76.

84. Colo.—Reed v. Davidson Dairy Co., 50 P.2d 532, 97 Colo. 462.
Mich.—Pearce v. Rodell, 276 N.W. 883, 283 Mich. 19.
Miss.—Gulf Research Development Co. v. Linder, 170 So. 646, 177 Miss. 123.
Mont.—Fulton v. Chouteau County Farmers' Co., 37 P.2d 1025, 1029, 98 Mont. 48, citing **Corpus Juris**—McNair v. Berger, 15 P.2d 834, 92 Mont. 441.
Okl.—Missouri Pac. R. Co. v. Steel, 284 P. 21, 141 Okl. 133.
Or.—Conn v. Oregon Electric Ry. Co., 300 P. 342, 346, 137 Or. 75, quoting **Corpus Juris.**
Tex.—Texas Employers' Ins. Ass'n v. White, Civ.App., 68 S.W.2d 511, 514, quoting **Corpus Juris,** error dismissed.
22 C.J. p 913 note 32.
Maps, diagrams, etc. see infra § 730.

85. U.S.—Trucking, Inc., v. Krotzer, C.C.A.Ohio, 106 F.2d 447.
Ala.—Law v. Gulf States Steel Co., 175 So. 322, 27 Ala.App. 484, certiorari denied 175 So. 326, 234 Ala. 352.
Cal.—Edelson v. Higgins, App., 111 P.2d 668—Miller v. Silvester, 35 P.2d 387, 140 Cal.App. 345—Olson v. Meacham, 19 P.2d 527, 129 Cal.App. 670—Hayes v. Emerson, 294 P. 765, 110 Cal.App. 470.
Fla.—City of Miami v. McCorkle, 199 So. 575.

from the testimony of witnesses.[86] However, it is essential that the photographs should be practically instructive as evidence,[87] and, it has been stated, substantially necessary.[88]

Photographs should be excluded where they are irrelevant or immaterial.[89] They should be excluded where they would confuse or mislead rather than aid the jury,[90] distract the jury's attention from the main issues,[91] or unduly emphasize the claims or the evidence of one of the parties,[92] or where the

Idaho.—State ex rel. McKelvey v. Styner, 72 P.2d 699, 705, 58 Idaho 233, citing **Corpus Juris.**
Ind.—Putman v. Murden, 184 N.E. 796, 799, 97 Ind.App. 313, citing **Corpus Juris**—Haven v. Snyder, 176 N.E. 149, 93 Ind.App. 54.
Iowa.—Gose v. True, 198 N.W. 528, 197 Iowa 1094.
Mont.—Fulton v. Chouteau County Farmers' Co., 37 P.2d 1025, 1029, 98 Mont. 48, citing **Corpus Juris.**
N.J.—Ellis v. Rosenberg, 188 A. 499, 15 N.J.Misc. 37.
N.C.—Queen City Coach Co. v. Lee, 11 S.E.2d 341, 218 N.C. 320.
Ohio.—Smith v. Cincinnati Traction Co., 24 Ohio N.P., N.S., 565.
Okl.—Schaff v. Coyle, 249 P. 947, 121 Okl. 228.
Or.—Conn v. Oregon Electric Ry. Co., 300 P. 342, 346, 137 Or. 75, quoting **Corpus Juris.**
Pa.—Adamczuk v. Holloway, 13 A.2d 2, 338 Pa. 263.
Tenn.—Radnor Water Co. v. Draughon, 89 S.W.2d 186, 19 Tenn.App. 371.
Tex.—Texas Employers' Ins. Ass'n v. White, Civ.App., 68 S.W.2d 511, 514, error dismissed, quoting **Corpus Juris**—Martin v. Bell-Woods Co., Civ.App., 57 S.W.2d 271.
Utah.—Blake v. Harding, 180 P. 172, 54 Utah 158.
Wis.—City of Baraboo v. Excelsior Creamery Co., 177 N.W. 36, 171 Wis. 242.
22 C.J. p 913 note 33.

Admission to show relations between persons

In will contest, where principal beneficiary testified concerning intimate relations between herself and testatrix, there was no error in permitting her to exhibit photographs of herself and testatrix, taken with each of latter's husbands, one picture being taken when witness was very small child.—Sloan v. Newman, 266 S.W. 257, 166 Ark. 259.

Photograph misrepresenting object

The objection that a photograph may be so made as to misrepresent the object is generally directed against its testimonial soundness, but is of no validity.
Ind.—Haven v. Snyder, 176 N.E. 149, 152, 93 Ind.App. 54.
Pa.—Adamczuk v. Holloway, 13 A.2d 2, 338 Pa. 263.

86. Or.—Conn v. Oregon Electric Ry. Co., 300 P. 342, 346, 137 Or. 75, quoting **Corpus Juris.**
Wash.—Keseleff v. Sunset Highway Motor Freight Co., 60 P.2d 720, 187 Wash. 642—Kelly v. Spokane, 145 P. 57, 83 Wash. 55.

Nonverbal mode of expressing testimony

"A photograph . . is used only as a 'non-verbal mode of expressing a witness' testimony' . . . and as a testimonial aid it may often help the jury to understand the evidence 'more clearly than they could from the words of any witnesses.' "—Finch v. W. R. Roach Co., 295 N.W. 324, 327, 295 Mich. 589.

87. U.S.—United Verde Extension Mining Co. v. Jordan, C.C.A.Ariz., 14 F.2d 304, affirming, D.C., Jordan v. United Verde Copper Co., 9 F.2d 144, affirmed United Verde Copper Co. v. Jordan, C.C.A., 14 F.2d 299, certiorari denied 47 S.Ct. 243, 273 U.S. 734, 71 L.Ed. 865.
Cal.—Haskins v. Southern Pac. Co., 39 P.2d 895, 3 Cal.App.2d 177.
Conn.—Walsh v. Studwell, 135 A. 554, 105 Conn. 453.
Mont.—Hall v. Northern Pac. Ry. Co., 186 P. 340, 56 Mont. 537.
N.Y.—Jardella v. Welin Davit & Boat Corporation, 220 N.Y.S. 115, 219 App.Div. 353.
R.I.—Souza v. United Electric Rys. Co., 152 A. 419, 421, 51 R.I. 124, citing **Corpus Juris.**
Tenn.—Mobile & O. R. Co. v. Keith, 6 Tenn.App. 18.
22 C.J. p 914 note 35.

Similarity to subject matter involved

In an action for damages to plaintiff's pasture lands through defendant's acts in allowing oil to escape into a stream from which it was carried over the lands at time of overflow, pictures of oil field were not admissible where it did not appear that conditions surrounding operations in the field were similar to those surrounding the operations in the field where the damage occurred.—Sussex Land & Live Stock Co. v. Midwest Refining Co., D.C.Wyo., 276 F. 932, affirmed, C.C.A., 294 F. 597.

88. Pa.—Adamczuk v. Holloway, 13 A.2d 2, 338 Pa. 263.
Tex.—Massachusetts Bonding & Insurance Co. v. Worthy, Civ.App., 9 S.W.2d 388, 393, error dismissed, citing **Corpus Juris.**
Wis.—Cottrill v. Pinkerton, 248 N.W. 124, 126, 211 Wis. 310.
22 C.J. p 914 note 36.

Cumulative evidence

Photographs may be properly excluded where they are merely cumulative evidence on an issue already conclusively proved or admitted.
Minn.—State, by Peterson v. Andrews, 297 N.W. 848.
N.H.—Hackett v. Boston & M. R. R., 6 A.2d 139, 89 N.H. 514.
Ohio.—Paul A. Sorg Paper Co. v. Hayes, 182 N.E. 886, 43 Ohio App. 140.

Photographs adding nothing to understanding of matter

In motorist's action for injuries sustained in automobile collision, refusal to admit photographs of highway was not error, even if protographs were a correct representation of the situation at the time of the accident, where jury could thoroughly understand the matters sought to be illustrated from the testimony and another photograph in evidence.—Dermott Grocery & Commission Co. of Eudora v. Meyer, 101 S.W.2d 443, 193 Ark. 591.

89. Ala.—Birmingham Baptist Hospital v. Blackwell, 128 So. 389, 221 Ala. 225—Bradley v. Lewis, 100 So. 324, 211 Ala. 264.
Minn.—Christopherson v. Custom Laundry Co., 229 N.W. 136, 179 Minn. 325.
Tex.—Texas Motor Coaches v. Palmer, Civ.App., 97 S.W.2d 253, reversed on other grounds 121 S.W.2d 323, 132 Tex. 77.

Negative evidence

Photographs showing a horse hitched to a carriage and standing at rest, offered to show its conduct while in harness and to show its gentle disposition, are not admissible to disprove that the horse had the habit of kicking.—Morgan v. Hendrick, 67 A. 702, 80 Vt. 284.

90. Ark.—Arkansas Power & Light Co. v. Marsh, 115 S.W.2d 825, 195 Ark. 1135.
Fla.—City of Miami v. McCorkle, 199 So. 575.
N.D.—Wyldes v. Patterson, 153 N.W. 630, 31 N.D. 282.
Pa.—Lutz v. Allegheny County, 195 A. 1, 327 Pa. 587.
Wash.—Finholt v. City of Seattle, 247 P. 950, 139 Wash. 497.
Wis.—Cottrill v. Pinkerton, 248 N.W. 124, 211 Wis. 310.

91. Ala.—Birmingham Baptist Hospital v. Blackwell, 128 So. 389, 221 Ala. 225.
Fla.—Mardorff v. State, 196 So. 625.
Tex.—Willis v. State, 90 S.W. 1100, 49 Tex.Cr. 139.

92. Fla.—Mardorff v. State, 196 So. 625.
Md.—Kirsch v. Ford, 183 A. 240, 170 Md. 90.

natural effect of their introduction in evidence would be to arouse the sympathies or prejudices of the jury, rather than to throw any real light on the issues.[93]

Photographs are admissible as secondary evidence of objects which cannot for one reason or another be produced in court,[94] and they are also admissible as demonstrative evidence.[95] Photographs are generally inadmissible as original or substantive evidence, but they must be sponsored by a witness whose testimony they serve to explain and illustrate,[96] although they may be admitted not only as representing things to which a witness testifies from his independent observation, but also as direct evidence of things which have not been described by a witness because they had not, or, as in the case of X-ray pictures, could not have, come within his observation.[97]

Motion pictures. A motion picture film is but a series of still photographs,[98] and its introduction and exhibition in evidence may be permitted[99] under the same basic principles as govern the admissibility of still photographs.[1]

A motion picture may be excluded on grounds which are sufficient to exclude a still photograph,[2] as well as on grounds peculiarly applicable to motion pictures, as for example on the ground that an exhibition in the court room would unduly delay the trial or result in confusion.[3]

Enlarged photographs. It is no objection to the admissibility of a photograph that it is enlarged, showing the subject or object magnified, where this does not have a tendency to mislead.[4]

Or.—De Witt v. Sandy Market, 115 P.2d 184, 193, citing **Corpus Juris.**
22 C.J. p 914 note 39.

93. Fla.—Mardorff v. State, 196 So. 625, 630, citing **Corpus Juris.**
Tex.—Southern Transp. Co. v. Adams, Civ.App., 141 S.W.2d 739, 744, error dismissed, judgment correct, citing **Corpus Juris.**
Wis.—Cottrill v. Pinkerton, 248 N.W. 124, 211 Wis. 310.
22 C.J. p 915 note 40.

94. Conn.—Cunningham v. Fair Haven & W. R. Co., 43 A. 1047, 72 Conn. 244.
22 C.J. p 915 note 41.

95. Minn.—Stewart v. St. Paul City R. Co., 80 N.W. 855, 78 Minn. 110.

96. Conn.—Hurlburt v. Bussemey, 126 A. 273, 101 Conn. 406.
Mich.—Finch v. W. R. Roach Co., 295 N.W. 324, 295 Mich. 589—Pearce v. Rodell, 276 N.W. 883, 283 Mich. 19.
Mo.—Baustian v. Young, 53 S.W. 921, 152 Mo. 317, 75 Am.S.R. 462—Bretail v. Missouri Pac. R. Co., App., 239 S.W. 597.
N.C.—Queen City Coach Co. v. Lee, 11 S.E.2d 341, 218 N.C. 320—Pearson v. Luther, 193 S.E. 739, 212 N.C. 412—Kelly v. Raleigh Granite Co., 156 S.E. 517, 200 N.C. 326—Huneycutt v. Cherokee Brick Co., 146 S.E. 227, 196 N.C. 556—Elliott v. Tallassee Power Co., 128 S.E. 730, 190 N.C. 62.
Pa.—Adamczuk v. Holloway, 13 A.2d 2, 338 Pa. 263.
22 C.J. p 915 note 43.

Discussion of rule

"A picture . . . is, for evidential purposes simply nothing, except so far as it has a human being's credit to support it. It is mere waste paper—a testimonial nonentity. It speaks to us no more than a stick or a stone. It can of itself tell us no more as to the existence of the thing portrayed upon it than can a tree or an ox. We must somehow put a testimonial human being behind it (as it were) before it can be treated as having any testimonial standing in court. It is somebody's testimony—or it is nothing."—Haven v. Snyder, 176 N.E. 149, 151, 93 Ind.App. 54.

97. Iowa.—State v. Matheson, 103 N.W. 137, 130 Iowa 440, 114 Am.S.R. 427, 8 Ann.Cas. 430.
Admission of X-ray photographs to show physical condition see infra § 712.

98. Cal.—Heiman v. Market St. Ry. Co., 69 P.2d 178, 21 Cal.App.2d 311.
Mo.—Morris v. E. I. Du Pont De Nemours & Co., 139 S.W.2d 984, 129 A.L.R. 352.

99. Cal.—Heiman v. Market St. Ry. Co., 69 P.2d 178, 21 Cal.App.2d 311.
Mich.—Rogers v. City of Detroit, Department of Street Railways, 286 N.W. 167, 289 Mich. 86.
Neb.—Denison v. Omaha & C. B. St. Ry. Co., 280 S.W. 905, 135 Neb. 307.

Presence in court of photographer

In personal injury action, motion pictures showing plaintiff at play were admissible, notwithstanding presence in court of moving camera operator who could testify as to what he saw when he took pictures, since operator could not describe in detail just how the plaintiff was doing such things, as was done by use of camera.—McGoorty v. Benhart, 27 N.E.2d 289, 305 Ill.App. 458.

1. Fla.—Gulf Life Ins. Co. v. Stossel, 179 So. 163, 131 Fla. 127, modifying 175 So. 804, 131 Fla. 268.
Miss.—Metropolitan Life Ins. Co. v. Wright, 199 So. 289, followed in Metropolitan Life Ins. Co. v. Larkin, 199 So. 293.
Mo.—Morris v. E. I. Du Pont De Nemours & Co., 139 S.W.2d 984, 129 A.L.R. 352.

2. Mo.—Morris v. E. I. Du Pont De Nemours & Co., supra.

Relevancy of evidence

In an action for personal injuries to a vaudeville dancer, who was struck by an automobile, it was reversible error to permit the introduction in evidence, over defendant's objection, of a motion picture showing a vaudeville performance prior to the accident, in which plaintiff, who had an artificial leg which did not prevent him from carrying on his work, was dancing, since it brought before the jury irrelevant matter, hearsay, and incompetent evidence, tending to make a farce of the trial.—Gibson v. Gunn, 202 N.Y.S. 19, 206 App.Div. 484, affirmed 202 N.Y.S. 927, 208 App.Div. 709.

3. Md.—State v. United Railways & Electric Co. of Baltimore, 159 A. 916, 162 Md. 404, 83 A.L.R. 1307.
N.Y.—Boyarsky v. G. A. Zimmerman Corporation, 270 N.Y.S. 134, 240 App.Div. 361.

Exhibition for publicity

Moving pictures should not be permitted in evidence if their use is solely for purpose of advertisement or to obtain publicity.—Boyarsky v. G. A. Zimmerman Corporation, supra.

Pictures sensational and unnecessary

Court should refuse to permit exhibition of moving pictures if they are sensational only and unnecessary, particularly where the facts may be described or evidence submitted in another form.—Boyarsky v. G. A. Zimmerman Corporation, supra.

4. Cal.—Sim v. Weeks, 45 P.2d 350, 357, 7 Cal.App.2d 28, quoting **Corpus Juris.**
Ga.—Western & A. R. R. v. Reed, 134 N.E. 134, 139, 35 Ga.App. 538, quoting **Corpus Juris.**

Marks on photographs. It has been held to be no objection to the admissibility of a photograph that it bears explanatory marks, where each mark or location material to the case is verified by witnesses.[5] On the other hand, it has been considered that the efficacy of a photograph as an instrument of evidence is destroyed by the fact that hearsay statements are written on the back of it.[6]

Notice to adverse party. It is not essential to the admissibility of photographs that the adverse party should have been notified of the intention to take them.[7]

§ 710. To Show Personal Appearance or Identity

Photographs may be admitted on questions of personal appearance or identity.

Photographs may be admitted in evidence on questions of personal appearance or identity,[8] as, for instance, of a deceased person[9] or one who is charged with the commission of a particular act,[10] and have also been held admissible to establish a likeness between a child and its putative father.[11] If the photograph is not practically instructive it is properly excluded.[12]

§ 711. To Show Physical Condition

Photographs may be admitted to prove the physical condition of a person at a particular time.

Photographs may be admitted to prove the physical condition of a person at a particular time,[13] or the existence, nature, and location of wounds or injuries,[14] where such evidence is relevant, as in

Tex.—Latham v. Houston Land & Trust Co., Civ.App., 62 S.W.2d 519, 523, error dismissed, quoting **Corpus Juris.**

22 C.J. p 918 note 72.

Enlargement of:

Photograph of writing in evidence see infra § 714.

X-ray picture see infra § 712.

Proof of accuracy see infra § 715.

5. Iowa.—In re Cheney's Estate, 274 N.W. 5, 9, 223 Iowa 1076, quoting **Corpus Juris.**

22 C.J. p 919 note 75.

6. N.J.—State v. Rombolo, 99 A. 434, 89 N.J.Law 565.

7. Tex.—Hawkins v. Missouri, K. & T. R. Co., 83 S.W. 52, 36 Tex.Civ.App. 633.

8. N.J.—Daley v. Public Service Co-Ordinated Transport, 155 A. 780, 9 N.J.Misc. 683.

Tex.—Culpepper v. Lloyds America, Civ.App., 140 S.W.2d 330, error dismissed, judgment correct—Tolivar v. Howth, Civ.App., 100 S.W.2d 1090, error dsimissed.

Va.—Lawson v. Darter, 160 S.E. 74, 157 Va. 284.

Wis.—Cottrill v. Pinkerton, 248 N.W. 124, 211 Wis. 310.

22 C.J. p 913 note 33 [c], [d], p 915 note 45.

Photographs of fingerprints

In action on burglary policy, photographs of fingerprints which were not those of members of family having access to building were properly admitted although they were not shown to be those of intruder.—New Amsterdam Casualty Co. v. James, 166 So. 813, 122 Fla. 710.

9. Ga.—Interstate Life & Accident Co. v. Stonecypher, 188 S.E. 294, 54 Ga.App. 497—Western & A. R. R. v. Reed, 134 S.E. 134, 35 Ga. App. 538.

N.H.—Hackett v. Boston & M. R. R., 6 A.2d 139, 89 N.H. 514.

22 C.J. p 915 note 46.

To show capacity to render services

In action for death, deceased child's picture was admissible to assist jury in determining child's capacity to render services.—City Ice Delivery Co. v. Turley, 160 S.E. 517, 44 Ga.App. 32.

On issue of testamentary capacity

In will contest on ground of lack of testamentary capacity and undue influence, photograph of deceased testatrix showing her personal appearance at about time will was executed was competent as tending to show her appearance, vigor, temperament, and apparent strength of character at time.—Brownlie v. Brownlie, 191 N.E. 268, 357 Ill. 117, 93 A.L.R. 1041.

10. R.I.—State v. Elwood, 24 A. 782, 17 R.I. 763.

22 C.J. p 915 note 47.

11. Cal.—In re Jessup, 21 P. 976, 22 P. 742, 1028, 81 Cal. 408, 6 L.R.A. 594.

Kan.—Shorten v. Judd, 42 P. 337, 56 Kan. 43, 54 Am.S.R. 587.

12. Md.—Brotherhood of Locomotive Firemen & Engineers v. Nash, 125 A. 441, 144 Md. 623.

13. Cal.—Crabbe v. Rhoades, 282 P. 10, 101 Cal.App. 503.

Ga.—Interstate Life & Accident Co. v. Stonecypher, 188 S.E. 294, 54 Ga.App. 497.

N.H.—Hackett v. Boston & M. R. R., 6 A.2d 139, 89 N.H. 514.

N.J.—Daley v. Public Service Co-Ordinated Transport, 155 A. 780, 9 N.J.Misc. 683.

Va.—Lawson v. Darter, 160 S.E. 74, 75, 157 Va. 284, quoting **Corpus Juris.**

Wash.—Keseleff v. Sunset Highway Motor Freight Co., 60 P.2d 720, 187 Wash. 642.

22 C.J. p 915 note 49.

To show size

(1) Comparative size for two persons may be shown by a photograph.—Commonwealth v. Keller, 43 A. 198, 191 Pa. 122.

(2) In action against railroad for death of eighteen month old child who had wandered upon track and was struck by train, a picture of child taken only a short time before accident was admissible, where child's size was in question.—Missouri Pac. R. Co. v. Maxwell, 109 S.W.2d 1254, 194 Ark. 938.

Artificial coloring

On the issue of extent of disfigurement resulting from automobile accident, photograph of plaintiff taken before the accident was not rendered inadmissible because it was artificially colored before the personal injuries were sustained, where the fact of artificial coloring was made known to the jury.—Harris v. Snider, 134 So. 807, 223 Ala. 94.

Motion pictures

(1) Motion pictures showing a person performing certain acts are admissible on the issue of the person's physical capacity to perform such acts at the time.—Heiman v. Market St. Ry. Co., 69 P.2d 178, 21 Cal.App.2d 311.

(2) Moving pictures taken of plaintiff eleven months after accident without plaintiff's knowledge while he was walking along street were admissible to disprove his claim that he was physically incapable of working as result of accident.—Boyarsky v. G. A. Zimmerman Corporation, 270 N.Y.S. 134, 240 App.Div. 361.

14. Ala.—Birmingham Baptist Hospital v. Blackwell, 128 So. 389, 221 Ala. 225.

Cal.—Packard v. Moore, 71 P.2d 922, 9 Cal.2d 571.

Mich.—Perri v. Tassie, 292 N.W. 370, 293 Mich. 464.

Mo.—Lackey v. Missouri & K. I. Ry. Co., 264 S.W. 807, 305 Mo. 260.

N.J.—Doherty v. American Employ-

an action for personal injuries.[15]

Photographs offered to show physical condition have been rejected, however, on the ground that they were of an indecent nature,[16] that the injuries were such that the jury could be sufficiently advised of the facts by a verbal description,[17] or that the injured person was in court and might exhibit his injury to the jury.[18]

Photographs of animals may be admitted for similar purposes.[19]

§ 712. —— X-Ray Photographs

An X-ray picture, properly identified and shown to be accurate, may be admitted in evidence where it tends to aid the jury to understand the nature and extent of the injuries involved.

When authenticated in the manner shown in this section, pictures or skiagraphs produced by an X-ray may be admitted in evidence in a proper case.[20] X-ray pictures may be admitted where they tend to aid the jury to understand the nature and extent of injuries involved or to throw light on the physical condition of a person.[21]

X-ray photographs should be excluded where they are not material to the case and would raise collateral issues,[22] or where they would not be intelligible to the jury.[23] An X-ray picture of a part of

ers' Ins. Co. of Boston, Mass., 169 A. 652, 112 N.J.Law 52.
Pa.—Marcinkiewicz v. Kutawich, 87 Pa.Super. 260.
S.D.—Lundgren v. Minty, 266 N.W. 145, 64 S.D. 217.
Tenn.—Colonial Baking Co. v. Acquino, 103 S.W.2d 613, 20 Tenn. App. 695.
Wash.—Prather v. Downs, 2 P.2d 709, 164 Wash. 427.
Wis.—Cottrill v. Pinkerton, 248 N.W. 124, 211 Wis. 310.
22 C.J. p 915 note 50.

Gruesomeness of photograph will not of itself render it inadmissible.—Breeding's Dania Drug Co. v. Runyon, Fla., 2 So.2d 376.

Place of or person taking picture as material
Photograph made of plaintiff's fractured arm shortly after removal of splints and before trial of her action for damages was admissible in evidence, regardless of where or by whom picture was taken.—Toole v. Paurine Parisian Dye House, 39 P. 2d 965, 98 Mont. 191.

15. Ala.—Birmingham Baptist Hospital v. Blackwell, 128 So. 389, 221 Ala. 225.
Cal.—Olson v. Meacham, 19 P.2d 527, 129 Cal.App. 670.
Mo.—Lackey v. Missouri & K. I. Ry. Co., 264 S.W. 807, 305 Mo. 260.
Pa.—Marcinkiewicz v. Kutawich, 87 Pa.Super. 260.
Tenn.—Colonial Baking Co. v. Acquino, 103 S.W.2d 613, 20 Tenn.App. 695.
22 C.J. p 916 note 51.

Photograph exciting emotions of jury
In action for injuries sustained by four year old boy when struck by automobile, where injuries and treatment were fully described, admission of photograph showing boy lying in bed and portraying weight and pulley arrangement on fractured legs was not error on ground that photograph unduly excited jury's emotions.—Herndobler v. Goodwin, 34 N.E.2d 8, 310 Ill.App. 267.

16. Wis.—Guhl v. Whitcomb, 85 N. W. 142, 109 Wis. 69, 83 Am.S.R. 889.
22 C.J. p 916 note 52.

17. N.Y.—Cirello v. Metropolitan Exp. Co., 88 N.Y.S. 932.

18. Wis.—Baxter v. Chicago & N. W. R. Co., 80 N.W. 644, 104 Wis. 307.
22 C.J. p 916 note 54 [a].

19. Md.—Weiller v. Weiss, 92 A. 1028, 124 Md. 461.
22 C.J. p 916 note 55.

20. Cal.—Sim v. Weeks, 45 P.2d 350, 356, 7 Cal.App.2d 28, quoting **Corpus Juris.**
Del.—Phillips v. Wilmington & Philadelphia Traction Co., 117 A. 241, 1 W.W.Harr. 593.
Ill.—Griswold v. Chicago Rys. Co., 170 N.E. 845, 339 Ill. 94, affirming 253 Ill.App. 498—Madison Coal Corporation v. Industrial Commission, 150 N.E. 724, 320 Ill. 65—Stevens v. Illinois Cent. R. Co., 137 N.E. 859, 306 Ill. 370—Powell v. Myers Sherman Co., 32 N.E.2d 663, 309 Ill.App. 12—Ehrenheim v. Yellow Cab Co., 239 Ill.App. 403.
Iowa.—Kramer v. Henely, 288 N.W. 610, 227 Iowa 504—Wosoba v. Kenyon, 243 N.W. 569, 215 Iowa 226.
Ky.—Louisville & N. R. Co. v. Briggs, 215 S.W. 529, 185 Ky. 676.
Mass.—McGrath v. Fash, 139 N.E. 303, 244 Mass. 327.
Miss.—Beard v. Turritin, 161 So. 688, 173 Miss. 206.
N.Y.—Berlin v. Bulkowstein, 291 N. Y.S. 91, 249 App.Div. 630—Brady v. Comprehensive Omnibus Corporation, 5 N.Y.S.2d 781.
Tex.—Southern Underwriters v. Waddell, Civ.App., 144 S.W.2d 637—Utilities Indemnity Exchange v. Burks, Civ.App., 7 S.W.2d 1112, error dismissed.
W.Va.—Jenkins v. Charleston General Hospital & Training School, 110 S. E. 560, 90 W.Va. 230, 22 A.L.R. 323.
22 C.J. p 916 notes 56, 57.

21. Ala.—City of Birmingham v. Mauzey, 108 So. 382, 214 Ala. 476.
Ill.—Killilay v. Hawk, 250 Ill.App. 222.
Ind.—Walker Hospital v. Pulley, 127 N.E. 559, 74 Ind.App. 659, rehearing denied 128 N.E. 933, 74 Ind.App. 659.
Ky.—Powell v. Galloway, 16 S.W.2d 489, 229 Ky. 37.
Mo.—Bledsoe v. Capital City Laundry Co., App., 256 S.W. 1076.

Lapse of time between injury and picture
An X-ray picture may be admitted, although it was taken a considerable period of time after the injury.
Cal.—Wilburn v. U. S. Gypsum Co., 60 P.2d 188, 16 Cal.App.2d 111.
Ill.—Cooney v. Hughes, 34 N.E.2d 566, 310 Ill.App. 371.
N.J.—Daniel v. Elmer, 167 A. 751, 11 N.J.Misc. 632, rule discharged 173 A. 911, 113 N.J.Law 227.

22. Vt.—Davis v. Dunn, 98 A. 81, 90 Vt. 253, Ann.Cas.1918D 994.

Photograph of subsequent injury
An X-ray photograph of an injury received subsequent to the injuries for which recovery is sought against defendant and for which defendant is not responsible should not be admitted.—Southern Ry. Co. v. Lockridge, 130 So. 557, 222 Ala. 15.

Photograph not showing injuries
(1) Trial court did not err in excluding defendant's offer of X-ray pictures taken of plaintiff a few days after the accident, where, according to medical testimony of defendant's witness, injuries complained of by plaintiff would not appear in those pictures.—City of Tulsa v. Macura, 100 P.2d 269, 186 Okl. 674.

(2) Where only the adverse party's witness testified that the X-ray picture did not show the injury complained of, its admission was not error.—Cooney v. Hughes, 34 N.E.2d 566, 310 Ill.App. 371.

23. Ill.—Colesar v. Star Coal Co., 99 N.E. 709, 255 Ill. 532.

the body of a stranger to the action may be admitted to enable the jury to compare it with the alleged abnormal condition shown on the picture of plaintiff,[24] but, where an X-ray picture of another person has nothing to do with the case, it is properly excluded.[25] Where an X-ray picture is part of the information acquired by a physician who is incompetent to testify, the X-ray picture is likewise incompetent.[26]

According to some authorities an X-ray picture is admissible only in connection with the testimony of a competent reader of such photographs,[27] but according to other authorities it may be admitted even in the absence of explanation by an expert.[28]

Authentication. An X-ray picture cannot be authenticated in the same manner as an ordinary photograph, that is, by testimony that it is a correct representation of the object it purports to picture, since it purports to show only shadows of objects not otherwise visible to the eye.[29] To authenticate an X-ray picture two things are generally required: (1) It must be shown that the picture offered is actually a picture of the object or part of the body of which it is claimed to be a picture.[30]

24. Cal.—Bruce v. Western Pipe & Steel Co., 169 P. 660, 177 Cal. 25—DeMartini v. McDonnell, 58 P.2d 170, 14 Cal.App.2d 405.
Mass.—McGrath v. Fash, 139 N.E. 303, 244 Mass. 327.
Minn.—Draxten v. Brown, 267 N.W. 498, 197 Minn. 511.
Wash.—Norland v. Peterson, 13 P.2d 483, 169 Wash. 380.

Identification as to sex

In action for personal injuries, excluding X-ray photograph claimed to be photograph of a normal pelvic cavity, proposed to be introduced in evidence for purpose of comparing it with X-ray photographs of plaintiff's pelvic cavity, was not error where proffered photograph was not identified as that of a man or of a woman.—Ralph v. MacMarr Stores, 62 P.2d 1285, 103 Mont. 421.

25. N.J.—Eggert v. Binder, 125 A. 106, 100 N.J.Law 174, 1 N.J.Misc. 555.

26. Miss.—Tonkel v. Yazoo & M. V. R. Co., 154 So. 351, 170 Miss. 321.

27. Ala.—Demopolis Telephone Co. v. Hood, 102 So. 35, 212 Ala. 216.
Idaho.—Call v. City of Burley, 62 P. 2d 101, 57 Idaho 58.
N.C.—Eaker v. International Shoe Co., 154 S.E. 667, 199 N.C. 379.
Okl.—Bucktrot v. Partridge, 265 P. 768, 130 Okl. 122, followed in Bucktrot v. Partridge, 265 P. 772, 130 Okl. 126—National Life & Accident Ins. Co. v. Roberson, 36 P. 2d 479, 169 Okl. 136.
Or.—Vale v. Campbell, 263 P. 400, 123 Or. 632.

28. Tex.—American Nat. Ins. Co. v. Points, Civ.App., 81 S.W.2d 762, error dismissed.

Picture understood by layman

X-ray picture tending to show dislocated elbow was competent without explanation by medical witness where such picture was sufficiently simple to give even a layman a tentative idea of the relative positions of the bones.—McMillen v. Foncannon, 276 P. 820, 128 Kan. 187, denying rehearing 274 P. 237, 127 Kan. 573.

29. Cal.—Sim v. Weeks, 45 P.2d 350, 356, 7 Cal.App.2d 28, quoting Corpus Juris.
Idaho.—Call v. City of Burley, 62 P. 2d 101, 57 Idaho 58.
Ill.—Stevens v. Illinois Cent. R. Co., 137 N.E. 859, 306 Ill. 370—Ehrenheim v. Yellow Cab Co., 239 Ill. App. 403.
Iowa.—Kramer v. Henely, 288 N.W. 610, 227 Iowa 504.
Ky.—City of Covington v. Bowen, 230 S.W. 532, 191 Ky. 376.
W.Va.—Quinn v. Flesher, 102 S.E. 300, 85 W.Va. 451.
22 C.J. p 916 note 56.

30. Ala.—Demopolis Telephone Co. v. Hood, 102 So. 35, 212 Ala. 216.
Del.—Phillips v. Wilmington & Philadelphia Traction Co., 117 A. 241, 1 W.W.Harr. 593.
Idaho.—Call v. City of Burley, 62 P. 2d 101, 57 Idaho 58.
Ill.—Wicks v. Cuneo-Henneberry Co., 150 N.E. 276, 319 Ill. 344, affirming 234 Ill.App. 502—Stevens v. Illinois Cent. R. Co., 137 N.E. 859, 306 Ill. 370—Powell v. Myers Sherman Co., 32 N.E.2d 663, 309 Ill.App. 12—Ehrenheim v. Yellow Cab Co., 239 Ill.App. 403.
Mo.—Hodges v. Chevrolet Motor Co., App., 116 S.W.2d 170—Chilton v. Ralls, 286 S.W. 718, 220 Mo.App. 355.
Mont.—West v. West, 4 P.2d 469, 90 Mont. 522.
N.J.—Joy v. Flax, 127 A. 596, 101 N.J.Law 43.
Ohio.—Lake Shore Power Co. v. Meyer, 1 N.E.2d 1021, 51 Ohio App. 534.
Tex.—Texas Indemnity Ins. Co. v. Phillips, Civ.App., 153 S.W.2d 503—Texas Employers' Ins. Ass'n v. Cheek, Civ.App., 63 S.W.2d 1103, error dismissed.

Identification held sufficient

(1) If X-ray photographs are identified by the surgeon under whose general direction and for whose use they were made, and by whom they were used in his diagnosis of the bodily injury, they are admissible in evidence.—Rickel v. Stockman, 168 A. 467, 111 N.J.Law 294—Greco v. Schmidt, 129 A. 146, 101 N.J.Law 554—Robinson v. Payne, 122 A. 882, 99 N.J.Law 135.

(2) X-ray plates of plaintiff's injury were properly admitted over objection that physician did not say he made them, where physician testified that they were made in his presence and under his supervision.—Very v. Willi, Mo.App., 293 S.W. 500.

(3) Admitting X-ray picture of plaintiff's injuries was proper as against contention that picture was not sufficiently identified, where technician had marked on the picture plaintiff's name, date, and parts of body X-rayed and testified as to source of information, notwithstanding technician was not personally acquainted with plaintiff and could not identify plaintiff in court room.—Beard v. Turritin, 161 So. 688, 173 Miss. 206.

(4) Where a physician testified that skiagraphs of plaintiff's broken bones were pictures of the injured anatomy of plaintiff, an objection to the admission in evidence of such pictures, on the ground that they were not properly identified, was not well taken.—Jones v. Sinsheimer, 214 P. 375, 107 Or. 491.

(5) Other cases.
Idaho.—Reinhold v. Spencer, 26 P. 2d 796, 53 Idaho 688.
Ind.—Kickels v. Fein, 10 N.E.2d 297, 104 Ind.App. 606.
Ky.—Consolidated Coach Corporation v. Saunders, 17 S.W.2d 233, 229 Ky. 284.
Mich.—Roach v. Petrequin, 208 N.W. 695, 234 Mich. 551.
Mo.—Clark v. Reising, 107 S.W.2d 33, 341 Mo. 282—Perringer v. Lynn Food Co., App., 148 S.W.2d 601.
N.J.—Clark v. Sears, 171 A. 557, 12 N.J.Misc. 354.
Tex.—Federal Underwriters Exchange v. Cost, 123 S.W.2d 332, 132 Tex. 299, affirming, Civ.App., 115 S.W.2d 706—Southern Underwriters v. Weldon, Civ.App., 142 S. W.2d 574—United Employers' Casualty Co. v. Burk, Civ.App., 140 S.W.2d 571, error granted.
Wash.—Manos v. James, 110 P.2d 887.

(2) It must be shown by satisfactory evidence that the picture is accurate, in the sense that it conforms to the standard of accuracy of X-ray pictures generally.[31] Proof tending to a greater or lesser degree to establish such accuracy may be furnished by testimony that the picture was taken by a competent and skilled person[32] operating a suitable and properly functioning machine[33] in a manner calculated to bring about a correct result.[34] Proof more nearly approaching the standard re-

Identification held insufficient

(1) In action on war risk policy, X-ray photographs were inadmissible because of insufficient identification, where operator who took them was not called as witness and doctor at whose instance photographs were taken testified that they were taken by man who did doctor's X-ray work, that insured was referred to such man, and that picture was sent down by patient as soon as it was developed within five or ten minutes.—U. S. v. La Favor, C.C.A.Wash., 72 F.2d 827.

(2) X-ray films of plaintiff's injury were properly excluded where neither hospital nurse in charge of X-ray records nor doctor under whose supervision X-rays were taken and labeled testified to identify them.—Clark v. Reising, 107 S.W.2d 33, 341 Mo. 282.

31. Cal.—Sim v. Weeks, 45 P.2d 350, 356, 7 Cal.App.2d 28, quoting **Corpus Juris.**
Del.—O'Neill v. Cooles, 140 A. 648, 3 W.W.Harr. 541.
Idaho.—Call v. City of Burley, 62 P. 2d 101, 107, 57 Idaho 58, citing **Corpus Juris.**
Ill.—Garvey v. Chicago Rys. Co., 171 N.E. 271, 339 Ill. 276—Kavale v. Morton Salt Co., 160 N.E. 752, 329 Ill. 445, affirming 242 Ill.App. 205—Wicks v. Cuneo-Henneberry Co., 150 N.E. 276, 319 Ill. 344, affirming 234 Ill.App. 502—Stevens v. Illinois Cent. R. Co., 137 N.E. 859, 306 Ill. 370—Ehrenheim v. Yellow Cab Co., 239 Ill.App. 403.
Iowa.—Wosoba v. Kenyon, 243 N.W. 569, 215 Iowa 226.
Ky.—Powell v. Galloway, 16 S.W.2d 489, 229 Ky. 37.
Mo.—Chilton v. Ralls, 286 S.W. 718, 220 Mo.App. 355.
Mont.—West v. Wilson, 4 P.2d 469, 90 Mont. 522.
N.J.—Greco v. Schmidt, 129 A. 146, 101 N.J.Law 554—Robinson v. Payne, 122 A. 882, 99 N.J.Law 135.
Okl.—National Life & Accident Ins. Co. v. Roberson, 36 P.2d 479, 169 Okl. 136—Bucktrot v. Partridge, 265 P. 768, 130 Okl. 122, followed in Bucktrot v. Partridge, 265 P. 772, 130 Okl. 126.
Or.—Yarbrough v. Carlson, 202 P. 739, 102 Or. 422.
Tex.—Texas Indemnity Ins. Co. v. Phillips, Civ.App., 153 S.W.2d 503—Traders & General Ins. Co. v. Wright, Civ.App., 95 S.W.2d 753, 758, citing **Corpus Juris,** and affirmed Wright v. Traders & General Ins. Co., 123 S.W.2d 314, 132 Tex. 172—Texas Employers' Ins. Ass'n v. Cheek, Civ.App., 63 S.W. 2d 1103, error dismissed.
W.Va.—Quinn v. Flesher, 102 S.E. 300, 85 W.Va. 451.
22 C.J. p 916 note 56.

Evidence held sufficient

(1) Testimony of a physician that an X-ray photograph had been taken and developed in his presence and placed in his possession, and that he could read it, was sufficient to warrant its admission in evidence without testimony of the physician who took it, being sufficient proof of its accuracy and correctness.—Phillips v. Wilmington & Philadelphia Traction Co., 117 A. 241, 1 W. W.Harr., Del., 593.

(2) X-rays were admissible as against contention as to insufficient foundation, where skilled technician who took such pictures described method of taking them, and examining physician who interpreted them was experienced in taking and interpreting X-ray pictures.—Bauer v. Reavell, 260 N.W. 39, 219 Iowa 1212.

(3) X-ray photographs of parts of the body are properly admitted when it is shown that witness personally took or assisted in taking them, that they were taken in accordance with recognized standards of taking such photographs, and that they have been continuously in possession of witness.—Southern Underwriters v. Weldon, Tex.Civ.App., 142 S.W.2d 574—United Employers' Casualty Co. v. Burk, Tex.Civ.App., 140 S.W.2d 571, error granted.

(4) Other cases see Reinhold v. Spencer, 26 P.2d 796, 53 Idaho 688.

Evidence held insufficient

(1) In personal injury action permitting chiropractor to exhibit an X-ray picture of a spine in conjunction with a human skeleton, and to point out to jury that spine was not in normal position from base of neck to lower extremity of back, was error, where operator who made X-ray did not testify, chiropractor stated that a physician made X-ray, but chiropractor did not say that he or physician was skilled, and there was no evidence as to proper machine.—Gulf Research Development Co. v. Linder, 170 So. 646, 177 Miss. 123.

(2) Admitting X-ray pictures and physician's testimony based solely on his interpretation thereof in compensation action was error where physician neither took nor supervised taking of pictures, was in room when some of pictures were taken, but did not know which ones, and had nothing to do with developing them.—Lake Shore Power Co. v. Meyer, 1 N.E.2d 1021, 51 Ohio App. 534.

Enlargement

In action for malpractice in treatment of fractured arm, enlarged X-ray photographs were admissible, notwithstanding enlargement exaggerated and distorted alignment of bones, where there was no issue as to reduction of fracture.—Sim v. Weeks, 45 P.2d 350, 7 Cal.App.2d 28

32. Ala.—Demopolis Telephone Co. v. Hood, 102 So. 35, 212 Ala. 216.
Ariz.—Arizona Eastern R. Co. v. Head, 222 P. 1041, 26 Ariz. 137, motion denied 224 P. 1057, 26 Ariz. 259.

33. Ill.—King v. Meeker, 269 Ill. App. 57.
Miss.—Gulf Research Development Co. v. Linder, 170 So. 646, 177 Miss. 123.
N.J.—Joy v. Flax, 127 A. 596, 101 N. J.Law 43.
N.C.—Eaker v. International Shoe Co., 154 S.E. 667, 199 N.C. 379.

34. Idaho.—Call v. City of Burley, 62 P.2d 101, 57 Idaho 58—Reinhold v. Spencer, 26 P.2d 796, 53 Idaho 688.
Ill.—Griswold v. Chicago Rys. Co., 170 N.E. 845, 339 Ill. 94, affirming 253 Ill.App. 498—Stevens v. Illinois Cent. R. Co., 137 N.E. 859, 306 Ill. 370—Lachenmyer v. Glotfelty, 2 N.E.2d 180, 284 Ill.App. 397.
Iowa.—Wosoba v. Kenyon, 243 N.W. 569, 215 Iowa 226.
Ky.—City of Covington v. Bowen, 230 S.W. 532, 191 Ky. 376.
Mont.—West v. Wilson, 4 P.2d 469, 90 Mont. 522.
N.J.—Joy v. Flax, 127 A. 596, 101 N.J.Law 43.
Okl.—National Life & Accident Ins. Co. v. Roberson, 36 P.2d 479, 169 Okl. 136.
W.Va.—Quinn v. Flesher, 102 S.E. 300, 85 W.Va. 451.

Value of picture as dependent on position of subject, etc.

"The value of X-ray pictures as evidence depends upon the position of the subject when the exposure is made, the angle of view, the length of time of exposure, the accuracy of the machine, and its correct location with reference to the part to be photographed."—Lake Shore Power Co. v. Meyer, 1 N.E.2d 1021, 1023, 51 Ohio App. 534.

quired for authenticating ordinary photographs may be furnished by evidence that the X-ray picture accurately represents a condition seen by the witness through a fluoroscopic view of the part of the body pictured.[35]

§ 713. To Show Location, Surroundings, and Condition of Premises or Inanimate Objects

Properly authenticated photographs may be admitted to show the location, surroundings, and condition of premises or of inanimate objects involved in the accident or other occurrence in controversy.

Where it becomes material to know the location, surroundings, and condition of the premises on which, or the place at which, an accident or other occurrence in controversy took place, or of inanimate objects connected with such occurrence, photographs thereof, which are verified by proof that they are true representations, see infra § 715, may be received in evidence.[36] Such photographs are

Failure to use textbook method

That X-ray picture of heart was not taken according to textbook rules merely affected weight of picture as evidence and of testimony of physician taking picture based thereon, but did not render picture or testimony incompetent.—Equitable Life Assur. Soc. of U. S. v. Reynolds, 82 S.W.2d 509, 259 Ky. 504.

Stating difficulties involved in taking picture

In action for injuries in collision between wagons, plaintiff's X-ray specialist was properly permitted to testify that he had difficulty in straightening plaintiff's hand to get it down on the plate, while an assistant made the picture, petition having alleged plaintiff's wrist was broken, sprained, deformed, and disfigured.—Hill v. Meyer, Mo.App., 221 S.W. 171.

35. Ill.—Stevens v. Illinois Cent. R. Co., 137 N.E. 859, 306 Ill. 370—Lachenmeyer v. Glotfelty, 2 N.E.2d 180, 284 Ill.App. 397.

36. U.S.—Trucking, Inc. v. Krotzer, C.C.A.Ohio, 106 F.2d 447—Salkin v. Erie R. Co., C.C.A.N.J., 23 F.2d 677—Zinnel v. U. S. Shipping Board Emergency Fleet Corporation, C.C.A.N.Y., 10 F.2d 47—Boyle v. Ward, D.C.Pa., 39 F.Supp. 545.

Ala.—Law v. Gulf States Steel Co., 175 So. 322, 27 Ala.App. 484, certiorari denied 175 So. 326, 234 Ala. 352.

Ariz.—Humphrey v. Atchison, T. & S. F. Ry. Co., 70 P.2d 319, 50 Ariz. 167.

Ark.—Graves v. Jewel Tea Co., 23 S.W.2d 972, 180 Ark. 980—La Grande v. Arkansas Oak Flooring Co., 245 S.W. 38, 155 Ark. 585.

Cal.—Miller v. Silvester, 35 P.2d 387, 140 Cal.App. 345—Olson v. Meacham, 19 P.2d 527, 129 Cal.App. 670—Hayes v. Emerson, 294 P. 765, 110 Cal.App. 470—Bernstein v. Minney, 274 P. 614, 96 Cal.App. 597.

Conn.—Ireland v. Connecticut Co., 150 A. 520, 111 Conn. 521—Skaling v. Sheedy, 126 A. 721, 101 Conn. 545, 36 A.L.R. 540.

D.C.—Altemus v. Talmadge, 58 F.2d 874, 61 App.D.C. 148, certiorari denied 53 S.Ct. 16, 287 U.S. 614, 77 L.Ed. 533.

Fla.—Stanley v. Powers, 169 So. 861, 125 Fla. 322.

Ga.—Western & A. R. R. v. Hughes, 142 S.E. 185, 37 Ga.App. 771, certiorari granted 49 S.Ct. 18, 278 U.S. 588, 73 L.Ed. 522, affirmed 49 S.Ct. 231, 278 U.S. 496, 73 L.Ed. 473.

Ill.—Blachek v. City Ice & Fuel Co., 35 N.E.2d 416, 311 Ill.App. 1—Campbell v. Chicago, B. & Q. R. Co., 27 N.E.2d 327, 305 Ill.App. 264—Goodrich v. Sprague, 26 N.E.2d 884, 304 Ill.App. 556, reversed on other grounds 32 N.E.2d 897, 376 Ill. 80—Burke v. Molloy, 14 N.E.2d 279, 294 Ill.App. 442—Scharfenstein v. Forest City Knitting Co., 253 Ill.App. 190—Moscarelli v. Sheldon, 247 Ill.App. 352—Sorensen v. Chicago Rys. Co., 217 Ill.App. 174.

Ind.—Tolbert v. Stratton, 200 N.E. 81, 102 Ind.App. 155—Haven v. Snyder, 176 N.E. 149, 93 Ind.App. 54.

Iowa.—Faatz v. Sullivan, 200 N.W. 321, 199 Iowa 875.

Kan.—Maxfield v. Fox Kansas Theatre Co., 107 P.2d 685, 152 Kan. 716.

Ky.—Louisville & N. R. Co. v. Bell, 125 S.W.2d 239, 276 Ky. 778—Greer v. Richards' Adm'r, 115 S.W.2d 568, 273 Ky. 91—Louisville & N. R. Co. v. McCoy, 87 S.W.2d 921, 261 Ky. 435.

Me.—McPhee v. Lawrence, 122 A. 675, 123 Me. 264.

Md.—Kirsch v. Ford, 183 A. 240, 170 Md. 90.

Mass.—Shapiro v. Lyon, 149 N.E. 543, 254 Mass. 110—Hamilton v. Inhabitants of Town of Heath, 140 N.E. 801, 246 Mass. 335.

Mich.—Pearce v. Rodell, 276 N.W. 883, 283 Mich. 19—Hartley v. A. I. Rodd Lumber Co., 276 N.W. 712, 282 Mich. 652—Martin Parry Corporation v. Berner, 244 N.W. 180, 259 Mich. 621.

Minn.—Kouri v. Olson-Keogh Produce Co., 253 N.W. 98, 191 Minn. 101—McKnight v. City of Duluth, 232 N.W. 795, 181 Minn. 450.

Miss.—Gulfport Fertilizer Co. v. Bilbo, 174 So. 65, 178 Miss. 791.

Mo.—Harrison v. St. Louis-San Francisco Ry. Co., 99 S.W.2d 841, 339 Mo. 821—Griggs v. Kansas City Rys. Co., 228 S.W. 508—Hunt v. City of St. Louis, 211 S.W. 673, 278 Mo. 213—Taylor v. Alton R. Co., App., 148 S.W.2d 806—Funke v. St. Louis-San Francisco Ry. Co., 35 S.W.2d 977, 225 Mo.App. 347—Bodam v. City of New Hampton, App., 290 S.W. 621—Weisbrod v. Mueller, App., 285 S.W. 542—Ross v. City of St. Joseph, App., 250 S.W. 625—Bretall v. Missouri Pac. R. Co., App., 239 S.W. 597.

N.H.—Goddard v. Berlin Mills Co., 131 A. 601, 82 N.H. 225.

N.J.—Braelow v. Klein, 125 A. 103, 100 N.J.Law 156.

N.Y.—Ryer v. Sheroak Realty Co., 2 N.Y.S.2d 348, 253 App.Div. 924—Handy v. Hadley-Luzerne Union Free School Dist. No. 1, 300 N.Y.S. 135, 252 App.Div. 353, reversed on other grounds 14 N.E.2d 390, 277 N.Y. 685—Delmonte v. La Fountain, 298 N.Y.S. 902, 252 App.Div. 806.

N.D.—Paul v. St. Paul Fire & Marine Ins. Co., 253 N.W. 752, 64 N.D. 479.

Ohio.—City of Hamilton v. Haferkamp, 4 N.E.2d 995, 53 Ohio App. 381—Kalovsky v. Meyer Dairy Products Co., 164 N.E. 370, 30 Ohio App. 118—Luebbering v. Whitaker, 10 Ohio App. 365, affirmed 128 N.E. 76, 101 Ohio St. 292.

Okl.—Hale-Halsell Co. v. Webb, 89 P.2d 273, 184 Okl. 589—Defiance Oils v. Hardzog, 61 P.2d 572, 178 Okl. 6—Massey v. Ivester, 33 P.2d 765, 168 Okl. 464—Federal Life Ins. Co. v. Firestone, 15 P.2d 141, 159 Okl. 228—Kansas City Southern Ry. Co. v. Waters, 249 P. 742, 120 Okl. 1—Patrick v. Siliskis, 222 P. 543, 105 Okl. 51.

Or.—Knapp v. Standard Oil Co. of California, 68 P.2d 1052, 156 Or. 564—Bowerman v. Columbia Gorge Motor Coach System, 284 P. 579, 132 Or. 106—Northwest Door Co. v. Lewis Inv. Co., 180 P. 495, 92 Or. 186.

Pa.—Adamczuk v. Holloway, 13 A.2d 2, 338 Pa. 263—Davis v. Borough of Shenandoah, 117 A. 207, 273 Pa. 501—Heffelfinger v. Schell, 50 Dauph.Co. 1.

properly received, even though the situation which they are intended to illustrate is capable of verbal description;[37] and it has been held that the fact that the jury later viewed the scene shown by a photograph does not render the photograph incompetent.[38]

A photograph may be received even though it does not show the entire premises or object to which the controversy relates,[39] especially where evidence concerning the omitted portion is introduced by both sides.[40] A photograph of an object which was not itself involved in the controversy may nevertheless be admitted where it is instructive and relates to a material issue,[41] but such a photograph is not admissible where it is not practically instructive.[42] A photograph which includes a number of articles the photographs of which would be inadmissible may be properly excluded, even though it includes other objects photographs of which would be admissible.[43]

§ 714. Photographic Copies of Documents

An enlarged photograph of a questioned document in evidence may be admitted as an aid in determining its genuineness; as to the admissibility of an unenlarged photograph the authorities are in conflict.

It would seem that under some circumstances and

Philippine.—Manila v. Cabangis, 10 Philippine 151.
Tenn.—Jackson v. City of Nashville, 68 S.W.2d 137, 17 Tenn.App. 413.
Tex.—Younger Bros. v. Ross, Civ. App., 151 S.W.2d 621—Olivas v. El Paso Electric Co., Civ.App., 54 S.W.2d 154, error refused—Dallas Gas Co. v. Bankers' & Shippers' Ins. Co., Civ.App., 53 S.W.2d 130, error refused—Exall v. Johnson, Civ.App., 1 S.W.2d 906, error dismissed—Southwestern Portland Cement Co. v. Bustillos, Civ.App., 216 S.W. 268, dismissed for want of jurisdiction, conforming to opinion Bustillos v. Southwestern Portland Cement Co., Com.App., 211 S.W. 929, which reversed Southwestern Portland Cement Co. v. Bustillos, Civ.App., 169 S.W. 638, error granted.
Utah.—Burtenshaw v. Bountiful Irr. Co., 61 P.2d 312, 90 Utah 196—Blake v. Harding, 180 P. 172, 54 Utah 158.
Wash.—Washington v. City of Seattle, 16 P.2d 597, 170 Wash. 371, 86 A.L.R. 113—Shanahan v. International Stage Co., 3 P.2d 1092, 164 Wash. 609—Norton v. Anderson, 2 P.2d 266, 164 Wash. 55.
Wis.—City of Baraboo v. Excelsior Creamery Co., 177 N.W. 36, 171 Wis. 242.
22 C.J. p 917 note 60.

Showing compass points

Where directions are material, the usefulness of photographs is increased by clearly indicating thereon the compass points.—Hommes' Adm'r v. Chesapeake & O. Ry. Co., 104 S.W.2d 431, 268 Ky. 203.

37. Ill.—McGoorty v. Benhart, 27 N.E.2d 289, 305 Ill.App. 458.
Neb.—Zancanella v. Omaha & C. B. St. R. Co., 142 N.W. 190, 93 Neb. 774.

38. Mass.—Morrissey v. Connecticut Valley St. Ry. Co., 124 N.E. 435, 233 Mass. 554.

39. Pa.—Chestnut Hill & Spring House Turnp. Co. v. Piper, 15 Wkly.N.C. 55.
22 C.J. p 918 note 62.

Part of damaged car

In action for injury to plaintiff's car by collision with defendant's truck, photographs of the car, which did not represent the entire damage, were admissible as correct representations of the front part of the car, which they purported to be, even though there were other details of the injury not shown.—Lee Lewis, Inc., v. Dosch, 235 S.W. 355, 193 Ky. 163.

40. Ill.—Illinois Southern R. Co. v. Hayer, 128 Ill.App. 315, affirmed 80 N.E. 316, 225 Ill. 613.

41. Mo.—Wilson v. Frankel, App., 61 S.W.2d 363.
Okl.—Southern Drilling Co. v. McKee, 42 P.2d 265, 171 Okl. 409.
Rule against admitting staged or posed photographs see infra § 715.

Similar objects

(1) In an action by a governess to recover damages for personal injuries received when she fell into a dumb-waiter from the fourth floor, photographs of the opening into the dumb-waiter on the third floor were admissible, on the question as to whether plaintiff was exercising due care and caution in entering the doorway constituting the opening to the dumb-waiter on the fourth floor, plaintiff never having been on such part of the fourth floor, where opening was not guarded by a gate as well as a door, as was true of the opening on the third floor.—Gibson v. Gernat, 267 F. 305, 50 App.D.C. 3, certiorari denied 40 S.Ct. 483, 253 U.S. 487, 64 L.Ed. 1026.

(2) In railroad employee's action for injuries under Federal Employers' Liability Act, photograph of tender attached to engine of class to which engine and tender by which plaintiff was injured belonged was admissible to explain testimony of witnesses.—Moore v. St. Joseph & G. I. Ry. Co., 186 S.W. 1035, 268 Mo. 31, affirmed St. Joseph & G. I. R. Co. v. Moore, 37 S.Ct. 278, 243 U.S. 311, 61 L.Ed. 741.

(3) In condemnation proceedings, admitting photographs admissible as showing general conditions under evidence was not error, although they showed special condition at particular spot two hundred seventy-five feet distant from land condemned.—In re Board of Recreation Com'rs of Town of West New York, Hudson County, 136 A. 176, 103 N.J.Law 419.

On issue of defective street or roadway

(1) In an action for personal injuries resulting from fall on sidewalk brought against a county and a railroad company, photographs of other parts of the walk than that where accident occurred, showing its condition, would be admissible, but only to show notice on the part of the county of the particular defect.—Bullock v. Yakima Valley Transp. Co., 184 P. 641, 108 Wash. 413, affirmed 187 P. 410, 108 Wash. 413.

(2) Admitting photographs of roadway in vicinity of, but not involved in, accident, in action for death, as bearing on issue of defect in highway causing accident, was erroneous.—Ireland v. Connecticut Co., 150 A. 520, 111 Conn. 521.

42. Ill.—Crane v. Railway Express Agency, 12 N.E.2d 672, 293 Ill.App. 328, modified on other grounds 15 N.E.2d 866, 369 Ill. 110.
N.H.—Palmer v. Edgerly, 181 A. 125, 87 N.H. 391, affirmed 181 A. 419, 87 N.H. 391.

Cumulative evidence

In action for injuries sustained in fall through hatchway, photographs of hatches on sister ship taken under different conditions were properly excluded where one photograph of a part of the sister ship had already been introduced for purpose of illustration only.—Wychgel v. States S. S. Co., 296 P. 863, 135 Or. 475, certiorari denied States S. S. Co. v. Wychgel, 52 S.Ct. 11, 284 U.S. 625, 76 L.Ed. 533.

43. Vt.—Goulette's Adm'r v. Grand Trunk Ry. Co., 107 A. 118, 93 Vt. 266.

for certain purposes, as, for example, the determination of its genuineness, a photographic or photostatic copy of a signature or other writing which is in evidence may be admitted notwithstanding it is not an enlargement of the original.[44] Such evidence has been excluded on the ground that it is merely secondary and that, the original being in evidence, proof of its contents or appearance by any kind of a copy is inadmissible.[45] In any event, a photograph which is of the same size as the original cannot be admitted unless, as in the case of other photographs, it is sufficiently authenticated.[46] Photographs of instruments already in evidence which are so enlarged as to make the proportions plainer and to illustrate the testimony of witnesses may go to the jury in the same way as would a magnifying glass or microscope,[47] provided their accuracy is sufficiently established.[48]

§ 715. Accuracy of Photograph; Time of Taking

Before a photograph may be admitted, it must be shown by extrinsic evidence to be a true and faithful representation of the place or subject it purports to represent as it existed at a time pertinent to the inquiry.

Before a photograph may be admitted into evidence, it must be shown by extrinsic evidence to be a true and faithful representation of the place or subject it purports to represent as it existed at a time pertinent to the inquiry;[49] and if for any reason it does not appear to represent the subject or condition existing at such time in such a way as to be instructive it may be excluded.[50] Thus, where

44. Iowa.—In re Cheney's Estate, 274 N.W. 5, 223 Iowa 1076.
Wis.—Baxter v. Chicago & N. W. R. Co., 80 N.W. 644, 104 Wis. 307.
Photographs as secondary evidence see infra § 815.
Use of photographs in comparing handwritings see supra § 617.
Value of photographs universally recognized
"The [evidentiary] value of photographs and photographic enlargements of questioned signatures and documents is everywhere recognized."—Leland v. Leonard, 112 A. 198, 199, 95 Vt. 36.

45. **Deed**
Ill.—Howard v. Illinois Trust & Savings Bank, 59 N.E. 1106, 189 Ill. 568.

46. Mo.—Home Ins. Co. of New York v. Savage, 103 S.W.2d 900, 231 Mo. App. 569.
Vt.—Leland v. Leonard, 112 A. 198, 95 Vt. 36.

47. La.—Rosenberg v. Robbert, 99 So. 447, 155 La. 557.
Mo.—Vanausdol v. Bank of Odessa, 5 S.W.2d 109, 222 Mo.App. 91.
Tex.—Latham v. Houston Land & Trust Co., Civ.App., 62 S.W.2d 519, 523, error dismissed, quoting Corpus Juris.
22 C.J. p 919 note 73.
Failure of adversary to introduce like evidence
Photographs of checks introduced could not be excluded on ground defendant was taken by surprise, where defendant had possession long enough to have made photograph.—Vanausdol v. Bank of Odessa, 5 S.W. 2d 109, 222 Mo.App. 91.
Showing of evidential value
An enlarged photograph of a note already received in evidence is not admissible, merely on proof that it is an accurate enlargement; but it must first be shown to the satisfaction of the judge that it possesses some evidential value in addition to that of the note itself.—Oviatt v. Wojcicky, 111 A. 837, 95 Conn. 562.

48. Vt.—Leland v. Leonard, 112 A. 198, 95 Vt. 36.
Mere technical photographic defects resulting from overexposure, overprinting, and the like do not render such enlargements inadmissible.—Leland v. Leonard, supra.

49. Ala.—Bradley v. Lewis, 100 So. 324, 211 Ala. 264.
Ark.—Ford v. Missouri Pac. R. Co., 271 S.W. 967, 969, 168 Ark. 884, citing Corpus Juris.
Cal.—Edelson v. Higgins, App., 111 P.2d 668—Miller v. Silvester, 35 P.2d 387, 140 Cal.App. 345.
Conn.—Crowell v. Middletown Sav. Bank, 189 A. 172, 122 Conn. 362.
Ind.—Tolbert v. Stratton, 200 N.E. 81, 102 Ind.App. 155—Steckbeck v. Worman, 125 N.E. 418, 71 Ind.App. 666.
Iowa.—Dice v. Johnson, 199 N.W. 346, 198 Iowa 1093—Gose v. True, 198 N.W. 528, 197 Iowa 1094.
Ky.—Louisville & N. R. Co. v. McCoy, 87 S.W.2d 921, 261 Ky. 435—Goldberg v. Wunderlich, 59 S.W.2d 1018, 248 Ky. 798.
Md.—Wimpling v. State, 189 A. 248, 254, 171 Md. 362, citing Corpus Juris.
Mass.—Bruce v. Hanks, 178 N.E. 728, 277 Mass. 268.
Mich.—Perri v. Tassie, 292 N.W. 370, 293 Mich. 464—Martin v. Parry Corporation v. Berner, 244 N. W. 180, 259 Mich. 621.
Miss.—Wheat v. Teche Lines, 179 So. 553, 181 Miss. 408.
Mo.—McCormick v. Lowe & Campbell Athletic Goods Co., App., 144 S.W.2d 866—Smith v. East St. Louis Ry. Co., 123 S.W.2d 198, 234 Mo.App. 1220—Home Ins. Co. of New York v. Savage, 103 S.W.2d 900, 901, 231 Mo.App. 569, citing Corpus Juris.
Neb.—Harrell v. People's City Mission Home, 267 N.W. 344, 131 Neb. 138.
N.J.—In re United New Jersey Railroad & Canal Co., 140 A. 450, 104 N.J.Law 385—Braelow v. Klein, 125 A. 103, 100 N.J.Law 156—Ellis v. Rosenberg, 188 A. 499, 15 N.J.Misc. 37—Day v. Beyer, 139 A. 317, 5 N.J.Misc. 1069.
N.Y.—Hadges v. New York Rapid Transit Corporation, 18 N.Y.S.2d 304, 259 App.Div. 154.
Ohio.—Hoover v. Turner, 182 N.E. 598, 42 Ohio App. 528.
Okl.—Hale-Halsell Co. v. Webb, 89 P.2d 273, 184 Okl. 589—Provident Life & Accident Ins. Co. of Chattanooga, Tenn., v. Everett, 61 P. 2d 679, 177 Okl. 588—Massey v. Ivester, 33 P.2d 765, 168 Okl. 464—Patrick v. Siliskis, 222 P. 543, 105 Okl. 51.
Pa.—Adamczuk v. Holloway, 13 A.2d 2, 338 Pa. 263.
Tenn.—Jackson v. City of Nashville, 68 S.W.2d 137, 17 Tenn.App. 413.
Tex.—Massachusetts Bonding & Insurance Co. v. Worthy, Civ.App., 9 S.W.2d 388, error dismissed.
Va.—Lawson v. Darter, 160 S.E. 74, 157 Va. 284.
Wash.—Quayle v. Knox, 27 P.2d 115, 175 Wash. 182—Norton v. Anderson, 2 P.2d 266, 164 Wash. 55.
Wis.—Marsh Wood Products Co. v. Babcock & Wilcox Co., 240 N.W. 392, 207 Wis. 209.
22 C.J. p 919 note 80.
Authentication of X-ray photographs see supra § 712.

50. U.S.—Sprinkle v. Davis, C.C.A. Va., 111 F.2d 925, 128 A.L.R. 1101.
Ark.—Arkansas Power & Light Co. v. Marsh, 115 S.W.2d 825, 195 Ark. 1135.
Conn.—Livingstone v. City of New Haven, 3 A.2d 836, 125 Conn. 123—Weller v. Fish Transport Co., 192 A. 317, 123 Conn. 49—Voltz v. Orange Volunteer Fire Ass'n, 172

the appearance and condition of subjects or places at a certain time are sought to be shown, photographs taken after their appearance and condition had materially changed are generally inadmissible,[51] and if, by reason of the susceptibility of the subject to change and the lapse of time involved, it appears likely that the condition is not the same, the photograph is not admissible[52] in the absence of proof sufficient to negative that likelihood or to show that no change had actually occurred.[53]

It is not necessary, however, that the situation or condition should be precisely the same, but it is sufficient if the situation is substantially unchanged,[54]

A. 220, 118 Conn. 307—Petrillo v. Kolbay, 165 A. 346, 116 Conn. 389.
Ill.—Krum v. Rogers, 22 N.E.2d 970, 301 Ill.App. 631—Streeter v. Humrichouse, 261 Ill.App. 556.
Ind.—Holland Furnace Co. v. Nauracaj, 14 N.E.2d 339, 105 Ind.App. 574.
Iowa.—Gose v. True, 198 N.W. 528, 197 Iowa 1094.
Md.—Nelson v. Seiler, 139 A. 564, 154 Md. 63.
N.J.—Halligan v. Westmont Loving Service, 187 A. 729, 14 N.J.Misc. 819.
Pa.—Trexler Lumber Co. v. Allemannia Fire Ins. Co. of Pittsburgh, 136 A. 856, 289 Pa. 13—Heffelfinger v. Schell, 50 Dauph. Co. 1.
R.I.—Souza v. United Electric Rys. Co., 152 A. 419, 51 R.I. 124.
Tex.—Schaff v. Copass, Civ.App., 262 S.W. 234.
22 C.J. p 920 note 82.

After collision

Photograph of plaintiff's car after collision showing a break was properly excluded to prove that break caused collision where there was no evidence tending to show that the break had been made prior to the collision.—Walsh v. Studwell, 135 A. 554, 105 Conn. 453.

After repairs made

Photographs of trucks taken several days after collision, when plaintiff's truck had been repaired, were incompetent.—Hooks v. General Storage & Transfer Co., 63 S.W.2d 527, 187 Ark. 887.

Mutilated picture

Admitting in wife's alienation suit mutilated kodak picture of husband and defendant, not correctly representing existing situation, was error.—Lass v. Lass, 217 N.W. 383, 52 S.D. 302.

51. Ala.—Williams v. Wicker, 179 So. 250, 235 Ala. 348.
Ark.—Dermott Grocery & Commission Co. of Eudora v. Meyer, 101 S.W.2d 443, 193 Ark. 591.
Colo.—Wold v. City of Boulder, 9 P.2d 931, 91 Colo. 44.
Ga.—Elliott v. Georgia Power Co., 197 S.E. 914, 58 Ga.App. 151.
Ill.—Althoff v. Illinois Cent. R. Co., 227 Ill.App. 417.
Ky.—Home Laundry Co. v. Cook, 125 S.W.2d 763, 277 Ky. 8.
R.I.—Carr v. American Locomotive Co., 70 A. 196, 29 R.I. 276.
Tex.—Empire Gas & Fuel Co. v. Muegge, Civ.App., 116 S.W.2d 758, 761, citing Corpus Juris—City of Waco v. Killen, Civ.App., 59 S.W.2d 940, error dismissed.
Va.—Virginian Ry. Co. v. Hillsman, 173 S.E. 503, 162 Va. 359.
Wash.—Finholt v. City of Seattle, 247 P. 950, 139 Wash. 497.
Wis.—Cottrill v. Pinkerton, 248 N.W. 124, 211 Wis. 310.
22 C.J. p 920 note 81.

"When the situation and surrounding circumstances are subject to change, photographs . . . must have been taken at the time of the transaction or before the situation and circumstances have undergone a change."—Hooks v. General Storage & Transfer Co., 63 S.W.2d 527, 530, 187 Ark. 887.

Disappearance of snow

It is proper to exclude photographs of the scene of a highway accident where at the time of the accident there was about four feet of snow on the ground and the pictures were taken after the snow had disappeared.—Grimm v. East St. Louis & S. R. Co., 180 Ill.App. 92.

Removal of ice

Where, immediately after plaintiff had fallen on a ridge of ice, the ice was removed, photographs of the premises, taken two or three days after the accident, were properly excluded.—Chicago, St. P., M. & O. R. Co. v. Rorvig, Minn., 217 F. 953, 133 C.C.A. 625.

52. La.—Greeves v. S. H. Kress & Co., App., 198 So. 171.

Floor one year later

In customer's action for injuries by falling on floor of store, on which thousands of people walked daily, a photograph of floors taken one year after accident was taken too long after accident to be of any probative value, and would not be considered, notwithstanding testimony to effect that floors were in same condition at time of fall as they appeared in photograph.—Greeves v. S. H. Kress & Co., supra.

53. Ala.—Bradley v. Lewis, 100 So. 324, 211 Ala. 264.
Ky.—Goldberg v. Wunderlich, 59 S.W.2d 1018, 248 Ky. 798.
Mo.—Myerson v. People's Motorbus Co. of St. Louis, App., 297 S.W. 451.
S.D.—Figland v. Jones, 172 N.W. 879, 42 S.D. 92.

More recent photograph prevented by objecting party

In action by lot owner for destruction of building and excavation of his lot, defendants were not entitled to object to admission of photographs of building taken several years before acts of destruction complained of since taking of more timely photographs was precluded by acts of defendants.—McGlone v. Stokes, 104 S.W.2d 191, 193 Ark. 1008.

Obstruction on sidewalk easily removed

In an action to recover damages for personal injuries, caused by an obstruction in the sidewalk, an objection to the admission in evidence of a photograph of the obstruction, which could easily and quickly be removed, is properly sustained, where there is no evidence as to when, by whom, or under what circumstances the photograph was taken, even though plaintiff testifies that the photograph is a fair and truthful representation of the place as it was at the time she fell.—Block & Block v. City of Philadelphia, 76 Pa.Super. 246.

54. U.S.—Stone v. Chicago, M., St. P. & P. R. Co., C.C.A.Iowa, 53 F.2d 813—Feather River Lumber Co. v. U. S., C.C.A.Cal., 30 F.2d 642, affirming, D.C., U. S. v. Feather River Lumber, 23 F.2d 936.
Fla.—City of Miami v. McCorkle, 199 So. 575.
Ill.—Moscarelli v. Sheldon, 247 Ill. App. 352.
Mich.—Perri v. Tassie, 292 N.W. 370, 293 Mich. 464.
Mo.—Johnson v. Kansas City, App., 272 S.W. 703, 704, quoting Corpus Juris.
Mont.—McNair v. Berger, 15 P.2d 834, 838, 92 Mont. 441, quoting Corpus Juris.
N.Y.—Becker v. Liscio, 229 N.Y.S. 361, 223 App.Div. 698.
Ohio.—City of Hamilton v. Haferkamp, 4 N.E.2d 995, 53 OhioApp. 381.
Okl.—Hale-Halsell Co. v. Webb, 89 P.2d 273, 184 Okl. 589.
Or.—Northwest Door Co. v. Lewis Inv. Co., 180 P. 495, 92 Or. 186.
S.D.—Doolin v. City of Winner, 204 N.W. 899, 48 S.D. 400.
Tex.—Bilbrey v. Gentle, Civ.App., 107 S.W.2d 597, error dismissed.
Wash.—Shanahan v. International Stage Co., 3 P.2d 1092, 164 Wash.

or if the things sought to be shown by the photograph and pertinent to the inquiry remain truthfully represented;[55] and where it is satisfactorily shown to be a truthful representation to such extent it is immaterial when the photograph was taken,[56] or that no proof is offered as to the time when it was taken.[57] It has been considered that, at least in the case of a photograph of a location or an inanimate

603—McCreedy v. Fournier, 194 P. 398, 113 Wash. 351.
22 C.J. p 921 note 87.

Change to aid photography

(1) The application of paint or chalk to skid marks or scratches in order to make them visible to the camera's eye does not render the photographs inadmissible.

Cal.—Hayes v. Emerson, 294 P. 765, 110 Cal.App. 476.

Ind.—Haven v. Snyder, 176 N.E. 149, 93 Ind.App. 54.

(2) In pedestrian's action against city for injuries from sidewalk defect, admission of photograph of place where pedestrian slipped was not error, although piece of white paper was put over place where eyewitness had seen skid marks and showed in photograph.—Swart v. City of Boston, 193 N.E. 360, 288 Mass. 542.

(3) However, in view of the court's discretion, while it is not error to admit such photographs, neither is it error to exclude them.—Hoover v. Turner, 182 N.E. 598, 42 Ohio App. 528.

Daytime photograph of scene of night accident

In an action against a street railroad company for the death of plaintiff's intestate, who was killed by a car at night, photographs of the scene of the accident, taken in the daytime, offered merely to show the physical surroundings, are admissible.—Griggs v. Kansas City Rys. Co., Mo., 228 S.W. 508.

Different weather conditions do not render a photograph inadmissible where it is not offered as indicating the weather conditions obtaining at the time of the occurrence.—Georgia Power Co. v. Gillespie, 173 S.E. 755, 48 Ga.App. 688.

55. Ariz.—Humphrey v. Atchison, T. & S. F. Ry. Co., 70 P.2d 319, 50 Ariz. 167.

Ark.—Graves v. Jewel Tea Co., 23 S.W.2d 972, 180 Ark. 980.

Ill.—Carroll v. Krause, 15 N.E.2d 323, 295 Ill.App. 552.

Minn.—Luck v. Minneapolis St. Ry. Co., 254 N.W. 609, 191 Minn. 503.

Mo.—Hunt v. City of St. Louis, 211 S.W. 673, 278 Mo. 213.

Tex.—Empire Gas & Fuel Co. v. Muegge, 143 S.W.2d 763, 135 Tex. 520, reversing, Civ.App., 116 S.W.2d 758.

Wis.—City of Baraboo v. Excelsior Creamery Co., 177 N.W. 36, 171 Wis. 242.

Absence of persons or objects not involved

The mere fact that a photograph offered to show appearance of locus of accident does not show all of the persons and objects which were present when a fact in issue transpired, does not of itself render photograph inadmissible, where it tells the truth about the situation and surroundings so far as it purports to show these things.—Hunt v. City of St. Louis, 211 S.W. 673, 278 Mo. 213.

Absence of snow

That photograph of place of injury disclosed absence of snow while it was conceded that there was snow on the ground at time of injury, is not a difference in situation such as to render photograph inadmissible if otherwise properly portraying place of injury.—Johnson v. Kansas City, Mo.App., 272 S.W. 703.

56. Ark.—Powell Bros. Truck Lines v. Barnett, 121 S.W.2d 116, 196 Ark. 1082.

Conn.—Willoughby v. City of New Haven, 197 A. 85, 123 Conn. 446.

Ga.—Coffee County v. Denton, 13 S.E.2d 209, 64 Ga.App. 368—Georgia Power Co. v. Gillespie, 173 S.E. 755, 48 Ga.App. 688—Western & A. R. R. v. Hughes, 142 S.E. 185, 37 Ga.App. 771, certiorari granted 49 S.Ct. 18, 278 U.S. 588, 73 L.Ed. 522, affirmed 49 S.Ct. 231, 278 U.S. 496, 73 L.Ed. 473.

Iowa.—Faatz v. Sullivan, 200 N.W. 321, 199 Iowa 875.

Mich.—Wallace v. Kramer, 296 N.W. 838, 296 Mich. 680.

Mo.—Rogers v. Mobile & O. R. Co., 85 S.W.2d 581, 337 Mo. 140, certiorari denied Mobile & O. R. Co. v. Rogers, 56 S.Ct. 178, 296 U.S. 642, 80 L.Ed. 456—Costello v. Kansas City, 219 S.W. 386, 280 Mo. 576—Ross v. City of St. Joseph, App., 250 S.W. 625.

N.J.—Wegener v. Sugarman, 138 A. 699, 106 N.J.Law 26.

N.C.—Kelly v. Raleigh Granite Co., 156 S.E. 517, 200 N.C. 326.

Okl.—Hale-Halsell Co. v. Webb, 89 P.2d 273, 274, 184 Okl. 589, citing *Corpus Juris*—Tulsa Yellow Cab Taxi & Baggage Co. v. Salomon, 75 P.2d 197, 181 Okl. 519.

Or.—Knapp v. Standard Oil Co. of California, 68 P.2d 1052, 156 Or. 564.

22 C.J. p 920 note 85.

Lapse of time not excluding photographs

(1) Twelve years.—Cottrill v. Pinkerton, 248 N.W. 124, 211 Wis. 310.

(2) Three years.—Feather River Lumber Co. v. U. S., C.C.A.Cal., 30 F.2d 642, affirming, D.C., U. S. v. Feather River Lumber, 23 F.2d 936.

(3) Eighteen months.—Bilbrey v. Gentle, Tex.Civ.App., 107 S.W.2d 597, error dismissed.

(4) Ten months.—Timlin v. City of Scranton, 12 A.2d 502, 139 Pa. Super. 503.

(5) Several months.—Altemus v. Talmadge, 58 F.2d 874, 61 App.D.C. 148, certiorari denied 53 S.Ct. 16, 287 U.S. 614, 77 L.Ed. 533.

(6) One month.—Chesapeake & O. Ry. Co. v. Fultz, 161 N.E. 835, 91 Ind.App. 639, certiorari denied 51 S. Ct. 31, 282 U.S. 855, 75 L.Ed. 757.

(7) Several days.—Parris v. Jaquith, 197 P. 750, 70 Colo. 63.

(8) Forty hours.—Becker v. Liscio, 229 N.Y.S. 361, 223 App.Div. 698.

(9) Other cases see 22 C.J. p 920 note 85 [a].

57. Cal.—Edelson v. Higgins, App., 111 P.2d 668.

Mo.—Johnson v. Kansas City, App., 272 S.W. 703.

N.J.—Ellis v. Rosenberg, 188 A. 499, 15 N.J.Misc. 37.

Wash.—Anelick v. The Arizona, 49 P.2d 3, 183 Wash. 467, certiorari granted The Arizona v. Anelich, 56 S.Ct. 573, 297 U.S. 701, 80 L.Ed. 989, affirmed 56 S.Ct. 707, 298 U.S. 110, 80 L.Ed. 1075, rehearing denied 56 S.Ct. 945, 298 U.S. 692, 80 L.Ed. 1409.

22 C.J. p 920 note 84.

"**When objects . . . are not of a character subject to sudden change**, such as hills and valleys, large growing trees, and permanent buildings, the time when a photograph of such objects has been taken is not necessarily so material. When, however, the question involved concerns the condition of a peculiar feature of the locus in quo which is subject to sudden change, the time . . . necessarily becomes material."—Block & Block v. City of Philadelphia, 76 Pa.Super. 246, 249.

Showing that evidence is part of res gestæ

In action for injuries sustained in collision at grade crossing between automobile and freight train, motorist had right to show by witnesses and photographs the condition and surroundings of the crossing, without establishing the character of such evidence as "res gestæ."—Campbell v. Chicago, B. & Q. R. Co., 27 N.E.2d 327, 305 Ill.App. 264.

object, the presumption is that the conditions remain the same, and it is for the party opposing the admission of the photograph to prove that there has been a material change of condition.[58] The fact that there have been changes in conditions, including even substantial changes, will not necessarily exclude a photograph where the changes can be and are explained, so that the photograph, as explained, will give a correct understanding of the condition existing at the time to which the controversy relates, and be practically instructive.[59]

The proof required to lay a sufficient foundation for the introduction of a photograph varies with the nature of the evidence which the photograph is offered to supply.[60] Where the photograph is offered, not as a mere general representation of the locus in quo, but to show distances, relative sizes, or locations of objects, it may be very deceptive and misleading,[61] and it seems that, in such a case, much more convincing proof of its accuracy is required than in ordinary cases.[62]

Technical accuracy. In some cases it has been held necessary and sufficient for the introduction of a photograph that it be shown to be a fair and accurate reproduction of the things or conditions as they were when the photograph was taken;[63] and it has been said that the methods and materials used in taking and processing the photograph should be shown in such cases.[64] It has been held that the fact that a photograph is incorrect in some particulars does not render it inadmissible, but merely affects its weight.[65]

Persons entitled to verify. The photograph may be verified by oath of the photographer who took it,[66] and, indeed, it has been said that this is the

58. Mo.—Johnson v. Kansas City, App., 272 S.W. 703, 704, quoting **Corpus Juris.**
S.C.—Wade v. Southern R. Co., 71 S.E. 859, 89 S.C. 280.
Presumption of continuance of condition see supra § 124.

59. U.S.—Gaughan v. Michigan Interstate Motor Freight, C.C.A., Ill., 94 F.2d 266—Salkin v. Erie R. Co., C.C.A.N.J., 23 F.2d 677.
Ark.—Powell Bros. Truck Lines v. Barnett, 121 S.W.2d 116, 196 Ark. 1082.
Ky.—Louisville & N. R. Co. v. Bell, 125 S.W.2d 239, 276 Ky. 778.
Mich.—Perri v. Tassie, 292 N.W. 370, 293 Mich. 464.
Minn.—McKnight v. City of Duluth, 232 N.W. 795, 181 Minn. 450.
Miss.—Gulfport Fertilizer Co. v. Bilbo, 174 So. 65, 178 Miss. 791.
Mo.—Smith v. Wilson, App., 296 S. W. 1036—Stotler v. Blanton-Sims Co., App., 273 S.W. 137—Johnson v. Kansas City, App., 272 S.W. 703, 704, quoting **Corpus Juris.**
Mont.—Palmer v. Riek, 88 P.2d 16, 108 Mont. 108—McNair v. Berger, 15 P.2d 834, 838, 92 Mont. 441, quoting **Corpus Juris.**
Okl.—Henry Chevrolet Co. v. Taylor, 108 P.2d 1024.
Pa.—Taylor v. Bland, 77 Pa.Super. 551—Rugens v. Jones, 54 York Leg.Rec. 8.
Wash.—Gooschin v. Ladd, 33 P.2d 653, 177 Wash. 625.
Wis.—City of Baraboo v. Excelsior Creamery Co., 177 N.W. 36, 171 Wis. 242.
22 C.J. p 921 note 88.

Substitution of person for plaintiff
In action by passenger for injuries alleged to have been received as she was stepping from station platform to first step of railroad car, refusal to admit photograph showing woman attempting to board identical car by same steps from identical spot on same platform was prejudicial error.—Cincinnati, N. O. & T. P. Ry. Co. v. Duvall, 92 S.W.2d 363, 263 Ky. 387.

Admissibility of evidence in explanation
In an action by a parent against a railroad for death of his minor child, there was no error in overruling objections to questions to a photographer as to what a "flag" on a photograph was for, whether it was to indicate where blood was on the track, etc.—Louisville & N. R. Co. v. Cross, 88 So. 908, 205 Ala. 626.

60. U.S.—Stone v. Chicago, M., St. P. & P. R. Co., C.C.Iowa, 53 F.2d 813.

61. Ky.—Ligon v. Allen, 162 S.W. 536, 157 Ky. 101, 1 L.R.A.,N.S., 842.
22 C.J. p 921 note 92.

62. Conn.—Cunningham v. Fair Haven & W. R. Co., 43 A. 1047, 72 Conn. 244.
Ky.—Ligon v. Allen, 162 S.W. 536, 157 Ky. 101, 51 L.R.A.,N.S., 842.

63. Fla.—Atlantic Coast Line R. Co. v. Mish, 128 So. 839, 99 Fla. 1246.
Utah.—Blake v. Harding, 180 P. 172, 54 Utah 158.

Processing defects
Defects in photographs and photographic enlargements of the disputed signatures resulting from overexposure, overprinting, and the like, which could be pointed out and explained so as to enable the court to make a proper estimate of their value as evidence, do not render the photographs and enlargements inadmissible.—Leland v. Leonard, 112 A. 198, 95 Vt. 86.

64. Mo.—Home Ins. Co. of New York v. Savage, 103 S.W.2d 900, 231 Mo.App. 569.
Neb.—Prime v. Squier, 203 N.W. 582, 113 Neb. 507.

Explanation of taking
(1) It was proper to allow witnesses who took photographs offered in evidence, to describe how they were taken, and explain objects appearing in them.—Gillet v. Shaw, 104 N.E. 719, 217 Mass. 59.
(2) Where there is no evidence as to how photographs showing plaintiff's injuries were taken, or that they were fairly taken, they are not admissible, even though plaintiff's physicians testified that they were a fair representation of his condition.—Cincinnati, N. O. & T. P. R. Co. v. Nolan, 170 S.W. 650, 161 Ky. 205.

65. Tenn.—Hughes v. State, 148 S. W. 543, 126 Tenn. 40, Ann.Cas. 1913D 1262.
Substantial truth and accuracy are sufficient.—Blake v. Harding, 180 P. 172, 54 Utah 158.

Inaccuracy as to distance
Photographs of scene of accident, although not affording an accurate test of distances, were properly admitted in evidence, where they were of some value in placing before jury the other surroundings of accident and other accurate measurements were taken of sourroundings.—St. Louis-San Francisco Ry. Co. v. Horn, 269 S.W. 576, 168 Ark. 191.

Conflicting evidence as to location of automobile collision would not render photographs of scratches on pavement allegedly caused by collision inadmissible.—Haven v. Snyder, 176 N.E. 149, 93 Ind.App. 54.

66. Pa.—Timlin v. City of Scranton, 12 A.2d 502, 139 Pa.Super. 503—

better practice.[67] However, it is not necessary to produce the photographer; sufficient verification may be furnished by the testimony of any competent witness who has sufficient knowledge to testify that the photograph fairly represents what it purports to represent.[68]

The presence of the verifying witness when the photograph was taken may be a factor in determining the sufficiency of the identification and proof of accuracy,[69] but the photograph may be admitted although the verifying witness was not present when it was taken;[70] and it is not necessary that the party objecting to the admission of the photograph should have been present when it was taken or that he should have exercised any control in respect thereof.[71]

Photographs of reproduced situations. A photograph, for the taking of which various objects involved in a controversy or purporting to represent such objects have been posed, staged, or arranged in a manner claimed to represent the location and relative positions of movable objects or persons at or before the time of the occurrence and before they were moved, offered to illustrate hypothetical situations or to explain certain theories of the parties is, according to some cases, inadmissible.[72] Other cases have held, however, that such a photograph may be admitted where it is verified by witnesses as an accurate representation and the arrangements are fully explained,[73] at least where the location or relative positions as shown are not dis-

Marcinkiewicz v. Kutawich, 87 Pa. Super. 260.
22 C.J. p 921 note 90.

That negative was developed by another does not render photograph inadmissible.—Central City v. Snodgrass, 28 S.W.2d 467, 234 Ky. 396.

Enlargement

It is not necessary in connection with the introduction of a photographic enlargement to call the person by whom such enlargement was made.—Diller v. Northern California Power Co., 123 P. 359, 162 Cal. 531, Ann.Cas.1913D 908.

67. Pa.—Thompson v. De Long, 110 A. 251, 267 Pa. 212, 9 A.L.R. 1326.

68. U.S.—Podolsky v. La Forge, C. C.A.Mass., 92 F.2d 954—Boyle v. Ward, D.C.Pa., 39 F.Supp. 545.
Ala.—Strickland v. Davis, 128 So. 233, 221 Ala. 247.
Cal.—Berkovitz v. American River Gravel Co., 215 P. 675, 191 Cal. 195—Miller v. Silvester, 35 P.2d 387, 140 Cal.App. 345.
Conn.—Stressman v. Vitiello, 158 A. 879, 114 Conn. 370.
Fla.—City of Miami v. McCorkle, 199 So. 575.
Ga.—Southern Ry. Co. v. Lunsford, 194 S.E. 602, 57 Ga.App. 53, certiorari denied 59 S.Ct. 78, 305 U.S. 619, 83 L.Ed. 395.
Ill.—Brownlie v. Brownlie, 191 N.E. 268, 357 Ill. 117, 93 A.L.R. 1041.
Ky.—King v. Ohio Valley Fire & Marine Ins. Co., 280 S.W. 127, 212 Ky. 770.
Md.—Gwynn Oak Park v. Becker, 10 A.2d 625, 177 Md. 528.
N.J.—Sidway v. Greater Atlantic Finance & Mortgage Co., 169 A. 531, 12 N.J.Misc. 83.
N.C.—White v. Hines, 109 S.E. 31, 182 N.C. 275.
Ohio.—Hoover v. Turner, 182 N.E. 598, 43 Ohio App. 528.
Pa.—Adamczuk v. Holloway, 13 A. 2d 2, 338 Pa. 263—Thompson v. De Long, 110 A. 251, 267 Pa. 212, 9 A.L.R. 1326—Timlin v. City of Scranton, 12 A.2d 502, 139 Pa. Super. 503—Marcinkiewicz v. Kutawich, 87 Pa.Super. 260.
Tex.—Wise v. City of Abilene, Civ. App., 141 S.W.2d 400.
Va.—Lawson v. Darter, 160 S.E. 74, 157 Va. 284.
22 C.J. p 921 note 91.

69. Ky.—King v. Ohio Valley Fire & Marine Ins. Co., 280 S.W. 127, 212 Ky. 770.
Mo.—Hutchison v. Moerschel Products Co., 133 S.W.2d 701, 234 Mo. App. 518.
N.J.—Haring v. Banks, 146 A. 675, 7 N.J.Misc. 605, affirmed 150 A. 918, 106 N.J.Law 569.
Wash.—Knapp v. Siegley, 208 P. 13, 120 Wash. 478.

70. Ala.—Strickland v. Davis, 128 So. 233, 221 Ala. 247—Alabama Trunk & Luggage Co. v. Hauer, 108 So. 339, 214 Ala. 473.

71. Ind.—Haven v. Snyder, 176 N.E. 149, 93 Ind.App. 54.
Mo.—State ex rel. State Highway Commission v. Bengal, App., 124 S. W.2d 687.

72. Ill.—Carroll v. Krause, 280 Ill. App. 52—Burns v. Salyers, 270 Ill. App. 46.
Ky.—Nunnelley's Adm'r v. Muth, 242 S.W. 622, 195 Ky. 352, 27 A.L.R. 910.
Me.—Babb v. Oxford Paper Co., 59 A. 290, 99 Me. 298.
Md.—Kirsch v. Ford, 183 A. 240, 170 Md. 90.
Minn.—Stewart v. St. Paul City R. Co., 80 N.W. 855, 78 Minn. 110.
Mo.—Lynch v. Missouri-Kansas-Texas R. Co., 61 S.W.2d 918, 333 Mo. 89.
Okl.—Empire Oil & Refining Co. v. Fields, 112 P.2d 395—Defiance Oils v. Hardzog, 61 P.2d 572, 178 Okl. 6—Massey v. Ivester, 33 P.2d 765, 168 Okl. 464—Patrick v. Siliskis, 222 P. 543, 105 Okl. 51.
Vt.—Hutchinson v. Knowles, 184 A. 705, 108 Vt. 195, followed in 184 A. 711, 108 Vt. 208.
Wash.—Fabbio v. Diesel Oil Sales Co., 95 P.2d 788, 1 Wash.2d 234.
22 C.J. p 920 note 83.

Reason for rule

The basis of the rule excluding photographs attempting to illustrate a theory or claim as to how an accident occurred is that there is a peculiar danger in such cases that the exhibits will be given the effect of speaking for themselves.—Reed v. Davidson Dairy Co., 50 P.2d 532, 97 Colo. 462.

Fixed and inanimate objects are not within the rule stated in the text.—Haven v. Snyder, 176 N.E. 149, 93 Ind.App. 54.

Moving picture

In street car accident case, excluding moving picture of another car taken after accident, and offered to show swaying of street car at place where the accident occurred was not error.—State v. United Railways & Electric Co. of Baltimore, 159 A. 916, 162 Md. 404, 83 A.L.R. 1307.

Admission for limited purpose

In action for collision between automobile and bicycle, admission of photographs showing a bicycle near scene of accident was not error, where court directed jury to regard photographs only as views of location of accident, and jury visited scene.—McGowan v. Tayman, 132 S. E. 316, 144 Va. 358.

73. Ark.—Jewel Tea Co. v. McCrary, 122 S.W.2d 534, 197 Ark. 294.
Ill.—Paden v. Rockford Palace Furniture Co., 220 Ill.App. 534, certiorari denied in Rockford Palace Furniture Co. v. Paden, 42 S.Ct. 54, 257 U.S. 645, 66 L.Ed. 413.
Miss.—Favre v. Louisville & N. R. Co., 178 So. 327, 180 Miss. 843.
Mont.—Fulton v. Chouteau County Farmers' Co., 37 P.2d 1025, 98 Mont. 48.

puted;[74] and it has been held that a photograph of this character could be admitted as a photograph of the result of an experiment where the proper foundation had been laid.[75]

Motion pictures. Motion pictures will not be admitted in evidence until a proper foundation has been laid; it must be shown that the pictures accurately represent what they purport to represent, and any inaccuracies or exaggerations must be explained to the jury.[76]

§ 716. Determination as to Admissibility

The admissibility of photographs is to be determined preliminarily by the trial court in the exercise of a sound discretion.

Whether a photograph is sufficiently verified[77] as a proper representation,[78] and whether it is practically instructive,[79] are preliminary questions to be determined by the trial judge. The admission or rejection of a photograph is a matter which rests largely in the discretion of the trial judge,[80]

Wash.—Farmer v. School Dist. No. 211, King County, 17 P.2d 899, 171 Wash 278, 115 A.L.R. 1171.

74. Colo —Reed v. Davidson Dairy Co., 50 P.2d 532, 97 Colo 462.

75. Minn.—Lewis v. Chicago Great Western R. Co., 193 N.W. 695, 155 Minn. 381.
Vt.—Thayer v. Glynn, 106 A. 834, 93 Vt. 257.

76. Fla.—Gulf Life Ins. Co. v. Stossel, 179 So. 163, 131 Fla. 127, modifying 175 So. 804, 131 Fla. 268.
Miss.—Metropolitan Life Ins. Co. v. Wright, 199 So. 289, followed in Metropolitan Life Ins. Co. v. Larkin, 199 So. 293.
N.Y.—Boyarsky v. G. A. Zimmerman Corporation, 270 N.Y.S. 134, 240 App.Div. 361.
R.I.—Owens v. Hagenbeck-Wallace Shows Co., 192 A. 158, 58 R.I. 162, 112 A.L.R. 113, reargument denied 192 A. 464, 58 R.I. 268, 112 A.L.R. 113.

Sufficiency of showing

(1) In action against railroad for truck occupant's death resulting from collision in Illinois, the exhibition of moving pictures showing a truck in position truck involved was in when struck and showing a passing train and general view of objects at and around crossing where accident occurred, was not an abuse of discretion where witness who was present when motion pictures were taken explained where camera was placed and testified that pictures were correct portrayal of physical conditions and surroundings and such witness was cross-examined.—Philippi v. New York, C. & St. L. R. Co., Mo.App., 136 S.W.2d 339.

(2) In personal injury action, motion pictures showing plaintiff at play were admissible, as against contention that pictures did not show continuity of action but only a few seconds exposure taken at different times to make one connected reel, where operator of moving camera explained in detail how pictures were taken and that his purpose was to follow plaintiff and get as many action pictures as possible.—McGoorty v. Benhart, 27 N.E.2d 289, 305 Ill. App. 458.

(3) In action for disability benefits under policies, refusal to permit reproduction of motion pictures of insured was not error, where pictures were not authenticated and there was no evidence as to speed at which camera was set when pictures were taken.—Pacific Mut. Life Ins. Co. of California v. Marks, 161 So. 543, 230 Ala. 417.

Taking photograph under direction of commissioner

Although in some cases, in order to have pictures taken after suit is begun admitted into evidence, it may be proper to give notice to the adverse party and to have a commissioner appointed under whose direction the picture should be taken, such procedure is not indispensable, and if in the judgment of either litigant notice and appointment of a commissioner should not be availed of, the litigant may proceed in any manner deemed by him advisable.—Gulf Life Ins. Co. v. Stossel, 179 So. 163, 131 Fla. 127, modifying 175 So. 804, 131 Fla. 268.

77. Minn.—Kouri v. Olson-Keogh Produce Co., 253 N.W. 98, 191 Minn. 101.
Pa.—Adamczuk v. Holloway, 13 A.2d 2, 338 Pa. 263.
22 C.J. p 921 note 94.

78. U.S.—Stone v. Chicago, M., St. P. & P. R. Co., C.C.A. Iowa, 53 F.2d 813.
Ariz.—Humphrey v. Atchison, T. & S. F. Ry. Co., 70 P.2d 319, 50 Ariz. 167.
Ark.—Dermott Grocery & Commission Co. of Eudora v. Meyer, 101 S.W.2d 443, 445, 193 Ark. 591, citing **Corpus Juris.**
Cal.—Sim v. Weeks, 45 P.2d 350, 7 Cal.App.2d 28—Olson v. Meacham, 19 P.2d 527, 129 Cal.App. 670—Hayes v. Emerson, 294 P. 765, 110 Cal.App. 470.
Colo.—Wold v. City of Boulder, 9 P.2d 931, 91 Colo. 44.
Conn.—Crowell v. Middleton Sav. Bank, 189 A. 172, 122 Conn. 362—Voltz v. Orange Volunteer Fire Ass'n, 172 A. 220, 118 Conn. 307.
Fla.—City of Miami v. McCorkle, 199 So. 575.
Ind.—Tolbert v. Stratton, 200 N.E. 81, 102 Ind.App. 155—Haven v. Snyder, 176 N.E. 149, 93 Ind.App. 54.
Me.—Penley v. Teague & Harlow Co., 140 A. 374, 126 Me. 583.
Mich.—Finch v. W. R. Roach Co., 295 N.W. 324, 295 Mich. 589.
Ohio.—Kalonsky v. Meyer Dairy Products Co., 164 N.E. 370, 30 Ohio App. 118.
Okl.—Provident Life & Accident Ins. Co. of Chattanooga, Tenn., v. Everett, 61 P.2d 679, 177 Okl. 588.
Or.—Knapp v. Standard Oil Co. of California, 68 P.2d 1052, 156 Or. 564.
Pa.—Adamczuk v. Holloway, 13 A.2d 2, 338 Pa. 263—Marcinkiewicz v. Kutawich, 87 Pa.Super. 260.
Wash.—Quayle v. Knox, 27 P.2d 115. 175 Wash. 182.
22 C.J. p 922 note 95.

79. Ariz.—Humphrey v. Atchison, T. & S. F. Ry. Co., 70 P.2d 319, 50 Ariz. 167.
Ark.—Dermott Grocery & Commission Co. of Eudora v. Meyer, 101 S.W.2d 443, 193 Ark. 591.
Conn.—Skaling v. Sheedy, 126 A. 721, 101 Conn. 545, 36 A.L.R. 540.
Ind.—Central Indiana Ry. Co. v. Mitchell, 199 N.E. 439, 102 Ind.App. 121—Haven v. Snyder, 176 N.E. 149, 93 Ind.App. 54.
Mass.—Swart v. City of Boston, 193 N.E. 360, 288 Mass. 542.
N.H.—Cross v. Berlin Mills Co., 105 A. 411, 79 N.H. 116.
N.J.—Jaeger v. Elizabethtown Consolidated Gas Co., 11 A.2d 746, 124 N.J.Law 420.
Ohio.—Hoover v. Turner, 182 N.E. 598, 42 Ohio App. 528.
Wash.—Gooschin v. Ladd, 33 P.2d 653, 177 Wash. 625.
22 C.J. p 922 note 96.

80. U.S.—Chicago G. W. R. Co. v. Robinson, C.C.A.Neb., 101 F.2d 994, certiorari denied 59 S.Ct. 1038, 307 U.S. 640, 83 L.Ed. 1520—Stone v. Chicago, M., St. P. & P. R. Co., C.C.A.Iowa, 53 F.2d 813—United Verde Extension Mining Co. v. Jordan, C.C.A.Ariz., 14 F.2d 304, affirming, D.C., Jordan v. United Verde Copper Co., 9 F.2d 144, affirmed, C.C.A., United Verde Copper Co. v. Jordan, 14 F.2d 299, and certiorari denied 47 S.Ct. 243, 273 U.S. 734, 71 L.Ed. 865—Boyle v. Ward, D.C.Pa., 39 F.Supp. 545.
Ariz.—Humphrey v. Atchison, T. & S.

and the discretion of the trial judge in admitting or rejecting a photograph as evidence in a particular case or under particular circumstances must not be exercised arbitrarily.[81]

7. Books and Other Printed Publications

§ 717. In General

A book or other publication printed by a private person and not shown to be approved by public authority, and particularly where not shown to be in general use among the class of persons interested in the matters of which it treats, is not usually regarded as competent evidence as regards such matters.

As a general rule a book or other publication printed by a private person and not shown to be approved by any public authority is not competent evidence of the facts therein stated,[82] at least if it does not appear to be in general use among the

F. Ry. Co., 70 P.2d 319, 50 Ariz. 167.
Ark.—Arkansas Power & Light Co. v. Marsh, 115 S.W.2d 825, 195 Ark. 1135—Dermott Grocery & Commission Co. of Eudora v. Meyer, 101 S. W.2d 443, 445, 193 Ark. 591, citing **Corpus Juris.**
Cal.—Sim v. Weeks, 45 P.2d 350, 7 Cal.App.2d 28—Olson v. Meacham, 19 P.2d 527, 129 Cal.App. 670—Hayes v. Emerson, 294 P. 765, 110 Cal.App. 470—Crabbe v. Rhoades, 282 P. 10, 101 Cal.App. 503.
Colo.—Reed v. Davidson Dairy Co., 50 P.2d 532, 97 Colo. 462.
Conn.—Livingstone v. City of New Haven, 3 A.2d 836, 125 Conn. 123—Murray v. Gagliardi, 135 A. 293, 105 Conn. 392.
Ind.—Central Indiana Ry. Co. v. Mitchell, 199 N.E. 439, 102 Ind. App. 121—Putman v. Murden, 184 N.E. 796, 97 Ind.App. 313—Haven v. Snyder, 176 N.E. 149, 93 Ind.App. 54.
Iowa.—Gose v. True, 198 N.W. 528, 197 Iowa 1094.
Me.—Penley v. Teague & Harlow Co., 140 A. 374, 126 Me. 583.
Md.—State, for Use of Emerson, v. Poe, 190 A. 231, 171 Md. 584—Kirsch v. Ford, 183 A. 240, 170 Md. 90—York Ice Machinery Corporation v. Sachs, 173 A. 240, 167 Md. 113—State v. United Railways & Electric Co. of Baltimore, 159 A. 916, 162 Md. 404, 83 A.L.R. 1307—Snibbe v. Robinson, 135 A. 838, 151 Md. 658, 50 A.L.R. 280.
Mass.—Swart v. City of Boston, 193 N.E. 360, 288 Mass. 542—Bruce v. Hanks, 178 N.E. 728, 277 Mass. 268—Byam v. Carlisle-Ayer Co., 172 N.E. 113, 272 Mass. 176—Hamilton v. Inhabitants of Town of Heath, 140 N.E. 801, 246 Mass. 335—Morrissey v. Connecticut Valley St. Ry. Co., 124 N.E. 435, 233 Mass. 554.
Mich.—Wallace v. Kramer, 296 N.W. 838, 296 Mich. 680—Finch v. W. R. Roach Co., 295 N.W. 324, 295 Mich. 589—Perri v. Tassie, 292 N.W. 370, 293 Mich. 464—Amedeo v. Grand Rapids & I. R. Co., 183 N.W. 929, 215 Mich. 37.
Minn.—Christopherson v. Custom Laundry Co., 229 N.W. 136, 179 Minn. 325.
Mo.—Philippi v. New York, C. & St. L. R. Co., App., 136 S.W.2d 339—Hutchison v. Moerschel Products Co., 133 S.W.2d 701, 234 Mo.App. 518—Home Ins. Co. of New York v. Savage, 103 S.W.2d 900, 901, 231 Mo.App. 569, citing **Corpus Juris.**
Mont.—Palmer v. Riek, 88 P.2d 16, 108 Mont. 108.
N.H.—Nickerson v. Bentley, 6 A.2d 142, 89 N.H. 533—Hackett v. Boston & M. R. R., 6 A.2d 139, 89 N.H. 514.
N.J.—Jaeger v. Elizabethtown Consolidated Gas Co., 11 A.2d 746, 124 N.J.Law 420—Braelow v. Klein, 125 A. 103, 100 N.J.Law 156—Ellis v. Rosenberg, 188 A. 499, 15 N.J.Misc. 37—Day v. Beyer, 139 A. 317, 5 N. J.Misc. 1069—Dumphy v. Thompson, 130 A. 639, 3 N.J.Misc. 1086.
N.C.—Pearson v. Luther, 193 S.E. 739, 212 N.C. 412.
Ohio.—Paul A. Sorg Paper Co. v. Hayes, 182 N.E. 886, 43 Ohio App. 140—Hoover v. Turner, 182 N.E. 598, 42 Ohio App. 528—Kalovsky v. Meyer Dairy Products Co., 164 N. E. 370, 30 Ohio App. 118.
Okl.—Schaff v. Coyle, 249 P. 947, 121 Okl. 228—Missouri, K. & T. Ry. Co. v. Smith, 223 P. 373, 97 Okl. 152.
Or.—De Witt v. Sandy Market, 115 P.2d 184—Knapp v. Standard Oil Co. of California, 68 P.2d 1052, 156 Or. 564.
Pa.—Adamczuk v. Holloway, 13 A.2d 2, 338 Pa. 263—Lutz v. Allegheny County, 195 A. 1, 327 Pa. 587—Trexler Lumber Co. v. Allemannia Fire Ins. Co. of Pittsburgh, 136 A. 856, 289 Pa. 13—Marcinkiewicz v. Kutawich, 87 Pa.Super. 260—Taylor v. Bland, 77 Pa.Super. 551—Heffelfinger v. Schell, 50 Dauph. Co. 1—Mrkich v. Pennsylvania R. Co., 23 West.Co.L.J. 182—Rugens v. Jones, 54 York Leg.Rec. 8.
S.D.—Lundgren v. Minty, 266 N.W. 145, 64 S.D. 217.
Tex.—Empire Gas & Fuel Co. v. Muegge, Civ.App., 116 S.W.2d 758, 761, citing **Corpus Juris.**
Vt.—Hutchinson v. Knowles, 184 A. 705, 108 Vt. 195, followed in 184 A. 711, 108 Vt. 208—Leland v. Leonard, 112 A. 198, 95 Vt. 36—Goulette's Adm'r v. Grand Trunk Ry. Co., 107 A. 118, 93 Vt. 266.
Wash.—Fabbio v. Diesel Oil Sales Co., 95 P.2d 788, 1 Wash.2d 234—Keseleff v. Sunset Highway Motor Freight Co., 60 P.2d 720, 187 Wash. 642—Gooschin v. Ladd, 33 P.2d 653, 177 Wash. 625—Quayle v. Knox, 27 P.2d 115, 175 Wash. 182.
Wis.—City of Baraboo v. Excelsior Creamery Co., 177 N.W. 36, 171 Wis. 242.
22 C.J. p 922 note 97.

Motion pictures
U.S.—Sprinkle v. Davis, C.C.A.Va., 111 F.2d 925, 128 A.L.R. 1101.
Md.—State v. United Railways & Electric Co. of Baltimore, 159 A. 916, 162 Md. 404, 83 A.L.R. 1307.
Mich.—Rogers v. City of Detroit, Department of Street Railways, 286 N.W. 167, 289 Mich. 86.
Mo.—Morris v. E. I. Du Pont De Nemours & Co., 139 S.W.2d 984, 129 A.L.R. 352.
Neb.—Denison v. Omaha & C. B. St. Ry. Co., 280 N.W. 905, 135 Neb. 307.
N.Y.—Boyarsky v. G. A. Zimmerman Corporation, 270 N.Y.S. 134, 240 App.Div. 361.

Part of photograph
Conn.—Jackiewicz v. United Illuminating Co., 138 A. 147, 106 Conn. 302.

Photographs of documents
Iowa.—In re Cheney's Estate, 274 N. W. 5, 223 Iowa 1076.

X-ray pictures
Iowa.—Kramer v. Henely, 288 N.W. 610, 227 Iowa 504.
Mass.—McGrath v. Fash, 139 N.E. 303, 244 Mass. 327.
Miss.—Gulf Research Development Co. v. Linder, 170 So. 646, 177 Miss. 123.
Mo.—Clark v. Reising, 107 S.W.2d 33, 341 Mo. 282—Perringer v. Lynn Food Co., App., 148 S.W.2d 601.

81. Mass.—De Forge v. New York, N. H. & H. R. Co., 59 N.E. 669, 178 Mass. 59, 86 Am.S.R. 464.
Neb.—Carlson v. Benton, 92 N.W. 600, 66 Neb. 486, 1 Ann.Cas. 159.

82. Ky.—Kentucky Public Service Co. v. Topmiller, 263 S.W. 706, 204 Ky. 196.
Pa.—Nyce v. Tyson, 18 Pa.Dist. & Co. 91, 48 Montg.Co. 153.
22 C.J. p 922 note 2—38 C.J. p 1181 note 33 [a] (4).

class of persons interested in the matters of which it treats, and if on account of the recent occurrence of the facts or for other reasons they may be proved by living witnesses or other better evidence.[83] Books and other printed publications shown to be in general use among the class of persons interested in the matters which they contain have, however, been held admissible.[84] Where the parties to the action have expressly agreed to accept a particular book as authority it may be introduced into evidence.[85]

Where a publication is independently relevant, that is, where the inquiry is as to whether certain matter was published, regardless of its truth or falsity, the publication is admissible,[86] and a publication may also be admissible on the question of knowledge of a certain person.[87]

§ 718. Books of Science and Learning

a. Inductive reasoning or opinion

b. Mathematical calculations, exact sciences, etc.

a. Inductive Reasoning or Opinion

Books of inductive, as distinguished from exact, science and learning are not usually admissible as independent evidence of the theories and opinions which they contain, although there exist cases to a contrary effect, and such books are sometimes admissible under statute.

Except as permitted by statute,[88] medical and other works of science or learning, at least books of inductive as distinguished from exact science, are, although accepted as standard authorities, ordinari-

Automobile "Red Book"

Mo.—Brown v. Republic Casualty & Surety Co., App., 31 S.W.2d 111.

Pa.—Nyce v. Tyson, 18 Pa.Dist. & Co. 91, 48 Montg.Co. 153.

Catalog of manufacturer

U.S.—M. & B. Mfg. Co. v. Munk, D.C. N.Y., 6 F.Supp. 203, reversed on other grounds, C.C.A., 77 F.2d 261.

Ky.—Harcourt v. Redmon, 140 S.W. 1009, 145 Ky. 512.

Christian Science writings

U.S.—Northern Trust Co. v. Commissioner of Internal Revenue, C.C.A., 116 F.2d 96.

City directory

Tex.—Defferari v. Terry, Civ.App., 68 S.W.2d 253, reversed on other grounds 99 S.W.2d 290, 128 Tex. 521.

Utah.—Christensen v. Johnson, 61 P. 2d 597, 90 Utah 273.

22 C.J. p 922 note 2 [d].

Manuals

(1) A manual of accident prevention in construction work issued by a contractors' association is inadmissible under the text rule.—McEachin v. Martin, 102 S.W.2d 864, 193 Ark. 787.

(2) A field manual of policies and instructions issued by automobile manufacturer to dealers is inadmissible.—Oakland Motor Car Co. v. Kremer Motor Co., 243 N.W. 673, 186 Minn. 455.

National electric safety code, issued by federal bureau of standards, offered as evidence in chief, was held properly excluded from evidence in action for death by electrocution of one erecting metal pole among power company's high voltage overhead wires.—Mississippi Power & Light Co. v. Whitescarver, C.C.A.Miss., 68 F.2d 928, affirming, D.C., Whitescarver v. Mississippi Power & Light Co., 5 F.Supp. 948.

Scrapbook

Ky.—Haralambo's Ex'r v. Christopher, 21 S.W.2d 983, 231 Ky. 550.

Telephone book

Ga.—Wofford Oil Co. of Georgia v. Solomon, 169 S.E. 780, 47 Ga.App. 42.

Textbook of Masonic jurisprudence, not shown to be followed by Masons generally, could not be relied on to show that defendant was Masonic outlaw.—Most Worshipful Prince Hall Grand Lodge, F. & A. M. of Colorado and Jurisdiction v. Most Worshipful Hiram Grand Lodge, F. & A. A. Y. M. of Colorado and Jurisdiction, National Compact Prince Hall Origin, 273 P. 648, 85 Colo. 17.

83. Mass.—Whiton v. Albany City Ins. Co., 109 Mass. 24.

Pa.—Spalding v. Hedges, 2 Pa. 240.

84. **Baseball guide**

Baseball guide is admissible to show beginning and end of playing season as regards recovery of damages for delay in delivering telegram containing offer of position.—Western Union Telegraph Co. v. Eckhardt, Tex.Civ.App., 2 S.W.2d 505, modified on other grounds, Com.App., 11 S.W.2d 777, rehearing denied 20 S. W.2d 759.

Rate book of insurer

In action on industrial life policy, providing that if true age of insured was greater than oldest age accepted by insurer, then payment of reserve would absolve insurer of further obligation, rate book of insurer would have been admissible if properly proved for the purpose of showing that there was no rate on a person over fifty years of age.—North Carolina Mut. Life Ins. Co. v. Banks, Tenn.App., 148 S.W.2d 54.

Rules

(1) The rules of a master car builders' association have been held admissible for the purpose of showing the proper construction of a railroad car in an action for injury to a brakeman resulting from a handhold coming off a car.—Leas v. Continental Fruit Express, 99 S.W. 859, 45 Tex.Civ.App. 162.

(2) The book of rules and certain general orders or regulations of defendant street railway for the operation of its cars, produced by the company's president at the request of a passenger suing for injuries, were properly admitted.—Bilodeau v. Fitchburg & L. St. Ry. Co., 128 N. E. 872, 236 Mass. 526.

Time-table

(1) A time-table is admissible in evidence as bearing on the speed of trains.—Perkins v. Chicago, M. & St. P. Ry. Co., 197 N.W. 758, 158 Minn. 184.

(2) Time-table of transportation company operating autostages is admissible in order to establish time of automobile collision occurring at certain point just as stage arrived.—Still v. Swanson, 27 P.2d 704, 175 Wash. 553.

85. N.C.—Hite v. Aydlett, 134 S.E. 419, 192 N.C. 166.

Handbook

In action for services as architect, admission of copy of certain handbook was not error, where contract expressly made the handbook authority on any question arising under contract.—Hite v. Aydlett, supra.

86. Ga.—Taylor v. Georgia L. & T. Co., 94 S.E. 254, 21 Ga.App. 272.

22 C.J. p 922 note 5.

87. Ohio.—Russell v. Weller, 28 Ohio Cir.Ct. 176.

22 C.J. p 922 note 6.

88. Conn.—Nicotra v. Bigelow, Sanford Carpet Co., 189 A. 603, 122 Conn. 353.

S.C.—LaCount v. General Asbestos & Rubber Co., 192 S.E. 262, 184 S.C. 232—Baker v. Southern Cotton Oil

ly, inadmissible as independent evidence of the theories and opinions therein expressed,[89] or as evidence for any purpose except to some extent in connection with the examination of an expert,[90] as an aid to the memory of the court in defining scientific terms,[91] or to show the state of the art, or the world's knowledge on the subject.[92] There exists, however, a particular line of cases which assert a contrary view permitting standard works of recognized authority to be introduced in evidence.[93]

The reasons for exclusion, under the usual rule, are because of the unsettled condition of the sciences themselves; because the language employed is technical, and hence not within the understanding of men of common experience; because of the difficulty of determining what books are or are not of good and established authority; because such books are written without the sanction of an oath, and the authors are not liable to cross-examination; and lastly, because such books are but hearsay evidence of matters about which living witnesses could be called to testify.[94]

b. Mathematical Calculations, Exact Sciences, Etc.

Books of recognized authority containing mathematical calculations, or dealing with the exact sciences, and the like may be introduced in evidence.

The reasons for the rejection of medical treatises and other works of the inductive class are held not to apply to works of recognized authority containing mathematical calculations or dealing with what are known as the exact sciences, and works of this character are ordinarily,[95] although not invariably,[96] held to be admissible. Accordingly almanacs,[97] tide tables,[98] millwrights' tables,[99] and standard encyclopedias[1] have been admitted. A table showing the rates of interest in other states, printed in an official publication, has been held ad-

Co., 159 S.E. 822, 161 S.C. 479—Edwards v. Union Buffalo Mills Co., 159 S.E. 818, 162 S.C. 17.

89. Ill.—Wilcox v. International Harvester Co. of America, 116 N.E. 151, 278 Ill. 465, affirming 198 Ill.App. 33.
Iowa.—Morton v. Equitable Life Ins. Co. of Iowa, 254 N.W. 325, 218 Iowa 846, 96 A.L.R. 315.
Me.—Shaw's Case, 140 A. 370, 126 Me. 572.
Mass.—Percoco's Case, 173 N.E. 515, 273 Mass. 429.
Mo.—Wright v. Stickler, App., 96 S.W.2d 932—Whitley v. Stein, App., 34 S.W.2d 998.
Neb.—Winters v. Rance, 251 N.W. 167, 125 Neb. 577—Oliverius v. Wicks, 187 N.W. 73, 107 Neb. 821.
S.C.—Baker v. Southern Cotton Oil Co., 159 S.E. 822, 161 S.C. 479—Edwards v. Union Buffalo Mills Co., 159 S.E. 818, 162 S.C. 17.
Tenn.—Standard Life Ins. Co. of the South v. Strong, 89 S.W.2d 367, 19 Tenn.App. 404.
Tex.—Texas Indemnity Ins. Co. v. Allison, Civ.App., 75 S.W.2d 999, 1000, citing **Corpus Juris**—San Angelo Water, Light & Power Co. v. Baugh, Civ.App., 270 S.W. 1101.
Wis.—Marsh Wood Products Co. v. Babcock & Wilcox Co., 240 N.W. 392, 207 Wis. 209.
22 C.J. p 923 note 7.

Extracts from books of the type indicated in the text have been held inadmissible.
Ky.—Kentucky Public Service Co. v. Topmiller, 263 S.W. 706, 204 Ky. 196.
Okl.—Clinton & O. W. Ry. Co. v. Dunlap, 181 P. 312, 75 Okl. 64, affirming 179 P. 749, 75 Okl. 64.
22 C.J. p 923 note 7 [e].

90. Ky.—Kentucky Public Service Co. v. Topmiller, 263 S.W. 706, 204 Ky. 196.
Minn.—Ruud v. Hendrickson, 222 N.W. 904, 176 Minn. 138.
Mo.—Cooper v. Atchison, T. & S. F. R. Co., 148 S.W.2d 773, certiorari denied Atchison, T. & S. F. R. Co. v. Cooper, 61 S.Ct. 1116, 313 U.S. 591, 85 L.Ed. 1546.
Neb.—Winters v. Rance, 251 N.W. 167, 125 Neb. 577.
Tex.—William Cameron Co. v. Downing, Civ.App., 147 S.W.2d 963.
Wis.—Ripon v. Bittel, 30 Wis. 614.
22 C.J. p 923 note 8.
Reference to authorities on examination of expert see supra §§ 573–575.

Preliminary proof
Proof by any competent doctor that medical book is used and recognized by the medical profession is sufficient proof of authenticity of such book to warrant its use in cross-examining physician.—William Cameron Co. v. Downing, Tex.Civ.App., 147 S.W.2d 963.

91. N.Y.—Winthrop Chemical Co. v. Blackman, 268 N.Y.S. 647, 150 Misc. 229.
22 C.J. p 923 note 9.

Names of drugs
The United States Pharmacopœia and New and Non-Official Remedies have been held competent to show that certain names of drugs are not the common or descriptive names thereof.—Winthrop Chemical Co. v. Blackman, supra.

92. U.S.—U. S. v. Two Cases of Chloro-Naptholeum Disinfectant, D.C.Md., 217 F. 477.

93. Ala.—City of Dothan v. Hardy, 188 So. 264, 237 Ala. 603, 122 A.L.R. 637—Watkins v. Potts, 122 So. 416, 219 Ala. 427, 65 A.L.R. 1097—Carraway v. Graham, 118 So. 807, 218 Ala. 453—Batson v. Batson, 117 So. 10, 217 Ala. 450.
22 C.J. p 924 note 12.

Irrelevant illustrations
Where illustrations from a medical book are not shown to have any relation to the particular case, they are not admissible under the text view.—Watkins v. Potts, 122 So. 416, 219 Ala. 427, 65 A.L.R. 1097.

94. Minn.—Ruud v. Hendrickson, 222 N.W. 904, 176 Minn. 138.
22 C.J. p 923 note 11.

95. U.S.—Western Assur. Co. v. J. H. Mohlman Co., N.Y., 83 F. 811, 28 C.C.A. 157, 40 L.R.A. 561, certiorari denied 18 S.Ct. 949, 168 U.S. 710, 42 L.Ed. 1213.
22 C.J. p 924 note 13.

96. Ill.—North Chicago Rolling Mill Co. v. Monka, 107 Ill. 340, following Connecticut Mut. L. Ins. Co. v. Ellis, 89 Ill. 516.
22 C.J. p 924 note 14.

97. Ala.—Mobile & B. R. Co. v. Ladd, 9 So. 169, 92 Ala. 287.
22 C.J. p 924 note 15.

98. N.Y.—Green v. Cornwell, 1 City Hall Rec. 11.
Wash.—Cherry Point Fish Co. v. Nelson, 66 P. 55, 25 Wash. 558.
"Tidal Bench Marks" along the coast of southern California and references therein to data which may be utilized in determining the mean or ordinary high tide are admissible.—Swarzwald v. Cooley, 103 P.2d 580, 39 Cal.App.2d 306.

99. N.Y.—Garwood v. New York Cent. & H. R. R. Co., 45 Hun 128.

1. Kan.—Atchison, T. & S. F. R. Co. v. Ryan, 64 P. 603, 62 Kan. 682.

missible,[2] but ordinary interest tables have been rejected.[3] An encyclopedia has been held inadmissible to show knowledge of certain classes of persons with respect to particular matters.[4]

Provision is sometimes made by statute for the admission of historical works, books of science and art, etc., when made by persons indifferent between the parties, as presumptive evidence of facts of general notoriety or interest,[5] but such statutes do not authorize the admission of medical treatises.[6]

§ 719. —— Mortality and Annuity Tables

Mortality and annuity tables are admissible in evidence to show the expectancy of human life.

Mortality and annuity tables are admissible in evidence to show the expectancy of human life,[7] although they are not, of course, see infra § 770, conclusive on the subject.

According to some authority, whether preliminary proof of the authenticity of mortality and annuity tables shall be required depends on whether the court desires evidence to satisfy itself.[8] Where such tables are shown to be of standard authority,[9] they may be received without any further proof of their authenticity and correctness,[10] as under such circumstances the court will, it is said, take judicial notice of their genuineness and authoritativeness.[11] A showing that the tables are used by

2. Ala.—Holley v. Coffee, 26 So. 239, 123 Ala. 406.

3. Iowa.—Grace v. Minneapolis & St. L. R. Co., 133 N.W. 672, 153 Iowa 418.
22 C.J. p 925 note 20.

4. Mass.—Whiton v. Albany City Ins. Co., 109 Mass. 24.
22 C.J. p 925 note 18.

5. Cal.—Gallagher v. Market St. R. Co., 6 P. 869, 67 Cal. 13, 51 Am.R. 680.
22 C.J. p 925 note 21.

6. Cal.—Gallagher v. Market St. R. Co., supra.
22 C.J. p 925 note 22.

7. U.S.—Southern Pac. Co. v. Klinge, C.C.A.Utah, 65 F.2d 85, certiorari denied Klinge v. Southern Pac. Co., 54 S.Ct. 72, 290 U.S. 657, 78 L.Ed. 569—United Verde Extension Mining Co. v. Littlejohn, C.C.A.Ariz., 279 F. 223—United Verde Extension Mining Co. v. Kaso, C.C.A. Ariz., 273 F. 369.
Ala.—Little Cahaba Coal Co. v. Arnold, 91 So. 586, 206 Ala. 598.
Cal.—Powers v. Sutherland Auto Stage Co., 213 P. 494, 190 Cal. 487—Newman v. Campbell, 73 P.2d 1265, 23 Cal.App.2d 639—Gotsch v. Market St. Ry., 265 P. 268, 89 Cal.App. 477.
Ga.—Atlantic Coast Line R. Co. v. Anderson, 133 S.E. 63, 35 Ga.App. 292.
Idaho.—Reinhold v. Spencer, 26 P.2d 796, 800, 53 Idaho 688, citing **Corpus Juris.**
Iowa.—Droullard v. Rudolph, 223 N.W. 100, 207 Iowa 367—Swegle v. Chicago, B. & Q. R. Co., 192 N.W. 894, 196 Iowa 413.
Ky.—Louisville & N. R. Co. v. Thompson's Adm'r, 288 S.W. 761, 217 Ky. 21.
Me.—Penley v. Teague & Harlow Co., 140 A. 374, 126 Me. 583.
Mich.—De Groot v. Winter, 251 N.W. 425, 265 Mich. 274—Garton v. Powers, 233 N.W. 373, 252 Mich. 442—Bullen v. Chicago & N. W. Ry. Co., 209 N.W. 124, 235 Mich. 240.
Miss.—Tucker v. Gurley, 176 So. 279, 179 Miss. 412.
Mo.—Willgues v. Pennsylvania R. Co., 298 S.W. 817, 318 Mo. 28—Morton v. Southwestern Telegraph & Telephone Co., 217 S.W. 831, 280 Mo. 360—Langan v. U. S. Life Ins. Co., App., 121 S.W.2d 268, transferred, see, 114 S.W.2d 984, and 130 S.W.2d 479, 344 Mo. 989, 123 A.L.R. 1409—Peters v. Kansas City Rys. Co., 224 S.W. 25, 204 Mo. App. 197—Stevens v. Kansas City Light & Power Co., 208 S.W. 630, 200 Mo.App. 651.
Mont.—Ralph v. MacMarr Stores, 62 P.2d 1285, 103 Mont. 421—McNair v. Berger, 15 P.2d 834, 92 Mont. 441—Cornell v. Great Northern Ry. Co., 187 P. 902, 57 Mont. 177.
Neb.—Litwiller v. Graff, 246 N.W. 922, 124 Neb. 460—Lyons v. Joseph, 246 N.W. 859, 124 Neb. 442.
Nev.—Smith v. Odd Fellows Bldg. Ass'n, 205 P. 796, 46 Nev. 48, 23 A.L.R. 38.
N.H.—Reed v. Boston & M. R. R., 119 A. 795, 80 N.H. 505.
N.J.—Hampton v. Pennsylvania R. Co., 179 A. 101, 115 N.J.Law 168—Auer v. Sinclair Refining Co., 137 A. 555, 103 N.J.Law 372, 54 A. L.R. 623—Dickerson v. Mutual Grocery Co., 124 A. 785, 100 N.J. Law 118.
N.M.—Van Sickle v. Keck, 81 P.2d 707, 42 N.M. 450.
N.Y.—Robbins v. Travelers' Ins. Co., 269 N.Y.S. 841, 151 Misc. 151, affirmed 272 N.Y.S. 551, 241 App.Div. 350—Lewis v. State, 183 N.Y.S. 653, 112 Misc. 667, reversed on other grounds 189 N.Y.S. 560, 197 App. Div. 712.
Okl.—Covington Coal Products Co. v. Stogner, 72 P.2d 491, 181 Okl. 35—Jacobsen v. Howard, 23 P.2d 185, 164 Okl. 88—Whitehead Coal & Mining Co. v. Winton, 230 P. 509, 107 Okl. 99.
Or.—Babcock v. Gray, 107 P.2d 846.
Pa.—Littman v. Bell Telephone Co. of Pennsylvania, 172 A. 687, 315 Pa. 370.
R.I.—Woodward v. Wilbur, 169 A. 486, 54 R.I. 60.
S.C.—Cook v. Atlantic Coast Line R. Co., 13 S.E.2d 1, 196 S.C. 230, 133 A.L.R. 1144.
S.D.—Knutsen v. Dilger, 253 N.W. 459, 62 S.D. 474.
Wash.—McGrady v. Brink, 81 P.2d 800, 195 Wash. 626—Borland v. Pacific Meat & Packing Co., 279 P. 94, 153 Wash. 14—Fisher v. City of Anacortes, 186 P. 271, 109 Wash. 191.
Wis.—Schaefer v. Rambo, 243 N.W. 204, 208 Wis. 421.
22 C.J. p 925 note 23.

Testimony

Admission of testimony of witness as to life expectancy from life expectancy tables was not improper where witness was called not as expert, but to produce recognized life expectancy table.—Mursky v. Brody, 181 A. 273, 13 N.J.Misc. 725.

8. Me.—Penley v. Teague & Harlow Co., 140 A. 374, 126 Me. 583.

Sufficiency of authentication is ordinarily for the trial court.—Reed v. Boston & M. R. R., 119 A. 795, 80 N.H. 505.

9. Mont.—McNair v. Berger, 15 P.2d 834, 92 Mont. 441.
N.J.—Dickerson v. Mutual Grocery Co., 124 A. 785, 100 N.J.Law 118.
Tex.—Galveston, H. & S. A. R. Co. v. Arispe, 17 S.W. 47, 81 Tex. 517.
Wash.—Roalsen v. Oregon Stevedoring Co., 267 P. 433, 147 Wash. 672.

10. Mont.—McNair v. Berger, 15 P. 2d 834, 92 Mont. 441.
N.J.—Dickerson v. Mutual Grocery Co., 124 A. 785, 100 N.J.Law 118.
Wash.—Roalsen v. Oregon Stevedoring Co., 267 P. 433, 147 Wash. 672.
22 C.J. p 926 note 26.

11. Mont.—McNair v. Berger, 15 P. 2d 834, 92 Mont. 441.
Wash.—Roalsen v. Oregon Stevedoring Co., 267 P. 433, 147 Wash. 672.
22 C.J. p 926 note 27.

reputable life insurance companies is sufficient to establish their status as standard authority.[12] Among tables which have been accepted and admitted as standard without proof of accuracy may be mentioned the Carlisle tables,[13] the American Experience table,[14] the Northampton tables,[15] the Wigglesworth tables,[16] and the Flatchcraft Insurance Manual.[17] Where the tables are not recognized as standard, extrinsic proof of their accuracy is necessary to authorize their reception.[18] It is not necessary that the tables should be printed in a volume by themselves, but where standard tables are printed in a work of general information, such as an encyclopedia,[19] a law book of general acceptance and authority,[20] a statute book,[21] or other book of a character appropriate to contain such tables,[22] the book may be admitted in evidence.

Relevancy of tables. Mortality and annuity tables, to be admissible, must be applicable to the facts of the particular case.[23] Such tables are competent if they show the life expectancy of persons of approximately the age of the person in question,[24] although they do not cover his exact age;[25] but tables which do not show the expectation at an age approximately that of the person in question should not be received.[26] That the jury may find other considerations which destroy the value of the tables does not render them inadmissible.[27] The fact that the tables make no reference to sex does not preclude their admission on the question of the life expectancy of a female.[28] It has been held that it is not necessary in order to admit such tables to prove that the person in question is in sound health,[29] nor are they rendered inadmissible by

12. N.J.—Graumann v. Ward, 147 A. 572, 7 N.J.Misc. 953.
Tex.—St. Louis, B. & M. Ry. Co. v. Davis, Civ.App., 262 S.W. 923.
22 C.J. p 926 note 28.

13. Mo.—Peters v. Kansas City Rys. Co., 224 S.W. 25, 204 Mo.App. 197.
Neb.—Mischo v. Von Dohren, 252 N.W. 830, 126 Neb. 164—Lyons v. Joseph, 246 N.W. 859, 124 Neb. 442—Mentz v. Omaha & C. B. St. Ry. Co., 170 N.W. 889, 103 Neb. 216, rehearing denied 173 N.W. 478, 103 Neb. 216—Wiley v. National Surety Co., 170 N.W. 349, 103 Neb. 68.
N.J.—Hampton v. Pennsylvania R. Co., 179 A. 101, 115 N.J.Law 168—Auer v. Sinclair Refining Co., 137 A. 555, 103 N.J.Law 372, 54 A.L.R. 623—Dickerson v. Mutual Grocery Co., 134 A. 785, 100 N.J.Law 118.
22 C.J. p 926 note 29.

14. U.S.—United Verde Extension Mining Co. v. Kaso, C.C.A.Ariz., 273 F. 369.
Ark.—Equitable Life Assur. Soc. of U. S. v. Pool, 71 S.W.2d 455, 189 Ark. 101.
Conn.—Jackiewicz v. United Illuminating Co., 138 A. 147, 106 Conn. 302.
Miss.—Tucker v. Gurley, 176 So. 279, 179 Miss. 412.
Mo.—Hohlstein v. St. Louis Roofing Co., 42 S.W.2d 573, 328 Mo. 899, transferred, see, App., 49 S.W.2d 226.
Mont.—McNair v. Berger, 15 P.2d 834, 92 Mont. 441.
Nev.—Smith v. Odd Fellows Bldg. Ass'n, 205 P. 796, 46 Nev. 48, 23 A.L.R. 38.
Okl.—Fife v. Adair, 47 P.2d 145, 173 Okl. 234—Jacobsen v. Howard, 23 P.2d 185, 164 Okl. 88.
Pa.—Littman v. Bell Telephone Co. of Pennsylvania, 172 A. 687, 315 Pa. 370.
Tex.—St. Louis, B. & M. Ry. Co. v. Davis, Civ.App., 262 S.W. 923.
Wis.—Schaefer v. Rambo, 243 N.W. 204, 208 Wis. 421.
22 C.J. p 926 note 30.
American Experience Tables of (Insured) Mortality see 41 C.J. p 216 note 65 [a].

15. Wis.—Peterson v. Oleson, 2 N.W. 94, 47 Wis. 122.
22 C.J. p 927 note 31.

16. Ill.—Winn v. Cleveland, C., C. & St. L. R. Co., 87 N.E. 954, 239 Ill. 132, affirming 143 Ill.App. 71.
22 C.J. p 927 note 32.

17. Tex.—Missouri, K. & T. R. Co. of Texas v. Ransom, 41 S.W. 826, 15 Tex.Civ.App. 689.

18. Tex.—Galveston, H. & S. A. R. Co. v. Arispe, 17 S.W. 47, 81 Tex. 517.
22 C.J. p 927 note 34.

19. Pa.—Littman v. Bell Telephone Co. of Pennsylvania, 172 A. 687, 315 Pa. 370.
22 C.J. p 927 note 35.

20. Me.—Penley v. Teague & Harlow Co., 140 A. 374, 126 Me. 583.
Nev.—Smith v. Odd Fellows Bldg. Ass'n, 205 P. 796, 46 Nev. 48, 23 A.L.R. 38.
N.H.—Reed v. Boston & M. R. R., 119 A. 795, 80 N.H. 505.
N.J.—Hendershot v. New York, S. & W. R. Co., 138 A. 206, 5 N.J. Misc. 727, affirmed 140 A. 919, 104 N.J.Law 436, certiorari denied New York, S. & W. R. Co. v. Hendershot, 48 S.Ct. 562, 277 U.S. 602, 72 L.Ed. 1009.
22 C.J. p 927 note 36.

Tables appearing in Corpus Juris, see 41 C.J. p 216 note 65 [a], have been held admissible.—Littman v. Bell Telephone Co. of Pennsylvania, 172 A. 687, 315 Pa. 370.

21. Nev.—Smith v. Odd Fellows Bldg. Ass'n, 205 P. 796, 46 Nev. 48, 23 A.L.R. 38.
22 C.J. p 927 note 37.

22. Pa.—Littman v. Bell Telephone Co. of Pennsylvania, 172 A. 687, 315 Pa. 370.
22 C.J. p 927 note 38.

Any standard work containing the tables are admissible to prove them.—Fasick v. Byerly, 200 A. 1, 331 Pa. 85.

State insurance department pamphlet
Wash.—Layton v. City of Yakima, 16 P.2d 449, 170 Wash. 332.

23. R.I.—Turner v. Maxon, 165 A. 372, 53 R.I. 164.
1 C.J. p 503 note 37.

Present value of money
A table not computing the present value of money in determining the present value of future income has been held inadmissible as inapplicable to the facts of a particular case.—Turner v. Maxon, 165 A. 372, 53 R.I. 164.

24. Iowa.—Pearl v. Omaha & St. L. R. Co., 88 N.W. 1078, 115 Iowa 535.

25. Tex.—Missouri, K. & T. R. Co. v. Hines, Civ.App., 40 S.W. 152.

26. Wis.—Decker v. McSorley, 86 N.W. 554, 111 Wis. 91.
22 C.J. p 927 note 41.

27. Wash.—Roalsen v. Oregon Stevedoring Co., 267 P. 433, 147 Wash. 672.

28. Iowa.—Croft v. Chicago, R. I. & P. R. Co., 109 N.W. 723, 134 Iowa 411.
22 C.J. p 927 note 42.

29. Cal.—Cusick v. Boyne, 82 P. 985, 1 Cal.App. 643.
Idaho.—Reinhold v. Spencer, 26 P.2d 796, 53 Idaho 688.
Ky.—Louisville & N. R. Co. v. Scott's Adm'r, 220 S.W. 1066, 188 Ky. 99.
Nev.—Smith v. Odd Fellows Bldg. Ass'n, 205 P. 796, 46 Nev. 48, 23 A.L.R. 38.
N.J.—Auer v. Sinclair Refining Co., 137 A. 555, 103 N.J.Law 372, 54 A.L.R. 623.

proof that such person is in ill health,[30] afflicted with disease,[31] is not an insurable risk,[32] or not insurable in some particular insurance company,[33] or is engaged in a hazardous employment,[34] although such a showing may, see infra § 770, impair their effect as evidence of life expectancy. There is, however, authority for the view that it is necessary for one who relies on a mortality table to prove the life expectancy of a person to show that such person belongs to the class of persons from which such tables are made, that is, persons of sound body and mind, having no physical defects or constitutional troubles, and of correct habits.[35]

Relevancy of life expectancy. Where the expectation of life is not relevant, mortality tables are of course not admissible.[36]

§ 720. —— Historical Works

Historical works of known character and accuracy may be admitted to prove historical facts of general and public notoriety.

Historical facts of general and public notoriety may be proved by reputation, and that reputation may be established by historical works of known character and accuracy;[37] but evidence of this sort is confined in a great measure to ancient facts which do not presuppose better evidence in existence, and where, from the nature of the transaction, the remoteness of the period, or the public and general reception of the facts, a just foundation is laid for general confidence,[38] and historical works have been held not admissible to prove particular facts or customs.[39] It has also been held that a statute providing for the admission of historical works does not render them admissible to prove the unwritten law of a foreign country.[40] The writings of a living author on recent historical subjects are not admissible,[41] and a local history has been excluded as evidence of the facts therein recited.[42]

§ 721. —— Dictionaries

Dictionaries may be resorted to as aids to the memory and understanding of the court.

While dictionaries are not of themselves evidence, they may be referred to as aids to the memory and understanding of the court,[43] and such a work has even been received in evidence.[44]

§ 722. —— Law Commentaries and Reports

a. Law commentaries
b. Law reports

a. Law Commentaries

Law commentaries of recognized authority are admissible.

Tex.—Sanders v. Universal Life & Accident Ins. Co., Civ.App., 74 S.W.2d 301, affirmed Universal Life & Accident Ins. Co. v. Sanders, 102 S.W.2d 405, 408, 129 Tex. 344, citing **Corpus Juris.**

30. Ark.—New York Life Ins. Co. v. Jacques, 64 S.W.2d 96, 188 Ark. 46.
Cal.—Groat v. Walkup Drayage & Warehouse Co., 58 P.2d 200, 14 Cal.App.2d 350.
Ky.—Louisville & N. R. Co. v. Scott's Adm'r, 220 S.W. 1066, 188 Ky. 99.
Neb.—Mentz v. Omaha & C. B. St. Ry. Co., 170 N.W. 889, 103 Neb. 216, rehearing denied 173 N.W. 478, 103 Neb. 216.
Wash.—Dixon v. Haynes, 262 P. 119, 146 Wash. 163, 55 A.L.R. 1218.
22 C.J. p 927 note 44.

31. Cal.—Scott v. Sheedy, 102 P.2d 575, 39 Cal.App.2d 96.
Nev.—Smith v. Odd Fellows Bldg. Ass'n, 205 P. 796, 46 Nev. 48, 23 A.L.R. 38.
Wash.—Dixon v. Haynes, 262 P. 119, 146 Wash. 163, 55 A.L.R. 1218.
22 C.J. p 927 note 45.

32. Tex.—Universal Life & Accident Ins. Co. v. Sanders, 102 S.W.2d 405, 129 Tex. 344, affirming Sanders v. Universal Life & Accident Ins. Co., Civ.App., 74 S.W.2d 301.
Wash.—Dixon v. Haynes, 262 P. 119, 146 Wash. 163, 55 A.L.R. 1218.

33. Va.—Culp v. Virginia R. Co., 87 S.E. 187, 77 W.Va. 125.

34. U.S.—United Verde Extension Mining Co. v. Koso, C.C.A.Ariz., 273 F. 369.
22 C.J. p 927 note 47.

35. Mich.—Fortner v. Koch, 261 N.W. 762, 272 Mich. 273.
Minn.—Butler v. Butler, 230 N.W. 575, 180 Minn. 134.
22 C.J. p 927 note 49.

In Mississippi

(1) Earlier authority adhered to the text rule.—Vicksburg R., Power & Mfg. Co. v. White, 34 So. 331, 82 Miss. 468.

(2) According to later authority, however, mortality tables are admissible on a showing that the person in question has been in good health and engaged in an occupation not extrahazardous nor such as is likely to impair health.—Tucker v. Gurley, 176 So. 279, 179 Miss. 412.

36. Mich.—Heagany v. National Union, 106 N.W. 700, 143 Mich. 186.
22 C.J. p 927 note 50.

Dower

Mortality tables are not admissible for the purpose of determining the value of an inchoate right of dower.—Reilly v. Cullinane, 287 F. 994, 53 App.D.C. 17.

Present worth of child

Pa.—Moore v. Leininger, 149 A. 662, 299 Pa. 380.

37. Cal.—Ames v. Empire Star Mines Co., 110 P.2d 13, prior opinion, App., 93 P.2d 635.
Me.—Piper v. Voorhees, 155 A. 556, 130 Me. 305.
Pa.—Laidley v. Rowe, 119 A. 474, 275 Pa. 389.
22 C.J. p 927 note 51.

38. U.S.—Morris v. Harmer's Heirs' Lessee, Ohio, 7 Pet. 554, 8 L.Ed. 781.

39. N.Y.—Roe v. Strong, 14 N.E. 294, 107 N.Y. 350.
22 C.J. p 928 note 53.

40. Or.—State v. Moy Looke, 7 Or. 54.

41. U.S.—Morris v. Harmer's Heirs' Lessee, Ohio, 7 Pet. 554, 8 L.Ed. 781.
22 C.J. p 928 note 55.

42. Pa.—Laidley v. Rowe, 119 A. 474, 275 Pa. 389.
22 C.J. p 928 note 56.

43. U.S.—Nix v. Hedden, N.Y., 13 S.Ct. 881, 149 U.S. 304, 37 L.Ed. 745.
22 C.J. p 928 note 57.

44. Iowa.—Banco de Sonora v. Bankers' Mut. Casualty Co., 95 N.W. 232.
22 C.J. p 928 note 58.

The works of commentators of recognized authority on domestic or foreign law are admissible,[45] and the courts must consult and obtain such aid as they can from the works of jurists and commentators on the subject of international law;[46] but these works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is.[47]

b. Law Reports

Law reports are admissible to prove the unwritten or common law.

The books of reports of cases adjudged in the courts of another state[48] or of a foreign country[49] are very generally held admissible as evidence of the unwritten or common law of the sister state or foreign country. In the same way the printed reports may be referred to as expositions of domestic law,[50] such reports being regarded, however, as secondary evidence only.[51]

§ 723. Statute Books

Admissibility of statute books is discussed in the C.J.S. title Statutes § 86, also 59 C.J. p 633 note 42–p 634 note 53.

§ 724. Market Quotations

Prices current and reports of the state of the market published in the newspapers or otherwise in general circulation and relied on by the commercial world are, as noted in § 181 supra, held admissible on an issue as to value.

§ 725. Live Stock Registers

Live stock registers may be introduced to prove certain matters.

Records published by authority of a recognized trotting association, if accepted and acted on by persons conversant with racing matters as authentic and official, have been held admissible for the purpose of showing the speed of a horse and that of others to which he is related;[52] and, under statute, a printed copy of a herd book in which cattle are registered has been held admissible if it is shown to be a standard authority recognized by cattle breeders, it being regarded as an historical work of a particular subject,[53] but a private catalogue of an individual is not admissible as a book of pedigree to show the history of an animal owned by him,[54] nor can entries in a book entitled the Year Book, purporting to give the age of race horses, be admitted where it did not appear that the book was published by authority of a recognized association acted on by persons conversant with such matters as authentic and official, but the evidence tended to show that it was compiled from mere statements not under oath made by persons interested.[55]

§ 726. Newspapers

Newspapers are not as a rule admissible to establish facts although they may be admitted to show knowledge and for other particular purposes.

While newspapers may be admissible in evidence to impute to a party knowledge of a fact,[56] or to prove current market prices, see supra § 183, a newspaper account is merely hearsay evidence of

45. U.S.—The Pawashick, D.C. Mass., 19 F.Cas.No.10,851, 2 Lowell 142.
22 C.J. p 928 note 59.

46. U.S.—Hilton v. Guyot, N.Y., 16 S.Ct. 139, 159 U.S. 113, 40 L.Ed. 95.

47. U.S.—The Paquete Habana, Fla., 20 S.Ct. 290, 175 U.S. 677, 44 L.Ed. 320.

48. Ala.—Smith v. Blinn, 127 So. 155, 221 Ala. 24.
N.J.—Tradesmen's Nat. Bank & Trust Co. v. Cummings Bros. Co., 157 A. 386, 9 N.J.Misc. 1333.
N.C.—Howard v. Howard, 158 S.E. 101, 200 N.C. 574.
22 C.J. p 928 note 62.

Law or facts

(1) The opinion of an appellate court as contained in a printed volume of law reports was not admissible to establish facts stated therein.—Western Union Tel. Co. v. Bradford, 113 S.W. 686, 52 Tex.Civ.App. 392.

(2) An excerpt from a reporter's statement of facts in the report of a case decided in another state is inadmissible to establish a fact recited therein.—Virginia & West Virginia Coal Co. v. Charles, D.C.Va., 251 F. 83.

(3) The decisions of the highest court of a sister state are, however, admissible to prove that a court of such state has general jurisdiction of a certain class of cases.—Howey v. Howey, Mo., 240 S.W. 450, certiorari denied 43 S.Ct. 92, 260 U.S. 730, 67 L.Ed. 485.

National Reporter System

The decisions of the courts of a sister state may be proved by the National Reporter System.
Fla.—Madison v. Robinson, 116 So. 31, 95 Fla. 321.
S.C.—Columbia Weighing Mach. Co. v. Rhem, 162 S.E. 427, 164 S.C. 376.

49. Mo.—Charlotte v. Chouteau, 33 Mo. 194—Marguerite v. Chouteau, 3 Mo. 540.

50. U.S.—Mackay v. Easton, Mo., 19 Wall 619, 22 L.Ed. 211, affirming 16 F.Cas.No.8,843, 2 Dill. 41.

51. **Secondary evidence only**
Ind.—Donellan v. Hardy, 57 Ind. 393.
22 C.J. p 929 note 65 [a].

52. Ohio.—Pittsburgh, C., C. & St. L. R. Co. v. Sheppard, 46 N.E. 61, 56 Ohio St. 68, 60 Am.S.R. 732.

53. Iowa.—Warrick v. Reinhard, 111 N.W. 983, 136 Iowa 27.
22 C.J. p 929 note 69.

54. Ky.—Louisville & N. R. Co. v. Frazee, 71 S.W. 437, 24 Ky.L. 1273.
22 C.J. p 929 note 70.
Proof of pedigree of animals generally see supra § 185.

55. N.C.—Bucham v. King, 108 S.E. 635, 182 N.C. 171.

56. Mass.—Com. v. Robinson, 1 Gray 555.
22 C.J. p 929 note 71.

the facts stated, and is not generally admissible in evidence to prove such facts,[57] and the same rule ordinarily applies to newspaper advertisements and notices.[58] Newspaper advertisements have, however, been held admissible for certain purposes.[59]

8. Other Private Records or Documents

§ 727. Church Registers and Certificates

Church registers and certificates are usually regarded as competent evidence of the facts which they recite.

Church registers and certificates kept or issued by a clergyman or other proper officer, such as registers of birth, marriages, or deaths, are regarded as competent evidence of the facts properly recited therein.[60] So baptismal registers or certificates are admissible to show the fact, and the date and place, of baptism,[61] but not to prove other facts, for example, the date, place, or birth of the child,[62] except, of course, that it was born before the baptism,[63] the age of the child,[64] or that it was baptized as the lawful child of the parents,[65] when these facts are in issue. Church baptismal records may, under certain circumstances, be admissible as evidence of the age of a person.[66] A certificate of fact made by a clerk of a religious organization has been held inadmissible.[67] Where births are required to be recorded, a birth certificate issued by a clergyman may be excluded.[68]

Census and membership record. Church census records may be admitted as evidence of the facts which they recite.[69] A church card record of membership has, however, been rejected.[70]

§ 728. Hospital Records

Hospital records are generally, but not invariably held to be inadmissible in absence of statute. Under specific rules relating to entries in the regular course of business, to records of particular classes of hospitals, or to records required by law to be kept, hospital records may, however, be admissible.

In the absence of statute, hospital records are

57. Ky.—Haralambo's Ex'r v. Christopher, 21 S.W.2d 983, 231 Ky. 550.
Tex.—Schaff v. Bourland, Civ.App., 266 S.W. 843.
Wash.—State v. Low, 74 P.2d 458, 460, 192 Wash. 631, quoting **Corpus Juris.**
22 C.J. p 929 note 73.

58. Wash.—State v. Low, supra, quoting **Corpus Juris.**
22 C.J. p 929 note 74.

59. Ind.—Wright v. Haley, 194 N.E. 637, 208 Ind. 46.
Fixing time of sale
A newspaper advertisement referring to a certain stock of merchandise has been held admissible to fix the time of the sale of such stock in violation of Bulk Sales Law.—Wright v. Haley, supra.
Preliminary proof
In action by automobile dealer for conversion of automobiles which had been properly repossessed by finance company, newspaper advertisement of automobiles for sale were improperly admitted, in absence of foundation showing that advertisement was inserted by finance company or its agents.—Lindsey v. Commercial Discount Co., 55 P.2d 896, 12 Cal.App.2d 345.

60. U.S.—U. S. v. Tod, C.C.A.N.Y., 296 F. 345.
Cal.—In re Bell's Estate, 243 P. 423, 198 Cal. 32.
Del.—Hall v. Hall, 161 A. 149, 5 W.W.Harr. 173.
Mich.—Livernash v. De Lorme, 175 N.W. 177, 208 Mich. 295.
Mo.—Arnold v. Brotherhood of Locomotive Firemen and Enginemen, 101 S.W.2d 729, 231 Mo.App. 508.
R.I.—Borda v. Borda, 117 A. 362, 44 R.I. 337.
22 C.J. p 901 note 11.
Foreign records
Pa.—In re McLaughlin's Estate, 29 Del.Co. 478.
22 C.J. p 901 note 11 [f].

61. U.S.—U. S. v. Tod, C.C.A.N.Y., 296 F. 345.
Cal.—In re Bell's Estate, 243 P. 423, 198 Cal. 32.
Ill.—Dailey v. Grand Lodge, Brotherhood of Railroad Trainmen, 142 N.E. 478, 311 Ill. 184—Foulkes v. Chicago Title & Trust Co., 283 Ill. App. 142.
Tex.—Bailey v. Fly, 80 S.W. 675, 35 Tex.Civ.App. 410.
22 C.J. p 901 note 12.

62. U.S.—U. S. v. Bukis, D.C.Pa., 17 F.Supp. 77.
Ill.—Dailey v. Grand Lodge, Brotherhood of Railroad Trainmen, 142 N.E. 478, 311 Ill. 184.
Tex.—Bailey v. Fly, 80 S.W. 675, 35 Tex.Civ.App. 410.
22 C.J. p 902 note 13.

63. U.S.—U. S. v. Tod, C.C.A.N.Y., 296 F. 345.
Ill.—Dailey v. Grand Lodge, Brotherhood of Railroad Trainmen, 142 N.E. 478, 311 Ill. 184—Foulkes v. Chicago Title & Trust Co., 283 Ill.App. 142.
22 C.J. p 902 note 13.

64. Tex.—Baldwin v. Salgado, Civ. App., 135 S.W. 608.

65. U.S.—Blackburn v. Crawfords, Md., 3 Wall. 175, 18 L.Ed. 186.

66. **Where age is set forth** in the record it has been held admissible on the question of age.—Dillon v. E. Heller & Bros., 122 A. 595, 99 N.J. Law 68.
Where there is other evidence tending to fix the age of the child at the time of baptism, the date of baptism, as proved by the entry, may be material and competent.—Whitcher v. McLaughlin, 115 Mass. 167.

67. Mass.—Oakes v. Hill, 14 Pick. 442.
Mich.—Tessmann v. Supreme Commandery U. F., 61 N.W. 261, 103 Mich. 185.

68. Puerto Rico.—Ex p. Carreras, 7 Puerto Rico 151.

69. Kan.—In re Doyle's Estate, 103 P.2d 52, 152 Kan. 23.
Additions
That a clergyman having custody of such census records subsequent to the time they are taken makes certain additions thereto may not render them incompetent.—In re Doyle's Estate, supra.

70. N.Y.—In re Fischer's Estate, 271 N.Y.S. 101, 151 Misc. 74, affirmed 277 N.Y.S. 939, 243 App. Div. 685.
Notation of change of address
N.Y.—In re Fischer's estate, supra.

as a rule,[71] although not invariably,[72] held not admissible as evidence of the facts stated therein, the rule excluding such records being particularly applicable where it does not appear that they are made or kept in accordance with any requirement of law[73] and where proof of their accuracy and authenticity is lacking.[74]

Entries in regular course of business. According to some authorities, and sometimes under statutes relating to entries or records made in the regular course of business, hospital records kept in the regular course of business are, on the laying of a proper foundation for their reception, admissible,[75] although there exists authority to the effect that in the absence of a statute extending "the shop-book rule" hospital records are not admissible as entries in the regular course of business.[76] Under authorities recognizing the liberal rule of admissibility, in order that hospital records may be admissible in evidence there must be compliance with statutes under which they are sought to be introduced;[77] it must appear that entries were made in the ordinary course of business by persons whose duty it is to make them;[78] they must be made contemporaneously with the facts to which

71. Ark.—Bankers' Reserve Life Co. v. Harper, 64 S.W.2d 327, 188 Ark. 81.
Cal.—Heiman v. Market St. Ry. Co., 69 P.2d 178, 180, 21 Cal.App.2d 311, citing **Corpus Juris.**
Conn.—Chernov v. Blakeslee, 111 A. 908, 95 Conn. 617—Jordan v. Apter, 105 A. 620, 93 Conn. 302.
Ga.—Bankers Health & Life Ins. Co. v. Kelsey, 5 S.E.2d 600, 60 Ga.App. 893—Metropolitan Life Ins. Co. v. Mapp, 142 S.E. 564, 38 Ga.App. 30.
Ill.—Flynn v. Troesch, 26 N.E.2d 91, 373 Ill. 275—Western Electric Co. v. Industrial Commission, 181 N. E. 638, 349 Ill. 139—Wright v. Upson, 135 N.E. 209, 303 Ill. 120—Plewe v. Chicago Motor Coach Co., 283 Ill.App. 57.
Ky.—Consolidated Coach Corporation v. Garmon, 26 S.W.2d 20, 233 Ky. 464.
La.—Lepine v. First Nat. Life Ins. Co., App., 184 So. 376.
Mich.—In re Sachs' Estate, 236 N.W. 805, 254 Mich. 358, citing **Corpus Juris**—Job v. Grand Trunk Western Ry. Co., 222 N.W. 723, 727, 245 Mich. 353, citing **Corpus Juris.**
Mo.—Kirkpatrick v. American Creosoting Co., 37 S.W.2d 996, 1003, 225 Mo.App. 774, citing **Corpus Juris.**
N.Y.—Vitarella v. Cantasano Bros., 218 N.Y.S. 927, 218 App.Div. 806—Sauer v. Weidel, 218 N.Y.S. 888, 218 App.Div. 805.
Ohio.—Netzel v. Todd, 165 N.E. 47, 30 Ohio App. 300—Brower v. Silverman, 16 Ohio App. 236.
Pa.—Norvidas v. Metropolitan Life Ins. Co., 6 Sch.Reg. 292.
Tenn.—Hill v. National Life & Accident Ins. Co., Inc., 11 Tenn.App. 33, 38, quoting **Corpus Juris.**
Tex.—Great American Indemnity Co. v. Dabney, Civ.App., 120 S.W.2d 496, 498, quoting **Corpus Juris**—Dallas Coffee & Tea Co. v. Williams, Civ.App., 45 S.W.2d 724, 730, quoting **Corpus Juris.**
22 C.J. p 902 note 17—1 C.J. p 501 note 97.

"Bedside notes" have been held inadmissible under the text rule.—St. Louis v. Boston & M. R. R., 145 A. 263, 83 N.H. 538—22 C.J. p 902 note 17 [a].

Narrative
N.Y.—In re Barney's Will, 174 N.Y. S. 242, 185 App.Div. 782.
Records of hospitals as public records see supra § 638.

72. Ill.—Boss v. Illinois Cent. R. Co., 221 Ill.App. 504.
La.—Lado v. First Nat. Life Ins. Co., 162 So. 579, 182 La. 726, affirming, App., 158 So. 872.
Md.—Langenfelder v. Jones, 13 A.2d 623, 178 Md. 421, motion denied 15 A.2d 422, 178 Md. 421.
Minn.—Schmidt v. Riemenschneider, 265 N.W. 816, 196 Minn. 612—Lund v. Olson, 234 N.W. 310, 182 Minn. 204, 75 A.L.R. 371.
Mo.—Wright v. John Hancock Mut. Life Ins. Co. of Boston, App., 153 S.W.2d 747.
Ohio.—Mutschman v. Petry, 189 N.E. 658, 46 Ohio App. 525.
22 C.J. p 902 note 18.

73. Conn.—Jordan v. Apter, 105 A. 620, 93 Conn. 302.

74. Conn.—Jordan v. Apter, supra.
Ill.—Plewe v. Chicago Motor Coach Co., 283 Ill.App. 57.
N.J.—Sullivan v. Coast Cities Coaches, 19 A.2d 442, 126 N.J.Law 300.
N.Y.—Dougherty v. Kalbach, 175 N. Y.S. 837.
Ohio.—Netzel v. Todd, 165 N.E. 47, 30 Ohio App. 300.
22 C.J. p 902 note 17 [b].

75. Conn.—Borucki v. MacKenzie Bros. Co., 3 A.2d 224, 125 Conn. 92.
Md.—Wickman v. Bohle, 196 A. 326, 173 Md. 694.
Mich.—Gile v. Hudnutt, 272 N.W. 706, 279 Mich. 358.
Neb.—Willis v. Order of Railroad Telegraphers, 296 N.W. 443.
N.H.—Williams v. Williams, 182 A. 172, 87 N.H. 430.
N.J.—Opdyke v. Halbach, 7 A.2d 635, 123 N.J.Law 123.
N.Y.—Meiselman v. Crown Heights Hospital, 34 N.E.2d 367, 285 N.Y. 389, reversing 20 N.Y.S.2d 174, 259 App.Div. 840, appeal denied 20 N.Y.S.2d 669, 259 App.Div. 916—Budka v. City of Schenectady, 12 N.Y.S.2d 603, 256 App.Div. 764.
Ohio.—Kellogg v. Industrial Commission of Ohio, 19 N.E.2d 511, 60 Ohio App. 22.
Pa.—Freedman v. Mutual Life Ins. Co. of New York, 21 A.2d 81—Evans v. Penn Mut. Life Ins. Co. of Philadelphia, 186 A. 133, 322 Pa. 547—Loder v. Metropolitan Life Ins. Co., 193 A. 403, 128 Pa.Super. 155.
R.I.—Conlon v. John Hancock Mut. Life Ins. Co., 183 A. 850, 56 R.I. 88.
Tex.—Houston Life Ins. Co. v. Dabbs, Civ.App., 95 S.W.2d 484, modified on other grounds 125 S. W.2d 1041, 132 Tex. 566.

Basis of admissibility
(1) Hospital records are admitted under the text rule on the same basis as books of account.—Kimber v. Kimber, 148 N.E. 293, 317 Ill. 561.
(2) Book entries in regular course of business generally see supra §§ 683–691.

76. Utah.—Clayton v. Metropolitan Life Ins. Co., 85 P.2d 819, 96 Utah 331, 120 A.L.R. 1117.

77. Cal.—Lusardi v. Prukop, 2 P.2d 870, 116 Cal.App. 506.
Conn.—Weller v. Fish Transport Co., 192 A. 317, 123 Conn. 49.
Fla.—Florida Power & Light Co. v. Bridgeman, 182 So. 911, 133 Fla. 195.
Mich.—Sadjak v. Parker-Wolverine Co., 274 N.W. 719, 281 Mich. 84.
N.Y.—Cottrell v. Prudential Ins. Co. of America, 23 N.Y.S.2d 335, 260 App.Div. 986—In re O'Grady's Estate, 3 N.Y.S.2d 778, 254 App.Div. 691—Geroeami v. Fancy Fruit & Produce Corporation, 291 N.Y.S. 837, 249 App.Div. 221—Stone v. Goodman, 271 N.Y.S. 500, 241 App. Div. 290.

78. Mich.—Metropolitan Life Ins. Co. v. Dabudka, 204 N.W. 771, 232 Mich. 36.
N.Y.—Geroeami v. Fancy Fruit & Produce Corporation, 291 N.Y.S. 837, 249 App.Div. 221.
Utah.—Clayton v. Metropolitan Life

they relate or within such time thereafter as to be part of the transaction;[79] must refer to matters which the persons making the entries have the duty to record;[80] and must be duly authenticated.[81] According to one line of cases recognizing the admissibility of hospital records as entries in regular course of business, in order that such records shall be admissible it is essential that they satisfy three probative requirements: (1) They must be made contemporaneously with the acts to which they purport to relate. (2) There must have been present at the time no contemplative motive for falsification. (3) They must have been made by a person having knowledge of the facts set forth or one competent to predicate a medical and scientific opinion on the facts.[82] According to some authorities, in order that hospital records may be admissible there must exist a necessity for admitting such records without requiring the persons making them to testify.[83]

Where hospital records are admissible as entries in the regular course of business, while not admissible for all purposes or as proof of all facts set forth,[84] they have been held admissible for the purpose of showing the fact of hospitalization and hospital treatment and the date of the patient's entry and discharge[85] and to show the age of a patient.[86]

Particular classes of hospitals. Under statute the records, when properly identified, of certain classes of hospitals, such as those receiving public support or charitable hospitals, may be admissible in evidence.[87] Records of hospitals not shown to be

Ins. Co., 85 P.2d 819, 96 Utah 331, 120 A.L.R. 1117.

79. R.I.—Ribas v. Revere Rubber Co., 91 A. 58, 37 R.I. 189.

80. N.H.—Williams v. Williams, 182 A. 172, 87 N.H. 430.

81. Ill.—Kimber v. Kimber, 148 N. E. 293, 317 Ill. 561—Wright v. Upson, 135 N.E. 209, 303 Ill. 120—Branch v. Woulfe, 21 N.E.2d 148, 300 Ill.App. 472.

Okl.—Massachusetts Bonding & Insurance Co. v. Jones, 94 P.2d 885, 185 Okl. 551.

Pa.—McGine v. State Mut. Ben. Soc., 189 A. 889, 124 Pa.Super. 602.

Questions for court

Questions as to the sufficiency of authentication are in the first instance for the trial court.—Williams v. Williams, 182 A. 172, 87 N.H. 430.

By one of two nurses

Where only one of the two nurses who made the entries in the record had testified with reference thereto, it was error to admit the entire record.—Wright v. Upson, 135 N.E. 209, 303 Ill. 120.

82. Pa.—Freedman v. Mutual Life Ins. Co. of New York, 21 A.2d 81—Paxos v. Jarka Corporation, 171 A. 468, 314 Pa. 148—Leed v. State Workmen's Ins. Fund, 194 A. 689, 128 Pa.Super. 572—Loder v. Metropolitan Life Ins. Co., 193 A. 403, 128 Pa.Super. 155.

Expert

(1) To satisfy the third and primary probative element specified in the text the person must be such an expert in the field as to be capable of drawing a sound conclusion concerning a condition not visible but reflected circumstantially by the existence of other visible and known symptoms.—Paxos v. Jarka Corporation, 171 A. 468, 314 Pa. 148.

(2) That interne who made hospital records was not a qualified physician did not render records inadmissible where testimony showed that records were made under immediate supervision of resident physician in charge who examined patient and checked report as recorded by interne.—Loder v. Metropolitan Life Ins. Co., 193 A. 403, 128 Pa.Super. 155.

(3) Particular hospital records have been held inadmissible for failure to satisfy the third requirement mentioned.—Paxos v. Jarka Corporation, supra—Leed v. State Workmen's Ins. Fund, 194 A. 689, 128 Pa. Super. 572.

83. Tenn.—Hill v. National Life & Accident Ins. Co., Inc., 11 Tenn. App. 33.

Reliance

Before hospital records may be admitted under the text rule it must appear that it is necessary to rely on such records as distinguished from the testimony of the physician who treated the patient.—Paxos v. Jarka Corporation, 171 A. 468, 314 Pa. 148.

Summary of hospital record

In personal injury action, exclusion of summary of hospital record containing statement as to plaintiff's condition was not improper where summary was composed by board of physicians, none of whom was called as a witness.—Wiedow v. Carpenter, 34 N.E.2d 83, 310 Ill.App. 342.

84. Pa.—McGine v. State Mut. Ben. Soc., 189 A. 889, 124 Pa.Super. 602.

Unexplained notation

A statute making certain records admissible in evidence has been held not to authorize the admission of a hospital record bearing an unexplained notation, "Man promised to pay hospital bill."—Petterson v. Lake, 26 N.E.2d 763, 136 Ohio St. 481.

85. N.Y.—Sommer v. Guardian Life Ins. Co. of America, 300 N.Y.S. 938, 253 App.Div. 763—Palmer v. John Hancock Mut. Life Ins. Co. of Boston, Mass., 270 N.Y.S. 10, 150 Misc. 669.

Pa.—Evans v. Penn Mut. Life Ins. Co. of Philadelphia, 186 A. 133, 322 Pa. 547—Loder v. Metropolitan Life Ins. Co., 193 A. 403, 128 Pa. Super. 155.

86. Ohio.—Pickering v. Peskind, 183 N.E. 301, 43 Ohio App. 401.

87. La.—Harrison v. Joseph Rathbone Lumber Co., 132 So. 797, 16 La.App. 207.

Mass.—McGaffigan v. Kennedy, 18 N. E.2d 344, 302 Mass. 12.

Classification

(1) Whether a particular institution is of the class contemplated by the statute is a preliminary question of fact for the trial judge.—McGaffigan v. Kennedy, supra.

(2) A hospital supported by receipts from patients but treating charity patients without charge is within the class contemplated.—McGaffigan v. Kennedy, supra.

(3) Under certain circumstances the records of a dispensary may be admissible as those of a hospital under the statute.—Burke v. John Hancock Mut. Life Ins. Co., 195 N.E. 507, 290 Mass. 299.

Treatment and medical history

(1) Records admissible under the statute referred to in the text are competent evidence of hospital treatment and medical history of the patient when those matters are in issue.—Burke v. John Hancock Mut. Life Ins. Co., 195 N.E. 507, 290 Mass. 299—Blosck's Case, 179 N.E. 223, 277 Mass. 451—Unterberg v. Boston Elevated Ry. Co., 164 N.E. 478, 266 Mass. 10—Raymond v. Flint, 114 N.E. 811, 225 Mass. 521.

(2) Thus a hospital record including a notation as to the odor of al-

within contemplation of such statute are, however, inadmissible thereunder,[88] as are records not in compliance with the requirements of such statute.[89]

Records required by law to be kept. According to some authority, when required by law to be kept hospital records so kept may be admissible when properly identified[90] and provided they do not violate the rule making communications between a patient and his physician privileged.[91]

§ 729. Hotel Registers

The admissibility of hotel registers has been both affirmed and denied.

Hotel registers, when properly identified, have been held to be admissible in evidence,[92] as, for instance, to show where a person was on a particular day,[93] although there is authority for the view that an entry on a hotel register is not admissible,[94] particularly in the absence of proof that entries in such register were regularly made and correctly kept.[95] At any rate, it is essential that the authenticity of such registers be established before they may be received in evidence.[96]

§ 730. Maps, Diagrams, Etc.

a. In general
b. Requirements as to accuracy and authenticity

a. In General

Maps, diagrams, etc., may, on the laying of a proper foundation, be received in evidence as legitimate aids to the court and jury.

It is a common practice in the courts to receive private or unofficial maps, diagrams, or sketches, for the purpose of giving a representation of objects and places which generally cannot otherwise be as conveniently shown or described by witnesses, and when proved to be correct or offered in connection with the testimony of a witness they are admissible as legitimate aids to the court or jury.[97]

cohol on the breath of a patient when admitted is admissible.—Clark v. Beacon Oil Co., 170 N.E. 836, 271 Mass. 27—Leonard v. Boston Elevated Ry. Co., 125 N.E. 593, 234 Mass. 480.

(3) Report of radiologist's findings on X-ray photographs has also been held admissible as record of hospital treatment and medical history.—Whipple v. Grandchamp, 158 N.E. 270, 261 Mass. 40, 57 A.L.R. 974.

(4) A particular entry of hospital record has, however, been held properly excluded as having no bearing on treatment or medical history of case.—Glass v. Metropolitan Life Ins. Co., 154 N.E. 563, 258 Mass. 127.

88. La.—Lepine v. First Nat. Life Ins. Co., App., 184 So. 376.

Mass.—Karpowicz v. Manasas, 176 N.E. 497, 275 Mass. 413.

Supervision by doctor

Doctor's testimony that hospital records were made under his supervision did not render competent records of hospital not shown to be of a class whose records are admissible under the statute.—Karpowicz v. Manasas, 176 N.E. 497, 275 Mass. 413.

89. La.—Sampson v. Life & Casualty Ins. Co. of Tennessee, App., 175 So. 148.

Connection with insured

In action on life policy, hospital records showing treatment of patient having same name as insured have been held inadmissible as not properly connected with insured.—Dolan v. Metropolitan Life Ins. Co., 123 So. 379, 11 La.App. 276.

Records not properly authenticated

La.—Sampson v. Life & Casualty Ins. Co. of Tennessee, App., 175 So. 148—Charity Hospital of Louisiana v. Fornea, 132 So. 663, 15 La.App. 638.

90. U.S.—Brown v. Maryland Casualty Co., C.C.A.Mo., 55 F.2d 159.

Mo.—Kirkpatrick v. Wells, 6 S.W.2d 591, 319 Mo. 1040—Allen v. American Life & Accident Ins. Co., App., 119 S.W.2d 450—Collins v. Leahy, App., 102 S.W.2d 801—White v. American Life & Accident Ins. Co. of St. Louis, App., 90 S.W.2d 118—Allen v. American Life & Accident Ins. Co., App., 83 S.W.2d 192—Smith v. Missouri Ins. Co., App., 60 S.W.2d 730—Mack v. Western & Southern Life Ins. Co., App., 53 S.W.2d 1108—Shaw v. American Ins. Union, App., 33 S.W.2d 1052.

Basis of admissibility

Recitals in hospital records pertaining to personal and statistical particulars relative to patients, which statute requires hospital to record, are admissible under the text rule, not as admissions against interest, being at most mere hearsay evidence of admissions, but are admitted into evidence under an exception to the hearsay rule.—Allen v. American Life & Accident Ins. Co., Mo.App., 119 S.W.2d 450.

91. Mo.—Vermillion v. Prudential Ins. Co. of America, 93 S.W.2d 45, 230 Mo.App. 993.

Privilege waived

Mo.—Galli v. Wells, 239 S.W. 894, 209 Mo.App. 460.

Privilege not waived

Mo.—Key v. Cosmopolitan Life, Health & Accident Ins. Co., App., 102 S.W.2d 797.

92. Iowa.—Ritter v. City of Ft. Madison, 234 N.W. 814, 212 Iowa 564.

Mo.—U. S. Water & Steam Supply Co. v. Jacobia, 137 S.W. 906, 156 Mo.App. 597.

N.J.—Simone v. Frobisher, 152 A. 669, 9 N.J.Misc. 30.

Tex.—Latham v. State, 172 S.W. 797, 75 Tex.Cr. 575.

93. Ill.—James v. Conklin, 158 Ill. App. 640.

94. Tex.—Sloan v. Sloan, Civ.App., 32 S.W.2d 513.

22 C.J. p 902 note 24.

95. Tex.—Sloan v. Sloan, supra.

96. Okl.—Hartshorn v. Hartshorn, 168 P. 822, 67 Okl. 45.

22 C.J. p 931 note 2.

97. U.S.—Hewitt v. U. S., C.C.A. Mo., 110 F.2d 1, 8, citing **Corpus Juris**—Bost v. U. S., C.C.A.Cal., 103 F.2d 717, 722, citing **Corpus Juris**—Feather River Lumber Co. v. U. S., C.C.A.Cal., 30 F.2d 642, affirming, D.C., U. S. v. Feather River Lumber Co., 23 F.2d 936.

Ala.—Harrison v. Mobile Light & Railroad Co., 171 So. 742, 233 Ala. 393—Williams v. Oates, 102 So. 712, 212 Ala. 396—City of Birmingham v. Kircus, 99 So. 780, 19 Ala. App. 614.

Ark.—Mississippi River Fuel Corporation v. Senn, 43 S.W.2d 255, 184 Ark. 554—Ault v. McGaughey, 292 S.W. 359, 173 Ark. 322.

Cal.—Silvey v. Harm, 8 P.2d 570, 574, 120 Cal.App. 561, citing **Corpus Juris**.

Ga.—Burns v. Tootle, 142 S.E. 861, 166 Ga. 226.

Idaho.—Gerber v. Wheeler, 115 P. 2d 100—Kleinschmidt v. Scribner, 30 P.2d 362, 367, 54 Idaho 185, citing **Corpus Juris**.

Ill.—Central Illinois Public Service Co. v. Deterding, 162 N.E. 865, 331 Ill. 277.

Minn.—Kies v. Warrick, 182 N.W. 998, 999, 149 Minn. 177, citing **Corpus Juris**.

For example, in personal injury cases, maps or diagrams of the scene of the accident are very generally admitted when shown to be accurate;[98] likewise, maps and diagrams of the scene of the occurrence are admissible in actions for death,[99] and the same is true in controversies with respect to real property, where it is desired to show the condition and situation of the premises,[1] or the location of a building.[2] A diagram of the location of wounds, authenticated by a physician's testimony, has been held admissible.[3]

A map or diagram may be admitted for use in connection with the testimony of a witness, to enable him to explain matters as to which he testifies, although it would not be admissible as independent evidence.[4]

Whether or not it is proper to admit maps, diagrams, or the like in any particular case is a question resting in the discretion of the trial court.[5] They may be properly excluded where they are ir-

Miss.—Gulf Research Development Co. v. Linder, 170 So. 646, 648, 177 Miss. 123, citing **Corpus Juris.**
N.C.—McKay v. Bullard, 14 S.E.2d 657, 219 N.C. 589.
Ohio.—Kalovsky v. Meyer Dairy Products Co., 164 N.E. 370, 30 Ohio App. 118—H. Belmar Co. v. Newton Tea & Spice Co., 14 Ohio App. 200.
Okl.—Provident Life & Accident Ins. Co. of Chattanooga, Tenn., v. Everett, 61 P.2d 679, 177 Okl. 588—Prairie Oil & Gas Co. v. Laskey, 46 P.2d 484, 485, 173 Okl. 48, quoting **Corpus Juris**—Stallaby v. Gallagher, 268 P. 303, 307, 131 Okl. 242, quoting **Corpus Juris.**
Or.—Babcock v. Gray, 107 P.2d 846, 850, citing **Corpus Juris.**
Pa.—Stafford v. New York Cent. R. Co., 80 Pa.Super. 408.
Tex.—Capitol Hotel Co. v. Rittenberry, Civ.App., 41 S.W.2d 697, error dismissed—Blair v. Astin, Civ. App., 10 S.W.2d 1054, error refused—U. S. Torpedo Co. v. Liner, Civ.App., 300 S.W. 641, reversed on other grounds Liner v. U. S. Torpedo Co., Com.App., 12 S.W.2d 552, and affirmed, Com.App., 16 S. W.2d 519.
Va.—Clinchfield Coal Corporation v. Hayter, 108 S.E. 854, 130 Va. 711.
Wash.—Norton v. Anderson, 2 P.2d 266, 164 Wash. 55.
22 C.J. p 910 note 15.

Assessment map

Conn.—City of New London v. Pequot Point Beach Co., 152 A. 136, 112 Conn. 340.

Blueprints

Ky.—City of Harlan v. Eversole, 58 S.W.2d 371, 248 Ky. 131.
N.D.—Andrieux v. Kaeding, 181 N. W. 59, 47 N.D. 17.
Pa.—Auch v. Susquehanna Pipe Line Co., 45 Dauph.Co. 120.
22 C.J. p 910 note 15 [a].

Mining maps

U.S.—Grant v. Pilgrim, C.C.A.Alaska, 95 F.2d 562—Standard Oil Co. v. Watts, C.C.A.Ill., 17 F.2d 981.

Filing

(1) Map need not be filed in any public office of record to be admissible.—Osterweil v. City of Newark, 182 A. 917, 116 N.J.Law 227.

(2) At any rate, the lack of a filing mark indorsed on a map does not preclude its admission into evidence under the text rule, where such map has apparently been filed with the proper officer.—Dunford v. Dardanelle & R. R. Co., 287 S.W. 170, 171 Ark. 1036.

(3) Recording as requisite to admissibility of private or unofficial writings generally see supra § 680.

98. Cal.—Smith v. Aggola, 81 P.2d 997, 27 Cal.App.2d 750.
Colo.—Small v. Clark, 263 P. 933, 83 Colo. 211.
Conn.—Hageman v. Freeburg, 162 A. 21, 115 Conn. 469—Hall v. Sera, 152 A. 148, 112 Conn. 291.
D.C.—District of Columbia v. Chessin, 61 F.2d 523, 61 App.D.C. 260.
Hawaii.—Kimura v. Honolulu Rapid Transit & Land Co., 29 Hawaii 240.
Ill.—Chapin v. Foege, 15 N.E.2d 943, 296 Ill.App. 96—Curtin v. Mann, 258 Ill.App. 419.
Kan.—Hamilton v. Harrison, 268 P. 119, 126 Kan. 188.
Ohio.—Kalovsky v. Meyer Dairy Products Co., 164 N.E. 370, 30 Ohio App. 118.
Or.—Walling v. Van Pelt, 285 P. 262, 132 Or. 243.
Tex.—Jackson-Strickland Transp. Co. v. Seyler, Civ.App., 123 S.W.2d 928, error dismissed by agreement.
22 C.J. p 911 note 16.

99. Ala.—Alabama Power Co. v. Talmadge, 93 So. 548, 207 Ala. 86, error dismissed 42 S.Ct. 463, 259 U.S. 575, 66 L.Ed. 1071.
Fla.—Atlantic Peninsular Holding Co. v. Oenbrink, 182 So. 812, 133 Fla. 325.
Okl.—Provident Life & Accident Ins. Co. of Chattanooga, Tenn., v. Everett, 61 P.2d 679, 177 Okl. 588.
Or.—Babcock v. Gray, 107 P.2d 846.
W.Va.—Collar v. McMullin, 148 S.E. 496, 107 W.Va. 440—Jeffries v. Ashcraft, 141 S.E. 14, 104 W.Va. 636.

1. Ala.—Williams v. Oates, 102 So. 712, 212 Ala. 396.
Ark.—Keith v. Drainage Dist. No. 7 of Poinsett County, 36 S.W.2d 59, 183 Ark. 384.
Cal.—Kearney Inv. Co. v. Golden Gate Ferry Co., 246 P. 322, 198 Cal. 560.
Conn.—Dawson v. Davis, 5 A.2d 703, 125 Conn. 330—City of New London v. Pequot Point Beach Co., 152 A. 136, 112 Conn. 340.
Ga.—Wardlaw v. Wardlaw, 1 S.E.2d 24, 187 Ga. 467—Brookman v. Rennolds, 98 S.E. 543, 148 Ga. 721.
Idaho.—Hawley v. Romney, 247 P. 1069, 42 Idaho 645.
Me.—Stutz v. Martin, 167 A. 861, 132 Me. 126.
Mass.—Hews v. Troiani, 179 N.E. 622, 278 Mass. 224.
Miss.—Harrison v. Taylor, 121 So. 131, 153 Miss. 576.
N.J.—Osterweil v. City of Newark, 182 A. 917, 116 N.J.Law 227.
Tex.—City of Dallas v. McMurray, Civ.App., 282 S.W. 296—Goodman v. Republic Inv. Co., Civ.App., 215 S.W. 466, dismissed for want of jurisdiction.
22 C.J. p 911 note 17.

2. Ala.—Wilson Bros. v. Mobile & O. R. Co., 92 So. 246, 207 Ala. 171.
N.Y.—Bodine v. Andrews, 62 N.Y.S. 385, 47 App.Div. 495.

3. Ark.—Hankins v. State, 145 S.W. 524, 103 Ark. 28.

4. Ala.—Hill v. Johnson, 106 So. 814, 214 Ala. 194.
Ariz.—Young Mines Co. v. Blackburn, 196 P. 167, 22 Ariz. 199.
Mo.—Collins v. Leahy, App., 102 S.W. 2d 801, 808, citing **Corpus Juris.**
W.Va.—State v. Sibert, 169 S.E. 410, 412, 113 W.Va. 717, citing **Corpus Juris**—Wiseman v. Terry, 163 S. E. 425, 111 W.Va. 620.
22 C.J. p 913 note 31.

5. Ala.—Harrison v. Mobile Light & Railroad Co., 171 So. 742, 750, 233 Ala. 393, citing **Corpus Juris.**
Cal.—Silvey v. Harm, 8 P.2d 570, 574, 120 Cal.App. 561, quoting **Corpus Juris.**
Conn.—Hall v. Sera, 152 A. 148, 112 Conn. 291—Pratt, Read & Co. v. New York, N. H. & H. R. Co., 130 A. 102, 102 Conn. 735, reargument denied 131 A. 395, 103 Conn. 508—Bisnovich v. British American Assur. Co., 123 A. 339, 100 Conn. 240.
Ill.—Moore v. Jansen & Schaefer, 265 Ill.App. 459.
Ohio.—Kalovsky v. Meyer Dairy Products Co., 164 N.E. 370, 30 Ohio App. 118.
Okl.—Prairie Oil & Gas Co. v. Laskey, 46 P.2d 484, 485, 173 Okl. 48, quoting **Corpus Juris.**

relevant or immaterial to the matter in issue;[6] where the oral description of the witness is plain and no necessity for explanation or illustration appears,[7] or where, in the opinion of the court, they would mislead the jury.[8]

A map, diagram, or a like instrument having marks or written memoranda thereon which may be taken by the jury as evidence should not be admitted,[9] this being particularly so as regards documents bearing marks and figures having no relevancy to the facts of the case being tried.[10] The mere fact that a plat bears objectionable memoranda may not, however, require its exclusion;[11] and where diagrams and plats, offered in evidence, contain matter not proper to go to the jury they may be received after such objectionable matter has been expunged.[12] Moreover, a plat from which objectionable marking has been stricken by court order may be admissible in connection with the testimony of the maker.[13] Inscriptions on a drawing made to bring it into uniformity with the observations of persons other than the person who prepared the drawing may not render it inadmissible.[14]

b. Requirements as to Accuracy and Authenticity

Maps, diagrams, etc., to be admissible in evidence must be accurate; authentication may also be required.

While the map, diagram, or sketch must be accurate in order to warrant its admission,[15] that is to say, the paper must correctly represent the situation as it existed at the time under consideration,[16] the requirement as to accuracy does not ex-

Or.—Babcock v. Gray, 107 P.2d 846.
Vt.—Woodcock's Adm'r v. Hallock, 127 A. 380, 98 Vt. 284.
22 C.J. p 913 note 28.

6. Conn.—Bishop v. City of Meriden, 159 A. 289, 114 Conn. 483—Johnson v. Charles William Palomba Co., 157 A. 902, 114 Conn. 108, 80 A.L.R. 441.
Nev.—Gray v. Coykendall, 6 P.2d 442, 53 Nev. 466.
22 C.J. p 910 note 15 [h].

Subdivision maps

In condemnation proceedings, maps showing how the land in question might be subdivided into building lots have been held to be inadmissible.
Cal.—People v. Olsen, 293 P. 645, 109 Cal.App. 523.
N.J.—In re Proceedings to Acquire Lands, etc., for Public Park, 150 A. 387, 107 N.J.Law 110.

7. Ill.—Smith v. Chicago Sanitary Dist., 108 N.E. 254, 260 Ill. 453.

8. Pa.—Hagen v. Carr, 48 A. 688, 198 Pa. 606.
22 C.J. p 767 note 21 [a].

9. Va.—Franklin & P. Ry. Co. v. Shoemaker's Committee, 159 S.E. 100, 156 Va. 619.
22 C.J. p 913 note 30.

10. Cal.—Martin v. Leatham, 71 P.2d 336, 22 Cal.App.2d 442.

Map used on another trial

A map of premises which had been used on trial of another action and bore numerous marks and figures placed thereon at such trial which were not relevant to facts in instant case, was not admissible.—Martin v. Leatham, supra.

11. Iowa.—Lee v. Farmers' Mut. Hail Ins. Ass'n of Iowa, 241 N.W. 403, 214 Iowa 932.

12. Ill.—Central Illinois Public Service Co. v. Deterding, 162 N.E. 865, 331 Ill. 277.

13. Mich.—Close v. Ann Arbor R. Co., 135 N.W. 346, 169 Mich. 392.
22 C.J. p 913 note 31 [a].

14. Ill.—Shellabarger v. Nattier, 7 N.E.2d 365, 289 Ill.App. 473.

Distances

Fact that distance marked on freehand drawing showing location of automobiles immediately after accident, made by witness who observed accident, was changed to meet observation of another person, has been held not to destroy admissibility of such drawing.—Shellabarger v. Nattier, supra.

15. Ala.—J. H. Burton & Sons Co. v. May, 103 So. 46, 212 Ala. 435.
Conn.—Simon v. Nelson, 170 A. 796, 118 Conn. 154.
Fla.—Hardee v. Horton, 108 So. 189, 90 Fla. 452, certiorari denied Horton v. Hardee, 47 S.Ct. 107, 273 U.S. 714, 71 L.Ed. 854.
Ga.—Burns v. Tootle, 142 S.E. 861, 166 Ga. 226.
Ill.—De May v. Brew, 29 N.E.2d 114, 306 Ill. 505—Burns v. Salyers, 270 Ill.App. 46—Moore v. Jansen & Schaefer, 265 Ill.App. 459—Town of Pleasant Hill v. Stark, 214 Ill. App. 169.
Md.—Jarvis v. Town of Berlin, 138 A. 7, 153 Md. 156.
Mass.—Iris v. Town of Hingham, 22 N.E.2d 13, 303 Mass. 401.
Ohio.—Czerwinski v. Edgar T. Ward Sons Co., 154 N.E. 361, 23 Ohio App. 304.
Tex.—Atlantic Refining Co. v. Gulf Land Co., Civ.App., 122 S.W.2d 197, affirmed Gulf Land Co. v. Atlantic Refining Co., 131 S.W.2d 73, 134 Tex. 59.
22 C.J. p 912 note 20.

Duty of counsel

Counsel having burden of proof should prepare dependable plat, where necessary to the proper understanding of the case. Accordingly, where a plat is received "subject to correction," as requested by such counsel, he cannot thereafter, on failure to make correction, assert that such plat be disregarded for inaccuracy.—Spencer v. Mankato Mill Works Co., 231 N.W. 202, 180 Minn. 509.

Question for jury

It is a question for the jury whether a diagram is correct.—Jones v. State, 61 So. 434, 181 Ala. 63.

16. Ala.—Gillespie v. Woodward Iron Co., 96 So. 595, 209 Ala. 458.
Conn.—Simon v. Nelson, 170 A. 796, 118 Conn. 154.
Ga.—Langan v. Hodges, 4 S.E.2d 489, 60 Ga.App. 567.

Larger area

(1) A map, otherwise relevant, is not inadmissible merely because it shows a larger area than was involved in the case at issue.—Stafford v. New York Cent. R. Co., 80 Pa. Super. 408.

(2) Map of larger tract than that involved in suit, which does not show lands involved were a part thereof, may, however, be properly excluded.—Borgstrom v. Bryan, 281 P. 432, 101 Cal.App. 164.

Objects as basis

In boundary dispute, admission of evidence contained in plat was proper, as against contention that plat was not based on natural or artificial objects but on conclusions and deductions of surveyor, where surveyor testified that he found evidences of natural objects witnessing original corner of survey.—Humble Oil & Refining Co. v. Owings, Tex. Civ.App., 128 S.W.2d 67.

Points of compass, when material, should be clearly indicated.—Hommes' Admr. v. Chesapeake & O. Ry. Co., 104 S.W.2d 431, 268 Ky. 203.

Time of making

(1) Particular maps, plats, and the like have been admitted into evidence as having been made with-

tend to strict mathematical accuracy,[17] substantial accuracy being sufficient;[18] and it has been held that a lack of accuracy goes merely to the weight and not to the admissibility of the evidence.[19] Under the rule that to be admissible maps, diagrams, and the like must be accurate, it is usually held that such accuracy must be made to appear,[20] although it has been held that the fact that no inaccuracy is pointed out may warrant admission of a map over objection that it is not an official or correct map or a correct copy.[21] It is usually held that it is not essential that the person making the map, diagram, or the like could testify to its correctness, but any person acquainted with the facts may do so,[22] but it has also been held that evidence based on knowledge of one other than the

in such time as to meet the requirements of the text rule.
Ohio.—H. Belmer Co. v. Newton Tea & Spice Co., 14 Ohio App. 200.
Tex.—Jackson-Strickland Transp. Co. v. Seyler, Civ.App., 123 S.W.2d 928, error dismissed by agreement.

(2) Other such papers have been held inadmissible for failure to meet such requirements.
U.S.—United Verde Extension Mining Co. v. Jordan, C.C.A.Ariz., 14 F.2d 304, affirming, D.C., Jordan v. United Verde Copper Co., 9 F. 2d 144, affirmed, C.C.A., United Verde Copper Co. v. Jordan, 14 F.2d 299, certiorari denied 47 S.Ct. 243, 273 U.S. 734, 71 L.Ed. 865.
Conn.—Johnson v. Charles William Palomba Co., 157 A. 902, 114 Conn. 108, 80 A.L.R. 441.
22 C.J. p 911 note 17 [b].

Variance from certificate

The admission, on the assessment of damages for the vacation of land for a road, of a surveyor's plat, prepared in attempted compliance with statute, has been held inadmissible where the terminals of the plat were different from those in the commissioners' certificate.—Town of Pleasant Hill v. Stark, 214 Ill.App. 169.

17. Ala.—Harrison v. Mobile Light & Railroad Co., 171 So. 742, 750, 233 Ala. 393, citing **Corpus Juris.**
Ill.—Shellaberger v. Nattier, 7 N.E. 2d 365, 289 Ill.App. 473.
N.C.—Kepley v. Kirk, 132 S.E. 788, 191 N.C. 690.
22 C.J. p 912 note 21.

Illustrative purpose; proportion and scale

(1) Maps and diagrams used merely to illustrate the testimony of a witness are not subject to such strict proof of accuracy as those offered as independent evidence.
Ariz.—Young Mines Co. v. Blackburn, 196 P. 167, 22 Ariz. 199.
Wash.—Deitchler v. Ball, 170 P. 123, 99 Wash. 483.

(2) When used for illustrative purposes, it is enough that such papers be sufficiently correct to enable the court and jury to understand better the statements of the witness.—Young Mines Co. v. Blackburn, supra.

(3) The mere fact that an object, such as a water main, shown on a map is out of proportion to other objects shown does not require rejection of such map.—Pennsylvania R. Co. v. Lincoln Trust Co., 167 N.E. 721, 91 Ind.App. 28, rehearing denied Pennsylvania R. Co. of Ft. Wayne v. Lincoln Trust Co., 120 N.E. 92, 91 Ind.App. 28.

(4) Nor does the fact that a map is not drawn to scale require exclusion, particularly where the jury is made aware of the fact that such map is not accurate and it is admitted for mere purpose of illustrating the testimony of witnesses.
Tex.—Sims v. Ford, Civ.App., 209 S.W. 699.
Wash.—Ingersoll v. Olwell, 220 P. 775, 127 Wash. 276.

(5) That vertical and horizontal distances are represented on different scales has been held not to effect the admissibility of a map.—Franklin v. Engel, 76 P. 84, 34 Wash. 480.

(6) There exists, however, authority to a contrary effect.—White v. Wilmington City R. Co., 63 A. 931, 22 Del. 105.

18. Ala.—Hill v. Johnson, 106 So. 814, 214 Ala. 194.
Ill.—Leonard v. Leonard, 17 N.E.2d 553, 369 Ill. 572.
Mo.—State ex rel. State Highway Commission v. Bailey, 115 S.W.2d 17, 234 Mo.App. 168.
Okl.—Provident Life & Accident Ins. Co. of Chattanooga, Tenn., v. Everett, 61 P.2d 679, 177 Okl. 588.

19. Iowa.—Bean v. Bickley, 174 N. W. 675, 187 Iowa 689.
N.M.—Territory v. Price, 91 P. 733, 14 N.M. 262.
N.C.—Kepley v. Kirk, 132 S.E. 788, 191 N.C. 690.
Ohio.—H. Belmer Co. v. Newton Tea & Spice Co., 14 Ohio App. 200.

Map not drawn to scale

The fact that a map showing physical facts observed as regards scene of automobile accident was not drawn to scale and that distances were simply stepped off by witness went to the weight of the map and not to its admissibility.—Jackson-Strickland Transp. Co. v. Seyler, Tex.Civ.App., 123 S.W.2d 928, error dismissed by agreement.

Survey

The text rule has been applied to a survey where the surveyor in making it did not consider variations in the magnetic needle.—City of Hazard v. Calhoun, 35 S.W.2d 552, 237 Ky. 406.

20. Ala.—Gillespie v. Woodward Iron Co., 96 So. 595, 209 Ala. 458.
Conn.—Simon v. Nelson, 170 A. 796, 118 Conn. 154.
Ga.—Mickle v. Moore, 4 S.E.2d 217, 188 Ga. 444—Odum v. McArthur, 127 S.E. 848, 160 Ga. 281—Langran v. Hodges, 4 S.E.2d 489, 60 Ga.App. 567—Poland v. C. C. Osborne Lumber Co., 139 S.E. 734, 37 Ga.App. 212.
Md.—Jarvis v. Town of Berlin, 138 A. 7, 153 Md. 156.
Mont.—State v. Martin, 219 P. 632, 68 Mont. 392.
Ohio.—Czerwinski v. Edgar T. Ward Sons Co., 154 N.E. 361, 23 Ohio App. 304.
22 C.J. p 910 note 15 [g].

Correspondence of lines

In absence of direct testimony, lines cut on land from which timber was sold cannot be taken as same as lines on plat, so as to warrant admission of latter to show deficiency in acreage.—White v. Northup, 132 A. 258, 150 Md. 18.

Preliminary evidence

(1) To render such papers admissible, preliminary evidence should be given of correctness of representation.—Provident Life & Accident Ins. Co. of Chattanooga, Tenn., v. Everett, 61 P.2d 679, 177 Okl. 588—Missouri, K. & T. Ry. Co. v. Smith, 223 P. 373, 97 Okl. 152.

(2) Evidence that certain persons pointed out lines of tract is admissible so far as it goes as introduction to offer of surveyor's plat.—White v. Northup, 132 A. 258, 150 Md. 18.

21. Ga.—Sikes v. Mutual Ben. Life Ins. Co., 187 S.E. 61, 182 Ga. 858.

22. Ala.—Harrison v. Mobile Light & Railroad Co., 171 So. 742, 750, 233 Ala. 393, citing **Corpus Juris.**
Fla.—Bank of South Jacksonville v. Cammar, 103 So. 827, 89 Fla. 296.
Mo.—Hatton v. Henman, 10 S.W.2d 967, 222 Mo.App. 954.
Mont.—State v. Whitcomb, 22 P.2d 823, 94 Mont. 415.
N.M.—Farmers' Development Co. v. Rayado Land & Irrigation Co., 213 P. 202, 28 N.M. 357.
Va.—Clinchfield Coal Corporation v. Hayter, 108 S.E. 854, 130 Va. 711.
22 C.J. p 912 note 26.

maker is insufficient to meet requirements as to accuracy.[23]

There are cases to the effect that to be admissible in evidence maps, plats, and the like must be authenticated,[24] and that a map or diagram cannot be received as evidence per se independently of the testimony of a witness verifying or accompanying it,[25] unless the parties have assented to it as containing the truth,[26] or unless, in the case of a transfer of realty, the map is referred to in a deed for the description of the subject matter conveyed, or otherwise becomes a part of the deed.[27] Certain unauthenticated maps may be received for certain purposes.[28]

§ 731. Reports of Mercantile Agencies

Reports of mercantile agencies are not usually admissible against third persons, although there are cases wherein such reports have been admitted.

The commercial "ratings" or other facts reported by a commercial agency are not, usually, admissible in evidence against third persons who did not in any way participate in making or publishing the reports.[29] In particular cases, however, such reports have been admitted.[30]

§ 732. Miscellaneous

In addition to those private writings considered under specifically appropriate heads in preceding sections, rules of evidence governing admissibility have been applied to a great variety of other types of private documents.

In applying the general rule of admissibility stated supra § 676, among the private or unofficial documents which have, after the laying of a proper foundation, been admitted in evidence are: Advertising circulars;[31] assignments;[32] bills of ex-

Evidence of makers sufficient

(1) Testimony of the makers of maps, surveys, and plats as to their accuracy has been held sufficient to render them admissible in evidence.
Ga.—Reynolds v. Snellgrove, 124 S.E. 136, 158 Ga. 683.
Mich.—Merkel v. Consumers' Power Co., 189 N.W. 997, 220 Mich. 128.
Minn.—Kies v. Warrick, 182 N.W. 998, 149 Minn. 177.

(2) In view of such testimony the mere fact that such papers were not made as provided by court order does not render them inadmissible.—Reynolds v. Snellgrove, supra.

(3) Moreover, where the surveyor who made a plat testifies as to the correctness of the acreage shown, it is not necessary that his notes be put into evidence in order to render such plat admissible.—Kies v. Warrick, supra.

Map made under witness' supervision
Ky.—Rieke v. Kentucky Utilities Co., 22 S.W.2d 98, 231 Ky. 700.

Person participating in survey
Ga.—Lewis v. Carr, 171 S.E. 298, 177 Ga. 761.

23. Ga.—Mickle v. Moore, 4 S.E.2d 217, 188 Ga. 444.
22 C.J. p 912 note 27.

Plat
A plat, made by a civil engineer and purporting to represent land in controversy, was improper where only proof that plat was correct was testimony of a witness who, although testifying that plat was correct, stated that she had never been to one side of tract of land and did not know where land lines were.—Mickle v. Moore, supra.

24. Or.—Mansfield v. Southern Oregon Stages, 1 P.2d 591, 136 Or. 669, followed in Longden v. Southern Oregon Stages, 1 P.2d 596, 136 Or. 684.
Philippine.—Manila v. Cabangis, 10 Philippine 151, 6 Off.Gaz. 507.
Tex.—Maxcy v. Norsworthy, Civ. App., 19 S.W.2d 926.

Authentication held lacking or insufficient as regards:
(1) Drawing.—American Tri-Ergon Corporation v. Coe, D.C.D.C., 30 F. Supp. 83, reversed on other grounds Radtke Patents Corporation v. Coe, 122 F.2d 937.

(2) Maps and plats.
Ga.—Pierce v. Dennett, 136 S.E. 440, 163 Ga. 471.
Ill.—Atchison, T. & S. F. Ry. Co. v. Commerce Commission, 167 N.E. 831, 335 Ill. 624.
N.Y.—Klepper v. Seymour House Corporation of Ogdensburg, 209 N.Y.S. 67, 212 App.Div. 277.

(3) Survey.—Miller v. Halleran, 270 S.W. 427, 219 Mo.App. 195.

Maps held sufficiently authenticated
U.S.—St. Joseph Loan & Trust Co. v. Studebaker Corporation, C.C.A. Ind., 66 F.2d 151, certiorari denied 54 S.Ct. 209, 290 U.S. 699, 78 L.Ed. 601.

25. Conn.—Hurlburt v. Bussemey, 126 A. 273, 101 Conn. 406.
Ga.—Pierce v. Dennett, 136 S.E. 440, 163 Ga. 471.
Md.—White v. Northup, 132 A. 258, 150 Md. 18.
Mo.—Cullen v. Johnson, 29 S.W.2d 39, 325 Mo. 253.
Tex.—Tallabas v. Wing Chong, Civ. App., 72 S.W.2d 636—Maxcy v. Norsworthy, Civ.App., 19 S.W.2d 926, 928, quoting **Corpus Juris.**
22 C.J. p 912 note 23.

26. Miss.—Bernstein v. Angeletty, 88 So. 273, 125 Miss. 656.
22 C.J. p 912 note 24.

27. Ala.—Williams v. Oates, 102 So. 712, 212 Ala. 396.
Fla.—Bank of South Jacksonville v. Cammar, 103 So. 827, 89 Fla. 296.
22 C.J. p 912 note 25.

28. **Facts of history**
Map, produced from Maine Historical Society, has been held admissible without extrinsic evidence of authenticity to prove remote facts of general history.—Piper v. Voorhees, 155 A. 556, 130 Me. 305.

29. Mo.—Blake v. Meadows, 123 S.W. 868, 225 Mo. 1, 30 L.R.A.,N.S., 1.
22 C.J. p 902 note 26—40 C.J. p 641 note 70.

Quotation service sheets
In an action by buyer of securities against the seller for fraudulently representing their market value, quotation service sheets furnished by bureau rendering reports only to its broker subscribers are not admissible, under statute making admissible market reports appearing in newspapers or periodicals of general circulation.—Horgan v. Frenkel, Kovac & Co., 293 N.Y.S. 264, 161 Misc. 493.

30. Wis.—Merrill Nat. Bank v. Illinois & W. Lumber Co., 77 N.W. 185, 101 Wis. 247.
40 C.J. p 641 note 71 [a].

31. Kan.—Oliver Farm Equipment Sales Co. v. Rich, 42 P.2d 604, 141 Kan. 584.

32. Mo.—Dempsey v. McGinnis, App., 249 S.W. 662.
22 C.J. p 857 note 74.

From husband to wife
W.Va.—Hunter v. Strider, 23 S.E. 567, 41 W.Va. 321.
30 C.J. p 1023 note 12.

ceptions;[33] bills of lading;[34] bills of sale;[35] bonds;[36] checks;[37] contracts;[38] deeds[39] and other transfers;[40] diaries;[41] due bills or I. O. U.'s;[42] inventories;[43] invoices;[44] and, likewise, the documents

33. Mo.—Dempsey v. McGinnis, App., 249 S.W. 662.

34. U.S.—Copper River & N. W. R. Co. v. Reeder, Alaska, 211 F. 280, 127 C.C.A. 648.
Mo.—Krallman v. Illinois Cent. R. Co., 235 S.W. 830, 209 Mo.App. 286.
S.C.—W. T. Rawleigh Co. v. Thompson, 114 S.E. 702, 122 S.C. 43.

Marine insurance cases
U.S.—Blagg v. Phœnix Ins. Co., Pa., 3 F.Cas.No.1,477, 3 Wash.C.C. 5—Graham v. Pennsylvania Ins. Co., Pa., 10 F.Cas.No.5,674, 2 Wash.C.C. 113.

35. Ariz.—International Harvester Co. of America v. Davotvich, 24 P. 2d 375, 42 Ariz. 249.
Tex.—Werner v. Eubanks, Civ.App., 7 S.W.2d 128.
22 C.J. p 858 note 76.

36. Tex.—Levy v. Goldsoll, 131 S. W. 420, 62 Tex.Civ.App. 257.
22 C.J. p 858 note 77.

37. U.S.—Mittry Bros. Const. Co. v. U. S., for Use of Belmont, C.C.A. Idaho, 75 F.2d 79, affirming in part, D.C., U. S., for Use and Benefit of Belmont, v. Mittry Bros. Const. Co., 4 F.Supp. 216—Veneri v. Draper, C.C.A.W.Va., 22 F.2d 33, certiorari denied 48 S.Ct. 339, 276 U.S. 633, 634, 72 L.Ed. 742.
Ala.—McDonough v. Commercial State Bank, 73 So. 754, 15 Ala. App. 429.
Ga.—Keramidas v. Rusch, 199 S.E. 590, 58 Ga.App. 615—Gibson v. Gibson, 178 S.E. 181, 50 Ga.App. 345.
Ind.—Bankers' Surety Co. v. German Investment & Securities Co., 126 N.E. 6, 189 Ind. 311.
La.—Bland v. Paradice Colonization Co., App., 146 So. 778.
N.Y.—Roge v. Valentine, 7 N.Y.S.2d 958, 255 App.Div. 475, reargument denied 9 N.Y.S.2d 900, 256 App. Div. 817, reversed on other grounds 20 N.E.2d 751, 280 N.Y. 268, 695, 280 N.Y. 809.
22 C.J. p 858 note 78.

Failure to offer stubs in evidence in connection with checks does not render the checks inadmissible.—Shaffer v. Bond, 99 A. 973, 129 Md. 648.

Showing accounts to be paid
The mere fact that checks failed to show on their faces what accounts they were given to pay did not render them inadmissible, where they were identified by plaintiff as checks given by him in payment of items of the account sued on.—Keramidas v. Rusch, 199 S.E. 590, 58 Ga. App. 615.

38. Ariz.—Clark v. Adams, 5 P.2d 413, 39 Ariz. 257.
Cal.—Security Trust & Savings Bank v. Carrier, 290 P. 458, 107 Cal. App. 333.
Ga.—Oliver v. O'Kelley, 173 S.E. 232, 48 Ga.App. 762.
Mich.—Goldberg v. Cities Service Oil Co., 266 N.W. 321, 275 Mich. 199.
Minn.—Sittauer v. Alvin, 187 N.W. 611, 151 Minn. 508.
N.Y.—Wawrzonek v. Central Hudson Gas & Electric Corporation, 12 N. E.2d 525, 276 N.Y. 412, reversing 281 N.Y.S. 430, 245 App.Div. 830.
Ohio.—Guy v. Henry J. Spieker Co., 186 N.E. 835, 45 Ohio App. 178.
Tex.—Paschall v. Gulf, C. & S. F. Ry. Co., Civ.App., 100 S.W.2d 183, modified on other grounds Campbell v. Paschall, 121 S.W.2d 593, 132 Tex. 226.
Utah.—Ashton v. Skeen, 39 P.2d 1073, 85 Utah 489, rehearing denied 44 P.2d 688, 85 Utah 508.
22 C.J. p 858 note 79.

Conditional sales contracts
Minn.—Holland Furnace Co. v. Jefferson, 216 N.W. 795, 173 Minn. 121.
Mont.—Harvey E. Mack Co. v. Ryan, 261 P. 283, 80 Mont. 524—Doering v. Selby, 244 P. 485, 75 Mont. 416.

39. Ala.—Reichert v. Jerome H. Sheip, Inc., 131 So. 229, 222 Ala. 133—Gray v. Alabama Fuel & Iron Co., 113 So. 35, 216 Ala. 416—Wilson Bros. v. Mobile & O. R. Co., 92 So. 246, 207 Ala. 171.
Ark.—Harvell v. Matthews, 72 S.W. 2d 214, 189 Ark. 356.
Ga.—Mitchell v. Hunt, 196 S.E. 711, 185 Ga. 835—Richards v. Smith, 153 S.E. 44, 170 Ga. 398—Graham v. Brand, 148 S.E. 84, 168 Ga. 356.
Kan.—Reitz v. Cooper, 256 P. 813, 123 Kan. 755.
La.—Loper v. White, 1 La.App. 695.
Minn.—Lee v. Lee, 184 N.W. 954, 150 Minn. 526.
Mo.—Bedell v. Garton, App., 70 S.W. 2d 372.
Mont.—Murray v. Creese, 260 P. 1051, 80 Mont. 453.
N.H.—Tuftonboro v. Willard, 197 A. 404, 89 N.H. 253.
N.C.—Hodgin v. Town of Liberty, 161 S.E. 94, 201 N.C. 658.
Tex.—Castleman v. Goodwin, 246 S. W. 657, 112 Tex. 323—Fleming v. Atlas, Civ.App., 51 S.W.2d 632, error dismissed—McMullen v. Parker, Civ.App., 45 S.W.2d 1011—Cobb-Holman Lumber Co. v. Liechty, Civ.App., 30 S.W.2d 356, reversed on other grounds, Com. App., 41 S.W.2d 18—Burton v. McGuire, Civ.App., 3 S.W.2d 576, affirmed, Com.App., 41 S.W.2d 238—First Nat. Bank v. Rush, Civ.App., 227 S.W. 378, modified on other grounds, Com.App., 246 S.W. 349, motion granted 249 S.W. 183.
Va.—Hastings v. Bain, 145 S.E. 735, 151 Va. 976.
22 C.J. p 858 note 80.

Deed dated subsequent to time action commenced
Utah.—Tanner v. Provo Reservoir Co., 289 P. 151, 76 Utah 335.

Proposed deed
In an action to recover damages for breach of contract to exchange real estate, proposed deed, executed by plaintiff, although not containing terms required by the contract, is admissible to show plaintiff was ready, able, and willing to carry out such agreement.—Gray v. Greenblatt, 155 A. 707, 113 Conn. 535.

Sufficiency of description
Description of land in deed is sufficient to warrant its reception when sufficient to allow the introduction of aliunde evidence to identify such land.
Ga.—Burns v. Tootle, 142 S.E. 861, 166 Ga. 226.
Tex.—Dunn v. Taylor, Civ.App., 107 S.W. 952.

Superseded deed
In a suit to cancel deeds and other instruments, a superseded deed is admissible when constituting a circumstance bearing on the main issues in the case, and this is so notwithstanding such superseded deed bears no certificate or file marks and is not made the basis of any claim.—Colvard v. Goodwin, Tex.Civ. App., 24 S.W.2d 786, error dismissed.

40. Tex.—Mitchell v. Stanton, Civ. App., 139 S.W. 1033.
22 C.J. p 858 note 81.

41. Conn.—Duvall v. Birden, 198 A. 255, 124 Conn. 43.

42. N.Y.—Lefevre v. Silo, 98 N.Y.S. 321, 112 App.Div. 464.
Pa.—Stewart v. Cunningham Piano Co., 183 A. 347, 120 Pa.Super. 317.

43. Minn.—People's Finance Corporation v. Houck, 217 N.W. 505, 173 Minn. 443—Kregel v. Cirkler, 198 N.W. 664, 158 Minn. 175.
N.J.—Bowes v. Bowes, 146 A. 377, 104 N.J.Eq. 545.

44. U.S.—Straus v. Victor Talking Mach. Co., C.C.A.N.Y., 297 F. 791.
Ga.—Arkansas Fuel Oil Co. v. Andrews Point Co., 13 S.E.2d 738, 64 Ga.App. 595.
Ill.—Stresenreuter Bros. v. Bowes, 233 Ill.App. 143.
S.C.—W. T. Rawleigh Co. v. Thompson, 114 S.E. 702, 122 S.C. 43.

Marine insurance cases
U.S.—Blagg v. Phœnix Ins. Co., Pa., 3 F.Cas.No.1,477, 3 Wash.C.C. 5—Graham v. Pennsylvania Ins. Co.,

which have been admitted include leases;[45] marine protests;[46] marine surveys;[47] mortgages[48] and deeds of trust;[49] logging scales and scale bills;[50] powers of attorney;[51] promissory notes;[52] receipts;[53] records and reports by auditors, engineers, or physicians;[54] releases;[55] requisitions;[56] scale tickets;[57] statements of account;[58] tracings and specifications;[59] wills;[60] written orders from employees for payment of their wages to others;[61] and a variety of other documents.[62]

Pa., 10 F.Cas.No.5,674, 2 Wash.C.C. 113.

Lack of authentication

In buyer's suit against seller for overpayment, evidence of defendant's statements admitting mistake in rendered invoices, together with original draft, competent as admissions, although not authenticated by person making invoices.—Counts v. Quin, Tex.Civ.App., 9 S.W.2d 394.

45. Ga.—Real Estate Bank & Trust Co v. Baldwin Locomotive Works, 90 S.E. 49, 145 Ga. 831.

22 C.J. p 858 note 83.

46. U.S.—Nixon v. Long, Pa., 1 Dall. 6, 1 L.Ed. 13.

22 C.J. p 903 notes 34–38.

Marine insurance cases

U.S.—Richelieu & O. Nav. Co. v. Boston Marine Ins. Co., Mich., 10 S.Ct. 934, 136 U.S. 408, 34 L.Ed. 398.

38 C.J. p 1182 notes 59, 61, 63 [a] (1) (3), [b] (1).

47. **Marine insurance cases**

U.S.—Batchelder v. Insurance Co. of North America, D.C.Pa., 30 F. 459.

38 C.J. p 1182 notes 53, 57 [b].

48. Ga.—Faircloth v. Taylor, 95 S.E. 689, 147 Ga. 787.

22 C.J. p 858 note 84.

49. Tex.—First Nat. Bank v. Rush, Civ.App., 227 S.W. 378, modified on other grounds, Com.App., 246 S.W. 349, motion granted 249 S.W. 183—Levy v. Goldsoll, 131 S.W. 420, 62 Tex.Civ.App. 257.

50. Mich.—Welch v. Palmer, 48 N.W. 552, 85 Mich. 310.

38 C.J. p 201 notes 33–37, 39, 41.

51. Ga.—Flint River Lumber Co. v. Smith, 49 S.E. 745, 122 Ga. 5, 106 Am.S.R. 85.

Tex.—Mitchell v. Robinson, Civ.App., 136 S.W. 501.

52. N.D.—Halliday v. Stambaugh, 204 N.W. 869, 52 N.D. 925.

22 C.J. p 858 note 87.

53. Ill.—Equitable Life Assur. Soc. of U. S. v. Stilley, 271 Ill.App. 283.

La.—Zahn v. Ferraro, 134 So. 289, 17 La.App. 167.

Minn.—Garbisch v. American Ry. Express Co., 225 N.W. 432, 177 Minn. 494.

Pa.—Schwartz v. Perlstein & Co., 83 Pa.Super. 61.

Tex.—Vergara v. Buck, Civ.App., 246 S.W. 697.

Utah.—Van Dyke's Food Store v. Independent Coal & Coke Co., 34 P.2d 706, 84 Utah 95.

22 C.J. p 858 note 88.

"Borrowed and loan" receipt

Receipt, denominated "borrowed and loan" receipt by purchaser of automobile to insurer thereof, has been held admissible in an action by seller on notes of purchaser as payee to show that such seller is not seeking double damages.—Cadillac Automobile Co. v. Fisher, 158 A. 717, 52 R.I. 123.

Pawn tickets

Philippine.—Salonga v. Concepcion, 3 Philippine 563.

Receipted bills have been held admissible to show:

(1) Cost of repairs to automobiles.—Byalos v. Matheson, 159 N.E. 242, 328 Ill. 269, affirming 243 Ill. App. 60.

(2) Quantity of hay involved in a suit against a carrier for damages.—Cardwell v. Payne, 226 Ill.App. 227.

Warehouse receipts

Ga.—Atlantic Compress Co. v. Chambliss, 84 S.E. 155, 15 Ga.App. 747.

La.—Willard Storage Battery Co. v. Caddo Transfer & Warehouse Co., 107 So. 618, 160 La. 909.

Tex.—American Grocery Co. v. Union Sugar Co., Civ.App., 246 S.W. 418.

54. **Auditors' reports**

Miss.—Missouri Pac. Transp. Co. v. Beard, 176 So. 156, 178 Miss. 764.

Engineers' records and reports

N.D.—Andrieux v. Kaeding, 181 N.W. 59, 47 N.D. 17.

Tex.—Peyton Creek Irr. Dist. v. White, Civ.App., 230 S.W. 1060, error refused.

22 C.J. p 859 note 98.

Physician's reports

Kan.—Fricke v. Mutual Life Ins. Co. of New York, 106 P.2d 677, 152 Kan. 525.

Reports of mercantile agencies see supra § 731.

55. Del.—White v. Philadelphia, B. & W. R. Co., 103 A. 354, 7 Boyce 104.

Tex.—First Nat. Bank v. Rush, Civ. App., 227 S.W. 378, modified on other grounds, Com.App., 246 S.W. 349, motion granted 249 S.W. 183.

56. N.Y.—Phœnix Coal Co. v. Pennsylvania R. Co., 180 N.Y.S. 283, 190 App.Div. 665.

57. **Accuracy**

In action for value of grain delivered, admission in evidence of scale tickets relied on by plaintiff to establish quantity of grain was proper over objection that some one must vouch for correctness of the weights, where plaintiff testified that defendant had directed him to have the grain weighed at the particular scale.—Pine v. Bradley, 101 P.2d 799, 187 Okl. 126.

58. Ark.—Chicago, R. I. & P. R. Co. v. Burkholder, 195 S.W. 1073, 129 Ark. 316.

Conn.—Richmond v. City of Norwich, 115 A. 11, 96 Conn. 582.

Ill.—Schneider v. Neubert, 226 Ill. App. 84.

Ind.—Hooker v. C. R. Pease Const. Co., 127 N.E. 156, 73 Ind.App. 236.

Mo.—Quirk v. Metropolitan Street R. Co., 210 S.W. 106, 200 Mo.App. 593, certiorari quashed State ex rel. Metropolitan St. Ry. Co. v. Ellison, Sup., 224 S.W. 820.

Or.—Abraham v. Mack, 273 P. 711, 130 Or. 32, rehearing denied 278 P. 972, 130 Or. 32.

R.I.—James C. Goff Co. v. Lunn, 137 A. 879, 48 R.I. 416.

59. Mass.—Byam v. Carlisle-Aver Co., 172 N.E. 113, 272 Mass. 176.

Admissibility of maps, diagrams, etc., as representing particular matters see supra § 730.

60. Ga.—Maddox v. Rowe, 23 Ga. 431, 68 Am.D. 535.

22 C.J. p 858 note 91.

61. Ala.—Alabama Iron Co. v. Smith, 46 So. 475, 155 Ala. 287.

62. Tex.—First Nat. Bank v. Rush, Civ.App., 227 S.W. 378, modified on other grounds, Com.App., 246 S.W. 349, motion granted 249 S.W. 183.

Application for license

Minn.—Noetzelman v. Webb, 283 N.W. 481, 204 Minn. 26.

Bank deposit slips

U.S.—Kay v. Federal Rubber Co., C.C.A.Pa., 60 F.2d 454.

Wash.—People's Bank & Trust Co. v. Douglas, 282 P. 838, 154 Wash. 450.

Delivery tickets

Mich.—Stephens Lumber Co. v. Townsend-Stark Corporation, 199 N.W. 706, 228 Mich. 182, modified on other grounds 201 N.W. 213, 229 Mich. 159.

Mill return

In action on contract for sale of mixed metals providing for final settlement subject to mill grading of metals, return from mill was held admissible, where buyer positively stated return was received from mill and contents of return clearly showed return covered metals in question.—Gueringer v. M. Kaplan & Son, La.App., 157 So. 763.

On the other hand, among particular writings which have been excluded or held inadmissible as incompetent, irrelevant, immaterial, or insufficiently authenticated are: Bills of lading;[63] bills of sale;[64] certificates;[65] checks;[66] contracts;[67] deeds;[68] inventories;[69] invoices;[70] logging scales and scale bills;[71] marine protests;[72] marine surveys;[73] notices;[74] promissory notes;[75] receipts;[76] reports;[77] statements of account;[78] and a variety of other writings.[79]

Notice to sue
That signer of note giving payee statutory written notice to sue designated himself therein as "indorser," when under both pleading and evidence he was technical "surety," does not render such notice inadmissible.—Milam v. Lewis, 170 S.E. 404, 47 Ga.App. 376.

School district warrants
Mo.—Consolidated School Dist. No. 6 of Jackson County v. Shawhan, App., 273 S.W. 182.

Waybills
Miss.—Robertson v. Greenwood Lumber Co., 90 So. 487, 127 Miss. 973.

63. Iowa.—Coad v. Pennsylvania Ry. Co., 175 N.W. 344, 187 Iowa 1025.
Vt.—Enos v. Owens Slate Co., 160 A. 185, 104 Vt. 329.

Marine insurance cases
Me.—Paine v. Maine Mut. Marine Ins. Co., 69 Me. 568.
38 C.J. p 1182 notes 47, 48, 50, 51.

64. **Noncompliance with statute** requiring that bills of sale for secondhand motor vehicles be in duplicate may require exclusion of such bills when offered in evidence.—Goode v. Martinez, Tex.Civ.App., 237 S.W. 576.

65. **Assumption of insurance risk certificate**
Mo.—Green v. American Life & Accident Ins. Co., App., 93 S.W.2d 1119.

Certificate of protest
Ga.—Woods v. Mays, 84 S.E. 450, 143 Ga. 209.

Unloading certificate
An unloading certificate made out by a stockyards company, and furnished a witness, was improperly admitted in evidence where there was no testimony from anyone who had any connection with its making to show that it correctly stated the fact recited therein.—Panhandle & S. F. Ry. Co. v. Clarendon Grain Co., Tex.Civ.App., 215 S.W. 866.

66. Cal.—Vaughan v. People's Mortg. Co., 20 P.2d 335, 130 Cal. App. 632.
Del.—Miller v. Frick, 107 A. 394, 7 Boyce 374, affirming Frick v. Miller, 107 A. 391, 7 Boyce 366.

67. Cal.—Larimer v. Smith, 19 P.2d 825, 130 Cal.App. 98.

Undated and unsigned printed forms
N.Y.—Perfect Safety Scaffolding Co. v. Carlin, 144 N.Y.S. 455.

68. Ga.—Moore v. Thornton, 179 S. E. 720, 180 Ga. 533—Real Estate Operators v. McMahon, 155 S.E. 755, 171 Ga. 454—Cook v. Powell, 129 S.E. 546, 160 Ga. 831—Potts v. Wilson, 123 S.E. 294, 158 Ga. 316—South Georgia Trust Co. v. Crandall, 170 S.E. 333, 47 Ga.App. 328.
N.C.—Newbern v. Hinton, 129 S.E. 181, 190 N.C. 108.
Wash.—Stusser v. Gottstein, 35 P. 2d 5, 178 Wash. 360.

Deed executed while action pending
Ga.—Lee v. Pearson, 75 S.E. 1051, 138 Ga. 646.
22 C.J. p 858 note 80 [e].

Erroneous description of property constituting the subject matter of a deed has been held to require its exclusion.—Gray v. Haasze, 245 P. 24, 138 Wash. 604.

Mesne conveyances
Where a deed was properly excluded from evidence, there was no error in excluding mesne conveyances thereunder, where offered as muniments of title and not as color of title.—Aiken v. McMillan, 106 So. 150, 213 Ala. 494.

Sheriff's deed
(1) A sheriff's deed is inadmissible to show transfer of title when not accompanied by the execution or judgment on which it is founded. —Megahee v. Megahee, 85 S.E. 877, 143 Ga. 738.

(2) In absence of statutory requirement that sheriffs' deeds contain a recital of the authority under which they are executed, such recital is not admissible as evidence of such authority.—Richards v. Rule, Tex.Com.App., 207 S.W. 912—Watson v. Tamez, Tex.Civ.App., 136 S.W.2d 645.

69. U.S.—Briggs Mfg. Co. v. U. S., D.C.Conn., 30 F.2d 962, reversed on other grounds, C.C.A., U. S. v. Briggs Mfg. Co., 40 F.2d 425.
Fla.—Dixie Fire Ins. Co. v. Hillsborough Dry Goods Co., 81 So. 446, 77 Fla. 250.

70. Iowa.—Coad v. Pennsylvania Ry. Co., 175 N.W. 344, 187 Iowa 1025.
S.C.—W. T. Rawleigh Co. v. Thompson, 114 S.E. 702, 122 S.C. 43.

Marine insurance cases
Me.—Paine v. Maine Mut. Marine Ins. Co., 69 Me. 568.
38 C.J. p 1182 note 47.

71. Me.—Brannen v. Atlas Plywood Corporation, 153 A. 186, 130 Me. 15.
38 C.J. p 201 notes 33 [d], 38, 40.

Scale bill insufficiently authenticated
Me.—Brannen v. Atlas Plywood Corporation, 153 A. 186, 130 Me. 15.

72. Md.—Patterson v. Maryland Ins. Co., 3 Harr. & J. 71, 5 Am.D. 419.
22 C.J. p 903 note 33.

Marine insurance cases
U.S.—Ruan v. Gardner, Pa., 20 F. Cas.No.12,100, 1 Wash.C.C. 145.
38 C.J. p 1182 notes 62, 63 [a] (2), [b] (2).

73. **Marine insurance cases**
U.S.—Cort v. Delaware Ins. Co., Pa., 6 F.Cas.No.3,257, 2 Wash.C.C. 375.
38 C.J. p 1182 note 57.

74. **Notice of declaration of forfeiture**
Iowa.—Shippley v. Gremmels, 185 N. W. 922, 192 Iowa 801.

Requiring disclosure of information
Notice served by plaintiff's attorney on defendant motorist, requiring him to furnish information obtained at scene of automobile accident, is properly excluded.—Dickinson v. Lee, 246 N.W. 669, 188 Minn. 130.

75. Ga.—Harper v. Sutherland, 162 S.E. 412, 44 Ga.App. 594.

76. Cal.—Stevens v. Chisholm, 178 P. 128, 179 Cal. 557.
Iowa.—State v. Cordaro, 233 N.W. 51, 211 Iowa 224.
N.J.—Bonhard v. Gindin, 142 A. 52, 104 N.J.Law 599.

Mortgage interest receipt
Receipt stating mortgage was paid was not competent evidence to prove that property was unencumbered.—Tourtellotte v. Saulnier, 166 N.E. 879, 267 Mass. 361.

77. **Fruit packers' reports**
Unauthenticated fruit packers' reports as to the number of boxes of fruit packed have been excluded.—Peterson v. Mineral King Fruit Co., 74 P. 162, 140 Cal. 624.

Physician's reports
Mass.—Farren's Case, 195 N.E. 738, 290 Mass. 452—Clark v. Barringer, 173 N.E. 239, 273 Mass. 107.

78. Ill.—Anderson v. Mitchell, 253 Ill.App. 509.

79. **Estimate of damage to insured property**
Tex.—Fire Ass'n of Philadelphia v. Da Camara, Civ.App., 85 S.W.2d 338.

Rent record
N.J.—Simone v. Frobisher, 152 A. 669, 9 N.J.Misc. 30.

Repair bills
Conn.—Wofsey v. New York & S. Ry. Co., 138 A. 136, 106 Conn. 254.

Entries in regular course of business. In consonance with the modern tendency, because of the magnitude and complexity of modern business, to widen the door to the admissibility in evidence of books of business enterprises,[80] the courts under statutes extending the "shopbook rule", and sometimes without the aid of statute, favor, on the laying of a proper foundation, the admissibility of any writing, book, record, paper, or instrument made or kept in the regular course of business,[81] although there exists authority to the effect that, in the absence of statute, writings not admissible under "the shopbook rule" at common law must be excluded.[82] Under a statutory reënactment of the old so-called "shopbook rule," limited to matters involving the sale of goods or rendering of services and charges made therefor, the records of a physician relating to other matters are not admissible.[83]

Mo.—Mann v. Stewart Sand Co., 243 S.W. 406, 211 Mo.App. 256.

Sales slip

Pa.—Bee, Inc., v. Pizor, 178 A. 525, 117 Pa.Super. 598.

Statements of weights and grades

Statements of weights and grades of cotton have been held incompetent, in absence of testimony of parties who prepared them.—Rhodus v. Dukes, 122 S.E. 872, 128 S.C. 354.

Waybill

Wyo.—Shikany v. Salt Creek Transp. Co., 45 P.2d 645, 48 Wyo. 190.

80. Pa.—William Zoller Co. v. Hartford Fire Ins. Co., 116 A. 359, 272 Pa. 386.

81. U.S.—Ulm v. Moore-McCormack Lines, C.C.A.N.Y., 115 F.2d 492, rehearing denied 117 F.2d 222, and certiorari denied 61 S.Ct. 941, 313 U.S. 567, 85 L.Ed. 1525.

Conn.—Borucki v. MacKenzie Bros. Co., 3 A.2d 224, 125 Conn. 92—Papas v. Ætna Ins. Co., 150 A. 310, 111 Conn. 415.

Ill.—National Malleable Castings Co. v. Iroquois Steel & Iron Co., 165 N.E. 199, 333 Ill. 588—W. T. Rawleigh Co. v. Ulm, 268 Ill.App. 248.

Ind.—Woodsmall v. Carr Tire Co., 185 N.E. 163, 98 Ind.App. 446.

Mass.—Bodell v. Sawyer, 3 N.E.2d 279, 294 Mass. 534—Hines v. Eastern S. S. Lines, 139 N.E. 823, 245 Mass. 385.

Neb.—Kehl v. Omaha Nat. Bank, 254 N.W. 397, 126 Neb. 695.

N.H.—Lebrun v. Boston & M. R. R., 142 A. 128, 83 N.H. 293.

N.J.—Bowes v. Bowes, 146 A. 377, 104 N.J.Eq. 545.

N.Y.—Meiselman v. Crown Heights Hospital, 34 N.E.2d 367, 285 N.Y. 389, reversing 20 N.Y.S.2d 174, 259 App.Div. 840, appeal denied 20 N.Y.S.2d 669, 259 App.Div. 916—Gutkind v. George Lueders & Co., 196 N.E. 201, 267 N.Y. 320, reversing 275 N.Y.S. 338, 242 App.Div. 764, and reargument denied 198 N.E. 429, 268 N.Y. 610—Funk v. Modo Lora Realty, 260 N.Y.S. 844, 145 Misc. 805.

N.C.—Breneman Co. v. Cunningham, 175 S.E. 829, 207 N.C. 77.

Pa.—Freedman v. Mutual Life Ins. Co. of New York, 21 A.2d 81—William Zoller Co. v. Hartford Fire Ins. Co., 116 A. 359, 272 Pa. 386—Pinkerton's Nat. Detective Agency v. Rosedale Silk Co., 184 A. 282, 121 Pa.Super. 496.

Authentication

(1) The sufficiency of the foundation contemplated by the text rule is a question for the trial court.—Schoonover v. Prudential Ins. Co. of America, 245 N.W. 476, 187 Minn. 343.

(2) Where records are made and kept in the usual course of business, general identification of them is sufficient without segregation and examination of each particular item or instrument.—Wishek v. U. S. Fidelity & Guaranty Co. of Baltimore, Md., 213 N.W. 488, 55 N.D. 321.

(3) One having supervision of records and transactions of company may identify entries made in regular course of business so as to satisfy requirements of the text rule notwithstanding such entries were made by subordinates.—People's Bank & Trust Co. v. Douglas, 282 P. 838, 154 Wash. 450.

Other statements of rule

(1) "All papers and instruments made in the usual and ordinary course of business as a part of the system of keeping a record of the transactions to which they pertain are, when shown by the testimony of those who made them, and in whose custody they have been kept, to be true and correct, admissible in evidence to establish such transactions."—Wishek v. U. S. Fidelity & Guaranty Co. of Baltimore, Md., 213 N.W. 488, 55 N.D. 321.

(2) "The liberal rule [is] that books and records, made and kept by a business man or concern in the usual course of business, are generally admissible in evidence."—Schoonover v. Prudential Ins. Co. of America, 245 N.W. 476, 480, 187 Minn. 343.

Purpose of statute

(1) The purpose of statutes of the type indicated in the text is to afford a more workable rule of evidence in the proof of business transactions under existing business conditions.—Johnson v. Lutz, 170 N.E. 517, 253 N.Y. 124—Roge v. Valentine, 7 N.Y.S.2d 958, 255 App.Div. 475, reargument denied 9 N.Y.S.2d 900, 256 App.Div. 817, reversed on other grounds 20 N.E.2d 751, 280 N.Y. 268, reargument denied 21 N.E.2d 695, 280 N.Y. 809—Funk v. Modo Lora Realty, 260 N.Y.S. 844, 145 Misc. 840.

(2) More specifically the purpose or objective of such statutes is to do away with the technical rulings which excluded records ordinarily used in business transactions when not formally identified by the makers.

U.S.—Ulm v. Moore-McCormack Lines, C.C.A.N.Y., 115 F.2d 492, rehearing denied 117 F.2d 222, and certiorari denied 61 S.Ct. 941, 313 U.S. 567, 85 L.Ed. 1525.

Ohio.—Eikenberry v. McFall, App., 36 N.E.2d 27.

(3) It is not, on the other hand, the purpose of such statutes to make all business and professional records admissible as competent or relevant regardless of the purpose for which, or manner in which, such records are made.

N.Y.—Poses v. Travelers Ins. Co., Hartford, Conn., 281 N.Y.S. 126, 245 App.Div. 304.

Pa.—Freedman v. Mutual Life Ins. Co. of New York, 21 A.2d 81.

Records not constituting account books

(1) Business records made in the regular course of business, although not constituting books of account, are admissible under the text rule.—Banner Grain Co. v. Burr Farmers' Elevator & Supply Co., 202 N.W. 740, 162 Minn. 334.

(2) Admissibility of book entries generally see supra §§ 682–695.

82. Utah.—Clayton v. Metropolitan Life Ins. Co., 85 P.2d 819, 96 Utah 331, 120 A.L.R. 1117.

"Shopbook rule" governing books of account see supra § 683.

83. Ariz.—Sovereign Camp, W. O. W., v. Sandoval, 54 P.2d 557, 47 Ariz. 167.

Medical history and condition

Under the text rule the clinical records of a physician are not admissible to show the medical history and condition of a patient on whom calls are made.—Sovereign Camp, W. O. W., v. Sandoval, supra.

Among writings which have been admitted under the liberal rule may be mentioned records of carriers,[84] such as records showing shipment of goods from one place to another,[85] the names of persons to whom certain cars are consigned,[86] and the delivery to a certain consignee according to contract and custom;[87] car shortage records;[88] records showing times of departure for carrier's vehicles;[89] refrigerator car icing records;[90] emergency stop reports;[91] "ticket books;"[92] freight bills;[93] weight sheets;[94] scale tickets;[95] records of a canal company,[96] of a gas company,[97] or of a grain elevator;[98] insurers' records;[99] railroad records and reports;[1] and ship's log, register, and other papers.[2] Other writings admitted include employers' records;[3] medical records and re-

84. U.S.—E. I. Du Pont de Nemours & Co. v. Tomlinson, C.C.A.N.C., 296 F. 634.

Preliminary proof

(1) Carrier's records made contemporaneously with facts by employees in regular course of carrier's business may be proved in court by agent or clerk whose duty is to make and keep such records.—Shapiro v. Pennsylvania R. Co., 83 F.2d 581, 65 App.D.C. 324.

(2) Carrier's books of original entry, showing time of arrival, storage, notice to consignees, etc., the entries being made by various clerks in the usual course of business, are admissible as aids to testimony of a witness who had general charge and supervision of the books; proof of accuracy and authentication by each clerk making such entries is not required.—Schwall v. Higginsville Milling Co., 190 S.W. 959, 195 Mo. App. 89.

85. Pa.—Pinkerton's Nat. Detective Agency v. Rosedale Silk Co., 184 A. 282, 121 Pa.Super. 496.

86. U.S.—Whitehurst v. U. S., C.C. A.Va., 272 F. 46.

87. Miss.—Illinois Cent. R. Co. v. Threefoot Bros. & Co., 83 So. 635, 121 Miss. 468.

88. U.S.—Cub Fork Coal Co. v. Fairmont Glass Co., C.C.A.Ind., 19 F. 2d 273.

89. **Time stage left certain point**

Records of transportation company operating autostages respecting time a certain stage left certain point, when identified by witness making entries, is admissible as bearing on time of automobile collision occurring at certain point just as stage arrived.—Still v. Swanson, 27 P.2d 704, 175 Wash. 553.

90. D.C.—Shapiro v. Pennsylvania R. Co., 83 F.2d 581, 65 App.D.C. 324.

91. Minn.—Sullivan v. Minneapolis St. Ry. Co., 200 N.W. 922, 161 Minn. 45.

92. Ga.—Allen v. Davis, 128 S.E. 74, 34 Ga.App. 5.

93. Ala.—Illinois Cent. R. Co. v. Nance, 80 So. 143, 16 Ala.App. 569.

Cal.—Kelly-Springfield Tire Co. v. Sischo, 28 P.2d 50, 136 Cal.App. 38.

Ill.—Pennsylvania R. Co. v. Gavin, 234 Ill.App. 28.

94. Ill.—National Malleable Castings Co. v. Iroquois Steel & Iron Co., 165 N.E. 199, 333 Ill. 588.

95. Tex.—Payne v. White House Lumber Co., Civ.App., 231 S.W. 417.

96. Mass.—Hines v. Eastern S. S. Lines, 139 N.E. 823, 245 Mass. 385.

Log book showing arrival of vessel

Official log book of canal company was admissible to show the time a vessel arrived at different points.—Hines v. Eastern S. S. Lines, supra.

97. U.S.—Newton v. Consolidated Gas Co. of New York, N.Y., 42 S.Ct. 264, 258 U.S. 165, 66 L.Ed. 538, modifying, D.C., Consolidated Gas Co. of New York v. Newton, 267 F. 231, and affirming, 274 F. 986—New York & Queens Gas Co. v. Newton, D.C.N.Y., 269 F. 277, affirmed Newton v. New York & Queens Gas Co., 42 S.Ct. 268, 258 U.S. 178, 66 L.Ed. 549.

98. **Scale and storage tickets**

N.D.—Wishek v. U. S. Fidelity & Guaranty Co. of Baltimore, Md., 213 N.W. 488, 55 N.D. 321.

99. N.Y.—In re Katz, 243 N.Y.S. 96, 230 App.Div. 172.

"Agents' dailies"

Forms known as "agents' dailies" furnished by insurers to their agents, when filled out to show matters relating to insurance policies, have been received in evidence.—Papas v. Ætna Ins. Co., 150 A. 310, 111 Conn. 415.

Instructions to agent

In action on life policy, foundation has been held sufficient to justify introduction of insurer's instructions to agent prohibiting furnishing of claim blanks unless policy was in force.—Kassmir v. Prudential Ins. Co. of America, 254 N. W. 446, 191 Minn. 340.

Policy records

Minn.—Topinka v. Minnesota Mut. Life Ins. Co., 248 N.W. 660, 189 Minn. 75, 95 A.L.R. 739.

Premium records

Ala.—Lincoln Reserve Life Ins. Co. v. Fowler, 132 So. 37, 222 Ala. 348.

1. **Wheel report**

A wheel report showing movement of traffic and constituting a part of the official records of a railroad company, kept in accordance with the regulations of the interstate commerce commission, may be admissible as against the company.—Baltimore & O. R. Co. v. Flechtner, C.C.A.Ohio, 300 F. 318, certiorari denied 45 S.Ct. 95, 266 U.S. 613, 69 L. Ed. 468.

Train conductors' reports have been admitted.

Kan.—Flanigan v. Hines, 193 P. 1077, 108 Kan. 133.

Minn.—Minnesota & Dakota Cattle Co. v. Chicago & N. W. R. Co., 122 N.W. 493, 108 Minn. 470.

Train despatchers' train sheets have been received.

U.S.—Hitchner Wall Paper Co. v. Pennsylvania R. Co., C.C.Pa., 158 F. 1011, affirmed 168 F. 602, 93 C.C.A. 598.

Ala.—Central of Georgia Ry. Co. v. Wilson, 111 So. 901, 215 Ala. 612.

Ark.—Bush v. Taylor, 207 S.W. 226, 136 Ark. 554.

Ill.—R. A. Watson Orchards, Inc., v. New York, C. & St. L. R. Co., 263 Ill.App. 397.

2. U.S.—The Georgian, C.C.A.Fla., 76 F.2d 550, affirming, D.C., 4 F. Supp. 718.

22 C.J. p 902 note 27, p 903 notes 30 [a], 31.

Authentication required

U.S.—U. S. v. Mitchell, Pa., 26 F. Cas.No.15,791, 2 Wash.C.C. 478.

22 C.J. p 931 note 98.

Marine insurance cases

Me.—Polleys v. Ocean Ins. Co., 14 Me. 141.

Pa.—Hall v. Insurance Co., 3 Phila. 331.

3. **Employees' group insurance cases**

Mich.—Klat v. Chrysler Corporation, 280 N.W. 747, 285 Mich. 241.

S.C.—Hildritch v. Equitable Life Assur. Soc. of U. S., 191 S.E. 900, 184 S.C. 142—Greer v. Equitable Life Assur. Soc. of U. S., 185 S. E. 68, 180 S.C. 162.

Time card

Time card of workman may be admissible in connection with his testimony to aid in establishing time of automobile accident.—Katz v. T. I. Butler Co., 254 P. 679, 81 Cal.App. 747.

Weekly earning cards

U.S.—Jennings v. U. S., C.C.A.Ga., 73 F.2d 470.

ports;[4] deed books;[5] sales records;[6] and miscellaneous other records.[7]

Writings or documents which have been held inadmissible under the liberal rule include records of carriers;[8] records of an electric lighting company;[9] employer's records;[10] employees' records;[11] medical records or reports;[12] and ship's log, register, and other papers.[13] Other writings held inadmissible include cost records;[14] sales records;[15] itemized bills;[16] notations on record cards and check stubs,[17]

4. **Office records of physicians**

(1) Office records of physicians have been held admissible in evidence.

U.S.—Cohan v. U. S., C.C.A.Ill., 77 F.2d 140—New York Life Ins. Co. v. Bullock, D.C.Fla., 59 F.2d 747—Adler v. New York Life Ins. Co., C.C.A.Ark., 33 F.2d 827.

Pa.—Freedman v. Mutual Life Ins. Co. of New York, 21 A.2d 81.

(2) The mere fact that physicians who have made such records are available to testify does not eliminate basis for admission of such records.—Freedman v. Mutual Life Ins. Co. of New York, supra.

Pharamacists' records

Pa.—Freedman v. Mutual Life Ins. Co. of New York, supra.

Report of physician to his employer

Colo.—Royal Indemnity Co. v. Industrial Commission, 293 P. 342, 88 Colo. 113.

N.H.—Lebrun v. Boston & M. R. R., 142 A. 128, 83 N.H. 293.

N.Y.—In re Katz, 243 N.Y.S. 96, 230 App.Div. 172.

5. Tex.—Stonum v. Schultz, Civ. App., 138 S.W.2d 825.

6. Tex.—Panhandle & S. F. Ry. Co. v. Clarendon Grain Co., Civ.App., 215 S.W. 866.

7. **"Bills of lading"**

In action to recover for goods sold, so called "bills of lading" made in regular course of seller's business, naming shipper, carrier, and consignee, and describing articles which were delivered, are admissible.—Chadwick & Carr Co. v. Smith, 199 N.E. 903, 293 Mass. 293.

Book showing number of trees cut and counted

Miss.—J. H. Leavenworth & Son v. Hunter, 116 So. 593, 150 Miss. 245.

Humidity charts

Or.—Silver Falls Timber Co. v. Eastern & Western Lumber Co., 40 P.2d 703, 149 Or. 126.

Inspection slips

Ky.—Reynolds v. Cooper, 237 S.W. 667, 193 Ky. 763.

Laboratory records

Conn.—Borucki v. MacKenzie Bros. Co., 3 A.2d 224, 125 Conn. 92.

"Record slips" of brokerage company

Mass.—Bodell v. Sawyer, 3 N.E.2d 279, 294 Mass. 534.

Register of bills receivable and payable

Minn.—Tiedt v. Larson, 219 N.W. 905, 174 Minn. 558.

Register of drawbridge tender

Mass.—Butchers' Slaughtering & Melting Ass'n v. Boston, 101 N. E 126, 214 Mass. 254.

22 C.J. p 858 note 96.

Statements of profit and loss

Objection to certain inventory figures in profit and loss statements, on ground no evidence was introduced as to their accuracy, has been held to affect merely the weight of such figures and does not render them inadmissible.—Woodsmall v. Carr Tire Co., 185 N.E. 163, 98 Ind. App. 446.

Statements of real estate managing agent

N.Y.—Funk v. Modo Lora Realty, 260 N.Y.S. 844, 145 Misc. 805.

Weight records and slips

U.S.—Alexander Eccles & Co. v. Strachan Shipping Co., D.C.Ga., 21 F.2d 656, reversed on other grounds, C.C.A., Strachan Shipping Co. v. Alexander Eccles & Co., 25 F.2d 361, certiorari denied Alexander Eccles & Co. v. Strachan Shipping Co., 49 S.Ct. 13, 278 U.S. 610, 73 L.Ed. 535.

Mo.—Prebe v. Quincy, O. & K. C. R. Co., App., 260 S.W. 816.

Okl.—Shefts Supply v. Cole, 36 P. 2d 754, 169 Okl. 259.

8. **Record of train movements**

A railroad carrier's record, made under the supervision of its car accountant, showing the daily movement of trains, and composed of reports of car checkers over the system, is inadmissible as a record made in regular course of business where merely a record of past events.—Hudgins Produce Co. v. Missouri Pac. R. Co., 215 S.W. 606, 139 Ark. 363.

9. **Time lights turned on**

In an action for injuries to plaintiff thrown from his wagon in collision with defendant's street car wherein plaintiff contended that he was blinded by the lights of the car, a lighting company's record of the time when the street lights were turned on was properly excluded as not sufficiently authenticated.—Mason v. Dover, S. & R. St. Ry., 109 A. 841, 79 N.H. 300.

10. **Employee's discharge card**

Employee's discharge card is inadmissible, where offered in connection with the testimony of a witness who testified he did not make entries, and there was no evidence that clerk making them was inaccessible.—Travelers' Ins. Co. of Hartford, Conn., v. Fox, 141 A. 547, 155 Md. 210.

11. Ala.—Pan American Petroleum Corporation v. Mullack, 167 So. 728, 232 Ala. 271.

12. **Affidavit** by physician as to cause of patient's death is not admissible under statute relating to writings made in regular course of business.—Poses v. Travelers Ins. Co., Hartford, Conn., 281 N.Y.S. 126, 245 App.Div. 304.

13. U.S.—The Pescawha, D.C.Or., 45 F.2d 221.

22 C.J. p 902 notes 28, 29.

Authentication required

Ky.—Vandyke v. Memphis, N. O. & C. Packet Co., 71 S.W. 441, 24 Ky.L. 1283.

22 C.J. p 931 note 98.

Marine insurance cases

N.Y.—Sharp v. United Ins. Co., 14 Johns. 201.

38 C.J. p 1181 notes 39–43.

14. U.S.—U. S. v. Wirth, 24 C.C.P. A., Customs, 188.

15. Ala.—Pan American Petroleum Corporation v. Mullack, 167 So. 728, 232 Ala. 271.

Neb.—Oss v. Hartford Accident & Indemnity Co. of Hartford, Conn., 264 N.W. 897, 130 Neb. 311.

Okl.—Weathers v. Roberts, 202 P. 775, 84 Okl. 98.

Tex.—Harlan-Elzy-Randall Co. v. American Fruit Growers, Civ.App., 7 S.W.2d 132, error dismissed American Fruit Growers v. Harlan-Elzey-Randall Co., Com.App., 16 S.W.2d 261.

16. U.S.—John Irving Shoe Co. v. Dugan, C.C.A.Mass., 93 F.2d 711.

17. N.Y.—Roge v. Valentine, 7 N. Y.S.2d 958, 255 App.Div. 475, reargument denied 9 N.Y.S.2d 900, 256 App.Div. 817, reversed on other grounds 20 N.E.2d 751, 280 N. Y. 268, reargument denied 21 N. E.2d 695, 280 N.Y. 809.

Membership card

In action on certificate of membership in benefit alliance which was composed of members of Young Men's Christian Association organized and maintained by and for steel company employees, entry made after death of member, on his membership card at the association, stating that member was deceased and

and, under the decisions of the courts, miscellaneous other writings.[18]

Sound records,[19] as well as accurate transcripts thereof,[20] may be admissible in evidence.

9. Authentication and Proof of Execution

§ 733. Necessity

a. In general

b. Limitations and exceptions

a. In General

As a general rule, the execution or authenticity of a private writing must be established before it may be admitted in evidence.

Stated broadly and as a general rule, both at common law and under statute in a number of jurisdictions, and subject to the limitations and exceptions referred to and considered in subdivision b this section, before private writings are receivable in evidence their due and valid execution or their genuineness and authenticity must be established, this rule having been applied and enforced with respect to writings of every character and description.[21] For a consideration of the admissibility of

was not eligible, was inadmissible, being a mere record of a past event.—Gulf States Steel Co. Y. M. C. A. Mut. Benefit Alliance v. Almaroad, 196 So. 878, 240 Ala. 32.

18. **Adding machine reports**

In suit to recover overpayment for grain purchased, adding machine reports have been held inadmissible for lack of authentication.—Thompson v. Burnsmeyer, Iowa, 171 N.W. 584.

"Dock sheets"

Ill.—Charles D. Stone & Co. v. New York Cent. R. Co., 214 Ill.App. 483.

Inspectors' reports

(1) An independent inspection bureau's inspector's report on condition of fruit has been held inadmissible in shipper's action against carrier, where inspection was not made until after removal of fruit to shipper's warehouse and two days had intervened between arrival of shipment and inspection.—Gus Dattilo Fruit Co. v. Louisville & N. R. Co., 37 S.W.2d 856, 238 Ky. 322.

(2) Reports by inspectors employed by a railroad to investigate conditions existing after the happening of an accident on which suit is brought, being merely a report of facts found by witnesses gathering evidence in defense of a probable suit are not admissible as a report made in ordinary course of business.—Aly v. Terminal R. R. Ass'n of St. Louis, 78 S.W.2d 851, 336 Mo. 340.

Policeman's report

Where a policeman is not present at the scene of an accident at the time it occurs, his report of such accident based on voluntary statements of third persons, not being made in the regular course of any business, profession, occupation, or calling, as provided by statute, is not admissible.—Johnson v. Lutz, 170 N.E. 517, 253 N.Y. 124, affirming 234 N.Y.S. 328, 226 App.Div. 772.

Interoffice records

Exhibits, consisting of certain interoffice records, attached to depositions taken in proceeding by steamship company for exoneration from, or limitation of, its liability as owner of steamship involved in collision, are not entitled to be admitted in evidence in absence of showing that exhibits were made in regular course of business, and in absence of laying of any foundation for their admission.—The Mandu, D.C.N.Y., 11 F.Supp. 845.

Official baseball records

Mo.—George v. Kansas City American Ass'n Baseball Co., App., 219 S.W. 134.

Register of drawbridge tender

Mass.—Butchers' Slaughtering & Melting Ass'n v. Boston, 101 N.E. 426, 214 Mass. 254.

22 C.J. p 858 note 96 [b].

19. Conn.—Kilpatrick v. Kilpatrick, 193 A. 765, 123 Conn. 218.

20. Conn.—Kilpatrick v. Kilpatrick, supra.

21. U.S.—Baush Mach. Tool Co. v. Aluminum Co. of America, C.C.A. Conn., 79 F.2d 217.

Ala.—Zion Star Baptist Church v. Hart, 152 So. 44, 228 Ala. 24—First Nat. Life Ins. Co. of America v. Simpson, 140 So. 766, 25 Ala. App. 72—Davis v. Hines, 85 So. 882, 17 Ala.App. 443.

Cal.—Ten Winkel v. Anglo California Securities Co., 81 P.2d 958, 11 Cal.2d 707.

Conn.—Goodwin v. U. S. Annuity & Life Ins. Co., 24 Conn. 591.

Ga.—Burt v. Gooch, 139 S.E. 912, 37 Ga.App. 301—Jones Motor Co. v. W. R. Finch Motor Co., 129 S. E. 915, 34 Ga.App. 399—Commercial Credit Co. v. Grant, 125 S. E. 382, 33 Ga.App. 31—Bibb Realty Co. v. S. F. Fulghum & Co., 108 S.E. 554, 27 Ga.App. 378.

Ill.—Buerger v. Buerger, 148 N.E. 274, 317 Ill. 401—Davis v. Michigan Cent. R. Co., 128 N.E. 539, 294 Ill. 355, affirming 213 Ill.App. 259.

Ind.—Pittsburgh, C., C. & St. L. Ry. Co. v. Ft. Wayne & Northern Indiana Traction Co., 138 N.E. 759, 193 Ind. 405—Price v. Mitchell, 123 N.E. 817, 70 Ind.App. 671.

Ky.—Cherry Bros. v. Tennessee Cent. Ry. Co., 299 S.W. 1099, 222 Ky. 79—Francis v. Hazlerig, 1 A.K. Marsh. 93.

Mich.—Frye v. Mielke, 254 N.W. 182, 266 Mich. 501—Flickema v. Henry Kraker Co., 233 N.W. 362, 252 Mich. 406, 72 A.L.R. 1046.

Mo.—Karr & Conn v. Cade School Co-op. Drainage District, App., 297 S.W. 730—Mourer v. Wabash Ry. Co., 280 S.W. 1050, 222 Mo.App. 495—Johnson v. American Ry. Express Co., App., 245 S.W. 1071.

Mont.—Angell v. Lewistown State Bank, 232 P. 90, 91, 72 Mont. 345, citing **Corpus Juris**.

N.H.—Williams v. Williams, 182 A. 172, 87 N.H. 430—St. Louis v. Boston & M. R. R., 145 A. 263, 83 N.H. 538.

N.J.—Sullivan v. Coast Cities Coaches, 19 A.2d 442, 126 N.J.Law 300—Robertson v. Burstein, 146 A. 355, 105 N.J.Law 375, 65 A.L.R. 324, reversing 141 A. 92, 104 N. J.Law 218.

N.Y.—Saldan Const. Co. v. Kasenetz, 232 N.Y.S. 378, 225 App. Div. 819—Distillers Agents v. Pershan, 262 N.Y.S. 112, 146 Misc. 378—Brady v. Comprehensive Omnibus Corporation, 5 N.Y.S.2d 781—Dougherty v. Kalbach, 175 N.Y. S. 837.

N.C.—Carpenter v. First Nat. Bank, 191 S.E. 329, 211 N.C. 740.

Okl.—Weathers v. Roberts, 202 P. 775, 84 Okl. 98—Columbian Nat. Life Ins. Co. v. Wirthle, 176 P. 406, 73 Okl. 302.

Pa.—Brenner v. Lesher, 2 A.2d 731, 332 Pa. 522—Katz v. Baratz, 9 Pa.Dist. & Co. 411.

Tenn.—Bennett v. Anderson, 101 S. W.2d 148, 20 Tenn.App. 523.

Tex.—Abeel v. Weil, 283 S.W. 769, 771, 115 Tex. 490, citing **Corpus Juris**—Hinrichs v. Texas & N. O. R. Co., Civ.App., 153 S.W.2d 859

particular kinds of private or unofficial documents or writings see supra §§ 676–732. Public records and documents are considered supra §§ 626–648.

Showing probate of will. In order that a will may be admitted in evidence in support of a claim of title to property bequeathed or devised by such will, it is necessary to show that the will has been regularly probated.[22]

b. Limitations and Exceptions

Proof of execution or authentication is dispensed with in certain cases, sometimes by reason of statutory provision, as in cases where execution or authenticity is not appropriately denied or challenged.

When the execution of a writing is not in issue but only the contents or the facts of the existence of such a writing, proof of execution or authenticity is unnecessary.[23] It is also considered that proof of authenticity may be dispensed with where it is offered, not as proof of a fact in issue, but merely for a collateral purpose,[24] as where, in the case of a deed, it is offered not as evidence of title, but merely to show color of title.[25]

Joint instruments. In the case of joint instruments or writings signed by more than one person, it is not necessary to prove execution by one not to be charged or not a party to the action, the writing being rendered admissible by proof of the execution by, or the signature of, the party to be charged.[26]

Writings referred to by evidence. Although the rule requiring proof of genuineness and authenticity before a document can be admitted in evidence has been applied to documents which are referred to by instruments already in evidence,[27] there are, on the other hand, cases in which such reference has been held to render further proof of authenticity

—Southwest Gas Co. v. Doney, Civ.App., 99 S.W.2d 1107, error dismissed—Texas Pipe Line Co. v. Sheffield, Civ.App., 99 S.W.2d 684—Texas & N. O. R. Co. v. West, Civ.App., 97 S.W.2d 712—Panhandle & S. F. Ry. Co. v. Reynolds, Civ.App., 33 S.W.2d 249—Massachusetts Bonding & Insurance Co. v. Le May, Civ.App., 28 S.W.2d 259, error dismissed—Covert v. Calvert, Civ.App., 287 S.W. 117—Browning v. Hinerman, Civ.App., 224 S.W. 236.

W.Va.—Woodrum Home Outfitting Co. v. Adams Express Co., 110 S.E. 549, 90 W.Va. 161.

Wis.—In re Dicks' Estate, 235 N.W. 401, 204 Wis. 89.

22 C.J. p 929 note 75–p 932 note 17—38 C.J. p 201 notes 33–35.

Rule as applied to bills and notes is considered in Bills and Notes § 672.

Purpose

The fundamental idea of authentication of a writing is to connect the writing with the person alleged to be its author.—Prudential Ins. Co. of America v. Pierce's Adm'x, 109 S.W.2d 616, 270 Ky. 216.

Foundation must be laid

Ga.—Cosmopolitan Life Ins. Co. v. Head, 98 S.E. 124, 23 Ga.App. 216.

Ill.—Western Electric Co. v. Industrial Commission, 181 N.E. 638, 349 Ill. 139.

Ohio.—Netzel v. Todd, 165 N.E. 47, 30 Ohio App. 300.

Identity

(1) Writing must be properly identified.

Iowa.—Shippley v. Gremmels, 185 N.W. 922, 192 Iowa 801.

Okl.—National Aid Life Ass'n v. Abbott, 62 P.2d 982, 178 Okl. 319.

(2) In action to establish title to land deed from bankruptcy trustee, which constituted link in chain of title on which defendant relied, was improperly admitted, without evidence that bankrupt and defendant were same person.—Jackson v. Burnham, 152 A. 56, 129 Me. 344.

Identity of author

Bills containing indorsement of "Pd." are inadmissible to prove payment where evidence of who marked "Pd." was lacking.—Dorroh v. Wall, Mo.App., 297 S.W. 705.

Delivery

In action on note executed by partners, which was found in possession of decedent on her death, wherein surviving partner contended that note was paid by being included in subsequent obligations, instrument purporting to constitute a mortgage and bond in an amount allegedly including the indebtedness represented by the note was properly excluded in absence of proof that it had been delivered to decedent.—Williams v. Caples, Pa., 20 A.2d 302.

Signature

(1) Written instruments are admissible only after signature is proved.

Colo.—Strong Leasing & Mining Co. v. Lagasse, 96 P.2d 891, 105 Colo. 247.

La.—Clark v. Norred, 4 La.App. 394.

(2) Hence lease is inadmissible in absence of evidence that person, whose name was signed, signed it.—Jones v. Sherwood Distilling Co., 132 A. 278, 150 Md. 24.

(3) The mere fact, however, that the signature to an agreement indorsed on a bill of lading is admitted by the signer will not render the bill of lading admissible without proof of execution.—Millam v. Southern R. Co., 36 S.E. 571, 58 S.C. 247.

Corporate instrument

(1) Corporate seal must be proved.—Leazure v. Hillegas, 7 Serg. & R., Pa., 313.

(2) Where an instrument purporting to be executed by a corporation is offered in evidence without proof of the genuineness of the corporate seal, and it is neither shown nor admitted that the instrument was signed for the corporation by its proper officers, it is properly excluded.—Malsby v. Gamble, 54 So. 766, 61 Fla. 310, 327.

Markings on admitted document

Even though check to pay premium, offered by defendant company, was properly received in evidence, admitting in evidence unauthenticated markings and indorsements thereon, which did not prove themselves, was error.—Martin v. New York Life Ins. Co., 234 P. 673, 30 N.M. 400, 40 A.L.R. 406.

As against one not party to writing

Tex.—Covert v. Calvert, Civ.App., 287 S.W. 117.

22. U.S.—Pineland Club v. Robert, S.C., 171 F. 341, 96 C.C.A. 233.

22 C.J. p 934 note 39.

23. N.H.—Pulsifer v. Walker, 159 A. 426, 85 N.H. 434, 81 A.L.R. 1052.

24. Mich.—Parnell v. Pungs, 157 N.W. 357, 190 Mich. 638.

22 C.J. p 935 note 52.

25. Ga.—Doe v. Roe, 32 Ga. 448.

22 C.J. p 935 note 53.

26. Mass.—Cosmopolitan Trust Co. v. Cirace, 142 N.E. 914, 248 Mass. 98.

22 C.J. p 929 note 75 [b].

27. Mich.—Lee v. Payne, 4 Mich. 106.

N.Y.—Jackson v. Sackett, 7 Wend. 94.

unnecessary.[28] It has been held, however, that there must be present more than mere reference,[29] reference without identification being insufficient.[30]

It has also been held that, where a contract lying wholly in parol refers for some of its terms to a written instrument, not as containing any operative words of obligation, but as rendering the verbal agreement definite in details, it is not necessary to the admission of the writing in evidence, in establishing the verbal contract, to prove its execution, it being sufficient to identify it.[31] So where a written instrument is so connected with the declarations of a party that they cannot be fully understood without it, proof of its execution is not a prerequisite to its admissibility in evidence, in connection with, and as explanatory of, the declarations.[32]

Writings relied on by adversary. Where one party relies on a written instrument as a part of his case, the other party may rely on recitals in, or indorsements on, such instrument, without any proof of authenticity or genuineness.[33]

Waiver or absence of objection. A party consenting to the introduction of a writing in evidence, except as to some extraneous matter written thereon, waives objection to the absence of proof of execution or authenticity.[34] Evidence of admissions tending to show recognition of a contract obviates the necessity for proof of execution.[35] In numerous cases written instruments have been received or considered receivable without proof of authenticity, where their authenticity did not appear to have been questioned.[36]

Statutory provisions. Statutes in a number of jurisdictions have limited or created exceptions to the general rule requiring proof of execution or authenticity as a prerequisite to the admissibility of private writings in evidence.[37] Among such statutes are those requiring proof of execution or authenticity only if execution has been denied or otherwise appropriately challenged or put in issue, restricted in some instances to writings of a particular kind, as for example writings which form the basis of a pleading or cause of action or defense.[38] It is only when the writing is one covered by the statute that appropriate denial is es-

28. Neb.—Lombard v. Mayberry, 40 N.W. 271, 24 Neb. 674, 8 Am.S.R. 234.
22 C.J. p 934 note 46.

Letter cancelling contract
A contract is admissible without proof of execution where a letter attempting cancellation of such contract is already in evidence.—Mendel v. Converse & Co., 118 S.E. 586, 30 Ga.App. 549.

29. Wis.—Wiesner v. Kosiedowski, 193 N.W. 374, 182 Wis. 521, affirmed 197 N.W. 208, 182 Wis. 521.

Incorporation essential
A mortgage conditioned on "a certain promissory note bearing even date herewith, executed by" mortgagor, and referring to the note in other clauses relating to performance and sale, did not so incorporate the note as to make it admissible without proof of execution.—Wiesner v. Kosiedowski, supra.

30. N.Y.—In re Pirie, 91 N.E. 587, 198 N.Y. 209, 19 Ann.Cas. 672.

31. N.Y.—Smith v. New York Cent. R. Co., 4 Abb.Dec. 262, 4 Keyes 180.

32. Ala.—Rims v. Sturtevant, 18 Ala. 359.

33. Ga.—Louisville & N. R. Co. v. Yudelson, 70 S.E. 576, 135 Ga. 731.
22 C.J. p 935 note 49.

34. Cal.—Larimer v. Smith, 19 P.2d 825, 130 Cal.App. 98.

35. Tex.—American Surety Co. v. Camp, Civ.App., 202 S.W. 798.

Acts of recognition
Testimony that office manager received defendant's checks for rent was proper foundation for evidence of written lease to defendants, proof of execution being unnecessary.—Gold v. Rousso, 238 Ill.App. 427.

36. Ill.—Brown v. Sprague, 229 Ill. App. 338.
N.H.—Pulsifer v. Walker, 159 A. 426, 85 N.H. 434, 81 A.L.R. 1052.
22 C.J. p 935 note 51.

37. Ga.—Mendel v. Converse & Co., 118 S.E. 586, 30 Ga.App. 549.
Mont.—Angell v. Lewistown State Bank, 232 P. 90, 72 Mont. 345.
N.J.—Robertson v. Burstein, 146 A. 355, 105 N.J.Law 375, 65 A.L.R. 324, reversing 141 A. 92, 104 N.J. Law 218.
Tex.—Bond v. Kirby Lumber Co., Civ.App., 2 S.W.2d 936, error refused.
22 C.J. p 935 note 50.

Applicability of statute
Statute permitting proof of corporate record by copy and certificate of corporate officer does not render admissible a copy of a letter sent to corporation and its possession, without proof of authenticity other than certificate of a corporate officer, where the corporation was not involved in the litigation.—In re Healea's Estate, 254 Ill.App. 334.

38. Ala.—Zion Star Baptist Church v. Hart, 152 So. 44, 228 Ala. 24.
Ark.—Springfield Life Ins. Co. v. King, 51 S.W.2d 859, 185 Ark. 1189.
Md.—Board of Education for Washington County v. Cearfoss, 166 A. 732, 165 Md. 178.
Minn.—Burnetti v. Duluth & I. R. Ry. Co., 209 N.W. 879, 168 Minn. 136.
Tex.—Southwest Bitulithic Co. v. Martinez, 143 S.W.2d 116, 135 Tex. 347, reversing Martinez v. Southwest Bitulithic Co., Civ.App., 119 S.W.2d 740—Sovereign Camp, Woodmen of the World v. Wernette, Civ.App., 216 S.W. 669—Citizens' Nat. Bank of Cameron v. U. S. Bond & Mortgage Co., Civ. App., 48 S.W.2d 676, certification of questions ordered on other grounds Citizens' Nat. Bank of Cameron v. Jones, 61 S.W.2d 987, 122 Tex. 551.
Wis.—In re Dick's Estate, 235 N.W. 401, 204 Wis. 89.
22 C.J. p 935 note 50.

On plea of non est factum
(1) Under common-law rule, plea of non est factum placed burden on plaintiff to prove execution of written instrument, including genuineness of signature, and, until this was done, instrument was not admissible in evidence.—Farmers' & Traders' State Bank of Bonaparte v. First Nat. Bank, 204 N.W. 404, 201 Iowa 73.
(2) Contract of guaranty declared on was held properly excluded as against plea of non est factum, in absence of proof of due execution. —Club Aluminum Co. v. Woodard, 158 S.E. 616, 43 Ga.App. 307.

Demand for proof of execution of a lease is not denial thereof.—Wally v. Jones, 119 A. 75, 275 Pa. 250.

Verified denial essential
Under some statutes written instrument appearing to have been

sential to compel proof of execution as a preliminary to admissibility.[39]

§ 734. —— Showing Authority to Execute

a. In general
b. Corporate instruments

a. In General

To render admissible writings signed or executed by persons other than those sought to be charged thereby, authority of such persons must ordinarily be established.

Generally, where a document by which it is sought to charge a party is written or signed by a person other than the party, there must be some proof of the authority of the writer, in order to admit the writing.[40] However, where the mere fact of execution of a deed or other instrument is relevant, regardless of whether or not the person by whom it was executed had any power to do so, such execution may be shown without proof of authority.[41] Such proof may also be dispensed with where the writing is offered not as proof of a fact in issue, but merely for a collateral purpose,[42] as where, in the case of a deed, it is offered not as evidence of title, but merely to show color of title.[43]

A deed executed by the person in whom is vested title to the property conveyed thereby may be received in evidence without any proof of authority of the grantor to execute such deed;[44] although

duly executed is admissible without formal proof of execution, where execution is alleged in petition and denial thereof is not verified.—Posey v. Brown, 37 P.2d 633, 169 Okl. 466.

Notice accompanying plea
R.I.—Mason v. Williams, 124 A. 467, 46 R.I. 24.

Decedent's instruments
Under the Texas statute an instrument charged to have been executed by decedent as a basis of a claim against the estate was admissible without proof of execution, in absence of any suspicion cast on the instrument by an affidavit of the administrator.—Box v. Ussery, Tex. Civ.App., 108 S.W.2d 230, error dismissed.

39. Ind.—Pittsburgh, C., C. & St. L. Ry. Co. v. Ft. Wayne & Northern Indiana Traction Co., 138 N.E. 759, 193 Ind. 405—Price v. Mitchell, 123 N.E. 817, 70 Ind.App. 671.

40. Ga.—Bass v. African Methodist Episcopal Church, 116 S.E. 816, 155 Ga. 57—Cohutta Talc Co. v. Gulf Refining Co., 178 S.E. 924, 50 Ga.App. 548—Scott v. Kelly-Springfield Tire Co., 125 S.E. 773, 33 Ga.App. 297—Bibbs Realty Co. v. S. F. Fulghum & Co., 108 S.E. 554, 27 Ga.App. 378.
N.J.—Ellick v. Reardon, 1 A.2d 340, 121 N.J.Law 8.
N.Y.—Distillers Agents v. Persham, 262 N.Y.S. 112, 146 Misc. 378.
N.D.—Wiseth v. Traill County Telephone Co., 291 N.W. 689.
Tex.—Hinrichs v. Texas & N. O. R. Co., Civ.App., 153 S.W.2d 859—City of Corpus Christi v. Live Oak County, Civ.App., 103 S.W.2d 226—Covert v. Calvert, Civ.App., 287 S.W. 117—Lanham v. West, Civ. App., 209 S.W. 258.
22 C.J. p 932 note 19.

Ratification
(1) Proof of ratification will satisfy the requirement even though there is lacking proof of original authority.

Iowa.—In re Johnson's Estate, 232 N.W. 282, 210 Iowa 891.
N.C.—Payne-Farris Co. v. Kuester, 193 S.E. 707, 212 N.C. 545.
Ohio.—Slamey v. City Material Co., 165 N.E. 55, 30 Ohio App. 435.

(2) In discharged employee's action against former employer to recover damages caused by discharge in violation of alleged contract between employer and labor union, contract, not signed by any officer of union, was properly excluded from evidence, notwithstanding purported ratification thereof by "laundrymen's division" of union, whose authority to ratify on behalf of the union was not shown.—Ellick v. Reardon, 1 A.2d 340, 121 N.J.Law 8.

Admission of agency
(1) Receipts for goods, shown to have been signed by person purporting to act as defendant's agent, may be admissible, it appearing that defendant admitted that man by name of signer had charge of his business.—Scott v. Kelly-Springfield Tire Co., 125 S.E. 773, 33 Ga.App. 297.

(2) Proof that contract signed by another as agent was defendant's contract was not required in suit thereon in order to make it admissible, where defendant's entire evidence recognized validity of contract.—Wyse v. Miller, 2 S.W.2d 806, 222 Mo.App. 165.

Identity of agent must be first proved.—Distillers Agents v. Pershan, 262 N.Y.S. 112, 146 Misc. 378.

Officer of court
When a deed conveying lands purports to have been executed by an officer of court under a decree, and it is sought to use the deed in evidence as title to the lands, the power or authority to make the deed must be shown unless waived.—American Trust Co. v. Fennell, 83 So. 386, 78 Fla. 535.

Subscribing witness
(1) Where subscribing witness signed name of defendant who could not write and who denied execution, it was unnecessary for plaintiff, in order to show prima facie execution of the contracts so as to entitle them to admission in evidence, to show that subscribing witness was authorized to sign defendant's name, where there is other proof of execution by defendant.—Southwest Bitulithic Co. v. Martinez, 143 S.W.2d 116, 135 Tex. 347, reversing Martinez v. Southwest Bitulithic Co., Civ. App., 119 S.W.2d 740.

(2) In such case it was sufficient if it could be shown that defendant gave her assent to the contracts by declaring in presence of notary that contracts were her acts and deed or by showing that she manifested her assent to the contracts or adopted them by making her mark or touching the pen.—Southwest Bitulithic Co. v. Martinez, supra.

Trustee
(1) Authority of one signing as trustee must be shown.—Hastey v. Roberts, 100 S.E. 569, 149 Ga. 479.

(2) Trustees' deed is incompetent where there was no evidence of appointment of trustees.—Widney v. Southern Pac. Co., 7 P.2d 1046, 120 Cal.App. 291.

41. Fla.—Hogans v. Carruth, 18 Fla. 587.

42. Pa.—McDermott v. Hoffman, 70 Pa. 31.
22 C.J. p 935 note 52.

43. Cal.—McDonald v. Bear River and Auburn Water & Mining Co., 13 Cal. 220.
22 C.J. p 935 note 53.

44. N.Y.—Rockwell v. Brown, 54 N. Y. 210, reversing 33 N.Y.Super. 380.
22 C.J. p 932 note 18.

Trustee under security deed
In ejectment by substituted trustee under security deed against purchaser claiming realty quitclaimed by original trustee to grantor by whom realty was conveyed by warranty deed to purchaser for consid-

title in such grantor at time of conveyance must first be shown.[45]

Instruments purporting to be made under powers of attorney. A deed, contract, or other writing purporting to have been executed by a person acting as attorney in fact for another cannot be received in evidence, unless or until the authority of the person by whom it was executed is established.[46] It has been held, however, that, where an action was brought on an alleged joint contract against two defendants, only one of whom appeared and answered, proof that such defendant signed the contract in his own name and as attorney for the other defendant was sufficient to entitle plaintiff to read the contract in evidence, without proving that such defendant had any authority to sign for his codefendant.[47]

A reservation in a deed by an attorney in fact may be shown, as against the grantee therein who accepted the deed, without proof of the authority of the attorney.[48]

b. Corporate Instruments

Except when the corporate seal is affixed to the writing, authority of the officer or agent of a corporation to execute the instrument must ordinarily be shown to render it admissible.

It is usually considered that the authority of corporate officers or agents who executed an instrument on behalf of the corporation must be shown before such instrument can be admitted,[49] at least where the execution thereof is put in issue,[50] unless the corporate seal is affixed to the instrument, in which case it is admissible without proof of the authority of the officer.[51] It has been held, however, that, where a conveyance made by a corporation purports to have been executed by the proper officers and the certificate of probate recites that they were such, the conveyance is admissible in evidence without further proof of their official capacity.[52]

Municipal corporation. On mere objection to its reception in evidence, proof of authority has been held to be unnecessary with respect to a contract allegedly executed by the mayor on behalf of a city and pleaded haec verba if the identical contract sued on is produced and there is proof that the mayor actually executed the same.[53]

Admissibility of corporate books and records is considered in §§ 699–700 supra.

§ 735. —— Effect of Acknowledgment and Registration

Due registration or recordation generally renders an instrument admissible without further proof.

eration which was paid to trustee, quitclaim deed by original trustee to grantor and warranty deed by grantor to purchaser was admissible in behalf of purchaser over objection that it had not been shown that trustee was authorized to convey property and that it had not been shown that grantor had fee-simple title to property.—Mitchell v. Miller, 189 S.E. 523, 183 Ga. 703.

45. Ala.—Aiken v. McMillan, 106 So. 150, 213 Ala. 494.

46. Neb.—Green v. Barker, 66 N.W. 1032, 47 Neb. 934.
22 C.J. p 932 note 20.

47. N.Y.—McKensie v. Farrell, 17 N.Y.Super. 192.

48. Tex.—Waco Bridge Co. v. Waco, 20 S.W. 137, 85 Tex. 320.

49. Ala.—W. A. Hanley Mfg. Co. v. International Recording Co., 60 So. 557, 6 Ala.App. 219.
Ark.—Salmon v. Boyer, 213 S.W. 383, 139 Ark. 236.
Cal.—Fischer v. Lukens, 182 P. 967, 41 Cal.App. 358.
Ga.—Bale v. Todd, 50 S.E. 990, 123 Ga. 99—Adams Loan & Investment Co. v. Dolvin Realty Co., 172 S.E. 606, 48 Ga.App. 183.
Iowa.—In re Johnson's Estate, 232 N.W. 282, 210 Iowa 891.
Pa.—Lycoming Trust Co. v. Allen, 156 A. 707, 102 Pa.Super. 184.
22 C.J. p 933 note 35.

Ratification
The contract is admissible where it is shown that the agent's act in making it has been ratified.—Wilkins v. Waldo Lumber Co., 153 A. 191, 130 Me. 5.

Testimony as to agency
Where the contract sued on was signed by M in the name of plaintiff, a corporation, "per M," and he testified that he was plaintiff's agent, the contract was properly admitted.—Floyd v. Taylor Cotton Co., 105 S.E. 646, 26 Ga.App. 96.

Evidence sufficient
Cal.—Simpson v. Bergmann, 13 P. 2d 531, 125 Cal.App. 1—Michie Grocery Co. v. Martin, 188 P. 615, 45 Cal.App. 659.
Ga.—Swift & Co. v. Dawson Paper Shell Pecan Co., 101 S.E. 754, 24 Ga.App. 625.

50. Ga.—U. S. Printing & Lithographing Co. v. Stovall Jones Co., 98 S.E. 407, 23 Ga.App. 472.
Ind.—Stevens v. West Side Hardware Store, 189 N.E. 846, 99 Ind. App. 165.

Authority shown
Ga.—Helping Hand of Good Samaritan v. Bank of Smithville, 125 S. E. 794, 33 Ga.App. 285.

51. Ala.—H. G. Hill Co. v. Taylor, 168 So. 693, 232 Ala. 471.
Cal.—Fischer v. Lukens, 182 P. 967, 41 Cal.App. 358.
Fla.—Delco Light Co. v. John Le Roy Hutchinson Properties, 128 So. 831, 99 Fla. 410—Malsby v. Gamble, 54 So. 766, 61 Fla. 310.
Ga.—Colaparchee Club v. Macon Nat. Bank, 144 S.E. 663, 166 Ga. 893—Burch v. Atlantic Life Ins. Co., 139 S.E. 123, 37 Ga.App. 63.
Mass.—Federal Nat. Bank v. Shoolman, 176 N.E. 919, 276 Mass. 191.
Tex.—Broach v. John Hancock Mut. Life Ins. Co., Civ.App., 122 S.W.2d 363, error refused.
22 C.J. p 933 note 36.

Recital of seal sufficient even though seal not actually affixed.—Walton v. Morton, 159 S.E. 259, 172 Ga. 789—Boone v. Jenkins, 95 S.E. 707, 147 Ga. 812.

Proof of seal
(1) Paper purporting to be act of private corporation bearing corporate seal is not admissible without evidence establishing authenticity of seal.—Robertson v. Burstein, 146 A. 355, 105 N.J.Law 375, 65 A.L.R. 324 reversing 141 A. 92, 104 N.J.Law 218.
(2) The usual practice is to prove the identity of a corporate seal by a witness acquainted with its impression.—Charleston v. Moorhead, 31 S.C.L. 430.

52. N.C.—Shaffer v. Hahn, 15 S.E. 1033, 111 N.C. 1.

53. Fla.—Ramsey v. City of Kissimmee, 149 So. 553, 111 Fla. 387.

In a number of jurisdictions due registration or recordation of a private writing makes it admissible without further proof, statutes frequently so providing.[54] However, it has been held that proof of execution does not serve to render admissible a recorded instrument which is not entitled to recordation because not acknowledged or because not otherwise in recordable form.[55]

Acknowledgment as affecting admissibility of a writing is considered in Acknowledgments § 25.

§ 736. —— Documents Produced on Notice

Apart from statute to the contrary, proof of execution must be made notwithstanding the writing has been produced by the adversary on notice.

Except as and to the extent that statute may otherwise provide,[56] a party is not relieved from the necessity of proving the execution or authenticity of a document which he offers in evidence by the fact that such document was produced by the adverse party on notice from him.[57] Proof of execution by one calling for production of a writing by his adversary is excused, however, sometimes by reason of statute, if the party producing the writing is a party to the instrument or claims a beneficial interest thereunder.[58] A statute dispensing with proof of execution by party served with notice to produce does not preclude the party serving notice from attacking the validity of the execution under a plea of non est factum.[59]

§ 737. Time for Proof

The court may admit a writing in evidence before proof of its execution or authenticity on assurance that this proof will be made later in the trial.

Although, as discussed in § 733 supra, it is generally required that the authenticity, genuinenesss, and execution of an instrument be proved prior to its admission in evidence, this is not always deemed essential,[60] and, on the assurance of a party that the due execution of a paper offered in evidence will be shown later in the trial, the court may allow it to be received without proof of execution.[61] Where an instrument is received in evidence without sufficient proof of its execution, the error is cured, if such proof is made subsequently during the trial.[62]

§ 738. Mode of Proof

Apart from statutes dispensing with common-law proof in case of writings satisfying its terms, any competent evidence may be used to prove the execution or authenticity of a writing as a preliminary to admissibility, this depending sometimes on whether or not the writing has been attested. Eyewitnesses or persons qualified as to handwriting may be used.

54. U.S.—Carter Oil Co. v. McQuigg, D.C.Ill., 27 F.Supp. 182, affirmed, C.C.A., 112 F.2d 275.
Cal.—Ley v. Babcock, 5 P.2d 620, 118 Cal.App. 525.
N.J.—Feder v. Forest Hill Apartments, 136 A. 297, 100 N.J.Eq. 455.
22 C.J. p 933 note 38.

Proof of recording

A deed properly acknowledged and spread on the record of deeds is prima facie evidence of its having been admitted of record, although the record shows no other act of the recording officer in admitting the same to record.—Sizemore v. Roach, 106 S.E. 435, 88 W.Va. 167.

Registration

La.—Cousins v. Cusachs, 6 La.App. 837.
N.C.—Dillingham v. Gardner, 13 S.E.2d 478, 219 N.C. 227.
Tex.—Willson v. Kuhn, Civ.App., 96 S.W.2d 128, error dismissed, rehearing denied 96 S.W.2d 236.

Original papers

Unimpeached certificates of county court clerks that deeds were acknowledged before them and duly recorded on specified dates, and of later county clerk that foregoing "substituted" deeds were lodged for record with him on certain date shows deeds to be original papers, not substitutes.—Burns v. Dillon, 9 S.W.2d 1095, 226 Ky. 82.

Certificate as to probate

A certificate by the clerk of the superior court of one of the counties in the state in which the clerk certified "that the execution of the annexed deed was this day proven before me by the oath and examination of" the subscribing witness thereto sufficiently referred to the deed and the grantor and grantee and rendered the deed admissible.—Devereux v. McMahon, 102 N.C. 284, 9 S.E. 635.

Attestation and recording

Deed attested by three witnesses, one of whom was officer authorized to attest, and recorded, is admissible without further proof of execution.—Guthrie v. Gaskins, 155 S.E. 185, 171 Ga. 303.

Mode of proof generally, see § 738 infra.

55. Cal.—Ten Winkel v. Anglo California Securities Co., 81 P.2d 958, 11 Cal.2d 707.
Fla.—Malsby v. Gamble, 54 So. 766, 61 Fla. 310, 327.
Ga.—Savage v. McCarthy, 148 S.E. 585, 168 Ga. 650—Hines v. Moore, 148 S.E. 162, 168 Ga. 451.

56. Ga.—Louisville & N. R. Co. v. Yudelson, 70 S.E. 576, 135 Ga. 731—Wrenn v. Massell Inv. Co., 194 S.E. 263, 56 Ga.App. 802—Mendel v. Converse & Co., 118 S.E. 586, 30 Ga.App. 549.
22 C.J. p 934 note 41.

Defect in notice to produce immaterial.—Wrenn v. Massell Inv. Co., 194 S.E. 263, 56 Ga.App. 802.

57. Del.—Taylor v. Jackson, 10 Del. 224.
22 C.J. p 934 note 40.

Identity of papers

Books and papers produced by witnesses on whom a subpœna duces tecum has been served must be identified when produced if the identity of the books produced as those called for in subpœna duces tecum is not admitted, but where identity is admitted there is no need of producing a witness to identify them.—Duncan v. Carson, 103 S.E. 665, 127 Va. 306, affirmed 105 S.E. 62, 127 Va. 306.

58. Ala.—Woodstock Iron Co. v. Reed, 4 So. 369, 84 Ala. 493.
22 C.J. p 934 note 42.

59. Ga.—Mendel v. Converse & Co., 118 S.E. 586, 30 Ga.App. 549.

60. Ind.—Allen v. State, 61 Ind. 268, 28 Am.R. 673.
Va.—Washington County v. Dunn, 27 Gratt. 608, 68 Va. 608.

61. N.C.—Dupree v. Virginia Home Ins. Co., 92 N.C. 417.

62. Neb.—Houck v. Linn, 66 N.W. 1103, 48 Neb. 227.

Stated broadly, and as a general rule, the execution, authenticity, or genuineness of a private writing as a preliminary to admissibility may be established by any competent evidence,[63] what constitutes competent evidence depending sometimes on whether or not the writing has been attested, as may be seen infra §§ 739 and 740. Apart from such distinctions, however, the best available proof should be used.[64] Proof may be made by the evidence of those who can testify to its execution,[65] or by those who can testify as to the signature or handwriting.[66]

The authenticity or genuineness of an unsigned writing may be proved by oral testimony.[67]

Partnership instrument. Proof of the signature of only one member of a partnership, even though made as an officer thereof, is sufficient proof of the execution of a partnership instrument to admit it in evidence.[68]

Statutory proof. Statutes in a number of jurisdictions have made common-law proof of execution unnecessary in the case of a writing bearing proof of its own due execution, as in the case of an instrument which has been acknowledged or proved and certified,[69] or as in the case of a deed proved as coming from the custody of the grantee.[70] Where common-law proof of execution is dispensed with as to instruments falling within specified categories or complying with specified conditions, the provisions of such statutes must be satisfied to dispense with further proof of execution.[71] The statutory method of proof, however, is not exclusive and usually does not prevent proof as at common law.[72] Hence, an instrument proved under common-law rules is admissible, even though a statute providing a method dispensing with such proof is not complied with.[73]

63. Ill.—Roeder v. Pipe, 235 Ill. App. 89.
Tex.—Gibralter Colorado Life Ins. Co. v. Taylor, Civ.App., 99 S.W.2d 1084, reversed on other grounds 123 S.W.2d 318, 132 Tex. 328.

Inapplicable statute

Statute relating to authenticity of records is inapplicable to chattel mortgages executed in another state, where original instrument was offered.—Hawkins v. Motor Bank of Denver, Colo., 150 N.E. 118, 84 Ind.App. 122.

64. Ohio.—Dinnie v. Schiele, 22 N.E.2d 917, 61 Ohio App. 511.

Proof of handwriting

Where the party alleged to have executed an instrument is unavailable, the best proof of handwriting is the testimony of witnesses who saw the instrument executed and are able to identify it, and the next best testimony is that of witnesses who have seen the party whose writing is in controversy write, or have had access to or possession of his writings so as to impress the character of the writing on the mind, and are enabled to form an opinion by comparing impression of writing on their minds with that which may be submitted for their examination.—Dinnie v. Schiele, supra.

65. Okl.—Weathers v. Roberts, 202 P. 775, 84 Okl. 98.
Pa.—Brenner v. Lesher, 2 A.2d 731, 332 Pa. 522.

Writing of decedent

Where person executing instrument is dead, other proof that he signed such instrument is proper.—W. B. Smith & Sons v. Gay, 106 So. 214, 21 Ala.App. 130.

66. Iowa.—In re Work's Estate, 233 N.W. 28, 212 Iowa 31.
Pa.—Brenner v. Lesher, 2 A.2d 731, 332 Pa. 522.

Mode of proof

Handwriting or signature may be proved by an eyewitness or other competent proof of handwriting.—In re Work's Estate, 233 N.W. 28, 212 Iowa 31.

67. Pa.—Brenner v. Lesher, 2 A.2d 731, 332 Pa. 522.

Unsigned admission

An admission may be stated orally, taken down stenographically and transcribed without being signed, and in such case oral evidence may supply proof of genuineness of transcription and its authorship or adoption by person allegedly making statement.—Brenner v. Lesher, supra.

68. Ark.—Salmon v. Boyer, 213 S.W. 383, 139 Ark. 236.

69. Cal.—Knaugh v. Baender, 257 P. 606, 84 Cal.App. 142.
Ga.—Wood v. Cauthen, 149 S.E. 138, 168 Ga. 766.
Mont.—Kroehnke v. Gold Creek Mining Co., 51 P.2d 640, 100 Mont. 571—Angell v. Lewistown State Bank, 232 P. 90, 72 Mont. 345.

Identity of grantor of deed

Where evidence showed that one under whom title was claimed had assumed name by which grantor was designated in deed and was true grantor, admission of deed in evidence was proper.—Knaugh v. Baender, 257 P. 606, 84 Cal.App. 142.
Registration or recordation as dispensing with further proof is considered supra § 735.

70. Ga.—Tippins v. Lane, 191 S.E. 134, 184 Ga. 331.

71. Ga.—Hines v. Moore, 148 S.E. 162, 168 Ga. 451—Commercial Credit Co. v. Grant, 125 S.E. 382, 33 Ga.App. 31.
Tex.—Jackson v. First Nat. Bank, Civ.App., 290 S.W. 276, error dismissed.

Filing of instrument in court and notice

Under a statute requiring the instrument to be offered in evidence to be filed in court and notice given to the adversary or his attorney, actual notice is sufficient if no method of giving notice is prescribed.—Fulton v. Bayne, 18 Tex. 50.

Constitution and by-laws of organizations

(1) Under some statutes, certified copies of by-laws of fraternal beneficial societies are prima facie evidence of their legal adoption.—Coffey v. The Maccabees, 86 Pa.Super. 46.

(2) Constitution and by-laws of beneficial society cannot be proved by expert testimony of witness or his familiarity with them.—Cohen v. Boslover Beneficial Ass'n, 176 A. 30, 116 Pa.Super. 55.

(3) The constitution and laws of a beneficial society cannot be proved by expert testimony of a witness who had been a member and an officer, because of his familiarity with them or with the practice in the organization, by his identification of a pamphlet as the officially printed and commonly accepted constitution and by-laws.—Tkatch v. Knights and Ladies of Security, 107 A. 890, 264 Pa. 578.

72. Va.—McGuire v. Atlantic Coast Line R. Co., 118 S.E. 225, 136 Va. 382.
Wis.—Christie v. Keator, 6 N.W. 334, 49 Wis. 640.

73. Tex.—Robinson v. Martel, 11 Tex. 149—Citizens' Nat. Bank of

Rebuttal. Evidence of authenticity or genuineness of a writing offered in evidence may be rebutted by any competent and relevant proof.[74]

§ 739. —— Attested Instruments

a. In general
b. Availability of secondary evidence
c. Nature of proof
d. Rebutting or impeaching evidence

a. In General

Except as statutes have changed or modified the rule, it is held generally that in the case of attested instruments proof of execution or authenticity must be made by the subscribing witnesses if available.

Unless and to the extent that statute excuses such proof or provides or sanctions a different mode of proof,[75] and subject to the limitations or exceptions discussed herein, the general rule is that the execution of an attested instrument must be proved by the subscribing witnesses if they, or any one of them, can be produced at the trial or hearing and are competent to be examined, statutes sometimes so providing.[76] This rule applies both to instruments under seal[77] and to instruments not under seal;[78] and its application extends not only to instruments which are required by law to be attested,[79] but also to instruments which are actually attested, although this is not necessary to their validity.[80] Proof by one testifying that he saw the instrument signed or executed does not dispense with the necessity of proof by a producable subscribing witness,[81] nor does proof of the maker's signature by one familiar therewith have such effect,[82] nor is proof of the handwriting of a witness who can be produced,[83] or of a witness who cannot be produced, if failure to produce another witness is not accounted for,[84] sufficient.

Notwithstanding general agreement on the rule, there seems to be lack of unanimity on its application. Thus while it has been held that the necessity of calling the subscribing witnesses cannot be dispensed with by reason of an admission of the party executing the instrument with respect to its execution,[85] even though such admission is under oath,[86] there is authority for the view that the instrument is admissible without proof by attesting witnesses where its authenticity is admitted by the party sought to be charged in his pleading in the action in which the instrument is sought to be used,[87] and that an admission by counsel in open

Cameron v. U. S. Bond & Mortgage Co., Civ.App., 48 S.W.2d 676, certification of questions ordered on other grounds Citizens' Nat. Bank of Cameron v. Jones, 61 S.W.2d 987, 122 Tex. 551—Denman v. James, Civ.App., 180 S.W. 1157—First State Bank of Teague v. Harris, Civ.App., 138 S.W. 1162—Morgan v. Baker, Civ.App., 40 S.W. 27.

Waiver of proof

In a suit to set aside an oil and gas lease as a cloud on title, where plaintiffs offered the lease in evidence, they waived any question of its execution and delivery.—Canon v. Scott, Tex.Civ.App., 230 S.W. 1042, reversed on other grounds Scott & Carmody v. Canon, Com.App., 240 S.W. 304.

74. Conn.—Goodwin v. U. S. Annuity & Life Ins. Co., 24 Conn. 591.

One familiar with handwriting may testify that writing or signature was not of the purported author.—Dinnie v. Schiele, 22 N.E.2d 917, 61 Ohio App. 511.

75. Ga.—Savage v. McCarthy, 148 S.E. 585, 168 Ga. 650—Hines v. Moore, 148 S.E. 162, 168 Ga. 451—Chance v. Chance, 135 S.E. 923, 163 Ga. 267.
N.J.—Miko v. Feldman, 181 A. 632, 13 N.J.Misc. 837.
22 C.J. p 935 note 59.

Effect of statute

(1) Statutes abrogating the necessity of proving the document by a subscribing witness if available do not thereby alter the general requirement for proving authenticity.—Robertson v. Burstein, 146 A. 355, 105 N.J.Law 375, 65 A.L.R. 324, reversing 141 A. 92, 104 N.J.Law 218.

(2) Execution or authenticity is provable thereunder as if the instrument were not attested.—Robertson v. Burstein, supra.

76. Conn.—Great Hill Lake v. Caswell, 11 A.2d 396, 398, 126 Conn. 364, citing Corpus Juris—Pepe v. Aceto, 175 A. 775, 119 Conn. 282.
Ga.—Savage v. McCarthy, 148 S.E. 585, 168 Ga. 650—Hines v. Moore, 148 S.E. 162, 168 Ga. 451—Chance v. Chance, 135 S.E. 923, 163 Ga. 267—Commercial Credit Co. v. Grant, 125 S.E. 382, 33 Ga.App. 31.
Mont.—Angell v. Lewistown State Bank, 232 P. 90, 72 Mont. 345.
22 C.J. p 936 notes 60, 65–72.

Affidavit of witness

An affidavit of an attesting witness to the fact that he was an attesting witness and saw the instrument signed is under some statutes prima facie proof of genuineness authorizing admission of the instrument without further proof.—Jackson v. Florsheim Bros. Dry Goods Co., 131 So. 725, 171 La. 605—Le Boeuf v. Duplantis, App., 162 So. 592.

77. U.S.—Clarke v. Courtney, Ky., 5 Pet. 319, 8 L.Ed. 140.
22 C.J. p 936 note 61.

78. Ala.—Bennet v. Robinson, 3 Stew. & P. 227.
S.C.—Townsend v. Covington, 14 S.C.L. 219.

79. N.D.—Brynjolfson v. Northwestern El. Co., 71 N.W. 555, 6 N.D. 450, 66 Am.S.R. 612.

80. Ga.—Giannone v. Fleetwood, 21 S.E. 76, 93 Ga. 491.
22 C.J. p 936 note 64.

However, such an instrument has been admitted without proponent's calling or accounting for absence of subscribing witness, where execution was not denied by pleadings nor notice given that strict proof of execution would be required but where execution was proved by eyewitness.—Kelly v. Prudential Ins. Co. of America, 6 A.2d 55, 334 Pa. 143.

81. Conn.—Pepe v. Aceto, 175 A. 775, 119 Conn. 282.

82. Mont.—Angell v. Lewistown State Bank, 232 P. 90, 72 Mont. 345.

83. S.C.—Spencer v. Bedford, 35 S.C.L. 96.
22 C.J. p 936 note 73.

84. Ky.—Chambers v. Handley, 3 J.J.Marsh. 98.
22 C.J. p 936 note 74.

85. Pa.—Harrington v. Gable, 81 Pa. 406.
22 C.J. p 936 note 75.

86. Ga.—Ellis v. Doe, 10 Ga. 253.
22 C.J. p 937 note 76.

87. U.S.—Smith v. Gale, 12 S.Ct. 674,

court will have the same effect.[88] So with respect to the testimony of the parties to the instrument, while this has been held not sufficient to supply the lack of testimony of the attesting witnesses,[89] there is support for the contrary view.[90] With respect to agents of the parties, it has been asserted that the testimony of such an agent is not sufficient,[91] and, on the other hand, that it is.[92]

According to the more generally prevailing view, the rule is not altered by statutes allowing parties to a suit to be witnesses,[93] although some courts have thought otherwise.[94]

Instruments incidentally in issue. Where a writing is not directly but only incidentally or collaterally in issue, its execution may be proved by any competent testimony without calling the subscribing witness.[95]

Ancient documents as not within the rule are considered infra § 744.

Waiver. The requirement of proof by the testimony of attesting witnesses may be dispensed with where the party against whom the instrument is to be used waives his right to insist on such proof,[96] but the fact that a party has permitted a deed to be read in evidence on one trial without proof of execution does not amount to permission of such party that it may be introduced on a subsequent trial without such proof.[97]

Who is a subscribing witness. In order to render a person a subscribing witness, within the rule under consideration, he must affix his signature to the instrument[98] by the request or with the consent of the parties executing it,[99] and one whose name is subscribed to an instrument without his own knowledge and consent is not a subscribing witness.[1] It is not necessary, however, that the subscribing witness should see the instrument executed if the party or parties acknowledge the instrument and request the witness to sign.[2]

b. Availability of Secondary Evidence

(1) In general
(2) Residence of witness

(1) In General

As a general rule unavailability of the subscribing witness will justify use of secondary evidence to prove execution or authenticity of a writing.

If the subscribing witness or witnesses to a written instrument cannot be produced for the purpose of proving its execution,[3] as for instance, if they are dead[4] or cannot be found after reasonable efforts,[5] or in the case of a lost deed, if the witnesses are unknown,[6] secondary evidence of execution is admissible.

144 U.S. 509, 36 L.Ed. 521, affirming 29 N.W. 661, 4 Dak. 182.
Pa.—Brock v. Watson, 10 Pa.Co. 182.

88. Tenn.—Grady v. Sharron, 6 Yerg. 320.

89. Ga.—Hines v. Moore, 148 S.E. 162, 168 Ga. 451.
22 C.J. p 937 note 79.

Vendee of deed
Where instrument does not fall within statutory exceptions, refusal to permit vendee to testify that vendor signed conveyance not properly recorded is proper.—Hines v. Moore, supra.

90. Mich.—Rayburn v. Mason Lumber Co., 23 N.W. 811, 57 Mich. 273.
22 C.J. p 937 note 80.

Under statute
Under the Alabama statute execution may be proved by the maker of the instrument without calling the attesting witnesses or accounting for their absence.—Huckaby v. McGonnon & Co., 105 So. 886, 213 Ala. 631—22 C.J. p 937 note 80 [d].

91. Ky.—McMurtry v. Frank, 4 T.B. Mon. 39.
Mass.—Barry v. Ryan, 4 Gray 523.

92. Ala.—Falls v. Gaither, 9 Port. 605.

93. Mass.—Brigham v. Palmer, 3 Allen 450.
22 C.J. p 937 note 83.

94. Mo.—Bowling v. Hax, 55 Mo. 446.
Ohio.—Garrett v. Hanshue, 42 N.E. 256, 53 Ohio St. 482, 35 L.R.A. 321.
22 C.J. p 937 note 84.

95. Conn.—Great Hill Lake v. Caswell, 11 A.2d 396, 126 Conn. 364.
Ga.—Hines v. Moore, 148 S.E. 162, 168 Ga. 451—Chance v. Chance, 135 S.E. 923, 163 Ga. 267—Johnson-Battle Lumber Co. v. Emanuel Lumber Co., 126 S.E. 861, 33 Ga. App. 517.
22 C.J. p 938 note 89.

96. Ill.—Forsythe v. Hardin, 62 Ill. 206.
22 C.J. p 938 note 90.

Execution not contested
Where pleadings do not deny execution and there is no notice given that strict proof of execution would be required, an instrument authenticated by person present at execution is properly admitted, even though attesting witness is not called and his unavailability not shown.—Kelly v. Prudential Ins. Co. of America, 6 A.2d 55, 334 Pa. 143.

97. Mo.—Baldridge v. Walton, 1 Mo. 520.

98. N.Y.—In re Clute, 75 N.Y.S. 1059, 37 Misc. 586.

99. N.Y.—Keppler v. Nessler, 232 N.Y.S. 232, 225 App.Div. 99.
22 C.J. p 937 note 86.

1. Md.—Handy v. State, 7 Harr. & J. 42.

2. Ala.—Elston v. Roop, 32 So. 129, 133 Ala. 331.
22 C.J. p 937 note 88.

3. Ga.—Rieves v. Smith, 192 S.E. 372, 184 Ga. 657, 112 A.L.R. 368.
N.J.—Edison Fixture Co. v. Martone, 130 A. 456, 3 N.J.Misc. 967.
22 C.J. p 938 note 92.

4. Ga.—Miller v. Everett, 14 S.E.2d 449—Rieves v. Smith, 192 S.E. 372, 184 Ga. 657, 112 A.L.R. 368—Edenfield v. Brinson, 100 S.E. 373, 149 Ga. 377.
Tex.—Southwest Bitulithic Co. v. Martinez, 143 S.W.2d 116, 135 Tex. 347, reversing Martinez v. Southwest Bitulithic Co., Civ.App., 119 S.W.2d 740—Rogers v. Rogers, Com.App., 240 S.W. 1104, reversing, Civ.App., 230 S.W. 489.
22 C.J. p 938 note 93.

5. Ga.—Dunaway v. Virginia-Carolina Chemical Co., 82 S.E. 1071, 142 Ga. 383.
22 C.J. p 938 note 94.

6. Ga.—Turner v. Cates, 16 S.E. 971, 90 Ga. 731.
22 C.J. p 939 note 95.

The same is true where, after the time of subscribing, the witness becomes incompetent because of his becoming a party in litigation or otherwise interested, whether his interest is thrown on him by operation of law or is acquired by his voluntary act.[7] It has been held, however, that if the party offering an instrument has himself rendered the witness incompetent, secondary evidence will not be received.[8]

If the subscribing witness to an instrument denies or cannot recollect the transaction in question, other evidence of its execution may be resorted to,[9] and even hostility of the only available witness has been held a sufficient ground to warrant resort to other evidence.[10] However, the mere fact that a witness is sick and incapable of attending the trial has been held to be no ground for dispensing with his testimony.[11]

(2) Residence of Witness

Residence of the witness outside of the state or beyond the reach of court process generally justifies the use of secondary evidence to prove the execution of the writing.

It is a sufficient ground for the admission of secondary evidence that the attesting witnesses reside outside of the state or country or beyond the reach of the process of the court.[12] Where this is the case, it has been held to be immaterial that the residence of the witness is known,[13] or that he resides near the place of trial,[14] although there is also authority for the view that where the residence of the witness is known, and he lives within a reasonable distance from the place of trial, although outside of the state, his deposition should be taken.[15]

Temporary absence. According to some authorities the mere absence of the witness is sufficient to lay the foundation for the introduction of secondary evidence, without any showing of a permanent residence outside of the state or country or beyond the jurisdiction of the court,[16] but other cases hold that a mere temporary absence of the witness will not justify the admission of secondary evidence.[17]

Evidence of nonresidence. The fact of nonresidence of the witness may be established by any competent evidence,[18] and residence outside of the jurisdiction may be presumed from the fact that the instrument was executed outside of the jurisdiction.[19] The mere fact, however, that a grantor is described in a deed as residing outside of the state where it is sought to use the deed in evidence, together with proof that he does actually reside outside of the state is not sufficient to establish that the deed was executed outside of the state so as to let in secondary evidence of its execution without accounting for the absence of the subscribing witnesses.[20]

c. Nature of Proof

(1) In general
(2) Handwriting of witness
(3) Handwriting of person executing instrument

(1) In General

Applicable statutes determine the mode and sufficiency of secondary proof of execution when the subscribing witness is not available.

Applicable statutory provisions govern the mode and sufficiency of the alternative or secondary proof of execution when such proof is permissible.[21]

(2) Handwriting of Witness

Proof of the handwriting of the attesting witness is sometimes admissible and sufficient to prove execution when the witness is not available, and sometimes only when proof of actual execution or of the handwriting of the maker of the instrument is not available.

Where the attesting witness is unavailable, proof of his handwriting is often admissible as secondary evidence,[22] and proof of the handwriting of one

7. Ala.—Robertson v. Allen, 16 Ala. 106.
22 C.J. p 939 note 96.

8. N.J.—Patterson v. Schenck, 15 N.J.Law 434.
22 C.J. p 939 note 99.

9. Pa.—Hamsher v. Kline, 57 Pa. 397.
22 C.J. p 939 note 1.

10. S.C.—Merck v. Merck, 71 S.E. 969, 89 S.C. 347, Ann.Cas.1913A 937.

11. N.Y.—Jackson v. Root, 18 Johns. 60.
N.C.—Gordon v. Payne, 1 N.C. 82.

12. N.J.—Edison Fixture Co. v. Martone, 130 A. 456, 3 N.J.Misc. 967.
22 C.J. p 939 note 4.

13. N.H.—Dunbar v. Marden, 13 N.H. 311.

14. Ga.—Harris v. Cannon, 6 Ga. 382, 389.
22 C.J. p 940 note 6.

15. Vt.—Rich v. Trimble, 2 Tyler 349.

16. Cal.—Jackson v. Feather River & Gibsonville Water Co., 14 Cal. 18.
22 C.J. p 940 note 8.

17. Tenn.—Harrel v. Ward, 2 Sneed 610.
22 C.J. p 940 note 9.

18. Mass.—Troeder v. Hyams, 27 N.E. 775, 153 Mass. 536.
22 C.J. p 940 note 10.

19. Wyo.—Boswell v. Laramie First Nat. Bank, 92 P. 624, 93 P. 661, 16 Wyo. 161.
22 C.J. p 940 note 11.

20. Mass.—Tyng v. Boston & M. R. Co., 12 Cush. 277.

21. Ga.—Miller v. Everett, 14 S.E.2d 449—Rieves v. Smith, 192 S.E. 372, 184 Ga. 657—Edenfield v. Brinson, 100 S.E. 373, 149 Ga. 377.

22. Tex.—Southwest Bitulithic Co. v. Martinez, 143 S.W.2d 116, 135 Tex. 347, reversing Martinez v.

of several witnesses may be sufficient.[23] In some jurisdictions proof of the handwriting of the witness is sufficient to admit the document in evidence without proof of the handwriting of the person by whom it was executed,[24] but in other jurisdictions the rule is that the handwriting of the maker as well as of the attesting witnesses must be proved,[25] unless the maker signed by mark,[26] or it is made to appear that proof of his handwriting is unavailable.[27] Under some statutes, proof of the handwriting of the attesting witnesses is permissible and sufficient to render the document admissible if evidence of actual execution or of the handwriting of the maker is unavailable.[28] In any event, there should be proof of some fact or facts showing the identity of the maker and connecting him with the instrument.[29]

Incompetent witnesses. Where the subscribing witnesses to an instrument on which an action is brought have become disqualified by interest acquired since its execution, proof of the handwriting of the witnesses is competent to prove the due execution of the instrument.[30] Where, however, the subscribing witness was, by reason of the relation of husband and wife or interest in some other way, incompetent to testify to the execution of an instrument at the time of the subscribing as well as at the time of trial, proof of the witness' handwriting is inadmissible, but proof of the party's handwriting is admissible as if there had been no attesting witness.[31]

Proof of sealing and delivery. Where the attestation of the subscribing witnesses certifies to the delivery as well as the execution of the document, delivery is sufficiently proved where nonproduction of the witnesses is accounted for and proof of their handwriting is made;[32] but such proof is insufficient to show delivery of an instrument containing no recital of delivery.[33] Proof of the death and of the handwriting of a subscribing witness to an instrument not in the usual form of a sealed instrument, nor purporting in the body thereof to be sealed, is not evidence of the delivery and sealing of the instrument, although a sufficient seal is affixed to the subscriber's name.[34]

(3) Handwriting of Person Executing Instrument

When the subscribing witness cannot be produced, proof of the maker's handwriting may be made to prove execution, but in some jurisdictions only if proof of the witness's handwriting cannot be made.

According to the decisions in some jurisdictions, and under the statutes of others, if it appears that the attesting witness is incapable of being produced, proof of the signature of the person executing the instrument may be made without first showing the unavailability of proof of the witness' handwriting.[35] In other jurisdictions, however, where the subscribing witness cannot be produced, it has been held essential as the next step to prove the handwriting of the witness, this being regarded as furnishing the evidence next in degree, and proof of the handwriting of the person who executed the instrument will not, according to these authorities, be admitted unless proof of the handwriting of the witness cannot be procured.[36] It is,

Southwest Bitulithic Co., Civ.App., 119 S.W.2d 740—Rogers v. Rogers, Com.App., 240 S.W. 1104, reversing, Civ.App., 230 S.W. 489.
22 C.J. p 940 note 13.

Signature by mark

Where signature of deceased subscribing witness on contracts was proved to be genuine and signature of surviving subscribing witness was also admitted to be genuine, and contracts bore notary public's certificate of acknowledgment, evidence established prima facie execution of the contracts so that admission of the contracts in evidence was not an abuse of trial court's discretion.—Southwest Bitulithic Co. v. Martinez, 143 S.W.2d 116, 135 Tex. 347, reversing Martinez v. Southwest Bitulithic Co., Civ.App., 119 S.W.2d 740.

23. Ala.—Smith v. Keyser, 22 So. 149, 115 Ala. 455.
22 C.J. p 940 note 14.

24. D.C.—U. S. v. Boyd, 8 App.D.C. 440.
22 C.J. p 940 note 15.

25. Ill.—Hobart v. Hobart, 39 N.E. 581, 154 Ill. 610, 45 Am.S.R. 151.
22 C.J. p 941 note 16.

26. La.—Tagiasco v. Molinari, 9 La. 512.
22 C.J. p 941 note 17.

27. La.—McGowan v. Laughlan, 12 La.Ann. 242.

28. Ga.—Miller v. Everett, 14 S.E.2d 449.
22 C.J. p 941 note 16 [b].

Instrument signed by mark

Where instrument was signed by marks, and at time of trial makers and subscribing witnesses were dead, and evidence authorized inference that direct evidence of actual signing by alleged makers was not attainable, evidence to effect that signatures of witnesses were in their genuine handwriting constituted sufficient prima facie proof of execution of alleged instrument to authorize its admission in evidence.—Miller v. Everett, Ga., 14 S.E.2d 449—Edenfield v. Brinson, 100 S.E. 373, 149 Ga. 377.

Handwriting of maker and witness

Ga.—Rieves v. Smith, 192 S.E. 372, 184 Ga. 657, 112 A.L.R. 368.

29. Mo.—Gallagher v. Delargy, 57 Mo. 29.
22 C.J. p 941 note 19.

30. Md.—Keefer v. Zimmerman, 22 Md. 274.
22 C.J. p 941 note 23.

31. Mass.—Packard v. Dunsmore, 11 Cush. 282.
22 C.J. p 941 note 24.

32. S.C.—Dawson v. Dawson, 14 S.C. Eq. 243.

33. S.C.—Dawson v. Dawson, supra.

34. N.J.—Newbold v. Lamb, 5 N.J. Law 526.

35. Ga.—Rieves v. Smith, 192 S.E. 372, 184 Ga. 657, 112 A.L.R. 368.
22 C.J. p 941 note 25.

36. N.C.—Jones v. Blount, 2 N.C. 238.
22 C.J. p 941 note 26.

however, agreed that proof of the handwriting of the person executing the instrument may be resorted to if the party is unable to prove the handwriting of the attesting witness,[37] or in a case where the subscribing witness merely made his mark instead of writing his name.[38]

Proof of the handwriting of the maker may always be produced as corroborative evidence of the due and valid execution of the instrument.[39]

d. Rebutting or Impeaching Evidence

The proof relating to the execution or authenticity of an attested instrument may be rebutted by competent and relevant evidence.

It may be shown by a subscribing witness or alleged subscribing witness that the instrument in question was not in fact delivered[40] or that his signature is not genuine.[41]

The presumption of the execution of an instrument by the maker arising from proof of the handwriting of a deceased subscribing witness may be rebutted by evidence that the signature is not in the maker's handwriting,[42] or by the denial of the person by whom the instrument purports to be executed in connection with other circumstances.[43]

The character of the subscribing witness to an instrument who has proved the instrument in open court for the purpose of registration has been held subject to be impeached in a subsequent suit based on the instrument, although he is not a witness in the suit.[44] So it has been held that, where an instrument is read in evidence on proof of the handwriting of a deceased attesting witness, the adverse party may show the bad character of such witness at the time when he made the attestation,[45] or his contradictory declarations, as that the instrument was a forgery, or was antedated,[46] although the instrument is not rendered inadmissible by proof of the bad character of the witness.[47] However, it has also been considered that where the execution of an instrument offered in evidence is proved by one of the subscribing witnesses, the other being dead, evidence of the bad character of deceased witness for veracity is not admissible,[48] and that in such case declarations of deceased witness cannot be shown to contradict the attestation.[49] Contradictory declarations of deceased witnesses have been rejected, even though no living witness testified to the execution of the instrument.[50]

§ 740. —— Unattested Instruments

The execution or authenticity of an unattested writing may be proved by competent eyewitnesses, by the admissions or testimony of the maker, or by competent evidence of the genuineness of his signature or handwriting.

Where a written instrument is not attested by any subscribing witnesses, it is nevertheless admissible, although evidence of execution or authenticity other than that of subscribing witnesses must of course be resorted to.[51] In such a case any competent proof may be used to prove the instrument.[52] It may be proved by the testimony of a person who was present and saw it executed,[53] by the testimony

37. N.Y.—McPherson v. Rathbone, 11 Wend. 96.
22 C.J. p 942 note 27.

38. Ga.—Watts v. Kilburn, 7 Ga. 356.
N.C.—Carrier v. Hampton, 33 N.C. 307.
Va.—Gilliam v. Perkinson, 4 Rand 325, 25 Va. 325.

39. N.C.—Miller v. Hahn, 84 N.C. 226.
22 C.J. p 942 note 29.

40. S.C.—Jackson v. Inabinit, 12 S.C.L. 9.

41. Tex.—Jones v. Garza, 11 Tex. 186.
22 C.J. p 942 note 31.

42. N.Y.—People v. McHenry, 19 Wend. 482.

43. W.Va.—Thompson v. Halstead, 29 S.E. 991, 44 W.Va. 390.

44. Del.—Vandyke v. Thompson, 1 Del. 109.

45. N.Y.—Losee v. Losee, 2 Hill 609.
22 C.J. p 942 note 35.

46. S.C.—Smith v. Asbell, 33 S.C.L. 141—McElwee v. Sutton, 18 S.C.L. 128.

47. Mo.—Lawless v. Guelbreth, 8 Mo. 139.

48. N.J.—Meeker v. Boylan, 28 N.J. Law 274.

49. N.J.—Meeker v. Boylan, supra.

50. D.C.—U. S. v. Boyd, 8 App.D.C. 440.
22 C.J. p 942 note 39.

51. Ill.—Dundy v. Chambers, 23 Ill. 369.
22 C.J. p 942 note 40.

52. N.C.—Henrico Lumber Co. v. Dare Lumber Co., 117 S.E. 10, 185 N.C. 237.
38 C.J. p 201 note 33–35.

One with knowledge of facts
Where chattel mortgage was not witnessed, mortgagee, or any other person having knowledge of facts, could testify to its execution.—Kelley v. Cassels, 147 So. 597, 226 Ala. 410.

Proof of signatures unnecessary
In proceeding respecting tutor's account of administration of minors' property, where minors filed opposition to account and tutor, who kept no systematic account of tutorship, testified that receipts from third persons showed all expenditures made by tutor during period covered by final account, receipts were admissible over objection that signatures of persons receiving payments were not properly proved.—Succession of Fontano, 200 So. 142, 196 La. 775.

53. Ga.—Modern Order of Praetorians v. Blackburn, 157 S.E. 331, 42 Ga.App. 690.
Md.—Matthews v. J. B. Colt Co., 125 A. 840, 145 Md. 667.
22 C.J. p 624 note 16—22 C.J. p 942 note 41.

Surveyor's field notes
Admitting field notes of surveyor on testimony of surveyor's assistant, without placing surveyor on stand to identify notes, was not error, where surveyor had merely recorded in presence of assistant data supplied him by assistant, and opponent had stated it had no objection to introduction of such portion of notes.—City of Detroit v. Porath, 260 N.W. 114, 271 Mich. 42.

or admissions of the person executing it,[54] by the testimony of any one familiar with his handwriting,[55] or by any competent proof of the genuineness of his handwriting.[56]

§ 741. Sufficiency of Evidence

A prima facie case of execution or authenticity is generally required or is sufficient to render the writing admissible. Proof may be by circumstantial evidence.

Although reasonable certainty in proof of the execution, genuineness, or authenticity of an instrument offered in evidence should be required,[57] it is not necessary that the proof should be conclusive, but a prima facie showing that the instrument is genuine and authentic is sufficient to warrant its reception.[58] Neither is it necessary, to entitle an unattested instrument to be read in evidence, that

54. Ga.—Modern Order of Praetorians v. Blackburn, 157 S.E. 331, 42 Ga.App. 690.
Ky.—Davis v. Antol, 262 S.W. 278, 203 Ky. 273.
Pa.—Brenner v. Lesher, 2 A.2d 731, 332 Pa. 522—Keys v. Hanscome Bros., 135 A. 860, 288 Pa. 389.
22 C.J. p 943 note 42.

Admission by agent
Ga.—Bell v. Mobley, 187 S.E. 876, 183 Ga. 198.

Explanation proper
When party admitted making his mark to a paper, effect was same as if he had admitted signing it, and it should have been admitted in evidence subject to explanation.—Davis v. Antol, 262 S.W. 278, 203 Ky. 273.

Identification of signature
(1) In action on industrial life policy, cross-examination wherein administrator admitted that signatures on proof of death were his, but that he did not know whether they were the papers he signed, was held to authorize admission of exhibits.—Palyo v. Western & Southern Life Ins. Co., 174 A. 640, 114 Pa.Super. 583.

(2) Where witness admitted signing a witness card, and did not deny signing particular card presented to her and admitted that handwriting looked like hers, and another witness testified that card had been signed by witness, card was sufficiently identified to justify its introduction in evidence.—Curtis v. Dallas Ry. & Terminal Co., Tex.Civ.App., 73 S.W.2d 964, error dismissed.

55. Ala.—Huckaby v. McConnon & Co., 105 So. 886, 213 Ala. 631.
S.C.—J. L. Mott Iron Works v. Kaiser Co., 103 S.E. 783, 131 S.C. 392, certiorari granted First Nat. Bank of Aiken v. J. L. Mott Iron Works, 41 S.Ct. 64, 254 U.S. 627, 65 L.Ed. 445, and affirmed 42 S.Ct. 286, 258 U.S. 240, 66 L.Ed. 593.
22 C.J. p 943 note 43.

56. Ga.—Modern Order of Praetorians v. Blackburn, 157 S.E. 331, 42 Ga.App. 690.
22 C.J. p 943 note 44.

Identification of signatures
Ohio.—Slamey v. City Material Co., 165 N.E. 55, 30 Ohio App. 435.

Contradictory statements of a witness as to the signature to a writing is without probative value and hence insufficient to authorize admission of the writing in evidence.—Martin v. Springfield City Water Co., Mo.App., 128 S.W.2d 674.

Characteristics of writing
Authenticity may be established by showing that peculiarities of spelling, style, etc., in the writing were characteristic of the supposed writer.—Josephs v. Briant, 172 S.W. 1002, 115 Ark. 538, Ann.Cas.1916E 741.
22 C.J. p 624 note 17.

57. N.Y.—People v. Manganaro, 112 N.E. 436, 218 N.Y. 9.

Prima facie case
One offering a document in evidence must make out a prima facie case and show that the paper is apparently as contended.
Conn.—Hurlburt v. Bussemey, 126 A. 273, 101 Conn. 406.
N.H.—Lawrence v. Tennant, 15 A. 543, 64 N.H. 532.

Proof of part insufficient
An instrument cannot be proved by proving part of it.—Brackenridge v. Roberts, 270 S.W. 1001, 114 Tex. 418, denying rehearing 267 S.W. 244, 114 Tex. 418.

Unsigned writing
Where written statements are unsigned, because their probative value is greater than mere oral statements, trial court, before submitting writing to jury, should be satisfied that evidence of its authentication is sufficient to satisfy a reasonably inquiring mind of its genuineness.—Brenner v. Lesher, 2 A.2d 731, 332 Pa. 522.

Contents as evidence of execution
(1) General rule is that mere contents of written instrument claimed to have been executed by certain person are not sufficient evidence of execution.—Malulo v. Resolved Corporation, 217 N.Y.S. 64, 217 App.Div. 777.

(2) However, where person claimed to have executed instrument was unable to sign his name, and contents were solely referable to him, instrument should have been admitted as some proof of his execution thereof, his denial thereof raising fact question for jury.—Malulo v. Resolved Corporation, supra.

58. Conn.—Max Ams Mach. Co. v. International Ass'n of Machinists, Bridgeport Lodge, No. 30, 102 A. 706, 92 Conn. 297.
Fla.—Ramsey v. City of Kissimmee, 149 So. 553, 111 Fla. 387.
Ind.—Hawkins v. Rieman, 125 N.E. 410, 73 Ind.App. 127.
Mo.—Copple v. Life & Annuity Ass'n, App., 196 S.W. 399.
Tex.—Southwest Bitulithic Co. v. Martinez, 143 S.W.2d 116, 135 Tex. 347, reversing Martinez v. Southwest Bitulithic Co., Civ.App., 119 S.W.2d 740.
22 C.J. p 943 note 46.

Showing held sufficient
U.S.—Adler v. New York Life Ins. Co., C.C.A.Ark., 33 F.2d 827—Second Nat. Bank v. Columbia Trust Co., C.C.A.N.J., 288 F. 17, 30 A.L.R. 1299.
Ala.—Pallilla v. Galilee Baptist Church, 112 So. 134, 215 Ala. 667—Richardson v. Stinson, 100 So. 209, 211 Ala. 254.
Ga.—Miller v. Everett, 14 S.E.2d 449—Rieves v. Smith, 192 S.E. 372, 184 Ga. 657, 112 A.L.R. 368—Modern Order of Praetorians v. Blackburn, 157 S.E. 331, 42 Ga.App. 690—Mendel v. Converse & Co., 118 S.E. 586, 30 Ga.App. 549.
Ill.—W. T. Rawleigh Co. v. Ulm, 268 Ill.App. 248—Paden v. Rockford Palace Furniture Co., 220 Ill.App. 534, certiorari denied Rockford Palace Furniture Co. v. Paden, 42 S.Ct. 54, 257 U.S. 645, 66 L.Ed. 413.
Ind.—Hawkins v. Motor Bank of Denver, Colo., 150 N.E. 118, 84 Ind.App. 122.
Iowa.—Smith v. Louisville & N. R. Co., 209 N.W. 465, 202 Iowa 292.
La.—Succession of Fontano, 200 So. 142, 196 La. 775—Reed v. Continental Casualty Co., App., 171 So. 491—Stewart Bros. Cotton Co. v. Dufilho, 133 So. 521, 16 La.App. 148.
Mo.—Caldwell v. Barnsdall Refining Corporation, App., 150 S.W.2d 504—Caldwell v. Barnsdall Refining Corporation, App., 135 S.W.2d 1105—Anderson v. Metropolitan Life Ins. Co., App., 96 S.W.2d 631.
N.C.—Devereux v. McMahon, 9 S.E. 635, 102 N.C. 284.
N.D.—Wishek v. U. S. Fidelity & Guaranty Co. of Baltimore, Md., 213 N.W. 488, 55 N.D. 321.
Ohio.—Slamey v. City Material Co., 165 N.E. 55, 30 Ohio App. 435.

its execution should be proved by direct evidence, but it will be sufficient if that fact is fairly inferable from the facts and circumstances proved.[59] It has even been considered that any evidence, however slight, tending to prove the execution of the instrument is sufficient to entitle the party offering it to have it shown to the jury.[60]

A sealed instrument is properly admitted on proof of the maker's signature, without proof as to the seal.[61] Since a deed properly acknowledged by a married woman, in which her husband joins, passes title to the property, its execution, for the purpose of admitting it in evidence, may be proved as at common law.[62]

Admissions. An admission, by the party against whom a writing is sought to be introduced, of its authenticity or correctness dispenses with further proof.[63] If the genuineness of the signature to an instrument is admitted or proved, it is not necessary to go further and prove the genuineness of the writing in the body of the instrument,[64] or to prove that it was actually made on the day of its date.[65]

§ 742. —— Testimony of Subscribing Witnesses

Testimony by an attesting witness that he was present, saw the execution of the writing, and attested the same is generally held sufficient to render the writing admissible.

Testimony of an attesting witness to the effect that he was present and saw the instrument signed and delivered and attested the execution is sufficient to entitle the instrument to admission as evidence;[66] and it has been held sufficient that the witness testified that the instrument was signed in his presence "to the best of his recollection."[67] It is not, however, essential to admit an instrument in evidence that the subscribing witness should remember its execution by the parties; it is sufficient if he states that his signature is genuine and that it would not have been placed on the instrument unless he had been called to witness it and unless the execution either took place in his presence or was acknowledged to him.[68]

Number of witnesses to be produced. Ordinarily it is sufficient to call one of several subscribing witnesses to an instrument to prove its execution and

Pa.—Brenner v. Lesher, 2 A.2d 731, 332 Pa. 522.
R.I.—Mason v. Williams, 124 A. 467, 46 R.I. 24.
S.C.—McRae v. S. F. Bowser & Co., 105 S.E. 411, 115 S.C. 262.
Tex.—Smith v. Allbright, Civ.App., 279 S.W. 552, affirmed Albright v. Smith, Com.App., 288 S.W. 178, reversed on other grounds Allbright v. Smith, 5 S.W.2d 970—Shults v. Peacock Military College, Civ.App., 234 S.W. 242.
22 C.J. p 943 note 46 [d].

Showing held insufficient
Cal.—Brown v. Ball, 12 P.2d 28, 123 Cal.App. 758.
Ga.—Hines v. Moore, 148 S.E. 162, 168 Ga. 451.
Mo.—Mourer v. Wabash Ry. Co., 280 S.W. 1050, 222 Mo.App. 495.
Okl.—National Aid Life Ass'n v. Abbott, 62 P.2d 982, 178 Okl. 319.
Tenn.—Bennett v. Anderson, 101 S.W.2d 148, 20 Tenn.App. 523.
22 C.J. p 943 note 46 [e].

Proof of delivery
(1) A husband's deed of life estate to wife and remainder to children, reciting that husband had delivered it, found in husband's safe in wife's "little box" was admissible in evidence without further proof of delivery.—State Banking Co. v. Miller, 196 S.E. 47, 185 Ga. 653.
(2) In suit to apply insurer's obligation under liability policy in satisfaction of judgment debt of insured for injury resulting from collision with automobile driven by employee of insured, wherein it was shown that employee had purchased automobile by conditional sale from insured through finance company and that insured's policy did not cover automobiles which had been sold, admitting assignment of sales contract by insured to finance company was not error, where insured's office manager testified document had been sent to finance company but did not remember doing so.—Rioux v. Employers Liability Assur. Corporation, 187 A. 753, 134 Me. 459.

Conflict in testimony goes to weight and not admissibility of the writing.—Larimer v. Smith, 19 P.2d 825, 130 Cal.App. 98.

Insufficient identification
Ariz.—Posner v. New York Life Ins. Co., 106 P.2d 488.

Signature by mark
It is sufficient proof of execution of mortgage, to render it prima facie admissible, that the subscribing witness testified that mortgagor could not write, and told witness to sign, which was done, mortgagor making his mark.—Richardson v. Stinson, 100 So. 209, 211 Ala. 254.

59. Ind.—Hawkins v. Rieman, 125 N.E. 410, 73 Ind.App. 127.
Iowa.—Smith v. Louisville & N. R. Co., 209 N.W. 465, 202 Iowa 292.
Tex.—Gibralter Colorado Life Co. v. Taylor, Civ.App., 99 S.W.2d 1084, reversed on other grounds 123 S.W.2d 318, 132 Tex. 328.
22 C.J. p 944 note 47.

Circumstantial or indirect evidence
Mich.—Flickema v. Henry Kraker Co., 233 N.W. 362, 252 Mich. 406, 72 A.L.R. 1046.
Okl.—Globe Automatic Sprinkler Co. v. Braniff, 214 P. 127, 89 Okl. 105.

60. Mo.—Hicks v. Chouteau, 12 Mo. 341.
22 C.J. p 944 note 48.

61. Md.—Murdock v. Schindel, 98 A. 149, 128 Md. 633.

62. Tex.—Lamberida v. Barnum, Civ.App., 90 S.W. 698.

63. Ill.—Scovill Mfg. Co. v. Cassidy, 114 N.E. 181, 275 Ill. 462, Ann.Cas. 1918E 602, affirming 195 Ill.App. 448.

64. La.—Mandere v. Bonsignore, 28 La.Ann. 521.

65. Me.—Pullen v. Hutchinson, 25 Me. 249.
Md.—Glenn v. Grover, 3 Md. 212.

66. Ala.—McClelland v. Coston, 149 So. 697, 227 Ala. 267.
22 C.J. p 944 note 54.

67. Cal.—McGarrity v. Byington, 12 Cal. 426.

68. Ala.—Williams v. Riddlesperger, 148 So. 803, 805, 227 Ala. 113, citing Corpus Juris.
Ga.—Hall v. Simmons, 179 S.E. 272, 50 Ga.App. 634.
22 C.J. p 945 note 56.

to authorize the reading of it to the jury,[69] unless, it has been held, the judge in his discretion requires the production of the others.[70] However, it has been held that the single witness must be able to prove all the facts essential to the legal execution of the instrument, proof of his own signature and the signatures of the other witnesses not being sufficient;[71] and the testimony of more than one witness is sometimes required by statute where the alleged maker of the instrument denies his signature.[72]

E. ANCIENT DOCUMENTS

§ 743. Definition

As shown infra § 747, ancient documents, within the meaning of the rule making them admissible without proof of execution, are generally held to be documents which have been in existence for thirty years or more.

§ 744. Admissibility in General

A document which appears to be of the age of at least thirty years, which is found in the proper custody, and which is unblemished by alterations and is otherwise free from suspicion is admissible in evidence without direct proof of its execution.

The "ancient document" rule is that a document which appears to be of the age of at least thirty years, which is found in the proper custody, and which is unblemished by alterations and is otherwise free from suspicion is admissible in evidence without direct proof of its execution on the theory that, under such circumstances, the instrument proves itself.[73] The rule is adopted for common convenience and is founded on the great difficulty of proving the due execution of a deed after an interval of many years. After the lapse of thirty years from the time of execution of a document the witnesses are presumed to be dead or beyond the jurisdiction of the court.[74] Under this rule documents have been frequently admitted in evidence on proof of the handwriting of parties thereto or of subscribing witnesses without calling subscribing witnesses who are still alive,[75] even though the testimony of the witness would tend to overthrow or to establish the document.[76] The fact that an instrument is an ancient document does not, however, affect its admissibility in evidence further than to dispense with proof of its genuineness where it is otherwise admissible.[77] When an ancient document is insufficiently accounted for, so that some proof of execution or authenticity is necessary, or where an instrument not ancient is yet sufficiently old to make such proof difficult, very slight proof is sufficient in comparison with that required concerning very recent transactions.[78]

Proof of the genuineness of an ancient document when offered as a standard for the purpose of comparing handwriting is considered supra § 617 b.

69. Conn.—O'Sullivan v. Overton, 14 A. 300, 56 Conn. 102.
22 C.J. p 945 note 57.

70. Mass.—Burke v. Miller, 7 Cush. 547.

71. N.Y.—Jackson v. Le Grange, 19 Johns. 386, 10 Am.D. 237.
S.C.—Martin v. Bowie, 15 S.E. 736, 37 S.C. 102—Russell v. Tunno, 45 S.C.L. 303.

72. La.—Watts v. Collier, 72 So. 822, 140 La. 99.

73. Ala.—Hamilton v. Town of Warrior, 112 So. 136, 215 Ala. 670.
Ga.—McDay v. Metropolitan Life Ins. Co., 181 S.E. 871, 51 Ga.App. 791.
Ky.—Brashears v. Riverside Coal & Timber Co., 278 S.W. 832, 212 Ky. 142—Cooper v. Williamson, 229 S. W. 707, 709, 191 Ky. 213, quoting **Corpus Juris.**
N.Y.—Fairchild v. Union Ferry Co. of New York & Brooklyn, 201 N. Y.S. 295, 121 Misc. 513, affirmed 207 N.Y.S. 835, 212 App.Div. 823, affirmed 148 N.E. 750, 240 N.Y. 666.
Pa.—Jones v. Scranton Coal Co., 118 A. 219, 274 Pa. 312.
Tex.—Martinez v. Bruni, Civ.App., 216 S.W. 655, modified on other grounds, Com.App., 235 S.W. 549.
22 C.J. p 945 note 66.

Where question is close as to whether a writing is admissible as an ancient document, the court should admit it, with an instruction that the jury have the right to pass finally on its genuineness.—Gaskin v. Guthrie, 132 S.E. 764, 162 Ga. 103.

After the lapse of a century or more, courts do not look at records with overtechnical eyes.—Beers v. Hotchkiss, 175 N.E. 506, 256 N.Y. 41, reversing 245 N.Y.S. 478, 230 App.Div. 447, which affirmed 238 N. Y.S. 463, 135 Misc. 796—People v. Foote, 273 N.Y.S. 567, 242 App.Div. 162, motion denied 5 N.E.2d 362, 272 N.Y. 622, appeal dismissed 7 N.E.2d 728, 273 N.Y. 629 and 7 N.E.2d 729, 273 N.Y. 630, certiorari denied Foote v. People of State of New York, 58 S.Ct. 367, 302 U.S. 760, 82 L.Ed. 588.

74. Md.—Homewood Realty Corporation v. Safe Deposit & Trust Co. of Baltimore, 154 A. 58, 160 Md. 457, 78 A.L.R. 8.
Pa.—Commonwealth v. Ball, 121 A. 191, 277 Pa. 301, 29 A.L.R. 626—Jones v. Scranton Coal Co., 118 A. 219, 274 Pa. 312.
22 C.J. p 946 note 67.

75. Va.—Wells v. New York Min. & Mfg. Co., 119 S.E. 127, 137 Va. 460.
22 C.J. p 946 notes 68, 69.

76. Ga.—Gardner v. Granniss, 57 Ga. 539.
Ky.—Everidge v. Martin, 175 S.W. 1004, 164 Ky. 497.

77. Ala.—Aiken v. McMillan, 106 So. 150, 213 Ala. 494.
Ky.—Cooper v. Williamson, 229 S.W. 707, 709, 191 Ky. 213, citing **Corpus Juris.**
N.Y.—In re Whalen's Estate, 261 N. Y.S. 761, 776, 146 Misc. 176, quoting **Corpus Juris.**
22 C.J. p 946 note 71.

78. U.S.—Winn v. Patterson, Ga., 9 Pet. 663, 9 L.Ed. 266.
22 C.J. p 947 note 72.

§ 745. Purposes for Which Admitted

Ancient documents may be admitted in evidence as proof of the facts recited therein, provided the writers would have been competent to testify as to such facts.

Ancient documents may be admitted in evidence as proof of the facts recited therein,[79] provided the writers would have been competent to testify as to such facts.[80] Such documents may, therefore, be received to prove or disprove title[81] or possession,[82] or the location of a boundary line,[83] or the existence of a highway[84] or right of way.[85] They may also be admitted to prove matters of pedigree,[86] heirship[87] or widowhood;[88] or to prove or disprove the identity of persons[89] or land,[90] or the existence of a power,[91] or the authority of an executor or administrator to sell.[92]

A recital in an ancient deed or will of any antecedent deed or document, consistent with its own provisions, will after the lapse of a long period be presumptive proof of the former existence of such deed or document, especially in a case where nothing appears to rebut such presumption.[93] Ancient documents coming out of the proper custody, and purporting on their face to show exercise of ownership, such as leases or licenses, have been admitted as being in themselves acts of ownership and proof of possession.[94]

§ 746. Character of Instrument

a. In general
b. Records
c. Copies or secondary evidence
d. Instruments executed under power

a. In General

Any document which is otherwise competent may, as a general rule, be admitted in evidence as an ancient document, on proof of the requisite facts.

It may be laid down as a general rule that any document or paper, if it is otherwise competent, may, on proof of the requisite facts, be admitted in evidence as an ancient document,[95] and this rule applies whether the writing is with or without attesting witnesses.[96] Among instruments which have been admitted under the ancient document rule may be mentioned abstracts of title,[97] account books,[98] affidavits,[99] antenuptial settlements,[1] assignments,[2]

79. Ala.—McMillan v. Aiken, 88 So. 135, 205 Ala. 35.
Ga.—Ryals v. Wilson, 111 S.E. 414, 152 Ga. 757.
Mo.—Brown v. Weare, 152 S.W.2d 649.
Tex.—Bendy v. W. T. Carter & Bros., Com.App., 269 S.W. 1037, affirming W. T. Carter & Bro. v. Bendy, Civ.App., 251 S.W. 265.
22 C.J. p 947 note 73.

80. N.Y.—In re Barney's Will, 174 N.Y.S. 242, 185 App.Div. 782.
R.I.—Budlong v. Budlong, 136 A. 308, 48 R.I. 144.
22 C.J. p 946 note 71 [a].

81. Fla.—Clark v. Cochran, 85 So. 250, 79 Fla. 788.
Ga.—Guthrie v. Gaskins, 155 S.E. 185, 171 Ga. 303.
Ky.—Elkhorn Coal Corporation v. Bradley, 288 S.W. 326, 216 Ky. 599.
Md.—Homewood Realty Corporation v. Safe Deposit & Trust Co. of Baltimore, 154 A. 58, 160 Md. 457, 78 A.L.R. 8.
Pa.—Mellott v. Mellott, 18 Pa.Dist. & Co. 97.
S.C.—Atlantic Coast Line R. Co. v. Searson, 135 S.E. 567, 137 S.C. 468.
Tex.—Magee v. Paul, 221 S.W. 254, 110 Tex. 470, answering certified questions, Civ.App., 159 S.W. 325, and answers conformed to, Civ. App., 224 S.W. 1118.
22 C.J. p 947 note 74.

Only in connection with other proof of a long-continued and undisputed possession, in accordance with the right or title claimed, are the recitals in an ancient deed, relating to the person from whom title was derived, admissible.—Furbee v. Underwood, 147 S.E. 472, 107 W.Va. 85.

82. Conn.—Mentz v. Town of Greenwich, 171 A. 10, 118 Conn. 137.
22 C.J. p 947 note 75.

83. Tex.—Jones-O'Brien, Inc., v. Loyd, Civ.App., 125 S.W.2d 684, error granted.
Va.—Keppler v. City of Richmond, 98 S.E. 747, 124 Va. 592.
22 C.J. p 947 notes 76–79.

84. R.I.—Horgan v. Jamestown Town Council, 80 A. 271, 32 R.I. 528.

85. Mass.—Randall v. Chase, 133 Mass. 210.
N.Y.—Oxford v. Willoughby, 73 N. E. 677, 181 N.Y. 155.

86. Okl.—Neustadt v. Coline Oil Co., 284 P. 52, 141 Okl. 113, certiorari denied 51 S.Ct. 38, 282 U. S. 799, 75 L.Ed. 719.
Tex.—Moses v. Chapman, Civ.App., 280 S.W. 911.
22 C.J. p 947 note 84.

87. Tex.—Sun Pipe Line Co. v. Wood, Civ.App., 129 S.W.2d 704—Moses v. Chapman, Civ.App., 280 S.W. 911.
W.Va.—Wilson v. Braden, 49 S.E. 409, 56 W.Va. 372, 107 Am.S.R. 927.

88. W.Va.—Wilson v. Braden, supra.

89. Tex.—Southwestern Settlement & Development Co. v. Village Mills Co., Civ.App., 245 S.W. 975.
22 C.J. p 947 note 87.

90. Ga.—King v. Sears, 18 S.E. 830, 91 Ga. 577.

91. N.Y.—Doe v. Campbell, 10 Johns. 475.
22 C.J. p 947 note 89.

92. Tex.—Williams v. Cessna, 95 S. W. 1106, 43 Tex.Civ.App. 315.

93. U.S.—Davis v. Gaines, La., 104 U.S. 386, 26 L.Ed. 757.
22 C.J. p 947 note 92.

94. Conn.—New York, etc., R. Co. v. Cella, 91 A. 972, 88 Conn. 515, Ann.Cas.1917D 590.
22 C.J. p 948 note 93.

95. Tex.—Holt v. Maverick, 23 S.W. 751, 5 Tex.Civ.App. 650.
22 C.J. p 948 note 94.

96. Va.—Nowlin v. Burwell, 75 Va. 551.

97. Ill.—Cooney v. A. Booth Packing Co., 48 N.E. 406, 169 Ill. 370.
22 C.J. p 948 note 96.

98. D.C.—Cole v. William Lea & Sons Co., 35 App.D.C. 355.

99. N.Y.—Coleman v. Bruch, 117 N. Y.S. 582, 132 App.Div. 716.

Although affiant was still alive, ancient affidavit was admissible.—Magee v. Paul, 221 S.W. 254, 110 Tex. 470, answering certified questions, Civ.App., 159 S.W. 325, and answers conformed to, Civ.App., 224 S.W. 1118.

1. Ga.—Adams v. Dickson, 23 Ga. 406.

2. N.Y.—Wolcott v. Merchant's Gar-

bonds,[3] building restriction agreements,[4] deeds,[5] instruments renouncing the right to administer,[6] land certificates[7] and transfers thereof,[8] leases,[9] letters,[10] licenses,[11] maps, plats, or field notes,[12] marriage certificates,[13] patents,[14] petitions for the appointment of administrators,[15] powers of attorney,[16] proceedings in ancient suits,[17] receipts,[18] signatures to the pay roll of a military company,[19] succession records,[20] and wills.[21]

b. Records

(1) Public records
(2) Private records

(1) Public Records

Ancient original public records are, in the absence of anything to impeach their verity, admissible in evidence without further proof of their authenticity, when shown to have come from the proper custody.

Ancient original public records, when shown to have come from the proper custody, are, in the absence of anything to impeach their verity, admissible in evidence without further proof of their authenticity, it being presumed after the lapse of thirty years that the official who made the record is dead.[22] The rule has been applied to books and records of land proprietors preserved as township or public records.[23] It has also been held applicable to public records of deeds and other conveyances,[24] and, according to the decisions of the

gling Oil Co., 60 N.Y.S. 862, 45 App. Div. 379.
22 C.J. p 948 note 1.

3. U.S.—Smythe v. Inhabitants of New Providence Tp., Union County, N. J., C.C.A.N.J., 263 F. 481, reversing Smythe v. Inhabitants of New Providence Tp., D.C., 253 F. 824.
22 C.J. p 948 note 2.

Title bonds
Ky.—Russell v. Tipton, 235 S.W. 763, 193 Ky. 305.
Va.—Wells v. New York Min. & Mfg. Co., 119 S.E. 127, 137 Va. 460.
22 C.J. p 948 note 2 [a], [b].

4. N.Y.—Goodhue v. Cameron, 127 N.Y.S. 120, 142 App.Div. 470.

5. Ala.—Carroll v. Carroll, 183 So. 857, 236 Ala. 556—Stewart v. Carnell, 180 So. 307, 235 Ala. 636—Stacey v. Taliaferro, 140 So. 748, 224 Ala. 488—McDowell v. Hutto, 135 So. 322, 223 Ala. 307—St. Clair Springs Hotel Co. v. Balcomb, 108 So. 858, 215 Ala. 12—Ray v. Farrow, 100 So. 868, 211 Ala. 445—McMillan v. Aiken, 88 So. 135, 205 Ala. 35.
Cal.—Ames v. Empire Star Mines Co., 110 P.2d 13, prior opinion 93 P.2d 635.
Conn.—Borden v. Town of Westport, 151 A. 512, 112 Conn. 152.
Ga.—Guthrie v. Gaskins, 155 S.E. 185, 171 Ga. 303—Gaskins v. Guthrie, 132 S.E. 764, 162 Ga. 103.
Ky.—Webb v. Webb, 255 S.W. 137, 200 Ky. 488.
Md.—Homewood Realty Corporation v. Safe Deposit & Trust Co. of Baltimore, 154 A. 58, 160 Md. 457, 78 A.L.R. 8.
Pa.—Mellott v. Mellott, 18 Pa.Dist. & Co. 97.
Tex.—Williams v. Cruse, Civ.App., 130 S.W.2d 908, error refused—Crockett v. Arkansas-Louisiana Gas Co., Civ.App., 125 S.W.2d 1101—Frost v. Crockett, Civ.App., 109 S.W.2d 529, error dismissed—Massie v. Hutcheson, Civ.App., 296 S. W. 939—Blake v. Marshall, Civ. App., 279 S.W. 612.
Utah.—Perry v. Perry, 245 P. 695, 67 Utah 45.
22 C.J. p 948 note 6.

Deed held inadmissible as ancient document under facts of case.—Miller v. Corpman, 257 S.W. 428, 301 Mo. 589.

6. N.Y.—Lalor v. Tooker, 114 N.Y. S. 403, 130 App.Div. 11.

7. Ala.—Jordan v. McClure Lumber Co., 54 So. 415, 170 Ala. 289.
22 C.J. p 948 note 8.

8. Tex.—Magee v. Paul, Civ.App., 159 S.W. 325.
22 C.J. p 948 note 9.

9. Tex.—Overstreet v. Houston Oil Co., Civ.App., 64 S.W.2d 354, error refused.
22 C.J. p 948 note 10.

10. N.Y.—Harrison v. New York Cent. R. Co., 6 N.Y.S.2d 978, 255 App.Div. 183, reargument denied 8 N.Y.S.2d 1017, 255 App.Div. 1032, affirmed 22 N.E.2d 483, 281 N.Y. 653.
Tex.—Smith v. Lynn, Civ.App., 152 S.W.2d 838.
22 C.J. p 948 note 11.

11. Mass.—Boston v. Richardson, 105 Mass. 351.
22 C.J. p 948 note 12.

12. Conn.—Petroman v. Anderson, 135 A. 391, 105 Conn. 366—Hurlburt v. Bussemey, 126 A. 273, 101 Conn. 406.
N.Y.—City of New York v. Wilson & Co., 15 N.E.2d 408, 278 N.Y. 86, modifying 1 N.Y.S.2d 655, 253 App. Div. 719, reargument denied 16 N E.2d 850, 278 N.Y. 702—Horton v. Niagara, Lockport & Ontario Power Co., 247 N.Y.S. 756, 231 App.Div. 398—People's Gas & Electric Co. of Oswego v. State, 175 N.Y.S. 321, 105 Misc. 231, modified on other grounds 179 N.Y.S. 520, 189 App. Div. 421.
S.C.—Atlantic Coast Line R. Co. v. Searson, 135 S.E. 567, 137 S.C. 468.
Tex.—Yturria Town & Improvement Co. v. Hidalgo County, Civ.App., 125 S.W.2d 1092.
22 C.J. p 948 note 13.

Although not placed on public records, map, showing blocks and streets of town, was admissible.—Hamilton v. Town of Warrior, 112 So. 136, 215 Ala. 670.

13. Ill.—Lunger v. Sechrest, 186 Ill App. 521.

14. Ala.—Brannan v. Henry, 57 So. 967, 175 Ala. 454.

15. N.Y.—Lalor v. Tooker, 114 N.Y. S. 403, 130 App.Div. 11.

16. U.S.—Winn v. Patterson, Ga., 9 Pet. 663, 9 L.Ed. 266.
22 C.J. p 949 note 17.

17. Tex.—Pendleton v. Shaw, 44 S. W. 1002, 18 Tex.Civ.App. 439.
22 C.J. p 949 note 18.

18. Tex.—Martinez v. Bruni, Civ. App., 216 S.W. 655, modified on other grounds, Com.App., 235 S. W. 549.
22 C.J. p 949 note 19.

19. Ohio.—Bell v. Brewster, 10 N. E. 679, 44 Ohio St. 690.

20. La.—De Gentile v. White Castle Lumber, etc., Co., 58 So. 517, 130 La. 705.

21. N.Y.—In re Barney's Will, 174 N.Y.S. 242, 185 App.Div. 782.
22 C.J. p 949 note 23.

22. R.I.—Almy v. Church, 26 A. 58, 18 R.I. 182.
22 C.J. p 949 note 24.

23. N.Y.—Sanger v. Merritt, 24 N. E. 386, 120 N.Y. 109.
22 C.J. p 950 note 25.

24. Ala.—Carroll v. Carroll, 183 So. 857, 236 Ala. 556—Stewart v. Carnell, 180 So. 307, 235 Ala. 636—Ray v. Farrow, 100 So. 868, 211 Ala. 445.
22 C.J. p 950 note 26.

Index to records
Tex.—Gulf Oil Corporation v. Ama-

courts, although irregularly made,[25] and although the originals were not required to be recorded,[26] provided the facts requisite for the admission of the deeds themselves as ancient documents exist.[27]

(2) Private Records

Records and books of a private character, such as those kept by associations and societies of various kinds, are admissible as ancient documents, where they contain intrinsic evidence of their verity, and are produced from the proper custody.

Records and books of a private character have been frequently admitted as ancient documents where they contain intrinsic evidence of their verity and genuineness and are produced from the proper custody.[28] Thus the courts will admit in evidence entries on the minutes of a Masonic[29] or Odd Fellows[30] lodge, as well as the records of a church,[31] parish,[32] or hospital.[33] Likewise, the books and records of companies of proprietors, under whose authority lands have been divided or disposed of, may be admitted,[34] without any proof of the original and continued legal organization of the proprietary and whether or not a clerk or any other person authorized to keep the records is in existence.[35]

c. Copies or Secondary Evidence

Certified or official copies of ancient recorded deeds or other documents are generally admitted in evidence as if they were the original instruments themselves.

While some cases lay down the broad rule that the ancient document rule extends only to original documents and not to copies, even though they are record copies,[36] there is authority that the rule applies to the admission of secondary evidence to prove the contents of an ancient instrument which has been lost, or which, for some other reason, cannot be produced.[37] Certified or official copies of ancient recorded deeds or other documents may be admitted in evidence as if they were the original instruments themselves,[38] especially if the copies themselves are of an age sufficient to constitute them ancient documents.[39] It has been held, however, that an examined copy of an instrument cannot be admitted in evidence without proof of the execution of the original, however old the original may purport to be.[40]

d. Instruments Executed under Power

The general rule is that the existence of a power of attorney, by virtue of which an ancient instrument purports to have been executed, will be presumed and need not be proved.

The general rule is that, where a deed or other instrument which purports to have been executed by virtue of a power of attorney is of such age as to be admissible as an ancient document, the existence of the power of attorney authorizing its execution will be presumed and need not be proved,[41] unless the power of attorney is recorded so that the evidence is perpetuated, in which case the deed is

zon Petroleum Corporation, Civ. App., 152 S.W.2d 902.

Recent record of ancient document

Where a record of document was so recently made that it does not come within the rule, it is not rendered admissible by the fact that the document itself is an ancient one.—Ketchum v. Boggs, Tex.Civ. App., 194 S.W. 201.

25. U.S.—Baeder v. Jennings, C.C. N.J., 40 F. 199, error dismissed 14 S.Ct. 1156, 154 U.S. 506, 38 L.Ed. 1075.
22 C.J. p 950 note 27.

26. N.C.—Thompson v. Buchanan, 141 S.E. 580, 195 N.C. 155.

27. U.S.—Baeder v. Jennings, C.C.N. J., 40 F. 199, error dismissed 14 S Ct. 1156, 154 U.S. 506, 38 L.Ed. 1075.

28. Cal.—Geary St., P. & O. R. Co. v. Campbell, 179 P. 453, 39 Cal. App. 496.
Pa.—Commonwealth v. Ball, 121 A. 191, 277 Pa. 301, 29 A.L.R. 626.
22 C.J. p 950 note 30.

29. Tex.—Howard v. Russell, 12 S. W. 525, 75 Tex. 171.

30. Tex.—Wiener v. Zweib, Civ.App., 128 S.W. 699.

31. Iowa.—Bergman v. Carson, 284 N.W. 442, 226 Iowa 449.
N.Y.—Layton v. Kraft, 98 N.Y.S. 72, 111 App.Div. 842, 18 N.Y.Ann.Cas. 228.

32. U.S.—Hodge v. Palms, Mich., 117 F. 396, 54 C.C.A. 570.
22 C.J. p 950 note 34.

33. N.Y.—Hamershlag v. Duryea, 68 N.Y.S. 1061, 58 App.Div. 288, affirmed 65 N.E. 1117, 172 N.Y. 622.

34. Me.—Goodwin v. Jack, 62 Me. 414.
22 C.J. p 950 note 36.

35. R.I.—Almy v. Church, 26 A. 58, 18 R.I. 182.
22 C.J. p 950 note 37.

36. Me.—McCleery v. Lewis, 70 A. 540, 104 Me. 33, 19 L.R.A.,N.S., 438.
22 C.J. p 951 note 43.

Age did not affect character of record book so as to make it admissible as an ancient document.—Wilson v. Moseley, 102 S.E. 330, 113 S. C. 278—22 C.J. p 951 note 43.

37. Ala.—Dick v. Darden, 85 So. 369, 204 Ala. 400.
Tex.—Massie v. Hutcheson, Civ.App., 296 S.W. 939.
22 C.J. p 951 note 40.

38. Fla.—Clark v. Cochran, 85 So. 250, 79 Fla. 788.
Tex.—W. T. Carter & Bro. v. Bendy, Civ.App., 251 S.W. 265.
22 C.J. p 950 note 39.

Photostatic copy

Tex.—Carter v. Green, Civ.App., 64 S.W.2d 1069, error refused.

Copy of unofficial translation of ancient document held not self-proving.—Aiken v. McMillan, 106 So. 150, 213 Ala. 494.

39. U.S.—Smyth v. New Orleans Canal & Banking Co., La., 93 F. 899, 35 C.C.A. 646.
22 C.J. p 951 note 41.

40. Tex.—Schunior v. Russell, 18 S. W. 484, 83 Tex. 83, distinguishing Holmes v. Coryell, 58 Tex. 680.

41. Ky.—Burns v. Dillon, 9 S.W.2d 1095, 226 Ky. 82.
Tex.—Pena v. Frost Nat. Bank, Civ. App., 119 S.W.2d 612, error refused—Loving County v. Higginbotham, Civ.App., 115 S.W.2d 1110, error dismissed—Humphreys v. Green, Civ.App., 234 S.W. 562.
22 C.J. p 951 note 44.

Presumption held inapplicable under facts of case.—Stephens v. House, Civ.App., 257 S.W. 585, conforming to answers to certified questions 248 S.W. 30, 112 Tex. 459.

not admissible without the production of the power, or an authenticated copy thereof, however ancient it may be.[42] A distinction has been drawn between a private and a statutory or public power,[43] and it has been held that an ancient deed purporting to have been made by an administrator under an order of court is not admissible in evidence in the absence of proof of the appointment of the grantor as administrator[44] and an order for sale made by a court having the necessary jurisdiction;[45] that the lapse of thirty years since the execution of a deed by a county judge to county land is not sufficient to create a presumption, in the absence of all record evidence, that the judge was authorized by the commissioners' court to sell the land;[46] and that a sheriff's deed is not admissible as an ancient instrument where the judgment and execution on which it is issued are not produced,[47] unless proper account is made for the absence of such evidence.[48] On the other hand, there are cases which do not recognize this distinction but admit ancient deeds purporting to be executed under a statutory or public power without proof of the power.[49]

Where the deed of a trustee is an ancient document, it will be presumed that he complied with the provisions of the trust deed;[50] and, where the authority of an administrator or a public officer to make the sale is shown, it will be presumed in favor of an ancient deed by him that the necessary and proper steps were taken to make the sale regular and legal,[51] at least where possession followed.[52] It has also been held that it will be presumed in favor of a deed by a public officer that he was duly chosen and qualified.[53]

§ 747. Age of Document

a. In general
b. Circumstances showing age
c. Computation of age

a. In General

The general rule is that, in order to render an instrument admissible as an ancient document, it must be shown that it has been in existence for thirty years or more.

Unless changed by statute,[54] the general rule is that in order to render an instrument admissible as an ancient document there must be direct proof or evidence reasonably warranting the inference that the instrument has been in existence for thirty years or more,[55] although it need not have been recorded for thirty years or at all.[56] Instruments recorded for ten years are made admissible by some statutes without proof of execution unless opposed by an affidavit of forgery.[57]

b. Circumstances Showing Age

The age of an instrument, which is claimed to be an ancient document, may be proved by its appearance, or by other circumstantial evidence.

The date of the paper, if resembling the residue of its contents, and not appearing to be altered, or interpolated, or otherwise spurious, is usually considered to be of itself a circumstance of some strength to show the period of its execution, inas-

42. U.S.—Butterfield v. Miller, Tenn., 195 F. 200, 115 C.C.A. 152.
22 C.J. p 952 note 45.

43. Tex.—Jobe v. Osborne, 97 S.W. 2d 939, 128 Tex. 509, reversing, Civ.App., 68 S.W.2d 375.
22 C.J. p 952 note 48.

44. U.S.—Butterfield v. Miller, Tenn., 195 F. 200, 115 C.C.A. 152.

45. Ill.—Fell v. Young, 63 Ill. 106.

46. Tex.—Spencer v. Levy, Civ.App., 173 S.W. 550.

47. Tex.—W. T. Carter & Bro. v. Bendy, Civ.App., 251 S.W. 265.
22 C.J. p 952 note 52.

48. Tex.—Bendy v. W. T. Carter & Bros., Com.App., 269 S.W. 1037, affirming W. T. Carter & Bro. v. Bendy, Civ.App., 251 S.W. 265—Kenley v. Robb, Com.App., 245 S.W. 68, reversing, Civ.App., 193 S.W. 375.

49. U.S.—Wilson v. Snow, 33 S.Ct. 487, 228 U.S. 217, 57 L.Ed. 807, 50 L.R.A.,N.S., 604, affirming 35 App. D.C. 562.
22 C.J. p 952 note 53.

50. Tex.—Wacaser v. Rockland Sav. Bank, Civ.App., 172 S.W. 737.

51. Tex.—Pendleton v. Shaw, 44 S. W. 1002, 18 Tex.Civ.App. 439—Graham v. Hawkins, 1 Tex.Unrep.Cas. 514.

52. N.J.—Osborne v. Tunis, 25 N.J. Law 633.
22 C.J. p 952 note 57.

53. Mass.—Blossom v. Cannon, 14 Mass. 177—Pejepscut v. Ranson, 14 Mass. 145.

54. Tenn.—Burr v. White Oak Lumber Co., 258 S.W. 798, 149 Tenn. 191.
Instruments held admissible as ancient documents, although less than thirty years of age.
Ala.—Woods v. Montevallo Coal, etc., Co., 3 So. 475, 84 Ala. 560, 5 Am.S. R. 393.
Pa.—Everley v. Stoner, 2 Yeates 122.
22 C.J. p 952 note 60.

55. Conn.—Great Hill Lake v. Caswell, 11 A.2d 396, 126 Conn. 364—Mentz v. Town of Greenwich, 171 A. 10, 118 Conn. 137.
Ky.—Cooper v. Williamson, 229 S. W. 707, 191 Ky. 213.
Me.—Landry v. Giguere, 147 A. 816, 128 Me. 382.
Mich.—Livernash v. De Lorme, 175 N.W. 177, 208 Mich. 295.
Tex.—Williams v. South Texas Development Co., Civ.App., 138 S.W. 2d 605, error refused.
Va.—Keppler v. City of Richmond, 98 S.E. 747, 124 Va. 592.
22 C.J. p 952 note 59—2 C.J. p 1336 note 37.
Evidence held sufficient to show document to be more than thirty years old.—Sage v. Dayton Coal & Iron Co., 251 S.W. 780, 148 Tenn. 1.
Antiquity alone is insufficient to warrant the admission of an instrument in evidence as an ancient document.
N.Y.—In re Marsh, 272 N.Y.S. 807, 152 Misc. 454.
R.I.—Budlong v. Budlong, 136 A. 303, 48 R.I. 144.
22 C.J. p 954 note 84.

56. Tex.—Ardoin v. Cobb, Civ.App., 136 S.W. 271.

57. Tex.—Wacaser v. Rockland Sav. Bank, Civ.App., 172 S.W. 737.

much as a suspicion opposed to its genuineness is not to be unreasonably indulged.[58] The date of an instrument is not, however, conclusive evidence of its age,[59] and a presumption of antiquity arising from the date may be overcome by proof to the contrary.[60] If it be established that the document has been on record for over thirty years, this fact is strong evidence in favor of its genuineness, although it may not have been recorded in the place or manner required by law.[61]

Indorsements and certificates. When the age of a document is under investigation, all indorsements made thereon and certificates attached thereto which in any manner indicate its age are matters to be considered by the jury,[62] where they are of such a character as to show to a cautious and discriminating man that they would not be there if the paper had been a forgery.[63] Thus in view of the habit of recorders of deeds, which is universal and matter of common knowledge, to indorse on the deeds themselves the fact and date of their registration, such certificates appearing on deeds are competent and sufficient evidence of the fact that the deeds were put on record during the year mentioned in the certificates.[64] It has been held, however, that, where the papers themselves show that, if they are genuine, evidence of a very satisfactory character might be produced to establish their actual antiquity and the genuineness of the indorsements on them, they will not be received in the absence of such evidence.[65]

Marks of age. The marks of age which a paper bears on its face, such as its tattered condition, its color, and the faded appearance of the ink may furnish evidence of the time of its execution which may be more or less strong according to circumstances,[66] but it has been considered that the credit to be given to these appearances has been lessened in modern times by advancement in the art of chemistry, with which skill in forgery has kept pace.[67]

Copies. It has been said that a copy of a document alleged to be ancient cannot be used to establish its age and the presumption arising therefrom of its proper execution.[68] A copy of an instrument has, however, been held to be admissible, where it was offered to show the fact that there was such a paper as the original instrument in existence at the date the copy purported to have been made, and as bearing on the question of the antiquity of the original.[69]

c. Computation of Age

The age of an instrument, which is claimed to be an ancient document, is to be computed from the date of execution to the day when it is offered in evidence.

In computing the age of an ancient document, the time is to be reckoned from the date of execution[70] to the day when the instrument is offered in evidence, and if the instrument is thirty years old when offered, it is not material that it was less than thirty years old when the action was commenced, since the competency of the evidence is to be determined by the state of things at the time when it is offered.[71] The thirty year period does not begin to run with respect to wills until the death of the testator, at least where possession under the instrument without other circumstances is relied on.[72]

Where the instrument is required to be recorded, the view has been advanced that the age is to be computed from the time when it was recorded.[73]

§ 748. Custody of Document

In order to render an instrument admissible as an ancient document, it must be shown that it comes from the proper custody or depository.

The general rule is that, in order to render an instrument admissible as an ancient document, it must be shown that it comes from the proper custody or depository.[74] The purpose of this rule is

58. N.Y.—Enders v. Sternbergh, 2 Abb.Dec. 31, 1 Keyes 264, 33 How. Pr. 464.
22 C.J. p 953 note 65.

59. Ill.—Whitman v. Heneberry, 73 Ill. 109.
22 C.J. p 953 note 66.

60. Miss.—Fairly v. Fairly, 38 Miss. 280.
22 C.J. p 953 note 67.

61. Fla.—Peninsular Naval Stores Co. v. Mathers, 119 So. 333, 340, 96 Fla. 620, quoting **Corpus Juris.**
22 C.J. p 953 note 71.

62. N.Y.—Jackson v. Laroway, 3 Johns.Cas. 283.
Tex.—Bell v. Hutchings, Civ.App., 41 S.W. 200.
22 C.J. p 953 note 72.

63. Ill.—Reuter v. Stuckart, 54 N.E. 1014, 181 Ill. 529.
22 C.J. p 953 note 73.

64. U.S.—Applegate v. Lexington & Carter County Min. Co., Ky., 6 S. Ct. 742, 117 U.S. 255, 29 L.Ed. 892.
22 C.J. p 953 note 74.

65. Ill.—Smith v. Rankin, 20 Ill. 14.

66. Pa.—Commonwealth v. Ball, 121 A. 191, 277 Pa. 301, 29 A.L.R. 626—Beaver Borough v. Cleveland & P. R. R. Co., 7 Pa.Dist. & Co. 157.
22 C.J. p 953 note 68.

67. Ill.—Smith v. Rankin, 20 Ill. 14, 20.
22 C.J. p 953 note 69.

68. Ga.—Patterson v. Collier, 75 Ga. 419, 58 Am.R. 472.

69. U.S.—Williams v. Conger, Tex., 8 S.Ct. 933, 125 U.S. 397, 31 L.Ed. 778.

70. Ohio.—Wright v. Hill, 94 N.E. 813, 83 Ohio St. 385.

71. Tex.—Johnson v. Shaw, 41 Tex. 428.
22 C.J. p 953 note 80.

72. N.Y.—Staring v. Bowen, 6 Barb. 109.
22 C.J. p 954 note 82.

73. Tex.—Ehrenberg v. Baker, Civ. App., 54 S.W. 435.
22 C.J. p 954 note 83.

74. Ala.—McMillan v. Aiken, 88 So. 135, 205 Ala. 35.
Ky.—Cooper v. Williamson, 229 S. W. 707, 191 Ky. 213.

to afford a reasonable assurance of the authenticity of the instrument,[75] and what constitutes proper custody in the particular case is a question for the determination of the court.[76]

It is considered that the careful preservation of an instrument by persons interested in the subject matter raises an inference of genuineness.[77] Documents are said to be in proper custody where they are in the place in which, and under the care of the person with whom, they would naturally be,[78] as, for instance, where they are found among the family papers of the persons entitled thereto,[79] or where they are found in the hands of an agent of the parties beneficially interested.[80] In such cases it is not necessary to account for their custody during the entire period of their existence.[81] A deed is in proper custody when found in the hands of an heir[82] or of the wife[83] of the grantee. On the other hand, a deed which has been in the possession of the grantor ever since its alleged execution is not admissible under the ancient document rule.[84]

No one custody will be deemed a necessary one[85] nor can any custody be said to be improper if it is proved to have had a legitimate origin, or if the circumstances of the particular case are such as to render such an origin probable.[86] Accordingly, the custody to be shown for the purpose of making a document evidence without proof of execution is not necessarily that of the person strictly entitled to the possession. It is enough if the person in whose custody the document is found is so connected with the document that he may reasonably be supposed to be in possession of it without fraud.[87]

§ 749. Possession under Instrument and Other Circumstances

While there is contrary authority, the general rule is that a deed may be introduced in evidence without proof of its execution or without proof of possession thereunder, if such an account is given of the instrument as will, under all the circumstances, afford the presumption that it is genuine.

The rule as to what evidence in addition to proof of antiquity and that the document comes from a proper source is required to justify the admission of an ancient instrument in evidence without proof of execution is not entirely settled. The decisions are harmonious to the extent that, where possession of land has accompanied a deed or will, that fact furnishes sufficient evidence of its authenticity to justify its admission.[88] If property passes through several hands in the course of a given time, each keeping in his possession the deed given to him, the possession of all is equally under the first deed, which may be given in evidence as an ancient deed, although never seen by any but the first grantee to whom it was given.[89]

Where possession has not accompanied the deed, the cases are not entirely agreed as to what proof other than proof of possession will be sufficient to justify its admission.[90] It has been held that proof of accompanying possession of the lands claimed to be embraced by the deed is indispensable to its admissibility as an ancient document,[91] and it has

N.C.—Gates v. McCormick, 97 S.E. 626, 176 N.C. 640.
Okl.—Kanimaya v. Choctaw Lumber Co., 294 P. 817, 147 Okl. 90, followed in Kanimaya v. Choctaw Lumber Co., 294 P. 822 (two cases), 147 Okl. 94.
Tenn.—Sage v. Dayton Coal & Iron Co., 251 S.W. 780, 781, 148 Tenn. 1, quoting **Corpus Juris**—Hill v. Hill, 9 Tenn.App. 507, 513, citing **Corpus Juris**.
Tex.—Rio Bravo Oil Co. v. Staley Oil Co., Civ.App., 138 S.W.2d 838, error granted.
22 C.J. p 954 note 85.

75. Ill.—Whitman v. Heneberry, 73 Ill. 109.
22 C.J. p 955 note 1.
Although custody is not established definitely, an instrument may be admitted as an ancient document, if the signatures are identified and its execution is proved, and it contains the other necessary elements, since the purpose of showing custody is to prove genuineness.—Kanimaya v. Choctaw Lumber Co., 294 P. 817, 147 Okl. 90, followed in Kanimaya v. Choctaw Lumber Co., 294 P. 822 (two cases), 147 Okl. 94.

76. Okl.—Kanimaya v. Choctaw Lumber Co., 294 P. 817, 821, 147 Okl. 90, citing **Corpus Juris**, and followed in Kanimaya v. Choctaw Lumber Co., 294 P. 822 (two cases) 147 Okl. 94.
22 C.J. p 955 note 2.

77. Tenn.—Sage v. Dayton Coal & Iron Co., 251 S.W. 780, 148 Tenn. 1.
22 C.J. p 954 note 86.

78. Ga.—Gaskin v. Guthrie, 132 S.E. 764, 162 Ga. 103.
Pa.—Buck v. McArthur, 86 Pa.Super. 49.
22 C.J. p 954 note 88, p 955 note 92.

79. Ohio—Bell v. Brewster, 10 N.E. 679, 44 Ohio St. 690.
22 C.J. p 955 note 93.

80. Ga.—Thursby v. Myers, 57 Ga. 155.
22 C.J. p 955 note 97.

81. Tex.—Flores v. Hovel, Civ.App., 125 S.W. 606.
22 C.J. p 955 note 98.

82. Mass.—In re Butrick, 69 N.E. 1044, 185 Mass. 107.

83. Ill.—Reuter v. Stuckart, 54 N.E. 1014, 181 Ill. 529.

84. Ga.—Williamson v. Mosley, 35 S.E. 301, 110 Ga. 53.
Tex.—Heintz v. O'Donnell, 42 S.W. 797, 17 Tex.Civ.App. 21.

85. Tex.—Flores v. Hovel, Civ.App., 125 S.W. 606.

86. Tenn.—Sage v. Dayton Coal & Iron Co., 251 S.W. 780, 148 Tenn. 1.
22 C.J. p 954 note 90.

87. Tex.—Ward v. Cameron, Civ. App., 76 S.W. 240.
22 C.J. p 955 note 91.

88. Ga.—Gaskin v. Guthrie, 132 S.E. 764, 162 Ga. 103.
22 C.J. p 955 note 3.

89. U.S.—Williams v. Conger, Tex., 8 S.Ct. 933, 125 U.S. 397, 31 L.Ed. 778.
N.H.—Waldron v. Tuttle, 4 N.H. 371.

90. N.J.—Havens v. Sea-Shore Land Co., 20 A. 497, 47 N.J.Eq. 365.

91. N.Y.—Jackson v. Blanshan, 3 Johns. 292, 3 Am.D. 485.
22 C.J. p 956 note 6.
Where there was adverse possession of the land, and it did not ap-

even been considered that possession for the full thirty years is required,[92] at least where possession is the only circumstance relied on to establish authenticity.[93] In a number of cases, however, it has been held that possession for a less period than thirty years will be sufficient if there are other circumstances tending to show the genuineness of the instrument;[94] and indeed, it may be stated as the generally accepted rule that a deed may be introduced in evidence without proof of its execution or without proof of possession thereunder, if such an account is given of the instrument as will under all the circumstances afford the presumption that it is genuine.[95] Thus the facts that important transactions have taken place under the deed[96] or that the persons claiming thereunder have paid taxes on the land,[97] especially in the case of wild and uncultivated land,[98] have been considered as circumstances tending to confirm the presumption of authenticity. Contemporaneous official acts may be considered in determining the genuineness of the deed, in the absence of proof of possession.[99]

Ancient documents coming out of proper custody and purporting on the face of them to show the exercise of ownership, such as a lease or a license, may be given in evidence without proof of possession or payment of rent under them, as being in themselves acts of ownership on the part of the lessor or licensor and hence proof of possession in him, at least where such acts of ownership are accompanied by other evidence showing enjoyment consistent with such ownership.[1]

§ 750. Defects or Irregularities

Although there is authority that an instrument, which is not valid on its face and which does not contain every essential requirement of the law under which it was made is inadmissible as an ancient document, this rule is not always applied.

The principle has been broadly laid down that the rule allowing ancient documents to be introduced in evidence without proof of their execution embraces no instrument which is not valid on its face and which does not contain every essential requirement of the law under which it was made.[2] Nevertheless in a number of cases instruments have been held admissible as ancient documents, although they showed on their face that they were in some respects defectively or irregularly executed,[3] although they were improperly or insufficiently acknowledged,[4] or although they are unrecorded or improperly recorded.[5] It has been held proper to admit in evidence a certified copy of a deed which has been of record more than thirty years, although not acknowledged as required by the law in force when it was executed;[6] but there is authority for the view that, in the absence of a proper acknowledgment and proper certificate of such acknowledgment of the execution of a deed, no lapse of time will make admissible as an ancient instrument a certified copy from the record of such deed.[7]

§ 751. Suspicious Circumstances

In order to be admissible as an ancient document, a paper must be free from suspicion and have the appearance of genuineness.

In order to be admissible as an ancient document, a paper must be free from suspicion and have the appearance of genuineness.[8]

pear that the grantee named in an ancient deed was ever in possession, the deed was inadmissible without proof of execution.—Towns v. Spurlin, 115 S.E. 487, 154 Ga. 782.

92. U.S.—Clarke v. Courtney, Ky., 5 Pet. 319, 8 L.Ed. 140.
N.Y.—Jackson v. Blanshan, 3 Johns. 292, 3 Am.D. 485.
22 C.J. p 956 note 7.

93. Va.—Nowlin v. Burwell, 75 Va. 551.
22 C.J. p 956 note 8.

94. Miss.—Nixon v. Porter, 34 Miss. 697, 69 Am.D. 408.
22 C.J. p 956 note 9.

95. Ga.—Gaskin v. Guthrie, 132 S.E. 764, 162 Ga. 103.
22 C.J. p 956 note 10.

Contemporaneous possession in grantor

Ancient deed in chain of title is admissible in evidence even against stranger to title without proof of contemporaneous possession in grantor when deed is of so remote a period that living persons cannot be found who can testify as to actual possession.—In re Marsh, 272 N.Y.S. 807, 152 Misc. 454.

96. Ill.—Bucklen v. Hasterlik, 51 Ill.App. 132, affirmed 40 N.E. 561, 155 Ill. 423.

97. S.C.—Thompson v. Branno, 14 S.C. 542.
22 C.J. p 957 note 12.

98. Ala.—White v. Farris, 27 So. 259, 124 Ala. 461.
22 C.J. p 957 note 13.

99. U.S.—Hodge v. Palms, Mich., 117 F. 396, 54 C.C.A. 570.

1. Mass.—Boston v. Richardson, 105 Mass. 351.
22 C.J. p 957 note 15.

2. Ala.—Messer-Johnson Realty Co. v. Security Savings & Loan Co., 94 So. 734, 208 Ala. 541.
22 C.J. p 957 note 16.

3. N.C.—Sears v. Braswell, 149 S.E. 846, 197 N.C. 515.
22 C.J. p 957 note 17.

4. U.S.—Williams v. Conger, Tex., 8 S.Ct. 933, 125 U.S. 397, 31 L.Ed. 778.
22 C.J. p 957 note 18.

5. Ohio.—Burgan v. Siegman, 9 Ohio App. 84.
22 C.J. p 957 note 19.

6. Ill.—Bradley v. Lightcap, 66 N.E. 546, 201 Ill. 511.
22 C.J. p 957 note 20.

7. Tex.—Hill v. Taylor, 14 S.W. 366, 77 Tex. 295.

8. Ala.—McMillan v. Aiken, 88 So. 135, 205 Ala. 35.
Ky.—Cooper v. Williamson, 229 S.W. 707, 191 Ky. 213.
Pa.—Beaver Borough v. Cleveland & P. R. R. Co., 7 Pa.Dist. & Co. 157.
Tex.—Roberts v. Waddell, Civ.App., 94 S.W.2d 211.
22 C.J. p 957 note 22.

Necessity of explanation of altera-

§ 752. —— Circumstances Appearing from Extraneous Evidence

While an instrument presented as an ancient document is not rendered inadmissible by the fact that an affidavit has been made attacking it as a forgery, its genuineness may be attacked, after its admission, by the introduction of evidence at the trial.

An instrument presented as an ancient document is not to be rejected because of extraneous evidence concerning it,[9] and accordingly the fact that an affidavit has been made attacking the document as a forgery, or otherwise impeaching its genuineness, has been held not to affect its admissibility,[10] although it may be shown to be a forgery or attacked on other grounds after its admission, by the introduction of evidence at the trial.[11] If an instrument would be an ancient instrument subject to record and duly recorded at such a time that the record would be ancient, a certified copy of the record is, under some statutes, admissible even as against an affidavit of forgery,[12] at least when an affidavit of the loss of the original is filed.[13] It has been held, however, that in such case the burden is on the party offering the deed to show the existence and execution of the original, although it appears from the certified copy that the original was more than thirty years old.[14]

F. COMPELLING PRODUCTION OF DOCUMENTS

§ 753. Public Record or Document

Courts have power to compel production of public records and documents, but will exercise this power only where necessary.

The courts have power to compel the custodian of public records and documents to produce them in court for inspection, and to be used as evidence when material and necessary;[15] and whenever it is made clearly to appear in a proper manner that their production is necessary and material for the support of either a cause of action or defense, or the promotion of public justice, the power should be exercised.[16] However, the power should not be exercised where such exercise is not shown to be necessary,[17] as where certified copies could be obtained[18] or where the party making application for the production of the record is not shown to have any rights or interest therein.[19]

§ 754. Private Writing by Adverse Party

Under or apart from statutes to that effect, a party may be required to produce pertinent documents in his possession for use as evidence on the trial by his adversary.

While at common law the courts did not have the power,[20] which courts of equity had,[21] to compel a party to produce a document in his possession for use on the trial, it is generally held that the courts, whether of common law or of equitable jurisdiction,[22] have the power to order the production of a

tions, interlineations, and erasures see Alteration of Instruments § 18.

9. Tex.—Williams v. Conger, 49 Tex. 582.
22 C.J. p 958 note 32 [a].

10. Tex.—Emory v. Bailey, 234 S.W. 660, 111 Tex. 337, 18 A.L.R. 901, reversing, Civ.App., 181 S.W. 831—Niles v. Houston Oil Co. of Texas, Civ.App., 288 S.W. 614.
22 C.J. p 958 note 33.

11. Ga.—Albright v. Jones, 31 S.E. 761, 106 Ga. 302.
22 C.J. p 958 note 34.

Evidence was held insufficient to show that title bond found thirty years after date of execution in possession of husband of named purchaser had not in fact been executed.—Russell v. Tipton, 235 S.W. 763, 193 Ky. 305.

12. Tex.—Emory v. Bailey, 234 S.W. 660, 111 Tex. 337, 18 A.L.R. 901, reversing, Civ.App., 181 S.W. 831—Chapman v. Kellogg, Com. App., 252 S.W. 151, reversing Kellogg v. Chapman, Civ.App., 201 S.W. 1096—Loving County v. Higginbotham, Civ.App., 115 S.W. 2d 1110, error dismissed—Conrad v. Hughes, Civ.App., 195 S.W. 1181.

13. Tex.—Holmes v. Coryell, 58 Tex. 680.

14. Ga.—Bentley v. McCall, 46 S.E. 645, 119 Ga. 530.

15. Ill.—Dunham v. Chicago, 55 Ill. 357.
22 C.J. p 958 note 38.
Compelling production of public records by:
Statutory proceeding for discovery see Discovery § 71 a (4).
Subpoena duces tecum see the C.J.S. title Witnesses § 25, also 70 C.J. p 48 note 14—p 55 note 71.
Right of access to, and inspection of, public records generally see the C.J.S. title Records § 35, also 53 C.J. p 623 note 50—p 634 note 58.

16. Ky.—Miller v. Price, 86 S.W.2d 152, 153, 260 Ky. 488, quoting **Corpus Juris.**
22 C.J. p 958 note 38.

17. Ga.—City of Atlanta v. Georgia Ry. & Power Co., 100 S.E. 442, 149 Ga. 411.

18. Ga.—City of Atlanta v. Georgia Ry. & Power Co., supra.
22 C.J. p 959 note 40.

19. Ill.—Dunham v. Chicago, 55 Ill. 357.
22 C.J. p 959 note 41.

20. Ark.—Cross v. Johnson, 30 Ark. 396.

Remedies of party; secondary evidence

(1) The only remedy of a party seeking such evidence was to serve on his adversary a notice to produce.—Cross v. Johnson, 30 Ark. 396—22 C.J. p 959 note 48.

(2) However, notice to produce gave him no rights with respect to actual production of documents, but served only to lay foundation for introduction of secondary evidence of their contents.—Merchants' Nat. Bank v. Boston State Nat. Bank, C. C.Mass., 17 F.Cas.No.9,448, 3 Cliff. 201.
22 C.J. p 959 note 49.

21. Pa.—Wills v. Kane, 2 Grant 47.

22. N.C.—Whitten v. Western Union Tel. Co., 54 S.E. 289, 141 N.C. 361.

document which contains evidence pertinent to the issue and is in the possession or control of a party for use in evidence by his adversary,[23] in many cases under statutes to that effect.[24]

While some statutes so providing are confined in their operation to actions at law,[25] other statutes are broader in their effect and apply to all actions or proceedings, whether the relief sought is legal or equitable,[26] including penal actions.[27] Statutes providing that parties to an action are subject to examination just as any other witness would be have been held to authorize the courts to compel the production of documents which are claimed to be necessary for use on the trial, provided such documents are in court and in the possession of the person to whom the order is addressed.[28] Under or without reference to a statute so providing, a court may require the production of a writing containing contradictory statements of a witness for use in cross-examining the witness;[29] but under such a statute the court cannot require the production of the writing at the request of a party conducting its examination in chief.[30]

In addition to the power of the court and the right of a party to compel the adverse party to produce documents on the trial for use as evidence, as considered in this and the following sections, the production of documents as evidence may be compelled by a subpœna duces tecum, as appears in the C.J.S. title Witnesses § 25, also 70 C.J. p 48 note 14 –p 55 note 71, and the production of documents for the purpose of inspection and examination may be compelled by a bill of discovery, or by statutory discovery proceedings, see Discovery §§ 18, 69–87.

Parties within rule. A corporation may be required to produce its books and papers where it is a party to an action;[31] and the officers of an organization, where parties to an action, may be required to produce the books and records of the organization.[32]

§ 755. —— Notice to Produce

A notice to produce is ordinarily a prerequisite to an order compelling the production of books and documents. Among other requirements, the notice should clearly identify the desired documents and should give a reasonable time for their production.

A notice to produce documents which the party giving the notice desires to introduce in evidence is ordinarily a prerequisite to the obtaining of an order of the court compelling the production of the papers;[33] and this is so, even though the papers are in the town or neighborhood where the case is

23. Conn.—Kane v. New Idea Realty Co., 133 A. 686, 104 Conn. 508.
Minn.—State v. Minneapolis Cold Storage Co., 184 N.W. 854, 150 Minn. 208.
22 C.J. p 959 note 51.

Essential power
Such power is essential to due administration of justice.
La.—Godel v. McLanahan, 2 Mart. N.S. 435.
N.C.—Whitten v. Western Union Tel. Co., 54 S.E. 289, 141 N.C. 361.
22 C.J. p 959 note 53.

Exercise as prejudicial
Exercise of this power involves no prejudice to rights of parties required to disclose evidence.—Whitten v. Western Union Tel. Co., supra—22 C.J. p 959 note 54.

Reluctance to exercise
It has been held that, while there are some circumstances under which production of papers or books will be ordered, the court will not ordinarily so order.—Golden v. Conner, 8 So. 148, 89 Ala. 598.

Documents in court
(1) Where a party to an action has in his possession in court documents which would be competent evidence against him, adverse party may, under proper circumstances, be entitled to an order permitting the inspection and use of them.—Cordi v. Garcia, 102 P.2d 820, 39 Cal. App.2d 189—22 C.J. p 959 note 51 [c] (1).
(2) Trial court may and should require production of any pertinent documentary evidence which may illustrate issue and which is within power or custody of anyone then personally in court, except where disclosure is prevented by privilege.—Hamlin v. Lupo, 101 S.E. 5, 24 Ga. App. 408—Atlantic Coast Line R. Co. v. Hill, 77 S.E. 316, 12 Ga.App. 392. 22 C.J. p 959 note 51 [c] (2).

24. Ala.—Ex parte Hart, 200 So. 783, 240 Ala. 642.
Kan.—Brown v. Meyer, 21 P.2d 368, 137 Kan. 553.
N.C.—Rivenbark v. Shell Union Oil Corporation, 8 S.E.2d 919, 217 N.C. 592.
22 C.J. p 959 note 55.

Purpose of such statutes is to prevent necessity of instituting suits in equity to obtain from adverse party in suit at law production of papers relating to litigated issue.—Geyger v. Geyger, C.C.Pa., 10 F.Cas. No.5,375, 2 Dall. 332.

25. U.S.—Merchants' Nat. Bank v. Boston State Nat. Bank, C.C.Mass., 17 F.Cas.No.9,448, 3 Cliff. 201.
22 C.J. p 960 note 57.

26. Ga.—Georgia Iron & Coal Co. v. Etowah Iron Co., 30 S.E. 878, 104 Ga. 395.
22 C.J. p 960 note 58.

27. U.S.—American Banana Co. v. United Fruit Co., C.C.N.Y., 153 F. 943.
22 C.J. p 960 note 59.

28. Conn.—Banks v. Connecticut R & Lighting Co., 64 A. 14, 79 Conn. 116.
Ohio.—Tenney v. Arnold, 165 N.E. 751, 30 Ohio App. 512.

29. Va.—Chesapeake & O. R. Co. v. Swartz, 80 S.E. 568, 115 Va. 723.

30. Va.—Norfolk & W. Ry. Co. v. Wilkes' Adm'r, 119 S.E. 122, 137 Va. 302.

31. N.C.—Rivenbark v. Shell Union Oil Corporation, 8 S.E.2d 919, 217 N.C. 592.

32. U.S.—United Mine Workers of America v. Coronado Coal Co., Ark., 258 F. 829, 169 C.C.A. 549, reversed on other grounds 42 S.Ct. 570, 259 U.S. 344, 66 L.Ed. 975, 27 A.L.R. 762, certiorari denied and leave to present petition granted 42 S.Ct. 587.

33. U.S.—Thompson v. Seldon, D. C., 20 How. 194, 15 L.Ed. 1001.
Ala.—Ex parte Hart, 200 So. 783, 240 Ala. 642.
Mo.—Norton v. Giffin, 286 S.W. 144, 221 Mo.App. 834.
22 C.J. p 960 notes 65, 66.
As prerequisite to admission of secondary evidence see infra §§ 843–849.

on trial.[34] However, it has also been held that the court is not required to deny the motion to compel production for failure to give notice to produce;[35] that notice to produce is not necessary where the adverse party has disclaimed possession of the document and even existence of the document;[36] and that, where the form of the action or the pleadings gives a party notice to be prepared to produce a written instrument, no other notice to produce is necessary.[37] While it has been considered that, even though a document is in court, a party cannot compel its production without having given notice to produce it,[38] the more general view is that no formal notice to produce is necessary if the papers are in court.[39]

Form and contents. As a general rule the notice to produce papers should be in writing,[40] although a parol notice may be sufficient.[41] The notice should embody a description of the document sufficient to identify it and to apprise a man of ordinary intelligence of what is demanded,[42] but it is not necessary that it should specifically call for the production of the paper from "term to term."[43] It is not necessary that the notice to produce should be sworn to.[44]

Successive trials. It has been held that, where a party to a suit gives the adverse party notice to produce a paper at the trial, such notice is sufficient for the production of the same paper at any subsequent trial of the same cause.[45]

Time for giving. The notice should allow a reasonable time for the production of the papers called for,[46] but the exigencies of a particular case may warrant a notice shorter than would usually be required.[47] A notice given at the trial is not ordinarily sufficient,[48] unless the desired papers are readily accessible and easily produced,[49] and no delay in the trial will result from granting the demand for production.[50]

Who may be given notice. Notice to produce books and papers may be given to either the party or his attorney.[51]

§ 756. —— Application to Court and Action Thereon

To compel production of papers application must be made to the court on notice to the adverse party. The proposed order must be, and must be shown to be, necessary and proper. The granting or refusal of the order is discretionary with the court.

The power of the court to compel the production of documents is usually invoked by motion or rule[52] which may properly be made before trial,[53] or even after the trial has begun if no delay in the trial is thereby occasioned.[54] The application must be made on notice to the adverse party[55] or his attorney,[56] at least where such application is made before trial,[57] or where the party is not present in

As conferring authority on court
Failure to produce on reasonable demand writings which are material to issue confers authority on court to compel production by proper process.—Cregg v. Puritan Trust Co., 129 N.E. 428, 237 Mass. 146.

34. Ga.—Brand v. Kennedy, 71 Ga. 707.

35. Or.—Houk v. Gilmore, 259 P. 891, 122 Or. 498.

36. La.—Harkness v. Leggett, 131 So. 190, 171 La. 405.

37. Me.—Kellar v. Savage, 20 Me. 199, 203.
22 C.J. p 961 note 81.

38. N.J.—Watkins v. Pintard, 1 N. J.Law 378.

39. Iowa.—Coyle v. Sawyer, 200 N. W. 721, 198 Iowa 1022.
22 C.J. p 960 note 69.

40. Tenn.—Burke v. Stewart, 9 Heisk. 175.

41. Tenn.—Burke v. Stewart, supra.

42. Ga.—Georgia Iron & Coal Co. v. Etowah Iron Co., 30 S.E. 878, 104 Ga. 395.
22 C.J. p 961 note 79.

Notice held sufficient
Kan.—Stone v. Jarbalo State Bank, 192 P. 839, 107 Kan. 496, denying rehearing 190 P. 1094, 107 Kan. 332.

Notice held too vague
Notice to defendants in attachment to produce all paid checks, all voucher check records, bank statements, and all communications between defendant and another party, although calling for some documents sufficiently described and pertinent was too vague and extensive to authorize peremptory order for production of papers and judgment as in case of default on failure to produce them.—Fluker v. Bank of Union Point, 173 S.E. 149, 178 Ga. 297.

43. Ga.—Carrington v. Brooks, 48 S. E. 970, 121 Ga. 250.

44. Ga.—Atlantic Coast Line R. Co. v. Hill, 77 S.E. 316, 12 Ga.App. 392.

45. Me.—Rawson v. Knight, 73 Me. 340.

46. Tenn.—Burke v. Stewart, 9 Heisk. 175.

47. Ga.—Adel v. Woodall, 50 S.E. 481, 122 Ga. 535, 538.
22 C.J. p 961 note 73.

48. Cal.—Avery v. Wiltsee, 171 P. 95, 177 Cal. 484.
22 C.J. p 961 note 74.

49. Del.—Lupton v. Underwood, 85 A. 965, 26 Del. 519.
Tex.—Hill v. Houser, 115 S.W. 112, 51 Tex.Civ.App. 359.

50. Tex.—Hill v. Houser, supra.
22 C.J. p 961 note 76.

51. Mass.—Thayer v. Middlesex Mut. Fire Ins. Co., 10 Pick. 326.
Tenn.—Burke v. Stewart, 9 Heisk. 175.

52. Ala.—Ex parte Hart, 200 So. 783, 240 Ala. 642.
22 C.J. p 961 note 83.

53. U.S.—Iasigi v. Brown, C.C.Mass., 12 F.Cas.No.6,993, 1 Curt. 401—Merchants' Nat. Bank v. Boston State Nat. Bank, C.C.Mass., 17 F. Cas.No.9,448, 3 Cliff. 201.

54. La.—Wolff v. Wolff, 17 So. 126, 47 La.Ann. 548.

55. Ala.—Ex parte Hart, 200 So. 783, 240 Ala. 642.
Ill.—Red Star Laboratories Co. v. Pabst, 194 N.E. 734, 359 Ill. 451.
22 C.J. p 961 note 86.

56. U.S.—Lowenstein v. Carey, D. C.Miss., 12 F. 811—Geyger v. Geyger, C.C.Pa., 10 F.Cas No.5,375, 2 Dall. 332.

57. U.S.—Iasigi v. Brown, C.C.Mass., 12 F.Cas.No.6,993, 1 Curt. 401.

person or by counsel when the motion is made.[58] The notice must allow a reasonable time for the party to appear and show cause, if he has any, why the production of the documents should not be ordered;[59] and it should state that the party by whom it is given intends to move for an order for the production of the documents,[60] and also that he intends to move for a judgment of nonsuit or by default, in case of noncompliance, where the statute gives him such right.[61]

The party who is called upon to produce documents may, in opposition to the motion or rule, show by affidavit that he has no such books or papers in his possession or under his control,[62] or any other reason which he may have why production should not be required of him.[63]

Necessity and propriety of requiring production. It is essential, and it is incumbent on the moving party, to show in its moving papers that the proposed order is necessary and proper;[64] and it has been held that a court has no power to require the production of documents where the essential conditions are not shown to exist.[65] Thus applicant must show that the paper exists,[66] describing it with reasonable certainty,[67] and must show also that it is in the possession or under the control of the other party,[68] that it is pertinent and material to the issue,[69] and that the case is such that a court of equity would compel a discovery.[70] It is sometimes required that the application shall state the facts which the moving party expects to prove by the documents whose production he seeks.[71] Ordinarily the existence of the conditions rendering it proper to require production should be shown by affidavit,[72] but under some statutes no affidavit is required in connection with a motion for the production of documents,[73] and a statement by the moving party's attorney in open court has been regarded as sufficient.[74] The materiality of the evidence sought to be secured should be certified to by the counsel of the moving party.[75]

Determination. A motion for production of documents should be decided before trial of the issues in the case.[76] While the granting or refusal of the order is a matter resting in the discretion of the trial court,[77] its discretion should be firmly exer-

58. Ind.—Globe Acc. Ins. Co. v. Helwig, 41 N.E. 976, 13 Ind.App. 539, 55 Am.S.R. 247.

59. U.S.—Lowenstein v. Carey, D.C. Miss., 12 F. 811.
22 C.J. p 961 note 90.

What constitutes reasonable time

It has been considered that notice should allow such time as would be sufficient for preparation to try issue of fact.—Rose v. King, 5 Serg. & R., Pa., 241.

60. U.S.—Bas v. Steele, C.C.Pa., 2 F.Cas.No.1,088, 3 Wash.C.C. 381.

61. U.S.—Bas v. Steele, supra.

62. U.S.—Lowenstein v. Carey, D.C. Miss., 12 F. 811.

63. U.S.—Lowenstein v. Carey, supra.

64. Ill.—Red Star Laboratories Co. v. Pabst, 194 N.E. 734, 359 Ill. 451.
22 C.J. p 961 note 94.

Application held proper

Conn.—Kane v. New Idea Realty Co., 133 A. 686, 104 Conn. 508.

Document previously objected to

Where introduction of copy of will was successfully objected to, and original was introduced, objecting party could not subsequently require production of copy for his own use. —Graham v. Hopkins, 28 S.E. 609, 101 Ga. 121.

Production held not necessary

Production of evidence in hands of adverse party cannot be required merely to save one the burden of obtaining his own evidence.—Lehan v. Chicago & N. W. Ry. Co., 172 N.W. 787, 169 Wis. 327.

65. U.S.—Merchants' Nat. Bank v. Boston State Nat. Bank, C.C.Mass., 17 F.Cas.No.9,448, 3 Cliff. 201.
Minn.—State v. Minneapolis Cold Storage Co., 184 N.W. 854, 150 Minn. 208.

Violation of constitution

It has been held that compelling production of documents, where no foundation as to necessity and propriety has been laid, constitutes violation of constitutional prohibition against illegal searches and seizures. —Hirshfeld v. Dana, 223 P. 451, 193 Cal. 142.

66. U.S.—Buell v. Connecticut Mut. L. Ins. Co., C.C.Ohio, 4 F.Cas.No. 2,103.
22 C.J. p 962 note 96.

67. Ala.—Burch v. Ingham Lumber Co., 102 So. 19, 212 Ala. 204.
S.C.—Sirrine v. C. E. Graham Trust Fund, 134 S.E. 415, 136 S.C. 448.
22 C.J. p 962 note 97.

68. Ga.—Virginia-Carolina Chemical Co. v. Hollis, 99 S.E. 154, 23 Ga. App. 634.
Tex.—Zurich General Accident & Liability Ins. Co. v. Thompson, Civ. App., 47 S.W.2d 663, error dismissed.
22 C.J. p 962 note 98.

69. Ala.—Burch v. Ingham Lumber Co., 102 So. 19, 212 Ala. 204.
Cal.—Barrington v. Pacific Electric Ry. Co., 256 P. 567, 83 Cal.App. 100.
Ga.—Virginia-Carolina Chemical Co. v. Hollis, 99 S.E. 154, 23 Ga.App. 634.
Ill.—Red Star Laboratories Co. v. Pabst, 194 N.E. 734, 359 Ill. 451.
Mass.—Woods v. Woods, 3 N.E.2d 837, 295 Mass. 238.
Minn.—Farmers' & Merchants' State Bank of New York Mills v. National Surety Co., 203 N.W. 969, 163 Minn. 257—State v. Minneapolis Cold Storage Co., 184 N.W. 854, 150 Minn. 208.
Wis.—Kellner v. Christiansen, 172 N. W. 796, 169 Wis. 390.
22 C.J. p 962 note 99.

Alleging conclusion

Allegation that certain papers, in possession of defendant, were necessary in trial of action is insufficient, as being a conclusion, and not alleging the facts showing the materiality and necessity of the papers.—J. E. Burleson Mica Co. v. Southern Express Co., 109 S.E. 853, 182 N.C. 669.

70. U.S.—Merchants' Nat. Bank v. Boston Nat. Bank, C.C.Mass., 17 F. Cas.No.9,448, 3 Cliff. 201.

71. U.S.—Lowenstein v. Carey, D.C. Miss., 12 F. 811.
22 C.J. p 962 note 2.

72. Pa.—Rose v. King, 5 Serg. & R. 241.
22 C.J. p 962 note 3.

73. N.C.—McDonald v. Carson, 95 N.C. 377.

74. Ga.—Atlantic Coast Line R. Co. v. Hill, 77 S.E. 316, 12 Ga.App. 392.

75. U.S.—Lowenstein v. Carey, D.C. Miss., 12 F. 811.

76. Pa.—Rose v. King, 5 Serg. & R. 241.

77. D.C.—Douglas v. Washington Terminal Co., 298 F. 199, 54 App. D.C. 326.

cised where the necessity and propriety of compelling production of the papers appear.[78] Under certain conditions, where the inconvenience or expense of producing the books or papers would be very great, the court may refuse to require the production of the documents.[79]

Order. An order of court requiring the production of papers is necessary to impose on the party having possession or control thereof an absolute obligation to produce them,[80] or render him subject to the consequences of nonproduction.[81] The order should conform to statutes authorizing such orders,[82] should prescribe a reasonable time for com-

Or.—Houk v. Gilmore, 259 P. 891, 122 Or. 498.
22 C.J. p 962 note 10.

Granting order held error

In an action against officers for false imprisonment, in connection with an investigation of a murder charge, it was held that it was error to require defendant's counsel to furnish plaintiff's counsel with transcript of testimony taken on a hearing before a magistrate.—Bailey v. Loomis, 200 N.W. 148, 228 Mich. 338.

Refusal held not error

(1) In a tax proceeding it was held that the trial court was justified in concluding that the production of defendant's books was demanded to enable the state's representatives to fish for evidence and in declining to require their production.—State v. Minneapolis Cold Storage Co., 184 N.W. 854, 150 Minn. 208.

(2) In claim case, refusing to order production of instruments mentioned in general notice to produce, and holding that claimant had sufficiently complied with notice, was held not abuse of discretion.—Macon Shoe Co. v. Equitable Loan Co., 169 S.E. 377, 46 Ga.App. 841.

(3) In action for personal injuries, trial court did not commit reversible error in refusing to compel the production of reports submitted to plaintiff's physician by specialists who had examined plaintiff, which were sought by defendant for purpose of cross-examination of plaintiff's physician.—Cordi v. Garcia, 102 P.2d 826, 39 Cal.App.2d 189.

(4) It has been said that, if court finds that deeds are actually on record, it will not order production of originals "merely as a cheap mode of procuring evidence", unless some special reason therefor is shown.—Geyger v. Geyger, C.C.Pa., 10 F.Cas. No.5,375, 2 Dall. 332.

Documents turned over to court

Court's turning over to plaintiff document called for by latter and given court for inspection was within court's discretion.—Kane v. New Idea Realty Co., 133 A. 686, 104 Conn. 508.

Denial of existence of papers

(1) Court is not bound to refuse to order production of papers merely because party in whose possession they are alleged to be does not admit their existence.—People v. Newaygo, 49 N.W. 921, 41 Mich. 258.

78. U.S.—Merchants' Nat. Bank v. Boston State Nat. Bank, C.C.Mass., 17 F.Cas.No.9,448, 3 Cliff. 201.
Ill.—See La Salle Mortgage & Discount Co. v. Horan, 30 N.E.2d 785, first case, 307 Ill.App. 547.

Order held warranted

(1) Plaintiff making required affidavit, after giving notice of application to produce writing, was entitled to order requiring insurer to produce letter.—Supreme Life & Casualty Co. v. Wall, 23 S.W.2d 251, 180 Ark. 895.

(2) In action for injuries sustained at gasoline filling station, court did not err in requiring corporate defendant to produce at trial liability insurance policy, with its letters and telegrams calling on insurer to defend case, on notice supported by affidavit that such policy, call on insurer to defend suit, and insurer's defense thereof constituted material evidence that filling station was under corporate defendant's management and control.—Rivenbark v. Shell Union Oil Corporation, 8 S.E.2d 919, 217 N.C. 592.

(3) Order requiring production of papers is particularly warranted when it appears that there is just ground to apprehend that delay will defeat action of court, and that party is unable to obtain evidence by subpœna duces tecum, and that circumstances are such that notice to produce is not safe and adequate remedy.—Merchants' Nat. Bank v. Boston State Nat. Bank, C.C.Mass., 17 F.Cas.No.9,448, 3 Cliff. 201.

(4) Where notice to produce specifies several books, only one of which is produced, the court should order the production of the others, where they are obviously relevant, notwithstanding there is testimony to effect that the book produced correctly shows entries brought forward from the other books.—American Nat. Bank v. Brunswick Light & Water Co., 26 S.E. 473, 100 Ga. 92.

Refusal held error

In action for injuries to mail carrier, court should have sustained motion to require plaintiff to produce written statement which he, immediately after accident, made to the post office concerning accident, and which post office employee had given to plaintiff's counsel, and oral evidence in relation thereto, which was indistinct recollection of what statement contained, did not suffice.—Bayne v. Kansas City, Mo.App., 263 S.W. 450.

79. Iowa.—Farmers' Sav. Bank of Rhodes v. Mallicoat, 228 N.W. 272, 209 Iowa 335.

Availability of copy

Where inconvenience and expense attending production of books and papers are very great, and sworn copy is given or proposed to be given, a strong case of necessity of production of books or papers themselves should be made to compel their production or to subject delinquent to penalty prescribed by statute.—Equitable L. Assur. Soc. v. Hardin, 178 S.W. 1155, 166 Ky. 51—22 C.J. p 963 note 16.

Books used in business

(1) Court has refused to require bank to bring books, used in daily conduct of its business, from a foreign jurisdiction for purpose of putting them in evidence.—Bank of Commerce v. Newberry, 128 P. 1064, 71 Wash. 422.

(2) Order requiring production was held proper as against contention that defendant would be inconvenienced thereby, where books were those of a defunct corporation and had not been used for two years.—Wheeler v. H. M. Wheeler Lumber Co., 81 So. 209, 144 La. 637.

Expense of appeal

Order requiring production was held proper as against contention that such evidence would swell record and make appeal expensive.—Wheeler v. H. M. Wheeler Lumber Co., supra.

80. U.S.—Thompson v. Seldon, D.C., 20 How. 194, 15 L.Ed. 1001.
22 C.J. p 963 note 18.

81. Ga.—Marshall v. McNeal, 40 S.E. 796, 114 Ga. 622.
22 C.J. p 963 note 19.

Failure to produce documents on trial on demand is not in itself evidence of alleged contents of such documents.—Cregg v. Puritan Trust Co., 129 N.E. 428, 237 Mass. 146.

Peremptory written order entered on minutes of court is essential.—Cunningham v. Avakian, 1 S.E.2d 433, 187 Ga. 575.

82. Ill.—Red Star Laboratories Co. v. Pabst, 194 N.E. 734, 359 Ill. 451.

Payment of attorney's fee

In absence of statutory authority to that effect, order cannot require adverse party to pay compensation

pliance therewith,[83] and should be limited only to those documents which are necessary and pertinent to the issue.[84] While the order should specify definitely what papers are required,[85] it is sufficient in this respect if it describes the papers with sufficient particularity to inform a party of what is wanted.[86] The order may be directed either to a party to the action[87] or to his counsel;[88] but it is bad if directed to a third person, even though he is the agent of a party,[89] unless such third person is the real party in interest.[90]

Where the motion is made before the trial and the moving party has made a prima facie showing, the correct practice is, it has been said, to enter an order nisi, leaving it for the other party to show cause at the trial why the document should not be produced, but obligating him to come to trial prepared to produce the document if he fails to show cause;[91] but it has also been considered that such an order may be either absolute or nisi, as the circumstances may justify or require,[92] and that the order may be in the form that the party produce the documents or account for their nonproduction.[93]

An order for the production of documents does not preclude an objection to their admission in evidence or even to an inspection thereof on the ground of irrelevancy, immateriality, privilege, or other grounds;[94] but such objections are waived where the document is produced and introduced in evidence by the party calling for it without objection on the part of the party by whom it is produced.[95]

§ 757. —— Time for Production

While there is some authority to the contrary, it is ordinarily held that a party need not produce the documents called for before the jury are called or the adverse party has entered on his case.

It has been held that a party need not respond to a notice requiring him to produce papers on a trial before the jury are called or the party demanding their production has entered on his case,[96] the statutes involved relating merely to production at the trial,[97] and, conversely, that, where production has been ordered, a call for actual production, after the jury have been sworn, is not too late.[98] However, there is authority for the view that a party properly notified to produce a paper in his possession on the trial of a case may be required to produce it for the inspection of the counsel of the opposite party before the trial has commenced if this is demanded,[99] and that the trial judge has a discretion to assign, for the production of books and papers, a day

of attorney for services rendered in examining documents to determine what is relevant, even though such fee could later be taxed as costs.—Red Star Laboratories Co. v. Pabst, supra.

Deposit of documents with clerk

Statute authorizing court to require production of books and papers was held not to authorize order requiring documents to be deposited with clerk prior to trial.—J. E. Burleson Mica Co. v. Southern Express Co., 109 S.E. 853, 182 N.C. 669.

83. Ga.—Georgia Iron & Coal Co. v. Etowah Iron Co., 30 S.E. 878, 104 Ga. 395.
22 C.J. p 963 note 20.

Time held insufficient

Foreign corporation having its books and office in another state should not be required to produce its books within one day after order.—James Bradford Co. v. Edward Hill's Son & Co., 108 A. 747, 7 Boyce, Del., 528.

Time of service of order

Order must be served on party reasonable time before the time for production.—Macomber v. Clarke, D. C., 16 F.Cas.No.8,918, 3 Cranch C.C. 347.

84. Iowa.—Hemmings v. Home Mut. Ins. Ass'n of Iowa, 203 N.W. 818, 199 Iowa 1311.

Order held too broad

In action on insurance policy, order requiring defendant to produce all original papers, files, and records having to do with contract, and all correspondence between parties since date prior to issuance of policy, which referred to plaintiff's contract, loss, claim, or proofs of loss or transactions between parties subsequent to date of fire, was too broad in its scope.—Hemmings v. Home Mut. Ins. Ass'n of Iowa, supra.

Orders held sufficiently limited

U.S.—Kunglig Jarnvagsstyrelsen v. Dexter & Carpenter, C.C.A.N.Y., 32 F.2d 195, certiorari denied 50 S.Ct. 32, 280 U.S. 579, 74 L.Ed. 629.
Ark.—Fidelity & Deposit Co. of Maryland v. Cunningham, 28 S.W. 2d 715, 181 Ark. 954.

85. La.—Murison v. Butler, 18 La. Ann. 197.
N.Y.—Olney v. Hatcliff, 37 Hun. 286.
22 C.J. p 963 note 21.

86. Mo.—Sonnenfeld v. Rosenthal, 152 S.W. 321, 247 Mo. 238.

87. Conn.—Banks v. Connecticut R. & Lighting Co., 64 A. 14, 79 Conn. 116.

88. Conn.—Banks v. Connecticut R. & Lighting Co., supra.

89. Pa.—Rose v. King, 5 Serg. & R. 241.

Officer of corporation

Defendant could not be required to produce books of corporation of which he was officer, books not being in his custody.—Pothier v. Doucette, 177 N.E. 84, 276 Mass. 326.

90. Kan.—Brown v. Meyer, 21 P.2d 368, 137 Kan. 553.

91. U.S.—Iasigi v. Brown, C.C. Mass., 12 F.Cas.No.6,993, 1 Curt. 401.
22 C.J. p 963 note 26.

92. U.S.—Merchants' Nat. Bank v. Boston State Nat. Bank, C.C.Mass., 17 F.Cas.No.9,448, 3 Cliff. 201.
22 C.J. p 963 note 27.

93. Del.—Thomas v. Pennsylvania R. Co., 47 A. 380, 18 Del. 411.

94. Conn.—Banks v. Connecticut R. & Lighting Co., 64 A. 14, 79 Conn. 116.
22 C.J. p 964 note 30.

95. Conn.—Banks v. Connecticut R. & Lighting Co., supra.

96. Ind.—Nickey v. Steuder, 73 N.E. 117, 164 Ind. 189.
22 C.J. p 964 note 32.

97. U.S.—Iasigi v. Brown, C.C. Mass., 12 F.Cas.No.6,993, 1 Curt. 401.

98. U.S.—Waller v. Stewart, D.C., 29 F.Cas.No.17,109, 4 Cranch C.C. 532.

99. U.S.—Fidelity Trust & Safe Deposit Co. v. Nevin, 10 Del. 143.
Ga.—Howard College v. Pace, 15 Ga. 486.
22 C.J. p 964 note 35.

other than the one fixed for the trial of the cause.[1] A response to a notice to produce documents at a designated term to be used in evidence may be required at a subsequent term to which there is a continuance.[2]

§ 758. —— Excuses for Nonproduction

The failure to produce a document may be excused where the court, in its discretion, deems the excuse sufficient.

In a proper case the nonproduction of the instrument may be excused and the order for its production rescinded,[3] the sufficiency of the excuse presented being a matter resting in the discretion of the trial court.[4] Nonproduction may be excused because of inability of the person against whom the order is issued to find the document after diligent search,[5] because the papers have been destroyed,[6] or because the party has been disabled from complying with the order by reason of the interference of the adverse party, to whom the writings have been previously tendered and by whom they had been refused, and who could not be injured by their nonproduction.[7] On the other hand, nonproduction is not excused by the fact that the party in possession of the document would not, by reason of his own incompetency as a witness, be able to give his own testimony in explanation,[8] or by the fact that the books were removed from the state in anticipation of the notice to produce.[9] While it has been held that nonproduction may be excused because of the fact that the documents called for are in the nature of hearsay or otherwise incompetent as evidence,[10] it has also been held that the documents must be produced, even though they might be incompetent, since they are open to objection when offered in evidence.[11]

An attempt to excuse nonproduction comes too late where it is made on a motion for new trial after a default judgment has been entered.[12]

§ 759. —— Effect of Production

In general, where documents are produced on notice and inspected by the adverse party, they become admissible, if relevant, in favor of the producing party. Authorities differ as to whether one may be bound to offer the documents in evidence.

While in some decisions the rule is laid down that papers which are produced on notice and submitted to the inspection of the other side become by reason of such production and inspection admissible in evidence for both parties at the trial,[13] provided the documents are relevant,[14] this rule is too broadly stated, in that it presupposes the admissibility of the documents in favor of the party calling for them;[15] for it is obvious that the mere production and inspection of documents does not of itself render them admissible in evidence,[16] at least, not in favor of the

1. La.—Murison v. Butler, 18 La. Ann. 296, followed in Marks' Succession, 32 So. 401, 108 La. 494.

2. Ga.—Carrington v. Brooks, 48 S. E. 970, 121 Ga. 250—American Ins. Co. v. Bailey, 65 S.E. 160, 6 Ga. App. 424.

3. Wis.—Roberts v. Francis, 100 N. W. 1076, 123 Wis. 78.
22 C.J. p 964 note 38.

4. Ala.—Herndon v. Givens, 16 Ala. 261.
Pa.—Long v. Miller, 17 Pa. Dist. 573.

5. Ill.—Cameron v. Savage, 87 Ill. 172.
22 C.J. p 964 note 40.

Documents subsequently found
Where guardian seeking to vacate foreclosure judgment against husband and wife served notice on plaintiffs to produce letter of wife, after which plaintiffs' attorney asked his clients for all letters, and subsequently some letters of wife came into hands of attorney which he did not know existed, whereupon attorney promptly notified guardian's attorney who did not see letter until morning of trial, guardian could not object to introduction of letters on ground that plaintiffs had refused to produce them after notice.—Dean v Metcalf, 58 P.2d 1073, 144 Kan. 174.

6. Cal.—Pinto v. Seely, 135 P. 43, 22 Cal.App. 318.
22 C.J. p 964 note 41.

7. Md.—Seldner v. Smith, 40 Md. 602.

8. La.—Imhof v. Imhof, 13 So. 90, 45 La.Ann. 706.

9. Vt.—In re Consolidated Rendering Co., 66 A. 790, 80 Vt. 55, 11 Ann.Cas. 1069, affirmed 28 S.Ct. 178, 207 U.S. 541, 52 L.Ed. 327, 12 Ann. Cas. 658.

If foreign corporation doing business in state under authority of its laws sees fit to remove its books and papers from state for purpose of putting them beyond its jurisdiction in anticipation of being called on to produce them in proceedings against citizens of state, it should not be permitted to plead its act as excuse for not obeying an order to produce them.—In re Consolidated Rendering Co., supra.

10. Minn.—Powell v. Northern Pac. R. Co., 48 N.W. 907, 46 Minn. 249.
22 C.J. p 964 note 43.

11. La.—Flower v. O'Connor, 7 La. 198.
22 C.J. p 964 note 43.

12. Pa.—N. E. Henderson & Son v. F. H. Smith Co., 155 A. 430, 304 Pa. 97.

13. Miss.—Anderson v. Root, 16 Miss. 362.
22 C.J. p 965 note 48.

Inspection essential
Production of papers on notice does not make them evidence in cause, unless party calling for papers inspects them, so as to become acquainted with their contents, whereupon they are admitted as evidence for both parties.—U. S. Fidelity & Guaranty Co. v. Continental Baking Co., 190 A. 768, 172 Md. 24.

14. Md.—U. S. Fidelity & Guaranty Co. v. Continental Baking Co., supra.

15. Mass.—Boyle v. Boston El. R. Co., 94 N.E. 247, 208 Mass. 41, 33 L.R.A.,N.S., 552, 21 Ann.Cas. 1020.
22 C.J. p 965 note 50.

16. Ga.—Mendel v. Converse & Co., 118 S.E. 586, 30 Ga.App. 549.
Pa.—Farmers' & Mechanics' Bank v. Israel, 6 Serg. & R. 293.
22 C.J. p 965 note 51.

In the apparently contrary case of Saunders v. Duval's Adm'r, 19 Tex. 467, "the court states the English rule, but does not, in terms, approve it, and it was not necessary to a decision of the case to approve or reject it."—Ellis v. Randle, 60 S.W. 462, 465, 24 Tex.Civ.App. 475, error refused.

party calling for them,[17] and what is really meant is the so-called "English rule," that, where a party calls for a paper and inspects it, it is thereby admissible evidence in favor of, but not against, the party who produces it.[18]

While it has been held that, if the documents are in any way material, the party demanding them is obliged to use them in evidence if he has inspected them,[19] it has been more commonly held that he is not so bound to use them in evidence,[20] at least where that is not made a condition of the production and examination;[21] and while it has been held that one may refuse to produce his documents except on the condition that the adverse party, if he examines them, shall introduce them in evidence,[22] it has also been held that the production of the documents may not be so conditioned.[23]

Of course, a document is not in evidence until it is offered and admitted as such.[24]

Limiting use of documents. While a party calling for the production of papers is not required to read them in their entirety,[25] he cannot call on his adversary for the production of documentary evidence and, when so produced, claim the benefit of such portion thereof as may be to his advantage and at the same time deprive the adverse party of the right to use such part as may tend to the latter's interest.[26] On the other hand, the party producing the documents cannot restrict the uses to which the evidence may be put, and the papers are competent for all legitimate purposes.[27]

Subsequent trials. It has been held that writings produced on notice and inspected become evidence on behalf of the producing party on all trials of the same case,[28] although there is authority for the view that the effect of a production and inspection is confined to the trial in the course of which it is had.[29] Certainly the production of such writings will not make them evidence for the producing party on the trial of another and entirely different case, although brought by the same plaintiff against the same defendant and for the same cause of action.[30]

§ 760. —— Effect of Nonproduction

Under various statutes, the failure to produce documents pursuant to order may result in the entry of judgment against the defaulting party, or acceptance as true of the facts intended to be proved, or the presumption that the document would be as described.

Although it has been considered that noncompliance with an order for production may afford a basis for action on the part of the court such as would be appropriate in any other case of contumacy,[31] the statutes do not ordinarily vest the courts with power to compel compliance with an order for the production of documents on the trial.[32] Under most statutes noncompliance with such order, and nonproduction of the document, authorize a

17. Del.—Saulsbury v. American Vulcanized Fibre Co., 91 A. 536, 28 Del. 182.
22 C.J. p 965 note 52.

18. Mass.—Boyle v. Boston El. R. Co., 94 N.E. 247, 208 Mass. 41, 32 L.R.A.,N.S., 552, 21 Ann.Cas. 1020.
22 C.J. p 965 note 53.

Reason for rule

(1) It would give party calling for documents unfair advantage over his adversary to allow him, after requiring latter to produce documents and after inspecting them, to insist on excluding them from the case altogether.—Decker v. Smith, 96 A. 915, 88 N.J.Law 630.

(2) "The production of a writing on notice, without objection by the party producing it, amounts on his part to an admission of its genuineness and relevancy, and inspection by the party calling for it is in effect an offer of the writing as evidence, thereby dispensing with the necessity of formal proof."—Saulsbury v. American Vulcanized Fibre Co., 91 A. 536, 538, 28 Del. 182.

Inspection as essential

(1) It follows from the reason for the rule that mere production of papers on notice or order does not render them admissible in evidence for producer, but they become admissible for him only when, and if, party calling for them inspects them.—Marsh v. French, 82 Ill.App. 76—22 C.J. p 966 note 56.

(2) It has been held, without reference to need for inspection, that production in response to notice is sufficient to render document admissible for producing party.—Adamucci v. Pennsylvania-Reading Seashore Lines, 182 A. 895, 14 N.J.Misc. 187.

Notice to produce as essential

Rule has been held not to apply where document was produced on mere request, rather than on notice to produce.—Shear v. Rogoff, 193 N.E. 63, 288 Mass. 357.

19. N.J.—Ellison v. Cruser, 40 N.J. Law 444.
22 C.J. p 965 note 46 [b].

20. Conn.—Laufer v. Bridgeport Traction Co., 37 A. 379, 68 Conn. 475, 37 L.R.A. 533.
N.Y.—Saal v. Katz, 142 N.Y.S. 516, 81 Misc. 239.

21. N.H.—Wentworth v. McDuffie, 48 N.H. 402.

22. N.H.—Wentworth v. McDuffie, supra—Austin v. Thompson, 45 N.H. 113.

23. Conn.—Kane v. New Idea Realty Co., 133 A. 686, 104 Conn. 508.

24. U.S.—Byerley v. Sun Co., C.C. Pa., 181 F. 138, affirmed 184 F. 455, 106 C.C.A. 537.

25. Pa.—Heaffer v. New Era Life Ins. Co., 101 Pa. 178.
22 C.J. p 965 note 46.

26. N.H.—Wentworth v. McDuffie, 48 N.H. 402.
22 C.J. p 965 note 47.
Necessity of considering entire document see infra § 774.

27. N.C.—Austin v. Secrest, 91 N.C. 214.

28. Ga.—Wooten v. Nall, 18 Ga. 609.

29. N.J.—Ellison v. Cruser, 40 N.J. Law 444.
22 C.J. p 966 note 58.

30. Ga.—Cushman v. Coleman, 19 S.E. 46, 92 Ga. 172.

31. U.S.—The La Bourgogne, N.Y., 28 S.Ct. 664, 210 U.S. 95, 52 L.Ed. 973.
N.Y.—Dunn v. New York Edison Co., 92 N.Y.S. 787, 46 Misc. 602.
22 C.J. p 966 note 61.

32. U.S.—Merchants' Nat. Bank v. Boston State Nat. Bank, C.C.Mass., 17 F.Cas.No.9,448, 3 Cliff. 201.
22 C.J. p 966 note 62.

penalty of some kind,[33] usually in the nature of a judgment against the party failing to produce,[34] such as dismissal or nonsuit, in the case of a plaintiff, see Dismissal and Nonsuit § 59, or the entry of a judgment by default in the case of a defendant.[35] Under other statutes the effect of an unexcused failure to produce documents pursuant to an order is that the facts which applicant has stated in his moving papers that he intends to establish by such documents shall be taken to be true,[36] or that the jury are required to assume that the document is as the party seeking its production alleged it to be in his moving papers.[37] Under some statutes the failure to produce documents pursuant to an order entails no other consequence than that of entitling the party who procured such order to give secondary evidence of their contents.[38]

Whether the penalty provided for in the statute should be imposed is within the discretion of the court;[39] and it has been held proper for the court to refuse to impose the penalty where the party seeking the production of documents would not be seriously affected by the failure to produce,[40] or where it is not established that the other party had disobeyed, or not sufficiently obeyed, the order to produce.[41]

§ 761. Private Writing by Witness

Where a witness and a document in his possession are both in court, the court has the power to, and in a proper case should, require its production.

Where both the witness and a certain document in his possession are actually in court, it is within the court's discretion to require the witness to produce such documents, even though no subpœna duces tecum has been issued or served;[42] and it has been held that, if the document contains competent material evidence, it is the court's duty to require its production where requested.[43]

§ 762. Private Writing by Stranger

Under statute to that effect a stranger may be ordered to produce documents in his possession.

Under statute to that effect the courts may order the production of books and papers belonging to, or in possession of, a stranger, as well as those belonging to, or in possession of, a party.[44]

G. CONCLUSIVENESS AND EFFECT

§ 763. In General

The conclusiveness and effect of documentary evidence are controlled to some extent by the nature or character of the particular evidence.

The conclusiveness and effect of documentary evidence are controlled, at least to some extent, by the nature or character of the particular document and the facts stated therein,[45] and will be considered in succeeding sections with respect to the principal subdivisions of such evidence, such as judicial records in § 765, official records and documents in § 766, and private writings in § 767. Documentary evidence relating to a long past event, prepared by parties not affected by it, and not appearing to have been changed, has great probative force,[46] and is entitled to greater consideration than oral testimony

33. U.S.—Iasigi v. Brown, C.C.Mass., 12 F.Cas.No.6,993, 1 Curt. 401.

34. U.S.—Waller v. Stewart, D.C., 29 F.Cas.No.17,109, 4 Cranch C.C. 532.
22 C.J. p 966 note 64.

35. Ga.—Cunningham v. Avakian, 1 S.E.2d 433, 187 Ga. 575.
Pa.—N. E. Henderson & Son v. F. H. Smith Co., 155 A. 430, 304 Pa. 97.
22 C.J. p 966 note 66.

36. Ark.—Supreme Life & Casualty Co. v. Wall, 23 S.W.2d 251, 180 Ark. 895.
22 C.J. p 966 note 67.

37. Neb.—Rankin v. Northern Assur. Co., 152 N.W. 324, 98 Neb. 172.

Failure to produce in response to notice

Failure to produce documents requested in notice to produce has been held to raise presumption, where prima facie case has been made out against party presumptively in possession of documents, that instrument would be as described in notice to produce.—Hale v. Grow, 106 S.E. 409, 88 W.Va. 173.

38. Ind.—Silvers v. Junction R. Co., 17 Ind. 142.

39. U.S.—Salmon Falls Mfg. Co. v. Midland Tire & Rubber Co., C.C.A. Ohio, 285 F. 214.

40. U.S.—Salmon Falls Mfg. Co. v. Midland Tire & Rubber Co., supra.

Evidence otherwise procurable

Where party calling for books had sufficient knowledge of their contents to make formal offer to show what books, if produced, would have shown, he is not seriously affected by failure to produce since he could procure the evidence by subpoena or secondary evidence.—Salmon Falls Mfg. Co. v. Midland Tire & Rubber Co., supra.

41. S.D.—Schmierer v. Mercer, 297 N.W. 682.

42. Mass.—Kincaide v. Cavanaugh, 84 N.E. 307, 198 Mass. 34.
Mich.—Hunton v. Hertz & Hosbach Co., 76 N.W. 1041, 118 Mich. 475.

43. Ga.—Tatum v. Padrosa, 100 S.E. 653, 24 Ga.App. 259.
Ohio.—Tenney v. Arnold, 165 N.E. 751, 30 Ohio App. 512.
22 C.J. p 966 note 70.

44. Iowa.—Iowa Loan & Trust Co. v. Polk County Dist. Ct., 127 N.W. 1114, 149 Iowa 66.

45. Cal.—Casper v. City and County of San Francisco, 57 P.2d 920, 6 Cal.2d 376.

Evidentiary value in suit or by way of set-off

A nonnegotiable chose in action has no greater evidentiary value in a cause of action by way of set-off than in an original suit.—Peterson v. Iris Theatre Co., 218 Ill.App. 416.

46. U.S.—Dorrance v. Dorrance, C.

as to circumstances, which occurred years ago, by witnesses subject to all the frailties of memories;[47] but where it shows on its face that it has been altered, and by a party affected thereby, it is entitled to no greater weight than the oral testimony relating thereto.[48] In order for documentary evidence to be conclusive as to the facts stated it must be an instrument or record having legal efficacy, to which the person to be bound is in some way a party, or the truth of which he vouches for, or is estopped to deny.[49]

§ 764. Legislative Journals

The conclusiveness and effect of legislative journals as evidence are considered in the C.J.S. title Statutes § 87, also 59 C.J. p 634 notes 54–64.

§ 765. Judicial Records

A judicial record generally imports absolute verity and is conclusive concerning the matters to which it relates, unless it is impeached.

As a general rule a judicial record imports absolute verity, and hence is conclusive concerning the matters to which it relates,[50] unless it is impeached by other evidence.[51] This rule of imported verity applies to entries on the clerk's or court's docket, where such docket is treated as the record, before the extended record is made up;[52] but an entry in the register of actions is of itself no evidence that the proceeding has been tried.[53] It has been held that the record of a judicial proceeding is evidence only that it was a part of the proceeding and is not evidence of the facts recited therein;[54] but, on the other hand, it has been held that the record is at least prima facie evidence of the action taken by the court[55] and of the facts recited.[56] Under some statutes an entry by a court officer is prima facie conclusive of the facts recited, but may be traversed at the first term after notice, before pleading to the merits.[57]

In order to make a judgment or decree, without any other portion of the record, competent and sufficient evidence of a fact, it must be a valid judg-

C.A.Mo., 264 F. 53, certiorari denied 41 S.Ct. 216, 254 U.S. 654, 65 L.Ed. 459.
Iowa.—State v. Consolidated Independent School Dist. of Dawson, 187 N.W. 11, 193 Iowa 300.
Ancient documents as evidence generally see supra §§ 743–752.

47. Ill.—Welch v. Worsley, 161 N.E. 493, 330 Ill. 172.
N.Y.—In re Schiff's Estate, 238 N.Y.S. 778, 136 Misc. 129.
Official records and documents see infra § 766.

48. U.S.—Dorrance v. Dorrance, C.C.A.Mo., 264 F. 53, certiorari denied 41 S.Ct. 216, 254 U.S. 654, 65 L.Ed. 459.

49. Mo.—Blue v. Supreme Court of American Woodmen, App., 135 S.W.2d 373—Johnson v. Missouri Ins. Co., App., 46 S.W.2d 959—Shaw v. American Ins. Co., App., 33 S.W.2d 1052.

50. Ind.—Henry v. Claffey, 127 N.E. 193, 189 Ind. 609, 14 A.L.R. 360, rehearing denied 128 N.E. 694, 189 Ind. 609, 14 A.L.R. 360.
Ky.—Allen v. Commonwealth, 114 S.W.2d 757, 762, 272 Ky. 533, citing **Corpus Juris**—Bush v. Board of Education of Clark County, 37 S.W.2d 849, 238 Ky. 297.
Miss.—Farmer v. Union Ins. Co. of Indiana, 111 So. 584, 146 Miss. 600—Jones v. Williams, 62 Miss. 183—Murrah v. State, 51 Miss. 652.
Okl.—Ex parte Wiggins, 267 P. 868, 40 Okl.Cr. 189.
Tex.—Speer v. State, Civ.App., 109 S.W.2d 1150, 1155, citing **Corpus Juris**.
Va.—Harris v. Coleman, 170 S.E. 587, 161 Va. 182.
Wash.—Spokane Savings & Loan Soc. v. Park Vista Improvement Co., 294 P. 1028, 160 Wash. 12.
22 C.J. p 968 note 89.
Conclusiveness of judgments generally see the C.J.S. title Judgments § 686, also 34 C.J. p 869 note 55—p 874 note 62.

51. Ark.—McCullough v. East Arkansas Lumber Co., 20 S.W.2d 305, 180 Ark. 57.
Ind.—Henry v. Claffey, 127 N.E. 193, 189 Ind. 609, 14 A.L.R. 360, rehearing denied 128 N.E. 694, 189 Ind. 609, 14 A.L.R. 360.
Ky.—Bush v. Board of Education of Clark County, 37 S.W.2d 849, 238 Ky. 297.
Wash.—Spokane Savings & Loan Soc. v. Park Vista Improvement Co., 294 P. 1028, 160 Wash. 12.

52. Me.—Leathers v. Cooley, 49 Me. 337.
22 C.J. p 968 note 89 [a].
Entry on judge's probate docket of permanent appointment of guardian is sufficient record evidence to establish that order was made at term when entry was made.—Hannon v. Henson, Tex.Civ.App., 7 S.W.2d 613, affirmed, Com.App., 15 S.W.2d 579.

53. Minn.—State v. Baldwin, 65 N.W. 80, 62 Minn. 518.

54. U.S.—Collins v. Streitz, C.C.A.Ariz., 95 F.2d 430, certiorari denied 59 S.Ct. 67, 305 U.S. 608, 83 L.Ed. 387.
Ariz.—Mutual Benefit Health & Accident Ass'n v. Neale, 33 P.2d 604, 43 Ariz. 532.
Kan.—Whalen v. Maresch, 239 P. 1103, 119 Kan. 333.
As evidence of attorney's authority
Portions of the record of a separate action, introduced in evidence, wherein appeared copies of a power of attorney, do not constitute evidence of attorney's authority to execute deed.—Collins v. Streitz, C.C.A.Ariz., 95 F.2d 430, certiorari denied 59 S.Ct. 67, 305 U.S. 608, 83 L.Ed. 387.

55. W.Va.—State v. Morris, 161 S.E. 576, 111 W.Va. 347.
A transcript of the record of a judgment from the docket of a justice of the peace, certified as provided by law, is prima facie evidence of such judgment in any proceeding where it becomes necessary to prove the same.—Cunningham v. Birch River Lumber Co., 109 S.E. 251, 89 W.Va. 326.
Operation and effect of justice's record or docket in general see the C.J.S. title Justices of the Peace § 125, also 35 C.J. p 715 note 95—p 716 note 3.

56. U.S.—Koons v. Bryson, N.C., 69 F. 297, 16 C.C.A. 227.
Colo.—Grimes v. Greenblatt, 107 P. 1111, 47 Colo. 495, 19 Ann.Cas. 608.
Decree reforming deed is, like deed, a muniment of title and prima facie evidence of ownership.—Petrullo v. Standard Fire Ins. Co. of Hartford, Conn., 191 A. 794, 118 N.J.Law 190.

57. Ga.—Baxter v. Crandall, 163 S.E. 526, 45 Ga.App. 125—Schermerhorn v. National Fire Ins. Co. of Hartford, Conn., 144 S.E. 395, 38 Ga.App. 470.

ment or decree,[58] and it must satisfactorily establish the fact which it is offered to prove,[59] and it has been held that a final decree, in the absence of the record of the cause to which the decree relates, is without evidential force.[60] The record of a prior action introduced to show the determination thereof is not proof of the facts testified to by the witnesses, although the testimony is included in the record.[61]

A mere statement or certificate of a judge as to proceedings before him does not, like a judicial record, import verity;[62] but a certificate attached to the judgment of a foreign court, stating that such court was a court of record having a seal, is sufficient to establish prima facie that the foreign court was a court of general jurisdiction.[63]

Inferences from record. The full record of a probate court wherein it appears that certain persons were named as executors, and accepted the trust, and qualified, is prima facie evidence that they are still executors, where it does not appear that the estate has been fully settled,[64] it being presumed that the probate records disclose all that has occurred respecting the settlement of estates.[65]

Aiding or impeaching one part of record by another. It has been held that a recital in one part of a judgment record may be either aided or impeached by a recital in another part,[66] but it is also laid down that the judgment or decree of a court controls the written opinion, and, if they are at variance, the former determines the rights of the parties.[67]

Foreign sentence or decree of condemnation in marine insurance. In an action on a policy of marine insurance, in some jurisdictions a foreign sentence or decree of condemnation is considered only prima facie evidence of the facts it determines,[68] and to have even that effect it must affirmatively appear that the court had jurisdiction.[69] In most jurisdictions, however, a foreign sentence of condemnation,[70] which states the causes of the condemnation[71] and is properly authenticated,[72] is conclusive, although the provisions of the policy may prevent the operation of the rule.[73] In some cases, however, it has been held that such sentence is not conclusive of a breach of warranty as to neutrality or nationality,[74] as where facts not authorizing condemnation as a prize are the stated grounds of condemnation;[75] nor is the sentence conclusive of such breach where it condemns a vessel or cargo as "good and lawful prize," without assigning the grounds of the decision.[76] To prove condemnation it is necessary to prove only libel and sentence.[77]

§ 766. Official Records and Documents

a. In general
b. Official certificates

a. In General

Official records and documents are generally prima facie evidence of the facts stated therein and are not

58. Wash.—In re Teeters, 21 P.2d 1032, 173 Wash. 138.

Lack of notice
That order discharging guardian contained recital that ward had made oral application to require guardian to surrender estate does not show general appearance waiving lack of jurisdiction of guardianship proceedings, where ward did not have notice of hearing at which order was made.—In re Teeters, supra.

59. Tenn.—Leonard v. Finney, 43 S.W.2d 213, 163 Tenn. 318.
Va.—Krebs v. Welch, 69 S.E. 346, 111 Va. 432.

Accounting for money
Recital in decree that purchase money from sale of land in creditor's suit was collected is not even prima facie evidence that money was not properly accounted for.—Harris v. Coleman, 170 S.E. 587, 161 Va. 182.

The record of a French court, in a criminal prosecution for adultery, does not tend to prove the facts on which conviction was obtained, when presented as evidence in an action in this state.—Gould v. Gould, 194 N.Y.S. 742, 201 App.Div. 674.

60. N.J.—In re Acker, 62 A. 556, 70 N.J.Eq. 669.
22 C.J. p 968 note 91.

61. N.Y.—Hilliker v. Rueger, 114 N.E. 391, 219 N.Y. 334.

62. U.S.—In re Veler, Ohio, 249 F. 633, 161 C.C.A. 543.

Judgment of justice of peace in another state cannot be proved solely by certified copy authenticated by justice.—Clark v. Dyer Fruit Box Mfg. Co., Tex.Civ.App., 290 S.W. 559.

63. Cal.—Uplinger v. Yonkin, 190 P. 822, 47 Cal.App. 435.

64. Conn.—Billings v. McKenzie, 89 A. 344, 87 Conn. 617.

65. Conn.—Billings v. McKenzie, supra.

66. Mo.—Cloud v. Pierce City, 86 Mo. 357—Jester v. Spurgeon, 27 Mo.App. 477.

67. Iowa.—Goodenow v. Litchfield, 9 N.W. 107, 13 N.W. 86, 59 Iowa 226.

68. Me.—Decrow v. Waldo Mut. Ins. Co., 43 Me. 460.
38 C.J. p 1182 note 67.

69. U.S.—Bradstreet v. Neptune Ins. Co., C.C.Mass., 3 F.Cas.No.1,793, 3 Sumn. 600.

70. U.S.—Bradstreet v. Neptune Ins. Co., supra.
38 C.J. p 1183 note 70.

71. Mass.—Sawyer v. Maine F. & M. Ins. Co., 12 Mass. 291—Robinson v. Jones, 8 Mass. 536, 5 Am. D. 114—Baxter v. New England Mar. Ins. Co., 6 Mass. 277, 4 Am.D. 125.

72. U.S.—Yeaton v. Fry, D.C., 5 Cranch 335, 3 L.Ed. 117.
38 C.J. p 1183 note 71.

73. U.S.—Maryland Ins. Co. v. Woods, Md., 6 Cranch 29, 3 L.Ed. 143.
38 C.J. p 1183 note 72.

74. U.S.—Fitzsimmons v. Newport Ins. Co., R.I., 4 Cranch 185, 2 L. Ed. 591.
38 C.J. p 1183 note 73.

75. U.S.—Fitzsimmons v. Newport Ins. Co., supra.

76. S.C.—Bailey v. South Carolina Ins. Co., 10 S.C.L. 541.

77. U.S.—Marine Ins. Co. of Alexandria v. Hodgson, D.C., 6 Cranch 206, 3 L.Ed. 200.

conclusive, unless of such a character as to give rise to estoppel.

In some instances, official records other than judicial or legislative have been held conclusive of the facts stated therein,[78] except where fraud or mistake is shown.[79] However, the more generally accepted view, which in some states is made the subject of statutory provisions, is that official records and documents, although they import verity and truth[80] as far as the statements therein are authorized,[81] and generally are prima facie evidence of the facts stated or shown,[82] are not conclusive,[83]

78. Cal.—Allen v. McKay, 72 P. 713, 139 Cal. 94.
22 C.J. p 969 note 98.

Official record of senate's confirmation or rejection of nomination by governor for appointment to office is conclusive evidence thereof.—Denison v. State, Tex.Civ.App., 61 S.W.2d 1017, error refused Denison v. State ex rel. Allred, 61 S.W.2d 1022, 122 Tex. 459.

Official record of a meeting of a board, such as a school board, imports verity, and it is conclusive as to the matters set forth therein, except where fraud or mistake is shown.—Western Union Telegraph Co. v. Guard, 139 S.W.2d 722, 283 Ky. 187.

County auditor's report is conclusive of facts not excepted to prior to its introduction in evidence, and is prima facie evidence as to facts excepted to as incorrect or untrue.—Medford v. Red River County, Tex. Civ.App., 84 S.W.2d 345.

Conclusiveness of county audit and settlement generally see Counties § 153.

79. Ky.—Western Union Telegraph Co. v. Guard, 139 S.W.2d 722, 283 Ky. 187.
La.—De Gentile v. White Castle Lumber & Shingle Co., 58 So. 517, 130 La. 705.

80. Colo.—Buckman v. H. A. Marr Grocery Co., 300 P. 894, 89 Colo. 183.

81. Colo.—Page v. Gillett, 141 P. 866, 26 Colo.App. 204.
22 C.J. p 970 note 14 [g].

82. Ala.—Hurst v. Kirby, 105 So. 872, 213 Ala. 640—Williams v. Oates, 102 So. 712, 212 Ala. 396.
Ariz.—Town of South Tucson v. Board of Sup'rs of Pima County, 84 P.2d 581, 52 Ariz. 575—Mutual Ben. Health & Accident Ass'n v. Neale, 33 P.2d 604, 43 Ariz. 532.
Ark.—Marable v. State, 2 S.W.2d 690, 175 Ark. 589.
Cal.—In re Woodson's Estate, 96 P. 2d 1016, 36 Cal.App.2d 77.
Ill.—Wyman v. Hageman, 148 N.E. 852, 318 Ill. 64.
Mass.—Dow v. U. S. Fidelity & Guaranty Co., 7 N.E.2d 426, 297 Mass. 34.
Mo.—Armstrong v. City of Monett, 228 S.W. 771.
Mont.—Anderson v. Spear-Morgan Livestock Co., 79 P.2d 667, 107 Mont. 18—Consolidated Gold & Sapphire Mining Co. v. Struthers, 111 P. 152, 41 Mont. 565.
N.C.—Braddy v. Pfaff, 186 S.E. 340, 210 N.C. 248.
Pa.—Carns v. Matthews, 174 A. 840, 114 Pa.Super. 528—Appeal of Kiebler, 30 Pa.Dist. & Co. 620.
S.D.—Housman v. Geiman, 252 N.W. 857, 62 S.D. 310.
Tex.—Emory v. Bailey, 234 S.W. 660, 111 Tex. 337, 18 A.L.R. 901, reversing, Civ.App., 181 S.W. 831.
Wash.—Steel v. Johnson, 115 P.2d 145—Wyant v. Independent Asphalt Paving Co., 203 P. 961, 118 Wash. 345.
Wis.—Vogel v. Delaware, L. & W. R. Co., 171 N.W. 198, 168 Wis. 567.
22 C.J. p 969 note 99.

Particular records and documents within rule

(1) Automobile commissioner's records as prima facie evidence of ownership of car.—East Baltimore Transfer Co. v. Goeb, 118 A. 74, 140 Md. 534.

(2) Commissioner's deed as sufficient to show commissioner's authority to make deed.—Baggett v. Lanier, 100 S.E. 254, 178 N.C. 129.

(3) Federal permits for the purchase and transportation of whiskey as prima facie evidence of compliance with law.—W. A. Gaines & Co. v. Holmes, 114 S.E. 327, 154 Ga. 344, 27 A.L.R. 98.

(4) Master's deed.
Ill.—Hooper v. Goldstein, 168 N.E. 1, 336 Ill. 125, certiorari denied 50 S.Ct. 239, 281 U.S. 724, 74 L.Ed. 1141.
Tenn.—Camp v. Riddle, 160 S.W. 844, 128 Tenn. 294, Ann.Cas.1915C 145.

(5) Proclamation of governor dissolving corporation for failure to pay license fees.
Or.—Smyth v. Kenwood Land Co., 190 P. 962, 97 Or. 19.
Utah.—Consolidated Mills & Feed Yards Co. v. Patterson, 221 P. 159, 62 Utah 506.

(6) Report of death filed in public bureau of vital statistics.—New York Life Ins. Co. v. Gill, 182 So. 109, 182 Miss. 815.

(7) Sheriff's deed.—Williams v. Oates, 102 So. 712, 212 Ala. 396.

(8) Tribal records as prima facie evidence of pedigree.—U. S. v. Mid-Continent Petroleum Corporation, C. C.A.Okl., 67 F.2d 37, certiorari denied Hosey v. Mid-Continent Petroleum Corporation, 54 S.Ct. 346, 290 U.S. 702, 78 L.Ed. 603.

Entries in official record books, made in the performance of official duty, are "prima facie evidence" of the facts stated therein, but such entries do not in and of themselves always express or guarantee the truthfulness of the contents of the document.—In re Woodson's Estate, 96 P.2d 1016, 36 Cal.App.2d 77.

Official record of a deed is presumed to be a copy or representation of what appears in the original deed.—Adkins v. Downing Gas Co., 198 S.E. 131, 120 W.Va. 401—Pardee v. Johnston, 74 S.E. 721, 70 W.Va. 347.

A ship's registry is prima facie but not conclusive proof that the person whose name appears therein as master was in fact such.—Draper v. Commercial Ins. Co., 21 N.Y. 378, reversing 11 N.Y.Super. 434.

United States Coast and Geodetic Surveys are prima facie evidence of facts shown, weight and effect being fact question for court in action to quiet title.—City of Los Angeles v. Duncan, 19 P.2d 289, 130 Cal.App. 11—City of Oakland v. Wheeler, 168 P. 23, 34 Cal.App. 442.

83. Mass.—Cosmopolitan Trust Co. v. Lyons, 138 N.E. 325, 244 Mass. 115.
Mo.—Allen v. American Life & Accident Ins. Co., App., 119 S.W.2d 450—Johnson v. Missouri Ins. Co., App., 46 S.W.2d 959, 961, citing **Corpus Juris**—Shaw v. American Ins. Union, App., 33 S.W.2d 1052, 1055, citing **Corpus Juris.**
Mont.—Musselshell Valley Farming & Livestock Co. v. Cooley, 283 P 213, 86 Mont. 276.
N.Y.—Klepper v. Seymour House Corporation of Ogdensburg, 218 N. Y.S. 476, 218 App.Div. 686, reversed on other grounds 158 N.E. 29, 246 N.Y. 85, 62 A.L.R. 955.
Ohio.—Carothers v. City of Cincinnati, 12 Ohio App. 69.
Pa.—Appeal of Kiebler, 30 Pa.Dist. & Co. 620.
Wash.—Wyant v. Independent Asphalt Paving Co., 203 P. 961, 118 Wash. 345.
22 C.J. p 969 note 1.

Corporate records of common school district, incomplete on their face, are not conclusive.—State ex inf. Mansur ex rel. Fowler v. McKown, 290 S.W. 123, 315 Mo. 1336.

Federal census reports are not conclusive of population of state governmental subdivision.—Gordon

unless they are of such a character that the person to be bound is estopped to deny the truth of their recitals.[84] Such a record or document is to be weighed by the court along with other evidence,[85] and may be rebutted, corrected, or modified by other competent evidence.[86] A record which is the only source of evidence by which official action can be shown, and which does not show any action, indicates that none was taken;[87] but this does not apply to action which may be shown otherwise than by the record.[88]

Statutory provisions, making such records prima facie evidence of their contents, have been held constitutional;[89] but such a statutory rule is limited to facts which the law affirmatively requires the record to state,[90] and does not include other matters in the record for personal information or for other reasons;[91] and applies only where the record otherwise complies with the requirements of the statute.[92]

It has been said that official records and documents are equal to ordinary testimony given under the obligation of an oath,[93] and with relation to remote events they are more satisfactory than the recollection of witnesses,[94] and when they are shown to have been made in the ordinary course of duty they are, in the absence of any evidence that they have been tampered with, entitled to very great weight.[95] It has also been said that a pamphlet or other document purporting to have been issued by the government, or under the authority of some department of the government, has no more weight as evidence and carries upon its face no stamp of greater authenticity or verity than documents issued by any other authority,[96] and a printed report containing a copy of an order found in a memorandum book of the office making such report has been held not evidence that the order had been made or that

v. Lowry, 217 N.W. 610, 116 Neb. 359—22 C.J. p 969 note 1 [b].

School records of a pupil's age, when required to be kept by law, like other official records, such as census returns and like enumeration lists, are evidence of the facts thus required to be recorded, although not record evidence in the sense of being conclusive.—Price v. Price, 185 N.Y.S. 570, 194 App.Div. 158, affirming 178 N.Y.S. 561.

Where a recorded map is an inaccurate copy of an original map because being reduced in size, it is not conclusive and the court is entitled to look to the original map to supply information not furnished by the copy.—Wheeless v. Burns, 123 So. 25, 219 Ala. 621.

84. Mo.—Allen v. American Life & Accident Ins. Co., App., 119 S.W.2d 450.

Hydrographic maps of the United States Coast and Geodetic Survey are entitled to full credence as evidence, and are to be taken as absolutely establishing the truth of all that they purport to show.—U. S. v. Romaine, Wash., 255 F. 253, 166 C.C.A. 423.

85. Mo.—Johnson v. Missouri Ins. Co., App., 46 S.W.2d 959—Shaw v. American Ins. Union, App., 33 S.W.2d 1052.
N.Y.—Price v. Price, 185 N.Y.S. 570, 194 App.Div. 158, affirming 178 N.Y.S. 561.

As best evidence
Kan.—Brack v. Ochs, 102 P. 479, 80 Kan. 433.
22 C.J. p 969 note 99 [a].

86. Mass.—Cosmopolitan Trust Co. v. Lyons, 138 N.E. 325, 244 Mass. 115.
N.C.—Braddy v. Pfaff, 186 S.E. 340, 210 N.C. 248.

Records of weather service that no snow had fallen during fifteen days preceding the accident do not demonstrate that plaintiff's testimony as to the accumulation of ice and snow was untrue.—Buffalo v. City of Des Moines, 186 N.W. 844, 193 Iowa 194.

87. Ill.—People ex rel. Wangelin v. City of St. Louis, 10 N.E.2d 369, 367 Ill. 57—Village of Bellwood v. Galt, 152 N.E. 591, 321 Ill. 504.

88. Tex.—Wiess v. Hall, Civ.App., 135 S.W. 384.

Issuance of marriage license
The fact that there was no record in the county clerk's office of a marriage license about the date of an alleged marriage does not show that no such license had been issued, as it might have been issued, executed, and never returned, in which case no record would have appeared of such issuance.—Wiess v. Hall, supra.

89. Ark.—Marable v. State, 2 S.W.2d 690, 175 Ark. 589.

90. Ariz.—Town of South Tucson v. Board of Sup'rs of Pima County, 84 P.2d 581, 52 Ariz. 575—Sovereign Camp W. O. W. v. Sandoval, 54 P.2d 557, 47 Ariz. 167.

91. Ariz.—Town of South Tucson v. Board of Sup'rs of Pima County, 84 P.2d 581, 52 Ariz. 575.

92. Mont.—Anderson v. Spear-Morgan Livestock Co., 79 P.2d 667, 107 Mont. 18.
S.D.—Housman v. Geiman, 252 N.W. 857, 62 S.D. 310.

Immaterial omissions
Ala.—Hurst v. Kirby, 105 So. 872 213 Ala. 640.

Stub in swamp land commissioner's book is insufficient to show title in a purchaser, especially where the law prescribes the exclusive method of proving title by an authenticated record.—Harmon v. Cox, 84 So. 183, 122 Miss. 221.

93. Del.—State v. Willoughby, 102 A. 983, 7 Boyce 83.

94. U.S.—U. S. v. Appalachian Electric Power Co., C.C.A.Va., 107 F.2d 769, affirming, D.C., 23 F.Supp. 83, certiorari granted 60 S.Ct. 608, 309 U.S. 638, 84 L.Ed. 999, reversed on other grounds 61 S.Ct. 291, 311 U.S. 377, 85 L.Ed. 243, rehearing denied 61 S.Ct. 548, 312 U.S. 712, 85 L.Ed. 1143.
Me.—Barker v. Fogg, 34 Me. 392.
Mo.—Armstrong v. City of Monett, 228 S.W. 771.

Guardian's report, made when matters were current and transpiring, should be given greater weight than imperfect memory of witnesses testifying to events fifty years old.—Burton v. McGuire, Tex.Com.App., 41 S.W.2d 238, affirming, Civ.App., 3 S.W.2d 576.

95. Ariz.—Costello v. Cunningham, 172 P. 664, 19 Ariz. 512.
Mich.—Thurstin v. Luce, 26 N.W. 103, 61 Mich. 292.

96. Tex.—Missouri, K. & T. R. Co. v. Dale Bros. Land & Cattle Co., Civ.App., 179 S.W. 935.

Purpose of statute providing for admissibility of ordinances published in book or pamphlet form is to constitute such publication presumptive evidence of what it purports to be.—Orr v. Hart, 258 N.W. 84, 219 Iowa 408.

the entry was true.[97]

Records of sister state. It has been said that a court, in admitting in evidence duly authenticated copies of the records of a sister state, cannot give to the records the force and effect accorded to them by the laws of the sister state, unless the laws are proved, as the court cannot judicially know the legal effect of the records in the sister state.[98] A statute providing that certain records shall be prima facie evidence does not apply to foreign records;[99] but, under some statutes, the statutes and decisions of courts of another state, purporting to be published by its authority, are prima facie evidence of its law.[1]

Effect of amendment. Leave of court to amend an official record has no effect on the record as evidence[2] until the amendment is made, in which case the record as amended has been held to be conclusive evidence of the facts therein stated.[3]

b. Official Certificates

Official certificates are generally prima facie, but not conclusive, evidence of the facts stated therein.

Official certificates are prima facie, but not conclusive, evidence of the facts stated therein,[4] and with respect to some certificates this rule has been declared by statute.[5] Such certificates may be rebutted, but ordinarily they will control in the absence of evidence to the contrary,[6] and cannot be impeached by mere inference.[7] A certificate of a public officer, however, as to matters which he is not required or authorized to certify is extraofficial and entitled to no greater weight as evidence than an unsworn certificate of any other person.[8]

A birth certificate filed and on record with the proper officials is conclusive of the date of a person's birth;[9] but, under some statutes, such a certificate is only prima facie evidence of facts recited therein,[10] and is not even prima facie evidence of

97. Mich.—Koehler v. Abey, 133 N.W. 923, 168 Mich. 113.

98. Mont.—American Sav. Bank & Trust Co. v. Chapman, 202 P. 385, 61 Mont. 408.
Tex.—Abeel v. Weil, 283 S.W. 769, 115 Tex. 490—Newsom v. Langford, Civ.App., 174 S.W. 1036.

99. Mass.—Vergnani v. Guidetti, 32 N.E.2d 272, 308 Mass. 450—In re Derinza, 118 N.E. 942, 229 Mass. 435.

1. N.Y.—Ball v. Cross, 132 N.E. 106, 231 N.Y. 329, 39 A.L.R. 600, reversing 180 N.Y.S. 434, 190 App. Div. 711, which affirmed 174 N.Y.S. 259, 106 Misc. 184.
R.I.—Hewett v. Hewett, 116 A. 883, 44 R.I. 308.

2. Ill.—People v. Cleveland, C., C. & St. L. Ry. Co., 145 N.E. 727, 314 Ill. 455.

3. Ill.—People v. Harquist, 146 N.E. 140, 315 Ill. 228—People v. Cleveland, C., C. & St. L. Ry. Co., 145 N.E. 727, 314 Ill. 455.

4. U.S.—U. S. v. Curran, D.C.N.Y., 298 F. 951.
Ark.—Bush v. Echols, 10 S.W.2d 906, 178 Ark. 507.
Mass.—Grover v. Smead, 2 N.E.2d 1012, 295 Mass. 11.
Minn.—O'Laughlin v. St. Anthony & Dakota Elevator Co., 192 N.W. 356, 155 Minn. 88.
Mo.—Woods v. National Aid Life Ass'n, App., 87 S.W.2d 698.
N.Y.—Lazarowitz v. Kazan, 203 N.Y.S. 610, 122 Misc. 202.
Pa.—In re McLaughlin's Estate, 29 Del.Co. 478.
Tex.—Blum Milling Co. v. Moore-Seaver Grain Co., Com.App., 277 S.W. 78, reversing Moore-Seaver Grain Co. v. Blum Milling Co., Civ. App., 264 S.W. 551—Taylor v. Hemphill, Civ.App., 238 S.W. 986, dismissed for want of jurisdiction.
22 C.J. p 969 note 7.

Particular certificates within rule

(1) Certificate of diligent search and failure to find document as evidence that document was not filed.—Adirondack Core & Plug Co. v. New York Cent. R. Co., 258 N.Y.S. 916, 144 Misc. 558, reversed on other grounds 264 N.Y.S. 484, 238 App.Div. 346, affirmed 191 N.E. 503, 264 N.Y. 439.

(2) Government certificate of inspection of car.—Fean v. Alabama Great Southern R. Co., 159 N.E. 487, 26 Ohio App. 96.

(3) Ordinary's certificate, on question whether applicant for exemption from license fee is disabled or indigent resident soldier within exemption statute.—Webb v. Mayor and Aldermen of Savannah, 175 S.E. 470, 179 Ga. 160.

An auctioneer's certificate pursuant to power of sale in mortgage is prima facie evidence of its recitals as to the notice, the time and place of sale, and regularity of it.—Elson v. Pridgen, Ala., 2 So.2d 110.

Report of state board of health on specimen of sputum which was regularly taken and mailed to board is prima facie evidence of what it purports to be, and, if its verity is to be overthrown, duty is on one challenging it to do so.—Mutual Life Ins. Co. of New York v. Knight, 178 So. 898, 130 Fla. 733.

5. Cal.—Stella v. Smith, 293 P. 656, 109 Cal.App. 409.
La.—Davis v. Selig & Baughman Hardware Co., 2 La.App. 665.
N.C.—American Fertilizing Co. v. Thomas, 106 S.E. 835, 181 N.C. 274.

Secretary of state's certificate, under official seal
Fla.—Gwynn v. Hardee, 110 So. 343, 92 Fla. 543.

6. U.S.—U. S. v. Curran, D.C.N.Y., 298 F. 951.
Mass.—Grover v. Smead, 2 N.E.2d 1012, 295 Mass. 11.
Miss.—Thompson v. Clay, 82 So. 1, 120 Miss. 190.

A verified suggestion by the attorney general of the state that a vessel seized under process of the admiralty court was the absolute property of the state is sufficient to establish that fact, at least in the absence of a specific denial of such ownership.—In re State of New York, 41 S.Ct. 592, 256 U.S. 503, 65 L.Ed. 1063.

A certificate of the order approving the bond of a trustee in bankruptcy constitutes conclusive evidence of the vesting in him of the title to the property of the bankrupt and is proof of the due appointment of such trustee.—Bank of Manchester v. Birmingham Trust & Savings Co., 119 S.E. 603, 156 Ga. 486.

7. Ill.—Light v. Reed, 85 N.E. 282, 234 Ill. 626, affirming 138 Ill.App. 611.
22 C.J. p 969 note 7 [b].

8. Ind.—Daggett v. Bonewitz, 7 N.E. 900, 107 Ind. 276.
Wyo.—Farmers State Bank of Riverton v. Investors Guaranty Corporation, 45 P.2d 1057, 48 Wyo. 319.

9. Mo.—Hente v. Michie, App., 151 S.W.2d 107.

10. Iowa.—Gardner v. Boland, 227 N.W. 902, 209 Iowa 362.

immaterial statements.[11] A certificate or record of births and baptisms of a church is not conclusive as to the date of the birth of a person[12] or as to his parentage.[13]

A certificate of death is prima facie, but not conclusive, evidence, in some states by statute, of the facts properly recited therein,[14] such as the fact and cause of death,[15] but is not such evidence as to matters of opinion or conclusion stated therein,[16] or as to hearsay statements.[17] In the absence of other controlling evidence, the facts recited must be taken as true,[18] but they are subject to rebuttal and explanation.[19] It has been held that a death certificate filed in another state need not be considered as prima facie evidence of the facts therein

11. Iowa.—Gardner v. Boland, supra.

Paternity

Statement in birth certificate that name of father was unknown is not presumptive evidence of that fact and does not contradict testimony with reference to paternity of child. —Gardner v. Boland, supra.

12. Mo.—Arnold v. Brotherhood of Locomotive Firemen and Enginemen, 101 S.W.2d 729, 231 Mo.App. 508.
N.Y.—Baronowski v. Quayle & Son Corporation, 253 N.Y.S. 587, 234 App.Div. 806, amended 254 N.Y.S. 1019, 235 App.Div. 644.

13. Mich.—Livernash v. De Lorme, 175 N.W. 177, 208 Mich. 295.
Philippine.—Basa v. Arquiza, 5 Philippine 187.

14. U.S.—Krug v. Mutual Ben. Health & Accident Ass'n, C.C.A. Mo., 120 F.2d 296—Guardian Life Ins. Co. of America v. Kissner, C.C.A.Mo., 111 F.2d 532—Brown v. Maryland Casualty Co., C.C.A.Mo., 55 F.2d 159—Young v. Aetna Life Ins. Co., D.C.Pa., 32 F.Supp. 389, affirmed, C.C.A., Aetna Life Ins. Co. v. Young, 113 F.2d 601.
Mass.—Lydon v. Boston Elevated Ry., 34 N.E.2d 642, 309 Mass. 205—Walcott v. Sumner, 32 N.E.2d 685, 308 Mass. 413.
Mich.—Bishop v. Shurly, 211 N.W. 75, 237 Mich. 76.
Minn.—Krema v. Great Northern Life Ins. Co., 282 N.W. 822, 204 Minn. 186—Milliren v. Federal Life Ins. Co., 242 N.W. 290, 185 Minn. 614—Pete v. Lampi, 185 N.W. 653, 150 Minn. 423.
Mo.—Simpson v. Wells, 237 S.W. 520, 292 Mo. 301.
N.J.—Aitken v. John Hancock Mut. Life Ins. Co., 10 A.2d 745, 124 N.J.Law 58, reversing 6 A.2d 133, 122 N.J.Law 436.
N.C.—Rees v. Jefferson Standard Life Ins. Co., 5 S.E.2d 154, 216 N.C. 428.
Pa.—Johnson v. Valvoline Oil Co., 200 A. 224, 131 Pa.Super. 266.
Tex.—Blue Bonnet Life Ins. Co. v. Reynolds, Civ.App., 150 S.W.2d 372.

15. U.S.—Krug v. Mutual Ben. Health & Accident Ass'n, C.C.A. Mo., 120 F.2d 296—Jones v. Mutual Life Ins. Co. of New York, C.C.A.Mo., 113 F.2d 873—Guardian Life Ins. Co. of America v. Kissner, C.C.A.Mo., 111 F.2d 532—Equitable Life Assur. Soc. of U. S. v. Stinnett, C.C.A.Ky., 13 F.2d 820.
Ala.—Metropolitan Life Ins. Co. v. Parks, 97 So. 788, 210 Ala. 261—American Nat. Ins. Co. v. Reed, 160 So. 543, 26 Ala.App. 350, certiorari denied 160 So. 546, 230 Ala. 221.
Cal.—Bennett v. Brady, 61 P.2d 530, 17 Cal.App.2d 114—Longuy v. La Société Francaise De Bienfaisance Mutuelle, 198 P. 1011, 52 Cal.App. 370.
Kan.—Kirsch v. Federal Life Ins. Co., 87 P.2d 591, 149 Kan. 309.
Ky.—Prudential Ins. Co. of America v. Tuggle's Adm'r, 72 S.W.2d 440, 254 Ky. 814—Ford v. Commonwealth Life Ins. Co., 67 S.W.2d 950, 252 Ky. 565—Louisville Gas & Electric Co. v. Duncan, 31 S.W.2d 915, 235 Ky. 613.
Mass.—Lydon v. Boston Elevated Ry., 34 N.E.2d 642, 309 Mass. 205—Broadbent's Case, 134 N.E. 632, 240 Mass. 449.
Mich.—Bishop v. Shurly, 211 N.W. 75, 237 Mich. 76.
Mo.—Simpson v. Wells, 237 S.W. 520, 292 Mo. 301—Sheppard v. Travelers Protective Ass'n of America, 124 S.W.2d 528, 233 Mo.App. 602.
N.Y.—Nestor v. Pabst Brewing Co., 181 N.Y.S. 477, 191 App.Div. 812.
Pa.—Griffin v. National Mining Co., 193 A. 447, 127 Pa.Super. 588.
Utah.—Bozicevich v. Kenilworth Mercantile Co., 199 P. 406, 58 Utah 458, 17 A.L.R. 346.
17 C.J. p 1178 notes 67, 68.

Recitals not part of proof of death are not binding on a beneficiary of life insurance policy.—Scott v. National Life & Accident Ins. Co., Mo. App., 281 S.W. 67.

Showing causes of death

The absence of a statement in copy of death certificate of any contributory causes of death of employee who died of meningitis does not show conclusively that there were no other causes nor preclude introduction of evidence as to such causes.—Berinato v. Harper Bros., 188 A. 744, 15 N.J.Misc. 53.

16. U.S.—Equitable Life Assur. Soc. of U. S. v. Stinnett, C.C.A.Ky., 13 F.2d 820.
N.C.—Rees v. Jefferson Standard Life Ins. Co., 5 S.E.2d 154, 216 N.C. 428.

17. Minn.—Milliren v. Federal Life Ins. Co., 242 N.W. 290, 185 Minn. 614.

18. Mass.—Lydon v. Boston Elevated Ry., 34 N.E.2d 642, 309 Mass. 205.
Mo.—Woods v. National Aid Life Ass'n, App., 87 S.W.2d 698.
N.J.—Aitken v. John Hancock Mut. Life Ins. Co., 6 A.2d 133, 122 N.J. Law 436, reversed on other grounds 10 A.2d 745, 124 N.J.Law 58.

19. U.S.—Krug v. Mutual Ben. Health & Accident Ass'n, C.C.A. Mo., 120 F.2d 296—Young v. Aetna Life Ins. Co., D.C.Pa., 32 F.Supp. 389, affirmed, C.C.A., Aetna Life Ins. Co. v. Young, 113 F.2d 601.
Ky.—Metropolitan Life Ins. Co. v. Cleveland's Adm'r, 11 S.W.2d 434, 226 Ky. 621.
Minn.—Krema v. Great Northern Life Ins. Co., 282 N.W. 822, 204 Minn. 186.
Pa.—Johnson v. Valvoline Oil Co., 200 A. 224, 131 Pa.Super. 266.
Tex.—Blue Bonnet Life Ins. Co. v. Reynolds, Civ.App., 150 S.W.2d 372, error refused.

Physician competent in rebuttal

The physician who made out the medical report embodied in the certificate may testify in rebuttal or explanation of the certificate.
Ky.—Metropolitan Life Ins. Co. v. Cleveland's Adm'r, 11 S.W.2d 434, 226 Ky. 621.
Minn.—Krema v. Great Northern Life Ins. Co., 282 N.W. 822, 204 Minn. 186.

Death certificate without probative value

(1) As to cause of death, where it is not identified by the physician whose name is signed to it and there is no showing that the certificate was submitted by a beneficiary so as to constitute the certificate a statement against interest.—Clay v. Liberty Industrial Life Ins. Co., La. App., 157 So. 838.

(2) Where the physician who made the certificate was witness for claimant offering it in evidence in compensation proceeding, and physician's testimony as to cause of death was inadmissible as not showing facts upon which opinion was founded.—Johnson v. Valvoline Oil Co., 200 A. 224, 131 Pa.Super. 266.

stated by the courts of a different state.[20] A statute making a death certificate prima facie evidence of facts stated is designed only for public purposes and does not apply in cases of private controversies between adverse parties.[21]

§ 767. Private Writings Generally

a. In general
b. Deeds

a. In General

Private writings are, as a rule, prima facie, but not conclusive, evidence of the facts stated or recited therein or shown thereby.

Private writings are, as a rule, prima facie, but not conclusive, evidence of the facts stated or recited therein or shown thereby,[22] and particularly are not conclusive against a third party.[23] Such documentary evidence, however, may be held conclusive if it is unequivocal and unmistakable in its meaning[24] and is not contradicted by other evidence;[25] and it may be sufficient to overcome a prima facie case for the opposing party.[26] On the other hand, if the writing or document is of an ambiguous or uncertain character, although it may constitute some evidence, it may be of little, if any, value as such;[27] but a contemporary construction

20. Wash.—Thompson v. Seattle, R. & S. R. Co., 128 P. 1070, 71 Wash. 436.

21. N.Y.—Beglin v. Metropolitan Life Insurance Co., 66 N.E. 102, 173 N.Y. 374—In re Curtiss' Will, 250 N.Y.S. 146, 140 Misc. 185.

22. U.S.—Royal Baking Powder Co. v. Hessey, C.C.A.Md., 76 F.2d 645, affirming, D.C., In re L. Van Bokkelen, 7 F.Supp. 639, certiorari denied Lowendahl v. Hessey, 56 S.Ct. 119, 296 U.S. 595, 80 L.Ed. 421—Central Paper Co. v. Southwick, C.C.A.Mich., 56 F.2d 593—Packard v. Hines, D.C.N.Y., 41 F.2d 557.
Ala.—Nobles v. Bank of Eclectic, 115 So. 13, 217 Ala. 124—Cadle v. Bland, 106 So. 170, 213 Ala. 665.
Ark.—Bush v. Taylor, 207 S.W. 226, 136 Ark. 554.
Idaho.—Harding v. Home Inv. & Sav. Co., 297 P. 1101, 49 Idaho 64, denying rehearing 286 P. 920, 49 Idaho 64.
Ind.—Frazer v. McMillin & Carson, 179 N.E. 564, 94 Ind.App. 431.
Ky.—Security Finance Co. v. A. L. Cook & Son, 3 S.W.2d 187, 223 Ky. 124—Barney v. Adkins, 295 S.W. 1039, 220 Ky. 769.
La.—Sunseri v. Cassagne, 185 So. 1, 191 La. 209.
Mass.—Rogers v. Price, 200 N.E. 274, 293 Mass. 537.
Mo.—Little Bros. Co. v. G. Mathes Iron & Metal Co., App., 223 S.W. 952.
N.J.—In re Benson's Will, 114 A. 456, 92 N.J.Eq. 618, affirmed 117 A. 925, 93 N.J.Eq. 671.
N.Y.—John S. Metcalf Co. v. Mayer, 211 N.Y.S. 53, 213 App.Div. 607—Goldman v. Rhoades, 203 N.Y.S. 548, 122 Misc. 567.
N.C.—Federal Land Bank of Columbia v. Robertson, 187 S.E. 575, 210 N.C. 436—Richardson v. Satterwhite, 164 S.E. 825, 203 N.C. 113.
N.D.—Bowers v. Hogan, 259 N.W. 92, 65 N.D. 372.
Pa.—Appeal of Pennsylvania Company, 86 Pa. 102—Chorpenning v. Boyce, 58 Pa. 474—Shulman v. Mantione, 21 Luz.L.Reg. 470.
Tex.—Thomas v. Calahan, Civ.App., 229 S.W. 602.
22 C.J. p 970 note 9.

Assignment of title to car

Under a statute making a certificate of title to an automobile prima facie evidence of ownership, an assignment on the back of such certificate of title furnishes prima facie evidence of ownership, and gives rise to the presumption that the assignment was made on date it bears, but is not prima facie evidence of facts therein stated.—Hayes v. Ogle, 21 P 2d 223, 143 Or. 1.

Time cards of workmen, as prima facie evidence of items of account for amount of labor performed.—Patrick v. Tetzlaff, 189 P. 115, 46 Cal.App. 243.

23. Ala.—Nobles v. Bank of Eclectic, 115 So. 13, 217 Ala. 124.
Mo.—Holman v. Metropolitan Life Ins. Co., 98 S.W.2d 343, 231 Mo. App. 230.
N.Y.—Brandt v. Beha, 216 N.Y.S. 178, 217 App.Div. 644.

Beneficiary suing on life policy was not party to, and was not bound by, records in insurer's home office showing that last semiannual premium due before insured's death had not been paid.—Holman v. Metropolitan Life Ins. Co., 98 S.W.2d 343, 231 Mo.App. 230.

Note

Recitals that note is renewal merely are prima facie evidence of such intent, but not conclusive against indorser not party to transaction.—Nobles v. Bank of Eclectic, 115 So. 13, 217 Ala. 124.

24. Fla.—Johns v. Gillian, 184 So. 140, 134 Fla. 575.
La.—Breeland v. Kenner, App., 166 So. 677.
Mo.—Gosney v. Costigan, 33 S.W.2d 947, 326 Mo. 1215—Concrete Steel Co. v. Reinforced Concrete Co., App., 72 S.W.2d 118—Greene v. Spinning, App., 48 S.W.2d 51.
N.C.—Perry v. Southern Surety Co. 129 S.E. 721, 190 N.C. 284.

Corporate existence

A recital in a building contractor's bond that the contractor is a corporation binds the surety to such fact, and in suit of such bond the obligee is relieved from proving the contractor's corporate existence.—St. Matthew's Evangelical Lutheran Church v. U. S. Fidelity & Guaranty Co., 192 N.W. 784, 222 Mich. 256.

25. U.S.—Irving Trust Co. v. Commercial Factors Corporation, C.C. A.N.Y., 68 F.2d 864, reversing, D. C., In re Nathan & Cohen Co., 58 F.2d 670.
Ala.—Clark v. Sanders, 171 So. 717, 233 Ala. 378.
Cal.—Nevin v. Mercer Casualty Co., 55 P.2d 251, 12 Cal.App.2d 222.
Minn.—Danielski v. Pioneer Bldg. Co., 242 N.W. 342, 186 Minn. 24.
N.Y.—Stephens v. Crawford, 205 N. Y.S. 39, 209 App.Div. 142, affirmed 147 N.E. 184, 239 N.Y. 535.
Pa.—Harkins v. Varone, 159 A. 860, 306 Pa. 376.

26. U.S.—U. S. v. Patterson, D.C. Mont., 4 F.Supp. 693.
Mo.—Blue v. Supreme Camp of American Woodmen, App., 135 S. W.2d 373.

Documentary evidence, in order to destroy plaintiff's prima facie case, must be an instrument or record having efficacy, to which plaintiff is in some way a party, or truth of which he vouches for, either expressly or in legal effect, or else for some reason is estopped to deny.—Blue v. Supreme Camp of American Woodmen, supra.

27. Cal.—Shirreffs v. Alta Canyada Corporation, 48 P.2d 55, 8 Cal.App. 2d 742.
Ill.—In re Martine's Estate, 233 Ill. App. 94.
La.—Peyton v. Roth, 88 So. 773, 149 La. 147.
Mass.—Chadwick & Carr Co. v. Smith, 199 N.E. 903, 293 Mass. 293.
Wash.—Centralia Labor Temple Ass'n v. O'Day, 246 P. 930, 139 Wash. 331.

Invoices as not proof of sale and delivery.—W. T. Rawleigh Co. v. Thompson, 114 S.E. 702, 122 S.C. 43.

by acts of parties to the writing has great weight, and is usually controlling if implications involved in the writing are doubtful.[28] Written evidence on the same issues as to which oral evidence has been given should not be disregarded, but should be given due weight,[29] and, as stated infra § 1033, it ordinarily is regarded as being the more reliable evidence.

The rules stated above, as to private writings being prima facie, and not conclusive, evidence of the facts stated or recited or shown thereby, have been applied to abstracts of title,[30] ancient documents,[31] bills of lading or invoices,[32] chattel mortgages,[33] inventories,[34] receipts,[35] releases,[36] and statements prepared by a bookkeeper.[37]

A regular marine survey made in accordance with the usages of maritime states is generally considered prima facie evidence of the facts which it recites,[38] but it is not conclusive[39] in the absence of evidence tending to substantiate its correctness.[40]

Recitals in a written contract are ordinarily regarded as prima facie, but not conclusive, evidence of the facts recited,[41] unless they are made conclusive by statute, as between the parties thereto

Letters held insufficient proof
Ala.—Sovereign Camp, W. O. W., v. Barton, 160 So. 684, 230 Ala. 293.
Conn.—Southern New England Ice Co. v. Town of West Hartford, 159 A. 470, 114 Conn. 496.
Ga.—Moor v. Southern Pac. Co., 132 S.E. 920, 35 Ga.App. 288.
La.—Rowe v. Smith, 106 So. 657, 160 La. 12—Jackson v. Dominick, App., 166 So. 367.
Neb.—Tillson v. Holloway, 143 N.W. 939, 94 Neb. 635.
N.Y.—Wachtel v. Equitable Life Assur. Soc. of U. S., 194 N.E. 850, 266 N.Y. 345, reversing 271 N.Y.S. 650, 241 App.Div. 172, and reargument denied 196 N.E. 60, 267 N.Y. 289—Beechwood Gun Club v. City of Beacon, 275 N.Y.S. 249, 153 Misc. 358, affirmed 275 N.Y.S. 219, 242 App.Div. 761—New Amsterdam Casualty Co. v. National Union Fire Ins. Co. of Pittsburgh, Pa., 273 N.Y.S. 647, 151 Misc. 894, affirmed 271 N.Y.S. 953, 241 App. Div. 813, affirmed 194 N.E. 745, 266 N.Y. 254.

Unauthenticated reports of contractor's employees, as to labor and material used are not controlling on referee.—Feroe v. B. H. Brooke Co., 219 N.Y.S. 97, 219 App.Div. 107, affirmed Feroe v. B. H. Brooks Co., 161 N.E. 194, 247 N.Y. 590.

Unverified English translations of alleged articles appearing in Russian papers obtained from United States government were not sufficient to show existence of Russian corporation was terminated by Soviet government.—Joint Stock Co. of Volgakama Oil & Chemical Factory v. National City Bank of New York, 206 N.Y.S. 476, 210 App.Div. 665, affirmed 148 N.E. 552, 240 N.Y. 368, reargument denied, 150 N.E. 532, 241 N.Y. 509.

28. U.S.—Mara v. U. S., D.C.N.Y., 54 F.2d 397.

29. N.Y.—Susquehanna Silk Mills v. Jacobson, 173 N.Y.S. 271, 185 App. Div. 378.

30. Wash.—Adams v. Mignon, 84 P. 2d 1016, 197 Wash. 293.
22 C.J. p 970 note 10.

31. U.S.—Johnson v. Jarvis, W.Va., 223 F. 756, 139 C.C.A. 286, affirming, D.C., 208 F. 353.
Ga.—Lanier v. Hebard, 51 S.E. 632, 123 Ga. 626.
22 C.J. p 970 note 11.

No presumption arises from recitals in ancient instrument, where other means of proving truth or falsity of recitals exist.—James v. Gaal, Tex.Civ.App., 282 S.W. 298.

A book as an ancient document is proof of the facts recorded therein.—Commonwealth v. Ball, 121 A. 191, 277 Pa. 301, 29 A.L.R. 626.

32. U.S.—Blagg v. Phœnix Ins. Co., C.C.Pa., 3 F.Cas.No.1,477, 3 Wash. C.C. 5.

33. Okl.—Cockrell v. Schmitt, 94 P. 521, 20 Okl. 207, 129 Am.S.R. 737.

Chattel mortgage executed and recorded in another state
Cal.—Motor Inv. Co. v. Breslauer, 221 P. 700, 64 Cal.App. 230.

34. Wis.—In re Langenbach's Estate, 230 N.W. 141, 201 Wis. 336.

35. Ala.—Blue v. Hooks, 141 So. 627, 224 Ala. 696.
Ill.—Byalos v. Matheson, 159 N.E. 242, 328 Ill. 269, affirming 243 Ill. App. 60.
Ky.—Dugan v. Harris, 13 Ky.Op. 297.

A receipt and release signed by infant in an accounting with guardian on reaching majority was prima facie evidence that it spoke the truth and was correct.—Long v. Town of Rockingham, 121 S.E. 461, 187 N.C. 199.

Customary receipt given by plaintiff's drayman to carrier's agent, stating that the goods were received in good order, was evidence of an inconclusive character as to the condition of the goods, where the goods, consisting of crockery, were inclosed in crates, and were concealed from view.—Louisville & N. R. Co. v. John W. O'Neill Co., 85 So. 482, 204 Ala. 154.

Receipt issued for premiums on industrial life policy, containing printed recitations that receipt was for deposit on revival application, was not conclusive against beneficiary who relied on such receipt to negative alleged lapse of policy, where no policy number was named and specific language requesting revival and conditions for revival were marked out.—Shultz v. American Nat. Ins. Co., Tex.Civ.App., 142 S.W. 2d 275, error dismissed.

Receipt providing that purchaser would pay taxes after date of contract is not "written instrument between parties" conclusive as to facts recited therein, as provided by statute.—Bevis v. Murphey, 16 P.2d 178, 127 Cal.App. 518.

36. Neb.—Pettit v. Louis, 129 N.W. 1005, 88 Neb. 496, 34 L.R.A.,N.S., 356.
N.C.—Long v. Town of Rockingham, 121 S.E. 461, 187 N.C. 199.

37. Ark.—United Walnut Co. v. Courtney, 130 S.W. 566, 96 Ark. 46, Ann.Cas.1912B 443.
22 C.J. p 971 note 20.

38. U.S.—Fireman's Fund Ins. Co. v. Globe Nav. Co., Wash., 236 F. 618, 149 C.C.A. 614.
38 C.J. p 1182 note 54.

39. N.Y.—Innes v. Alliance Mut. Ins. Co., 3 N.Y.Super. 310.
38 C.J. p 1182 note 55.

40. N.Y.—Howard v. Orient Mut. Ins. Co., 25 N.Y.Super. 539.

41. Cal.—Knight v. Marks, 226 P. 931, 66 Cal.App. 593.
Ky.—Dotson v. Hunt, 270 S.W. 38, 207 Ky. 832.
Mass.—Buono v. Cody, 146 N.E. 703, 251 Mass. 286.
Mo.—McElvain v. St. Louis & S. F. R. Co., 131 S.W. 736, 151 Mo.App. 126.
Neb.—Bullock v. Power-Heafey Coal Co., 152 N.W. 392, 98 Neb. 221.
Tex.—Rector v. Anderson, Civ.App., 1 S.W.2d 699.
Utah.—Utah State Nat. Bank v. Livingston, 254 P. 781, 69 Utah 284.

Recitals in a real estate mortgage on which the Home Owners' Loan Corporation had made a refinancing loan were prima facie correct.—

and their successors in interest,[42] or there is no contradictory evidence.[43] These rules apply to recitals as prima facie, and not conclusive, evidence of consideration[44] or payment.[45] The recital of a valuable consideration in a contract, however, is conclusive of the nature of the contract and its effect on that account.[46] Every writing which is the foundation of an action is prima facie evidence of a consideration for the debt or duty for which it was given until it is disputed by the pleadings or contradicted by the proof.[47]

Corporate records. The records of the acts of the incorporators, stockholders, members, directors, or trustees of a corporation or association,[48] includ-

Home Owners' Loan Corporation v Rawson, 83 P.2d 765, 196 Wash. 548.

42. Cal.—Bevis v. Murphey, 16 P.2d 178, 127 Cal.App. 518—Lane Mortg. Co. v. Crenshaw, 269 P. 672, 93 Cal.App. 411.
La.—Kerwin v. Hibernia Ins. Co., 28 La.Ann. 312.
Mich.—City Inv. Co. v. Zimni, 238 N.W. 170, 255 Mich. 388.
Or.—Thomson v. Silsby, 252 P. 712, 120 Or. 501.

43. Cal.—Kott v. Hilton, App., 114 P.2d 666.
Mo.—McElvain v. St. Louis & S. F. R. Co., 131 S.W. 736, 151 Mo.App. 126.

"The recital of a fact upon the truth of which the execution of a contract is dependent and which, reflecting a joint attitude of mind, is made an integral and essential part of a contract, is conclusive in the absence of mistake sufficient to reform the contract."—Kefover v. Potter Title & Trust Co., 181 A. 771, 773, 320 Pa. 51.

44. Ala.—Boyd v. Dent, 113 So. 11, 216 Ala. 171.
Cal.—Kott v. Hilton, App., 114 P.2d 666.
Iowa.—Young Men's Christian Ass'n v. Caward, 239 N.W. 41, 213 Iowa 408.
Minn.—Maddy v. National Life Ins. Co. of the United States of America, 194 N.W. 880, 156 Minn. 375.
S.D.—Poppke v. Poppke, 231 N.W. 933, 57 S.D. 262.
Tex.—Orbeck v. Alfei, Civ.App., 276 S.W. 947—Grogan v. Lea, Civ. App., 269 S.W. 1070.

Agreed value of personal property, as stated in contract of exchange for other property, is prima facie evidence of the value of the property.—Brunsvold v. Medgorden, 153 N.W. 163, 171 Iowa 413—Norton v. Hinecker, 115 N.W. 612, 137 Iowa 750, 15 Ann.Cas. 474.

Recital of "one dollar and other valuable consideration" or "value received," is prima facie evidence of consideration, although not conclusive where met or controlled by other evidence.
Md.—Farmers' & Merchants' Nat. Bank of Bel Air v. Anderson, 137 A. 367, 152 Md. 641.
Mass.—Finegan v. Prudential Ins. Co. of America, 14 N.E.2d 172, 300 Mass. 147, 116 A.L.R. 535.
Minn.—National Surety Co. v. Winslow, 173 N.W. 181, 143 Minn. 66.

For mortgage

Where there is little satisfactory evidence as to amount of debt evidenced by mortgage, and no fraud or misrepresentation is shown, recitals of mortgage will stand as the authoritative statement of its consideration.—Sykes v. Poteet, 197 So. 884, 240 Ala. 122.

Statutory conclusive presumption of truth of recitals of contract does not apply to recital of consideration.—Lane Mortg. Co. v. Crenshaw, 269 P. 672, 93 Cal.App. 411.

45. Cal.—Woods Leasing Co. v. Funcheon, 25 P.2d 47, 134 Cal.App. 111.
N.J.—Friedman v. Kaufman, 158 A. 761, 10 N.J.Misc. 252.
N.Y.—Orthey v. Bogan, 140 N.E. 722, 236 N.Y. 351, reversing 194 N.Y.S. 963, 202 App.Div. 810, and reargument denied 142 N.E. 318, 236 N.Y. 643.
Or.—Hoy v. Biladeau, 223 P. 241, 110 Or. 591.
Pa.—Hardy v. State Mut. Ben. Soc., 170 A. 704, 111 Pa.Super. 336.
Tex.—Orbeck v. Alfei, Civ.App., 276 S.W. 947—Fadell v. Taylor, Civ. App., 229 S.W. 965, reversed on other grounds Faddell v. Taylor, Com.App., 239 S.W. 931.

Down payment

(1) The recital in conditional sales contract that down payment should be a specified sum did not constitute a recital that down payment had in fact been received, but even if statement might be so considered, the recital was merely in the nature of a "receipt" and could be contradicted.—Creamery Package Mfg. Co. v. Cheyenne Ice Cream Co., 100 P.2d 116, 55 Wyo. 277.

(2) Actual facts may be shown in determining whether amount referred to in conditional sales contract as cash payment was in fact such or a note constituting mere evidence of portion of purchase price to become due.—Jones-Short Motor Co. v. Bolin, 279 P. 395, 153 Wash. 198.

Transfer of notes as security, and not as payment

Ala.—Jones v. Moore, 102 So. 200, 212 Ala. 248.

"Paid" stamped on note through error, not conclusive of payment.—First Nat. Bank v. Drexler, La.App., 184 So. 607.

46. Ala.—Sherrill v. Alabama Appliance Co., 197 So. 1, 240 Ala. 46—Ross v. Parks, 8 So. 368, 93 Ala. 153, 30 Am.S.R. 47, 11 L.R.A. 148.

Recital in an insurance policy of payment of premium in advance is conclusive evidence of payment, so as to make the policy binding, but does not preclude recovery on notes given in payment of the premium.—Masson v. New England Mut. Life Ins. Co., 260 P. 367, 85 Cal.App. 633.

47. Ala.—Blackmon v. Engram, 116 So. 307, 22 Ala.App. 396.

48. U.S.—Northern Pac. Ry. Co. v. Helvering, C.C.A., 83 F.2d 508—Wessel v. U. S., C.C.A.Neb., 49 F.2d 137.
Ala.—McMillan v. Aiken, 88 So. 135, 205 Ala. 35.
Ark.—City Electric St. R. Co. v. First Nat. Exch. Bank, 34 S.W. 89, 62 Ark. 33, 54 Am.S.R. 282, 31 L.R.A. 535.
Ill.—Chicago Title & Trust Co. v. Central Trust Co. of Illinois, 144 N.E. 165, 312 Ill. 396, reversing 224 Ill.App. 474.
La.—City of New Orleans, by and through Public Belt Railroad Commission, v. New Orleans Coal & Bisso Towboat Co., 124 So. 693, 12 La.App. 124, transferred, see 123 So. 724, 168 La. 1093.
Minn.—Topinka v. Minnesota Mut. Life Ins. Co., 248 N.W. 660, 189 Minn. 75, 95 A.L.R. 739.
N.J.—McCoy v. McCloskey, 117 A. 473, 94 N.J.Eq. 60.
Pa.—Fell v. Pitts, 106 A. 574, 263 Pa. 314.
22 C.J. p 971 note 17.

Particular records within rule

(1) Balance sheet.—Wessel v. U. S, C.C.A.Neb., 49 F.2d 137.

(2) Certified report as to value of stock.—Ferrando v. U. S. Nat. Building & Loan Ass'n, 160 A. 716, 307 Pa. 25.

(3) Entries in books in usual course of business as prima facie evidence of correctness of assets and liabilities set forth.—In re Auditore's Estate, 240 N.Y.S. 502, 136 Misc. 664, affirmed In re Auditore's Will, 250 N.Y.S. 902, 233 App.Div. 740, appeal dismissed In re Parascandola, 178 N.E. 792, 257 N.Y. 554.

ing its minutes,[49] are generally prima facie, and not conclusive, evidence of the facts stated, unless the statements are sham or fictitious.[50] Such evidence may be rebutted or explained,[51] but may be overcome only by evidence of a more reliable character,[52] or by proof of such inconsistencies in the records as to warrant their being disbelieved.[53] The minutes of a corporation are presumptive evidence that proceedings not therein recited did not actually occur;[54] but are not conclusive that no other business than that recorded was transacted.[55] Unequivocal documents showing the business of a corporation control testimony of the president to the contrary;[56] and a certified accountant's report, adopted by a corporation, as to the value of its assets cannot be impeached by the corporation.[57]

Hospital records, although required by statute,[58] are ordinarily prima facie, and not conclusive, evidence of the facts recited therein, or shown there-

(4) Train sheets kept by railroad's train dispatcher from reports of local agents.
Ark.—Bush v. Taylor, 207 S.W. 226, 136 Ark. 554.
Mo.—Chapple v. St. Louis & H. R. Co., App., 284 S.W. 863.

Books showing issuance of stock, although kept by the assistant secretary, and the entries made by him rather than the secretary are prima facie evidence of the facts shown by the entries therein.—Kaye v. Metz, 198 P. 1047, 186 Cal. 42.

Books of bank are best evidence of assets and liabilities, but are not conclusive, and are subject to contradiction by one who has personal knowledge of facts.
U.S.—Pufahl v. Fidelity Nat. Bank of Oklahoma City, C.C.A.Okl., 40 F.2d 25.
Tex.—Chapman v. Harris, Civ.App., 275 S.W. 75.

Statement in corporate charter that capital stock had been subscribed for in accordance with affidavit showing that three persons had, between them, subscribed for all stock of corporation, does not conclusively show that each subscribed for one third.—Yakey v. Chapman Milling Co., Tex.Civ.App., 74 S.W.2d 148, error dismissed.

Records as to stock ownership
(1) Stock book is prima facie evidence of stock ownership.
Ala.—Oden v. King, 113 So. 609, 216 Ala. 504, 54 A.L.R. 1413.
Minn.—Johnson v. Freid, 232 N.W. 519, 181 Minn. 316.
Neb.—Brownell v. Adams, 236 N.W. 750, 121 Neb. 304.

(2) However, it has been held that qualifications of both stockholders and officers are matter of record, and being for protection of corporation and public, record is conclusive.—In re Sharp Bros., D.C.Mont., 2 F.Supp. 227.

49. U.S.—Thermopolis Northwest Electric Co. v. Ireland, C.C.A.Wyo., 119 F.2d 409.
Ala.—McMillan v. Aiken, 88 So. 135, 205 Ala. 35.
Cal.—Cox v. First Nat. Bank, 52 P. 2d 524, 10 Cal.App.2d 302.
Ill.—Forest Glen Brick & Tile Co. v. Gade, 55 Ill.App. 181, appeal dismissed 42 N.E. 65, 158 Ill. 39, affirmed 46 N.E. 286, 165 Ill. 367.
Iowa.—J. E. Tusant & Son Co. v. Chas. Weitz Sons, 191 N.W. 884, 195 Iowa 1386.
Ky.—Kelley-Koett Mfg. Co. v. Goldenberg, 270 S.W. 15, 207 Ky. 695.
N.J.—Dickerson v. Metedeconk Co., 198 A. 881, 123 N.J.Eq. 484—Van Hook v. Somerville Mfg. Co., 5 N J.Eq. 137, reversed on other grounds 5 N.J.Eq. 633, 45 Am.D. 401.
N.Y.—Levine v. Behn, 8 N.Y.S.2d 58, 169 Misc. 601, affirmed 12 N.Y.S.2d 190, 257 App.Div. 156, reversed on other grounds 25 N.E.2d 871, 282 N.Y. 120.
Or.—Teiser v. Swirsky, 2 P.2d 920, 137 Or. 595, rehearing denied 4 P. 2d 322, 137 Or. 595.
Pa.—Krick v. Fairy Silk Co., 166 A. 554, 311 Pa. 202—Shuman v. Main, Beaver & Black Creek Mut. Fire Ins. Co., 108 A. 265, 265 Pa. 38.
Tex.—Crenshaw v. Muse, Civ.App., 118 S.W.2d 631—First Nat. Bank v. Brown, Civ.App., 4 S.W.2d 635, reformed on other grounds, Com. App., 15 S.W.2d 563.
Wash.—Rockwell v. Peyran, 20 P.2d 841, 172 Wash. 434.
22 C.J. p 970 note 16.

General rule is that minutes of corporate meetings are prima facie evidence, and usually best evidence, of what they purport to show as to corporate business transacted at such meetings, subject to correction by parol testimony when shown not to be true record.—Gentry Futch Co. v. Gentry, 106 So. 473, 90 Fla. 595.

50. Minn.—Axford v. Western Syndicate Inv. Co., 170 N.W. 587, 141 Minn. 412.

51. Fla.—Gentry Futch Co. v. Gentry, 106 So. 473, 90 Fla. 595.
Minn.—Topinka v. Minnesota Mut. Life Ins. Co., 248 N.W. 660, 189 Minn. 75, 95 A.L.R. 739.
N.Y.—In re Auditore's Estate, 240 N.Y.S. 502, 136 Misc. 664, affirmed In re Auditore's Will, 250 N.Y.S. 902, 233 App.Div. 740, appeal dismissed In re Parascandola, 178 N. E. 792, 257 N.Y. 554.
Tex.—Chapman v. Harris, Civ.App., 275 S.W. 75.
Parol evidence in explanation of corporate records see infra § 892.

52. Iowa.—Campbell v. Centerville Block Coal Co., 179 N.W. 957, 190 Iowa 18.

Corporate minutes cannot be impeached by parol evidence of the directors, who do not remember the directors' meeting or what transpired there.—Great Western Mfg. Co. v. Porter, 172 P. 1018, 103 Kan. 84.

Copy in contradiction of original
Where the original minute book is in evidence, in the absence of evidence that it has been fraudulently changed or altered, a copy taken from a copy of the original is not admissible to contradict it.—Bartholomew v. Walsh, 157 N.W. 575, 191 Mich. 252.

53. La.—Joseph Chalona Co. v. American Ry. Express Co., 123 So. 147, 11 La.App. 18.

Surgeon's report
That number and frequency of company surgeon's entries in report of injured employee's examination are not disclosed does not demonstrate their unreliability, as the degree of regularity goes only to weight as evidence of their truthworthiness. —Lebrun v. Boston & M. R. R., 142 A. 128, 83 N.H. 293.

54. N.Y.—Shelby v. New York Steam Co., 121 N.Y.S. 619.

55. Minn.—Northwest Nat. Motor Car & Vehicle Co. v. McConnell, 190 N.W. 608, 153 Minn. 398.

56. Minn.—E. C. Vogt, Inc., v. Ganley Bros. Co., 242 N.W. 338, 185 Minn. 442.

57. Pa.—Ferrando v. U. S. Nat. Building & Loan Ass'n, 160 A. 716, 307 Pa. 25.

58. Mo.—Allen v. American Life & Accident Ins. Co., App., 119 S.W.2d 450.

Not public institution
A statute requiring that the personal and statistical particulars relative to hospital patients shall be obtained and recorded does not make the hospital a "public institution," or make its employees "public officials," accredited by "governmental authority," who act under their official oaths, as respects the weight such records have as evidence.—Allen v. American Life & Accident Ins. Co., supra.

by;[59] but they are subject to contradiction or explanation,[60] and unless they are contradicted or impeached they will be regarded as conclusive evidence.[61] Where the admissibility of such records is regulated by statute, they have probative force only to the extent to which they are admissible.[62]

Maps, plats, and diagrams. A private or unofficial map, plat, or diagram, when properly admitted in evidence, see supra § 730, is generally regarded as prima facie, and not conclusive, evidence of the objects or places shown thereby,[63] and its value as prima facie evidence is not affected by a certificate of a surveyor that it is correct or nearly correct.[64] The probative value of such a map, plat, or diagram is generally for the court or jury to determine in connection with related testimony given by witnesses,[65] and it may be sufficient to control the testimony given by such witnesses.[66] Ancient maps and sketches, however, in the absence of positive evidence to the contrary, generally will be accepted as correct,[67] and it has been held that an ancient map, taken from the records of the commonwealth, by whose agents it was made in the line of their public duty for a public purpose, is conclusive as to matters covered by it,[68] and that the original plat accompanying a patent issued by the state is either preponderating or alone conclusive.[69] A map filed for record a number of years after the execution of a deed has no evidential value in a suit to quiet title.[70] Rough sketches by an unskilled witness while testifying, not drawn to scale nor correctly representing conditions or distances, have no evidential value.[71]

b. Deeds

(1) In general
(2) Recital of consideration
(3) Mortgage or trust deeds

(1) In General

Recitals in a deed are generally prima facie evidence of the facts stated or shown thereby, and, if not contradicted or impeached become conclusive; but such recitals do not constitute evidence against strangers, except in case of an ancient deed.

59. Ark.—Progressive Life Ins. Co. v. Hulbert, 118 S.W.2d 268, 196 Ark. 352.
Ill.—Wright v. Upson, 135 N.E. 209, 303 Ill. 120.
La.—Lepine v. First Nat. Life Ins. Co., App., 184 So. 376.
Mo.—Chapman v. National Life & Accident Ins. Co., App., 144 S.W.2d 834—Allen v. American Life & Accident Ins. Co., App., 119 S.W.2d 450—Tinsley v. Washington Nat. Ins. Co., App., 97 S.W.2d 874—Smith v. Missouri Ins. Co., App., 60 S.W.2d 730—Mack v. Western & Southern Life Ins. Co., App., 53 S.W.2d 1108—Shaw v. American Ins. Union, App., 33 S.W.2d 1052.
Pa.—Osche v. New York Life Ins. Co., 187 A. 396, 324 Pa. 1—Sack v. Metropolitan Life Ins. Co., 175 A. 723, 115 Pa.Super. 430.

60. Mo.—Wright v. John Hancock Mut. Life Ins. Co. of Boston, App., 153 S.W.2d 747.
Pa.—Evans v. Penn Mut. Life Ins. Co. of Philadelphia, 186 A. 133, 322 Pa. 547.

Record not evidence

Hospital record showing that plaintiff stated his foot was cut by broken glass is not evidence of such fact, where plaintiff himself testifies that he does not know what caused the injury.—Beverly Beach Club v. Marron, 192 A. 278, 172 Md. 471.

61. Mo.—Tinsley v. Washington Nat. Ins. Co., App., 97 S.W.2d 874—White v. American Life & Accident Ins. Co. of St. Louis, App., 90 S.W.2d 118—Smiley v. Bergmore Realty Co., 73 S.W.2d 836 229 Mo.App. 141—Smith v. Missouri Ins. Co., App., 60 S.W.2d 730—Mack v. Western & Southern Life Ins. Co., App., 53 S.W.2d 1108.
Pa.—Osche v. New York Life Ins. Co., 187 A. 396, 324 Pa. 1.

Evidence held insufficient to impeach records

Mo.—Smith v. Missouri Ins. Co., App., 60 S.W.2d 730.

62. Mass.—Kelley v. Jordan Marsh Co., 179 N.E. 299, 278 Mass. 101.
Admissibility of hospital records see supra § 728.

63. Cal.—City of Los Angeles v. Duncan, 19 P.2d 289, 130 Cal.App. 11—MacGregor v. Knowlden, 282 P. 438, 102 Cal.App. 42.
N.Y.—Leary v. City of New York, 7 N.E.2d 256, 273 N.Y. 342, affirming 290 N.Y.S. 144, 248 App.Div. 741.
Tex.—Stevenson v. Mills, Civ.App., 14 S.W.2d 94—Yturria Town & Improvement Co. v. Schunior, Civ. App., 289 S.W. 188.
Wis.—Dickinson v. Smith, 114 N.W. 133, 134 Wis. 6.
22 C.J. p 970 note 15.

The mine map of a coal mining company which was required to be recorded is not controlling in a suit for the removal of coal from under adjoining land, since parties knowingly mining under another's land would not be astute to uncover it by detailed map.—Fuher v. Westmoreland Coal Co., 116 A. 61, 272 Pa. 14.

School superintendent's plat showing land omitted from consolidated school district did not control on whether land was in district.—State ex rel. and to Use of Parman v Manring, 58 S.W.2d 269, 332 Mo. 235.

Map prepared for convenience of city in assessing lands for taxes was not binding on railroad on question whether lane was public highway.—Michael A. Scatuorchio, Inc., v. New York, S. & W. R. Co., 159 A. 704, 10 N.J.Misc. 528.

64. Wis.—Dickinson v. Smith, 114 N.W. 133, 134 Wis. 6.

65. Iowa.—Bean v. Bickley, 174 N. W. 675, 187 Iowa 689.
N.C.—Eason v. Buffaloe, 152 S.E. 496, 198 N.C. 520.

Generally ex parte maps, surveys, and reports have no probative value, independent of the testimony of the witnesses, and when used to illustrate and explain their testimony.—Wilson v. McCoy, 117 S.E. 473, 93 W.Va. 667.

66. Ind.—Pittsburgh, C., C. & St. L. R. Co. v. Philpott, 128 N.E. 662, 75 Ind.App. 59, denying rehearing 127 N.E. 827, 75 Ind.App. 59.
N.Y.—Hartnet v. New York, 127 N. Y.S. 295.
22 C.J. p 970 note 15 [d].

67. La.—Burgin v. Simon, 65 So. 128, 135 La. 213.

68. Pa.—Smucker v. Pennsylvania R. Co., 41 A. 457, 188 Pa. 40—Holmes & Holmes v. Public Service Commission, 79 Pa.Super. 374.

69. Ky.—New Era Land Co. v. Childs, 171 S.W. 417, 161 Ky. 588—Mercer v. Bate, 4 J.J.Marsh. 334.

70. Cal.—Cohn v. Leffingwell, 256 P. 1114, 83 Cal.App. 555.

71. Cal.—Moss v. Stubbs, 296 P. 86, 111 Cal.App. 359, denying rehearing 295 P. 572, 111 Cal.App. 359.

Recitals in a deed have been held to be evidence generally without being conclusive of the facts recited or shown thereby;[72] but, ordinarily, such recitals, particularly in an ancient deed,[73] are considered prima facie evidence of the facts stated, as against the parties thereto and their privies,[74] or as raising a presumption of the truth of such facts,[75] and, under some statutes, as prima facie evidence of title.[76] Such recitals may prevail over extrinsic evidence,[77] and if the recitals are not contradicted or impeached, they may constitute conclusive evidence of the truth of such facts,[78] although particular recitals have been held not sufficient evidence of the facts stated.[79] Such recitals, however, are not sufficient as evidence against persons who are not parties to the deed or their privies,[80] except in case of ancient deeds.[81]

It has been held that particular recitals are conclusive evidence of the facts recited, in an action in which the purpose of the deed is directly involved,[82] but that if the deed is merely collateral to the purposes of the action, recitals in the deed are only prima facie evidence of the facts recited.[83] A recital in a deed against the interest of the grantor may be taken as true as against him in behalf of a party who does not claim under the deed,[84] but recitals in favor of such grantor do not have the same force.[85] A recital as to the date of the conveyance may, in the absence of better evidence, be accorded probative force with respect to the fact recited,[86] but it cannot acquire force to vary or

72. U.S.—Northern Pac. Ry. Co. v. Adams County, D.C.Wash., 1 F. Supp. 163, appeal dismissed, C.C. A., 63 F.2d 1012 and Adams County v. Spokane, P. & S. Ry. Co., 66 F.2d 1008, reversed on other grounds Chicago, M. St. P. & P. R. Co. v. Adams County, 72 F.2d 816.
18 C.J. p 265 note 91.

73. Ala.—Lyons v. Taylor, 166 So. 15, 231 Ala. 600.
Pa.—Brock v. Atlantic Refining Co., 116 A. 552, 273 Pa. 76.

Identity of names is prima facie evidence of persons named in an ancient deed.—Lyons v. Taylor, 166 So. 15, 231 Ala. 600.

74. Ala.—Fowler v. Fowler, 88 So. 648, 205 Ala. 514.
Cal.—James v. James, 251 P. 666, 80 Cal.App. 185.
Pa.—James v. Letzler, 8 Watts & S. 192.
Tex.—Gramm v. Coffield, Civ.App., 116 S.W.2d 1089, error dismissed—Jackson v. Langford, Civ.App., 60 S.W.2d 265—Havard v. Smith, Civ. App., 13 S.W.2d 743.
22 C.J. p 970 note 14—18 C.J. p 265 note 92.

75. Ala.—Heflin v. Heflin, 113 So. 535, 216 Ala. 519.
18 C.J. p 265 note 94.

76. U.S.—Baxter v. McGee, C.C.A. Ark., 82 F.2d 695, certiorari denied McGee v. Baxter, 56 S.Ct. 948, 298 U.S. 680, 80 L.Ed. 1401.

77. Iowa.—Bennett Sav. Bank v. Smith, 152 N.W. 717, 171 Iowa 405.
22 C.J. p 970 note 14 [h].

78. Ala.—Wildman v. Means, 94 So. 823, 208 Ala. 487—Fowler v. Fowler, 88 So. 648, 205 Ala. 514—Moore v. McAllister, 88 So. 643, 205 Ala. 512.
Cal.—Cohn v. Leffingwell, 256 P. 1114, 83 Cal.App. 555.
Mo.—Travelers' Ins. Co. v. Beagles, 62 S.W.2d 800, 333 Mo. 568.
N.J.—Depew v. Smith, 184 A. 823, 120 N.J.Eq. 285.
Okl.—Payne v. Allen, 62 P.2d 1227, 178 Okl. 328.
Pa.—Brock v. Atlantic Refining Co., 116 A. 552, 273 Pa. 76.
Tex.—Dittman v. Cornelius, Com. App., 234 S.W. 880, reversing, Civ. App., 218 S.W. 109—Bond v. Middleton, Civ.App., 131 S.W.2d 294.
Vt.—Smith v. Vermont Marble Co., 133 A. 355, 99 Vt. 384.
18 C.J. p 265 note 90.
Estoppel to deny truth of recitals in deeds see Estoppel §§ 37, 38.

79. W.Va.—Rowland Land Co. v. Barrett, 75 S.E. 57, 70 W.Va. 703.
18 C.J. p 265 note 95—22 C.J. p 970 note 11 [c].

Descriptive calls to a certain line, without additional evidence, are at most nothing more than circumstances which neither the court nor the jury are compelled to accept.—Marshburn v. Stewart, Tex.Civ.App., 295 S.W. 679.

Recitals relating to past events, such as the source of the grantor's title, are insufficient to establish the truth of the facts recited.—Crews v. Lombard, Mo., 216 S.W. 512.

80. U.S.—Northern Pac. Ry. Co. v. Adams County, D.C.Wash. 1 F. Supp. 163, appeal dismissed, C.C.A., 63 F.2d 1012, and Adams County v. Spokane, P. & S. Ry. Co., 66 F.2d 1008, reversed on other grounds Chicago, M. St. P. & P. R. Co. v. Adams County, 72 F.2d 816.
Ala.—Moore v. McAllister, 88 So. 643, 205 Ala. 512.
Iowa.—Ross v. Loomis, 20 N.W. 749, 64 Iowa 432—Costello v. Burke, 19 N.W. 247, 63 Iowa 361.
Mo.—Stewart v. Omaha Loan & Trust Co., 222 S.W. 808, 283 Mo. 364.
N.Y.—In re Marsh, 272 N.Y.S. 807, 152 Misc. 454.
Tenn.—Swainson v. Scott, 76 S.W. 909, 111 Tenn. 140.
Tex.—Brown v. Connor, Civ.App., 140 S.W.2d 495.
22 C.J. p 970 note 14 [e].

Recitals in deed from husband to his wife are not evidence against husband's creditors, and it is incumbent on wife's purchaser who interposes a claim on the creditors' levy to show that such recitals are true.—Wells v. Blitch, 187 S.E. 86, 182 Ga. 826.

81. U.S.—Northern Pac. Ry. Co. v. Adams County, D.C.Wash., 1 F. Supp. 163, appeal dismissed, C.C.A., 63 F.2d 1012 and Adams County v. Spokane, P. & S. Ry. Co., 66 F. 2d 1008, reversed on other grounds Chicago, M. St. P. & P. R. Co. v. Adams County, 72 F.2d 816.
Pa.—Brock v. Atlantic Refining Co, 116 A. 552, 273 Pa. 76.
18 C.J. p 265 note 92 [a].

Weight of evidence

Evidence afforded by recitals or declarations of ancient deed, over thirty years old, is not entitled to much weight, and may be repudiated by slight evidence of more definite character.—Keppler v. City of Richmond, 98 S.E. 747, 124 Va. 592.

82. Tenn.—Ferguson v. Booth, 160 S.W. 67, 128 Tenn. 259, Ann.Cas. 1915C 1079—McQuiddy Printing Co. v. Hirsig, 134 S.W.2d 197, 23 Tenn. App. 434.

83. Tenn.—Ferguson v. Booth, 160 S.W. 67, 128 Tenn. 259, Ann.Cas. 1915C 1079.

84. Pa.—Stoever v. Whitman, 6 Binn. 416.
18 C.J. p 265 note 96.

85. Pa.—Stoever v. Whitman, 6 Binn. 416.

86. Tex.—Humble Oil & Refining Co. v. Clark, 87 S.W.2d 471, 126 Tex. 262, reversing Clark v. Humble Oil & Refining Co., Civ.App., 57 S.W.2d 597.

destroy the conveyance effected by the instrument.[87] A recital in the record of an ancient or destroyed deed, that in testimony whereof the grantor has hereunto set his hand and seal, is presumptive evidence that a seal was affixed to the original deed, notwithstanding the absence of a scroll or seal after the grantor's name on the record.[88] A deed or assignment by one party to another followed by an assignment of the same property by a third party to a fourth party, is not legal proof of title in the latter, although the conveyance to him recited that the grantor owns or previously acquired title to the property, in the absence of proof of how he acquired title.[89]

(2) Recital of Consideration

The recital of a consideration in a deed, including acknowledgment of payment, is prima facie evidence of the consideration paid or agreed to be paid; but the recital is subject to contradiction, and in the absence of evidence to the contrary it may be held conclusive. Such recitals are not evidence against strangers to the deed.

The recital of a consideration in a deed is prima facie evidence of the amount paid or agreed to be paid,[90] and of the fact that the consideration was a valuable one.[91] Except so far as the consideration expressed is necessary to support the conveyance,[92] the recital of the consideration is not conclusive, but is only prima facie evidence thereof,[93] and is subject to contradiction or explanation,[94] and in the absence of evidence to the contrary, the expressed consideration will generally be held to be the true and only one,[95] and, if expressed in dollars, that amount will be presumed to be the agreed value of the property and the actual consideration.[96] The ownership of the money paid may also be evidenced by the recital.[97]

Recital of a nominal consideration has little relevance in determining the intention of the parties.[98] A deed expressing only a nominal consideration does not import a valuable consideration,[99] and, in the absence of evidence to the contrary, shows that the conveyance was voluntary,[1] and is insufficient to show a purchase in good faith for value or to

87. Tex.—Humble Oil & Refining Co. v. Clark, supra.

88. N.C.—Jones v. Coleman, 125 S.E. 406, 188 N.C. 631—Hopkins v. Empire Lumber Co., 78 S.E. 286, 162 N.C. 533.

89. U.S.—Chisholm-Ryder Co. v. Buck, D.C.Md., 1 F.Supp. 268, affirmed, C.C.A., 65 F.2d 735.

90. Ala.—Boyd v. Dent, 113 So. 11, 216 Ala. 171.
Fla.—Florida Moss Products Co. v. City of Leesburg, 112 So. 572.
Ill.—Palliser v. Mills, 171 N.E. 618, 339 Ill. 568—Howell v. Moores, 19 N.E. 863, 127 Ill. 67.
Iowa.—Kroll v. Kirchner, 293 N.W. 433—Gilbert v. Plowman, 256 N.W. 746, 218 Iowa 1345.
Kan.—Toner v. Conqueror Trust Co., 293 P. 745, 131 Kan. 651, 72 A.L.R. 1018.
Ky.—Reiss v. Wintersmith, 44 S.W.2d 609, 241 Ky. 470—Cheney's Adm'r v. Houston, 38 S.W.2d 198, 238 Ky. 410—O'Neal v. Turney's Ex'x, 300 S.W. 913, 222 Ky. 361—Vernon v. Vernon, 277 S.W. 248, 211 Ky. 196.
Miss.—Burks v. Moody, 106 So. 528, 141 Miss. 370, suggestion of error overruled 107 So. 279, 141 Miss. 370.
Mo.—Stump v. Marshall, 266 S.W. 476.
Mont.—Leggat v. Leggat, 33 P. 5, 13 Mont. 190.
N.C.—Ex parte Barefoot, 160 S.E. 365, 201 N.C. 393.
Or.—North American Securities Co. v. Cole, 118 P. 1032, 62 Or. 1.
Tex.—Willson v. Kuhn, Civ.App., 96 S.W.2d 236, denying rehearing 96 S.W.2d 128—Jackson v. Langford, Civ.App., 60 S.W.2d 265—Chaison v. Stark, Civ.App., 29 S.W.2d 500, reversed on other grounds Stark v. Chaison, Com.App., 50 S.W.2d 776—Berryman v. Flake, Civ.App., 20 S.W.2d 803—Orbeck v. Alfei, Civ.App., 276 S.W. 947.
18 C.J. p 266 note 11.

91. Fla.—Wise v. Wise, 184 So. 91, 134 Fla. 553.
Md.—Boyle v. Maryland State Fair, 134 A. 124, 150 Md. 333.
18 C.J. p 265 note 6.

Recital of less than appraised value
Where Indian's conveyance of allotted lands, made when Act Congr. July 1, 1902 § 16 was in effect, requiring that land should not be sold for less than appraised value, recites consideration of less, such recital prima facie establishes invalidity of conveyance, but may be rebutted by parol evidence as to actual consideration, which if proved, establishes validity of the instrument, regardless of consideration in recital. —Jefferson v. Gallagher, 231 P. 227, 104 Okl. 263.

92. N.Y.—McCrea v. Purmort, 16 Wend. 460, 30 Am.D. 103.

93. Ala.—Boyd v. Dent, 113 So. 11, 216 Ala. 171.
Ark.—Brewer v. Yancey, 277 S.W. 11, 169 Ark. 816.
Ky.—Combs v. Combs, 114 S.W. 334, 130 Ky. 827.
Mass.—City of Marlborough v. Snow, 17 N.E.2d 322, 301 Mass. 429.
Okl.—First Nat. Bank v. Raymer, 71 P.2d 485, 180 Okl. 529—Jefferson v. Gallagher, 231 P. 227, 104 Okl. 263.
Puerto Rico.—Olivieri v. Tornabells, 7 Puerto Rico 92.
Tex.—Berryman v. Flake, Civ.App., 20 S.W.2d 803—Whitehead v. Weldon, Civ.App., 264 S.W. 958—Ralls v. Parish, Civ.App., 151 S.W. 1089.
18 C.J. p 266 note 12.

Not sufficient, of itself, to show "purchaser for value"
Tex.—Towns v. Muhler, Civ.App., 152 S.W.2d 866, error refused.

94. Ga.—Shackelford v. Orris, 68 S.E. 838, 135 Ga. 29.
Iowa.—Kroll v. Kirchner, 293 N.W. 433.
Ky.—Combs v. Combs, 114 S.W. 334, 130 Ky. 827.
Mass.—City of Marlborough v. Snow, 17 N.E.2d 322, 301 Mass. 429.
Okl.—First Nat. Bank v. Raymer, 71 P.2d 485, 180 Okl. 529.
Parol evidence to show true consideration see infra § 950.

95. Ind.—Fitch v. Gundrum, 122 N.E. 428, 69 Ind.App. 572.
Ky.—Combs v. Combs, 114 S.W. 334, 130 Ky. 827.
N.D.—Walker v. O'Connell, 249 N.W. 726, 728, 63 N.D. 622, citing **Corpus Juris**.
18 C.J. p 266 note 9.

96. Ga.—Clements v. Landrum, 26 Ga. 401.

97. N.J.—Stall v. Fulton, 30 N.J. Law 430.

98. Utah.—Ruthrauff v. Silver King Western Min. & Mill. Co., 80 P.2d 338, 95 Utah 279.

99. N.Y.—Ochenkowski v. Dunaj, 251 N.Y.S. 589, 232 App.Div. 441, affirming Ochenkowsky v. Dunaj, 244 N.Y.S. 267, 137 Misc. 674.

1. Mo.—Sanford v. Van Pelt, 282 S.W. 1022, 314 Mo. 175—Edmonds v. Scharff, 213 S.W. 823, 279 Mo. 78.

raise a presumption thereof.[2] A recital of the consideration as one dollar is prima facie evidence that it was nominal.[3]

Payment. The recital of a consideration has been held to be prima facie evidence that the consideration has in fact been paid,[4] but is not evidence that the payment was of money.[5] The recital of amounts as bearing interest from anterior dates imports payment of such amounts with interest at the date of the deed.[6] If the consideration recital acknowledges payment or the receipt of the consideration or purchase money, it is prima facie proof of such fact,[7] except where the expressed consideration is the maintenance of the grantor for a given time,[8] although the deed also recites that a lien is retained until payment is made.[9] Such a recital or acknowledgment, however, is not conclusive, but is only prima facie evidence,[10] and is open to explanation and may be disproved;[11] but in the absence of contradictory evidence it generally will be held to be conclusive.[12] The recital of a valuable consideration is prima facie evidence that the grantee is a purchaser in good faith, and no proof of actual payment is required.[13] Recitals of amounts paid for lands pursuant to an exchange contract are prima facie evidence of a mutual agreement as to the values of the respective properties,[14] and, in the absence of evidence to the contrary, are sufficient to authorize a judgment against one party for the amount paid by the other for a shortage on which total consideration was based.[15]

Effect as to third persons. The recital of a consideration is insufficient to establish the consideration, or the fact of its payment, against a third person, not a party to the deed or a privy,[16] as one who claims in opposition to the deed;[17] nor, it is decided, is the acknowledgment of a receipt in a deed of payment any evidence thereof as against strangers to the instrument,[18] unless it is made so by statute.[19] Recitals of value in deeds in exchange of property are not evidence binding on the principal, in an action by a broker for compensation based on the actual value.[20]

2. N.Y.—Ochenkowsky v. Dunaj, 244 N.Y.S. 267, 137 Misc. 674, affirmed Ochenkowski v. Dunaj, 251 N.Y.S. 589, 232 App.Div. 441.

3. Iowa.—Ransom v. Lochmiller, 224 N.W. 469, 207 Iowa 1315.

4. Fla.—Florida Moss Products Co. v. City of Leesburg, 112 So. 572, 93 Fla. 656.
Ga.—Brenner v. Wright, 194 S.E. 553, 185 Ga. 280.
Iowa.—Gilbert v. Plowman, 256 N.W. 746, 218 Iowa 1345.
Okl.—First Nat. Bank v. Raymer, 71 P.2d 485, 180 Okl. 529.
Or.—Toney v. Toney, 165 P. 221, 84 Or. 310.
Tex.—Jackson v. Langford, Civ.App., 60 S.W.2d 265—Chaison v. Stark, Civ.App., 29 S.W.2d 500, reversed on other grounds Stark v. Chaison, Com.App., 50 S.W.2d 776—Berryman v. Flake, Civ.App., 20 S.W.2d 803, error dismissed.
Recital of conveyance of other land as the consideration, creates no presumption that the land was conveyed, but is merely evidence of that fact.—Smith v. Dunman, 29 S.W. 432, 9 Tex.Civ.App. 319.

5. Minn.—Enkema v. McIntyre, 161 N.W. 587, 136 Minn. 293, 2 A.L.R. 411.

6. Ky.—Ricketts v. Lambert, 3 Bush. 670.

7. Ark.—Jones v. Ainell, 186 S.W. 65, 123 Ark. 532—Morton v. Morton, 102 S.W. 213, 82 Ark. 492.
Cal.—Pomper v. Behnke, 276 P. 122, 97 Cal.App. 628.
Ga.—Brenner v. Wright, 194 S.E. 553, 185 Ga. 280.
Kan.—Toner v. Conqueror Trust Co., 293 P. 745, 131 Kan. 651, 72 A.L.R. 1018.
Mo.—Silber v. Silber, 249 S.W. 390.
N.Y.—Voorhies v. Voorhies, 120 N.Y.S. 677, 66 Misc. 78.
Tex.—Orbeck v. Alfei, Civ.App., 276 S.W. 947—Shaw v. Gillespie, Civ.App., 270 S.W. 1043.
W.Va.—Bulick v. Milkint, 111 S.E. 310, 90 W.Va. 509.
18 C.J. p 266 note 13.

8. Me.—Maker v. Maker, 74 Me. 104.

9. Tenn.—Arnold v. Harris, Ch.App., 52 S.W. 715.

10. Cal.—In re Lissner's Estate, 81 P.2d 448, 27 Cal.App.2d 570.
Ill.—Forest Preserve Dist. of Cook County v. Hahn, 173 N.E. 763, 341 Ill. 599.
Md.—Wolfe v. Hauver, 1 Gill 84.
Vt.—Lazell v. Lazell, 12 Vt. 443, 36 Am.D. 352.
W.Va.—Bulick v. Milkint, 111 S.E. 310, 90 W.Va. 509.
18 C.J. p 266 note 14—22 C.J. p 970 note 14 [f].

11. Ill.—Kimball v. Walker, 30 Ill. 482.
Iowa.—Gilbert v. Plowman, 256 N.W. 746, 218 Iowa 1345.
Ky.—Bradford v. Kirby, 2 Ky.Op. 587.
Md.—Wolfe v. Hauver, 1 Gill 84.
Okl.—First Nat. Bank v. Raymer, 71 P.2d 485, 180 Okl. 529.
Tex.—Orbeck v. Alfei, Civ.App., 276 S.W. 947.
W.Va.—Bulick v. Milkint, 111 S.E. 310, 90 W.Va. 509.
18 C.J. p 266 note 15.
Parol or extrinsic evidence to explain or contradict payment see infra § 953.

12. La.—Beard v. Nunn, 133 So. 429, 172 La. 155.
Mo.—Travelers' Ins. Co. v. Beagles, 62 S.W.2d 800, 333 Mo. 568.

13. N.Y.—Ochenkowsky v. Dunaj, 244 N.Y.S. 267, 137 Misc. 674, affirmed Ochenkowski v. Dunaj, 251 N.Y.S. 589, 232 App.Div. 441.
S.C.—Deloach v. Turner, 41 S.C.L. 143.

14. Tex.—Moss-Tate Inv. Co. v. Owens, Civ.App., 22 S.W.2d 1096, error refused.

15. Tex.—Moss-Tate Inv. Co. v. Owens, supra.

16. Cal.—James v. James, 251 P. 666, 80 Cal.App. 185—Black Eagle Oil Co. v. Belcher, 133 P. 1153, 22 Cal.App. 258.
As against attacking creditor see the C.J.S. title Fraudulent Conveyances § 410, also 27 C.J. p 815 notes 46–48.

17. Kan.—King v. Mead, 57 P. 113, 60 Kan. 539.

18. Ark.—Star Lime & Zinc Mining Co. v. Arkansas Nat. Bank, 225 S.W. 322, 146 Ark. 246.
Minn.—Rux v. Adam, 172 N.W. 912, 143 Minn. 35.
Tex.—Johns v. Wear, Civ.App., 230 S.W. 1008.
18 C.J. p 267 note 20.

19. La.—Beard v. Nunn, 133 So. 429, 172 La. 155.

20. Tex.—Howell v. Bartlett, Civ.App., 19 S.W.2d 104.

(3) Mortgage or Trust Deeds

Recitals in a deed to a purchaser on a sale under a mortgage or deed of trust are generally taken as prima facie evidence of the regularity of the sale and of the facts recited. Some trust deeds contain a clause to this effect.

The recitals in the deed executed to the purchaser, in pursuance of a sale under a mortgage or trust deed, are generally taken as prima facie, but not conclusive, evidence of the regularity of the sale and of the facts recited;[21] the burden of proving otherwise being on the person attacking the sale or deed,[22] and in the absence of evidence to the contrary the recitals being controlling.[23] In some states this rule applies by statute,[24] and, as noted hereafter a clause to this effect is frequently inserted in deeds of trust. This rule, of prima facie evidence, applies to recitals made by the mortgagee or trustee, or by his attorney in fact, or by an auctioneer assuming to execute the power of sale;[25] but it applies only to facts recited which are material to the execution of the trust,[26] and to acts done in the exercise of the power of sale,[27] such as notice of sale,[28] or the receipt of a stated consideration,[29] or payment of the bid;[30] and it does not apply as against a third person, such as a purchaser under a subsequent deed of trust.[31] Where, however, the purchaser does not rely on the legal presumption arising from the execution of a trustee's deed, as to the proper posting of notices of sale, but introduces evidence which proves that they had not been posted, the presumption is eliminated, and the decision must turn on the evidence.[32] A sheriff's deed on a statutory foreclosure of a mortgage is no evidence that the foreclosure was legal, and a recital therein that the mortgage contains a power of sale is no evidence of that fact.[33] A failure to recite in detail performance of one essential particular has been held to raise no presumption against the performance of such duty, al-

21. Ala.—Wilson v. Federal Land Bank of New Orleans, 159 So. 493, 230 Ala. 75—Union Bank & Trust Co. v. Royall, 148 So. 399, 226 Ala. 670—Davis v. Ashburn, 141 So. 226, 224 Ala. 572—Crabtree v. Price, 102 So. 605, 212 Ala. 387—Dinkins v. Latham, 79 So. 493, 202 Ala. 101.
Cal.—Security-First Nat. Bank of Los Angeles v. Cryer, 104 P.2d 66, 39 Cal.App.2d 757—Ley v. Babcock, 5 P.2d 620, 118 Cal.App. 525.
Ga.—Pennington v. Palmer, 176 S.E. 697, 49 Ga.App. 540, conforming to Palmer v. Pennington, 175 S.E. 380, 179 Ga. 76.
Mo.—General American Life Ins. Co. v. Barton, 125 S.W.2d 886, 233 Mo. App. 543.
N.J.—Ackermann v. Loadsman, 18 A. 2d 572, 129 N.J.Eq. 120—Ocean County Nat. Bank v. Stillwell, 197 A. 286, 123 N.J.Eq. 337.
N.C.—Pearce v. Watkins, 14 S.E.2d 653, 219 N.C. 636—Dillingham v. Gardner, 13 S.E.2d 478, 219 N.C. 227—Hayes v. Ferguson, 174 S.E. 121, 206 N.C. 414.
Tenn.—Mitchell v. Sherrell, 11 Tenn. App. 210.
Wyo.—Delfelder v. Teton Land & Investment Co., 24 P.2d 702, 46 Wyo. 142, rehearing denied 26 P. 2d 153, 46 Wyo. 142.
41 C.J. p 994 note 88.

22. Ark.—Clark v. Wommack, 95 S. W.2d 891, 192 Ark. 895—McConnell v. Day, 33 S.W. 731, 61 Ark. 464.
N.C.—Dillingham v. Gardner, 13 S. E.2d 478, 219 N.C. 227.

In Texas, in the absence of provision in trust deed that recitals in trustee's deed as to full execution of trust shall be taken as evidence thereof, one asserting title under trustee's deed must show that notices of sale were published as required by trust deed.—Smith v. Allbright, Civ.App., 261 S.W. 461—Meisner v. Taylor, 120 S.W. 1014, 56 Tex.Civ.App. 187.
Burden of evidence generally see supra §§ 110, 111.

23. Nev.—McLaughlin v. Mutual Building & Loan Ass'n of Las Vegas, 60 P.2d 272, 57 Nev. 181.

Undenied recital that a note was given partly for a sum advanced for the payment of taxes, may be considered as evidence establishing that fact, so as to entitle an assignee of the note and trust deed to recover such sum and enforce a tax lien against the maker's homestead.—Davis v. National Bond & Mortgage Corporation, Tex.Civ.App., 45 S.W. 2d 272, reversed on other grounds National Bond & Mortgage Co. v. Davis, Com.App., 60 S.W.2d 429.

24. Va.—Preston v. Johnson, 53 S. E. 1, 105 Va. 238.
41 C.J. p 995 note 90.

In Missouri

(1) Under St.Annot. § 3094, and prior similar statutes, recitals in a trustee's deed are prima facie evidence of the facts recited.—Cockrell v. Taylor, 145 S.W.2d 416—Lustenberger v. Hutchinson, 119 S.W.2d 921, 343 Mo. 51—Title Guaranty Trust Co. v. Sessinghaus, 28 S.W.2d 1001, 325 Mo. 420—41 C.J. p 995 note 90, Missouri cases.

(2) In the absence of statute, an express stipulation was necessary in order to render a forelosure deed prima facie evidence.—Vail v. Jacobs, 62 Mo. 130.
41 C.J. p 994 note 88 [f].

25. Ala.—Davis v. Ashburn, 141 So. 226, 224 Ala. 572—Dinkins v. Latham, 79 So. 493, 202 Ala. 101.

26. Colo.—Page v. Gillett, 141 P. 866, 26 Colo.App. 204.

27. Cal.—Central Sav. Bank of Oakland v. Lake, 217 P. 563, 62 Cal. App. 588.
N.C.—Hayes v. Ferguson, 174 S.E. 121, 206 N.C. 414.

28. Cal.—Central Sav. Bank of Oakland v. Lake, 217 P. 563, 62 Cal. App. 588.
41 C.J. p 994 note 88 [c].

Recital of proper advertisement in deed made in exercise of power of sale under deed of trust is prima facie evidence of such fact.—Biggs v. Oxendine, 178 S.E. 216, 207 N.C. 601—Brewington v. Hargrove, 100 S. E. 308, 178 N.C. 143.

Recital that notice was published "for the length of time as required by law," is sufficient without reciting that notice was published weekly, in absence of evidence that publication was not made weekly.—Chandler v. Bank of Brooksville, 178 So. 797, 181 Miss. 529.

29. Minn.—Smith v. Tolversen, 252 N.W. 423, 190 Minn. 410.
R.I.—Fudim v. Kane, 136 A. 306, 48 R.I. 155.
Recitals as to consideration in deeds generally see supra § 767 b (2).

30. S.C.—Gowdy v. Gowdy, 65 S.E. 385, 83 S.C. 349.
41 C.J. p 994 note 88 [d].

31. Tenn.—Henderson v. Galloway, 8 Humphr. 692.

32. Miss.—Smith v. Kirkland, 42 So. 285, 89 Miss. 647.

33. Mich.—Bradway v. Miller, 167 N.W. 15, 200 Mich. 648.
41 C.J. p 994 note 88 [e].

though the performance of other essential acts is particularly recited;[34] but there is authority to the contrary.[35] The recitals of a deed by a substituted trustee are generally not prima facie evidence of the validity of his own appointment,[36] but where such validity has been established by evidence aliunde, the recitals of the deed showing substantial conformity to the requirements of the deed of trust are prima facie true,[37] and it has been held that a recital that the trustee named in the deed declined and refused to act, as a ground for the appointment of the substitute trustee, is prima facie evidence of that fact.[38] A recital in a deed made by a sheriff, as substitute trustee, that he acted at the request of the legal holder of the note, is prima facie, but not conclusive evidence of that fact.[39]

Sale by administrator. The recitals are not prima facie evidence where the sale is made and the deed executed by the administrator of the original trustee, although the trust deed itself authorizes the personal representative of the trustee to sell in case of the trustee's death;[40] but where the purchaser's title under the deed is coupled with possession, a presumption arises that the sale was regular.[41]

Under stipulation in trust deed. The effect of such recitals as evidence of the regularity of the sale and of the facts recited is frequently determined by a clause inserted in deeds of trust to the effect that the recitals in the trustee's deed to the foreclosure purchaser shall be prima facie,[42] full,[43] or conclusive[44] evidence of the truth of the state-

34. Ill.—Tartt v. Clayton, 109 Ill. 579.

35. Miss.—Jones v. Frank, 85 So. 310, 123 Miss. 280.

Failure to recite posting of notice

Where the trustee's deed particularly recites his authority, the default in payment, an instruction to sell, and a sale made after a newspaper advertisement for required time, but does not recite posting of notice at court house door, as required by statute, the presumption of compliance with all requirements, especially as to advertisement, is rebutted.—Jones v. Frank, supra.

36. Ark.—Arnold v. Watson, 121 S. W. 354, 91 Ark. 328.

Cal.—Central Sav. Bank of Oakland v. Lake, 217 P. 563, 62 Cal.App. 588.

Tex.—Crow v. Thompson, Civ.App., 131 S.W.2d 1064, error dismissed judgment correct.

Reason for rule

"One does not prove agency by the statement of an agent as to his own power . . . nor can one establish legal title in his grantor by the statement of said grantor in the grant that he has such title."—Central Sav. Bank of Oakland v. Lake, 217 P. 563, 564, 62 Cal.App. 588.

37. Ark.—Arnold v. Watson, 121 S. W. 354, 91 Ark. 328.

38. Mo.—Peters v. Kirkwood Federal Savings & Loan Ass'n, App., 136 S.W.2d 369, transferred, see 130 S.W.2d 507, 344 Mo. 1067.

Tex.—Hart v. Estelle, Civ.App., 34 S.W.2d 665, affirmed Estelle v. Hart, Com.App., 55 S.W.2d 510.

39. Mo.—Hurst Automatic Switch & Signal Co. v. Trust Co. of St. Louis, 216 S.W. 954.

40. Va.—Sulphur Mines Co. v. Thompson, 25 S.E. 232, 93 Va. 293.

41. Va.—Sulphur Mines Co. v. Thompson, supra.

42. Ark.—Clark v. Wommack, 95 S. W.2d 891, 192 Ark. 895.

Tex.—Smith v. Elliott, Civ.App., 149 S.W.2d 1067, error refused—Ellis v. Michigan Realty Co., Civ.App., 138 S.W.2d 880—Heiner v. Homeland Realty Co., Civ.App., 100 S.W. 2d 793—Hunt v. Isom, Civ.App., 77 S.W.2d 1095—Compton v. Republic Building & Loan Ass'n, Tex. Civ.App., 67 S.W.2d 1095—Allen v. Farm & Home Savings & Loan Ass'n of Missouri, Civ.App., 58 S. W.2d 866, error refused—McCurdy v. Gray, Civ.App., 239 S.W. 641, error granted—Smith v. Bittick, Civ.App., 237 S.W. 331, error refused.

41 C.J. p 995 note 97.

Recitals held to show prima facie

(1) That original trustee was requested to act and refused to do so.—Taylor v. San Antonio Joint Stock Land Bank, Civ.App., 101 S.W.2d 868, reversed on other grounds San Antonio Joint Stock Land Bank v. Taylor, 105 S.W.2d 650, 129 Tex. 335—41 C.J. p 995 note 97 [a].

(2) That substitute trustee was legally appointed.—Ellis v. Michigan Realty Co., Tex.Civ.App., 138 S.W.2d 880, error refused—Tom v. Kenedy Nat. Farm Loan Ass'n, Tex.Civ.App., 123 S.W.2d 416—Allen v. Farm & Home Savings & Loan Ass'n of Missouri, Tex.Civ.App., 58 S.W.2d 866, error refused.

Recitals in substitute trustee's deed

(1) Recitals in a substitute trustee's deed cannot be given the effect contemplated in such a clause unless the trustee's deed made out at least a prima facie valid appointment of the substitute trustee.—City Nat. Bank of Houston v. Moody, Tex. Civ.App., 115 S.W.2d 745.

(2) Where trust deed authorized an appointment of a substitute trustee, recitations in a substitute trus tee's deed of the failure of the original trustee to act and of the proper request for him to sell, of proper advertisement, and other prerequisites to an exercise of his power, are prima facie proof of the regularity and validity of the sale.—Johnson v. Marti, Tex.Civ.App., 214 S.W. 726, error refused.

43. Tex.—Kaiser v. Hutcheson, Civ. App., 112 S.W.2d 1058, error dismissed—Mortimer v. Williams, Civ.App., 262 S.W. 123—McCreary v. Reliance Lumber Co., 41 S.W. 485, 16 Tex.Civ.App. 45—Jesson v. Texas Land & Loan Co., 21 S.W. 624, 3 Tex.Civ.App. 25.

As prima facie

Although trust deed provides that recitals in trustee's deed shall be full evidence of matters therein stated, and that performance of prerequisites to sale shall be presumed, recitals in trustee's deed constitute at most only prima facie evidence of truth thereof.—Collier v. Ford, Tex. Civ.App., 81 S.W.2d 821, error dismissed.

44. Cal.—Zedar v. Duke, 299 P. 524, 212 Cal. 621—Roberts v. Colyear, 180 P. 937, 179 Cal. 669—Southern Title & Trust Co. v. Freer, 7 P.2d 1113, 120 Cal.App. 423—Turner v. Marshall, 265 P. 860, 90 Cal.App. 345—Atkinson v. Foote, 186 P. 831, 44 Cal.App. 149.

41 C.J. p 995 note 99.

As prima facie case for purchaser

Where trust deed provided that recitals in trustee's deed should be conclusive against trustor and his assigns, recitals in trustee's deed made a prima facie case for purchaser in action to quiet title against persons claiming under deed from defaulting owner.—Zedar v. Duke, 299 P. 524, 212 Cal. 621.

Stipulation held conclusive

Validity of sale under trust deed, which stipulated that sale should be bar against grantor, that recital in trustee's deed of proper sale should be conclusive thereof, and that all

ments made therein. A clause making the recitals prima facie evidence applies only to recitals authorized by the deed;[45] but under such clause the court may ascertain the real truth when necessary to the determination of the rights in litigation,[46] and, in the absence of evidence to the contrary, may accept the recitals as true and require no further proof thereon,[47] and it has been held that in such a case the recitals are required to be accepted as true,[48] and that the recitals are conclusive against a stranger to the deed who is only a trespasser on the land.[49] Under a further clause that all prerequisites to sale shall be presumed to have been performed, the deed to the purchaser constitutes prima facie proof that all prerequisites to the validity of the sale and deed have been observed,[50] and those executing the trust deed will be presumed to have waived their rights to require that all provisions showing a right of sale be further shown.[51] Such a provision, however, relates only to the acts of the trustee, and not to acts of a third person.[52]

Under a clause making the recitals conclusive proof of matters of procedure relating to the sale, plaintiff is not required to make further proof thereof,[53] and the party executing the trust deed cannot introduce evidence to refute the recitals.[54] Such a clause, however, is conclusive only as to recitals referred to therein,[55] such as notice of sale;[56] and even though a recital is not conclusive, it may be sufficient, in the absence of evidence to the contrary, to establish the fact recited.[57] However, a stipulation that the recitals shall be conclusive will protect only an innocent purchaser, and is not available to a beneficiary purchasing at a sale made in violation of the trust.[58] It has also been held that a stipulation that the recitals shall be full evidence of the truth of the matters therein stated, and all prerequisites to such sale shall be presumed to have been performed, does not apply where a direct attack on the trustee's deed is made by a suit to set it aside for fraud.[59]

§ 768. Books of Account

A book of accounts is generally prima facie, but not conclusive, evidence of transactions properly recorded therein.

A book of accounts, when admitted, is prima facie, but not conclusive, evidence of transactions properly recorded therein,[60] and is subject to ex-

presumptions in favor of regularity of judicial and official acts should lie in favor of trustee's acts, cannot be attacked by grantor under trust deed in trespass to try title by grantee under trustee's deed which recited valid sale, in absence of specific allegations as to invalidity.—Vaughan v. West, Tex.Civ.App., 100 S.W.2d 166, error dismissed.

45. Tex.—Bowman v. Oakley, Civ. App., 212 S.W. 549, error refused.

46. Tex.—Bowman v. Oakley, supra.

47. Tex.—Allen v. Farm & Home Savings & Loan Ass'n of Missouri, Civ.App., 58 S.W.2d 866, error refused.

48. Ark.—Clark v. Wommack, 95 S.W.2d 891, 192 Ark. 895.

49. Tex.—Lewis v. Dainwood, Civ. App., 130 S.W.2d 456, error refused.

50. Tex.—Adams v. Zellner, 183 S.W. 1143, 107 Tex. 653—Whittaker v. Schlanger, Civ.App., 139 S.W.2d 177, error dismissed, judgment correct—Goode v. Davis, Civ.App., 135 S.W.2d 285, error dismissed, judgment correct—Dabney v. Owen, Civ.App., 87 S.W.2d 285.

Notice of sale

A recital that the sale was advertised in the manner required is prima facie evidence that public notice of the sale was given as required by law and the terms of the trust deed. —Natali v. Witthaus, 135 S.W.2d 969, 134 Tex. 513, reversing Witthaus v. Natali, Civ.App., 107 S.W.2d 998—McFarlane v. Whitney, 134 S.W.2d 1047, 134 Tex. 394, reversing, Civ. App., 106 S.W.2d 406—Adams v. Zellner, 183 S.W. 1143, 107 Tex. 653—Southland Lumber Co. v. Boyd, Com. App., 244 S.W. 119, reversing Boyd v. Johnson, Civ.App., 234 S.W. 235—Hunt v. Isom, Civ.App., 77 S.W.2d 1095—Compton v. Republic Building & Loan Ass'n, Civ.App., 67 S.W.2d 1095, error dismissed.

51. Tex.—Goode v. Davis, Civ.App., 135 S.W.2d 285.

52. Tex.—Meisner v. Taylor, 120 S. W. 1014, 56 Tex.Civ.App. 187.
41 C.J. p 995 note 3.

53. Cal.—Pacific States Savings & Loan Co. v. Painter, 99 P.2d 1103, 37 Cal.App.2d 645.

54. Cal.—Bank of America Nat. Trust & Savings Ass'n v. McLaughlin Land & Livestock Co., 105 P.2d 607, 40 Cal.App.2d 620.

55. Cal.—Harker v. Rickershauser, 271 P. 912, 94 Cal.App. 755.

56. Cal.—Pacific States Savings & Loan Co. v. O'Neill, 61 P.2d 1160, 7 Cal.2d 596—Cobb v. California Bank, 57 P.2d 924, 6 Cal.2d 389—Birkhofer v. Krumm, 81 P.2d 609, 27 Cal.App.2d 513, certiorari denied Krumm v. Birkhofer, 59 S. Ct. 249, 305 U.S. 653, 83 L.Ed. 423—Bechtel v. Wilson, 63 P.2d 1170, 18 Cal.App.2d 331, rehearing denied 64 P.2d 785, 18 Cal.App.2d 331—Leonard v. Bank of America Nat. Trust & Savings Ass'n, 60 P.2d 325, 16 Cal.App.2d 341.

Right to inquire into notice

In an action for deficiency judgment after foreclosure of trust deed providing that recitals of trustees' deed of due and proper notice should be conclusive evidence thereof, defendants are not entitled to inquire into sufficiency of notice under rule applicable to equitable proceedings, since action was not equitable proceeding, and defendant failed to offer to do equity as would be required if defendants were seeking equitable relief.—Bechtel v. Wilson, 63 P.2d 1170, 18 Cal.App.2d 331, rehearing denied 64 P.2d 785, 18 Cal.App.2d 331.

57. Cal.—Hopkins v. J. D. Millar Realty Co., 289 P. 221, 106 Cal.App. 409.

58. Cal.—Seccombe v. Roe, 133 P. 507, 22 Cal.App. 139.

59. Tex.—Hill v. Gomez, Civ.App., 260 S.W. 618.

60. U.S.—Newton v. Consolidated Gas Co. of New York, N.Y., 42 S. Ct. 264, 258 U.S. 165, 66 L.Ed. 538, modifying, D.C., Consolidated Gas Co. of New York v. Newton, 267 F. 231, and affirming 274 F. 986—New England Trust Co. v. Farr, C.C.A. Mass., 57 F.2d 103, certiorari denied 53 S.Ct. 14, 287 U.S. 612, 77 L.Ed. 532—Wasmann v. City Nat. Bank of Knoxville, Tenn., C.C.A. Tenn., 52 F.2d 705—In re Gubelman, C.C.A.N.Y., 13 F.2d 732, reversed on other grounds Equitable Trust Co. v. First Nat. Bank of Trinidad, Colo., 48 S.Ct. 167, 275

planation or contradiction,[61] and if it is not contradicted or explained it may become conclusive;[62] these rules apply to partnership books.[63] The fact that goods sold or services rendered are charged on a party's books to a particular person is not conclusive evidence that the credit was given to such person.[64]

The degree of credit to be given to a book of accounts as evidence is ordinarily a question for the jury[65] or other trier of the facts,[66] and is to be determined by the general appearance and condition of the books, the manner in which they were kept, the circumstances under which the entries were made, and the other facts in the case;[67] and

U.S. 359, 72 L.Ed. 313—Mollohon Mfg. Co. v. U. S., Ct.Cl., 8 F.Supp. 725—In re Phoenix Bond & Mortgage Co., D.C.Mass., 6 F.Supp. 110.

Ala.—Fidelity & Deposit Co. of Maryland v. Hutchens Co., 118 So. 328, 218 Ala. 171—American Trust & Savings Bank v. Montano, 89 So. 899, 18 Ala.App. 136, certiorari denied Montano v. American Trust & Savings Bank, 89 So. 923, 206 Ala. 700.

Cal.—MacDiarmid v. McDevitt, 275 P. 500, 502, 97 Cal.App. 414, citing **Corpus Juris.**

Ga.—Herrington v. Sears, Roebuck & Co., 142 S.E. 181, 37 Ga.App. 795.

Iowa.—Shea v. Biddle Improvement Co., 176 N.W. 948, 188 Iowa 952.

Miss.—Garner v. Sperry, 161 So. 703, 173 Miss. 11.

N.J.—Benfrey Dress Co. v. Irving Gale, Inc., 177 A. 432, 13 N.J.Misc. 212.

N.Y.—Warner Quinlan Co. v. Ben Charat, Inc., 257 N.Y.S. 722, 143 Misc. 443.

Or.—Radtke v. Taylor, 210 P. 863, 105 Or. 559, 27 A.L.R. 1423.

Pa.—Philadelphia Inquirer Co. v. Sabia, 90 Pa.Super. 266—In re Ewing's Estate, 3 Fay.L.J. 161—Star Shoe Mfg. Co. v. Masucci, 40 Lack. Jur. 179.

22 C.J. p 971 note 23.

Entries in books of account are merely evidence of facts, and do not make facts nor convert mental conceptions or legal theories into tangible facts.—Howell v. Ott, 181 So. 740, 182 Miss. 252, overruling suggestion of error 180 So. 52, 182 Miss. 252.

Books of account kept by a gas company in the manner required by the public service commission, for the purpose of enabling the commission to keep watch of the public utilities of the state, would be the first source for information as to the cost of making the gas, and are prima facie evidence of such expenses on behalf of a gas company, as well as when used against it.—Kings County Lighting Co. v. Nixon, D.C.N.Y., 268 F. 143, affirmed Newton v. Kings County Lighting Co., 42 S.Ct. 268, 258 U.S. 180, 66 L.Ed. 550.

Admissibility of books of account see supra §§ 682–695.

61. U.S.—In re Phœnix Bond & Mortgage Co., D.C.Mass., 6 F.Supp. 110.

N.Y.—Pierce v. Fenno, 238 N.Y.S. 394, 228 App.Div. 23, affirmed 175 N.E. 299, 255 N.Y. 528.

22 C.J. p 971 note 28 [a] [b].

Contradicted account held insufficient

In action on open account wherein defendant denied under oath copy of account attached to petition, which consisted of pages of account kept by bookkeeping machine consisting of figures only, such pages of account were insufficient standing alone to sustain burden resting on plaintiff to establish each item of account. —Burford v. Richards & Conover Hardware Co., 77 P.2d 1145, 182 Okl. 402.

Impeachment of credit of books generally see supra § 691.

62. U.S.—Martins Fork Coal Co. v. Harlan-Wallins Coal Corporation, C.C.A.Ky., 83 F.2d 967, affirming, D.C., 14 F.Supp. 902.

Pa.—Star Shoe Mfg. Co. v. Masucci, 40 Lack.Jur. 179—Ribble Estate v. Arnold, 32 Luz.L.Reg. 88.

Books of account regularly and correctly kept in due course of business may be sufficient proof of debts, in the absence of counter proof although no one testifies to sale of specific articles charged.—Greene v. Greene, 110 So. 218, 145 Miss. 87, 19 A.L.R. 565.

Where evidence is full on the matter of proof of account by books of original entry, and stands uncontradicted, the court is justified in assuming that account is proved.—W. T. Rawleigh Co. v. Thompson, 114 S.E. 702, 122 S.C. 43.

63. N.Y.—Pierce v. Fenno, 238 N.Y. S. 394, 228 App.Div. 23, affirmed 175 N.E. 299, 255 N.Y. 528.

Va.—Dunlop v. McGehee's Ex'r, 124 S.E. 199, 139 Va. 643.

Wis.—Wallschlaeger v. Wallschlaeger's Estate, 205 N.W. 402, 187 Wis. 640.

As against partner who assumed the duty of keeping the partnership books during the existence of the firm, entries therein, unless satisfactorily explained, are conclusive, whether true or false.—Davis v. Bicknell, 139 N.E. 490, 244 Mass. 352 —47 C.J. p 785 note 73.

Credit book entry does not establish defense that indebtedness due partnership had been paid.—Shapira v. Budish, 175 N.E. 159, 275 Mass. 120.

64. Mich.—Larsen v. Jensen, 19 N. W. 130, 53 Mich. 427.

22 C.J. p 971 note 24.

Books of soft drink manufacturer showing that distributor of its products was indebted to it for merchandise sold and delivered and for cash advances, without other evidence, is not sufficient to show that distributor was indebted for such items.—Royal Products v. Johnson, La.App., 191 So. 329.

Delivery to one and charge to another

Books of account, which show goods were delivered to one person and charged to another, do not alone make out prima facie case of indebtedness against person charged. —James C. Goff Co. v. Lunn, 137 A. 879, 48 R.I. 416.

65. Cal.—MacDiarmid v. McDevitt, 275 P. 500, 502, 97 Cal.App. 414, citing Corpus Juris.

Ga.—Taylor v. Tucker, 1 Ga. 231.

Iowa.—Graham v. Dillon, 121 N.W. 47, 144 Iowa 82—Frick v. Kabaker, 90 N.W. 498, 116 Iowa 494.

W.Va.—Di Bacco v. Benedetto, 95 S. E. 601, 82 W.Va. 84.

22 C.J. p 971 note 27.

That books of account may be more accurate than testimony of witness as to particular facts is matter for jury.—Perry v. Ryback, 153 A. 770, 302 Pa. 559.

66. Vt.—Greene v. Mills, 14 A. 5, 60 Vt. 440.

22 C.J. p 971 note 27 [a].

67. U.S.—New England Trust Co. v. Farr, C.C.A.Mass., 57 F.2d 103, certiorari denied 53 S.Ct. 14, 287 U.S. 612, 77 L.Ed. 532—Cameron v. Commissioner of Internal Revenue, C.C.A., 56 F.2d 1021.

Cal.—MacDiarmid v. McDevitt, 275 P. 500, 97 Cal.App. 414.

Iowa.—Shea v. Biddle Improvement Co., 176 N.W. 948, 188 Iowa 952.

Ky.—Terrell v. J. S. Poer Paint & Glass Co., 50 S.W.2d 946, 244 Ky. 311.

La.—Dealer's Finance Co. v. Featherstone, 131 So. 486, 15 La.App. 180.

Miss.—Howell v. Ott, 181 So. 740, 182 Miss. 252, overruling suggestion of error 180 So. 52, 182 Miss. 252—Morgan v. King, 91 So. 30, 128 Miss. 401.

N.Y.—In re Brown's Estate, 190 N.Y. S. 184, 116 Misc. 483.

Okl.—Oklahoma Natural Gas Co. v. McFarland, 229 P. 216, 103 Okl. 6.

when so considered the court may be required to accept the book of accounts as against uncertain testimony to the contrary.[68] If the book of accounts shows on its face that it was not kept in the usual course of business and does not contain all the dealings between the parties it has no probative value other than mere memoranda to use to refresh the memory;[69] and entries not made by any person who knew the facts evidenced thereby or at the time the transactions occurred, or in such manner as to explain themselves, have little, if any, probative value,[70] and indeed the mere fact that the entries are not self-explanatory renders it essential that they be explained by proper evidence.[71]

§ 769. Market Quotations

Market quotations may be unsatisfactory evidence of value where transactions are infrequent and of unknown significance.

Market quotations of the value of corporate stock, which show infrequent transactions of unknown significance, have been held to fall short of furnishing a satisfactory indication of the value of a large block of such stock held by a state.[72]

§ 770. Mortality Tables

Mortality tables are generally prima facie, but not conclusive, evidence of life expectancy.

Mortality tables are prima facie, but not conclusive, evidence of the life expectancy of a particular person.[73] They are to be accepted only as an aid in arriving at such expectancy,[74] in connection with other evidence, such as of age, health, habits,

Tex.—Ætna Casualty & Surety Co. v. Higginbotham-Bartlett Co., Civ. App., 71 S.W.2d 592, error refused.
Wash.—Hill Syrup Co. v. Marine Nat. Bank, 223 P. 595, 128 Wash. 509.
22 C.J. p 971 note 28.

Ledger entries identified by seller's bookkeeper constitute evidence which, with bookkeeper's testimony as to posting, establish prima facie case for goods sold.—Warner Quinlan Co. v. Ben Charat, Inc., 257 N.Y.S. 722, 143 Misc. 443.

A book of original entries, supported by a suppletory oath, but without an evidential statement as to delivery of goods or performance of services, is not sufficient evidence of delivery or performance.—Mansfield v. Gushee, 114 A. 296, 120 Me. 333.

Person making entries unavailable as witness

Where the person making the entries is the only person having knowledge of the delivery of the goods or performance of the services, and he is dead, insane, or out of the jurisdiction of the court, etc., on proof of his handwriting, and that the books were kept in the regular course of business, etc., the books themselves may be sufficient proof of delivery of goods or performance of services.—Mansfield v. Gushee, supra.

Failure to show who kept account, etc.

Verdict based on account between county and highway contractor could not be upheld, where it was not shown who kept account and account was not explained or verified, since book had no probative value.—Eatonton Oil & Auto Co. v. Greene County, 185 S.E. 296, 53 Ga.App. 145, conforming to certified question 181 S.E. 758, 181 Ga. 47.

68. U.S.—Martin's Fork Coal Co. v. Harlan-Wallins Coal Corporation, D.C.Ky., 14 F.Supp. 902, affirmed, C.C.A., 83 F.2d 967.

69. Cal.—Tipps v. Landers, 190 P. 173, 182 Cal. 771.

70. Me.—Mansfield v. Gushee, 114 A. 296, 120 Me. 333.
Utah.—Utah Commercial & Savings Bank v. Fox, 140 P. 660, 44 Utah 323.

71. Me.—Mansfield v. Gushee, 114 A. 296, 120 Me. 333.
Utah.—Walker v. Skliris, 98 P. 114, 34 Utah 353.

72. U.S.—Virginia v. West Virginia, 35 S.Ct. 795, 238 U.S. 202, 59 L.Ed. 1272.
Computation of value of stock generally see Corporations § 415.

73. Ala.—Louisville & N. R. Co. v. Grizzard, 189 So. 203, 238 Ala. 49, certiorari denied 60 S.Ct. 140, 308 U.S. 603, 84 L.Ed. 504—Alabama Fuel & Iron Co. v. Minyard, 97 So. 918, 210 Ala. 299—Little Cahaba Coal Co. v. Arnold, 91 So. 586, 206 Ala. 598—Gulf States Steel Co. v. Jones, 85 So. 264, 204 Ala. 48.
Cal.—Newman v. Campbell, 73 P.2d 1265, 23 Cal.App.2d 639—Murphy v. National Ice Cream Co., 300 P. 91, 114 Cal.App. 482.
Conn.—Donoghue v. Smith, 157 A. 415, 114 Conn. 64.
Ind.—Pittsburg, C., C. & St. L. R. Co. v. Sudhoff, 90 N.E. 467, 173 Ind. 314.
Iowa.—Droullard v. Rudolph, 223 N. W. 100, 207 Iowa 367.
Kan.—Bowman v. Coyle, 260 P. 643, 644, 124 Kan. 492, quoting Corpus Juris.
Mich.—Garton v. Powers, 233 N.W. 373, 252 Mich. 442.
Minn.—Scheffler v. Minneapolis & St. L. R. Co., 21 N.W. 711, 32 Minn. 518.
Miss.—Tucker v. Gurley, 176 So. 279, 179 Miss. 412.
Neb.—Litwiller v. Graff, 246 N.W. 922, 124 Neb. 460.
N.C.—Young v. E. A. Wood & Co., 146 S.E. 70, 196 N.C. 435.
Okl.—Covington Coal Products Co. v. Stogner, 72 P.2d 491, 181 Okl. 25—Fife v. Adair, 47 P.2d 145, 173 Okl. 234.
Pa.—McCaffrey v. Schwartz, 132 A. 810, 285 Pa. 561.
Tex.—Universal Life & Accident Ins. Co. v. Sanders, 102 S.W.2d 405, 129 Tex. 344, affirming Sanders v. Universal Life & Accident Ins. Co., Civ.App., 74 S.W.2d 301—Hemsell v. Summers, Civ.App., 138 S.W. 2d 865—Ward v. Cathey, Civ.App., 210 S.W. 289, error refused.
Vt.—Shappy v. McGarry, 174 A. 856, 106 Vt. 466.
Wash.—Estes v. Schulte, 264 P. 990, 146 Wash. 688.
22 C.J. p 972 note 30.

74. Ind.—Pittsburg, C. C. & St. L. R. Co. v. Sudhoff, 90 N.E. 467, 173 Ind. 314.
Minn.—Scheffler v. Minneapolis St. L. R. Co., 21 N.W. 711, 32 Minn. 518.
Miss.—Tucker v. Gurley, 176 So. 279, 179 Miss. 412.
N.C.—Young v. E. A. Wood & Co., 146 S.E. 70, 196 N.C. 435.
Pa.—Littman v. Bell Telephone Co. of Pennsylvania, 172 A. 687, 315 Pa. 370.
R.I.—Turner v. Maxon, 165 A. 372, 53 R.I. 164.
Tex.—Universal Life & Accident Ins. Co. v. Sanders, 102 S.W.2d 405, 129 Tex. 344, affirming Sanders v. Universal Life & Accident Ins. Co., Civ.App., 74 S.W.2d 301.
22 C.J. p 972 note 31.

Particular table to be considered

In action under Federal Employers' Liability Act against railroad for death of engineer, wherein the only life expectancy table before the jury was the American standard containing no substandard classification

occupation, surroundings, and other elements, bearing on the probable continuance of life,[75] and may have little or no weight where it is shown that the person whose life expectancy is in question is, or was at the time of his death, in ill health, afflicted with disease, or engaged in a hazardous employment.[76] It has been held, however, that mortality tables, if uncontradicted, should be controlling as to the expectancy of life,[77] and such tables have been held controlling as to the life expectancy of one who was shown by the evidence never to have been sick prior to the injury which caused his death.[78]

§ 771. Photographs

Photographs are to be considered under the same tests as other evidence, their weight depending on the skill, accuracy, and manner in which they were taken.

Photographs are to be considered under the same tests as other evidence, and the weight to be given them by the jury depends on the skill, accuracy, and manner in which they were taken, as well as on the character of the thing shown.[79] They are not entitled to the same consideration as is conceded physical facts, but should be weighed by the jury, together with other evidence, as the evidence of facts.[80] They are merely illustrative of other testimony, and ordinarily, where there is disputing testimony, they will not be considered conclusive;[81] they are no more conclusive of physical facts than the testimony of witnesses,[82] and evidence in conflict therewith

for railroad employees, jury were justified in considering that table only, although table was not necessarily to be treated as an absolute guide.—Louisville & N. R. Co. v. Grizzard, 189 So. 203, 238 Ala. 49, certiorari denied 60 S.Ct. 140, 308 U.S. 603, 84 L.Ed. 504.

Weight of tables as question for jury

Wash.—McGrady v. Brink, 81 P.2d 800, 195 Wash. 626.

75. Ala.—Alabama Fuel & Iron Co. v. Minyard, 97 So. 918, 210 Ala. 299.
Cal.—Murphy v. National Ice Cream Co., 300 P. 91, 114 Cal.App. 482.
Conn.—Donoghue v. Smith, 157 A. 415, 114 Conn. 64.
Kan.—Bowman v. Coyle, 260 P. 643, 124 Kan. 492.
Neb.—Moses v. Matthews, 146 N.W. 920, 95 Neb. 672, Ann.Cas.1915A 698.
N.Y.—Hartley v. Eagle Ins. Co., 118 N.E. 622, 222 N.Y. 178, reversing 152 N.Y.S. 686, 167 App.Div. 230.
Pa.—Littman v. Bell Telephone Co. of Pennsylvania, 172 A. 687, 315 Pa. 370.
Vt.—Shappy v. McGarry, 174 A. 856, 106 Vt. 466.

Standard mortality tables show merely the probability of the duration of life at any given age, based on the law of averages, and the normal probability may be qualified by the physical condition of the person in question, his general health, his personal habits, and the character of his employment.—Alabama Fuel & Iron Co. v. Minyard, 97 So. 918, 210 Ala. 299.

Not essential evidence

In an action for the death of a boy four years old, a mortuary table, which begins at ten years, is not an essential piece of evidence in determining expectancy of decedent's life.—Standard Oil Co. v. Cates, C.C.A.N.C., 28 F.2d 718, certiorari denied 49 S.Ct. 179, 278 U.S. 654, 73 L.Ed. 564.

76. Ky.—Louisville & N. R. Co. v. Scott's Adm'r, 220 S.W. 1066, 188 Ky. 99.
Neb.—Mentz v. Omaha & C. B. St. Ry. Co., 170 N.W. 889, 103 Neb. 216, rehearing denied 173 N.W. 478.
Nev.—Smith v. Odd Fellows Bldg. Ass'n, 205 P. 796, 46 Nev. 48, 23 A.L.R. 38.
22 C.J. p 972 note 33.

77. Ind.—Buschbaum v. Hale, 182 N.E. 93, 97 Ind.App. 219.
Mich.—Garton v. Powers, 233 N.W. 373, 252 Mich. 442.
Wis.—Secord v. John Schroeder Lumber Co., 150 N.W. 971, 160 Wis. 1.

78. Mich.—Davis v. Michigan Cent. R. Co., 111 N.W. 76, 147 Mich. 479.

79. Ind.—Pettibone v. Howard, 34 N.E.2d 12—Haven v. Snyder, 176 N.E. 149, 93 Ind.App. 54.
Pa.—Baxter v. Philadelphia & R. Ry. Co., 107 A. 881, 264 Pa. 467, 9 A.L.R. 504.
Tenn.—Jackson v. City of Nashville, 68 S.W.2d 137, 17 Tenn.App. 413.
Va.—Perkins v. Director General of Railroads, 112 S.E. 839, 133 Va. 242.
W.Va.—Coleman v. Norfolk & W. Ry. Co., 131 S.E. 563, 100 W.Va. 679.
22 C.J. p 972 note 36.

Photographs depend for their convincingness on skill of person making them and truthfulness of person vouching for them.—Haven v. Snyder, 176 N.E. 149, 93 Ind.App. 54.

80. Ark.—Missouri Pac. R. Co. v. Henderson, 110 S.W.2d 516, 194 Ark. 884.
Mo.—Bretall v. Missouri Pac. R. Co., App., 239 S.W. 597—Davidson v. St. Louis & S. F. R. Co., 148 S.W. 406, 164 Mo.App. 701.
Tenn.—Radnor Water Co. v. Draughon, 89 S.W.2d 186, 19 Tenn.App. 371—Jackson v. City of Nashville, 68 S.W.2d 137, 17 Tenn.App. 413.
Tex.—Chicago, R. I. & G. Ry. Co. v. Wisdom, Civ.App., 216 S.W. 241, reversed on other grounds Wisdom v. Chicago, R. I. & G. R. Co., Com. App., 231 S.W. 344.

The jury may consider the question of accuracy of a photograph which had been admitted.—Marcy v. Barnes, 16 Gray (Mass.) 161, 77 Am. D. 405.

81. Cal.—Mattson v. Maryland Casualty Co., 279 P. 1045, 100 Cal.App. 96.
Ga.—Savannah Electric & Power Co. v. Horton, 162 S.E. 299, 44 Ga.App. 578.
Mo.—Bretall v. Missouri Pac. R. Co., App., 239 S.W. 597.
Pa.—Kennedy v. Southern Pennsylvania Traction Co., 3 A.2d 395, 333 Pa. 406.
Wash.—Lewis v. City of Spokane, 215 P. 36, 124 Wash. 684.

Photographs showing view of a railroad crossing on a clear day are not conclusive of the distance which could be seen along the tracks or of contributory negligence, when the accident occurred at dusk and a view could not then be had for more than several hundred feet.—Baxter v. Philadelphia & R. Ry. Co., 107 A. 881, 264 Pa. 467, 9 A.L.R. 504.

X-ray photographs, especially of soft parts of body, and their reading by roentgenologist, with respect to cloudy surfaces on plate, are not conclusive evidence, and do not compare in probative force or value with actual conditions revealed by post mortem.—Breslin v. Richfield Oil Corporation, 187 A. 822, 124 Pa.Super. 43.

82. Ind.—Pettibone v. Howard, 34 N.E.2d 12—Haven v. Snyder, 176 N.E. 149, 93 Ind.App. 54.
Wash.—Lewis v. City of Spokane, 215 P. 36, 124 Wash. 684.

will not be ignored,[83] unless it is unreliable.[84]

§ 772. Pleadings

A properly verified pleading may have value as evidence of facts stated therein.

A verified pleading may have value as evidence of facts stated therein,[85] unless it is verified merely on information and belief, in which case it is regarded as without evidentiary value.[86] A pleading properly brought on the record as evidence is at least prima facie correct,[87] and is conclusive as to facts alleged by one party and affirmed by the other party.[88] An unverified pleading, however, constitutes no proof of the facts alleged;[89] and it has been held that the pleadings in a case cannot be considered as evidence therein, unless made so by statute.[90]

§ 773. Copies

A properly authenticated copy of a document or record is generally prima facie evidence of the existence, regularity, and contents of the original document or record.

A properly authenticated copy of a document is sufficient prima facie proof of its existence and proper execution,[91] and certified copies of ancient instruments are entitled to the same weight as the ancient instruments themselves.[92] An attested or certified copy of a recorded deed is prima facie proof of its execution and delivery,[93] and, under some statutes, is prima facie evidence of the execution of the deed and of its contents,[94] and is sufficient proof of the validity of the deed in the absence of evidence to the contrary.[95] A certified copy of a document may be treated the same as the original document, where the latter was executed before a notary in a foreign country, under the laws of which the original was kept by the notary.[96]

A certified copy of an official document or record is prima facie, but not conclusive, evidence of the existence and regularity of the document or record certified to,[97] and of the facts stated

No more weight than testimony on which their accuracy depended
Va.—Perkins v. Director General of Railroads, 112 S.E. 839, 133 Va. 242.

Motion pictures displayed to jury are entitled to no more weight than the testimony of a reliable witness.—Maryland Casualty Co. v. Coker, C.C.A.Tex., 118 F.2d 43.

Contradiction of accuracy
Evidence having been received that photographs of scene of accident are accurate, although taken some time subsequent, it is not error to permit opposing evidence by properly qualified witness.—Missouri Pac. R. Co. v. Steel, 284 P. 21, 141 Okl. 133.

Correctness held question for jury
Mo.—Cunningham v. Kansas City, 38 S.W.2d 734, 225 Mo.App. 1063.

83. Ind.—Haven v. Snyder, 176 N.E. 149, 93 Ind.App. 54.

84. N.H.—Niemi v. Boston & M. R. R., 173 A. 361, 87 N.H. 1, affirmed 175 A. 245, 87 N.H. 1.

Automobile driver's testimony that view of approaching train three hundred to three hundred fifty feet from crossing was cut off by rail fence and bank from where driver looked must be rejected, where authentic photographs taken very soon after collision show that train could be seen from such place.—Niemi v. Boston & M. R. R., supra.

85. La.—Farley v. Frost-Johnson Lumber Co., 63 So. 122, 133 La. 497, L.R.A.1915A 200, Ann.Cas.1915 C 717—Taylor v. Byrnes, App., 151 So. 235.
S.C.—Baugh & Sons Co. v. Graham, 148 S.E. 220, 150 S.C. 398.
Tex.—Hill v. Lofton, Civ.App., 165 S.W. 67.
22 C.J. p 972 note 38.

Items in plaintiff's statement of claim, introduced in evidence by defendant, constituted some legally sufficient evidence of facts therein stated.—J. A. Laporte Corporation v. Pennsylvania-Dixie Cement Corporation, 165 A. 195, 164 Md. 642, 108 A.L.R. 1474, reargument denied 168 A. 844, 164 Md. 642, 108 A.L.R. 1480.
Conclusiveness of allegations against pleader see the C.J.S. title Pleading §§ 59–62, also 49 C.J. p 122 note 54–p 128 note 28.

86. Tex.—Alamo Club v. State, Civ. App., 147 S.W. 639.

87. Pa.—Delmont Gas Coal Co. v. Diamond Alkali Co., 119 A. 710, 275 Pa. 535—McCord v. Durant, 19 A. 489, 134 Pa. 184.

88. Or.—Richards v. Page Inv. Co., 228 P. 937, 112 Or. 507.

89. Tex.—American Nat. Ins. Co. v. Park, Civ.App., 55 S.W.2d 1088, error refused.

90. Pa.—Buehler v. United States Fashion Plate Co., 112 A. 632, 269 Pa. 428—Skillman v. Magill, 98 Pa. Super. 72.

91. Neb.—Bulger v. Prenica, 142 N. W. 117, 93 Neb. 697.

Carbon copy of letter sufficient to raise issue
Tex.—Runnels v. La Fitte, Civ.App., 61 S.W.2d 585.

92. Tex.—Huling v. Moore, Civ. App., 194 S.W. 188.

93. Me.—Holman v. Lewis, 76 A. 956, 107 Me. 28.

That copy of deed is in different ink affects credibility.—Crow v. Smith, 92 So. 905, 207 Ala. 311.

94. Cal.—Overton v. Harband, 44 P. 2d 484, 6 Cal.App.2d 455.
Ky.—Gibson's Adm'r v. Commonwealth, for Use and Benefit of Hamilton, 78 S.W.2d 336, 257 Ky. 487.

95. Cal.—Overton v. Harband, 44 P. 2d 484, 6 Cal.App.2d 455.

96. Mich.—Hackley Union Nat. Bank v. Farmer, 234 N.W. 135, 252 Mich. 674.
Tex.—Smith v. Townsend, 1 Dall. 570.

97. U.S.—City of Weslaco, Tex., v. Porter, C.C.A.Tex., 56 F.2d 6.
Ky.—Brandon v. Butler, 278 S.W. 156, 212 Ky. 76.
Okl.—McHodge v. Tulsa St. Ry. Co., 219 P. 656, 96 Okl. 269.
Wash.—Lanterman v. Nestor, 261 P. 800, 146 Wash. 37.

A certified copy of a record by a public officer authorized to make it, not only vouches for its own correctness, but proves prima facie the original to have been in the public office when the copy was made, an officer's certificate being accorded the sanctity of a deposition.—U. S. v. Brelin, Mo., 166 F. 104, 92 C.C.A. 88.

Seal
(1) Where a certified copy of an official deed, or record of a deed, recites that the deed was under seal, it will be presumed that the deed was properly sealed, although the certified copy does not show a seal. Fla.—Adams v. Orange Realty Sales, 187 So. 625, 136 Fla. 844, affirming 183 So. 621, 134 Fla. 175.

therein,[98] and, under some statutes, may be sufficient proof thereof;[99] but it is not sufficient evidence of a fact which is not properly shown by the original record,[1] nor is it sufficient where it contradicts the original.[2] In case of a variance between an original record and a certified copy thereof, the original must govern,[3] but a certified copy of a record, as primary evidence, prevails over conflicting parol testimony, as secondary evidence.[4] A statute making a certified copy of the record of a given instrument prima facie evidence of its execution and contents does not apply where the instrument has not been recorded.[5] Copies of records duly authenticated will have in another state the effect as evidence which they are entitled to by the laws of the state where the record is made.[6] A certified copy of a certificate of death is prima facie evidence, in some states by statute, of the facts recited,[7] but this does not permit an opinion or conclusion expressed in such a copy to be treated as prima facie proof of a fact to be determined on the trial of the issues in an action involving death.[8]

An exemplified copy of a judicial record imports absolute verity of what it purports to show,[9] and is sufficient proof of the matters to which it relates;[10] but it has been held that a certified copy of probate proceedings is prima facie evidence of such matters,[11] and that a certified copy of a judgment is prima facie evidence of its entry and validity.[12] Exemplifications of the record of judicial proceedings in a foreign country must be considered as prima facie correct.[13]

§ 774. Entire Documents to Be Considered

A book or document offered in evidence must as a general rule be considered in its entirety, the parts operating against the interest of the party offering it as well as the parts in his favor.

N.C.—Ruark v. Harper, 100 S.E. 584, 178 N.C. 249.

(2) Such a recital in a copy of a deed by a corporation, as recorded, is not evidence that the president who signed the deed did in fact affix the seal of the corporation, where it is the duty of the recorder to note on the copy made by him the certificates and proofs appearing on the face of the instrument.—Fischer v. Lukens, 182 P. 967, 41 Cal.App. 358.

98. Ariz.—Mutual Ben. Health & Accident Ass'n v. Neale, 33 P.2d 604, 43 Ariz. 532.

Certified copies of delinquent tax rolls, properly certified to city tax assessor and collector, are sufficient to make out prima facie case as to regularity of assessment and levy of taxes sued for.—Texas Land & Cattle Co. v. City of Fort Worth, Tex.Civ.App., 73 S.W.2d 860, error refused. Appeal dismissed 55 S.Ct. 658, 295 U.S. 716, 79 L.Ed. 1672, rehearing denied 55 S.Ct. 913, 295 U.S. 769, 79 L.Ed. 1710.

99. Ky.—Huffman v. National Surety Co., 51 S.W.2d 950, 244 Ky. 714.
Tex.—Gattison v. Meyer, Civ.App., 297 S.W. 900.

Award of compensation

In suit to set aside award of industrial accident board, certified copy under hand of secretary of the board, attested by the seal of the board, certifying to an award made by the board awarding compensation to employee, was sufficient to show valid and final award previously made by board.—Traders & General Ins. Co. v. Holtzclaw, Tex.Civ.App., 111 S.W.2d 759, error dismissed.

A certified copy of book entries in a land office is entitled to as much credence as the books themselves if offered as proof of their contents.—Gattison v. Meyer, Tex. Civ.App., 297 S.W. 900.

Certified copy of minutes of board of examiners as sufficient proof of an appointment by the board.—State v. Rouleau, 219 P. 1096, 68 Mont. 529.

Copy of warrant issued to sheriff by justice of the peace held insufficient to establish legality of proceedings in justice's court.—Chiarella v. State, 294 N.Y.S. 243, 162 Misc. 232, affirmed 300 N.Y.S. 281, 252 App. Div. 358.

1. Mo.—Sutter v. Metropolitan St. Ry. Co., App., 208 S.W. 851.

2. Mo.—Whitman v. Giesing, 123 S. W. 1052, 224 Mo. 600.

A certified copy of an abstract of title is not sufficient to show title in a suit to quiet title, where the original abstract disproves the copy. —Whitman v. Giesing, supra.

Contradiction by original

Original of permit to burn over lands, notwithstanding filed copy, is admissible, on offer of permittee, in action against him for fire spreading to another's land.—Anderson v. Eischen, C.C.A.Or., 16 F.2d 54.

3. Miss.—De Lashment v. McClelland, 118 So. 904, 152 Miss. 781.
S.D.—Jelinski v. Ruml, 157 N.W. 1051, 37 S.D. 253.

4. Tex.—Gattison v. Meyer, Civ. App., 297 S.W. 900.

5. Ohio.—Wood-Nash Motor Co. v. Midland Acceptance Corporation, 167 N.E. 412, 31 Ohio App. 442.

6. Ala.—Smoot v. Fitzhugh, 9 Port. 72—Swift v. Fitzhugh, 9 Port. 39.
N.J.—North Jersey Discount Co. v. Ætna Ins. Co., 13 A.2d 226, 125 N.J.Law 7.

7. U.S.—Krug v. Mutual Ben. Health & Accident Ass'n, C.C.A. Mo., 120 F.2d 296.
Ala.—Metropolitan Life Ins. Co. v. Parks, 97 So. 788, 210 Ala. 261.
Ky.—Fidelity Mut. Life Ins. Co. v. Hembree, 41 S.W.2d 649, 240 Ky. 97.
Mo.—Simpson v. Wells, 237 S.W. 520, 292 Mo. 301.
N.C.—Rees v. Jefferson Standard Life Ins. Co., 5 S.E.2d 154, 216 N. C. 428.
Pa.—Johnson v. Valvoline Oil Co., 200 A. 224, 131 Pa.Super. 266.

Subject to rebuttal

A certified copy of a death certificate which was filed by insured's attending physician as required by law of another state where insured's death occurred was subject to rebuttal and explanation.—Krug v. Mutual Ben. Health & Accident Ass'n, C.C.A.Mo., 120 F.2d 296.

8. N.C.—Rees v. Jefferson Standard Life Ins. Co., 5 S.E.2d 154, 216 N.C. 428.

9. Vt.—Cootey v. Remington, 189 A. 151, 108 Vt. 441.

10. Cal.—Jordan v. Clausen, 56 P.2d 240, 13 Cal.App.2d 16.
Ga.—Massell Realty Co. v. Hanbury, 141 S.E. 653, 165 Ga. 534.

Certified copy of amplified record, reciting municipal judge's name and that plaintiff recover verdict, determines validity of judgment and shows proceedings were regular.—Lamka v. Hooper, 155 N.E. 295, 324 Ill. 426.

11. Tex.—Jones v. Puckett, Civ. App., 275 S.W. 179.

12. Fla.—Thomas v. Goodbread, 82 So. 835, 78 Fla. 278.

13. Vt.—Woodbridge v. Austin, 2 Tyler 740.

A book or document offered in evidence, including public documents and records,[14] as well as private documents and writings,[15] must as a general rule be considered in its entirety, the parts operating against the interest of the party offering it as well as the parts in his favor.[16] Indeed the party producing the document in the first instance is sometimes required to read the entire instrument, on the ground that unless the whole is read there can be no certainty as to the real sense,[17] and, where an account is contained in several books, all such books should be produced and considered,[18] but this does not apply to a book containing an account not referring or related to other accounts in evidence.[19] However, where parts of a document or record can be understood without the remainder, such parts may be used without offering the entire document in evidence,[20] although under such circumstances the adverse party is entitled to introduce the remainder so far as it is relevant, as explained supra § 190. Matter on the reverse side of an instrument or document cannot be considered,[21] unless it has been received in evidence as a part of the instrument or document.[22] Where a provision of a foreign law is introduced the court may consider any or all the laws on the subject involved which appear in the volume introduced.[23]

§ 775. Introduction for Particular Purpose

Documentary evidence introduced by one party to prove a particular fact, or for a particular purpose, may generally be weighed and considered for or against either party.

Documentary evidence properly admitted in a case, regardless of by whom it was introduced, may, as a general rule, be weighed and considered for or against either party,[24] and, although it is introduced to prove a particular fact, or for a particular purpose, it becomes substantive evidence in the cause and may be used by the adverse party for other purposes;[25] but this rule does not apply to a writing used merely to refresh the memory of a witness.[26] Accordingly it has been held that a party is not entitled, by an express qualification at the time of introducing a document, to restrict its effect as evidence to a definite purpose, but he is compelled to offer it for what it is worth as evidence generally,[27] although a contrary view has

14. Cal.—Root v. Conlin, 223 P. 1023, 65 Cal.App. 241.
Mo.—Case v. Sipes, 217 S.W. 306, 280 Mo. 110.
S.C.—Dukes v. Smoak, 186 S.E. 780, 181 S.C. 182.
22 C.J. p 972 note 46 [a] (1).

"An official record is evidence only of what it purports to show."—Third Nat. Bank & Trust Co. v. U. S., C. C.A.Ohio, 53 F.2d 599, 603.

Certificate of clerk
Where original chattel mortgage was properly received in evidence, certificate of clerk, as required by statute, that instrument was filed at time certain, was in evidence before court, as against contention certificate was not identified or offered in evidence.—National Life Ins. Co. of U. S. of America v. Baker, 23 P.2d 1098, 94 Mont. 600.

Minutes of board
N.C.—Brown v. Town of Hillsboro, 117 S.E. 41, 185 N.C. 368.
S.C.—Dukes v. Smoak, 186 S.E. 780, 181 S.C. 182.

15. U.S.—U. S. v. Patterson, D.C. Mont., 4 F.Supp. 693.
22 C.J. p 972 note 46 [a] (4).

16. U.S.—Zucca v. U. S., 10 Ct.Cust. App. 133.
Mo.—Case v. Sipes, 217 S.W. 306, 280 Mo. 110—Sikes v. Riga, 297 S. W. 727, 221 Mo.App. 152.
Pa.—Cockcroft v. Metropolitan Life Ins. Co., 189 A. 687, 690, 125 Pa. Super. 293, citing **Corpus Juris**.
S.C.—Dukes v. Smoak, 186 S.E. 780, 181 S.C. 182.
22 C.J. p 972 note 46.
Admission of remainder of document or record by one party, where part introduced by the other party see supra § 190.
Right to use entire document see supra § 759.

17. Idaho.—In re Brown's Estate, 15 P.2d 604, 610, 52 Idaho 286, citing **Corpus Juris**, and motion denied and modified on other ground Fite v. French, 30 P.2d 360, 54 Idaho 104.
22 C.J. p 973 note 47.

18. N.Y.—Pendleton v. Weed, 17 N. Y. 72—Larue v. Rowland, 7 Barb. 107.
22 C.J. p 973 note 48.

19. N.Y.—Doolittle v. Stone, 5 Silv. Sup. 412, 8 N.Y.S. 605, affirmed 32 N.E. 639, 136 N.Y. 613.
22 C.J. p 973 note 48 [a].

20. Ill.—Vischer v. Northwestern El. R. Co., 171 Ill.App. 544, affirmed 100 N.E. 270, 256 Ill. 572.

21. N.Y.—Brown v. State, 29 N.Y.S. 2d 85, 176 Misc. 748.

An unauthorized indorsement on the back of a deed, by a stranger, is not proof of the things certified therein, and may not be used as proof that the deed was in fact interlined before or after its execution and delivery.—Meadow Realty Corporation v. Atlantic City Sewerage Co., 7 A.2d 808, 126 N.J.Eq. 44, affirmed 12 A.2d 855, 127 N.J.Eq. 284.

Reverse side of photograph
Legends or description appearing in ink on reverse side of photographic exhibits, not received in evidence, cannot be considered.—Brown v. State, 29 N.Y.S.2d 85, 176 Misc. 748.

22. Ala.—Cooper v. Blair, 167 So. 701, 232 Ala. 262.
22 C.J. p 972 note 46 [b].

23. Cal.—In re May's Estate, 297 P. 955, 112 Cal.App. 673.

24. Cal.—In re Bell's Estate, 243 P. 423, 198 Cal. 32.
La.—Samuel Stamping & Enameling Co. v. Monroe Furniture Co., App., 172 So. 217, amending and refusing rehearing 171 So. 463.

25. N.Y.—Roge v. Valentine, 20 N. E.2d 751, 280 N.Y. 268, reversing 7 N.Y.S.2d 958, 255 App.Div. 475, reargument denied 9 N.Y.S.2d 900, 256 App.Div. 817, reargument denied 21 N.E.2d 695, 280 N.Y. 809.
Wash.—Huston v. Graham, 14 P.2d 44, 169 Wash. 521.
22 C.J. p 973 note 51.
Effect of admission of evidence generally see the C.J.S. title Trial § 86, also 64 C.J. p 137 notes 4–23.

26. Ill.—Erie & Pacific Dispatch v. Stanley, 22 Ill.A. 459, affirmed 14 N.E. 212, 123 Ill. 158.
Wash.—State v. McKeown, 20 P.2d 1114, 172 Wash. 563.

27. N.M.—McKnight v. El Paso Brick Co., 120 P. 694, 16 N.M. 721, Ann.Cas.1912D 1309.

been asserted.[28] Where a document is introduced for the purpose of impeaching a statement of fact therein, and the party fails so to impeach it, all material facts alleged in the document are presumed to be true and the party introducing it is bound thereby.[29]

XIX. BEST AND SECONDARY EVIDENCE

A. IN GENERAL

§ 776. Definitions

"Best evidence" or "primary evidence" is that which is the most natural and satisfactory proof of the fact under investigation. All other evidence which in its nature suggests the presence of better evidence is called "secondary evidence."

While in some circumstances "best evidence" may mean that evidence which is more specific and definite as opposed to that which is merely general and indefinite or descriptive,[30] "best evidence" or "primary evidence" is variously defined as that particular means of proof which is indicated by the nature of the fact under investigation as the most natural and satisfactory;[31] that kind of proof which under any possible circumstances affords the greatest certainty of the fact in question;[32] evidence which carries on its face no indication that better remains behind;[33] the best evidence the nature of the case admits; such evidence as may be called for in the first instance, on the principle that its nonproduction gives rise to a reasonable suspicion that if produced it would tend against the fact alleged.[34] All evidence falling short of this standard and which in its nature suggests that there is better evidence of the same fact, is "secondary evidence."[35] It has been said, however, that evidence which was originally secondary may become primary by the loss or destruction of the evidence originally primary.[36]

§ 777. The "Best Evidence Rule"

The best evidence rule is that the highest degree of proof of which the case from its nature is susceptible must, if accessible, be produced.

The rule of evidence commonly known as "the best evidence rule" is that the highest degree of proof of which the case from its nature is susceptible must, if accessible, be produced; or, in other words, that no evidence shall be received which presupposes that the party who offers it can obtain better evidence;[37] but this rule is to be taken in connec-

N.Y.—Winants v. Sherman, 3 Hill 74.

Restriction of use of evidence to special purpose in general see the C.J.S. title Trial §§ 87–89, also 64 C.J. p 137 note 25—p 139 note 54.

28. La.—Murray's Succ., 7 So. 126, 41 La.Ann. 1109.

A newspaper publication of the minutes of the proceedings of a public board is not proof that the meeting was held at the place therein stated where the publication is not properly authenticated, and it was admitted over objection only for the purpose of showing the fact of publication.—Milton v. Lincoln Parish School Board, 94 So. 386, 152 La. 761.

29. Philippine.—U. S. v. Williams, 18 Philippine 291.

30. Tex.—Pettit v. Campbell, Civ. App., 149 S.W.2d 633, 635.

31. Mo.—Best v. Equitable Life Assur. Soc., App., 299 S.W. 118, 120.

22 C.J. p 973 note 55.

32. Tex.—Pettit v. Campbell, Civ. App., 149 S.W.2d 633, 635.

Other statement

That on which those concerned rely and act.—Yazoo & M. V. R. Co. v. M. Levy & Sons, 106 So. 525, 527, 141 Miss. 199.

Statutory statement

"That kind of evidence which, under every possible circumstance, affords the greatest certainty of the fact in question."

Cal.—Mendocino County v. Peters, 82 P. 1122, 1124, 2 Cal.App. 24.

Mont.—Dubie v. Batani, 37 P.2d 662, 666, 97 Mont. 468—Capell v. Fagan, 77 P. 55, 30 Mont. 507, 2 Ann. Cas. 37.

33. Miss.—Jelks v. Barrett, 52 Miss. 315, 321.

34. 1 Abbott L.D. p 448.

Similar statement

Primary evidence is the best evidence of which the case, in its nature, is susceptible.—Landon v. Morehead, 126 P. 1027, 1032, 34 Okl. 701.

35. Mo.—Best v. Equitable Life Assur. Soc., App., 299 S.W. 118, 120.

Okl.—Landon v. Morehead, 126 P. 1027, 1032, 34 Okl. 701.

Tex.—Pettit v. Campbell, Civ.App., 149 S.W.2d 633, 635.

22 C.J. p 973 note 56–57.

Other definitions

(1) All evidence which shows on its face that better remains behind. —Putnam v. Goodall, 31 N.H. 419, 424.

(2) Evidence which is merely substitutionary in its nature.—Anglo-American Packing & Provision Co. v. Cannon, C.C.Ga., 31 F. 313, 314.

(3) Something which is not original.—In re Youroveta Home & Foreign Trade Co., C.C.A.N.Y., 297 F. 723, 726.

Statutory statements

(1) "Such evidence as from necessity in some cases is substituted for stronger and better proof."—O'Connor v. U. S., 75 S.E. 110, 111, 11 Ga. App. 246.

(2) "That which is inferior to primary."—Capell v. Fagan, 77 P. 55, 30 Mont. 507, 2 Ann.Cas. 37.

36. Cal.—Myran v. Smith, 4 P.2d 219, 117 Cal.App. 355.

Miss.—Jelks v. Barrett, 52 Miss. 315.

Insurance application

In the absence of an insurance policy, the application is the best evidence of the contract.—Universal Life & Accident Ins. Co. v. Reed, Tex.Civ.App., 115 S.W.2d 728.

37. U.S.—Minor v. Tillotson, La., 7 Pet. 99, 8 L.Ed. 621—U. S. Sugar Refinery v. E. P. Allis Co., C.C.A. Ill., 56 F. 786.

Ala.—Zion Star Baptist Church v. Hart, 152 So. 44, 228 Ala. 24—Motor Sales Corporation v. Wisdom, 96 So. 68, 209 Ala. 242.

Fla.—Lidden v. Board of Public In-

tion with the settled principle, discussed in § 782 infra, that the best evidence rule applies exclusively to

struction for Jackson County, 175 So. 806, 128 Fla. 838.

Kan.—Lynch v. Rosenberger, 249 P. 682, 684, 121 Kan. 601, 60 A.L.R. 376, quoting **Corpus Juris**—Priddy-Maer Elevator Co. v. Wenzel, 243 P. 1016, 120 Kan. 423.

Ky.—Louisville Bridge Co. v. Louisville & N. R. Co., 75 S.W. 285, 116 Ky. 258.

La.—Franklin v. First African Baptist Church of New Orleans, 2 La. App. 698.

Mich.—Paul v. University Motor Sales Co., 278 N.W. 714, 283 Mich. 587—Pandaleon v. Brecker, 198 N. W. 953, 227 Mich. 297.

Miss.—Citizens Bank of Coldwater v. Callicott, 174 So. 78, 178 Miss. 747.

Mont.—Cheadle v. Bardwell, 26 P.2d 336, 340, 95 Mont. 299, quoting **Corpus Juris**—Kyle v. Kingsbury, 206 P. 346, 63 Mont. 145—Manhattan Malting Co. v. Sweteland, 36 P. 84. 14 Mont. 269.

N.J.—Pluchino v. Piccolo, 175 A. 812, 114 N.J.Law 82.

N.C.—American Nat. Bank v. Brickhouse, 136 S.E. 636, 193 N.C. 231.

Okl.—Gray v. Cosden, 284 P. 288, 141 Okl. 183—Guest v. Shamburger, 251 P. 97, 120 Okl. 164—Lieuallen v. Young, 241 P. 342, 345, 115 Okl. 153, citing **Corpus Juris**—School Dist. No. 17, Rogers County v. Eaton, 223 P. 857, 97 Okl. 177—Landon v. Morehead, 126 P. 1027, 34 Okl. 701.

Porto Rico.—Gandia v. Porto Rico Fertilizer Co., 28 Porto Rico 516.

Tex.—Lindsay v. Woods, Civ.App., 27 S.W.2d 263—Sykes v. Caldwell, Civ.App., 282 S.W. 282—Locke v. Wallingford, Civ.App., 265 S.W. 1086—Gulf, C. & S. F. Ry. Co. v. Peacock, 128 S.W. 463, 60 Tex.Civ. App. 250.

W.Va.—Thompson v. Turkey Gap Coal & Coke Co., 139 S.E. 642, 104 W.Va. 134—Chicago Art Co. v. Thacker, 63 S.E. 770, 65 W.Va. 143—Fox v. Baltimore & O. R. Co., 12 S.E. 757, 34 W.Va. 466.

22 C.J. p 974 note 59.

Other statements

(1) Facts must be proved by "best evidence" obtainable, or, in other words, best evidence of which case in its nature is susceptible must be produced by party on whom burden of proving facts rests.—Pettit v. Campbell, Tex.Civ.App., 149 S.W.2d 633.

(2) Primary evidence of an obligation or instrument is always required when possible.—Murff v. Murff, La.App., 1 So.2d 407.

(3) The rule requiring "best evidence" means that no evidence which is merely substitutionary in its nature shall be received so long as original evidence can be had.

U.S.—Anglo-American Packing & Provision Co. v. Cannon, C.C.Ga., 31 F. 313.

Fla.—Liddon v. Board of Public Instruction for Jackson County, 175 So. 806, 128 Fla. 838.

Tex.—Pettit v. Campbell, supra.

Statutory statement

"The best evidence which exists of the facts sought to be proved must be produced, unless its absence is satisfactorily accounted for."

U.S.—Anglo-American Packing & Provision Co. v. Cannon, C.C.A.Ga., 31 F. 313, 314.

Ga.—Compton v. Fender, 64 S.E. 475, 132 Ga. 483—Hudson v. Spence, 49 Ga. 479, 481—O'Connor v. U. S., 75 S.E. 110, 111, 11 Ga.App. 246.

Reason for rule

"The exaction of anything less might impair the advantage of having agreements reduced to writing."—Kyle v. Kingsbury, 206 P. 346, 347, 63 Mont. 145.

Purpose

(1) The rule is adopted for the prevention of fraud, and is declared to be essential to the pure administration of justice.

Ill.—U. S. Sugar Refinery v. E. P. Allis Co., C.C.A.Ill., 56 F. 786.

Ky.—Louisville Bridge Co. v. Louisville & N. R. Co., 75 S.W. 285, 116 Ky. 258.

Mont.—Manhattan Malting Co. v. Sweteland, 36 P. 84, 14 Mont. 269.

22 C.J. p 974 note 59 [a] (1), (3).

(2) Other purposes see 22 C.J. p 974 note 59 [a] (2), (4), (5).

Ancient origin

Pa.—Pecoraro v. Pecoraro, 161 A. 591, 105 Pa.Super. 543.

22 C.J. p 974 note 59 [c].

Nature

The so-called best evidence rule is spoken of as a rule of evidence, but is generally more nearly a rule of procedure.—Michigan Bankers' Ass'n v. Ocean Accident & Guarantee Corporation, 264 N.W. 868, 274 Mich. 470.

Evidence to corroborate and sustain presumption of compliance with law is subject to rule requiring best evidence.—Smith v. Pacific Alaska Airways, C.C.A.Alaska, 89 F.2d 253, certiorari denied Pacific Alaska Airways v. Smith, 58 S.Ct. 20, 302 U.S. 700, 82 L.Ed. 541.

Insurance contracts

The best evidence rule applies to insurance contracts.—New York Underwriters' Ins. Co. v. Mullins, 52 S.W.2d 697, 244 Ky. 788.

Motion picture

(1) Testimony of persons seeing screen presentation of motion picture is the best evidence of the facts portrayed.

N.Y.—Feeney v. Young, 181 N.Y.S. 481, 191 App.Div. 501.

Tex.—Houston v. Interstate Circuit, Civ.App., 132 S.W.2d 903.

(2) The reason is that, as discussed in § 782 infra, the best evidence rule applies only to documentary evidence and not to physical objects.—Feeney v. Young, supra.

(3) The rule that an ordinary photograph is the best evidence of what is shown thereby, stated infra § 792, is inapplicable to such screen portrayal, which is merely a flash print not permanent in nature.—Feeney v. Young, supra.

Value and market price

(1) Evidence of market price or market value is the best evidence of value.—Taylor County v. Olds, Tex. Civ.App., 67 S.W.2d 1102, error dismissed—Galveston Wharf Co. v. McYoung, 2 Tex.A.Civ.Cas. § 643.

(2) This is true as to the value of realty.—Taylor County v. Olds, supra.

(3) It is also applicable as to the value of personalty.—Gulf, C. & S. F. Ry. Co. v. Peacock, 128 S.W. 463, 60 Tex.Civ.App. 250.

(4) However, the best evidence of the value of property covered by a fire insurance policy has been said to include duplicate bills of invoices of goods made by the wholesaler or jobber at the time of sale or shipment, inventories taken in good faith prior to destruction of the goods, records of subsequent sales, and other business books and records.—New York Underwriters' Ins. Co. v. Mullins, 52 S.W.2d 697, 244 Ky. 788.

(5) Best proof of current market price is actual sales made.—Ford v. Norton, 260 P. 411, 32 N.M. 518, 55 A.L.R. 261.

(6) Testimony as to value of oil well output based on estimates of prices and quantities, was competent when given by one who was thoroughly familiar with prices and had a partial record of the output and was familiar with the production.—Seaboard Oil Co. v. Huntsman, 245 S.W. 860, 196 Ky. 758.

(7) Testimony by wife seeking divorce of prices paid for household goods bought by parties is not objectionable as not best evidence.—Tribble v. Tribble, 144 S.E. 665, 166 Ga. 850.

Particular evidence held best or primary

(1) Book of account, as distinguished from sheets taken therefrom.—Terral v. Siratt, 125 S.W.2d 451, 197 Ark. 734.

documentary evidence.[38] If the best evidence possible cannot be produced, then the next best evidence should be admitted.[39]

It is for the court to determine what is the best, and what is secondary, evidence of any fact which it is desired to prove.[40]

§ 778. —— Limitations of Rule Generally

The best evidence rule operates solely to bar the admission of any evidence which by its nature indicates other evidence more direct, positive, and conclusive; this rule may be relaxed by the trial court.

"The best evidence rule" does not demand that the strongest possible evidence of the matter in dispute shall be given, nor that all evidence existing in the case shall be produced, but requires simply that no evidence shall be given from which, considering its own character and the nature of the transaction, an inference may arise that there is obtainable by the party other evidence more direct and conclusive and more nearly original in its source.[41]

(2) Letter by defendant's architect to plaintiff as to fact of complaint.—Rutland Sash & Door Co. v. Gleason, 126 A. 577, 98 Vt. 215.

(3) Publication containing defamatory matter, as to charges made.—Prussing v. Jackson, 69 N.E. 771, 208 Ill. 85, reversing 85 Ill.App. 324—37 C.J. p 73 note 34.

(4) Communication of libelous charge, rather than the telegram on which based.—Draper v. Hellman Commercial Trust & Savings Bank, 263 P. 240, 203 Cal. 26.

(5) Meaning given to word "malpractice" by courts and medico-legal writers.—Monohan v. Devinny, 225 N.Y.S. 601, 131 Misc. 248, modified on other grounds Monahan v. Devinny, 229 N.Y.S. 60, 223 App.Div. 547.

(6) Tally into the ship and receipts given for each lighter as to what was actually loaded.—Scott v. W. R. Grace & Co., C.C.A.N.Y., 275 F. 340.

(7) View by jury of physical object incapable of being produced in court.—Crowell v. Middletown Sav. Bank, 189 A. 172, 122 Conn. 362.

(8) Vendor's lien notes, sufficiently describing land and reciting that lien is retained in notes and in deed. —Ruby v. Davis, Tex.Civ.App., 277 S.W. 430.

(9) Weight, height, and markings on the body, to show identity.—Bailey v. Metropolitan Life Ins. Co., App., 115 S.W.2d 151, certiorari quashed State ex rel., Metropolitan Life Ins. Co. v. Shain, 121 S.W.2d 789, 343 Mo. 435.

(10) Written agreement for the payment and acceptance of a sum for personal injuries, as to whether the agreement was a covenant not to sue or a release and discharge.—Slaughter v. Sweet & Piper Horse & Mule Co., Mo.App., 259 S.W. 131.

(11) Affidavits filed to meet the statutory requirement of evidence of title when the assignee of the original grantee applies for a duplicate certificate, which show that the original certificate had been transferred to claimant, but that the certificate and the transfers had been lost.—Magee v. Paul, 221 S.W. 254, 110 Tex. 470, answering certified questions, Civ.App.1913, 159 S.W. 325 conformed to 224 S.W. 1118.

(12) Notwithstanding the certificate of purchase issued for swamp lands was contended to be the original and best evidence of the lands sold, the records of the land office were admissible, under Acts 1921 No. 238, to show the sale without first showing the loss of the certificate.—Marsh v. Erwin, 244 S.W. 441, 155 Ark. 371.

(13) Other evidence see 22 C.J. p 973 note 56–57 [a] (2)–(4).

Particular evidence held secondary

(1) Numbered cards which office employee identified as loan records made up from notes executed by borrower.—White v. Parish, 23 N.E. 2d 939, 302 Ill.App. 172.

(2) Photograph offered for purpose of proving appearance of physical object which cannot be produced in court or inspected by jury. —Crowell v. Middletown Sav. Bank, 189 A. 172, 122 Conn. 362.

(3) Written bid by prospective purchaser of property from estate, not conforming to terms of sale made by court in notice and order for sale.—Fontana Land Co. v. Laughlin, 250 P. 669, 199 Cal. 325, 48 A.L.R. 1308.

(4) In action against vendor for operation of competing theater contrary to contract, purchaser's income tax returns were not original evidence of his profits and losses.—Clay v. Richardson, Tex.Civ.App., 38 S.W.2d 849.

Particular evidence held not best or primary

(1) An appraisal is not the best evidence of the value of personalty. —First Nat. Bank of Toms River v. Levy, 16 A.2d 555, 125 N.J.Law 458.

(2) "Family history" could not be best evidence of extent and value of estate.—Griffith v. Benzinger, 125 A. 512, 144 Md. 575.

Deposition as secondary evidence see Depositions § 92 a.

Election ballots as best evidence see Elections § 288.

38. Pa.—Commonwealth ex rel. Park v. Joyce, 175 A. 422, 316 Pa. 434—Perry v. Ryback, 153 A. 770, 302 Pa. 559.

"There is no general rule that the best evidence must be introduced or that better evidence must be introduced before inferior evidence."—Commonwealth ex rel. Park v. Joyce, 175 A. 422, 424, 316 Pa. 434—Perry v. Ryback, 153 A. 770, 773, 302 Pa. 559.

39. La.—Franklin v. First African Baptist Church of New Orleans, 2 La.App. 698.

Mo.—Best v. Equitable Life Assur. Soc., App., 299 S.W. 118, 120.

Mont.—Cheadle v. Bardwell, 26 P.2d 336, 340, 95 Mont. 299, quoting **Corpus Juris.**

Nev.—Hunnewell v. Hunnewell, 27 P.2d 1062, 1064, 55 Nev. 150, citing **Corpus Juris.**

N.C.—American Nat. Bank v. Brickhouse, 136 S.E. 636, 193 N.C. 231.

Okl.—School Dist. No. 17, Rogers County, v. Eaton, 223 P. 857, 97, Okl. 177.

22 C.J. p 975 note 60.

Rule construed

The rule that where the best evidence the nature of the case will admit of cannot possibly be had, the best evidence that can be had shall be allowed signifies nothing more than that, if the best legal evidence cannot possibly be produced, the next best legal evidence shall be admitted.—Gray v. Pentland, 2 Serg. & R., Pa., 23.

Corporate profits and dividends

Where proof, by means of account books and dividend checks, of compliance with a statutory requirement that dividends be declared by the corporate trustees is impossible the next best evidence is admissible. —Kilbourne v. Kilbourne, 287 P. 41, 156 Wash. 439.

40. Ill.—Boyer v. Broffey, 109 Ill. App. 94.

Mont.—Cheadle v. Bardwell, 26 P.2d 336, 340, 95 Mont. 299, quoting **Corpus Juris.**

41. U.S.—Minor v. Tillotson, La., 7 Pet. 99, 100, 8 L.Ed. 621—U. S. Sugar Refinery v. E. P. Allis Co., C.C.A.Ill., 56 F. 786.

Fla.—Liddon v. Board of Public In-

While secondary evidence cannot be admitted in substitution for primary evidence,[42] yet, where the evidence offered is primary or original in its character, it cannot be excluded because there might have been introduced other primary evidence that is corroborative or stronger and more conclusive.[43] Under such circumstances it is the weight of the evidence, not its admissibility, that is involved.[44] In brief it is essential to the exclusion of evidence under the best evidence rule that the evidence not produced should be not only more direct, satisfactory, and conclusive than that offered, but should be also higher in grade or degree; and where there is no substitution of secondary for primary or original evidence the rule is not violated.[45] It is also to be observed that the rule requiring a party to produce the best evidence which is available is not inflexible, but may, under proper circumstances, be relaxed by the trial court.[46] So it has been held that where it is sought to use a written statement as an admission, the best evidence rule does not apply, but a copy of the writing or parol evidence of its contents is admissible.[47] The rule as to primary and secondary evidence can have no application when the issue to be proved is the genuineness of the signature of an opposing party to the suit who has by his pleadings denied the execution of the instrument purporting to have been executed by him.[48]

§ 779. —— Admissibility of Best Evidence Obtainable

Compliance with the best evidence rule is had if the evidence sought to be admitted is competent, the best obtainable under the circumstances, and if the absence of better evidence is not attributable to the fault of the party presenting the evidence.

Where the evidence offered, while not of the highest degree or of the most satisfactory kind, is otherwise competent and is the best which under the circumstances of the case can be produced, and the absence of evidence of a higher degree or of a more conclusive character is not attributable to the fault of the party seeking to prove the fact in controversy, then the requirements of the best evidence rule are complied with and the evidence is admissible.[49] However, the secondary evidence offered

struction for Jackson County, 175 So. 806, 128 Fla. 838.
Ga.—Short v. Haney, 4 S.E.2d 497, 60 Ga.App. 585.
Ill.—Hellwig v. Lomelino, 33 N.E.2d 174, 309 Ill.App. 369.
Ky.—Seaboard Oil Co. v. Huntsman, 245 S.W. 860, 196 Ky. 758.
La.—Bland v. Paradice Colonization Co., App., 146 So. 778.
Mont.—Manhattan Malting Co. v. Sweteland, 36 P. 84, 14 Mont. 269.
Puerto Rico.—Gandia v. Puerto Rico Fertilizer Co., 28 Puerto Rico 516.
Tex.—Pettit v. Campbell, Civ.App., 149 S.W.2d 633.
22 C.J. p 975 note 62.

Debtor's records

Best evidence rule does not require that creditors prove their case by debtors' records.—Bland v. Paradice Colonization Co., La.App., 146 So. 778.

42. Mo.—Home Ins. Co. of New York v. Savage, 103 S.W.2d 900, 231 Mo.App. 569.
22 C.J. p 975 note 62.

43. Mich.—Perl v. Cohodas, Peterson, Paoli, Nast Co., 294 N.W. 697, 295 Mich. 325.
Puerto Rico.—Gandia v. Puerto Rico Fertilizer Co., 28 Puerto Rico 516.
22 C.J. p 975 note 62.

44. Pa.—City of Williamsport v. Citizens' Water & Gas Co., 81 A. 316, 232 Pa. 232.
22 C.J. p 976 note 63.

45. N.C.—Edwards v. Nunn, 140 S.E. 84, 194 N.C. 492.
Puerto Rico.—Gandia v. Puerto Rico Fertilizer Co., 28 Puerto Rico 516.
Tex.—Magee v. Paul, 221 S.W. 254, 110 Tex. 470, answering certified questions, Civ.App., 159 S.W. 325, conformed to 224 S.W. 1118.
22 C.J. p 976 note 64.

46. Tex.—Mecaskey v. Bewley Mills, Civ.App., 8 S.W.2d 688, 690, quoting **Corpus Juris.**
22 C.J. p 976 note 65.

"The best evidence by which a fact may be proven should be used. But it is of importance that the truth be developed in the simplest manner, without regard to impractical technicalities. While rules of evidence should be followed, they are not themselves the end to be attained. They are only the means to the end."—Priddy-Maer Elevator Co. v. Wenzel, 243 P. 1016, 1018, 120 Kan. 423.

47. Tex.—Rhineland Union Gin & Volunteer State Life Ins. Co., Civ. App., 113 S.W.2d 925, 926, citing **Corpus Juris**—Mecaskey v. Bewley Mills, Civ.App., 8 S.W.2d 688, 690, quoting **Corpus Juris.**
22 C.J. p 976 note 66.

48. Tex.—Wilson v. Paulus, Civ. App., 30 S.W.2d 573, error refused.

49. U.S.—Miller v. Estabrook, C.C.A. W.Va., 273 F. 143.
Cal.—Myran v. Smith, 4 P.2d 219, 117 Cal.App. 355.
Ill.—Coal Creek Drainage & Levee Dist. v. Sanitary Dist. of Chicago, 167 N.E. 807, 336 Ill. 11, reversing 254 Ill.App. 289—People v. Chicago, R. I. & P. Ry. Co., 160 N.E. 841, 329 Ill. 467.
Kan.—State v. Dowling, 232 P. 615, 117 Kan. 493.
Ky.—Eversole v. Baker, 288 S.W. 758, 217 Ky. 15—Seaboard Oil Co. v. Huntsman, 245 S.W. 860, 196 Ky. 758.
Mich.—Wuerth v. Frohlich, 232 N.W. 373, 251 Mich. 701.
Miss.—Yazoo & M. V. R. Co. v. M. Levy & Sons, 106 So. 525, 141 Miss. 199.
Mo.—Charles v. Charles, 281 S.W. 417, 313 Mo. 256—Eisenbarger v. Wilhite, App., 238 S.W. 159.
22 C.J. p 976 note 67.

Purpose of rule is to secure a correct determination of an issue of fact.—People v. Chicago, R. I. & P. Ry. Co., 160 N.E. 841, 329 Ill. 467.

Burial place

Where more perfect records of ownership are not available, records of association, in whose cemetery vaults, tombs, or lots are located, may be examined.—In re St. Vincent de Paul Benev. Ass'n of New Orleans, La.App., 175 So. 140.

Damages

(1) The best evidence of which the subject of damages will admit is receivable.—Compton v. Fisher-McCall, Inc., 299 N.W. 750, 298 Mich. 648.

(2) Law requires best evidence obtainable on subject of prospective loss of earnings, but does not render the somewhat speculative character of such proof any ground for exclusion.—Foote v. Huelster, 261 N.W. 296, 272 Mich. 194.

Family history and genealogy probably require the more frequent applications of the text rule.—McKeown v. Brown, 149 N.W. 593, 167 Iowa 489.

must be otherwise competent and admissible, notwithstanding it is the best or only evidence of which the nature of the case is susceptible; and if for any reason it is incompetent it cannot be admitted.[50] When secondary evidence is admissible, it will serve as proof of the fact in question.[51]

§ 780. —— Prerequisites to Exclusion of Evidence

Evidence will be excluded as secondary only when it appears that there is better evidence which is material, relevant, and competent and which will better establish and explain the fact in issue.

Before evidence can be excluded on the ground that it is secondary it must appear either from the nature of the fact to be proved or by evidence introduced by the objecting party that there is higher evidence in existence and of what that evidence consists;[52] that it is material, relevant, and compe-

Age
If the absence of better evidence is satisfactorily explained, age may be proved by circumstantial evidence.—Campbell v. Wilson, 23 Tex. 253, 76 Am.D. 67—22 C.J. p 171 note 67.

Value
(1) In the absence of an established standard by which the market value of property can be determined, the best evidence available must be used.
Ill.—Kankakee Park Dist. v. Heidenreich, 159 N.E. 289, 328 Ill. 198.
Iowa.—Weaver v. National F. Ins. Co., 165 N.W. 223, 181 Iowa 1000.
Tex.—Taylor County v. Olds, Civ. App., 67 S.W.2d 1102, error dismissed.
Wyo.—Shikany v. Salt Creek Transp. Co., 45 P.2d 645, 48 Wyo. 190.
(2) Other instance see 22 C.J. p 976 note 67 [d].

50. U.S.—In re Youroveta Home & Foreign Trade Co., C.C.A.N.Y., 297 F. 723.
Del.—Grossman v. Delaware Electric Power Co., 155 A. 806, 4 W.W.Harr. 521.
Mo.—Scrivner v. American Car & Foundry Co., 50 S.W.2d 1001, 330 Mo. 408.
22 C.J. p 977 note 69.
Affidavit of justice of peace who tried case as to basis of action would not be competent as secondary evidence of contents of lost records of justice court.—Higgs-Taft Furniture Co. v. Clark, 131 S.E. 731, 191 N.C. 369.

51. Cal.—Myran v. Smith, 4 P.2d 219, 117 Cal.App. 355.

52. Ala.—Milner Land Co. v. Houston, 142 So. 410, 225 Ala. 223.
Fla.—Liddon v. Board of Public Instruction for Jackson County, 175 So. 806, 128 Fla. 838.
Neb.—Cotten v. Stolley, 248 N.W. 384, 387, 124 Neb. 855, quoting **Corpus Juris.**
Tex.—Pettit v. Campbell, Civ.App., 149 S.W.2d 633—Ruppert v. Hermleigh Co-op. Gin & Supply Co., Civ. App., 133 S.W.2d 305, 307, quoting **Corpus Juris**—Cocke v. Humphreys & Day, Civ.App., 293 S.W. 892, 893, quoting **Corpus Juris.**
22 C.J. p 977 note 70.

Duty to show best evidence
A party seeking to have parol testimony admitted has the duty of showing the existence of better evidence if in existence.—Liddon v. Board of Public Instruction for Jackson County, 175 So. 806, 128 Fla. 838.

Advances by joint adventurer
On proceedings to compel accounting of joint adventure profits, defendant's testimony and canceled checks were competent to show advances made, such evidence not presupposing the existence of better evidence.—Barrick v. Pratt, C.C.A. Ala., 32 F.2d 732.

Computation of capital and profits
The method of computing capital or profits of partnership agreed on by partners without fraud, deceit, or concealment may be shown by parol if not embodied in a written agreement.—Madden v. Shaw, 177 N. E. 820, 277 Mass. 71.

Damages
As affecting the amount of damages, estimates of experts as to the replacement cost of a building are admissible where no books have been kept.—Mather v. Muselman, 257 P. 427, 79 Mont. 566.

Execution sale
Admitting oral testimony to establish agreement of judgment debtor's attorney regarding execution sale was not error, in absence of showing that agreement had been reduced to writing.—Evans v. Power County, 1 P.2d 614, 50 Idaho 690.

Fraud
In an action to set aside a conveyance on the ground that the lien notes received by vendor as part of the purchase price were falsely represented to be first lien notes, the court did not err in admitting oral testimony that the notes transferred to vendor were represented to be first liens, where there was no written record of the transfer to vendor, and it could be ascertained from the notes themselves that they were executed subsequently to other notes which constituted a first lien on the land.—Simmons v. Lemons, Tex.Civ. App., 258 S.W. 868.

Insurance
Testimony as to whom fire insurance policy was originally issued is admissible where the policy does not show such person because of having been changed in this respect.—Becker v. Farmers' Mut. Fire Ins. Co. of Rock Tp., Jefferson County, Mo.App., 99 S.W.2d 148.

Lease
Oral evidence is admissible in action for rent, where it had not appeared there was written lease.—Flint Creek Lodge No. 11, A. F. & A. M., v. Brown, 264 P. 394, 81 Mont. 573.

Letters supplementing books of account
Letters from employer to sales person reflecting account books showing sales, profits, commissions, and advances under employment contract, held admissible since letters contained something more than the original books and therefore the best evidence rule did not stand in their way.—Walker-Smith Co. v. Roan, Tex.Civ.App., 43 S.W.2d 1108.

Market report
When a government market report is written on a bulletin board in chalk or otherwise, and has been erased, parol testimony is admissible as secondary evidence.—Bailey v. St. Louis & S. F. Ry. Co., Mo.App., 290 S.W. 630.

Marriage
Where law at time of marriage did not require license, parol evidence was admissible to establish marriage without showing loss of primary evidence.—Doiron v. Vacuum Oil Co., 113 So. 748, 164 La. 15.

Payment
Testimony that county money was paid out for specified purposes was properly admitted over objection that warrants would be the best evidence, it not disclosing that there was any warrant.—Payne v. Franklin County, 116 S.E. 627, 155 Ga. 219.

Taxation
Evidence of oral decision in income tax proceeding is improperly excluded, where objecting party failed to show that there was better evidence.—Cocke v. Humphreys & Day, Tex.Civ.App., 293 S.W. 892.

Transfer
In a suit by a surety who has paid the debt against the principal, since the payment operates to vest legal

tent to prove the fact;[53] and that if produced it would more satisfactorily explain and establish the fact than the evidence offered.[54]

In the absence of objection to secondary evidence, such evidence is properly admissible, as pointed out in the C.J.S. title Trial § 152, also 64 C.J. p 229 notes 55, 56, and 22 C.J. p 978 note 73.

§ 781. —— Evidence Relating to Collateral Matters

The best evidence rule has no application to proof of facts collateral to the issue.

Evidence relating to a matter which does not form the foundation of the cause of action or defense, but is collateral to the issue, does not properly fall within the best evidence rule, and, although secondary in its character, cannot be excluded on the ground that primary evidence is obtainable.[55]

§ 782. —— Rule Confined to Documentary Evidence

As a general rule it is held that the best evidence rule is applicable only to documentary evidence, apparently contrary adjudications being generally otherwise explainable.

As a general rule the term "best evidence" is confined to cases where the law has divided evidence into primary and secondary,[56] that is, where some documentary evidence exists,[57] and there are no degrees of evidence, except where some document or other written instrument exists, the contents of which should be proved by an original rather than by other evidence which is open to the danger of inaccuracy.[58] So the courts have repeatedly held that the best evidence rule does not apply to parol

and equitable title as to the instrument evidencing the debt in the surety without a transfer, the instrument evidencing the obligation is admissible, no transfer being required. —Reese v. Mackentepe, 140 So. 550, 224 Ala. 372.

53. Fla.—Nahmod v. Nelson, 3 So. 2d 162.
Neb.—Cotten v. Stolley, 248 N.W. 384, 387, 124 Neb. 855, quoting Corpus Juris.
Tex.—Ruppert v. Hermleigh Co-op. Gin & Supply Co., Civ.App., 133 S.W.2d 305, 307, quoting Corpus Juris.
22 C.J. p 978 note 71.

Evidence held competent
Va.—Kentucky Virginia Stone Co. v. Fortner, 165 S.E. 401, 159 Va. 234.

54. Neb.—Cotten v. Stolley, 248 N.W. 384, 387, 124 Neb. 855, quoting Corpus Juris.
Tex.—Ruppert v. Hermleigh Co-op. Gin & Supply Co., Civ.App., 133 S.W.2d 305, 307, quoting Corpus Juris.
22 C.J. p 978 note 72.

55. U.S.—U. S. v. Aluminum Co. of America, D.C.N.Y., 35 F.Supp. 820.
Ala.—Benson & Co. v. Foreman, 1 So.2d 898, citing Corpus Juris—Richardson v. Charles A. Jones Flour & Grain Co., 103 So. 463, 212 Ala. 492, citing Corpus Juris—Little v. People's Bank of Mobile, 96 So. 763, 766, 209 Ala. 620, citing Corpus Juris—Bardeleben v. Sellers, 84 So. 403, 17 Ala.App. 247.
Miss.—Tallahatchie Lumber Co. v. Cecil Lumber Co., 87 So. 449, 451, 124 Miss. 897, citing Corpus Juris.
N.Y.—Eyre v. Coal & Iron Nat. Bank of City of New York, 204 N.Y.S. 21, 27, 208 App.Div. 686, citing Corpus Juris.
Pa.—McCullough v. Holland Furnace Co., 141 A. 631, 633, 293 Pa. 45, quoting Corpus Juris.
Tex.—Hranicky v. Trojanowsky, Civ. App., 153 S.W.2d 649—Ruppert v. Hermleigh Co-op. Gin & Supply Co., Civ.App., 133 S.W.2d 305, 307, quoting Corpus Juris—Crawford v. Ramsey, Civ.App., 73 S.W.2d 1064, 1066, citing Corpus Juris—Hutson v. Clark, Civ.App., 3 S.W. 2d 484.
Wyo.—Campbell v. Wyoming Development Co., 100 P.2d 124, 144, 55 Wyo. 347, quoting Corpus Juris.
22 C.J. p 978 note 74.

Particular collateral matters
(1) A determination by the superintendent of banks as to enforcement of stockholders' liabilities that the assets are insufficient to meet the liabilities, relating only to the right of the official to maintain the action and not to any question of defendant's liability, is on a collateral issue and need not be proved by the best evidence.—Smith v. Olson, 208 N.W. 585, 50 S.D. 81.

(2) In action by corporation, which succeeded bankrupt corporation, against employee of both corporations on open account and account stated, parol proof that plaintiff's predecessor corporation went into bankruptcy was admissible as relating to only collateral fact.—Benson & Co. v. Foreman, Ala., 1 So.2d 898.

(3) Contention that corporation which succeeded partnership had no assignable interest in partnership contract, being in nature of collateral matter, could be shown by parol. —Fisher v. Berg, 290 P. 984, 158 Wash. 176.

(4) In an action for damages for burning cotton alleged to have been caused by defendant intentionally burning his own property to obtain the insurance, parol proof as to insurance on the buildings destroyed was admissible.—De Bardeleben v. Sellers, 84 So. 403, 17 Ala.App. 247.

(5) Other matters see 22 C.J. p 978 note 74 [a].
Agency collateral to issue see infra § 803.
Chattel mortgage collateral to issue see infra § 800.
Deed collateral to issue see infra § 796.
Letters collateral to issue see infra § 792.
Notice collateral to issue see infra § 792.
Rules of railroad companies collateral to issue see infra § 792.
Terms of contract collateral to issue see infra § 792.
Terms of partnership only collaterally involved see infra § 803.
Title to:
 Personalty collaterally involved see infra § 799.
 Realty collaterally involved see infra § 794.
Writings and records collateral to issue generally see infra § 787.

56. Mich.—Michigan Bankers' Ass'n v. Ocean Accident & Guarantee Corporation, 264 N.W. 868, 274 Mich. 470—Elliott v. Van Buren, 33 Mich. 49, 20 Am.R. 668.
Pa.—Commonwealth ex rel. Park v. Joyce, 175 A. 422, 316 Pa. 434—Perry v. Ryback, 153 A. 770, 302 Pa. 559—Pecoraro v. Pecoraro, 161 A. 591, 592, 105 Pa.Super. 543, quoting Corpus Juris.

57. Pa.—Pecoraro v. Pecoraro, supra, quoting Corpus Juris —American Mfg. Co. v. S. Morgan Smith Co., 33 Pa.Super. 469.

58. Mich.—Michigan Bankers' Ass'n v. Ocean Accident & Guarantee Corporation, 264 N.W. 868, 274 Mich. 470.
Pa.—Commonwealth ex rel. Park v. Joyce, 175 A. 422, 316 Pa. 434—Perry v. Ryback, 153 A. 770, 302 Pa. 559—Pecoraro v. Pecoraro, 161

evidence so as to exclude the otherwise competent testimony of a witness on the ground that another witness who might give more conclusive evidence ought to be called,[59] and, while there are some decisions which are apparently opposed to this view, these are easily explainable by reason of a certain laxity on the part of the courts with respect to stating with precision the ground on which evidence is rejected. Examples of this may be found in cases where the courts have rejected as not the best evidence testimony which was clearly hearsay,[60] irrelevant,[61] or destitute of probative value,[62] and was, therefore, inadmissible regardless of the best evidence rule.[63] So also it sometimes happens that, where the testimony of witnesses as to certain matters is available, writings relating to the same matters are excluded on the ground, as stated, that the oral evidence is the best, although it is apparent that the writings are inadmissible because mere unsworn statements.[64] Likewise, although the best evidence rule has been applied to evidence of physical objects,[65] the rule does not apply to proof of the nature, appearance, and condition of mere physical objects, but these facts may be proved by parol without offering the objects themselves in evidence or accounting for their absence,[66] and even where the objects themselves are present in court.[67] Hence, whatever the law may have been in early times, at the present day it can be said to be well settled that the best evidence rule applies exclusively to documentary evidence; and this is the view adopted by the more modern writers on the law of evidence.[68]

§ 783. Inadmissibility of Primary Evidence

When th best evidence, if accessible, would be inadmissible, se ındary evidence likewise is inadmissible.

Secondaıy evidence of the contents of a writing cannot be introduced where it appears that, for any reason, the writing if produced would not be admissible,[69] even if its absence is satisfactorily explained.[70] A fortiori, after a writing itself has been offered in evidence and rejected, parol evidence of its contents cannot be received,[71] unless,

A. 591, 592, 105 Pa.Super. 543, quoting **Corpus Juris**.
22 C.J. p 980 note 84.
Degrees of secondary evidence see infra § 784.

59. Ark.—Kelley v. Sparks, 102 S. W.2d 838, 193 Ark. 811.
Wash.—Hartford v. Faw, 7 P.2d 4, 6, 166 Wash. 335, quoting **Corpus Juris**.
22 C.J. p 979 note 75.

60. Ala.—Motor Sales Corporation v. Wisdom, 96 So. 68, 209 Ala. 242.
N.J.—Pluchino v. Piccolo, 175 A. 812, 114 N.J.Law 82.
22 C.J. p 979 note 76.

61. N.Y.—Cheritree v. Roggen, 67 Barb. 124.

62. Ky.—Jefferson Standard Life Ins. Co. v. Cheek's Adm'r, 80 S.W. 2d 518, 258 Ky. 621.
22 C.J. p 979 note 78.

63. N.Y.—Rockwell v. Tunnicliff, 62 Barb. 408.

64. Colo.—Ft. Lyon Canal Co. v. Bennett, 156 P. 604, 61 Colo. 111.
22 C.J. p 980 note 80.

65. Ga.—Seaboard Air Line Ry. Co. v. Young, 148 S.E. 757, 40 Ga.App. 4.
Miss.—Harris v. Pounds, 187 So. 891, 185 Miss. 688.

Particular objects

(1) Best evidence of weight of log would be size of log, species of timber to which it belonged, and estimates of men specially trained in handling of timber as to weight of such log.—Harris v. Pounds, 187 So. 891, 185 Miss. 688.

(2) The assertion of witnesses that a log was too heavy to be carried by six men without showing what experience such witnesses had had in judging such weight would violate the best evidence rule.—Harris v. Pounds, supra.

(3) Testimony of the condition of a guard rail of a bridge, picked up shortly after an automobile had crashed through it, is admissible where testimony is given that a search has been made for the rail and it has not been found.—Seaboard Air Line Ry. Co. v. Young, 148 S.E. 757, 40 Ga.App. 4.

66. N.Y.—Carroll v. Gimbel Bros., New York, 186 N.Y.S. 737, 195 App. Div. 444.
22 C.J. p 980 note 85.

67. Vt.—Congdon v. Howe Scale Co., 29 A. 253, 66 Vt. 255.

68. N.Y.—Carroll v. Gimbel Bros., New York, 186 N.Y.S. 737, 195 App. Div. 444.
Pa.—Pecoraro v. Pecoraro, 161 A. 591, 592, 105 Pa.Super. 543, quoting **Corpus Juris**—American Mfg. Co. v. S. Morgan Smith Co., 33 Pa.Super. 469.

Rule of best evidence obtainable is expressly, if not solely, applicable to documentary evidence as to which original must be produced if possible. —Wuerth v. Frohlich, 232 N.W. 373, 251 Mich. 701.

Best evidence rule inapplicable

(1) Admission of testimony of widow as to having received money from husband, not relating to the contents of a written instrument, is not improper as contrary to the best evidence rule.—Inland Steel Co. v. Barbalic, 166 N.E. 9, 89 Ind.App. 163.

(2) Best evidence rule is inapplicable to introduction of oral evidence as to real estate broker suing for commission being licensed where it was not necessary, nor attempted, to establish the contents of a writing as to license.—Petersen v. Swanson, 1 P.2d 630, 57 Idaho 49.

69. Ga.—Poland v. C. C. Osborne Lumber Co., 139 S.E. 734, 37 Ga. App. 212.
Ill.—Le Roy State Bank v. J. Keenan's Bank, 169 N.E. 1, 337 Ill. 173, reversing 253 Ill.App. 51—Krumin v. Bruknes, 255 Ill.App. 503.
Tex.—American Indemnity Co. v. Baldwin Motor Co., Civ.App., 19 S. W.2d 848.
22 C.J. p 1042 note 38.

Grounds of inadmissibility of writing

(1) Absolutely privileged communications.—Krumin v. Bruknes, 255 Ill.App. 503.

(2) Other grounds see 22 C.J. p 1042 note 38 [a].

70. N.Y.—Peck v. Valentine, 94 N. Y. 569, reversing 29 Hun 668.
22 C.J. p 1042 note 39.

71. Ga.—Crider v. Woodward, 135 S.E. 95, 162 Ga. 743.
Ill.—Le Roy State Bank v. J. Keenan's Bank, 169 N.E. 1, 337 Ill. 173, reversing 253 Ill.App. 51.
22 C.J. p 1042 note 40.

Identification of land

Testimony of witness to apply descriptive terms of muniments of title and identify land in dispute is inadmissible where muniments were rejected.—Crider v. Woodward, 135 S.E. 95, 162 Ga. 743.

it has been held, the writing itself was clearly admissible and its exclusion improper,[72] in which case the party who procured its exclusion cannot be heard to object that parol evidence of its contents is not the best evidence.[73] If the fact to which the writing relates can be proved independently of the writing, it may be proved by parol evidence even though the writing if produced could not be received as evidence of the fact.[74]

§ 784. Degrees and Kinds of Secondary Evidence

Secondary evidence may be either the testimony of witnesses or a copy of the writing. In this country the majority rule is that a copy is a higher degree of secondary evidence than testimony of witnesses and, when obtainable, bars the admission of such testimony; but a number of jurisdictions have followed the English courts in holding that there are no degrees of secondary evidence. Hearsay is inadmissible as secondary evidence.

Secondary evidence of the contents of a writing may be furnished by the testimony of witnesses[75] or by the production of a copy.[76] On the question whether there are degrees of secondary evidence, that is, whether one kind of secondary evidence is admissible when another kind having more probative value is accessible, there are many dicta and some decisions, but these are in conflict. Some authorities hold that the most satisfactory kind of secondary evidence must always be produced or its absence explained,[77] and accordingly, by what is characteri ed as the American rule,[78] it is held that a copy, roved to be correct, is evidence of a higher grade than parol evidence of the contents of an instrument.[79] On the other hand, under the so-called

Testimony as to letter

A witness should not be permitted to testify concerning a letter, where the letter itself has been excluded.—Gregory v. Webb, 89 S.W. 1109, 40 Tex.Civ.App. 360.

72. Utah.—Nebeker v. Harvey, 60 P. 1029, 21 Utah 363.

73. S.C.—Burnett v. Crawford, 27 S. E. 645, 50 S.C. 161.

74. Iowa.—Gilbert Bros. v. Chicago, R. I. & P. R. Co., 136 N.W. 911, 156 Iowa 440.
22 C.J. p 1042 note 43.

75. Colo.—Perdew v. Perdew, 64 P. 2d 602, 99 Colo. 544.
D.C.—Conkling v. New York Life Ins. & Trust Co., 262 F. 620, 49 App.D.C. 166.
Ky.—Dennis v. Thomson, 43 S.W.2d 18, 240 Ky. 727.
La.—Vidrine v. Deshotels, 158 So. 618, 181 La. 50.
Mo.—Scrivner v. American Car & Foundry Co., 50 S.W.2d 1001, 1008, 330 Mo. 408, quoting **Corpus Juris.**
22 C.J. p 1068 note 66.

Caution required

Parol evidence to supply record testimony should be received with great caution.—Massie v. Hutcheson, Tex.Civ.App., 258 S.W. 244, reversed on other grounds, Com.App., 270 S. W. 544.

Entire contents must be given.
Ky.—Leary v. Leary, 262 S.W. 293, 203 Ky. 344.
N.C.—Powers v. Murray, 117 S.E. 161, 185 N.C. 336.
Pa.—Collins v. Home Ins. Co. of New York, 167 A. 621, 110 Pa.Super. 72, followed in Collins v. Phœnix Ins. Co. of Hartford, Conn., 167 A. 626, 110 Pa.Super. 83.

Knowledge of contents

(1) The witness must have personal knowledge of the contents of the writing.
Mich.—Thompson v. Walker, 234 N. W. 144, 253 Mich. 126.
N.C.—Powers v. Murray, 117 S.E. 161, 185 N.C. 336.
Pa.—Richard's Appeal, 15 A. 903, 122 Pa. 547—In re Byrne's Estate, 186 A. 187, 122 Pa.Super. 413—Collins v. Home Ins. Co. of New York, 167 A. 621, 110 Pa.Super. 72, followed in Collins v. Phœnix Ins. Co. of Hartford, Conn., 167 A. 626, 110 Pa.Super. 83—Martz v. Bower, 94 Pa.Super. 175.
S.C.—Atlantic Coast Line R. Co. v. Searson, 135 S.E. 567, 137 S.C. 468.

(2) Hence, parol testimony of witness who was not agent who forwarded notice of lapsing of policy to insured, as to contents thereof, is inadmissible.—Ciccone v. Colonial Life Ins. Co. of America, 164 A. 444, 110 N.J.Law 276.

Testimony of lump sum payments improper

Where parol testimony is admissible as secondary evidence, testimony of lump sum payments is improper, itemized statement being necessary.—Hoyt v. Ware, 118 S.E. 734, 156 Ga. 98.

Attorney

An attorney for a corporation at the time it was decided to organize another corporation, and wherein transfer of assets to the latter corporation was effected by documents prepared by attorney, was competent to testify as to the assignment of assets to the corporation, and to testify to contents of assignment of personal property including the land contract sued on which he prepared and which he testified was lost while in his custody.—Bradway v. Netzorg, 298 N.W. 501, 298 Mich. 198.
Parol evidence secondary to written evidence see infra §§ 785–812.

76. Mo.—Scrivner v. American Car & Foundry Co., 50 S.W.2d 1001, 1008, 330 Mo. 408, quoting **Corpus Juris**—Seibert v. Budde, 226 S.W. 8.
Tenn.—Branch v. Branch, 225 S.W. 1038, 143 Tenn. 210.
Tex.—Panhandle & S. F. Ry. Co. v. Hurst, Civ.App., 251 S.W. 538.
22 C.J. p 1068 note 67.

Abstract of destroyed record of lease is admissible even though a mere summary, since, as stated in Abstracts of Title § 3 b, an abstract should contain a full summary or statement of the material parts of all grants, conveyances, wills, or other instruments or matters of record relied on as evidence of title, and such statement will be presumed.—Mercantile Trust Co. of San Francisco v. All Persons Claiming, 191 P. 691, 183 Cal. 369.

Mere absence of name of buyer from copy does not render the copy inadmissible as secondary evidence when it contains the dates and items of the sales.—Woicicky v. Anderson, 111 A. 896, 95 Conn. 534.

Record, or copy thereof, of original plat map is secondary evidence, in absence of proof as to whether it was used or relied on by purchaser of property.—City of Dallas v. McMurray, Tex.Civ.App., 282 S.W. 296.
Copy secondary to original writing see infra §§ 813–821.

77. Mo.—Scrivner v. American Car & Foundry Co., 50 S.W.2d 1001, 1008, 330 Mo. 408, quoting **Corpus Juris.**
22 C.J. p 1068 note 68.

Copy of original is superior to a copy of a copy in case of conflict.—Tennis Coal Co. v. Napier, 135 S.W. 295, 142 Ky. 719.

78. Mich.—Baroda State Bank v. Peck, 209 N.W. 827, 235 Mich. 542.

79. Ill.—Gross v. Thornson's Estate, 121 N.E. 600, 286 Ill. 185, reversing 208 Ill.App. 600.
22 C.J. p 1069 note 69.
Michigan authorities see infra note 81.

English rule,[80] other authorities hold that there are no degrees of secondary evidence, but that parol or any other secondary evidence is competent which is admissible by other rules of law, its weight being a matter for the jury.[81] It is universally conceded, however, that where a proper case is made for the introduction of secondary evidence, any kind of secondary evidence is competent which is admissible by other rules of law, unless it is shown by the nature of this evidence itself or is made to appear by the objecting party that other and more satisfactory secondary evidence is known to the other party and can be produced by him.[82] Moreover, where the sec-

Copy contradicted by other evidence

(1) Where a certified copy of process is in evidence and the justice presiding in the case has testified that he issued process, contrary to the showing of the copy, admission of the docket is not error as not the highest and best evidence.—Haverty Furniture Co. v. Thompson, 169 S.E 213, 46 Ga.App. 739.

(2) Where an original instrument, after being recorded by the register of deeds, is lost, and a proper foundation is laid, oral testimony is competent to prove its contents, and that it differs from the recorded copy.—Jackman v. Lawrence Drilling & Development Co., 187 P. 258, 106 Kan. 59.

(3) Although contents of lost papers in case on file in clerk's office may be established by copies appearing in clerk's writ book, mere failure of record in writ book to show portion of record of lost paper is not conclusive of nonexistence thereof, but existence and contents of lost portion of record may be established by parol.—Benton v. Maddox, 184 S.E. 788, 52 Ga.App. 813.

(4) Secondary evidence is admissible to show contents of original petition, notwithstanding existence of carbon copy of petition, where original petition was changed to include the description of the land.—Patton v. Sartin, 87 P.2d 589, 149 Kan. 299.

Letterpress copies of letters are the best secondary evidence of their contents, and unless they are produced or their absence explained parol evidence of the contents of the letters is not admissible.—Ford v. Cunningham, 25 P. 403, 87 Cal. 209—22 C.J. p 1068 note 68 [b].

Contrary Michigan holding see infra note 81.

Receipt by territorial treasurer stating that a certified copy of an air license has been filed, made prima facie evidence by statute, is the best evidence of the existence, registration, and contents of the license so as to make oral testimony of such matters inadmissible.—Smith v. Pacific Alaska Airways, C.C.A.Alaska, 89 F.2d 253, certiorari denied Pacific Alaska Airways v. Smith, 58 S.Ct. 20, 302 U.S. 700, 82 L.Ed. 541.

Telegram

A copy of a telegram is a higher grade of secondary evidence than parol testimony.

Ga.—Western Union Tel. Co. v. Hines, 20 S.E. 349, 94 Ga. 430.

N.H.—Howley v. Whipple, 48 N.H. 487.

Contrary authorities see infra note 81.

Admissibility of copy of telegram see infra § 814.

80. Mich.—Baroda State Bank v. Peck, 209 N.W. 827, 235 Mich. 542.

81. Mass.—Grover v. Smead, 2 N.E. 2d 1012, 295 Mass. 11—Fleming v. Doodlesack, 169 N.E. 795, 270 Mass. 271.

Tex.—Busby v. First Nat. Bank, Civ. App., 68 S.W.2d 328, error dismissed—Clay v. Richardson, Civ. App., 38 S.W.2d 849.

22 C.J. p 1069 note 70.

In Michigan

(1) It was first held that no rule of law required secondary evidence to be of one kind rather than another where the writing was private in nature and not required to be in writing, so that oral evidence was admissible regardless of the existence of a copy.—Eslow v. Mitchell, 26 Mich. 500.

(2) Following cases, however, held that oral testimony of a lost paper was not competent if a copy was available, distinguishing the prior case as dictum.—Phillips v. U. S. Benevolent Society, 84 N.W. 57, 125 Mich. 186.

(3) In a later case it was held error to exclude oral testimony of the contents of a letter on the ground a letterpress copy is the best secondary evidence.—People v. Christian, 107 N.W. 919, 144 Mich. 247.

(4) But by a divided court the American rule, as applied by a trial court, was affirmed, it having been held by the trial court that a defendant in possession of copy of letter of guaranty sued on cannot testify as to contents of original, or that plaintiff's copy was not accurate, without producing or accounting for his copy.—Baroda State Bank v. Peck, 209 N.W. 827, 235 Mich. 542.

Insurance policy

In an action on a fire policy which had been lost, insured is not bound to accept what defendant insured said was a copy, and may proceed in its own way to prove policy, either by testimony or production of copy.—Williams Mfg. Co. v. Insurance Co. of North America, 106 A. 657, 93 Vt. 161.

Telegrams

(1) Where the telegraph message actually delivered is the best and primary evidence of the contents of the message, if its nonproduction is satisfactorily accounted for, parol evidence is admissible, even though there is other secondary evidence which may be more satisfactory, as for instance a written copy or the message delivered to the telegraph company.—Nickerson v. Spindell, 41 N.E. 105, 164 Mass. 25—22 C.J. p 1069 note 70 [b].

(2) However, where the message delivered would be inadmissible for lack of proper preliminary proof that it would constitute a correct copy, the oral testimony is likewise inadmissible.—American Fidelity Co. of Montpelier, Vt. v. State, 109 A. 99, 135 Md. 326.

Contrary authorities see supra note 79.

Admissibility of copy of telegram see infra § 814.

82. Mo.—Scrivner v. American Car & Foundry Co., 50 S.W.2d 1001, 1008, 330 Mo. 408, quoting **Corpus Juris.**

Wash.—J. & H. Goodwin Co. v. Schwaegler, 266 P. 177, 147 Wash. 547.

22 C.J. p 1069 note 71.

Terms of contract

Where loss of written contract is proved, and there is no evidence of existence of copy within reach of process of court, parol testimony of substantive terms of contract is admissible.—Scrivner v. American Car & Foundry Co., 50 S.W.2d 1001, 330 Mo. 408.

Sheriff's deed

In a suit to quiet title, a sheriff's deed containing full recitals of a valid tax judgment against unknown heirs, a valid execution and advertisement, and an offer for sale is admissible as secondary evidence to show title.—Seibert v. Budde, Mo., 226 S.W. 8.

Sufficiency

(1) Secondary proof of contents of written instrument, imposing obligations on parties thereto, should be clear, or not of doubtful character in probative worth.

Cal.—Caine v. Briscoe, 248 P. 774, 78 Cal.App. 660.

Ky.—Suter v. Suter, 128 S.W.2d 704, 278 Ky. 403—Chilton's Adm'r v. Shelley, 49 S.W.2d 305, 243 Ky. 576.

ondary evidence offered is parol, the otherwise competent testimony of one witness cannot be rejected on the ground that it is not as conclusive and satisfactory as would be the testimony of some other witness who is not called.[83]

Hearsay is not admissible as secondary evidence.[84]

B. PAROL EVIDENCE SECONDARY TO WRITTEN EVIDENCE

1. In General

§ 785. General Rule

As a general rule, written evidence of a fact constitutes the best evidence thereof and, unless its absence is satisfactorily explained, parol evidence of such fact is not admissible.

Where written evidence of a fact exists, the writing as a general rule constitutes the best evidence of that fact; and where the writing is not produced parol evidence is inadmissible to prove its contents unless its absence is satisfactorily explained. In brief, parol evidence is not admissible in substitution for available written evidence, and the contents of an accessible writing cannot be proved by parol.[85] Where the fact to be proved is

(2) This rule applies alike to secondary evidence of contents of a contract and contents of a lost deed or other muniment of title.—Chilton's Adm'r v. Shelley, supra.

(3) However, where the lost instrument is a muniment of title to realty, more assuring proof of its former existence, its contents, and its loss, is necessary than if it were a writing less extensive in effect, and proof must be "strong and conclusive."—Suter v. Suter, supra.

(4) Secondary evidence of the contents of a written instrument must give its language, and a statement of witness' conclusion of its legal effect is not sufficient.—Walker v. Drogmund, 74 P.2d 1235, 101 Colo. 521.

(5) The precise language of the writing need not be given.

Mont.—Nelson v. Gough, 202 P. 196, 61 Mont. 301.

Pa.—In re Lepper's Estate, 161 A. 569, 106 Pa.Super. 123.

(6) So where the language of an instrument is not given, secondary evidence describing the instrument as a deed is not improper.—Fidelity Lumber Co. v. Adams, Tex.Civ.App., 230 S.W. 177, error dismissed.

(7) Secondary evidence of the existence of an insurance policy, consisting of a notice to insured by the company, identifying the policy and giving due date of next premium, and a letter to insured's agent enclosing forms for proof of death and an admission of the existence of the policy, constitutes prima facie evidence of the existence of the policy.—Underwriters Life Ins. Co. v. Borneman, Tex.Civ.App., 141 S.W.2d 1005.

83. Pa.—Commonwealth ex rel. Park v. Joyce, 175 A. 422, 316 Pa. 434.
22 C.J. p 1070 note 72.

84. Mo.—Scrivner v. American Car & Foundry Co., 50 S.W.2d 1001, 330 Mo. 408.
R.I.—Arnold v. Barrington, 117 A. 424, 426, 44 R.I. 298, citing **Corpus Juris.**
22 C.J. p 1070 notes 73–33.

Rule inapplicable

In trespass to try title, depending on whether a deed was forged, where it appeared that the deed was destroyed, and the parties, witnesses, and notary had died, declaration by a witness that an attesting witness said he had seen the grantor sign the deed, in corroboration of other testimony, was not inadmissible as hearsay.—Rodgers v. Bell, Tex.Civ.App., 207 S.W. 630.

85. U.S.—Therm-O-Proof Insulation Co. v. Slayter & Co., C.C.A.Ill., 80 F.2d 557—Kimble v. Kiser, C.C.A.W.Va., 59 F.2d 626—U. S. v. Charleston, S. C., Min. & Mfg. Co., D.C.Fla., 298 F. 127, affirmed, C.C.A., Charleston, S. C. Min. & Mfg. Co. v. U. S., 3 F.2d 1019, certiorari denied 45 S.Ct. 513, 268 U.S. 695, 69 L.Ed. 1162, and affirmed 47 S.Ct. 348, 273 U.S. 220, 71 L.Ed. 618.
Ala.—Alabama Water Co. v. Knowles, 124 So. 96, 220 Ala. 61—Corona Coal Co. v. Hooker, 85 So. 477, 204 Ala. 221.
Ark.—Seaman-Dunning Corporation v. Haralson, 29 S.W.2d 1085, 182 Ark. 93.
Cal.—McCormick Saeltzer Co. v. Grizzly Creek Lumber Co., 240 P. 32, 74 Cal.App. 278.
Conn.—Donoghue v. Smith, 157 A. 415, 114 Conn. 64—Gaul v. Baker, 143 A. 51, 108 Conn. 173.
D.C.—Nunan v. Timberlake, 85 F.2d 407, 66 App.D.C. 150.
Fla.—Firestone Service Stores of Gainesville v. Wynn, for Use and Benefit of Home Ins. Co., N. Y., 179 So. 175, 131 Fla. 94.
Ga.—Skipper v. Alexander, 158 S.E. 32, 172 Ga. 246—Illinois Cent. R. Co. v. Banks, 122 S.E. 85, 31 Ga. App. 756—Smith v. Savannah Electric Co., 102 S.E. 548, 25 Ga.App. 59.
Ill.—Rockwell Lime Co. v. Illinois Commerce Commission, 26 N.E.2d 99, 373 Ill. 309, certiorari denied Chicago & N. W. R. Co. v. Rockwell Lime Co., 61 S.Ct. 16, 311 U.S. 660, 85 L.Ed. 423—Maxcy-Barton Organ Co. v. Glen Bldg. Corporation, 189 N.E. 326, 355 Ill. 228, 95 A.L.R. 321—Allanson v. Frieder, 27 N.E.2d 307, 305 Ill.App. 232.
Ky.—Herald-Post v. Spinner, 38 S.W.2d 245, 238 Ky. 436—Breckinridge County v. Beard, 27 S.W.2d 427, 233 Ky. 823—Staples v. Continental Ins. Co. of New York, 5 S.W.2d 265, 268, 223 Ky. 842, citing **Corpus Juris**—John L. Dunlap & Co. v. Perry, 230 S.W. 291, 191 Ky. 290.
Minn.—Farm Mortgage & Loan Co. v. Pederson, 205 N.W. 286, 164 Minn. 425.
Mo.—Newport v. Montgomery Ward & Co., 127 S.W.2d 687, 344 Mo. 646—Gosnell v. Camden Fire Ins. Ass'n of Camden, App., 109 S.W.2d 59.
N.Y.—Harmon v. Matthews, 27 N.Y.S.2d 656.
N.C.—Edwards v. Nunn, 140 S.E. 84, 194 N.C. 492—Harris v. Singletary, 137 S.E. 724, 193 N.C. 583—Rosenmann v. Belk-Williams Co., 132 S.E. 282, 191 N.C. 493—Brown v. Town of Hillsboro, 117 S.E. 41, 185 N.C. 368.
Okl.—Lieuallen v. Young, 241 P. 342, 115 Okl. 153.
Pa.—Nettis v. General Tire Co. of Philadelphia, 177 A. 39, 317 Pa. 204—Moore v. Stauffer Sales Co., 158 A. 191, 104 Pa.Super. 19—National Fire-Proofing Co. v. E. P. Foulk & Bro., 6 Pa.Dist. & Co. 780, 39 Lanc.L.Rev. 293—Petition of O'Malley, 48 Dauph.Co. 428—Smithsonian Inst. Series v. Cotsack, 33 Luz.L.Reg. 305.
S.C.—Sample v. Gulf Refining Co., 191 S.E. 209, 183 S.C. 399.
Tex.—Pettit v. Campbell, Civ.App., 149 S.W.2d 633—Clay v. Richardson, Civ.App., 9 S.W.2d 413, 416, error refused, quoting **Corpus Juris**—City of San Antonio v. Gray-

required by law to be evidenced by a writing, parol evidence is of course not admissible unless the absence of the writing is satisfactorily explained;[86] but the mere fact that a matter is such as might ordinarily be expected to be evidenced by a writing of some kind does not exclude parol evidence thereof, where it does not appear that any written record thereof was actually made or that any written evidence thereof exists.[87]

§ 786. Limitations of Rule

There is perhaps no rule of evidence which allows of more exceptions than the best evidence rule, and it is difficult to formulate any rule which will accurately define in what cases it is not necessary to produce a writing, there being much conflict in the decisions, although this arises more from the difficulty of application of the best evidence rule to differing cases than from any uncertainty in the rule itself.

It cannot be laid down as a universal rule that, where written evidence of a fact exists, all parol evidence of the same fact must be excluded;[88] and it has been said that there is perhaps no rule of evidence which allows of more exceptions than that which requires the best evidence which the case admits of to be adduced.[89] It is difficult, however, to formulate any rule which will accurately define in what cases it is not necessary to produce a writing as the best evidence, there being much conflict in the decisions, although this arises more from the difficulties of application of the best evidence rule to differing cases than from any uncertainty in the rule itself.[90] Writings which constitute primary evidence have been divided into three classes: (1) Instruments which the law requires to be in writing. (2) Those contracts which the parties themselves have put in writing. (3) All other writings the existence of which is disputed and which are material to the issue, and this classification has been expressly approved in numerous cases, and it has been held that writings which do not fall within one of the enumerated classes are not primary evidence.[91] In order that a writing may constitute primary evidence within the rule under discussion, the writing must have a legitimate tendency to prove the fact to be established, parol evidence being admissible where the writing, if produced, would not be evidence of the fact to be proved.[92] It is also necessary that the writing should in reality be the more accurate, satisfactory, and conclusive medium of proof; where the matter to be proved is a substantive fact which exists independently of any writing, although evidenced thereby, and which can be as fully and satisfactorily established by parol as by the written evidence, then both classes of evidence are primary and independent and parol evidence may be admitted regardless of the writing.[93]

burg Oil Co., Civ.App., 259 S.W. 985—Panhandle & S. F. R. Co. v. Sanderson, Civ.App., 218 S.W. 540, dismissed for want of jurisdiction—Metropolitan Casualty Ins. Co. v. Edwards, Civ.App., 210 S.W. 856, dismissed for want of jurisdiction—Galveston, H. & S. A. Ry. Co. v. Johnson & Johnson, Civ. App., 133 S.W. 725.
Vt.—Andrews v. Aldrich, 158 A. 676, 104 Vt. 235.
Wash.—Smith v. Johnson, 98 P.2d 312, 2 Wash.2d 351—Brick v. City of Seattle, 293 P. 453, 159 Wash. 413, affirmed 295 P. 921, 159 Wash. 413.
22 C.J. p 980 note 88.

86. Tex.—Bell v. Bowles, Civ.App., 258 S.W. 892, reversed on other grounds Bowles v. Bell, Com.App., 270 S.W. 1013.
22 C.J. p 982 note 89.

87. Ala.—Newell Contracting Co. v. Lacy, 155 So. 379, 229 Ala. 208.
Or.—Kuntz v. Emerson Hardwood Co., 184 P. 253, 93 Or. 565.
22 C.J. p 982 note 90.
Prerequisites to exclusion of evidence generally see supra § 780.

88. U.S.—Transcontinental Petroleum Co. v. Interocean Oil Co., C. C.A.S.D., 262 F. 278.
Ga.—Bass v. African Methodist Episcopal Church, 116 S.E. 816, 155 Ga. 57—Hartley v. Hartley, 179 S. E. 245, 50 Ga.App. 848.
22 C.J. p 983 note 91.

Explanatory testimony

In action on notes given by partners, testimony explanatory of unilateral letters or receipts not conclusively binding on defendant partners should have been allowed with regard to meaning of expression in their exhibit, not violating rule that writing itself is best evidence.—Hanson v. Roesch, 176 P. 349, 104 Wash. 257.

89. Ala.—Sally v. Capps, 1 Ala. 121.
22 C.J. p 983 note 92.

90. N.J.—Gilbert v. Duncan, 29 N. J.Law 133, reversed on other grounds 29 N.J.Law 521.

91. Wis.—Teegarden v. Caledonia, 6 N.W. 875, 50 Wis. 292.
22 C.J. p 983 note 95.

92. Pa.—Commonwealth ex rel. Park v. Joyce, 175 A. 422, 316 Pa. 434.
22 C.J. p 983 note 96.

93. U.S.—MacLaughlin v. Hull, C. C.A.Wash., 87 F.2d 641—Fidelity & Casualty Co. of New York v. Glenn, C.C.A.W.Va., 3 F.2d 913—Brown v. Town of Eustis, D.C.Fla., 293 F. 197.
Ala.—Most Worshipful Grand Lodge of A. F. & A. M. of Alabama (Colored) v. Callier, 140 So. 557, 224 Ala. 364—Moundville Lumber Co. v. Warren, 83 So. 479, 203 Ala. 488.
Ark.—Foster-Holcomb Inv. Co. v. Little Rock Pub. Co., 236 S.W. 597, 151 Ark. 449.
D.C.—Nunan v. Timberlake, 85 F.2d 407, 66 App.D.C. 150.
Ga.—Wood v. Cauthen, 149 S.E. 138, 168 Ga. 766—Bass v. African Methodist Episcopal Church, 116 S.E. 816, 155 Ga. 57—Cooper v. Johnson, 107 S.E. 849, 151 Ga. 608—Arkansas Fuel Oil Co. v. Andrews Point Co., 13 S.E.2d 738, 64 Ga.App. 595—Lamon v. Perry, 125 S.E. 907, 33 Ga.App. 248.
Ill.—People v. Dime Sav. Bank, 183 N.E. 604, 350 Ill. 503—People for Use of Kaskaskia Commons Permanent School Fund v. Mitchell, 240 Ill.App. 281, 285, citing **Corpus Juris**.
Iowa.—Riddle v. Chicago, B. & Q. R. Co., 210 N.W. 770, 203 Iowa 1232.
Ky.—Dolle v. Melrose Properties, 67 S.W.2d 706, 252 Ky. 482.
Mich.—New Jersey Title Guarantee & Trust Co. v. McGrath, 214 N.W. 195, 197, 239 Mich. 404, quoting **Corpus Juris**—Pearson v. Wallace, 170 N.W. 72, 203 Mich. 622.
N.Y.—Eyre v. Coal & Iron Nat. Bank of City of New York, 204 N.Y.S. 21, 27, 208 App.Div. 686, citing **Corpus Juris**.

So also, where it appears that a witness has a distinct and independent recollection of the matters of which he testifies, his testimony is not rendered incompetent under the best evidence rule by reason of the fact that he or some other person made a contemporaneous written memorandum of those matters which is not produced;[94] and indeed under such circumstances the written memorandum is frequently said to be secondary evidence and inadmissible,[95] although it is considered that an original entry or memorandum made by a witness at or presently after the time of the transaction is admissible in evidence as auxiliary to his testimony, or as a detailed statement of the facts, when without its aid he is unable to recollect distinctly the facts to which it relates, but he testifies to the truth and correctness of the writing.[96] However, it has been held that an unimpeached writing is to be accepted under the best evidence rule in preference to parol evidence based on memory.[97]

Where the writing or other documentary evidence of a fact is not as satisfactory or conclusive as the testimony of available witnesses, it is frequently excluded on the ground that the witnesses ought to be called, especially where the witness is the person who made the writing or executed the document.[98] Where the question is not what the writing actually contained, but what a given individual told another were its contents, the writing is not the best evidence.[99]

The filing of a paper in the proper office may be shown by parol evidence.[1]

N.D.—MacDonald v. Fitzgerald, 171 N.W. 879, 42 N.D. 133.
Okl.—Jones v. Webb, 67 P.2d 801, 803, 180 Okl. 6, citing **Corpus Juris.**
Pa.—Pecoraro v. Pecoraro, 161 A. 591, 592, 105 Pa.Super. 543, citing **Corpus Juris**—City of Philadelphia v. Stange, 157 A. 358, 103 Pa. Super. 275—Cupples v. Yearick, 99 Pa.Super. 269.
22 C.J. p 984 note 97.

94. Cal.—People by State Department of Public Works, v. Marblehead Land Co., 255 P. 553, 82 Cal. App. 289—Maguire v. Cunningham, 222 P. 838, 64 Cal.App. 536.
Conn.—Kilpatrick v. Kilpatrick, 193 A. 765, 123 Conn. 218.
Fla.—Florida Power & Light Co. v. Bridgeman, 182 So. 911, 133 Fla. 195.
Ga.—Sutton v. Ford, 118 S.E. 747, 155 Ga. 863—Hearn v. Red Devil Co., 119 S.E. 469, 31 Ga.App. 84.
Idaho.—Kelso v. Edward Rutledge Timber Co., 269 P. 94, 46 Idaho 497.
Ill.—People for Use of Kaskaskia Commons Permanent School Fund v. Mitchell, 240 Ill.App. 281, 285, citing **Corpus Juris.**
La.—Istrouma Mercantile Co. v. Northern Assur. Co., Limited, of London, 165 So. 11, 183 La. 855.
Minn.—State v. Walso, 265 N.W. 345, 196 Minn. 525.
Mo.—Schwartz v. Mercantile Trust Co., App., 279 S.W. 253.
N.J.—Dubois v. De Fazio, 4 A.2d 52, 122 N.J.Law 37.
N.Y.—Harmon v. Matthews, 27 N.Y. S.2d 656—Hubsch v. Fifth Ave. Coach Co., 185 N.Y.S. 475.
N.C.—Edwards v. Nunn, 140 S.E. 84, 194 N.C. 492.
Pa.—In re Link's Estate, 180 A. 1, 319 Pa. 513—Cupples v. Yearick, 99 Pa.Super. 269.
S.C.—Greer v. Equitable Life Assur. Soc. of U. S., 185 S.E. 68, 180 S.C. 162.
Tex.—Ruppert v. Hermleigh Co-op. Gin & Supply Co., Civ.App., 133 S W.2d 305, 306, citing **Corpus Juris**—Cates v. Clark, Civ.App., 24 S.W. 2d 450, error denied 33 S.W.2d 1065, 119 Tex. 519—Stephens v. House, Civ.App., 257 S.W. 585, conforming to answers to certified questions 248 S.W. 30, 112 Tex. 459—Hatfield v. Hatfield, Civ.App., 233 S.W. 350, dismissed for want of jurisdiction.
Wis.—Terbell v. Jones, 15 Wis. 253.
22 C.J. p 985 note 98.

Mechanical recording
In wife's divorce action, fact that part of conversation which witness heard over earphones was at the same time mechanically recorded did not affect admissibility of testimony of witness of what he in fact heard through earphones, as against contention that discs on which conversation was mechanically recorded were best evidence.—Kilpatrick v. Kilpatrick, 193 A. 765, 123 Conn. 218.

95. U.S.—Third Nat. Bank & Trust Co. v. U. S., C.C.A.Ohio, 53 F.2d 599.
Colo.—Oliver v. Weaver, 212 P. 978, 72 Colo. 540.
Ky.—Louisville R. Co. v. Raymond, 123 S.W. 281, 135 Ky. 738, 27 L.R. A.,N.S., 176.
La.—Rush v. Town of Farmerville, 101 So. 243, 156 La. 857—Daniels v. Union Oil Mill, App., 161 So. 614.
Mo.—McColgan v. Noble, App., 29 S. W.2d 205.
N.J.—People's Bank & Trust Co. v. Allen, 110 A. 704, 94 N.J.Law 355.
N.Y.—In re Barney's Will, 174 N.Y. S. 242, 185 App.Div. 782.
Okl.—Gray v. Cosden, 284 P. 288, 141 Okl. 183.
22 C.J. p 985 note 99.

96. N.Y.—Wilson v. Kings County El. R. Co., 21 N.E. 1015, 114 N.Y. 487.
22 C.J. p 985 note 1.

97. Ind.—American Ins. Co. of Newark, N. J., v. Paggett, 128 N.E. 468, 73 Ind.App. 677.
Ky.—Duff v. May, 54 S.W.2d 4, 245 Ky. 709.

98. Ala.—Johns-Manville Sales Corporation v. Williams, 153 So. 609, 228 Ala. 366.
Cal.—Longuy v. La Société Francaise De Bienfaisance Mutuelle, 198 P. 1011, 52 Cal.App. 370.
Fla.—Smith v. Hinkley, 123 So. 564, 98 Fla. 132.
Md.—Riley v. Naylor, 16 A.2d 857.
Mo.—Ozark Fruit Growers' Ass'n v. Bank of Aurora, 52 S.W.2d 430—McColgan v. Noble, App., 29 S.W. 2d 205.
Pa.—Fougeray v. Pfleger, 170 A. 257, 314 Pa. 65.
Wash.—Bennington v. Northern Pac. Ry. Co., 192 P. 1073, 113 Wash. 1.
22 C.J. p 985 note 2.

Records made by third persons
While the testimony of a person making a record has been held the best evidence of the facts shown, parol evidence as to the contents of records made by third persons is inadmissible.
Ark.—National Life & Accident Ins. Co. v. Threlkeld, 70 S.W.2d 851, 189 Ark. 165.
Mo.—Kirkpatrick v. Wells, 6 S.W.2d 591, 319 Mo. 1040—Best v. Equitable Life Assur. Soc., App., 299 S.W. 118.
Tenn.—Tevis v. Proctor & Gamble Distributing Co., 113 S.W.2d 64, 21 Tenn.App. 494.

99. Ga.—Minnesota Lumber Co. v. Hobbs, 49 S.E. 783, 122 Ga. 20.

1. Mo.—State v. Clardy, 185 S.W. 184, 267 Mo. 371.

§ 787. Writings and Records Collateral to Issue

Ordinarily the best evidence rule does not apply to writings collateral to the issue.

It is generally held that the best evidence rule does not apply to writings collateral to the issue. So, where the execution or existence of a writing, as distinct from its contents, does not form the foundation of the action, although it is material to the controversy, and where the purpose of the evidence is not to maintain or destroy any right involved in the action, the production of the writing is not required, but its execution and existence may be proved by parol.[2] On the same principle, where the contents of a writing are not directly in issue the matters contained in the writing may be proved by parol evidence without accounting for the failure to produce the writing,[3] and a fortiori the subject of documents which are not the foundation of the action may be proved by parol.[4] Likewise, where the existence or contents of a judicial record are only incidentally or collaterally involved, the best evidence rule does not require that the record be produced or its absence explained before parol evidence can be admitted;[5] nor can parol evidence be excluded on the ground that record evidence ought to be produced, where the record is not

2. Ala.—Gilliland v. Dobbs, 174 So. 784, 234 Ala. 364—J. E. Pinkham Lumber Co. v. C. W. Griffin & Co., 102 So. 689, 691, 212 Ala. 341, citing **Corpus Juris.**
Ill.—Evans v. Williams, 232 Ill.App. 439.
Ky.—Hazel v. Dougherty, 268 S.W. 823, 207 Ky. 89.
N.C.—Edwards v. Nunn, 140 S.E. 84, 194 N.C. 492—Davis v. North Carolina Shipbuilding Co., 104 S.E. 82, 180 N.C. 74.
Tex.—Jagoe Const. Co. v. U. S. Fidelity & Guaranty Co., Com.App., 58 S.W.2d 503, reversing, Civ.App., 38 S.W.2d 824—Ruppert v. Hermleigh Co-operative Gin & Supply Co., Civ.App., 133 S.W.2d 305, 307, quoting **Corpus Juris**—Cocke v. Southland Life Ins. Co., Civ.App., 75 S.W.2d 194, 200, error refused, citing **Corpus Juris**—American General Ins. Co. v. Nance, Civ. App., 60 S.W.2d 280, error refused —Houston Belt & T. Ry. Co. v. Rogers, Civ.App., 44 S.W.2d 420, error dismissed—Bridgeport Mach. Co. v. Geers, Civ.App., 36 S.W.2d 1047, error dismissed—Hutson v. Clark, Civ.App., 3 S.W.2d 484.
22 C.J. p 1015 note 75.
Fact of making or existence of writing generally see infra § 791.

3. Ala.—Sheffield Chamber of Commerce v. Hatch, 127 So. 173, 220 Ala. 601—Kershaw Mining Co. v. Lankford, 105 So. 896, 213 Ala. 630—Little v. People's Bank of Mobile, 96 So. 763, 209 Ala. 620—Lurie v. Kegan-Grace Co., 96 So. 344, 209 Ala. 339—Mt. Vernon-Woodberry Mills v. Union Springs Guano Co., 155 So. 710, 26 Ala.App. 136, certiorari denied 155 So. 716, 229 Ala. 91—Mallory S. S. Co. v. Druhan, 84 So. 874, 17 Ala.App. 365.
Alaska.—Babcock v. O'Lanagan, 7 Alaska 171, 175, citing **Corpus Juris.**
Cal.—Bassi v. Walden, 222 P. 866, 64 Cal.App. 764.
Fla.—Firestone Service Stores of Gainesville v. Wynn, for Use and Benefit of Home Ins. Co., N. Y., 179 So. 175, 131 Fla. 94.
Ga.—Continental Trust Co. v. Bank of Harrison, 136 S.E. 319, 36 Ga. App. 149, conforming to answer to certified questions 134 S.E. 775, 162 Ga. 758, 50 A.L.R. 412—Martin v. Hutchinson, 105 S.E. 313, 26 Ga. App. 24.
Ill.—Forest Preserve Dist. of Cook County v. Kean, 131 N.E. 117, 298 Ill. 37.
Ky.—Hazel v. Dougherty, 268 S.W. 823, 207 Ky. 89.
La.—Equipment Finance Corporation v. Atkins, 139 So. 154, 19 La. App. 834.
Miss.—Tallahatchie Lumber Co. v. Cecil Lumber Co., 87 So. 449, 451, 124 Miss. 897, citing **Corpus Juris.**
Mo.—Rutledge v. Weisenborn, App., 142 S.W.2d 884.
N.H.—Pulsifer v. Walker, 159 A. 426, 85 N.H. 434, 81 A.L.R. 1052.
N.J.—Green Motors v. E. I. Du Pont De Nemours Co., 174 A. 542, 12 N.J.Misc. 759.
N.Y.—Clover Crest Farm v. New York Cent. Mut. Fire Ins. Co., 179 N.Y.S. 352, 189 App.Div. 548.
N.C.—Chatham v. C. C. Disher Chevrolet Co., 1 S.E.2d 117, 215 N.C. 88 —Harris v. Singletary, 137 S.E. 724, 193 N.C. 583.
S.C.—Campbell v. Life & Casualty Ins. Co. of Tennessee, 152 S.E. 18, 155 S.C. 63.
S.D.—J. B. Colt Co. v. Hayenga, 217 N.W. 187, 52 S.D. 201.
Tenn.—War Finance Corporation v. Ready, 2 Tenn.App. 61.
Tex.—Ruppert v. Hermleigh Co-operative Gin & Supply Co., Civ. App., 133 S.W.2d 305, 307, quoting **Corpus Juris**—Rhineland Union Gin v. Volunteer State Life Ins. Co., Civ.App., 113 S.W.2d 925, error dismissed—Cocke v. Southland Life Ins. Co., Civ.App., 75 S.W.2d 194, 200, error refused, citing **Corpus Juris**—Commercial Standard Ins. Co. v. Lee, Civ.App., 37 S.W.2d 789, error dismissed—Longenecker v. Ward County Water Improvement Dist. No. 3, 8 S.W.2d 306—Lipsitz v. Prideaux, Civ.App., 266 S.W. 199, 203, citing **Corpus Juris** —Rose Mfg. Co. v. Western Union Telegraph Co., Civ.App., 251 S.W. 337—Frost v. Smith, Civ.App., 207 S.W. 392. Reversed on other grounds Smith v. Frost, Com.App., 254 S.W. 926.
Vt.—Wetmore & Morse Granite Co. v. Ryle, 107 A. 109, 93 Vt. 245.
22 C.J. p 1015 note 76.
Letters or contracts collateral to issue see infra § 792 b.

Whether witness familiar with rules
In insurer's suit to cancel life policy, allowing cross-examiner's questions seeking to discover whether witness was familiar with certain rules was not abuse of discretion, as against objection that written rules themselves were best evidence. —Rushville Nat. Bank of Rushville v. State Life Ins. Co., 1 N.E.2d 445, 210 Ind. 492.

4. Ga.—Oliver v. Lane, 167 S.E. 116, 46 Ga.App. 136.
Kan.—Sullivan v. Finch, 36 P.2d 1023, 140 Kan. 399.
Ky.—Hazel v. Dougherty, 268 S.W. 823, 207 Ky. 89.
N.H.—Pulsifer v. Walker, 159 A. 426, 85 N.H. 434, 81 A.L.R. 1052.
N.J.—Rathbun v. Brancatella, 107 A. 279, 93 N.J.Law 222.
N.C.—Herring v. Ipock, 121 S.E. 758, 187 N.C. 459.
Tex.—Cochran v. William M. Rice Institute for Advancement of Literature, Science and Art, Civ.App., 123 S.W.2d 359, error refused.
22 C.J. p 1016 note 77.

5. Ala.—Wainwright v. Stuart, 168 So. 457, 27 Ala.App. 179.
Minn.—Belle City Malleable Iron Co. v. Clark, 215 N.W. 855, 172 Minn. 508.
Tex.—Cocke v. Southland Life Ins. Co., Civ.App., 75 S.W.2d 194, 200, error refused citing **Corpus Juris** —Burchard v. Woodward, Civ. App., 223 S.W. 707.
22 C.J. p 1016 note 78.

a part of the fact to be proved but is merely a collateral or subsequent memorial thereof.[6]

§ 788. Admissions as to Matters Evidenced by Writings or Records

There is a conflict of authority as to the application of the best evidence rule to admissions against interest.

It has been held in many jurisdictions that the best evidence rule does not apply to parol admissions in pais and against interest, or acts equivalent thereto, and that such admissions are competent as primary evidence against the party making them, although they involve what must necessarily be contained in a written instrument,[7] in a corporate vote,[8] or in a public record.[9] However, the rule that parol admissions as to the contents of a writing are admissible was held not applicable where the execution of the writing is directly involved, and there was no proof of its execution or existence.[10]

In other jurisdictions the best evidence rule is applied to parol proof of admissions by a party to the same extent as it is applied to other parol evidence; and the admissions are competent evidence only where other parol evidence of the fact to be proved would be competent.[11] This view applies, of course, to exclude parol evidence of admissions as to matters of record,[12] although it has been held proper to receive the admissions of a party as to the existence and contents of an original document on file as a public record in a foreign country, where an alleged copy of the document is shown to him and he acknowledges its correctness.[13] It has also been held that an admission by a party during his examination as a witness that a paper produced was a letterpress copy of an agreement which he had signed and a true copy of the original was binding on him as an admission.[14]

§ 789. Proving Results of Voluminous Writings and Records

The result of an examination of voluminous writings and records may be admitted in evidence, if the books, etc., are properly in evidence or their absence satisfactorily explained.

It is generally held, sometimes by virtue of statutory provisions, that where the results of voluminous facts contained in writings, or of the examination of many books and papers or records, are to be proved, and the necessary examination of this documentary evidence cannot be conveniently or satisfactorily made in court, it may be made by an expert accountant or other competent person and the results thereof may be proved by him,[15] provid-

6. Ala.—Reed v. State ex rel. Davis, 174 So. 498, 234 Ala. 306.
Kan.—Jackson v. Jones, 287 P. 603, 130 Kan. 488.
S.C.—Greer v. Equitable Life Assur. Soc. of U. S., 185 S.E. 68, 180 S.C. 162.
Tex.—Cocke v. Southland Life Ins. Co., Civ.App., 75 S.W.2d 194, error refused—Kansas City Life Ins. Co. v. Elmore, Civ.App., 226 S.W. 709.
Wash.—Proctor v. Appleby, 188 P. 481, 110 Wash. 403.
22 C.J. p 1016 note 79.

7. U.S.—Metropolitan Life Ins. Co. v. Hogan, C.C.A.Ill., 63 F.2d 654.
Mass.—Morrissey v. Powell, 23 N.E. 2d 411, 304 Mass. 268, 124 A.L.R. 1522.
Tex.—Mecaskey v. Bewley Mills, Civ.App., 8 S.W.2d 688, error dismissed.
Utah.—Bracken v. Dahle, 251 P. 16, 68 Utah 486.
22 C.J. p 1016 note 81, p 411 note 12.
Statement read to party
Carbon copy of written statement which witness testified had been read by plaintiff to defendant, who admitted that facts stated therein were true, was admissible in evidence.—Allen v. Creighton, Tex.Civ. App., 131 S.W.2d 47, error refused.

8. Mass.—Clarke v. Warwick Cycle Mfg. Co., 54 N.E. 887, 174 Mass. 434.

9. Ind.—Combs v. Union Trust Co., 46 N.E. 16, 146 Ind. 688.
22 C.J. p 1016 note 83.

10. Tex.—Sanders v. Lane, Com. App., 227 S.W. 946, reversing Lane v. Sanders, Civ.App., 201 S.W. 1018.

11. Minn.—Horton v. Charbourn, 17 N.W. 865, 31 Minn. 322.
22 C.J. p 1016 note 84, p 411 note 11.
Receipt as original evidence
In a shipper's action against a railway company to recover an overcharge of freight, receipted bills, delivered by the company to the shipper, showing the amount paid, were not secondary evidence, but were admissible as original evidence of admissions by the defendant.—Central of Georgia Ry. Co. v. Heaton Bros., 107 S.E. 628, 27 Ga.App. 237.

12. Ark.—Halliburton v. Fletcher, 22 Ark. 453.
22 C.J. p 1016 note 85.

13. N.Y.—Cociancich v. Vazzoler, 62 N.Y.S. 893, 48 App.Div. 462.
Or.—Payette First Nat. Bank v. Miller, 87 P. 892, 48 Or. 587.

14. Ala.—Barnett v. Wilson, 31 So. 521, 132 Ala. 375.
N.Y.—Haas v. Storner, 47 N.Y.S. 1100, 21 Misc. 661.

15. U.S.—North Western Refrigerator Line Co. v. Ervin, C.C.A. Miss., 78 F.2d 186, certiorari denied 56 S.Ct. 143, 296 U.S. 622, 80 L.Ed. 442—Kay v. Federal Rubber Co., C.C.A.Pa., 60 F.2d 454—Oklahoma Gas & Electric Co. v. Bates Expanded Steel Truss Co., D.C.Del., 34 F.2d 547—U. S. v. Aluminum Co. of America, D.C.N.Y., 35 F.Supp. 820—Jacob Dold Packing Co. v. U. S., 66 Ct.Cl. 525.
Ala.—Dean v. Thames, 175 So. 257, 234 Ala. 388—Navco Hardwood Co. v. Becks, 134 So. 4, 222 Ala. 631—Sovereign Camp, W. O. W., v. Hoomes, 122 So. 686, 219 Ala. 560—Hurst v. Kirby, 105 So. 872, 213 Ala. 640.
Cal.—Johnstone v. Morris, 292 P. 970, 210 Cal. 580—Skidmore v. Tuolumne County, 96 P.2d 178, 35 Cal.App.2d 525—Brown v. Ball, 12 P.2d 28, 123 Cal.App. 758—McPherson v. Great Western Milling Co., 186 P. 803, 44 Cal.App. 491.
Del.—Ætna Casualty & Surety Co. v. City of Wilmington, 157 A. 208, 17 Del.Ch. 285.
Ill.—People ex rel. Blair v. Ervin, 31 N.E.2d 789, 375 Ill. 435—Comstock v. Morgan Park Trust & Savings Bank, 11 N.E.2d 394, 367 Ill. 276, modifying 4 N.E.2d 653, 287 Ill.App. 613, transferred, see 2 N.E.2d 311, 363 Ill. 341—Le Roy State Bank v. J. Keenan's Bank, 169 N.E. 1, 337 Ill. 173, reversing

ed the books, papers, or records themselves are properly in evidence or the person objecting thereto has an opportunity to examine them, or their absence is satisfactorily explained,[16] the admission of

253 Ill.App. 51—People v. Chicago, B. & Q. R. Co., 133 N.E. 325, 300 Ill. 399—Chicago Title & Trust Co. v. Chicago Trust Co., 1 N.E.2d 87, 284 Ill.App. 247—Le Roy State Bank v. J. Keenan's Bank, 261 Ill. App. 441.
Ind.—Lester v. Hinkle, 153 N.E. 179, 90 Ind.App. 193.
Ky.—Bush v. Board of Education of Clark County, 37 S.W.2d 849, 238 Ky. 297—Esterman-Verkamp Co. v. Rouse, 278 S.W. 124, 211 Ky. 791.
Mich.—Michigan Bankers' Ass'n v. Ocean Accident & Guarantee Corporation, 264 N.W. 868, 274 Mich. 470—Thompson v. Walker, 234 N. W. 144, 253 Mich. 126.
Minn.—Watson v. Gardner, 236 N.W. 213, 183 Minn. 233.
Mo.—Benz v. Powell, 93 S.W.2d 877, 338 Mo. 1032—State ex rel. Sullivan County v. Maryland Casualty Co., 66 S.W.2d 537, 334 Mo. 259.
Mont.—In re Kostohris' Estate, 29 P.2d 829, 96 Mont. 226.
N.C.—Sineath v. Katzis, 12 S.E.2d 671, 218 N.C. 740—LaVecchia v. North Carolina Joint Stock Land Bank of Durham, 9 S.E.2d 489, 218 N.C. 35.
N.D.—Wishek v. U. S. Fidelity & Guaranty Co. of Baltimore, Md., 213 N.W. 488, 55 N.D. 321—Baird v. National Surety Co. of New York, 209 N.W. 204, 54 N.D. 91.
Okl.—Brazelton's Wholesale Cleaners & Dyers v. Cash, 78 P.2d 810, 182 Okl. 493—Hooven v. First Nat. Bank, 273 P. 257, 134 Okl. 217, 66 A.L.R. 1203—Bell v. Tackett, 272 P. 461, 134 Okl. 164—Pierce Petroleum Corporation v. Osage Coal Co., 271 P. 675, 133 Okl. 130.
Or.—Hubble v. Hubble, 279 P. 550, 130 Or. 177—Carrey v. Haun, 227 P. 315, 111 Or. 586.
Pa.—Diamond Alkali Co. v. Henderson Coal Co., 134 A. 386, 287 Pa. 232.
Tex.—Bush v. Davis, Civ.App., 147 S.W.2d 888, error dismissed—Fairbanks, Morse & Co. v. Carsey, Civ. App., 109 S.W.2d 985, error dismissed—Corbett v. Raymondville Independent School Dist., Civ.App., 56 S.W.2d 325, error dismissed—Byrd v. Taylor, Civ.App., 40 S.W. 2d 942, error dismissed—American Surety Co. of New York v. North Texas Nat. Bank, Civ.App., 14 S.W. 2d 88, reversed on other grounds Royal Indemnity Co. v. North Texas Nat. Bank, Com.App., 25 S.W.2d 822, modified 34 S.W.2d 249—Hartford Accident & Indemnity Co. v. Shaw, Civ.App., 8 S.W.2d 196, error dismissed.
Vt.—Standish v. Newton, 152 A. 41, 103 Vt. 85—Capital Garage Co. v. Powell, 130 A. 754, 99 Vt. 12.
Va.—White Sewing Mach. Co. v. Gilmore Furniture Co., 105 S.E. 134, 128 Va. 630.
Wash.—Nelson v. City of Seattle, 38 P.2d 1034, 180 Wash. 1—Foy v. Pacific Power & Light Co., 188 P. 514, 110 Wash. 248.
Wis.—Riesen v. School Dist. No. 4 of Village of Shorewood, 212 N.W. 783, 192 Wis. 283.
22 C.J. p 1017 note 88.

Rule not applicable

Ga.—Blackshear Mfg. Co. v. Harrell, 12 S.E.2d 328, 191 Ga. 433.

16. U.S.—Cabel v. U. S., C.C.A. Mass., 113 F.2d 998—Connecticut Importing Co. v. Frankfort Distilleries, C.C.A.Conn., 101 F.2d 79—Hartford Accident & Indemnity Co. v. Collins-Dietz-Morris Co., C. C.A.Okl., 80 F.2d 441—Berthold-Jennings Lumber Co. v. St. Louis, I. M. & S. Ry. Co., C.C.A.Mo., 80 F.2d 32, 102 A.L.R. 688, certiorari denied 56 S.Ct. 591, 297 U.S. 715, 80 L.Ed. 1001—Elmer Co. v. Kemp, C.C.A.Cal., 67 F.2d 948, modifying, D.C., Kemp v. Elmer Co., 56 F.2d 657—Federal Reserve Bank of San Francisco v. Idaho Grimm Alfalfa Seed Growers' Ass'n, C.C.A.Idaho, 8 F.2d 922, certiorari denied 46 S. Ct. 347, 270 U.S. 646, 70 L.Ed. 778.
Cal.—Shields v. Rancho Buena Ventura, 203 P. 114, 187 Cal. 569—Mayer v. Hazzard, 51 P.2d 189, 10 Cal.App.2d 1.
Colo.—Riant Amusement Co. v. Bailey, 255 P. 628, 81 Colo. 389—McDonald v. McFerson, 249 P. 496, 80 Colo. 4.
Del.—Ætna Casualty & Surety Co. v. Mayor and Council of Wilmington, 157 A. 208, 209, 17 Del.Ch. 285, citing **Corpus Juris**.
Ga.—U. S. Fidelity & Guaranty Co. v. Toombs County, 1 S.E.2d 411, 187 Ga. 544—Nowell v. Mayor and Council of Monroe, 171 S.E. 143, 47 Ga.App. 665, conforming to answer 171 S.E. 136, 177 Ga. 648.
Ill.—Hochschild v. Goddard Tool Co., 233 Ill.App. 56—Stevick v. Vennum, 227 Ill.App. 86.
Iowa.—Gregg v. Middle States Utilities Co. of Delaware, 293 N.W. 66, 132 A.L.R. 415—Farmers' Nat. Bank of Kingsley v. Pratt, 186 N. W. 924, 193 Iowa 406.
Mich.—Thompson v. Walker, 234 N. W. 144, 253 Mich. 126.
Mo.—Dawes v. Starrett, 82 S.W.2d 43, 336 Mo. 897—Strong v. Missouri-Lincoln Trust Co. of St. Louis, App., 263 S.W. 1038.
N.J.—Central R. Co. of New Jersey v. State Tax Department, 169 A. 489, 112 N.J.Law 5 affirming Central R. Co. of New Jersey v. State Board of Tax Appeals, 162 A. 889, 109 N.J.Law 395, and certiorari denied Central R. Co. of New Jersey v. State Tax Commission, 55 S. Ct. 79, 293 U.S. 568, 79 L.Ed. 667.
Ohio.—McNaughton v. Presbyterian Church of Coshocton County, 172 N.E. 561, 35 Ohio App. 443.
Okl.—Casselman v. State, 54 P.2d 678, 682, 58 Okl.Cr. 371, citing **Corpus Juris**—Consolidated Pipe Line Co. v. British American Oil Co., 21 P.2d 762, 163 Okl. 171—Cecil v. Montgomery, 218 P. 311, 95 Okl. 184.
Or.—Oregon Liquor Control Commission v. Coe, 99 P.2d 29—Hubble v. Hubble, 279 P. 550, 130 Or. 177.
Pa.—Ehmling v. D. L. Ward Co., 124 A. 181, 279 Pa. 527—Magen v. Gardiner, 101 Pa.Super. 14.
Philippine.—U. S. v. Hazley, 9 Philippine 384, 6 Off.Gaz. 43.
Tex.—Goodrich v. First Nat. Bank, Civ.App., 70 S.W.2d 609, error refused—Watson Co. v. Lone Star Service Station, Civ.App., 16 S.W. 2d 151, error dismissed—Ewing v. Wm. L. Foley, Inc., Civ.App., 239 S.W. 251, reversed on other grounds 280 S.W. 499, 115 Tex. 222, 44 A.L.R. 627—Cochran v. Hamblen, Civ.App., 215 S.W. 374, dismissed for want of jurisdiction.
Va.—Lyric Theatre Corporation v. Vaughan, 191 S.E. 600, 168 Va. 595.
Wash.—Fidelity & Deposit Co. of Maryland v. Bassett, 233 P. 325, 133 Wash. 77.
22 C.J. p 1017 note 88.

All books necessary

Books of account of public utility corporation were not admissible as basis for testimony of the corporation's accountant concerning its financial condition, to show that performance of alleged agreements to repurchase stock with stockholder would have impaired its capital, where the company's auditor admitted that books of subsidiary companies, which were not available, would be necessary for determination of the correct condition of the company on particular date or as basis for financial statement introduced in evidence.—Gregg v. Middle States Utilities Co. of Delaware, Iowa, 293 N.W. 66, 132 A.L.R. 415.

Records in adjoining room

The admission of testimony of a witness as to his examination of books and writings was held not error although the records were not offered in evidence, where they were in a room adjoining that where the testimony was taken and the adverse party had an opportunity to examine them.—Burns v. City of Nashville, 221 S.W. 828, 142 Tenn. 541.

such testimony being a matter resting largely in the discretion of the trial court.[17] It seems, however, that the jury are not bound by the result thus ascertained, but may make their own calculations from the books and papers in evidence.[18]

§ 790. Proof of Negative

The best evidence rule has been held to preclude proof by parol evidence that a writing does not show a certain fact; there is also authority to the contrary.

While it has been held that the best evidence rule precludes proof by parol evidence that an original private writing does not show a certain fact,[19] it has also been held that a person who has examined public records may testify that they do not contain a certain entry or show a certain matter, as shown infra § 807 d, that a witness, who has examined a corporate record for the purpose of showing the absence of a certain entry therein, may testify to the absence of such entry, and that the fact that the records of a corporation or association contain no entry relevant to the matter does not preclude parol evidence that certain action was not taken as shown infra § 810 a (2). Where books or papers are voluminous, the testimony of one who has examined them is obviously the proper method of proving that certain things are not shown thereby.[20]

§ 791. Fact of Making or Existence of Writing

The existence of a writing as distinct from its contents, or the nonexistence thereof, may be proved by parol evidence.

The existence of a writing as distinct from its contents may be proved by parol,[21] and parol evi-

Books not offered or received in evidence

Where defendants' account books and records, although present in court and identified as defendants' records, were not offered or received in evidence, nor a sufficient foundation for their reception laid under the common-law rule or under N.M. Code 1915, § 2187, the summaries and statements prepared by a public accountant from such records were inadmissible.—Hagan Coal Mines v. New State Coal Co., C.C.A.N.M., 30 F.2d 92.

Production of persons preparing exhibits

Exhibits and memoranda consisting of estimates respecting revenues and expenses and contributed revenues and credits of certain subsidiaries of railroad corporation in reorganization were properly rejected, where persons preparing them were not produced.—In re Chicago, R. I. & P. Ry. Co., C.C.A.Ill., 110 F.2d 395.

Possession of books by objectors

Account prepared, by an expert accountant based on partnership books and books of other companies controlled by defendant partners was admissible, where the books were kept entirely by the defendants or under their supervision.—Freeman v. Donohoe, 223 P. 431, 65 Cal. App. 65.

Untrue abstract

Purported audit of set of books and testimony relating to audit by one making purported audit, which was not true abstract from books, held improperly admitted.—Crusader Oil Producing Co. v. Davis, 123 So. 721, 168 La. 1085.

17. Mich.—Michigan Bankers' Ass'n v. Ocean Accident & Guarantee Corporation, 264 N.W. 868, 274 Mich. 470.
N.D.—Baird v. National Surety Co. of New York, 209 N.W. 204, 54 N. D. 91.
Okl.—Bell v. Tackett, 272 P. 461, 134 Okl. 164.
22 C.J. p 1017 note 89.

18. Ill.—Welsh v. Shunway, 83 N. E. 549, 232 Ill. 54, 71.
22 C.J. p 1017 note 90.

19. Ga.—Nix v. Armour Fertilizer Works, 151 S.E. 561, 40 Ga.App. 745.
22 C.J. p 1018 note 91.

20. Fla.—Kent v. Knowles, 133 So. 315, 317, 101 Fla. 1375, quoting Corpus Juris.
22 C.J. p 1018 note 95.

21. Ala.—Singer v. Alexander City Bank, 138 So. 263, 223 Ala. 677—Liberty Life Assur. Soc. v. Woodard, 121 So. 30, 219 Ala. 24—American Ry. Express Co. v. Stanley, 92 So. 642, 207 Ala. 380—Greil Bros. Co. v. McLain, 89 So. 505, 206 Ala. 212—Empire Securities Co. v. Webb, 81 So. 51, 202 Ala. 549.
Cal.—Crinella v. Northwestern Pac. R. Co., 259 P. 774, 85 Cal.App. 440.
Fla.—Firestone Service Stores of Gainesville v. Wynn, for Use and Benefit of Home Ins. Co., N. Y., 179 So. 175, 131 Fla. 94.
Ga.—Winkles v. Drake, 141 S.E. 67, 165 Ga. 335—Odum v. McArthur, 139 S.E. 870, 165 Ga. 103—Green v. Johnson, 113 S.E. 402, 153 Ga. 738—Butts v. Maryland Casualty Co., 184 S.E. 774, 52 Ga.App. 838—Alexander v. Richardson, 140 S.E. 638, 37 Ga.App. 407—Continental Trust Co. v. Bank of Harrison, 136 S.E. 319, 36 Ga.App. 149, conforming to answer to certified questions 134 S.E. 775, 162 Ga. 758, 50 A.L.R. 412—Lamon v. Perry, 125 S.E. 907, 33 Ga.App. 248—J. B. Colt Co. v. Pickron, 124 S.E. 550, 32 Ga.App. 715.
Idaho.—Union Cent. Life Ins. Co. v. Nielson, 114 P.2d 252.
Iowa.—Porter v. Tenant, 197 N.W. 79, 197 Iowa 200—Coad v. Pennsylvania Ry. Co., 175 N.W. 344, 187 Iowa 1025.
Mich.—Jacob v. Gratiot Central Market Co., 255 N.W. 331, 267 Mich. 262—Charvat v. Gildemeister, 192 N.W. 674, 222 Mich. 286.
Mo.—Reed v. Steward, 240 S.W. 206—State ex rel. Daniel v. Torrey, 33 S.W.2d 130, 225 Mo.App. 966—McCormick v. Travelers' Ins. Co., 264 S.W. 916, 215 Mo.App. 258.
Mont.—Stone-Ordean-Wells Co. v. Anderson, 212 P. 853, 66 Mont. 64.
Or.—Pacific States Fire Ins. Co. v. C. Rowan Motor Co., 260 P. 441, 122 Or. 665.
Tex.—Kansas City Life Ins. Co. v. Fisher, Civ.App., 83 S.W.2d 1063, error dismissed—Indemnity Ins. Co. of North America v. Garsee, Civ.App., 54 S.W.2d 817—Burrows v. Nacogdoches Nat. Farm Loan Ass'n, Civ.App., 7 S.W.2d 172, error dismissed.
Vt.—Berkley v. Burlington Cadillac Co., 131 A. 16, 99 Vt. 227—Wetmore & Morse Granite Co. v. Ryle, 107 A. 109, 93 Vt. 245.
Wash.—Colvin v. Auto Interurban Co., 232 P. 365, 132 Wash. 591—Hoptowit v. Brown, 198 P. 370, 115 Wash. 661.
W.Va.—Kirkhart v. United Fuel Gas Co., 102 S.E. 806, 86 W.Va. 79.
22 C.J. p 986 note 4.

Judgment of witness

It cannot be shown by parol evidence that an agreement was put in writing, when the witness is unable to state substantially the language thereof, the existence of an agreement being determined from the language of the parties, and not by the judgment of the witness.—Anderson v. Augustana College, 132 N.E. 826, 300 Ill. 72.

dence is admissible, according to the decisions of the courts, as primary and positive proof of the nonexistence of laws or other documentary evidence.[22]

2. APPLICATIONS OF RULE

§ 792. Private Writings

a. Contracts generally
b. Letters and telegrams
c. Notices
d. Accounts and books of account
e. Rules of railroad companies
f. Photographs
g. Other writings
h. Writings not within rule

a. Contracts Generally

(1) In general
(2) Requisites of writing

(1) In General

The best evidence rule applies to a written contract, unless it is only collaterally involved, but the existence of a contract as distinct from its terms may be proved by parol evidence.

The best evidence of the terms of a contract in writing is the writing itself, and parol evidence is not admissible unless the instrument is lost or its absence is otherwise satisfactorily explained.[23] Accordingly, where a contract or a material part thereof is contained in writings such as bills of lading, see infra this section, subdivision g, correspondence, see infra this section subdivision b, policies of insurance[24] or where a contract or material part

In addition to duplicate original
Admitting compensation claimant's testimony asserting timely filing of claim was not error where claimant previously identified copy, which was duplicate original of claim, as exact copy of claim.—Public Indemnity Co. v. Pearce, Tex.Civ.App., 56 S.W.2d 906, error dismissed.

22. Tex.—Willacy County Water Control and Improvement Dist. No. 1 v. Nelson, Civ.App., 108 S.W.2d 271—Ruggles v. Seedig, Civ.App., 247 S.W. 650.
Parol evidence of nonexistence of records see infra § 807.

23. U.S.—McGinley v. Commissioner of Internal Revenue, C.C.A., 80 F.2d 692—Berthold-Jennings Lumber Co. v. St. Louis, I. M. & S. Ry. Co., C.C.A.Mo., 80 F.2d 32, 102 A.L.R. 688, certiorari denied 56 S.Ct. 591, 297 U.S. 715, 80 L.Ed. 1001—Russell v. Heiner, C.C.A.Pa., 53 F.2d 1009, affirming, D.C., 45 F.2d 872—The Valmar, D.C.Pa., 38 F.Supp. 618.
Ariz.—Arizona Fire Ins. Co. v. Dillingham, 205 P. 589, 23 Ariz. 508.
Cal.—Ross v. Sweeters, 7 P.2d 334, 119 Cal.App. 716.
Ga.—Brenard Mfg. Co. v. Winn-Wilkes Drug Co., 120 S.E. 446, 31 Ga.App. 200.
Ind.—Zietlow v. Vickers, 181 N.E. 376, 94 Ind.App. 455.
La.—Hamill v. Moore, 193 So. 715, 194 La. 486.
Mass.—Potter v. Crocker, 142 N.E. 838, 248 Mass. 327.
Mich.—Fine Arts Corporation v. Kuchins Furniture Mfg. Co., 257 N.W. 822, 269 Mich. 277—Briggs & Turivas v. Adjustable Table Co., 189 N.W. 66, 219 Mich. 314—Zilwaukee Tp. v. Saginaw Bay City Ry. Co., 181 N.W. 37, 213 Mich. 61.
Minn.—Nygaard v. Maeser Fur Farms, 237 N.W. 7, 183 Minn. 388.
Mo.—Whittington v. Westport Hotel Operating Co., 33 S.W.2d 963, 326 Mo. 1117—Caldwell v. Barnsdall Refining Corporation, App., 150 S.W.2d 504—Schaeffer v. Reineke, App., 121 S.W.2d 213—Metropolitan Discount Co. v. Indermuehle, 272 S.W. 1037, 217 Mo.App. 326.
Mont.—Wilson v. Davis, 103 P.2d 149, 110 Mont. 356—Cheadle v. Bardwell, 26 P.2d 336, 95 Mont. 299.
N.J.—Rogers v. McKenna, 124 A. 777, 96 N.J.Eq. 386.
N.C.—Harris v. Singletary, 137 S.E. 724, 193 N.C. 583.
Pa.—City of Philadelphia v. National Surety Co., 173 A. 181, 315 Pa. 356—Colonial Mfg. Co. v. Carideo, 18 A.2d 731, 142 Pa.Super. 485—Michael v. Stuber, 73 Pa.Super. 390—First Nat. Bank & Trust Co. of Bethlehem v. Shaffer, 18 Lehigh Co. L.J. 371, affirmed 12 A.2d 916, 338 Pa. 244.
S.C.—Brabham v. Southern Express Co., 117 S.E. 368, 124 S.E. 368, certiorari denied American Ry. Express Co. v. Brabham, 43 S.Ct. 359, 261 U.S. 614, 67 L.Ed. 827.
S.D.—Bisson v. Farmers Ins. Co. of Minnehaha County, 268 N.W. 698, 64 S.D. 525—Avery Co. v. Peterson, 171 N.W. 204, 41 S.D. 442.
Tenn.—Wilson v. Wilson, 130 S.W.2d 140, 28 Tenn.App. 244—American Fruit Growers v. Hawkinson, 106 S.W.2d 564, 21 Tenn.App. 127—Southern Coal Co. v. Smith, 12 Tenn.App. 408.
Tex.—Federal Underwriters Exchange v. Walker, Civ.App., 134 S.W.2d 388, error granted—Dow v. Leecraft, Civ.App., 248 S.W. 1088—Mayhew & Isbell Lumber Co. v. Valley Wells Truck Growers' Ass'n, Civ.App., 216 S.W. 225.
W.Va.—Kirkhart v. United Fuel Gas Co., 102 S.E. 806, 86 W.Va. 79.
22 C.J. p 986 note 6.

Subsequent oral contract
Written contract, stating terms of subsequent oral agreement sued on, was admissible as best evidence.—Ketchum v. Conneaut Lake Co., 163 A. 534, 309 Pa. 224.

Receipted bill
(1) Where automobile was stolen from garage and damaged, receipted bill from professional repairman was not inadmissible as not best evidence.—Byalos v. Matheson, 159 N.E. 242, 328 Ill. 269, affirming 243 Ill. App. 60.

(2) In action for excessive demurrage charges paid, receipted freight bills of connecting carrier, by which goods were shipped to reconsignment point after delay for which excessive charges were made, were held admissible as best evidence, where identified by officer of plaintiff company as originals paid by it.—Buschow Lumber Co. v. Union Pac. R. Co., 276 S.W. 409, 220 Mo. App. 743.

Admission not erroneous
Mo.—Heart of America Lumber Co. v. Wyatt Lumber Co., 59 S.W.2d 800, 227 Mo.App. 794.

24. La.—Clay v. Liberty Industrial Life Ins. Co., 157 So. 838—Weisman Ins. Agency v. Bass, 127 So. 635, 14 La.App. 207.
N.C.—Union Indemnity Co. v. Perry, 158 S.E. 560, 200 N.C. 765.
Or.—Pacific States Fire Ins. Co. v. C. Rowan Motor Co., 260 P. 441, 122 Or. 665.
S.C.—Greer v. Equitable Life Assur. Soc. of U. S., 185 S.E. 68, 180 S.C. 162—Legrande v. Legrande, 182 S.E. 432, 178 S.C. 230, 102 A.L.R. 582.
22 C.J. p 986 note 10.

appears in applications for insurance,[25] maps, surveys, and drawings,[26] railroad tickets,[27] or subscriptions,[28] parol evidence thereof is inadmissible. A fortiori, the writing must be produced where the contract is one required by law to be in writing,[29] such as a contract to convey real estate or an interest therein,[30] or a conveyance or mortgage thereof, see infra § 796.

However, where the matter to be proved is simply that a contract was made, as distinct from its terms or provisions, the best evidence rule does not apply even though such contract was in writing, but the fact may be proved by parol,[31] and where the terms of a written contract are collateral to the issue they may be proved by parol evidence without producing the writing or accounting for its absence.[32]

Performance of contract. Parol evidence is not admissible to show the performance of a written contract according to its terms, unless the contract is lost or its absence is otherwise satisfactorily explained;[33] but this rule does not exclude parol evidence of what was actually done pursuant to a written contract,[34] nor does it require the production of a written report of work done under a contract for public improvements, even though the report is required by law to be made, where the purpose of making the report is other than to preserve evidence of the work done.[35]

(2) Requisites of Writing

In order to exclude parol evidence of the terms of a contract it must appear that the parties actually reduced their contract to writing before execution or performance. A supplemental parol agreement may be proved by parol evidence.

In order to exclude parol evidence of the terms of a contract on the ground that there is written evidence thereof, it must appear that the parties or their authorized agents actually reduced the material terms of the contract to writing and that the writing was intended to embody their agreement, for otherwise the contract still rests in parol and may be proved by parol notwithstanding the existence of a writing relating thereto,[36] such as a mem-

Where contract would perpetrate fraud
In action on insurance binder covering liability for damages resulting from blasting, where insurer claimed that insurance did not cover such liability, insured could prove by parol evidence terms of his application and character of protection insurer agreed to furnish knowing character of protection insured desired, since if the contract did not furnish this protection, it was a fraud on plaintiff.—Thompson-Cadillac Co. v. U. S. Casualty Co., 40 P.2d 170, 180 Wash. 481.

Where fact is not disputed parol evidence is admissible.—Legrande v. Legrande, 182 S.E. 432, 178 S.C. 230, 102 A.L.R. 582.

Terms of policy fixed by law
It has been held that an insurance policy need not be introduced in evidence, since the law fixes its terms. —Associated Employers' Reciprocal v. Brown, Tex.Civ.App., 56 S.W.2d 483, error dismissed.

25. Miss.—Afro-American Sons and Daughters v. Webster, 161 So. 318, 172 Miss. 602.
22 C.J. p 986 note 11.

Application also inadmissible
Application for fire insurance being inadmissible, because not attached to policy, parol evidence of contents was also inadmissible.—American Indemnity Co. v. Baldwin Motor Co., Tex.Civ.App., 19 S.W.2d 848, error dismissed.

26. Pa.—In re Change of Grade & Grading, Paving & Curbing of South Beatty St., Pittsburgh, 75 Pa.Super. 145.
22 C.J. p 987 note 12.

Explanatory testimony admissible
Mo.—State ex rel. State Highway Commission v. Bengal, App., 124 S.W.2d 687.

27. Ala.—Central of Georgia R. Co. v. Campbell, 64 So. 540, 10 Ala. App. 288.
Utah.—McCollum v. Southern Pac. Co., 88 P. 663, 31 Utah 494.

28. Kan.—Beeler v. Highland Univ. Co., 54 P. 295, 8 Kan.A. 89.
22 C.J. p 987 note 14.

29. N.Y.—In re Bernard's Estate, 26 N.Y.S.2d 767, 176 Misc. 132.

30. Ala.—Ricketts v. Birmingham St. R. Co., 5 So. 353, 85 Ala. 600.
Tex.—Jones v. Herring, Civ.App., 16 S.W.2d 325, error dismissed.

Rule not applicable
In an action for the breach of an agreement to sell real estate, where the statute of frauds was involved, and the case did not involve a lost instrument, the case did not come within the rule concerning secondary evidence.—Dillingham v. Dahlgren, 198 P. 882, 52 Cal.App. 322.

31. Or.—Pacific States Fire Ins. Co. v. C. Rowan Motor Co., 260 P. 441, 122 Or. 665.
22 C.J. p 987 note 20.

Note
Tex.—J. M. Radford Grocery Co. v. Estelline State Bank, Civ.App., 66 S.W.2d 1110, error dismissed.

Check
Ill.—Gold v. Rousso, 238 Ill.App. 427.

32. Ala.—Hale v. Brown, 99 So. 645, 211 Ala. 106.
Ark.—Dillinger v. Lee, 250 S.W. 332, 158 Ark. 374.
Ga.—Butts v. Maryland Casualty Co., 184 S.E. 774, 52 Ga.App. 838.
Ill.—Wolf v. People's Bank, 255 Ill. App. 127.
Miss.—Tallahatchie Lumber Co. v. Cecil Lumber Co., 87 So. 449, 451, 124 Miss. 897, citing **Corpus Juris.**
Tex.—Schebesta v. Stewart, Civ. App., 37 S.W.2d 781, error dismissed.
22 C.J. p 987 note 21.

Contract not collateral to issue
Ark.—T. J. Ellis & Co. v. Farrell, 225 S.W. 349, 146 Ark. 274.

33. Minn.—Dade v. Aetna Ins. Co., 56 N.W. 48, 54 Minn. 336.
22 C.J. p 987 note 17.

34. Ind.—Lee v. Hills, 66 Ind. 474.
22 C.J. p 987 note 18.

35. La.—Grady v. Desobry, 21 La. Ann. 132.
22 C.J. p 987 note 19.

36. U.S.—Marston v. Downing Co., C.C.A.Ga., 73 F.2d 94—Walker Grain Co. v. Blair Elevator Co., Tex., 254 F. 422, 166 C.C.A. 54.
Ga.—Eley v. Reese, 155 S.E. 24, 171 Ga. 212.
Iowa.—Riggs v. Gish, 205 N.W. 833, 201 Iowa 148.
Mich.—Jacob v. Gratiot Central Market Co., 255 N.W. 331, 267 Mich. 262.
Mo.—Cannon v. S. S. Kresge Co., 116 S.W.2d 559, 233 Mo.App. 173.
N.Y.—J. & H. Goodwin v. Dingfelder, 228 N.Y.S. 23, 223 App.Div. 742.
Ohio.—Guardian Life Ins. Co. of

orandum made by an agent who acted for one of the parties only[37] or whose agency was limited to bringing the parties together.[38] Where the immediate issue is whether there is or was a writing embodying the contract, it is erroneous to exclude parol evidence bearing on that issue on the assumption that such a writing exists.[39]

An oral promise made by one party in consideration of the execution of a written instrument by the other may be shown by parol evidence.[40] Also a supplemental parol agreement may be proved by parol evidence.[41]

Parol evidence of a valid verbal contract is not excluded under the best evidence rule by the fact that the contract is reduced to writing after it has been executed or performed.[42]

b. Letters and Telegrams

Ordinarily parol evidence is inadmissible to prove the contents of a letter or telegram.

As a general rule a letter is the best evidence of its own contents, and unless the letter itself is lost or its absence is explained, parol evidence of its contents is not admissible,[43] but the fact that a letter was received may be shown by parol in order to lay the foundation for the introduction of the letter in evidence.[44] Parol evidence is admissible where it is sought to prove the mere fact that a letter was written, and the fact is not an issue but only collaterally involved,[45] and even the contents of a letter may be proved by parol where its contents are not in issue.[46]

Telegrams. The best evidence of the contents of a telegram is the original message itself, and parol evidence of the contents of the message is admissible only where the original writing is lost or its absence is otherwise satisfactorily explained,[47] but in order that this rule may apply it must be shown that the message delivered to the operator was in writing, for as many telegrams are communicated orally by the sender to the operator the court cannot assume without proof that, in any particular case, the telegram was delivered to the operator in writing.[48] So also parol evidence is clearly admissible to prove the message actually delivered to the addressee, where it appears that, after transmis-

America v. Veser, 190 N.E. 405, 128 Ohio St. 200.
S.C.—Virginia-Carolina Chemical Co. v. Moore, 39 S.E. 346, 61 S.C. 166.
Tex.—Missouri State Life Ins. Co. v. Woodson, Civ.App., 256 S.W. 988.
Wash.—Meacham v. Dioguardi, 8 P.2d 293, 166 Wash. 684.
22 C.J. p 987 note 22.

37. Mass.—Tisdale v. Harris, 20 Pick. 9.
22 C.J. p 987 note 23.

38. N.Y.—Aguiree v. Allen, 10 Barb. 74, affirmed 7 N.Y. 543, Seld. 35.

39. Mich.—Kalamazoo Novelty Mfg. Works v. Macalister, 40 Mich. 84.

40. Pa.—Shughart v. Moore, 78 Pa. 469.
22 C.J. p 988 note 26.

41. Tex.—Banner Oil & Gas Co. v. Gordon, Civ.App., 235 S.W. 945, dismissed for want of jurisdiction.

42. N.Y.—Amies v. Wesnofske, 174 N.E. 436, 255 N.Y. 156, 73 A.L.R. 918, reversing 243 N.Y.S. 885, 230 App.Div. 761.
22 C.J. p 988 note 27.

43. Ala.—Sheehan v. Wilmot, 105 So. 909, 213 Ala. 687—Goodwin v. Riddle, 85 So. 433, 204 Ala. 216.
Cal.—First Nat. Bank v. De Moulin, 205 P. 92, 56 Cal.App. 313.
Ga.—Electric Paint & Varnish Co. v. Lunsford, 198 S.E. 277, 58 Ga.App. 270.
Kan.—Motor Car Sales Co. v. Brown, 223 P. 309, 115 Kan. 344—Carey v. Lewis, 202 P. 587, 110 Kan. 56.
Ky.—Keystone Gas Co. v. Allen, 14 S.W.2d 155, 227 Ky. 801—Staples v. Continental Ins. Co. of New York, 5 S.W.2d 265, 268, 223 Ky. 842, citing **Corpus Juris**—Baird & Williams v. Pewitt, 227 S.W. 297, 190 Ky. 323.
Mass.—Paull v. Radio, 200 N.E. 401, 293 Mass. 521.
Mo.—Findley v. Johnson, 142 S.W.2d 61—Brandtjen & Kluge v. Hunter, App., 145 S.W.2d 1009—McCartney v. Taylor Aircraft Co., App., 140 S.W.2d 95.
N.J.—Koch v. Franklin Mortgage & Title Guaranty Co., 176 A. 723, 13 N.J.Misc. 139, affirmed 181 A. 219, 115 N.J.Law 562.
N.Y.—Pedro y Seltzer, Inc. v. Brivio, 180 N.Y.S. 706, 191 App.Div. 110.
N.C.—Mahoney-Jones Co. v. Osborne, 127 S.E. 533, 189 N.C. 445.
R.I.—Gallivan v. O'Donnell, 171 A. 911, 54 R.I. 194.
Tex.—Service Mut. Ins. Co. of Texas v. White, Civ.App., 138 S.W.2d 273, error refused—Laster v. Texas Mut. Life Ins. Ass'n, Civ.App., 86 S.W.2d 842, error dismissed—Fowler v. Hardee, Civ.App., 16 S.W.2d 154—Tarwater v. Donley County State Bank, Civ.App., 277 S.W. 176.
W.Va.—Dalton v. Martin, 136 S.E. 47, 102 W.Va. 595.
Wis.—Jones v. Citizens' Savings & Trust Co., 171 N.W. 648, 168 Wis. 646.
22 C.J. p 988 note 31.

Whereabouts of person
It is not competent to prove the whereabouts of a person at a particular time by testimony as to the fact that a letter had been received from him from a particular place at such time, but the letter itself with the envelope and postmark should be introduced.—Hunter v. Hanson, 151 Ill.App. 446.

Weight of parol evidence
Parol evidence as to contents of letter, which is itself not in evidence, may possess probative value sufficient to establish contents of letter.—Sinclair Refining Co. v. Giddens, 187 S.E. 201, 54 Ga.App. 69.

44. Miss.—Baldridge v. Stribling, 57 So. 658, 101 Miss. 666.

Receipt presumed
Receipt of letters properly addressed and having requisite postage is presumed, but this does not abrogate best evidence rule as to proof of such letters.—Mahoney-Jones Co. v. Osborne, 127 S.E. 533, 189 N.C. 445.

45. Ga.—Hall v. Simmons, 179 S.E. 272, 50 Ga.App. 634.
22 C.J. p 989 note 34.

46. N.Y.—Griswold v. Learned, 9 N.Y.St. 242.
N.C.—State v. Hayes, 50 S.E. 623, 138 N.C. 660.

47. Ill.—Ginsberg v. Ginsberg, 198 N.E. 432, 361 Ill. 499.
22 C.J. p 989 note 36.

Exception where collaterally involved
Md.—American Fidelity Co. of Montpelier, Vt., v. State, 109 A. 99, 135 Md. 326.

48. Ind.—Terre Haute & I. R. Co. v. Stockwell, 20 N.E. 650, 118 Ind. 98.
22 C.J. p 989 note 37.

sion, the message was delivered to him orally without being reduced to writing.[49] The mere fact of the delivery of a telegram for transmission, as distinct from the contents thereof, may be proved by parol evidence without accounting for the writing,[50] and it has also been held that, where copies of telegrams relating to a matter about which there is no controversy have been filed on notice, it is proper to permit the operator who received the telegrams to state them, when such statement does not materially differ from the copies filed.[51]

c. Notices

The contents of a written notice cannot be proved by parol evidence unless its absence is satisfactorily explained.

While the contents of a notice ordinarily cannot be proved by parol evidence, unless the document itself is lost or its absence is satisfactorily explained,[52] except where the notice is collateral to the issue or is unimportant and not likely to have been preserved,[53] it has been held that the contents of a written notice of the dishonor of a note may be proved by parol;[54] and the fact that notice was given or received may be proved by parol without accounting for the absence of the writing,[55] especially where the notice is not in issue but is merely collaterally involved.[56]

Requirement of writing. Where a notice or notice and demand are required by law to be in writing and constitute an essential element of the right of action, so that without proof thereof the action cannot be maintained, the best evidence rule applies to make the writing primary evidence, and parol or other secondary evidence is not admissible until a proper foundation has been laid for its introduction.[57]

d. Accounts and Books of Account

Parol evidence is ordinarily inadmissible to prove written accounts or books of account, but the rule does not exclude parol evidence given by a witness whose testimony is founded on personal knowledge independent of the books.

As a general rule original written accounts and books of account are the best evidence of the matters they contain, and unless they are lost or their absence is otherwise satisfactorily explained their contents cannot be proved by parol;[58] but it has been held that parol evidence is admissible to show

49. Vt.—Durkee v. Vermont Cent. R. Co., 29 Vt. 127.

50. Ind.—Western Union Tel. Co. v. Cline, 35 N.E. 564, 8 Ind.App. 364.
22 C.J. p 989 note 39.

51. Tex.—International & G. N. R. Co. v. Prince, 14 S.W. 171, 77 Tex. 560, 19 Am.S.R. 795, followed in International & G. N. R. Co. v. Cock, 14 S.W. 242.

52. Ark.—Courtney v. G. A. Linaker Co., 293 S.W. 723, 173 Ark. 777.
Ga.—Lightfoot v. Head & Cain, 107 S.E. 609, 27 Ga.App. 148.
Ill.—New Stauton Coal Co. v. Industrial Commission, 136 N.E. 782, 304 Ill. 613.
Ky.—Boggess v. Insurance Co. of North America, 31 S.W.2d 899, 235 Ky. 529.
22 C.J. p 989 note 41.

53. N.C.—Jones v. Call, 93 N.C. 170.
22 C.J. p 989 note 42.

54. N.J.—Burgess v. Vreeland, 24 N.J.Law 71, 59 Am.D. 408.
N.Y.—Paton v. Lent, 11 N.Y.Super. 231.

55. Iowa.—Peterson v. Johnson, 212 N.W. 138, 205 Iowa 16.
22 C.J. p 989 note 43.

Proof by introducing notice
Tex.—St. Louis Southwestern Ry. Co. of Texas v. Seale & Jones, Civ. App., 247 S.W. 883, modified on other grounds, Com.App., 267 S.W. 676.

Posting of notices
Parol evidence is admissible to prove posting of notices.
Iowa.—Peterson v. Johnson, 212 N.W. 138, 205 Iowa 16.
Ohio.—State v. Hall, 13 Ohio App. 350.
22 C.J. p 989 note 43 [a].

56. Ala.—Polly v. McCall, 37 Ala. 20.
Mo.—Young v. Keller, 16 Mo.App. 550.

57. Ga.—Western Union Tel. Co. v. Bates, 20 S.E. 639, 93 Ga. 352.
22 C.J. p 989 note 45.

58. U.S.—Title Guaranty & Surety Co. v. State of Missouri ex rel. and to Use of Stormfeltz, C.C.A.Mo., 105 F.2d 496—National-Ben Franklin Fire Ins. Co. v. Stuckey, C.C.A. Ga., 86 F.2d 175—St. Joseph Loan & Trust Co. v. Studebaker Corporation, C.C.A.Ind., 66 F.2d 151, certiorari denied 54 S.Ct. 209, 290 U.S. 699, 78 L.Ed. 601—In re Wilson, C. C.A.Ill., 16 F.2d 177—The Erma S., D.C.Fla., 14 F.2d 696.
Ala.—Powell v. Pickett, 121 So. 23, 219 Ala. 18—Solomon v. Rogers, 98 So. 370, 210 Ala. 423—American Ry. Express Co. v. Stanley, 92 So. 642, 207 Ala. 380.
Cal.—Todd v. Lyon, 202 P. 899, 55 Cal.App. 67—Goatman v. Fuller, 195 P. 256, 50 Cal.App. 403.
Conn.—Lentine v. McAvoy, 136 A. 76, 105 Conn. 528.
Ga.—Cook v. Powell, 129 S.E. 546, 160 Ga. 831—Williamson-Inman & Co. v. Thompson, 187 S.E. 194, 53 Ga.App. 821—Nix v. Armour Fertilizer Works, 151 S.E. 561, 40 Ga. App. 745.
Ill.—Rothschild v. Sabath, 17 N.E. 2d 354, 297 Ill.App. 638—Hochschild v. Goddard Tool Co., 233 Ill. App. 56.
Ind.—Equitable Life Assur. Soc. of the U. S. v. Campbell, 150 N.E. 31, 85 Ind.App. 450, rehearing denied 151 N.E. 682, 85 Ind.App. 450.
Iowa.—Varga v. U. S. Fidelity & Guaranty Co., 245 N.W. 765, 215 Iowa 499—M. Shiloff Grocery Co. v. Eberline, 202 N.W. 86, 199 Iowa 562—Coad v. Pennsylvania Ry. Co., 175 N.W. 344, 187 Iowa 1025.
Kan.—Sheperdson v. Storrs, 217 P. 290, 114 Kan. 148.
Ky.—Harlan Coal & Coke Co. v. Davidson, 262 S.W. 936, 203 Ky. 580.
Miss.—Fatherree v. Griffin, 121 So. 119, 153 Miss. 570—Smith v. Chicago Portrait Co., 82 So. 145, 120 Miss. 277.
Mo.—Isreal v. Fanchon & Marco, App., 58 S.W.2d 774—Roland v. Gassman, App., 44 S.W.2d 658.
N.Y.—Lans v. Stern, 190 N.Y.S. 770.
Okl.—Batchelder v. Minks, 189 P. 194, 78 Okl. 149.
Pa.—Crunden Martin Mfg. Co. v. Turner, 129 A. 580, 283 Pa. 545—Muncey v. Pullman Taxi Service Co., 112 A. 30, 269 Pa. 97—Woodling v. Holshue, 14 Northumb.Leg. J. 301.
R.I.—Edward Wilkinson & Co. v. Universal Safety Ash Tray Co., 133 A. 658.
S.C.—W. T. Rawleigh Co. v. Thompson, 114 S.E. 702, 122 S.C. 43.
Tex.—J. E. Earnest & Co. v. Word, Com.App., 152 S.W.2d 325, revers-

that a particular fact does not appear in a book, or to show whether or not certain books contained a certain entry;[59] and the rule is also subject to qualification where it is necessary to prove the results of the examination of voluminous books, as shown supra § 789. The rule does not apply to exclude parol evidence given by witnesses whose testimony is founded on their personal knowledge independent of the books;[60] and where persons who can give such independent testimony are available

ing Word v. J. E. Earnest & Co., Civ.App., 129 S.W.2d 833—Thompson v. Prince, Civ.App., 126 S.W. 2d 574, error refused.

Va.—Sykes v. Brown, 159 S.E. 202, 156 Va. 881.

Wis.—Paschke v. Stoller, 207 N.W. 704, 189 Wis. 348.

22 C.J. p 989 note 46.

Where books in court

In action for rent, tried on counterclaim for loss caused by defective heating plant, permitting defendant to testify from memorandum taken from his original books, which were in court, was held not error.—Levy v. Hampton, 130 A. 536, 3 N.J.Misc. 1050.

Explanatory evidence

The admission of testimony as to the purpose and meaning of an entry of a specified amount on a company's ledger, and whether it referred to an amount received on a fieri facias, was held not objectionable on the ground that the writing was the best evidence.—Ward v. Speer, 111 S.E. 411, 153 Ga. 29.

Parol evidence of margin of profit on cash sales held admissible, in action on fire policy, to prove loss.—Massachusetts Fire & Marine Ins. Co. v. Schneider, C.C.A.Ga., 28 F.2d 658, certiorari denied 49 S.Ct. 264, 279 U.S. 844, 73 L.Ed. 989.

Evidence considered

(1) While testimony respecting entries in books of account should have been excluded, court will cast accounts between parties, where defendant, after objecting to such testimony, invoked result of examination by himself of such books.—Brookfield Co. v. Mart, 10 P.2d 594, 139 Or. 495.

(2) Admission of account of ten distinct items and checks representing loans of former employee to corporation was held not obnoxious to best evidence rule.—Bland v. Paradice Colonization Co., La.App., 146 So. 778.

(3) Where a stenographer made out certificates as to analysis of cotton seed from the books in the laboratory, and the correctness of the contents of the certificates was authenticated by an examination under oath of the person who made the analysis, who had personal knowledge of the correctness of the certificates, the certificates were properly admitted in evidence over the objection that they were not the original certificates and that the books in the laboratory contained the original and the best evidence.—Harris, Cortner & Co. v. Union Cotton Oil Co., 94 So. 559, 208 Ala. 535.

(4) In an action on a note given by one copartner to another, where it was asserted that over fifty thousand dollars had been charged to the payee copartner for which the maker had not accounted, and drafts and checks claimed to have been charged to the payee's account were introduced in connection with the payee's testimony, the entire bank account of the payee was admissible, despite the contention that it was not the best evidence, to show that checks and drafts were not charged to his account as claimed.—Gray v. Stolley, Tex.Civ.App., 230 S.W. 866.

Evidence held admissible as best that could be obtained.

U.S.—Lumbermen's Mut. Ins. Co. of Mansfield, Ohio, v. Johnson Lumber Co., C.C.A.Ga., 53 F.2d 940.

Mo.—State ex rel. and to Use of Missouri Poultry & Game Co. v. Nolte, App., 229 S.W. 273.

59. Me.—Waldron v. Priest, 51 A. 235, 96 Me. 36.

22 C.J. p 990 notes 47, 48.

Proof of negative generally see supra § 790.

In Georgia

(1) The rule stated in the text has been applied.—Perry v. Camilla Cotton Oil & Fertilizer Co., 111 S.E. 823, 28 Ga.App. 512.

(2) However, it has also been held that parol evidence is not admissible to show what books of account do not contain.—Nix v. Armour Fertilizer Works, 151 S.E. 561, 40 Ga.App. 745—22 C.J. p 1018 note 91.

60. Cal.—Feder v. Bryson, 295 P. 546, 111 Cal.App. 448—Edwards v. California Sweet Potato Corporation, 286 P. 733, 104 Cal.App. 715—Maguire v. Cunningham, 222 P. 838, 64 Cal.App. 536.

Conn.—Venezia v. Town of Fairfield, 172 A. 90, 118 Conn. 325.

D.C.—New Arcade Co. v. Owens, 258 F. 965, 49 App.D.C. 65.

Ga.—Payne v. Franklin County, 116 S.E. 627, 155 Ga. 219—Mayor and Council of Buford v. Medley, 197 S.E. 494, 58 Ga.App. 48—Villa Rica Mfg. Co. v. General American Life Ins. Co., 190 S.E. 49, 55 Ga.App. 328—Samples v. Ashley, 179 S.E. 745, 51 Ga.App. 109—Bennett v. Danforth, 137 S.E. 285, 36 Ga.App. 466—Booth v. Schmoller & Mueller Piano Co., 122 S.E. 636, 32 Ga.App. 35.

Idaho.—McCornick & Co., Bankers, v. Tolmie Bros., 243 P. 355, 42 Idaho 1—Ashley & Rumelin, Bankers, v. Brady, 238 P. 314, 41 Idaho 160.

Ill.—North American Life Ins. Co. v. Colonial Trust & Savings Bank, 236 Ill.App. 464.

Me.—Mansfield v. Gushee, 114 A. 296, 120 Me. 333.

Mass.—Koski v. Haskins, 128 N.E. 427, 236 Mass. 346.

Mich.—New Jersey Title Guarantee & Trust Co. v. McGrath, 214 N.W. 195, 197, 239 Mich. 404, quoting **Corpus Juris**—McCulloch v. Von Zellen, 187 N.W. 350, 218 Mich. 278.

Minn.—Larson v. Citizens' State Bank of Westbrook, 172 N.W. 125, 142 Minn. 334.

Mo.—Miller v. Great American Ins. Co. of New York, App., 61 S.W. 2d 205—Craighead v. Roberts, App., 263 S.W. 536.

N.J.—Ackerman v. Somerset Bus Co., 174 A. 343, 12 N.J.Misc. 660.

N.M.—Rarey v. McAdoo, 205 P. 731, 28 N.M. 14.

Okl.—Penner v. International Harvester Co. of America, 41 P.2d 843, 171 Okl. 41—Guest v. Shamburger, 251 P. 97, 120 Okl. 164.

Or.—Dockery v. Gardner, 15 P.2d 481, 141 Or. 64.

Pa.—Perry v. Ryback, 153 A. 770, 302 Pa. 559—Vondersmith v. Kloidt, 17 A.2d 706, 143 Pa.Super. 170—Barr v. Walsh, 86 Pa.Super. 584—In re Croushore's Estate, 79 Pa.Super. 286.

Tex.—Interstate Electric Co. v. Roberts-Christian Electric Co., Civ. App., 82 S.W.2d 1070, 1072, citing **Corpus Juris**—Salinas v. Salinas, Civ.App., 77 S.W.2d 568, error dismissed—Sunshine Oil Corporation v. Dooley, Civ.App., 238 S.W. 357.

Wash.—Schultz v. Wells Butchers' Supply Co., 275 P. 737, 151 Wash. 382.

22 C.J. p 990 note 50.

Proof of mechanic's lien

Where a statute subjecting buildings to liens for debts contracted for materials furnished therefor does not prescribe the kind of evidence necessary to prove that the debt was contracted, the delivery of the material or the performance of labor may be proved by parol, although custom and convenience has introduced the practice of using the original books of entry, supported by the oath of the party to substantiate such charges.—Church v. Davis, 9

and can readily be called as witnesses, or do in fact testify, the books of account are frequently excluded as being inferior evidence, especially where such persons made the book entries containing the facts to be proved.[61] Also books of account are best evidence only of what the books contain, and it has been held that a party may explain, contradict, or supplement an account as shown by books by competent evidence.[62]

Parol evidence is admissible to prove matters where no record thereof was kept in books.[63]

e. Rules of Railroad Companies

Ordinarily parol evidence is not admissible to prove the written or printed orders, rules, or regulations of a railroad company.

The written or printed orders, rules, or regulations of a railroad company concerning the management and running of its trains and the duties of its employees cannot be proved by parol evidence without accounting for failure to produce the regulations, etc., themselves,[64] unless the witness is able to state what such orders, rules, or regulations are, on his own personal knowledge and recollection, independent of the written or printed evidence thereof,[65] or unless the rules are only collaterally involved.[66] Parol evidence is not excluded where it does not appear that any written or printed rules exist, or where it is shown that the rules in question were not written or printed,[67] but where it appeared that one railroad company was managed by another it has been presumed that there was an order or resolution of the latter extending its printed rules and regulations over the operation of the former.[68] The fact that certain rules were not in force on a given date and had not then been put into the hands of the employees is susceptible of proof by the testimony of any one cognizant of the fact;[69] and on the question as to what was actually done, as distinct from what the rules or regulations required, parol evidence is competent.[70]

f. Photographs

Generally parol evidence is inadmissible to prove what is shown by a photograph, but there is some contrary authority with respect to X-rays.

An ordinary photograph is the best evidence of what is shown thereby, and parol evidence on the subject is not admissible without accounting for failure to produce the photograph itself.[71] While it is usually considered that the same rule applies to X-ray photographs,[72] in some cases expert testimony as to what X-rays showed was held prop-

Watts, Pa., 304—40 C.J. p 463 note 37.

Statute not exclusive

A statute providing for admission in evidence of entries in books of account under certain circumstances, is not exclusive.—Hawkins v. Central Foundry Co., 50 P.2d 685, 174 Okl. 397—Howerton v. Joplin Supply Co., 232 P. 104, 105 Okl. 171.

Where information gleaned from books themselves, testimony is not admissible.

N.J.—Weisbond v. Schultz, 126 A. 663, 2 N.J.Misc. 1132.

Tenn.—Equitable Trust Co. v. Central Trust Co., 239 S.W. 171, 145 Tenn. 148.

61. U.S.—R. Hoe & Co. v. Commissioner of Internal Revenue, C.C.A., 30 F.2d 630.

Cal.—Argue v. Monte Regio Corporation, 2 P.2d 54, 115 Cal.App. 575.

Ga.—Dixon v. Sol Loeb Co., 120 S.E. 31, 31 Ga.App. 165.

22 C.J. p 991 note 51.

62. Okl.—Antrim Lumber Co. v. Snell, 36 P.2d 920, 169 Okl. 314.

63. U.S.—National-Ben Franklin Fire Ins. Co. v. Stuckey, C.C.A. Ga., 86 F.2d 175—Hoopes Bros. & Thomas Co. v. Trower, C.C.A.Pa., 63 F.2d 259.

Mont.—Flint Creek Lodge No. 11, A. F. & A. M., v. Brown, 264 P. 394, 81 Mont. 573.

64. U.S.—Schroble v. Lehigh Valley R. Co., C.C.A.N.Y., 62 F.2d 993.

Ala.—Louisville & N. R. Co. v. Harper, 83 So. 142, 203 Ala. 398.

Cal.—Wilson v. Atchison, T. & S. F. Ry. Co., 45 P.2d 372, 6 Cal.App. 2d 735.

Ill.—Franks v. Baltimore & O. S. W. R. Co., 269 Ill.App. 129.

Tex.—Torres v. Kansas City, M. & O. Ry. Co. of Texas, Civ.App., 35 S.W.2d 229, 230, citing **Corpus Juris.**

22 C.J. p 992 note 56.

Schedules required by law

Neb.—Rose v. Chicago & N. W. Ry. Co., 197 N.W. 952, 111 Neb. 783.

65. N.Y.—Devoe v. New York Cent., etc., R. Co., 66 N.E. 568, 174 N.Y. 1, reversing 75 N.Y.S. 136, 70 App. Div. 495.

66. N.Y.—Oldenburg v. New York Cent., etc., R. Co., 9 N.Y.S. 419, 422, affirmed 11 N.Y.S. 689.

22 C.J. p 992 note 58.

67. Ind.—Pittsburgh, C., C. & St. L. R. Co. v. Martin, 61 N.E. 229, 157 Ind. 216.

22 C.J. p 992 note 59.

68. Ind.—Cincinnati, H. & D. R. Co. v. McMullen, 20 N.E. 287, 117 Ind. 439, 10 Am.S.R. 67.

69. Pa.—Dougherty v. Philadelphia & R. R. Co., 33 A. 340, 171 Pa. 457.

22 C.J. p 992 note 61.

70. Ky.—Cincinnati, N. O. & T. P. R. Co. v. Jones, 197 S.W. 932, 177 Ky. 485.

71. N.Y.—Marion v. B. G. Coon Constr. Co., 141 N.Y.S. 647, 157 App.Div. 95, affirmed 110 N.E. 444, 216 N.Y. 178.

As evidence of facts shown

Where the accuracy and authenticity of photographs of the railroad and street car tracks and surroundings at the place of an accident were not questioned, it was error to exclude them on the ground that the situation was better described by the evidence.—McCrotty v. Baltimore & O. S. W. R. Co., 223 Ill.App. 390.

Effect of photograph

Refusal to permit expert to answer question respecting his testimony after examining picture of kidneys in standard medical work, on ground picture was best evidence was not error.—Kirkpatrick v. Wells, 6 S.W.2d 591, 319 Mo. 1040.

72. U.S.—Gay v. U. S., C.C.A.Ill., 118 F.2d 160.

Iowa.—Daniels v. Iowa City, 183 N. W. 415, 191 Iowa 811—Lang v. Marshalltown Light, Power & Ry. Co., 170 N.W. 463, 185 Iowa 940.

N.Y.—Gursslin v. Helenboldt, 21 N. Y.S.2d 269, 259 App.Div. 1064.

Okl.—Patrick & Tillman v. Matkin, 7 P.2d 414, 154 Okl. 232.

W.Va.—Neill v. Fidelity Mut. Life

erly admitted,[73] especially where no demand was made for the production of the X-rays,[74] and it has also been considered that such photographs are not within the rule, and that the opinion of experts as to what they show is the best evidence,[75] and that X-rays are admissible as evidence only when supported by the testimony of the person taking them or an expert who knew them to show accurately the true condition of the object represented thereby.[76] Of course, testimony as to actual conditions, based on the witness' personal knowledge cannot be excluded on an objection that an X-ray photograph is the best evidence.[77]

g. Other Writings

The best evidence rule has been applied to many other writings.

The best evidence rule has been applied to various other writings and, unless the absence of the writing is satisfactorily explained, parol evidence has been held inadmissible to prove the contents of, among other instruments, assignments,[78] bills,[79] bills of lading,[80] bonds,[81] and wills.[82] Also, the rule has been held to exclude parol evidence of the contents of checks, drafts, or promissory notes,[83] plans,[84] memoranda,[85] estimates,[86] the filing of a claim,[87] or standard life tables.[88]

In addition thereto, parol evidence has been held inadmissible to prove the rating of a person on the

Ins. Co., 195 S.E. 860, 119 W.Va. 694.

22 C.J. p 992 note 64.

Corpus Juris has been cited in a case which held that evidence as to what X-rays showed should have been admitted, the record showing that the photographs themselves could not be produced.—American Nat. Ins. Co. v. Points, Tex.Civ.App., 81 S.W.2d 762, 766.

73. Tex.—Federal Underwriters Exchange v. Ener, Civ.App., 126 S.W. 2d 769, error dismissed, judgment correct.

74. N.Y.—Marion v. B. G. Coon Constr. Co., 141 N.Y.S. 647, 157 App.Div. 95, affirmed 110 N.E. 444, 216 N.Y. 178.

75. Or.—Vale v. Campbell, 263 P. 400, 401, 123 Or. 632, citing **Corpus Juris.**

Tex.—Maryland Casualty Co. v. Dicken, Civ.App., 80 S.W.2d 800, error dismissed.

Radiographs

Ind.—Lafayette St. Ry. v. Ullrich, 168 N.E. 709, 92 Ind.App. 202, denying rehearing 166 N.E. 257, 92 Ind.App. 202.

76. Or.—Vale v. Campbell, 263 P. 400, 123 Or. 632.

77. Ky.—Bolar v. Browning, 181 S. W. 1109, 168 Ky. 273.

Mo.—Boyle v. Bunting Hardware Co., App., 238 S.W. 155.

78. Cal.—Mutual Building & Loan Ass'n of Long Beach v. Corum, 60 P.2d 316, 16 Cal.App.2d 212.

Iowa.—Harvey v. Phillips, 186 N.W. 910, 193 Iowa 231.

Mo.—Ford v. Wabash Ry. Co., 300 S.W. 769, 318 Mo. 723, affirming, App., 266 S.W. 1032—Piper v. Wayne Mfg. Co., App., 253 S.W. 437.

N.Y.—Pedro y Seltzer, Inc., v. Brivio, 180 N.Y.S. 706, 191 App.Div. 110—Schack v. Wormser, 185 N.Y. S. 580.

S.C.—Cain v. Whitlock, 182 S.E. 752, 178 S.C. 289.

Tex.—U. S. Fidelity & Guaranty Co. v. Henderson County, Civ.App., 253 S.W. 835, affirmed, Com.App., 276 S.W 203, in which motion for rehearing is overruled 276 S.W. 1119.

5 C.J. p 1019 note 33—22 C.J. p 988 note 29.

Rule not applicable

Assignee of open account may testify in suit thereon that he owns account as shown by assignment, where record of assignment was in evidence.—Sykes v. Caldwell, Tex. Civ.App., 282 S.W. 282.

Blanks filled in

It has also been held improper to admit an assignment in which blanks had been filled in, under a written power of attorney, without producing the power.—Wabash R. Co. v. Meyer, 119 Ill.App. 104—22 C.J. p 988 note 30.

79. Pa.—Hindman v. Pittsburgh Trust Co., 109 A. 876, 266 Pa. 204.

80. Ill.—Wood & Co. v. Illinois Cent. R. Co., 240 Ill.App. 6.

Pa.—Sims v. Pennsylvania R. Co., 123 A. 676, 679, 279 Pa. 111, citing **Corpus Juris.**

22 C.J. p 991 note 53.

Claim for shortage or overcharge

A witness who made out bills of lading or shipping receipts may not state their contents nor testify that the shipment was such as the paper described, unless it be in a case where either shipper or consignee are impleading the carrier for shortage or overcharge.—Coad v. Pennsylvania Ry. Co., 175 N.W. 344, 187 Iowa 1025.

81. Cal.—Equitable Trust Co. of New York v. Western Land & Power Co., 176 P. 876, 38 Cal.App. 535.

Ga.—James v. Hudson, 152 S.E. 829, 170 Ga. 321.

22 C.J. p 988 note 28.

82. Ky.—Clark's Adm'x v. Callahan, 288 S.W. 301, 216 Ky. 674.

N.C.—Fawcett v. Fawcett, 132 S.E. 796, 191 N.C. 679.

Ohio.—Raymond v. Hearon, 164 N.E. 644, 30 Ohio App. 184.

22 C.J. p 991 note 52.

Former will

Ky.—Leary v. Leary, 262 S.W. 293, 203 Ky. 344.

83. U.S.—Leonard, Crossett & Riley v. Whelay, C.C.A.Idaho, 44 F.2d 692.

Ga.—Jones v. Berry, 151 S.E. 538, 40 Ga.App. 813—O. W. Waters & Co. v. Whitehurst, 131 S.E. 188, 34 Ga.App. 815.

Ill.—Cusanelli v. Steele, 5 N.E.2d 296, 287 Ill.App. 490.

Ind.—Edmondson v. Friedell, 163 N. E. 89, 200 Ind. 298.

Ky.—Prater v. Hays Elkhorn Coal Co., 70 S.W.2d 378, 253 Ky. 713.

Minn.—Farmers' State Bank of Iona v. Gehlsen, 212 N.W. 599, 170 Minn. 341.

Mont.—Burnett v. Burnett, 219 P. 831, 68 Mont. 546.

S.C.—Mull v. Easley Lumber Co., 113 S.E. 356, 121 S.C. 155.

22 C.J. p 986 note 9, p 992 notes 69, 70.

84. Cal.—Milwaukee Bldg. Co. v. Wetzel, 270 P. 382, 93 Cal.App. 775.

Tex.—Capitol Hotel Co. v. Rittenberry, Civ.App., 41 S.W.2d 697, error dismissed.

85. Ga.—Scott v. Kelly-Springfield Tire Co., 125 S.E. 773, 33 Ga.App. 297.

N.Y.—Ernst Zobel Co. v. Canals, 176 N.Y.S. 537, 188 App.Div. 231.

86. Ala.—Hines v. Laurendine, 84 So. 780, 17 Ala.App. 350.

87. S.C.—Ancrum v. State Highway Department, 161 S.E. 98, 162 S.C. 504.

88. Iowa.—Knott v. Peterson, 101 N.W. 173, 125 Iowa 404.

Kan.—Erb v. Popritz, 52 P. 871, 59 Kan. 264, 68 Am.S.R. 362.

books of a commercial agency,[89] written instructions given to an officer with respect to serving a writ,[90] the contents of "time-checks" made out to employees of a railroad company,[91] a writing alleged to constitute a libel,[92] the presentation of a claim to a county auditor,[93] the terms of a bet, where such terms were evidenced by a written memorandum,[94] an application for an internal revenue license to sell liquor,[95] the transfer of a liquor license,[96] rights under a license,[97] the opinion of an attorney given in writing,[98] or instructions contained in an illustrated catalogue as to the management of an engine.[99]

On the question whether the personal property of decedent's estate is sufficient to pay the debts, it has been considered that the inventory is the best evidence; and testimony based on opinion is not admissible;[1] but, on the other hand, it has been held that the inventory and appraisement of the estate are not as high a grade of evidence as the testimony of the administrator or the appraisers,[2] and the fact that a witness' knowledge of decedent's financial condition was derived in part from proceedings had in the probate court in settlement of decedent's estate has been held not to render the witness' testimony inadmissible as being secondary evidence.[3]

As the log book of a vessel is not proof per se of the facts therein stated except in certain cases specified by statute, it is proper to admit parol evidence to establish the time of sailing of a vessel and to show the course and termination of her voyage, without first proving that the log book is missing or lost.[4] However, where it is sought to show what was in a log book of a ship, one who merely had access to the records cannot testify as to what they contain.[5]

The scale bill and the record thereof required by law are the best evidence of the number of feet in the logs scaled and measured; and where the scale has been made as provided by law, the scale bill should be produced or some sufficient reason should be shown for its nonproduction, before parol evidence of its contents will be received.[6] However, it has been held that, where logs were in fact surveyed by a deputy surveyor general but his report was not approved or recorded by the surveyor general, it was competent to prove by the deputy the fact that he made the survey and the result thereof.[7]

h. Writings Not within Rule

Some writings or inscriptions which cannot be classified as documents have been held not to come within the operation of the best evidence rule.

There are certain writings or inscriptions which cannot be properly classified as documents, and which the courts decline to hold as the best evidence of what they contain, but regard as simply matters of description or identity and primarily susceptible of proof by parol evidence.[8] Among writings of this class are words written on the tag of a valise,[9] or on labels attached to jugs or decanters and indicating their contents.[10] The same view has been expressed with respect to the mark or brand of a manufacturing company,[11] but on the other hand a card attached to goods, stating the name of the manufacturer and the character of the goods, has been held to be technically the best evidence of its contents, although slight evidence of its loss was sufficient to lay the foundation for parol evidence.[12]

§ 793. Particular Facts and Transactions

The application of the best evidence rule to par-

89. Iowa.—Deere v. Bagley, 45 N. W. 557, 80 Iowa 197.
Tex.—Bruce v. Bruce, Civ.App., 89 S.W. 435.

90. Me.—Thornton v. Moody, 11 Me. 253.

91. Kan.—Chicago, K. & N. R. Co. v. Brown, 24 P. 497, 44 Kan. 384.

92. Pa.—Gray v. Pentland, 2 Serg. & R. 23, 4 Serg. & R. 420.
37 C.J. p 73 note 34.

93. Iowa.—McGuire v. Iowa County, 111 N.W. 34, 133 Iowa 636.

94. Ind.—Frazee v. State, 58 Ind. 8.

95. Tex.—Barnes v. State, 174 S.W. 1051, 76 Tex.Cr. 365.

96. Mo.—Hill v. Sheridan, 107 S.W. 426, 128 Mo.App. 415.

97. Mo.—Gosnell v. Camden Fire Ins. Ass'n of Camden, N. J., App., 109 S.W.2d 59.

98. Pa.—Commonwealth v. Beaman, 57 Pa.Super. 132.

99. Iowa.—Richardson v. Douglas, 69 N.W. 530, 100 Iowa 239.

1. La.—Semple v. Fletcher, 3 Mart. N.S. 382.
22 C.J. p 992 note 80.

2. Ala.—McPeters v. Phillips, 46 Ala. 496.

3. Minn.—Phelps v. Winona & St. P. R. Co., 35 N.W. 273, 37 Minn. 485, 5 Am.S.R. 867.

4. U.S.—U. S. v Gibert, C.C.Mass., 25 F.Cas.No.15,204, 2 Sumn. 19.

5. Tenn.—De Marcus v. De Marcus, 12 Tenn.App. 643.

6. Wis.—Steele v. Schricker, 12 N. W. 396, 55 Wis. 134.
38 C.J. p 202 note 49.

7. Minn.—Antill v. Potter, 71 N.W. 935, 69 Minn. 192.

8. Ill.—Mitchell v. Louisville & N. R. Co., 35 N.E.2d 81, 310 Ill.App. 563, conforming to mandate 31 N. E.2d 965, 375 Ill. 545, reversing 27 N.E.2d 861, 305 Ill.App. 635.

9. Ala.—Benjamin v. State, 67 So. 792, 793, 12 Ala.App. 148.
Mass.—Commonwealth v. Morrell, 99 Mass. 542.

10. Mass.—Commonwealth v. Blood, 11 Gray 74.

11. Ala.—Piano v. State, 49 So. 803, 161 Ala. 88.

12. Kan.—Atchison, T. & S. F. R. Co. v. Palmore, 75 P. 509, 68 Kan. 545, 64 L.R.A. 90.

ticular facts and circumstances is set forth infra §§ 794–803.

Examine Pocket Parts for later cases.

§ 794. —— Title to Real Estate

Where title to real property is in issue, parol evidence is inadmissible to prove title unless the absence of deeds, patents, wills, mortgages, or other muniments of title is satisfactorily explained.

It is elementary law that where the title to real property is in issue, the deeds, patents, wills, mortgages, or other muniments of title constitute the best evidence, and parol evidence is not admissible to prove title unless their absence is satisfactorily explained.[13] However, parol evidence is admissible as tending to prove or disprove fraud, even though it bears on and may affect the question of title;[14] and evidence that there was a deed prior to the one introduced in evidence is not a violation of the rule.[15]

Where title not in issue. Where the title to real property is not in issue but is only collaterally involved, or where it is necessary for a party to make only a prima facie showing of ownership, the best evidence rule is not applicable, and the fact of title or prima facie right of ownership may be established by parol evidence.[16] However, although the title is only collaterally involved, yet, if it appears that the knowledge of the witness is derived from a written instrument affecting the title, the best evidence rule applies and the testimony is inadmissible unless the instrument is produced or its absence explained.[17]

§ 795. —— Possession of Real Property

Ordinarily parol evidence is admissible to prove possession of real property notwithstanding the existence of written evidence.

Parol evidence is always admissible for the purpose of proving mere possession of real property, notwithstanding the existence of written evidence such as deeds or other muniments of title.[18] The

13. U.S.—Richardson's Lessee v. Campbell, Pa., 1 Dall. 10, 1 L.Ed. 15—U. S. v. Hoblitzell, D.C.Va., 2 F.Supp. 832.
Ala.—Townley v. Birmingham Fuel Co., 77 So. 28, 200 Ala. 654—Coleman v. Stewart, 53 So. 1020, 170 Ala. 255.
Cal.—Bostwick v. Mahoney, 14 P. 832, 73 Cal. 238.
Ga.—Crider v. Woodward, 135 S.E. 95, 162 Ga. 743—Bourquin v. Bourquin, 107 S.E. 767, 151 Ga. 575.
Ill.—Young v. Ebersohl, 159 N.E. 235, 328 Ill. 273—Albertson v. Cicero, 21 N.E. 815, 129 Ill. 226—Lavery v. Brooke, 37 Ill.App. 51.
Iowa.—Inter-Ocean Reinsurance Co. v. Morrison, 283 N.W. 909, 225 Iowa 1336.
Kan.—Douglass v. Geiler, 4 P. 1039, 32 Kan. 499.
Ky.—Mullins v. Rader, 264 S.W. 1058, 204 Ky. 431—Arthur v. Humble, 130 S.W. 958, 140 Ky. 56.
La.—Adcock v. Palmer, 153 So. 538, 179 La. 131—Liles v. Pitts, 82 So. 735, 145 La. 650—Louisiana Sulphur Mining Co. v. Brimstone R. & Canal Co., 79 So. 324, 143 La. 743—Dance v. Craighead, 63 So. 604, 134 La. 6—Tabernacle Baptist Church v. Green, 50 So. 1, 124 La. 171—McKenzie v. Bacon, 4 So. 65, 40 La. Ann. 157—Bailey v. Ward, 32 La. Ann. 839—Halsey v. Sanridge, 27 La.Ann. 198—French v. Bach, 26 La.Ann. 731—George v. Campbell, 26 La.Ann. 445—Bradford v. Cook, 4 La.Ann. 229—Freret v. Meux, 9 Rob. 414—White v. Holsten, 4 Mart. 471.
Mich.—McBride v. Closser, 175 N.W. 388, 208 Mich. 398—Jennison v. Haire, 29 Mich. 207.
Minn.—Moe v. Chesrown, 55 N.W. 832, 54 Minn. 118.
Mo.—Hall v. Small, 77 S.W. 733, 178 Mo. 629—Gee v. Sherman, 293 S. W. 789, 221 Mo.App. 121.
N.J.—Rundall v. Hill, 107 A. 35, 90 N.J.Eq. 262.
N.Y.—Carter v. Pitcher, 34 N.Y.S. 549, 87 Hun 580, 68 N.Y.St. 661—Jackson ex dem. Garnsey v. Livingston, 7 Wend. 136—Jackson ex dem. Van Alen v. Vosburgh, 7 Johns. 186.
N.C.—Anderson v. Walker, 130 S.E. 840, 190 N.C. 826—Sipe v. Herman, 76 S.E. 556, 161 N.C. 107—Cox v. Ward, 12 S.E. 379, 107 N.C. 507.
Tenn.—Hart v. Vinsant, 6 Heisk. 616.
Tex.—Vaello v. Rodriguez, Civ.App., 218 S.W. 1082, dismissed for want of jurisdiction.
Wash.—Dobbins v. Dexter Horton & Co., 113 P. 1088, 62 Wash. 423.
W.Va.—Garrett v. South Penn Oil Co., 66 S.E. 741, 66 W.Va. 587.
22 C.J. p 993 note 90.

Title to standing timber is within the rule.—South Arkansas Lumber Co. v. Tremont Lumber Co., 83 So. 378, 146 La. 61—22 C.J. p 993 note 90 [c].

Legal or equitable title

(1) The text rule applies to proof of legal title.—Texas Creosoting Co. v. Hartburg Lumber Co., Tex.Com. App., 16 S.W.2d 255, denying rehearing 12 S.W.2d 169, which affirmed, Civ.App., 298 S.W. 645.

(2) However, an equitable title in trespass to try title may be proved by parol evidence where pleadings present issue of title only, provided evidence connects claimant with legal source.—Texas Creosoting Co. v. Hartburg Lumber Co., supra.

Deed book as primary evidence

Where an original deed is not produced, the deed book in which it has been recorded is primary evidence and parol evidence is inadmissible.—Adkins v. Downing Gas Co., 198 S.E. 131, 120 W.Va. 401.

14. Tex.—Young v. Barcroft, Civ. App., 168 S.W. 392, error dismissed.

15. Fla.—Cross v. Aby, 45 So. 820, 55 Fla. 311.

16. Ala.—Melvin v. Scowley, 104 So. 817, 213 Ala. 414.
Ga.—Roberts v. Moore, 72 S.E. 239, 136 Ga. 790—Fidelity & Deposit Co. of Maryland v. Fine, 194 S.E. 58, 56 Ga.App. 729.
Iowa.—Bagley v. Bates, 276 N.W. 797, 224 Iowa 637.
La.—Grevenberg v. Borel, 25 La.Ann. 530.
Mo.—Esty v. Walker, 3 S.W.2d 741, 222 Mo.App. 619.
Tex.—Monk v. Danna, Civ.App., 110 S.W.2d 84, 86, citing **Corpus Juris**, error dismissed—Fenzl v. City of Houston, Civ.App., 63 S.W.2d 729, error refused—Lowry v. Saxton, Civ.App., 23 S.W.2d 806, error dismissed—Texas Co. v. Burkett, Civ. App., 255 S.W. 763, affirmed 296 S. W. 273, 117 Tex. 16, 54 A.L.R. 1397—Texas Co. v. Ramsower, Civ. App., 255 S.W. 466, affirmed, Com. App., 7 S.W.2d 872.
22 C.J. p 994 note 95.

17. Ala.—Ricketts v. Birmingham St. R. Co., 5 So. 353, 85 Ala. 600—Bell v. Denson, 56 Ala. 444.

18. Ala.—Townley v. Birmingham Fuel Co., 77 So. 28, 200 Ala. 654.

same is true as to a mere transfer of possession of land,[19] and a tenant may testify under whom he holds possession;[20] but a witness cannot be asked whether a person is in possession of the land described in a certain deed, as the answer would involve parol evidence as to what the deed contains,[21] and it has been said that if the occupation of land is founded on a written contract, even though it is defective, the writing must be produced as being the best evidence.[22] So, also, where it is sought to prove ownership or possession by the fact of the execution of a mortgage on the land, the best evidence rule requires the production of the mortgage or an explanation of its absence.[23]

§ 796. —— Sales, Conveyances, and Mortgages of Real Property

Parol evidence is ordinarily inadmissible to prove the terms of a conveyance or mortgage of real estate. The cases are conflicting as to whether such evidence is admissible to show the existence of a conveyance or when it was executed.

Where it is sought to prove a sale or conveyance of real property, the written contract of sale or the deed of conveyance constitutes the best evidence of the transaction and the terms thereof; and unless the instrument is lost or its absence is otherwise satisfactorily explained, parol evidence of the transaction is not admissible.[24] The same rule applies to a written instrument given by a grantee to a grantor showing that the grantee is to hold the land in trust,[25] and to a mortgage of real estate.[26] However, it has been held that a witness, otherwise competent, may testify as to the real consideration for a deed without the deed itself being exhibited.[27]

Where the record of a conveyance or a properly authenticated copy of the record is made primary evidence by statute, parol evidence of the contents of a recorded conveyance is not admissible if the statutory primary evidence can be produced.[28]

Deed collateral to issue. The rule just stated does not properly apply where the contents of the deed are not in issue or the object of the evidence is not to establish a conveyance under the deed, and the instrument is only collaterally involved. In such cases parol evidence is admissible.[29] There are, however, cases in which this limitation to the rule has not been observed.[30]

Fact of conveyance and time thereof. There is some difference of judicial opinion as to whether the best evidence rule applies to exclude parol evidence of the fact of a sale or conveyance of land, as distinct from the contents of the contract or deed. The weight of authority supports the view that, under such circumstances, the rule does not apply, and parol evidence that a person has purchased land, has sold and conveyed it, or has executed a deed thereof, has been held admissible without producing the written instrument or accounting for its absence.[31] In other cases, however, such evidence has been excluded under the best evidence rule.[32]

N.C.—Singleton v. Roebuck, 100 S.E. 313, 178 N.C. 201.
Wis.—Boos v. Gomber, 24 Wis. 499.
22 C.J. p 994 note 97.

19. S.C.—Martin v. Bowie, 15 S.E. 736, 37 S.C. 102.
22 C.J. p 994 note 98.

20. Mo.—Birmingham Drainage Dist. v. Chicago, M. & St. P. R. Co., 178 S.W. 893, 266 Mo. 60.
22 C.J. p 994 note 99.

21. Ala.—Hardy v. Randall, 55 So. 997, 173 Ala. 516, 522.
22 C.J. p 994 note 1.

22. Conn.—Buell v. Cook, 5 Conn. 206.

23. Ala.—Bell v. Denson, 56 Ala. 444.

24. Ala.—Godbey v. Godbey, 87 So. 35, 204 Ala. 585.
Ark.—Spencer v. Pierce, 287 S.W. 1019, 172 Ark. 108.
Cal.—Forbes v. Forbes, 182 P. 773, 41 Cal.App. 365.
Fla.—Kight v. American Eagle Fire Ins. Co. of New York, 170 So. 664, 125 Fla. 608.
Ga.—Pierce v. Dennett, 136 S.E. 440, 163 Ga. 471—Campbell v. Sims, 131 S.E. 483, 161 Ga. 517—Bacon v. Howard, 110 S.E. 888, 152 Ga. 616.
La.—Nelson, Curtis & Nelson v. Bridgeman, 92 So. 855, 152 La. 190.
Mo.—Potts-Turnbull Advertising Co. v. Gatchell, 257 S.W. 134.
Mont.—Wilson v. Davis, 103 P.2d 149, 110 Mont. 356.
S.C.—Mull v. Easley Lumber Co., 113 S.E. 356, 121 S.C. 155.
Tex.—King v. Cliett, Civ.App., 31 S.W.2d 350, error refused—Spurlock v. Zaring, Civ.App., 270 S.W. 1099.
22 C.J. p 994 note 4.

25. Tex.—Boyd v. Boyd, Civ.App., 78 S.W. 39.

26. Ala.—Burns v. Broughton, 137 So. 418, 223 Ala. 527.
Ga.—Bowen v. Mobley, 151 S.E. 667, 40 Ga.App. 833.
Idaho.—In re Brown's Estate, 15 P. 2d 604, 52 Idaho 286, motion denied and modified on other grounds Fite v. French, 30 P.2d 360, 54 Idaho 104.
La.—Union Bank of Mississippi v. Ellis, 3 La.Ann. 188.
Mo.—Wayne Oil Tank & Pump Co. v. Equitable Refining Co., 275 S.W. 984, 220 Mo.App. 507.
N.J.—Wilson v. Stevens, 148 A. 392, 105 N.J.Eq. 381.
22 C.J. p 995 note 6.

27. Ga.—Parker v. Wellons, 160 S.E. 109, 43 Ga.App. 721.

28. Wis.—Johnson v. Ashland Lumber Co., 9 N.W. 464, 52 Wis. 458—Sexsmith v. Jones, 13 Wis. 565.

29. Alaska.—Babcock v. O'Lanagan, 7 Alaska 171, 175, citing Corpus Juris.
Iowa.—Bagley v. Bates, 276 N.W. 797, 224 Iowa 637.
Wyo.—Campbell v. Wyoming Development Co., 100 P.2d 124, 144, 55 Wyo. 347.
22 C.J. p 995 note 11.

30. Tex.—Rogers v. Wallace, Civ. App., 28 S.W. 246.
22 C.J. p 995 note 12.

31. Ga.—Hightower v. Keaton, 144 S.E. 759, 167 Ga. 94—City of La Grange v. Pound, 177 S.E. 762, 50 Ga.App. 219.
22 C.J. p 995 note 15.

32. Pa.—McDonald v. Campbell, 2 Serg. & R. 473.
22 C.J. p 995 note 16.

Also, while it has been held that the time when a deed was executed and delivered may be shown by parol evidence, since this is not proving the contents of the instrument,[33] there is also authority for the contrary view.[34]

§ 797. —— Leases and Tenancy of Real Property

Ordinarily the terms of a written lease or the transfer or assignment thereof cannot be shown by parol evidence.

Where the relation of landlord and tenant exists by virtue of a written lease or other instrument, and the existence and terms of the tenancy lie at the foundation of the cause or are directly in issue, the written instrument constitutes the best evidence, and parol or other secondary evidence is excluded under the best evidence rule;[35] but it is generally held that where the fact to be established is simply the existence of the tenancy as distinct from its terms, the best evidence rule does not apply, and, although there may be a lease or other written instrument defining the terms of the tenancy, the fact of the tenancy may be proved by parol without the necessity of producing the writing.[36] It has also been held that, although the terms of the tenancy may be directly in issue, verbal statements of the landlord or tenant or acts amounting to admissions are competent evidence against the party who made them, although they may involve the contents of the lease, and that to such admissions the best evidence rule is not applicable.[37]

Where a written lease was not signed, although one was prepared, the writing is not the best evidence, but the term of the letting may be shown by parol.[38]

Transfer or assignment of lease. On an issue whether a lease was transferred, the written transfer has been held to be the best evidence,[39] but in an action for rent, parol evidence of an assignment of the lease has been held admissible,[40] and parol evidence of possession and payment of rent by one other than the original lessee has been received to show an assignment of the lease.[41]

§ 798. —— Boundaries

The best evidence rule generally excludes parol evidence of the contents of maps and surveys describing the boundaries of land when these matters become material to the issue.

The best evidence rule excludes parol evidence of the contents of maps and surveys describing the boundaries of land when these matters become material to the issue,[42] although it has been held that the testimony of a witness who has knowledge of the lines, marks, and corners, and is thus competent to testify as to the boundaries of the property, is primary evidence and not secondary either to field notes or certified copies of field notes, or to the testimony of a person who was present and saw the survey originally made.[43] Of course, parol testimony is admissible in regard to boundaries in the absence of better evidence.[44]

§ 799. —— Title to Personal Property

Where title to personal property is in issue and it appears that it is evidenced by a written instrument, it is generally held that parol evidence is not admissible unless the instrument is lost or its absence otherwise satisfactorily explained. However, there are some cases holding that title to personalty can be shown by parol.

Where the title to personal property is in issue, and it appears that the title is evidenced by a bill of sale or other similar written instrument, it is generally held that the writing is the best evidence,

33. Ind.—Davar v. Cardwell, 27 Ind. 478.

34. Mo.—Frick Co. v. Marshall, 86 Mo.App. 463.
Tex.—Thompson v. Investors' Syndicate, Civ.App., 52 S.W.2d 923, error refused.

35. Ark.—Bingham v. Rhea, 143 S.W.2d 1087.
Ky.—Kirk v. Springton Coal Co., 124 S.W.2d 760, 276 Ky. 501—Cherry Bros. v. Tennessee Cent. Ry. Co., 299 S.W. 1099, 222 Ky. 79.
N.C.—Chatham v. C. C. Disher Chevrolet Co., 1 S.E.2d 117, 215 N.C. 88.
Tex.—Townsend v. Day, Civ.App., 224 S.W. 283, reversed on other grounds Day v. Townsend, Com. App., 238 S.W. 213—Green v. Montgomery, Civ.App., 211 S.W. 471.
22 C.J. p 996 note 17.

Facts not shown by lease
Testimony as to consideration paid for lease was not erroneously admitted because lease was best evidence, where lease did not show consideration.—Baldwin v. McLendon, 153 S.E. 18, 170 Ga. 437.

Extraneous facts
In action for damage caused by defendants' sheep eating and destroying plaintiff's hay stacked on land occupied by defendants as lessees, testimony that lessor had permitted hay to remain on land was admissible as against objection that the lease was the best evidence and contained no such reservation, such testimony being competent to prove license by lessee's predecessors, and the subsequent consent of lessee recognizing and continuing such license.—Kendrick v. Healy, 192 P. 601, 27 Wyo. 123.

36. Kan.—Dunlap v. Waters, 161 P. 641, 99 Kan. 257.
22 C.J. p 996 note 18.

37. Va.—Taylor v. Peck, 21 Gratt. 11, 62 Va. 11.

38. Tex.—Edwards v. Old Settlers' Assoc., Civ.App., 166 S.W. 423.
22 C.J. p 996 note 20.

39. Ala.—Southern R. Co. v. Leard, 39 So. 449, 146 Ala. 349.

40. Or.—Hotel Marion Co. v. Waters, 150 P. 865, 77 Or. 426.

41. U.S.—May v. Sheehy, C.C.D.C., 16 F.Cas.No.9,335, 4 Cranch C.C. 135.

42. Tex.—City of Dallas v. McMurray, Civ.App., 282 S.W. 296.
22 C.J. p 993 note 91.

43. Mo.—Weaver v. Robinett, 17 Mo. 459.

44. Md.—Marvil Package Co. v. Ginther, 140 A. 95, 154 Md. 213.

and parol evidence is not admissible unless the instrument is lost or its absence is otherwise satisfactorily explained.[45] There is, however, authority to the effect that title to personalty can be shown by parol,[46] even though there is a writing, not produced, evidencing the same fact,[47] at least where the title is not a matter of record,[48] or where the witness bases his statement on his own knowledge, and the written evidence consists merely of entries made by him from such knowledge.[49]

Of course, where the title to personal property is not directly in issue and is only collaterally involved, or it is necessary for a party to make only a prima facie showing of ownership, the best evidence rule is not applicable and the title or prima facie right of ownership may be proved by parol evidence,[50] even though the bill of sale, or other instrument transferring title, is required by statute to be recorded.[51]

§ 800. —— Sales and Mortgages of Personal Property

Where a sale or mortgage of personal property is evidenced by a written instrument, parol evidence is ordinarily inadmissible to prove matters contained in the writing, although it may be admitted to show the fact and time thereof.

Where a sale of personal property is in issue and the transfer is evidenced by a bill of sale or similar written instrument,[52] this instrument, as a general rule, constitutes the best evidence of the terms of the transaction and parol evidence is not admissible to prove matters contained in the writing unless the instrument itself is lost or its absence is otherwise satisfactorily explained.[53] The same rule applies to a mortgage of personal property,[54] although where the matter to be proved is the mere identity of the property mortgaged, parol evidence is admissible.[55]

Fact and time of sale or mortgage. A distinction has been made between proving the mere fact of the sale or its date and showing the terms of the transaction, it being held that where a writing is not essential to the passing of title, parol evidence is admissible to establish the fact of the sale and likewise the time when it was made, notwithstanding that the terms of the sale have been reduced to writing.[56] So, also, the mere existence of a chattel mortgage, where the fact is collateral to the issue, may be proved by parol;[57] but this distinction has not always been observed and the best evidence rule has been applied, not only in proving the terms of the sale, but also in proving the fact that the sale was made.[58]

Requisites of writing. In order to exclude parol

45. Ga.—Short v. Haney, 4 S.E.2d 497, 60 Ga.App. 585.
Ky.—Mussellam v. Cincinnati, N. O. & T. P. Ry. Co., 104 S.W. 337, 126 Ky. 500, 31 Ky.L. 908.
22 C.J. p 996 note 25.

Existence of writing
In a case in which the existence of a writing does not appear, the court held that ownership of a judgment or other incorporeal right may be proved by parol testimony.—Succession of Davis, La.App., 185 So. 640.

46. Okl.—Oklahoma State Bank of Ada v. Cole, 38 P.2d 914, 170 Okl. 64.
22 C.J. p 997 note 26.

Cumulative testimony not incompetent
U.S.—Title Guaranty & Surety Co. v. State of Missouri ex rel. and to Use of Stormfeltz, C.C.A.Mo., 105 F.2d 496.

Rule has been applied to establish ownership of corporate stock.—Oklahoma State Bank of Ada v. Cole, 38 P.2d 914, 170 Okl. 64.

47. W.Va.—Dixon-Pocahontas Fuel Co. v. Myers Grain Co., 77 S.E. 362, 71 W.Va. 715, Ann.Cas.1914C 115.

48. Wash.—United Iron Works v. Hurley Mason Co., 128 P. 209, 71 Wash. 275.

49. Wash.—Hartford v. Faw, 7 P.2d 4, 6, 166 Wash. 335, quoting Corpus Juris.
22 C.J. p 997 note 29.

50. Ala.—Nunn Battery Co. v. Battery Mfg. Co., 194 So. 182, 239 Ala. 96.
Ind.—Greaf v. Breitenstein, 187 N.E. 347, 97 Ind.App. 525.
Me.—Lyman v. Redman, 23 Me. 289.
Mo.—Cable v. Johnson, App., 63 S.W. 2d 433.
N.J.—Wilson Transp. Co. v. Owens-Illinois Glass Co., 17 A.2d 581, 125 N.J.Law 636—Capuzzi v. Erie R. Co., 141 A. 566, 6 N.J.Misc. 464.
Puerto Rico.—Carreno v. Russell, 32 Puerto Rico 248.
Tex.—Elliott v. Langham, Civ.App., 60 S.W.2d 287.
22 C.J. p 997 note 30.

51. Mo.—Carpenter v. Gruendler Mach. Co., App., 141 S.W. 1147.

52. **Judgment or incorporeal right**
In a case where it does not appear that a writing existed, it was held by the court that the transfer of a judgment or other incorporeal right may be proved by parol testimony.—Succession of Davis, La.App., 185 So. 640.

53. Ga.—Scott v. Kelly-Springfield Tire Co., 125 S.E. 773, 33 Ga.App. 297.
Minn.—Rasmussen v. McComb, 187 N.W. 513, 151 Minn. 558.
Pa.—Popkin Bros. v. Dunlap, 196 A. 586, 130 Pa.Super. 50.
Tex.—Moring v. Wolf & Klar, Civ. App., 146 S.W.2d 1088.
22 C.J. p 997 note 32.

Statute requiring writing
La.—Weil v. Weil, 126 So. 742, 13 La.App. 8.

A fortiori, a written agreement is admissible as best evidence of a sale.
Md.—Deckelman v. Lake, 131 A. 762, 149 Md. 533.
Wash.—Seal v. Long, 192 P. 896, 112 Wash. 370.

54. Ala.—A. C. Scharnagel & Sons v. Britton, 94 So. 201, 18 Ala.App. 671.
Mont.—Mott v. Buckley, 196 P. 359, 59 Mont. 278.
22 C.J. p 997 note 33.

55. Iowa.—Citizens' Bank v. Rhutasel, 25 N.W. 261, 67 Iowa 316.

56. Tex.—Kolp v. Brazer, Civ.App., 161 S.W. 899.
22 C.J. p 997 note 36.

57. Ala.—Foxworth v. Brown, 24 So. 1, 120 Ala. 59.
Wis.—Sleep v. Heyman, 16 N.W. 17, 57 Wis. 495.

58. La.—Lucile v. Toustin, 5 Mart. 611.
22 C.J. p 997 note 38.

evidence of a sale on the ground that there is written evidence thereof, it must appear that the writing contains at least the material terms of the transaction,[59] and where a parol sale of chattels is perfected by delivery, and thereafter a bill of sale is executed and delivered, the sale may be proved by parol evidence without the production of the writing.[60]

§ 801. —— Foreign Law

Foreign usages or customs are provable by parol evidence.

The common law of another state or country may be proved by parol, as shown in the title Common Law § 22, and the same is true of foreign usages or unwritten regulations.[61]

Proof of the statute law of another state or country is discussed in the C.J.S. title Statutes § 452 et seq, also 22 C.J. p 1001 notes 87–93 and 59 C.J. p 1208 note 19–p 1216 note 15.

Rate of interest. In the absence of a contract providing therefor, the right to recover interest on claims for money is solely the creature of statute as shown in the C.J.S. title Interest § 3, also 33 C.J. p 183 notes 43–49, and it has been considered that the rate of interest of another state cannot be proved by parol evidence unless the allowance of such interest is expressly proved as a usage having the force of law.[62] However, it has also been considered that while the best evidence rule obtains if it affirmatively appears that the law of the foreign state as to interest is a statute,[63] a judge cannot presume that a law granting interest must be a statute, and therefore, where it is not proved that a statute exists on the subject, parol evidence is admissible to show that the laws of another state give interest on notes on which no interest is expressed;[64] and parol evidence has also been held admissible to prove that, by the common law and usage and customs of merchants in a foreign state, interest is demandable on an open account from the time it becomes due.[65]

§ 802. —— Payment and Delivery

The payment of money or the delivery of merchandise may be proved by parol without accounting for the absence of a writing evidencing such fact where the person can testify to the fact positively and from his own independent knowledge, not founded on his having seen the writing.

The payment of money[66] or the delivery of merchandise[67] may be proved by parol without accounting for the absence of a receipt evidencing such fact, where the witness can testify to the fact positively and from his own independent knowledge, not founded on his having seen the receipt; and the rule has been applied although book entries were made in regard to the transaction.[68] While bills representing payments by a person have been held admissible,[69] receipts have sometimes been held inadmissible as being inferior to the testimony of living witnesses.[70] However, in a suit for an accounting by an administrator, etc., it has been held that receipts were the best evidence of payments for taxes, repairs, etc., and should be produced or accounted for.[71]

Contents of receipt. A distinction is to be observed between proof of the payment or the delivery of the property and proof of the contents of the receipt. Where it is sought to prove that a person executed and delivered a receipt for a certain amount, or to show by whom, or the manner in which, the receipt was signed, or to prove facts which it recites, parol evidence is not admissible

59. S.C.—Hodges v. Tarrant, 9 S.E. 1038, 31 S.C. 608.
22 C.J. p 998 note 41.

60. Ala.—Sanders v. Stokes, 30 Ala. 432.
22 C.J. p 997 note 35.

61. Miss.—Stewart v. Swanzy, 23 Miss. 502.
22 C.J. p 1001 note 86.

62. Ky.—Talbot v. Peeples, 6 J.J. Marsh. 200.
Tex.—Tryon v. Rankin, 9 Tex. 595.

63. La.—Mason v. Mason, 12 La. 589.
22 C.J. p 1002 note 96.

64. La.—Boggs v. Reed, 5 Mart. 673, 12 Am.D. 482.

65. La.—Wakeman v. Marquand, 5 Mart.N.S. 265.

66. Ala.—Phillips v. Langston, 88 So. 177, 17 Ala.App. 572.
Ga.—Citizens' & Southern Bank v. Seigler, 146 S.E. 485, 167 Ga. 657—Kennedy v. Walker, 120 S.E. 105, 156 Ga. 711.
Ill.—Branch v. Lee, 26 N.E.2d 88, 373 Ill. 333.
Ind.—Western & Southern Life Ins. Co. v. Spencer, 179 N.E. 794, 95 Ind.App. 281.
Tex.—Jeffreys v. McGlamery, Civ. App., 96 S.W.2d 572.
22 C.J. p 1002 note 1, p 1003 note 5.

67. Pa.—Sims v. Pennsylvania R. Co., 123 A. 676, 279 Pa. 111.
22 C.J. p 1003 notes 2, 5.
Receipt of goods by common carrier can be proved by parol without producing the bill of lading or accounting for its absence.—McBee v. Caesar, 13 P. 652, 15 Or. 62.
22 C.J. p 991 note 54.
Delivery of goods on written orders may be shown by parol.—Neblett v. Barron, Tex.Civ.App., 160 S.W. 1167.
22 C.J. p 997 note 39.
Quality and kind of goods delivered may be shown by parol evidence.—Lee v. Hills, 66 Ind. 474.

68. Ga.—Citizens' & Southern Bank v. Seigler, 146 S.E. 485, 167 Ga. 657.
22 C.J. p 1003 note 4.

69. N.Y.—Sammon v. Deluclas, 204 N.Y.S. 785, 123 Misc. 151.

70. Mo.—Doherty v. Doherty, 134 S. W. 1112, 155 Mo.App. 481.
22 C.J. p 1003 note 6.

71. Ga.—Hoyt v. Ware, 118 S.E. 734, 156 Ga. 98.

without accounting for the absence of the receipt, for this would be proving the contents of the receipt by parol, and of its contents the instrument itself is the best evidence.[72]

Commercial paper. The payment of obligations which are evidenced by commercial paper may be proved by parol evidence, without producing the written instruments or accounting for their absence.[73] Also, where payment has been made by giving commercial paper, the paper need not be produced or its absence accounted for, but the fact of such payment may be proved by parol.[74]

§ 803. —— Other Facts and Transactions

a. In general
b. Agency
c. Partnership
d. Corporate existence
e. Birth, marriage, and death
f. Arbitration and award

a. In General

The best evidence rule is not applicable where the question involved is merely the identity of a person, document, or thing.

Where the question to be solved by the evidence is merely the identity of a person, document, or thing, the best evidence rule does not apply, and parol evidence is admissible.[75]

b. Agency

Where the appointment of an agent or attorney is in writing, unless the absence of the writing is explained, the best evidence rule applies to exclude parol evidence of an agent's or attorney's appointment or authority, including agents and officers of a corporation. Parol evidence may be admissible where the agent had both written and oral authority.

Where it appears that the appointment of an agent or an attorney in fact was made in writing, the best evidence rule applies to exclude parol evidence of the agent's or attorney's appointment or powers, or of other matters contained in the writing unless the absence of the writing is explained.[76] This is obviously true where the law expressly requires that the agent's authority must be evidenced by a writing, as in cases of authority to sell real estate[77] or to execute an instrument under seal;[78] but where the authority of the attorney or agent is not required by law to be in writing, and where it does not appear that written evidence thereof exists, the best evidence rule, of course, does not apply and parol evidence is admissible.[79] So, also, although the agent was appointed by a written power of attorney or other writing, the fact of agency may be proved by parol where it is collateral to the issue,[80] or where, as to the particular matter in controversy, the agency was constituted independently of the power of attorney,[81] as where the agent had both written and oral authority, and it does not appear that he acted under the written authority.[82] Parol evidence may be admitted to interpret the powers conferred in writing,[83] or to show a further special agency to do a particular act,[84] or a subsequent enlargement[85] or modification[86] of the original authority. Likewise, where the admissions

72. N.J.—Fielder v. Friedman, 12 A.2d 897, 124 N.J.Law 514.
Tex.—Universal Life Ins. Co. v. Warren, Civ.App., 126 S.W.2d 796, error dismissed—Spurlock v. Zaring, Civ.App., 270 S.W. 1099.
22 C.J. p 991 note 55, p 1003 note 7.

73. Ind.—Coonrod v. Madden, 25 N.E. 1102, 126 Ind. 197.
22 C.J. p 1003 note 8.

74. Ala.—Abbeville State Bank v. Wiley Fertilizer Co., 140 So. 431, 224 Ala. 421.
Ga.—Tift v. Shiver & Aultman, 102 S.E. 47, 24 Ga.App. 638.
N.Y.—Eyre v. Coal & Iron Nat. Bank of City of New York, 204 N.Y.S. 21, 208 App.Div. 686.
Tex.—Southern Underwriters v. Erwin, Civ.App., 134 S.W.2d 720, error granted—City Nat. Bank of Spur v. Rhome-Farmer Livestock Commission Co., Civ.App., 259 S.W. 184.
22 C.J. p 1003 note 9.

75. Iowa.—Citizens' Bank v. Rhutasel, 25 N.W. 261, 67 Iowa 316.
22 C.J. p 1002 note 99.

76. La.—Herrington v. Herrington, 127 So. 617, 170 La. 249.
Mich.—McNamara v. E. W. Ross Co., 196 N.W. 336, 225 Mich. 335.
22 C.J. p 998 note 46.

Powers of trustees
In action by trustees of common-law trust, the trust instrument was best evidence by which power of trust and the authority of the trustees could be proved.—Morriss v. Finkelstein, Mo.App., 127 S.W.2d 46—Nau v. Beasley, App., 5 S.W.2d 664.

Parol evidence where copy admitted
Permitting bank cashier to testify orally as to authority to sign contract was not error, where copy of resolution authorizing him was indorsed on contract.—Main v. Brown, 211 N.W. 232, 202 Iowa 924.

77. La.—Keary v. Ducote, 23 La. Ann. 196.
22 C.J. p 998 note 48.

78. Ala.—Elliott v. Stocks, 67 Ala. 336.

79. Cal.—Handley v. Johnson, 286 P. 428, 104 Cal.App. 606.
Mass.—McDonough v. McGovern, 135 N.E. 128, 241 Mass. 236.
N.J.—Ackerman v. Somerset Bus Co., 174 A. 343, 12 N.J.Misc. 660.
22 C.J. p 998 note 50.

80. Ala.—Birmingham News Co. v. Birmingham Printing Co., 104 So. 506, 213 Ala. 256.
22 C.J. p 999 note 51.

81. Iowa.—Gross v. Feehan, 81 N.W. 235, 110 Iowa 163.
N.H.—Caldwell v. Wentworth, 16 N.H. 318.

82. N.Y.—Bank of North America v. Embury, 33 Barb. 323, 21 How. Pr. 14.

83. Wis.—Gee v. Bolton, 17 Wis. 604.
22 C.J. p 999 note 54.

84. S.C.—Williams v. Cochran, 41 S.C.L. 45.

85. Ill.—Hartford F. Ins. Co. v. Wilcox, 57 Ill. 180.
22 C.J. p 999 note 56.

86. Minn.—Dayton v. Neil, 45 N.W. 231, 43 Minn. 246.

of a party as to matters contained in a writing dispense with the production of the writing, it has been held that the principal's admissions of the agency may be proved by parol without the necessity of producing the written authority of the agent.[87] In an action between the principal and a third person who is a stranger to the instrument, the third person may establish by parol the fact of the agency.[88]

Agent of corporation. Where the authority of an agent or officer of a corporation is required to be given in a formal manner,[89] or where the authority is claimed under the charter or by-laws, or under a recorded resolution of the corporation,[90] it must be proved by the production of such written evidence, and parol evidence is ordinarily not admissible. However, parol testimony as to the fact of agency or the nature and extent of authority has been held admissible[91] where it is sought to show the apparent authority of an officer or agent or a ratification of his acts,[92] or where the minutes of the corporation are silent,[93] and such testimony has been admitted where it was held not necessary to show that a person is an officer de jure.[94]

c. Partnership

While a written partnership agreement constitutes the best evidence thereof, the fact of partnership may be proved by parol evidence in actions between partners and third persons.

If a partnership agreement exists in the form of written articles of copartnership, and it is sought to prove the terms of the agreement or other matters contained in the instrument, the instrument is the best or primary evidence and the best evidence rule applies;[95] but in actions between partners and third persons, where it is sought to prove not the terms of the agreement, but merely the existence of partnership,[96] or where the terms of the partnership are not in issue but are only collaterally involved,[97] the best evidence rule does not apply, and such facts may be proved by parol evidence without the necessity of producing the written articles or explaining their absence. On the other hand, it seems that as between the partners themselves the articles of copartnership constitute the best evidence even of the fact of partnership.[98]

d. Corporate Existence

While the articles of incorporation have been held the best evidence of their contents, there is authority for the view that corporate existence may be shown by other evidence.

The articles of incorporation are the best evidence of their contents,[99] and it has been frequently considered that the best evidence of the organization and existence of a corporation is furnished by the articles of incorporation or the other records of organization.[1] There is, however, authority for

87. Vt.—Curtis v. Ingham, 2 Vt. 287.

88. Ill.—Kaskaskia Bridge Co. v. Shannon, 6 Ill. 15.

89. Cal.—Carey v. Philadelphia & Cal. Petroleum Co., 33 Cal. 694.

90. Ga.—Supreme Kingdom v. Fourth Nat. Bank of Macon, 164 S.E. 204, 174 Ga. 779—South Georgia Trust Co. v. Crandall, 170 S.E. 333, 47 Ga.App. 328—Kaylor v. Carrollton Bank, 141 S.E. 422, 37 Ga.App. 664.
Md.—Eastern Shore Brokerage & Commission Co. v. Harrison, 118 A. 192, 141 Md. 91.
Mo.—Buffalo Trust Co. v. Producers' Exchange No. 148, California, Mo., 23 S.W.2d 644, 224 Mo.App. 199.
14a C.J. p 405 note 98, p 406 note 11—22 C.J. p 998 note 46 [c], p 1011 note 48 [d].

91. Cal.—City of Venice v. Short Line Breach Land Co., 181 P. 658, 180 Cal. 447.
14A C.J. p 406 note 9—22 C.J. p 1013 note 55 [a].

92. Cal.—Fowler Gas Co. v. Weber, 181 P. 663, 180 Cal. 471.
N.J.—Norelli v. Mutual Savings Fund Harmonia, 1 A.2d 440, 121 N.J.Law 60.

93. Cal.—Fowler Gas Co. v. Weber, 181 P. 663, 180 Cal. 471.
Ga.—Kaylor v. Carrollton Bank, 141 S.E. 422, 37 Ga.App. 664.
N.J.—Norelli v. Mutual Savings Fund Harmonia, 1 A.2d 440, 121 N.J.Law 60.
N.M.—Abo Land Co. v. Dunlavy, 181 P. 582, 25 N.M. 273.

94. N.D.—Citizens' State Bank of Enderlin v. Skeffington, 196 N.W. 953, 50 N.D. 494.
Tex.—Laurel Oil Co. v. Stockton, Civ.App., 281 S.W. 1106.
22 C.J. p 1012 note 52.

95. Kan.—Curtis v. Hanna, 53 P.2d 795, 143 Kan. 186.
Mo.—Mackie-Clemens Fuel Co. v. Brady, 208 S.W. 151, 202 Mo.App. 551.
22 C.J. p 999 note 61.
Admissibility of parol evidence generally to prove or disprove existence of partnership see the C.J.S. title Partnership § 52, also 47 C.J. p 720 note 73—p 721 note 80.

96. Ga.—Atlantic Orchard Corporation v. Caldwell, 152 S.E. 298, 41 Ga.App. 205.
Kan.—Curtis v. Hanna, 53 P.2d 795, 143 Kan. 186.
Miss.—Stubblefield v. Roper, 101 So. 852, 136 Miss. 831.
Mo.—Mackie-Clemens Fuel Co. v. Brady, 208 S.W. 151, 202 Mo.App. 551.
Tex.—Green v. Hagens, Civ.App., 51 S.W.2d 771, error dismissed.
22 C.J. p 999 note 62.

97. Ala.—Paterson v. Mobile Steel Co., 80 So. 855, 202 Ala. 471.
N.C.—Brem v. Allison, 68 N.C. 412.

98. Miss.—Stubblefield v. Roper, 101 So. 852, 136 Miss. 831.
22 C.J. p 999 note 64.

99. Ind.—Miller v. Wild Cat Gravel Road Co., 52 Ind. 51.
N.Y.—Saltsman v. Shults, 14 Hun 256.

1. N.Y.—Baker-Goldstein Co. v. Kurtz, 203 N.Y.S. 532.
Tex.—Bain Peanut Co. of Texas v. Pinson & Guyger, Civ.App., 273 S.W. 655.
14 C.J. p 113 note 6 [c]—22 C.J. p 999 note 66.

Admission in pleading

(1) Plea of privilege, containing affidavit reciting that defendant was corporation, was properly admitted to show defendant was private corporation over objection that it was not best evidence thereof.—Fort Worth Warehouse & Storage Co. v. Maddocks, Tex.Civ.App., 33 S.W.2d 227.

(2) However, a plea of privilege, after amendment, was held not best evidence of defendant's corporate existence, in view of a statute pro-

the view that corporate existence may be shown by other evidence,[2] and parol evidence has been held admissible to prove the establishment and existence of a corporation de facto without accounting for the absence of the corporate records.[3] It has also been held that, while ordinarily the business which a corporation was chartered to conduct must be stated in its charter, the purpose of its organization may be shown independent of the charter recitals.[4] Where the date of filing is no part of the articles of incorporation such date may be proved by parol.[5]

e. Birth, Marriage, and Death

Where the writing is the more satisfactory proof, the best evidence rule is said to require that the documentary evidence be produced to show the fact or date of a birth, marriage, or death.

Where the fact or date of a birth or death is in issue, the best evidence rule is said to require that the usual documentary or record evidence of these facts be produced, and that its absence must be explained before parol evidence is admissible,[6] and the same rule has been said to apply to proof of marriage, the registry being considered the best evidence.[7] However, this rule would seem to apply only where the writing is the more satisfactory proof and not where the witness has a distinct and independent recollection of the facts to which he testifies,[8] and the mere fact that the law requires a record of marriages to be kept does not make the record higher evidence than the direct testimony of witnesses, and such evidence is admissible without producing the record or accounting for its absence; the object of the record being to facilitate and preserve the evidence and not to limit or narrow the mode of proof.[9] It has also been held that in civil actions the production of record evidence of the marriage is unnecessary, parol evidence being admissible.[10] Where it does not appear that there is a legally authorized public register, or record of births, marriages, or deaths, in existence, the existence of such a record will not be presumed but must be positively proved,[11] and these facts and their dates may be proved by parol evidence, provided it does not appear that there is higher evidence obtainable.[12] Under such circumstances heirship may be proved by parol evidence, such as reputation and other corroborating facts,[13] and on an issue of infancy, parol evidence is admissible to prove the date of birth and the consequent fact of infancy, unless it be shown that there is accessible record or other competent documentary evidence thereof.[14] Although an entry in a family Bible or other family memorandum or record as to the date of a person's birth or death may be competent evidence, such an entry does not belong to the grade of record evidence, and not only is it no better than the testimony of living witnesses cognizant of such date,[15] but where the parent or other relative who made the entry is alive and can testify, the entry is often regarded inferior or secondary to such per-

viding that a corporation exists only from and after filing of charter in office of secretary of state, where no accounting was made for nonproduction of a certified copy of charter or record thereof.—Bain Peanut Co. of Texas v. Pinson & Guyger, Tex.Civ.App., 273 S.W. 655.

2. Ark.—Young v. People's Loan & Investment Co., 18 S.W.2d 903, 179 Ark. 910—American Agricultural Chemical Co. v. Bond, 6 S.W.2d 2, 177 Ark. 164—American Trust Co. v. Netherlands-American Mortg. Bank, 276 S.W. 1010, 169 Ark. 867—Sturdivant v. Ka-Dene Medicine Co., 275 S.W. 921, 169 Ark. 535.
Cal.—Loop Bldg. Co. v. De Coo, 275 P. 881, 97 Cal.App. 354.
Wash.—Umpqua Valley Fruit Union v. North Pacific Fruit Distributors, 183 P. 101, 108 Wash. 265.
22 C.J. p 999 note 67.

3. Ark.—Kelley v. Sterns Publishing & Novelty Co., 227 S.W. 609, 147 Ark. 383.
22 C.J. p 1000 note 68.

4. Tex.—Hereford First State Bank & Trust Co. v. Southwestern Engineering & Construction Co., Civ. App., 153 S.W. 680.

5. Ind.—Johnson v. Crawfordsville, F., K., & Ft. W. R. Co., 11 Ind. 280.

6. Ala.—Reichert v. Jerome H. Sheip, Inc., 102 So. 440, 212 Ala. 300.
N.Y.—Bonnano v. Metz Bros. Co., 177 N.Y.S. 51, 188 App.Div. 380.
22 C.J. p 1000 note 72.

7. La.—Brown v. Texas & P. Ry. Co., 138 So. 221, 18 La.App. 656.
22 C.J. p 1000 note 73.

8. Ky.—Maryland Casualty Co. v. Chamos, 263 S.W. 370, 203 Ky. 820.
Miss.—Messina v. New York Life Ins. Co., 161 So. 462, 173 Miss. 378.
Mont.—McGonigle v. Prudential Ins. Co. of America, 46 P.2d 687, 100 Mont. 203.
22 C.J. p 1000 note 74.

Best evidence of sequence of deaths
In determining whether husband or wife, who had both been murdered, died first, so as to ascertain descent of title to realty owned by husband and wife, testimony of witnesses who claimed to have heard a negro confess to the murders and narrate the sequence of execution was competent as being the best evidence.—Edwards v. Swilley, 118 S.W.2d 584, 196 Ark. 633.

Proof of own age
Party's testimony as to his age was not inadmissible under best evidence rule because of failure to show that no certificate or record of his birth was obtainable.—Commonwealth ex rel. Park v. Joyce, 175 A. 422, 316 Pa. 434.

9. La.—Oliphant v. Louisiana Long Leaf Lumber Co., 112 So. 500, 163 La. 601, reversing 7 La.App. 521.
22 C.J. p 1000 note 75.

10. Vt.—Massucco v. Tomassi, 67 A. 551, 80 Vt. 186.
22 C.J. p 1000 note 76.

11. La.—Broussard v. Mallet, 8 Mart.N.S. 269.
22 C.J. p 1000 note 77.

12. S.C.—Dobson v. Cothran, 13 S.E. 679, 34 S.C. 518.
22 C.J. p 1000 note 78.

13. La.—Lewis v. His Executors, 5 La. 387.
22 C.J. p 1000 note 79.

14. Ky.—Beeler v. Young, 3 Bibb. 520.
22 C.J. p 1000 note 80.

15. Tex.—Jaffe v. Deckard, Civ. App., 261 S.W. 390.
22 C.J. p 1001 note 82.

son's testimony and not admissible as independent evidence.[16] However, a family Bible is the best evidence of its contents and parol evidence is inadmissible to prove such contents unless the absence of the written evidence is satisfactorily explained.[17]

A Jewish "get" or divorce, obtained in a foreign country, may, it has been held, be proved by parol.[18]

f. Arbitration and Award

Parol evidence is ordinarily inadmissible to show the contents of a submission to arbitration or an award thereunder.

The best evidence of the contents of a written submission to arbitration,[19] or a written award[20] is the writing itself, and parol evidence of the contents thereof is not admissible unless the absence of the writing is satisfactorily explained; but parol evidence is not only admissible but necessary to show the matters which were acted on by the arbitrators and considered by them in making up the award.[21]

§ 804. Public Writings

The best evidence rule applies to writings of a public character and, where such writings are accessible, parol evidence of their contents is excluded.

The best evidence rule applies as well to writings of a public character as to private documents; and, where such writings are accessible, parol evidence of their contents is excluded.[22] Among writings of this character may be mentioned the official registry of the arrival and departure of mails;[23] the books of a collector of internal revenue[24] or of a county tax assessor;[25] an internal revenue license;[26] the judgment of an inspector of buildings condemning a wall;[27] a plat, report, and legislative confirmation of the reservation of a city block by state commissioners;[28] the rulings and orders of the interstate commerce commission;[29] a pardon;[30] a public weigher's certificate;[31] government market reports, when written, printed, and posted or tacked on a bulletin board;[32] government and railroad reports as to quantity of rock shipped;[33] and reports kept and issued by a university as to the average monthly rainfall.[34]

§ 805. —— Newspapers

Ordinarily parol evidence is not admissible to prove the contents of a newspaper.

While it is usually considered that the best evidence of a notice, advertisement, or other matter contained in a newspaper is the newspaper itself, and unless the absence of the paper is satisfactorily explained, parol evidence of its contents is not admissible,[35] there is also authority for the contrary view.[36] So also, while it has been held that in an action by a printer for services, the newspaper in which the matter was printed is the best evidence of the performance of the services,[37] there is also authority for the view that it is unnecessary to produce the newspaper in order to show the performance by a printer of services in publishing advertisements and the like.[38]

§ 806. —— Election, Appointment, or Official Character of Public Officers

The best evidence rule applies where it is necessary to prove that a person was an officer de jure or where a statute expressly provides the manner in which the evidence of an election or appointment shall be preserved of record.

Where a question arises as to whether a particular person is a public officer, but the circumstances are such that it is not necessary to show that he is such officer de jure, it is not necessary to produce

16. Tex.—Jaffe v. Deckard, supra.
22 C.J. p 1001 note 83.

17. Ind.—Supreme Tribe of Ben Hur v. Bastian, 151 N.E. 346, 85 Ind.App. 327.

18. N.Y.—Matter of Spondre, 162 N.Y.S. 943, 98 Misc. 524, 527.
22 C.J. p 1001 note 84.

19. Ind.—Williams v. Dewitt, 12 Ind. 309.
22 C.J. p 998 note 42.

20. Ala.—Scarborough v. Reynolds, 12 Ala. 252.
22 C.J. p 998 note 43.

21. N.C.—Brown v. Brown, 49 N.C. 123.
Pa.—Scott v. Baker, 37 Pa. 330.

22. Ark.—Firemens Relief and Pension Fund of Stuttgart v. Rittman, 129 S.W.2d 595, 198 Ark. 580.
Ballot is best evidence of its contents.
Colo.—Winters v. Pacheco, 292 P. 1061, 88 Colo. 105.
Tex.—Griffith v. State, Civ.App., 216 S.W. 469.
Wis.—State ex rel. Graves v. Wiegand, 249 N.W. 537, 212 Wis. 286.

23. Ala.—Miller v. Boykin, 70 Ala. 469.

24. Tex.—Thurman v. State, 78 S.W. 937, 45 Tex.Cr. 569.
Wis.—Meyer v. Home Ins. Co., 106 N.W. 1087, 127 Wis. 293.

25. Tex.—Hicks v. Pogue, Civ.App., 76 S.W. 786.

26. Tex.—Campbell v. State, 129 S.W. 139, 59 Tex.Cr. 496.

27. N.Y.—Nesbit v. Bendheim, 15 N.Y.S. 300.

28. Neb.—State Historical Ass'n v. Lincoln, 15 N.W. 717, 14 Neb. 336.

29. Ala.—Mouton v. Louisville & N. R. Co., 29 So. 602, 128 Ala. 537.

30. Ky.—Parson v. Commonwealth, 112 S.W. 617, 33 Ky.L. 1051.

31. Tex.—Commerce Milling & Grain Co. v. Morris, 65 S.W. 1118, 27 Tex.Civ.App. 553.

32. Mo.—Bailey v. St. Louis & S. F. Ry. Co., App., 290 S.W. 630.

33. Tex.—Sabine Land & Improvement Co. v. Perry, Civ.App., 54 S.W. 327.

34. Mo.—St. Louis v. Arnot, 7 S.W. 15, 94 Mo. 275.

35. Ind.—Griffin v. Hubbell, 11 N.E.2d 136, 212 Ind. 684.
Tex.—Cavitt v. Gulledge, Civ.App., 255 S.W. 784.
22 C.J. p 1003 note 22.

36. La.—Miller v. Webb, 8 La. 516.
22 C.J. p 1003 note 23.

37. S.C.—Richards v. Howard, 11 S.C.L. 474 note.

38. Tenn.—Enloe v. Hall, 1 Humphr. 303.
22 C.J. p 1004 note 25.

written or record evidence of his election or appointment, but parol evidence that he is acting in an official capacity, as such officer, is sufficient;[39] but the record is the best evidence, and parol evidence is excluded, where it is necessary to prove that the person in question was an officer de jure,[40] as where his appointment or election is specifically alleged,[41] or where it is sought to show the result of an election,[42] or where a statute expressly provides the manner in which evidence of the election or appointment shall be preserved of record.[43] So also, where under the law a certain municipal office must be created by ordinance, parol testimony of a witness that he holds such office is insufficient if objected to.[44]

However, the best evidence rule has been held not applicable with respect to proof of the appointment of peace officers.[45] It has been held that a public officer may testify as to when he was appointed, notwithstanding the public record thereof.[46]

Officer of foreign state or country. The best evidence rule may apply to exclude parol evidence, where it is sought to prove the official character of a judicial officer of a foreign state or country.[47] Where it is sought to prove a negative, as that during a certain time a certain person was not a justice of the peace, a certified copy of the record of commissions from the executive office is, it has been held, the best evidence both in its character as record evidence and in the degree of its demonstrative power.[48]

§ 807. Records and Judicial Documents

a. In general
b. Limitations of rule
c. Want of record
d. Proof of absence from record

a. In General

Where the fact to be proved is one which the law requires to appear of record, the general rule is that the record itself or a properly authenticated copy is the best evidence, and parol evidence cannot be received to prove the fact.

Where the fact to be proved is one which the law requires to appear of record, the general rule is that the record itself or a properly authenticated copy is the best evidence, and parol evidence cannot be received to prove the fact except where the record is lost or destroyed or is for other reasons inaccessible, and a properly authenticated copy cannot be obtained.[49]

39. Ala.—Wilson v. Jones, 122 So. 342, 219 Ala. 332.
22 C.J. p 1004 note 26.
Admissibility of parol evidence in election contests see Elections § 278.

40. Mont.—State v. Rouleau, 219 P. 1096, 68 Mont. 529.
N.Y.—Savie v. City of New York, 193 N.Y.S. 577, 118 Misc. 156, affirmed Savic v. City of New York, 196 N.Y.S. 442, 203 App.Div. 81.

41. Ky.—Henderson County v. Dixon, 63 S.W. 756, 23 Ky.L. 1204.
Mass.—Griffin v. Rising, 2 Cush. 75.

42. Mass.—Griffin v. Rising, supra.
22 C.J. p 1004 note 29.

43. Mont.—State v. Rouleau, 219 P. 1096, 1101, 68 Mont. 529, citing **Corpus Juris.**
Tenn.—Reagan v. McBroom, 51 S.W. 2d 995, 164 Tenn. 476.
22 C.J. p 1004 note 30.
Proper evidence stated
Where the authority of a special officer is questioned, it may be proved either by a formal commission, signed by the governor as a presiding officer of the board of examiners, or by a certified copy of the record of the appointment, certified to by the secretary of state as secretary of the board, but not otherwise.—State v. Rouleau, 219 P. 1096, 68 Mont. 529.
Custodian's testimony admitted
County clerk's testimony that ballot stubs, of which he was official custodian, showed certain number of ballots cast in two precincts, votes in which were not counted, was admissible in election contest, although he did not file stubs in evidence.—Scott v. Roberts, 72 S.W.2d 728, 255 Ky. 34.

44. Mo.—De Soto v. Brown, 44 Mo. App. 148.
22 C.J. p 1004 note 31.

45. Mo.—City of Festus, ex rel. and to Use of Stolzer, v. Kausler, App., 77 S.W.2d 197.

46. Conn.—Bishop v. Copp, 114 A. 682, 96 Conn. 571.

47. S.C.—Clark v. Parsons, 24 S.C. L. 16.
22 C.J. p 1004 note 32.

48. Ga.—Fain v. Garthright, 5 Ga. 6.

49. U.S.—Smith v. Pacific Alaska Airways, C.C.A.Alaska, 89 F.2d 253, certiorari denied Pacific Alaska Airways v. Smith, 58 S.Ct. 20, 302 U.S. 700, 82 L.Ed. 541.
Ala.—Ft. Payne Co. v. City of Ft. Payne, 114 So. 63, 216 Ala. 679.
Ark.—Alphin v. Banks, 102 S.W.2d 558, 193 Ark. 563—Thomas v. Spires, 22 S.W.2d 553, 180 Ark. 671—Dickson v. Board of Directors of Long Prairie Levee Dist., 225 S.W. 12, 146 Ark. 14.
Cal.—Conlin v. Southern Pac. R. Co., 182 P. 67, 40 Cal.App. 733.
Fla.—Milk Commission v. Dade County Dairies, 200 So. 83.
Ga.—Smith v. Alexander & Bland, 148 S.E. 98, 168 Ga. 382—City of Atlanta v. Hawkins, 166 S.E. 262, 45 Ga.App. 847—Miller County v. Bush, 110 S.E. 515, 28 Ga.App. 130.
Ill.—People ex rel. Toman v. Chicago Heights Terminal Transfer R. Co., 32 N.E.2d 161, 375 Ill. 590—People ex rel. Wangelin v. City of St. Louis, 10 N.E.2d 369, 367 Ill. 57—People ex rel. Pfeiffer v. Morris, 6 N.E.2d 864, 365 Ill. 470—Utpatel v. Chicago Title & Trust Co., 218 Ill.App. 75.
Kan.—Berry v. Peterson, 254 P. 394, 123 Kan. 4.
Ky.—Bonner v. Commonwealth, 99 S.W. 1150, 30 Ky.L. 992.
La.—International Alkali Co. v. New Orleans & N. E. R. Co., 134 So. 299, 16 La.App. 537.
Md.—Meyer Motor Car Co. v. First Nat. Bank, 140 A. 34, 154 Md. 77—Brotherhood of Locomotive Firemen & Engineers v. Nash, 125 A. 441, 144 Md. 623.
Mich.—Armstrong v. Rachow, 171 N.W. 389, 205 Mich. 168.
Mo.—State ex rel. Reynolds County v. State Highway Commission, 42 S.W.2d 193, 328 Mo. 859—State ex rel. and to Use of Johnson v. St. Louis-San Francisco Ry. Co., 286 S.W. 360, 315 Mo. 430—White v. Hasburgh, App., 124 S.W.2d 560.
N.J.—In re Beam, 117 A. 613, 93 N.J. Eq. 593.

The testimony of the custodian of a record is not competent to establish the contents of the record,[50] but he may state what the record shows for the purpose of identification.[51]

A certificate of a public officer that his books show certain facts is not the best evidence of their contents, and in the absence of a statute authorizing it is not competent evidence of entries therein.[52]

b. Limitations of Rule

To constitute the record the best evidence of any given fact, the record must be one which is authorized or required by law to be kept.

In order to constitute a record the best evidence of any given fact, the record must be one which is authorized or required by law to be kept, and the fact must be one for the recording of which the law makes provision; otherwise, although the fact may exist in and be proved by a record, it is not necessarily thus to be proved, and other evidence of the fact is not secondary, but original,[53] and is admissible.[54] The book or document must also be one which the law declares to be a record or to be evidence of the fact it recites,[55] and the record must be one which would naturally show the fact sought to be proved,[56] and parol testimony is admissible where the statute makes the report admissible solely to prove compliance with the statute.[57] Thus, on questions of the identity of persons, records and registers are not the best evidence, for although the entries in them are received it is still necessary to identify the persons mentioned and this must be

N.M.—Pace v. Wight, 181 P. 430, 25 N.M. 276.

N.Y.—Metropolitan Casualty Ins. Co. of New York v. Rochester Fruit & Vegetable Co., 249 N.Y.S. 572, 232 App.Div. 321—In re Smith's Estate, 242 N.Y.S. 464, 136 Misc. 863.

N.C.—Buncombe County v. Cain, 188 S.E. 399, 210 N.C. 766—Becton v. Goodman, 105 S.E. 875, 181 N.C. 475.

Okl.—Horn v. First Mortgage Loan Co., 72 P.2d 777, 181 Okl. 87—Commercial Credit Co. v. Williams, 50 P.2d 141, 174 Okl. 160—Hynds v. Walker, 299 P. 905, 149 Okl. 195—Gaston v. Caruth, 243 P. 192, 116 Okl. 146.

Or.—Poole v. Vining, 201 P. 726, 102 Or. 414, motion overruled 202 P. 724, 102 Or. 414.

Pa.—Feldgus v. Friedman, 112 A. 97, 269 Pa. 60.

R.I.—Frank W. Coy Real Estate Co. v. Pendleton, 123 A. 562, 45 R.I. 477.

Tenn.—Crowder v. Stafford, 1 Tenn. App. 539.

Tex.—Shuffield v. Taylor, 83 S.W.2d 955, 125 Tex. 601, reversing Taylor v. Shuffield, Civ.App., 52 S.W. 2d 788—Slaughter v. Bledsoe Independent School Dist., Civ.App., 38 S.W.2d 888—Sparks v. State, Civ. App., 27 S.W.2d 918, error refused—American Employers' Ins. Co. v. Thompson, Civ.App., 11 S.W.2d 358, error dismissed.

22 C.J. p 1004 note 34.

Tax certificates and records

(1) Tax certificates and receipts have been held admissible to show payment of taxes.

Ark.—Laughlin v. Fisher, 218 S.W. 199, 141 Ark. 629.

Kan.—Reddy v. Graham, 205 P. 362, 110 Kan. 753.

Mo.—Blaske v. Wehmeyer, 226 S.W. 868, 285 Mo. 524.

Okl.—Bilby v. Halsell, 232 P. 379, 105 Okl. 215.

(2) It has been said that payment of taxes may be proved by tax collector's receipts, records of taxes collected in the tax collector's office, or by direct or circumstantial evidence.—City of San Antonio v. Grayburg Oil Co., Tex.Civ.App., 259 S.W. 985—Holasek v. Janek, Civ.App., 244 S.W. 285.

(3) The official tax digest is admissible as primary evidence for the purpose of showing a return of property for taxation.—Eady v. Slaton, 185 S.E. 351, 182 Ga. 322—Wiley v. Martin, 136 S.E. 151, 163 Ga. 381—Ridley v. Ridley, 102 S.E. 918, 25 Ga.App. 154.

Applying words to specific object

Parol evidence has been admitted for the purpose of applying the words of a record to the specific object of the writing.—Mayo v. Inhabitants of Town of West Springfield, 157 N.E. 700, 260 Mass. 594.

Impeachment of record

In action of assumpsit to collect unpaid delay rentals allegedly due under oil and gas lease, court erred in permitting impeachment of record of deed in plaintiff's chain of title by parol testimony based solely on visual examination of the record by witness.—Adkins v. Downing Gas Co., 198 S.E. 131, 120 W.Va. 401.

Certificate given to owner

Certificate of oil inspector containing statutory data and delivered to defendant, wholesale dealer in kerosene, after kerosene had been tested while in tank car, was, in suit by customer for injuries due to explosion, admissible as against objection that inspector's record was the best evidence.—Way v. S. L. Collins Oil Co., 173 N.W. 20, 187 Iowa 1375.

Where record admitted

Objection to admission of testimony on ground that it was not best evidence of action of board was overcome by introduction of pertinent portions of minutes of board bearing on such subject.—Smith v. Tolbert, 127 S.E. 868, 160 Ga. 268.

Records not only proof

Records of county treasurer have been held not to constitute only proof of amount owing to county by township tax collectors, under tax duplicate covering county taxes.—Commonwealth, at Suggestion and to Use of Franklin County v. Kauffman, 171 A. 572, 314 Pa. 396.

To show claim considered

Evidence that special advisory committee and commissioner himself had considered claim was held admissible, where evidence was offered only to show that claim had been reconsidered on its merits, so as to toll limitation statute and leave claim undecided and pending.—U. S. ex rel. Botany Worsted Mills v. Helvering, 89 F.2d 848, 67 App.D.C. 104.

50. Ark.—Thomas v. Spires, 22 S.W. 2d 553, 180 Ark. 671.

22 C.J. p 1005 note 35.

51. Iowa.—Powers v. Iowa Cent. R. Co., 136 N.W. 1049, 157 Iowa 347.

52. Neb.—Sampson v. Northwestern Nat. Life Ins. Co., 123 N.W. 302, 85 Neb. 319.

53. Ill.—People v. Hunt, 142 N.E. 522, 311 Ill. 291.

22 C.J. p 1005 note 39.

54. Minn.—Gustafson v. Northwestern Reed & Fiber Co., 230 N.W. 795, 180 Minn. 338.

Mo.—State ex rel. and to Use of Johnson v. St. Louis-San Francisco Ry. Co., 286 S.W. 360, 315 Mo 430.

55. N.Y.—Town of Fishkill v. Fishkill & B. Plank Road Co., 22 Barb. 634.

22 C.J. p 1005 note 40.

56. Vt.—Brookline v. Westminster, 4 Vt. 224.

22 C.J. p 1005 note 41.

57. Me.—Lawyerson v. Nadeau, 10 A.2d 357, 136 Me. 361.

done by extrinsic evidence,[58] and the same is true where it is sought to show the identity of animals, certified copies of recorded brands and ear-marks being held not the only competent evidence, but parol evidence being equally admissible.[59] Where the fact to be established is one of general knowledge, or, as it has been termed, "a public fact," it may be proved by the testimony of any person cognizant thereof notwithstanding it appears of record.[60] The rule does not exclude the testimony of a witness to the mere fact that he signed the record,[61] and it has been held that the maps and records of a city are not the best evidence of the actual location of city streets on the ground.[62] So also a certificate that town officers were sworn to the faithful performance of their duties has been held to be merely evidence that the proper oath was administered, which may be established by oral testimony.[63] The fact of deposit of papers becoming public records in the proper place, as distinct from the contents thereof, may be proved by parol.[64]

c. Want of Record

Where the fact to be proved is not one as to the existence of which the law declares the record to be the sole and conclusive evidence, it is ordinarily held that, if the record does not contain evidence of the fact, parol evidence otherwise competent is admissible.

Where the fact to be proved is not one as to the existence of which the law declares the record to be the sole and conclusive evidence, it is generally held that, if the record does not contain evidence of the fact, parol evidence otherwise competent is admissible,[65] especially when to exclude such evidence would prejudice the rights of innocent persons or enable a public officer to take advantage of his own default;[66] and a fortiori, where the fact is not one which is required to appear of record and does not so appear, it may be established by parol.[67]

However, where a record is intact, secondary evidence has been held not admissible to show acts about which the record is silent,[68] and where the record is the only legal evidence of a fact, the lack of a record does not render parol evidence admissible.[69]

d. Proof of Absence from Record

Parol evidence is generally admissible to prove a negative, that is, that facts or documents do not appear of record.

Where it is sought to prove a negative, that is, that facts or documents do not appear of record, or that as to certain acts or proceedings the record is silent, parol evidence is admissible as primary proof; the record is not higher evidence.[70] It has been considered, however, that parol evidence of this character is necessarily unsatisfactory and inconclusive,[71] and some cases have gone so far as to regard the record as the best evidence under such circumstances.[72] The certificate of the custodian of the record that facts or instruments do not appear of record is generally held incompetent and inad-

58. Pa.—Howser v. Commonwealth, 51 Pa. 332.

59. N.M.—Gale v. Salas, 66 P. 520, 11 N.M. 211—Chavez v. Territory, 30 P. 903, 6 N.M. 455.

60. Tex.—Richardson v. Impey, Civ. App., 94 S.W.2d 490, error dismissed.
22 C.J. p 1005 note 44.

61. Cal.—People v. Donovan, 43 Cal. 162.
22 C.J. p 1005 note 45.

62. Tex.—International & G. N. R. Co. v. Morin, 116 S.W. 656, 53 Tex. Civ.App. 531.

63. R.I.—Pendleton v. Briggs, 92 A. 1024, 37 R.I. 352, 93 A. 794, 37 R. I. 471.

64. Mo.—State v. Clardy, 185 S.W. 184, 267 Mo. 371.

65. Cal.—Ryan v. Burk, 77 P.2d 224, 25 Cal.App.2d 342.
Conn.—Mower v. State Department of Health, 142 A. 473, 108 Conn. 74, appeal dismissed Mower v. State Department of Health for State of Connecticut, 49 S.Ct. 82, 278 U.S. 570, 73 L.Ed. 511.
Iowa.—Wildeboer v. Petersen, 175 N. W. 349, 187 Iowa 169.
Ky.—Whitley City Graded School Dist. No. 57 v. McCreary County Board of Education, 13 S.W.2d 1007, 227 Ky. 682—Board of Education of Pulaski County v. Jasper, 235 S.W. 366, 193 Ky. 222.
22 C.J. p 1005 note 51.
Fact of making or existence of writing generally see supra § 791.

66. Wyo.—Rohrbaugh v. Mokler, 188 P. 448, 26 Wyo. 514.
22 C.J. p 1006 note 52.

67. Ind.—Paul v. Walkerton Woodlawn Cemetery Ass'n, 184 N.E. 537, 204 Ind. 693.
Mo.—Donnelly v. City of St. Louis, 285 S.W. 1005.
Neb.—State v. Warrick, 184 N.W. 896, 106 Neb. 750.
Tex.—Miller v. Tucker, Civ.App., 119 S.W.2d 92.
22 C.J. p 1006 note 53.

68. Ind.—Allen v. Gilkison, 132 N. E. 12, 76 Ind.App. 233.
Neb.—Village of Deshler v. Southern Nebraska Power Co., 277 N.W. 77, 133 Neb. 778.

69. Cal.—Ryan v. Burk, 77 P.2d 224, 25 Cal.App.2d 342.
Tenn.—Bank of Erin v. Houston County, 6 Tenn.App. 638.
22 C.J. p 1006 note 54.

70. Ala.—Reichert v. Jerome H. Sheip, Inc., 102 So. 440, 212 Ala. 300.
Ark.—Thomas v. Spires, 22 S.W.2d 553, 180 Ark. 671.
Conn.—Mower v. State Department of Health, 142 A. 473, 108 Conn. 74, appeal dismissed Mower v. State Department of Health for State of Connecticut, 49 S.Ct. 82, 278 U. S. 570, 73 L.Ed. 511.
Fla.—Kent v. Knowles, 133 So. 315, 317, 101 Fla. 1375, quoting **Corpus Juris.**
Okl.—Mannus-Dewall v. Smith, 281 P. 807, 809, 139 Okl. 195, quoting **Corpus Juris.**
S.D.—In re Jacobson's Will, 184 N. W. 237, 44 S.D. 409.
Tex.—Ruggles v. Seedig, Civ.App., 247 S.W. 650, 651, citing **Corpus Juris.**
22 C.J. p 1006 note 55, p 1018 note 92.

71. Kan.—Bemis v. Becker, 1 Kan. 226.
22 C.J. p 1006 note 56.

72. Ga.—Adams v. Fitzgerald, 14 Ga. 36.
La.—Cannon v. Labarre, 13 La. 399.

missible,[73] although there is authority to the contrary.[74]

By whom proof made. That documents or facts do not appear of record may be proved by the sworn testimony of the person who is legal custodian of the record,[75] or, it is usually considered, by that of any other competent person.[76] However, some cases have held that the custodian when accessible is the only competent witness,[77] and, of course, it is obviously improper to admit the evidence of a person who is not the custodian of the records and is not shown to have made any examination of them.[78]

§ 808. —— Official Records and Documents

a. In general
b. Land office records

a. In General

The best evidence rule has been applied in many cases involving various official records and documents.

The rule that the record is the best evidence has been applied to the record of an executive act;[79] records in the office of a state secretary of state;[80] the record of proceedings of a legislative body;[81] the record of the proceedings of a county board, as shown in the title Counties § 91 c; records of proceedings of drainage commissioners;[82] records of the board of commissioners of a special road district;[83] records of a state geological survey;[84] records of tax lists;[85] weather bureau records;[86] the rules of a civil service commission;[87] a claim presented to a county auditor;[88] and a carrier's published schedule of fares as filed with and approved by the railroad commission.[89] The best evidence of the transfer with the consent of the city of an unexpired dramshop license is the license with the transfer indorsed thereon.[90]

b. Land Office Records

The best evidence of a land office record is the record itself and parol evidence is ordinarily not admissible as to the facts contained therein without first showing that the record evidence cannot be had.

The best evidence of the contents of a land office record is the record itself or a duly authenticated copy thereof, and parol evidence of the facts contained therein is not admissible, without first showing that the record evidence cannot be had.[91] Where, however, the fact is not one which is required to appear of record, it may be established by parol evidence,[92] and such evidence is admissible to show the location of a tract of land, although there is record evidence of the fact.[93]

§ 809. —— Judicial Records and Documents

a. In general
b. Applications of rule

73. Tex.—World Oil Co. v. Hicks, Civ.App., 75 S.W.2d 905, certified questions answered 103 S.W.2d 962, 129 Tex. 297.
22 C.J. p 1006 note 58, p 169 note 29 [c] (1).

74. Pa.—Struthers v. Reese, 4 Pa. 129.
22 C.J. p 1006 note 59.

75. Md.—Meyer Motor Car Co. v. First Nat. Bank, 140 A. 34, 154 Md. 77.
Okl.—Mannus-Dewall v. Smith, 281 P. 807, 809, 139 Okl. 195, quoting **Corpus Juris.**
Tex.—World Oil Co. v. Hicks, 75 S.W.2d 905, certified questions answered 103 S.W.2d 962, 129 Tex. 297.
22 C.J. p 1006 note 60, p 169 note 29 [c] (2).

76. Miss.—Bourland v. Hatchcock, 188 So. 9, 11, 186 Miss. 223, citing **Corpus Juris.**
22 C.J. p 1006 note 61.

77. Mo.—Osmak v. American Car & Foundry Co., 40 S.W.2d 714, 328 Mo. 159, 77 A.L.R. 722.
22 C.J. p 1006 note 62.

78. Ga.—Dixon v. Patterson, 69 S.E. 21, 135 Ga. 183.

79. U.S.—Peysert v. U. S., 41 Ct.Cl. 311.
22 C.J. p 1006 note 64.

80. R.I.—Michaels-Bauer v. Doughty, 124 A. 253, 45 R.I. 510.
22 C.J. p 1006 note 65.

81. Neb.—State ex rel. Ball v. Hall, 263 N.W. 400, 130 Neb. 18—Day v. Walker, 247 N.W. 350, 124 Neb. 500.
Tex.—Denison v. State, Civ.App., 61 S.W.2d 1017, error refused Denison v. State ex rel. Allred, 61 S.W.2d 1022, 122 Tex. 459.

82. Ill.—People v. Prather, 153 N.E. 382, 322 Ill. 280—People v. Schenck, 96 N.E. 864, 252 Ill. 441.

83. Mo.—State v. Heffernan, 148 S.W. 90, 243 Mo. 442.

84. N.J.—Stout v. Edison Portland Cement Co., 81 A. 737, 82 N.J.Law 133, affirmed 83 A. 1119, 83 N.J. Law 639.

85. Colo.—Antero & Lost Park Reservoir Co. v. Board of Com'rs of Park County, 225 P. 269, 75 Colo. 131.
Okl.—Milbourn v. State, 32 P.2d 291, 168 Okl. 168.
S.D.—Vogelgesang v. Farmers' State Bank, 223 N.W. 831, 54 S.D. 575.
Tex.—Crocker v. Santo Consol. Independent School Dist., Civ.App., 116 S.W.2d 750, error dismissed.

86. U.S.—The Perseverance, D.C.N.Y., 49 F.2d 785.
Ind.—Garrett v. Winterich, 87 N.E. 161, 44 Ind.App. 322, rehearing denied 88 N.E. 308, 44 Ind.App. 322.

87. Ill.—Chicago v. Fitzmaurice, 138 Ill.App. 239, reversed on other grounds 90 N.E. 304, 242 Ill. 572.

88. Iowa.—McGuire v. Iowa County, 111 N.W. 34, 133 Iowa 636.

89. La.—International Alkali Co. v. New Orleans & N. E. R. Co., 134 So. 299, 16 La.App. 537.
22 C.J. p 1007 note 73.

90. Mo.—Hill v. Sheridan, 107 S.W. 426, 128 Mo.App. 415.

91. Ark.—Thomas v. Spires, 22 S.W.2d 553, 180 Ark. 671.
N.Y.—Dinneen v. Martin, 178 N.Y.S. 384.
22 C.J. p 1007 notes 76, 77.

92. U.S.—Guitard v. Stoddard, Mo., 16 How. 494, 14 L.Ed. 1030.
Miss.—Phillips v. Doe, 21 Miss. 31.

93. Conn.—Byard v. Hoelscher, 151 A. 351, 112 Conn. 5.
22 C.J. p 1007 note 79.

c. Limitations of rule
d. Want of record

a. In General

The proceedings, orders, judgments, and decrees of courts of record cannot be proved by parol unless the record is lost or destroyed, or is otherwise inaccessible, and a properly authenticated copy or transcript thereof cannot be obtained.

In accordance with the general rule excluding parol evidence of the contents of an accessible public record, it is well settled that the proceedings, orders, judgments, and decrees of courts of record cannot be proved by parol unless the record is lost or destroyed or is otherwise inaccessible, and a properly authenticated copy or transcript thereof cannot be obtained.[94] This rule has been held to apply, even though the evidence is offered merely to prove the result of a judgment, and not the proceedings by which it was obtained,[95] and to exclude parol evidence of the mere existence of a judgment.[96]

b. Applications of Rule

(1) In general
(2) Bankruptcy proceedings
(3) Proceedings in probate courts
(4) Proceedings before justices and magistrates
(5) Seizure and sale of property

(1) In General

The rule has been applied to proof of facts appearing in the records of courts of criminal jurisdiction or of courts of other states or foreign countries, and to proof of facts or documents appearing in the records although such facts and documents are not the acts of the court itself.

The rule just stated applies where it is sought to establish by parol facts which properly appear on the records of a court, or to prove by oral evidence the contents of documents properly constituting a part of such records, although such facts and documents are not the acts of the court itself.[97] In like manner the record itself, or a properly authenticated copy or transcript, is the best evidence, and parol evidence is excluded by this rule, where it is sought to prove facts properly appearing of record in courts of criminal jurisdiction,[98] or, it has been

94. Ala.—Whitaker v. Kennamer, 155 So. 855, 229 Ala. 80—Boasberg v. Cooke, 136 So. 797, 223 Ala. 389—McNeil v. Ritter Dental Mfg. Co., 104 So. 230, 213 Ala. 24.
Cal.—Anchors v. Anchors, App., 107 P.2d 973—Sills v. Forbes, 91 P.2d 246, 33 Cal.App.2d 219.
Conn.—Hogewoning v. Hogewoning, 167 A. 813, 117 Conn. 264—Beers v. Bridgeport Hydraulic Co., 124 A. 23, 100 Conn. 459.
Ga.—Hardeman v. Hardeman, 175 S.E. 9, 179 Ga. 34—Henderson Lumber Co. v. Lankford, 107 S.E. 157, 151 Ga. 440—Bryan v. Haney, 168 S.E. 116, 46 Ga.App. 524.
Ill.—People v. North Fork Outlet Drainage Dist., 162 N.E. 184, 331 Ill. 68.
Ky.—Jones v. Hodgkins, 26 S.W.2d 19, 20, 233 Ky. 491, citing **Corpus Juris.**
Md.—Annarina v. Boland, 111 A. 84, 136 Md. 365.
N.H.—Slocinski v. Radwan, 144 A. 787, 83 N.H. 501, 63 A.L.R. 543.
N.C.—Buncombe County v. Cain, 188 S.E. 399, 210 N.C. 766—Gauldin v. Town of Madison, 102 S.E. 851, 179 N.C. 461, 10 A.L.R. 1497.
Okl.—Wood v. City of Chickasha, 257 P. 286, 125 Okl. 212—McAdams v. C. D. Shamburger Lumber Co., 240 P. 124, 112 Okl. 173.
Or.—Oliver v. Burg, 58 P.2d 245, 154 Or. 1.
R.I.—Rostron v. Rostron, 142 A. 162, 49 R.I. 292.
Tenn.—Black v. Nashville Banner Pub. Co., App., 141 S.W.2d 908.
Tex.—Richards v. Rule, Com.App., 207 S.W. 912, reversing, Rule v. Richards, Civ.App., 159 S.W. 386—Scott v. Molter, Civ.App., 149 S.W.2d 642—General Exchange Ins. Corporation v. Appling, App., 144 S.W.2d 699—Woods v. Hardware Mut. Casualty Co., Civ.App., 141 S.W.2d 972, error refused—Cavers v. Sioux Oil & Refining Co., Civ.App., 23 S.W.2d 421, reversed on other grounds, Com.App., 39 S.W.2d 862, rehearing denied 43 S.W.2d 578—Becker v. Cooper, Civ.App., 22 S.W.2d 1083, error dismissed—Turley v. Tobin, Civ.App., 7 S.W.2d 949, error refused.
Wash.—Thompson-Cadillac Co. v. U. S. Casualty Co., 40 P.2d 170, 180 Wash. 481—In re Webber's Guardianship, 286 P. 668, 156 Wash. 230.
Wis.—Douglass v. Ransom, 237 N.W. 260, 205 Wis. 439.
22 C.J. p 1007 note 81—38 C.J. p 1182 note 53 [d].

Divorce

(1) The text rule has been applied to proof of divorce actions.
Ga.—McDonald v. McDonald, 180 S.E. 815, 180 Ga. 771.
N.J.—Weaver v. Patterson, 111 A. 506, 92 N.J.Eq. 170.

(2) However, testimony that witness knew that certain man had been divorced from first wife has been held not inadmissible as not best evidence.—Moore v. Follett, Tex. Civ.App., 11 S.W.2d 662, error dismissed.

Complaint before grand jury

Where it appeared that criminal complaint lodged against plaintiff was not dismissed, but that no indictment was returned, clerk of grand jury, by producing original complaint bearing indorsement of foreman of grand jury, that no bill was found, was held to have produced best evidence nature of case was susceptible of.—Helstowski v. Greenberg, 126 A. 615, 2 N.J.Misc. 1094, affirmed 130 A. 918, 101 N.J. Law 560.

Minutes of judge

It is not custom of judges to keep official minutes, but note which trial judge, by personal indorsement, directs clerk to spread in minutes constitutes best evidence of what judge actually did, in absence of proper enrollment.—Roberts v. Edwards, 127 S.E. 307, 141 Va. 338.

Eviction

(1) In a suit for breach of a covenant of warranty, parol evidence has been held not admissible to show the evidence on which a judgment of eviction was rendered.—Cooper v. Watson, 10 Wend., N.Y., 202.

(2) However, where an eviction by due course of law need not be shown, parol evidence is admissible.—Randolph v. Meek, Mart. & Y., Tenn., 58.

95. N.J.—Lomerson v. Hoffman, 24 N.J.Law 674, reversed on other grounds 25 N.J.Law 625.

96. N.J.—Livesey v. Besson, 82 A. 509, 82 N.J.Law 333.
22 C.J. p 1008 note 83.

97. Tenn.—Hall v. Hall, Ch.A., 59 S.W. 203.
22 C.J. p 1008 note 87.

98. Ky.—Prewitt v. Wilson, 46 S.W.2d 90, 242 Ky. 231.

held, in the courts of sister states or foreign countries.[99]

The rule under discussion applies also to exclude parol evidence of the contents of pleadings,[1] of the findings and verdict of a jury,[2] and of judicial writs, including the returns and other indorsements made thereon.[3] The rule also applies to exclude parol evidence of such matters as the time when an action was commenced, or when a pleading was filed,[4] or when a judgment was rendered,[5] the service of notice,[6] the issues involved,[7] a warrant signed by the president of a court-martial,[8] an adoption effected by order of court,[9] the dismissal of an action,[10] a bill of costs,[11] the appointment of a receiver,[12] the authority of a receiver to sell land under an order of court,[13] authority from the commissioners' court of a county to execute a deed,[14] and whether the bond which a sheriff is required to give for the performance of his duties has been acknowledged in open court by the parties who executed and recorded it.[15]

Parol evidence as to the testimony of a witness on a former trial has been considered not admissible if a transcript of such testimony can be obtained,[16] but there is also authority for the contrary view.[17] However, parol testimony of the contents of a deposition taken in another proceeding has been held inadmissible in the absence of an excuse for not producing such deposition or a certified copy thereof,[18] and written testimony signed by a witness is the best evidence of his testimony.[19] A certificate by the clerk of the court that a special receiver qualified by giving bond as required by the decree appointing him is inadmissible in evidence, an authenticated copy of the record being necessary evidence.[20]

(2) Bankruptcy Proceedings

The best evidence rule excludes parol evidence of proceedings in a court of bankruptcy.

The rule under consideration excludes parol evidence of proceedings in a court of bankruptcy,[21] such as the appointment of a trustee,[22] a claim of

Mo.—State, on Inf. of McKittrick, v. Williams, 144 S.W.2d 98.
Neb.—In re Hoagland, 260 N.W. 695, 129 Neb. 6.
N.J.—Horton v. Horton, 130 A. 24, 2 N.J.Misc. 683.
N.Y.—Taggart v. Graby, 286 N.Y.S. 382, 159 Misc. 155.
22 C.J. p 1008 note 88.

99. Cal.—Anchors v. Anchors, App., 107 P.2d 973.
Mass.—Hanley Co. v. Whitney, 182 N.E. 104, 279 Mass. 546.
22 C.J. p 1008 note 89.

1. Ala.—Alabama Fuel & Iron Co. v. Denson, 94 So. 311, 208 Ala. 337.
N.J.—Illonardo v. Erie R. Co., 135 A. 77, 103 N.J.Law 4, affirmed 137 A. 917, 103 N.J.Law 698.
22 C.J. p 1009 note 90.

2. N.C.—Rollins v. Wicker, 70 S.E. 934, 154 N.C. 559.
22 C.J. p 1009 note 91.

3. Cal.—Sills v. Forbes, 91 P.2d 246, 33 Cal.App.2d 219.
La.—Davis v. Southland Inv. Co., App., 149 So. 303.
Mich.—Kobic v. Reed, 219 N.W. 678, 242 Mich. 594.
N.D.—Vaughan v. U. S. Fidelity & Guaranty Co., 217 N.W. 167, 56 N. D. 272.
Or.—Oliver v. Burg, 58 P.2d 245, 154 Or. 1.
22 C.J. p 1009 note 92.

Action on bail bond

(1) The surrender of the principal, being generally required by law to be recorded, must be proved by the record.—Griffin v. Moore, 2 Ga. 331—6 C.J. p 951 note 90.

(2) The arrest of the principal, however, under a capias ad satisfaciendum may be shown by parol evidence.—McKnight v. Sessions, 42 S.C.L. 210.

(3) The insolvency of the principal may be shown by parol evidence. —Willard v. Wickham, 7 Watts, Pa., 292.

4. Ark.—Hogue v. Hogue, 208 S.W. 579, 137 Ark. 485, followed in Hogue v. Dudley, 208 S.W. 582, 137 Ark. 615.
Mo.—Citizens Bank of Springfield v. Wright, App., 122 S.W.2d 409.
22 C.J. p 1009 note 93.

5. Ariz.—American Surety Co. of New York v. Mosher, 64 P.2d 1025, 48 Ariz. 552.

6. Iowa.—Manion v. Brady, 138 N. W. 558, 158 Iowa 306.
La.—Collins v. McCook, 136 So. 204, 17 La.App. 415.

7. Idaho.—Barton v. Dyer, 220 P. 488, 38 Idaho 1.

8. N.Y.—Stebbins v. Cooper, 4 Den. 191.

9. Okl.—Coombs v. Cook, 129 P. 698, 35 Okl. 326.

10. Ga.—Keen v. Tanner, 71 S.E 141, 136 Ga. 194.

11. Mo.—Gates v. Hunter, 13 Mo. 511.

12. Mich.—Pearson v. Wallace, 170 N.W. 72, 203 Mich. 622.

13. Mo.—Hutchinson v. Patterson, 126 S.W. 403, 226 Mo. 174.
22 C.J. p 1009 note 1.

14. Mo.—Carter v. St. Louis & S. F. Ry. Co., App., 249 S.W. 124.
Tex.—Gamble v. Martin, 129 S.W. 386, 60 Tex.Civ.App. 517.

15. Tenn.—Bryan v. Glass, 2 Humphr. 390.

16. Ill.—Carroll v. Krause, 15 N.E. 2d 323, 295 Ill.App. 552.
22 C.J p 1009 note 4.

17. Tex.—Pettit v. Campbell, Civ. App., 149 S.W.2d 633.
22 C.J. p 1009 note 5.

18. Tex.—Pettit v. Campbell, supra.

19. N.Y.—Harmon v. Matthews, 27 N.Y.S.2d 656.

20. W.Va.—Hagan v. Holderby, 57 S.E. 289, 62 W.Va. 106, 125 Am.S. R. 960.

21. Cal.—Appling v. Minarets & W. Ry. Co., 280 P. 1029, 100 Cal.App. 621, followed in Appling v. Sugar Pine Lumber Co., 280 P. 1033, 100 Cal.App. 800.
Ky.—McDermott v. Byrley Supply Co., 28 S.W.2d 988, 234 Ky. 670.
Md.—Berg v. Plitt, 12 A.2d 609, 178 Md. 155, reargument denied 13 A. 2d 364, 178 Md. 155.
Utah.—Jones v. Pingree, 273 P. 303, 73 Utah 190.
22 C.J. p 1009 note 8.

Letter reciting sale of account

A letter from one purporting to be a trustee in bankruptcy reciting the sale of an account to one of the parties is not the best evidence of the sale and is inadmissible.—Keller v. Faickney, 94 S.W. 103, 42 Tex. Civ.App. 483.

22. N.Y.—Saxe v. Neil, 224 N.Y.S. 660, 661, 221 App.Div. 492, citing Corpus Juris.
22 C.J. p 1009 note 9.

exemption,[23] the setting aside of certain property to a bankrupt as exempt,[24] the contents of a schedule,[25] or a certificate of discharge.[26]

(3) Proceedings in Probate Courts

The general rule relating to proof of facts appearing in the records of a court excludes parol evidence of the proceedings of probate courts.

The rule under consideration also excludes parol evidence of the proceedings of probate courts,[27] such as the probate of a will:[28] the appointment of an administrator;[29] or guardian;[30] the revocation of the powers of an executor;[31] or the setting apart of a year's support to the widow and children;[32] as well as of matters occurring in such court and evidenced by the records thereof, although not acts of the court itself, such as the grounds of a contest of probate;[33] the qualification of an executor[34] or guardian;[35] the execution of the statutory bond by an administrator as required by order of court;[36] a claim against a decedent's estate;[37] the allowance of a claim by an executor or administrator;[38] the fact that administration on an estate is still pending;[39] the report,[40] inventory,[41] or final account[42] of an executor or administrator; the confirmation of a sale of realty;[43] or the terms of distribution of decedent's estate.[44]

(4) Proceedings before Justices and Magistrates

Where the proceedings and judgments of justices of the peace, magistrates, etc., are required by law to be put in writing or a record is kept, parol evidence is excluded unless the writing has been lost or destroyed or is otherwise inaccessible.

Although the courts of justices of the peace, magistrates, and trial justices are not technically courts of record, yet where the proceedings and judgments of such courts are required by law to be put in writing, or where a record of such proceedings and judgments is in fact kept, such writing or record, or a properly authenticated transcript thereof, constitutes the best evidence, and parol evidence of the matters contained therein is excluded unless the writing has been lost or destroyed or is otherwise inaccessible.[45] This is true, although the parol evidence offered to prove such proceedings or judgments is the testimony of the justice himself;[46] but where no record exists parol evidence is admissible.[47]

(5) Seizure and Sale of Property

As a general rule the seizure and sale of property under an order or decree or other judicial process cannot be proved by parol evidence.

As a general rule the seizure and sale of property under an order or decree or other judicial process cannot be proved by parol evidence, unless the loss or destruction of the record evidence of the authority under which the proceedings were had is shown, and a properly authenticated copy or tran-

23. Ala.—Northern Alabama R. Co. v. Feldman, 56 So. 16, 1 Ala.App. 334.

24. N.D.—Galvin v. Tibbs, 119 N.W. 39, 17 N.D. 600.

25. Ill.—Thomson v. Caverley, 148 Ill.App. 295.
22 C.J. p 1009 note 12.

26. N.C.—Regan v. Regan, 72 N.C. 195.

27. U.S.—Title Guaranty & Surety Co. v. State of Missouri ex rel. and to Use of Stormfeltz, C.C.A.Mo., 105 F.2d 496.
Iowa.—Wapello County Sav. Bank v. Keokuk County, 229 N.W. 721, 209 Iowa 1127.
Md.—Davidove v. Duvall, 153 A. 417, 160 Md. 345.
Mo.—Moore v. Mansfield, 286 S.W. 353.
Tex.—James v. Gaal, Civ.App., 282 S.W. 298.
22 C.J. p 1009 note 15.

28. Ky.—Betty v. Petrie, 128 S.W. 320, 138 Ky. 426.
22 C.J. p 1009 note 16.

29. Ala.—Elliott v. Eslava, 3 Ala. 568.
22 C.J. p 1009 note 17.

30. Vt.—In re Clogston's Estate, 106 A. 594, 93 Vt. 46.

31. Md.—Wright v. Gilbert, 51 Md. 146.
22 C.J. p 1010 note 18.

32. Ga.—Selph v. Selph, 65 S.E. 881, 133 Ga. 409.

33. Ala.—Donegan v. Wade, 70 Ala. 501.

34. Tex.—Roberts v. Connellee, 8 S.W. 626, 71 Tex. 11.

35. Md.—Clarke v. State, 8 Gill. & J. 111.

36. Miss.—Shannon v. Summers, 38 So. 345, 86 Miss. 619.

37. Ala.—Kornegay v. Mayer, 33 So. 36, 135 Ala. 141.
22 C.J. p 1010 note 24.

38. Md.—Harper v. Davis, 80 A. 1012, 115 Md. 349, 35 L.R.A.,N.S., 1026, Ann.Cas.1913A 861.

39. Tex.—Williams v. Davis, 56 Tex. 250.

40. Neb.—Quinby v. Ayers, 95 N.W. 464, 1 Neb. (Unoff.) 70.
22 C.J. p 1010 note 27.

41. Md.—Davidove v. Duvall, 153 A. 417, 160 Md. 345.
Tex.—Roberts v. Connellee, 8 S.W. 626, 71 Tex. 11.

42. Me.—Pierce v. Strickland, 26 Me. 277.

43. Tex.—James v. Gaal, Civ.App., 282 S.W. 298.

44. Conn.—Bishop v. Copp, 114 A. 682, 96 Conn. 571.
Ga.—McKee v. McKee, 48 Ga. 332.

45. Ala.—Smith v. Bailey, 106 So. 239, 214 Ala. 4.
Cal.—Langensand v. Obert, 18 P.2d 725, 129 Cal.App. 214.
Colo.—Smith v. Elliott, 33 P.2d 386, 95 Colo. 68.
Ga.—Tuxworth v. Barber, 101 S.E. 715, 24 Ga.App. 609.
Mont.—Hawley v. Richardson, 198 P. 450, 60 Mont. 118.
Okl.—Carr v. Cobble, 232 P. 108, 107 Okl. 225, citing Corpus Juris.
Tenn.—Black v. Nashville Banner Pub. Co., App., 141 S.W.2d 908.
22 C.J. p 1010 note 31.
Contents of warrant
The contents of a magistrate's warrant are not provable by parol.—Annarina v. Boland, 111 A. 84, 136 Md. 365.
22 C.J. p 1010 note 31 [a] (1).

46. Pa.—Zimmerman v. Houghwot, 189 A. 519, 125 Pa.Super. 319.
22 C.J. p 1010 note 32.

47. Okl.—Kingham v. Capps, 229 P. 224, 106 Okl. 269.

script of the record cannot be obtained.[48] However, parol evidence as to facts concerning the sale are admissible where the record does not contain evidence thereof and no statute requires a record of such facts,[49] and the mere fact of the issuance of an execution, as distinct from its contents may be proved by parol.[50]

c. Limitations of Rule

A judicial record does not constitute the best evidence of facts which are not from their nature susceptible of proof by the record, and parol evidence is also admissible where a conclusion of fact or a collection of facts is sought to be shown.

A judicial record does not constitute the best evidence of facts which are not from their nature susceptible of proof by the record,[51] or of facts which, while they may perhaps be to some extent provable by the record, are in their nature independent facts or matters in pais.[52] Among the latter class are merely ministerial acts of a court, such as granting letters testamentary[53] or approving official bonds.[54] Also, although court records are the best evidence, parol evidence has been held admissible where a conclusion of fact[55] or a collection of facts[56] is sought to be shown; and parol evidence is admissible to show the fact of litigation,[57] or merely to show the fact of arrest, at whose instigation it was made, and its effect.[58]

The admissibility of parol evidence as to the contents of a judicial record where it is only collaterally involved is considered supra § 787.

d. Want of Record

The rule whereby secondary evidence is admitted as to lost or destroyed records is not applicable to judicial records, although parol evidence is admissible in a proceeding to have the missing record properly made up.

It is generally held that the proceedings, judgments, and decrees of court of record can be proved only by the record itself or a properly authenticated copy thereof, and that, if no record of such matters has ever been made, the absence of the record cannot be supplied by parol or other extrinsic evidence, the rule whereby secondary evidence is admitted as to lost or destroyed records not being applicable.[59] In such cases the proper remedy is by legal proceedings to have the missing record properly made up,[60] and for this purpose parol evidence is admissible to show the existence and occurrence of the proceedings, the record of which is to be supplied.[61] However, the foregoing rules do not apply to the proof of facts and proceedings which are not required by law to be recorded;[62] nor do these rules apply in proving the proceedings of a tribunal which is not a court of record.[63]

§ 810. —— Corporate Records

a. Private corporations
b. Public corporations

48. Ga.—Walton v. Mitchell, 74 S.E. 1006, 11 Ga.App. 159.
22 C.J. p 1010 note 34.

Copy filed in another county

Where a sheriff returned the original execution, on which a levy was made, and his return thereof, to the justices' court of one county, and filed a copy thereof in the county court of another county, the sheriff was properly permitted to testify, in a proceeding based on such levy, that a copy attached to the justice's deposition was correct, and that in the copy filed in the other county he had omitted to make an interlineation, over an objection that the original execution was the best evidence.—Peeples v. Slayden-Kirksey Woolen Mills, Tex.Civ.App., 90 S.W. 61.

Recital in deed

The fact that the best evidence of a sheriff's authority to sell is not available, and that proper predicate has been laid for secondary evidence, does not alter the rule that recital in a sheriff's deed is not competent evidence of his power to sell.—Richards v. Rule, Tex.Com.App., 207 S.W. 912, reversing Rule v. Richards, Civ.App., 159 S.W. 386.

49. Or.—Rae v. Morgan, 266 P. 1069, 125 Or. 644, rehearing denied 267 P. 1072, 125 Or. 644.

50. Conn.—Supples v. Lewis, 37 Conn. 568.

51. Iowa.—Holt v. Marshall, 191 N.W. 294.
Mo.—Harbstreet v. Shipman, 122 S.W.2d 395, 233 Mo.App. 526.
Mont.—Dick v. King, 257 P. 1022, 80 Mont. 40.
22 C.J. p 1011 note 37.

52. Mo.—General Motors Acceptance Corporation v. Lyman, 78 S.W.2d 109, 229 Mo.App. 455.
22 C.J. p 1011 note 38.

53. Ill.—Wardwell v. McDowell, 31 Ill. 364—Ayres v. Clinefelter, 20 Ill. 465.

54. Mo.—State v. McGonigle, 13 S.W. 758, 101 Mo. 353, 20 Am.S.R. 609, 8 L.R.A. 735.

55. N.D.—First Nat. Bank v. Carroll, 179 N.W. 664, 46 N.D. 62.

56. Ala.—Birmingham Bottling Co. v. Morris, 69 So. 85, 193 Ala. 627.

57. Conn.—Ezzo v. Geremiah, 142 A. 461, 107 Conn. 670.
Ky.—Jones v. Hodgkins, 26 S.W.2d 19, 233 Ky. 491.
22 C.J. p 984 note 97 [h].

58. Or.—Oliver v. Hutchinson, 69 P. 139, 1024, 41 Or. 443.

59. Tex.—Woods v. Hardware Mut. Casualty Co., Civ.App., 141 S.W.2d 972, error refused—Turley v. Tobin, Civ.App., 7 S.W.2d 949, 952, quoting **Corpus Juris**, error refused.
22 C.J. p 1011 note 42.
Admission of docket entries, etc., generally see supra § 632.

60. Tex.—Woods v. Hardware Mut. Casualty Co., Civ.App., 141 S.W.2d 972, error refused.
22 C.J. p 1011 note 43.

61. Me.—Moody v. Moody, 11 Me. 247.
Okl.—In re Bates, 174 P. 743, 70 Okl. 321.

62. Mo.—Hinson v. Morris, App., 298 S.W. 254.
Neb.—State v. Warrick, 184 N.W. 896, 899, 106 Neb. 750, citing **Corpus Juris**.
Tex.—Richards v. Rule, Com.App., 207 S.W. 912, reversing Rule v. Richards, Civ.App., 159 S.W. 386—W. T. Carter & Bro. v. Bendy, Civ.App., 251 S.W. 265.
22 C.J. p 1011 note 45.

63. Ala.—Sugar Valley Land Co. v. Johnson, 85 So. 871, 17 Ala.App. 409.
22 C.J. p 1011 note 46.

a. Private Corporations

(1) In general

(2) Want of record

(1) In General

The record of the proceedings of a private corporation is the best evidence of its contents, and parol evidence is not admissible if the record is accessible.

Where a record of the acts and proceedings of a private corporation is required by law to be kept, and even where such a record is actually kept, although not required by law, such record constitutes the best evidence of its contents, and parol evidence is not admissible if the record is accessible.[64] The foregoing rule, however, is not of unlimited scope, and independent facts of which a witness has personal knowledge may be proved by his testimony, notwithstanding they may also appear on the records of the corporation.[65] The fact that a corporate meeting was held may be proved by parol without producing the record of what occurred at the meeting,[66] and parol testimony explaining the records is admissible.[67] Where corporate records are

64. U.S.—Simpkinson v. Commissioner of Internal Revenue, C.C.A., 89 F.2d 397, reversed on other grounds 93 F.2d 1015—D. P. Paul & Co. v. Mellon, D.C.N.Y., 24 F.2d 738—Fox v. Johnson & Wimsatt, D.C.D.C., 31 F.Supp. 64.
Ala.—First Nat. Bank v. Cotton, 164 So. 371, 231 Ala. 288.
Cal.—Lawrence v. Premier Indemnity Assur. Co., 182 P. 431, 180 Cal. 688—Irwin v. Pickwick Stages System, 25 P.2d 998, 134 Cal.App. 443.
Ill.—Mullanphy Sav. Bank v. Schott, 26 N.E. 640, 135 Ill. 655, 667, 25 Am.S.R. 401—Wardlow v. Grand Lodge, Brotherhood of Railroad Trainmen, 245 Ill.App. 142—Knights and Ladies of America v. Weber, 101 Ill.App. 488.
Iowa.—Andrew v. Iowa Sav. Bank of Oelwein, 213 N.W. 271.
Kan.—Smith v. Hutchinson Box Board & Paper Co., 180 P. 983, 104 Kan. 732.
Ky.—Bennett v. Madison Sales Co., 95 S.W.2d 604, 264 Ky. 728.
Mich.—Jacob v. Gratiot Central Market Co., 255 N.W. 331, 267 Mich. 262.
Mo.—Medling v. Abraham Lincoln Life Ins. Co., 41 S.W.2d 6, 225 Mo. App. 1243—Buffalo Trust Co. v. Producers' Exchange No. 148, California, Mo., 23 S.W.2d 644, 224 Mo.App. 199.
N.Y.—President and Directors of Manhattan Co. v. Hausling, 1 N.Y. S.2d 702, 706, 253 App.Div. 255, citing Corpus Juris—National Bank of Republic v. Navassa Phosphate Co., 8 N.Y.S. 929, 56 Hun 136.
N.C.—Respess v. Rex Spinning Co., 133 S.E. 391, 191 N.C. 809.
N.D.—Bank of Valley City v. Lee, 175 N.W. 575, 43 N.D. 503.
Okl.—Kirk Okl. Co. v. Bristow, 7 P.2d 682, 154 Okl. 188—National Surety Co. v. Wingate, 5 P.2d 376, 153 Okl. 132—Anderson v. Gunther City Coke, Coal & Mining Co., 281 P. 982, 139 Okl. 102—Anderson v. Intemann, 281 P. 977, 139 Okl. 278—Grant-Sprague Lumber Co. v. First Nat. Bank, 227 P. 104, 100 Okl. 73.
Pa.—Costa v. Croatian Fraternal Union of America, 185 A. 869, 122 Pa.Super. 447.
S.D.—Smith v. Olson, 208 N.W. 585, 50 S.D. 81—Palmer v. Bratager, 172 N.W. 507, 41 S.D. 649.
Tenn.—North Carolina Mut. Life Ins. Co. v. Banks, App., 148 S.W.2d 54.
Tex.—Stinnett v. Paramount-Famous Lasky Corporation of New York, Com.App., 37 S.W.2d 145, affirming Paramount-Famous Lasky Corporation of New York v. Stinnett, Civ.App., 17 S.W.2d 125—Mutual Life & Loan Ass'n of America v. Skidmore, Civ.App., 50 S.W.2d 384—O'Hara v. Texas Nat. Bank of Forth Worth, Civ.App., 299 S.W. 649—Sykes v. Caldwell, Civ.App., 282 S.W. 282—Chapman v. Harris, Civ.App., 275 S.W. 75.
Wash.—Walnut Park Lumber & Coal Co. v. Roane, 17 P.2d 896, 171 Wash. 362.
Wis.—In re Lemke's Will, 238 N.W. 806, 206 Wis. 5.
22 C.J. p 1011 note 48.

Sale, ownership, or transfer of stock

(1) In some cases, the record of stock was held to constitute the best evidence of its contents.
Ark.—Berlin v. Rainwater, 294 S.W. 368, 174 Ark. 66.
Del.—Schultz v. Commonwealth Mortgage Co., 107 A. 774, 12 Del. Ch. 104.
N.J.—Mateer v. New Jersey Telephone Co., Sup., 135 A. 663.
S.D.—Farmers' State Bank of Parker v. Tri-State Mut. Grain Dealers' Fire Ins. Co. of Luverne, Minn., 170 N.W. 638, 41 S.D. 398.
22 C.J. p 1011 note 48 [a] (1).

(2) The certificates of stock have been held the best evidence of an interest in the subject matter of a suit against a corporation.—Steel's Department Stores v. Buckingham, 123 A. 391, 143 Md. 680.

(3) However, the books of a corporation are not the only competent evidence of the sales of its stock.—Kuebker v. Success Heater & Mfg. Co., Iowa, 192 N.W. 435.

65. U.S.—R. Hoe & Co. v. Commissioner of Internal Revenue, C.C.A., 30 F.2d 630.
Ala.—Hestle v. Louisville & N. R. Co., 81 So. 149, 16 Ala.App. 657.
Ark.—Old American Ins. Co. v. Jackson, 292 S.W. 380, 173 Ark. 424.
Ga.—Bass v. African Methodist Episcopal Church, 116 S.E. 816, 155 Ga. 57—Continental Trust Co. v. Bank of Harrison, 136 S.E. 319, 36 Ga.App. 149, conforming to answer to certified questions 134 S. E. 775, 162 Ga. 758, 50 A.L.R. 412.
Ill.—People for Use of Kaskaskia Commons Permanent School Fund v. Mitchell, 240 Ill.App. 281.
Ind.—Lowe v. Swafford, 199 N.E. 709, 209 Ind. 514, 103 A.L.R. 1222—Paul v. Walkerton Woodlawn Cemetery Ass'n, 184 N.E. 537, 204 Ind. 693.
Mich.—New Jersey Title Guarantee & Trust Co. v. McGrath, 214 N.W. 195, 239 Mich. 404.
Mo.—Tobin v. Hewitt Co., App., 232 S.W. 257.
N.Y.—Schachter v. Night & Day Press, 210 N.Y.S. 423, 125 Misc. 172.
Okl.—McMurray v. Witherspoon Live Stock Commission Co., 269 P. 357, 359, 132 Okl. 100, quoting Corpus Juris.
Tex.—Pearson v. Black, Civ.App., 120 S.W.2d 1075.
22 C.J. p 1012 note 49.

Ownership of fund in bank

The cashier of a bank may be allowed to testify, without producing the books, that certain money held by the bank was credited to a certain person.—Smith v. Flatonia First Nat. Bank, 95 S.W. 1111, 43 Tex.Civ. App. 495.

Ownership of stock

Testimony of the manager of a corporation as to the amount of stock owned by the president thereof has been held competent, such fact being within the manager's personal knowledge.—Peppers v. Pennsylvania Door & Sash Co., 285 S.W. 5, 171 Ark. 521.

66. U.S.—Ramsdell v. National Rivet & Novelty Co., C.C.W.Va., 104 F. 16.

67. Mo.—Mackey v. First Nat. Bank, App., 293 S.W. 66.

collateral to the main issue, parol evidence thereof is admissible,[68] and the result of an examination of many books, papers, and records may be proved by a competent person,[69] provided the writings themselves are properly in evidence.[70]

The application of the best evidence rule to proof of the existence of a corporation or the fact of agency and the nature and extent of an officer's or agent's authority is discussed supra § 803; and the admission of copies of corporate records is discussed infra § 818.

(2) Want of Record

Parol evidence is admissible to prove a fact where the corporate records are incomplete or the fact to be proved is of such a character that it would not be shown by the record.

Unless it is expressly provided by statute, charter, or articles of corporation that the acts and proceedings of a private corporation can be proved only by its records, parol evidence is admissible to prove a fact or transaction which has been omitted from the corporate records.[71] One reason for this rule is that the omission of a corporation to make a record of its proceedings should not be allowed to prejudice the rights of an innocent third person who has in good faith relied on an official assurance of its corporate acts.[72] The same is true where the matter to be proved is of such a character that it would not be shown by the record;[73] and the fact that the records of a corporation contain no entry relevant to the matter does not preclude parol evidence that certain action was not taken.[74]

b. Public Corporations

(1) In general
(2) Ordinances

(1) In General

Where a record thereof exists, the acts and proceedings of a municipal or other public corporation or board may not ordinarily be proved by parol testimony.

Where the acts and proceedings of a municipal[75]

68. Ala.—Finney v. Bouchelle, 124 So. 423, 220 Ala. 194.
Mo.—Rutledge v. Weisenborn, App., 142 S.W.2d 884, 886, citing **Corpus Juris.**

69. Ind.—Lester v. Hinkle, 153 N.E. 179, 90 Ind.App. 193.
Iowa.—Andrew v. Hartford Accident & Indemnity Co., 223 N.W. 529, 207 Iowa 652.

70. Mich.—Michigan Bankers' Ass'n v. Ocean Accident & Guarantee Corporation, 264 N.W. 868, 274 Mich. 470.

71. U.S.—Handley v. Stutz, Tenn., 11 S.Ct. 530, 139 U.S. 417, 35 L.Ed. 227, reversing, C.C., Stutz v. Handley, 41 F. 531—Bank of United States v. Dandridge, Va., 12 Wheat. 64, 6 L.Ed. 552—Cory v. Hamilton Nat. Bank, C.C.A.Ky., 31 F.2d 379, affirming, D.C., In re Federal Coal Co., 31 F.2d 375—Louisville Trust Co. v. National Bank of Kentucky, D.C.Ky., 3 F.Supp. 909, reversed on other grounds, C.C.A., National Bank of Kentucky v. Louisville Trust Co., 67 F.2d 97, certiorari denied Louisville Trust Co. v. National Bank of Kentucky, 54 S.Ct. 440, 291 U.S. 665, 78 L.Ed. 1056.
Ala.—McMillan v. Aiken, 88 So. 135, 205 Ala. 35.
Cal.—Todd v. Temple Hospital Ass'n, 273 P. 595, 96 Cal.App. 42.
Del.—Phœnix Finance Corporation v. Iowa-Wisconsin Bridge Co., Super., 16 A.2d 789.
Fla.—Redstone v. Redstone Lumber & Supply Co., 133 So. 882, 884, 101 Fla. 226, citing **Corpus Juris.**
Ga.—De Loach v. Bennett, 119 S.E. 592, 156 Ga. 683—Martin v. Leesburg Bank, 73 S.E. 387, 137 Ga. 285—Helping Hand of Good Samaritan v. Bank of Smithville, 125 S.E. 794, 33 Ga.App. 285.
Iowa.—Claim of Hannahs, 252 N.W. 539, 541, 217 Iowa 1016, quoting **Corpus Juris.**
Me.—4-One Box Machine Makers v. Wirebounds Patents Co., 159 A. 496, 131 Me. 70.
Mich.—Jacob v. Gratiot Central Market Co., 255 N.W. 331, 267 Mich. 262—Otsego Paper Stock Co. v. Slosberg, 202 N.W. 991, 230 Mich. 260.
Miss.—Williams v. Williams Yellow Pine Co., 146 So. 143, 166 Miss. 803.
N.Y.—Butts v. Gaylord State Bank, 282 N.Y.S. 1, 156 Misc. 555.
N.C.—Scotton Motor Co. v. Scotton, 129 S.E. 198, 190 N.C. 194—Sanders v. Mayo, 118 S.E. 910, 186 N.C. 108—Bailey v. Hassell, 115 S.E. 166, 184 N.C. 450.
Okl.—Anderson v. Gunther City Coke, Coal & Mining Co., 281 P. 982, 139 Okl. 102—Anderson v. Intemann, 281 P. 877, 139 Okl. 278.
Or.—Cannon v. Farmers' Union Grain Agency, 202 P. 725, 103 Or. 26.
Pa.—KoEune v. State Bank of Schuylkill Haven, 4 A.2d 234, 134 Pa.Super. 108—McCay v. Luzerne & Carbon County Motor Transit Co., 189 A. 772, 125 Pa.Super. 217.—Bank of Kentucky v. Schuylkill Bank, 1 Pars.Eq.Cas. 180, affirmed 1 Pars. 269, 5 Pa.L.J. 251.
Tex.—Ross v. Sutter, Civ.App., 223 S.W. 273.
Utah.—Copper King Mining Co. v. Hanson, 176 P. 623, 52 Utah 605.
Va.—Altavista Cotton Mills v. Lane, 112 S.E. 637, 641, 133 Va. 1, citing **Corpus Juris.**
Wash.—Walnut Park Lumber & Coal Co. v. Roane, 17 P.2d 896, 171 Wash. 362.
Wis.—Lisbon Town Fire Ins. Co. v. Tracy, 296 N.W. 126, 236 Wis. 651.
14 C.J. p 921 note 40—14A C.J. p 93 note 92—22 C.J. p 1013 notes 53, 55.

72. Iowa.—Claim of Hannahs, 252 N.W. 539, 541, 217 Iowa 1016, quoting **Corpus Juris.**
22 C.J. p 1013 note 54.

73. La.—First Baptist Church of Covington v. Jackson, 120 So. 639, 10 La.App. 170.
S.D.—Dacotah Packing Co. v. Bertelson, 217 N.W. 393, 52 S.D. 324.
22 C.J. p 1013 note 56.

74. Ala.—United Order of Golden Cross v. Hooser, 49 So. 354, 160 Ala. 334—Bessemer Land & Improvement Co. v. Jenkins, 18 So. 565, 111 Ala. 135, 56 Am.S.R. 26.

75. Ala.—Pilcher v. City of Dothan, 93 So. 16, 207 Ala. 421—Town of Clanton v. Chilton County, 87 So. 345, 205 Ala. 103.
Ark.—Hill v. City of Rector, 256 S.W. 848, 161 Ark. 574.
Colo.—Kinzie v. Incorporated Town of Haxtun, Phillips County, 63 P.2d 511, 99 Colo. 588.
Ga.—Western & A. R. R. v. Peterson, 147 S.E. 513, 168 Ga. 259.
Ky.—Fidelity & Deposit Co. of Maryland v. Commonwealth, for Use of City of Jackson, 67 S.W.2d 719, 252 Ky. 476—City of Somerset v. Gardiner, 15 S.W.2d 303, 228 Ky. 512—Rockport Coal Co.'s Trustee in Bankruptcy v. Tilford, 300 S.W. 898, 222 Ky. 288—Town

or other public[76] corporation, or of a public board,[77] as, for instance, a public school board,[78] are required to appear of record, parol evidence is not admissible to prove such acts or proceedings unless the absence of the record is satisfactorily explained; but this rule does not exclude parol evidence of an independent fact which is not necessarily a matter of record and which is not shown by the witness' testimony to be a matter of record; in such a case parol evidence founded on the witness' own knowledge is not secondary but original evidence.[79] So also, where no record has been kept with respect to certain matters, these may be shown by parol,[80] for the right of a third person dealing in good faith with a municipal corporation or board cannot be prejudiced by a failure of the corporation or board to keep a proper record of its proceedings.[81] A fortiori, parol evidence is admissible, in a suit to require a clerk to make a record of the passage of resolutions, to prove the passage of such resolutions.[82]

(2) Ordinances

Where a record exists and is accessible, parol evidence is not admissible to prove the existence and contents of a municipal ordinance.

The best evidence of the existence and provisions of a municipal ordinance is the record containing it, and parol evidence is not admissible unless the loss or destruction of the record is established;[83] but in the absence of any record of an ordinance the fact of its passage or its contents may be proved

of Nortonville v. Woodward, 231 S.W. 224, 191 Ky. 730—Price Bros. v. City of Dawson Springs, 227 S. W. 470, 190 Ky. 349.
Mich.—Schurtz v. City of Grand Rapids, 175 N.W. 421, 208 Mich. 510.
Pa.—Commonwealth ex rel. Volunteer Fire Dept. v. Township of Coal, 14 Northumb.L.J. 332, 32 Mun.L.R. 46.
Va.—Hammer v. Commonwealth ex rel. Hoover, 193 S.E. 496, 169 Va. 355.
22 C.J. p 1013 note 57.

Parol evidence admissible
Although a statute makes the minutes of a meeting of a town board prima facie evidence of the business transacted thereat, it has been broadly stated that parol evidence is admissible for the same purpose. —McFayden v. Town of Calistoga, 240 P. 523, 74 Cal.App. 373.

76. Iowa.—Butler v. St. Louis L. Ins. Co., 45 Iowa 93.
22 C.J. p 1013 note 58.

77. Ill.—People ex rel. Smith v. Wabash Ry. Co., 28 N.E.2d 119, 374 Ill. 165—People ex rel. Frick v. Chicago & E. I. Ry. Co., 198 N.E. 212, 361 Ill. 470—People v. Illinois Cent. R. Co., 145 N.E. 719, 314 Ill. 339—Village of Brookfield v. Ricker, 129 N.E. 100, 295 Ill. 316.
Ky.—Ebert v. Board of Education of School Dist. of City of Newport, 123 S.W.2d 185, 278 Ky. 75.
Mass.—Scullin v. Cities Service Oil Co., 22 N.E.2d 666, 304 Mass. 75—Carbone, Inc., v. Kelly, 194 N.E. 701, 289 Mass. 602.
Mont.—State v. Dilworth, 258 P. 250, 80 Mont. 111.
22 C.J. p 1013 note 59.

This rule has been applied to exclude parol evidence of the proceedings of:
(1) A board of supervisors.—Hunter v. Bennett, 115 So. 204, 149 Miss. 368—Smith v. Board of Sup'rs of Tallahatchie County, 86 So. 707, 124 Miss. 36.
(2) County commissioners.—Blackwell v. Houston County, 147 S.E. 574, 168 Ga. 248.

78. Cal.—Clark v. Conley School Dist. of Kern County, 261 P. 723, 86 Cal.App. 527.
Ill.—Crawford v. Board of Education Dist. No. 88, 215 Ill.App. 198.
Ky.—Western Union Telegraph Co. v. Guard, 139 S.W.2d 722, 283 Ky. 187.
Mo.—State ex rel. School Dist. of Affton v. Smith, 80 S.W.2d 858, 336 Mo. 703.
22 C.J. p 1014 note 60.

79. Ga.—City of Atlanta v. Blackmon, 179 S.E. 842, 51 Ga.App. 165.
22 C.J. p 1014 note 62.

80. U.S.—Joseph v. Village of Downers Grove, C.C.A.Ill., 104 F. 2d 974. Certiorari denied Village of Downers Grove v. Joseph, 60 S. Ct. 142, 308 U.S. 605, 84 L.Ed. 506.
Ga.—Jeanes v. Mayor, etc., of Milledgeville, 165 S.E. 900, 45 Ga.App. 755, followed in Wall v. Mayor, etc. of Milledgeville, 166 S.E. 218, 45 Ga.App. 849.
Ill.—Gebhardt v. Village of La Grange Park, 268 Ill.App. 556, reversed on other grounds 188 N.E. 372, 354 Ill. 234.
Ind.—American Employers Ins. Co. v. Board of Finance of Township of Knight, Vanderburgh County, 200 N.E. 418, 102 Ind.App. 520.
Mo.—Bonsack & Pearce v. School Dist. of Marceline, 49 S.W.2d 1085, 226 Mo.App. 1238.
Mont.—State v. Madison State Bank of Virginia City, 251 P. 548, 77 Mont. 498.
N.J.—Sullivan v. Mayor and Council of Borough of Ramsey, 143 A. 364, 105 N.J.Law 142, reversing Sullivan v. Borough of Ramsey, Sup., 139 A. 886.
N.C.—Hearne v. Stanly County, 123 S.E. 641, 188 N.C. 45.
R.I.—Murphy v. Duffy, 124 A. 103, 46 R.I. 210.
Tex.—Weaver v. Commissioners' Court of Nacogdoches County, 146 S.W.2d 170, 135 Tex. 611, reversing Commissioners' Court of Nacogdoches County v. Weaver, Civ. App., 141 S.W.2d 764—City of Electra v. American La France & Foamite Industries, Inc., Civ.App., 133 S.W.2d 223, 226, citing Corpus Juris.
22 C.J. p 1014 note 63.

81. Wyo.—Rohrbaugh v. Mokler, 188 P. 443, 26 Wyo. 514.
22 C.J. p 1014 note 64.

82. Mo.—State ex rel. William R. Compton Co. v. Walter, 23 S.W.2d 167, 324 Mo. 290.

83. Ark.—Satterfield v. Fewell, 149 S.W.2d 949.
Fla.—Douglass v. Sapotnick, 171 So. 765, 126 Fla. 753, followed in 173 So. 926, 131 Fla. 246.
Ga.—Hight Accessory Place v. Lam, 105 S.E. 872, 26 Ga.App. 163.
La.—Williams v. Windham, 3 La. App. 127.
Mo.—State ex rel. Barkwell v. Trimble, 274 S.W. 683, 309 Mo. 546—Page v. City of Fayette, 116 S.W. 2d 578, 233 Mo.App. 37—City of Brunswick ex rel. Barkwell v. Scott, 275 S.W. 994, 219 Mo.App. 45.
22 C.J. p 1014 note 65—43 C.J. p 581 note 17.

Necessity of objection
Parol evidence was held sufficient to warrant a finding that an ordinance was legally enacted in a case in which it did not appear that objection was made to proving such fact by parol.—Heller v. Alvarado, 20 S.W. 1003, 1 Tex.Civ.App. 409.

by parol evidence[84] and, in the absence of a statute to the contrary, proof of the publication of a municipal ordinance may be made by parol.[85] Parol evidence that an ordinance was properly signed by the mayor has been received,[86] and it has also been held that a witness may state as a fact the existence of a quarantine in force in a municipality as against an objection that the statute or ordinance establishing the quarantine is the best evidence;[87] and parol evidence that no ordinance or resolution had been passed with respect to a particular matter has been held admissible.[88] Where it did not appear that a city ordinance was duly attested by the city clerk as required by statute, in order to be introduced in evidence it was held that such ordinance could not be considered as affecting the right of a litigant to introduce parol proof on the subject covered thereby.[89]

§ 811. —— Records of Unincorporated Associations

Parol evidence is not admissible to prove the contents of an accessible record of an unincorporated association.

The best evidence rule applies to the records of unincorporated associations and precludes the introduction of parol evidence as to the contents thereof unless failure to produce the record is properly accounted for;[90] but acts and proceedings of such an association of which no record exists may be shown by parol.[91]

§ 812. —— Records of Deeds and Mortgages

Parol evidence is not admissible to prove the contents of the records of deeds and mortgages where the records or properly authenticated copies are accessible.

In accordance with general rules stated supra § 807, parol evidence is not admissible to prove the contents of the records of deeds and mortgages where the records or properly authenticated copies are accessible,[92] and this is true even though the testimony offered is that of the custodian of the records.[93]

C. COPY SECONDARY TO ORIGINAL WRITING

§ 813. General Rule

As a general rule the original of a writing is the best evidence, and a copy is inadmissible.

Although subject to limitations, discussed infra § 818, the general rule is that, where the fact to be proved is evidenced by a writing, the original writing is the best evidence, and a copy is not admissible,[94] except where, as stated infra § 837, the absence of the original is accounted for. Even though a copy has been admitted in evidence, the court should withdraw it if it subsequently appears that the original is available.[95]

84. U.S.—City of Weslaco, Tex., v. Porter, C.C.A.Tex., 56 F.2d 6.
Ala.—Ingram v. Evans, 148 So. 593, 227 Ala. 14.
Iowa.—Matson v. Mitchell, 179 N.W. 173.
22 C.J. p 1014 note 66—43 C.J. p 581 note 25.

85. Iowa.—Eldora v. Burlingame, 17 N.W. 148, 62 Iowa 32.
22 C.J. p 1014 note 67.

86. Iowa.—Powers v. Iowa Cent. R. Co., 136 N.W. 1049, 157 Iowa 347.

87. S.C.—Mitchiner v. Western Union Tel. Co., 50 S.E. 190, 70 S.C. 522.

88. Ga.—Scott v. Mayor, etc., of Mount Airy, 14 S.E.2d 127, 64 Ga. App. 828.

89. Mass.—O'Brien v. Woburn, 69 N.E. 350, 184 Mass. 598.

90. Okl.—Brotherhood of American Yeoman v. Hutchinson, 218 P. 841, 92 Okl. 221.
22 C.J. p 1014 note 70.

The constitution and by-laws of a benevolent society are within the rule stated in the text.
Ark.—Rural Home Lodge No. 1720, Grand United Order of Odd Fellows of Little Rock, v. Sea, 220 S. W. 305, 143 Ark. 167.
La.—Bonnette v. Bonnette, App., 161 So. 616.
22 C.J. p 1014 note 70 [a].

91. N.Y.—Harmon v. Matthews, 27 N.Y.S.2d 656.
Tex.—Crenshaw v. Muse, Civ.App., 118 S.W.2d 631.
22 C.J. p 1015 note 71.

92. Mont.—Green v. Baker, 214 P. 88, 66 Mont. 568.
22 C.J. p 1015 note 72.

Passage of title to third persons
In petitory action, plaintiffs, alleging that land involved was acquired by their ancestor immediately after dissolution of community between him and his wife by latter's death and transferred by ancestor's subsequently executed deeds, valid on their face, although alleged to be donations in disguise, cannot introduce evidence tending to vary public records of such deeds after title has passed into hands of third parties, and hence have no right or cause of action.—Chachere v. Superior Oil Co., 187 So. 321, 192 La. 193.

93. Ark.—Jones v. Melindy, 36 S.W. 22, 62 Ark. 203.
22 C.J. p 1015 note 73.

94. Md.—Bogart v. Willis, 148 A. 585, 158 Md. 393.
Mo.—Randazzo Macaroni Mfg. Co. v. Minneapolis & St. L. R. Co., App., 251 S.W. 466.
Pa.—Abercrombie v. Bailey, 196 A. 725, 326 Pa. 65—Perry v. Ryback, 153 A. 770, 302 Pa. 559.
22 C.J. p 1018 note 96.

Reasons for rule
(1) One reason for excluding copies as secondary evidence is the possibility of error in the transcription, or, in other words, because it is not the best evidence of the fact sought to be shown by the paper.—Bogart v. Willis, 148 A. 585, 158 Md. 393.
(2) Other reason see 22 C.J. p 1018 note 96 [a].
Use of copies by witness to refresh memory or to testify from see the C.J.S. title Witnesses § 359, also 70 C.J. p 593 note 76—p 594 note 98.

95. Ind.—Gimbel v. Hufford, 46 Ind. 125.

§ 814. Applications of Rule

The "best evidence rule" has been applied to exclude evidence of copies of various writings, including contracts, commercial paper, grants, deeds, and mortgages.

The rule stated in the preceding section has been applied to exclude as secondary evidence copies of contracts,[96] accounts and books of account,[97] agreements to submit to arbitration, and awards rendered pursuant thereto,[98] bank bills,[99] bank deposit slips,[1] bills of lading,[2] bonds,[3] a diagram taken from the abstract book of a county assessor of taxes,[4] entries in a family Bible showing a person's age,[5] estimate of repairs as relating to extent of loss affecting insurer's liability,[6] financial reports,[7] hotel records,[8] invoices,[9] judgments,[10] letters,[11] maps[12] or plans,[13] manifests of vessels,[14] a notice to a mortgagee to discharge the mortgage of record,[15] receipts,[16] resolutions of directors of a corporation,[17] proof of loss required to be given to insurers, discussed in the C.J.S. title Insurance § 1341, a tax roll, which has been held secondary to the original assessment books,[18] wills,[19] and waybills issued by a railroad company.[20] Where the title to real property is in issue, the rule applies to exclude copies of grants,[21] deeds,[22] mortgages,[23] and contracts to convey.[24]

96. Ala.—Security Finance Co. v. Kelly's Tire Shop, 114 So. 298, 216 Ala. 642.
Ga.—Brenard Mfg. Co. v. Winn-Wilkes Drug Co., 120 S.E. 446, 31 Ga.App. 200.
22 C.J. p 1019 note 3.
However, a copy of employment contract between defendants in action against corporation and employee thereof for injuries to one struck by automobile owned and driven by such employee has been held admissible in evidence, no reason being given.—Barnes v. Real Silk Hosiery Mills, 108 S.W.2d 58, 341 Mo. 563.

Assignments

(1) A copy of an assignment is inadmissible as secondary evidence.—Levine v. Potter, 221 N.Y.S. 287, 220 App.Div. 242—22 C.J. p 1019 note 6.

(2) Thus a copy of an assignment of tenant's right to recover a deposit is inadmissible.—Levine v. Potter, supra.

Chattel mortgages

Tex.—Boydston v. Morris, 10 S.W. 331, 71 Tex. 697.
22 C.J. p 1019 note 10.
Realty mortgages see infra note 23.

Commercial paper

Wash.—Bond v. Werley, 28 P.2d 318, 175 Wash. 659.
22 C.J. p 1020 note 19.

Contracts of partnership

Ky.—Commonwealth v. Parlin & Orendorff Co., 80 S.W. 791, 118 Ky. 168, 26 Ky.L. 58.
22 C.J. p 1019 note 2.

Unsigned copy of agent's contract for sale of land is inadmissible.—Schweickhardt v. Chessen, 161 N.E. 118, 329 Ill. 637.
Contracts to convey realty see infra note 24.

Lease

Unsigned copy of oil and gas lease without certificate of acknowledgment required by statute is erroneously admitted in action to cancel lease.—Stein v. Blackwell, Tex.Civ. App., 47 S.W.2d 490.

97. Ala.—Armour Fertilizer Works v. Kinney, 114 So. 41, 216 Ala. 547—Booker v. Benson Hardware Co., 113 So. 256, 216 Ala. 398.
Okl.—Avery v. Abraham, 243 P. 728, 114 Okl. 101.
R.I.—Cook v. Greenlaw, 19 A.2d 8.
Tex.—Lloyd v. Cochran, Civ.App., 256 S.W. 337, error dismissed Cochran v. Lloyd, 278 S.W. 1114, 114 Tex. 581.
22 C.J. p 1019 note 4.

98. Ky.—Davidson v. Davidson, 10 B.Mon. 115.

99. Ga.—Robinson v. Bealle, 20 Ga. 275.

1. Ill.—Schmidt v. Barr, 165 N.E. 131, 333 Ill. 494, 65 A.L.R. 1.

2. S.C.—Walker v. Southern R. Co., 56 S.E. 952, 76 S.C. 308.
22 C.J. p 1019 note 8.

3. Ala.—Monts v. Stephens, 43 Ala. 217.
N.Y.—Selden v. Delaware & H. Canal Co., 29 N.Y. 634.

4. Tex.—Hicks v. Pogue, 76 S.W. 786, 33 Tex.Civ.App. 333.

5. N.J.—Ryerson v. Grover, 1 N.J. Law 458.
22 C.J. p 1019 note 12.

6. N.J.—Smith v. National Union Fire Ins. Co., 130 A. 371, 3 N.J. Misc. 994.

7. Pa.—First Nat. Bank v. Bank of Pittsburgh, 99 Pa.Super. 600.

8. Mont.—Cohen v. Clark, 119 P. 775, 44 Mont. 151.

9. Md.—New York & B. Transp. Line v. Baer, 84 A. 251, 118 Md. 73.
Vt.—State v. Alpert, 92 A. 32, 88 Vt. 191.

10. Tex.—De Zavala v. Scanlan, Com.App., 65 S.W.2d 489, reversing Scanlan v. De Zavala, Civ.App., 42 S.W.2d 849.

Copy contained in agreed statement of facts

Original draft of judgment, identical with copy thereof in agreed statement of facts, in suit on supersedeas bond, is admissible.—De Zavala v. Scanlan, supra.

11. Ala.—Avant v. Avant, 92 So. 651, 207 Ala. 489.
Ark.—Supreme Life & Casualty Co. v. Wall, 23 S.W.2d 251, 180 Ark. 895.
Iowa.—Alquist v. Thompson, 251 N. W. 509.
Ky.—Sharp v. Culton, 89 S.W.2d 869, 262 Ky. 84.
22 C.J. p 1019 note 15.

12. Tex.—City of Dallas v. McMurray, Civ.App., 282 S.W. 296.
22 C.J. p 1020 note 17.

13. N.H.—Keefe v. Sullivan County R. Co., 71 A. 379, 75 N.H. 116.
22 C.J. p 1020 note 18.

14. La.—Pendery v. Crescent Mut. Ins. Co., 21 La.Ann. 410.

15. Ala.—Royal Lumber Co. v. Elsberry, 64 So. 71, 185 Ala. 462.

16. Ill.—Charles D. Stone & Co. v. New York Cent. R. Co., 214 Ill. App. 483.

17. Iowa.—Ruthven v. Clarke, 79 N. W. 454, 109 Iowa 25.
22 C.J. p 1020 note 22.

18. Ala.—Anniston City Land Co. v. Edmondson, 37 So. 424, 141 Ala. 366.

19. N.M.—Grissom v. Grissom, 185 P. 64, 25 N.M. 518.

20. Kan.—Haas v. Chubb, 74 P. 230, 67 Kan. 787.
Tex.—Texas & P. R. Co. v. Lynch, 87 S.W. 884, 39 Tex.Civ.App. 96.
22 C.J. p 1020 note 25.
However, without giving reasons for so holding, a waybill has been held not inadmissible as not the best evidence.—Atlantic Coast Line R. Co. v. Thrower, 6 S.E.2d 899, 217 N.C. 77.

21. Ga.—Brooking v. Dearmond, 27 Ga. 58.
22 C.J. p 1020 note 26.

22. S.C.—Lancaster v. Lee, 51 S.E. 139, 71 S.C. 280.
22 C.J. p 1020 note 27.

23. Ga.—Kelley v. Jeffries, 95 S.E. 287, 147 Ga. 741.
22 C.J. p 1021 note 28.

24. Mich.—Woods v. Burke, 35 N.W. 798, 67 Mich. 674.

Telegrams. The general rule stated in the preceding section is applicable to telegrams.[25] Thus it is said that the original message is the best evidence and that a copy is not admissible,[26] unless the absence of the original message is accounted for, as stated infra § 837. The real difficulty arises in determining what constitutes the original message, that is, whether it is the message filed by the sender with the telegraph company or the message delivered by the company to the intended recipient. It is settled that, in the absence of evidence of mistake in transmission, if the sender takes the initiative so that the telegraph company is to be regarded as his agent, the message actually delivered to the intended recipient is the primary or best evidence; on the other hand, if the sender assumes the risk of transmission or is merely the employer of the telegraph company the message filed is the best evidence.[27] However, where the evidence is sought to be admitted in proof of handwriting of the sender of a telegraphic reply, the message filed is the primary evidence.[28]

§ 815. —— Photographs

Photostatic copies are secondary evidence and thus generally inadmissible.

Photographs of written instruments can be used only as secondary evidence.[29] They are but copies which may or may not be facsimiles of their originals; and whether a photographic copy of a writing when offered in evidence is a mathematically exact reproduction of its original is a question of fact.[30] Hence, where the original writing is in court, it is proper to reject a photograph thereof,[31] except, perhaps, as evidence of genuineness, as discussed supra § 714. However, as stated infra § 820, a photostatic copy is admissible as proof of a collateral fact when shown to be an exact copy of the original, and such copy is admissible when the absence of the original is accounted for, as stated infra § 837.

§ 816. —— Letterpress Copies

Letterpress copies are secondary evidence and as such are inadmissible.

Letterpress copies of a writing stand on the same footing as any other copies and are secondary evidence, not admissible,[32] although such copies are admissible when the absence of the original is accounted for, as stated infra § 837.

§ 817. —— Copy of a Copy

Generally a copy of a copy is deemed inadmissible, but the contrary has been held.

It is generally held that a copy of a copy of an original written instrument or other writing is not admissible in evidence,[33] unless the absence of both the original and the copy is accounted for, stated

25. N.H.—Howley v. Whipple, 48 N. H. 487.
22 C.J. p 1020 note 16.

26. Me.—Morneault v. Cohen, 120 A. 915, 122 Me. 543.
N.H.—Howley v. Whipple, 48 N.H. 487.
22 C.J. p 1020 note 16.
Grade of copy of telegram as secondary evidence see supra § 784.
Admissibility of copies of messages in actions against telegraph company see the C.J.S. title Telegraphs and Telephones § 192, also 62 C.J. p 209 notes 69, 70, and 22 C.J. p 1020 note 16 [d].

27. Me.—Morneault v. Cohen, 120 A. 915, 122 Me. 543.
Utah.—B. T. Moran, Inc., v. First Sec. Corporation, 24 P.2d 384, 82 Utah 316.
22 C.J. p 1020 note 16 [a].
Corpus Juris statement has been cited in applying the rule to a criminal prosecution.—State v. Lozier, 204 N.W. 256, 258, 200 Iowa 652.
Telegram received and reply held originals
Tex.—Texas State Bank of Fort Worth v. Press Pub. Co., Civ.App., 250 S.W. 464.

28. N.H.—Howley v. Whipple, 48 N. H. 487.

29. Ark.—Union Cent. Life Ins. Co. v. Mendenhall, 34 S.W.2d 1078, 183 Ark. 25.
Ill.—Wilson v. Glens Falls Ins. Co, 32 N.E.2d 961, 309 Ill.App. 286—In re Healea's Estate, 254 Ill.App. 334.
Iowa.—Olson v. New York Life Ins. Co., 295 N.W. 833.
Ky.—Black Mountain Corporation v. Parsons, 126 S.W.2d 874, 277 Ky. 486.
Mich.—National Land Co. v. Ternes, 299 N.W. 144, 298 Mich. 455.
N.J.—Linden Silk Co. v. Paterson Silk Throwing Co., 197 A. 57, 59, 119 N.J.Law 482, citing **Corpus Juris.**
22 C.J. p 918 note 67, p 1021 note 36.
Even though less likely to be an imperfect reproduction, a photograph comes within the general rule that a copy is inadmissible.—Union Cent. Life Ins. Co. v. Mendenhall, 34 S. W.2d 1078, 183 Ark. 25.
Noncompliance with statute
A photostatic copy of a financial statement is admissible as secondary evidence, even though a statute authorizing public recording officers to make use of photographic processes for the reproduction of documents as public records is not complied with.—Nebraska State Bank of Republican City v. Walker, 196 N.W. 128, 111 Neb. 203.
Photographs as evidence generally see supra §§ 709–716.

30. Mich.—In re Foster, 34 Mich. 21.
22 C.J. p 1021 note 36.

31. Mich.—In re Foster, supra.
Wash.—Crane v. Horton, 32 P. 223, 5 Wash. 479.
22 C.J. p 918 note 68.

32. Md.—Marsh v. Hand, 35 Md. 123.
22 C.J. p 1021 note 39.
However, letterpress copies of letters shown to have been in the handwriting of a deceased person and to have been written by the deceased to his client, for whom he made loans, have been held competent.—McAuley v. Siscoe, 205 P. 346, 110 Kan. 804.
"Letterpress copy" defined see 18 C. J.S. p 132 note 52.

33. Me.—Jackson v. Burnham, 152 A. 56, 129 Me. 344.
Tex.—Independent Order of Puritans v. Brown, Civ.App., 229 S.W. 939.
22 C.J. p 1021 note 40.
Copy of carbon copy is not admissible.—Eastham v. Stumbo, 279 S. W. 1109, 212 Ky. 685.
Unauthorized copy of certificate
Where a record of a certificate of the secretary of state, to the effect that charter was granted to a

infra § 837; but the contrary has been held on the ground that there are no degrees in secondary evidence.[34]

§ 818. Limitations of Rule

The rule that a copy of a writing is secondary evidence and is inadmissible is subject to limitations. Moreover the rule may be waived.

The rule that a copy is secondary evidence and is inadmissible, stated supra § 813, has been held inapplicable where the copy was made by the party against whom it is attempted to be used, and was furnished by him to the party on whose behalf it is offered,[35] and where the copy is set forth in an answer in equity in compliance with an interrogatory and a demand made in the bill.[36] It has also been held that, in order to prove corporate existence as against stockholders, a license recorded in the books of the corporation may properly be proved by producing the book.[37] So in some jurisdictions by reason of statute a sworn copy of corporate records is admissible where the original would be evidence.[38] To prove the publication of a newspaper containing a libel, it is not necessary to produce a copy which has been actually published.[39] A copy is admissible as positive evidence of a negative fact, such as the nonexistence of a disputed subject matter.[40]

Blue prints,[41] vellum tracings,[42] published bank reports,[43] and corporate books containing lists of stockholders[44] have been held to be originals and not objectionable as copies.

As the term "copy" is sometimes applied to what is really an original writing, the mere fact that a writing is referred to as a "copy" is not conclusive that it is not the best evidence,[45] and hence while the word "copy," as generally used, presumes an original from which it is taken, this is not always true.[46]

The use of copies as secondary evidence when attached to depositions as exhibits is discussed in Depositions § 70. The application of the best evidence rule to authenticated transcripts or copies is discussed supra §§ 649–675, and whether the rule that copies are secondary evidence and inadmissible applies to exclude a record where such record is by statute prima facie evidence, supra § 641.

Waiver. The rule that the original and not the copy is the best evidence may be waived.[47] Moreover, the admission of a copy is not improper where no objection is made, see the C.J.S. title Trial § 152, also 64 C.J. p 229 note 55 [c], and 22 C.J. p 1019 note 99.

§ 819. —— Admission of Correctness

An admission of the correctness of a copy by the party against whom it is to be used is sufficient to justify its admission in evidence.

An admission by the party against whom a copy of a writing is sought to be used, that the copy is correct, is usually held to render the copy admis-

land and trust company on a specified date, and that no charter had ever been granted to a land and trust company of a name slightly different, was not an instrument required or permitted by law to be recorded by the county clerk, the original was not an archive of his office, and its record amounted to no more than a certified copy made by the clerk of the certificate of the secretary of state, hence it was not the best evidence of the fact sought to be proved.—Bomar v. Runge, Tex.Civ.App., 225 S.W. 287, error refused.

34. Mass.—Goodrich v. Weston, 102 Mass. 362, 3 Am.R. 469.
22 C.J. p 1022 note 41.

Objection that a copy offered is only a copy of a copy is considered purely technical.
Conn.—Cameron v. Peck, 37 Conn. 555.
N.Y.—Robertson v. Lynch, 18 Johns. 451.
Degrees of secondary evidence see supra § 784.

35. S.C.—Griswold v. Texas Co., 161 S.E. 469, 168 S.C. 156.
22 C.J. p 1022 note 46.

36. Wis.—Farmers' & Mechanics' Bank v. Griffith, 2 Wis. 443.
22 C.J. p 1022 note 47.

37. Ill.—Culver v. Chicago Third Nat. Bank, 64 Ill. 528.

38. Ind.—Paul v. Walkerton Woodlawn Cemetery Ass'n, 184 N.E. 537, 204 Ind. 693.

39. Minn.—Simmons v. Holster, 13 Minn. 249.
37 C.J. p 74 note 36.

40. Idaho.—Common School Dist. No. 27 in Twin Falls County v. Twin Falls Nat. Bank, 299 P. 662, 50 Idaho 668.

Nonexistence of order authorizing school warrant

Book containing carbon copy of each order issued by school district to county auditor for warrant on school fund is admissible to prove nonissuance of order.—Common School Dist. No. 27 in Twin Falls County v. Twin Falls Nat. Bank, supra.

41. Ill.—Fuchs & Lang Mfg. Co. v. R. J. Kittredge & Co., 89 N.E. 723, 242 Ill. 88.
However, in patent infringement action, certain blueprints introduced by defendants were not the "best evidence", where neither the original drawing nor the person making it was produced, and no satisfactory explanation was made of their absence.—Livesay v. Drolet, D.C.Fla., 38 F.Supp. 885.

42. Tex.—Spencer v. Levy, Civ.App., 173 S.W. 550, 556.
22 C.J. p 1021 note 32.

43. Del.—Middletown People's Nat. Bank v. Rhoades, 90 A. 409, 28 Del. 65.
Md.—Crisfield Mar. Bank v. Stirling, 80 A. 736, 115 Md. 90.

44. Minn.—Lindeke v. Scott County Co-op. Co., 148 N.W. 459, 126 Minn. 464.
22 C.J. p 1021 note 34.

45. N.C.—Banks v. Richardson, 47 N.C. 109.
22 C.J. p 1022 note 51.

46. N.C.—Banks v. Richardson, supra.
22 C.J. p 1023 note 52.

47. Or.—Payette First Nat. Bank v. Miller, 87 P. 892, 48 Or. 587.
22 C.J. p 1019 note 98.

sible in evidence,[48] but this is true only where the admission is clear and explicit,[49] and an admission of the correctness of certain entries does not make a copy thereof admissible.[50]

§ 820. —— Writings Collateral to Issue

A copy is admissible for the purpose of showing facts collateral to the issue.

It has been held that, where a writing is purely collateral to the issue, the contents thereof may be shown by a copy.[51] So a photostatic copy is admissible as proof of a collateral fact when shown to be an exact copy of the original.[52]

§ 821. Duplicate Originals and Counterparts

In the case of duplicate originals or counterparts each duplicate original or counterpart is admissible as primary evidence. The rule is particularly applicable to copies produced by the same mechanical operation, such as carbon, impression, printing press and manifold copies. If, however, some but not all carbon copies are signed, the unsigned copies become secondary evidence.

Where an original instrument or writing is made or executed in duplicate or in a greater number of counterparts, each duplicate or counterpart is primary evidence and is admissible.[53] In such case it is unnecessary to account for the absence of the other duplicate or counterparts, as stated infra § 837, nor need notice to produce be given, as pointed out infra § 844. However, as stated infra § 850, the document offered in evidence must be shown to be in fact a duplicate of the one not produced. As a general rule either duplicate is admissible, and the mere fact that one duplicate was delivered to the adverse party does not change the other duplicate into secondary evidence;[54] but where a copy contains matter not found on the other copy or counterparts such copy is admissible.[55]

Copies produced by same mechanical operation. Where several copies of a writing are made at the same time by the same mechanical operation, each is regarded as an original and is admissible as such,[56] without the necessity of accounting for the original, stated infra § 837. The most usual application of this rule is found in the case of carbon

48. Ala.—Commercial Casualty Ins. Co. v. Hubert, 147 So. 134, 135, 226 Ala. 357, citing **Corpus Juris**—Perry v. Dozier, 49 So. 909, 161 Ala. 292.
Mich.—Goldberg v. Cities Service Oil Co., 266 N.W. 321, 275 Mich. 199.
22 C.J. p 1023 note 54.

49. Ala.—Fletcher v. Weisman, 1 Ala. 602.
22 C.J. p 1023 note 55.

50. Neb.—Fitch v. Martin, 104 N.W. 1072, 74 Neb. 538.

51. N.C.—Morrison v. Hartley, 101 S.E. 375, 178 N.C. 618.
Tex.—Crawford v. Ramsey, Civ.App., 73 S.W.2d 1064.
22 C.J. p 1023 note 57.

52. Tex.—Cochran v. William M. Rice Institute for Advancement of Literature, Science and Art, Civ. App., 123 S.W.2d 359, error refused.

53. Ala.—Denson v. Kirkpatrick Drilling Co., 144 So. 86, 225 Ala. 473—Sandlin v. Anders, 88 So. 560, 205 Ala. 453—Stockburger v. Aderholt, 86 So. 464, 204 Ala. 557.
Mass.—Quinn v. Standard Oil Co. of New York, 144 N.E. 53, 249 Mass. 194.
Mo.—Union Trust Co. v. Wyatt, 58 S.W.2d 708—Green v. Powell, App., 46 S.W.2d 915.
Okl.—Reeves & Co. v. Martin, 94 P. 1058, 20 Okl. 558.
Pa.—Perry v. Ryback, 153 A. 770, 302 Pa. 559.
S.C.—Griswold v. Texas Co., 161 S.E. 409, 163 S.C. 156.
Tex.—Hughey v. Donovan, Civ.App., 135 S.W.2d 265—Killingsworth v. General Motors Acceptance Corporation, Civ.App., 37 S.W.2d 823, 825, citing **Corpus Juris**.
22 C.J. p 1023 note 59.

Meat-tags

Where one member of a firm of meat dealers testified that when he got orders for meat he made out tags showing the weight of the meat, and gave them to other men, who cut and wrapped up the meat, and put one of the tags inside, the other being kept in the dealers' office, and the person receiving the meat testified that he got a copy of the tags with every shipment, and recognized those produced as comparing with the ones received, the tags were admissible over the objection that they were not the best evidence.—Jan Wai v. Smith-Riddell Co., 202 P. 952, 55 Cal.App. 59.

Protest of bill or note

(1) If the original certificate of protest of a note is lost, a duplicate may be received in evidence.—Kellam v. McKoon, 31 Hun, N.Y., 519.

(2) A duplicate protest of a bill may be given in evidence without producing the original bill, if it is shown that the bill was lost after protest.—Usher v. Gaither, 2 Harr. & M., Md., 457.

Unilateral agreement under seal

A duplicate copy of a unilateral contract under seal is inadmissible either as an original or as a copy of the original.—Quinn v. Standard Oil Co. of New York, 144 N.E. 53, 249 Mass. 194.

Contention that document did not bind party does not justify excluding it.—Krell v. Tucker, 204 N.Y.S. 307.

54. Tex.—Hughey v. Donovan, Civ. App., 135 S.W.2d 265—Davenport v. Railroad Commission, Civ.App., 85 S.W.2d 661.

55. Mont.—Ralph v. MacMarr Stores, 62 P.2d 1285, 103 Mont. 421.

Copy of delivery bill

Where a defendant, in delivering merchandise, used duplicate or triplicate copies of the delivery bill or invoice, retaining one showing the fact of receipt of the merchandise, the time thereof, and the signature identifying the person receiving the delivery, such copy is properly admissible.—Ralph v. MacMarr Stores, supra.

56. Ga.—Hannifin v. Wolpert, 193 S.E. 81, 56 Ga.App. 466—Yarbrough v. Shackelford, 158 S.E. 532, 43 Ga. App. 243—Lewis v. Phillips-Boyd Pub. Co., 89 S.E. 177, 18 Ga.App. 181.
Ky.—Gus Dattilo Fruit Co. v. Louisville & N. R. Co., 37 S.W.2d 856, 238 Ky. 322.
Pa.—Brenner v. Lesher, 2 A.2d 731, 332 Pa. 522—John Wanamaker, Philadelphia, v. Chase, 81 Pa.Super. 201, 203, citing **Corpus Juris**.
Tex.—Musser v. State, Cr., 124 S.W. 2d 372, 374, 136 Tex.Cr. 233, quoting **Corpus Juris**.
22 C.J. p 1024 note 62.

Corpus Juris statement has been quoted in connection with a prosecution for robbery.—State v. Trice, Mo., 92 S.W.2d 135, 136.

Copies or duplicate licenses to run hotel

Ga.—Hannifin v. Wolpert, 193 S.E. 81, 56 Ga.App. 466.

copies, which are usually admitted as duplicate originals,[57] although carbon copies have been held not to be duplicate originals,[58] but the rule is also applicable to impression copies,[59] printing press copies,[60] and to copies made with manifold paper.[61]

57. Ala.—Sovereign Camp, W. O. W., v. Hoomes, 122 So. 686, 219 Ala. 560—Speer v. Lancaster-Johnson Lumber Co., 108 So. 746, 214 Ala. 688—Liverpool & London & Globe Ins. Co., Limited, of England v. McCree, 105 So. 901, 213 Ala. 534—Campbell Motor Co. v. Brewer, 101 So. 748, 212 Ala. 50—Sandlin v. Anders, 88 So. 560, 205 Ala. 453.

Ariz.—M. Karam & Sons Mercantile Co. v. Serrano, 77 P.2d 447, 51 Ariz. 397—Rio Grande Oil Co. v. Upton Oil Co., 266 P. 3, 33 Ariz. 474.

Ga.—Anderson v. Tate, 82 S.E. 246, 141 Ga. 840—Hannifin v. Wolpert, 193 S.E. 81, 56 Ga.App. 466—Yarbrough v. Shackelford, 158 S.E. 532, 43 Ga.App. 243—Martin & Lanier Paint Co. v. Daniels, 108 S.E. 246, 27 Ga.App. 302.

Idaho.—American Surety Co. of New York v. Blake, 27 P.2d 972, 54 Idaho 1, 91 A.L.R. 153.

Ill.—Illinois Tuberculosis Ass'n v. Springfield Marine Bank, 282 Ill. App. 14.

Ind.—Town of Frankton v. Closser, 20 N.E.2d 216, 107 Ind.App. 193—Watts v. Geisel, 194 N.E. 502, 100 Ind.App. 92—Massachusetts Bonding & Insurance Co. v. State, 149 N.E. 377, 82 Ind.App. 377.

Kan.—Patton v. Sartin, 87 P.2d 589, 149 Kan. 299—Prescott, Wright, Snider Co. v. City of Cherryvale, 4 P.2d 457, 134 Kan. 53—Priddy-Maer Elevator Co. v. Wenzel, 243 P. 1016, 120 Kan. 423.

Mo.—Anglo-American Mill Co. v. Twin City Mercantile & Mfg. Co., 35 S.W.2d 982, 225 Mo.App. 329.

N.C.—Standard Sand & Gravel Corporation v. McClay, 131 S.E. 754, 756, 191 N.C. 313, citing **Corpus Juris**.

Okl.—Carter v. Carl Merveldt & Son, 80 P.2d 254, 183 Okl. 152—Great American Life Ins. Co. v. Stephenson, 55 P.2d 56, 176 Okl. 295—Anglo-Texas Oil Co. v. Manatt, 256 P. 740, 125 Okl. 92—U. S. Fire Ins. Co. of City of New York v. L. C. Adam Mercantile Co., 245 P. 885, 117 Okl. 73.

W.Va.—Rubenstein v. Metropolitan Life Ins. Co., 190 S.E. 531, 118 W. Va. 367—G. Elias & Bro. v. Boone Timber Co., 102 S.E. 488, 85 W.Va. 508.

22 C.J. p 1024 note 63.

Reason for rule

The reason under the best evidence rule for requiring the production of the original entry does not obtain, for the possibility, often strong probability, of error in copying is not present.—Gus Dattilo Fruit Co v. Louisville & N. R. Co., 37 S.W.2d 856, 238 Ky. 322.

Corpus Juris text has been cited in a case applying the rule to criminal prosecutions.—State v. Lee, 138 So. 662, 173 La. 770.

Absence of surprise

Admitting carbon copy of letter notifying seller of unsatisfactory performance of milling machinery is not error, where adverse party is not surprised.—Anglo-American Mill Co. v. Twin City Mercantile & Mfg. Co., 35 S.W.2d 982, 225 Mo.App. 329.

Carbon copy assumed

Where duplicate notices have been prepared and one is offered in evidence, the court will assume that it is a carbon copy, in the absence of a showing otherwise.—Town of Frankton v. Closser, 20 N.E.2d 216, 107 Ind.App. 193.

Copy different from original

(1) The rule that a carbon impression of a letter or document written on a typewriter with the same stroke of the keys is an original, and that either impression is primary evidence of the letter or document in question, will not be applied where there is satisfactory evidence that the original instrument has in fact been changed or altered.—Patton v. Sartin, 87 P.2d 589, 149 Kan. 299.

(2) In brokers' action for balance due for purchase and sale of wheat for defendant, carbon copies of confirmations claimed by brokers to have been sent defendant showing amount of each purchase and sale, and bearing printed statement that actual receipt of property and payment therefor was contemplated, were properly received, where there was no printed matter on carbon copies.—Rothschild v. Sabath, 17 N.E.2d 354, 297 Ill.App. 638.

(3) Where receipts were admitted in evidence, carbon copies thereof were admissible to show whether any changes had been made.—King v. Dearing-Orman Mercantile Co., 82 So. 627, 17 Ala.App. 143.

Secondary evidence

(1) It has been said that a carbon copy of a corporate by-law is secondary evidence.—Little v. National Colortype Co., 247 S.W. 368, 197 Ky. 524.

(2) However, other adjudications of the same jurisdiction support the text rule.—Gus Dattilo Fruit Co. v. Louisville & N. R. Co., 37 S.W.2d 856, 238 Ky. 322—Davis v. Williams Bros. Const. Co., 269 S.W. 289, 292, 207 Ky. 404, quoting **Corpus Juris**.

58. Fla.—Lockwood v. L. & L. Freight Lines, 171 So. 236, 126 Fla. 474.

Tex.—Mauritz v. Schwind, Civ.App., 101 S.W.2d 1085, error dismissed—New Amsterdam Casualty Co. v. Parham, Civ.App., 2 S.W.2d 866, error dismissed—Givens v. Turner, Civ.App., 225 S.W. 403.

22 C.J. p 1024 note 63 [c].

However, a carbon copy of letter received by indorser and showing that indorser knew of disposition of note has been held admissible to show that indorser knowingly ratified plaintiff's act in paying indorser's liability in suit to recover amount paid.—First Nat. Bank v. Keeley, Tex.Civ.App., 61 S.W.2d 1037, error dismissed.

Intention of writer controls whether the carbon copy is to be deemed a duplicate original, for, if the purpose is merely to preserve a copy, such copy, or the original if it is sent and the copy retained, is not a duplicate original, but if the intention is to make a number of simultaneous originals to have equal and equivalent value as evidence the rule of duplicate originals applies.—Lockwood v. L. & L. Freight Lines, 171 So. 236, 126 Fla. 474.

Incomplete copy

Carbon copies of "outturn" sheets and confirmation notices were not admissible as duplicate originals where the originals were partly printed and partly typewritten, the carbon copies not including the printed portion.—Givens v. Turner, Tex.Civ.App., 225 S.W. 403.

59. Ga.—Hannifin v. Wolpert, 193 S.E. 81, 56 Ga.App. 466—Yarbrough v. Shackelford, 158 S.E. 532, 43 Ga. App. 243—Lewis v. Phillips-Boyd Pub. Co., 89 S.E. 177, 18 Ga.App. 181.

Kan.—Enright v. Atchison, T. & S. F. R. Co., 152 P. 629, 96 Kan. 545.

60. Ill.—People v. Chicago, R. I. & P. Ry. Co., 160 N.E. 841, 844, 329 Ill. 467, citing **Corpus Juris**.

22 C.J. p 1024 note 62 [c].

Specimen ballots identified by printer and county clerk as being produced by same type as and identical with forms prescribed and used in elections are admissible as original evidence to prove contents.—People v. Chicago, R. I. & P. Ry. Co., supra.

61. Ga.—Mayor, etc., of Gainesville v. White, 107 S.E. 571, 27 Ga.App. 16.

A distinction has been drawn with respect to instruments requiring signatures, such as contracts, it being considered that where several carbon copies are made all the copies are originals until signed, and when one is signed the other become copies with the signatures missing.[62] Such unsigned copies are inadmissible in the absence of proof that the original is not obtainable, as pointed out infra § 837.

Where printed copies are admissible by reason of statute, a mimeograph copy is admissible.[63]

D. GROUNDS FOR ADMISSION OF SECONDARY EVIDENCE

§ 822. In General

Secondary evidence is competent where a proper foundation for its admission is shown, but it may be used only in those cases specified by law.

Secondary evidence of the contents of a writing not produced is competent if a proper foundation for its admission be shown;[64] but it may be used only in those cases specified by law.[65]

Particular grounds for the admission of secondary evidence, such as the loss, destruction, or inaccessibility of primary evidence or the failure of the adverse party to produce primary evidence on notice, are discussed infra §§ 823–834.

§ 823. Loss or Destruction of Primary Evidence

Secondary evidence is admissible where primary evidence of the fact has been lost or destroyed without fault of the party offering the secondary evidence.

Secondary evidence becomes admissible where the writing containing or constituting the primary evidence of the fact to be proved is satisfactorily shown to have been lost or destroyed without the fault of the party desiring to prove the fact,[66] and

62. Ga.—Mayor, etc., of Gainesville v. White, supra.
Mont.—Rogness v. Northern Pac. Ry. Co., 196 P. 989, 59 Mont. 373.
Pa.—Brenner v. Lesher, 2 A.2d 731, 332 Pa. 522.
Tex.—Great American Indemnity Co. v. Dabney, Civ.App., 128 S.W.2d 496, error dismissed, judgment correct.
22 C.J. p 1024 note 64.

Typewritten signature
That employer's letter to employee's widow was only unsigned carbon copy did not render it inadmissible, where it was document sent to widow and typewritten signature of employer, followed by word "Superintendent," adequately identified author.—Sunny Point Packing Co. v. Faigh, C.C.A.Alaska, 63 F.2d 921.

63. Tex.—Sellers v. Gibson, Civ. App., 46 S.W.2d 336, error refused.

Copy of freight rates
Mimeographed copy of freight rates fixed by railroad commission is admissible as constituting substantial compliance with governing statute.—Sellers v. Gibson, supra.

64. U.S.—Fidelity & Deposit Co. of Maryland v. Union Trust Co. of Rochester, N. Y., D.C.N.Y., 37 F. Supp. 3.
Ark.—Fry v. Poe, 1 S.W.2d 29, 175 Ark. 375.
Ill.—Voellinger v. Kohl, 261 Ill.App. 271.
Mich.—Kent County v. Krakowski, 175 N.W. 427, 207 Mich. 631.
N.J.—Fagan v. Central R. Co. of New Jersey, 107 A. 422, 93 N.J. Law 203.
N.C.—Powers v. Murray, 117 S.E. 161, 185 N.C. 336.
Preliminaries to admission of secondary evidence see infra §§ 835–850.

Basis for admitting secondary evidence
The underlying principle on which secondary evidence is admitted, where the primary evidence has been lost or destroyed, or is otherwise inaccessible to the party desiring to use it, is the rule that if the evidence is competent and the best obtainable the best evidence rule is complied with and the evidence is admissible.—Ring's Petition, 72 A. 548, 104 Me. 544—22 C.J. p 977 note 68.

Purpose of secondary evidence rule is to permit parties to show what would be shown by lost instrument itself.—Lueth v. Goodknecht, 177 N.E. 690, 345 Ill. 197, 79 A.L.R. 780.

Where record evidence does not exist parol evidence is admissible.—Freer v. Arnold, 205 N.Y.S. 801, 123 Misc. 619.

Certified copy of deed is admissible without a showing of loss of or inability to produce the original where so provided by statute.—Stone v. Light, Tex.Civ.App., 228 S.W. 1108.

65. La.—Murff v. Murff, App., 1 So. 2d 407.

Admission zealously guarded
S.D.—Smith v. Munson, 238 N.W. 27, 59 S.D. 6.

66. U.S.—Baltimore American Ins. Co. of New York v. Pecos Mercantile Co., C.C.A.N.M., 122 F.2d 143.
Ala.—Life & Casualty Ins. Co. v. Bell, 180 So. 573, 235 Ala. 548.
Cal.—Johnston Realty Corporation v. Showalter, 250 P. 289, 80 Cal. App. 176.
Conn.—Torrington Electric Light Co. v. Stedman, 123 A. 261, 100 Conn. 217.
Del.—Doe v. Roe, 162 A. 515, 5 W.W. Harr. 229.
Fla.—Green v. Camp, 54 So. 363, 61 Fla. 256.
Ga.—Sheffield v. Sheffield, 104 S.E. 213, 150 Ga. 440.
Ill.—Mullanphy Sav. Bank v. Schott, 26 N.E. 640, 135 Ill. 655, 25 Am. S.R. 401.
Ky.—Royal Collieries Co. v. Wells, 276 S.W. 515, 210 Ky. 600.
Mass.—O'Connor v. Boston Retirement Board, 23 N.E.2d 862, 304 Mass. 471.
Mich.—Flint v. Trahey, 259 N.W. 146, 270 Mich. 534.
Mo.—Doniphan v. Transue, App., 226 S.W. 635.
N.J.—Frank v. Pillsbury, 145 A. 725, 104 N.J.Eq. 383—Mutual Life Ins. Co. of New York v. Cobb, Ch., 107 A. 58.
N.Y.—In re Tilden's Estate, 194 N.Y.S. 565, 118 Misc. 729—Harmon v. Matthews, 27 N.Y.S.2d 656.
N.C.—Savage v. Currin, 176 S.E. 569, 207 N.C. 222—Powers v. Murray, 117 S.E. 161, 185 N.C. 336.
Ohio.—Janchar v. Cerkvenik, 172 N.E. 634, 35 Ohio App. 519.
Okl.—McCoy v. Wosika, 180 P. 967, 75 Okl. 3.
Pa.—Petition of O'Malley, 48 Dauph. Co. 428—Brenner v. Lesher, 45 Dauph.Co. 140—Wildwood Strand Realty Co. v. Skipper, 53 York Leg.Rec. 19.
S.C.—Owens v. Ocean Forest Club, 12 S.E.2d 839, 196 S.C. 97.
Tex.—Martin v. Grandview Independent School Dist., Civ.App., 266 S.W. 607.
Vt.—Lycoming Fire Ins. Co. v. Wright, 12 A. 103, 60 Vt. 515.

where, in the case of a lost instrument, the party has made a proper search for the instrument.[67] The loss of an instrument in the course of transmission by mail will warrant secondary evidence of its contents.[68]

Where part of a writing has been torn off and lost, a copy of the entire writing is admissible,[69] or where there is no copy, the part of the writing remaining may be introduced in evidence, and parol evidence given as to the contents of the part which has been lost.[70]

§ 824. —— Destruction by Party Offering Secondary Evidence

Secondary evidence is admissible, where the primary evidence of the fact sought to be proved has been destroyed by the party seeking to establish the fact, only where such destruction was by accident or mistake or free from circumstances of fraud.

The rule admitting secondary evidence of the contents of a lost or destroyed writing, see supra § 823, must be so applied as to promote the ends of justice and to guard against fraud or imposition.[71] It is not, therefore, a matter of course to admit secondary evidence of the contents of a writing on proof of its destruction, but the cause or motive of the destruction is the controlling fact which determines the admissibility of such evidence.[72] Where it appears that a party seeking to establish a fact has voluntarily destroyed a writing constituting or containing the best evidence of that fact, he cannot introduce secondary evidence thereof, especially where the suit is in his own behalf and is founded on the writing, without first introducing evidence to explain his destruction of the writing and to repel all inference of fraudulent design arising therefrom.[73]

If, however, it appears that the loss or destruction occurred through accident or mistake, or on an erroneous impression of its effect, or under other circumstances free from a suspicion of intended fraud, there is no impediment to the introduction of secondary evidence.[74] If the writing was destroyed in the usual course of business, or when it was not

Wash.—Nelson v. Davenport, 183 P. 132, 108 Wash. 259.
22 C.J. p 1024 note 65.
Particular applications of rule with respect to private writings and public records and documents see §§ 826, 827 infra.

67. U.S.—In re Willfuehr, D.C.N.Y., 292 F. 387.
Ala.—Collum Motor Co. v. Anderson, 133 So. 693, 222 Ala. 643—Cotton v. Courtright, 111 So. 7, 215 Ala. 474—Kennedy v. County Board of Education, 107 So. 907, 214 Ala. 349—May Hosiery Mills v. Munford Cotton Mills, 87 So. 674, 205 Ala. 27—Brown v. Shelby County, 85 So. 416, 204 Ala. 252.
Cal.—Deacon v. Bryans, 263 P. 371, 88 Cal.App. 322—Ulm v. Prather, 192 P. 878, 49 Cal.App. 141.
Ill.—Lang v. North American Union, 226 Ill.App. 31.
Ky.—Elkhorn Land & Improvement Co. v. Wallace, 24 S.W.2d 560, 232 Ky. 741.
Mass.—Prudential Trust Co. v. Coghlin, 144 N.E. 283, 249 Mass. 184.
Mo.—Spellmeyer v. Theo. Hiertz Metal Co., App., 272 S.W. 1068.
N.M.—Williams v. Selby, 24 P.2d 728, 37 N.M. 474.
Okl.—National Surety Co. v. Wingate, 5 P.2d 376, 153 Okl. 132.
Tex.—Eagle Furniture Stores v. Jones, Civ.App., 110 S.W.2d 610—San Antonio Machine & Supply Co. v. Central Texas Power & Transmission Co., Civ.App., 295 S.W. 229.
Vt.—In re Warner's Estate, 127 A. 362, 98 Vt. 254.
Wash.—First State Bank of Binford v. Arneson, 186 P. 889, 109 Wash. 346.
Admissibility of evidence in actions to establish lost instruments see the C.J.S. title Lost Instruments § 13, also 38 C.J. p 259 note 14 et seq.
Search for missing document see infra § 842b.
Statute requiring advertisement of the loss of an instrument on which a suit is based does not affect the operation of a statute authorizing the introduction in evidence of a copy of a record on proof of loss of the original.—White v. White, 100 So. 442, 156 La. 324.

68. Conn.—U. S. Bank v. Sill, 5 Conn. 106, 13 Am.D. 44.
22 C.J. p 1027 note 66.

69. **Promissory note**
Ind.—Dean v. Speakman, 7 Blackf. 317.

70. Ky.—Lee v. Lee, 11 S.W.2d 956, 226 Ky. 776.
Mo.—Connell v. A. C. L. Haase & Sons Fish Co., 257 S.W. 760, 302 Mo. 48.
Okl.—Bossert Corporation v. Holliday, 260 P. 480, 127 Okl. 214.
22 C.J. p 1027 note 68.

71. U.S.—Renner v. Columbia Bank, D.C., 9 Wheat. 581, 6 L.Ed. 166.

72. Cal.—Bagley v. Eaton, 10 Cal. 126—Bagley v. McMickle, 9 Cal. 430.

73. U.S.—Consolidated Coke Co. v. Commissioner of Internal Revenue, C.C.A., 70 F.2d 446.
Mich.—Collateral Liquidation v. Manning, 283 N.W. 691, 287 Mich. 568.
22 C.J. p 1032 note 75.
Voluntary destruction of deed
(1) Where a grantee voluntarily destroys a deed which is the proper and primary evidence of his title, the rule of the text applies to prevent his giving secondary evidence of the contents of the deed to establish his title.—Wilke v. Wilke, 28 Wis. 296—Parker v. Kane, 4 Wis. 1, 65 Am.D. 283.
(2) Parties holding under the grantee of a destroyed deed are as effectively estopped from proving its contents by parol as the grantee himself.—Massie v. Hutcheson, Tex.Com.App., 270 S.W. 544, reversing, Civ.App., 258 S.W. 244—22 C.J. p 1032 note 75 [c] (2).
(3) However, the rule does not apply where innocent third persons attempt to establish title under a deed thus destroyed.—Wilke v. Wilke, supra.
Fraudulent loss or destruction
If loss or destruction of writing is shown to have been result of fraudulent design, parol evidence is inadmissible, and the weaker the reason for preservation or fraudulent destruction, the stronger becomes the reason for admissibility and the more relaxed the stringency in respect to foundation proof.—Harmon v. Matthews, 27 N.Y.S.2d 656.

74. Tenn.—Pigg v. Houston & Liggett, 8 Tenn.App. 613.
22 C.J. p 1032 note 76.
Negligent destruction of a document is no bar to its proof by sec-

likely to be used as evidence in the party's favor, and had no value, the destruction cannot be held fraudulent and secondary evidence is admissible.[75]

Presumption of voluntary destruction. It will not be presumed that a party has voluntarily or fraudulently destroyed an instrument which he was interested in preserving, where there is no evidence on that point except that the instrument cannot be found,[76] but in such a case the only inference is that the instrument is lost.[77]

§ 825. —— Destruction by Party against Whom Secondary Evidence Offered

Secondary evidence is admissible where the primary evidence of the fact sought to be shown has been lost or destroyed by the party against whom the evidence is offered.

Where the writing or record constituting or containing the best evidence of a fact has been lost or voluntarily destroyed by the party against whom the fact is sought to be proved, secondary evidence is admissible;[78] and in this respect any acts of such party whereby the writing is effectually placed beyond the power and control both of the other party and the court are equivalent to destruction.[79]

§ 826. —— Private Writings

The rule authorizing the admission of secondary evidence where primary evidence has been lost or destroyed has been applied in the case of the loss or destruction of many kinds of private writings, such as deeds, contracts, notes, letters, and wills.

The rule permitting the introduction of secondary evidence, where the primary evidence has been lost or destroyed without fault of the party seeking to prove the fact, see supra § 823, has been applied to admit secondary evidence of lost or destroyed private writings of many and varied kinds.[80] Thus the rule has been applied to admit secondary evidence of deeds and other sealed instruments,[81] including tax deeds,[82] deeds of adoption,[83] and deeds of trust;[84] bonds,[85] mortgages,[86] and leases;[87] contracts,[88] including contracts or articles of part-

ondary evidence.—May Hosiery Mills v. Munford Cotton Mills, 87 So. 674, 205 Ala. 27—22 C.J. p 1032 note 76 [b].

75. Ind.—Beem v. Beem, 141 N.E. 81, 193 Ind. 481.
Ky.—Reynolds v. Cooper, 237 S.W. 667, 193 Ky. 763.
R.I.—Nelson v. Blake, 173 A. 625.
22 C.J. p 1033 note 77.

76. Ala.—May Hosiery Mills v. Munford Cotton Mills, 87 So. 674, 205 Ala. 27.
22 C.J. p 1033 note 79.
Presumptions arising from destruction of evidence see supra § 153.

77. Mass.—Foster v. Mackay, 7 Metc. 531.
N.J.—Clark v. Hornbeck, 17 N.J.Eq. 430.

78. U.S.—In re Willfuehr, D.C.N.Y., 292 F. 387, 388, quoting Corpus Juris—Armstrong v. Belding Bros. & Co., D.C.Conn., 280 F. 895, affirmed, C.C.A., 297 F. 728, certiorari denied, Belding Bros. & Co. v. Armstrong, 44 S.Ct. 459, 265 U.S. 585, 68 L.Ed. 1192.
Iowa.—Standard Oil Co. (Indiana) v. Stubbs-Auckland Oil Co., 265 N.W. 121, 221 Iowa 489.
Pa.—Freed v. Fisher, 54 Montg.Co. 244.
22 C.J. p 1033 note 80.
Presumptions arising from spoliation, fabrication, or nonproduction of evidence see supra §§ 151–156.
Gas meter
N.Y.—Rocha v. Consolidated Edison Co. of New York, 22 N.Y.S.2d 157.

79. U.S.—In re Willfuehr, D.C.N.Y., 292 F. 387, 388, quoting Corpus Juris.
22 C.J. p 1033 note 81.

80. **Meat inspection stamp**
N.H.—Howson v. Foster Beef Co., 177 A. 656, 87 N.H. 200.
Order of employer to employee
Neb.—Metcalfe v. Chicago, R. I. & P. Ry. Co., 172 N.W. 246, 103 Neb. 431.
Statement of lodge membership
Ala.—Grand Lodge, K. P., v. Yancy, 156 So. 575, 26 Ala.App. 152, certiorari denied 156 So. 579, 229 Ala. 239.
X-ray plates or pictures
Mo.—Spellmeyer v. Theo. Hiertz Metal Co., App., 272 S.W. 1068.
Or.—Vale v. Campbell, 263 P. 400, 123 Or. 632.
W.Va.—Quinn v. Flesher, 102 S.E. 300, 85 W.Va. 451.

81. Ala.—Dabbs v. Letson, 98 So. 4, 210 Ala. 306—United States Lumber & Cotton Co. v. Cole, 81 So. 664, 202 Ala. 688.
Ga.—Gay v. Demott, 111 S.E. 379, 153 Ga. 19—Drawdy v. Musslewhite, 107 S.E. 549, 27 Ga.App. 84.
Ky.—Elkhorn Land & Improvement Co. v. Wallace, 24 S.W.2d 560, 232 Ky. 741—Lee v. Lee, 11 S.W.2d 956, 226 Ky. 776.
La.—Dupuy v. Joly, 200 So. 806, 197 La. 19.
Tenn.—Tennessee Barium Corporation v. Williams, 133 S.W.2d 1015, 23 Tenn.App. 398.
Tex.—Martinez v. Bruni, Civ.App., 216 S.W. 655, modified on other grounds, Com.App., 235 S.W. 549.
22 C.J. p 1027 note 70.
Government land patent
Mo.—Reed v. Steward, 240 S.W. 206.
Grant from state
S.C.—Clary v. Bonnett, 103 S.E. 779, 114 S.C. 452.

82. Mo.—Kries v. Holladay-Klotz Land & Lumber Co., 98 S.W. 1086, 121 Mo.App. 184.
Vt.—Brown v. Austin, 41 Vt. 262.

83. Mo.—Gipson v. Owens, 226 S.W. 856, 286 Mo. 33.
Neb.—In re Desoe's Estate, 278 N.W. 852, 134 Neb. 371.

84. Cal.—Hall v. Crowley, 106 P. 426, 12 Cal.App. 30.

85. Ind.—Freyermuth v. State ex rel. Burns, 2 N.E.2d 399, 210 Ind. 235.
22 C.J. p 1027 note 73.

86. Ala.—McNutt v. Thomas, 121 So. 690, 23 Ala.App. 118—J. H. Arnold & Co. v. Pinckard & Lay, 80 So. 164, 16 Ala.App. 590, certiorari denied Ex parte Pinckard & Lay, 80 So. 894, 202 Ala. 699.
N.J.—Wilson v. Stevens, 148 A. 392, 105 N.J.Eq. 381.
Tex.—Eagle Furniture Stores v. Jones, Civ.App., 110 S.W.2d 610.
22 C.J. p 1027 note 74.

87. U.S.—Chatham Gold Dredging Co. v. Burns, C.C.A.Alaska, 84 F.2d 717.
Ark.—Bingham v. Rhea, 143 S.W.2d 1087.
22 C.J. p 1027 note 75.

88. Ala.—First Colored Cumberland Presbyterian Church v. W. D. Wood Lumber Co., 88 So. 433, 205 Ala. 442.
Ark.—Kelley v. Sparks, 102 S.W.2d 838, 193 Ark. 811.
Iowa.—Stewart v. Todd, 173 N.W. 619, 190 Iowa 283, 20 A.L.R. 1272, modified on other grounds 180 N.W. 146, 190 Iowa 283, 20 A.L.R. 1272.

nership,[89] guaranties,[90] contracts to convey land,[91] and insurance policies;[92] assignments,[93] bills of sale,[94] and chattel mortgages;[95] checks,[96] drafts,[97] and bills of exchange and promissory notes;[98] receipts, vouchers, or invoices;[99] accounts or books of account;[1] inventories;[2] and books and records of a corporation[3] or of an unincorporated association[4] or stock company.[5]

In addition, the rule has been applied to admit secondary evidence of letters[6] and telegrams;[7] no-

Ky.—Walker v. City of Richmond, 262 S.W. 628, 203 Ky. 461.
Mich.—Bignell v. Franks, 180 N.W. 493, 212 Mich. 236.
Mo.—Gipson v. Owens, 226 S.W. 856, 286 Mo. 33—Pate v. Mullen, App., 209 S.W. 291.
Wash.—First State Bank of Binford v. Arneson, 186 P. 889, 109 Wash. 346.
22 C.J. p 1027 note 76.

89. Cal.—Ulm v. Prather, 192 P. 878, 49 Cal.App. 141.
22 C.J. p 1028 note 77.

90. Ga.—Probasco v. Shaw, 87 S.E. 466, 144 Ga. 416.

91. Tex.—Rains v. McMills, 14 Tex. 614.

92. La.—Tuck v. Harmon, App., 151 So. 803.
Ohio.—Drucker v. Travelers Ins. Co., 200 N.E. 774, 51 Ohio App. 303.
S.C.—Globe & Rutgers Fire Ins. Co. v. Foil, 200 S.E. 97, 189 S.C. 91—Bank v. North Carolina Mut. Life Ins. Co., 195 S.E. 649, 186 S.C. 394.
22 C.J. p 1028 note 80.

93. Cal.—McKey v. MacIntosh, 188 P. 310, 45 Cal.App. 628.
22 C.J. p 1028 note 81.

Assignment of judgment
Cal.—Flickinger v. McKesson, 183 P. 195, 41 Cal.App. 577.
Mass.—Smith v. Brown, 24 N.E. 31, 151 Mass. 338.

94. Ga.—Fambrough v. De Vane, 82 S.E. 249, 141 Ga. 794.
Mo.—Schultis v. Rice, 89 S.W. 357, 114 Mo.App. 274.

95. Wis.—Hoeffler v. Carew, 116 N.W. 241, 135 Wis. 605.
22 C.J. p 1028 note 83.

96. Ga.—Crump v. Bank of Toccoa, 153 S.E. 531, 41 Ga.App. 505.
Mo.—Baker v. Scott County Milling Co., 20 S.W.2d 494, 323 Mo. 1089.
N.Y.—Sundelevitz v. Fourteenth St. Bank, 127 N.Y.S. 315.

97. U.S.—Russo-Chinese Bank v. National Bank of Commerce, Wash., 187 F. 80, 109 C.C.A. 398.

98. Cal.—Deacon v. Bryans, 263 P. 371, 88 Cal.App. 322.
Ill.—Metcalf v. Metcalf, 219 Ill.App. 96.
Mo.—South Side Buick Auto Co. v. Bejach, App., 44 S.W.2d 870.
22 C.J. p 1028 note 86.

99. Ala.—Ziliak & Schafer Milling Co. v. Moore, 131 So. 798, 222 Ala. 254.
Ga.—Hoyt v. Ware, 118 S.E. 734, 156 Ga. 98—Tuggle v. Fisk Rubber Co. of New York, 106 S.E. 594, 26 Ga.App. 493.
Mo.—Steinberg v. Merchants' Bank of Kansas City, 67 S.W.2d 63, 334 Mo. 297.
N.C.—Fort Worth & D. C. Ry. Co. v. Hegwood, 151 S.E. 641, 198 N.C. 309.
Ohio.—Bevis v. American Ry. Exp. Co., 17 Ohio App. 73.
Wash.—Murray v. Chamberlain, 219 P. 8, 126 Wash. 642.
22 C.J. p 1028 note 87.

1. U.S.—Equitable Life Assur. Soc. of U. S. v. Sieg, C.C.A.Ohio., 53 F.2d 318—Bryce Plumbing & Heating Co. v. Maryland Casualty Co., D.C.S.C., 21 F.Supp. 854.
Ill.—Bank of Sandoval v. First Nat. Bank of Sandoval, 216 Ill.App. 571.
Kan.—Stanley v. Wickam, 211 P. 1117, 1118, 112 Kan. 628, citing **Corpus Juris**.
Mich.—Munroe, Boyce & Co. v. Ward, 174 N.W. 285, 207 Mich. 369.
Mo.—Farmers' State Bank of Ellsinore v. Consolidated School Dist. No. 1, 293 S.W. 453, 220 Mo.App. 1312—Schroeder v. Stadley, App., 261 S.W. 934—Doniphan v. Transue, App., 226 S.W. 635.
N.Y.—People v. Rice, 223 N.Y.S. 566, 221 App.Div. 443.
Pa.—Abercrombie v. Bailey, 190 A. 725, 326 Pa. 65—Allegro v. Rural Valley Mut. Fire Ins. Co., 112 A. 140, 268 Pa. 333.
Tex.—Osage Oil & Gas Co. v. Caulk, Civ.App., 243 S.W. 551.
Vt.—Chadwick v. Wiggin, 116 A. 74, 95 Vt. 515.
22 C.J. p 870 note 34, p 1028 note 88.

Bank pass book
Kan.—Bundy v. National Fire Ins. Co., 288 P. 738, 130 Kan. 735.

Time book
Wash.—Foy v. Pacific Power & Light Co., 188 P. 514, 110 Wash. 248.

2. U.S.—In re Margolis, D.C.N.Y., 23 F.Supp. 735.
Ark.—Arkansas Mut. F. Ins. Co. v. Woolverton, 102 S.W. 226, 82 Ark. 476.
Conn.—Sachs v. Feinn, 183 A. 384, 121 Conn. 77.

3. Ala.—McMillan v. Aiken, 88 So. 135, 205 Ala. 35.
Ark.—Connecticut Fire Ins. Co. v. Boydston, 293 S.W. 730, 173 Ark. 437.
Mass.—Waters v. Gilbert, 2 Cush. 27.
N.M.—Abo Land Co. v. Dunlavy, 181 P. 582, 25 N.M. 273.
N.Y.—Seymour v. Mechanics & Metals Nat. Bank of City of New York, 200 N.Y.S. 758, 121 Misc. 119.
Okl.—National Surety Co. v. Wingate, 5 P.2d 376, 153 Okl. 132.
Pa.—Rockwood Water Co. v. Wolf, 33 Pa.Dist. & Co. 115, 9 Som.Leg. J. 63.
Utah.—Copper King Mining Co. v. Hanson, 176 P. 623, 52 Utah 605.
14 C.J. p 921 note 41—22 C.J. p 1028 note 90.

4. N.Y.—Harmon v. Matthews, 27 N.Y.S.2d 656.

5. Tex.—Cameron v. Decatur First Nat. Bank, Civ.App., 34 S.W. 178.

6. U.S.—General Motors Acceptance Corporation v. American Ins. Co., C.C.A.Fla., 50 F.2d 803, certiorari denied American Ins. Co. v. General Motors Acceptance Corporation, 52 S.Ct. 130, 284 U.S. 676, 76 L.Ed. 571.
D.C.—Conkling v. New York Life Ins. & Trust Co., 262 F. 620, 49 App.D.C. 166.
Ala.—Cotton v. Courtright, 111 So. 7, 215 Ala. 474.
Ga.—Wenar v. Stocks, 169 S.E. 376, 177 Ga. 127—Martin v. Mayer, 11 S.E.2d 218, 63 Ga.App. 387—N. C. Foster Lumber Co. v. Sykes, 166 S.E. 61, 45 Ga.App. 826—Knox v. Harrell, 107 S.E. 594, 108 S.E. 117, 26 Ga.App. 772.
Ill.—Puntenney v. Wildeman & Co., 149 N.E. 2, 318 Ill. 139, affirming 234 Ill.App. 547.
Ind.—Beem v. Beem, 141 N.E. 81, 193 Ind. 481.
La.—Thom v. Thom, 117 So. 750, 166 La. 648—Antoine v. Hamilton, App., 144 So. 614.
Mass.—Drew v. Drew, 144 N.E. 763, 250 Mass. 41.
Minn.—In re Berdell's Estate, 173 N.W. 665, 143 Minn. 328.
Miss.—Stanton v. Cox, 139 So. 458, 162 Miss. 438.
Mo.—Locke v. Woodman, App., 225 S.W. 352.
N.M.—Williams v. Selby, 24 P.2d 728, 37 N.M. 474.
Tex.—Wood v. Spears, Civ.App., 62 S.W.2d 550, error dismissed.
Vt.—Capital Garage Co. v. Powell, 122 A. 423, 97 Vt. 204, petition dismissed 123 A. 200, 97 Vt. 328.
Wash.—Avgerinion v. First Guaranty Bank, 252 P. 535, 142 Wash. 73.
22 C.J. p 1028 note 92.

Post cards
Tex.—Duree v. Ætna Ins. Co., Civ. App., 66 S.W.2d 764.

7. La.—Peterman v. Vermont Sav. Bank, 159 So. 598, 181 La. 403.

tices[8] and demands;[9] wills;[10] powers of attorney or other written authority to act as agent;[11] maps;[12] memoranda;[13] licenses[14] and certificates;[15] railroad tickets[16] and passes;[17] a publication alleged to be libelous;[18] a written confession of a crime;[19] and documents more than thirty years old, which, if not lost or destroyed, would prove themselves.[20]

§ 827. —— Public Records and Documents

The rule authorizing the admission of secondary evidence where primary evidence has been lost or destroyed has been applied in the case of the loss or destruction of various kinds of public and judicial records and documents.

With respect to secondary evidence of their contents when the originals are lost or destroyed, see supra § 823, public records do not differ from private documents; so, where it is satisfactorily shown that public records have been lost or destroyed, their contents may be proved by parol or other competent secondary evidence, provided the existence of other and better evidence is not disclosed by the circumstances of the case or the character of the evidence introduced.[21] Accordingly the courts have admitted secondary evidence with respect to the contents of land office records;[22] school board or

Mo.—Brigham City Fruit Growers' Ass'n v. G. H. Zollmann Produce Co., 220 S.W. 911.
Okl.—Stapleton Motor Sales Co. v. Oates, 235 P. 513, 109 Okl. 173.
Tex.—San Antonio Machine & Supply Co. v. Central Texas Power & Transmission Co., Civ.App., 295 S. W. 229—Osage Oil & Gas Co. v. Caulk, Civ.App., 243 S.W. 551—Haskell v. Merrill, Civ.App., 242 S.W. 331.
Va.—Radford Water Power Co. v. Dunlap, 105 S.E. 257, 128 Va. 658.
22 C.J. p 1029 note 93.

8. Ala.—Ex parte Bennett, 86 So. 109, 204 Ala. 390, denying certiorari Tanneyhill v. Bennett, 86 So. 108, 17 Ala.App. 315.
Ark.—Perry v. Gill, 44 S.W.2d 1084, 184 Ark. 1099.
Ill.—Lang v. North American Union, 226 Ill.App. 31.
Iowa.—Cleophas v. Walker, 233 N. W. 257, 211 Iowa 122.
Mo.—O'Donnell v. Kansas City Life Ins. Co., App., 277 S.W. 973.
22 C.J. p 1029 note 94.

9. Kan.—Western Union Tel. Co. v. Collins, 25 P. 187, 45 Kan. 88, 10 L. R.A. 515.
22 C.J. p 1029 note 95.

10. U.S.—Neely v. Broad Street Nat. Bank of Red Bank, D.C.N.J., 16 F.Supp. 839.
Mo.—Thomson v. Butler, 147 S.W.2d 437.
Philippine.—Timbol v. Manalo, 6 Philippine 254, 4 Off.Gaz. 596.
22 C.J. p 1029 note 96.

11. N.Y.—Bank of North America v. Embury, 33 Barb. 323, 21 How. Pr. 14.
22 C.J. p 1029 note 97.

12. W.Va.—Wilson v. McConnell, 77 S.E. 540, 72 W.Va. 81.

13. Ill.—Sherman v. Pardridge, 177 Ill.App. 304.
Vt.—In re Rogers, 67 A. 726, 80 Vt. 259.

14. **Marriage license**
Ala.—Crook v. Webb, 28 So. 384, 125 Ala. 457.

15. **Automobile registration certificate**
Mass.—Grover v. Smead, 2 N.E.2d 1012, 295 Mass. 11.
Certificate of debtor's exemption from execution
Me.—Angier v. Smalley, 56 Me. 515.
Marriage certificate
La.—Succession of Gaudinse, 175 So. 595, 187 La. 844.
22 C.J. p 1029 note 3.
Naturalization certificate
Minn.—Miller v. Berg, 251 N.W. 682, 190 Minn. 352.
N.Y.—People v. Smith, 31 N.Y.S. 199, 10 Misc. 100.
Notarial certificate
(1) Where a notarial certificate attached to a note has been lost, a copy of the original may properly be admitted in evidence.—Prudential Trust Co. v. Coghlin, 144 N.E. 283, 249 Mass. 184.
(2) However, it has been held that the facts in a protest of a note cannot be proved by showing that a notarial certificate stating those facts has existed and has been lost, since the statute creates a species of evidence unknown to the common law; and where it cannot be produced, proof of the facts must be made in the usual manner.
Iowa.—Frank v. Johnson, 237 N.W. 488, 490, 212 Iowa 807, 75 A.L.R. 128, quoting **Corpus Juris.**
N.Y.—Dutchess County Bank v. Ibbotson, 5 Den. 110.

16. D.C.—Howard v. Chesapeake & O. R. Co., 11 App.D.C. 300.

17. Tex.—International & G. N. R. Co. v. Lynch, Civ.App., 99 S.W. 160.

18. Ala.—Weir v. Hoss, 6 Ala. 881.
Mo.—Connell v. A. C. L. Haase & Sons Fish Co., 257 S.W. 760, 302 Mo. 48.
37 C.J. p 73 note 35.

19. Ky.—Tyree v. Commonwealth. 170 S.W. 33, 160 Ky. 706.

20. Minn.—Rogers v. Clark Iron Co., 116 N.W. 739, 104 Minn. 198.
22 C.J. p 1029 note 10.

21. Ala.—Walker County v. Burdeshaw, 169 So. 227, 232 Ala. 621—Brown v. Shelby County, 85 So. 416, 204 Ala. 252.
Ark.—Commonwealth Farm Loan Co. v. Lester, 15 S.W.2d 991, 179 Ark. 293.
Cal.—Box v. Young, 26 P.2d 290, 219 Cal. 243.
Ga.—McCool v. Wilcher, 107 S.E. 365, 27 Ga.App. 96—Lewis v. State Board of Medical Examiners, 99 S. E. 147, 23 Ga.App. 647.
Ind.—Freyermuth v. State ex rel. Burns, 2 N.E.2d 399, 210 Ind. 235.
Ky.—Commonwealth ex rel. Love v. Reynolds, 146 S.W.2d 41, 44, 284 Ky. 809, citing **Corpus Juris**—Kissel-Skiles Co. v. Neff, 24 S.W.2d 588, 592, 232 Ky. 825, citing **Corpus Juris.**
Md.—O'Brien v. State, 94 A. 1034, 126 Md. 270.
Tex.—Gulf Oil Corporation v. Amazon Petroleum Corporation, Civ. App., 152 S.W.2d 902.
22 C.J. p 1029 note 11.
Record of ancient grant from proprietors of town
Conn.—St. Peter's Church v. Beach, 26 Conn. 355.
Record of organization of a plantation for election purposes.—Prentiss v. Davis, 22 A. 246, 83 Me. 364.

22. N.C.—Baggett v. Lanier, 100 S. E. 254, 178 N.C. 129.
Tenn.—Dunlap v. Sawvel, 223 S.W. 142, 142 Tenn. 696.
22 C.J. p 1030 note 12.
Conveyance books
La.—Johnson v. Flick, 119 So. 254, 167 La. 354.
Land patent
U.S.—La Terre Co. v. Billiot's Shell Island, C.C.A.La., 103 F.2d 53, affirming, D.C., 20 F.Supp. 106.

district records;[23] marriage records;[24] or the minutes of a municipal corporation;[25] and have received such evidence to show the incorporation of a town;[26] the qualification of a public officer;[27] the proceedings of county commissioners;[28] the sale of public lands;[29] the establishment of a public road;[30] the location of a railroad;[31] or the provisions of an ordinance.[32]

Secondary evidence is also admissible to prove the contents of lost or destroyed documents of a public character,[33] such as certificates of entry of land at a land office;[34] surveys,[35] and field books thereof;[36] township plats;[37] tax warrants;[38] returns of a tax collector;[39] a "grand list" of taxable inhabitants;[40] notices of tax sales;[41] an order of a board of county commissioners[42] or of a town board of supervisors;[43] a municipal ordinance;[44] a permit to move a building;[45] and written appointments of, or authority to, public officers.[46]

Judicial records or documents. The rule stated supra § 823 applies equally to admit parol or other competent secondary evidence to prove the contents of lost or destroyed judicial records, writs, processes, and other judicial papers,[47] provided their former existence and loss or destruction is first established by competent proof.[48] Accordingly such evidence has been admitted to show the contents of an affidavit;[49] an attachment;[50] a bail[51] or other[52] bond; a summons[53] or other process;[54] a pleading;[55] a judgment[56] or order;[57] and, likewise has

23. Ala.—Kennedy v. County Board of Education, 107 So. 907, 214 Ala. 349.
Mo.—State ex rel. School Dist. of Affton v. Smith, 80 S.W.2d 858, 336 Mo. 703.
22 C.J. p 1030 note 13.

24. La.—Brown v. Texas & P. Ry. Co., 138 So. 221, 18 La.App. 656.

25. Pa.—Fisher v. South Williamsport, 1 Pa.Super. 336.

26. Mass.—Stockbridge v. West Stockbridge, 12 Mass. 400.

27. Ky.—Graham v. Gordon, 1 Ky. Op. 91.

28. Okl.—Trotter v. Wood, 152 P. 600, 52 Okl. 20.

29. La.—Winn Parish Bank v. White Sulphur Lumber Co., 62 So. 907, 133 La. 282.

30. Kan.—Bowland v. McDonald Independent Tel. Co., 107 P. 797, 82 Kan. 84, motion granted 107 P. 1119, 82 Kan. 357.

31. Me.—U. S. Peg Wood, Shank & Leather Board Co. v. Bangor & A. R. Co., 72 A. 190, 104 Me. 472.

32. Mo.—Mound City ex rel. Reinert Bros. Const. Co. v. Dearmont, 299 S.W. 819, 221 Mo.App. 1225.
22 C.J. p 1030 note 23—43 C.J. p 581 note 18.

33. Conn.—State v. U. S. Fidelity & Guaranty Co., 135 A. 44, 105 Conn. 230.
22 C.J. p 1030 note 24.
Neb.—Hull v. City of Humboldt, 186 N.W. 78, 107 Neb. 326.

34. Ark.—Carpenter v. Smith, 88 S. W. 976, 76 Ark. 447.
22 C.J. p 1030 note 26.

35. U.S.—La Terre Co. v. Billiot's Shell Island, D.C.La., 20 F.Supp. 186, affirmed, C.C.A., 103 F.2d 53.
22 C.J. p 1030 note 27.

36. N.Y.—Jackson v. Jacoby, 9 Cow. 125.

37. U.S.—Hedrick v. Hughes, Mo., 15 Wall. 123, 21 L.Ed. 52.
22 C.J. p 1030 note 29.

38. Me.—Gerry v. Herrick, 82 A. 882, 87 Me. 219.
22 C.J. p 1030 note 30.

39. Tex.—Powell v. County, Civ. App., 198 S.W. 1037.

40. Vt.—Spear v. Tilson, 24 Vt. 420.

41. Ala.—Gilliland v. Armstrong, 71 So. 700, 196 Ala. 513.

42. Idaho.—Black-Canyon Irr. Dist. v. Marple, 112 P. 766, 19 Idaho 176.

43. Wis.—Schroeder v. Klipp, 97 N. W. 909, 120 Wis. 245.

44. U.S.—Monett Electric Light, Power & Ice Co. v. Monett, C.C. Mo., 186 F. 360.
Ala.—Ingram v. Evans, 148 So. 593, 227 Ala. 14.
Neb.—Village of Deshler v. Southern Nebraska Power Co., 277 N.W. 77, 133 Neb. 778.

45. Ohio.—Toledo, B. G. & So. Tract. Co. v. Sterling, 29 Ohio Cir.Ct. 227.

46. Ill.—Viehweg v. City of Mount Olive, 19 N.E.2d 211, 298 Ill.App. 412.
22 C.J. p 1030 note 38.

47. Ky.—Commonwealth ex rel. Love v. Reynolds, 146 S.W.2d 41, 44, 284 Ky. 809, citing **Corpus Juris.**
Wash.—In re Reimer's Estate, 259 P. 32, 145 Wash. 172.
22 C.J. p 1030 note 40.
Secondary evidence of contents of lost:
Appeal or supersedeas bond see Appeal and Error § 2085 c.
Or destroyed depositions see Depositions § 87.

Where a record has become illegible by reason of lapse of time, the testimony of a witness, who examined and copied it while it was legible, may be received to supply the defect.—Little v. Downing, 37 N.H. 355.

48. Pa.—Baskin v. Seechrist, 6 Pa. 154, 162.
Wash.—In re Reimer's Estate, 259 P. 32, 145 Wash. 172.
Proof of grounds for admission of secondary evidence see infra §§ 837–842.

49. Ala.—Collum Motor Co. v. Anderson, 133 So. 693, 222 Ala. 643.
Ill.—Ashley v. Johnson, 74 Ill. 392.
Ky.—Kissel-Skiles Co. v. Neff, 24 S. W.2d 588, 592, 232 Ky. 825, citing **Corpus Juris.**
Wis.—Caseville Inv. Co. v. Berg, 229 N.W. 532, 201 Wis. 144.

50. Ala.—Derrett v. Alexander, 25 Ala. 265.
Tex.—Rule v. Richards, Civ.App., 159 S.W. 386.

51. Tex.—Day v. State, 101 S.W. 806, 51 Tex.Cr. 324.

52. Ala.—Collum Motor Co. v. Anderson, 133 So. 693, 222 Ala. 643.

53. Ky.—Commonwealth ex rel. Love v. Reynolds, 146 S.W.2d 41, 284 Ky. 809.
Okl.—Carr v. Cobble, 232 P. 108, 107 Okl. 225.
22 C.J. p 1031 note 45.

54. **Justice of peace**
Ark.—Gracie v. Morris, 22 Ark. 415.

55. Ga.—Haney & Tinsley v. Owens, 147 S.E. 720, 39 Ga.App. 462.
22 C.J. p 1031 note 47.
Indictment
Ga.—Lewis v. State Board of Medical Examiners, 99 S.E. 147, 23 Ga. App. 647.

56. La.—Parish of Jefferson v. Texas Co., 189 So. 580, 192 La. 931, certiorari denied Texas Co. v. Parish of Jefferson, 60 S.Ct. 138, 308 U.S. 601, 84 L.Ed. 503.
Tex.—Clements v. Texas Co., Civ. App., 273 S.W. 993.
22 C.J. p 1031 note 48.

57. Ky.—Eversole v. Baker, 288 S. W. 758, 217 Ky. 15.
22 C.J. p 1031 note 49.

been admitted to show contents of a judgment roll;[58] an execution;[59] a return;[60] a docket entry;[61] a docket[62] or files of a justice of the peace[63] or of a police court;[64] a warrant of arrest;[65] record of adoption proceedings;[66] a report of commissioners in partition proceedings;[67] and records of naturalization.[68]

Such evidence has also been received to show the granting of an order for administration;[69] the issuance and service of summons;[70] the issues involved in a former action;[71] the rendition and signing of a decree;[72] the issuance of an execution[73] and a levy[74] and sale[75] thereunder; and a jury commissioner's oath.[76]

Effect of statutes for restoration of records. Statutes providing for the restoration and establishment of lost or destroyed records have been held merely to provide an additional remedy and not to preclude showing the contents of such records by secondary evidence, when they become material in any action.[77]

§ 828. Inaccessibility of Primary Evidence

Secondary evidence is admissible where primary evidence of the fact sought to be proved is inaccessible to the party.

In order to introduce secondary evidence of a writing it is not necessary to show that the original has been lost or destroyed, but it is sufficient to show that it is deposited in a place from which it cannot be removed for the purpose of being produced in court,[78] or that it is not in the possession or under the control of the party seeking to show the facts, and that he is unable to produce it[79] with-

58. N.Y.—Mandeville v. Reynolds, 68 N.Y. 528.

59. Ga.—Gordon v. Ransom & Lomax Lumber Co., 106 S.E. 176, 151 Ga. 181—Felker v. Still, 153 S.E. 781, 41 Ga.App. 462.
N.Y.—Koland v. Van Aken, 290 N.Y.S. 768, 248 App.Div. 918.
Tex.—W. T. Carter & Bro. v. Bendy, Civ.App., 251 S.W. 265.
22 C.J. p 1031 note 51.

60. Tex.—Rule v. Richards, Civ. App., 159 S.W. 386.
22 C.J. p 1031 note 52.

61. Pa.—Harvey v. Thomas, 10 Watts 63, 36 Am.D. 141.

62. Miss.—Scott v. Loomis, 21 Miss. 635.

63. Colo.—Conway v. John, 23 P. 170, 14 Colo. 30.

64. Mich.—People v. Gordon, 39 Mich. 259.

65. U.S.—U. S. v. Lambell, C.C.D.C., 26 F.Cas.No.15,553, 1 Cranch C.C. 312.
Ky.—Kissel-Skiles Co. v. Neff, 24 S.W.2d 588, 592, 232 Ky. 825, citing **Corpus Juris.**
Mont.—Hawley v. Richardson, 198 P. 450, 60 Mont. 118.

66. Ill.—Kennedy v. Borah, 80 N.E. 767, 226 Ill. 243.
Okl.—Coombs v. Cook, 129 P. 698, 35 Okl. 326.

67. Tex.—Johnson v. Franklin, Civ. App., 76 S.W. 611.

68. N.J.—Conover v. Old, 77 A. 1070, 80 N.J.Law 535.
22 C.J. p 1032 note 60.

69. Ga.—Brown v. Madden, 81 S.E. 196, 141 Ga. 419.
Vt.—In re Warner's Estate, 127 A. 362, 98 Vt. 254.

70. Cal.—Kriste v. International Sav., etc., Bank, 119 P. 666, 17 Cal. App. 301.

71. U.S.—Holford v. James, 136 F. 553, 69 C.C.A. 263, affirming 76 S.W. 261, 4 Ind.T. 632.
Tex.—Robbins v. Hubbard, Civ.App., 108 S.W. 773.

72. Minn.—Smith v. Valentine, 19 Minn. 452.

73. N.Y.—Leland v. Cameron, 31 N.Y. 115.
22 C.J. p 1032 note 66.

74. Ala.—Baucum v. George, 65 Ala. 259.
Mich.—Cilley v. Van Patten, 35 N.W. 831, 68 Mich. 80.

75. Mich.—Cilley v. Van Patten, supra.
22 C.J. p 1032 note 68.

76. La.—State v. Stewart, 14 So. 143, 45 La.Ann. 1164.

77. N.C.—Hughes v. Pritchard, 68 S.E. 906, 153 N.C. 23.
22 C.J. p 1032 note 72.

78. Mo.—Montgomery v. Dorme, 79 S.W. 913, 181 Mo. 5.
22 C.J. p 1033 note 82.

79. U.S.—Equitable Life Assur. Soc. of U. S. v. Sieg, C.C.A.Ohio, 53 F.2d 318—Penix v. Sloan, C.C.A.Tex., 3 F.2d 258—First Camden Nat. Bank & Trust Co. v. J. R. Watkins Co., D.C.Pa., 36 F.Supp. 416, reversed on other grounds, C.C.A., 122 F.2d 826.
Ala.—Sulzbacher v. Campbell, 121 So. 706, 219 Ala. 191—Berow v. Brown, 94 So. 772, 208 Ala. 476.
Ark.—Illinois Steel Bridge Co. v. Mullins, 118 S.W.2d 579, 196 Ark. 651—Bevers v. Bradstreet, 280 S.W. 667, 170 Ark. 650.
Cal.—McAlister v. Lightburn, 14 P.2d 133, 126 Cal.App. 6.
Fla.—Johns Supply Co. v. McNeeley, 169 So. 732, 125 Fla. 306—Bacon v. Feigel, 80 So. 518, 76 Fla. 581.
Ga.—Gregg v. Fitzpatrick, 187 S.E. 730, 54 Ga.App. 303.
Ill.—Pittsburgh, C., C. & St. L. Ry. Co. v. Gage, 121 N.E. 582, 286 Ill. 213.
Ky.—Eversole v. Baker, 288 S.W. 758, 217 Ky. 15—Seaboard Oil Co. v. Huntsman, 245 S.W. 860, 196 Ky. 758.
La.—Hamilton v. National Life & Accident Ins. Co., App., 146 So. 517.
Me.—Bates v. Schillinger, 145 A. 395, 128 Me. 14.
Md.—Bogart v. Willis, 148 A. 585, 158 Md. 393.
Mo.—Torwegge v. O'Reilly, 239 S.W. 116, 292 Mo. 613—Garrett v. Limes, App., 209 S.W. 295.
N.J.—Biehler v. Great American Indemnity Co., Sup., 21 A.2d 225.
N.Y.—Newins v. Newins, 13 N.Y.S. 2d 377.
N.D.—Torkelson v. Byrne, 276 N.W. 134, 68 N.D. 13, 113 A.L.R. 1213.
Okl.—Carter v. McCasland, 268 P. 706, 131 Okl. 253—Bilby v. Halsell, 232 P. 379, 105 Okl. 215—McCoy v. Wosika, 180 P. 967, 75 Okl. 3.
Or.—State v. Cornwall, 201 P. 1072, 102 Or. 220.
Pa.—Brenner v. Lesher, 2 A.2d 731, 332 Pa. 522—Abercrombie v. Bailey, 190 A. 725, 326 Pa. 65.
Tex.—Commonwealth Casualty Co. v. Coogle, Civ.App., 31 S.W.2d 362—Gattison v. Meyer, Civ.App., 297 S.W. 900—Lancaster v. Norris, Civ.App., 271 S.W. 401, reversed on other grounds Norris v. Lancaster, Com.App., 280 S.W. 574—St. Louis Southwestern Ry. Co. v. Texas Packing Co., Civ.App., 253 S.W. 864.
Utah.—Ballard v. Beneficial Life Ins. Co., 21 P.2d 847, 82 Utah 1.
2 C.J. p 376 notes 4, 5—22 C.J. p 1033 note 83.

Where party never had possession or control of primary evidence as to a certain matter he may introduce secondary evidence thereof.

in a reasonable time[80] after the exercise of reasonable diligence.[81]

The mere prospect, however, that an original writing will be required as evidence in another action,[82] or the fact that it is inconvenient for the party to produce it,[83] is not a sufficient ground for the introduction of secondary evidence; and, a fortiori, a party whose negligence is responsible for the unavailability of the best evidence, will not be permitted to introduce secondary evidence.[84]

§ 829. —— Primary Evidence in Custody of Court

Secondary evidence is admissible, where the primary evidence is in the custody of a court in the same jurisdiction, only where it cannot be procured therefrom.

Where an original instrument is in the possession of another court of the same state, secondary evidence of its contents is admissible if it appears that the instrument cannot be procured.[85] However, the mere fact that an instrument is on file in another court in the same state or jurisdiction does not dispense with the necessity of reasonable efforts to obtain it; and, if it does not appear that the instrument cannot with reasonable diligence be produced, secondary evidence is not admissible.[86] Similarly secondary evidence cannot be introduced where the original instrument is on file in the court in which its contents are sought to be shown, provided permission of the court can readily be obtained to remove the instrument and introduce it in evidence.[87]

§ 830. —— Primary Evidence Held by Third Person

A party may introduce secondary evidence where primary evidence of the fact to be proved is in the possession or control of a third person and secondary evidence is admissible in some cases without a showing of inability to secure the primary evidence from such third person.

Where a party desires to use in evidence a writing which is in the possession of a third person, the proper way to compel its production ordinarily is by the issuance of a subpœna duces tecum, as is shown in the C.J.S. title Witnesses § 25, also 70 C.J. p 48 note 16; and in order to be entitled to introduce secondary evidence of its contents, he must show that it is beyond his power to produce the instrument in this or in some other way, on which showing the evidence becomes admissible.[88] This rule is, however, opposed to some extent by a line of authorities holding that where a party desiring to prove facts evidenced by written instruments shows that the documents are not in his possession or control, and it appears from the circumstances of the case and the nature of the documents themselves that he is not entitled to their custody, he may introduce secondary evidence of their contents without further proof of his inability to procure the originals.[89] Under statutes providing for the admission of copies, records, or transcripts of records in proving conveyances and mortgages of land, and especially in establishing chains of title, it has been held that where a person desiring to prove a deed or mortgage is not the grantee or mortgagee or the

U.S.—Penix v. Sloan, C.C.A.Tex., 3 F.2d 258.
Ala.—Equitable Life Assur. Soc. of U. S. v. Garrett, 160 So. 776, 26 Ala.App. 395.
Ark.—Illinois Bankers' Life Ass'n v. Mann, 250 S.W. 887, 158 Ark. 425.
Photographic copy of a document is admissible where the original cannot be produced.—In re McClellan, 107 N.W. 681, 20 S.D. 498—22 C.J. p 918 note 65.
Photographic copies of documents see supra § 714.

80. N.M.—Williams v. Selby, 24 P.2d 728, 37 N.M. 474.
W.Va.—Thompson v. Turkey Gap Coal & Coke Co., 139 S.E. 642, 104 W.Va. 134.

81. Ga.—Brookman v. Rennolds, 98 S.E. 543, 148 Ga. 721—Haney & Tinsley v. Owens, 147 S.E. 720, 39 Ga.App. 462.
N.M.—Williams v. Selby, 24 P.2d 728, 37 N.M. 474.
W.Va.—Thompson v. Turkey Gap Coal & Coke Co., 139 S.E. 642, 104 W.Va. 134.

82. U.S.—The Alice, D.C.Fla., 12 F. 923.

83. U.S.—The Alice, supra.
22 C.J. p 1034 note 85.

84. Okl.—Missouri, O. & G. R. Co. v. West, 151 P. 212, 50 Okl. 521.
22 C.J. p 1034 note 86.

85. Md.—De Crette v. Mohler, 127 A. 639, 147 Md. 108.
22 C.J. p 1034 note 87.
Primary evidence in custody of foreign court see infra § 831.

86. Tex.—Crafts v. Daugherty, 6 S.W. 850, 69 Tex. 477.
22 C.J. p 1034 note 88.

87. Ind.—Dare v. McNutt, 1 Ind. 148.
Secondary evidence held admissible where the original document had been filed in a former action in the same court and was therefore in the custody of the court and not of the adverse party, and where the files of the former action were subsequently introduced in evidence.—Wismer v. Alyea, 138 So. 763, 103 Fla. 1102.

88. Ark.—Dunaway v. Ragsdale, 9 S.W.2d 6, 177 Ark. 718.
Pa.—Automobile Securities Co. v. Scungio, 81 Pa.Super. 362.
Tex.—Independence Indemnity Co. v. Polk, Civ.App., 14 S.W.2d 330, error dismissed.
22 C.J. p 1034, note 91.
Denial of identity of paper produced
Where a witness hostile to plaintiff produced a paper claimed to be the contract sued on, but plaintiff denied that such paper was the contract, his failure to call such witness as his own was no ground for excluding the testimony of other witnesses, who claimed to have seen the contract, as to their recollection of it.—Stark v. Burke, 109 N.W. 206, 131 Iowa 684.

89. Cal.—Ex parte Connor, 108 P.2d 10, 16 Cal.2d 701, certiorari denied Connor v. People of State of California, 61 S.Ct. 844, 313 U.S. 542.
Ga.—Electric Paint & Varnish Co. v. Lunsford, 198 S.E. 277, 58 Ga.App. 270.
22 C.J. p 1035 note 94.

person who is entitled to the custody of the instrument, and it is shown that the instrument is not in his possession or control, he may introduce secondary evidence without further proof of his inability to produce the original instrument.[90]

Possession of primary evidence obtained by fraud. A party who is deprived of the possession of written instruments belonging to him, by the fraudulent representations or devices of another person who unjustly detains or secretly disposes of such instruments so that they cannot be found or recovered, may give secondary evidence of their contents as in the case of lost documents.[91] This rule is especially applicable where the party offering an instrument in evidence at the trial is deprived of its possession and control by the fraudulent devices of his adversary's attorney.[92]

§ 831. —— Primary Evidence Out of Jurisdiction

Secondary evidence may be admitted where the primary evidence is out of the jurisdiction, although according to some authorities it is necessary to show that efforts were made to obtain the primary evidence.

In a large number of cases where primary evidence of the fact to be proved was out of the jurisdiction of the court in which the evidence was desired to be used, as where books, instruments, documents, or other writings constituting or containing the primary evidence were in possession of a stranger who was beyond the jurisdiction of the court and the reach of its process, courts have held secondary evidence admissible, apparently without further proof of inability to procure the original writings.[93] Other authorities, however, have asserted that the fact that the writing is in the possession of a person beyond the jurisdiction of the court is not in itself sufficient ground for the introduction of secondary evidence, but that it must be shown that fruitless efforts have been made to obtain the writing, or the court must be satisfied that with the exercise of due diligence the writing cannot be produced.[94] Secondary evidence becomes admissible when the court is satisfied that the party desiring to prove the fact has made sufficiently diligent efforts to procure the primary evidence, but without success, or when it appears that the evidence is not subject to his control and that efforts to obtain it would be fruitless,[95] as where the original is in the hands of a person not in the jurisdiction of the court who refuses to surrender it,[96] or where the person in possession of the document

90. Neb.—Buck v. Gage, 43 N.W. 110, 27 Neb. 306.
22 C.J. p 1035 note 96.

Combined note and mortgage

Where promise to pay note was part of complete agreement consisting of unconditional promise to make such payment and pledge of security therefor, mortgage part of agreement could not be considered as mere incident to note in determining whether certified copy of agreement was admissible in foreclosure hearing before master because of inability to produce original note and mortgage, since the whole instrument must be construed together.—Johns Supply Co. v. McNeeley, 169 So. 732, 125 Fla. 306.

91. U.S.—In re Willfuehr, D.C.N.Y., 292 F. 387, 388, citing **Corpus Juris.**
22 C.J. p 1035 note 97.

Mere charge of conspiracy

A defendant does not entitle himself to the use of secondary evidence by merely charging that a combination and conspiracy exists between plaintiff and a third person, and that the third person has control of the primary evidence on which defendant relies to sustain his defense; and by simply making such a charge in general terms with the prayer that the third person be made a party plaintiff he cannot deprive plaintiff of the right to insist that secondary evidence shall not be received to defeat his action until it is made to appear that the primary evidence cannot be produced.—Bailey v. Trammell, 27 Tex. 317.

92. Iowa.—Selman v. Cobb, 4 Iowa 534.

93. Ala.—L. D. King Store Co. v. Thomas, 134 So. 822, 24 Ala.App. 324.
Ark.—Dierks Lumber & Coal Co. v. Kull, 4 S.W.2d 926, 176 Ark. 966—Bevers v. Bradstreet, 280 S.W. 667, 170 Ark. 650.
Ga.—Gregg v. Fitzpatrick, 187 S.E. 730, 54 Ga.App. 303.
Mass.—Gould v. Kramer, 149 N.E. 142, 253 Mass. 433.
Mich.—Blaty v. Gray, 187 N.W. 360, 217 Mich. 531.
Mo.—Gordon & Koppel Clothing Co. v. New York Cent. R. Co., App., 285 S.W. 755—Locke v. Woodman, App., 225 S.W. 352.
Mont.—Nelson v. Gough, 202 P. 196, 61 Mont. 301.
N.Y.—Harmon v. Matthews, 27 N.Y. S.2d 656.
Ohio.—Janchar v. Cerkvenik, 172 N. E. 634, 35 Ohio App. 519.
Pa.—Petition of O'Malley, 48 Dauph. Co. 428.
Tex.—Lindsay v. Woods, Civ.App., 27 S.W.2d 263—Caldwell v. McGarvey, Civ.App., 285 S.W. 859—Texas State Bank of Fort Worth v. Press Pub. Co., Civ.App., 250 S.W. 464—Haskell v. Merrill, Civ. App., 242 S.W. 331—Rogers v. Riley, Civ.App., 240 S.W. 1011—People's Sav. Bank v. Marrs, Civ.App., 206 S.W. 847.
Wash.—Walnut Park Lumber & Coal Co. v. Roane, 17 P.2d 896, 171 Wash. 362.
W.Va.—Bourn v. Dobbins, 115 S.E. 424, 92 W.Va. 263.
22 C.J. p 1036 note 1.

94. Minn.—Gasser v. Great Northern Ins. Co., 176 N.W. 484, 145 Minn. 205.
N.C.—Mahoney-Jones Co. v. Osborne, 127 S.E. 533, 189 N.C. 445
22 C.J. p 1036 note 2.

Corpus Juris quoted in a criminal case as showing the conflict in the decisions respecting the necessity for a showing of diligence to procure primary evidence out of the jurisdiction.—Haire v. State, 39 S.W.2d 70, 74, 118 Tex.Cr. 16.

95. Iowa.—Noble v. United Ben. Life Ins. Co., 297 N.W. 881.
Mo.—Radford v. Horton, 227 S.W. 1073, 207 Mo.App. 601.
N.Y.—Hoppe v. Russo-Asiatic Bank, 193 N.Y.S. 250, 200 App.Div. 460.
Tex.—Rountree Motor Co. v. Insurance Co. of North America, Civ. App., 95 S.W.2d 550, error dismissed.
22 C.J. p 1037 note 3.

96. Iowa.—Noble v. United Ben. Life Ins. Co., 297 N.W. 881.
Minn.—Gasser v. Great Northern Ins. Co., 176 N.W. 484, 145 Minn. 205.
22 C.J. p 1038 note 4.

resides in another county than that in which the trial is had.[97]

It is usually considered that where it appears that a party could have procured the original writing, he cannot be permitted to introduce secondary evidence of its contents, even though the writing is out of the jurisdiction;[98] but, on the other hand, a party has been allowed to introduce secondary evidence of the contents of books or documents under his control in another state where production of the originals would interfere with the ordinary course of his business,[99] and where removal was forbidden by the laws of the state in which the originals were located.[1]

Primary evidence in custody of foreign court or government. Where an original written instrument is in the custody of the court of another state or country, or is attached to, or forms a part of, the record of that court and cannot be removed therefrom, secondary evidence of its contents is admissible.[2] Further, secondary evidence of the contents of a document is admissible where the original is in the possession of a foreign government,[3] as where it is filed among the archives of such government and cannot be withdrawn therefrom.[4]

§ 832. Failure of Adverse Party to Produce Primary Evidence on Notice

Secondary evidence is admissible to prove a fact where the primary evidence thereof is in the possession or control of an adverse party who fails or refuses to produce it on notice.

Secondary evidence is admissible where the primary evidence of a fact which a party desires to prove is in the possession or control of his adversary[5] who fails or refuses to produce it[6] after being notified to do so.[7] The rule applies although the

97. Tex.—Sayles v. Bradley & Metcalf Co., 49 S.W. 209, 92 Tex. 406.
22 C.J. p 1038 note 5.

98. Okl.—Coddington v. Andrews, 64 P.2d 666, 179 Okl. 63.
Tex.—Barrow v. Bement, Civ.App., 239 S.W. 273.
22 C.J. p 1038 note 6.

99. U.S.—Templar Motors Co. v. Bay State Pump Co., C.C.A.Ohio, 289 F. 24.
22 C.J. p 1038 note 7.

1. **Books of bank**
Mo.—Citizens' State Bank v. Ferson, App., 208 S.W. 136.

2. Cal.—Koenig v. Steinbach, 6 P.2d 525, 119 Cal.App. 425.
22 C.J. p 1038 note 9.
Document in custody of federal court
Neb.—Nebraska State Bank of Republican City v. Walker, 196 N.W. 128, 111 Neb. 203.

3. N.J.—Sansone v. Selvaggi, 2 A.2d 355, 121 N.J.Law 274.

4. Tex.—De la Garza v. Macmanus, Civ.App., 44 S.W. 704.
22 C.J. p 1038 note 12.

5. U.S.—First Camden Nat. Bank & Trust Co. v. J. R. Watkins Co., D.C.Pa., 36 F.Supp. 416, reversed on other grounds, C.C.A., 122 F.2d 826.
Ill.—Brown v. Sprague, 229 Ill.App. 338.
Mo.—Miller v. Phenix Fire Ins. Co. of Paris, France, App., 9 S.W.2d 672.
Neb.—Metcalfe v. Chicago, R. I. & P. Ry. Co., 172 N.W. 246, 103 Neb. 431.
N.Y.—Posner v. Rosenbaum, 270 N.Y.S. 849, 240 App.Div. 543.
Pa.—Wildwood Strand Realty Co. v. Skipper, 53 York Leg.Rec. 19.
Tex.—St. Louis Southwestern Ry. Co. v. Texas Packing Co., Civ.App., 253 S.W. 864.
22 C.J. p 1038 note 16.

6. Ark.—Wright v. Lake, 39 S.W.2d 712, 183 Ark. 954.
Ill.—Mitchell v. Louisville & N. R. Co., 31 N.E.2d 965, 375 Ill. 545, reversing 27 N.E.2d 861, 305 Ill. App. 635, conformed to 35 N.E.2d 81, 310 Ill.App. 563—People v. Small, 150 N.E. 435, 319 Ill. 437.
Ky.—Kelly's Ex'r v. Kelly, 149 S.W. 2d 17, 285 Ky. 715.
N.Y.—Major v. Leary, 268 N.Y.S. 413, 241 App.Div. 606—Newins v. Newins, 13 N.Y.S.2d 377.
N.C.—Mahoney-Jones Co. v. Osborne, 127 S.E. 533, 189 N.C. 445—Powers v. Murray, 117 S.E. 161, 185 N.C. 336.
Pa.—Harring v. Glen Alden Coal Co., 198 A. 508, 130 Pa.Super. 552, reversed on other grounds 3 A.2d 381, 332 Pa. 410.
Tex.—City of San Antonio v. Grayburg Oil Co., Civ.App., 259 S.W. 985.
Where adversary alone could explain absence of primary evidence, but failed to do so, secondary evidence was admissible.—Galveston, H & S. A. Ry. Co. v. City of Eagle Pass, Tex.Civ.App., 249 S.W. 268, reversed on other grounds, Com.App., 260 S.W. 841.

7. U.S.—David Stott Flour Mills v. Richardson, D.C.Pa., 6 F.2d 332—Armstrong v. Belding Bros. & Co., D.C.Conn., 280 F. 895, affirmed, C.C.A., 297 F. 728, certiorari denied Belding Bros. & Co. v. Armstrong, 44 S.Ct. 459, 265 U.S. 585, 68 L.Ed. 1192—Isham v. U. S., 76 Ct.Cl. 1.
Ala.—Eggleston v. Wilson, 100 So. 89, 211 Ala. 140—Polytinsky v. Johnston, 99 So. 839, 211 Ala. 99—Dabbs v. Letson, 98 So. 4, 210 Ala. 306—Woodmen of the World v. Maynor, 89 So. 750, 206 Ala. 176—Royal Exchange Assurance of London v. Almon, 89 So. 456, 202 Ala. 374.
Ariz.—Jones v. Stanley, 233 P. 598, 27 Ariz. 381.
Ark.—Century Life Ins. Co. v. Custer, 10 S.W.2d 882, 178 Ark. 304, 61 A.L.R. 914.
Ga.—Dure v. City of Macon, 127 S.E. 142, 159 Ga. 875—Floyd v. Taylor Cotton Co., 105 S.E. 646, 26 Ga.App. 96.
Ill.—National Malleable Castings Co. v. Iroquois Steel & Iron Co., 165 N.E. 199, 333 Ill. 588—Oberman v. U. S. Fire Ins. Co. of New York, 144 N.E. 798, 313 Ill. 172—Bayfield v. Defenbacher, 266 Ill.App. 385.
Ind.—Reserve Loan Life Ins. Co. v. Sumner, 123 N.E. 443, 70 Ind.App. 472.
Iowa.—Federal Land Bank of Omaha v. Ditto, 288 N.W. 618, 227 Iowa 475—Coad v. Pennsylvania Ry. Co., 175 N.W. 344, 187 Iowa 1025.
Kan.—Brown v. Meyer, 21 P.2d 368, 137 Kan. 553—Smith v. Henry, 298 P. 760, 133 Kan. 22.
Ky.—Breckinridge County v. Beard, 27 S.W.2d 427, 233 Ky. 823.
La.—Franklin v. First African Baptist Church of New Orleans, 2 La. App. 698, 699, quoting **Corpus Juris.**
Me.—Denison v. Daws, 117 A. 314, 121 Me. 402.
Mass.—Pickard v. Boston Elevated Ry. Co., 166 N.E. 561, 267 Mass. 133—Bresky v. Rosenberg, 152 N.E. 347, 256 Mass. 66—Cregg v. Puritan Trust Co., 129 N.E. 423, 237 Mass. 146.
Neb.—Nebraska State Bank of Republican City v. Walker, 196 N.W. 128, 111 Neb. 203.
N.J.—North Jersey Discount Co. v

person to whom the notice is given is not a party to the record, if it appears that he is the real party in interest,[8] and the fact that the party seeking to show the contents of the writing might have compelled its production by his adversary does not preclude his offering secondary evidence of its contents under the circumstances stated.[9] A person who has failed to produce the primary evidence, and through whose fault the necessity has arisen for resorting to secondary evidence, cannot complain that the secondary evidence is not of a wholly satisfactory character.[10]

Where a party refuses, on demand being made, to produce, for the inspection of witnesses and of the jury, an article, the value of which is in question, the adverse party may introduce secondary evidence of its value.[11]

Possession of primary evidence. It is not necessary for the party seeking to introduce secondary evidence to show that the original writing is in the actual possession of his adversary, but it is sufficient that the circumstances are such as to indicate that the writing is in his possession or under his control.[12] It makes no difference that the instrument is in the actual possession of some third person if it is still within the control of the adverse party, but under such circumstances the adverse party is held to his obligation to produce the writing on notice, and on his failure to do so secondary evidence is admissible.[13] The same rule applies where the document is in the custody of another court from which it may be withdrawn,[14] or is out of the jurisdiction.[15]

Further, it is not necessary that the party entitled to the custody of an instrument should, on being notified to produce it, admit having it in his possession, but secondary evidence is admissible where he denies having it in his possession,[16] or disclaims any knowledge of the instrument.[17] Thus, where the addressee of a letter denies having received it, the writer, on showing that it was duly mailed,[18] is usually permitted to introduce secondary evidence of its contents,[19] although in such case it

Ætna Ins. Co., 13 A.2d 226, 125 N.J.Law 7.
N.Y.—Harmon v. Matthews, 27 N.Y.S.2d 656.
N.C.—Morrison v. Hartley, 101 S.E. 375, 178 N.C. 618.
Ohio.—Janchar v. Cerkvenik, 172 N.E. 634, 35 Ohio App. 519.
Pa.—Brenner v. Lesher, 2 A.2d 731, 332 Pa. 522—Trustees of Bryn Mawr College v. Gold Building & Loan Ass'n, 182 A. 98, 120 Pa.Super. 246—Petition of O'Malley, 48 Dauph.Co. 428.
S.C.—Bank v. North Carolina Mut. Life Ins. Co., 195 S.E. 649, 186 S.C. 394.
Tenn.—Macon County v. Dixon, 100 S.W.2d 5, 20 Tenn.App. 425—Motor Service Co. v. Teuton, 15 Tenn. App. 597.
Tex.—Underwriters Life Ins. Co. v. Borneman, Civ.App., 141 S.W.2d 1005—Metropolitan Life Ins. Co. v. Funderburk, Civ.App., 81 S.W.2d 132, error dismissed—West Texas Const. Co. v. Liberty Nat. Bank of Oklahoma City, Civ.App., 48 S.W.2d 681—Commercial Standard Ins. Co. v. E. P. McKnight Chevrolet Co., Civ.App., 43 S.W.2d 636, error refused—City Nat. Bank of Bowie v. Southern Casualty Co., Civ.App., 33 S.W.2d 830, 832, citing **Corpus Juris**—Utilities Indemnity Exchange v. Burks, Civ.App., 7 S.W.2d 1112, error dismissed—Texas State Bank of Fort Worth v. Press Pub. Co., Civ.App., 250 S.W. 464—Independent Order of Puritans v. Brown, Civ.App., 229 S.W. 939—Mercer v. McMurry, Civ.App., 229 S.W. 699.
Utah.—Baker v. Glenwood Mining Co., 21 P.2d 889, 82 Utah 100.
Wash.—Smith v. Cadillac Motor Car Co., 277 P. 453, 152 Wash. 131—Davidson v. Clow, 271 P. 78, 149 Wash. 414.
22 C.J. p 1038 note 16—14a C.J. p 405 note 99.
Notice to produce primary evidence as prerequisite to admission of secondary evidence see infra §§ 843–849.
Proof of authority of corporate officers or agents may be made by secondary evidence where the corporation fails or refuses to produce record proof thereof after being called on to do so.
Ala.—Montgomery R. Co. v. Hurst, 9 Ala. 513.
N.Y.—Clark v. Farmers' Woolen Mfg. Co., 15 Wend. 256.

8. Me.—Norton v. Heywood, 20 Me. 359.

9. U.S.—General Motors Acceptance Corporation v. American Ins. Co., C.C.A.Fla., 50 F.2d 803, certiorari denied American Ins. Co. v. General Motors Acceptance Corporation, 52 S.Ct. 130, 284 U.S. 676, 76 L.Ed. 571.
22 C.J. p 1040 note 19.

10. La.—Franklin v. First African Baptist Church of New Orleans, 2 La.App. 698, 699, quoting **Corpus Juris**.
22 C.J. p 1040 note 20.

11. **Ring**
Mont.—Sullivan v. Girson, 102 P. 320, 39 Mont. 274.

12. Tex.—Newsom v. Davis, 20 Tex. 419.
22 C.J. p 1041 note 25.

13. Tex.—City Nat. Bank of Bowie v. Southern Casualty Co., Civ.App., 33 S.W.2d 830, 832, citing **Corpus Juris**.
22 C.J. p 1041 note 26.

14. N.Y.—Jackson v. Shearman, 6 Johns. 19.

15. U.S.—Missouri, K. & T. R. Co. v. Elliott, 102 F. 96, 42 C.C.A. 188, affirming 51 S.W. 1067, 2 Ind.T. 407.

16. Ala.—Wiggins v. Sullivan, 121 So. 731, 732, 219 Ala. 186, citing **Corpus Juris**.
Cal.—Pittler v. Bank of America Nat. Trust & Savings Ass'n, 58 P.2d 981, 15 Cal.App.2d 5.
Ga.—Caffey v. Pattillo, 13 S.E.2d 202, 64 Ga.App. 382.
Mich.—Harris v. P. Koenig Coal Co., 194 N.W. 511, 223 Mich. 683.
Tex.—Kahn v. Cole, Civ.App., 227 S.W. 556.
22 C.J. p 1041 note 29.

17. Ga.—Caffey v. Pattillo, 13 S.E.2d 202, 64 Ga.App. 382.
Ill.—Oberman v. U. S. Fire Ins. Co. of New York, 144 N.E. 798, 313 Ill. 172.
Miss.—Davis v. Crawford, 168 So. 261, 175 Miss. 493.
Or.—Michelin Tire Co. of California v. Williams, 293 P. 938, 939, 135 Or. 158, citing **Corpus Juris**.
22 C.J. p 1041 note 30.

18. Ala.—Provident Life & Accident Ins. Co. v. Hudgens, 158 So. 757, 229 Ala. 552—J. E. Pinkham Lumber Co. v. C. W. Griffin & Co., 102 So. 689, 212 Ala. 341—Sorrell v. Scheuer, 96 So. 216, 209 Ala. 268.
22 C.J. p 1041 note 31.

19. Mass.—Meehan v. North Adams

is a question for the jury whether the alleged original ever existed.[20]

On the other hand, if the document is held by a third person and is not in the adverse party's control, the notice is inoperative, and the party's failure to produce the document will not warrant the admission of secondary evidence, but the party seeking to introduce the evidence must summon the third person or show that with due diligence the document cannot be obtained.[21]

Qualified, conditional, or restricted production. Where books or papers are produced in court pursuant to a notice, the party producing them has no right to impose any conditions as to their use in evidence, but the requirement is absolute that they shall be brought into court for the benefit of the adverse party and shall be offered without reserve; hence, if the party producing the books or papers endeavors to restrict their use in evidence, his adversary is entitled to give secondary evidence of their contents.[22]

Primary evidence privileged from production. Where the documents, notice to produce which has been given, are privileged from production, and the party seeking to introduce the evidence has inspected and taken copies of the documents, he can, notwithstanding the privilege, introduce such secondary evidence on failure of his opponent to produce the writings.[23] Likewise, while an attorney cannot be compelled to produce or disclose the contents of a document intrusted to him by his client, as appears in the C.J.S. title Witnesses § 283, also 70 C.J. p 428 note 60, he may be compelled to testify that such an instrument exists and that it is in his custody, and then, if proper notice to produce has been given, the opposite party may introduce secondary evidence.[24]

§ 833. —— Effect of Production of Original Instrument

Secondary evidence is inadmissible where the primary evidence has been produced; but the introduction of secondary evidence on failure to produce the primary evidence is not error although the primary evidence is subsequently produced.

Where the adverse party has produced the original instrument in compliance with a notice to do so, secondary evidence of its contents cannot be introduced;[25] but where secondary evidence has been introduced on failure to comply with the notice, the fact that the original evidence is afterward produced does not render erroneous the previous admission of the secondary evidence.[26]

§ 834. —— Effect of Noncompliance with Notice

A person who fails to comply with a notice to produce primary evidence in his possession may not introduce secondary evidence of the fact or, according to some authorities, offer the primary evidence in his own behalf.

A person will not be allowed to give secondary evidence of the contents of original papers which are in his possession and which he has refused to produce on notice,[27] and, although by such refusal he has compelled his adversary to resort to secondary evidence, he is still precluded from introducing secondary evidence in his own behalf.[28] Whether the party has estopped himself from using secondary evidence is a question the determination of which depends on the facts of the particular case and rests largely in the sound discretion of the trial court.[29]

A party who has refused to produce an original document on notice, cannot, by subsequently producing it, exclude the secondary evidence given by his adversary,[30] nor can he be permitted to introduce the original document as evidence in his own behalf on his side of the case;[31] but according to some authorities, where the primary evidence is produced and tendered to the requesting party before secondary evidence has been introduced, the requesting party is precluded from offering secondary evidence and the tendering party is permitted to

Sav. Bank, 19 N.E.2d 299, 302 Mass. 357.
22 C.J. p 1041 note 32.

20. U.S.—Dunbar v. U. S., Or., 15 S.Ct. 325, 156 U.S. 185, 39 L.Ed. 390.
22 C.J. p 1041 note 33.

21. Kan.—Jobes v. Lows, 66 P. 627, 63 Kan. 886.
22 C.J. p 1042 note 35.

22. La.—Skillman v. Downs, 10 La. 103.
22 C.J. p 1041 note 21.

23. Wis.—Speiser v. Phœnix Mut. L. Ins. Co., 97 N.W. 207, 119 Wis. 530.
22 C.J. p 1041 note 22.

24. U.S.—Rhoades v. Selin, C.C.Pa., 20 F.Cas.No.11,740, 4 Wash.C.C. 715.
22 C.J. p 1041 note 24.

25. Mont.—McGonigle v. Prudential Ins. Co. of America, 46 P.2d 687, 100 Mont. 203.
22 C.J. p 1042 note 36.

26. Ind.—Phenix Ins. Co. v. Jacobs, 55 N.E. 778, 23 Ind.App. 509.
Tex.—Gulf, C. & S. F. R. Co. v. Leatherwood, 69 S.W. 119, 29 Tex. Civ.App. 507.

27. N.Y.—Dole v. Belden, 1 N.Y.S. 667.
22 C.J. p 1068 note 61.

28. Mass.—Gage v. Campbell, 131 Mass. 566.
N.Y.—Dole v. Belden, 1 N.Y.S. 667.

29. Vt.—State v. Marsh, 40 A. 836, 70 Vt. 288.

30. La.—Pevtavin v. Hopkins, 5 Mart. 438.
22 C.J. p 1068 note 64.
Effect of production of original instrument see supra § 833.

31. N.J.—Merritt v. Jordan, 60 A. 183, 65 N.J.Eq. 772.
22 C.J. p 1068 note 65.

introduce the primary evidence,[32] and in some instances primary evidence previously withheld has subsequently been introduced by the withholding party apparently without objection.[33]

E. PRELIMINARIES TO ADMISSION OF SECONDARY EVIDENCE

§ 835. In General

Before a party may introduce secondary evidence of the contents of a writing a proper predicate must be laid.

Before a party may introduce secondary evidence of the contents of a written instrument a proper predicate must be laid,[34] and it must be shown that the primary evidence, if it were available, would be admissible.[35] The basis for the introduction of secondary evidence need not be laid by allegations of the pleadings,[36] and in the absence of a statute to the contrary secondary evidence is admissible without notice of intention to introduce it.[37]

§ 836. Proof of Execution, Existence, and Genuineness of Original Instrument

Before a party may introduce secondary evidence of the contents of a writing satisfactory proof must be made of the former existence, proper execution, and gen-

32. Neb.—Sallander v. Prairie Life Ins. Co., 200 N.W. 344, 112 Neb. 629.

33. Ala.—Royal Exchange Assurance of London v. Almon, 80 So. 456, 202 Ala. 374.

34. U.S.—Ætna Ins. Co. of Hartford, Conn., v. Taylor, C.C.A.Ga., 86 F.2d 225.
Ala.—Sovereign Camp, W. O. W. v. Hoomes, 122 So. 686, 219 Ala. 560—Ft. Payne Co. v. City of Ft. Payne, 114 So. 63, 216 Ala. 679—Philip Olim & Co. v. C. A. Watson & Sons, 85 So. 460, 204 Ala. 179.
D.C.—Arnold v. Thompson & Spear Co., 279 F. 307, 51 App.D.C. 325.
Fla.—Lockwood v. L. & L. Freight Lines, 171 So. 236, 126 Fla. 474.
Ga.—City of Atlanta v. Hawkins, 166 S.E. 262, 45 Ga.App. 847.
Ill.—Cooper v. Schoeberlein, 247 Ill. App. 147—Central Guarantee Co. v. Fourth & Central Trust Co., 244 Ill.App. 61.
Ind.—Glaser v. Williamsburg City Fire Ins. Co., 125 N.E. 787, 72 Ind. App. 319.
Iowa.—Inter-Ocean Reinsurance Co. v. Morrison, 283 N.W. 909, 225 Iowa 1336.
Ky.—Sharp v. Culton, 89 S.W.2d 869, 262 Ky. 84.
Mass.—Comstock v. Soule, 21 N.E.2d 257, 303 Mass. 153.
Minn.—Lind v. Western Union Telegraph Co., 217 N.W. 486, 173 Minn. 424.
N.Y.—Shea v. Shea, 188 N.Y.S. 693, 197 App.Div. 126—Longacre v. Yonkers R. Co., 182 N.Y.S. 373, 191 App.Div. 770.
Okl.—Rourke v. Meier, 233 P. 178, 106 Okl. 109.
Or.—Bridenstine v. Gerlinger Motor-car Co., 168 P. 73, 86 Or. 411, affirmed 168 P. 922, 86 Or. 411.
S.C.—Sample v. Gulf Refining Co., 191 S.E. 209, 183 S.C. 399.
S.D.—Wilcox v. McCain Land & Live Stock Co., 159 N.W. 49, 37 S.D. 511.
Tex.—Houston Oil Co. of Texas v. Niles, Com.App., 255 S.W. 604, reversing Niles v. Houston Oil Co. of Texas, Civ.App., 191 S.W. 748—Chism v. C. W. Hall Motor Co., Civ.App., 278 S.W. 350.
Utah.—Larsen v. Ryan, 180 P. 178, 54 Utah 250.
Vt.—In re Chisholm's Will, 108 A. 393, 93 Vt. 453.
Wash.—Oravetz v. Cruson, 214 P. 828, 124 Wash. 384.
Grounds for admission of secondary evidence see supra §§ 822–834.

Compliance with legal requirements
Only after complying with the requirements specified by law may secondary evidence be used.—Murff v. Murff, La.App., 1 So.2d 407.

Burden of proof is on offerer of secondary evidence to show affirmatively existence of facts necessary to render it competent.—Mahoney-Jones Co. v. Osborne, 127 S.E. 533, 189 N.C. 445.

Question propounded by opposite party respecting existence of any writing to evidence alleged agreement does not render secondary evidence of letter admissible.—Mauritz v. Schwind, Tex.Civ.App., 101 S.W.2d 1085, error dismissed.

Predicate held sufficiently laid
Ga.—Patterson v. Loeb, 194 S.E. 885, 57 Ga.App. 235.
Mo.—Isreal v. Fanchon & Marco, App., 58 S.W.2d 774—Thos. Cusack Co. v. Lubrite Refining Co., App., 261 S.W. 727.
N.C.—Mebane Graded School Dist. v. Alamance County, 189 S.E. 873, 211 N.C. 213.
Tex.—Travelers Ins. Co. v. Cadena, Civ.App., 91 S.W.2d 1112, error dismissed—Schlesinger v. Kennerly, Civ.App., 41 S.W.2d 1002, error dismissed—Unique Illustrating Co. v. Withers, Civ.App., 33 S.W. 2d 1074.

35. U.S.—Morton Butler Timber Co. v. U. S., C.C.A.Tenn., 91 F.2d 884—Cohen v. New York Life Ins. Co., C.C.A.Pa., 21 F.2d 278.
Ga.—Poland v. C. C. Osborne Lumber Co., 139 S.E. 734, 37 Ga.App. 212.
Ill.—Wahl v. Schmidt, 237 Ill.App. 372.
Md.—Malone v. Malone, 129 A. 10, 148 Md. 200.
Tex.—Atkins v. Dodds, Civ.App., 121 S.W.2d 1010, error granted.
Inadmissibility of primary evidence as ground for exclusion of secondary evidence see § 783 supra.

Entry in Bible
Secondary evidence about entry in Bible concerning date of birth was inadmissible, in absence of showing that entry was competent.—Prudential Ins. Co. of America v. Pierce's Adm'x, 109 S.W.2d 616, 270 Ky. 216.

Contents of books of account
Secondary evidence as to contents of books of account should not have been received in evidence without same predicate as would have been requisite had the books been offered. —Caldwell v. McGarvey, Tex.Civ. App., 285 S.W. 859.

Copy of genealogical chart was properly rejected, where witness making chart did not specify from what records or in what manner information was obtained.—In re Ross' Estate, 167 A. 365, 312 Pa. 36.

Map
In absence of proof of official character of map found in office of town clerk, copy thereof was inadmissible.—Hanson v. Board of Trustees of Town of Mill Valley, 241 P. 572, 74 Cal.App. 585.

36. Tex.—Taylor County v. Olds, Civ.App., 67 S.W.2d 1102, error dismissed.

37. S.C.—Macedonia Baptist Church v. City of Columbia, 10 S.E.2d 350, 195 S.C. 59—Crosland v. Hunsucker, 129 S.E. 199, 132 S.C. 398.

Loss first discovered during trial
Under a statute so providing, party was entitled to have copy of note admitted without giving notice of intention to substitute copy for original where the loss was first discovered during trial of an action. —Peebles v. Miles, 198 So. 29, 189 Miss. 623.

uineness of the writing, and of its delivery and acceptance if they are necessary to its taking effect.

Before a party can be permitted to introduce secondary evidence of the contents of a written instrument, satisfactory proof must be made of the former existence of the instrument,[38] and this necessarily involves proof of its proper execution[39] or genuineness.[40] It must also be shown, where these

38. U.S.—Fidelity Trust Co. v. Mayhugh, C.C.A.Tex., 268 F. 712.
Ark.—Union Cent. Life Ins. Co. v. Mendenhall, 34 S.W.2d 1078, 183 Ark. 25.
Ga.—Gay v. Demott, 111 S.E. 379, 153 Ga. 19—McDonald v. Redding Lumber Co., 159 S.E. 888, 43 Ga. App. 656—Trice v. Adams, 125 S.E. 878, 33 Ga.App. 257.
Mo.—State ex rel. Barkwell v. Trimble, 274 S.W. 683, 309 Mo. 546—City of Brunswick ex rel. Barkwell v. Scott, 275 S.W. 994, 219 Mo.App. 45.
Neb.—Cohen v. Swanson Petroleum Co., 276 N.W. 190, 133 Neb. 581.
N.J.—Linden Silk Co. v. Paterson Silk Throwing Co., 197 A. 57, 119 N.J.Law 482.
Okl.—Vann v. Vann, 96 P.2d 76, 186 Okl. 42—Alexander v. Samuels, 58 P.2d 878, 177 Okl. 323, 105 A.L.R. 1171—Bean v. Harris, 219 P. 300, 93 Okl. 10.
Pa.—In re Ray's Estate, 156 A. 64, 304 Pa. 421, 79 A.L.R. 772.
S.C.—Sample v. Gulf Refining Co., 191 S.E. 209, 213, 183 S.C. 399, citing **Corpus Juris.**
S.D.—Smith v. Munson, 238 N.W. 27, 59 S.D. 6.
Tenn.—Robertson v. Freeman, 10 Tenn.App. 207.
Tex.—Tarwater v. Donley County State Bank, Civ.App., 277 S.W. 176.
Wyo.—Caswell v. Ross, 188 P. 977, 27 Wyo. 1.
22 C.J. p 1042 note 44.

Judicial record
Tex.—Turley v. Tobin, Civ.App., 7 S.W.2d 949, error refused.
Wash.—In re Reimer's Estate, 259 P. 32, 145 Wash. 172.

Ordinance
Mo.—State ex rel. Barkwell v. Trimble, 274 S.W. 683, 309 Mo. 546.

Effect of demand to produce original
That party had made a written demand to produce the original did not relieve him of the obligation of proving that there was an original.—Lally v. Cash, 164 P. 443, 18 Ariz. 574.

Proceeding to establish lost or destroyed instrument or record
(1) Before secondary evidence of a lost instrument can be given, it is not necessary to establish its existence and contents by a statutory proceeding, where all the parties to the transaction have long since died, and the proceeding could not produce better evidence.—Jones v. Scranton Coal Co., 118 A. 219, 274 Pa. 312.
(2) Contents of records or papers on file may be proved even by parol without establishing the lost or destroyed original.—Lewis v. State Board of Medical Examiners, 99 S.E. 147, 23 Ga.App. 647.

Sworn denial of original assignment under statute is not required.—Shaw v. Main, Tex.Civ.App., 76 S.W.2d 541.

Evidence held admissible
Tex.—Hyman v. Alberry, Civ.App., 130 S.W.2d 891, error dismissed, judgment correct.

Evidence held sufficient
Ga.—Sharp v. Autry, 194 S.E. 194, 185 Ga. 160.
Ill.—Metcalf v. Metcalf, 219 Ill.App. 96.
Minn.—Miller v. Berg, 251 N.W. 682, 190 Minn. 352.
Mo.—Moore v. Black, App., 275 S.W. 549.
Tenn.—McDonald v. Baldwin, App., 148 S.W.2d 385.
Tex.—Georgia Casualty Co. v. Ginn, Civ.App., 272 S.W. 601—Martinez v. Bruni, Civ.App., 216 S.W. 655, modified on other grounds, Com. App., 235 S.W. 549.
22 C.J. p 1042 note 45 [g].

Evidence held insufficient
Ark.—Mabelvale Special School Dist. v. Halstead Special School Dist., 276 S.W. 584, 169 Ark. 645.
Ga.—Gay v. Demott, 111 S.E. 379, 153 Ga. 19.
Mont.—Wilson v. Davis, 103 P.2d 149, 110 Mont. 356.
Okl.—Illinois Bankers' Life Ass'n v. Hardy, 4 P.2d 1049, 153 Okl. 67.
Wash.—In re Reimer's Estate, 259 P. 32, 145 Wash. 172.
22 C.J. p 1042 note 45 [h].

39. U.S.—O'Donnell v. U. S., C.C.A. Cal., 91 F.2d 14, certiorari granted U. S. v. O'Donnell, 58 S.Ct. 146, 302 U.S. 677, 82 L.Ed. 523, reversed on other grounds 58 S.Ct. 708, 303 U.S. 501, 82 L.Ed. 980—Foamite-Childs Corporation v. Pyrene Mfg. Co., D.C.Del., 288 F. 416, 418, citing **Corpus Juris.**
Ala.—Johnson v. Alabama Gas, Fuel & Mfg. Co., 8 So. 101, 90 Ala. 505.
Ga.—Gay v. Demott, 111 S.E. 379, 153 Ga. 19—Dyson v. Knight, 61 S.E. 468, 130 Ga. 573, 124 Am.S.R. 179.
Ky.—Ames Body Corporation v. Ralph, 277 S.W. 1028, 211 Ky. 735.
Mich.—National Land Co. v. Ternes, 299 N.W. 144, 298 Mich. 455.
Mo.—City of Brunswick ex rel. Barkwell v. Scott, 275 S.W. 994, 219 Mo.App. 45.
S.C.—Bourne v. Maryland Casualty Co., 192 S.E. 605, 185 S.C. 1, 118 A.L.R. 1—Sample v. Gulf Refining Co., 191 S.E. 209, 213, 183 S.C. 399, citing **Corpus Juris.**
Wyo.—Caswell v. Ross, 188 P. 977, 27 Wyo. 1.
22 C.J. p 1042 note 45.

Certified copy of instrument filed of record is not admissible without proof of execution, in the absence of a statute to the contrary.—Loomis Mach. Co. v. Proctor, 71 P.2d 1029, 41 N.M. 519.

Execution of ordinance
To prove execution of ordinance by secondary evidence, it is necessary to prove first the existence of a journal entry evidencing its passage, as required by law.—City of Brunswick ex rel. Barkwell v. Scott, 275 S.W. 994, 219 Mo.App. 45.

Burden imposed by affidavit of forgery
An affidavit of forgery imposes the burden of proving prima facie the execution of the lost original on the party offering secondary evidence.—Liddell v. Gordon, Tex.Civ. App., 241 S.W. 750, reversed on other grounds, Com.App., 254 S.W. 1098.

Effect of admission impleading
Admitting copy of instrument over objection that original was best evidence, was not error, in view of admissions as to execution thereof in answers to interrogatories and by plea.—Pocahontas Graphite Co. v. Minerals Separation North American Corporation, 109 So. 873, 215 Ala. 225.

Evidence held sufficient
Cal.—Pontius v. McLain, 298 P. 541, 113 Cal.App. 452.
Ga.—Sharp v. Autry, 194 S.E. 194, 185 Ga. 160—Roughton v. Roughton, 173 S.E. 673, 178 Ga. 367.
Ind.—Lakin v. Duncan, 180 N.E. 676, 95 Ind.App. 188.
La.—Burns v. Jolley, 95 So. 648, 153 La. 212.
Philippine.—Espino v. Espino, 9 Philippine 41, 5 Off.Gaz. 854.
22 C.J. p 1042 note 45 [g].

Evidence held insufficient
Ga.—Gay v. Demott, 111 S.E. 379, 153 Ga. 19.
Mont.—Wilson v. Davis, 103 P.2d 149, 110 Mont. 356.
22 C.J. p 1042 note 45 [h].

40. U.S.—Cohen v. New York Life Ins. Co., C.C.A.Pa., 21 F.2d 278.
Cal.—Forman v. Goldberg, App., 108 P.2d 983—McCoy v. Southern Pac. Mo., 83 P.2d 970, 29 Cal.App.2d 16, certiorari denied 59 S.Ct. 827, 307 U.S. 626, 83 L.Ed. 1510—Palma v. Leslie, 45 P.2d 391, 6 Cal.App.2d 702.

things are necessary to the taking effect of the instrument, that it was delivered[41] and accepted.[42] The same requirements must be complied with before introducing secondary evidence of the contents of an instrument which is beyond the jurisdiction of the court.[43]

The existence, execution, or genuineness of an instrument is a question of fact,[44] and may be proved by direct or circumstantial evidence,[45] and parol evidence is competent to show such facts.[46] Although questions as to the former existence, ex-

Ga.—Trice v. Adams, 125 S.E. 878, 33 Ga.App. 257.
La.—Coons Silo & Building Co.'s Receiver v. Van Horn, 115 So. 757, 165 La. 577.
N.Y.—Rockline v. Richard, 167 N.E. 457, 251 N.Y. 321, reversing 233 N. Y.S. 875, 226 App.Div. 687.
N.C.—Liberty Chair Co. v. Crawford, 137 S.E. 577, 193 N.C. 531, 51 A.L. R. 1496—American Nat. Bank v. Brickhouse, 136 S.E. 636, 193 N.C. 231.
Pa.—Slone v. Thomas, 12 Pa. 209.
Tex.—Gibralter Colorado Life Co. v. Taylor, 123 S.W.2d 318, 132 Tex. 328, reversing, Civ.App., 99 S.W.2d 1084.
Wyo.—Caswell v. Ross, 188 P. 977, 27 Wyo. 1.
22 C.J. p 1043 note 48.

Proof of possession as sufficient foundation

Documents coming from possession of defendant and affording evidence of plaintiff's right in property may be introduced by plaintiff without further foundation consisting of testimony as to handwriting.—Golly v. Northland Elevator Co., 207 N.W. 438, 53 N.D. 564.

Proof that original telegram was signed by purported sender is not essential.—Brigham City Fruit Growers' Ass'n v. G. H. Zollmann Produce Co., Mo., 220 S.W. 911.

Evidence held sufficient

Minn.—Halstead v. Minnesota Tribune Co., 180 N.W. 556, 147 Minn. 294.
Mo.—Grigham City Fruit Growers' Ass'n v. G. H. Zollmann Produce Co., 220 S.W. 911.
22 C.J. p 1043 note 48 [f].

Evidence held insufficient

Ga.—McDonald v. Redding Lumber Co., 159 S.E. 888, 43 Ga.App. 656.
22 C.J. p 1043 note 48 [g].

41. Ga.—Sharp v. Autry, 194 S.E. 194, 185 Ga. 160.
22 C.J. p 1043 note 46.

Letters

(1) A copy of a letter cannot be admitted without proof that the original was received.
Ind.—Lesh v. Johnston Furniture Co., 13 N.E.2d 708, 214 Ind. 176, motion denied 14 N.E.2d 537, 214 Ind. 176.
N.Y.—Shea v. Shea, 188 N.Y.S. 693, 197 App.Div. 126.

(2) In the absence of proof of actual receipt, it must be shown that the letter was properly addressed, stamped, and posted.
U.S.—Texas Co. v. Rosenthal-Brown Fur Co., D.C.La., 12 F.2d 297, affirmed, C.C.A., 16 F.2d 1022, certiorari denied 47 S.Ct. 658, 274 U. S. 746, 71 L.Ed. 1327.
Ala.—Denson v. Kirkpatrick Drilling Co., 144 So. 86, 225 Ala. 473.
Ill.—First Trust & Savings Bank v. City of Park Ridge, 242 Ill.App. 574.
Mass.—W. R. Grace & Co. v. National Wholesale Grocery Co., 146 N.E. 908, 251 Mass. 251.
Miss.—Kasson Hat & Cap Mfg. Co. v. J. D. Blakeney & Son, 108 So. 139, 142 Miss. 851.
Mo.—Bluff City Shoe Co. v. Levy, App., 273 S.W. 1086.
N.Y.—Commercial Cable Bldg. Co. v. McKenna, 168 N.Y.S. 13.
Pa.—Goodbody v. Margiotti, 187 A. 425, 323 Pa. 529, petition dismissed 191 A. 582, 323 Pa. 560a—Harrison v. Welsh, 145 A. 507, 295 Pa. 501.
S.D.—Smith v. Munson, 238 N.W. 27, 59 S.D. 6—Wilcox v. McCain Land & Live Stock Co., 159 N.W. 49, 37 S.D. 511.
Tex.—Weaver v. Oliver, Civ.App., 40 S.W.2d 984.
W.Va.—Phoenix Ins. Co. v. Thomas, 138 S.E. 381, 103 W.Va. 574.

(3) Such proof of mailing creates a presumption, see supra § 136, of its receipt by the addressee.
Ala.—Sorrell v. Scheuer, 96 So. 216, 209 Ala. 268.
Mich.—Ewing v. Klatt, 209 N.W. 838, 235 Mich. 536.
Mo.—Collins v. Hoover, 218 S.W. 940, 205 Mo.App. 93.
N.C.—Liberty Chair Co. v. Crawford, 137 S.E. 577, 193 N.C. 531, 51 A.L. R. 1496.

(4) It is not necessary that the identical person who deposited the letters in the mail should positively so swear from his personal recollection.—Ponder v. Jefferson Standard Life Ins. Co., D.C.La., 6 F.2d 300.

(5) Proof of mailing is unnecessary where actual receipt is proved.
Ill.—First Trust & Savings Bank v. City of Park Ridge, 242 Ill.App. 574.
Mo.—Locke v. Woodman, App., 225 S.W. 352.

Evidence held sufficient

U.S.—General Motors Acceptance Corporation v. American Ins. Co., C.C.A.Fla., 50 F.2d 803, certiorari denied American Ins. Co. v. General Motors Acceptance Corporation, 52 S.Ct. 130, 284 U.S. 676, 76 L.Ed. 571.
Ala.—Benton Mercantile Co. v. Owensboro Wagon Co., 91 So. 784, 207 Ala. 49.
Ind.—Lakin v. Duncan, 180 N.E. 676, 95 Ind.App. 188.
Mass.—Meehan v. North Adams Sav. Bank, 19 N.E.2d 299, 302 Mass. 357—Prudential Trust Co. v. Hayes, 142 N.E. 73, 247 Mass. 311—Eveland v. Lawson, 132 N.E. 719, 240 Mass. 99.
Or.—Hyde v. Albert E. Peirce & Co., 31 P.2d 755, 147 Or. 5.
Philippine.—Benedicto v. Grindrod, 6 Philippine 179, 4 Off.Gaz. 458.
Tex.—Texas Cotton Co-op. Ass'n v. Pollock, Civ.App., 62 S.W.2d 300, error dismissed—Georgia Casualty Co. v. Ginn, Civ.App., 272 S.W. 601—Punchard v. Masterson, Civ. App., 103 S.W. 826, certified questions answered 101 S.W. 204, 100 Tex. 479.

Evidence held insufficient

Ill.—Meyer v. Krug, 19 N.E.2d 111, 298 Ill.App. 625.
Mich.—Ewing v. Klatt, 209 N.W. 838, 235 Mich. 536.
Mo.—Collins v. Hoover, 218 S.W. 940, 205 Mo.App. 93.

42. Tex.—Village Mills Co. v. Houston Oil Co., Civ.App., 186 S.W. 785.
22 C.J. p 1043 note 47.

43. Ga.—McDonald v. Redding Lumber Co., 159 S.E. 888, 43 Ga.App. 656.
22 C.J. p 1044 note 49.

44. Ala.—Chas. E. Morris & Co. v. Bynum Bros., 93 So. 467, 207 Ala. 541.
La.—Peterman v. Vermont Sav. Bank, 159 So. 598, 181 La. 403.

45. Ga.—Sharp v. Autry, 194 S.E. 194, 185 Ga. 160.
Okl.—Globe Automatic Sprinkler Co. v. Braniff, 214 P. 127, 89 Okl. 105.
Tex.—Bounds v. Little, 12 S.W. 1109, 75 Tex. 316.
22 C.J. p 1042 note 45 [d].

46. La.—Peterman v. Vermont Sav. Bank, 159 So. 598, 181 La. 403.
Md.—Robinson v. Singerly Pulp & Paper Co., 72 A. 828, 110 Md. 382.
Mo.—J. B. Colt Co. v. Watson, 247 S.W. 493, 215 Mo.App. 467.
22 C.J. p 1044 note 50.

Citizenship certificate

Minn.—Miller v. Berg, 251 N.W. 682, 190 Minn. 352.

Former existence of record may be shown by parol evidence.
La.—Coons Silo & Building Co.'s Re-

ecution, and genuineness of the original instrument are for the court to determine in the first instance,[47] the ultimate determination of such questions is for the jury,[48] who are not concluded by the preliminary finding of the court.[49]

Ancient documents. Secondary evidence of the contents of ancient documents stated to have been lost or destroyed is admissible without proof of their execution,[50] except where the evidence is met by a statutory affidavit of forgery.[51]

§ 837. Proof of Grounds for Admission of Secondary Evidence

Where a party seeks to introduce secondary evidence of the contents of a document, and as a foundation relies on the loss, destruction, or inaccessibility of the original, he must first establish this fact.

Where a party seeks to introduce secondary evidence of the contents of documents, and as a foundation for the introduction of such evidence relies on the fact that the original writings have been lost or destroyed or are inaccessible to him, see supra §§ 823–831, he must first establish this fact.[52]

ceiver v. Van Horn, 115 So. 757, 758, 165 La. 577, quoting Corpus Juris.
Wash.—In re Reimer's Estate, 259 P. 32, 145 Wash. 172
22 C.J. p 1044 note 51.

47. Tex.—Liddell v. Gordon, Civ. App., 241 S.W. 750, reversed on other grounds, Com.App., 254 S. W. 1098.

48. Okl.—Globe Automatic Sprinkler Co. v. Braniff, 214 P. 127, 89 Okl. 105.
Tex.—Niles v. Houston Oil Co., Civ. App., 191 S.W. 748.
Rebutting witness
Where sufficient predicate to allow testimony as to existence and loss of deed was laid in absence of jury, the refusal of the court to allow a rebutting witness to testify was not an abuse of discretion, as such witness would again have to be heard by the jury.—Martinez v. Bruni, Tex.Civ.App., 216 S.W. 655, modified on other grounds, Com.App., 235 S.W. 549.

49. Me.—St. Croix Co. v. Seacoast Canning Co., 96 A. 1059, 114 Me. 521.

50. Tex.—Massie v. Hutcheson, Civ. App., 296 S.W. 939.
22 C.J. p 1045 note 55.
Ancient documents see supra §§ 743–752.

51. Ga.—McCall v. Bentley, 40 S.E. 768, 114 Ga. 752.

52. U.S.—U. S. v. Braden, C.C.A. Tenn., 92 F.2d 682.
Ala.—Security Finance Co. v. Kelly's Tire Shop, 114 So. 298, 216 Ala. 642—Dabbs v. Letson, 98 So. 4, 210 Ala. 306.
Ark.—Mississippi River Fuel Corporation v. Young, 67 S.W.2d 581, 188 Ark. 575—Supreme Life & Casualty Co. v. Wall, 23 S.W.2d 251, 180 Ark. 895.
Cal.—Cotton v. Hudson, App., 110 P. 2d 70—Brown v. Gow, 18 P.2d 377, 128 Cal.App. 671.
Conn.—McCue v. McCue, 128 A. 914, 100 Conn. 448.
Fla.—Firestone Service Stores, of Gainesville v. Wynn, for Use and Benefit of Home Ins. Co., N. Y., 179 So. 175, 131 Fla. 94.
Ga.—Haden v. Liberty Co., 188 S.E. 29, 183 Ga. 209—Abercrombie v Georgia Distributing Co., 148 S.E 296, 39 Ga.App. 654—Ward-Truitt Co. v. Nicholson, 99 S.E. 153, 23 Ga.App. 672.
Idaho.—Oatman v. Hampton, 256 P 529, 43 Idaho 675—Stockmen's Nat Bank v. First Nat. Bank, 221 P 150, 38 Idaho 395.
Ill.—McCarthy v. Meyer, 132 N.E. 198, 298 Ill. 620, reversing 219 Ill App. 647—Kibbat v. Clokey, 263 Ill.App. 410—Charles D. Stone & Co. v. New York Cent. R. Co., 214 Ill.App. 483.
Ind.—Gimbel v. Hufford, 46 Ind. 125—Eubanks v. Gulley, 182 N.E. 95, 94 Ind.App. 650.
Iowa.—Olson v. New York Life Ins. Co., 295 N.W. 833—Vacuum Oil Co. v. Carstens, 231 N.W. 380, 211 Iowa 1129.
Ky.—Suter v. Suter, 128 S.W.2d 704, 278 Ky. 403—Distad v. Ætna Casualty & Surety Co., 67 S.W.2d 24, 252 Ky. 326—Peters Branch of International Shoe Co. v. Jones, 56 S.W.2d 994, 996, 247 Ky. 193, citing Corpus Juris—Parsons & Scoville Co. v. Terrell, 14 S.W.2d 751, 228 Ky. 194—Ames Body Corporation v. Ralph, 277 S.W. 1028, 211 Ky. 735—Mutual Life Ins. Co. of New York v. Louisville Trust Co., 269 S.W. 1014, 207 Ky. 654.
La.—Clark v. Norred, 4 La.App. 394.
Md.—Berg v. Plitt, 12 A.2d 609, 178 Md. 155, reargument denied 13 A. 2d 364, 178 Md. 155—Malone v. Malone, 129 A. 10, 148 Md. 200.
Mich.—Paul v. University Motor Sales Co., 278 N.W. 714, 283 Mich. 587.
Mo.—Bluff City Shoe Co. v. Levy, App., 273 S.W. 1086—Metropolitan Discount Co. v. Wasson, App., 235 S.W. 465.
Mont.—Wilson v. Davis, 103 P.2d 149, 110 Mont. 356—Rogness v. Northern Pac. Ry. Co., 196 P. 989, 59 Mont. 373—Capell v. Fagan, 77 P. 55, 30 Mont. 507, 2 Ann.Cas. 37.
N.H.—Howley v. Whipple, 48 N.H. 487.
N.J.—Linden Silk Co. v. Paterson Silk Throwing Co., 197 A. 57, 119 N.J.Law 482—Biehler v. Great American Indemnity Co., 21 A.2d 225, 127 N.J.Law 114—Blitzer v. Michaels, 146 A. 589, 7 N.J.Misc. 561—Smith v. National Union Fire Ins. Co., 130 A. 371, 3 N.J.Misc. 994.
N.M.—Grissom v. Grissom, 185 P. 64, 25 N.M. 518.
N.Y.—Rockline v. Richard, 167 N.E. 457, 251 N.Y. 321, reversing 233 N.Y.S. 875, 226 App.Div. 687—In re Cogswell's Estate, 286 N.Y.S. 967, 247 App.Div. 856—Miller v. Insurance Co. of North America, 202 N.Y.S. 295.
N.C.—Campbell v. Peoples Sav. Bank & Trust Co., 200 S.E. 392, 214 N. C. 680—Liberty Chair Co. v. Crawford, 137 S.E. 577, 193 N.C. 531, 51 A.L.R. 1496—American Nat. Bank v. Brickhouse, 136 S.E. 636, 193 N. C. 231—Worthington v. Gilmers, Inc., 129 S.E. 153, 190 N.C. 128.
N.D.—De Nault v. Hoerr, 262 N.W. 361, 66 N.D. 82.
Ohio.—Blackburn's Lessee v. Blackburn, 8 Ohio 81.
Okl.—Avery v. Abraham, 243 P. 728, 114 Okl. 101.
Pa.—Perry v. Ryback, 153 A. 770, 302 Pa. 559—First Nat. Bank v. Bank of Pittsburgh, 99 Pa.Super. 600.
S.C.—Bourne v. Maryland Casualty Co., 192 S.E. 605, 185 S.C. 1, 118 A.L.R. 1.
S.D.—Housman v. Geiman, 252 N.W. 857, 62 S.D. 310.
Tenn.—Metropolitan Life Ins. Co. v. Walton, 83 S.W.2d 274, 19 Tenn. App. 59.
Tex.—Hughey v. Donovan, Civ.App., 135 S.W.2d 265—Atkins v. Dodds, Civ.App., 121 S.W.2d 1010, error granted—Mauritz v. Schwind, Civ. App., 101 S.W.2d 1085, error dismissed—Boaz v. Ledenham, Civ. App., 53 S.W.2d 335—Devlin v. Heid Bros., Civ.App., 47 S.W.2d 383, error dismissed—Clay v. Richardson, Civ.App., 38 S.W.2d 849, 851, quoting Corpus Juris—Unique Illustrating Co. v. Withers, Civ. App., 21 S.W.2d 350—New Amsterdam Casualty Co. v. Parham, Civ. App., 2 S.W.2d 866, error dismissed.
Vt.—Residents of Royalton v. Central Vermont Ry. Co., 138 A. 782, 100 Vt. 443.
W.Va.—Thompson v. Turkey Gap

The same rule applies where it is sought to introduce secondary evidence of the contents of public[53] or corporate[54] records. Where the best evidence to prove a fact consists of the testimony of a particular person, the oral testimony of another person, which in its nature constitutes secondary evidence, is inadmissible in the absence of a showing that the best evidence cannot be obtained.[55]

Freedom from fault. Before secondary evidence of a written instrument will be admitted, it must be shown by the party offering the evidence that the primary evidence was not intentionally lost or destroyed,[56] or that its loss or destruction was without his fault.[57]

Copy of a copy. In the case of a copy of a copy, in those jurisdictions in which the original copy is regarded as a higher form of evidence see supra § 817, both the original writing and the original copy must be accounted for,[58] but the rule is otherwise in jurisdictions in which different degrees of secondary evidence are not recognized.[59]

Duplicate originals and carbon copies. Where an original instrument or writing is made or executed in duplicate or in a greater number of counterparts, each duplicate or counterpart constitutes primary evidence, see supra § 821, and a duplicate or counterpart may be admitted without accounting for the absence of the other duplicate or counterpart.[60] The document offered in evidence must be shown to be in fact a duplicate of the one not produced.[61] However, secondary evidence of the contents of an instrument or writing thus executed is not admissible until the absence of all the originals is satisfactorily explained.[62]

Coal & Coke Co., 139 S.E. 642, 104 W.Va. 134.
Wyo.—Caswell v. Ross, 188 P. 977, 27 Wyo. 1.
22 C.J. p 1018 note 96, p 1045 note 57.

However, it has been held that where lessor introduced in evidence a copy of a letter to lessees from company demanding, as lessor's assignee, payment of rent, court did not err in permitting lessees to introduce a copy of a letter written as an answer to company, in absence of effort by lessor to find original letter sent to company or request by lessor for delay to enable lessor to make a search for letter.—Hinz v. Stoller, 92 P.2d 713, 199 Wash. 611.

Proof as of lost document must be made.—In re Sabin, 191 N.Y.S. 766, 117 Misc. 656.

Letterpress copy is inadmissible unless the absence of the original is accounted for.—Spottiswood v. Weir, 6 P. 381, 66 Cal. 525—22 C.J. p 1021 note 39.

Photographs of written instruments are inadmissible unless the absence of the original is accounted for.
Ark.—Union Cent. Life Ins. Co. v. Mendenhall, 34 S.W.2d 1078, 183 Ark. 25.
Ky.—Black Mountain Corporation v. Parsons, 126 S.W.2d 874, 277 Ky. 486.
N.Y.—Cohen v. Elias, 163 N.Y.S. 1051, 176 App.Div. 763.

Records

(1) Record of deed is not admissible without proof that original could not be produced.
Iowa.—Buckley v. Ebendorf, 216 N.W. 20, 204 Iowa 896.
Okl.—Meriwether v. Bowling, 84 P. 2d 1, 184 Okl. 1.

(2) Record of receipt given purchaser of land from United States is inadmissible in the absence of proof of the loss of the original.—Saecker v. Cohn, 179 P. 890, 180 Cal. 151.

Copy admissible as primary evidence

It has been held that where a copy of a prior writing is attached to, and incorporated in, a written contract, it is admissible as primary evidence without accounting for the absence of the original.—Comer v. Comer, 11 N.E. 848, 120 Ill. 420.

Where there are several sources of information of the same fact it is not ordinarily necessary to show that all have been exhausted before secondary evidence can be resorted to, but it is sufficient to prove the loss of the instrument on which the party relies.—Smith v. Brown, 24 N.E. 31, 151 Mass. 338—Goodrich v. Weston, 102 Mass. 362, 3 Am.R. 469.

53. Mo.—City of Brunswick ex rel. Barkwell v. Scott, 275 S.W. 994, 219 Mo.App. 45.
22 C.J. p 1046 note 58.

Certified transcript of recorded deed is inadmissible on apt objection in the absence of a showing of the loss or destruction of the original.—Driver v. Fitzpatrick, 95 So. 466, 209 Ala. 34—Acree v. Shaw, 80 So. 817, 202 Ala. 433.

54. Ill.—Abersol v. Elmwood Coal Co., 106 Ill.App. 235.
N.Y.—Latourette v. Clark, 51 N.Y. 639.
Okl.—Grant-Sprague Lumber Co. v. First Nat. Bank, 227 P. 104, 100 Okl. 73.
Or.—Bowick v. Miller, 26 P. 861, 21 Or. 25.

55. Ark.—Gibson Oil Co. v. Bush, 1 S.W.2d 88, 175 Ark. 944.

56. Conn.—Woicicky v. Anderson, 111 A. 896, 95 Conn. 534.

Under statute

Ill.—Strakis v. Strakis, 143 N.E. 394, 312 Ill. 168—Vournazos v. Glos, 104 N.E. 1053, 263 Ill. 314.

57. Ky.—Home Ins. Co. v. Westerfield, 99 S.W.2d 464, 266 Ky. 494—Chilton's Adm'r v. Shelley, 49 S.W.2d 305, 243 Ky. 576.
Okl.—Incorporated Town of Sallisaw v. Wells, 216 P. 118, 90 Okl. 78—Adams v. King, 170 P. 912, 68 Okl. 190.

58. Ky.—Eastham v. Stumbo, 279 S.W. 1109, 212 Ky. 685.
22 C.J. p 1021 note 40.

59. Conn.—Cameron v. Peck, 37 Conn. 555.
22 C.J. p 1022 note 42.

60. Mass.—Quinn v. Standard Oil Co. of New York, 144 N.E. 53, 249 Mass. 194.
Tex.—Killingsworth v. General Motors Acceptance Corporation, Civ. App., 37 S.W.2d 823, 825, citing **Corpus Juris.**
22 C.J. p 1023 note 59.

Duplicate copy of bilateral agreement under seal is admissible in evidence without accounting for nonproduction of other.—Quinn v. Standard Oil Co. of New York, 144 N.E. 53, 249 Mass. 194.

61. Ala.—Sandlin v. Anders, 88 So. 560, 205 Ala. 453.
Iowa.—Kyser v. Kansas City, St. J. & C. B. R. Co., 9 N.W. 133, 56 Iowa 207, 440.
Mass.—Quinn v. Standard Oil Co. of New York, 144 N.E. 53, 249 Mass. 194.

Testimony that paper was "copy" was insufficient for admission of paper as duplicate original.—Yarbrough v. Shackelford, 158 S.E. 532, 43 Ga. App. 243.

62. Tex.—Bryson v. Boyce, 92 S.W. 820, 41 Tex.Civ.App. 415.
22 C.J. p 1024 note 61, p 1046 note 60.

The rule that it is not necessary to account for the absence of other duplicates or counterparts applies where several copies of a writing are made at the same time by the same mechanical operation, as in the case of carbon copies,[63] except in those jurisdictions in which they are not deemed duplicate originals.[64]

§ 838. —— Burden of Proof and Presumptions

The burden of proving the facts essential to a proper foundation for the admission of secondary evidence rests on the party seeking to introduce the evidence, and in determining whether or not grounds for the admission of secondary evidence exist all proper presumptions will be indulged in.

The burden of proving the facts essential to a proper foundation for the admission of secondary evidence, such as the loss, destruction, or inaccessibility of an original written instrument, ordinarily rests on the party seeking to introduce the evidence.[65]

In determining whether or not grounds for the admission of secondary evidence exist all proper presumptions will be indulged in.[66] Thus it will be presumed that after the date of a sale required by law the posted notices or advertisements thereof have been lost.[67] A long acquiescence of adverse parties in the possession of land by another will warrant an assumption of the existence and loss of record links in making up his title, the length of time varying with the conditions under which the records were kept and the casualties to which they were exposed.[68]

Fraudulent destruction. Fraudulent spoliation or destruction of an instrument will not be presumed.[69] However, a presumption of fraudulent intent may arise on proof that an instrument was intentionally destroyed,[70] and, where it appears that the party offering secondary evidence of the contents of an instrument has deliberately destroyed the instrument, he has the burden of rebutting the presumption of fraudulent intent.[71]

§ 839. —— By Whom Proof Should Be Made

While any competent witness who has knowledge of

63. U.S.—Maryland Casualty Co. v. Simmons, C.C.A.Ga., 2 F.2d 29, certiorari denied 45 S.Ct. 226, 266 U.S. 634, 69 L.Ed. 480.
Ala.—Campbell Motor Co. v. Brewer, 101 So. 748, 212 Ala. 50.
Ill.—Illinois Tuberculosis Ass'n v. Springfield Marine Bank, 282 Ill. App. 14.
Ind.—Town of Frankton v. Closser, 20 N.E.2d 216, 107 Ind.App. 193—Watts v. Geisel, 194 N.E. 502, 100 Ind.App. 92—Massachusetts Bonding & Insurance Co. v. State, 149 N.E. 377, 82 Ind.App. 377.
Ky.—Gus Dattilo Fruit Co. v. Louisville & N. R. Co., 37 S.W.2d 856, 238 Ky. 322—Davis v. Williams Bros. Const. Co., 269 S.W. 289, 207 Ky. 404.
Okl.—Carter v. Carl Merveldt & Son, 80 P.2d 254, 183 Okl. 152—Great American Life Ins. Co. v. Stephenson, 55 P.2d 56, 176 Okl. 295—Martin v. Glen Lumber Co., 163 P. 128, 65 Okl. 80.
W.Va.—G. Elias & Bro. v. Boone Timber Co., 102 S.E. 488, 85 W.Va. 508.

Printing press copies made from the same type at approximately the same time are admissible without the necessity of accounting for the absence of other duplicate originals.—People v. Chicago, R. I. & P. Ry. Co., 160 N.E. 841, 329 Ill. 467.

64. Tex.—McDonald v. Hanks, 113 S.W. 604, 52 Tex.Civ.App. 140.
22 C.J. p 1024 note 63 [c].

Unsigned carbon copy of a signed letter or document is not admissible without proof that the signed copy was unobtainable.—Brenner v. Lesher, 2 A.2d 731, 332 Pa. 522—Sanner v. U. S. Transfer Co., 193 A. 830, 127 Pa.Super. 191.

65. Conn.—Woicicky v. Anderson, 111 A. 896, 95 Conn. 534.
Ga.—Trice v. Adams, 125 S.E. 878, 33 Ga.App. 257.
Ill.—McCarthy v. Meyer, 132 N.E. 198, 298 Ill. 620, reversing 219 Ill. App. 647—Moore, for Use of St. Louis Joint Stock Land Bank v. National Fire Ins. Co. of Hartford, 275 Ill.App. 1.
N.C.—Mahoney-Jones Co. v. Osborne, 127 S.E. 533, 189 N.C. 445.
Tenn.—Robertson v. Freeman, 10 Tenn.App. 207.
Tex.—Massie v. Hutcheson, Com. App., 270 S.W. 544, reversing, Civ. App., 258 S.W. 244.
22 C.J. p 1046 note 65.

Where the evidence offered is not inadmissible on its face, the burden of showing facts not apparent on its face rendering it incompetent under the best evidence rule rests on the party objecting to its admission.—Cotton v. Cotton, 104 So. 650, 213 Ala. 336.

66. **Continued possession**
Ala.—Speer v. Lancaster-Johnson Lumber Co., 108 So. 746, 214 Ala. 688—Brilliant Coal Co. v. Sparks, 81 So. 185, 16 Ala.App. 665, certiorari denied Ex parte Brilliant Coal Co., 82 So. 161, 203 Ala. 131.

Possession of deed by grantee
Ala.—Roy v. F. M. Martin & Son, 81 So. 142, 16 Ala.App. 650.

Presumptions relating to inaccessibility or destruction
(1) Where the evidence showed that on renewal of contracts original contracts were surrendered to buyer, who subsequently fled and was a fugitive from justice, proof of their contents was admissible, as presumptively the buyer had the original contracts or had destroyed them.—Rogers Lamb Co. v. Coast Securities Co., 209 P. 246, 58 Cal.App. 744.

(2) Presumption is conclusive that books and records of insolvent or bankrupt foreign corporation with offices outside state are in custody of its receiver as respects inaccessibility.—Walnut Park Lumber & Coal Co. v. Roane, 17 P.2d 896, 171 Wash. 362.

67. Ga.—Patterson v. Loeb, 194 S.E. 885, 57 Ga.App. 235—Hogan v. Morris, 66 S.E. 550, 7 Ga.App. 232—Taylor v. Boynton, 66 S.E. 550, 7 Ga.App. 233.

68. N.C.—Yount v. Miller, 91 N.C. 331.

69. Ala.—May Hosiery Mills v. Munford Cotton Mills, 87 So. 674, 205 Ala. 27.

70. Ind.—Kurtz v. Cooperider, 127 N.E. 572, 73 Ind.App. 393.
Tex.—Massie v. Hutcheson, Com. App., 270 S.W. 544, reversing, Civ. App., 258 S.W. 244.

71. Or.—Smith v. Dunn, 107 P.2d 985.
Tex.—Massie v. Hutcheson, Com. App., 270 S.W. 544, reversing, Civ. App., 258 S.W. 244.

the facts may testify as to the loss, destruction, or inaccessibility of the instrument in question, the person in whose hands it was at the time of loss, or in whose hands it may be presumed to be or to whose possession it is traced should testify as to the facts if he is within reach of the process of the court.

While any competent witness who has knowledge of the facts may testify as to the loss, destruction, or inaccessibility of the instrument in question,[72] the loss or destruction should be proved by the person in whose hands the instrument was at the time of the loss, or in whose custody it may be presumed to be or to whose possession it is traced, if he is within reach of the process of the court.[73] In case he is out of the jurisdiction, his deposition must be procured if practicable or some good excuse given for not doing so.[74] If he is dead, the loss or destruction of the document should be proved by his legal representatives who are charged with the custody of his papers, or by his successor in office,[75] or, if such papers were ever in the custody of any other person, that person should be produced to account for their loss.[76] In brief, the last custodian of the document should be produced or his absence should be satisfactorily explained.[77]

The party seeking to introduce the secondary evidence may make the preliminary proof of loss or destruction of the original document,[78] although he is not required to do so[79] unless he is the proper custodian of the document.[80]

§ 840. —— Mode and Order of Proof

The preliminary proof of loss, destruction, or inaccessibility of primary evidence, the order of which rests largely in the trial court's discretion, may generally be made either by the testimony or affidavit of a party, or, in the case of a record, according to some authorities, by the certificate of the custodian.

The preliminary proof of loss, destruction, or inaccessibility of primary evidence when made by a party to the cause may generally be made either by his affidavit or his testimony in open court,[81] although his affidavit appears to be generally considered the proper mode of proof, at least in the first instance,[82] and an affidavit of loss is sometimes provided for by statute.[83] It has been held that the affidavit of a person not a party cannot be considered, but such person must be called as a witness so that he may be cross-examined.[84]

An affidavit of loss must be made within the state unless it is otherwise provided by statute,[85] and it has been held that such affidavit must be made before the court where the action is pending.[86] So far as the form of the affidavit is concerned, a substantial compliance with the statute is

72. U.S.—Stockyards Loan Co. v. Miller, C.C.A.Okl., 288 F. 176.
Mo.—Midwest Nat. Bank & Trust Co. v. Parker Corn Co., 245 S.W. 217, 211 Mo.App. 413.
22 C.J. p 1047 note 77, p 1049 note 10.

Nonexistence of record may be proved by the oath of anyone who has made a search therefor.—Smith v. Chadron First Nat. Bank, 63 N.W. 796, 45 Neb. 444.

At time of trial
Person who can testify as to loss or inaccessibility of instrument at time of trial should be called as witness.—Trice v. Adams, 125 S.E. 878, 33 Ga.App. 257.

Witness held not qualified
Witness, who was neither officer nor employee, was not qualified to account for loss of corporation's books and records so as to render secondary evidence admissible.—L. H. Woodard Co. v. Anderson, D.C. Utah, 34 F.2d 709.

73. Ga.—Trice v. Adams, 125 S.E. 878, 33 Ga.App. 257.
Ill.—McCarthy v. Meyer, 132 N.E. 198, 298 Ill. 620, reversing 219 Ill.App. 647—Moore, for Use of St. Louis Joint Stock Land Bank v. National Fire Ins. Co. of Hartford, 275 Ill.App. 1.
Ky.—Home Ins. Co. v. Westerfield, 99 S.W.2d 464, 466, 266 Ky. 494, citing Corpus Juris.
N.Y.—Harmon v. Matthews, 27 N.Y.S.2d 656.
S.C.—Wilson v. Moseley, 102 S.E. 330, 113 S.C. 278.
Tex.—Shaw v. Main, Civ.App., 76 S.W.2d 541—Martinez v. Bruni, Civ.App., 216 S.W. 655, modified on other grounds, Com.App., 235 S.W. 549.
Wyo.—Caswell v. Ross, 188 P. 977, 27 Wyo. 1.
22 C.J. p 1046 note 69.

Testimony of custodian of public record is admissible.
Tenn.—Dunlap v. Sawvel, 223 S.W. 142, 142 Tenn. 696.
Tex.—Pendleton v. Shaw, 44 S.W. 1002, 18 Tex.Civ.App. 439.

74. Wyo.—Caswell v. Ross, 188 P. 977, 27 Wyo. 1.
22 C.J. p 1047 note 70.

75. Tex.—Baldwin v. Goldfrank, 26 S.W. 155, 9 Tex.Civ.App. 269.
22 C.J. p 1047 note 71.

76. Ill.—Rankin v. Crow, 19 Ill. 626.
22 C.J. p 1047 note 72.

77. Tex.—Vandergriff v. Piercy, 59 Tex. 371.
22 C.J. p 1047 note 73.

78. Ill.—Metcalf v. Metcalf, 219 Ill. App. 96.
22 C.J. p 1047 note 74.

79. La.—Weaver v. Cox, 15 La.Ann. 463.
N.Y.—Smith v. Young, 2 Barb. 545.

80. N.Y.—Batchelor v. Hatie, 50 N.Y.S. 663, 23 Misc. 119.
22 C.J. p 1047 note 75.

Where last custodian's testimony can be obtained, the party's affidavit is inadmissible.—Pryor v. McNairy, 1 Stew., Ala., 150.

81. Tex.—Gray v. Thomas, 18 S.W. 721, 83 Tex. 246.
22 C.J. p 1048 note 79.

82. Colo.—Walker v. Drogmund, 74 P.2d 1235, 101 Colo. 521.
Ill.—Metcalf v. Metcalf, 219 Ill.App. 96.
22 C.J. p 1048 note 80.

83. Ill.—Oswald v. Newbanks, 168 N.E. 340, 336 Ill. 490—New York Cent. R. Co. v. Kinsella, 155 N.E. 284, 324 Ill. 339.
22 C.J. p 1048 note 81.

Place of filing
Under a statute requiring the affidavit of loss "to be filed in said cause," the affidavit should be filed with the judge rather than in office of clerk of court.—Stejenka v. National Beverage Co., 230 Ill.App. 27.

84. Vt.—Viles v. Moulton, 13 Vt. 510.
22 C.J. p 1049 note 4.

85. Ky.—Ramy v. Kirk, 9 Dana 267.

86. Tenn.—Tyree v. Magness, 1 Sneed 276.

sufficient;[87] but the affidavit should state with certainty whether the instrument is lost or destroyed, or is in the possession of the adverse party, and should show what diligence has been used to find or recover it.[88] Where a party seeks to introduce secondary evidence of more than one instrument, the affidavit must apply to each instrument separately.[89] Where a party's affidavit of loss has been adjudged insufficient, he may make and submit a second affidavit.[90]

An affidavit of loss may be dispensed with where proof of loss is otherwise made;[91] and indeed it has been held that the affidavit of the party is inadmissible.[92]

Certificate of custodian of record. While it has been held that the certificate of the custodian of a record is incompetent to prove loss of the record or parts thereof, but that this fact must be proved by the oath of some person having knowledge thereof,[93] there is also authority for the contrary view,[94] and such a certificate is sometimes made admissible by statute.[95]

Order of proof. The order of the proof preliminary to the introduction of secondary evidence rests largely in the sound discretion of the trial court.[96] It is not error for the court to permit an affidavit of loss to be filed after proof of the record of the instrument has been received.[97]

§ 841. —— Admissibility of Evidence

The admissibility of evidence offered to establish the grounds for admitting secondary evidence is usually governed by the general rules of evidence.

The admissibility of evidence offered for the purpose of establishing the grounds for the admission of secondary evidence is usually considered to be governed by the same rules as govern the admissibility of evidence offered for any other purpose,[98] although it has also been asserted that in such an investigation the court is not bound by rules of evidence applicable to testimony addressed to a jury.[99]

A witness can state only facts within his personal knowledge.[1] While the existence of the grounds for the reception of secondary evidence cannot be shown by hearsay,[2] statements made to the witness while he was endeavoring to locate the writing, constituting information acted on by him, may be shown as bearing on good faith and diligence in the search for such writing.[3] The admission of a party is not competent to affect his coparties where their interest is not joint.[4]

Loss or destruction of records. The loss of public records, such for instance as the records of judicial proceedings, may be proved by parol.[5] To show the probability of loss it is competent to prove that, when the record should have been made and thereafter, the officers keeping the records were

87. Ill.—Spitzer v. Schlatt, 94 N.E. 504, 249 Ill. 416.
22 C.J. p 1048 note 84.

Affidavit containing particulars specified by statute

Affidavit containing all the particulars mentioned in the statute is sufficient basis for the introduction of secondary evidence.—Barto v. Kellogg, 124 N.E. 633, 289 Ill. 528.

88. Ill.—Palmer v. Logan, 4 Ill. 56.

89. Ill.—New York Cent. R. Co. v. Kinsella, 155 N.E. 284, 324 Ill. 339.

90. Tex.—Bateman v. Bateman, 21 Tex. 432.

91. Tex.—Smith v. Cavitt, 50 S.W. 167, 20 Tex.Civ.App. 558, 561.
22 C.J. p 1048 note 88.

92. Mo.—Gould v. Trowbridge, 32 Mo. 291.
22 C.J. p 1048 note 89.

93. N.C.—Wilcox v. Ray, 2 N.C. 410.
22 C.J. p 1049 note 11.

94. Pa.—Ruggles v. Gaily, 2 Rawle 232—Weidman v. Kohr, 4 Serg. & R. 174.

95. Wis.—State v. Rosenthal, 102 N.W. 49, 123 Wis. 442.
22 C.J. p 1049 note 13.

96. Mo.—Felker v. Breece, 126 S.W. 424, 226 Mo. 320.
Mont.—Hawley v. Richardson, 198 P. 450, 60 Mont. 118.
22 C.J. p 1048 note 93.

Motion to strike secondary evidence is properly overruled where there was subsequently admitted evidence showing that the primary evidence was lost.—Lenape Hydraulic Pressing & Forging Co. v. Ellis Resilient Wheel Corporation, 251 P. 885, 141 Wash. 571.

97. Ill.—New York Cent. R. Co. v. Kinsella, 155 N.E. 284, 324 Ill. 339.

98. Tex.—Vandergriff v. Piercy, 59 Tex. 371.
22 C.J. p 1049 note 96.

Evidence held admissible

(1) Evidence showing loss.—Hyman v. Alberry, Tex.Civ.App., 130 S.W.2d 891, error dismissed, judgment correct.

(2) Evidence showing search for lost instrument.—Walsh v. Alfred Sears Co., 169 N.E. 805, 270 Mass. 296.

(3) Evidence tracing lost instrument and showing where it was last seen.
Ga.—South Georgia Trust Co. v. Crandall, 170 S.E. 393, 47 Ga.App. 328.
Vt.—Williams Mfg. Co. v. Insurance Co. of North America, 106 A. 657, 93 Vt. 161.

99. N.Y.—Bridges v. Hyatt, 2 Abb. Pr. 449, affirmed 16 N.Y. 546.

1. Ala.—Mitchell v. Mitchell, 3 Stew. & P. 81.
22 C.J. p 1049 note 98.

2. U.S.—Virginia & West Virginia Coal Co. v. Charles, D.C.W.Va., 251 F. 83, affirmed 254 F. 379, 165 C.C.A. 599, error allowed 255 F. 992, 167 C.C.A. 671, and dismissed 40 S.Ct. 345, 252 U.S. 569, 64 L.Ed. 720.
22 C.J. p 1049 note 99, p 1049 note 2.
Proof by affidavit or certificate see § 840 supra.

Unsworn declaration of last custodian of the writing is ordinarily incompetent.—Justice v. Luther, 94 N.C. 793—22 C.J. p 1049 note 99.

Admission of custodian, in response to a demand for a copy of a writing that it had been lost is competent as against his employer.—Indianapolis, etc., R. Co. v. Jewett, 16 Ind. 273.

3. U.S.—Virginia & West Virginia Coal Co. v. Charles, D.C.Va., 251 F. 83.

4. N.Y.—Dan v. Brown, 4 Cow. 483, 15 Am.D. 395.

5. Mich.—Cilley v. Van Patten, 35 N.W. 831, 68 Mich. 80.
22 C.J. p 1049 note 6.

careless and negligent in performing their duties.[6]

§ 842. —— Sufficiency of Evidence

a. In general
b. Search for missing document

a. In General

The fact of loss or destruction of an instrument as a basis for secondary evidence must be proved by a fair preponderance of evidence, and the sufficiency of the evidence in the particular case rests in the sound discretion of the trial court.

The fact of loss or destruction of an instrument preliminary to the admission of secondary evidence of its contents must be shown with reasonable certainty.[7] Like any other fact, it must be proved by a fair preponderance of evidence, and this is sufficient.[8] It is not necessary that the loss or destruction should be proved beyond the possibility of a mistake,[9] but it is sufficient that the evidence is such as to raise a reasonable inference of loss or destruction,[10] and it has been said that the proof, being addressed to the court, as shown infra this subdivision, need not be as strict as if it were to be submitted to a jury.[11] The character and value of the missing document may determine the extent of the proof,[12] and, where the missing document is the foundation of the action, more strictness in proof is required than where the document is only collaterally involved.[13] Where there is no proof of the destruction of a document to avoid production, the evidence need not be as strong as where the circumstances are not free from suspicion.[14]

The sufficiency of the evidence on the preliminary proof depends on the facts of the particular case,[15] and reference is made in the notes to a number of illustrative cases or decisions in which the evidence has been held to be[16] or in which the ev-

6. La.—Burke v. Tregre, 28 La. Ann. 437.
Miss.—Stevenson v. McReary, 20 Miss. 9, 51 Am.D. 102.

7. Fla.—Neylans v. Herndon, 84 So. 89, 79 Fla. 213.
La.—Parker v. Bascle, 98 So. 628, 154 La. 1027.
22 C.J. p 1050 note 15.

Clearly established
Loss or destruction must be clearly established.—Incorporated Town of Sallisaw v. Wells, 216 P. 118, 90 Okl. 78.

Loss vaguely accounted for
It is unsafe to accept parol evidence of the contents of a writing whose loss is only vaguely accounted for.—Clay v. Richardson, Tex. Civ.App., 9 S.W.2d 413, 416, error refused, quoting **Corpus Juris**—22 C.J. p 1050 note 16.

8. Tex.—Clay v. Richardson, supra, citing **Corpus Juris.**
22 C.J. p 1049 note 14.

9. Iowa.—Swanson Automobile Co. v. Stone, 174 N.W. 247, 187 Iowa 309.
Pa.—In re Ray's Estate, 156 A. 64, 304 Pa. 421, 79 A.L.R. 772.
22 C.J. p 1050 note 17.

10. Fla.—Neylans v. Herndon, 84 So. 89, 79 Fla. 213.
Ga.—Beal v. Francis, 137 S.E. 251, 163 Ga. 894—Haney & Tinsley v. Owens, 147 S.E. 720, 39 Ga.App. 462.
La.—Shreveport Long Leaf Lumber Co. v. Garson Bros., 93 So. 117, 152 La. 343.
Okl.—McCormick v. Stonebraker, 270 P. 1098, 133 Okl. 34.
22 C.J. p 1050 note 18.

11. N.Y.—Fetherly v. Waggoner, 11 Wend. 599.

12. N.Y.—People v. Dolan, 78 N.E. 569, 186 N.Y. 4, 116 Am.S.R. 521, 9 Ann.Cas. 453—Harmon v. Matthews, 27 N.Y.S.2d 656.
Character and value of document as affecting degree of diligence in search see § 842 b (2) infra.

13. Mo.—Scrivner v. American Car & Foundry Co., 50 S.W.2d 1001, 330 Mo. 408.

14. N.Y.—Harmon v. Matthews, 27 N.Y.S.2d 656.
Suspicious circumstances as affecting degree of diligence in search see § 842 b (2) infra.

15. Ill.—Maxcy-Barton Organ Co. v. Glen Bldg. Corporation, 189 N. E. 326, 355 Ill. 228, 95 A.L.R. 321.
Mont.—Kyle v. Kingsbury, 206 P. 346, 63 Mont. 145.
22 C.J. p 1050 note 24.

Evidence of control
Very slight evidence that the party notified to produce has control of the document will be sufficient where the document belongs exclusively to him and has recently been or regularly ought to be in his possession according to the course of business.—Rose v. Winnsboro Nat. Bank, 19 S.E. 487, 41 S.C. 191.

16. U.S.—U. S. v. Reitmeyer, D.C. La., 11 F.2d 648—Purington Paving Brick Co. v. Metropolitan Paving Co., C.C.A.Mo., 4 F.2d 676.
Ala.—Ingram v. Evans, 148 So. 593, 227 Ala. 14—Wiggins v. Sullivan 121 So. 731, 219 Ala. 186—Boswell v. Land, 114 So. 470, 217 Ala. 39—Sovereign Camp, W. O. W. v. Graham, 107 So. 98, 214 Ala. 239—Loyd v. Christian, 94 So. 279, 208 Ala. 322—May Hosiery Mills v. Munford Cotton Mills, 87 So. 674, 205 Ala. 27.
Ark.—Commonwealth Farm Loan Co. v. Lester, 15 S.W.2d 991, 179 Ark. 293.
Cal.—White v. White, 102 P.2d 432, 39 Cal.App.2d 57—Bartholomae Oil Corporation v. Oregon Oil & Development Co., 288 P. 814, 106 Cal. App. 57—Rogers Lamb Co. v. Coast Securities Co., 209 P. 246, 58 Cal. App. 744.
Colo.—Contos v. Darrow, 220 P. 996, 74 Colo. 259.
Fla.—Clark v. Cochran, 85 So. 250, 79 Fla. 788.
Ga.—Sharp v. Autry, 194 S.E. 194, 185 Ga. 160—Stanaland v. Horne, 142 S.E. 142, 165 Ga. 685—Sigman v. Adams, 106 S.E. 82, 151 Ga. 88—Garmany v. Lawton, 53 S.E. 669, 124 Ga. 876, 110 Am.S.R. 207—Marshall v. Sheffield, 134 S.E. 139, 35 Ga.App. 507.
Ill.—Maxcy-Barton Organ Co. v. Glen Bldg. Corporation, 189 N.E. 326, 355 Ill. 228, 95 A.L.R. 321—Lueth v. Goodknecht, 177 N.E. 690, 345 Ill. 197, 79 A.L.R. 780—McCarthy v. Meyer, 132 N.E. 198, 298 Ill. 620, reversing 219 Ill.App. 647—Metcalf v. Metcalf, 219 Ill.App. 96.
Ind.—Ætna Life Ins. Co. of Hartford, Conn., v. Huffstetter, 195 N. E. 598, 101 Ind.App. 355—Lakin v. Duncan, 180 N.E. 676, 95 Ind.App. 188—Nussmeyer v. Wood, 133 N. E. 389, 77 Ind.App. 169—C. Callahan Co. v. Dahm, 132 N.E. 599, 76 Ind.App. 492.
Iowa.—Stoner v. First American Fire Ins. Co. of New York, 246 N.W. 615, 215 Iowa 665—Anthon State Bank v. Bernard, 201 N.W. 59, 198 Iowa 1345.
Ky.—Prudential Ins. Co. of America v. Pierce's Adm'x, 109 S.W.2d 616, 270 Ky. 216—Chilton's Adm'r v. Shelley, 49 S.W.2d 305, 243 Ky. 576—Parsons & Scoville Co. v. Terrell, 14 S.W.2d 751, 228 Ky. 194.
La.—White v. White, 100 So. 442,

idence has been held not to be[17] sufficient for this purpose.

Question for trial court. Preliminary proof of the loss or destruction of primary evidence does not involve the question in issue and is not regarded as evidence in the cause; it is addressed solely to the trial court and its sufficiency is a question for that court and not for the jury.[18] Moreover the sufficiency of the evidence on the preliminary proof rests in the sound discretion of the trial court,[19]

156 La. 324—Burns v. Jolley, 95 So. 648, 153 La. 212.
Mass.—Duncanson v. Palmer, 150 N. E. 300, 254 Mass. 494.
Mich.—Baroda State Bank v. Peck, 209 N.W. 827, 235 Mich. 542—Bignell v. Franks, 180 N.W. 493, 212 Mich. 236.
Minn.—C. Gotzian & Co. v. Truszinski, 210 N.W. 880, 169 Minn. 199—Galanter v. Minneapolis Fire & Marine Ins. Co., 199 N.W. 886, 160 Minn. 6—Halstead v. Minnesota Tribune Co., 180 N.W. 556, 147 Minn. 294—In re Berdell's Estate, 173 N.W. 665, 143 Minn. 328.
Miss.—Gordon v. Manning, 44 Miss. 756.
Mo.—Pickel v. McCawley, 44 S.W.2d 857, 329 Mo. 166—Jenkins v. Jenkins, 260 S.W. 111, 303 Mo. 818—Hunter v. Weil, 222 S.W. 472—Kline v. Groeschner, 219 S.W. 648, 280 Mo. 599—Midwest Nat. Bank & Trust Co. v. Parker Corn Co., 245 S.W. 217, 211 Mo.App. 413.
Mont.—St. Martin State Bank v. Steffes, 290 P. 259, 88 Mont. 85—Kyle v. Kingsbury, 206 P. 346, 63 Mont. 145.
N.C.—Smith v. Pilot Life Ins. Co., 4 S.E.2d 821, 216 N.C. 152—Orr v. Twiggs, 187 S.E. 791, 210 N.C. 578.
Okl.—Illinois Bankers Life Ass'n v. Hardy, 51 P.2d 292, 174 Okl. 326—Kimberly v. Cissna, 16 P.2d 1090, 161 Okl. 17—McCormick v. Stonebraker, 270 P. 1098, 133 Okl. 34—Adams v. King, 173 P. 206, 68 Okl. 190, reversing 170 P. 912, 68 Okl. 190.
Pa.—Brenner v. Lesher, 2 A.2d 731, 332 Pa. 522—In re Ray's Estate, 156 A. 64, 304 Pa. 421, 79 A.L.R. 772—Brenner v. Lesher, 45 Dauph. Co. 140.
S.C.—Macedonia Baptist Church v. City of Columbia, 10 S.E.2d 350, 195 S.C. 59.
Tenn.—McDonald v. Baldwin, App., 148 S.W.2d 385—Tennessee Barium Corporation v. Williams, 133 S.W. 2d 1015, 23 Tenn.App. 398.
Tex.—American Nat. Ins. Co. v. Points, Civ.App., 81 S.W.2d 762, error dismissed—Shaw v. Main, Civ. App., 76 S.W.2d 541—Dancy v. Missouri-Kansas-Texas R. Co. of Texas, Civ.App., 49 S.W.2d 910—Bowles v. Bryan, Civ.App., 277 S. W. 760—Georgia Casualty Co. v. Ginn, Civ.App., 272 S.W. 601—St. Louis Southwestern R. Co. of Texas v. Turner, Civ.App., 225 S.W. 383, error refused—Standard Scale & Supply Co. v. Chapin, Civ.App., 218 S.W. 645—Martinez v. Bruni, Civ.App., 216 S.W. 655, modified on other grounds, Com.App., 235 S.W. 549.
Wash.—Lenape Hydraulic Pressing & Forging Co. v. Ellis Resilient Wheel Corporation, 251 P. 885, 141 Wash. 571.
Wyo.—Cullyford Co. v. Joss, 246 P. 27, 35 Wyo. 10.
22 C.J. p 1050 note 25.

17. Ala.—Lynn v. Kelly, 85 So. 394, 204 Ala. 206—Carr v. Moore, 82 So. 473, 203 Ala. 223—L. D. King Store Co. v. Thomas, 134 So. 822, 24 Ala.App. 324.
Ark.—Supreme Lodge Woodmen of Union of U. S. v. Montgomery, 8 S.W.2d 446, 177 Ark. 865—Mabelvale Special School Dist. v. Halstead Special School Dist., 276 S. W. 584, 169 Ark. 645.
Cal.—Anthony v. Janssen, 191 P. 538, 183 Cal. 329.
Ga.—Saffold v. Hattaway, 147 S.E. 75, 168 Ga. 126—Roberts v. Allen, 122 S.E. 86, 31 Ga.App. 660.
Ill.—Mullanphy Sav. Bank v. Schott, 26 N.E. 640, 135 Ill. 655, 25 Am. S.R. 401.
Ky.—Home Ins. Co. v. Westerfield, 99 S.W.2d 464, 266 Ky. 494—Staples v. Continental Ins. Co. of New York, 5 S.W.2d 265, 223 Ky. 842—Althoff v. Cull, 216 S.W. 361, 186 Ky. 120.
Mich.—Paul v. University Motor Sales Co., 278 N.W. 714, 283 Mich. 587—Vanderberg v. Detroit & C. Nav. Co., 186 N.W. 477, 216 Mich. 682.
Mont.—Wilson v. Davis, 103 P.2d 149, 110 Mont. 356.
N.J.—Biehler v. Great American Indemnity Co., 21 A.2d 225.
N.Y.—Wright v. Firemen's Ins. Co. of Newark, N. J., 291 N.Y.S. 508, 249 App.Div. 87.
N.C.—Sermons v. Allen, 113 S.E. 605, 184 N.C. 127.
Okl.—Illinois Bankers' Life Ass'n v. Hardy, 4 P.2d 1049, 153 Okl. 67.
Philippine.—Araujo v. Celis, 6 Philippine 223.
S.C.—Sample v. Gulf Refining Co., 191 S.E. 209, 183 S.C. 399.
Tex.—Block v. Tarrant Wholesale Drug Co., Civ.App., 138 S.W.2d 874—Clay v. Richardson, Civ.App., 38 S.W.2d 849—Bibb v. Underwood, Civ.App., 38 S.W.2d 384.
Vt.—Andrews v. Aldrich, 158 A. 676, 104 Vt. 235.
Wash.—In re Reimer's Estate, 259 P. 32, 145 Wash. 172.
W.Va.—Kirkhart v. United Fuel Gas Co., 102 S.E. 806, 86 W.Va. 79.
Wyo.—Caswell v. Ross, 188 P. 977, 27 Wyo. 1.
22 C.J. p 1051 note 26.

Counsel's statement that original deed was not in possession of party producing certified copy was insufficient for introduction of copy.—Oatman v. Hampton, 256 P. 529, 43 Idaho 675.

18. Cal.—Brown v. Gow, 18 P.2d 377, 128 Cal.App. 671.
Mo.—Scrivner v. American Car & Foundry Co., 50 S.W.2d 1001, 1008, 330 Mo. 408, citing **Corpus Juris.**
N.H.—Hill v. Barney, 18 N.H. 607.
N.Y.—Harmon v. Matthews, 27 N.Y. S.2d 656.
N.C.—Mahoney-Jones Co. v. Osborne, 127 S.E. 533, 189 N.C. 445.
Vt.—Andrews v. Aldrich, 158 A. 676, 104 Vt. 235.
22 C.J. p 1052 note 31.

Innocent or fraudulent destruction
Whether or not the destruction was innocent of corrupt intent or design was preliminary question for court.—Massie v. Hutcheson, Tex. Com.App., 270 S.W. 544, reversing, Civ.App., 258 S.W. 244.

Necessity for making finding
Court must make finding that original writing was lost or destroyed, if that is relied on as foundation for secondary evidence of its contents. —Mahoney-Jones Co. v. Osborne, 127 S.E. 533, 189 N.C. 445.

19. Ala.—Sorrell v. Scheuer, 96 So. 216, 209 Ala. 268.
Cal.—Wolf v. Donahue, 273 P. 547, 206 Cal. 213—White v. White, 102 P.2d 432, 39 Cal.App.2d 57—Brown v. Gow, 18 P.2d 377, 128 Cal.App. 671.
Ga.—Wilson-Weesner-Wilkinson Co. v. Collier, 8 S.E.2d 171, 62 Ga.App. 457—Metropolitan Life Ins. Co. v. Vickery, 176 S.E. 815, 49 Ga.App. 727—Crump v. Bank of Toccoa, 153 S.E. 531, 41 Ga.App. 505.
Ill.—Maxcy-Barton Organ Co. v. Glen Bldg. Corporation, 189 N.E. 326, 355 Ill. 228, 95 A.L.R. 321.
Iowa.—Farmers' Sav. Bank v. Neel, 187 N.W. 555, 193 Iowa 685, 21 A.L.R. 1116.
Minn.—Watson v. Gardner, 236 N.W. 213, 183 Minn. 233—Northern Oil & Gas Co. v. Birkeland, 206 N.W. 380, 164 Minn. 466—Gasser v. Great Northern Ins. Co., 176 N.W. 484, 145 Minn. 205.
Mo.—Scrivner v. American Car & Foundry Co., 50 S.W.2d 1001, 1008, 330 Mo. 408, citing **Corpus Juris**—Welch v. Noah, App., 52 S.W.2d 493—O'Donnell v. Kansas City Life

whose determination will generally not be disturbed by an appellate court,[20] although it is reviewable,[21] and may be overruled where an abuse of discretion amounting to error of law appears.[22]

Admissions. Where both parties admit that an instrument has been lost, this is sufficient to warrant the reception of secondary evidence.[23] The contents of an instrument may be proved against a party by his admissions in writing, without accounting for nonproduction of the original document.[24]

Destruction of place of deposit. The destruction by fire of the place of deposit is ordinarily sufficient proof of the loss or destruction of the document to warrant the admission of secondary evidence of its contents;[25] but, if there is any doubt as to the destruction of the document in the fire, its proper custodian should be called to prove that the document was in the place of deposit when the fire occurred.[26]

Lapse of time as affecting proof. Where there has been a great lapse of time since the execution of an instrument alleged to be lost, strict proof of the loss need not be required,[27] and indeed lapse of time,[28] especially when combined with the ravages of war in which many citizens lost deeds and papers,[29] has been held sufficient to raise an inference of the loss of a document.

Oath of person as sufficient proof. By statute or rule of court the oath of the person seeking to introduce secondary evidence, that the original is not in his possession, power, or custody, and that he believes that it is lost or destroyed, is sometimes made sufficient to warrant the reception of secondary evidence,[30] but testimony of the person that he has never seen the original document does not meet with these requirements.[31]

Proof where person never had custody. Where the person never had the custody of the document and never was entitled to its possession, he will not be held to such strict requirements in proving its loss, destruction, or inaccessibility as if the document were one of which he had once had the possession or to the custody of which he was entitled.[32]

b. Search for Missing Document

(1) In general
(2) Degree of diligence
(3) Place of search
(4) Search for missing record

(1) In General

Generally, in order to establish the loss or destruction of a document as a basis for secondary evidence, it must be shown that a diligent and bona fide but unsuccessful search has been made for the document in the proper place or places.

While a search for a missing document is not necessary where, from the nature of the case, it is evident that the search would be unavailing,[33] gen-

Ins. Co., App., 277 S.W. 973—Spellmeyer v. Theo. Hiertz Metal Co., App., 272 S.W. 1068.
Okl.—Jones v. Webb, 67 P.2d 801, 180 Okl. 6—Smith v. Braley, 184 P. 586, 76 Okl. 220.
Pa.—Wilson v. Reiszner, 118 A. 557, 275 Pa. 5.
S.C.—Sample v. Gulf Refining Co., 191 S.E. 209, 183 S.C. 399.
Tex.—Massie v. Hutcheson, Civ.App., 296 S.W. 939—Martinez v. Bruni, Civ.App., 216 S.W. 655, modified on other grounds, Com.App., 235 S.W. 549.
22 C.J. p 1052 note 32.

Proof of loss or destruction of public records, such as judicial records or records of deeds is governed by the same rule.—State v. Yount, 172 S.W. 431, 186 Mo.App. 258—22 C.J. p 1053 note 36.

20. Cal.—White v. White, 102 P.2d 432, 39 Cal.App.2d 57—Brown v. Gow, 18 P.2d 377, 128 Cal.App. 671.
Ga.—Orr v. Dunn, 88 S.E. 669, 145 Ga. 137—Wilson-Weesner-Wilkinson Co. v. Collier, 8 S.E.2d 171, 62 Ga.App. 457—Magid v. Beaver, 197 S.E. 80, 57 Ga.App. 871, conforming to mandate, 196 S.E. 422, 185 Ga. 669, reversing 192 S.E. 532, 56 Ga.App. 286.
Mass.—Comstock v. Soule, 21 N.E.2d 257, 303 Mass. 153.
Minn.—Cookson v. Hill, 178 N.W. 591, 146 Minn. 165.
N.J.—Billet v. Pennsylvania Fire Ins. Co., 129 A. 209, 101 N.J.Law 546.
N.Y.—Harmon v. Matthews, 27 N.Y. S.2d 656.
Okl.—McCormick v. Stonebraker, 270 P. 1098, 133 Okl. 34.
Wyo.—Caswell v. Ross, 188 P. 977, 27 Wyo. 1.
22 C.J. p 1052 note 33.
Review of rulings on reception of evidence see Appeal and Error § 1604.

21. N.C.—Avery v. Stewart, 46 S. E. 519, 134 N.C. 287.

22. Mo.—Scrivner v. American Car & Foundry Co., 50 S.W.2d 1001, 1008, 330 Mo. 408, citing Corpus Juris.
22 C.J. p 1053 note 35.

23. Ark.—Waldroop v. Ruddell, 131 S.W. 670, 96 Ark. 171.

24. Minn.—Swing v. Cloquet Lumber Co., 141 N.W. 117, 121 Minn. 221, L.R.A.1918C 660.

25. N.C.—Robertson v. Council, 3 S.E. 681.
22 C.J. p 1052 note 29.

26. Tex.—Bray v. Aikin, 60 Tex. 688.
22 C.J. p 1052 note 30.

27. U.S.—Lewis v. Baird, C.C.Ohio, 15 F.Cas.No.8,316, 3 McLean 56.
22 C.J. p 1050 note 20.

28. Ga.—Doe v. Biggers, 6 Ga. 188.
22 C.J. p 1050 note 21.

29. S.C.—Peay v. Picket, 14 S.C.L. 318—Holmes v. Rochell, 2 S.C.L. 487.

30. Ga.—Cameron v. Kersey, 41 Ga. 40.
22 C.J. p 1052 note 27.

31. Ga.—Sutton v. McLoud, 26 Ga. 638.

32. Mo.—City of Macon v. Fidelity & Deposit Co., 189 S.W. 645, 194 Mo.App. 677.
22 C.J. p 1050 note 23.

33. Iowa.—Farmers' Sav. Bank v. Neel, 187 N.W. 555, 193 Iowa 685, 21 A.L.R. 1116.
Tex.—St. Louis Southwestern R. Co. of Texas v. Turner, Civ.App., 225 S.W. 383, error refused.

erally, in order to establish the loss or destruction of a document as a basis for the admission of secondary evidence, it must be shown, and it is sufficient if it is shown, that a diligent and bona fide but unsuccessful search has been made for the document in the proper place or places,[34] and that the party has exhausted in a reasonable degree all accessible sources of information and means of discovery which the nature of the case would naturally suggest.[35] As the question of diligence depends largely on the character and extent of the search, these must be shown.[36] Hence a mere statement that the original is lost or destroyed, unsupported by a showing of a search or other facts, is insufficient,[37] as also is a mere statement of the witness that diligent search has been made.[38] However, a witness' testimony that he had searched for the missing document in the last place in which it had been seen by him, but that he had been unable to find it has been held sufficient to warrant the admission of secondary evidence.[39]

Document shown to have been destroyed. Where it is shown that the document has been destroyed, no proof of search for it is required before admitting secondary evidence of its contents.[40]

(2) Degree of Diligence

The degree of diligence in searching for a lost document which must be shown in order that secondary evidence may be admitted depends largely on the particular circumstances of the case, and rests largely in the trial court's discretion.

The degree of diligence in searching for a lost document which must be shown in order to warrant the reception of secondary evidence of its contents depends largely on the particular circumstances of the case,[41] and rests largely in the discretion of the

Search held unnecessary

A widow's testimony that husband had left home, taking things with him in sack, that not long afterward he was sent to an asylum where he died, and that she had not seen husband's Bible since he left home, could be deemed sufficient predicate for proving nature of entries in Bible, even though no reasonable search therefor was made.—Prudential Ins. Co. of America v. Pierce's Adm'x, 109 S.W.2d 616, 270 Ky. 216.

34. U.S.—O'Donnell v. U. S., C.C.A. Cal., 91 F.2d 14, certiorari granted U. S. v. O'Donnell, 58 S.Ct. 146, 302 U.S. 677, 82 L.Ed. 523, reversed on other grounds 58 S.Ct. 708, 303 U.S. 501, 82 L.Ed. 980.
Cal.—Anthony v. Janssen, 191 P. 538, 183 Cal. 329.
Colo.—Hollis v. Commercial Nat. Bank of Salida, 13 P.2d 262, 91 Colo. 151.
Mo.—Bullock v. E. B. Gee Land Co., 148 S.W.2d 565.
Neb.—Cohen v. Swanson Petroleum Co., 276 N.W. 190, 133 Neb. 581.
N.C.—Sears v. Braswell, 149 S.E. 846, 197 N.C. 515—Harris v. Singletary, 137 S.E. 724, 193 N.C. 583—Mahoney-Jones Co. v. Osborne, 127 S.E. 533, 189 N.C. 445.
Okl.—Atwood v. Hayes, 281 P. 259, 139 Okl. 95—Bean v. Harris, 219 P. 300, 93 Okl. 10.
S.C.—Bourne v. Maryland Casualty Co., 192 S.E. 605, 185 S.C. 1, 118 A.L.R. 1.
Tex.—Laster v. Texas Mut. Life Ins. Ass'n, Civ.App., 86 S.W.2d 842, error dismissed—Shaw v. Main, Civ. App., 76 S.W.2d 541—Bibb v. Underwood, Civ.App., 38 S.W.2d 384—Southern Surety Co. v. Eoff, Civ. App., 22 S.W.2d 964.
Wash.—Cole v. Peterson, 187 P. 368, 109 Wash. 671.
22 C.J. p 1053 note 37.

Proof of reasonable search is usually prerequisite to establishing loss of document.—Prudential Ins. Co. of America v. Pierce's Adm'x, 109 S.W.2d 616, 270 Ky. 216—Elkhorn Land & Improvement Co. v. Wallace, 24 S.W.2d 560, 232 Ky. 741—Mutual Life Ins. Co. of New York v. Louisville Trust Co., 269 S.W. 1014, 207 Ky. 654.

35. Ga.—Crump v. Bank of Toccoa, 153 S.E. 531, 41 Ga.App. 505—Hanley & Tinsley v. Owens, 147 S. E. 720, 39 Ga.App. 462.
Iowa.—Swanson Automobile Co. v. Stone, 174 N.W. 247, 187 Iowa 309.
Ky.—Mutual Life Ins. Co. of New York v. Louisville Trust Co., 269 S.W. 1014, 207 Ky. 654.
N.J.—Biehler v. Great American Indemnity Co., 21 A.2d 225.
N.Y.—Harmon v. Matthews, 27 N. Y.S.2d 656.
N.C.—Mahoney-Jones Co. v. Osborne, 127 S.E. 533, 189 N.C. 445—Sermons v. Allen, 113 S.E. 605, 184 N.C. 127.
Tenn.—Tennessee Barium Corporation v. Williams, 133 S.W.2d 1015, 23 Tenn.App. 398—Robertson v. Freeman, 10 Tenn.App. 207.
Tex.—Clay v. Richardson, Civ.App., 38 S.W.2d 849, 851, quoting **Corpus Juris**—Bibb v. Underwood, Civ.App., 38 S.W.2d 384—Martinez v. Bruni, Civ.App., 216 S.W. 655, modified on other grounds 235 S. W. 549.
Wyo.—Caswell v. Ross, 188 P. 977, 27 Wyo. 1.
22 C.J. p 1053 note 37.

Presumption of loss is established when party has reasonably exhausted all means of discovery.—Beall v. Francis, 137 S.E. 251, 163 Ga. 894.

36. Tex.—Bibb v. Underwood, Civ. App., 38 S.W.2d 384.
22 C.J. p 1054 note 38.

37. N.C.—Avery v. Stewart, 46 S.E. 519, 134 N.C. 287.
22 C.J. p 1054 note 39.

38. Tex.—Bibb v. Underwood, Civ. App., 38 S.W.2d 384.
22 C.J. p 1054 note 40.

39. Ala.—Commercial Inv. Trust v. Hurst Bros., 126 So. 886, 23 Ala. App. 454.

40. Idaho.—Knowles v. Kasiska, 268 P. 3, 5, 46 Idaho 379, citing **Corpus Juris**.
22 C.J. p 1055 note 42.

However, it has been stated that, "To show a writing is lost or destroyed, in general terms, without showing a reasonable search or inquiry for it, has never been regarded as sufficient to admit secondary or parol evidence of its contents."—Harris v. Singletary, 137 S.E. 724, 726, 193 N.C. 583.

Where destruction is conceded proof of search is unnecessary.—Shultz v. North River Ins. Co. of New York, 210 P. 1102, 112 Kan. 369.

41. Minn.—Gasser v. Great Northern Ins. Co., 176 N.W. 484, 145 Minn. 205.
Neb.—Cohen v. Swanson Petroleum Co., 276 N.W. 190, 133 Neb. 581.
N.C.—Mahoney-Jones Co. v. Osborne, 127 S.E. 533, 189 N.C. 445.
Tenn.—Tennessee Barium Corporation v. Williams, 133 S.W.2d 1015, 23 Tenn.App. 398.
Tex.—Clay v. Richardson, Civ.App., 38 S.W.2d 849, 851, quoting **Corpus Juris**.
22 C.J. p 1055 note 43.

Sufficient search held shown
Iowa.—Anthon State Bank v. Bernard, 191 N.W. 283, 194 Iowa 1090.
Md.—Wright v. Rever, 136 A. 61, 151 Md. 558.
N.C.—Orr v. Twiggs, 187 S.E. 791, 210 N.C. 578.

trial court.[42] It has been considered necessary to show that the search was made with the utmost good faith and was as thorough and vigilant as though, were the paper not found its benefit would be lost.[43] If any suspicion hangs over the instrument, or there are circumstances tending to excite a suspicion that it is designedly withheld, the most rigid inquiry should be made into the reason for its nonproduction;[44] but where there is no such suspicion, all that ought to be required is a showing of reasonable diligence in the effort to obtain the original.[45]

The court must be satisfied on the whole that the paper is lost or destroyed,[46] and that it cannot be found at the time of the trial;[47] but it is generally sufficient to prove that diligent and unsuccessful search has been made in every reasonable quarter; it is not ordinarily necessary to show that every source of information or discovery has been exhausted.[48] Thus it is generally sufficient if the person seeking to introduce the secondary evidence shows that he has unsuccessfully searched in the proper places and inquired of the proper persons for the original,[49] and, with respect to inquiry, it is sufficient to show that it was made of those persons in whose possession the original should have been or was last known to have been.[50] In fine, it is held that under ordinary circumstances sufficient grounds are established for the introduction of secondary evidence, where it appears from the preliminary evidence that there is no reasonable probability or suspicion that the writing is designedly withheld or suppressed;[51] and it is not necessary to negative every possibility of its suppression.[52]

Denial of existence, execution, or contents. Where one party denies the existence, execution, or alleged contents of a writing on which the adverse party bases his cause of action or defense, the adverse party must show great diligence in searching for, or endeavoring to procure, the original in order to warrant the admission of secondary evidence.[53]

Character, value, and importance of document. In determining the degree of diligence in a search for a document which must be shown, the character, value, and importance of the paper, and the purposes for which it is expected to be used are material matters to be considered.[54] If the document is a private paper in which the party offering secondary evidence of its contents has a personal interest, and if it is an important paper, such as in the usual course of business would be likely to be in his possession or in the possession of another for his benefit, search for it in every direction in which it can be traced may reasonably be required, before secondary evidence of its contents will be received.[55]

Pa.—Brenner v. Lesher, 2 A.2d 731, 332 Pa. 522—Brenner v. Lesher, 45 Dauph.Co. 140.
S.C.—Crosland v. Hunsucker, 129 S.E. 199, 132 S.C. 398.
Tex.—Humphreys v. Green, Civ.App., 234 S.W. 562.

Sufficient search held not shown

Ga.—Chedel v. Mooney, 123 S.E. 300, 158 Ga. 297—Mechanics' Ins. Co. of Philadelphia v. Teat, 129 S.E. 554, 34 Ga.App. 361.
Mo.—Austin-Western Road Machinery Co. v. Commercial State Bank, App., 282 S.W. 105.
Pa.—Muncey v. Pullman Taxi Service Co., 112 A. 30, 269 Pa. 97.
Tex.—Laster v. Texas Mut. Life Ins. Ass'n, Civ.App., 86 S.W.2d 842, error dismissed.

42. Ga.—Haney & Tinsley v. Owens, 147 S.E. 720, 39 Ga.App. 462—Trice v. Adams, 125 S.E. 878, 33 Ga. App. 257.
Md.—Wright v. Rever, 136 A. 61, 151 Md. 558.
Minn.—Gasser v. Great Northern Ins. Co., 176 N.W. 484, 145 Minn. 205.
Pa.—Muncey v. Pullman Taxi Service Co., 112 A. 30, 269 Pa. 97.
Tenn.—Tennessee Barium Corporation v. Williams, 133 S.W.2d 1015, 23 Tenn.App. 398.

43. Ill.—McCarthy v. Meyer, 132 N.E. 198, 298 Ill. 620, reversing 219 Ill.App. 647—Moore, for Use of St. Louis Joint Stock Land Bank, v. National Fire Ins. Co. of Hartford, 275 Ill.App. 1.
22 C.J. p 1055 note 44.

44. Cal.—Cotton v. Hudson, App., 110 P.2d 70.
Fla.—Neylans v. Herndon, 84 So. 89, 79 Fla. 213.
Ky.—Mutual Life Ins. Co. of New York v. Louisville Trust Co., 269 S.W. 1014, 207 Ky. 654.
22 C.J. p 1055 note 45.

45. Fla.—Neylans v. Herndon, 84 So. 89, 79 Fla. 213.
Tex.—Clay v. Richardson, Civ.App., 38 S.W.2d 849, 851, quoting **Corpus Juris**—Bibb v. Underwood, Civ. App., 38 S.W.2d 384.
22 C.J. p 1055 note 45.

46. Ill.—McCarthy v. Meyer, 132 N.E. 198, 298 Ill. 620, reversing 219 Ill.App. 647.
22 C.J. p 1055 note 46.

47. Iowa.—Fisher v. Carter, 160 N.W. 15, 178 Iowa 636.
22 C.J. p 1055 note 47.

48. N.C.—Smith v. Pilot Life Ins. Co., 4 S.E.2d 321, 216 N.C. 152.
22 C.J. p 1055 note 48.

49. Cal.—Cotton v. Hudson, 110 P.2d 70, 42 Cal.App.2d 812.
22 C.J. p 1055 note 49.

50. Fla.—Neylans v. Herndon, 84 So. 89, 79 Fla. 213.
Ky.—Elkhorn Land & Improvement Co. v. Wallace, 24 S.W.2d 560, 232 Ky. 741—Mutual Life Ins. Co. of New York v. Louisville Trust Co., 269 S.W. 1014, 207 Ky. 654.
Tex.—Bibb v. Underwood, Civ.App., 38 S.W.2d 384.
22 C.J. p 1056 note 50.

51. U.S.—Renner v. Columbia Bank, C.C.D.C., 9 Wheat. 581, 6 L.Ed. 166.
22 C.J. p 1056 note 51.

52. N.C.—Robards v. McLean, 30 N.C. 522.

53. N.M.—Daly v. Bernstein, 28 P. 764, 6 N.M. 380, 398.
22 C.J. p 1056 note 53.

54. Cal.—Cotton v. Hudson, 110 P.2d 70, 42 Cal.App.2d 812.
N.M.—Williams v. Selby, 24 P.2d 728, 37 N.M. 474.
N.C.—Mahoney-Jones Co. v. Osborne, 127 S.E. 533, 189 N.C. 445.
22 C.J. p 1056 note 54.

55. N.J.—Johnson v. Arnwine, 42 N.J.Law 451, 36 Am.R. 527.
Or.—Wiseman v. Northern Pac. R. Co., 26 P. 272, 20 Or. 425, 23 Am. S.R. 135.

If the document is one in which other persons are also interested, and which has been placed in the hands of a custodian for safekeeping, the custodian must be required to make search, and the fruitlessness of such search must be shown, before secondary evidence can be admitted.[56] If the paper is one of importance chiefly to third persons, search among the papers of such persons as would have an interest in the preservation of the paper, or would under the circumstances be likely to have it in possession, will be sufficient.[57]

Where the document is useless, or of little or no value, or is of such a character that it would not naturally be preserved with any care, its loss or destruction may be inferred on very slight evidence.[58] Further, where the purpose for which an instrument was executed has been accomplished, so that the instrument is functus officio, and the necessity or reason for preserving no longer exists, very slight evidence of search will suffice.[59]

(3) Place of Search

In order that secondary evidence may be admitted, a careful search should be made where the document was last known to be, or where it would be likely to be found.

While it is not necessary in order that secondary evidence may be admitted to search for a missing document in every place where the document might possibly be,[60] a careful search should be made where the document was last known to be, or where it would be likely to be found, and this will be sufficient.[61] If the document is traced to the possession of a particular person or officer, or if by law some particular person or officer is charged with its custody, or if the document has a particular place of deposit, then these avenues of search must be diligently explored; the papers of the custodian must be searched by him, or the place of deposit carefully examined.[62]

On the death of the person entitled to the custody of the document, application should be made to those persons who are charged with the custody of his papers, or who in fact have them in their possession, such for instance, as his legal representatives or his successor in office, and diligent search among these papers should be made;[63] and if this search is unsuccessful the proof is ordinarily sufficient.[64]

(4) Search for Missing Record

The rules with respect to the sufficiency of the proof of search as a basis for secondary evidence apply with at least equal force where it is sought to establish the loss or destruction of public records or documents constituting matters of record.

The rules with respect to the sufficiency of the proof of search for a missing document, stated supra subdivisions b (1)–(3) of this section, and especially as to the person who should make the search and the place where the search should be made, apply with at least equal force where it is sought to establish the loss or destruction of public records or documents constituting matters of record, these writings commonly being in the custody of public officers and having well known places of deposit.[65]

56. N.J.—Johnson v. Arnwine, 42 N.J.Law 451, 36 Am.R. 527—Smith v. Axtell, 1 N.J.Eq. 494.

57. Mo.—Macon v. Maryland Fidelity, etc., Co., App., 189 S.W. 645.
22 C.J. p 1056 note 57.

58. Kan.—Atchison, T & S. F. R. Co. v. Palmore, 75 P. 509, 68 Kan. 545, 64 L.R.A. 90.
22 C.J. p 1056 note 58.

59. Tenn.—Robertson v. Freeman, 10 Tenn.App. 207, 213, quoting **Corpus Juris**.
22 C.J. p 1057 note 59.

60. Tenn.—Robertson v. Freeman, 10 Tenn.App. 207, 213, quoting **Corpus Juris**.
22 C.J. p 1057 note 60.

61. U.S.—O'Donnell v. U. S., C.C.A. Cal., 91 F.2d 14, certiorari granted U. S. v. O'Donnell, 58 S.Ct. 146, 302 U.S. 677, 82 L.Ed. 523, reversed on other grounds 58 S.Ct. 708, 303 U.S. 501, 82 L.Ed. 980.
Cal.—Cotton v. Hudson, App., 110 P. 2d 70.
Colo.—Hollis v. Commercial Nat. Bank of Salida, 13 P.2d 262, 91 Colo. 151.
Fla.—Neylans v. Herndon, 84 So. 89, 79 Fla. 213.
Ky.—Elkhorn Land & Improvement Co. v. Wallace, 24 S.W.2d 560, 232 Ky. 741—Mutual Life Ins. Co. of New York v. Louisville Trust Co., 269 S.W. 1014, 207 Ky. 654.
La.—Parker v. Bascle, 98 So. 628, 154 La. 1027.
Okl.—Bean v. Harris, 219 P. 300, 93 Okl. 10.
Tenn.—Robertson v. Freeman, 10 Tenn.App. 207, 213, quoting **Corpus Juris**.
Tex.—Bibb v. Underwood, Civ.App., 38 S.W.2d 384.
22 C.J. p 1057 notes 61, 62.

Witness need not directly state that he looked in all likely places, it being sufficient if this is a reasonable and proper inference from his testimony.—Ross P. Beckstrom Co. v. Armstrong Paint & Varnish Works, 220 Ill.App. 598.

Party's affidavit of loss should show that search has been made in those places where the document would be most likely to be found, and should exclude all presumptions that the party may have the document in his own possession or may know where it is.—Hill v. Taylor, 14 S.W. 366, 77 Tex. 295—22 C.J. p 1054 note 41.

62. Colo.—Hollis v. Commercial Nat. Bank of Salida, 13 P.2d 262, 91 Colo. 151.
S.C.—Wilson v. Moseley, 102 S.E. 330, 113 S.C. 278.
22 C.J. p 1057 note 62.

63. U.S.—O'Donnell v. U. S., C.C.A. Cal., 91 F.2d 14, certiorari granted U. S. v. O'Donnell, 58 S.Ct. 146, 302 U.S. 677, 82 L.Ed. 523, reversed on other grounds 58 S.Ct. 708, 303 U. S. 501, 82 L.Ed. 980.
22 C.J. p 1058 note 64.

64. Ill.—Hawley v. Hawley, 58 N. E. 332, 187 Ill. 351.
22 C.J. p 1058 note 64.

65. Okl.—Lowe v. Cravens, 240 P. 638, 112 Okl. 190.
Tenn.—Robertson v. Freeman, 10 Tenn.App. 207.
22 C.J. p 1058 note 66.

The same requirements exist in respect of proving the loss or destruction of the records of private[66] or municipal[67] corporations.

§ 843. Notice to Produce Primary Evidence

An affidavit in response to a notice to produce is not admissible in evidence.

An affidavit in response to a notice to produce primary evidence has been held not to be admissible in evidence.[68]

§ 844. —— Necessity

As a general rule, a party cannot give secondary evidence of the contents of original documents which are in the possession or control of his adversary, without first giving his adversary or his attorney due notice to produce them at the trial, but there are a number of exceptions, or apparent exceptions, to the rule.

As a general rule, a party cannot give secondary evidence of the contents of original documents which are actually[69] or presumptively[70] in the possession or control of his adversary, without first giving his adversary or his attorney due notice to produce them at the trial.

There are, however, exceptions, or apparent exceptions, to the rule.[71] Notice to produce is un-

66. Colo.—Expansion Gold Min. & Leasing Co. v. Campbell, 163 P. 968, 62 Colo. 410.
22 C.J. p 1059 note 67.

67. Ga.—Segars v. City of Cornelia, 4 S.E.2d 60, 60 Ga.App. 457.
22 C.J. p 1059 note 68.

68. Ga.—Martin & Lanier Paint Co. v. Daniels, 108 S.E. 246, 27 Ga. App. 302.

69. U.S.—U. S. v. Charleston, S. C., Min. & Mfg. Co., D.C.Fla., 298 F. 127, affirmed, C.C.A., Charleston, S. C., Min. & Mfg. Co. v. U. S., 3 F. 2d 1019, certiorari denied 45 S.Ct. 513, 268 U.S. 695, 69 L.Ed. 1162, and affirmed 47 S.Ct. 348, 273 U.S. 220, 71 L.Ed. 618.
Ala.—Zion Star Baptist Church v. Hart, 152 So. 44, 228 Ala. 24—Sovereign Camp, W. O. W., v. Hoomes, 122 So. 686, 219 Ala. 560—Dabbs v. Letson, 98 So. 4, 210 Ala. 306—Avant v. Avant, 92 So. 651, 207 Ala. 409.
Ark.—Union Cent. Life Ins. Co. v. Mendenhall, 34 S.W.2d 1078, 183 Ark. 25—Supreme Lodge Woodmen of Union of U. S. v. Montgomery, 8 S.W.2d 446, 177 Ark. 865—Heard v. Farmers' Bank of Hardy, 295 S. W. 38, 174 Ark. 194—Frazer v. Pettit-Galloway Co., 287 S.W. 1010, 172 Ark. 209.
Ga.—Ward-Truitt Co. v. Nicholson, 99 S.E. 153, 23 Ga.App. 672.
Iowa.—Miller v. Mutual Fire & Tornado Ass'n of Cedar Rapids, 259 N.W. 572, 219 Iowa 689.
Ky.—Peters Branch of International Shoe Co. v. Jones, 56 S.W.2d 994, 996, 247 Ky. 193, citing **Corpus Juris.**
La.—McCaskey Register Co. v. Wimberly, 129 So. 431, 14 La.App. 58.
Md.—Malone v. Malone, 129 A. 10, 148 Md. 200.
Mass.—Renwick v. Eastern Massachusetts St. Ry. Co., 175 N.E. 475, 275 Mass. 145.
Miss.—Miller v. Cullifer, 132 So. 327, 159 Miss. 712—Kanson Hat & Cap Mfg. Co. v. J. D. Blakeney & Son, 108 So. 139, 142 Miss. 851.
Mo.—Bluff City Shoe Co. v. Levy, App., 273 S.W. 1086—Metropolitan Discount Co. v. Wasson, App., 235 S.W. 465.
Mont.—Wilson v. Davis, 103 P.2d 149, 110 Mont. 356—Parham v. Chicago. M. & St. P. Ry. Co., 189 P. 227, 57 Mont. 492.
N.J.—Fielder v. Friedman, 12 A.2d 897, 124 N.J.Law 514—Robinson v. Borough of Edgewater, 119 A. 7, 98 N.J.Law 205.
N.Y.—Krupit v. National Liberty Ins. Co. of America, 192 N.Y.S. 341—Gordon v. Christenson, 188 N. Y.S. 135.
N.C.—Morrison v. Southern States Finance Co., 148 S.E. 458, 197 N.C. 322—Liberty Chair Co. v. Crawford, 137 S.E. 577, 193 N.C. 531, 51 A.L.R. 1496—Worthington v. Gilmers, Inc., 129 S.E. 153, 190 N. C. 128—Mahoney-Jones Co. v. Osborne, 127 S.E. 533, 189 N.C. 445—Sermons v. Allen, 113 S.E. 605, 184 N.C. 127.
N.D.—Rott v. Provident Life Ins. Co., 274 N.W. 849, 67 N.D. 529—Ley v. Home Ins. Co. of New York, 251 N.W. 137, 64 N.D. 200.
Pa.—Abercrombie v. Bailey, 190 A. 725, 326 Pa. 65.
Tenn.—Metropolitan Life Ins. Co. v. Walton, 83 S.W.2d 274, 19 Tenn. App. 59.
Tex.—Woodmen of the World Life Ins. Soc. v. Sosebee, Civ.App., 144 S.W.2d 308, error granted—Fire Ass'n of Philadelphia v. Da Camara, Civ.App., 85 S.W.2d 338—Sovereign Camp, W. O. W., v. Gordon, Civ.App., 62 S.W.2d 628, error refused—Beck v. Cleeton, Civ.App., 34 S.W.2d 914, error dismissed—Borger Townsite Co. v. Hutchinson County, Civ.App., 34 S.W.2d 912—Fowler v. Hardee, Civ.App., 16 S. W.2d 154—Keen & Woolf Oil Co. v. Fulenwider, Civ.App., 284 S.W. 322—American Surety Co. of New York v. State, Civ.App., 277 S.W. 790—Davis v. Kennedy, Civ.App., 245 S.W. 259.
22 C.J. p 1059 note 69.
Failure to produce primary evidence on notice as ground for admission of secondary evidence see supra §§ 832-834.

Purpose of the requirement is to afford the party time and opportunity to produce the document.—Woodmen of the World Life Ins. Soc. v. Sosebee, Tex.Civ.App., 144 S.W.2d 308, error granted—Torres v. Kansas City, M. & O. Ry. Co. of Texas, Tex. Civ.App., 35 S.W.2d 229, 230, quoting **Corpus Juris**, and error dismissed Kansas City, M. & O. R. Co. v. Torres, Com.App., 57 S.W.2d 1099—22 C. J. p 1059 note 69 [a] (1).

Notice should be given, or failure to do so excused
Miss.—Miller v. Cullifer, 132 So. 327, 159 Miss. 712.

Mere demand for the production of the original which is not followed up is insufficient.—In re Brown's Estate, 15 P.2d 604, 52 Idaho 286, motion denied and modified on other grounds Fite v. French, 30 P.2d 360, 54 Idaho 104.

Where no effort had been made to procure a letter sent to the adverse party secondary evidence of its contents was inadmissible.
Ala.—Grand Lodge of Alabama, A. F. & A. M., v. Goodwin, 85 So. 553, 204 Ala. 213.
Colo.—Daniels-Greager v. Caledonian Ins. Co., 86 P.2d 264, 103 Colo. 323.

Cure of error
Any error in receiving parol evidence of a fact without notice to produce a document said to be primary evidence of the fact is cured by subsequent proof that no such document ever existed.
U.S.—Pecos Valley Bank v. Evans-Snider-Buel Co., Tex., 107 F. 654, 46 C.C.A. 534.
Pa.—Reading R. Co. v. Johnson, 7 Watts & S. 317.

70. N.J.—Durbrow v. Hackensack Meadows Co., 71 A. 59, 77 N.J.Law 89.

71. Tex.—Woodmen of the World Life Ins. Soc. v. Sosebee, Civ.App., 144 S.W.2d 308, error granted.

Where party admitted receipt of original letter a carbon copy of the letter was admissible without demand for production of the original.

necessary in cases where it is sought to prove not the contents of an original document but some fact collateral thereto, or where the document relates not to the main issue in the cause but to some collateral circumstance,[72] or the document in question is not one which constitutes primary evidence of the fact sought to be proved,[73] or where the existence of the document is brought out for the first time on the trial,[74] or where the nature of the action or defense, or the form or contents of the pleadings, and the like, give notice to the adverse party that it is fairly incumbent on him, in his own interest, to be prepared to produce a particular instrument or writing,[75] or where a party has obtained possession of an original document by wrongful means, such as fraud, violence, and the like,[76] or where it is apparent that notice would serve no useful purpose.[77] Notice is dispensed with where it is shown that a document could not be produced even if notice were given,[78] as where the document is not actually or presumptively in the possession or control of the adverse party,[79] as where it is shown that it has been lost or destroyed,[80] or is in the possession of a third person who is out of the jurisdiction of the court and beyond the reach of its process,[81] provided there is not such a privity between the party and the custodian of the document that the writing is really under the party's control.[82]

In addition, notice to produce is dispensed with where a party denies the authenticity of a document,[83] or that he has,[84] or ever had,[85] possession

—Fairbanks v. Fairbanks, 80 P.2d 17, 59 Idaho 1.

72. Ala.—Modern Order of Praetorians v. Wilkins, 125 So. 396, 220 Ala. 382.
Mo.—Pickel v. McCawley, 44 S.W.2d 857, 860, 329 Mo. 166, citing **Corpus Juris.**
22 C.J. p 1060 note 72.

73. Ala.—Hirschfelder v. Levy, 69 Ala. 351.
Ind.—Pittsburgh, C., C. & St. L. R. Co. v. Brown, 97 N.E. 145, 98 N.E. 625, 178 Ind. 11.

74. **Printed rules of railroad company**
Ala.—Northern Alabama R. Co. v. Key, 43 So. 794, 150 Ala. 641.

75. Ga.—Ward-Truitt Co. v. Nicholson, 99 S.E. 153, 23 Ga.App. 672.
Mo.—Pickel v. McCawley, 44 S.W.2d 857, 860, 329 Mo. 166, citing **Corpus Juris.**
Or.—Michelin Tire Co. of California v. Williams, 293 P. 938, 135 Or. 158.
Tex.—Woodmen of the World Life Ins. Soc. v. Sosebee, Civ.App., 144 S.W.2d 308, error granted—Interstate Electric Co. v. Roberts-Christian Electric Co., Civ.App., 82 S.W.2d 1070—Galloway v. Moeser, Civ.App., 82 S.W.2d 1067—Torres v. Kansas City, M. & O. Ry. Co. of Texas, Civ.App., 35 S.W.2d 223, 230, quoting **Corpus Juris**, and error dismissed Kansas City, M. & O. R. Co. v. Torres, Com.App., 57 S.W.2d 1099—Borger Townsite Co. v. Hutchinson County, Civ.App., 31 S.W.2d 912—Adams v. Shemwell, Civ.App., 276 S.W. 941—Curlee Clothing Co. v. Lowery, Civ.App., 275 S.W. 730—El Paso Townsite Co. v. Watts, Civ.App., 227 S.W. 709, dismissed for want of jurisdiction—Givens v. Turner, Civ. App., 225 S.W. 403.
22 C.J. p 1060 note 76.
Bill of particulars may give adverse party notice.—Mirkus v. G. & S. Skirt Co., 185 N.Y.S. 867.
Rule held inapplicable
N.D.—Ley v. Home Ins. Co. of New York, 251 N.W. 137, 64 N.D. 200.

76. Tex.—Prieto v. Hunt, Civ.App., 167 S.W. 4.
22 C.J. p 1061 note 83.

77. Ga.—Crump v. Bank of Toccoa, 153 S.E. 531, 41 Ga.App. 505.
Writing withheld
Actual notice to produce original writing is not prerequisite to admission of secondary proof where notice would be futile because original is withheld by the other litigant.—Abercrombie v. Bailey, 190 A. 725, 326 Pa. 65.

78. Minn.—Vought v. Porter, 217 N.W. 352, 173 Minn. 302.
Wash.—Rockwell v. Peyran, 20 P.2d 841, 172 Wash. 434.

79. Iowa.—Anthon State Bank v. Bernard, 191 N.W. 283, 194 Iowa 1090—Farmers' Sav. Bank v. Neel, 187 N.W. 555, 193 Iowa 685, 21 A.L.R. 1116.
N.J.—Prell v. Slaff, 172 A. 734, 12 N.J.Misc. 504.
N.D.—Kalman v. Dinnie, 176 N.W. 656, 45 N.D. 112.
22 C.J. p 1061 note 84.
Omission of notice of little importance where it was not to be expected that the party had, and it was conceded he did not have, the original document.—Biehler v. Great American Indemnity Co., N.J.Sup., 21 A.2d 225.

80. Ala.—Dabbs v. Letson, 98 So. 4, 210 Ala. 306.
Ill.—Ross P. Beckstrom Co. v. Armstrong Paint & Varnish Co., 220 Ill.App. 598.
Mont.—Wilson v. Davis, 103 P.2d 149, 110 Mont. 356.
N.D.—Kalman v. Dinnie, 176 N.W. 656, 45 N.D. 112.
Pa.—Abercrombie v. Bailey, 190 A. 725, 326 Pa. 65.
Tex.—City Nat. Bank of Bowie v. Southern Casualty Co., Civ.App., 33 S.W.2d 830.
Wash.—In re Hamilton's Estate, 70 P.2d 426, 190 Wash. 646.
Wyo.—First Nat. Bank v. Ford, 216 P. 691, 30 Wyo. 110, 31 A.L.R. 1441.
22 C.J. p 1062 note 85.
Where it is admitted or testified by the adverse party or his attorney that the document has been lost or destroyed, notice is unnecessary.
Ga.—Crump v. Bank of Toccoa, 153 S.E. 531, 41 Ga.App. 505.
Ky.—Muir v. Glossbrenner Motors Co., 276 S.W. 1058, 211 Ky. 1.
Minn.—Clary v. O'Shea, 75 N.W. 115, 72 Minn. 105, 71 Am.S.R. 465.
22 C.J. p 1062 note 86.

81. Iowa.—Farmers' Sav. Bank v. Neel, 187 N.W. 555, 193 Iowa 685, 21 A.L.R. 1116.
22 C.J. p 1062 note 87.

82. Pa.—De Baril v. Pardo, 8 A. 876, 6 Pa.Cas. 148.
Vt.—Murray v. Mattison, 32 A. 479, 67 Vt. 553.

83. Ky.—Walker v. Hester, 198 S.W. 912, 178 Ky. 342.
22 C.J. p 1062 note 89.

84. U.S.—General Motors Acceptance Corporation v. American Ins. Co., C.C.A.Fla., 50 F.2d 803, certiorari denied American Ins. Co. v. General Motors Acceptance Corporation, 52 S.Ct. 130, 284 U.S. 676, 76 L.Ed. 571.
Neb.—Dold v. Munsor, 186 N.W. 353, 107 Neb. 501.
Tex.—Woodmen of the World Life Ins. Soc. v. Sosebee, Civ.App., 144 S.W.2d 308, error granted.
22 C.J. p 1062 note 90.
Validity of subpœna
Regardless of whether subpœna calling for certain documents was good or bad, receiving secondary evidence of their contents was proper where party denied he had possession of them.—Bollin v. Fahl, 206 N.W. 495, 232 Mich. 658.

85. U.S.—Heller v. U. S., C.C.A.S.C., 104 F.2d 446, 448, citing **Corpus Juris.**

of it. It has been held that the same result follows a denial of the existence of the instrument.[86]

A valid notice once given need not be repeated at subsequent terms of court,[87] or on the retrial of the case,[88] or on a mere change in the title of the action.[89]

Document constituting a notice. It is almost universally held that where the instrument, the contents of which are to be proved, is itself a notice, notice to produce it is not a prerequisite to the admission of secondary evidence; but the contents of the document may be proved by a copy or by parol or, of course, by a duplicate original.[90] Where a statute requires a written notice or notice and demand to be served on a party as a prerequisite to an action against him, it is held that notice to produce these writings is not necessary before secondary evidence of their contents can be admitted.[91] However, there is some support for the view that a notice to produce is necessary even though the paper in question is itself a notice,[92] at least where the notice is a prerequisite to the interposition of a defense on which the party seeking to show the contents thereof relies.[93] Where the fact necessary to be proved is the mere mailing of a notice, and not the contents thereof, proof of mailing is admissible without service of a notice to produce.[94]

Evasion of notice. Evidence that the party in possession of an original document has evaded the service of notice to produce it and has avoided the production of the document has been held sufficient to dispense with actual service of the notice.[95]

Instruments executed in duplicate. Although the contrary has been held,[96] as a general rule notice to produce is not a prerequisite to the introduction of a duplicate original as evidence.[97] It has been held, however, that if the party seeking to show

Ala.—Sorrell v. Scheuer, 96 So. 216, 209 Ala. 268.
Ariz.—Pawley v. First Nat. Bank, 256 P. 507, 32 Ariz. 135.
Idaho.—American Surety Co. of New York v. Blake, 27 P.2d 972, 54 Idaho 1, 91 A.L.R. 153.
Ill.—First Nat. Bank & Trust Co. of Kalamazoo, Mich., v. Kirshbaum, 263 Ill.App. 537.
Ind.—Meridian Mut. Fire Ins. Co. v. Sapkaris, 145 N.E. 784, 82 Ind.App. 272.
Md.—Isaacs v. Williams, 129 A. 895, 149 Md. 19.
Mo.—Mercantile Trust Co. v. Paulding Stave Co., App., 210 S.W. 438.
N.J.—Feingold v. Norwich Union Indemnity Co., 190 A. 311, 117 N.J. Law 541—Prell v. Slaff, 172 A. 734, 12 N.J.Misc. 504.
Contra Klein v. Handler, 137 A. 833, 5 N.J.Misc. 662.
Or.—Michelin Tire Co. of California v. Williams, 293 P. 938, 135 Or. 158.
Pa.—Abercrombie v. Bailey, 190 A. 725, 326 Pa. 65.
22 C.J. p 1062 notes 91, 92.

86. Ala.—Liberty Life Assur. Soc. v. Woodard, 121 So. 30, 219 Ala. 24.
Kan.—Bertenshaw v. Laney, 94 P. 805, 77 Kan. 497.
Neb.—Dold v. Munsor, 186 N.W. 853, 107 Neb. 501.
Or.—Michelin Tire Co. of California v. Williams, 293 P. 938, 135 Or. 158.

In Minnesota
(1) The rule of the text has been followed.—Vought v. Porter, 217 N. W. 352, 173 Minn. 302.
(2) There is also authority for the view that such a denial does not dispense with the necessity for a notice to produce.—Clary v. O'Shea, 75 N. W. 115, 72 Minn. 105, 108, 71 Am.S.R. 465.
22 C.J. p 1062 note 94.

87. Ala.—Speer v. Lancaster-Johnson Lumber Co., 108 So. 746, 214 Ala. 688.

88. Utah.—Van Leeuwen v. Huffaker, 5 P.2d 714, 78 Utah 521.

89. Mo.—Church v. Chicago & A. R. Co., 23 S.W. 1056, 119 Mo. 203.
30 C.J. p 1023 note 10 [a].

90. U.S.—Lindenberger v. Beall, D. C., 6 Wheat. 104, 5 L.Ed. 216.
22 C.J. p 1062 note 97.
Notice of dishonor of note
U.S.—Lindenberger v. Beall, supra.
8 C.J. p 1040 note 20.
Instrument held not in nature of notice
Ga.—Ward-Truitt Co. v. Nicholson, 99 S.E. 153, 23 Ga.App. 672.

91. Iowa.—Brentner v. Chicago, M. & St. P. R. Co., 12 N.W. 615, 58 Iowa 625.
22 C.J. p 1063 note 98.

92. Ga.—Lathrop v. Mitchell, 47 Ga. 610.
22 C.J. p 1063 note 99.
Notice of claim of loss under insurance policy.
Mont.—Parham v. Chicago, M. & St. P. Ry. Co., 189 P. 227, 57 Mont. 492.
N.Y.—Krupit v. National Liberty Ins. Co. of America, 192 N.Y.S. 341.
Tenn.—Metropolitan Life Ins. Co. v. Walton, 83 S.W.2d 274, 19 Tenn. App. 59.
Notice of dishonor of note
Ark.—Jones v. Robinson, 11 Ark. 504, 51 Am.D. 212.
Notice of lapse of policy
N.J.—Ciccone v. Colonial Life Ins. Co. of America, 164 A. 444, 110 N J.Law 276.
Notice of surrender of leased premises.—Klein v. Handler, 137 A. 833, 5 N.J.Misc. 662.

93. Ala.—Peterman v. Southern Cotton Oil Co., 73 So. 991, 15 Ala.App. 491.
22 C.J. p 1063 note 1.

94. Ala.—Collins v. Alabama Great Southern R. Co., 16 So. 140, 104 Ala. 390.

95. Ark.—Bright v. Pennywit, 21 Ark. 130.

96. Tex.—Fire Ass'n of Philadelphia v. Da Camara, Civ.App., 85 S.W.2d 338.
Carbon copy
Tex.—Mauritz v. Schwind, Civ.App., 101 S.W.2d 1085, error dismissed.

97. U.S.—Maryland Casualty Co. v. Simmons, C.C.A.Ga., 2 F.2d 29, certiorari denied 45 S.Ct. 226, 266 U. S. 634, 69 L.Ed. 480.
Ala.—Smith v. Sharp, 98 So. 566, 210 Ala. 587—Sandlin v. Anders, 88 So. 560, 205 Ala. 453.
Ga.—Martin & Lanier Paint Co. v. Daniels, 108 S.E. 246, 27 Ga.App. 302—City of Gainesville v. White, 107 S.E. 571, 27 Ga.App. 16.
Idaho.—American Surety Co. of New York v. Blake, 27 P.2d 972, 54 Idaho 1, 91 A.L.R. 153.
Ind.—Watts v. Geisel, 194 N.E. 502, 100 Ind.App. 92.
Ky.—Davis v. Williams Bros. Const. Co., 269 S.W. 289, 207 Ky. 404.
Minn.—Piscor v. Village of Hibbing, 211 N.W. 952, 169 Minn. 478.
Mo.—Mercantile Trust Co. v. Paulding Stave Co., App., 210 S.W. 438.
N.Y.—Krell v. Tucker, 204 N.Y.S. 307.
N.C.—Liberty Chair Co. v. Crawford, 137 S.E. 577, 193 N.C. 531, 51 A.L. R. 1496—Standard Sand & Gravel

the contents of the paper has lost his copy he cannot prove the contents thereof by parol without taking any steps to cause his adversary to produce the duplicate copy in his possession,[98] although there is authority for the contrary view.[99] Where part of one copy has been destroyed, notice to the adverse party to produce the other original is a prerequisite to the reception of parol evidence as to the contents of the destroyed part.[1]

Where a paper alleged to be mutilated is produced voluntarily, on request of counsel, the fact that no notice to produce was given will not preclude the reception of secondary evidence of the contents of the part alleged to have been destroyed.[2]

Where both parties have copies of a lost instrument one party may introduce his copy in evidence without serving on his adversary a notice requiring the latter to produce his own copy.[3]

§ 845. —— Sufficiency of Notice

The sufficiency of a notice to produce a writing is a preliminary question of fact for the trial court whose determination will generally not be disturbed.

The sufficiency of a notice to produce a written instrument as a preliminary to the reception of secondary evidence depends largely on the circumstances of the particular case,[4] and presents a preliminary question of fact for the trial court, whose determination will generally not be disturbed on appeal, except in a plain instance of injury through an improper exercise of discretion.[5]

A notice to produce documents should describe the desired papers with sufficient accuracy to enable the party notified to understand what writings are required,[6] and a notice to produce certain documents described therein is not sufficient to warrant the introduction of secondary evidence of other documents than those mentioned in the notice.[7] It is not, however, necessary that the notice should describe the documents with perfect accuracy, but it is sufficient if so framed with regard to the subject matter to which the documents relate, or otherwise, that the party notified cannot doubt what papers are meant.[8] A notice to produce a certain letter, described as inclosed in an envelope, sufficiently indicates an intention to call for the envelope as well as the inclosure.[9]

Necessity of writing. As a general rule a notice to produce when given before trial and as a preliminary preparation therefor should be in writing,[10] but a notice given at the trial need not be in writing.[11]

Notice embodied in pleadings. A formal notice to produce may properly be embodied in,[12] or attached to,[13] a pleading served on a party.

Agreement to produce as notice. An agreement between opposing counsel in open court that defendant would without notice produce before the

Corporation v. McClay, 131 S.E. 754, 191 N.C. 313.
Okl.—Anglo-Texas Oil Co. v. Manatt, 256 P. 740, 125 Okl. 92—U. S. Fire Ins. Co. of City of New York v. L. C. Adam Mercantile Co., 245 P. 885, 117 Okl. 73.
W.Va.—G. Elias & Bro. v. Boone Timber Co., 102 S.E. 488, 85 W.Va. 508.
22 C.J. p 1061 note 78.
Duplicate original as primary evidence see supra § 821.
Carbon copy held not duplicate original
Ga.—Ward-Truitt Co. v. Nicholson, 99 S.E. 153, 23 Ga.App. 672.

98. Fla.—Norris v. Billingsley, 37 So. 564, 48 Fla. 102.

99. Ind.—Pittsburgh, C., C. & St. L. R. Co. v. Brown, 97 N.E. 145, 98 N.E. 625, 178 Ind. 11, 31.
22 C.J. p 1061 note 80.

1. Iowa.—Carper v. Ridpath, 149 N.W. 841, 168 Iowa 22.

2. Iowa.—Bell v. Chicago, B. & Q. R. Co., 20 N.W. 456, 64 Iowa 321.

3. Ind.—Pittsburgh, C., C. & St. L. R. Co. v. Brown, 97 N.E. 145, 98 N.E. 625, 178 Ind. 11.

4. Tex.—Woodmen of the World Life Ins. Soc. v. Sosebee, Civ.App., 144 S.W.2d 808, error granted.
W.Va.—Waddell v. Trowbridge, 119 S.E. 290, 94 W.Va. 482.

5. Miss.—Ætna Life Ins. Co. v. Thomas, 144 So. 50, 52, 166 Miss. 53, citing **Corpus Juris**, and suggestion of error overruled 146 So. 134, 166 Miss. 53.
22 C.J. p 1064 note 8.
Error held not ground for reversal
Tex.—Boaz v. Ledenham, Civ.App., 58 S.W.2d 835.

6. Ga.—Ringwald v. J. R. Watkins Medical Co., 111 S.E. 83, 28 Ga. App. 298.
Tex.—Stockwell v. Snyder, Civ.App., 51 S.W.2d 812, reversed on other grounds 84 S.W.2d 705, 126 Tex. 6.
22 C.J. p 1063 note 4.

7. U.S.—In re Youroveta Home & Foreign Trade Co., C.C.A.N.Y., 297 F. 723.
Tex.—Theis v. Curtis, Civ.App., 33 S.W.2d 754.
22 C.J. p 1063 note 5.
Notice to produce a copy of a document is insufficient to require the production of the original.—Avant v. Avant, 92 So. 651, 207 Ala. 409.

8. Cal.—Burke v. Table Mountain Water Co., 12 Cal. 403.
22 C.J. p 1063 note 6.
Notice held sufficient
Ala.—Allen v. Southern Coal & Coke Co., 87 So. 562, 205 Ala. 363.
Miss.—Ætna Life Ins. Co. v. Thomas, 144 So. 50, 166 Miss. 53, suggestion of error overruled 146 So. 134, 166 Miss. 53.
S.C.—Southern Cotton Oil Co. v. Schafer Co., 138 S.E. 882, 140 S.C. 445.
22 C.J. p 1063 note 6 [b].

9. U.S.—U. S. v. Duff, C.C.N.Y., 6 F. 45, 19 Blatchf. 9.

10. Ill.—Cummings v. McKinney, 5 Ill. 59.
22 C.J. p 1064 note 9.

11. **Verbal notice at meeting before referee** has been held sufficient.—Kerr v. McQuire, 28 N.Y. 446, 28 How.Pr. 27.

12. Tex.—Casualty Reciprocal Exchange v. Berry, Civ.App., 90 S.W.2d 595, error refused.
Nature of action or pleadings as putting party on notice see supra § 844.

13. Ala.—Allen v. Southern Coal & Coke Co., 87 So. 562, 205 Ala. 363.

trial all documents in his possession or under his control, relating to the case, is equivalent to notice to produce them.[14]

§ 846. —— To Whom Notice Given

Notice to produce a paper may be given either to the real party in interest or his attorney of record, but service on a person who does not have or never had the paper in his possession or control is nugatory.

Notice to produce a paper as a preliminary to the admission of secondary evidence may be given, sometimes by reason of statute, either to the real party in interest or to his attorney of record.[15] However, in order for service on an attorney to be effective, he must hold the paper as attorney for a party to the cause; the fact that the paper is in his possession is insufficient if he holds it as attorney for a stranger.[16] Service of notice on a person who does not have or never had the instrument in his possession or control is nugatory.[17]

On the death of a trustee, the title deed of the trust estate devolves on his personal representative, and a notice to produce it, given to one of the cestuis que trust is not of itself sufficient to authorize the admission of secondary evidence.[18] The proper custodian of a canceled mortgage is the mortgagor, and of an outstanding uncanceled mortgage is the mortgagee; and where it appears that due notice has been served on the mortgagee to produce the original mortgage, and that the mortgagor resides beyond the jurisdiction of the court, a sufficient foundation is laid to admit as secondary evidence a properly certified copy of the mortgage.[19]

§ 847. —— Time for Service of Notice

Notice to produce a document must be given in sufficient time to enable a party by the exercise of reasonable diligence to produce the document.

Notice to produce a document as a preliminary to the admission of secondary evidence must be timely served.[20] No comprehensive rule can be laid down as to whether or not notice was timely served, but each case must be determined largely on its peculiar facts, especially with regard to the accessibility of the document.[21] The most that can be said is that the notice must be given in sufficient time to enable the party by the exercise of reasonable diligence, under the circumstances, to procure and produce the writings desired.[22] If it was impossible to procure the document between the time of giving notice and the time of the trial, this fact should be made to appear.[23]

Notice at trial. Notice given or demand made during the trial is generally sufficient where the document is in the possession of the adverse party or his attorney at the trial and is in court,[24] or where the paper, although not actually in court, is so near that it can be speedily obtained.[25] Likewise, where the circumstances of the case are such that the doc-

14. Ind.—Duringer v. Moschino, 93 Ind. 495.

15. Ala.—Simington v. Kent, 8 Ala. 691.
22 C.J. p 1064 note 13.
Service on president of corporation is sufficient.—City Nat. Bank of Bowie v. Southern Casualty Co., Tex. Civ.App., 33 S.W.2d 830.
Letter written to party's agent
Where defendant had not kept a copy of the letter written by him to a commercial agency, the agent of plaintiff, it was sufficient for him to given notice to produce the letter to plaintiff's attorney, without giving any to the agency, which was not a party.—Rheinstein Dry Goods Co. v. McDougall, 62 S.E. 1085, 149 N.C. 252.

16. Me.—Baker v. Pike, 33 Me. 213.

17. Mont.—Wilson v. Davis, 103 P. 2d 149, 110 Mont. 356.
N.Y.—Herman v. Heller, 172 N.Y.S. 474.
Or.—Toomey v. Casey, 160 P. 583, 82 Or. 71.
Tex.—Theis v. Curts, Civ.App., 33 S.W.2d 754—Southern Surety Co. v. Eoff, Civ.App., 22 S.W.2d 964—American Surety Co. of New York v. State, Civ.App., 277 S.W. 790.
Utah.—Van Leeuwen v. Huffaker, 5 P.2d 714, 78 Utah 521.
22 C.J. p 1064 note 16.

18. Ala.—Powell v. Knox, 16 Ala. 364.

19. Ga.—Sims v. Scheussler, 58 S. E. 693, 2 Ga.App. 466.

20. N.C.—Mahoney-Jones Co. v. Osborne, 127 S.E. 533, 189 N.C. 445.

21. Ill.—Barto v. Kellogg, 124 N. E. 633, 289 Ill. 528—Pittsburgh, C. C. & St. L. Ry. Co. v. Gage, 121 N. E. 582, 286 Ill. 213.
Tex.—Woodmen of the World Life Ins. Soc. v. Sosebee, Civ.App., 144 S.W.2d 308, error granted.
22 C.J. p 1064 note 20.
Party living in another town
Generally, if a party dwells in another town than that in which a trial is had, service on him of notice to produce papers at the place where the trial is had, or after he has left home to attend court, is not sufficient.—Mahoney-Jones Co. v. Osborne, 127 S.E. 533, 189 N.C. 445—Sermons v. Allen, 113 S.E. 605, 184 N.C. 127—22 C.J. p 1065 note 23 [a].
Notices held sufficient
Ill.—Pittsburgh, C., C. & St. L. Ry. Co. v. Gage, 121 N.E. 582, 286 Ill. 213.
22 C.J. p 1065 note 22.
Notices held insufficient
N.C.—Beard v. Southern R. Co., 55 S.E. 505, 143 N.C. 136.
22 C.J. p 1065 note 23.

22. Ill.—Pittsburgh, C., C. & St. L. Ry. Co. v. Gage, 121 N.E. 582, 286 Ill. 213.
22 C.J. p 1064 note 20.
Reasonable time within which to produce the document should be given.—Miller v. Cullifer, 132 So. 327, 159 Miss. 712.

23. Ill.—Cody v. Hough, 20 Ill. 43.
22 C.J. p 1065 note 21.

24. U.S.—General Motors Acceptance Corporation v. American Ins. Co., C.C.A.Fla., 50 F.2d 803, certiorari denied American Ins. Co. v. General Motors Acceptance Corporation, 52 S.Ct. 130, 284 U.S. 676, 76 L.Ed. 571.
Tex.—Woodmen of the World Life Ins. Soc. v. Sosebee, Civ.App., 144 S.W.2d 308, error granted.
22 C.J. p 1065 note 27.

25. Ala.—Standard Acc. Ins. Co. of Detroit, Mich., v. Hoehn, 110 So. 7, 215 Ala. 109.

ument may be fairly presumed to be in the possession of the adverse party at the trial, and the want of a notice to produce it could work no surprise on him and could not prejudice his rights, notice before the trial is not a prerequisite to the introduction of secondary evidence.[26] Thus notice at the trial is sufficient where the papers are the subject of the action or defense.[27]

If the paper is not shown to be in court or readily procurable by the party who is supposed to have it, notice at the trial is not sufficient,[28] unless the party denies the existence of the paper or that it is in his possession or under his control.[29]

Notice on nonjudicial day. It has been held that a notice to produce a document is good, although given on a nonjudicial day.[30]

Notice to produce on the trial of the cause is sufficient whenever the cause comes on for trial; a delay or continuance does not necessitate a new notice.[31]

§ 848. —— Proof of Service of Notice

Whether or not a notice to produce a document was served on a party is for the trial court to determine on the basis of the evidence properly adduced.

The issue as to whether or not a notice to produce a document was served on a party is for the trial court to determine[32] on the basis of the evidence properly adduced.[33] The sufficiency of the proof of service is addressed to the court's sound discretion.[34] The mere statement of counsel to the court that he served such a notice has been held insufficient.[35]

§ 849. —— Waiver of Notice or of Objections to Its Sufficiency

The right to a notice to produce a writing and objections to the sufficiency of the notice may be waived.

The right of a person to require a notice to produce documents in his possession before the introduction of secondary evidence of their contents may be waived by him.[36] Likewise he may waive objection for insufficient description of the documents,[37] or because of service too short a time before trial.[38]

The actual production of the documents or a voluntary offer to produce them will amount to a waiver.[39]

§ 850. Proof as to Correctness of Copy

Where the secondary evidence offered is a writing purporting to be a copy of an original document it must be shown to be a true copy, although minor discrepancies will be tolerated.

Where the secondary evidence offered is a writing purporting to be a copy of an original document, it must be shown that the writing is in fact a true copy,[40] although minor discrepancies will be

W.Va.—Waddell v. Trowbridge, 119 S.E. 290, 94 W.Va. 482.
22 C.J. p 1065 note 28.

26. Wis.—Barker v. Barker, 14 Wis. 131.
22 C.J. p 1065 note 29.

27. Ill.—Maxcy-Barton Organ Co. v. Glen Bldg. Corporation, 189 N.E. 326, 355 Ill. 228, 95 A.L.R. 321.
22 C.J. p 1065 note 31.

28. N.J.—Ciccone v. Colonial Life Ins. Co. of America, 164 A. 444, 445, 110 N.J.Law 276, citing Corpus Juris.
S.C.—Ancrum v. State Highway Department, 161 S.E. 98, 162 S.C. 504.
W.Va.—Waddell v. Trowbridge, 119 S.E. 290, 94 W.Va. 482.
22 C.J. p 1065 note 32.

29. N.J.—Ciccone v. Colonial Life Ins. Co. of America, 164 A. 444, 445, 110 N.J.Law 276, citing Corpus Juris.
Tex.—Woodmen of the World Life Ins. Soc. v. Sosebee, Civ.App., 144 S.W.2d 308, error refused.
22 C.J. p 1066 note 33.
Denial of possession as dispensing with necessity of notice see supra § 844.

30. Or.—Sugar Pine Lumber Co. v. Garrett, 42 P. 129, 28 Or. 168.

31. N.Y.—Wilson v. Gale, 4 Wend. 623.
22 C.J. p 1065 note 26.

32. Not for jury
Tex.—Empire Gas & Fuel Co. v. Pendar, Civ.App., 244 S.W. 184.

33. Proof by affidavit
It is irregular to prove by affidavit the service of a notice to produce documents, the proper mode of proof being the examination of witnesses at the trial.—Willard v. Germer, 3 N.Y.Super. 50.

34. Mo.—Moore v. Washington Life & Accident Ins. Co., App., 58 S.W. 2d 763.

Sheriff's return
A sheriff's return "executed by delivering a copy" indorsed on a notice to produce papers is sufficient, since it implies a delivery to each person to whom the notice is addressed.—McDonald v. Carson, 94 N.C. 497.

35. Ill.—Landt v. McCullough, 69 N.E. 107, 206 Ill. 214, reversing 103 Ill.App. 668.
Or.—Oregon Art Tile Co. v. Hegele Co., 164 P. 548, 84 Or. 82.

36. Wis.—Kalk v. Fielding, 7 N.W. 296, 50 Wis. 339.
22 C.J. p 1066 note 36.

37. Miss.—Lockhart v. Camfield, 48 Miss. 470.
22 C.J. p 1066 note 37.

38. N.Y.—Willard v. Germer, 3 N.Y. Super. 50.

39. Me.—Dwinell v. Larrabee, 38 Me. 464.
22 C.J. p 1066 note 39.

40. U.S.—Ætna Ins. Co. of Hartford, Conn., v. Taylor, C.C.A.Ga., 86 F.2d 225—New York & Cuba Mail S. S. Co. v. Continental Ins. Co. of City of New York, D.C.N.Y., 32 F.Supp. 251, reversed on other grounds, C.C.A., 117 F.2d 404—U. S. v. Aluminum Co. of America, D. C.N.Y., 1 F.R.D. 1.
Ala.—Polytinsky v. Sharpe, 100 So. 750, 211 Ala. 510.
Ark.—Martin v. Duke, 245 S.W. 173, 156 Ark. 54.
Cal.—Saecker v. Cohn, 179 P. 890, 180 Cal. 151—Ryan v. Vawter, 21 P.2d 990, 131 Cal.App. 722.
Ga.—Trice v. Adams, 125 S.E. 878, 33 Ga.App. 257.
Ill.—Kibbat v. Clokey, 263 Ill.App. 410.
Ind.—Hottenstein v. Hottenstein, 133 N.E. 489, 191 Ind. 460.
La.—Johnson v. District Grand Lodge No. 21, Grand United Order of Odd Fellows of Louisiana, App., 149 So. 145.

tolerated.[41]

The usual mode of proving the correctness of a copy is by the testimony of a person who has compared the copy with the original and found it to be correct.[42] In such case it is not necessary that the witness should have actually read the original, but it is sufficient that the original was read to him by another person while he read the copy and found that it corresponded with what was read to him.[43] Where the person who made the original, a short time thereafter made a copy by writing down at the dictation of another reading from the original, and he testified that the copy was a true and correct one to the best of his knowledge and belief, and it did not appear that the testimony of the person who read from the original could be obtained, it was held that the copy was admissible, although the witness did not compare it with the original with his own eyes.[44] Where the copy was written by one person while another read from the original, and was then compared by a second reading by the same person, followed by the writer, this was held sufficient to show correctness of the copy, without showing that in making the comparison the writer held the original and the reader the copy.[45] Testimony of the person who made the copy is not essential to prove its correctness, but this may be

Md.—American Fidelity Co. of Montpelier, Vt., v. State, 109 A. 99, 135 Md. 326.
Mo.—Scrivner v. American Car & Foundry Co., 50 S.W.2d 1001, 1009, 330 Mo. 408, quoting **Corpus Juris**—Jenkins v. Jenkins, 260 S.W. 111, 303 Mo. 818.
Or.—Enyart v. Merrick, 34 P.2d 629, 148 Or. 321.
Pa.—In re Ross' Estate, 167 A. 365, 312 Pa. 36—Cohen v. Boslover Beneficial Ass'n, 176 A. 30, 116 Pa. Super. 55.
R.I.—Cook v. Greenlaw, 19 A.2d 8.
S.C.—Bank v. North Carolina Mut. Life Ins. Co., 195 S.E. 649, 186 S.C. 394—Pryor v. Atlanta-Charlotte Airline Ry. Co., 184 S.E. 137, 179 S.C. 423.
Tex—Arkansas Road Const. Co. v. Thomas & Ratliff, Civ.App., 245 S.W. 743—In re McLaren's Estate, Civ.App., 221 S.W. 1045.
22 C.J. p 1066 note 40.

Photostatic copy of a document is admissible only on proof that it is an exact copy of the original.
U.S.—U. S. v. Braden, C.C.A.Tenn., 92 F.2d 682.
N.J.—Pan American Securities Corporation of New York v. Fried. Krupp Aktiengesellschaft, 198 A. 770, 16 N.J.Misc. 225.
N.Y.—Miller v. Insurance Co. of North America, 202 N.Y.S. 295.

Public records

(1) A copy of a public record in order to be admissible must be shown to be a true copy.—Housman v. Geiman, 252 N.W. 857, 62 S.D. 310.

(2) A duly authorized public record of a private document is presumed to be a true and correct copy of the original.—Foamite-Childs Corporation v. Pyrene Mfg. Co., D.C. Del., 288 F. 416.

Agreement of parties dispenses with necessity of authentication of copy.—Clark v. Fergerson, 20 S.W. 2d 1013, 231 Ky. 36.

Admission of testimony of person certifying copy

Testimony of justice, who certified purported copy of original process, that he issued original process and certified copy without noticing that copy was not signed, is admissible.—Haverty Furniture Co. v. Thompson, 169 S.E. 213, 46 Ga.App. 739.

Evidence sufficient to show correctness of purported copy.
U.S.—Bankers' & Shippers' Ins. Co. of New York v. Murdock, C.C.A. Ark., 72 F.2d 292.
Ala.—Huckaby v. McConnon & Co., 105 So. 886, 213 Ala. 631.
Ark.—Knight v. American Ins. Union, 288 S.W. 395, 172 Ark. 303.
Cal.—Larimer v. Smith, 19 P.2d 825, 130 Cal.App. 98.
Ill.—Schneider v. Neubert, 226 Ill. App. 84.
Iowa.—Butman v. Christy, 198 N.W. 314, 197 Iowa 661.
Kan.—Hewett v. Gott, 294 P. 897, 132 Kan. 168.
La.—Thom v. Thom, 117 So. 750, 166 La. 648.
Mo.—Gosney v. Costigan, 33 S.W.2d 947, 326 Mo. 1215.
N.H.—Richardson v. Boston & M. R. R., 117 A. 733, 80 N.H. 370.
R.I.—Dawley v. Congdon, 105 A. 393, 42 R.I. 64.
S.D.—Huwe v. Moulton, 203 N.W. 457, 48 S.D. 205, reversed on other grounds 211 N.W. 453, 50 S.D. 588.
Tenn.—McDonald v. Baldwin, App., 148 S.W.2d 385.
Tex.—Cochran v. William M. Rice Institute for Advancement of Literature, Science and Art, Civ.App., 123 S.W.2d 359, error refused—Hanover Fire Ins. Co. v. Slaughter, Civ.App., 111 S.W.2d 362—Houston & T. C. R. Co. v. Clement Grain Co., Civ.App., 295 S.W. 234—Hart v. Associated Oil Co., Civ. App., 261 S.W. 506, reversed on other grounds Associated Oil Co. v. Hart, Com.App., 277 S.W. 1043—W. T. Rawleigh Co. v. Lemon, Civ. App., 247 S.W. 683.
Wash.—In re Auritt's Estate, 27 P. 2d 713, 175 Wash. 303—Brown v. Jones, 273 P. 194, 150 Wash. 449—Swingley v. Daniels, 212 P. 729, 123 Wash. 409.
22 C.J. p 1066 note 40 [1].

Evidence not sufficient to show correctness of purported copy.
Ill.—Stevens v. Illinois Cent. R. Co., 137 N.E. 859, 306 Ill. 370.
Kan.—Ritchie v. Metropolitan Life Ins. Co., 66 P.2d 622, 145 Kan. 525.
Mo.—Johnson v. Wabash Ry. Co., App., 251 S.W. 719.
Tenn.—Dushan v. Metropolitan Life Ins. Co., 14 Tenn.App. 422.
22 C.J. p 1066 note 40 [1].

41. Ga.—Roughton v. Roughton, 173 S.E. 673, 178 Ga. 367—Trice v. Adams, 125 S.E. 878, 33 Ga.App. 257.
Mich.—Baroda State Bank v. Peck, 209 N.W. 827, 235 Mich. 542.

Omission of signature from copy is not a fatal defect.
Me.—Osher v. Frangedakis, 174 A. 264, 133 Me. 512.
Md.—Anderson v. Stewart, 70 A. 228, 108 Md. 340.
Tex.—Hart v. Associated Oil Co., Civ.App., 261 S.W. 506, reversed on other grounds Associated Oil Co. v. Hart, Com.App., 277 S.W. 1043.

42. Ark.—Knight v. American Ins. Union, 288 S.W. 395, 172 Ark. 303.
Kan.—Hewett v. Gott, 294 P. 897, 132 Kan. 168.
22 C.J. p 1066 note 40, p 1067 note 41.

Any person who has seen original writing, and compared it with copy, is competent witness to prove authenticity of copy.—Brenner v. Lesher, 2 A.2d 731, 332 Pa. 522.

43. Pa.—Krise v. Neason, 66 Pa. 253.
22 C.J. p 1067 note 42.

44. Or.—Tenny v. Mulvaney, 9 Or. 405.

45. N.J.—Rice v. Rice, Ch., 25 A. 321.
22 C.J. p 1067 note 44.

shown by any competent witness.[46]

A witness will not, however, be permitted to testify as to the correctness of a copy when he did not make the copy and has not compared it or verified it in any way except by his recollection of having seen or written the original a long time before.[47] Mere proof of the handwriting of the copyist is insufficient,[48] unless the copy is a facsimile, as in the case of a letterpress copy, in which case the handwriting of the copy is indisputably that of the person who wrote the original.[49] Where there is some evidence introduced to show that the writing offered as a copy of the original is a true copy thereof, the writing is admissible and the question whether it is in fact a true copy is for the jury,[50] although where the document is the foundation of the action more strictness in the proof is required than where the document is only collaterally involved.[51]

Affording opportunity to verify copy. An opportunity to verify the correctness of the copy must, under some statutes, be afforded to the party against whom the copy is to be used.[52]

Possession of original by adverse party. Where the adverse party has the original and may thus detect any incorrectness of the copy, strict proof of accuracy may be dispensed with.[53]

Proving incorrectness of copy. Where a party introduces in evidence a certified copy of a public record, it has been held that he cannot show by parol that the copy is incorrect in any particular.[54] However, it is generally held that, where an original deed has been lost and a certified copy of the record thereof is introduced in evidence, it may be shown that the copy is not in fact a true copy,[55] although it has been considered that the record itself must be produced.[56]

XX. PAROL OR EXTRINSIC EVIDENCE AFFECTING WRITINGS

A. IN GENERAL

§ 851. Rule Stated

It is a general rule that parol or extrinsic evidence is not admissible to add to, subtract from, vary, or contradict judicial or official records or documents, or written instruments which dispose of property, or are contractual in nature and which are valid, complete, unambiguous, and unaffected by accident or mistake. This rule, which is known as the parol evidence rule, is one of substantive law and not merely one of evidence; and it obtains in equity as well as at law.

It is a well established rule of the common law, which has been embodied in statutes in a number of states, that when any judgment of any court, or any other judicial or official proceeding, or any grant or other disposition of property, or any contract, agreement, or undertaking has been reduced to writing, and is evidenced by a document or series of documents, the contents of such documents cannot be contradicted, altered, added to, or varied by parol or extrinsic evidence.[57] This rule, which is

46. Ill.—Lombard v. Johnson, 76 Ill. 599.
Tenn.—Terry v. Wood, 7 Baxt. 292.
Correctness of photographic representation may be shown by any witness who is competent to speak from personal observation and knowledge, and need not be made by the photographer who took it.—Nebraska State Bank of Republican City v. Walker, 196 N.W. 128, 111 Neb. 203.

47. Ind.—Hottenstein v. Hottenstein, 133 N.E. 489, 191 Ind. 460.

48. N.J.—Wills v. McDole, 5 N.J. Law 589.
N.Y.—Brewster v. Countryman, 12 Wend. 446.

49. Minn.—Smith v. Moorhead Mfg. Co., 23 Minn. 141.

50. Mich.—Burrill v. Wilcox Lumber Co., 32 N.W. 824, 65 Mich. 571.
Pa.—Pittsburgh & W. R. Co. v. Equitable Real Estate Co., 88 Pittsb. L.J. 417.
22 C.J. p 1067 note 50.
Whether writing is copy of copy
Where a witness testifies of his own knowledge that the paper is in fact a true copy of the original, it should be admitted; and the question whether the evidence shows it to be a copy of the original or simply a copy of a copy is for the jury to determine.—Fowler v. Hoffman, 31 Mich. 215.
22 C.J. p 1067 note 49.

51. Mo.—Scrivner v. American Car & Foundry Co., 50 S.W.2d 1001, 330 Mo. 408.
N.J.—Rice v. Rice, Ch., 25 A. 321.

52. Ill.—Wyman v. Chicago, 98 N.E. 266, 254 Ill. 202.

53. Ind.—State Bank v. Ensminger, 7 Blackf. 105.
22 C.J. p 1067 note 53.

54. Iowa.—Monk v. Corbin, 12 N.W. 571, 58 Iowa 503.

55. U.S.—Booth v. Tiernan, Ill., 3 S.Ct. 122, 109 U.S. 205, 27 L.Ed. 907.
22 C.J. p 1067 note 56.

56. Ga.—Georgia R. & Banking R. Co. v. Hamilton, 59 Ga. 171.

57. U.S.—In re Tomarchio, D.C.Mo., 269 F. 400.
Ala.—Pieme v. Arata, 80 So. 811, 202 Ala. 427.
Mo.—Hudler v. Muller, 55 S.W.2d 419, 421, citing **Corpus Juris**—German Evangelical B. Church of Concordia v. Reith, 39 S.W.2d 1057, 1064, 327 Mo. 1098, citing **Corpus Juris.**
Neb.—Theno v. National Assur. Corporation, 276 N.W. 375, 377, 133 Neb. 618, citing **Corpus Juris.**
Or.—Marks v. Twohy Bros. Co., 194 P. 675, 679, 98 Or. 514, citing **Corpus Juris.**
R.I.—Kuzoian v. Jaffa, 161 A. 130, 131, 52 R.I. 367, citing **Corpus Juris.**
Wyo.—Holly Sugar Corporation v. Fritzler, 296 P. 206, 215, 42 Wyo. 446, citing **Corpus Juris.**
22 C.J. p 1070 note 34.
Parol admission
(1) Party's parol admission is inadmissible to contradict documentary proof or take place of existing record evidence.—Murphy v. Craig, C.C.A.Ariz., 28 F.2d 963.

(2) It is inadmissible to prove or disprove written record title to realty.—City of Oneida v. Drake, 232 N.Y.S. 248, 133 Misc. 382.

known and referred to as the parol evidence rule,[58] is commonly stated in briefer form and narrower terms to the effect that parol or extrinsic evidence is not admissible to affect, contradict, vary, modify, add to, or subtract from a written instrument.[59] Another common statement, set out below in § 901,

58. U.S.—Bertelsen & Petersen Engineering Co. v. U. S., C.C.A.Mass., 60 F.2d 745, vacating, D.C., 49 F.2d 395—In re Tomarchio, D.C.Mo., 269 F. 400.
Cal.—In re Gaines' Estate, 100 P.2d 1055, 15 Cal.2d 255, superseding, App., 92 P.2d 646—Nourse v. Kovacevich, App., 109 P.2d 999—Gore v. Bingaman, 85 P.2d 172, 29 Cal. App.2d 460—Fogler v. Purkiser, 16 P.2d 305, 127 Cal.App. 554.
Fla.—Knabb v. Reconstruction Finance Corporation, 197 So. 707—Milton v. Burton, 84 So. 147, 79 Fla. 266.
Ill.—Air Conditioning Corporation v. Honaker, 16 N.E.2d 153, 296 Ill. App. 221.
Iowa.—Graves v. Greenfiel, 195 N.W. 252, 196 Iowa 696.
Mass.—Kesslen Shoe Co. v. Philadelphia Fire & Marine Ins. Co., 3 N.E.2d 257, 295 Mass. 123.
Neb.—Theno v. National Assur. Corporation, 276 N.W. 375, 133 Neb. 618.
N.H.—Steinfield v. Monadnock Mills, 123 A. 224, 81 N.H. 152.
N.Y.—Higgs v. De Maziroff, 189 N.E. 555, 263 N.Y. 473, 92 A.L.R. 807, reversing 262 N.Y.S. 974, 238 App. Div. 828, reargument denied 263 N.Y.S. 944, 239 App.Div. 780—Traders' Nat. Bank of Rochester v. Laskin, 144 N.E. 784, 238 N.Y. 535, reversing 201 N.Y.S. 728, 207 App. Div. 18, amendment of remittitur denied 147 N.E. 172, 239 N.Y. 507—Merchant's Nat. Bank of Plattsburgh v. R. Prescott & Son, 249 N.Y.S. 6, 139 Misc. 603, affirmed 257 N.Y.S. 900, 235 App.Div. 878, reargument denied 258 N.Y.S. 1016, 236 App.Div. 764.
Okl.—Investors Royalty Co. v. Lewis, 91 P.2d 764, 185 Okl. 302.
Pa.—Architectural Tile Co. v. McSorley, 166 A. 913, 311 Pa. 299.
R.I.—Kuzoian v. Jaffa, 161 A. 130, 52 R.I. 367.
S.D.—Janssen v. Tusha, 287 N.W. 501, 66 S.D. 604.
Tenn.—McQuiddy Printing Co. v. Hirsig, 134 S.W.2d 197, 23 Tenn. App. 434.
Tex.—Texas & Pac. Ry. Co. v. Cassaday, Civ.App., 148 S.W.2d 471, error dismissed, judgment correct—Williamson v. Diltz, Civ.App., 101 S.W.2d 833, error dismissed—Tackett v. Cunningham, Civ. App., 91 S.W.2d 965.
Utah.—Garrett v. Ellison, 72 P.2d 449, 93 Utah 184, 129 A.L.R. 666.
Vt.—F. N. Phillips Co. v. Gay's Express, 20 A.2d 102, 112 Vt. 49—O'Brien v. Holden, 160 A. 192, 104 Vt. 338.
Wash.—McGregor v. First Farmers'-Merchants' Bank & Trust Co., 40 P.2d 144, 180 Wash. 440—Andersonian Inv. Co. v. Wade, 184 P. 327, 108 Wash. 373.
Wis.—Tees v. Lee, 291 N.W. 792, 234 Wis. 607.

59. U.S.—Bernheimer v. First Nat. Bank, C.C.A.Cal., 78 F.2d 139, certiorari denied 56 S.Ct. 172, 296 U.S. 639, 80 L.Ed. 454—Kendrick v. Speck, C.C.A.N.C., 67 F.2d 295—Dry Ice Corporation of America v. Josephson, D.C.N.Y., 43 F.2d 408—The Jacob Luckenbach, D.C.La., 36 F.2d 381—Brown v. New York Life Ins. Co., D.C.S.C., 22 F.Supp. 82, reversed on other grounds New York Life Ins. Co. v. Brown, 99 F.2d 199, certiorari denied Brown v. New York Life Ins. Co., 59 S.Ct. 487, 306 U.S. 638, 83 L.Ed. 1039.
Ariz.—Cashion v. Bank of Arizona, 245 P. 360, 30 Ariz. 172.
Cal.—In re Watterson's Estate, 20 P.2d 772, 130 Cal.App. 741.
Colo.—Bradley v. Blattman, 291 P. 1034, 88 Colo. 58.
D.C.—Lippincott v. Kerr, 40 F.2d 802, 59 App.D.C. 290.
Fla.—Peplax Medicine Co. v. Tampa Drug Co., 102 So. 632, 88 Fla. 473.
Iowa.—Cox v. Fleisher Const. Co., 223 N.W. 521, 208 Iowa 458.
Kan.—Lamphear v. McLean, 10 P.2d 889, 135 Kan. 266.
Me.—Bar Harbor & Union River Power Co. v. Foundation Co., 149 A. 801, 129 Me. 81.
Mass.—Brooks v. Bennett, 177 N.E. 685, 277 Mass. 8—Downey v. Levenson, 142 N.E. 85, 247 Mass. 358.
Mich.—Hanson v. Fletcher Auto Sales Co., 214 N.W. 187, 239 Mich. 118.
Minn.—Taylor v. More, 263 N.W. 537, 195 Minn. 448.
Miss.—Jeffery v. Jeffery, 127 So. 296, 157 Miss. 187.
Mo.—State ex rel. W. L. Morrison Inv. Co. v. Trimble, 256 S.W. 171, 301 Mo. 146, quashing certiorari Sandbrook v. W. L. Morrison Inv. Co., 239 S.W. 543, 209 Mo.App. 600—Samuel Haas Trimmed Hat Co. v. Service Ass'n, 297 S.W. 129, 222 Mo.App. 307.
Neb.—Theno v. National Assur. Corporation, 276 N.W. 375, 377, 133 Neb. 618, citing **Corpus Juris.**
N.J.—Paruch v. Rasiewicz, 12 A.2d 141, 124 N.J.Law 356—Trenton Banking Co. v. Howard, Ch., 187 A. 569, affirmed 187 A. 575, 121 N.J.Eq. 85.
N.Y.—McCarthy v. Krebs Pigment & Chemical Co., 194 N.Y.S. 138, 118 Misc. 566.
N.C.—Dawson v. Wright, 181 S.E. 264, 208 N.C. 418.
S.C.—Henderson v. Rice, 158 S.E. 258, 160 S.C. 307—Hart v. Harrison, 152 S.E. 17, 155 S.C. 147—Carter v. American Fruit Growers, 134 S.E. 292, 136 S.C. 389.
Tenn.—Hammer v. American United Life Ins. Co., App., 141 S.W.2d 501.
Tex.—South Texas Implement & Machine Co. v. Anahuac Canal Co., Com.App., 280 S.W. 521, affirming South Texas Implement & Machinery Co. v. Anahuac Canal Co., Civ. App., 269 S.W. 1097—Texas & Pac. Ry. Co. v. Cassaday, Civ.App., 148 S.W.2d 471, error dismissed, judgment correct—Daggett v. Wolff, Civ.App., 44 S.W.2d 1063—McGraw v. Merchants' & Planters' Nat. Bank, Civ.App., 34 S.W.2d 633, error refused.
Utah.—Last Chance Ranch Co. v. Erickson, 25 P.2d 952, 82 Utah 475—Penn Star Mining Co. v. Lyman, 231 P. 107, 64 Utah 343—Hansen v. Greenleaf, 218 P. 969, 62 Utah 168.
Va.—Jones v. Franklin, 168 S.E. 753, 160 Va. 266—Mathieson Alkali Works v. Virginia Banner Coal Corporation, 136 S.E. 673, 147 Va. 125.
Wash.—Webb McDonald Tractor & Equipment Co. v. Coyle, 63 P.2d 475, 188 Wash. 658—Clise v. Scott, 38 P.2d 1019, 180 Wash. 207—Brewster District Unit v. Monroe, 200 P. 841, 117 Wash. 21.
Wis.—Darling & Co. v. Frank Carter Co., 242 N.W. 519, 208 Wis. 222.

Sealed or unsealed instruments

The rule excluding parol evidence which varies or contradicts the terms of a written instrument, although it originated with reference to sealed instruments, has been universally extended to unsealed instruments also.—Whitaker & Fowle v. Lane, 104 S.E. 252, 128 Va. 317, 11 A.L.R. 1157.

Extrinsic utterances

(1) The parol evidence rule excludes extrinsic utterances when it is sought to use those utterances for the purpose for which the writing was made which has superseded them as the legal act.—Garrett v. Ellison, 72 P.2d 449, 93 Utah 184, 129 A.L.R. 666.

(2) The rule that parol evidence is not to be received to vary the terms of a written instrument excludes all previous and contemporaneous declarations, conversations, and interlocutions of the parties.
Okl.—W. T. Rawleigh Co. v. Cate, 38 P.2d 940, 170 Okl. 38.
W.Va.—Watson v. Buckhannon River Coal Co., 120 S.E. 390, 95 W.Va. 164.

deals with the most usual application of the rule, namely, its application to contracts. Furthermore, in view of the numerous important limitations of, and exceptions to, the rule, which are stated and discussed in §§ 929-1015 infra, the rule is sometimes stated in terms which exclude the application of some of these limitations and exceptions. As so stated, the rule is that parol evidence is inadmissible to vary, alter, or contradict a written instrument where the instrument is complete,[60] unambiguous,[61] and valid,[62] or there is no fraud, accident, or mistake, or claim or allegation thereof, in respect of the instrument.[63]

Negotiations between parties before signing written instrument cannot change or vary its terms, such negotiations being merged in writing.
Mich.—National Cash Register Co. v. Hosier, 232 N.W. 177, 251 Mich. 403.
S.C.—Simon v. Ætna Casualty & Surety Co., 148 S.E. 648, 151 S.C. 44.

Admissions are no more competent than other evidence when offered for the purpose of contradicting written instruments.—Metropolitan Life Ins. Co. v. Hogan, C.C.A. Ill., 63 F.2d 654.

Presumption
Written instrument is presumably intended to represent entire transaction on matters dealt with in writing, and parol evidence as to subject or elements so covered is inadmissible.
Mont.—Continental Oil Co. v. Bell, 21 P.2d 65, 94 Mont. 123—Hosch v. Howe, 16 P.2d 699, 92 Mont. 405.
Pa.—Nelly v. Diskin, 173 A. 735, 113 Pa.Super. 249.

Inference from parol evidence may not vary a written instrument, since parol evidence may not.—Strike v. White, 63 P.2d 600, 91 Utah 170.

60. Fla.—Bond v. Hewitt, 149 So. 606, 111 Fla. 180—Florida Moss Products Co. v. City of Leesburg, 112 So. 572, 93 Fla. 656.
Ky.—Eigelbach v. Roppel, 92 S.W.2d 764, 263 Ky. 604—Kirchdorfer v. Watkins, 248 S.W. 251, 198 Ky. 69.
Mich.—Gardner v. City Nat. Bank & Trust Co., 255 N.W. 587, 267 Mich. 270.
Miss.—Allen v. Allen, 168 So. 658, 175 Miss. 735.
Vt.—O'Brien v. Holden, 160 A. 192, 104 Vt. 338.

61. Ark.—Reuter Milling Co. v. McKinney, 278 S.W. 963, 170 Ark. 84.
Fla.—Bond v. Hewitt, 149 So. 606, 111 Fla. 180—Florida Moss Products Co. v. City of Leesburg, 112 So. 572, 93 Fla. 656.
La.—McQueen v. Palmer, App., 155 So. 264.
Mich.—Paul v. University Motor Sales Co., 278 N.W. 714, 283 Mich. 587—Gardner v. City Nat. Bank & Trust Co., 255 N.W. 587, 267 Mich. 270.
Miss.—Allen v. Allen, 168 So. 658, 175 Miss. 735.
N.J.—Collins Realty Co. v. Sale, 144 A. 585, 104 N.J.Eq. 138—Platt v. Currie, 135 A. 808, 100 N.J.Eq. 543.
Tex.—United North & South Oil Co. v. Tiller, Civ.App., 283 S.W. 676.
Utah.—Fox Film Corporation v. Ogden Theatre Co., 17 P.2d 294, 82 Utah 279, 90 A.L.R. 1299.
Vt.—O'Brien v. Holden, 160 A. 192, 104 Vt. 338.

Plain, definite, and unambiguous written instrument
U.S.—Lincoln Nat. Life Ins. Co. v. Bastian, C.C.A.W.Va., 31 F.2d 859.
Cal.—Shelley v. Hart, 297 P. 82, 112 Cal.App. 231.
Iowa.—Dunn v. Dunn, 258 N.W. 695, 219 Iowa 349—Dolan v. Danbury State Bank, 223 N.W. 400, 207 Iowa 597.
Okl.—Kilpatrick v. Plummer, 291 P. 501, 145 Okl. 117.

Instrument containing clear and definite language
N.Y.—Duffield & Co. v. Ellsworth, 255 N.Y.S. 716, 143 Misc. 40.

Plain provisions
Parol evidence cannot be given effect to vary or destroy plain provisions of written obligation.—Tackett v. Cunningham, Tex.Civ.App., 91 S.W.2d 965.

Intention derivable from instrument itself
If intention of parties to written instrument can be gathered or derived from instrument, its terms cannot be contradicted or varied by parol evidence.—Moore v. Wooten, Tex.Com.App., 280 S.W. 742, reversing, Civ.App., 265 S.W. 210, and rehearing denied, Com.App., 283 S.W. 153—Mathews v. Myers, Tex.Civ.App., 42 S.W.2d 1099.

Presumption
Writing, unless uncertain or ambiguous, is conclusively presumed to speak for itself.—Fraters Glass & Paint Co. v. Southwestern Const. Co., 254 P. 1097, 200 Cal. 688.

62. U.S.—Lighting Fixture Supply Co. v. Fidelity Union Fire Ins. Co., C.C.A.La., 55 F.2d 110, certiorari denied 52 S.Ct. 641, 286 U.S. 558, 76 L.Ed. 1292—Etna Forge & Bolt Co. v. Youngstown Sheet & Tube Co., C.C.A.Pa., 282 F. 786.
Ill.—Linn v. Clark, 128 N.E. 824, 295 Ill. 22.
Ky.—Staverson v. Kentucky Utilities Co., 287 S.W. 890, 216 Ky. 309.
Wash.—Smith v. Johnson, 98 P.2d 312, 2 Wash.2d 351.

Parol evidence rule presupposes existence of valid writing.—Bell v. Mulkey, Tex.Civ.App., 7 S.W.2d 115, affirmed, Com.App., 16 S.W.2d 287.

Genuine obligation
A man cannot impeach his genuine written obligation by his own uncorroborated testimony.—Greer v. Miller-Buick, 53 York Leg.Rec., Pa., 123.

63. U.S.—Harding v. Taubel, C.C.A. Pa., 1 F.2d 614—Second Nat. Bank v. Columbia Trust Co., C.C.A.N.J., 288 F. 17, 30 A.L.R. 1299—Etna Forge & Bolt Co. v. Youngstown Sheet & Tube Co., C.C.A.Pa., 282 F. 786.
Ga.—Smith v. Lawrence, 99 S.E. 536, 23 Ga.App. 795.
Iowa.—Banwart v. Shullenburg, 180 N.W. 190, 190 Iowa 418.
Ky.—Eigelbach v. Roppel, 92 S.W.2d 764, 263 Ky. 604—Kirchdorfer v. Watkins, 248 S.W. 251, 198 Ky. 69.
La.—McQueen v. Palmer, App., 155 So. 264.
Miss.—Allen v. Allen, 168 So. 658, 175 Miss. 735.
Or.—Kight v. Orchard-Hays, 275 P. 682, 128 Or. 668.
Pa.—Hein v. Fetzer, 152 A. 388, 301 Pa. 403—U. S. Nat. Bank of Johnstown v. Evans, 146 A. 126, 296 Pa. 541—Cain v. Marick, 91 Pa.Super. 129—Peerless Roofing & Siding Corporation v. Bryson, 29 Del.Co 448—Anderson v. Cohen, 27 Del. Co. 364.
Tex.—Von Hatzfeld v. Haubert, Civ. App., 224 S.W. 220.

Absence of fraud, surprise, or mistake
N.J.—Collins v. Sale, 144 A. 585, 104 N.J.Eq. 138—Platt v. Currie, 135 A. 808, 100 N.J.Eq. 543.
Tex.—United North & South Oil Co. v. Tiller, Civ.App., 283 S.W. 676.
Utah.—Fox Film Corporation v. Ogden Theatre Co., 17 P.2d 294, 82 Utah 279, 90 A.L.R. 1299.

Absence of fraud, error, or duress
La.—Hart v. Hart, 3 La.App. 622.

Absence of fraud or mutual mistake of fact
Wash.—Farmers' State Bank of Newport v. Lamon, 231 P. 952, 132 Wash. 369, 42 A.L.R. 1072.

Fraud or error not pleaded
La.—Giefers v. Negri, 2 La.App. 156.

Fraud or want of consideration not charged
N.Y.—Yager v. Ajax Chemical & Surgical Commodities, 204 N.Y.S. 467, 122 Misc. 561.

The parol evidence rule is a reasonable[64] and most salutary[65] one, and it should be strictly adhered to.[66] It is founded on experience[67] and created by necessity;[68] and it is designed to give certainty to a transaction which has been reduced to writing by protecting the parties against the doubtful veracity of interested, and the uncertain memory of disinterested, witnesses.[69] The rule is founded on the long experience that written evidence is so much more certain and accurate than that which rests in fleeting memory only, that it would be unsafe, when parties have expressed the terms of their contract in writing, to admit weaker evidence to control and vary the stronger and to show that the parties intended a different contract from that expressed in the writing signed by them.[70] It is obvious that written instruments would soon come to be of little value if their explicit provisions could be varied, controlled, or superseded by parol evidence, and it is also plain that a different rule would greatly increase the temptations to commit perjury;[71] and courts have expressed regret that in their anxiety to avoid possible injustice in particular cases, they have been gradually construing away a principle[72] which has always been considered one of the greatest barriers against fraud and perjury.[73]

The rule obtains in equity as well as at law,[74] although courts of equity, largely because of their power to afford relief in cases of fraud, accident, or mistake, are rather more liberal than courts of law in receiving parol evidence[75] under the various limitations of, and exceptions to, the rule, see infra §§ 929–1015, and it is said that they apply or disregard the rule as the ends of justice require.[76]

Rule of substantive law or of evidence. It has been asserted that the rule under discussion is one of evidence merely.[77] However, according to the modern and better view, the parol evidence rule, as applied to contracts, is a rule, not of evidence or of evidence merely, but of substantive law,[78] it being considered that parol evidence is excluded be-

Assumption
Court, in absence of fraud, accident, or mistake, must assume that all essential features to carry out intention of parties were embodied in written instrument.—Yorkshire Worsted Mills v. Braman, 175 A. 726, 115 Pa.Super. 333.

64. Wis.—Tees v. Lee, 291 N.W. 792, 234 Wis. 607.

65. R.I.—Kuzoian v. Jaffa, 161 A. 130, 52 R.I. 367.

66. Pa.—Architectural Tile Co. v. McSorley, 166 A. 913, 311 Pa. 299.
22 C.J. p 1074 note 38.

67. Mo.—Fischman-Harris Realty Co. v. Kleine, App., 82 S.W.2d 605.

68. Mo.—Fischman-Harris Realty Co. v. Kleine, supra.

69. Wis.—Tees v. Lee, 291 N.W. 792, 234 Wis. 607.

70. Mass.—Underwood v. Simonds, 12 Metc. 275.
Or.—Marks v. Twohy Bros. Co., 194 P. 675, 679, 98 Or. 514, citing **Corpus Juris.**
Utah.—Garrett v. Ellison, 72 P.2d 449, 93 Utah 184, 129 A.L.R. 666.

71. Or.—Marks v. Twohy Bros. Co., 194 P. 675, 680, 98 Or. 514, citing **Corpus Juris.**
22 C.J. p 1074 note 39.

72. N.C.—Moffitt v. Maness, 9 S.E. 399, 102 N.C. 457.
Pa.—Rearick v. Rearick, 15 Pa. 66.
Tenn.—Richardson v. Thompson, 1 Humphr. 151.

73. U.S.—In re Tomarchio, D.C.Mo., 269 F. 400.
22 C.J. p 1074 note 40.

Object of rule is to prevent fraud and perjury by excluding evidence of written contract other than writing itself.—Choolgian v. Nordstrom, 150 A. 499, 111 Conn. 572.

74. U.S.—In re Tomarchio, D.C.Mo., 269 F. 400.
Mass.—Goldband v. Allen, 139 N.E. 834, 245 Mass. 143.
Minn.—Seifert v. Mutual Ben. Life Ins. Co., 281 N.W. 770, 203 Minn. 415.
22 C.J. p 1074 note 41.

Equity respects the parol evidence rule.—Graves v. Greenfiel, 195 N.W. 252, 196 Iowa 696.

Unambiguous sealed instrument
Where final agreement is written and under seal, and unambiguous, equity will not allow parties to vary it by extrinsic testimony.—Elam v. Ford, 134 S.E. 670, 145 Va. 536.

75. N.J.—Stoutenburgh v. Tompkins, 9 N.J.Eq. 332.
Va.—Trout v. Norfolk & W. R. Co., 59 S.E. 394, 107 Va. 576, 17 L.R.A., N.S., 702.

76. N.J.—Downs v. Jersey Central Power & Light Co., 170 A. 835, 115 N.J.Eq. 348, affirmed 174 A. 887, 117 N.J.Eq. 138.

77. W.Va.—Leckie v. Bray, 113 S.E. 746, 91 W.Va. 456.
22 C.J. p 1075 note 46.

78. Ariz.—Bradley v. Industrial Commission, 76 P.2d 745, 746, 51 Ariz. 291, citing **Corpus Juris.**
Cal.—In re Gaines' Estate, 100 P.2d 1055, 15 Cal.2d 255, superseding, App., 92 P.2d 646—Bank of America Nat. Trust & Savings Ass'n v. Pendergrass, 48 P.2d 659, 4 Cal. 2d 258—Nourse v. Kovacevich, App., 109 P.2d 999—Gore v. Bingaman, 85 P.2d 172, 29 Cal.App.2d 460—Fogler v. Purkiser, 16 P.2d 305, 127 Cal.App. 554—Russell v. Stillwell, 288 P. 785, 106 Cal.App. 88.
Conn.—Cohn v. Dunn, 149 A. 851, 111 Conn. 342, 70 A.L.R. 740.
Fla.—Knabb v. Reconstruction Finance Corporation, 197 So. 707.
Mass.—Kesslen Shoe Co. v. Philadelphia Fire & Marine Ins. Co., 3 N.E.2d 257, 295 Mass. 123—Western Newspaper Union v. Dittemore, 161 N.E. 908, 264 Mass. 74—Goldband v. Allen, 139 N.E. 834, 245 Mass. 143.
Minn.—Seifert v. Mutual Ben. Life Ins. Co., 281 N.W. 770, 203 Minn. 415.
Miss.—Edrington v. Stephens, 114 So. 387, 148 Miss. 583.
Neb.—Theno v. National Assur. Corporation, 276 N.W. 375, 133 Neb. 618.
N.Y.—Higgs v. De Maziroff, 189 N.E. 555, 263 N.Y. 473, 92 A.L.R. 807, reversing 262 N.Y.S. 974, 238 App. Div. 828, reargument denied 263 N.Y.S. 944, 239 App.Div. 780—Guinzburg v. Blustein, 202 N.Y.S. 333, 121 Misc. 784.
Okl.—Investors Royalty Co. v. Lewis, 91 P.2d 764, 766, 185 Okl. 302, citing **Corpus Juris.**
Or.—Marks v. Twohy Bros. Co., 194 P. 675, 680, 98 Or. 514, citing **Corpus Juris.**
Tenn.—McQuiddy Printing Co. v. Hirsig, 134 S.W.2d 197, 23 Tenn. App. 434—Wilson v. Wilson, 130 S.W.2d 140, 23 Tenn.App. 244.
Tex.—Great Nat. Life Ins. Co. v. Presley, Civ.App., 129 S.W.2d 730, error dismissed—Tackett v. Cunningham, Civ.App., 91 S.W.2d 965.
Vt.—F. N. Phillips Co. v. Gay's Express, 20 A.2d 102, 105, 112 Vt. 49, citing **Corpus Juris.**

cause the law requires the terms of the agreement to be found in the writing itself[79] and not because of any reasons which ordinarily require the exclusion of evidence, such as some policy against its admission, or its untrustworthiness or lack of probative value.[80] While it has been declared to be of minor importance whether the rule is one of substantive law or of evidence,[81] it would seem to be otherwise where, in accordance with the view that the rule is one of substantive law, it is considered, as it sometimes is, that evidence properly falling within the inhibition of the rule does not become admissible merely no objection is made thereto[82] and that, although it is admitted without objection, it should be disregarded, see the C.J.S. title Trial § 154, also 64 C.J. p 230 note 68, and error in the admission thereof may be complained of on appeal, see Appeal and Error § 290 a. Waiver of the benefit of the rule is considered in § 863 infra.

It has been said that the parol evidence rule is a rule of interpretation or construction;[83] but it has also been stated that, although the rule operates to limit the evidence from which interpretive inferences may be drawn,[84] it is not, of itself, a rule of interpretation.[85]

While the rule does not depend on,[86] it is analogous to,[87] and rests on substantially the same principle,[88] as the statute of frauds.

It has asserted, on the one hand, that the rule does not depend on the doctrine of estoppel[89] and, on the other hand, that, as applied to contracts,[90] it rests basically on estoppel.[91]

§ 852. Legal Effect of Instrument

Parol or extrinsic evidence is not admissible to defeat, modify, or vary the legal effect of a written instrument.

The legal effect of a written instrument, even though not apparent from the terms of the instrument itself, but left to be implied by law, can no more be contradicted, defeated, modified, varied, explained, or controlled by parol or extrinsic evidence than if such effect had been expressed,[92] especially

Wash.—McGregor v. First Farmers'-Merchants' Bank & Trust Co., 40 P.2d 144, 180 Wash. 440—Andersonian Inv. Co. v. Wade, 184 P. 327, 108 Wash. 373.
22 C.J. p 1075 note 50.

In Missouri

(1) There is authority in support of the text.—Sol Abrahams & Son Const. Co. v. Osterholm, Mo.App., 136 S.W.2d 86.

(2) But in an earlier case it is said that the parol evidence rule is only a rule of evidence.—Fischman-Harris Realty Co. v. Kleine, Mo. App., 82 S.W.2d 605.

79. Cal.—Nourse v. Kovacevich, App., 109 P.2d 999.
N.Y.—Guinzburg v. Blustein, 202 N.Y.S. 333, 121 Misc. 784.

Broader statement of rule

The parol evidence rule is a rule of substantive law, because it deals with the question of where and in what sources and materials are to be found the terms of a legal act.
Fla.—Milton v. Burton, 84 So. 147, 79 Fla. 266.
N.H.—Steinfield v. Monadnock Mills, 123 A. 224, 81 N.H. 152.

80. Cal.—In re Gaines' Estate, 100 P.2d 1055, 15 Cal.2d 255, superseding, App., 92 P.2d 646—Nourse v. Kovacevich, App., 109 P.2d 999.
Vt.—F. N. Phillips Co. v. Gay's Express, 20 A.2d 102, 112 Vt. 49.

81. N.Y.—McCarthy v. Krebs Pigment & Chemical Co., 194 N.Y.S. 138, 118 Misc. 566.

82. Wash.—McGregor v. First Farmers'-Merchants' Bank & Trust Co., 40 P.2d 144, 180 Wash. 440.

83. Ill.—Air Conditioning Corporation v. Honaker, 16 N.E.2d 153, 296 Ill.App. 221.

84. S.D.—Janssen v. Tusha, 287 N.W. 501, 66 S.D. 604.

85. Tenn.—McQuiddy Printing Co. v. Hirsig, 134 S.W.2d 197, 23 Tenn. App. 434.

86. U.S.—Reid v. Diamond Plate-Glass Co., Mich., 85 F. 193, 29 C.C.A. 110.
Md.—Wesley v. Thomas, 6 Harr. & J. 24.

87. U.S.—Union Mut. Ins. Co. v. Wilkinson, Iowa, 13 Wall. 222, 20 L.Ed. 617.

88. U.S.—Reid v. Diamond Plate-Glass Co., Mich., 85 F. 193, 29 C.C.A. 110.

89. N.C.—Wilkinson v. Wilkinson, 17 N.C. 376.

90. U.S.—Bertelsen & Petersen Engineering Co. v. U. S., C.C.A.Mass., 60 F.2d 745, vacating, D.C., 49 F. 2d 395.

91. U.S.—Root v. John T. Robinson Co., D.C.Mass., 55 F.2d 303.

92. Ark.—Fullerton v. Storthz, 33 S.W.2d 714, 182 Ark. 751.
Cal.—Calpetro Producers' Syndicate v. Charles M. Woods Co., 274 P. 65, 206 Cal. 246—La France v. Kashishian, 269 P. 655, 204 Cal. 643—Janssen v. Gordon, 96 P.2d 152, 35 Cal.App.2d 410—Wurdeman v. Waller, 263 P. 558, 88 Cal. App. 393—Blackledge v. McIntosh, 259 P. 770, 85 Cal.App. 475—Hamilton v. Consolidated Water Co. of Pomona, 204 P. 416, 56 Cal.App. 7.
Idaho.—Gramkow v. Farmers' Co-op. Irr. Co., 277 P. 431, 47 Idaho 578—Mahas v. Kasiska, 276 P. 315, 47 Idaho 179.
Ky.—First Nat. Bank of Hazard's Receiver v. Hignite, 43 S.W.2d 658, 659, 241 Ky. 276, quoting **Corpus Juris.**
Miss.—Mechanics State Bank v. Tuf-Nut Garment Mfg. Co., 188 So. 278, 185 Miss. 589—Divelbiss v. Jones, 144 So. 464, 164 Miss. 111—McGee, Dean & Co. v. Burt, 121 So. 847, 848, 153 Miss. 851, citing **Corpus Juris.**
Mo.—Baptiste Tent & Awning Co. v. Uhri, App., 129 S.W.2d 9—Stephens v. Bell, App., 106 S.W.2d 19—Ocean Accident & Guarantee Corporation v. Missouri Engineering & Contracting Co., App., 63 S.W.2d 196.
Neb.—Dawson County State Bank v. Durland, 209 N.W. 243, 114 Neb. 605.
Okl.—Foster v. Atlas Life Ins. Co., 6 P.2d 805, 809, 154 Okl. 30, quoting **Corpus Juris.**
Utah.—Ruthrauff v. Silver King Western Min. & Mill. Co., 80 P.2d 338, 342, 95 Utah 279, citing **Corpus Juris.**
Vt.—O'Brien v. Holden, 160 A. 192, 104 Vt. 338.
Va.—King v. Commercial Finance Co., 175 S.E. 733, 163 Va. 260.
Wash.—McGregor v. First Farmers'-Merchants' Bank & Trust Co., 40 P.2d 144, 180 Wash. 440.
Wyo.—Holly Sugar Corporation v. Fritzler, 296 P. 206, 215, 42 Wyo. 446, citing **Corpus Juris.**
22 C.J. p 1075 note 51.

where persons who were not present at its execution have acted on the instrument as legally construed.[93] However, it has been held that where a written contract is made in one state, to be performed in another, and it does not specify what law is to govern, parol evidence is admissible to show that it was intended that the law of the state where it was made should govern.[94]

§ 853. —— Time for Payment or Performance

Where a written contract does not specify the time for performance or payment, the law fixes the time and ordinarily parol evidence of an oral agreement for performance or payment at a particular time is inadmissible.

Where no time of performance is specified in a contract, the legal effect is that it is to be performed within a reasonable time, see Contracts § 503 a, and parol or extrinsic evidence is not admissible to show an agreement that it shall be performed at a particular time[95] or, as was held in the case of an affreightment contract, before navigation is officially declared closed for the season;[96] and, a fortiori, where a contract expressly provides for performance within a reasonable time, parol evidence to support a contention that the contract is to be performed within a specified time is not admissible.[97] So, also, where the contract provides for performance "as soon as possible" or uses other expressions which are construed to mean in a reasonable time, parol evidence of an inconsistent oral agreement is not admissible;[98] and where a contract allows a certain period for performance beginning on the date of its execution, but the day of the month is left blank, the time runs from the last day of the month and parol evidence that the contract was actually executed on a particular day of the month is inadmissible.[99] Under some circumstances, however, parol evidence concerning the time for performance of a written contract not stating such time may be received[1] on the theory that it does not alter, vary, contradict, or otherwise affect the writing, but merely throws light on the question as to what is a reasonable time,[2] and indicates what the parties, at the time of the execution of the contract, considered a reasonable time.[3]

The law fixes the time for payment where it is not otherwise fixed see Contracts § 503 d (1), and the C.J.S. title Payment § 5, also 48 C.J. p 592 notes 9, 10; and where a written contract fails to designate the time, ordinarily parol evidence is inadmissible to show an agreement as to the time for payment.[4]

As shown infra § 1013, parol evidence as to time for performance or payment may be admissible where the written contract is deemed incomplete and not expressive of the entire agreement of the parties.

Whether parol evidence is admissible to vary the time for payment or performance expressly stated in a written contract is considered infra § 901 dealing with contracts generally, infra § 895 dealing with notes, infra § 910 dealing with sales, and infra § 923 dealing with mortgages.

§ 854. —— Duration of Contract

The duration and termination of a written contract not specifying any time for its duration being governed by law, ordinarily parol evidence is not admissible to

Complete and unambiguous instrument

(1) The legal effect of a written instrument complete in itself and unambiguous in its terms cannot be changed by parol evidence.—Paul v. University Motor Sales Co., 278 N.W. 714, 283 Mich. 587.

(2) Parol agreement as to restriction in deed purporting to state whole agreement is inadmissible against covenantors not parties to parol agreement.—Kliem v. Sisters of Charity of St. Elizabeth, 139 A. 174, 101 N.J.Eq. 761.

93. Tex.—Rhine v. Blake, 59 Tex. 240.

94. Mo.—Davis v. Tandy, 81 S.W. 457, 107 Mo.App. 437.

95. Conn.—Cohn v. Dunn, 149 A. 851, 111 Conn. 342, 70 A.L.R. 740.
N.J.—Aboczky v. Stier, 18 A.2d 262, 126 N.J.Law 109—Marcus & Co. v. K. L. G. Baking Co., 3 A.2d 627, 122 N.J.Law 202.
S.C.—J. B. Colt Co. v. Hallman, 110 S.E. 462, 118 S.C. 404.
Vt.—Hayden v. Hoadley, 111 A. 343, 94 Vt. 345.
22 C.J. p 1076 note 55.

96. U.S.—Grammer S. S. Corporation v. James Richardson & Sons, C.C.A.N.Y., 47 F.2d 186, affirming, D.C., Grammer S. S. Co. v. James Richardson & Sons, 37 F.2d 366.

97. Mo.—Johnson v. Schuchardt, 63 S.W.2d 17, 333 Mo. 781, 89 A.L.R. 914.

98. Ill.—Ferguson v. Paulman, 226 Ill.App. 432.
Mo.—Guess v. Russell Bros. Clothing Co., App., 231 S.W. 1015.

99. La.—Reitzell v. Louisiana Central Lumber Co., 125 So. 307, 12 La.App. 464.

1. Pa.—Andre v. Andre, 187 A. 321, 123 Pa.Super. 597.

2. Iowa.—R. P. Andreas & Son v. Hempy, 276 N.W. 791, 795, 224 Iowa 561, citing **Corpus Juris.**
Mass.—Atwood v. Cobb, 16 Pick. 227, 26 Am.D. 657.

Evidence of understanding of parties
Okl.—Thomas v. Chapman, 249 P. 1104, 119 Okl. 249.

3. Ark.—American Historical Soc. v. Vestal, 74 S.W.2d 964, 189 Ark. 651.

One party
Evidence as to declarations and representations by party to contract, silent as to time of performance of work, as to what he considered reasonable time, is admissible, where it does purport to show that a specific time for performance had been agreed on by the parties.—Perth Amboy Dry Dock Co. v. Crawford, 135 A. 897, 103 N.J.Law 440.

4. U.S.—Inner Shoe Tire Co. v. Treadway, C.C.A.Tex., 286 F. 838.
Ala.—Miller Bros. v. Direct Lumber Co., 92 So. 473, 207 Ala. 338.
22 C.J. p 1076 note 56.

show an agreement or intent that such contract shall continue in force for, and only for, a particular period of time.

There are legal rules governing the duration and termination of a contract not specifying the time it shall remain in force, see Contracts § 398; and where such a contract is in writing, ordinarily parol evidence is not admissible to show an agreement or intent that the contract shall continue for, or be limited to, a particular period of time;[5] but it is otherwise, as shown infra § 1013, where the case is within the exception to the parol evidence rule which allows parol evidence of an omitted provision where the writing is incomplete and does not express the entire agreement of the parties.

§ 855. —— Medium or Source of Payment

Where a written engagement is made payable in money generally, the legal implication as to the medium of payment is controlling and parol evidence of an agreement inconsistent therewith is inadmissible.

Where an engagement is in general terms made payable in money, it is by legal implication payable in lawful money of the country, see the C.J.S. title Payment § 15, also 48 C.J. p 597 note 77, and parol evidence cannot be admitted to show an agreement that it should be paid in any other medium or manner,[6] or that payment should be made only out of some particular fund.[7]

§ 856. —— Compensation for Services

If the case is a proper one for the legal implication that a reasonable sum is to be paid for services where the contract of employment is silent as to the compensation to be paid, parol evidence of an agreement for a specific sum is not admissible.

Where a contract of employment is silent as to the compensation to be paid for the services the law implies a reasonable sum, see Contracts § 363, and parol evidence is not admissible to show an agreement for a specific sum;[8] but it is otherwise where the contract of employment shows on its face that it is not intended to regulate the subject of compensation, either expressly or by necessary implication.[9]

§ 857. —— Priority of Lien

The operation and effect of mortgages or other instruments in respect of equality or priority of lien may be confirmed, but not altered or varied, by parol evidence of agreement or intention.

The nature, operation, and effect of two mortgages securing the same debt or installments of the same debt, or of one mortgage securing several notes of the same series, cannot be altered or varied, in respect of equality or priority of lien, by parol evidence of a different agreement or intention;[10] but oral testimony is admissible to counteract any presumption as to subordination which might arise from a transfer by the mortgagee of part of the secured notes and retention of the remainder;[11] and it is also admissible to show that a person, before taking a mortgage not stating that it was a first lien, was informed and understood that it would be subordinate to a deed of trust expressly stating that it was a first lien.[12]

§ 858. —— Matters Excluded by Legal Implication

Oral evidence is not admissible to prove matters excluded from an instrument by necessary implication.

Parol evidence is not admissible to prove that which the terms of the instrument exclude by necessary implication. Expressio unius personæ vel rei est exclusio alterius, or, as the maxim is frequently stated, expressum facit cessare tacitum. In other words, where there is an express contract in writing, it is not competent to prove facts from which a different contract may be implied; other-

5. Mich.—Farmers' Co-op. Creamery Co. of Saranac v. Huhn, 216 N.W. 370, 241 Mich. 23.
Mo.—Ogden v. Atlas Brewing Co., App., 248 S.W. 644.
Okl.—Foster v. Atlas Life Ins. Co., 6 P.2d 805, 809, 154 Okl. 30, quoting **Corpus Juris**.
22 C.J. p 1076 note 60.

In New York

(1) There are decisions supporting the text.—Wightman v. New York Life Ins. Co., 104 N.Y.S. 214, 119 App.Div. 496—Eichenauer v. Rentz Candy Co., 88 N.Y.S. 260, 43 Misc. 151.

(2) But there are later decisions to the contrary.—Meltzer v. Kaminer, 227 N.Y.S. 459, 131 Misc. 813—Wilson v. Hitchcock, 174 N.Y.S. 673.

6. Cal.—McArthur v. Johnson, 15 P. 2d 151, 153, 216 Cal. 580, quoting **Corpus Juris**.
Ga.—Fuller v. Fuller, 152 S.E. 122, 41 Ga.App. 24.
Okl.—Summerall v. Covington Bros. Farm Loan & Inv. Co., 280 P. 584, 138 Okl. 142, citing **Corpus Juris**.
Va.—Rector v. Hancock, 102 S.E. 663, 127 Va. 101.
22 C.J. p 1076 note 62.

7. Cal.—McArthur v. Johnson, 15 P. 2d 151, 153, 216 Cal. 580, quoting **Corpus Juris**—Scatena v. Lawson, 273 P. 592, 95 Cal.App. 720.
Tex.—Peck & Hickernell v. Sanford & Dublin, Civ.App., 246 S.W. 719.
22 C.J. p 1077 note 63.

8. Kan.—Clark v. Townsend, 153 P. 555, 96 Kan. 650.
Mo.—Williams v. Kansas City Suburban Belt R. Co., 85 Mo.App. 103.
Corpus Juris is cited in a case which holds, however, that parol evidence is admissible to show an agreement or intention that no charge should be made for services.—Winslow v. Atz, 177 A. 272, 280, 168 Md. 230.

9. Ala.—Sayre v. Wilson, 5 So. 157, 86 Ala. 151.

10. Ala.—Booker v. Booker, 125 So. 212, 220 Ala. 367.
Iowa.—Isett v. Lucas, 17 Iowa 503, 85 Am.D. 572.
La.—Leonard v. Brooks, 105 So. 54, 158 La. 1032.

11. La.—Leonard v. Brooks, supra.

12. Tex.—Southwestern Public Service Co. v. Smith, Civ.App., 48 S. W.2d 456.

wise it would be necessary for the parties to every agreement to provide in terms that they are not to be bound by anything which is not expressly stipulated.[13]

§ 859. Proceedings in Which Rule Not Applicable

In some administration proceedings testimony may be received regardless of the parol evidence rule.

Where, in a proceeding for approval of the final report of an administrator, the probate court has all the matters in question before it and has the adjustment of all the rights of the parties involved under consideration, it may accept testimony regardless of the parol evidence rule.[14]

§ 860. —— Proceedings Directly Attacking Instrument

Parol evidence is admissible in a proceeding constituting a direct attack on a record or instrument.

The rule excluding parol or extrinsic evidence to alter or contradict a written instrument does not apply in a proceeding brought for the purpose of establishing that the writing does not truly express the intention of the parties,[15] as, for instance, an action for reformation, see the C.J.S. title Reformation of Instruments § 83, also 53 C.J. p 1029 note 1–p 1030 note 5; and in such a proceeding it may be shown that the instrument does not correctly express the intentions of the parties by reason of a mutual mistake,[16] or that it is tainted with fraud,[17] or was procured by the exercise of undue influence;[18] and this is true whether or not the contract is such as is required by the statute of frauds to be in writing.[19] Even on a direct attack, however, the court will not resort to extrinsic evidence for the purpose of reading into a writing terms and conditions other than those intended to be included therein by the parties.[20]

Corporate records may be varied by parol evidence when directly attacked for fraud.[21]

Where a judgment, order, or record of a judicial tribunal is directly attacked, as by motion to vacate or modify the judgment or order or correct the record, parol evidence of entry by mistake or inadvertence or of the falsity of a recital is admissible.[22]

§ 861. —— Controversies to Which Strangers to Writing Are Parties

The parol evidence rule does not apply, and may not properly be invoked by either party to the litigation against the other, where at least one of the parties to the suit is not a party or a privy of a party to the written instrument in question and does not base a claim on the instrument or assert a right originating in the instrument or the relation established thereby.

The rule excluding parol evidence to vary or contradict a written instrument applies in,[23] and only

13. U.S.—Standard Sanitary Mfg. Co. v. Arrott, Pa., 135 F. 750, 68 C.C.A. 388.
22 C.J. p 1077 note 67.

14. Iowa.—In re Oelwein's Estate, 251 N.W. 694, 217 Iowa 1137.

15. Fla.—Hartsfield v. Williams, 200 So. 220.
Miss.—Stone v. Grenada Grocery Co., 1 So.2d 229.
N.Y.—Hutchison v. Ross, 187 N.E. 65, 262 N.Y. 381, 89 A.L.R. 1007, affirming Ross v. Ross, 253 N.Y.S. 871, 233 App.Div. 626, which reversed 243 N.Y.S. 418, 137 Misc. 795, affirmed Hutchison v. Ross, 253 N.Y.S. 889, 233 App.Div. 516, and reargument denied 188 N.E. 102, 262 N.Y. 643, 89 A.L.R. 1023.
Ohio.—Blosser v. Enderlin, 148 N.E. 393, 113 Ohio St. 121.
Pa.—Pollow v. Henry L. Doherty & Co., 14 Pa.Dist. & Co. 293.
S.D.—Ulvilden v. Sorken, 237 N.W. 565, 58 S.D. 466, 82 A.L.R. 1209.
Tex.—Cawthon v. Cochell, Civ.App., 121 S.W.2d 414, error dismissed—Gooch v. Sparkman, Civ.App., 285 S.W. 897.
22 C.J. p 1291 note 64, p 1126 note 35.

16. Ark.—Sewell v. Umsted, 278 S.W. 36, 169 Ark. 1102.
Idaho.—Udelavitz v. Ketchen, 190 P. 1029, 33 Idaho 165.
Tex.—Jack W. Neal Auto Co. v. Serna, Civ.App., 259 S.W. 999.
Wis.—Badger Sav. Building & Savings Ass'n, 283 N.W. 466, 230 Wis. 145.
22 C.J. p 1291 note 66.

17. Neb.—Johnson v. Nebraska Bldg. & Inv. Co., 190 N.W. 590, 109 Neb. 235.
Tex.—Jack W. Neal Auto Co. v. Serna, Civ.App., 259 S.W. 999.
Wash.—Cooney v. Mossbach, 222 P. 893, 128 Wash. 427.
Wis.—Badger Sav. Building & Loan Ass'n v. Mutual Building & Savings Ass'n, 283 N.W. 466, 230 Wis. 145.
22 C.J. p 1291 note 67.

18. Cal.—Hick v. Thomas, 27 P. 208, 376, 90 Cal. 289.

19. Ill.—McLennan v. Johnston, 60 Ill. 306.

20. Cal.—Pascoe v. Morrison, 25 P. 2d 9, 219 Cal. 54.

21. Ky.—Martin v. Holian, 126 S.W. 2d 465, 277 Ky. 291.

22. Wash.—In re Teeters, 21 P.2d 1032, 173 Wash. 138.
22 C.J. p 1791 note 64 [b], [c].

23. U.S.—Pugh v. Commissioner of Internal Revenue, C.C.A., 49 F.2d 76, certiorari denied Pugh v. Burnet, 52 S.Ct. 22, 284 U.S. 642, 76 L. Ed. 546.
Ala.—Ex parte St. Paul Fire & Marine Ins. Co. of St. Paul, Minn., 184 So. 267, 268, 236 Ala. 543, citing **Corpus Juris**, and reversing 184 So. 265, 28 Ala.App. 351—American Book Co. v. State, 113 So. 592, 216 Ala. 367—Peters v. Pilcher, 100 So. 902, 211 Ala. 548.
Ark.—Barfield Mercantile Co. v. Connery, 234 S.W. 481, 150 Ark. 428.
Cal.—Seaboard Dairy Credit Corporation v. Herman, 33 P.2d 1042, 139 Cal.App. 320—Auditorium Co. v. Barsotti, 181 P. 413, 40 Cal.App. 592.
Iowa.—Willard Storage Battery Co. v. Palmer, 205 N.W. 976, citing **Corpus Juris**—Commercial Sav. Bank of Washington, Iowa, v. Colthurst, 191 N.W. 787, 195 Iowa 1032, denying rehearing 188 N.W. 844, 195 Iowa 1032.
La.—Fudickar v. Inabnet, 146 So. 745, 176 La. 777—White v. Machen, App., 178 So. 736.
Minn.—Geiger v. Sanitary Farm Dairies, 178 N.W. 501, 146 Minn. 235.
Miss.—Stone v. Grenada Grocery Co., 178 So. 107, 180 Miss. 566.
Mo.—Slaughter v. Sweet & Piper

in,[24] controversies between the parties to the instrument, their privies, representatives, or successors in interest, persons claiming under or through them, or persons claiming or asserting rights, interests, or benefits under the instrument or rights originating in the writing or the relation established thereby. It has no application in a controversy to which at least one of the parties is a stranger to the instrument,[25] whether the controversy is wholly be-

Horse & Mule Co., App., 259 S.W. 131.
N.H.—Stacy v. F. M. Hoyt Shoe Co., 141 A. 467, 83 N.H. 281.
N.Y.—County Trust Co. of New York v. Mara, 273 N.Y.S. 597, 242 App. Div. 206, affirmed 195 N.E. 190, 266 N.Y. 540—Merchants' Nat. Bank of Plattsburgh v. R. Prescott & Son, 249 N.Y.S. 6, 139 Misc. 603, affirmed 257 N.Y.S. 900, 235 App. Div. 878, reargument denied 258 N.Y.S. 1016, 236 App.Div. 764.
N.D.—State Bank of Ardock v. Burke, 208 N.W. 115, 53 N.D. 777.
Ohio.—Bowman v. Tax Commission of Ohio, 20 N.E.2d 916, 135 Ohio St. 295, affirming Bowman v. Tax Commission, 22 N.E.2d 524, 61 Ohio App. 163.
Pa.—Title Holding Co. v. Black, 159 A. 560, 306 Pa. 352—Crew Levick Co. v. Philadelphia Inv. Building & Loan Ass'n, 177 A. 498, 117 Pa. Super. 397.
Tex.—Peters v. Lerew, Civ.App., 139 S.W.2d 321, error dismissed, judgment correct—Williamson v. Diltz, Civ.App., 101 S.W.2d 833, error dismissed—Daggett v. Corn, Civ.App., 54 S.W.2d 1098, 1101, error refused, citing **Corpus Juris**—Long Bell Lumber Co. v. Futch, Civ.App., 20 S.W.2d 1076, error refused.
Utah.—Garrett v. Ellison, 72 P.2d 449, 93 Utah 184, 129 A.L.R. 666.
22 C.J. p 1294 notes 88, 90.

Suit on instrument

Oral evidence is not admissible to vary the terms of the instrument on which suit is brought.
Ala.—Crescent Brewing Co. v. Handley, 7 So. 912, 90 Ala. 486.
Neb.—State Bank of Ceresco v. Belk, 77 N.W. 58, 56 Neb. 710.
N.H.—Hoyt v. French, 24 N.H. 198.

Wife as principal where contract made with husband

Wife to whom deed of farm was given is principal, in determining admissibility of alleged collateral agreement with wife, notwithstanding written contract was with husband.—Mitchill v. Lath, 160 N.E. 646, 247 N.Y. 377, 68 A.L.R. 239, reversing Mitchell v. Lath, 221 N.Y.S. 864, 220 App.Div. 776, and reargument denied Mitchill v. Lath, 162 N.E. 511, 248 N.Y. 526.

24. Ala.—Bradley v. Hall, 195 So. 883, 239 Ala. 544—Peters v. Pilcher, 100 So. 902, 211 Ala. 548.
Ark.—Barfield Mercantile Co. v. Connery, 234 S.W. 481, 150 Ark. 428.
Cal.—Heinfelt v. Arth, 41 P.2d 191, 4 Cal.App.2d 381.
D.C.—Spund v. Cafritz Const. Co., 48 F.2d 1014, 60 App.D.C. 102.
Ind.—Hilgemeier v. Bower Mfg. Co., 139 N.E. 691, 81 Ind.App. 191.
Ky.—Commonwealth by Meredith v. Hardin, 150 S.W.2d 477, 286 Ky. 404.
La.—W. K. Henderson Iron Works & Supply Co. v. Jeffries, 105 So. 792, 159 La. 620—Commercial Germania Trust & Savings Bank v. White, 81 So. 753, 145 La. 54—Mercier v. Clesi, App., 142 So. 853—Ewell v. Giamanco, 139 So. 515, 19 La.App. 672.
Neb.—State Bank of Beaver Crossing v. Mackley, 236 N.W. 165, 121 Neb. 28—American Surety Co. of New York v. School Dist. No. 64 of Douglas County, 219 N.W. 583, 117 Neb. 6—Durland Trust Co. v. Payne, 182 N.W. 1016, 1017, 106 Neb. 135, quoting **Corpus Juris.**
N.Y.—Robert v. U. S. Shipping Board Emergency Fleet Corporation, 148 N.E. 650, 240 N.Y. 474, reversing 207 N.Y.S. 908, 211 App. Div. 868.
N.D.—Kittelson v. Collette, 240 N.W. 920, 61 N.D. 768—Fuller v. Fried, 224 N.W. 668, 57 N.D. 824.
Ohio.—Bowman v. Tax Commission of Ohio, 20 N.E.2d 916, 919, 135 Ohio St. 295, quoting **Corpus Juris**, and affirming Bowman v. Tax Commission, 22 N.E.2d 524, 61 Ohio App. 163.
Okl.—In re Assessment of Alleged Omitted Property of Kennedy for Taxation in Osage County for 1917, 58 P.2d 134, 137, 177 Okl. 74, quoting **Corpus Juris.**
Or.—Easley v. Bottemiller, 90 P.2d 481, 162 Or. 90—Lane v. National Ins. Agency, 37 P.2d 365, 148 Or. 589—Bagley Co. v. International Harvester Co. of America, 195 P. 348, 349, 99 Or. 519, quoting **Corpus Juris.**
Pa.—Roberts v. Cauffiel, 128 A. 670, 283 Pa. 64—In re Gill's Estate, 112 A. 80, 268 Pa. 500.
Tex.—Owen v. King, Civ.App., 84 S.W.2d 743, reversed on other grounds 111 S.W.2d 695, 130 Tex. 614, 114 A.L.R. 859—Southwestern Public Service Co. v. Smith, Civ. App., 48 S.W.2d 456—Gugenheim v. Dallas Plumbing Co., Civ.App., 42 S.W.2d 268, 272, citing **Corpus Juris**—Pearce v. Hallum, Civ.App., 30 S.W.2d 399, error refused.
22 C.J. p 1292 note 71.

Restriction to parties

(1) It is stated in a number of cases that the parol evidence rule is binding only on, or is applicable only as between, or in suits, disputes, or controversies between, the parties to the written contract or other instrument.
U.S.—Pim v. Wait, C.C.N.Y., 32 F. 741.
Cal.—Bituminized Brick & Tile Co. v. Simons Brick Co., 192 P. 528, 183 Cal. 687.
Iowa.—Kiser v. Morton Farmers' Mut. Ins. Ass'n, 237 N.W. 328, 213 Iowa 18.
La.—Graffagnini v. Shnaider, 7 La. App. 256, 693.
Neb.—Fitzgerald v. Union Stock Yards Co., 131 N.W. 612, 89 Neb. 393, 33 L.R.A.,N.S., 983.
N.J.—Albert Lifson & Sons v. Williams, 162 A. 129, 10 N.J.Misc. 982.
N.Y.—People ex rel. Hilton v. Fahrenkopf, 5 N.Y.S.2d 868, 254 App. Div. 397, reversed on other grounds 17 N.E.2d 765, 279 N.Y. 49—Schickler v. Penrod Co., 227 N.Y.S. 331, 222 App.Div. 627.
Tex.—Williford Lumber Co. v. Malakoff Brick Co., Civ.App., 113 S.W. 2d 248, error dismissed—Vander Stucken v. Willoughby, Civ.App., 242 S.W. 478.

(2) This, however, is not a full statement of the rule and is inaccurate in that the rule applies to privies as well as to parties.—Daggett v. Corn, Tex.Civ.App., 54 S.W.2d 1098, error refused.

(3) Furthermore, the statement is inaccurate in that it fails to recognize that the rule applies where a third person, not a party to the contract, bases his case on it and seeks to enforce it.
Ill.—Merchants' Loan & Trust Co. v. Ummach, 228 Ill.App. 67.
Minn.—Martin v. Setter, 239 N.W. 219, 184 Minn. 457, 80 A.L.R. 471.

(4) And in one case wherein the statement is made, it appears that the person in question was neither a party nor a privy to the contract.—Ziegler v. City of New York, 281 N.Y.S. 462, 156 Misc. 624, affirmed 291 N.Y.S. 401, 248 App.Div. 873 and 300 N.Y.S. 1152, 253 App.Div. 764.

25. U.S.—First Nat. Bank of Ottawa v. Lloyd's of London, C.C.A.Ill., 116 F.2d 221, 132 A.L.R. 599—The W. D. Anderson, D.C.Pa., 17 F. Supp. 754, affirmed, C.C.A., 94 F.2d 377, certiorari denied Atlantic Refining Co. v. Smith, 58 S.Ct. 764, 303 U.S. 658, 82 L.Ed. 1117.
Ala.—American Book Co. v. State, 113 So. 592, 216 Ala. 367—Jones v. First Nat. Bank, 89 So. 437, 206 Ala. 203.

tween strangers or third persons[26] or is between a stranger and a party to the instrument.[27] In such case the rule is neither binding on nor available to the stranger,[28] and it may not properly be invoked by him[29] or it may not properly be invoked or

Ark.—Arkmo Lumber Co. v. Cantrell, 252 S.W. 901, 159 Ark. 445.
Cal.—Peterson v. First Nat. Bank, 281 P. 1104, 101 Cal.App. 532.
Colo.—Continental Trust Co. v. Johnston, 188 P. 1112, 67 Colo. 592.
Conn.—Burke v. Yencsik, 182 A. 135, 120 Conn. 618.
Ga.—Equitable Life Assur. Soc. v. Florence, 171 S.E. 317, 47 Ga.App. 711.
Ill.—Brady v. Marshall, 23 N.E.2d 764, 302 Ill.App. 151—Century Trust & Savings Bank v. Adams, 215 Ill.App. 79.
Ind.—State Highway Commission v. Wilhite, 31 N.E.2d 281.
Iowa.—Andrew v. Naglestad, 249 N.W. 131, 216 Iowa 248—W. T. Madden Co. v. F. Becker Asphaltum Roofing Co., 218 N.W. 466, 467, 205 Iowa 783, citing **Corpus Juris.**
La.—Bank of Acadia v. Lafosse, 5 La.App. 616.
Minn.—Geiger v. Sanitary Farm Dairies, 178 N.W. 501, 146 Minn. 235.
Mo.—Cantrell v. Burgess, App., 141 S.W.2d 200—Wissmann v. Pearline, App., 135 S.W.2d 1—Berry v. Royster, App., 232 S.W. 477.
Mont.—Greening v. Gazette Printing Co., 88 P.2d 862, 108 Mont. 158.
Nev.—Quinn v. Quinn, 13 P.2d 221, 54 Nev. 262.
N.J.—Coles v. People's Gas Co., 162 A. 405, 109 N.J.Law 428—Halliwell v. Trans-States Finance Corporation, 118 A. 837, 98 N.J.Law 133—Albert Lifson & Sons v. Williams, 162 A. 129, 10 N.J.Misc. 982.
N.Y.—Bay Apartments v. Lento, 292 N.Y.S. 762, 249 App.Div. 855—Liberty Bank of Buffalo v. High Park Development Co., 236 N.Y.S. 194, 134 Misc. 783, affirmed 234 N.Y.S. 832, 227 App.Div. 647.
N.C.—Jones v. Raney Chevrolet Co., 9 S.E.2d 395, 217 N.C. 693.
Or.—Lane v. National Ins. Agency, 37 P.2d 365, 148 Or. 589—Commercial Securities v. Mast, 28 P.2d 635, 145 Or. 394, 92 A.L.R. 194—Zoharopulos v. Hamilton, 216 P. 184, 108 Or. 201.
S.C.—Ex parte Moore, 159 S.E. 503, 161 S.C. 107—Liberty Nat. Bank v. Hines, 104 S.E. 313, 115 S.C. 82.
Tex.—Peters v. Lerew, Civ.App., 139 S.W.2d 321, error dismissed, judgment correct—Monk v. Danna, Civ.App., 110 S.W.2d 84, error dismissed—Owen v. King, Civ.App., 84 S.W.2d 743, reversed on other grounds 111 S.W.2d 695, 130 Tex. 614, 114 A.L.R. 859—Universal Credit Co. v. Gasow-Howard Motor Co., Civ.App., 73 S.W.2d 909, error dismissed—Long Bell Lumber Co. v. Futch, Civ.App., 20 S.W.2d 1076, error refused—Hall v. San Jacinto State Bank, Civ.App., 255 S.W. 506.
Wash.—In re Finke's Estate, 63 P.2d 354, 188 Wash. 694—Park v. Department of Labor and Industries, 51 P.2d 620, 184 Wash. 472—McKay v. General Accident, Fire & Life Assur. Corporation, Limited, of Perth, [redacted]and, 290 P. 820, 158 Wash. 207.
Wis.—Burnett County Abstract Co. v. Eau Claire Citizens' Loan & Investment Co., 255 N.W. 890, 891, 216 Wis. 35, citing **Corpus Juris.**

26. U.S.—Page v. United Fruit Co., C.C.A.Mass., 3 F.2d 747, certiorari granted Northern Ry. Co. v. Page, 46 S.Ct. 19, 269 U.S. 542, 70 L.Ed. 402, reversed on other grounds 47 S.Ct. 491, 274 U.S. 65, 71 L.Ed. 929.
Ohio.—Bowman v. Tax Commission of Ohio, 20 N.E.2d 916, 135 Ohio St. 295, affirming Bowman v. Tax Commission, 22 N.E.2d 524, 61 Ohio App. 163.
Or.—Lane v. National Ins. Agency, 37 P.2d 365, 148 Or. 589.
Va.—Harriss, Magill & Co. v. John H. Rodgers & Co., 129 S.E. 513, 143 Va. 815.

27. U.S.—Page v. United Fruit Co., C.C.A.Mass., 3 F.2d 747, certiorari granted Northern Ry. Co. v. Page, 46 S.Ct. 19, 269 U.S. 542, 70 L.Ed. 402, reversed on other grounds 47 S.Ct. 491, 274 U.S. 65, 71 L.Ed. 929—Federal Intermediate Credit Bank v. Globe & Rutgers Fire Ins. Co., D.C.Md., 7 F.Supp. 56, 69, citing **Corpus Juris.**
Ala.—Harris v. Geneva Mill Co., 96 So. 622, 209 Ala. 538—Jones v. First Nat. Bank, 89 So. 437, 206 Ala. 203.
Ariz.—Collins v. Collins, 52 P.2d 1169, 46 Ariz. 485.
Cal.—Gammon v. Ealey & Thompson, 275 P. 1005, 97 Cal.App. 452—Leak v. Colburn, 204 P. 249, 55 Cal.App. 784—Auditorium Co. v. Barsotti, 181 P. 413, 40 Cal.App. 592.
Iowa.—Grimes Sav. Bank v. McHarg, 276 N.W. 781, 224 Iowa 644—Holst v. Consolidated Independent School Dist. of Cushing, Woodbury & Ida Counties, 211 N.W. 398, 203 Iowa 288.
Ky.—Maples v. Louisville Ry. Co., 241 S.W. 341, 195 Ky. 77.
La.—W. K. Henderson Iron Works & Supply Co. v. Jeffries, 105 So. 792, 159 La. 620.
Minn.—Schlecht v. Schlecht, 209 N.W. 883, 168 Minn. 168.
Neb.—State Bank of Beaver Crossing v. Mackley, 236 N.W. 165, 121 Neb. 28—American Surety Co. of New York v. School Dist. No. 64 of Douglas County, 219 N.W. 583, 117 Neb. 6—Menking v. Larson, 199 N.W. 823, 112 Neb. 479—Woodruff v. Cooper, 192 N.W. 725, 109 Neb. 857—Durland Trust Co. v. Payne, 182 N.W. 1016, 1017, 106 Neb. 135, quoting **Corpus Juris.**
N.J.—Philadelphia Dairy Products Co. v. Zimmer, 186 A. 442, 14 N.J.Misc. 572.
Ohio.—Bowman v. Tax Commission of Ohio, 20 N.E.2d 916, 919, 135 Ohio St. 295, quoting **Corpus Juris,** and affirming Bowman v. Tax Commission, 22 N.E.2d 524, 61 Ohio App. 163.
Okl.—In re Assessment of Alleged Omitted Property of Kennedy for Taxation in Osage County for 1917, 58 P.2d 134, 137, 177 Okl. 74, quoting **Corpus Juris**—Dawson v. Cobb, 42 P.2d 269, 171 Okl. 296.
Or.—Easley v. Bottemiller, 90 P.2d 481, 162 Or. 90—Lane v. National Ins. Agency, 37 P.2d 365, 148 Or. 589—Phez Co. v. Salem Fruit Union, 233 P. 547, 557, 113 Or. 398, citing **Corpus Juris**—Bagley Co. v. International Harvester Co. of America, 195 P. 348, 349, 99 Or. 519, quoting **Corpus Juris.**
S.D.—Smith v. Shields, 240 N.W. 498, 500, 59 S.D. 447, citing **Corpus Juris,** and affirming 230 N.W. 26, 56 S.D. 599.
Va.—Harriss, Magill & Co. v. John H. Rodgers & Co., 129 S.E. 513, 143 Va. 815.
22 C.J. p 1293 note 72.

Different and more liberal rule applies to admission of extrinsic evidence for interpretation of contract, where controversy arises between party thereto and third party.—Katz v. People's Finance & Thrift Co., 281 P. 1097, 101 Cal.App. 552.

28. N.H.—Stacy v. F. M. Hoyt Shoe Co., 141 A. 467, 83 N.H. 281.
N.D.—Kittelson v. Collette, 240 N.W. 920, 61 N.D. 768.
Tex.—Milliken v. Anderson, Civ.App., 294 S.W. 921.

29. U.S.—Indianapolis Glove Co. v. U. S., C.C.A.Ind., 96 F.2d 816.
Ala.—Bradley v. Hall, 195 So. 883, 239 Ala. 544.
Iowa.—Nissen v. Sabin, 212 N.W. 125, 202 Iowa 1362, 50 A.L.R. 1216.
La.—Hooper v. Miller, 125 So. 77, 12 La.App. 9.
Minn.—Schlecht v. Schlecht, 209 N.W. 883, 168 Minn. 168.
Mo.—Slinkard v. Lamb Const. Co., App., 212 S.W. 61, affirmed 225 S.W. 352, 286 Mo. 623.

Objection to evidence

(1) Objection to oral testimony which varies written instrument can only be made by party to instrument or some one in privity with such

relied upon against him,[30] as the stranger, not claiming under, and not having assented to, the contract, is neither bound by it nor entitled to have it reformed or set aside, and is therefore at liberty, when the evidence is otherwise competent and relevant, to show by parol evidence that the written instrument does not express the full or true character of the transaction,[31] and where the stranger to the instrument is free to vary or contradict it by parol evidence his adversary, although a party to the instrument, must be equally free to do so.[32] This has been held to be true with respect to writings of all kinds, as for example, assignments;[33]

party.—Spraul v. Garliepp & Mack, 32 P.2d 657, 138 Cal.App. 491.

(2) An oral agreement is admissible in its entirety or not at all; and where the interest of a party is disclosed only by evidence of the oral agreement, and he does not object to that part which is favorable to him, he has no standing to object to other parts as contradicting or varying a written instrument.—Bilharz v. Martinsen, 228 N.W. 268, 209 Iowa 296.

(3) Where a person is not, on the face of a written contract, a party thereto and he does not claim rights thereunder, but instead it is sought to hold him liable thereon, there is no ground of estoppel entitling him to object to the admission of parol evidence, and if he bases his alleged right to object on the ground that he is in reality a party to the contract, this may be fatal because constituting an admission of liability.—Hooper v. Miller, 125 So. 77, 12 La.App. 9.

Stranger may not complain of oral testimony.—Keadle v. Padden, 20 P. 2d 403, 143 Or. 350, rehearing denied 22 P.2d 892, 143 Or. 350.

30. Iowa.—Nissen v. Sabin, 212 N. W. 125, 202 Iowa 1362, 50 A.L.R. 1216.
N.Y.—Schickler v. Penrod Co., 227 N.Y.S. 331, 222 App.Div. 627.
Tex.—Berryman v. Norfleet, Civ. App., 41 S.W.2d 722, error dismissed.

31. U.S.—Root v. John T. Robinson Co., D.C.Mass., 55 F.2d 303.
Ala.—Peters v. Pilcher, 100 So. 902, 211 Ala. 548.
Cal.—Mayfield v. Fidelity & Casualty Co. of New York, 61 P.2d 83, 16 Cal.App.2d 611.
Ill.—McKee v. Gaulrapp, 11 N.E.2d 380, 367 Ill. 321—Komorowski v. Boston Store of Chicago, 263 Ill. App. 88.
Iowa.—Iowa Builders' Supply Co. v. Petersen, 267 N.W. 716, 221 Iowa 978.
Mass.—Simons v. Northeastern Finance Corporation, 171 N.E. 643, 271 Mass. 285—Tripp v. National Shawmut Bank of Boston, 161 N. E. 904, 263 Mass. 505—Marsh v. Beraldi, 157 N.E. 347, 260 Mass. 225—Guaranty Sec. Corporation v. Eastern S. S. Co., 134 N.E. 364, 241 Mass. 120.
Mo.—Tomlinson v. Marshall, 236 S. W. 680, 208 Mo.App. 381.
Neb.—Durland Trust Co. v. Payne, 182 N.W. 1016, 1017, 106 Neb. 135, quoting **Corpus Juris.**
N.J.—Albert Lifson & Sons v. Williams, 162 A. 129, 10 N.J.Misc. 982.
N.Y.—Nelkin v. Provident Loan Soc. of New York, 193 N.E. 245, 265 N.Y. 393, reversing 271 N.Y.S. 314, 241 App.Div. 875.
N.C.—Miles v. Walker, 102 S.E. 884, 179 N.C. 479.
Ohio.—Bowman v. Tax Commission of Ohio, 20 N.E.2d 916, 919, 135 Ohio St. 295, quoting **Corpus Juris,** and affirming Bowman v. Tax Commission, 22 N.E.2d 524, 61 Ohio App. 163.
Okl.—In re Assessment of Alleged Omitted Property of Kennedy for Taxation in Osage County for 1917, 58 P.2d 134, 137, 177 Okl. 74, quoting **Corpus Juris.**
Or.—Harris v. Schnitzer, 27 P.2d 1010, 146 Or. 391—Bagley Co. v. International Harvester Co. of America, 195 P. 348, 349, 99 Or. 519, quoting **Corpus Juris.**
S.C.—Peoples Nat. Bank of Greenville v. Upchurch, 190 S.E. 515, 183 S.C. 147—Ex parte Moore, 159 S.E. 503, 161 S.C. 107.
S.D.—Smith v. Shields, 240 N.W. 498, 59 S.D. 447, affirming 230 N.W. 26, 56 S.D. 599.
Tex.—Peters v. Lerew, Civ.App., 139 S.W.2d 321, error dismissed, judgment correct—Williford Lumber Co. v. Malakoff Brick Co., Civ.App., 113 S.W.2d 248, error dismissed—Bagley v. Pollock, Civ.App., 19 S. W.2d 193—Oil Well Supply Co. v. Burk-Waggoner Oil Co., Civ.App., 261 S.W. 830—Vander Stucken v. Willoughby, Civ.App., 242 S.W. 478, 479, citing **Corpus Juris.**
Wash.—Patent Scaffolding Co. v. Roosevelt Apartments, 18 P.2d 857, 171 Wash. 507.
22 C.J. p 1293 note 72.

Word "assent," as used in stating the reason for the text proposition, means a person's assent to be bound or assent to the contract as his own; and the fact that a person has signed a contract as president of a corporation does not preclude him as an individual from introducing parol evidence.—Continental Trust Co. v. Johnston, 188 P. 1112, 67 Colo. 592.

Parol evidence rule does not apply to witnesses who are strangers, and not parties, to the contract and deed between another person and plaintiff, even though they have contracts of the same nature with the same person.—Hegna v. Peters, 201 N.W. 803, 199 Iowa 259.

Evidence otherwise inadmissible

In action for land by grantee of deed made under power of sale in security deed against subsequent grantee of deed executed by common predecessor, charge that, even though subsequent grantee was not entitled to reformation of previous security deed, it could as stranger thereto show by parol the alleged mutual mistake therein, by which land in subsequent grantee's possession had been erroneously included, was improper.—Volunteer State Life Ins. Co. v. Powell-White Co., 1 S.E.2d 662, 187 Ga. 705.

32. Cal.—Mayfield v. Fidelity & Casualty Co. of New York, 61 P. 2d 83, 87, 16 Cal.App.2d 611, citing **Corpus Juris.**
Ill.—Reams v. Janoski, 268 Ill.App. 8.
Iowa.—Grimes Sav. Bank v. McHarg, 276 N.W. 781, 224 Iowa 644.
Neb.—Durland Trust Co. v. Payne, 182 N.W. 1016, 1017, 106 Neb. 135, quoting **Corpus Juris.**
N.Y.—Ziegler v. City of New York, 281 N.Y.S. 462, 156 Misc. 624, affirmed 291 N.Y.S. 401, 248 App. Div. 873 and 300 N.Y.S. 1152, 253 App.Div. 764.
N.D.—Kittelson v. Collette, 240 N. W. 920, 61 N.D. 768.
Ohio.—Bowman v. Tax Commission of Ohio, 20 N.E.2d 916, 919, 135 Ohio St. 295, quoting **Corpus Juris,** and affirming Bowman v. Tax Commission, 22 N.E.2d 524, 61 Ohio App. 163.
Or.—Bagley Co. v. International Harvester Co. of America, 195 P. 348, 349, 99 Or. 519, quoting **Corpus Juris.**
Tex.—Milliken v. Anderson, Civ. App., 294 S.W. 921—Vander Stucken v. Willoughby, Civ.App., 242 S.W. 478, 479, citing **Corpus Juris.**
Wash.—Vancouver Nat. Bank v. Katz, 252 P. 934, 142 Wash. 306.
Wis.—Anderson Yard Co. v. Citizens' State Bank of Rice Lake, 203 N. W. 921, 187 Wis. 60.
22 C.J. p 1293 note 72.

33. U.S.—Kunihiro v. Lyons Bros. Co., C.C.A.Cal., 12 F.2d 894, certiorari denied 47 S.Ct. 112, 273 U. S. 723, 71 L.Ed. 859—Kunihiro v. M. O. Coggins Co., C.C.A.Cal., 12 F.2d 894, certiorari denied 47 S. Ct. 112, 273 U.S. 223, 71 L.Ed. 859.

bills of sale;[34] contracts of exchange;[35] contracts of sale;[36] contractual receipts;[37] dealers' reports of sales filed with a state official pursuant to statute;[38] deeds;[39] insurance policies;[40] leases;[41] licenses;[42] mortgages;[43] and releases.[44] Corporate records are not conclusive on strangers to the corporation but may be contradicted by them[45] or by the corporation in an action to which such persons are parties,[46] and even a judicial record is not conclusive on persons not parties or privies to the action or proceeding and does not preclude them from introducing parol evidence concerning it.[47]

A class of cases in which the parol evidence rule is frequently held not applicable is that in which the litigation concerns taxes and the writings involved are records of a private corporation or instruments to which the state or government is not a party.[48] Another class of cases of this kind is that in which a broker sues for commissions and the writing claimed to exclude parol evidence is a contract between the principal and the customer.[49] Also, notwithstanding some authority to the contrary,[50] it is held that the parol evidence rule is inapplicable where an action is brought to recover for death, or for injuries to person or property, resulting from the negligence of an employee of defendant, and a written contract of employment showing him to be a servant or an independent contractor, as the case may be, is claimed to be conclusive.[51]

Mo.—Ayers v. Continental Ins. Co., App., 217 S.W. 550.
Tex.—Milliken v. Anderson, Civ.App., 294 S.W. 921.

34. La.—White v. Machen, App., 178 So. 736.
Mich.—Sewall v. Feller, 284 N.W. 662, 288 Mich. 107.
22 C.J. p 1294 note 76.

35. Cal.—C. L. Glover Co. v. Farinacci, 298 P. 133, 113 Cal.App. 183—Gammon v. Ealey & Thompson, 275 P. 1005, 97 Cal.App. 452.

36. D.C.—Spund v. Cafritz Const. Co., 48 F.2d 1014, 60 App.D.C. 102.
Ga.—Reid v. Morrison, 121 S.E. 860, 31 Ga.App. 613.
22 C.J. p 1294 note 77.

37. Iowa.—Dilenbeck v. Herrold, 164 N.W. 869, 183 Iowa 264.
22 C.J. p 1294 note 80.

38. Minn.—Bolton-Swanby Co. v. Owens, 275 N.W. 855, 201 Minn. 162.

39. Ala.—Hester v. First Nat. Bank, 186 So. 717, 237 Ala. 307.
Iowa.—Kiser v. Morton Farmers' Mut. Ins. Ass'n, 249 N.W. 753, 216 Iowa 928—Royal Union Life Ins. Co. v. Hughes, 218 N.W. 251, 205 Iowa 563—Nissen v. Sabin, 212 N.W. 125, 202 Iowa 1362, 50 A.L.R. 1216—Morton Farmers' Mut. Ins. Ass'n of Page and Fremont Counties, Iowa, v. Farquhar, 206 N.W. 123, 200 Iowa 1206—Shult v. Doyle, 201 N.W. 787, 200 Iowa 1—Peters v. Goodrich, 185 N.W. 903, 192 Iowa 799.
La.—Smith v. Chappell, 148 So. 242, 177 La. 311.
Mo.—Burk v. Walton, 86 S.W.2d 92, 337 Mo. 781.
Neb.—Nebraska Wesleyan University v. Smith, 202 N.W. 625, 113 Neb. 208—Durland Trust Co. v. Payne, 182 N.W. 1016, 1017, 106 Neb. 135, quoting **Corpus Juris.**
N.Y.—Liberty Bank of Buffalo v. High Park Development Co., 236 N.Y.S. 194, 134 Misc. 733, affirmed 234 N.Y.S. 832, 227 App.Div. 647.
Tex.—Godwin v. Banister, Civ.App., 242 S.W. 1098.
22 C.J. p 1294 note 73.

40. N.C.—Elam v. Smithdeal Realty & Insurance Co., 109 S.E. 632, 182 N.C. 599, 18 A.L.R. 1210.
Ohio.—Bowman v. Tax Commission of Ohio, 20 N.E.2d 916, 919, 135 Ohio St. 295, quoting **Corpus Juris**, and affirming Bowman v. Tax Commission, 22 N.E.2d 524, 61 Ohio App. 163.
22 C.J. p 1294 note 79.

41. La.—Graffagnini v. Shnaider, 7 La.App. 256, 693.
Or.—Wilkens v. Western States Grocery Co., 114 P.2d 542, 544, citing **Corpus Juris.**
22 C.J. p 1294 note 75.

42. U.S.—Wooster v. Simonson, C.C. N.Y., 20 F. 316.

43. Or.—Harris v. Schnitzer, 27 P. 2d 1010, 146 Or. 391.
Tex.—Foster v. Butler Bros., Civ. App., 153 S.W.2d 623.
22 C.J. p 1294 note 74.

44. Ill.—Reams v. Janoski, 268 Ill. App. 8.
Mo.—Slinkard v. Lamb Const. Co., 225 S.W. 352, 286 Mo. 623, affirming, App., 212 S.W. 61.
N.H.—Wheat v. Carter, 106 A. 602, 79 N.H. 150.
Tex.—Pennington v. Bevering, Civ. App., 9 S.W.2d 401, affirmed, Com. App., 17 S.W.2d 772.

45. Minn.—Northland Produce Co. v. Stephens, 133 N.W. 93, 116 Minn. 23—State v. Guertin, 119 N.W. 43, 106 Minn. 248, 130 Am.S.R. 610.

46. Pa.—In re Kisner, 99 A. 168, 254 Pa. 597.

47. N.J.—Den v. Clark, 10 N.J.Law 217, 18 Am.D. 417.
22 C.J. p 1294 note 83.

48. U.S.—Borin Corporation v. Commissioner of Internal Revenue, C. C.A., 117 F.2d 917—Indianapolis Glove Co. v. U. S., C.C.A.Ind., 96 F.2d 816—Tex-Penn Oil Co. v. Commissioner of Internal Revenue, C.C.A., 83 F.2d 518, certiorari granted Helvering v. Tex-Penn Oil Co., 57 S.Ct. 28, 299 U.S. 529, 81 L.Ed. 390, affirmed 57 S.Ct. 569, 300 U.S. 481, 81 L.Ed. 755—Benedum v. Commissioner of Internal Revenue, C.C.A., 83 F.2d 518, certiorari granted Helvering v. Benedum, 57 S.Ct. 28, 299 U.S. 529, 81 L.Ed. 390, affirmed 57 S.Ct. 569, 300 U.S. 481, 81 L.Ed. 755—Parriott v. Commissioner of Internal Revenue, C.C.A., 83 F.2d 518, certiorari granted Helvering v. Parriott, 57 S.Ct. 28, 299 U.S. 529, 81 L.Ed. 390, affirmed 57 S.Ct. 569, 300 U.S. 481, 81 L.Ed. 755—Commissioner of Internal Revenue v. Olds, C.C.A., 60 F.2d 252—Schuh Drug Co. v. U. S., D. C.Ill., 49 F.2d 644—Schneider v. Duffy, D.C.N.J., 43 F.2d 642—U. S. v. Board, D.C.Ky., 14 F.2d 459.
Okl.—In re Assessment of Alleged Omitted Property of Kennedy for Taxation in Osage County for 1917, 58 P.2d 134, 177 Okl. 74.
Utah.—Utah-Idaho Sugar Co. v. State Tax Commission, 73 P.2d 974, 93 Utah 406.

49. Cal.—C. L. Glover Co. v. Farinacci, 298 P. 133, 113 Cal.App. 183.
D.C.—Spund v. Cafritz Const. Co., 48 F.2d 1014, 60 App.D.C. 102.
Ga.—Reid v. Morrison, 121 S.E. 860, 31 Ga.App. 613.
Kan.—Beckett v. Miller, 204 P. 539, 110 Kan. 479.
Mo.—Cash v. Wysocki, App., 229 S. W. 428.
N.Y.—Bierman v. Barbieri, 207 N. Y.S. 174, 124 Misc. 157.
Pa.—Reel v. Oravetz, 123 A. 679, 279 Pa. 147.
9 C.J. p 648 note 14.

50. Tex.—Clark v. Lynch, Civ.App., 139 S.W.2d 294.

51. Ariz.—Arizona-Hercules Copper Co. v. Crenshaw, 184 P. 996, 21 Ariz. 15.
Cal.—Luckie v. Diamond Coal Co., 183 P. 178, 41 Cal.App. 468.
Iowa.—Root v. Shadbolt & Middleton, 193 N.W. 634, 195 Iowa 1225.

Application of exceptions. Where parol evidence is admissible under some exception to the parol evidence rule, the exception may be especially applicable where one of the parties to the litigation is not a party to the writing in question,[52] or where the only person who may properly complain is not made a party to the suit.[53] However, parol proof varying the contract apparently assumed by an indorser is restricted to a controversy between such indorser and his immediate indorsee;[54] and the right to vary or add to the consideration of a contract by parol or extrinsic evidence, is, as a general rule, confined to the parties thereto, or their successors.[55]

§ 862. —— Controversies between Parties on Same Side of Instrument

The rule known as the parol evidence rule is not applicable in a controversy between parties on the same side of an instrument or their privies.

The rule excluding parol evidence to vary a writing is not applicable in a controversy between parties to the instrument whose interests thereunder are the same, or their privies, as in the case of contests between grantors, grantees, coöbligors, or coobligees, or between privies of parties on the same side.[56]

§ 863. Waiver of Benefit of Rule

There is some authority for the view that the parol evidence rule may be waived.

Considered merely as a rule of evidence, see supra § 851, the parol evidence rule may be waived by failure to invoke it,[57] as by failure to object to the introduction of parol evidence, see the C.J.S. title Trial § 115, also 64 C.J. p 169 note 94; and where a party who is entitled to the benefit of the rule waives the benefit thereof by allowing such evidence to be received without objection and without any effort to have it stricken from the minutes or disregarded by the trial court, he cannot, after the trial has closed and the case has been decided against him, invoke the rule in order to secure a reversal of the judgment by an appellate court.[58] However, as stated supra § 851, the weight of authority supports the view that the parol evidence rule is one of substantive law and not one of evidence merely; and, as noted in the C.J.S. title Trial § 154, also 64 C.J. p 230 notes 67, 68, there is a conflict of authority as to whether parol evidence which is inadmissible because it varies or contradicts a writing, but which has been admitted without objection, must, on the one hand, be considered and given its due effect, or, on the other hand, must be disregarded, in the trial court.

The admission of parol evidence by plaintiff is unobjectionable where the subject matter thereof has been admitted by defendant in his answer;[59] and the introduction of parol evidence by defendant relating to consideration is not improper where plaintiff has opened up the subject of consideration by bringing the action.[60] Whether the introduction by one party of parol evidence affecting a writing entitles the other party to introduce evidence of the same nature is considered supra § 190.

§ 864. Rights of Third Persons

The intervention of the rights of a third person may preclude the admission of parol evidence under an exception to the parol evidence rule.

Even though some of the exceptions to the parol evidence rule might warrant the introduction of parol evidence to show the true contract evidenced by the writing, or some collateral agreement and the like, the rights of a third person may intervene so as to preclude the admission of any evidence whatever to show the transaction or the effect of the instrument to be other than it appears to be on

Mont.—Greening v. Gazette Printing Co., 88 P.2d 862, 108 Mont. 158.

52. Cal.—Central Heights Imp. Co. v. Memorial Parks, 105 P.2d 596, 40 Cal.App.2d 591.
N.J.—Ball v. Metalwash Machinery Co., 8 A.2d 370, 123 N.J.Law 285.

53. Tex.—National Life & Accident Ins. Co. v. Lucas Funeral Home, Civ.App., 89 S.W.2d 468, error dismissed.

54. Tenn.—Sands v. Parker, 284 S. W. 902, 153 Tenn. 664.

55. Tex.—Gaines Motor Sales Co. v. Hastings Mfg. Co., Civ.App., 104 S. W.2d 548, error dismissed.
22 C.J. p 1294 note 85.

56. Fla.—McClure v. Century Estates, 120 So. 4, 10, 96 Fla. 568, followed in Hall v. University Realty Co., 121 So. 808, 97 Fla. 639, quoting **Corpus Juris.**
La.—Richard v. Cain, 122 So. 866, 168 La. 608.
Okl.—Brazell v. Brown, 38 P.2d 17, 169 Okl. 623.
Utah.—Garrett v. Ellison, 72 P.2d 449, 452, 93 Utah 184, 129 A.L.R. 666, quoting **Corpus Juris.**
22 C.J. p 1295 note 92.

57. Tenn.—State v. Cothron, 113 S. W.2d 81, 87, 21 Tenn.App. 519, citing **Corpus Juris.**
W.Va.—Leckie v. Bray, 113 S.E. 746, 748, 91 W.Va. 456, citing **Corpus Juris.**
"It is elementary that the parol evidence rule may be waived."—Baird v. Divide County, 228 N.W. 226, 58 N.D. 867.

58. Ga.—Commercial Credit Co. v. Lewis, 200 S.E. 566, 569, 59 Ga. App. 144, citing **Corpus Juris**—Southern Envelope Co. v. Adamson Printing Co., 180 S.E. 770, 771, 51 Ga.App. 475, citing **Corpus Juris.**
Mo.—Fischman-Harris Realty Co. v. Kleine, App., 82 S.W.2d 605, 611, quoting **Corpus Juris.**
22 C.J. p 1295 note 95.

59. Ariz.—Fidelity-Phenix Fire Ins. Co. v. Garrison, 6 P.2d 47, 39 Ariz. 277.

60. Cal.—Bowman v. Union Trust Co. of San Diego, 106 P.2d 913, 41 Cal.App.2d 397.

its face.[61] This is especially true in respect of an instrument which, as concerns third persons, derives its effect, not from the mere convention of the parties, but from compliance with the registry laws.[62]

B. WRITINGS WITHIN RULE

1. Public or Official Records, Documents, or Proceedings

§ 865. Judicial Records or Proceedings

The rule excluding parol or extrinsic evidence to alter a written document applies to judicial records, including orders, decrees, judgments, and recitals in the record.

It is a stringently enforced rule that parol or extrinsic evidence is not admissible, at least in collateral proceedings,[63] to contradict, impeach, vary, or explain judicial records, such records importing verity.[64] The rule applies especially where the rights of third persons acquired under a judgment would be affected.[65] Its protection embraces orders,[66] decrees,[67] and judgments[68] of the court,

61. U.S.—Brown v. Camp, C.C.A.Ga., 275 F. 612.
Ariz.—Hagan v. Cosper, 292 P. 1020, 37 Ariz. 209.
La.—Hooper v. Miller, 125 So. 77, 12 La.App. 9.
22 C.J p 1295 note 98.

62. La.—Veillon Motor Co. v. Veillon, App., 161 So. 199—Amite Auto Co. v. Appel, 134 So. 332, 16 La. App. 307.

63. Ala.—Laird v. Columbia Loan & Investment Co., 114 So. 208, 216 Ala. 619.
Ky.—Commonwealth, for Use of Patrick, v. Williams, 65 S.W.2d 1012, 252 Ky. 133.
Mass.—Bryer v. American Surety Co. of New York, 189 N.E. 109, 285 Mass. 336.
Miss.—Watkins v. Mississippi State Board of Pharmacy, 154 So. 277, 170 Miss. 26.
Mo.—Sisk v. Wilkinson, 265 S.W. 536, 305 Mo. 328—State ex rel. Gregory v. Henderson, 88 S.W.2d 893, 230 Mo.App. 1.
Proceedings directly attacking instrument see supra § 860.

Unrecorded action of court

(1) Court's unrecorded action cannot be shown by parol evidence in collateral proceeding.—Ex parte Lineville Nat. Bank, 116 So. 419, 217 Ala. 381.

(2) A county court order which has never been entered of record, and its purport and meaning, may not be established by parol evidence in collateral proceeding.—Commonwealth, for Use of Patrick, v. Williams, 65 S.W.2d 1012, 252 Ky. 133.

64. U.S.—In re Crosby Stores, C.C. A.N.Y., 65 F.2d 360—Barnsdall Refining Corporation v. Birnamwood Oil Co., D.C.Wis., 32 F.Supp. 308—Karnes v. Keck, D.C.Ill., 11 F. Supp. 577.
Ala.—Baxley v. Jackson, 113 So. 500, 216 Ala. 411—Glass v. State, 163 So. 819, 26 Ala.App. 570.
Ill.—Central Trust Co. of Illinois v. Hagen, 171 N.E. 531, 339 Ill. 384, reversing 249 Ill.App. 507.
Ky.—Simpson v. Antrobus, 86 S.W. 2d 544, 260 Ky. 641—Staverson v. Kentucky Utilities Co., 287 S.W. 890, 891, 216 Ky. 309, quoting **Corpus Juris.**
Mo.—State ex rel. and to Use of Conran v. Duncan, 63 S.W.2d 135, 139, citing **Corpus Juris**—Sisk v. Wilkinson, 265 S.W. 536, 305 Mo. 328.
N.J.—Adams v. Camden Safe Deposit & Trust Co., 188 A. 913, 15 N.J.Misc. 48, reversed on other grounds 2 A.2d 361, 121 N.J.Law 389.
Va.—Farant Inv. Corporation v. Francis, 122 S.E. 141, 138 Va. 417.
22 C.J. p 1077 note 68.
Evidence not inconsistent with judicial records see infra § 931.

Amplification or modification by parol is not permitted.—Bryer v. American Surety Co. of New York, 189 N.E. 109, 285 Mass. 336.

Enlargement by parol is not permitted.—State ex rel. Gregory v. Henderson, 88 S.W.2d 893, 230 Mo. App. 1.

Record of district court

Mass.—Commonwealth v. Duggan, 154 N.E. 67, 257 Mass. 465.

Errors of fact or law

In quo warranto to test validity of county court's order incorporating special road district, oral testimony proving errors of fact or law in proceedings was properly excluded.—State ex inf. Mayfield ex rel. Cook v. Dougan, 264 S.W. 997, 305 Mo. 383.

65. Ill.—Rivard v. Gardner, 39 Ill. 125.
22 C.J. p 1078 note 69.

66. U.S.—In re Crosby Stores, C.C. A.N.Y., 65 F.2d 360.
Mo.—State ex rel. and to Use of Conran v. Duncan, 63 S.W.2d 135.
22 C.J. p 1081 note 19.

Order of commissioner's court

Tex.—Colonial Trust Co. v. Hill County, Com.App., 27 S.W.2d 144, reversing Hill County v. Colonial Trust Co., Civ.App., 18 S.W.2d 787—Eastland County v. Davisson, Civ.App., 290 S.W. 196, reversed on other grounds, Com.App., 298 S.W. 268.

Order of juvenile court

Ala.—Glass v. State, 163 So. 819, 26 Ala.App. 570.

The intention of the court in making an order cannot be proved by parol evidence.—Colonial Trust Co. v. Hill County, Tex.Com.App., 27 S.W. 2d 144, reversing Hill County v. Colonial Trust Co., Civ.App., 18 S.W.2d 787.

67. Tenn.—Brandon v. Brandon, 135 S.W.2d 929, 175 Tenn. 463.
34 C.J. p 506 note 59 [b].

Meaning of decree

(1) Where decree is complete and unambiguous in itself, extraneous matters may not be resorted to for purpose of giving decree meaning which its language, without such help, would not carry.—Stellwagen v. Stellwagen, 269 N.W. 216, 277 Mich. 412—Belting v. Marschner, 222 N.W. 137, 245 Mich. 111.

(2) After decree has become final, statement of court as to what was meant by decree is not permissible.—Brooks v. Miami Bank & Trust Co., 156 So. 757, 116 Fla. 589.

Conversation between trial judge, defendant and another, after trial and argument of case, was held incompetent in subsequent action as contradicting findings and decree in first action.—Campbell v. Nunn, 2 P. 2d 899, 78 Utah 316.

68. U.S.—Fisher v. Jordan, D.C.Tex., 32 F.Supp. 608, reversed on other grounds, C.C.A., 116 F.2d 183, certiorari denied Jordan v. Fisher, 61 S.Ct. 734, 312 U.S. 697, 85 L.Ed. 1132.
Iowa.—Hawkeye Securities Fire Ins. Co. v. United Inv. Co., 251 N.W. 874, 876, 217 Iowa 644, citing **Corpus Juris.**
Miss.—Armstrong v. Employer's Liability Assur. Corporation, 88 So. 163, 125 Miss. 570.
Tex.—Missouri-Kansas-Texas R. Co. of Texas v. Pluto, Civ.App., 130 S.W.2d 1048, reversed on other grounds, Com.App., 156 S.W.2d 265.
34 C.J. p 506 note 59.

Judgment of commissioner's court

Tex.—Eastland County v. Davisson,

ages for certain items embraced within the declaration, parol or extrinsic evidence is generally not admissible to vary the record as to elements and items of damage allowed for in a judgment, verdict, or award.

Parol evidence is not admissible to vary judicial records by showing that a judgment did not contain a certain item of damages[96] or that a verdict did not include allowance for a particular element of damages.[97]

It may be shown that in the trial of an action the jury allowed in their award of damages certain items embraced within the declaration;[98] but the rule against contradicting the record precludes any showing that in a suit brought for one cause of action damages were given for another and different cause of action,[99] or for anything not included in the declaration;[1] nor can it be shown after the confirmation of the report of commissioners allowing damages for the widening of a street that in the amount awarded by them to a certain person was included a sum intended for the benefit of another person, and for a purpose not appearing in the report.[2]

c. Judicial or Execution Sale

Parol or extrinsic evidence is generally not admissible to vary the records of judicial or execution sales.

The general rule with respect to the conclusiveness of records applies to the record of a judicial or execution sale.[3] Consequently it cannot be shown by parol or extrinsic evidence in contradiction of the record that necessary prerequisites to the sale were omitted;[4] that the sale did not pass the quantity of land[5] or the title[6] which the record shows to have passed; that the real purchaser was a person other than the one stated on the record;[7] that the terms and conditions of sale were other than those appearing by the record;[8] or that property was sold without authority.[9]

Parol evidence has been held admissible for the purpose of showing the amount of money received by an administrator for a sale of land to be different from the amount named in the report of sale made by him.[10] The dates disclosed by the record control in determining the rights as between purchasers, but as between distributees the true facts can be proved in a proper proceeding.[11]

d. Time of Signing or Entering Judgments or Orders

With some qualifications, the general rule is that a statement of the record as to the time of signing or entering a judgment or order cannot be contradicted by parol or extrinsic evidence.

A statement of the record as to the time of signing or entering up a judgment is a material part thereof and hence cannot be contradicted by parol or extrinsic evidence;[12] and the same rule applies to orders, except in direct proceedings to set them aside;[13] but the exact hour of the entry of a judgment may be proved, as matter dehors the record, by competent evidence,[14] unless such proof would tend to impeach the record;[15] and it has been held that a clerk's entry as to the date of the original decree is not a verity, parol evidence being admissible to correct it,[16] and, although there is authority to the contrary,[17] that the date of a judgment of a justice of the peace may be shown by extrinsic evidence to have been erroneously entered on his docket.[18]

e. Poor Debtor Proceedings

Authorities differ as to whether a certificate of a judicial officer as to the administration of a poor debtor's oath or bond, or a certificate that due notice was given

96. Mo.—Forsee v. Garrison, 235 S W. 473, 208 Mo.App. 408.

97. Ind.—Oster v. Broe, 64 N.E. 918, 161 Ind. 113.

98. N.J.—Wallace v. Coil, 24 N.J. Law 600.

99. N.J.—Wallace v. Coil, supra.

1. S.C.—Craig v. Todd, 5 S.C.L. 551.

2. N.Y.—Turner v. Williams, 10 Wend. 139.

3. Tex.—Collins v. Ball, 17 S.W. 614, 82 Tex. 259, 27 Am.S.R. 877.
22 C.J. p 1080 note 11.

4. Ark.—Monroe County v. Clark, 203 S.W. 264, 134 Ark. 100.
Kan.—Pritchard v. Madren, 2 P. 691, 31 Kan. 38.

5. S.C.—Thompson v. Wofford, 13 S.C. 216.

6. La.—McKenzie v. Cacon, 4 So. 65, 40 La.Ann. 157.

7. Ky.—Small v. Hodgen, 1 Litt. 16.

8. U.S.—In re Crosby Stores, C.C.A. N.Y., 65 F.2d 360.
22 C.J. p 1080 note 16.

9. Conn.—Pitts v. Clark, 2 Root (Conn.) 221.
22 C.J. p 1080 note 17.

10. Ind.—State v. Lindley, 98 Ind. 48.

11. Pa.—Kanofsky v. Carey, 89 Pa. Super. 422.

12. U.S.—Karnes v. Keck, D.C.Ill., 11 F.Supp. 577, 579, quoting **Corpus Juris.**
Ky.—Supreme Tent of Knights of Maccabees of World v. Dupriest, 38 S.W.2d 241, 242, 238 Ky. 352, quoting **Corpus Juris.**
22 C.J. p 1081 note 32.

13. U.S.—Karnes v. Keck, D.C.Ill., 11 F.Supp. 577, 579, quoting **Corpus Juris.**
Ark.—Woodruff County v. Road Improvement Dist. No. 14, 252 S.W. 930, 159 Ark. 374.
Ky.—Supreme Tent of Knights of Maccabees of World v. Dupriest, 38 S.W.2d 241, 242, 238 Ky. 352, quoting **Corpus Juris**—Bennett v. Tiernay, 1 Ky.L. 312.

14. N.J.—Hunt v. Swayze, 25 A. 850, 55 N.J.Law 33.

15. Ill.—Roche v. Beldam, 10 N.E. 191, 119 Ill. 320, followed in Hansen v. Schlesinger, 17 N.E. 718, 125 Ill. 230.
22 C.J. p 1081 note 35.

16. Iowa.—Manion v. Brady, 126 N. W. 801.

17. Ill.—Wiley v. Sutherland, 41 Ill. 25.

18. Mo.—Raum v. Eyermann, 2 Mo. App. 476.

the creditor, is conclusive as against parol or extrinsic evidence.

It has been asserted as the rule that a certificate of a judicial officer as to the administration of a poor debtor's oath or bond is conclusive,[19] unless its effect is destroyed by an agreed statement of facts or the voluntary admission of illegal testimony,[20] and that the same is true as to the certificate that due notice was given to the creditor;[21] but in other jurisdictions a contrary rule has been followed, so as to permit the introduction of parol or extrinsic evidence.[22]

f. Recognizances

In the absence of statutory permission, parol evidence is not admissible to control or impeach the record of a recognizance, at least as between the parties.

It has been laid down that, in the absence of statutory permission,[23] the record of a recognizance may not be controlled or impeached by parol evidence,[24] at least as between the parties.[25] Thus parol or extrinsic evidence is not admissible to vary or impeach the record as to the taking of a recognizance,[26] the terms thereof,[27] or its default or forfeiture;[28] and material parts of a recognizance cannot be supplied by parol evidence;[29] but it has been held that a magistrate's certificate of recognizance on issuing a writ of replevin may be contradicted by parol evidence.[30]

g. Other Matters

Various particular matters embodied in judicial records, in addition to the matters considered in preceding subdivisions of this section, have been protected from contradiction or variation by the rule excluding parol or extrinsic evidence.

Parol or extrinsic evidence has been held not admissible to vary the date of the acknowledgment of service on a bill of exceptions;[31] to contradict the recitals of a judgment and admissions of record showing an entry of appearance;[32] to contradict or impeach the report or action of appraisers on execution proceedings[33] or in ejectment;[34] to vary the record of an assignment of dower as to the identity of the land set off[35] or its boundaries,[36] or as to dower having been assigned in all the land;[37] to explain or enlarge a record of criminal conviction;[38] to impugn the certificate of officers to whom the selection or drawing of jurors is confided;[39] to vary an unambiguous property settlement embodied in a divorce judgment;[40] to alter a decree of divorce by showing prior statements of, or agreement between, the parties as to the duration of alimony payments;[41] to show in a collateral proceeding that entries in records have been wrongfully eradicated;[42] to prove that the issues in a prior action were other than the pleadings and decree in such action plainly showed;[43]

19. Me.—Burnham v. Howe, 23 Me. 489.
22 C.J. p 1081 note 21.

20. Me.—Clement v. Wyman, 31 Me. 50.

21. Me.—Clement v. Wyman, supra.
22 C.J. p 1081 note 23.

22. N.H.—Parker v. Staniels, 38 N.H. 251.

In Massachusetts

(1) Such a certificate has been held not conclusive of the regularity of the previous proceedings.—Slasson v. Brown, 20 Pick. 436.

(2) Parol evidence is admissible to show that the place where service was made of notice of an application of a debtor to take the poor debtor's oath was not "the last and usual place of abode of the creditor," within a statute authorizing service by leaving a copy of the notice at such place.—Smith v. Randall, 1 Allen 456.

(3) However, it has been held that record of municipal court of city of Boston, which, correctly construed, shows that debtor on certain date delivered himself for examination in accordance with statute, and gave notice of his desire to take oath for relief of poor debtors, cannot be contradicted or controlled by extrinsic evidence, but is conclusive and binding on parties in action against surety on debtor's recognizance.—McKeon v. Briggs, 123 N.E. 387, 233 Mass. 99.

23. Va.—Walker v. Commonwealth, 131 S.E. 230, 144 Va. 648.

24. Ga.—Hardwick v. Shahan, 118 S.E. 575, 30 Ga.App. 526.
22 C.J. p 1081 note 25.

25. Vt.—Walker v. Briggs, 11 Vt. 84.
Controversies to which strangers to writing are parties generally see supra § 861.

26. Ill.—Welborn v. People, 76 Ill. 516.
53 C.J. p 588 note 38.

27. Ind.—Murphy v. Merry, 8 Blackf. 295.
53 C.J. p 588 note 40.

28. Me.—State v. Gilmore, 81 Me. 405, 17 A. 316.
53 C.J. p 588 note 39.

The admissibility of parol evidence of a magistrate to show a default has been questioned.—Dillingham v. U. S., C.C.Pa., 7 F.Cas.No. 3,913, 2 Wash.C.C. 422.

29. Ga.—Hardwick v. Shahan, 118 S.E. 575, 30 Ga.App. 526.
53 C.J. p 588 note 41.

30. Conn.—Gregory v. Sherman, 44 Conn. 466.
53 C.J. p 588 note 42.

31. Ga.—Shealy v. McClung, 50 Ga. 485.

32. Tex.—Noble v. Empire Gas & Fuel Co., Civ.App., 20 S.W.2d 849, affirmed Empire Gas & Fuel Co. v. Noble, Com.App., 36 S.W.2d 451.

33. N.H.—Fletcher v. State Capital Bank, 37 N.H. 369.
22 C.J. p 1080 note 96.

34. Ky.—Patrick v. Woods, 3 Bibb 29.

35. Me.—Young v. Gregory, 46 Me. 475.

36. Ark.—Farr v. Farr, 21 Ark. 573.

37. Mass.—Fuller v. Ruse, 26 N.E. 410, 153 Mass. 46.

38. Mass.—Lynch v. Lyons, 20 N.E. 2d 953, 303 Mass. 116.

39. La.—State v. Johnson, 41 So. 117, 116 La. 856.
22 C.J. p 1080 note 2.

40. Tex.—Peterman v. Peterman, Civ.App., 55 S.W.2d 1108.

41. Tenn.—Brandon v. Brandon, 135 S.W.2d 929, 175 Tenn. 463.
Wis.—Maxwell v. Sawyer, 63 N.W. 283, 90 Wis. 352.

42. Mass.—Bryer v. American Surety Co. of New York, 189 N.E. 109, 285 Mass. 336.

43. Or.—Butler v. Maas, 94 P.2d 1116, 163 Or. 201.

to show that the judge was not present during proceedings;[44] to vary the description of land in a report of commissioners in condemnation proceedings;[45] to attack an apparently proper return of execution by the sheriff;[46] to vary a clear stipulation in writing with respect to certain suits;[47] to attack the propriety of a verdict;[48] or to alter the description in a writ.[49]

Inquisition of lunacy. It has been held that the record of selectmen who are made by statute a judicial tribunal for holding inquisitions of lunacy cannot be impeached by parol evidence;[50] but any person not a party to an inquisition may, if the proceeding is admitted in evidence against him, introduce other evidence to show that the alleged lunatic was of sound mind at any period of the time covered thereby.[51]

§ 871. —— Minutes of Court

A court's minutes cannot be varied by parol evidence, in the absence of fraud or error; but extrinsic evidence is admissible to show whether an entry is what it purports to be. The minutes are not admissible to contradict or impeach the record proper.

The minutes of a judge or clerk are ordinarily proved by the production of the proper docket and showing by inspection that there is a minute, in which case it cannot be contradicted, explained, or enlarged by parol evidence[52] in the absence of any averment of fraud or error;[53] but, since there is nothing about a minute which in legal contemplation precludes the possibility of forgery or mistake, it may be shown by evidence aliunde whether the entry produced is in fact what it purports to be;[54] and the person by whom the minute purports to have been made is a competent witness whenever the question of the genuineness thereof is involved.[55]

Contradiction of record by minutes. The minutes of the court are not admissible for the purpose of contradicting or impeaching the record proper after it has been made up.[56]

§ 872. —— Evidence as to Jurisdiction

a. Courts of general jurisdiction
b. Inferior courts

a. Courts of General Jurisdiction

As a general rule, parol or extrinsic evidence is not admissible to show want of jurisdiction in a court of record or general jurisdiction; but in a proper case such evidence may be received to support jurisdiction.

As appears in Courts § 96, the jurisdiction of courts of record, or general jurisdiction, is presumed, and as a general rule parol or extrinsic evidence will not be received to show that such a court had not jurisdiction[57] or to contradict recitals showing jurisdiction,[58] unless there is something in the record itself showing that such recitals are not or cannot be true.[59]

A plain and unambiguous judgment in a proceeding cannot be explained by parol evidence as to what was litigated in the proceeding or what was determined by the judgment.—Rainier Heat & Power Co. v. City of Seattle, 193 P. 233, 113 Wash. 95.

44. Mass.—Thompson v. Globe Newspaper Co., 181 N.E. 249, 279 Mass. 176.

45. Kan.—C. G. Larned Mercantile, Real-Estate & Live Stock Co. v. Omaha, H. & G. R. Co., 42 P. 712, 56 Kan. 174.
Mo.—Sassman v. State Highway Commission, App., 45 S.W.2d 1093.

46. Tenn.—Farmers' Bank v. Wyatt, 40 S.W.2d 402, 163 Tenn. 31.

47. Mo.—State v. Lefaivre, 53 Mo. 470.
Or.—Dolph v. Speckart, 186 P. 32, 94 Or. 550.

48. Conn.—Taylor v. Talman, 2 Root 291.

49. Me.—Stuart v. Morrison, 67 Me. 549.

50. Me.—Eastport v. Belfast, 40 Me. 262.

51. N.J.—Aber v. Clark, 10 N.J.Law 217, 18 Am.D. 417.
Controversies to which strangers to writing are parties see supra § 861.

52. Miss.—Hammond-Gregg Co. v. Bradley, 80 So. 489, 119 Miss. 72.
22 C.J. p 1081 note 36.
Evidence of less dignity cannot be received to impeach a certified copy of an entry in the minute book.—State ex rel. Waldrop v. Mayo, 170 So. 117, 125 Fla. 442.
The day on which the term began cannot be shown by parol evidence contradicting the minutes of the court.—Steverson v. McLeod Lumber Co., 81 So. 788, 120 Miss. 65.

53. La.—Hickman v. Enterprise Lumber Co., 105 So. 343, 159 La. 280—Weil v. Levi, 3 So. 559, 40 La.Ann. 135.

54. Ill.—Gillett v. Booth, 95 Ill. 183.
Miss.—Hammond-Gregg Co. v. Bradley, 80 So. 489, 119 Miss. 72.
Invalidating or defeating operation of instrument generally see infra §§ 972–983.

55. Ill.—Gillett v. Booth, 95 Ill. 183.

56. Wash.—Hanley v. Most, 115 P. 2d 951, 952, citing **Corpus Juris.**
22 C.J. p 1082 note 40.

57. Ill.—People v. Jones, 164 N.E. 835, 333 Ill. 382.
22 C.J. p 1082 note 42.

58. Fla.—Kroier v. Kroier, 116 So. 753, 95 Fla. 865.
22 C.J. p 1082 note 43.
Adoption proceedings
The jurisdictional fact of an adopted child's residence in the county as stated in the judgment of adoption cannot be controverted by proof aliunde.—Avery v. Avery, 255 S.W. 18, 160 Ark. 375.
Partition proceedings
In a collateral action attacking proceedings in partition ordering and confirming a sale, evidence of defendant in prior action that he was not served with process was properly excluded, where it contradicted the record.—Fleming v. Chappell, 110 S.E. 148, 118 S.C. 290.
Probate records
When a party to an action offers probate records to establish his title to real estate, and such record evidence purports to show the domicile of his ancestor under whom he claims title, he cannot, in the absence of fraud, accident, or mistake, for the purpose of showing lack of jurisdiction, impeach the record by parol proof that his ancestor was domiciled elsewhere.—Seifert v. Seifert, 200 P. 243, 82 Okl. 230.

59. U.S.—Riggs v. Collins, C.C.Ill.,

Parol evidence to support the jurisdiction may in a proper case be received,[60] but in the case of a court purporting to exercise special statutory powers it is said that jurisdiction can be shown only by the record.[61]

Foreign courts. As appears in the C.J.S. title Judgments § 893, also 34 C.J. p 1142 note 70–p 1145 note 88, it is the usual rule that any jurisdictional fact appearing in a record of a foreign judgment, or a judgment of a sister state, may be met by pleading and proof to the contrary.

b. Inferior Courts

Under most authorities, extrinsic evidence is admissible to show the absence of jurisdiction in an inferior court, despite statements as to jurisdiction in the record, or to show jurisdiction where it does not appear there.

As appears in Courts § 97, there is no presumption of jurisdiction in the case of courts of inferior, limited, or special jurisdiction, and any statement with relation to jurisdiction found in the minutes, docket, record, or judgment of a justice of the peace or other inferior court is usually regarded as only prima facie evidence, in opposition to which it may be shown by any satisfactory means of proof that the authority of the court did not extend over the matter in controversy or the parties to the action,[62] although there is authority for the view that such a recital is conclusive.[63] Conversely, it is usually held that, where the jurisdiction does not appear on the face of the record, it may be shown by evidence aliunde,[64] although this also has been denied.[65]

§ 873. —— Aiding or Impeaching One Part of Record by Another

One part of a judicial record may be aided or impeached by other parts.

A recital in one part of a judicial record may be either aided or impeached by other parts of the record.[66]

§ 874. —— Matters Not Protected

Among other matters in judicial records not protected by the parol evidence rule, parol or extrinsic evidence is admitted to impeach unauthorized or extrajudicial certificates, to explain an entry of satisfaction of judgment or execution, to show the true time of issuing a process, and to show for what a judgment was recovered.

Unauthorized or extrajudicial certificate. The rule protecting judicial records from impeachment by extrinsic evidence does not apply so as to protect unauthorized or extrajudicial certificates of judges, justices, or officers of the court.[67]

The execution book kept by a clerk of court is only prima facie evidence of the truth of the entries therein, and may be contradicted by parol.[68]

Satisfaction of judgment or execution. An entry of satisfaction of a judgment or execution is, in the absence of statute giving it a different effect, nothing but a receipt, and, like any other mere receipt, may be explained or varied by satisfactory evidence that payment was not in fact made,[69] but a written instrument of full satisfaction of a judgment has been protected from contradiction by extrinsic evidence.[70]

Time of issuing process. The true time of filling up a process and placing it in the officer's hands for service or execution may, under most authorities, be shown by extrinsic proof irrespective of the date of the process,[71] although it has been said that dates in writs which are part of the record of the

20 F.Cas.No.11,824, 2 Biss. 268, affirmed 14 Wall. 491, 20 L.Ed. 723.
22 C.J. p 1082 note 44.

60. Neb.—Bantley v. Finney, 62 N.W. 213, 43 Neb. 794.
22 C.J. p 1082 note 45.
Evidence in aid of record generally see infra § 1010.

61. Ill.—People v. North Fork Outlet Drainage Dist., 162 N.E. 184, 331 Ill. 68.

62. Iowa.—Christensen v. Esbeck, 149 N.W. 76, 167 Iowa 130.
22 C.J. p 1082 note 47.
Where jurisdictional facts are not required to appear in the writings necessary in a proceeding, extrinsic evidence is admissible to show the absence of the facts not shown in the writings submitted.—In re Sharon's Estate, 177 P. 283, 179 Cal. 447.

63. Ala.—Ex p. Davis, 11 So. 308, 95 Ala. 9.

64. Ga.—Baker v. Thompson, 15 S.E. 644, 89 Ga. 486.
22 C.J. p 1082 note 49.
Evidence in aid of record generally see infra § 1010.

65. Miss.—Bank of Richton v. Jones, 121 So. 823, 153 Miss. 796.
22 C.J. p 1082 note 50.

66. Mo.—State ex rel. McMillan v. Guinn, 274 S.W. 456, 309 Mo. 291.
22 C.J. p 1082 note 52.
Explicit and irreconcilable contradiction of one part of a court record by another part may be shown.—Kroier v. Kroier, 116 So. 753, 95 Fla. 865.

67. Ky.—Simpson v. Antrobus, 86 S.W.2d 544, 545, 260 Ky. 641, citing **Corpus Juris**.
22 C.J. p 1083 note 53.
Clerk's indorsement on petition that summons was issued on date before limitation expired was held not to preclude proof that summons was issued subsequently, since clerk was not required to make such indorsement.—Simpson v. Antrobus, 86 S.W.2d 544, 260 Ky. 641.

68. Ark.—State v. Warner, 48 S.W.2d 246, 185 Ark. 610.
Va.—Taylor v. Dundass, 1 Wash. 92, 1 Va. 92.

69. Mass.—Lait v. Sears, 115 N.E. 247, 226 Mass. 119.
22 C.J. p 1081 note 28.
Receipts generally see infra § 926.

70. U.S.—Mann v. Minnesota Electric Light & Power Co., C.C.A.Okl., 43 F.2d 36.

71. Mich.—Howell v. Shepard, 12 N.W. 661, 48 Mich. 472.
N.H.—Robinson v. Burleigh, 5 N.H. 225.
22 C.J. p 1081 note 31.
Date of instrument generally see infra § 963.

court may not be impeached by parol evidence.[72]

Basis of recovery. Evidence outside the record, even parol, is admissible to show for what the judgment was recovered, that is, what was the real cause of action.[73]

Amendment of record. A defendant in execution is not precluded by an amendment of the execution, made by authority of the court, from showing the original form of the execution.[74]

Other matters. Extrinsic evidence has been admitted to show that a copy of an indictment, established as an office paper in lieu of the lost original, was nolle prosequied because of a variance from the original indictment.[75] Likewise parol evidence has been received to show the conversations between parties which resulted in a written stipulation for dismissal of the action.[76]

§ 875. —— Denial of Existence of Record

Extrinsic evidence is admissible to support a denial of the existence of a record.

A denial of the existence of a record is not an attempt to contradict the record, and extrinsic evidence is admissible in support of such denial.[77]

§ 876. Official Records and Documents

Parol or extrinsic evidence is not admissible, at least in collateral proceedings, to contradict or impeach the records and documents prepared and kept by public officers or filed with them for record or preservation.

Parol or extrinsic evidence is not admissible, at least in a collateral proceeding,[78] to contradict, vary, or impeach the official records or documents prepared and kept by public officers in the performance of their duties as such,[79] or filed with them for record or preservation pursuant to statute;[80] but in order thus to protect from contradiction a paper or document deposited in a public office it must have been made and certified in the manner, and have come from the source, required by statute to constitute it an official paper.[81]

§ 877. —— Legislative Records

Parol or extrinsic evidence is generally not admissible to contradict or impeach the enrolled bill of a statute or the journals of the legislature, although missing portions of the legislative record may be supplied by such evidence.

Records of the legislature are conclusive evidence of the matters which they purport to show,[82] and parol or extrinsic evidence will not be received to contradict or impeach either the enrolled bill of a statute[83] or, in the absence of a statute having a different effect,[84] the journals of the houses of the

A writ of garnishment may be shown to have been issued on a date other than the date it bears, in a direct attack on the judgment taken against the garnishee.—Hufstedler v. Harral, Tex.Civ.App., 54 S.W.2d 353, 355, citing **Corpus Juris.**

72. U.S.—Karnes v. Keck, D.C.Ill., 11 F.Supp. 577.

73. U.S.—Russell v. Place, N.Y., 94 U.S. 606, 24 L.Ed. 214.
34 C.J. p 506 note 57.

Contract or tort
The character of a judgment as one on contract or for tort may be ascertained by going back of the judgment and examining the character of the cause of action.
U.S.—Barnett v. Conklin, C.C.A.Mo., 268 F. 177, certiorari denied 41 S.Ct. 375, 255 U.S. 570, 65 L.Ed. 791.
Minn.—Gould v. Svendsgaard, 170 N.W. 595, 141 Minn. 437.

74. Ky.—Kleissendorff v. Fore, 3 B. Mon. 471.

75. Ga.—O'Berry v. Davis, 121 S. E. 857, 31 Ga.App. 755.

76. Cal.—Dunbar v. Osbun, 58 P.2d 979, 14 Cal.App.2d 684.

77. Ala.—Rainey v. Ridgeway, 43 So. 843, 151 Ala. 532, 533.
22 C.J. p 1083 note 57.

78. Ala.—State v. Campbell, 103 So. 471, 212 Ala. 493.
Pa.—Commonwealth v. Adams, 97 Pa.Super. 510.
22 C.J. p 1083 note 59 [f].
Proceedings directly attacking instrument see supra § 860.

79. Ill.—People ex rel. Toman v. Chicago Heights Terminal Transfer R. Co., 32 N.E.2d 161, 375 Ill. 590—People ex rel. Pfeiffer v. Morris, 6 N.E.2d 864, 365 Ill. 470—Jackson Park Hospital Co. v. Courtney, 4 N.E.2d 864, 364 Ill. 497—People ex rel. Carlstrom v. Shurtleff, 189 N.E. 291, 355 Ill. 210—People v. Chicago & E. I. Ry. Co., 145 N.E. 714, 314 Ill. 382.
Kan.—Heman Const. Co. v. Mason, 198 P. 966, 967, 109 Kan. 373, citing **Corpus Juris.**
Mont.—State v. American Bank & Trust Co., 243 P. 1093, 75 Mont. 369.
N.D.—Baird v. Divide County, 228 N. W. 226, 230, 58 N.D. 867, citing **Corpus Juris.**
22 C.J. p 1083 note 59.

Amended record
Where public official, charged with duty of making record of official action, fails to do so because of accident, oversight, or other cause, record, as thereafter properly amended, has same force and effect as though originally made, and cannot be contradicted by parol.—People v. Hartquist, 146 N.E. 140, 315 Ill. 228.

80. Conn.—Eld v. Gorham, 20 Conn. 8.
22 C.J. p 1083 note 60.

81. U.S.—U. S. v. Souders, D.C.N.J., 27 F.Cas.No.16,358, 2 Abb. 456.
22 C.J. p 1084 note 61.

82. W.Va.—Capito v. Topping, 64 S. E. 845, 65 W.Va. 587, 22 L.R.A.,N. S., 1089.
22 C.J. p 1084 note 62.
Parol evidence as to foreign statutes generally see the C.J.S. title Statutes § 456, also 59 C.J. p 1210 note 44—p 1212 note 67.

Purpose of act
The testimony of a legislator who introduced a bill is not admissible to show the purpose of the act.—State v. Hoff, Civ.App., 29 S.W. 672, affirmed 31 S.W. 290, 88 Tex. 297.

83. S.C.—Wingfield v. South Carolina Tax Commission, 144 S.E. 846, 147 S.C. 116.
22 C.J. p 1084 note 63.

Contradiction by legislative journals is not permitted.—Koehler v. Hill, 14 N.W. 738, 60 Iowa 543, 15 N.W. 609.
Contra State v. Frank, 83 N.W. 74, 60 Neb. 327, 85 N.W. 956, 61 Neb. 679.

84. Mo.—Bradley v. West, 60 Mo. 33.

legislature,[85] although such evidence may be received to supply missing portions of the legislative record which have become detached through accident or design.[86]

The admissibility of evidence in determining the validity of statutes generally is considered in the C.J.S. title Statutes §§ 85–87, also 59 C.J. p 631 note 10–p 634 note 63.

§ 878. —— County Records and Proceedings

County records cannot, as a rule, be varied or contradicted by parol or extrinsic evidence, but matters improperly placed on record are not so protected.

County records and proceedings cannot, as a rule, be varied or contradicted by parol or extrinsic evidence,[87] and it has been held that a deficiency in the record cannot be supplied by the testimony of the inhabitants;[88] but the rule in this respect does not extend so far as to protect matters which, although actually placed on record, are not proper matters of record,[89] or to preclude a showing, not inconsistent with the record, that certain action evidenced thereby was improper.[90] A fortiori, evidence which does not contradict, but merely explains, the record may be received.[91]

§ 879. —— Municipal Records and Proceedings

Parol or extrinsic evidence cannot be admitted to vary or contradict municipal records, unless the record contains something giving ground for attack.

Parol or extrinsic evidence cannot be admitted to vary or contradict municipal records,[92] unless something appearing in the record itself gives ground for an attack.[93] This rule applies to the records of boroughs[94] and cities,[95] and, likewise, this rule ap-

85. Fla.—Jackson Lumber Co. v. Walton County, 116 So. 771, 95 Fla. 632, appeal dismissed 49 S.Ct. 338, 73 L.Ed. 1011.
Mont.—Standard Oil Co. (Indiana) v. State Board of Equalization, 99 P. 2d 229, 110 Mont. 5.
22 C.J. p 1084 note 64.

Affirmative showing of the journals of the legislature may not be attacked by parol evidence.—State v. Carley, 104 So. 577, 89 Fla. 361.

The purpose and intention of the legislature in enacting a statute may not be established by evidence dehors the legislative journals.—Wheeler v. Board of Com'rs of City of Hopkinsville, 53 S.W.2d 740, 245 Ky. 388.

Absolute verity is imported by the journals of the legislature as to matters duly shown thereon.—Byrd v. State, 102 So. 223, 212 Ala. 266.

86. Neb.—Hull v. City of Humboldt, 186 N.W. 78, 107 Neb. 326.
22 C.J. p 1084 note 65.
Supplying omissions generally see infra §§ 890, 1008.

87. Kan.—Flemming v. Board of Com'rs of Ellsworth County, 240 P. 591, 592, 119 Kan. 598, quoting **Corpus Juris.**
22 C.J. p 1084 note 67.
Parol evidence as to records of county board see Counties § 91 c.

Absolute verity is imported by an order of board of supervisors levying additional taxes and therefore parol evidence is incompetent to contradict recitals.—Scott County v. Dubois, 130 So. 106, 158 Miss. 245.

Bids for county bonds held clear; hence parol evidence was incompetent to alter terms of bid, in absence of allegation of fraud or mistake.—Perry County v. Hazard Bank & Trust Co., 36 S.W.2d 868, 238 Ky. 49.

County road warrants which are unambiguous cannot be contradicted by oral testimony.—Austin Bros. v. Patton, Tex.Com.App., 288 S.W. 182, reversing, Civ.App., 245 S.W. 991, modified on other grounds, Com.App., 290 S.W. 153. Motion denied 294 S. W. 537.

88. Mass.—Manning v. Gloucester Fifth Parish, 6 Pick. 6.

89. Ala.—Mobile County v. Linch, 73 So. 423, 198 Ala. 57.

90. N.D.—Baird v. Divide County, 228 N.W. 226, 230, 58 N.D. 867, quoting **Corpus Juris.**
22 C.J. p 1084 note 70.

91. Ky.—Ray v. Woodruff, 182 S.W. 662, 168 Ky. 563.

92. Ind.—Van Der Veer v. State, 165 N.E. 265, 97 Ind.App. 1.
N.J.—Campbell v. City of Hackensack, 178 A. 794, 115 N.J.Law 209, 98 A.L.R. 1225.
N.Y.—Loos v. City of New York, 9 N.Y.S.2d 760, 170 Misc. 14, 104, reversed on other grounds 13 N.Y. S.2d 119, 257 App.Div. 219.
22 C.J. p 1085 note 72.

Record made pursuant to law with respect to proceedings of municipal body cannot be explained, enlarged, or contradicted by parol evidence.—Avery v. City of Chicago, 178 N.E. 351, 345 Ill. 640.

Minutes of municipal body are conclusive in the absence of corruption, bad faith, or a clear abuse of power.—Commonwealth ex rel. Volunteer Fire Dept. v. Township of Coal, Pa., 14 Northumb.L.J. 332, 32 Mun. 46.

Minutes of board of water commissioners cannot be added to where there was no showing that they inadvertently failed to include matter sought to be proved.—Livingstone v. MacGillivray, 36 P.2d 622, 1 Cal.2d 546.

Records of board of fire and police commissioners cannot be changed by parol evidence.—People ex rel. Reilly v. City of Kankakee, 6 N.E.2d 260, 288 Ill.App. 192.

Appeal from grant of license
Where landowner obtained license to store fuel oil, parol evidence that appeal to fire marshal by resident who was not abutting owner was filed on abutting owners' behalf was inadmissible.—Barnard v. Metropolitan Ice Co., 180 N.E. 308, 278 Mass. 441.

Matter not constituting record
Rule against admitting parol evidence to vary or contradict record in collateral proceeding is inapplicable to unbound, unrecorded typewritten document, purporting to set out proceedings of municipal governing body's meeting, at which ordinance was adopted.—City of Weslaco, Tex. v. Porter, C.C.A.Tex., 56 F.2d 6.

93. Iowa.—State v. Alexander, 77 N. W. 841, 107 Iowa 177.
22 C.J. p 1085 note 73.

94. N.J.—Jentz v. Ronan, 193 A. 701, 118 N.J.Law 421.
Pa.—Commonwealth v. King, 17 Pa. Dist. 785.

95. Ill.—Rand McNally & Co. v. City of Chicago, 216 Ill.App. 510.
N.J.—Murphy v. Cuddy, 1 A.2d 758, 121 N.J.Law 209.

Records of city council or other governing body generally
U.S.—Brown-Crummer Inv. Co. of Wichita, Kan., v. City of Florala, D.C.Ala., 55 F.2d 238.
Ala.—Penton v. Brown-Crummer Inv. Co., 131 So. 14, 222 Ala. 155.
Ark.—Lewis v. Forrest City Special Improvement Dist., 246 S.W. 867, 156 Ark. 356—Roberts v. Street Improvement Dist. No. 2 of City

plies to the records of villages,[96] irrigation districts,[97] and park districts.[98]

Parol evidence may be introduced as to matters, such as the call of a meeting of a municipal body,[99] which do not constitute a part of its record.[1]

§ 880. —— Town Records

Town records, entered by an authorized officer, cannot be contradicted by parol evidence as to matters within the town's jurisdictions.

The records of a town cannot be contradicted or added to by parol evidence in respect to matters regularly within the jurisdiction of the town or its officers, where the entry of record is made by a public officer in pursuance of the duty imposed on him by law.[2]

§ 881. —— School District Records

A school district's records cannot be contradicted or varied by parol or extrinsic evidence.

The records of a school district are within the protection of the parol evidence rule, and cannot be contradicted or varied by parol or extrinsic evidence.[3]

§ 882. —— Highway Records

Highway commissioners' records cannot be varied by parol.

The records of highway commissioners cannot be varied by parol.[4]

§ 883. —— Tax Records

Tax records and documents are commonly considered conclusive and not subject to impeachment by parol evidence.

Records and official documents relating to the assessment and collection of taxes and the acts of the tax officers in the premises are commonly considered conclusive and not subject to impeachment by parol evidence,[5] although there is authority for

of Morrilton, 245 S.W. 489, 156 Ark. 248.
Ill.—Avery v. City of Chicago, 178 N.E. 351, 345 Ill. 640.
Ind.—City of Mt. Vernon, Ind., v. Alldridge, 128 N.E. 934, 74 Ind. App. 309.
Ky.—City of Campbellsville v. Taylor County Telephone Co., 18 S.W. 2d 305, 229 Ky. 843.
Mich.—Flintoff v. Muskegon Traction & Lighting Co., 175 N.W. 438, 208 Mich. 527.
N.J.—Campbell v. City of Hackensack, 178 A. 794, 115 N.J.Law 209, 98 A.L.R. 1225.
R.I.—Toupin v. Marceau, 180 A. 353, 55 R.I. 265—Gelinas v. Fugere, 180 A. 346, 55 R.I. 225.
22 C.J. p 1085 note 72 [a] (1), [c].

Certificate of civil service board
Pa.—Detoro v. City of Pittston, Super., 21 A.2d 114.

Adoption of resolution cannot be shown by parol testimony where the official minutes do not contain the resolution.—Campbell v. City of Hackensack, 178 A. 794, 115 N.J.Law 209, 98 A.L.R. 1225.

Custom of clerk in writing the minutes of the city council cannot be shown by parol evidence which would vary the minutes.—City of Mt. Vernon, Ind., v. Alldridge, 128 N. E. 934, 74 Ind.App. 309.

Express recitals of the records of a city showing due passage of an ordinance cannot be contradicted by parol evidence.—Herzoff v. City of Omaha, 248 N.W. 314, 124 Neb. 785.

Lack of recollection by members of a city council may not be shown by parol to impeach the official records of the adoption of a resolution by the city council.—City Center Bank of Kansas City, Mo., v. City of Rosedale, 196 P. 770, 108 Kan. 474.

Opinions or understanding of city officials cannot be shown by parol evidence to vary a record.
N.Y.—Casler v. Tanzer, 234 N.Y.S. 571, 134 Misc. 48.
Wash.—Gillum v. Pacific Coast R. Co., 279 P. 114, 152 Wash. 657.

96. Ill.—Village of Bellwood v. Galt, 152 N.E. 591, 321 Ill. 504.

Record required by statute
Ill.—Selby v. Village of Winfield, 255 Ill.App. 67.

97. Mont.—State v. Dilworth, 258 P. 250, 80 Mont. 111.

98. Ill.—Potter v. Fon du Lac Park Dist., 168 N.E. 908, 337 Ill. 111.

99. R.I.—Gelinas v. Fugere, 180 A. 346, 55 R.I. 225.

1. R.I.—Gelinas v. Fugere, supra.

2. Ill.—People v. Chicago & E. I. Ry. Co., 138 N.E. 127, 306 Ill 402.
22 C.J. p 1085 note 74.
However, it has been declared that "we do not believe that these [township] records are of that absolute verity, that any person shall be estopped to show the truth, in consequence of any matter which they contain."—Westerhaven v. Clive, 5 Ohio 136, 138.

Record of town meeting cannot be added to, or varied by, parol.—Walsh v. Farrington, 165 A. 914, 105 Vt. 269.

Record of township board cannot be contradicted or impeached by parol testimony.—North Star Tp. v. Cowdry, 179 N.W. 259, 212 Mich. 7.

3. Ill.—Foltz v. Hutson, 281 Ill.App. 286.
Mo.—State ex rel. School Dist. of Affton v. Smith, 80 S.W.2d 858, 336 Mo. 703.
Tex.—Yorktown Independent School Dist. v. Afflerbach, Com.App., 12 S.W.2d 130, 133, citing Corpus Juris.
22 C.J. p 1085 note 76.

Amended record of a school board speaks as of day of proceedings recorded, and cannot be contradicted by parol.—Phenicie v. Board of Education of St. Joseph Community High School Dist. No. 305, 157 N.E. 34, 326 Ill. 73.

File mark of receipt of petition for election for establishment of a community high school district is part of record of office of county superintendent of schools for purpose of showing date of filing, and parol evidence is not admissible to show that superintendent had such petition in his hands on another date.—People ex rel. Pfeiffer v. Morris, 6 N.E.2d 864, 365 Ill. 470.

4. Ill.—Seass v. Monroe, 146 Ill.App. 56.
Kan.—Flemming v. Board of Com'rs of Ellsworth County, 240 P. 591, 592, 119 Kan. 598, quoting Corpus Juris.

5. Ill.—People v. Vail, 129 N.E. 494, 296 Ill. 61.
22 C.J. p 1085 note 78.

Affidavit of service of notice to redeem from tax sale cannot be aided by parol.—Geil v. Babb, 242 N. W. 34, 214 Iowa 263.

Assessment roll
Insufficient description of land on assessment roll cannot be aided by extrinsic evidence, and name listed under heading of "owner" cannot aid description.—Ransom v. Young, 168 So. 473, 176 Miss. 194.

the view that tax records are open to contradiction.[6]

§ 884. —— Land Office Records

The records and documents of land offices are not subject to contradiction or impeachment by parol or extrinsic evidence.

The protection of the rule against the contradiction or impeachment of public records by parol or extrinsic evidence is usually extended to the records and documents of land offices.[7]

§ 885. —— Official Surveys, Maps, and Plats

An official survey, map, or plat, or one which is duly filed or recorded, cannot be contradicted or invalidated by parol or extrinsic evidence; but evidence aliunde is admissible where the survey was not according to law.

An official survey, map, or plat, or one which is duly filed or recorded in the proper office, is not subject to be contradicted, impeached, or invalidated by parol or extrinsic evidence,[8] and an unambiguous plat cannot be explained or modified by such evidence.[9] However, evidence aliunde is admissible where the survey was not made according to law;[10] and it has been held that papers in the handwriting of a surveyor, found in his office, may be given in evidence to impeach his return of survey.[11]

§ 886. —— Registration or Certificate Thereof

Authorities differ as to the conclusiveness of the record or registration of a deed or other instrument, and the recording officer's certificate thereof, against parol or extrinsic evidence.

There is authority asserting the conclusiveness of the record or registration of a deed or other instrument,[12] and the recording officer's certificate thereof.[13] On the other hand, in a number of cases such records and certificates have been declared to be, or regarded as, merely prima facie evidence and open to contradiction;[14] and parol evidence has been admitted to prove the date of recording where the certificate fails to disclose such date.[15]

§ 887. —— Other Official Records and Documents

Official records and documents which have been held

Plat book of an assessor cannot be impeached or varied by parol evidence as to the description of land.—Blayden v. Morris, 214 P. 1039, 37 Idaho 37.

Record of board of assessors, which is duly kept pursuant to statutory requirement, generally cannot be varied or added to by other evidence.—Carbone, Inc., v. Kelly, 194 N.E. 701, 289 Mass. 602.

Records of county commissioners as to whether a tract of land is seated or unseated and has been assessed, taxed, and sold by the treasurer cannot be varied by parol testimony or by the private record of an assessor.—McCall v. Lorimer, Pa., 4 Watts 351.

6. Ohio.—State v. Aldridge, 64 N.E. 562, 66 Ohio St. 598.
22 C.J. p 1085 note 79.

7. Ill.—Daggett v. Wilkinson, 178 N.E. 41, 345 Ill. 244.
22 C.J. p 1085 note 80.

Patent description which is unambiguous, so that a surveyor can identify the land by such description, cannot be varied by the field notes of the original survey.—Board of Trustees of Town of Casa Colorado Land Grant v. Pooler, 28 P.2d 519, 38 N.M. 87.

8. La.—In re Moran, 1 La.A. (Orleans) 17.
R.I.—Swanson v. Gillan, 173 A. 122, 54 R.I. 382.
Tex.—Floyd v. Day, Civ.App., 50 S.W.2d 371, error dismissed.
22 C.J. p 1086 note 81.

Corpus Juris section referred to in connection with the applicability of the hearsay rule to official maps of departments of the federal government.—Bost v. U. S., C.C.A.Cal., 103 F.2d 717, 722.

Assessor's plat book cannot be impeached or varied as to the description of land by parol evidence.—Blayden v. Morris, 214 P. 1039, 37 Idaho 37.

Certified copy of official map on file in the general land office of the government survey of lands, which is made up from the government surveyor's field notes, is the best evidence of what appears thereon, and testimony of a surveyor to the effect that the field notes of the government surveyor of the land in question shows a different survey from that shown on such plat is not admissible to contradict or vary such plat.—H. Weston Lumber Co. v. Strahan, 90 So. 452, 128 Miss. 54.

Existence of marked line, which did not conform to the description of natural and artificial monuments in the patent, and conflicted with the courses and distances in the field notes, cannot be shown by parol evidence.—Braumiller v. Burke, Tex. Civ.App., 232 S.W. 906, overruling motion, Com.App., 247 S.W. 501.

Intent of landowner to dedicate a strip of land, marked "reserved" on a recorded plat, to the general use of lot owners cannot be shown by parol evidence.—Swanson v. Gillan, 173 A. 122, 54 R.I. 382.

Unambiguous location calls by which a survey was located and patented cannot be varied by parol testimony, in a suit in trespass to try title, for the purpose of creating an ambiguity in the surveyor's calls.—Wilson v. Giraud, Civ.App., 234 S.W. 110, conforming to answers to certified questions 231 S.W. 1074, 111 Tex. 253.

9. Okl.—Milliken v. Smith, 251 P. 84, 120 Okl. 211.

10. Ala.—Bridges v. McClendon, 56 Ala. 327.
22 C.J. p 1086 note 83.

11. Pa.—Democrat v. Goodlander, 2 Yeates 313.

12. U.S.—Pugh v. Commissioner of Internal Revenue, C.C.A., 49 F.2d 76, certiorari denied Pugh v. Burnet, 52 S.Ct. 22, 284 U.S. 642, 76 L. Ed. 546.
22 C.J. p 1086 note 86.

13. N.J.—Vanderveere v. Gaston, 25 N.J.Law 615.
22 C.J. p 1086 note 87.

14. Ind.—Greaf v. Breitenstein, 187 N.E. 347, 97 Ind.App. 525.
22 C.J. p 1086 note 88.

Registration of motor vehicle may be contradicted by parol evidence.
Ind.—Greaf v. Breitenstein, 187 N.E. 347, 97 Ind.App. 525.
Minn.—Bolton-Swanby Co. v. Owens, 275 N.W. 855, 201 Minn. 162.

15. Ala.—Truss v. Harvey, 24 So. 927, 120 Ala. 636.
Tenn.—Miller v. Estill, Meigs 479.
22 C.J. p 1086 note 87 [b], p 1087 note 89.

within the parol evidence rule include a governor's proclamation, records of drainage district commissioners, military records, and the records of official sales.

It has been held that state officers such as the board of administration, the auditor, and the treasurer cannot contradict their records by parol evidence,[16] but that the state itself is not concluded by those records.[17] The protection of the parol evidence rule has been extended to a proclamation of a governor,[18] the records of drainage district commissioners,[19] military records,[20] the enrollment record of freedmen citizens of the Creek Nation,[21] and the return of an officer on a warrant of a distress.[22] The admissibility of parol or extrinsic evidence in aid of, or to impeach, a certificate of acknowledgment has received full treatment in the title Acknowledgments §§ 121–124, 129, and 130.

The records of official sales, kept pursuant to statutory requirements, cannot be contradicted or varied by parol evidence;[23] but an affidavit required by statute as to sales on foreclosure by advertisement has been held to be only prima facie evidence of the facts stated therein, and subject to be controverted.[24]

§ 888. —— Transcripts and Authenticated Copies

A transcript or duly authenticated copy of a record or recorded instrument cannot be shown by parol evidence to be incorrect.

A transcript or a duly authenticated copy of a record or recorded instrument cannot be shown by parol evidence to be incorrect,[25] but its incorrectness may be shown by a production of the record or the original document and a comparison therewith.[26]

§ 889. —— Records or Documents Not Conclusive

Official entries and documents which may be contradicted by parol or extrinsic evidence include records of births, marriages, and burials, the registry of a vessel at the custom house, United States signal service records, filing marks or indorsements, calendars of prisoners, ex parte reports and statements, and foreign documents.

There is a class of entries, sometimes called records, which are of a public nature and required by law to be kept by various officers, but which are of a less solemn character and are not accorded the conclusiveness attaching to judgments of courts of record; these, while competent evidence of the facts recorded and required by law to be recorded, are not conclusive, but may be contradicted by parol or other extrinsic evidence.[27] To this class belong records of births and marriages,[28] a register of burials,[29] the registry or enrollment of a vessel at the custom house,[30] the record kept by a person employed in the signal service of the United States,[31] a filing mark or indorsement placed by an officer on a public document,[32] the calendar of prisoners kept by a sheriff or jailer,[33] the certificate of an ordinary as to the disability of a soldier,[34] a naturalization certificate stating the age of a naturalized citizen,[35] and other writings of a like character.[36]

Ex parte certificate, report, or statement. The law does not give a conclusive effect to the ex parte certificates and reports of public officers in relation to matters which depend on the exercise of integrity, judgment, and discretion, and by which private rights and contracts may be seriously affected, but they may be controverted by extrinsic

16. Kan.—Heman Const. Co. v. Mason, 198 P. 966, 109 Kan. 373.

17. Kan.—Heman Const. Co. v. Mason, supra.

18. Tex.—Raney & Hamon v. Hamilton & White, Civ.App., 234 S.W. 229.

19. Ill.—People v. Prather, 153 N. E. 382, 322 Ill. 280.

20. Mass.—Fitchburg v. Lunenburg, 102 Mass. 358.
22 C.J. p 1086 note 85.

21. Okl.—Miller v. Allen, 229 P. 152, 104 Okl. 39.

22. Mass.—Wilson v. Loring, 7 Mass. 392—Purrington v. Loring, 7 Mass. 388.

23. Ark.—Cooper v. Freeman Lumber Co., 31 S.W. 981, 32 S.W. 494, 61 Ark. 36.
Or.—Bays v. Trulson, 35 P. 26, 25 Or. 109.

24. N.Y.—Mowry v. Sanborn, 72 N. Y. 534, reversing 11 Hun 545—Story v. Hamilton, 20 Hun 133, affirmed 86 N.Y. 428.

25. W.Va.—Pardee v. Johnston, 74 S.E. 721, 70 W.Va. 347.
22 C.J. p 1087 note 93.
Parol or extrinsic evidence contradicting foreign documents see infra § 889.

26. Ala.—Mobile Cong. Church v. Morris, 8 Ala. 182.

27. Me.—Goodrich v. Senate, 42 A. 409, 92 Me. 248.

28. Pa.—Ohlweiler v. Ohlweiler, 72 Pa.Super. 518.
22 C.J. p 1087 note 96.
Correctness of answers
The record of a marriage license in the technical sense, is conclusive proof of the fact of the issuing of the license, and is evidence that the parties appeared and made answer as therein set forth; but it is not conclusive that the answers as made were exactly correct.—Ohlweiler v. Ohlweiler, supra.

29. U.S.—Lewis v. Marshall, Ky., 5 Pet. 470, 8 L.Ed. 195.

30. N.Y.—Whiton v. Spring, 74 N. Y. 169.
22 C.J. p 1087 note 97.
Contra Clark v. Slidell, 5 Rob., La., 330.

31. U.S.—Evanston v. Gunn, Ill., 99 U.S. 660, 25 L.Ed. 306.

32. Ohio.—Franks v. Moore, 194 N. E. 39, 48 Ohio App. 403.
22 C.J. p 1087 note 99.

33. U.S.—White v. U. S., Ala., 17 S. Ct. 38, 164 U.S. 100, 41 L.Ed. 365.
Me.—Goodrich v. Senate, 42 A. 409, 92 Me. 248.

34. Ga.—Kelly v. City of Jefferson, 173 S.E. 133, 178 Ga. 427.

35. N.Y.—Schnurman v. Metropolitan Life Ins. Co., 5 N.Y.S.2d 276, 254 App.Div. 892.

36. Me.—Goodrich v. Senate, 42 A. 409, 92 Me. 248.
22 C.J. p 1083 note 59 [e].

evidence,[37] unless a legislative intent that they should be conclusive as to the matters required to be reported is expressed or must necessarily be implied from the language used.[38] Ex parte statements filed by claimant in support of a preëmption claim to land do not bar proof of the true facts by parol evidence.[39]

Foreign documents. It has been held that it would be pushing the comity usually extended to tribunals and officers of a foreign government beyond the bounds of justice and the usages of nations to claim for them a total exemption from inquiry when their acts affect the rights of another nation or its citizens.[40]

§ 890. —— Supplying Omissions

Matters required by law to appear in an official record or document cannot be supplied by parol or extrinsic evidence, but matters not so required, and not varying, but supplementing, the record, may be shown by such evidence. Omissions may be explained by parol, and they may be supplied by parol, in the absence of inhibiting statutes, where the rights of innocent persons might otherwise be prejudiced.

Where certain matters are by law required to be made to appear of record or in an official document, an omission as to such matters cannot be supplied by parol or extrinsic evidence;[41] nor can the records of official proceedings be supplemented by parol so as to show a compliance with statutory requirements;[42] nor can public officers put into their report, by parol evidence, matters as to which they were not authorized by law to act;[43] and in no case can an omission which renders the record or document null and void be supplied by parol.[44]

However, an omission may be explained by parol;[45] and parol evidence may be admissible to show matters which, while they might properly appear on the record or document, are not required to be therein set forth, and which do not contradict or vary the record, but supplement it,[46] or matters as to which a record is usually kept, although not required by statute,[47] or matters allowed by statute for the purpose of amending the record;[48] and, under a statute providing that no omission in the assessment of property should affect the legality of taxes levied therein, it has been held that a fact omitted from the record may be proved by parol.[49] It has also been asserted that, in the absence of any statute making the record of a public officer or board the sole evidence of his or its

37. Kan.—Saville v. Marshall County School-Dist. No. 27, 22 Kan. 529.
22 C.J. p 1087 note 3.

38. Ind.—Hunter v. Burnsville Turnp. Co., 56 Ind. 213.

39. U.S.—Southern Pac. Co. v. City of Reno, D.C.Nev., 257 F. 450, affirmed, C.C.A., City of Reno v. Southern Pac. Co., 268 F. 751.

40. U.S.—U. S. v. King, La., 3 How. 773, 11 L.Ed. 824.
22 C.J. p 1088 note 5, p 1087 note 93 [b].

41. Ill.—People ex rel. Toman v. Chicago Heights Terminal Transfer R. Co., 32 N.E.2d 161, 375 Ill. 590—People ex rel. Pfeiffer v. Morris, 6 N.E.2d 864, 365 Ill. 470—Jackson Park Hospital Co. v. Courtney, 4 N.E.2d 864, 364 Ill. 497—People ex rel Carlstrom v. Shurtleff, 189 N.E. 291, 355 Ill. 210.
N.Y.—Howard v. Town of Brighton, 257 N.Y.S. 41, 143 Misc. 265.
Pa.—Potts v. School Dist. of Penn. Tp., 193 A. 290, 127 Pa.Super. 173.
22 C.J. p 1088 note 7.
Omission of patent to disclose invention cannot be supplied by oral testimony.—General Electric Co. v. U. S. Electric Mfg. Co., C.C.A.N.Y., 63 F.2d 764, modifying, D.C., 56 F.2d 630.

42. Ind.—Van Der Veer v. State, 165 N.E. 265, 97 Ind.App. 1.
Miss.—Gordan v. Smith, 122 So. 762, 154 Miss. 787, followed in McDevitt v. Walls, 122 So. 766.
Neb.—Hull v. City of Humboldt, 156 N.W. 78, 107 Neb. 326.
22 C.J. p 1088 note 8.

43. N.J.—Vorrath v. Hoboken, 8 A. 125, 49 N.J.Law 285.

44. N.D.—Sheets v. Paine, 86 N.W. 117, 10 N.D. 103.
22 C.J. p 1088 note 10.

45. Pa.—Wilson v. Belinda, 3 Serg. & R. 396.
22 C.J. p 1088 note 11.

46. U.S.—Gulf Refining Co. of Louisiana v. Phillips, C.C.A.La., 11 F.2d 967, affirming, D.C., 5 F.2d 514 and certiorari denied 47 S.Ct. 93, 273 U.S. 697, 71 L.Ed. 845, and Gulf Refining Co. of Louisiana v. Sandlin, 47 S.Ct. 93, 273 U.S. 697, 71 L.Ed. 845.
Ariz.—Tolleson Union High School Dist. v. Kincaid, 85 P.2d 708, 53 Ariz. 60.
Ill.—Jackson v. School Directors of Dist. No. 85, Grundy County, Ill., 232 Ill.App. 102.
Mo.—State ex rel. School Dist. of Affton v. Smith, 80 S.W.2d 858, 336 Mo. 703—Peter v. Kaufmann, 38 S.W.2d 1062, 327 Mo. 915.
N.Y.—People ex rel. Sound Realty Co. v. Nicholson, 13 N.E.2d 595, 277 N.Y. 101, affirming Sound Realty Co. v. Nicholson, 298 N.Y.S. 192, 251 App.Div. 819, motion and reargument denied 298 N.Y.S. 510, 251 App.Div. 886, motion denied 16 N.E.2d 106, 278 N.Y. 567.
Pa.—Stroup v. Luzerne County, 35 Luz.Leg.Reg. 95.
Tex.—Doss v. West Texas Const. Co., 96 S.W.2d 1116, 128 Tex. 339, affirming West Texas Const. Co. v. Doss, Civ.App., 59 S.W.2d 866—Yorktown Independent School Dist. v. Afflerbach, Com.App., 12 S.W.2d 130, reversing Afflerbach v. Yorktown Independent School Dist., Civ.App., 1 S.W.2d 410—City of Electra v. American La France & Foamite Industries, Civ.App., 133 S.W.2d 223, error dismissed, judgment correct—City of Odessa v. Elliott, Civ.App., 47 S.W.2d 866, reversed on other grounds, Com. App., 58 S.W.2d 34.
Wis.—Grimm v. Bayfield County, 182 N.W. 466, 174 Wis. 43.
22 C.J. p 1088 note 12.
Supplying omissions as aid in construction see infra § 1008.
Merely directory statute providing for the keeping of records does not preclude parol evidence supplying omissions from the records.—Manley v. Northumberland County, D.C.Pa., 32 F.Supp. 775.

47. U.S.—Manley v. Northumberland County, supra.
22 C.J. p 1088 note 13.

48. Ill.—People v. Illinois Cent. R. Co., 145 N.E. 719, 314 Ill. 339.

49. Iowa.—Cedar Rapids & M. R. R. Co. v. Carroll County, 41 Iowa 153.

proceedings, parol evidence is admissible to show that certain acts were done or proceedings had, although as to them the record is silent, where the rights of innocent persons might otherwise be prejudiced.[50]

§ 891. Quasi Public Records

Parol evidence has been held admissible to explain or contradict such quasi public records as a ship's log book, entries by physicians in an asylum's ward books, and a religious society's records.

Parol evidence has been held admissible to explain or contradict records which, while kept pursuant to a public duty or even required by statute, have not the dignity which pertains to the more solemn official records, and which include a ship's log book,[51] entries made by physicians in the ward books of an asylum,[52] and the records of a religious society.[53]

§ 892. Corporate Records

While there are authorities opposed, the preponderance of authority favors the view that the records of a private corporation may not be varied or contradicted by parol evidence.

The preponderance of authority favors the view that the records of a private corporation may not be varied or contradicted by parol,[54] although there are cases in which this conclusive effect has been denied.[55]

50. Mich.—Rubatt v. Wakefield Tp., 215 N.W. 38, 239 Mich. 536—Draper v. Village of Springwells, 209 N.W. 150, 235 Mich. 168—North Star Tp. v. Cowdry, 179 N.W. 259, 212 Mich. 7.
Or.—Hornig v. Town of Canby, 188 P. 700, 95 Or. 612
Wash.—Pratt v. Pautzke, 24 P.2d 442, 174 Wash. 171.
22 C.J. p 1088 note 15.

Imperfect or silent record

An imperfectly kept, or a completely silent, record may be supplemented by evidence aliunde where the rights of creditors or third persons would otherwise be prejudiced. —Ramsey v. City of Kissimmee, 149 So. 553, 111 Fla. 387.

51. U.S.—The Hercules, D.C.Mass., 12 F.Cas.No.6,401, 1 Sprague 534.
22 C.J. p 1088 note 17.

52. N.J.—State v. Hinkley, 9 N.J.L.J. 118.

53. Vt.—Fletcher First Universalist Soc. v. Leach, 35 Vt. 108.

54. U.S.—Duffy v. Treide, C.C.A.Md., 75 F.2d 17—American & British Mfg. Corporation v. New Idria Quicksilver Mining Co., C.C.A.R.I., 293 F. 509—Fox v. Johnson & Wimsatt, D.C.D.C., 31 F.Supp. 64.
Ariz.—Southern Methodist Hospital and Sanatorium of Tucson v. Wilson, 46 P.2d 118, 45 Ariz. 507.
Ill.—Nelson v. John B. Colegrove & Co. State Bank, 265 Ill.App. 488, affirmed 184 N.E. 233, 351 Ill. 124.
Ind.—Star Pub. Co. v. Ball, 134 N.E. 285, 192 Ind. 158—Nordyke & Marmon Co. v. Swift, 123 N.E. 449, 71 Ind.App. 176.
Miss.—Maas v. Sisters of Mercy of Vicksburg, 99 So. 468, 135 Miss. 505.
N.C.—Respess v. Rex Spinning Co., 133 S.E. 391, 191 N.C. 809.
Utah.—William Budge Memorial Hospital v. Maughan, 3 P.2d 258, 79 Utah 516, rehearing denied 13 P.2d 1119, 79 Utah 516.
Wis.—Huebner v. Advance Refrigerator Co., 227 N.W. 868, 200 Wis. 233, 66 A.L.R. 1325.
22 C.J. p 1088 note 20.
Subscription to corporate stock see infra § 911.

Amplification or explanation of a corporation's records by extrinsic evidence is permitted where such evidence does not contradict the records.—In re Rickshaw, Inc., D.C. Mass., 12 F.Supp. 424.

In collateral action, especially as to the declaration of a dividend, parol evidence is not admissible to impeach the accuracy of corporate records.
Ill.—Ford v. Ford Mfg. Co., 222 Ill. App. 76.
R.I.—Dennis v. Joslin Mfg. Co., 36 A. 129, 19 R.I. 666.

Purpose of corporation must be ascertained from articles of incorporation unaided by extrinsic evidence.
La.—Moresi v. Burleigh, 127 So. 624, 170 La. 270.
Mich.—Kalamazoo v. Kalamazoo Heat, Light & Power Co., 82 N.W. 811, 124 Mich. 74.

Corporate records are conclusive as to the qualifications of both stockholders and officers.—In re Sharp Bros., D.C.Mont., 2 F.Supp. 227.

In Kentucky

(1) It has been stated that, generally speaking, corporate records cannot be varied by parol evidence except in cases of direct attack for fraud or possibly some other attack on the integrity of the record.—Martin v. Holian, 126 S.W.2d 465, 277 Ky. 291.

(2) Where the integrity of a corporate record is not attacked, parol evidence is inadmissible to alter or vary its terms.—Harlan-Kellioka Coal Co. v. Kelly, 262 S.W. 259, 203 Ky. 260.

(3) On the other hand, it has been held that the minutes of a corporate meeting are only prima facie evidence of the proceedings and parol testimony is admissible to show what actually occurred in the absence of an estoppel.
U.S.—In re Independent Distillers of Kentucky, D.C.Ky., 34 F.Supp. 724.
Ky.—Kelley-Koett Mfg. Co. v. Goldenberg, 270 S.W. 15, 17, 207 Ky. 695, quoting Corpus Juris.

Report of bank examiner of which a copy was filed among the bank's records is not a corporate record within the parol evidence rule.—Conyers v. Cleveland, C.C.A.S.C., 87 F.2d 195.

55. Cal.—Hygienic Health Food Co. v. Grant, 202 P. 653, 187 Cal. 431, motion denied 204 P. 389—Cox v. First Nat. Bank, 52 P.2d 524, 10 Cal.App.2d 302.
N.J.—Graham v. Fleissner's Ex'rs, 153 A. 526, 107 N.J.Law 278.
Pa.—Krick v. Fairy Silk Co., 166 A. 554, 311 Pa. 202—In re Loeffler's Estate, 121 A. 186, 277 Pa. 317—Lincoln v. Christian, 94 Pa.Super. 145.
22 C.J. p 1088 note 21—14 C.J. p 377 note 58.
Supplying omissions from corporate records see infra § 1009.

Admittedly incorrect and incomplete minutes of a directors' meeting do not preclude parol evidence of what actually occurred at the meeting.—Peterson v. First Nat. Bank, 281 P. 1104, 101 Cal.App. 532.

Director charged with fraud may contradict the corporation minutes as to his participation in a directors' meeting.—Sugarland Industries v. Parker, Tex.Civ.App., 293 S.W. 609.

Ownership of stock

Oral evidence is admissible to show that real stockholder is person other than stockholder of record. —Veigel v. Dakota Trust & Savings Bank, 225 N.W. 657, 55 S.D. 236.

Strength of parol testimony necessary

When a corporation seeks to destroy the effect of entries on its books which purport to be regular records of the proceedings of its board of directors or stockholders,

Parol evidence has been received to explain records of directors' meetings;[56] but it has also been held that the recorded vote of the directors or stockholders of a corporation must be construed by its terms alone, with reference to the subject matter to which it applies, and that parol evidence is not admissible to show the sense in which it was understood by a director or stockholder,[57] and that neither the private views nor the public declarations of individual members of the corporation can be inquired into for the purpose of ascertaining the meaning.[58] Parol evidence has also been received as to a corporate intent with respect to action to be taken in the future,[59] or to show that the principal place of business within the state of a foreign corporation is at a place other than that designated in its certificate filed for the purpose of doing business within the state.[60]

2. Private Writings

§ 893. Arbitration and Award

The admissibility of parol or extrinsic evidence in connection with matters of arbitration and award is considered in § 131 c of the title Arbitration and Award.

§ 894. Assignments

The parol evidence rule applies to assignments.

An assignment or transfer which is clear and unambiguous cannot be contradicted or varied by parol evidence.[61] This rule excludes any showing by the parties of parol reservations,[62] or evidence adding to the terms of the instrument by showing a parol warranty[63] or guaranty.[64]

§ 895. Bills and Notes

The general rule, which is subject to limitations and exceptions, is that bills, notes, and similar instruments cannot be varied or contradicted by parol or extrinsic evidence.

Although the authorities as to the admissibility of parol evidence to affect commercial paper have been said to be by no means uniform,[65] the general rule, which is subject to limitations and exceptions appearing infra §§ 929–1015, is that bills, notes, and other instruments of a similar nature are not subject to be varied or contradicted by parol or extrinsic evidence.[66]

A check, being in legal effect but a bill of ex-

it should offer for that purpose testimony of a more conclusive nature than such as serves merely to create a suspicion that there was an irregularity in the manner in which the records were kept.
Ark.—Grand Nat. Bank of St. Louis v. Taylor, 1 S.W.2d 818, 176 Ark. 1.
Tex.—McIlhenny v. Binz, 13 S.W. 655, 80 Tex. 1, 26 Am.S.R. 705.

Recital of stockholders' agreement to pay debts
N.C.—Asbury v. Mauney, 92 S.E. 267, 173 N.C. 454.

Corpus Juris statement quoted with approval in a case involving a prosecution for embezzlement of corporate funds.—Lewis v. People, 60 P.2d 1089, 1101, 99 Colo. 102.

56. N.M.—Franciscan Hotel Co. v. Albuquerque Hotel Co., 24 P.2d 718, 37 N.M. 456.

57. Mass.—Gould v. Norfolk Lead Co., 9 Cush. 338, 57 Am.D. 50.
N.H.—Peterborough R. Co. v. Wood, 61 N.H. 418.

58. Conn.—Bartlett v. Kinsley, 15 Conn. 327.

59. Conn.—New York, N. H. & H. R. Co. v. Offield, 60 A. 740, 78 Conn. 1.

60. U.S.—Mason & Hanger Co. v. Sharon, 231 F. 861, 146 C.C.A. 57.

61. U.S.—McAleer v. U. S., 14 S.Ct. 160, 150 U.S. 424, 37 L.Ed. 1130—In re Vanity Fair Slippers, D.C. N.Y., 4 F.Supp. 83.
Ky.—Farmers' & Traders' Bank of Campton, Ky., v. Smith, 7 S.W.2d 200, 224 Ky. 761.
La.—Collins v. Jones, App., 152 So. 802.
Miss.—Taylor v. C. I. T. Corporation, 191 So. 60, 187 Miss. 581—Martin v. First Nat. Bank, 164 So. 896, 176 Miss. 338.
N.C.—Byrd v. Southern Ry. Co., 112 S.E. 589, 195 N.C. 873.
Okl.—Niagra Fire Ins. Co. v. Flowers, 259 P. 840, 127 Okl. 137.
Tex.—Butler v. Jenkins Oil Corporation, 97 S.W.2d 466, 128 Tex. 356, affirming, Civ.App., 68 S.W.2d 248.
22 C.J. p 1141 note 47—5 C.J. p 1019 note 34.

Assignments for benefit of creditors are within the rule.—American Agr. Chemical Co. v. Small, 151 A. 555, 129 Me. 303—22 C.J. p 1141 note 47 [b].

Warranty contained in assignment of an oil lease cannot be contradicted.—Hill v. Provine, Tex.Civ.App., 260 S.W. 681.

62. N.Y.—Spies v. National City Bank, 74 N.Y.S. 64, 68 App.Div. 70, affirmed 66 N.E. 736, 174 N.Y. 222, 61 L.R.A. 193.

63. Ala.—Griel v. Lomax, 5 So. 325, 86 Ala. 132.
22 C.J. p 1141 note 49.

64. Minn.—Jones v. Alley, 17 Minn. 292.
22 C.J. p 1141 note 50.

65. W.Va.—Long v. Potts, 75 S.E. 62, 70 W.Va. 719.
22 C.J. p 1089 note 30.

66. U.S.—Miller v. Hockley, C.C.A. Md., 80 F.2d 980, certiorari denied 56 S.Ct. 677, 298 U.S. 657, 80 L. Ed. 1383.
Ala.—Woodlawn Federal Savings & Loan Ass'n v. Williams, 187 So. 177, 237 Ala. 446—Steiner Bros. v. Slifkin, 186 So. 156, 237 Ala. 226—Jackson v. Sample, 173 So. 510, 234 Ala. 75—Dean v. Lyde, 136 So. 857, 223 Ala. 394—Davenport & Harris Undertaking Co. v. Roberson, 121 So. 733, 219 Ala. 203—Ford v. Southern Motor Co., 93 So. 902, 208 Ala. 170.
Ariz.—Boyle v. Webb, 94 P.2d 642, 54 Ariz. 188.
Ark.—Shanks v. Clark, 300 S.W. 453, 175 Ark. 883—Oliver Const. Co. v. Union Trust Co., 284 S.W. 779, 171 Ark. 482.
Cal.—Bank of America Nat. Trust & Savings Ass'n v. Goldstein, 76 P.2d 545, 25 Cal.App.2d 37—Seth v. Lew Hing, 14 P.2d 537, 125 Cal.App. 729, rehearing denied 15 P.2d 190, 125 Cal.App. 729.
Colo.—Abercrombie v. Bear Canon Coal Co., 279 P. 42, 86 Colo. 169.
Conn.—J. E. Smith & Co. v. Say, 129 A. 538, 102 Conn. 558.

change, is subject to the same rule, and cannot be varied or contradicted by parol evidence.[67] The same has been held as to a notation on a check, indorsed by the payee, with respect to the purpose for which it was given;[68] but by other authority a memorandum on a check may be explained by parol.[69]

Liability or enforcement. It is not permissible to show a parol agreement of the payee or holder of commercial paper not to enforce payment against

Ga.—Buffington v. Bank of College Park, 122 S.E. 50, 157 Ga. 570—Evans v. Jones, 170 S.E. 541, 47 Ga.App. 351—Sewell v. Armour Fertilizer Works, 147 S.E. 717, 39 Ga.App. 516—Long v. Farmers' Hardware Co., 110 S.E. 422, 27 Ga. App. 639—Stewart v. Hardin, 101 S.E. 716, 24 Ga.App. 611.

Idaho.—Mahas v. Kasiska, 276 P. 315, 47 Idaho 179—Craven v. Bos, 225 P. 136, 38 Idaho 722.

Ill.—Cusanelli v. Steele, 5 N.E.2d 296, 287 Ill.App. 490—Shiel v. Chicago Title & Trust Co., 262 Ill.App. 410—Hinsdale State Bank v. Lytle, 262 Ill.App. 151—North Avenue State Bank v. Nichols, 252 Ill.App. 366—People v. Michigan Avenue Trust Co., 229 Ill.App. 512.

Iowa.—Versteeg v. Hoeven, 239 N.W. 709, 214 Iowa 92—Herron v. Brinton, 175 N.W. 831, 188 Iowa 60.

Kan.—Brown v. Pryor, 298 P. 747, 133 Kan. 129.

Mass.—Wadsworth v. Richenburg, 22 N.E.2d 108, 303 Mass. 548.

Mich.—Price v. Klett, 238 N.W. 253, 255 Mich. 354—Stone v. Steil, 202 N.W. 982, 230 Mich. 249.

Minn.—Brown v. Backer, 207 N.W. 20, 166 Minn. 50.

Miss.—McArthur v. Fillingame, 186 So. 828, 829, citing **Corpus Juris**—Allen v. Grenada Bank, 124 So. 69, 155 Miss. 91—Porter Hardware Co. v. Peacock, 91 So. 856, 129 Miss. 129.

Mo.—Stephens v. Bell, App., 106 S.W.2d 19—Mutual Life of Illinois v. McKinnis, App., 47 S.W.2d 564.

Mont.—Swan v. Le Claire, 251 P. 155, 77 Mont. 422.

Neb.—Sturm v. Lloyd, 264 N.W. 150, 130 Neb. 89.

N.H.—Merrimack River Sav. Bank v. Higgins, 195 A. 369, 89 N.H. 154.

N.J.—Garon v. Becker, 1 A.2d 376, 121 N.J.Law 73, affirming 197 A. 892, 120 N.J.Law 30—Superior Finance Corporation v. John A. McCrane Motors, 160 A. 341, 10 N.J. Misc. 638.

N.C.—Coral Gables v. Ayres, 181 S. E. 263, 208 N.C. 426.

Okl.—Allis-Chalmers Mfg. Co. v. Hawhee, 105 P.2d 410, 187 Okl. 670—Wignall v. Montgomery, 49 P.2d 163, 173 Okl. 399—White v. Oliver, 49 P.2d 147, 173 Okl. 559, 100 A.L.R. 1461—Hopkins v. Walker, 291 P. 70, 144 Okl. 254.

Pa.—Speier v. Michelson, 14 Pa.Dist. & Co. 183, affirmed 154 A. 127, 303 Pa. 66—Security Finance Co. v. Reiser, 7 Pa.Dist. & Co. 634.

R.I.—Neo Sicilia Loan Co. v. Perry, 190 A. 457, 57 R.I. 441.

S.C.—Peoples Nat. Bank of Greenville v. Upchurch, 190 S.E. 515, 183 S.C. 147.

S.D.—Thompson v. Dakota Independent Oil Co., 288 N.W. 148.

Tenn.—Todd v. Third Nat. Bank, 113 S.W.2d 740, 172 Tenn. 586—American Fruit Growers v. Hawkinson, 106 S.W.2d 564, 21 Tenn.App. 127.

Tex.—Farrier v. Hopkins, 112 S.W. 2d 182, 131 Tex. 75—Robertson v. City Nat. Bank of Bowie, 36 S.W.2d 481, 120 Tex. 226—McFarland v. Shaw, Civ.App., 45 S.W.2d 193, reversing Shaw v. McFarland, Civ. App., 28 S.W.2d 563—Dooley v. Gray, Civ.App., 54 S.W.2d 558, error dismissed.

Utah.—Garrett v. Ellison, 72 P.2d 449, 93 Utah 184, 129 A.L.R. 666.

Wash.—Dove v. Cowlitz Valley Bank, 71 P.2d 555, 191 Wash. 429.

Wis.—In re McAskill's Estate, 257 N.W. 177, 216 Wis. 276—Marshall v. Wittig, 251 N.W. 439, 213 Wis. 374.

22 C.J. p 1089 note 31.

"A promissory note, in the usual commercial form, is a complete contract in itself, and its terms cannot be varied or contradicted by parol evidence."—Farmers' Nat. Bank, Pilger, v. Ohman, 199 N.W. 802, 112 Neb. 491.

Presumption is that a note embodies the entire agreement of the parties.—Fischman-Harris Realty Co. v. Kleine, Mo.App., 82 S.W.2d 605.

Certificate of deposit is within the rule.

Iowa.—Elgersma v. Sheldon Nat. Bank, 190 N.W. 138, 194 Iowa 676.

Mass.—Wasserman v. Cosmopolitan Trust Co. of Boston, 147 N.E. 742, 252 Mass. 253.

Due bill is within the rule.—Offerdahl v. Brydges, 188 P. 612, 45 Cal.App. 654.

Effect of Negotiable Instruments Act

Rule admitting parol evidence, tending to vary or modify implied contract, as between indorser of note and his immediate indorsee, was abrogated as to negotiable instruments by Negotiable Instruments Act.—Moore v. Altmyer, 202 N.W. 214, 199 Iowa 368.

After negotiation

(1) Where a note has been negotiated before maturity and is held in due course, the rule is especially applicable.—Olsen v. Zappone, 273 P. 635, 83 Mont. 573.

(2) Indorsement and negotiation of note fixes liability, and any restriction must appear in the writing.—Dean v. Lyde, 136 So. 857, 223 Ala. 394.

Negotiability

Whenever instrument manifestly embraces all elements of negotiable instrument, its negotiability is presumed, and no extrinsic evidence may be considered to show nonnegotiability.—International Finance Corporation v. Philadelphia Wholesale Drug Co., 167 A. 790, 312 Pa. 280—22 C.J. p 1089 note 31 [d] (2).

Memorandum which is part of a note cannot be contradicted or varied.

La.—Reconstruction Finance Corporation v. Holloway, 186 So. 35, 191 La. 583.

Mo.—Kelley v. Briggs, App., 290 S. W. 105—Corley v. McKeag, 9 Mo. App. 38.

Evidence of payments made prior to execution of a note and applying toward its satisfaction is inadmissible.—Bledsoe v. Stuckey, 190 P. 217, 47 Cal.App. 95.

Forged signature as indorsement

In an action on an insurance policy covering liability for forged indorsements only, evidence is inadmissible to show that a forged signature under the signature of the maker of a note is an indorsement.—Grange Trust Co. of Huntingdon, Pa., v. American Surety Co. of New York, D.C.Pa., 30 F.2d 445, affirmed, C.C.A., 37 F.2d 479.

Note as mere evidence of interest

Parol evidence was held inadmissible to show that note was merely evidence of interest in land, title to which stood in maker's name.—Dye v. Rafter Farm Mortg. Co., 297 P. 672, 132 Kan. 795.

67. Ky.—First Nat. Bank's Receiver v. Hignite, 43 S.W.2d 658, 659, 241 Ky. 276, quoting **Corpus Juris.**

La.—Succession of Spann, 125 So. 289, 169 La. 412—Beck v. Continental Casualty Co., App., 145 So. 810.

Mich.—Stone v. Steil, 202 N.W. 982, 230 Mich. 249.

Mont.—Montana Live Stock & Loan Co. v. Stewart, 190 P. 985, 58 Mont. 221.

N.C.—Walker v. Burt, 109 S.E. 43, 182 N.C. 325.

22 C.J. p 1091 note 32.

68. Miss.—Aaronson v. McGowan, 180 So. 738, 181 Miss. 642.

69. Or.—Bade v. Hibberd, 93 P. 364, 50 Or. 501.

the person or persons liable thereon;[70] or a parol agreement that the payee or holder shall look to some other person or persons for payment,[71] shall require payment only in a certain event, see infra § 937, or shall receive payment out of some particular fund,[72] or shall not require payment until a certain security has been exhausted,[73] or shall not call on one of the persons liable for payment until all remedies against the others have been exhausted,[74] or that the obligation may be extinguished by part payment.[75]

Any evidence varying or nullifying the effect of a written acceptance of a bill is inadmissible.[76]

Interest. Parol evidence is not admissible to show that a bill or note was not to bear interest,[77] or, conversely, that a noninterest-bearing instrument was to bear interest;[78] nor may it be shown that interest was to be paid at a rate other than that expressed in the instrument,[79] or that interest apparently payable at maturity was to be paid annually.[80]

Medium of payment. Where, by the express terms or legal effect of a bill or note, it is payable in money, parol evidence is not admissible to show that it was to be paid in any other way.[81] Thus,

70. U.S.—Cline v. Receiver of Commercial Nat. Bank of Chatsworth, C.C.A.Ill., 90 F.2d 968.
Ark.—McEuen v. Wakenight, 26 S.W. 2d 575, 181 Ark. 531.
Cal.—Bank of America Nat. Trust & Savings Ass'n v. Goldstein, 76 P.2d 545, 25 Cal.App.2d 37—Calvary Presbyterian Church of South Pasadena v. Brydon, 41 P.2d 377, 4 Cal.App.2d 676.
D.C.—McGrew v. McGrew, 279 F. 923, 51 App.D.C. 345.
Ill.—Cusanelli v. Steele, 5 N.E.2d 296, 287 Ill.App. 490—Tegtmeyer v. Nordlund, 259 Ill.App. 247.
Iowa.—First Nat. Bank v. Holley, 205 N.W. 767, 200 Iowa 938.
Kan.—Federal Farm Mortg. Corporation v. Bolinger, 108 P.2d 492, 152 Kan. 700—Union Nat. Bank v. Pirotte, 193 P. 327, 107 Kan. 573.
Ky.—Carter v. Vine Grove State Bank, 32 S.W.2d 973, 236 Ky. 191.
Mo.—Holland Banking Co. v. Griggs, 19 S.W.2d 290, 323 Mo. 289.
N.Y.—Pavia v. Park-Lexington Corporation, 245 N.Y.S. 527, 138 Misc. 600, affirmed 252 N.Y.S. 931, 234 App.Div. 668.
Okl.—White v. Oliver, 49 P.2d 147, 173 Okl. 559, 100 A.L.R. 1461.
Or.—Brownell v. Heitman, 266 P. 1067, 125 Or. 515.
Pa.—Fidelity Title & Trust Co. v. Garland, 139 A. 876, 291 Pa. 297.
Tenn.—Belmont Land & Mining Co. v. Noone, 13 Tenn.App. 152.
Tex.—McCormack v. Cockburn, Civ. App., 125 S.W.2d 695, error dismissed, judgment correct—Federal American Nat. Bank & Trust Co. of Washington, D. C., v. Scott, Civ.App., 103 S.W.2d 1064—Ellington v. Commercial State Bank of San Augustine, Civ.App., 15 S.W. 2d 59, affirmed Commercial State Bank of San Augustine v. Ellington, Com.App., 24 S.W.2d 359.
Wis.—First Nat. Bank v. Hizer, 207 N.W. 688, 189 Wis. 359.
22 C.J. p 1091 note 39—8 C.J. p 1043 note 52 [b].

Check is within the rule.—First Nat. Bank's Receiver v. Hignite, 43 S.W.2d 658, 241 Ky. 276.

Note as evidence of gift

In an action on a note complete on its face, importing valuable consideration, parol evidence is not admissible to show that it was evidence of a gift, and that the principal was not to be paid, but only the interest during the lifetime of the payee.—Jessup v. Parkhill, Iowa, 200 N.W. 414.

Release on obtaining signature

Proof that a note was signed by one of several on a condition that he should be released whenever a certain other signature was obtained would involve a violation of the parol evidence rule.—Duncan v. Smith, 256 S.W. 384, 161 Ark. 635.

Release of surety

Under the Negotiable Instruments Law authorizing the holder of a negotiable instrument to "renounce his rights against any party to the instrument," and providing that a "renunciation must be in writing," the release of a surety on a note cannot be shown by parol, the word "renunciation" being used in the sense of "release."—Baldwin v. Daly, 83 P. 724, 41 Wash. 416.

71. Tex.—Farrier v. Hopkins, 112 S. W.2d 182, 131 Tex. 75—Helland v. Oppenheimer, Civ.App., 102 S. W.2d 299, error refused.
22 C.J. p 1092 note 40.

72. U.S.—Grand Valley Water Users' Ass'n v. Zumbrunn, C.C.A. Colo., 272 F. 943.
Ark.—Galloway v. Davis, 146 S.W. 2d 536—Shanks v. Clark, 300 S.W. 453, 175 Ark. 883.
Del.—Lippman v. Alder, 157 A. 433, 5 W.W.Harr. 51.
D.C.—McGrew v. McGrew, 279 F. 923, 51 App.D.C. 345.
Ga.—South Georgia Trust Co. v. Crandall, 170 S.E. 333, 47 Ga.App. 328.
Idaho.—Craven v. Bos, 225 P. 136, 38 Idaho 722.
Iowa.—Hoover v. Hoover, 291 N.W. 154—International Stock Food Co. v. Beshey, 204 N.W. 265, 200 Iowa 165.
Kan.—Hudson State Bank v. Haile, 286 P. 228, 130 Kan. 322.
Minn.—Merchants' Nat. Bank of Detroit v. Bryngelson, 199 N.W. 905, 160 Minn. 205—Live Stock State Bank v. Hise, 185 N.W. 498, 150 Minn. 301.
Mo.—Friday v. Scherer, App., 110 S. W.2d 819—Bross v. Stancliff, 240 S.W. 1091, 211 Mo.App. 342.
22 C.J. p 1092 note 42.

73. Ohio.—Martin v. First Nat. Bank, 11 Ohio Cir.Ct.,N.S., 93.
22 C.J. p 1092 note 43.

74. Va.—Barrett v. Vaughan & Co., Bankers, 178 S.E. 64, 163 Va. 811.
22 C.J. p 1092 note 44.

75. S.D.—Kingsley v. Kempthorne, 235 N.W. 653, 58 S.D. 253.
22 C.J. p 1092 note 45.

76. Ark.—Oliver Const. Co. v. Union Trust Co., 284 S.W. 779, 171 Ark. 482.
Conn.—J. E. Smith & Co. v. Say, 129 A. 538, 102 Conn. 558.
22 C.J. p 1092 note 46.

Negotiability

Extrinsic evidence is not admissible to show whether an acceptance is negotiable or nonnegotiable.—International Finance Co. v. Northwestern Drug Co., D.C.Minn., 282 F. 920.

77. Ind.—Stutsman v. Stutsman, 3 Blackf. 231.
Mont.—Burnett v. Burnett, 219 P. 831, 68 Mont. 546.

Rate left blank

Where a note provided for interest, but the rate was left blank, the note could not be shown to be noninterest-bearing.—Burnett v. Burnett, supra.

78. Iowa.—Elgersma v. Sheldon Nat. Bank, 190 N.W. 138, 194 Iowa 676.
22 C.J. p 1091 note 38.

79. Mo.—Calloway v. McKnight, 163 S.W. 932, 180 Mo.App. 621.
22 C.J. p 1091 note 35.

80. Md.—Dance v. Dance, 56 Md. 433.
Mo.—Koehring v. Muemminghoff, 61 Mo. 403, 21 Am.R. 402.

81. Ark.—Vinson v. Wooten, 259 S. W. 366, 163 Ark. 170.
Iowa.—Union Mortg. Co. v. Evans, 205 N.W. 776, 200 Iowa 1000.

it cannot be shown that it was intended that a bill or note should be paid in work,[82] in real estate,[83] in debts of other persons,[84] in goods,[85] or in depreciated or duplicate currency.[86] Parol evidence is not admissible to show that anything other than lawful money was intended,[87] or that "lawful money" means "lawful silver money."[88]

Place of payment. Under some authorities, parol evidence cannot be admitted to contradict a promissory note with respect to the place of payment,[89] although, as appears infra § 1003, collateral agreements as to the place of payment have been held admissible. Where the question of jurisdiction alone was involved, and the bank at which payment was to be made was insufficiently described, parol evidence was not admissible to show that a bank at the place where the action was brought was intended.[90]

Time for payment. It cannot be shown that the time for the payment of the obligation as agreed on by the parties is different from the date of maturity as appearing in the instrument,[91] or that there was an agreement at the time of making the note that it would be renewed at maturity,[92] or might be paid off in installments;[93] nor can the maker of a note show that the payee agreed, at the time of the making, not to bring suit for a specified time.[94]

Indorsement without recourse. An indorser cannot show, as against a subsequent holder without notice, that his indorsement was intended to be without recourse and that he was not to be held liable,[95] nor, conversely, can it be shown that one who indorsed "without recourse" was to be held liable notwithstanding such indorsement.[96]

§ 896. Bills of Sale

The great weight of authority places bills of sale or sale notes within the parol evidence rule.

The great weight of authority places bills of sale or sale notes within the rule that parol or extrinsic evidence is inadmissible to vary, add to, contradict, or explain a written instrument.[97] On the other hand, it has also been held that a simple bill

Okl.—Adkins v. Morgan, 41 P.2d 835, 837, 170 Okl. 616, citing **Corpus Juris.**
Tenn.—Searcy v. Brandon, 68 S.W. 2d 112, 167 Tenn. 218.
22 C.J. p 1094 note 57.
Collateral agreements see infra § 1003.
Legal effect of instrument as to medium of payment see supra § 855.
Limitations and exceptions as to medium of payment generally see infra § 984.

82. Ala.—Grissom v. J. B. Colt & Co., 118 So. 580, 218 Ala. 336.
Ind.—Louden v. Birt, 4 Ind. 566.
Tenn.—Searcy v. Brandon, 68 S.W. 2d 112, 113, 167 Tenn. 218, citing **Corpus Juris.**
22 C.J. p 1095 note 58.
Rule limited to executory agreements
General rule that parol evidence is inadmissible to show prior or contemporaneous oral agreement for payment of note in manner other than that specified in instrument applies to executory and not to executed parol agreements.—Phillips v. Gillaspie, 171 So. 567, 186 La. 45, affirming, App., 167 So. 242.

83. Kan.—Brown v. Pryor, 298 P. 747, 133 Kan. 129.
22 C.J. p 1095 note 59.

84. Ala.—Murchie v. Cook, 1 Ala. 41.

85. Ark.—Harmon v. Harmon, 199 S. W. 553, 131 Ark. 501.
22 C.J. p 1095 note 61.

86. Tex.—Miller v. Lacy, 33 Tex. 351.
22 C.J. p 1095 note 62.

87. Ark.—Roane v. Green, 24 Ark. 210.
22 C.J. p 1095 note 63.

88. Conn.—Alsop v. Goodwin, 1 Root 196.

89. Ala.—Montgomery R. Co. v. Hurst, 9 Ala. 513.
22 C.J. p 1096 note 72.

90. Iowa.—Baily v. Birkhofer, 98 N. W. 594, 123 Iowa 59.
22 C.J. p 1096 note 73.

91. U.S.—Lincoln Nat. Life Ins. Co. v. Bastian, C.C.A.W.Va., 31 F.2d 859.
Ala.—Jackson v. Sample, 173 So. 510, 234 Ala. 75—Ford v. Southern Motor Co., 93 So. 902, 903, 203 Ala. 170, quoting **Corpus Juris.**
Cal.—Nesbit v. MacDonald, 263 P. 1007, 203 Cal. 219.
Ga.—South Georgia Trust Co. v. Crandall, 170 S.E. 333, 47 Ga.App. 328.
Miss.—Cox v. Timlake, 153 So. 794, 169 Miss. 568.
Mo.—Benson v. Harrison, 39 Mo. 303.
Okl.—Wignall v. Montgomery, 49 P. 2d 163, 173 Okl. 399—Nelson v. Sapulpa State Bank, 212 P. 309, 88 Okl. 155.
S.C.—American Fertilizing Co. v. Brigman, 149 S.E. 105, 151 S.C. 383.
Tex.—Dibrell v. Central Nat. Bank, Civ.App., 293 S.W. 874, 877, quoting **Corpus Juris.**
22 C.J. p 1095 note 68.
Legal effect of instrument as to time for payment see supra § 853.

92. Ala.—Ford v. Southern Motor Co., 93 So. 902, 903, 203 Ala. 170, quoting **Corpus Juris.**
22 C.J. p 1095 note 69.

93. U.S.—Nalitzky v. Williams, N. J., 237 F. 802, 151 C.C.A. 44.

94. Ill.—Schroer v. Wessell, 89 Ill. 113.
22 C.J. p 1096 note 71.

95. Iowa.—Moore v. Altmyer, 202 N.W. 214, 199 Iowa 368.
Minn.—Johnson Hardware Co. v. Kempf, 246 N.W. 663, 188 Minn. 109.
N.D.—Farmers' Exch. State Bank of Sanger v. Iverson, 201 N.W. 509, 51 N.D. 909.
Okl.—Allan v. Terrell, 259 P. 268, 126 Okl. 251.
Tex.—Windham v. Creech, Civ.App., 79 S.W.2d 631—Horton v. Bolding, Civ.App., 67 S.W.2d 435, error dismissed—Barger v. Brubaker, Civ.App., 187 S.W. 1025.
22 C.J. p 1094 note 51.

96. Idaho.—First Nat. Bank v. Stringfield, 235 P. 897, 40 Idaho 587—Payette Nat. Bank v. Ingard, 200 P. 344, 34 Idaho 295.
Or.—Smith v. Barner, 188 P. 216, 95 Or. 486.
22 C.J. p 1094 note 52.

97. Ariz.—Lee v. Standard Cement Pipe Co., 103 P.2d 457, 458, 55 Ariz. 463, quoting **Corpus Juris.**
N.J.—Crowley v. E. Homan Co., 130 A. 372, 3 N.J.Misc. 968.
N.C.—J. Goldman & Co. v. Crank, 156 S.E. 919, 200 N.C. 384.
22 C.J. p 1096 note 74.

of sale does not embody the preliminary or essential terms of a contract in such a way as to exclude parol evidence.[98] These authorities are not necessarily conflicting, but may be explained by the distinction that in so far as a bill of sale partakes of the nature of a receipt or is simply declaratory of a fact, it may be explained or perhaps contradicted, but to the extent that it expresses the contract of the parties and defines their rights and liabilities, it is subject to the same rule as other written contracts and precludes the admission of parol or extrinsic evidence.[99]

Property included. The conclusive effect of a bill of sale extends to the statements therein as to the property included or the description thereof, and as to these matters the instrument cannot be contradicted or varied;[1] but the recital of a bill of sale as to the number of articles included therein and to be delivered pursuant thereto does not estop the purchaser to deny that he received that number.[2]

Title or interest conveyed. It is not permissible to show by parol or extrinsic evidence that the title or interest conveyed was other than that which appears from the face of a bill of sale,[3] or to vary the time of the vesting of title as shown thereby.[4] Thus, it has been held that a bill of sale cannot be shown to have been intended as a pledge or mortgage,[5] at least as to innocent third persons,[6] although there is also authority for the contrary view,[7] particularly where no innocent third persons will be affected.[8]

Warranty. It is stated as a general rule that a warranty cannot be engrafted on a bill of sale by parol or extrinsic evidence,[9] and that a warranty contained in the bill cannot be varied or limited by such evidence;[10] but an implied warranty may be sustained by parol,[11] or the implied warranty of title which results from the sale itself may be rebutted by such evidence; that is to say the vendor may overcome the legal presumption by proof that he did not warrant the title, for in such case he does not add to the terms expressed in writing but only rebuts a legal presumption not itself expressed in writing but arising from that which is expressed.[12]

§ 897. Bonds

The parol evidence rule applies to bonds.

The execution of a bond merges all prior agreements or understandings with reference to the subject matter, and the instrument is not subject to be varied or contradicted, as to either its terms or conditions, by parol or extrinsic evidence;[13] and in the absence of fraud, accident, or mistake, the inter-

Promise of vendee, embodied in a bill of sale, to pay a debt owed by the vendor to a third party cannot be varied by parol.—Germain v. Great Northern Lumber Co., 173 N.W. 667, 143 Minn. 311.

98. N.Y.—Kass v. Horowitz, 184 N.Y.S. 511, 113 Misc. 353.
Wash.—Bertelson v. Arthur, 244 P. 695, 138 Wash. 445.
22 C.J. p 1096 note 75.

99. Ariz.—Lee v. Standard Cement Pipe Co., 103 P.2d 457, 758, 55 Ariz. 463, quoting **Corpus Juris.**
22 C.J. p 1096 note 76.

1. Ariz.—Lee v. Standard Cement Pipe Co., supra, quoting **Corpus Juris.**
Cal.—Seaboard Dairy Credit Corporation v. Herman, 33 P.2d 1042, 139 Cal.App. 320.
N.J.—Crowley v. E. Homan Co., 130 A. 372, 3 N.J.Misc. 968.
22 C.J. p 1096 note 77.

2. Cal.—Murdock v. Clarke, 24 P. 272, 27 P. 275, 90 Cal. 427.

3. Iowa.—Allen v. Bryson, 25 N.W. 820, 67 Iowa 591, 56 Am.R. 358.
22 C.J. p 1096 note 79.

4. Mass.—Rennell v. Kimball, 5 Allen 356.

5. Me.—Grant v. Frost, 13 A. 881, 80 Me. 202.
22 C.J. p 1097 note 81.

6. Mo.—State v. Koch, 40 Mo.App. 635.
Rights of third persons generally see supra § 864.

7. Fla.—Smith v. Hope, 41 So. 69, 51 Fla. 541.
22 C.J. p 1097 note 83.

8. Mo.—King v. Greaves, 51 Mo. App. 534.

9. Ala.—Loegler v. C. V. Hill & Co., 193 So. 120, 122, 238 Ala. 606, citing **Corpus Juris.**
22 C.J. p 1097 note 85.
Oral warranty as collateral agreement see infra § 1003.

Bill of sale as stating performed parol contract

The rule is otherwise where the bill of sale is merely a statement in writing of the terms of a preëxisting parol contract which has been fully performed and terminated.—Hughes v. State, 98 N.E. 839, 50 Ind. App. 617.

10. Minn.—Humphrey v. Merriam, 49 N.W. 199, 46 Minn. 413.
22 C.J. p 1097 note 86.

11. Ky.—Miller v. Gaither, 3 Bush 152.

12. Cal.—Johnson v. Powers, 3 P. 625, 65 Cal. 179—Miller v. Van Tassel, 24 Cal. 458.
Rebutting presumption or inference generally see infra § 1015.

13. Fla.—Sewell v. Huffstetler, 93 So. 162, 83 Fla. 629.
Ga.—Stokes v. Humphries, 111 S.E. 36, 152 Ga. 621.
Ky.—Fidelity & Deposit Co. of Maryland v. Jones, 75 S.W.2d 1057, 256 Ky. 181—Board of Councilmen of City of Frankfort v. Board of Education of City of Frankfort, 284 S.W. 1085, 215 Ky. 286.
Minn.—School Dist. No. 1 of Itasca County v. Security State Bank of Grand Rapids, 233 N.W. 296, 181 Minn. 537.
Pa.—Fenton Storage Co. v. Feinstein, 195 A. 176, 129 Pa.Super. 125.
S.C.—Simon v. Ætna Casualty & Surety Co., 148 S.E. 648, 652, 151 S.C. 44, quoting **Corpus Juris.**
Tex.—Ætna Casualty & Surety Co. v. Parker Roofing Co., Civ.App., 43 S.W.2d 1102, reversed on other grounds Parker Roofing Co. v. Ætna Casualty & Surety Co., Com. App., 55 S.W.2d 508.
Va.—Nottingham v. Farmers & Merchants Trust Bank, 196 S.E. 634, 170 Va. 291.
Wis.—Loveland v. Loyd, 227 N.W. 242, 200 Wis. 115.
22 C.J. p 1097 note 89.
"The rule is elementary that parol proof is not admissible to contradict or vary the terms of a written instrument, and it is said in Coots v. Farnsworth, 28 N.W. 534,

pretation of a bond cannot be controlled by testimony dehors the instrument where the intention of the parties appears from its terms.[14]

§ 898. Certificates of Stock

A stock certificate considered together with a charter or resolution as a contract has been held not variable by parol evidence.

A certificate of stock considered together with a corporate charter or a resolution of directors as a contract has been held not subject to variation by parol evidence.[15] However, parol evidence is admissible to show the real character of the transaction,[16] and may be admitted where a stock certificate is regarded as evidence of a fact or admission and not as an agreement.[17]

§ 899. Charter Parties

The parol evidence rule applies to a charter party.

Parol evidence is not generally admissible to enlarge or vary the terms of a charter party or in any way to contradict it.[18]

§ 900. Collateral Security or Pledges

A writing evidencing a deposit as a pledge or collateral security is within the parol evidence rule.

A writing evidencing a deposit as a pledge or collateral security cannot be added to, contradicted, or varied by showing the nature of the transaction to be other than what appears by the face of the instrument,[19] and, conversely, where the law requires a pledge to be in writing parol evidence is not admissible to show that writings which on their face are not pledges amount to such in fact.[20]

§ 901. Contracts

With certain exceptions, parol or extrinsic evidence is not admissible to vary the terms of a written contract, for prior or contemporaneous negotiations are regarded as merged therein.

The most usual application of the parol evidence rule is with respect to contracts, as to which it is established that, with certain exceptions, considered infra §§ 929–1015, such as fraud, accident, mistake, or ambiguity, parol or extrinsic evidence is not admissible to vary, add to, modify, or contradict the terms or provisions of the written instrument,[21] by

61 Mich. 497, that this rule 'should be rigidly enforced in cases of bonds, if at all.'"—Brandt v. Vanderveen, 182 N.W. 35, 41, 213 Mich. 121.

Time of payment

Minn.—Heider v. Hermann Sons Hall Ass'n, 243 N.W. 699, 186 Minn. 494.

22 C.J. p 1097 note 89 [b] (4).

Relationship between coöbligors

Holder of bond cannot assert that relation of principal and surety exists as between coöbligors who signed as principals on a bond.—Klorman v. Westcliff Co., 170 A. 251, 12 N.J.Misc. 266.

14. Pa.—Phœnix Mill Co. v. Kresge, 98 A. 772, 254 Pa. 36—New Holland Dairies v. Regent Dairy Products Corporation, 174 A. 664, 115 Pa.Super. 87.

15. Md.—James F. Powers Foundry Co. v. Miller, 171 A. 842, 166 Md. 590.

N.Y.—Snyder v. Lindsey, 52 N.E. 592, 157 N.Y. 616, affirming 36 N.Y.S. 1037, 92 Hun 432.

16. Mo.—Wild v. Western Union Bldg. & Loan Ass'n, 60 Mo.App. 200.

Real character of transaction generally see infra § 1015.

17. U.S.—Brick v. Brick, D.C., 98 U.S. 514, 25 L.Ed. 256.

Writings not contractual generally see infra § 928.

18. U.S.—U. S. Gypsum Transp. Co. v. Dampskibs Aktieselskabet Karmoy, C.C.A.N.Y., 54 F.2d 1086, affirming, D.C., 48 F.2d 376—The Addison E. Bullard, Fla., 258 F. 180, 169 C.C.A. 248, affirming, D.C., 252 F. 241—Matthias v. Beeche, D.C. N.Y., 111 F. 940—The Oregon v. Pittsburgh & L. A. Iron Co., Ohio, 55 F. 666, 5 C.C.A. 229—Sorenson v. Keyser, Miss., 51 F. 30, 2 C.C.A. 92, reversed on other grounds 52 F. 163, 2 C.C.A. 650—Barclay v. Holme, N.Y., 2 F.Cas.No.974, 17 Betts, D.C., MS. 1.

S.C.—Bulow v. Goddard, 10 S.C.L. 45, 9 Am.D. 663.

22 C.J. p 1098 note 93.

19. Ga.—Deen v. Bank of Hazlehurst, 147 S.E. 909, 39 Ga.App. 633.

Mo.—Interurban Construction Co. v. Hayes, 89 S.W. 927, 191 Mo. 248.

Tex.—Citizens Industrial Bank of Austin v. Oppenheim, Civ.App., 92 S.W.2d 312, error dismissed.

22 C.J. p 1098 note 94.

That transaction amounts to sale cannot be shown by parol.—Kosatzky v. Robinson, 230 N.Y.S. 480, 132 Misc. 819—22 C.J. p 1098 note 94 [a].

20. La.—De Blois v. Reiss, 32 La. Ann. 586.

W.Va.—Mineral Ridge Mfg. Co. v. Smith, 91 S.E. 817, 79 W.Va. 736.

21. U.S.—Fisher v. Underwriters at Lloyd's London, C.C.A.Ill., 115 F.2d 641—Obartuch v. Security Mut. Life Ins. Co., C.C.A.Ill., 114 F.2d 873, certiorari denied 61 S.Ct. 730, 312 U.S. 696, 85 L.Ed. 1131, rehearing denied 61 S.Ct. 824, 312 U.S. 716, 85 L.Ed. 1146—Cincinnati Underwriters Agency Co. v. Thomas J. Emery Memorial, C.C.A.Ohio, 88 F.2d 506, certiorari denied Thomas J. Emery Memorial v. Cincinnati Underwriters Agency Co., 58 S.Ct. 14, 302 U.S. 696, 82 L.Ed. 537—Wells Fargo Bank & Union Trust Co. v. McDuffie, C.C.A.Cal., 71 F.2d 720, certiorari denied McDuffie v. Wells Fargo Bank & Union Trust Co., 55 S.Ct. 346, 293 U.S. 626, 79 L.Ed. 713—Dickinson Tire & Machine Co. v. Dickinson, C.C.A.N.Y., 29 F.2d 493—Summit Coal Co. v. Southern Cotton Oil Co., C.C.A.Ala., 24 F.2d 48—Gammon v. Howard W. Scott, Inc., C.C.A.Va., 16 F.2d 902—Rosenberg Bros. & Co. v. U. S. Shipping Board Emergency Fleet Corporation, D.C.Cal., 7 F.2d 893, affirmed, C.C.A., 12 F.2d 721, certiorari granted 47 S.Ct. 237, 273 U.S. 682, 71 L.Ed. 838, reversed on other grounds, 48 S.Ct. 256, 276 U.S. 202, 72 L.Ed. 531—Frenzer v. Frenzer, C.C.A.Neb., 2 F.2d 218, certiorari denied 46 S.Ct. 101, 269 U.S. 574, 70 L.Ed. 419—The Valmar, D.C.Pa., 38 F.Supp. 618—Corbett v. Winston Elkhorn Coal Co., C.C.A.Ky., 296 F. 577—Hess v. Couzinie, C.C.A.N.Y., 296 F. 858—The Coca-Cola Bottling Co. v. The Coca-Cola Co., D.C.Del., 269 F. 796—American Guaranty Co. v. American Fidelity Co., C.C.A.Ohio, 260 F. 897, certiorari denied 40 S.Ct. 180, 251 U.S. 559, 64 L.Ed. 414—Hazen Mfg. Co. v. Wareham, Mich., 242 F. 642, 155 C.C.A. 332—Baltimore Refrigerating & Heating Co., Md., 162 F. 117, 89 C.C.A. 117, certiorari denied 29 S.Ct. 685, 212 U.S. 577, 53 L.Ed. 658—Carden v.

showing the intentions of the parties, or their real | agreement with reference to the subject matter, to

U. S., 87 Ct.Cl. 189—Cooper v. U. S., 84 Ct.Cl. 436.

Ala.—Griffin v. Tatum Chevrolet Co., 166 So. 49, 231 Ala. 534—Liles v Cox, 110 So. 716, 215 Ala. 327—Brown v. Scheuer, Wise & Co., 97 So. 50, 210 Ala. 47—Bozeman v. J. B. Colt Co., 95 So. 588, 19 Ala.App. 126.

Alaska.—Grigsby v. Dickinson, 7 Alaska 457.

Ariz.—Dover Copper Mining Co. v. Doenges, 12 P.2d 288, 40 Ariz. 349—Chandler Improvement Co. v. Andersen, 7 P.2d 255, 39 Ariz. 426—Sonora Bank & Trust Co. v. Compania Agricola del Rio Mayo, S. A., 185 P. 638, 21 Ariz. 77.

Ark.—Ferguson v. C. H. Triplett Co., 134 S.W.2d 538, 199 Ark. 546—Page v. Oates, 109 S.W.2d 661, 194 Ark. 809—Dodson v. Wade, 101 S.W.2d 182, 193 Ark. 534—Jordan v. Winooski Sav. Bank, 58 S.W.2d 942, 187 Ark. 212—New Home Sewing Mach. Co. v. Westmoreland, 38 S.W.2d 314, 183 Ark. 769—Love v. Couch, 28 S.W.2d 1067, 181 Ark. 994—Almand v. Alexander, 23 S.W.2d 611, 180 Ark. 947—Ogletree v. Smith, 3 S.W.2d 683, 176 Ark. 597—Wilson v. Nugent, 299 S.W. 18, 174 Ark. 1115—American Southern Trust Co. v. McKee, 293 S.W. 50, 173 Ark. 147—Texas Co. v. Snow, 291 S.W. 826, 172 Ark. 1128—Richards v. Billingslea, 282 S.W. 985, 170 Ark. 1100—Brown & Hackney v. Daubs, 213 S.W. 4, 139 Ark. 53.

Cal.—Shivers v. Liberty Building-Loan Ass'n, 106 P.2d 4, prior opinion, App., 101 P.2d 493—Ferguson v. Koch, 268 P. 342, 204 Cal. 342, 58 A.L.R. 1176—Parigian v. Citizens Nat. Trust & Savings Bank of Los Angeles, App., 110 P.2d 117—First Bond & Mortgage Co. of Glendale v. Malouf, 98 P.2d 824, 37 Cal.App.2d 74—Kohl v. Lytle Creek Water & Improvement Co., 75 P.2d 71, 24 Cal.App.2d 353—Columbia Casualty Co. v. Lewis, 57 P.2d 1010, 14 Cal.App.2d 64—California Jewelry Co. v. Provident Loan Ass'n, 45 P.2d 271, 6 Cal.App.2d 506—Koeberle v. Hotchkiss, 40 P.2d 911, 4 Cal.App.2d 252—Russell v. Stillwell, 288 P. 785, 106 Cal.App. 88—Regalia v. Mariani, 279 P. 455, 100 Cal.App. 1—Brandenstein v. Jackling, 278 P. 880, 99 Cal.App. 438—Inner Shoe Tire Co. v. Tondro, 257 P. 211, 83 Cal.App. 689—Gilde v. Schuster, 257 P. 121, 83 Cal.App. 537—Greathouse v. Daleno, 206 P. 1019, 57 Cal.App. 187.

Colo.—Brennan v. Monson, 50 P.2d 534, 97 Colo. 448—Thompson v. Sweet, 17 P.2d 308, 91 Colo. 552—Stroup v. Pearce, 288 P. 627, 87 Colo. 436—Shearer v. Shearer, 269 P. 19, 84 Colo. 234—Hickman-Lunbeck Grocery Co. v. Hager, 227 P. 829, 75 Colo. 554—Antero & Lost Park Reservoir Co. v. Lowe, 191 P. 945, 69 Colo. 409.

Del.—Arthur Jordan Piano Co. v. Lewis, 154 A. 467, 4 W.W.Harr. 434.

Fla.—Knabb v. Reconstruction Finance Corporation, 197 So. 707—Prescott v. Mutual Ben. Health & Accident Ass'n, 183 So. 311, 133 Fla. 510, 119 A.L.R. 525—W. T. Rawleigh Co. v. Langford, 175 So. 339, 128 Fla. 663—Supervisors, Inc., v. Arcadia Citrus Growers' Ass'n, 135 So. 296, 101 Fla. 804—Bryan v. St. Andrews Bay Community Hotel Corporation, 126 So. 142, 99 Fla. 132, followed in Sudduth v. St. Andrews Bay Community Hotel Corporation, 126 So. 302, 99 Fla. 151.

Ga.—Holloway v. Brown, 155 S.E. 917, 171 Ga. 481—Renfroe v. Alden, 137 S.E. 831, 164 Ga. 77—Roberts v. Investors' Sav. Co., 113 S.E. 398, 154 Ga. 45—Long v. Cash, 189 S.E. 73, 54 Ga.App. 764—Eaves v. Georgian Co., 169 S.E. 519, 47 Ga.App. 37—Ramsey-Fender Motor Co. v. Chapman, 168 S.E. 92, 46 Ga.App. 385—Macon Baseball Ass'n v. Pennington, 166 S.E. 35, 45 Ga.App. 611—North Georgia Lumber Co. v. Lawson, 150 S.E. 865, 40 Ga.App. 680—Boston Ins. Co. v. H. B. Burch & Bros., 150 S.E. 458, 40 Ga.App. 517—Flood v. Empire Inv. Co., 133 S.E. 60, 35 Ga.App. 266—Long v. Farmers' Hardware Co., 110 S.E. 422, 27 Ga. App. 659—West v. Hill & Adams, 99 S.E. 155, 23 Ga.App. 636—Fortson v. Strickland, 99 S.E. 147, 23 Ga.App. 607.

Idaho.—Larsen v. Buys, 292 P. 239, 49 Idaho 615—Milner v. Earl Fruit Co. of Northwest, 232 P. 581, 584, 40 Idaho 339, quoting **Corpus Juris**—Davis v. Idaho Minerals Co., 231 P. 712, 40 Idaho 64—Hurt v. Monumental Mercury Mining Co., 206 P. 184, 35 Idaho 295.

Ill.—Daytona Gables Development Co. v. Glen Flora Inv. Co., 178 N.E. 107, 345 Ill. 371—Sterling-Midland Coal Co. v. Great Lakes Coal & Coke Co., 165 N.E. 793, 334 Ill. 281—Kopprasch v. Satter, 162 N.E. 141, 331 Ill. 126—Schweikhardt v. Chessen, 161 N.E. 118, 329 Ill. 637—Sheets v. Security First Mortg. Co., 12 N.E.2d 324, 293 Ill.App. 222—Reynolds v. First Nat. Bank, 279 Ill.App. 581, 600—Brundage v. Gottschalk, 265 Ill.App. 260—Selby v. Village of Winfield, 255 Ill. App. 67—Lindsey v. Rosen, 255 Ill. App. 21, conforming to directions 167 N.E. 89, 335 Ill. 402—Schmidt v. Schmidt, 253 Ill.App. 514—Harmony Cafeteria Co. v. International Supply Co., 249 Ill.App. 532—Victor v. Warner, 248 Ill.App. 35—Cowles v. Morris & Co., 242 Ill. App. 548, affirmed 161 N.E. 150, 330 Ill. 11—United Romanian Meat Market & Grocery Co. v. Abramson, 218 Ill.App. 577.

Ind.—Tribune Co. v. Red Ball Transit Co., 151 N.E. 338, 84 Ind.App. 666, rehearing denied 151 N.E. 836, 84 Ind.App. 666—Foulkes Contracting Co. v. U. S. Fidelity & Guaranty Co., 130 N.E. 831, 75 Ind. App. 393.

Iowa.—Kruse v. Wickham, 292 N.W. 515—Walker v. Todd, 280 N.W. 512, 225 Iowa 276—Burrier v. Sheriff, 223 N.W. 395, 207 Iowa 692—Heard v. Nancolas, 175 N.W. 13, 187 Iowa 1045—Piano Mfg. Co. v. Eich, 97 N.W. 1106.

Kan.—J. R. Watkins Co. v. Waldo, 230 P. 1051, 117 Kan. 250—Farmers' & Bankers' Life Ins. Co. v. Whitney, 182 P. 645, 105 Kan. 237.

Ky.—Cumnock-Reed Co. v. Lewis, 128 S.W.2d 926, 278 Ky. 496—Ford v. Coles, 128 S.W.2d 609, 278 Ky. 131—Johnson v. Stumbo, 126 S.W.2d 165, 277 Ky. 301—Phipps v. Frances, 101 S.W.2d 924, 267 Ky. 203—Akins v. City of Covington, 97 S.W.2d 588, 265 Ky. 740—Our Home Life Ins. Co. v. Butch, 47 S.W.2d 714, 242 Ky. 766—Apple v. McCullough, 38 S.W.2d 955, 239 Ky. 74—Goodin v. Page, 29 S.W.2d 581, 235 Ky. 54—Treas v. Bank of Marshall County, 28 S.W.2d 43, 234 Ky. 376—L. C. Powers & Sons v. J. E. Brogdon Sheet Metal Works, 21 S.W.2d 131, 231 Ky. 103—Boone, Foreman & Lackey v. Halteman & Cave Ins. Agency, 11 S.W.2d 973, 226 Ky. 839—J. B. Colt Co. v. Moran, 11 S.W.2d 147, 226 Ky. 479—J. B. Colt Co. v. Brown, 6 S.W.2d 473, 224 Ky. 438—Goldstein v. McDonald, 3 S.W.2d 200, 223 Ky. 161—Turner Elkhorn Coal Co. v. Smith, 291 S.W. 715, 218 Ky. 503—J. B. Colt & Co. v. Clay, 288 S.W. 745, 216 Ky. 782—Sanders v. Wender, 265 S.W. 939, 205 Ky. 422.

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Minn.—Osterberg v. Section 30 Development Co., 200 N.W. 738, 160 Minn. 497.

Miss.—Taylor v. C. I. T. Corporation, 191 So. 60, 187 Miss. 581—Fornea v. Goodyear Yellow Pine Co., 178 So. 914, 181 Miss. 50—Welch v. Gant, 138 So. 585, 161 Miss. 867—Stirling v. Logue, 123 So. 825, 154 Miss. 812—Kendrick v. Robertson, 111 So. 99, 145 Miss. 585—Maas v. Sisters of Mercy of Vicksburg, 99 So. 468, 135 Miss. 505.

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Mont.—Union Electric Co. v. Lovell Livestock Co., 54 P.2d 112, 10[illegible] Mont. 450—Linn v. French, 33 P 2d 1002, 97 Mont. 292—Peterson v Nelson, 252 P. 368, 77 Mont. 539—Webber v. Killorn, 212 P. 852, 66 Mont. 130—Read v. Lewis and Clark County, 178 P. 177, 55 Mont. 412.

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Nev.—Chiquita Mining Co. v. Fairbanks, Morse & Co., 104 P.2d 191.

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N.M.—Featherstone v. Walker, 88 P. 2d 271, 43 N.M. 181—Franciscan Hotel Co. v. Albuquerque Hotel Co., 24 P.2d 718, 37 N.M. 456—Prentice v. Cain, 202 P. 121, 27 N. M. 368.

N.Y.—Hutchison v. Ross, 187 N.E. 65, 262 N.Y. 381, 89 A.L.R. 1007, affirming Ross v. Ross, 253 N.Y.S. 871, 233 App.Div. 626, reversing 243 N.Y.S. 418, 137 Misc. 795, affirmed Hutchison v. Ross, 253 N. Y.S. 889, 233 App.Div. 516, and reargument denied 188 N.E. 102, 262 N.Y. 643, 89 A.L.R. 1023—Heller v. Pope, 164 N.E. 881, 250 N.Y. 132, affirming 226 N.Y.S. 828, 222 App.Div. 738—Rupert v. Singhi, 153 N.E. 33, 243 N.Y. 156, reversing 214 N.Y.S. 912, 216 App.Div. 737—Newburger v. American Surety Co., 151 N.E. 155, 242 N.Y. 134, reversing 209 N.Y.S. 886, 214 App. Div. 712—Electric Equipment Corporation v. Delco Appliance Corporation, 297 N.Y.S. 498, 252 App. Div. 1—William H. Waters Inc. v. March, 269 N.Y.S. 420, 240 App. Div. 120—New Amsterdam Casualty Co. v. Parsons, 220 N.Y.S. 340, 219 App.Div. 486—W. G. Cornell Co. v. McKiever, 211 N.Y.S. 488, 214 App.Div. 738—Weiss v. Brown, 194 N.Y.S. 441, 201 App.Div. 560—Hechinger v. Ulacia, 185 N.Y.S. 323, 194 App.Div. 330—Robertson v. Schoonmaker, 285 N.Y.S. 204, 158 Misc. 627—Gulickson v. Seglin Const. Co., 273 N.Y.S. 908, 152 Misc. 624—Zaidens v. Salter, 254 N.Y.S. 603, 142 Misc. 439—Merchants' Nat. Bank of Plattsburgh v. R. Prescott & Son, 249 N.Y.S. 6, 139 Misc. 603, affirmed 257 N.Y.S. 900, 235 App.Div. 878, reargument denied 258 N.Y.S. 1016, 236 App. Div. 764—Alexander v. United Fruit Co., 226 N.Y.S. 113, 131 Misc. 41—Johnson v. State, 175 N.Y.S. 234, 104 Misc. 201, affirmed 175 N. Y.S. 784, 188 App.Div. 33—Lowber v. Le Roy, 4 N.Y.Super. 202.

N.C.—Oliver v. Hecht, 177 S.E. 399, 207 N.C. 481—Kindler v. Wachovia Bank & Trust Co., 167 S.E. 811, 204 N.C. 198—Miller v. Farmers' Federation, 134 S.E. 407, 192 N.C. 144—Western Carolina Lumber Co. v. Sturgill, 130 S.E. 845, 190 N.C. 776—Garland v. Linville Improvement Co., 115 S.E. 164, 184 N.C. 551.

N.D.—Allgood v. National Life Ins. Co., 240 N.W. 874, 61 N.D. 763—Stair v. Hibbs, 204 N.W. 621, 52 N. D. 910.

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fer Oil & Refining Co., 228 P. 772, 103 Okl. 28—Outcault Advertising Co. v. Waurika Nat. Bank, 227 P. 144, 100 Okl. 96—Virginia-California Gasoline Co. v. Jordan, 224 P. 325, 98 Okl. 148—Purdy v. Miller Hunter Co., 221 P. 490, 94 Okl. 209—McGraw v. Hildebrant, 214 P. 688, 89 Okl. 140—Delk v. City Nat. Bank of Duncan, 205 P. 753, 85 Okl. 238—Vaughn v. Smith, 195 P. 754, 80 Okl. 244—Romans v. Shannon, 195 P. 298, 80 Okl. 199—Garber v. Hauser, 185 P. 436, 76 Okl. 292.

Or.—Thorne v. Edwards, 34 P.2d 640, 147 Or. 443—Massachusetts Protective Ass'n v. Palmer, 18 P.2d 585, 141 Or. 688—Johns-Manville Corporation v. Heckart, 277 P. 821, 129 Or. 505—Kight v. Orchard-Hays, 275 P. 682, 128 Or. 668—Hyland v. Oregon Agr. Co., 225 P. 728, 111 Or. 212.

Pa.—Chanin v. J. B. Liebman & Co., 20 A.2d 208, 341 Pa. 552—Dahath Electric Co. v. Suburban Electric Development Co., 2 A.2d 765, 332 Pa. 129—Germantown Trust Co. v. Emhardt, 184 A. 457, 321 Pa. 561, followed 184 A. 460, 321 Pa. 567—Tomlinson v. Wilson, 164 A. 721, 310 Pa. 41—Emmons v. McCreery, 160 A. 722, 307 Pa. 62—Russell v. Sickles, 160 A. 610, 306 Pa. 586—Humphrey v. Brown, 139 A. 606, 291 Pa. 53—Seitzinger v. Ridgway, 4 Watts & S. 472—Atlas Bolt & Screw Co. v. Komins, 10 A.2d 871, 138 Pa.Super. 474—East Coast Finance Corporation v. Linck, 159 A. 468, 104 Pa.Super. 518—Sterling Engineering & Manufacturing Corporation v. Jennings, 101 Pa.Super. 291—Smith v. Holmwood, 87 Pa.Super. 100—Murphy v. Pinney, 86 Pa. Super. 458—Salicone v. Peterson Motors Inc., 82 Pa.Super. 153—First Nat. Bank of Pittston v. Cawley, 20 Pa.Dist. & Co. 207, 28 Luz.Leg.Reg. 43—Roth Downs Mfg. Co. v. Profy, 16 Pa.Dist. & Co. 138—Pollow v. Henry L. Doherty & Co., 14 Pa.Dist. & Co. 293—Steininger v. Spaid, 12 Pa.Dist. & Co. 732—National Fire-Proofing Co. v. E. P. Foulk & Bro., 6 Pa.Dist. & Co. 780, 39 Lanc.L.Rev. 293—Lawrence Leather Co. v. Ullman Hide & Leather Co., 32 Berks Co.L.J. 143—Guth v. Raymond, 19 Leh.Co.L.J. 126—Fish v. Regula, 33 Luz.Leg. Reg. 249—Goodrich Co. v. Litwak, 8 Sch.Reg. 100.

R.I.—D. W. Flint Motor Sales Co. v. Crofton, 171 A. 236, 237, 54 R. I. 160, citing **Corpus Juris**—Kuzoian v. Jaffa, 161 A. 130, 52 R.I. 367—Robert Forsyth & Son v. Tanenbaum, 161 A. 112.

S.C.—Able v. Equitable Life Assur. Soc. of U. S., 195 S.E. 652, 186 S. C. 381—John T. Stanley Co. v. Kaufman, 171 S.E. 32, 170 S.C. 521—Liquid Carbonic Co. v. Coclin, 159 S.E. 461, 161 S.C. 40—Williams v. Barringer, 158 S.E. 735—Continental Jewelry Co. v. Kerhulas, 134 S.E. 505, 136 S.C. 496—J. B. Colt Co. v. Britt, 123 S.E. 845, 129 S.C. 226—Gumarin v. Southern Life & Trust Co., 90 S.E. 319, 106 S.C. 37.

S.D.—Thompson v. Dakota Independent Oil Co., 288 N.W. 148—Stoefen v. Brooks, 287 N.W. 330, 66 S.D. 587—Midway Farmers' Warehouse Co. v. Foley, 213 N.W. 507, 51 S. D. 288—Farmers' Elevator Co. of Colton v. Swier, 210 N.W. 671, 50 S.D. 436.

Tenn.—Thompson v. Exchange Bldg. Co., 8 S.W.2d 489, 157 Tenn. 275, 60 A.L.R. 693—McGannon v. Farrell, 214 S.W. 432, 141 Tenn. 631—Barton v. Barton, 78 S.W.2d 356, 18 Tenn.App. 409—Weeks v. Dealers' Implement Co., 65 S.W.2d 585, 16 Tenn.App. 599—Meyer v. Cooper, 6 Tenn.App. 38.

Tex.—Distributors Inv. Co. v. Patton, 110 S.W.2d 47, 130 Tex. 449, reversing, Civ.App., 83 S.W.2d 782,—Higginbotham Cattle Co. v. Whaley & Lewis, Com.App., 41 S.W.2d 34, reversing, Civ.App., 26 S.W.2d 308—Hidalgo County Water Control and Improvement Dist. No. 1 v. Goodwin, Com.App., 25 S.W.2d 813, reversing, Civ.App., 14 S.W. 2d 321—Johnson v. Johnson, Com. App., 14 S.W.2d 805, reversing, Civ. App., 6 S.W.2d 175—San Antonio Machine & Supply Co. v. Allen, Com.App., 284 S.W. 542, modifying, Civ.App., 279 S.W. 493—Eldora Oil Co. v. Thompson, Com.App., 244 S. W. 505, reversing, Civ.App., 230 S. W. 738—Texas & Pac. Ry. Co. v. Cassaday, Civ.App., 148 S.W.2d 471, error dismissed, judgment correct—Massad v. Bumpus, Civ.App., 146 S.W.2d 1073, error dismissed, judgment correct—Hastings v. Champer, Civ.App., 139 S.W.2d 863, 864, quoting **Corpus Juris**—Pope v. Mergenthaler Linotype Co., Civ. App., 131 S.W.2d 668, error refused—Cochell v. Cawthon, Civ.App., 110 S.W.2d 636, error dismissed—Norm Co. v. Leonard's Department Store, Civ.App., 96 S.W.2d 1112—Lingwiler v. Connor, Civ.App., 92 S.W.2d 509, error refused—Alamo Lumber Co. v. Fahrenthold, Civ.App., 58 S. W.2d 1085, error refused—Daggett v. Corn, Civ.App., 54 S.W.2d 1098, error refused—Jackson v. Hughes, Civ.App., 52 S.W.2d 687, reversed on other grounds Hughes v. Jackson, 81 S.W.2d 656, 125 Tex. 130—Selz Schwab & Co. v. Smith, Civ. App., 44 S.W.2d 455, 458, quoting **Corpus Juris**—Rich v. Walker-Smith Co., Civ.App., 42 S.W.2d 181, reversed on other grounds, Com. App., 57 S.W.2d 1098—Hall v. Odiorne, Civ.App., 14 S.W.2d 870, error dismissed—Atwood v. National Petroleum Co., Civ.App., 7 S.W. 2d 964, error dismissed—Keystone Pipe & Supply Co. of Texas v. Kleeden, Civ.App., 299 S.W. 671—Battle v. Wolfe, Civ.App., 283 S. W. 1073—McCaskey Register Co. v. Mann, Civ.App., 283 S.W. 544—Jack W. Neal Auto Co. v. Serna, Civ.App., 259 S.W. 999—Wolf v. Pittman & Harrison Co., Civ.App., 247 S.W. 322—Samworth v. Hudson, Civ.App., 234 S.W. 423—Leeson v. City of Houston, Civ.App., 225 S.W. 763, affirmed, Com.App., 243 S.W. 485—Russell v. Green, Civ.App., 214 S.W. 448.

Utah.—Erickson v. Bastian, 102 P.2d 310, 98 Utah 587—Garrett v. Ellison, 72 P.2d 449, 93 Utah 184, 129 A.L.R. 666—Strike v. White, 63 P. 2d 600, 91 Utah 170—B. T. Moran, Inc. v. First Security Corporation, 24 P.2d 384, 389, 82 Utah 316, citing **Corpus Juris**—Fox Film Corporation v. Ogden Theatre Co., 17 P. 2d 294, 82 Utah 279, 90 A.L.R. 1299—Combined Metals v. Bastian, 267 P. 1020, 71 Utah 535.

Vt.—Conner v. Carpenter, 28 Vt. 237.

Va.—Wood v. Southern Shale Brick Corporation, 4 S.E.2d 360, 173 Va. 364—Stewart-Warner Corporation v. Smithey, 175 S.E. 882, 163 Va. 476—Title Ins. Co. of Richmond v. Howell, 164 S.E. 387, 158 Va. 713—Clark v. Miller, 138 S.E. 556, 148 Va. 83—Coal River Collieries v. Eureka Coal & Wood Co., 132 S. E. 337, 144 Va. 263, 46 A.L.R. 485.

Wash.—Alaska Pac. Salmon Co. v. Matthewson, 101 P.2d 606, 3 Wash. 2d 560—Fogh v. East Waterway Dock & Warehouse Co., 221 P. 302, 127 Wash. 558—Hays v. Bashor, 185 P. 814, 108 Wash. 491.

W.Va.—Ballengee v. Beckley Coal & Supply Co., 161 S.E. 562, 111 W.Va. 304—Watzman v. Unatin, 131 S. E. 874, 101 W.Va. 41—Jones v. Kessler, 126 S.E. 344, 98 W.Va. 1—Watson v. Buckhannon River Coal Co., 120 S.E. 390, 95 W.Va. 164.

Wis.—Tees v. Lee, 291 N.W. 792, 234 Wis. 607—Hampton Plains Realty Co. v. Cohen, 252 N.W. 572, 214 Wis. 128—Blazei v. Cologne, 250 N.W. 752, 213 Wis. 48—In re Read's Will, 203 N.W. 352, 187 Wis. 333—Creasy Corporation v. Dunning, 196 N.W. 775, 182 Wis. 388—Alexander Hamilton Institute v. Hart, 192 N.W. 481, 180 Wis. 90—Oconto Chamber of Commerce v. Grandall, 185 N.W. 544, 175 Wis. 447.

Wyo.—Holly Sugar Corporation v. Fritzler, 296 P. 206, 42 Wyo. 446.

22 C.J. p 1098 note 96.

"There is no better settled principle of law than the one so often stated that written contracts and agreements may not be contradicted, changed or modified by parol evidence."—S. Gumpert Co. v. Hernreich, 134 S.W.2d 568, 571, 199 Ark. 376.

have been different from what is expressed in the writing,[22] for where the parties have deliberately put their engagements into writing in such terms as import a legal obligation, without any uncertainty as to the object or extent of their engagement, all previous or contemporaneous negotiations and agreements with reference to the subject matter are, or are presumed or considered to have been, merged in, or superseded by, the written contract, and the whole engagement of the parties and the extent of their undertaking is conclusively[23] presumed to

Purpose of parol evidence rule is not to forbid extrinsic evidence in general, but only such evidence as is intended to supersede and destroy clear intention set forth in written contract.—Owens v. Baker, 193 N.E. 778, 48 Ohio App. 347.

The parol evidence rule is a salutary rule for the preservation of the sanctity of contracts.—Rhodes v. Lewis, 287 N.W. 662, 136 Neb. 870.

Rule of substantive law
Cal.—In re Gaines' Estate, 100 P.2d 1055, 15 Cal.2d 255, superseding, App., 92 P.2d 646.
Mass.—Western Newspaper Union v. Dittemore, 161 N.E. 908, 264 Mass. 74—Goldband v. Allen, 139 N.E. 834, 245 Mass. 143.
R.I.—Cameron & Ingalls Engineering Co. v. Providence Body Co., 114 A. 1, 43 R.I. 573.

Either at law or in equity
N.J.—Speedograph Corporation v. Maier, 111 A. 325, 92 N.J.Eq. 125.

Contracts under seal
Ill.—Marcus v. S. S. Kresge Co., 283 Ill.App. 556—Gardner v. Shekleton, 253 Ill.App. 333.
N.Y.—Lipe v. Beech-Nut Packing Co., 277 N.Y.S. 832, 243 App.Div. 433—Rosenshine v. Lebovitz, 248 N.Y.S. 235, 139 Misc. 258.

Whether negotiable or ordinary written contract
Iowa.—First Nat. Bank v. Mether, 251 N.W. 505, 217 Iowa 695.

Rule defines limits of written contract
N.Y.—Mitchill v. Lath, 160 N.E. 646, 247 N.Y. 377, 68 A.L.R. 239, reversing Mitchell v. Lath, 221 N.Y.S. 864, 220 App.Div. 776, and reargument denied Mitchill v. Lath, 162 N.E. 511, 248 N.Y. 526.

The rule applies to subsequent declarations of the parties as well as to prior or contemporaneous oral declarations.—United Iron Works v. Outer Harbor Dock & Wharf Co., 141 P. 917, 168 Cal. 81—Palma v. Leslie, 45 P.2d 391, 6 Cal.App.2d 702—22 C. J. p 1098 note 96 [d].

Partial destruction of contract
Parol evidence may not be admitted to vary terms of contract "so that it may stand in part as written and go down as to other parts."—McArthur v. Fillingame, 186 So. 828, 184 Miss. 869.

Municipal and county contracts
U.S.—Sells v. City of Chicago, Ill., 201 F. 874, 120 C.C.A. 212, certiorari denied 33 S.Ct. 776, 229 U.S. 616, 57 L.Ed. 1353.
Tex.—Austin Bros. v. Patton, Com. App., 294 S.W. 537, denying motion 288 S.W. 182, which reversed, Civ.App., 245 S.W. 991, and which modified, Com.App., 290 S.W. 153.

Overruling questions designed to change or modify a written contract held proper.—Chancellor Union Land Co. v. Jaffe, 140 A. 395, 104 N.J.Law 394—Greenberg v. Weisberg, 133 A. 70, 4 N.J.Misc. 453.

A verbal contract cannot be engrafted on a written one.—Porterfield v. American Surety Co., Mo. App., 228 S.W. 868.

Venue of suit brought on written contract cannot be fixed by parol evidence when contract contains no clues or recitals from which place of performance can be definitely determined.—National Bank of Commerce of Houston v. Moody, Tex. Civ.App., 90 S.W.2d 279.

Where the express language of a contract authorizes alterations and variations, the rule is not applicable.—Taylor v. Williams, 250 S.W. 820, 199 Ky. 154—22 C. J. p 1105 note 3.

22. U.S.—Indianapolis Glove Co. v. U. S., C.C.A.Ind., 96 F.2d 816—Kramer v. Harsch, C.C.A.Pa., 278 F. 860.
Ark.—Jackson County Gin Co. v. McCuistion, 5 S.W.2d 729, 177 Ark. 60.
Cal.—Gilde v. Schuster, 257 P. 121, 83 Cal.App. 537.
Ga.—Feingold v. McDonald Mortgage & Realty Co., 145 S.E. 90, 166 Ga. 838.
Idaho.—Milner v. Earl Fruit Co. of Northwest, 232 P. 581, 584, 40 Idaho 339, quoting **Corpus Juris.**
La.—Duncan Steele, Inc. v. Labatt, App., 130 So. 841, citing **Corpus Juris.**
Mass.—Home Inv. Co. v. Iovieno, 137 N.E. 382, 243 Mass. 121.
Mich.—Roosevelt Park Protestant Reformed Church v. London, 292 N.W. 486, 293 Mich. 547.
Mo.—Murphy v. Holliway, 16 S.W. 2d 107, 223 Mo.App. 714—Kelley v. Briggs, App., 290 S.W. 105—Nugent v. Armour Packing Co., App., 81 S.W. 506, affirmed 106 S.W. 648, 208 Mo. 480.
Mont.—Union Electric Co. v. Lovell Livestock Co., 54 P.2d 112, 101 Mont. 450.
N.J.—Phillips v. Koppelon, 115 A. 182, 96 N.J.Law 550.
N.Y.—Susquehanna S. S. Co. v. A. O. Andersen & Co., 203 N.Y.S. 568, 208 App.Div. 26, reversed on other grounds, 146 N.E. 381, 239 N.Y. 285.
Or.—Loveland v. Warner, 204 P. 622, 103 Or. 638, rehearing denied 206 P. 298, 103 Or. 638.
R.I.—D. W. Flint Motor Sales Co. v. Crofton, 171 A. 236, 237, 54 R.I. 160, citing **Corpus Juris.**
S.C.—Blackwell v. Faucett, 108 S.E. 295, 117 S.C. 60.
Tex.—Hastings v. Champer, Civ. App., 139 S.W.2d 863, 864, quoting **Corpus Juris**—Jones v. Sun Oil Co., Civ.App., 110 S.W.2d 80, error refused—Selz Schwab & Co. v. Smith, Civ.App., 44 S.W.2d 455, 458, quoting **Corpus Juris.**
Utah.—B. T. Moran, Inc. v. First Security Corporation, 24 P.2d 384, 389, 82 Utah 316, citing **Corpus Juris.**
22 C.J. p 1098 note 96.
Intention of parties and meaning of contract as deduced from language see Contracts § 296.

Statute held not to authorize parol evidence to show that intent of parties was different from that implied in words used.—Tyer v. Caldwell, 242 P. 760, 114 Okl. 13.

Party's subjective intention contrary to written memorial of his contract is immaterial.—The President Arthur, C.C.A.N.Y., 72 F.2d 276, affirming, D.C., 42 F.2d 288, and certiorari denied Morse Dry Dock & Repair Co. v. The President Arthur, 55 S.Ct. 149, 293 U.S. 615, 79 L.Ed. 704.

23. Ariz.—Merryman v. Sears, 72 P.2d 943, 50 Ariz. 412—S. H. Kress & Co. v. Evans, 189 P. 625, 21 Ariz. 442.
Ark.—Wilson v. Nugent, 299 S.W. 18, 174 Ark. 1115.
Cal.—Sorensen v. Commercial Credit Co., 60 P.2d 169, 16 Cal.App.2d 71—Palma v. Leslie, 45 P.2d 391, 6 Cal.App.2d 702—Van Haaren v. Whitmore, 38 P.2d 829, 3 Cal.App. 2d 632.
Fla.—Everglade Lumber Co. v. Nettleton Lumber Co., 149 So. 736, 111 Fla. 333.
Ga.—Neuhoff v. Swift & Co., 188 S. E. 831, 54 Ga.App. 651—Sumner v. General Motors Acceptance Corporation, 186 S.E. 747, 53 Ga.App. 630—Indiana Truck Corporation v. Glock, 168 S.E. 124, 46 Ga.App. 519—Smith v. Loftis Bros. & Co., 158 S.E. 768, 43 Ga.App. 354—

have been reduced to writing,[24] and, according to | the decisions on the subject, the writing being

Barfield v. Farkas, 150 S.E. 600, 40 Ga.App. 559—Automobile Battery Co. v. Geraghty & Co., 118 S. E. 412, 30 Ga.App. 446—Parcel Delivery Co. v. American Oil Pump & Tank Co., 104 S.E. 27, 25 Ga.App. 659.

Iowa.—Northern Trust Co. v. Anderson, 262 N.W. 529, 222 Iowa 590, opinion adhered to 271 N.W. 192, 222 Iowa 590—Burrier v. Sheriff, 223 N.W. 395, 207 Iowa 692—Banwart v. Shullenburg, 180 N.W. 190, 190 Iowa 418.

Ky.—Farmers' & Traders' Bank of Campton, Ky., v. Smith, 7 S.W.2d 200, 224 Ky. 761—Sanders v. Wender, 265 S.W. 939, 205 Ky. 422.

La.—Parlor City Lumber Co. v. Sandel, 173 So. 737, 186 La. 982.

Mass.—Nelson v. Hamlin, 155 N.E. 18, 258 Mass. 331—Snider v. Deban, 144 N.E. 69, 249 Mass. 59.

Mich.—Wild v. Wild, 254 N.W. 208, 266 Mich. 570—Donaldson v. Hull, 242 N.W. 732, 258 Mich. 388.

Mo.—Employer's Indemnity Corporation v. Garrett, 38 S.W.2d 1049, 327 Mo. 874—Crossan v. Noll, App., 120 S.W.2d 189.

N.J.—Downs v. Jersey Central Power & Light Co., 174 A. 887, 117 N. J.Eq. 138, affirming 170 A. 835, 115 N.J.Eq. 348.

N.Y.—Higgs v. De Maziroff, 189 N.E. 555, 263 N.Y. 473, 92 A.L.R. 807, reversing 262 N.Y.S. 974, 238 App. Div. 828, reargument denied 263 N.Y.S. 944, 239 App.Div. 780—Ocheo Realty Corporation v. Sev Realty Corporation, 199 N.Y.S. 466, 205 App.Div. 324—Lynch v. Harrer, 263 N.Y.S. 640.

Ohio.—Steel Sanitary Co. v. Pangborn Corporation, 175 N.E. 615, 38 Ohio App. 65.

Or.—Hyland v. Oregon Agr. Co., 225 P. 728, 111 Or. 212.

Pa.—Bryant v. Bryant, 144 A. 904, 295 Pa. 146—Gianni v. R. Russel & Co., 126 A. 791, 281 Pa. 320—Colonial Mfg. Co. v. Carideo, 16 A. 2d 731, 142 Pa.Super. 485.

Tex.—White, Ward & Erwin v. Hager, 248 S.W. 319, 112 Tex. 516.

Utah.—Combined Metals v. Bastian, 267 P. 1020, 71 Utah 535.

Va.—Wheeler v. Wardell, 3 S.E.2d 377, 173 Va. 168—Stewart-Warner Corporation v. Smithey, 175 S.E. 882, 163 Va. 476—Coal River Collieries v. Eureka Coal & Wood Co., 132 S.E. 337, 144 Va. 263, 46 A.L. R. 485—Rector v. Hancock, 102 S. E. 663, 127 Va. 101.

W.Va.—O'Farrell v. Virginia Public Service Co., 177 S.E. 304, 115 W. Va. 502—Watzman v. Unatin, 131 S.E. 874, 101 W.Va. 41—Jones v. Kessler, 126 S.E. 344, 98 W.Va. 1.

Wyo.—Bushnell v. Elkins, 245 P. 304, 34 Wyo. 495, 51 A.L.R. 13.

24. U.S.—G. L. Webster Co. v. Trinidad Bean & Elevator Co., C.C.A. Va., 92 F.2d 177—Kendrick v Speck, C.C.A.N.C., 67 F.2d 295—Bankers' Reserve Life Co. v. Yelland, C.C.A.Nev., 41 F.2d 654, certiorari denied Yelland v. Bankers Reserve Life Co., 51 S.Ct. 344, 283 U.S. 820, 75 L.Ed. 1435—Rajotte-Winters v. Whitney Co., C.C.A.Or., 2 F.2d 801—Frenzer v. Frenzer. C.C.A.Neb., 2 F.2d 218, certiorari denied 46 S.Ct. 101, 269 U.S. 574, 70 L.Ed. 419—The Valmar, D.C. Pa., 38 F.Supp. 618—Rash v. Shower Bros. Co., C.C.A.Pa., 258 F. 819—Kramer v. Harsch, C.C.A.Pa., 278 F. 860—The Coca-Cola Bottling Co. v. The Coca-Cola Co., D.C. Del., 269 F. 796—Carden v. U. S., 87 Ct.Cl. 189.

Ala.—Griffin v. Tatum Chevrolet Co., 166 So. 49, 231 Ala. 534—Bozeman v. J. B. Colt Co., 95 So. 588, 19 Ala.App. 126.

Ariz.—Welker v. Mishkin, 251 P. 891, 31 Ariz. 239.

Ark.—Word v. Sparks, 82 S.W.2d 5, 191 Ark. 893—Lane v. Smith, 17 S. W.2d 319, 179 Ark. 533—Harrower v. Insurance Co. of North America, 222 S.W. 39, 144 Ark. 279.

Cal.—Shivers v. Liberty Building-Loan Ass'n, 106 P.2d 4, prior opinion, App., 101 P.2d 493—Parigian v. Citizens Nat. Trust & Savings Bank of Los Angeles, App., 110 P. 2d 117—Nourse v. Kovacevich, App., 109 P.2d 999—First Bond & Mortgage Co. of Glendale v. Malouf, 98 P.2d 824, 37 Cal.App.2d 74—Blackwell v. Thomasson, 258 P. 724, 84 Cal.App. 784—Gilde v. Schuster, 257 P. 121, 83 Cal.App. 537—Shelby v. Byers, 238 P. 177, 73 Cal.App. 44.

Colo.—San Luis Cent. R. Co. v. Sims, 182 P. 8, 66 Colo. 471.

Fla.—Prescott v. Mutual Ben. Health & Accident Ass'n, 183 So. 311, 133 Fla. 510, 119 A.L.R. 525.

Ga.—Wynn v. First Nat. Bank, 167 S.E. 513, 176 Ga. 218—Renfroe v. Alden, 137 S.E. 831, 164 Ga. 77—Roberts v. Investors' Sav. Co., 113 S.E. 398, 154 Ga. 45—Eatonton Oil & Auto Co. v. Greene County, 185 S.E. 296, 53 Ga.App. 145, conforming to certified question 181 S.E. 758, 181 Ga. 47—Boston Ins. Co. v. H. B. Burch & Bros., 150 S.E. 458, 40 Ga.App. 517—Rauschenberg v. Peeples, 118 S.E. 409, 30 Ga.App. 384.

Idaho.—Milner v. Earl Fruit Co. of Northwest, 232 P. 581, 584, 40 Idaho 339, quoting **Corpus Juris**.

Ill.—Decatur Lumber & Mfg. Co. v. Crail, 183 N.E. 228, 350 Ill. 319, reversing 264 Ill.App. 244—Daytona Gables Development Co. v. Glen Flora Inv. Co., 178 N.E. 107, 345 Ill. 371—Schweickhardt v. Chessen, 161 N.E. 118, 329 Ill. 637—Armstrong Paint & Varnish Works v. Continental Can Co., 133 N.E. 711, 301 Ill. 102, reversing 220 Ill.App. 90—Adams v. Eisenstein, 248 Ill.App. 559—Clubine v. Citro, 238 Ill.App. 479—Sheehan v. Reardon, 223 Ill.App. 365.

Ind.—O'Brien v. Higley, 70 N.E. 242, 162 Ind. 316.

Iowa.—Jacobsen v. Moss, 268 N.W. 162, 163, 221 Iowa 1342, quoting **Corpus Juris**—McKenney & Seabury v. Nelson, 262 N.W. 101, 220 Iowa 504—Security Sav. Bank v. Capp, 186 N.W. 927, 193 Iowa 278—Edwards v. Wagner, 183 N.W. 450, 191 Iowa 822—Heard v. Nancolas, 175 N.W. 13, 187 Iowa 1045.

Kan.—Hudson v. Riley, 180 P. 198, 104 Kan. 534.

Ky.—Phipps v. Frances, 101 S.W.2d 924, 267 Ky. 203—Our Home Life Ins. Co. v. Butch, 47 S.W.2d 714, 242 Ky. 766—Pickrell & Craig Co. v. Bollinger-Babbage Co., 264 S.W. 737, 204 Ky. 314—Robb v. Sherrill-Russell Lumber Co., 241 S.W. 64, 194 Ky. 835—Tross v. Bills' Ex'x, 224 S.W. 660, 189 Ky. 115.

La.—Franks v. Davis Bros. Lumber Co., 84 So. 101, 146 La. 803.

Me.—Hoyt v. Tapley, 116 A. 559, 121 Me. 239—Johnson v. Burnham, 115 A. 261, 120 Me. 491—Bassett v. Breen, 107 A. 832, 118 Me. 279.

Mass.—Ernest F. Carlson Co. v. Fred T. Ley & Co., 168 N.E. 812, 269 Mass. 272—Butler v. Prussian, 147 N.E. 892, 252 Mass. 265—Pearlstein v. Novitch, 131 N.E. 853, 239 Mass. 228—American Electrical Works v. New England Electric R. Constr. Co., 72 N.E. 64, 186 Mass. 546.

Mich.—Labadie v. Boehle, 284 N.W. 707, 288 Mich. 223—Birney v. Ready, 184 N.W. 462, 216 Mich. 7—Quisle v. Brezner, 180 N.W. 467, 212 Mich. 254.

Minn.—Taylor v. More, 263 N.W. 537, 195 Minn. 448.

Miss.—Grenada Auto Co. v. Waldrop, 195 So. 491, 188 Miss. 468—State Highway Department v. Duckworth, 172 So. 148, 178 Miss. 35—Parker v. McCaskey Register Co., 171 So. 337, 177 Miss. 347—Bank of Lena v. Slay, 170 So. 635, 176 Miss. 825—Perrault v. White Sewing Mach. Co., 127 So. 271, 157 Miss. 167—Dowling v. Smyley, 116 So. 294, 150 Miss. 272.

Mo.—Elliott v. Winn, 264 S.W. 391, 305 Mo. 105, certiorari denied Winn v. Elliott, 45 S.Ct. 100, 266 U.S. 621, 69 L.Ed. 472—Koob v. Ousley, 240 S.W. 102—St. Louis Auto Parts & Salvage Co. v. Indiana Auto Salvage Co., App., 89 S. W.2d 134—Fischman-Harris Realty Co. v. Kleine, App., 82 S.W.2d 605—Wind v. Bank of Maplewood

regarded as the only evidence of the agreement.[25] The rule, however, goes even further than this, and it has been established that, where the instrument is free from ambiguity and is in itself susceptible of a clear and sensible construction, parol or extrinsic evidence is not admissible even to explain its meaning or determine the construction of the writing.[26]

The parol evidence rule has been applied to contracts so as to exclude evidence of negotiations generally, and particularly of those prior to the writing,[27] and, likewise, to exclude evidence relating to

& Trust Co., App., 58 S.W.2d 332—Hellrung v. Viviano, App., 7 S.W.2d 258—Shaffner v. Moore Shoe Co., App., 3 S.W.2d 263—Bank of Dearborn v. Gabbert, 291 S.W. 142, 221 Mo.App. 923—Bank of Dearborn v. Gabbert, App., 274 S.W. 861.

Mont.—Linn v. French, 33 P.2d 1002, 97 Mont. 292—Lewis v. Aronow, 251 P. 146, 77 Mont. 348—Webber v. Killorn, 212 P. 852, 66 Mont. 130.

Nev.—Chiquita Mining Co. v. Fairbanks, Morse & Co., 104 P.2d 191.

N.M.—Prentice v. Cain, 202 P. 121, 27 N.M. 368.

N.Y.—Hendricks v. Clements, 186 N.Y.S. 378, 195 App.Div. 144.

N.C.—Home Owners' Loan Corporation v. Ford, 193 S.E. 279, 212 N.C. 324—Oliver v. Hecht, 177 S.E. 399, 207 N.C. 481.

Okl.—Allis Chalmers Mfg. Co. v. Byers, 88 P.2d 368, 184 Okl. 475—Masho v. Harbour Longmire Co., 85 P.2d 300, 184 Okl. 125—Hicks v. Mid-Kansas Oil & Gas Co., 76 P.2d 269, 182 Okl. 61—Vance v. Commercial Credit Co., 55 P.2d 1015, 176 Okl. 343—Mid-West Chevrolet Corporation v. Noah, 48 P.2d 283, 173 Okl. 198—First Nat. Bank v. Gum, 293 P. 188, 146 Okl. 53—McCain v. J. B. Colt Co., 281 P. 769, 139 Okl. 178—Nachtsheim v. Bartle, 268 P. 195, 131 Okl. 166—Guess v. Miner, 265 P. 633, 130 Okl. 93—J. B. Colt Co. v. Thompson, 242 P. 1030, 114 Okl. 61—Outcault Advertising Co. v. Waurika Nat. Bank, 227 P. 144, 100 Okl. 96—Bolon v. Massey, 222 P. 685, 101 Okl. 8—Western Silo Co. v. Pruitt, 221 P. 106, 94 Okl. 154—Ozark States Trust Co. v. Winkler, 202 P. 12, 84 Okl. 7—Shaw v. Hutton, 183 P. 477, 75 Okl. 255.

Or.—Johns-Manville Corporation v. Heckart, 277 P. 821, 129 Or. 505.

Pa.—Germantown Trust Co. v. Emhardt, 184 A. 457, 321 Pa. 561, followed 184 A. 460, 321 Pa. 567—Gianni v. R. Russel & Co., 126 A. 791, 281 Pa. 320—Colonial Mfg. Co. v. Carideo, 16 A.2d 731, 142 Pa. Super. 485—Atlas Bolt & Screw Co. v. Komins, 10 A.2d 871, 138 Pa.Super. 474—Schmitt v. William G. Johnston Co., 7 A.2d 131, 136 Pa.Super. 213—C. I. T. Corporation v. Grosick, 167 A. 440, 110 Pa.Super. 165—Preis v. Mulholland & Gotwals, 96 Pa.Super. 104—Reber v. Lipschutz, 92 Pa.Super. 292—Murphy v. Pinney, 86 Pa.Super. 458—Jizmajian v. Papazian, 30 Del. Co. 145—National Cash Register Co. v. Elfenbein, 20 Erie Co. 390—Goodrich Co. v. Litwak, 8 Sch. Reg. 100.

R.I.—Robert Forsyth & Son v. Tanenbaum, 161 A. 112.

S.C.—John T. Stanley Co. v. Kaufman, 171 S.E. 32, 170 S.C. 521.

S.D.—Thompson v. Dakota Independent Oil Co., 288 N.W. 148—Stoefen v. Brooks, 287 N.W. 330, 66 S.D. 587.

Tenn.—Henderson v. Henderson, 14 S.W.2d 714, 158 Tenn. 452, rehearing denied 17 S.W.2d 15, 159 Tenn. 126—McQuiddy Printing Co. v. Hirsig, 134 S.W.2d 197, 23 Tenn.App. 434—American Fruit Growers v. Hawkinson. 106 S.W.2d 564, 21 Tenn.App. 127—Weeks v. Dealers' Implement Co., 65 S.W.2d 585, 16 Tenn.App. 599.

Tex.—Courreges v. System Freight Service, Civ.App., 152 S.W.2d 841—Hastings v. Champer, Civ.App., 139 S.W.2d 863, 864, quoting **Corpus Juris**—Distributors Inv. Co. v. Patton, Civ.App., 83 S.W.2d 782, reversed on other grounds 110 S.W. 2d 47, 130 Tex. 449—Jackson v. Hughes, Civ.App., 52 S.W.2d 687, reversed on other grounds Hughes v. Jackson, 81 S.W.2d 656, 125 Tex. 130—Selz Schwab & Co. v. Smith, Civ.App., 44 S.W.2d 455, 458, quoting **Corpus Juris**—North v. Atlas Brick Co., Civ.App., 281 S.W. 608, modified on other grounds Atlas Brick Co. v. North, Com.App., 288 S.W. 146—San Antonio Machine & Supply Co. v. Allen, Civ.App., 268 S.W. 532—Houston, E. & W. T. Ry. Co. v. Browder, Civ.App., 265 S.W. 227, reversed on other grounds, Com.App., 283 S.W. 154—Jack W. Neal Auto Co. v. Serna, Civ.App., 259 S.W. 999—Barnes v. Early-Foster Co., Civ.App., 228 S.W. 248.

Vt.—Wood v. James, 106 A. 566, 93 Vt. 36.

Va.—Wood v. Southern Shale Brick Corporation, 4 S.E.2d 360, 173 Va. 364.

Wash.—P. S. Wick Co. v. Du Barry, 293 P. 447, 159 Wash. 380—Inter City Auto Stage Co. v. Bothell Bus Co., 247 P. 1040, 139 Wash. 674.

W.Va.—Ballengee v. Beckley Coal & Supply Co., 161 S.E. 562, 111 W.Va. 304—Braude & McDonnell v. Isadore Cohen Co., 106 S.E. 52, 87 W. Va. 763.

Wyo.—Dunn v. Gilbert, 254 P. 121, 36 Wyo. 249.

22 C.J. p 1102 note 97.

Merger with respect to contracts generally see Contracts §§ 380–384.

Subsequent agreements see infra §§ 1004–1006.

25. U.S.—The Valmar, D.C.Pa., 38 F.Supp. 618.

Cal.—First Bond & Mortgage Co. of Glendale v. Malouf, 98 P.2d 824, 37 Cal.App.2d 74.

Ga.—Rauschenberg v. Peeples, 118 S.E. 409, 30 Ga.App. 384.

Pa.—Germantown Trust Co. v. Emhardt, 184 A. 457, 321 Pa. 561, followed 184 A. 460, 321 Pa. 567—Colonial Mfg. Co. v. Carideo, 16 A. 2d 731, 142 Pa.Super. 485—Atlas Bolt & Screw Co. v. Komins, 10 A.2d 871, 138 Pa.Super. 474—Nelly v. Diskin, 173 A. 735, 113 Pa.Super. 249—C. I. T. Corporation v. Grosick, 167 A. 440, 110 Pa.Super. 165—Goodrich Co. v. Litwak, 8 Sch. Reg. 100.

Writing not expressing entire agreement see infra § 1013.

"The basic principle underlying the so-called 'parol evidence' rule respecting contracts in writing is that the law presumes that the parties, by making a writing on the subject, intended the writing made to be the sole expositor of their agreement."—Everglade Lumber Co. v. Nettleton Lumber Co., 149 So. 736, 738, 111 Fla. 333.

26. U.S.—Westinghouse Electric & Mfg. Co. v. Radio-Craft Co., C.C. A.N.J., 291 F. 169, affirmed, C.C.A., Radio-Craft Co. v. Westinghouse Electric Mfg. Co., 7 F.2d 432.

Idaho.—Milner v. Earl Fruit Co. of Northwest, 232 P. 581, 584, 40 Idaho 339, quoting **Corpus Juris**.

Mich.—Roosevelt Park Protestant Reformed Church v. London, 292 N.W. 486, 293 Mich. 547.

Tex.—Hastings v. Champer, Civ. App., 139 S.W.2d 863, 864, quoting **Corpus Juris**.

22 C.J. p 1104 note 98.

Construction of language see infra §§ 959–962.

27. U.S.—Kaplan v. American Cotton Oil Co., C.C.A.La., 12 F.2d 969—Carden v. U. S., 87 Ct.Cl. 189.

Ariz.—Coe v. Winchester, 33 P.2d 286, 43 Ariz. 500.

Cal.—Southern California Music Co. v. Labes, 288 P. 1096, 106 Cal.App. 255.

Colo.—Hoffman v. Wichita Farm

communications,[28] oral commitments,[29] conversations or declarations,[30] correspondence,[31] representations or statements, particularly those prior to, or contemporaneous with, the contract,[32] and other utterances.[33]

The time of performance fixed by the contract cannot be changed by parol or extrinsic evidence.[34]

§ 902. —— Requisites of Writing

To be within the parol evidence rule, a written contract need not be in any particular form, or be contained in one paper, or be signed by both parties.

It is of course necessary to the application of the parol evidence rule to contracts that there shall be a complete written contract between the parties, as appears infra § 1013; but it is not necessary that the contract be in any particular form,[35] or that it

Lighting Co., 28 P.2d 808, 94 Colo. 153.
Conn.—Pyskoty v. Sobusiak, 145 A. 58, 109 Conn. 593.
Ill.—Sallo v. Boas, 158 N.E. 364, 327 Ill. 145.
Miss.—Grenada Auto Co. v. Waldrop, 195 So. 491, 188 Miss. 468.
Okl.—First Nat. Bank v. Gum, 293 P. 188, 146 Okl. 53.
N.Y.—Sayer v. Sunderland, 220 N.Y. S. 409, 219 App.Div. 615.
Ohio.—Owens v. Baker, 193 N.E. 778, 48 Ohio App. 347.
Pa.—Shapiro v. Rudley, 183 A. 106, 121 Pa.Super. 42.
S.C.—Retailer's Service Bureau v. Smith, 163 S.E. 649, 165 S.C. 238.

Time or nature of prior negotiations immaterial
Ind.—Eickmier v. Geddes, 126 N.E. 859, 73 Ind.App. 167.

Oral or written negotiations are excluded.—In re Gaines' Estate, 100 P.2d 1055, 15 Cal.2d 255, superseding, App., 92 P.2d 646.

28. Me.—Johnson v. Burnham, 115 A. 261, 120 Me. 491.

29. N.M.—Alford v. Rowell, 103 P. 2d 119, 44 N.M. 392.

30. U.S.—Schnerb v. Holt Mfg. Co., C.C.A.N.Y., 289 F. 1001, petition dismissed 44 S.Ct. 7, 263 U.S. 726, 68 L.Ed. 527.
Ariz.—Merryman v. Sears, 72 P.2d 943, 50 Ariz. 412—S. H. Kress & Co. v. Evans, 189 P. 625, 21 Ariz. 442.
Ga.—Starr v. Pan-American Petroleum Corporation, 160 S.E. 689, 44 Ga.App. 207—Parcel Delivery Co. v. American Oil Pump & Tank Co., 104 S.E. 27, 25 Ga.App. 659.
Ill.—Sallo v. Boas, 158 N.E. 364, 327 Ill. 145—Rozgis v. Missouri State Life Ins. Co., 271 Ill.App. 155.
Kan.—Hudson v. Riley, 180 P. 193, 104 Kan. 534.
Ky.—Brown v. Union Cent. Life Ins. Co., 44 S.W.2d 514, 241 Ky. 514—Farmers' & Traders' Bank of Campton, Ky., v. Smith, 7 S.W.2d 200, 224 Ky. 761—Turner Elkhorn Coal Co. v. Smith, 291 S.W. 715, 218 Ky. 503—John S. Noel Co. v. Theobald, 288 S.W. 1031, 217 Ky. 28—Sanders v. Wender, 265 S.W. 939, 205 Ky. 422.
Mich.—Carlson v. Johnson, 265 N.W. 517, 275 Mich. 35.
Miss.—Grenada Auto Co. v. Waldrop, 195 So. 491, 188 Miss. 468.
Mo.—State ex rel. Chaney v. Grinstead, 282 S.W. 715, 314 Mo. 55.
N.J.—Superior Finance Corporation v. McCrane, 174 A. 559, 113 N.J. Law 501.
N.Y.—Ganger, Inc., v. Angell, 287 N.Y.S. 948, 159 Misc. 464, reversing 283 N.Y.S. 61, 157 Misc. 143.
N.C.—W. L. Slayton & Co. v. Board of Com'rs of Cabarrus County, 120 S.E. 452, 186 N.C. 690.
Pa.—International Fuel Service Corporation v. Stearns, 155 A. 285, 304 Pa. 157.
Tex.—Hunt County v. White, Civ. App., 285 S.W. 663.
Va.—Wood v. Southern Shale Brick Corporation, 4 S.E.2d 360, 173 Va. 364.

31. U.S.—Dickinson Tire & Machine Co. v. Dickinson, C.C.A.N. Y., 29 F.2d 493—El Dorado Refining Co. v. Lientz, C.C.A.Kan., 7 F.2d 814.
Colo.—Middelkamp v. Smith, 213 P. 673, 73 Colo. 129.

32. Ala.—W. T. Rawleigh Co. v. Phillips, 167 So. 271, 232 Ala. 124.
Ga.—Sumner v. General Motors Acceptance Corporation, 186 S.E. 747, 53 Ga.App. 630—Smith v. Loftis Bros. & Co., 158 S.E. 768, 43 Ga. App. 354—Barfield v. Farkas, 150 S.E. 600, 40 Ga.App. 559—Parcel Delivery Co. v. American Oil Pump & Tank Co., 104 S.E. 27, 25 Ga. App. 659.
Mich.—National Cash Register Co. v. Verbrugge, 248 N.W. 608, 263 Mich. 243.
N.Y.—Lynch v. Harrer, 263 N.Y.S. 640.
Okl.—Mascho v. Harbour Longmire Co., 85 P.2d 300, 184 Okl. 125—Oklahoma Gas & Electric Co. v. Smith, 50 P.2d 1094, 174 Okl. 529—McKee v. Columbus Mut. Life Ins. Co. of Columbus, Ohio, 42 P. 2d 831, 172 Okl. 250—Love County Nat. Bank v. Straughn, 30 P.2d 461, 167 Okl. 446—Clark v. Stevens, 10 P.2d 422, 156 Okl. 231—Wichita Flour Mills Co. v. Guymon Equity Exchange, 1 P.2d 657, 150 Okl. 245—Pine v. Lenox Drilling Co., 249 P. 420, 119 Okl. 225—Bonfils v. Geeslin, 247 P. 673, 120 Okl. 130—Green v. Cox Machinery Co., 244 P. 414, 116 Okl. 255—J. B. Colt Co. v. Thompson, 242 P. 1030, 114 Okl. 61—Inner Shoe Tire Co. v. Mueller, 235 P. 1072, 108 Okl. 229—Outcault Advertising Co. v. Waurika Nat. Bank, 227 P. 144, 100 Okl. 96—Cromwell v. Lewis, 223 P. 671, 98 Okl. 53—Bolon v. Massey, 222 P. 685, 101 Okl. 8—Fuller v. Caraway, 221 P. 79, 97 Okl. 110—Western Silo Co. v. Pruitt, 221 P. 106, 94 Okl. 154—Lindsey State Bank v. McGrew, 219 P. 904, 96 Okl. 74—Ozark States Trust Co. v. Winkler, 202 P. 12, 84 Okl. 7.
Pa.—East Coast Finance Corporation v. Linck, 159 A. 468, 104 Pa. Super. 518—Smith v. Holmwood, 87 Pa.Super. 100.
Wash.—Clise v. Scott, 38 P.2d 1019, 180 Wash. 207.

Representations or statements by agent
Ky.—John S. Noel Co. v. Theobald, 288 S.W. 1031, 217 Ky. 28.
Okl.—American Trust Co. v. Walker, 246 P. 833, 117 Okl. 156.
S.C.—J. B. Colt Co. v. Robinson, 135 S.E. 312, 137 S.C. 224.
Wyo.—Holly Sugar Corporation v. Fritzler, 296 P. 206, 42 Wyo. 446.

33. Fla.—Milton v. Burton, 84 So. 147, 79 Fla. 266.
N.Y.—In re Blodgett's Estate, 7 N.Y. S.2d 364, 168 Misc. 898.
Wis.—Stuart v. Crowley, 217 N.W. 719, 195 Wis. 47.

34. Minn.—Dakota State Bank v. Winona Wagon Co., 203 N.W. 212, 162 Minn. 445.
Mont.—Leigland v. Rundle Land & Abstract Co., 208 P. 1075, 64 Mont. 154.
Or.—Dutcher v. Gresham Berry Growers, 12 P.2d 304, 140 Or. 320.
22 C.J. p 1105 note 2.
Legal effect of instrument as to time of performance see supra § 853.
Admissibility where contract is ambiguous or silent see infra § 1015.

35. N.Y.—Gulickson v. Seglin Const. Co., 273 N.Y.S. 908, 152 Misc. 624.
22 C.J. p 1106 note 8.

A memorandum need not be formal or signed by party to be bound, to become exclusive evidence of contract.—Rast v. Bergquist, 235 N. W. 372, 182 Minn. 392.

An oral contract confirmed by letter is not within the rule.—Copeland

all be contained in one paper,[36] or signed by both parties;[37] and a writing evidencing the whole of an agreement between the parties which has been delivered, accepted, and under which business has been transacted, cannot be varied by parol, even though it is not signed;[38] nor does the fact that a contract originally rested in parol and was reduced to writing only after being partly performed preclude the application to the writing of the rule excluding parol evidence to vary or contradict the writing, for the parol agreement is merged in the written one.[39]

A party signing a contract in blank has been held entitled to dispute the terms written above his signature as against the party who wrote them,[40] but it has also been held that a business man who signs a printed contract containing blanks cannot be permitted to vary by parol the contract evidenced by the filling in of the blanks where the insertions are consistent with the printed parts.[41] A contract signed by parties able to read and write cannot be varied by parol evidence, even though one party may not have read it.[42]

§ 903. —— Bailments

The parol evidence rule applies to contracts of bailment.

With some exceptions, as where fraud or mistake appears, see infra §§ 978, 979, parol evidence is not admissible to vary or modify the terms of a written contract of bailment;[43] but, where a written contract of bailment does not specify the time of its continuance, what length of time is reasonable under the circumstances may be shown by parol.[44]

A contract of storage is within the parol evidence rule and cannot be varied or contradicted.[45]

§ 904. —— Building and Working

A contract for buildings or other works cannot be varied by parol or extrinsic evidence.

A contract for buildings or other works stands on the same plane as any other contract and must be held to express the entire agreement of the parties, so that it cannot be varied, added to, modified, or contradicted by parol or extrinsic evidence, or by any showing of the intentions of the parties, or of their real agreement, with reference to the subject matter.[46] Thus it cannot be shown that certain rep-

v. Cherry, 95 S.W.2d 1275, 20 Tenn. App. 122.

36. Vt.—Kinnear & Gager Mfg. Co. v. Miner, 92 A. 459, 88 Vt. 324.
22 C.J. p 1106 note 9.

Contract in form of correspondence
Ark.—Engles v. Blocker, 192 S.W. 193, 127 Ark. 385.
22 C.J. p 1106 note 9 [a].

37. Minn.—Rast v. Bergquist, 235 N.W. 372, 182 Minn. 392.
22 C.J. p 1106 note 10.

A written proposition accepted and acted on consummates a contract in writing which cannot be varied by parol.—Manufacturers' & Merchants' Inspection Bureau v. Everwear Hosiery Co., 138 N.W. 624, 152 Wis. 73, 42 L.R.A.,N.S., 847, Ann. Cas.1914C 449—22 C.J. p 1106 note 10 [b].

Documents written by one party and relied on by the other are within the parol evidence rule.—Phelan v. Atlantic Nat. Bank of Boston, 17 N.E.2d 697, 301 Mass. 463.

Oral acceptance of written offer is not within the rule.—Zion Baptist Church v. Hebert, 28 P.2d 799, 94 Colo. 59.

38. Mich.—Cohen v. Jackoboice, 59 N.W. 665, 101 Mich. 409.
22 C.J. p 1107 note 11.

39. Tex.—Moore-Seaver Grain Co. v. Blum Milling Co., Civ.App., 264 S.W. 551, 553, citing **Corpus Juris**, and reversed on other grounds Blum Milling Co. v. Moore-Seaver Grain Co., Com.App., 277 S.W. 78.
22 C.J. p 1107 note 12.

40. Ill.—Martin v. Trainer, 125 Ill. App. 474.

41. Mo.—White v. Elwell, 176 S.W. 486, 189 Mo.App. 36.
22 C.J. p 1107 note 14.

42. Miss.—Jourdan v. Albritton, 111 So. 591, 146 Miss. 651.

43. Ky.—Sipple v. Pennington, 273 S.W. 434, 209 Ky. 600.
22 C.J. p 1107 note 17.

44. Tenn.—Cobb v. Wallace, 5 Coldw. 539, 98 Am.D. 435.
Duration of contract generally see supra § 854.

45. Ill.—Howland v. Newton Ice & Cold Storage Co., 240 Ill.App. 307.
Mass.—Bellows v. Worcester Storage Co., 7 N.E.2d 588, 297 Mass. 188.
Or.—Wright v. Morton, 267 P. 818, 125 Or. 563.
22 C.J. p 1107 note 21.
Warehouse and storage receipts see infra § 926.

Contract for storage space
U.S.—City of Newark v. Mills, C. C.A.N.J., 35 F.2d 110, affirming, D. C., Petition of Mills, 29 F.2d 207, and certiorari denied City of Newark v. Mills, 50 S.Ct. 237, 281 U. S. 722, 74 L.Ed. 1140.

46. U.S.—Rajotte-Winters v. Whitney Co., C.C.A.Or., 2 F.2d 801—Stang & Mitchell v. U. S., C.C.A. Va., 290 F. 136—Davis v. Commissioners of Sewerage of City of Louisville, D.C.Ky., 13 F.Supp. 672, modified on other grounds, C.C.A., Commissioners of Sewerage of City of Louisville, Ky. v. Davis, 88 F.2d 797.
Ark.—Creek v. Baxter, 43 S.W.2d 227, 184 Ark. 1193—Nowlin-Carr Co. v. Cook, 283 S.W. 7, 171 Ark. 51.
Cal.—Columbia Casualty Co. v. Lewis, 57 P.2d 1010, 14 Cal.App.2d 64.
Ga.—Cobb v. Bond, 148 S.E. 411, 39 Ga.App. 637.
Ill.—Simon v. South End Cleaners & Dyers, 246 Ill.App. 14.
La.—Fire Protection Equipment Co. v. Rabinowitz, App., 194 So. 733—Federal Sign System v. Gumina, 2 La.App. 60.
Md.—J. L. Robinson Const. Co. v. Barry, 108 A. 688, 135 Md. 275.
Mass.—Beacon Tool & Machine Co. v. National Products Mfg. Co., 147 N.E. 572, 252 Mass. 88.
N.J.—Booye v. Ries, 134 A. 86, 102 N.J.Law 322.
N.Y.—Murdock v. Gould, 86 N.E. 12, 193 N.Y. 369, reversing 105 N.Y.S. 1132, 120 App.Div. 888—Stevens Floor Co. v. Forrest, 237 N.Y.S. 225, 227 App.Div. 214.
Or.—Graef v. Bowles, 248 P. 1090, 119 Or. 498.
Pa.—Taber v. Porter-Gildersleeve Co., 114 A. 773, 271 Pa. 245.
Tex.—Stout v. Sommers, Civ.App., 28 S.W.2d 247, affirmed Sommers v. Stout, Com.App., 44 S.W.2d 901—Hamic v. George S. Allison & Sons, Civ.App., 247 S.W. 918, af-

resentations were made before or at the time the contract was made,[47] and a parol warranty of fitness for a specific purpose,[48] or a new provision requiring the performance of additional duties,[49] cannot be added; nor where the clear legal effect of the contract is to include the doing of certain work can it be shown by parol evidence that such work was not included.[50]

§ 905. —— Carriage

a. In general
b. Bills of lading
c. Railroad or steamship tickets

a. In General

The parol evidence rule applies to contracts of carriage or shipment.

The rule against the admission of parol evidence to vary or contradict a written contract applies in full force to contracts of carriage or shipment.[51]

b. Bills of Lading

Bills of lading, in so far as they constitute mere receipts, are subject to explanation or contradiction, but as contracts they cannot be varied by parol evidence.

Bills of lading are instruments of a two-fold character, being at once contracts and receipts, as appears in Carriers § 123, and in the C.J.S. title Shipping § 111, also 58 C.J. p 359 note 51. In so far as they partake of the nature of mere receipts, they are, in the absence of statute, subject to explanation or contradiction,[52] and it may be shown by parol evidence that none of the goods, or only a part of the goods, described in the bill of lading was in fact received,[53] as against a shipper or anyone who has not advanced value on the face of the

firmed Geo. S. Allen & Sons v. Hamic, Com.App., 260 S.W. 1037.
Wash.—Robinson Tile & Marble Co. v. Samuels, 266 P. 701, 147 Wash. 445.
W.Va.—Corns-Thomas Engineering & Construction Co. v. McDowell County Court, 115 S.E. 462, 92 W. Va. 368.

Provisions as to price or payment
Cal.—Peschong v. Madden, 281 P. 1068, 101 Cal.App. 632.
Kan.—H. B. McCray Lumber Co. v. Terry, 278 P. 746, 128 Kan. 529.
N.Y.—Sherman v. New York, 1 N.Y. 316—Union Stove Works v. Arnoux, 28 N.Y.S. 23, 7 Misc. 700.

Work not contemplated
Parol testimony showing work not originally contemplated would be necessary to build rooms in size required by contract was held inadmissible.—Valder v. Berg, 260 P. 240, 122 Or. 661.

Basis of bid
In contractor's action against city based on fraudulent misrepresentation as to quantity of excavation required, contractor could not, by oral testimony, controvert his written statement accompanying bid that he understood plans and specifications, had made examinations, and that bid was based thereon.—Palmberg v. City of Astoria, 229 P. 380, 112 Or. 353, denying rehearing 228 P. 107, 112 Or. 353.

47. Ky.—United Equipment Co. v. D. T. Bohon Co., 263 S.W. 27, 203 Ky. 527.
22 C.J. p 1108 note 23 [a] (5).

48. Cal.—United Iron Works v. Standard Brass Casting Co., 231 P. 567, 69 Cal.App. 384.

49. R.I.—Cameron & Ingalls Engineering Co. v. Providence Body Co., 114 A. 1, 43 R.I. 573.

50. Mass.—Daly v. Kingston, 58 N.E. 1019, 177 Mass. 312.
Mich.—Unruh v. De Wolf, 231 N.W. 92, 251 Mich. 38.

51. U.S.—Grammer S. S. Co. v. James Richardson & Sons, D.C.N.Y., 37 F.2d 366, affirmed, C.C.A., Grammer S. S. Corporation v. James Richardson & Sons, 47 F.2d 186—Eastern S. S. Co. v. 170,040 50/60 Bushels of Wheat, etc., D.C. N.Y., 1 F.2d 558, affirmed, C.C.A., Pioneer Steamship Co. v. 92,680 Bushels of Wheat, 11 F.2d 1015.
Ala.—American Ry. Express Co. v. Henderson, 107 So. 746, 214 Ala. 268.
La.—Raphiel v. American Ry. Express Co., 120 So. 786, 10 La.App. 463.
Va.—Peery v. Norfolk & W. Ry. Co., 124 S.E. 250, 140 Va. 113.
22 C.J. p 1109 note 27.

A written contract cannot be pieced out by oral testimony.—Bradford v. Hines, 227 S.W. 869, 206 Mo. App. 582.

52. U.S.—The Robin Gray, D.C.N.Y., 53 F.2d 1037, reversed in part on other grounds, C.C.A., 65 F.2d 375, modified on other grounds 65 F.2d 376, certiorari denied Seas Shipping Co. v. Approximately 3,251,000 Feet Board Measure of Lumber, 54 S.Ct. 70, 290 U.S. 653, 78 L.Ed. 566—Olivier Straw Goods Corporation v. Osaka Shosen Kaisha, D.C.N.Y., 21 F.2d 618, reversed on other grounds, C.C.A., 27 F. 2d 129, certiorari denied Osaka Shosen Kaisha v. Olivier Straw Goods Corporation, 49 S.Ct. 22, 278 U.S. 618, 73 L.Ed. 540—The Muskegon, D.C.N.Y., 10 F.2d 817—Eastern S. S. Co. v. 170,040 50/60 Bushels of Wheat etc., D.C.N.Y., 1 F.2d 558, affirmed, C.C.A., Pioneer Steamship Co. v. 92,680 Bushels of Wheat, 11 F.2d 1015—The Isla de Panay, C.C.A.N.Y., 293 F. 723, certiorari granted Austin Nichols & Co. v. The Isla de Panay, 44 S. Ct. 133, 263 U.S. 697, 68 L.Ed. 512. Affirmed Austin Nichols & Co. v. The Isla de Panay, 45 S.Ct. 269, 267 U.S. 260, 69 L.Ed. 603—The Arpillao, C.C.A.N.Y., 270 F. 426, reversing, D.C., 241 F. 282, and certiorari denied Jose Tayas' Sons Co. v. Pompeian Co., 41 S.Ct. 377, 255 U.S. 574, 65 L.Ed. 793.
Ala.—Louisville & N. R. Co. v. Cullman Warehouse, 147 So. 431, 226 Ala. 493—Wye Shipping Co. v. Hunter, Benn & Co., 100 So. 475, 211 Ala. 326.
Ark.—Arkansas Western Ry. Co. v. Robson, 285 S.W. 372, 171 Ark. 698.
Ga.—Western & A. R. R. v. Legg, 123 S.E. 31, 32, 32 Ga.App. 368, citing Corpus Juris.
Tex.—Texarkana & Ft. S. Ry. Co. v. Brass, Com.App., 260 S.W. 828, affirming, Civ.App., 245 S.W. 457, and rehearing overruled, Com.App. 262 S.W. 737—Morris v. Davis, Civ.App., 3 S.W.2d 109, 111, quoting Corpus Juris, and affirmed Davis v. Morris, Com.App., 13 S.W. 2d 63.
22 C.J. p 1109 note 30.
Receipts generally see infra § 926.

A statement as to the condition of goods at the time of their receipt in a bill of lading is merely prima facie evidence and parol evidence is admissible to show the actual condition of the goods.
Ark.—Arkansas Western Ry. Co. v. Robson, 285 S.W. 372, 171 Ark. 698.
Ill.—S. Valentine & Co. v. Atchison, T. & S. F. Ry. Co., 220 Ill.App. 188.
Tex.—Morris v. Davis, Civ.App., 3 S.W.2d 109, affirmed Davis v. Morris, Com.App., 13 S.W.2d 63.
22 C.J. p 1110 note 33.

53. U.S.—Strohmeyer & Arpe Co. v.

bill.[54] This principle has been held to apply to third parties as well as to the original parties to the bill of lading, where it is marked "not negotiable."[55] Conversely, the shipper or consignee may contradict the bill of lading by parol evidence showing that the carrier received a larger quantity than the bill of lading acknowledged to have been received.[56]

On the other hand, in so far as bills of lading express the contract between the parties and define their rights, liabilities, and undertakings, they cannot be varied or contradicted by parol evidence.[57] It has been held, nevertheless, that, where goods are received and actually shipped under a parol contract, the subsequent receipt of a bill of lading does not preclude the shipper from relying on the parol contract.[58]

c. Railroad or Steamship Tickets

Railroad or steamship tickets, so far as contractual in nature, cannot be varied by parol evidence, but, where regarded as mere tokens, they are not within the rule.

Railroad or steamship tickets are within the rule against variation or contradiction so far as they express the contract,[59] but they are not necessarily of a contractual nature,[60] and, where they are regarded as tokens that the fare has been paid rather than as contracts, they are not within the rule.[61]

§ 906. —— Employment

Written contracts of employment are within the parol evidence rule; thus it cannot be shown that the duration of the employment, the compensation, or the services to be rendered were to be otherwise than as expressed in the contract.

American Line S. S. Corporation, C.C.A.N.Y., 97 F.2d 360.
Conn.—Shore v. New York, N. H. & H. R. Co., 121 A. 344, 345, 99 Conn. 129, quoting **Corpus Juris.**
La.—Raphiel v. American Ry. Express Co., 120 So. 786, 10 La.App. 463.
Tex.—Gulf, C. & S. F. Ry. Co. v. Kempner, Com.App., 282 S.W. 795, reversing, Civ.App., 275 S.W. 459.
Va.—Director General of Railroads v. Chandler, 106 S.E. 226, 129 Va. 418.
10 C.J. p 199 note 98.

54. U.S.—Strohmeyer & Arpe Co. v. American Line S. S. Corporation, C.C.A.N.Y., 97 F.2d 360.

55. Pa.—Franklin Trust Co. v. Philadelphia, B. & W. R. Co., 70 A. 949, 222 Pa. 96, 22 L.R.A.,N.S., 828.

56. Iowa.—Chapin v. Chicago, M. & St. P. R. Co., 44 N.W. 820, 79 Iowa 582.

57. U.S.—South Carolina Asparagus Growers' Ass'n v. Southern Ry. Co., C.C.A.S.C., 46 F.2d 452, 454, citing **Corpus Juris**—Western Lumber Mfg. Co. v. U. S., D.C. Cal., 9 F.2d 1004—Rosenberg Bros. & Co. v. U. S. Shipping Board Emergency Fleet Corporation, D. C.Cal., 7 F.2d 893, affirmed, C.C.A., U. S. Shipping Board Emergency Fleet Corporation v. Rosenberg Bros. & Co., 12 F.2d 721, certiorari granted 47 S.Ct. 237, 273 U.S. 682, 71 L.Ed. 838, reversed on other grounds, 48 S.Ct. 256, 276 U.S. 202, 72 L.Ed. 531—Eastern S. S. Co. v. 170,040 50/60 Bushels of Wheat, etc., D.C.N.Y., 1 F.2d 558, affirmed, C.C.A., Pioneer Steamship Co. v. 92,680 Bushels of Wheat, 11 F.2d 1015—Missouri-Pacific R. Co. v. Sorrell, D.C.Tex., 21 F.Supp. 886—The Arpillao, C.C.A.N.Y., 270 F. 426, reversing, D.C., 241 F. 282, and certiorari denied Jose Tayas' Sons Co. v. Pompeian Co., 41 S.Ct. 377, 255 U.S. 574, 65 L.Ed. 793.
Ark.—Arkansas Western Ry. Co. v. Robson, 285 S.W. 372, 171 Ark. 698.
Ga.—Central of Georgia Ry. Co. v. Griner & Rustin, 127 S.E. 878, 33 Ga.App. 705—Western & A. R. R. v. Legg, 123 S.E. 31, 32, 32 Ga. App. 368, citing **Corpus Juris.**
La.—Wichita Falls Motor Co. v. Kerr S. S. Co., 107 So. 777, 160 La. 992—Raphiel v. American Ry. Express Co., 120 So. 786, 10 La.App. 463.
Mont.—Cook v. Northern Pac. Ry. Co., 203 P. 512, 515, 61 Mont. 573, citing **Corpus Juris.**
N.J.—Pennsylvania-Reading Seashore Lines v. Unit Const. Co., 189 A. 376, 377, quoting **Corpus Juris**, and 117 N.J.Law 494, reversing, 186 A. 445, 14 N.J.Misc. 542.
22 C.J. p 1109 note 31.

Rule of substantive law
Tex.—Texarkana & Ft. S. Ry. Co. v. Brass, Com.App., 260 S.W. 828, affirming, Civ.App., 245 S.W. 457, and rehearing overruled, Com.App., 262 S.W. 737.

Notations on carrier's waybill are inadmissible to vary shipping contract or shipper's written instructions.—Gus Datillo Fruit Co. v. Illinois Cent. R. Co., 299 S.W. 1089, 222 Ky. 41.

Route
(1) Both shipper and carrier are bound by selection of route shown in bill of lading, and it is error to permit evidence with reference to the carrier's duty to ship by another route.—Illinois Cent. R. Co. v. Luther, 283 S.W. 1013, 214 Ky. 658.

(2) Where there is no stipulation in the bill of lading as to the route over which the goods shall be transported, parol evidence that the goods were to be shipped by a particular route is not competent.
Ill.—Shafton Co. v. St. Louis, I. M. & S. R. Co., 174 Ill.App. 121.
Ind.—Snow v. Indiana, B. & W. R. Co., 9 N.E.* 702, 109 Ind. 422.
N.Y.—White v. Van Kirk, 25 Barb. 16, reversed on other grounds, White v. Ashton, 51 N.Y. 280.

Place or mode of stowing
(1) In some cases parol evidence of an agreement that the goods might be stored on deck has been held inadmissible, inasmuch as a bill of lading which is silent as to the place of storage in a ship imports a contract, according to the customs of shipping, that the goods are to be stored under deck.
U.S.—The Wellington, D.C.Wis., 29 F. Cas.No.17,384, 1 Biss. 279.
N.Y.—Creery v. Holly, 14 Wend. 26.

(2) However, in other cases it has been held that a bill of lading silent as to the place of stowage of cargo carries with it a presumption that the cargo is to be stowed under deck, but that such silence is not an express contract on that point, and an agreement to carry on deck may be shown.
U.S.—Two Hundred and Sixty Hogsheads of Molasses, D.C.Me., 24 F. Cas.No.14,296, 1 Hask. 24—Vernard v. Hudson, C.C.Mass., 28 F.Cas.No. 16,921, 3 Sumn. 405.
Va.—Doane v. Keating, 12 Leigh 391, 39 Va. 391, 37 Am.D. 671.

58. N.Y.—Guillaume v. General Transatlantic Co., 3 N.E. 489, 100 N.Y. 491.
22 C.J. p 1110 note 32.

59. U.S.—Bachman v. Clyde SS. Co., N.Y., 152 F. 403, 81 C.C.A. 529.
22 C.J. p 1110 note 34.

60. Iowa.—Coine v. Chicago & N. W. R. Co., 99 N.W. 134, 123 Iowa 458.

61. S.C.—Levan v. Atlantic Coast Line R. Co., 68 S.E. 770, 86 S.C. 514.
22 C.J. p 1110 note 36.

The terms of a written contract of employment cannot be varied or contradicted by parol.[62] This rule precludes any showing that the duration of the employment was by a parol agreement to be different from the term stated in the written contract,[63] that the hours of work were to be otherwise than as provided therein,[64] that the compensation to be paid was other than that stipulated,[65] that services for which payment was promised by the contract were rendered gratuitously,[66] or that the services to be rendered were other than those expressed in the contract.[67]

§ 907. —— Guaranty, Suretyship, and Indemnity

Written contracts of guaranty, suretyship, and indemnity are within the parol evidence rule.

In the absence of ambiguity, uncertainty, fraud, or mistake, a written undertaking of guaranty or suretyship cannot be varied, contradicted, or added to by parol or extrinsic evidence.[68]

62. Conn.—Roessler v. Burwell, 176 A. 126, 119 Conn. 289.
Ga.—North Georgia Lumber Co. v. Lawson, 150 S.E. 865, 40 Ga.App. 680.
Ky.—Hoffman v. Wilson, 270 S.W. 788, 208 Ky. 195.
La.—Duncan Steele, Inc. v. Labatt, App., 130 So. 841, citing **Corpus Juris.**
Me.—Johnson v. Burnham, 115 A. 261, 120 Me. 491.
N.C.—Sherrill v. Graham County, 170 S.E. 636, 205 N.C. 178.
Okl.—Nichlos v. Melton & Melton, 284 P. 642, 141 Okl. 210.
Tex.—French v. Love, Civ.App., 281 S.W. 301.
Wis.—Milwaukee Corrugating Co. v. Flagge, 198 N.W. 394, 184 Wis. 139.
22 C.J. p 1110 note 39.

Particular contracts within rule

(1) Agency generally.
U.S.—J. W. Ringrose Co. v. W. & J. Sloane, D.C.Pa., 266 F. 402, affirmed, C.C.A., 272 F. 445.
Pa.—Dahath Electric Co. v. Suburban Electric Development Co., 2 A.2d 765, 332 Pa. 129.
Tenn.—Jackson v. Texas Co., 10 Tenn.App. 235.
22 C.J. p 1110 note 39 [a] (1).

(2) Between attorney and client.
Ark.—Lake v. Wilson, 35 S.W.2d 597, 38 S.W.2d 25, 183 Ark. 180—Central Clay Drainage Dist. v. Hunter, 295 S.W. 19, 174 Ark. 293.
Cal.—In re Prather's Estate, 191 P. 521, 183 Cal. 314.
Fla.—McGill v. Cockrell, 101 So. 199, 88 Fla. 54.
Minn.—Hoy v. Nichols, 212 N.W. 530, 170 Minn. 191.
N.J.—Harris v. Brockhurst, 194 A. 876, 119 N.J.Law 187.
Tex.—Johnson v. Cofer, Civ.App., 113 S.W.2d 963.

(3) Between an insurance company and its agent.—Stone v. Hartford Fire Ins. Co., 21 S.W.2d 281, 231 Ky. 264—22 C.J. p 1110 note 39 [a] (2).

(4) Between a broker and his employer.
Cal.—Wright-Callender-Andrews Co. v. Eaton, 191 P. 68, 47 Cal.App. 685.
Ga.—McGlawn v. Lane & Watkins, 128 S.E. 219, 34 Ga.App. 58.
Ky.—Carter v. Hall, 229 S.W. 132, 191 Ky. 75.
Mo.—Isaac T. Cook Co. v. Craddock-Terry Co., App., 109 S.W.2d 731.
N.J.—Lesnik v. Yerg, 142 A. 565, 6 N.J.Misc. 717.
Okl.—Bateman v. Richard, 232 P. 443, 105 Okl. 272.
Or.—Kight v. Orchard-Hays, 275 P. 682, 128 Or. 668.
Pa.—Emmons v. McCreery, 160 A. 722, 307 Pa. 62.
R.I.—Wolf v. Moran, 133 A. 350.
Tex.—French v. Love, Civ.App., 281 S.W. 301—Smith v. Jones, Civ.App., 264 S.W. 573.
Wis.—Johnson v. S. W. Straus & Co., 234 N.W. 335, 203 Wis. 256.
22 C.J. p 1110 note 39 [a] (3).

(5) Between school authorities and a school teacher.
Iowa.—Miner v. Lovilia Independent School Dist., 234 N.W. 817, 212 Iowa 973.
S.C.—McElveen v. Evergreen School Dist. No. 17, 184 S.E. 794, 179 S.C. 291.
Tenn.—Ottinger v. Cocke County Board of Education, 12 Tenn.App. 532.
22 C.J. p 1110 note 39 [a] (5).

63. Mass.—Campion v. Boston & M. R. R., 169 N.E. 499, 269 Mass. 579.
Mich.—Muir v. Leonard Refrigerator Co., 257 N.W. 723, 269 Mich. 406.
22 C.J. p 1111 note 40.

64. N.Y.—Alexander v. United Fruit Co., 226 N.Y.S. 113, 131 Misc. 41.

65. U.S.—J. W. Ringrose Co. v. W. & J. Sloane, D.C.Pa., 266 F. 402, affirmed, C.C.A., 272 F. 445.
Cal.—In re Prather's Estate, 191 P. 521, 183 Cal. 314.
Minn.—Hoy v. Nichols, 212 N.W. 530, 170 Minn. 191.
Tenn.—Ottinger v. Cocke County Board of Education, 12 Tenn.App. 532.
22 C.J. p 1111 note 41.

Agreement for share of profit
Tex.—Stapper v. Van Valkenburgh & Vogel, Civ.App., 128 S.W.2d 466, error dismissed, judgment correct.
22 C.J. p 1111 note 41 [b].

Agreement as to bonus
Mich.—Muir v. Leonard Refrigerator Co., 257 N.W. 723, 269 Mich. 406.
22 C.J. p 1111 note 41 [c].

66. Mass.—Worthington v. Plymouth County R. Co., 47 N.E. 403, 168 Mass. 474.

67. U.S.—Arkansas Amusement Corporation v. Kempner, C.C.A.Ark., 57 F.2d 466.
Iowa.—Miner v. Lovilia Independent School Dist., 234 N.W. 817, 212 Iowa 973.
La.—C. G. Robinson & Co. v. Connell, 117 So. 774, 166 La. 685.

68. U.S.—National Surety Co. v. McGreevy, C.C.A.Mo., 64 F.2d 899, certiorari denied McGreevy v. National Surety Co., 54 S.Ct. 62, 290 U.S. 644, 78 L.Ed. 559—Johnston v. Fidelity Nat. Bank & Trust Co. of Kansas City, Mo., C.C.A.Kan., 8 F.2d 847.
Cal.—Mortgage Guarantee Co. v. Chotiner, 64 P.2d 138, 8 Cal.2d 110, 108 A.L.R. 1080—Whitaker v. Title Insurance & Trust Co., 199 P. 528, 186 Cal. 432—Hammond Lumber Co. v. Danziger, 37 P.2d 517, 2 Cal.App. 197.
Iowa.—Andrew v. Austin, 232 N.W. 79, 213 Iowa 963.
La.—Jaburg Bros. v. Wagner & Bro., 5 La.App. 682.
Mass.—Scholl v. Gilman, 160 N.E. 889, 263 Mass. 295.
Minn.—Belle City Malleable Iron Co. v. Clark, 215 N.W. 855, 172 Minn. 508.
Miss.—Central Shoe Co. v. J. P. Conn & Co., 133 So. 126, 160 Miss. 151.
Mo.—Loveland v. Jungbluth, App., 226 S.W. 46.
Nev.—Bailey v. Neagle, 13 P.2d 634, 635, 54 Nev. 257, quoting **Corpus Juris.**
N.J.—Superior Finance Corporation v. McCrane, 174 A. 559, 113 N.J. Law 501.
Okl.—Maney v. Cherry, 41 P.2d 82, 170 Okl. 469.
Tex.—Frank L. Smith Tire Store v. Firestone Tire & Rubber Co., Civ. App., 68 S.W.2d 577, error refused.
22 C.J. p 1112 note 44.

Evidence held inadmissible
(1) To show that a written guaranty plainly applicable only to future indebtedness, was intended to apply to past indebtedness.—Amer-

Indemnity. The rule excluding parol or extrinsic evidence to contradict or vary a written contract applies to contracts of indemnity.[69]

§ 908. —— Insurance

The parol evidence rule is applicable to insurance policies.

The rule stated in § 901 supra, that, with certain exceptions, a contract in writing merges all previous negotiations leading up thereto and cannot be altered or contradicted by parol or extrinsic evidence is applicable to contracts or policies of insurance generally,[70] including contracts or policies of burglary,[71] fire,[72] and, likewise, including contracts

ican Sec. Bank v. Liberty Motor Co., 214 P. 1062, 124 Wash. 678.

(2) To show that a written contract of guaranty expressly providing that it should remain in force until terminated by written notice, was understood to be in force only for a limited term.—Pratt v. National Bank of Commerce of Seattle, C.C.A.Ala., 297 F. 148.

(3) Written guaranty providing that it was a continuing agreement to cover indebtedness of any and every form that debtor may owe creditor, whether now contracted or to be contracted, could not be explained by extrinsic evidence for purpose of showing that it was intended to apply only to indebtedness incurred by debtor for certain year.—Miller v. National Printing & Engraving Co., 45 P.2d 483, 172 Okl. 447.

69. Ky.—Bank of Blaine v. Hanshaw, 75 S.W.2d 529, 255 Ky. 825.
22 C.J. p 1112 note 46.

70. U.S.—Jones v. Jefferson Standard Life Ins. Co., C.C.A.Ga., 79 F.2d 640, certiorari denied 56 S.Ct. 310, 296 U.S. 646, 80 L.Ed. 459, rehearing denied 56 S.Ct. 380, 296 U.S. 665, 80 L.Ed. 474—Sevald v. U.S., C.C.A.Ind., 73 F.2d 860, certiorari denied 55 S.Ct. 648, 295 U.S. 736, 79 L.Ed. 1684—Lighting Fixture Supply Co. v. Fidelity Union Fire Ins. Co., C.C.A.La., 55 F.2d 110, certiorari denied 52 S.Ct. 641, 286 U.S. 558, 76 L.Ed. 1292—Smith v. Royal Ins. Co., D.C.Cal., 5 F.Supp. 435, reversed on other grounds, C.C.A., Royal Ins. Co. v. Smith, 77 F.2d 157.
Ill.—Krmicek v. Federal Life Ins. Co., 252 Ill.App. 232.
Mass.—Penta v. Home Fire & Marine Ins. Co. of California, 160 N.E. 807, 263 Mass. 262.
Mich.—Wells v. Prudential Ins. Co. of America, 214 N.W. 308, 239 Mich. 92.
N.H.—Metropolitan Life Ins. Co. v. Olsen, 123 A. 576, 81 N.H. 143, 32 A.L.R. 1472.
N.J.—Alcamo v. Motorists Casualty Ins. Co., 165 A. 861, 11 N.J.Misc. 350—Weatherby v. Scottish Union & National Ins. Co., 157 A. 169, 9 N.J.Misc. 1256.
N.Y.—Drennan v. Sun Indemnity Co. of New York, 280 N.Y.S. 723, 244 App.Div. 571, affirmed 2 N.E.2d 534, 271 N.Y. 182—Metzger v. Ætna Ins. Co., 240 N.Y.S. 755, 229 App.Div. 26.
Ohio.—Wagner v. National Fire Ins. Co., 8 N.E.2d 144, 132 Ohio St. 405—German Beneficial Union v. Weinfurtner, 190 N.E. 397, 128 Ohio St. 173.
Okl.—Atlas Life Ins. Co. v. Spitler, 63 P.2d 82, 178 Okl. 537—California State Life Ins. Co. v. Bailey, 54 P.2d 647, 176 Okl. 153.
Or.—Jaloff v. United Auto Indemnity Exchange, 250 P. 717, 120 Or. 381.
S.C.—Blue Bird Ice Cream Co. v. American Employers' Ins. Co. of Boston, Mass., 189 S.E. 657, 182 S.C. 384.
S.D.—Davenport v. Firemen's Ins. Co. of Newark, N. J., 199 N.W. 208, 47 S.D. 426.
Tenn.—Provident Life & Accident Ins. Co. v. Mattock, 3 Tenn.App. 432.
Tex.—Veal v. Fire Ass'n of Philadelphia, Civ.App., 30 S.W.2d 715—Commonwealth Casualty Co. v. Holyfield, Civ.App., 264 S.W. 157.
Wash.—Samarzich v. Ætna Life Ins. Co. of Hartford, Conn., 40 P.2d 129, 180 Wash. 379.
22 C.J. p 1113 note 47.

The rule applies particularly to insurance contracts.—Baker v. Keet-Rountree Dry Goods Co., 2 S.W.2d 733, 740, 318 Mo. 969, citing **Corpus Juris**, and rehearing denied 3 S.W.2d 1003, 318 Mo. 969.

Statutory rule
La.—Shuff v. Life & Casualty Ins. Co. of Tennessee, 114 So. 637, 164 La. 741, affirming 6 La.App. 503—Langston v. U. S. Nat. Life & Casualty Co., 4 La.App. 474.
33 C.J. p 115 note 49 [a].

Ignorance of the English language on the part of the insured held not to authorize parol evidence.
U.S.—Sevald v. U. S., C.C.A.Ind., 73 F.2d 860, certiorari denied 55 S.Ct. 648, 295 U.S. 736, 79 L.Ed. 1684.
N.H.—Turcotte v. Prudential Ins. Co. of America, 182 A. 9, 87 N.H. 440.

Failure to read or understand
Evidence that insured had not read or understood and assented to the terms of the policy is inadmissible.—Virginia F. & M. Ins. Co. v. Morgan, 18 S.E. 191, 90 Va. 290—33 C.J. p 115 note 50.

Nonwaiver agreement
(1) Where insured executed a nonwaiver agreement before any attempt was made to adjust his loss, parol evidence of what occurred when such agreement was executed was inadmissible.—Weddington v. Piedmont F. Ins. Co., 54 S.E. 271, 141 N.C. 234, 8 Ann.Cas. 497.

(2) Waiver and estoppel as regards discharge, performance, and the like see infra § 966.

Agent's knowledge of existence of certain facts
An insurance company cannot avail itself of provisions in the policy that it should be void if certain facts therein mentioned as essential to the insurance should be found not to exist when these facts were known to the agent not to exist when the policy was issued through him, and the existence of such facts and the knowledge of the agent may be proved by parol.—Pearlstine v. Phœnix Ins. Co., 54 S.E. 372, 74 S.C. 246.

71. Ill.—Bankers' State Bank v. New Jersey Fidelity & Plate Glass Ins. Co. of Newark, N. J., 263 Ill.App. 205.
Mo.—Teich v. Globe Indemnity Co., App., 25 S.W.2d 554.

72. U.S.—Lighting Fixture Supply Co. v. Fidelity Union Fire Ins. Co., C.C.A.La., 55 F.2d 110, certiorari denied 52 S.Ct. 641, 286 U.S. 558, 76 L.Ed. 1292.
Ga.—Cutright v. National Union Fire Ins. Co., App., 15 S.E.2d 540—Scottish Union & National Ins. Co. v. Fortesque, 140 S.E. 893, 37 Ga.App. 366.
N.H.—Morin v. Mercury Ins. Co., 175 A. 864, 87 N.H. 159.
N.J.—Kramer v. Western Assur. Co., 157 A. 171, 9 N.J.Misc. 1261—Weatherby v. Scottish Union & National Ins. Co., 157 A. 169, 9 N.J.Misc. 1256.
N.Y.—Colin v. Hamilton Fire Ins. Co. of City of New York, 233 N.Y.S. 86, 225 App.Div. 346, reversed on other grounds 167 N.E. 454, 251 N.Y. 312, reargument denied 168 N.E. 440, 251 N.Y. 592—States Import & Export Corporation v. Hartford Fire Ins. Co., 206 N.Y.S. 323, 210 App.Div. 374.
Ohio.—Wagner v. National Fire Ins. Co., 8 N.E.2d 144, 132 Ohio St. 405.
Or.—Meader v. Farmers' Mut. Fire Relief Ass'n, 1 P.2d 138, 137 Or. 111.

or policies of life,[73] live stock,[74] marine,[75] and title[76] insurance.

The rule has been applied so as to exclude evidence of negotiations, conversations, or statements,[77] custom,[78] intent,[79] letters,[80] and unrelated documents.[81]

Parol evidence is not admissible to add to, vary, or contradict statements made in the application,[82] if the application is accepted[83] and attached to, recited in, or indorsed on the policy.[84]

Ordinarily, where the policy specifically describes the property, parol or extrinsic evidence is not admissible, in the absence of fraud or mistake, to show what property was intended to be covered, or that the intention of the parties was to insure other property than that described;[85] nor is it admissible to show the destruction of property in a different building than the one described in the policy,[86] and

Vt.—Williams Mfg. Co. v. Insurance Co. of North America, 113 A. 780, 95 Vt. 132.

26 C.J. p 77 note 57, p 522 note 37.

Iron-safe provision

Mo.—Mackey v. Home Ins. Co. of New York, App., 284 S.W. 161.

73. Colo.—Fee v. Wells, 176 P. 829, 65 Colo. 348.

Mich.—Kapralian v. Central Life Ins. Co. of Illinois, 267 N.W. 598, 276 Mich. 85.

Minn.—Miller v. McCarthy, 270 N.W. 559, 198 Minn. 497.

Mo.—Baker v. Keet-Rountree Dry Goods Co., 2 S.W.2d 733, 318 Mo. 969, rehearing denied 3 S.W.2d 1003, 318 Mo. 969.

N.C.—Smith v. Pilot Life Ins. Co., 4 S.E.2d 321, 216 N.C. 152.

Okl.—Badgett v. Oklahoma Life Ins. Co., 54 P.2d 1059, 176 Okl. 86.

Or.—Morford v. California Western States Life Ins. Co., 113 P.2d 629.

Tenn.—Hammer v. American United Life Ins. Co., App., 141 S.W.2d 501.

Endowment policy

N.Y.—Manson v. New York Life Ins. Co., 243 N.Y.S. 579, 229 App.Div. 670.

Parol evidence as to disability provisions held properly rejected.

Ark.—Metropolitan Life Ins. Co. v. Minton, 66 S.W.2d 627, 188 Ark. 456—Guardian Life Ins. Co. v. Johnson, 57 S.W.2d 555, 186 Ark. 1019.

N.H.—Turcotte v. Prudential Ins. Co. of America, 182 A. 9, 87 N.H. 440.

S.C.—Chapman v. Metropolitan Life Ins. Co., 173 S.E. 801, 172 S.C. 250.

Agent's statements held inadmissible.—Policyholder's Nat. Life Ins. Co. v. Nelson, 211 N.W. 444, 50 S.D. 606.

74. Iowa.—Mills v. Farmers' Ins. Co., 37 Iowa 400.

38 C.J. p 110 note 78 [b] (2).

75. La.—Gomila v. Hibernia Ins. Co., 4 So. 490, 40 La.Ann. 553.

38 C.J. p 1179 notes 85, 86.

76. U.S.—Banes v. New Jersey Title Guarantee & Trust Co., N. J., 142 F. 957, 74 C.C.A. 127.

Cal.—Whitaker v. Title Insurance & Trust Co., 199 P. 528, 186 Cal. 432.

62 C.J. p 1068 note 60.

77. Ariz.—Industrial Commission v. Arizona Power Co., 295 P. 305, 37 Ariz. 425, affirmed 297 P. 452, 38 Ariz. 44.

Colo.—Fee v. Wells, 176 P. 829, 65 Colo. 348.

Mass.—Penta v. Home Fire & Marine Ins. Co. of California, 160 N.E. 807, 263 Mass. 262.

Mich.—Kapralian v. Central Life Ins. Co. of Illinois, 267 N.W. 598, 276 Mich. 85.

Mo.—Baker v. Keet-Rountree Dry Goods Co., 2 S.W.2d 733, 318 Mo. 969, rehearing denied 3 S.W.2d 1003, 318 Mo. 969.

N.Y.—Colin v. Hamilton Fire Ins. Co. of City of New York, 233 N.Y.S. 86, 225 App.Div. 346, reversed on other grounds, 167 N.E. 454, 251 N.Y. 312, reargument denied 168 N.E. 440, 251 N.Y. 592.

Or.—Morford v. California Western States Life Ins. Co., 113 P.2d 629.

S.D.—Policyholder's Nat. Life Ins. Co. v. Nelson, 221 N.W. 444, 50 S.D. 606.

Tenn.—Provident Life & Accident Ins. Co. v. Matlock, 3 Tenn.App. 432.

38 C.J. p 1179 note 86.

78. N.Y.—Ira S. Bushey & Sons v. American Ins. Co., 142 N.E. 340, 237 N.Y. 24, affirming 199 N.Y.S. 929, 206 App.Div. 715, and reargument denied 143 N.E. 732, 237 N.Y. 536.

22 C.J. p 1113 note 47 [b].

79. Ill.—Niedringhaus v. Ætna Ins. Co., 235 Ill.App. 335.

Mich.—Michigan Stamping Co. v. Michigan Employers' Casualty Co., 209 N.W. 104, 235 Mich. 4.

N.H.—Metropolitan Life Ins. Co. v. Olsen, 123 A. 576, 81 N.H. 143, 32 A.L.R. 1472.

N.Y.—Ira S. Bushey & Sons v. American Ins. Co., 237 N.Y. 24, 142 N.E. 340, affirming 199 N.Y.S. 929, 206 App.Div. 715, and reargument denied 143 N.E. 732, 237 N.Y. 536.

Wash.—Franklin v. Northern Life Ins. Co., 104 P.2d 310, 4 Wash.2d 541—Samarzich v. Ætna Life Ins. Co. of Hartford, Conn., 40 P.2d 129, 180 Wash. 379.

80. Mo.—Baker v. Keet-Rountree Dry Goods Co., 2 S.W.2d 733, 318 Mo. 969, rehearing denied 3 S.W.2d 1003, 318 Mo. 969.

81. U.S.—Leithauser v. Hartford Fire Ins. Co., C.C.A.Ohio, 78 F.2d 320, certiorari denied 56 S.Ct. 249, 296 U.S. 645, 80 L.Ed. 459.

82. U.S.—Sevald v. U. S., C.C.A.Ind., 73 F.2d 860, certiorari denied 55 S.Ct. 648, 295 U.S. 736, 79 L.Ed. 1684.

Ala.—Olive v. Equitable Life Assur. Soc. of U. S., 151 So. 57, 227 Ala. 557.

Ga.—Carolina Life Ins. Co. of Columbia, S. C., v. Murphy, 170 S.E. 817, 47 Ga.App. 425.

Mo.—Banks v. Clover Leaf Casualty Co., 233 S.W. 78, 207 Mo.App. 357.

Evidence that insured was not asked the questions in the application, but that examiner answered them, was held inadmissible because contradicting statement in the policy that answers to questions were made by insured.—New York Life Ins. Co. v. Stewart, C.C.A.La., 69 F.2d 957.

83. Ky.—Our Home Life Ins. Co. v. Butch, 47 S.W.2d 714, 242 Ky. 766.

84. Ky.—Our Home Life Ins. Co. v. Butch, supra.

N.Y.—Emanuele v. Metropolitan Life Ins. Co., 242 N.Y.S. 715, 137 Misc. 542.

The designation of a beneficiary in an application for insurance may be varied by parol evidence where it is not made a part of the policy, which is the contract between the parties.—Rudershauer v. Metropolitan L. Ins. Co., 18 Ohio Cir.Ct. 609, 10 Ohio Cir.Dec. 258.

85. Md.—Ætna Casualty & Surety Co. of Hartford, Conn., v. Gerber, 117 A. 856, 140 Md. 441.

N.Y.—American Surety Co. of New York v. Patriotic Assur. Co., 150 N.E. 599, 242 N.Y. 54, reversing 208 N.Y.S. 828, 213 App.Div. 819, and reargument denied 154 N.E. 602, 243 N.Y. 553.

Ohio.—Fidelity & Casualty Co. of New York v. Hartzell Bros. Co., 143 N.E. 137, 109 Ohio St. 566.

Okl.—Druggists' Mut. Fire Ins. Co. of Iowa v. Shaw, 41 P.2d 69, 170 Okl. 510.

Vt.—Williams Mfg. Co. v. Insurance Co. of North America, 113 A. 780, 95 Vt. 132.

26 C.J. p 77 note 59, p 524 note 69.

86. Tex.—Ætna F. Ins. Co. v. Brannon, Civ.App., 81 S.W. 560.

that defendant knew at the time the contract was made that the property was not located in the building described therein.[87]

§ 909. —— Partnership

Parol evidence is inadmissible to vary a written contract of partnership, or an agreement for dissolution or for the purchase of a partner's interest.

A written contract of partnership cannot be extended, limited, or otherwise varied by parol evidence to show that the true relation of the parties or their rights and liabilities are different from those appearing in the written instrument,[88] for all of their prior negotiations and agreements with respect to the proposed partnership are merged in the articles of partnership.[89] The same rule applies to a written agreement for the dissolution of a partnership,[90] or for the purchase of a retiring partner's interest.[91]

§ 910. —— Sale or Exchange

a. In general
b. Warranty
c. Reservations
d. Orders

a. In General

The parol evidence rule applies to written contracts for the sale or exchange of realty or personalty, and to such provisions as those relating to price, time and mode of payment, and time and place of delivery.

The parol evidence rule applies in full force to contracts of sale, whether formally drawn up and executed or existing only in the shape of offers or orders and acceptances thereof,[92] and whether re-

87. Tex.—Ætna F. Ins. Co. v. Brannon, supra.

88. U.S.—Brooks v. Smith, C.C.A. Mass., 290 F. 33—De Rees v. Costaguta, C.C.A.N.Y., 275 F. 172, certiorari denied 42 S.Ct. 56, 257 U.S. 648, 66 L.Ed. 415.
Ga.—Clegg v. Lyons, Harris & Brooks, 118 S.E. 432, 30 Ga.App. 482.
Iowa.—In re Talbott's Estate, 213 N.W. 779, 204 Iowa 363.
Pa.—Reiter v. Morton, 96 Pa. 229, 38 Leg.Int. 234, 28 Pittsb.Leg.J. 127.
22 C.J. p 1114 note 56.

89. Cal.—Rassaert v. Mensch, 120 P. 1072, 17 Cal.App. 637.
Ill.—Evans v. Hanson, 42 Ill. 234.

90. Pa.—Union Radiator Co. v. Pritts, 18 Pa.Dist. & Co. 200.
Tex.—Davis v. McCarty, Civ.App., 145 S.W.2d 287, error refused—Tackett v. Cunningham, Civ.App. 91 S.W.2d 965.
22 C.J. p 1114 note 58.

91. Minn.—McInnis v. National Casualty Co., 129 N.W. 125, 388, 113 Minn. 156.
22 C.J. p 1114 note 59.

92. U.S.—In re Woody, D.C.N.Y., 57 F.2d 207, affirmed, C.C.A., 57 F.2d 1087—U. S. v. Koplin, D.C.Ga., 24 F.2d 840.
Ark.—Moody v. Kahn, 298 S.W. 353, 174 Ark. 1072.
Cal.—McWhinney v. Ewers, 297 P. 42, 112 Cal.App. 448.
Ga.—Holloway v. Brown, 155 S.E. 917, 171 Ga. 481.
Ill.—Hercules Powder Co. v. Rowan, 245 Ill.App. 291.
Ind.—Finch v. McClellan, 130 N.E. 13, 77 Ind.App. 533, rehearing denied 131 N.E. 236, 77 Ind.App. 533.
Iowa.—Farmers' Elevator Co. of Onawa v. Reddix, 170 N.W. 765, 185 Iowa 425.
Kan.—Meyer v. Wilson, 293 P. 738, 131 Kan. 717—Thomas v. Citizens' State Bank of Wichita, 283 P. 507, 129 Kan. 540.
Ky.—John S. Noel Co. v. Theobald, 288 S.W. 1031, 217 Ky. 28—Sinnett v. J. R. Watkins Co., 282 S.W. 769, 214 Ky. 76.
La.—Acme Burlap Bag Co. v. Hardin Bag Co., 1 La.App. 379.
Mass.—Whitty Mfg. Co. v. Clark, 180 N.E. 315, 278 Mass. 370.
Mich.—Milwaukee Tank Works v. East Jordan Co-Op. Ass'n, 218 N.W. 650, 242 Mich. 266.
Mo.—Bank of Dearborn v. Gabbert, 291 S.W. 142, 221 Mo.App. 923.
N.J.—Shinn v. Black, 117 A. 142, 97 N.J.Law 219.
N.Y.—William H. Waters, Inc., v. March, 269 N.Y.S. 420, 240 App. Div. 120.
Ohio.—Harris v. Mentges, 24 Ohio N.P., N.S., 510.
Or.—Wright v. Morton, 267 P. 818, 125 Or. 563.
Pa.—Thal v. Schreibman, 19 Pa.Dist. & Co. 323, affirmed 176 A. 532, 116 Pa.Super. 331.
S.C.—J. B. Colt Co. v. Freedman, 117 S.E. 351, 124 S.C. 211.
S.D.—J. B. Colt Co. v. Heinricy, 227 N.W. 435, 56 S.D. 39.
Tex.—C. A. Bryant Co. v. Hamlin Independent School Dist., 14 S.W. 2d 53, 118 Tex. 255, answering certified questions, Civ.App., 18 S.W. 2d 750—Massey-Harris Co. v. Bernard, Civ.App., 84 S.W.2d 1091, error dismissed—J. B. Colt Co. v. Ellis, Civ.App., 293 S.W. 629—Trott v. Flato, Civ.App., 244 S.W. 1085.
Wash.—Asbury v. Yakima Milling Co., 242 P. 362, 137 Wash. 203.
22 C.J. p 1114 note 61.
Orders see infra § 910 d.

Similar rule under statute
Cal.—Warner v. Taft Land & Development Co., 297 P. 969, 113 Cal. App. 71—Ackerman v. Channel Commercial Co., 199 P. 1101, 53 Cal.App. 259.
La.—Roe v. Maniscalco, 141 So. 49, 174 La. 526—Succession of Curtis, 100 So. 412, 156 La. 243—Campbell v. Cook, 91 So. 731, 151 La. 267—Bostwick v. Thomson, 88 So. 775, 149 La. 152—Guillory v. Meyers, App., 149 So. 260.

Rule applied
(1) To conditional sales.
Ga.—Griffeth v. Wilmore, 167 S.E. 914, 46 Ga.App. 481—A. J. Colson & Sons v. Ellis, 151 S.E. 654, 40 Ga.App. 768.
Md.—Frankfort Distilleries v. Burns Bottling Mach. Works, 197 A. 599, 174 Md. 12.
Mass.—Tripp v. National Shawmut Bank of Boston, 161 N.E. 904, 263 Mass. 505.
Va.—Jones v. Franklin, 168 S.E. 753, 160 Va. 266.
22 C.J. p 1114 note 61 [d].

(2) To sales at auction.—Warner v. Doscher, 210 N.Y.S. 83, 213 App. Div. 117, affirmed 150 N.E. 574, 241 N.Y. 605—Johnson v. State, 175 N.Y.S. 234, 104 Misc. 201, affirmed 175 N.Y.S. 784, 188 App.Div. 33.

Property included
(1) Parol or extrinsic evidence cannot be admitted to contradict or vary the terms of the contract of sale as to the property included therein, or as to the description of such property.
Cal.—Da Rocha v. Corse, 271 P. 208, 94 Cal.App. 335.
Colo.—Thompson v. Swain Flour Brokerage Co., 25 P.2d 745, 93 Colo. 268.
Ind.—Southwestern Milling Co. v. Niemeier, 131 N.E. 831, 76 Ind. App. 278.
Ky.—Ford v. Coles, 128 S.W.2d 609, 278 Ky. 131—Apple v. McCullough, 38 S.W.2d 955, 958, 239 Ky. 74, quoting **Corpus Juris.**

lating to real[93] or personal[94] property.

Thus, parol evidence is inadmissible to show that

La.—Lesseigne v. Cedar Grove Realty Co., 91 So. 136, 150 La. 641.
Md.—Wagner v. Bing, 163 A. 199, 163 Md. 496.
Mass.—Specialty Trading Co. v. A. C. Erisman Co., 166 N.E. 642, 267 Mass. 220.
Mo.—Wood v. White Eagle Oil & Refining Co., App., 274 S.W. 894, 898, citing **Corpus Juris.**
N.J.—Crowley v. E. Homan Co., 130 A. 372, 3 N.J.Misc. 968.
N.Y.—Abramowitz v. Fraccalvieri, 237 N.Y.S. 274, 227 App.Div. 418, modified on other grounds 237 N.Y.S. 717, 228 App.Div. 636.
Okl.—Oklahoma Union Ry. Co. v. Mathews, 217 P. 458, 91 Okl. 266.
Tenn.—Rogers v. Battle, 43 S.W.2d 1071, 1072, 163 Tenn. 537, quoting **Corpus Juris**—Maryville Furniture Co. v. Rowen, 1 Tenn.App. 184.
Tex.—American Law Book Co. v. Fulwiler, Civ.App., 219 S.W. 881.
22 C.J. p 1117 note 68, p 1263 note 14 [a].

(2) Identification of subject matter generally see infra § 1007.

Failure to read the contract is not a ground for the admission of parol evidence.—Knight & Bostwick v. Moore, 234 N.W. 902, 203 Wis. 540.

Attorney's fees

Provision in contract, that if seller, on default of buyer, must employ an attorney, buyer is to pay "an additional sum equal to 10 per cent. of the purchase price" as attorney fees, is binding, unless unconscionable, and testimony as to the reasonable value of attorney's services is inadmissible.—Johnson v. Kaeser, 239 P. 324, 196 Cal. 686.

Type smaller than required

Provisions of a contract in smaller type than that required by statute may be contradicted by parol evidence.—Moore v. Ætna Casualty & Surety Co., 155 S.E. 707, 155 Va. 556.

Only by counter letter or by interrogatories on facts and articles may authentic sales be attacked.—Truett Nash Motor Co. v. Centanni, La. App., 184 So. 362—Brinker v. Feist, 129 So. 416, 14 La.App. 101—Hood v. Hood, 128 So. 546, 14 La.App. 424.

93. Cal.—Quality Building & Securities Co. v. Bledsoe, 14 P.2d 128, 125 Cal.App. 493—Randolph v. Wise, 256 P. 575, 83 Cal.App. 183.
Ky.—Ford v. Coles, 128 S.W.2d 609, 278 Ky. 131.
La.—Roe v. Maniscalco, 141 So. 49, 174 La. 526—Guillory v. Meyers, App., 149 So. 260.
Md.—Bond v. Weller, 118 A. 142, 141 Md. 8.
Mass.—Queenin v. Blank, 167 N.E. 680, 268 Mass. 432—Twohig v. Daly, 142 N.E. 700, 248 Mass. 49—Downey v. Levenson, 142 N.E. 85, 247 Mass. 358.
Mich.—Hodgson v. Lamberson, 207 N.W. 16, 233 Mich. 425—Stepanian v. Moskovitz, 206 N.W. 359, 232 Mich. 630—Smith v. Rattray, 203 N.W. 844, 231 Mich. 218—Ogooshevitz v. Sampson, 178 N.W. 642, 211 Mich. 180.
N.J.—Yentis v. Townsend, 139 A. 10, 104 N.J.Law 109—Walls v. Chrstos, 139 A. 3, 104 N.J.Law 81—Brauer v. Trustees of First M. E. Church of Red Bank, 1 A.2d 409, 124 N.J.Eq. 247.
N.Y.—Berg v. Hoffman, 292 N.Y.S. 721, 249 App.Div. 913, reversed on other grounds, 9 N.E.2d 806, 275 N.Y. 132—Abramowitz v. Fraccalvieri, 237 N.Y.S. 274, 227 App.Div. 418, modified on other grounds 237 N.Y.S. 717, 228 App.Div. 636—Warner v. Doscher, 210 N.Y.S. 83, 213 App.Div. 117, affirmed 150 N.E. 574, 241 N.Y. 605—Polucek v. Jahoda, 196 N.Y.S. 445, 203 App.Div. 38—Spielvogel v. Veit, 189 N.Y.S. 899, 197 App.Div. 804.
Pa.—Emmanuel v. Hughes, 145 A. 586, 295 Pa. 492.
R.I.—Archambault v. Pierce, 127 A. 146, 46 R.I. 295.
Tenn.—Myers v. Lindsay, 5 Lea 331.
Tex.—Dutton v. Miller, Civ.App., 11 S.W.2d 551—Martin Bros. v. McKnight, Civ.App., 245 S.W. 447—Richardson v. Terry, Civ.App., 212 S.W. 523, dismissed for want of jurisdiction—Alexander v. Anderson, Civ.App., 207 S.W. 205.
Utah.—Last Chance Ranch Co. v. Erickson, 25 P.2d 952, 82 Utah 475.
Wis.—Gilbert v. Stockman, 44 N.W. 845, 76 Wis. 62, 20 Am.S.R. 23.
22 C.J. p 1114 note 61.

Contracts held within rule

(1) Purchase of oil and gas lease.—Swain v. Patterson, 258 P. 278, 126 Okl. 28.

(2) Sale of mill.—Kriner v. Dinger, 147 A. 830, 297 Pa. 576.

(3) Transfer of warehouses.—Tri-State Terminal Co. v. Washington Wheat Growers' Ass'n, 236 P. 75, 134 Wash. 519.

A binder contract is within the parol evidence rule although the execution of a more formal contract is contemplated.—Klein v. Cohen, 186 N.Y.S. 601.

Escrow instructions relating to sale of realty have been held to constitute "contract in writing," rendering testimony of plaintiff that furniture was included in sale inadmissible.—Thoroman v. David, 249 P. 513, 199 Cal. 386.

Liability for broker's commission

Mass.—Bowditch v. E. T. Slattery Co., 161 N.E. 878, 263 Mass. 496.

Proportion of price paid by joint purchasers

Where there is a contract to convey land to several joint purchasers, parol evidence may be admitted to show the proportion of the purchase money paid by each.—Brothers v. Porter, 6 B.Mon., Ky., 106.

Subsequent deed not part of same transaction

A written contract for the sale of land and a deed thereof thereafter made are not necessarily parts of one transaction, and hence the deed may be shown to have been executed pursuant to the terms of an intervening oral agreement changing the terms of the written contract of sale.—Jost v. Wolf, 110 N.W. 232, 130 Wis. 37.

94. U.S.—Keystone Steel & Wire Co. v. Kokomo Steel & Wire Co., C.C.A.Ind., 275 F. 794.
Cal.—Ackerman v. Channel Commercial Co., 199 P. 1101, 53 Cal.App. 259.
Ind.—O'Brien v. Higley, 70 N.E. 242, 162 Ind. 316.
Ky.—Hull v. Bassett, 2 Ky.Op. 596.
La.—Brinker v. Feist, 129 So. 416, 14 La.App. 101.
Miss.—Parker v. McCaskey Register Co., 171 So. 337, 177 Miss. 347—J. B. Colt Co. v. Hinton, 109 So. 856, 143 Miss. 800.
Mo.—Metropolitan Discount Co. v. Wasson, App., 235 S.W. 465—Guess v. Russell Bros. Clothing Co., App., 231 S.W. 1015—Outcault Advertising Co. v. Schierbaum, App., 209 S.W. 982.
N.Y.—Independent Trading Co. v. E. Fougera & Co., 183 N.Y.S. 431, 192 App.Div. 686, affirmed 135 N.E. 931, 233 N.Y. 592—Sidney Blumenthal & Co. v. Zimmerman, 189 N.Y.S. 209.
Pa.—Reber v. Lipschutz, 92 Pa.Super. 292.
Tex.—Barreda v. Craig, Thompson & Jeffries, Com.App., 222 S.W. 177, reversing Craig, Thompson & Jeffries v. Barreda, Civ.App., 200 S.W. 868—Moore-Seaver Grain Co. v. Blum Milling Co., Civ.App., 264 S.W. 551, reversed on other grounds, Blum Milling Co. v. Moore-Seaver Grain Co., Com.App., 277 S.W. 78.
Va.—Jones v. Franklin, 168 S.E. 753, 160 Va. 266.
22 C.J. p 1114 note 61.

Sales of particular property

(1) Automobiles.
Iowa.—Marshall v. Greenlease-Lied Motor Co., 255 N.W. 666, 218 Iowa 597.
Pa.—Greer v. Miller-Buick, 53 York Leg.Rec. 123.
Tex.—Kyle v. Robert & St. John Motor Co., Civ.App., 22 S.W.2d 736.
Wash.—Baxter v. Ford Motor Co., 12 P.2d 409, 168 Wash. 456, 88 A.

a written instrument evidencing a sale was an exchange of property,[95] a mere receipt,[96] or a contract creating an agency relationship.[97]

A contract for an exchange of property is in substance and effect a contract of sale and is within the rule precluding variation or contradiction by parol or extrinsic evidence.[98]

Price. The statement in a contract of sale as to the price paid or to be paid by the purchaser is an essential part of the contract, and hence it cannot be varied or contradicted by parol.[99]

Time, place, and mode of payment. A contract of sale is conclusive as to the time, mode, and terms of payment, and cannot be varied or contradicted as to these matters by parol;[1] and the same is true of the place of payment.[2]

Time and place of delivery. Parol evidence is not admissible to vary or contradict the language of the contract as to the time[3] or place[4] of delivery of the articles sold, especially where the original agreement is in the form of a covenant. Where no time for delivery is specified, the law implies a contract that the goods shall be delivered within a reasonable time, and no evidence will be admissible to prove a specific time at which they were to be delivered, for that would be to contradict and vary the legal interpretation of the instrument;[5] nor can parol evidence be received to show that the expression "reasonable time" meant a stated time spoken of by the parties before the contract was signed,[6] or to show the purpose of the parties in introducing into the contract the phrase "or as soon as possible," after the date of delivery.[7]

Time as essence of contract. If the contract of sale provides that time is of its essence, the contrary cannot be shown by extrinsic evidence.[8] Ac-

L.R. 521, affirmed 15 P.2d 1118, 168 Wash. 456, 88 A.L.R. 521.

(2) Billiard and pool tables.—Southern Billiard & Supply Co. v. Shepherd, 23 S.W.2d 914, 232 Ky. 489.

(3) Bonds.—W. L. Slayton & Co. v. Board of Com'rs of Cabarrus County, 120 S.E. 452, 186 N.C. 690.

(4) Cotton.—Farmers' State Bank of Blum v. Kempner, Tex.Civ.App., 251 S.W. 548.

(5) Cultivator.—Emerson-Brantingham Implement Co. v. Cornutt, Tex.Civ.App., 11 S.W.2d 262.

(6) Electricity.—Kansas Electric Utilities Co. v. Bowersock, 202 P. 92, 109 Kan. 718.

(7) Farm machinery.—Nichols & Shepard Co. v. Swisher, 202 P. 630, 110 Kan. 20.

(8) Phonographs and records.—Loveland v. Turner, 237 P. 1115, 77 Colo. 544.

(9) Radios.
Mo.—Stevens v. Smotherman, 24 S.W.2d 670, 223 Mo.App. 1078.
Tex.—Stevens v. Bickford, Civ.App., 28 S.W.2d 842.

(10) Shares of stock.
Ariz.—Heffern Co-op. Consol. Gold Min. & Mill. Co. v. Gauthier, 193 P. 1021, 22 Ariz. 67.
Ga.—Brosseau v. Jacobs' Pharmacy Co., 98 S.E. 79, 148 Ga. 651.
La.—Rayne State Bank v. Mouton, 123 So. 633, 168 La. 939.
Mass.—Kennedy Bros. v. Bird, 192 N.E. 73, 287 Mass. 477.
N.J.—Shinn v. Black, 117 A. 142, 97 N.J.Law 219.
N.Y.—Gilbert v. Rosen, 180 N.Y.S. 772, 191 App.Div. 87.
Wash.—Schwab v. Getty, 258 P. 1035, 145 Wash. 66, 54 A.L.R. 1382.
14 C.J. p 713 note 1.

(11) Spark plugs.—Benford Mfg. Co. v. Standard Tire & Rubber Co., 126 N.E. 667, 235 Mass. 380.

(12) Sugar.—Tibbitts-Hewitt Grocery Co. v. S. E. Lux, Jr., Mercantile Co., C.C.A.Mo., 5 F.2d 549.

(13) Yarn.—Avondale Mills v. Benchley Bros., 138 N.E. 586, 244 Mass. 153.

95. N.Y.—United Display Fixture Co. v. S. & W. Bauman, 183 N.Y.S. 4.

96. Iowa.—Mechanics' Sav. Bank v. Gish, 203 N.W. 687, 200 Iowa 463.

97. Wash.—W. T. Rawleigh Co. v. Harper, 22 P.2d 665, 173 Wash. 233.

98. N.Y.—Markert v. Feinblatt, 231 N.Y.S. 524, 224 App.Div. 525, modified on other grounds 166 N.E. 344, 250 N.Y. 613.
Utah—Rampton v. Cole, 172 P. 477, 52 Utah 36.

99. U.S.—MacDonald v. Commissioner of Internal Revenue, C.C.A., 76 F.2d 513.
Cal.—Silveira v. Associated Milk Producers, 219 P. 461, 63 Cal.App. 572.
Colo.—Piccoli v. Paramount Lubricants Co., 250 P. 149, 80 Colo. 175.
Iowa.—Conn v. Heaps, 216 N.W. 73, 205 Iowa 248—Holmes v. Rivers, 124 N.W. 801, 145 Iowa 399.
La.—Grimm v. Pugh, App., 197 So. 641, 643, citing **Corpus Juris.**
Mass.—Graustein v. H. P. Hood & Sons, 200 N.E. 14, 293 Mass. 207.
R.I.—D. W. Flint Motor Sales Co. v. Crofton, 171 A. 236, 237, citing **Corpus Juris**—Robert Forsyth & Son v. Tanenbaum, 161 A. 112.
Utah.—Battle Creek Bread Wrapping Mach. Co. v. Paramount Baking Co., 39 P.2d 323, 88 Utah 67.
22 C.J. p 1118 note 70.

Discount
Pa.—International Fuel Service Corporation v. Stearns, 155 A. 285, 304 Pa. 157.

1. Ala.—Nelson v. Burnham, 141 So. 241, 224 Ala. 570.
Cal.—Rathbun v. Security Mfg. Co., 256 P. 296, 82 Cal.App. 793.
La.—Guillory v. Meyers, App., 149 So. 260.
Md.—Spellman v. Dundalk Co., 165 A. 192, 164 Md. 465.
R.I.—D. W. Flint Motor Sales Co. v. Crofton, 171 A. 236, 237, citing **Corpus Juris.**
22 C.J. p 1118 note 71.
Legal effect of instruments as to:
Medium or source of payment see supra § 855.
Time for payment see supra § 853.

2. Tex.—N. Estrada, Inc., v. Terry, Civ.App., 293 S.W. 286.

3. U.S.—Shoninger Bros. v. Dormer Bros. Co., N.Y., 241 F. 662, 154 C.C.A. 420.
22 C.J. p 1118 note 73.

4. Ky.—Handley v. Moorman, 4 Bibb 1.
Va.—Lawson v. Hobbs, 91 S.E. 750, 120 Va. 690.

5. N.J.—Marcus & Co. v. K. L. G. Baking Co., 3 A.2d 627, 630, citing **Corpus Juris.**
S.C.—Retailer's Service Bureau v. Smith, 163 S.E. 649, 652, 165 S.C. 238, quoting **Corpus Juris.**
22 C.J. p 1118 note 75.

6. Fla.—Jenkins v. Lykes, 19 Fla. 148, 45 Am.R. 19.
22 C.J. p 1118 note 76.

7. N.Y.—Williams v. Gridley, 96 N.Y.S. 978, 110 App.Div. 525, affirmed 79 N.E. 1119, 187 N.Y. 526.

8. Wash.—Sandstone Brick & Lime Co. v. Lawler, 101 P. 360, 53 Wash. 10.

cording to some authorities, parol evidence cannot be admitted to show that time was of the essence of the contract where the terms of the contract do not so provide;[9] but there is also authority for the contrary view.[10]

Obligations of vendor of business. It has been held in a number of cases that a written contract for the sale of a business cannot be added to by parol evidence of an agreement that the good will was included or that the vendor should not again engage in such business at a particular place or for a particular time.[11]

Withdrawal of offer to purchase. Where, in an action on an alleged written contract, defendant denied that the written offer to purchase was accepted before it was withdrawn, and there was no evidence of acceptance, evidence of the substitution of an oral contract was held not objectionable as contradicting the written contract.[12]

b. Warranty

Parol evidence is not admissible to add a warranty to a written contract of sale or to vary an express or implied warranty contained therein.

Parol or extrinsic evidence is not admissible either to add to the terms of a written contract of sale by engrafting thereon a warranty as to the thing sold,[13] or to limit, destroy, add to, or extend to matters other than those specified an express warranty contained in the instrument.[14] Evidence of a verbal warranty such as would be implied from the contract itself does not change the terms of the written instrument, and hence may be admitted,[15] but implied warranties are protected from change or alteration by parol evidence.[16]

9. Mich.—Ferguson v. Arthur, 87 N.W. 259, 128 Mich. 297.
Minn.—Austin v. Wacks, 15 N.W. 409, 30 Minn. 335.
Mo.—Tufts v. Morris, 87 Mo.App. 98.
S.D.—Strunk v. Smith, 66 N.W. 926, 8 S.D. 407.

10. Iowa.—Thurston v. Arnold, 43 Iowa 43.
Contra Jones v. Alley, 4 Greene 181.
Ky.—Browning v. Huff, 263 S.W. 661, 204 Ky. 13.
22 C.J. p 1118 note 79.

11. Ala.—Collas v. Brown, 100 So. 769, 211 Ala. 443.
Kan.—Graber v. Star Hardware Co., 251 P. 1116, 122 Kan. 416.
Wis.—Tees v. Lee, 291 N.W. 792, 234 Wis. 607.
22 C.J. p 1120 note 89.

12. S.C.—Midland Roofing Mfg. Co. v. Pickens, 80 S.E. 484, 96 S.C. 286.
22 C.J. p 1120 note 91.

13. Ala.—Loegler v. C. V. Hill & Co., 193 So. 120, 122, 238 Ala. 606, citing **Corpus Juris.**
Ariz.—O. S. Stapley Co. v. Newby, 110 P.2d 547.
Cal.—Merchants' Finance Co. v. Acosta Bros., 255 P. 772, 82 Cal. App. 431.
Colo.—Jamison v. Niel Nohr Automobile Co., 234 P. 695, 77 Colo. 85.
Ga.—Commercial Credit Co. v. Lewis, 200 S.E. 566, 59 Ga.App. 144—Cody & Edgar v. Automobile Financing, 140 S.E. 634, 37 Ga.App. 452.
Iowa.—Blecher v. Schmidt, 235 N.W. 34, 211 Iowa 1063—J. L. Owens Co. v. Leland Farmers' Elevator Co., 185 N.W. 590, 192 Iowa 771.
Mass.—S. F. Bowser & Co. v. Birmingham, 177 N.E. 268, 276 Mass. 289.
Mich.—Flanigan v. Byers, 195 N.W. 820, 225 Mich. 66.
Mont.—Union Electric Co. v. Lovell Livestock Co., 54 P.2d 112, 101 Mont. 450.
N.Y.—Bennett v. Piscitello, 19 N.Y.S.2d 777, 259 App.Div. 964, reversing 9 N.Y.S.2d 69, 170 Misc. 177, appeal granted 20 N.Y.S.2d 1020, 259 App.Div. 986, and affirmed 33 N.E.2d 251—Strauss v. Abraham Levitt & Sons, 278 N.Y.S. 953, 244 App.Div. 739—Zacharia v. Osaka Textiles, 7 N.Y.S.2d 696.
Pa.—McCrory Stores Corporation v. Komins, 17 Pa.Dist. & Co. 267.
Tex.—Chastain v. Gilbert, Civ.App., 145 S.W.2d 938—German v. Continental Jewelry Co., Civ.App., 22 S.W.2d 341—P. B. Yates Mach. Co. v. Groce, Civ.App., 281 S.W. 226, affirmed in part and reversed in part on other grounds, Com.App., 288 S.W. 161.
Utah.—Fox Film v. Ogden Theatre Co., 17 P.2d 294, 296, 82 Utah 279, citing **Corpus Juris.**
22 C.J. p 1119 note 83.
Contemporaneous oral warranty see infra § 1003.

That goods were sold by sample, to which they were to conform, cannot be shown.
Ark.—Sweet Springs Milling Co. v. Gentry, Buchanan & Co., 218 S.W. 380, 142 Ark. 234, rehearing denied 219 S.W. 1013, 142 Ark. 234.
N.Y.—American Aniline Products v. Mitsui & Co., 179 N.Y.S. 895, 190 App.Div. 485.
Vt.—Ætna Chemical Co. v. Spaulding & Kimball Co., 126 A. 582, 98 Vt. 51.
55 C.J. p 452 note 45.

Buyer of goods by sample cannot show by parol a more enlarged or different contract respecting the quality.—Mayer v. Dean, 22 N.E. 261, 115 N.Y. 556, 5 L.R.A. 540.

14. U.S.—George v. Crowder, C.C.A. N.C., 287 F. 53.
Ark.—N. Sauer Milling Co. v. Stueart, 133 S.W.2d 639, 199 Ark. 210.
Cal.—First Federal Trust Co. v. Stockfleth, 276 P. 371, 98 Cal.App. 21—American Steel Pipe & Tank Co. v. Hubbard, 183 P. 830, 42 Cal. App. 520—Yuba Mfg. Co. v. Stone, 179 P. 418, 39 Cal.App. 440.
Ga.—Smith v. Loftis Bros. & Co., 158 S.E. 768, 43 Ga.App. 354—Smith v. Fisher, 102 S.E. 170, 24 Ga.App. 729.
Iowa.—Blecher v. Schmidt, 235 N.W. 34, 211 Iowa 1063—J. L. Owens Co. v. Leland Farmers' Elevator Co., 185 N.W. 590, 192 Iowa 771.
Ky.—Rudolph Wurlitzer Co. v. Kaufman-Straus Co., 116 S.W.2d 305, 273 Ky. 149.
Mo.—Rock Island Implement Co. v. Wally, App., 268 S.W. 904, 913, citing **Corpus Juris.**
N.C.—Primrose Petroleum Co. v. Allen, 14 S.E.2d 402, 219 N.C. 461.
Tenn.—Deaver v. J. C. Mahan Motor Co., 43 S.W.2d 199, 163 Tenn. 429.
Va.—Scott v. Albemarle Horse Show Ass'n, 104 S.E. 842, 128 Va. 517.
22 C.J. p 1119 note 84.

15. U.S.—U. S. v. Spearin, 39 S.Ct. 59, 248 U.S. 132, 63 L.Ed. 166, affirming Spearin v. U. S., 51 Ct.Cl. 155.
Mich.—Tufts v. Verkuyl, 82 N.W. 891, 124 Mich. 242.
22 C.J. p 1120 note 85.

Conclusion that implied warranty is available to buyer under written contract does not violate parol evidence rule.—J. A. Campbell Co. v. Corley, 13 P.2d 610, 140 Or. 462.

Evidence to show implied warranty admissible.
N.Y.—Dexter & Carpenter v. E. W. Bliss Buildings, 205 N.Y.S. 412, 123 Misc. 379.
Or.—J. A. Campbell Co. v. Corley, 13 P.2d 610, 140 Or. 462.

16. Ga.—Bond v. Perrin, 88 S.E. 954, 145 Ga. 200.

Where the instrument contains a warranty the scope of which is uncertain, parol evidence may be admitted to show its scope;[17] and it is also permissible to show that a recital in the instrument was intended as a warranty.[18]

c. Reservations

Reservations cannot be shown by parol where such showing would vary a written contract of sale.

Reservations cannot be shown by parol where such showing would add to or contradict a written contract of sale.[19] Accordingly a reserved right to rescind,[20] cancel,[21] or abandon[22] the contract cannot be shown.

d. Orders

A written purchase order which contains the entire agreement cannot be varied by parol; and the same is true where there are a written order and an acceptance thereof, or where a written order is made in acceptance of a written offer.

A written purchase order which contains the entire agreement cannot be varied by parol,[23] and where there are a written order and an acceptance thereof,[24] as by an acceptance in writing[25] or by delivery and receipt of the goods,[26] or where a written order is made in acceptance of a written offer,[27] these constitute the contract and cannot be varied or contradicted.

§ 911. —— Subscription

A written contract of subscription, including, with some exceptions, subscriptions for stock of a corporation, cannot be varied by parol evidence.

A written contract of subscription to any undertaking or enterprise or for any other object cannot be varied or contradicted by parol or extrinsic evidence.[28] Accordingly conditions claimed to be attached to the subscription but not appearing in the paper signed cannot be shown.[29]

Wis.—Mallow v. Hall, 245 N.W. 90, 209 Wis. 426.

17. Kan.—Nichols & Shepard Co. v. Maxon, 92 P. 545, 76 Kan. 697.

18. Mo.—Sharp v. Sturgeon, 75 Mo. App. 651.

19. N.J.—Middleton v. Kavanagh, 155 A. 745, 9 N.J.Misc. 906.
Wis.—Schweitzer v. Connor, 14 N. W. 922, 57 Wis. 177.
22 C.J. p 1119 note 81.

Right of drawback
U.S.—Albers Bros. Milling Co. v. U. S., 16 Ct.Cust.App. 236.

20. S.C.—Burwell & Dunn Co. v. Chapman, 38 S.E. 222, 59 S.C. 581.
22 C.J. p 1119 note 82.

21. Colo.—Piggly Wiggly, Grimes Co. v. Lowell Packing Co., 29 P.2d 623, 94 Colo. 166.
S.D.—L. D. Powell Co. v. Larkin, 217 N.W. 200, 52 S.D. 245.

22. Cal.—New Richmond Land Co. v. Ivanovich, 198 P. 221, 52 Cal. App. 222.

23. Ark.—Morris v. Southwestern Supply Co., 206 S.W. 894, 136 Ark. 507.
Ga.—Frank & Meyer Neckwear Co. v. White, 124 S.E. 116, 32 Ga.App. 613.
Me.—Knobel v. Bramson, 119 A. 305, 122 Me. 553.
Mass.—Specialty Trading Co. v. A. C. Erisman Co., 166 N.E. 642, 267 Mass. 220.
N.Y.—Aristo Hosiery Co. v. Goldstein-Lasar Co., 188 N.Y.S. 460.
S.C.—Burwell & Dunn Co. v. Chapman, 38 S.E. 222, 59 S.C. 581.
Tex.—Little v. Armstrong Mfg. Co., Civ.App., 58 S.W.2d 849, error refused.
22 C.J. p 1117 note 65.

Writing not expressing entire agreement see infra § 1013.

Adverse claimant cannot vary written offer to buy land from owner by parol proof that he intended to exclude land claimed by adverse possession.—R. W. Wier Lumber Co. v. Eaves, Tex.Com.App., 296 S.W. 481, reversing, Civ.App., 291 S.W. 337.

Unsigned orders held not to constitute contracts, so that parol evidence was admissible in connection therewith.
S.C.—Hamilton Brown Shoe Co. v. Stanley, 120 S.E. 234, 126 S.C. 501.
Tex.—Curlee Clothing Co. v. Lowery, Civ.App., 275 S.W. 730.

24. Neb.—Crook v. O'Shea, 252 N. W. 456, 126 Neb. 67.

25. Wis.—Ohio Electric Co. v. Wisconsin-Minnesota Light & Power Co., 155 N.W. 112, 161 Wis. 632.

A written order, not accepted in writing, is not a written contract, within the rule.—A. O. Andersen Trading Co. v. Brody, 184 N.Y.S. 383, 193 App.Div. 681.

Where a parol sale was made without an agreement that the contract was to be reduced to writing, the mere fact that buyer subsequently filled out an order blank, and that on receipt thereof seller sent buyer a letter of confirmation, did not make the contract a written one, so as to come within the parol evidence rule.—Taylor Milling Co. v. American Bag Co., Tex.Civ.App., 230 S.W. 782.

26. Fla.—Everglade Lumber Co. v. Nettleton Lumber Co., 149 So. 736, 111 Fla. 333—Peplax Medicine Co. v. Tampa Drug Co., 102 So. 632, 88 Fla. 473.
W.Va.—Portland Cement Co. v. Whitmore Lumber Co., 150 S.E. 607, 108 W.Va. 226.

Where a note is given for the purchase price after the articles are delivered, parol evidence is inadmissible to vary the written order.—McCain v. J. B. Colt Co., 281 P. 769, 139 Okl. 178—J. B. Colt Co. v. Florence, 261 P. 142, 128 Okl. 14.

27. Ill.—Kraft-Phenix Cheese Corporation v. H. B. Smith Mach. Co., 267 Ill.App. 539.
Tex.—C. A. Bryant Co. v. Hamlin Independent School Dist., Civ.App., 274 S.W. 266.

28. Iowa.—McCabe v. O'Connor, 28 N.W. 573, 69 Iowa 134.
Kan.—American Legion, Christie E. Wilson Post No. 324, Rexford, Kan., v. Thompson, 245 P. 744, 121 Kan. 124.
Me.—Warren Academy v. Starrett, 15 Me. 443.

A written subscription to build a road, which recites that the subscribers bind themselves to pay in cash the amount opposite their names evidences a complete contract, which cannot be varied by parol evidence limiting the liability of any subscriber.
N.C.—Rousseau v. Call, 85 S.E. 414, 169 N.C. 173.
Pa.—Young Men's Christian Ass'n v. Buckland, 25 Pa.Dist. & Co. 355, 52 Montg.Co. 151.
Wash.—Michels v. Rustemeyer, 56 P. 380, 20 Wash. 597.
22 C.J. p 1120 note 93.

A subscription signed by only one party is protected by the parol evidence rule.—Guinzburg v. Blustein, 202 N.Y.S. 333, 121 Misc. 784.

29. Ala.—Ex parte South, 88 So. 221, 205 Ala. 31, denying certiorari

For corporate stock. With some exceptions, discussed infra § 941, as to the showing of a condition or contingency, a written contract of subscription for the stock of a corporation merges all prior agreements or negotiations with reference to the subject matter, and cannot be varied, controlled, or contradicted by parol evidence of the understanding or intentions of the parties, or of previous or contemporaneous agreements or undertakings not expressed in the writing.[30] On the other hand, parol evidence is not admissible to show that a written contract was intended as a subscription to stock when on its face it is a different contract.[31]

§ 912. —— Miscellaneous

The parol evidence rule has been applied to contracts and agreements relating to various particular types of subject matter other than those hereinbefore specifically considered.

In addition to the particular types of contracts considered in §§ 903–911 supra, the parol evidence rule has been applied to contracts or agreements relating to various other types of subject matter, such as advertising,[32] composition with creditors,[33] deposit,[34] donation,[35] escrow,[36] marketing,[37] novation,[38] option,[39] party wall construction,[40] rescission,[41] separation of husband and wife,[42] and trusts.[43]

§ 913. Deeds

Prior negotiations or agreements are generally regarded as merged in a deed, which is presumed to express

South v. First Nat. Bank, 88 So. 219, 17 Ala.App. 569.
S.D.—Huron Lodge No. 444, of the Benevolent and Protective Order of Elks v. Hinckley, 222 N.W. 661, 662, 54 S.D. 99, quoting **Corpus Juris**, and affirming 210 N.W. 200, 50 S.D. 355.
Vt.—Smith v. Burton, 10 A. 536, 59 Vt. 408.
22 C.J. p 1120 note 94.

30. Fla.—Bryan v. St. Andrews Bay Community Hotel Corporation, 126 So. 142, 99 Fla. 132, followed in Sudduth v. St. Andrews Bay Community Hotel Corporation, 126 So. 302, 99 Fla. 151.
Ill.—Chicago, S. & St. L. Ry. Co. v. Martin, 249 Ill.App. 109.
Kan.—Dickinson County Hospital Co. v. Kessinger, 279 P. 7, 128 Kan. 576.
Mass.—Boss v. Greater Boston Mortg. Corporation, 146 N.E. 686, 251 Mass. 455.
Or.—Laing v. Hutton, 6 P.2d 884, 138 Or. 307—Myrtle Point Mill & Lumber Co. v. Clarke, 203 P. 588, 102 Or. 533.
S.C.—Steele v. Singletary, 110 S.E. 833, 120 S.C. 132.
S.D.—Huron Lodge No. 444, of the Benevolent and Protective Order of Elks v. Hinckley, 222 N.W. 661, 662, 54 S.D. 99, citing **Corpus Juris**, and affirming 210 N.W. 200, 50 S.D. 355.
Tex.—Stevens v. Davenport, Civ. App., 19 S.W.2d 445.
22 C.J. p 1121 note 95.

31. N.J.—Elizabeth Library Assoc. v. Crane, 29 N.J.Law 302.

32. Mass.—Eastern Advertising Co. v. Shapiro, 161 N.E. 240, 263 Mass. 228.
N.Y.—National Garment Retailers' Ass'n v. Seidel, 185 N.Y.S. 865.
22 C.J. p 1107 note 15.
A contract for the use of advertising cuts cannot be modified by evidence of representations inducing the contract.—Outcault Adv. Co. v. Bradley, 150 S.W. 148, 105 Ark. 50.

33. Iowa.—Federal Cartridge Corporation v. Western Auto Specialty Co., 257 N.W. 785, 219 Iowa 271.
N.Y.—Acker v. Phœnix, 4 Paige 305.
Wash.—Washington Securities Co. v. American Nitrogen Products Co., 253 P. 1070, 142 Wash. 624.

34. Tex.—Chapman v. Cochran, Civ. App., 271 S.W. 169, reversed on other grounds, Austin v. Cochran, Com.App., 2 S.W.2d 821.
Joint deposit agreement
Cal.—Henry v. Bank of America, 47 P.2d 1068, 8 Cal.App.2d 353—In re Fritz' Estate, 20 P.2d 361, 130 Cal. App. 725—Hill v. Badeljy, 290 P. 637, 107 Cal.App. 598.
Ill.—Illinois Trust & Savings Bank v. Van Vlack, 141 N.E. 546, 310 Ill. 185.
Certificate of deposit
Ind.—Rich v. Dessar, 50 Ind. 309.
Mass.—Sawyer v. National Shawmut Bank, 28 N.E.2d 455, 306 Mass. 313.
S.C.—Rice v. City of Columbia, 162 S.E. 458, 164 S.C. 261.
Deposit slip
N.C.—Ledwell v. Shenandoah Milling Co., 1 S.E.2d 841, 215 N.C. 371.
Transmittal contract
Mich.—Okulich v. Goldman, 215 N. W. 11, 239 Mich. 569.

35. Ark.—Graham Bros. Co. v. Galloway Woman's College, 81 S.W.2d 837, 190 Ark. 692.

36. Kan.—Citizens' State Bank of Long Beach, Cal., v. Warrenburg, 278 P. 28, 128 Kan. 302.
La.—Clark v. Bush, App., 184 So. 588.

37. Cal.—Davis v. Stanislaus County Farmers' Union, 238 P. 95, 72 Cal.App. 698.
S.C.—Burch v. South Carolina Cotton Growers' Co-op. Ass'n, 187 S.E. 422, 181 S.C. 295.

38. Ga.—McKenzie Trust Co. v. Bullard, 132 S.E. 125, 35 Ga.App. 19, transferred, see 127 S.E. 277, 159 Ga. 884.

39. U.S.—Hudson v. Texas Gulf Sulphur Co., C.C.A.N.Y., 72 F.2d 251, certiorari denied 55 S.Ct. 209, 293 U.S. 617, 79 L.Ed. 706—Board of Education of City of Albuquerque v. American Nat. Bank of Oklahoma City, Okl., C.C.A.N.M., 294 F. 14.
Cal.—Bongiovanni v. Fickett, 10 P.2d 539, 122 Cal.App. 538.
N.Y.—Mandel v. National Ass'n Bldg. Corporation, 193 N.Y.S. 777, 200 App.Div. 767—H. C. King Motor Sales Corporation v. Peterson, 201 N.Y.S. 510.
S.D.—New Reliance Gold-Mining Co. v. Ofer Gold-Mining Co., 205 N.W. 377, 48 S.D. 549.
22 C.J. p 1114 note 55.

40. Idaho.—First Nat. Bank v. Cruickshank, 225 P. 142, 38 Idaho 789.

41. Idaho.—Holverson v. Evans, 224 P. 1067, 38 Idaho 428.

42. Ill.—Kohler v. Kohler, 146 N.E. 476, 316 Ill. 33.
Kan.—Allen v. Allen, 196 P. 1075, 108 Kan. 765.
Mich.—Carpenter v. Carpenter, 117 N. W. 598, 154 Mich. 100.
N.Y.—Woods v. Bard, 2 N.Y.S.2d 254.
Maintenance
Pa.—Scott v. Scott, 95 Pa.Super. 273.

43. Iowa.—Lunt v. Van Gorden, 294 N.W. 351.
N.J.—Trenton Banking Co. v. Howard, Ch., 187 A. 569, affirmed 187 A. 575, 121 N.J.Eq. 85.
N.Y.—Union Trust Co. of Rochester v. Boardman, 213 N.Y.S. 277, 215 App.Div. 73, affirmed 159 N.E. 678, 246 N.Y. 627.
Okl.—Northway v. First Nat. Bank, 35 P.2d 934, 169 Okl. 70.
Or.—Allen v. Hendrick, 206 P. 733, 104 Or. 202.

the intention of the parties; and, with some exceptions, parol or extrinsic evidence is inadmissible to add to, vary, or contradict the terms of the instrument.

The execution and acceptance of a deed being the final act of the parties expressing the terms of their agreement with reference to the subject matter, all prior negotiations or agreements are generally regarded as merged therein,[44] and the deed must be presumed to express truly the intention of the parties.[45] Hence, subject to exceptions treated infra §§ 929–1015, the general rule is that parol or extrinsic evidence cannot be received to add to, limit, vary, or contradict the terms of a deed,[46] at least so far as its contractual recitals or provisions are concerned.[47] Such evidence cannot be introduced to show the understanding of the parties as to the

44. U.S.—Frenzer v. Frenzer, C.C.A. Neb., 2 F.2d 218, certiorari denied 46 S.Ct. 101, 269 U.S. 574, 70 L.Ed. 419.
Del.—Gibney v. Stockdale Corporation, 174 A. 117, 20 Del.Ch. 272.
Ga.—Feingold v. McDonald Mortgage & Realty Co., 145 S.E. 90, 166 Ga. 838.
Ind.—Wayne International Bldg. & Loan Ass'n v. Beckner, 134 N.E. 273, 191 Ind. 664.
Iowa.—Swensen v. Union Central Life Ins. Co., 280 N.W. 600, 225 Iowa 428.
Ky.—Conrad v. Smith, 261 S.W. 1103, 203 Ky. 171.
Mich.—Wild v. Wild, 254 N.W. 208, 266 Mich. 570.
Miss.—Wright v. Lott, 124 So. 270, 155 Miss. 185.
Mo.—Douglass v. Hammel, 285 S.W. 433, 313 Mo. 514.
Pa.—Sullivan v. Emerick, 86 Pa.Super. 185.
Tex.—Gill v. Baird, Civ.App., 32 S.W.2d 941, affirmed 77 S.W.2d 201, 124 Tex. 252—Woods v. Selby Oil & Gas Co., Civ.App., 2 S.W.2d 895, affirmed, Com.App., 12 S.W.2d 994.
Wash.—Cowan v. Gladder, 206 P. 923, 120 Wash. 144.
22 C.J. p 1121 note 98.

45. Iowa.—Iowa Farm Credit Corporation v. Halligan, 241 N.W. 475, 214 Iowa 903.
N.J.—Goldsmith v. Meyer, 109 A. 298, 94 N.J.Law 40—Smith v. Colonial Woodworking Co., 160 A. 351, 110 N.J.Eq. 418, affirming 154 A. 744, 108 N.J.Eq. 303, motion denied 162 A. 255, 111 N.J.Eq. 313.
Pa.—Detwiler v. Coldren, 166 A. 374, 311 Pa. 44—In re Brolasky's Estate, 163 A. 292, 309 Pa. 30—Harper v. Coleman, 94 Pa.Super. 62—Sullivan v. Emerick, 86 Pa.Super. 185.
22 C.J. p 1122 note 99.

46. U.S.—Frenzer v. Frenzer, C.C.A. Neb., 2 F.2d 218, certiorari denied 46 S.Ct. 101, 269 U.S. 574, 70 L. Ed. 419.
Ala.—Hall v. Hubbard, 112 So. 235, 215 Ala. 653—Cryar v. Ogle, 99 So. 157, 19 Ala.App. 493, certiorari denied Ex parte Cryar, 99 So. 158, 211 Ala. 13.
Ark.—Smith v. School Dist. No. 14, 94 S.W.2d 706, 192 Ark. 792.
Cal.—In re Kellogg, 107 P.2d 964, 41 Cal.App.2d 833.
Conn.—Sweeney v. Sweeney, 11 A.2d 806, 126 Conn. 391.
Del.—Gibney v. Stockdale Corporation, 174 A. 117, 20 Del.Ch. 272.
Ga.—Stonecypher v. Georgia Power Co., 189 S.E. 13, 183 Ga. 498, answers to certified questions conformed to 189 S.E. 672, 55 Ga.App. 197—Lovett v. H. C. Arnall Merchandise Co., 185 S.E. 315, 182 Ga. 356—Flanders v. Cook, 144 S.E. 903, 167 Ga. 66.
Ill.—Fowler v. Black, 26 N.E. 596, 136 Ill. 363, 11 L.R.A. 670.
Ind.—Van Blaricum v. Kerkhoff, 147 N.E. 633, 83 Ind.App. 411.
Iowa.—Smith v. Godfrey, 205 N.W. 366, 200 Iowa 768—Deupree v. Kibler, 192 N.W. 842—Prenosil v. Pelton, 173 N.W. 235, 186 Iowa 1235.
Kan.—Brown v. Parmalee, 285 P. 563, 130 Kan. 165.
Ky.—Clark v. Fergerson, 20 S.W.2d 1013, 231 Ky. 36—Bender v. South, 225 S.W. 504, 189 Ky. 623.
La.—McBride v. Elam, 8 La.App. 520.
Md.—Parran v. Wilson, 154 A. 449, 160 Md. 604—Gittings v. Hall, 1 Harr. & J. 14, 2 Am.D. 502.
Mass.—Oldfield v. Smith, 24 N.E.2d 544, 304 Mass. 590—Connecticut Valley Onion Co. v. Pielock, 183 N. E. 526, 281 Mass. 287.
Mich.—Wild v. Wild, 254 N.W. 208, 266 Mich. 570.
Miss.—Wright v. Lott, 124 So. 270, 155 Miss. 185—Lowery v. Williams, 109 So. 670, 143 Miss. 661.
Mo.—Williams v. Reid, 37 S.W.2d 537—Douglass v. Hammel, 285 S. W. 433, 313 Mo. 514.
N.J.—Blumberg v. Weiss, 17 A.2d 823, 129 N.J.Eq. 34, reversing 10 A.2d 743, 126 N.J.Eq. 616—Smith v. Colonial Woodworking Co., 160 A. 351, 110 N.J.Eq. 418, affirming 154 A. 744, 108 N.J.Eq. 303, motion denied 162 A. 255, 111 N.J.Eq. 313.
N.Y.—Bayork Realty Corporation v. State, 297 N.Y.S. 973, 251 App.Div. 534, affirmed 13 N.E.2d 50, 276 N.Y. 659.
N.C.—Winston Brick Mfg. Co. v. Hodgin, 130 S.E. 330, 190 N.C. 582.
Okl.—Poston v. City of McAlester, 268 P. 1110, 132 Okl. 4—Hyde v. City of Altus, 218 P. 1081, 92 Okl. 170.
Pa.—Goodman v. City of Bethlehem, 185 A. 719, 323 Pa. 58—Detwiler v. Coldren, 166 A. 374, 311 Pa. 44—Hancock v. McAvoy, 25 A. 48, 151 Pa. 439, 31 Wkly.N.C. 258—Goldsmith v. Means, 158 A. 596, 104 Pa. Super. 571—Harper v. Coleman, 94 Pa.Super. 62—Sullivan v. Emerick, 86 Pa.Super. 185—Pierce v. Pierce, 12 Pa.Dist. & Co. 374, 26 Sch.Leg. Rec. 187.
S.C.—Carson v. McCaskill, 99 S.E. 108, 111 S.C. 516.
Tex.—Earle v. Marx, 15 S.W. 595, 80 Tex. 39—Rogers v. Rogers, Com.App., 15 S.W.2d 1037, reversing, Civ.App., 7 S.W.2d 126—Massad v. Bumpus, Civ.App., 146 S. W.2d 1073, error dismissed, judgment correct—Jasper State Bank v. Goodrich, Civ.App., 107 S.W.2d 600, error dismissed—Borger Townsite Co. v. Hutchinson County, Civ. App., 34 S.W.2d 912—Gill v. Baird, Civ.App., 32 S.W.2d 941, affirmed 77 S.W.2d 201, 124 Tex. 252—Capy v. Redlinger, Civ.App., 17 S.W.2d 1092—Woods v. Selby Oil & Gas Co., Civ.App., 2 S.W.2d 895, affirmed, Com.App., 12 S.W.2d 994.
Utah.—Paloni v. Beebe, 110 P.2d 563—Ruthrauff v. Silver King Western Min. & Mill. Co., 80 P.2d 338. 95 Utah 279—Van Cott v. Jacklin, 226 P. 460, 63 Utah 412.
Vt.—Fletcher v. Phelps, 28 Vt. 257.
Wis.—Hemmis v. Consolidated Water Power & Paper Co., 181 N.W. 743, 173 Wis. 518.
22 C.J. p 1122 note 1.

Trust deed

Ill.—Bergman v. Bergman, 153 N.E. 735, 323 Ill. 73.
Tenn.—Horn v. Goodman, 1 Tenn. App. 90.

"Authentic acts"

In Louisiana the verity and reality of "authentic acts" may be assailed only by means of a counter-letter or by the answers of the other party to interrogatories on facts and articles.—Scurto v. Le Blanc, 184 So. 567, 191 La. 136—Franton v. Rusca, 175 So. 66, 187 La. 578—Locascio v. First State Bank & Trust Co. of Hammond, 123 So. 304, 168 La. 723—Jeansonne v. Jeansonne, App., 171 So. 497, modified on other grounds 175 So. 626, 187 La. 939.

47. Neb.—In re Weitzel's Estate, 280 N.W. 270, 135 Neb. 43.
Tex.—Guggenheim v. Dallas Plumbing Co., Com.App., 59 S.W.2d 105, reversing Gugenheim v. Dallas Plumbing Co., Civ.App., 42 S.W.2d 268—Jones v. Texas Co., Civ.App., 80 S.W.2d 761—Turner v. Dinwiddie, Civ.App., 276 S.W. 444.

effect of a deed the terms of which are not ambiguous,[48] or to show that a deed, at the time of its execution, was intended to have an operation different from that imported by its terms;[49] nor is it permissible to give evidence of a prior parol agreement pursuant to which the deed was executed.[50]

§ 914. —— Grants of Public Lands

Grants of public lands cannot ordinarily be impeached or varied by parol or extrinsic evidence.

Grants of public lands, where the subject matter is within the power of the officer making the grant, are of that dignity which precludes the admission of any parol or extrinsic evidence to impeach, vary, or contradict them,[51] or even, it has been held, to aid in their construction.[52] Even in a collateral proceeding not between the parties to the grant, it has been held that the grant, being a matter of record, cannot in general be impeached and declared void, except by some matter of record, evidence of the same grade as the grant itself, or by facts apparent on the face of the grant.[53]

Character of land. A title under a grant of public lands of the government cannot be defeated by parol evidence that the land is not of such a character as to be subject to the grant, where there is no evidence that the secretary of the interior neglected or refused to decide the question,[54] but it is otherwise where such neglect or refusal is made to appear.[55]

§ 915. —— Official Deeds

A deed given at a judicial, execution, or other official sale cannot be varied by parol, as by showing different terms of sale, or by varying the description of the property.

A deed executed by a public officer in his official capacity to the purchaser at a judicial, execution, or other official sale is entitled to the same conclusive effect as any other deed and is not subject to be impeached, contradicted, added to, or varied by parol or extrinsic evidence.[56] Thus, it cannot be shown that the terms of sale were other than those appearing by the deed,[57] or, in the absence of any ambiguity in the description of the premises, that land covered thereby was not intended to be conveyed.[58] It is not permissible to show that the land was sold under a different judgment and execution than those recited in the deed,[59] nor can a recital as to the property sold be enlarged by parol evidence.[60]

"A deed is a written contract subject to the parol evidence rule."—Kittelson v. Collette, 240 N.W. 920, 61 N.D. 768.

48. Ill.—Fowler v. Black, 26 N.E. 596, 136 Ill. 363, 11 L.R.A. 670.
Mo.—Douglass v. Hammel, 285 S.W. 433, 313 Mo. 514.
N.H.—Smart v. Huckins, 134 A. 520, 82 N.H. 342.
Tex.—Gill v. Baird, Civ.App., 32 S.W. 2d 941, affirmed 77 S.W.2d 201, 124 Tex. 252—Wolters v. Farmers' Life Ins. Co., Civ.App., 255 S.W. 666, modified on other grounds Farmers' Life Ins. Co. v. Wolters, Com. App., 263 S.W. 259, reversed on other grounds 10 S.W.2d 698, rehearing denied 14 S.W.2d 58.
22 C.J. p 1123 note 3.

Representation as to timber
Where a deed recites the quantity of timber on the land, evidence that defendants did not understand they were representing amount specified therein is inadmissible.—Columbia River Door Co. v. Priest, 274 P. 116, 128 Or. 359.

49. Ga.—Arrington v. Arrington, 7 S.E.2d 665, 189 Ga. 725.
Ill.—Rockford Trust Co. v. Moon, 18 N.E.2d 447, 370 Ill. 250.
Kan.—Brown v. Parmalee, 285 P. 563, 130 Kan. 165.
Ky.—Clark v. Fergerson, 20 S.W.2d 1013, 231 Ky. 36.
Mass.—Oldfield v. Smith, 24 N.E.2d 544, 304 Mass. 590.
Mich.—Millard v. Millard, 180 N.W. 429, 212 Mich. 662.
Minn.—Stavanau v. Gray, 172 N.W. 885, 143 Minn. 1.
N.H.—Smart v. Huckins, 134 A. 520, 82 N.H. 342.
Tex.—Woods v. Selby Oil & Gas Co., Civ.App., 2 S.W.2d 895, affirmed, Com.App., 12 S.W.2d 994.
22 C.J. p 1123 note 2.
"It is well settled that the legal effect of a deed cannot be varied simply by showing that the grantor misunderstood the legal effect of its terms, or intended a different effect from that which the language of the instrument imports."—Rogers v. Rogers, Tex.Com.App., 15 S.W.2d 1037, 1039, reversing, Civ.App., 7 S. W.2d 126.

50. U.S.—Frenzer v. Frenzer, C.C.A. Neb., 2 F.2d 218, certiorari denied 46 S.Ct. 101, 269 U.S. 574, 70 L. Ed. 419.
Del.—Gibney v. Stockdale Corporation, 174 A. 117, 20 Del.Ch. 272.
Ill.—Bergman v. Bergman, 153 N.E. 735, 323 Ill. 73.
22 C.J. p 1123 note 4.

51. Cal.—Broome v. Lantz, 294 P. 709, 211 Cal. 142, certiorari denied Lantz v. Broome, 52 S.Ct. 9, 284 U.S. 621, 76 L.Ed. 530.
22 C.J. p 1123 note 12.

52. U.S.—Stuart v. Easton, Pa., 18 S.Ct. 650, 170 U.S. 383, 42 L.Ed. 1078, affirming 74 F. 854, 21 C.C.A. 146.
22 C.J. p 1124 note 13.

53. Tenn.—Fowler v. Nixon, 7 Heisk. 719.
22 C.J. p 1124 note 16.

54. U.S.—French v. Fyan, Mo., 93 U.S. 169, 23 L.Ed. 812.
22 C.J. p 1124 note 14.

55. U.S.—Hannibal & St. J. R. Co. v. Smith, 9 Wall. 95, 19 L.Ed. 599, affirming 41 Mo. 310.

56. Miss.—Cox v. Richerson, 191 So. 99, 186 Miss. 576, 124 A.L.R. 1138.
Tex.—Texas Co. v. Van Deventer, Civ.App., 290 S.W. 560.
22 C.J. p 1124 note 17.

Guardian's deed
Where the intent of the parties and of the probate court can be derived from court orders authorizing sale of wards' property, parol evidence is inadmissible to vary terms of guardian's deed.—Mathews v. Myers, Tex.Civ.App., 42 S.W.2d 1099.

57. Ga.—Wells v. Savannah, 32 S.E. 669, 107 Ga. 1.

58. Ga.—Oliver v. Brown, 29 S.E. 159, 102 Ga. 157.
N.J.—Todd v. Philhower, 24 N.J.Law 796.

59. Nev.—Zabriskie v. Meade, 2 Nev. 285, 90 Am.D. 542.
22 C.J. p 1124 note 20.

60. N.C.—Wade v. Pellitier, 71 N.C. 74.

§ 916. —— Matters as to Which Deed Is Conclusive

a. Property or interest conveyed
b. Other matters

a. Property or Interest Conveyed

A deed is usually conclusive as to the description and boundaries of the property conveyed, and the estate or interest conveyed. Parol or extrinsic evidence is not admissible to engraft reservations or limitations on a deed or to defeat or vary express reservations.

Ordinarily, the description in a deed of the premises intended to be conveyed cannot be varied, controlled, or contradicted by parol or extrinsic evidence,[61] where such description is clear and free from ambiguity.[62] In applying this principle, the deed must be held to be conclusive evidence that the land intended to be conveyed was that described in the deed rather than an entirely different tract.[63] The deed is likewise conclusive as to the quantity of land described therein,[64] and the intention to include or exclude particular land.[65]

Boundaries. The statements of a deed as to the boundaries of land have the same conclusiveness as any other portion of the description, and cannot be varied by parol or extrinsic evidence or by showing any understanding of the parties different from that expressed in the deed.[66] Such evidence is not admissible to contradict or vary the statements in

61. Ark.—Spencer v. Pierce, 287 S.W. 1019, 172 Ark. 108.
Md.—Parran v. Wilson, 154 A. 449, 160 Md. 604.
Minn.—Kehrer v. Seeman, 235 N.W. 386, 182 Minn. 596.
Okl.—Dawson v. Sears, 110 P.2d 910.
S.C.—Shuler v. Williams, 99 S.E. 819, 112 S.C. 349.
Tex.—Smith v. Sorelle, 87 S.W.2d 703, 126 Tex. 353, reversing Busby v. Smith, Civ.App., 53 S.W.2d 138—Woods v. Selby Oil & Gas Co., Civ. App., 2 S.W.2d 895, affirmed, Com. App., 12 S.W.2d 994.
Wis.—Rowell v. Rhadans, 175 N.W. 937, 171 Wis. 86.
22 C.J. p 1125 note 31.
"Parol evidence cannot make a deed convey land that it does not purport to convey, nor prevent it from conveying that which it does clearly purport to convey."—Frost Lumber Industries of Texas v. Brantley, Tex.Civ.App., 109 S.W.2d 999, 1001.

Reference to plan
When a grant or deed of conveyance of land contains an express reference to a certain plan, such plan, in legal construction, becomes a part of the deed, and is subject to no other explanations by extraneous evidence than if all the particulars of the description had been actually inserted in the body of the grant or deed.
Ala.—State v. Meaher, 105 So. 562, 213 Ala. 466.
Me.—Perkins v. Jacobs, 129 A. 4, 124 Me. 347—Bradstreet v. Winter, 109 A. 482, 119 Me. 30.

Personalty included in deed of realty
In replevin to recover the materials in a tramroad removed from plaintiff's land by defendant, parol evidence that the tramroad equipment was included in a deed of realty to plaintiff's grantor was inadmissible, where such deed made no mention thereof.—Lane v. Bell Lumber Co., 115 S.E. 207, 122 S.C. 140.

62. Cal.—Edwards v. Lewis, 76 P.2d 720, 25 Cal.App.2d 168.
Mass.—Hirsch v. Fisher, 180 N.E. 230, 278 Mass. 492—Panikowski v. Giroux, 172 N.E. 890, 272 Mass. 580—Peavey v. Moran, 152 N.E. 360, 256 Mass. 311.
Pa.—Detwiler v. Coldren, 166 A. 374, 311 Pa. 44—Goldsmith v. Means, 158 A. 596, 104 Pa.Super. 571—Harper v. Coleman, 94 Pa.Super. 62.
Tex.—Scheller v. Groesbeck, Com. App., 231 S.W. 1092, reversing, Civ. App., 215 S.W. 353—Morgan v. Mace, Civ.App., 259 S.W. 1095.
22 C.J. p 1125 note 31.
Explanation of ambiguous description see infra § 1007.

63. Ga.—Feingold v. McDonald Mortgage & Realty Co., 145 S.E. 90, 166 Ga. 838.
La.—White v. Ouachita Natural Gas Co., 150 So. 15, 177 La. 1052.
Tex.—Kelly v. Wilson, Civ.App., 233 S.W. 141, error refused.
22 C.J. p 1125 note 32.

64. Ala.—Hess v. Cheney, 3 So. 791, 83 Ala. 251—Rogers v. Peebles, 72 Ala. 529—Winston v. Browning, 61 Ala. 80—Dozier v. Duffee, 1 Ala. 320.
Colo.—Garbanati v. Fassbinder, 25 P. 991, 15 Colo. 535.
Md.—Baltimore Permanent Building & Land Soc. v. Smith, 54 Md. 187, 39 Am.R. 374.
Minn.—Kehrer v. Seeman, 235 N.W. 386, 182 Minn. 596.
N.Y.—Faure v. Martin, 7 N.Y. 210, 3 Seld. 210, 57 Am.D. 515.
22 C.J. p 1125 note 33.

Area as integral part of description
When dimensions or area constitute an integral part of the description, they cannot be varied by parol any more than other parts of the deed.—Edmundson v. Mullen, 110 So. 391, 215 Ala. 297.

Sale by acre
(1) A deed which conveys, by tract, all the land within specified boundaries, generally cannot be varied by parol evidence to the effect that the sale was one by the acre.—Blaylock v. Hackel, 138 S.E. 333, 164 Ga. 257.
(2) A deed stating that the land is conveyed "in gross and not by the acre" cannot ordinarily be contradicted by oral evidence that the sale was by the acre.—Southern v. Sine, 123 S.E. 436, 95 W.Va. 634.

Expression "more or less" in stating the number of acres in the land conveyed, the description of which is otherwise certain, does not let in evidence of a parol agreement to make up that quantity of land.—Baynard v. Eddings, 33 S.C.L. 374.

65. Ga.—Kennedy v. Kennedy, 188 S.E. 722, 183 Ga. 432, 109 A.L.R. 1143.
Utah.—Coop v. George A. Lowe Co., 263 P. 485, 71 Utah 145.
Wis.—Rowell v. Rhadans, 175 N.W. 937, 171 Wis. 86.
22 C.J. p 1126 note 34.
"Where the description of a parcel of land in a deed is certain and buttressed by documentary evidence, parol testimony cannot be used to enlarge the scope of the descriptive words so as to include another and distinct parcel owned by the grantor."—Prickett v. Frum, 132 S.E. 501, 101 W.Va. 217.

66. Ill.—Kesl v. Cobine, 145 N.E. 148, 313 Ill. 438.
Ky.—Kinney v. Hutchinson, 220 S.W. 1069, 188 Ky. 43.
La.—Laurent v. Laurent, 84 So. 212, 146 La. 939.
Mass.—Peavey v. Moran, 152 N.E. 360, 256 Mass. 311.
N.C.—Daniel v. Tallassee Power Co., 168 S.E. 217, 204 N.C. 274.
Tex.—Crabb v. Texas Pac. Coal & Oil Co., Civ.App., 238 S.W. 279, reversed on other grounds, Com.App., 249 S.W. 835.
22 C.J. p 1126 note 36.
Parol evidence of boundaries as identifying subject matter see infra § 1007.

Oral proof of field notes is inadmissible to vary or repudiate the description of land contained in unambiguous field notes of a deed.—

the deed as to the courses,[67] distances,[68] or calls;[69] and a line supplied by necessary intendment cannot be varied by parol.[70]

Estate or interest conveyed. It is not permissible to contradict or vary the terms of a deed by parol or extrinsic evidence to show that the estate or interest intended to be conveyed was different from that which the clear language of the instrument purports to convey;[71] so parol evidence is not admissible to change the character of the estate created in a married woman by deed.[72] A parol agreement to reconvey cannot, in the absence of accident, fraud, mistake, or undue advantage, be set up to contradict the terms of an absolute conveyance.[73]

Reservations or limitations. A deed which is on its face an absolute grant is not subject to have reservations or limitations engrafted thereon by parol or extrinsic evidence of intentions, understandings, or agreements contradictory to, or at variance with, its clear language;[74] and, conversely, where the deed does contain reservations or limitations they cannot be defeated or varied by evidence of this character,[75] even though such reservations are

Frost Lumber Industries of Texas v. Brantley, Tex.Civ.App., 109 S.W.2d 999.

Actual line of surveyor

Where description in field notes or in deed is unambiguous both on its face and in its application to the ground, extrinsic or parol evidence is not admissible to show that surveyor actually ran a line of the survey at a different place from that described in the field notes or deed.—Blake v. Pure Oil Co., 100 S.W.2d 1009, 128 Tex. 536, reversing, Civ.App., 68 S.W.2d 244—Gill v. Peterson, 86 S.W.2d 629, 126 Tex. 216, reversing Peterson v. Gill, Civ.App., 51 S.W.2d 1057.

Where boundary lines were inaccurately stated in conveyance, but there was an established line recognized by both parties, parol evidence was inadmissible to show what boundaries were intended.—Stitzel v. Frederici, 98 Pa.Super. 456.

67. Mass.—Allen v. Kingsbury, 16 Pick. 235.
22 C.J. p 1126 note 37.

Reasons for fixing course

Where a deed is unambiguous, the court will not inquire into the reasons why the parties fixed a course as they did.—Rossi v. Sophia, 300 P. 522, 163 Wash. 173.

68. Ala.—Edmundson v. Mullen, 110 So. 391, 215 Ala. 297.
22 C.J. p 1126 note 38.

69. N.C.—Daniel v. Tallassee Power Co., 168 S.E. 217, 204 N.C. 274.
Tex.—Atlantic Oil Producing Co. v. Hughey, Civ.App., 107 S.W.2d 613, error dismissed, rehearing denied Hughey v. Atlantic Oil Producing Co., 109 S.W.2d 1041, 130 Tex. 255—Texas Co. v. Van Deventer, Civ.App., 290 S.W. 560—Dilworth v. Buchanan, Civ.App., 260 S.W. 279—Hamman v. San Jacinto Rice Co., Civ.App., 229 S.W. 1008, error granted—Swann v. Mills, Civ.App., 219 S.W. 850, dismissed for want of jurisdiction.
22 C.J. p 1126 note 39.

70. Vt.—Whittier v. Parmenter, 96 A. 378, 90 Vt. 16.

71. Ill.—Rockford Trust Co. v. Moon, 18 N.E.2d 447, 370 Ill. 250—Harder v. Matthews, 141 N.E. 442, 309 Ill. 548.
Kan.—Brown v. Parmalee, 285 P. 563, 130 Kan. 165.
Ky.—Clark v. Fergerson, 20 S.W.2d 1013, 231 Ky. 36.
Mass.—Hirsch v. Fisher, 180 N.E. 230, 278 Mass. 492.
Mich.—Millard v. Millard, 180 N.W. 429, 212 Mich. 662.
Mo.—Williams v. Reid, 37 S.W.2d 537—Wood v. White Eagle Oil & Refining Co., App., 274 S.W. 894, 898, citing **Corpus Juris.**
S.C.—Drake v. Drake, 145 S.E. 705, 148 S.C. 147.
Tex.—Rogers v. Rogers, Com.App., 15 S.W.2d 1037, reversing, Civ.App., 7 S.W.2d 126—Jones v. Bedford, Civ.App., 56 S.W.2d 305, error refused—Reeves v. Reeves, Civ.App., 38 S.W.2d 852—Crayton v. Phillips, Civ.App., 297 S.W. 888, affirmed, Com.App., 4 S.W.2d 961.
22 C.J. p 1127 note 42.

Fee or life estate

In absence of allegation of fraud, mistake, or the like, oral evidence is inadmissible to show that deed conveying fee was intended to convey merely life estate.—Willoughby v. Brandes, 297 S.W. 54, 317 Mo. 544.

Easement granted in plain and unambiguous language may not be varied or modified by extraneous circumstances or parol testimony.—Capy v. Redlinger, Tex.Civ.App., 17 S.W.2d 1092.

72. Tex.—McKivett v. McKivett, Com.App., 70 S.W.2d 694, affirming, Civ.App., 45 S.W.2d 1102.
30 C.J. p 1023 note 7.

Separate property

Except for the purpose of showing fraud or other ground for setting aside a transaction, where a husband permitted property to be conveyed to his wife as her separate property, evidence that he did not intend that the property should become the wife's separate property is wholly inconsequential.—Miller v. Brode, 199 P. 531, 186 Cal. 409.

73. N.C.—Bonham v. Craig, 80 N.C. 224—Campbell v. Campbell, 55 N.C. 364.

74. Ark.—Smith v. School Dist. No. 14, 94 S.W.2d 706, 192 Ark. 792—Barfield Mercantile Co. v. Connery, 234 S.W. 481, 150 Ark. 428.
Ga.—Kennedy v. Kennedy, 188 S.E. 722, 183 Ga. 432, 109 A.L.R. 1143.
Ky.—Conrad v. Smith, 261 S.W. 1103, 203 Ky. 171.
Miss.—Blaylock v. Lonn, 128 So. 555, 157 Miss. 783.
N.J.—Blumberg v. Weiss, 17 A.2d 823, 129 N.J.Eq. 34, reversing 10 A.2d 743, 126 N.J.Eq. 616—William Dahm Realty Corporation v. Cardel, 16 A.2d 69, 128 N.J.Eq. 222.
Okl.—Hyde v. City of Altus, 218 P. 1081, 92 Okl. 170.
Or.—O'Neil v. Twohy Bros. Co., 190 P. 306, 98 Or. 481.
Tex.—Quanah, A. & P. Ry. Co. v. Wiseman, Civ.App., 247 S.W. 695—Taylor v. County School Trustees of Eastland County, Civ.App., 229 S.W. 670, error refused.
22 C.J. p 1128 note 58.

Fixtures

(1) Where articles are stamped with appearance of fixtures by their mode of annexation, they pass by a conveyance, and evidence of vendor's intent in placing them on the realty is not competent to vary terms and effect of deed.—Farmers & Merchants Bank v. Sawyer, 163 So. 657, 26 Ala.App. 520, certiorari denied 163 So. 659, 231 Ala. 137.

(2) Other decisions as to ownership of fixtures see 22 C.J. p 1128 note 58 [a] (7).

Lease

Deed is written evidence of title, and parol evidence of lease excepted from its operation is inadmissible.—Dark Tobacco Growers' Co-op. Ass'n v. Ray, 285 S.W. 198, 215 Ky. 373.

75. Ky.—Dodson v. Powell, 215 S.W. 82, 185 Ky. 387.
Mass.—Panikowski v. Giroux, 172 N.E. 890, 272 Mass. 580.
Mich.—Roberts v. Congregation Shaarey Zedek, 218 N.W. 662, 242 Mich. 662.
Wis.—Hemmis v. Consolidated Wa-

inconsistent with the other provisions of the deed.[76]

b. Other Matters

A deed is conclusive as to the parties thereto. Parol or extrinsic evidence is not admissible to engraft a covenant or warranty on a deed, or to vary the legal effect of a covenant contained therein.

Character of instrument. Parol declarations by the grantor are not generally admissible to change the character of a deed.[77]

Parties. A deed is conclusive as to the parties thereto, and parol evidence is not admissible to show that the person described in the deed as the grantee was not the person intended.[78] In a case where an attorney in fact, acting under a power of attorney executed by both husband and wife, signed a deed of conveyance as the attorney of the husband only, it was held that the failure to execute the deed as attorney of the wife could not be overcome by evidence showing a mistake on the part of the attorney in drawing the deed.[79]

Covenants and warranties. Parol or extrinsic evidence is not admissible to engraft on a deed a covenant, agreement, or warranty,[80] such as a covenant of warranty or title,[81] or an agreement of the vendor to extinguish interfering claims[82] or existing encumbrances,[83] or a warranty as to the quantity,[84] character,[85] or condition[86] of the property; nor can the legal effect of a covenant contained in a deed,[87] such as a covenant of warranty or title,[88] or against encumbrances,[89] be enlarged, varied, re-

ter Power & Paper Co., 181 N.W. 743, 173 Wis. 518.
22 C.J. p 1129 note 59.

76. S.C.—Jacobs v. Mutual Ins. Co., 35 S.E. 221, 56 S.C. 558.

77. Wis.—Jones v. Caird, 141 N.W. 228, 153 Wis. 384, 388, Ann.Cas. 1914A 88.
22 C.J. p 1123 note 10.
Showing real nature of transaction see infra § 1015.

78. La.—Succession of Prescott, 127 So. 611, 170 La. 233—Eberle v. Eberle, 108 So. 549, 161 La. 313.
N.Y.—Liberty Bank of Buffalo v. High Park Development Co., 236 N.Y.S. 194, 134 Misc. 733, affirmed 234 N.Y.S. 832, 227 App.Div. 647.
22 C.J. p 1124 note 29, p 1245 note 20.

Forced heirs may use parol evidence to recover property transferred by ancestor, but not where ancestor never had title to property.—Eberle v. Eberle, 108 So. 549, 161 La. 313.

79. Iowa.—Wilkinson v. Getty, 13 Iowa 157, 81 Am.D. 428.

80. Ga.—Stonecypher v. Georgia Power Co., 189 S.E. 13, 183 Ga. 498, answers to certified questions conformed to, 189 S.E. 672, 55 Ga. App. 197.
Ky.—Mueller v. Storrs, 278 S.W. 557, 212 Ky. 176.
22 C.J. p 1127 note 48.

Use of property
In suit by grantees of lots, testimony that grantor represented that other lots would not be permitted to be used for business purposes is incompetent.—Gibney v. Stockdale Corporation, 174 A. 117, 20 Del.Ch. 272.

81. N.D.—Alsterberg v. Bennett, 106 N.W. 49, 14 N.D. 596.
22 C.J. p 1127 notes 49, 50.

82. Ky.—Machir v. McDowell, 4 Bibb 473.

83. Wis.—Desmond v. McNamara, 82 N.W. 701, 107 Wis. 126.
22 C.J. p 1123 note 6.

84. Mich.—Martin v. Hamlin, 18 Mich. 354, 100 Am.D. 181.
22 C.J. p 1127 note 51.

85. Minn.—McMurphy v. Walker, 20 Minn. 382.
22 C.J. p 1127 note 52.

86. N.Y.—Eighmie v. Taylor, 98 N. Y. 288.

87. Ala.—Corley v. Vizard, 84 So. 299, 203 Ala. 564.
Ga.—Arrington v. Arrington, 7 S.E. 2d 665, 189 Ga. 725.
Iowa.—Reit v. Driesen, 237 N.W. 325, 327, 212 Iowa 1011, citing **Corpus Juris.**
R.I.—Greenstein v. Rosenstein, 117 A. 528, 44 R.I. 407.
15 C.J. p 1312 note 11—22 C.J. p 1127 note 54.

Liability of wife
Where a married woman executes a general warranty deed in conjunction with her husband, oral evidence is generally incompetent to show that she intended only to convey her marital rights and did not intend to be liable on the covenants in the deed.—Watts v. Ramsey, 2 S.W.2d 409, 156 Tenn. 463.

Covenant running with land
Since covenant allowing grantee to remove improvements ran with land, subsequent vendee was unaffected by parol agreement of original vendee to replace improvements removed with new buildings.—Guardian Loan & Trustee Co. v. Schunke, Tex.Civ. App., 36 S.W.2d 585, error refused.

88. Ga.—Long v. Sullivan, 183 S.E. 71, 52 Ga.App. 318.
Ky.—Sales v. Duncan, 256 S.W. 17, 201 Ky. 161.
Tex.—Massad v. Bumpus, Civ.App., 146 S.W.2d 1073, error dismissed, judgment correct.
22 C.J. p 1128 note 55.

Showing agreement not to rely on covenant
Parol evidence of contemporaneous agreement not to rely on covenants of warranty violates rule against varying terms of legal instrument by parol.—Lost Creek Coal & Mineral Land Co. v. Hendon, 110 So. 308, 215 Ala. 212.

89. Ark.—Arkansas Trust Co. v. Bates, 59 S.W.2d 1025, 187 Ark. 331.
D.C.—Miller v. Schwinn, Inc., 113 F. 2d 748, 72 App.D.C. 282.
Ill.—Palmer v. Baum, 238 Ill.App. 472.
Iowa.—Pope v. Coe, 225 N.W. 939, 208 Iowa 759.
Neb.—McClure v. Campbell, 40 N.W. 595, 25 Neb. 57.
Tenn.—Stone v. Shuttle, 3 Tenn.App. 274.
Tex.—Pochyla v. Cralle, Civ.App., 42 S.W.2d 793.
22 C.J. p 1128 note 56.

Occupancy of tenant
(1) In an action for breach of covenant against encumbrances founded on the existence of an outstanding lease, defendants may not vary the terms of the deed by showing a contemporaneous oral agreement consenting to occupation by the lessee under the lease.—Klippel v. Borngesser, 188 N.W. 654, 177 Wis. 423.

(2) Oral evidence that grantee agreed to accept grantor's tenants is inadmissible as contradicting warranty deed containing covenant against incumbrances.—Western Grain Co. v. Beaver Land-Stock Co., 253 P. 539, 120 Or. 678.

(3) Where damages are sought for breach of covenant against encumbrances because of retention of possession by a tenant of the vendor, parol evidence is inadmissible to show that the grantees bought subject to the occupancy of the tenant and undertook for themselves to get possession.—Morriss v. Hesse,

stricted, or destroyed by parol evidence of simultaneous or prior agreements or of the intentions of the parties. Parol or extrinsic evidence is likewise inadmissible to affect a grantee's stipulation to pay a mortgage or outstanding purchase-money notes given by a prior owner.[90]

The admissibility of parol evidence to show that a grantee, as part of the consideration for a deed, assumed an existing encumbrance is considered infra § 950.

§ 917. Instruments of Compromise and Settlement

Written instruments of compromise or settlement are within the protection of the parol evidence rule.

The general rule is that where parties enter into a written compromise or settlement of claims or liabilities, the written instrument is not subject to be varied or contradicted in its terms or effect by parol or extrinsic evidence,[91] although it has, on the other hand, been said that settlements are always susceptible of explanation and correction.[92]

§ 918. Leases

A written lease is protected by the parol evidence rule.

The general rule, subject to exceptions and limitations considered infra §§ 929–1015, is that the terms and effect of a written lease cannot be added to, contradicted, or varied by parol or extrinsic evidence of the intentions of the parties, their negotiations leading up to the lease, or what was said and done prior to, and at the time of, executing the instrument.[93] Such evidence has been held inad-

Tex.Civ.App., 231 S.W. 317, reversing Civ.App., 210 S.W. 710.

Warranty against all claims

(1) Parol evidence is inadmissible to show that the grantor did not warrant against a particular encumbrance when the covenant was against all encumbrances.
Ark.—Sheffield v. Maxwell, 260 S.W. 399, 163 Ark. 448.
S.C.—Grice v. Scarborough, 29 S.C. L. 649, 42 Am.D. 391.

(2) Parol evidence is inadmissible to show that warranty deed, warranting against all claims, was not intended to warrant against a specific claim.—Texas Co. v. Snow, 291 S.W. 826, 172 Ark. 1128.

Showing agreement to remove encumbrance

Parol evidence is not admissible to show that the purchaser to a contract of sale or deed orally agreed to remove an encumbrance or lien against the realty where the written contract or deed contains a covenant or warranty against such encumbrance or lien.—Paloni v. Beebe, Utah, 110 P.2d 563.

90. Iowa.—Reit v. Dreisen, 237 N. W. 325, 212 Iowa 1011.
La.—Industrial Homestead Ass'n v. Sparacino, 153 So. 838, 179 La. 273.
22 C.J. p 1123 notes 7, 8.

91. U.S.—Peters v. Plains Petroleum Co., C.C.A.Okl., 43 F.2d 49—Nissen v. First Nat. Bank of Waterloo, Iowa, C.C.A.S.D., 267 F. 689.
Ariz.—Wallace v. First Nat. Bank, 7 P.2d 586, 39 Ariz. 451.
Ark.—Anderson v. Fletcher, 151 S.W. 2d 673.
Cal.—Holtham v. Savory, 238 P. 136, 72 Cal.App. 497.
Ill.—Hubbard v. Settles, 236 Ill.App. 227—United Boiler Heating & Foundry Co. v. Ackermann-Quigley Printing Co., 236 Ill.App. 111.
Ky.—Turner Elkhorn Coal Co. v. Smith, 39 S.W.2d 649, 239 Ky. 428—Pickrell & Craig Co. v. Bollinger-Babbage Co., 264 S.W. 737, 204 Ky. 314.
La.—Shannon v. Shannon, 177 So. 676, 188 La. 588.
Mich.—Montana Flour Mills Co. v. Lawrence, 194 N.W. 489, 224 Mich. 21.
Tex.—Massey-Harris Co. v. Bernard, Civ.App., 84 S.W.2d 1091, error dismissed.
22 C.J. p 1129 note 62.
Receipts in full see infra § 926.
Releases see infra § 927.

92. Ky.—Byrne v. Schwing, 6 B. Mon. 199.

93. U.S.—Washburn v. Gillespie, Okl., 261 F. 41, 171 C.C.A. 637, certiorari denied 40 S.Ct. 396, 252 U. S. 587, 64 L.Ed. 729, followed in Wright v. Gillespie, Okl., 261 F. 46, 171 C.C.A. 642, Howe v. Gillespie, Okl., 261 F. 48, 171 C.C.A. 644, O'Donnell v. Gillespie, Okl., 261 F. 48, 171 C.C.A. 644, Sutherland v. Gillespie, Okl., 261 F. 49, 171 C.C.A. 645, Renfrow v. Gillespie, Okl., 261 F. 49, 171 C.C.A. 645.
Ala.—Frazier v. Riley, 111 So. 10, 215 Ala. 517.
Ark.—Parker v. Keenan, 26 S.W.2d 69, 181 Ark. 467.
Cal.—Gibbs v. Seeger, 19 P.2d 514, 130 Cal.App. 123.
Colo.—Martin v. Grant, 8 P.2d 764, 90 Colo. 300—Wilmore v. Kalberer, 133 P. 763, 24 Colo.App. 209.
D.C.—Merritt v. Kay, 295 F. 973, 54 App.D.C. 152.
Ga.—Rice & Hutchins Atlanta Co. v. Griffin, 104 S.E. 634, 150 Ga. 607.
Hawaii.—Richards v. Ontai, 19 Hawaii 451.
Ill.—Hoefeld v. Ozello, 125 N.E. 5, 290 Ill. 147—Gale v. U. S. Brewing Co. of Chicago, 181 Ill.App. 381.
See Muller v. Bernstein, 198 Ill. App. 104—University Club of Chicago v. Deakin, 182 Ill.App. 484, reversed on other grounds 106 N.E. 790, 265 Ill. 257, L.R.A.1915C 854.
Kan.—Cushenbery v. Waite-Phillips Co., 240 P. 400, 119 Kan. 478.
Ky.—Piney Oil & Gas Co. v. Allen, 32 S.W.2d 325, 235 Ky. 767—Clark v. Fergerson, 20 S.W.2d 1013, 231 Ky. 36—Mitchell v. Ford Elkhorn Mining Co., 250 S.W. 811, 199 Ky. 131—Marshall v. Benge, 6 Ky.Op. 339.
La.—Brenner v. Ford, 6 La.App. 654.
Mich.—Patterson v. Butterfield, 221 N.W. 293, 244 Mich. 330—Polczynski v. Nowicki, 198 N.W. 976, 227 Mich. 415—Meredith v. McCormick, 175 N.W. 280, 208 Mich. 563, 8 A.L.R. 669.
Minn.—Randolph v. Thompson, 219 N.W. 91, 174 Minn. 283—Stewart v. Murray, 13 Minn. 426.
N.J.—Hoffman v. Seidman, 127 A. 199, 101 N.J.Law 106.
N.Y.—Loma Corporation v. Wing, 204 N.Y.S. 216, 123 Misc. 222.
N.C.—Ferguson v. Ballenger, 179 S. E. 663, 208 N.C. 829.
Okl.—Guess v. Miner, 265 P. 633, 130 Okl. 93—Horseshoe Mining Co. v. Red Rose Lead & Zinc Mining Co., 230 P. 492, 104 Okl. 45—Dixon v. McCann, 206 P. 597, 87 Okl. 109.
Or.—Temple Enterprises v. Combs, 100 P.2d 613, 128 A.L.R. 856.
Pa.—Stein v. Bell Telephone Co. of Pennsylvania, 151 A. 690, 301 Pa. 107—MacBrine-McAdams Realty Co., to Use of McAdams, v. Morris, 196 A. 511, 129 Pa.Super. 604—Yoder v. Swainbank, 82 Pa.Super. 568—Fox v. Boorse, 81 Pa.Super. 211—Camden Safe Deposit & Trust Co. v. Eavenson, 10 Pa.Dist. & Co. 749—Myers v. Martin Construction and Supply Co., 6 Pa. Dist. & Co. 718, 39 Lanc.L.Rev. 353, affirmed Myers v. Martin, 87 Pa.Super. 501, 40 Lanc.L.Rev. 81—Wright v. Milne, 9 Pa.Dist. 170.

missible to show that an instrument which is on its face a lease is in reality a contract of sale.[94]

§ 919. —— Conclusiveness as to Particular Matters

A lease is generally conclusive, as against parol or extrinsic evidence, as to all matters specified therein, such as rent, repairs, improvements, the term, and the use of the premises. An implied warranty in a lease cannot be contradicted by parol.

Description and identity of premises. A written lease is conclusive as to the description and identity of the demised premises, and cannot be contradicted, added to, or varied in this respect by parol evidence.[95]

Rent. A written lease cannot be varied by establishing a parol agreement between the parties modifying its terms as to the rent payable,[96] either with respect to the amount of rent to be paid according to its terms,[97] or the time[98] or mode[99] of payment; nor can an agreement be shown that payment of rent shall cease on a certain contingency or condition not named in the writing.[1]

Term. The statements in the lease as to the term thereof are conclusive, and the term can be neither enlarged nor restricted by showing a contemporaneous or prior parol agreement,[2] or a contrary understanding or intent of a party;[3] nor can an oral agreement be shown giving the tenant the right to surrender the premises and terminate the lease on the happening of certain contingencies, or at his pleasure.[4] However, an oral lease to take effect after the expiration of the written lease may be shown.[5]

Use of premises. The terms of a written lease with respect to the use of the premises cannot be contradicted or varied by parol or extrinsic evidence.[6] Thus, a covenant in the lease that the premises will not be used for certain purposes or in a certain manner cannot be controlled by parol evidence showing declarations that the covenant would not be enforced;[7] and, conversely, where the pur-

Philippine.—Legarda v. Zarate, 36 Philippine 68.
Tex.—Gulf Production Co. v. Warren, Civ.App., 99 S.W.2d 616, error refused, and certiorari denied Oakwood Realty Co. v. Gulf Production Co., 58 S.Ct. 27, 302 U.S. 707, 82 L.Ed. 546—Redden v. Pure Oil Co., Civ.App., 86 S.W.2d 874—Adkins v. Goodloe, Civ.App., 76 S.W. 2d 168, error dismissed.
W.Va.—Gwinn v. Rogers, 115 S.E. 428, 92 W.Va. 533.
Wis.—Blazei v. Cologne, 250 N.W. 752, 213 Wis. 48, citing **Corpus Juris.**
22 C.J. p 1129 note 65.

Bailment lease
Pa.—General Motors Acceptance Corporation v. Hartman, 174 A. 795, 114 Pa.Super. 544.

94. Cal.—County Nat. Bank & Trust Co. of Santa Barbara v. Investment Corporation of Santa Barbara, App., 109 P.2d 368.
Colo.—Simpson v. Nelson, 208 P. 455, 71 Colo. 490.
Ill.—Andrus v. Mann, 92 Ill. 40.
Showing real nature of transaction generally see infra § 1015.

95. Ill.—Ballance v. City of Peoria, 54 N.E. 428, 180 Ill. 29.
Mich.—Meredith v. McCormick, 175 N.W. 280, 208 Mich. 563, 8 A.L.R. 669.
Pa.—Stein v. Bell Telephone Co. of Pennsylvania, 151 A. 690, 301 Pa. 107—Lindsay v. Rose, 6 Pa.Dist. & Co. 325.
22 C.J. p 1130 note 73.

96. Cal.—County Nat. Bank & Trust Co. of Santa Barbara v. Investment Corporation of Santa Barbara, App., 109 P.2d 368.
N.Y.—Goerlitz v. Schwartz, 112 N.Y. S. 1119.
Okl.—Dixon v. McCann, 206 P. 597, 87 Okl. 109.
Pa.—Eareckson v. Hoyt, 58 Pa.Super. 531.
Wash.—Searl v. Shell Oil Co., 21 P. 2d 249, 172 Wash. 621.
Wyo.—Barrett v. First Nat. Bank of Green River, 62 P.2d 318, 319, 50 Wyo. 502, quoting **Corpus Juris.**
22 C.J. p 1131 note 76.

97. N.J.—Bayarsky v. Joseph Feld & Co., 4 A.2d 709, 122 N.J.Law 230, reversed on other grounds 8 A.2d 316, 123 N.J.Law 194.
Or.—Temple Enterprises v. Combs, 100 P.2d 613, 128 A.L.R. 856.
Wyo.—Barrett v. First Nat. Bank of Green River, 62 P.2d 318, 50 Wyo. 502.
22 C.J. p 1131 note 77.

Premature vacation of premises
The written provisions of a lease cannot be varied by alleged prior oral statements by lessor that he would accept less than total balance due should lessee vacate premises prior to expiration of lease.—Bastien v. Bronstine, 92 P.2d 736, 104 Colo. 521.

98. La.—Brenner v. Ford, 6 La.App. 654.
N.J.—Kistler v. McBride, 48 A. 558, 65 N.J.Law 553.
N.Y.—Giles v. Comstock, 4 N.Y. 270, 4 Comst. 270, 53 Am.D. 374.
22 C.J. p 1131 note 78.

99. Pa.—Stull v. Thompson, 25 A. 890, 154 Pa. 43.
22 C.J. p 1131 note 79.

1. Minn.—Chute Co. v. Latta, 142 N.W. 1048, 123 Minn. 69.
22 C.J. p 1131 note 80.

2. Mass.—Khederian v. John T. Connor Co., 159 N.E. 443, 262 Mass. 29.
Pa.—Knoll v. Jones, 1 Pa.Co. 485, affirmed Jones v. Knoll, 8 A. 857, 116 Pa. 85.
22 C.J. p 1132 note 86.

Renewal of lease
Oral agreements at or prior to the execution of a written lease as to renewal thereof are inadmissible where they vary terms of written instrument.—Doepfner v. Snyder, 160 A. 313, 109 N.J.Law 21.

3. Iowa.—Roberts v. Watson, 195 N.W. 211, 196 Iowa 816.
Tex.—Adkins v. Goodloe, Civ.App., 76 S.W.2d 168, error dismissed.

4. Ill.—Shamberg v. Stearns, 178 Ill.App. 587.
22 C.J. p 1132 note 87.

5. Cal.—Gabel v. Page, 92 P. 749, 6 Cal.App. 618.

6. Ill.—Hoefeld v. Ozello, 125 N.E. 5, 290 Ill. 147.
Mich.—Patterson v. Butterfield, 221 N.W. 293, 244 Mich. 330.
22 C.J. p 1129 note 65 [e].

Agreement to sign consent
A verbal agreement of the landlord, without consideration, to sign a consent to the use of the premises for certain purposes cannot be shown.—Nostrand v. Hughes, 67 N.Y. S. 72, 54 App.Div. 602.

7. N.Y.—Dodge v. Lambert, 15 N.Y. Super. 570.

pose for which the premises are to be occupied is not stated in the lease, parol evidence is not admissible to show that the property was to be devoted to a particular use.[8]

Repairs and improvements. A lease cannot ordinarily be added to by showing an agreement to make certain repairs and improvements not stipulated for in the instrument,[9] nor can the express stipulations of a lease in regard to these matters be varied or controlled by parol.[10] A written lease cannot be varied by showing an intention to create a lien on improvements in favor of the lessor in order to insure payment of the rent.[11]

Warranty. It cannot be shown by parol that there was an oral warranty in reference to the condition of the demised premises or property, or their fitness for the purpose for which they are liable, which is not contained in the lease itself.[12] Parol evidence cannot be introduced to contradict an implied warranty in a lease,[13] such as an implied warranty of title.[14]

Reservations and exceptions not contained in the lease cannot be shown by parol.[15]

Assignment; sublease. Where a lease is silent as to the lessee's right to assign his term, parol evidence is inadmissible to show that the premises were to be used and occupied only by the lessee himself.[16] A right given by the lease to sublet either generally or for certain purposes cannot be restricted by evidence of a contemporaneous oral prohibition against subletting for a purpose within the general terms of the authority.[17]

Accessories to be furnished. The terms of a written lease cannot be added to by showing an agreement on the part of the lessor to furnish certain accessories which are necessary or convenient to the use of the demised premises or property, such as water, steam, and the like;[18] nor can a custom of furnishing such accessories be shown where this would add to the terms of the written instrument by parol.[19]

Fixtures. A written lease dealing with the subject of fixtures cannot be varied by evidence of an oral agreement as to fixtures,[20] nor can an agreement that the tenant shall have the right to remove buildings or other fixtures erected by him, at the end of his term, be added to a lease by parol evidence.[21]

Other particular matters as to which leases have been held conclusive and not subject to parol or extrinsic evidence include the quantity of mineral to be mined,[22] the time for conducting drilling operations,[23] the tenant's right of access to certain places,[24] the return of certain live stock by the lessee of a ranch,[25] the price which one party was to pay to the other for substances obtained from the leased property[26] or for merchandise there purchased,[27] and the right of the tenant to purchase the leased premises.[28]

8. N.J.—Hoffman v. Seidman, 127 A. 199, 101 N.J.Law 106.

9. N.Y.—Bailey v. Krupp, 110 N.Y.S. 994, 59 Misc. 459.
Wis.—Blazei v. Cologne, 250 N.W. 752, 753, 213 Wis. 48, quoting **Corpus Juris.**
22 C.J. p 1131 note 81.

10. Ala.—Frazier v. Riley, 111 So. 10, 215 Ala. 517.
La.—Algiers Homestead Ass'n v. Salathe, App., 188 So. 202.
Wis.—Blazei v. Cologne, 250 N.W. 752, 753, 213 Wis. 48, quoting **Corpus Juris.**
22 C.J. p 1131 note 82, p 1129 note 65 [b].

11. Okl.—Horseshoe Mining Co. v. Red Rose Lead & Zinc Mining Co., 230 P. 492, 104 Okl. 45.

12. Ark.—Parker v. Keenan, 26 S.W.2d 69, 181 Ark. 467.
22 C.J. p 1132 note 91.

Strength of floor
Parol evidence is inadmissible to show representations of the landlord as to the strength of the floor, where such evidence contradicts or adds to the terms of the lease.
Mich.—Metzgar Register Co. v. Thomas Canning Co., 190 N.W. 245, 220 Mich. 435.
N.Y.—Madison Tire & Rubber Co. v. Malcolm Tire Co., 205 N.Y.S. 355, 123 Misc. 425.

13. Cal.—La France v. Kashishian, 269 P. 655, 204 Cal. 643.

14. Cal.—La France v. Kashishian, supra.

15. Mass.—Hovey v. Newton, 7 Pick. 29.
N.H.—Meredith Mechanic Assoc. v. American Twist Drill Co., 20 A. 330, 66 N.H. 267.

16. Ala.—Nave v. Berry, 22 Ala. 382.

17. Mich.—Harrison v. Howe, 67 N.W. 527, 109 Mich. 476.
22 C.J. p 1132 note 85.

18. Ill.—Slaughter v. Johnson, 128 Ill.App. 417.
22 C.J. p 1130 note 70.

19. R.I.—Watkins v. Green, 46 A. 38, 22 R.I. 34.

20. Ala.—Middleton v. Alabama Power Co., 71 So. 461, 196 Ala. 1.
Tex.—Steinberg v. Morgan, Civ.App., 300 S.W. 253.

21. Pa.—Hamilton v. Fleck, 95 A. 252, 249 Pa. 607.
22 C.J. p 1131 note 75.

22. U.S.—Williams Pocahontas Coal Co. v. Berwind Land Co., C.C.A.W.Va., 76 F.2d 319, certiorari denied 56 S.Ct. 128, 296 U.S. 610, 80 L.Ed. 432.
Tenn.—Weatherly v. American Agr. Chemical Co., 65 S.W.2d 592, 16 Tenn.App. 613.

23. Okl.—Dixon v. McCann, 206 P. 597, 87 Okl. 109.
Tex.—Jackson v. Pure Oil Operating Co., Civ.App., 217 S.W. 959.

24. N.Y.—Schulte Realty Co. v. Pulvino, 179 N.Y.S. 371.

25. S.D.—Hobbs v. Whitelock, 231 N.W. 904, 57 S.D. 198.

26. Colo.—Wolf Tongue Mining Co. v. Hinman, 182 P. 16, 67 Colo. 406.

27. Wash.—Searl v. Shell Oil Co., 21 P.2d 249, 172 Wash. 621.

28. Colo.—Simpson v. Nelson, 208 P. 455, 71 Colo. 490.
Mich.—Polczynski v. Nowicki, 198 N.W. 976, 227 Mich. 415.
N.Y.—Sargent v. Vought, 185 N.Y.S. 578, 194 App.Div. 807.

§ 920. Letters

Letters are protected by the parol evidence rule if they are contractual in nature.

The parol evidence rule may protect letters from variation or contradiction where they are of a contractual nature, containing offers, propositions, representations, and the like, especially where it is intended that the receiver shall act on the faith of the contents of the letter;[29] but letters forming no part of a contract or not contractual in their nature are not protected.[30]

§ 921. Licenses

A license, at least if contractual in nature, cannot be varied by parol or extrinsic evidence.

A license is not subject to be varied by parol or extrinsic evidence, at least if the license is of a contractual nature;[31] but on the other hand, it has been considered that a license not under seal, and not based on any consideration, while more cogent and persuasive than oral evidence, is of no higher nature, and may be explained, varied, or contradicted by parol.[32]

§ 922. Mortgages and Deeds of Trust

Mortgages and deeds of trust are within the protection of the parol evidence rule.

Except as indicated infra §§ 929–1015, in connection with the limitations of, and exceptions to, the parol evidence rule generally, the terms and legal effect of mortgages and deeds of trust cannot be added to, varied, controlled, or contradicted by parol or extrinsic evidence.[33] Thus it cannot be shown that a transaction evidenced by a written instrument which clearly appears on its face to be a mortgage was intended by the parties to be a conditional sale,[34] an absolute conveyance,[35] or an assignment.[36]

§ 923. —— Conclusiveness as to Particular Matters

Mortgages are usually conclusive, as against parol or extrinsic evidence, as to all the matters set forth therein, such as the debt or obligation secured, the property covered, and the time and mode of payment.

Particular matters as to which the terms of a mortgage have been held conclusive and a bar to

Pa.—Lindsay v. Rose, 6 Pa.Dist. & Co. 325.
22 C.J. p 1129 note 65 [c].

29. U.S.—New York Alaska Gold Dredging Co. v. Walbridge, C.C.A. Alaska, 76 F.2d 655, 662, quoting **Corpus Juris**—Nisley Co. v. Rudolph & Bauer, C.C.A.Ky., 64 F.2d 571—South Florida Lumber Mills v. Breuchaud, C.C.A.Fla., 51 F.2d 490, certiorari denied 52 S.Ct. 37, 284 U.S. 659, 76 L.Ed. 558.
Colo.—Middlekamp v. Smith, 213 P. 673, 73 Colo. 129—Ownbey v. Silverstein, 194 P. 607, 69 Colo. 325.
Ky.—Barret v. Ivison, 57 S.W.2d 1005, 248 Ky. 243.
Minn.—Rast v. Bergquist, 235 N.W. 372, 182 Minn. 372.
Mo.—Levine v. Hochman, 273 S.W. 204, 217 Mo.App. 76.
Pa.—Dorsheimer v. Read Machinery Co., 81 Pa.Super. 46.
22 C.J. p 1132 note 92.
Writing not expressing entire agreement see infra § 1013.

Terms contained by implication in a letter cannot be varied by parol evidence.—Fitch v. Tyler, 288 P. 74, 105 Cal.App. 306—22 C.J. p 1132 note 92 [b].

Intent of writer of letters must be deduced from words used where there is nothing in letters showing sarcasm or irony.—Cochran v. Lorraine Mfg. Co., 155 A. 572, 52 R.I. 17.

30. Ariz.—Atlantic Commission Co. v. Noe, 53 P.2d 1088, 47 Ariz. 123.
Cal.—Kornblum v. Bank of Italy, 222 P. 143, 64 Cal.App. 170.
Mass.—Povey v. Colonial Beacon Oil Co., 200 N.E. 891, 294 Mass. 86.
Mich.—In re Taylor's Estate, 182 N.W. 101, 213 Mich. 497.
Minn.—Farmers' Handy Wagon Co. v. Askegaard, 172 N.W. 881, 143 Minn. 13.
Pa.—Garrison v. Salkind, 132 A. 125, 285 Pa. 265.
Tex.—Freeport Town-Site Co. v. S. H. Hudgins & Sons, Civ.App., 212 S.W. 287, error refused.
22 C.J. p 1133 note 95.
Noncontractual writings generally see infra § 928.

31. U.S.—Evory v. Candee, C.C. Conn., 8 F.Cas.No.4,583, 17 Blatchf. 200.
Va.—Stewart-Warner Corporation v. Smithey, 175 S.E. 882, 163 Va. 476.
22 C.J. p 1133 note 96.

32. N.Y.—Fargis v. Walton, 14 N.E. 303, 107 N.Y. 398.

33. Colo.—Howry v. Sigel-Campion Live Stock Commission Co., 249 P. 658, 80 Colo. 143.
Ill.—Concordia Building & Loan Ass'n v. Burton, 9 N.E.2d 466, 291 Ill.App. 167—Buttas v. Juddson Hotel Co., 256 Ill.App. 305.
Kan.—Beeler v. Lind, 235 P. 113, 118 Kan. 276.
La.—Commercial Bank of Arcadia v. Simmonds, 2 La.App. 658.
Me.—Whitney v. Lowell, 33 Me. 318.
Md.—Whitelock v. Whitelock, 143 A. 712, 156 Md. 115.
Mo.—Stephens v. Bell, App., 106 S.W.2d 19.
N.Y.—Traders' Nat. Bank of Rochester v. Laskin, 144 N.E. 784, 238 N.Y. 535, reversing 201 N.Y.S. 728, 207 App.Div. 18, and amendment of remittitur denied 147 N.E. 172, 239 N.Y. 507.
Okl.—Allis-Chalmers Mfg. Co. v. Hawhee, 105 P.2d 410, 187 Okl. 670.
Tenn.—Dobson v. Dobson, 1 Tenn. App. 369—Horn v. Goodman, 1 Tenn.App. 90.
Tex.—South Texas Implement & Machine Co. v. Anahuac Canal Co., Com.App., 280 S.W. 521, affirming South Texas Implement & Machinery Co. v. Anahuac Canal Co., Civ.App., 269 S.W. 1097—Chandler v. Guaranty Mortg. Co., Civ.App., 89 S.W.2d 250.
Utah.—Garrett v. Ellison, 72 P.2d 449, 93 Utah 184, 129 A.L.R. 666.
Wash.—Investment & Securities Co. v. Adams, 72 P.2d 288, 192 Wash. 41.
22 C.J. p 1133 note 98.

Covenant against encumbrances
A mortgagor who covenanted with the mortgagee that he owned the property free of encumbrances could not, as between the parties, testify that he notified the mortgagee that others claimed an interest.—Hansen v. Daniels, 272 P. 941, 73 Utah 142.

A written agreement granting possession to the mortgagee by the mortgagor cannot be varied by proof of antecedent or contemporaneous negotiations.—Seifert v. Mutual Ben. Life Ins. Co., 281 N.W. 770, 203 Minn. 415.

34. Pa.—Brown v. Nickle, 6 Pa. 390.
Vt.—Wing v. Cooper, 37 Vt. 169.

35. Md.—Fowler v. Pendleton, 88 A. 124, 121 Md. 297.
Wash.—Goon Gan v. Richardson, 17 P. 762, 16 Wash. 373.

36. Tex.—Dunham v. McNatt, 39 S.W. 1016, 15 Tex.Civ.App. 552.

parol or extrinsic evidence include the personal liability of the mortgagor,[37] the payment of taxes,[38] the order of priority of several obligations secured by the same mortgage,[39] and the right of the mortgagor to remove[40] or sell[41] the mortgaged property. Such evidence has also been held inadmissible to deprive the mortgage of its priority over other liens,[42] to vary a subordination clause,[43] or, where there are two mortgages securing the same liability to contradict them with respect to which property is primarily liable.[44]

Debts or obligations secured. Ordinarily the terms of a mortgage are conclusive as to the debts or obligations intended to be secured thereby and cannot be added to or varied in this respect by parol evidence.[45] Parol evidence is not admissible to show that the mortgage was security for a debt not in the contemplation of the parties when it was executed.[46] Where the indebtedness is specially described, it is incompetent to show that by a contemporaneous parol agreement it was intended to secure a debt of a wholly different character;[47] and where the amount of the future advance was specified, and that amount was advanced, it was held not competent to show by parol that the mortgage was intended also to secure a further indebtedness so as to give it a preference over junior encumbrances.[48]

Instances in which parol evidence is admissible to show the true consideration for a mortgage are considered infra § 952.

Property included. As a general rule, the description in the mortgage of the property covered thereby is conclusive, and parol or extrinsic evidence is not admissible to contradict, add to, or vary such description by showing a different intention of the parties.[49] Instances in which parol evidence is admissible as necessary to properly identify the subject matter of a mortgage are considered infra § 1007.

Time and mode of payment. Parol evidence is not admissible to vary or contradict the express language of a mortgage with reference to the time when the debt secured thereby,[50] or interest there-

37. Tex.—Rudolph v. Price, Civ. App., 146 S.W. 1037.
22 C.J. p 1134 note 3.

Fiduciary capacity
Parol evidence as to the intent of mortgagors to be bound individually, or only in a fiduciary capacity, is inadmissible if contradictory of the written agreement.—East River Sav. Bank v. Samuels, 31 N.E.2d 906, 284 N.Y. 470, reversing 20 N.Y.S.2d 664, 259 App.Div. 870.

Wife's joinder in mortgage
A married woman, who has joined with her husband in a joint promise to pay the debt secured by a mortgage, cannot vary the instrument by parol evidence that she joined in the mortgage for the sole purpose of releasing her inchoate interest.—Noble County Bank v. Waterhouse, 163 N.E. 119, 89 Ind.App. 94—22 C.J. p 1133 note 98 [d].

Joinder in extension agreement
An extension agreement which by its terms renders a signer personally liable for the mortgage debt cannot be contradicted by parol evidence that such person was not intended to be held personally.—Norfolk County Trust Co. v. Green, 24 N.E.2d 12, 304 Mass. 406.

38. N.J.—Marneil Realty Corporation v. Twin Brook Realty Corporation, 181 A. 882, 119 N.J.Eq. 205.

39. Ill.—Schultz v. Plankinton Bank, 30 N.E. 346, 141 Ill. 116, 33 Am.S. R. 290, affirming 40 Ill.App. 462.
Pa.—Hancock's App., 34 Pa. 155.

40. Tex.—Universal Credit Co. v. O'Neal, Civ.App., 140 S.W.2d 596.
Utah.—Miller v. Manhattan Fire & Marine Ins. Co., 290 P. 937, 76 Utah 540.

41. Kan.—Manchester State Bank v. Elmo Farmers' Union Co-op. Business Ass'n, 241 P. 118, 119 Kan. 835.

42. Pa.—Reading v. Hopson, 90 Pa. 494.
22 C.J. p 1134 note 4.

43. N.Y.—York Mortg. Corporation v. Clotar Const. Corporation, 235 N.Y.S. 50, 226 App.Div. 827, reversed on other grounds 172 N.E. 265, 254 N.Y. 128.

44. La.—McRae v. His Creditors, 16 La.Ann. 305.

45. Kan.—Thomas v. Citizens' State Bank of Wichita, 283 P. 507, 129 Kan. 540.
S.C.—First Nat. Bank v. Pierson, 117 S.E. 542, 124 S.C. 327.
S.D.—Charles Friend & Son v. Schmidt, 233 N.W. 913, 57 S.D. 477, quoting **Corpus Juris.**
22 C.J. p 1134 note 8.

Amount secured
The terms of a mortgage are usually conclusive as to the amount of money secured thereby.—Bejil v. Blumberg, Tex.Civ.App., 215 S.W. 471.

Past or future debts
(1) A mortgage which by its terms is to cover future debts cannot be varied in this particular by contradictory parol evidence.
Ala.—First Nat. Bank v. Bain, 188 So. 64, 237 Ala. 580.
S.C.—Ex parte American Fertilizing Co., 115 S.E. 236, 122 S.C. 171.
(2) Unsupported testimony of the mortgagor that the mortgage was given as security for past and future advances, and not for moneys received at the time, is insufficient to overcome provisions calling for payment of a specific sum and is therefore properly excluded.—Dixon v. Minogue, 120 A. 664, 276 Pa. 562.

46. Ala.—Wilkerson v. Tillman, 66 Ala. 532.
41 C.J. p 456 note 51.

47. Ark.—Briggs v. Steele, 121 S.W. 754, 91 Ark. 458.
41 C.J. p 456 note 55.

48. N.Y.—Truscott v. King, 6 N.Y. 147—Murray v. Barney, 34 Barb. 336.

49. Iowa.—Farmers' Sav. Bank of Slater v. Weeks, 227 N.W. 508, 209 Iowa 26—Johnson v. Turnholt, 203 N.W. 715, 199 Iowa 1331.
Tex.—South Texas Implement & Machine Co. v. Anahuac Canal Co., Com.App., 280 S.W. 521, affirming South Texas Implement & Machinery Co. v. Anahuac Canal Co., Civ. App., 269 S.W. 1097—Simon v. State Mut. Life Assur. Co., Civ. App., 126 S.W.2d 682, error refused —Childress v. First State Bank of Barnhart, Civ.App., 264 S.W. 350.
22 C.J. p 1135 note 14.
"It is a well-settled rule that parol evidence may aid but not make a description" in a chattel mortgage.—Pace v. Threewit, 88 P.2d 247, 249, 31 Cal.App.2d 509.

50. Ala.—Formby v. Williams, 81 So. 682, 203 Ala. 14.
Iowa.—Farmers' Sav. Bank of Sla-

on,[51] shall become payable; nor can it be shown that it was intended that payment should be made only out of a certain fund.[52]

§ 924. Powers of Attorney

A power of attorney is protected by the parol evidence rule.

A power of attorney cannot be added to, varied, or contradicted by parol evidence,[53] although it has been held in several cases that in a proper case such evidence may be received to interpret the powers conferred by the instrument.[54]

§ 925. Printed Conditions of Sale at Auction

Printed conditions of sale at an auction are within the parol evidence rule.

It has been held that the printed conditions under which a sale by auction proceeds cannot be varied or contradicted by parol evidence of the verbal statements of the auctioneer made at the time of sale, unless it is for the purpose of proving fraud.[55]

§ 926. Receipts

a. General rules

b. Applications of rules

a. General Rules

Receipts are not protected by the parol evidence rule unless they are contractual in nature. An instrument constituting both a receipt and a contract is protected only as to the contractual part.

It is well settled as a general proposition that the rule excluding parol or extrinsic evidence to vary or contradict written instruments does not apply to mere receipts, and that these may be contradicted by showing that money receipted for was not in fact paid, that certain items were or were not intended to be included, or otherwise.[56] Such in-

ter v. Weeks, 227 N.W. 508, 209 Iowa 26.
N.J.—Binns v. Smith, 115 A. 69, 93 N.J.Eq. 33.
22 C.J. p 1135 note 16.
Parol evidence as to time for payment or performance generally see supra § 853.

A written agreement extending the due date cannot be contradicted by parol evidence as to the intent of one of the parties.—Alliance Trust Co. v. Armstrong, 186 So. 633, 185 Miss. 148.

51. Md.—Owens v. Graetzel, 132 A. 265, 149 Md. 689.

52. Va.—Sangston v. Gordon, 22 Gratt. 755, 63 Va. 755.
22 C.J. p 1135 note 17.

53. Conn.—Di Blasi v. Di Blasi, 159 A. 477, 114 Conn. 539.
La.—Landis v. Agnew, 97 So. 601, 154 La. 435—Noble v. Plouf, 97 So. 599, 154 La. 429.
Tex.—Smith v. Overton, Civ.App., 295 S.W. 702.
22 C.J. p 1135 note 19.

54. Mich.—Coldwater Nat. Bank v. Buggie, 75 N.W. 1057, 117 Mich. 416.
22 C.J. p 1135 note 20.
Construction of language generally see infra §§ 959–962.

55. Mo.—Choteau v. Goddin, 39 Mo. 229, 90 Am.D. 462.

56. U.S.—New York Life Ins. Co. v. Seifris, C.C.A.Pa., 46 F.2d 391—Wunderlich v. National Surety Corporation, D.C.Minn., 24 F.Supp. 640, reversed on other grounds, C.C.A., National Surety Corporation v. Wunderlich, 111 F.2d 622—Burget v. Cranston, C.C.A.Ohio, 297 F. 32, certiorari denied 45 S.Ct. 94, 266 U.S. 610, 69 L.Ed. 466—Stanley Bulkley Co. v. U. S., 26 C.C.P.A. (Customs) 368, 374, citing **Corpus Juris.**
Ala.—Nearhos v. Keith, 130 So. 409, 410, 221 Ala. 643, citing **Corpus Juris**—Sovereign Camp, W. O. W., v. Gay, 117 So. 78, 217 Ala. 543—McCarty-Greene Motor Co. v. House, 114 So. 60, 216 Ala. 666.
Cal.—Coats v. General Motors Corporation, 81 P.2d 906, 11 Cal.2d 601, prior opinion, App., 64 P.2d 1168—Lawrence v. Premier Indemnity Assur. Co., 182 P. 431, 180 Cal. 688—McKenzie v. Los Angeles Life Ins. Co., 275 P. 1003, 97 Cal. App. 659—Gladium Co. v. Thatcher, 272 P. 340, 95 Cal.App. 85.
Colo.—Hickman-Lunbeck Grocery Co. v. Hager, 227 P. 829, 75 Colo. 554—Plains Iron Works Co. v. Haggott, 188 P. 735, 68 Colo. 121.
D.C.—Heiskell v. Curtis, 259 F. 987, 49 App.D.C. 91.
Fla.—Schmitt v. Bethea, 82 So. 817, 78 Fla. 304.
Ga.—Oliver v. Head, 2 S.E.2d 716, 60 Ga.App. 13.
Idaho.—Idaho Gold Dredging Corporation v. Boise Payette Lumber Co., 115 P.2d 401—Berryman v. Dore, 251 P. 757, 759, 43 Idaho 327, citing **Corpus Juris.**
Ill.—Deloney v. Dependable Accident & Health Ins. Co., 263 Ill. App. 53—Atherton v. Shelly, 217 Ill.App. 419. See Clark v. Pacific Mut. L. Ins. Co., 185 Ill.App. 580.
Iowa.—D. F. Hallowell & Sons v. Van Zetten, 239 N.W. 593, 213 Iowa 748—Bremhorst v. Phillips Coal Co., 211 N.W. 898, 202 Iowa 1251—Peerboom v. Minges, 207 N.W. 753, 201 Iowa 706, followed in Gibson & Enos v. Minges, 207 N.W. 755—Coe v. Moline Power Farming Corporation, 202 N.W. 265—State v. Amrine, 200 N.W. 602, 198 Iowa 968—Effron, Kushner & Co. v. American Ry. Express Co., 193 N.W. 539, 195 Iowa 1168—Yardley v. Iowa Electric Co., 191 N.W. 791, 195 Iowa 380—Higley & Co. v. Burlington, C. R. & N. Ry. Co., 68 N.W. 829, 99 Iowa 503, 61 Am.S.R. 250—Thompson v. Maxwell, 38 N.W. 125, 74 Iowa 415—Lowe Bros. & Co. v. Young, 13 N.W. 329, 59 Iowa 364.
Kan.—Loflin v. Ault, 87 P.2d 524, 149 Kan. 340—Blomberg v. State Bank of Ogden, 241 P. 242, 118 Kan. 688, 119 Kan. 691.
Ky.—Drane v. Louisville Ry. Co., 131 S.W.2d 439, 279 Ky. 490.
Me.—Appeal of Crockett, 154 A. 180, 130 Me. 135.
Md.—Hirons v. Hubbell, 132 A. 645, 149 Md. 593—Realty & Construction Corporation v. Bresnan, 112 A. 182, 137 Md. 276.
Mass.—Povey v. Colonial Beacon Oil Co., 200 N.E. 891, 294 Mass. 86—Rosenblatt v. Holstein Rubber Co., 183 N.E. 705, 281 Mass. 297—Lubin v. Hedtler, 146 N.E. 660, 251 Mass. 422—Foster v. Commercial Nat. Bank, 142 N.E. 767, 248 Mass. 279—Allen v. Abramson, 139 N.E. 648, 245 Mass. 321—Macdonald v. Dana, 27 N.E. 993, 154 Mass. 152.
Mich.—Richards v. Rogers Boiler & Burner Co., 234 N.W. 428, 252 Mich. 52, reversing 226 N.W. 871, 248 Mich. 155—Pawlicki v. Hollenbeck, 229 N.W. 626, 628, 250 Mich. 38, citing **Corpus Juris**—Wills Sainte Claire, Inc., v. Laffrey, 226 N.W. 660, 248 Mich. 24—Skuratowicz v. Highland Park State Bank, 208 N.W. 437, 234 Mich. 356—Karnov v. Goldman, 201 N.W. 447, 229 Mich. 551—Brusseau v. Potter's Estate, 185 N.W. 836, 837, 217 Mich. 165, citing **Corpus Juris.**
Minn.—Thompson v. Layman, 42 N. W. 1061, 41 Minn. 295.

struments are not protected by the parol evidence rule because they are not contractual in their nature, but are mere admissions or acknowledgments, and the reason which has given rise to the parol evidence rule has no application to them;[57] and it has also been considered that receipts are usually general in their expressions, that matters not thought of at the time should not be controlled by their general expressions, contrary to right and to the intention of the parties, and that many mistakes are made in settlements, to correct which the doors of justice should not be shut by the general terms of a receipt, which describes no particulars of what is settled.[58] When a receipt contains no general or vague expressions, but is definitely descriptive of what is intended to be affected thereby, such a receipt, like other writings in general, must not be assailed with parol evidence, unless on the ground of fraud.[59]

Receipts constituting or embodied in contracts. Where a writing, although in the form of a receipt, also embodies the elements of a contract, it is, in

Miss.—Allen v. Allen, 168 So. 658, 175 Miss. 735—Blacketor v. Cartee, 161 So. 696, 172 Miss. 889.

Mo.—Meyer v. Weber, 109 S.W.2d 702, 233 Mo.App. 832—Ferrenbach v. Fehlig, 74 S.W.2d 503, 505, citing **Corpus Juris**—Wind v. Bank of Maplewood & Trust Co., App., 58 S.W.2d 332, 334, citing **Corpus Juris**—Crocker v. MacCartney, App., 24 S.W.2d 649—Bert v. Rhodes, App., 258 S.W. 40—Eggimann v. Houck, App., 240 S.W. 478.

Mont.—Nuhn v. Nuhn, 37 P.2d 571, 97 Mont. 596—Gallaher v. Theilbar Realties, 18 P.2d 1101, 93 Mont. 421.

N.H.—Markarian v. Bartis, 199 A. 573, 89 N.H. 370—Bunker v. Great Falls Mfg. Co., 146 A. 529, 84 N.H. 84—Steinfield v. Monadnock Mills, 123 A. 224, 81 N.H. 152.

N.J.—Adams v. Camden Safe Deposit & Trust Co., 2 A.2d 361, 121 N.J. Law 389, reversing 188 A. 913, 15 N.J.Misc. 48—Husted v. Sugarman, 150 A. 417, 106 N.J.Law 365—Otis Elevator Co. v. Stafford, 111 A. 695, 95 N.J.Law 79—Finkelstein v. Brodsky, 157 A. 654, 10 N.J.Misc. 55, affirmed 163 A. 664, 110 N.J. Law 13—Smith v. Gavin, 136 A. 428, 5 N.J.Misc. 323.

N.Y.—Klein v. Metropolitan Life Ins. Co., 8 N.Y.S.2d 351, 255 App.Div. 335, appeal denied.

N.C.—Jenkins v. Wood, 160 S.E. 488, 201 N.C. 460.

Or.—McCargar & McKay v. Federal Securities Co., 284 P. 179, 134 Or. 342, rehearing denied 293 P. 595, 134 Or. 342—Pierce v. Northern Pac. Ry. Co., 271 P. 976, 127 Or. 461, 62 A.L.R. 644—Marks v. Twohy Bros. Co., 194 P. 675, 98 Or. 514.

Pa.—Wagner v. Marcus, 136 A. 847, 848, 288 Pa. 579, citing **Corpus Juris**—Haze v. Home Friendly Ins. Co. of Maryland, 197 A. 632, 130 Pa.Super. 366—Lion Match Co. v. Frank, 169 A. 13, 110 Pa.Super. 599—Pittsburgh-Texas Gas & Oil Co. v. Adams, 79 Pa.Super. 511.

S.C.—Cain v. Whitlock, 182 S.E. 752, 178 S.C. 289—McGuinn v. Ætna Life Ins. Co., 171 S.E. 793, 171 S. C. 136—Gladden v. Keistler, 140 S.E. 161, 141 S.C. 524.

S.D.—Hoidal v. Runehey, 225 N.W. 299, 55 S.D. 171.

Tenn.—Kenner v. City Nat. Bank, 46 S.W.2d 46, 164 Tenn. 119, rehearing granted on other grounds 47 S. W.2d 756, 164 Tenn. 288.

Tex.—Cox v. Jasper, Civ.App., 97 S. W.2d 530—National Life & Accident Ins. Co. v. Baughman, Civ. App., 54 S.W.2d 537, 538, citing **Corpus Juris**—Holt v. First State Bank of Miami, Civ.App., 32 S.W. 2d 386.

Va.—Honaker Lumber Co. v. Kiser, 113 S.E. 718, 134 Va. 50.

Wash.—Elliott v. Seattle Co., 34 P. 2d 442, 178 Wash. 94—McCourtie v. Bayton, 294 P. 238, 159 Wash. 418—Kilbourne v. Kilbourne, 287 P. 41, 156 Wash. 439—Donovan v. Hallowell, 248 P. 412, 140 Wash. 312—Hill Syrup Co. v. National City Bank of Seattle, 224 P. 578, 129 Wash. 171.

W.Va.—Winfree v. Dearth, 188 S.E. 880, 118 W.Va. 71—Huminsky v. Gary Nat. Bank, 150 S.E. 9, 11, 107 W.Va. 658, citing **Corpus Juris**—Holcombe v. Laurel Creek Coal Co., 123 S.E. 248, 96 W.Va. 473.

Wis.—U. S. Fidelity & Guaranty Co. v. Pullen, 283 N.W. 462, 230 Wis. 137—Nimz v. Fullerton Lumber Co., 247 N.W. 338, 211 Wis. 36—Lefebvre v. Nickolai, 236 N.W. 684, 205 Wis. 115—Danielson v. Bank of Scandinavia, 230 N.W. 83, 201 Wis. 392, 70 A.L.R. 746—Stuart v. Crowley, 217 N.W. 719, 195 Wis. 47—Durkin v. Machesky, 188 N.W. 97, 177 Wis. 595.

22 C.J. p 1135 note 22.

Claims covered by receipt

(1) Receipt for money covering damage to automobile alone could be shown not to cover claim for personal injuries against insured.—Pawlicki v. Hollenbeck, 229 N.W. 626, 250 Mich. 38.

(2) Beneficiary of insurance policy could show that receipt was given for sum received in payment for sickness disability, hospital confinement, and fatal sickness expenses, and not for accidental death of insured.—Inter-Ocean Casualty Co. v. Wilkins, 182 N.E. 252, 96 Ind.App. 231.

Carrier's receipt

Parol evidence is admissible to show that a carrier's receipt never had any legal existing or binding force, and was given under such circumstances that it failed to state the agreement of the parties.—Purcell v. Southern Express Co., 34 Ga. 315.

Receipt given in representative capacity

Administrator could show that proceeds of insurance policy belonged to him in his personal capacity, notwithstanding he signed receipt for such proceeds as administrator of estate.—Hall v. Simmons, 179 S.E. 272, 50 Ga.App. 634.

In Louisiana

(1) It has been held that a receipt for money paid is not conclusive as between the parties and may be explained or contradicted by parol evidence.—Cappel v. Evansville Oil Corporation, App., 195 So. 104—Johnson v. New Orleans Electric Engineering, App., 179 So. 121—State ex rel. Moulin v. Ideal Savings & Homestead Ass'n, App., 178 So. 521—Otis Elevator Co. v. Southern Hat Co., 124 So. 696, 697, 11 La.App. 699, citing **Corpus Juris.**

(2) However, a contrary view has been indicated in some cases.—Poullet v. Life & Casualty Ins. Co. of Tennessee, App., 167 So. 870—Green v. Johnson, 129 So. 384, 14 La.App. 110.

57. U.S.—Freiberg v. Pierce, C.C.A. Okl., 83 F.2d 961.

Ga.—Crider v. City Supply Co., 85 S.E. 350, 16 Ga.App. 377.

Mich.—Brusseau v. Potter's Estate, 185 N.W. 836, 837, 217 Mich. 165, citing **Corpus Juris.**

N.H.—Steinfield v. Monadnock Mills, 123 A. 224, 81 N.H. 152.

Pa.—Wagner v. Marcus, 136 A. 847, 288 Pa. 579.

Tex.—Alexander v. Meredith, Civ. App., 262 S.W. 111.

22 C.J. p 1137 note 25.

58. Vt.—Raymond v. Roberts, 2 Aik. 204, 16 Am.D. 698.

59. Pa.—Wagner v. Marcus, 136 A. 847, 848, 288 Pa. 579, quoting **Corpus Juris.**

22 C.J. p 1137 note 24.

so far as it expresses the contract or is contractual in its nature, subject to the same rules as any other contract and is ordinarily not open to variation or contradiction by parol.[60] The mere fact that a contract, as part of its terms, acknowledges the receipt of certain money or property does not render the entire writing a mere receipt subject to contradiction by parol evidence;[61] but where a written instrument is both a receipt and a contract, the contractual nature of the writing does not prevent the admission of parol evidence to contradict or explain that portion which is operative only as a receipt.[62] The name by which the parties designate a writing does not determine its character as a mere receipt or a contract.[63]

b. Applications of Rules

The rule permitting explanation or contradiction of mere receipts by parol is applied to all instruments, including receipts in full, which in effect are simple receipts. Warehouse receipts, however, are usually contractual in nature and therefore conclusive.

It has been said that the distinction between receipts and contracts, with respect to the contradiction thereof by parol evidence, has not been satisfactorily established and that cases can be found which are difficult, if not impossible, to reconcile.[64] The rule that parol evidence is admissible to explain or contradict receipts has been applied to many writings in the nature of receipts, whether or not they might technically be termed such.[65] Parol ev-

60. U.S.—Freiberg v. Pierce, C.C.A. Okl., 83 F.2d 961—Wunderlich v. National Surety Corporation, D.C. Minn., 24 F.Supp. 640, reversed on other grounds, C.C.A., National Surety Corporation v. Wunderlich, 111 F.2d 622.
Ark.—Home Life Ins. Co. v. Taylor, 55 S.W.2d 929, 186 Ark. 768—Wilson v. Nugent, 299 S.W. 18, 21, 174 Ark. 1115, citing **Corpus Juris.**
Cal.—Lawrence v. Premier Indemnity Assur. Co., 182 P. 431, 180 Cal. 688.
Colo.—Hickman-Lumbeck Grocery Co. v. Hager, 227 P. 829, 75 Colo. 554.
Ga.—Oliver v. Head, 2 S.E.2d 716, 60 Ga.App. 13—Caswell v. Vanderbilt, 132 S.E. 123, 35 Ga.App. 34.
Hawaii.—Koon v. Maui Dry Goods & Grocery Co., 30 Hawaii 313.
Ill.—Loeb, for Use of Moses v. Flannery, 148 Ill.App. 471.
Miss.—Orgill Bros. & Co. v. Polk, 124 So. 649, 155 Miss. 492.
Mo.—Wind v. Bank of Maplewood & Trust Co., App., 58 S.W.2d 332, 334, citing **Corpus Juris**—Raicher v. National Bank of Commerce in St. Louis, 268 S.W. 111, 216 Mo.App. 346—Bert v. Rhodes, App., 258 S. W. 40—Eggimann v. Houck, App., 240 S.W. 478.
Mont.—Nuhn v. Nuhn, 37 P.2d 571, 97 Mont. 596.
N.J.—Katcher v. American Express Co., 109 A. 741, 94 N.J.Law 165, reversing 105 A. 497, 92 N.J.Law 309—Alcamo v. Motorists Casualty Ins. Co., 165 A. 861, 11 N.J.Misc. 350—Finklestein v. Brodsky, 157 A. 654, 10 N.J.Misc. 55, affirmed 163 A. 664, 110 N.J.Law 13.
N.Y.—Graves v. Friend, 7 N.Y.Super. 568.
N.C.—Jenkins v. Wood, 160 S.E. 488, 201 N.C. 460.
Ohio.—Nankas v. National Bank of Commerce, 164 N.E. 237, 30 Ohio App. 54.
Pa.—Bryant v. Bryant, 144 A. 904, 295 Pa. 146, affirming 10 Pa.Dist. & Co. 723—Wagner v. Marcus, 136 A. 847, 288 Pa. 579.
S.C.—Cain v. Whitlock, 182 S.E. 752, 178 S.C. 289—Gladden v. Keistler, 140 S.E. 161, 164, 141 S.C. 524, quoting **Corpus Juris.**
Tex.—Cox v. Jasper, Civ.App., 97 S. W.2d 530—Alexander v. Meredith, Civ.App., 262 S.W. 111.
Wash.—McDonald v. Wyant, 8 P.2d 428, 167 Wash. 49—Donovan v. Hallowell, 248 P. 412, 140 Wash. 312—Shannon v. Prall, 196 P. 635, 115 Wash. 106.
W.Va.—Huminsky v. Gary Nat. Bank, 150 S.E. 9, 11, 107 W.Va. 658, citing **Corpus Juris.**
Wis.—Nimz v. Fullerton Lumber Co., 247 N.W. 338, 211 Wis. 36.
22 C.J. p 1138 note 32.
Bills of lading see supra § 905.
Limitations of, and exceptions to, parol evidence rule generally see infra §§ 929–1015.
Receipt of securities as collateral
An instrument acknowledging the receipt of government bonds and a certificate of deposit, and stating that they were to be held as collateral for certain notes until a specified date, was more than a mere receipt, and, to the extent that it evidenced a contract whereby the securities were to be so held, could not be varied, contradicted, or enlarged by parol evidence.—Eggimann v. Houck, Mo.App., 240 S.W. 478.

61. Ark.—Home Life Ins. Co. v. Taylor, 55 S.W.2d 929, 186 Ark. 768.
Iowa.—Buechler v. Olson, 189 N.W. 741, 194 Iowa 245.
Mich.—Karnov v. Goldman, 201 N.W. 447, 448, 229 Mich. 551, citing **Corpus Juris.**
Pa.—Wagner v. Marcus, 136 A. 847, 288 Pa. 579.
S.C.—Gladden v. Keistler, 140 S.E. 161, 164, 141 S.C. 524, quoting **Corpus Juris.**
22 C.J. p 1139 note 33.

62. Ala.—Nearhos v. Keith, 130 So. 409, 221 Ala. 643—Churchill v. Walling, 88 So. 582, 205 Ala. 509.
Ark.—Wilson v. Nugent, 299 S.W. 18, 174 Ark. 1115.
Hawaii.—Koon v. Maui Dry Goods & Grocery Co., 30 Hawaii 313.
N.Y.—Schulman Goldberg Theatrical Corporation v. Katz, 215 N.Y.S. 549, 126 Misc. 777.
Okl.—Carter v. Atchison, T. & S. F. Ry. Co., 56 P.2d 403, 176 Okl. 397.
Tex.—Kelsey v. Blackman, Civ.App., 293 S.W. 199.
22 C.J. p 1139 note 34.
"The recital of payment in a written contract may be contradicted by oral testimony."—Berry v. Royster, Mo.App., 232 S.W. 477, 479.

63. S.C.—Gladden v. Keistler, 140 S.E. 161, 141 S.C. 524.
Tex.—Alexander v. Meredith, Civ. App., 262 S.W. 111.

64. Ohio.—Jackson v. Ely, 49 N.E. 792, 57 Ohio St. 450.
Tex.—Alexander v. Meredith, Civ. App., 262 S.W. 111.
Wash.—Donovan v. Hallowell, 248 P. 412, 140 Wash. 312—Shannon v. Prall, 196 P. 635, 115 Wash. 106.
Wis.—Nimz v. Fullerton Lumber Co., 247 N.W. 338, 211 Wis. 36.

65. U.S.—Stanley Bulkley Co. v. U. S., 26 C.C.P.A., Customs, 368.
Mass.—Povey v. Colonial Beacon Oil Co., 200 N.E. 891, 294 Mass. 86.
N.H.—Markarian v. Bartis, 199 A. 573, 89 N.H. 370.
N.Y.—Triebwasser v. Frank, 6 N.Y. S.2d 1.
Or.—Ratcliffe v. Union Oil Co. of California, 77 P.2d 136, 159 Or. 221—Marks v. Twohy Bros. Co., 194 P. 675, 98 Or. 514.
Pa.—Bole v. Alden Park Manor, 98 Pa.Super. 65.
R.I.—Redbird Farm v. Providence Live Poultry Co., 12 A.2d 730.
Tex.—National Life & Accident Ins. Co. v. Baughman, Civ.App., 54 S. W.2d 537, 538, citing **Corpus Juris.**

idence has also been held admissible to vary receipts which were not independent instruments, but mere parts of, or indorsements on, other instruments.[66] According to some authorities, an acknowledgment in an insurance policy that the first premium has been paid constitutes more than a mere receipt and cannot ordinarily be contradicted by parol;[67] but others hold the contrary.[68]

A receipt given by a public officer in the discharge of his duties as such is no more protected from contradiction or explanation by parol evidence than any other receipt,[69] unless according to the terms of the law under which it is given it constitutes unassailable written evidence of a fact.[70]

Warehouse and storage receipts. A warehouse or storage receipt usually evidences a contract of storage between the maker of the receipt and the person to whom it is issued, and hence cannot, as a general rule, be varied by parol evidence.[71] However, when it is nothing more than an acknowl-

Wis.—Nimz v. Fullerton Lumber Co., 247 N.W. 338, 211 Wis. 36.

22 C.J. p 1085 note 80 [a] (2), p 1088 note 20 [c], p 1105 note 5 [a] (2), p 1137 note 26, p 1138 note 32 [d] (1).

Writings held within rule

(1) Bank deposit slips.

Ga.—Greeson v. Farmers' & Merchants' Bank, 179 S.E. 191, 50 Ga. App. 566.

La.—Owen v. Tangipahoa Bank & Trust Co., 157 So. 549, 180 La. 747, 97 A.L.R. 873.

Mont.—Stankey v. Citizens' Nat. Bank of Laurel, 209 P. 1054, 64 Mont. 309.

Okl.—Turner v. American Nat. Bank, 201 P. 514, 83 Okl. 259—Hastings v. Hugo Nat. Bank, 197 P. 457, 81 Okl. 189—Citizens' Bank of Headrick v. Citizens' State Bank of Altus, 182 P. 657, 75 Okl. 225.

22 C.J. p 1137 note 26 [a] (1).

(2) Bank pass book or entries therein.

Cal.—Anthony v. Crocker First Nat. Bank, 272 P. 767, 95 Cal.App. 347.

Ky.—Black Mountain Bank v. Kelly, 280 S.W. 461, 213 Ky. 34.

Mo.—In re Liquidation of Fidelity Bank & Trust Co., App., 77 S.W.2d 480.

N.Y.—Cooper v. Public Nat. Bank of New York, 203 N.Y.S. 642, 208 App. Div. 430.

7 C.J. p 638 note 61 [c]—22 C.J. p 1137 note 26 [a] (2).

(3) Cancellation of a vendor's lien on the margin of a record.—Conley v. Archillion, 225 S.W. 5, 146 Ark. 64.

(4) Check.—Nealon v. Travers, 153 A. 44, 160 Md. 324.

(5) "Customer's receipt" issued by dealers in foreign exchange.—Calin v. Marcovich, 165 N.E. 329, 88 Ind. App. 655.

(6) Delivery tickets.—Mickel v. Associated Oil Co., 30 P.2d 352, 147 Or. 81.

(7) Express company's receipt for money received for transmission.—Slivick v. American Express Co., 186 N.W. 185, 176 Wis. 314.

(8) Rent receipts.

Mo.—Wallich v. Glenos, App., 152 S.W.2d 679.

Utah.—Ogden v. Hirigaray, 235 P. 875, 65 Utah 164.

(9) Satisfaction of mortgage or judgment.

U.S.—Becker Steel Co. of America v. Cummings, D.C.N.Y., 16 F.Supp. 601.

Idaho.—Berryman v. Dore, 251 P. 757, 43 Idaho 327.

Ill.—Eagle Indemnity Co. v. Haaker, 33 N.E.2d 154, 309 Ill.App. 406.

Wis.—Flanagan's Estate v. Flanagan's Estate, 173 N.W. 297, 169 Wis. 537.

22 C.J. p 1137 note 26 [a] (6), [d]—34 C.J. p 732 note 2.

Writing of dual nature

Certificate of deposit for bonds deposited with bank, was held partly a receipt and partly a contract, as regards admissibility of parol evidence to show whether it was special deposit creating trust relationship.—Robertson v. Ramsey, 66 S.W. 2d 1022, 17 Tenn.App. 248.

66. U.S.—Wunderlich v. National Surety Corporation, D.C.Minn., 24 F.Supp. 640, reversed on other grounds, C.C.A., National Surety Corporation v. Wunderlich, 111 F. 2d 622.

Ala.—Wye Shipping Co. v. Hunter, Benn & Co., 100 So. 475, 211 Ala. 326.

Idaho.—Berryman v. Dore, 251 P. 757, 43 Idaho 327.

Iowa.—Yardley v. Iowa Electric Co., 191 N.W. 791, 195 Iowa 380.

Mass.—Rosenblatt v. Holstein Rubber Co., 183 N.E. 705, 281 Mass. 297.

Mich.—Wills Sainte Claire, Inc. v. Laffrey, 226 N.W. 660, 248 Mich. 24.

Miss.—Allen v. Allen, 168 So. 658, 175 Miss. 735.

Wis.—Stuart v. Crowley, 217 N.W. 719, 195 Wis. 47.

22 C.J. p 1138 notes 27, 28.

Indorsement on check

Cal.—Short v. Orland Oil Syndicate, 84 P.2d 324, 29 Cal.App.2d 326.

Indorsement on note

(1) Where notes are indorsed with notations of receipts of money or with the word "payment", such markings are open to explanation and need not be construed as importing an actual liquidation of the obligation.—Aliquippa Nat. Bank, to Use of Woodlawn Trust Co. v. Harvey, 16 A.2d 409, 340 Pa. 223.

(2) Indorsement on back of note of receipt of interest was open to contradiction and could be explained by parol.—Hildebrand v. Burger, 156 A. 593, 102 Pa.Super. 163.

67. Ind.—Gary Nat. Life Ins. Co. v. McQuaid, 138 N.E. 353, 80 Ind.App. 4.

Wis.—De Groot v. Mutual Life Ins. Co. of New York, 190 N.W. 443, 179 Wis. 202.

22 C.J. p 1138 note 27 [e] (3), (4).

68. U.S.—New York Life Ins. Co. v. Seifris, C.C.A.Pa., 46 F.2d 391.

22 C.J. p 1138 note 27 [e] (1), (2).

69. Ill.—Branch v. Lee, 26 N.E.2d 88, 373 Ill. 333—People v. Evanston Ry. Co., 153 N.E. 603, 323 Ill. 109.

22 C.J. p 1138 note 29.

Tax receipts

(1) Tax receipts are not conclusive.

Ga.—Miller County v. Bush, 110 S.E. 515, 28 Ga.App. 130.

Ill.—People v. Evanston Ry. Co., 153 N.E. 603, 323 Ill. 109.

S.D.—Hoidal v. Runchey, 225 N.W. 299, 55 S.D. 171.

22 C.J. p 1138 note 29 [a].

(2) It is competent to prove by parol evidence the particular land on which taxes have been paid, and thus to supplement or contradict evidence of written receipts for taxes.

Ill.—Branch v. Lee, 26 N.E.2d 88, 373 Ill. 333.

Miss.—Perret v. Borries, 30 So. 59, 78 Miss. 934.

70. Pa.—Halsey v. Blood, 29 Pa. 319.

22 C.J. p 1138 note 30.

71. Fla.—Wicoma Inv. Co. v. Pridgeon, 188 So. 597, 137 Fla. 540.

Ill.—Howland v. Newton Ice & Cold Storage Co., 240 Ill.App. 307.

Ind.—Drudge v. Leiter, 49 N.E. 34, 18 Ind.App. 694, 63 Am.S.R. 359.

Mass.—Bellows v. Worcester Storage Co., 7 N.E.2d 588, 297 Mass. 188.

Or.—Wright v. Morton, 267 P. 818, 125 Or. 563.

R.I.—Providence Warehouse Co. v.

edgment of the receipt of property it stands on the same ground as other receipts and is open to parol explanation or contradiction.[72]

A receipt to a warehouseman on return of the goods, reciting their return "in good condition," is not conclusive on the receiptor in an action for injuries to the goods.[73]

Receipts in full. According to the great preponderance of authority, the mere fact that a receipt purports to be in full of all demands or for certain claims does not make the instrument of such a contractual nature as to preclude the admission of parol evidence to vary its effect.[74] There are, however, cases in which a contrary view has been asserted;[75] and a receipt in full cannot be varied where it is of a contractual nature,[76] as in the case of a receipt which is in the nature of an agreement for the compromise or settlement of dis-

Providence & W. R. Co., 34 A. 739, 19 R.I. 423.
Tex.—Kahn v. Cole, Civ.App., 227 S.W. 556.
22 C.J. p 1139 note 36.
Contracts of storage see supra § 903.

Hotel check

A check which was given guest by hotel on delivery of guest's articles, and which expressed the terms and conditions under which hotel keeper agreed to care for such articles, could not be altered by parol evidence.—Huckins Hotels v. Smith, 235 S.W. 787, 151 Ark. 167.

72. Minn.—Robson v. Swart, 14 Minn. 371, 100 Am.D. 238.
22 C.J. p 1139 note 37.

A warehouse receipt of a dual nature, partaking of the nature of both a receipt and a contract, is subject to explanation by parol as to the provisions concerning receipt.—Churchill v. Walling, 88 So. 582, 205 Ala. 509.

Place of storage

Plaintiff may show oral contract of storage in fire proof warehouse, although he accepted storage receipt providing for storage in nonfireproof building, where it appeared that the goods had already been destroyed by fire at the time of plaintiff's acceptance of the receipt.—Lyndall v. Fidelity Storage & Warehouse Co., 87 Pa.Super. 344.

Quantity or condition of goods

A noncontractual warehouse receipt may be varied by parol evidence as to the quantity or condition of the goods.—Wicoma Inv. Co. v. Pridgeon, 188 So. 597, 137 Fla. 540.

73. N.Y.—Comerford v. Smith, 81 N.Y.S. 610, 82 App.Div. 638.

74. U.S.—Wunderlich v. National Surety Corporation, D.C.Minn., 24 F.Supp. 640, reversed on other grounds, C.C.A., National Surety Corporation v. Wunderlich, 111 F. 2d 622.
Cal.—Short v. Orland Oil Syndicate, 84 P.2d 324, 29 Cal.App.2d 326—Coats v. General Motors Corporation, 39 P.2d 838, 843, 3 Cal.App.2d 340, citing **Corpus Juris**—Sears v. Whiston, 34 P.2d 818, 139 Cal.App. 682.
Colo.—Plains Iron Works Co. v. Haggott, 188 P. 735, 68 Colo. 121.
Fla.—Schmitt v. Bethea, 82 So. 817, 78 Fla. 304.
Ga.—Newcomb v. Wagoner, 132 S.E. 117, 35 Ga.App. 29.
Idaho.—Idaho Gold Dredging Corporation v. Boise Payette Lumber Co., 115 P.2d 401.
Ind.—Inter-Ocean Casualty Co. v. Wilkins, 182 N.E. 252, 96 Ind.App. 231.
Iowa.—In re Newson's Estate, 219 N.W. 305, 310, 206 Iowa 514, citing **Corpus Juris**—State v. Amrine, 200 N.W. 602, 198 Iowa 968—Yardley v. Iowa Electric Co., 191 N.W. 791, 195 Iowa 380.
Mich.—Richards v. Rogers Boiler & Burner Co., 234 N.W. 428, 252 Mich. 52, reversing 226 N.W. 871, 248 Mich. 155—Pawlicki v. Hollenbeck, 229 N.W. 626, 628, 250 Mich. 38, citing **Corpus Juris**—Brusseau v. Potter's Estate, 185 N.W. 836, 217 Mich. 165.
Miss.—Massachusetts Protective Ass'n v. Cranford, 102 So. 171, 173, 137 Miss. 876, citing **Corpus Juris.**
Mo.—Knight v. Glenn Falls Ins. Co., App., 20 S.W.2d 941.
N.H.—Bunker v. Great Falls Mfg. Co., 146 A. 529, 84 N.H. 84.
N.C.—Norwood v. Most Worshipful Grand Lodge of North Carolina, Free and Accepted Ancient Masons, 102 S.E. 749, 179 N.C. 441.
Pa.—Balkus v. Elchisak, 6 Sch.Reg. 21.
R.I.—Waterman v. Mowry, 148 A. 32.
Tenn.—Denney v. Life & Casualty Ins. Co., 136 S.W.2d 731, 23 Tenn. App. 633.
Wis.—Nimz v. Fullerton Lumber Co., 247 N.W. 338, 340, 211 Wis. 36, citing **Corpus Juris.**
22 C.J. p 1138 note 32 [d] (2), p 1140 note 41.

"A receipt in full is merely an acknowledgment of final payment of the account, and is always subject to explanation."—Johnson v. Mound City State Bank, 237 N.W. 891, 895, 58 S.D. 622.

Receipt for workmen's compensation

A receipt in full given by an employee for payments received under a workmen's compensation act can be shown to have been based on a mistaken assurance that disability had terminated.—Bunker v. Great Falls Mfg. Co., 146 A. 529, 84 N.H. 84.

Check for services rendered

The statement on a check that it is given as payment in full for services rendered does not thereby render it conclusive and incapable of contradiction by parol.
Iowa.—In re Newson's Estate, 219 N.W. 305, 206 Iowa 514—McGuire v. Interurban Ry. Co., 200 N.W. 55, 199 Iowa 203.
Mass.—Rosenblatt v. Holstein Rubber Co., 183 N.E. 705, 281 Mass. 297.
Or.—Houk v. Gilmore, 259 P. 891, 122 Or. 498.
S.D.—Johnson v. Mound City State Bank, 237 N.W. 891, 58 S.D. 622.

A payroll containing a formal general receipt in full has been held not a technical release, but merely a receipt, and hence open to explanation.—Campbell v. City of Boston, 186 N.E. 577, 283 Mass. 365.

Agreement that receipt was not to be in full

When participants in transaction agree that receipt, although purporting to be in full, was not so intended, and that there was more due, the door is wide open for proof as to amount due.—Hardy v. State Mut. Ben. Soc., 170 A. 704, 111 Pa.Super. 336.

In Louisiana

(1) The rule stated in the text has been followed.—Otis Elevator Co. v. Southern Hat Co., 124 So. 696, 11 La.App. 699—Dixie Mills Supply Co. v. Town of Homer, 6 La.App. 714—M. Kaplan & Son v. Louisiana Pulp & Paper Co., 5 La.App. 229.

(2) However, it has also been held that, in the absence of a claim of error or fraud, a receipt in full for an heir's share in a succession cannot be contradicted by parol evidence that it was to cover his interest in the movable property only.—Courtney v. Ballard, 5 La.App. 754.

75. Ark.—Cache Valley Lumber Co. v. Culver Co., 125 S.W. 430, 93 Ark. 383.
22 C.J. p 1140 note 42.

76. Wash.—Shannon v. Prall, 196 P. 635, 115 Wash. 106.

puted claims, particularly of claims for unliquidated damages, wherein one party accepts and receives from the other a sum of money or certain property in complete satisfaction and discharge.[77]

§ 927. Releases

Releases are usually within the parol evidence rule, as being of a contractual nature; but a release may be so similar in character to a mere receipt as to be subject to explanation or contradiction by parol.

A release is usually an instrument of such a contractual nature as to be within the general rule prohibiting the admission of parol or extrinsic evidence to vary or contradict written contracts;[78] but such a writing may be so similar in its character to a receipt as to be governed by the rule permitting mere receipts to be explained, controlled, qualified, or even contradicted by parol evidence.[79]

An indorser's consent to a sealed release of the maker's liability on a note may be shown by parol, not for the purpose of affecting the legal meaning of the release, but to show that, whatever its meaning, he has consented that it shall prevail.[80]

§ 928. Writings Not Contractual nor Amounting to Disposition of Property

Writings which are noncontractual and do not dispose of rights, such as statements of account and mere memoranda, are not within the protection of the parol evidence rule.

A writing which does not vest, pass, or extinguish any right either by contract, operation of law, or otherwise, and which is used as evidence of a fact rather than as evidence of a contract or right, may be susceptible of explanation by extrinsic circum-

77. Ky.—Drane v. Louisville Ry. Co., 131 S.W.2d 439, 279 Ky. 490.
Mo.—Mueller v. Shell Pipe Line Corporation, App., 38 S.W.2d 297.
N.C.—Walker v. Burt, 109 S.E. 43, 182 N.C. 325.
Wash.—Donovan v. Hallowell, 248 P. 412, 140 Wash. 312.
22 C.J. p 1140 note 40.
Instruments of compromise and settlement see supra § 917.
Releases see infra § 927.

78. U.S.—Gunter v. Standard Oil Co. (Indiana), C.C.A.Mo., 60 F.2d 389—Therrell v. Gerstell, C.C.A. Fla., 55 F.2d 82—Houston v. Trower, C.C.A.Kan., 297 F. 558.
Cal.—Coats v. General Motors Corporation, 39 P.2d 838, 843, 3 Cal. App.2d 340, citing **Corpus Juris**—Bangle v. Southwell, 232 P. 58, 70 Cal.App. 561.
Idaho.—Berryman v. Dore, 251 P. 757, 759, 43 Idaho 327, citing **Corpus Juris.**
Kan.—Garrison v. Marshall, 233 P. 119, 117 Kan. 722.
Ky.—Drane v. Louisville Ry. Co., 131 S.W.2d 439, 279 Ky. 490.
Mass.—Radovsky v. Wexler, 173 N.E. 409, 273 Mass. 254—Gold v. Boston Elevated Ry. Co., 138 N.E. 251, 244 Mass. 144—Frost v. Brigham, 29 N.E. 217, 139 Mass. 43.
Minn.—Martin v. Setter, 239 N.W. 219, 184 Minn. 457, 80 A.L.R. 471.
Mo.—Boggs v. Pacific Steam Laundry Co., 70 S.W. 818, 171 Mo. 282.
N.H.—Steinfield v. Monadnock Mills, 123 A. 224, 81 N.H. 152.
N.J.—Falkenstein v. Gibson, 154 A. 876, 108 N.J.Eq. 251, 76 A.L.R. 1457.
N.Y.—Farnham v. Farnham, 198 N.Y.S. 771, 204 App.Div. 573—Polesir v. All Borough Transp. Corporation, 16 N.Y.S.2d 762, 172 Misc. 946.
Pa.—Newland v. Lehigh Valley R. Co., 173 A. 822, 315 Pa. 193—Kennedy v. Metropolitan Life Ins. Co., 6 Sch.Reg. 348.
Tenn.—Greer v. J. T. Fargason Grocer Co., 77 S.W.2d 443, 168 Tenn. 242, 96 A.L.R. 1141—Stegall v. City of Chattanooga, 66 S.W.2d 266, 16 Tenn.App. 124.
Wash.—Donovan v. Hallowell, 248 P. 412, 140 Wash. 312—Betcher v. Kunz, 192 P. 955, 112 Wash. 563.
Wyo.—Natrona Power Co. v. Clark, 225 P. 586, 31 Wyo. 284.
22 C.J. p 1140 note 44.
Admissibility to show true consideration of release see infra § 952.
Instruments of compromise and settlement generally see supra § 917.

Special application of rule

"The general rule . . . that oral evidence cannot be introduced to vary the terms of a written instrument . . . is especially true of a release."—Adams v. Camden Safe Deposit & Trust Co., 188 A. 913, 914, 15 N.J.Misc. 48, reversed on other grounds 2 A.2d 361, 121 N.J.Law 389.

Effect of statute; intent of parties

Parol evidence is not admissible to explain or vary an unambiguous release, notwithstanding a statute provides that all releases in writing must have effect according to the intention of the parties thereto.—Steenhuis v. Holland, 115 So. 2, 217 Ala. 105—Wright v. McCord, 88 So 150, 205 Ala. 122—Barbour v. Poncelor, 83 So. 130, 203 Ala. 386.

Claims included

(1) Parol evidence is inadmissible to restrict the purpose of a release to only those claims known by both parties.—Barbour v. Poncelor, supra.

(2) "Parol evidence is inadmissible to prove that claims not included in the writing were understood at the time of the executing of the release to be embraced in the transaction."—In re Atwater, C.C.A.N.Y., 266 F. 278, 281, certiorari granted Atwater v. Guernsey, 41 S.Ct. 13, 254 U.S. 624, 65 L.Ed. 444. Affirmed 41 S.Ct. 150, 254 U.S. 423, 65 L.Ed. 339—22 C.J. p 1140 note 44 [a] (1).

(3) Release of claim for injuries arising out of automobile accident which expressly covered "all claims by reason of the said accident" could not be varied by parol evidence to show that release was not intended to cover damages to automobile.—Miller v. Gane, 192 N.E. 313, 288 Mass. 57.

Recital as to representations

A recital in a release that no representations other than those expressed therein had been made to injured person was contractual in nature, and rendered oral testimony inadmissible to show that in fact other statements had been made as an inducement.—St. Paul Mercury & Indemnity Co. v. Ritchie, Miss., 198 So. 741.

79. Cal.—Coats v. General Motors Corporation, 39 P.2d 838, 3 Cal. App.2d 340.
Idaho.—Berryman v. Dore, 251 P. 757, 759, 43 Idaho 327, citing **Corpus Juris.**
Miss.—Massachusetts Protective Ass'n v. Cranford, 102 So. 171, 137 Miss. 876.
Wash.—Kilbourne v. Kilbourne, 287 P. 41, 156 Wash. 439.
22 C.J. p 1141 note 45.
Receipts generally see supra § 926.

Release deed

In an action on a vendor's lien note, a release deed pleaded by defendant was held not a contract, and conclusive of payment, but subject to explanation by parol.—Pierce v. Baker, Tex.Civ.App., 238 S.W. 699.

80. Mass.—Arlington Nat. Bank v. Bennett, 101 N.E. 982, 214 Mass. 352.

stances or facts.[81] This rule has been applied to statements or books of account,[82] bills of parcels,[83] memoranda,[84] written admissions,[85] and other writings of a noncontractual nature.[86] Statements of loss or proofs of claim furnished to an insurer have been held to be subject to correction or explanation by parol evidence;[87] but a contrary view has also been asserted.[88]

C. LIMITATIONS OF, AND EXCEPTIONS TO, RULE

§ 929. In General

The rule excluding parol evidence to vary or explain written documents is a flexible one, subject to many exceptions.

There is perhaps no rule of law or of evidence which is more flexible or subject to a greater number of exceptions than the rule which excludes parol evidence offered to vary or explain written documents.[89]

While it has been said that in the multitude of exceptions much confusion has arisen, so that the exact limit to be placed on the exceptions depends not only on the peculiar facts of each case, but also to some extent on the peculiar cast of thought of the individuals composing the court,[90] it may be stated generally that the courts have endeavored to adapt their rulings, either way, to the obvious demands of abstract justice in each particular case.[91] The result is that, while the decisions are fairly uniform with respect to their abstract statements of the limitations of and exceptions to this rule, when the question arises as to whether a case presenting a particular state of facts comes within the general rule, or is taken out of it by one of the recognized limitations or exceptions, or again brought within it by one of the numerous limitations of, and ex-

81. Kan.—Kotlarsky v. Fidelity Union Fire Ins. Co., 21 P.2d 305, 307, 137 Kan. 609, quoting **Corpus Juris.**
Mo.—Ferrenbach v. Fehlig, App., 74 S.W.2d 503, 505, citing **Corpus Juris.**
N.Y.—Rosenthal v. United Transp. Co., 188 N.Y.S. 154, 196 App.Div. 540.
Pa.—Garrison v. Salkind, 132 A. 125, 126, 285 Pa. 265, quoting **Corpus Juris.**
Tex.—Grigsby v. First Nat. Bank, Civ.App., 125 S.W.2d 368, reversed on other grounds, Com.App., 144 S.W.2d 244, rehearing denied and opinion corrected 146 S.W.2d 174.
Vt.—Woodhouse v. Woodhouse, 130 A. 758, 99 Vt. 91.
22 C.J. p 1105 note 5, p 1142 note 56.
Noncontractual recitals in contracts see infra § 986.

82. Ky.—Patton v. Catlettsburg Nat. Bank, 255 S.W. 690, 200 Ky. 775.
Mo.—Carson v. Manor Baking Co., App., 138 S.W.2d 43—Wind v. Bank of Maplewood & Trust Co., App., 58 S.W.2d 332, 335, citing **Corpus Juris.**
22 C.J. p 1142 note 57, p 1143 note 62.

83. Cal.—Campion v. Downey, 245 P. 1098, 77 Cal.App. 125.
22 C.J. p 1143 note 58.

84. U.S.—U. S. S. S. Co. v. Allied S. S. Corporation, N.Y., 255 F. 537, 166 C.C.A. 605.
Ala.—O'Neal v. Plowden, 124 So. 882, 220 Ala. 317.
Ga.—McAlister v. Sanders, 1 S.E.2d 590, 59 Ga.App. 550.
La.—E. R. Godfrey & Sons Co. v. Odenwald & Son, 118 So. 835, 9 La. App. 84.
Mass.—Ehrlich v. United Smelting & Aluminum Co., 147 N.E. 20, 252 Mass. 12.
Mich.—Urban v. McNinch, 251 N.W. 537, 265 Mich. 415.
Mo.—McGinnis v. Ætna Life Ins. Co., App., 78 S.W.2d 501—Nichols v. Bank of Syracuse, 278 S.W. 793, 220 Mo.App. 1019.
Okl.—Lindsay State Bank v. McGrew, 219 P. 904, 96 Okl. 74.
Tex.—Turco Products v. Nobles, Civ. App., 54 S.W.2d 570.
22 C.J. p 1098 note 94 [b], p 1143 note 60.

85. Colo.—Shearer v. Shearer, 269 P. 19, 84 Colo. 234—Hickman-Lunbeck Grocery Co. v. Hager, 227 P. 829, 75 Colo. 554.
Mo.—Wind v. Bank of Maplewood & Trust Co., App., 58 S.W.2d 332.
Tex.—Grigsby v. First Nat. Bank, Civ.App., 125 S.W.2d 368, reversed on other grounds, Com.App., 144 S. W.2d 244, rehearing denied and opinion corrected 146 S.W.2d 174.
Admission of indebtedness
N.J.—J. K. Larkin & Co. v. Murphy, 138 A. 704, 5 N.J.Misc. 921.

86. **Particular writings**
(1) Bank deposit or account.—Brooke Smith & Co. v. Southland Life Ins. Co., Tex.Civ.App., 278 S.W. 916—22 C.J. p 1142 note 57 [a], [b].
(2) Instructions to a bank.
Cal.—Kornblum v. Bank of Italy, 222 P. 143, 64 Cal.App. 170.
Mich.—In re Taylor's Estate, 182 N. W. 101, 213 Mich. 497.
(3) Bid for construction.—P-H Lumber Co. v. Thielen, 271 Ill.App. 269.
(4) Inventory.—In re Langenbach's Estate, 230 N.W. 141, 201 Wis. 336.
(5) Offer of a prize.—Hood v. Polish National Alliance of U. S., 246 Ill.App. 137.
(6) Sales slip.—Anders v. Lee-Rogers Chevrolet Co., 7 La.App. 481.
(7) Letters see supra § 920.
(8) Receipts see supra § 926.
(9) Other writings see 22 C.J. p 1105 note 5, p 1143 note 64.

87. Mo.—Knight v. Glenn Falls Ins. Co., App., 20 S.W.2d 941.
Tex.—Washington Fidelity Nat. Ins. Co. v. Smith, Civ.App., 80 S.W.2d 413.
22 C.J. p 1143 note 63.

88. Ill.—Watt v. Iroquois Auto Ins. Underwriters, 256 Ill.App. 210.

89. Ark.—Jackson County Gin Co. v. McCuistion, 5 S.W.2d 729, 177 Ark. 60.
Cal.—Donze v. Donze, 264 P. 294, 88 Cal.App. 769.
N.Y.—Sanford v. Getman, 210 N.Y.S. 682, 684, 213 App.Div. 367, quoting **Corpus Juris**, and affirming 206 N.Y.S. 865, 124 Misc. 80.
Va.—Mathieson Alkali Works v. Virginia Banner Coal Corporation, 124 S.E. 470, 140 Va. 89.
22 C.J. p 1144 note 66.

90. Okl.—Mid-West Chevrolet Corporation v. Noah, 48 P.2d 283, 285, 173 Okl. 198, quoting **Corpus Juris.**
Tenn.—Crotzer v. Shawl, 5 Tenn. App. 240.
22 C.J. p 1144 note 67.

91. Pa.—Thompson v. McClenachan, 17 Serg. & R. 110.
22 C.J. p 1144 note 68.
Permitting fraud
Parol evidence rule will not be applied in cases where it would open door to, instead of preventing, fraud. —Choolgian v. Nordstrom, 150 A. 499, 111 Conn. 572.

ceptions to, those limitations and exceptions, the authorities are in many instances in hopeless conflict.[92]

A statute which allows a party to call his adversary as a witness furnishes no ground for establishing an exception to the parol evidence rule, for if the matter could thus be opened up, other witnesses might be called, and all the consequences which the rule is designed to prevent might follow.[93]

§ 930. Evidence Not Inconsistent with Writing

In general, the parol evidence rule does not exclude evidence which does not tend to vary or contradict the written instrument.

The parol evidence rule does not preclude the reception of parol evidence with reference to a matter evidenced by the writing, where such evidence relates to a matter in pais, or is of such a character that it does not tend to vary or contradict the written instrument.[94] Thus parol evidence which

92. Okl.—Mid-West Chevrolet Corporation v. Noah, 48 P.2d 283, 173 Okl. 198.
22 C.J. p 1144 note 69.

93. Mass.—Kelly v. Cunningham, 1 Allen 473.

94. U.S.—Barreda v. Silsbee, Md., 21 How. 146, 16 L.Ed. 86—Levering v. Indemnity Ins. Co. of North America, C.C.A.Cal., 50 F.2d 151, 153, citing **Corpus Juris**—Massachusetts Fire & Marine Ins. Co. v. Schneider, C.C.A.Ga., 28 F.2d 658, certiorari denied 49 S.Ct. 264, 279 U.S. 844, 73 L.Ed. 989—Sawyer v. Eaton, C.C.A.Me., 293 F. 898.
Ala.—Brotherhood Ins. Co. v. Harris, 138 So. 295, 224 Ala. 28, denying certiorari 138 So. 292, 24 Ala.App. 395—Davis v. Morgan, 91 So. 318, 206 Ala. 576—Brown v. Shelby County, 85 So. 416, 204 Ala. 252—Brenard Mfg. Co. v. Citronelle Mercantile Co., 37 So. 509, 140 Ala. 602.
Ark.—Jordan v. Winooski Sav. Bank, 58 S.W.2d 942, 187 Ark. 212—Kerby v. Feild, 38 S.W.2d 308, 183 Ark. 714—First Nat. Bank v. City of Malvern, 287 S.W. 185, 171 Ark. 994—Sheffield v. Maxwell, 260 S.W. 399, 163 Ark. 448.
Cal.—Fraser's Million Dollar Pier Co. v. Ocean Park Pier Co., 197 P. 328, 198 P. 212, 185 Cal. 464—Honore v. Lemm, 184 P. 664, 181 Cal. 420—Stowe v. Kaetzel, 101 P.2d 719, 38 Cal.App.2d 356—Lindsay v. Mack, 43 P.2d 350, 5 Cal.App.2d 491—Hammond Lumber Co. v. Danziger, 37 P.2d 517, 2 Cal.App.2d 197—Bedig v. Southern Pac. Co., 258 P. 148, 84 Cal.App. 325—Greathouse v. Daleno, 206 P. 1019, 57 Cal.App. 187.
Colo.—Johnson Oil & Refining Co. v. Elder, 42 P.2d 610, 96 Colo. 314—International Harvester Co. of America v. Edwards, 233 P. 164, 76 Colo. 531.
Conn.—Hartford Steam Boiler Inspection & Insurance Co. v. Firemen's Mut. Ins. Co., 170 A. 151, 118 Conn. 49.
Ga.—Youmans v. Edenfield, 137 S.E. 288, 36 Ga.App. 529.
Ill.—Potter v. Fon du Lac Park Dist., 168 N.E. 908, 337 Ill. 111.
Ind.—Bollero v. Wintermute, 168 N.E. 40, 91 Ind.App. 1.
Iowa.—Hauge v. Farmers' Mut. Hail Ins. Ass'n of Iowa, 212 N.W. 473, 205 Iowa 1099—Young v. Young, 200 N.W. 181, 198 Iowa 789—Heisel v. Minneapolis & St. L. R. Co., 171 N.W. 177, 185 Iowa 885.
Ky.—Coleman v. Coleman's Ex'r, 224 S.W. 668, 189 Ky. 96.
La.—Sparks v. Dan Cohen Co., 175 So. 590, 187 La. 830—Hodge v. Hodge, 92 So. 134, 151 La. 612—First Nat. Bank v. Coreil, App., 145 So. 393, rehearing denied 146 So. 479—Purnell v. Dugue, 129 So. 178, 14 La.App. 137.
Md.—Mayor and City Council of Baltimore v. Home Credit Co., 166 A. 604, 165 Md. 57, reargument denied 167 A. 552, 165 Md. 57.
Mass.—Bergson v. H. P. Hood & Sons, 15 N.E.2d 196, 300 Mass. 340, 116 A.L.R. 951.
Miss.—Virginia-Carolina Chemical Co. v. Ruffin, 88 So. 500, 126 Miss. 80.
Mo.—Kemper Mill & Elevator Co. v. Hines, 239 S.W. 803, 293 Mo. 88—Henneke v. Gasconade Power Co., App., 152 S.W.2d 667—Shapiro v. Childs Co., 17 S.W.2d 677, 222 Mo. App. 1126—Proctor v. Home Trust Co., 284 S.W. 156, 221 Mo.App. 577—Heath v. Beck, App., 231 S.W. 657, retransferred see, Sup., 225 S.W. 993.
Mont.—Continental Oil Co. v. Bell, 21 P.2d 65, 94 Mont. 123—Stone-Ordean-Wells Co. v. Anderson, 212 P. 853, 66 Mont. 64.
Neb.—Lee v. Hildebrand, 230 N.W. 673, 119 Neb. 717.
Nev.—Barcellos v. Gompertz, 245 P. 700, 49 Nev. 326.
N.J.—Halliwell v. Trans-States Finance Corporation, 118 A. 837, 98 N.J.Law 133.
N.Y.—East Lake Lumber Co. v. Van Gorder, 174 N.Y.S. 38, 105 Misc. 704—Leffler v. Green River Distilling Co., 180 N.Y.S. 422.
N.C.—T. C. May Co. v. Menzies Shoe Co., 119 S.E. 227, 186 N.C. 144.
Okl.—Edwards v. Rutland Sav. Bank, 75 P.2d 1152, 1154, 181 Okl. 643, quoting **Corpus Juris**—Inland Refining Co. v. Langworthy, 240 P. 627, 112 Okl. 280.
Pa.—Ohlbaum v. Mayer, 131 A. 858, 285 Pa. 260—Rose v. Scott, 75 Pa. Super. 196.
S.D.—Worthington v. Hess, 225 N.W. 225, 55 S.D. 155.
Tenn.—New River Lumber Co. v. Blue Ridge Lumber Co., 240 S.W. 763, 770, 146 Tenn. 181, citing **Corpus Juris**—Gibson County v. Fourth & First Nat. Bank, 96 S.W.2d 184, 190, 20 Tenn.App. 168, citing **Corpus Juris**—Crotzer v. Shawl, 5 Tenn.App. 240.
Tex.—Babb v. Mil-Po Clothes, Civ. App., 117 S.W.2d 873, 875, citing **Corpus Juris**—Gulf Refining Co. v. Rogers, Civ.App., 57 S.W.2d 183, error dismissed—American Exchange Nat. Bank of Dallas v. Keeley, Civ.App., 39 S.W.2d 929, error dismissed—Kansas Flour Mills Corporation v. McDonald, Civ.App., 32 S.W.2d 890—Galveston, H. & S. A. Ry. Co. v. American Salvage & Supply Co., Civ. App., 15 S.W.2d 25—Grayson v. Hays, Civ.App., 295 S.W. 289—Chapman v. Denton, Civ.App., 268 S.W. 252, followed in Chapman v. Jones, Civ.App., 268 S.W. 1119—George v. Hall, Civ App., 262 S.W. 174—Estes v. Rutledge, Civ.App., 252 S.W. 224—Ellerd v. Murray, Civ.App., 247 S.W. 631.
Vt.—Firestone Tire & Rubber Co. v. Hart, 158 A. 90, 104 Vt. 100.
Va.—Richmond Postal Credit Union v. Booker, 195 S.E. 663, 170 Va. 129.
Wash.—Polley v. Peabody, 198 P. 731, 116 Wash. 120—Keith v. Peart, 197 P. 928, 115 Wash. 552, opinion corrected on other grounds 200 P. 314.
Wis.—Lisbon Town Fire Ins. Co. v. Tracy, 296 N.W. 126, 236 Wis. 651.
10 C.J. p 199 note 89 [a] (4)—22 C.J. p 1107 note 22, p 1142 note 52, p 1144 note 71.

Negativing implications

Warranties being only such as law implies, where not expressed in document, parol evidence negativing implication was not inadmissible as varying written instrument.—Queensboro Nat. Bank of City of New York v. Kelly, C.C.A.N.Y., 48 F.2d 574, 87 A.L.R. 1172, certiorari denied Kelly v. Queensboro Nat.

does not vary or contradict the document under consideration is admissible to establish the connection of the document with the case;[95] to show matters as to which the instrument is silent;[96] to explain how an agreement is to be carried out;[97] to show matters required to be shown by the contract,[98] or without which it could not be performed;[99] to show the manner in which the contract was performed,[1] and whether there was a breach of contract;[2] and to show a particular mode of payment or discharge agreed on by the parties.[3] Certainly the circumstances that a matter is evidenced by a writing cannot preclude the admission of parol evidence of independent facts, although they relate to the same transaction.[4]

Corroborative evidence. Evidence consistent

Bank of City of New York, 52 S.Ct. 9, 284 U.S. 620, 76 L.Ed. 529.

Representations

Evidence of representations made at time of execution of instrument is admissible where offered only for purpose of showing what terms of the instrument would have passed if representations had been true, and not for purpose of showing that it was intended to pass something which by terms of instrument was not passed.—Sharp v. New York, 40 Barb., N.Y., 256, 25 How.Pr. 389.

Evidence held admissible to show

(1) Excuse for failure to comply with contract within required time.—Collins v. Eksoozian, 214 P. 670, 61 Cal.App. 184.

(2) Purpose for which checks were issued or received.—U. S. Fidelity & Guaranty Co. v. Hicks, 21 S.W.2d 421, 180 Ark. 118.

(3) Purpose and intent to become incorporated.—Espy v. Mt. Lebanon Cemetery, 1 Walk. Pa., 40.

(4) That husband and wife had been living separately at time of execution of separation contract.—Boland v. Boland, 46 P.2d 238, 7 Cal. App.2d 401.

(5) That one party has, according to terms of writing, made election respecting manner of its performance.—Norton v. Ware, 35 Me. 218.

(6) That owner of land rejected offer to purchase, irrevocable for specified period, prior to expiration of such period.—Harvey v. Aaron, 2 La.App. 288.

(7) That parties did not act under bill of sale.—Kahn v. Ilitzky, Tex. Civ.App., 107 S.W.2d 1015, error dismissed.

(8) That party had not read contract.—Standard Oil Co. v. Myers, 169 So. 312, 232 Ala. 662.

(9) That seller knew purpose for which property had been purchased.—Liquid Carbonic Co. v. Coclin, 159 S.E. 461, 161 S.C. 40.

(10) That words "without recourse" were written by indorser at time of indorsement.—Fitchburg Bank v. Greenwood, 2 Allen, Mass., 434—22 C.J. p 1094 note 54.

(11) Things to be done in future.—Cozad v. Central Bank Co., Ohio App., 34 N.E.2d 787.

95. Mo.—Wilson v. Kansas City Life Ins. Co., 128 S.W.2d 319, 233 Mo.App. 1006.

Effect of admission of such evidence

Explanatory parol evidence introduced to explain connection of documentary evidence with case does not change character of documentary evidence or effect its legal efficacy; nor does the parol evidence take on character of documentary evidence, but it remains parol evidence and will be so regarded by court.—Wilson v. Kansas City Life Ins. Co., supra.

96. Pa.—Iacovino v. Caterino, 2 A. 2d 828, 332 Pa. 556.

Public record

Witness examining public record equally available to both parties may testify as to matters not in record without violating parol evidence rule.—Kent v. Knowles, 133 So. 315, 101 Fla. 1375.

Furnishing of equipment

Evidence that bridge contractor was to furnish pile driver to subcontractor was held not to vary written contract containing no provision therefor.—Stone v. Morrison & Powers, Tex.Civ.App., 294 S.W. 641, reversed on other grounds, Com. App., 298 S.W. 538.

97. Ala.—Commercial Credit Co. v. Perkins, 184 So. 178, 180, citing **Corpus Juris**—Alabama Trunk & Luggage Co. v. Hauer, 108 So. 339, 341, 214 Ala. 473, quoting **Corpus Juris.**

Ark.—Vinson v. Wooten, 259 S.W. 366, 163 Ark. 170.

Ky.—W. R. Willett Lumber Co. v. Lloyd Lumber Co., 262 S.W. 573, 203 Ky. 397.

Tex.—Stone v. Messer, Civ.App., 247 S.W. 911.

22 C.J. p 1146 note 72.

Plans and specifications

In action on building contractor's bond, evidenee with respect to plans and specifications on blank forms of Federal Housing Administration which needed explanation was held admissible.—Maryland Casualty Co. v. Cunningham, 173 So. 506, 234 Ala. 80.

Work included in contract

In suit involving liability of general contractors in attachment issued against them on a judgment against subcontractor for work done by plaintiffs, general contractors' contention being that plaintiffs' claim was embraced in contract with subcontractor, and that a release executed by him was in full for everything, architect was properly permitted to testify in explanation, as to whether sheets and bulletin made a part of contract with subcontractor included work done by plaintiffs.—Morrow v. Arthur, 106 A. 356, 134 Md. 182.

98. N.Y.—Imperial Woolen Co. v. F. B. Q. Clothing Co., 179 N.Y.S. 688, 190 App.Div. 270.

Amount of goods not received

N.Y.—Imperial Woolen Co. v. F. B. Q. Clothing Co., supra.

99. Ala.—Smith v. Lewis, 102 So. 21, 212 Ala. 133.

Amount due under contract

Where written contracts of sale provided that, should goods be repossessed, all installments due at repossession should be paid by buyer, and on repossession vendee again orally agreed to pay such back installments, vendor's testimony as to amount thereof did not contradict the writing.—Smith v. Lewis, supra.

1. Mich.—Malone v. Gates, 49 N.W. 638, 87 Mich. 332.

Scale of logs

Parol evidence is admissible as to the manner in which a scale of logs, required by contract, was made.—Malone v. Gates, supra.

Disregard of instructions

In action for broker's commissions, evidence showing broker's disregard of instruction to lease for short term was not inadmissible as varying written agreement.—Mitchell v. Gould, 266 P. 565, 90 Cal.App. 647.

2. Ala.—Brenard Mfg. Co. v. McCarty Drug Co., 101 So. 759, 212 Ala. 66.

3. U.S.—In re Independent Coal Corporation, C.C.A.N.Y., 18 F.2d 1, certiorari denied Empire Coal Mining Co. v. Updike, 47 S.Ct. 764, 274 U.S. 750, 71 L.Ed. 1331.

Ala.—Perkins Oil Co. of Delaware v. Davis, 153 So. 417, 228 Ala. 190.

22 C.J. p 1146 note 74.

4. Ala.—Milner Land Co. v. Houston, 142 So. 410, 225 Ala. 223.

Ga.—Hill v. Fryer, 126 S.E. 885, 33 Ga.App. 564.

La.—Crewley Lumber Co. v. Plaffer, 4 La.App. 606.

with the instrument and offered merely to show the truth of the facts therein stated is competent.[5]

§ 931. —— Judicial Records

Parol or extrinsic evidence relating to a judicial record is admissible if it does not tend to impeach or contradict the record.

The existence of a judicial record does not preclude the reception of evidence which, while it relates to the same matters dealt with in the record, in no way tends to impeach or contradict the record.[6] Thus extrinsic facts, not required to be made a part of the record, may be shown,[7] and, conversely, the custodian of the records who has examined them may testify that they do not disclose certain matters.[8]

§ 932. Aiding Inference from Instrument

Parol evidence may aid an inference deducible from the instrument.

Parol evidence is admissible to aid an inference which may be deduced from a written instrument.[9]

§ 933. Alterations, Erasures, and Mutilation

Parol evidence is admissible to show that an alteration was made in a writing, to show the circumstances surrounding such alteration, and to show the effect on the instrument. Such evidence is also admissible as to matters relating to erasures in, or mutilation of, instruments.

By way of exception to the general rule against parol evidence to vary or contradict a written instrument, parol or extrinsic evidence is admissible, for the purpose of impeaching an instrument, to show the fact that an alteration was made therein,[10]

Mont.—Hall v. Advance-Rumely Thresher Co., 212 P. 290, 65 Mont. 566.
N.J.—Mass v. Schomer, 144 A. 19, 103 N.J.Eq. 560.
N.D.—Krueger v. Dulas, 191 N.W. 1014, 49 N.D. 542.
15 C.J. p 1313 note 18—22 C.J. p 1109 note 28, p 1146 note 76.

Evidence held admissible to show

(1) Climatic conditions at time performance of contract was begun.—Clapp v. American Express Co., 125 N.E. 162, 234 Mass. 174.

(2) Entry and possession under defective deed.—Bridgmans v. Wells, 13 Ohio 43—15 C.J. p 1312 note 17.

(3) Manner in which encumbrance or easement originated.—Kruger v. Constable, N.Y., 128 F. 908, 63 C.C.A. 634, affirming, C.C., 116 F. 722—15 C.J. p 1313 note 34.

(4) That purchaser of lots had knowledge of restriction on property not incorporated in deed or contract.
Iowa.—Hegna v. Peters, 201 N.W. 803, 199 Iowa 259.
Tenn.—Ridley v. Haiman, 47 S.W.2d 750, 164 Tenn. 239.

(5) That seller had knowledge of purpose for which purchase was made, so as to create implied warranty of fitness.—Sampson v. Frank F. Pels Co., 192 N.Y.S. 538, 199 App. Div. 854.

(6) That maker of note knew of defects prior to purchase.—Anderson v. Van Doren, 172 N.W. 117, 142 Minn. 237.

5. Pa.—Somerset Colliery Co. v. John, 68 A. 843, 219 Pa. 380.
22 C.J. p 1134 note 7.

6. Ala.—Sims v. Kent, 130 So. 213, 221 Ala. 589.
Iowa.—Ryan v. Becker, 111 N.W. 426, 136 Iowa 273, 14 L.R.A.,N.S., 329.
La.—Succession of Davis, App., 185 So. 640.
Miss.—Armstrong v. Employer's Liability Assur. Corporation, 88 So. 163, 125 Miss. 570.
Mo.—General Motors Acceptance Corporation v. Lyman, 78 S.W.2d 109, 229 Mo.App. 455.
Neb.—Martin v. Sanford, 261 N.W. 136, 129 Neb. 212, 100 A.L.R. 179.
Okl.—Thompson v. Walker, 191 P. 154, 79 Okl. 50.
Tex.—Rusk County v. Maloney, Civ. App., 38 S.W.2d 868, error refused—Mitchell v. Reitz, Civ.App., 269 S.W. 279, error dismissed, Com. App., 281 S.W. 1044—Lambrecht v. Lewis, Civ.App., 240 S.W. 988, dismissed for want of jurisdiction.
22 C.J. p 1147 note 77.

Nonexistence of basic facts

In an action for false imprisonment in connection with plaintiff's arrest for vagrancy, although the record of the police magistrate showed a complaint, trial, and conviction, plaintiff could prove that there was no complaint, trial, or conviction, such evidence not contradicting or impeaching the record, but showing that the facts on which it purported to be founded were nonexistent.—Crowley v. Rummel, 195 P. 986, 22 Ariz. 179.

Extrinsic evidence held admissible

(1) To show explanatory or supplemental matters.—Harms v. Pohlmann, 297 S.W. 138, 222 Mo.App. 276.

(2) To show fact of special lien not otherwise shown in the records.—Edwards v. Decatur Bank & Trust Co., 167 S.E. 292, 176 Ga. 194.

(3) To show oral pleadings not otherwise clearly shown in record.—Bryan v. Jacoby, Tex.Civ.App., 11 S.W.2d 373.

(4) To show reason for consenting to entry of judgment.
Ark.—Knapp v. Gray, 239 S.W. 757, 153 Ark. 160.
Tex.—Stewart v. Profit, Civ.App., 146 S.W. 563.

(5) To show that certain entry made by clerk in index to judgment docket was not there when witnesses examined it.—Sullivan State Bank v. First Nat. Bank, 146 N.E. 403, 82 Ind.App. 419.

(6) To show true date of filing answer, where such evidence was offered not to impeach clerk's official entry, which entry was denied by clerk, but to show when plea was filed.—Giddens v. Rentz, 133 S.E. 265, 35 Ga.App. 411.

7. Ohio.—Darling v. Peck, 15 Ohio 65.

8. Ga.—Dixon v. Patterson, 69 S.E. 21, 135 Ga. 183.

9. Va.—Mayo v. Murchie, 3 Munf. 358, 17 Va. 358.
22 C.J. p 1147 note 80.

Rate of interest

Calculation showing interest rate charged as determined from amount of principal and interest is admissible where neither note nor mortgage disclosed rate.—American Nat. Ins. Co. v. Schenck, Tex.Civ.App., 85 S.W. 2d 833.

10. Cal.—Akopoff v. Mesropian, 273 P. 604, 96 Cal.App. 128, citing **Corpus Juris**—Dolan v. Carmel Canning Co., 234 P. 926, 71 Cal.App. 197.
Ga.—J. B. Colt Co. v. Butler, 115 S.E. 503, 29 Ga.App. 396.
Ky.—Dwiggins v. Howard, 57 S.W. 2d 649, 247 Ky. 746.
Mass.—New England Grape Co. v. Fidelity & Deposit Co. of Maryland, 167 N.E. 646, 268 Mass. 293.
Minn.—Dr. Ward's Medical Co. v. Wolleat, 199 N.W. 738, 741, 160 Minn. 21, citing **Corpus Juris**.
S.C.—Furst & Thomas v. Whitmire, 133 S.E. 222, 135 S.C. 38.
2 C.J. p 1283 note 67—22 C.J. p 1147 note 83, p 1213 note 59 [b].

Character of conveyance

Parol evidence was admissible to

and the person by whom, and the circumstances under which, it was made.[11] Thus such evidence may be admitted for the purpose of showing that the instrument fails to express the true contract or agreement of the parties,[12] or to show that an alteration of, or addition to, a writing was made without authority from the writer,[13] or that blanks were filled contrary to directions.[14] So, also, parol evidence is admissible to explain an alteration or to show that the change was made under such circumstances as not to vitiate the instrument.[15]

Alteration of a record may, it has been held, be shown by parol,[16] although this has been denied.[17]

Erasures. Parol evidence is admissible to show an erasure in a written instrument provided it is offered in good faith;[18] to explain an erasure;[19] to show the time when and the circumstances under which an erasure was made, and to sustain the validity of the instrument notwithstanding;[20] and, where the instrument is to be enforced as though there had been no erasure, parol evidence may be received to show what the erased words were if they cannot be ascertained from the instrument itself.[21] It has also been held that, where the portion of a written instrument bearing on a certain matter has been purposely erased by the parties, evidence of a parol agreement with regard to the erased matter is admissible, since it is then not embraced within the contract.[22]

Mutilation. Although an instrument may be so mutilated that an essential portion thereof is illegible, it may nevertheless be shown by parol that it was mutilated under circumstances not affecting its validity;[23] and if parts are missing their contents may be shown by parol.[24] It is permissible to show that part of the writing has been detached, so that the writing offered in evidence does not express the true agreement of the parties.[25]

§ 934. Clerical or Typographical Errors

Clerical and typographical errors in written instruments, including public and judicial records, may be corrected by extrinsic evidence.

Clerical errors in a written instrument may be corrected by extrinsic evidence,[26] and the same rule applies to typographical errors in printed matter.[27]

show that deed conveying land as donation was altered after delivery to show sale.—Gabert v. St. Tammany Yacht Club, 116 So. 667, 166 La. 57.

Duration of lease

In action to cancel an oil and gas lease, it would not be varying the original instrument by parol testimony to permit lessor to testify that lessee prepared the lease to run for a period of six months, and after the delivery of the lease struck out the words "six months" and inserted the words "ten years."—Smith v. Fleming, Tex.Civ.App., 231 S.W. 136, motion overruled 231 S.W. 1117.

Indorsement on note

Indorser may show, as against his immediate indorsee, that words "without recourse," after being omitted by mistake, were added by consent, and were subsequently stricken out without indorser's consent.—Beal v. Wood, 5 Mo.App. 591.

11. Kan.—Forbes v. Madden, 158 P. 850, 98 Kan. 559.
22 C.J. p 1147 note 84—2 C.J. p 1283 note 67.

12. Cal.—Akopoff v. Mesropian, 273 P. 604, 96 Cal.App. 128, citing **Corpus Juris**—Dolan v. Carmel Canning Co., 234 P. 926, 928, 71 Cal. App. 197, citing **Corpus Juris**.
Ky.—Gaines v. Scott, 3 Ky.L. 418, 11 Ky.Op. 361.
Okl.—Leland v. Oklahoma Const. Co., 55 P.2d 1013, 176 Okl. 216.
22 C.J. p 1147 note 85—2 C.J. p 1283 note 69.

Evidence to resolve ambiguity

Where bill of lading contained the dates "August" and "September" in typewriting, one superimposed on the other, evidence was admissible to show which date was correct.—Second Nat. Bank v. Columbia Trust Co., C.C.A.N.J., 288 F. 17, 30 A.L.R. 1299.

13. Cal.—Dolan v. Carmel Canning Co., 234 P. 926, 71 Cal.App. 197.
Kan.—Dimmock v. Ploeger, 264 P. 1044, 125 Kan. 461.
22 C.J. p 1147 note 82—2 C.J. p 1283 note 70.

14. Minn.—Dr. Ward's Medical Co. v. Wolleat, 199 N.W. 738, 160 Minn. 21.
2 C.J. p 1283 note 71.

15. Wash.—Titus v. Titus, 119 P. 813, 66 Wash. 345, Ann.Cas.1913C 343.
22 C.J. p 1147 note 81—2 C.J. p 1283 note 68.

16. Okl.—Sackett v. Rose, 154 P. 1177, 55 Okl. 398, L.R.A.1916D 820.
22 C.J. p 1147 note 86—2 C.J. p 1283 note 74.

17. Tenn.—Kerr v. Porter, 1 Overt. 15.

18. Mo.—Medling v. Abraham Lincoln Life Ins. Co., 41 S.W.2d 6, 225 Mo.App. 1243.

19. Ill.—Douthit v. Swiney, 141 N. E. 535, 310 Ill. 180.

20. Iowa.—Cedar Rapids Nat. Bank v. Carlson, 136 N.W. 659, 156 Iowa 343.
22 C.J. p 1148 note 88.

21. Minn.—Thomas v. Thomas, 79 N.W. 104, 76 Minn. 237, 77 Am.S.R. 639.
22 C.J. p 1148 note 89.

22. Ga.—Gay v. Parish, 75 S.E. 323, 138 Ga. 399.
22 C.J. p 1148 note 90.

23. Ind.—Hatch v. Dickinson, 7 Blackf. 48.

24. D.C.—Waring v. United States Fidelity & Guaranty Co., 24 App.D. C. 119.

25. La.—Young v. Geter, App., 174 So. 661.
22 C.J. p 1148 note 93.

26. Ky.—Hatcher-Powers Shoe Co. v. Bickford, 278 S.W. 615, 212 Ky. 163.
Wis.—Dunville v. Industrial Commission, 279 N.W. 695, 228 Wis. 86.
22 C.J. p 1148 note 94.

Effect of misplaced parenthesis

Admission of testimony as to how clause containing allegedly misplaced parenthetical mark was composed was not error, where testimony was not offered for purpose of contradicting or varying terms of contract, but to show that as result of accidental or negligent use of closing parenthetical mark, instrument was given meaning contrary to intent of parties as clearly appeared from whole tenor of instrument.—Housing Authority of New Orleans v. Henry Ericsson Co., 2 So.2d 195, 197 La. 732.

27. S.C.—Cato v. Atlanta & C. A. L. Ry. Co., 152 S.E. 522, 155 S.C. 304.
22 C.J. p 1148 note 95.

Public and judicial records. Parol or extrinsic evidence may also be received to correct clerical errors in public records or documents,[28] or judicial records,[29] although it has also been laid down as a rule that parol evidence is not admissible to show clerical errors or mistakes in judicial records, in collateral proceedings, or in actions founded on the judgment.[30]

§ 935. Condition or Contingency

In general, parol evidence is admissible to show conditions precedent, which relate to the existence of a valid contract, but is not admissible to show conditions subsequent, which provide for the nullification or modification of an existing contract.

While in many cases it has simply been held that parol evidence is,[31] or is not,[32] admissible to show the existence of some contingency or condition affecting the operation and effect of a written instrument, the true basis of distinction, as stated in Corpus Juris, which has been frequently quoted and cited with approval, is that the rule excluding parol evidence has no place in any inquiry unless the court has before it some ascertained paper beyond question binding and of full effect.[33] Hence, parol evidence is admissible to show conditions precedent, which relate to the delivery or taking effect of the instrument, as that it shall only become effective on certain conditions or contingencies, for this is not an oral contradiction or variation of the written instrument but goes to the very existence of the contract and tends to show that no valid and effective contract ever existed;[34] but such evidence is not

28. Ky.—Altes' Ex'x v. Beauchamp, 126 S.W.2d 867, 277 Ky. 491.
22 C.J. p 1148 note 96.

Agreement of parole from prison
Evidence that discrepancy between copies of parole agreements was clerical mistake was admissible in habeas corpus proceedings.—Ex parte Colcord, 207 N.W. 213, 49 S.D. 416.

Date of town meeting
Error in record of town meeting as to date of such meeting may be corrected by parol evidence.—Grimm v. Bayfield County, 182 N.W. 466, 174 Wis. 43.

29. Ga.—Fraser v. Neese, 137 S.E. 550, 163 Ga. 843.
22 C.J. p 1148 note 98.

Judicial sale
Even where the subject of a sale is real estate and the sale is a judicial one, an error in the description of the thing actually sold may be shown by parol.—Lattimer's Heirs v. Gulf Refining Co. of Louisiana, 83 So. 543, 146 La. 249.

Date of filing petition
Mo.—Citizens Bank of Springfield v. Wright, App., 122 S.W.2d 409.

30. Ala.—King v. Martin, 67 Ala. 177.
22 C.J. p 1148 note 97.

31. Cal.—Scott Co. v. Rolkin, 23 P.2d 1065, 133 Cal.App. 209.
22 C.J. p 1148 note 99.

32. Ala.—Moore v. Williamson, 98 So. 201, 210 Ala. 427.
D.C.—Lake v. Parker, 2 F.2d 127, 55 App.D.C. 78.
Ga.—Floyd v. Taylor Cotton Co., 105 S.E. 646, 26 Ga.App. 96.
Ill.—Green v. Ashland Sixty-Third State Bank, 178 N.E. 468, 346 Ill. 174—Allen v. Hayes, 141 N.E. 188, 309 Ill. 374.
Pa.—Speier v. Michelson, 154 A. 127, 303 Pa. 66—Fenton Storage Co. v. Feinstein, 195 A. 176, 129 Pa.Super. 125—Philadelphia Record Co. v. Sweet, 188 A. 631, 124 Pa.Super. 414—Cain v. Marick, 91 Pa.Super. 129.
S.C.—Busby v. Hamby, 117 S.E. 223, 123 S.C. 534.
Tex.—Cottingham v. Harrison, Civ. App., 89 S.W.2d 255, error dismissed—Texarkana Pipe Works v Caddo Oil & Refining Co. of Louisiana, Civ.App., 228 S.W. 586—Mayhew & Isbell Lumber Co. v. Valley Wells Truck Growers' Ass'n, Civ. App., 216 S.W. 225.
22 C.J. p 1149 note 1.

Statutory provisions
Under statute setting out circumstances in which parol evidence may be admitted, and not including existence of condition precedent, parol evidence was held not admissible to show oral understanding that certain event occur before contract was to be binding even though party acted hastily or unwisely in executing contract.—Wheeler v. James, 223 P. 900, 70 Mont. 37.

Condition on guaranty
(1) Parol evidence has been held not admissible to attach condition to absolute written guaranty.—Rosenbloom v. W. E. Lamneck Co., C.C.A. Pa., 24 F.2d 340.

(2) Evidence of parol agreement that one guaranteeing buyer's performance under title-retaining sales contract, at time of pledge thereof, should not be liable until truck sold had been repossessed by pledgee, was held incompetent.—College Nat. Bank of Berkeley v. Morrison, 280 P. 218, 100 Cal.App. 403.

Subscriptions
(1) Parol evidence is not admissible to show that subscription was not to be payable except on other conditions than those embodied in written contract.
Ala.—Ex parte South, 88 So. 221, 205 Ala. 31, denying certiorari South v. First Nat. Bank, 88 So. 219, 17 Ala.App. 569.
Iowa.—Blair v. Buttolph, 33 N.W. 349, 72 Iowa 31.
Me.—Farmington First Free-will Baptist Parish v. Perham, 24 A. 958, 84 Me. 563.
Neb.—Gerner v. Church, 62 N.W. 51, 43 Neb. 690.
N.Y.—Guinzburg v. Blustein, 202 N. Y.S. 333, 121 Misc. 784.
N.D.—Tompkins v. Dinnie, 130 N.W. 935, 21 N.D. 305.
Vt.—Blodgett v. Morrill, 20 Vt. 509.

(2) Where defendants, with knowledge of its contents, signed an absolute subscription for a charitable purpose, an oral agreement that defendants would donate the sum mentioned only in case their business continued to prosper cannot be established.—Guinzburg v. Blustein, supra.

33. Neb.—Gund v. Roulier, 188 N. W. 185, 108 Neb. 589, reversed on other grounds 190 N.W. 220, 108 Neb. 589—Security Sav. Bank v. Rhodes, 185 N.W. 421, 422, 107 Neb. 223, 20 A.L.R. 412, quoting **Corpus Juris.**
N.J.—Marneil Realty Corporation v. Twin Brook Corp., Ch., 181 A. 882, 885, 119 N.J.Eq. 205, citing **Corpus Juris**—Cohen v. Cohn, 140 A. 319, 320, 102 N.J.Eq. 245, citing **Corpus Juris,** and reversing Cohen v. Cohen, 138 A. 693, 101 N.J.Eq. 401.
Tex.—Moore v. Wilson, Civ.App., 138 S.W.2d 1099, error refused.
Utah.—Nuttall v. Berntson, 30 P.2d 738, 741, 83 Utah 535, quoting **Corpus Juris.**
Wyo.—McClintock v. Ayers, 253 P. 658, 36 Wyo. 132, rehearing denied 255 P. 355, 36 Wyo. 132.
22 C.J. p 1150 note 2.

34. U.S.—Commissioner of Internal Revenue v. Gibbs-Preyer Trusts Nos. 1 and 2, C.C.A., 117 F.2d 619—English v. Hetherington & Berner, C.C.A.Ill., 71 F.2d 613—American Surety Co. of New York v. Egan, C.C.A.Mich., 62 F.2d 223—Atlas Petroleum Co. v. Cocklin, C.

admissible to show conditions subsequent, which | provide for the nullification or modification of an

C.A.Iowa, 59 F.2d 571—Mankin v. Bartley, C.C.A.Va., 277 F. 960—Gateway Produce Co. v. Farrier Bros., C.C.A.Tex., 268 F. 513.
Cal.—Hanrahan-Wilcox Corporation v. Jenison Machinery Co., 73 P.2d 1241, 23 Cal.App.2d 642—Gleeson v. Dunn, 298 P. 119, 113 Cal.App. 347.
D.C.—Lippincott v. Kerr, 40 F.2d 802, 59 App.D.C. 290.
Ga.—Crandall v. Shepard, 144 S.E. 772, 166 Ga. 889—Butler v. Citizens' Bank, 110 S.E. 501, 28 Ga. App. 184.
Ill.—Economy Fuse & Mfg. Co. v. Standard Electric Mfg. Co., 274 Ill. App. 139, affirmed 194 N.E. 922, 359 Ill. 504—Sugar v. Marinello, 260 Ill.App. 85—Heitman v. Diercks, 256 Ill.App. 274.
Ind.—Russell v. Gift, 167 N.E. 546, 90 Ind.App. 106.
Iowa.—Kruse v. Wickham, 292 N.W. 518—Walker v. Todd, 280 N.W. 512, 225 Iowa 276—In re Simplot's Estate, 246 N.W. 396, 215 Iowa 578—Hills Sav. Bank v. Hirt, 216 N. W. 281, 283, 204 Iowa 940, quoting **Corpus Juris**—Kilby v. Fitzpatrick, 187 N.W. 580, 193 Iowa 714—Rath v. Schoon, 182 N.W. 180, 192 Iowa 180—Banwart v. Shullenburg, 180 N.W. 190, 190 Iowa 418—Herron v. Brinton, 175 N.W. 831, 188 Iowa 60.
Ky.—New York Canners v. Rucker, 37 S.W.2d 31, 238 Ky. 204—Struck v. Dralle, 20 S.W.2d 88, 89, 230 Ky. 393, citing **Corpus Juris**—Lincoln v. Burbank, 290 S.W. 1081, 218 Ky. 89—Pickrell v. Wilson, 250 S. W. 135, 136, 199 Ky. 20, citing **Corpus Juris**—Robb v. Sherrill-Russell Lumber Co., 241 S.W. 64, 194 Ky. 835.
La.—Mire v. Haas, App., 174 So. 374—Blaushild v. Rockhold, 7 La.App. 709.
Mass.—Levene v. Crowell, 138 N.E. 9, 243 Mass. 441.
Mich.—White Showers v. Fischer, 270 N.W. 205, 207, 278 Mich. 32, citing **Corpus Juris**—Sharrar v. Wayne Sav. Ass'n, 224 N.W. 379, 381, 246 Mich. 225, citing **Corpus Juris.**
Minn.—Minar Rodelius Co. v. Lysen, 277 N.W. 523, 202 Minn. 149—Hendrickson v. Bannitz, 261 N.W. 189, 194 Minn. 528.
Neb.—Johnson v. Shuler, 277 N.W. 807, 134 Neb. 25—Hanneman v. Olson, 206 N.W. 155, 114 Neb. 88—Gund v. Roulier, 188 N.W. 185, 108 Neb. 589, reversed on other grounds, 190 N.W. 220, 108 Neb. 589—Security Sav. Bank v. Rhodes, 185 N.W. 421, 422, 107 Neb. 223, 20 A.L.R. 412, quoting **Corpus Juris.**
N.J.—Marneil Realty Corporation v. Twin Brook Corp., 181 A. 882, 885, 119 N.J.Eq. 205, citing **Corpus Juris**—Cohen v. Cohn, 140 A. 319, 320, 102 N.J.Eq. 245, citing **Corpus Juris,** and reversing Cohen v. Cohen, 138 A. 693, 101 N.J.Eq. 401.
N.Y.—Lee v. Industrial Laundry Mach. Co., 27 N.Y.S.2d 202, 261 App.Div. 741—Sherry v. Marsh, 9 N.Y.S.2d 494, 256 App.Div. 219—Klein v. Metropolitan Life Ins. Co., 8 N.Y.S.2d 351, 255 App.Div. 335—Royal Indemnity Co. v. Preferred Accident Ins. Co. of New York, 276 N.Y.S. 313, 243 App.Div. 297, affirmed 198 N.E. 407, 268 N.Y. 566, reargument denied 200 N.E. 52, 269 N.Y. 674—Rhinock v. Simms, 235 N.Y.S. 143, 226 App.Div. 313, affirmed 171 N.E. 800, 253 N.Y. 602—Bergin v. Anderson, 213 N.Y.S. 764, 215 App.Div. 832—Savage Realty Co. v. Lust, 196 N.Y.S. 296, 203 App.Div. 55—Hechinger v. Ulacia, 185 N.Y.S. 323, 324, 194 App.Div. 330, quoting **Corpus Juris**—State Bank of Newfane v. Lautz, 252 N.Y.S. 461, 141 Misc. 276—Buszozak v. Wolo, 211 N.Y.S. 557, 125 Misc. 546.
N.C.—Jefferson Standard Life Ins. Co. v. Morehead, 183 S.E. 606, 209 N.C. 174—Roebuck v. Carson, 146 S.E. 708, 196 N.C. 672—Tobacco Growers' Co-op. Ass'n v. Moss, 121 S.E. 738, 187 N.C. 421—Summit Ave. Bldg. Co. v. Sanders, 117 S. E. 3, 185 N.C. 328—White v. Fisheries Products Co., 111 S.E. 182, 183 N.C. 228—Kelly v. Oliver, 18 S.E. 698, 113 N.C. 442.
N.D.—Foot Schulze & Co. v. Skeffington, 202 N.W. 642, 644, 52 N.D. 307, citing **Corpus Juris**—Lilly v. Haynes Co-op. Coal Mining Co., 196 N.W. 556, 50 N.D. 465.
Ohio.—Broderick Co. v. Colville, 179 N.E. 810, 41 Ohio App. 449—Frankel Chevrolet Co. v. Snyder, 174 N. E. 751, 37 Ohio App. 378—Mitzel Co. v. Shields, 172 N.E. 621, 35 Ohio App. 514—Martin v. Steinke, 154 N.E. 47, 22 Ohio App. 146.
Okl.—Yeager v. Jackson, 19 P.2d 970, 162 Okl. 207—Commercial Nat. Bank of Muskogee v. Ahrens, 245 P. 557, 117 Okl. 65.
Tenn.—Gibson County v. Fourth & First Nat. Bank, 96 S.W.2d 184, 20 Tenn.App. 168—Crotzer v. Shawl, 5 Tenn.App. 240, 244, citing **Corpus Juris.**
Tex.—Moore v. Wilson, Civ.App., 138 S.W.2d 1099, error refused—Mauritz v. Schwind, Civ.App., 101 S.W. 2d 1085, error dismissed—Shepherd v. Woodson Lumber Co., Civ.App., 63 S.W.2d 581—Davis v. Jarnigan, Civ.App., 59 S.W.2d 281, 285, citing **Corpus Juris**—Republic Supply Co. v. Barrow, Civ.App., 41 S.W.2d 475, error dismissed—American Surety Co. of New York v. Whitehead, Civ.App., 29 S.W.2d 507, affirmed in part and reversed in part on other grounds American Surety Co. v. Whitehead, Com.App., 45 S.W.2d 958—Roddy v. Citizens' State Bank of Copeville, Civ.App., 11 S.W.2d 652, 653, citing **Corpus Juris**—American Slicing Mach. Co. v. Vincent, Civ.App., 279 S.W. 317, 318, citing **Corpus Juris**—Morris v. Logan, Civ.App., 273 S.W. 1019—Barnes v. Early-Foster Co., Civ. App., 228 S.W. 248—Cooper v. Hinman, Civ.App., 212 S.W. 972, reversed on other grounds, Com.App., 235 S.W. 564.
Utah.—Utah-Idaho Sugar Co. v. State Tax Commission, 73 P.2d 974, 93 Utah 406—Nuttall v. Berntson, 30 P.2d 738, 83 Utah 535—Parker v. Weber County Irr. Dist., 251 P. 11, 68 Utah 472—Parker v. Weber County Irr. Dist., 236 P. 1105, 65 Utah 354.
Va.—Meadows v. McClaugherty, 187 S.E. 475, 167 Va. 41—Clark v. Miller, 138 S.E. 556, 148 Va. 83—Harris v. Sanford, 138 S.E. 465, 148 Va. 181, 54 A.L.R. 699—Whitaker & Fowle v. Lane, 104 S.E. 252, 128 Va. 317, 11 A.L.R. 1157.
W.Va.—Brown v. Cabell, 161 S.E. 438, 111 W.Va. 186.
Wis.—George F. Russell, Inc., v. Hickcox, 222 N.W. 807, 197 Wis. 622—Bultman v. Frankart, 215 N. W. 432, 194 Wis. 296—Edward T. Kelly Co. v. Von Zakobiel, 171 N. W. 75, 168 Wis. 579.
Wyo.—McClintock v. Ayers, 253 P. 658, 36 Wyo. 132, rehearing denied 255 P. 355, 36 Wyo. 132.
22 C.J. p 1150 note 3–p 1156 note 39.
"The condition here imposed related not to the performance, but to the existence of a contract."—Liebling v. Florida Realty Inv. Corporation, C.C.A.Fla., 24 F.2d 688, affirming, D.C., 14 F.2d 234.

Unilateral contracts only

It has been said that parol evidence of conditional delivery is admissible only with respect to unilateral contracts which become effective by delivery, and not with respect to bilateral contracts, executed by both parties in presence of witnesses, each party retaining a copy.—State v. Interstate Surety Co., 204 N.W. 650, 48 S.D. 341.

Conditional acceptance

When a proposal, even in writing, is made and accepted, it is permissible to show it was accepted with conditions or qualifications.—Lawrence v. Premier Indemnity Assur. Co., 182 P. 431, 180 Cal. 688.

Particular instruments

(1) Guaranty.
Mont.—Baroch v. Greater Montana Oil Co., 225 P. 800, 70 Mont. 93.
N.Y.—Clipper v. Goldstein, 254 N.Y. S. 60, 234 App.Div. 85.

existing contract, as that the contract is to cease to be effective or is to have an effect different from that stated therein, on certain conditions or contingencies, for this does vary or contradict the terms of the writing.[35]

Consistency with instrument. Where the alleged condition precedent is inconsistent with the written instrument parol evidence thereof is inadmissible.[36] Thus, where an instrument states that no conditions exist or may exist except as expressed therein, parol evidence of a condition precedent is not admissible, since such evidence would vary and contradict the writing.[37]

Condition contained in instrument. While it has been held that where the contract contains a written condition precedent to its becoming effective such condition cannot be varied by parol,[38] it has also been held that the condition may be varied or

(2) Insurance contracts.
N.C.—Dawson v. Concordia Fire Ins. Co. of Milwaukee, Wis., 135 S.E. 34, 192 N.C. 312.
Pa.—Eaton v. New York Life Ins. Co. of New York, 172 A. 121, 315 Pa. 68, 95 A.L.R. 462.
Va.—Reliance Life Ins. Co. v. Gulley's Adm'x, 114 S.E. 551, 134 Va. 468.

(3) Subscription contract.—Vance v. Dobson, 266 S.W. 368, 205 Ky. 640.

Particular conditions

(1) That others should also execute the instrument.
U.S.—Union Joint Stock Land Bank of Detroit, Mich., v. Byers, C.C.A. Pa., 100 F.2d 82, certiorari denied 59 S.Ct. 642, 306 U.S. 653, 83 L.Ed. 1052.
Mich.—Rothstein v. Weeks, 195 N. W. 49, 224 Mich. 548.
N.Y.—New Amsterdam Casualty Co. v. Parsons, 220 N.Y.S. 340, 219 App.Div. 486.
N.D.—Foot Schulze & Co. v. Skeffington, 202 N.W. 642, 52 N.D. 307.
Tex.—Thomason v. Berry, Com.App., 276 S.W. 185, reversing Berry v. Thomason, Civ.App., 261 S.W. 154—Roddy v. Citizens' State Bank of Copeville, Civ.App., 11 S.W.2d 652.

(2) That contract was not to be effective unless loan was made.
N.Y.—Saltzman v. Barson, 146 N.E. 618, 232 N.Y. 332, modifying 205 N.Y.S. 548, 210 App.Div. 84.
Tenn.—Smith v. Beeler, 9 Tenn.App. 190.

(3) That application for loan was delivered under oral stipulation that it depended on possible purchase of real estate.—Friedmann v. Hamilton, 86 Pa.Super. 473.

35. U.S.—State-Planters' Bank & Trust Co. v. First Nat. Bank, C.C. A. Va., 76 F.2d 527, certiorari denied, 55 S.Ct. 923, 295 U.S. 764, 79 L.Ed. 1706.
Iowa.—Hoover v. Hoover, 291 N.W. 154, 157, 228 Iowa 981, citing **Corpus Juris**—Hills Sav. Bank v. Hirt, 216 N.W. 281, 283, 204 Iowa 940, quoting **Corpus Juris.**
Ky.—Lincoln v. Burbank, 290 S.W. 1081, 218 Ky. 89—Pickrell v. Wilson, 250 S.W. 135, 199 Ky. 20.
Mass.—Canton v. Thomas, 162 N.E. 769, 264 Mass. 457—Spevack v. Budish, 130 N.E. 191, 238 Mass. 215.
Neb.—Gund v. Roulier, 188 N.W. 185, 108 Neb. 589, reversed on other grounds, 190 N.W. 220, 108 Neb. 589—Security Sav. Bank v. Rhodes, 185 N.W. 421, 422, 107 Neb. 223, 20 A.L.R. 412, quoting **Corpus Juris.**
N.J.—More Game Birds in America v. Boettger, 14 A.2d 778, 125 N.J. Law 97—Marnell Realty Corporation v. Twin Brook Corp., 181 A. 882, 885, 119 N.J.Eq. 205, citing **Corpus Juris**—Cohen v. Cohn, 140 A. 319, 320, 102 N.J.Eq. 245, citing **Corpus Juris,** and reversing Cohen v. Cohen, 138 A. 693, 101 N.J. Eq. 401.
N.Y.—Salzman v. Barson, 146 N.E. 618, 232 N.Y. 332, modifying 205 N.Y.S. 548, 210 App.Div. 84—Darling v. Darling, 270 N.Y.S. 557, 241 App.Div. 57, affirmed 193 N.E. 428, 265 N.Y. 650—Rhinock v. Simms, 235 N.Y.S. 143, 226 App.Div. 313, affirmed 171 N.E. 800, 253 N.Y. 602—Alexander Hamilton Institute v. Folgner, 6 N.Y.S.2d 65, 168 Misc. 358—Robertson v. Schoonmaker, 285 N.Y.S. 204, 158 Misc. 627—Buszozak v. Wolo, 211 N.Y.S. 557, 125 Misc. 546.
N.C.—Craig-Little Realty & Insurance Co. v. Spurrier, 130 S.E. 624, 190 N.C. 726—Summit Ave. Bldg. Co. v. Sanders, 111 S.E. 705, 183 N. C. 413.
Tenn.—Croizer v. Shawl, 5 Tenn. App. 240, 243, citing **Corpus Juris.**
Tex.—Mauritz v. Schwind, Civ.App., 101 S.W.2d 1085, error dismissed.
22 C.J. p 1151 note 4.

Condition cannot be claimed except where agreement has been deposited in escrow or delivery was made conditional.—Barnes v. Verry, 218 N.W. 561, 174 Minn. 173.

Condition affecting payment

Parol condition affecting payment of delivered written instrument is not enforceable if it operates to vary terms of written agreement.—Shepherd v. Woodson Lumber Co., Tex. Civ.App., 63 S.W.2d 581.

36. Ariz.—Pleasant v. Arizona Storage & Distributing Co., 267 P. 794, 34 Ariz. 68.
Ill.—Chicago Title & Trust Co. v. Cohen, 1 N.E.2d 717, 284 Ill.App. 181.
Kan.—U. S. Fidelity & Guaranty Co. v. Grabske, 267 P. 322, 111 Kan. 271.
Mich.—Frischkorn Real Estate Co. v. Hoskins, 196 N.W. 888, 226 Mich. 30.
N.Y.—Hendricks v. Clements, 186 N. Y.S. 378, 195 App.Div. 144.
S.D.—State v. Interstate Surety Co., 204 N.W. 650, 48 S.D. 341.

"A written contract is presumed to be a finality, and a party may not prove by parol a provision or condition foreign to any of the terms of the written instrument."—Rath v. Schoon, 182 N.W. 180, 181, 192 Iowa 180.

Condition held not inconsistent

Written contract between general contractors and subcontractor made subject to specifications of architect was not inconsistent with oral agreement rendering written contract ineffective until approved by building commission, so that establishment of oral agreement with showing that approval was refused constituted defense to subcontractor's action on written contract.—Nuttall v. Berntson, 30 P.2d 738, 83 Utah 535.

Condition held inconsistent

Evidence of previous oral agreement, whereby subsequent written agreement for rent of road grader was not to be effective unless lessee was satisfied with grader's performance, was properly excluded under parol evidence rule, as being inconsistent with specific terms of written agreement specifying date that rent should be payable and providing that written agreement constituted the entire contract.—Hanrahan-Wilcox Corporation v. Jenison Machinery Co., 73 P.2d 1241, 23 Cal. App.2d 642.

37. Ga.—Automobile Battery Co. v. Geraghty & Co., 118 S.E. 412, 30 Ga.App. 446.
La.—Duncan Steele, Inc. v. Labatt, 130 So. 841, 15 La.App. 350.
Wis.—Edward T. Kelly Co. v. Von Zakobiel, 171 N.W. 75, 168 Wis. 579.

38. N.Y.—Alhambra Amusement Co. v. Associated First National Pictures, 202 N.Y.S. 605, 207 App.Div. 550, affirmed 152 N.E. 413, 242 N. Y. 528.

other conditions precedent shown, provided such change or addition is not wholly repugnant to that expressed in the writing.[39]

Denial of existence of condition. Parol evidence has been held admissible to disprove the existence of a condition.[40]

§ 936. —— Sealed Instruments Generally

Authorities differ as to whether parol evidence is admissible to show a conditional delivery of a sealed instrument.

While it has been a well established general rule that an instrument under seal cannot be delivered to the grantee or obligee on a parol condition which may prevent the taking effect of the instrument according to its tenor,[41] it has also been held that the attaching of a seal is no longer attended with the formality it once was, so that a sealed instrument can be delivered on an oral condition precedent, and parol evidence of such delivery is admissible,[42] at least with respect to instruments which are not required to be under seal.[43]

§ 937. —— Bills and Notes

In general, while parol evidence is not admissible to attach conditions to a negotiable instrument absolute in its terms, it is admissible to show that the delivery of the instrument was conditional or for a special purpose only.

Where a bill or note or other negotiable instrument is absolute in its terms, neither the maker nor the indorser can be allowed to attach oral conditions thereto or show that the obligation was a conditional one;[44] and this has been held to be true notwithstanding the fact that the note was given pur-

Wash.—Pacific Nat. Bank v. San Francisco Bridge Co., 63 P. 207, 23 Wash. 425.

Number and character of signatories

The written contract providing that as to the second party the contract was "not valid till signed by ten or more persons as second party," parol agreement that it should be signed by ten "financially responsible" persons, including three named persons, cannot be shown, in the absence of claim of fraud or misrepresentation, as this would vary the contract.—Travers-Newton Chautauqua System v. Naab, 196 N.W. 36, 37, 196 Iowa 1313, 32 A.L.R. 780.

39. Okl.—Rutherford v. Holbert, 142 P. 1099, 42 Okl. 735, L.R.A. 1915B 221.

40. Kan.—State v. Rural High School Dist. No. 2, Clark County, 280 P. 892, 128 Kan. 797.

41. D.C.—Newman v. Baker, 10 App.D.C. 187.

22 C.J. p 1152 note 5.

42. U.S.—American Surety Co. of New York v. Egan, C.C.A.Mich., 62 F.2d 223—Mankin v. Bartley, C. C.A.Va., 277 F. 960.

Va.—Meadows v. McClaugherty, 187 S.E. 475, 167 Va. 41—Reliance Life Ins. Co. v. Gulley's Adm'x, 114 S. E. 551, 134 Va. 468—Whitaker & Fowle v. Lane, 104 S.E. 252, 128 Va. 317, 11 A.L.R. 1157.

22 C.J. p 1156 note 39.

Release

N.Y.—McManus v. Biddison, 272 N. Y.S. 199, 152 Misc. 239, affirmed 271 N.Y.S. 1099, 242 App.Div. 623.

43. N.Y.—Blewitt v. Boorum, 37 N. E. 119, 142 N.Y. 357, 40 Am.S.R. 600, affirming 14 N.Y.S. 298, 59 N. Y.Super. 321.

44. U.S.—Rosenbloom v. W. E. Lamneck Co., C.C.A.Pa., 24 F.2d 340—Virginia-Carolina Chemical Corporation v. Fuller, D.C.Ga., 35 F.Supp. 482—Sioux Falls Nat. Bank v. Klaveness, C.C.A.Minn., 264 F. 40.

Ala.—Davenport & Harris Undertaking Co. v. Roberson, 121 So. 733, 219 Ala. 203—Hamilton Furniture Co. v. Brenard Mfg. Co., 110 So. 153, 215 Ala. 187—Kilgore v. Arant, 146 So. 540, 25 Ala.App. 356.

Ariz.—Hoopes v. Long, 9 P.2d 196, 198, 40 Ariz. 25, citing **Corpus Juris.**

Ark.—Nelson v. Wells, 87 S.W.2d 40, 191 Ark. 613—Seelbinder v. Stewart, 83 S.W.2d 66, 190 Ark. 1132.

Cal.—McArthur v. Johnson, 15 P.2d 151, 216 Cal. 580.

Ga.—Hartman v. Citizens' Bank & Trust Co., 171 S.E. 195, 47 Ga.App. 562—Bowen v. Mobley, 151 S.E. 667, 40 Ga.App. 833—Sikes v. Payton, 99 S.E. 310, 23 Ga.App. 721—J. M. Dixon & Co. v. Bank of Quitman, 98 S.E. 112, 23 Ga.App. 279.

Idaho.—Finlayson v. Harris, 291 P. 1071, 49 Idaho 697.

Ill.—Berghoff v. Cummings, 225 Ill. App. 1—Shinner v. Raschke, 213 Ill.App. 324.

Ind.—Wheat v. Goss, 141 N.E. 311, 193 Ind. 558.

Iowa.—Hills Sav. Bank v. Hirt, 216 N.W. 281, 204 Iowa 940.

Kan.—Naftzger v. Buser, 186 P. 997, 106 Kan. 115.

Ky.—Eigelbach v. Roppel, 92 S.W.2d 764, 263 Ky. 604—Barret v. Clarke, 9 S.W.2d 1091, 226 Ky. 109.

Me.—Kuhn v. Simmons, 139 A. 474, 126 Me. 434.

Mass.—National Bank of Charlottesville v. Cambridge Salvage Supply Co., 169 N.E. 787, 270 Mass. 280—Dodge v. Bowen, 162 N.E. 368, 264 Mass. 208—Pelonsky v. Wattendorf, 152 N.E. 337, 255 Mass. 558.

Mich.—MacCrone v. Eckert, 267 N. W. 766, 275 Mich. 683.

Minn.—Fljozdal v. Johnson, 248 N. W. 215, 188 Minn. 612—Kullberg Mfg. Co. v. Smith, 218 N.W. 99, 173 Minn. 504, affirming 216 N.W. 249, 173 Minn. 504—Merchants' Nat. Bank of Detroit v. Bryngelson, 199 N.W. 905, 160 Minn. 205.

Mo.—In re Kenage's Estate, App., 3 S.W.2d 1041—First Nat. Bank & Trust Co. v. Limpp, 288 S.W. 957, 221 Mo.App. 951—People's Bank of Ava v. Rankin, 282 S.W. 91, 220 Mo.App. 205—Earle v. Woodruff, App., 274 S.W. 107.

N.J.—Realty & Security Co. v. Walden, 191 A. 777, 118 N.J.Law 152—Church v. National Newark & Essex Banking Co., 116 A. 620, 97 N. J.Law 237, 22 A.L.R. 524—Delman v. Cohen, 186 A. 683, 14 N.J.Misc. 684.

N.Y.—Bernstein v. Kritzer, 171 N.E. 690, 253 N.Y. 410, affirming 234 N.Y.S. 748, 226 App.Div. 866—Union Trust Co. of Rochester v. Mayer, 270 N.Y.S. 355, 150 Misc. 375, affirmed and reversed on other grounds 273 N.Y.S. 438, 242 App. Div. 671, and affirmed 285 N.Y.S. 1046, 246 App.Div. 685—Golden v. Kiely, 26 N.Y.S.2d 777.

N.D.—Baird v. Keitzman, 233 N.W. 905, 60 N.D. 317.

Or.—U. S. Rubber Co. v. Kimsey, 26 P.2d 565, 567, 145 Or. 73, quoting **Corpus Juris**—Trites v. Abbott, 267 P. 520, 125 Or. 362.

Pa.—Plunkett v. Roehm, 12 Pa.Super. 83.

S.C.—Bethea v. Floyd, 181 S.E. 721, 177 S.C. 521, certiorari denied Allen v. Bethea, 56 S.Ct. 143, 296 U.S. 622, 80 L.Ed. 442—C. G. Gunter, Inc. v. Hindman, 179 S.E. 494, 175 S.C. 436.

S.D.—First Nat. Bank v. Johnson, 221 N.W. 260, 53 S.D. 537.

Tex.—Lawther Grain Co. v. Winniford, Com.App., 249 S.W. 195, 200, citing **Corpus Juris,** and reversing Winniford v. Lawther Grain Co., Civ.App., 232 S.W. 853.

Va.—Crafts v. Broadway Nat. Bank

suant to a verbal agreement for the payment of a sum of money on a certain contingency, for the condition must be held to have been waived by, or merged in, the unconditional note.[45] However, both under the provisions of the Negotiable Instruments Law, or similar statutes, to that effect, and at common law, it may be shown, as between the parties or persons other than holders in due course, that the delivery was conditional or for a special purpose only and that the instrument never in fact came into force as a binding obligation,[46] or that

of Richmond, 128 S.E. 364, 142 Va. 702.

22 C.J. p 1152 note 7.

Condition to negotiable instrument as defense in action thereon see title Bills and Notes §§ 487, 488.

However, it has been broadly stated that parol evidence is competent to establish stipulations and conditions affecting the rights of the immediate parties to a written indorsement or transfer of a negotiable instrument.—Sanford Real Estate, Loan & Insurance Co. v. Gavin, 120 S.E. 820, 187 N.C. 14.

Even as against payee

Ill.—Handley v. Drum, 237 Ill.App. 587.

Payment from specific fund

(1) Generally, parol evidence is not admissible to show that payment of note was to be made out of a specific fund, that being a "condition subsequent."—Hoover v. Hoover, Iowa, 291 N.W. 154.

(2) Evidence that bill or note is payable from specific fund see supra § 895.

Reduction of note

Evidence that at the time defendant executed a note payee's agent stated that a reduction of the note would be made was inadmissible, unless fraud was pleaded.—Virginia-Carolina Chemical Co. v. Cooley, 200 N.Y.S. 393, 206 App.Div. 67.

Particular conditions held inadmissible

(1) That signer of note should not be liable thereon except in case of principal maker's death.

Iowa.—Fairley v. Falcon, 214 N.W. 538, 204 Iowa 290.

Tex.—Wise v. Boyd, Civ.App., 267 S.W. 543, reversed on other grounds King v. Wise, Com.App., 282 S.W. 570.

(2) That maker shall not be required to pay it until such time as should be convenient for him.—Deerfield State Bank v. Coerber, 215 P. 285, 113 Kan. 498.

(3) That indorser should not be liable unless certain other persons signed.

Ga.—Bank of Tallapoosa v. Patterson, 145 S.E. 97, 38 Ga.App. 644.

Ky.—Tross v. Bills' Ex'x, 224 S.W. 660, 189 Ky. 115.

(4) That note given for broker's commission should not be paid until purchaser paid for the land.

Ga.—Bradley v. Dozier Land Co., 113 S.E. 819, 29 Ga.App. 78.

Tex.—Helmke v. Prasifka, Civ.App., 17 S.W.2d 463, error refused.

(5) That note was not to be paid until after accounting, and that it was to be paid wholly or partly in credits.—Chalk v. Daggett, Tex.Com. App., 257 S.W. 228, modifying, Civ. App., 204 S.W. 1057.

(6) That makers were not bound to pay note if they returned automobile.—Bucca v. Dobos, 40 S.W.2d 376, 239 Ky. 777.

(7) That note should be credited with whatever was reasonable amount due makers for services rendered to payee.—Brown v. Horn, 122 S.E. 710, 32 Ga.App. 95.

(8) That if price of particular make of automobile declined seller would credit buyer with difference. —Asbill Motor Co. v. Chaplin, 112 S.E. 921, 120 S.C. 211.

45. Ind.—Grantham v. Hoglen, 125 N.E. 461, 72 Ind.App. 24.

Or.—United States Rubber Co. v. Kimsey, 26 P.2d 565, 567, 145 Or. 73, quoting **Corpus Juris.**

22 C.J. p 1153 note 8.

46. Ala.—Pointer v. Farmers' Fertilizer Co., 160 So. 252, 230 Ala. 87 —Knox v. Rivers Bros., 96 So. 241, 209 Ala. 308.

Ariz.—Boyle v. Webb, 94 P.2d 642, 54 Ariz. 188—Taylor v. Deese, 14 S.W. 2d 255, 179 Ark. 39.

Cal.—Harper v. French, 84 P.2d 216, 29 Cal.App.2d 214—Peterson v. Matchinske, 291 P. 248, 108 Cal. App. 7—Silva v. Gordo, 224 P. 757, 65 Cal.App. 486.

Fla.—Cockrell v. Taylor, 165 So. 887, 122 Fla. 798, 105 A.L.R. 1338—Felkel v. Abernethy, 150 So. 631, 112 Fla. 358.

Ga.—Empire Mortg. & Inv. Corporation v. Donaldson, 12 S.E.2d 489, 64 Ga.App. 197—Murphy v. Drum & Bugle Corps, 186 S.E. 444, 53 Ga.App. 448—South Georgia Trust Co. v. Crandall, 170 S.E. 333, 47 Ga.App. 328.

Hawaii.—Pacific Bank v. Gomes, 29 Hawaii 763.

Idaho.—First Nat. Bank v. Campbell, 230 P. 43, 39 Idaho 736—Taylor v. Fluharty, 208 P. 866, 35 Idaho 705.

Ill.—Economy Fuse & Mfg. Co. v. Standard Electric Mfg. Co., 194 N. E. 922, 359 Ill. 504, affirming 274 Ill.App. 139—Bell v. McDonald, 139 N.E. 613, 308 Ill. 329—Paluszewski v. Tomczak, 273 Ill.App. 245—Fronek v. Wroblewski, 255 Ill.App. 529 —Schmidt v. Schmidt, 253 Ill.App. 514—Ehlert v. Cleminson, 253 Ill. App. 346—Handley v. Drum, 237 Ill.App. 587.

Ind.—National City Bank v. Kirk, 134 N.E. 772, 85 Ind.App. 120.

Iowa.—Hoover v. Hoover, 291 N.W. 154—Walker v. Todd, 280 N.W. 512, 225 Iowa 276—Versteeg v. Hoeven, 239 N.W. 709, 214 Iowa 92—Townsend v. Athelstan Bank, 237 N.W. 356, 212 Iowa 1078—Andrew v. Hanson, 222 N.W. 10, 206 Iowa 1258—Kline v. Reeder, 212 N.W. 693, 203 Iowa 396—Thompson v. Finch, 195 N.W. 744, 196 Iowa 1013 —Security Sav. Bank v. Hambright, 193 N.W. 576, 195 Iowa 1147—City Nat. Bank of Auburn, Ind., v. Mason, 186 N.W. 30, 192 Iowa 1048—Mason v. Cater, 182 N. W. 179, 192 Iowa 143—Herron v. Brinton, 175 N.W. 831, 188 Iowa 60.

Ky.—Barret v. Clarke, 9 S.W.2d 1091, 226 Ky. 109.

Me.—Kuhn v. Simmons, 139 A. 474, 126 Me. 434.

Mass.—Zielmann v. Copelof, 122 N.E. 552, 232 Mass. 393.

Mich.—Malone v. Kugel, 275 N.W. 169, 281 Mich. 351—MacCrone v. Eckert, 267 N.W. 766, 275 Mich. 683—Taylor v. Rugenstein, 222 N. W. 107, 245 Mich. 152.

Minn.—Drovers' Cattle, Loan & Investment Co. v. McGraw, 184 N.W. 365, 150 Minn. 50—Wade v. National Bank of Commerce, 174 N.W. 889, 144 Minn. 187.

Mo.—J. B. Colt Co. v. Gregor, 44 S. W.2d 2, 328 Mo. 1216, reversing, App., 11 S.W.2d 1098—Mutual Life of Illinois v. McKinnis, App., 15 S.W.2d 935—Bank of Hollister v. O'Brien, 290 S.W. 1009, 220 Mo. App. 1276—Earle v. Woodruff, App., 274 S.W. 107—Slupsky v. Starr, App., 223 S.W. 816.

Mont.—Baroch v. Greater Montana Oil Co., 225 P. 800, 70 Mont. 93.

Neb.—Luikart v. Braasch, 265 N.W. 13, 130 Neb. 361—Witte v. Broz, 197 N.W. 121, 111 Neb. 76.

N.J.—De Candia v. Weisman, 150 A. 414, 106 N.J.Law 455.

N.M.—Roehl v. Anderson, 249 P. 1010, 31 N.M. 616.

N.Y.—Mount Vernon Trust Co. v. Bergoff, 285 N.Y.S. 417, 247 App. Div. 737, reversed on other grounds 5 N.E.2d 196, 272 N.Y. 192—Salt Springs Nat. Bank of Syracuse v. Hitchcock, 263 N.Y.S. 55, 238 App. Div. 150, reversing 259 N.Y.S. 24, 144 Misc. 547—Kelly v. Eggers, 256 N.Y.S. 93, 235 App.Div. 53—Hoagland, Allum & Co. v. Allan-

Norman Holding Corporation, 23? N.Y.S. 291, 228 App.Div. 133—Union Trust Co. of Rochester v. Mayer, 270 N.Y.S. 355, 150 Misc. 375, affirmed and reversed on other grounds 273 N.Y.S. 438, 242 App. Div. 671, and affirmed 285 N.Y.S. 1046, 246 App.Div. 685—Lafayette Nat. Bank of Buffalo v. Eberly, 199 N.Y.S. 787, 121 Misc. 3.

N.C.—Galloway v. Thrash, 176 S.E. 303, 207 N.C. 165—Acme Mfg. Co. v. McPhail, 106 S.E. 672, 181 N. C. 205.

N.D.—First Nat. Bank v. Miller, 179 N.W. 997, 46 N.D. 551.

Ohio.—Mitzel Co. v. Shields, 172 N. E. 621, 35 Ohio App. 514.

Okl.—Hogue v. McClain County Nat. Bank, 47 P.2d 575, 173 Okl. 122—Harlow Pub. Co. v. Walden, 32 P.2d 278, 168 Okl. 163—Lawrence v. Perlstein, 226 P. 63, 102 Okl. 58.

Or.—United States Rubber Co. v. Kimsey, 26 P.2d 565, 567, 145 Or. 73, quoting **Corpus Juris**—Bank of Freewater v. Hyett, 1 P.2d 1113, 137 Or. 193—First Nat. Bank v. Conroy, 272 P. 271, 127 Or. 302—Vincent v. Russell, 201 P. 433, 101 Or. 672, 20 A.L.R. 417.

Pa.—Hotaling v. Fisher, 79 Pa.Super. 103.

R.I.—Lopato v. Hayman, 111 A. 529, 43 R.I. 271.

S.C.—Alexander v. Kerhulas, 149 S.E. 12, 151 S C. 354.

S.D.—First Nat. Bank v. Johnson, 221 N.W. 260, 53 S.D. 537—Dacotah Packing Co. v. Bertelson, 217 N.W. 393, 52 S.D. 324.

Tex.—McAdams v. Panhandle Mut. Hail Ass'n, Civ.App., 44 S.W.2d 1005—Shaw v. Avant, Civ.App., 23 S.W.2d 447, error refused—Helmke v. Prasifka, Civ.App., 17 S.W.2d 463, error refused—Roddy v. Citizens' State Bank of Copeville, Civ. App., 11 S.W.2d 652—Morris v. Logan, Civ.App., 273 S.W. 1019—Minchew v. Morris, Civ.App., 241 S.W. 215—Waters v. Byers Bros. & Co., Civ.App., 233 S.W. 572.

Utah.—Central Bank of Bingham v. Stephens, 199 P. 1018, 1022, 58 Utah 358, quoting **Corpus Juris.**

Va.—Meadows v. McClaugherty, 187 S.E. 475, 167 Va. 41—Harris v. Sanford, 138 S.E. 465, 148 Va. 181, 54 A.L.R. 699—Coal River Collieries v. Eureka Coal & Wood Co., 132 S.E. 337, 144 Va. 263, 46 A.L. R. 485—Conway v. American Nat. Bank of Danville, 131 S.E. 803, 146 Va. 357—Continental Trust Co. v. Witt, 124 S.E. 265, 139 Va. 458—Robertson v. Virginia Nat. Bank, 115 S.E. 536, 135 Va. 166—Reliance Life Ins. Co. v. Gulley's Adm'x, 114 S.E. 551, 134 Va. 468.

Wash.—McGregor v. First Farmers'-Merchants' Bank & Trust Co., 40 P. 2d 144, 180 Wash. 440—First Methodist Episcopal Church v. Soden, 229 P. 534, 131 Wash. 228—Dickson v. Protzman, 212 P. 249, 123 Wash. 247.

W.Va.—Huntington Finance Co. v. Young, 143 S.E. 102, 105 W.Va. 405.

Wis.—Maxcy v. Peavey, 187 N.W. 1020, 177 Wis. 140.

22 C.J. p 1153 note 9.

"As between the maker and payee thereof, or as between the maker and one holding with notice of the conditions under which it was executed . . . [a note] is subject to the rules applicable to ordinary written contracts."—Blaine v. Darwin, 295 P. 131, 133, 160 Wash. 327.

Conditional delivery of negotiable instruments generally see Bills and Notes § 79.

Construction of statute

Statutory provision that "delivery may be shown to have been conditional, or for a special purpose only, and not for the purpose of transferring the property in the instrument" means that parol evidence is admissible as to conditions that will defeat the passage of the beneficial interest in the instrument, and not conditions which merely restrict the source of payment.—McArthur v. Johnson, 15 P.2d 151, 152, 216 Cal. 580.

Conditions precedent

"Conditional delivery refers to conditions precedent and not to conditions subsequent."—Santa Ana Sugar Co. v. Smith, 2 P.2d 866, 867, 116 Cal.App. 422.

Renewal note is within rule stated in text.—Smith v. Dotterweich, 93 N.E. 985, 200 N.Y. 299, 33 L.R.A.,N. S., 892—Salt Springs Nat. Bank of Syracuse v. Hitchcock, 263 N.Y.S. 55, 238 App.Div. 150, reversing 259 N.Y.S. 24, 144 Misc. 547—Title Guarantee & Trust Co. v. Pam, 182 N.Y. S. 824, 192 App.Div. 268, affirming 155 N.Y.S. 333, which is affirmed 134 N.E. 525, 232 N.Y. 441, reargument denied 135 N.E. 904, 233 N.Y. 530.

Particular conditions

(1) That signed negotiable instrument should not be complete until signature of certain other persons were secured.

Ark.—Halliburton v. Cannon, 254 S. W. 687, 160 Ark. 428.

Ga.—Bray v. Comer Mercantile Co., 124 S.E. 817, 32 Ga.App. 746.

Kan.—People's State Bank of Hoisington v. Hoisington Co-op. Mercantile Mfg. Ass'n, 234 P. 71, 118 Kan. 61.

Or.—American Nat. Bank v. Kerley, 220 P. 116, 109 Or. 155, 32 A.L.R. 262.

S.D.—Klundt v. Sande, 223 N.W. 338, 54 S.D. 421.

Tenn.—Waggoner v. Dorris, 68 S.W. 2d 142, 17 Tenn.App. 420.

Tex.—Kimball-Krough Pump Co. v Judd, Civ.App., 88 S.W.2d 579.

Va.—Nottingham v. Farmers & Merchants Trust Bank, 196 S.E. 634, 170 Va. 291.

(2) That sale be consummated before note for broker's commission became binding.

S.D.—Ricords v. Mead, 189 N.W. 703, 45 S.D. 617.

Tex.—State Bank of Orange Grove v. Williams, Civ.App., 277 S.W. 773, reversing 252 S.W. 222.

(3) That notes should not become effective until delivery of deed securing said note.

Mo.—Bunch v. Phillips, App., 79 S. W.2d 785.

Tex.—Thomason v. Lee, Civ.App., 4 S.W.2d 157, error refused.

Particular purposes held within rule

(1) Parol evidence of agreement that note would be destroyed or returned if plaintiff was unable to get judgment on other claims is admissible to show delivery for special purpose.—Rector v. Evans, Tex.Com. App., 6 S.W.2d 105, modifying, Civ. App., 288 S.W. 826, which reversed 278 S.W. 924.

(2) Parol evidence is admissible to show that a note indorsed by plaintiff and delivered to defendant was delivered for collection only.—Weidenfeld v. Pacific Improvement Co., D.C.N.Y., 267 F. 699.

(3) Testimony that wife of maker of note signed on representation of payee that she would not be personally liable, but would merely waive her homestead right, does not tend to vary its terms.—City Nat. Bank of Huron v. Dwyer, 200 N.W. 109, 47 S.D. 567.

(4) Evidence of parol agreement that subcontractors' note was delivered to road contractor for holding until engineer's estimates disclosed whether subcontractors were indebted to contractor, or vice versa, in order to obtain release of subcontractors' teams and equipment, is admissible.—Davis v. Jarnigan, Tex. Civ.App., 59 S.W.2d 281, error dismissed.

Conditional obligation or conditional delivery

As respects admissibility of parol evidence, contemporaneous oral agreement that note should be paid in services constituted "conditional obligation" rather than "conditional delivery," since agreement affected method by which note was to be paid and not manner in which it was to be delivered, "conditional delivery" being delivery which by agreement between parties is to take effect only on happening of future contingency.—Phillips v. Gillaspie, 171 So. 567, 186 La. 45, affirming, App., 167 So. 242.

an indorsement never became effective.[47] This is especially so if the event or contingency affects the consideration of the instrument.[48]

In order that parol evidence of a conditional delivery of a negotiable instrument be admissible, the condition must be a legal condition;[49] and it must not be inconsistent with, or contradictory of, the express terms of the instrument.[50] Moreover, the agreement establishing the condition must have been entered into prior to, or contemporaneously with, the delivery of the note;[51] and a conditional delivery cannot be established by an oral agreement subsequent to the delivery of the note.[52]

Acceptance. The general rule is that if an acceptance is absolute on its face, a contemporaneous condition cannot be shown by parol,[53] while, if a condition is expressed, no other condition can be shown.[54] However, parol evidence has been held admissible to establish a condition precedent to liability on a trade acceptance.[55]

Reference to condition. Where a negotiable instrument makes an ambiguous reference to a condition of payment, parol evidence is admissible to establish the condition.[56]

A written agreement contemporaneous with a note, the effect of which is to prescribe a contingency until the happening of which no action can be maintained, is admissible.[57]

§ 938. —— Bills of Sale and Contracts of Sale

While parol evidence is not admissible to annex oral conditions to a bill of sale or contract of sale, it is admissible to show that the delivery of such instrument was conditional.

Parol evidence is not admissible to annex to a bill of sale[58] or a contract of sale[59] any condition

47. N.Y.—Salt Springs Nat. Bank of Syracuse v. Hitchcock, 263 N.Y.S. 55, 238 App.Div. 150, reversing 259 N.Y.S. 24, 144 Misc. 547.
N.C.—Sanders v. Boykin, 134 S.E. 643, 192 N.C. 262.

Other indorsers required
It may be shown by parol evidence that indorsement was not to be effective until certain other indorsements were obtained.
Ga.—Murphy v. Drum & Bugle Corps, 186 S.E. 444, 53 Ga.App. 448.
Minn.—Towle-Jamieson Inv. Co. v. Brannan, 205 N.W. 699, 165 Minn. 82.
N.C.—Jefferson Standard Life Ins. Co. v. Morehead, 183 S.E. 606, 209 N.C. 174.

48. Ala.—Phillips v. Matthews, 88 So. 641, 205 Ala. 480.
Or.—Vincent v. Russell, 201 P. 433, 101 Or. 672, 20 A.L.R. 417.

Failure of consideration as prerequisite
It has been held that where consideration for note had failed, evidence is admissible to show conditional delivery and that condition had failed, but that where note is supported by consideration, maker cannot be permitted to say that there was an understanding that delivery was conditional.—Tegtmeyer v. Nordlund, 259 Ill.App. 247.

49. Vt.—West Rutland Trust Co. v. Houston, 158 A. 69, 104 Vt. 204, 80 A.L.R. 664.

50. Cal.—Santa Ana Sugar Co. v. Smith, 2 P.2d 866, 116 Cal.App. 422.
Mass.—Liberty Trust Co. v. Price, 156 N.E. 749, 259 Mass. 596.
N.Y.—Jefferson County Nat. Bank v. Dusckas, 2 N.Y.S.2d 336, 166 Misc. 720.
Pa.—Collins v. Horn, 188 A. 87, 124 Pa.Super. 115.
S.C.—Jackson v. Carter, 121 S.E. 559, 128 S.C. 79.

Under Negotiable Instruments Law
The provision of Negotiable Instruments Law authorizing proof that a note was delivered for special purposes only, when construed with the following clause that it was not for the purpose of transferring property in the instrument, does not permit proof of delivery under a collateral agreement contradicting the terms of the note.—Waters v. Byers Bros. & Co., Tex.Civ.App., 233 S.W. 572.

Demand note
Agreement not to make demand for payment of note payable on demand until a contingency occurs is a void attempt to change the stipulated date of maturity.—Jackson v. Sample, 183 So. 646, 236 Ala. 486.

51. Cal.—Ellington v. Pacific Coast Pulp & Paper Corporation, 28 P.2d 404, 135 Cal.App. 703.
However, under Negotiable Instruments Act, it has been held proof of conditional delivery by parol agreement is admissible only when agreement is contemporaneous with delivery, and not when agreement is prior to delivery.—Hall v. Farmers' Bank of Severance, 220 P. 237, 74 Colo. 165.

52. Cal.—Ellington v. Pacific Coast Pulp & Paper Corporation, 28 P.2d 404, 135 Cal.App. 703—Santa Ana Sugar Co. v. Smith, 2 P.2d 866, 116 Cal.App. 422.
Tex.—Cook v. Barrier, Civ.App., 73 S.W.2d 623.

53. Conn.—J. E. Smith & Co. v. Say, 129 A. 538, 102 Conn. 558.
Iowa.—State Bank v. Central Flour & Feed Co., 288 N.W. 614, 227 Iowa 596.
Mass.—National Bank of Charlottesville v. Cambridge Salvage Supply Co., 169 N.E. 787, 270 Mass. 280.
Okl.—Shaw v. Hutton, 183 P. 477, 75 Okl. 255.
22 C.J. p 1154 note 11.

54. Conn.—J. E. Smith & Co. v. W. M. Hurlburt Co., 106 A. 319, 93 Conn. 391.
22 C.J. p 1154 note 12.

55. N.Y.—Siegel v. Schwarzschild, 189 N.Y.S. 556, 197 App.Div. 751.

56. Kan.—Farmers' State Bank of Cuba v. Blazek, 222 P. 748, 115 Kan. 178.

57. Colo.—Munro v. King, 3 Colo. 238.
Wis.—Elmore v. Hoffman, 6 Wis. 68.

58. Vt.—Dixon v. Blondin, 5 A. 514, 58 Vt. 689.
22 C.J. p 1154 note 14.

59. U.S.—West Tennessee-Grain Co. v. J. C. Shaffer & Co., C.C.A.Tenn., 299 F. 197—Peerless Coal Co. v. Steffey & Findley, C.C.A.Md., 297 F. 829.
Ark.—Fair Store No. 32 v. Hadley Milling Co., 229 S.W. 727, 148 Ark. 209.
Ga.—Parks v. Washington & L. R. Co., 133 S.E. 634, 35 Ga.App. 635—McNair v. Manget, 130 S.E. 698, 34 Ga.App. 633.
La.—Washburn Crosby Co. v. Riccobono, 111 So. 65, 162 La. 698—Reed & Brown v. Morning Treat Coffee Co., App., 164 So. 449.
Minn.—Peterson v. Johnson Nut Co., 297 N.W. 178—Little v. Dyer, 233 N.W. 7, 181 Minn. 487—Walchak v. U. S. Installment Realty Co., 188 N.W. 319, 152 Minn. 550.
Mo.—Scullin Steel Co. v. Mississippi Valley Iron Co., 273 S.W. 95, 308

other than and different from conditions, if any, recited therein. However, it may be shown that a written order for goods was delivered with the condition that it should become operative only on the happening of a certain contingency, or the performance of a condition,[60] or that a bill of sale,[61] or contract of sale,[62] was executed or delivered on condition that it should not become effective until

Mo. 453—Marshall Hall Grain Co. v. P. H. Boyce Mercantile Co., 211 S.W. 725, 203 Mo.App. 220.
N.J.—Rockaway v. Hirsch, 142 A. 37, 6 N.J.Misc. 419—Sanders v. Fried, 138 A. 701, 5 N.J.Misc. 934—Saffran v. Grillo, 133 A. 772, 4 N.J. Misc. 618.
Tex.—Swift v. Roach, Civ.App., 266 S.W. 846.
Va.—Hopkins v. Le Cato, 128 S.E. 55, 142 Va. 769.
Wis.—Edward T. Kelly Co. v. Von Zakobiel, 171 N.W. 75, 168 Wis. 579.
22 C.J. p 1154 notes 15, 16.

Condition of delivery of property

Parol evidence is not admissible to show that a condition was attached to the delivery of the property which was the subject of the contract.—Plumley v. Yellow Mfg. Acceptance Corporation, 6 P.2d 830, 153 Okl. 302.

Contracts to sell or convey realty

(1) Contracts to sell or convey realty are within the rule.
Colo.—Morgan v. W. A. Howard Realty Co., 191 P. 114, 68 Colo. 414.
Ill.—Firebaugh v. Wittenberg, 227 Ill.App. 77, reversed on other grounds 141 N.E. 379, 309 Ill. 536.
Minn.—Skelton v. Grimm, 195 N.W. 139, 156 Minn. 419.
N.J.—Elwood v. Smith, 139 A. 900, 104 N.J.Law 248, affirmed 143 A. 916, 105 N.J.Law 236—Cohen v. Cohn, 140 A. 319, 102 N.J.Eq. 245, reversing Cohen v. Cohen, 138 A. 693, 101 N.J.Eq. 401.
N.Y.—Mercantile Paper Products Co. v. 1491 Third Ave. Realty Corporation, 245 N.Y.S. 219, 230 App. Div. 436, affirmed 175 N.E. 349, 255 N.Y. 640.

(2) Parol evidence of announcement prior to auction sale of municipal land that sale was subject to confirmation was held inadmissible, where resolution, notice, and conditions constituted written contract.—Buckley v. Jersey City, 148 A. 630, 105 N.J.Eq. 470, affirmed 151 A. 905, 107 N.J.Eq. 137.

Particular conditions

(1) That cash payment under contract for sale was to be held in escrow.—State v. Banking House of A. Castetter, 224 N.W. 21, 118 Neb. 231.

(2) That, if automobile owner secured better price from another dealer, written sale contract was to be ineffective.—Frankel Chevrolet Co. v. Snyder, 174 N.E. 751, 37 Ohio App. 378.

(3) That seller would repurchase live stock sold and their offspring.—First Nat. Bank v. Fickert, 196 P. 112, 51 Cal.App. 99.

60. Idaho.—Continental Jewelry Co. v. Ingelstrom, 252 P. 186, 43 Idaho 337.
22 C.J. p 1154 note 17.

Approval of complete order by seller

Where purchaser of sewing machines refused to sign an unconditional order until a written agreement was entered into by which the agent of the seller agreed to sell the machines for the purchaser on commission, and that unsold machines could be returned to the seller, which agreement was attached to the order, whereupon the purchaser signed the order and agreement, but the agent detached the agreement to sell for the purchaser before forwarding the unconditional order to the seller, parol evidence was admissible to show that the purchaser was not to be bound by his signature of the unconditional order, without the undertaking attached thereto being approved by the seller.—Standard Sewing Mach. Co. v. Rainwater, 225 S.W. 326, 146 Ark. 81.

61. Tex.—Potts v. Burkett, Civ.App., 278 S.W. 471.

Delivery to third person

Where possession of property was transferred to vendee but bill of sale was placed in hands of third person to be delivered to vendee upon payment of purchase price, vendor could show that bill of sale was never delivered and that parties did not intend title to pass until bill of sale was delivered.—Garcia v. Hernandez, Tex.Civ.App., 226 S.W. 1099, dismissed for want of jurisdiction.

62. Ark.—Dodson v. Wade, 101 S.W. 2d 182, 193 Ark. 534.
Iowa.—Carney v. Miller, 174 N.W. 643, 187 Iowa 927.
Kan.—Emerson-Brantingham Implement Co. v. Burlingame Co-op. Elevator Co., 293 P. 495, 497, 131 Kan. 731, citing **Corpus Juris.**
Neb.—Farmers' State Bank of Plymouth v. Bank of Plymouth, 234 N. W. 626, 120 Neb. 663.
N.Y.—Thomas Nelson & Sons Pub. Co. v. Bonner, 200 N.Y.S. 341.
N.C.—Jobbers' Overall Co. v. C. S. Hollister Co., 119 S.E. 1, 186 N.C. 208.
Okl.—Yeager v. Jackson, 19 P.2d 970, 162 Okl. 207.
Pa.—Sheinman Brothers v. Hovland-Sardeson-McColm Co., 78 Pa.Super. 479.
S.C.—Alexander v. Kerhulas, 149 S. E. 12, 151 S.C. 354.
Tex.—American Slicing Mach. Co. v. Vincent, Civ.App., 279 S.W. 317.
22 C.J. p 1154 note 18.

Contracts to sell or convey realty

(1) Contracts to sell or convey realty are within the rule.
U.S.—Liebling v. Florida Realty Inv. Corporation, C.C.A.Fla., 24 F.2d 688, affirming, D.C., 14 F.2d 234.
D.C.—Robertson v. Ramsay, 298 F. 557, 54 App.D.C. 346.
Kan.—Mayse v. Grieves, 285 P. 630, 130 Kan. 96.
Or.—Sunnyside Land & Investment Co. v. Campbell, 23 P.2d 323, 143 Or. 658.
Utah.—Utah-Idaho Sugar Co. v. State Tax Commission, 73 P.2d 974, 93 Utah 406.

(2) Proof that proposition to transfer realty was conditioned on coöwners' signing is not violative of parol evidence rule.—Struck v. Dralle, 20 S.W.2d 88, 230 Ky. 393.

(3) Parol testimony establishing oral agreement that written contract for purchase of realty was conditioned on vendor's delivering possession before designated date is admissible.—Yeager v. Jackson, 19 P.2d 970, 162 Okl. 207.

Delivery in escrow

One signing an agreement to purchase real estate was entitled to show by parol, when sued for commissions for the use of a broker, that the instrument was signed with the express understanding that it was to be held in escrow by the broker, and not delivered to the owner until the purchaser had sold his place, and that such place had never been sold, and the instrument had never been delivered.—Farrell v. Bean, 106 S.E. 315, 26 Ga.App. 462.

Recital merging all agreements

Evidence of oral condition precedent was admissible in action on written contract by seller, notwithstanding written contract provided that "this order covers all agreements and is . . . not subject to cancellation except with our consent."—White Showers v. Fischer, 270 N.W. 205, 278 Mich. 32.

Conditional sales

Parol evidence is admissible to show that auto seized by sheriff as defendant's property had been only conditionally sold to him, and was at time still owned by conditional seller.—Ewell v. Giamanco, 139 So. 515, 19 La.App. 672.

Particular conditions

(1) That contract first be approved by certain persons.
Miss.—Plant Flour Mills Co. v. San-

the happening of a future event. It has also been held permissible to show that a contract for the sale of corporate stock was conditioned on the purchaser's ability to complete the purchase within the time mentioned.[63] However, a conditional delivery may not be shown where the condition of delivery is in conflict with the express terms of the writing.[64]

§ 939. —— Bonds

Parol evidence is not admissible to show a condition which changes or defeats the operation of a bond, but is admissible to show the failure of consistent conditions precedent, so that the bond never came into existence.

The rule that parol or extrinsic evidence is not admissible to change or defeat the operation of a written instrument by showing a condition attached thereto and not appearing in the writing applies with full force to bonds.[65] However, consistently with this rule, it may be shown by parol or extrinsic evidence that the bond never became effective because of the failure of conditions precedent or of delivery therein,[66] unless the conditions contradict the express terms of the bond.[67]

§ 940. —— Deeds of Conveyance, Leases, and Mortgages

Parol evidence is inadmissible to attach conditions to deeds, leases, or mortgages. While such evidence is admissible to show that a lease was conditionally delivered, authorities differ as to whether such a showing may be made with respect to a deed.

Since a deed of conveyance may be delivered to a third person to take effect on a condition to be subsequently performed, see Escrows § 7, such a delivery may be shown by parol evidence.[68] On the other hand, since it is generally held that a deed cannot be delivered to the grantee or his agent in escrow, see Escrows § 7, or on condition, see Deeds § 48, and that a deed so delivered becomes effective at once according to its terms, it has been held that parol evidence is not admissible to show that a deed which has been executed and delivered is subject to any conditions whatever which do not appear in the writing itself.[69] Not all authorities are in agree-

ders & Ellis, 157 So. 713, 172 Miss. 539.
N.Y.—C. Alexopoulos Frères, Inc., v. Nemours Trading Corporation, 199 N.Y.S. 74, 205 App.Div. 39.
Wash.—Antill v. Neely, 260 P. 252, 145 Wash. 341.

(2) That property contracted for first be approved.—National Cash Register Co. v. Holt, 101 S.W.2d 441, 193 Ark. 617.

(3) That purchaser establish satisfactory financial condition.—Weber v. Hall Bros., 204 N.W. 153, 231 Mich. 493.

(4) That contract is to be suspended until after trial of machine.—Columbia Weighing Mach. Co. v. Palace Drug Co., 299 S.W. 23, 175 Ark. 334.

(5) That written contract for sale of distillate was not to be effective until price had advanced.—Atlas Petroleum Co. v. Cocklin, C.C.A.Iowa, 59 F.2d 571.

(6) That there was to be no deal if within limited time defendant should conclude not to go through with trade.—Minar Rodelius Co. v. Lysen, 277 N.W. 523, 202 Minn. 149.

(7) That contract to purchase piano was not to be effective until purchaser made down payment.—Bultman v. Frankart, 215 N.W. 432, 194 Wis. 296.

(8) That time of delivery be extended.—Northwestern Consol. Milling Co. v. Sloan, 232 Ill.App. 266.

63. U.S.—Brady v. Kern, D.C.Pa., 218 F. 862, affirmed 222 F. 873, 138 C.C.A. 299, certiorari denied 36 S.Ct. 164, 239 U.S. 643, 60 L.Ed. 483.

64. Pa.—Hill v. Smith, 75 Pa.Super. 340.

65. Mich.—Mason, etc., Co. v. Gage, 78 N.W. 130, 119 Mich. 361.
22 C.J. p 1154 note 20.

66. Ala.—McConnon & Co. v. Kirby, 100 So. 764, 211 Ala. 440.
Va.—Rhodes v. Walton, 175 S.E. 865, 176 S.E. 472, 163 Va. 360.
22 C.J. p 1154 note 21.

Conditioned on other signatories
Testimony that bond was signed by surety on condition that others were to sign it, and that it was not to become operative until they did so, would not go to vary its contents, but to its existence.
Ark.—W. T. Rawleigh Co. v. Moore, 55 S.W.2d 63, 186 Ark. 571.
Utah.—State v. Foxley, 249 P. 125, 68 Utah 41.
Va.—Nottingham v. Farmers & Merchants Trust Bank, 196 S.E. 634, 170 Va. 291.

67. Va.—Rhodes v. Walton, 175 S.E. 865, 176 S.E. 472, 163 Va. 360—White v. Commonwealth, 164 S.E. 375, 158 Va. 749.

68. Ark.—Mansfield Lumber Co. v. Gravette, 5 S.W.2d 726, 177 Ark. 31.
Mich.—Dikeman v. Arnold, 40 N.W. 42, 71 Mich. 656.
Miss.—Mississippi State Highway Commission v. Anderson, 184 So. 450, 183 Miss. 458, overruling suggestion of error 183 So. 498.
Or.—Norton v. Norton, 209 P. 1048, 105 Or. 651—Foulkes v. Sengstacken, 158 P. 952, 163 P. 311, 83 Or. 118.

Promise to support grantor
In suit to cancel and recover possession of deed to realty executed in favor of grantor's son and deposited in escrow with written instructions that it should be delivered to son at grantor's death and should not be withdrawn by grantor, evidence that conveyance was made in consideration of son's promise to maintain grantor during remainder of her lifetime was not inadmissible as tending to vary and modify the terms of the written instruction, but was evidence as to a separate agreement that if son failed to perform he would have no title in the property.—Teel v. Bank of Eureka, Cal.App., 110 P.2d 78.

69. Ala.—Hume v. Kirkwood, 113 So. 613, 216 Ala. 534.
Ariz.—Schornick v. Schornick, 220 P. 397, 25 Ariz. 563, 31 A.L.R. 159.
Md.—Buchwald v. Buchwald, 199 A. 800, 175 Md. 115.
N.Y.—Herrmann v. Jorgenson, 189 N.E. 449, 263 N.Y. 348, reversing 263 N.Y.S. 981, 239 App.Div. 817, reargument denied 191 N.E. 549, 264 N.Y. 529—Savage Realty Co. v. Lust, 196 N.Y.S. 296, 203 App.Div. 55—Buszozak v. Wolo, 211 N.Y.S. 557, 125 Misc. 546.
Pa.—Eaton v. New York Life Ins. Co. of New York, 172 A. 121, 315 Pa. 68, 95 A.L.R. 462.
22 C.J. p 1155 note 25.

Effect of this rule is simply that when one has made deed and delivered it to grantee who thereby becomes possessed of power to use

ment, however, and it has also been held that evidence may be received to show that, although a grantee was put in manual possession of the deed, it was not, in a legal sense, delivered to him, but was delivered on condition that it should not become a binding conveyance until the happening of a certain contingency.[70] Thus, a purchaser may prove by parol that he did not accept a deed as performance of the vendor's contract to convey or only accepted it as such conditionally, for such evidence does not contradict the terms of the deed or tend to prove that it was not to be operative as a conveyance according to its terms.[71] So, also, where the delivery of a deed by a vendor, and of the purchase-money notes and mortgage by the purchaser, were contemporaneous acts, parol evidence is admissible to show the condition on which the deed was accepted and the notes and mortgage executed.[72]

It is usually held that parol evidence is not admissible to prove that a lease[73] or a mortgage[74] is subject to conditions not appearing in the instrument. However, it has been held permissible to show that delivery of a lease was conditional,[75] or that the lease was subject to a condition precedent,[76] except where the condition is contradictory of the express terms of the lease;[77] and it may be

it, grantor cannot overthrow title thus created by any assertion that he did not intend to do precisely what he did do when deed was delivered.—Moore v. Winans, 48 N.Y.S. 287, 23 App.Div. 308, affirmed 57 N. E. 1118, 160 N.Y. 703.

Deed not containing entire contract

Where deed reserving life estate in farm does not contain entire contract resulting in conveyance, the grantee may show by parol that he accepted title on condition that he should occupy farm for annual rental during grantor's lifetime, where latter had made previous oral promise to give grantee a farm for services which he subsequently performed.—Luther v. Luther, 170 N.W. 364, 103 Neb. 46.

In Texas

(1) Rule stated in text has been followed.—Mauritz v. Schwind, Civ. App., 101 S.W.2d 1085, error dismissed—Stephens v. Carr, Civ.App., 95 S.W.2d 215, error dismissed—Pridgen v. Furnish, Civ.App., 11 S. W.2d 844, affirmed, Com.App., 23 S. W.2d 307—Cooper v. Hinman, Civ. App., 212 S.W. 972, reversed on other grounds, Com.App., 235 S.W. 564.

(2) However, it has also been held that nondelivery may be shown, and that an agreement that the deed should not be regarded as delivered until a certain condition is fulfilled may be shown.—Speer v. Dalrymple, Com.App., 222 S.W. 174, 176, reversing, Civ.App., 196 S.W. 91—Morris v. Logan, Civ.App., 273 S.W. 1019—Silliman v. Oliver, Civ.App., 247 S. W. 902.

(3) And the leading case stating the rule, Holt v. Gordon, 174 S.W. 1097, 107 Tex. 137, is distinguished on the theory that "the holding in that case proceeded upon the fact that delivery had been completed between the parties."—Speer v. Dalrymple, supra.

(4) In any event, parol evidence is inadmissible to engraft condition subsequent on deed.—Tripplehorn v. Ladd-Hannon Oil Corporation, Civ. App., 8 S.W.2d 217, error dismissed Ladd-Hannon Oil Corporation v Tripplehorn, 13 S.W.2d 666, 118 Tex. 195—Waybourn v. Spurlock, Civ.App., 281 S.W. 587.

70. Ark.—Inman v. Quirey, 194 S. W. 858, 128 Ark. 605.
Mo.—Poplin v. Brown, 205 S.W. 411, 200 Mo.App. 255.
N.C.—Metropolitan Life Ins. Co. v. Dial, 183 S.E. 609, 209 N.C. 339.
Tenn.—Barton v. Barton, 78 S.W.2d 356, 18 Tenn.App. 409.
W.Va.—Brown v. Cabell, 161 S.E. 438, 111 W.Va. 186.

Agreement to convey

Conditional delivery of agreement to convey may be shown by parol evidence.—Sugar v. Marinello, 260 Ill.App. 85.

In Iowa

(1) Rule stated in text has been followed.—Bousselot v. Bousselot, 189 N.W. 947, 194 Iowa 453.

(2) But parol evidence is not admissible to show conditions to defeat legal effect of deed after delivery. —Burch v. Nicholson, 137 N.W. 1066, 157 Iowa 502.
22 C.J. p 1155 note 25.

71. Minn.—Slocum v. Bracy, 56 N. W. 826, 55 Minn. 249, 43 Am.S.R. 499.

72. Iowa.—McCormick v. Merritt, 105 N.W. 428, 131 Iowa 160.

73. Ark.—Gray v. Jones, 79 S.W. 2d 443, 190 Ark. 503.
22 C.J. p 1155 note 31.

Term of lease conditional

Evidence of parol agreement that term of lease was conditional on outcome of pending action was incompetent.—Bookstein v. Dragunaitis, 214 N.W. 219, 239 Mich. 65.

74. N.C.—Thomas v. Carteret County, 109 S.E. 384, 182 N.C. 374.
22 C.J. p 1155 note 32.

Conditions of future advances

However, where mortgage is given to secure future advances, but mortgagee is not bound to make subsequent advances, extrinsic evidence is admissible to show conditions under which future credit was to be extended.—Wardman v. Iseman, 99 Pa. Super. 551.

Chattel mortgage

N.Y.—Lion Brewery of New York City v. Loughran, 229 N.Y.S. 216, 223 App.Div. 623, reversing 226 N.Y.S. 656, 131 Misc. 331.
Ohio.—Starr Piano Co. v. Edgar, 31 Ohio Cir.Ct. 295.

75. Mich.—Hagan v. Moch, 229 N. W. 629, 249 Mich. 511.
22 C.J. p 1155 note 33.

Waiver of condition

Parol evidence that a landlord promised to do work on demised premises before a contract for increased rent was operative, and that unless it was done the lease should not become effective, is admissible to establish a conditional delivery of the contract, except where the tenant, by staying over after that time, waives the promise as a condition precedent.—Well Financed Investing Co. v. Binder, 181 N.Y.S. 737.

76. Kan.—Schlotthauer v. Greenfield, 205 P. 623, 110 Kan. 701.
La.—Mire v. Haas, App., 174 So. 374.
Minn.—Stadelmann v. Boothroyd, 212 N.W. 908, 170 Minn. 430.
Mo.—Pfeiffenberger v. Scott's Cleaning Co., App., 144 S.W.2d 183.
N.Y.—Frasca v. Metropolitan Life Ins. Co., 287 N.Y.S. 375, 248 App. Div. 588, affirmed 4 N.E.2d 816, 272 N.Y. 588.
Wis.—Munz v. Leuchtenberger, 192 N.W. 475, 180 Wis. 56.

Repairs; authority of agent

Parol testimony that lease would be ineffective unless landlord made repairs is not objectionable as varying terms of lease, nor on ground that landlord's agent had no authority to make such agreement, since defendant did not seek to show agreement, but merely condition precedent.—James v. Cortright, 126 So. 631, 220 Ala. 578.

77. N.Y.—City of New York v. Warner, 197 N.Y.S. 218, 119 Misc. 687.

Specified date of commencement

Where a written lease expressly provided that it should be effective

shown that a chattel mortgage was subject to a condition that it should be canceled in case the title to real property, also made liable for the debt, should prove to be as represented.[78]

Oil and gas leases have been held to be subject to the same rules as deeds, with respect to parol evidence of conditions.[79]

§ 941. —— Subscriptions to Corporate Stock

While parol evidence is not admissible to show conditions to a subscription to corporate stock, it may show that the subscription did not become a binding obligation until the fulfillment of conditions precedent.

A subscription to the stock of a corporation cannot be varied by parol or extrinsic evidence for the purpose of showing that it was made on conditions not appearing in the written instrument.[80] However, it may be shown that the subscription was made under such circumstances that it was not to become a binding obligation until a certain condition was fulfilled,[81] and where the subscription books have been signed not by the alleged subscriber but by a person whom he authorized to subscribe for him, the subscriber may show by parol evidence that he authorized the subscription only on certain conditions.[82] So, where the subscription has been delivered in escrow it may be shown that it was delivered to take effect only on certain conditions.[83]

§ 942. —— Conditions on Which Delivery to Be Made

Parol evidence is admissible to show that an instrument was not to be delivered until conditions were performed.

The rule that parol evidence is admissible to prove a conditional delivery of an instrument, or a condition precedent to its becoming effective, see § 935 supra, applies a fortiori where the instrument was not to be delivered at all until certain oral conditions should be performed, as where it was deposited with a third person.[84]

§ 943. —— Time for Performance of Condition

Parol evidence is not admissible to enlarge the time allowed for performance of a condition precedent.

Parol evidence is not admissible to enlarge the time allowed for the performance of a condition precedent specified in a written instrument.[85]

§ 944. —— Performance of Conditions

Parol evidence is admissible to show whether or not a condition precedent has been fulfilled or waived.

and that rent should be due thereunder from a fixed date, the rule that parol testimony is competent to prove the condition on which alone a written instrument shall become effective did not permit parol evidence of an agreement that the lease should not become effective until the removal of another occupant.—City of New York v. Warner, supra.

78. Mo.—Shantz v. Shriner, 150 S. W. 727, 167 Mo.App. 635.

79. Tex.—Parker v. Sorell, Civ.App., 230 S.W. 819.

Evidence held inadmissible

(1) After absolute delivery of assignment of oil lease, parol evidence is inadmissible to show it was not to take effect till happening of future event not expressed therein.—Tripplehorn v. Ladd-Hannon Oil Corporation, Civ.App., 8 S.W.2d 217, error dismissed Ladd-Hannon Oil Corporation v. Tripplehorn, 13 S.W. 2d 666, 118 Tex. 195.

(2) Parol evidence is inadmissible to show that an oil and gas lease complete on its face which recited payment of a cash consideration was delivered to the grantee without payment with the understanding that it should not become effective until payment.—Parker v. Sorell, Tex.Civ.App., 230 S.W. 819.

Evidence held admissible

(1) Testimony that oil lease was not to be effective until escrow agreement was signed and lease deposited in escrow was not inadmissible as contradicting written contract, but admissible to show that no contract was made.—Jordan v. Winooski Sav. Bank, 58 S.W.2d 942, 187 Ark. 212.

(2) Parol evidence has been held admissible to show that lease was delivered to lessee on special condition, and that delivery was never completed.—Moore v. Wilson, Tex. Civ.App., 138 S.W.2d 1099, error refused.

(3) Where at time of execution and delivery of oil and gas lease it was understood that lease had not been completely executed, other signatures being necessary, it was held that parol evidence to that effect could be introduced.—Watson v. Cloud, Tex.Civ.App., 225 S.W. 807.

80. Or.—Myrtle Point Mill & Lumber Co. v. Clarke, 203 P. 588, 102 Or. 533.

22 C.J. p 1155 note 35.

Effect of oral and secret conditions to subscriptions see Corporations § 319.

81. La.—Ricau v. Couvillion, 115 So. 471, 165 La. 235.

Ohio.—Martin v. Steinke, 154 N.E. 47, 22 Ohio App. 146.

22 C.J. p 1156 note 36.

Dependence on amount subscribed

Parol evidence is admissible to show that subscriptions were taken under agreement that they would not be effective until specific amount of stock was subscribed.—Sharrar v. Wayne Sav. Ass'n, 224 N.W. 379, 246 Mich. 225.

82. Ill.—Tonica & P. R. Co. v. Stein, 21 Ill. 95.

83. Kan.—Goutermont v. Bland, 162 P. 270, 99 Kan. 431.

22 C.J. p 1156 note 38.

84. Ky.—Robb v. Sherrill-Russell Lumber Co., 241 S.W. 64, 194 Ky. 835.

Miss.—Mississippi State Highway Commission v. Anderson, 184 So. 450, 183 Miss. 458, overruling suggestion of error 183 So. 498.

Ohio.—Pierce v. Isabel, App., 36 N.E. 2d 64.

Or.—Norton v. Norton, 209 P. 1048, 105 Or. 651.

Tex.—Moore v. Wilson, Civ.App., 138 S.W.2d 1099, error refused—Garcia v. Hernandez, Civ.App., 226 S.W. 1099, dismissed for want of jurisdiction.

22 C.J. p 1156 notes 39 [a], 40.

85. S.C.—Ould v. Spartanburg Realty Co., 77 S.E. 866, 94 S.C. 184.

Vt.—Porter v. Stewart, 2 Aik. 417.

Wash.—United Iron Works v. Wagner, 154 P. 460, 89 Wash. 293.

22 C.J. p 1156 note 42.

Parol evidence is admissible to show that a condition precedent to the liability of a party to a written instrument has been fulfilled,[86] or, where the instrument is by its terms to be void unless certain conditions are complied with, to show noncompliance.[87]

So also a waiver of the condition precedent may be shown by parol.[88]

§ 945. —— Completeness of Writing

The rule excluding the showing of conditions by parol evidence is limited to instruments which on their face are complete.

The rule excluding parol evidence to show conditions annexed to the delivery of a deed or other written instrument applies only to instruments which on their face are complete and require nothing but delivery to make t˙ m effective,[89] and not to instruments which are insufficiently executed or show on their face that they are not intended to take effect.[90]

§ 946. Connection of Different Writings

While there is some authority to the contrary, parol evidence is admissible to connect two instruments, particularly where one appears to be incomplete or refers to the other.

It has been asserted that parol evidence is not admissible to connect writings which are in themselves distinct and complete and do not on their face show any connection;[91] but this rule is not of uniform operation, as there are cases in which such evidence has been considered admissible;[92] and certainly such evidence must be admissible where there is something on the face of one of the instruments to indicate that it does not in itself evidence a complete transaction, or where it refers to some other writing or undertaking.[93]

86. La.—Phillips v. Gillaspie, App., 167 So. 242, affirmed 171 So. 567, 186 La. 45.
Tex.—Morgan v. Steinberg, Civ.App., 23 S.W.2d 527.
22 C.J. p 1156 note 43.

87. U.S.—Mankin v. Bartley, C.C.A. Va., 277 F. 960.
D.C.—Robertson v. Ramsay, 298 F. 557, 54 App.D.C. 346.
Ga.—Crandall v. Shepard, 144 S.E. 772, 166 Ga. 889.
Iowa.—In re Simplot's Estate, 246 N.W. 396, 215 Iowa 578.
N.Y.—Royal Indemnity Co. v. Preferred Accident Ins. Co. of New York, 276 N.Y.S. 313, 243 App.Div. 297, affirmed 198 N.E. 407, 268 N. Y. 566, reargument denied 200 N. E. 52, 269 N.Y. 674.
Tex.—Morgan v. Steinberg, Civ.App., 23 S.W.2d 527.
Utah.—Nuttal v. Berntson, 30 P.2d 738, 83 Utah 535.
Wis.—Edward T. Kelly Co. v. Von Zakobiel, 171 N.W. 75, 168 Wis. 579.
Wyo.—McClintock v. Ayers, 253 P. 658, 36 Wyo. 132, rehearing denied 255 P. 355, 36 Wyo. 132.
22 C.J. p 1156 note 44.

Compromise agreement
Noncompliance with conditions of compromise or settlement agreement may be shown by parol.—Meyer v. McKee, 19 Ill.App. 109.

Fulfillment of condition barred
Parol evidence is admissible to show that condition could not have been performed, as, for example, that contractor could not have secured architect's approval where such approval was condition of contract.—Young & Pratt v. Southwest Insulation & Packing Co., Tex.Civ. App., 94 S.W.2d 276, error dismissed.

88. Mo.—Edwards v. Business Men's Acc. Ass'n of America, 221 S.W. 422, 205 Mo.App. 102.

Reason for rule
Such parol proof does not constitute the varying or contradicting of the terms of a written contract, since without the waiver there is no contract.—Edwards v. Business Men's Acc. Ass'n of America, supra.

89. N.Y.—Rhinock v. Simms, 235 N. Y.S. 143, 226 App.Div. 313, affirmed 171 N.E. 800, 253 N.Y. 602.
22 C.J. p 1156 note 45.

90. N.Y.—Rhinock v. Simms, supra.
22 C.J. p 1156 note 45.
Writing not expressing entire agreement generally see infra § 1013.

Letter accompanying loan
Where letter accompanying loan of money embodied only part of transaction, parol evidence is admissible to show rest of transaction and that certain conditions were agreed on.—Whalen v. First Mortg. Co. of America, 239 N.Y.S. 446, 228 App.Div. 304.

91. Va.—Texas Co. v. Northup, 153 S.E. 659, 154 Va. 428.
22 C.J. p 1157 note 46.

Election petition
Under statute relative to petitions for division of school districts, it cannot be shown by parol evidence that a sheet of paper without heading of any kind or statutory affidavit is part of petition on separate sheet signed by minority of electors and bearing the required affidavit, or that a plat on a third sheet is that referred to in the petition.—Boxley v. Mackaman, 191 N.W. 1017, 46 S. D. 241.

In Tennessee
(1) Rule stated in text prevails.—State, for Use of Burrow, v. Cothron, 113 S.W.2d 81, 86, 21 Tenn.App. 519, citing **Corpus Juris.**
(2) However, rule does not apply to trusts or to agreements to execute mutual wills.—State, for Use of Burrow, v. Cothron, 113 S.W.2d 81, 21 Tenn.App. 519.

92. Ark.—Poulas v. Kumpures, 70 S.W.2d 47, 189 Ark. 44.
Cal.—Storm & Butts v. Lipscomb, 3 P.2d 567, 117 Cal.App. 6—Orton v. Dabney, 255 P. 532, 82 Cal.App. 281—Peterson v. Wagner, 198 P. 25, 52 Cal.App. 1.
Conn.—Sweeney v. Sweeney, 11 A.2d 806, 126 Conn. 391.
Idaho.—Munro v. McAllister, 203 P. 286, 34 Idaho 638.
Ill.—Mayer v. Illinois Life Ins. Co., 211 Ill.App. 285.
Mass.—Scullin v. Cities Service Oil Co., 22 N.E.2d 666, 304 Mass. 75.
Tex.—Berry v. Shepperd, Civ.App., 131 S.W.2d 282.
22 C.J. p 1157 note 47.

Contemporaneous execution
Where instruments are executed at same time or contemporaneously for same purpose and in course of same transaction, parol evidence is admissible to connect instruments and to explain any conflict between them.—Johnsen v. Haynie, Tex.Civ. App., 70 S.W.2d 602.

93. Ala.—Fidelity & Casualty Co. of New York v. Raborn, 173 So. 399, 27 Ala.App. 367, certiorari denied 173 So. 402, 234 Ala. 31.
Ark.—Roach v. Board of Directors of St. Francis Levee Dist., 269 S. W. 986, 168 Ark. 364.
Cal.—Turner v. Stock, 251 P. 814, 79 Cal.App. 662.
Ga.—Mendel v. Converse & Co., 118 S.E. 586, 30 Ga.App. 549.

Conversely, extrinsic evidence is admissible to show that several instruments executed by the same parties and pertaining to the same subject matter are independent of each other.[94]

Connection between obligation and security therefor. Parol evidence would seem to be always permissible to connect an instrument containing an obligation to pay money with another instrument evidencing the giving of security for, or a guaranty of, payment, as this is in effect nothing more than identifying the subject matter of the latter instrument, or explaining an ambiguity, and the latter instrument is usually of such a character as to show that it does not, standing alone, evidence the complete agreement of the parties;[95] and this is true even though the note or other obligation produced does not in all particulars correspond with a description thereof in the mortgage or other writing.[96]

§ 947. Connection of Parol Agreement with Writing between Different Persons

Under certain conditions parol evidence is admissible to connect a parol agreement with a written agreement between different persons.

Under certain conditions parol evidence is admissible to show the connection between a verbal agreement and a written agreement even though the parties to the two agreements are not identical.[97]

§ 948. Consideration

It is ordinarily competent to introduce parol evidence as to the consideration for a written instrument provided such evidence does not change its legal effect or contractual terms.

As a general rule the recitals of a written instrument as to the consideration are not conclusive, and it is always competent to inquire into the consideration and show by parol or other extrinsic evidence what the real consideration was.[98] It may

Tex.—Lloyds America v. Friend, Civ. App., 91 S.W.2d 766.
22 C.J. p 1157 note 48.
Identification of writing referred to see infra § 960.
Incomplete writings generally see infra § 1013.

Documents pinned together
Ga.—Rollins v. Cox, 138 S.E. 76, 164 Ga. 231.

Identity of parties and purpose
In action on bond indemnifying surety on warehousemen's bond, where indemnity bond described principal of warehousemen's bond as "J. C. C. and W. J. M., doing business as the Consolidated Warehouse," whereas principal was "Consolidated Warehouses, by J. C. C.," and described beneficiary as commissioner of agriculture and industries, where as beneficiary was the state, parol evidence was admissible to identify and connect the two bonds.—Fidelity & Casualty Co. of New York v. Raborn, 173 So. 402, 234 Ala. 31, denying certiorari 173 So. 399, 27 Ala.App. 367.

Nature of reference
It is not necessary that reference be explicit, it being sufficient if it is fairly traceable; and contemporaneous execution of two instruments as part of one transaction shows unmistakably that they relate to the same matter.—Texas Co. v. Northup, 153 S.E. 659, 154 Va. 428.

94. Ariz.—Cooper v. Holder, 210 P. 690, 24 Ariz. 415.

Agreement not to reëngage in business
Parol evidence tending to show that agreement appended to contract of sale, whereby seller of business agreed not to again engage in business, was not executed at same time as and as part of contract of sale, does not tend to vary or contradict written instrument.—Kimbro v. Wells, 165 S.W. 645, 112 Ark. 126.

95. Pa.—In re Hunter's Estate, 11 Pa.Dist. & Co. 457.
22 C.J. p 1157 note 50.
Identification of subject matter generally see infra § 1007.

96. Wis.—Paine v. Benton, 32 Wis. 491.
22 C.J. p 1157 note 51.

97. Minn.—Van Cappellen v. Chicago, St. P., M. & O. R. Co., 148 N. W. 104, 126 Minn. 251.

Written agreement is admissible to explain oral agreement between different persons, where oral agreement was to be identical with written agreement which was referred to therein.—Hargrave v. Davidson, 13 N.C. 535.

98. U.S.—Lincoln Nat. Life Ins. Co. v. Horwich, C.C.A.Ill., 115 F.2d 892—Deutser v. Marlboro Shirt Co., C.C.A.Md., 81 F.2d 139, 142, citing **Corpus Juris**, and affirming, D.C., Union Central Life Insurance Co. v. Deutser, 13 F.Supp. 313—Baker v. U. S., 81 Ct.Cl. 598.
Ala.—Pruett v. First Nat. Bank of Anniston, 157 So. 846, 848, 229 Ala. 441, citing **Corpus Juris**—Moore v. Williamson, 104 So. 645, 213 Ala. 274, 42 A.L.R. 981—Harris v. Geneva Mill Co., 96 So. 622, 209 Ala. 538.
Cal.—Richardson v. Lamp, 290 P. 14, 209 Cal. 668—Pearce v. Underwood, 84 P.2d 244, 29 Cal.App.2d 282—Kohl v. Lytle Creek Water & Improvement Co., 75 P.2d 71, 24 Cal.App.2d 353—Koeberle v. Hotchkiss, 40 P.2d 911, 4 Cal.App.2d 252—Booja Singh v. White, 296 P. 119, 111 Cal.App. 683—W. P. Fuller & Co. v. McClure, 191 P. 1027, 48 Cal.App. 185.
Ga.—Sikes v. Sikes, 133 S.E. 239, 162 Ga. 302—Reeves Tractor & Implement Co. v. Barrow, 118 S.E. 456, 30 Ga.App. 420.
Idaho.—Van Winkle v. Van Winkle, 57 P.2d 692, 694, 56 Idaho 588, citing **Corpus Juris.**
Ill.—Mayer v. Illinois Life Ins. Co., 211 Ill.App. 285.
Kan.—MacLorinan v. Finley, 261 P. 587, 124 Kan. 637.
Ky.—Panke v. Collins-Moore & Co., 134 S.W.2d 608, 280 Ky. 701—Fordson Coal Co. v. Garrard, 125 S.W.2d 977, 277 Ky. 218, 121 A.L.R. 841—Apple v. McCullough, 38 S.W. 2d 955, 956, 239 Ky. 74, quoting **Corpus Juris**—Jones v. Riddell, 5 S.W.2d 1077, 224 Ky. 245—Deatly's Heirs v. Murphy, 3 A.K.Marsh. 472.
La.—Da Ponte v. Ogden, 108 So. 777, 161 La. 378—Clarke v. Oden, 99 So. 605, 155 La. 801—B. F. Goodrich Co. v. Truxillo, App., 191 So. 753—Morris v. Morris, App., 160 So. 134—Crichton Co. v. Smith, 137 So. 643, 18 La.App. 567.
Mich.—Edoff v. Hecht, 260 N.W. 93, 96, 270 Mich. 689, quoting **Corpus Juris.**
Minn.—Adams v. Reliance Acceptance Co., 244 N.W. 810, 187 Minn. 209.
Miss.—Blum v. Planters' Bank & Trust Co., 135 So. 353, 161 Miss. 226.
Mo.—Craig v. Koss Const. Co., 69 S.W.2d 964, 967, quoting **Corpus Juris.**
N.J.—Adams v. Camden Safe Deposit & Trust Co., 2 A.2d 361, 121 N.J. Law 389, reversing 188 A. 913, 15 N.J.Misc. 48—Dieckman v. Walser, 168 A. 582, 583, 114 N.J.Eq. 382, citing **Corpus Juris.**

be shown that the real consideration was in fact greater than that which is expressed in the instrument,[99] or that there was some other consideration in addition to that set forth,[1] especially where the

N.Y.—Hutchison v. Ross, 187 N.E. 65, 262 N.Y. 381, 89 A.L.R. 1007, affirming Ross v. Ross, 253 N.Y.S. 871, 233 App.Div. 626, which reversed 243 N.Y.S. 418, 137 Misc. 795, affirmed Hutchison v. Ross, 253 N.Y.S. 889, 233 App.Div. 516, and reargument denied 188 N.E. 102, 262 N.Y. 643, 89 A.L.R. 1023—Reade v. Sullivan, 18 N.Y.S.2d 841, 842, 259 App.Div. 229, citing **Corpus Juris**—I. & I. Holding Corporation v. Gainsburg, 296 N.Y.S. 752, 251 App.Div. 550, affirmed 12 N.E.2d 532, 276 N.Y. 427, 115 A.L.R. 582—Strobe v. Netherland Co., 283 N.Y.S. 246, 245 App.Div. 573—McGuire v. McGuire, 193 N.Y.S. 772, 201 App.Div. 71—Siegel v. Schwarzschild, 189 N.Y.S. 556, 197 App.Div. 751.

Ohio.—Detroit & I. R. Co. v. Murry, 158 N.E. 205, 206, 25 Ohio App. 409, citing **Corpus Juris**—State ex rel. Roettinger v. City of Cincinnati, 31 Ohio N.P.,N.S., 230, affirmed 195 N.E. 71, 49 Ohio App. 42.

Okl.—Carter v. Atchison, T. & S. F. Ry. Co., 56 P.2d 403, 176 Okl. 397—Jefferson v. Gallagher, 231 P. 227, 104 Okl. 263.

Or.—Hurst v. Merrifield, 23 P.2d 124, 129, 144 Or. 78, citing **Corpus Juris.**

Pa.—In re Cridge's Estate, 137 A. 455, 289 Pa. 331—Tasin v. Bastress, 110 A. 744, 268 Pa. 85. See Metropolitan Refining Co. v. Beaver Valley Mill Supply Co., 14 Pa. Dist. & Co. 454.

S.C.—Halsey v. Minnesota-South Carolina Land & Timber Co., 177 S.E. 29, 174 S.C. 97, 100 A.L.R. 1—Woodrow v. Frederick, 131 S.E. 598, 133 S.C. 431.

Tenn.—Gibson County v. Fourth & First Nat. Bank, 96 S.W.2d 184, 20 Tenn.App. 168.

Tex.—Roberson v. Keck, Civ.App., 135 S.W.2d 256, error dismissed, judgment correct—Texas Co. v. Tucker, Civ.App., 129 S.W.2d 762, error refused—Busby v. Guaranty Title & Trust Co., Civ.App., 93 S.W.2d 183, error dismissed—Daggett v. Wolff, Civ.App., 44 S.W.2d 1063—Lane v. Cunningham, Civ.App., 38 S.W.2d 906, 908, citing **Corpus Juris,** and reversed on other grounds, Com.App., 58 S.W.2d 35—Smith v. Chipley, Civ.App., 14 S.W.2d 116, 121, quoting **Corpus Juris**—Pridgen v. Furnish, Civ.App., 11 S.W.2d 844, affirmed, Com. App., 23 S.W.2d 307—Lindsay v. Texas Iron & Steel Co., Civ.App., 9 S.W.2d 287, 289, error refused, quoting **Corpus Juris**—Flynt v. Garmon, Civ.App., 275 S.W. 444—Grogan v. Lea, Civ.App., 269 S.W. 1070, 1072, quoting **Corpus Juris**—Milmo Nat. Bank v. Garza, Civ. App., 269 S.W. 155, reversed on other grounds Garza v. Milmo Nat. Bank, Com.App., 280 S.W. 548—Whitehead v. Weldon, Civ.App., 264 S.W. 958, 959, citing **Corpus Juris**—Babb v. Miller, Civ.App., 259 S.W. 177, reversed on other grounds Miller v. Babb, Com.App., 263 S.W. 253—Anders v. California State Life Ins. Co., Civ.App., 214 S.W. 497.

Utah.—Last Chance Ranch Co. v. Erickson, 25 P.2d 952, 958, 82 Utah 475, citing **Corpus Juris.**

Va.—Sale v. Figg, 180 S.E. 173, 164 Va. 402—Richeson v. Wood, 163 S. E. 339, 158 Va. 269, 82 A.L.R. 1189.

Wis.—Stuart v. Crowley, 217 N.W. 719, 195 Wis. 47.

22 C.J. p 1157 note 53.

Altering or defeating legal effect or operation of instrument see infra § 956.

Contradiction of contractual terms generally see infra § 958.

Reason for rule

(1) "The fact indeed that the true consideration is not material to the validity of a written contract, but may or may not be material to the parties, is the real, if not the only, reason for the rule, both at common law and by statute, that excludes the consideration stated in a contract from the general rule forbidding the introduction of parol evidence to vary the terms of a written contract".—Steele v. Hinkle, 265 S.W. 931, 933, 205 Ky. 408.

(2) Consideration is not part of contract, but merely inducement thereto, and hence may be shown by parol evidence whenever necessary.—Hibernia Bank & Trust Co. v. Boyd, 48 S.W.2d 1084, 164 Tenn. 376.

Covenants not ordinarily affected

Since the expressed consideration of an instrument does not ordinarily affect the covenants of the parties, the fact that there existed a different or further consideration than that set out in the writing may be shown orally.—Tasin v. Bastress, 110 A. 744, 268 Pa. 85.

Limitation to matters understood by parties

"The right to show the real consideration for the making of a contract is limited to what the parties understood the consideration to be at the time the contract was entered into."—Place v. Tri-State Investment Co., 212 Ill.App. 524, 529.

Existence of consideration

(1) Parol evidence is admissible, both for the purpose of demonstrating the existence of a consideration for the promise embodied in a subscription agreement and to show the acts of the promisee which have been performed in reliance thereon.—In re Lord's Will, 25 N.Y.S.2d 747, 175 Misc. 921.

(2) Extrinsic evidence is permissible to sustain contract attacked for want of consideration.—I. & I. Holding Corporation v. Gainsburg, 296 N.Y.S. 752, 251 App.Div. 550, affirmed 12 N.E.2d 532, 276 N.Y. 427, 115 A.L.R. 582.

In Iowa

(1) It has been stated that the law is well settled that, where a consideration on which a written instrument rests is clearly expressed, such consideration cannot be contradicted or altered by parol.—Burrier v. Sheriff, 223 N.W. 395, 396, 207 Iowa 692—Banwart v. Shullenburg, 180 N.W. 190, 190 Iowa 418—22 C.J. p 1157 note 53 [d].

(2) Other cases are in accord with the text.—Sioux City First Nat. Bank v. Flynn, 91 N.W. 784, 117 Iowa 493—22 C.J. p 1157 note 53.

(3) The apparent conflict has been explained on the ground that the cases contrary to the general rule that the recitals of a written instrument as to consideration are not conclusive and that it is competent to inquire into the consideration and to show by parol what the real consideration was, will on examination be found to be cases where the evidence tended to change the contract itself, and its other terms, instead of the consideration.—Stratford State Bank v. Young, 140 N.W. 376, 159 Iowa 375.

99. Ark.—Rowland v. Ward, 12 S. W.2d 785, 178 Ark. 851.

Ky.—Apple v. McCullough, 38 S.W.2d 955, 956, 239 Ky. 74, quoting **Corpus Juris.**

Mich.—Edoff v. Hecht, 260 N.W. 93, 96, 270 Mich. 689, quoting **Corpus Juris.**

Tex.—Lindsay v. Texas Iron & Steel Co., Civ.App., 9 S.W.2d 287, 289, error refused, quoting **Corpus Juris.**

Utah.—Afton Livestock Co. v. Peterson, 220 P. 710, 62 Utah 437.

22 C.J. p 1159 note 54.

1. Ark.—Rowland v. Ward, 12 S.W. 2d 785, 178 Ark. 851.

Colo.—W. T. Rawleigh Co. v. Dickneite, 61 P.2d 1028, 99 Colo. 276.

Ind.—Pennsylvania Co. v. Dolan, 32 N.E. 802, 6 Ind.App. 109, 51 Am.S. R. 289.

Ky.—Apple v. McCullough, 38 S.W. 2d 955, 956, 239 Ky. 74, quoting **Corpus Juris.**

Mich.—Edoff v. Hecht, 260 N.W. 93, 96, 270 Mich. 689, quoting **Corpus Juris.**

N.Y.—Reade v. Sullivan, 18 N.Y.S.2d

consideration set forth is only nominal,[2] even though the additional consideration rested on the happening of a contingency.[3] A fortiori, where the writing expresses that there were other considerations in addition to that set forth, it may be shown by parol what these were.[4] It may also be shown that the actual consideration was less than that recited in the instrument.[5] Where an aggregate sum is mentioned in a contract as the consideration for the transfer of several items of property, the actual consideration for each item may be shown by parol.[6]

Where the true consideration does not appear on the face of the instrument it may be shown by parol,[7] as where there is an ambiguity,[8] or the instrument does not purport to set forth the full consideration,[9] or where it is apparent from the instrument itself that the recited consideration is not the real one.[10]

Want or failure of consideration. It is frequently held that a want or failure of consideration, either whole or in part, may be shown by parol,[11] at least as between the original parties to the instru-

841, 842, 259 App.Div. 229, citing **Corpus Juris.**
Tex.—Cochell v. Cawthon, Civ.App., 110 S.W.2d 636, error refused—Daggett v. Wolff, Civ.App., 44 S.W.2d 1063—Lindsay v. Texas Iron & Steel Co., Civ.App., 9 S.W.2d 287, 289, quoting **Corpus Juris.**
22 C.J. p 1159 note 55.

Allegation of mistake may be necessary.—Louisville & N. R. Co. v. Helm, 89 S.W. 709, 121 Ky. 645, 28 Ky.L. 603.

2. D.C.—Madison v. White, 54 F.2d 440, 60 App.D.C. 329.
Ky.—Apple v. McCullough, 38 S.W.2d 955, 956, 239 Ky. 74, quoting **Corpus Juris.**
Mich.—Edoff v. Hecht, 260 N.W. 93, 96, 270 Mich. 689, quoting **Corpus Juris.**
N.Y.—Reade v. Sullivan, 18 N.Y.S.2d 841, 842, 259 App.Div. 229, citing **Corpus Juris.**
Tex.—Lindsay v. Texas Iron & Steel Co., Civ.App., 9 S.W.2d 287, error refused.
Utah.—Last Chance Ranch Co. v. Erickson, 25 P.2d 952, 958, 82 Utah 475, citing **Corpus Juris.**
22 C.J. p 1160 note 56.

3. Ky.—Apple v. McCullough, 38 S.W.2d 955, 956, 239 Ky. 74, quoting **Corpus Juris.**
22 C.J. p 1160 note 57.

4. Ariz.—Cashion v. Bank of Arizona, 245 P. 360, 30 Ariz. 172.
Fla.—Enns-Halbe Co. v. Templeton, 135 So. 135, 101 Fla. 609—Herrin v. Abbe, 46 So. 183, 55 Fla. 769, 18 L.R.A.,N.S., 907.
Iowa.—Klingensmith v. Klingensmith, 185 N.W. 75, 193 Iowa 350.
Miss.—Blum v. Planters' Bank & Trust Co., 135 So. 353, 161 Miss. 226.
Ohio.—Bevard v. Drucker, 182 N.E. 699, 43 Ohio App. 294.
Tex.—Manton v. City of San Antonio, Civ.App., 207 S.W. 951, error refused.
22 C.J. p 1160 note 58.

5. Ark.—Bass v. Starnes, 158 S.W. 136, 108 Ark. 357.
Me.—Hodges v. Healy, 14 A. 11, 80 Me. 281, 6 Am.S.R. 199.
22 C.J. p 1160 note 59.

6. Minn.—Mulcahy v. Dieudonne, 115 N.W. 636, 103 Minn. 352.
22 C.J. p 1161 note 62.

7. Ariz.—Wentz v. Pacific States Savings & Loan Co., 83 P.2d 1006, 52 Ariz. 508.

Where it is apparent from instrument itself that the consideration recited therein is not the true one, parol evidence may be admitted to show the true consideration. Parol evidence may be admitted to show true consideration, when it is apparent from instrument itself that consideration recited is not real consideration.—Cashion v. Bank of Arizona, 245 P. 360, 30 Ariz. 172.

8. Ark.—Whittaker v. Holmes, 263 S.W. 788, 165 Ark. 1.
Ga.—Waller v. Martin-Senour Co., 166 S.E. 53, 45 Ga.App. 808.
Ind.—Old First Nat. Bank & Trust Co. v. Scheuman, 13 N.E.2d 551, 214 Ind. 652, 119 A.L.R. 1165.
Mo.—Hackney v. Hargrove, App., 259 S.W. 495.
N.J.—Clott v. Jordan, 160 A. 684, 10 N.J.Misc. 733.
W.Va.—Baughman v. Hoffman, 110 S.E. 829, 90 W.Va. 388.

"Value received"
Expression "value received," as consideration for written instrument, is patent ambiguity, authorizing parol evidence of consideration.—Waller v. Martin-Senour Co., 166 S.E. 53, 45 Ga.App. 808.
Latent and patent ambiguities warranting admission of parol evidence generally see infra § 961.

9. Tenn.—Fuller v. McCallum, 118 S.W.2d 1028, 22 Tenn.App. 143.
Tex.—Stanolind Oil & Gas Co. v. Cerf, Civ.App., 110 S.W.2d 177, error dismissed.

10. Ariz.—Cashion v. Bank of Arizona, 245 P. 360, 30 Ariz. 172.

Even though contractual in nature, additional consideration may be shown by parol where the instrument on its face discloses that the consideration recited is merely part of the actual consideration.—Von Herberg v. Von Herberg, Wash., 106 P.2d 737.

11. Ala.—New Farley Nat. Bank v. Montgomery County, 84 So. 815, 203 Ala. 654.
Cal.—Sandrini v. Branch, 90 P.2d 593, 32 Cal.App.2d 707—Pearce v. Underwood, 84 P.2d 244, 29 Cal.App.2d 282—Koeberle v. Hotchkiss, 40 P.2d 911, 4 Cal.App.2d 252—Lewis Pub. Co. v. Henderson, 284 P. 713, 103 Cal.App. 425—Griswold v. Frame, 191 P. 962, 48 Cal.App. 178.
Ky.—Carter v. Vine Grove State Bank, 32 S.W.2d 973, 236 Ky. 191.
La.—Green v. Louisiana Highway Commission, App., 3 So.2d 236—Crichton Co. v. Smith, 137 So. 643, 18 La.App. 567.
N.C.—Jefferson Standard Life Ins. Co. v. Morehead, 183 S.E. 606, 209 N.C. 174—Galloway v. Thrash, 176 S.E. 303, 207 N.C. 165.
Okl.—Fredrick v. Ludwig, 240 P. 1049, 112 Okl. 217.
Or.—Hurst v. Merrifield, 23 P.2d 124, 129, 144 Or. 78, citing **Corpus Juris**—Marks v. Twohy Bros. Co., 194 P. 675, 98 Or. 514.
S.C.—Cain v. Whitlock, 182 S.E. 752, 178 S.C. 289.
Tenn.—Samuel v. King, 14 S.W.2d 963, 158 Tenn. 546.
Tex.—Gaines Motor Sales Co. v. Hastings Mfg. Co., Civ.App., 104 S.W.2d 548, error dismissed—Red Oak Electric Gin Co. v. Waxahachie Nat. Bank of Waxahachie, Civ.App., 279 S.W. 884.
Vt.—Citizens' Sav. Bank & Trust Co. v. Paradis & Sons, 146 A. 3, 102 Vt. 114.
22 C.J. p 1160 note 60.

"The rule that absence or failure of consideration for a written contract may be shown by parol is so elementary as to require no citation of authorities."—Standard Oil Co. of Indiana v. Calvet, 227 N.W. 885, 886, 56 S.D. 192—Independent Harvester Co. v. Anderson, 186 N.W. 112, 114, 45 S.D. 60.

Effect of statutes
(1) Although Rev.St.1909 § 2794 makes a written promise to pay money or property import a consideration, it does not prevent affirmation and showing that there was no consideration or that it failed.—Terry v. Terry, Mo.App., 217 S.W. 842.

ment.[12] Parol evidence of a want or failure of consideration is admissible, according to some authorities, to destroy a written instrument by showing that in fact the instrument never came into existence.[13] A statement which may be found in the cases is that parol evidence is not admissible to show a want or failure of consideration where the recitals of consideration in the contract are contractual in their nature rather than merely evidentiary of the receipt of the consideration.[14]

Fraud, accident, or mistake. The principle admitting parol evidence to vary the consideration expressed in a written instrument does not rest on the ground of fraud, accident, or mistake, and hence it is not necessary, in order to form a basis for the admission of such evidence, that the pleading should contain any allegation thereof.[15] Where one does charge fraud of consideration in a written instrument, he may show the truth, and the other parties, to repel such charge, may likewise show the truth, even though the evidence tends to show another or different consideration from that recited.[16]

§ 949. —— Sealed Instruments Generally

It is now generally held that parol evidence may be admitted to show the true consideration for an instrument under seal, or failure of consideration, although parol evidence will be excluded where offered to show absence of consideration defeating the instrument.

It was formerly held that the clause stating the consideration in an instrument under seal must be

(2) Code provisions as to merger and superseding of negotiations by written instruments do not prevent showing want or failure of consideration by parol.—Lewis Pub. Co. v. Henderson, 284 P. 713, 103 Cal.App. 425.

(3) Statute providing that, if cause expressed in consideration is one that does not exist, contract cannot be invalidated if party can show existence of sufficient consideration, did not apply where defendant sought to show contract was without consideration and that parties subsequently made different verbal contract.—Guillory v. Meyers, La. App., 149 So. 260.

In Iowa

(1) It is permissible to show that by reason of collateral parol agreement there was want or failure of consideration for a written contract. —Banwart v. Shullenburg, 180 N.W. 190, 190 Iowa 418—Herron v. Brinton, 175 N.W. 831, 188 Iowa 60.

(2) Earlier cases are apparently more in consonance with the text rule.—Middaugh v. Des Moines Ice & Cold Storage Co., 169 N.W. 395, 184 Iowa 969—Beaty v. Carr, 80 N. W. 326, 109 Iowa 183—Port v. Robbins, 35 Iowa 208—Gelpcke v. Blake, 19 Iowa 263.

In Pennsylvania

(1) Consideration set forth in writing is not always controlling.—Pittsburgh & L. E. R. Co. v. Borough of McKees Rocks, 135 A. 227, 287 Pa. 311.

(2) Parol evidence is admissible to show failure of consideration.—In re Cridge's Estate, 137 A. 455, 289 Pa. 331.

(3) A defense based on failure of consideration is not an attack on the instrument, nor an attempt to modify it, since, while want of consideration would contradict the terms of instrument, failure of consideration does not do so, but shows that the consideration contemplated was never received.—Sprenger, now for Use of Stoecker, v. Litten, 15 A.2d 527, 142 Pa.Super. 194—Wildwood Strand Realty Co. v. Skipper, 53 York Leg.Rec. 19.

12. Ga.—Miller v. Whitesburg Banking Co., 197 S.E. 906, 58 Ga.App. 84—Ramsey-Fender Motor Co. v. Chapman, 168 S.E. 92, 46 Ga.App. 385—A. M. Robinson Co. v. Rice, 148 S.E. 542, 39 Ga.App. 785—Lynchburg Shoe Co. v. Daniel, 98 S.E. 107, 23 Ga.App. 186.
La.—Consolidated Cos. v. Angelloz, App., 170 So. 556, reinstating 166 So. 910.

13. Cal.—Braselton v. Vokal, 200 P. 670, 53 Cal.App. 582.
Ga.—Miller v. Whitesburg Banking Co., 197 S.E. 906, 58 Ga.App. 84—Phillips v. Phillips, 169 S.E. 537, 46 Ga.App. 838.
N.Y.—Hendricks v. Clements, 186 N. Y.S. 378, 195 App.Div. 144.
Tex.—Babb v. Miller, Civ.App., 259 S.W. 177, reversed on other grounds Miller v. Babb, Com.App., 263 S.W. 253.

Evidence as varying terms of writing

(1) Fraud, illegality, want of consideration, delivery on an unperformed condition, and the like, may be shown by parol, not to contradict or vary, but to destroy a written instrument. Such proof does not recognize the contract as ever existing as a valid agreement and is received from the necessity of the case to show that that which appears to be, is not and never was a contract.—International Assets Corporation v. Axelrod, 281 N.Y.S. 32, 245 App.Div. 300—Salt Springs Nat. Bank of Syracuse v. Hitchcock, 263 N.Y.S. 55, 238 App.Div. 150, reversing 259 N.Y.S. 24, 144 Misc. 547.

(2) Defense of failure of consideration does not attempt to vary terms of written contract within parol evidence rule, but attacks existence of contract and renders it unenforceable if proved.—Neilsen v. Richter, 67 P.2d 353, 20 Cal.App.2d 546.

(3) Showing that the contract was without consideration does not change the contract, but simply voids the contract.—Ramsey-Fender Motor Co. v. Chapman, 168 S.E. 92, 46 Ga.App. 385.

14. N.Y.—Hutchison v. Ross, 187 N. E. 65, 262 N.Y. 381, 89 A.L.R. 1007, affirming Ross v. Ross, 253 N.Y.S. 871, 233 App.Div. 626, which reversed 243 N.Y.S. 418, 137 Misc. 795, affirmed Hutchison v. Ross, 253 N.Y.S. 889, 233 App.Div. 516, and reargument denied 188 N.E. 102, 262 N.Y. 643, 89 A.L.R. 1023.
S.C.—Cain v. Whitlock, 182 S.E. 752, 178 S.C. 289.
Admission of parol evidence where consideration executory or contractual see infra § 958.

Recital held not contractual

Ky.—Steele v. Hinkle, 265 S.W. 931, 205 Ky. 408.

Effect of statutes

Statute as to proof of want of consideration does not abrogate parol evidence rule where instrument is contractual respecting consideration. —Gunter v. Standard Oil Co. (Indiana), C.C.A.Mo., 60 F.2d 389.

15. La.—Consolidated Cos. v. Angelloz, 170 So. 556, reinstating 166 So. 910.
Pa.—In re Hirsh's Estate, 5 Pa.Dist. & Co. 207.
Tex.—Chaney v. Maupin, Civ.App., 153 S.W.2d 187—Busby v. Guaranty Title & Trust Co., Civ.App., 93 S.W.2d 183, error dismissed—Berryman v. Flake, Civ.App., 20 S.W. 2d 803, 805, error dismissed, quoting **Corpus Juris**—Smith v. Chipley, Civ.App., 14 S.W.2d 116, 121, quoting **Corpus Juris**—Grogan v. Lea, Civ.App., 269 S.W. 1070, 1072, quoting **Corpus Juris.**
22 C.J. p 1161 note 63.

16. Miss.—Allen v. Allen, 168 So. 658, 175 Miss. 735.

taken to be conclusive on the parties like other parts of the instrument and was not open to contradiction or explanation;[17] but the more modern decisions settle the rule that, although the consideration expressed in a sealed instrument is prima facie the sum paid or to be paid, it may still be shown by the parties that the real consideration is different from that expressed in the written instrument;[18] and this rule is sometimes established by statute.[19] Where a valuable consideration is relied on to support an instrument under seal, it may be inquired into by parol even though the result of admitting parol evidence is to show that the consideration recited in the instrument is not the real or exclusive one, provided nothing is permitted to be proved by parol which is directly inconsistent with the consideration recited or which directly changes the character of the instrument or of its covenants.[20] However, consideration sufficient to support a sealed instrument is implied, and the actual consideration may be inquired into only for the purpose of ascertaining what amount may be due,[21] not to defeat the sealed instrument,[22] and parol evidence of want of consideration is inadmissible to defeat an instrument under seal,[23] except in the case of fraud or the like.[24] Where the purpose is to show failure as distinguished from want of consideration, parol evidence may be introduced to vary the recitals of a sealed instrument.[25] It may be shown by parol evidence that a party to a note under seal was an accommodation endorser so that there was no consideration where the suit is by the payee against the endorser.[26]

§ 950. —— Deeds of Conveyance

a. In general
b. Assumption of encumbrances
c. In actions for breach of covenant

a. In General

Parol evidence is ordinarily admissible to show the true consideration for a deed, without alleging fraud or mistake or seeking its reformation, as to show the amount or character of the consideration or consideration additional to that set forth; but parol proof is inadmissible to contradict the contractual terms of the deed or to let in evidence overturning the operative words of an unambiguous instrument.

It is a well established rule, sometimes embodied in statutes, that the true consideration of a deed of conveyance may always be inquired into, and shown by parol evidence,[27] without allegations of

17. N.Y.—Maigley v. Hauer, 7 Johns. 341.
22 C.J. p 1161 note 64.

18. N.Y.—Hocking Valley Ry. Co. v. Barbour, 183 N.Y.S. 163, 192 App. Div. 654, affirmed 130 N.E. 909, 230 N.Y. 599—Maynicke v. Maynicke, 274 N.Y.S. 864, 152 Misc. 727.
W.Va.—Gay v. Gibson, 132 S.E. 717, 101 W.Va. 284.
Wis.—Spankus v. West, 267 N.W. 910, 222 Wis. 238—Bradley Bank v. Tomahawk Pulp & Paper Co., 242 N.W. 505, 208 Wis. 134.
22 C.J. p 1161 note 65.

Right to specific performance
When the purpose of showing what is the true consideration of an agreement under seal is not to defeat its validity as a contract because of absence of any consideration, but is to prove what the true consideration is in order to enable court to determine whether there had been such performance as to entitle a party to specific performance of the agreement, then such consideration may be shown.—Helbig v. Bonsness, 277 N.W. 634, 227 Wis. 52, 115 A.L.R. 373.

19. Ky.—Hite v. Reynolds, 173 S.W. 1108, 163 Ky. 502, Ann.Cas.1917B 619.

20. Pa.—Piper v. Queeney, 127 A. 474, 282 Pa. 135.

21. N.J.—Wilson v. Stevens, 148 A. 392, 105 N.J.Eq. 381.
Pa.—Goodrich Co. v. Litwak, 8 Sch. Reg. 100.

22. Wis.—Bradley Bank v. Tomahawk Pulp & Paper Co., 242 N.W. 505, 208 Wis. 134.

23. N.Y.—Cochran v. Taylor, 7 N.E.2d 89, 273 N.Y. 172, reversing 289 N.Y.S. 911, 248 App.Div. 669, affirming 282 N.Y.S. 530, 156 Misc. 750.
Pa.—Piper v. Queeney, 127 A. 474, 282 Pa. 135.
S.C.—Bandy v. Bandy, 197 S.E. 396, 187 S.C. 410—Bank of Charleston v. Oates, 158 S.E. 272, 160 S.C. 188.

Cannot show failure to pay one dollar consideration
Parol evidence that one dollar recited as consideration for a sealed option to buy property was not in fact paid did not warrant finding that the option was revocable because without consideration, since such evidence is inadmissible to contradict recited consideration in sealed instrument for purpose of defeating it.—Cochran v. Taylor, 7 N.E.2d 89, 273 N.Y. 172, reversing 289 N.Y.S. 911, 248 App.Div. 669, affirming 282 N.Y.S. 530, 156 Misc. 750.

24. Del.—Italo-Petroleum Corporation of America v. Hannigan, 14 A.2d 401, 1 Terry 534.
W.Va.—Gay v. Gibson, 132 S.E. 717, 101 W.Va. 284.

Proof of want of consideration as element of fraud
A seal prima facie imports consideration, where none is alleged or proved, but is not conclusive of the issue, where the instrument, as a deed, is attacked for fraud or undue influence, in which case want or insufficiency of consideration may be proved as an element tending to prove fraud.—Dingle v. Major, 101 S.E. 836, 113 S.C. 390.

25. Pa.—Piper v. Queeney, 127 A. 474, 282 Pa. 135—Sprenger, now for Use of Stoecker v. Litten, 15 A.2d 527, 142 Pa.Super. 194. See In re Murphy's Estate, 54 York Leg.Rec. 65.

26. Pa.—Hess v. Gower, 11 A.2d 787, 139 Pa.Super. 405.

27. Ala.—Pruett v. First Nat. Bank, 157 So. 846, 848, 229 Ala. 441, citing **Corpus Juris**—Union Bank & Trust Co. v. Royall, 148 So. 399, 401, 226 Ala. 670, citing **Corpus Juris**—Phillips v. Sipsey Coal Mining Co., 118 So. 513, 218 Ala. 296—Corley v. Vizard, 84 So. 299, 203 Ala. 564.
Ariz.—Loganbill v. Zook, 3 P.2d 273, 274, 38 Ariz. 540, quoting **Corpus Juris**.
Ark.—Curlee v. Morris, 120 S.W.2d 10, 196 Ark. 779—Crowe v. Davidson, 72 S.W.2d 763, 189 Ark. 414—Moon v. Gilliam, 61 S.W.2d 64, 187 Ark. 581—Missouri Pac. R. Co. v. Swafford, 55 S.W.2d 85, 186 Ark. 631—Hartsfield v. Crumpler, 297 S.W. 1012, 174 Ark. 1179—Whitlock v. Barham & Duncan, 288 S.W. 4, 172 Ark. 198—Wilson v. Biles, 287 S.W. 373, 171 Ark. 912—Sutton v. Sutton, 216 S.W. 1052, 141 Ark. 93.
Cal.—Lindsay v. Mack, 43 P.2d 350, 5 Cal.App.2d 491—Burrows v. Bur-

rows, 28 P.2d 1072, 136 Cal.App. 323—Epperson v. Cappellino, 298 P. 533, 113 Cal.App. 473—Miller v. First Sav. Bank of Colusa, 266 P. 294, 90 Cal.App. 387.

Conn.—Sullivan v. Clear, 127 A. 14, 101 Conn. 603.

Ga.—Guffin v. Kelly, 14 S.E.2d 50, 191 Ga. 880—Stonecypher v. Georgia Power Co., 189 S.E. 13, 183 Ga. 498, answers to certified questions conformed to 189 S.E. 672, 55 Ga. App. 197—Hendrix v. Bank of Portal, 149 S.E. 879, 169 Ga. 264—Sikes v. Sikes, 133 S.E. 239, 162 Ga. 302—Neal v. Neal, 111 S.E. 387, 153 Ga. 44—Bibb County v. Jones, 106 S.E. 727, 151 Ga. 302—Young v. Young, 104 S.E. 149, 150 Ga. 515—Parker v. Wellons, 160 S.E. 109, 43 Ga.App. 721.

Ill.—Forest Preserve Dist. of Cook County v. Hahn, 173 N.E. 763, 341 Ill. 599—Metzger v. Emmel, 124 N.E. 360, 289 Ill. 52, affirming 212 Ill.App. 163—Erzinger v. Gerrity, 271 Ill.App. 450—Thompson v. Crains, 216 Ill.App. 300, modified in other respects 128 N.E. 508, 294 Ill. 270, 12 A.L.R. 931.

Ind.—Powell v. Nusbaum, 136 N.E. 571, 192 Ind. 358—Foster v. Pruett, 15 N.E.2d 121, 105 Ind.App. 367.

Iowa.—Kroll v. Kirchner, 293 N.W. 433—Hawn v. Malone, 176 N.W. 393, 188 Iowa 439.

Kan.—Shields v. Johnson, 257 P. 926, 927, 124 Kan. 155, citing **Corpus Juris.**

Ky.—Hazelwood v. Woodward, 126 S.W.2d 857, 277 Ky. 447—Allen v. McIntosh, 125 S.W.2d 234, 276 Ky. 751—Piney Oil & Gas Co. v. Allen, 32 S.W.2d 325, 235 Ky. 767—Ecton v. Flynn, 17 S.W.2d 407, 229 Ky. 476—Holbrook v. Letcher County, 4 S.W.2d 382, 223 Ky. 597—O'Neal v. Turney's Ex'x, 300 S.W. 913, 222 Ky. 361—Newton v. Newton's Adm'r, 283 S.W. 83, 214 Ky. 278—Runyon v. Runyon, 251 S.W. 173, 199 Ky. 378.

La.—Succession of Diez, 195 So. 613, 194 La. 1089—Morris v. Monroe Sand & Gravel Co., 117 So. 763, 166 La. 656—Ryals v. Ryals, App., 199 So. 481—Farris v. Miller, App., 159 So. 132.

Md.—Drury v. State Capital Bank of Eastern Shore Trust Co., 161 A. 176, 163 Md. 84.

Mass.—Brooks v. Bennett, 177 N.E. 685, 277 Mass. 8.

Mich.—Higgins v. McGill, 175 N.W. 410, 207 Mich. 570.

Miss.—Allen v. Allen, 168 So. 658, 175 Miss. 735—Haden v. Sims, 150 So. 210, 168 Miss. 64—Blum v. Planters' Bank & Trust Co., 135 So. 353, 355, 161 Miss. 226, citing **Corpus Juris**—Raleigh State Bank v. Williams, 117 So. 365, 150 Miss. 766—Moore v. Moore, 105 So. 850, 141 Miss. 795.

Mo.—Robinson v. Field, 117 S.W.2d 308, 342 Mo. 778—Crenshaw v. Crenshaw, 208 S.W. 249, 276 Mo. 471—Baile v. St. Joseph F. & M. Ins. Co., 73 Mo. 371—Hollocher v. Hollocher, 62 Mo. 267—Fontaine v. Boatman's Savings Institution, 57 Mo. 552—Brown v. Bland, App., 229 S.W. 448—Field v. Brown, 229 S.W. 445, 207 Mo.App. 55.

N.J.—Dieckman v. Walser, 168 A. 582, 583, 114 N.J.Eq. 382, citing **Corpus Juris,** and affirming Dieckmann v. Walser, 163 A. 284, 112 N.J.Eq. 46.

N.C.—Federal Land Bank of Columbia v. Robertson, 187 S.E. 575, 210 N.C. 436—Ex parte Barefoot, 160 S.E. 365, 201 N.C. 393—Unaka and City Nat. Bank of Johnson City, Tenn., v. Lewis, 159 S.E. 312, 201 N.C. 148.

N.D.—Nesvold v. Gerding, 190 N.W. 815, 49 N.D. 207.

Okl.—Webb v. Burnam, 239 P. 653, 111 Okl. 248—Jefferson v. Gallagher, 231 P. 227, 104 Okl. 263—Lindsay State Bank v. McGraw, 219 P. 904, 96 Okl. 74—Tayiah v. Bunnell, 186 P. 240, 77 Okl. 40.

Or.—Dodds v. Mayer, 294 P. 1040, 135 Or. 43.

Pa.—See Perseo v. Demito, 55 Montg. Co.L. 143.

S.C.—Farr v. Sprouse, 130 S.E. 210, 133 S.C. 93—Knighton v. Des Portes Mercantile Co., 112 S.E. 343, 119 S.C. 340—Scott v. Wiggins, 101 S.E. 113, 113 S.C. 88.

Tenn.—Reider v. Orme, 68 S.W.2d 960, 17 Tenn.App. 497—Harkins v. Wells, 13 Tenn.App. 299.

Tex.—Pitts v. Camp County, 39 S.W.2d 608, 120 Tex. 558, answers to certified questions conformed to, Civ.App., 42 S.W.2d 853—Hanrick v. Hanrick, 214 S.W. 321, 110 Tex. 59, overruling rehearing 173 S.W. 211, 110 Tex. 59—Barber v. Herring, Com.App., 229 S.W. 472, reversing Herring v. Barber, Civ. App., 203 S.W. 142—Chaney v. Maupin, Civ.App., 153 S.W.2d 187—Skinner v. Vaughan, Civ.App., 150 S.W.2d 260, error dismissed, judgment correct—Hall v. Barrett, Civ.App., 126 S.W.2d 1045—McCarson v. Bullock, Civ.App., 78 S.W.2d 1083—Moore v. Parrish, Civ.App., 70 S.W.2d 315, error dismissed—Sammann v. Deitrich, Civ. App., 39 S.W.2d 647—Lane v. Cunningham, Civ.App., 38 S.W.2d 906, reversed on other grounds, Com. App., 58 S.W.2d 35—Moss-Tate Inv. Co. v. Owens, Civ.App., 22 S.W.2d 1096, error refused—Jackson v. Overton, Civ.App., 18 S.W.2d 773, error refused—Givens v. Featherstone, Civ.App., 12 S.W.2d 613—Lindsay v. Texas Iron & Steel Co., Civ.App., 9 S.W.2d 287, error refused—Rogers v. Rogers, Civ.App., 7 S.W.2d 126, reversed on other grounds, Com.App., 15 S.W. 2d 1037—Glaser v. Henderson, Civ. App., 2 S.W.2d 987—Whitehead v. Weldon, Civ.App., 264 S.W. 958—Martin Bros. v. McKnight, Civ. App., 245 S.W. 447—Mitchell v. Walker, Civ.App., 241 S.W. 1090, reversed on other grounds Walker v. Mitchell, Com.App., 255 S.W. 1106—Davis v. Aydelott, Civ.App., 238 S.W. 1011—Conner v. McAfee, Civ.App., 214 S.W. 646, error refused—Sanger v. Futch, Civ.App., 208 S.W. 681, error refused.

Utah.—Last Chance Ranch Co. v. Erickson, 25 P.2d 952, 82 Utah 475.

Va.—Ashworth v. Hagan Estates, 181 S.E. 381, 161 Va. 151—Otey v. Oakey, 160 S.E. 8, 157 Va. 314—Swain v. Virginia Bank & Trust Co., 144 S.E. 645, 151 Va. 655—Echard v. Waggoner, 101 S.E. 245, 126 Va. 238.

W.Va.—Baughman v. Hoffman, 110 S.E. 829, 90 W.Va. 388.

Wis.—In re Getchell's Estate, 247 N.W. 859, 211 Wis. 644—Stuart v. Crowley, 217 N.W. 719, 195 Wis. 47—Clark v. Tallmadge, 176 N.W. 906, 171 Wis. 133.

22 C.J. p 1162 note 67.

Deed as prima facie proof of good consideration and of what the consideration was see Deeds § 189.

Contradiction or explanation of recited consideration

(1) Consideration expressed in deed is not conclusive, but may be contradicted or explained, being at best only prima facie evidence of fact, omission of which may be supplied by parol testimony.—Lollis v. Lollis, 85 S.W.2d 732, 191 Ark. 199.

(2) Recital that consideration was location of county seat may be explained by proof of facts elucidating the pertinent circumstances prevailing at the time the deed was executed.—Pitts v. Camp County, 39 S.W.2d 608, 120 Tex. 558, answers to certified questions conformed to, Civ. App., 42 S.W.2d 853.

Incomplete recital

Where grantor's admission showed that the recital of consideration in a deed was incomplete, it was competent to introduce parol evidence irrespective of general rules respecting admission of parol evidence as to consideration.—In re Cridge's Estate, 137 A. 455, 289 Pa. 331.

Where true consideration admittedly not stated

La.—Moore v. Pitre, 90 So. 252, 149 La. 910.

Statute following common-law rule

Ky.—McQueen v. Estridge, 65 S.W. 2d 454, 251 Ky. 464.

Under statute permitting impeachment of consideration of any writing, true consideration of deed may be shown by parol, although it contradicts written instrument.—Beaver Dam Coal Co. v. Brashear, 54 S.W.2d 609, 246 Ky. 69.

fraud or mistake,[28] or seeking reformation of the deed,[29] as for the purpose of showing the amount[30] or character[31] of the consideration, or by whom it was paid,[32] for the obvious reason that a change in, or contradiction of, the expressed consideration does not affect in any manner the covenants of the grantor or grantee, and neither enlarges nor limits the grant.[33] It is also permissible, where there is no contradiction of the contractual terms of the instrument, to show want or failure of the consideration recited in a deed;[34] but these rules cannot be extended so as to let in proof overturning the operative words of the grant in a deed free from ambiguity, or contradicting the deed itself or the descriptions therein,[35] or for the purpose of invalidating the instrument or impairing its effect as a conveyance,[36] as by showing that there was no consideration,[37] unless there are spe-

Deed from parent to child
The true consideration of a deed from parents to children may be shown by parol.
Ala.—Zaner v. Thrower, 84 So. 820, 203 Ala. 650.
S.C.—Drake v. Drake, 145 S.E. 705, 148 S.C. 147.

Damages on exchange of property
On issue of damages for partial failure of title to exchanged property, evidence as to value of any property given in exchange by either party is admissible, regardless of rule against parol evidence, to show true consideration and thereby furnish basis for determination of value of part to which title has failed.—Thorn v. Dunn, Tex.Civ.App., 94 S.W.2d 1229.

28. Ky.—McNeill's Adm'x v. Riley, 75 S.W.2d 1068, 256 Ky. 170—McQueen v. Estridge, 65 S.W.2d 454, 251 Ky. 464—Harshbarger v. Bryan, 24 S.W.2d 601, 232 Ky. 816—Noble's Adm'r v. Combs, 15 S.W.2d 491, 228 Ky. 746—Robinson's Adm'r v. Alexander, 239 S.W. 786, 194 Ky. 494—Potter v. Baynes, 217 S.W. 359, 186 Ky. 489.
Tex.—Busby v. Guaranty Title & Trust Co., Civ.App., 93 S.W.2d 183, error dismissed—Whitehead v. Weldon, Civ.App., 264 S.W. 958—Williams v. Flowers, Civ.App., 255 S.W. 1020—D. Sullivan & Co. v. Schreiner, Civ.App., 222 S.W. 314, error refused.

29. Ky.—McQueen v. Estridge, 65 S.W.2d 454, 251 Ky. 464.
S.D.—James Valley Bank of Huron v. Richards, 219 N.W. 560, 52 S.D. 597.

30. Ark.—Lollis v. Lollis, 85 S.W.2d 732, 191 Ark. 199.
Cal.—Robson v. O'Toole, 214 P. 278, 60 Cal.App. 710.

Mistake in computation
Mass.—City of Marlborough v. Snow, 17 N.E.2d 322, 302 Mass. 429—Cardinal v. Hadley, 33 N.E. 575, 158 Mass. 352, 35 Am.S.R. 492.

31. Cal.—Robson v. O'Toole, 214 P. 278, 60 Cal.App. 710.
Fla.—Florida Moss Products Co. v. City of Leesburg, 112 So. 572, 93 Fla. 656.
Kan.—Shields v. Johnson, 257 P. 926, 124 Kan. 155.
Mo.—Cave v. Wells, 5 S.W.2d 636, 319 Mo. 930.

Disproving pecuniary character of consideration
Where the owners of an estate, acquired by descent and owned in common, partition the same by an interchange of mutual releases in the form of quitclaim deeds, and there is no element of bargain and sale in the transaction, no new title is cast by such deeds and if they recite a consideration of pecuniary character, parol evidence to disprove such recital is competent.—Lee v. Fike, 162 N.E. 682, 28 Ohio App. 283.

Whether consideration was paid by money or property may be shown by parol.—Shields v. Johnson, 257 P. 926, 124 Kan. 155.

Sale or exchange
Where parol evidence was admissible to show whether a transaction was a mere exchange of equities or a sale of land, the whole transaction, together with the circumstances surrounding the payment, was admissible for the purpose of showing the true consideration.—Hawn v. Malone, 176 N.W. 393, 188 Iowa 439.

32. Kan.—Shields v. Johnson, 257 P. 926, 124 Kan. 155.

33. Ariz.—Loganbill v. Zook, 3 P.2d 273, 274, 38 Ariz. 540, quoting **Corpus Juris.**
Okl.—Tayiah v. Bunnell, 186 P. 240, 77 Okl. 40.
22 C.J. p 1163 note 68.

34. U.S.—Currie v. Matson, D.C.La. 33 F.Supp. 454.
Cal.—Miller v. First Sav. Bank of Colusa, 266 P. 294, 90 Cal.App. 387—Rundell v. McDonald, 182 P. 450, 41 Cal.App. 175.
Iowa.—Guenther v. Kurtz, 216 N.W. 39, 204 Iowa 732.
La.—Green v. Louisiana Highway Commission, App., 3 So.2d 236. See Grimm v. Pugh, App., 197 So. 641.
Contradiction of contractual terms of contract generally see infra § 958.

Gift
Where fire insurer relies on deed to insured property from insured to third person as showing that insured was not, as policy required, sole owner at time of fire, deed may be shown by parol to be deed of gift, notwithstanding deed recites monetary consideration.—Pooser v. Norwich Union Fire Ins. Soc., 182 S.E. 44, 51 Ga.App. 962.

35. Ala.—Union Bank & Trust Co. v. Royall, 148 So. 399, 401, 226 Ala. 670, citing **Corpus Juris**—Baker v. Horsley, 101 So. 830, 212 Ala. 181.
Ariz.—Loganbill v. Zook, 3 P.2d 273, 274, 38 Ariz. 540, quoting **Corpus Juris.**
Ind.—Boonville Milling Co. v. Roth, 127 N.E. 823, 73 Ind.App. 427.
La.—Brewer v. New Orleans Land Co., 97 So. 605, 154 La. 446—McQueen v. Palmer, App., 155 So. 264.
Minn.—Thiem v. Eckert, 206 N.W. 721, 165 Minn. 379.
Mo.—Weissenfels v. Cavel, 106 S.W. 1028, 208 Mo. 515.
Neb.—In re Weitzel's Estate, 280 N.W. 270, 135 Neb. 43.
Tex.—Pridgen v. Furnish, Com.App., 23 S.W.2d 307, affirming, Civ.App., 11 S.W.2d 844—Hillman v. Graves, Civ.App., 134 S.W.2d 436—Waggoner v. Magnolia Petroleum Co., Civ.App., 252 S.W. 865.
Utah.—Paloni v. Beebe, 110 P.2d 563.
Wis.—Stuart v. Crowley, 217 N.W. 719, 195 Wis. 47.
Parol evidence as to prior and contemporaneous agreements see infra §§ 997–1003.

36. Conn.—Hartford - Connecticut Trust Co. v. Divine, 116 A. 239, 97 Conn. 193, 21 A.L.R. 134.
Ill.—Greer v. Carter Oil Co., 25 N.E.2d 805, 373 Ill. 168—Negley v. Ingleman, 166 N.E. 477, 335 Ill. 52.

37. Ark.—Moncrief v. Miller, 14 S.W.2d 227, 178 Ark. 1069.
Conn.—Monski v. Lukomske, 173 A. 897, 118 Conn. 635—Hartford-Connecticut Trust Co. v. Divine, 116 A. 239, 97 Conn. 193, 21 A.L.R. 134.
Ill.—Negley v. Ingleman, 166 N.E. 477, 335 Ill. 52.
Iowa.—Johnson v. Lavene, 192 N.W. 885, 196 Iowa 471.
La.—Johnson v. Johnson, 185 So. 299, 191 La. 408—Schrock v. Bolding, 132 So. 504, 171 La. 929—Depaula & Distefano v. Costanza, App., 169 So. 822.
Mo.—Keener v. Williams, 271 S.W. 489, 307 Mo. 682—Johnston v. Bank of Poplar Bluff, 294 S.W. 111, 221 Mo.App. 127.
Tex.—Crayton v. Phillips, Com.App., 4 S.W.2d 961, affirming, Civ.App., 297 S.W. 888.
W.Va.—Hunt v. Hunt, 114 S.E. 283, 91 W.Va. 685.

cial circumstances such as fraud, retention of possession by the grantor, or the like.[38] Where the consideration is stated not by way of mere receipt or recital of fact, but in such a way as to make it one of the terms of the contract between grantor and grantee, a different consideration, whether variant or additional, cannot be shown by parol.[39]

Sale in gross or by acre. That a sale of land was actually one by the acre may be shown by parol evidence although the contract and deed show a sale in gross.[40]

Additional consideration for deed. It is ordinarily permissible to introduce evidence to show that the consideration for a deed was greater than that expressed in the instrument,[41] as where the consideration specified was purely nominal,[42] as in the case of deeds reciting a nominal consideration followed by a clause relative to "other good and valuable considerations," or the like.[43] However, where the additional consideration for a deed sought to be shown by parol is purely contractual and imposes on one party an additional contractual obligation repugnant to the plain terms of the writing, parol proof may not be resorted to for the purpose of enforcing such additional obligation.[44]

b. Assumption of Encumbrances

Ordinarily parol evidence is admissible to show that the purchaser of realty did or did not assume encumbrances as part of the consideration for a deed, although some authorities refuse to admit such evidence in contradiction of a warranty against encumbrances. Parol proof concerning assumption of encumbrances may not be introduced in violation of the contractual terms of the deed.

It may be shown, although not expressed in a deed, that the grantee agreed as part of the consideration to pay or assume an existing encumbrance,[45]

Deed of trust
Parol evidence is inadmissible to show that there was no consideration for a note and deed of trust or to show a consideration that would have the effect of rendering the instruments void.—Hartsfield v. Crumpler, 297 S.W. 1012, 174 Ark. 1179.

Defeating operative words
While the consideration of a deed is open to investigation and explanation for some purposes, in the absence of fraud or mistake, want of consideration of a quitclaim deed cannot be shown for the purpose of defeating its operative words.—Crenshaw v. Crenshaw, 208 S.W. 249, 276 Mo. 471.

38. Ariz.—Collins v. Collins, 52 P.2d 1169, 46 Ariz. 485.

Deed attacked for fraud
If deed is attacked by third parties for fraud, it may be shown, in addition to consideration expressed, that substantial and valuable consideration was paid, or the converse.—Warren Refining & Chemical Co. v. Dyer, 132 S.E. 877, 101 W.Va. 452.

39. Ga.—Young v. Young, 104 S.E. 149, 150 Ga. 515.
Tex.—Graves v. Graves, Civ.App., 26 S.W.2d 694, error dismissed.

40. N.Y.—Murdock v. Gilchrist, 52 N.Y. 242.
Ohio.—Conklin v. Hancock, 66 N.E. 518, 67 Ohio St. 455—Procter v. Bell, 9 Ohio Dec., Reprint, 853, 17 Cinc.L.Bul. 389.
Tenn.—Barnes v. Gregory, 1 Head 230.
Tex.—Briley v. Hay, Civ.App., 13 S.W.2d 997—Franco-Texan Land Co. v. Simpson, 20 S.W. 953, 1 Tex.Civ.App. 600.
Vt.—White v. Miller, 22 Vt. 380.
W.Va.—Crislip v. Cain, 19 W.Va. 438.

41. Ala.—Gilliland v. Hawkins, 112 So. 454, 216 Ala. 97.
Ark.—Rowland v. Ward, 12 S.W.2d 785, 178 Ark. 851.
Tex.—Cochell v. Cawthon, Civ.App., 110 S.W.2d 636, error dismissed—Silliman v. Oliver, Civ.App., 233 S.W. 867, error refused—Foster v. Wright, Civ.App., 217 S.W. 1090.

Foundation for introduction of proof
Where grantee represented that the words "other considerations" in his deed included notes, this was sufficient to let in proof that the "other considerations" referred to the notes.—Luse v. Beard, Tex.Civ.App., 252 S.W. 243.

42. D.C.—Madison v. White, 54 F.2d 440, 60 App.D.C. 329.
Tex.—Lindsay v. Texas Iron & Steel Co., Civ.App., 9 S.W.2d 287, error refused—Wells v. Timms, Civ.App., 275 S.W. 468.
Utah.—Last Chance Ranch Co. v. Erickson, 25 P.2d 952, 82 Utah 475.

43. Fla.—Bond v. Hewitt, 149 So. 606, 111 Fla. 180—Enns-Halbe Co. v. Templeton, 135 So. 135, 101 Fla. 609.
Iowa.—Klingensmith v. Klingensmith, 185 N.W. 75, 193 Iowa 350.
Miss.—Blum v. Planters' Bank & Trust Co., 135 So. 353, 161 Miss. 226.
N.J.—Clott v. Jordan, 160 A. 684, 10 N.J.Misc. 733.
Ohio.—Bevard v. Drucker, 182 N.E. 699, 43 Ohio App. 294.
S.D.—James Valley Bank of Huron v. Richards, 219 N.W. 560, 52 S.D. 597.
Tex.—Manton v. City of San Antonio, Civ.App., 207 S.W. 951, error refused.

Recital regarded as surplusage
Consideration of deed stated as one dollar and other good and valuable consideration is open to investigation and explanation, and recital of sum of one dollar might be treated as surplusage.—Finley v. Williams, 29 S.W.2d 103, 325 Mo. 688.

No intent to set out true consideration in deed
Where there has been a contract for the sale of realty at a designated sum and consideration recited includes mortgage indebtedness against property which is specifically assumed, but deed executed pursuant thereto does not purport to set out true consideration and recites consideration as nominal sum and other valuable consideration, it is permissible to prove the actual consideration to be paid by the vendee to the vendor.—Fuller v. McCallum & Robinson, 118 S.W.2d 1028, 22 Tenn.App. 143.

44. Fla.—Bond v. Hewitt, 149 So. 606, 111 Fla. 180.
Wis.—In re Petzold's Estate, 265 N.W. 87, 220 Wis. 297.

45. Cal.—Robson v. O'Toole, 214 P. 278, 60 Cal.App. 710.
Ill.—Erzinger v. Gerrity, 271 Ill.App. 450—Barnett v. Hubbard, 245 Ill.App. 109—Thompson v. Crains, 216 Ill.App. 300, modified in other respects 128 N.E. 508, 294 Ill. 270, 12 A.L.R. 931.
Ind.—Evans v. Bolley, 137 N.E. 619, 79 Ind.App. 196.
Kan.—Woodburn v. Harvey, 190 P. 620, 107 Kan. 57, rehearing denied 191 P. 468, 107 Kan. 422.
Tex.—Leeson v. City of Houston, Civ.App., 225 S.W. 763, affirmed, Com.App., 243 S.W. 485—Bills v. Thayer, Civ.App., 266 S.W. 822—Kleck v. Kleck, Civ.App., 246 S.W. 720.
Wash.—Bollong v. Corman, 201 P. 297, 117 Wash. 336.
22 C.J. p 1163 note 70.

even though the property is granted subject to mortgage,[46] although assumption of an encumbrance may not be shown by parol in contradiction of the contractual terms of the deed;[47] and where a party's own allegations show that there was no intent to assume an encumbrance, he may not show the contrary by parol.[48] On the other hand, where the deed contains a recital as to assumption of debts or encumbrances, this is not necessarily conclusive as against parol proof,[49] and in contradiction of the recital in the deed it may be shown by parol that a debt or encumbrance was not assumed as part of the consideration,[50] although where assumption of a mortgage is recited as part of the consideration in a deed and the parties have for a number of years acted in accordance with the assumption clause both may be bound by the recited consideration.[51] Where the deed contains an assumption clause, but the underlying contract as written does not, it may be shown by parol that such clause was properly inserted in the deed.[52]

Mutual conveyances between cotenants. Where two tenants in common of separate tracts of property executed mutual conveyances to each other in order to divide their interests, parol evidence was held inadmissible to show that one tenant in fact assumed an indebtedness secured by a deed of trust on one of the tracts, the deed making no mention thereof.[53]

Effect of covenant against encumbrances. The authorities are conflicting as to whether or not the assumption by the grantee of an encumbrance may be shown by parol where the deed contains a covenant against encumbrances.[54] It has been held that even though the deed contains a covenant of warranty against encumbrances, parol evidence of assumption does not destroy the warranty but leaves it in full force and effect except as to the specific encumbrance, the payment or assumption of which was a part of the consideration,[55] but there is also authority for the contrary view.[56] It has also been

Judgment

An agreement by grantee as part of consideration to discharge a judgment constituting an encumbrance on land conveyed to him, not expressed in deed, could be shown by parol.—Whitehead v. Weldon, Tex. Civ.App., 264 S.W. 958.

Mortgage

Where deed recited that land conveyed was encumbered by two mortgages, but did not state that grantee assumed and agreed to pay mortgage debt, parol evidence was admissible to show that grantee agreed to pay mortgage debt and that amount thereof was deducted from purchase price.—Edwards v. Rutland Sav. Bank, 75 P.2d 1152, 181 Okl. 643.

Paving

Where there was no paving lien or paving contract or ordinance in existence when contract for purchase of property was made, parol evidence was admissible to show the real agreement of the parties as to which of the parties should pay for the pavement in case the abutting street should be paved by the city.—Leeson v. City of Houston, Tex.Com.App., 243 S.W. 485, affirming, Civ.App., 225 S.W. 763.

Taxes

It was not error to admit parol evidence that vendor agreed to pay taxes on property for current year as they became due and payable.—Grogan v. Lea, Tex.Civ.App., 269 S. W. 1070.

Showing amount

In suit by vendees who had rescinded to recover back price paid, where the written contracts evidenced plaintiffs' obligations to pay taxes and interest, the amount so paid might be shown by parol.—Brewer v. New Orleans Land Co., 97 So. 605, 154 La. 446.

46. Cal.—White v. Schader, 198 P. 19, 185 Cal. 606, 21 A.L.R. 499.

No inconsistency

An agreement to assume and pay a mortgage not being inconsistent with a deed reciting that the property is granted subject to the mortgage, such an agreement may be shown by parol evidence, as showing the consideration for the deed.—White v. Schader, supra.

47. Iowa.—Dillivan v. German Sav. Bank, 124 N.W. 350.
22 C.J. p 1128 note 9.

48. Iowa.—Dimmitt v. Johnson, 203 N.W. 261, 199 Iowa 966.

Where mortgagee seeking deficiency judgment against purchasers of mortgaged property pleaded a contract between mortgagor and purchaser which showed exchange of other property for mortgaged property, and no intent to pay mortgage or retain part of price for that purpose, it was held that mortgagee could not contradict terms of such written contract by parol evidence that consideration was not as stated, and that purchaser actually retained part of price to pay mortgage.—Dimmitt v. Johnson, supra.

49. Fla.—Luria v. Bank of Coral Gables, 142 So. 901, 106 Fla. 175, rehearing denied 143 So. 598, 106 Fla. 175.

Ordinarily no estoppel

Grantee in deed containing clause that grantee assumes and agrees to pay mortgages on land is ordinarily not estopped from denying such recital, and may show by parol evidence that he never made such agreement.—Stowers v. Stuck, 268 N.W. 310, 131 Neb. 409.

Reformation as unnecessary

That grantee in deed did not resort to reformation to eliminate clause reciting that he assumed mortgage on land purchased by him does not necessarily prevent oral proof, on motion for deficiency judgment in foreclosure suit, that he did not assume mortgage.—Stowers v. Stuck, 268 N.W. 310, 131 Neb. 409.

50. Fla.—Luria v. Bank of Coral Gables, 142 So. 901, 106 Fla. 175, rehearing denied 143 So. 598, 106 Fla. 175.
Mo.—Empire Trust Co. v. Hitchcock, 123 S.W.2d 565, 233 Mo.App. 581.
Neb.—Stowers v. Stuck, 268 N.W. 310, 131 Neb. 409—Peters Trust Co. v. Miskimins, 211 N.W. 615, 115 Neb. 88.

51. Iowa.—First Nat. Bank v. McDonough, 219 N.W. 329, 205 Iowa 1329, followed in First Nat. Bank v. Gurnett, 221 N.W. 958, 206 Iowa 1290.

52. Mich.—Lahey v. Hackley Union Nat. Bank, 259 N.W. 130, 270 Mich. 438.

53. Miss.—Garner v. Garner, 78 So. 623, 117 Miss. 694.

54. Miss.—Martin v. Partee, 83 So. 673, 121 Miss. 482.

55. N.D.—Erickson v. Wiper, 157 N. W. 592, 33 N.D. 193.
22 C.J. p 1163 note 71.

56. Fla.—Bond v. Hewitt, 149 So. 606, 111 Fla. 180.
Miss.—Martin v. Partee, 83 So. 673, 121 Miss. 482.
22 C.J. p 1163 note 72.

held that where the deed contains a general warranty clause and recites a money consideration it is competent to prove by parol that part of such recited money consideration consisted in assumption of an encumbrance.[57]

c. In Actions for Breach of Covenant

In suits for breach of covenant parol evidence is ordinarily admissible to increase or decrease damages by showing the true consideration, although parol evidence may be inadmissible where the action is by a remote grantee against the original covenantor, where the actual consideration cannot be estimated in money, or where it is sought to introduce such evidence to defeat the deed or a recovery on the covenant.

Generally speaking, parol evidence is admissible in a suit for breach of covenant or warranty to show the true consideration,[58] although the deed contains an acknowledgment on the part of the grantor that it has been paid at the time of or before the execution of the deed.[59] Plaintiff may introduce parol evidence to show a greater consideration than that recited so as to increase damages,[60] or defendant may show by parol that the consideration was less, so as to reduce damages,[61] although parol evidence may not be introduced for the purpose of defeating the deed or a recovery on the covenant.[62] So, too, in an action for breach of covenant of warranty on an exchange of land, where there has been no agreement as to the actual value of the land conveyed to plaintiff, parol evidence of such value is admissible on the issue of damages.[63] In the absence, however, of a statute controlling, where the action is by a remote grantee against the original covenantor the latter cannot show that the consideration paid was other than that expressed in the deed,[64] and where the actual consideration is such that it cannot be estimated in money, the consideration expressed in the deed is conclusive.[65]

§ 951. —— Bills and Notes

a. In general
b. Indorsement

a. In General

The rule and the qualifications thereof permitting the introduction of parol evidence with respect to the true consideration of an instrument are applicable to promissory notes, bills of exchange, and other commercial paper.

The real consideration for a promissory note or bill of exchange may be shown by parol,[66] and ac-

General warranty in a conveyance includes a warranty against encumbrances, and parol evidence is inadmissible to show that the grantee agreed to assume a deed of trust then on the land.—Hicks v. Sullivan, 89 So. 811, 127 Miss. 148.

57. S.C.—Scott v. Wiggins, 101 S.E. 113, 113 S.C. 88.

58. Ark.—Wade v. Texarkana Building & Loan Ass'n, 233 S.W. 937, 150 Ark. 99.
Ind.—Smith v. Lamont, 137 N.E. 620, 79 Ind.App. 209.
15 C.J. p 1336 note 28.

59. N.Y.—Bingham v. Weiderwax, 1 N.Y. 509.

60. Ark.—Arkansas Trust Co. v. Bates, 59 S.W.2d 1025, 187 Ark. 331.

61. Ark.—Arkansas Trust Co. v. Bates, supra.

62. Ark.—Arkansas Trust Co. v. Bates, supra.

63. Mo.—Howard v. Hurst, 137 S. W. 1, 156 Mo.App. 205.

64. Ill.—Illinois Land & Loan Co. v. Bonner, 91 Ill. 114.
15 C.J. p 1336 notes 30, 31.

65. Mich.—Randall v. Randall, 37 Mich. 563.

66. U.S.—Deutser v. Marlboro Shirt Co., C.C.A.Md., 81 F.2d 139, affirming, D.C., Union Central Life Insurance Co. v. Deutser, 13 F.Supp. 313—Bromfield v. Trinidad Nat. Inv. Co., Colo., 36 F.2d 646, 648, 71 A.L.R. 542, citing **Corpus Juris.**
Ala.—First Nat. Bank v. Bain, 188 So. 64, 237 Ala. 580—Birmingham News Co. v. Moseley, 141 So. 689, 693, citing **Corpus Juris**—Hardegree v. Riley, 122 So. 814, 815, 219 Ala. 607, citing **Corpus Juris**—Wells v. Drane, 90 So. 898, 206 Ala. 583—Phillips v. Matthews, 88 So. 641, 205 Ala. 480—Blount County Bank v. Robinett & McCay, 122 So. 802, 23 Ala.App. 145, certiorari denied 122 So. 804, 219 Ala. 503—Blackmon v. Engram, 116 So. 307, 22 Ala.App. 396.
Ariz.—Wentz v. Pacific States Savings & Loan Co., 83 P.2d 1006, 52 Ariz. 508.
Ark.—Vinson v. Wooten, 259 S.W. 366, 163 Ark. 170.
Cal.—McKay v. Security-First Nat. Bank of Los Angeles, 96 P.2d 376, 35 Cal.App.2d 349—Harper v. French, 84 P.2d 216, 29 Cal.App.2d 214—Spellacy v. Young, 186 P. 368, 44 Cal.App. 174.
Ga.—J. P. Byrd & Co. v. Marietta Fertilizer Co., 56 S.E. 86, 87, 127 Ga. 30—Yarbrough v. Shackelford, 158 S.E. 532, 43 Ga.App. 243—Southern Crushed Stone & Granite Co. v. Dorn, 141 S.E. 59, 37 Ga.App. 564—Spells v. Swift & Co., 130 S.E. 593, 34 Ga.App. 620.
Ky.—Vinaird v. Bodkin's Adm'x, 72 S.W.2d 707, 254 Ky. 841.
La.—Belknap Hardware & Mfg. Co. v. Hearn, 155 So. 396, 179 La. 909—B. F. Goodrich Co. v. Truxillo, App., 191 So. 753.
Mo.—Bunch v. Phillips, App., 79 S.W.2d 785—Bollinger v. New Era Pub. Co., App., 68 S.W.2d 725.
N.H.—Stratton v. Stratton, 129 A. 876, 82 N.H. 125.
N.J.—Kover v. Robinson, 165 A. 73, 110 N.J.Law 363, affirmed 168 A. 297, 111 N.J.Law 240.
N.Y.—Residence Funding Co. v. Francis, 268 N.Y.S. 239, 149 Misc. 380.
Okl.—Roberts v. Boydston, 97 P.2d 898, 186 Okl. 336.
S.C.—Stalnaker v. Tolbert, 114 S.E. 412, 121 S.C. 437.
Tex.—City Investment & Loan Co. v. Wichita Hardware Co., 91 S.W.2d 683, 127 Tex. 44, modifying, Civ.App., 57 S.W.2d 222—Gaines Motor Sales Co. v. Hastings Mfg. Co., Civ.App., 104 S.W.2d 548, error dismissed—Central Nat. Bank of Waco v. Lawson, Civ.App., 7 S.W.2d 915, affirmed, Com.App., 27 S.W.2d 125.
Wash.—First State Bank of Kellogg v. Merritt, 1 P.2d 902, 163 Wash. 467.
W.Va.—Rauschenbach v. McDaniel's Estate, 11 S.E.2d 852.
22 C.J. p 1164 note 74.

Checks
Ga.—Purcell v. Armour Packing Co., 61 S.E. 138, 4 Ga.App. 253.
Kan.—Griffith v. Marsh, 118 P. 879, 85 Kan. 698.

cordingly, where such matters are available by way of defense as discussed in Bills and Notes §§ 486–524, it may be shown that there was no consideration[67] or that the consideration was illegal,[68] or inadequate,[69] or has failed,[70] or that the instru-

Exact and full consideration for a note may be shown by parol.—Cambon Bros. v. Suthon, 84 So. 496, 147 La. 66.

Surrounding circumstances
Circumstances under which a note was given may be inquired into as bearing on the consideration for the note.—First Nat. Bank v. Holmes, 181 N.W. 46, 213 Mich. 41.

Rent note payable in cotton
A rent note calling for "40,000 lbs. of United States lint cotton," indicating on its face lack of completeness in failing to designate which grade of the standard system of grading was to be applied, parol evidence was admissible to supply the omission by explaining the consideration.—Mays v. Hankinson & Hagler, 120 S.E. 793, 31 Ga.App. 473.

67. U.S.—Bromfield v. Trinidad Nat. Inv. Co., Colo., 36 F.2d 646, 648, 71 A.L.R. 542, citing **Corpus Juris.**
Ala.—Spencer v. Blanke Mfg. & Supply Co., 124 So. 904, 220 Ala. 350.
Ariz.—Boyle v. Webb, 94 P.2d 642, 54 Ariz. 188—Yuma Nat. Bank v. Balsz, 237 P. 198, 28 Ariz. 336.
Ark.—Lincoln Reserve Life Ins. Co. v. Jones, 10 S.W.2d 910, 178 Ark. 466—Tate v. Gould, 299 S.W. 24, 175 Ark. 306—Vinson v. Wooten, 259 S.W. 366, 163 Ark. 170—Chandler v. Griffin, 239 S.W. 18, 152 Ark. 625—McElrath v. Gomer, 215 S.W. 881, 144 Ark. 641.
Cal.—Richardson v. Lamp, 290 P. 14, 209 Cal. 668—Harper v. French, 84 P.2d 216, 29 Cal.App.2d 214—Bank of America Nat. Trust & Savings Ass'n v. Goldstein, 76 P.2d 545, 25 Cal.App.2d 37—Cooper v. Cooper, 39 P.2d 820, 3 Cal.App.2d 154.
D.C.—McGrew v. McGrew, 279 F. 923, 51 App.D.C. 345.
Ga.—Anderson v. Rheney, 110 S.E. 164, 152 Ga. 418—Southern Crushed Stone & Granite Co. v. Dorn, 141 S.E. 59, 37 Ga.App. 564—Porter Fertilizer Co. v. Brewer, 136 S.E. 477, 36 Ga.App. 329—McDonald v. Citizens' Bank of Ludowici, 103 S.E. 851, 25 Ga.App. 609—Stewart v. Hardin, 101 S.E. 716, 24 Ga.App. 611.
Iowa.—Northern Trust Co. v. Anderson, 262 N.W. 529, 222 Iowa 590, adhered to 271 N.W. 192, 222 Iowa 590—Jones v. Wilson, 258 N.W. 82, 219 Iowa 324—Cooley v. Will, 237 N.W. 315, 212 Iowa 701, followed in 237 N.W. 318, 319—Security Sav. Bank v. Carlson, 231 N.W. 643, 210 Iowa 1117.
Kan.—Farmers' State Bank of Russell v. Montgomery, 282 P. 741, 129 Kan. 203—First Nat. Bank v. Stroup, 177 P. 836, 104 Kan. 11.
La.—Belknap Hardware & Mfg. Co. v. Hearn, 155 So. 396, 179 La. 909—Succession of Moreira, 134 So. 697, 172 La. 533—B. Olinde & Sons Co. v. Istrouma Mercantile Co., App., 172 So. 793—Thornton v. Beeson, 135 So. 283, 17 La.App. 37.
Me.—Westbrook Trust Co. v. Timberlake, 115 A. 555, 121 Me. 64.
Mass.—Tanners Nat. Bank of Woburn v. Dean, 186 N.E. 219, 283 Mass. 151.
Mo.—Eckery v. Byng, App., 45 S.W.2d 924—Main St. Bank v. Ennis, 7 S.W.2d 391, 222 Mo.App. 915—In re Kenage's Estate, App., 3 S.W.2d 1041—Wolfinbarger v. Metcalf, App., 282 S.W. 749—Farmers' Bank of Westboro v. Harris, App., 250 S.W. 946—Eastin v. Bank of Harrisonville, 246 S.W. 991, 213 Mo.App. 130—Central Nat. Bank v. Walterscheid, 222 S.W. 912, 204 Mo.App. 179.
Neb.—Ricketts v. Reichenbach, 272 N.W. 254, 132 Neb. 466—Luikart v. Meierjurgen, 248 N.W. 379, 124 Neb. 816—Bennington State Bank v Petersen, 207 N.W. 673, 114 Neb. 420.
Nev.—Dixon v. Miller, 184 P. 926, 43 Nev. 280.
N.H.—Stratton v. Stratton, 129 A. 876, 82 N.H. 125.
N.C.—American Agr. Chemical Co. v. Griffin, 164 S.E. 577, 202 N.C. 812.
N.D.—Farmers' & Merchants' State Bank of Tolna v. Stavn, 194 N.W. 689, 49 N.D. 993.
Okl.—Planters' Trading Co. v. Golden Grocery Co., 281 P. 771, 139 Okl. 246—First State Bank of Gowen v. Miller, 246 P. 591, 118 Okl. 49—Lindsay State Bank v. Forbis, 235 P. 470, 108 Okl. 126—Oilton State Bank v. Ross, 234 P. 567, 108 Okl. 24.
Or.—Tomihiro v. United Hotel Corporation, 28 P.2d 880, 145 Or. 629—Eastham v. Bechtel, 275 P. 670, 128 Or. 673—Vincent v. Russell, 201 P. 433, 101 Or. 672, 20 A.L.R. 417.
R.I.—Gardner v. Gardner, 121 A. 385, 45 R.I. 214—Lopato v. Hayman, 111 A. 529, 43 R.I. 271.
S.C.—First Nat. Bank v. Ussery, 128 S.E. 707, 131 S.C. 518.
S.D.—Smith v. Munson, 238 N.W. 27, 59 S.D. 6—Fuller v. James Murphy Harms Supply Co., 223 N.W. 713, 54 S.D. 492, followed in Hofeman v. James Murphy Harms Supply Co., 223 N.W. 719, 54 S.D. 507, Hofemann v. Anderson, 223 N.W. 719, 54 S.D. 506, Payne v. James Murphy Harms Supply Co., 223 N.W. 719, 54 S.D. 507, Payne v. Anderson, 223 N.W. 719, 54 S.D. 506, Warfield v. James Murphy Harms Supply Co., 223 N.W. 720, 54 S.D. 508, and Warfield v. Anderson, 223 N.W. 720, 54 S.D. 508—Independent Harvester Co. v. Anderson, 186 N.W. 112, 45 S.D. 60—First State Bank of Lemmon v. McMahon, 185 N.W. 1014, 45 S.D. 76.
Tenn.—Bank of Rockwood v. Foster, 12 Tenn.App. 418.
Tex.—McFarland v. Shaw, Com.App., 45 S.W.2d 193, reversing Shaw v. McFarland, Civ.App., 28 S.W.2d 563.
Utah.—Hanson v. Greenleaf, 218 P. 969, 62 Utah 168.
Va.—Baach v. Bank of Pocahontas, 160 S.E. 68, 157 Va. 124, 76 A.L.R. 1324.
Wash.—Spokane State Bank v. Tilton, 233 P. 15, 132 Wash. 641.
W.Va.—Shannon v. Lampton, 177 S.E. 776, 115 W.Va. 765—Federal Savings & Trust Co. v. Davis, 139 S.E. 703, 104 W.Va. 235.
Wyo.—Wright v. Krouskop, 108 P.2d 262.
22 C.J. p 1165 note 77.

Pertinent facts
Where the maker of a note may prove by parol that it was really without consideration, contrary to a recital of consideration therein, any facts pertinent to such an issue thus made are relevant.—Stewart v. Hardin, 101 S.E. 716, 24 Ga.App. 611.

Note for labor
In suit on negotiable note "for labor," payable to maker's son four months after maker's death, whether consideration was actually given may be established by proof, although the instrument imported a consideration.—Murrell v. Gibbs' Adm'r, 120 S.W.2d 1018, 275 Ky. 124.

68. Ark.—Tate v. Gould, 299 S.W. 24, 175 Ark. 306.
La.—Belknap Hardware & Mfg. Co. v. Hearn, 155 So. 396, 179 La. 909.
22 C.J. p 1165 note 78.

69. Tex.—Barnes v. McCarthy, Civ. App., 132 S.W. 85.

70. U.S.—Bromfield v. Trinidad Nat. Inv. Co., 36 F 2d 646, 648, 71 A.L.R. 542, citing **Corpus Juris.**
Ariz.—Boyle v. Webb, 94 P.2d 642, 54 Ariz. 188.
Ark.—Poulas v. Kumpures, 70 S.W.2d 47, 189 Ark. 44—Tate v. Gould, 299 S.W. 24, 175 Ark. 306.
Cal.—Shepard v. Hunt, 185 P. 677, 43 Cal.App. 630.
Fla.—Odlin v. Stuckey, 80 So. 291, 76 Fla. 42.
Ga.—Commerial Credit Co. v. Lewis, 200 S.E. 566, 59 Ga.App. 144—Tyre v. Price, 183 S.E. 843, 52 Ga.App. 526—Kaylor v. Bolton, 173 S.E. 191, 48 Ga.App. 670—Phillips v. Phillips, 169 S.E. 537, 46 Ga.App. 838—

ment was for forbearance or extension given,[71] or, as discussed infra § 985, for accommodation, further it may be shown that a note was given as a payment to be credited on the maker's account[72] or as collateral for an existing debt,[73] or was not to be construed as a relinquishment or waiver of a set-off claimed against such debt.[74] While parol evidence of a contemporaneous agreement is inadmissible to contradict, vary, or explain the terms of a negotiable instrument, it may be introduced to show absence of consideration for the instrument,[75] and where a note is given in consideration of a trade agreement the breach thereof is a defense which may be shown orally or by writings other than the note.[76]

The Negotiable Instruments Law does not preclude parol proof, as between original parties, of the true consideration for a bill or note,[77] nor does it preclude admission of parol evidence of the want or failure of consideration as between original parties.[78]

Altering or defeating agreement. Where the effect of parol evidence contradicting the consideration expressed in the instrument or showing the true consideration to be different therefrom would be to change or defeat the legal operation and effect of the instrument or to add new matter to an instrument otherwise complete on its face, the evidence is not admissible;[79] but while it is true that, where the consideration of a promissory note is so stated therein to make it a part of the terms and conditions of the contract, it is not permissible to set up another and different consideration for the purpose of showing a failure of the latter, it is still competent to show that the true basis of the contract was without actual consideration of any sort whatever, and that the resultant promise is for that reason wholly void.[80]

Revis v. Bank of La Grange, 109 S.E. 684, 27 Ga.App. 564.

Ill.—Kratzmeyer v. Weissman, 235 Ill.App. 305.

La.—Belknap Hardware & Mfg. Co. v. Hearn, 155 So. 396, 179 La. 909—B. Olinde & Sons Co. v. Istrouma Mercantile Co., App., 172 So. 793—Goldsmith v. Parsons, App., 156 So. 822, affirming 154 So. 68, affirmed 161 So. 879, and case remanded 161 So. 175, 182 La. 122.

Md.—Leonard v. Union Trust Co. of Maryland, 117 A. 322, 140 Md. 203—Leonard v. Union Trust Co. of Maryland, 117 A. 318, 140 Md. 192.

Mo.—Bunch v. Phillips, App., 79 S.W.2d 785—Dickherber v. Turnbull, App., 31 S.W.2d 234—Boswell v. Richards, App., 224 S.W. 1031.

Nev.—Dixon v. Miller, 184 P. 926, 43 Nev. 280.

N.J.—Koyer v. Robinson, 165 A. 73, 110 N.J.Law 363, affirmed 168 A. 297, 111 N.J.Law 240—Westmont Nat. Bank v. Payne, 156 A. 652, 108 N.J.Law 133.

N.Y.—Title Guarantee & Trust Co. v. Pam, 134 N.E. 525, 232 N.Y. 441, affirming 182 N.Y.S. 824, 192 App.Div. 268, which affirmed 155 N.Y.S. 333, and reargument denied 135 N.E. 904, 233 N.Y. 530—Ruppert v. Singhi, 209 N.Y.S. 324, 212 App.Div. 630.

N.C.—American Agr. Chemical Co. v. Griffin, 164 S.E. 577, 202 N.C. 812—Swift & Co. v. Aydlett, 135 S.E. 141, 192 N.C. 330.

Okl.—Roberts v. Boydston, 97 P.2d 898, 186 Okl. 336—Templeman v. Wilson Motor Co., 43 P.2d 411, 171 Okl. 537—Fredrick v. Ludwig, 240 P. 1049, 112 Okl. 217.

Pa.—Early v. Huntley, 172 A. 683, 315 Pa. 382.

S.C.—First Nat. Bank v. Ussery, 128 S.E. 707, 131 S.C. 518.

S.D.—Independent Harvester Co. v. Anderson, 186 N.W. 112, 45 S.D. 60.

Tex.—Central Nat. Bank of Waco v. Lawson, Com.App., 27 S.W.2d 125, affirming, Civ.App., 7 S.W.2d 915—Thrift Packing Co. v. Royal Mfg. Co., Civ.App., 27 S.W.2d 255, error dismissed—Shaw v. Nolen, Civ. App., 23 S.W.2d 445—Lee v. First Nat. Bank, Civ.App., 254 S.W. 394.

Utah.—Hanson v. Greenleaf, 218 P. 969, 62 Utah 168.

Va.—Baach v. Bank of Pocahontas, 160 S.E. 68, 157 Va. 124, 76 A.L.R. 1324.

22 C.J. p 1165 note 80.

71. Ill.—Morgan v. Fallenstein, 27 Ill. 31.

N.Y.—Kelly v. Theiss, 47 N.Y.S. 145, 21 Misc. 311.

72. Mont.—Bennett v. Tillmon, 44 P. 80, 18 Mont. 28.

73 Ky.—Kirchdorfer v. Watkins, 248 S.W. 251, 252, 198 Ky. 69, citing **Corpus Juris.**

22 C.J. p 1165 note 82.

74. Mont.—Bohn Mfg. Co. v. Harrison, 34 P. 313, 13 Mont. 293.

75. N.D.—Farmers' & Merchants' State Bank of Tolna v. Stavn, 194 N.W. 689, 49 N.D. 993.

76. Miss.—Hattiesburg Chero Cola Bottling Co. v. Nugrape Bottling Works, 116 So. 885, 150 Miss. 762.

77. Idaho.—Taylor v. Fluharty, 208 P. 866, 35 Idaho 705.

W.Va.—Huntington Finance Co. v. Young, 143 S.E. 102, 105 W.Va. 405.

78. Ill.—First Nat. Bank v. Trott, 236 Ill.App. 412.

Iowa.—Security Sav. Bank v. Carlson, 231 N.W. 643, 210 Iowa 1117—State Sav. Bank of Logan v. Osborn, 175 N.W. 964, 188 Iowa 168.

La.—Robichaux v. Block, 81 So. 371, 144 La. 859.

Nev.—Dixon v. Miller, 184 P. 926, 43 Nev. 280.

79. U.S.—Virginia-Carolina Chemical Corporation v. Fuller, D.C.Ga., 35 F.Supp. 482.

Ala.—First Nat. Bank v. Bain, 188 So. 64, 237 Ala. 580.

Ga.—Spells v. Swift & Co., 130 S.E. 593, 34 Ga.App. 620—Lee v. Exchange Nat. Bank of Fitzgerald, 120 S.E. 694, 31 Ga.App. 470.

Kan.—Buser v. Everly, 224 P. 66, 115 Kan. 674.

Minn.—Brown v. Backer, 207 N.W. 20, 166 Minn. 50.

Mo.—First Nat. Bank & Trust Co. v. Limpp, 288 S.W. 957, 221 Mo.App. 951.

Va.—Good v. Dyer, 119 S.E. 277, 137 Va. 114.

Contractual recitals

Real consideration of note may be shown unless recital of consideration contained therein is contractual in its nature.—Hattiesburg Chero Cola Bottling Co. v. Nugrape Bottling Works, 116 So. 885, 150 Miss. 762.

Maker of check may not show that check was without consideration in order to defeat liability in action by bank.—First Nat. Bank's Receiver v. Hignite, 43 S.W.2d 658, 241 Ky. 276.

Contingent consideration

Where the promise of a maker of a note to pay is an unconditional promise made with knowledge that part of the consideration was contingent, parol evidence that such contingent part of the consideration was not furnished is inadmissible.—Tyre v. Price, 183 S.E. 843, 52 Ga.App. 526.

80. Ga.—Porter Fertilizer Co. v.

b. Indorsement

It is ordinarily held that as between the parties parol evidence may be introduced to show the character of consideration for indorsement of a negotiable instrument, or the absence or failure thereof, and the like.

As against his immediate indorsee, an indorser may introduce parol evidence going to show the consideration of the transfer.[81] The indorser may show that his indorsement was wholly without consideration;[82] that it was with notice of a defense and as collateral for an existing debt;[83] that he was merely the agent of the indorsee;[84] that the consideration for the transfer has failed[85] or been diverted;[86] that the indorsement was intended as a receipt and given on payment of the note[87] or merely to effect a transfer;[88] that the real consideration was less than the face of the note;[89] that the indorsement was intended as a security for certain payments, the balance being payable to the indorser after such payments were satisfied,[90] or that the indorsement was for the accommodation of the indorsee, as discussed infra § 985.

§ 952. —— Other Instruments

The rule admitting parol evidence to show the consideration or lack thereof for written instruments is applicable to instruments of all kinds, such as assignments, bills of sale, bonds, releases and contracts generally.

The rule permitting the true consideration to be shown by parol or extrinsic evidence has been applied to assignments;[91] bills of sale;[92] and, like-

Brewer, 136 S.E. 477, 36 Ga.App. 329.

81. Ill.—Bradshaw v. Grigsby, 283 Ill.App. 420.
Minn.—Henry Simons Lumber Co. v. Schnobrich, 198 N.W. 406, 159 Minn. 116.
N.C.—American Agr. Chemical Co. v. Griffin, 164 S.E. 577, 202 N.C. 812.
Vt.—Citizens' Sav. Bank & Trust Co. v. Paradis & Sons, 146 A. 3, 102 Vt. 114.
22 C.J. p 1165 note 84.

Nature and character of an indorsement made on a note after delivery and the intent of the parties to the transaction may be shown.—Cripple Creek State Bank v. Rollestone, 202 P. 115, 70 Colo. 434.

Showing prior negotiations

Where a written contract provided for the purchase by one corporation of the business and assets of another and the payment of all the indebtedness of the latter, saving it and its sureties harmless from liability thereon, and pursuant to prior oral negotiations the officers and promoters of the purchasing corporation indorsed a note, evidencing a prior obligation of the corporation whose business was purchased, it was held that parol evidence of the prior negotiations was admissible to show the facts and circumstances of the indorsement and to fix the consideration therefor.—Hilgemeier v. Bower Mfg. Co., 139 N.E. 691, 81 Ind. App. 191.

82. Ark.—Ellis v. First Nat. Bank, 260 S.W. 714, 163 Ark. 471.
Ill.—Cohen v. Wolffs, 242 Ill.App. 50—First Nat. Bank v. Trott, 236 Ill.App. 412.
Va.—Baach v. Bank of Pocahontas, 160 S.E. 68, 157 Va. 124, 76 A.L.R. 1324.
22 C.J. p 1165 note 85.

Under Negotiable Instruments Law

(1) Negotiable Instruments Law does not prevent showing by parol evidence want or failure of consideration for indorsement.—Young v. Jackson, 255 N.W. 877, 218 Iowa 628.

(2) Under Negotiable Instruments Law, the immediate indorser of a promissory note in suit by indorsee may not interpose defense that note was indorsed by him as a gift and gratuity and that, therefore, indorsement and delivery were without good and valuable consideration in order to lay foundation for parol evidence.—Valentine v. Hayes, 135 So. 538, 102 Fla. 157.

83. Wash.—Keeler v. Commercial Printing Co., 48 P. 239, 16 Wash. 526.

84. Kan.—Lovejoy v. Citizens' Bank, 23 Kan. 331.

85. Ark.—Ellis v. First Nat. Bank, 260 S.W. 714, 163 Ark. 471.
Wis.—Smith v. Carter, 25 Wis. 283.

86. Ala.—Avery v. Miller, 6 So. 38, 86 Ala. 495.

87. Ind.—Spencer v. Sloan, 9 N.E. 150, 108 Ind. 183, 58 Am.R. 35.
22 C.J. p 1166 note 91.

88. Ark.—Lake Providence First Nat. Bank v. Reinman, 125 S.W. 443, 93 Ark. 376, 379, 28 L.R.A.,N.S., 530.
Cal.—Allin v. Williams, 32 P. 441, 97 Cal. 403.

89. Ala.—Cook v. Cockrill, 1 Stew. 475, 18 Am.D. 67.

90. Ill.—Scammon v. Adams, 11 Ill. 575.
Mo.—Wood v. Matthews, 73 Mo. 477.

91. U.S.—Deutser v. Marlboro Shirt Co., C.C.A.Md., 81 F.2d 139, affirming, D.C., Union Central Life Insurance Co. v. Deutser, 13 F.Supp. 313.
Cal.—Laugharn v. Chamberlain, 34 P.2d 756, 139 Cal.App. 601—Thatcher v. G. & M. Concrete Co., 280 P. 211, 100 Cal.App. 424.
Minn.—Midland Nat. Bank of Minneapolis v. Hendrickson, 206 N.W. 723, 165 Minn. 446.
Mo.—Ferrenbach v. Fehlig, App., 74 S.W.2d 503, 506, citing **Corpus Juris**.
Pa.—Miller v. Belmont Packing & Rubber Co., 110 A. 802, 268 Pa. 51.
R.I.—Gunn v. McCabe, 139 A. 916, 49 R.I. 53.
22 C.J. p 1166 note 97.

Explaining recital of "one dollar" as consideration

Where assignment of rent by lessor to mortgagee recited consideration of one dollar and contained no contractual consideration, actual consideration could be shown, and when shown must be given effect.—Flower v. King, 250 N.W. 43, 189 Minn. 461.

"For value received"

That statement in written assignment of lease containing words "for value received" declared that assignment obviated necessity of application for a receiver for realty involved could not be construed to mean that such was the whole consideration or that by the assignment assignors did not give up something of value that inured to assignee, and parol testimony was admissible to prove the actual consideration for the assignment, where there was no language in assignment indicating such an interpretation, and statement was signed only by assignee.—Denver Joint Stock Land Bank of Denver, Colo., v. Sherman, Mo.App., 152 S.W.2d 702.

"Other valuable consideration"

Where assignment of lessor's rights recited one dollar and other valuable consideration, parol evidence is admissible to show what other valuable consideration was.—Cashion v. Bank of Arizona, 245 P. 360, 30 Ariz. 172.

92. Cal.—Seaboard Dairy Credit Corporation v. Herman, 33 P.2d 1042, 139 Cal.App. 320—Wurdeman v. Waller, 263 P. 558, 88 Cal.App. 393.
Ga.—Miller v. Whitesburg Banking Co., 197 S.E. 906, 58 Ga.App. 84.
Mo.—George O. Richardson Machinery Co. v. Dix, App., 245 S.W. 215.

wise, the rule has been applied to bonds;[93] cer- | tificates of deposit;[94] contracts generally;[95] con-

Or.—Wilson v. Prettyman, 185 P. 587, 94 Or. 275.
Tex.—Rogers v. Rogers, Civ.App., 150 S.W.2d 139—Mullin v. Nash-El Paso Motor Co., Civ.App., 250 S. W. 472.
Wis.—Baierl v. Riesenecker, 230 N. W. 605, 201 Wis. 454, reversing 227 N.W. 9, 201 Wis. 454.
22 C.J. p 1166 note 98.

93. Del.—O'Connor v. Caplan, 106 A. 48, 12 Del.Ch. 72.
Mo.—Chicago, B. & Q. R. Co. v. Vanden-Boom, App., 30 S.W.2d 186.
N.Y.—Hocking Valley Ry. Co. v. Barbour, 183 N.Y.S. 163, 192 App. Div. 654, affirmed 130 N.E. 909, 230 N.Y. 599—Hocking Valley Ry. Co. v. Barbour, 179 N.Y.S. 810, 190 App.Div. 341.
Tex.—Barker v. Fagg, Civ.App., 107 S.W.2d 490.
22 C.J. p 1166 note 99.

Replevy bond

The recital of issuance of the writ of detinue, and its levy in a replevy bond are not matters of substance but of inducement, showing the consideration of the bond and parol evidence may supply omissions therein. —White v. Morring, 95 So. 494, 19 Ala.App. 69, certiorari denied Ex parte White, 95 So. 495, 209 Ala. 95.

94. Iowa.—Murray v. First Trust & Savings Bank of Sibley, Osceola County, 207 N.W. 781, 201 Iowa 1325.

Loan instead of deposit

Oral evidence is admissible to prove that certificates of deposit represent loans, and not actual deposits. —Murray v. First Trust & Savings Bank of Sibley, Osceola County, supra.

95. U.S.—Fidelity & Deposit Co. of Maryland v. Wheeler, C.C.A.Iowa, 34 F.2d 892—Koplar v. Warner Bros. Pictures, D.C.Del., 19 F.Supp. 173—Union Central Life Ins. Co. v. Deutser, D.C.Md., 13 F.Supp. 313, affirmed, C.C.A., Deutser v. Marlboro Shirt Company, 81 F.2d 139.
Ala.—Moore v. Williamson, 104 So. 645, 213 Ala. 274, 42 A.L.R. 981—Jones v. First Nat. Bank, 89 So. 437, 206 Ala. 203.
Ark.—Hartsfield v. Crumpler, 297 S. W. 1012, 174 Ark. 1179.
Cal.—Wilson v. Davis, 81 P.2d 971, 11 Cal.2d 761—Bowman v. Union Trust Co. of San Diego, 106 P.2d 913, 41 Cal.App.2d 397—Sandrini v. Branch, 90 P.2d 593, 32 Cal.App. 2d 707—Pearce v. Underwood, 84 P.2d 244, 29 Cal.App.2d 282—Lindsay v. Mack, 43 P.2d 350, 5 Cal. App.2d 491—Board of Home Missions and Church Extension of M. E. Church v. Manley, 19 P.2d 21, 129 Cal.App. 541—Peterson v. Matchinske, 291 P. 248, 108 Cal.App. 7.
Colo.—W. T. Rawleigh Co. v. Dickneite, 61 P.2d 1028, 99 Colo. 276.
D.C.—O'Connor v. Shapiro, 13 F.2d 957, 56 App.D.C. 351.
Ga.—Phillips v. Phillips, 169 S.E. 537, 46 Ga.App. 838—Waller v. Martin-Senour Co., 166 S.E. 53, 45 Ga.App. 808—A. M. Robinson Co. v. Rice, 148 S.E. 542, 39 Ga.App. 785 —Amason v. Bank of Tignall, 134 S.E. 115, 35 Ga.App. 509—Georgia Casualty Co. v. Dixie Trust & Security Co., 98 S.E. 414, 23 Ga.App. 447.
Ky.—Bullock v. Young, 67 S.W.2d 941, 252 Ky. 640—Paducah Newspapers v. Goodman, 65 S.W.2d 990, 251 Ky. 754—Apple v. McCullough, 38 S.W.2d 955, 239 Ky. 74—Huff v. Fuller, 246 S.W. 149, 197 Ky. 119 —Penn Furniture Co. v. Ratliff, 238 S.W. 393, 194 Ky. 162.
La.—Cleveland v. Westmoreland, 186 So. 593, 191 La. 863—Guaranty Bank & Trust Co. v. Hunter, 137 So. 904, 173 La. 497—Green v. Louisiana Highway Commission, App., 3 So.2d 236—Wainwright v. Gilham, App., 188 So. 434—State ex rel. Muslow v. Louisiana Oil Refining Corporation, App., 176 So. 686, motion denied 177 So. 476, affirmed Arkansas Fuel Oil Co. v. State of Louisiana ex rel. Muslow, 58 S.Ct. 832, 304 U.S. 197, 82 L. Ed. 1287, rehearing denied 58 S.Ct. 1044, 304 U.S. 589, 82 L.Ed. 1549—Collins v. Jones, App., 152 So. 802.
Me.—Greeley v. Greeley, 110 A. 637, 119 Me. 264.
Mass.—Lane v. Sullivan, 19 N.E.2d 74, 302 Mass. 213.
Mich.—Petition of Ptolemy, 276 N.W. 476, 282 Mich. 353—National Security & Trust Co. v. Niles Invisible Door Check Co., 193 N.W. 199, 222 Mich. 510.
Miss.—Hattiesburg Chero Cola Bottling Co. v. Nugrape Bottling Works, 116 So. 885, 150 Miss. 762.
Mo.—Lohrer v. Chas. F. Vogel Real Estate Co., App., 239 S.W. 1098—Berry v. Royster, App., 232 S.W. 477.
Neb.—Barth v. Reber, 280 N.W. 219, 135 Neb. 25—Luikart v. Massachusetts Bonding & Insurance Co., 263 N.W. 124, 130, 129 Neb. 771, citing **Corpus Juris**—Hartman v. Lipovsky, 241 N.W. 563, 122 Neb. 823.
N.M.—Morrison v. Crisp, 202 P. 123, 27 N.M. 380.
N.Y.—M. O'Neil Supply Co. v. Petroleum Heat & Power Co., 19 N. E.2d 676, 280 N.Y. 50, reversing 6 N.Y.S.2d 328, 254 App.Div. 833, motion denied 21 N.E.2d 196, 280 N.Y. 687—I. & I. Holding Corporation v. Gainsburg, 12 N.E.2d 532, 276 N.Y. 427, 115 A.L.R. 582, affirming 296 N.Y.S. 752, 251 App. Div. 550—Reade v. Sullivan, 18 N. Y.S.2d 841, 259 App.Div. 229—Widder Dye & Chemical Co. v. U. S. Marking Tag Co., 269 N.Y.S. 802, 241 App.Div. 703—Traders' Nat. Bank of Rochester v. Laskin, 201 N.Y.S. 728, 207 App.Div. 18, reversed on other grounds 144 N.E. 784, 238 N.Y. 535, amendment of remittitur denied 147 N.E. 172, 239 N.Y. 507—Higgins v. Exchange Nat. Bank, 253 N.Y.S. 859, 142 Misc. 69—Nahoum v. Slocum, Avram & Slocum Trading Co., 182 N. Y.S. 318, 111 Misc. 627.
N.C.—Whedbee v. Ruffin, 126 S.E. 616, 189 N.C. 257.
N.D.—Clark v. Henderson, 244 N.W. 314, 62 N.D. 503, 84 A.L.R. 347—Heckenlaible v. Cook, 189 N.W. 110, 48 N.D. 1209.
Ohio.—Detroit & I. R. Co. v. Murry, 158 N.E. 205, 25 Ohio App. 409.
Okl.—Amerada Petroleum Corporation v. Tucker, 55 P.2d 54, 176 Okl. 289—Berry-Beall Dry Goods Co. v. Francis, 230 P. 496, 104 Okl. 81.
Pa.—Washington Steel Form Co. v. North City Trust Co., 162 A. 829, 308 Pa. 351.
S.C.—Shelton v. Skyland Stages, 169 S.E. 718, 170 S.C. 100.
S.D.—Independent Harvester Co. v. Anderson, 186 N.W. 112, 45 S.D. 60.
Tenn.—Frierson v. International Agr. Corporation, App., 148 S.W.2d 27—Harris v. Morgan, 7 S.W.2d 53, 157 Tenn. 140.
Tex.—Pope v. Mergenthaler Linotype Co., Civ.App., 131 S.W.2d 668, error refused—Gaines Motor Sales Co. v. Hastings Mfg. Co., Civ.App., 104 S.W.2d 548, error dismissed—Theophilakos v. Costello, Civ.App., 54 S.W.2d 203—Smith v. Chipley, Civ.App., 14 S.W.2d 116.
Vt.—Citizens' Sav. Bank & Trust Co. v. Paradis & Sons, 146 A. 3, 102 Vt. 114.
Va.—Wood v. Southern Shale Brick Corporation, 4 S.E.2d 360, 173 Va. 364—Richeson v. Wood, 163 S.E. 339, 158 Va. 269, 82 A.L.R. 1189.
Wash.—Von Herberg v. Von Herberg, 106 P.2d 737.
22 C.J. p 1166 note 2.

Charitable pledge

Where no consideration is stated in charitable pledge, or where there is recital of insufficient consideration, holder may allege and prove true consideration, and in doing so is not limited to words in agreement. —I. & I. Holding Corporation v. Gainsburg, 296 N.Y.S. 752, 251 App. Div. 550, affirmed 12 N.E.2d 532, 276 N.Y. 427, 115 A.L.R. 582.

Usury

In an action to foreclose a mortgage, the defense being usury, parol evidence was admissible to show that the consideration for an agreement, made after the execution of the mortage and greatly benefiting the mortgagee, was a certain five

tracts of employment;[96] contracts of guaranty and suretyship;[97] contracts of insurance;[98] contracts of sale or exchange;[99] leases;[1] mortgages and deeds of trust,[2] as where parol evidence is admitted to show that a mortgage was given to secure future advances;[3] options;[4] partnership agreements;[5]

thousand dollars received from a third person, the written supplementary agreement stating that the consideration was "$10 and other valuable consideration."—Midland Timber Co. v. Furman, 97 S.E. 831, 111 S.C. 287.

96. Mo.—Mytton v. New York, C. & St. L. R. Co., App., 198 S.W. 189.
Tex.—Suderman-Dolson Co. v. Rodgers, 104 S.W. 193, 47 Tex.Civ.App. 67.

97. Ga.—Waller v. Martin-Senour Co., 166 S.E. 53, 45 Ga.App. 808.
La.—Consolidated Cos. v. Angelloz, App., 166 So. 910, reinstated 170 So. 556.
Mo.—Lohrer v. Chas. F. Vogel Real Estate Co., App., 239 S.W. 1098.
W.Va.—Henderson v. Kessel, 116 S.E. 68, 93 W.Va. 60.
22 C.J. p 1166 note 4.

98. Ill.—Mayer v. Illinois Life Ins. Co., 211 Ill.App. 285.
Ky.—Continental Casualty Co. v. Jasper, 88 S.W. 1078, 121 Ky. 77, 28 Ky.L. 53.

99. Ala.—Fambrough v. Townson, 85 So. 476, 204 Ala. 251.
Cal.—Los Angeles County v. Farnsworth, 41 P.2d 577, 4 Cal.App.2d 516—Quality Building & Securities Co. v. Bledsoe, 14 P.2d 128, 125 Cal.App. 493—Andrews v. De Lorm, 283 P. 393, 102 Cal.App. 623—Robson v. O'Toole, 214 P. 278, 60 Cal.App. 710.
Ga.—Hamilton v. Conyers, 28 Ga. 276—Ramsey-Fender Motor Co. v. Chapman, 168 S.E. 92, 46 Ga.App. 385.
Ind.—Old First Nat. Bank & Trust Co. v. Scheuman, 13 N.E.2d 551, 214 Ind. 652, 119 A.L.R. 1165—Boyd v. Greer, 123 N.E. 122, 70 Ind.App. 77.
Kan.—Youmans v. Kansas Telephone Co., 295 P. 697, 132 Kan. 360.
La.—Ridgely v. Fabacher, 156 So. 212, 180 La. 171—Succession of Rhodes, 114 So. 107, 164 La. 488—De Ponte v. Ogden, 108 So. 777, 161 La. 378—Wainwright v. Gilham, App., 188 So. 434—Morris v. Morris, App., 160 So. 134—McConnell v. Harris Chevrolet Co., App., 147 So. 827—Breeden v. Breeden, App., 147 So. 757.
Mass.—Fay v. Corbett, 124 N.E. 73, 233 Mass. 403.
Miss.—Woodrich v. St. Catherine Gravel Co., 195 So. 307, 188 Miss. 417, 127 A.L.R. 1179.
Mo.—Craig v. Koss Const. Co., App., 69 S.W.2d 964—Hackney v. Hargrove, App., 259 S.W. 495.
Neb.—Stanton Nat. Bank of Stanton v. Swallow, 203 N.W. 561, 113 Neb. 336.
N.Y.—Vieser v. Bellows, 199 N.Y.S. 341, affirmed 205 N.Y.S. 26, 209 App.Div. 540, appeal dismissed 147 N.E. 221, 239 N.Y. 622.
N.C.—Federal Land Bank of Columbia v. Robertson, 187 S.E. 575, 210 N.C. 436.
N.D.—Pattee v. Prall, 176 N.W. 659, 45 N.D. 107.
Ohio.—Detroit & I. R. Co. v. Murry, 158 N.E. 205, 25 Ohio App. 409.
Okl.—Amerada Petroleum Corporation v. Tucker, 55 P.2d 54, 176 Okl. 289.
Or.—Schmidt v. Wirth, 195 P. 375, 99 Or. 261.
Pa.—Real Estate Co. of Pittsburg v. Rudolph, 153 A. 438, 301 Pa. 502.
S.C.—Halsey v. Minnesota-South Carolina Land & Timber Co., 177 S.E. 29, 174 S.C. 97, 100 A.L.R. 1.
Tex.—Daggett v. Wolff, Civ.App., 44 S.W.2d 1063—Kelsey v. Blackman, Civ.App., 293 S.W. 199—Speer v. Hansen, Civ.App., 213 S.W. 324.
Utah.—Afton Livestock Co. v. Peterson, 220 P. 710, 62 Utah 437.
Va.—Protestant Episcopal High School in Virginia v. Parrish, 190 S.E. 146, 168 Va. 103.
W.Va.—Crislin v. Cain, 19 W.Va. 438.
Wis.—Coyne v. Coyne, 225 N.W. 138, 199 Wis. 263, rehearing denied 225 N.W. 935, 199 Wis. 263.
22 C.J. p 1166 note 6.

1. Ark.—Whittaker v. Holmes, 263 S.W. 788, 165 Ark. 1.
Cal.—Johnston v. Courtial, 14 P.2d 771, 216 Cal. 506.
Ga.—Elliott v. Marshall, 176 S.E. 770, 179 Ga. 639—Tift v. McCaskill, 155 S.E. 192, 171 Ga. 289.
Mich.—Hagan v. Moch, 229 N.W. 629, 249 Mich. 511.
Miss.—Ravesies v. Martin, 199 So. 282.
Mont.—Sunburst Oil & Gas Co. v. Neville, 257 P. 1016, 79 Mont. 550.
Tex.—Wallace v. Renfroe, Civ.App., 124 S.W.2d 456, error dismissed, judgment correct—Stanolind Oil & Gas Co. v. Cerf, Civ.App., 110 S.W.2d 177, error dismissed—Harris v. Mann, Civ.App., 207 S.W. 156.
Wis.—Northwestern Loan & Trust Co. v. Topp Oil & Supply Co., 248 N.W. 466, 211 Wis. 489.
22 C.J. p 1167 note 9.

2. U.S.—In re Shapiro, D.C.Md., 35 F.Supp. 579.
Ala.—First Nat. Bank v. Bain, 188 So. 64, 237 Ala. 580—Montgomery v. Hart, 144 So. 101, 225 Ala. 471—Bynon v. Citizens' Bank of Carbon Hill, 130 So. 391, 221 Ala. 626.
Ark.—Temple v. Hamilton, 11 S.W.2d 465, 178 Ark. 355—Hollenberg Music Co. v. Williams, 200 S.W. 989, 132 Ark. 617.
Cal.—W. P. Fuller & Co. v. McClure, 191 P. 1027, 48 Cal.App. 185—International Mortgage Bank v. Eaton, 177 P. 880, 39 Cal.App. 39.
Fla.—Mallard v. Ewing, 164 So. 674, 121 Fla. 654—Ronnoc Grove Co. v. Coe-Mortimer Co., 91 So. 265, 83 Fla. 370.
Ill.—See Garrard v. J. S. Ashbrook Co., 222 Ill.App. 387—Dunn v. Burke, 139 Ill.App. 12.
Iowa.—Farmers' Sav. Bank of Williamsburg v. Cash, 200 N.W. 603, 199 Iowa 597—Corn Belt Trust & Savings Bank of Belle Plaine v. May, 196 N.W. 735, 197 Iowa 54.
Ky.—McNeill's Adm'x v. Riley, 75 S.W.2d 1068, 256 Ky. 170—Dwiggins v. Howard, 57 S.W.2d 649, 247 Ky. 746.
Mich.—Ruloff v. Hazen, 83 N.W. 370, 124 Mich. 570—Blair v. Harris, 42 N.W. 790, 75 Mich. 167.
Minn.—Burns v. Burns, 144 N.W. 761, 124 Minn. 176.
Miss.—Wimberly v. Wortham, 3 So. 459.
Mo.—Harwood v. Toms, 32 S.W. 666, 130 Mo. 225—Stumbaugh v. Hall, App., 30 S.W.2d 160—C. D. Johnson Farming Co. v. Goodwyn, App., 208 S.W. 110.
Neb.—Rhodes v. Lewis, 287 N.W. 662, 136 Neb. 870.
Pa.—In re Hirsh's Estate, 5 Pa.Dist. & Co. 207. See Shallek v. O'Hara, 5 Sch.Reg. 277.
S.C.—Woodrow v. Frederick, 131 S.E. 598, 133 S.C. 431—Kaphan v. Ryan, 16 S.C. 352.
S.D.—Charles Friend & Son v. Schmidt, 233 N.W. 913, 57 S.D. 477.
Wis.—Clark v. Tallmadge, 176 N.W. 906, 171 Wis. 133.

Evidence admissible to show incorrect recital of consideration
Mich.—Higgins v. McGill, 175 N.W. 410, 411, 207 Mich. 570.

3. Iowa.—Corn Belt Trust & Savings Bank of Belle Plaine v. May, 196 N.W. 735, 197 Iowa 54.
Mont.—First Nat. Bank v. Robke, 235 P. 327, 72 Mont. 527.
Pa.—Wardman v. Iseman, 99 Pa. Super. 551.

Chattel mortgage
Ark.—Temple v. Hamilton, 11 S.W.2d 465, 178 Ark. 355.
Mass.—Glassman v. Ficksman, 131 N.E. 316, 238 Mass. 580.

Realty mortgage
Iowa.—Everist v. Carter, 210 N.W. 559, 202 Iowa 498.

4. N.Y.—Benedict v. Pincus, 84 N.E. 284, 191 N.Y. 377.

5. Tex.—Ramsey v. Bird, Civ.App., 170 S.W. 1075.

railroad passes;[6] and releases and settlement agreements.[7] It is also permissible under the general rule to introduce parol evidence to show want or failure of consideration in respect of such instruments.[8] However, the rule permitting the true consideration or a want or failure of consideration to be shown by parol evidence in these instances is subject to the rule considered infra § 956 precluding the introduction of parol evidence where its effect would be to contradict recitals of consideration intended of themselves to embody a contractual right or obligation, and where evidence proffered would have such effect it is to be excluded,[9] as, for example, where it is offered to vary the contractual

6. S.C.—Nickles v. Seaboard Air Line R. Co., 54 S.E. 255, 74 S.C. 102.

7. Ky.—Hazelwood v. Woodward, 126 S.W.2d 857, 277 Ky. 447.
Or.—Cockerham v. First Nat. Bank, 297 P. 363, 136 Or. 176.
Pa.—Tasin v. Bastress, 110 A. 744, 268 Pa. 85.
Tenn.—Hibernia Bank & Trust Co. v. Boyd, 48 S.W.2d 1084, 164 Tenn. 376.
Tex.—Cochell v. Cawthon, Civ.App., 110 S.W.2d 636, error dismissed—Anders v. California State Life Ins. Co., Civ.App., 214 S.W. 497.
22 C.J. p 1167 note 12.

Surrounding circumstances

Oral evidence concerning circumstances under which written release of interest in decedent's estate was executed by heirs held admissible to show consideration therefor.—Nelson v. Nelson, 20 P.2d 995, 131 Cal. App. 126.

8. Cal.—In re Kellogg, 107 P.2d 964, 41 Cal.App.2d 833.
Ga.—Miller v. Whitesburg Banking Co., 197 S.E. 906, 58 Ga.App. 84—Ramsey-Fender Motor Co. v. Chapman, 168 S.E. 92, 46 Ga.App. 385.
La.—Chandler v. Burkhalter, 121 So. 353, 10 La.App. 575.
Minn.—Morrison v. Johnson, 181 N. W. 945, 148 Minn. 343.
N.Y.—Beekman v. Stern, 181 N.Y.S. 873, 191 App.Div. 512.
Or.—In re Clymer's Estate, 44 P.2d 1082, 150 Or. 351.
Tex.—C. V. Hill & Co. v. Parker, Civ.App., 145 S.W.2d 330.

Assignment

Wis.—In re Carlin's Estate, 208 N. W. 988, 190 Wis. 133.

Bond

Wis.—John A. Tolman & Co. v. Peterson, 175 N.W. 916, 170 Wis. 433.

Contracts generally

Cal.—Pearce v. Underwood, 84 P.2d 244, 29 Cal.App.2d 282.

Contract of guaranty

La.—Consolidated Cos. v. Angelloz, App., 170 So. 556, reinstating 165 So. 910.

Contracts limiting carrier's liability

Parol evidence is admissible to show that notwithstanding contrary recitals no reduction in rates or other consideration was in fact given.—Ward v. Missouri Pac. R. Co., 58 S.W. 28, 158 Mo. 226—10 C.J. p 154 note 81.

Contract of sale

Ark.—O. K. Transfer & Storage Co. v. Crabtree, 248 S.W. 271, 157 Ark. 323.
Cal.—Quality Building & Securities Co. v. Bledsoe, 14 P.2d 128, 125 Cal.App. 493—Lewis Pub. Co. v. Henderson, 284 P. 713, 103 Cal. App. 425.

Mortgages and deeds of trust

U.S.—Lefmann v. Brill, Ohio, 142 F. 44, 73 C.C.A. 230.
Kan.—Rice v. Rice, 165 P. 799, 101 Kan. 20.
Mich.—Sellers v. Perry, 158 N.W. 144, 191 Mich. 619.
Miss.—Ravesies v. Martin, 199 So. 282.
N.C.—Bruner v. Threadgill, 88 N.C. 361.
Va.—Waller v. Eanes' Adm'r, 157 S. E. 721, 156 Va. 389.

Option contracts

(1) Generally.—Morrison v. Johnson, 181 N.W. 945, 148 Minn. 343.

(2) Option under seal.—Hartford-Connecticut Trust Co. v. Divine, 116 A. 239, 97 Conn. 193, 21 A.L.R. 134.

Releases

(1) Evidence showing that release was given without consideration should have been permitted if release was not under seal.—Weitling v. Sorenson, 272 N.Y.S. 338, 241 App. Div. 377.

(2) Alleged prior parol agreement to pay balance of commission if optionee exercised option could not be deemed real consideration for broker's releasing vendor from paying such balance so as to permit parol evidence of agreement in order to show failure of consideration for written release.—W. Ross Campbell Co. v. Sears, Roebuck & Co., 29 P.2d 910, 136 Cal.App. 765.

9. U.S.—Bastian v. U. S., C.C.A. Ohio, 118 F.2d 777—Wiley v. Dixie Oil Co., C.C.A.Kan., 43 F.2d 51.
Ala.—First Nat. Bank v. Bain, 188 So. 64, 237 Ala. 580—Kilgore v. Arant, 146 So. 540, 25 Ala.App. 356.
Cal.—Quality Building & Securities Co. v. Bledsoe, 14 P.2d 128, 125 Cal.App. 493.
Ga.—Calhoun v. Lemon, 14 S.E.2d 710—Automobile Battery Co. v. Geraghty & Co., 118 S.E. 412, 30 Ga.App. 446—Georgia Casualty Co. v. Dixie Trust & Security Co., 98 S.E. 414, 23 Ga.App. 447.
Ind.—Ross v. Terre Haute, Indianapolis & Eastern Traction Co., 173 N.E. 707, 92 Ind.App. 13, transferred, see 171 N.E. 665, 202 Ind. 698.
Mo.—Meyer v. Weber, 109 S.W.2d 702, 233 Mo.App. 832.
Neb.—Chalupnik v. Brant, 279 N.W. 159, 134 Neb. 465.
N.D.—Clark v. Henderson, 244 N.W. 314, 62 N.D. 503, 84 A.L.R. 347.
Pa.—Vogel v. Taub, 173 A. 270, 316 Pa. 41.
R.I.—Kuzoian v. Jaffa, 161 A. 130, 52 R.I. 367.
S.C.—Shelton v. Skyland Stages, 169 S.E. 718, 170 S.C. 100—Gladden v. Keistler, 140 S.E. 161, 141 S.C. 524.
Wis.—Borchert v. Coons, 171 N.W. 70, 168 Wis. 523.
Varying contractual recitals generally see infra § 958.

Assignment

U.S.—Wiley v. Dixie Oil Co., C.C.A. Kan., 43 F.2d 51.

Contracts generally

Doctrine permitting real consideration of written contract to be shown by parol or other extrinsic evidence has no application where the statement of consideration is contractual and consists of specific, direct promise.—Farmers' Elevator Co. of Colton v. Swier, 210 N.W. 671, 50 S.D. 436.

Building contract

Parol evidence to show that real agreement was to pay different sum from that expressed in written building contract was held properly excluded in the absence of fraud, as contradictory of the contractual terms of the instrument.—Duchatkiewicz v. Cohen, 136 A. 910, 5 N.J. Misc. 438.

Exchange of lands

In contract for exchange of lands, consideration is contractual part of writing, within rule excluding parol testimony.—Borchert v. Coons, 171 N.W. 70, 168 Wis. 523.

Lease

Wyo.—Barrett v. First Nat. Bank, 62 P.2d 318, 50 Wyo. 502.

Option under seal

Defendant cannot dispute existence of sufficient consideration to support option under seal for purchase of realty in action at law for damages.—Samonds v. Cloninger, 127 S.E. 706, 189 N.C. 610.

Release

Ky.—Drane v. Louisville Ry. Co., 131 S.W.2d 439, 279 Ky. 490.

terms of a sale in respect of the amount, time, mode, or terms of payment.[10]

§ 953. —— Payment of Consideration

Parol evidence is admissible to explain or contradict the noncontractual recitals of a written instrument respecting the fact or method of payment of consideration.

A recital in a written instrument as to the payment of the consideration is merely in the nature of a receipt and may be contradicted,[11] unless such contradiction would have the effect of rendering nugatory some substantial and contractual provision of a valid written contract or undertaking,[12] or, in the case of a conveyance, where the grantor or those claiming under him attempt, by contradicting the consideration clause, to defeat the operation of the deed.[13] One seeking to defeat a conveyance may not show failure to pay or perform

Mo.—Ezo v. St. Louis Smelting & Refining Co., App., 87 S.W.2d 1051.
Va.—Harvey v. Richmond, F. & P. Ry. Co., 173 S.E. 351, 162 Va. 49, 92 A.L.R. 240.

Unagreed consideration

It is not permissible to prove, as consideration for contract, consideration which parties have never agreed on.—Gloth v. Gloth, 153 S.E. 879, 154 Va. 511, 71 A.L.R. 700.

10. Md.—Rafferty v. Butler, 105 A. 530, 133 Md. 430.

Character of title

Recital in contract for sale of realty that title was merchantable held not recital of consideration, but of contractual term, and evidence to show defective title was properly excluded.—First Federal Trust Co. v. Stockfleth, 276 P. 371, 98 Cal.App. 21.

Money consideration

Where written contract for sale of automobile recited a money consideration, parol evidence was inadmissible to prove that in fact seller had agreed to take second-hand automobile as part of the consideration instead of money.—Rafferty v. Butler, 105 A. 530, 133 Md. 430.

11. U.S.—Deutser v. Marlboro Shirt Co., C.C.A.Md., 81 F.2d 139, 142, citing **Corpus Juris**, and affirming, D.C., Union Central Life Insurance Co. v. Deutser, 13 F.Supp. 313—Cascaden v. Bell, Alaska, 257 F. 926, 169 C.C.A. 76.
Ark.—Lollis v. Lollis, 85 S.W.2d 732, 191 Ark. 199.
Del.—Missouri-Kansas Pipe Line Co. v. Satterthwaite, Super., 14 A.2d 414.
Ga.—Coles v. Mozley, 95 S.E. 963, 148 Ga. 21—Newsom v. Reynolds Chevrolet Co., 158 S.E. 763, 43 Ga. App. 376—Googe v. York, 142 S.E. 562, 38 Ga.App. 62.
Ill.—Wright v. Buchanan, 123 N.E. 53, 287 Ill. 468.
Ky.—Hazelwood v. Woodward, 126 S.W.2d 857, 277 Ky. 447—Beaver Dam Coal Co. v. Brashear, 54 S. W.2d 609, 246 Ky. 69—Saylor's Adm'r v. Brock, 219 S.W. 441, 187 Ky. 553.
La.—Grimm v. Pugh, App., 197 So. 641.
Minn.—Trost v. Brey, 194 N.W. 617, 156 Minn. 242.
Mo.—Finley v. Williams, 29 S.W.2d 103, 325 Mo. 688—Berry v. Royster, App., 232 S.W. 477.
Neb.—Hartman v. Lipovsky, 241 N. W. 563, 122 Neb. 823.
N.J.—River Park Homes Corporation v. Hammond, 1 A.2d 16, 120 N.J. Law 519, affirmed 5 A.2d 697, 122 N.J.Law 466—Clott v. Jordan, 160 A. 684, 10 N.J.Misc. 733.
N.Y.—Moller v. Paulivico, 208 N.Y.S. 737, 212 App.Div. 394.
N.C.—Pate v. Gaitley, 111 S.E. 339, 183 N.C. 262.
N.D.—Clark v. Henderson, 244 N.W. 314, 62 N.D. 503, 84 A.L.R. 347.
Okl.—Lindsay State Bank v. McGrew, 219 P. 904, 96 Okl. 74—Tayiah v. Bunnell, 186 P. 240, 77 Okl. 40.
Pa.—Real Estate Co. of Pittsburg v. Rudolph, 153 A. 438, 439, 301 Pa. 502, citing **Corpus Juris.**
S C.—Cain v. Whitlock, 182 S.E. 752, 178 S.C. 289.
Tenn.—Harkins v. Wells, 13 Tenn. App. 299.
Tex.—Skinner v. Vaughan, Civ.App., 150 S.W.2d 260, error dismissed, judgment correct—Davis v. Williams, Civ.App., 144 S.W.2d 445, error dismissed, Sup., 14 S.W.2d 982—Cochell v. Cawthon, Civ.App., 110 S.W.2d 636, error dismissed—Berryman v. Flake, Civ.App., 20 S. W.2d 803, 805, error dismissed, quoting **Corpus Juris**—Smith v. Chipley, Civ.App., 14 S.W.2d 116, 121, quoting **Corpus Juris**—Glaser v. Henderson, Civ.App., 2 S.W.2d 987—Waybourn v. Spurlock, Civ. App., 281 S.W. 587, 589, citing **Corpus Juris**—Silliman v. Oliver, Civ.App., 247 S.W. 902—Silliman v. Oliver, Civ.App., 233 S.W. 867, error refused—McKay v. Tally, Civ.App., 220 S.W. 167, followed in McKay v. Fulgham, 220 S.W. 171.
W.Va.—Hunt v. Hunt, 114 S.E. 283, 91 W.Va. 685—Baughman v. Hoffman, 110 S.E. 829, 90 W.Va. 388.
Wyo.—Creamery Package Mfg. Co. v. Cheyenne Ice Cream Co., 100 P. 2d 116, 118, 55 Wyo. 277, quoting **Corpus Juris**—Kay v. Spencer, 213 P. 571, 29 Wyo. 382, 27 A.L.R. 1122.
22 C.J. p 1167 note 13.

Recovery of unpaid consideration

The rule forbidding introduction of parol evidence to show failure of consideration recited in instrument is not operative when evidence is offered for purpose of obtaining recovery of that which has not been paid.—Cochell v. Cawthon, Tex.Civ. App., 110 S.W.2d 636, error dismissed.

Showing over payment

Where contract provided for sale of land at specified price per acre, purchaser's acceptance of deed did not estop him from showing a shortage in the acreage and from recovering amount overpaid, the deed being the act of the vendor in assumed execution of the contract.—Duffy v. Phipps, 104 S.E. 655, 180 N.C. 313.

Showing payments other than those recited

Testimony as to other payments than of amounts called for by sale contract and shown by receipts was not inadmissible as tending to vary written contract.—Southern California Music Co. v. Labes, 288 P 1096, 106 Cal.App. 255.

12. Ill.—Bach Brick Co. v. City of Chicago, 166 N.E. 495, 335 Ill. 101—Crawford v. Abraham Lincoln Life Ins. Co., 278 Ill.App. 576—Erzinger v. Gerrity, 271 Ill.App. 450.
Mo—Mongler v. Mongler, App., 57 S.W.2d 740.
Wis.—Spankus v. West, 267 N.W. 910, 222 Wis. 238.
22 C.J. p 1168 note 14.
Contractual recitals of consideration generally see infra § 958.

13. La.—Johnson v. Johnson, 185 So. 299, 191 La. 408.
N.J.—River Park Homes Corporation v. Hammond, 1 A.2d 16, 120 N.J. Law 519, affirmed 5 A.2d 697, 122 N.J.Law 466.
Or.—Marks v. Twohy Bros. Co., 194 P. 675, 680, 98 Or. 514, citing **Corpus Juris.**
W.Va.—Hunt v. Hunt, 114 S.E. 283, 91 W.Va. 685.
22 C.J. p 1168 note 15.
Introduction of parol evidence in connection with consideration supporting a resulting trust see the C.J.S. title Trusts § 105, also 65 C.J. p 381 notes 3-5 and 22 C.J. p 1168 notes 15-17.

a consideration not expressed in the writing itself.[14]

Manner of payment. Where an instrument recites a certain amount as the consideration, parol evidence may be admitted to show the method of payment, or how such amount was actually paid or was to be paid.[15] So evidence that the consideration was paid in property is admissible, although a money consideration is expressed,[16] although it has been held that where an instrument is on its face payable in money parol evidence is inadmissible to show that a different method of payment was contemplated in violation of the expressed contractual term of the instrument.[17]

§ 954. —— Where Consideration Not Stated

Where the instrument states no consideration or fails to set forth what the consideration is, parol evidence is admissible to show the consideration and of what it consists, although under the guise of doing so it is not proper to admit parol evidence in effect destroying the contractual clauses of the instrument.

Even though the instrument does not state any consideration or set forth what the consideration is, parol evidence may be admitted to show that there was a consideration, and of what it consisted,[18] unless the instrument is of such a nature that the failure to express a consideration renders it void under the statute of frauds.[19] One may not, under the guise of showing the unexpressed consideration for an instrument, show by parol that there was no consideration or that it failed for the purpose of defeating its operative words.[20]

§ 955. —— Consistency with Expressed Consideration

The principle admitting parol evidence in explanation of the consideration recited in a written instrument is ordinarily limited in its application to evidence of such other consideration as may be consistent with that expressed.

While parol evidence is admissible to show a different consideration from that expressed in a written instrument where such different consideration is consistent with that expressed,[21] it has been laid down that the consideration to be shown by the pa-

14. Ark.—Green v. Mulkey, 218 S.W. 201, 142 Ark. 124.

15. Ark.—Jones v. Little, 194 S.W. 229, 128 Ark. 640.
Kan.—Shields v. Johnson, 257 P. 926, 927, 124 Kan. 155, citing **Corpus Juris.**
La.—Wainwright v. Gilham, App., 188 So. 434.
22 C.J. p 1168 note 18.

Advancement
Where deed from father to son recited consideration of one hundred and five dollars, parol evidence was admissible to show that it was an advancement.—Smith v. Hood, 103 So. 574, 212 Ala. 554.

Payment in amounts different from recitation
Evidence showing consideration for land was paid in amounts different from those mentioned in written agreement is admissible, where aggregate of payments was same.—Bonhard v. Gindin, 142 A. 52, 104 N.J.Law 599.

Payment in different form
In action to recover consideration recited in instrument acknowledging its receipt, defendant may introduce parol testimony to show that consideration was actually paid, although in different form or way from that expressed in instrument.—Cochell v. Cawthon, Tex.Civ.App., 110 S.W.2d 436, error dismissed.

16. N.J.—Adams v. Camden Safe Deposit & Trust Co., 2 A.2d 361, 121 N.J.Law 389, reversing 188 A. 913, 15 N.J.Misc. 48.
22 C.J. p 1169 note 19.

17. Tex.—Lawther Grain Co. v. Winniford, Com.App., 249 S.W. 195, reversing Winniford v. Lawther Grain Co., Civ.App., 232 S.W. 853.

18. Ark.—Moncrief v. Miller, 14 S.W.2d 227, 178 Ark. 1069.
Cal.—Los Angeles County v. Farnsworth, 41 P.2d 577, 4 Cal.App.2d 516.
Ga.—J. E. Dunson & Bros. Co. v. J. C. Smith Seed Co., 106 S.E. 914, 26 Ga.App. 585.
Iowa.—In re Simplot's Estate, 246 N.W. 396, 215 Iowa 578.
Neb.—Rhodes v. Lewis, 287 N.W. 662, 664, 136 Neb. 870, quoting **Corpus Juris**—Elvidge v. Brant, 267 N.W. 169, 131 Neb. 1—Luikart v. Massachusetts Bonding & Insurance Co., 263 N.W. 124, 125, 130, 129 Neb. 771, quoting **Corpus Juris.**
N.Y.—Strobe v. Netherland Co., 283 N.Y.S. 246, 245 App.Div. 573.
N.D.—Nesvold v. Thompson, 217 N.W. 516, 56 N.D. 385.
Pa.—Washington Steel Form Co. v. North City Trust Co., 162 A. 829, 308 Pa. 351.
S.C.—Stalnaker v. Tolbert, 114 S.E. 412, 121 S.C. 437.
Tex.—Robert & St. John Motor Co. v. Bumpass, Civ.App., 65 S.W.2d 399, error dismissed—Jennings v. McNabb, Civ.App., 243 S.W. 562—Lovelady v. Harding, Civ.App., 207 S.W. 933.
22 C.J. p 1169 note 20.

"Love and affection"
Evidence showing that deed apparently voluntary, for love and affection, was based on valuable consideration was held admissible.—Farrar Lumber Co. v. Brindle, 151 S.E. 923, 170 Ga. 37.

Marriage
Consideration of marriage for conveyance executed before marriage may be shown by parol evidence, although not recited in conveyance.—Thomas v. Mickle, 154 So. 95, 228 Ala. 458.

Compromise agreement
Where a memorandum of a compromise agreement does not state the consideration it is competent to show by parol evidence what the consideration was.—Bunel v. O'Day, C.C.Mo., 125 F. 303.

Freight rates
Mo.—Phœnix Powder Mfg. Co. v. Wabash R. Co., 74 S.W. 492, 101 Mo.App. 442.

19. Neb.—Rhodes v. Lewis, 287 N.W. 662, 664, 136 Neb. 870, quoting **Corpus Juris.**
22 C.J. p 1169 note 21.

20. Ark.—Moncrief v. Miller, 14 S.W.2d 227, 178 Ark. 1069.

21. Ala.—Union Bank & Trust Co. v. Royall, 148 So. 399, 226 Ala. 670—Gilliland v. Hawkins, 112 So. 454, 216 Ala. 97.
Fla.—Mallard v. Ewing, 164 So. 674, 121 Fla. 654.
Pa.—Murray v. Flesher, 88 Pa.Super. 592—In re Patterson's Estate, 86 Pa.Super. 299.
Wash.—In re Tveekrem's Estate, 14 P.2d 3, 169 Wash. 468.

No contradiction
Proof of agreement to construct cattle guards and ditches did not contradict deed reciting consideration of one dollar and other con-

rol evidence must be consistent with that stated in the writing, otherwise the evidence cannot be admitted.[22] Where the instrument is complete on its face a stipulation as to consideration becomes contractual and the ordinary rule precluding the varying of a written instrument by parol becomes applicable,[23] and where the instrument on its face states that all of the consideration is expressed therein, it has been held that an additional consideration cannot be shown,[24] although there is authority to the effect that this doctrine has undergone a marked change so as to admit of a wider latitude of inquiry and that a consideration different in amount or quantity may be shown provided only it is not inconsistent with that expressed.[25]

§ 956. —— Altering or Defeating Legal Effect or Operation of Instrument

a. In general

b. Illegality of consideration

a. In General

The rule admitting parol evidence as to consideration will not be so applied as to permit the introduction thereof to defeat the legal effect and operation of a written instrument.

Where the effect of parol evidence contradicting the consideration expressed in the instrument or showing the true consideration to be different therefrom would be to change or defeat the legal operation and effect of the instrument, or to add new matter to an agreement complete on its face, the evidence is not admissible; for in such case it comes within the rule which forbids the introduction of parol evidence to vary, contradict, or defeat a written instrument and not within the exception to that rule that parol evidence is admissible for the purpose of contradicting or showing that the true consideration is other than, and different from, that expressed in the writing.[26] However, where fraud is charged, the want of consideration may be

siderations.—Beaver Dam Coal Co. v. Brashear, 54 S.W.2d 609, 246 Ky. 69.

22. Ala.—Union Bank & Trust Co. v. Royall, 148 So. 399, 226 Ala. 670—Davis v. Anderson, 119 So. 670, 218 Ala. 557—Boatright v. Fennell, 104 So. 1, 213 Ala. 10.
Ark.—Broyles v. International Harvester Co., 150 S.W.2d 733.
Cal.—Charles Brown & Sons v. White Lunch Co., 268 P. 490, 92 Cal.App. 457.
Colo.—Collins v. Shaffer, 179 P. 152, 66 Colo. 84.
Ga.—Bald Mountain Portland Cement Co. v. McGuirk, 99 S.E. 134, 23 Ga.App. 629.
Ind.—Friedman v. Citizens' Natural Gas, Oil & Water Co., 147 N.E. 294, 82 Ind.App. 667.
Kan.—Diehm v. Great Lakes Pipe Line Co., 87 P.2d 537, 149 Kan. 334—Stanley v. Blair, 21 P.2d 311, 137 Kan. 469.
La.—Grimm v. Pugh, App., 197 So. 641—Reimers v. Hebert, 7 La.App. 56.
Mo.—Gates Hotel Co. v. Federal Inv. Co., 52 S.W.2d 1016, 331 Mo. 107—Betts v. Harvey, App., 297 S.W. 995.
Or.—Coker v. Richey, 202 P. 551, 104 Or. 14, 22 A.L.R. 744, rehearing denied 204 P. 945, 104 Or. 14—Marks v. Twohy Bros. Co., 194 P. 675, 98 Or. 514.
Tex.—Southland Life Ins. Co. v. Gatewood, 141 S.W.2d 588, 135 Tex. 177, affirming, Civ.App., 115 S.W.2d 723—Johnson v. Johnson, Com. App., 14 S.W.2d 805, 807, quoting **Corpus Juris**, and reversing, Civ. App., 6 S.W.2d 175—Matlock v. Gulf, C. & S. F. Ry. Co., Civ.App., 99 S.W.2d 1056, error dismissed—Waybourn v. Spurlock, Civ.App., 281 S.W. 587—Henderson v. Scott Oil & Refining Co., Civ.App., 258 S.W. 1082—Stephenson v. Stitz, Civ.App., 255 S.W. 812—Burt v. Deorsam, Civ.App., 227 S.W. 354.
Wash.—Grandview Inland Fruit Co. v. Hartford Fire Ins. Co., 66 P.2d 827, 189 Wash. 590, 109 A.L.R. 1472.
22 C.J. p 1169 note 22.

Clearly expressed consideration

Where the consideration on which a written instrument rests is clearly expressed therein, that consideration cannot be varied or altered by parol.—Banwart v. Shullenburg, 180 N.W. 190, 190 Iowa 418.

Memorandum on check

(1) Where an employer gave a check and two notes to his employee in payment of commissions on orders procured by the employee, a memorandum on the check, "Full settlement to April 1st on shipments made," precluded parol proof that the check and notes were given in full payment of all transactions between the parties, including future shipments on orders procured by employee.—Stone v. Steil, 202 N.W. 982, 230 Mich. 249.

(2) In action for balance of partnership profits, where plaintiff was shown to have accepted check reciting that it was settlement in full, evidence that such check was not settlement in full was incompetent as contradicting contemporaneous written instrument.—De Loache v. De Loache, 127 S.E. 419, 189 N.C. 394.

Plain and unambiguous statement

Parol evidence was held inadmissible to vary or add to unambiguous provisions of deed stating that, as part of consideration, grantee assumed payment of certain note, in absence of allegations and proof of fraud, mistake, or accident.—Phœnix Mut. Life Ins. Co. v. Bernfield, Tex. Civ.App., 101 S.W.2d 1025.

23. Ind.—Friedman v. Citizens' Natural Gas, Oil & Water Co., 147 N.E. 294, 82 Ind.App. 667.

24. Ill.—Moffat Coal Co. v. Miller, 173 Ill.App. 408.
Mass.—Budro v. Burgess, 83 N.E. 318, 197 Mass. 74.
22 C.J. p 1169 note 23.

25. Fla.—Mallard v. Ewing, 164 So. 674, 121 Fla. 654.

26. U.S.—Bastian v. U. S., C.C.A. Ohio, 118 F.2d 777—Horbach v. Coyle, C.C.A.Neb., 2 F.2d 702.
Ala.—Higdon v. Leggett, 94 So. 359, 208 Ala. 352—Ex parte South, 88 So. 221, 205 Ala. 31, denying certiorari South v. First Nat. Bank, 88 So. 219, 17 Ala.App. 569—Corley v. Vizard, 84 So. 299, 203 Ala. 564—Kilgore v. Arant, 146 So. 540, 25 Ala.App. 356.
Ariz.—Merryman v. Sears, 72 P.2d 943, 50 Ariz. 412.
Ark.—Wright v. Marshall, 33 S.W.2d 43, 182 Ark. 890.
Fla.—Florida Moss Products Co. v. City of Leesburg, 112 So. 572, 93 Fla. 656.
Ga.—Phillips v. Phillips, 169 S.E. 537, 46 Ga.App. 838—Middlebrooks v. Dunlap-Huckabee Auto Co., 162 S.E. 153, 44 Ga.App. 543—Spells v. Swift & Co., 130 S.E. 593, 34 Ga.App. 620—Cunningham v. Huson Ice & Coal Co., 105 S.E. 860, 26 Ga. App. 302.
Ill.—Hagen v. Lehmann, 148 N.E. 57, 317 Ill. 227, affirming 234 Ill.App.

shown in connection with and as part of the fraud,[27] and it may be shown in favor of creditors of the grantor that a deed founded on an expressed valuable consideration was without any consideration and therefore liable to be set aside.[28]

b. Illegality of Consideration

Illegality of consideration may be shown even though the result is to defeat the legal effect or operation of a written instrument.

The principle stated in the preceding subsection does not apply so as to preclude the admission of evidence to show that the consideration was vicious or illegal, for if such evidence were excluded the policy of the law in making a deed, contract, or other undertaking founded on an illegal consideration void would be defeated by the parties expressing on the face of the instrument a legal consideration.[29] Conversely, it has been held proper to exclude parol evidence to contradict a stipulation on the back of a note sued on, which stipulation disclosed an invalid consideration, and to show a different and lawful consideration.[30]

§ 957. —— Good and Valuable Considerations

The authorities conflict as to whether recital of a valuable consideration or of a good consideration is so far a contractual term of the instrument as to preclude admission of parol evidence to show that the true consideration was not of the kind recited, although where fraud appears such evidence is in all cases held admissible.

There is a conflict of authority respecting the admissibility of parol evidence to show that a deed reciting a valuable consideration or one reciting a merely good consideration is in fact supported by a consideration the opposite in kind from that recited.[31] Some authorities take the view that such evidence is not admissible;[32] hence, where a deed purports to be based on a good consideration it may not be shown by parol that it is in fact supported by a valuable consideration,[33] and conversely that where the deed purports to be based on a

395—Erzinger v. Gerrity, 271 Ill. App. 450.
Ind.—Western Paving & Supply Co. v. Citizens' St. R. Co., 26 N.E. 188, 28 N.E. 88, 128 Ind. 525, 25 Am. S.R. 462, 10 L.R.A. 770.
Iowa.—Blackledge v. Puncture Proof Retread Co., 181 N.W. 662, 190 Iowa 1303.
Kan.—Buser v. Everly, 224 P. 66, 115 Kan. 674.
Ky.—Drane v. Louisville Ry. Co., 131 S.W.2d 439, 279 Ky. 490.
La.—Lockwood Oil Co. v. Atkins, 104 So. 386, 158 La. 610—Drewett v. Carnahan, App., 183 So. 103—McQueen v. Palmer, App., 155 So. 264.
Md.—Airey v. Airey, 152 A. 430, 431, 160 Md. 41, citing **Corpus Juris.**
Mo.—Ezo v. St. Louis Smelting & Refining Co., App., 87 S.W.2d 1051—First Nat. Bank & Trust Co. v. Limpp, 288 S.W. 957, 959, 221 Mo. App. 951, quoting **Corpus Juris.**
N.C.—Samonds v. Cloninger, 127 S.E. 706, 189 N.C. 610.
Ohio.—Gardner v. Kern, 155 N.E. 134, 115 Ohio St. 575, affirming Kern v. Gardner, 159 N.E. 840, 26 Ohio App. 48—Lee v. Fike, 162 N.E. 682, 28 Ohio App. 283—Thiessen v. Moore, 14 Ohio App. 460, modified on other grounds 137 N.E. 906, 105 Ohio St. 401.
Or.—Lange v. Allen, 251 P. 715, 120 Or. 96—Loveland v. Warner, 204 P. 622, 108 Or. 638, rehearing denied 206 P. 298, 103 Or. 638—Marks v. Twohy Bros. Co., 194 P. 675, 680, 98 Or. 514, quoting **Corpus Juris.**
Pa.—Vogel v. Taub, 173 A. 270, 316 Pa. 41.
S.C.—C. G. Gunter, Inc., v. Hindman, 179 S.E. 494, 175 S.C. 436—National Loan & Exchange Bank v. Tolbert, 124 S.E. 772, 129 S.C. 503.
Tex.—Russell v. Russell, 120 S.W.2d 793, 132 Tex. 73, reversing, Civ. App., 94 S.W.2d 243—Johnson v. Johnson, Com.App., 14 S.W.2d 805, 807, quoting **Corpus Juris,** and reversing, Civ.App., 6 S.W.2d 175—Hunt v. Bagwell, Civ.App., 111 S.W.2d 312, error refused—Shaw v. Lumpkin, Civ.App., 241 S.W. 220—Nolan v. Young, Civ.App., 220 S.W. 154.
Utah.—Last Chance Ranch Co. v. Erickson, 25 P.2d 952, 958, 82 Utah 475, citing **Corpus Juris.**
Va.—Gloth v. Gloth, 153 S.E. 879, 154 Va. 511, 71 A.L.R. 700.
Wash.—Grandview Inland Fruit Co. v. Hartford Fire Ins. Co., 66 P.2d 827, 836, 189 Wash. 590, 109 A.L.R. 1472, citing **Corpus Juris.**
W.Va.—Hunt v. Hunt, 114 S.E. 283, 91 W.Va. 685.
22 C.J. p 1170 note 25.

Provision stating that writing contained entire agreement
Where written land contract did not mention alleged promised improvements and stated that it contained entire agreement, purchaser could not rescind on ground that there was failure of consideration when improvements were not installed.—Clancy v. Becker-Arbuckle-Wright Corporation, 29 P.2d 868, 137 Cal.App. 43.

27. U.S.—Pennok Oil Co. v. Roxana Petroleum Co. of Oklahoma, C.C.A.Okl., 289 F. 416.
La.—Logan v. Walker, 94 So. 430, 152 La. 880.
22 C.J. p 1170 note 26.

28. Ohio.—Groves v. Groves, 62 N.E. 1044, 65 Ohio St. 442.
22 C.J. p 1170 note 27.

29. Ala.—Wilson v. Singer Sewing Machine Co., 108 So. 358, 214 Ala. 536.
Ark.—Lincoln Reserve Life Ins. Co. v. Jones, 10 S.W.2d 910, 178 Ark. 466.
Ga.—A. M. Robinson Co. v. Rice, 148 S.E. 542, 39 Ga.App. 785.
22 C.J. p 1170 note 29.

Suppression of criminal prosecution
Parol evidence that consideration for note was an agreement to suppress prosecution of crime is admissible.—Wilson v. Singer Sewing Mach. Co., 108 So. 358, 214 Ala. 536.

30. N.C.—Pierce v. Cobb, 77 S.E. 350, 161 N.C. 300, 44 L.R.A.,N.S., 379.

31. Neb.—Harman v. Fisher, 134 N.W. 246, 90 Neb. 688, 39 L.R.A.,N.S., 157.

32. Ala.—Pique v. Arendale, 71 Ala. 91.
S.C.—Knighton v. Des Portes Mercantile Co., 112 S.E. 343, 119 S.C. 340.
22 C.J. p 1171 note 31.

33. Ala.—Schwab v. Powers, 153 So. 423, 228 Ala. 205.

Inconsistency
In harmony with the general rule that in the absence of fraud or mistake an inconsistent consideration may not be shown by parol, where a deed recites "love and affection" as its consideration it is improper to introduce parol evidence of a valuable consideration, such as satisfaction of a mortgage, to sup-

valuable consideration it may not be shown by parol that it is supported by a good consideration.[34] This rule is, however, subject to the qualification that parol evidence is admissible where there is fraud,[35] and there are cases which, irrespective of the question of fraud, fail to follow this rule[36] or expressly disavow it.[37] On the one hand, it has been held that where an instrument recites a valuable consideration it may be shown by parol that the true consideration was merely love and affection and the deed voluntary,[38] and that, notwithstanding a deed recites a money consideration, it may be shown that it was in fact an advancement;[39] and it would certainly seem proper, where a deed expresses merely a nominal valuable consideration, to show a good consideration, such as natural love and affection, and such evidence has been admitted.[40] On the other hand, it has been held that where the instrument recites merely a consideration, such as love and affection, it may be shown by parol that there was in fact a valuable consideration,[41] and, where the rights of creditors are not involved, it has been held that it may be shown by parol that an instrument reciting a nominal valuable consideration and love and affection was not a voluntary instrument but was in fact supported by a substantial valuable consideration.[42] The mere recitation of "good and valuable consideration" will not support an instrument where by parol it is shown that nothing good or valuable was in fact given.[43]

§ 958. —— Where Consideration Executory or Contractual

Where the consideration recited in a complete and unambiguous instrument is essentially contractual in character, the exception admitting parol evidence as to consideration becomes inapplicable, and the case falls within the general rule excluding parol evidence to vary a written instrument.

Where the statement in a written instrument as to the consideration is more than a mere statement of fact or acknowledgment of payment of a money consideration, and is of a contractual nature, as where the consideration consists of a specific and direct promise by one of the parties to do certain things, this part of the contract can no more be changed or modified by parol or extrinsic evidence than any other part, for a party has the right to make the consideration of his agreement of the essence of the contract, and when this is done the provision as to the consideration for the contract must stand on the same plane as the other provisions of the contract with reference to conclusiveness and immunity from attack by parol or extrinsic evidence.[44] For the same reason, where the

port the deed.—Boatright v. Fennell, 104 So. 1, 213 Ala. 10.

34. La.—Loranger v. Citizens' Nat. Bank of Hammond, 111 So. 418, 162 La. 1054—Drewett v. Carnahan, App., 183 So. 103.
N.Y.—Moller v. Paulivico, 208 N.Y.S. 737, 212 App.Div. 394.

35. S.C.—Knighton v. Des Portes Mercantile Co., 112 S.E. 343, 119 S.C. 340.

36. Ga.—Thompson v. Cody, 28 S.E. 669, 100 Ga. 771.
22 C.J. p 1171 note 32.

37. Cal.—Carty v. Connolly, 27 P. 599, 91 Cal. 15.
Ind.—Nichols v. Burch, 27 N.E. 737, 128 Ind. 324.
Neb.—Harman v. Fisher, 134 N.W. 246, 90 Neb. 688, 39 L.R.A.,N.S., 157.
22 C.J. p 1171 note 32.

38. Ga.—King & Hamilton v. Mobley, 103 S.E. 237, 150 Ga. 256—Pooser v. Norwich Union Fire Ins. Soc., 182 S.E. 44, 51 Ga.App. 962.
Tex.—Burns v. Nichols, Civ.App., 207 S.W. 158.
It has, however, been intimated that parol evidence that a conveyance was a gift could not be introduced in contradiction of recitals of valuable consideration in a deed, although the decision, as pointed out by the court, could be based on the finding that even if admissible the parol evidence was not conclusive.—Mahoney v. Mahoney, Tex.Civ.App., 103 S.W.2d 459, error dismissed.

39. Conn.—Meeker v. Meeker, 16 Conn. 383.
Iowa.—Finch v. Garrett, 71 N.W. 429, 102 Iowa 381.
Ohio.—Shelby v. Cunningham, 90 N. E. 805, 81 Ohio St. 289, 25 L.R.A., N.S., 1194.
22 C.J. p 1171 note 35.

40. Ga.—Dawson v. Briscoe, 24 S. E. 157, 97 Ga. 408.
Ind.—Kenney v. Phillipy, 91 Ind. 511.
Pa.—Lewis v. Brewster, 57 Pa. 410.

41. Ga.—Armour Fertilizer Works v. Maxwell, 199 S.E. 120, 186 Ga. 801—Farrar Lumber Co. v. Brindie, 151 S.E. 923, 170 Ga. 37.
Ky.—Ecton v. Flynn, 17 S.W.2d 407, 229 Ky. 476.
Tex.—Moore v. Parrish, Civ.App., 70 S.W.2d 315, error dismissed.

42. Ark.—Howard v. Howard, 238 S.W. 604, 152 Ark. 387.

43. U.S.—In re Greene, D.C.N.Y., 45 F.2d 428.

44. Ala.—Baker v. Horsley, 101 So. 830, 831, 212 Ala. 181, quoting **Corpus Juris.**
Ariz.—Jarnagin v. Edwards, 194 P. 1097, 22 Ariz. 116.
Ark.—Young v. Blocker, 146 S.W.2d 902—Central Life Ins. Co. of Illinois v. Thompson, 33 S.W.2d 388, 182 Ark. 705—Sims v. Best, 215 S. W. 519, 140 Ark. 384.
Cal.—Koeberle v. Hotchkiss, 40 P.2d 911, 4 Cal.App.2d 252—Mahan v. Millar, 205 P. 67, 56 Cal.App. 280.
Fla.—Knabb v. Reconstruction Finance Corporation, 197 So. 707, 716, citing **Corpus Juris**—Florida Moss Products Co. v. City of Leesburg, 112 So. 572, 574, 93 Fla. 656, citing **Corpus Juris.**
Ga.—Calhoun v. Lemon, 14 S.E.2d 710—Young v. Young, 104 S.E. 149, 150 Ga. 515—Stonecypher v. Georgia Power Co., 189 S.E. 13, 183 Ga. 498, answers to certified questions conformed to 189 S.E. 672, 55 Ga. App. 197—Spells v. Swift & Co., 130 S.E. 593, 34 Ga.App. 620—Reeves Tractor & Implement Co. v. Barrow, 118 S.E. 456, 30 Ga. App. 420—Georgia Casualty Co. v. Dixie Trust & Security Co., 98 S.E. 414, 23 Ga.App. 447.
Ill.—Miller v. Paul, 237 Ill.App. 166.
Ind.—Wayne International Building & Loan Ass'n v. Beckner, 134 N.E. 273, 191 Ind. 664—Ross v. Terre Haute, Indianapolis & Eastern Traction Co., 173 N.E. 707, 92 Ind. App. 13, transferred, see 171 N.E. 665, 202 Ind. 698.
Iowa.—Reit v. Driesen, 237 N.W. 325, 212 Iowa 1011—Clayman v. Bibler, 231 N.W. 334, 210 Iowa 497.
Ky.—Drane v. Louisville Ry. Co., 131 S.W.2d 439, 279 Ky. 490.

writing is complete on its face, an additional executory consideration cannot be shown by parol,[45] or, as it is sometimes expressed, new terms cannot be engrafted into an agreement by parol under the guise of varying the consideration.[46] In cases of this character proof of fraud or mistake is prerequisite to introduction of parol evidence.[47]

When rule not applicable. The rule excluding pa-

La.—Brewer v. New Orleans Land Co., 97 So. 605, 154 La. 446—Barre v. Hunter, App., 181 So. 674.
Mich.—Reyburn v. Goodrich, 290 N. W. 340, 292 Mich. 91.
Minn.—Brown v. Backer, 207 N.W. 20, 166 Minn. 50—Thiem v. Eckert, 206 N.W. 721, 165 Minn. 379—Laughren v. J. S. Nolan Sales Stable Co., 203 N.W. 445, 163 Minn. 85.
Miss.—Tullos v. Town of Magee, 179 So. 557, 181 Miss. 288—State Highway Department v. Duckworth, 172 So. 148, 178 Miss. 35.
Mo.—Burk v. Walton, 86 S.W.2d 92, 337 Mo. 781—Gates Hotel Co. v. Federal Inv. Co., 52 S.W.2d 1016, 331 Mo. 107—Meyer v. Weber, 109 S.W.2d 702, 233 Mo.App. 832—Bert v. Rhodes, App., 258 S.W. 40—Duncan v. Spencer, App., 211 S. W. 698.
Neb.—In re Weitzel's Estate, 280 N. W. 270, 135 Neb. 43—Chalupnik v. Brant, 279 N.W. 159, 134 Neb. 465—S. Spiegal & Son v. Alpirn, 185 N.W. 415, 107 Neb. 233.
N.J.—Adams v. Camden Safe Deposit & Trust Co., 2 A.2d 361, 121 N.J.Law 389, reversing 188 A. 913, 15 N.J.Misc. 48.
N.Y.—Parsons v. Lipe, 286 N.Y.S. 60, 158 Misc. 32, affirmed Parsons v. First Trust & Deposit Co., 277 N.Y.S. 426, 243 App.Div. 681, and 277 N.Y.S. 428, 243 App.Div. 681, affirmed 200 N.E. 31, 269 N.Y. 630—Warshawsky v. Ward, 248 N.Y.S. 309, 139 Misc. 793, reversed on other grounds 253 N.Y.S. 246, 233 App.Div. 390.
N.C.—Samonds v. Cloninger, 127 S. E. 706, 189 N.C. 610.
N.D.—Jensen v. Siegfried, 263 N.W. 715, 66 N.D. 222.
Or.—Loveland v. Warner, 204 P. 622, 103 Or. 638, rehearing denied 206 P. 298, 103 Or. 638—Marks v. Twohy Bros. Co., 194 P. 675, 680, 98 Or. 514, quoting **Corpus Juris**—O'Neil v. Twohy Bros. Co., 190 P. 306, 98 Or. 481.
R.I.—Kuzoian v. Jaffa, 161 A. 130, 52 R.I. 367.
S.C.—C. G. Gunter, Inc. v. Hindman, 179 S.E. 494, 175 S.C. 436—Halsey v. Minnesota-South Carolina Land & Timber Co., 177 S.E. 29, 174 S. C. 97, 100 A.L.R. 1—Shelton v. Skyland Stages, 169 S.E. 718, 170 S.C. 100.
S.D.—Independent Harvester Co. v. Anderson, 186 N.W. 112, 115, 45 S. D. 60, citing **Corpus Juris.**
Tex.—North Texas Building & Loan Ass'n v. Overton, 86 S.W.2d 738, 126 Tex. 104, error refused, answers conformed to, Civ.App., 91 S.W.2d 429—Bates v. Lefforge, Com.App., 63 S.W.2d 360, reversing, Civ.App., 42 S.W.2d 806—Guggenheim v. Dallas Plumbing Co., Com.App., 59 S.W.2d 105, reversing Gugenheim v. Dallas Plumbing Co., Civ.App., 42 S.W.2d 268—Pridgen v. Furnish, Com. App., 23 S.W.2d 307, affirming, Civ. App., 11 S.W.2d 844—Johnson v. Johnson, Com.App., 14 S.W.2d 805, 807, quoting **Corpus Juris**, and reversing, Civ.App., 6 S.W.2d 175—Hillman v. Graves, Civ.App., 134 S. W.2d 436—Massey-Harris Co. v. Bernard, Civ.App., 84 S.W.2d 1091, 1094, error dismissed, citing **Corpus Juris**—Pevehouse v. Lubbock Nat. Bank, Civ.App., 79 S.W.2d 1107—Smith v. Koennecke, Civ. App., 73 S.W.2d 933—Kansas City Life Ins. Co. v. Hudson, Civ.App., 71 S.W.2d 574, 577, quoting **Corpus Juris**—Frank L. Smith Tire Store v. Firestone Tire & Rubber Co., Civ.App., 68 S.W.2d 577, error refused—Sisk v. Randon, Civ.App., 33 S.W.2d 1082, affirmed 70 S.W. 2d 689, 123 Tex. 326—Lindsay v. Texas Iron & Steel Co., Civ.App., 9 S.W.2d 287, 289, error refused, quoting **Corpus Juris**—Waggoner v. Magnolia Petroleum Co., Civ. App., 252 S.W. 865—Martin Bros. v. McKnight, Civ.App., 245 S.W. 447—Humble Oil & Refining Co. v. Strauss, Civ.App., 243 S.W. 528—Waters v. Byers Bros. & Co., Civ. App., 233 S.W. 572—D. Sullivan & Co. v. Schreiner, Civ.App., 222 S.W. 314, error refused—Martin v. Martin, Civ.App., 222 S.W. 291, error refused.
Utah.—Paloni v. Beebe, 110 P.2d 563.
Va.—Harvey v. Richmond, F. & P. Ry. Co., 173 S.E. 351, 162 Va. 49, 92 A.L.R. 240.
Wash.—Grandview Inland Fruit Co. v. Hartford Fire Ins. Co., 66 P.2d 827, 836, 189 Wash. 590, 109 A.L.R. 1472, citing **Corpus Juris**—Clise v. Scott, 38 P.2d 1019, 180 Wash. 207—Holdridge v. Garretson, 277 P. 982, 152 Wash. 226.
Wis.—In re Petzold's Estate, 265 N. W. 87, 220 Wis. 297—Stuart v. Crowley, 217 N.W. 719, 195 Wis. 47—Sheldon v. Blackman, 205 N. W. 486, 186 Wis. 4—Borchert v. Coons, 171 N.W. 70, 168 Wis. 523.
Wyo.—Barrett v. First Nat. Bank, 62 P.2d 318, 50 Wyo. 502.
22 C.J. p 1172 note 36.

Contractual right vested, created, or extinguished

Admissibility of parol evidence to prove true consideration, or that consideration is different from that expressed in written instrument, is an exception to rule excluding such evidence, and if stated consideration is in nature of a contract by which a right is vested, created, or extinguished, terms of contract thereby evidenced cannot be varied by parol evidence.—Smith v. School Dist. No. 14, 94 S.W.2d 706, 192 Ark. 792.

When consideration of essence

Where the consideration stated in a written contract is of the essence of the agreement and is a contractual term of the contract, parol testimony is not admissible to vary the consideration from that expressed in the contract.—Wood v. Southern Shale Brick Corporation, 4 S.E.2d 360, 173 Va. 364.

Only monetary consideration open to explanation

The consideration for a written contract which is subject to explanation is a monetary and not a contractual one.—Coker v. Richey, 204 P. 945, 104 Or. 14, denying rehearing 202 P. 551, 104 Or. 14, 22 A.L.R. 741.

Test as to contractual character of consideration

Instrument's legal effect, not its name, determines whether consideration named is contractual element.—Coyne v. Coyne, 225 N.W. 935, 199 Wis. 263, denying rehearing 225 N. W. 138, 199 Wis. 263.

45. Cal.—Koeberle v. Hotchkiss, 40 P.2d 911, 4 Cal.App.2d 252.
Fla.—Bond v. Hewitt, 149 So. 606, 111 Fla. 180—Florida Moss Products Co. v. City of Leesburg, 112 So. 572, 93 Fla. 656.
Ind.—Friedman v. Citizens' Natural Gas, Oil & Water Co., 147 N.E. 294, 82 Ind.App. 667.
Or.—Marks v. Twohy Bros. Co., 194 P. 675, 681, 98 Or. 514, quoting **Corpus Juris.**
22 C.J. p 1172 note 37.

46. Or.—Marks v. Twohy Bros. Co., supra, quoting **Corpus Juris.**
Tex.—See Lindsay v. Texas Iron & Steel Co., Civ.App., 9 S.W.2d 287, 289, error refused, quoting **Corpus Juris.**
22 C.J. p 1172 note 38.

47. Tex.—Great Nat. Life Ins. Co. v. Presley, Civ.App., 129 S.W.2d 730, error dismissed—Waybourn v. Spurlock, Civ.App., 281 S.W. 587—Flynt v. Garmon, Civ.App., 275 S. W. 444—Schlag v. Johnson, Civ. App., 208 S.W. 369.

rol evidence of a consideration different from a contractual one recited in the written instrument has no application when it is evident that the instruments were executed in pursuance of a more comprehensive agreement which the parties did not undertake to express in writing,[48] or where it is apparent from the face of the instrument that the recital as to consideration is incomplete, in which case parol evidence may be introduced to show even a consideration contractual in character.[49]

§ 959. Construction of Language

Where a written instrument is ambiguous, parol evidence is admissible to ascertain its meaning, but parol evidence is not admissible to add to or detract from the writing.

The parol evidence rule does not preclude the admission of parol or extrinsic evidence for the purpose of aiding in the interpretation or construction of a written instrument, where the language of the instrument itself, taken alone, is such that it does not clearly express the intention of the parties or the subject of the agreement.[50] Such evidence is admitted not to add to or detract from the writing, but merely to ascertain what the meaning of the parties is,[51] and the admission of such evidence is

48. Tex.—Street v. Roberts, 66 S. W. 1120, 28 Tex.Civ.App. 222.

49. Wash.—Von Herberg v. Von Herberg, 106 P.2d 737.

50. U.S.—Buhl v. Kavanagh, C.C.A. Mich., 118 F.2d 315—Cudahy Packing Co. v. City of Omaha, C.C.A. Neb., 24 F.2d 3, certiorari denied 49 S.Ct. 9, 278 U.S. 601, 73 L.Ed. 530—W. R. Grace & Co. v. Frank Waterhouse & Co., C.C.A.Wash., 264 F. 422.
Ala.—Commercial Credit Co. v. Perkins, 184 So. 178, 236 Ala. 616.
Ariz.—Loganbill v. Zook, 3 P.2d 273, 275, 38 Ariz. 540, citing **Corpus Juris**—Miller Cattle Co. v. Francis, 298 P. 631, 38 Ariz. 197.
Ark.—Stoops v. Bank of Brinkley, 225 S.W. 593, 146 Ark. 127—Brown & Hackney v. Daubs, 213 S.W. 4, 139 Ark. 53.
Cal.—California Canning Peach Growers v. Williams, 78 P.2d 1154, 11 Cal.2d 221—Yeremian v. Turlock Dehydrating & Packing Co., 85 P.2d 515, 30 Cal.App.2d 92—Joy v. Rousseau, 236 P. 972, 72 Cal. App. 179.
Fla.—Whitfield v. Webb, 131 So. 786, 789, 100 Fla. 1619, citing **Corpus Juris**—McClure v. Century Estates, 120 So. 4, 96 Fla. 568, followed in Hall v. University Realty Co., 121 So. 808, 97 Fla. 639.
Ga.—Tilley v. Malcolm, 101 S.E. 127, 149 Ga. 514—Martin v. Mayer, 11 S.E.2d 218, 63 Ga.App. 387—Swanson v. Mobley, 127 S.E. 806, 33 Ga. App. 791—Chero Cola Bottling Co. v. Southern Express Co., 116 S.E. 325, 29 Ga.App. 656—Oglesby Grocery Co. v. Puyallup & Sumner Fruit Growers' Canning Co., 113 S. E. 64, 28 Ga.App. 790.
Ill.—Scholbe v. Schuchardt, 127 N.E. 169, 292 Ill. 529, 13 A.L.R. 247, reversing 212 Ill.App. 663—Reilly Tar & Chemical Corporation v. Lewis, 23 N.E.2d 243, 301 Ill.App. 459.
Ind.—Valparaiso Hotel Co. v. Schneider, 195 N.E. 589, 100 Ind.App. 341.
Kan.—Heyen v. Garton, 283 P. 636, 129 Kan. 453—Robben v. Farmers' Co-op. Co., 278 P. 10, 128 Kan. 310—Berg v. Scully, 245 P. 119, 120 Kan. 637.
Ky.—Coldiron v. Martin's Fork Coal Co., 262 S.W. 948, 203 Ky. 577.
Mich.—Edoff v. Hecht, 260 N.W. 93, 96, 270 Mich. 689, quoting **Corpus Juris.**
Mo.—Haseltine v. Farmers' Mut. Fire Ins. Co. of Billings, Christian County, 263 S.W. 810, affirming, App., 240 S.W. 815.
Neb.—Helfrich v. Baxter, 267 N.W. 922, 924, 131 Neb. 285, quoting **Corpus Juris.**
N.J.—Ferris v. Ferris, 1 A.2d 423, 124 N.J.Eq. 261—Myers v. J. Wiss & Sons Co., 118 A. 450, 94 N.J.Eq. 189—Newark Sav. Inst. v. Jones' Ex'rs, 37 N.J.Eq. 449, affirmed 38 N.J.Eq. 299.
N.Y.—People v. Call, 223 N.Y.S. 257, 129 Misc. 862.
Okl.—West v. Anderson, 42 P.2d 543, 171 Okl. 165.
Pa.—Iacovino v. Caterino, 2 A.2d 828, 332 Pa. 556—Simon v. Myers, 130 A. 256, 284 Pa. 3—Shuman v. Main, Beaver & Black Creek Mut. Fire Ins. Co., 108 A. 265, 265 Pa. 38.
S.C.—Burch v. South Carolina Cotton Growers' Co-op. Ass'n, 187 S. E. 422, 181 S.C. 295—Breedin v. Smith, 120 S.E. 64, 126 S.C. 346.
S.D.—Marso v. Heck, 210 N.W. 153, 50 S.D. 332.
Tex.—Pitts v. Camp County, 39 S.W. 2d 608, 120 Tex. 558, answers to certified questions conformed to, Civ.App., 42 S.W.2d 853—Gaines Motor Sales Co. v. Hastings Mfg. Co., Civ.App., 104 S.W.2d 548, error dismissed—Southwestern Life Ins. Co. v. Brooks, Civ.App., 89 S W.2d 1059, error dismissed—Wood v. Young, Civ.App., 11 S.W.2d 369—Barnes v. Early-Foster Co., Civ. App., 228 S.W. 248—Wilson v. Beaty, Civ.App., 211 S.W. 524.
Wash.—Hanson v. Roesch, 176 P. 349, 104 Wash. 257.
Wis.—Bahr v. Evangelical Lutheran St. John's Soc. of Poynette, 295 N. W. 700, 236 Wis. 490—Alltone Co. v. Bonded Aleather Shoe Co., 217 N.W. 302, 194 Wis. 591.
22 C.J. p 1173 note 40—38 C.J. p 1179 note 87.
Construction of ambiguous contracts generally see Contracts § 294.
Where party who prepares contract seeks to enforce it, if any of its terms are ambiguous so that it becomes necessary to construe it, parol evidence may be admitted to throw light on its meaning.—Bracy Bros. Hardware Co. v. Herman-McCain Const. Co., 259 S.W. 384, 163 Ark. 133.

51. U.S.—International Trading Co. of America v. John Sexton & Co., C.C.A.Ill., 24 F.2d 12.
Cal.—Ferris v. Emmons, 6 P.2d 950, 214 Cal. 501—Palma v. Leslie, 45 P.2d 391, 6 Cal.App.2d 702.
Iowa.—Mealey v. Kanealy, 286 N.W. 500, 226 Iowa 1266, 131 A.L.R. 945.
Ky.—Lovill v. Hatfield, 268 S.W. 807, 207 Ky. 142.
La.—Kentwood Bank v. Darouse, App., 141 So. 478.
Mo.—Baptiste Tent & Awning Co. v. Uhri, App., 129 S.W.2d 9, 11, citing **Corpus Juris.**
N.J.—Ferris v. Ferris, 1 A.2d 423, 124 N.J.Eq. 261.
N.M.—Cullender v. Levers, 34 P.2d 1089, 38 N.M. 436.
N.Y.—Tobias v. Lynch, 182 N.Y.S. 643, 192 App.Div. 54, affirmed 135 N.E. 898, 233 N.Y. 515.
Okl.—Hawkins v. Mattes, 41 P.2d 880, 171 Okl. 186.
Tex.—Remington Rand v. Sugarland Industries, Com.App., 153 S.W.2d 477, reversing, Civ.App., 122 S.W. 2d 723—Somerset Pipe Line Co. v. Pioneer Oil & Refining Co., Civ. App., 289 S.W. 155.
Wis.—Alltone Co. v. Bonded Aleather Shoe Co., 217 N.W. 302, 194 Wis. 591.
22 C.J. p 1174 note 41, p 1114 note 52.
"While parol evidence may be received to explain an ambiguity in a written contract, it is not admissible to add terms to the contract."—Cincinnati Underwriters Agency Co. v. Thomas J. Emery Memorial, C.C.A.

subject to the limitation that it must be consistent with the writing.[52] Thus a written instrument is open to explanation by parol or extrinsic evidence when it is expressed in short and incomplete terms,[53] or is fairly susceptible of more than one construction,[54] or where the language employed is vague, uncertain, obscure, or ambiguous;[55] and where the words of the contract must be applied to

Ohio, 88 F.2d 506, 508, certiorari denied Thomas J. Emery Memorial v. Cincinnati Underwriters Agency Co., 58 S.Ct. 14, 302 U.S. 696, 82 L.Ed. 537.

Explaining markings

Parol evidence is admissible to explain marks stamped on an insurer's loan record card and to show that such marks had nothing to do with any payments on the loan, as such evidence could not be construed as contradicting a written instrument.—McGinnis v. Ætna Life Ins. Co., Mo.App., 78 S.W.2d 501.

Matters essential to compliance

Evidence which is introduced, not for the purpose of varying the terms of a contract, but for the purpose of showing what is essential to a compliance with its terms, is admissible.—Jordan v. Adams, 232 S.W. 14, 149 Ark. 104.

52. Ky.—World Fire & Marine Ins. Co. v. Rivard, 76 S.W.2d 264, 256 Ky. 457.
S.C.—Carson v. McCaskill, 99 S.E. 108, 111 S.C. 516.
Tex.—Remington Rand v. Sugarland Industries, Com.App., 153 S.W.2d 477, reversing, Civ.App., 122 S.W. 2d 729—Higginbotham Cattle Co. v. Whaley & Lewis, Com.App., 41 S.W.2d 84, reversing, Civ.App., 26 S.W.2d 308.

53. Ky.—Akins v. City of Covington, 97 S.W.2d 588, 265 Ky. 740—World Fire & Marine Ins. Co. v. Rivard, 76 S.W.2d 264, 256 Ky. 457—Ades v. Wash, 251 S.W. 970, 199 Ky. 687.
Mass.—Kesslen Shoe Co. v. Philadelphia Fire & Marine Ins. Co., 3 N.E.2d 257, 295 Mass. 123.
Mont.—Sutton v. Masterson, 284 P. 264, 86 Mont. 530.
22 C.J. p 1174 note 42.

54. Ark.—Marley v. Hackler, 3 S.W. 2d 20, 176 Ark. 238—Stoops v. Bank of Brinkley, 225 S.W. 593, 146 Ark. 127.
Cal.—Walsh v. Walsh, 116 P.2d 62, prior opinion, App., 108 P.2d 763—Wachs v. Wachs, 79 P.2d 1085, 11 Cal.2d 322—Raisch v. Monterey County, 35 P.2d 587, 140 Cal.App. 627—Kenney v. Los Feliz Inv. Co., 9 P.2d 225, 121 Cal.App. 378.
Iowa.—Dunn v. Dunn, 258 N.W. 695, 219 Iowa 349.
Ky.—White Star Coal Co. v. Pursifull, 217 S.W. 1020, 186 Ky. 697.
Mo.—Huddleston v. Huddleston, App., 11 S.W.2d 1065.
Neb.—State v. Commercial Casualty Ins. Co., 248 N.W. 807, 810, 125 Neb. 43, 88 A.L.R. 790, citing **Corpus Juris**—John A. Creighton Real Estate Co. v. City of Omaha, 201 N.W. 657, 112 Neb. 802, reversed on other grounds 204 N.W. 66, 112 Neb. 802.
N.C.—Sawyer v. Pritchard, 118 S.E. 835, 186 N.C. 52.
Pa.—Dorrington v. Manning, 4 A.2d 886, 135 Pa.Super. 194—In re Sarver's Estate, 200 A. 709, 711, 132 Pa.Super. 238, citing **Corpus Juris**—Pennsylvania Co. for Insurances on Lives and Granting Annuities v. Wallace, 50 Dauph.Co. 215.
S.C.—Cooper & Griffin v. W. C. Cooke & Co., 115 S.E. 312, 122 S.C. 314.
Tex.—Rigsby v. Boone County State Bank of Lebanon, Ind., Civ.App., 241 S.W. 207.
Wash.—Perkins v. Brown, 38 P.2d 253, 179 Wash. 597, 101 A.L.R. 275.
22 C.J. p 1175 note 43.

55. U.S.—Electrical Research Products v. Gross, C.C.A.Alaska, 120 F. 2d 301—State Farm Mut. Automobile Ins. Co. v. Mackechnie, C.C.A. Neb., 114 F.2d 728—Ostroff v. New York Life Ins. Co., C.C.A.Cal., 104 F.2d 986, reversing, D.C., 23 F. Supp. 724, certiorari denied New York Life Ins. Co. v. Ostroff, 60 S.Ct. 122, 308 U.S. 592, 84 L.Ed. 495—Rothstein v. Edwards, C.C.A. Cal., 94 F.2d 488—Cuneo Press v. Claybourn Corporation, C.C.A.Ill., 90 F.2d 233—Cincinnati Underwriters Agency Co. v. Thomas J. Emery Memorial, C.C.A.Ohio, 88 F.2d 506, certiorari denied Thomas J. Emery Memorial v. Cincinnati Underwriters Agency Co., 58 S.Ct. 14, 302 U.S. 696, 82 L.Ed. 537—Alexander Pickering & Co. v. Chinese American Cold Storage Ass'n, C.C.A.China, 71 F.2d 895, certiorari denied 55 S.Ct. 122, 293 U.S. 606, 79 L.Ed. 697—International Ticket Scale Corporation v. International Ticket Scale Corporation of Chicago, Ill., C.C.A.Ill., 56 F.2d 969—Dry Ice Corporation of America v. Josephson, D.C.N.Y., 43 F.2d 408—North River Ins. Co. v. Becnel, C. C.A.La., 33 F.2d 231, certiorari denied 50 S.Ct. 39, 280 U.S. 592, 74 L.Ed. 640—Van de Putte v. Texas Pacific Coal & Oil Co., D.C.Mont., 35 F.Supp. 794—Cook v. Des Moines Union Ry. Co., D.C.Iowa, 16 F. Supp. 810—A. Magnus Sons Co. v. Orey, C.C.A.Or., 287 F. 1—Ford Motor Co. v. Hotel Woodward Co., C.C.A.N.Y., 271 F. 625, certiorari denied 41 S.Ct. 537, 256 U.S. 698, 65 L.Ed. 1177, and 42 S.Ct. 590, 259 U.S. 588, 66 L.Ed. 1078.
Ala.—American Mut. Liability Ins. Co. of Boston v. Tuscaloosa Veneer Co., 186 So. 133, 237 Ala. 187—Metcalf v. Montgomery, 155 So. 582, 229 Ala. 156.
Ariz.—Loganbill v. Zook, 3 P.2d 273, 38 Ariz. 540—Miller Cattle Co. v. Francis, 298 P. 631, 38 Ariz. 197—Miller Cattle Co. v. Francis, 281 P. 211, 35 Ariz. 535.
Ark.—Metropolitan Life Ins. Co. v. Reynolds, 109 S.W.2d 675, 194 Ark. 716—National Rys. Advertising Co. v. E. L. Bruce Co., 220 S.W. 48, 143 Ark. 292—Ellege v. Henderson, 218 S.W. 831, 142 Ark. 421—Johnson v. Missouri Pac. R. Co., 214 S.W. 17, 139 Ark. 507.
Cal.—California Canning Peach Growers v. Williams, 78 P.2d 1154, 11 Cal.2d 221—California Canning Peach Growers v. Harkey, 78 P.2d 1137, 11 Cal.2d 188—People v. Ganahl Lumber Co., 75 P.2d 1067, 10 Cal.2d 501—G. R. Holcomb Estate Co. v. Burke, 48 P.2d 669, 4 Cal.2d 289—Crawford v. France, 27 P.2d 645, 219 Cal. 439—U. S. Building & Loan Ass'n of Los Angeles v. Salisbury, 17 P.2d 140, 217 Cal. 35—Cristina v. Mattenberger, 300 P. 450, 212 Cal. 670—Klopputh v. McCord, 296 P. 882, 211 Cal. 734—Broome v. Lantz, 294 P. 709, 211 Cal. 142, certiorari denied Lantz v. Broome, 52 S.Ct. 9, 284 U.S. 621, 76 L.Ed. 530—Petroleum Midway Co. v. Moynier, 272 P. 740, 205 Cal. 733—Brusseau v. Hill, 256 P. 419, 201 Cal. 225, 55 A.L.R. 157—Nourse v. Kovacevich, App., 109 P.2d 999—Palm Springs-La Quinta Development Co. v. Palm Springs Land & Irrigation Co., 98 P.2d 530, 36 Cal.App.2d 730—Edwards v. Lewis, 76 P.2d 720, 25 Cal.App.2d 168—Kohl v. Lytle Creek Water & Improvement Co., 75 P.2d 71, 24 Cal. App.2d 353—Hower v. Woman's Home Missionary Soc. of California Conference of M. E. Church, 41 P.2d 583, 4 Cal.App.2d 719—Spraul v. Gurliepp & Mack, 32 P.2d 657, 138 Cal.App. 491—Kern v. Henry, 31 P.2d 454, 138 Cal.App. 46—Citizens' Nat. Trust & Savings Bank of Los Angeles v. Arrowhead Springs Beverage Co., 14 P.2d 821, 126 Cal.App. 550—Stacy-Judd v. Stone, 12 P.2d 143, 124 Cal.App. 165—Marlin v. Robinson, 11 P.2d 70, 123 Cal.App. 373—Koenig v. Steinbach, 6 P.2d 525, 119 Cal.App. 425—Bonner v. Finney, 294 P. 466, 110 Cal.App. 518—Branch v. Bekins Van & Storage Co., 290 P. 146, 106 Cal.App. 623—Lewis Pub. Co. v. Henderson, 284 P. 713, 103 Cal. App. 425—Rowell v. Western Motor Transport Co., 270 P. 400, 94 Cal.App. 12—Todd v. Meserve, 269

P. 710, 93 Cal.App. 370—Klegman v. Moyer, 266 P. 1009, 91 Cal.App. 333—Hind v. Uchida Trading Co., 203 P. 1028, 55 Cal.App. 260—Curtin v. Moran & Co., 194 P. 1049, 50 Cal.App. 176—Brett v. Vanomar Producers, 187 P. 758, 45 Cal.App. 286.

Colo.—Greater Service Homebuilders' Inv. Ass'n v. Albright, 293 P. 345, 88 Colo. 146.

D.C.—H. Herfurth, Jr., Inc., v. U. S., to Use of Squire, 85 F.2d 719, 66 App.D.C. 220—District of Columbia v. North-Eastern Const. Co., 70 F.2d 779, 63 App.D.C. 175.

Fla.—McClure v. Century Estates, 120 So. 4, 96 Fla. 568, followed in Hall v. University Realty Co., 121 So. 808, 97 Fla. 639.

Ga.—Bass v. African Methodist Episcopal Church, 116 S.E. 816, 155 Ga. 57—Russ v. Myrick, 115 S.E. 644, 154 Ga. 829—Davis v. Jones, 112 S.E. 891, 153 Ga. 639—Atlanta Banking & Savings Co. v. Chastain, 104 S.E. 628, 150 Ga. 640—Tilley v. Malcolm, 101 S.E. 127, 149 Ga. 514—Commercial Credit Co. v. Lewis, 200 S.E. 566, 59 Ga.App. 144—Florence v. State Highway Board, 196 S.E. 86, 57 Ga.App. 752—Niagara Sprayer & Chemical Co. v. Cotton States Fertilizer Co., 173 S.E. 460, 48 Ga.App. 779—Jenks v. Billingsley, 146 S.E. 649, 39 Ga.App. 243—Mendel v. Converse & Co., 118 S.E. 586, 30 Ga.App. 549—McCreary v. Acton, 114 S.E. 230, 29 Ga.App. 162.

Idaho.—Hayes v. Flesher, 198 P. 678, 34 Idaho 13.

Ill.—Reilly Tar & Chemical Corporation v. Lewis, 23 N.E.2d 243, 301 Ill.App. 459—Stevens v. Blue, 20 N.E.2d 855, 300 Ill.App. 133—Lyon & Healy v. Central States Hotel Co., 16 N.E.2d 155, 296 Ill.App. 245—Keefer Coal Co. of Illinois v. United Electric Coal Cos., 10 N.E. 2d 210, 291 Ill.App. 477—Volandus v. Melaucksis, 227 Ill.App. 355. See Corwin v. L'Anse Quarries Co., 211 Ill.App. 305.

Ind.—Old First Nat. Bank & Trust Co. v. Scheuman, 13 N.E.2d 551, 214 Ind. 652, 119 A.L.R. 1165—Morse v. Morse, App., 27 N.E.2d 392—Valparaiso Hotel Co. v. Schneider, 195 N.E. 589, 100 Ind. App. 341—Estes v. Anderson Oil Co., 176 N.E. 560, 93 Ind.App. 365, reversing 171 N.E. 925—Hilgemeier v. Bower Mfg. Co., 139 N.E. 691, 81 Ind.App. 191—La Valle v. Fox, 134 N.E. 674, 78 Ind.App. 31.

Iowa.—Vorthmann v. Great Lakes Pipe Line Co., 289 N.W. 746—R. P. Andreas & Son v. Hempy, 276 N. W. 791, 224 Iowa 561—Zimbelman v. Boone Coal, 263 N.W. 335, 220 Iowa 1310—Sol Popofsky Co. v. Wearmouth, 248 N.W. 358, 216 Iowa 114—Rath v. Schoon, 182 N. W. 180, 192 Iowa 180.

Kan.—McComas v. Siedhoff, 106 P.2d 674, 152 Kan. 546—Whitacre v. State Bank of Keats, 26 P.2d 584, 138 Kan. 313—Miami Ocean View Co. v. Phillips, 19 P.2d 690, 137 Kan. 46—Robben v. Farmers' Co-op. Co., 278 P. 10, 128 Kan. 310.

Ky.—Maynard v. McHenry, 113 S.W. 2d 13, 271 Ky. 642—Rosa v. Nava, 31 S.W.2d 910, 235 Ky. 574—Boone, Foreman & Lackey v. Halteman & Cave Ins. Agency, 11 S.W.2d 973, 226 Ky. 839—Jones v. Riddell, 5 S. W.2d 1077, 224 Ky. 245—Baumer v. T. A. Miller Land Co., 283 S.W. 76, 214 Ky. 259—Calloway v. Bryant, 263 S.W. 687, 204 Ky. 160.

La.—Hamill v. Moore, 193 So. 715, 194 La. 486—Nabors Oil Corporation v. Samuels, 143 So. 330, 175 La. 371—Tremont Lumber Co. v. Peavy, 110 So. 79, 162 La. 35—Catherine Planting & Mfg. Co. v. Pointe Coupee Trust & Savings Bank, 107 So. 711, 160 La. 957.

Md.—Kalavan v. Hamburger, 13 A. 2d 343, 178 Md. 218—Keyser v. Kemper, 146 A. 275, 157 Md. 437, 65 A.L.R. 641—Pryor v. Pryor, 131 A. 47, 146 Md. 683.

Mass.—Coleman Bros. Corporation v. Commonwealth, 29 N.E.2d 832, 307 Mass. 205—Oldfield v. Smith, 24 N.E.2d 544, 304 Mass. 590—Kesslen Shoe Co. v. Philadelphia Fire & Marine Ins. Co., 3 N.E.2d 257, 295 Mass. 123—Burr v. Peacock, 158 N.E. 664, 292 Mass. 466—Donovan v. Travers, 188 N.E. 705, 285 Mass. 167—Nickel v. Zeitz, 154 N.E. 769, 258 Mass. 282—Sudhalter v. Oberstein, 138 N.E. 801, 244 Mass. 442—Pearlstein v. Novitch, 131 N.E. 853, 239 Mass. 228.

Mich.—Hall v. Equitable Life Assur. Soc. of U. S., 295 N.W. 204, 295 Mich. 404—Valentine v. King Mfg. Co., 245 N.W. 529, 260 Mich. 601—Grover v. Gratiot Macomb Development Co., 240 N.W. 66, 257 Mich. 26—Cook v. Schwemler, 235 N.W. 219, 253 Mich. 458—Pierson v. Davidson, 233 N.W. 329, 252 Mich. 319—Unruh v. De Wolf, 231 N.W. 92, 251 Mich. 38—Strand Amusement Co. v. Hall, 222 N.W. 85, 244 Mich. 656—McIntosh v. Groomes, 198 N.W. 954, 227 Mich. 215—Elbom v. Pavsner, 196 N.W. 442, 225 Mich. 213—Michigan Crown Fender Co. v. Welch, 178 N.W. 684, 211 Mich. 148, 13 A.L.R. 896.

Minn.—State Bank of Monticello v. Lauterbach, 268 N.W. 918, 198 Minn. 98.

Miss.—Carter v. Collins, 117 So. 336, 151 Miss. 1—Hessig-Ellis Drug Co. v. Parks, 116 So. 435, 150 Miss. 322.

Mo.—Missouri Service Co. v. City of Stanberry, 108 S.W.2d 25, 341 Mo. 500—Sebastian County Coal & Mining Co. v. Mayer, 274 S.W. 770, 310 Mo. 104—Willson v. Chicago Bonding & Surety Co., 214 S.W. 371—Worthington Drainage Dist. of Schuyler County and Putnam County v. Davis, App., 151 S.W.2d 469—Baptiste Tent & Awning Co. v. Uhri, App., 129 S.W.2d 9—Johnston v. Dickerson, 127 S.W.2d 64, 233 Mo.App. 762—Hellrung v. Viviano, App., 7 S.W.2d 288—Wolfe v. Stark Bros. Nurseries & Orchards Co., App., 288 S.W. 1004—Ebbs v. Neff, 282 S.W. 74, 220 Mo. App. 1070—Foulke v. Hickman, App., 259 S.W. 496—Price v. Culler, App., 253 S.W. 1096—Kuder v. Rowan, 237 S.W. 188, 208 Mo.App. 480—Mayfield v. George O. Richardson Machinery Co., 231 S.W. 288, 208 Mo.App. 206.

Mont.—New Home Sewing Mach. Co. v. Songer, 7 P.2d 238, 91 Mont. 137—Musselshell Valley Farming & Livestock Co. v. Cooley, 283 P. 213, 86 Mont. 276—Parham v. Chicago, M. & St. P. Ry. Co., 189 P. 227, 57 Mont. 492.

Neb.—Elvidge v. Brant, 267 N.W. 169, 131 Neb. 1—Machurek v. Ohio Nat. Life Ins. Co., 249 N.W. 81, 125 Neb. 35—State v. Commercial Casualty Ins. Co., 248 N.W. 807, 810, 125 Neb. 43, 88 A.L.R. 790, citing **Corpus Juris**.

N.J.—Garon v. Becker, 197 A. 892, 120 N.J.Law 30, affirmed 1 A.2d 376, 121 N.J.Law 73—Journal Plaza Holding Co. v. J. H. L. Co., 152 A. 14, 107 N.J.Eq. 14, reversing 147 A. 581, 105 N.J.Eq. 290.

N.M.—Collender v. Levers, 34 P.2d 1089, 38 N.M. 436—Franciscan Hotel Co. v. Albuquerque Hotel Co., 24 P.2d 718, 37 N.M. 456—Burns v. Heron, 13 P.2d 875, 36 N.M. 270.

N.Y.—Cordua v. Guggenheim, 8 N.E. 2d 274, 274 N.Y. 51, reversing In re Andrew's Will, 290 N.Y.S. 427, 248 App.Div. 771—In re Oakes, 162 N.E. 79, 248 N.Y. 280, reversing in part 222 N.Y.S. 864, 220 App. Div. 758—Sun Oil Co. v. Heller, 161 N.E. 319, 248 N.Y. 28, affirming 225 N.Y.S. 912, 222 App.Div. 665—A. W. Burritt Co. v. Palmer-Marcy Co., 140 N.E. 221, 236 N.Y. 135, reversing 194 N.Y.S. 915—U. S. Printing & Lithograph Co. v. Powers, 135 N.E. 225, 233 N.Y. 143, reversing 187 N.Y.S. 957, 196 App.Div. 934—Lee v. Industrial Laundry Mach. Co., 27 N.Y.S.2d 202, 261 App.Div. 741—Geller v. Tow, 27 N.Y.S.2d 138, 261 App. Div. 773—Adams v. Judson, 277 N. Y.S. 304, 243 App.Div. 404—Morris v. Morris, 254 N.Y.S. 429, 234 App. Div. 187, affirming 247 N.Y.S. 28, 138 Misc. 682, and affirmed 184 N.E. 131, 260 N.Y. 650—McCarthy v. Krebs Pigment & Chemical Co., 198 N.Y.S. 545, 204 App.Div. 501, reversing 194 N.Y.S. 138, 118 Misc. 566—Hausman v. Buchman, 179 N. Y.S. 26, 189 App.Div. 597—Markstein v. M. Ufland & Co., 214 N.Y.

S. 476, 126 Misc. 683—Windsor Residences v. 201 East 18th St. Corporation, 25 N.Y.S.2d 329—Dairymen's League Co-op. Ass'n v. Metropolitan Casualty Ins. Co. of New York, 8 N.Y.S.2d 403, affirmed 15 N.Y.S.2d 664, 258 App.Div. 847, reargument denied 17 N.Y.S.2d 1002, 258 App.Div. 1030.

N.C.—Williams v. Greensboro Fire Ins. Co., 185 S.E. 21, 209 N.C. 765—Robinson v. Benton, 161 S.E. 208, 201 N.C. 712—Hughes & Ray v. Mitchell County, 145 S.E. 609, 196 N.C. 343—Hite v. Aydlett, 134 S.E. 419, 192 N.C. 166—Miller v. Green, 112 S.E. 417, 183 N.C. 652.

Ohio.—Fairmont Creamery Co. v. Ewing, 182 N.E. 883, 43 Ohio App. 191.

Okl.—Pepis v. Red Bank Oil Co., 44 P.2d 846, 170 Okl. 189—Wilson v. Olsen, 30 P.2d 710, 167 Okl. 527—Woods v. Davis, 7 P.2d 905, 155 Okl. 6—Moore v. Henry H. Cross Co., 275 P. 1061, 135 Okl. 235—Swift v. McMurray, 271 P. 635, 133 Okl. 104—J. R. Rice Co. v. Hardeman-King Co., 265 P. 102, 130 Okl. 48—White v. Kroeger, 186 P. 477, 77 Okl. 46, followed in 186 P. 478, 77 Okl. 48.

Or.—Wilkens v. Western States Grocery Co., 114 P.2d 542—Klinge v. Farris, 273 P. 954, 128 Or. 142, affirming 268 P. 748, 128 Or. 142—Jaloff v. United Auto Indemnity Exchange, 250 P. 717, 120 Or. 381—Sig C. Mayer & Co. v. Smith, 230 P. 355, 112 Or. 559.

Pa.—Security Trust Co. of Pottstown v. Stapp, 1 A.2d 236, 332 Pa. 9—City of Philadelphia v. National Surety Co., 173 A. 181, 315 Pa. 356—Laney v. Columbia Natural Gas Co., 158 A. 266, 305 Pa. 527—Schwartz v. Whelan, 145 A. 525, 295 Pa. 425, 65 A.L.R. 277—Lever v. Lagomarsino, 127 A. 452, 282 Pa. 110—Massiah v. Hood, 10 A.2d 79, 138 Pa.Super. 90—In re Sarver's Estate, 200 A. 709, 711, 132 Pa. Super. 238, citing **Corpus Juris**—Frechie v. Boyd, 100 Pa.Super. 553—Cassone v. Kauffman, 19 Lehigh L.J. 1.

R.I.—Goggin v. Goggin, 194 A. 730, 59 R.I. 145, 113 A.L.R. 569—Limerick v. Lemerie, 167 A. 260—Costantino v. Costantino, 163 A. 223—Continental Illustrating Co. v. Longley Motor Sales Co., 113 A. 869, 43 R.I. 552.

S.C.—John T. Stanley Co. v. Kaufman, 171 S.E. 32, 170 S.C. 521—Charles v. West, 152 S.E. 644, 155 S.C. 488—De Vore v. Piedmont Ins. Co., 142 S.E. 593, 144 S.C. 417—Goddard v. Bulow, 10 S.C.L. 45, 9 Am.D. 663.

S.D.—Jensen v. Jensen's Estate, 253 N.W. 619, 62 S.D. 496—Independent Harvester Co. v. Anderson, 186 N.W. 112, 45 S.D. 60.

Tenn.—Hood Rubber Products Co. v. Malone, 8 Tenn.App. 456.

Tex.—Houston Oil Co. of Texas v. Kirkindall, 145 S.W.2d 1074, affirming Humble Oil & Refining Co. v. Kirkindall, Civ.App., 119 S.W.2d 731—Blake v. Pure Oil Co., 100 S.W.2d 1009, 128 Tex. 536, reversing, Civ.App., 68 S.W.2d 244—Higginbotham Cattle Co. v. Whaley & Lewis, Com.App., 41 S.W.2d 34, reversing, Civ.App., 26 S.W.2d 308—Hart v. Light & Jones, Com.App., 245 S.W. 671, reversing Light v. Hart, Civ.App., 193 S.W. 740—Richardson v. Wilson, 213 S.W. 613, reversing, Civ.App., 178 S.W. 566—Butler v. Southwest Dairy Products Co., Civ.App., 146 S.W.2d 1036, error dismissed, judgment correct—Jones v. First State Bank of Dumas, Civ.App., 145 S.W. 2d 681—C. V. Hill & Co. v. Parker, Civ.App., 145 S.W.2d 330—Texas Co. v. Foshee, Civ.App., 142 S.W.2d 603, error refused—Century Indemnity Co. v. Carnes, Civ.App., 138 S.W.2d 555, error dismissed, judgment correct—Williamson v. Diltz, Civ.App., 101 S.W.2d 833, error dismissed—Texas Co. v. Schram, Civ.App., 93 S.W.2d 544—Sanderson v. Sanderson, Civ.App., 82 S.W.2d 1008, affirmed 109 S.W. 2d 744, 30 Tex. 264—Young v. Williams, Civ.App., 80 S.W.2d 399, error refused—Commercial Securities Co. v. Rea, Civ.App., 78 S.W. 2d 707, affirmed 105 S.W.2d 872, 130 Tex. 11—Ætna Casualty & Surety Co. v. Higginbotham-Bartlett Co., Civ.App., 71 S.W.2d 592, error refused—City Investment & Loan Co. v. Wichita Hardware Co., Civ.App., 57 S.W.2d 222, modified on other grounds 91 S.W.2d 683, 127 Tex. 44—Swindell v. Stephens, Civ.App., 35 S.W.2d 1052, error refused—Lunsford v. Pearce, Civ. App., 19 S.W.2d 71—Great Plains Oil & Gas Co. v. Cox, Civ.App., 5 S.W.2d 796—Somerset Pipe Line Co. v. Pioneer Oil & Refining Co., Civ.App., 289 S.W. 155—American Refining Co. v. Sims Oil Co., Civ. App., 282 S.W. 894, affirmed Simms Oil Co. v. American Refining Co., Com.App., 288 S.W. 163—Stevens v. Palmour, Civ.App., 269 S.W. 1057—Wagner v. Davis, Civ.App., 268 S.W. 278—Miller v. Wilson, Civ.App., 258 S.W. 540—Britton v. Baxley, Civ.App., 252 S.W. 880—Willson v. Riley, Civ.App., 240 S.W. 626—Ranger Cisco Oil Co. v. Consolidated Oil Co. of Texas, Civ. App., 239 S.W. 648, dismissed for want of jurisdiction—Gladney Milling Co. v. Dement, Civ.App., 230 S.W. 1038.

Utah.—Starley v. Deseret Foods Corporation, 74 P.2d 1221, 93 Utah 577—Penn Star Mining Co. v. Lyman, 231 P. 107, 64 Utah 343.

Vt.—W. T. Rawleigh Co. v. Kent, 143 A. 288, 101 Vt. 220.

Va.—Huffman v. Landes, 177 S.E. 200, 163 Va. 652—Stewart-Warner Corporation v. Smithey, 175 S.E. 882, 163 Va. 476—Wellington, Sears & Co. v. King, 161 S.E. 889, 157 Va. 767—City of South Norfolk v. Wolcott, 125 S.E. 687, 140 Va. 611.

Wash.—First Nat. Bank v. Hemrich, 58 P.2d 827, 186 Wash. 499—Dioguardi v. Haddow, 8 P.2d 978, 167 Wash. 62—Yarno v. Hedlund Box & Lumber Co., 225 P. 659, 129 Wash. 457, modified on other grounds 227 P. 518, 129 Wash. 457—Kane v. Gwinn Inv. Co., 212 P. 256, 123 Wash. 320—Greenwood v. International Harvester Co., 211 P. 727, 122 Wash. 603.

W.Va.—Berry v. O'Dell, 7 S.E.2d 340—Henson v. Lamb, 199 S.E. 459, 120 W.Va. 552—Hodge v. Garten, 182 S.E. 582, 116 W.Va. 564—Harvey v. Dwyer, 150 S.E. 235, 108 W. Va. 85—Sycamore Coal Co. v. Adkins, 133 S.E. 330, 101 W.Va. 211.

Wis.—Bahr v. Evangelical Lutheran St. John's Soc. of Poynette, 295 N.W. 700, 236 Wis. 490—Milwaukee County v. Badger Chair & Furniture Co., 269 N.W. 659, 223 Wis. 118—Koskey v. Harnischfeger Corporation, 265 N.W. 583, 221 Wis. 267—Firestone Tire & Rubber Co. v. Werner, 236 N.W. 118, 204 Wis. 306—Piszczek v. Ziolkowski, 227 N.W. 237, 200 Wis. 22—George A. Peterson Co. v. Iowa County, 191 N.W. 565, 179 Wis. 329.

22 C.J. p 1175 note 44—22 C.J. p 1112 note 43, 5 C.J. p 1019 note 36—10 C.J. p 199 note 91—31 C.J. p 974 note 5—33 C.J. p 115 note 51.

Bills, notes, or acceptances

(1) When the issue of ambiguity is raised in a controversy involving negotiable notes, as between the original parties and those standing in the shoes of such parties or against those taking with notice parol testimony is admissible to show the true facts.

U.S.—Basile v. California Packing Corporation, C.C.A.Cal., 25 F.2d 576—Nyssa-Arcadia Drainage Dist. v. First Nat. Bank, D.C.Or., 3 F.2d 648.

Ala.—Stephens v. Mitchell, 137 So. 426, 223 Ala. 531—Dozier v. Vizard Inv. Co., 83 So. 572, 203 Ala. 421.

Ga.—Southern Crushed Stone & Granite Co. v. Dorn, 141 S.E. 59, 37 Ga.App. 564.

Idaho.—Taylor v. Fluharty, 239 P. 1049, 41 Idaho 511.

Ill.—Jefferson Trust & Savings Bank of Peoria v. W. Heller & Son, 16 N.E.2d 433, 296 Ill.App. 447.

Tenn.—Commerce Union Bank v. Jackson, 111 S.W.2d 870, 21 Tenn. App. 412.

Tex.—McFarland v. Shaw, Com.App., 45 S.W.2d 193, reversing Shaw v.

facts ascertainable only by extrinsic evidence a resort to such evidence is necessarily permitted.[56] So also, if there is doubt and uncertainty, not about what the substance of the contract is, but as to its peculiar application, it may be explained and properly directed.[57] It is not every contract of vague or obscure meaning, however, that calls for or will admit of other evidence to aid in its interpretation.[58] If the paper itself affords a reasonably clear understanding of what the parties have engaged themselves to do, extrinsic evidence is not admissible to arrive at its meaning.[59] If, on the other hand, after the exhaustion of the resources of the paper itself, its meaning is still obscure, extrinsic evidence is admissible to arrive at its meaning.[60]

An "ambiguity" in a writing which will warrant the introduction of parol evidence is duplicity, indistinctness, or an uncertainty of meaning or expression,[61] and a mere omission or mistake is not an ambiguity.[62] Language is ambiguous within the parol evidence rule when it is reasonably construable in more than one sense.[63] As otherwise stated, a contract is ambiguous when its meaning can-

McFarland, Civ.App., 28 S.W.2d 563—Jones v. First State Bank of Dumas, Civ.App., 145 S.W.2d 681—City Investment & Loan Co. v. Wichita Hardware Co., Civ.App., 57 S.W.2d 222, modified on other grounds 91 S.W.2d 683, 127 Tex. 44.

W.Va.—Boardman v. Frick, 120 S.E. 883, 95 W.Va. 263.

22 C.J. p 1175 note 44 [e].

(2) The term "ambiguous," used with reference to note, means uncertain because susceptible of more than one meaning.—City Investment & Loan Co. v. Wichita Hardware Co., Civ.App., 57 S.W.2d 222, modified on other grounds 91 S.W.2d 683, 127 Tex. 44.

(3) In action on note which carried no signature on its face and carried all signatures on its reverse side, parol evidence was admissible to show whether the signatures were placed on the reverse side as makers or as indorsers, since the intention of the signers was not clear.—Garon v. Becker, 197 A. 892, 120 N.J.Law 30, affirmed 1 A.2d 376, 121 N.J.Law 73.

(4) Statute providing that one signing as other than maker, drawer, or acceptor is deemed an indorser unless he clearly indicates an intent to be bound in some other capacity does not prevent inquiry by court into meaning of ambiguous indorsement, nor require treatment of ambiguous indorser as general indorser.—Cristina v. Mattenberger, 300 P. 450, 212 Cal. 670.

(5) The words "without recourse," following the name of the first, and preceding the name of a second, indorser of a bill or note may be shown by parol evidence to apply to the former instead of the latter.

Kan.—Leahmer v. McCullough, 162 P. 297, 99 Kan. 451.

Ky.—Goolrick v. Wallace, 157 S.W. 920, 154 Ky. 596, 49 L.R.A.,N.S., 789.

Neb.—Corbett v. Fetzer, 66 N.W. 417, 47 Neb. 269.

Nature of ambiguity

An ambiguity, in order to authorize parol evidence, must relate to a subject treated of in the paper and must arise out of words used in treating that subject.—Southampton v. Jessup, 65 N.E. 949, 173 N.Y. 84, modifying 72 N.Y.S. 312, 780, 64 App.Div. 525—Johnson v. State, 175 N.Y.S. 234, 104 Misc. 201, affirmed 175 N.Y.S. 784, 188 App.Div. 33.

Resolutions or other minutes of corporation

U.S.—Thermopolis Northwest Electric Co. v. Ireland, C.C.A.Wyo., 119 F.2d 409.

Ky.—Bennett v. Madison Sales Co., 95 S.W.2d 604, 264 Ky. 728.

Use of broadly descriptive terms and latitudinarian expressions of indemnity bond justified resort to extrinsic proof to ascertain what bond included.—Southwest Nat. Bank v. Employers' Indemnity Corporation, Tex.Com.App., 12 S.W.2d 189, reversing Employers' Indemnity Corporation v. Southwest Nat. Bank, Civ. App., 299 S.W. 676.

Lines run by surveyor

(1) Where calls in field notes are conflicting or ambiguous, parol evidence is admissible to show where a survey or a line of a survey was actually made on the ground.—Blake v Pure Oil Co., 100 S.W.2d 1009, 128 Tex. 536, reversing, Civ.App., 68 S.W.2d 244.

(2) A grant of land should be established by the calls of its own field notes, but if a conflict exists in the calls parol evidence may be introduced to relieve doubt and locate the lines which were actually run by the surveyor.—Whittenburg v. Jameson, Tex.Civ.App., 143 S.W.2d 668.

56. Mich.—Edoff v. Hecht, 260 N.W. 93, 96, 270 Mich. 689, quoting **Corpus Juris.**

Tex.—Barker v. Fagg, Civ.App., 107 S.W.2d 490.

22 C.J. p 1176 note 45.

How agreement to be carried out

Where language of written agreement is ambiguous or otherwise doubtful, parol evidence is admissible, not to contradict, alter, or vary terms of written agreement, but rather to explain how agreement was to be carried out.—Meserve v. Traverso, 197 A. 54, 119 N.J.Law 566, affirming 192 A. 835, 15 N.J.Misc. 554.

57. U.S.—In re Atwater, C.C.A.N.Y., 266 F. 278, certiorari granted Atwater v. Guernsey, 41 S.Ct. 13, 254 U.S. 624, 65 L.Ed. 444. Affirmed 41 S.Ct. 150, 254 U.S. 423, 65 L.Ed. 339.

Mich.—Edoff v. Hecht, 260 N.W. 93, 96, 270 Mich. 689, quoting **Corpus Juris.**

22 C.J. p 1177 note 46.

Admissibility of parol evidence to apply writing to its subject matter see infra § 1007.

58. Ky.—Akins v. City of Covington, 97 S.W.2d 588, 265 Ky. 740.

59. Cal.—Palma v. Leslie, 45 P.2d 391, 6 Cal.App.2d 702.

Ky.—Harmon v. Thompson, 84 S.W. 2d 569, 119 Ky. 528, 27 Ky.L. 181.

60. Ky.—Atkins v. City of Covington, 97 S.W.2d 588, 265 Ky. 740.

61. Ga.—Tarbutton v. Duggan, 163 S.E. 298, 45 Ga.App. 31.

Memorandum of sale

Since a memorandum of sale, as distinguished from a contract of sale, is understood to be a note or a minute informally made of the agreement, there is much more likelihood of an ambiguity lurking in a memorandum than in a contract.—International Trading Co. of America v. John Sexton & Co., C.C.A.Ill., 24 F.2d 12.

Necessity of resorting to description of rights reserved in deed is some indication that what is included in substance reserved is not clear, as respects parol evidence.—Beury v. Shelton, 144 S.E. 629, 151 Va. 28.

62. Mich.—Michigan Chandelier Co. v. Morse, 297 N.W. 64, 297 Mich. 41—Zilwaukee Tp. v. Saginaw Bay City Ry. Co., 181 N.W. 37, 213 Mich. 61.

Blanks may create ambiguity

U.S.—Harris v. Travelers Ins. Co., C.C.A.Tex., 80 F.2d 127.

63. Tex.—Jarecki Mfg. Co. v. Hinds, Civ.App., 295 S.W. 274, error dismissed, Com.App., 6 S.W.2d 343.

Wis.—Wheelwright v. Pure Milk Ass'n, 240 N.W. 769, 208 Wis. 40,

not be ascertained within its four corners,[64] and if a written contract is so worded that it can be given a certain or definite legal meaning or interpretation it is not ambiguous.[65] Whether there is ambiguity in a writing must be determined from a reading of the writing itself,[66] and before extrinsic evidence is admissible the court must determine that the writing is ambiguous or incomplete.[67]

The rule admitting parol or extrinsic evidence for the purpose of aiding in the construction of a writing applies to judicial records,[68] and to official writings or proceedings[69] as well as to private writings.

Where the language used is clear and unambiguous, extrinsic evidence is not admissible on the ground of aiding the construction, for in such case the only thing which could be accomplished would be to show the meaning of the writing to be other than what its terms express,[70] and the instrument cannot be varied or contradicted under the guise of

motion denied 242 N.W. 486, 208 Wis. 40.

64. Ariz.—Miller Cattle Co. v. Francis, 298 P. 631, 38 Ariz. 197.

Evidence to render contract ambiguous

Parol evidence is not admissible to render a written contract ambiguous, which, on its face, is capable of being given a definite certain legal meaning.—Lewis v. East Texas Finance Co., Tex., 146 S.W.2d 977, reversing, Civ.App., 123 S.W.2d 803.

65. Tex.—Remington Rand v. Sugarland Industries, Com.App., 153 S.W.2d 477, reversing, Civ.App., 122 S.W.2d 729—Lewis v. East Texas Finance Co., 146 S.W.2d 977, reversing, Civ.App., 123 S.W.2d 803.

Evidence properly rejected

Where contract would permit of reasonable interpretation without resort to extrinsic evidence, rejection of parol evidence to aid in interpretation and of proof of a contemporaneous oral contract was proper, since contract was complete in itself.—Big Boy Drilling Corporation v. Etheridge, Cal.App., 111 P.2d 953.

Intelligent construction

Where the terms of an agreement are so ambiguous as not to be susceptible of intelligent construction, parol evidence may be admitted to make clear that which is obscure.—Bank of Napoleonville v. Knobloch & Rainold, 80 So. 214, 144 La. 100.

66. Mich.—Quisle v. Brezner, 180 N.W. 467, 212 Mich. 254.

Mo.—Lion Match Co. v. Hess, App., 253 S.W. 108.

Person of competent skill

A written instrument is ambiguous only when found to be of uncertain meaning by persons of competent skill and information.

Iowa.—Comptograph Co. v. Burroughs Adding Mach. Co., 159 N.W. 465, 179 Iowa 83.

N.Y.—In re Billings' Estate, 249 N.Y.S. 732, 139 Misc. 496, granting application to reopen 244 N.Y.S. 686, 137 Misc. 758.

67. Ill.—Schneider v. Neubert, 139 N.E. 84, 308 Ill. 40.

Question of law

Whether there is ambiguity in written instrument authorizing introduction of parol testimony is "question of law" for determination by court and not by jury.—Butler v. Southwest Dairy Products Co., Tex. Civ.App., 146 S.W.2d 1036, error dismissed, judgment correct—Jones v. Sun Oil Co., Tex.Civ.App., 110 S.W.2d 80, error refused—Graham's Estate v. Stewart, Tex.Civ.App., 15 S.W.2d 72, error refused.

68. U.S.—In re Crystal Ice & Fuel Co., D.C.Mont., 283 F. 1007.

Ariz.—Anderson v. State, 96 P.2d 281, 54 Ariz. 387, 126 A.L.R. 501.

Del.—Dolby v. Whaley, Super., 197 A. 161.

Iowa.—Hawkeye Securities Fire Ins. Co. v. United Inv. Co., 251 N.W. 874, 217 Iowa 644.

Minn.—In re Fiske's Estate, 291 N.W. 289, 207 Minn. 44.

Ohio.—Woodruff v. Paschen, 15 Ohio App. 276, affirmed 137 N.E. 867, 105 Ohio St. 396.

Okl.—Magnolia Petroleum Co. v. State, 52 P.2d 81, 175 Okl. 11.

Pa.—Lansford Building & Loan Ass'n v. Sheerin, 190 A. 901, 325 Pa. 474.

Wis.—Green v. Loberg, 237 N.W. 274, 205 Wis. 221.

22 C.J. p 1177 note 47.

Statement of trial judge on granting judgment of divorce was admissible to explain ambiguity in judgment.—In re Kehl's Estate, 254 N.W. 639, 215 Wis. 353.

Immaterial ambiguity

That the commissioners' report and decree in a partition suit may be ambiguous in some respects immaterial to issues in subsequent litigation constitutes no warrant for going into the report and decree and making specific all parts deemed ambiguous.—Pickrell v. Pickrell, Tex. Civ.App., 134 S.W.2d 740.

Unambiguous judicial records are not subject to construction with the aid of extrinsic evidence.

U.S.—Gila Valley Irr. Dist. v. U. S., C.C.A.Ariz., 118 F.2d 507.

Or.—Butler v. Maas, 94 P.2d 1116, 163 Or. 201.

Tex.—Pickrell v. Pickrell, Civ.App., 134 S.W.2d 740—Missouri-Kansas-Texas R. Co. of Texas v. Pluto Civ.App., 130 S.W.2d 1048, error granted.

Wash.—Gardner v. Herbert, 5 P.2d 782, 165 Wash. 429.

69. Ill.—People ex rel. Toman v. M. Born & Co., 26 N.E.2d 848, 373 Ill. 490.

Ind.—Livengood v. Munns, App., 27 N.E.2d 92.

Miss.—Martin v. Smith, 105 So. 494, 140 Miss. 168—Jordan v. W. C. Griffin Land Co., 97 So. 513, 133 Miss. 78.

Mo.—State ex rel. School Dist. of Affton v. Smith, 80 S.W.2d 858, 336 Mo. 703.

Okl.—Schuman v. Campbell, 83 P.2d 549, 183 Okl. 553.

Pa.—Rochester Borough v. Pittsburgh, Ft. W. & C. Ry. Co., 123 A. 319, 278 Pa. 412—Bolay v. City of Philadelphia, 157 A. 374, 102 Pa.Super. 510.

S.C.—Mason v. Williams, 9 S.E.2d 537, 194 S.C. 290.

22 C.J. p 1177 note 48.

Land assessed and sold

Where one piece of land was assessed and sold, the purchaser, in order to sustain his title to an entirely different piece of land, will not be permitted to show by parol that the latter, and not the former, was intended to be assessed and sold.—H. Weston Lumber Co. v. Strahan, 90 So. 452, 128 Miss. 54.

Unambiguous writings may not be explained by parol evidence.—Pickrell v. Pickrell, Tex.Civ.App., 134 S.W.2d 740.

70. U.S.—Commissioner of Internal Revenue v. Gibbs-Preyer Trusts Nos. 1 and 2, C.C.A., 117 F.2d 619—Kline v. Yokom, C.C.A.Ill., 117 F.2d 370—Lincoln Nat. Life Ins. Co. v. Horwich, C.C.A.Ill., 115 F.2d 892—Price, Forbes & Co. v. Montgomery, C.C.A.Ill., 115 F.2d 611—Commissioners of Sewerage of City of Louisville v. Davis, C.C.A. Ky., 88 F.2d 797, modifying, D.C., Davis v. Commissioners of Sewerage of City of Louisville, 13 F. Supp. 672—Williams Pocahontas Coal Co. v. Berwind Land Co., C. C.A.W.Va., 76 F.2d 319, certiorari denied 56 S.Ct. 128, 296 U.S. 610, 80 L.Ed. 432—Beck v. Zurich General Accident & Liability Ins. Co., Limited, of Zurich, Switzerland, C.C.A.Ill., 62 F.2d 965—H. K. Re-

gar & Sons v. Scott & Williams, D.C.N.Y., 57 F.2d 242, reversed on other grounds, C.C.A., 63 F.2d 229—Continental Oil Co. v. Fisher Oil Co., C.C.A.Okl., 55 F.2d 14—Ries v. Dodson, C.C.A.Pa., 46 F.2d 68—Queen Ins. Co. of America v. Meyer Milling Co., C.C.A.Mo., 43 F.2d 885—Dry Ice Corporation of America v. Josephson, D.C.N.Y., 43 F.2d 408—Charlton Woolen Co. v. White, D.C.Mass., 27 F.Supp. 371—Doll v. Libin, D.C.Mont., 17 F. Supp. 546—Vital v. Kerr, C.C.A. N.Y., 297 F. 959, certiorari denied Bigio v. Kerr, 44 S.Ct. 637, 265 U. S. 592, 68 L.Ed. 1196—Logan v. Big Sandy Lumber Co., C.C.A.Ala., 296 F. 658—Wichita Petroleum Co. v. Winant, C.C.A.Tex., 295 F. 67—Joring v. Harriss, C.C.A.N.Y., 292 F. 974, certiorari denied 44 S.Ct. 37, 263 U.S. 710, 68 L.Ed. 518—Oriental Textile Mills v. Thompson Worsted Co., D.C.Pa., 273 F. 732.

Ala.—Henderson v. Noland, 189 So. 732, 238 Ala. 213, 123 A.L.R 483—Saint v. Britnell, 91 So. 310, 206 Ala. 533.

Ariz.—Wallace v. First Nat. Bank, 7 P.2d 586, 39 Ariz. 451—Miller Cattle Co. v. Mattice, 298 P. 640, 38 Ariz. 180—Rio Grande Oil Co. v. Upton Oil Co., 266 P. 3, 33 Ariz. 474—Merchants' & Stock Growers' Bank v. Marley, 264 P. 471, 33 Ariz. 294—Pass v. Stephens, 198 P. 712, 22 Ariz. 461.

Ark.—Bishop v. Melton, 152 S.W.2d 299—Johnson v. Johnson, 68 S.W. 2d 465, 188 Ark. 992—Quaile & Co. v. William Kelly Milling Co., 43 S.W.2d 369, 184 Ark. 717, 79 A.L.R. 183—Arkansas Amusement Corporation v. Kempner, 33 S.W.2d 42, 182 Ark. 897—Thane v. Merchants' & Farmers' Bank of Dumas, 7 S. W.2d 758, 177 Ark. 66—Batton v. Jones, 268 S.W. 857, 167 Ark. 478—Caldwell v. Dunn, 245 S.W. 809, 156 Ark. 126.

Cal.—California Canning Peach Growers v. Williams, 78 P.2d 1154, 11 Cal.2d 221—Joerger v. Pacific Gas & Electric Co., 276 P. 1017, 207 Cal. 8—Ohio Electric Car Co. v. Le Sage, 188 P. 982, 182 Cal. 450—Nourse v. Kovacevich, App., 109 P.2d 999—First Bond & Mortgage Co. of Glendale v. Malouf, 98 P.2d 824, 37 Cal.App.2d 74—Del Giorgio v. Powers, 81 P.2d 1006, 27 Cal. App.2d 668—Ayako Sakamu v. Zellerbach Paper Co., 77 P.2d 313, 25 Cal.App.2d 309—Cox v. Miller, 59 P.2d 628, 15 Cal.App.2d 494—Hammond Lumber Co. v. Danziger, 37 P.2d 517, 2 Cal.App. 197—Parkford v. Union Drilling & Petroleum Co., 5 P.2d 440, 118 Cal.App. 538—Security Trust & Savings Bank v. McAdoo, 293 P. 149, 109 Cal.App. 505—Southern California Music Co. v. Labes, 288 P. 1096, 106 Cal. App. 255—Morgan v. Green, 260 P. 596, 86 Cal.App. 216—Jones v. Coulter, 243 P. 487, 75 Cal.App. 540—Eastman v. Piper, 229 P. 1002, 68 Cal.App. 554—Silveira v. Associated Milk Producers, 219 P. 461, 63 Cal.App. 572—Petersen v. Bunting, 185 P. 508, 43 Cal.App. 707—Drake v. Tucker, 184 P. 502, 43 Cal.App. 53.

Conn.—Hamden Holding Corporation v. United Men's Shops, 18 A.2d 356, 127 Conn. 500.

Fla.—Carson v. Palmer, 190 So. 720, 139 Fla. 570.

Ga.—Calhoun v. Lemon, 14 S.E.2d 710—Tilley v. Malcolm, 101 S.E. 127, 149 Ga. 514—Georgia Lumber & Turpentine Co. v. Milltown Lumber Co., 109 S.E. 178, 27 Ga. App. 551.

Idaho.—Utah Const. Co. v. McIlwee, 266 P. 1094, 45 Idaho 707.

Ill.—Automatic Oil Heating Co. v. Lee, 16 N.E.2d 919, 296 Ill.App. 628—Sheets v. Security First Mortg. Co., 12 N.E.2d 324, 293 Ill. App. 222—North Avenue State Bank v. Nichols, 252 Ill.App. 366. See Fred Allen Automobile Supply Co. v. H. W. Johns-Manville Co., 211 Ill.App. 217.

Ind.—Michigan Pipe Co. v. Sullivan County Water Co., 127 N.E. 768, 190 Ind. 14, rehearing denied 129 N.E. 5, 190 Ind. 14—Unger v. McManus, 130 N.E. 146, 75 Ind.App. 595—Fenn v. American Rattan & Reed Mfg. Co., 130 N.E. 129, 75 Ind.App. 146.

Iowa.—Vorthmann v. Great Lakes Pipe Line Co., 289 N.W. 746—Hillje v. Tri-City Equipment Co., 275 N.W. 880, 224 Iowa 43—Commercial Nat. Bank of Waterloo v. Crissman & Linville, 242 N.W. 355, 214 Iowa 217, followed in Lauerman Bros. Co. v. Crissman & Linville, 242 N.W. 358—Van Liew v. Mally, 197 N.W. 299, 198 Iowa 347—Seibel v. Commonwealth Life Ins. Co., 190 N.W. 173, 194 Iowa 701—Rath v. Schoon, 182 N.W. 180, 192 Iowa 180.

Kan.—Gooch v. Wilcox, 11 P.2d 743, 135 Kan. 683—Hazelton v. Chaffin, 197 P. 870, 109 Kan. 175.

Ky.—Senters v. Elkhorn & Jellico Coal Co., 145 S.W.2d 848, 284 Ky. 667—Tarr v. Tarr's Ex'r, 82 S.W. 2d 810, 259 Ky. 638—Dawson v. Dawson, 11 S.W.2d 933, 226 Ky. 750—Calloway v. Bryant, 263 S.W. 687, 204 Ky. 160.

La.—Reid v. Lowden, 189 So. 286, 192 La. 811, affirming 185 So. 100—Landeche Bros. Co. v. New Orleans Coffee Co., 138 So. 513, 173 La. 701—Valley Securities Co. v. Stafford, 8 La.App. 607.

Me.—Clark's Case, 126 A. 18, 124 Me. 47.

Md.—American Weekly v. Patterson, 16 A.2d 912.

Mass.—Brand v. Suburban Land Co., 12 N.E.2d 737, 299 Mass. 336—National Shawmut Bank of Boston v. Citizens' Nat. Bank of Boston, 191 N.E. 647, 287 Mass. 329—Levin v. Century Indemnity Co., 181 N.E. 223, 279 Mass. 256—Cohen v. Bailly, 165 N.E. 7, 266 Mass. 39—Snider v. Deban, 144 N.E. 69, 249 Mass. 59—H. P. Hood & Sons v. Perry, 142 N.E. 794, 248 Mass. 350—Boston Consol. Gas Co. v. Folson, 130 N.E. 197, 237 Mass. 565—American Historical Soc. v Storer, 122 N.E. 392, 232 Mass. 372.

Mich.—Thomas v. Texas Co., 297 N. W. 490, 297 Mich. 275—Michigan Chandelier Co. v. Morse, 297 N.W. 64, 297 Mich. 41—Vobless v. Weisenthal, 292 N.W. 493, 293 Mich. 565—Roosevelt Park Protestant Reformed Church v. London, 292 N.W. 486, 293 Mich. 547—Frank D. Hovey Realty Corporation v. Kahan, 211 N.W. 48, 236 Mich. 683—Phelps v. Brevoort, 174 N.W. 281, 207 Mich. 429.

Minn.—Peterson v. Johnson Nut Co., 297 N.W. 178—Wendt v. Wallace, 247 N.W. 569, 188 Minn. 488—Ruthton Co-op. Creamery Co. v. Ruthton State Bank, 217 N.W. 133, 173 Minn. 255.

Miss.—Taylor v. C. I. T. Corporation, 191 So. 60, 187 Miss. 581—Stuart v. McCoy, 141 So. 899, 163 Miss. 551—Slush v. Foxworth, 111 So. 841, 146 Miss. 360.

Mo.—In re Wood's Estate, 232 S.W. 671, 288 Mo. 588—Wood v. Utter, 77 S.W.2d 832, 229 Mo.App. 309—Securities Inv. Co. of St. Louis v. International Shoe Co., App., 5 S. W.2d 682—Bay v. Wank, 255 S.W. 324, 215 Mo.App. 153—Lion Match Co. v. Hess, App., 253 S.W. 108.

Mont.—Union Electric Co. v. Lovell Livestock Co., 54 P.2d 112, 101 Mont. 450—Linn v. French, 33 P.2d 1002, 97 Mont. 292—Roecher v. Commercial Nat. Bank, 289 P. 388, 87 Mont. 570—Hollensteiner v. Anderson, 252 P. 796, 78 Mont. 122—Berne v. Stevens, 215 P. 803, 67 Mont. 254.

Neb.—In re Weitzel's Estate, 280 N. W. 270, 135 Neb. 43—Chalupnik v. Brant, 279 N.W. 159, 134 Neb. 465—Lawrence v. Equitable Life Ins. Co. of Iowa, 257 N.W. 530, 128 Neb. 72.

N.J.—Jersey Discount Co. v. Ætna Ins. Co., 17 A.2d 784, 126 N.J.Law 106—61-69 Pierrepont Street v. Feist, 11 A.2d 727, 124 N.J.Law 412—Hunn v. Meade, 196 A. 700, 119 N.J.Law 333—Hoffman v. Seidman, 127 A. 199, 101 N.J.Law 106—Brauer v. Trustees of First M. E. Church of Red Bank, 1 A.2d 409, 124 N.J.Eq. 247—Bellisfield v. Holcombe, 139 A. 817, 102 N.J.Eq. 20—Myers v. J. Wiss & Sons Co., 118 A. 450, 94 N.J.Eq. 189.

N.M.—Featherstone v. Walker, 88 P. 2d 271, 43 N.M. 181.

N.Y.—Churchill Evangelistic Ass'n v. Columbia Broadcasting System, 260 N.Y.S. 451, 236 App.Div. 624, affirming 255 N.Y.S. 134, 142 Misc. 210—Goebbel v. Gross, 275 N.Y.S. 308, 153 Misc. 637—Hunts Point Restaurant v. Oval Foods, 274 N.Y.S. 450, 153 Misc. 451—Girard Nat. Bank v. Brody, 204 N.Y.S. 832, 122 Misc. 790—McCarthy v. Krebs Pigment & Chemical Co., 194 N.Y.S. 138, 118 Misc. 566.

N.C.—W. L. Slayton & Co. v. Board of Com'rs of Cabarrus County, 120 S.E. 452, 186 N.C. 690.

Ohio—Vale v. Stephens, 159 N.E. 114, 25 Ohio App. 523.

Okl.—Manley v. Boling, 96 P.2d 30, 186 Okl. 59—Federal Deposit Ins. Corporation v. Grim, 86 P.2d 774, 184 Okl. 275—Brazelton's Wholesale Cleaners & Dyers v. Cash, 78 P.2d 810, 182 Okl. 493—Empire Oil & Refining Co. v. Babson, 77 P.2d 682, 182 Okl. 336—Hicks v. Mid-Kansas Oil & Gas Co., 76 P.2d 269, 182 Okl. 61—Miller v. National Printing & Engraving Co., 45 P.2d 483, 172 Okl. 447—Kansas City Southern Ry. Co. v. Whitaker, 242 P. 220, 115 Okl. 212—Smart v. Bassler, 223 P. 352, 101 Okl. 39—Delk v. City Nat. Bank of Duncan, 205 P. 753, 85 Okl. 238—Romans v. Shannon, 195 P. 298, 80 Okl. 199.

Or.—Hulin v. Veatch, 35 P.2d 253, 148 Or. 119, 94 A.L.R. 1319—Minto v. Salem Water, Light & Power Co., 250 P. 722, 725, 120 Or. 202, quoting **Corpus Juris**—Allen v. Hendrick, 206 P. 733, 104 Or. 202.

Pa.—Musselman v. Sharswood Building & Loan Ass'n, 187 A. 419, 323 Pa. 550—Detwiler v. Coldren, 166 A. 374, 311 Pa. 44—Mott v. Kaldes, 135 A. 764, 288 Pa. 264—Heningkamp v. Valley Smokeless Coal Co., 118 A. 28, 274 Pa. 186—Hines v. Union Connellsville Coke Co., 114 A. 521, 271 Pa. 219—Pollow v. Henry L. Doherty & Co., 14 Pa.Dist. & Co. 293. See Decker v. Williams, 26 North.Co. 74, affirmed 196 A. 910, 130 Pa.Super. 100—In re Walker's Estate, 53 York Leg.Rec. 1.

S.C.—Leonard v. Atkinson, 130 S.E. 755, 133 S.C. 249.

S.D.—Janssen v. Tusha, 287 N.W. 501, 66 S.D. 604—Hobbs v. Whitelock, 231 N.W. 904, 57 S.D. 198.

Tex.—Lewis v. East Texas Finance Co., 146 S.W.2d 977, reversing, Civ. App., 123 S.W.2d 803—Farmers' Seed & Gin Co. v. Brooks, 81 S.W. 2d 675, 125 Tex. 234, answering certified questions, Civ.App., 85 S.W.2d 1096—Remington Rand v. Sugarland Industries, Com.App., 153 S.W.2d 477, reversing, Civ. App., 122 S.W.2d 729—Higginbotham Cattle Co. v. Whaley & Lewis, Com.App., 41 S.W.2d 34, reversing, Civ.App., 26 S.W.2d 308—Colonial Trust Co. v. Hill County, Com. App., 27 S.W.2d 144, reversing, Civ.App., 18 S.W.2d 787—San Antonio Machine & Supply Co. v. Allen, Com.App., 284 S.W. 542, modifying, Civ.App., 279 S.W. 493—Texas Co. v. Foshee, Civ.App., 142 S.W.2d 603, error refused—Hastings v. Champer, Civ.App., 139 S.W.2d 863—Tampke v. Childress, Civ.App., 57 S.W.2d 952, error dismissed—American Surety Co. of New York v. Wm. Cameron & Co., Civ.App., 35 S.W.2d 217, affirmed in part and reversed in part on other grounds Wm. Cameron & Co. v. American Surety Co. of New York, Com.App., 55 S.W.2d 1032—Geo. L. Simpson & Co. v. City of Lubbock, Civ.App., 17 S.W.2d 163, error dismissed—Graham's Estate v. Stewart, Civ.App., 15 S.W.2d 72, error refused—Atlas Petroleum Corporation v. Galveston, H. & S. A. Ry. Co., Civ.App., 5 S.W.2d 215, error refused—Reynolds v. McMan Oil & Gas Co., Civ.App., 279 S.W. 939, reversed on other grounds, Com.App., 11 S.W.2d 778, rehearing denied 14 S.W.2d 819—U. S. Casualty Co. v. Medcalf & Thomas, Civ.App., 272 S.W. 539—Galveston, H. & S. A. Ry. Co. v. Henry, Civ. App., 252 S.W. 210—Stamps v. Platt, Civ.App., 218 S.W. 47.

Utah.—Erickson v. Bastian, 102 P. 2d 310, 98 Utah 587—Ruthrauff v. Silver King Western Min. & Mill. Co., 80 P.2d 338, 95 Utah 279—Starley v. Deseret Foods Corporation, 74 P.2d 1221, 93 Utah 577—Garrett v. Ellison, 72 P.2d 449, 93 Utah 184, 129 A.L.R. 666—Mifflin v. Shiki, 293 P. 1, 77 Utah 190.

Vt.—Freegard v. Bingham, 187 A. 801, 108 Vt. 404—Wood v. James, 106 A. 566, 93 Vt. 36.

Va.—Beury v. Shelton, 144 S.E. 629, 151 Va. 28—Mathieson Alkali Works v. Virginia Banner Coal Corporation, 136 S.E. 673, 147 Va. 125—M. M. Rowe Co. v. Wallerstein, 133 S.E. 669, 145 Va. 191.

Wash.—Deer Park Lumber Co. v. Oregon-Washington Lumber & Mfg. Co., 177 P. 336, 104 Wash. 531.

W.Va.—Ligon v. Godfrey L. Cabot, Inc., 15 S.E.2d 595—Berry v. O'-Dell, 7 S.E.2d 340—Attorneys' Nat. Clearing House v. Greever, 5 S.E. 2d 621—Sycamore Coal Co. v. Adkins, 133 S.E. 330, 101 W.Va. 211—Milligan Coal Co. v. Polowy, 124 S.E. 674, 97 W.Va. 228—Smyth v. Brick Row Realty Co., 124 S.E. 499, 97 W.Va. 40.

Wis.—Badger Sav. Building & Loan Ass'n v. Mutual Building & Savings Ass'n, 283 N.W. 466, 230 Wis. 145—In re Townsend's Estate, 281 N.W. 642, 229 Wis. 60—Hampton Plains Realty Co. v. Cohen, 252 N.W. 572, 214 Wis. 128—Kurzon v. Espenhains Dry Goods Co., 248 N.W. 149, 211 Wis. 629—Wheelwright v. Pure Milk Ass'n, 240 N.W. 769, 208 Wis. 40, motion denied 242 N.W. 486, 208 Wis. 40—In re Read's Will, 203 N.W. 352, 187 Wis. 333—American Steam Laundry Co. v. Riverside Printing Co., 177 N.W. 852, 171 Wis. 644.

22 C.J. p 1177 note 49.

Restriction of construction of contract to terms of contract generally see Contracts § 296.

Bills and notes

(1) The text rule applies to bills and notes.

Conn.—J. E. Smith & Co. v. W. M. Hurlburt Co., 106 A. 319, 93 Conn. 391.

Ga.—Fortson v. Strickland, 99 S.E. 147, 23 Ga.App. 607.

Miss.—Shapleigh Hardware Co. v. Spiro, 106 So. 209, 141 Miss. 38, 44 A.L.R. 393.

Va.—Wheeler v. Wardell, 3 S.E.2d 377, 173 Va. 168.

(2) For example, where the language of a note is plain, parol evidence is not admissible to change the due date specified therein.—Gregory v. South Texas Lumber Co., Tex. Civ.App., 216 S.W. 420, dismissed for want of jurisdiction.

(3) Likewise where terms of note are plain regarding notice fixing maturity, no resort to extraneous evidence may be had to determine intention.—Bass v. Hueter, 270 P. 958, 205 Cal. 284.

(4) Negotiable Instr.Act § 39, prescribing construction to be given where language of instrument is ambiguous or there are omissions therein, does not authorize admission of extrinsic evidence to clarify ambiguities.—La Caisse Populaire Credit Union v. Cross, 199 N.E. 548, 293 Mass. 190.

Change of beneficiary of life policy

In an action on an ordinary life insurance policy conferring on insured no right to change the beneficiary therein without her consent, provisions of the constitution and by-laws of insurer, unknown to insured, cannot be resorted to to show authority therefor.—Jones v. North Carolina Mut. & Provident Ass'n, 90 S.E. 30, 105 S.C. 427.

Evidence of custom of defendant held inadmissible where his agreement was in writing and was not ambiguous.—Pomerantz v. Taylor, 288 N.Y.S. 124, 248 App.Div. 639.

Writings held unambiguous and not subject to explanation by parol evidence.

U.S.—Shell Oil Co. v. Manley Oil Corporation, C.C.A.Ill., 124 F.2d 714, reversing, D.C., 37 F.Supp. 289—Ætna Casualty & Surety Co. v. First Nat. Bank, C.C.A.Pa., 103 F.2d 977—Cincinnati Underwriters Agency Co. v. Thomas J. Emery Memorial, C.C.A.Ohio, 88 F.2d 506, certiorari denied Thomas J. Em-

ery Memorial v. Cincinnati Underwriters Agency Co., 58 S.Ct. 14, 302 U.S. 696, 82 L.Ed. 537—Central States Power & Light Corporation v. U. S. Zinc Co., C.C.A.Okl., 60 F. 2d 832, certiorari denied U. S. Zinc Co. v. Central States Power & Light Corporation, 53 S.Ct. 123, 287 U.S. 660, 77 L.Ed. 570—Deepwater Oil Refineries v. Ramsey, D. C.Okl., 59 F.2d 346, affirmed, C.C. A., Ramsey v. Deepwater Oil Refineries, 65 F.2d 931—Arkansas Amusement Corporation v. Kempner, C.C.A.Ark., 57 F.2d 466—Ries v. Dodson, C.C.A.Pa., 46 F.2d 68—Dry Ice Corporation of America v. Josephson, D.C.N.Y., 43 F.2d 408—Midland Steel Sales Co. v. Waterloo Gasoline Engine Co., C.C.A. Iowa, 9 F.2d 250—Geary v. Adams Oil & Gas Co., D.C.Ill., 31 F.Supp. 830—Bushwick-Decatur Motors v. Ford Motor Co., D.C.N.Y., 30 F. Supp. 917, affirmed, C.C.A., 116 F. 2d 675—Fink v. Northwestern Mut. Life Ins. Co. of Milwaukee, Wis., D.C.Mich., 29 F.Supp. 972—Gates v. Carbon Hill Coal Co., D.C.Wash., 294 F. 591, affirmed, C.C.A., 1 F.2d 848—Chesapeake & Virginian Coal Co. v. Rich Block Coal Co., C.C. A.W.Va., 291 F. 1011—East Harlan Coal Co. v. R. E. Hamilton & Sons Co., C.C.A.Ky., 277 F. 337—American Steel Foundries v. Indian Refining Co., C.C.A.Ill., 275 F. 800.

Ala.—Wilson v. Connor, 122 So. 404, 219 Ala. 344—Ellard v. Goodall, 83 So. 568, 203 Ala. 476—Pieme v. Arata, 80 So. 811, 202 Ala. 427.

Ariz.—Chandler Improvement Co. v. Andersen, 7 P.2d 255, 39 Ariz. 426.

Ark.—Twist v. Gray, 147 S.W.2d 29—Home Life Ins. Co. v. Taylor, 55 S.W.2d 929, 186 Ark. 768—Gray v. General Const. Co., 250 S.W. 342, 158 Ark. 641—Lesser-Goldman Cotton Co. v. Adams, 249 S.W. 371, 158 Ark. 10—Brown & Hackney v. Daubs, 213 S.W. 4, 139 Ark. 53.

Cal.—Barnhart Aircraft v. Preston, 297 P. 20, 212 Cal. 19—Redmon v. Graham, 295 P. 1031, 211 Cal. 491—Nourse v. Kovacevich, App., 109 P.2d 999—O'Hare v. Peacock Dairies, 79 P.2d 433, 26 Cal.App.2d 345, followed in 79 P.2d 443, 26 Cal.App.2d 753, motion denied 82 P.2d 1112, 28 Cal.App.2d 562—Wells v. Union Oil Co., 76 P.2d 696, 25 Cal.App.2d 165—Courtwright v. Dimmick, 70 P.2d 269, 22 Cal.App. 2d 68—Blodgett v. Merritt Annex Oil Co., 65 P.2d 123, 19 Cal.App.2d 169—White v. Cascade Oil Co., 58 P.2d 994, 14 Cal.App.2d 695—Keeler v. Murphy, 3 P.2d 950, 117 Cal. App. 386—Bryson v. Bryson, 216 P. 391, 62 Cal.App. 170—Braden v. Mitchell, 210 P. 43, 59 Cal.App. 29.

Colo.—Las Animas Consol. Canal Co. v. Hinderlider, 68 P.2d 564, 100 Colo. 508—Exchange Nat. Bank of Colorado Springs v. Receivers of City Savings, Building & Loan Ass'n, 37 P.2d 394, 95 Colo. 498—Antero & Lost Park Reservoir Co. v. Lowe, 194 P. 945, 69 Colo. 409.

Conn.—Hosmer v. Butler, 143 A. 526, 108 Conn. 465.

Del.—State, for Use of Warner Co., v. Massachusetts Bonding & Insurance Co., Super., 9 A.2d 77.

Fla.—Prescott v. Mutual Ben. Health & Accident Ass'n, 183 So. 311, 133 Fla. 510, 119 A.L.R. 525—Reid v. Barry, 112 So. 846, 93 Fla. 849.

Ga.—Board of Education of Appling County v. Hunter, 10 S.E.2d 749, 190 Ga. 767—Flanders v. Cook, 144 S.E. 903, 167 Ga. 66—Henderson v. Sessoms, 123 S.E. 14, 157 Ga. 902—Handy v. Handy, 115 S.E. 114, 154 Ga. 686—Carver v. Leach, 185 S.E. 155, 53 Ga.App. 112—Rauschenberg v. Peeples, 118 S.E. 409, 30 Ga.App. 384.

Idaho.—Meir-Nandorf v. Milner, 201 P. 720, 34 Idaho 396.

Ill.—McKenna Process Co. of Illinois v. Blatchford Corporation, 25 N.E. 2d 916, 304 Ill.App. 101—Erzinger v. Gerrity, 271 Ill.App. 450—Campbell v. Lindley, 256 Ill.App. 480—McConnaughy v. Gage, 252 Ill.App. 17.

Iowa.—Dolan v. Danbury State Bank, 223 N.W. 400, 207 Iowa 597—Alex Moffit & Sons v. Price Bros., 193 N. W. 565, 196 Iowa 1216.

Kan.—Gustason v. Dean, 57 P.2d 69, 143 Kan. 845—Cease v. De Hek, 253 P. 232, 122 Kan. 699—Hager v. Hale, 204 P. 529, 110 Kan. 507.

Ky.—Maynard v. McHenry, 113 S.W. 2d 13, 271 Ky. 642—Akins v. City of Covington, 97 S.W.2d 588, 265 Ky. 740—G. F. Vanzant Lumber Co. v. Hopkins, 37 S.W.2d 37, 238 Ky. 179—Sanders v. Wender, 265 S. W. 939, 205 Ky. 422—Coles v. Morrison, 261 S.W. 600, 202 Ky. 834—Featherstone v. Hale, 244 S.W. 420, 196 Ky. 219—Harlan Coal & Land Co. v. King Harlan Mining Co., 232 S.W. 650, 192 Ky. 111.

La.—Dorsett v. Thomas, 92 So. 734, 152 La. 60—Planters' Fertilizer & Chemical Co. v. Barton, 84 So. 440, 147 La. 15—Massett v. C. G. Conn Co., 127 So. 638, 13 La.App. 266—Johnson v. Thomas, 6 La.App. 267.

Md.—Standard Scale & Supply Co. v. Baltimore Enamel & Novelty Co., 110 A. 486, 136 Md. 278, 9 A.L.R. 1502.

Mass.—Snider v. Deban, 144 N.E. 69, 249 Mass. 59—Meegan v. Hall, 135 N.E. 555, 241 Mass. 449—Burke v. Atlantic Chemical Co., 134 N.E. 404, 241 Mass. 65—Cass v. Lord, 128 N.E. 716, 236 Mass. 430.

Mich.—Sadowski v. General Discount Corporation, 294 N.W. 703, 295 Mich. 340—Zilwaukee Tp. v. Saginaw Bay City Ry. Co., 181 N.W. 37, 213 Mich. 61—Quisle v. Brezner, 180 N.W. 467, 212 Mich. 254—Jones v. Nash, 171 N.W. 439, 204 Mich. 677—Richard v. Lee, 171 N. W. 382, 205 Mich. 92.

Minn.—Ruthton Co-op. Creamery Co. v. Ruthton State Bank, 217 N.W. 133, 173 Minn. 255—Kris v. Pattison, 198 N.W. 541, 159 Minn. 213.

Miss.—Divelbiss v. Jones, 144 So. 464, 164 Miss. 111—Welch v. Gant, 138 So. 585, 161 Miss. 867.

Mo.—White v. Kentling, 134 S.W.2d 39, 345 Mo. 526—Wooldridge v. Bryan, 270 S.W. 658, 307 Mo. 234—Elliott v. Winn, 264 S.W. 391, 305 Mo. 105, certiorari denied Winn v. Elliott, 45 S.Ct. 100, 266 U.S. 621, 69 L.Ed. 472—Ocean Accident & Guarantee Corporation v. Missouri Engineering & Contracting Co., App., 63 S.W.2d 196—Huddleston v. Huddleston, App., 11 S.W. 2d 1065—Wood v. White Eagle Oil & Refining Co., 274 S.W. 894, 220 Mo.App. 1004—Edmunds v. Cochrane, App., 226 S.W. 1007—Godfrey v. Martha Inv. Co., App., 216 S.W. 822.

Mont.—Hill Cattle Corporation v. Killorn, 256 P. 497, 79 Mont. 327.

Neb.—Lawrence v. Equitable Life Ins. Co. of Iowa, 257 N.W. 530, 128 Neb. 72—Martin v. Reavis, 220 N. W. 238, 117 Neb. 219.

N.J.—Hoffman v. Seidman, 127 A. 199, 101 N.J.Law 106.

N.M.—Dyer v. Compere, 73 P.2d 1356, 41 N.M. 716.

N.Y.—Shoyer v. Edmund Wright-Ginsberg Co., 148 N.E. 328, 240 N. Y. 223, modifying 206 N.Y.S. 421, 210 App.Div. 645—National City Bank of New York v. Berwin, 270 N.Y.S. 678, 240 App.Div. 550—Samuel Eiseman & Co. v. Fruchtman, 207 N.Y.S. 112, 211 App.Div. 543—Rodgers v. Rodgers, 197 N.Y. S. 494, 203 App.Div. 682, modified on other grounds 139 N.E. 557, 235 N.Y. 408, remittitur amended 142 N.E. 290, 236 N.Y. 577—Doherty v. Monroe Eckstein Brewing Co., 191 N.Y.S. 59, 198 App.Div. 708, affirming 187 N.Y.S. 633—Traylor v. Crucible Steel Co. of America, 183 N.Y.S. 181, 192 App.Div. 445, affirmed 134 N.E. 581, 232 N.Y. 583—Goebbel v. Gross, 275 N.Y.S. 308, 153 Misc. 637—Smith v. Compania Litografica de la Habana, 217 N. Y.S. 39, 127 Misc. 508, affirmed 222 N.Y.S. 902, 220 App.Div. 782—Bernstein v. Smith, 194 N.Y.S. 789, 119 Misc. 34—Madison Ave. Realty Co. v. Martin, 187 N.Y.S. 318, 114 Misc. 315—Schmidl v. Central Laundry & Supply Co., 13 N.Y.S.2d 817—Atlas Electric Sign Corporation v. Norden Electric Sign Corporation, 197 N.Y.S. 242.

N.C.—Galloway v. Goolsby, 97 S.E. 617, 176 N.C. 635.

Ohio.—Rorick v. Gilbert, 186 N.E. 756, 45 Ohio App. 96, affirming Gilbert v. Rorick, 186 N.E. 90, 125 Ohio St. 636.

Okl.—Carroll v. Bowen, 68 P.2d 773, 180 Okl. 215—Jennings v. Amerada

explanation or construction.[71] A meaning cannot be given to an instrument under the guise of construction or explanation which is not to be found in the instrument itself;[72] nor can any evidence of the language employed by the parties in making the contract be resorted to except that which is furnished by the writing itself.[73]

Customs and usages. The extent to which evidence of custom and usage is admissible in construction of a written instrument is treated in the C.J.S. title Customs and Usages §§ 21–29.

Where the language used is too doubtful for any settled construction, parol evidence cannot, it has been held, be received to create instead of merely construing the contract, for this would be an attempt to do for a party that which he has not chosen to do for himself, and the law very properly denies such authority to courts of justice.[74] Also, if the writing leaves the agreement of the parties vague and indefinite as to an essential element thereof, it is no contract and cannot be made one by parol.[75] It has been held, however, that if the

Petroleum Corporation, 66 P.2d 1069, 179 Okl. 561—Maney v. Cherry, 41 P.2d 82, 170 Okl. 469—Cummins v. Houghton, 29 P.2d 71, 167 Okl. 278—Anthis v. Wheeler, 278 P. 1081, 136 Okl. 199—Green-Beekman Const. Co. v. McClintic-Marshall Co., 272 P. 420, 134 Okl. 60—Romans v. Shannon, 195 P. 298, 80 Okl. 199—First Nat. Bank v. Clay, 177 P. 115, 74 Okl. 112.

Or.—Logan v. Luukinen, 231 P. 184, 113 Or. 52.

Pa.—Hoffman v. Buchanan, 83 Pa. Super. 454.

S.C.—Shelton v. Skyland Stages, 169 S.E. 718, 170 S.C. 100.

Tenn.—Standard Oil Co. of Louisiana v. Petroleum Products Storage Co., 44 S.W.2d 317, 163 Tenn. 565.

Tex.—Lewis v. East Texas Finance Co., 146 S.W.2d 977, reversing, Civ.App., 123 S.W.2d 803—Anderson & Kerr Drilling Co. v. Bruhlmeyer, 136 S.W.2d 800, 134 Tex. 574, 127 A.L.R. 1217, answers to certified questions conformed to, Civ.App., 138 S.W.2d 1118—City of Fort Worth v. Burnett, 114 S.W.2d 220, 131 Tex. 190, answering certified questions, Civ.App., 115 S.W.2d 436—Leonard v. Prater, Com.App., 36 S.W.2d 216, 86 A.L.R. 499, reversing, Civ.App., 18 S.W.2d 681—Texarkana & Ft. S. Ry. Co. v. Brass, Com.App., 260 S.W. 828, affirming, Civ.App., 245 S.W. 457, and rehearing overruled, Com.App., 262 S.W. 737—Baldwin v. Drew, Com.App., 244 S.W. 987, reversing, Civ.App., 195 S.W. 636—Riggins v. Post, Com.App., 213 S.W. 600, reversing Civ.App., 172 S.W. 210—Countiss v. Baldwin, Civ.App., 151 S.W.2d 235, error dismissed, judgment correct—Humble Oil & Refining Co. v. Parish, Civ.App., 146 S.W.2d 1045, error dismissed, judgment correct—Thomas v. Warner-Quinlan Co. of Texas, Civ.App., 65 S.W.2d 321, error refused—T. G. Shaw Oil Corporation v. Parker, Civ.App., 61 S.W.2d 587—Chestnut v. Casner, Civ.App., 42 S.W.2d 175, error refused—Leon v. Gulf Production Co., Civ.App., 35 S.W.2d 1101, error refused—Jarecki Mfg. Co. v. Hinds, Civ.App., 295 S.W. 274, error dismissed, Com.App., 6 S.W.2d 343—American Refining Co. v. Staley, Civ.App., 274 S.W. 272—Bell v. Kirby Petroleum Co., Civ.App., 269 S.W. 170—Heid Bros. v. Reisto, Civ.App., 247 S.W. 349—Great Southern Oil & Refining Ass'n v. Cooper, Civ.App., 231 S.W. 157—Barnes v. Early-Foster Co., Civ.App., 228 S.W. 248—Arcola Sugar Mills Co. v. Farmer Hamlett's Co., Civ.App., 220 S.W. 385, dismissed for want of jurisdiction.

Vt.—Johnson v. Desmarais, 112 A. 199, 94 Vt. 496.

Va.—Mathieson Alkali Works v. Virginia Banner Coal Corporation, 136 S.E. 673, 147 Va. 125—Hopkins v. Le Cato, 128 S.E. 55, 142 Va. 769.

Wash.—Webb McDonald Tractor & Equipment Co. v. Coyle, 63 P.2d 475, 188 Wash. 658—United Fig & Date Co. v. Falkenburg, 28 P.2d 287, 176 Wash. 122—Robinson v. Shell Oil Co., 21 P.2d 246, 172 Wash. 611—Camp v. Carey, 278 P. 183, 152 Wash. 480—O'Brien v. O'Brien, 245 P. 923, 139 Wash. 153—Johnson v. Ellis-Mylroie Lumber Co., 213 P. 464, 124 Wash. 123—Bayers v. Barry, 194 P. 993, 114 Wash. 252.

W.Va.—Collins v. Treat, 152 S.E. 205, 108 W.Va. 443.

Wis.—Hampton Plains Realty Co. v. Cohen, 252 N.W. 572, 214 Wis. 128—United Ins. Co. v. Ruben, 245 N.W. 586, 209 Wis. 550—Schuhknecht v. Roberes, 212 N.W. 657, 192 Wis. 275—Erie City Iron Works v. City of Marshfield, 201 N.W. 753, 186 Wis. 273—Barnhart v. Stern, 196 N.W. 245, 182 Wis. 197—Oconto Chamber of Commerce v. Grandall, 185 N.W. 544, 175 Wis. 447—Cochrane v. Jacob E. Decker & Sons, 177 N.W. 856, 172 Wis. 38.

Wyo.—Holly Sugar Corporation v. Fritzler, 296 P. 206, 42 Wyo. 446.

71. Cal.—Palm Springs-La Quinta Development Co. v. Palm Springs Land & Irrigation Co., 98 P.2d 530, 36 Cal.App.2d 730.

Colo.—Piggly Wiggly, Grimes Co. v. Lowell Packing Co., 29 P.2d 623, 624, 94 Colo. 166, citing **Corpus Juris.**

Ky.—Jackson v. Gourley, 268 S.W. 322, 206 Ky. 712.

Mich.—Erkiletian v. Devletian, 299 N.W. 821, 299 Mich. 95—Patterson v. Butterfield, 221 N.W. 293, 244 Mich. 330.

Mo.—Ward v. Kurn, 132 S.W.2d 245, 234 Mo.App. 241.

N.Y.—Onondaga Water Service Corporation v. Crown Mills, 230 N.Y.S. 691, 132 Misc. 848.

Tenn.—Cummins v. McCoy, 125 S.W.2d 509, 22 Tenn.App. 681.

Tex.—Remington Rand v. Sugarland Industries, Com.App., 153 S.W.2d 477, reversing, Civ.App., 122 S.W.2d 729—Byrd v. Crazy Water Co., Civ.App., 140 S.W.2d 334—Smith v. Holloway, Civ.App., 115 S.W.2d 427—Hopkins v. City of Dallas, Civ.App., 297 S.W. 347.

22 C.J. p 1178 note 50.

Evidence held not to vary writing

Cal.—Spraul v. Garliepp & Mack, 32 P.2d 657, 138 Cal.App. 491—Ballman v. H. A. Lueking Teaming Co., 219 S.W. 603, 281 Mo. 342.

Incomplete instrument

That unambiguous written realty exchange agreement was incomplete and so deficient in terms as to preclude relief by specific performance does not warrant extrinsic evidence to vary or add to agreement concededly executed as parties intended.—Pascoe v. Morrison, 25 P.2d 9, 219 Cal. 54.

72. Cal.—Joerger v. Pacific Gas & Electric Co., 276 P. 1017, 207 Cal. 8.

73. U.S.—Bryan v. Welch, C.C.A. Okl., 74 F.2d 964, certiorari denied Welch v. Bryan, 55 S.Ct. 826, 295 U.S. 748, 78 L.Ed. 1693.

22 C.J. p 1179 note 51.

74. Cal.—Palma v. Leslie, 45 P.2d 391, 6 Cal.App.2d 702.

Iowa.—Reichert v. Russell Motorcar Co., 170 N.W. 441, 186 Iowa 437.

22 C.J. p 1179 note 53.

75. U.S.—Rothstein v. Edwards, C.C.A.Cal., 94 F.2d 488.

Colo.—Greater Service Homebuilders' Inv. Ass'n v. Albright, 293 P. 345, 88 Colo. 146.

Okl.—Bordner v. Gordon, 221 P. 50, 94 Okl. 165.

Or.—Hyland v. Oregon Agr. Co., 225 P. 728, 111 Or. 212.

writing is wholly unintelligible on its face it is permissible to prove the parol contract which the parties attempted to reduce to writing.[76] Likewise, where the writing when considered alone appeared too indefinite and uncertain to constitute a valid contract, parol evidence has been admitted to show the real contract, provided such evidence does not vary or contradict the writing.[77]

§ 960. —— What Evidence Admissible

Parol evidence which tends to show the correct interpretation of ambiguous language used in a written instrument is admissible.

The parol evidence which can be admitted to explain the contract must be such as tends to show the correct interpretation of the language used, and its only purpose is to enable the court or jury to understand what the language really means; evidence which has no tendency to aid in the construction of the writing or to explain any ambiguity therein cannot be received.[78] It is therefore necessary that the line which separates evidence which aids the interpretation of what is in the instrument from direct evidence of intention independent of the instrument should be kept steadily in view, the duty of the court being to declare the meaning of what is written in the instrument, not of what was intended to be written.[79]

Acts of parties. Where the meaning of the parties is uncertain from the words used and it is not within the power of the court to ascertain their meaning by reference to the body of the instrument, evidence of the acts of the parties contemporaneous with and immediately prior to the execution of the instrument may properly be considered.[80] The subsequent conduct of the parties acting under a contract the meaning of which is doubtful may also be shown to aid in the construction of the instrument and in determining the question of intent.[81] Such evidence is, however, competent only to show the understanding of the parties and not to affect the terms of the contract.[82]

Condition of subject matter. A deed or other writing should be construed with reference to the actual state of the subject matter at the time of its execution, and for that purpose extrinsic evidence may be admitted to place the court or jury in the position of the parties at the time of executing the instrument, and thus enable them intelligently to interpret the language used.[83]

Conversations and statements of parties. The conversations and statements of the parties at the time of or just previous to the execution of the contract between them may be admissible for the purpose of aiding in the construction of the writing;[84] but oral declarations of the parties made at

76. Ill.—Moulding v. Prussing, 70 Ill. 151.

77. Tex.—Parmer County v. Smith, Civ.App., 47 S.W.2d 883.

78. Mo.—Murphy v. Holliway, 16 S.W.2d 107, 223 Mo.App. 714.
Or.—Salem King's Products Co. v. Ramp, 196 P. 401, 409, 100 Or. 329, citing **Corpus Juris.**
22 C.J. p 1179 note 55.

Competent testimony

(1) Circumstances existing at execution of deed must be proved by competent testimony, and in way prescribed by legal rules of evidence. Such circumstances, to explain recited consideration, must be pertinent to language used and situation of grantor, and what grantor said or did long before deed or thereafter having no visible connection with deed, would be too remote to explain recital of consideration.—Pitts v. Camp County, 39 S.W.2d 608, 120 Tex. 558, answers to certified questions conformed to, Civ.App., 42 S.W.2d 853.

(2) In action concerning deposit pursuant to contract, testimony of attorney who prepared contract concerning conversation before making of contract and purpose of certain provision therein was not admissible under parol evidence rule.—Baltimore Trust Co. v. Interocean Oil Co., D.C.Md. 26 F.Supp. 817, affirmed, C.C.A., British-American Oil Producing Co. v. Baltimore Trust Co., 105 F.2d 291.

Establishing sense

Parol evidence to be admissible must establish sense or meaning which language of contract will reasonably bear.—Wheelwright v. Pure Milk Ass'n, 240 N.W. 769, 208 Wis. 40, motion denied 242 N.W. 486, 208 Wis. 40.

To apply contract

Parol evidence is admissible in so far as it is necessary, and no farther, to enable the court to apply a written instrument.—Cargill Commission Co. v. Swartwood, 198 N.W. 536, 159 Minn. 1.

79. Okl.—Hicks v. Mid-Kansas Oil & Gas Co., 76 P.2d 269, 272, 182 Okl. 61, quoting **Corpus Juris.**
Tex.—Bauer v. Taylor, Civ.App., 118 S.W.2d 826, error refused.
22 C.J. p 1179 note 56.

80. Ind.—City of Hammond v. Standard Oil Co., 138 N.E. 769, 79 Ind.App. 356.
Mo.—Securities Inv. Co. of St. Louis v. International Shoe Co., App., 5 S.W.2d 682.
N.C.—Blankenship v. Dowtin, 133 S.E. 199, 191 N.C. 790, followed in Green River Mfg. Co. v. Bell, 161 S.E. 923, 201 N.C. 846.
22 C.J. p 1179 note 57.

81. U.S.—Shell Oil Co. v. Manley Oil Corporation, D.C.Ill., 37 F.Supp. 289, reversed on other grounds, C.C.A., 124 F.2d 714.
Mo.—City of California v. Burke, 239 S.W. 830, 292 Mo. 466—Securities Inv. Co. of St. Louis v. International Shoe Co., App., 5 S.W.2d 682.
Mont.—Snider v. Carmichael, 58 P.2d 1004, 102 Mont. 387.
N.H.—Brown-Wales Co. v. Barber, 184 A. 855, 88 N.H. 103—Smart v. Huckins, 134 A. 520, 82 N.H. 342.
Pa.—Rochester & Pittsburgh Coal & Iron Co. v. Makoma Coal Co., 114 A. 261, 271 Pa. 394.
W.Va.—Bragg v. Peytona Lumber Co., 135 S.E. 841, 102 W.Va. 587—Stewart v. Blackwood Electric Steel Corporation, 130 S.E. 447, 100 W.Va. 331.
22 C.J. p 1179 note 58.

82. U.S.—Potter v. Phenix Ins. Co., C.C.Mo., 63 F. 382.

83. U.S.—Puerto Rico Sugar Co v. Lorenzo, Puerto Rico, 222 U.S. 481, 32 S.Ct. 133, 56 L.Ed. 277.
22 C.J. p 1181 note 66.

84. U.S.—Electrical Research Products v. Gross, C.C.A.Alaska, 120 F.2d 301—Walter v. Rowlands, C.C.A.Cal., 28 F.2d 687.

or before the time of the execution of the instrument are not admissible for the purpose of showing an intention or purpose not therein expressed.[85] Conversations between, and statements of, the parties to a written contract after its execution have also been held admissible to explain an ambiguity in the writing.[86] Statements which are too remote and indefinite to throw any light on the meaning of the language used in the writing are, of course, inadmissible.[87]

Expert evidence. The admission of expert testimony to show what work was necessary to be done in order to comply with a building contract is not an infringement of the rule which forbids the admission of parol evidence to vary or contradict a written contract.[88]

Extrinsic matters referred to. Where a writing itself contains a reference to extrinsic matters, these matters may be shown for the purpose of explaining the writing.[89]

Identification of writing referred to. Where a written instrument contains a reference to some other writing, parol evidence is admissible for the purpose of identifying the writing so referred to.[90]

Ala.—Brenard Mfg. Co. v. McCarty Drug Co., 101 So. 759, 212 Ala. 66.
Cal.—Walsh v. Walsh, 116 P.2d 62, prior opinion, App., 108 P.2d 763—Central Heights Imp. Co. v. Memorial Parks, 105 P.2d 596, 40 Cal.App.2d 591—Norton v. Farmers Automobile Inter-Insurance Exchange, 105 P.2d 136, 40 Cal.App.2d 556—Blodgett v. Merritt Annex Oil Co., 65 P.2d 123, 19 Cal.App.2d 169—Raisch v. Monterey County, 35 P.2d 587, 140 Cal.App. 627—Bayles v. Browning, 24 P.2d 546, 133 Cal.App. 618—Kenney v. Los Feliz Inv. Co., 9 P.2d 225, 121 Cal.App. 378—Joy v. Rousseau, 236 P. 972, 72 Cal.App. 179—Aderholt v. Wood, 226 P. 950, 66 Cal.App. 666.
Md.—Lambdin v. Dantzebecker, 181 A. 353, 356, 169 Md. 240, citing **Corpus Juris.**
Mich.—Valentine v. King Mfg. Co., 245 N.W. 529, 260 Mich. 601.
Mo.—Vance v. Humphreys, 241 S.W. 91, 210 Mo.App. 498—Barnett v. Logan, App., 210 S.W. 440.
Mont.—Park Saddle Horse Co. v. Royal Indemnity Co., 261 P. 880, 81 Mont. 99.
Neb.—Jensen v. Romigh, 274 N.W. 199, 133 Neb. 71.
N.H.—Smart v. Huckins, 134 A. 520, 82 N.H. 342.
N.Y.—Pure Oil Co. v. Rosengarten, 255 N.Y.S. 598, 234 App.Div. 508.
Ohio.—Myers v. Sunlight Laundry Co., 10 Ohio App. 275.
Okl.—Phillips Petroleum Co. v. Widick, 52 P.2d 773, 175 Okl. 376.
Or.—Salem King's Products Co. v. Ramp, 196 P. 401, 100 Or. 329.
Pa.—Thompson v. Emerald Oil Co., 123 A. 810, 279 Pa. 321—Kahler v. Van Aken, 31 Luz.L.Reg. 245.
Tex.—Pierce v. Allen, Civ.App., 278 S.W. 453—Stowell v. Texas Employers' Ins. Ass'n, Civ.App., 259 S.W. 311.
Utah.—Jordan v. Madsen, 279 P. 499, 74 Utah 280.
Va.—State Farm Mut. Automobile Ins. Co. v. Justis, 190 S.E. 163, 168 Va. 158—City of South Norfolk v. Wolcott, 125 S.E. 687, 140 Va. 611.
Wis.—Bahr v. Evangelical Lutheran St. John's Soc. of Poynette, 295 N.W. 700, 236 Wis. 490—Weidner v. Hyland, 255 N.W. 134, 216 Wis. 12, modified on other grounds and rehearing denied 256 N.W. 244, 216 Wis. 12—Firestone Tire & Rubber Co. v. Werner, 236 N.W. 118, 204 Wis. 306.
22 C.J. p 1180 note 60, p 1191 note 1.

Conversations which do not aid in solving ambiguity are, of course, inadmissible.—Neher v. Kauffman, 242 P. 713, 197 Cal. 674.

85. U.S.—Bryan v. Welch, C.C.A. Okl., 74 F.2d 964, certiorari denied Welch v. Bryan, 55 S.Ct. 826, 295 U.S. 748, 79 L.Ed. 1693—J. N. Pharr & Sons v. C. D. Kenny Co., C.C.A.La., 272 F. 37, certiorari denied 42 S.Ct. 57, 257 U.S. 648, 66 L.Ed. 415.
Cal.—Union Liquors v. Finkel & Lasarow, App., 113 P.2d 19.
Ill.—O'Hern v. De Long, 19 N.E.2d 214, 298 Ill.App. 375.
La.—McWilliams v. Ritchie, 8 La. App. 205.
Mich.—Grinnell Bros. v. Brown, 171 N.W. 399, 205 Mich. 134.
Mo.—Isaac T. Cook Co. v. Craddock-Terry Co., App., 109 S.W.2d 731.
N.Y.—Gold v. Ross, 187 N.Y.S. 72, 195 App.Div. 721.
Okl.—Lee v. National Refining Co., 75 P.2d 406, 181 Okl. 556—Phillips Petroleum Co. v. Widick, 52 P.2d 773, 175 Okl. 376—McKee v. Columbus Mut. Life Ins. Co. of Columbus, Ohio, 42 P.2d 831, 832, 171 Okl. 250, citing **Corpus Juris.**
Pa.—Goodman v. City of Bethlehem, 185 A. 719, 323 Pa. 58—Hepler v. Shenk, 145 A. 63, 295 Pa. 108.
Va.—Foltz v. Conrad Realty Co., 109 S.E. 463, 131 Va. 496.
W.Va.—W. C. Barlett Lumber Co. v. Brookville Title & Trust Co., 5 S.E.2d 812.
22 C.J. p 1180 note 61.

Meaning of words

Conversation between original parties to unambiguous grant of easement was incompetent to prove meaning of words used.—Bennett v. Newell, 165 N.E. 27, 266 Mass. 127.

86. Cal.—Central Heights Imp. Co. v. Memorial Parks, 105 P.2d 596, 40 Cal.App.2d 591.
22 C.J. p 1180 note 62.

87. Tex.—Pitts v. Camp County, 89 S.W.2d 608, 120 Tex. 558, answers to certified questions conformed to, Civ.App., 42 S.W.2d 853—Countiss v. Baldwin, Civ.App., 151 S.W.2d 235, error dismissed, judgment correct.

88. Ill.—Maremont, Wolfson & Cohen Co. v. Schwarzschild & Sulzberger Co., 194 Ill.App. 619.
Iowa.—Haver v. Tenney, 36 Iowa 80.
Vt.—Douglass v. Morrisville, 95 A. 810, 89 Vt. 393.

89. U.S.—Harding v. Taubel, C.C.A. Pa., 1 F.2d 614, 617, citing **Corpus Juris.**
22 C.J. p 1181 note 68.

Contract

Under a contract leasing machinery, "to be used by lessee on his contract at Singac," it did not vary the terms of the written instrument to show what lessee's contract was and that lessor knew all about it, the agreement implying that lessor knew of the contract and generally the kind of work it called for.—Hoisting Engine Sales Co. v. Hart, 142 N.E. 342, 237 N.Y. 30, 31 A.L.R. 536, affirming 198 N.Y.S. 921, 205 App.Div. 897.

90. Va.—Mathieson Alkali Works v. Virginia Banner Coal Corporation, 136 S.E. 673, 147 Va. 125.
22 C.J. p 1181 note 70.

Building contracts

(1) Parol evidence is admissible to identify specifications referred to in building contract.—Bergin v. Williams, 138 Mass. 544.

(2) However, where such reference is false it cannot be aided by parol evidence.—Willamette Steam Mills Lumbering & Mfg. Co. v. Los Angeles College Co., 29 P. 629, 94 Cal. 229—9 C.J. p 698 note 71.

Letter

In an action for a balance due on goods sold and delivered where it appeared that a telegram ordering the goods referred to a "letter of even date," evidence of the situa-

Inducing cause. The inducing causes leading up to the execution of a written instrument may also be shown to aid in its construction where its phraseology is doubtful or ambiguous.[91] It has been held, however, that evidence of advertisements and advertising circulars is not admissible to show that a contract for the sale of realty was in fact the sale of a security within the Blue Sky Law.[92]

Intention of parties. Parol or extrinsic evidence of the intention of the parties may be received to clear up an ambiguity by reason of which such intention is not definitely expressed;[93] but, where

tion of the parties and surrounding circumstances was admissible to show not only that there was no letter of that date, but that the letter referred to was one dated the preceding day, and such evidence did not violate the rule against varying the terms of a written instrument.—Bergman v. Service Caster & Truck Co., Mo.App., 249 S.W. 973.

91. Kan.—Shellberg v. McMahon, 157 P. 268, 98 Kan. 46—Citizens' Bank v. Brigham, 60 P. 754, 61 Kan. 727, reversing 58 P. 1117, 9 Kan.App. 889.
N.J.—Schradin v. Harry W. Bealer Co., 176 A. 321, 117 N.J.Eq. 443, affirming 168 A. 854, 114 N.J.Eq. 459.
Tex.—Gravity Canal Co. v. Sisk, 95 S.W. 724, 43 Tex.Civ.App. 194.
Showing inducing cause where improper use of instrument attempted see infra § 970.

92. Ill.—McCormick v. Shively, 267 Ill.App. 99.

93. U.S.—Lincoln Nat. Life Ins. Co. v. Horwich, C.C.A.Ill., 115 F.2d 892—William C. Atwater & Co. v. Terminal Coal Corporation, C.C.A. Mass., 115 F.2d 887, affirming, D. C., 32 F.Supp. 178—Commissioner of Internal Revenue v. Proctor Shop, C.C.A., 82 F.2d 792, followed in 82 F.2d 795—American Nat. Red Cross v. Raven Honey Dew Mills, C.C.A.Neb., 74 F.2d 160—In re Pilot Radio & Tube Corporation, C. C.A.Mass., 72 F.2d 316, affirming, D.C., 5 F.Supp. 453, certiorari denied Eckhardt v. Ball, 55 S.Ct. 92, 293 U.S. 584, 79 L.Ed. 680—Murray v. Chicago, St. P., M. & O. Ry. Co., C.C.A.Ill., 65 F.2d 312—Western Battery & Supply Co. v. Hazelett Storage Battery Co., C.C.A.Mo., 61 F.2d 220, reversing, D.C., Hazelett Storage Battery Co. v. Western Battery & Supply Co., 52 F.2d 659, and certiorari denied 53 S.Ct. 399, 288 U.S. 608, 77 L.Ed. 982—Evans v. Sperry, D.C.Ill., 12 F.2d 438—In re C. G. Grove & Son, 7 F.2d 228, affirmed Martin v. Breckenridge, 14 F.2d 260—Van de Putte v. Texas Pacific Coal & Oil Co., D.C.Mont., 35 F.Supp. 794—The Marianne, D.C.La., 24 F.Supp. 786—Corbett v. Winston Elkhorn Coal Co., C.C.A.Ky., 296 F. 577—Cascaden v. Bell, Alaska, 257 F. 926, 169 C.C.A. 76—The Calabria, D.C.N.Y., 24 F. 607—Crooks Terminal Warehouses, Chicago, Ill., v. U. S., 92 Ct.Cl. 401.
Ala.—Creamery Package Mfg. Co. v. Fields, 180 So. 275, 235 Ala. 602—Lindsey Lumber & Export Co. v. Deas, 161 So. 473, 230 Ala. 447—Douglas & Mizell v. Ham Turpentine Co., 97 So. 650, 210 Ala. 180.
Alaska.—Kapsamalis v. Lechner & Skeen, 5 Alaska 75.
Ariz.—Scoville v. Vail Inv. Co., 103 P.2d 662, 55 Ariz. 486, followed in Vail v. Scoville, 103 P.2d 668, 55 Ariz. 502, and Vail Inv. Co. v. Scoville, 103 P.2d 669, 55 Ariz. 501—Hoover v. Odle, 250 P. 993, 31 Ariz. 147.
Ark.—Sternberg v. Snow King Baking Powder Co., 57 S.W.2d 1057, 186 Ark. 1161—Ashton Glassell Co. v. Mansfield Lumber Co., 39 S.W.2d 324, 183 Ark. 895—Hawkins v. Bradley, 13 S.W.2d 291, 178 Ark. 1073—Jackson County Gin Co. v. McCuistion, 5 S.W.2d 729, 177 Ark. 60—Clark v. Thompson, 289 S.W. 760, 172 Ark. 1176—Bracy Bros. Hardware Co. v. Herman-McCain Const. Co.. 259 S.W. 384, 163 Ark. 133—Camden Nat. Bank v. Donaghey, 237 S.W. 460, 148 Ark. 653—Mays v. Barnett, 234 S.W. 488, 150 Ark. 492—Byrd v. Baker-Matthews Lumber Co., 230 S.W. 584, 148 Ark. 576—Maxwell v. Felker, 230 S.W. 266, 148 Ark. 393—Darnell v. Bibb, 221 S.W. 1061, 143 Ark. 580—Ellege v. Henderson, 218 S.W. 831, 142 Ark. 421—Brown & Hackney v. Daubs, 213 S.W. 4, 139 Ark. 53—Montgomery & Co. v. Arkansas Cold Storage & Ice Co., 124 S.W. 768, 93 Ark. 191.
Cal.—Walsh v. Walsh, 116 P.2d 62, prior opinion, App., 108 P.2d 763—California Canning Peach Growers v. Williams, 78 P.2d 1154, 11 Cal.2d 221—People v. Ganahl Lumber Co., 75 P.2d 1067, 10 Cal.2d 501—Hurlbut v. Quigley, 180 P. 613, 180 Cal. 265—Pierson v. Bradfield, App., 111 P.2d 460—Hamilton v. Ferguson, 79 P.2d 427, 26 Cal.App. 2d 390—Steiner v. Davis, 76 P.2d 157, 24 Cal.App.2d 692—First-Trust Joint Stock Land Bank of Chicago v. Meredith, 60 P.2d 1023, 16 Cal. App.2d 504, hearing denied 62 P.2d 369, 16 Cal.App.2d 504—Coats v. General Motors Corporation, 39 P. 2d 838, 3 Cal.App.2d 340—Minnich v. Minnich, 15 P.2d 804, 127 Cal. App. 1—Shelley v. Hart, 297 P. 82, 112 Cal.App. 231—Merritt v. Rey, 286 P. 510, 104 Cal.App. 700—Campbell v. Summar, 266 P. 989, 91 Cal.App. 307—Morgan v. Green, 260 P. 596, 86 Cal.App. 216—Bennett v. Northwestern Nat. Ins. Co., 257 P. 586, 84 Cal.App. 130—Gilde v. Schuster, 257 P. 121, 83 Cal. App. 537—Hodoian v. Garabedian, 251 P. 227, 79 Cal.App. 762—Holtham v. Savory, 238 P. 136, 72 Cal. App. 497—Stieglitz v. Settle, 233 P. 350, 70 Cal.App. 351—Bassi v. Walden, 222 P. 866, 64 Cal.App. 764—Hind v. Uchida Trading Co., 203 P. 1028, 55 Cal.App. 260—Gash v. Hammer, 202 P. 917, 55 Cal.App. 50—Newell v. Redondo Water Co., 202 P. 914, 55 Cal.App. 86—Lang v. Pacific Brewing & Malting Co., 187 P. 81, 44 Cal.App. 618—Ruffin v. Becker, 148 P. 233, 26 Cal.App. 701, 27 Cal.App. 163.
Colo.—Logsdon v. Quiat, 81 P.2d 770, 102 Colo. 560—Auto Owners Service Ass'n v. Pollard, 223 P. 38, 74 Colo. 524.
Del.—Foreman's Systems v. Milk Dealers' Crate Corporation, 120 A. 358, 13 Del.Ch. 351.
Fla.—Roe v. Kendrick, 200 So. 394—Routh v. Williams, 193 So. 71, 141 Fla. 334.
Ga.—Muller v. Cooper, 141 S.E. 300, 165 Ga. 439—Shackelford v. Fitzgerald, 105 S.E. 597, 151 Ga. 35.
Idaho.—Molyneux v. Twin Falls Canal Co., 35 P.2d 651, 54 Idaho 619, 94 A.L.R. 1264—Gould v. Frazier, 285 P. 673, 48 Idaho 798—First Nat. Bank v. Crane Creek Sheep Co., 273 P. 945, 47 Idaho 149.
Ill.—Clark v. Muir, 132 N.E. 193, 298 Ill. 548—Miles v. Nelson, 250 Ill. App. 405—Melody v. Arcola State Bank, 249 Ill.App. 85—Jasper County Nat. Loan & Bldg. Ass'n v. Coen, 233 Ill.App. 511.
Ind.—Davis v. Christie, App., 24 N. E.2d 273—In re Jones, 180 N.E. 495, 94 Ind.App. 624—La Valle v. Fox, 134 N.E. 674, 78 Ind.App. 31—Chalmers & Williams v. Surprise, 123 N.E. 841, 70 Ind.App. 646.
Iowa.—In re Talbott's Estate, 224 N. W. 550, 209 Iowa 1—Needles v. Shenandoah Nat. Bank of Shenandoah, 211 N.W. 392, 202 Iowa 927—Shuler v. Independent Sand & Gravel Co., 209 N.W. 731, 203 Iowa 134—Beeman v. Stilwell, 189 N.W. 969, 194 Iowa 231—White v. Home Mut. Ins. Ass'n of Iowa, 179 N. W. 315, 189 Iowa 1051.
Kan.—Ray v. Rorabaugh-Paxton Dry Goods Co., 7 P.2d 76, 134 Kan. 413.
Ky.—Ogle Coal Co. v. Martin, 24 S. W.2d 296, 232 Ky. 564—Boone, Foreman & Lackey v. Halteman & Cave Ins. Agency, 11 S.W.2d 973, 226 Ky. 839—Jones v. Riddell, 5

the writing is free from ambiguity, parol evidence | is not admissible to show that the real intention of

S.W.2d 1077, 224 Ky. 245—Torian v. Hibbs' Ex'x, 245 S.W. 502, 196 Ky. 784—Hudson & Collins v. McGuire, 223 S.W. 1101, 188 Ky. 712, 17 A.L.R. 148.

La.—Tremont Lumber Co. v. Peavy, 110 So. 79, 162 La. 35—Edwards v. Walker, 132 So. 773, 15 La.App. 664.

Me.—Bar Harbor & Union River Power Co. v. Foundation Co., 149 A. 801, 129 Me. 81.

Md.—Richfield Oil Corporation of New York v. Chesapeake & C. B. R. Co., 20 A.2d 581—Bothwell v. Employers' Underwriters' Agency, 125 A. 504, 145 Md. 36.

Mass.—Sutcliffe v. Burns, 1 N.E.2d 23, 294 Mass. 126—Kavanaugh v. Johnson, 195 N.E. 797, 290 Mass. 587—Graves v. Apt, 124 N.E. 432, 233 Mass. 587.

Mich.—Pittsburgh Plate Glass Co. v. Art Centre Apartments, 235 N.W. 234, 253 Mich. 501—Whittlesey v. Herbrand Co., 187 N.W. 279, 217 Mich. 625—O'Dell v. Day, 183 N.W. 17, 214 Mich. 566—People v. Boyes, 175 N.W. 289, 208 Mich. 58.

Mo.—Johnson v. Schuchardt, 63 S.W.2d 17, 333 Mo. 781, 89 A.L.R. 914—Kellermann Contracting Co. v. City of St. Louis, App., 135 S.W.2d 369—Wolfe v. Stark Bros. Nurseries & Orchards Co., App., 288 S.W. 1004—Ebbs v. Neff, 282 S.W. 74, 220 Mo.App. 1070—Jobes v. Miller, 209 S.W. 549, 201 Mo.App. 45.

Mont.—Snider v. Carmichael, 58 P.2d 1004, 102 Mont. 387—U. S. Nat. Bank of Red Lodge v. Chappell, 230 P. 1084, 71 Mont. 553.

Neb.—Jensen v. Romigh, 274 N.W. 199, 133 Neb. 71.

N.H.—Smart v. Huckins, 134 A. 520, 82 N.H. 342.

N.J.—Clifton Trust Co. v. Windsor Mfg. Co., 18 A.2d 35, 125 N.J.Law 619—Meserve v. Traverso, 197 A. 54, 119 N.J.Law 566, affirming 192 A. 835, 15 N.J.Misc. 554.

N.Y.—Cordua v. Guggenheim, 8 N.E.2d 274, 274 N.Y. 51, reversing In re Andrew's Will, 290 N.Y.S. 427, 248 App.Div. 771—Corenbleth v. Gulden, 15 N.Y.S.2d 101, 257 App.Div. 629—Weitling v. Sorenson, 5 N.Y.S.2d 79, 254 App.Div. 539—J. J. Fisher Co. v. Central City Roofing Co., 2 N.Y.S.2d 670, 254 App.Div. 569—Chase Nat. Bank of City of New York v. Wessell, 281 N.Y.S. 146, 245 App.Div. 815—Weitling v. Sorenson, 272 N.Y.S. 338, 241 App.Div. 377—F. S. Royster Guano Co. v. Globe & Rutgers Fire Ins. Co., 234 N.Y.S. 685, 226 App.Div. 178, affirmed 168 N.E. 834, 252 N.Y. 75—Brower v. Wandel, 229 N.Y.S. 543, 224 App.Div. 81—Levy v. Forster, 231 N.Y.S. 238, 224 App.Div. 463—Schneider v. Vietor, 208 N.Y.S. 897, 208 App. Div. 624—Sakurai v. C. Platou Co., 201 N.Y.S. 485, 206 App.Div. 447—Doelger v. Battery Park Nat. Bank, 194 N.Y.S. 582, 201 App.Div. 515—Hausman v. Buchman, 179 N.Y.S. 26, 189 App.Div. 597—Pike v. Naylon Securities Co., 251 N.Y.S. 659, 140 Misc. 734—Fullam v. Peterson, 21 N.Y.S.2d 797—M. Feigel & Bro. v. Russell Playing Card Co., 188 N.Y.S. 423—Knickerbocker Metallic Bed Co. v. Newman, 174 N.Y.S. 651.

Okl.—Manley v. Boling, 96 P.2d 30, 186 Okl. 59—Safety Cab Co. v. Fair, 74 P.2d 607, 181 Okl. 264—Phillips Petroleum Co. v. Widick, 52 P.2d 773, 175 Okl. 376—Hawkins v. Mattes, 41 P.2d 880, 171 Okl. 186—Clark v. Herbert, 270 P. 329, 132 Okl. 272—Mitchell v. Vogele, 256 P. 906, 125 Okl. 176—Rogers v. Kinney, 250 P. 890, 122 Okl. 73—Eagle Printing & Publishing Co. v. Chandler, 243 P. 237, 116 Okl. 108.

Or.—Salem King's Products Co. v. Ramp, 196 P. 401, 100 Or. 329.

Pa.—Security Trust Co. of Pottstown v. Stapp, 1 A.2d 236, 332 Pa. 9—Bauer v. Byrd, 91 A. 847, 245 Pa. 432—In re Adams' Estate, 12 A.2d 465, 139 Pa.Super. 512—Dorrington v. Manning, 4 A.2d 886, 135 Pa.Super. 194—Kane v. McClenachan, 159 A. 61, 104 Pa.Super. 417—Commercial Credit Co. v. Commercial Banking Corporation, 46 Dauph.Co. 323.

R.I.—Salvas v. Jussaume, 145 A. 97, 50 R.I. 75.

S.C.—Stackhouse v. Pure Oil Co., 180 S.E. 188, 176 S.C. 318—Gilbert v. Glenn, 156 S.E. 325, 159 S.C. 135—Shuler v. Williams, 99 S.E. 819, 112 S.C. 349—Carson v. McCaskill, 99 S.E. 108, 111 S.C. 516.

S.D.—Turner County v. Peterson, 283 N.W. 144, 66 S.D. 317—Reedy v. Davidson, 235 N.W. 710, 58 S.D. 274.

Tenn.—Ridley v. Haiman, 47 S.W.2d 750, 164 Tenn. 239—Frierson v. International Agr. Corporation, App., 148 S.W.2d 27—Gibson County v. Fourth & First Nat. Bank, 96 S.W.2d 184, 20 Tenn.App. 168—Hughes v. Young, 65 S.W.2d 858, 17 Tenn.App. 24—Bank of Commerce & Trust Co. v. North, 11 Tenn.App. 519.

Tex.—State Nat. Bank of Corpus Christi v. Morgan, 143 S.W.2d 757, 135 Tex. 509, affirming, Civ.App., 123 S.W.2d 1036—Guardian Trust Co. v. Bauereisen, 121 S.W.2d 579, 132 Tex. 396, reversing, Civ.App., 99 S.W.2d 357—Houston Oil Co. of Texas v. Kirkindall, 145 S.W.2d 1074, affirming Humble Oil & Refining Co. v. Kirkindall, Civ.App., 119 S.W.2d 731—Higginbotham Cattle Co. v. Whaley & Lewis, Com.App., 41 S.W.2d 34, reversing, Civ.App., 26 S.W.2d 308—Turner v. Montgomery, Com.App., 293 S.W. 815, affirming, Civ.App., 286 S.W. 624—Hart v. Light & Jones, Com.App., 245 S.W. 671, reversing Light v. Hart, Civ.App., 193 S.W. 740—Porter v. McKinnon, Com. App., 221 S.W. 574, affirming McKinnon v. Porter, Civ.App., 192 S.W. 1112—Marlett v. Brownfield, Civ.App., 155 S.W.2d 636—Butler v. Southwest Dairy Products Co., Civ.App., 146 S.W.2d 1036, error dismissed, judgment correct—Jones v. First State Bank of Dumas, Civ.App., 145 S.W.2d 681—Murphy v. Dilworth, Civ.App., 129 S.W.2d 418, error granted—Ellisor v. Kennedy, Civ.App., 128 S.W.2d 842, error refused—Johnson v. Cofer, Civ.App., 113 S.W.2d 963—Brown v. Stoker, Civ.App., 102 S.W.2d 248, error dismissed—Fireman's Fund Ins. Co. v. Leopold, Civ.App., 84 S.W.2d 840, error dismissed—McMillan v. American General Ins. Co., Civ.App., 80 S.W.2d 796, error dismissed—Pecos Mercantile Co. v. Texlite, Inc., Civ. App., 65 S.W.2d 811, affirmed Texlite Inc. v. Pecos Mercantile, 96 S.W.2d 73, 128 Tex. 57—Sellers v. Spiller, Civ.App., 64 S.W.2d 1049—Weiss v. Mitchell, Civ.App., 58 S.W.2d 165, error dismissed—City Investment & Loan Co. v. Wichita Hardware Co., Civ.App., 57 S.W.2d 222, modified on other grounds 91 S.W.2d 683, 127 Tex. 44—Curry v. Texas Co., Civ.App., 8 S.W.2d 206, error dismissed—Texas Employers' Ins. Ass'n v. Knouff, Civ.App., 297 S.W. 799, reversed on other grounds, Com.App., 7 S.W.2d 68—Thomson v. Collins, Civ.App., 267 S.W. 516—Farmers' Rice Milling Co. v. Standard Rice Co., Civ.App., 264 S.W. 276—Stowell v. Texas Employers' Ins. Ass'n, Civ.App., 259 S.W. 311—Galveston, H. & S. A. Ry. Co. v. McSpadden, Civ.App., 248 S.W. 454—Empire Gas & Fuel Co. v. Pendar, Civ.App., 244 S.W. 184—Baleja v. Henderson, Civ. App., 241 S.W. 1080—Quanah, A. & P. Ry. Co. v. Cooper, Civ.App., 236 S.W. 811, error refused—Ferguson v. Johnson, Civ.App., 228 S.W. 338, dismissed for want of jurisdiction—Benton v. Jones, Civ. App., 220 S.W. 193.

Utah.—Clark v. North Cottonwood Irrigation & Water Co. of Farmington, 11 P.2d 300, 79 Utah 425—Penn Star Mining Co. v. Lyman, 231 P. 107, 64 Utah 343.

Va.—Barrett v. Vaughan & Co., Bankers, 178 S.E. 64, 163 Va. 811—Shirley v. Van Every, 167 S.E. 345, 159 Va. 762—Adams, Payne & Gleaves v. Indiana Wood Preserving Co., 154 S.E. 558, 155 Va. 18—Parker v. Murphy, 146 S.E. 254,

a party was other than that clearly expressed by | the writing.94 It is also well established that parol

152 Va. 173—Turner & Happersett v. Hall & Connor, 104 S.E. 861, 128 Va. 247.
W.Va.—Hodge v. Garten, 182 S.E. 582, 116 W.Va. 564.
Wis.—Green v. Loberg, 237 N.W. 274, 205 Wis. 221—Firestone Tire & Rubber Co. v. Werner, 236 N.W. 118, 204 Wis. 306—Owens v. Hughes, 205 N.W. 812, 188 Wis. 215—George A. Peterson Co. v. Iowa County, 191 N.W. 565, 179 Wis. 329.
22 C.J. p 1109 note 25, p 1182 note 73—38 C.J. p 1179 note 87.
Construction of contracts generally to determine intention of parties see Contracts § 295.

Beneficiary of life policy

(1) Where life policy is not clear concerning the intended beneficiary, parol evidence is admissible to show actual intention.—Hall v. Equitable Life Assur. Soc. of U. S., 295 N.W. 204, 295 Mich. 404.

(2) Such inquiry should be limited to evidence of intention at a definite date not so remote as to afford time and opportunity for a change of desire and purpose on the part of insured.—Pope v. Pope, 119 N.E. 11, 67 Ind.App. 153.

Broad language

Where the language of a contract is broader than the meaning of the parties, parol evidence is admissible to narrow and restrict the meaning of the language used to accord with the actual meaning of the parties.—Printz v. McLeod, 104 S.E. 818, 128 Va. 471.

Time as of essence

Parol evidence may be considered in determining whether parties intended time to be of essence of realty contract.—Wimer v. Wagner, 20 S.W.2d 650, 323 Mo. 1156, 79 A.L.R. 1231.

94. U.S.—Occidental Indemnity Co. v. Scott, C.C.A.Or., 91 F.2d 596, rehearing denied 92 F.2d 239—East & West Ins. Co. of New Haven, Conn. v. Fidel, C.C.A.N.M., 49 F.2d 35—Kunihiro v. Lyons Bros. Co., C.C.A.Cal., 12 F.2d 894, certiorari denied 47 S.Ct. 112, 273 U.S. 723, 71 L.Ed. 859—Kunihiro v. M. O. Coggins Co., C.C.A.Cal., 12 F.2d 894, certiorari denied 47 S.Ct. 112, 273 U.S. 723, 71 L.Ed. 859—Shell Oil Co. v. Manley Oil Corporation, D.C.Ill., 37 F.Supp. 289, reversed, on other grounds, C.C.A., 124 F.2d 714—Baltimore Trust Co. v. Interocean Oil Co., D.C.Md., 26 F.Supp. 817, affirmed, C.C.A., British-American Oil Producing Co. v. Baltimore Trust Co., 105 F.2d 291—In re Vanity Fair Slippers, D.C.N.Y., 4 F.Supp. 83—In re Ballard, D.C. Tex., 279 F. 574—Lovelace v. Southwestern Petroleum Co., 267 F. 513, affirming, D.C., 267 F. 504.
Ala.—Spragins v. McCaleb, 188 So. 251, 237 Ala. 658.
Ark.—Williams v. Dumas, 126 S.W. 2d 934, 197 Ark. 1011—Camden Nat. Bank v. Donaghey, 237 S.W. 460, 148 Ark. 653—Morris v. Southwestern Supply Co., 206 S.W. 894, 136 Ark. 507.
Cal.—Watson v. Peyton, 73 P.2d 906, 10 Cal.2d 156—Brant v. California Dairies, 48 P.2d 13, 4 Cal.2d 128—Joerger v. Pacific Gas & Electric Co., 276 P. 1017, 207 Cal. 8—Union Liquors v. Finkel & Lasarow, App., 113 P.2d 19—First Bond & Mortgage Co. of Glendale v. Malouf, 98 P.2d 824, 37 Cal.App.2d 74—Chiarello v. Axelson, 76 P.2d 731, 25 Cal. App.2d 157—Briggs v. Marcus-Lesoine, Inc., 39 P.2d 442, 3 Cal.App. 2d 207—Anderson v. Palladine, 178 P. 553, 39 Cal.App. 256.
Colo.—Millage v. Churchill, 195 P. 107, 69 Colo. 457.
Del.—Foreman's Systems v. Milk Dealers' Crate Corporation, 120 A. 358, 13 Del.Ch. 351.
Ga.—Kennedy v. McLean, 187 S.E. 102, 182 Ga. 898—Handy v. Handy, 115 S.E. 114, 154 Ga. 686—Alexander Film Co. v. Brittain, 11 S.E. 2d 66, 63 Ga.App. 384—National Manufacture & Stores Corporation v. Dekle, 173 S.E. 408, 48 Ga.App. 515.
Idaho.—Meir-Nandorf v. Milner, 201 P. 720, 34 Idaho 396.
Ill.—Rockford Trust Co. v. Moon, 18 N.E.2d 447, 370 Ill. 250—Freeman v. Equitable Life Assur. Soc. of U. S., 26 N.E.2d 714, 304 Ill.App. 517—McKenna Process Co. of Illinois v. Blatchford Corporation, 25 N.E.2d 916, 304 Ill.App. 101—Erzinger v. Gerrity, 271 Ill.App. 450.
Ind.—Coddington v. Joseph Campbell Co., 137 N.E. 679, 80 Ind.App. 205—Fenn v. American Rattan & Reed Mfg. Co., 130 N.E. 129, 75 Ind.App. 146.
Iowa.—Northern Trust Co. v. Anderson, 262 N.W. 529, 533, 222 Iowa 590, citing **Corpus Juris**—Johnson v. Lavene, 192 N.W. 885, 196 Iowa 471.
Kan.—Kansas Electric Utilities Co. v. Bowersock, 202 P. 92, 109 Kan. 718—Allen v. Allen, 196 P. 1075, 108 Kan. 765—Harwi v. Morton, 186 P. 740, 106 Kan. 87.
Ky.—Hudson & Collins v. McGuire, 223 S.W. 1101, 188 Ky. 712, 17 A.L.R. 148.
Mass.—Oldfield v. Smith, 24 N.E.2d 544, 304 Mass. 590—Davis v. H. S. & M. W. Snyder, 143 N.E. 819, 248 Mass. 387—Barbrick v. Huddell, 139 N.E. 629, 245 Mass. 428—Gold v. Boston Elevated Ry. Co., 138 N.E. 251, 244 Mass. 144—Muse v. De Vito, 137 N.E. 730, 243 Mass. 384—Graves v. Apt, 124 N.E. 432, 233 Mass. 587.
Mich.—Michigan Chandelier Co. v. Morse, 297 N.W. 64, 297 Mich. 41—Zilwaukee Tp. v. Saginaw Bay City Ry. Co., 181 N.W. 37, 213 Mich. 61—Meredith v. McCormick, 175 N.W. 280, 208 Mich. 563, 8 A.L.R. 669.
Minn.—Stavanau v. Gray, 172 N.W. 885, 143 Minn. 1.
Miss.—Edward Hines Yellow Pine Trustees v. Bond, 113 So. 184, 146 Miss. 637.
Mo.—Haley v. Sippley, 297 S.W. 362, 317 Mo. 505.
Mont.—Hill Cattle Corporation v. Killorn, 256 P. 497, 79 Mont. 327.
N.H.—N. E. Redlon Co. v. Franklin Square Corporation, 195 A. 348, 89 N.H. 137, affirmed 197 A. 329, 89 N.H. 137—Barclay v. Dublin Lake Club, 192 A. 620, 89 N.H. 87.
N.J.—Corn Exchange Nat. Bank & Trust Co. of Philadelphia v. Taubel, 175 A. 55, 113 N.J.Law 605.
N.M.—Higgins v. Cauhape, 261 P. 813, 33 N.M. 11.
N.Y.—Eidlitz v. Fischbach & Moore, 267 N.Y.S. 896, 239 App.Div. 483—Dealy v. Klapp, 196 N.Y.S. 702, 203 App.Div. 216, affirmed 142 N.E. 313, 236 N.Y. 631—Magidson v. Bloom, 11 N.Y.S.2d 324, 170 Misc. 832—Nix v. Low, 1 N.Y.S.2d 21, 165 Misc. 484—Friedbar Realty Corporation v. Sanford, 198 N.Y.S. 38, 119 Misc. 621—In re Schmidlapp's Estate, 196 N.Y.S. 108, 119 Misc. 215, affirmed In re Schmidlapp, 199 N.Y S. 948, 206 App.Div. 689, which is affirmed In re Schmidlapp's Estate, 140 N.E. 697, 236 N.Y. 278—Heller v. Boylan, 29 N.Y.S.2d 653.
N.C.—Sansom v. Warren, 2 S.E.2d 459, 215 N.C. 432.
Ohio.—Spitz v. Nunn, 171 N.E. 117, 34 Ohio App. 397—Selzer v. Turske, 164 N.E. 65, 30 Ohio App. 15.
Okl.—Walker v. Renegar, 61 P.2d 666, 178 Okl. 82—Rogers v. Kinney, 250 P. 890, 122 Okl. 73—Eagle Printing & Publishing Co. v. Chandler, 243 P. 237, 116 Okl. 108—Kansas City Southern Ry. Co. v. Whitaker, 242 P. 220, 115 Okl. 212—Mann v. Brady, 196 P. 346, 80 Okl. 299.
Or.—U. S. Nat. Bank of La Grande v. Miller, 258 P. 205, 122 Or. 285, 58 A.L.R. 339.
Pa.—Anstead v. Cook, 140 A. 139, 291 Pa. 335—Miller v. Rodd, 131 A. 482, 285 Pa. 16—Atherton v. Clearview Coal Co., 110 A. 298, 267 Pa. 425.
R.I.—Goggin v. Goggin, 194 A. 730, 59 R.I. 145, 113 A.L.R. 569.
S.C.—Carson v. McCaskill, 99 S.E. 108, 111 S.C. 516—Sanders v. Boynton, 98 S.E. 854, 112 S.C. 56.
Tex.—Murphy v. Dilworth, 151 S.W.

evidence is not admissible to give to a writing a construction conformable to the secret intentions which one or both of the parties may have entertained but which the writing fails to express,[95] and a party's uncommunicated intention cannot be shown by parol.[96]

Knowledge of subject matter. It has been held that, in cases of obscure instruments, the court may inquire into the actual state of knowledge which the parties to the instrument had on the subject of it,[97] and where it involves questions of science may refer to the state of public knowledge or learning on the subject at the time the instrument was made.[98]

Other transactions between same parties. Previous and contemporaneous transactions may properly be taken into consideration to ascertain the sense in which the parties to a writing used particular terms,[99] or to ascertain the subject matter of the

2d 1004, reversing, Civ.App., 129 S.W.2d 418—Lewis v. East Texas Finance Co., 146 S.W.2d 977, reversing, Civ.App., 123 S.W.2d 803—Crayton v. Phillips, Com.App., 4 S.W.2d 961, affirming, Civ.App., 297 S.W. 888—City of Abilene v. Sayles, Com.App., 295 S.W. 578, affirming Sayles v. City of Abilene, Civ.App., 290 S.W. 239—McCarty v. Pugh, Com.App., 265 S.W. 126, reversing, Civ.App., 253 S.W. 690—Benskin v. Barksdale, Com.App., 246 S.W. 360, reversing, Civ.App., Barksdale v. Benskin, 194 S.W. 402—Baldwin v. Drew, Com.App., 244 S.W. 987, reversing, Civ.App., 195 S.W. 636—Scheller v. Groesbeck, Com.App., 231 S.W. 1092, reversing, Civ.App., 215 S.W. 353—Turner v. Cattleman's Trust Co. of Ft. Worth, 215 S.W. 831, reversing, Cattlemen's Trust Co. of Ft. Worth v. Turner, Civ.App., 182 S.W. 438—Stewart v. McKee, Civ.App., 150 S.W.2d 415, error granted—Butler v. Southwest Dairy Products Co., Civ.App., 146 S.W.2d 1036, error dismissed, judgment correct—Sun Oil Co. v. Smith, Civ.App., 113 S.W.2d 683, error dismissed—Van Cleave v. Bell Oil & Gas Co., Civ.App., 102 S.W.2d 1103, error dismissed—Stroope v. Byrd, Civ.App., 101 S.W.2d 624—Sharpe v. Womack, Civ.App., 73 S.W.2d 1058, modified on other grounds 93 S.W.2d 712, 127 Tex. 357—Thomas v. Warner-Quinlan Co. of Texas, Civ.App., 65 S.W.2d 321, error refused—Alamo Lumber Co. v. Fahrenthold, Civ.App., 58 S.W.2d 1085, error refused—Johnson v. Montgomery, Civ.App., 31 S.W.2d 160, error refused—Graham's Estate v. Stewart, Civ.App., 15 S.W.2d 72, error refused—Winn v. Miller, Civ.App., 8 S.W.2d 714, error dismissed—First State Bank of Terrell v. Riddle, Civ.App., 289 S.W. 199—Morgan v. Mace, Civ.App., 259 S.W. 1095—Graham v. Knight, Civ.App., 240 S.W. 981—Donigan v. Emmert, Civ.App., 239 S.W. 659, dismissed for want of jurisdiction—Kelly v. Wilson, Civ.App., 233 S.W. 141, error refused—Great Southern Oil & Refining Ass'n v. Cooper, Civ.App., 231 S.W. 157.

Utah.—Dohrmann Hotel Supply Co. v. Beau Brummel, Inc., 103 P.2d 650—Starley v. Deseret Foods Corporation, 74 P.2d 1221, 93 Utah 577.

Vt.—Read & Davis v. Reynolds, 112 A. 359, 95 Vt. 45—Greene v. Helme, 111 A. 557, 94 Vt. 392.

Va.—Pepper v. Dixie Splint Coal Co., 181 S.E. 406, 165 Va. 179.

Wash.—Parke v. Case, 193 P. 688, 115 Wash. 243.

W.Va.—Hardesty v. Fairmont Supply Co., 14 S.E.2d 436—Trimble v. Hope Natural Gas Co., 187 S.E. 331, 117 W.Va. 650—Collins v. Treat, 152 S.E. 205, 108 W.Va. 443—Cline Cola Beverage Co. v. Raleigh Coca Cola Bottling Works, 130 S.E. 252, 99 W.Va. 596—Watson v. Buckhannon River Coal Co., 120 S.E. 390, 95 W.Va. 164—Maddy v. Maddy, 105 S.E. 803, 87 W.Va. 581.

Wis.—Koskey v. Harnischfeger Corporation, 265 N.W. 583, 221 Wis. 267—In re McAskill's Estate, 257 N.W. 177, 216 Wis. 276—Hampton Plains Realty Co. v. Cohen, 252 N.W. 572, 214 Wis. 128—Schilling v. Milwaukee Bedding Co., 221 N.W. 743, 197 Wis. 250—H. H. Camp Co. v. Pabst Brewing Co., 178 N.W. 474, 172 Wis. 211.

22 C.J. p 1183 note 74.

"Parol evidence is admitted where uncertainty exists as to the meaning of a contract to show what the parties meant by what they said, but it is not admitted to show that they meant something other than what they said."—Rilovich v. Raymond, 67 P.2d 1062, 1068, 20 Cal.App.2d 630.

In absence of allegations of fraud or mistake, no evidence of the intention of the parties can be considered which changes the obligation expressed in the writing.—Arcola Sugar Mills Co. v. Farmer Hamlett's Co., Tex.Civ.App., 220 S.W. 385, dismissed for want of jurisdiction.

Instructions as to delivery

When written instructions as to delivery are deposited with a deed, the effect of the transaction depends on the construction of the writing, and anything which grantor may have said expressive of his intent or wishes is immaterial.—Singleton v. Kelly, 212 P. 63, 61 Utah 277.

"**The purpose of construction** is to extract the intent of the parties; and that construction is to be made without the aid of testimony aliunde, if the intention of the parties can be ascertained from the writing itself, and resort to other evidence is to be had only when some portion of the writing is ambiguous or in apparent conflict with other portions thereof."—Lawless v. Caddo River Lumber Co., 223 S.W. 395, 397, 145 Ark. 132.

Unexpressed intention

Parol evidence is not admissible to import into a writing an intention not expressed therein.

Ala.—Reichert v. Jerome H. Sheip, Inc., 91 So. 618, 206 Ala. 648.

Ariz.—Assignment of Rich Hardware Co., 196 P. 454, 22 Ariz. 254.

95. Iowa.—Sapulpa Refining Co. v. Cedar Rapids Oil Co., 179 N.W. 168, 190 Iowa 892.

Mass.—Dutton v. Bennett, 152 N.E. 621, 256 Mass. 397.

N.H.—Pettee v. Omega Chapter of Alpha Gamma Rho, 171 A. 441, 86 N.H. 419, affirming 170 A. 1, 86 N.H. 419.

22 C.J. p 1179 note 52.

96. Ala.—Norton-Crossing Co. v. Martin, 81 So. 71, 202 Ala. 569.

Iowa.—Northern Trust Co. v. Anderson, 262 N.W. 529, 222 Iowa 590, adhered to 271 N.W. 192, 222 Iowa 590.

Ohio.—Myers v. Sunlight Laundry Co., 10 Ohio App. 275.

Pa.—Franklin Sugar Refining Co. v. Lykens Mercantile Co., 117 A. 780, 274 Pa. 206.

Tex.—American Refining Co. v. Sims Oil Co., Civ.App., 282 S.W. 894, affirmed Simms Oil Co. v. American Refining Co., Com.App., 288 S.W. 163.

22 C.J. p 1183 note 75.

97. U.S.—Markey v. Brunson, C.C.A. S.C., 286 F. 893, 895, citing **Corpus Juris.**

Ala.—American Mut. Liability Ins. Co. of Boston v. Tuscaloosa Veneer Co., 186 So. 133, 237 Ala. 187—Obermark v. Clark, 114 So. 135, 216 Ala. 564, 55 A.L.R. 1153.

22 C.J. p 1183 note 76.

98. Vt.—Ward v. Preferred Acc. Ins. Co., 67 A. 821, 80 Vt. 321.

22 C.J. p 1183 note 76.

99. U.S.—Ingram-Day Lumber Co. v.

contract.[1] Where, however, there is no ambiguity in the contract as applied to the existing facts, it is improper to permit oral testimony to be given of prior transactions between the parties.[2]

Other writings. Other writings relating to the same subject matter are, especially if expressly referred to,[3] admissible in evidence to explain the writing before the court,[4] or to aid the description of the subject matter.[5] A reference to a particular writing, however, does not exclude evidence other than the writing so referred to.[6]

Prior negotiations. The negotiations between the parties prior to the execution of a contract or other writing may be admissible for the purpose of aiding the court in the interpretation of the written instrument if its meaning is doubtful or uncertain,[7] but the negotiations leading up to a written contract or deed are inadmissible on its construction where

Schultz, C.C.A.Wis., 45 F.2d 359, certiorari denied 51 S.Ct. 366, 283 U.S. 833, 75 L.Ed. 1445.
Ga.—Weems v. Albert Pick & Co., 127 S.E. 819, 33 Ga.App. 579.
Minn.—City of South St. Paul v. Northern States Power Co., 248 N.W. 288, 189 Minn. 26.
W.Va.—Bragg v. Peytona Lumber Co., 135 S.E. 841, 102 W.Va. 587.
22 C.J. p 1183 note 81.

Former insurance policy
In action for insurance premium on renewal policy, former policy was held admissible to explain ambiguity in classification of employees constituting basis of premium rate.—Zurich General Accident & Liability Ins. Co. v. Carlton & C. R. Co., 291 P. 349, 133 Or. 398.

Original contract
Where the original draft of a contract was modified by erasure and interlineation, the original draft may be considered in determining the effect to be given the contract as modified.—Thomas v. Williams, 176 N.W. 968, 188 Iowa 961.

1. Cal.—Fee v. McPhee Co., 160 P. 397, 31 Cal.App. 295.
22 C.J. p 1183 note 82.

2. Ga.—Weems v. Albert Pick & Co., 127 S.E. 819, 33 Ga.App. 579.
Wis.—In re Read's Will, 203 N.W. 352, 187 Wis. 333.

3. U.S.—Snare & Triest Co. v. U. S., 57 Ct.Cl. 151.
La.—C. C. Mengel & Bro. Co. v. Liberty Oil Co., 106 So. 724, 725, 160 La. 143, quoting **Corpus Juris.**
Tex.—Higginbotham Cattle Co. v. Whaley & Lewis, Com.App., 41 S.W.2d 34, reversing, Civ.App., 26 S.W.2d 308.
22 C.J. p 1183 note 77—33 C.J. p 115 note 55.

Reference to show chain of title
Provision in an unambiguous assignment of oil and gas lease that land was same as conveyed by designated predecessor in title did not render description in assignment admissible to show which land was intended to be conveyed, where provision was merely reference to show chain of title.—Redden v. Pure Oil Co., Tex.Civ.App., 86 S.W.2d 874.

4. Tex.—Marlett v. Brownfield, Civ.App., 145 S.W.2d 636.

Utah.—Penn Star Mining Co. v. Lyman, 231 P. 107, 64 Utah 343.
22 C.J. p 1183 note 78.

An explanatory letter accompanying an altered lease, and constituting a part of the lessee's offer, should be considered in determining the meaning of the offer.—Doolittle v. Wilson, 227 P. 345, 116 Kan. 576.

Memoranda can be received to make plain things which are obscure in deed.—Huffman v. Landes, 177 S.E. 200, 163 Va. 652.

Unsigned memoranda
On issue as to whether grantor, placing deeds in escrow to be delivered on her death, intended to make absolute irrevocable delivery thereof, an indorsement on the envelope containing the deeds, made according to grantor's instructions at the time they were delivered by her in escrow, and in the presence of the parties, were admissible on the question of her intent, irrespective of proper signature thereto.—Pitney v. Pitney, 202 P. 940, 55 Cal.App. 22.

5. N.H.—Clough v. Bowman, 15 N.H. 504.
Tex.—Young v. Gharis, Civ.App., 170 S.W. 796.
Wis.—Meade v. Gilfoyle, 24 N.W. 413, 64 Wis. 18.

6. U.S.—Deery v. Cray, Md., 10 Wall. 263, 19 L.Ed. 887.
Tenn.—Hughlett v. Conner, 12 Heisk. 83.

7. U.S.—Operators' Oil Co. v. Barbre, C.C.A.Okl., 65 F.2d 857—Deutschle v. Wilson, C.C.A.Iowa, 39 F.2d 406—Markey v. Brunson, C.C.A.S.C., 286 F. 893.
Ariz.—Coe v. Winchester, 33 P.2d 286, 43 Ariz. 500.
Cal.—Palma v. Leslie, 45 P.2d 391, 6 Cal.App.2d 702.
Colo.—Huston v. Gaffner, 176 P. 952, 67 Colo. 377.
Mass.—Maksymiuk v. Puceta, 181 N.E. 388, 279 Mass. 346.
Mich.—National Cash Register Co. v. Verbrugge, 248 N.W. 608, 263 Mich. 243—McIntosh v. Groomes, 198 N.W. 954, 227 Mich. 215—Michigan Crown Fender Co. v. Welch, 178 N.W. 684, 211 Mich. 148, 13 A.L.R. 896.
N.H.—Kann v. Wausau Abrasives Co., 153 A. 823, 85 N.H. 41—Lariviere v. Stratton, 120 A. 846, 81 N.H. 17.
N.Y.—Almgren v. Dutilh, 5 N.Y. 28—Gardenier v. Scripter, 210 N.Y.S. 331, 124 Misc. 832—M. Feigel & Bro. v. Russell Playing Card Co., 188 N.Y.S. 423.
Ohio.—Ferguson v. Laux, 15 N.E.2d 167, 57 Ohio App. 495.
Okl.—Smith v. First Nat. Bank, 29 P.2d 971, 167 Okl. 408.
Or.—Zurich General Accident & Liability Ins. Co. v. Carlton & C. R. Co., 291 P. 349, 133 Or. 398.
Tenn.—Dawkins v. Koch, 12 Tenn. App. 220.
W.Va.—Whitaker-Glessner Co. v. Suburban Brick Co., 104 S.E. 62, 86 W.Va. 621.
Wis.—Seitz v. Zukowski, 215 N.W. 939, 194 Wis. 78.
22 C.J. p 1183 note 83.

Contract entered into by telegram
Where final offer and acceptance is by telegram, resort will be had to prior correspondence to arrive at intent.—Griffin Grocery Co. v. Richardson, C.C.A.Okl., 10 F.2d 467.

Correspondence leading up to written ambiguous contract held admissible.
Ga.—National Manufacture & Stores Corporation v. Dekle, 173 S.E. 408, 48 Ga.App. 515.
Iowa.—First Nat. Bank v. Branagan, 198 N.W. 659, 198 Iowa 453, 36 A.L.R. 548, modified on other grounds 199 N.W. 972.
Wis.—Goodman v. Brown Land & Lumber Co., 197 N.W. 730, 183 Wis. 574.

Conversations with third persons
In an action on a written contract of employment which was ambiguous, testimony as to a conversation had with a third person some time before the execution of the contract, the third person taking no part in the negotiations, was inadmissible to explain the ambiguity.—Strayer v. Gimbel Bros., 178 N.W. 241, 172 Wis. 76.

Written offer
Where a contract was ambiguous, the intention of the parties could be made clear by referring to the written offer which one party submitted preliminary to the contract.—Kirby v. U. S., for and on behalf of Crow Tribe Indians, C.C.A.Mont., 273 F. 391, affirmed 43 S.Ct. 144, 260 U.S. 423, 67 L.Ed. 329.

its terms are free from ambiguity.[8] Where a deed, the terms of which leave a doubt as to its meaning, was executed in fulfillment of a written contract, such contract may be admitted in evidence to explain the deed,[9] but evidence of an agreement in pursuance of which an unambiguous deed was given is not admissible as an aid in the construction of the deed.[10] Evidence of negotiations which are too remote in point of time to throw light on the intent of the parties in executing a written contract is, of course, inadmissible.[11] Where it appears that the parties intended to make out of the writing a definite memorial of their words, it has been held that parol evidence of their prior negotiations is inadmissible, notwithstanding ambiguities in the contract as written.[12]

Practical construction. As stated in Corpus Juris, which has been quoted as expressing "the well-established rule,"[13] evidence of the practical construction given to an instrument of writing by the parties thereto may be admissible to explain its meaning when explanation is necessary.[14] Where, how-

8. U.S.—Markey v. Brunson, C.C.A. S.C., 286 F. 893—Oriental Textile Mills v. Thompson Worsted Co., D.C.Pa., 273 F. 732—Pressed Steel Car Co. v. Union Pac. R. Co., C.C. A.N.Y., 270 F. 518, reversing, D.C., 254 F. 316.
Ark.—Arkansas Amusement Corporation v. Kempner, 33 S.W.2d 42, 182 Ark. 897.
Cal.—Hercules Glue Co. v. Littooy, 76 P.2d 700, 25 Cal.App.2d 182—Holliday v. Porter, 29 P.2d 276, 136 Cal.App. 480—Cline v. Smith, 274 P. 761, 96 Cal.App. 697.
Ill.—Automatic Oil Heating Co. v. Lee, 16 N.E.2d 919, 296 Ill.App. 628.
Iowa.—Conklin v. Silver, 174 N.W. 573, 187 Iowa 819, 7 A.L.R. 832.
Ky.—Falls City Machinery & Wrecking Co. v. Walter, 6 S.W.2d 1053, 224 Ky. 726—Middle Creek Coal Co. v. Harris, 265 S.W. 465, 205 Ky. 119.
Mass.—Sobel v. Signal Shoe Co., 190 N.E. 535, 286 Mass. 286—Watters v. Blatt, 144 N.E. 106, 249 Mass. 340.
Mich.—Erkiletian v. Devletian, 299 N.W. 821, 299 Mich. 95.
Mo.—Baker v. J. W. McMurry Contracting Co., 223 S.W. 45, 282 Mo. 685—Milem v. McCullough, App., 218 S.W. 983.
Neb.—Smith v. Bailey, 181 N.W. 926, 105 Neb. 754.
Okl.—Drumright v. Brown, 184 P. 110, 76 Okl. 162.
S.D.—Janssen v. Tusha, 287 N.W. 501, 66 S.D. 604.
Tex.—Murphy v. Dilworth, 151 S. W.2d 1004, reversing, Civ.App., 129 S.W.2d 418—Read v. Gibson & Johnson, Civ.App., 12 S.W.2d 620, error dismissed.
Vt.—Freegard v. Bingham, 187 A. 801, 108 Vt. 404—Wood v. James, 106 A. 566, 93 Vt. 36.
Va.—Williamsburg Power Co. v. City of Williamsburg, 124 S.E. 215, 139 Va. 787.
Wash.—Deer Park Lumber Co. v. Oregon-Washington Lumber & Mfg. Co., 177 P. 336, 104 Wash. 531.
Wis.—Schilling v. Milwaukee Bedding Co., 221 N.W. 743, 197 Wis. 250.

A statute under which evidence of prior negotiations is admissible does not permit the introduction of such evidence to raise a doubt as to the meaning of clear terms.—Hercules Glue Co. v. Littooy, 76 P.2d 700, 25 Cal.App.2d 182.

9. Iowa.—Swensen v. Union Central Life Ins. Co., 280 N.W. 600, 225 Iowa 428—Huxford v. Trustees of Funds and Donations for Diocese of Iowa, 185 N.W. 72, 193 Iowa 134.
Tex.—Richardson v. Wilson, Com. App., 213 S.W. 613, reversing, Civ. App., 178 S.W. 566.
Wis.—Helmholz v. Everingham, 24 Wis. 266.

Contract expressly referred to

While a contract to convey, when followed by a conveyance, is merged into the conveyance, which becomes the measure of the rights of the parties, when the conveyance makes special reference to the conditions of the contract and recites that it is made for the purpose of fulfilling the same, it is proper to examine the contract to see what conditions are referred to.—Newell v. Redondo Water Co., 202 P. 914, 55 Cal.App. 86.

10. Mich.—Holmes v. Holmes, 183 N.W. 784, 215 Mich. 112.

11. N.Y.—U. S. Printing & Lithograph Co. v. Powers, 135 N.E. 225, 233 N.Y. 143, reversing 187 N.Y.S. 957, 196 App.Div. 934.

12. U.S.—Eustis Min. Co. v. Beer, Sondheimer & Co., D.C.N.Y., 239 F. 976.

13. U.S.—Arkansas Amusement Corporation v. Kempner, C.C.A. Ark., 57 F.2d 466, 476.

14. U.S.—Ætna Life Ins. Co. v. Phillips, C.C.A.Okl., 69 F.2d 901—Vital v. Kerr, C.C.A.N.Y., 297 F. 959, certiorari denied Bigio v. Kerr, 44 S.Ct. 637, 265 U.S. 952, 68 L.Ed. 1196.
Ala.—Lipscomb v. Partrick, 134 So. 13, 222 Ala. 635—Aiken v. McMillan, 106 So. 150, 213 Ala. 494—Underwood v. Duskin & Stewart Realty Co., 85 So. 845, 17 Ala.App. 543.
Cal.—Newell v. Redondo Water Co., 202 Pa. 914, 55 Cal.App. 86.
Colo.—Auto Owners Service Ass'n v. Pollard, 223 P. 38, 74 Colo. 524.
Conn.—W. G. Maltby, Inc., v. Associated Realty Co., 158 A. 548, 114 Conn. 283.
D.C.—J. E. Hanger, Inc., of Washington, D. C., v. Fitzsimmons, 273 F. 348, 50 App.D.C. 384.
Ga.—Florence v. State Highway Board, 196 S.E. 86, 57 Ga.App. 752.
Ill.—Wurn v. Berkson, 141 N.E. 293, 309 Ill. 520, modifying 137 N.E. 141, 305 Ill. 231.
Ind.—Valparaiso Hotel Co. v. Schneider, 195 N.E. 589, 100 Ind.App. 341—Estes v. Anderson Oil Co., 176 N.E. 560, 93 Ind.App. 365, reversing 171 N.E. 925—Tribune Co. v. Red Ball Transit Co., 151 N.E. 338, 84 Ind.App. 666, rehearing denied 151 N.E. 836, 84 Ind.App. 666—City of Hammond v. Standard Oil Co., 138 N.E. 769, 79 Ind.App. 356.
La.—Shoreline Oil Corporation v. Guy, App., 189 So. 348.
Minn.—Wilmot v. Minneapolis Automobile Trade Ass'n, 210 N.W. 861, 169 Minn. 140.
Mo.—City of California v. Burke, 239 S.W. 830, 292 Mo. 466.
N.M.—Cullender v. Levers, 34 P.2d 1089, 38 N.M. 436.
N.Y.—Weitling v. Sorenson, 272 N. Y.S. 338, 241 App.Div. 377—Sarachen & Rosenthal v. Wilson & Co., 202 N.Y.S. 591, 207 App.Div. 768, reargument denied 203 N.Y.S. 627, 208 App.Div. 826, affirmed 148 N.E. 706, 240 N.Y. 563.
Okl.—Brazelton's Wholesale Cleaners & Dyers v. Cash, 78 P.2d 810, 182 Okl. 493—Bell-Wayland Co. v. Russell Jobbers' Mills, 218 P. 827, 92 Okl. 201—Strange v. Hicks, 188 P. 347, 78 Okl. 1.
Pa.—Rochester & Pittsburgh Coal & Iron Co. v. Makoma Coal Co., 114 A. 261, 271 Pa. 394—Fisher v. Ronemus, 110 A. 87, 267 Pa. 325—Zimmerman v. Union Paving Co., 6 Sch.Reg. 102.
Tex.—Howell v. Continental Casualty Co., Civ.App., 110 S.W.2d 210, error dismissed.
Vt.—Cray v. Bellows Falls Ice Co., 184 A. 695, 108 Vt. 190.
Va.—Hill's Adm'rs v. Hill, 103 S.E. 605, 127 Va. 341.
Wash.—North Pacific Finance Cor-

ever, the writing contains no ambiguity the construction given the instrument by the parties is inadmissible,[15] and this rule does not extend so far as to permit the overthrow of plain terms of a contract,[16] and an unambiguous contract cannot be varied by evidence of a construction by the parties different from that which the language clearly imports.[17] It is only when the contract is so ambiguous and obscure as to be plainly susceptible of two or more constructions that evidence of contemporaneous construction by the parties is admissible.[18]

Purpose of writing. In order correctly to ascertain the intentions of the parties to a deed, contract, or other instrument of writing, and properly to interpret the same, it is competent to inquire into the purpose for which the writing was executed, and to this end parol evidence is admissible.[19] This

poration v. Howell-Thompson Motor Co., 298 P. 424, 162 Wash. 387—Heaton v. Smith, 235 P. 958, 134 Wash. 450, affirmed 240 P. 362, 136 Wash. 695.
W.Va.—Stewart v. Blackwood Electric Steel Corporation, 130 S.E. 447, 100 W.Va. 331—Watson v. Buckhannon River Coal Co., 120 S. E. 390, 95 W.Va. 164.
Wis.—Ogden v. Straus Bldg. Corporation, 202 N.W. 34, 187 Wis. 232.
Wyo.—Rouan v. Casper Brick & Tile Co., 211 P. 1102, 29 Wyo. 154.
22 C.J. p 167 note 1, p 1180 note 63.

Showing ambiguity
That railroads, shippers, and public service commission for many years interpreted demurrage tariff clause contrary to interpretation contended for showed that the clause is ambiguous, and made evidence thereof admissible.—Mellon v. J. M. Burguieres Co., 120 So. 15, 167 La. 583, mandate conformed to 121 So. 215, 10 La.App. 137.

Statute of limitations does not limit the period during which the practical construction may be inquired into.—City of South St. Paul v. Northern States Power Co., 248 N.W. 288, 189 Minn. 26.

When contract construed as whole
Mere use of words in contract which, standing by themselves, are capable of only one meaning, cannot, when contract considered as a whole shows ambiguity in its meaning, prevent introduction of parol evidence to show understanding and construction placed on contract by parties thereto.—Commercial Securities Co. v. Rea, Civ.App., 78 S.W.2d 707, affirmed 105 S.W.2d 872, 130 Tex. 11.

15. Ariz.—Miller Cattle Co. v. Mattice, 298 P. 640, 38 Ariz. 180.
Cal.—Hine v. State Life Ins. Co. of Indianapolis, Ind., 35 P.2d 1042, 140 Cal.App. 657.
Mass.—Mann v. Bailen, 200 N.E. 383, 293 Mass. 507—Koshland v. American Woolen Co., 194 N.E. 102, 289 Mass. 308, 97 A.L.R. 928.
Miss.—Texas Co. v. Jackson, 165 So. 546, 551, 174 Miss. 737, citing **Corpus Juris.**
Mo.—Korneman v. Davis, 219 S.W. 904, 281 Mo. 234.
N.J.—City of Bayonne v. Public Service Ry. Corporation, 119 A. 9, 98 N.J.Law 255.
N.Y.—Potter v. New York, O. & W. Ry. Co., 253 N.Y.S. 394, 233 App. Div. 578, affirmed 185 N.E. 708, 261 N.Y. 489—East Forty-Sixth Street Realty Corp. v. Gutschneider, 174 N.Y.S. 518, 186 App.Div. 503.
Pa.—Dahath Electric Co. v. Suburban Electric Development Co., 2 A.2d 765, 332 Pa. 129—American Dressler Tunnel Kilns v. Holt, 112 A. 43, 269 Pa. 293.
Tex.—Murphy v. Dilworth, 151 S.W. 2d 1004, reversing, Civ.App., 129 S.W.2d 418.
Wash.—McLaren v. Narrows Land Co., 191 P. 389, 111 Wash. 402.
W.Va.—Leckie v. Bray, 113 S.E. 746, 91 W.Va. 456.

16. Mo.—Wood v. White Eagle Oil & Refining Co., 274 S.W. 894, 899, 220 Mo.App. 1004, quoting **Corpus Juris.**
Or.—Lakeshore Gardens Drainage Dist. v. California Oregon Power Co., 90 P.2d 1038, 1041, 162 Or. 26, citing **Corpus Juris.**
22 C.J. p 1181 note 64.

Letters showing the construction placed on the contract by the parties thereto are inadmissible where the effect of such evidence would be to violate the plain and unambiguous terms of the contract.—Industrial Commission v. Arizona Power Co., 297 P. 452, 38 Ariz. 44, affirming 295 P. 305, 37 Ariz. 425.

17. U.S.—Buder v. New York Trust Co., C.C.A.N.Y., 82 F.2d 168, 104 A.L.R. 1035.
Cal.—Ohio Electric Car Co. v. Le Sage, 188 P. 982, 182 Cal. 450.
N.M.—Cullender v. Levers, 34 P.2d 1089, 38 N.M. 436.
N.Y.—McGovern v. City of New York, 195 N.Y.S. 925, 202 App.Div. 317.
N.C.—Kluttz v. Allison, 199 S.E. 395, 214 N.C. 379.
22 C.J. p 1181 note 65.

18. Ky.—White Star Coal Co. v. Pursifull, 217 S.W. 1020, 186 Ky. 697.

19. U.S.—Lincoln Nat. Life Ins. Co. v. Horwich, C.C.A.Ill., 115 F.2d 892—Bertelsen & Petersen Engineering Co. v. U. S., C.C.A.Mass., 60 F.2d 745, vacating, D.C., 49 F. 2d 395—Tubize Chatillon Corporation v. White Transp. Co., D.C.Md., 11 F.Supp. 91.
Ark.—Mahaffey v. Glover, 45 S.W.2d 521, 184 Ark. 1159.
Cal.—Kreiss v. Swinehart, 256 P. 879, 83 Cal.App. 399.
Conn.—Sweeney v. Sweeney, 11 A.2d 806, 126 Conn. 391—Choolgian v. Nordstrom, 150 A. 499, 111 Conn. 572.
D.C.—O'Connor v. Shapiro, 13 F.2d 957, 56 App.D.C. 351.
Fla.—Bostwick v. Antuono, 156 So. 435, 116 Fla. 208, affirming 150 So. 731, 116 Fla. 208.
Idaho.—Ware v. Independent School Dist. No. 3 of Clark County, 44 P. 2d 1097, 55 Idaho 510—First Nat. Bank v. Reins, 248 P. 9, 42 Idaho 720.
Ill.—Ouska v. Pearson, 9 N.E.2d 69, 291 Ill.App. 6.
Ind.—Morse v. Morse, App., 27 N.E. 2d 392.
Iowa.—Versteeg v. Hoeven, 239 N.W. 709, 214 Iowa 92—Hawn v. Malone, 176 N.W. 393, 188 Iowa 439—Rowe v. Rowe, 174 N.W. 354, 187 Iowa 640.
Ky.—BancoKentucky Co.'s Receiver v. National Bank of Kentucky's Receiver, 137 S.W.2d 357, 281 Ky. 784.
La.—Spellman v. Bradley, 115 So. 403, 165 La. 106—McWilliams v. Geddes & Moss Undertaking & Embalming Co., App., 164 So. 144.
Mass.—Beaman-Marvell Co. v. Gunn, 28 N.E.2d 443, 306 Mass. 419.
Minn.—Graffam v. Lynott, 212 N.W. 937, 170 Minn. 434.
Mo.—Service Purchasing Co. v. Brennan, 42 S.W.2d 39, 226 Mo. App. 110, transferred, see Sup., 32 S.W.2d 81.
Mont.—Bowles Livestock Commission Co. v. Midland Nat. Bank of Billings, 23 P.2d 967, 94 Mont. 467—New Home Sewing Mach. Co. v. Songer, 7 P.2d 238, 91 Mont. 137.
Neb.—Stanton Nat. Bank of Stanton v. Swallow, 203 N.W. 561, 113 Neb. 336.
N.Y.—In re Brown's Will, 169 N.E. 612, 252 N.Y. 366, modifying In re Brown's Ex'r, 226 N.Y.S. 1, 130 Misc. 865, and modifying In re Brown's Estate, 232 N.Y.S. 371, 225 App.Div. 759—O'Connor v. O'-Connor, 293 N.Y.S. 64, 249 App.

rule is frequently applied where assignments of instruments absolute on their face have in reality been made for collection or some other special purpose.[20] The rule, however, is subject to the qualification that the purpose thus disclosed must not be inconsistent with the express terms of the instrument,[21] for if the parties have clearly stated their purpose in the instrument itself no extrinsic evidence will be received to vary or contradict it.[22]

Relations of parties. Evidence is admissible to

Div. 515—Rosenthal v. United Transp. Co., 188 N.Y.S. 154, 196 App.Div. 540—Bank of New York & Trust Co. v. Snedeker, 16 N.Y.S. 2d 930, 173 Misc. 126, affirmed 13 N.Y.S.2d 278, 257 App.Div. 939—James v. Fundanic, 179 N.Y.S. 165.
Tenn.—Frierson v. International Agr. Corporation, App., 148 S.W.2d 27—Weatherly v. American Agr. Chemical Co., 65 S.W.2d 592, 16 Tenn.App. 613.
Tex.—Mauritz v. Bell, Civ.App., 81 S.W.2d 730, error refused.
Utah.—Brown v. Skeen, 58 P.2d 24, 89 Utah 568.
Wis.—Neises v. Hesselmann, 191 N.W. 498, 179 Wis. 334.
22 C.J. p 1184 note 86.
Dispute as to contractual character of writing see infra § 967.
"The rule which excludes parol testimony to contradict or vary a written instrument has reference to the language used by the parties. That cannot be qualified or varied from its natural import, but must speak for itself. The rule does not forbid an inquiry into the object of the parties in executing and receiving the instrument."
U.S.—Peugh v. Davis, D.C., 96 U.S. 332, 336, 24 L.Ed. 775.
Mont.—S. W. Bridges & Co. v. Bank of Fergus County, 251 P. 1057, 1060, 77 Mont. 524—McCaull-Dinsmore Co. v. Stevens, 194 P. 213, 214, 59 Mont. 206.

Bills and notes

(1) As between the immediate parties, parol evidence is admissible to show the purpose for which a bill or note was issued, transferred, or indorsed.
U.S.—Philadelphia Nat. Bank v. Fulton Nat. Bank, D.C.Ga., 25 F.2d 995.
Ark.—Ellis v. First Nat. Bank, 260 S.W. 714, 163 Ark. 471.
Cal.—Cooper v. Cooper, 39 P.2d 820, 3 Cal.App.2d 154.
Ga.—Schneider Marble Co. v. Knight, 141 S.E. 426, 37 Ga.App. 646.
Ill.—First Nat. Bank of Granite City v. Draper, 266 Ill.App. 579.
Iowa.—Kline v. Reeder, 212 N.W. 693, 203 Iowa 396—Security Sav. Bank v. Hambright, 193 N.W. 576, 195 Iowa 1147.
Kan.—First National Bank v. Stroup, 177 P. 836, 104 Kan. 11.
La.—B. F. Goodrich Co. v. Truxillo, App., 191 So. 753.
Minn.—Gilbert v. Pioneer Nat. Bank of Duluth, 288 N.W. 153, 206 Minn. 213.
Mo.—Mutual Life of Illinois v. McKinnis, App., 47 S.W.2d 564—Mutual Life of Illinois v. McKinnis, App., 15 S.W.2d 935.
Neb.—First Trust Co. of Lincoln v. Anderson, 281 N.W. 796, 135 Neb. 397—Elmcreek Ditch Co. v. St. John, 255 N.W. 16, 127 Neb. 253—People's State Bank v. Smith, 231 N.W. 141, 120 Neb. 29—Lee v. Hildebrand, 230 N.W. 673, 119 Neb. 717—Spangenberg v. Losey, 216 N. W. 191, 116 Neb. 112.
N.H.—Burque v. Brodeur, 158 A. 127, 85 N.H. 310.
N.J.—Allied Tar & Chemical Corporation v. Joffe, 164 A. 446, 110 N. J.Law 129, reversing 157 A. 117, 9 N.J.Misc. 1221.
N.Y.—State Bank of Newfane v. Lautz, 252 N.Y.S. 461, 141 Misc. 276.
N.C.—Gallowav v. Thrash, 176 S.E. 303, 207 N.C. 165.
N.D.—First Nat Bank v. Miller, 179 N.W. 997, 46 N.D. 551.
Okl.—Hartley v. Riley, 204 P. 920, 85 Okl. 101.
R.I.—Lopato v. Hayman, 111 A. 529, 43 R.I. 271.
Tex.—Kimball-Krough Pump Co. v. Judd, Civ.App., 88 S.W.2d 579—Roddy v. Citizens' State Bank of Copeville, Civ.App., 11 S.W.2d 652.
Va.—Webb v. Pleasants, 132 S.E. 175, 144 Va. 516.

(2) This is particularly true where the instrument or indorsement is ambiguous.—Reeves v. Williams, 285 S. W. 353, 171 Ark. 681—Cypress Drainage Dist. of Perry and Conway Counties v. Blair, 245 S.W. 310, 156 Ark. 130.

(3) An illegal purpose, however, cannot be shown by parol evidence.—West Rutland Trust Co. v. Houston, 158 A. 69, 104 Vt. 204, 80 A.L.R. 664.

Mortgage

Parol evidence is admissible to show the purpose for which a mortgage was given.
Mo.—C. D. Johnson Farming Co. v. Goodwyn, App., 208 S.W. 110.
N.Y.—Wood v. Travis, 248 N.Y.S. 22, 231 App.Div. 331.
S.D.—Charles Friend & Son v. Schmidt, 233 N.W. 913, 57 S.D. 477.
Wyo.—Bachmann v. Huett, 184 P. 709, 26 Wyo. 332.

Stock certificate

Purpose of assignment of stock certificate in blank by mother to daughter could be properly shown, there being nothing in Uniform Stock Transfer Act which prohibited showing of such purpose.—Succession of Sharpe, 103 So. 443, 158 La. 61.

20. U.S.—Beneke v. Moss, C.C.A.W. Va., 46 F.2d 948.
Ark.—McNeill v. Rowland, 132 S.W. 2d 370, 198 Ark. 1094.
Cal.—Winterburn v. Sherriff, 263 P. 1023, 88 Cal.App. 659.
Iowa.—Leach v. Plymouth County Sav. Bank of Le Mars, 207 N.W. 332, 201 Iowa 349.
Kan.—Smith v. Kagey, 73 P.2d 56, 146 Kan. 563.
Mass.—Klemmer v. Morse, 154 N.E. 835, 258 Mass. 300.
Minn.—Alton v. Hecht, 238 N.W. 482, 184 Minn. 271.
Neb.—Gregory v. American Bank Bldg. Co., 188 N.W. 191, 108 Neb. 507.
N.D.—Moore v. Schrage, 201 N.W. 163, 51 N.D. 858.
Okl.—Niagra Fire Ins. Co. v. Flowers, 259 P. 840, 127 Okl. 137.
5 C.J. p 1019 note 37—22 C.J. p 1185 note 87.

21. Cal.—Yuba Inv. Co. v. Yuba Consol. Gold Fields, 194 P. 19, 184 Cal. 469.
Iowa.—Maytag v. Morgan, 226 N.W. 93, 208 Iowa 658—Burrier v. Sheriff, 223 N.W. 395, 207 Iowa 692.
Mich.—Molsons Bank v. Hoekzema, 216 N.W. 416, 240 Mich. 642.
22 C.J. p 1185 note 88.

Character or nature of liability

Rule permitting oral evidence to show purpose of written instrument does not permit oral evidence to contradict character or nature of liability expressed in instrument itself.—Hunt County v. White, Tex.Civ. App., 285 S.W. 663.

Power of attorney

Evidence in explanation of principal's purpose and secret understanding with agent was inadmissible to construe power of attorney in suit to cancel mortgages given thereunder.—Malaguti v. Rosen, 160 N.E. 532, 262 Mass. 555.

22. U.S.—National Surety Co. v. McGreevy, C.C.A.Mo., 64 F.2d 899, certiorari denied McGreevy v. National Surety Co., 54 S.Ct. 62, 290 U. S. 644, 78 L.Ed. 559.
Ala.—Spragins v. McCaleb, 188 So. 251, 237 Ala. 658—Capitol Lumber Co. v. Mullinix, 94 So. 88, 208 Ala. 266.
Cal.—Kunz v. Anglo & London Paris Nat. Bank of San Francisco, 5 P.2d 417, 214 Cal. 341.
Fla.—Long v. Angel, 198 So. 339.
Ill.—Lockwood & Strickland Co. v. City of Chicago, 214 Ill.App. 25.
Iowa.—Myers v. Wendel, 200 N.W. 431, 198 Iowa 859.

show the relations of the parties to the subject matter and to each other, where, on the face of the contract or other writing, its terms are obscure and the evidence tends to dispel the obscurity.[23]

Rules of association. Where the constitution and by-laws of an association prescribe the mode of performing contracts of a certain kind between members of the association, they become a part of a contract between such members, and are admissible in evidence in an action on such a contract to aid in its construction.[24] Likewise, where an ambiguous trade rule was referred to in the contract and became a part of it, parol evidence may be introduced to elucidate it.[25]

Surrounding circumstances. Parol evidence is admissible to show the situation of the parties and the circumstances under which a written instrument was executed, for the purpose of ascertaining the intentions of the parties and properly construing the writing.[26] In other words, the court may, by re-

La.—Whittington v. Heirs of Pegues, 115 So. 441, 165 La. 151—Succession of Griffin, App., 165 So. 745.
Mo.—Davis v. Chas. F. Luehrmann Hardwood Lumber Co., 246 S.W. 66, 212 Mo.App. 693.
Mont.—Crawford v. Pierse, 185 P. 315, 56 Mont. 371.
Okl.—L. B. Price Mercantile Co. v. Jones, 73 P.2d 1160, 181 Okl. 359.
Or.—Port Inv. Co. v. Oregon Mut. Fire Ins. Co., 94 P.2d 734, 163 Or. 1, 124 A.L.R. 1342.'
Tex.—Tarkenton v. Marshall, Civ. App., 91 S.W.2d 473.
22 C.J. p 1185 note 89.

Bills and notes

(1) Where a negotiable instrument clearly states the purpose for which it was given, it has been held that it cannot be varied by parol evidence to show that it was received for another purpose.—Diamant v. Chestnut, 169 N.W. 927, 204 Mich. 237.

(2) Of course, as to a purchaser in good faith for value before maturity, parol evidence that an unrestricted indorsement was made for purposes of collection only is inadmissible.—Sands v. Parker, 284 S.W. 902, 153 Tenn. 664.

23. U.S.—Tubize Chattilon Corporation v. White Transp. Co., D.C.Md., 6 F.Supp. 15.
Ala.—American Mut. Liability Ins. Co. of Boston v. Tuscaloosa Veneer Co., 186 So. 133, 237 Ala. 187—Obermark v. Clark, 114 So. 135, 216 Ala. 564, 55 A.L.R. 1153.
Cal.—Du Val Moore & Co. v. Ward, 87 P.2d 732, 31 Cal.App.2d 205.
Mass.—Martin v. Jablonski, 149 N.E. 156, 253 Mass. 451.
Mich.—In re Landwehr's Estate, 282 N.W. 873, 286 Mich. 698.
Minn.—Berkner v. Ekman, 190 N.W. 259, 153 Minn. 277.
22 C.J. p 1185 note 90.

Confidential relation

"Parol evidence is not inadmissible on the part of a party to a written instrument, the interpretation or construction of which is under consideration, when it shows that the relations of the parties thereto were especially confidential; that the plaintiff had great confidence in the defendant, and relied upon his advice, and was likely to be guided thereby."—Handrub v. Griffin, 275 P. 196, 127 Kan. 732.

24. N.Y.—Peabody v. Speyers, 56 N.Y. 230.

25. U.S.—Walker Grain Co. v. Blair Elevator Co., Tex., 254 F. 422, 166 C.C.A. 54.

26. U.S.—Lincoln Nat. Life Ins. Co. v. Horwich, C.C.A.Ill., 115 F.2d 892—Economy Fuse & Manufacturing Co. v. Raymond Concrete Pile Co., C.C.A.Ill., 111 F.2d 875—New York Alaska Gold Dredging Co. v. Walbridge, C.C.A.Alaska, 76 F.2d 655, 662, citing **Corpus Juris**—Fidelity & Deposit Co. of Maryland v. Walker, C.C.A.Tex., 75 F.2d 115—Ætna Life Ins. Co. v. Phillips, C.C.A.Okl., 69 F.2d 901—Operators' Oil Co. v. Barbre, C.C.A.Okl., 65 F.2d 857—Sampliner v. Maryland Casualty Co., C.C.A.Ohio, 63 F.2d 332—Commissioner of Internal Revenue v. R. J. Darnell, Inc., C.C.A., 60 F.2d 82—Ætna Casualty & Surety Co. v. National Bank of Tacoma, C.C.A.Wash., 59 F.2d 493, 495, citing **Corpus Juris**—Queensboro Nat. Bank of City of New York v. Kelly, C.C.A.N.Y., 48 F.2d 574, 87 A.L.R. 1172, certiorari denied Kelly v. Queensboro Nat. Bank of City of New York, 52 S.Ct. 9, 284 U.S. 620, 76 L.Ed. 529—Gill v. Benjamin Franklin Realty & Holding Co., C.C.A.Pa., 43 F.2d 337, certiorari denied 51 S.Ct. 106, 282 U.S. 892, 75 L.Ed. 786—Newport News Shipbuilding & Dry Dock Co. v. U. S., C.C.A.Va., 34 F.2d 100, affirming in part and reversing in part, D.C., U. S. v. Newport News Shipbuilding & Dry Dock Co., 21 F.2d 112, and certiorari denied 50 S.Ct. 69, 280 U.S. 599, 74 L.Ed. 645—Walter v. Rowlands, C.C.A.Cal., 28 F.2d 687—Modoc County Bank v. Ringling, C.C.A.Cal., 7 F.2d 535—Tennessee Min. & Mfg. Co. v. New River Lumber Co., C.C.A.Tenn., 5 F.2d 559—Neal v. Akers, C.C.A.N.C., 286 F. 903—W. R. Grace & Co. v. Frank Waterhouse & Co., C.C.A.Wash., 264 F. 422—Bingen v. First Trust Co. of St. Paul, D.C.Minn., 23 F.Supp. 958, reversed on other grounds, C.C.A., 103 F.2d 260—Irving Trust Co. v. Deutsch, D.C.N.Y., 2 F.Supp. 971, modified on other grounds, C.C.A., 73 F.2d 121, certiorari denied Biddle v. Irving Trust Co., 55 S.Ct. 405, 294 U.S. 708, 79 L.Ed. 1243, rehearing denied 55 S.Ct. 514, 294 U.S. 733, 79 L.Ed. 1262, certiorari denied Deutsch v. Irving Trust Co., 55 S.Ct. 405, 294 U.S. 708, 79 L.Ed. 1243, Hammond v. Irving Trust Co., 55 S.Ct. 405, 294 U.S. 708, 79 L.Ed. 1243, Irving Trust Co. v. Mendes, 55 S.Ct. 405, 294 U.S. 708, 79 L.Ed. 1243 and Bell v. Irving Trust Co., 55 S.Ct. 406, 294 U.S. 709, 79 L.Ed. 1243.
Ala.—American Mut. Liability Ins. Co. of Boston v. Tuscaloosa Veneer Co., 186 So. 133, 237 Ala. 187—Milner Land Co. v. Houston, 142 So. 410, 225 Ala. 223—Scheuer v. Britt, 115 So. 237, 217 Ala. 196—Obermark v. Clark, 114 So. 135, 216 Ala. 564, 55 A.L.R. 1153—Smith v. Harbaugh, 112 So. 914, 216 Ala. 202—Ben Cheeseman Realty Co. v. Thompson, 112 So. 151, 216 Ala. 9—Meadow River Lumber Co. v. Black, 153 So 290, 26 Ala.App. 28, certiorari denied 153 So. 293, 228 Ala. 279.
Ariz.—Kirchoff v. Cummard, 226 P. 1092, 26 Ariz. 512.
Ark.—Maxwell v. Felker, 230 S.W. 266, 148 Ark. 393—New York Life Ins. Co. v. Allen, 220 S.W. 803, 143 Ark 143—Brown & Hackney v. Daubs, 213 S.W. 4, 139 Ark. 53.
Cal.—Wachs v. Wachs, 79 P.2d 1085, 11 Cal.2d 322—Cristina v. Mattenberger, 300 P. 450, 212 Cal. 670—Osborn v. Hoyt, 184 P. 854, 181 Cal. 336—First Bond & Mortgage Co. of Glendale v. Malouf, 98 P.2d 824, 37 Cal.App.2d 74—Du Val Moore & Co. v. Ward, 87 P.2d 732, 31 Cal.App.2d 205—Weaver v. Grunbaum, 87 P.2d 406, 31 Cal.App.2d 42—Pacific Indemnity Co. v. California Electric Works, 84 P.2d 313, 29 Cal.App.2d 260, followed in Jacques v. Standard Oil Co. of California, 84 P.2d 322, 29 Cal.App.2d 745—Fernald v. Lawsten, 79 P.2d 742, 26 Cal.App.2d 552—Ross v. Pacific Mortg. Guaranty Co., 61 P.2d 368, 16 Cal.App.2d 672—Eaton v. Thieme, 59 P.2d 638, 15 Cal.App.2d 458—California Jewelry Co. v. Provident Loan Ass'n, 45 P.2d 271, 6 Cal.App.2d 506—Coats v. Gener-

ceiving evidence of the circumstances under which | the writing was made, place itself in the situation

al Motors Corporation, 39 P.2d 838, 3 Cal.App.2d 340—Raisch v. Monterey County, 35 P.2d 587, 140 Cal. App. 627—Ezmirlian v. Otto, 34 P. 2d 774, 139 Cal.App. 486—Bayles v. Browning, 24 P.2d 546, 133 Cal. App. 618—Nelson v. Nelson, 20 P. 2d 995, 131 Cal.App. 126—Risley v. Clark, 8 P.2d 872, 121 Cal.App. 86—Kierulff & Ravenscroft v. Koping, 271 P. 353, 94 Cal.App. 473—Gilde v. Schuster, 257 P. 121, 83 Cal.App. 537—White v. Ardzrooni, 235 P. 461, 71 Cal.App. 393—Henika v. Lange, 203 P. 798, 55 Cal.App. 336—Brady v. Fowler, 188 P. 319, 45 Cal.App. 588—Brett v. Vanomar Producers, 187 P. 758, 45 Cal.App. 286—R. N. Nason & Co. v. Kennedy, 180 P. 349, 40 Cal.App. 159.

Colo.—Zion Baptist Church v. Hebert, 28 P.2d 799, 94 Colo. 59—George Tritch Hardware Co. v. Donovan, 221 P. 881, 74 Colo. 350—Schmelzer v. Condit, 195 P. 323, 69 Colo. 405.

Fla.—Marion Mortg. Co. v. Howard, 131 So. 529, 100 Fla. 1418—Schmitt v. Bethea, 82 So. 817, 78 Fla. 304.

Ga.—Tolbert v. Short, 104 S.E. 245, 150 Ga. 413—Wells v. First Nat. Exhibitors' Circuit, 99 S.E. 615, 149 Ga. 200—Niagara Sprayer & Chemical Co. v. Cotton States Fertilizer Co., 173 S.E. 460, 48 Ga.App. 779—National Manufacture & Stores Corporation v. Dekle, 173 S.E. 408, 48 Ga.App. 515.

Ill.—Lewis v. Braun, 191 N.E. 56, 356 Ill. 467—Linn v. Clark, 128 N. E. 824, 295 Ill. 22—Reilly Tar & Chemical Corporation v. Lewis, 23 N.E.2d 243, 301 Ill.App. 459—Ouska v. Pearson, 9 N.E.2d 69, 291 Ill. App. 6.

Ind.—Jackson Hill Coal & Coke Co. v. Merchants' Heat & Light Co., 140 N.E. 532, 193 Ind. 422—Smith v. Ostermeyer Realty Co., 197 N. E. 743, 102 Ind. 164—Obering v. Swain-Roach Lumber Co., 155 N. E. 712, 86 Ind.App. 632—City of Hammond v. Standard Oil Co., 138 N.E. 769, 79 Ind.App. 356.

Iowa.—Mealey v. Kanealy, 286 N.W. 500, 226 Iowa 1266, 131 A.L.R. 945—Dunn v. Dunn, 258 N.W. 695, 219 Iowa 349—Dolan v. Danbury State Bank, 223 N.W. 400, 207 Iowa 597—Tucker v. Leise, 206 N.W. 258, 201 Iowa 48—Alex Moffit & Sons v. Price Bros., 193 N.W. 565, 196 Iowa 1216—Edwards v. Wagner, 183 N.W. 450, 191 Iowa 822—Hawn v. Malone, 176 N.W. 393, 188 Iowa 439.

Ky.—Linn v. Milliken, 132 S.W.2d 62, 279 Ky. 771—Davenport v. National Fluorspar Co., 103 S.W.2d 84, 267 Ky. 713—Myers Bros. v. Hager, 98 S.W.2d 36, 266 Ky. 3—Lincoln Nat. Life Ins. Co. v. Means 95 S.W.2d 264, 264 Ky. 566, certiorari denied 57 S.Ct. 42, 299 U.S. 578, 81 L.Ed. 426—Blair v. Mammoth Cave Nat. Park Ass'n, 90 S. W.2d 10, 262 Ky. 212—Holliday v. Sphar, 89 S.W.2d 327, 262 Ky. 45—Barrowman v. Charles, 28 S.W. 2d 780, 234 Ky. 508—Standard Elkhorn Coal Co. v. Bolen, 236 S.W. 241, 193 Ky. 342.

La.—Jenkins v. Pine Grove Land Co., 131 So. 660, 171 La. 530—Mixon v. St. Paul Fire & Marine Ins. Co. of St. Paul, Minn., 84 So. 790, 147 La. 302—Consolidated Cos. v. Angelloz, App., 166 So. 910, reinstated 170 So. 556—Central Savings Bank & Trust Co. v. Hamilton, App., 161 So. 658.

Me.—Goodwin v. Cabot Amusement Co., 149 A. 574, 129 Me. 36.

Md.—American Weekly v. Patterson, 16 A.2d 912—Kriel v. Cullison, 169 A. 203, 165 Md. 402.

Mass.—Clark v. State St. Trust Co., 169 N.E. 897, 270 Mass. 140—Albiani v. United Artists Corporation, 169 N.E. 435, 269 Mass. 544—Moss v. Old Colony Trust Co., 140 N.E. 803, 246 Mass. 139—Linton v. Noonan, 130 N.E. 170, 238 Mass. 31—New York Cent. R. Co. v. Stoneman, 123 N.E. 679, 233 Mass. 258.

Mich.—In re Landwehr's Estate, 282 N.W. 873, 286 Mich. 698—Michigan Crown Fender Co. v. Welch, 178 N. W. 684, 211 Mich. 148, 13 A.L.R. 896.

Minn.—Donlin v. Wamsley, 223 N.W. 98, 176 Minn. 234.

Miss.—Bradley v. Howell, 134 So. 843, 161 Miss. 346, modifying 133 So. 660, 161 Miss. 346.

Mo.—Baptiste Tent & Awning Co. v. Uhri, App., 129 S.W.2d 9—Proctor v. Home Trust Co., 284 S.W. 156, 221 Mo.App. 577.

Mont.—Butler Bros. Development Co. v. Butler, 108 P.2d 1041, 111 Mont. 329—Brown v. Homestake Exploration Corporation, 39 P.2d 168, 98 Mont. 305—Berne v. Stevens, 215 P. 803, 67 Mont. 254—Duckett v. Biggs, 188 P. 938, 57 Mont. 443.

N.J.—Schradin v. Harry W. Bealer Co., 176 A. 321, 117 N.J.Eq. 443, affirming 168 A. 854, 114 N.J.Eq. 459.

N.Y.—Smathers v. Standard Oil Co. of New York, 191 N.Y.S. 843, 199 App.Div. 368, affirmed 135 N.E. 942, 233 N.Y. 617—Levy v. Forster, 231 N.Y.S. 238, 224 App.Div. 463—Sayer v. Sunderland, 220 N.Y.S. 409, 219 App.Div. 615—Missir v. American Oriental Ice Mfg. Co., 195 N. Y.S. 191, 201 App.Div. 756—Churchill Evangelistic Ass'n v. Columbia Broadcasting System, 255 N.Y. S. 134, 142 Misc. 210, affirmed 260 N.Y.S. 451, 236 App.Div. 624—Bellclair v. Wirth & Hamid, 236 N.Y.S. 306, 134 Misc. 801—In re Sterling's Will, 27 N.Y.S.2d 36.

N.C.—Bailey v. Hassell, 115 S.E. 166, 184 N.C. 450.

Ohio.—In re Fulk's Estate, 24 N.E.2d 1020, 136 Ohio St. 233—Rorick v. Gilbert, 186 N.E. 756, 45 Ohio App. 96, affirming Gilbert v. Rorick, 186 N.E. 90, 125 Ohio St. 636—Norfolk & Chesapeake Coal Co. v. John, 18 Ohio App. 512.

Okl.—Brogden v. Perryman, 56 P. 2d 398, 176 Okl. 505—Moore v. Henry H. Cross Co., 275 P. 1061, 135 Okl. 235—U. S. Fidelity & Guaranty Co. v. Town of Comanche, 246 P. 238, 114 Okl. 237—Daniel v. Pappas, 220 P. 355, 93 Okl. 165—Kingfisher Mill & Elevator Co. v. Westbrook, 192 P. 209, 79 Okl. 188.

Or.—Norton v. Norton, 209 P. 1048, 105 Or. 651—Allen v. Hendrick, 206 P. 733, 104 Or. 202.

Pa.—Dorrington v. Manning, 4 A.2d 886, 135 Pa.Super. 194.

S.C.—Bullard v. Cox, 101 S.E. 111, 112 S C. 392.

S.D.—Taylor v. Nissen, 235 N.W. 703, 58 S.D. 299.

Tenn.—Frierson v. International Agr. Corporation, App., 148 S.W.2d 27—Weatherly v. American Agr. Chemical Co., 65 S.W.2d 592, 16 Tenn. App. 613—Williams v. Buntin, 4 Tenn.App. 340.

Tex.—Guardian Trust Co. v. Bauereisen, 121 S.W.2d 579, 132 Tex. 396, reversing, Civ.App., 99 S.W.2d 357—Gray v. Merritt, Com.App., 276 S.W. 187, reversing Merritt v. Gray, Civ.App., 262 S.W. 539—Murphy v. Dilworth, Civ.App., 129 S. W.2d 418, error granted—Remington Rand v. Sugarland Industries, Civ.App., 122 S.W.2d 729, error granted—Newton v. McCarrick, Civ.App., 75 S.W.2d 472, error dismissed—James-Dickinson Farm Mortg. Co. v. Galbraith, Civ.App., 19 S.W.2d 171, error dismissed—Giles v. Corbett, Civ.App., 293 S.W. 180—Pyron v. Brownfield, Civ.App., 269 S.W. 202—San Antonio Machine & Supply Co. v. Allen, Civ. App., 268 S.W. 532—Masterson v. Amarillo Oil Co., Civ.App., 253 S. W. 908—Bourland v. Huffhines, Civ.App., 244 S.W. 847—Baleja v. Henderson, Civ.App., 241 S.W. 1080—Pyron v. Brownfield, Civ.App., 238 S.W. 725—New England Equitable Ins. Co. v. Mechanics'-American Nat. Bank of St. Louis, Civ. App., 213 S.W. 685, reversed on other grounds Mechanics' & American Nat. Bank of St. Louis v. New England Equitable Ins. Co., Com. App., 234 S.W. 1087.

Utah.—Ernst v. Allen, 184 P. 827, 55 Utah 272.

Vt.—Walsh v. Farrington, 165 A. 914, 105 Vt. 269.

Va.—State Farm Mut. Automobile Ins. Co. v. Justis, 190 S.E. 163, 168

of the parties who made it, and to that extent look in on their minds and so judge of the meaning of the words, and of the correct application of the language to the thing described, from the point of view of the parties who wrote or executed the instrument.[27] Such evidence is received, not for the purpose of importing into the writing an intention not expressed therein, but simply with the view of elucidating the meaning of the words employed; and in its admission the line which separates evidence which aids the interpretation of what is in the instrument from direct evidence of intention independent of the instrument must be kept steadily in view, the duty of the court being to declare the meaning of what is written in the instrument and not of what was intended to be written.[28] Accord-

Va. 158—Protestant Episcopal High School in Virginia v. Parrish, 190 S.E. 146, 168 Va. 103—Turner & Happersett v. Hall & Connor, 104 S.E. 861, 128 Va. 247.
Wash.—Russell v. Mutual Lumber Co., 246 P. 580, 139 Wash. 229—Pickering v. Roeder, 177 P. 321, 104 Wash. 539.
W.Va.—Stewart v. Blackwood Electric Steel Corporation, 130 S.E. 447, 100 W.Va. 331—Smyth v. Brick Row Realty Co., 124 S.E. 499, 97 W.Va. 40.
Wis.—Hampton Plains Realty Co. v. Cohen, 252 N.W. 572, 214 Wis. 128—Wheelwright v. Pure Milk Ass'n, 240 N.W. 769, 208 Wis. 40, motion denied 242 N.W. 486, 208 Wis. 40—Williams v. Jones, 185 N.W. 231, 175 Wis. 380—Hodges v. Nalty, 89 N.W. 535, 113 Wis. 567.
Wyo.—Holly Sugar Corporation v. Fritzler, 296 P. 206, 218, citing **Corpus Juris.**
22 C.J. p 1186 note 95, p 1181 note 69, p 1128 note 57—26 C.J. p 77 note 58.

Agreement and deed

Where the parties enter into an agreement and a deed of conveyance which appear to be contradictory, testimony is admissible for the purpose of explaining how the two instruments came to be made.—Mollino v. Ogden & Clarkson Corporation, 154 N.E. 307, 243 N.Y. 450, 49 A.L.R. 518, affirming in part and reversing in part 214 N.Y.S. 885, 216 App. Div. 738, appeal granted and reargument denied 215 N.Y.S. 887, 216 App. Div. 807.

"Ambiguity"

If, in reading contract in light of surrounding circumstances, intention is reasonably clear, there is no "ambiguity."—Arkansas Amusement Corporation v. Kempner, C.C.A.Ark., 57 F.2d 466.

Business methods

Parol evidence is admissible in appropriate instances to explain business methods of parties in light of which contract is to be interpreted.—Martin v. Jablonski, 149 N.E. 156, 253 Mass. 451.

Guaranty

Rule that where a written guaranty contract is ambiguous, evidence is admissible to clarify circumstances under which guaranty was executed to arrive at true intention of parties is applicable in action against a surety.—Chase Nat. Bank of City of New York v. Carver, 2 N.Y.S.2d 329, 166 Misc. 708.

Insurance policies

(1) In case of ambiguity, evidence of the circumstances under which an insurance policy was issued is admissible.—Mixon v. St. Paul Fire & Marine Ins. Co. of St. Paul, Minn., 81 So. 790, 147 La. 302.

(2) This may include insured's testimony as to the kind of a policy for which he applied.—Mixon v. St. Paul Fire & Marine Ins. Co. of St Paul, Minn., supra.

Patent ambiguities

Rule permitting parol evidence to show circumstances under which written agreement was made for purpose of facilitating construction applies only to patent ambiguities.—Barnhart Aircraft v. Preston, 297 P. 20, 212 Cal. 19.

Resolution of corporation

Parol evidence is admissible to show circumstances under which resolution of corporation was passed, where minutes are incomplete and fragmentary, or language is ambiguous and indefinite.—Respess v. Rex Spinning Co., 133 S.E. 391, 191 N.C. 809.

Statutes

(1) Some statutory provisions have been declared to be statutory reënactments of the text rule.—Hollman v. Hollman, 264 P. 289, 88 Cal. App. 748.

(2) Under such statutes, in construing a writing, the language therein must be considered before resorting to extrinsic evidence.—Marlin v. Robinson, 11 P.2d 70, 123 Cal.App. 373.

(3) A statute providing that when an agreement has been reduced to writing it is presumed to contain all the terms, and evidence varying or contradicting the writing is not admissible except in cases of mistake or imperfection, or where the validity of the agreement is in dispute, does not, in proper cases, exclude evidence of the circumstances under which an agreement was made, or to which it relates.—State v. Broadwater Elevator Co., 201 P. 687, 61 Mont. 215.

Time

Parol and other proof as to surrounding facts and circumstances must relate to the time of the execution of the conveyance.—Reichert v. Jerome H. Sheip, Inc., 91 So. 618, 206 Ala. 648.

To resolve ambiguities

Parol evidence showing circumstances surrounding issuance of bond and understanding of parties respecting purpose was admissible not only to ascertain intention, but to resolve ambiguities.—Ætna Casualty & Surety Co. v. National Bank of Tacoma, C.C.A.Wash., 59 F.2d 493.

27. Cal.—Palma v. Leslie, 45 P.2d 391, 6 Cal.App.2d 702.
Ky.—Holliday v. Sphar, 89 S.W.2d 327, 262 Ky. 45.
N.M.—Franciscan Hotel Co. v. Albuquerque Hotel Co., 24 P.2d 718, 37 N.M. 456.
Or.—Salem King's Products Co. v. Ramp, 196 P. 401, 100 Or. 329.
Tenn.—Robertson v. Ramsey, 66 S. W.2d 1022, 17 Tenn.App. 248.
Va.—Coal River Collieries v. Eureka Coal & Wood Co., 132 S.E. 337, 144 Va. 263, 46 A.L.R. 485—Williamsburg Power Co. v. City of Williamsburg, 124 S.E. 215, 139 Va. 787—Matthews v. La Prade, 107 S. E. 795, 130 Va. 408.
Wash.—Griffin v. Lear, 212 P. 271, 123 Wash. 191—Mikusch v. Beeman, 188 P. 780, 111 Wash. 658.
W.Va.—Watson v. Buckhannon River Coal Co., 120 S.E. 390, 95 W.Va. 164.
Wyo.—Rouan v. Casper Brick & Tile Co., 211 P. 1102, 29 Wyo. 154.
22 C.J. p 1189 note 96.

28. Ill.—Rockford Trust Co. v. Moon, 18 N.E.2d 447, 370 Ill. 250—Higinbotham v. Blair, 139 N.E. 909, 308 Ill. 568.
Iowa.—Young v. Bierschenk, 201 N. W. 591, 199 Iowa 309.
N.J.—Corn Exchange Nat. Bank & Trust Co. of Philadelphia v. Taubel, 175 A. 55, 113 N.J.Law 605.
Wash.—Shannon v. Prall, 196 P. 635, 115 Wash. 106.
22 C.J. p 1189 note 97.

Different contract

(1) While it is the general rule that, in construing a contract, it is proper for the court to take into consideration the surrounding circumstances, this does not give to either party the right to establish by oral evidence a different contract from that expressed in the written agreement.—Sterling-Midland Coal Co. v.

ingly, where the instrument is clear and unambiguous on its face, and no intimation is given of a disclosure of a latent ambiguity, no evidence is admissible to give to it a construction other than that which is plainly expressed. It must be interpreted according to its terms, and it will be enforced without resorting to proof of the surrounding circumstances.[29]

Understanding of parties. Parol or extrinsic evidence of the understanding of the parties with respect to the construction of a written instrument is usually held admissible to explain that which would otherwise be ambiguous.[30] On the other hand, where the writing is clear and unambiguous, parol evidence of the understanding of the parties with respect to it is inadmissible,[31] and it has been con-

Great Lakes Coal & Coke Co., 165 N.E 793, 334 Ill. 281—Armstrong Paint & Varnish Works v. Continental Can Co., 133 N.E. 711, 301 Ill. 102, reversing 220 Ill.App. 90.

(2) Evidence of surrounding circumstances, while admissible for purposes of interpretation, cannot be given the effect of adding a new term to a written agreement.—California Jewelry Co. v. Provident Loan Ass'n, 45 P.2d 271, 6 Cal.App.2d 506.

29. Cal.—Fraters Glass & Paint Co. v. Southwestern Const. Co., 254 P. 1097, 200 Cal. 688—Courtwright v. Dimmick, 70 P.2d 269, 22 Cal.App. 2d 68—Briggs v. Marcus-Lesoine, Inc., 39 P.2d 442, 3 Cal.App.2d 207—Smith v. Fall River Joint Union High School Dist., 5 P.2d 930, 118 Cal.App. 673—White v. Ardzrooni, 235 P. 461, 462, 71 Cal.App. 393, quoting **Corpus Juris**—California Pear Growers' Ass'n v. Herspring, 213 P. 518, 60 Cal.App. 503.

Iowa.—Kimball Bros. Co. v. Palatine Ins. Co., Limited, of London, England, 195 N.W. 987, 197 Iowa 598.

Ky.—Falls City Machinery & Wrecking Co. v. Walter, 6 S.W.2d 1053, 224 Ky. 726.

Md.—White v. Northup, 132 A. 258, 150 Md. 18.

Mass.—New York Cent. R. Co. v. Central New England Ry. Co., 162 N.E. 324, 264 Mass. 128, certiorari granted Central New England Ry. Co. v. Boston & A. R. Co., 49 S.Ct. 176, 278 U.S. 596, 73 L.Ed. 526, affirmed 49 S.Ct. 358, 279 U.S. 415, 73 L.Ed. 770.

Mich.—Juif v. Dillman, 282 N.W. 892, 287 Mich. 35.

Mo.—White v. Kentling, 134 S.W.2d 39, 345 Mo. 526—Wood v. Utter, App., 77 S.W.2d 832, 837, citing **Corpus Juris.**

Mont.—Purdin v. Westwood Ranch & Live Stock Co., 216 P. 326, 67 Mont. 553.

N.Y.—Ayers v. Palatine Ins. Co., Limited, of London, Eng., 137 N.E. 608, 234 N.Y. 334, modifying 191 N.Y.S. 915, 199 App.Div. 957—Harding v. O'Malley, 236 N.Y.S. 172, 226 App.Div. 586—Susquehanna S. S. Co. v. A. O. Andersen & Co., 203 N.Y.S. 568, 208 App.Div. 26, reversed on other grounds 146 N.E. 381, 239 N.Y. 285—Beechwood Gun Club v. City of Beacon, 275 N.Y.S. 249, 153 Misc. 358, affirmed 275 N.Y.S. 219, 242 App.Div. 761.

Ohio.—Rorick v. Gilbert, 186 N.E. 756, 45 Ohio App. 96, affirmed Gilbert v. Rorick, 186 N.E. 90, 125 Ohio St. 636.

Pa.—City of Philadelphia v. National Surety Co., 173 A. 181, 315 Pa. 356.

Tenn.—Weatherly v. American Agr. Chemical Co., 65 S.W.2d 592, 16 Tenn.App. 613.

Tex.—Lewis v. East Texas Finance Co., 146 S.W.2d 977, 136 Tex. 149, reversing, Civ.App., 123 S.W.2d 803—Remington Rand v. Sugarland Industries, Com.App., 153 S.W.2d 477, reversing, Civ.App., 122 S.W. 2d 729.

22 C.J. p 1189 note 98.

However, it has been said that the rule that all the surrounding circumstances can be considered in examining the meaning of a writing applies as well to an unambiguous writing as to an ambiguous one.—Jewett Refrigerator Co. v. Lawless, 198 N.Y.S. 617, 120 Misc. 443.

Title insurance

An offer by plaintiff, in an action on a policy of title insurance to show the circumstances under which the title policy was issued, to show the intention of the parties was properly overruled.—Banes v. New Jersey Title Guarantee & Trust Co., N.J., 142 F. 957, 74 C.C.A. 127.

Where contract not questioned

Evidence of circumstances leading to contract is inadmissible in action thereon between parties, where contract is not questioned.—Northeast Lumber Co. v. Harris, 295 S.W. 455, 220 Ky. 454.

30. U.S.—Standard Brands v. Eastern S. S. Lines, C.C.A.N.Y., 97 F. 2d 918—American Surety Co. of New York v. Egan, C.C.A.Mich., 62 F.2d 223—Ætna Casualty & Surety Co. v. National Bank of Tacoma, C.C.A.Wash., 59 F.2d 493, 495, citing **Corpus Juris**—W. R. Grace & Co. v. Toyo Kisen Kabushiki Kaisha, C.C.A.Cal., 12 F.2d 519, affirming, D.C., 7 F.2d 889, certiorari denied 47 S.Ct. 109, 273 U.S. 717, 71 L.Ed. 856.

Ark.—Street v. Shull, 58 S.W.2d 932, 187 Ark. 180.

Cal.—Kirkpatrick v. Pye, 210 P. 438, 59 Cal.App. 125.

Conn.—W. G. Maltby, Inc., v. Associated Realty Co., 158 A. 548, 114 Conn. 283.

Fla.—Whitfield v. Webb, 131 So. 786, 789, 100 Fla. 1619, citing **Corpus Juris.**

Kan.—Kinsley Milling Co. v. Wait, 213 P. 160, 112 Kan. 809.

Md.—Luria Bros. & Co. v. Klaff, 115 A. 849, 139 Md. 586.

Mass.—Linton v. Noonan, 130 N.E. 170, 238 Mass. 31.

Mo.—Haseltine v. Farmers' Mut. Fire Ins. Co. of Billings, Christian County, 263 S.W. 810, affirming, App., 240 S.W. 815—Frank v. Myers, 109 S.W.2d 54, 232 Mo.App. 681.

Mont.—Brown v. Homestake Exploration Corporation, 39 P.2d 168, 98 Mont. 305.

Neb.—Helfrich v. Baxter, 267 N.W. 922, 131 Neb. 285—Machurek v. Ohio Nat. Life Ins. Co., 249 N.W. 81, 125 Neb. 35.

N.J.—Newark Sav. Inst. v. Jones' Ex'rs, 37 N.J.Eq. 449, affirmed 38 N.J.Eq. 299.

N.Y.—Hausman v. Buchman, 179 N.Y.S. 26, 189 App.Div. 597.

Pa.—Shuman v. Main, Beaver & Black Creek Mut. Fire Ins. Co., 108 A. 265, 265 Pa. 38.

S.C.—Burch v. South Carolina Cotton Growers' Co-op. Ass'n, 137 S.E. 422, 181 S.C. 295—W. S. Gray Cotton Mills v. Spartanburg County Mills, 137 S.E. 684, 139 S.C. 223.

Tenn.—Bank of Commerce & Trust Co. v. North, 11 Tenn.App. 519.

Tex.—International Filter Co. v. Conroe Gin, Ice & Light Co., Civ.App., 269 S.W. 210, reversed on other grounds, Com.App., 277 S.W. 631.

Wis.—Firestone Tire & Rubber Co. v. Werner, 236 N.W. 118, 204 Wis. 306.

22 C.J. p 1190 note 99.

Letter written by one of the parties to the contract, showing that the interpretation placed on an ambiguous clause by the other party was the correct one, was admissible.—Miller Cattle Co. v. Francis, 281 P. 211, 35 Ariz. 535.

31. U.S.—Kline v. Yokom, C.C.A.Ill., 117 F.2d 370—Sickelco v. Union Pac. R. Co., C.C.A.Cal., 111 F.2d 746—Carden v. U. S., 87 Ct.Cl. 189.

Ark.—Stoops v. Bank of Brinkley, 225 S.W. 593, 146 Ark. 127.

Kan.—Morgan v. Wheeler, 95 P.2d 320, 150 Kan. 667.

Mo.—Frank v. Myers, 109 S.W.2d 54, 232 Mo.App. 681.

sidered that the parties cannot testify as to their understanding or interpretation of the contract, even though its terms are uncertain and obscure.[32] The understanding which one party to a contract has of its meaning is not evidence in his own favor and against the other party, to whom such understanding was not communicated, where the effect of the contract is in controversy;[33] nor can understandings which are not even indicated by anything in the writing be shown.[34] A fortiori, the plain terms of a contract cannot be varied by evidence of what one of the parties supposed it to mean.[35] Evidence of one party to a contract as to the understanding which another party thereto had of the meaning of an ambiguous clause has been held to be inadmissible.[36]

§ 961. —— Latent and Patent Ambiguity

a. In general
b. Latent ambiguity
c. Intermediate ambiguity
d. Patent ambiguity

a. In General

Under Lord Bacon's rule a latent ambiguity may be explained by extrinsic evidence, while a patent ambiguity may not.

It was laid down as the rule by Lord Bacon that a latent ambiguity may be explained by extrinsic evidence, but that a patent ambiguity may not;[37] and this has been very generally accepted by the courts as correct.[38] This general distinction has, however, been criticized,[39] and it is necessary to examine into the statement closely in order to see what it really means and how far it is a correct exposition of the law.[40]

b. Latent Ambiguity

(1) Rule stated
(2) Limitations of rule
(3) In what latent ambiguity consists

(1) Rule Stated

A latent ambiguity, to explain which parol or other extrinsic evidence is admissible, arises where a writing on its face appears clear and unambiguous, but there is some collateral matter which makes the meaning uncertain.

A latent ambiguity arises when the writing on its face appears clear and unambiguous, but there is some collateral matter which makes the meaning uncertain;[41] and it is so well established as to be

Mont.—Schauer v. Morgan, 216 P. 347, 67 Mont. 455.
N.H.—Pettee v. Omega Chapter of Alpha Gamma Rho, 171 A. 441, 86 N.H. 419, affirming 170 A. 1, 86 N. H. 419—Stevens v. Mutual Protection Fire Ins. Co., 149 A. 498, 84 N.H. 275, 69 A.L.R. 624.
Or.—Stanfield v. Arnwine, 202 P. 559, 102 Or. 289.
Tenn.—McQuiddy Printing Co. v. Hirsig, 134 S.W.2d 197, 23 Tenn. App. 434.
Tex.—Hunt County v. White, Civ. App., 285 S.W. 663—Norman v. Stark Grain & Elevator Co., Civ. App., 237 S.W. 963, error refused.
Wis.—Koskey v. Harnischfeger Corporation, 265 N.W. 583, 221 Wis. 267—Lindoft v. Vandenberg, 230 N.W. 46, 201 Wis. 330.

Words of definite meaning
Where parties to written instrument have used language having a definite meaning in the law, their understanding is inadmissible to show that language has a different meaning.—Merrimack River Sav. Bank v. Higgins, 195 A. 369, 89 N. H. 154.

32. Md.—Diamond v. Shriver, 80 A. 217, 114 Md. 643.
S.C.—Carolina, Cumberland Gap & Chicago R. Co. v. Seigler, 24 S.C. 124.
22 C.J. p 1191 note 2.

Insurance policy
A policy of insurance is to be construed by the court, and hence in proceeding for declaratory judgment under the policy, evidence of the parties' understanding of the meaning of the policy is properly excluded.—American Fidelity Co. v. Provencher, 3 A.2d 824, 90 N.H. 16.

33. N.H.—Pettee v. Omega Chapter of Alpha Gamma Rho, 171 A. 441, 86 N.H. 419, affirming 170 A. 1, 86 N.H. 419.
22 C.J. p 1191 note 3.

What one party thought
Parol evidence is incompetent to show merely what one of parties to contract thought.—Title Ins. Co. of Richmond v. Howell, 164 S.E. 387, 158 Va. 713.

34. Ark.—Freed v. Brown, 41 Ark. 495.

35. Cal.—Da Rocha v. Corse, 271 P. 208, 94 Cal.App. 335.
Ga.—Burns v. Pittsburg Tube Co., 181 S.E. 501, 51 Ga.App. 737.
Md.—Woodcock v. Pope, 140 A. 76, 154 Md. 135.
Mo.—Campbell v. Snoddy, 249 S.W. 131, 215 Mo.App. 339.
Mont.—Schauer v. Morgan, 216 P. 347, 67 Mont. 455.
Pa.—In re Donohoe's Estate, 115 A. 878, 271 Pa. 554, 20 A.L.R. 392.
W.Va.—Wysong v. Board of Education of Town Dist., 102 S.E. 733, 86 W.Va. 57.
22 C.J. p 1191 note 5.

Where rules of association of fire underwriters are not ambiguous, testimony of officers and members of association as to their construction and understanding thereof is not admissible.—Curtin v. Gildea, D.C., 2 F.2d 865, affirmed, C.C.A., Gildea v. Curtin, 3 F.2d 800.

36. **Evidence held inadmissible**
Testimony of officer of former corporate owner of leasehold, where no question was raised during its ownership as to meaning of ambiguous provision of lease, as to his understanding of meaning of such provision and as to understanding which officer of subsequent corporate owner had concerning such provision, was inadmissible for purpose of explaining ambiguity.—Zimbelman v. Boone Coal, 263 N.W. 335, 220 Iowa 1310.

37. U.S.—Ætna Life Ins. Co. v. Phillips, C.C.A.Okl., 69 F.2d 901, 904, citing **Corpus Juris.**
22 C.J. p 1191 note 6.

38. Ill.—Higinbotham v. Blair, 139 N.E. 909, 910, 308 Ill. 568, citing **Corpus Juris.**
22 C.J. p 1191 note 7.

39. Tex.—Meyers v. Maverick, Civ. App., 28 S.W. 716.
22 C.J. p 1191 note 8.

40. N.C.—North Carolina Deaf, etc., Inst., etc. v. Norwood, 45 N.C. 65.
22 C.J. p 1191 note 9.

41. U.S.—Arkansas Amusement Corporation v. Kempner, C.C.A. Ark., 57 F.2d 466.
Conn.—Mirando v. Mirando, 132 A. 910, 104 Conn. 318.

beyond all possible dispute that parol or other extrinsic evidence is always admissible to explain a latent ambiguity in any written instrument.[42] The reason which is usually given for the rule is that as the ambiguity is raised by extrinsic evidence the same kind of evidence must be admitted to remove it.[43] On the other hand, where there is no latent ambiguity, there can be no occasion for extrinsic evidence.[44]

(2) Limitations of Rule

While parol evidence may be admitted to explain a latent ambiguity, it cannot do more; and the existence of the latent ambiguity must be shown before such evidence is admissible.

It is to be observed, however, that while parol evidence may be admitted in explanation where there is a latent ambiguity, it can do no more than explain the doubtful expressions of the instrument

Fla.—Whitfield v. Webb, 131 So. 786, 100 Fla. 1619.
Ill.—Board of Education of City of Rockford v. City of Rockford, 24 N.E.2d 366, 372 Ill. 442.
Mich.—Hall v. Equitable Life Assur. Soc. of U. S., 295 N.W. 204, 295 Mich. 404—Zilwaukee Tp. v. Saginaw Bay City Ry. Co., 181 N.W. 37, 213 Mich. 61.
N.C.—Miller v. Green, 112 S.E. 417, 183 N.C. 652.
Tex.—Murphy v. Dilworth, 151 S.W. 2d 1004, 1005, citing **Corpus Juris**, and reversing, Civ.App., 129 S.W. 2d 418.
W.Va.—Collins v. Treat, 152 S.E. 205, 206, 108 W.Va. 443, quoting **Corpus Juris.**
22 C.J. p 1192 note 10.

Extrinsic ambiguity

In statute authorizing admission of evidence to explain an "extrinsic ambiguity" in a written contract, the words "extrinsic ambiguity" have the same meaning as "latent ambiguity," which is an uncertainty which does not arise by the terms of the instrument itself, but is created by some collateral matter not appearing in the instrument; and the statute providing for exclusion of extraneous evidence of terms of a written agreement does not exclude evidence of circumstances under which agreement was made or to which it relates, or evidence explaining an extrinsic ambiguity.—Pacific Indemnity Co. v. California Electric Works, 84 P.2d 313, 29 Cal.App.2d 260, followed in Jacques v. Standard Oil Co. of California, 84 P.2d 322, 29 Cal.App.2d 745.

42. U.S.—Queen Ins. Co. of America v. Meyer Milling Co., C.C.A.Mo., 43 F.2d 885—Rogers v. Jones, C.C. A.Okl., 40 F.2d 333.
Ala.—Alabama Power Co. v. Pierre, 183 So. 665, 669, 236 Ala. 521, citing **Corpus Juris**—Reichert v. Jerome H. Sheip, Inc., 91 So. 618, 206 Ala. 648.
Ark.—Ellege v. Henderson, 218 S.W. 831, 142 Ark. 421—Johnson v. Missouri Pac. R. Co., 214 S.W. 17, 139 Ark. 507.
Cal.—In re Dominici's Estate, 90 P. 448, 151 Cal. 181—Pacific Indemnity Co. v. California Electric Works, 84 P.2d 313, 29 Cal.App.2d 260, followed in Jacques v. Standard Oil Co. of California, 84 P.2d 322, 29 Cal.App.2d 745—Turner v. Stock, 251 P. 814, 79 Cal.App. 662—Shelley v. Byers, 238 P. 177, 73 Cal.App. 44.
Fla.—Whitfield v. Webb, 131 So. 786, 100 Fla. 1619.
Ga.—Atlanta Banking & Savings Co. v. Chastain, 104 S.E. 628, 150 Ga. 640.
Ill.—Weber v. Adler, 143 N.E. 95, 311 Ill. 547.
Ky.—Akins v. City of Covington, 97 S.W.2d 588, 265 Ky. 740—Luigart v. Federal Parquatry Mfg. Co., 238 S.W. 758, 194 Ky. 213.
La.—Lea v. Terry, 15 La.Ann. 159—Item Co. v. Polazzo, 134 So. 345, 18 La.App. 594, modified on other grounds 138 So. 458, 18 La.App. 594.
Mich.—Hall v. Equitable Life Assur. Soc. of U. S., 295 N.W. 204, 295 Mich. 404—Detroit, G. H. & M. Ry. Co. v. Howland, 224 N.W. 366, 246 Mich. 318, 68 A.L.R. 1—Zilwaukee Tp. v. Saginaw Bay City Ry. Co., 181 N.W. 37, 213 Mich. 61.
Mo.—Meinhardt v. White, 107 S.W.2d 1061, 341 Mo. 446—State ex rel. W. L. Morrison Inv. Co. v. Trimble, 256 S.W. 171, 301 Mo. 146, quashing certiorari Sandbrook v. W. L. Morrison Inv. Co., App., 239 S.W. 543—Korneman v. Davis, 219 S.W. 904, 281 Mo. 234.
Mont.—New Home Sewing Mach. Co. v. Songer, 7 P.2d 238, 91 Mont. 137.
N.J.—Franklin K. Pearce Co. v. Beverly Beach, 150 A. 399, 107 N.J. Law 73—Winfield v. Saunders, 142 A. 907, 6 N.J.Misc. 833, affirmed 147 A. 537, 105 N.J.Law 580—Rosenberg v. Maryland Casualty Co., 130 A. 726, 3 N.J.Misc. 1132, affirmed 132 A. 923, 102 N.J.Law 724.
N.Y.—McCarthy v. Krebs Pigment & Chemical Co., 194 N.Y.S. 138, 118 Misc. 566—Levy v. New River Collieries Co., 203 N.Y.S. 589.
N.C.—Perry v. Morgan, 14 S.E.2d 46, 219 N.C. 377—Green v. Harshaw, 121 S.E. 456, 187 N.C. 213—Miller v. Green, 112 S.E. 417, 183 N.C. 652.
Ohio.—Rorick v. Gilbert, 186 N.E. 756, 45 Ohio App. 96, affirming Gilbert v. Rorick, 186 N.E. 90, 125 Ohio St. 636—Zydel v. Clarkson, 163 N.E. 584, 29 Ohio App. 382.
Or.—Weniger v. Ripley, 293 P. 425, 134 Or. 265.
Pa.—Simmons v. Dietrich, 177 A. 477, 117 Pa.Super. 408—Ketcham v. Central Trust & Savings Co., 71 Pa.Super. 376—In re Phillips Estate, 10 Pa.Dist. & Co. 479, affirmed 143 A. 9, 293 Pa. 351.
Tex.—First Nat. Bank v. Rush, Com. App., 210 S.W. 521, affirming Rush v. First Nat. Bank, Civ.App., 160 S.W. 609, overruling rehearing 160 S.W. 319, and rehearing overruled, Com.App., 213 S.W. 931—Jasper State Bank v. Goodrich, Civ.App., 107 S.W.2d 600, error dismissed—Dow v. American Liberty Oil Co., Civ.App., 83 S.W.2d 401, error refused—Strother v. Hamilton, Civ. App., 268 S.W. 529.
Utah.—Kennedy v. Griffith, 95 P.2d 752, 98 Utah 183—Bamberger Co. v. Certified Productions, 48 P.2d 489, 88 Utah 194, adhered to 53 P. 2d 1153, 88 Utah 213—Fox Film Corporation v. Ogden Theatre Co., 17 P.2d 294, 82 Utah 279, 90 A.L.R. 1299—Boley v. Butterfield, 194 P. 128, 57 Utah 262.
Vt.—Goodenough v. McGregor, 181 A. 287, 107 Vt. 524.
Wash.—Fagan v. Walters, 197 P. 635, 115 Wash. 454.
Wis.—Ogden v. Straus Bldg. Corporation, 202 N.W. 34, 187 Wis. 232.
10 C.J. p 191 note 30 [a]—14 C.J. p 713 note 2—22 C.J. p 1192 note 11.

43. U.S.—St. Paul Fire & Marine Ins. Co. v. Balfour, Cal., 168 F. 212, 216, 93 C.C.A. 498.
22 C.J. p 1194 note 12.

44. Ala.—Pieme v. Arata, 80 So. 811, 202 Ala. 427.
Colo.—Haselwood v. Moore, 69 P.2d 248, 100 Colo. 556.
Ky.—Luigart v. Federal Parquatry Mfg. Co., 238 S.W. 758, 194 Ky. 213.
Me.—Parkman v. Freeman, 117 A. 301, 121 Me. 341.
Tex.—Woods v. Selby Oil & Gas Co., Civ.App., 2 S.W.2d 895, affirmed, Com.App., 12 S.W.2d 994.

Instruments held not ambiguous

Mass.—Buckley v. Gray, 188 N.E. 610, 285 Mass. 110.
Mich.—Juif v. Dillman, 282 N.W. 892, 287 Mich. 35.
Mo.—Farm & Home Savings & Loan Ass'n v. Theiss, 111 S.W.2d 189, 342 Mo. 40.

consistently with the relations of the parties and the other incidents of the contract.[45] The rule that where an ambiguity is created by parol it may be removed by parol was never intended to violate the rule that a writing shall not be contradicted or explained by inferior testimony.[46] If, therefore, when an ambiguity is created by parol the instrument itself removes the ambiguity it cannot be controlled.[47] When there are two tracts of land, to either of which the same description applies, and a deed purports to convey one of them by such description, and it is proposed to show by parol testimony, not that the intention was to convey one in particular, but that it was to convey both, the offer is not to remove an ambiguity and to identify a thing that has actually been conveyed, but rather to enlarge the operation of the instrument, and to make it convey two tracts of land, contrary to the expressed intention to convey one only. This is not evidence to explain a deed, but is simply evidence to add to its terms and make it convey more than it purports to convey and hence is not admissible.[48] Extrinsic evidence cannot cure a latent ambiguity in a deed unless the description, after the rejection of the false description, permits the location of the land on some particular tract.[49] The fact that there is in a writing a latent ambiguity which may be met or removed by parol evidence does not open the door for the admission of parol evidence generally or for any other purpose.[50]

The existence of a latent ambiguity must be established before extrinsic evidence is admissible.[51] This may be disclosed by the surrounding circumstances.[52] To discover a latent ambiguity it is proper to go outside the instrument to ascertain whether the words used aptly fit the facts existing when the instrument was executed.[53]

(3) In What Latent Ambiguity Consists

While a latent ambiguity may exist from the terms of the instrument itself, the most ordinary instance is where an instrument contains a reference to a particular person or thing, and is thus apparently clear, but it is shown by extrinsic evidence that there are two or more persons or things to whom or to which the description might properly apply.

The most ordinary instance of a latent ambiguity is where an instrument of writing contains a reference to a particular person or thing and is thus apparently clear on its face, but it is shown by extrinsic evidence that there are two or more persons or things to whom or to which the description in the instrument might properly apply.[54] Where a grant is issued to a certain person, but no person of that name ever existed, it is a case of latent ambiguity and evidence is admissible to show who was the person intended,[55] and the same is true where a grantee is described by a wrong christian name,[56] or where a deed is made to a partnership by its firm name.[57] Latent ambiguities also arise through the difficulty in applying to the land itself a description thereof contained in a written instrument,[58] and it has been held that where the ambiguity consists of a reference to records, documents,

45. Tex.—Murphy v. Dilworth, 151 S.W.2d 1004, 1005, citing **Corpus Juris**, and reversing, Civ.App., 129 S.W.2d 418.
22 C.J. p 1194 note 13.
Evidence held inadmissible
Tex.—Redden v. Pure Oil Co., Civ. App., 86 S.W.2d 874.

46. Mich.—Michigan Chandelier Co. v. Morse, 297 N.W. 64, 67, 297 Mich. 41, quoting **Corpus Juris**—Zilwaukee Tp. v. Saginaw Bay City Ry. Co., 181 N.W. 37, 40, 213 Mich. 61, quoting **Corpus Juris.**

47. Kan.—Pilcher v. Puckett, 94 P. 132, 77 Kan. 284, 17 L.R.A.,N.S., 1083.
22 C.J. p 1194 note 14.

48. Tex.—Clark v. Gregory, 27 S.W. 56, 87 Tex. 189.

49. Tex.—McMurray v. Standley, Com.App., 1 S.W.2d 592, affirming, Civ.App., 297 S.W. 557.

50. Tenn.—Stewart v. Phœnix Ins. Co., 9 Lea 104.

51. U.S.—University City v. Home Fire & Marine Ins. Co., C.C.A.Mo., 114 F.2d 288—East & West Ins. Co. of New Haven, Conn., v. Fidel, C.C.A.N.M., 49 F.2d 35.

52. U.S.—East & West Ins. Co. of New Haven, Conn., v. Fidel, supra.

53. U.S.—Queen Ins. Co. of America v. Meyer Milling Co., C.C.A.Mo., 43 F.2d 885.

54. U.S.—Queen Ins. Co. of America v. Meyer Milling Co., C.C.A.Mo., 43 F.2d 885.
Mich.—Hall v. Equitable Life Assur. Soc. of U. S., 295 N.W. 204, 295 Mich. 404.
Mo.—Meinhardt v. White, 107 S.W. 2d 1061, 341 Mo. 446—Sims v. Missouri State Life Ins. Co., 23 S.W.2d 1075, 223 Mo.App. 1150.
Ohio.—Zydel v. Clarkson, 163 N.E. 584, 29 Ohio App. 382.
S.C.—Hastings v. Union Fire Ins. Co., 125 S.E. 923, 130 S.C. 326.
Tenn.—Hibernia Bank & Trust Co. v. Boyd, 48 S.W.2d 1084, 164 Tenn. 376.
Tex.—Johnson v. Dallas Cooperage & Woodenware Co., 34 S.W.2d 845, 848, 120 Tex. 27, citing **Corpus Juris**—Cities Service Oil Co. v. Brown, 27 S.W.2d 115, 119 Tex. 242, citing **Corpus Juris.**
Utah.—Kennedy v. Griffith, 95 P.2d 752, 98 Utah 183.
22 C.J. p 1194 note 17.

55. Ga.—Bowen v. Slaughter, 24 Ga. 338, 71 Am.D. 135.

56. Wis.—Staak v. Sigelkow, 12 Wis. 234.

57. Fla.—LaFayette Land Co. v. Caswell, 52 So. 140, 59 Fla. 544, 138 Am.S.R. 166.

58. U.S.—Kuhn v. Chesapeake & O. R. Co., C.C.A.W.Va., 118 F.2d 400, 404, citing **Corpus Juris**—Cities Service Oil Co. v. Dunlap, C.C.A. Tex., 115 F.2d 720, rehearing denied 117 F.2d 31, and certiorari denied 61 S.Ct. 940, 313 U.S. 566, 85 L.Ed. 1525—John L. Roper Lumber Co. v. Hinton, D.C.N.C., 260 F. 996, affirmed, C.C.A., 269 F. 574.
Ill.—Board of Education of City of Rockford v. City of Rockford, 24 N.E.2d 366, 372 Ill. 442—Weber v. Adler, 143 N.E. 95, 311 Ill. 547—Higinbotham v. Blair, 139 N.E. 909, 308 Ill. 568.
Ky.—Vanover v. Consolidation Coal Co., 237 S.W. 21, 193 Ky. 616.
Mo.—Meinhardt v. White, 107 S.W. 2d 1061, 341 Mo. 446.
N.J.—Franklin K. Pearce Co. v. Beverly Beach, 150 A. 399, 107 N.J. Law 73.

and descriptions outside of the writing, and which are necessary to be regarded as part of the description of the subject matter, there is a latent ambiguity.[59] So, when a person, by a written instrument, sells or contracts to sell a certain number of articles of a specified kind and owns more of such articles than the number mentioned in the writing, a case of latent ambiguity arises.[60] Where one assigns his "claim" the assignment conveys only what is due the assignor, and parol evidence is admissible to show the amount due.[61] The courts also consider that a latent ambiguity may exist from the terms of the instrument itself,[62] as, for example, where a writing is capable of two constructions, both of which are in harmony with the language used.[63]

c. Intermediate Ambiguity

The ambiguities existing in those cases in which the words are all sensible and have a settled meaning but consistently admit of two interpretations according to the subject matter in the contemplation of the parties have been called intermediate.

It has been suggested that those cases in which the words are all sensible and have a settled meaning, but at the same time consistently admit of two interpretations according to the subject matter in the contemplation of the parties, constitute an intermediate class partaking of the nature both of patent and latent ambiguities, and in such case evidence ought to be admitted showing the circumstances under which the contract was made and the subject matter to which the parties refer.[64] The difficulty is, however, more easily solved by assigning this character of cases to the class of latent ambiguities, which will reconcile many apparently conflicting statements of the rule.[65]

d. Patent Ambiguity

(1) In general
(2) Description of land

(1) In General

A patent ambiguity is one which exists or appears on the face of the writing itself, and parol evidence is inadmissible to explain it where the effect of such evidence would be the addition of new terms to the instrument. Notwithstanding the broad statement of Lord Bacon's rule, parol evidence is admissible to explain a patent ambiguity or to show the circumstances surrounding the transaction and the situation of the parties, so long as its admission does not add new terms or create new obligations.

What is usually termed a patent ambiguity is such as exists or appears on the face of the writing itself;[66] one apparent on the face of the in-

N.C.—Norton v. Smith, 103 S.E. 14, 179 N.C. 553.

Or.—Weniger v. Ripley, 293 P. 425, 134 Or. 265.

Tex.—Wilson v. Giraud, 231 S.W. 1074, 111 Tex. 253, 1074, answers to certified questions conformed to Civ.App., 234 S.W. 110—Redden v. Pure Oil Co., Civ.App., 86 S.W.2d 874—Kinard v. Eubank, Civ.App., 292 S.W. 633—Hanks v. Hamman, 282 S.W. 935, reversed on other grounds, Com.App., 288 S.W. 143, set aside 289 S.W. 993.

22 C.J. p 1195 note 21.

Insurance contract

A "latent ambiguity" in an insurance contract may be one in which the description of insured property is clear on face of instrument, but there is more than one estate to which the description applies, or it may be one where property is imperfectly or in some respects erroneously described, so that description does not refer with precision to any particular object, and if such an ambiguity develops, extrinsic evidence is admissible to show intent of parties.—University City v. Home Fire & Marine Ins. Co., C.C.A.Mo., 114 F.2d 288.

59. Tex.—Finberg v. Gilbert, Civ. App., 124 S.W. 979, reversed on other grounds 141 S.W. 82, 104 Tex. 539.

22 C.J. p 1195 note 22.

60. Ill.—Marshall v. Gridley, 46 Ill. 247.

61. Or.—Hill v. Wood, 19 P.2d 89, 142 Or. 143.

62. U.S.—Andujar v. Hani, C.C.A. N.Y., 277 F. 62.

Ark.—Walden v. Fallis, 283 S.W. 17, 171 Ark. 11, 45 A.L.R. 1396—Garner Mfg. Co. v. Cornelius Lumber Co., 262 S.W. 1011, 165 Ark. 119.

Cal.—Norton v. Farmers Automobile Inter-Insurance Exchange, 105 P. 2d 136, 40 Cal.App.2d 556—Gallatin v. Markowitz, 33 P.2d 424, 139 Cal. App. 10.

La.—Item Co. v. Polazzo, 134 So. 345, 18 La.App. 594, modified on other grounds 138 So. 458, 18 La.App. 594.

Okl.—Packard Oklahoma Motor Co. v. Funk, 245 P. 571, 117 Okl. 96.

Tex.—C. A. Bryant Co. v. Hamlin Independent School Dist., 14 S.W. 2d 53, 118 Tex. 255, answering certified questions, Civ.App., 18 S.W. 2d 750—Texas Co. v. Meador, Civ. App., 243 S.W. 991, reversed on other grounds, Com.App., 250 S.W. 148—Texas Pac. Coal & Oil Co. v. Harris, Civ.App., 230 S.W. 237.

Wash.—Jones v. Standard Oil Co. of California, 2 P.2d 76, 164 Wash. 83.

22 C.J. p 1195 note 24.

Deeds

Where deed conveyed described land subject to oil and gas lease and conveyances of mineral rights, intention being to convey such land with one sixty-fourth of all minerals thereunder, and grantors then owned one eighth of mineral content and one eighth of reserved royalty amounting to one sixty-fourth of oil produced and saved, evidence was admissible to show whether conveyance was of one eighth or one sixty-fourth of mineral content.—Hobbs Townsite Co. v. Hobbs, 32 P.2d 818, 38 N.M. 331.

Record

Where record showed that defendant corporation "appeared by its president," parol evidence was held admissible to show that plaintiff was president of such corporation.—Beck v. Semones' Adm'r, 134 S.E. 677, 145 Va. 429.

63. Cal.—Kenney v. Los Feliz Inv. Co., 9 P.2d 225, 121 Cal.App. 378.

La.—J. A. Fay & Egan Co. v. Lafayette Lumber Co., 119 So. 781, 9 La.App. 674.

22 C.J. p 1196 note 25.

64. Ala.—Reynolds v. Lawrence, 40 So. 576, 147 Ala. 216, 119 Am.S.R. 78.

22 C.J. p 1196 note 26.

65. Miss.—Schlottman v. Hoffman, 18 So. 893, 73 Miss. 188, 55 Am.S. R. 527.

66. U.S.—Deery v. Cray, Md., 10 Wall. 263, 19 L.Ed. 887—Wolff Truck Frame Co. v. American.

strument arising by reason of inconsistency, obscurity, or an inherent uncertainty of the language adopted, such that the effect of the words in the connection used is to convey either no definite meaning or a double one.[67] The true rule with regard to patent ambiguities must be taken to be this: The patent ambiguity which cannot be explained by parol evidence is that which remains uncertain after the court has received evidence of the surrounding circumstances and collateral facts which are of such a nature as to throw light on the intention of the parties. In other words and more generally speaking, if the court, after placing itself in the situation in which the parties stood at the time of executing the instrument, and with full understanding of the force and import of the words, cannot definitely ascertain the meaning and intention of the parties from the language of the instrument thus illustrated, it is a case of incurable and hopeless uncertainty and the instrument is so far inoperative and void; and it cannot be sustained or rendered operative by the introduction of evidence which would necessarily have the effect of adding new terms to the writing.[68] It is certainly not true that an ambiguity appearing on the face of the paper, if that alone is looked to, cannot be explained by parol.[69] That portion of Lord Bacon's rule in which he states that a patent ambiguity cannot be explained by parol has frequently been repeated by the courts,[70] but the broad general statement has been subjected to much criticism,[71] on the ground that it is too general,[72] too broad,[73] and not of universal application,[74] and it has never been acted on in its widest extent,[75] at least where the word "ambiguity" is taken in its broad sense of doubtfulness, uncertainty, or double meaning,[76] for there are to be found in the reports many cases where, although the ambiguity was such as should undoubtedly be designated as patent, if that term is taken in its broad sense, the courts have admitted evidence to explain it,[77] or to show the circumstances surrounding the transaction and the situation of the parties.[78] In addition to this there are many cases flatly repudiating this part of the rule and expressly holding that a patent as well as a latent ambiguity may be explained by extrinsic evidence;[79] and it has been said that only where there is a patent ambiguity is parol evidence admissible, and then only to explain the meaning and not to vary the terms

Steel Foundries, Ill., 195 F. 940, 115 C.C.A. 628.
Ark.—Dorr v. School Dist. No. 26, 40 Ark. 237.
Colo.—Kretschmer v. Hard, 32 P. 418, 18 Colo. 223.
Fla.—Whitfield v. Webb, 131 So. 786, 100 Fla. 1619.
Mich.—Hall v. Equitable Life Assur. Soc. of U. S., 295 N.W. 204, 295 Mich. 404.
Minn.—McRoberts v. McArthur, 64 N.W. 903, 62 Minn. 310.
Miss.—Brown v. Guice, 46 Miss. 299.
Mo.—Mudd v. Dillon, 65 S.W. 973, 166 Mo. 110.
N.H.—Lathrop v. Blake, 23 N.H. 46.
N.Y.—Petrie v. Trustees of Hamilton College, 53 N.E. 216, 158 N.Y. 458—Strong v. Waters, 50 N.Y.S. 257, 27 App.Div. 299—In re Billings' Estate, 249 N.Y.S. 732, 139 Misc. 496, granting application to reopen 244 N.Y.S. 686, 137 Misc. 758.
Pa.—Lycoming Mut. Ins. Co. v. Sailer, 67 Pa. 108.
Utah.—Conlan v. Doull, 9 P. 568, 4 Utah 267, affirmed 10 S.Ct. 253, 133 U.S. 216, 33 L.Ed. 596.
22 C.J. p 1196 note 29.
Latent ambiguity existing from terms of instrument see supra subdivision b (3) of this section.
Patent ambiguity generally see 3 C. J.S. p 1036 note 45 et seq.

67. Mich.—Zilwaukee Tp. v. Saginaw Bay City Ry. Co., 181 N.W. 37, 213 Mich. 61.

68. U.S.—Ætna Life Ins. Co. v. Phillips, C.C.A.Okl., 69 F.2d 901.
Ill.—Higinbotham v. Blair, 139 N.E. 909, 308 Ill. 568.
Ky.—National Bank of Kentucky at Louisville v. Minary, 299 S.W. 985, 221 Ky. 798.
Wash.—Fagan v. Walters, 197 P. 635, 115 Wash. 454.
Va.—Harvey v. Dwyer, 158 S.E. 523, 109 W.Va. 676.
22 C.J. p 1199 note 45.

69. Ill.—Marske v. Willard, 48 N.E. 290, 169 Ill. 276.
22 C.J. p 1197 note 36.

70. Mich.—Zilwaukee Tp. v. Saginaw Bay City Ry. Co., 181 N.W. 37, 213 Mich. 61.
N.C.—Perry v. Morgan, 14 S.E.2d 46, 219 N.C. 377—Green v. Harshaw, 121 S.E. 456, 187 N.C. 213.
Ohio.—Rorick v. Gilbert, 186 N.E. 756, 45 Ohio App. 96, affirming Gilbert v. Rorick, 186 N.E. 90, 125 Ohio St. 636.
Tex.—Higginbotham Cattle Co. v. Whaley & Lewis, Civ.App., 26 S.W. 2d 308, reversed on other grounds, Com.App., 41 S.W.2d 34.
Vt.—Farmers' Feed & Grain Co. v. Longway, 154 A. 674, 103 Vt. 327.
22 C.J. p 1196 note 30.

71. Cal.—Jenny Lind Co. v. Bower, 11 Cal. 194.
22 C.J. p 1197 note 31.

72. Iowa.—Palmer v. Albee, 50 Iowa 429.
Miss.—Peacher v. Strauss, 47 Miss. 353.

73. Miss.—Schlottman v. Hoffman, 18 So. 893, 73 Miss. 188, 55 Am.S. R. 527.
22 C.J. p 1197 note 33.

74. Miss.—Peacher v. Strauss, 47 Miss. 353.

75. N.Y.—Fish v. Hubbard, 21 Wend. 651.
22 C.J. p 1197 note 37.

76. Ga.—Sparta First Nat. Bank v. Hancock Warehouse Co., 82 S.E. 481, 142 Ga. 99.
22 C.J. p 1197 note 35.

77. W.Va.—Harvey v. Dwyer, 158 S.E. 523, 109 W.Va. 676.
22 C.J. p 1197 note 38.

78. Ala.—Louisville & N. R. Co. v. Crick, 117 So. 167, 217 Ala. 547, followed in Louisville & N. R. Co. v. Copeland, 117 So. 176, 217 Ala. 556.
22 C.J. p 1197 note 39.
Unilateral instruments
In construing a patent ambiguity in unilateral instruments, evidence is limited to acts and statements of maker, from which intention may be inferred, to exclusion of direct declarations of intention.—Smart v. Huckins, 134 A. 520, 82 N.H. 342.

79. Kan.—Roth v. Huser, 76 P.2d 871, 147 Kan. 433.
Mo.—Sims v. Missouri State Life Ins. Co., 23 S.W.2d 1075, 223 Mo. App. 1150.
Mont.—Brown v. Homestake Exploration Corporation, 39 P.2d 168, 98 Mont. 305.
22 C.J. p 1198 note 40.

of the instrument.[80] A blank in an instrument, considered as a patent ambiguity, may be explained by parol evidence.[81]

(2) Description of Land

Decisions as to admissibility of evidence to explain a patent ambiguity in description of land are not uniform, but such evidence will not be admitted when the description can apply equally to more than one parcel of land.

The lack of uniformity in the cases is well illustrated by those relating to the description of land. Thus the principle that parol evidence is inadmissible to explain or correct a patent ambiguity has been frequently applied to such ambiguities in the description of land in a deed or other writing.[82] Such an ambiguity exists where it appears that the description is impossible and that the tract of land could not exist, or that it is so contradictory, inconsistent, or uncertain that the location and identification of the land is impossible of determination;[83] or where there is a failure to recite the state, county, town, or range in which the land is located.[84] On the other hand, extrinsic evidence has been held admissible although the description contains patent ambiguities as to the identity of the land,[85] and there are a number of cases holding that an omission of the name of the state, county, section, township, or range from the description of land in a writing may be supplied by parol,[86] some of which base their holding on the ground that such an omission constitutes a latent ambiguity.[87] It has been held that to constitute a patent ambiguity in the description of land which cannot be explained by extrinsic evidence, the description on its face, or aided by judicial knowledge, must apply equally to two or more different tracts or parcels.[88]

§ 962. —— Meaning of Words, Phrases, and Abbreviations

a. In general
b. Words of fixed meaning
c. Technical or trade terms
d. Abbreviations, signs, and cipher writings
e. Foreign language
f. Local usage of terms
g. Intention as to meaning of words

a. In General

Where there is doubt as to the true sense and meaning of the words, or difficulty in application of them under the surrounding circumstances, parol evidence may be introduced to ascertain the sense and meaning in order that the instrument may be made to speak the real mind of the parties.

Where any doubt arises as to the true sense and meaning of the words themselves, or any difficulty as to their application under the surrounding circumstances, the sense and meaning of the language may be investigated and ascertained by evidence dehors the instrument, for both reason and common sense agree that by no other means can the language of the instrument be made to speak the real mind of the party. In such a case parol evidence is admissible ex necessitate.[89]

80. Ariz.—White v. Frye, 234 P. 34, 27 Ariz. 447.

81. U.S.—Crisp County, Ga., v. S. J. Groves & Sons Co., C.C.A.Ga., 73 F.2d 327, 96 A.L.R. 391.

82. Fla.—Carson v. Palmer, 190 So. 720, 139 Fla. 570.
Ill.—Crocker v. Smith, 9 N.E.2d 309, 366 Ill. 535—Daytona Gables Development Co. v. Glen Flora Inv. Co., 178 N.E. 107, 345 Ill. 371—Holm v. Lynd, 176 N.E. 57, 343 Ill. 645—Hogan v. Orr, 173 N.E. 162, 341 Ill. 58—Weber v. Adler, 143 N.E. 95, 311 Ill. 547.
Mo.—John Hill Const. Co. v. Goldsmith, App., 237 S.W. 860.
N.C.—North Carolina Self Help Corporation v. Brinkley, 2 S.E.2d 889, 215 N.C. 615.
Pa.—Lindsay v. Rose, 6 Pa.Dist. & Co. 325.
Tex.—Continental Supply Co. v. Missouri, K. & T. Ry. Co. of Texas, Civ.App., 250 S.W. 1095, affirmed, Com.App., 268 S.W. 444, rehearing denied Continental Supply Co. v. Missouri, K. & T. Ry. Co., 269 S.W. 1040.
22 C.J. p 1198 note 41.

Meaningless sentences
Where grantee was assured that an easement for a right of way had expired, and that he could inclose all the property, a sentence following a description of the premises reading, "All that portion of the above-described property lying south of a line running from a point which lies north 1 degree 8″ west 16 feet from the true point of beginning to a point east 270 feet," cannot be explained by parol evidence so as to except the easement from the statutory warrant, the sentence, taken alone, being meaningless.—Fagan v. Walters, 197 P. 635, 115 Wash. 454.

83. Fla.—Carson v. Palmer, 190 So. 720, 139 Fla. 570.
Mo.—Meinhardt v. White, 107 S.W. 2d 1061, 341 Mo. 446.

84. Mo.—Martin v. Kitchen, 93 S. W. 780, 195 Mo. 477.
22 C.J. p 1199 note 42.

85. Tex.—Battle v. Wolfe, Civ.App., 283 S.W. 1073.

86. Ala.—Nolen v. Henry, 67 So. 500, 190 Ala. 540, Ann.Cas.1917B 792.
22 C.J. p 1199 note 43.

87. Ill.—Halliday v. Hess, 35 N.E. 380, 147 Ill. 588.
22 C.J. p 1199 note 44.

88. Ala.—Martin v. Baines, 116 So. 341, 217 Ala. 326.

Description held not ambiguous
Conn.—Bielby v. Blinn, 151 A. 357, 112 Conn. 1.

89. U.S.—William C. Atwater & Co. v. Terminal Coal Corporation, C.C.A.Mass., 115 F.2d 887, affirming, D.C., 32 F.Supp. 178—American Nat. Red Cross v. Raven Honey Dew Mills, C.C.A.Neb., 74 F.2d 160—Anderson v. Eischen, C.C.A.Or., 16 F.2d 54—Smith v. Royal Ins. Co., D.C.Cal., 5 F.Supp. 435, reversed on other grounds, C.C.A., 77 F.2d 157—West Tennessee Grain Co. v. J. C. Shaffer & Co., C.C.A. Tenn., 299 F. 197.
Ala.—W. T. Smith Lumber Co. v. Fox, 164 So. 214, 231 Ala. 159; reversing 164 So. 213, 26 Ala.App. 587—Russell v. Garrett, 93 So. 711, 208 Ala. 92.
Ark.—American Snuff Co. v. Stuckey, 128 S.W.2d 1063, 197 Ark. 540—Batton v. Jones, 268 S.W. 857, 167 Ark. 478—Wisconsin & Arkansas

Illustrations of the application of this principle might be multiplied almost indefinitely, but without attempting to exhaust them it may be said that extrinsic evidence has been admitted to show the meaning of such words and phrases as "accepted mortgage,"[90] "account,"[91] "accounts,"[92] "accrued

Lumber Co. v. Fitzhugh, 235 S.W. 1001, 151 Ark. 81—Yale Automobile Co. v. Walker, 224 S.W. 632, 145 Ark. 344—National Rys. Advertising Co. v. E. L. Bruce Co., 220 S.W. 48, 143 Ark. 292.

Cal.—Wachs v. Wachs, 79 P.2d 1085, 11 Cal.2d 322—California Canning Peach Growers v. Williams, 78 P. 2d 1154, 11 Cal.2d 221—Cabrera v. Thannhauser & Co., 192 P. 45, 183 Cal. 604—Pierson v. Bradfield, App., 111 P.2d 460—Du Val Moore & Co. v. Ward, 87 P.2d 732, 31 Cal.App.2d 205—Schmidt v. Cain, 272 P. 803, 95 Cal.App. 378—Fleuti v. Appledorn, 260 P. 601, 86 Cal.App. 209—Watson v. Fisher, 250 P. 577, 79 Cal.App. 621—Henika v. Lange, 203 P. 798, 55 Cal.App. 336.

Conn.—Relyea v. Pacific Fire Ins. Co., 2 A.2d 377, 124 Conn. 654—Gray v. Greenblatt, 155 A. 707, 113 Conn. 535—Mazzotta v. Bornstein, 133 A. 677, 104 Conn. 430.

Ga.—Lowery Lock Co. v. Wright, 115 S.E. 801, 154 Ga. 867—Robinson v. Herbst Bros., 12 S.E.2d 77, 79, 63 Ga.App. 738, citing **Corpus Juris**—Taber Mill v. Southern Brighton Mills, 175 S.E. 665, 49 Ga.App. 390—Porter v. Sterling Products Co., 150 S.E. 457, 40 Ga.App. 522—Oglesby Grocery Co. v. Puyallup & Sumner Fruit Growers' Canning Co., 113 S.E. 64, 28 Ga.App. 790.

Ill.—Schneider v. Neubert, 139 N.E. 84, 308 Ill. 40—Armstrong Paint & Varnish Works v. Continental Can Co., 133 N.E. 711, 301 Ill. 102, reversing 220 Ill.App. 90—Shapiro v. Masor, 242 Ill.App. 63.

Ind.—Hamlyn v. Hamlyn, 7 N.E.2d 644, 103 Ind.App. 333.

Iowa.—Nylander v. Nylander, 268 N. W. 7, 221 Iowa 1358.

Kan.—Hemingway v. Torson, 266 P. 26, 125 Kan. 700—Fontana v. Integrity Mut. Casualty Co., 243 P. 1035, 120 Kan. 406.

Ky.—Rudd v. Hayden, 97 S.W.2d 35, 265 Ky. 495.

La.—Pilsbury v. Typhoon Fan Co., 110 So. 96, 162 La. 81—Watson v. St. Helena Parish School Board, 141 So. 482, 19 La.App. 784—New Orleans Terminal Co. v. Dixie Rendering, Inc., 140 So. 272, 19 La. App. 611.

Mass.—Kennedy Bros. v. Bird, 192 N.E. 73, 287 Mass. 477—Nelson v. Hamlin, 155 N.E. 18, 258 Mass. 331—Martin v. Jablonski, 149 N.E. 156, 253 Mass. 451—Chandler, Gardner & Williams v. Reynolds, 145 N.E. 476, 250 Mass. 309.

Mich.—Cook v. Schwemler, 235 N.W. 219, 253 Mich. 458—Godfrey Conveyor Co. v. Port Huron Storage & Bean Co., 194 N.W. 989, 224 Mich. 337.

Miss.—Overby v. Burnham, 200 So. 591—Mixon v. Green, 193 So. 8, 187 Miss. 343—Vinegar Bend Lumber Co. v. Churchwell, 86 So. 299, 123 Miss. 807.

Mo.—Paisley v. Lucas, 143 S.W.2d 262—State ex rel. W. L. Morrison Inv. Co. v. Trimble, 256 S.W. 171, 301 Mo. 146, quashing certiorari Sandbrook v. W. L. Morrison Inv. Co., 239 S.W. 543, 209 Mo.App. 600—Hellrung v. Viviano, App., 7 S. W.2d 288—Bailey v. St. Louis & S. F. Ry. Co., App., 290 S.W. 630—Trembley-Wilson Real Estate & Loan Co. v. Williams, App., 272 S. W. 1071.

Mont.—New Home Sewing Mach. Co. v. Songer, 7 P.2d 238, 91 Mont. 137—National Cash Register Co. v. Wall, 190 P. 135, 58 Mont. 60.

N.H.—Osgood Const. Co. v. Town of Claremont, 122 A. 346, 81 N.H. 29—Weston v. Ball, 116 A. 99, 80 N.H. 275.

N.Y.—Reliable Press v. Bristol Carpet Cleaning Co., 25 N.Y.S.2d 70, 261 App.Div. 256, reversing 21 N. Y.S.2d 76, 174 Misc. 521, and reargument denied 26 N.Y.S.2d 315, 261 App.Div. 899, and appeal denied 26 N.Y.S.2d 496, 261 App.Div. 943—Levy v. Forster, 231 N.Y.S. 238, 224 App.Div. 463—S. Stroock & Co. v. Joseph Lichtenthal, Inc., 229 N.Y.S. 371, 224 App.Div. 19, reversing 222 N.Y.S. 5, 129 Misc. 288—Liondale Mercantile Co. v. Gerber, 188 N.Y.S. 825, 197 App.Div. 345—American Aniline Products v. Mitsui & Co., 179 N.Y.S. 895, 190 App.Div. 485—McTague v. Conroy, 232 N.Y.S. 171, 133 Misc. 312, affirmed 236 N.Y.S. 844, 227 App. Div. 745—Jewett Refrigerator Co. v. Lawless, 198 N.Y.S. 617, 120 Misc. 443.

Ohio.—Ohio Crane Co. v. Hicks, 143 N.E. 388, 110 Ohio St. 168—Amicon v. Holtz, 160 N.E. 482, 26 Ohio App. 485—Norfolk & Chesapeake Coal Co. v. John, 18 Ohio App. 512.

Okl.—Tyer v. Caldwell, 242 P. 760, 114 Okl. 13.

Or.—Watson v. Pacific Mut. Life Ins. Co. of California, 21 P.2d 201, 144 Or. 413, motion denied and supplemented 25 P.2d 162, 144 Or. 413—Allen v. Hendrick, 206 P. 733, 104 Or. 202—Stanfield v. Arnwine, 202 P. 559, 102 Or. 289.

Pa.—Simon v. Myers, 130 A. 256, 284 Pa. 3—White Heat Products Co. v. Thomas, 109 A. 685, 266 Pa. 551—Agricultural Ins. Co. of Watertown, N. Y., v. Pittsburgh Refrigeration Corporation, 191 A. 665, 127 Pa.Super. 27—Amorosa v. Ovelman, 89 Pa.Super. 377.

R.I.—Johnson v. Kile & Morgan Co., 140 A. 3, 49 R.I. 99.

Tex.—American Employers' Ins. Co. v. Hookfin, Civ.App., 33 S.W.2d 801, error refused—Stephens County v. Moore, Civ.App., 14 S.W.2d 958—Humphrey v. Davis, Civ.App., 11 S.W.2d 383—Curry v. Texas Co., Civ.App., 8 S.W.2d 206, 211, error dismissed, quoting **Corpus Juris**—Wright v. King, Civ.App., 292 S.W. 602—San Antonio Machine & Supply Co. v. Allen, Civ. App., 279 S.W. 493, modified on other grounds, Com.App., 284 S.W. 542—San Antonio Machine & Supply Co. v. Allen, Civ.App., 268 S. W. 532—Ahrens v. Lowther, Civ. App., 223 S.W. 235, error refused.

Va.—Stewart-Warner Corporation v. Smithey, 175 S.E. 882, 163 Va. 476—Mathieson Alkali Works v. Virginia Banner Coal Corporation, 136 S.E. 673, 147 Va. 125—Elterich v. Leicht Real Estate Co., 107 S.E. 735, 130 Va. 224, 18 A.L.R. 441.

Wash.—Kane v. Order of United Commercial Travelers of America, 100 P.2d 1036, 3 Wash.2d 355—Ethredge v. Diamond Drill Contracting Co., 83 P.2d 364, 196 Wash. 483—Reilly v. Hopkins, 234 P. 13, 133 Wash. 421.

W.Va.—Waugh v. Bluefield Supply Co., 150 S.E. 373, 107 W.Va. 671—Roberts v. Lykins, 145 S.E. 440, 106 W.Va. 280—Redden v. Glade Creek Coal & Lumber Co., 141 S. E. 639, 105 W.Va. 138.

Wis.—Schwemer v. Fry, 249 N.W. 62, 212 Wis. 88, 90 A.L.R. 308—Darling & Co. v. Frank Carter Co., 242 N.W. 519, 208 Wis. 222—Jones v. Holland Furnace Co., 206 N.W. 57, 188 Wis. 394.

22 C.J. p 1199 note 46.

Effect of testimony

A complainant who sought confirmation of tax title who allegedly was entitled to aid description by parol testimony was bound by result which application of such rule brings about.—Seward v. Carter, Miss., 200 So. 248.

90. S.D.—Smith v. Johnson, 138 N. W. 18, 30 S.D. 200.

91. Pa.—Denniston v. Schaal, 5 Pa. Super. 632.

92. Mich.—Preston Nat. Bank v. George T. Smith Middlings Purifier Co., 60 N.W. 981, 102 Mich. 462.

22 C.J. p 1200 note 49.

dividends,"[93] "all accounts,"[94] "all advertising matter that goes with an order of this size,"[95] "all the good second hand pipe,"[96] "all the proceeds and crops produced,"[97] "all timber that is claimed,"[98] "artesian,"[99] "article,"[1] "as a regular circuit number,"[2] "as early as possible,"[3] "assigns,"[4] "associates,"[5] "at settlement,"[6] "attachments,"[7] "average,"[8] "barrel,"[9] "block,"[10] "bonus,"[11] "book accounts and bills receivable,"[12] "buffets,"[13] "Canada money,"[14] "capital stock,"[15] "car-load,"[16] "catch,"[17] "charge the amount against me and of my mother's estate,"[18] "choice,"[19] "clear,"[20] "conditions of service, as hitherto existing,"[21] "cotton season,"[22] "currency,"[23] "current funds,"[24] "deed of conveyance,"[25] "delivered,"[26] "dowery,"[27] "duplicate,"[28] "during,"[29] "easement,"[30] "electric outfit,"[31] "entire catch,"[32] "entitled to all the privileges of the course of study,"[33] "expense,"[34] "farm,"[35] "flowing well,"[36] "freight and passenger depot,"[37] "good cotton,"[38] "good custom cowhide,"[39] "good, merchantable, shipping hay,"[40] "grading, excavating, and filling,"[41] "guarantee,"[42] "guaranteed number of nights,"[43] "half his part,"[44] "heart of yellow pine,"[45] "high water mark,"[46] "homestead farm,"[47] "increasing transportation facilities,"[48] "inspection allowed,"[49] "lease,"[50] "leasehold interest,"[51] "liabilities,"[52] "lo-

93. Mass.—Kennedy Bros. v. Bird, 192 N.E. 73, 287 Mass. 477.

94. Cal.—Hawley v. Bader, 15 Cal. 44.

95. Ga.—Doctor Shoop Family Medicine Co. v. Clifford, 75 S.E. 822, 11 Ga.App. 491.

96. N.Y.—Pipe & Contractors' Supply Co. v. Mason & Hanger Co., 168 N.Y.S. 740, 181 App.Div. 317.

97. Cal.—Millet v. Taylor, 146 P. 42, 26 Cal.App. 161.

98. Wash.—Ahlman v. Wilson, 174 P. 970, 102 Wash. 677.
22 C.J. p 1200 note 54.

99. Miss.—Hattiesburg Plumbing Co. v. Carmichael 31 So. 536, 80 Miss. 66.

1. Ala.—Napier v. Elliott, 58 So. 435, 177 Ala. 113.

2. Iowa.—Boyl v. Midland Lyceum Bureau, 138 N.W. 384, 157 Iowa 578.

3. Ga.—Steinhauer v. Thompson, 85 S.E. 677, 16 Ga.App. 470.

4. Colo.—Farmers' Pawnee Canal Co. v. Henderson, 102 P. 1063, 46 Colo. 37.

5. Minn.—State v. Sibley, 25 Minn. 387.

6. Pa.—Amorosa v. Ovelman, 89 Pa. Super. 377.

7. Ga.—Strickland v. McElveen, 93 S.E. 24, 20 Ga.App. 320.

8. N.Y.—Hebbard v. American Sheet Metal Lath Co., Inc., 150 N.Y.S. 72.

9. Mass.—Miller v. Stevens, 100 Mass. 518, 97 Am.D. 123, 1 Am.R. 139.

10. Cal.—Ferris v. Emmons, 6 P.2d 950, 214 Cal. 501.

11. Conn.—Smith v. David B. Crockett Co., 82 A. 569, 85 Conn. 282, 39 L.R.A.,N.S., 1148.

12. U.S.—Austin Machinery Co. of Michigan v. Consolidation Coal Co., C.C.A.Tenn., 67 F.2d 771.

13. Va.—Pine Beach Inv. Corp. v. Columbia Amusement Co., 56 S.E. 822, 106 Va. 810.

14. N.Y.—Thompson v. Sloan, 23 Wend. 71, 35 Am.D. 546.

15. U.S.—Miller v. A. D. Baker Co., D.C.Ohio, 208 F. 190.

16. N.C.—Layton v. Elba Mfg. Co., 77 S.E. 677, 161 N.C. 482.

17. Wash.—Parks v. Elmore, 110 P. 381, 59 Wash. 584.

18. N.Y.—Schmittler v. Simon, 21 N.E. 162, 114 N.Y. 176, 11 Am.S.R. 621.

19. Mo.—Lebrecht v. Miller, App., 192 S.W. 1050.

20. Wis.—Zielica v. Worzalla, 156 N.W. 623, 162 Wis. 603.

"Cleared"
Mo.—Wentzel v. Lake Lotawana Development Co., 48 S.W.2d 185, 226 Mo.App. 960.

"Clearing"
Mo.—Wentzel v. Lake Lotawana Development Co., supra.

21. Wash.—Norton v. State, 176 P. 347, 104 Wash. 248.

22. Ark.—Morris v. Hellums Co., 199 S.W. 927, 131 Ark. 585.

23. Iowa.—Pilmer v. Des Moines Branch State Bank, 16 Iowa 321.
22 C.J. p 1201 note 75.

24. Iowa.—American Emigrant Co. v. Clark, 47 Iowa 671.
22 C.J. p 1095 note 65, p 1201 note 76.

25. U.S.—Zantzinger v. Ketch, Pa., 4 Dall. 132, 1 L.Ed. 772.

26. Tex.—Marlin Lumber Co. v. Samuel Hastings Co., Civ.App., 198 S.W. 1076.
22 C.J. p 1201 note 78.

27. N.H.—Cordopatis v. Bakalopoulos, 104 A. 786, 79 N.H. 77.

28. Md.—McCann v. Preston, 28 A. 1102, 79 Md. 223.

29. N.Y.—Bird v. Beckwith, 60 N.Y.S. 1041, 45 App.Div. 124.

30. Mo.—Bernero v. McFarland Real Estate Co., 114 S.W. 531, 134 Mo. App. 290.

31. Ga.—Fountain v. Hagan Gas Engine & Mfg. Co., 78 S.E. 423, 140 Ga. 70.

32. Wash.—Parks v. Elmore, 110 P. 381, 59 Wash. 584.

33. Pa.—Iron City Commercial College v. Kerr, 3 Brewst. 196.

34. Tex.—Leonard v. Prater, Com. App., 36 S.W.2d 216, 86 A.L.R. 499, reversing, Civ.App., 18 S.W.2d 681.
22 C.J. p 1201 note 86.

35. N.H.—Locke v. Rowell, 47 N.H. 46.

36. S.D.—De Rue v. McIntosh, 127 N.W. 532, 26 S.D. 42.

37. S.C.—Murray v. Northwestern R. Co., 42 S.E. 617, 64 S.C. 520.

38. Ga.—Ford v. Lawson, 65 S.E. 444, 133 Ga. 237.

39. Vt.—Wait v. Fairbanks, Brayt. 77.

40. N.Y.—Fitch v. Carpenter, 43 Barb. 40.

41. Ga.—Atlanta v. Schmeltzer, 10 S.E. 543, 83 Ga. 609.

42. Ill.—Craig v. Chicago Coach & Carriage Co., 172 Ill.App. 564.

43. Iowa.—Boyl v. Midland Lyceum Bureau, 138 N.W. 384, 157 Iowa 578.
22 C.J. p 1201 note 95.

44. Newfoundl.—Kent v. Christopher, 6 Newfoundl. 147.
22 C.J. p 1201 note 96.

45. Colo.—San Miguel Cons. Gold Min. Co. v. Stubbs, 90 P. 842, 39 Colo. 359.

46. Mo.—Coffman v. Saline Valley R. Co., 167 S.W. 1053, 183 Mo.App. 622.

47. N.H.—Locke v. Rowell, 47 N.H. 46.

48. Mo.—Lewis v. Coates, 5 S.W. 897, 93 Mo. 170.

49. Tex.—Marlin Lumber Co. v. Samuel Hastings Co., Civ.App., 198 S.W. 1076.

50. U.S.—Smith v. Royal Ins. Co., D.C.Cal., 5 F.Supp. 435, reversed on other grounds, C.C.A., Royal Ins. Co. v. Smith, 77 F.2d 157.

51. U.S.—Smith v. Royal Ins. Co., supra.

52. Ill.—Wilkin v. Citizens Nat.

cal manager,"[53] "lumber enough to build one dwelling house,"[54] "macadam,"[55] "made,"[56] "measured in wall,"[57] "merchantable timber,"[58] "normal conditions,"[59] "of excellent stock,"[60] "old channel,"[61] "ordinary alterations,"[62] "or for the purpose of making connections with any other industry, except coal mines,"[63] "outbuildings,"[64] "proceeds,"[65] "proceeds of sales,"[66] "product,"[67] "profit,"[68] "published,"[69] "rail,"[70] "rainy day,"[71] "ready for occupancy,"[72] "regular prices and regular terms,"[73] "river,"[74] "sanction,"[75] "satisfactory bond of the full amount of the contract,"[76] "Savannah market,"[77] "season,"[78] "security for the payment made by note,"[79] "set of books,"[80] "settle,"[81] "stockholders,"[82] "store,"[83] "subject to the mortgage,"[84] "suitable,"[85] "taken from a two-inch meter,"[86] "taking stock,"[87] "team,"[88] "tenement house,"[89] "terms—cash with documents attached,"[90] "terms regular,"[91] "Texas money, at its current price at New Orleans,"[92] "the currency used in the common business of the country at the date of maturity,"[93] "the dock,"[94] "the street,"[95] "things,"[96] "to be paid out of the last payment,"[97] "to be taken from the car,"[98] "unsettled,"[99] "vicinity,"[1] "waste ground,"[2] "what moneys may be due me,"[3] "when transit car,"[4] "white oak timber,"[5] "wholesale cost,"[6] "without damage,"[7] "with reasonable dispatch,"[8] "with the right to inherit,"[9] and "work."[10]

b. Words of Fixed Meaning

Where words are familiar and ordinary and not of technical use and have a well defined meaning, parol evidence is not admissible to explain them or give them a different meaning.

Where the words used are familiar and ordinary

Bank of Paris, 18 N.E.2d 251, 298 Ill.App. 38.

53. Ga.—Walker v. Riley, 65 S.E. 301, 6 Ga.App. 519.

54. Ga.—Coleman v. Kea, 78 S.E. 429, 12 Ga.App. 798.

55. Mo.—Viernow v. Carthage, 123 S.W. 67, 139 Mo.App. 276.

56. Mo.—Hellrung v. Viviano, App., 7 S.W.2d 288.

57. Pa.—Miller v. Wiggins, 76 A. 711, 227 Pa. 564, 19 Ann.Cas. 942.

58. Tenn.—Dorris v. King, Ch., 54 S.W. 683.

59. Ky.—Westinghouse Electric & Mfg. Co. v. Greenville Coal Co., 183 S.W. 901, 169 Ky. 280.

60. Mich.—Minor v. Walker, 146 N. W. 305, 179 Mich. 645.

61. Me.—Emery v. Webster, 42 Me. 204, 66 Am.D. 274.

62. U.S.—Miller v. Spring Garden Ins. Co., Wash., 202 F. 442, 120 C. C.A. 548.

63. Ill.—Sholl v. Peoria & P. U. R. Co., 114 N.E. 529, 276 Ill. 267.

64. Cal.—Ruprecht v. Nicholson, 264 P. 332, 88 Cal.App. 762.

65. Ill.—Gould v. Lewis, 267 Ill.App. 569.
22 C.J. p 1201 note 13.

66. N.Y.—Coles v. Saitta, 119 N.Y.S. 253.

67. Ill.—Stewart v. Smith, 28 Ill. 397.

68. Mich.—Brown v. Bartlett, 167 N. W. 847, 201 Mich. 268.

69. Mass.—Stoops v. Smith, 100 Mass. 63, 97 Am.D. 76, 1 Am.R. 85.

70. N.C.—Willis v. Jarrett Constr. Co., 67 S.E. 265, 152 N.C. 100.

71. U.S.—Balfour v. Wilkins, D.C. Or., 2 F.Cas.No.807, 5 Sawy. 429.

72. Cal.—Morse v. Tochterman, 132 P. 1055, 21 Cal.App. 726.
22 C.J. p 1201 note 20.

73. Ind.—Hoerger v. Sidway Mercantile Co., 109 N.E. 770, 183 Ind. 610.

74. N.H.—Greenleaf v. Kilton, 11 N. H. 530.

75. N.Y.—O'Sullivan v. Roberts, 42 N.Y.Super. 282.

76. Pa.—McCrum v. Love, 58 Pa. Super. 404.

77. Ga.—Goodman v. Henderson, 58 Ga. 567.

78. Ga.—Purdom Naval Stores Co. v. Knight, 59 S.E. 433, 129 Ga. 590.
22 C.J. p 1201 note 26.

79. N.Y.—Campbell Printing Press & Mfg. Co. v. Walker, 1 N.Y.St. 200.

80. Ark.—Western Assur. Co. v. Altheimer, 25 S.W. 1067, 58 Ark. 565.

81. Ill.—Adam v. Columbian Nat. Life Ins. Co., 191 Ill.App. 378.

82. Tex.—Carleton v. Roberts, 1 Tex.Unrep.Cas. 587.
22 C.J. p 1201 note 31.

83. Colo.—Divine v. George, 166 P. 242, 63 Colo. 341.
"Store and garage"
Conn.—Mirando v. Mirando, 132 A. 910, 104 Conn. 318.

84. Vt.—Merrill v. Cooper, 86 Vt. 314.

85. Ark.—Davis v. Martin Stave Co., 168 S.W. 553, 113 Ark. 325.

86. N.Y.—Green Island Water Supply Co. v. Trojan Laundry Co., 110 N.Y.S. 508, 126 App.Div. 584.

87. Tex.—Ginnuth v. Blankenship & Blake Co., Civ.App., 28 S.W. 828.

88. Wis.—Ganson v. Madigan, 15 Wis. 144, 82 Am.D. 659.

89. N.Y.—Kitching v. Brown, 73 N. E. 241, 180 N.Y. 414, 70 L.R.A. 742, affirming 87 N.Y.S. 75, 92 App.Div. 160.

90. Wash.—Phœnix Packing Co. v. Humphrey-Ball Co., 108 P. 952, 58 Wash. 396.

91. Mo.—Dinuba Farmers' Union Packing Co. v. J. M. Anderson Grocer Co., 182 S.W. 1036, 193 Mo.App. 236.

92. Tex.—Roberts v. Short, 1 Tex. 373.

93. Va.—Calbreath v. Virginia Porcelain & Earthenware Co., 22 Gratt. 697, 63 Va. 697.

94. Mich.—Obenauer v. Solomon, 115 N.W. 696, 151 Mich. 570.

95. Ky.—Versailles v. Brown, 96 S. W. 1108, 29 Ky.L. 1223.

96. Ala.—Napier v. Elliott, 58 So. 435, 177 Ala. 113.

97. Mass.—Proctor v. Hartigan, 9 N.E. 841, 143 Mass. 462.

98. Conn.—Falletti v. Carrano, 103 A. 753, 92 Conn. 636.

99. Cal.—Auzerais v. Naglee, 15 P. 371, 74 Cal. 60.

1. S.C.—John T. Stanley Co. v. Kaufman, 171 S.E. 32, 170 S.C. 521.
22 C.J. p 1202 note 49.

2. Ind.—Prather v. Ross, 17 Ind. 495.

3. Mass.—Capron v. Anness, 136 Mass. 271.

4. Conn.—Harlow v. Parsons Lumber & Hardware Co., 71 A. 734, 81 Conn. 572.

5. Ark.—Taylor v. Union Sawmill Co., 152 S.W. 150, 105 Ark. 518.

6. Ark.—Finn v. Culberhouse, 150 S.W. 698, 105 Ark. 197.

7. N.Y.—McKee v. De Witt, 43 N. Y.S. 132, 12 App.Div. 617.

8. Mich.—Harmon v. Michigan United Tract. Co., 168 N.W. 521, 202 Mich. 298.
22 C.J. p 1202 note 54.

9. Cal.—Weinstein v. Moers, 279 P. 444, 207 Cal. 534.

10. Conn.—In re Curtis-Castle Arbitration, 30 A. 769, 64 Conn. 501, 42 Am.S.R. 200.

and not of technical use and have a well defined meaning, parol evidence is not admissible to explain them or give them a different meaning;[11] and, even where the words used are of a technical nature, or are confined to commercial parlance, if they have a fixed meaning among those to whom they are familiar, extrinsic evidence cannot be admitted to give them a different meaning.[12]

This principle has been applied to exclude extrinsic evidence of a large number of words and phrases, among which may be mentioned "acceptable to the engineer,"[13] "appurtenances,"[14] "as soon as possible,"[15] "burlap sacks,"[16] "car,"[17] "cellar,"[18] "currency of this state,"[19] "current funds,"[20] "deal,"[21] "delivery,"[22] "demonstration,"[23] "dollars,"[24] "estate,"[25] "fully insured,"[26] "furnished,"[27] "good quality,"[28] "grandson,"[29] "gross,"[30] "half,"[31] "help,"[32] "home,"[33] "intestate,"[34] "legal representatives,"[35] "legitimate railroad purposes,"[36] "liabilities,"[37] "made useful,"[38] "manufacturing business,"[39] "market value,"[40] "more or less,"[41] "New York state currency,"[42] "north half,"[43] "paid,"[44] "par bank notes,"[45] "passenger elevator,"[46] "passenger train,"[47] "placing,"[48] and, likewise, among

11. U.S.—Continental Ins. Co. v. Sabine Towing Co., C.C.A.Tex., 117 F.2d 694, certiorari denied Sabine Towing Co. v. Continental Ins. Co., 61 S.Ct. 1111, 313 U.S. 588, 85 L.Ed. 1543—A. W. Feeser, Inc., v. American Can Co., D.C.Md., 2 F.Supp. 561.
Ala.—Ex parte South, 88 So. 221, 205 Ala. 31, denying certiorari South v. First Nat. Bank, 88 So. 219, 17 Ala.App. 569.
Cal.—Parigian v. Citizens Nat. Trust & Savings Bank of Los Angeles, App., 110 P.2d 117—Palm Springs-La Quinta Development Co. v. Palm Springs Land & Irrigation Co., 98 P.2d 530, 36 Cal.App.2d 730.
Fla.—Johnston v. Cox, 154 So. 206, 114 Fla. 243.
Ga.—Henderson v. Sessoms, 123 S. E. 14, 157 Ga. 902—Mergenthaler Linotype Co. v. Glover Printing & Stationery Co., 199 S.E. 756, 58 Ga. App. 634.
Ky.—Kentucky & West Virginia Power Co. v. Gilliam, 276 S.W. 983, 210 Ky. 820.
La.—Pine Hills v. Lehmann, 126 So. 209, 169 La. 838.
Md.—Waddell v. Phillips, 105 A. 771, 133 Md. 497.
Mass.—Schaffer v. Hotel & Railroad News Co., 165 N.E. 389, 266 Mass. 276.
Mich.—Kent Storage Co. v. Grand Rapids Lumber Co., 214 N.W. 111, 239 Mich. 161.
N.Y.—Gray v. Shepard, 41 N.E. 500, 147 N.Y. 177, reversing 29 N.Y.S. 975, 79 Hun 467—Bank of Rockville Centre Trust Co. v. Baldwin, 265 N.Y.S. 343, 238 App.Div. 354—Globe & Rutgers Fire Ins. Co. v. Lesher, Whitman & Co., 215 N.Y.S. 225, 126 Misc. 874.
N.D.—Morton v. Woolery, 189 N.W. 232, 48 N.D. 1132, 24 A.L.R. 1107.
Okl.—Kingfisher Mill & Elevator Co. v. Westbrook, 192 P. 209, 79 Okl. 188.
R.I.—Allen v. Perrino, 181 A. 407, 55 R.I. 353, 101 A.L.R. 620.
Tex.—Edwards v. O'Neal, Civ.App., 28 S.W.2d 569, error dismissed—Bell v. Kirby Petroleum Co., Civ. App., 269 S.W. 170—Stockyards Nat. Bank v. Wilkinson, Civ.App., 230 S.W. 1040, error refused.
Vt.—Burlington Grocery Co. v. Heaphy's Estate, 126 A. 525, 98 Vt. 122.
Wash.—Olympic Securities Co. v. Pennsylvania Fire Ins. Co., 237 P. 707, 135 Wash. 307.
22 C.J. p 1202 note 58.

12. Me.—Keeling-Easter Co. v. Dunning, 92 A. 929, 113 Me. 34.
22 C.J. p 1203 note 59.

13. U.S.—United Engineering & Contracting Co. v. Broadnax, N.Y., 136 F. 351, 69 C.C.A. 177, affirming, C.C., 128 F. 649, and certiorari denied 25 S.Ct. 800, 197 U.S. 624, 49 L.Ed. 911.

14. Tex.—Johnson v. Nasworthy, App., 16 S.W. 758.

15. N.Y.—Williams v. Gridley, 96 N.Y.S. 978, 110 App.Div. 525, affirmed 79 N.E. 1119, 187 N.Y. 526.

16. Me.—Keeling-Easter Co. v. Dunning, 92 A. 929, 113 Me. 34.

17. Ind.—Fowler Utilities Co. v. Chaffin Coal Co., 87 N.E. 689, 43 Ind.App. 438.

18. N.Y.—Lossing v. Cushman, 88 N.E. 649, 195 N.Y. 386, reversing 108 N.Y.S. 368, 123 App.Div. 693.

19. Mo.—Cockrill v. Kirkpatrick, 9 Mo. 697.
22 C.J. p 1203 note 66.

20. Ill.—Galena Ins. Co. v. Kupfer, 28 Ill. 332, 81 Am.D. 284.
22 C.J. p 1203 note 67.

21. Mass.—Greenfield First Nat. Bank v. Coffin, 38 N.E. 444, 162 Mass. 180.

22. Wis.—Lippert v. Saginaw Milling Co., 84 N.W. 831, 108 Wis. 512.

23. Vt.—Grout v. Moulton, 64 A. 453, 79 Vt. 122.

24. Ill.—Howes v. Austin, 35 Ill. 396.
22 C.J. p 1203 note 71.

25. Pa.—In re Kemerer, 96 A. 654, 251 Pa. 282.
Tex.—O'Connor v. Camp, Civ.App., 158 S.W. 203.

26. S.C.—Kentucky Wagon Mfg. Co. v. People's Supply Co., 57 S.E. 676, 77 S.C. 92, 122 Am.S.R. 540.
22 C.J. p 1203 note 73.

27. Wash.—McConnell v. Gordon Const. Co., 178 P. 823, 105 Wash. 659.

28. Ark.—Allen v. Nothern, 180 S. W. 465, 121 Ark. 150.

29. N.B.—Doe v. Taylor, 6 N.B. 525.

30. Pa.—Lipper Mfg. Co. v Morris, 58 Pa.Super. 611.
22 C.J. p 1203 note 77.

31. Vt.—Butler v. Gale, 27 Vt. 739.

32. Wis.—Hooker v. Hyde, 21 N.W. 52, 61 Wis. 204.

33. N.H.—Day v. Towns, 81 A. 405, 76 N.H. 200.

34. Ill.—Wilson v. Wilson, 109 N.E. 36, 268 Ill. 270.

35. Ala.—Sullivan v. Louisville & N. R. Co., 35 So. 694, 138 Ala. 650.

36. Or.—Abraham v. Oregon & C. R. Co., 60 P. 899, 37 Or. 495, 82 Am.S.R. 779, 64 L.R.A. 391.

37. Eng.—Lloyd v. Sturgeon Falls Pulp Co., 85 L.T.Rep.N.S. 162.

38. Mass.—Davis v. Ball, 6 Cush. 505, 53 Am.D. 53.

39. Ky.—Green River Chemical Co. v. Rockport, 134 S.W. 1164, 142 Ky. 609.

40. N.J.—Bockian v. United Candy Co., 102 A. 393, 91 N.J.Law 314.

41. N.Y.—Beardmore v. Barry, 103 N.Y.S. 353, 118 App.Div. 334, affirmed 86 N.E. 1122, 193 N.Y. 639.

42. N.Y.—Ehle v. Chittenango Bank, 24 N.Y. 548.

43. Wash.—Robinson v. Taylor, 123 P. 444, 68 Wash. 351, Ann.Cas. 1913E 1011.

44. Tex.—Latham Co. v. Louer, Civ. App., 176 S.W. 920.

45. Tenn.—Bachman v. Roller, 9 Baxt. 409, 40 Am.R. 97.

46. Cal.—Wilmarth v. Pacific Mut. Life Ins. Co., 143 P. 780, 168 Cal. 536, Ann.Cas.1915B 1120.

47. Ill.—Nadler v. Illinois Commercial Men's Assoc., 188 Ill.App. 459.

48. N.Y.—Heiberger v. Johnson, 53 N.Y.S. 1057, 34 App.Div. 66.

which may be mentioned plans,"[49] "quality guaranteed,"[50] "returned for repairs,"[51] "ridge or hill,"[52] "satisfactory demonstration,"[53] "season,"[54] "ship timber,"[55] "sound,"[56] "special tax,"[57] "stock guaranteed true to name,"[58] "strand,"[59] "to be forwarded,"[60] "unavoidable accident,"[61] "vigorously push,"[62] "watchman's clause,"[63] "well,"[64] "wood,"[65] and "workmanlike manner."[66]

c. Technical or Trade Terms

In a proper case parol evidence is admissible to explain technical or trade terms or expressions in written instruments.

Where a written instrument contains words or expressions which are of a technical nature, or words used in a particular trade or business, being connected with some art, science, or occupation, and unintelligible to the common reader, yet susceptible of a definite interpretation by experts, parol evidence is admitted for the purpose of explaining the language used and thus effectuating the intention of the parties through the medium of their own language.[67]

Words having both popular and technical mean-

49. Pa.—Hartley-Zeigler Co. v. Bacon, 96 A. 257, 251 Pa. 87.

50. U.S.—Union Selling Co. v. Jones, Neb., 128 F. 672, 63 C.C.A. 224.

51. N.Y.—Edwin B. Stimpson Co. v. Chicago, B. & Q. R. Co., 164 N.Y.S. 68.

52. Vt.—Cilley v. Bacon, 93 A. 261, 88 Vt. 496.

53. Vt.—Grout v. Moulton, 64 A. 453, 79 Vt. 122.

54. Mass.—Buffington v. McNally, 78 N.E. 309, 192 Mass. 198.
22 C.J. p 1203 note 3.

55. N.H.—Pillsbury v. Locke, 33 N. H. 96, 66 Am.D. 711.

56. Ohio.—Thompson v. Pruden, 18 Ohio Cir.Ct. 886, 4 Ohio Cir.Dec. 20.
22 C.J. p 1203 note 5.

57. Mo.—Pleadwell v. Missouri Glass Co., 140 S.W. 935, 160 Mo. App. 585, 131 S.W. 941, 151 Mo. App. 51.

58. Cal.—Burge v. Albany Nurseries, Inc., 168 P. 343, 176 Cal. 313.

59. N.Y.—Stillman v. Burfeind, 47 N.Y.S. 280, 21 App.Div. 13.

60. Mo.—Fischer v. Mechants' Dispatch Transp. Co., 13 Mo.App. 133.

61. N.Y.—Neff v. Friedman, 32 N.Y. Super. 607.

62. Ill.—Lord v. Owen, 35 Ill.App. 382.

63. U.S.—Kentucky Vermillion Mining & Concentrating Co. v. Norwich Union Fire Ins. Soc., 146 F. 695, 77 C.C.A. 121.

64. N.Y.—Strong v. Waters, 50 N. Y.S. 257, 27 App.Div. 299.

65. Newfoundl.—Thomas v. Marine Ins. Co., 4 Newfoundl. 173.

66. Wash.—Armstrong v. Wheeler, 150 P. 5, 86 Wash. 251.

67. U.S.—Manhattan Oil Co. v. Mosby, C.C.A.Mo., 72 F.2d 840, 845, quoting **Corpus Juris.** Certiorari denied 55 S.Ct. 237, 293 U.S. 623, 79 L.Ed. 710—Palmer v. Aeolian Co., C.C.A.Iowa, 46 F.2d 746, certiorari denied 51 S.Ct. 560, 283 U.S. 851, 75 L.Ed. 1458—International Trading Co. of America v. John Sexton & Co., C.C.A.Ill., 24 F.2d 12—Franklin Sugar Refining Co. v. William D. Mullen Co., C.C.A.Del., 12 F.2d 885, reversing, D.C., 7 F.2d 470—A. W. Feeser, Inc., v. American Can Co., D.C.Md., 2 F.Supp. 561—Franklin Sugar Refining Co. v. Egerton, C.C.A.Md., 288 F. 698—American Sugar Refining Co. v. Colvin Atwell & Co., D.C.Pa., 286 F. 685—American Concrete Steel Co. v. Hart, C.C.A.N.Y., 285 F. 322, affirming, D.C., Hart v. American Concrete Steel Co., 278 F. 541—Schmidt & Zeigler v. Griffin Grocery Co., C.C.A.Ga., 284 F. 641.
Ark.—American Snuff Co. v. Stuckey, 123 S.W.2d 1063, 197 Ark. 540—Clear Creek Oil & Gas Co. v. Bushmiaer, 264 S.W. 830, 165 Ark. 303.
Cal.—California Canning Peach Growers v. Williams, 78 P.2d 1161, 11 Cal.2d 233—California Canning Peach Growers v. Williams, 78 P. 2d 1154, 11 Cal.2d 221—Cohn v. Bessemer Gas Engine Co., 186 P. 200, 44 Cal.App. 85.
Conn.—John Arborio, Inc., v. Scapin, 186 A. 488, 121 Conn. 492.
Ga.—Walnut Creek Milling Co. v. Smith Bros. Co., 173 S.E. 95, 178 Ga. 40, answers conformed to 174 S.E. 255, 49 Ga.App. 116—Mays v. Hankinson & Hagler, 120 S.E. 793, 31 Ga.App. 473—H. A. Dover & Son v. Iroquois Mfg. Co., 117 S.E. 109, 30 Ga.App. 135.
Ill.—Air Conditioning Corporation v. Honaker, 16 N.E.2d 153, 296 Ill. App. 221.
Ind.—Keithly v. Craig, 135 N.E. 156, 79 Ind.App. 403.
La.—Mixon v. St. Paul Fire & Marine Ins. Co. of St. Paul, Minn., 84 So. 790, 147 La. 302.
Mass.—Stanley Newman Co. v. City of Boston, 197 N.E. 55, 291 Mass. 366—Martin v. Jablonski, 149 N.E. 156, 253 Mass. 451—Linton v. Noonan, 130 N.E. 170, 238 Mass. 31.
Mich.—Edgar v. Hewett Grain & Provision Co. of Escanaba, 202 N. W. 972, 230 Mich. 168—Cornell v. New Era Lumber Co., 39 N.W. 7, 71 Mich. 350.
Mo.—Wisconsin & Arkansas Lumber Co. v. Buschow Lumber Co., App., 257 S.W. 840.
Mont.—Rice v. Chicago, M. & St. P. Ry. Co., 197 P. 999, 59 Mont. 570.
Neb.—State v. Commercial Casualty Ins. Co., 248 N.W. 807, 125 Neb. 43, 88 A.L.R. 790.
N.Y.—William H. Waters, Inc., v. March, 269 N.Y.S. 420, 240 App. Div. 120—McCarthy v. Krebs Pigment & Chemical Co., 198 N.Y.S. 545, 204 App.Div. 501, reversing 194 N.Y.S. 138, 118 Misc. 566—Gumbinsky Bros. Co. v. Smalley, 197 N.Y.S. 530, 203 App.Div. 661, affirmed 139 N.E. 758, 235 N.Y. 619—Mandel v. National Ass'n Bldg. Corporation, 193 N.Y.S. 777, 200 App.Div. 767—Brimberg v. George B. Herzig Co., 192 N.Y.S. 830, 200 App.Div. 106—Kraft v. Lincoln Mills Co., 28 N.Y.S.2d 129.
N.C.—Owens v. Reserve Loan Life Ins. Co., 175 S.E. 203, 206 N.C. 864—Richardson v. Woodruff & Sons, 100 S.E. 173, 178 N.C. 46.
Okl.—Sterling Milk Products Co. v. O. K. Co-operative Milk Ass'n, 84 P.2d 610, 184 Okl. 71—Webb v. Woods, 55 P.2d 959, 176 Okl. 306—Smith v. Ferguson, 221 P. 447, 96 Okl. 150—Hines v. Olsen, 190 P. 266, 78 Okl. 259—Winemiller v. Page, 183 P. 501, 75 Okl. 278.
Or.—Hurst v. W. J. Lake & Co., 16 P.2d 627, 141 Or. 306, 89 A.L.R. 1222—Coast Fir Lumber Co. v. Parker, 213 P. 617, 106 Or. 641—McDonald v. Supple, 190 P. 315, 96 Or. 486.
Pa.—Electric Reduction Co. v. Colonial Steel Co., 120 A. 116, 276 Pa. 181—Railway Express Agency v. Pennsylvania Public Utility Commission, 4 A.2d 176, 134 Pa.Super. 405—Casselberry v. Stair, 34 Pa. Dist. & Co. 72.
S.C.—Cooper & Griffin v. W. C. Cooke & Co., 115 S.E. 312, 122 S.C. 314.
Tenn.—Ulhorn v. Cohen Grocery Co., 3 Tenn.App. 400.
Tex.—Taylor Milling Co. v. American Bag Co., Civ.App., 230 S.W. 732—Dallas Waste Mills v. Early-Foster Co., Civ.App., 218 S.W. 515, dismissed for want of jurisdiction.

ing. It is not necessary in order that this rule may apply that the word or phrase should have no fixed meaning in ordinary usage, for even though it has such a meaning, yet if it also has a technical meaning in the language of commerce or art,[68] parol evidence is admissible to show that it was used in the latter sense,[69] and extrinsic evidence is admissible to explain what the technical meaning is.[70] On the other hand, the existence of a recognized technical meaning of a word or phrase does not preclude a showing that it was used in a colloquial sense, where the sense in which it is used is doubtful,[71] or where the writing would be entirely meaningless if the word or phrase was given its strict technical meaning.[72]

In the application of the principle under consideration, extrinsic evidence has been admitted to show the meaning of a large number of words and phrases, among which may be mentioned "actual stone measured in the wall,"[73] "Ad. Service consisting of: One Little Housemaid cut for each week,"[74] "all right of way clearing,"[75] "approximation,"[76] "Bayo,"[77] "Big Vein Cumberland coal,"[78] "board measure,"[79] "breeder,"[80] "burlesque,"[81] "busy season,"[82] "cabinet and mahogany door making,"[83] "car,"[84] "carpentry and timbers,"[85] "C/O Harder for dressing, Tuscaloosa, Alabama,"[86] "cold storage,"[87] "colliery,"[88] "confirm,"[89] "crop of flax,"[90] "dangers of the river,"[91] "dirt work,"[92] "division," as used by railroad men,[93] "dry salt,"[94] "dull season,"[95] "equipment,"[96] "excavated and repaired,"[97] "feed privileges,"[98] "flagging,"[99] "floor slab,"[1] "four dollars an order,"[2] "furnishing trade,"[3] "furring,"[4] "Geneva washed furnace coke,"[5] "good, hard brick,"[6] "guaranteed basis 70¢,"[7] "handle,"[8] "heater charges,"[9] "hewn timber, to average one hundred and twenty feet, and class B. No. 1

Vt.—Miles v. Vermont Fruit Co., 124 A. 559, 98 Vt. 1.
Wash.—Craig v. Richfield Oil Co. of California, 10 P.2d 216, 167 Wash. 664—Florence Fish Co. v. Everett Packing Co., 188 P. 792, 111 Wash. 1—Wright v. Seattle Grocery Co., 177 P. 818, 105 Wash. 383.
Wis.—Seitz v. Zukowski, 215 N.W. 939, 194 Wis. 78.
22 C.J. p 1203 note 16.
Testimony of skilled witness see supra § 482.

68. Mich.—Chase v. Ainsworth, 97 N.W. 404, 135 Mich. 119.
22 C.J. p 1204 note 17.

69. U.S.—American Agr. Chemical Co. v. Moore, D.C.Ala., 17 F.2d 196.
Cal.—Cooney v. Glide, 275 P. 257, 97 Cal.App. 77.
N.Y.—Gumbinsky Bros. Co. v. Smalley, 197 N.Y.S. 530, 203 App.Div. 661, affirmed 139 N.E. 758, 235 N.Y. 619.
Wash.—Florence Fish Co. v. Everett Packing Co., 188 P. 792, 111 Wash. 1.
22 C.J. p 1205 note 18.

70. Or.—Abraham v. Oregon & C. R. Co., 60 P. 899, 37 Or. 495, 82 Am.S.R. 779, 64 L.R.A. 391.
22 C.J. p 1205 note 20.

71. Kan.—Missouri, K. & T. R. Co. v. Missouri Pac. R. Co., 175 P. 97, 103 Kan. 1.
Mich.—Brown v. Bartlett, 167 N.W. 847, 201 Mich. 268.

72. Iowa.—Kohl v. Frederick, 88 N. W. 1055, 115 Iowa 517.

73. Tex.—Brenneman v. Bush, Civ. App., 30 S.W. 699.

74. Mo.—Buster Brown Co. v. North Mehornay Furniture Co., 126 S.W. 988, 140 Mo.App. 707.

75. N.B.—Laine v. Kennedy, 43 N. B. 173.

76. N.C.—Neal v. Camden Ferry Co., 82 S.E. 878, 166 N.C. 563.
22 C.J. p 1205 note 26.

77. Cal.—Gardiner v. McDonogh, 81 P. 964, 147 Cal. 313.

78. U.S.—S. M. Hamilton Coal Co. v. New York & Philadelphia Coal & Coke Co., N.Y., 160 F. 75, 87 C.C.A. 231.

79. Ark.—Paepcke-Leicht Lumber Co. v. Talley, 153 S.W. 833, 106 Ark. 400.

80. Minn.—St. Paul & M. Trust Co. v. Harrison, 66 N.W. 980, 64 Minn. 300.
22 C.J. p 1205 note 30.

81. Pa.—Hyde & Behman Amusement Co. v. Safe Deposit & Trust Co., 93 A. 285, 247 Pa. 146.
22 C.J. p 1205 note 31.

82. Wash.—Schultz v. Simmons Fur Co., 90 P. 917, 46 Wash. 555.

83. N.Y.—Stroud v. Frith, 11 Barb. 300.

84. Wash.—Carstens v. Nut House, 164 P. 770, 96 Wash. 50.

85. Ind.—Todd v. Howell, 95 N.E. 279, 47 Ind.App. 665.

86. Ala.—Barron v. Mobile & O. R. Co., 56 So. 862, 2 Ala.App. 555.
22 C.J. p 1206 note 8.

87. N.Y.—Behrman v. Linde, 47 Hun 530.

88. Pa.—Carey v. Bright, 58 Pa. 70.

89. N.Y.—Dominion Trading Co., Inc., v. Kronman & Co., Inc., 170 N.Y.S. 219.
22 C.J. p 1205 note 38.

90. N.Y.—Goodrich v. Stevens, 5 Lans. 230.

91. Ala.—McClure v. Cox, 32 Ala. 617, 70 Am.D. 552.

92. La.—F. A. Cocke Live Stock Co. v. Adams, 2 La.App. 608.

93. Or.—Burton v. Oregon-Washington R. & Nav. Co., 38 P.2d 72, 148 Or. 648.

94. S.C.—Forbes v. Pearson, 68 S.E. 964, 87 S.C. 67.

95. Wash.—Schultz v. Simmons Fur Co., 90 P. 917, 46 Wash. 555.

96. Or.—Bligh v. Laflar, 178 P. 353, 91 Or. 388, rehearing denied 179 P. 238, 91 Or. 388.
22 C.J. p 1205 note 43.

97. Pa.—Miller v. McKeesport & W. R. Co., 36 A. 287, 179 Pa. 350.

98. Tex.—Missouri, K. & T. R. Co. v. De Bord, 53 S.W. 587, 21 Tex. Civ.App. 691.

99. Ill.—Toledo, St. L. & W. R. Co. v. East St. Louis & S. R. Co., 197 Ill.App. 230.

1. Md.—Ætna Indemn. Co. v. Waters, 73 A. 712, 110 Md. 673.

2. N.Y.—Newhall v. Appleton, 49 N. Y.Super. 238.

3. Ark.—Wilkes v. Stacy, 169 S.W. 796, 113 Ark. 556.

4. Mo.—Lasar Mfg. Co. v. Pelligreen Constr. & Inv. Co., 163 S.W. 691, 179 Mo.App. 447.

5. U.S.—McKeefrey v. Dimmick, C. C.Pa., 166 F. 370.

6. N.Y.—Felter v. Claffy, 12 N.Y.St. 625, affirmed 24 N.E. 1096, 120 N.Y. 627.

7. Ala.—J. C. Lysle Milling Co. v. North Alabama Grocery Co., 77 So. 748, 201 Ala. 222.

8. Tex.—San Antonio Life Ins. Co. v. Griffith, Civ.App., 185 S.W. 335.

9. Me.—Ross v. Maine Cent. R. Co., 96 A. 223, 114 Me. 287.

good,"[10] "horse power,"[11] "keep them out,"[12] "levels,"[13] "lighterage free,"[14] "loose delivered Bennettsville,"[15] "margins to cover any decline in the market shall be deposited by the buyer promptly on demand of the seller, and the failure to deposit same promptly shall entitle the seller to close out his contract and hold the buyer for any loss,"[16] "mason work,"[17] "mercantile measurement,"[18] "merchantable lumber, mill run,"[19] "modern asphalt roadway,"[20] "noiseless steam motors,"[21] "No. 2 or better" grade of lumber,[22] "number / common basswood,"[23] "on margin,"[24] "Outcault Service De Luxe,"[25] "properly brickwork,"[26] "quantity guaranteed,"[27] "regular engagement,"[28] "regular season,"[29] "reinsurances,"[30] "retorts,"[31] "right of way clearing,"[32] "roof slab,"[33] "royalties,"[34] "saw timber,"[35] "sea letter,"[36] "season" in contracts of employment,[37] "shipment buyer's option,"[38] "shipping instructions,"[39] "slightly processed,"[40] "spitting of blood,"[41] "standard 1905,"[42] "subject to Louisville terms,"[43] "subject to strikes,"[44] "switching,"[45] "terms: Dryer, net sixty days,"[46] "theatrical season,"[47] "to be invoiced as per the following cost mark,"[48] "tontine policy,"[49] "transfer,"[50] "transportation,"[51] "traveling expenses,"[52] "two hundred Rose two hundred Ohio one hundred Triumph,"[53] "white basswood,"[54] "wholesale cost,"[55] "winter months,"[56] "winter wheat bran,"[57] "without time limit,"[58] "zinc,"[59] and "74 degree gasoline."[60]

d. Abbreviations, Signs, and Cipher Writings

Parol evidence is admissible in a proper case to explain the meaning of abbreviations, signs, or cipher writings.

Parol or extrinsic evidence is admissible to explain the meaning of abbreviations appearing in a written instrument;[61] but this principle is of course not applicable in the case of those abbreviations of

10. Ala.—Jones v. Anderson, 76 Ala. 427—Jones v. Anderson, 2 So. 911, 82 Ala. 302.

11. Tex.—Southern Gas Engine Co. v. Adams, Civ.App., 169 S.W. 1143.

12. Iowa.—Morrison Mfg. Co. v. Bryson, 103 N.W. 1016, 106 N.W. 153, 129 Iowa 645.

13. Vt.—Douglass v. Morrisville, 95 A. 810, 89 Vt. 393.

14. Me.—Ross v. Maine Cent. R. Co., 96 A. 223, 114 Me. 287.

15. S.C.—Forbes v. Pearson, 68 S. E. 964, 87 S.C. 67.

16. S.C.—Forbes v. Pearson, supra.

17. Ill.—Elgin v. Joslyn, 36 Ill.App. 301, affirmed 26 N.E. 1090, 136 Ill. 252.

18. Ark.—Paepcke-Leicht Lumber Co. v. Talley, 153 S.W. 833, 106 Ark. 400.
Mo.—Gaunt v. Pries, 21 Mo.App. 540.

19. Or.—Barnes v. Leidigh, 79 P. 51, 46 Or. 43.

20. Ky.—Tennant Land Co. v. Nordeman, 146 S.W. 756, 148 Ky. 361.

21. N.H.—Farnum v. Concord Horse R. Co., 29 A. 541, 66 N.H. 569.

22. Wis.—Garton Toy Co. v. Buswell Lumber & Mfg. Co., 136 N.W. 147, 150 Wis. 341.

23. N.Y.—Lucas E. Moore Stave Co. v. M. Mosson Co., 126 N.Y.S. 79.

24. Conn.—Hatch v. Douglas, 48 Conn. 116, 40 Am.R. 154.

25. Kan.—Outcault Advertising Co. v. H. G. Waltner Mercantile Co., 153 P. 518, 96 Kan. 689.

26. Pa.—Edmonds v. Connellsville First Nat. Bank, 64 A. 671, 215 Pa. 547.

27. N.Y.—Bissel v. Campbell, 54 N. Y. 353.

28. N.Y.—Lewis v. Blackwood, 137 N.Y.S. 1061, 153 App.Div. 36.

29. Pa.—Lovering v. Miller, 67 A. 209, 128 Pa. 212.

30. Mass.—Federal Ins. Co. v. Gilmour, 92 N.E. 36, 206 Mass. 203.

31. Mich.—McKinnon Boiler & Machine Co. v. Central Michigan Land Co., 120 N.W. 26, 156 Mich. 11.

32. N.B.—Laine v. Kennedy, 43 N.B. 173.

33. Md.—Ætna Indemn. Co. v. Waters, 73 A. 712, 110 Md. 673.

34. Okl.—Melton v. Sneed, 109 P.2d 509.

35. Tex.—Butcher v. Smith, Civ. App., 195 S.W. 1180, appeal dismissed Smith v. Butcher, 223 S.W. 166, 110 Tex. 617.

36. N.Y.—Sleght v. Hartshorne, 2 Johns. 531, reversing 1 Johns 192.

37. N.Y.—McIntosh v. Miner, 65 N. Y.S. 735, 53 App.Div. 240—Wachtershauser v. Smith, 10 N.Y.S. 535.

38. S.C.—Forbes v. Pearson, 68 S. E. 964, 87 S.C. 67.

39. Tex.—Higgins Mill & Elevator Co. v. Gossett, 125 S.W. 927, 59 Tex.Civ.App. 136.

40. Cal.—Scudders-Gale Grocery Co. v. Gregory Fruit Co., 99 P. 978, 9 Cal.App. 553.

41. Mo.—Singleton v. St. Louis Mut. Ins. Co., 66 Mo. 63, 27 Am.R. 321.

42. Ga.—Kirby Planing Mill Co. v. Hughes, 75 S.E. 1059, 11 Ga.App. 645.

43. Ala.—Cassells' Mill v. Strater Bros. Grain Co., 51 So. 969, 166 Ala. 274.

44. Wis.—Hesser - Milton - Renahan Coal Co. v. La Crosse Fuel Co., 90 N.W. 1094, 114 Wis. 654.

45. Ga.—Dixon v. Central of Georgia R. Co., 35 S.E. 369, 110 Ga. 173.

46. Pa.—A. T. Hagen Co. v. Greenwood, 27 Pa.Super. 239.

47. Pa.—Lovering v. Miller, 67 A. 209, 218 Pa. 212.
22 C.J. p 1206 note 94.

48. Mo.—Webb v. Steiner, 87 S.W. 618, 113 Mo.App. 482.

49. Mo.—Thompson v. Thorne, 83 Mo.App. 241.

50. Ga.—Dixon v. Central of Georgia R. Co., 35 S.E. 369, 110 Ga. 173.

51. Ga.—Dixon v. Georgia Cent. R. Co., supra.

52. Mo.—Wilcox v. Baer, 85 Mo.App. 587.

53. Mo.—Elam v. Western Union Tel. Co., 88 S.W. 115, 113 Mo.App. 538.
22 C.J. p 1206 note 1.

54. N.Y.—Lucas E. Moore Stave Co. v. M. Mosson Co., 126 N.Y.S. 79.

55. Ark.—Finn v. Culberhouse, 150 S.W. 698, 105 Ark. 197.

56. Cal.—Whitney v. Aronson, 130 P. 700, 21 Cal.App. 9.

57. Va.—Walker v. Gateway Milling Co., 92 S.E. 826, 121 Va. 217.

58. N.Y.—Sholl v. Prince Line, 96 N.Y.S. 368, 109 App.Div. 591.
22 C.J. p 1206 note 6.

59. N.J.—New Jersey Zinc Co. v. Boston Franklinite Co., 15 N.J.Eq. 418.
22 C.J. p 1206 note 7.

60. Wis.—Berry v. Wadhams Oil Co., 146 N.W. 783, 156 Wis. 588.

61. Ga.—Morrison v. Alexander, 106 S.E. 734, 26 Ga.App. 455.
Ill.—People v. Thompson, 129 N.E. 155, 295 Ill. 187.
Me.—Lewis Poultry Co. v. New York

the meanings of which the courts will take judicial notice.[62] Similarly, where a writing contains certain signs or characters the meaning of which is not commonly known, although it is familiar to those among whom such signs or characters are used, parol or extrinsic evidence of their meaning is admissible;[63] and parol explanations of memoranda used in businesses, and unintelligible to those not engaged in such businesses, have always been admitted as violating no rule against contradicting or varying the terms of a written contract.[64] Where a writing is in cipher, the meaning may be explained by a person able to read the cipher.[65] For parol evidence to be admissible to explain an abbreviation the explanation must be consistent with the terms of the instrument.[66] Evidence as to what was said as to initials is inadmissible where it would add to the terms of the writing.[67]

e. Foreign Language

A writing in a foreign language not understood by the court may be interpreted.

If the writing is in a language not understood by the court, it may be interpreted.[68]

f. Local Usage of Terms

Parol evidence as to local usage of terms may be admitted.

Where words or phrases have acquired a definite meaning by local usage, and the language used is such that the court does not understand it, parol evidence is admissible as to the meaning of such words or phrases;[69] but it has also been held that, where a term is of general use throughout the state or country and is not peculiar to any particular part or section thereof, it cannot be shown by parol evidence that in a certain locality the term has a meaning other than that which it has in other parts of the state or country.[70]

g. Intention as to Meaning of Words

The meaning of words cannot be varied by the private intention of the parties where the meaning is clear, but in a proper case evidence is admissible to show that the parties intended the words to be used out of their ordinary meaning.

While the meaning of words of a written instrument, if clear, cannot be varied by proof of the private intention of the parties,[71] the court may receive evidence to show that the parties intended the words to be used out of their ordinary meaning.[72]

Cent. R. Co., 105 A. 109, 117 Me. 482.
Miss.—Seward v. Carter, 200 So. 248.
N.Y.—Bolton Worsted Mills Co. v. United British Ins. Co., 193 N.Y.S. 688, 118 Misc. 530.
Okl.—King Collie Co. v. Richards, 184 P. 130, 76 Okl. 6.
Tex.—North Texas Oil & Refining Co. v. Standard Tank Car Co., Civ. App., 249 S.W. 253.
22 C.J. p 1206 note 10.

62. Mich.—Dages v. Brake, 83 N.W. 1039, 125 Mich. 64, 84 Am.S.R. 556.
22 C.J. p 1207 note 11.

63. N.Y.—Loonsk Bros. v. Sinclair Motor Corporation, 4 N.Y.S.2d 416, 254 App.Div. 137.
Ohio.—State v. Board of Deputy State Sup'rs of Elections of Crawford County, 143 N.E. 667, 110 Ohio St. 240.
22 C.J. p 1207 note 12.

64. N.Y.—Franklin Sugar Refining Co. v. Lipowicz, 160 N.E. 916, 247 N.Y. 465, 59 A.L.R. 1414, affirming 221 N.Y.S. 11, 220 App.Div. 160.
22 C.J. p 1207 note 14.
Memoranda held explainable
(1) "F. O. B."
Cal.—Gianelli v. Globe Grain & Milling Co., 191 P. 720, 48 Cal.App. 103.
Or.—McDonald v. Supple, 190 P. 315, 96 Or. 486.
22 C.J. p 1207 note 14 [a] (3), (4).
(2) "O. K."—Nowlin v. Noteware, 7 S.W.2d 791, 177 Ark. 688.
22 C.J. p 1207 note 14 [a] (1).

65. Ga.—Wilson v. Frisbee, 57 Ga. 269.
Pa.—Wingate v. Mechanics' Bank, 10 Pa. 104.

66. Okl.—White v. Oliver, 49 P.2d 147, 173 Okl. 559, 100 A.L.R. 1461.

67. N.J.—National Spun Silk Co. v. Peerless Silk Mills Corporation, 116 A. 711, 97 N.J.Law 190, affirming 114 A. 312, 96 N.J.Law 49.

68. Iowa.—Erusha v. Tomash, 67 N.W. 390, 98 Iowa 510.
22 C.J. p 1207 note 16.

69. U.S.—Daniel v. Pappas, C.C.A. Okl., 16 F.2d 880—Markey v. Brunson, C.C.A.S.C., 286 F. 893.
Ark.—Murdock v. Reynolds, 22 S.W. 2d 1007, 180 Ark. 729.
Neb.—Haney v. Collins, 174 N.W. 419, 103 Neb. 782.
N.J.—Cramer & King Co. v. National Surety Co. of New York, 134 A. 771, 103 N.J.Law 83.
N.Y.—Wells v. Fisher, 199 N.Y.S. 594, 596, 205 App.Div. 212, citing **Corpus Juris**, and reversed on other grounds 142 N.E. 358, 237 N.Y. 79.
Or.—Coast Fir Lumber Co. v. Parker, 213 P. 617, 106 Or. 641.
22 C.J. p 1207 note 17.

70. N.Y.—Stillman v. Burfeind, 47 N.Y.S. 280, 21 App.Div. 13.
22 C.J. p 1208 note 18.

71. U.S.—In re Tidewater Coal Exch., D.C.N.Y., 292 F. 225, affirmed, C.C.A., 296 F. 701, certiorari denied Davis v. Coyle, 44 S.Ct. 454, 264 U.S. 596, 68 L.Ed. 868—Pond Creek Mill & Elevator Co. v. Clark, C.C.A.Ill., 270 F. 482.
Cal.—Watson v. Fisher, 250 P. 577, 79 Cal.App. 621.
Ind.—Southwestern Milling Co. v. Niemeier, 131 N.E. 831, 76 Ind. App. 278.
Mo.—State ex rel. Youngman v. Calhoun, App., 231 S.W. 647—Outcault Advertising Co. v. Schierbaum, App., 209 S.W. 982.
N.D.—Embden State Bank v. Boyle, 196 N.W. 820, 50 N.D. 573.
22 C.J. p 1208 note 19.

72. U.S.—In re Tidewater Coal Exch., D.C.N.Y., 292 F. 225, affirmed, C.C.A., 296 F. 701, certiorari denied Davis v. Coyle, 44 S.Ct. 454, 264 U.S. 596, 68 L.Ed. 868.
Ga.—Pioneer Mercantile Co. v. Freeman, 113 S.E. 21, 29 Ga.App. 11.
Ohio.—In re Fulk's Estate, 24 N.E. 2d 1020, 136 Ohio St. 233.

Evidence of real sense in which words with special meaning or trade phrase were used in contract, or generally known fixed trade significance thereof, is competent, if justice requires, but word having common or generally accepted ordinary meaning is supposed to have been so intended, unless it is plain from context or properly made to appear that it was used in another sense.—Tate-Jones & Co. v. Union Electric Steel Co., 126 A. 813, 281 Pa. 448.

Thus evidence has been held admissible to show the meaning attached to the word "premium."[73] If the writing itself shows that certain words therein were used in a particular sense, evidence dehors the writing of the ordinary meaning of such words is not admissible.[74]

§ 963. Date of Instrument

As a general rule parol evidence is admissible to supply or correct the date of an instrument where the date is not a material part of the contract.

As a general rule it is admissible to show by parol the true date of an instrument, even though such evidence may tend to vary the writing, or to supply the date when it is omitted, for the date is not generally such an important element of the agreement that the reason of the rule against parol evidence applies thereto, and in addition to this the evidence usually amounts to mere correction of a mistake.[75]

On the other hand, the rule against parol evidence to vary or contradict written agreements applies in full force to preclude any evidence varying the date of a written instrument, where the date is a material part of the contract or undertaking, so that to vary the date would vary the rights of the parties.[76] Such a case arises where a promissory note is made payable a certain time after date,[77] where the date is referred to in the body of the contract as fixing the time of payment,[78] or where the date of a lease shows the remaining time it has to run and is thus obviously an essential item in the description of the interest created by the instrument, without the fixing of which the whole interest under the lease would be indeterminate.[79] However, where a contract provided that certain work should be completed within a certain number of days "after the date of the execution of the contract," parol evidence was admitted to show that the contract was executed and delivered at a date subsequent to the date of the instrument.[80]

§ 964. Discharge, Performance, and the Like

The discharge, performance, release, or abrogation of a written contract ordinarily may be shown by parol.

Parol evidence is admissible to show that a writing purporting to be a contract has ceased to be a contract.[81] It is always competent for a party to a written contract or obligation to show that his lia-

73. Ga.—Pioneer Mercantile Co. v. Freeman, 113 S.E. 21, 29 Ga.App. 11.

74. Tex.—West v. Carlisle, Civ.App., 199 S.W. 515.

75. U.S.—Queen Ins. Co. of America v. Citro, C.C.A.Ill., 58 F.2d 107—Anderson v. Eischen, C.C.A.Or., 16 F.2d 54—Davidson v. Poague, C.C.A.Ill., 263 F. 876.
Ala.—Phillips v. Sipsey Coal Mining Co., 118 So. 513, 218 Ala. 296—Edmundson v. Mullen, 110 So. 391, 215 Ala. 297—Moore v. Williamson, 104 So. 645, 213 Ala. 274, 42 A.L.R. 981—Harris v. Geneva Mill Co., 96 So. 622, 209 Ala. 538—Sovereign Camp, W. O. W., v. Reed, 94 So. 910, 208 Ala. 457—Pake v. Lindsey Mill Co., 94 So. 573, 208 Ala. 569—Jones v. First Nat. Bank, 89 So. 437, 206 Ala. 203—Davis v. Reid Lumber Co., 86 So. 379, 204 Ala. 517—Corley v. Vizard, 84 So. 299, 203 Ala. 564—Barnes v. Federal Acceptance Corporation, 149 So. 723, 25 Ala.App. 531—Bowdoin v. Headley, 98 So. 32, 19 Ala.App. 457.
Ark.—Lofton v. King, 47 S.W.2d 578, 185 Ark. 421.
Cal.—Kloke v. Pongratz, 101 P.2d 522, 38 Cal.App.2d 395—Gas Appliance Sales Co. v. W. B. Bastian Mfg. Co., 262 P. 452, 87 Cal.App. 301.
Fla.—Lance v. Smith, 167 So. 366, 123 Fla. 461.
Ga.—Waynesboro Planing Mill v. Perkins Mfg. Co., 134 S.E. 831, 35 Ga.App. 767.
Idaho.—Rupert Nat. Bank of Rupert v. Insurance Co. of North America of Philadelphia, 234 P. 465, 40 Idaho 530.
Ill.—Illinois Nat. Bank & Trust Co. v. Holmes, 35 N.E.2d 823, 311 Ill. App. 286—Union Bank of Chicago v. Metropolitan Life Ins. Co., 266 Ill.App. 345.
Ind.—Ratcliff v. Dick Johnson School Tp., 185 N.E. 143, 204 Ind. 525—Smith v. Ostermeyer Realty Co., 197 N.E. 743, 102 Ind.App. 164.—Cassidy v. Ward, 123 N.E. 724, 70 Ind.App. 550.
Kan.—West v. West, 9 P.2d 981, 984, 135 Kan. 223, quoting Corpus Juris.
Ky.—Citizens Bank & Trust Co. v. McEuen, 134 S.W.2d 1012, 281 Ky. 113.
La.—Toomer v. Price, 122 So. 856, 168 La. 578.
Mont.—Harrison State Bank v. U. S. Fidelity & Guaranty Co., 22 P.2d 1061, 94 Mont. 100.
Neb.—Farmers' State Bank of Plymouth v. Bank of Plymouth, 234 N.W. 626, 120 Neb. 663.
N.J.—Ball v. Metalwash Machinery Co., 8 A.2d 370, 123 N.J.Law 285.
Ohio.—Walser v. Farmers' Trust Co. of Indianapolis, Ind., 185 N.E. 535, 126 Ohio St. 367—Springfield Loan Co. v. National Guarantee & Finance Co., 27 N.E.2d 257, 63 Ohio App. 508—Shelton v. American Ins. Union, 181 N.E. 497, 41 Ohio App. 512.
Or.—Turner v. Jackson, 4 P.2d 925, 139 Or. 539, affirmed 11 P.2d 1048, 139 Or. 539—Cannon v. Farmers' Union Grain Agency, 202 P. 725, 103 Or. 26.
Pa.—Davis v. Cauffiel, 135 A. 107, 287 Pa. 420.
Tex.—Magee v. Barnes, Civ.App., 135 S.W.2d 1038—Bentz v. State, 95 S.W.2d 410, 130 Tex.Cr. 553.
Wash.—Naylor v. Lovell, 186 P. 855, 109 Wash. 409.
22 C.J. p 1208 note 22.
Mistake generally see infra § 978.

76. Ky.—Ehrmann v. Stitzel, 90 S.W. 275, 121 Ky. 751, 28 Ky.L. 728, 123 Am.S.R. 224.
22 C.J. p 1209 note 23.
Date of issuance of insurance policy cannot be shown to be other than as stated in the policy where the policy provided that the application and policy should constitute the entire contract and that its date should be deemed the day of issue.—Travia v. Metropolitan Life Ins. Co., 173 So. 721, 186 La. 934.

77. Me.—Huston v. Young, 33 Me. 85.

78. Mass.—Joseph v. Bigelow, 4 Cush. 82.

79. Me.—Kingsley v. Siebrecht, 42 A. 249, 92 Me. 23, 69 Am.S.R. 486.

80. U.S.—District of Columbia v. Camden Iron Works, 21 S.Ct. 680, 118 U.S. 453, 45 L.Ed. 948, affirming 15 App.D.C. 198.

81. Conn.—J. E. Smith & Co. v. W. M. Hurlburt Co., 106 A. 319, 93 Conn. 391.

bility thereunder has been terminated by some method known to the law;[82] thus it is permissible to show that a contract or other obligation has been discharged,[83] or that a party has been released from all or a part of his obligations under the writing,[84] unless such a showing would tend to vary a writing evidencing the transaction in connection with which the release is claimed to have been given.[85] It is also permissible to show that the obligations which a party to a writing has thereby assumed have or have not been performed by him.[86]

Further, parol evidence is admissible to show that the written agreement between the parties has been repudiated, rescinded, abrogated, or abandoned in whole or in part,[87] at least where the written agreement does not involve matters required to be in writing.[88] However, parol evidence of a rescission or cancellation of a written agreement may be rejected where the written agreement is one required to be in writing.[89]

82. Tex.—Barcus v. J. I. Case Threshing Mach. Co., Civ.App., 197 S.W. 478.
22 C.J. p 1209 note 28.
Showing equities of relation to defeat enforcement
When equities of relation between parties to contract forbid enforcement thereof, such relation may be shown by parol evidence.—Polk County Nat. Bank of Bartow v. Shelton, C.C.A.Fla., 69 F.2d 352.

83. Cal.—Hooke v. Great Western Lumber Co., 202 P. 492, 54 Cal. App. 681.
Iowa.—Kruse v. Wickham, 292 N.W. 518—Banwart v. Shullenburg, 180 N.W. 190, 190 Iowa 418.
La.—Boland Mach. & Mfg. Co. v. Favret, App., 177 So. 836.
Mass.—Graustein v. Dolan, 185 N.E. 489, 282 Mass. 579.
Neb.—Seminole Bond & Mortgage Co. v. Investors' Realty Co., 254 N.W. 732, 127 Neb. 193.
N.C.—Jefferson Standard Life Ins. Co. v. Morehead, 183 S.E. 606, 209 N.C. 174.
Tex.—First Nat. Bank v. Brown, Civ.App., 111 S.W.2d 806, reversed on other grounds 131 S.W.2d 958, 134 Tex. 38.
22 C.J. p 1209 note 29.

84. Ill.—McNeill v. Harrison & Sons, 2 N.E.2d 959, 286 Ill.App. 120.
Okl.—Abraham v. Mike, 63 P.2d 743, 178 Okl. 597, followed in Abraham v. Mike, 65 P.2d 183, 179 Okl. 224.
S.C.—Callaham v. Ridgeway, 135 S.E. 646, 138 S.C. 10.
Utah.—Inter-Mountain Ass'n of Credit Men v. Davies, 214 P. 307, 61 Utah 461.
Wis.—Koch v. Johnstone, Inc., 232 N.W. 883, 202 Wis. 445—Hedstrom v. Schaumann, 183 N.W. 968, 174 Wis. 354.
22 C.J. p 1209 note 30, p 1276 note 5.

85. N.Y.—Kaplan v. Goodman, 175 N.Y.S. 745, 187 App.Div. 505.
22 C.J. p 1209 note 31.

86. U.S.—Bu-Vi-Bar Petroleum Corporation v. Krow, C.C.A.Okl., 47 F.2d 1065—Macomber v. Goldthwaite, C.C.A.Or., 22 F.2d 638.
Cal.—Haberman v. Sawall, 237 P. 776, 72 Cal.App. 576.
Fla.—Everglade Lumber Co. v. Nettleton Lumber Co., 149 So. 736, 111 Fla. 333.
Ga.—Baxley Hardware Co. v. Morris, 140 S.E. 869, 165 Ga. 359.
La.—Phillips v. Gillaspie, 171 So. 567, 186 La. 45, affirming, App., 167 So. 242.
Minn.—Pillsbury Flour Mills Co. v. Pittlekow, 186 N.W. 687, 151 Minn. 557.
Miss.—Albert Mackie & Co. v. S. S. Dale & Sons, 84 So. 453, 122 Miss. 430.
Neb.—Seminole Bond & Mortgage Co. v. Investors' Realty Co., 254 N.W. 732, 127 Neb. 193.
N.C.—Harvell v. Haynes Auto Co., 98 S.E. 377, 177 N.C. 29.
Wash.—Blaine v. Darwin, 295 P. 131, 160 Wash. 327.
22 C.J. p 1209 note 32.
Manner of performance may be shown by parol.—Walcowich Bros. v. Hysaw, Tex.Civ.App., 9 S.W.2d 1046.
Time of performance may be shown by parol.—R. P. Andreas & Son v. Hempy, 276 N.W. 791, 224 Iowa 561.
Performance of covenant
N.H.—Morril v. Chadwick, 9 N.H. 84.
Compromise of judgment may be shown by parol.—Bauman-George Piano Co. v. Matthews, 4 La.App. 334.

87. U.S.—United States S. S. Co. v. Allied S. S. Corporation, N.Y., 255 F. 537, 166 C.C.A. 605.
Ark.—Ferguson v. C. H. Triplett Co., 134 S.W.2d 538, 199 Ark. 546.
Cal.—Haberman v. Sawall, 237 P. 776, 72 Cal.App. 576—Hooke v. Great Western Lumber Co., 202 P. 492, 54 Cal.App. 681—Arsenio v. Smith, 194 P. 756, 50 Cal.App. 173.
Ga.—Johnson v. American Nat. Bank, 125 S.E. 506, 33 Ga.App. 70—J. R. Mitchell & Son v. La Fayette Investment & Realty Co., 118 S.E. 777, 30 Ga.App. 696.
Ill.—Loeber v. Harrie, 167 Ill.App. 311.
Iowa.—Munn v. Town of Drakesville, 285 N.W. 644, 647, 226 Iowa 1040, citing **Corpus Juris.**
Me.—Johnson v. Burnham, 115 A. 261, 120 Me. 491.
Md.—Birckner v. Tilch, 18 A.2d 222—Gibula v. Sause, 194 A. 826, 173 Md. 87.
Mo.—Roth v. Roth, App., 142 S.W.2d 818.
N.Y.—Robert v. U. S. Shipping Board Emergency Fleet Corporation, 148 N.E. 650, 240 N.Y. 474, reversing 207 N.Y.S. 908, 211 App. Div. 868.
N.C.—Pack v. Katzin, 1 S.E.2d 566, 215 N.C. 233.
N.D.—Dawson Farmers' Elevator Co. v. Opp, 223 N.W. 350, 57 N.D. 598.
Ohio.—Twyman v. Wood, 22 N.E.2d 495, 61 Ohio App. 229.
Pa.—Glick v. Peoples-Pittsburgh Trust Co., East End Branch, 7 A.2d 364, 136 Pa.Super. 349—KoEune v. State Bank of Schuylkill Haven, 4 A.2d 234, 134 Pa.Super. 108—Goldman v. National Refrigerator Co., 182 A. 730, 120 Pa.Super. 458—De Long Hook & Eye Co. v. Tait, 164 A. 848, 108 Pa.Super. 369—Trimble v. Fester, 162 A. 337, 106 Pa.Super. 544—Frechie v. Boyd, 100 Pa.Super. 553—Noon v. Rodstein, 89 Pa.Super. 153—Hudson v. Hyman, 85 Pa.Super. 245.
R.I.—Ciambelli v. Porter, 177 A. 145, 55 R.I. 14.
S.D.—Wangsness v. Stephenson, 184 N.W. 362, 44 S.D. 536.
Tenn.—Brunson v. Gladish, 125 S.W.2d 144, 174 Tenn. 309.
Wash.—Rowe v. Hosher, 193 P. 688, 115 Wash. 243.
Wis.—T. F. Pagel Lumber Co. v. Webster, 285 N.W. 739, 231 Wis. 222.
22 C.J. p 1210 note 33, p 1276 notes 2–4.
Surrender of lease may be shown by parol.
Colo.—Brown v. Hallett, 190 P. 429, 68 Colo. 316.
N.J.—Mairs v. Sparks, 5 N.J.Law 606.
Wis.—Beach v. Gehl, 235 N.W. 778, 204 Wis. 367.

88. U.S.—Bertelsen & Petersen Engineering Co. v. U. S., C.C.A.Mass., 60 F.2d 745, vacating, D.C., 49 F.2d 395.
La.—Conklin v. Caffall, 179 So. 434, 189 La. 301—Salley v. Louviere, 162 So. 811, 183 La. 92, setting aside, App., 158 So. 676—Harvey v. Mouncou, 3 La.App. 231.
22 C.J. p 1210 note 33 [a].

89. La.—Sharkey v. Wood, 5 Rob. 326—Spencer v. Sloo, 8 La. 290—

Sealed instrument. A sealed instrument cannot, it has been held, be released or rescinded by parol.[90]

§ 965. —— Payment or Accord and Satisfaction

Parol evidence is admissible to show payment of an obligation or its discharge by accord and satisfaction or composition settlement.

Where a writing evidences an obligation or a promise to pay money, or is based on a money consideration, extrinsic evidence is admissible to show that the money has been paid, either partly or in full,[91] or the obligation satisfied.[92] This is true, even though the evidence tends to show a payment or satisfaction other than in money or in the method provided by the writing, provided the payment or satisfaction actually made has been accepted by the parties as a compliance with the obligation which the writing shows; or is in accordance with an agreement that the obligation may be satisfied in that manner.[93] However, it has been held that the verity of unsigned indorsements of payments on a note cannot be established by parol evidence.[94]

Accord and satisfaction; composition. A person liable on a written instrument may show that his liability has been discharged by accord and satisfaction[95] or by a composition settlement.[96]

§ 966. —— Waiver and Estoppel

Waiver or estoppel as to a contractual right may be shown by parol and according to some authorities waiver of demand and notice of dishonor of a bill or note may be proved by parol.

Parol or other extrinsic evidence has been admitted to show that a party to a contract has waived the benefit of, or become estopped to assert, his rights under some or all of the provisions in his favor in the agreement.[97] Where the instrument,

Andrus v. Chretian, 7 La. 318—Blade v. Young, 8 La.App. 591—Piper v. Gray, 2 La.App. 313.

Subsequent parol agreement to modify or vary contract required to be in writing see infra § 1005.

Oral abrogation of written agreement see Contracts § 388.

Lease of realty

Where under the statute of frauds a lease of realty must be in writing, a parol agreement for its rescission is inadmissible.—Gardner v. Sittig, Tex.Civ.App., 188 S.W. 731.

Parol evidence of acts inconsistent with contract

If the evidence offered is a mere verbal agreement to cancel, it is inadmissible to show surrender and abandonment of a contract required to be in writing, but, where acts are done by one which are inconsistent with the continuance of the contract and which tend to show an abandonment or surrender, parol evidence of the acts and of statements made, which are explanatory of them, is inadmissible.—Collins v. Huck, 109 So. 341, 161 La. 641.

90. Ind.—Sinard v. Patterson, 3 Blackf. 353.

N.Y.—Delacroix v. Bulkley, 13 Wend. 71.

Subsequent parol agreement to modify or abrogate sealed agreement see infra § 1005.

91. U.S.—Lyon v. Mutual Benefit Health & Accident Ass'n, Ark., 59 S.Ct. 297, 305 U.S. 484, 83 L.Ed. 303, reversing, C.C.A., Mutual Ben. Health & Accident Ass'n v. Lyon, 95 F.2d 528, certiorari granted Lyon v. Mutual Ben. Health & Accident Ass'n, 59 S.Ct. 81, 306 U.S. 583, 83 L.Ed. 367, rehearing denied 59 S.Ct. 459, 306 U.S. 667, 83 L.Ed. 1062—City of Dalhart v. Childers, D.C.Tex., 18 F.Supp. 903.

Cal.—Griswold v. Frame, 191 P. 962, 48 Cal.App. 178.

Colo.—Bartholomew v. Emerson-Brantingham Implement Co., 187 P. 538, 68 Colo. 244.

D.C.—Madison v. White, 54 F.2d 440, 60 App.D.C. 329.

Okl.—State v. Hinkle, 287 P. 722, 143 Okl. 33—Bradley Metcalf Co. v. McLaughlin, 208 P. 1032, 87 Okl. 34.

Tenn.—Tippett v. Shaw, 4 Tenn.App. 132.

Tex.—Dooley v. Gray, Civ.App., 54 S.W.2d 558, error dismissed, citing **Corpus Juris**—Phipps v. Hemphill, Civ.App., 267 S.W. 310, 311, citing **Corpus Juris.**

Va.—Honaker Lumber Co. v. Kiser, 113 S.E. 718, 134 Va. 50.

8 C.J. p 1043 note 46—22 C.J. p 1210 note 35.

Agreement as to application of payments may be shown by parol.—Brown v. Scheuer, Wise & Co., 97 So. 50, 210 Ala. 47.

92. Tenn.—Tippett v. Shaw, 4 Tenn. App. 132.

Tex.—First Nat. Bank v. Brown, Civ.App., 111 S.W.2d 806, reversed on other grounds 131 S.W.2d 958, 134 Tex. 38.

22 C.J. p 1210 note 36.

93. Ga.—Mutual Furniture Co. v. Moore, 4 S.E.2d 711, 60 Ga.App. 655.

La.—Phillips v. Gillaspie, 171 So. 567, 186 La. 45, affirming, App., 167 So. 242.

Minn.—Northwest Nat. Motor Car & Vehicle Co. v. McConnell, 190 N. W. 608, 153 Minn. 398.

N.C.—Jefferson Standard Life Ins. Co. v. Morehead, 183 S.E. 606, 209 N.C. 174.

Tex.—Gulf Production Co. v. Continental Oil Co., Civ.App., 61 S.W. 2d 185, modified on other grounds, Sup., 132 S.W.2d 553—Due v. W. T. Rawleigh Co., Civ.App., 58 S.W.2d 179—Roderick v. Elliott, Civ.App., 17 S.W.2d 102—Seley v. Colbert, Civ.App., 272 S.W. 818.

22 C.J. p 1210 note 37.

Acceptance of note in absolute payment of account may be shown by parol.—Smith v. Baubie, 239 N. W. 396, 256 Mich. 335.

Renewal note as payment of original

Agreement that renewal note should operate as payment of original note may be shown by parol.—Farmers & Merchants Bank of Charing v. Rogers, 189 S.E. 274, 55 Ga. App. 38.

94. La.—Brierly v. Johns, 28 La. Ann. 245.

95. Cal.—Griswold v. Frame, 191 P. 962, 48 Cal.App. 178.

R.I.—Neo Sicilia Loan Co. v. Perry, 190 A. 457, 57 R.I. 441.

Va.—Rector v. Hancock, 102 S.E. 663, 127 Va. 101.

22 C.J. p 1210 note 38.

96. La.—Russell v. Douget, App., 171 So. 501.

97. U.S.—Bu-Vi-Bar Petroleum Corporation v. Krow, C.C.A.Okl., 47 F. 2d 1065—Gray v. Schoonmaker, D. C.Ill., 30 F.Supp. 1019.

Ariz.—Green v. Gila Water Co., 285 P. 263, 36 Ariz. 303.

Ark.—Indiana Lumbermen's Mut. Ins. Co. v. Myers Stave & Mfg. Co., 250 S.W. 18, 158 Ark. 199.

Cal.—Bardeen v. Commander Oil Co., 104 P.2d 875, 40 Cal.App.2d 341—Michaels v. Pacific Soft Water Laundry, 286 P. 165, 104 Cal.App. 349, rehearing denied 286 P. 1071, 104 Cal.App. 349—Kushner v. Home Service Co., 267 P. 555, 91 Cal.

as in the case of insurance policies, forbids a waiver of any of its provisions, except in writing, parol evidence to show a waiver or estoppel has in some cases been rejected[98] and in other cases admitted.[99]

Waiver of demand or notice of dishonor. It is held by numerous authorities that a waiver of demand and notice of dishonor of a bill or note may be proved by parol;[1] but it has been also held that a verbal waiver at the time of drawing the bill, or of indorsing it, tends to vary the instrument itself, and that such a waiver cannot, therefore be shown.[2]

§ 967. Dispute as to Contractual Character of Writing

Parol evidence is admissible to show that an ostensible contract was not intended by the parties to be such.

The rule which excludes parol evidence to contradict or vary the terms of a written agreement can be applied only when a written agreement is proved to exist between the parties, and consequently parol evidence is admissible to show that a writing, although purporting on its face to be a contract, was not in fact intended by the parties to be such.[3] Furthermore, where a paper set up as an

App. 692—Limsky v. Scottish Union & National Ins. Co., 229 P. 1017, 68 Cal.App. 688—Chanan Singh v. Cross, 212 P. 946, 60 Cal.App. 309—Fox v. California Fruit Co., 187 P. 971, 45 Cal.App. 475.
Conn.—MacKay v. Ætna Life Ins. Co., 173 A. 783, 118 Conn. 538.
D.C.—Merritt v. Kay, 295 F. 973, 54 App.D.C. 152.
Fla.—Bellaire Securities Corporation v. Brown, 168 So. 625, 124 Fla. 47—Masser v. London Operating Co., 145 So. 79, 106 Fla. 474.
Idaho.—Mull v. U. S. Fidelity & Guaranty Co., 206 P. 1048, 35 Idaho 393.
Ill.—Neil v. Kennedy, 149 N.E. 775, 319 Ill. 75—Fuchs v. Peterson, 146 N.E. 556, 315 Ill. 370, affirming 232 Ill.App. 287.
Kan.—Leinbach v. Dyatt, 212 P. 894, 112 Kan. 782.
Ky.—Standard Auto Ins. Ass'n v. Henson, 256 S.W. 414, 201 Ky. 230.
La.—Salley v. Louviere, 162 So. 811, 183 La. 92, setting aside, App., 158 So. 676—Boland Mach. & Mfg. Co. v. Favret, App., 177 So. 836.
Me.—Johnson v. Burnham, 115 A. 261, 120 Me. 491.
Md.—Bealmear v. James, 128 A. 40, 147 Md. 274.
Mass.—Downey v. Levenson, 142 N.E. 85, 247 Mass. 358.
Mich.—Jacob v. Cummings, 182 N.W. 115, 213 Mich. 373.
Miss.—Stone v. Grenada Grocery Co., 1 So.2d 229—Green v. Rule, 100 So. 380, 135 Miss. 810—Albert Mackie & Co. v. S. S. Dale & Sons, 84 So. 453, 122 Miss. 430—Whidden v. Davidson, 83 So. 178, 120 Miss. 769.
Mo.—Hiller v. Connecticut Fire Ins. Co., App., 63 S.W.2d 461—Katz v. Dreyfoos, App., 26 S.W.2d 999—Black v. Emory, App., 275 S.W. 48—Cantrell v. Robards, 238 S.W. 831, 210 Mo.App. 688—Edwards v. Business Men's Acc. Ass'n of America, 221 S.W. 422, 205 Mo. App. 102.
N.H.—Bilodeau v. Prudential Ins. Co. of America, 151 A. 481, 84 N.H. 405.
N.M.—McKinley County Abstract & Investment Co. v. Shaw, 239 P. 865, 30 N.M. 517.
N.Y.—Sayer v. Sunderland, 220 N.Y.S. 409, 219 App.Div. 615—Harris v. Goldberg, 182 N.Y.S. 262, 111 Misc. 600.
Pa.—Simons v. Safety Mut. Fire Ins. Co. of Lebanon, 120 A. 822, 277 Pa. 200—Glick v. Peoples-Pittsburgh Trust Co., East End Branch, 7 A.2d 364, 136 Pa.Super. 349—KoEune v. State Bank of Schuylkill Haven, 4 A.2d 234, 134 Pa.Super. 108—Frechie v. Boyd, 100 Pa. Super. 553.
S.C.—McGuinn v. Ætna Life Ins. Co., 171 S.E. 793, 171 S.C. 136.
Tex.—Chicago Fire & Marine Ins. Co. v. Herring, Civ.App., 54 S.W.2d 236, error refused—Guarantee Mercantile Co. v. Jefferson Farmers' Union Cotton Warehouse Co., Civ. App., 247 S.W. 601.
Vt.—In re Delligan's Estate, 13 A.2d 282—Martin v. Martin & Carpenter, 127 A. 292, 98 Vt. 326, 55 A.L.R. 697.
Wash.—Gabrielson v. Swinburne, 51 P.2d 368, 184 Wash. 242.
22 C.J. p 1210 note 39, p 1276 notes 2–4.

Assent to substituted mode of performance may be shown by parol.—McDonnell Const. Co. v. Delta & Pine Land Co., 141 So. 757, 163 Miss. 646.

Waiver by purchaser of provision relating to outstanding lease

Where a contract of sale recited that an outstanding lease could be canceled on certain conditions, when in fact it was subject to cancellation only on different conditions, and a supplemental agreement contained no waiver of the provision as to the lease, and recited a payment wholly apart from any waiver or release, it could not be varied by oral evidence that the purchaser waived such provision in consideration of such payment.—Droege v. Arluck, 203 N.Y.S. 509, 122 Misc. 655.

98. U.S.—New York Lumber Underwriters v. Rife, Tenn., 35 S.Ct. 717, 237 U.S. 605, 59 L.Ed. 1140.
22 C.J. p 1211 note 40.

Admissibility of evidence in actions on insurance policies to show estoppel and waiver see the C.J.S. title Insurance § 1346, also 1 C.J. p 503 notes 21–26, 26 C.J. pp 529–531 notes 62–85, and 33 C.J. pp 120, 121 notes 12–26.

Waiver at time of execution of writing

It is not permissible to show that certain conditions expressed in the writing were waived at the time when it was executed, as this would contradict the instrument.
Ill.—Adams v. Eisenstein, 248 Ill. App. 559.
Iowa.—Singmaster v. Robinson, 164 N.W. 776, 181 Iowa 522.
N.Y.—Levic v. Metropolitan Life Ins. Co., 275 N.Y.S. 908, 242 App.Div. 595.

99. Ga.—Brown v. Globe & Rutgers Fire Ins. Co., 133 S.E. 260, 161 Ga. 849, reversing 126 S.E. 268, 33 Ga. App. 141, vacated 133 S.E. 263, 35 Ga.App. 342.
Tex.—New Amsterdam Casualty Co. v. Harrington, Civ.App., 11 S.W.2d 533, error dismissed—Occidental Fire Ins. Co. v. Fort Worth Grain & Elevator Co., Civ.App., 294 S.W. 953.
Vt.—Martin v. Martin & Carpenter, 127 A. 292, 98 Vt. 326, 55 A.L.R. 697.

1. Pa.—In re Marquardt, 95 A. 917, 251 Pa. 73.
Wis.—Weinbergen v. McConnell, 213 N.W. 313, 192 Wis. 539.
8 C.J. p 699 note 6—22 C.J. p 1211 note 42.

Even where there is a written waiver of notice a waiver of demand may be proved by parol.—Mills v. Beard, 19 Cal. 158—8 C.J. p 1041 note 29.

2. Minn.—Lieberman v. Fox, 200 N.W. 468, 160 Minn. 449.
8 C.J. p 699 note 5—22 C.J. p 1211 note 43.

3. U.S.—In re H. Hicks & Son, C.C.A.N.Y., 82 F.2d 277, affirming, D.C., 10 F.Supp. 684—Powers v. Maryland Casualty Co., D.C.Mass., 25 F.2d 890.
Cal.—Cooper v. Cooper, 39 P.2d 820, 3 Cal.App.2d 154—Texas Co. v. Berry Garage, 9 P.2d 241, 121 Cal.

agreement is not admitted to be such by the party sought to be affected by it and there is a conflict of evidence on the question whether it is such agreement or not, the court will not exclude testimony adduced to prove a verbal agreement differing in its terms from the written one,[4] but will merely direct the jury to disregard such testimony in case they find the writing to be the agreement of the parties.[5]

§ 968. Formal Parts of Instrument

The parol evidence rule does not apply to nonessential or merely formal parts of an instrument.

The reasons on which the rule excluding parol evidence to add to, vary, or contradict a written instrument is founded confine it to the essential and substantial parts of the writing and the rule does not apply to those parts which are nonessential or merely formal.[6]

§ 969. Identification of Writing

Parol evidence is admissible to identify writings, including public records.

Evidence, the sole purpose of which is to identify a writing offered in evidence, is not objectionable as tending to vary or contradict it.[7] Where supposed duplicate copies of one agreement differ as to certain particulars, parol evidence is admissible to show which of the two papers embodies the real agreement.[8]

Public records may be identified by the testimony of witnesses,[9] and it has been held that, where there were two apparently perfect records of the proceedings of a town meeting, parol evidence must of necessity be admissible to determine which was the legitimate record.[10]

§ 970. Inducing Cause

Evidence is admissible to show a contemporaneous oral agreement on the faith of which a written contract was executed where there is an attempt to make a fraudulent use of the writing.

It has been held that where the execution of a written instrument has been induced by an oral stipulation or agreement made at the time, on the faith of which the party executed the writing and without which he would not have executed it, but such agreement or stipulation is omitted from the writing, even if its omission is not due to fraud or mistake, evidence of the oral agreement or stipulation may be given, although it may have the effect of varying the contract or obligation evidenced by the writing,[11] where there has been an attempt to make a fraudulent use of the instrument in violation of such promise or agreement, or where the circumstances would make the use of the writing for any purpose inconsistent with such agreement dishonest or fraudulent.[12] This rule is put on the ground that the attempt by one party afterward to take advantage of the omission of such terms from the contract is a fraud on the other party who was

App. 455—Allen's Collection Agency v. Lee, 238 P. 169, 73 Cal.App. 68.
Md.—Gross v. Stone, 197 A. 137, 173 Md. 653.
Mass.—Beaman-Marvell Co. v. Gunn, 28 N.E.2d 443, 306 Mass. 419—Hallett v. Moore, 185 N.E. 474, 282 Mass. 380, 91 A.L.R. 572.
Mont.—Smith v. Fergus County, 39 P.2d 193, 98 Mont. 377.
N.Y.—Morgenstern v. Diamond, 221 N.Y.S. 161, 220 App.Div. 191—Hechinger v. Ulacia, 185 N.Y.S. 323, 194 App.Div. 330.
N.D.—Northwestern Nat. Bank of Minneapolis, Minn., v. Rosenquist, 224 N.W. 909, 57 N.D. 916.
Tex.—Standard Motor Co. v. Miller, Civ.App., 45 S.W.2d 786, 794, quoting **Corpus Juris**—Bell v. Mulkey, Civ.App., 7 S.W.2d 115, 117, quoting **Corpus Juris**, and affirmed, Com.App., 16 S.W.2d 287.
Wis.—Strohn v. Detroit & M. R. Co., 21 Wis. 554, 94 Am.D. 564.
22 C.J. p 1211 note 44, p 1214 note 61.

4. Cal.—P. A. Smith Co. v. Muller, 256 P. 411, 201 Cal. 219.
Ga.—Empire Mut. Annuity & Life Ins. Co. v. Avery, 59 S.E. 324, 3 Ga.App. 97.
Or.—Goldstein v. Robert Dollar Co., 270 P. 903, 127 Or. 29.
Tex.—Bell v. Mulkey, 7 S.W.2d 115, 117, quoting **Corpus Juris**, and affirmed, Com.App., 16 S.W.2d 287.
22 C.J. p 1211 note 45.

5. Tex.—Standard Motor Co. v. Miller, Civ.App., 45 S.W.2d 786, 794, quoting **Corpus Juris**—Bell v. Mulkey, 7 S.W.2d 115, 117, quoting **Corpus Juris**, and affirmed, Com. App., 16 S.W.2d 287.
22 C.J. p 1211 note 45.

6. Cal.—Gas Appliance Sales Co. v. W. B. Bastian Mfg. Co., 262 P. 452, 87 Cal.App. 301.
S.C.—Knighton v. Des Portes Mercantile Co., 112 S.E. 343, 119 S.C. 340—Barmore v. Jay, 13 S.C.L. 371, 13 Am.D. 736.
Tex.—King v. Underwood, Civ.App., 112 S.W. 334, reversed on other grounds Underwood v. King, 119 S. W. 298, 102 Tex. 561.

7. Cal.—Shelley v. Hart, 297 P. 82, 112 Cal.App. 231.
Idaho.—Clay v. Board of Com'rs of Madison County, 168 P. 667, 30 Idaho 794.
Ill.—Mayer v. Illinois Life Ins. Co., 211 Ill.App. 285.
Tex.—Missouri State Life Ins. Co. v. Woodson, Civ.App., 256 S.W. 988.
22 C.J. p 1212 note 48.

8. N.Y.—Bowman v. Poppenberg, 103 N.Y.S. 245, 53 Misc. 373.
22 C.J. p 1212 note 49.

9. N.C.—Hopper v. Justice, 16 S.E. 626, 111 N.C. 418.

10. Vt.—Walter v. Belding, 24 Vt. 658.

11. Neb.—Doran v. National Surety Co., 250 N.W. 82, 125 Neb. 299.
Pa.—First Nat. Bank v. Lawall, 124 A. 632, 280 Pa. 407—Christian Moerlein Brewing Co. v. Rusch, 116 A. 145, 272 Pa. 181—Kerr v. McClure, 109 A. 600, 266 Pa. 103.
22 C.J. p 1212 note 53.
Duress see infra § 981.
Fraud see infra § 979.
Prior or contemporaneous collateral agreement as inducement see infra § 1000.
Showing inducing cause as aid to construction see supra § 960.
Undue influence see infra § 982.

12. Pa.—First Nat. Bank v. Lawall, 124 A. 632, 280 Pa. 407—Campbell

induced to execute it on the faith of such promise, and hence he will be permitted to show by parol evidence the truth of the matter.[13]

§ 971. Illegible Writings

Illegible or obscure writings may be explained or clarified by parol evidence.

Where a writing is illegible, parol evidence as to the matter evidenced thereby is necessarily admissible,[14] and, if the writing is obscure and difficult to read, the evidence of persons skilled in deciphering writing is admissible to show what it is.[15]

§ 972. Invalidating or Defeating Operation of Instrument

Parol evidence is admissible to disprove the legal existence of a written instrument or to rebut its operation.

The objection to parol evidence does not apply where it is offered not for the purpose of contradicting or varying the effect of a written contract of admitted authority, but to disprove the legal existence or rebut the operation of the instrument,[16]

& Taylor v. Rhoads, 10 Pa.Dist. & Co. 136, 40 Lanc.L.Rev. 545.

22 C.J. p 1212 note 54.

13. Pa.—Powelton Coal Co. v. McShain, 75 Pa. 238.

22 C.J. p 1213 note 55.

Corpus Juris quoted in a case in which the text rule was held inapplicable because of the absence of any allegation of fraud or dishonesty.—Lagrange Female College v. Carey, 147 S.E. 390, 392, 168 Ga. 291.

14. Kan.—Walrath v. Whittekind, 26 Kan. 482.

22 C.J. p 1213 note 56.

Illegibility resulting from mutilation see supra § 933.

15. N.Y.—Arthur v. Roberts, 60 Barb. 580.

22 C.J. p 1213 note 57.

16. U.S.—Barnsdall Refining Corporation v. Birnamwood Oil Co., C.C.A.Wis., 92 F.2d 817.

Ala.—Dean v. Lyde, 136 So. 857, 223 Ala. 394.

Ark.—Marshall Motor Service v. Norm Co., 109 S.W.2d 662, 194 Ark. 805—National Cash Register Co. v. Holt, 101 S.W.2d 441, 193 Ark. 617—Massachusetts Mut. Life Ins. Co. v. Brun, 62 S.W.2d 961, 187 Ark. 790.

Cal.—Nourse v. Kovacevich, App., 109 P.2d 999—First Bond & Mortgage Co. of Glendale v. Malouf, 98 P.2d 824, 37 Cal.App.2d 74.

Conn.—J. E. Smith & Co. v. W. M. Hurlburt Co., 106 A. 319, 93 Conn. 391.

Ga.—Hinkle v. Hixon, 113 S.E. 805, 154 Ga. 193—Electric Paint & Varnish Co. v. Lunsford, 198 S.E. 277, 58 Ga.App. 270—Blue Ridge Park Nurseries v. Owen, 152 S.E. 485, 41 Ga.App. 98—Georgia Lumber & Turpentine Co. v. Milltown Lumber Co., 109 S.E. 178, 27 Ga.App. 551—Farrell v. Bean, 106 S.E. 315, 26 Ga.App. 462.

Ill.—Kilcoin v. Ortell, 135 N.E. 16, 302 Ill. 531.

Ky.—Cumnock-Reed Co. v. Lewis, 128 S.W.2d 926, 278 Ky. 496.

La.—Consolidated Cos. v. Angelloz, App., 170 So. 556, reinstating 165 So. 910.

Md.—Gross v. Stone, 197 A. 137, 173 Md. 653.

Mich.—Roosevelt Park Protestant Reformed Church v. London, 292 N.W. 486, 293 Mich. 547—White Showers, Inc. v. Fischer, 270 N.W. 205, 278 Mich. 32—McRae v. Union Trust Co., 177 N.W. 956, 210 Mich. 692.

Neb.—Hanneman v. Olson, 206 N.W. 155, 114 Neb. 88.

N.J.—Timken Silent Automatic Corporation v. Vetrovec, 197 A. 265, 119 N.J.Law 500—Hudson County Store Fixture Mfg. Co. v. Gutmann, 127 A. 575, 3 N.J.Misc. 147, affirmed Hudson County Store Fixture Mfg. Co. v. Guttman, 130 A. 918, 102 N.J.Law 218.

N.Y.—International Assets Corporation v. Axelrod, 281 N.Y.S. 32, 245 App.Div. 300—Vieser v. Bellows, 205 N.Y.S. 26, 205 App.Div. 540, affirming 199 N.Y.S. 341, appeal dismissed 147 N.E. 221, 239 N.Y. 622—Traders' Nat. Bank of Rochester v. Laskin, 201 N.Y.S. 728, 207 App.Div. 18, reversed on other grounds 144 N.E. 784, 238 N.Y. 535, amendment of remittitur denied 147 N.E. 172, 239 N.Y. 507—Hendricks v. Clements, 186 N.Y.S. 378, 195 App.Div. 144—Rubin v. Whitney, 295 N.Y.S. 255, 162 Misc. 821.

N.C.—Jefferson Standard Life Ins. Co. v. Morehead, 183 S.E. 606, 209 N.C. 174.

Okl.—Eales v. Morris, 37 P.2d 428, 170 Okl. 219—Martin v. Clem, 280 P. 826, 138 Okl. 245.

Tenn.—Harkins v. Wells, 13 Tenn. App. 299.

Tex.—McCaskey Register Co. v. Mann, Civ.App., 283 S.W. 544, 546, citing **Corpus Juris**—Bell v. Mulkey, Civ.App., 248 S.W. 784—J. M. Radford Grocery Co. v. Noyes, Civ. App., 233 S.W. 117.

Va.—Clark v. Miller, 138 S.E. 556, 148 Va. 83.

Wyo.—Whitcher v. Waddell, 292 P. 1091, 1092, 42 Wyo. 274, quoting **Corpus Juris.**

22 C.J. p 1213 note 59.

Evidence relating to:

Alteration see supra § 933.

Consideration see supra § 956.

Proceedings in which parol evidence rule not applicable see supra §§ 859–862.

Authentic acts

(1) Parties may attack authentic sales by counter letter, answer to interrogatories on facts and articles, or for fraud and error alleged and proved.—Hood v. Hood, 128 So. 546, 14 La.App. 424.

(2) As between parties to a public act, parol testimony is not admissible to show simulation which admits of no other proof between the parties to a contract than a counter letter or something equivalent thereto.—Massey v. James, 99 So. 718, 155 La. 977.

(3) Where plaintiff voluntarily assented to authentic act of sale, it was held that she could not assail act by parol.—Brinker v. Feist, 129 So. 416, 14 La.App. 101.

Basis of admission generally

(1) Oral evidence varying written contract, to be admissible, must be of fraud, accident, or mistake sufficient to secure reformation of instrument.—U. S. Nat. Bank of Johnstown v. Evans, 146 A. 126, 296 Pa. 541—Gianni v. R. Russel & Co., 126 A. 791, 281 Pa. 320.

(2) So, where contract provides that seller is not bound by any representation concerning automobile sold, false and fraudulent representations concerning sale may not be pleaded by buyer in avoidance of contract in absence of fraud, accident, or mistake, as result of which buyer signed contract without knowledge of its true contents.—Waits v. Lumpkin, 1 S.E.2d 72, 59 Ga.App. 416.

(3) Fraud see infra § 979.

(4) Mistake see infra § 978.

Surprise or accident

Parol evidence is admissible to establish basis for relief against consequences of surprise or accident.

Mo.—Employers' Indemnity Corporation v. Garrett, 38 S.W.2d 1049, 327 Mo. 874.

N.J.—Downs v. Jersey Central Power & Light Co., 174 A. 887, 117 N.J.Eq. 138, affirming 170 A. 835, 115

and in order to determine the validity of the writing the true character of the transaction may always be shown.[17] So also evidence which is offered not for the purpose of varying or contradicting the terms of a written instrument but to show that it was never intended to be operative between the parties and never in fact had any legal existence as a contract or grant is admissible;[18] nor does this rule conflict with the rule stated supra § 895 that in the absence of a plea of oversight, fraud, or mistake a party who has signed a note cannot introduce parol evidence that it was agreed that the maker would never be called on to pay the note.[19]

§ 973. —— Disproving Authenticity of Record

Parol evidence is admissible to disprove the authenticity of a purported record.

The rule which declares that parol evidence is inadmissible to vary or contradict a record does not prohibit the introduction of such evidence, when the purpose is to show that a paper, writing, or instrument which purports to be a record is in fact not a record.[20]

§ 974. —— Showing That Document Is Not True Record

Parol evidence is admissible to show that a document claimed to be a public record is not the true record.

Parol evidence may be given to show that a certain document claimed to be a public record is not in fact the true record.[21]

§ 975. —— Incapacity of Party

Incapacity of a party may be shown by parol.

It may be shown by parol that a party to a contract had not the legal capacity to make it.[22]

N.J.Eq. 348—Levine v. Lafayette Bldg. Corporation, 142 A. 441, 103 N.J.Eq. 121, reversed on other grounds 148 A. 772, 105 N.J.Eq. 532.

Tex.—Cox v. Shannon, Civ.App., 141 S.W.2d 412, error dismissed, judgment correct.

Corporate minutes are only prima facie evidence of the transactions recorded, and competent testimony contradicting them or showing what actually took place is admissible.—KoEune v. State Bank of Schuylkill Haven, 4 A.2d 234, 134 Pa.Super. 108.

Creation or destruction of title

Parol evidence is not admissible to create, although it is admissible under proper allegations to destroy, title.—Walton v. Walton, 100 So. 786, 156 La. 611—Prather v. A. Marx & Son, 1 La.App. 354.

Nondelivery of goods ordered

Defendant in action on common counts for price of lumber ordered in writing was not debarred by parol evidence rule from showing that lumber was never delivered and accepted, and trial judge erred in directing verdict for plaintiff on ground that written order was conclusively presumed to be completed contract incapable of contradiction or variance by parol evidence.—Everglade Lumber Co. v. Nettleton Lumber Co., 149 So. 736, 111 Fla. 333.

17. Ga.—Mendel v. Converse & Co., 118 S.E. 586, 30 Ga.App. 549.

Iowa.—Dille v. Longwell, 197 N.W. 439, 198 Iowa 540.

Okl.—Martin v. Clem, 280 P. 826, 138 Okl. 245.

S.D.—Smith v. Munson, 238 N.W. 27, 59 S.D. 6.

Wyo.—Whitcher v. Waddell, 292 P. 1091, 1092, 42 Wyo. 274, quoting **Corpus Juris.**

22 C.J. p 1214 note 60.

18. U.S.—In re H. Hicks & Son, C.C.A.N.Y., 82 F.2d 277, affirming, D.C., 10 F.Supp. 684—McJunkin v. Richfield Oil Corporation, D.C.Cal., 33 F.Supp. 466.

Ariz.—Brown v. First Nat. Bank, 36 P.2d 174, 44 Ariz. 189.

Cal.—P. A. Smith Co. v. Muller, 256 P. 411, 201 Cal. 219—In re Kellogg, 107 P.2d 964, 41 Cal.App.2d 833—Texas Co. v. Berry Garage, 9 P.2d 241, 121 Cal.App. 455.

Conn.—Choolgian v. Nordstrom, 150 A. 499, 111 Conn. 572.

Ky.—Cumnock-Reed Co. v. Lewis, 128 S.W.2d 926, 929, 278 Ky. 496, citing **Corpus Juris.**

Me.—Greeley v. Greeley, 110 A. 637, 119 Me. 264.

Mass.—Massachusetts Biographical Soc. v. Howard, 125 N.E. 605, 234 Mass. 483.

Mo.—Elmer v. Flett, App., 297 S.W. 985.

R.I.—Gardner v. Gardner, 121 A. 385, 43 R.I. 214.

Tex.—Bernard v. Fidelity Union Casualty Co., Civ.App., 296 S.W. 693—Bell v. Mulkey, Civ.App., 248 S.W. 784.

Vt.—Northeastern Nash Automobile Co. v. Bartlett, 136 A. 697, 100 Vt. 246.

Wyo.—Whitcher v. Waddell, 292 P. 1091, 1092, 42 Wyo. 274, quoting **Corpus Juris.**

22 C.J. p 1214 note 61.

Dispute as to contractual character of writing generally see supra § 967.

Real nature of transaction generally see infra § 1015.

Nonacceptance may be shown

Ala.—State Savings & Loan Co. v. Strong, 147 So. 436, 226 Ala. 453.

Ohio.—Gross v. Campbell, 160 N.E. 511, 26 Ohio App. 460, affirmed 160 N.E. 852, 118 Ohio St. 285.

Wis.—Williams v. Jensen, 231 N.W. 276, 202 Wis. 19.

22 C.J. p 1214 note 61 [b].

19. Ky.—Cumnock-Reed Co. v. Lewis, 128 S.W.2d 926, 278 Ky. 496.

20. Ala.—Dement v. Central of Georgia Ry. Co., 80 So. 882, 202 Ala. 498.

Ky.—Vansant v. Watson, 19 S.W.2d 994, 230 Ky. 316.

22 C.J. p 1214 note 62.

21. Ala.—State v. Campbell, 103 So. 471, 212 Ala. 493.

Miss.—Federal Land Bank of New Orleans v. Leflore County, 153 So. 882, 170 Miss. 1.

Ohio.—Harbage v. Tracy, 28 N.E.2d 520, 64 Ohio App. 151, appeal dismissed 27 N.E.2d 141, 136 Ohio St. 534.

R.I.—Toupin v. Marceau, 180 A. 353, 55 R.I. 265.

Wash.—State v. Superior Court of Washington in and for Walla Walla County, 203 P. 375, 118 Wash. 217.

22 C.J. p 1228 note 69.

22. Ga.—Mayer v. Waterman, 104 S.E. 497, 150 Ga. 613.

Mont.—Koerner v. Northern Pac. Ry. Co., 186 P. 337, 56 Mont. 511.

Va.—Bear's Adm'x v. Bear, 109 S.E. 313, 131 Va. 447.

22 C.J. p 1222 note 8.

Intoxication

Parol evidence of the facts and circumstances attending the execution of an instrument is properly admissible, where it is alleged by a party thereto that he signed it while incapacitated by intoxication.

§ 976. —— Lack of Authority

Parol evidence is admissible to show lack of authority of one signing an instrument purporting to bind another.

Where an instrument purporting to bind one person is executed by another, parol evidence is competent to show whether the latter had authority to sign an instrument in the terms of that which he did sign, or whether the instrument has been accepted by the person to be bound as his contract.[23] So also extrinsic evidence is admissible to show the lack of authority of public officers, as of the officer who issued a patent[24] or bounty order.[25] Evidence of a clerk of court is admissible to show that he had not qualified as jury commissioner by taking the oath prior to drawing the venire, as this does not contradict the official record of such drawing, but merely shows that he was not qualified to do the act.[26] So parol evidence is admissible to invalidate an award by showing that the arbitrators exceeded their powers, although the submission and award are in writing and under seal.[27] It has been held, however, that in a suit on a poor debtor's recognizance, testimony of an assistant clerk of the municipal court is not admissible to show that an affidavit which was filed as a prerequisite to the proceedings which resulted in the execution of such recognizance was taken before an unauthorized person, since the records of a municipal court cannot be contradicted.[28]

§ 977. —— Matters Relating to Execution or Delivery

a. Execution
b. Delivery

a. Execution

Parol evidence is admissible on the issue of whether or not an instrument was executed.

The rule excluding parol evidence to vary or contradict the terms of a written instrument presupposes the due execution and delivery of the writing in a way to bind both parties as to its terms;[29] and it has no application when the execution of the writing is the subject of inquiry, but on the issue of execution vel non what was said and done at the time, and by whom, are the vital facts, and evidence as to these matters is admissible.[30] So also it may be shown that an instrument was executed in blank and was filled out without authority or improperly.[31]

Approval of bill by governor. Where on mandamus to compel the governor to forward to the clerk of the court a statute alleged to have been passed and approved, it appeared that the bill in question was presented to the governor and signed by him, the oral testimony of the governor that he signed the bill by inadvertence and under a misapprehension as to what he was signing, and that he immediately erased his name, has been held admissible as the best evidence of a want of approval, the court considering that it was not an offer of parol testimony to alter or modify the language of a law.[32]

—Van Meter v. Zumwalt, 206 P. 507, 35 Idaho 235.

Falsity of allegations in petition for removal of disabilities of minority may be proved by parol evidence. —Howard v. McMurchy, 166 So. 917, 175 Miss 328.

23. U.S.—Austin-Western Road Machinery Co. v. Veal, C.C.A.Ga., 115 F.2d 112—Thane Lumber Co. v. J. L. Metz Furniture Co., C.C.A.Ark., 12 F.2d 701.
Neb.—Omaha Alfalfa Milling Co. v. Pinkham, 178 N.W. 910, 105 Neb. 20.
22 C.J. p 1222 note 9.

Authority of insurance agent
Accident policy providing that no agent had authority to change policy, and that receipt signed by secretary and agent should be sole evidence of payment of renewal premium, was not conclusively binding on insured as notice of agent's powers, since relationship between insurer and agents is extrinsic to policy and, if different, may be shown by parol. —North American Accident Ins. Co. v. Plummer, 176 A. 466, 167 Md. 670.

24. U.S.—Sherman v. Buick, Cal., 93 U.S. 209, 23 L.Ed. 849.

25. Wis.—Hubbard v. Lyndon, 28 Wis. 674.

26. La.—State v. Ashworth, 6 So. 556, 41 La.Ann. 683.

27. N.Y.—Butler v. New York, 7 Hill 329, reversing 1 Hill 489.

28. Mass.—Watts v. Stevenson, 47 N.E. 447, 169 Mass. 61.

29. Cal.—Harper v. French, 84 P.2d 216, 29 Cal.App.2d 214.
Ill.—Kilcoin v. Ortell, 135 N.E. 16, 302 Ill. 531.
22 C.J. p 1222 note 14.

30. Ala.—Bell-Carns Realty Co. v. Drennen, 122 So. 424, 219 Ala. 450 —Harris v. Geneva Mill Co., 96 So. 622, 209 Ala. 538.
Ark.—Dodson v. Wade, 101 S.W.2d 182, 193 Ark. 534.
Ga.—Mendel v. Converse & Co., 118 S.E. 586, 30 Ga.App. 549.
Ill.—Fisk Tire Co. v. Burmeister, 252 Ill.App. 545.
Ky.—Drane v. Louisville Ry. Co., 131 S.W.2d 439, 279 Ky. 490.
Ohio.—Brudno v. Kohn, 170 N.E. 581, 34 Ohio App. 133.
22 C.J. p 1222 note 14.

31. Cal.—Jones v. Coulter, 243 P. 487, 75 Cal.App. 540.
Minn.—Saunders v. Commercial Credit Trust, 256 N.W. 142, 192 Minn. 272.
Mo.—Commercial Jewelry Co. v. Russell Grocer Co., App., 240 S.W. 858.
22 C.J. p 1223 note 15.

Completion in unauthorized manner
When lease incomplete as to term for which it was to run is signed by one party thereto, and completed by other to whom it was intrusted for completion, evidence is admissible to show that instrument was completed in unauthorized manner; and admission of oral testimony concerning conversations before signing of lease was not objectionable because of absence of finding of fraud.—Kidder v. Greenman, 187 N.E. 42, 283 Mass. 601, 88 A.L.R. 1370.

32. Md.—Allegany County v. Warfield, 60 A. 599, 100 Md. 516, 108 Am.S.R. 446.

b. Delivery

Notwithstanding an instrument is in possession of the party to whom it purports to be executed, parol evidence is admissible to show that there was never any valid and effective delivery.

Delivery of a deed or other written instrument is the final act of the parties by which the party executing the instrument puts it into the possession of the other party, both intending thereby to make it operative and binding;[33] but it is not a part of the contract and is not proved by it.[34] While the intent and purpose thereby to make the instrument effective is generally inferred from the act thus changing the custody, or from the fact that the party to whom it purports to be executed has it in his possession, this may be explained and rebutted by parol evidence,[35] and declarations of intentions connected with the execution and delivery and the circumstances attending the same may properly come in as part of the res gestæ.[36] Thus, although an instrument which has been delivered in the legal sense cannot be contradicted or varied by parol evidence,[37] it may be shown that there never was any valid and effective delivery of the instrument,[38] that delivery was conditional, see supra § 935, or that an apparent delivery was without authority[39] or was only in escrow.[40] It may also be shown that the party executing the instrument handed it to the other party, not as a final delivery, but to be examined and returned,[41] or for the purpose of being retained until some precedent act was done by the

33. Vt.—King v. Woodbridge, 34 Vt. 565.

34. N.Y.—Barney v. Forbes, 28 N. E. 890, 118 N.Y. 580.
22 C.J. p 1223 note 18.

Delivery or nondelivery

(1) Real test of delivery of deed is intention of grantor, which intention may be manifested by mere acts and words or both, and may be shown by parol evidence.—Simler v. Simler, 32 P.2d 876, 168 Okl. 288.

(2) Fact of delivery or nondelivery of bill of sale may be shown by parol.—Edwards v. Gordon, 129 So. 43, 221 Ala. 473.

(3) Delivery vel non of conveyance may be shown by parol.—Phillips v. Sipsey Coal Mining Co., 118 So. 513, 218 Ala. 296.

(4) Whether deed was delivered is a question of fact on which parol evidence relating to grantor's instructions for its retention and delivery after his death is admissible.—Reed v. Severin, 249 P. 219, 79 Cal. App. 252.

Tax deed

Proof of delivery is not required to be shown by tax deed itself, but may be established by parol evidence.—Lance v. Smith, 167 So. 366, 123 Fla. 461.

35. Cal.—Harper v. French, 84 P.2d 216, 29 Cal.App.2d 214—Beyerle v. California Surety Co., 7 P.2d 1034, 120 Cal.App. 236—Leo G. McLaughlin Co. v. Phillips, 189 P. 788, 46 Cal.App. 637.
Ga.—Jennings v. Powell, 198 S.E. 809, 58 Ga.App. 416—Bank of Tallapoosa v. Patterson, 145 S.E. 97, 38 Ga.App. 644.
Ill.—Mitchell v. Clem, 128 N.E. 815, 295 Ill. 150.
Iowa.—Kruse v. Wickham, 292 N. W. 518.
Va.—Whitaker & Fowle v. Lane, 104 S.E. 252, 128 Va. 317, 11 A.L.R. 1157.
22 C.J. p 1223 note 19.

36. Ala.—State Savings & Loan Co. v. Strong, 147 So. 436, 226 Ala. 453.
22 C.J. p 1223 note 20.

37. Ill.—Mitchell v. Clem, 128 N.E. 815, 295 Ill. 150.
Ky.—Cumnock-Reed Co. v. Lewis, 128 S.W.2d 926, 278 Ky. 496.
Mass.—Liberty Trust Co. v. Price, 156 N.E. 749, 259 Mass. 596.
Or.—Houk v. Gilmore, 259 P. 891, 122 Or. 498.
Va.—Clark v. Miller, 138 S.E. 556, 148 Va. 83.

Intent

Devisee of grantor could not attack deed delivered to grantee on ground delivery was not intended.—Herrmann v. Jorgenson, 189 N.E. 449, 263 N.Y. 348, reversing 263 N.Y.S. 981, 239 App.Div. 817, reargument denied 191 N.E. 549, 264 N.Y. 529.

Evidence held inadmissible

(1) Testimony of son that absolute deeds from mother to daughter were in mother's possession at her death.—Blackledge v. McIntosh, 259 P. 770, 85 Cal.App. 475.

(2) Parol evidence that deed admittedly delivered was in effect not delivered.—Johnson v. Staats' Estate, 46 P.2d 900, 97 Colo. 91.

Incomplete instrument

Rule that note, apparently complete, may be shown incomplete for want of signature of an additional party does not apply where person sued is liable as principal debtor having no right to contribution against person not signing.—Bank of Tallapoosa v. Patterson, 145 S.E. 97, 38 Ga.App. 644.

38. Ala.—Harris v. Geneva Mill Co., 96 So. 622, 209 Ala. 538.
Ariz.—Brown v. First Nat. Bank, 36 P.2d 174, 175, 44 Ariz. 189, citing **Corpus Juris.**
Ark.—Dodson v. Wade, 101 S.W.2d 182, 193 Ark. 534.
Cal.—Jones v. Coulter, 243 P. 487, 75 Cal.App. 540—Allen's Collection Agency v. Lee, 238 P. 169, 73 Cal. App. 68—Kinney v. Kinney, 234 P. 913, 71 Cal.App. 192—Leo G. McLaughlin Co. v. Phillips, 189 P. 788, 46 Cal.App. 637.
Ga.—W. T. Rawleigh Co. v. Royal, 119 S.E. 339, 30 Ga.App. 706.
Ill.—Kilcoin v. Ortell, 135 N.E. 16, 302 Ill. 531—Mitchell v. Clem, 128 N.E. 815, 295 Ill. 150.
Mass.—Hallett v. Moore, 185 N.E. 474, 282 Mass. 380, 91 A.L.R. 572.
Mo.—Bank of Hollister v. O'Brien, 290 S.W. 1009, 220 Mo.App. 1276.
N.Y.—International Assets Corporation v. Axelrod, 281 N.Y.S. 32, 245 App.Div. 300—Sanford v. Getman, 210 N.Y.S. 682, 213 App.Div. 367, affirming 206 N.Y.S. 865, 124 Misc. 80.
N.D.—Rule v. Connealy, 237 N.W. 197, 61 N.D. 57.
Okl.—Shaw v. Hutton, 183 P. 477, 75 Okl. 255.
Tex.—Bell v. Mulkey, Com.App., 16 S.W.2d 287, affirming, Civ.App., 7 S.W.2d 115—Speer v. Dalrymple, Com.App., 222 S.W. 174, reversing, Civ.App., 196 S.W. 911—Moore v. Wilson, Civ.App., 138 S.W.2d 1099, error refused.
Utah.—Hanson v. Greenleaf, 218 P. 969, 62 Utah 168.
Wash.—Garring v. Stephens, 184 P. 314, 108 Wash. 474.
Wis.—Williams v. Jensen, 231 N.W. 276, 202 Wis. 19.
22 C.J. p 1223 note 21.

39. N.D.—Northern Trust Co. v. Bruegger, 159 N.W. 859, 35 N.D. 150, Ann.Cas.1917E 447.
22 C.J. p 1223 note 23.

40. Cal.—Rees v. Rees, 216 P. 1006, 191 Cal. 399.
Ga.—Farrell v. Bean, 106 S.E. 315, 26 Ga.App. 462.
22 C.J. p 1224 note 24.

41. Ill.—Ryan v. Cooke, 68 Ill.App. 592, affirmed 50 N.E. 213, 172 Ill. 302.
22 C.J. p 1224 note 25.

party to whom it purported to be executed;[42] or that the party obtained possession of it by fraud, accident, or mistake and against the will, or contrary to the intention of, the other party;[43] or that by mistake a wrong paper was delivered.[44] Similarly it may be shown by parol that an instrument in the form of a contract was accepted by the person to whom it was delivered under the belief that it was a mere receipt, to which he was entitled.[45]

§ 978. ——— Mistake

a. In general
b. Character of mistake
c. Necessity for pleading and proving mistake

a. In General

Generally parol evidence is admissible for the purpose of showing that by reason of a mistake a record, deed, or other written instrument does not truly express the intention of the parties.

Parol evidence is, as a general rule, admissible for the purpose of showing that by reason of a mistake a written instrument does not truly express the intention of the parties,[46] mistake being always recognized as one of the grounds of equity jurisdiction;[47] and, while many authorities declare that evidence of mistake is admissible only in equity and not in a court of law,[48] this rule is by no means universal, and there are many cases in the books, especially since the tendency has grown up to obliterate the sharp distinctions between law and equity, in which parol evidence has been held admissible to show a mistake in reducing the agreement to writing irrespective of the form of the action and whether it is in fact an action at law or a suit in equity.[49] Where due to an overestimation of the

42. Mo.—Poplin v. Brown, 205 S.W. 411, 200 Mo.App. 255.
22 C.J. p 1224 note 26.

43. Iowa.—Creveling v. Banta, 115 N.W. 598, 138 Iowa 47.
22 C.J. p 1224 note 27.

44. Vt.—King v. Woodbridge, 34 Vt. 565.
22 C.J. p 1224 note 28.

45. Ala.—State Savings & Loan Co. v. Strong, 147 So. 436, 226 Ala. 453.
22 C.J. p 1224 note 29.

46. U.S.—Gillis v. Curd, C.C.A.Ky., 117 F.2d 705—In re Crosby Stores, C.C.A.N.Y., 65 F.2d 360.
Ark.—Hartsfield v. Crumpler, 297 S. W. 1012, 174 Ark. 1179—Sewell v. Umsted, 278 S.W. 36, 169 Ark. 1102.
Cal.—Nourse v. Kovacevich, App., 109 P.2d 999—First Bond & Mortgage Co. of Glendale v. Malouf, 98 P.2d 824, 37 Cal.App.2d 74—Palma v. Leslie, 45 P.2d 391, 6 Cal.App.2d 702.
Idaho.—Exum v. Portneuf-Marsh Valley Irr. Co., 220 P. 112, 38 Idaho 155.
Ill.—Easter v. Holcomb, 221 Ill.App. 485.
Ind.—City of Hammond v. Standard Oil Co., 138 N.E. 769, 79 Ind.App. 356.
Iowa.—Galva First Nat. Bank v. Reed, 215 N.W. 732, 205 Iowa 7.
Ky.—Haber v. Woods, 132 S.W.2d 944, 280 Ky. 287—Metropolitan Life Ins. Co. v. Trunick's Adm'r, 16 S.W.2d 759, 229 Ky. 173—Cardwell v. Strother, Litt.Sel.Cas. 429, 12 Am.D. 326.
Md.—Gross v. Stone, 197 A. 137, 173 Md. 653.
Mass.—Martin v. Jablonski, 149 N. E. 156, 253 Mass. 451—Wasserman v. Cosmopolitan Trust Co. of Boston, 147 N.E. 742, 252 Mass. 253—Downey v. Levenson, 142 N.E. 85, 247 Mass. 358.
Mo.—Dickson v. Maddox, 48 S.W.2d 873, 877, 330 Mo. 51, quoting **Corpus Juris**—Employers' Indemnity Corporation v. Garrett, 38 S.W.2d 1049, 327 Mo. 874—State ex rel. Kilkenny v. Daues, 289 S.W. 550, quashing certiorari Kilkenny v. Kilkenny, 279 S.W. 184, 220 Mo. App. 535.
Nev.—Chiquita Mining Co. v. Fairbanks, Morse & Co., 104 P.2d 191.
N.J.—Levine v. Lafayette Bldg. Corporation, 142 A. 441, 103 N.J.Eq. 121, reversed on other grounds 148 A. 772, 105 N.J.Eq. 532.
N.Y.—Donald Friedman & Co. v. Newman, 174 N.E. 703, 255 N.Y. 340, 73 A.L.R. 95, reversing 243 N. Y.S. 408, 230 App.Div. 103, and motion denied 175 N.E. 345, 255 N.Y. 632, 73 A.L.R. 95—Levy v. Neuss, Hesslein & Co., 192 N.Y.S. 868.
Pa.—In re Baird's Estate, 148 A. 907, 299 Pa. 39—Miller v. Central Trust & Savings Co., 132 A. 579, 285 Pa. 472.
R.I.—Conti v. Fisher, 134 A. 849, 48 R.I. 33.
S.C.—Henderson v. Rice, 158 S.E. 258, 160 S.C. 307.
S.D.—Ulvilden v. Sorken, 237 N.W. 565, 567, 58 S.D. 466, 82 A.L.R. 1209, citing **Corpus Juris**—Purinton v. Purinton, 176 N.W. 31, 42 S.D. 426.
Tenn.—Gibson County v. Fourth & First Nat. Bank, 96 S.W.2d 184, 20 Tenn.App. 168.
Tex.—Means v. Limpia Royalties, Civ.App., 115 S.W.2d 468, error dismissed—Barker v. Fagg, Civ.App., 107 S.W.2d 490—Middleton v. Brawley, Civ.App., 12 S.W.2d 257—Fenter v. Robinson, Civ.App., 230 S.W. 844.
Va.—Jones v. Franklin, 168 S.E. 753, 160 Va. 266—Barnett v. Cloyd's Ex'rs, 100 S.E. 674, 125 Va. 546.
Wis.—Badger Sav. Building & Loan Ass'n v. Mutual Building & Savings Ass'n, 283 N.W. 466, 230 Wis. 145.
22 C.J. p 1224 note 30.

47. Idaho.—Bowers v. Bennett, 164 P. 93, 30 Idaho 188.
22 C.J. p 1225 note 31.
Mistake as ground of equity jurisdiction generally see Equity § 47.

48. Ill.—Sheehan v. Reardon, 223 Ill.App. 365.
22 C.J. p 1225 note 32.
"In the absence of an obvious mistake, a plaintiff in an action at law cannot correct by parol evidence substantial errors in the terms of a written instrument to which he and the defendants are directly or medially parties, the remedy of parties so situated being in a court of equity for reformation of the instrument."—New York, N. H. & H. R. Co. v. Preferred Underwriters, 146 N.E. 905, 907, 252 Mass. 1.
Reformation
Proof of mistake is inadmissible without prayer for reformation of contract.
Ky.—Stevens v. Chatfield, 18 S.W.2d 1006, 230 Ky. 194.
Wis.—Newport Mining Co. v. Fireman's Ins. Co. of Newark, N. J., 183 N.W. 161, 174 Wis. 401.

49. Va.—Massachusetts Bonding & Insurance Co. v. Piedmont Service Station, 181 S.E. 397, 165 Va. 167.
22 C.J. p 1225 note 33.
In ejectment, where supposed grantee claimed no right or title to land embraced in deed, parol evidence of mistake in description of deed was admissible to show character of possession of holder.—Findlay v. Hardwick, 160 So. 336, 230 Ala. 197.
In Kentucky
(1) The rule of the text applies.

quantity of goods purchased, the buyer paid more than the amount due, in an action to recover the overpayment, the parol evidence rule does not apply.[50]

Records. Parol evidence has been held admissible to show error in journals of the houses of a legislature,[51] a map which is an archive of the land office,[52] the registration of an automobile,[53] and a resolution by the board of directors of a corporation, entered on the record of their proceedings;[54] but parol evidence has been held not admissible to show an error in the entry of an order of the fiscal court fixing the salary of the county judge.[55]

Deeds. The rule that parol evidence is admissible to show a mistake in a written instrument has been frequently applied to deeds,[56] most commonly in proceedings brought for the purpose of reformation[57] or other proceedings in equity,[58] but also in actions at law.[59] Thus evidence has been admitted to show a mistake in the name of the grantee,[60] the description of the property conveyed,[61] or the insertion of courses and distances;[62] as to the quantity of land;[63] in stating the district wherein the property lies;[64] or in omitting covenants which were to be performed by the grantee.[65] It has also been held permissible to show that the property conveyed was not that which was sold,[66] or that property intended to be conveyed was omitted by mistake,[67] although this rule cannot be extended to permit a mortgagee or purchaser to prove that the mortgagor or vendor intended to convey property that he did not own.[68]

Other instruments. Evidence has been admitted to show mistakes in connection with assignments,[69]

—Cincinnati, N. O. & T. P. Ry. Co. v. Pendleton, 96 S.W. 434, 29 Ky.L. 721.

(2) But formerly it was held that mistake in the execution of a written contract could not be proved in a common-law action.—Tribble v. Oldham, 5 J.J.Marsh. 137.

In Missouri

(1) The strict rule is that a mistake in a written contract cannot be corrected in an action at law.—Luecke v. Cohen, 129 S.W. 1002, 150 Mo.App. 48—Bassett v. Glover, 31 Mo.App. 150.

(2) Nevertheless, the rule has not been universally followed, and parol evidence of a mistake has been held competent in a number of actions at law.—Bassett v. Glover, supra.

22 C.J. p 1225 note 33.

50. Ind.—Irwin v. Harbough, 134 N.E. 905, 78 Ind.App. 175.

51. La.—State v. State Secretary, 9 So. 776, 43 La.Ann. 590.

52. Tex.—Stevens v. Crosby, Civ. App., 166 S.W. 62.

53. N.Y.—Doherty v. Rogers, 204 N.Y.S. 536, 209 App.Div. 291.

54. Kan.—St. Louis, F. S. & W. R. Co. v. Tiernan, 15 P. 544, 37 Kan. 606.

22 C.J. p 1226 note 36.

55. Ky.—Grayson County v. Rogers, 122 S.W. 866.

56. U.S.—Frost Lumber Industries v. Federal Petroleum Co., D.C.La., 20 F.Supp. 612.

Cal.—Palma v. Leslie, 45 P.2d 391, 6 Cal.App.2d 702.

Mo.—Employers' Indemnity Corporation v. Garrett, 38 S.W.2d 1049, 327 Mo. 874.

Or.—Strong & MacNaughton Trust Co. v. Bodley, 15 P.2d 470, 141 Or. 36.

Pa.—McCann v. Pickup, 17 Phila. 56, 42 Leg.Int. 286.

Tex.—Luginbyhl v. Thompson, Civ. App., 11 S.W.2d 380, error dismissed—Ray v. Barrington, Civ. App., 297 S.W. 781—Bills v. Thayer, Civ.App., 266 S.W. 822.

22 C.J. p 1226 note 37.

What evidence inadmissible

(1) Where examination of prior deeds in connection with plan showed obvious scrivener's error in stating length of boundary in deed, court improperly admitted parol evidence of contrary intention.—Goldsmith v. Means, 158 A. 596, 104 Pa.Super. 571 —22 C.J. p 1226 note 37 [c].

(2) Parol evidence of survey made after execution and delivery of deed is not competent to correct mistake in description.—Watford v. Pierce, 124 S.E. 838, 188 N.C. 430.

Deed made to correct mistake in a previous deed made by the predecessor of the officer by whom the later deed is made is only prima facie evidence of the truth of the correction and may be rebutted.—Maxcy v. Clabaugh, 6 Ill. 26.

57. Iowa.—Swensen v. Union Central Life Ins. Co., 280 N.W. 600, 225 Iowa 428—Huxford v. Trustees of Funds and Donations for Diocese of Iowa, 185 N.W. 72, 193 Iowa 134.

22 C.J. p 1226 note 38.

Admissibility of parol evidence in action to cancel or reform instrument generally see supra § 860.

58. Idaho—Hayes v. Flesher, 198 P. 678, 34 Idaho 13.

22 C.J. p 1226 note 39.

59. Va.—Elliott v. Horton, 28 Gratt. 766, 69 Va. 766.

22 C.J. p 1226 note 40.

60. Tex.—Dunham v. Chatham, 21 Tex. 231, 73 Am.D. 228.

22 C.J. p 1226 note 41.

61. U.S.—Cities Service Oil Co. v. Dunlap, C.C.A.Tex., 100 F.2d 294, rehearing denied, C.C.A., 101 F.2d 314, certiorari granted 59 S.Ct. 828, 307 U.S. 617, 83 L.Ed. 1498, reversed on other grounds 60 S.Ct. 201, 308 U.S. 208, 84 L.Ed. 196—Smith v. Brown, C.C.A.Tex., 3 F.2d 926.

Idaho.—Gould v. Frazier, 285 P. 673, 48 Idaho 798.

La.—Smith v. Chappell, 148 So. 242, 177 La. 311—Demoss v. Wilson, 8 La.App. 492—Gaines v. Tidwell, 2 La.App. 12.

22 C.J. p 1226 note 42.

62. Va.—Vanover v. Hollyfield, 144 S.E. 450, 151 Va. 287.

22 C.J. p 1226 note 43.

63. La.—Wurzburger v. Meric, 20 La.Ann. 415.

22 C.J. p 1226 note 44.

64. Ga.—Way v. Lowery, 72 Ga. 63.

22 C.J. p 1226 note 45.

65. N.C.—Ring v. Mayberry, 84 S.E. 846, 168 N.C. 563.

Pa.—Townsend v. Lacock, 71 A. 187, 222 Pa. 330.

66. La.—Federal Land Bank of New Orleans v. Ballard, App., 187 So. 326.

22 C.J. p 1226 note 47.

67. La.—Federal Land Bank of New Orleans v. Ballard, supra.

22 C.J. p 1226 note 48.

68. La.—Federal Land Bank of New Orleans v. Ballard, supra.

69. Pa.—Bolster v. Bismark Bldg. & Loan Assoc., 29 Pittsb.Leg.J. 97.

Tex.—Marathon Oil Co. v. Rone, Civ. App., 83 S.W.2d 1028, error refused.

51 C.J. p 251 note 42 [a].

bills and notes,[70] bonds,[71] chattel mortgages,[72] contracts generally,[73] contracts of carriage or shipment,[74] contracts of guaranty,[75] contracts of insurance,[76] contracts of partnership,[77] contracts of sale[78] or exchange,[79] covenants,[80] leases,[81] municipal ordinances,[82] real estate mortgages[83] and deeds

70. N.J.—Westmont Nat. Bank v. Payne, 156 A. 652, 108 N.J.Law 133.
Okl.—Fredrick v. Ludwig, 240 P. 1049, 112 Okl. 217.
22 C.J. p 1226 note 50—8 C.J. p 1027 note 15 [a].

Evidence excluded

In payee's suit on note to which corporation's president had affixed its name as maker in presence of payee, who knew of no limitation on president's authority, and corporation's treasurer, who made no objection, refusal to permit corporation, after it had denied its signature under oath and president's authority to bind it, to show that note was signed inadvertently, was held proper, especially in absence of contention that corporation's name had been forged.—Timberlake v. Cox Bros., 43 P.2d 924, 39 N.M. 183.

71. Minn.—Pleason Realty & Investment Co. v. Kleinman, 206 N.W. 645, 165 Minn. 342.

72. S.D.—Castle v. Gleason, 141 N.W. 516, 31 S.D. 590.

73. U.S.—Danciger Oil & Refining Co. of Texas v. Ball, C.C.A.Tex., 54 F.2d 908.
Cal.—Crawford v. France, 27 P.2d 645, 219 Cal. 439—Goodrich v. Turney, 186 P. 806, 44 Cal.App. 516—Spear v. Farwell, 42 P.2d 391, 5 Cal.App.2d 111.
Colo.—Johnson Oil & Refining Co. v. Elder, 42 P.2d 610, 96 Colo. 314.
Conn.—O'Hara v. Hartford Oil Heating Co., 138 A. 438, 106 Conn. 468.
Ky.—Senters v. Elkhorn & Jellico Coal Co., 145 S.W.2d 848, 284 Ky. 667—Calloway v. Bryant, 263 S.W. 687, 204 Ky. 160.
La.—Atlas Oil Co. v. Logan, 116 So. 582, 166 La. 28—Mercier v. Clesi, App., 142 So. 853—Hill v. Maguire, 140 So. 169, 19 La.App. 798.
Mich.—Elbom v. Pavsner, 196 N.W. 442, 225 Mich. 213.
N.J.—Downs v. Jersey Central Power & Light Co., 174 A. 887, 117 N.J.Eq. 138 affirming 170 A. 835, 115 N.J.Eq. 348.
Pa.—Roberts v. Roesch, 159 A. 870, 306 Pa. 435—In re Cridge's Estate, 137 A. 455, 289 Pa. 331—Preis v. Mulholland & Gotwals, 96 Pa. Super. 104.
Tex.—Cox v. Shannon, Civ.App., 141 S.W.2d 412, error dismissed, judgment correct—Middleton v. Brawley, Civ.App., 12 S.W.2d 257—Nichols v. Lorenz, Civ.App., 237 S.W. 629—Standard Fire Ins. Co. of Hartford, Conn., v. Buckingham, Civ.App., 211 S.W. 531.
W.Va.—Corns-Thomas Engineering & Construction Co. v. McDowell County Court, 115 S.E. 462, 92 W. Va. 368.
22 C.J. p 1226 note 52.

Defeating specific performance

Parol evidence of mistake causing execution of contract is admissible to defeat prayer for specific performance.—Danciger Oil & Refining Co. of Texas v. Ball, C.C.A.Tex., 54 F.2d 908.

Evidence excluded

Where written contract plainly states obligations assumed, contemporaneous parol remarks cannot be proven under allegation of error.—A. Baldwin & Co. v. Le Long, La. App., 142 So. 206—McWilliams v. Ritchie, 7 La.App. 272.

74. U.S.—Patagonia S. S. Co. v. Gans S. S. Line, N.Y., 243 F. 532, 156 C.C.A. 230.
Ark.—Arkansas Western Ry. Co. v. Robson, 285 S.W. 372, 171 Ark. 698.
Mo.—McNeill v. Wabash Ry. Co., 231 S.W. 649, 207 Mo.App. 161.
N.Y.—Funch v. Abenheim, 20 Hun 1.
Tex.—City Nat. Bank of El Paso v. El Paso & N. E. Ry. Co., Civ.App., 225 S.W. 391, certiorari granted 42 S.Ct. 461, 258 U.S. 616, 66 L.Ed. 792, and affirmed 43 S.Ct. 640, 262 U.S. 695, 67 L.Ed. 1184.
22 C.J. p 1227 note 53.

To preclude carrier from showing mistake in quantity of goods recited in bill of lading, the language of the agreement must be quite clear and explicit.—Abbe v. Eaton, 51 N.Y. 410.

75. Tex.—Cooper Grocery Co. v. Neblett, Civ.App., 203 S.W. 365.

76. Mass.—American Mut. Liability Ins. Co. v. Condon, 183 N.E. 106, 280 Mass. 517.
N.H.—Morin v. Mercury Ins. Co., 175 A. 864, 87 N.H. 159.
Okl.—U. S. Fidelity & Guaranty Co. v. Town of Comanche, 246 P. 238, 114 Okl. 237.
22 C.J. p 1227 note 55—26 C.J. p 523 notes 40–43—33 C.J. p 115 note 52—62 C.J. p 1068 note 61 [a].

Estoppel

Insurance company is estopped to invoke parol evidence rule to enable it to take advantage of mistakes of its agents.—Massachusetts Bonding & Insurance Co. v. Piedmont Service Station, 181 S.E. 397, 165 Va. 167.

Accident policy

In action on accident policy in which defense was lapse for nonpayment of premium, evidence as to true date of premium payments could be considered to explain inconsistency in cards bearing notation of premium payments, where card, unexplained, indicated that second payment was made nine months before first payment.—Bordelon v. Atlas Life Ins. Co., La.App., 161 So. 642.

77. N.Y.—Isles v. Tucker, 12 N.Y. Super. 393.

78. Colo.—Schmidt v. Wither, 221 P. 885, 74 Colo. 328.
Ill.—Trabue v. Bowman, 257 Ill.App. 330.
Mich.—Wells v. Niagara Land & Timber Co., 220 N.W. 667, 243 Mich. 550.
Mo.—Kite v. Pittman, App., 278 S.W. 830.
Pa.—Roberts v. Roesch, 159 A. 870, 306 Pa. 435.
22 C.J. p 1096 note 74 [c], p 1227 note 57.

A recital as to the interest of a part owner of a vessel which is the subject of a bill of sale may be contradicted by parol in a suit by such part owner for his share of the proceeds of the sale.—Whiton v. Spring, 74 N.Y. 169.

79. Cal.—McCombs v. Church, 180 P. 535, 180 Cal. 283—White v. Greenwood, 199 P. 1095, 52 Cal. App. 737.
Wash.—Chapman v. Milliken, 239 P. 4, 136 Wash. 74.

80. Mass.—Leland v. Stone, 10 Mass. 459.
15 C.J. p 1312 note 12.

81. Ga.—Georgia Lumber & Turpentine Co. v. Milltown Lumber Co., 109 S.E. 178, 27 Ga.App. 551.
Ind.—Moran v. Wilson, 133 N.E. 845, 77 Ind.App. 553.
N.D.—Lane v. Aldrich, 189 N.W. 329, 48 N.D. 1086.
Okl.—Eales v. Morris, 37 P.2d 428, 170 Okl. 219.
Tex.—Texas Pacific Coal & Oil Co. v. Crabb, Com.App., 249 S.W. 835, reversing Crabb v. Texas Pacific Coal & Oil Co., Civ.App., 238 S.W. 279.
22 C.J. p 1227 note 58.

Evidence in support of instrument

Where plaintiff was seeking to set aside a lease for mutual mistake, parol evidence as to the situation of the parties and the negotiations leading to the lease is admissible against him.—Moxham v. Sherwood Co. of West Virginia, C.C.A.W.Va., 267 F. 781.

82. Ill.—Fish v. Walsh, 154 N.E. 148, 323 Ill. 359.

83. Ariz.—Cooper v. Francis, 285 P. 271, 36 Ariz. 273.
La.—Federal Land Bank of New Orleans v. Ballard, App., 187 So. 326.
22 C.J. p 1227 note 59.

of trust,[84] receipts,[85] and releases.[86] Where a contract of purchase, including a warranty, of a motor vehicle purports to be made with the manufacturer's agent, when in fact the seller is not such an agent, but is the owner of the vehicle, he is not in a position to assert that his independent oral warranties vary the terms of the manufacturer's guaranty set forth in the written contract, and evidence thereof is admissible.[87]

b. Character of Mistake

To authorize admission of parol evidence, the mistake must have been one of fact, and it must have been mutual or induced by unconscionable conduct of a party.

The rule admitting parol evidence in case a written instrument, through mistake, does not correctly express the intention of the parties applies only in cases of mistake of fact and not where a party has contracted under a mistake of law.[88] Furthermore, in order to render parol evidence admissible to contradict the terms of a writing on the ground of mistake, it must clearly appear that such mistake was mutual,[89] or that the mistake, if unilateral, resulted from fraud, imposition, or other unconscionable or inequitable conduct of the other party.[90] Where the person sought to be bound by a writing has carelessly signed such writing without reading it, the fact that it is averred not to contain the contract as made furnishes no ground for admitting parol evidence to vary its terms, for it is not the duty of courts to relieve parties from the results of their own gross negligence.[91]

c. Necessity for Pleading and Proving Mistake

In order that parol evidence may be admissible, facts showing the existence of the mistake must be alleged and proved.

In order that parol evidence may be admissible to show a mistake in a written instrument the existence of such mistake must have been alleged in the pleadings,[92] and the allegation must have been

84. Miss.—Lauderdale v. Hallock, 15 Miss. 622.

85. Iowa.—Rundel v. Boone County, 216 N.W. 122, 204 Iowa 965—Halligan v. Keeler, 148 N.W. 971, 167 Iowa 72.
N.C.—Jenkins v. Wood, 160 S.E. 488, 201 N.C. 460.
22 C.J. p 1227 note 61.
Warehouse receipt
Ala.—Warrant Warehouse Co. v. Cook, 95 So. 282, 209 Ala. 60.
Evidence excluded
Where the description in a proposed realty sale contract did not correspond with the description in the earnest-money receipt, testimony that purchaser knew what he was buying was inadmissible, under the oral evidence rule, to prove that the receipt description was wrong.—Park v. McCoy, 208 P. 1098, 121 Wash. 189.

86. U.S.—Lion Oil Refining Co. v. Albritton, C.C.A.Ark., 21 F.2d 280.
Ind.—State Highway Commission v. Wilhite, 31 N.E.2d 281.
Iowa.—Malloy v. Chicago Great Western R. Co., 170 N.W. 481, 185 Iowa 346.
Mich.—Erkiletian v. Devletian, 299 N.W. 821, 299 Mich. 95.
Tex.—Pierce v. Baker, Civ.App., 238 S.W. 699.
22 C.J. p 1227 note 62.
In Alabama nonfraudulent unambiguous release for valuable consideration cannot be impeached or varied by parol evidence, such as evidence of mutual mistake regarding extent of injuries.—Miles v. Barrett, 134 So. 661, 223 Ala. 293.

87. Md.—Rittenhouse - Winterson Auto Co. v. Kissner, 98 A. 361, 129 Md. 102.

88. W.Va.—Rosin Coal Land Co. v. Martin, 94 S.E. 358, 81 W.Va. 33.
22 C.J. p 1227 note 63.

89. Ky.—Standard Auto Ins. Ass'n v. West, 262 S.W. 296, 203 Ky. 335.
N.M.—Timberlake v. Cox Bros., 43 P.2d 924, 39 N.M. 183.
Tex.—Keystone Pipe & Supply Co. of Texas v. Kleeden, Civ.App., 299 S. W. 671.
22 C.J. p 1227 note 64.
Evidence held inadmissible where, under statements of plea, both parties knew that amount of note was not correct.—Virginia-Carolina Chemical Corporation v. Fuller, D.C.Ga., 35 F.Supp. 482.

90. Fla.—Hartsfield v. Williams, 200 So. 220.
Ky.—Senters v. Elkhorn & Jellico Coal Co., 145 S.W.2d 848, 284 Ky. 667.
La.—Morehead Mfg. Co. v. Howard's D. G. S., Inc., Odorless Cleaners, App., 172 So. 549.
Md.—Gross v. Stone, 197 A. 137, 173 Md. 653.
Tex.—Standard Fire Ins. Co. of Hartford, Conn., v. Buckingham, Civ.App., 211 S.W. 531.
Fraud generally see infra § 979.

91. U.S.—Hettrick Mfg. Co. v. Waxahachie Cotton Mills, C.C.A.Ohio, 1 F.2d 913.
Ariz.—Bradley v. Industrial Commission, 76 P.2d 745, 51 Ariz. 291.
22 C.J. p 1227 note 65.
Acceptance
Under statute a shipper, accepting a contract of shipment on which was noted the points at which stops were to be made for resting and feeding live stock, was presumed to have done so with knowledge of its contents, and could not assert ignorance thereof as a reason for resorting to parol evidence of prior negotiations or agreements to vary or alter its contents.—Cook v. Northern Pac. Ry. Co., 203 P. 512, 61 Mont. 573.

92. Ariz.—Lee v. Standard Cement Pipe Co., 103 P.2d 457, 55 Ariz. 463.
Cal.—Alameda County Title Ins. Co. v. Panella, 24 P.2d 163, 218 Cal. 510—Central Bank of Oakland v. Wells Fargo Bank & Union Trust Co., 64 P.2d 465, 18 Cal.App.2d 559, hearing denied 65 P.2d 1301, 18 Cal.App.2d 559.
Ind.—Cain v. Hunt, 41 Ind. 466.
Kan.—Parker v. Mouse, 84 P.2d 941, 148 Kan. 643.
Ky.—Metropolitan Life Ins. Co. v. Trunick's Adm'r, 16 S.W.2d 759, 229 Ky. 173—Lincoln v. Burbank, 290 S.W. 1081, 218 Ky. 89—James v. Stokes, 261 S.W. 868, 203 Ky. 127.
La.—Harnischfeger Sale Corporation v. Sternberg Co., 154 So. 10, 179 La. 317—McGuire v. Nelson Bros., 148 So. 56, 177 La. 302—Diaz v. Killeen, 3 La.App. 370.
Mo.—Highland Inv. Co. v. Kansas City Computing Scales Co., 209 S. W 895, 277 Mo. 365—Humana Co. v. Hughes, App., 213 S.W. 515.
Or.—Hawkins v. Rodgers, 179 P. 563, 91 Or. 483, rehearing denied 179 P. 905, 91 Or. 483.
Tex.—Horton v. Bolding, Civ.App., 67 S.W.2d 435, error dismissed.
22 C.J. p 1228 note 66.
Allegations held sufficient
La.—Bell v. Leiendecker, 170 So. 386, 174 So. 89, 187 La. 1, reversing, App., 170 So. 386.
Tex.—Keystone Pipe & Supply Co. of Texas v. Kleeden, Civ.App., 299 S.

sustained by proof.[93] Only a statement of facts showing error need be alleged;[94] it is not necessary that the word "error" be employed,[95] nor is it necessary to allege mistake when the facts are such that the law will impute it.[96]

§ 979. —— Fraud

a. In general
b. Intention to defraud third persons
c. Necessity for pleading and proving fraud
d. Purpose for which evidence considered

a. In General

Parol evidence is admissible to show that a written instrument was induced by fraud, even though the writing recites that all agreements between the parties are contained therein or provides that no verbal agreements or representations affecting its validity will be recognized; and this rule applies to judicial and official records as well as to private writings.

It is well established that, as fraud vitiates everything which it touches, parol evidence is always admissible to show, for the purpose of invalidating a written instrument, that its execution was procured by fraud, or that, by reason of fraud, it does not express the true intentions of the parties.[97]

W. 671—Smith v. Hampton, Civ. App., 42 S.W.2d 466.

93. La.—Diaz v. Killeen, 3 La.App. 370.
Pa.—First Nat. Bank v. Sagerson, 129 A. 323, 283 Pa. 406.
Tex.—Keystone Pipe & Supply Co. of Texas v. Kleeden, Civ.App., 299 S.W. 671.
22 C.J. p 1228 note 67.

94. La.—Hill v. Maguire, 140 So. 169, 19 La.App. 798.

95. La.—Hill v. Maguire, supra.

96. Ky.—Garrison v. Hansford, 72 S.W.2d 468, 254 Ky. 768.

97. U.S.—Iasigi v. Brown, Mass., 17 How. 183, 15 L.Ed. 208—Obartuch v. Security Mut. Life Ins. Co., C. C.A.Ill., 114 F.2d 873, certiorari denied 61 S.Ct. 730—Equitable Life Assur. Soc. of U. S. v. Johnson, C. C.A.Mich., 81 F.2d 543—Danciger Oil & Refining Co. of Texas v. Ball, C.C.A.Tex., 54 F.2d 908—Neff & Fry Co. v. Ashmead, C.C.A.N.Y., 36 F. 2d 771.
Ala.—Alabama Power Co. v. Pierre, 183 So. 665, 669, 236 Ala. 521, citing **Corpus Juris**—Worthington v. Eggler, 98 So. 788, 210 Ala. 535, citing **Corpus Juris.**
Ariz.—Lutfy v. R. D. Roper & Sons Motor Co., 115 P.2d 161.
Ark.—Hamburg Bank v. Jones, 151 S.W.2d 990—Galion Iron Works & Mfg. Co. v. Otto V. Martin Const. Co., 3 S.W.2d 310, 176 Ark. 448—Hartsfield v. Crumpler, 297 S.W. 1012, 174 Ark. 1179—Hayes v. Gammon, 272 S.W. 644, 168 Ark. 1116.
Cal.—Ferguson v. Koch, 268 P. 342, 204 Cal. 342, 58 A.L.R. 1176—Rothstein v. Janss Inv. Corporation, App., 113 P.2d 465—In re Kellogg, 107 P.2d 964, 41 Cal.App.2d 833—Fernald v. Lawsten, 79 P.2d 742, 26 Cal.App.2d 552—De Olazabal v. Mix, 74 P.2d 787, 24 Cal.App.2d 258—W. Ross Campbell Co. v. Sears, Roebuck & Co., 29 P.2d 910, 136 Cal.App. 765—Heefner v. Citizens' Trust & Savings Bank, 278 P. 872, 99 Cal.App. 794—Wiberg v. Barnum, 278 P. 871, 99 Cal.App. 323—Blackwell v. Thomasson, 258 P. 724, 84 Cal.App. 784—Campion v. Downey, 245 P. 1098, 77 Cal.App. 125—Lindemann v. Coryell, 212 P. 47, 59 Cal.App. 788.
Conn.—O'Hara v. Hartford Oil Heating Co., 138 A. 438, 106 Conn. 468.
Ga.—Smith v. Harvey-Given Co., 185 S.E. 793, 182 Ga. 410—Morton v. Wallace, 171 S.E. 720, 177 Ga. 856.
Idaho.—Advance-Rumely Thresher Co. v. Jacobs, 4 P.2d 657, 51 Idaho 160.
Ind.—Burroughs v. Southern Colonization Co., 173 N.E. 716, 96 Ind. App. 93.
Iowa.—Rance v. Gaddis, 284 N.W. 468, 226 Iowa 531—Schipfer v. Stone, 218 N.W. 568, 206 Iowa 328, rehearing denied and modified on other grounds 219 N.W. 933, 206 Iowa 328—Christensen v. Harris, 180 N.W. 325, 190 Iowa 256—Qualley v. Citizens' Sav. Bank, 177 N. W. 539, 188 Iowa 1212—Nolan v. Guggerty, 174 N.W. 706, 187 Iowa 980.
Kan.—Dimmock v. Ploeger, 264 P. 1044, 125 Kan. 461.
Ky.—Goodin v. Page, 29 S.W.2d 581, 235 Ky. 54.
La.—Clarke v. Oden, 99 So. 605, 155 La. 801—Great Eastern Oil & Refining Co. v. Bullock, 91 So. 680, 151 La. 209—Jefferson v. Herold, 81 So. 714, 144 La. 1064—Breeden v. Breeden, 126 So. 599, 12 La.App. 484—McCollister Bros. v. Labarre, 7 La.App. 350.
Md.—Gross v. Stone, 197 A. 137, 173 Md. 653.
Mass.—New England Foundation Co. v. Elliott A. Watrous, Inc., 27 N. E.2d 756, 306 Mass. 177—Harris v. Delco Products, 25 N.E.2d 740, 305 Mass. 362—Wasserman v. Cosmopolitan Trust Co. of Boston, 147 N.E. 742, 252 Mass. 253.
Mich.—People's Wayne County Bank of Dearborn v. Harvey, 255 N.W. 436, 268 Mich. 47—Schupp v. Davey Tree Expert Co., 209 N.W. 85, 235 Mich. 268—J. B. Colt Co. v. Cousino, 198 N.W. 222, 226 Mich. 518.
Minn.—Silliman v. Dobner, 205 N.W. 696, 165 Minn. 87.
Miss.—McArthur v. Fillingame, 186 So. 828, 184 Miss. 869—Blair v. Frank B. Russell & Co., 81 So. 785, 120 Miss. 108.
Mo.—Employers' Indemnity Corporation v. Garrett, 38 S.W.2d 1049, 327 Mo. 874—Bunch v. Paxton, Duke & Bradley, App., 295 S.W. 474, 475, citing **Corpus Juris.**
Mont.—Koch v. Rhodes, 188 P. 933, 57 Mont. 447.
Neb.—Paper v. Galbreth, 237 N.W. 582, 583, 121 Neb. 454, quoting **Corpus Juris**—Chapin v. Noll, 224 N. W. 687, 689, 118 Neb. 318, quoting **Corpus Juris.**
Nev.—Chiquita Mining Co. v. Fairbanks, Morse & Co., 104 P.2d 191.
N.H.—Land Finance Corporation v. Grafton County Electric Light & Power Co., 144 A. 845, 83 N.H. 518—Weston v. Ball, 116 A. 99, 80 N. H. 275.
N.J.—Timken Silent Automatic Corporation v. Vetrovec, 197 A. 265, 119 N.J.Law 500—Christie v. Lalor, 181 A. 312, 116 N.J.Law 23—Westmont Nat. Bank v. Payne, 156 A. 652, 108 N.J.Law 133—Downs v. Jersey Central Power & Light Co., 174 A. 887, 117 N.J.Eq. 138, affirming 170 A. 835, 115 N.J.Eq. 348—Mass v. Schomer, 144 A. 19, 103 N.J.Eq. 560—Levine v. Lafayette Bldg. Corporation, 142 A. 441, 103 N.J.Eq. 121, reversed on other grounds 148 A. 772, 105 N.J.Eq. 532—Gordon v. Schellhorn, 123 A. 549, 95 N.J.Eq. 563—Rosenberg v. Reisman, 153 A. 839, 9 N.J.Misc. 357—Newton v. Middleton, 127 A. 580, 3 N.J.Misc. 157.
N.Y.—Salt Springs Nat. Bank of Syracuse v. Hitchcock, 263 N.Y.S. 55, 238 App.Div. 150, reversing 259 N.Y.S. 24, 144 Misc. 547—Eufemia v. Moan, 206 N.Y.S. 185, 186, citing **Corpus Juris.**
N.C.—Willett v. National Accident & Health Ins. Co., 180 S.E. 580, 208 N.C. 344—Hill v. Star Ins. Co. of America, 157 S.E. 599, 200 N.C. 502—F. L. Voliva Hardware Co. v. Kinion, 131 S.E. 579, 191 N.C. 218.
N.D.—Dalheimer v. Lucia, 194 N.W. 925, 928, 50 N.D. 78, quoting **Corpus Juris.**
Ohio.—Colonial Finance Co. v. McCrate, 19 N.E.2d 527, 60 Ohio App.

The rule in this respect is not rendered inapplicable | by the fact that the writing contains a recital to

68, appeal dismissed 18 N.E.2d 269, 134 Ohio St. 523.
Okl.—Alexander Hamilton Institute v. Wayne, 98 P.2d 37, 186 Okl. 358—Moyer v. Closs, 97 P.2d 901, 186 Okl. 354—Bowersock v. Barker, 96 P.2d 18, 186 Okl. 48, 127 A.L.R. 130—Publishers Finance Co. v. Lovelace, 93 P.2d 748, 185 Okl. 322—Miller v. Troy Laundry Machinery Co., 62 P.2d 975, 977, 178 Okl. 313, quoting **Corpus Juris**—Waite Phillips Co. v. Sidwell, 250 P. 415, 120 Okl. 81.
Pa.—Miller v. Central Trust & Savings Co., 132 A. 579, 285 Pa. 472—Hertzog v. Leon, 124 A. 683, 280 Pa. 560—Frederick v. Campbell, 14 Serg. & R. 293—Frederick v. Campbell, 13 Serg. & R. 136—Oxweld Acetylene Co. v. Johnson, 72 Pa. Super. 404—Speier v. Michelson, 14 Pa.Dist. & Co. 183, affirmed 154 A. 127, 303 Pa. 66—Friedman v. Hamilton, 6 Pa.Dist. & Co. 168, affirmed Friedmann v. Hamilton, 86 Pa.Super. 473—Brisbin v. Scott, 28 Del.Co. 495, 51 York Leg.Rec. 91.
Puerto Rico.—Aponte v. Garzot, 28 Puerto Rico 586.
S.C.—Sutton v. Continental Casualty Co., 167 S.E. 647, 168 S.C. 372—Henderson v. Rice, 158 S.E. 258, 160 S.C. 307—Continental Jewelry Co. v. Kerhulas, 134 S.E. 505, 136 S.C. 496.
S.D.—Purinton v. Purinton, 176 N.W. 31, 42 S.D. 426.
Tenn.—Samuel v. King, 14 S.W.2d 963, 158 Tenn. 546—First Nat. Bank v. Barbee, 265 S.W. 371, 150 Tenn. 355—Gibson County v. Fourth & First Nat. Bank, 96 S.W.2d 184, 20 Tenn.App. 168—Security Finance Co. v. Duncan, 5 Tenn. App. 631, 636, citing **Corpus Juris**—Ellis v. Bruce, 5 Tenn.App. 344.
Tex.—Southern Surety Co. v. Adams, 34 S.W.2d 789, 119 Tex. 489, affirming, Civ.App., 278 S.W. 943—Speer v. Dalrymple, Com.App., 222 S.W. 174, reversing, Civ.App., 196 S.W. 911—W. K. Ewing Co. v. Krueger, Civ.App., 152 S.W.2d 488—Strickler v. International Harvester Co., Civ.App., 141 S.W.2d 989, error dismissed, judgment correct—Larson v. Sterling Mut. Life Ins. Co., Civ.App., 134 S.W.2d 717—Bankers Life & Loan Ass'n v. Pitman, Civ.App., 115 S.W.2d 1008—Means v. Limpia Royalties, Civ. App., 115 S.W.2d 468, error dismissed—Panhandle Const. Co. v. City of Spearman, Civ.App., 89 S.W.2d 1053—New Home Sewing Mach. Co. v. March, Civ.App., 67 S.W.2d 1107, 1108, quoting **Corpus Juris**—Middleton v. Brawley, Civ. App., 12 S.W.2d 257—McCaskey Register Co. v. Mann, Civ.App., 283 S.W. 544—Waybourn v. Spurlock, Civ.App., 281 S.W. 587, 589, citing **Corpus Juris**—White v. Carlton, Civ.App., 277 S.W. 701—Cattle Raisers' Loan Co. v. Sutton, Civ.App., 271 S.W. 233—Oil Well Supply Co. v. Burk-Waggoner Oil Co., Civ.App., 261 S.W. 830—Babb v. Miller, Civ.App., 259 S.W. 177, reversed on other grounds Miller v. Babb, Com.App., 263 S.W. 253—Masterson v. Amarillo Oil Co., Civ. App., 253 S.W. 908—Balaguer v. Macey, Civ.App., 238 S.W. 322, dismissed for want of jurisdiction—Fenter v. Robinson, Civ.App., 230 S.W. 844.
Utah.—Central Bank of Bingham v. Stephens, 199 P. 1018, 58 Utah 358.
Va.—Jones v. Franklin, 168 S.E. 753, 160 Va. 266.
Wash.—Moser v. New Amsterdam Casualty Co., 279 P. 581, 153 Wash. 127—Burke v. Mayer, 177 P. 662, 105 Wash. 1.
Wis.—Sherlock v. Bradley Polytechnic Institute, 198 N.W. 756, 184 Wis. 425—Wulfers v. E. W. Clark Motor Co., 188 N.W. 652, 177 Wis. 497.
22 C.J. p 1215 note 65.
Unilateral mistake resulting from fraud of other party see supra § 978 b.

Admission of absence of fraud does not prevent showing of fraud later discovered, notwithstanding party making admission made independent investigation.—Omar Oil & Gas Co. v. Mackenzie Oil Co., 138 A. 392, 3 W.W.Harr Del., 259.

Admission of debt

Purchaser of oil properties was not precluded from showing fraud in contract by admission of claim in extension agreement executed prior to discovery of alleged fraud.—Omar Oil & Gas Co. v. Mackenzie Oil Co., supra.

Authentic acts

Where plaintiff voluntarily assented to authentic act of sale, she could not assail act by parol.—Brinker v. Feist, 129 So. 416, 14 La.App. 101.

Contemporaneous parol agreement

(1) Extrinsic evidence of a parol agreement, which was inducing cause of, or part of consideration for, a contemporaneous written contract, executed on faith of such agreement, is admissible to show fraud, but such evidence of a parol agreement relating directly to the subject of the written contract is inadmissible, although it be alleged that written contract was signed on faith of oral promises.—Alford v. Rowell, 103 P. 2d 119, 44 N.M. 392.

(2) So it has been held that making and violating contemporaneous parol agreement inconsistent with writing is not such fraud as will permit varying of the written instrument, when no sufficient reason appears why it was not incorporated in the writing.
Ga.—Bowen v. Swift & Co., 184 S.E. 625, 52 Ga.App. 793—Moore v. Flowers Lumber Co., 133 S.E. 650, 35 Ga.App. 336—Mendel v. Converse & Co., 118 S.E. 586, 30 Ga. App. 549—Reeves Tractor & Implement Co. v. Barrow, 118 S.E. 456, 30 Ga.App. 420—Automobile Battery Co. v. Geraghty & Co., 118 S.E. 412, 30 Ga.App. 446.
Mo.—Meyer v. Weber, 109 S.W.2d 702, 233 Mo.App. 832.
Pa.—Lycoming Trust Co., to Use of Carson, v. Smithgall, 5 A.2d 152, 334 Pa. 4—Hein v. Fetzer, 152 A. 388, 301 Pa. 403—U. S. Nat. Bank of Johnstown v. Evans, 146 A. 126, 296 Pa. 541—Emmanuel v. Hughes, 145 A. 586, 295 Pa. 492—Fidelity Title & Trust Co. v. Garland, 139 A. 876, 291 Pa. 297—Humphrey v. Brown, 139 A. 606, 291 Pa. 53—Schmitt v. William G. Johnston Co., 7 A.2d 131, 136 Pa.Super. 213—Washington Finance Corporation v. Scannell, 95 Pa.Super. 191.
S.C.—Greer Bank & Trust Co. v. Waldrop, 151 S.E. 920, 155 S.C. 47.
Tex.—Mitcham v. London, Civ.App., 110 S.W.2d 140—Houghton v. American Trust & Savings Bank, Civ.App., 247 S.W. 904.
Wis.—Beers v. Atlas Assur. Co., 253 N.W. 584, 215 Wis. 165.
22 C.J. p 1214 note 65 [h], [i].

(2) And proof of promissory fraud, inducing written contract, cannot be made by representations contradictory of terms of writing.
Minn.—McCreight v. Davey Tree Expert Co., 254 N.W. 623, 191 Minn. 489.
Wis.—Beers v. Atlas Assur. Co., supra.

(3) On the other hand, it has been held that the parol evidence rule is intended to prevent, not to promote, frauds, and it would be a fraud to allow a party to a written agreement to enforce it as written when he has agreed not to do so, where the other, on the faith of the agreement, has acted thereon to his detriment.—Andersonian Inv. Co. v. Wade, 184 P. 327, 108 Wash. 373.

(4) So it has been decided that a false promise not intended to be performed made to trick and deceive another into execution of written instrument is fraud, and may in action on instrument be shown by any competent evidence, oral or documentary.
Md.—Councill v. Sun Ins. Office of London, 126 A. 229, 146 Md. 137.
Okl.—American Asbestos Products Co. v. Smith Bros., 73 P.2d 839, 181 Okl. 350.
S.C.—Palmetto Bank & Trust Co. v. Grimsley, 133 S.E. 437, 134 S.C. 493, 51 A.L.R. 42.

the effect that all agreements between the parties are contained therein,[98] or a provision that no verbal agreements affecting its validity will be recognized,[99] or a provision that all prior agreements,

(5) Bringing of action on indorsements of note has been held not to disclose fraud justifying admission of parol evidence showing that indorsers were not to be held liable on their indorsements.—Columbia Nat Bank of Columbia v. People's Bank, 160 S.E. 728, 162 S.C. 324.

(6) Plaintiffs who prepared instrument evidencing contract completely performed by them are not entitled to show contemporaneous parol agreement on ground of defendant's fraud.—Gladden v. Keistler, 140 S.E. 161, 141 S.C. 524.

(7) Alleged oral misrepresentations of purchaser as to character of improvements to be erected on property purchased, not mentioned in contract, are not admissible and constitute no defense to suit for specific performance.—Lescher v. Baird, 294 S.W. 17, 173 Ark. 1033.

(8) Admission of proof of deceit in making contemporaneous and collateral promise does not vary terms of written instrument.—King v. Wise, Tex.Com.App., 282 S.W. 570, reversing Wise v. Boyd, Civ.App., 267 S.W. 543.

(9) Prior and contemporaneous collateral agreements generally see infra §§ 997–1003.

Relation to agreement

(1) Fraud, which may be shown by parol, must relate to, and be connected with, the agreement relied on, and must tend to vitiate that agreement.—J. I. Case Threshing Mach. Co. v. Copren Bros., 187 P. 772, 45 Cal.App. 159—Yuba Mfg. Co. v. Stone, 179 P. 418, 39 Cal.App. 440.

(2) So representations of seller's agent with reference to capacity of tractor or what it would do in the matter of driving rice threshers amounted to no more, although claimed to have been fraudulently made, than an assurance or warranty that tractor would do a certain amount of work, and, being ignored in written contract which warranted tractor to be in good working order and free from latent defects, evidence thereof was not admissible on the theory that it proved fraud inducing execution of contract and avoiding the whole thereof.—Yuba Mfg. Co. v. Stone, supra.

Time of representations

Admissibility of evidence respecting seller's oral misrepresentations inducing contract of purchase is not dependent on time when they were made, but conduct and statements of parties throughout entire transaction may be shown.—Wolf Co. v. Smith Mercantile Co., 127 S.E. 208, 188 N.C. 322.

98. Ala.—Abercrombie v. Martin & Hoyt Co., 150 So. 497, 227 Ala. 510—People's Auto Co. v. Staples, 143 So. 553, 225 Ala. 372—Alabama Machinery & Supply Co. v. Caffey, 104 So. 509, 213 Ala. 260.

Ariz.—Lutfy v. R. D. Roper & Sons Motor Co., 115 P.2d 161—Arnett v. Sanderson, 218 P. 986, 988, 25 Ariz. 433, citing **Corpus Juris.**

Cal.—Stewart v. Crowley, 3 P.2d 562, 213 Cal. 694—Inner Shoe Tire Co. v. Tondro, 257 P. 211, 83 Cal.App. 689.

Conn.—Callahan v. Jursek, 124 A. 31, 100 Conn. 490.

Ga.—Williams v. Toomey, 159 S.E. 866, 173 Ga. 199.

Ind.—Marker v. Outcault Advertising Co., 122 N.E. 32, 69 Ind.App. 344.

Iowa.—Good Roads Machinery Co., Ft. Wayne, Ind. v. Ott, 171 N.W. 721, 186 Iowa 908.

La.—Gullett Gin Co. v. Varnado Gin Co., 120 So. 240, 10 La.App. 158.

Mich.—Fignar v. Schreiber, 239 N.W. 270, 255 Mich. 661—National Cash Register Co. v. Hosier, 232 N.W. 177, 251 Mich. 402—Hanson v. Fletcher Auto Sales Co., 214 N.W. 187, 239 Mich. 118—Chandler Motor Sales Co. v. Dertien, 201 N.W. 954, 229 Mich. 630—Plate v. Detroit Fidelity & Surety Co., 201 N.W. 459, 229 Mich. 489—Plate v. Detroit Fidelity & Surety Co., 201 N.W. 457, 229 Mich. 482—J. B. Colt Co. v. Cousino, 198 N.W. 222, 226 Mich. 518—J. B. Colt Co. v. Reade, 190 N.W. 672, 221 Mich. 92.

Minn.—Wisconsin Mystic Iceless Refrigerator v. Minnesota Mystic Iceless Refrigerator, 230 N.W. 796, 180 Minn. 334.

Miss.—Nash Mississippi Valley Motor Co. v. Childress, 125 So. 708, 156 Miss. 157.

Neb.—Paper v. Galbreath, 237 N.W. 582, 583, 121 Neb. 454, quoting **Corpus Juris.**

N.J.—Timken Silent Automatic Corporation v. Vetrovec, 197 A. 265, 119 N.J.Law 500—Guilder v. Boonton-Pine Brook-New York Bus Co., 164 A. 316, 110 N.J.Law 103.

N.Y.—Bareham & McFarland v. Kane, 240 N.Y.S. 123, 228 App.Div. 396.

N.C.—Wolf Co. v. Smith Mercantile Co., 127 S.E. 208, 189 N.C. 322.

N.D.—National Cash Register Co. v. Midway City Creamery Co., 191 N.W. 762, 49 N.D. 441.

Okl.—Alexander Hamilton Institute v. Wayne, 98 P.2d 37, 186 Okl. 358—Bowersock v. Barker, 96 P.2d 18, 186 Okl. 48, 127 A.L.R. 130—Publishers Finance Co. v. Lovelace, 93 P.2d 748, 185 Okl. 322—Miller v. Troy Laundry Machinery Co., 62 P.2d 975, 178 Okl. 313—Mid-West Chevrolet Corporation v. Noah, 48 P.2d 283, 173 Okl. 198.

Pa.—National Cash Register Co. v. Elfenbein, 20 Erie Co. 390.

R.I.—International Accountants Soc. v. Kiernan, 143 A. 858.

S.D.—National Cash Register Co. v. Mahaney, 205 N.W. 710, 49 S.D. 1.

Tex.—C. V. Hill & Co. v. Parker, Civ.App., 145 S.W.2d 330—New Home Sewing Mach. Co. v. March, Civ.App., 67 S.W.2d 1107, 1108, quoting **Corpus Juris**—Norm Co. v. City Drug Stores, Civ.App., 59 S.W.2d 270—Sibley v. Southland Life Ins. Co., Civ.App., 11 S.W.2d 250, 253, reversed on other grounds, Sup., 36 S.W.2d 145, citing **Corpus Juris**—George v. Birchfield, Civ. App., 264 S.W. 632.

Wash.—Webster v. L. Romano Engineering Corporation, 34 P.2d 428, 178 Wash. 118—Champlin v. Transport Motor Co., 33 P.2d 82, 177 Wash. 659.

Wis.—Morse Chain Co. v. T. W. Meiklejohn, Inc., 296 N.W. 106, 237 Wis. 383—Jones v. Brandt, 181 N.W. 813, 173 Wis. 539.

22 C.J. p 1217 note 66—42 C.J. p 779 note 3.

99. Ariz.—Arnett v. Saunderson, 218 P. 986, 988, 25 Ariz. 433, citing **Corpus Juris.**

Iowa.—McTee & Co. v. Ryder, 265 N.W. 636, 637, 221 Iowa 407, citing **Corpus Juris**—James v. Grill, 173 N.W. 897, 186 Iowa 1300—Good Roads Machinery Co., Ft. Wayne, Ind. v. Ott, 171 N.W. 721, 186 Iowa 908.

Mo.—Rabenau v. Harrell, 213 S.W. 92, 278 Mo. 247—National Theatre Supply Co. v. Rigney, App., 130 S.W.2d 258.

Neb.—Paper v. Galbreth, 237 N.W. 582, 583, 121 Neb. 454, quoting **Corpus Juris**—Stroman v. Atlas Refining Corporation, 199 N.W. 26, 112 Neb. 187.

Okl.—Miller v. Troy Laundry Machinery Co., 62 P.2d 975, 977, 178 Okl. 313, quoting **Corpus Juris.**

Or.—Reihsen v. Burlingame Co., 282 P. 554, 131 Or. 208—Sharkey v. Burlingame Co., 282 P. 546, 131 Or. 185.

S.C.—Empire Buggy Co. v. Moss, 151 S.E. 788, 154 S.C. 424.

Tex.—New Home Sewing Mach. Co. v. March, Civ.App., 67 S.W.2d 1107, 1108, quoting **Corpus Juris**—Ten-Cate v. First Nat. Bank, Civ.App., 52 S.W.2d 323, 327, quoting **Corpus Juris**—Cattle Raisers' Loan Co. v. Sutton, Civ.App., 271 S.W. 233—Bankers' Trust Co. v. James, Civ.App., 209 S.W. 830, error refused—Bankers' Trust Co. v. Calhoun, Civ.App., 209 S.W. 826, error refused.

both written and oral, are entirely canceled thereby,[1] or provisions that the sale evidenced by the agreement was without warranty,[2] or that no representations had been made,[3] or that all representations were merged in the written contract,[4] or that all assertions and promises on the part of the seller shall be taken as expressions of opinion only;[5] and the fact that the writing recites that it contains the only representations made and relied on has been held not to prevent a party from showing the contrary by parol evidence.[6] Thus it has been frequently held that even if the contract, when reduced to writing, places limitations on the agent's authority, parol evidence is admissible to prove fraudulent representations of an agent by which the contract was induced.[7] There is, however, author-

Wash.—Producers' Grocery Co. v. Blackwell Motor Co., 212 P. 154, 155, 123 Wash. 144, citing **Corpus Juris.**

22 C.J. p 1217 note 67.

1. U.S.—Crowell v. Baker Oil Tools, C.C.A.Cal., 99 F.2d 574.

2. Del.—Omar Oil & Gas Co. v. Mackenzie Oil Co., 138 A. 392, 3 W.W.Harr. 259.

Mo.—International Harvester Co. of America v. Jeffries, App., 4 S.W.2d 501.

Tex.—Strickler v. International Harvester Co., Civ.App., 141 S.W.2d 989, error dismissed, judgment correct.

That purchaser was a lawyer did not preclude him from showing fraud in procuring his signature on contract which excluded warranties not indorsed on contract.—General Motors Acceptance Corporation v. Whitehead, 161 S.E. 494, 163 S.C. 236.

Statements held not warranties

In action on note given for price of Diesel engine with defense of fraud, evidence of seller's statement that engine was being used all over United States in dump trucks and that it would develop more power than certain gasoline engine was not inadmissible because of stipulation in order against oral warranties, since such statements were not warranties but false representations.—Peoples Bank & Trust Co. v. L. Romano Engineering Corporation, 62 P.2d 445, 188 Wash. 290, affirmed 65 P.2d 688, 188 Wash. 290.

3. Del.—Omar Oil & Gas Co. v. Mackenzie Oil Co., 138 A. 392, 3 W.W.Harr. 259.

N.Y.—Bridger v. Goldsmith, 38 N.E. 458, 143 N.Y. 424.

Or.—Carty v. McMenamin, 216 P. 228, 108 Or. 489.

4. Cal.—Whiting v. Squeglia, 232 P. 986, 70 Cal.App. 108.

5. Md.—Standard Motor Co. v. Peltzer, 128 A. 451, 147 Md. 509.

6. U.S.—Hubert v. Apostoloff, D.C.N.Y., 278 F. 673, affirmed, C.C.A., 285 F. 161.

Cal.—Blackwell v. Thomasson, 258 P. 724, 84 Cal.App. 784.

Del.—Webster v. Palm Beach Ocean Realty Co., 139 A. 457, 16 Del.Ch. 15.

Idaho.—J. I. Case Co. v. Bird, 11 P.2d 966, 51 Idaho 725—Advance-Rumely Thresher Co. v. Jacobs, 4 P.2d 657, 51 Idaho 160.

Ill.—Ginsburg v. Bartlett, 262 Ill. App. 14—Miller v. Nydick, 254 Ill. App. 584.

Contra Zalapi v. Holcomb & Hoke Mfg. Co., 241 Ill.App. 102.

Iowa.—Jordan v. Nelson, 178 N.W. 544, 10 A.L.R. 1464.

La.—Roby Motors Co. v. Price, App., 173 So. 793—Morehead Mfg. Co. v. Howard's D. G. S., Inc., Odorless Cleaners, App., 172 So. 549.

Minn.—Ganley Bros. v. Butler Bros. Bldg. Co., 212 N.W. 602, 170 Minn. 373, 56 A.L.R. 1.

Tenn.—J. B. Colt Co. v. Odle, 4 Tenn. App. 174.

Wash.—Dieterich v. Rice, 197 P. 1, 115 Wash. 365—Wells v. Walker, 186 P. 857, 109 Wash. 332.

Wyo.—Baylies v. Vanden Boom, 278 P. 551, 40 Wyo. 411, 70 A.L.R. 924.

Contract construed as not equivalent to statement that representations antecedent to execution were not inducement to its making; hence parol evidence rule did not exclude proof of fraud therein.—Arnold v. National Aniline & Chemical Co., C. C.A.N.Y., 20 F.2d 364, 56 A.L.R. 4.

In Georgia

(1) Contract excluding representations outside contract estops party from setting up fraud to abate purchase money, but not to rescind contract for fraud.—Keating v. Woods-Young Co., 155 S.E. 206, 42 Ga.App. 63.

(2) So under a mortgage note for the purchase price of a chattel, excluding warranties, express or implied, or conditions, stipulations, or statements not included therein, note was held not subject to defense that the seller made false representations and warranties which were relied on by the buyer.—Brooks v. Williams Mfg. Co., 115 S.E. 150, 29 Ga.App. 258—Connell v. Newkirk-George Motor Co., 111 S.E. 749, 28 Ga.App. 382—Butler v. Citizens' Bank, 110 S.E. 501, 28 Ga.App. 184.

(3) In buyer's suit against seller for damages from fraudulent representations as to condition of automobile, testimony as to actual fraud inducing contract was admissible and authorized verdict for buyer, although conditional sales contract provided that seller made no warranty save warranty of title, and that buyer agreed that all inducements and agreements and representations were merged into contract, and that there were no representations, warranties, or agreements touching contract not contained therein.—Nalley & Co. v. Moore, 181 S.E. 429, 51 Ga.App. 718.

7. Idaho.—J. I. Case Co. v. Bird, 11 P.2d 966, 51 Idaho 725—Advance-Rumely Thresher Co. v. Jacobs, 4 P.2d 657, 51 Idaho 160.

Ill.—Klee v. Chicago Trust Co., 1 N. E.2d 548, 284 Ill.App. 112, reversed on other grounds 6 N.E.2d 442, 365 Ill. 354.

Iowa.—Good Roads Machinery Co., Ft. Wayne, Ind. v. Ott, 171 N.W. 721, 186 Iowa 908.

Mich.—Gloeser v. Moore, 278 N.W. 72, 283 Mich. 425—J. B. Colt Co. v. Cousino, 198 N.W. 222, 226 Mich. 518—J. B. Colt Co. v. Reade, 190 N.W. 672, 221 Mich. 92.

Minn.—National Equipment Corporation v. Volden, 252 N.W. 444, 190 Minn. 596, rehearing denied 252 N. W. 835, 190 Minn. 596.

Mo.—Rice v. Lammers, App., 65 S. W.2d 151.

N.Y.—Electric Paint & Varnish Co. v. Binghamton Woven Wire Spring Co., 236 N.Y.S. 337, 134 Misc. 638—White v. Hiawatha Silver Black Fox Corporation, 206 N.Y.S. 847, 123 Misc. 868.

N.C.—White v. Fisheries Products Co., 116 S.E. 169, 185 N.C. 68.

Or.—Rice v. Levinger, 18 P.2d 221, 141 Or. 413.

Pa.—Lloyd & Elliott v. Lang, 180 A. 74, 118 Pa.Super. 190.

R.I.—Bloomberg v. Pugh Bros. Co., 121 A. 430, 45 R.I. 360.

S.D.—National Cash Register Co. v. Mahaney, 205 N.W. 710, 49 S.D. 1.

Tenn.—J. B. Colt Co. v. Odle, 4 Tenn. App. 174.

Tex.—Dallas Joint Stock Land Bank of Dallas v. Harrison, Civ.App., 135 S.W.2d 573, error granted—Union Deposit Co. v. Moseley, Civ. App., 75 S.W.2d 190, error dismissed—Free Sewing Mach. Co. v. S. T. Atkin Furniture Co., Civ. App., 71 S.W.2d 604—Bankers' Mortg. Co. v. Baxter, Civ.App., 66 S.W.2d 408—Bankers' Mortg. Co. of Topeka, Kan. v. Rogers, Civ. App., 61 S.W.2d 593, followed in Bankers' Mortg. Co. of Topeka v. Chambers, 61 S.W.2d 597, and Bankers' Mortg. Co. of Topeka v. Johnson, 61 S.W.2d 597—Massirer

ity holding that where a written contract, which a party attacks on the ground of the oral fraudulent representations of the other party, contains provisions negativing the claim that the representations were relied on, or contains other representations on the same subject inconsistent with the alleged oral representations, the oral representations are inadmissible, as varying the contract.[8] With the limitation that, while a party may in an action at law avoid the contract by proof of fraud, he cannot in such an action establish by parol evidence and recover on an agreement different from that expressed in the writing,[9] the rule admitting evidence of fraud applies in actions at law as well as in suits in equity.[10] An action of deceit based on fraud in the procurement of a contract not being an action to enforce the contract, parol evidence of the fraud is admissible notwithstanding that the contract is in writing.[11]

Only the victim of fraud can be permitted to

v. Milam, Civ.App., 223 S.W. 302—Landfried v. Milam, Civ.App., 214 S.W. 847—Detroit Automatic Scale Co. v. G. B. R. Smith Milling Co., Civ.App., 217 S.W. 198—American Law Book Co. v. Fulwiler, Civ. App., 219 S.W. 881.

Wash.—Producers' Grocery Co. v. Blackwell Motor Co., 212 P. 154, 155, 123 Wash. 144.

Binding force on principal of representations, declarations, and admissions of agent generally see Agency § 236.

In California

(1) In an early case as an exception to the rule that fraud in the inducement of a contract may be shown, it was declared that where the party seeking to rely on fraudulent representations of an agent had notice of the limitation on the agent's authority to make representations evidence thereof was inadmissible, and the principal was bound only by representations in written contract, provisions of which gave notice that agent's authority went no further.—Gridley v. Tilson, 262 P. 322, 202 Cal. 748.

(2) This doctrine was applied and expanded in a number of appellate court decisions.—Clancy v. Becker-Arbuckle-Wright Corporation, 29 P. 2d 868, 137 Cal.App. 43—W. J. Lachford Co. v. Southern California Gas Co., 13 P.2d 871, 125 Cal.App. 112—Title Guarantee & Trust Co. v. Campbell, 9 P.2d 265, 121 Cal.App. 763—Campbell v. Title Guarantee & Trust Co., 9 P.2d 264, 121 Cal.App. 374.

(3) But in a later supreme court case the doctrine of Gridley v. Tilson, supra was expressly limited and the appellate court cases cited above were overruled, it being held that one induced to enter into a contract by untrue material representations of the other party's agent may rescind it and recover from the principal the consideration paid, even though the principal was innocent and the party deceived had reason to know that the agent's statements were unauthorized.—Speck v. Wylie, 36 P.2d 618, 620, 1 Cal.2d 625.

In Mississippi

(1) Where sale contract was an offer of purchaser, sent to seller by seller's agent for acceptance, and contained representation that buyer was not relying on any statement or representation not contained therein, evidence of alleged fraudulent representations by agent was incompetent.—Berry v. McKay, 194 So. 299—J. B. Colt Co. v. Ryals, 186 So. 315—J. B. Colt Co. v. Harris, 171 So. 695, 177 Miss. 536—White v. Stewart, 145 So. 747, 166 Miss. 694—Natchez Pecan Marketing Ass'n v. Bramlett, 143 So. 429, 163 Miss. 596—Stevens v. Stanley, 121 So. 814, 153 Miss. 801—Junius Hart Piano House, Ltd., v. Stewart, 111 So. 106, 145 Miss. 488—J. B. Colt Co. v. McCullough, 105 So. 744, 141 Miss. 328—J. B. Colt Co. v. Odom, 101 So. 853, 136 Miss. 651.

(2) But statute respecting misrepresentations in sale of investment securities abrogates parol evidence rule to extent of permitting proof of misrepresentation, notwithstanding provisions in contract limiting powers of agents.—Bankers' Mortg. Co. v. State, 141 So. 335—Bankers' Mortg. Co. v. McMullen, 141 So. 331, 165 Miss. 382.

8. Colo.—Trujillo v. Wichita Farm Lighting Co., 14 P.2d 1009, 91 Colo. 307—Canon City Industrial Stores Co. v. McInerney, 208 P. 457, 71 Colo. 492.

N.Y.—Kreshover v. Berger, 116 N. Y.S. 20, 62 Misc. 613, reversed on other grounds 119 N.Y.S. 737, 135 App.Div. 27.

S.C.—Chapman v. Metropolitan Life Ins. Co., 173 S.E. 801, 806, 172 S.C. 250, quoting **Corpus Juris**—J. B. Colt Co. v. Kinard, 119 S.E. 581, 126 S.C. 205.

Tex.—Distributors Inv. Co. v. Patton, 110 S.W.2d 47, 130 Tex. 449, reversing, Civ.App., 83 S.W.2d 782—Southern Surety Co. v. Adams, 34 S.W.2d 789, 792, 119 Tex. 489, affirming, Civ.App., 278 S.W. 943, citing **Corpus Juris**—Wright v. Couch, Civ.App., 54 S.W.2d 207.

In Massachusetts

(1) Fraud which enters into making of a contract, as distinguished from that which is antecedent to it, cannot be excluded from reach of law by any phrase inserted in contract itself.—Butler v. Prussian, 147 N.E. 892, 252 Mass. 265.

(2) Applying this rule, parol evidence of fraud inducing the contract has been admitted, notwithstanding recital in contract.—Noack v. Standard Stores, 183 N.E. 54, 281 Mass. 53—Florimond Realty Co. v. Waye, 167 N.E. 635, 268 Mass. 475—Hashem v. Massachusetts Sec. Corporation, 150 N.E. 846, 255 Mass. 29.

(3) And evidence to identify subject matter of contract was rightly admitted, it being step in proving fraud whereby different motor was substituted for one which plaintiff was led to expect he was buying.—Butler v. Prussian, supra.

(4) But where party was not induced to sign contract by any misrepresentation as to its contents or meaning, he is assumed to have assented to all its provisions; and where it provided that it was made under the inducements and representations therein expressed, and no other, parol evidence of antecedent misrepresentations was not admissible.—De Pasquale v. Bradlee & McIntosh Co., 156 N.E. 37, 258 Mass. 483—Sullivan v. Roche, 153 N.E. 549, 257 Mass. 166—O'Meara v. Smyth, 137 N.E. 294, 243 Mass. 188.

(5) Fraud of purchasers of realty in representing that no broker was in transaction was held not merged in written contract.—Cheraska v. Ohanasian, 156 N.E. 715, 259 Mass. 341, 52 A.L.R. 1149.

9. Mont.—Biering v. Ringling, 252 P. 872, 78 Mont. 145.

S.C.—Chapman v. Metropolitan Life Ins. Co., 173 S.E. 801, 806, 172 S.C. 250, quoting **Corpus Juris.**

22 C.J. p 1217 note 69.

10. Ill.—Kilcoin v. Ortell, 135 N.E. 16, 302 Ill. 531.

N.H.—Lyman v. Kimball, 131 A. 690, 82 N.H. 232.

N.J.—Paruch v. Rasiewicz, 12 A.2d 141, 124 N.J.Law 356.

N.Y.—Sedgefield Holding Co. v. 440 West End Ave. Corporation, 239 N.Y.S. 178, 228 App.Div. 138.

S.C.—Chapman v. Metropolitan Life Ins. Co., 173 S.E. 801, 806, 172 S.C. 250, quoting **Corpus Juris.**

22 C.J. p 1217 note 70.

11. U.S.—Keeler v. Fred T. Ley & Co., C.C.A.Mass., 65 F.2d 499—Keeler v. Fred T. Ley & Co., C.C.A.

show such fraud by extrinsic evidence; one is estopped to show his own fraud to impeach a writing which is sought to be used against him.[12]

Records. Judicial[13] or official[14] records may, it has been held, be attacked by parol for fraud.

Private writings. Parol evidence has been received to show fraud in connection with assignments and transfers,[15] bills and notes,[16] and indorsements or transfers thereof,[17] and, likewise,

Mass., 49 F.2d 872—Fosgate v. Nocatee Fruit Co., D.C.Fla., 3 F.2d 606, affirmed, C.C.A., Nocatee Fruit Co. v. Fosgate, 12 F.2d 250—Pennok Oil Co. v. Roxana Petroleum Co. of Oklahoma, C.C.A.Okl., 289 F. 416.

Ala.—Creamery Package Mfg. Co. v. Fields, 180 So. 275, 235 Ala. 602—People's Auto Co. v. Staples, 143 So. 553, 225 Ala. 372.

Cal.—Berning v. Colodny & Colodny, 284 P. 496, 103 Cal.App. 188.

Conn.—Callahan v. Jursek, 124 A. 31, 100 Conn. 490.

Iowa.—Joseph v. Mangos, 185 N.W. 464, 192 Iowa 729—Stanhope v. Swafford, 45 N.W. 403, 80 Iowa 45—Porter v. Stone, 17 N.W. 654, 62 Iowa 442.

Kan.—Boxer v. Watchorn Oil & Gas Co., 243 P. 316, 120 Kan. 278.

Me.—Prince v. Brackett, Shaw & Lunt Co., 130 A. 509, 125 Me. 31.

Md.—Standard Motor Co. v. Peltzer, 128 A. 451, 147 Md. 509.

Mass.—Burns v. Dockray, 30 N.E. 551, 156 Mass. 135.

Minn.—Nelson v. Moore, 258 N.W. 828, 193 Minn. 455.

Miss.—Lundy v. Hazlett, 112 So. 591, 147 Miss. 808.

Mo.—Metropolitan Paving Co. v. Brown-Crummer Inv. Co., 274 S.W. 815, 309 Mo. 638.

N.H.—Coon v. Atwell, 46 N.H. 510.

N.Y.—Bennett v. Burch-Buell Motor Corporation, 224 N.Y.S. 666, 221 App.Div. 517.

Okl.—Mid-West Chevrolet Corporation v. Noah, 48 P.2d 283, 173 Okl. 198.

Or.—Shafer v. Ekstrand, 14 P.2d 287, 140 Or. 582.

R.I.—Bytovetski v. McDuff's Estate, 171 A. 923, 54 R.I. 207.

Tenn.—Smith v. Cozart, 2 Head 526.

Tex.—Brownlee v. Thrower, Civ. App., 300 S.W. 240, reversed on other grounds Thrower v. Brownlee, Com.App., 12 S.W.2d 184.

Wash.—Moser v. New Amsterdam Casualty Co., 279 P. 581, 153 Wash. 127—Bertelson v. Arthur, 244 P. 695, 138 Wash. 445.

Provision in contract that "It is mutually agreed that there are no promises, verbal understandings, or agreements of any kind pertaining to this order not clearly specified in it," did not preclude plaintiff from asserting in an action of deceit that the contract was induced by defendant's false oral representations.—John N. Benedict Co. v. McKeage, 195 N.Y.S. 228, 201 App.Div. 161.

12. W.Va.—Rosin Coal Land Co. v. Martin, 94 S.E. 358, 81 W.Va. 33.

13. Idaho.—Havird v. Boise County, 24 P. 542, 2 Idaho (Hasb.) 687.
22 C.J. p 1217 note 72.

14. Ill.—People's Gaslight & Coke Co. v. Stuckart, 121 N.E. 629, 286 Ill. 164.

Pa.—Commonwealth v. Adams, 97 Pa. Super. 510.

22 C.J. p 1217 note 73.

Legislative records

La.—State v. State Secretary, 9 So. 776, 43 La.Ann. 590.

15. N.Y.—Schickler v. Penrod Co., 227 N.Y.S. 331, 222 App.Div. 627.

Pa.—Dunbar v. Preston, 132 A. 707, 285 Pa. 502—In re Hollowell's Estate, 182 A. 779, 120 Pa.Super. 576.

Tex.—Haley v. Ennis, Civ.App., 274 S.W. 215.

Wis.—Graham v. Zellers, 238 N.W. 385, 205 Wis. 542, 78 A.L.R. 353.

22 C.J. p 1217 note 74.

16. Ark.—Hamburg Bank v. Jones, 151 S.W.2d 990.

Cal.—De Olazabal v. Mix, 74 P.2d 787, 24 Cal.App.2d 258.

Ga.—Sweat & Gaskins v. Williamson, 195 S.E. 408, 185 Ga. 495—Lester v. Bank of Adrian, 102 S.E. 846, 25 Ga.App. 116.

Iowa.—Schipfer v. Stone, 218 N.W. 568, 206 Iowa 328, rehearing denied and modified on other grounds 219 N.W. 933, 206 Iowa 328—Commercial Sav. Bank of Washington, Iowa v. Colthurst, 191 N.W. 787, 195 Iowa 1032, denying rehearing 188 N.W. 844, 195 Iowa 1032.

La.—Russell v. Douget, App., 171 So. 501.

Me.—Portland Morris Plan Bank v. Winckler, 143 A. 173, 127 Me. 306.

Mass.—Boston Five Cents Sav. Bank v. Brooks, 34 N.E.2d 435, 309 Mass. 52.

Mich.—Gobles Co-op. Ass'n v. Albright, 226 N.W. 876, 248 Mich. 68.

Minn.—Bearl v. Edison Finance Corporation, 288 N.W. 844, 206 Minn. 479.

Mo.—Phœnix Mut. Life Ins. Co. v. Goessling, App., 121 S.W.2d 182—Bunch v. Phillips, App., 79 S.W.2d 785—Ingle System Co. v. Coil, App., 211 S.W. 904.

N.J.—Westmont Nat. Bank v. Payne, 156 A. 652, 108 N.J.Law 133—First Nat. Bank v. Keown, 156 A. 3, 9 N.J.Misc. 892.

Okl.—Rohland v. International Harvester Co. of America, 76 P.2d 1078, 182 Okl. 200—Planters' Trading Co. v. Golden Grocery Co., 281 P. 771, 139 Okl. 246.

R.I.—E. S. Company v. Rocheleau, 161 A. 145, 52 R.I. 378—International Accountants Soc. v. Kiernan, 143 A. 858.

S.D.—Fuller v. James Murphy Harms Supply Co., 223 N.W. 713, 54 S.D. 492, followed in Hofeman v. James Murphy Harms Supply Co., 223 N.W. 719, 54 S.D. 507, Hofemann v. Anderson, 223 N.W. 719, 54 S.D. 506, Payne v. James Murphy Harms Supply Co., 223 N.W. 719, 54 S.D. 507, Payne v. Anderson, 223 N.W. 719, 54 S.D. 506, Warfield v. James Murphy Harms Supply Co., 223 N.W. 720, 54 S.D. 508, and Warfield v. Anderson, 223 N.W. 720, 54 S.D. 508—First State Bank of Lemmon v. McMahon, 185 N.W. 1014, 45 S.D. 76.

Tenn.—Samuel v. King, 14 S.W.2d 963, 158 Tenn. 546.

Tex.—McFarland v. Shaw, Com.App., 45 S.W.2d 193, reversing Shaw v. McFarland, Civ.App., 28 S.W.2d 563—King v. Wise, Com.App., 282 S.W. 570, reversing Wise v. Boyd, Civ.App., 267 S.W. 543—Strickler v. International Harvester Co., Civ.App., 141 S.W.2d 989, error dismissed, judgment correct—Farmers' State Bank of Florence v. Cottingham, Civ.App., 261 S.W. 426—Lee v. First Nat. Bank, Civ. App., 254 S.W. 394.

Utah.—Hanson v. Greenleaf, 218 P. 969, 62 Utah 168.

Va.—Continental Trust Co. v. Witt, 124 S.E. 265, 139 Va. 458.

Wash.—Puget Sound Telephone Co. v. Telechronometer Co. of America, 227 P. 867, 130 Wash. 468.

W.Va.—Attorneys' Nat. Clearing House v. Greever, 5 S.E.2d 621.

22 C.J. p 1217 note 75.

Evidence held inadmissible

Liability of signers of note is to be determined from note itself, and maker cannot, over proper objection, deny her liability to indorser's assignee who had paid note by parol evidence that indorser fraudulently represented that maker was not to be personally liable.—Fischman-Harris Realty Co. v. Kleine, Mo.App., 82 S.W.2d 605.

17. Ark.—Ellis v. First Nat. Bank, 260 S.W. 714, 163 Ark. 471.

Cal.—Carter v. Turner, 265 P. 870, 90 Cal.App. 193.

Ky.—Dorman v. Hook, 85 S.W.2d 1001, 260 Ky. 367.

Mich.—People's Wayne County Bank of Dearborn v. Harvey, 255 N.W. 436, 268 Mich. 47.

N.Y.—Wiesenthal v. Krane, 234 N.Y.S. 392, 226 App.Div. 82.

to show fraud in connection with bills of sale,[18] | bonds,[19] chattel mortgages,[20] contracts generally,[21]

Wis.—Monroe v. State Bank of Patch Grove, 193 N.W. 991, 181 Wis. 19, 35 A.L.R. 1115.
22 C.J. p 1218 note 76.

18. La.—Logan v. Walker, 94 So. 430, 152 La. 880.
Mich.—Picard v. McCormick, 11 Mich. 68.
R.I.—Barnett v. De Angelis, 133 A. 349.
Wash.—Bertelson v. Arthur, 244 P. 695, 138 Wash. 445.
22 C.J. p 1218 note 77.

19. Mass.—Blaney v. Rogers, 54 N.E. 561, 174 Mass. 277.
Pa.—McCulloch v. McKee, 16 Pa. 289.
Tex.—Union Deposit Co. v. Moseley, Civ.App., 75 S.W.2d 190, error dismissed.

20. Mass.—Kilkus v. Shakman, 150 N.E. 186, 254 Mass. 274.
Minn.—Bearl v. Edison Finance Corporation, 288 N.W. 844, 206 Minn. 479.
Tex.—Strickler v. International Harvester Co., Civ.App., 141 S.W.2d 989, error dismissed, judgment correct—Crockett v. Anselin, Civ.App., 132 S.W. 99.

21. U.S.—Globe Steel Abrasive Co. v. National Metal Abrasive Co., C.C.A.Ohio, 101 F.2d 489—Equitable Life Assur. Soc. of U. S. v. Johnson, C.C.A.Mich., 81 F.2d 543—Holt v. Quaker State Oil Refining Co., C.C.A.N.C., 67 F.2d 170—Gamble-Robinson Co. v. Buzzard, C.C.A.Iowa, 65 F.2d 950—Nonantum Inv. Co. v. Maryland Casualty Co., C.C.A.Mass., 56 F.2d 329—Danciger Oil & Refining Co. of Texas v. Ball, C.C.A.Tex., 54 F.2d 908—Neff & Fry Co. v. Ashmead, C.C.A.N.Y., 36 F.2d 771—Union Central Life Ins. Co. v. Deutser, D.C.Md., 13 F.Supp. 313, affirmed, Deutser v. Marlboro Shirt Company, C.C.A., 81 F.2d 139—A. W. Feeser, Inc. v. American Can Co., D.C.Md., 2 F.Supp. 561—U. S. v. Raine-Andrews Lumber Co., D.C. W.Va., 262 F. 787.
Ala.—Brenard Mfg. Co. v. Pearson, 106 So. 171, 213 Ala. 675—Edwards v. Crittenden, 104 So. 277, 213 Ala. 156—J. B. Colt Co. v. Price, 97 So. 696, 210 Ala. 189—Smith v. McDonald, 130 So. 516, 24 Ala.App. 88—Bozeman v. J. B. Colt Co., 95 So. 588, 19 Ala.App. 126.
Ariz.—L. C. James Motor Co. v. Wetmore, 286 P. 180, 36 Ariz. 382.
Ark.—Commercial Credit Co. v. Childs, 137 S.W.2d 260, 199 Ark. 1073, 128 A.L.R. 726.
Cal.—Crawford v. France, 27 P.2d 645, 219 Cal. 439—Alameda County Title Ins. Co. v. Panella, 24 P.2d 168, 218 Cal. 510—Ferguson v. Koch, 268 P. 343, 204 Cal. 342, 58 A.L.R. 1176—Hunt v. L. M. Field, Inc., 262 P. 730, 202 Cal. 701—Gridley v. Tilson, 262 P. 322, 202 Cal. 748—Mooney v. Cyriacks, 195 P. 922, 185 Cal. 70—Rothstein v. Janss Inv. Corporation, App., 113 P.2d 465—In re Kellogg, 107 P.2d 964, 41 Cal.App.2d 833—Wholesalers Board of Adjusters v. Norton, 57 P.2d 552, 13 Cal.App.2d 663—Lozier v. Janss Inv. Co., App., 29 P.2d 470—W. J. Lachford Co. v. Southern California Gas Co., 13 P.2d 871, 125 Cal.App. 112—Long v. Los Altos Country Club Properties, 9 P.2d 600, 122 Cal.App. 116—Peterson v. Wood, 7 P.2d 359, 119 Cal.App. 731—Heefner v. Citizens' Trust & Savings Bank, 278 P. 872, 99 Cal.App. 794—Wiberg v. Barnum, 278 P. 871, 99 Cal.App. 323—Mazuran v. Stefanich, 272 P. 772, 95 Cal.App. 327—Odson v. Swanson, 233 P. 354, 70 Cal.App. 279—Hageman v. Colombet, 198 P. 842, 52 Cal.App. 350—Floyd v. Tierra Grande Development Co., 197 P. 684, 51 Cal.App. 654.
D.C.—Smith v. O'Connor, 88 F.2d 749, 66 App.D.C. 367.
Ga.—Hixon v. Hinkle, 118 S.E. 874, 156 Ga. 341—Kimbrough v. Adams, App., 16 S.E.2d 96—Edge v. Alertox, Inc., 171 S.E. 181, 47 Ga.App. 598—C. J. Howard, Inc., v. C. V. Nalley & Co., 161 S.E. 380, 44 Ga.App. 311—Barron G. Collier, Inc., v. Bailey, 120 S.E. 427, 31 Ga.App. 197.
Ill.—Michuda v. Sanitary Dist. of Chicago, 27 N.E.2d 582, 305 Ill. App. 314.
Ind.—Burroughs v. Southern Colonization Co., 173 N.E. 716, 96 Ind. App. 93—Mt. Pleasant Coal Co. v. Watts, 151 N.E. 7, 91 Ind.App. 501—Tribune Co. v. Red Ball Transit Co., 151 N.E. 338, 84 Ind.App. 666, rehearing denied 151 N.E. 836, 84 Ind.App. 666.
Iowa.—Schmidt v. Twedt, 257 N.W. 325, 219 Iowa 128—Galva First Nat. Bank v. Reed, 215 N.W. 732, 205 Iowa 7—Good Roads Machinery Co., Ft. Wayne, Ind. v. Ott, 171 N.W. 721, 186 Iowa 908.
Kan.—Blankinship v. Porter, 47 P.2d 72, 142 Kan. 284—Mills v. Purdy, 45 P.2d 1049, 142 Kan. 133—Meyer v. Wilson, 293 P. 738, 131 Kan. 717—Logan v. Collinson, 220 P. 291, 114 Kan. 620.
Ky.—Senters v. Elkhorn & Jellico Coal Co., 145 S.W.2d 848, 284 Ky. 667—Goodin v. Page, 29 S.W.2d 581, 235 Ky. 54—Calloway v. Bryant, 263 S.W. 687, 204 Ky. 160.
La.—McTee & Co. v. Brown Funeral Home, App., 183 So. 558—Hill v. Maguire, 140 So. 169, 19 La.App. 798—Doll v. Thoele, 126 So. 522, 12 La.App. 570—Hazlehurst Oil Mill & Fertilizer Co. v. Fornea, 8 La. App. 766—Brenard Mfg. Co. v. Green, 8 La.App. 412.
Me.—Portland Morris Plan Bank v. Winckler, 143 A. 173, 127 Me. 306.
Mass.—Bates v. Southgate, 31 N.E.2d 551, 308 Mass. 170, 133 A.L.R. 1349—Harris v. Delco Products, 25 N.E.2d 740, 305 Mass. 362—Florimond Realty Co. v. Waye, 167 N.E. 635, 268 Mass. 475—Granlund v. Saraf, 160 N.E. 408, 263 Mass. 76—Hashem v. Massachusetts Sec. Corporation, 150 N.E. 846, 255 Mass. 29.
Mich.—Robinson v. Great Lakes College, 292 N.W. 701, 294 Mich. 192—Mieske v. Harmony Electric Co., 270 N.W. 216, 278 Mich. 61—Rosenblatt v. John F. Ivory Storage Co., 247 N.W. 733, 262 Mich. 513—Fox v. John F. Ivory Storage Co., 246 N.W. 147, 261 Mich. 358—Elbom v. Paysner, 196 N.W. 442, 225 Mich. 213—Bryan v. Houseman-Spitzley Corporation, 182 N.W. 111, 213 Mich. 236.
Minn.—National Equipment Corporaton v. Volden, 252 N.W. 444, 190 Minn. 596, rehearing denied 252 N.W. 835, 190 Minn. 596—Ganley Bros. v. Butler Bros. Bldg. Co., 212 N.W. 602, 170 Minn. 373, 56 A.L.R. 1—Hansen v. Daniel Hayes Co., 188 N.W. 317, 152 Minn. 222—Remington v. Savage, 182 N.W. 524, 148 Minn. 405—Roseberry v. Hart-Parr Co., 176 N.W. 175, 145 Minn. 142—Gasser v. Wall, 131 N.W. 850, 115 Minn. 59.
Miss.—Fornea v. Goodyear Yellow Pine Co., 178 So. 914, 181 Miss. 50—Pan-American Petroleum Corporation v. Woods, 153 So. 793, 169 Miss. 562—Henry v. W. T. Rawleigh Co., 120 So. 188, 152 Miss. 320.
Mo.—National Theatre Supply Co. v. Rigney, App., 130 S.W.2d 258—Fischman-Harris Realty Co. v. Kleine, App., 82 S.W.2d 605—Rice v. Lammers, App., 65 S.W.2d 151—Conroys, Inc., v. Brooks, App., 50 S.W.2d 708.
Neb.—Baxter v. Nebraska Bldg. & Inv. Co., 192 N.W. 235, 109 Neb. 748—Schuster v. North American Hotel Co., 186 N.W. 87, 106 Neb. 672, overruling moton for rehearing 184 N.W. 136, 106 Neb. 672.
N.J.—Timken Silent Automatic Corporation v. Vetrovec, 197 A. 265, 119 N.J.Law 500—Christie v. Lalor, 181 A. 312, 116 N.J.Law 23—Marsella v. Bloch, 127 A. 251, 101 N.J.Law 115, 2 N.J.Misc. 733—Easy Term Loan Co. v. Silberman, 125 A. 561, 100 N.J.Law 67—Margolis v. Pinnas, 124 A. 529, 99 N.J.Law 515, 1 N.J.Misc. 117—Downs v. Jersey Central Power & Light Co., 174 A. 887, 117 N.J.Eq. 138, affirming 170 A. 835, 115 N.J.Eq. 348—Gordon v. Schellhorn, 123 A. 549, 95 N.J.Eq. 563—Diamond Rubber Co. v. Feldstein, 166 A. 710, 11 N.J. Misc. 457, affirmed 171 A. 815, 112

contracts of carriage or shipment,[22] contracts of guaranty,[23] contracts of insurance,[24] contracts of sale,[25] releases, settlements, and, likewise, to show

N.J.Law 514—Mayher v. Brunner, 143 A. 695, 6 N.J.Misc. 1066—American Photo Player Co. v. Harriet Amusement Co., 129 A. 182, 3 N.J.Misc. 558.
N.Y.—Whipple v. Brown Bros. Co., 121 N.E. 748, 225 N.Y. 237, affirming 156 N.Y.S. 63, 170 App.Div. 531—Lee v. Industrial Laundry Mach. Co., 27 N.Y.S.2d 202, 261 App.Div. 741—Ragonese v. Joseph Harris Co., 12 N.Y.S.2d 413, 257 App.Div. 895—Sedgefield Holding Co. v. 440 West End Ave. Corporation, 239 N.Y.S. 178, 228 App.Div. 138—Hendricks v. Clements, 186 N.Y.S. 378, 195 App.Div. 144—Export & Import News Bureau v. Rosenthal, 188 N.Y.S. 846.
N.C.—F. L. Voliva Hardware Co. v. Kinion, 131 S.E. 579, 191 N.C. 218.
N.D.—Carufel v. Kounts, 232 N.W. 609, 60 N.D. 91—Dalheimer v. Lucia, 194 N.W. 925, 50 N.D. 78.
Ohio.—Zydel v. Clarkson, 163 N.E. 584, 29 Ohio App. 382.
Okl.—Alexander Hamilton Institute v. Wayne, 98 P.2d 37, 186 Okl. 358—Publishers Finance Co. v. Lovelace, 93 P.2d 748, 185 Okl. 322—Miller v. Troy Laundry Machinery Co., 62 P.2d 975, 178 Okl. 313—Societe Titanor v. Sherman Machine & Iron Works, 45 P.2d 144, 172 Okl. 213—Rollison v. Muir, 21 P.2d 1062, 163 Okl. 266—Smith v. Ferguson, 221 P. 447, 96 Okl. 150—Seneca Co. v. Darnell, 197 P. 453, 81 Okl. 213.
Or.—Outcault Advertising Co. v. Jones, 239 P. 1113, 119 Or. 214.
Pa.—Feuerstein v. New Century Realty Co., 156 A. 110, 304 Pa. 271—In re Cridge's Estate, 137 A. 455, 289 Pa. 331—Pellegrini v. Radiant Soc., 89 Pittsb.Leg.J. 367.
R.I.—E. S. Company v. Rocheleau, 161 A. 145, 52 R.I. 378—Lovejoy v. MacKinnon, 159 A. 736, 52 R.I. 203.
S.C.—J. B. Colt Co. v. Brown, 110 S.E. 402, 118 S.C. 368.
S.D.—National Cash Register Co. v. Mahaney, 205 N.W. 710, 49 S.D. 1.
Tenn.—Torbett v. Jones, 86 S.W.2d 898, 19 Tenn.App. 307.
Tex.—Browning Engineering Co. v. Willett, Com.App., 228 S.W. 151, affirming Willett v. Browning Engineering Co., Civ.App., 186 S.W. 352—Cox v. Shannon, Civ.App., 141 S.W.2d 412, error dismissed, judgment correct—Texas Co. v. Schram, Civ.App., 93 S.W.2d 544—Free Sewing Mach. Co. v. S. T. Atkin Furniture Co., Civ.App., 71 S.W.2d 604—Hansen v. Holland, Civ.App., 65 S.W.2d 510, error refused—Pollock Paper & Box Co. v. Southwest Box Co., Civ.App., 57 S.W.2d 231—Price v. D'Yarmett, Civ.App., 27 S.W.2d 616, error refused—Marion Mach. Foundry & Supply Co. v. R. T. Harris Interests, Civ.App., 26 S.W.2d 449—J. B. Colt Co. v. Wheeler, Civ.App., 12 S.W.2d 1102, error dismissed, Com.App., 23 S.W.2d 299—Middleton v. Brawley, Civ.App., 12 S.W.2d 257—Shepherd Laundries Co. v. Griffin, Civ.App., 285 S.W. 683—Wright v. Lynskey, Civ.App., 285 S.W. 655—McCaskey Register Co. v. Mann, Civ.App., 283 S.W. 544—Wolff v. Cohen, Civ.App., 281 S.W. 646—Advance-Rumely Thresher Co. v. Higgins, Civ.App., 279 S.W. 531—Nichols v. Lorenz, Civ.App., 237 S.W. 629—Acme Tire & Vulcanizing Co. v. National Cash Register Co., Civ.App., 233 S.W. 158—Standard Fire Ins. Co. of Hartford, Conn. v. Buckingham, Civ.App., 211 S.W. 531—Martin v. Iroquois Mfg. Co., Civ.App., 207 S.W. 569—Conn v. Rosamond, Civ.App., 161 S.W. 73, error refused.
Vt.—Pellon v. Connecticut General Life Ins. Co., 168 A. 701, 105 Vt. 508—Holbrook Grocery Co. v. Armstrong, 122 A. 458, 97 Vt. 197.
Va.—Stevens v. Clintwood Drug Co., 154 S.E. 515, 155 Va. 353.
Wash.—Mono Service Co. v. Kurtz, 17 P.2d 29, 170 Wash. 539—Trotter v. Williams, 8 P.2d 980, 167 Wash. 151—Svarz v. Dunlap, 235 P. 801, 134 Wash. 555—Flint v. Owl Land & Investment Co., 210 P. 811, 122 Wash. 401.
W.Va.—Corns-Thomas Engineering & Construction Co. v. McDowell County Court, 115 S.E. 462, 92 W.Va. 368.
Wis.—Creasy Corporation v. Dunning, 196 N.W. 775, 182 Wis. 388.
22 C.J. p 1218 note 80.

Statutory rule that the execution of a written contract supersedes all oral negotiations or stipulations preceding or accompanying the contract was designed to prevent fraud, not to promote or protect it.—Bowersock v. Barker, 96 P.2d 18, 186 Okl. 48, 127 A.L.R. 130.

Fraud in procurement of prior contract

Under a plea setting up the defense of fraud, it may be shown that the fraud complained of occurred in the procurement of a contract for which the contract sued on was a substitute or of which it was a modification.—Clark v. Harmer, 9 App.D.C. 1.

22. Ark.—Arkansas Western Ry. Co. v. Robson, 285 S.W. 372, 171 Ark. 698.

Charter party

U.S.—Barreda v. Silsbee, Md., 21 How. 146, 16 L.Ed. 86.
Mich.—Lyon v Tiffany, 42 N.W. 1098, 76 Mich. 158.
N.Y.—Johnson v. Miln, 14 Wend. 195.

Limitation of liability

While in general a bill of lading is conclusive as to the rate charged for transportation, it may be shown by parol that as a matter of fact the representation that the goods are being carried at a reduced rate in consideration of a limitation of liability is false.—McFadden Missouri Pac. R. Co., 4 S.W. 689, 92 Mo. 343, 1 Am.S.R. 721.

23. Ala.—Townsend v. Cowles, 31 Ala. 428.

24. U.S.—Obartuch v. Security Mut. Life Ins. Co., C.C.A.Ill., 114 F.2d 873, certiorari denied 61 S.Ct. 730, 312 U.S. 696.
La.—Willhite v. Hartford Fire Ins. Co., 8 La.App. 538—Fisette v. Mutual Life Ins. Co., 7 La.App. 226.
N.Y.—Royal Indemnity Co. v. Preferred Accident Ins. Co. of New York, 276 N.Y.S. 313, 243 App.Div. 297, affirmed 198 N.E. 407, 268 N.Y. 566, reargument denied 200 N.E. 52, 269 N.Y. 674.
22 C.J. p 1218 note 82.

25. Ala.—Alabama Power Co. v. Pierre, 183 So. 665, 236 Ala. 521—Cardinal Hat Co. v. Lande, 153 So. 196, 228 Ala. 176—National Supply Co. v. Southern Creamery Co., 140 So. 590, 224 Ala. 507—Northwestern Rug Mfg. Co. v. Russellville Furniture & Mercantile Co., 116 So. 314, 22 Ala.App. 404.
Ark.—Peebles Garage v. Downey, 111 S.W.2d 454, 195 Ark. 31—Smith v. Leeper, 75 S.W.2d 1012, 189 Ark. 1051—Singer Sewing Mach. Co. v. Cole, 63 S.W.2d 977, 187 Ark. 1017—Shaver v. Clark County Bank, 31 S.W.2d 132, 182 Ark. 188—Galion Iron Works & Mfg. Co. v. Otto V. Martin Const. Co., 3 S.W.2d 310, 176 Ark. 448—Northwestern Rug Mfg. Co. v. Leftwich Hardware & Furniture Co., 2 S.W.2d 1109, 176 Ark. 212—Pictorial Review Co. v. Rosen, 285 S.W. 385, 171 Ark. 719—Tenenbaum v. Gerhard B. Lambert Co., 215 S.W. 596, 140 Ark. 231, 8 A.L.R. 745—Harrell v. Hill, 19 Ark. 102, 68 Am.D. 202.
Cal.—Ferguson v. Koch, 268 P. 342, 204 Cal. 342, 58 A.L.R. 1176—Mooney v. Cyriacks, 195 P. 922, 185 Cal. 70—Boulevard Land Co. v. King, 13 P.2d 864, 125 Cal.App. 224—Pacific Finance Corporation v. McGowan, 287 P. 139, 105 Cal.App. 216—American Soda Fountain Co. v. Martin, 279 P. 680, 100 Cal.App. 43—J. B. Colt Co. v. Freitas, 244 P. 916, 76 Cal.App. 278—Bechtold v. Coney, 183 P. 841, 42 Cal.App. 563.
Conn.—Gustafson v. Rustemeyer, 39 A. 104, 70 Conn. 125, 66 Am.S.R. 92, 39 L.R.A. 644.
Ill.—Security Trust & Savings Bank

fraud in connection with discharges,[26] covenants,[27] deeds of conveyance,[28] and in connection with

of Charles City, Iowa v. Telford, 211 Ill.App. 149.
Ind.—Equitable Trust Co. of New London v. Milligan, 65 N.E. 1044, 31 Ind.App. 20.
Kan.—Boxer v. Watchorn Oil & Gas Co., 243 P. 316, 120 Kan. 278—Kowing v. Reynolds, 214 P. 427, 113 Kan. 317—Fisher Mach. Works Co. v. Singletary, 179 P. 328, 104 Kan. 460.
La.—Roby Motors Co. v. Price, App., 173 So. 793.
Mass.—New England Foundation Co. v. Elliott A. Watrous, Inc., 27 N.E. 2d 756, 306 Mass. 177.
Mich.—Delta Asbestos Co. v. Sanders, 243 N.W. 16, 259 Mich. 317—Milwaukee Tank Works v. East Jordan Co-op. Ass'n, 218 N.W. 650, 242 Mich. 266—Rodgers v. Simons Sales Co., 199 N.W. 683, 227 Mich. 695—J. B. Colt Co. v. Cousino, 198 N.W. 222, 226 Mich. 518—J. B. Colt Co. v. Reade, 190 N.W. 672, 221 Mich. 92.
Mo.—Bunch v. Paxton, Duke & Bradley, App., 295 S.W. 474—Holden v. Wells, App., 290 S.W. 83—Kite v. Pittman, App., 278 S.W. 830—Bixler v. Wagster, App., 256 S.W. 520.
Mont.—Advance-Rumely Thresher Co. v. Wenholz, 258 P. 1085, 80 Mont. 82.
N.H.—Coon v. Atwell, 46 N.H. 510.
N.Y.—Thomas v. Beebe, 25 N.Y. 244—Bareham & McFarland v. Kane, 240 N.Y.S. 123, 228 App.Div. 396—Sommer v. Ehrgott, 184 N.Y.S. 802, 193 App.Div. 663.
N.D.—Gussner v. R. Miller & H. Shuper, 176 N.W. 359, 44 N.D. 587.
Or.—Klinge v. Farris, 268 P. 748, 128 Or. 142, affirmed 273 P. 954, 128 Or. 142.
Pa.—Ohlbaum v. Mayer, 131 A. 858, 285 Pa. 260—Frederick v. Campbell, 14 Serg. & R. 293—Frederick v. Campbell, 13 Serg. & R. 136—Vereb v. Yellow Truck & Coach Co., 89 Pittsb.Leg.J. 290.
S.C.—General Motors Acceptance Corporation v. Whitehead, 161 S.E. 494, 163 S.C. 236—Southern Iron & Equipment Co. v. Bamberg, E. & W. Ry. Co., 149 S.E. 271, 151 S.C. 506.
Tex.—Southern Surety Co. v. Adams, 34 S.W.2d 789, 119 Tex. 489, affirming, Civ.App., 278 S.W. 943—Edward Thompson Co. v. Sawyers, 234 S.W. 873, 111 Tex. 374—Rich v. Ferguson, 45 Tex. 396—Bennett v. Pape, Civ.App., 152 S.W.2d 486, error dismissed, judgment correct—Ten-Cate v. First Nat. Bank, Civ. App., 52 S.W.2d 323—Columbia Weighing Mach. Co. v. McElroy's Drug Store, Civ.App., 299 S.W. 351—Commercial Jewelry Co. v. Braczyk, Civ.App., 277 S.W. 754—Avery Co. of Texas v. Harrison Co., Civ. App., 254 S.W. 1015, reversed on other grounds 267 S.W. 254—Acme Tire & Vulcanizing Co. v. National Cash Register Co., Civ.App., 233 S. W. 158—American Law Book Co. v. Fulwiler, Civ.App., 219 S.W. 881—Wuest v. Moehrig, 57 S.W. 864, 24 Tex.Civ.App. 124—Franco-Texan Land Co. v. Simpson, 20 S.W. 953, 1 Tex.Civ.App. 600.
Va.—Transit Corporation of Norfolk v. Four Wheel Drive Auto Co., 145 S.E. 331, 151 Va. 865.
Wash.—Titan Truck Co. v. Richardson, 210 P. 790, 122 Wash. 452—H. E. Gleason Co. v. Carman, 187 P. 329, 109 Wash. 536.
W.Va.—Miles F. Bixler Co. v. Dunsmore, 156 S.E. 72, 109 W.Va. 727—Depue v. Sergent, 21 W.Va. 326—Crislip v. Cain, 19 W.Va. 438.
Wis.—Luedke v. Pauly Motor Truck Co., 195 N.W. 853, 182 Wis. 346—Jones v. Brandt, 181 N.W. 813, 173 Wis. 539.
14 C.J. p 713 note 4—22 C.J. p 1124 note 22, p 1218 note 83—42 C.J. p 778 note 1, p 779 note 4.

Contracts for exchange of lands
Cal.—Morey v. Bovee, 25 P.2d 2, 218 Cal. 780—Darrow v. Houlihan, 272 P. 1049, 205 Cal. 771—Kleist v. Priem, 196 P. 72, 51 Cal.App. 32.
Mont.—Petit v. Sinclier, 163 P. 467, 53 Mont. 317.
Tex.—Price v. D'Yarmett, Civ.App., 27 S.W.2d 616, error refused—Whitehead v. Reiger, Civ.App., 282 S.W. 651, affirmed, Com.App., 6 S. W.2d 745.
Wyo.—Baylies v. Vanden Boom, 278 P. 551, 40 Wyo. 411, 70 A.L.R. 924.

Goods sold "as is"
(1) That goods were sold "as is" was held not to preclude purchaser's right to show circumstances existing and conversations had before execution of agreement.
Mass.—Connelly v. Fellsway Motor Mart, 170 N.E. 467, 270 Mass. 386—Reinherz v. American Piano Co., 150 N.E. 216, 254 Mass. 411.
Mich.—Hanson v. Fletcher Auto Sales Co., 214 N.W. 187, 239 Mich. 118.
(2) However, it has been held that where a motor vehicle is sold "as is" under a written contract reciting that all promises, verbal understandings, and agreements of any kind not therein set out are expressly waived, the purchaser cannot claim any right of recovery for false representations made by way of inducement.—Munn v. Earl C. Anthony, Inc., 171 P. 1082, 36 Cal.App. 312.

Contract waiving defects
That a contract contains a stipulation in effect that one of the parties could waive any defects or objections to the title of the property which the other agreed to convey to them, does not preclude a recovery by them if the entire contract was procured by fraudulent representations.—Hoyt v. First Nat. Bank, Tex. Civ.App., 247 S.W. 637, affirmed Freshwater v. Hoyt, Com.App., 259 S.W. 923.

26. U.S.—Lion Oil Refining Co. v. Albritton, C.C.A.Ark., 21 F.2d 280.
Ark.—Standard Oil Co. of Louisiana v. Richerson, 67 S.W.2d 1003, 188 Ark. 882.
Cal.—Martin v. Sugarman, 21 P.2d 428, 218 Cal. 17.
Fla.—Roper v. Florida Public Utilities Co., 179 So. 904, 131 Fla. 709.
Kan.—Smith v. St. L. & S. F R. Co., 148 P. 759, 95 Kan. 451.
Mich.—Erkiletian v. Devletian, 299 N.W. 821, 299 Mich. 95.
N.D.—Minneapolis Threshing Mach. Co. v. Huncovsky, 202 N.W. 280, 282, 52 N.D. 112, citing **Corpus Juris.**
Tex.—Texas & N. O. R. Co. v. Thompson, Civ.App., 1 S.W.2d 938, affirmed, Com.App., 12 S.W.2d 963.
22 C.J. p 1219 note 84.

27. Mass.—Leland v. Stone, 10 Mass. 459.
15 C.J. p 1312 note 12.

28. U.S.—Keeler v. Fred T. Ley & Co., C.C.A.Mass., 49 F.2d 872—Currie v. Matson, D.C.La., 33 F.Supp. 454.
Cal.—Fernald v. Lawsten, 79 P.2d 742, 26 Cal.App.2d 552—Jarvis v. Singleton, 18 P.2d 382, 129 Cal. App. 250.
Ga.—Baker County Power Co. v. Adkins, 149 S.E. 910, 169 Ga. 187—Berry v. Royal, 110 S.E. 167, 152 Ga. 425.
La.—Reid v. Phillips, 148 So. 690, 177 La. 497—Franks v. Davis Bros. Lumber Co., 84 So. 101, 146 La. 803—Walldorf v. Ciolino, 127 So. 445, 13 La.App. 646—Armand v. Armand, 8 La.App. 810.
Mich.—Robinson v. Great Lakes College, 292 N.W. 701, 294 Mich. 192.
Miss.—State Highway Commission v. Powell, 185 So. 589, 184 Miss. 266.
Mo.—Newmeyer v. Williams, 225 S. W. 109, 205 Mo.App. 460.
Pa.—Pierce v. Pierce, 12 Pa.Dist. & Co. 374, 26 Sch.Leg.Rec. 187.
S.C.—W. S. Gray Cotton Mills v. Spartanburg County Mills, 137 S.E. 684, 139 S.C. 223.
Tex.—Ray v. Barrington, Civ.App., 297 S.W. 781—Biggs v. Doak, Civ. App., 259 S.W. 665, second motion overruled 260 S.W. 882—Walker v. Ames, Civ.App., 229 S.W. 365, dismissed for want of jurisdiction.
Va.—Strickland v. Ayers, 165 S.E. 387, 159 Va. 311.
W.Va.—Stump v. Hite, 102 S.E. 926, 86 W.Va. 233.
22 C.J. p 1219 note 85.

Subsequent misrepresentations
Proof of oral misrepresentations of

leases,[29] receipts,[30] mortgages,[31] and subscriptions to corporate stock.[32]

b. Intention to Defraud Third Persons

The authorities are in conflict as to the admissibility of parol evidence on behalf of a party to the instrument to show an intent to defraud a third person, but it seems that one not a party to the instrument may rely on parol evidence to show an intent to defraud him.

It is usually held not permissible for one party to a writing, in an action against the other party, to show by parol evidence that at the time it was executed it was agreed to be a mere sham and made only for the purpose of deceiving the creditors of one of the parties,[33] or other third persons,[34] but there is also authority for the view that such evidence may be received.[35] A creditor suing to have a debtor's sale of his property declared simulated and void may rely on parol evidence.[36]

c. Necessity for Pleading and Proving Fraud

In order to permit the introduction of parol evidence of fraud it is generally held necessary to plead facts showing fraud, although it has been held that fraud may be proved under the general issue.

It is usually held necessary, in order to permit the introduction of parol evidence of fraud, that fraud should be alleged in the pleadings;[37] although it has also been held that fraud may be proved un-

vendor subsequent to execution of deed is relevant and admissible as tending to show probability of testimony as to similar representations prior to execution of deed.—Newton v. Middleton, 127 A. 580, 3 N.J.Misc. 157.

29. Iowa.—Sisson v. Kaper, 75 N.W. 490, 105 Iowa 599.
La.—Rome v. New River Lodge No. 402, F. & A. M., App., 197 So. 174.
Neb.—Nittler-Rhump v. Jones, 199 N.W. 542, 112 Neb. 238.
N.Y.—Kulerban Holding Corporation v. Blauner, 190 N.Y.S. 484.
Pa.—Feuerstein v. New Century Realty Co., 156 A. 110, 304 Pa. 271—Wolfe v. Arrott, 1 A. 333, 109 Pa. 473, 16 Wkly.N.C. 565—Christie v. Blakeley, 15 A. 874, 2 Mon. 118.
Wash.—Hobson v. Union Oil Co. of California, 59 P.2d 929, 187 Wash. 1.
22 C.J. p 1219 note 86.

30. Iowa.—Coe v. Moline Power Farming Corporation, 202 N.W. 265.
N.J.—Husted v. Sugarman, 150 A. 417, 106 N.J.Law 365.
N.C.—Jenkins v. Wood, 160 S.E. 488, 201 N.C. 460.
Pa.—Letvin v. Phœnix Ins. Co. of Hartford, Conn., 91 Pa.Super. 422.
22 C.J. p 1219 note 88.

31. U.S.—Minnesota Mut. Inv. Co. v. McGirr, C.C.A.Colo., 263 F. 847.
Cal.—Fleury v. Ramacciotti, 67 P.2d 339, 8 Cal.2d 660.
Fla.—Hartsfield v. Williams, 200 So. 220.
Ky.—Dwiggins v. Howard, 57 S.W.2d 649, 247 Ky. 746.
Mass.—Boston Five Cents Sav. Bank v. Brooks, 34 N.E.2d 435, 309 Mass. 52.
Pa.—Aronson v. Mackey, 85 Pa.Super. 108.
Va.—Waller v. Eanes' Adm'r, 157 S.E. 721, 156 Va. 389.
22 C.J. p 1134 note 3 [a], p 1219 note 87.

32. Ill.—Steven v. Combination Fountain Co., 231 Ill.App. 360.
Iowa.—Sioux City Tire & Mfg Co. v. Harris, 190 N.W. 142.
Mich.—Gobles Co-op. Ass'n v. Albright, 226 N.W. 876, 248 Mich. 68—Plate v. Detroit Fidelity & Surety Co., 201 N.W. 459, 229 Mich. 489—Plate v. Detroit Fidelity & Surety Co., 201 N.W. 457, 229 Mich. 482.
Mo.—Buckman v. Bankers' Mortg. Co., App., 263 S.W. 1046, 1053, 1054.
Neb.—Griffin v. Bankers' Realty Inv. Co., 181 N.W. 169, 105 Neb. 419.
N.J.—Tams v. Abrams Ramos & Co., 185 A. 521, 120 N.J.Eq. 253.
N.Y.—White v. Hiawatha Silver Black Fox Corporation, 206 N.Y.S. 847, 123 Misc. 868.
Ohio.—Zilliox v. City View Apartment & Storage Co., 153 N.E. 183, 20 Ohio App. 156.
Utah.—Penn Star Mining Co. v. Lyman, 231 P. 107, 64 Utah 343.
14 C.J. p 713 note 4—22 C.J. p 1219 note 89.

33. La.—Barrow v. Grant, 41 So. 220, 116 La. 952.
Vt.—Conner v. Carpenter, 28 Vt. 237.

34. Minn.—Graham v. Savage, 126 N.W. 394, 110 Minn. 510, 136 Am. S.R. 527, 19 Ann.Cas. 1022.
Vt.—Kinnear & Gager Mfg. Co. v. Miner, 92 A. 459, 88 Vt. 324.
22 C.J. p 1220 note 91.

35. Neb.—Coffman v. Malone, 154 N.W. 726, 98 Neb. 819, L.R.A.1917B 258.
22 C.J. p 1220 note 92.

36. La.—Ideal Savings & Homestead Ass'n v. Gould, 112 So. 40, 163 La. 442.

37. Ky.—Metropolitan Life Ins. Co. v. Trunick's Adm'r, 16 S.W.2d 759, 229 Ky. 173—Lincoln v. Burbank, 290 S.W. 1081, 218 Ky. 89—James v. Stokes, 261 S.W. 868, 203 Ky. 127.
La.—Harnischfeger Sale Corporation v. Sternberg Co., 154 So. 10, 179 La. 317—Guillory v. Meyers, App., 149 So. 260—Diaz v. Killeen, 3 La. App. 370.
Mo.—Willoughby v. Brandes, 297 S.W. 54, 317 Mo. 544—Humana Co. v. Hughes, App., 213 S.W. 515.
N.J.—American Photo Player Co. v. Harriet Amusement Co., 129 A. 182, 3 N.J.Misc. 558.
Pa.—Federal Sales Co. of Philadelphia v. Farrell, 107 A. 668, 264 Pa. 149—Dinch v. Workman, 84 Pa. Super. 39.
Tex.—Great Nat. Life Ins. Co. v. Presley, Civ.App., 129 S.W.2d 730, error dismissed—Horton v. Bolding, Civ.App., 67 S.W.2d 435, error dismissed—Keystone Pipe & Supply Co. of Texas v. Kleeden, Civ. App., 299 S.W. 671.
W.Va.—Attorneys' Nat. Clearing House v. Greever, 5 S.E.2d 621.
22 C.J. p 1220 note 93.

Allegations held sufficient
Ky.—Haber v. Woods, 132 S.W.2d 944, 280 Ky. 287.
La.—Bell v. Leiendecker, 174 So. 89, 187 La. 1, reversing App., 170 So. 386—Hazlehurst Oil Mill & Fertilizer Co. v. Fornea, 8 La.App. 766.
Or.—First Nat. Bank v. Anderson, 228 P. 929, 112 Or. 167.
Tenn.—Samuel v. King, 14 S.W.2d 963, 158 Tenn. 546.
Tex.—Holland v. Brown, Civ.App., 66 S.W.2d 1095, error refused—Hunter Milling Co. v. Satterwhite, Civ.App., 60 S.W.2d 316—Leonard v. Jackson, Civ.App., 19 S.W.2d 800.

Allegations held insufficient
Ga.—Slaten v. College Park Cemetery Co., 193 S.E. 872, 185 Ga. 27—Ford v. Serenado Mfg. Co., 109 S.E. 415, 27 Ga.App. 535.
Tex.—Smith v. Hampton, Civ.App., 42 S.W.2d 466.

Prayer for reformation
Proof of fraud by which portions of contract were omitted is inadmissible without prayer for reformation of contract.—Stevens v. Chatfield, 18 S.W.2d 1006, 230 Ky. 194.

der the general issue,[38] or general denial,[39] and that where an instrument is pleaded in defense or read in evidence on the trial under a general denial, as the foundation of or in support of a defense in an action at law, plaintiff has the same right to show that it was obtained from him by fraud or that the particular clause relied on was inserted fraudulently as he would have if it were the subject of a formal issue.[40] Only a statement of facts showing fraud need be alleged;[41] it is not necessary to allege fraud in direct terms.[42] Thus it is not necessary to allege fraud when the facts are such that the law will impute it.[43] Where fraud or mistake is alleged and proved, it is then proper to admit testimony to show the real agreement between the parties, but it is not proper, simply on the allegation of fraud or mistake, and without proof to establish the averment, to permit parties to offer parol evidence to contradict the writing which purports to contain the contract between them.[44]

d. Purpose for Which Evidence Considered

Parol evidence admitted to prove fraud can be considered only to defeat the instrument, and not to control or vary the terms thereof.

Parol evidence admitted and admissible only for the purpose of proving fraud in a written agreement cannot be legally used to control or vary the terms of such agreement,[45] that is to say, if the evidence is insufficient to defeat the instrument, it cannot be considered for any other purpose.[46] Thus the evidence must tend to establish some independent fact or representation, some fraud in the procurement of the instrument, or some breach of confidence concerning its use, and not a promise directly at variance with the promise of the writing.[47]

§ 980. —— Forgery

Parol evidence is admissible to prove a forgery.

Parol evidence is always admissible to show that an instrument introduced in evidence is a forgery.[48]

§ 981. —— Duress

Parol evidence is admissible to defeat an instrument by showing duress.

Parol evidence is admissible to defeat a written instrument by showing that it was executed under duress.[49]

38. Del.—Thomas v. Grise, 1 Pennew. 381, 41 A. 883.
Evidence admissible under pleadings generally see the C.J.S. title Pleading §§ 524–530, also 49 C.J. p 791 note 15—p 804 note 1.

39. Mo.—Wissmann v. Pearline, App., 135 S.W.2d 1.

40. N.Y.—Chambovet v. Cagney, 35 N.Y.Super. 474.

41. La.—Hill v. Maguire, 140 So. 169, 19 La.App. 798.
Tex.—Oil Well Supply Co. v. Burk-Waggoner Oil Co., Civ.App., 261 S.W. 830.

42. La.—Hill v. Maguire, 140 So. 169, 19 La.App. 798.
S.C.—W. S. Gray Cotton Mills v. Spartanburg County Mills, 137 S.E. 684, 139 S.C. 223.

43. Ky.—Garrison v. Hansford, 72 S.W.2d 468, 254 Ky. 768.

44. Mo.—Guess v. Russell Bros. Clothing Co., App., 231 S.W. 1015.
Pa.—First Nat. Bank v. Sagerson, 129 A. 333, 283 Pa. 406.
Tex.—Keystone Pipe & Supply Co. of Texas v. Kleeden, Civ.App., 299 S.W. 671—Burchill v. Hermsmeyer, Civ.App., 212 S.W. 767.
22 C.J. p 1220 note 96.

Evidence held insufficient to invoke rule as to admissibility of parol evidence where writing was procured by fraud or misrepresentation.
Ala.—Edwards v. Crittenden, 104 So. 277, 213 Ala. 156.
Mo.—Scott v. Tanner, App., 208 S.W. 264.
Tenn.—Southern Tractor Co. v. Brown Constructing Co., 98 S.W. 2d 1082, 20 Tenn.App. 332.

What must be shown

To permit a party to a written contract to go behind the writing, he must show fraud in the procurement of the contract practiced by the other parties, and ordinary care and prudence exercised by himself.—Hall v. Kansas City Southern Ry. Co., Mo.App., 209 S.W. 582.

45. U.S.—A. W. Feeser, Inc., v. American Can Co., D.C.Md., 2 F. Supp. 561, 566, citing **Corpus Juris.**
Ga.—Cunningham v. Huson Ice & Coal Co., 105 S.E. 860, 26 Ga.App. 302.
La.—Reimers v. Hebert, 7 La.App. 56.
Mo.—Fischman-Harris Realty Co. v. Kleine, App., 82 S.W.2d 605.
N.Y.—Madison Tire & Rubber Co. v. Malcolm Tire Co., 205 N.Y.S. 355, 123 Misc. 425.
22 C.J. p 1220 note 97.

Evidence held inadmissible

(1) Evidence of representations to subscriber to syndicate that company's preferred stock was subscribed and subscriber would receive stock for money already paid.—Orange County Co. v. Appleton, 169 N.E. 783, 270 Mass. 123.

(2) In purchasers' action for rescission of contract to convey land and water rights, where vendors were not in a position to convey the water rights, testimony as to fraud and misrepresentations by vendor.—French v. C. D. & E. Inv. Co., 195 P. 521, 114 Wash. 416.

46. Iowa.—Blumer v. Schmidt, 146 N.W. 751, 164 Iowa 682.

Fraud in filling order

In action for cancellation of notes given for fertilizer on ground that maker had purchased tobacco fertilizer and was sent cotton and corn fertilizer, parol evidence was inadmissible to show that contract had been fraudulently filled in as order for cotton and corn fertilizer.—Winstead v. Acme Mfg. Co., 176 S.E. 304, 207 N.C. 110.

47. Cal.—Bank of America Nat. Trust & Savings Ass'n v. Pendergrass, 48 P.2d 659, 4 Cal.2d 258.

48. Ark.—New Home Sewing Mach. Co. v. Westmoreland, 38 S.W.2d 314, 183 Ark. 769.
22 C.J. p 1215 note 64—53 C.J. p 589, note 43.

49. Ga.—Philips v. Philips, 162 S.E. 672, 174 Ga. 413, followed in 162 S.E. 675, 174 Ga. 420.
Idaho.—Van Meter v. Zumwalt, 206 P. 507, 35 Idaho 235.
La.—Harnischfeger Sale Corporation v. Sternberg Co., 154 So. 10, 179 La. 317.
Mich.—Erkiletian v. Devletian, 299 N.W. 821, 299 Mich. 95.
N.Y.—Berg v. Hoffman, 9 N.E.2d 806, 275 N.Y. 132, reversing 292 N.Y.S. 721, 249 App.Div. 913—Brulatour, Inc., v. Garsson, 242 N.Y.S. 583, 229 App.Div. 466.
Ohio.—Zydel v. Clarkson, 163 N.E. 584, 29 Ohio App. 382.

§ 982. —— Undue Influence

Parol evidence is admissible to show that the execution of an instrument was procured through undue influence.

Parol evidence may be admitted for the purpose of showing that the execution of a conveyance, will, or other instrument was procured through the exercise of undue influence.[50]

§ 983. —— Illegality

Parol evidence is admissible to show that a written instrument is tainted with illegality.

The rule which forbids the introduction of parol evidence to contradict, add to, or vary a written instrument does not extend to evidence offered to show that the contract was made in furtherance of objects forbidden by statute, by the common law, or by the general policy of the law;[51] and this is true, even though the writing expressly provides that nothing but itself shall be considered.[52] This rule is a necessary one, for otherwise the most nefarious transactions might be protected by written instruments on the face of which no vice is apparent.[53] In accordance with the rule parol evidence is admissible to show that, although the writing evidencing a transaction is legal on its face, the real transaction is tainted with usury;[54] or that a contract valid on its face was intended, not as a commercial transaction, but as a mere wager on the future state of the market.[55] However, a mere intention to violate the law in connection with matters covered by the writing cannot be shown by parol, where there is no taint of illegality in the contract actually made,[56] nor is it permissible, under such circumstances, to show a violation of law in carrying out the contract.[57] Neither can a lawful contract be defeated by proof of a collateral agreement between the parties as to the doing of an unlawful act.[58]

Tenn.—First Nat. Bank v. Barbee, 265 S.W. 371, 150 Tenn. 355.
Va.—Jones v. Franklin, 168 S.E. 753, 160 Va. 266.
22 C.J. p 1214 note 63.

Evidence held not to show duress
N.Y.—Mara v. Tunney, 258 N.Y.S. 191, 236 App.Div. 82.

50. Cal.—In re Kellogg, 107 P.2d 964, 41 Cal.App.2d 833.
S.D.—First State Bank of Lemmon v. McMahon, 185 N.W. 1014, 45 S.D. 77.
22 C.J. p 1228 note 68.

51. U.S.—Horbach v. Coyle, C.C.A. Neb., 2 F.2d 702, 705, quoting **Corpus Juris.**
Ala.—Wright v. Martin, 107 So. 818, 214 Ala. 334.
Ark.—Poulas v. Kumpures, 70 S.W. 2d 47, 189 Ark. 44.
Cal.—Endicott v. Rosenthal, 16 P.2d 673, 216 Cal. 721—Morey v. Paladini, 203 P. 760, 187 Cal. 727.
Ga.—Allen v. Owen, 3 S.E.2d 467, 60 Ga.App. 210—Lynchburg Shoe Co. v. Daniel, 98 S.E. 107, 23 Ga.App. 186.
Ill.—Morrissey v. Morrissey, 19 N.E. 2d 835, 299 Ill.App. 173.
La.—Belknap Hardware & Mfg. Co. v. Hearn, 155 So. 396, 179 La. 909—Cahow v. Hughes, App., 173 So. 471, affirming 169 So. 801—Consolidated Cos. v. Angelloz, App., 170 So. 556, reinstating 165 So. 910—Goldsmith v. Parsons, App., 156 So. 822, affirming 154 So. 68, affirmed 161 So. 879, and case remanded 161 So. 175, 182 La. 122.
Mass.—Commonwealth v. Weinfield's, Inc., 25 N.E.2d 198, 305 Mass. 108.
Mo.—Benas v. Title Guaranty Trust Co., 267 S.W. 28, 216 Mo.App. 53.
N.J.—Easy Term Loan Co. v. Silberman, 125 A. 561, 100 N.J.Law 67.
N.Y.—Pink v. L. Kaplan, Inc., 300 N.Y.S. 45, 252 App.Div. 490—Salt Springs Nat. Bank of Syracuse v. Hitchcock, 263 N.Y.S. 55, 238 App. Div. 150, reversing 259 N.Y.S. 24, 144 Misc. 547—McCraith v. Buss, 190 N.Y.S. 597, 198 App.Div. 524—Chapin v. Austin, 300 N.Y.S. 932, 165 Misc. 414—Boer v. Garcia, 193 N.Y.S. 814, 118 Misc. 272.
Pa.—Simpson v. Penn Discount Corporation, 5 A.2d 796, 798, 335 Pa. 172, quoting **Corpus Juris**—Majeska v. Dannenbaum, 170 A. 398, 111 Pa.Super. 308.
S.C.—Liberty Mut. Ins. v. Gilreath, 4 S.E.2d 126, 191 S.C. 244, 129 A. L.R. 1148.
S.D.—Ulvilden v. Sorken, 237 N.W. 565, 58 S.D. 466, 82 A.L.R. 1209.
Tex.—Burpee Can Sealer Co. v. Henry McDonnell Co., Civ.App., 75 S. W.2d 458, error refused—Amarillo Oil Co. v. Ranch Creek Oil & Gas Co., Civ.App., 271 S.W. 145, error dismissed, Com.App., 288 S.W. 1114—W. T. Rawleigh Co. v. Watson, Civ.App., 256 S.W. 955—W. T. Rawleigh Co. v. Smith, Civ.App., 231 S.W. 799—Fenter v. Robinson, Civ.App., 230 S.W. 844—Caddell v. J. R. Watkins Medical Co., Civ. App., 227 S.W. 226.
Utah.—Golden v. American Keene Cement & Plaster Co., 95 P.2d 755, 98 Utah 23.
Va.—Jones v. Franklin, 168 S.E. 753, 160 Va. 266—Richeson v. Wood, 163 S.E. 339, 158 Va. 269, 82 A.L.R. 1189—Cumming v. Cumming, 102 S.E. 572, 127 Va. 16.
Wis.—Miller v. Anderson, 196 N.W. 869, 183 Wis. 163, 34 A.L.R. 1529.
22 C.J. p 1220 note 99.

Purpose of proof
Illegality may be shown to destroy but not to modify written contract.—O'Hara v. Hartford Oil Heating Co., 138 A. 438, 106 Conn. 468.

Ignorance of stakeholder as to terms of true contract of deposit does not bar introduction of evidence otherwise admissible of such terms, whenever intention of parties to deposit comes in issue.—Lyman v. Kimball, 131 A. 690, 82 N.H. 232.

52. U.S.—In re Canfield, D.C.N.Y., 190 F. 266, 267, reversed on other grounds 193 F. 934, 13 C.C.A. 562, affirmed 33 S.Ct. 491, 228 U.S. 161, 57 L.Ed. 780.
22 C.J. p 1221 note 1.

53. Mass.—Commonwealth v. Weinfield's, Inc., 25 N.E.2d 198, 305 Mass. 108.
Pa.—Simpson v. Penn Discount Corporation, 5 A.2d 796, 798, 335 Pa. 172, quoting **Corpus Juris.**
22 C.J. p 1221 note 2.

54. Fla.—Wicker v. Trust Co. of Florida, 147 So. 586, 109 Fla. 411.
Pa.—Simpson v. Penn Discount Corporation, 5 A.2d 796, 798, 335 Pa. 172, quoting **Corpus Juris.**
22 C.J. p 1221 note 3.

55. Mo.—Smith v. Bailey, 209 S.W. 945, 200 Mo.App. 627.
Tex.—Fenter v. Robinson, Civ.App., 230 S.W. 844—P. T. Talbot & Son v. Martindale, Civ.App., 211 S.W. 302.
22 C.J. p 1221 note 4.

56. U.S.—Illinois Surety Co. v. O'-Brien, Ohio, 223 F. 933, 139 C.C.A. 413.
Ga.—Walton County v. Powell, 19 S.E. 989, 94 Ga. 646.
22 C.J. p 1222 note 5.

57. Ga.—Walton County v. Powell, supra.
22 C.J. p 1222 note 6.

58. U.S.—Porter v. Viets, C.C.Ill., 19 F.Cas.No.11,291, 1 Biss. 177.
Pa.—Irvin v. Irvin, 32 A. 445, 169 Pa. 529, 29 L.R.A. 292.
22 C.J. p 1222 note 7.

To permit the introduction of parol evidence of illegality, it is not necessary to allege mistake, error, or fraud.[59]

§ 984. Medium of Payment

Parol evidence may be admitted to show the medium of payment of an obligation in writing where the evidence does not contradict the terms of the instrument.

Parol evidence may be admitted to show the medium of payment of an obligation in writing[60] where the evidence is not contradictory of the terms of the instrument.[61]

Civil War contracts. In litigation concerning contracts made in the seceding states during the Civil War the courts usually admitted parol evidence to show that the parties intended payment to be made in Confederate treasury notes,[62] and in order to avoid the hardship growing out of such contracts there was legislation in some of the states providing for the reception of such evidence.[63] Conversely, it might be thus shown that the parties intended lawful money and not Confederate notes.[64]

§ 985. Nature, Extent, and Origin of Liability

a. In general
b. Accommodation paper
c. Indorsements
d. Suretyship

a. In General

Evidence is admissible which does not tend to vary or contradict the terms of a written obligation but merely shows the nature or extent of the liability of the obligors.

Evidence is admissible which does not tend to vary or contradict the terms of a written obligation but merely shows the nature or extent of the liability of the obligors.[65] Thus parol evidence may be admitted to show the relation inter se of the parties to commercial paper or other obligations for the payment of money,[66] as between the original parties,[67] such as payee and drawee[68] or maker and payee,[69] and as against a payee with notice;[70] but this rule does not extend so far as to authorize the admission of evidence which is inconsistent with, or contradictory of, the instrument itself,[71] and ac-

59. La.—Consolidated Cos. v. Angelloz, App., 170 So. 556, reinstating 165 So. 910.

60. La.—Guillory v. Meyers, App., 149 So. 260.
22 C.J. p 1228 note 70.

61. La.—Guillory v. Meyers, supra.
22 C.J. p 1228 note 71.

62. U.S.—Confederate Note Case, N. C., 19 Wall. 548, 22 L.Ed. 196.
22 C.J. p 1228 note 74.

63. Ala.—Scheible v. Bacho, 41 Ala. 423.
22 C.J. p 1228 note 75.

64. Va.—Stearns v. Mason, 24 Gratt. 484, 65 Va. 484.
22 C.J. p 1228 note 76.

65. Kan.—Schroyer v. Ruffhead, 253 P. 414, 122 Kan. 767.
Ky.—Harned v. Harned, 110 S.W.2d 674, 270 Ky. 735.
Mont.—Spear v. Ryan, 208 P. 1069, 64 Mont. 145.
Neb.—Sturm v. Lloyd, 264 N.W. 150, 151, 130 Neb. 89, quoting **Corpus Juris.**
22 C.J. p 1228 note 77.

Purpose or inducing cause of obligation
Kan.—First Nat. Bank v. Willis, 280 P. 782, 128 Kan. 681.
N.Y.—New Amsterdam Casualty Co. v. Parsons, 220 N.Y.S. 340, 219 App.Div. 486.
Okl.—First Nat. Bank v. Golden Glow Refining Co., 288 P. 960, 143 Okl. 299—Oilton State Bank v. Ross, 234 P. 567, 108 Okl. 24.

Extent of guaranty
Minn.—Taney v. Hodson, 212 N.W. 196, 170 Minn. 230.

66. Cal.—Bank of Italy v. Wetzel, 255 P. 254, 82 Cal.App. 240.
Conn.—Jaronko v. Czerwinski, 166 A. 388, 117 Conn. 15, 90 A.L.R. 299.
Ga.—Bowden v. Owens, 127 S.E. 664, 33 Ga.App. 700—Waters v. Gainsville Nat. Bank, 105 S.E. 627, 26 Ga.App. 119.
Ky.—Farmers Nat. Bank of Glasgow v. Guthrie, 145 S.W.2d 518, 284 Ky. 583.
La.—Palmer v. Oscar Dowling Food Products, 142 So. 127, 174 La. 923.
Neb.—Sturm v. Lloyd, 264 N.W. 150, 151, 130 Neb. 89, quoting **Corpus Juris.**
N.J.—Paulin v. Kaighn, 27 N.J.Law 503.
N.C.—Bank of Chapel Hill v. Rosenstein, 177 S.E. 643, 207 N.C. 529—Stanley v. Parker, 176 S.E. 279, 207 N.C. 159—Howell v. Roberson, 150 S.E. 32, 197 N.C. 572—Lancaster v. Stanfield, 132 S.E. 21, 191 N.C. 340.
Va.—Houston v. Bain, 196 S.E. 657, 170 Va. 378—Cox v. Hagan, 100 S. E. 666, 125 Va. 656.
Wash.—Holland v. Tjosevig, 186 P. 317, 109 Wash. 142.
22 C.J. p 1229 note 78.

Form of paper is only prima facie evidence of parties' relationship, parol evidence being competent to show their true relationship.—Record v. Rochester Trust Co., 192 A. 177, 89 N.H. 1, 110 A.L.R. 1218.

67. La.—B. Olinde & Sons Co. v. Istrouma Mercantile Co., App., 172 So. 793.
Mass.—Tait v. Downey, 166 N.E. 857, 267 Mass. 422.
Tenn.—Commerce Union Bank v. Jackson, 111 S.W.2d 870, 21 Tenn. App. 412.

68. Tex.—Alex Woldert Co. v. Citizens' Bank of Ft. Valley, Ga., Civ. App., 234 S.W. 124, dismissed for want of jurisdiction.

69. N.J.—Ehret v. Basso, 131 A. 677, 4 N.J.Misc. 69.

70. Cal.—Figari v. Olcese, 195 P. 425, 184 Cal. 775, 15 A.L.R. 192.

71. Ill.—Great Western Hat Works v. Pride Hat Co., 224 Ill.App. 249.
Neb.—Sturm v. Lloyd, 264 N.W. 150, 151, 130 Neb. 89, quoting **Corpus Juris.**
N.H.—Mercier v. Nashua Buick Co., 146 A. 165, 84 N.H. 59.
Wash.—Dove v. Cowlitz Valley Bank, 71 P.2d 555, 191 Wash. 429.
22 C.J. p 1229 note 83.
"The parties to a promissory note . . . cannot by parol evidence show that they signed the note in any other capacity than that which appears on the note itself."—Cardoza v. Pereira, 167 A. 532, 53 R.I. 460.

Relation determined from note itself
Vt.—Greenwood v. Lamson, 168 A. 915, 106 Vt. 37.

Apparent maker as witness
(1) It has been asserted that it is competent to show that a person signing a note, apparently as maker, signed only as a witness.
Ga.—Thompson v. Wilkinson, 71 S.E. 678, 9 Ga.App. 367.
Minn.—Union Cent. Life Ins. Co. v. Flynn, 264 N.W. 786, 196 Minn. 260.
Neb.—Sturm v. Lloyd, 264 N.W. 150,

cordingly it has been considered that a party apparently primarily liable on an instrument cannot show by parol that he was an indorser only.[72]

Origin of Liability. Parol evidence is admissible as to the origin of the debt for which an obligation was given, for this does not change or even purport to change any of the terms of the written obligation.[73]

b. Accommodation Paper

Parol evidence generally is admissible to show that a note or other instrument was an accommodation paper and that a signer thereof was an accommodation party; but there are many cases in which such evidence has been rejected.

Parol evidence generally is admissible to show that a note or other instrument was an accommodation paper[74] or that a party to the instrument,[75] such as a maker[76] or indorser[77] thereof, was an accommodation party, at least as between the original parties,[78] and parol evidence is also admissible to determine which party to the instrument was accommodated.[79] However there are many cases in

151, 130 Neb. 89, quoting **Corpus Juris.**

(2) However, it has been held that such a contention cannot be interposed as a defense to an action on the note.—Adams v. Vanzandt, 150 So. 807, 25 Ala.App. 527, certiorari denied 150 So. 808, 227 Ala. 553.

72. Ala.—Holczstein v. Bessemer Trust & Savings Bank, 136 So. 409, 223 Ala. 271—Green v. Waynesboro Motor Co., 116 So. 363, 217 Ala. 348.
Mich.—Price v. Klett, 238 N.W. 253, 255 Mich. 354.
R.I.—Burke v. Jacobson, 165 A. 363, 53 R.I. 173.
Tex.—Turner v. Montgomery, Civ. App., 67 S.W.2d 637.
22 C.J. p 1230 note 85, p 1231 notes 3, 5.

73. S.C.—Armstrong v. Carwile, 35 S.E. 196, 56 S.C. 463.

74. Ala.—Davenport & Harris Undertaking Co. v. Roberson, 121 So. 733, 219 Ala. 203.
Ark.—McElrath v. Gomer, 215 S.W. 881, 144 Ark. 641.
Kan.—First Nat. Bank v. Stroup, 177 P. 836, 104 Kan. 11.
Mo.—Farmers' Bank of Westboro v. Harris, App., 250 S.W. 946.
Neb.—Lee v. Hildebrand, 230 N.W. 673, 119 Neb. 717—Bennington State Bank v. Petersen, 207 N.W. 673, 114 Neb. 420.
N.J.—People's Nat. Bank of New Brunswick, N. J. v. Schepflin, 62 A. 333, 73 N.J.Law 29.
Or.—Eastham v. Bechtel, 275 P. 670, 128 Or. 673.
S.C.—Commercial Nat. Bank v. Ashley Corporation, 130 S.E. 890, 133 S.C. 304.
Tex.—McFarland v. Shaw, Com.App., 45 S.W.2d 193, reversing Shaw v. McFarland, Civ.App., 28 S.W.2d 563.
22 C.J. p 1164 note 76.

75. N.D.—Anamoose Nat. Bank v. Dockter, 216 N.W. 206, 56 N.D. 33.
S.D.—First State Bank of Lemmon v. McMahon, 185 N.W. 1014, 45 S.D. 76.

76. Ark.—Gowan v. Robinson, 86 S.W.2d 19, 191 Ark. 356.
Md.—Makover v. Webb, 6 A.2d 231, 176 Md. 524.
Mass.—Tanners Nat. Bank of Woburn v. Dean, 186 N.E. 219, 283 Mass. 151.
Mo.—Massa v. Huehnerhoff, App., 59 S.W.2d 723—Dickherber v. Turnbull, App., 31 S.W.2d 234—People's Bank of Glasgow v. Yager, App., 6 S.W.2d 633—Central Nat. Bank v. Walterscheid, 222 S.W. 912, 204 Mo.App. 179.
N.Y.—Goldberg v. Albert, 291 N.Y.S. 855, 161 Misc. 281—In re Faigelman's Estate, 254 N.Y.S. 161, 142 Misc. 167.
Tenn.—Rockwood v. Foster, 12 Tenn. App. 418.
Tex.—Felker v. Thomas, Civ.App., 83 S.W.2d 1055.

Where such defense is issue of fact
Neb.—Willis v. Sponsler, 219 N.W. 581, 117 Neb. 1.

Ostensible maker in fact a surety could, as against surety knowing thereof, prove that both parties signed as accommodation indorsers for real maker.—Schlosburg v. Tanenbaum, 144 S.E. 804, 38 Ga.App. 641.

77. La.—Palmer v. Oscar Dowling Food Products, 142 So. 127, 174 La. 923.
Mass.—Goodman v. Gaull, 138 N.E. 910, 244 Mass. 528.
Mo.—National Bank of Commerce in St. Louis v. Laughlin, 264 S.W. 706, 305 Mo. 8—Producers' State Bank v. Danciger, 264 S.W. 1000, 218 Mo App. 39.
N.Y.—Goldberg v. Albert, 291 N.Y.S. 855, 161 Misc. 281—Franco v. Swartz, 225 N.Y.S. 739, 131 Misc. 74—Residence Funding Co. v. Francis, 268 N.Y.S. 239, 149 Misc. 380.
N.D.—Goldammer-Cranna-Weaver Co. v. Price, 234 N.W. 63, 60 N.D. 272.
Tex.—Ladd v. Anderson, Civ.App., 89 S.W.2d 1041, reversed on other grounds Anderson v. Ladd, 115 S.W.2d 608, 131 Tex. 479.
Wash.—Spokane State Bank v. Tilton, 233 P. 15, 132 Wash. 641.
22 C.J. p 1166 note 88—8 C.J. p 82 note 9.

78. Kan.—Rice v. Rice, 165 P. 799, 101 Kan. 20.
Miss.—Jeffery v. Jeffery, 127 So. 296, 157 Miss. 187.
Mo.—National Bank of Commerce in St. Louis v. Laughlin, 264 S.W. 706, 305 Mo. 8—Dickherber v. Turnbull, App., 31 S.W.2d 234—Central Nat. Bank v. Walterscheid, 222 S.W. 912, 204 Mo.App. 179.
N.Y.—In re Faigelman's Estate, 254 N.Y.S. 161, 142 Misc. 167.

In action by payee
Mass.—Tanners Nat. Bank of Woburn v. Dean, 186 N.E. 219, 283 Mass. 151.
Minn.—Boyd State Bank v. Dodge, 203 N.W. 604, 163 Minn. 151.
Mo.—Massa v. Huehnerhoff, App., 59 S.W.2d 723.
N.Y.—Goldberg v. Albert, 291 N.Y.S. 855, 161 Misc. 281.

Where innocent purchaser not involved
Tex.—Central Nat. Bank of Waco v. Lawson, Civ.App., 7 S.W.2d 915, affirmed, Com.App., 27 S.W.2d 125.

79. Iowa.—Security Sav. Bank v. Carlson, 231 N.W. 643, 210 Iowa 1117—State Sav. Bank of Woden v. Markworth, 212 N.W. 729, 203 Iowa 461—First Nat. Bank v. Holley, 205 N.W. 767, 200 Iowa 938.
La.—Nolan v. Brown, 93 So. 113, 152 La. 333.
Mass.—United Beef Co. v. Childs, 27 N.E.2d 962, 306 Mass. 187—Tanners Nat. Bank of Woburn v. Dean, 186 N.E. 219, 283 Mass. 151—Goodman v. Gaul, 138 N.E. 910, 244 Mass. 528.
Mo.—National Bank of Commerce in St. Louis v. Laughlin, 284 S.W. 706, 305 Mo. 8—People's Bank of Glasgow v. Yager, App., 6 S.W.2d 633.
Neb.—Luikart v. Meierjurgen, 248 N.W. 379, 124 Neb. 816—Bennington State Bank v. Petersen, 207 N.W. 673, 114 Neb. 420.
N.D.—Anamoose Nat. Bank v. Dockter, 216 N.W. 206, 56 N.D. 33.

Evidence held admissible to show
(1) That the payee was accommodated.
Kan.—Farmers' State Bank of Russell v. Montgomery, 282 P. 741, 129 Kan. 203.
Mo.—People's Bank of Glasgow v. Yager, App., 6 S.W.2d 633.

which such evidence has been rejected[80] such as against a holder for value,[81] and where an indorsement recites that it is for value and with full recourse it cannot be shown by parol that the indorsement was only for accommodation.[82]

c. Indorsements

Generally parol evidence is inadmissible to vary the contract implied from the indorsement of commercial paper; however, such evidence is usually admissible as between the immediate parties or at the suit of a holder with notice to show that the liability of indorsers is otherwise than that which prima facie appears.

Generally parol evidence is inadmissible to contradict, vary, or explain the contract implied from the indorsement of commercial paper.[83] Thus the liability of an indorser cannot be changed by parol evidence,[84] either to enlarge such liability[85] or, ac-

Neb.—First Trust Co. of Lincoln v. Anderson, 281 N.W. 796, 135 Neb. 397—Ricketts v. Reichenbach, 272 N.W. 254, 132 Neb. 466.
Tex.—First Nat. Bank v. Brown, Civ. App., 111 S.W.2d 806, reversed on other grounds 131 S.W.2d 958, 134 Tex. 38.

(2) That the payee was not accommodated.—Wilhoit v. Seavall, 246 P. 1013, 121 Kan. 239, 48 A.L.R. 1273.

80. Ohio.—McGowan v. Cosmopolitan Bank & Trust Co., 169 N.E. 574, 121 Ohio St. 503, affirming 169 N.E. 38, 33 Ohio App. 250.

Agreement that indorser was not liable

In action on note, evidence that defendant was accommodation indorser and that plaintiff agreed that defendant would not be called on to pay it held inadmissible.—Liberty Bank of Buffalo v. Supplee, 256 N.Y. S. 134, 143 Misc. 98.

81. Miss.—Jeffery v. Jeffery, 127 So. 296, 157 Miss. 187.
Mo.—Bank of Dearborn v. Gabbert, App., 274 S.W. 861.
Wash.—In re Hemrich's Guardianship, 59 P.2d 748, 187 Wash. 21.

82. Ga.—Phillips v. Bridges, 93 S. E. 115, 20 Ga.App. 489.

"For value received"

S.C.—Home Bank of Barnwell v. Mixon, 121 S.E. 787, 128 S.C. 310.

83. U.S.—Cline v. Receiver of Commercial Nat. Bank of Chatsworth, C.C.A.Ill., 90 F.2d 968—Polk County Nat. Bank of Bartow v. Shelton, C.C.A.Fla., 69 F.2d 352.
Ala.—Woodlawn Federal Savings & Loan Ass'n v. Williams, 187 So. 177, 237 Ala. 446—Pointer v. Farmers' Fertilizer Co., 160 So. 252, 230 Ala. 87—Ward Motor Co. v. Assets Realization Co., 144 So. 25, 225 Ala. 548—Dean v. Lyde, 136 So. 857, 223 Ala. 394—Holczstein v. Bessemer Trust & Savings Bank, 136 So. 409, 223 Ala. 271.
Ark.—McDonald v. Thompson, 268 S. W. 602, 167 Ark. 338.
Cal.—Janssen v. Gordon, App., 96 P. 2d 152.
Fla.—Erwin v. Crandall, 175 So. 862, 129 Fla. 45—Valentine v. Hayes, 135 So. 538, 102 Fla. 157.
Ga.—Guaranty Mortg. Co. of Atlanta v. National Life Ins. Co., 189 S.E. 603, 55 Ga.App. 104, affirmed 192 S.E. 298, 184 Ga. 644.
Ill.—J. L. Mott Iron Works v. Rosenzweig, 211 Ill.App. 430.
Iowa.—Versteeg v. Hoeven, 239 N.W. 709, 214 Iowa 92.
Ky.—James v. Stokes, 261 S.W. 868, 203 Ky. 127.
La.—Leonard v. Brooks, 105 So. 54, 158 La. 1032.
N.C.—Busbee v. Creech, 135 S.E. 326, 192 N.C. 499.
N.D.—Bank of Conway v. Stary, 200 N.W. 505, 51 N.D. 399, 37 A.L.R. 1186.
S.C.—Carolina Nat. Bank v. Wilson, 150 S.E. 765, 153 S.C. 251.
Tex.—Stein v. Hamman, Civ.App., 13 S.W.2d 234, certified questions answered 6 S.W.2d 352, 118 Tex. 16, rehearing denied 9 S.W.2d 1104, 118 Tex. 16—Barringer v. Wilson, Civ.App., 81 S.W. 533.
Va.—Wheeler v. Wardell, 3 S.E.2d 377, 173 Va. 168.
22 C.J. p 1231 notes 1, 9.

"The implications and intendments which the law attaches to signatures on negotiable paper make such indorsement the equivalent of a complete written contract, which cannot be varied by parol evidence."—Fairley v. Falcon, 214 N.W. 538, 541, 204 Iowa 290.

Full or restrictive indorsement

Miss.—Taylor v. C. I. T. Corporation, 191 So. 60, 187 Miss. 581.

Indorsement intended as evidence of payment

Ark.—Fullerton v. Storthz, 33 S.W. 2d 714, 182 Ark. 751.

Negotiability of instrument

(1) Indorsement of note, containing waiver of presentment for payment, notice of nonpayment, protest, notice of protest, and diligence in bringing suit, cannot be modified or varied by parol evidence of delivery on condition or for special purpose only, whether note was negotiable or not.—Moore v. Altmyer, 202 N. W. 214, 199 Iowa 368.

(2) In action on instrument which was mere chose in action, court improperly excluded extrinsic evidence offered to establish liability of indorsers.—Stewart v. McIntosh, 9 N. E.2d 427, 291 Ill.App. 65.

Signature on back of nonnegotiable paper may be explained.
Md.—Iglehart v. Farmers Nat. Bank of Annapolis, 197 A. 133, 117 A.L. R. 667, affirmed on reargument 200 A. 833, 117 A.L.R. 672.
Mo.—Farm & Home Savings & Loan Ass'n v. Theiss, 111 S.W.2d 189, 342 Mo. 40.
Vt.—Duchaine v. Phœnix, 135 A. 715, 100 Vt. 112.

Indorsement after delivery

The nature and character of an indorsement made on a note after delivery may be shown.—Cripple Creek State Bank v. Rollestone, 202 P. 115, 70 Colo. 434.

84. Fla.—Valentine v. Hayes, 135 So. 538, 102 Fla. 157.
Ill.—Cohen v. Ets-Hokin, 219 Ill.App. 340.
Md.—Harvard Pub. Co. v. Benjamin, 35 A. 930, 84 Md. 333, 57 Am.S.R. 402.
N.Y.—Liberty Bank of Buffalo v. Supplee, 256 N.Y.S. 134, 143 Misc. 98.
N.C.—Waddell v. Hood ex rel. People's Bank of Burnsville, 176 S.E. 558, 207 N.C. 250—Wrenn v. Lawrence Cotton Mills, 150 S.E. 676, 198 N.C. 89—Busbee v. Creech, 135 S.E. 326, 192 N.C. 499.
Or.—Douglas v. Rumelin, 264 P. 852, 125 Or. 261, rehearing denied 266 P. 624, 125 Or. 261—First Nat. Bank v. Bach, 193 P. 1041, 98 Or. 332.
Pa.—Temple v. Baker, 17 A. 516, 125 Pa. 634.
Tex.—Spurgin v. Denton County Nat. Bank, Civ.App., 235 S.W. 970.
22 C.J. p 1091 note 39 [c], p 1231 notes 6, 7.

Position of names on commercial paper as effecting liability

Parol evidence to change liability occasioned by position of names on commercial paper can be considered only where fraud or mistake is shown.—Pender v. Cook, 150 A. 892, 300 Pa. 468.

As between immediate parties

Even as between immediate parties to indorsement of negotiable note, indorser cannot set up facts in contravention of legal liability imposed on him under statute.—Valentine v. Hayes, 135 So. 538, 102 Fla. 157

85. N.C.—Waddell v. Hood ex rel. People's Bank of Burnsville, 176 S.E. 558, 207 N.C. 250—Wrenn v. Lawrence Cotton Mills, 150 S.E.

cording to the decisions of the courts, to lessen such liability,[86] especially where the payee had no knowledge other than the usual legal intendment.[87] Parol evidence cannot be allowed to prejudice a bona fide holder.[88]

However, parol evidence has been held admissible as between the immediate parties, or at the suit of a holder with notice, to show that the liability of indorsers is otherwise than appears prima facie.[89] Such evidence has been held admissible as between the indorser and others, such as the indorsee,[90] maker,[91] or surety,[92] and evidence has also been held admissible to show that the indorsement was to an agent or for a special purpose,[93] or to explain an irregular indorsement.[94]

Blank indorsements. The implications and intendments, that have attached by law to blank indorsements of negotiable commercial paper render them complete contracts that cannot be varied by parol;[95] however, there are numerous cases, both in the same and in other jurisdictions, in which the courts, proceeding on the theory that a blank indorsement of negotiable commercial paper is a contract only so far expressed in writing as to raise a presumption of a certain undertaking, which is not conclusive except in favor of subsequent bona fide holders for value, have permitted the introduction of parol evidence to explain the true contract as between the original and immediate parties to the paper,[96] and on the same theory such evidence

676, 198 N.C. 89—Busbee v. Creech, 135 S.E. 326, 192 N.C. 499.
22 C.J. p 1232 note 10.

Making indorser liable as maker
Fla.—Hopkins v. Commercial Bank, 60 So. 183, 64 Fla. 310.
Ga.—Collins v. Everett, 4 Ga. 266.
Minn.—Burwell v. Gaylord, 138 N. W. 685, 119 Minn. 426.
S.C.—Henderson v. Rice, 158 S.E. 258, 160 S.C. 307.
22 C.J. p 1231 notes 2, 8.

86. Mass.—Essex Co. v. Edmands, 12 Gray 273, 71 Am.D. 758.
22 C.J. p 1232 note 11.

87. W.Va.—Long v. Campbell, 17 S. E. 197, 37 W.Va. 665.
22 C.J. p 1232 note 12.

88. Ga.—Guaranty Mortg. Co. of Atlanta v. National Life Ins. Co., 189 S.E. 603, 55 Ga.App. 104.
22 C.J. p 1232 note 13.

89. La.—Rice v. Passman, App., 196 So. 371—Prestenbach v. Mansur, 125 So. 310, 14 La.App. 429, modified on other grounds 129 So. 445, 14 La.App. 429.
Me.—Holston v. Haley, 135 A. 98, 125 Me. 485.
Mo.—Quackenboss v. Harbaugh, 249 S.W. 940, 298 Mo. 240.
N.H.—Perley v. Wing, 133 A. 26, 82 N.H. 299.
N.H.—Lancaster v. Stanfield, 132 S. E. 21, 191 N.C. 340.
Pa.—Reeder v. Union Trust Co., 26 Pa.Dist. 833.
Vt.—Grapes v. Willoughby, 108 A. 421, 93 Vt. 458.
Va.—Houston v. Bain, 196 S.E. 657, 170 Va. 378—Shepherd v. Mortgage Sec. Corporation of America, 123 S.E. 553, 139 Va. 274—Cox v. Hagan, 100 S.E. 666, 125 Va. 656.
22 C.J. p 1229 notes 80, 81, p 1244 note 14.

90. Neb.—Nebraska State Bank of Sidney v. Howe, 187 N.W. 77, 108 Neb. 23.
Wis.—Monroe v. State Bank of Patch Grove, 193 N.W. 991, 181 Wis. 19, 35 A.L.R. 1115.

Rule changed by Negotiable Instruments Act
Iowa.—Moore v. Altmyer, 202 N.W. 214, 199 Iowa 368.

91. La.—Crawford v. Rawls, 6 La. App. 372.
Tex.—Helland v. Oppenheimer, Civ. App., 102 S.W.2d 299, error refused —Carver v. Caldwell, Civ.App., 208 S.W. 555.

Apparent maker
Ga.—Taff v. Larey, 116 S.E. 866, 29 Ga.App. 631.

92. N.C.—Lancaster v. Stanfield, 132 S.E. 21, 191 N.C. 340.

93. Ga.—Sanders v. Ayers, 117 S.E. 651, 155 Ga. 630.
Mich.—Union Trust Co. v. Matthews, 242 N.W. 781, 258 Mich. 433.
Wis.—Monroe v. State Bank of Patch Grove, 193 N.W. 991, 181 Wis. 19, 35 A.L.R. 1115.

94. Ga.—Bowden v. Owens, 127 S.E. 664, 33 Ga.App. 700.

Rule changed by statute
Former rule that parol evidence was admissible to show that parties to note intended irregular indorser's contract to be that of maker, surety, or guarantor rather than indorser has been changed by statute.—Pointer v. Farmers' Fertilizer Co., 160 So. 252, 230 Ala. 87.
Indorsement before delivery see infra text and notes 99-4.

95. Ark.—McDonald v. Thompson, 268 S.W. 602, 167 Ark. 338.
Colo.—Shaw v. Brady, 251 P. 532, 80 Colo. 337—Interstate Trust Co. v. U. S. Nat. Bank, 185 P. 260, 67 Colo. 6, 10 A.L.R. 705.
Conn.—Spencer v. Allerton, 22 A. 778, 60 Conn. 410.
Ga.—Jones v. Commercial Credit Co., 184 S.E. 652, 52 Ga.App. 796.
Ill.—First Nat. Bank v. Yakey, 253 Ill.App. 128—Katz Finance Co. v. Levy, 241 Ill.App. 576.
Mo.—Orthwein v. Nolker, 234 S.W. 787, 290 Mo. 284—Overland Auto Co. v. Winters, 210 S.W. 1, 277 Mo. 425 affirming, App., 180 S.W. 561—Fischman-Harris Realty Co. v. Kleine, App., 82 S.W.2d 605—Geller, Ward & Hasner Hardware Co. v. Drozda, 217 S.W. 557, 203 Mo. App. 91.
N.D.—Routier v. Williams, 204 N.W. 678, 52 N.D. 793.
Ohio.—Shannon v. Universal Mortgage & Discount Co., 157 N.E. 478, 116 Ohio St. 609, 54 A.L.R. 992.
Tex.—Waxahachie Nat. Bank v. Forreston Gin Co., Com.App., 46 S.W. 2d 666, reversing Forreston Gin Co. v. Waxahachie Nat. Bank, Civ. App., 31 S.W.2d 355—Blucher v. Eubank, Com.App., 5 S.W.2d 972, reversing Eubank v. Blucher, Civ. App., 294 S.W. 343.
W.Va.—Cole v. George, 103 S.E. 201, 86 W.Va. 340.
Wis.—Palmersheim v. Gates, 191 N. W. 567, 179 Wis. 291.
22 C.J. p 1092 note 47.

Certificate of deposit
S.D.—Coons v. Herrick, 227 N.W. 460, 56 S.D. 51.

96. Ark.—First Nat. Bank v. Brunk, 280 S.W. 372, 170 Ark. 583.
Ga.—Hopkins Automobile Equipment Co. v. Lyon, 1 S.E.2d 460, 59 Ga. App. 468—Jones v. Commercial Credit Co., 184 S.E. 652, 52 Ga.App. 796—Bowden v. Owens, 127 S.E. 664, 33 Ga.App. 700—Taff v. Larey, 116 S.E. 866, 29 Ga.App. 631 —Cowart Co. v. Sheffield, 89 S.E. 1101, 18 Ga.App. 512.
22 C.J. p 1093 note 48.

Collection
An indorsement may be shown to be for the purpose of collection.
Ark.—First Nat. Bank v. Brunk, 280 S.W. 372, 170 Ark. 583.
Ga.—Sanders v. Ayers, 117 S.E. 651, 155 Ga. 630.
Idaho.—First Nat. Bank v. Stringfield, 235 P. 897, 40 Idaho 587.
Ind.—Pond v. Newgent, 176 N.E. 17, 96 Ind.App. 468.
Ky.—Armstrong v. Boyertown Nat. Bank, 11 Ky.L. 90.
22 C.J. p 1093 note 48 [d].

has been held to be admissible as against subsequent holders with notice.[97] The rule cannot, however, be relaxed to such an extent as to permit a showing that a blank indorsement was not to have any force at all.[98]

Indorsements before delivery. It has been held that the character of the undertaking of a party who places his name on the back of a note before its delivery to the payee may be shown by parol,[99] at least as between the parties, and generally in behalf of subsequent holders of the instrument.[1] There are, however, numerous cases, some of which were decided under statutes changing the rule, in which evidence offered for the purpose of explaining such an indorsement has been rejected.[2] It has been stated that the rule applied only before the adoption of the Negotiable Instrument Law,[3] but it has nevertheless been applied in cases controlled by such law.[4]

d. Suretyship

Parol evidence generally is admissible to show that an apparent principal on an instrument is a surety, at least as between the original parties or others with notice; but there is authority to the contrary.

It is usually considered that parol evidence is admissible to show that a person apparently or ostensibly on the face of the instrument a principal such as a joint or several obligor promisor or maker, is in fact only a surety,[5] at least as between the original parties, or as against a payee or other ob-

97. Ga.—Taff v. Larey, 116 S.E. 866, 29 Ga.App. 631.
22 C.J. p 1094 note 49.

Apparent indorser a principal
In payee's suit on note carrying prima facie blank indorsement of defendant, parol evidence that defendant was in fact principal and expressly contracted as such held admissible.—Pickett v. Bank of Ellijay, 186 S.E. 426, 182 Ga. 540, answers to certified questions conformed to 186 S.E. 746, 53 Ga.App. 607.

98. Conn.—Schine v. Johnson, 103 A. 974, 92 Conn. 590.

99. Tenn.—Roskind v. Elterman, 1 Tenn.App. 272, 274, citing **Corpus Juris.**
22 C.J. p 1230 note 86—8 C.J. p 79 notes 62, 63, p 1033 note 32.

Evidence has been held admissible to show that the signatory was:

(1) Maker.—Roskind v. Elterman, 1 Tenn.App. 272—22 C.J. p 1231 note 88.

(2) Surety or maker.—Kealing v. Vansickle, 74 Ind. 529, 39 Am.R. 101.

(3) Maker or guarantor.—Browning v. Merritt, 61 Ind. 425.

(4) Guarantor.—Browning v. Merritt, supra—22 C.J. p 1231 note 91.

(5) Indorser.—Milligan v. Holbrook, 48 N.E. 157, 168 Ill. 343—22 C.J. p 1231 note 92.

(6) Second indorser.—Patch v. Washburn, 16 Gray 82—22 C.J. p 1231 note 93.

(7) Indorser or guarantor.—Kellogg v. Dunn, 2 Metc. (Ky.) 215.

(8) Second indorser or guarantor.—Burton v. Hansford, 10 W.Va. 470, 27 Am.R. 571.

(9) Surety.—Wetmore & Morse Granite Co. v. Ryle, 107 A. 109, 93 Vt. 245—22 C.J. p 1231 note 96.

Whether or not note negotiable, parol evidence may explain indorsement.—Wells v. Jackson, 6 Blackf. (Ind.) 40.

Indorsement after maturity may be explained.—McCelvey v. Noble, 46 S.C.L. 167.

Payee's indorsement without recourse later placed above it will not preclude explanation.—Watkins v. Kirkpatrick, 26 N.J.Law 84—22 C.J. p 1231 note 99.

1. Ala.—Long v. Gwin, 80 So. 440, 202 Ala. 358.
22 C.J. p 1230 note 87.

2. N.C.—Wrenn v. Lawrence Cotton Mills, 150 S.E. 676, 198 N.C. 89.
Vt.—Grapes v. Willoughby, 108 A. 421, 93 Vt. 458.
22 C.J. p 1231 note 1—p 1232 note 13—8 C.J. p 78 note 61.

3. Ill.—First Nat. Bank v. Yakey, 253 Ill.App. 128.
N.C.—Wrenn v. Lawrence Cotton Mills, 150 S.E. 676, 198 N.C. 89.

4. Ala.—Long v. Gwin, 80 So. 440, 202 Ala. 358.
Tenn.—Roskind v. Elterman, 1 Tenn. 272, 274, citing **Corpus Juris.**
8 C.J. p 79 notes 62, 63.

5. U.S.—In re Goodwin, C.C.Mo., 10 F.Cas.No.5,549, 5 Dill. 140.
Ala.—Bruce v. Edwards, 1 Stew. 11, 18 Am.D. 33.
Ark.—Kendall v. Milligan, 34 S.W. 78, 62 Ark. 629—Vestal v. Knight, 15 S.W. 17, 54 Ark. 97—State Bank v. Watkins, 6 Ark. 123.
Cal.—Josephian v. Lion, 227 P. 204, 66 Cal.App. 650.
D.C.—Schwartz v. Sacks, 2 F.2d 188, 55 App.D.C. 87.
Fla.—Hersey v. Bradford County Bank, 130 So. 6, 100 Fla. 747.
Ga.—Seymour v. Bank of Thomasville, 121 S.E. 578, 157 Ga. 99, answers to certified questions conformed to 121 S.E. 579, 31 Ga.App. 602—Shank v. Washington Exchange Bank, 52 S.E. 621, 124 Ga. 508—Matheson v. Jones, 30 Ga. 306, 76 Am.D. 647—Fraser v. McConnell, 23 Ga. 368—Bank of St. Mary's v. Mumford & Tyson, 6 Ga. 44—Allmond v. Mount Vernon Bank, 186 S.E. 581, 53 Ga.App. 565—Campbell v. Rybert, 167 S.E. 924, 46 Ga.App. 461—Schlosburg v. Tanenbaum, 144 S.E. 804, 38 Ga. App. 641—Nunnally v. J. B. Colt Co., 129 S.E. 119, 34 Ga.App. 247—J. B. Colt Co v. Miller, 117 S.E. 113, 30 Ga.App. 148—Waters v. Gainesville Nat. Bank, 105 S.E. 627, 26 Ga.App. 119.
Ill.—Flynn v. Mudd, 27 Ill. 323—Trustees of Schools v. Southard, 31 Ill.App. 359.
Ind.—Harvey v. Osborn, 55 Ind. 535—Holland v. Johnson, 51 Ind. 346.
Iowa.—Iowa Nat. Bank v. Cooper, 101 N.W. 459—Piper v. Newcomer, 25 Iowa 221—Lauman v. Nichols, 15 Iowa 161—Corielle v. Allen, 13 Iowa 289.
Kan.—Rose v. Williams, 5 Kan. 483.
Ky.—Baker v. Johnson, 69 S.W.2d 341, 253 Ky. 251—Baskett v. Rudy, 217 S.W. 112, 186 Ky. 208—Black v. McCarley's Ex'r, 104 S.W. 987, 126 Ky. 825, 31 Ky.L. 1198—Farmer's & Mechanics Bank v. Cosby, 4 J.J.Marsh. 366.
La.—Ross v. Ross, 9 Rob. 173—Butler v. Ford, 9 Rob. 112—Roberts v. Jenkins, 19 La. 453.
Me.—Westbrook Trust Co. v. Timberlake, 115 A. 555, 121 Me. 64—Springer v. Toothaker, 43 Me. 381, 69 Am.D. 66—Lime Rock Bank v. Mallett, 42 Me. 349—Lime Rock Bank v. Mallett, 34 Me. 547, 56 Am.D. 673.
Md.—Makover v. Webb, 6 A.2d 231, 176 Md. 524.
Mass.—Bearse v. Lebowich, 99 N.E. 175, 212 Mass. 344—Guild v. Butler, 127 Mass. 386.
Miss.—Meggett v. Baum, 57 Miss. 22.
Mo.—Coats v. Swindle, 55 Mo. 31—Newkirk v. Hays, 275 S.W. 964, 220 Mo.App. 514—Gerkin v. Beauchamp, App., 240 S.W. 887—O'Howell v. Kirk, 41 Mo.App. 523.
Neb.—Nordeen v. Nelson, 279 N.W. 323, 134 Neb. 707.
N.J.—Mount v. Zisken, 7 N.J.L.J. 71.
N.Y.—In re Hayes' Will, 232 N.Y.S. 147, 224 App.Div. 634, modifying

ligee with notice;[6] but there are numerous cases, | even in the same jurisdictions, where the contrary

229 N.Y.S. 113, 131 Misc. 806, and reversed on other grounds 169 N. E. 120, 252 N.Y. 148—New Amsterdam Casualty Co. v. Parsons, 220 N.Y.S. 340, 219 App.Div. 486—Sheppard v. Conley, 9 N.Y.S. 777, 30 N. Y.St. 639—In re Benedict, 13 Abb. N.Cas. 67, 1 Dem.Surr. 547—Mohawk & H. R. R. Co. v. Costigan, 2 Sandf.Ch. 306.

N.C.—Jefferson Standard Life Ins. Co. v. Morehead, 183 S.E. 606, 209 N.C. 174—Sanders v. Boykin, 134 S.E. 643, 192 N.C. 262—Forbes v. Sheppard, 3 S.E. 817, 98 N.C. 111.

Ohio.—Baker v. Kellogg, 29 Ohio St. 663—McDowell v. Reese, 10 Ohio Dec., Reprint, 303, 20 Cinc.L.Bul. 102—Reddish's Ex'rs v. Pentheuse, Wright 538.

Tex.—Pridgen v. Buchannon, 27 Tex. 589—Smith v. Doak, 3 Tex. 215—Guaranty State Bank of New Braunfels v. Kuehler, Civ.App., 114 S.W.2d 622, error refused—Spiegel v. Mayhall, Civ.App., 292 S.W. 262—Farmer's State Bank of Florence v. Cottingham, Civ.App., 261 S.W. 426—Guaranty State Bank of Dodge v. Roark, Civ.App., 243 S.W. 591.

Vt.—Seaboard Nat. Bank v. Fischer, 129 A. 927, 98 Vt. 506—National Bank of Newbury v. Hale, 129 A. 155, 98 Vt. 481—Arbukle v. Templeton, 25 A. 1095, 65 Vt. 205—Harrington v. Wright, 48 Vt. 427—Flanagan & Adams v. Post, 45 Vt. 246—Bank of St. Albans v. Smith, 30 Vt. 148.

Va.—Boulware v. Hartsook's Adm'r., 3 S.E. 289, 83 Va. 679.

W.Va.—Huffman v. Manley, 98 S.E. 613, 83 W.Va. 503—Parsons v. Harrold, 32 S.E. 1002, 46 W.Va. 122—Creigh v. Hedrick, 5 W.Va. 140.

22 C.J. p 1232 note 14.

"The introduction of parol testimony to show the relationship of a particular signer to a written obligation (i. e., whether principal or surety) is not a violation of" the parol evidence rule.—Harned v. Harned, 110 S.W.2d 674, 675, 270 Ky. 735.

Suretyship is collateral to the contract and can be shown by extrinsic evidence.—Webber v. Swift & Co., Civ.App., 226 S.W. 509.

Position of names immaterial or not conclusive.

Ga.—O'Quinn v. Carter, 129 S.E. 296, 34 Ga.App. 310.

Ky.—Peoples Bank v. Bowling, 123 S.W.2d 1052, 276 Ky. 228.

22 C.J. p 1232 note 14 [c].

Necessity of giving notice to principal applies only as between principal and surety.—Bank of Lumpkin County v. Justus, 103 S.E. 794, 150 Ga. 286—Brown v. Merchants' Trading Co., 106 S.E. 208, 26 Ga.App. 331.

Alleged maker may show he is not surety

Ala.—Spencer v. Blanke Mfg. & Supply Co., 124 So. 904, 220 Ala. 350.

Instrument signed by only one person

(1) It has been held that where only one person signs the instrument parol evidence is inadmissible to show that the person who signed was in fact only a surety.—Jordan v. Douglas Grocery Co., 108 S.E. 139, 27 Ga.App. 296.

(2) However, in another case it was held that the fact that there was but one signer did not preclude a showing by parol evidence that the signatory was a surety.—Gillett v. Citizens' Nat. Bank, 104 N.E. 775, 56 Ind.App. 694.

Instruments under seal

(1) The rule of the text has been applied to instruments under seal.

Ga.—Hardy v. Boyer, 67 S.E. 205, 7 Ga.App. 472.

Ill.—Rogers v. Trustees of Schools of Tp. 23 N., R. 4 E, 46 Ill. 428.

Miss.—Smith v. Clopton, 48 Miss. 66. Contra Willis v. Ives, 1 Sm. & M. 307.

N.C.—Davis v. Alexander, 177 S.E. 417, 207 N.C. 417.

(2) However there is authority for the contrary view.—Greene v. Lake, 13 D.C. 162.

(3) Such evidence has been rejected in an action at law.—Dozier v. Lea, 7 Humphr., Tenn., 520—Deberry v. Adams, 9 Yerg., Tenn., 52.

6. Ala.—Tennessee-Hermitage Nat. Bank v. Hagan, 119 So. 4, 218 Ala. 390.

Ark.—Broyles v. Edmonson, 104 S. W.2d 813, 193 Ark. 1125—Bank of Searcy v. Baldock, 240 S.W. 399, 183 Ark. 308.

Colo.—Drescher v. Fulham, 52 P. 685, 11 Colo.App. 62.

Ga.—Seymour v. Bank of Thomasville, 121 S.E. 578, 157 Ga. 99, answers to certified questions conformed to 121 S.E. 579, 31 Ga.App. 602—Bank of Lumpkin County v. Justus, 103 S.E. 794, 150 Ga. 286—Stewart v. Parker, 55 Ga. 656—Franklin Savings & Loan Co. v. Branan, 188 S.E. 67, 54 Ga.App. 363.

Ind.—Brannon v. Iron Works, 49 N. E. 469, 19 Ind.App. 305.

Iowa.—Benson v. Alleman, 263 N.W. 305, 220 Iowa 731.

Mich.—Stevens v. Oaks, 25 N.W. 309, 58 Mich. 343—Smith v. Shelden, 35 Mich. 42, 24 Am.R. 529.

Minn.—Strong v. Baker, 25 Minn. 442.

Mo.—Martinsburg Bank v. Bunch, 251 S.W. 742, 212 Mo.App. 249.

Neb.—Nordeen v. Nelson, 279 N.W. 323, 134 Neb. 707.

N.C.—Kennedy v. Atlantic Trust & Banking Co., 104 S.E. 464, 180 N.C. 225.

Okl.—Sudberry v. Johnston, 45 P.2d 1086, 172 Okl. 641—Strother v. Wilkinson, 216 P. 436, 90 Okl. 247.

Or.—Lovell v. Potts, 226 P. 1111, 112 Or. 538.

Pa.—First Nat. Bank & Trust Co. of Ford City v. Stolar, 197 A. 499, 130 Pa.Super. 480—Zimerman v. Bridges, 4 A. 181, 8 Pa.Cas. 45.

Philippine.—Machan v. De la Trinidad, 3 Philippine 684.

Tex.—Stroop v. McKenzie, 38 Tex. 132—McFarland v. Shaw, Com. App., 45 S.W.2d 193, reversing Shaw v. McFarland, Civ.App., 28 S.W.2d 563—Coffin v. Loomis, Civ. App., 41 S.W. 511.

Wash.—Culbertson v. Wilcox, 39 P. 954, 11 Wash. 522.

Wis.—Irvine v. Adams, 4 N.W. 573, 48 Wis. 468, 33 Am.R. 817.

22 C.J. p 1229 note 79—8 C.J. p 72 note 66.

Notice or knowledge by the payee or holder may be shown.

Ark.—Colvin v. Glover, 220 S.W. 832, 143 Ark. 498.

Ga.—Benson v. Henning, 178 S.E. 406, 50 Ga.App. 492—Cheshire v. Hightower, 127 S.E. 891, 33 Ga. App. 793—Paulk v. Williams, 110 S.E. 632, 28 Ga.App. 183.

Me.—Westbrook Trust Co. v. Timberlake, 115 A. 555, 121 Me. 64.

N.C.—Furr v. Trull, 171 S.E. 641, 205 N.C. 417.

Tex.—Farmers' State Bank of Florence v. Cottingham, Civ.App., 261 S.W. 426.

Liability as between sureties

Relationship of party signing note as surety for another surety may be shown.

Ala.—U. S. Fidelity & Guaranty Co. v. Yeilding Bros. Co. Department Stores, 143 So. 176, 225 Ala. 307.

Ark.—Bank of Searcy v. Baldock, 240 S.W. 399, 183 Ark. 308.

Ill.—Early v. Cassens, 216 Ill.App. 581.

Ky.—Vansant's Ex'x v. Gardner's Ex'x, 42 S.W.2d 300, 240 Ky. 318—Keeton v. Owens, 15 S.W.2d 487, 228 Ky. 522—Walker v. Walker, 15 S.W.2d 298, 228 Ky. 357.

N.Y.—Barry v. Ransom, 12 N.Y. 462.

N.C.—Howell v. Roberson, 150 S.E. 32, 197 N.C. 572.

S.C.—State v. Bowen, 98 S.E. 864, 112 S.C. 165.

In actions for indemnity and contribution, parol evidence is admitted to establish the relation of sureties among themselves and to the principal obligor, for the written instrument is designed to express the undertaking and obligation of the signers to the obligee and is not designed to show their agreement or understanding among themselves.—

view has been asserted,[7] and such evidence has been held inadmissible as against a payee without notice,[8] or where the contract expressly recites that the alleged sureties signed as principals,[9] and in some earlier cases it was rejected in an action at law.[10]

Evidence to show signer a principal. Parol evidence may be admissible to show that an alleged surety was actually a principal.[11] It has also been held that it may be shown by parol that one whose signature to a note is followed by the word "surety" was nevertheless a principal.[12]

§ 986. Noncontractual Recitals

Parol evidence is admissible to explain, modify, or contradict noncontractual recitals.

A statement of fact contained in a contract but forming no part of the contract may be explained, modified, or contradicted by parol evidence.[13] This rule has been applied to recitals in deeds,[14] official deeds,[15] and insurance policies.[16]

§ 987. Papers Relating to Same Transaction

Where several instruments pertain to the same transaction, it may be permissible to explain or vary the effect of one of such papers by what is contained in another, and parol evidence is admissible to show which paper expresses the true agreement.

Under the rule that papers, executed contemporaneously or at different times, relating to the same transaction should be construed together, as considered in the C.J.S. title Contracts § 298, it may be permissible to explain, contradict, or vary the effect of one of such papers by what is contained in another,[17] and, where two such papers differ in a certain particular, extrinsic evidence is admissible to show which paper expresses the true agreement of the parties.[18]

§ 988. Parties to Instrument or Obligation

Where a writing is ambiguous as to the parties thereto, parol evidence is admissible to show who are the real parties.

Where a deed, contract, or other instrument in writing is ambiguous as to the parties thereto, pa-

Haywood v. Russell, 110 S.E. 81, 182 N.C. 711—22 C.J. p 1244 note 15.

7. Cal.—Shriver v. Lovejoy, 32 Cal. 574.
Ga.—Durden v. Royster Guano Co., 123 S.E. 603, 158 Ga. 234.
Vt.—Alexander v. Chevalier, 126 A. 498, 98 Vt. 230.
Wash.—In re Hemrich's Guardianship, 59 P.2d 748, 187 Wash. 21.
12 C.J. p 1233 note 15.

Where reformation of contract not requested
In action on contract, defense that defendant was not principal in contract but only surety for coöbligor therein was improperly presented where defendant did not ask for reformation of contract to make it appear that he was only surety therein.—Laurel Cliffs Mfg. & Distributing Co. v. Prichard, 75 S.W.2d 491, 255 Ky. 762.

As against persons relying on apparent character of signer as principal.—Josephian v. Lion, 227 P. 204, 66 Cal.App. 650.

8. Mass.—Wilson v. Foot, 11 Metc. 285.

9. Mich.—Coots v. Farnsworth, 28 N.W. 534, 61 Mich. 497.
Mo.—Picot v. Signiago, 22 Mo. 587.
N.H.—Heath v. Derry Bank, 44 N.H. 174—Derry Bank v. Baldwin, 41 N.H. 434.
Vt.—McNamara v. Pickett, 1 A.2d 716, 109 Vt. 500—Barton Sav. Bank & Trust Co. v. Bickford, 122 A. 582, 97 Vt. 166—Claremont Bank v. Wood, 10 Vt. 582.
Wash.—Karatofski v. Hampton, 237 P. 17, 135 Wash. 139, modified on other grounds 239 P. 563.

10. Miss.—Kerr v. Baker, 1 Miss. 140.
N.J.—Pintard v. Davis, 20 N.J.Law 205.
Ohio.—Farrington v. Gallaway, 10 Ohio 543.
S.C.—Levy v. Hampton, 12 S.C.L. 145—McCall's Ex'r v. Evans' Adm'r, 2 Brev. 3.

11. Ga.—Landrum v. Leachman, 123 S.E. 915, 32 Ga.App. 471.

12. Tex.—Daugherty v. Wiles, Civ. App., 156 S.W. 1089, reversed on other grounds, Com.App., 207 S.W. 900.

13. Ala.—Baty v. Foster, 132 So. 895, 222 Ala. 442—Smith v. McDonald, 130 So. 516, 518, 24 Ala. App. 88, quoting **Corpus Juris.**
Cal.—Gauger v. Westberg, 272 P. 1108, 95 Cal.App. 575.
Colo.—Brennan v. Monson, 50 P.2d 534, 97 Colo. 448.
Ill.—Linn v. Clark, 128 N.E. 824, 295 Ill. 22.
Mo.—Hunter v. Hunter, 39 S.W.2d 359, 327 Mo. 817.
Tex.—Seeligson v. Mitchum, 12 S.W. 237, 74 Tex. 571—Massey-Harris Co. v. Bernard, Civ.App., 84 S.W.2d 1091, error dismissed—Frank L. Smith Tire Store v. Firestone Tire & Rubber Co., Civ.App., 68 S.W.2d 577, error refused.
Utah.—Garrett v. Ellison, 72 P.2d 449, 93 Utah 184, 129 A.L.R. 666.
Vt.—Kimball v. New York Life Ins. Co., 108 A. 921, 94 Vt. 106.
22 C.J. p 1233 note 18, p 1144 note 65.

Recital as to value
Okl.—First Nat. Bank v. Beatty, 45 P.2d 158, 172 Okl. 47.
22 C.J. p 1233 note 18 [a].

14. La.—Tillman v. Mosely, 14 La. Ann. 710, following Davis v. Binion, 5 La.Ann. 248.
22 C.J. p 1233 note 18 [b].

15. N.Y.—Stafford v. Williams, 12 Barb. 240.

16. Or.—Yoshida v. Security Ins. Co. of New Haven, Conn., 26 P.2d 1082, 145 Or. 325.
26 C.J. p 78 note 64.

17. U.S.—New York Alaska Gold Dredging Co. v. Walbridge, C.C.A. Alaska, 76 F.2d 655—Glens Falls Indemnity Co. v. Apple & Bond Co., C.C.A.Md., 69 F.2d 695.
Ill.—Edward Thompson Co. v. Hunt, 218 Ill.App. 616.
Neb.—Hager v. Burnham, 196 N.W. 896, 111 Neb. 481.
N.Y.—Thomas v. Austin, 4 Barb. 265.
S.D.—Taylor v. Nissen, 235 N.W. 703, 58 S.D. 299.

Papers referred to in contract are admissible
Mich.—McNamara v. E. W. Ross Co., 196 N.W. 336, 225 Mich. 335.
Mo.—Wisconsin & Arkansas Lumber Co. v. Buschow Lumber Co., App., 257 S.W. 840.

18. U.S.—New York Alaska Gold Dredging Co. v. Walbridge, C.C.A. Alaska, 76 F.2d 655, 662, quoting **Corpus Juris**—Basile v. California Packing Corporation, C.C.A.Cal., 25 F.2d 576.
22 C.J. p 1233 note 21.

rol evidence is admissible to show who are the real parties,[19] and the principle that the rule excluding parol or extrinsic evidence to vary or contradict a written contract does not apply as against third persons, see supra § 861, has been successfully invoked to procure or sustain the admission of evidence showing that a person not a party to a writing was entitled to participate in the benefits thereof.[20]

On the other hand, the general rule against the admission of parol evidence to vary or contradict a written instrument has been held to preclude the admission of evidence to show that the parties to the instrument,[21] particularly in the case of negotiable instruments and instruments under seal,[22] are other than those whose names appear in or are signed thereto. Where a deed described the grantees therein as husband and wife, parol evidence that they were not husband and wife has been held not admissible.[23]

§ 989. —— Showing Real Party in Interest

Parol evidence is admissible to show for whose benefit a contract was made or the real party in interest, but such evidence is inadmissible where the effect would be to vary or contradict the terms of the instrument.

When the terms of a contract are not thereby varied or contradicted, parol evidence is admissible to show for whose benefit the contract was made or the real party in interest,[24] as where the instru-

19. U.S.—Jones v. Fox Film Corporation, C.C.A.Tex., 68 F.2d 116.
Cal.—Branch v. Bekins Van & Storage Co., 290 P. 146, 106 Cal.App. 623.
Ga.—Farrar Lumber Co. v. Brindle, 151 S.E. 923, 170 Ga. 37.
Ill.—Wurn v. Berkson, 141 N.E. 293, 309 Ill. 520, modifying 137 N.E. 141, 305 Ill. 231—Reilly Tar & Chemical Corporation v. Lewis, 23 N.E.2d 243, 301 Ill.App. 459.
Ind.—Hamlyn v. Hamlyn, 7 N.E.2d 644, 103 Ind.App. 333.
La.—Kaufman v. Gregory, 5 La.App. 644.
Md.—Goszka v. Kleis, 161 A. 170, 163 Md. 167.
Mich.—Hall v. Equitable Life Assur. Soc. of U. S., 295 N.W. 204, 295 Mich. 404.
Minn.—Drabek v. Wedrickas, 234 N. W. 6, 182 Minn. 217.
Mo.—Estes v. Great American Ins. Co. of New York, App., 112 S.W.2d 153—Becker v. Farmers' Mut. Fire Ins. Co. of Rock Tp., Jefferson County, App., 99 S.W.2d 148—Newbill v. Union Indemnity Co., App., 60 S.W.2d 658.
N.Y.—Schonberger v. Culbertson, 247 N.Y.S. 180, 231 App.Div. 257—Grand Iron Works v. Bracken, 219 N.Y.S. 108, 218 App.Div. 665.
Pa.—Kane v. McClenachan, 159 A. 61, 104 Pa.Super. 417.
Wash.—In re Tveekrem's Estate, 14 P.2d 3, 169 Wash. 468.
22 C.J. p 1233 note 22.

20. Minn.—Curtis v. Northwestern Bedding Co., 141 N.W. 161, 121 Minn. 288.
22 C.J. p 1234 note 24.
Parol evidence to show real party in interest see infra § 989.

21. U.S.—Hutchings v. Caledonian Ins. Co. of Scotland, C.C.A.S.C., 35 F.2d 309.
Ala.—Heath v. Hill, 138 So. 538, 224 Ala. 25.
Ark.—Ogletree v. Smith, 3 S.W.2d 683, 176 Ark. 597.
Ill.—P. & O. Banking Corporation v. Wurm Bros. Co., 282 Ill.App. 560, 564, quoting **Corpus Juris**—Jacobs v. Frank, 271 Ill.App. 264.
Iowa.—Northwestern Terra Cotta Co. v. Lyman, 194 N.W. 179.
La.—Hodge v. Hodge, 92 So. 134, 151 La. 612.
Mo.—Newbill v. Union Indemnity Co., App., 60 S.W.2d 658—Samuel Haas Trimmed Hat Co. v. Service Ass'n, 297 S.W. 129, 222 Mo. App. 307.
N.Y.—New Amsterdam Casualty Co. v. Parsons, 220 N.Y.S. 340, 219 App.Div. 486.
Pa.—Eagler v. Cherewfka, 86 Pa. Super. 122.
S.C.—National Loan & Exchange Bank v. Tolbert, 124 S.E. 772, 129 S.C. 503.
Tex.—Farrier v. Hopkins, 112 S.W.2d 182, 131 Tex. 75.
22 C.J. p 1234 note 26, p 1244 notes 10, 11.

22. Ga.—Exchange Bank v. Cash, 151 S.E. 345, 169 Ga. 753—Porter Fertilizer Co. v. Brewer, 136 S.E. 477, 36 Ga.App. 329.
Ill.—Shiel v. Chicago Title & Trust Co., 262 Ill.App. 410—Elkhart State Bank of Elkhart v. Schlarman, 270 Ill.App. 440—Feulner v. Gillam, 211 Ill.App. 348.
Mo.—Raney v. Home Ins. Co., 246 S.W. 57, 213 Mo.App. 1.
Neb.—Norfolk Nat. Bank v. First Nat. Bank, 210 N.W. 101, 114 Neb. 560.
N.D.—Hamm v. Mutz, 203 N.W. 673, 52 N.D. 504.
Tex.—Farrier v. Hopkins, 112 S.W.2d 182, 131 Tex. 75—Williamson v. Diltz, Civ.App., 101 S.W.2d 833, error dismissed—Chandler v. Commercial Credit Co., Civ.App., 16 S. W.2d 141.
Conclusiveness of deed as to parties see supra § 916.

Action by bona fide holder

One who takes negotiable paper contracts with the parties appearing on its face, and parol evidence is not admissible to add a principal not so appearing.—Webster v. Wray, 27 N.W. 644, 19 Neb. 558, 56 Am.R. 754—22 C.J. p 1242 note 92.

23. Mich.—Hawley v. Dibble, 151 N. W. 712, 184 Mich. 298.

24. Ark.—Davis v. Reynolds, 241 S. W. 379, 154 Ark. 101.
Ga.—Watts v. Taylor, 137 S.E. 119, 36 Ga.App. 537.
Hawaii.—Jardin v. Doucet, 34 Hawaii 651.
Ind.—Ninde v. Bank of Geneva, 181 N.E. 378, 95 Ind.App. 558.
Minn.—Saunders v. Commercial Credit Trust, 256 N.W. 142, 192 Minn. 272—Midland Nat. Bank of Minneapolis v. Hendrickson, 206 N.W. 723, 165 Minn. 446—Ristvedt v. Walters, 178 N.W. 166, 146 Minn. 146.
Miss.—Allen v. Grenada Bank, 124 So. 69, 71, 155 Miss. 91, quoting **Corpus Juris.**
Mo.—American Fruit Growers v. St. Louis, B. & M. Ry. Co., App., 261 S.W. 949, certiorari denied St. Louis, B. & M. R. Co. v. American Fruit Growers, 45 S.Ct. 94, 266 U. S. 611, 69 L.Ed. 467.
N.Y.—North River Mortg. Corporation v. 254 Sixth Ave. Realty Corporation, 240 N.Y.S. 654, 136 Misc. 342.
Okl.—Hutchison Lumber Co. v. Lewis, 214 P. 721, 89 Okl. 145.
Or.—Pennick v. American Nat. Bank, 268 P. 1012, 126 Or. 615—Blomquist v. Jennings, 250 P. 1101, 119 Or. 691.
S.D.—Byrum v. Dilts, 183 N.W. 974, 44 S.D. 318.
Tex.—Moore v. B. & M. Chevrolet Co., Civ.App., 72 S.W.2d 945—Donoho v. Carwile, Civ.App., 214 S.W. 553, error refused.
Wis.—Rathmann v. Schwanz, 175 N. W. 812, 170 Wis. 459.
22 C.J. p 1235 note 28.
Designation of beneficiary in contract for benefit of third person see Contracts § 519 c (2) (d).

ment shows that a party thereto acts not for himself but for another.[25]

Parol evidence to show the real party in interest is inadmissible, however, where its effect is to vary or contradict the terms of the instrument;[26] and this rule has been applied to bills and notes.[27] However, it has been held that, in an action by the legal owner of a note of which another is the beneficial owner, evidence is admissible on behalf of the maker to show the beneficial owner where the maker has a good defense against him.[28]

Sealed instruments. A sealed instrument cannot, according to a number of authorities, be varied by parol evidence as to the real parties in interest.[29]

§ 990. —— Character in Which Party Acts or Contracts

a. In general
b. Bills and notes

a. In General

In case of ambiguity on the face of an instrument parol evidence may be admitted to show the character or capacity in which a party acts or contracts.

Where there is on the face of an instrument ambiguity as to the character or capacity in which a party acts or contracts, the door is open to parol evidence, which cannot in such case be said to vary the instrument.[30] Thus, where an executor, administrator, guardian, or other fiduciary is a party to an instrument, parol evidence is admissible to show that he acted in his fiduciary capacity;[31] and, where there is such ambiguity on the face of an instrument or agreement made or signed by a public or corporate officer as to be consistent with the construction, either that he means to bind himself personally, or that he acts in his official capacity, parol evidence is clearly admissible to prove the circumstances under which the contract was made and the true nature of the transaction, in order to show in what character he acted.[32]

Where, however, the legal effect of an instrument is to bind the officers by whom it is signed alone, and the name of the corporation does not appear on the instrument in such a way as to render it doubtful from the paper itself whether the corporation or the officers were intended to be bound, parol evidence is not admissible to show that the officers acted only in their official capacity,[33] and the same rule applies to an obligation signed by a fiduciary[34] or public officer.[35]

b. Bills and Notes

In the absence of an ambiguity parol evidence is inadmissible to show that a party, such as an officer of a corporation, signed a bill or note in a different capacity.

Where there is no ambiguity on the face of a bill or note as to the capacity in which a party signed his name, parol evidence is inadmissible to show that he signed in a different capacity.[36] Parol evi-

25. Fla.—Love v. Brown Development Co. of Michigan, 131 So. 144, 100 Fla. 1373.
La.—Callaghan v. Natalbany Lumber Co., 126 So. 534, 13 La.App. 253.
Utah.—Charter Oak Life Ins. Co. v. Stephens, 15 P. 253, 5 Utah 319, affirmed 12 S.Ct. 277, 142 U.S. 326, 35 L.Ed. 1029.
22 C.J. p 1235 note 29.

26. Miss.—Southern School Book Depository v. Holmes, 61 So. 698, 104 Miss. 736.
N.Y.—Yager v. Ajax Chemical & Surgical Commodities, 204 N.Y.S. 467, 122 Misc. 561—Kaplan v. Lanzner, 193 N.Y.S. 2.

27. Ga.—Campbell Tile & Mantel Co. v. S. A. Lynch Enterprise Finance Corporation, 165 S.E. 457, 45 Ga.App. 555.
N.Y.—Yager v. Ajax Chemical & Surgical Commodities, 204 N.Y.S. 467, 122 Misc. 561.
Tex.—Moore v. B. & M. Chevrolet Co., Civ.App., 72 S.W.2d 945.

28. Ill.—Feulner v. Gillam, 211 Ill. App. 348.
Okl.—McAlester v. Bank of McAlester, 218 P. 839, 95 Okl. 193—Schmidt v. Turnbuckle Oil Co., 212 P. 418, 88 Okl. 223.

29. N.Y.—Peterson v. New York, 87 N.E. 772, 194 N.Y. 437.
Tex.—Moore v. B. & M. Chevrolet Co., Civ.App., 72 S.W.2d 945.
22 C.J. p 1235 note 30.

30. Fla.—Johnson v. Morris, 177 So. 286, 129 Fla. 543.
Ga.—Coniff v. Hunnicutt, 122 S.E. 694, 157 Ga. 823—Lowery v. Davidson, 44 Ga. 38.
Ill.—Feulner v. Gillam, 216 Ill.App. 85.
Mass.—Pearlstein v. Novitch, 131 N. E. 853, 239 Mass. 228.
Mo.—Hurley v. Stevens, 279 S.W. 720, 220 Mo.App. 1057.
N.J.—Model Plan Finance Corporation v. Eagles, 153 A. 530, 107 N.J. Law 452.
N.Y.—Halperin v. Magida, 201 N.Y.S. 180.
S.D.—Healy-Owen-Hartzell Co. v. Bonilla Equity Exchange, 219 N.W. 791, 53 S.D. 1.
22 C.J. p 1235 note 31.

31. U.S.—Lincoln Nat. Life Ins. Co. v. Horwich, C.C.A.Ill., 115 F.2d 892.
Ga.—U. S. Fidelity & Guaranty Co. v. Newton, 139 S.E. 365, 37 Ga.App. 70.
22 C.J. p 1236 note 32.

32. Mo.—International Store Co. v. Barnes, App., 3 S.W.2d 1039.
N.Y.—Hauswald v. Katz, 214 N.Y.S. 705, 216 App.Div. 92.
S.D.—Healy-Owen-Hartzell Co. v. Bonilla Equity Exchange, 219 N.W. 791, 53 S.D. 1.
22 C.J. p 1236 note 33, p 1244 note 8.

33. Cal.—Otis Elevator Co. v. Berry, 82 P.2d 704, 28 Cal.App.2d 430.
Mont.—Schauer v. Morgan, 216 P. 347, 352, 67 Mont. 455, citing **Corpus Juris.**
N.J.—Drill Const. Co. v. Rosenthal, 151 A. 399, 8 N.J.Misc. 666.
22 C.J. p 1236 note 34.

34. N.Y.—American Surety Co. v. McDermott, 25 N.Y.S. 467, 5 Misc. 298, affirmed 29 N.Y.S. 76, 9 Misc. 132.
22 C.J. p 1236 note 35.

35. Ill.—Thayden v. Christiansen, 246 Ill.App. 380.
Wash.—Costello v. Bridges, 142 P. 687, 81 Wash. 192, L.R.A.1915A 853.

36. **Signing as witness instead of comaker**
Idaho.—International Harvester Co. of America v. Beverland, 219 P. 201, 37 Idaho 782.

dence is not ordinarily admissible to show that one signed a note in a representative capacity,[37] such as trustee,[38] whether or not, according to some authorities, he added such designation to his signature.

On the other hand, where from the face of a note it is doubtful whether the party making it acted for himself or for another, parol evidence is admissible to show the character of the transaction,[39] at least as between the original parties,[40] or as against subsequent holders with notice.[41] According to some authorities the addition of a designation after the signature creates under certain circumstances an ambiguity sufficient to permit the introduction of parol evidence.[42]

Corporate instruments. Where an officer of a corporation signs or indorses a corporate note, check, or draft and no ambiguity exists, parol evidence is inadmissible to exempt him from personal responsibility.[43] On the other hand, there are cases in which extrinsic evidence has been admitted to show that officers executed an instrument in their official capacity as the instrument of the corporation,[44] at least as between the original parties,[45] or as against subsequent holders with notice.[46] Whether an ambiguity appears depends on the circumstances of the case.[47]

37. U.S.—Bertenshaw v. Lincoln State Bank of Chicago, Ill., C.C.A. Kan., 283 F. 25.
Ark.—Lawrence County Bank v. Arndt, 65 S.W. 1052, 69 Ark. 406.
Mo.—Finch v. Heeb, 107 S.W.2d 962, 231 Mo.App. 591—Farmers' Bank of Weatherby v. Redman, App., 24 S.W.2d 235.
Va.—Coal River Collieries v. Eureka Coal & Wood Co., 132 S.E. 337, 144 Va. 263, 46 A.L.R. 485.
Wash.—Schwab v. Getty, 258 P. 1035, 145 Wash. 66, 54 A.L.R. 1382.
22 C.J. p 1237 note 37.
Signing of negotiable instruments by agents see infra § 991.
Execution of bills and notes by representatives see Bills and Notes § 32 b.

38. Fla.—Spofford v. Hanna, 135 So. 536, 102 Fla. 261.
22 C.J. p 1237 note 39, p 1236 note 35 [b].

39. Ala.—Cotton v. Courtright, 111 So. 7, 215 Ala. 474—McWhorter v. Lewis, 4 Ala. 198.
Colo.—Bieser v. Irwin, 72 P.2d 271, 101 Colo. 210, 113 A.L.R. 1360.
Ga.—Tollison-Davenport Co. v. Carr, 156 S.E. 274, 42 Ga.App. 340.
Mich.—Simon v. Tropp, 233 N.W. 415, 252 Mich. 559.
Mo.—Finch v. Heeb, 107 S.W.2d 962, 231 Mo.App. 591.
Tex.—George v. Hall, Civ.App., 262 S.W. 174.
Va.—Coal River Collieries v. Eureka Coal & Wood Co., 132 S.E. 337, 144 Va. 263, 46 A.L.R. 485.
22 C.J. p 1236 note 33 [a], p 1237 note 41.

40. U.S.—Brown v. Smith, C.C.A. Conn., 73 F.2d 524.
Colo.—Bieser v. Irwin, 72 P.2d 271, 101 Colo. 210, 113 A.L.R. 1360.
Idaho.—Taylor v. Fluharty, 208 P. 866, 35 Idaho 705.
Iowa.—Schuling v. Ervin, 169 N.W. 686, 185 Iowa 1.
Mich.—Annis v. Pfeiffer, 271 N.W. 568, 278 Mich. 692.
Pa.—Dormont Savings & Trust Co. v. Kommer, 13 A.2d 525, 338 Pa. 548.
W.Va.—Huntington Finance Co. v. Young, 143 S.E. 102, 105 W.Va. 405.
22 C.J. p 1237 note 42.

41. Idaho.—Taylor v. Fluharty, 208 P. 866, 35 Idaho 705.
Ill.—Tampa Investment & Securities Co. v. Taylor, 272 Ill.App. 541.
W.Va.—Huntington Finance Co. v. Young, 143 S.E. 102, 105 W.Va. 405.

42. Mo.—Finch v. Heeb, 107 S.W.2d 962, 231 Mo.App. 591.

"Trustees"

Parol evidence was admissible to show the capacity in which defendants signed note which bore the name Chaffee Lodge No. 735, I. O. O. F., followed by the word "Trustees," and then followed by the signatures of the three defendants sued thereon grouped together with a bracket, made with a pen, to the left of the names and to the left of the bracket the word "Trustees," written with a pen.—Finch v. Heeb, supra.

Trust company signing as trustee

Ill.—Quigley v. Merrill, 7 N.E.2d 499, 289 Ill.App. 620.

43. Ark.—First Nat. Bank v. J. H. Synder Mfg. Co., 1 S.W.2d 817, 175 Ark. 1134.
Personal liability of officers of corporation see Corporations §§ 761–930.

44. Mich.—Lexington State Bank v. Rose City Creamery Co., 173 N.W. 481, 207 Mich. 81.
Pa.—Reider v. Christ Church of Evangelical Ass'n of North America, 32 Berks Co.L.J. 241.
Tex.—Weeks v. San Angelo Nat. Bank, Civ.App., 65 S.W.2d 348, error refused.
22 C.J. p 1237 note 43.

45. Idaho.—Taylor v. Fluharty, 208 P. 866, 35 Idaho 705.
22 C.J. p 1237 note 44.

46. Kan.—Kline v. Tescott Bank, 31 P. 688, 50 Kan. 91, 34 Am.S.R. 107, 18 L.R.A. 533.
Mont.—Anderson v. Border, 244 P. 494, 75 Mont. 516.

47. **Absence of official designation**

(1) Parol evidence is inadmissible to show that note signed by company and individual without official designation was to bind company only, there being no ambiguity.—First Nat. Bank v. J. H. Snyder Mfg. Co., 1 S.W.2d 817, 175 Ark. 1134.

(2) Where a note in ordinary form was signed by the name of a corporation, followed by defendant's individual name without qualification, defendant will not be permitted to show that the words "vice president" were intended to be added after his signature, or an agreement that he should be bound only as vice president of the corporation.—Farmers' State Bank of Newport v. Lamon, 231 P. 952, 132 Wash. 369, 42 A.L.R. 1072.

(3) A note reading, "We promise to pay," and signed with the name of a corporation and the names of its officers cannot be shown to be the obligation of the corporation.
Utah.—Starley v. Deseret Foods Corporation, 74 P.2d 1221, 93 Utah 577.
Va.—Coal River Collieries v. Eureka Coal & Wood Co., 132 S.E. 337, 144 Va. 263, 46 A.L.R. 485.
Wash.—Moore v. Webster, 71 P.2d 369, 191 Wash. 394—Farmers' State Bank of Newport v. Lamon, 231 P. 952, 132 Wash. 369, 42 A.L.R. 1072.

(4) In suit on note on which names of corporation and its president appeared, although there was nothing to show capacity in which president signed, or that he was president, signatures created ambiguity, and evidence explaining that ambiguity was admissible.—First State Bank of Denton v. Smoot-Curtis Co., Tex.Civ.App., 121 S.W.2d 667, error dismissed.

Addition of official designation to signature

(1) Where a promissory note is written on the letterhead of "Smith Manufacturing & Irrigating Company," and signed by five persons, with

§ 991. —— Instruments Signed by Agents

a. In general
b. Contracts under seal
c. Negotiable instruments

a. In General

Parol evidence is admissible in many cases to show that one signing an instrument did so as agent for another, although such evidence may not be admitted where it would vary the express terms of the writing.

In order to charge the real principal it is always competent, in whatever form a contract is executed by an agent, to ascertain by evidence dehors the instrument who is the principal, and whether it purports to be the contract of an agent or is made in the name of the agent as principal.[48] Where a reading of a simple contract discloses that it is executed for or on behalf of a principal,[49] or discloses an intention to bind such principal,[50] or is so uncertain in its terms as to leave it in doubt whether it was intended to bind the agent or the principal,[51] parol evidence is admissible to show that the principal is the real party in interest and is therefore liable on the contract. Indeed, there is much authority in favor of a still further relaxation of the rule against parol evidence to affect writings, to the extent of admitting such evidence to charge the real principal on a simple contract wherein the agent appears as principal,[52] since the

the words "President," "Vice President," "Treasurer," "Secretary," and "Director" appended to the signatures, respectively, with the seal of the corporation to the left of such signature, an ambiguity arises as to the capacity in which the makers have signed, for which a resort to parol evidence is admissible, as between the original parties to the note, to determine their actual intention.—Taylor v. Fluharty, 208 P. 866, 35 Idaho 705.

(2) However, it has been held that a note reading "We promise to pay" and signed with the name of a corporation and the names of its officers with the addition of their respective official designations cannot be shown to be the obligation alone of the corporation.—Mathews v. Dubuque Mattress Co., 54 N.W. 225, 87 Iowa 246, 19 L.R.A. 676—22 C.J. p 1237 note 40.

"By" officer

The signing of an instrument in the name of the corporation "by" an officer does not warrant the reception of parol evidence where the note contained the words "We promise to pay."—Herman v. Metropolitan Petroleum Co., 253 Ill.App. 536.

48. Ark.—Moore v. Ziba Bennitt & Co., 227 S.W. 753, 147 Ark. 216.
Cal.—Caspary v. Moore, 70 P.2d 224, 21 Cal.App.2d 694.
Pa.—Penn Discount Corporation v. Sharp, 189 A. 749, 751, 125 Pa.Super. 171, quoting **Corpus Juris.**
Va.—Radford Water Power Co. v. Dunlap, 105 S.E. 257, 128 Va. 653.
22 C.J. p 1234 note 25.
Liabilities of principal to third persons see Agency §§ 231–274.

49. Ala.—Campbell Motor Co. v. Brewer, 101 So. 748, 212 Ala. 50.
Cal.—Rummelsburg v. McDonald, 226 P. 412, 66 Cal.App. 380—Swartz v. Burr, 185 P. 411, 43 Cal.App. 442.
Ga.—Dorsey v. Rankin, 157 S.E. 876, 43 Ga.App. 12.
22 C.J. p 1237 note 46.

50. Cal.—Caspary v. Moore, 70 P.2d 224, 21 Cal.App.2d 694—Rummelsburg v. McDonald, 226 P. 412, 66 Cal.App. 380—Swartz v. Burr, 185 P. 411, 43 Cal.App. 442.
22 C.J. p 1237 note 47.

Sufficiency of disclosure

That letters were written on bank's stationery and that president signing letters appended his official title was not alone enough to authorize parol evidence to show intention to bind bank.—Earlston Coal Co. v. Huntington Nat. Bank of Columbus, C.C.A.Ohio, 63 F.2d 329, certiorari denied Earlston Coal Co. v. Huntington Nat. Bank of Columbus, Ohio, 54 S.Ct. 54, 290 U.S. 637, 78 L.Ed. 554.

51. U.S.—Erskine v. U. S., C.C.A. Cal., 84 F.2d 690, rehearing denied 84 F.2d 880.
Ala.—Cotton v. Courtright, 111 So. 7, 215 Ala. 474—Railway Express Agency v. Luverne Bank & Trust Co., App., 2 So.2d 787, certiorari denied, Sup., 2 So.2d 790.
Cal.—Caspary v. Moore, 70 P.2d 224, 21 Cal.App.2d 694—Rummelsburg v. McDonald, 226 P. 412, 66 Cal. App. 380.
Ga.—Dorsey v. Rankin, 157 S.E. 876, 43 Ga.App. 12.
Ill.—Burge Machine Works v. Mandarian Inn, 225 Ill.App. 358.
Mass.—Stern v. Lieberman, 29 N.E. 2d 839.
Mich.—John R. Carpenter Co. v. Horner, 189 N.W. 853, 220 Mich. 15.
N.J.—Solomon v. New Jersey Indemnity Co., 110 A. 813, 94 N.J. Law 318, affirmed 113 A. 927, 95 N. J.Law 545.
N.Y.—Lerand Corporation v. Meltzer, 196 N.E. 283, 267 N.Y. 343, reversing 275 N.Y.S. 179, 242 App.Div. 844, and reargument denied 198 N. E. 396, 268 N.Y. 546—Hernandez v. Brookdale Mills, 185 N.Y.S. 485, 194 App.Div. 369.
N.D.—Davis v. Joerke, 181 N.W. 68, 47 N.D. 39.
Tex.—Cowan v. Hulse & Allen, Civ. App., 273 S.W. 663.
Vt.—Coates v. Eastern States Farmers' Exch., 180 A. 709, 99 Vt. 170.
22 C.J. p 1237 note 48.

52. U.S.—Moore v. Consolidated Products Co., C.C.A.Kan., 10 F.2d 319—Camp Mfg. Co. v. Jordan, D. C.N.C., 292 F. 182.
Cal.—Brooks v. Minturn, 1 Cal. 481—Rubin v. Platt Music Co., 268 P. 396, 92 Cal.App. 203—Marshall v. Bernheim, 221 P. 401, 64 Cal.App. 283.
Del.—Pope v. Landy, Super., 1 A.2d 589.
Ga.—Schneider Marble Co. v. Knight, 141 S.E. 420, 37 Ga.App. 646.
Ky.—National Deposit Bank of Owensboro v. Ohio Coal Co., 62 S. W.2d 1048, 250 Ky. 288.
Mass.—McTigue v. Ryan, 190 N.E. 733, 286 Mass. 515—Feinberg v. Poorvu, 143 N.E. 824, 249 Mass. 88.
Mo.—Baptiste Tent & Awning Co. v. Uhri, App., 129 S.W.2d 9—Mayhew v. Black, 259 S.W. 494, 216 Mo. App. 202—Miner v. Sever, App., 255 S.W. 578—U. S. Wood Preserving Co. v. Granite Bituminous Paving Co., App., 245 S.W. 349—Young v. Emmke, 242 S.W. 161, 210 Mo. App. 56—Huff v. Doerr, 228 S.W. 849, 206 Mo.App. 563.
N.Y.—Woodhouse v. Duncan, 13 N. E. 334, 106 N.Y. 527—Knickerbocker Portland Cement Co. v. State, 217 N.Y.S. 652, 218 App.Div. 22—Cantor v. Mutual Trimming & Binding Co., 23 N.Y.S.2d 429.
Or.—Pennick v. American Nat. Bank, 268 P. 1012, 126 Or. 615.
Pa.—Horwath v. Simon, 95 Pa.Super. 410.
Tex.—Berry v. Pierce Petroleum Corporation, 39 S.W.2d 824, 120 Tex. 452—Rex Liquor Stores v. McCart, Civ.App., 152 S.W.2d 376.
22 C.J. p 1237 note 49.

Where the transaction relates to the affairs of the principal and not to the personal affairs of the agent, a contract made by an agent in his own name may be shown by parol

admission of parol evidence to show that an additional and unnamed party is also liable on the instrument in no way alters, varies, or contradicts it, having the effect not of exonerating the agent, but merely of superadding the liability of the principal,[53] this being so even though the contract is of such a character that it must, under the statute of frauds, be in writing.[54]

The foregoing principle cannot, however, be carried to the extent of varying the express terms of the writing,[55] and it has accordingly been held that, if a contract purports to be executed by one in his own behalf,[56] or shows without ambiguity that the one so executing, although an agent, binds himself as principal,[57] parol evidence is inadmissible to show that the agent acted for his principal in making the contract.

Evidence to enable principal to sue. Where there is nothing to define the character of the contracting party to a simple contract, he may be shown by parol to be the agent merely, so as to confer the right of suing on the principal,[58] such evidence not contradicting the writing, but merely explaining the transaction.[59] Where, however, the contracting party expressly states himself to be "owner," it is not competent to show by parol that he acted not as owner but as agent for the real owner, or acted for a coöwner as well as for himself.[60]

Evidence to charge agent personally. Where a contract on its face is unequivocally that of a principal by the hand of his agent, parol evidence is inadmissible to contradict the plain terms of such contract by showing that it was intended to bind the agent personally.[61] However, parol evidence is admissible to charge the agent where the contract is ambiguous as to the capacity in which the agent signed[62] or to show that the agent was transacting business under the name of the ostensible principal;[63] and it has been held that, where a public officer enters into a contract in connection with his office, the presumption that he did not intend to bind himself personally may be overcome by parol evidence showing that such was his intention,[64] although full and clear proof is necessary.[65]

Evidence to exonerate agent from liability. If a simple contract is on its face the undertaking of the agent only, no reference being made to any representative capacity, or if it is otherwise made in a manner to bind the agent personally, parol evidence will not be received to exonerate the agent from liability thereon,[66] whether the principal was known

evidence to be that of the principal.—Lincoln Nat. Life Ins. Co. v. Horwich, C.C.A.Ill., 115 F.2d 892—Queen Ins. Co. of America v. Citro, C.C.A.Ill., 58 F.2d 107.

A known, as well as an undisclosed, principal may be charged by parol proof, where he is not identified by the terms of the contract.—Winston & Co. v. Clark County Const. Co., 217 S.W. 1027, 186 Ky. 743.

53. Ky.—Winston & Co. v. Clark County Const. Co., 217 S.W. 1027, 186 Ky. 743.
Md.—Hospelhorn v. Poe, 198 A. 582, 174 Md. 242, 118 A.L.R. 682.
Tex.—Eddleman v. Wofford, Civ.App., 217 S.W. 221, dismissed for want of jurisdiction.
22 C.J. p 1238 note 50.

54. Kan.—Mertz v. Hubbard, 88 P. 529, 75 Kan. 1, 121 Am.S.R. 352, 8 L.R.A.,N.S., 733, 12 Ann.Cas. 485.
22 C.J. p 1238 note 50.

55. U.S.—Western Sugar Refining Co. v. Helvetia Swiss F. Ins. Co., C.C.Cal., 163 F. 644.
22 C.J. p 1238 note 51.

56. Cal.—Bloom v. Coates, 213 P. 260, 190 Cal. 458—Ferguson v. McBean, 27 P. 518, 91 Cal. 63, 14 L.R.A. 65—Broy v. Calaveras Central Gold Mining Co., 64 P.2d 456, 18 Cal.App.2d 371.
N.J.—Shinn v. Smiley, Ch., 122 A. 581, rehearing denied 122 A. 534, 94 N.J.Eq. 583.
Pa.—Koelle v. Gehris Motors, 28 Del. Co. 436.
Tex.—Williamson v. Diltz, Civ.App., 101 S.W.2d 833, error dismissed—Southwest Gas Co. v. Doney, Civ. App., 99 S.W.2d 1107, error dismissed—Waggoner v. Magnolia Petroleum Co., Civ.App., 252 S.W. 865—Eddleman v. Wofford, Civ.App., 217 S.W. 221, dismissed for want of jurisdiction.
22 C.J. p 1238 note 52.

57. Cal.—Heringer v. Schumacher, 263 P. 550, 88 Cal.App. 349.
22 C.J. p 1238 note 53.

58. Ark.—Davis v. Reynolds, 241 S. W. 379, 154 Ark. 101.
Minn.—Ristvedt v. Walters, 178 N. W. 166, 146 Minn. 146.
Mo.—U. S. Wood Preserving Co. v. Granite Bituminous Paving Co., App., 245 S.W. 349.
Pa.—Horwath v. Simon, 95 Pa.Super. 410.
22 C.J. p 1239 note 54.

59. U.S.—Ford v. Williams, Md., 21 How. 287, 6 L.Ed. 36.
22 C.J. p 1239 note 55.

60. Del.—Cartmell v. Nigro, 165 A. 625, 19 Del.Ch. 231.
La.—Sladovich v. Glaser, 91 So. 297, 150 La. 918.
Mass.—Ritson v. Atlas Assur. Co., 171 N.E. 448, 272 Mass. 73.
22 C.J. p 1239 note 57.

61. Mich.—St. Joseph Valley Bank v. Napoleon Motors Co., 202 N.W. 933, 230 Mich. 498.
Wis.—Rathmann v. Schwanz, 175 N. W. 812, 170 Wis. 459.
22 C.J. p 1239 note 58.

62. Mo.—City of St. Louis ex rel. and to Use of Sears v. Clark, App., 35 S.W.2d 986.

63. Tex.—Martin v. Hemphill, Com. App., 237 S.W. 550, reversing, Civ. App., 221 S.W. 333.

64. Miss.—Copes v. Matthews, 18 Miss. 398.

65. Miss.—Copes v. Matthews, supra.
22 C.J. p 1239 note 61.

66. U.S.—Pickands, Mather & Co. v. H. A. & D. W. Kuhn & Co., C.C.A. Ohio, 8 F.2d 704, certiorari denied 46 S.Ct. 352, 270 U.S. 654, 70 L.Ed. 783.
Ark.—Threlkeld v. Baptist Hospital, 5 S.W.2d 305, 176 Ark. 1073—United Drug Co. v. Bedell, 223 S.W. 372, 145 Ark. 96.
Cal.—Otis Elevator Co. v. Berry, 82 P.2d 704, 28 Cal.App.2d 430.
Colo.—Warshauer Sheep & Wool Co. v. Rio Grande State Bank, 247 P. 183, 79 Colo. 540.
Ky.—Moore v. Spicer, 61 S.W.2d 5, 249 Ky. 464.
La.—Pike v. Kentwood Bank, 83 So. 904, 146 La. 704.
N.Y.—Knickerbocker Portland Ce-

or unknown at the time the contract was executed.[67] However, if the paper bears on its face some reference to a principal,[68] or some appellation or provision indicating representative capacity,[69] thereby suggesting doubt as to the character in which defendant acted, parol evidence is admissible to show that the contract was in fact that of defendant's principal and that it was so understood between defendant and the other contracting party.

Parol evidence offered in discharge of the agent may be rebutted by evidence on the part of the other party that he contracted with the agent alone.[70]

Where the person sought to be charged relies for relief on the fact that he acted as a public agent or officer, parol evidence is admissible to show whether he was a public or private agent[71] or was acting individually or as a public officer.[72]

b. Contracts under Seal

Parol evidence is generally inadmissible to show that a party to a sealed contract was acting as agent for another, although such evidence has been admitted where the intention of the parties was uncertain.

Parol evidence is inadmissible to show that the nominal party to a contract under seal was acting as agent for another,[73] either for the purpose of exonerating him from liability[74] or for the purpose of charging his principal,[75] or, as otherwise expressed, a contract under seal may not be turned into a simple contract of a person not in any way appearing on its face to be a party to or interested in it, on proof dehors the instrument that the nominal party was acting as agent of another,[76] either for the purpose of charging the principal[77] or to enable him to sue.[78] Where, however, the intention of the parties to the instrument is uncertain, parol evidence is admissible, even in case of an instrument under seal, to show the intention of the parties, as to whether the agent or principal was to be bound.[79]

Where seal unnecessary. Where the seal is unnecessary to the validity of a contract apparently executed on behalf of one not a party to it, it has been held that parol evidence is admissible to discharge the person actually signing it and to bind his principal,[80] but there is also authority for the contrary view.[81]

c. Negotiable Instruments

As between the original parties or those chargeable with notice, parol evidence is admissible to show the agent's authority, or to show the true intention of the parties where, from the instrument, it is doubtful to whom the credit was given.

In an action between the original parties to a negotiable instrument, or those chargeable with notice, parol evidence is generally admissible to show the agent's authority,[82] or to remove a doubt and show

ment Co. v. State, 217 N.Y.S. 652, 218 App.Div. 22—Hernandez v. Brookdale Mills, 185 N.Y.S. 485, 194 App.Div. 369—Seneca Finance Corporation v. Oakes, 252 N.Y.S. 525, 141 Misc. 355—Ph. Van Ommeren Corporation of New York v. Rothe, 204 N.Y.S. 227, 123 Misc. 141—Cantor v. Mutual Trimming & Binding Co., 23 N.Y.S.2d 429.
Pa.—Horwath v. Simon, 95 Pa.Super. 410—Koelle v. Gehris Motors, 28 Del.Co. 436.
Utah.—Starley v. Deseret Foods Corporation, 74 P.2d 1221, 93 Utah 577—Roe v. Schweitzer, 184 P. 938, 55 Utah 204.
Wis.—Page Woven Wire Fence Co. v. Staudenmayer, 182 N.W. 746, 174 Wis. 154.
22 C.J. p 1239 note 62.
Liability of agent to third persons see Agency §§ 205–224.

67. Ind.—George v. Smith, 129 N.E. 231, 190 Ind. 582.
22 C.J. p 1239 note 63.

68. N.Y.—Hale v. Hirsch, 199 N.Y.S. 514, 205 App.Div. 308.
22 C.J. p 1239 note 64.

69. U.S.—Strachan Shipping Co. v. Alexander Eccles & Co., C.C.A.Ga., 25 F.2d 361, reversing, D.C., Alexander Eccles & Co. v. Strachan Shipping Co., 21 F.2d 656, and certiorari denied 49 S.Ct. 13, 278 U.S. 610, 73 L.Ed. 535.
Cal.—Otis Elevator Co. v. Berry, 82 P.2d 704, 28 Cal.App.2d 430.
22 C.J. p 1239 note 65.

70. Pa.—Barclay v. Pursley, 20 A. 411, 110 Pa. 13.

71. Conn.—Ogden v. Raymond, 22 Conn. 379, 58 Am.D. 429.
Mich.—Scott v. Detroit Young Men's Soc., 1 Dougl. 119.

72. Ga.—Ghent v. Adams, 2 Ga. 214.
Va.—Walker v. Christian, 21 Gratt. 291, 62 Va. 291.

73. Ga.—Mather-Groover Co. v. Roberts, 187 S.E. 913, 54 Ga.App. 397.
N.Y.—Lerand Corporation v. Meltzer, 196 N.E. 283, 267 N.Y. 343, reversing 275 N.Y.S. 179, 242 App.Div. 844, and reargument denied 198 N.E. 396, 268 N.Y. 546.
Tex.—Rex Liquor Stores v. McCart, Civ.App., 152 S.W.2d 376.
22 C.J. p 1240 note 70.

74. S.C.—Wallace v. Langston, 29 S.E. 552, 52 S.C. 133.
22 C.J. p 1240 note 71.

75. Ga.—Mather-Groover Co. v. Roberts, 187 S.E. 913, 54 Ga.App. 397.
Tex.—Rex Liquor Stores v. McCart, Civ.App., 152 S.W.2d 376.
22 C.J. p 1240 note 72.
Liability of principal on sealed contract made by agent see Agency § 246.

76. N.Y.—Anderson v. Connor, 87 N.Y.S. 449, 43 Misc. 384.
22 C.J. p 1240 note 73.

77. N.Y.—Briggs v. Partridge, 64 N.Y. 357, 21 Am.R. 617— Whitehouse v. Drisler, 56 N.Y.S. 95, 37 App.Div. 525.

78. Ga.—Hollingsworth v. Georgia Fruit Growers, Inc., 196 S.E. 766, 768, 185 Ga. 873, quoting **Corpus Juris**—Byers v. Harper, 13 S.E.2d 389, 390, 64 Ga.App. 404, quoting **Corpus Juris.**
22 C.J. p 1240 note 75.

79. Mo.—Shuetze v. Bailey, 40 Mo. 69.
22 C.J. p 1240 note 76.

80. Tex.—Rex Liquor Stores v. McCart, Civ.App., 152 S.W.2d 376.
22 C.J. p 1240 note 77.

81. Or.—Barbre v. Goodale, 38 P. 67, 43 P. 378, 28 Or. 465.

82. Conn.—Austin, Nichols & Co. v. Gross, 120 A. 596, 98 Conn. 782.
Mass.—Adams v. Swig, 125 N.E. 857, 234 Mass. 584.

the true intention of the parties, where from the whole instrument it is doubtful to whom the credit was given, whether the doubt arises from the appearance of the names of both agent and principal on the instrument, or from other indicia of an intention to contract in a representative capacity.[83] Parol evidence is also admissible to show that the principal has adopted the name of the agent, and that the intention was to bind the principal.[84]

Instrument not indicating principal. Where neither the name of the principal nor any other circumstance appears on the face of the instrument to connect it with him, extrinsic evidence is not admissible to charge the principal or to show any other intent than that expressed in the instrument to bind the agent,[85] although the word "agent," or other descriptive word, is added to the signature.[86] It is held by some authorities, however, that, as between the immediate parties to the instrument, parol evidence is admissible to show that the payee was cognizant of all the facts, and that the intention was to bind the principal, so that where the agent signs his own name with descriptive words, and the instrument fails to disclose the principal, although the mere fact that descriptive words are added to the agent's signature does not charge third persons with knowledge of any representative relation, parol evidence is admissible to show that the payee was cognizant of all the facts, that the maker was in fact an agent, and that the intention was to bind the principal,[87] and that there was no consideration moving to him, which fact was known to the payee.[88] It has been held that the same rule applies where the holder took the paper after maturity.[89]

Admissibility to charge or discharge agent. Parol evidence is not admissible to charge the agent on a negotiable instrument, where he executes it in the name of the principal,[90] or the face of the instrument clearly indicates that it was made on behalf of a principal ascertainable from the instrument,[91] or where the payee admits in his pleading that the credit was given to the principal;[92] nor is such evidence admissible to discharge an agent who signs only his own name to a negotiable instrument,[93] even though he described himself in

Mo.—Page v. Lathrop, 20 Mo. 589—Finch v. Heeb, App., 131 S.W.2d 146.

83. Ark.—Wilenzick v. Simon, 3 S.W.2d 297, 176 Ark. 1206.
Cal.—Van Haaren v. Whitmore, 38 P.2d 829, 8 Cal.App.2d 632.
Ga.—Tollison-Davenport Co. v. Carr, 156 S.E. 274, 42 Ga.App. 340.
Ind.—Bayh v. Hanna, 122 N.E. 7, 69 Ind.App. 348.
Kan.—Solomon Nat. Bank v. Continental Trust Co., 193 P. 316, 107 Kan. 700.
Mass.—Adams v. Swig, 125 N.E. 857, 234 Mass. 584.
Mich.—Simon v. Tropp, 233 N.W. 415, 252 Mich. 559.
Mo.—Finch v. Heeb, App., 131 S.W.2d 146—Finch v. Heeb, 107 S.W.2d 962, 231 Mo.App. 591.
N.Y.—H. & K. Costume Co. v. Maison Bernard Importing Co., 187 N.Y.S. 106, 114 Misc. 553.
Wis.—Kegel v. McCormack, 272 N.W. 650, 225 Wis. 19, 111 A.L.R. 643.
22 C.J. p 1240 note 80.

84. N.Y.—Merchants' Nat. Bank of Plattsburg, N. Y., v. Home Deposit Co. of America, 218 N.Y.S. 293, 128 Misc. 446 affirmed 224 N.Y.S. 852, 221 App.Div. 828.
22 C.J. p 1241 note 81.

85. Cal.—Crocker Nat. Bank of San Francisco v. Say, 288 P. 69, 209 Cal. 436.
Fla.—Spofford v. Hanna, 135 So. 536, 102 Fla. 261.
N.D.—Biard v. Publishers' Nat. Service Bureau, 199 N.W. 757, 51 N.D. 374.
22 C.J. p 1241 note 82.
Liability of undisclosed principal on negotiable instrument see Agency § 247; Bills and Notes § 32.

Reason for rule

"An undisclosed principal has been held liable except in cases of negotiable instruments and specialties, but the law seems well settled that in the case of negotiable instruments an undisclosed principal could not be charged at any time. In the case of negotiable instruments this restriction arises, not by reason of the status of the parties, but by reason of the character of the instrument. When a negotiable instrument is executed by an agent without sufficiently indicating on its face who the principal is, parol evidence cannot be introduced to charge the principal, although the agent executed the instrument as an agent. This exception to the rule is based upon the reason that each party who takes a negotiable instrument makes his contract with the parties who appear on its face to be bound for its payment; and in suits upon negotiable instruments no evidence is admissible to charge any person as principal thereto unless his name in some way is disclosed on the instrument itself."—Pratt v. Hopper, 55 P.2d 517, 518, 12 Cal.App.2d 291.

86. Neb.—Western Wheeled Scraper Co. v. McMillen, 99 N.W. 512, 71 Neb. 686.
22 C.J. p 1241 note 82.
Parol evidence to show character or capacity in which party acts or contracts see supra § 990.

87. U.S.—In re Delpark, C.C.A.N.Y., 65 F.2d 582.
Conn.—Austin, Nichols & Co. v. Gross, 120 A. 596, 98 Conn. 782.
Fla.—Hazlett v. Willaume, 80 So. 309, 76 Fla. 514.
Idaho.—Taylor v. Fluharty, 208 P. 866, 35 Idaho 705.
Ohio.—Spangler v. Citizens' Nat. Bank, 190 N.E. 636, 47 Ohio App. 123.
22 C.J. p 1241 note 83.

88. Md.—Sumwalt v. Ridgely, 20 Md. 107.
22 C.J. p 1241 note 84.

89. La.—Barry v. Pike, 21 La.Ann. 221.

90. N.C.—Delius v. Cawthorn, 13 N.C. 90.
Wis.—Liebscher v. Kraus, 43 N.W. 166, 74 Wis. 387, 17 Am.S.R. 171, 5 L.R.A. 496.
Liability of agent executing negotiable instrument see Bills and Notes § 32.

91. Ala.—Little v. People's Bank of Mobile, 96 So. 763, 209 Ala. 620.
22 C.J. p 1242 note 87.

92. Ga.—University Bank v. Hamilton, 78 Ga. 312.

93. Cal.—Crocker Nat. Bank of San Francisco v. Say, 288 P. 69, 209 Cal. 436—Van Haaren v. Whitmore, 38 P.2d 829, 8 Cal.App.2d 632.
N.H.—True W. Jones Brewing Co. v. Flaherty, 120 A. 432, 80 N.H. 571.
N.Y.—Purgold v. J. L. Hachtmann &

the body of the instrument or in the signature as the agent of another,[94] and the payee has notice of the agency at the time of the contract.[95]

§ 992. —— Individual or Partnership Contract

Parol evidence has been held admissible to show that an individual obligation was intended to bind, or was for the benefit of, a partnership, especially where the instrument indicated that it was more than a mere personal obligation.

Parol evidence has been held to be admissible to show that an instrument executed by one partner individually is intended as a firm obligation and is binding on the firm,[96] or was made for the use and benefit of the firm,[97] especially where the instrument contains something indicating that it is more than a mere personal obligation.[98] However, it has also been held that where two or more individuals are partners under a firm name consisting of their individual names, or indicating that there is more than one member, or where other parties to the instrument have knowledge of the existence of a partnership, an instrument executed by one partner in his individual name alone cannot be shown, for the purpose of charging the partnership, to be in truth the agreement or undertaking of the partnership as such, there being nothing on the face of the instrument to indicate that such is the case.[99]

It may be shown by parol that the name of an individual appearing as a party to an instrument is a partnership name,[1] and that the contract or obligation is that of the firm;[2] and similarly where several persons have formed a partnership but have not adopted any firm name, and one of them has made a contract in his own name with a person who knows he is acting for the firm, parol evidence is admissible to bind the firm on such contract.[3] Where an instrument is executed by several persons, it is competent to show by parol, when properly pleaded, that such persons composed a partnership and that they executed the instrument as a firm obligation,[4] or that the transaction was a partnership one and for the benefit of the firm.[5] Where land is purchased or leased in the individual names of the persons composing the firm, parol evidence is admissible to show that the purchase or lease was a partnership enterprise.[6] Parol evidence is admissible to show that property standing in the name of one partner is owned by the firm.[7]

§ 993. —— Identification of Parties

Parol evidence is admissible to identify a person as being the one named in an instrument.

Where a person claims the benefit of an instrument in writing, or it is sought to charge him thereunder, parol evidence is admissible for the purpose of identifying such person as the one named in the instrument.[8] This rule is applied where two per-

Co., 201 N.Y.S. 76, affirmed 197 N.Y.S. 942, 204 App.Div. 864.
Tex.—Merchants' & Planters' State Bank of Winnsboro, Tex., v. Brewer, Civ.App., 286 S.W. 253.
Wash.—Moore v. Webster, 71 P.2d 369, 191 Wash. 394.
22 C.J. p 1242 note 89.

94. Iowa.—Kessel v. Murray, 196 N.W. 591, 197 Iowa 17, 33 A.L.R. 1346.
22 C.J. p 1242 note 90.

95. Ill.—Hypes v. Griffin, 89 Ill. 134, 31 Am.R. 71.
22 C.J. p 1242 note 91.

96. U.S.—In re Warren, D.C.Me., 29 F.Cas.No.17,191, 2 Ware 322.
Cal.—Milonas v. Sarantitis, 292 P. 978, 109 Cal.App. 343.
Mass.—Trowbridge v. Cushman, 24 Pick. 310.
N.C.—Brown v. Town of Hillsboro, 117 S.E. 41, 185 N.C. 368.
Ohio.—Fosdick v. Van Horn, 40 Ohio St. 459.
Or.—Aramburn v. Guerricagoitia, 193 P. 922, 98 Or. 258.
Pa.—Dinger v. Friedman, 123 A. 641, 279 Pa. 8.
Wash.—Vancouver Nat. Bank v. Katz, 252 P. 934, 142 Wash. 306.
22 C.J. p 1242 note 93.

97. U.S.—Hutchinson v. Peyton, C.C.D.C., 12 F.Cas.No.6,958, 2 Cranch C.C. 365.
Tex.—New Amsterdam Casualty Co. v. Harrington, Civ.App., 11 S.W.2d 533, error dismissed.

98. Ga.—Dorsey v. Rankin, 157 S.E. 876, 43 Ga.App. 12.
Ky.—Owings v. Trotter, 1 Bibb 157.

99. Wash.—Alaska Pac. Salmon Co. v. Matthewson, 101 P.2d 606, 3 Wash.2d 560.
22 C.J. p 1242 note 96.

1. La.—Calhoun v. Star Ins. Co. of America, 105 So. 231, 159 La. 77.
22 C.J. p 1242 note 97.

2. Ill.—Daugherty v. Heckard, 89 Ill.App. 544, affirmed 59 N.E. 569, 189 Ill. 239.

3. Mass.—Getchell v. Foster, 106 Mass. 42.

4. U.S.—Duell v. Greiner, D.C.Fla., 15 F.2d 726—In re Rudy, D.C.Ky., 25 F.Supp. 912—In re Davis & Trousdale, D.C.Tex., 280 F. 136.
Ill.—Dreyfus v. Union Nat. Bank, 45 N.E. 408, 164 Ill. 83.
22 C.J. p 1242 note 1.

5. Ohio.—Teare v. Cain, 7 Ohio Cir. Ct. 375, 4 Ohio Cir.Dec. 643.

6. N.Y.—In re Allen St. in City of New York, 266 N.Y.S. 277, 148 Misc. 488.
22 C.J. p 1243 note 3.

7. N.J.—Gansevoort Bank v. Carragan, 55 A. 741, 69 N.J.Law 404.
22 C.J. p 1243 note 4.

8. Cal.—Branch v. Bekins Van & Storage Co., 290 P. 146, 106 Cal. App. 623.
Conn.—Bryant Electric Co. v. Stein, 111 A. 204, 95 Conn. 211.
Ill.—Daytona Gables Development Co. v. Glen Flora Inv. Co., 178 N.E. 107, 345 Ill. 371.
La.—Fortner's Heirs v. Good Pine Lumber Co., 83 So. 319, 146 La. 11—Sisters of Charity of Incarnate Word v. Emery, 81 So. 99, 144 La. 614—French Market Ice Mfg. Co. of New Orleans v. Dalton, 130 So. 122, 15 La.App. 115.
Me.—Inhabitants of Brownville v. U. S. Pegwood & Shank Co., 123 A. 170, 123 Me. 379.
Mass.—Souza v. Metropolitan Life Ins. Co., 170 N.E. 62, 270 Mass. 189.
Mich.—Hall v. Equitable Life Assur. Soc. of U. S., 295 N.W. 204, 295 Mich. 404—Meyer v. Shapton, 144 N.W. 887, 178 Mich. 417.
N.J.—Winfield v. Saunders, 147 A.

sons have the same name and it is uncertain which was intended;[9] where a contract has been made in the name of a partnership and it does not appear who the members of the partnership are or who were intended to be bound thereby;[10] or where a contract has been signed with an incorrect, fictitious, assumed, business, or trade name.[11]

§ 994. —— Relations of Parties

The actual relation between parties to an instrument may be shown by parol where the effect of the writing is not thereby varied.

The relation actually existing between parties to an instrument may be shown by parol, where the effect of such evidence is not to vary the effect of the writing.[12] However, parol evidence is not admissible to show the relationship of the parties where the instrument itself fixes their relationship;[13] and where a written paper appears to be a joint undertaking of all the signers, parol evidence is not admissible to show that some of the signers were parties of the first part contracting with the others as parties of the second part.[14]

§ 995. —— Mistake or Variance in Name

As a general rule a mistake or variance in the name of a party to an instrument may be shown by parol, although there is some authority to the contrary.

While there are cases supporting the rule that a written instrument can be reformed only in equity and hence that in an action or proceeding at law parol evidence is not admissible to show a mistake in the name of a party,[15] at least where the contract is one which is required by law to be in writing,[16] the more generally accepted view is that, at law as well as in equity, a mistake or variance in the name of a party may be shown and parol evidence admitted to show the real party intended.[17] However, parol evidence has been held not admissible to prove that a lease, which reserves rent to one person and which purports to be for his sole use, was meant and intended to be for the benefit of

537, affirming 142 A. 907, 6 N.J. Misc. 833.
S.C.—Setzer v. Foil, 183 S.E. 907, 179 S.C. 232.
Tex.—King v. Wise, Com.App., 282 S.W. 570, reversing Wise v. Boyd, Civ.App., 267 S.W. 543—Warren v. Parlin-Orendorff Implement Co., Civ.App., 207 S.W. 586, error refused.
22 C.J. p 1243 note 5—18 C.J. p 175 note 31.

9. U.S.—Norton v. Larney, Okl., 45 S.Ct. 145, 266 U.S. 511, 69 L.Ed. 413, affirming, C.C.A., 289 F. 395.
Idaho.—McDougall v. Servel, 292 P. 590, 50 Idaho 9.
Mo.—Sims v. Missouri State Life Ins. Co., 23 S.W.2d 1075, 223 Mo. App. 1150.
N.J.—Winfield v. Saunders, 142 A. 907, 6 N.J.Misc. 833, affirmed 147 A. 537, 105 N.J.Law 580.
Pa.—Scull v. Scull, 167 A. 496, 109 Pa.Super. 226.
22 C.J. p 1243 note 6.
Where there is no ambiguity or uncertainty as to which of two persons having the same name was intended, parol evidence is inadmissible.—Standard Life & Accident Ins. Co. v. Taylor, 34 S.W. 781, 12 Tex. Civ.App. 386.

10. Ga.—Tarbutton v. Duggan, 163 S.E. 298, 45 Ga.App. 31.
R.I.—Winoker v. Winoker, 136 A. 764, 48 R.I. 184.
Tex.—Southern Surety Co. v. Bus Union Station, Civ.App., 23 S.W.2d 484, error dismissed.
22 C.J. p 1244 note 7.
Deed made to firm in firm name
N.C.—Murray v. Blackledge, 71 N.C. 492.
22 C.J. p 1244 note 7 [a].

11. Ala.—National Life & Accident Ins. Co. v. Saffold, 144 So. 816, 225 Ala. 664.
Ill.—Beilin v. Krenn & Dato, 183 N. E. 330, 350 Ill. 284—Mackie v. Schoenstadt, 138 N.E. 686, 307 Ill. 398.
N.J.—Rosenberg v. Maryland Casualty Co., 130 A. 726, 3 N.J.Misc. 1132, affirmed 132 A. 923, 102 N.J.Law 724.
N.Y.—Mail & Express Co. v. Parker Axles, Inc., 198 N.Y.S. 20, 204 App.Div. 327.
S.D.—Anderson v. Security Land Co., 224 N.W. 937, 55 S.D. 40.
22 C.J. p 1244 note 9.

12. Ill.—Schultz v. Charleston, 261 Ill.App. 51.
Kan.—Atchison, T. & S. F. Ry. Co. v. Boyle Commission Co., 178 P. 614, 615, 104 Kan. 166, citing **Corpus Juris.**
Md.—Kremen v. Rubin, 116 A. 640, 139 Md. 682.
Mass.—Pearlstein v. Novitch, 131 N. E. 853, 239 Mass. 228.
Minn.—Judd v. Skidmore, 22 N.W. 183, 33 Minn. 140—Austin v. Wacks, 15 N.W. 409, 30 Minn. 335.
Pa.—Brink v. Shaffer, 159 A. 719, 306 Pa. 386.
S.D.—Healy-Owen-Hartzell Co. v. Bonilla Equity Exchange, 219 N.W. 791, 53 S.D. 1.
Utah.—Garrett v. Ellison, 72 P.2d 449, 452, 93 Utah 184, citing **Corpus Juris.**
22 C.J. p 1244 note 13, p 1229 note 78 —10 C.J. p 199 note 89 [a] (1)—30 C.J. p 1023 note 8.
Admissibility of parol evidence to show relationship of parties in determining liabilities on obligations for payment of money see supra § 985.

13. Ky.—Federal Chemical Co. v. Pioneer Coal & Coke Co., 246 S.W. 127, 197 Ky. 110.

14. Mass.—Myrick v. Dame, 9 Cush. 248.
22 C.J. p 1245 note 16.

15. Wis.—Zbikowski v. Straz, 295 N.W. 777, 236 Wis. 462.
22 C.J. p 1245 note 17.
Admissibility of parol evidence to show grantee as person other than one named in deed see supra § 916.

16. U.S.—Grant v. Naylor, Md., 4 Cranch 224, 2 L.Ed. 603.
22 C.J. p 1245 note 18.

17. Ala.—Reese v. Mackentepe, 140 So. 550, 224 Ala. 372.
Cal.—Branch v. Bekins Van & Storage Co., 290 P. 146, 152, 106 Cal. App. 623, quoting **Corpus Juris.**
Del.—Washington Fire Co. No. 7, of City of Wilmington v. Yates, 115 A. 365, 13 Del.Ch. 32—Elbert v. Wilmington Turngemeinde, 107 A. 215, 7 Boyce 355.
La.—Fortner's Heirs v. Good Pine Lumber Co., 83 So. 319, 146 La. 11.
Me.—Inhabitants of Brownville v. U. S. Pegwood & Shank Co., 123 A. 170, 123 Me. 379.
Mich.—Hall v. Equitable Life Assur. Soc. of U. S., 295 N.W. 204, 295 Mich. 404.
Mo.—Settles v. Scott, 211 S.W. 35.
Tex.—Weeks v. San Angelo Nat. Bank, Civ.App., 65 S.W.2d 348, error refused.
22 C.J. p 1245 note 19.

another person,[18] or that the name of the wrong person was inserted in a bond by mistake.[19]

§ 996. Place of Execution

Parol evidence is admissible to show that an instrument was executed at a place other than that stated in the writing.

The place at which an instrument was executed, not being an essential part of the writing, parol evidence is admissible to show that the instrument was executed at a place different from the one at which it purports to have been executed.[20]

§ 997. Prior and Contemporaneous Collateral Agreements

The parol evidence rule does not preclude the admission of extrinsic evidence of a valid prior or contemporaneous parol agreement which is collateral both in form and substance in that, although related in a general sense to the written instrument in question, it is independent thereof and does not vary or contradict the express or implied provisions thereof nor invade the particular field which the instrument undertakes expressly or impliedly to cover, but instead has for its subject a matter which the parties might naturally deal with separately.

The rule excluding parol evidence to vary or contradict a writing does not extend so far as to preclude the admission of extrinsic evidence to show a valid prior or contemporaneous collateral parol agreement between the parties, which is separate and distinct from, and independent of, the written instrument, has not been merged in, or superseded by, such instrument, and does not contradict, conflict with, or vary the express or implied provisions thereof or deal with a definite and particular subject matter which the written instrument expressly or impliedly undertakes to cover.[21] Except where, as shown infra § 999, the writing expressly

18. N.Y.—Jackson v. Foster, 12 Johns. 488.

19. N.C.—Coleman v. Crumpler, 13 N.C. 508.
22 C.J. p 1245 note 22.

20. Cal.—Taylor v. Lundblade, App., 111 P.2d 344—Gas Appliance Sales Co. v. W. B. Bastian Mfg. Co., 262 P. 452, 87 Cal.App. 301.
22 C.J. p 1245 note 23.

21. U.S.—Levering v. Indemnity Ins. Co. of North America, C.C.A.Cal., 50 F.2d 151, 153, citing **Corpus Juris**—Stewart v. Meadows, C.C.A. Mo., 282 F. 861.
Ala.—Pyle v. Pizitz, 110 So. 822, 215 Ala. 398—Bissell Motor Co. v. Johnson, 97 So. 49, 210 Ala. 38.
Cal.—Buckner v. A. Leon & Co., 267 P. 693, 204 Cal. 225—McKee v. Lynch, 104 P.2d 675, 40 Cal.App.2d 216—Davis Welding & Manufacturing Co. v. Advance Auto Body Works, 100 P.2d 1067, 38 Cal.App. 2d 270—Cotton v. Riverside Cement Co., 85 P.2d 136, 29 Cal.App.2d 588—Greathouse v. Daleno, 206 P. 1019, 57 Cal.App. 187.
Colo.—Prochnow v. Victor M. Cox Loan & Investment Co., 179 P. 809, 65 Colo. 580.
Conn.—Booth v. Booth & Bayliss Commercial School, 180 A. 278, 120 Conn. 221, 99 A.L.R. 1517—Colin v. Dunn, 149 A. 851, 111 Conn. 342, 70 A.L.R. 740.
Del.—Arthur Jordan Piano Co. v. Lewis, 154 A. 467, 472, 4 W.W. Harr. 423, citing **Corpus Juris.**
Ga.—Stonecypher v. Georgia Power Co., 189 S.E. 13, 183 Ga. 498, answers to certified questions conformed to 189 S.E. 672, 55 Ga.App. 197—Long v. Cash, 189 S.E. 73, 54 Ga.App. 764—Bernstein v. Fagelson, 143 S.E. 237, 38 Ga.App. 294.
Iowa.—Andrew v. Brooks, 257 N.W. 315, 191 Iowa 134, citing **Corpus Juris**—In re Simplot's Estate, 246 N.W. 396, 215 Iowa 578—Cox v. Fleisher Const. Co., 223 N.W. 521, 208 Iowa 458—Stoner v. Stehm, 202 N.W. 530, 200 Iowa 809—Miller Hotel Co. v. Gorman, 190 N.W. 524, 194 Iowa 751.
Ky.—Bullock v. Young, 67 S.W.2d 941, 252 Ky. 640.
La.—Wainwright v. Gilham, App., 188 So. 434—Brandin Slate Co. v. Fornea, App., 183 So. 572.
Mass.—Western Newspaper Union v. Dittemore, 161 N.E. 908, 264 Mass. 74—Williams v. Pittsfield Lime & Stone Co., 154 N.E. 572, 258 Mass. 65.
Mo.—Slabon v. St. Louis Car Co., App., 102 S.W.2d 939—Hart v. Riedel, App., 51 S.W.2d 891—First Nat. Bank & Trust Co. v. Limpp, 288 S.W. 957, 221 Mo.App. 951—Pate v. Mullen, App., 209 S.W. 291.
N.M.—Baca v. Fleming, 187 P. 277, 25 N.M. 643.
N.Y.—Mitchill v. Lath, 160 N.E. 646, 247 N.Y. 377, 68 A.L.R. 239, reversing Mitchell v. Lath, 221 N.Y.S. 864, 220 App.Div. 776, and reargument denied Mitchill v. Lath, 162 N.E. 511, 248 N.Y. 526—American Aniline Products v. Mitsui & Co., 179 N.Y.S. 895, 190 App.Div. 485—Davis v. Davis, 205 N.Y.S. 710, 123 Misc. 504, affirmed 208 N.Y.S. 850, 213 App.Div. 846.
N.C.—Boone v. Boone, 9 S.E.2d 383, 217 N.C. 722.
Okl.—Mid-West Chevrolet Corporation v. Noah, 48 P.2d 283, 173 Okl. 198—Oklahoma Natural Gas Corporation v. Grier, 39 P.2d 588, 170 Okl. 291—Oklahoma Natural Gas Corporation v. Duffey, 39 P.2d 587, 170 Okl. 291—Oklahoma Natural Gas Corporation v. Hudson, 39 P. 2d 585, 170 Okl. 291—Oklahoma Natural Gas Corporation v. Douglas, 39 P.2d 578, 170 Okl. 284, 101 A.L.R. 144—Packard Oklahoma Motor Co. v. Funk, 245 P. 571, 117 Okl. 96—City Nat. Bank of McAlester v. Edwards, 229 P. 487, 100 Okl. 202.
Or.—Thorne v. Edwards, 34 P.2d 640, 147 Or. 443.
Pa.—In re Cridge's Estate, 137 A. 455, 289 Pa. 331—McCormick v. Harris, 196 A. 885, 130 Pa.Super. 175.
S.C.—Ballenger v. Macauley, 157 S. E. 141, 159 S.C. 389—Knighton v. Des Portes Mercantile Co., 112 S. E. 343, 119 S.C. 340.
S.D.—James River Bank of Frankfort v. Hansen, 211 N.W. 976, 51 S.D. 13—Interstate Surety Co. v. Thompson, 186 N.W. 115, 45 S.D. 91.
Tenn.—McGannon v. Farrell, 214 S. W. 432, 141 Tenn. 631—Weeks v. Dealers' Implement Co., 65 S.W.2d 585, 16 Tenn.App. 599—DuPont Rayon Co. v. Roberson, 12 Tenn. App. 261.
Tex.—Huddleston v. Wheeler Lumber, Bridge & Supply Co., Civ.App., 75 S.W.2d 715—Chadwick Machinery Co. v. Kelley, Civ.App., 60 S. W.2d 555—Dooley v. Gray, Civ. App., 54 S.W.2d 558, error dismissed—Wright v. Williamson, Civ. App., 27 S.W.2d 558—North v. Atlas Brick Co., Civ.App., 281 S.W. 608, modified on other grounds Atlas Brick Co. v. North, Com.App., 288 S.W. 146—Brooke Smith & Co. v. Southland Life Ins. Co., Civ. App., 278 S.W. 916—Houston Nat. Exch. Bank v. Chapman, Civ.App., 263 S.W. 929—Hall v. San Jacinto State Bank, Civ.App., 255 S.W. 506—Taylor Milling Co. v. American Bag Co., Civ.App., 230 S.W. 782.
Utah.—Garrett v. Ellison, 72 P.2d 449, 93 Utah 184, 129 A.L.R. 666—Last Chance Ranch Co. v. Erickson, 25 P.2d 952, 82 Utah 475.

excludes oral agreements, evidence of a parol collateral agreement may be received, regardless of whether or not the written agreement contains any reference to such collateral agreement,[22] or whether or not the oral contract refers to the written contract,[23] and whether the action is at law or in equity.[24] Proof of such an agreement must be clear and precise,[25] and the existence of the alleged collateral agreement is a question for the jury.[26]

Although, to justify admission of evidence of an oral agreement as a collateral one, the agreement must be collateral in form,[27] form alone is not sufficient, for, if it were, written contracts might always be modified by parol, it not being difficult, where a contract contains several promises on each side, to put any one of them in the form of a collateral agreement.[28] Substance, and not form, is the test;[29] and in applying this test the policy of the courts of the particular state should be considered, such as a policy, more strict than that of some other jurisdictions, of upholding the parol evidence rule and not lightly or easily adopting modifications thereof.[30] To be collateral, the agreement may and must be such as the parties might naturally make separately and would not ordinarily be expected to embody in the writing;[31] and it must not be so clearly connected with the principal transaction as to be part and parcel thereof.[32]

§ 998. —— Consistency of Agreement with Writing

Evidence of a prior or contemporaneous verbal agreement is not admissible to vary, contradict, or defeat the operation of a valid written instrument.

In order to let in evidence of a collateral agreement between the parties, such agreement must be consistent with the terms of the writing; if the evidence tends to vary or contradict the terms of the written instrument, or to defeat its operation, it cannot be received.[33] With respect to this principle

Vt.—Roof v. Jerd, 146 A. 250, 102 Vt. 129, 68 A.L.R. 235—Wood v. James, 106 A. 566, 93 Vt. 36.
Va.—Sale v. Figg, 180 S.E. 173, 164 Va. 402—King v. Commercial Finance Co., 175 S.E. 733, 735, 163 Va. 260, citing **Corpus Juris.**
Wash.—McGregor v. First Farmers'-Merchants' Bank & Trust Co., 40 P. 2d 144, 180 Wash. 440—King v. Second Avenue Inv. Co., 200 P. 572, 117 Wash. 41—Bayers v. Barry, 194 P. 993, 114 Wash. 252.
22 C.J. p 1245 note 24.

Collateral contract of indemnity
Tex.—Barker v. Fagg, Civ.App., 107 S.W.2d 490.

Collateral contract of suretyship
Tex.—Durham v. McDowell, Civ. App., 265 S.W. 425.

Agreement for valid and separate consideration
Ga.—Hewlett v. Almand, 103 S.E. 173, 25 Ga.App. 346.
Neb.—Elvidge v. Brant, 267 N.W. 169, 131 Neb. 1.

Agreement acted on or executed
(1) The rule that previous oral negotiations are merged in a written contract, and that the terms of the agreement cannot be made to appear otherwise than by the writing, does not prevent proof of collateral independent parol agreements between the parties which were acted upon prior to the time of the writing.—Hilgemeier v. Bower Mfg. Co., 139 N.E. 691, 81 Ind.App. 191.

(2) A parol collateral agreement which has become executed may be shown to explain the transaction in which the collateral agreement was executed.—Richards v. Hodges, 80 S. E. 439, 164 N.C. 183.

22. Mo.—Scott v. Asbury, App., 198 S.W. 1131.
Tex.—Downey v. Hatter, Civ.App., 48 S.W. 32.

23. Kan.—Bundy v. Liberty Life Ins. Co., 95 P.2d 550, 150 Kan. 658.

24. Me.—Bryant v. Mansfield, 22 Me. 360.

25. Pa.—Locher v. Jones, 32 Pa.Co. 313.

26. Ga.—Carter v. Griffin, 40 S.E. 290, 114 Ga. 321.
Tenn.—Hines v. Willcox, 33 S.W. 914, 96 Tenn. 148, 54 Am.S.R. 823, 34 L.R.A. 824, 832.

27. Minn.—Taylor v. More, 263 N. W. 537, 195 Minn. 448.
N.Y.—Mitchill v. Lath, 160 N.E. 646, 247 N.Y. 377, 68 A.L.R. 239, reversing Mitchell v. Lath, 221 N.Y. S. 864, 220 App.Div. 776, and reargument denied Mitchill v. Lath, 162 N.E. 511, 248 N.Y. 526—William H. Waters, Inc., v. March, 269 N.Y.S. 420, 240 App.Div. 120—Robertson v. Schoonmaker, 285 N.Y.S. 204, 158 Misc. 627.

28. N.Y.—Mitchill v. Lath, 160 N. E. 646, 247 N.Y. 377, 68 A.L.R. 239, reversing Mitchell v. Lath, 221 N. Y.S. 864, 220 App.Div. 776, and reargument denied Mitchill v. Lath, 162 N.E. 511, 248 N.Y. 526.

29. N.Y.—Mitchill v. Lath, supra.

30. N.Y.—Mitchill v. Lath, supra.

31. Minn.—Taylor v. More, 263 N. W. 537, 195 Minn. 448.
Neb.—Elvidge v. Brant, 267 N.W. 169, 131 Neb. 1.
N.Y.—Mitchill v. Lath, 160 N.E. 646, 247 N.Y. 377, 68 A.L.R. 239, reversing Mitchell v. Lath, 221 N.Y. S. 864, 220 App.Div. 776, and reargument denied Mitchill v. Lath, 162 N.E. 511, 248 N.Y. 526—William H. Waters, Inc., v. March, 269 N.Y.S. 420, 240 App.Div. 120—Robertson v. Schoonmaker, 285 N.Y.S. 204, 158 Misc. 627.
Pa.—McCormick v. Harris, 196 A. 885, 130 Pa.Super. 175.

Test
(1) Test to determine whether oral agreement is collateral is to ascertain whether, in view of circumstances of parties, subject matter, and nature of writing, it would have been natural for contracting parties to have embodied oral agreement in their writing had they intended to make it a part of their contractual obligations.—Thorne v. Edwards, 34 P.2d 640, 147 Or. 443.

(2) Another statement is that the test of whether the parol agreement comes within the field embraced by the writing is to determine whether the parties would naturally and normally include the one in the other. Ariz.—Stewart v. Southwest Cotton Co., 2 P.2d 1041, 38 Ariz. 547.
Pa.—Bryant v. Bryant, 144 A. 904, 295 Pa. 146—Wagner v. Marcus, 136 A. 847, 288 Pa. 579—McCormick v. Harris, 196 A. 885, 130 Pa.Super. 175—Spangler v. Zimmerman, 50 Dauph.Co. 93.

32. Minn.—Taylor v. More, 263 N.W. 537, 195 Minn. 448.
N.Y.—Mitchill v. Lath, 160 N.E. 646, 247 N.Y. 377, 68 A.L.R. 239, reversing Mitchell v. Lath, 221 N.Y. S. 864, 220 App.Div. 776, and reargument denied Mitchill v. Lath, 162 N.E. 511, 248 N.Y. 526—Robertson v. Schoonmaker, 285 N.Y.S. 204, 158 Misc. 627.

33. U.S.—Price, Forbes & Co. v. Montgomery, C.C.A.Ill., 115 F.2d 611—Liberty Petroleum Co. v. California Co., C.C.A.Colo., 114 F.2d 980—Harris v. Lipscomb Lumber Co., C.C.A.N.C., 77 F.2d 665—First

it has been said that the implied provisions or con- | ditions of a contract are as much a part of its terms

Nat. Bank v. Fidelity Nat. Bank of Oklahoma City, C.C.A.Tex., 74 F.2d 447—Wells Fargo Bank & Union Trust Co. v. McDuffie, C.C.A.Cal., 71 F.2d 720, certiorari denied McDuffie v. Wells, Fargo Bank & Union Trust Co., 55 S.Ct. 346, 293 U.S. 626, 79 L.Ed. 713—David v. Robert Dollar Co., C.C.A.Or., 2 F.2d 803—F. D. Cummer & Son Co. v. Findley, D.C.Pa., 30 F.Supp. 884, affirmed, C.C.A., Findley v. F. D. Cummer & Son Co., 109 F.2d 1015—Lathrop v. Rice & Adams Corporation, D.C.N.Y., 17 F.Supp. 622—Century Electric Co. v. Detroit Copper & Brass Rolling Mills, C.C.A.Mo., 264 F. 49—Bernheim v. U. S., 61 Ct.Cl. 763.

Ala.—Perkins Oil Co. of Delaware v. Davis, 153 So. 417, 419, 228 Ala. 190, citing **Corpus Juris**—Bell, Rogers & Zemurray Bros. v. Jenkins, 130 So. 396, 397, 221 Ala. 652, quoting **Corpus Juris**—North River Ins. Co. of City of New York v. Waddell, 112 So. 336, 216 Ala. 55, 52 A.L.R. 838.

Ariz.—Welker v. Mishkin, 251 P. 891, 31 Ariz. 239.

Ark.—Pictorial Review Co. v. Rosen, 285 S.W. 385, 171 Ark. 719.

Cal.—Maxwell v. Carlon, 86 P.2d 666, 30 Cal.App.2d 356—De Olazabal v. Mix, 74 P.2d 787, 24 Cal.App.2d 258—Stone Drill Corporation v. Stoody Co., 40 P.2d 945, 4 Cal.App.2d 367—Cross v. Thiele, 197 P. 974, 51 Cal.App. 780.

Colo.—Index Shale Oil Co. v. Wheeler, 255 P. 982, 81 Colo. 402.

Fla.—Prescott v. Mutual Ben. Health & Accident Ass'n, 183 So. 311, 133 Fla. 510, 119 A.L.R. 525—Moses v. Woodward, 147 So. 690, 109 Fla. 348, reversing 140 So. 651, 109 Fla. 348, rehearing granted 141 So. 117, 109 Fla. 348.

Ga.—Stonecypher v. Georgia Power Co., 189 S.E. 13, 183 Ga. 498, answers to certified questions conformed to 189 S.E. 672, 55 Ga.App. 197—Brinson v. Franklin, 171 S.E. 287, 177 Ga. 727—Roberts v. Investors' Sav. Co., 113 S.E. 398, 154 Ga. 45—Head v. Waycross Coca-Cola Bottling Co., 171 S.E. 583, 47 Ga.App. 842—Middlebrooks v. Dunlap-Huckabee Auto Co., 162 S.E. 153, 44 Ga.App. 543—Missouri Paint & Varnish Co. v. Bainbridge Variety Works, 158 S.E. 615, 43 Ga.App. 317—Boston Ins. Co. v. H. B. Burch & Bros., 150 S.E. 458, 40 Ga.App. 517—Googe v. York, 142 S.E. 562, 38 Ga.App. 62—Jones v. Fuller, 107 S.E. 544, 27 Ga.App. 84—Producers' Co. v. Empire Cotton Oil Co., 104 S.E. 25, 25 Ga.App. 486.

Hawaii.—Henry Waterhouse Trust Co. v. Rawlins, 33 Hawaii 876—Smith v. Lee Chee, 27 Hawaii 122,

Idaho.—Beebe v. Pioneer Bank & Trust Co., 201 P. 717, 34 Idaho 385.

Ill.—Scholbe v. Schuchardt, 127 N.E. 169, 292 Ill. 529, 13 A.L.R. 247, reversing 212 Ill.App. 663—United Service Stations v. Alpert, 33 N.E.2d 902, 310 Ill.App. 260.

Ind.—Mouch v. Indiana Rolling Mill Co., 151 N.E. 137, 93 Ind.App. 540.

Iowa.—In re Simplot's Estate, 246 N.W. 396, 215 Iowa 578—Cady v. Lynam, 200 N.W. 190, 198 Iowa 661—Parriott v. Levis, 195 N.W. 578, 196 Iowa 875.

Kan.—Continental Supply Co. v. Morgan, 298 P. 790, 133 Kan. 121.

Ky.—Citizens Nat. Bank of Glasgow v. Damron, 149 S.W.2d 762, 286 Ky. 43—Brown v. Union Cent. Life Ins. Co., 44 S.W.2d 514, 241 Ky. 514—Prudential Life Ins. Co. of America v. Bowling, 35 S.W.2d 322, 237 Ky. 290—Cumberland & M. R. Co. v. Lucas, 15 S.W.2d 1008, 228 Ky. 748—Robb v. Sherrill-Russell Lumber Co., 241 S.W. 64, 194 Ky. 835.

La.—Great Eastern Oil & Refining Co. v. Bullock, 91 So. 680, 151 La. 209—Item Co. v. Wormington Machinery & Power Equipment Co., 4 La.App. 519—Brenard Mfg. Co. v. M. Levy, Inc., 4 La.App. 279, affirmed 109 So. 43, 161 La. 496—Brenard Mfg. Co. v. M. Levy, Inc., 2 La.App. 577, affirmed 109 So. 43, 161 La. 496.

Md.—Highley v. Phillips, 5 A.2d 824, 176 Md. 463—Power v. Allied Asphalt Products Corporation, 159 A. 251, 162 Md. 175.

Mass.—Vitagraph, Inc., v. Park Theatre Co., 144 N.E. 85, 249 Mass. 25.

Mich.—Reyburn v. Goodrich, 290 N.W. 340, 292 Mich. 91—Shabluk v. Highland Park State Bank, 209 N.W. 819, 235 Mich. 648—Vasu v. People's State Bank, 208 N.W. 690, 234 Mich. 610—Stone v. Steil, 202 N.W. 982, 230 Mich. 249.

Minn.—Taylor v. More, 263 N.W. 537, 195 Minn. 448—Hendrickson v. Bannitz, 261 N.W. 189, 194 Minn. 528—Crosby v. Crescent Oil Co. of Minnesota, 255 N.W. 853, 192 Minn. 98—McCreight v. Davey Tree Expert Co., 254 N.W. 623, 191 Minn. 489—Brown v. Backer, 207 N.W. 20, 166 Minn. 50—Stevens Corporation v. Farmers' Equipment Co., 203 N.W. 213, 162 Minn. 465—Shinners v. Ford, 186 N.W. 704, 151 Minn. 328—Commercial Jewelry Co. v. Bowen, 175 N.W. 995, 145 Minn. 487.

Miss.—Grenada Auto Co. v. Waldrop, 195 So. 491, 188 Miss. 468—Mississippi State Highway Commission v. West, 179 So. 279, 181 Miss. 206.

Mo.—Fuchs v. Leahy, 9 S.W.2d 897, 321 Mo. 47—Cantrell v. Burgess, App., 141 S.W.2d 200—First Nat. Bank & Trust Co. v. Limpp, 288 S.W. 957, 221 Mo.App. 951.

Neb.—Smith v. Bailey, 181 N.W. 926, 105 Neb. 754.

N.M.—Chaves County Building & Loan Ass'n v. Hodges, 59 P.2d 671, 40 N.M. 326—American Nat. Bank of Tucumcari v. Trinidad Bean & Elevator Co., 24 P.2d 1105, 37 N.M. 514.

N.Y.—Cordua v. Guggenheim, 8 N.E.2d 274, 274 N.Y. 51, reversing In re Andrew's Will, 290 N.Y.S. 427, 248 App.Div. 771—Mitchill v. Lath, 160 N.E. 646, 247 N.Y. 377, 68 A.L.R. 239, reversing Mitchell v. Lath, 221 N.Y.S. 864, 220 App.Div. 776, and reargument denied Mitchill v. Lath, 162 N.E. 511, 248 N.Y. 526—William H. Waters, Inc., v. March, 269 N.Y.S. 420, 240 App.Div. 120—Smith v. McCullaugh, 255 N.Y.S. 497, 234 App.Div. 490—Lion Brewery of New York City v. Loughran, 229 N.Y.S. 216, 223 App.Div. 623, reversing 226 N.Y.S. 656, 131 Misc. 331—Robertson v. Schoonmaker, 285 N.Y.S. 204, 158 Misc. 627—Dornholz v. Home of Daughters of Jacob for Aged Hebrew, 19 N.Y.S.2d 17.

N.C.—Jefferson Standard Life Ins. Co. v. Morehead, 183 S.E. 606, 209 N.C. 174—Security Nat. Bank v. Sternberger, 178 S.E. 595, 207 N.C. 811, 97 A.L.R. 720—Winstead v. Acme Mfg. Co., 176 S.E. 304, 207 N.C. 110—Carlton v. Central Oil Co., 172 S.E. 883, 206 N.C. 117—Clark v. Atlantic Coast Line R. Co., 135 S.E. 26, 192 N.C. 280—Exum v. Lynch, 125 S.E. 15, 188 N.C. 392—Jobbers' Overall Co. v. C. S. Hollister Co., 119 S.E. 1, 186 N.C. 208—White v. Fisheries Products Co., 111 S.E. 182, 183 N.C. 228—Acme Mfg. Co. v. McPhail, 106 S.E. 672, 181 N.C. 205—Patton v. Sinclaire Lumber Co., 101 S.E. 613, 179 N.C. 103.

N.D.—Jensen v. Siegfried, 263 N.W. 715, 66 N.D. 222.

Okl.—Bonfils v. Geeslin, 247 P. 673, 120 Okl. 130—Halsell v. First Nat. Bank, 235 P. 532, 109 Okl. 220—First Nat. Bank v. Richburg, 181 P. 145, 75 Okl. 1.

Or.—Blackwell v. McDonald, 91 P.2d 836, 162 Or. 424.

Pa.—Home Bldg. & Sav. Co. v. Ruthrauff, 145 A. 129, 295 Pa. 237—In re Cridge's Estate, 137 A. 455, 289 Pa. 331.

S.C.—C. G. Gunter, Inc., v. Hindman, 179 S.E. 494, 175 S.C. 436—Columbia Nat. Bank of Columbia v. People's Bank, 160 S.E. 728, 162 S.C. 324.

Tenn.—McGannon v. Farrell, 214 S.W. 432, 141 Tenn. 631—Jackson v. Texas Co., 10 Tenn.App. 235—Crotzer v. Shawl, 5 Tenn.App. 240.

as the written parts, and the rule which forbids the proof of a collateral parol agreement which is inconsistent with the written terms equally forbids the proof of one which is inconsistent with its implied provisions or conditions.[34] No additional force is added to the rule by inserting in the writing a statement of the principle.[35]

The foregoing is true, both at law and in equity,[36] where the written instrument is valid,[37] complete, see infra § 999, and unambiguous[38] and there

Tex.—Arrington v. McDaniel, Com. App., 14 S.W.2d 1009, modifying, Civ.App., 4 S.W.2d 262, certified questions answered 25 S.W.2d 295, 119 Tex. 148—Aero-Gas Refining Co. v. Fisk Tire Co., Civ.App., 137 S.W.2d 191, error refused—Smith v. Holloway, Civ.App., 115 S.W.2d 427—Mauritz v. Schwind, Civ.App., 101 S.W.2d 1085, error dismissed—Stephens v. Carr, Civ.App., 95 S. W.2d 215, error dismissed—Cottingham v. Harrison, Civ.App., 89 S.W.2d 255, error dismissed—Jones v. Texas Co., Civ.App., 80 S.W.2d 761, 762, quoting **Corpus Juris**—First Nat. Bank v. Boyd, Civ.App., 75 S.W.2d 928, error dismissed—Stein v. Gulf Production Co., Civ. App., 73 S.W.2d 871, error dismissed—Blaylock v. Sheffield Rubber Products Corporation, Civ.App., 56 S.W.2d 227—Colonial Building & Loan Ass'n v. Meyer, Civ.App., 48 S.W.2d 729—Haskell Motor Co. v. Remington, Civ.App., 25 S.W.2d 913—Leoloff v. Werner, Civ.App., 7 S.W.2d 1095—Ford Motor Co. v. Maddox Motor Co., Civ.App., 3 S.W. 2d 911, affirmed Maddox Motor Co. v. Ford Motor Co., Com.App., 23 S.W.2d 333—Columbia Weighing Mach. Co. v. McElroy's Drug Store, Civ.App., 299 S.W. 351—United North & South Oil Co. v. Tiller, Civ.App., 283 S.W. 676—Berry v. Guilliot, Civ.App., 250 S.W. 482—Sandoval v. Eagle Pass Lumber Co., Civ.App., 248 S.W. 132—Waters v. Byers Bros. & Co., Civ.App., 233 S.W. 572.

Va.—Wood v. Southern Shale Brick Corporation, 4 S.E.2d 360, 173 Va. 364—Fidelity & Casualty Co. of New York v. Copenhaver Contracting Co., 165 S.E. 528, 159 Va. 126.

Wash.—O'Brien v. O'Brien, 245 P. 923, 139 Wash. 153—National Bank of Commerce of Seattle v. Pettibone, 217 P. 505, 125 Wash. 607—Robertson v. Wilson, 209 P. 841, 121 Wash. 358.

W.Va.—Ligon v. Godfrey L. Cabot, Inc., 15 S.E.2d 595.

Wis.—Juergens v. Ritter, 279 N.W. 51, 227 Wis. 480—Firestone Tire & Rubber Co. v. Werner, 236 N.W. 118, 204 Wis. 306.

22 C.J. p 1248 note 29.

Oral agreement will not be deemed collateral to written agreement if it contradicts provisions thereof.—Thorne v. Edwards, 34 P.2d 640, 147 Or. 443.

Test as to whether evidence is admissible as exception to general rule excluding parol evidence of stipulations or conversations prior to or contemporaneous with unambiguous written instrument is whether parol evidence contradicts written instrument.—Gibson County v. Fourth & First Nat. Bank, 96 S.W.2d 184, 20 Tenn.App. 168.

Party who entered into written contract, for a valuable consideration and with full knowledge of its terms, may not contend successfully nor show by parol that it is not binding or does not express the real agreement and that the real agreement is a prior or contemporaneous parol agreement inconsistent with the writing.

Colo.—Houston v. Snyder, 188 P. 749, 68 Colo. 214.

Mo.—Supreme Lodge, K. P., v. Dalzell, 223 S.W. 786, 205 Mo.App. 207.

Tex.—Pioneer Building & Loan Ass'n v. Johnston, Civ.App., 117 S.W.2d 556, error dismissed—Wilie v. Hays, Civ.App., 269 S.W. 503—Wilson v. Enfield, Civ.App., 249 S. W. 531.

Time of agreement

(1) Parol evidence rule operates to exclude evidence of parol agreements at variance with written contract only where parol agreements are made contemporaneously with or prior to written contract.—Connell v. Diamond T. Truck Co., 188 A. 463, 88 N.H. 316.

(2) Subsequent agreements see infra §§ 1004–1006.

Written instrument given in part performance of oral contract

It is said that the rule that proof of a contemporaneous oral agreement is not admissible to contradict or vary the terms of a written contract does not apply where the contract itself is oral, and the written instrument is given merely in part performance of it; but it is also stated that, in such case, the written agreement may not be disputed as to the matters covered by it.—Independent Harvester Co. v. Malzohn, 179 N.W. 727, 147 Minn. 145.

34. Minn.—Taylor v. More, 263 N.W. 537, 195 Minn. 448—Cargill Commission Co. v. Swartwood, 198 N. W. 536, 159 Minn. 1.

N.Y.—Mitchill v. Lath, 160 N.E. 646, 247 N.Y. 377, 68 A.L.R. 239, reversing Mitchell v. Lath, 221 N.Y. S. 864, 220 App.Div. 776 and reargument denied Mitchill v. Lath, 162 N.E. 511, 248 N.Y. 526—William H. Waters, Inc., v. March, 269 N. Y.S. 420, 240 App.Div. 120.

22 C.J. p 1251 note 30.

Oral agreement not to amend corporate charter

To permit introduction of an alleged oral agreement among three stockholders who held all of Class A stock in oil company which carried with it special veto rights relating to the election of directors that they would not further amend corporate charter by striking out special veto rights, would violate parol evidence rule, where no provision restricting right to amendment appeared in charter.—Aldridge v. Franco Wyoming Oil Co., Del.Ch., 7 A. 2d 753, sustained 14 A.2d 380.

35. Cal.—Dolan v. Carmel Canning Co., 234 P. 926, 71 Cal.App. 197.

36. Ala.—Worthington v. Eggler, 98 So. 788, 210 Ala. 535.

Fla.—E. J. Sparks Enterprises v. Christman, 117 So. 388, 95 Fla. 928—Forbes v. Ft. Lauderdale Mercantile Co., 90 So. 821, 83 Fla. 66.

In law action parties to written contract cannot show inconsistent contemporaneous oral agreement, subject matter of which is covered by contract.—Beers v. Atlas Assur. Co., 253 N.W. 584, 215 Wis. 165.

37. N.J.—Aboczky v. Stier, 18 A.2d 262, 126 N.J.Law 109.

Va.—Wood v. Southern Shale Brick Corporation, 4 S.E.2d 360, 173 Va. 364—King v. Commercial Finance Co., 175 S.E. 733, 163 Va. 260.

Instrument with valid consideration

U.S.—Drake v. Moore, D.C.Ill., 14 F. Supp. 89.

Apparently legal contract

Pa.—Miller v. Miller, 131 A. 236, 284 Pa. 414.

Validity not disputed

Cal.—Mulholland v. Parker, 78 P.2d 1045, 26 Cal.App.2d 107.

38. Cal.—Mulholland v. Parker, 78 P.2d 1045, 26 Cal.App.2d 107.

Fla.—McComb v. Hygeia Coca-Cola Bottling Works, 188 So. 219, 137 Fla. 260—Holly Hill Grove & Fruit Co. v. Wicker, 133 So. 622, 101 Fla. 181, modified on other grounds 135 So. 780, 101 Fla. 184—E. J. Sparks Enterprises v. Christman, 117 So. 388, 95 Fla. 928—Forbes v. Ft. Lauderdale Mercantile Co., 90 So. 821, 83 Fla. 66.

Ga.—A. W. Muse Co. v. Collins, 199 S.E. 856, 58 Ga.App. 753.

Mass.—Warren v. Stoneman, 176 N. E. 795, 276 Mass. 259.

Mo.—A. B. Collins & Co. v. Quentin, App., 71 S.W.2d 758.

Okl.—Roth v. Roach, 242 P. 201, 115 Okl. 199.

is no fraud, accident, mistake,[39] duress,[40] undue influence,[41] illegality,[42] lack or insufficiency of consideration,[43] or other ground for reforming it or setting it aside,[44] and it is sought to vary or contradict it, or defeat its operation, in respect of its duration,[45] obligation,[46] binding effect,[47] time or

R.I.—Burns v. Devoren, 112 A. 428.
Tenn.—Gibson County v. Fourth & First Nat. Bank, 96 S.W.2d 184, 20 Tenn.App. 168.
Tex.—Randolph v. Mackecliney, Civ. App., 52 S.W.2d 926—Smith v. Hampton, Civ.App., 42 S.W.2d 466.
Vt.—Hayden v. Hoadley, 111 A. 343, 94 Vt. 345.
W.Va.—Central Trust Co. v. Virginia Trust Co., 197 S.E. 12, 120 W.Va. 23.

Instrument absolute on its face
U.S.—English v. Hetherington & Berner, C.C.A.Ill., 71 F.2d 613.

Unconditional written promise
Ill.—Sugar v. Marinello, 260 Ill.App. 85.

Plain and unambiguous written contract
Miss.—McInnis v. Manning, 95 So. 250, 131 Miss. 119.
W.Va.—O'Farrell v. Virginia Public Service Co., 177 S.E. 304, 115 W. Va. 502.

Contract containing plain language
U.S.—Ingram-Day Lumber Co. v. Schultz, C.C.A.Wis., 45 F.2d 359, order denied 51 S.Ct. 366, 283 U.S. 833, 75 L.Ed. 1445.

Written contract certain in terms
Cal.—Coneland Water Co. v. Nickalls, 242 P. 518, 75 Cal.App. 212.

Written contract having clear and unambiguous terms
Ill.—Carlton v. Smith, 2 N.E.2d 116, 285 Ill.App. 380.

Terms of written contract neither ambiguous nor obscure
Pa.—National Engraving Co. v. Schmier, 27 North.Co. 178.

Where contract term is ambiguous, evidence of antecedent or contemporaneous oral agreements or conversations is admissible for purposes of interpretation.—Darling & Co. v. Frank Carter Co., 242 N.W. 519, 208 Wis. 222—Firestone Tire & Rubber Co. v. Werner, 236 N.W. 118, 204 Wis. 306.

39. U.S.—U. S. Shipping Board Emergency Fleet Corporation v. Galveston Dry Dock & Construction Co., C.C.A.Tex., 13 F.2d 607, certiorari denied Galveston Dry Dock & Construction Co. v. U. S. Shipping Board Emergency Fleet Corporation, 47 S.Ct. 237, 273 U.S. 725, 71 L.Ed. 860—Kramer v. Harsch, C.C.A.Pa., 278 F. 860.
Cal.—Parigian v. Citizens Nat. Trust & Savings Bank of Los Angeles, App., 110 P.2d 117.
Mo.—St. Louis Basket & Box Co. v. Mastin, App., 79 S.W.2d 493.
Okl.—Investors Royalty Co. v. Lewis, 91 P.2d 764, 185 Okl. 302—Rock v. Fisher, 241 P. 496, 115 Okl. 53—Reinheimer v. Mays, 182 P. 230, 75 Okl. 131, reversing 174 P. 752.
Pa.—Richards v. Integrity Trust Co., 177 A. 28, 317 Pa. 513—Steininger v. Spaid, 150 A. 620, 300 Pa. 428—Citizens' Nat. Bank of Waynesburg, Pa., v. Wisecarver, 150 A. 103, 300 Pa. 60—Bryant v. Bryant, 144 A. 904, 295 Pa. 146—Kuhn v. Commonwealth, 140 A. 527, 291 Pa. 497—Colonial Mfg. Co. v. Carideo, 16 A.2d 731, 142 Pa.Super. 485—Crew Levick Co. v. Philadelphia Inv. Building & Loan Ass'n, 177 A. 498, 117 Pa.Super. 397—Gordon v. Iron City Industrial Cleaning Corporation, 167 A. 650, 109 Pa.Super. 216—Cohen v. Shure, 18 Pa.Dist. & Co. 58—National Bank of Fayette County, 4 Fay.L.J. 155—Neff v. Schmier, 27 North.Co. 131—Greer v. Miller-Buick, 53 York Leg.Rec. 123.
Tex.—Tackett v. Cunningham, Civ. App., 91 S.W.2d 965—Randolph v. Mackechney, Civ.App., 52 S.W.2d 926—Smith v. Hampton, Civ.App., 42 S.W.2d 466—Texas Illinois Co. v. Gant, Civ.App., 251 S.W. 575—D. Sullivan & Co. v. Schreiner, Civ.App., 222 S.W. 314, error refused.
W.Va.—O'Farrell v. Virginia Public Service Co., 177 S.E. 304, 115 W. Va. 502.

Absence of fraud or mistake
Cal.—Mulholland v. Parker, 78 P.2d 1045, 26 Cal.App.2d 107—Dolan v. Carmel Canning Co., 234 P. 926, 71 Cal.App. 197.
Conn.—Spivack v. Connecticut Smiles, 20 A.2d 731, 128 Conn. 146.
Del.—Jefferis v. William D. Mullen Co., 130 A. 39, 15 Del.Ch. 9.
Ind.—Friedman v. Citizens' Natural Gas, Oil & Water Co., 147 N.E. 294, 82 Ind.App. 667—McNaught v. McNaught, 133 N.E. 402, 77 Ind.App. 171.
Kan.—J. B. Colt Co. v. Kocher, 255 P. 48, 123 Kan. 286—Macksville State Bank v. Ehrlich, 241 P. 462, 119 Kan. 796.
Ky.—McKenna v. Culton, 80 S.W.2d 13, 258 Ky. 333—Geary-Gay Motor Co. v. Chasteen, 58 S.W.2d 393, 248 Ky. 283.
Mass.—Whittier v. Goldberg, 174 N. E. 491, 274 Mass. 335.
Mich.—Karnov v. Goldman, 201 N.W. 447, 229 Mich. 551.
Mo.—Schroeder v. Drewer, App., 113 S.W.2d 1045.
N.Y.—Kirkpatrick Home for Childless Women v. Kenyon, 196 N.Y.S. 475, denying motion 196 N.Y.S. 250, 119 Misc. 349, and affirmed 199 N. Y.S. 851, 206 App.Div. 728.
Okl.—Roth v. Roach, 242 P. 201, 115 Okl. 199.
Pa.—Neville v. Kretzschmar, 114 A. 625, 271 Pa. 222.
Tex.—White, Ward & Erwin v. Hager, 248 S.W. 319, 112 Tex. 516.
Utah.—Field v. Missouri State Life Ins. Co., 290 P. 979, 77 Utah 45.
Va.—Wood v. Southern Shale Brick Corporation, 4 S.E.2d 360, 173 Va. 364—King v. Commercial Finance Co., 175 S.E. 733, 163 Va. 260.
W.Va.—Central Trust Co. v. Virginia Trust Co., 197 S.E. 12, 120 W. Va. 23.

Absence of fraud
Ala.—Holczstein v. Bessemer Trust & Savings Bank, 136 So. 409, 223 Ala. 271—Vest v. Night Commander Lighting Co., 139 So. 295, 24 Ala.App. 549, certiorari denied 139 So. 297, 224 Ala. 213.
Cal.—In re Kellogg, 107 P.2d 964, 41 Cal.App.2d 833.
Ohio.—Owens v. Baker, 193 N.E. 778, 48 Ohio App. 347.

40. Mich.—Karnov v. Goldman, 201 N.W. 447, 229 Mich. 551.
W.Va.—Central Trust Co. v. Virginia Trust Co., 197 S.E. 12, 120 W.Va. 23.

41. Cal.—In re Kellogg, 107 P.2d 964, 41 Cal.App.2d 833—Mulholland v. Parker, 78 P.2d 1045, 26 Cal. App.2d 107.

42. W.Va.—Central Trust Co. v. Virginia Trust Co., 197 S.E. 12, 120 W. Va. 23.

43. Cal.—In re Kellogg, 107 P.2d 964, 41 Cal.App.2d 833.
W.Va.—Central Trust Co. v. Virginia Trust Co., 197 S.E. 12, 120 W.Va. 23.

44. Wash.—Benson v. Metropolitan Life Ins. Co., 217 P. 709, 126 Wash. 709.

Lack of attempt to reform
Written contract cannot, without effort to reform it, be varied by parol evidence of previous agreements or understandings.—Globe & Rutgers Fire Ins. Co. of New York v. McIntosh, 13 S.W.2d 775, 227 Ky. 639.

Party affirming and not repudiating written agreement cannot set up a verbal agreement as the one actually made.—Ezo v. St. Louis Smelting & Refining Co., Mo.App., 87 S. W.2d 1051.

45. Tex.—Brenard Mfg. Co. v. Barnett, Civ.App., 210 S.W. 990.

46. N.Y.—Harris v. Eakins, 194 N. Y.S. 187, 201 App.Div. 257.
Pa.—Greer v. Miller-Buick, 53 York Leg.Rec. 123.

47. Fla.—Holly Hill Grove & Fruit Co. v. Wicker, 133 So. 622, 101 Fla.

mode of payment,[48] or in other respects, by parol evidence of a prior or contemporaneous oral agreement between the same parties[49] and on the same subject,[50] or by parol or extrinsic evidence of any prior or contemporaneous oral statements,[51] promises,[52] representations,[53] conversations,[54] negotiations,[55] understandings,[56] or agreements which were merged in or superseded by the written contract.[57] However, a parol contemporaneous agreement adding to, varying, or modifying a written agreement may be shown as a part of the entire transaction where one party has acted on the parol agreement, to his detriment if it is not recognized, under circumstances charging the other party with knowledge of such acting and making it his duty to speak if recognition of the agreement is not intended.[58] Also the rule against the admission of parol evidence of prior or contemporaneous agreements to vary or contradict the terms of a contract reduced to writing does not apply to evidence offered to show that the writing is in reality no contract at all, it never having been intended to be the actual

181, modified on other grounds 135 So. 780, 101 Fla. 184.

48. U.S.—Florida Power & Light Co. v. Atlantic, Gulf & Pacific Co., C.C.A.Fla., 38 F.2d 948.
S.C.—C. G. Gunter, Inc., v. Hindman, 179 S.E. 494, 175 S.C. 436.
Tex.—Mauritz v. Schwind, Civ.App., 101 S.W.2d 1085, error dismissed—Robert & St. John Motor Co. v. Bumpass, Civ.App., 65 S.W.2d 399, error dismissed.

49. Cal.—Keeler v. Murphy, 3 P.2d 950, 117 Cal.App. 386.

50. Kan.—Minneapolis Threshing Mach. Co. v. Francisco, 189 P. 981, 106 Kan. 704.
N.C.—Miller v. Farmers' Federation, 134 S.E. 407, 192 N.C. 144.
Wis.—Beers v. Atlas Assur. Co., 253 N.W. 584, 215 Wis. 165.

51. W.Va.—Central Trust Co. v. Virginia Trust Co., 197 S.E. 12, 120 W.Va. 23.

52. U S.—Hidalgo County Water Improvement Dist. No. 4 v. Western Metal Mfg. Co., C.C.A.Tex., 16 F.2d 893, certiorari denied Hidalgo County Water Improvement v. Western Metal Mfg. Co., 47 S.Ct. 768, 274 U.S. 758, 71 L.Ed. 1337.
Ala.—Ashton v. Weaver, 149 So. 717, 25 Ala.App. 513.
Pa.—Neville v. Kretzschmar, 114 A. 625, 271 Pa. 222.
W.Va.—O'Farrell v. Virginia Public Service Co., 177 S.E. 304, 115 W. Va. 502.

53. Ga.—McMillan v. Cochran, 101 S.E. 717, 24 Ga.App. 579.
Mass.—Orange County Co. v. Appleton, 169 N.E. 783, 270 Mass. 123.
Okl.—Lefors v. Miami Building & Loan Ass'n, 82 P.2d 1029, 183 Okl. 410—Rock v. Fisher, 241 P. 496, 115 Okl. 53—Posey v. Citizens' State Bank, 220 P. 628, 93 Okl. 266—Western Silo Co. v. Stobaugh, 182 P. 670, 75 Okl. 73.
Tex.—D. Sullivan & Co. v. Schreiner, Civ.App., 222 S.W. 314, error refused.

54. Cal.—Williams v. Silverstein, 2 P.2d 165, 213 Cal. 269.
Me.—Luce v. Park Street Motor Corporation, 122 A. 338, 123 Me. 169.
Minn.—Segerstrom v. Holland Piano Mfg. Co., 170 N.W. 930, 142 Minn. 104.
Mo.—Sol Abrahams & Son Const. Co. v. Osterholm, App., 136 S.W.2d 86.
R.I.—Cadillac Automobile Co. v. Fisher, 158 A. 717, 52 R.I. 123.
Tenn.—Gibson County v. Fourth & First Nat. Bank, 96 S.W.2d 184, 20 Tenn.App. 168.
W.Va.—W. C. Barlett Lumber Co. v. Brookville Title & Trust Co., 5 S.E.2d 812—Central Trust Co. v. Virginia Trust Co., 197 S.E. 12, 120 W.Va. 23.

55. Mass.—Spevack v. Budish, 130 N.E. 191, 238 Mass. 215.
Mich.—Mieske v. Harmony Electric Co., 270 N.W. 216, 278 Mich. 61.
Miss.—Goff v. Jacobs, 145 So. 728, 164 Miss. 817.
N.J.—Wills v. Camden Lime Co., 140 A. 310, 104 N.J.Law 428.
N.Y.—V. Valente, Inc., v. Mascitti, 295 N.Y.S. 330, 163 Misc. 287.
N.D.—Kramer v. K. O. Lee & Son Co., 237 N.W. 166, 61 N.D. 28.
Pa.—Steininger v. Spaid, 150 A. 620, 300 Pa. 428.

56. U.S.—Texas Co. of Mexico, S. A., v. Roos, C.C.A.Tex., 43 F.2d 1, certiorari denied Roos v. Texas Co. of Mexico, S. A., 51 S.Ct. 216, 282 U.S. 902, 75 L.Ed. 794.
Ark.—Millar-Jefferies Chevrolet Co. v. Wakenight, 21 S.W.2d 185, 180 Ark. 288.
Fla.—E. J. Sparks Enterprises v. Christman, 117 So. 388, 95 Fla. 928—Forbes v. Ft. Lauderdale Mercantile Co., 90 So. 821, 83 Fla. 66.
Kan.—J. B. Colt Co. v. Kocher, 255 P. 48, 123 Kan. 286.
La.—Plaza Amusement Co. v. Frank Rubenstein & Co., 111 So. 702, 163 La. 272.
N.J.—Aboczky v. Stier, 18 A.2d 262, 126 N.J.Law 109.
N.C.—Oliver v. Hecht, 177 S.E. 399, 207 N.C. 481.
Pa.—Miller v. Miller, 131 A. 236, 284 Pa. 414—National Engraving Co. v. Schmier, 27 North.Co. 178.
R.I.—Phillips v. Columbus Wholesale Grocery Co., 197 A. 197, 60 R.I. 47.

57. Ala.—Worthington v. Davis, 94 So. 806, 208 Ala. 600.
Ariz.—Pleasant v. Arizona Storage & Distributing Co., 267 P. 794, 34 Ariz. 68.
Cal.—Miller v. Security-First Nat. Bank of Los Angeles, 25 P.2d 420, 219 Cal. 120, certiorari denied 54 S.Ct. 455, 291 U.S. 667, 78 L.Ed. 1058—Parigan v. Citizens Nat. Trust & Savings Bank of Los Angeles, App., 110 P.2d 117.
Conn.—Cohn v. Dunn, 149 A. 851, 111 Conn. 342, 70 A.L.R. 740.
Ill.—Sterling-Midland Coal Co. v. Great Lakes Coal & Coke Co., 165 N.E. 793, 334 Ill. 281.
Ind.—Glazer v. Hook, 129 N.E. 249, 74 Ind.App. 497.
Iowa.—Union Mortg. Co. v. Evans, 205 N.W. 776, 200 Iowa 1000.
La.—Daily States Pub. Co. v. Uhalt, 126 So. 228, 169 La. 893.
Mich.—Taylor v. Ward, 249 N.W. 473, 264 Mich. 118.
Mo.—Van Sant v. Austin-Hamill-Hoover Live Stock Commission Co., 295 S.W. 506, 221 Mo.App. 1096.
N.Y.—Georgiades v. Andavalloglou, 231 N.Y.S. 114, 225 App.Div. 651.
Okl.—Allis-Chalmers Mfg. Co. v. Hawhee, 105 P.2d 410, 187 Okl. 670—Schuman v. McLain, 61 P.2d 226, 177 Okl. 576.
Or.—John Deere Plow Co. of Moline v. Silver Mfg. Co., 245 P. 1083, 118 Or. 62.
Pa.—Colonial Mfg. Co. v. Carideo, 16 A.2d 731, 142 Pa.Super. 485—Home Owners Loan Corporation v. Compton, 27 Del.Co. 327.
Tenn.—Brunson v. Gladish, 125 S.W. 2d 144, 174 Tenn. 309.
Tex.—Federal Underwriters Exchange v. Skinner, Civ.App., 146 S.W.2d 325, error dismissed, judgment correct—Gifford-Hill & Co. v. Jones, Civ.App., 99 S.W.2d 656—Thos. W. Blake Lumber Co. v. Guaranty State Bank of Woodville, Civ.App., 290 S.W. 187.
Wash.—McGregor v. First Farmers'-Merchants' Bank & Trust Co., 40 P.2d 144, 180 Wash. 440—Benson v. Metropolitan Life Ins. Co., 217 P. 709, 126 Wash. 123.

Superseded letter
Cal.—Brandenstein v. Jackling, 278 P. 880, 99 Cal.App. 438.

58. Wash.—Andersonian Inv. Co. v. Wade, 184 P. 327, 108 Wash. 373.

or real contract or never having been delivered with the intention that it is to become a binding contract, and that the prior or contemporaneous parol agreement is the real contract.[59]

§ 999. —— Completeness of Writing

In determining the admissibility of evidence of a prior or contemporaneous parol agreement, claimed to be collateral to the agreement stated in a written instrument, the completeness or incompleteness of the instrument is accorded weight, especially in connection with other rules relating to the admissibility of such evidence or where the apparent completeness or incompleteness of the writing relates to the whole transaction or arrangement, or all the agreements, between the parties.

The admissibility of extrinsic evidence of matters not provided for in a written instrument which does not express the entire agreement or understanding of the parties is discussed infra in § 1013, dealing with the admissibility of evidence of those parts of a single contract which have not been reduced to writing as distinguished from the admissibility of evidence of separate parol agreements collateral to the main contract.

The admission of extrinsic evidence sought to be introduced on the ground that it shows a prior or contemporaneous agreement collateral to the agreement evidenced by a written instrument may be precluded by the completeness of the instrument[60] and the absence of fraud, accident, or mistake or a claim thereof,[61] as where it appears that the instrument covers completely the entire arrangement and transaction, and all the agreements and obligations, between the parties.[62] The rule, stated supra § 998, that, in the absence of fraud, accident, or mistake, evidence which varies or contradicts the express or implied terms of the written instrument is not admissible as evidence of a collateral agreement, is applicable where the instrument is complete.[63] So also the rule, stated infra

59. Tex.—Standard Motor Co. v. Miller, Civ.App., 45 S.W.2d 786—Bell v. Mulkey, Civ.App., 248 S.W. 784.

60. U.S.—South Florida Lumber Mills v. Breuchaud, C.C.A.Fla., 51 F.2d 490, certiorari denied 52 S.Ct. 37, 284 U.S. 659, 76 L.Ed. 558—In re Vanity Fair Slippers, D.C.N.Y., 4 F.Supp. 83.
Ark.—Federal Lumber Co. v. Harris, 238 S.W. 611, 152 Ark. 448.
D.C.—H. Herfurth, Jr., Inc., v. U. S., to Use of Squire, 85 F.2d 719, 66 App.D.C. 220.
Ga.—Roberts v. Investors' Sav. Co., 113 S.E. 398, 154 Ga. 45.
Idaho.—Gardiner v. Gardiner, 214 P. 219, 36 Idaho 664.
Mass.—Boston Consol. Gas Co. v. Folsom, 130 N.E. 197, 237 Mass. 565.
Mich.—Davis v. Steingass, 183 N.W. 713, 215 Mich. 57.
Minn.—Taylor v. More, 263 N.W. 537, 195 Minn. 448.
Mo.—Holtkamp v. A. P. Green Fire Brick Co., App., 242 S.W. 999.
Neb.—In re Weitzel's Estate, 280 N. W. 270, 135 Neb. 43—Weidenfeld v. Olson, 271 N.W. 806, 132 Neb. 303—S. Spiegal & Son v. Alpirn, 185 N.W. 415, 107 Neb. 233.
N.Y.—Dranow v. Weingarten, 242 N. Y.S. 541, 230 App.Div. 15.
Pa.—Rothstein, to Use of H. Rothstein & Sons v. Jefferson Ice Mfg. Co., 9 A.2d 149, 137 Pa.Super. 298.
Wash.—Sears, Roebuck & Co. v. Nicholas, 97 P.2d 633, 2 Wash.2d 128.
Wis.—Tees v. Lee, 291 N.W. 792, 234 Wis. 607.

It must appear that written contract is incomplete before parol evidence can be admitted to show collateral agreement.—Rauschenberg v. Peeples, 118 S.E. 409, 30 Ga.App. 384.

Evidence of prior offer is properly excluded where the contract is complete in itself and makes no reference to such offer.—Hooker v. C. R. Pease Const. Co., 127 N.E. 156, 73 Ind.App. 236.

Parol testimony as to discussion which leads up to execution of a full, complete and unambiguous written instrument is not admissible.—Erkiletian v. Devletian, 299 N. W. 821, 299 Mich. 95.

Paper evidencing negotiation previous to, and superseded by, a complete contract is inadmissible.—Crowther v. Hirschmann, 190 A. 760, 172 Md. 697.

61. Pa.—Chorba v. Sadoski, 34 Luz. L.Reg. 337.
Tex.—San Antonio Machine & Supply Co. v. Allen, Civ.App., 268 S.W. 532—Winkler v. Creekmore, Civ. App., 241 S.W. 730, affirmed, Com. App., 256 S.W. 257.

62. U.S.—David v. Robert Dollar Co., C.C.A.Or., 2 F.2d 803.
Mo.—J. B. Colt Co. v. Gregor, 44 S. W.2d 2, 328 Mo. 1216, reversing, App., 11 S.W.2d 1098.
Neb.—Dunn v. Mutual Ben. Health & Accident Ass'n, 282 N.W. 487, 135 Neb. 506.
Wash.—Sears, Roebuck & Co. v. Nicholas, 97 P.2d 633, 2 Wash. 128.
Wis.—Tees v. Lee, 291 N.W. 792, 234 Wis. 607.

When there is a single and final memorial of the understanding of the parties, the parol evidence rule comes into operation and prior and contemporaneous negotiations, oral or written, are excluded.—Nourse v. Kovacevich, Cal.App., 109 P.2d 999.

63. Ga.—Reeves Tractor & Implement Co. v. Barrow, 118 S.E. 456, 30 Ga.App. 420.
Ky.—Simpson v. Blaine, 230 S.W. 934, 191 Ky. 465—Simons v. Douglas Ex'r, 225 S.W. 721, 189 Ky. 644.
Me.—Bassett v. Breen, 107 A. 832, 118 Me. 279.
Minn.—Cargill Commission Co. v. Swartwood, 198 N.W. 536, 159 Minn. 1.
Neb.—Dunn v. Mutual Ben Health & Accident Ass'n, 282 N.W. 487, 135 Neb. 506—Zelen v. Domestic Industries, 282 N.W. 387, 135 Neb. 456—Bartels v. Wade, 266 N.W. 712, 130 Neb. 836.
N.J.—Collins Realty Co. v. Sale, 144 A. 585, 104 N.J.Eq. 138.
Okl.—First State Bank of Hartshorne v. Southwest Nat. Bank of Oklahoma City, 257 P. 382, 172 Okl. 10.
Or.—Duncan Lumber Co. v. Willapa Lumber Co., 182 P. 172, 93 Or. 386, rehearing denied 183 P. 476, 93 Or. 386.
Pa.—In re Gill's Estate, 171 A. 457, 314 Pa. 558—People's-Pittsburgh Trust Co. v. B. P. Dunn Home Site Co., 166 A. 844, 311 Pa. 315—Collins v. Horn, 188 A. 87, 124 Pa. Super. 115.
S.D.—International Milling Co. v. Reierson, 225 N.W. 218, 55 S.D. 139.
Tenn.—American Fruit Growers v. Hawkinson, 106 S.W.2d 564, 21 Tenn.App. 127.
Tex.—Thompson v. Gordon, Civ.App., 283 S.W. 874.
Wash.—Asher Bros. General Illuminating Co. v. General Illuminating Co., 74 P.2d 495, 193 Wash. 105.
Wis.—Borchert v. Coons, 171 N.W. 70, 168 Wis. 523.

Integration of agreement

(1) As stated in the Am.L.Inst. Restatement, Contracts § 237, the integration of an agreement makes all prior oral or written agreements relating thereto inoperative to add to

§ 1001, that an oral agreement must relate to a different subject from that of the written instrument to make it collateral and extrinsic evidence thereof admissible applies where the instrument is complete; and, in order to let in parol evidence of collateral agreements relating to the same subject matter as a written agreement between the same parties, it must appear that the writing was not intended to embrace the entire agreement of the parties.[64] Furthermore, where the instrument purports on its face to be a complete expression of the whole agreement that is, contains such language as imports a complete legal obligation, it is conclusively presumed that the parties have introduced into it every material term, and, in the absence of fraud, accident, or mistake, parol evidence cannot be admitted to add another term under the guise of proving a collateral agreement.[65] However, it is recognized that there may coexist at the same time and between the same parties two contracts, one of which is in writing and complete in itself and the other of which is in parol and complete in itself; and where, in such case, the contemporaneous parol collateral agreement refers to a matter on which the writing is silent and is in no manner inconsistent with the terms of the written instrument it may be established by parol proof.[66]

Extrinsic evidence of a parol collateral agreement is admissible where the other requisites to admissibility are satisfied and the instrument in question is incomplete,[67] or it is fairly arguable that it is

or vary agreement.—G. L. Webster Co. v. Trinidad Bean & Elevator Co., C.C.A.Va., 92 F.2d 177.

(2) Also, as stated in the Am.L. Inst. Restatement, Contracts, § 239, where there is integration by formal written agreement of part of terms of contract, prior written agreements and contemporaneous oral agreements are operative to vary such terms only to same extent as if whole contract had been integrated.—Elvidge v. Brant, 267 N.W. 169, 131 Neb. 1.

Evidence of prior or contemporaneous conversations, negotiations, representations, statements, or promises will not be received to vary or contradict a complete written contract, in the absence of fraud, accident, or mistake.

Fla.—Knabb v. Reconstruction Finance Corporation, 197 So. 707.

Ga.—Mendel v. Converse & Co., 118 S.E. 586, 30 Ga.App. 549—Rawlings v. Fields, 110 S.E. 499, 28 Ga.App. 195.

Utah.—B. T. Moran, Inc., v. First Sec. Corporation, 24 P.2d 384, 82 Utah 316.

Wis.—Rathmann v. Schwanz, 175 N.W. 812, 170 Wis. 459.

64. Ga.—Rawlings v. Fields, 110 S.E. 499, 28 Ga.App. 195.

Kan.—Radebaugh v. Dillon, 240 P. 406, 119 Kan. 492.

N.Y.—Lynch v. Harrer, 263 N.Y.S. 640, 645, quoting **Corpus Juris.**

Okl.—Smith v. Dunbar Co., 257 P. 282, 125 Okl. 215.

Pa.—People's-Pittsburgh Trust Co. v. B. P. Dunn Home Site Co., 166 A. 844, 311 Pa. 315.

22 C.J. p 1251 note 31.

Negotiations relating to same subject matter

A written contract, which is a formal memorial of agreement manifestly intended by parties to be a complete integration of their contract, excludes all prior and contemporaneous negotiations relating to same subject matter, and cannot be added to, subtracted from, or altered in any way by prior or contemporaneous negotiations relating to its subject matter.—Spayd Bros. v. Black-Clawson Co., Ohio App., 31 N.E.2d 487.

65. U.S.—Inner Shoe Tire Co. v. Treadway, C.C.A.Tex., 286 F. 838.

Cal.—Heffner v. Gross, 178 P. 860, 179 Cal. 738—Cook v. Cook, 54 P.2d 1150, 12 Cal.App.2d 70—Wright-Callender-Andrews Co. v. Eaton, 191 P. 68, 47 Cal.App. 685.

Ga.—Murphy v. Rugely, 100 S.E. 729, 24 Ga.App. 262.

Mo.—Crossan v. Noll, App., 120 S.W.2d 189—Lion Match Co. v. Hess, App., 253 S.W. 108, 111, quoting **Corpus Juris**—Sunderland v. Hackney Mfg. Co., 181 S.W. 1192, 192 Mo.App. 287.

Mont.—Rowe v. Emerson-Brantingham Implement Co., 201 P. 316, 61 Mont. 73.

N.Y.—Automotive Electric Service Corporation v. Times Square Stores Corporation, 24 N.Y.S.2d 733, 175 Misc. 865—Lynch v. Harrer, 263 N.Y.S. 640, 645, quoting **Corpus Juris.**

Pa.—Schmitt v. William G. Johnston Co., 7 A.2d 131, 136 Pa.Super. 213—Bury & Holman v. Pezalla, 27 Del.Co. 405.

S.D.—Farmers' Elevator Co. of Colton v. Swier, 210 N.W. 671, 50 S.D. 436.

W.Va.—Leckie v. Bray, 113 S.E. 746, 91 W.Va. 456.

22 C.J. p 1252 note 33.

The test of whether parol evidence is admissible as an exception to the rule that where terms of an agreement have been reduced to writing no evidence of other negotiations or terms is admissible is the completeness or incompleteness of the written contract.—Hudson v. Barneson, 183 P. 274, 41 Cal.App. 633.

66. Iowa.—Parriott v. Levis, 195 N.W. 578, 196 Iowa 875.

67. U.S.—Glens Falls Indemnity Co. v. Apple & Bond Co., C.C.A.Md., 69 F.2d 695.

Ariz.—S. H. Kress & Co. v. Evans, 189 P. 625, 21 Ariz. 442.

Cal.—Shivers v. Liberty Building-Loan Ass'n, 106 P.2d 4, prior opinion 101 P.2d 493—Crawford v. France, 27 P.2d 645, 219 Cal. 439—Lawrence v. Premier Indemnity Assur. Co., 182 P. 431, 180 Cal. 688—Stephan v. Lagerqvest, 199 P. 52, 52 Cal.App. 519.

Ga.—Renfroe v. Alden, 137 S.E. 831, 164 Ga. 77.

Idaho.—Schmershall v. Foster, 215 P. 979, 37 Idaho 247.

Ill.—Schmidt v. Schmidt, 143 N.E. 75, 311 Ill. 458.

Iowa.—Root v. Shadbolt & Middleton, 193 N.W. 634, 195 Iowa 1225.

Kan.—Lucas v. Individual Mausoleum Co., 5 P.2d 1077, 134 Kan. 266.

Mass.—Bodell v. Sawyer, 3 N.E.2d 279, 294 Mass. 534—Sermuks v. Automatic Aluminum Heel Co., 153 N.E. 8, 256 Mass. 478—See v. Downey, 152 N.E. 67, 256 Mass. 47.

Minn.—Bjornstad v. Northern States Power Co., 263 N.W. 289, 195 Minn. 439.

Mo.—Eggimann v. Houck, App., 240 S.W. 478.

Neb.—Doran v. National Surety Co., 250 N.W. 82, 125 Neb. 299.

N.Y.—Armsby v. Hygrade Auto Exch., 188 N.Y.S. 483.

N.C.—Acme Mfg. Co. v. McPhail, 106 S.E. 672, 181 N.C. 205.

Pa.—Garrison v. Salkind, 132 A. 125, 285 Pa. 265.

Tex.—Geyser Ice Co. v. Sharp, Civ. App., 87 S.W.2d 883.

It is only where instrument appears to be complete in itself that evidence of prior or contemporaneous matters is excluded.

Ga.—Smith v. Fisher, 102 S.E. 170, 24 Ga.App. 729.

N.Y.—Savage Realty Co. v. Lust, 196 N.Y.S. 296, 203 App.Div. 55.

so,[68] as where it appears not intended to be a complete and final statement of the whole transaction between the parties;[69] but, where a writing shows that a contract is imperfect in that a vital element is lacking, parol evidence of prior or contemporaneous oral agreements is not admissible to supply the defect in the absence of an allegation of omission by fraud or mutual mistake.[70]

Whether, on the one hand, a written instrument is so complete as to exclude parol evidence of a prior or contemporaneous oral agreement or, on the other hand, the oral agreement is collateral and parol evidence thereof is admissible, depends on whether the parties to the written contract intended the instrument to include all promises[71] and to cover all subjects on which they negotiated.[72] The completeness of the instrument for this purpose may appear on its face,[73] as where the instrument expressly states that it contains the entire agreement or agreements between the parties, or that it supersedes all prior agreements, or employs other language manifesting an intent of the parties not to be bound by any agreement not expressed therein.[74] So also the incompleteness of the instrument may appear on its face,[75] as where it expressly refers to, or recognizes the existence of, other agreements between the parties,[76] it being permissible, in

68. N.Y.—B. H. Krueger, Inc., v. Hearn Department Stores, Inc., 27 N.Y.S.2d 733.

69. U.S.—City of Newark v. Mills, C.C.A.N.J., 35 F.2d 110, affirming, D.C., Petition of Mills, 29 F.2d 207, and certiorari denied City of Newark v. Mills, 50 S.Ct. 237, 281 U.S. 722, 74 L.Ed. 1140—Gray v. Schoonmaker, D.C.Ill., 30 F.Supp. 1019.
Ill.—American Spiral Pipe Works v. Universal Oil Products Co., 220 Ill.App. 383.
Mo.—Humana Co. v. Hughes, App., 213 S.W. 515.
N.C.—Boone v. Boone, 9 S.E.2d 383, 217 N.C. 722.

Writing not intended to embody or express entire agreement
Conn.—Strakosch v. Connecticut Trust & Safe Deposit Co., 114 A. 660, 96 Conn. 471.
N.Y.—Traders' Nat. Bank of Rochester v. Laskin, 144 N.E. 784, 238 N.Y. 535, reversing 201 N.Y.S. 728, 207 App.Div. 18. Amendment of remittitur denied 147 N.E. 172, 239 N.Y. 507.
Tex.—Halbert v. Ward, Civ.App., 61 S.W.2d 162, error refused—Wilson v. Enfield, Civ.App., 249 S.W. 531.

Writings clearly not covering entire transaction
Minn.—Wade v. National Bank of Commerce, 174 N.W. 889, 144 Minn. 187.

Where written instrument forms part of more comprehensive transaction, the terms of which are not attempted to be expressed in writing, parol testimony as to such parts of the transaction as were not reduced to writing is admissible.—Harness v. Luttrall, Tex.Civ.App., 225 S.W. 810.

Writing or writings not expressing entire arrangement between parties
Neb.—Johnson v. Shuler, 277 N.W. 807, 134 Neb. 25.
N.Y.—Nahoum v. Slocum, Avram & Slocum Trading Co., 182 N.Y.S. 318, 111 Misc. 627.

70. Kan.—Van Deren v. Heineke & Co., 252 P. 459, 122 Kan. 215.

71. N.Y.—Ball v. Grady, 196 N.E. 402, 267 N.Y. 470, affirming 275 N.Y.S. 581, 243 App.Div. 526—Higgins v. Exchange Nat. Bank, 253 N.Y.S. 859, 142 Misc. 69.

72. U.S.—Radio Corporation of America v. Cable Radio Tube Corporation, C.C.A.N.Y., 66 F.2d 778, certiorari denied Cable Radio Tube Corporation v. Radio Corporation of America, 54 S.Ct. 373 (two cases), 290 U.S. 703, 78 L.Ed. 604.

73. Ga.—Kenney v. Walden, 113 S.E. 61, 28 Ga.App. 810.
Iowa.—Barnett v. Lovejoy, 186 N.W. 1, 193 Iowa 678.
N.Y.—Builders' Brick & Supply Co. v. Walsh Transp. Co., 174 N.Y.S. 690, 106 Misc. 460, affirmed 178 N.Y.S. 881, 189 App.Div. 898.

74. Ark.—Burton v. Burns, 143 S.W.2d 874—R. C. A. Photophone v. Sharum, 75 S.W.2d 59, 189 Ark. 797—Smith v. Bank of Marianna, 5 S.W.2d 335, 176 Ark. 1146—Carolus v. Arkansas Light & Power Co., 262 S.W. 330, 164 Ark. 507.
Ga.—Curtis v. Pierce, 122 S.E. 208, 157 Ga. 717—Conyers v. Yorkshire Ins. Co., 117 S.E. 102, 30 Ga.App. 6—Shinall Bros. v. Skelton, 112 S.E. 163, 28 Ga.App. 527.
Ill.—Metropolitan Life Ins. Co. v. Schwarz, 33 N.E.2d 934, 310 Ill. App. 205.
Mass.—Eastern Advertising Co. v. Shapiro, 161 N.E. 240, 263 Mass. 228.
Miss.—Wellford & Withers v. Arnold, 140 So. 220, 162 Miss. 786—J. R. Watkins Co. v. Poag, 122 So. 473, 154 Miss. 222.
Neb.—Schuster v. North American Hotel Co., 186 N.W. 87, 106 Neb. 672, overruling motion for rehearing 184 N.W. 136, 106 Neb. 672.
N.Y.—V. Valente, Inc., v. Mascitti, 295 N.Y.S. 330, 163 Misc. 287.
N.C.—Commercial Banking Corporation v. Linthicum, 177 S.E. 398, 207 N.C. 455—Ward v. Liddell Co., 108 S.E. 634, 182 N.C. 223.
Pa.—Dahath Electric Co. v. Suburban Electric Development Co., 2 A.2d 765, 332 Pa. 129—Hauer v. Martin, 131 A. 187, 284 Pa. 407—Eightieth Division Veterans Ass'n v. Johnson, 159 A. 467, 100 Pa.Super. 447—Smith v. Holmwood, 87 Pa. Super. 100—Meyercord Co. v. Gwilliam Mfg. Co., 85 Pa.Super. 33—Holcomb & Hoke Mfg. Co. v. Gamba, 80 Pa.Super. 191—Roth Downs Mfg. Co. v. Profy, 16 Pa.Dist. & Co. 138.
Utah.—S. W. Bridges & Co. v. Candland, 54 P.2d 842, 88 Utah 373—B. T. Moran, Inc., v. First Sec. Corporation, 24 P.2d 384, 82 Utah 316.
Va.—King v. Commercial Finance Co., 175 S.E. 733, 735, 163 Va. 260, citing **Corpus Juris.**
Wis.—Edward T. Kelly Co. v. Von Zakobiel, 171 N.W. 75, 168 Wis. 579.
22 C.J. p 1253 note 36.

75. Cal.—Stephan v. Lagerqvest, 199 P. 52, 52 Cal.App. 519.
Ga.—Bowen v. Swift & Co., 184 S.E. 625, 52 Ga.App. 793.
Mo.—Goodspeed v. Grand Nat. Bank, App., 46 S.W.2d 913.

Writing affirmatively showing lack of intent to embody all of transaction
Fla.—Milton v. Burton, 84 So. 147, 79 Fla. 266.

Directors' minutes purporting to state merely existence of agreement
Mont.—Biering v. Ringling, 240 P. 829, 74 Mont. 176.

76. Ill.—Dillow v. Hileman, 21 N.E. 2d 632, 300 Ill.App. 509.
N.Y.—Kelly v. Eggers, 256 N.Y.S. 93, 235 App.Div. 53.
Pa.—C. D. Brown & Co. v. Standard Hide Co., 152 A. 557, 301 Pa. 543.
S.C.—Herlonk v. Southern States Lumber Co., 77 S.E. 219, 93 S.C. 529.
Tex.—Jones v. Texas Co., Civ.App.,

case of a direct reference to a verbal agreement, to prove such agreement, even though the effect of the proof is to add material terms and conditions to the contract evidenced by the writing.[77] According to some authorities, the only criterion of the completeness of a writing as a full expression of the agreement of the parties is the writing itself,[78] and parol evidence is inadmissible to prove incompleteness;[79] but, according to other authorities, the surrounding circumstances may be considered[80] where the document is not conclusive.[81] At any rate, the question is to be determined primarily from the writing itself;[82] and where the writing is complete on its face parol evidence is not admissible to prove that it is incomplete.[83] An instrument may be admittedly incomplete[84] or, on the other hand, a party may be precluded, by his admission of a merger thereof, from showing a prior matter resting in parol.[85] The completeness or incompleteness of particular classes of writings is discussed infra § 1003.

§ 1000. —— Matters of Inducement

Generally speaking, a collateral agreement which constituted part of the consideration for a written agreement, or operated as an inducement for entering into it, may be shown by parol evidence; but there is some divergence of authority as to the limitations of the rule.

The rule admitting parol evidence of a collateral agreement, see supra § 997, is especially applicable where such agreement constituted a part of the consideration of the written agreement,[86] or operated as an inducement for entering into it,[87] and it appears that the writing was executed on the faith of the oral agreement;[88] and indeed there are a num-

80 S.W.2d 761, 762, quoting **Corpus Juris.**
22 C.J. p 1253 note 37, p 1290 note 56.

77. Ill.—Dillow v. Hileman, 21 N.E. 2d 632, 300 Ill.App. 509.
Minn.—Ruggles v. Swanwick, 6 Minn. 526.

78. Cal.—Hudson v. Barneson, 183 P. 274, 41 Cal.App. 633.
Ky.—Simpson v. Blaine, 230 S.W. 934, 191 Ky. 465.
Mo.—Lion Match Co. v. Hess, App., 253 S.W. 108, 110, quoting **Corpus Juris.**
N.Y.—Lynch v. Harrer, 263 N.Y.S. 640, 645, quoting **Corpus Juris.**
22 C.J. p 1251 note 32.

79. Iowa.—In re Simplot's Estate, 246 N.W. 396, 215 Iowa 578.
N.Y.—Lynch v. Harrer, 263 N.Y.S. 640, 645, quoting **Corpus Juris.**
22 C.J. p 1253 note 34.

80. Kan.—Lucas v. Individual Mausoleum Co., 5 P.2d 1077, 134 Kan. 266.

81. U.S.—McDonnell v. General News Bureau, C.C.A.Pa., 93 F.2d 898.

82. U.S.—McDonnell v. General News Bureau, supra.

83. U.S.—Texas Co. v. Lou Halperin's Stations, D.C.N.Y., 15 F.Supp. 404, affirmed, C.C.A., 86 F.2d 1014.
Neb.—Davis v. Ferguson, 197 N.W. 390, 111 Neb. 691.
N.Y.—Lynch v. Harrer, 263 N.Y.S. 640, 645, quoting **Corpus Juris.**
22 C.J. p 1253 note 35.

84. Pa.—Kerr v. McClure, 109 A. 600, 266 Pa. 103—Federal Sales Co. of Philadelphia v. Farrell, 107 A. 668, 264 Pa. 149—Dinch v. Workman, 84 Pa.Super. 39.

85. S.C.—Savannah Guano Co. v. Fogle, 100 S.E. 59, 112 S.C. 234.

86. Ala.—General Mills v. O'Rear, 194 So. 823, 239 Ala. 270.
Mich.—Sharrar v. Wayne Sav. Ass'n, 224 N.W. 379, 246 Mich. 225.
N.Y.—Higgins v. Exchange Nat. Bank, 253 N.Y.S. 859, 142 Misc. 69.
Tex.—State v. Collins & Burford Drug Co., Civ.App., 118 S.W.2d 965, affirmed 128 S.W.2d 382, 133 Tex. 222—Norm Co. v. City Drug Stores, Civ.App., 59 S.W.2d 270, 272, quoting **Corpus Juris**—Southwestern Public Service Co. v. Smith, Civ. App., 48 S.W.2d 456, 458, quoting **Corpus Juris**—Glaser v. Henderson, Civ.App., 2 S.W.2d 987.
Wash.—McGregor v. First Farmers'-Merchants' Bank & Trust Co., 40 P.2d 144, 180 Wash. 440—Champlin v. Transport Motor Co., Wash., 33 P.2d 82, 83, 177 Wash. 659, quoting **Corpus Juris.**
22 C.J. p 1253 note 39.

87. U.S.—Commissioner of Internal Revenue v. Gibbs-Preyer Trusts Nos. 1 and 2, C.C.A., 117 F.2d 619—M. H. McCloskey, Jr. (Inc.) v. U. S., 66 Ct.Cl. 105, 127, quoting **Corpus Juris.**
Ala.—General Mills v. O'Rear, 194 So. 823, 239 Ala. 270—Jackson v. Sample, 173 So. 510, 234 Ala. 75.
Ga.—Indiana Truck Corporation v. Glock, 168 S.E. 124, 46 Ga.App. 519.
Iowa.—Mason v. Cater, 182 N.W. 179, 192 Iowa 143—Banwart v. Shullenburg, 180 N.W. 190, 190 Iowa 418—Herron v. Brinton, 175 N.W. 831, 188 Iowa 60.
Mich.—Sharrar v. Wayne Sav. Ass'n, 224 N.W. 379, 246 Mich. 225.
N.Y.—Royal Indemnity Co. v. Preferred Accident Ins. Co. of New York, 276 N.Y.S. 313, 243 App. Div. 297, affirmed 198 N.E. 407, 268 N.Y. 566, reargument denied 200 N.E. 52, 269 N.Y. 674—New Amsterdam Casualty Co. v. Parsons, 220 N.Y.S. 340, 219 App.Div. 486—Higgins v. Exchange Nat. Bank, 253 N.Y.S. 859, 142 Misc. 69.
N.C.—Carothers v. James Stewart & Co., 102 S.E. 615, 179 N.C. 693.
N.D.—State Bank of Ardock v. Burke, 208 N.W. 115, 53 N.D. 777—Streeter v. Archer, 176 N.W. 826, 46 N.D. 251.
Ohio.—Glass v. O'Toole, 173 N.E. 214, 36 Ohio App. 450—Central Community Chautauqua System v. Rentschler, 166 N.E. 698, 31 Ohio App. 525.
Okl.—Young v. Eaton, 198 P. 857, 82 Okl. 166.
Pa.—U. S. Nat. Bank of Johnstown v. Evans, 146 A. 126, 296 Pa. 541.
S.C.—John T. Stanley Co. v. Kaufman, 171 S.E. 32, 170 S.C. 521—Knighton v. Des Portes Mercantile Co., 112 S.E. 343, 119 S.C. 340.
Tenn.—Hughes v. Herbert, 17 S.W.2d 16, 159 Tenn. 187—Gibson County v. Fourth & First Nat. Bank, 96 S.W.2d 184, 20 Tenn.App. 168.
Tex.—Brown v. Stoker, Civ.App., 102 S.W.2d 248, 250, citing **Corpus Juris**—Geyser Ice Co. v. Sharp, Civ. App., 87 S.W.2d 883, 886, citing **Corpus Juris**—Huddleston v. Wheeler Lumber, Bridge & Supply Co., Civ.App., 75 S.W.2d 715—Norm Co. v. City Drug Stores, Civ.App., 59 S.W.2d 270, 272, quoting **Corpus Juris**—Southwestern Public Service Co. v. Smith, Civ.App., 48 S.W. 2d 456, 458, quoting **Corpus Juris**—Loveless v. Johnson, Civ.App., 274 S.W. 658.
Wash.—McGregor v. First Farmers'-Merchants' Bank & Trust Co., 40 P.2d 144, 180 Wash. 440—Champlin v. Transport Motor Co., 33 P.2d 82, 83, 177 Wash. 659, quoting **Corpus Juris.**
Wis.—Edward T. Kelly Co. v. Von Zakobiel, 171 N.W. 75, 168 Wis. 579.
22 C.J. p 1253 note 40.

88. N.M.—Alford v. Rowell, 103 P. 2d 119, 44 N.M. 392.
Pa.—Humbert v. Meyers, 123 A. 733, 279 Pa. 171.

ber of cases asserting or intimating that it is necessary in order to render proof of the oral agreement admissible that it should have been of this character.[89] The parol agreement may be proved in such case, although it is not referred to in the written agreement.[90]

The foregoing is true where the parol evidence is not inconsistent with, or contradictory of, the written instrument;[91] and, according to some authorities, parol evidence is admissible to establish a contemporaneous oral agreement which induced the execution of the written contract, even though it may vary, change, or reform the latter contract;[92] or, as more frequently stated, where, at the time of executing a writing, a stipulation has been entered into, a condition annexed, or a promise made by word of mouth, on the faith of which the writing has been executed, parol evidence of such matters is admissible even though it may vary or materially change the terms of the contract,[93] and in such case it is not necessary to allege that the agreement was left out of the contract through fraud, accident, or mistake.[94] However, an oral agreement or stipulation may not be added to the writing itself under the guise of proving consideration[95] or for the purpose of showing the stipulation on the faith of which the writing was executed where such stipulation was knowingly omitted from the writing by both parties;[96] and, where the consideration expressed in the writing is contractual, it may not be added to, subtracted from, varied, or contradicted by proof of a prior or contemporaneous oral agreement.[97] Parol proof of representations inducing the making of a written contract must be limited to matters not otherwise plainly expressed in the writing;[98] and evidence of an oral promise or agreement relating directly to the subject of the written contract is inadmissible, even though the written contract was signed on the faith of the oral promise or agreement;[99] but there is some authority for the view that evidence of a contemporaneous, independent agreement, which induced the making of the principal agreement and is not at variance therewith, is admissible even though it concerns the same subject matter.[1] It is held that evidence of an oral agreement which was the inducing cause of the written contract is not admissible where the writing expressly states that it is the only agreement between the parties or stipulates against any agreement not stated therein;[2] but it is also held that representations constituting matters of inducement may be shown notwithstanding a clause in the written contract that no representation not incorporated therein shall be binding.[3]

§ 1001. —— Subject of Collateral Agreement

Various, and somewhat divergent, rules have been laid down as to the necessity of a difference in the subject matter of oral and written agreements to make the

89. Me.—Neal v. Flint, 33 A. 669, 88 Me. 72.
22 C.J. p 1254 note 41.
Real basis for admission is to show fraud.—Alford v. Rowell, 103 P.2d 119, 44 N.M. 392.

90. Ga.—Neuhoff v. Swift & Co., 188 S.E. 831, 54 Ga.App. 651.
Tex.—Loveless v. Johnson, Civ.App., 274 S.W. 658—Lee v. First Nat. Bank, Civ.App., 254 S.W. 394.

91. Ala.—Mercantile Finance Corporation of Alabama v. Scruggs, 151 So. 353, 227 Ala. 585—Standard Paint & Lead Works v. Ingram Hardware Co., 129 So. 20, 221 Ala. 374.
Pa.—Humbert v. Meyers, 123 A. 733, 279 Pa. 171—Roth Downs Mfg. Co. v. Profy, 16 Pa.Dist. & Co. 138.
S.C.—John T. Stanley Co. v. Kaufman, 171 S.E. 32, 170 S.C. 521.

92. Fla.—Mallard v. Ewing, 164 So. 674, 121 Fla. 654.

93. Pa.—Federal Reserve Bank of Philadelphia v. Gearon, 200 A. 80, 331 Pa. 65—First Nat. Bank v. Lawall, 124 A. 632, 280 Pa. 407—Dixon v. Minogue, 120 A. 664, 276 Pa. 562—Dannish Pride Milk Products Co. v. Marcus, 116 A. 303, 272 Pa. 340—Sheinman Bros. v. Hovland-Sardeson-McColm Co., 78 Pa.Super. 479.
Tex.—Southwestern Public Service Co. v. Smith, Civ.App., 48 S.W.2d 456, 458, quoting **Corpus Juris.**
Wash.—Champlin v. Transport Motor Co., 33 P.2d 82, 83, 177 Wash. 659, quoting **Corpus Juris.**
22 C.J. p 1254 note 42.

94. Pa.—Federal Sales Co. of Philadelphia v. Farrell, 107 A. 668, 264 Pa. 149—Dinch v. Workman, 84 Pa.Super. 39.
Tex.—Southwestern Public Service Co. v. Smith, Civ.App., 48 S.W.2d 456, 458, quoting **Corpus Juris.**
Wash.—Champlin v. Transport Motor Co., 33 P.2d 82, 83, 177 Wash. 659, quoting **Corpus Juris.**
22 C.J. p 1254 note 43.

95. Mich.—Wild v. Wild, 254 N.W. 208, 266 Mich. 570.

96. N.Y.—McCauley v. Brooklyn Steam Marble Co., 180 N.Y.S. 365, 190 App.Div. 595.

97. U.S.—Sanders v. Northwestern Bell Telephone Co., C.C.A.N.D., 65 F.2d 888.
Mo.—Meyer v. Weber, 109 S.W.2d 702, 233 Mo.App. 832.
S.D.—Farmers' Elevator Co. of Colton v. Swier, 210 N.W. 671, 50 S.D. 436.
Tex.—Sinclair Refining Co. v. Best, Civ.App., 107 S.W.2d 697.
Wis.—Borchert v. Coons, 171 N.W. 70, 168 Wis. 523.

98. Tenn.—Searcy v. Brandon, 68 S.W.2d 112, 167 Tenn. 218—Litterer v. Wright, 268 S.W. 624, 151 Tenn. 210.

99. Mont.—Continental Oil Co. v. Bell, 21 P.2d 65, 94 Mont. 123.
N.M.—Alford v. Rowell, 103 P.2d 119, 44 N.M. 392.

1. S.C.—John T. Stanley Co. v. Kaufman, 171 S.E. 32, 170 S.C. 521.

2. Ark.—Northwest Arkansas Lumber Co. v. Houston, 215 S.W. 165, 140 Ark. 182.
Neb.—Schuster v. North American Hotel Co., 186 N.W. 87, 106 Neb. 672, overruling motion for rehearing 184 N.W. 136, 106 Neb. 672.
Pa.—Holcomb & Hoke Mfg. Co. v. Gamba, 80 Pa.Super. 191.
Wis.—Edward T. Kelly Co. v. Von Zakobiel, 171 N.W. 75, 168 Wis. 579.

3. N.J.—Duralith Corporation v. Van Houten, 174 A. 484, 113 N.J. Law 374.
Tex.—Price v. Advance-Rumley Thresher Co., Civ.App., 264 S.W. 113.

oral agreement admissible as evidence of a collateral matter.

It has been variously held or asserted, sometimes in the same jurisdictions: That where the parties have reduced a contract to writing, in order to warrant the introduction of parol evidence of a matter as collateral, it must relate to a subject distinct from that to which the writing relates;[4] that the rule against parol evidence does not apply where a distinct, collateral, contemporaneous agreement, independent of and not varying or contradicting the written agreement, is offered in evidence, although it relates to the same subject matter;[5] that evidence of a contemporaneous oral collateral contract may be admissible where it covers a matter distinct from, although closely related to, the express subject matter of the written instrument;[6] that evidence of a parol agreement between one of the parties to the written agreement and a third person is admissible, even though the subject matter of the oral agreement includes matters dealt with in the written agreement;[7] that the court should exclude evidence of an oral agreement to perform some affirmative, specific act with regard to a general subject which was obviously, from the face of the contract, in the minds of the parties when the written contract was made;[8] and that where an oral and a written agreement relate to the same subject matter and are so interrelated that both would be executed at the same time and in the same contract, the scope of the oral subsidiary agreement must be taken to be covered by the writing.[9]

§ 1002. —— Separate and Independent Character of Agreement

An agreement collateral to a writing must be separate and distinct from, and independent of, that expressed in the writing, to render parol evidence thereof admissible.

In order to admit parol evidence of a collateral agreement as to a transaction evidenced by a writing, the agreement must be separate and distinct from, and independent of, that which the writing purports to express.[10] When this requisite is satisfied, as it frequently is,[11] and the other requisites to admissibility are met, parol evidence of a collateral agreement is receivable, see supra § 997.

§ 1003. —— Particular Writings

a. Assignments
b. Bills and notes
c. Building and construction contracts
d. Contracts of carriage or storage
e. Contracts of partnership and joint adventure
f. Employment contracts
g. Insurance policies or contracts
h. Leases

4. U.S.—Gray v. Schoonmaker, D.C. Ill., 30 F.Supp. 1019.
Ala.—Navco Hardware Co. v. Mobile & Gulf Nav. Co., 106 So. 862, 214 Ala. 176.
Iowa.—George Parks & Co. v. Howard Hotel Realty Co., 203 N.W. 247, 200 Iowa 479—Parriott v. Levis, 195 N.W. 578, 196 Iowa 875.
Mont.—Continental Oil Co. v. Bell, 21 P.2d 65, 94 Mont. 123.
N.M.—Alford v. Rowell, 103 P.2d 119, 44 N.M. 392—Baca v. Fleming, 187 P. 277, 25 N.M. 643.
N.D.—Stair v. Hibbs, 204 N.W. 621, 52 N.D. 910.
S.C.—Mallard v. Duke, 126 S.E. 525, 131 S.C. 175.
Tenn.—Gibson County v. Fourth & First Nat. Bank, 96 S.W.2d 184, 20 Tenn.App. 168.
Tex.—Distributors Inv. Co. v. Patton, 110 S.W.2d 47, 130 Tex. 449, reversing, Civ.App., 83 S.W.2d 782—McCormack v. Cockburn, Civ. App., 125 S.W.2d 695, error dismissed, judgment correct.
22 C.J. p 1254 note 44.

5. Ala.—Alabama Power Co. v. Pierre, 183 So. 665, 236 Ala. 521—Pointer v. Farmers' Fertilizer Co., 160 So. 252, 230 Ala. 87—Bell, Rogers & Zemurray Bros. v. Jenkins, 130 So. 396, 221 Ala. 652.
Iowa.—Cady v. Lynam, 200 N.W. 190, 198 Iowa 661.
Ky.—McKenna v. Culton, 80 S.W.2d 13, 258 Ky. 333—U. S. Bond & Mortgage Corporation v. Berry, 61 S.W.2d 293, 249 Ky. 610.
Me.—Johnson v. Burnham, 115 A. 261, 120 Me. 491.
Mo.—Kissick v. Kissick, 279 S.W. 764, 221 Mo.App. 420.
Okl.—Pepis v. Red Bank Oil Co., 44 P.2d 846, 170 Okl. 189.
S.C.—John T. Stanley Co. v. Kaufman, 171 S.E. 32, 170 S.C. 521.
22 C.J. p 1254 note 45.

6. U.S.—Sickelco v. Union Pac. R. Co., C.C.A.Cal., 111 F.2d 746.
Cal.—Cotton v. Riverside Cement Co., 85 P.2d 136, 29 Cal.App.2d 588—Gardiner v. Burket, 40 P.2d 279, 3 Cal.App.2d 666.

7. N.Y.—Cantor v. Mutual Trimming & Binding Co., 23 N.Y.S.2d 429.

8. Ariz.—Stewart v. Southwest Cotton Co., 2 P.2d 1041, 38 Ariz. 547.

9. Pa.—Gianni v. R. Russel & Co., 126 A. 791, 281 Pa. 320—Colonial Mfg. Co. v. Carideo, 16 A.2d 731, 142 Pa.Super. 485—Nelly v. Diskin, 173 A. 735, 113 Pa.Super. 249—C. I. T. Corporation v. Grosick, 167 A. 440, 110 Pa.Super. 165—Murphy v. Pinney, 86 Pa.Super. 458—Bury & Holman v. Pezalla, 27 Del.Co. 405.

10. La.—Trcka v. Bragmans Bluff Lumber Co., 141 So. 81, 174 La. 631.
Mich.—Weber v. Hall Bros., 204 N. W. 153, 231 Mich. 493—Frischkorn Real Estate Co. v. Hoskins, 196 N.W. 888, 226 Mich. 30.
Mo.—Crossan v. Noll, App., 120 S.W. 2d 189.
N.Y.—Smith v. Smith, 212 N.Y.S. 196, 214 App.Div. 383—Lynch v. Harrer, 263 N.Y.S. 640, 645, quoting **Corpus Juris.**
Tenn.—McGannon v. Farrell, 214 S. W. 432, 141 Tenn. 631.
22 C.J. p 1254 note 47.

11. Cal.—Fawcett v. Edmund Peycke Co., 187 P. 39, 44 Cal.App. 592.
Ind.—Garn v. Houser, 128 N.E. 772, 75 Ind.App. 364.
Mass.—Dixon v. Lamson, 136 N.E. 346, 242 Mass. 129.
N.C.—Bunn v. Wall, 104 S.E. 470, 180 N.C. 662.
Or.—De Vol v. Citizens' Bank, 179 P. 282, 92 Or. 696, rehearing denied 181 P. 985, 92 Or. 606.
Tex.—Mitchell v. Kennady, Civ.App., 238 S.W. 293, dismissed for want of jurisdiction.
Wis.—People's Trust & Savings Bank v. Wassersteen, 276 N.W. 330, 226 Wis. 249.

i. Mortgages and other securities
j. Receipts and releases
k. Records
l. Sales of personalty
m. Sales of realty
n. Miscellaneous writings

a. Assignments

Parol evidence may be admissible to show an agreement collateral to a written assignment, but not where it would vary, contradict, or defeat the operation of the assignment.

A written instrument evidencing an assignment does not preclude parol evidence of a collateral agreement which does not contradict or vary the terms of the instrument, where the agreement was between the parties to the assignment or, in the case of an assignment to a trustee, was between the assignor and the trustee, or was between the assignor and a third person and the assignee had knowledge thereof at the time he took the assignment.[12] On the other hand, parol or extrinsic evidence of an agreement claimed to be collateral to a written assignment or contract to assign is not admissible where it is within the general rule excluding parol or extrinsic evidence concerning written contracts, rather than within the exception which allows parol or extrinsic evidence of collateral agreements,[13] as where it would alter, vary, contradict, or defeat the operation of the written assignment,[14] the assignment is complete[15] and unambiguous,[16] and there is no showing of an omission by fraud, accident, or mistake.[17]

b. Bills and Notes

(1) In general
(2) Obligation or liability
(3) Time, place, and amount of payment
(4) Manner of payment or satisfaction

(1) In General

While, on account of the limited field covered by promissory notes and other negotiable instruments and their failure to state the entire transaction or all the arrangements between the parties, there is ample room, in connection with such instruments, for collateral agreements which may be proved by parol or extrinsic evidence, nevertheless, by reason of the absolute and unconditional terms and the legal effect of such instruments, they exclude evidence of many agreements which vary or contradict their express or implied provisions or defeat their operation.

Bills and notes and instruments of a like character do not as a rule even purport to express the entire contract or agreement between the parties thereto, and hence parol or extrinsic evidence is admissible to show collateral agreements between such parties,[18] provided such agreements are not inconsistent with, and do not tend to change, vary, alter,

12. Iowa.—White v. Gutshall, 238 N.W. 909, 213 Iowa 401.
Minn.—Robie v. Holdahl, 219 N.W. 945, 175 Minn. 44.
Mo.—Kissick v. Kissick, 279 S.W. 764, 221 Mo.App. 420.
N.Y.—Smith v. Smith, 212 N.Y.S. 196, 214 App.Div. 383.
Tex.—Fry v. Barron, Civ.App., 2 S.W.2d 888.
22 C.J. p 1254 note 51.

13. Cal.—Winter v. Knapp, 265 P. 527, 90 Cal.App. 75.
Ill.—Sheets v. Security First Mortg. Co., 12 N.E.2d 324, 293 Ill.App. 222.
Ky.—Treas v. Bank of Marshall County, 28 S.W.2d 43, 234 Ky. 376.
Mass.—Mechaber v. Pittle, 170 N.E. 52, 270 Mass. 193.
N.Y.—New Amsterdam Casualty Co. v. National Union Fire Ins. Co. of Pittsburgh, Pa., 273 N.Y.S. 647, 151 Misc. 894, affirmed 271 N.Y.S. 953, 241 App.Div. 813, affirmed 194 N.E. 745, 266 N.Y. 254.
Okl.—First Nat. Bank v. Richburg, 181 P. 145, 75 Okl. 1.
S.D.—Adron v. Evans, 217 N.W. 397, 52 S.D. 292, 59 A.L.R. 947.
Tex.—Garza v. Klepper, Civ.App., 15 S.W.2d 194, error refused.

14. Ark.—Shamis v. Rice-Stix Dry Goods Co., 244 S.W. 340, 155 Ark. 352.
Cal.—Boteler v. Robinson, 288 P. 135, 105 Cal.App. 611.
Ga.—City Purchasing Co. v. Clough, 142 S.E. 469, 38 Ga.App. 53.
Iowa.—Liberty Oil Co. v. Polk, 185 N.W. 10, 193 Iowa 146.
Mich.—Kay v. Miller, 209 N.W. 46, 235 Mich. 304.
Wash.—Asher Bros. General Illuminating Co. v. General Illuminating Co., 74 P.2d 495, 193 Wash. 105.

15. Ga.—Spurlock v. Garner, 144 S.E. 819, 38 Ga.App. 614.

16. Ga.—Spurlock v. Garner, supra.
Mass.—Bergson v. H. P. Hood & Sons, 15 N.E.2d 196, 300 Mass. 340, 116 A.L.R. 951.

17. Pa.—Marsh v. Baldwin, 20 Erie Co. 28.

Absence of fraud
Ga.—Spurlock v. Garner, 144 S.E. 819, 38 Ga.App. 614.

18. U.S.—First Nat. Bank v. Fidelity Nat. Bank of Oklahoma City, C.C.A.Tex., 74 F.2d 447—Bromfield v. Trinidad Nat. Inv. Co., C.C.A.Colo., 36 F.2d 646, 71 A.L.R 542—C. & J. Camp v. Miller, D.C.Fla., 300 F. 579.
Ala.—Bell, Rogers & Zemurray Bros. v. Jenkins, 130 So. 396, 221 Ala. 652—Blount County Bank v. Robinett & McCay, 122 So. 802, 23 Ala. App. 145, certiorari denied 122 So. 804, 219 Ala. 503.
Cal.—Gibson v. Cruickshank, 248 P. 732, 78 Cal.App. 652.
Ga.—Hawkins v. Haynes, 150 S.E. 442, 40 Ga.App. 532—Robinson v. Odom, 133 S.E. 53, 35 Ga.App. 262.
Kan.—Phipps v. Union Stock Yards Nat. Bank, 34 P.2d 561, 140 Kan. 193.
Mont.—First Nat. Bank v. Holding, 4 P.2d 709, 90 Mont. 529.
N.J.—Donahue v. Casabianca, 162 A. 763, 764, 109 N.J.Law 425, quoting **Corpus Juris**.
N.Y.—Hoagland, Allum & Co. v. Allan-Norman Holding Corporation, 239 N.Y.S. 291, 228 App.Div. 133.
Okl.—Curtis v. McCrory, 252 P. 394, 123 Okl. 105.
S.D.—Farmers' & Merchants' State Bank of Plankinton v. Wolf, 191 N.W. 451, 46 S.D. 162.
Tex.—Corona Petroleum Co. v. Jameson, Civ.App., 146 S.W.2d 512, error dismissed, judgment correct—Goldstein v. Union Nat. Bank of Dallas, Civ.App., 216 S.W. 409, conforming to answers to certified questions Goldstein v. Union Nat. Bank, 213 S.W. 584, 109 Tex. 555.
Wash.—McGregor v. First Farmers'-Merchants' Bank & Trust Co., 40 P.2d 144, 180 Wash. 440.
22 C.J. p 1255 note 52.

impair, defeat, or contradict, the terms or legal effect of the written instrument.[19] Evidence of a pa-

Executed oral agreement
Okl.—Blythe v. Campbell, 242 P. 770, 115 Okl. 227.

19. U.S.—Bernheimer v. First Nat. Bank, C.C.A.Cal., 78 F.2d 139, certiorari denied 56 S.Ct. 172, 296 U.S. 639, 80 L.Ed. 454—Kendrick v. Speck, C.C.A.N.C., 67 F.2d 295—Murphy v. Craig, C.C.A.Ariz., 28 F. 2d 963.
Ala.—Jackson v. Sample, 173 So. 510, 234 Ala. 75—Foster v. Featherston, 160 So. 689, 230 Ala. 268—Pointer v. Farmers' Fertilizer Co., 160 So. 252, 230 Ala. 87—Roberson v. Cantrell, 160 So. 224, 230 Ala. 152, citing **Corpus Juris**—Holczstein v. Bessemer Trust & Savings Bank, 136 So. 409, 223 Ala. 271—Bell, Rogers & Zemurray Bros. v. Jenkins, 130 So. 396, 221 Ala. 652—Ford v. Southern Motor Co., 93 So. 902, 208 Ala. 170.
Ariz.—Ainsworth v. National Bank of Arizona at Phœnix, 266 P. 8, 33 Ariz. 466.
Ark.—Nelson v. Wells, 87 S.W.2d 40, 191 Ark. 613—Randle v. Overland Texarkana Co., 32 S.W.2d 1064, 182 Ark. 877, 75 A.L.R. 1516—Rice v. Milligan, 6 S.W.2d 554, 177 Ark. 427.
Cal.—Alameda County Title Ins. Co. v. Panella, 24 P.2d 163, 218 Cal. 510.
Fla.—Fannin v. Fritter, for Use of American Nat. Bank of Pensacola, 172 So. 691, 127 Fla. 97—Anderson v. Ax, 139 So. 798, 104 Fla. 294.
Ga.—Seymour v. Bank of Thomasville, 121 S.E. 578, 157 Ga. 99, answers to certified questions conformed to 121 S.E. 579, 31 Ga.App. 602—A. W. Muse Co. v. Collins, 199 S.E. 856, 58 Ga.App. 753—International Harvester Co. of America v. Felton, 192 S.E. 464, 56 Ga. App. 290—Robinson v. Odom, 133 S.E. 53, 35 Ga.App. 262—Buckeye Cotton Oil Co. v. Malone, 126 S.E. 913, 33 Ga.App. 519—Anderson v. International Harvester Co., 109 S.E. 417, 27 Ga.App. 533.
Idaho.—International Harvester Co. of America v. Beverland, 219 P. 201, 37 Idaho 782.
Ill.—Scholbe v. Schuchardt, 127 N.E. 169, 292 Ill. 529, 13 A.L.R. 247, reversing 212 Ill.App. 663.
Iowa.—Andrew v. Brooks, 257 N.W. 315, 219 Iowa 134, citing **Corpus Juris**—Davenport v. Mullins, 205 N.W. 499, 200 Iowa 836.
Kan.—Brown v. Pryor, 298 P. 747, 133 Kan. 129.
La.—Fudickar v. Inabnet, 146 So. 745, 747, 176 La. 777, quoting **Corpus Juris.**
Mass.—First Nat. Bank of Boston v. Mathey, 31 N.E.2d 25, 308 Mass. 108—Paulink v. American Express Co., 163 N.E. 740, 265 Mass. 182, 62 A.L.R. 506.
Mich.—MacCrone v. Eckert, 267 N.W. 766, 275 Mich. 683—Palmer Nat. Bank v. Van Doren, 244 N.W. 485, 260 Mich. 310—Rider v. Coyne, 224 N.W. 332, 246 Mich. 365—Anderson v. Engard, 210 N.W. 237, 236 Mich. 221—Gorsche v. First Nat. Bank, 206 N.W. 992, 233 Mich. 428.
Minn.—Tiedt v. Johnson, 186 N.W. 779, 151 Minn. 288—Naftalin v. La Salle Holding Co., 186 N.W. 128, 151 Minn. 68.
Miss.—Bank of Lena v. Slay, 170 So. 635, 176 Miss. 825—Traders' Sec. Co. v. Sullivan, 112 So. 869, 147 Miss. 72.
Mo.—Montgomery v. College Mound Sec. Trust Co., App., 10 S.W.2d 971—Bank of Hollister v. O'Brien, 290 S.W. 1009, 220 Mo.App. 1276.
Neb.—Vybiral v. Schildhauer, 265 N. W. 241, 130 Neb. 433.
N.H.—Merrimack River Sav. Bank v. Higgins, 195 A. 369, 89 N.H. 154.
N.J.—Donahue v. Casabianca, 162 A. 763, 764, 109 N.J.Law 425, quoting **Corpus Juris.**
N.Y.—Crater v. Bininger, 45 N.Y. 545, affirming 54 Barb. 155—Yudelbaum v. Chorosh, 249 N.Y.S. 798, 140 Misc. 121.
Okl.—Allis-Chalmers Mfg. Co. v. Hawhee, 105 P.2d 410, 187 Okl. 670.
Or.—Johnson v. Curl, 33 P.2d 237, 147 Or. 530, rehearing denied 34 P.2d 975, 147 Or. 530—U. S. Rubber Co. v. Kimsey, 26 P.2d 565, 145 Or. 73.
Pa.—Gilmore v. Gilmore, 120 A. 270, 276 Pa. 333—Second Nat. Bank of Reading v. Yeager, 111 A. 159, 268 Pa. 167—In re Cummins' Estate, 18 Wash.Co. 80.
R.I.—Brooks v. Josephson, 129 A. 812, 47 R.I. 78.
S.C.—Columbia Nat. Bank of Columbia v. People's Bank, 160 S.E. 728, 162 S.C. 324—Ballenger v. Macauley, 157 S.E. 141, 159 S.C. 389.
Tex.—Shelton v. Montoya Oil & Gas Co., Com.App., 292 S.W. 165, affirming, Civ.App., 272 S.W. 222—Shepherd v. Woodson Lumber Co., Civ.App., 63 S.W.2d 581—General Motors Acceptance Corporation v. Beltes, Civ.App., 57 S.W.2d 263, error refused—Dooley v. Gray, Civ. App., 54 S.W.2d 558, error dismissed—Whiteman v. Bishop, Civ.App., 289 S.W. 730—Sharpe v. National Bank of Commerce, Civ.App., 272 S.W. 321—Farmers' State Bank of Florence v. Cottingham, Civ.App., 261 S.W. 426—Bush & Gerts Piano Co. of Texas v. Thomas, Civ.App., 261 S.W. 202—First State Bank of Otto v. Cohn, Civ.App., 247 S.W. 923—Dobbs v. Johnson, Civ.App., 230 S.W. 1035—Slaughter v. Texas Life Ins. Co., Civ.App., 218 S.W. 1109.
Vt.—West Rutland Trust Co. v. Houston, 158 A. 69, 104 Vt. 204, 80 A.L.R. 664—Citizens' Sav. Bank & Trust Co. v. Paradis & Sons, 146 A. 3, 102 Vt. 114—Alexander v. Chevalier, 126 A. 498, 98 Vt. 230.
Wis.—In re McAskill's Estate, 257 N. W. 177, 216 Wis. 276—Chafee Land Co. v. Clark, 177 N.W. 609, 171 Wis. 408.
22 C.J. p 1255 note 53.

Purpose of rule that terms of a note may not be changed by proof of a varying contemporaneous agreement is to render certain parties' rights to a contract which has been reduced to writing.—Nimmo v. Supernaw, 271 N.W. 705, 279 Mich. 126.

In action at law defendant may not show a collateral parol agreement to vary the written terms of a promissory note.—Henry Waterhouse Trust Co. v. Rawlins, 33 Hawaii 876.

Unless payee is accommodated party note cannot be contradicted by parol evidence of contemporaneous agreement.—People's Trust & Savings Co. v. Arthaud, Mo.App., 22 S.W. 2d 860.

If bill or note is absolute on its face, evidence of a verbal agreement, made at the same time, qualifying its terms, is not admissible.
Ill.—Feulner v. Gillam, 211 Ill.App. 348.
Mich.—First Nat. Bank v. Holmes, 181 N.W. 46, 213 Mich. 41.

Unambiguous instrument
The general rule that proof of contemporaneous parol declarations and agreements is inadmissible to contradict, vary, or alter the terms of a written contract is applicable to an attempt to prove a prior or contemporaneous parol agreement or declaration to affect the terms of a bill or note where the bill or note is not uncertain, doubtful, or ambiguous.—Williams v. Silverstein, 2 P.2d 165, 213 Cal. 269.

Fixed terms
Extrinsic parol agreement prior to or contemporaneous with written note cannot be availed of to avoid enforcement of fixed terms of note.—Kitts v. Hill, 300 P. 610, 89 Colo. 186.

In absence of fraud, accident, or mistake, or an allegation thereof, evidence of a prior or contemporaneous parol agreement is not admissible to vary or contradict the terms, destroy the character, or impair the legal effect, of a promissory note.
Ala.—Steiner Bros. v. Slifkin, 186 So. 156, 237 Ala. 226.
Ga.—Jones v. Lawman, 194 S.E. 416, 56 Ga.App. 764, transferred, see, 190 S.E. 607, 184 Ga. 25.
Ky.—Bevins v. First Nat. Bank, 79 S.W.2d 348, 258 Ky. 11—Wilhoit v. McCubbin, 61 S.W.2d 897, 250 Ky. 60.

rol agreement may be introduced to show the inducement of,[20] or real consideration for,[21] a note, an additional, or even main, consideration,[22] want of consideration,[23] and, ordinarily, partial or total failure of consideration,[24] although it has been held otherwise in an action by an innocent purchaser for value[25] or where, if there was a partial failure of consideration, it occurred before, and was known to defendant when, the note was given.[26] Reference in a note to an agreement or collateral transaction renders evidence of such agreement or transaction admissible.[27]

Objections to the admission of evidence of a mere contemporaneous parol agreement are of no avail where the matter offered in evidence is not of that character but, instead, is a statement on the back of a note,[28] a written agreement attached to the note,[29] or another writing or writings which must be construed with the note.[30] However, where the written contract between the parties consists of a note and other writings, parol testimony of an oral agreement or understanding varying or contradicting such written contract is inadmissible.[31]

Negotiability. Notwithstanding some authority to the contrary,[32] it is generally held that parol evidence is not admissible to vary the terms, or destroy the legal effect, of a note or other instrument which is negotiable in form by showing an agreement that it shall not be negotiable or shall not be negotiated or transferred[33] and that this is true, in the absence of fraud or mistake,[34] whether the instrument is in the hands of an innocent holder[35] or a party with whom the agreement was made.[36]

Whether a collateral agreement may be interposed as a defense in an action on a negotiable instrument is discussed in Bills and Notes §§ 487, 488. The pleading of such defense is treated in Bills and Notes § 622.

(2) Obligation or Liability
(a) In general
(b) Of indorser

(a) In General

It is not permissible to vary, contradict, or defeat the obligation or unconditional promise expressed in a

Minn.—Johnson v. Benham, 203 N.W. 444, 163 Minn. 31.
Pa.—In re Waber's Estate, 177 A. 51, 317 Pa. 497.
Tex.—Brown v. Cooper Co., Civ.App., 99 S.W.2d 637, error dismissed—Sutton v. Schoellkopf, Civ.App., 62 S.W.2d 318, error refused.

20. Iowa.—Versteeg v. Hoeven, 239 N.W. 709, 214 Iowa 92.
Okl.—Edwards v. City Nat. Bank of McAlester, 201 P. 233, 83 Okl. 204.
Tex.—Pope v. Hennessey, Civ.App., 38 S.W.2d 834.

Violation of agreement

(1) Evidence of contemporaneous parol agreement inducing execution of note and which agreement is violated as soon as note is executed may be introduced in suit to enforce note.—State ex rel. Shull v. Ingle, 29 P.2d 959, 167 Okl. 377.

(2) Where litigation is between the original parties to a note or those standing in no better situation than the original parties, and charged with knowledge of the purpose of the note and for what reason and under what conditions given, the maker may show a contemporaneous parol agreement between himself and beneficiary of the note which induced him to sign it, and the violation of which by the payee will defeat its enforcement.—Boardman v. Frick, 120 S.E. 883, 95 W.Va. 263.

21. Ala.—Pointer v. Farmers' Fertilizer Co., 160 So. 252, 230 Ala. 87.

22. U.S.—Queensboro Nat. Bank of City of New York v. Kelly, C.C.A. N.Y., 48 F.2d 574, 87 A.L.R. 1172, certiorari denied Kelly v. Queensboro Nat. Bank of City of New York, 52 S.Ct. 9, 284 U.S. 620, 76 L. Ed. 529.

23. Mont.—U. S. Nat. Bank of Red Lodge v. Chappell, 230 P. 1084, 71 Mont. 553.
Okl.—Powell v. Security Nat. Bank of Tulsa, 284 P. 5, 141 Okl. 169.

24. Ala.—Kilgore v. Arant, 146 So. 540, 25 Ala.App. 356.
Cal.—Harper v. French, 84 P.2d 216, 29 Cal.App.2d 214.
La.—Goldsmith v. Parsons, 161 So. 175, 182 La. 122, remanding, App., 156 So. 822, reinstating 154 So. 68, which is affirmed 161 So. 879.
22 C.J. p 1255 note 54.

25. Tex.—Traders' Securities Co. v. Green, Civ.App., 4 S.W.2d 183.

26. N.Y.—Empire Coal Sales Corporation v. Platt, 7 N.Y.S.2d 43, 255 App.Div. 791.

27. Ky.—Kirchdorfer v. Watkins, 248 S.W. 251, 198 Ky. 69.
N.C.—J. I. Case Co. v. Cox, 178 S.E. 585, 207 N.C. 759.
Ohio.—Mitzel Co. v. Shields, 172 N.E. 621, 35 Ohio App. 514.

28. Cal.—Fletcher v. Original Pit Barbecue, 294 P. 416, 110 Cal.App. 670.

29. Ark.—Central States Life Ins. Co. v. Barrow, 77 S.W.2d 801, 190 Ark. 141.

30. Ga.—Horne & Ponder v. O. B. & E. J. Evans, 120 S.E. 787, 31 Ga. App. 370.
Ill.—McComb v. Meade, 256 Ill.App. 128.
Va.—Long v. Mayo, 157 S.E. 767, 156 Va. 185.

31. Ark.—Page v. Oates, 109 S.W. 2d 661, 194 Ark. 809.
Ga.—Widincamp v. Patterson, 127 S. E. 158, 33 Ga.App. 483.
Miss.—Erdington v. Stephens, 114 So. 387, 148 Miss. 583.

32. Wyo.—Holdsworth v. Blyth & Fargo Co., 146 P. 603, 23 Wyo. 52.

33. U.S.—Bernheimer v. First Nat. Bank of Beverly Hills, C.C.A.Cal., 78 F.2d 139, certiorari denied 56 S.Ct. 172, 296 U.S. 639, 80 L.Ed. 454.
Cal.—Lindemann v. Coryell, 212 P. 47, 59 Cal.App. 788.
N.Y.—Cohen & Feldman v. Silbowitz, 261 N.Y.S. 325, 146 Misc. 324.
N.D.—Baird v. Keitzman, 233 N.W. 905, 60 N.D. 317.
Okl.—New England Nat. Bank & Trust Co., in Kansas City, Mo., v. Hille, 4 P.2d 42, 151 Okl. 185.
Pa.—Levitt v. Johnstown Office Supply Co., 157 A. 804, 103 Pa.Super. 76.

34. Wash.—Maccallum-Donahoe Finance Co. v. Devoe, 209 P. 514, 121 Wash. 295.

35. Minn.—Midland Nat. Bank of Minneapolis v. Farmers' Co-op. Elevator Co., 196 N.W. 275, 157 Minn. 348.
Wash.—Maccallum-Donahoe Finance Co. v. Devoe, 209 P. 514, 121 Wash. 295—Larsen v. Betcher, 195 P. 27, 114 Wash. 247.

36. Wash.—Maccallum-Donahoe Finance Co. v. Devoe, 209 P. 514, 121 Wash. 295

note or other negotiable instrument, which is supported by a valuable consideration and has become effectual by delivery, by introducing parol evidence of a prior or contemporaneous oral agreement that a signer of the instrument shall not be bound, obligated, or liable at all or that his liability shall be subject to a limitation or condition subsequent not expressed in the instrument.

In the absence of fraud, accident, mistake,[37] illegality,[38] or want of consideration, as considered subsequently in this section, parol evidence of a prior or contemporaneous oral agreement is not admissible to vary or contradict the terms of a note containing an unconditional promise to pay,[39] to defeat the unconditional promise to pay contained in a note,[40] or to vary, impair, or overturn the obligation expressed in a note;[41] and consequently it is not permissible to introduce parol evidence of a prior or contemporaneous oral promise, agreement, or understanding that a maker or person signing the note is not to be bound, obligated, or liable,[42] or held bound or liable,[43] that he need not, and will not, be called on or required to pay,[44] that the note will not be presented for payment,[45] that the payee will not collect,[46] enforce,[47] or, accord-

37. Cal.—Seth v. Lew Hing, 14 P.2d 537, 125 Cal.App. 729, rehearing denied 15 P.2d 190, 125 Cal.App. 729.
Ky.—Cumnock-Reed Co. v. Lewis, 128 S.W.2d 926, 278 Ky. 496—Geary-Gay Motor Co. v. Chasteen, 58 S.W.2d 393, 248 Ky. 283—Phelps v. Home Owned Stores, 46 S.W.2d 1090, 242 Ky. 531—Brown v. Turpin, 17 S.W.2d 253, 229 Ky. 383.
Or.—Bank of Freewater v. Hyett, 1 P.2d 1113, 137 Or. 193.
Pa.—Slater v. Chiccarino, 167 A. 247, 109 Pa.Super. 353.
Tex.—Northwestern Nat. Life Ins. Co. v. Miears, Civ.App., 115 S.W.2d 1128—Whiteman v. Bishop, Civ.App., 289 S.W. 730—Exum v. Mayfield, Civ.App., 286 S.W. 481.
Wash.—Legal Adjustment Bureau v. West Coast Const. Co., 298 P. 429, 162 Wash. 260—Moore v. Kildall, 191 P. 394, 111 Wash. 504.

38. Or.—Bank of Freewater v. Hyett, 1 P.2d 1113, 137 Or. 193.

39. Ala.—Brown Shoe Co. v. Rowell, 187 So. 498, 237 Ala. 404.
Ky.—Geary-Gay Motor Co. v. Chasteen, 58 S.W.2d 393, 248 Ky. 283—Payne v. Claypool, 31 S.W.2d 901, 235 Ky. 526.

40. Ga.—White County Bank v. Whelchel, 164 S.E. 66, 45 Ga.App. 229—Pulliam v. Merchants' & Miners' State Bank, 125 S.E. 509, 33 Ga.App. 68.

41. Kan.—Blair v. McQuary, 189 P. 948, 106 Kan. 710.
Tex.—Robert & St. John Motor Co. v. Bumpass, Civ.App., 65 S.W.2d 399, error dismissed.

42. Ark.—Randle v. Overland Texarkana Co., 32 S.W.2d 1064, 182 Ark. 877, 75 A.L.R. 1516.
Fla.—Forbes v. Ft. Lauderdale Mercantile Co., 90 So. 821, 83 Fla. 66.
Ill.—Cusanelli v. Steele, 5 N.E.2d 296, 287 Ill.App. 490.
Mo.—Farm & Home Savings & Loan Ass'n v. Theiss, 111 S.W.2d 189, 342 Mo. 40—Farmers' Bank of Weatherby v. Redman, App., 24 S.W.2d 235—Hackett v. Dennison, 19 S.W.2d 541, 223 Mo.App. 1213—First Nat. Bank & Trust Co. v. Limpp, 288 S.W. 957, 221 Mo.App. 951—Harms v. Long, App., 213 S.W. 507.
N.Y.—Morris v. Douglass, 262 N.Y.S. 712, 237 App.Div. 747.
N.C.—Industrial Loan & Investment Bank v. Dardine, 177 S.E. 635, 207 N.C. 509.
Okl.—First Nat. Bank v. Boxley, 264 P. 184, 129 Okl. 159, 64 A.L.R. 588.
Or.—McFarland v. Hueners, 190 P. 584, 96 Or. 579.
Pa.—U. S. Nat. Bank of Johnstown v. Evans, 146 A. 126, 296 Pa. 541—First Nat. Bank v. Sagerson, 129 A. 333, 283 Pa. 406.
S.D.—First State Bank of Lemmon v. McMahon, 185 N.W. 1014, 45 S.D. 77.
Tex.—Northwestern Nat. Life Ins. Co. v. Miears, Civ.App., 115 S.W.2d 1128.
22 C.J. p 1091 note 39.

In action on trade acceptance containing absolute and unqualified promise to pay by drawer, testimony that it was given to satisfy banking law, and under agreement that drawer was not to be liable, was inadmissible as contradicting the promise to pay.—Tennille Banking Co. v. Ward, 116 S.E. 347, 29 Ga.App. 660.

43. Ark.—W. T. Rawleigh Co. v. Berry, 115 S.W.2d 843, 195 Ark. 963—Richardson v. Merchants' & Planters' Bank & Trust Co., 69 S.W.2d 396, 188 Ark. 1104.
Cal.—Seth v. Lew Hing, 14 P.2d 537, 125 Cal.App. 729, rehearing denied 15 P.2d 190, 125 Cal.App. 729.
D.C.—Ryan v. Security Savings & Commercial Bank, 271 F. 366, 50 App.D.C. 292.
Ky.—Citizens Nat. Bank of Glasgow v. Damron, 149 S.W.2d 762, 286 Ky. 43—Phelps v. Home Owned Stores, 46 S.W.2d 1090, 242 Ky. 531.
Neb.—Security Sav. Bank v. Rhodes, 185 N.W. 421, 107 Neb. 223, 20 A.L.R. 412.
N.Y.—Manufacturers Trust Co. v. Grossman, 286 N.Y.S. 602, 247 App.Div. 199, affirmed 3 N.E.2d 874, 272 N.Y. 471.
Tex.—McCormack v. Cockburn, Civ.App., 125 S.W.2d 695, error dismissed, judgment correct.

44. Ark.—Blanks v. American Southern Trust Co., 9 S.W.2d 310, 177 Ark. 832.
Fla.—Fannin v. Fritter, for Use of American Nat. Bank of Pensacola, 172 So. 691, 127 Fla. 97.
Ga.—Peagler v. Huey, 188 S.E. 906, 183 Ga. 677—Gibson v. First Nat. Bank, 123 S.E. 606, 158 Ga. 350.
Ill.—Hinsdale State Bank v. Lytle, 262 Ill.App. 151—Farmers' State Bank & Trust Co. of Decatur v. Parr, 234 Ill.App. 78.
Kan.—Manhattan Chamber of Commerce v. Gallagher, 254 P. 345, 123 Kan. 155.
Ky.—Cumnock-Reed Co. v. Lewis, 128 S.W.2d 926, 278 Ky. 496—Davis v. Poulos, 36 S.W.2d 373, 237 Ky. 763—Brown v. Turpin, 17 S.W.2d 253, 229 Ky. 383.
Mo.—Fischman-Harris Realty Co. v. Kleine, App., 82 S.W.2d 605—Main St. Bank v. Ennis, 7 S.W.2d 391, 222 Mo.App. 917.
Or.—Bank of Freewater v. Hyett, 1 P.2d 1113, 137 Or. 193—Trites v. Abbott, 267 P. 520, 125 Or. 362—Brownell v. Heitman, 266 P. 1067, 125 Or. 515.
Vt.—West Rutland Trust Co. v. Houston, 158 A. 69, 104 Vt. 204, 80 A.L.R. 664.
Va.—Clark v. Miller, 138 S.E. 556, 148 Va. 83.
W.Va.—Tabler v. Hoult, 158 S.E. 782, 110 W.Va. 542.
22 C.J. p 1091 note 39.

45. Ala.—Brown Shoe Co. v. Rowell, 187 So. 498, 237 Ala. 404.

46. Ill.—First State Bank of Mt. Carmel v. Holsen, 245 Ill.App. 75.
Mo.—Thompson v. Bratcher, App., 8 S.W.2d 1027.
Mont.—Farmers' & Miners' State Bank v. Probst, 263 P. 693, 81 Mont. 248.

47. Ga.—Pulliam v. Merchants' & Miners' State Bank, 125 S.E. 509, 33 Ga.App. 68.
Pa.—Slater v. Chiccarino, 167 A. 247, 109 Pa.Super. 353.
Wis.—T. F. Pagel Lumber Co. v. Webster, 285 N.W. 739, 231 Wis. 222.

Enforcement according to terms

Oral agreement, entered into at execution of note, that it was not to be enforced according to terms, is

ing to the decisions of the courts, sue on[48] the note, that the note is to be returned or surrendered,[49] or that another person,[50] whether another maker of the note,[51] an indorser,[52] or a third person,[53] is to be the real and sole obligor for purposes of liability, collection, and payment. So, also, an agreement limiting liability may not be shown by parol evidence.[54] The foregoing is true where the note was given for a valuable consideration;[55] and according to some authorities it is true even in respect of an accommodation party to a note or other negotiable instrument,[56] at least where the person accommodated is a third person, and not the payee;[57] but other authorities allow the introduction of parol evidence of an agreement for exemption of the accommodation party from liability[58] where the payee is the accommodated party.[59]

As between the original parties, evidence of a contemporaneous,[60] as distinguished from a prior,[61]

prevented by parol evidence rule from being available as defense.—Security Nat. Bank v. West, 243 P. 1014, 120 Kan. 434, rehearing denied 244 P. 1036, 120 Kan. 613.

48. Ga.—Jennings v. Powell, 198 S. E. 809, 58 Ga.App. 416.
S.C.—Stalnaker v. Tolbert, 114 S.E. 412, 121 S.C. 437.

49. Cal.—Hellman Commercial Trust & Savings Bank v. Maurice, 288 P. 683, 105 Cal.App. 653.
Colo.—Dodo v. Stocker, 219 P. 222, 74 Colo. 95.
Ill.—State Bank of West Pullman v. Hovnanian, 250 Ill.App. 144.
Mass.—Maglione v. Penta, 165 N.E. 424, 266 Mass. 413.
Mich.—MacCrone v. Eckert, 267 N. W. 766, 275 Mich. 683.
Mo.—Farmers' State Bank v. Miller, 300 S.W. 834, 222 Mo.App. 633.
N.Y.—Ruppert v. Singhi, 153 N.E. 33, 243 N.Y. 156, reversing 214 N.Y. S. 912, 216 App.Div. 737.
N.D.—Security Nat. Co. v. Sanders, 235 N.W. 714, 60 N.D. 597.
Or.—Dant & Russell v. Ostlind, 35 P.2d 668, 148 Or. 204.
Pa.—Yorkshire Worsted Mills v. Braman, 175 A. 726, 115 Pa.Super. 333.

50. Iowa.—Farmers' State Bank of Strahan, Iowa, v. Fisher, 216 N.W. 709, 204 Iowa 1049.
N.Y.—Merchants' Nat. Bank of Plattsburgh v. R. Prescott & Son, 249 N.Y.S. 6, 139 Misc. 603, affirmed 257 N.Y.S. 900, 235 App.Div. 878, reargument denied 258 N.Y.S. 1016, 236 App.Div. 764.
Tex.—Helland v. Oppenheimer, Civ. App., 102 S.W.2d 299, error refused.

Agreement not altering instrument
In action against maker on note, parol evidence showing that under specified agreement intervener is principal debtor is not inadmissible as altering terms of written instrument by parol, the validity of the note being recognized according to its terms and defendant being liable on the note even if intervener is the principal debtor.—Ruden v. Dalkin, 251 N.W. 807, 62 S.D. 66.

51. Or.—U. S. Rubber Co. v. Kimsey, 26 P.2d 565, 145 Or. 73.

Collection, if possible, from other maker
Parol testimony that payee of note had agreed to look to defendant maker only in event note could not be collected from other maker was properly excluded as violating parol evidence rule.—Sudberry v. Johnston, 45 P.2d 1086, 172 Okl. 641.

52. Ga.—La Grange Lumber & Supply Co. v. Farmers' & Traders' Bank, 140 S.E. 766, 37 Ga.App. 409.

53. Ark.—Allen v. Bank of Eureka Springs, 15 S.W.2d 408, 179 Ark. 334.
Cal.—Van Haaren v. Whitmore, 38 P. 2d 829, 8 Cal.App.2d 632.
Neb.—Security Sav. Bank v. Rhodes, 185 N.W. 421, 107 Neb. 223, 20 A. L.R. 412.
N.J.—Giberson v. First Nat. Bank, 136 A. 323, 100 N.J.Eq. 502.
Tex.—Whiteman v. Bishop, Civ.App., 289 S.W. 730.

54. Tex.—Exum v. Mayfield, Civ. App., 286 S.W. 481.
Va.—Continental Trust Co. v. Witt, 124 S.E. 265, 139 Va. 458.
Wash.—Legal Adjustment Bureau v. West Coast Const. Co., 298 P. 429, 162 Wash. 260—Moore v. Kildall, 191 P. 394, 111 Wash. 504.

55. U.S.—Drake v. Moore, D.C.Ill., 14 F.Supp. 89.
Cal.—Seth v. Lew Hing, 14 P.2d 537, 125 Cal.App. 729, rehearing denied 15 P.2d 190, 125 Cal.App. 729.
Fla.—Strickland v. Jewell, 85 So. 670, 80 Fla. 221.
Mass.—Quincy Trust Co. v. Woodbury, 13 N.E.2d 377, 299 Mass. 565.
Okl.—First Nat. Bank v. Golden Glow Refining Co., 288 P. 960, 143 Okl. 299.
Tex.—Robertson v. City Nat. Bank of Bowie, 36 S.W.2d 481, 120 Tex. 226.

Where there is issue of want of consideration, it is improper to exclude evidence of written agreement, absolving defendant maker from personal liability on note.—U. S. Nat. Bank of Red Lodge v. Chappell, 230 P. 1084, 71 Mont. 553.

56. Idaho.—Central Bank of Bingham v. Perkins, 251 P. 627, 43 Idaho 310.
Iowa.—Citizens' Nat. Bank of Winterset v. Rowe, 243 N.W. 363, 214 Iowa 715.
Me.—Nonotuck Sav. Bank v. Norton, 189 A. 829, 135 Me. 92.
Md.—Crothers v. National Bank of Chesapeake City, 149 A. 270, 158 Md. 587.
Tenn.—First Nat. Bank v. Barbee, 265 S.W. 371, 150 Tenn. 355.
Tex.—McCormack v. Cockburn, Civ. App., 125 S.W.2d 695, error dismissed, judgment correct.
Wash.—Bank of California v. Starrett, 188 P. 410, 110 Wash. 231, 9 A.L.R. 177.

57. U.S.—Drake v. Moore, D.C.Ill., 14 F.Supp. 89.

58. N.Y.—Whitestown Nat. Bank v. Lewis, 199 N.Y.S. 666, 205 App.Div. 553.
N.D.—Gallagher v. Tappen State Bank, 235 N.W. 640, 60 N.D. 558.

Showing accommodation
Contemporaneous parol or written agreement is admissible to show that note was given for accommodation.—Farmers' Bank of Conway v. Miller, Mo.App., 8 S.W.2d 92.

59. Mo.—People's Bank of Glasgow v. Yager, App., 6 S.W.2d 633.
Neb.—First Trust Co. of Lincoln v. Anderson, 281 N.W. 796, 135 Neb. 397.

60. Cal.—Peterson v. First Nat. Bank, 281 P. 1104, 101 Cal.App. 532.
Colo.—McCaffrey v. Mitchell, 56 P.2d 926, 57 P.2d 900, 98 Colo. 467—Denison Clay Co. v. Pennock, 32 P.2d 189, 95 Colo. 20—Wheelock v. Hondius, 222 P. 404, 74 Colo. 400.
Mich.—MacCrone v. Eckert, 267 N. W. 766, 275 Mich. 683.
Mo.—Bunch v. Phillips, App., 79 S.W.2d 785.

Delivery for special purpose
Under a statute allowing, as between the immediate parties, delivery to be shown to have been conditional or for a special purpose only, where a note was executed and delivered to the payee for negotiation for the special purpose of obtaining money to pay an attorney's fee and the payee was to pay part of the note, an agreement to that effect is admissible in an action by the payee.—Exum v. Mayfield, Tex.Civ.App., 297 S.W. 607.

61. Colo.—Wheelock v. Hondius, 222 P. 404, 74 Colo. 400.

agreement is admissible to show a conditional delivery of a note; and it is sometimes said to be admissible, where it does not contradict the terms of the instrument, to show the terms and conditions on which the bill or note is payable, or by which payment may be avoided;[62] but it is not admissible to show that the instrument is never to take effect, or become binding, or be paid;[63] and after an instrument expressing an absolute and unconditional promise to pay has become effectual by delivery, such evidence is not admissible to add a condition subsequent or change the promise to a conditional one.[64]

(b) Of Indorser

Generally speaking, parol evidence of a prior or contemporaneous oral agreement respecting the existence, nature, extent, or enforcement of the liability of an indorser is inadmissible to add to, vary, or nullify the legal effect of, or the obligation expressed or implied in, the indorsement; but sometimes, under statute or otherwise, evidence of such an agreement is considered admissible between or against certain parties or to show an inducement for the indorsement.

Ordinarily, it is considered that the legal effect of, or the obligation expressed or implied in, an indorsement may not be nullified, added to, varied, or changed by parol evidence of a prior or contemporaneous oral agreement respecting the existence, nature, extent, or enforcement of liability of the indorser, or the status or capacity in which he is bound or obligated;[65] and some courts apply this rule even as between or among the parties to the agreement;[66] but sometimes, under statute or otherwise, evidence of such an agreement is received as between or among the immediate parties,[67] or

62. Ala.—Pointer v. Farmers' Fertilizer Co., 160 So. 252, 230 Ala. 87—Hardegree v. Riley, 122 So. 814, 219 Ala. 607.

63. Colo.—Wheelock v. Hondius, 222 P. 404, 74 Colo. 400.
Ill.—Paluszewski v. Tomczak, 273 Ill. App. 245.
Mich.—MacCrone v. Eckert, 267 N. W. 766, 275 Mich. 683.
Tex.—Cooper Co. v. Smith, Civ.App., 126 S.W.2d 518—Mitcham v. London, Civ.App., 110 S.W.2d 140.

Check as receipt
Agreement at time of delivery, that check was given merely in nature of receipt, is inadmissible.—Weinstein v. Sprintz, 234 Ill.App. 492.

64. U.S.—J. J. Lewis & Sons v. Ladson Lumber Co., C.C.A.Va., 2 F.2d 50.
Ala.—Pointer v. Farmers' Fertilizer Co., 160 So. 252, 230 Ala. 87.
Cal.—Scatena v. Lawson, 273 P. 592, 95 Cal.App. 720.
Ga.—Cairo Banking Co. v. Hall, 157 S.E. 346, 42 Ga.App. 785.
Ind.—Olson v. Ætna Trust & Savings Co., 152 N.E. 854, 90 Ind.App. 249.
Mass.—Zielmann v. Copelof, 122 N.E. 552, 232 Mass. 393.
Vt.—West Rutland Trust Co. v. Houston, 158 A. 69, 104 Vt. 204, 80 A.L.R. 664—Citizens' Sav. Bank & Trust Co. v. Paradis & Sons, 146 A. 3, 102 Vt. 114—Alexander v. Chevalier, 126 A. 498, 98 Vt. 230.
Va.—Continental Trust Co. v. Witt, 124 S.E. 265, 139 Va. 458.
Wash.—Whitman Realty & Inv. Co. v. Day, 296 P. 171, 161 Wash. 72.

65. Del.—Lippman v. Alder, 157 A. 433, 5 W.W.Harr. 51.
Ill.—Kroll v. Hoyt, 214 Ill.App. 428—Muntz v. Schmidt, 213 Ill.App. 641.
Iowa.—Ætna State Bank v. Hawks, 239 N.W. 91, 213 Iowa 340—Berry v. Gross, 184 N.W. 661, 192 Iowa 300.
Kan.—Hass v. Meyer, 233 P. 1021, 118 Kan. 109—Citizens' Bank of Lane v. North End State Bank, 226 P. 998, 116 Kan. 303, 35 A.L.R. 1109.
Ky.—Tross v. Bills' Ex'x, 224 S.W. 660, 189 Ky. 115.
Md.—Penrose v. Canton Nat. Bank of Canton, 127 A. 852, 147 Md. 200.
Mich.—Nimmo v. Supernaw, 271 N.W. 705, 279 Mich. 126.
Mo.—Fischman-Harris Realty Co. v. Kleine, App., 82 S.W.2d 605—Bank of Dearborn v. Gabbert, App., 274 S.W. 861.
N.J.—Beers v. Broad & Market Nat. Bank of Newark, 131 A. 105, 102 N. J.Law 5.
N.C.—Carr v. Clark, 171 S.E. 88, 205 N.C. 265—Kindler v. Wachovia Bank & Trust Co., 167 S.E. 811, 204 N.C. 198—Wrenn v. Lawrence Cotton Mills, 150 S.E. 676, 198 N.C. 89.
Ohio.—Commercial Credit Co. v. Bishop, 170 N.E. 658, 34 Ohio App. 217.
Okl.—Bailey v. Plumbers' Supply Co., 244 P. 791, 117 Okl. 81.
Or.—Nickell v. Bradshaw, 183 P. 12, 94 Or. 580, 11 A.L.R. 623.
Pa.—First Nat. Bank v. Lawall, 124 A. 632, 280 Pa. 407—First Nat. Bank v. Baer, 120 A. 815, 277 Pa. 184.
S.C.—Columbia Nat. Bank of Columbia v. People's Bank, 160 S.E. 728, 162 S.C. 324.
S.D.—First Nat. Bank v. Wollman, 225 N.W. 713, 55 S.D. 244, reversed on other grounds First Nat. Bank v. Wollmann, 231 N.W. 539, 57 S. D. 171.
Tex.—Republic Supply Co. v. Barrow, Civ.App., 41 S.W.2d 475, error dismissed—Polk-Genung-Polk Co. v. McGhee, Civ.App., 248 S.W. 155.
Va.—Conway v. American Nat. Bank of Danville, 131 S.E. 803, 146 Va. 357.
Wis.—Shea v. Patton, 250 N.W. 424, 212 Wis. 626, 92 A.L.R. 718.
22 C.J. p 1092 note 47.

Agreement that indorsement in blank is without recourse
Cal.—Title Insurance & Trust Co. v. Bandini Estate Co., 79 P.2d 141, 26 Cal.App.2d 157—Quatman v. Superior Court of Glenn County, 221 Pa. 666, 64 Cal.App. 203.
Iowa.—First Nat. Bank v. Raatz, 225 N.W. 856, 208 Iowa 1189.
22 C.J. p 1094 note 51.

Agreement that blank indorsement is qualified
Iowa—Kent State Sav. Bank v. Campbell, 223 N.W. 403, 208 Iowa 341.

Agreement that indorser without recourse is guarantor
Cal.—Mathes v. Bangs, 16 P.2d 749, 128 Cal.App. 171.
Idaho.—Payette Nat. Bank v. Ingard, 200 P. 344, 34 Idaho 295.

66. Va.—Wheeler v. Wardell, 3 S. E.2d 377, 173 Va. 168.
W.Va.—Cole v. George, 103 S.E. 201, 86 W.Va. 346.

In action for contribution among accommodation indorsers
Ala.—Gafford v. Tittle, 141 So. 653, 224 Ala. 605.

67. Colo.—Loveland v. Sigel-Campion Live Stock Co., 234 P. 168, 77 Colo. 22.
Ga.—Massell v. Prudential Ins. Co. of America, 196 S.E. 115, 57 Ga.App. 460—Kaiser v. Simmons, 183 S.E. 343, 52 Ga.App. 355.
Mass.—Tait v. Downey, 166 N.E. 857, 267 Mass. 422.
N.Y.—Bernstein v. Kritzer, 171 N.E. 690, 253 N.Y. 410, affirming 234 N.Y.S. 748, 226 App.Div. 866—Wittemann v. Sands, 144 N.E. 671, 238 N.Y. 434, 37 A.L.R. 1216, reversing 201 N.Y.S. 958, 207 App.Div. 856.
Contra Liberty Bank of Buffalo v. Supplee, 256 N.Y.S. 134, 143 Misc. 98—Girard Nat. Bank v. Brody, 204 N.Y.S. 832, 122 Misc. 790.

against a party who is not a holder in due course,[68] or to show an inducement for the indorsement.[69]

(3) Time, Place, and Amount of Payment

Parol evidence of a prior or contemporaneous oral agreement concerning the amount of a promissory note, interest, time of payment, or extension or renewal is not admissible where it varies or contradicts the note; but evidence of an agreement as to place of payment is admissible where the note does not state any place at which payment is to be made.

Parol evidence of a prior or contemporaneous oral agreement for a correction or adjustment of amount or other oral agreement respecting amount is not admissible to vary or contradict a promissory note[70] where there was an absolute delivery of the note;[71] but it may be admissible to show a conditional delivery and partial failure of consideration.[72] So, also, a promissory note showing on its face that it is payable at a definite time or on demand may not be varied or contradicted by evidence of a prior or contemporaneous oral agreement respecting time for payment, demand for payment, or collection;[73] but, where no specific date of payment is named in the note, it is permissible to prove by extrinsic evidence, and especially by a notation in the margin of the note, the date agreed on by the parties.[74] Notwithstanding some authority to the contrary,[75] it is generally held that a note payable at a specified date, and either making no provision for extension or renewal or making definite provision therefor, may not be varied or contradicted by parol evidence of a prior or contemporaneous oral agreement respecting extension or renewal.[76]

Interest. It is not permissible to introduce evidence of a prior or contemporaneous parol agreement for an interest rate different than that specified in the note,[77] or an agreement that interest will not be charged after maturity,[78] that a rebate of interest will be granted if the note is paid before maturity,[79] or that the note shall be satisfied by the

N.C.—Gillam v. Walker, 126 S.E. 424, 189 N.C. 189.
Wash.—White v. Armstrong, 7 P.2d 12, 166 Wash. 346.
22 C.J. p 1093 note 48.

68. Ga.—Massell v. Prudential Ins. Co. of America, 196 S.E. 115, 57 Ga. App. 460.
Or.—Robinson v. Linn, 65 P.2d 669, 155 Or. 591.

In action by receiver of payee on note indorsed with name of estate "by B. B. Executrix," oral evidence is admissible to show agreement at time of indorsement that executrix assumed no personal responsibility and that the estate only was to be bound.—Hellawell v. Garrett Busch & Son, 285 N.Y.S. 717, 157 Misc. 805, modified on other grounds 290 N.Y.S. 143, 248 App.Div. 737.
22 C.J. p 1094 note 49.

69. Ky.—Tross v. Bills' Ex'x, 224 S.W. 660, 189 Ky. 115.
Md.—Leonard v. Union Trust Co. of Maryland, 117 A. 318, 140 Md. 192.
Va.—Edmondson v. Ballard, 141 S.E. 776, 149 Va. 798.

70. U.S.—Virginia-Carolina Chemical Corporation v. Fuller, D.C.Ga., 35 F.Supp. 482.
Ga.—Burgess v. Calhoun Nat. Bank, 113 S.E. 800, 154 Ga. 193—Tyre v. Price, 183 S.E. 843, 52 Ga.App. 526—Moore v. Flowers Lumber Co., 133 S.E. 650, 35 Ga.App. 336—Atlanta Journal v. Power, 108 S.E. 121, 27 Ga.App. 280.
N.Y.—Title Guarantee & Trust Co. v. Pam, 134 N.E. 525, 232 N.Y. 441, affirming 182 N.Y.S. 824, 192 App. Div. 268, which affirmed 155 N.Y.S. 333, and reargument denied 135 N.E. 904, 233 N.Y. 530.
Va.—Good v. Dyer, 119 S.E. 277, 137 Va. 114.

71. N.Y.—State Bank of Newfane v. Lautz, 252 N.Y.S. 461, 141 Misc. 276.

72. La.—Goldsmith v. Parsons, 161 So. 175, 182 La. 122, remanding case, App., 156 So. 822, reinstating 154 So. 68, and affirmed 161 So. 879.

73. Ala.—Jackson v. Sample, 173 So. 510, 234 Ala. 75.
Ark.—Nelson v. Wells, 87 S.W.2d 40, 191 Ark. 613.
Cal.—Alameda County Title Ins. Co. v. Panella, 24 P.2d 163, 218 Cal. 510—Keeler v. Murphy, 3 P.2d 950, 117 Cal.App. 386—Lindemann v. Coryell, 212 P. 47, 59 Cal.App. 788—Rottman v. Hevener, 202 P. 334, 54 Cal.App. 485—Rottman v. Hevener, 202 P. 329, 54 Cal.App. 474.
Idaho.—Mahas v. Kasiska, 276 P. 315, 47 Idaho 179.
Ky.—Simpson v. Blaine, 230 S.W. 934, 191 Ky. 465.
Mass.—Downing v. Brennan, 122 N.E. 729, 232 Mass. 535.
N.J.—Jones v. Westcott, 150 A. 50, 8 N.J.Misc. 312.
N.C.—Roebuck v. Carson, 146 S.E. 708, 196 N.C. 672.
N.D.—Farmers' State Bank of Lisbon v. Fausett, 210 N.W. 638, 54 N.D. 696, 48 A.L.R. 1219.
Tex.—Dibrell v. Central Nat. Bank of San Angelo, 293 S.W. 874.
Va.—Crafts v. Broadway Nat. Bank of Richmond, 128 S.E. 364, 142 Va. 702.
W.Va.—Capital City Bank v. Foster, 165 S.E. 802, 112 W.Va. 520.
Wis.—First Wisconsin Nat. Bank of Milwaukee v. Pierce, 278 N.W. 451, 227 Wis. 581.
22 C.J. p 1095 note 68.

74. Tex.—Walker v. Flanary, Civ. App., 178 S.W. 992.

75. Mass.—Keith v. Radway, 109 N.E. 446, 221 Mass. 515.

76. Ala.—Ford v. Southern Motor Co., 93 So. 902, 208 Ala. 170.
Cal.—Rathbun v. Security Mfg. Co., 256 P. 296, 82 Cal.App. 793.
D.C.—Dick v. Marx & Rawolle, 4 F.2d 879, 55 App.D.C. 267, certiorari denied 45 S.Ct. 509, 268 U.S. 688, 69 L.Ed. 1158.
Fla.—Boyer Bros. v. Miami Nat. Bank, 105 So. 113, 90 Fla. 65.
Ga.—Green v. Thomas, 151 S.E. 556, 40 Ga.App. 744.
Ind.—Beck v. O'Dell, 140 N.E. 527, 193 Ind. 386.
Iowa.—Hills Sav. Bank v. Hirt, 216 N.W. 281, 204 Iowa 940.
Ky.—Lincoln v. Burbank, 290 S.W. 1081, 218 Ky. 89.
N.Y.—Timmons v. Bourges Service, Inc., 200 N.Y.S. 133, 205 App.Div. 600.
Okl.—Nelson v. Sapulpa State Bank, 212 P. 309, 88 Okl. 155.
S.D.—Smith v. Even, 220 N.W. 878, 53 S.D. 369.
Tex.—Tackett v. Cunningham, Civ. App., 91 S.W.2d 965—Commercial Inv. Co. v. Till, Civ.App., 3 S.W.2d 911—Hendrick v. Chase Furniture Co., Civ.App., 186 S.W. 277.
Wash.—Maccallum-Donahoe Finance Co. v. Devoe, 209 P. 514, 121 Wash. 295.
22 C.J. p 1095 note 69.

77. Ariz.—Inter-State Fidelity Building & Loan Ass'n v. Hollis, 17 P.2d 1101, 41 Ariz. 295.
22 C.J. p 1091 note 35.

78. Del.—Jefferis v. William D. Mullen Co., 130 A. 39, 15 Del.Ch. 9.

79. Tex.—Guarantee Life Ins. Co. v. Davidson, Com.App., 234 S.W. 883, reversing Davidson v. Guar-

payment of interest only.[80] However, in connection with evidence of compliance with such agreement, parol evidence has been held admissible to show an agreement for usurious interest[81] or an agreement to pay conventional interest exceeding the rate recited in the note.[82]

Place of payment. Evidence of a collateral agreement as to the place of payment is admissible[83] where the note does not state any place at which payment is to be made.[84]

(4) Manner of Payment or Satisfaction

According to the weight of authority, parol evidence of an antecedent or contemporaneous oral agreement for payment or satisfaction of a promissory note or other negotiable instrument from a particular fund or source, by something other than money, or in any manner other than that stated in the instrument is inadmissible because varying, contradicting, or defeating the obligation or effect of the instrument.

There is some authority for the view that evidence of a collateral agreement as to the mode or manner of payment or satisfaction of a promissory note is admissible;[85] but the weight of modern authority supports the view that parol evidence of a prior or contemporaneous oral agreement for payment or extinguishment of the note in any way, manner, or method other than that stated in the note itself is inadmissible.[86] While an executed agreement may be shown,[87] an oral agreement may be shown only where it has been executed and has resulted in extinguishment of the note by payment or otherwise.[88]

It is generally considered that where a note is in the usual form and contains an absolute and unconditional promise to pay, parol evidence is not admissible to show an oral agreement that the note shall be paid only from, or out of, earnings, profits, dividends, commissions, rentals, proceeds of a sale, or other particular and specified fund or source.[89] It has, however, been held that where the creditor actually receives the fund, a contemporaneous oral agreement that a promissory note, unconditional in its terms, shall be paid from a certain fund may be proved by parol evidence, as it does not repudiate the written instrument nor avoid payment thereof, but, on the contrary, shows that the contract has actually been fulfilled and the payment made.[90] Also, where a note does contain a provision for application of certain funds to payment of the note, evidence of a collateral agreement may be admis-

antee Life Ins. Co., Civ.App., 220 S.W. 582.

80. Kan.—Lanphear v. McLean, 10 P.2d 889, 135 Kan. 266.

81. Iowa.—Seekel v. Norman, 32 N. W. 334, 71 Iowa 264.
Mass.—Rohan v. Hanson, 11 Cush. 44.

82. La.—Converse v. Dicks, 138 So. 515, 173 La. 707.

83. Kan.—Logan v. Hartwell, 5 Kan. 649.
Me.—Wyman v. Winslow, 11 Me. 398, 26 Am.D. 542.

84. U.S.—Brent v. Metropolis Bank, 1 Pet. 89, 7 L.Ed. 65.
22 C.J. p 1255 note 56 [a].

85. N.C.—Kindler v. Wachovia Bank & Trust Co., 167 S.E. 811, 204 N.C. 198—Stack v. Stack, 163 S.E. 589, 202 N.C. 461—Roebuck v. Carson, 146 S.E. 708, 196 N.C. 672—National Bank of Suffolk v. Winslow, 137 S.E. 320, 193 N.C. 470.
22 C.J. p 1255 note 55.

86. U.S.—Bromfield v. Trinidad Nat. Inv. Co., C.C.A.Colo., 36 F.2d 646, 71 A.L.R. 542.
Fla.—Payne v. Nicholson, 131 So. 324, 100 Fla. 1459.
Ga.—Gibson v. First Nat. Bank, 123 S.E. 606, 158 Ga. 350.
La.—Fudickar v. Inabnet, 146 So. 745, 176 La. 777—Jonesboro State Bank v. Jones, App., 160 So. 187.
Mass.—Reardon v. Murdock, 198 N. E. 268, 292 Mass. 362—Trahant v. Perry, 149 N.E. 149, 253 Mass. 486.
Okl.—Hensley v. Moss, 270 P. 317, 132 Okl. 267—Union Nat. Bank v. Lavacota Oil & Gas Co., 213 P. 869, 89 Okl. 258.
22 C.J. p 1094 note 57.

87. Ind.—Zimmerman v. Adee, 25 N. E. 828, 126 Ind. 15.
N.J.—Buchanon v. Adams, 10 A. 662, 49 N.J.Law 636, 60 Am.R. 666.

88. N.J.—Jones v. Westcott, 150 A. 50, 8 N.J.Misc. 312.

89. U.S.—Bromfield v. Trinidad Nat. Inv. Co., C.C.A.Colo., 36 F.2d 646, 71 A.L.R. 542—Murphy v. Craig, C.C.A.Ariz., 28 F.2d 963—David v. Robert Dollar Co., C.C.A.Or., 2 F.2d 803.
Ariz.—Boyle v. Webb, 94 P.2d 642, 54 Ariz. 188—Neil v. Tuley, 281 P. 216, 35 Ariz. 523—Albert Steinfeld & Co. v. Tew, 274 P. 1047, 35 Ariz. 147.
Ark.—Kimmer v. New Gin, 137 S.W. 2d 749, 199 Ark. 1187.
Cal.—McArthur v. Johnson, 15 P.2d 151, 216 Cal. 580—Wright v. Shoenhair, 280 P. 174, 100 Cal.App. 163.
Colo.—Index Shale Oil Co. v. Wheeler, 255 P. 982, 81 Colo. 402—Faris v. Beck, 222 P. 652, 74 Colo. 480.
Iowa.—Hoover v. Hoover, 291 N.W. 154—Hills Sav. Bank v. Hirt, 216 N.W. 281, 204 Iowa 940—Davenport v. Mullins, 205 N.W. 499, 200 Iowa 836—Mechanics' Sav. Bank v. Gish, 203 N.W. 687, 200 Iowa 463.
Kan.—Hangen v. Pinkston, 204 P. 675, 110 Kan. 463—Underwood v. Viles, 187 P. 881, 106 Kan. 287.
Mich.—Anderson v. Engard, 210 N.W. 237, 236 Mich. 221.
Mo.—Mutual Life of Illinois v. McKinnis, App., 15 S.W.2d 935.
N.Y.—White v. Douglas, 270 N.Y.S. 661, 240 App.Div. 530—Timmons v. Bourges Service, Inc., 200 N.Y.S. 133, 205 App.Div. 600—Weiss v. Brown, 194 N.Y.S. 441, 201 App. Div. 560.
N.D.—Baird v. Keitzman, 233 N.W. 905, 60 N.D. 317—Mantz v. Fischer, 200 N.W. 795, 51 N.D. 685.
Okl.—Posey v. Citizens' State Bank, 220 P. 628, 93 Okl. 266.
Or.—Dant & Russell v. Ostlind, 35 P.2d 668, 148 Or. 204.
Pa.—McDowell Nat. Bank of Sharon, to Use of Nathan Rosenblum & Co. v. Rosenblum, 200 A. 679, 132 Pa.Super. 48.
Wis.—Muender v. Muender, 196 N. W. 773, 182 Wis. 417.
22 C.J. p 1092 note 42.

Case is not within rule where it is not claimed that the note was to be paid solely out of the funds in question, but rather that the funds reached plaintiff and he did not apply them as agreed.—Red Oak Electric Gin Co. v. Waxahachie Nat. Bank of Waxahachie, Tex.Civ.App., 279 S.W. 884.

90. Ariz.—Norton v. Tucson Cattle Loan Co., 236 P. 1110, 28 Ariz. 358.

sible for the purpose of explanation.[91]

Some courts receive evidence of a contemporaneous oral agreement for payment, satisfaction, or discharge by something other than money,[92] while other courts exclude such evidence[93] where there is merely an offer to perform the agreement, although not where the agreement has been performed.[94] More specifically, it is both affirmed[95] and denied[96] that an oral agreement for payment by return of cattle or merchandise may be shown; and there is authority both for[97] and against[98] the proposition that an oral agreement for payment in labor or services may be shown.

Credits, set-offs, or counterclaims. It has been held, on the one hand, that an extrinsic agreement concerning credits may not be shown, because it would vary the unconditional terms of the note,[99] and that a parol agreement that the note is to be set off against the maker's demands against the payee cannot be engrafted on the note,[1] and, on the other hand, that evidence of an extrinsic agreement concerning a credit on,[2] or offset or counterclaim against,[3] the note, or concerning the assumption by the payee of some duty or obligation which, when performed, will, to the extent thereof, satisfy the note,[4] does not alter, vary, or contradict the obligation of the maker as expressed in the note and hence is admissible.

In an action on a secured note, evidence of an oral agreement of the payee to look solely or primarily to the security for payment is inadmissible.[5] Where collateral is pledged as security for all of the liabilities of the maker of a note to the payee, a provision in the note allowing the payee to apply the collateral on any obligation may not be contradicted by proof of a prior and superseded oral agreement for application to the note first.[6]

c. Building and Construction Contracts

Parol evidence is admissible to show a prior or contemporaneous agreement collateral to a building and construction contract.

Under the rules stated supra §§ 997–1002, the existence of a building and construction contract does not preclude parol evidence of a prior or contemporaneous collateral agreement,[7] unless the parol evidence is inconsistent with, varies, or contradicts

91. Tex.—Tackett v. Cunningham, Civ.App., 91 S.W.2d 965.

92. N.C.—Justice v. Coxe, 151 S.E. 252, 198 N.C. 263.

93. Ga.—Cole v. Bank of Bowersville, 120 S.E. 790, 31 Ga.App. 435.
Tex.—Cooper Co. v. Smith, Civ.App., 126 S.W.2d 518—Mitcham v. London, Civ.App., 110 S.W.2d 140.
22 C.J. p 1095 notes 58–62.

94. Tex.—Consolidated Oil Co. of Texas v. Schaffner, Civ.App., 286 S.W. 258, affirmed Schaffner v. Consolidated Oil Co. of Texas, Com. App., 293 S.W. 159.

95. Okl.—Palestine Drug Co. v. Boggs, 29 P.2d 56, 167 Okl. 260.

96. Va.—Cox v. Parsons, 183 S.E. 440, 165 Va. 575, followed in 183 S.E. 443, 165 Va. 582.

97. La.—Phillips v. Gillaspie, 171 So. 567, 186 La. 45, affirming, App., 167 So. 242.
Okl.—Powell v. Security Nat. Bank of Tulsa, 284 P. 5, 141 Okl. 169.
Where service has been fully performed
Wash.—Blaine v. Darwin, 295 P. 131, 160 Wash. 327.

98. Tenn.—Searcy v. Brandon, 68 S.W.2d 112, 167 Tenn. 218.
Tex.—Northwestern Nat. Life Ins. Co. v. Miears, Civ.App., 115 S.W.2d 1128—Stavely v. Stavely, Civ.App., 94 S.W.2d 545, error dismissed.
22 C.J. p 1095 note 58.

99. Cal.—McIndoe v. Cooley, 273 P. 1104, 96 Cal.App. 90.
S.C.—Asbill Motor Co. v. Chaplin, 112 S.E. 921, 120 S.C. 211.
Tex.—Evans v. Swartz, Civ.App., 264 S.W. 234.
Wyo.—Bushnell v. Elkins, 245 P. 304, 34 Wyo. 495, 51 A.L.R. 13.

1. Ga.—J. E. Dunson & Bros. Co. v. J. C. Smith Seed Co., 106 S.E. 914, 26 Ga.App. 585.

2. Fla.—Payne v. Nicholson, 131 So. 324, 100 Fla. 1459.
Iowa.—Andrews v. Brooks, 257 N.W. 315, 219 Iowa 134—Randolph State Bank v. Osborn, 223 N.W. 493, 207 Iowa 729.

3. Fla.—Payne v. Nicholson, 131 So. 324, 100 Fla. 1459.
In Kentucky
(1) The interposition of an oral contract as a counterclaim or set-off to a promissory note is not regarded as an attempt to vary or contradict the terms of the note.—Bootes v. Gwinner's Adm'r, 64 S.W.2d 904, 251 Ky. 322.
(2) While, in an earlier case, it was held that such a contract could not be presented as a counterclaim or set-off in the absence of an allegation that the writing sued on did not contain the entire agreement of the parties, there was another ground, unconnected with the parol evidence rule, on which the decision was also based.—Gore v. Ferguson, 256 S.W. 720, 201 Ky. 368.

4. Ala.—Roberson v. Cantrell, 160 So. 224, 230 Ala. 152—Ward Motor Co. v. Assets Realization Co., 144 So. 25, 225 Ala. 548.

5. Ga.—Skeffington v. Rowland, 184 S.E. 330, 52 Ga.App. 619.
Iowa.—Smith v. Breeding, 195 N.W. 208, 196 Iowa 670.
La.—People's Bank v. Cookston, App., 142 So. 285.
Mass.—Boston Five Cents Sav. Bank v. Brooks, 34 N.E.2d 435, 309 Mass. 52—Starks v. O'Hara, 165 N.E. 127, 266 Mass. 310.
Tex.—Bashara v. Thomson, Civ.App., 93 S.W.2d 747.

6. Mich.—In re Dosker, 280 N.W. 61, 284 Mich. 597.

7. Ark.—Newell Contracting Co. v. Elkins, 257 S.W. 54, 161 Ark. 625.
Cal.—Greathouse v. Daleno, 206 P. 1019, 57 Cal.App. 187.
Ky.—Williams v. Ben Williamson & Co., 79 S.W.2d 194, 257 Ky. 767.
Mo.—Kennedy v. Bowling, 4 S.W.2d 438, 319 Mo. 401.
Or.—Stark v. McKenna, 263 P. 391, 124 Or. 332—Paldanius v. Strauss, 198 P. 253, 100 Or. 497.
Pa.—Nowalk v. Hileman, 180 A. 93, 118 Pa.Super. 322—Bilger v. Leader, 14 Northumb.L.J. 169.
Tenn.—Inman v. Jones Creek Drainage Dist. No. 10, 5 Tenn.App. 211.
Tex.—Panhandle Const. Co. v. City of Spearman, Civ.App., 89 S.W.2d 1053—Metts v. Waits, Civ.App., 8 S.W.2d 569—Gibson v. Texas Co., Civ.App., 239 S.W. 671, dismissed for want of jurisdiction.
Time for commencing work
Conn.—Cohn v. Dunn, 149 A. 851, 111 Conn. 342, 70 A.L.R. 740.
Contract with architect
Cal.—Hudson v. Barneson, 183 P. 274, 41 Cal.App. 633.

the terms of the writing.[8]

d. Contracts of Carriage or Storage

Prior or contemporaneous agreements may be shown by parol evidence where they are collateral to, and consistent with, a written contract for carriage or storage, but not where they have been merged in, or superseded by, or, if proved, would vary the terms of, the written contract.

The existence of a written contract for the carriage of goods, live stock,[9] or passengers,[10] or for the storage of goods,[11] does not preclude the admission of parol evidence of a prior or contemporaneous agreement collateral thereto but not inconsistent therewith. It is otherwise, however, where the bill of lading or other written contract for the carriage of goods or live stock is complete[12] and without ambiguity[13] and the matters sought to be shown by parol evidence consist of prior oral agreements, representations, negotiations, or directions which were superseded by, or presumably were merged in, the written contract[14] or consist of prior or contemporaneous oral agreements which would vary or alter the terms of the written contract.[15]

N.D.—Keck v. Kavanaugh, 177 N.W. 99, 45 N.D. 81.

Reference in written contract to oral agreement

In an action on a construction contract providing for payment of actual cost plus ten per cent "as verbally agreed upon," where defendant claimed that the ten per cent should be computed only on the amount paid for labor, and plaintiff claimed that the percentage should be based on the total cost of the building, oral evidence of verbal negotiations made part of the written contract by reference was admissible to show the actual agreement.—Ohio Crane Co. v. Hicks, 143 N.E. 388, 110 Ohio St. 168.

8. U.S.—Weber-Squires Corporation v. Firestone Tire & Rubber Co., C. C.A.Fla., 76 F.2d 711—Orange Car & Steel Co. v. U. S., 75 Ct.Cl. 552.
Cal.—Bruner v. Hegyi, 183 P. 369, 42 Cal.App. 97.
Ga.—Brown-Randolph Co. v. Gude, 106 S.E. 161, 151 Ga. 281.
Idaho.—Utah Const. Co. v. McIlwee, 266 P. 1094, 45 Idaho 707.
Iowa.—George Parks & Co. v. Howard Hotel Realty Co., 203 N.W. 247, 200 Iowa 479.
La.—Terrebonne Lumber & Supply Co. v. Favret, App., 2 So.2d 256.
Mich.—Strom-Johnson Const. Co., v. Riverview Furniture Co., 198 N.W. 714, 227 Mich. 55.
Mo.—Hudler v. Muller, 55 S.W.2d 419.
N.Y.—Krauth v. Harris, 194 N.Y.S. 526.
Pa.—Hoesch v. Freedman, 167 A. 256, 109 Pa.Super. 503—Barnum v. Hunter, 76 Pa.Super. 1.
S.C.—Simon v. Ætna Casualty & Surety Co., 148 S.E. 648, 151 S.C. 44.
Tex.—Winkler v. Creekmore, Com. App., 256 S.W. 257, affirming, Civ. App., 241 S.W. 730—Trout v. Wichita State Bank & Trust Co., Civ. App., 23 S.W.2d 871—Galveston, H. & S. A. Ry. Co. v. City of Eagle Pass, Civ.App., 249 S.W. 268, reversed on other grounds, Com.App., 260 S.W. 841.
Wis.—Findorff v. Fuller & Johnson Mfg. Co., 248 N.W. 766, 212 Wis. 365—Krueger v. Osborn-Meyer, 228 N.W. 519, 201 Wis. 236.

Building contracts as writings within parol evidence rule see supra § 904.

Agreement to pay premium on bond

Mass.—Inhabitants of Town of Brookline v. Crane Const. Co., 189 N.E. 795, 285 Mass. 558.
N.D.—Van Nice v. Christian Reformed Church of Hull, 231 N.W. 604, 59 N.D. 564.

Specifications attached to contract

Miss.—House v. Sealey, 122 So. 741, 154 Miss. 663.

Time for completion of work

Mo.—Baker v. J. W. McMurry Contracting Co., 223 S.W. 45, 282 Mo. 685—Hannan, Hickey Bros. Const. Co. v. Chicago, B. & Q. R. Co., App., 247 S.W. 436, transferred, see, Sup., 226 S.W. 881.

Contract with architect

Ark.—Dierks Special School Dist. v. Van Dyke, 237 S.W. 428, 152 Ark. 27.
Tex.—Ellerd v. Sodeberg, Civ.App., 222 S.W. 674, dismissed for want of jurisdiction.

Varying term implied by law

Where a well-drilling agreement specified no time for performance, Civ.Code § 1657, providing that in such case a reasonable time is allowed, was as much a part of the contract as though written therein, and parol evidence of an agreement fixing the time was inadmissible to change or vary it.—California Drilling & Machinery Co. v. Crowder, 209 P. 68, 58 Cal.App. 529.

9. U.S.—W. R. Grace & Co. v. Toyo Kisen Kabushiki Kaisha, C.C.A. Cal., 12 F.2d 519, affirming, D.C., 7 F.2d 889, and certiorari denied 47 S.Ct. 109, 273 U.S. 717, 71 L.Ed. 856—The Sarnia, C.C.A.N.Y., 278 F. 459, certiorari denied Sarnia S. S. Co. v. De Vasconcellos, 42 S.Ct. 382, 258 U.S. 625, 66 L.Ed. 797.
Fla.—Atlantic Coast Line R. Co. v. Cowart, 190 So. 546, 140 Fla. 596.
Ill.—Baker v. Michigan Southern & N. I. R. Co., 42 Ill. 73—Chicago & W. M. R. Co. v. Hull, 76 Ill.App. 408.
Mass.—Kesslen Shoe Co. v. Philadelphia Fire & Marine Ins. Co., 3 N.E.2d 257, 295 Mass. 123.
Tex.—R. L. Heflin, Inc., v. Texas Oceanic S. S. Co., Civ.App., 58 S. W.2d 133, error dismissed.
Va.—Harriss, Magill & Co. v. Latham-Bradshaw Cotton Co., 129 S.E. 525, 143 Va. 811—Harriss, Magill & Co. v. John H. Rodgers & Co., 129 S.E. 513, 143 Va. 815.
10 C.J. p 199 note 89 [a] (2)-(4)—22 C.J. p 1251 note 32 [e], p 1256 note 61.

10. Ind.—Evansville & T. H. R. Co. v. Wilson, 50 N.E. 90, 20 Ind.App. 5.
Mich.—Hayes v. Wabash R. Co., 128 N.W. 217, 163 Mich. 174, 31 L.R.A., N.S., 229.

11. Miss.—Tallahatchie Compress & Storage Co. v. Hartshorn, 88 So. 278, 125 Miss. 662, 17 A.L.R. 974.
22 C.J. p 1256 note 63.

12. Ala.—Norton-Crossing Co. v. Martin, 81 So. 71, 202 Ala. 769.
Iowa.—Marks & Shields v. Chicago, R. I. & P. Ry. Co., 169 N.W. 764, 184 Iowa 1352.

13. Iowa.—Marks & Shields v. Chicago, R. I. & P. Ry. Co., supra.
Vt.—F. N. Phillips Co. v. Gay's Express, 20 A.2d 102, 112 Vt. 49.

14. U.S.—Hildebrand v. Geneva Mill Co., D.C.Ala., 32 F.2d 343.
Iowa.—Marks & Shields v. Chicago, R. I. & P. Ry. Co., 169 N.W. 764, 184 Iowa 1352.
Mont.—Cook v. Northern Pac. Ry Co., 203 P. 512, 61 Mont. 573.

15. U.S.—Petroleum Export Corporation v. Kerr S. S. Co., C.C.A.Cal., 32 F.2d 969—Western Lumber Mfg. Co. v. U. S., D.C.Cal., 9 F.2d 1004—S. L. Shepard & Co. v. Agwilines, Inc., D.C.S.C., 39 F.Supp. 528—The Velma Lykes, D.C.Tex., 6 F.Supp. 886.
N.J.—Pennsylvania-Reading Seashore Lines v. Unit Const. Co., 189 A. 376, 117 N.J.Law 494, reversing 186 A. 445, 14 N.J.Misc. 542.
N.Y.—Dorff v. Taya, 185 N.Y.S. 174, 194 App.Div. 278.
Vt.—F. N. Phillips Co. v. Gay's Express, 20 A.2d 102, 112 Vt. 49.

e. Contracts of Partnership and Joint Adventure

Parol evidence may be admitted to show an agreement collateral to a contract of partnership or joint adventure.

Under the rules stated supra §§ 997–1002, parol evidence is admissible to show an agreement collateral to, but not inconsistent with, a contract of partnership or joint adventure.[16]

f. Employment Contracts

Evidence of a prior or contemporaneous agreement claimed to be collateral to a written contract of employment may not or may be admissible accordingly as it does or does not vary or contradict the express or implied provisions of the writing, and accordingly as the two agreements do or do not relate to the same subject matter, and the writing is complete or incomplete or expressly excludes or refers to agreements not contained therein.

The existence of a written contract of employment does not preclude the admission of parol evidence of prior or contemporaneous collateral agreements between the employer and employee,[17] which are not inconsistent with, or contradictory of, and do not vary or change the writing,[18] and which relate to a matter as to which the writing is silent,[19] where the writing is incomplete[20] or expressly refers to extrinsic agreements without stating them.[21] On the other hand, evidence claimed to be of this character is not admissible where it falls within some rule of exclusion,[22] as where it is inconsistent with, or contradictory of, and would change or vary the express or implied terms, or defeat the operation, of a written contract of employment[23] which

Contracts of:
Bailment as within parol evidence rule generally see supra § 903.
Carriage as within parol evidence rule generally see supra § 905.

Exemption of consignor from liability for freight charges
A consignor, not inserting provision absolving him from liability for freight charges at time of signing bill of lading, declaring him liable therefor unless he stipulated to contrary in space provided for such purpose, cannot prove prior or contemporaneous parol negotiations or agreements for his exemption from such liability.—Missouri-Pacific R. Co. v. Sorrell, D.C.Tex., 21 F.Supp. 886.

16. Cal.—Bank of Italy v. Zerga, 275 P. 476, 97 Cal.App. 285.
Ga.—Kerlin v. Young, 125 S.E. 204, 159 Ga. 95.
Md.—Walker v. Schindel, 58 Md. 360.
Wash.—Kelly v. Bank, 62 P.2d 1359, 188 Wash. 614.
Contract of partnership as writing within parol evidence rule see supra § 909.

Assumption of partnership debts
In an action on account against a partnership, where defendant offered in evidence a list of debts owing by his partners at the time he was received into the partnership and to testify that he contracted to pay only the debts exhibited to him at that time, and where the partnership contract included everything necessary to make it complete and there was nothing in its terms to indicate that it was not intended to express the whole agreement between the parties, such parol evidence was inadmisible to vary the terms of the clause whereby defendant, with his partners, assumed all the indebtedness owed by the former firm.—Lybrand v. Watkins Hardware Co., 239 S.W. 1053, 183 Ark. 266.

Joint adventure
Oral agreement not covered by written contract for joint enterprise is not objectionable as varying terms of written contract.—Miller v. Nudd, 271 P. 80, 149 Wash. 419.

17. N.Y.—Baker v. Watson, 241 N.Y.S. 70, 136 Misc. 840.
N.C.—Hite v. Aydlett, 134 S.E. 419, 192 N.C. 166.
Tex.—Nemir v. Bennett, Civ.App., 238 S.W. 908.
22 C.J. p 1256 note 64.

18. Ark.—William W. Cohen & Co. v. Austin, 290 S.W. 579, 172 Ark. 723.
Cal.—Linney v. Challacombe, 4 P.2d 789, 118 Cal.App. 95.
N.Y.—O'Neil v. McKinley Music Co., 178 N.Y.S. 459, 189 App.Div. 255—Kislak v. Roberts, 177 N.Y.S. 194, 108 Misc. 1.
N.C.—Greene v. Bechtel, 136 S.E. 294, 193 N.C. 94.
Pa.—Goldman v. National Refrigerator Co., 182 A. 730, 120 Pa.Super. 458.
Wash.—La Rue v. Wong On, 244 P. 567, 138 Wash. 345.
22 C.J. p 1256 note 65.

19. Ark.—Almand v. Alexander, 23 S.W.2d 611, 180 Ark. 947.
Cal.—Crawford v. France, 27 P.2d 645, 219 Cal. 439—Linney v. Challacombe, 4 P.2d 789, 118 Cal.App. 95.
Fla.—Milton v. Burton, 84 So. 147, 79 Fla. 266.
Tex.—Martinez v. Cathey, Civ.App., 215 S.W. 370, appeal of both parties refused.
W.Va.—Thomas v. Fisher, 129 S.E. 317, 99 W.Va. 419.

20. Ala.—Gulf Trading Co. v. Radcliff, 114 So. 308, 216 Ala. 645.
Cal.—McKee v. Lynch, 104 P.2d 675, 40 Cal.App.2d 216—Linney v. Challacombe, 4 P.2d 789, 118 Cal.App. 95.
Fla.—Potter v. Realty Securities Corporation, 82 So. 298, 77 Fla. 768.
Md.—Winslow v. Atz, 177 A. 272, 168 Md. 230.
Mass.—Sermuks v. Automatic Aluminum Heel Co., 153 N.E. 8, 256 Mass. 478.

Brief writing not disclosing real intention of parties
Ark.—William W. Cohen & Co. v. Austin, 290 S.W. 579, 172 Ark. 723.

21. Cal.—Kellogg v. Snell, 270 P. 232, 93 Cal.App. 717.
Mass.—Zampatella v. Thomson-Crooker Shoe Co., 144 N.E. 82, 249 Mass. 37.
N.C.—Roberts-Atkinson Co. v. International Harvester Co. of America, 131 S.E. 757, 191 N.C. 291.

22. Ariz.—Stewart v. Southwest Cotton Co., 2 P.2d 1041, 38 Ariz. 547.
Cal.—Jones v. Foster, 2 P.2d 582, 116 Cal.App. 102.
La.—Eves v. Columbia Sugar Co., App., 145 So. 383.
Mass.—Goyette v. C. V. Watson Co., 140 N.E. 285, 245 Mass. 577.
N.J.—Levy v. Rothchild, 142 A. 36, 104 N.J.Law 460.
N.Y.—Bulnick v. Railroad Federal Savings & Loan Ass'n, 8 N.Y.S.2d 975.
Okl.—Foster v. Atlas Life Ins. Co., 6 P.2d 805, 154 Okl. 30.
Or.—Houk v. Gilmore, 259 P. 891, 122 Or. 498.
Pa.—Goldbacher v. United Automobile Service Corporation of Pa., 100 Pa.Super. 18.
Tex.—Selz Schwab & Co. v. Smith, Civ.App., 44 S.W.2d 455, error dismissed.
Utah.—Van Leeuwen v. Huffaker, 5 P.2d 714, 78 Utah 521.
Va.—Wessel, Duval & Co. v. Crozet Cooperage Co., 130 S.E. 393, 143 Va. 469.
22 C.J. p 1110 note 39, p 1252 note 33 [a] (3).

23. U.S.—Sabine Collieries Corpora-

relates to the same subject matter,[24] and is unambiguous,[25] complete,[26] and designed to express the whole arrangement between the parties,[27] especially where it expressly stipulates against the existence or binding effect of agreements, conditions, or representations not contained therein.[28]

g. Insurance Policies or Contracts

In view of the completeness of many written contracts of insurance, the existence of express provisions excluding agreements not expressed in the writing, and the tendency, in many cases, of the offered evidence to vary or contradict the terms of the instrument, evidence sought to be introduced for the purpose of proving a prior or contemporaneous agreement collateral to a policy or other written contract of insurance is excluded more frequently than it is admitted.

Evidence of a prior or contemporaneous collateral agreement between insured and insurer or its agent may be admissible, notwithstanding the fact that there is a written contract or policy of insurance,[29] as where the policy and the indorsements thereon do not fully express the arrangements between the parties.[30] Frequently, however, evidence claimed to be of this character is excluded on one or more grounds,[31] such as the completeness and entirety of the policy or other written contract,[32] the merger of all prior parol agreements therein,[33] the presumption that it contains all the terms of the agreement by which the parties intend to be bound,[34] the lack of ambiguity therein,[35] the existence therein,[36] or in a governing statute,[37] of a

tion v. Beverage, C.C.A.W.Va., 300 F. 72.
Ark.—Donaghey v. Remmel & McCarroll, 34 S.W.2d 1085, 183 Ark. 67.
Ill.—Hunter v. Gates, 227 Ill.App. 105.
Mass.—Chinese American Restaurant v. Finigan, 172 N.E. 510, 272 Mass. 360.
Neb.—Davis v. Ferguson, 197 N.W. 390, 111 Neb. 691.
N.Y.—Hellevik v. American Sugar Transit Corporation, 26 N.Y.S.2d 724, 261 App.Div. 591—A. W. McLaughlin & Co. v. Southern Hotel Co., 177 N.Y.S. 323, 188 App.Div. 679—Gulickson v. Seglin Const. Co., 273 N.Y.S. 908, 152 Misc. 624—Smith v. Compania Litografica de la Habana, 217 N.Y.S. 39, 127 Misc. 508, affirmed 222 N.Y.S. 902, 220 App.Div. 782—Schmidl v. Central Laundry & Supply Co., 13 N.Y.S.2d 817—Hurwitz v. Fox, 199 N.Y.S. 785—Poris v. American-National Co., 197 N.Y.S. 853.
Okl.—Pringey v. Maryland Casualty Co., 73 P.2d 461, 181 Okl. 278.
Pa.—Chanin v. J. B. Liebman & Co., 20 A.2d 208, 341 Pa. 552.
Tenn.—Hartford Fire Ins. Co. v. Deere, 134 S.W.2d 875, 23 Tenn. App. 467.
Va.—Payne v. Jennings, 131 S.E. 209, 144 Va. 126, 48 A.L.R. 628.
Wash.—McDonald v. Wyant, 8 P.2d 428, 167 Wash. 49—Sexton v. Reilly, 229 P. 305, 131 Wash. 206.
22 C.J. p 1110 note 39.

Where fraud not alleged
Ala.—Bissell Motor Co. v. Johnson, 97 So. 49, 210 Ala. 38.

Preceding oral negotiations varying terms of written agreements for broker's commission are inadmissible.—Trickey v. Smith, 16 P.2d 146, 127 Cal.App. 513.

24. N.Y.—Schwarz v. Repeatograph Co., 185 N.Y.S. 82.

25. La.—Walker v. Meyer, 119 So. 480, 9 La.App. 195, reversed on other grounds 119 So. 26, 167 La. 218.
Tex.—Randolph v. Mackechney, Civ. App., 52 S.W.2d 926.

26. Ariz.—S. H. Kress & Co. v. Evans, 189 P. 625, 21 Ariz. 442.
Mo.—Phœnix Mut. Life Ins. Co. v. Goessling, App., 121 S.W.2d 132.
N.J.—Berry v. Knights of Columbus Home Ass'n of Atlantic City, 148 A. 644, 106 N.J.Law 232.

27. Neb.—Dunn v. Mutual Ben. Health & Accident Ass'n, 282 N.W. 487, 135 Neb. 506.

28. Miss.—Ismert-Hincke Milling Co. v. Natchez Baking Co., 86 So. 588, 124 Miss. 205.
N.Y.—E. A. Strout Farm Agency v. De Forest, 195 N.Y.S. 101, 201 App. Div. 777.
Pa.—Lloyd & Elliott v. Lang, 180 A. 74, 118 Pa.Super. 190.

29. Idaho.—Bales v. General Ins. Co. of America, 24 P.2d 57, 53 Idaho 327.
S.C.—McGuinn v. Ætna Life Ins. Co., 171 S.E. 793, 171 S.C. 136—Galphin v. Pioneer Life Ins. Co., 154 S.E. 855, 157 S.C. 469.
Tex.—National Mut. Ben. Ass'n v. Aaron, Civ.App., 45 S.W.2d 371, modified on other grounds, Com. App., 67 S.W.2d 855.
22 C.J. p 1256 note 66.

30. Wis.—Montague v. Northwestern Mut. Life Ins. Co., 178 N.W. 455, 172 Wis. 192.

31. U.S.—Ætna Ins. Co. v. Sacramento-Stockton S. S. Co., C.C.A. Cal., 273 F. 55.
Ga.—Tarver v. Swann, 137 S.E. 126, 36 Ga.App. 461.
Ind.—Fidelity Health & Accident Co. v. Holbrook, 169 N.E. 57, 96 Ind. App. 457, rehearing denied 170 N.E. 346, 96 Ind.App. 457.
Mo.—Baker v. Keet-Rountree Dry Goods Co., 2 S.W.2d 733, 318 Mo. 969, rehearing denied 3 S.W.2d 1003, 318 Mo. 969—Daly v. Sovereign Camp, W. O. W., App., 55 S. W.2d 743—State ex rel. Chorn v. Hudson, App., 222 S.W. 1049.
N.J.—Siegler v. New Amsterdam Casualty Co., 130 A. 543, 3 N.J. Misc. 1069.
S.D.—Davenport v. Firemen's Ins. Co. of Newark, N. J., 199 N.W. 203, 47 S.D. 426—House v. Bankers' Reserve Life Co. of Omaha, Neb., 180 N.W. 69, 43 S.D. 440.
Tex.—Federal Underwriters Exchange v. Walker, Civ.App., 134 S.W.2d 388, error granted—Rio Grande Nat. Life Ins. Co. v. Bandy, Civ. App., 110 S.W.2d 122.
22 C.J. p 1113 note 47.

32. Mass.—Cass v. Lord, 128 N.E. 716, 236 Mass. 430.
N.Y.—Metzger v. Ætna Ins. Co., 240 N.Y.S. 755, 229 App.Div. 26.

33. Ark.—Harrower v. Insurance Co. of North America, 222 S.W. 39, 144 Ark. 279.
N.C.—Moore v. Fidelity & Casualty Co. of New York, 177 S.E. 406, 207 N.C. 433.

34. N.C.—McNeal v. Life & Casualty Ins. Co., of Tennessee, 135 S.E. 300, 192 N.C. 450—Ocean Accident & Guarantee Corporation v. Piedmont Ry. & Electric Co., 102 S.E. 636, 179 N.C. 402.

35. U.S.—Globe Indemnity Co. v. Cohen, C.C.A.Pa., 106 F.2d 687, certiorari denied Cohen v. Globe Indemnity Co., 60 S.Ct. 513, 309 U.S. 660, 84 L.Ed. 1008—Whitney v. Union Central Life Ins. Co., C.C.A. Neb., 47 F.2d 861—Sellars v. Continental Life Ins. Co., C.C.A.S.C., 30 F.2d 42.
Kan.—State ex rel. v. Bank Sav. Life Ins. Co., 75 P.2d 297, 147 Kan. 170.
Ohio.—Elliott v. Business Men's Assur. Co., 11 N.E.2d 203, 56 Ohio App. 541.

36. Ga.—Tarver v. Swann, 137 S.E. 126, 36 Ga.App. 461.
Mass.—London Guarantee & Accident Co. v. Jacobson, 135 N.E. 122, 241 Mass. 255.
S.C.—Williams v. Philadelphia Life Ins. Co., 100 S.E. 157, 112 S.C. 436.

37. Ala.—Tutton v. Liverpool &

provision prohibiting or excluding agreements not expressed therein or requiring the policy, or application and policy, to contain or constitute the entire contract between the parties, the absence of fraud, accident, or mistake,[38] and the tendency of the offered evidence to vary, alter, change, abrogate, or contradict the terms of the policy or other written instrument.[39]

h. Leases

Parol evidence of an agreement claimed to be collateral to a written lease, sublease, or contract for a lease or sublease, is or is not admissible accordingly as it does or does not possess the requisites to admissibility of evidence of a collateral agreement.

As many oral agreements between the parties to a written lease are held not to be admissible under the exception of collateral agreements from the application of the parol evidence rule, and are therefore left to the operation of such rule, some of the propositions stated herein are similar to those stated above in §§ 918, 919, dealing with the application of the parol evidence rule to parol evidence generally where the writing involved is a lease, and such sections should be consulted for collateral authorities.

The existence of a written lease, sublease, or contract for a lease or sublease, does not preclude parol evidence of a separate and independent collateral agreement between the parties to the writing,[40] where the collateral agreement deals with a matter as to which the writing is silent,[41] the writing does not appear or purport to cover completely the entire arrangement or transaction, or all the agreements, between the parties,[42] and the evidence does not vary or contradict the terms of the writing,[43] or where, even though the evidence of the oral agreement may vary or contradict the written lease, the writing is not in issue and is not in

London & Globe Ins. Co., Limited, 186 So. 551, 237 Ala. 230.
S.C.—Perry v. North Carolina Mut. Life Ins. Co., 185 S.E. 47, 180 S.C. 72.
22 C.J. p 1256 note 67.

38. D.C.—Supreme Lodge, K. P., v. Wood, 286 F. 998, 52 App.D.C. 334.
Ga.—Scottish Union & National Ins. Co. v. Fortesque, 140 S.E. 893, 37 Ga.App. 366—Home Ins. Co. of New York v. Swann, 133 S.E. 280, 35 Ga.App. 358.
Mo.—St. Louis Basket & Box Co. v. Mastin, App., 79 S.W.2d 493—Bloodworth v. Alcorn, App., 246 S.W. 995.
S.C.—Perry v.. North Carolina Mut. Life Ins. Co., 185 S.E. 47, 180 S.C. 72.

39. U.S.—Globe Indemnity Co. v. Cohen, C.C.A.Pa., 106 F.2d 687, certiorari denied Cohen v. Globe Indemnity Co., 60 S.Ct. 513, 309 U.S. 660, 84 L.Ed. 1008.
Ala.—Tutton v. Liverpool & London & Globe Ins. Co., Limited, 186 So. 551, 237 Ala. 230.
Ga.—Mitchener v. Union Cent. Life Ins. Co., 194 S.E. 530, 185 Ga. 194—Scottish Union & National Ins. Co. v. Fortesque, 140 S.E. 893, 37 Ga.App. 366—Home Ins. Co. of New York v. Swann, 133 S.E. 280, 35 Ga.App. 358.
Ill.—Jones v. Ætna Ins. Co., 226 Ill. App. 160.
Ind.—Lincoln Nat. Life Ins. Co. v. Sobel, App., 35 N.E.2d 121.
Kan.—State ex rel. v. Bank Sav. Life Ins. Co., 75 P.2d 297, 147 Kan. 170.
Ky.—Prudential Life Ins. Co. of America v. Bowling, 35 S.W.2d 322, 237 Ky. 290.
Mass.—Cass v. Lord, 128 N.E. 716, 236 Mass. 430.
Mich.—Wells v. Prudential Ins. Co. of America, 214 N.W. 308, 239 Mich. 92.
Mo.—Banks v. Clover Leaf Casualty Co., 233 S.W. 78, 207 Mo.App. 357.
N.J.—Mariotti v. Metropolitan Life Ins. Co., 5 A.2d 759, 122 N.J.Law 360.
N.Y.—Metzger v. Ætna Ins. Co., 240 N.Y.S. 749, 229 App.Div. 2.
N.C.—Jones v. Gate City Life Ins. Co., 4 S.E.2d 848, 216 N.C. 300.
S.C.—Hyder v. Metropolitan Life Ins. Co., 190 S.E. 239, 183 S.C. 98—Perry v. North Carolina Mut. Life Ins. Co., 185 S.E. 47, 180 S.C. 72.
Utah.—Field v. Missouri State Life Ins. Co., 290 P. 979, 77 Utah 45.
22 C.J. p 1256 note 68.
Canceled certificate is not admissible to vary terms of policy sued on.—Merchants & Bankers Guaranty Co. v. Downs, 175 So. 704, 128 Fla. 767.

40. Colo.—Creek v. Lebo Inv. Co., 276 P. 329, 85 Colo. 357.
D.C.—Lippincott v. Kerr, 40 F.2d 802, 59 App.D.C. 290.
Mich.—Stifter v. Hartman, 195 N.W. 673, 225 Mich. 101.
N.Y.—Merly Realty Corporation v. Wallack, 234 N.Y.S. 491, 134 Misc. 96.
Okl.—Graham v. Dunlap, 65 P.2d 538, 179 Okl. 295.
S.C.—National Bank of South Carolina v. People's Grocery Co., 150 S.E. 478, 153 S.C. 118.
22 C.J. p 1256 note 70.
Parol reservation of growing crop
Ohio.—Youmans v. Caldwell, 4 Ohio St. 71.

41. Cal.—Gardiner v. Burket, 40 P. 2d 279, 3 Cal.App.2d 666—Scheimer v. James, 199 P. 827, 53 Cal.App. 207.
N.Y.—Fifth Ave. Bond & Mortgage Co. v. Ehrlich, 173 N.Y.S. 740.
Okl.—Brazell v. Brown, 38 P.2d 17, 169 Okl. 623.
S.C.—Rowland & Sons v. Bock, 148 S.E. 549, 150 S.C. 490.
Agreement inadvertently omitted from lease
La.—Atlas Oil Co. v. Logan, 116 So. 582, 166 La. 28.

42. N.Y.—Apparel & Accessories Associates v. New York World's Fair 1939, 26 N.Y.S.2d 522, affirmed Apparel & Accessories Associates v. New York World's Fair 1940, 26 N.Y.S.2d 528, 261 App. Div. 944, reargument denied 27 N.Y.S.2d 469, 261 App.Div. 1074.
Pa.—Blair's Estate, now to Use of Goldfarb v. Appliance Service Co., 15 A.2d 520, 141 Pa.Super. 508.
Tex.—Corona Petroleum Co. v. Jameson, Civ.App., 146 S.W.2d 512, error dismissed, judgment correct—Masterson v. Amarillo Oil Co., Civ.App., 253 S.W. 908.

43. Cal.—Stockburger v. Dolan, 94 P.2d 33, 14 Cal.2d 313, 128 A.L.R. 83, superseding 87 P.2d 411—Scheimer v. James, 199 P. 827, 53 Cal.App. 207.
Colo.—Frosh v. Sun Drug Co., 16 P. 2d 428, 91 Colo. 440.
Iowa.—Stoner v. Stehm, 202 N.W. 530, 200 Iowa 809.
Va.—Roberts Coal Co. v. Corder Coal Co., 129 S.E. 341, 143 Va. 133.
Compliance with condition
Where a lease makes the consent of the lessor a condition to the removal of hay and straw from the premises, proof of such consent shows a compliance with the condition and does not vary or contradict the lease, even though the consent was given when the lease was executed and delivered, rather than afterward, that being a mere immaterial incident.—Morrison v. Altland, 74 Pa.Super. 38.

the record in any sense other than that it is referred to in the oral evidence,[44] or where one of the parties to the litigation is not a party, or in privity with a party, to the lease.[45] Frequently, however, evidence sought to be introduced under this rule is held inadmissible,[46] as where the writing is complete[47] and unambiguous,[48] there is no allegation or proof of fraud, accident, or mistake,[49] and no attempt to reform the instrument,[50] and the evidence offered would vary or contradict the express or implied terms of the written instrument,[51] add

44. Iowa.—Fisher v. Nicola, 241 N. W. 478, 214 Iowa 801.

45. Or.—Lane v. National Ins. Agency, 37 P.2d 365, 148 Or. 589.

46. Cal.—Parigian v. Citizens Nat. Trust & Savings Bank of Los Angeles, App., 110 P.2d 117.
Ga.—Googe v. York, 142 S.E. 562, 38 Ga.App. 62.
Iowa.—Jacobsen v. Moss, 268 N.W. 162, 221 Iowa 1342—Jones v. Sargent, 188 N.W. 818, 193 Iowa 1256.
La.—Monroe Inv. Co. v. Ford, 122 So. 586, 168 La. 475.
Mass.—Whittier v. Goldberg, 174 N. E. 491, 274 Mass. 335—Thall v. Berkowitz, 163 N.E. 876, 265 Mass. 335.
Mo.—Schroeder v. Drewer, App., 113 S.W.2d 1045—Gentner v. Johnson, App., 270 S.W. 442.
N.Y.—Halloran v. N. & C. Contracting Co., 164 N.E. 324, 249 N.Y. 381, affirming 226 N.Y.S. 825, 223 App. Div. 721, which reversed 224 N.Y. S. 813, 222 App.Div. 690—Stonemor Realty Co. v. Beyda, 201 N.Y.S. 418, 206 App.Div. 476—Cochran v. Scherer, 192 N.Y.S. 199, 117 Misc. 765.
N.C.—Stewart v. Thrower, 193 S.E. 701, 212 N.C. 541—Singleton v. Atlantic Coast Line R. Co, 166 S.E. 305, 203 N.C. 462.
Pa.—Title Holding Co. v. Black, 159 A. 560, 306 Pa. 352.
R.I.—New England Transp. Co. v. Doorley, 197 A. 205, 60 R.I. 50.
S.C.—Mallard v. Duke, 126 S.E. 525, 131 S.C. 175.
S.D.—Aegerter v. Hayes, 226 N.W. 345, 55 S.D. 337.
Tex.—Hall v. Johnson, Civ.App., 225 S.W. 1110—Russell v. Old River Co., Civ.App., 210 S.W. 705.
Wis.—Blazei v. Cologne, 250 N.W. 752, 213 Wis. 48.

47. Ala.—Frazier v. Riley, 111 So. 10, 215 Ala. 517.
Cal.—Wetzler v. Patterson, 238 P. 1077, 73 Cal.App. 527.
Iowa.—Parriott v. Levis, 195 N.W. 578, 196 Iowa 875—Banwart v. Shullenburg, 180 N.W. 190, 190 Iowa 418.
N.Y.—Hayes v. Rosenblatt, 181 N.Y. S. 241, 111 Misc. 370.
N.D.—Allgood v. National Life Ins. Co., 240 N.W. 874, 61 N.D. 763.
Pa.—Gianni v. Russell & Co., 126 A. 791, 281 Pa. 320.

Writing complete on its face
Cal.—Parigian v. Citizens Nat. Trust & Savings Bank of Los Angeles, App., 110 P.2d 117.
Mo.—Sol Abrahams & Son Const. Co. v. Osterholm, App., 136 S.W.2d 86.
N.J.—Lobsenz v. Central Market Co., 181 A. 265, 13 N.J.Misc. 785.
N.Y.—Lynch v. Harrer, 263 N.Y.S. 640.

Lease expressing whole arrangement between parties
Neb.—Weidenfeld v. Olson, 271 N.W. 806, 132 Neb. 303.

Lease intended to integrate all agreements or whole transaction
N.H.—Piper v. Town of Meredith, 139 A. 294, 83 N.H. 107, 55 A.L.R. 148.
N.Y.—Henlun Holding Corporation v. Ess Bros. Holding Corporation, 239 N.Y.S. 257, 228 App.Div. 99.

Lease presumptively containing all stipulations and promises made by parties
Ala.—Peters v. Pilcher, 100 So. 902, 211 Ala. 548.

Express statements in lease as to completeness
(1) Where lease stated that it contained all agreements made, permitting tenant to testify to alleged prior agreement for lease for an additional year was error.—Direct Realty Co. v. Fergang, 9 N.Y.S.2d 776.
(2) Also, where lease contained provision that parties agreed that lease contained entire contract and that no oral representations should affect lease, lessee could not obtain forfeiture or rescission of lease because of alleged oral misrepresentations.—Cassara v. Bowman, 186 So. 514, 136 Fla. 302.

48. Ala.—Frazier v. Riley, 111 So. 10, 215 Ala. 517.
Ind.—Owen v. Fletcher Savings & Trust Bldg. Co., 189 N.E. 173, 99 Ind.App. 365.
Iowa—Banwart v. Shullenburg, 180 N.W. 190, 190 Iowa 418.
N.D.—Allgood v. National Life Ins. Co., 240 N.W. 874, 61 N.D. 763.
Tex.—Adkins v. Goodloe, Civ.App., 76 S.W.2d 168, error dismissed.

49. Cal.—Parigan v. Citizens Nat. Trust & Savings Bank of Los Angeles, App., 110 P.2d 117—Wetzler v. Patterson, 238 P. 1077, 73 Cal.App. 527.
Colo.—Martin v. Grant, 8 P.2d 764, 90 Colo. 300.
Ky.—Saad v. Hatfield, 80 S.W.2d 583, 258 Ky. 525—McKenna v. Culton, 80 S.W.2d 13, 258 Ky. 383.
Neb.—Lowe v. Payne, 186 N.W. 320, 107 Neb. 378.
N.J.—Lobsenz v. Central Market Co., 181 A. 265, 13 N.J.Misc. 785.
N.C.—Merchants Oil Co. v. Mecklenburg County, 194 S.E. 114, 212 N. C. 642.
Okl.—Cushing Refining & Gasoline Co. v. Smith & Smith, 68 P.2d 782, 180 Okl. 219—Fox Petroleum Co. v. Booker, 253 P. 33, 123 Okl. 276—Stebbins v. Lena Lumber Co., 214 P. 918, 89 Okl. 244.
Pa.—Priestman-Helmetag Co. v. Wolf, 177 A. 30, 317 Pa. 346—Colonial Mfg. Co. v. Carideo, 16 A.2d 731, 142 Pa.Super. 485—Nelly v. Diskin, 173 A. 735, 113 Pa.Super. 249—Ferrainolo v. Locker, 167 A. 651, 110 Pa.Super. 128.
S.D.—Cullen v. Spotts, 198 N.W. 708, 47 S.D. 339.
Tex.—Great Nat. Life Ins. Co. v. Presley, Civ.App., 129 S.W.2d 730, error dismissed.
W.Va.—Central Trust Co. v. Virginia Trust Co., 197 S.E. 12, 120 W.Va. 23.

50. Ark.—Lawrence v. Mahony, 225 S.W. 340, 145 Ark. 310.
Cal.—Harris v. Bissell, 202 P. 453, 54 Cal.App. 307.

51. Ala.—Frazier v. Riley, 111 So. 10, 215 Ala. 517—Peters v. Pilcher, 100 So. 902, 211 Ala. 548.
Ark.—Bray v. Woodley, 258 S.W. 119, 162 Ark. 186—Lawrence v. Mahony, 225 S.W. 340, 145 Ark. 310.
Cal.—Stockburger v. Dolan, 94 P.2d 33, 14 Cal.2d 313, 128 A.L.R. 83, superseding 87 P.2d 411.
Ill—Loop Office Building Corporation v. Hogan, 253 Ill.App. 574—First Trust & Savings Bank v. Economical Drug Co., 250 Ill.App. 112—Weidknecht v. Clark, 215 Ill. App. 308—Hoefeld v. Ozello, 213 Ill.App. 152, affirmed 125 N.E. 5, 290 Ill. 147.
Iowa.—Parriott v. Levis, 195 N.W. 578, 196 Iowa 875.
Kan.—McElroy v. Ball, 87 P.2d 608, 149 Kan. 284.
Mass.—Kidder v. Greenman, 187 N. E. 42, 283 Mass. 601, 88 A.L.R. 1370—Whittier v. Goldberg, 174 N. E. 491, 274 Mass. 335.
Mont.—Williams v. Neal, 271 P. 455, 83 Mont. 244.
Neb.—Weidenfeld v. Olson, 271 N.W. 806, 132 Neb. 303.
N.J.—Kesselman v. Cohen, 135 A. 348, 5 N.J.Misc. 31.
N.Y.—Newburger v. American Surety Co., 151 N.E. 155, 242 N.Y. 134, reversing 209 N.Y.S. 886, 214 App. Div. 712—Hayes v. Rosenblatt, 181 N.Y.S. 241, 111 Misc. 370—Rakover v. Blum, 13 N.Y.S.2d 464.

a term or provision to the lease itself,[52] or show prior or contemporaneous agreements, understandings, negotiations, conversations, or representations which were merged in, or superseded by, the written instrument.[53]

Accordingly, as the evidence offered does or does not meet the requisites of admissibility of a collateral agreement, evidence of antecedent or contemporaneous oral agreements concerning repairs,[54] improvements,[55] fixtures,[56] the use of the premises leased,[57] or the use of adjoining premises or other parts of the building,[58] is or is not admissible.

i. Mortgages and Other Securities

While evidence of a prior or contemporaneous agreement claimed to be collateral to a mortgage or other security may be introduced where the requisites to admissibility of a collateral agreement are met, frequently such evidence is excluded because it varies, contradicts, or defeats the written instrument.

Subject to the usual limitation that the evidence must not have the effect of varying, contradicting, or nullifying the writing,[59] parol evidence may be

N.C.—Miles v. Walker, 102 S.E. 884, 179 N.C. 479.
Pa.—Murphy v. Pinney, 86 Pa.Super. 458.
Tex.—Russell v. Old River Co., Civ. App., 210 S.W. 705.
22 C.J. p 1257 note 71.

Agreement changing legal rights
Neither party to oil and gas lease will be permitted to prove prior or contemporaneous oral agreement changing legal rights of parties as fixed by contract and law applicable thereto.—Chi-Okla. Oil & Gas Co. v. Shertzer, 231 P. 877, 105 Okl. 111.

52. Miss.—Pan-American Petroleum Corporation v. Woods, 153 So. 793, 169 Miss. 562.
N.Y.—Sardone v. Joseph Diamond Holding Co., 279 N.Y.S. 659, 244 App.Div. 300, motion granted 198 N.E. 528, 268 N.Y. 630.
N.C.—Barnes v. Saleeby, 98 S.E. 708, 177 N.C. 256.
Okl.—Fuller v. Caraway, 221 P. 79, 97 Okl. 110.
Or.—De Wolfe v. Kupers, 211 P. 927, 106 Or. 176.
22 C.J. p 1252 note 33 [a] (7).

53. Ala.—Peters v. Pilcher, 100 So. 902, 211 Ala. 548.
Ark.—Vanhooser v. Gattis, 214 S.W. 44, 139 Ark. 44.
Cal.—Maxwell v. Carlon, 86 P.2d 666, 30 Cal.App.2d 356—Hoffman v. Citizens State Bank of Long Beach, 67 P.2d 1061, 21 Cal.App.2d 7.
Ga.—Rice & Hutchins Atlanta Co. v. Griffin, 104 S.E. 634, 150 Ga. 607.
N.Y.—Well Financed Investing Co. v. Binder, 181 N.Y.S. 737.
Okl.—Fox Petroleum Co. v. Booker, 253 P. 33, 123 Okl. 276.
Va.—Powell v. John E. Hughes Orphanage, 138 S.E. 637, 148 Va. 331.
Wis.—Blazei v. Cologne, 250 N.W. 752, 213 Wis. 48.

54. **Evidence admissible**
S.C.—Rowland & Sons v. Bock, 148 S.E. 549, 150 S.C. 490.
22 C.J. p 1132 note 83, p 1257 note 72.

Evidence inadmissible
La.—Algiers Homestead Ass'n v. Salathe, App., 188 So. 202.
Mich.—Scherer v. Moran, 187 N.W. 322, 217 Mich. 607.
N.Y.—Lynch v. Harrer, 263 N.Y.S. 640, 645, citing Corpus Juris.
Pa.—Johnstown Millwork & Lumber Co. v. Varner, 177 A. 325, 117 Pa. Super. 374.
Tenn.—Litterer v. Wright, 268 S.W. 624, 151 Tenn. 210.
Tex.—Great Nat. Life Ins. Co. v. Presley, Civ.App., 129 S.W.2d 730, error dismissed.

55. **Evidence held admissible**
D.C.—Okie v. Person, 23 App.D.C. 170.
22 C.J. p 1257 note 73.

Evidence held inadmissible
Iowa.—Banwart v. Shullenburg, 180 N.W. 190, 190 Iowa 418.
N.Y.—Lynch v. Harrer, 263 N.Y.S. 640, 645, citing Corpus Juris—Well Financed Investing Co. v. Binder, 181 N.Y.S. 737.
Okl.—Stebbins v. Lena Lumber Co., 214 P. 918, 89 Okl. 244.

56. **Evidence admissible**
Mich.—Oppenheim v. Lowe, 219 N. W. 595, 242 Mich. 662.
N.Y.—Lewis v. Seabury, 74 N.Y. 409, 30 Am.R. 311.

Evidence inadmissible
Ark.—Vanhooser v. Gattis, 214 S.W. 44, 139 Ark. 390.

57. **Evidence admissible**
Iowa.—Chamberlain v. Brown, 120 N.W. 334, 141 Iowa 540.

Evidence inadmissible
Cal.—Wetzler v. Patterson, 238 P. 1077, 73 Cal.App. 527—Harris v. Bissell, 202 P. 453, 54 Cal.App. 307.
Mo.—Grossenbacher v. Daly, App., 287 S.W. 781.
W.Va.—Gwinn v. Rogers, 115 S.E. 428, 92 W.Va. 533.

58. **Evidence held admissible**
Mo.—Gray v. Gaff, 8 Mo.App. 329.

Evidence held inadmissible
N.C.—Sakellaris v. Wyche, 170 S.E. 638, 205 N.C. 173.
Wis.—Hannan v. Harper, 208 N.W. 255, 189 Wis. 588, 45 A.L.R. 1119.

59. Ala.—Beasley v. Beasley, 90 So. 347, 206 Ala. 480.
Ga.—Wilder v. Federal Land Bank of Columbia, 169 S.E. 13, 176 Ga. 813—Allison v. United Small-Loan Corporation, 189 S.E. 263, 54 Ga. App. 820.
La.—Truett Nash Motor Co. v. Centanni, App., 184 So. 362.
Md.—Stratmann v. Haile, 119 A. 698, 142 Md. 31.
Mich.—In re Nielsen's Estate, 262 N. W. 429, 272 Mich. 636.
Mo.—Gates Hotel Co. v. Federal Inv. Co., 52 S.W.2d 1016, 331 Mo. 107—Gorin Sav. Bank v. Early, App., 260 S.W. 480.
Mont.—Hosch v. Howe, 16 P.2d 699, 92 Mont. 405.
Neb.—Vybiral v. Schildhauer, 265 N. W. 241, 130 Neb. 433.
N.J.—Sichel v. Amalgamated B. & L. Ass'n, 166 A. 713, 113 N.J.Eq. 335—Childs v. South Jersey Amusement Co., 122 A. 803, 95 N.J.Eq. 207.
N.Y.—National Bank of Rochester v. Erion-Haines Realty Co., 232 N.Y. S. 57, 224 App.Div. 642—Lion Brewery of New York City v. Fricke, 198 N.Y.S. 491, 204 App. Div. 470.
N.D.—State Bank of Ardock v. Burke, 208 N.W. 115, 53 N.D. 777.
Okl.—Blankenburg v. Norval & Dial, 275 P. 1040, 135 Okl. 131.
Tex.—Smith v. Holloway, Civ.App., 115 S.W.2d 427—Mauritz v. Schwind, Civ.App., 101 S.W.2d 1085, error dismissed—Bains v. Robert & St. John Motor Co., Civ.App., 72 S.W.2d 703—Wilie v. Hays, Civ. App., 269 S.W. 503.
22 C.J. p 1257 note 79, p 1133 note 98.

In absence of allegation of fraud, accident, or mistake
Pa.—Pennsylvania Co. for Insurances on Lives and Granting Annuities, to Use of Belmont, v. Lebanon Building & Loan Ass'n, 10 A.2d 418, 337 Pa. 316—Richards v. Integrity Trust Co., 177 A. 28, 317 Pa. 513.

In North Carolina it is held that, although a deed of trust recites an indebtedness for money borrowed, it is proper to introduce evidence of a contemporaneous agreement that one party need not advance to the other the money specified in the deed of trust, but instead may sell, at a discount, the bonds of the other party for the latter's use and benefit.—Smith v. Page Trust Co., 141 S.E. 575, 195 N.C. 183.

received of a prior or contemporaneous collateral agreement with respect to the transaction evidenced by a mortgage or other security.[60]

It is not permissible to vary or contradict the provisions or legal effect of a mortgage or other security by evidence of a parol agreement not to record[61] or enforce[62] the security, or by evidence of an agreement concerning the property[63] or interest[64] covered, or the indebtedness secured.[65] Evidence of a parol agreement as to priority or order of payment between or among two or more mortgages, a mortgage and another lien, or two or more notes secured by the same mortgage has been received in some cases[66] and excluded in others.[67]

j. Receipts and Releases

Parol evidence is admissible to show a prior or contemporaneous agreement collateral to a receipt or release.

Under the rules discussed supra §§ 997–1002, parol evidence is admissible to show a prior or contemporaneous agreement collateral to a receipt,[68] unless such evidence is to be rejected because it contradicts or varies, or is inconsistent with, the terms of the receipt.[69] As is shown supra § 926,

60. Ala.—Bell, Rogers & Zemurray Bros. v. Jenkins, 130 So. 396, 221 Ala. 652.
Ark.—City Nat. Bank v. Riggs, 66 S.W.2d 293, 188 Ark. 420.
Cal.—W. P. Fuller & Co. v. McClure, 191 P. 1027, 48 Cal.App. 185.
Mass.—General Ice Cream Corporation v. Stern, 195 N.E. 890, 291 Mass. 86.
Mo.—Browne v. Franklin Fire Ins. Co., 37 S.W.2d 977, 225 Mo.App. 665—Cunningham v. Holzmark, 37 S.W.2d 956, 225 Mo.App. 762, motion overruled 47 S.W.2d 1097, 225 Mo.App. 762.
N.Y.—Traders' Nat. Bank of Rochester v. Laskin, 144 N.E. 784, 238 N.Y. 535, reversing 201 N.Y.S. 728, 207 App.Div. 18, amendment of remittitur denied 147 N.E. 172, 239 N.Y. 507—Atlantic Mortg. Corporation v. Kramer Contracting Co., 224 N.Y.S. 453, 221 App.Div. 560.
Okl.—Simons v. Harber, 243 P. 510, 116 Okl. 233.
22 C.J. p 1257 note 80.

Stipulation as to possession, prior to default, of mortgaged chattels
Me.—Gallagher v. Aroostook Federation of Farmers, 197 A. 554, 135 Me. 386.

Identification of collateral agreement
Parol evidence is admissible in case of chattel mortgages to identify collateral agreement.—In re Pilot Radio & Tube Corporation, C.C.A. Mass., 72 F.2d 316, affirming, D.C., 5 F.Supp. 453, certiorari denied Eckhardt v. Ball, 55 S.Ct. 98, 293 U.S. 584, 79 L.Ed. 680.

Oral undertakings held collateral to, and not conditions of, mortgage
Mass.—Winick v. Padovani, 186 N.E. 82, 283 Mass. 126.

Same agreement as shown in mortgage
It is not error to allow the introduction of parol evidence of an agreement which is the same as that clearly shown by a mortgage which has already been introduced in evidence.—Cason, Monk & Co. v. Baker, Tex.Civ.App., 62 S.W.2d 592.

61. U.S.—Davis v. Indian Territory Co., C.C.A.Okl., 93 F.2d 976.

62. Cal.—Thomson v. Langton, 187 P. 970, 45 Cal.App. 415.
N.Y.—Sautter v. Frick, 242 N.Y.S. 369, 229 App.Div. 345, affirmed 177 N.E. 129, 256 N.Y. 535.
Tenn.—Dobson v. Dobson, 1 Tenn. App. 369.

63. U.S.—In re Theodore A. Kochs Co., C.C.A.Ill., 120 F.2d 603.
Miss.—Stone v. Grenada Grocery Co., 178 So. 107, 180 Miss. 566.

Condition of property
U.S.—Guess v. Lummus Cotton Gin Co., C.C.A.S.C., 52 F.2d 948.

Fixtures
(1) As a mortgage expressly covering a lot and all improvements situate thereon includes fixtures which have become part of the realty, a contemporaneous oral agreement that it does not cover fixtures is not admissible as between the parties and their privies.—Beebe v. Pioneer Bank & Trust Co., 201 P. 717, 34 Idaho 385.

(2) However, in suit by transferee of security deed on land to enjoin removal of creamery machinery thereon, evidence of oral agreement between grantor and original grantee excepting machinery removable without material injury to freehold from operation of security deed is competent, although transferee had no actual notice of such agreement, the very nature of the property being sufficient to put him on inquiry.—Sawyer v. Foremost Dairy Products, 177 S.E. 584, 179 Ga. 809—Sawyer v. Foremost Dairy Products, 169 S.E. 115, 176 Ga. 854.

64. Ala.—Moore v. Bragg, 103 So. 452, 212 Ala. 481.

65. Ark.—Bank of Searcy v. Kroh, 114 S.W.2d 26, 195 Ark. 785—Lightle v. Rotenberry, 266 S.W. 297, 166 Ark. 337.
Mo.—Stephenson v. Jobes, 250 S.W. 638, 213 Mo.App. 621.

66. Iowa.—Wuennecke v. Hausman, 247 N.W. 531, 216 Iowa 725.
N.C.—Sanford Real Estate, Loan & Insurance Co. v. Gavin, 120 S.E. 320, 187 N.C. 14.
22 C.J. p 1257 note 80 [a].

67. Mich.—Sisson v. Hirons, 270 N.W. 784, 278 Mich. 553—Carr v. Stencel, 270 N.W. 261, 278 Mich. 182.
N.Y.—Van Nostrand v. Dwight-Murray Realty Co., 201 N.Y.S. 9, 206 App.Div. 720.
Wis.—Chafee Land Co. v. Clark, 177 N.W. 609, 171 Wis. 408.

68. Ga.—Hyman v. Warren County Fertilizer Co., 113 S.E. 226, 28 Ga. App. 687.
Iowa.—In re Newson's Estate, 219 N.W. 305, 206 Iowa 514.
Minn.—Tiedt v. Johnson, 186 N.W. 779, 151 Minn. 288.
N.Y.—Birnbaum v. Stein, 184 N.Y.S. 50, 112 Misc. 240.
Tex.—Daniels v. Wallace, Civ.App., 298 S.W. 649.

Effective date of receipt
Evidence of an oral agreement respecting time when a receipt, by which insured released all rights under a "lost policy," was to be effective, was admissible, where receipt was silent on matter of delivery, such evidence not varying terms of written instrument.—Transport Truck & Auto Co. v. Iowa Mut. Ins. Co. of De Witt, 198 N.W. 658, 197 Iowa 1297.

69. U.S.—Freiberg v. Pierce, C.C.A. Okl., 83 F.2d 961.
Mass.—Paulink v. American Express Co., 163 N.E. 740, 265 Mass. 182, 62 A.L.R. 506.
Mich.—Pawlowski v. Hirschfeld, 213 N.W. 118, 238 Mich. 25.
Miss.—Orgill Bros. & Co. v. Polk, 124 So. 649, 155 Miss. 492.
N.J.—Finkelstein v. Brodsky, 157 A. 654, 10 N.J.Misc. 55, affirmed 163 A. 664, 110 N.J.Law 13.
S.C.—Gladden v. Keistler, 140 S.E. 161, 141 S.C. 524.

Trust receipt
Tex.—Scott v. Industrial Finance Corporation, Civ.App., 265 S.W. 181.

Warehouse receipt
Miss.—McGee, Dean & Co. v. Burt, 121 So. 847, 153 Miss. 851.
Mont.—State v. Broadwater Elevator Co., 201 P. 687, 61 Mont. 215.

a receipt may be of such a nature that it is not regarded as a writing within the parol evidence rule.

The existence of a written release does not preclude parol evidence of a prior or contemporaneous collateral agreement,[70] provided such evidence is consistent with, and does not vary or contradict the terms of, the writing.[71]

k. Records

Parol evidence of a collateral agreement affecting matters evidenced by a judicial record is admissible if the evidence does not contradict the record.

In accordance with the rules discussed supra §§ 997–1002, a collateral agreement between the parties may be shown by parol, even though such agreement is connected with matters which are evidenced by a judicial record, provided the evidence does not tend to contradict the record.[72]

l. Sales of Personalty

(1) When evidence admissible
(2) When evidence inadmissible

(1) When Evidence Admissible

The rule as to the admissibility of parol evidence of a prior or contemporaneous collateral agreement not in conflict with a writing which it is apparent does not cover the entire agreement between the parties applies to contracts for the sale of personalty.

In accordance with the rules stated supra §§ 997–1002, as to the admissibility of parol evidence of a collateral undertaking not in conflict with a writing which it is apparent does not cover the entire transaction or define the obligations of both parties, evidence of a parol prior or contemporaneous agreement connected with a sale of personalty may be admissible.[73] Thus evidence has been admitted to show that there were certain reservations or limi-

70. Ala.—Seymour v. Sweet, 156 So. 848, 229 Ala. 299.
Ark.—Warren & S. R. R. Co. v. Wilson, 50 S.W.2d 976, 185 Ark. 1063—Southwestern Veneer Co. v. Dennison, 298 S.W. 30, 174 Ark. 560.

71. Ark.—Texas Co. v. Williams, 13 S.W.2d 309, 178 Ark. 1100.
Fla.—McComb v. Hygeia Coca-Cola Bottling Works, 188 So. 219, 137 Fla. 260.
Miss.—St. Paul Mercury & Indemnity Co. v. Ritchie, 198 So. 741—Alabama & V. Ry. Co. v. Kropp, 92 So. 691, 129 Miss. 616.
Ohio.—Cleveland, C., C. & St. L. Ry. Co. v. Green, 186 N.E. 365, 126 Ohio St. 512, 87 A.L.R. 1268, certiorari denied Green v. Cleveland, C. & St. L. Ry. Co., 55 S.Ct. 516, 294 U.S. 715, 79 L.Ed. 1249, rehearing denied 55 S.Ct. 551, 294 U.S. 734, 79 L.Ed. 1262, motion denied 55 S.Ct. 653, 295 U.S. 768, 79 L.Ed. 1709.
Okl.—Allis Chalmers Mfg. Co. v. Byers, 88 P.2d 368, 184 Okl. 475.
Tex.—Tinkle v. Tinkle, Civ.App., 110 S.W.2d 239, error dismissed.
W.Va.—Jackson v. Jackson, 99 S.E. 259, 84 W.Va. 100.
Release as writing within parol evidence rule see supra § 927.

Release under seal

Ordinarily, parol agreements cannot vary terms of release under seal.—McManus v. Biddison, 272 N.Y.S. 199, 152 Misc. 239, affirmed 271 N.Y.S. 1099, 242 App.Div. 623.

72. Ga.—Guthrie v. Gaskins, 161 S.E. 810, 173 Ga. 867.
Tenn.—Tippett v. Shaw, 4 Tenn.App. 132.
22 C.J. p 1257 note 81.
Judicial and official records as writings within parol evidence rule see supra §§ 865–890.

Agreement as to satisfaction of judgment rendered

In action on bond given to dissolve attachment, agreement between plaintiff and principal debtor, executed after judgment was rendered, and providing a method by which the judgment was to be satisfied, was admissible, where agreement was contemporaneous and independent and was not merged in or concluded by judgment.—Taborsak v. Massachusetts Bonding & Insurance Co., 193 N.E. 729, 289 Mass. 8.

Restriction of execution to certain property

In proceeding by purchaser of realty at sheriff's sale under act defining rights, remedies, duties, and liabilities of purchasers of realty at judicial sales, and others, grantee of realty under unrecorded deed from judgment debtors was not entitled to show oral agreement that execution should be restricted to realty other than that in question.—Miners Sav. Bank of Pittston v. Tracy, 192 A. 246, 326 Pa. 367, dismissed Toole v. Miners Sav. Bank of Pittston, 58 S.Ct. 272, 302 U.S. 651, 82 L.Ed. 504.

73. U.S.—Silverthorne v. McFarland, C.C.A.S.C., 266 F. 60.
Ark.—Bogert v. Wade, 21 S.W.2d 956, 180 Ark. 523—Hayes Grain Co. v. Rea-Patterson Milling Co., 223 S.W. 390, 145 Ark. 65.
Cal.—Buckner v. A. Leon & Co., 267 P. 693, 204 Cal. 225—Cotton v. Riverside Cement Co., 85 P.2d 136, 29 Cal.App.2d 588—Klepper v. American-La France Fire Engine Co. of California, 285 P. 1048, 104 Cal.App. 249—Schmidt v. Cain, 272 P. 803, 95 Cal.App. 378—Hammond v. San Mateo Planing Mill Co., 187 P. 144, 44 Cal.App. 750.
Colo.—Maher v. Wiesman, 259 P. 1027, 82 Colo. 320—C. H. Parker & Son Electrical Co. v. Batterson, 219 P. 1077, 74 Colo. 188.
Conn.—State Finance Corporation v. Ballestrini, 150 A. 700, 111 Conn. 544—Asbestos Products Corporation v. Matson, 116 A. 680, 97 Conn. 381.
Ill.—Sterling-Midland Coal Co. v. Great Lakes Coal & Coke Co., 165 N.E. 793, 334 Ill. 281—Foerster v. L. Fish Furniture Co., 265 Ill.App. 410—Offenberg v. Arrow Distilleries Co., 222 Ill.App. 512.
Kan.—Home Hardware & Implement Co. v. Denniston, 18 P.2d 135, 136 Kan. 838—Emerson-Brantingham Implement Co. v. Burlingame Co-op. Elevator Co., 293 P. 495, 131 Kan. 731—Hoard v. White, 220 P. 296, 114 Kan. 531—Fisher Mach. Works Co. v. Singletary, 179 P. 328, 104 Kan. 460.
Ky.—George Drug Co. v. Daniel Boone Realty Co., 18 S.W.2d 281, 229 Ky. 818—Stephenson & Co. v. Bradbury, 248 S.W. 1055, 198 Ky. 416.
La.—Brandin Slate Co. v. Fornea, App., 183 So. 572.
Mass.—Welch v. Bombardieri, 147 N.E. 595, 252 Mass. 84—Lyman B. Brooks Co. v. Wilson, 105 N.E. 607, 218 Mass. 205.
Minn.—Yale Tire & Rubber Co. v. Schmauss, 197 N.W. 753, 158 Minn. 456.
Miss.—Benson v. Berry-Dampeer Co., 130 So. 157, 158 Miss. 237.
Mo.—Charles A. Liemke Co. v. Krekeler Grocer Co., 95 S.W.2d 820, 231 Mo.App. 169—Ford v. Stevens Motor Car Co., 220 S.W. 980, 203 Mo. App. 669.
N.Y.—Williamson v. Casa-Eguia, 170 N.E. 486, 253 N.Y. 41, reversing 234 N.Y.S. 449, 226 App.Div. 195—Jardella v. Welin Davit & Boat Corporation, 220 N.Y.S. 115, 219 App. Div. 353—H. L. Oppenheim Co. v.

tations agreed on by the parties, and consistent with the writing but not expressed therein;[74] that there was an oral warranty with respect to the articles sold;[75] or that the seller agreed to advertise the goods sold[76] or to insure them.[77] So also it has been held that an agreement by the vendor of a stock of goods or business establishment not to engage in the same business at a particular place or for a specified time may be shown.[78] Parol evidence as to other collateral agreements relating to the mode or terms of payment,[79] or to the man-

Warshaw, 199 N.Y.S. 235—Armsby v. Hygrade Auto Exch., Inc., 188 N.Y.S. 483.
N.C.—Smithfield Mills v. Stevens, 168 S.E. 201, 204 N.C. 382.
Pa.—Goldstein, for Use of Ambridge Savings & Trust Co., now for Use of Goldstein v. Penny, 195 A. 27, 328 Pa. 78—Wright v. General Carbonic Co., 114 A. 517, 271 Pa. 332—Roberts v. Cauffiel, 6 Pa.Dist. & Co. 706, affirmed 128 A. 670, 283 Pa. 64.
Tex.—West Texas Utilities Co. v. Ellis, Civ.App., 102 S.W.2d 234, reversed on other grounds 126 S.W.2d 13, 133 Tex. 104—Central Power & Light Co. v. Friedrich, Civ.App., 70 S.W.2d 1012, error dismissed.
Va.—White Sewing Mach. Co. v. Gilmore Furniture Co., 105 S.E. 134, 128 Va. 630.
22 C.J. p 1257 notes 82, 83—38 C.J. p. 202 notes 55, 56.

74. N.C.—Exum v. Lynch, 125 S.E. 15, 188 N.C. 392.
22 C.J. p 1258 note 85.

Particular evidence admissible

(1) Agreement that individual members of partnership would not be liable for goods sold partnership.—Marion Mach. Foundry & Supply Co. v. R. T. Harris Interests, Tex. Civ.App., 26 S.W.2d 449.

(2) Agreement to refund purchase price on demand.
Conn.—Pyskoty v. Sobusiak, 145 A. 58, 109 Conn. 593.
Okl.—Oklahoma Natural Gas Corporation v. Douglas, 39 P.2d 578, 170 Okl. 284, 101 A.L.R. 144, followed in Oklahoma Natural Gas Corporation v. Hudson, 39 P.2d 585, 170 Okl. 291, Oklahoma Natural Gas Corporation v. Duffey, 39 P.2d 587, 170 Okl. 291 and Oklahoma Natural Gas Corporation v. Grier, 39 P.2d 588, 170 Okl. 291.
Wis.—Danielson v. Bank of Scandinavia, 230 N.W. 83, 201 Wis. 392, 70 A.L.R. 746.

(3) Where written contract for sale of goods merely described them by brand, and buyer, sued for breach of contract, pleaded contemporaneous oral agreement specifying grade, evidence of oral agreement was admissible.—Hunter Milling Co. v. Satterwhite, Tex.Civ.App., 60 S.W.2d 316.

75. Ala.—B. F. Goodrich Co. v. Hughes, 194 So. 842, 239 Ala. 373.
Ariz.—Rosenburg v. Capital Cut Stone & Granite Co., 238 P. 330, 28 Ariz. 505—Gilmore v. Wingate, 190 P. 571, 21 Ariz. 542.
Ark.—Linograph Co. v. Bost, 24 S.W.2d 321, 180 Ark. 1116.
Cal.—Shelley v. Hart, 297 P. 82, 112 Cal.App. 231—Schmidt v. Cain, 272 P. 803, 95 Cal.App. 378—Tracy Brick & Art Stone Co. v. Wurster, 187 P. 125, 44 Cal.App. 652—San Francisco Casing Co. v. Mueller, 179 P. 211, 39 Cal.App. 394.
Ga.—Walnut Creek Milling Co. v. Smith Bros. Co., 174 S.E. 255, 49 Ga.App. 116, conforming to answers 173 S.E. 95, 178 Ga. 40—Smith v. Fisher, 102 S.E. 170, 24 Ga.App. 729.
Idaho.—Sorensen v. Webb, 214 P. 749, 37 Idaho 13.
Ill.—National Cash Register Co. v. Foerster, 16 N.E.2d 160, 296 Ill. App. 640—Altic v. Kelvinator Sales Corporation, 261 Ill.App. 473—Offenberg v. Arrow Distilleries Co., 222 Ill.App. 512, 516, quoting **Corpus Juris**—J. P. Seeburg Piano Co. v. Lindner, 221 Ill.App. 94.
La.—Stewart v. Clay, 123 So. 158, 10 La.App. 727, followed in Stewart v. Machin, 123 So. 160, 10 La.App. 754—Stracener v. Nunnally Bros. Motor Co., 121 So. 617, 11 La.App. 541, rehearing denied Stracener v. Nunnally Bros. Motor Co., 123 So. 911, 11 La.App. 541—McCollister Bros. v. Labarre, 7 La.App. 350.
N.Y.—V. Valente, Inc., v. Mascitti, 295 N.Y.S. 330, 163 Misc. 287—Thomson v. Meyercord Co., 174 N.Y.S. 732.
N.C.—Edgerton v. Johnson, 7 S.E.2d 535, 217 N.C. 314—Sample v. Gray, 113 S.E. 497, 184 N.C. 24.
Pa.—Continental Fibre Co. v. B. F. Sturtevant Co., 116 A. 533, 273 Pa. 30.
S.C.—Yancey v. Southern Wholesale Lumber Co., 131 S.E. 32, 133 S.C. 369.
Tenn.—Elbinger Shoe Co. v. Thomas, 1 Tenn.App. 161.
Wash.—Titan Truck Co. v. Richardson, 210 P. 790, 122 Wash. 452—H. E. Gleason Co. v. Carman, 187 P. 329, 109 Wash. 536.
22 C.J. p 1251 note 32[c], p 1254 note 46, p 1258 note 84—42 C.J. p 783 note 12.

A written order for goods is not a formal contract which will merge all previous oral agreements or warranties between the parties and preclude oral testimony, tending to establish a collateral agreement not included in the order signed by one party and accepted by the other.
Ga.—Macon Cigar & Tobacco Co. v. Berriman Bros., 157 S.E. 916, 43 Ga.App. 38.
Mo.—St. Louis Auto Parts & Salvage Co. v. Indiana Auto Salvage Co., App., 89 S.W.2d 134.
N.Y.—A. O. Andersen Trading Co. v. Brody, 184 N.Y.S. 383, 193 App. Div. 681.
Wash.—Long v. 500 Co., 212 P. 559, 123 Wash. 347.
22 C.J. p 1251 note 32 [a], [b].

Obligation imposed by law

Parol evidence rule is not applicable where, as with many warranties, an obligation is imposed by law irrespective of intention to contract.—Hobart Mfg. Co. v. Rodziewicz, 189 A. 580, 125 Pa.Super. 240.

Implied warranty

(1) Parol evidence, although not admissible to prove express warranty or inducing representations under complete contract, is admissible to prove circumstances tending to establish implied warranty.
Pa.—Hobart Mfg. Co. v. Rodziewicz, supra.
Wash.—Mayer Lifeboat Co. v. Isaacson Co. Iron Works, 212 P. 1054, 123 Wash. 566.

(2) Where alleged verbal warranties are those implied, evidence thereof not changing legal effect of written contract is admissible.—McDonald v. Sanders, 137 So. 122, 103 Fla. 93.

76. Mass.—Ayer v. R. W. Bell Mfg. Co., 16 N.E. 754, 147 Mass. 46.

77. Ark.—Brunswick - Balke - Collender Co. v. Culberson, 12 S.W.2d 903, 178 Ark. 957.
La.—McConnell v. Harris Chevrolet Co., App., 147 So. 827.

78. Ark.—Thompson v. Davenport, 224 S.W. 611, 145 Ark. 276.
N.J.—Superior Metal Products Co. v. Standard Auto Supply Co., 127 A. 334, 3 N.J.Misc. 116.
Wash.—United Dye Works v. Strom, 35 P.2d 760, 179 Wash. 41.
Wis.—Lazar v. Berg, 191 N.W. 966, 179 Wis. 610.
22 C.J. p 1258 note 87.

79. Minn.—Harding v. Texoleum Co., 191 N.W. 394, 154 Minn. 55.
Mo.—Bagnall v. Frank Fehr Brewing Co., 221 S.W. 793, 203 Mo.App. 635.

Particular agreements

(1) Place of payment.—Lee v. National Furniture Stores, 161 S.E. 450, 163 S.C. 204.

ner, time, or place of delivery,[80] has been held admissible, under the conditions specified as to consistency with a writing not purporting to constitute the entire agreement between the parties.

(2) When Evidence Inadmissible

A parol contemporaneous agreement connected with a written contract for the sale of personalty may not be shown where it varies or contradicts the writing or where the writing appears to be intended to embrace the entire agreement of the parties.

Under the rules stated supra §§ 997–1002, evidence of a parol contemporaneous agreement connected with a sale of personalty may be inadmissible to modify the terms of the written contract to which it relates where it varies or contradicts the writing, or where the writing appears to be intended to embrace the entire agreement of the parties,[81]

(2) Extending time for payment.—Orem v. Hansen Packing Co., 7 P.2d 546, 91 Mont. 222.

(3) Agreement whereby goods would be paid for by customer only as ordered out.—Standard Crown Co. v. Jones, 145 S.E. 5, 196 N.C. 208.

(4) Agreement that no interest would be charged on unpaid balance.—Jacob Bros. Co. v. Brown, 173 N.Y.S. 136.

80. Cal.—Boland v. Smith, 190 P. 825, 47 Cal.App. 404.
Minn.—Harding v. Texoleum Co., 191 N.W. 394, 154 Minn. 55.
Pa.—Meyercord Co. v. Stern, 80 Pa. Super. 413.

Inspection

Where written order giving buyer right to inspect goods does not specify when or where the examination is to be made, parol evidence is admissible on such subject.—A. O. Andersen Trading Co. v. Brody, 184 N.Y.S. 383, 193 App.Div. 681.

81. U.S.—Miami Lime & Chemical Co. v. York Ice Machinery Corporation, C.C.A.Fla., 104 F.2d 312—Griffin Mfg. Co. v. Boom Boiler & Welding Co., C.C.A.Ohio, 90 F.2d 209, certiorari denied 58 S.Ct. 143, 302 U.S. 741, 82 L.Ed. 573—H. F. Wilcox Oil & Gas Co. v. Skidmore, C.C.A.Mo., 72 F.2d 748—Thomas A. Edison, Inc., v. Blackman Distributing Co., C.C.A.N.Y., 66 F.2d 722, modifying, D.C., 4 F.Supp. 600—Mohawk Sausage & Provision Co. v. Hygrade Food Products Corporation, C.C.A.Mass., 61 F.2d 425—Hogue-Kellogg Co. v. G. L. Webster Canning Co., C.C.A.Va., 22 F.2d 384, certiorari denied G. L. Webster Canning Co. v. Hogue-Kellogg Co., 48 S.Ct. 529, 277 U.S. 592, 72 L.Ed. 1004.
Ala.—Capitol Lumber Co. v. Mullinix, 94 So. 88, 208 Ala. 266.
Ariz.—Miller Cattle Co. v. Mattice, 298 P. 640, 38 Ariz. 180—Gilmore v. Wingate, 190 P. 571, 21 Ariz. 542.
Cal.—De Haven v. Kuhn, 271 P. 1053, 205 Cal. 556—Buckley v. Shell Chemical Co., 89 P.2d 453, 32 Cal.App.2d 209—Kuhn v. Valley Meat Co., 72 P.2d 164, 23 Cal.App.2d 25—Seaboard Dairy Credit Corporation v. Herman, 33 P.2d 1042, 139 Cal.App. 320—Kocher v. Cartman Tire Exchange, 291 P. 856, 108 Cal.App. 619—Diller v. Schindler, 263 P. 277, 88 Cal.App. 250—A. R. G. Bus Co. v. White Auto Co., 198 P. 829, 52 Cal.App. 142—Whitaker v. Dunlap-Morgan Co., 186 P. 181, 44 Cal.App. 140.
Fla.—Marianna Lime Products Co. v. McKay, 147 So. 264, 109 Fla. 275—McDonald v. Sanders, 137 So. 122, 103 Fla. 93.
Ga.—Red Line Products Co. v. J. M. High Co., 195 S.E. 296, 57 Ga.App. 304—Kaylor v. Bolton, 173 S.E. 191, 48 Ga.App. 670—Robinson v. Belcher, 140 S.E. 412, 37 Ga.App. 412—Hoffman v. Franklin Motor Car Co., 122 S.E. 896, 32 Ga.App. 229—West v. Miller, 122 S.E. 809, 32 Ga.App. 199—Palmer v. Knoxville Lumber & Mfg. Co., 108 S.E. 557, 27 Ga.App. 386.
Idaho.—Peck v. Nixon, 277 P. 1112, 47 Idaho 675.
Ill.—Carlton v. Smith, 2 N.E.2d 116, 285 Ill.App. 380—Kraft-Phenix Cheese Corporation v. H. B. Smith Mach. Co., 267 Ill.App. 539—Hercules Powder Co. v. Rowan, 245 Ill. App. 291.
Iowa.—Junkin v. Hargrove & Arnold, 195 N.W. 217, 196 Iowa 1387—Farmers' Elevator Co. of Onawa v. Reddix, 170 N.W. 765, 185 Iowa 425.
Kan.—J. B. Colt Co. v. Kocher, 255 P. 48, 123 Kan. 286.
Ky.—Geary-Gay Motor Co. v. Chasteen, 58 S.W.2d 393, 248 Ky. 283—Stevens v. Chatfield, 18 S.W.2d 1006, 230 Ky. 194—J. B. Colt Co. v. Moran, 11 S.W.2d 147, 226 Ky. 479—J. B. Colt Co. v. Brown, 6 S.W.2d 473, 224 Ky. 438—Paducah Hosiery Mills v. Proctor & Schwartz, 276 S.W. 803, 210 Ky. 806—Ades v. Wash, 251 S.W. 970, 199 Ky. 687.
La.—Brenard Mfg. Co. v. M. Levy, Inc., 109 So. 43, 161 La. 496, affirming 4 La.App. 279 and 2 La.App. 577—Cire & Delhomme v. De Gruy, 107 So. 130, 160 La. 336—McCaskey Register Co. v. Wimberly, 129 So. 431, 14 La.App. 58—Brenard Mfg. Co. v. Gibbs, 119 So. 483, 9 La.App. 137.
Me.—Sawyer v. Hillgrove, 146 A. 705, 128 Me. 230—Hoyt v. Tapley, 116 A. 559, 121 Me. 239.
Mass.—Reliable Waste Co. v. Waterhead Mills, 131 N.E. 215, 238 Mass. 496.
Minn.—Marshall Milling Co. v. Hintz-Cameron Co., 194 N.W. 772, 156 Minn. 301.
Miss.—Missouri Paint & Varnish Co. v. Clayborne, 144 So. 465, 164 Miss. 115—Tropical Paint & Oil Co. v. Mangum & Hatcher, 125 So. 248, 155 Miss. 876.
Mo.—Guess v. Russell Bros. Clothing Co., App., 231 S.W. 1015.
Mont.—Continental Oil Co. v. Bell, 21 P.2d 65, 94 Mont. 123.
N.Y.—St. Regis Paper Co. v. Hubbs & Hastings Paper Co., 138 N.E. 495, 235 N.Y. 30, reversing 194 N.Y.S. 150, 482, 201 App.Div. 397—Adovasio v. Alba Furniture Factories, 26 N.Y.S.2d 617—Lieberman v. Lexington Motor Co. of New York, 194 N.Y.S. 578—Luzanov v. Fingerman, 180 N.Y.S. 433.
N.C.—J. B. Colt Co. v. Conner, 139 S.E. 694, 194 N.C. 344.
Ohio.—Spayd Bros. v. Black-Clawson Co., App., 31 N.E.2d 487—Amicon v. Holtz, 160 N.E. 482, 26 Ohio App. 485.
Okl.—Kansas City Flower Market Co. v. Furrow, 25 P.2d 794, 165 Okl. 245.
Or.—Feenaughty v. Beall, 178 P. 600, 91 Or. 654.
Pa.—Atlas Bolt & Screw Co. v. Komins, 10 A.2d 871, 138 Pa.Super. 474.
R.I.—Northway Motor Sales Co. v. Pugh, 116 A. 485.
S.C.—Murray Co. v. Ouzts, 109 S.E. 122, 117 S.C. 388—Seacoast Packing Co. v. Long, 108 S.E. 159, 116 S.C. 406.
S.D.—Woodring v. Winner Nat. Bank of Winner, S. D., 227 N.W. 438, 56 S.D. 43.
Tex.—Firestone Tire & Rubber Co. v. Fisk Tire Co., 113 S.W.2d 175, 131 Tex. 158, reversing, Civ.App., 87 S.W.2d 794—C. A. Bryant Co. v. Hamlin Independent School Dist., 14 S.W.2d 53, 118 Tex. 255, answering certified questions, Civ.App., 18 S.W.2d 750—Ellerd v. Bell, 249 S.W. 456, 112 Tex. 536—Avery Co. of Texas v. Harrison Co., Com. App., 267 S.W. 254, reversing, Civ. App., 254 S.W. 1015—Houston Transfer & Carriage Co. v. Williams, Com.App., 221 S.W. 1081, reversing, Civ.App., 201 S.W. 712—Pope v. Mergenthaler Linotype Co., Civ.App., 131 S.W.2d 668, error refused—Unique Illustrating Co. v. Withers, Civ.App., 21 S.W.2d 350.

as is indicated by a stipulation therein that it constitutes the entire agreement.[82] Accordingly, parol evidence has been held inadmissible to show that the parties intended a transaction other than a sale,[83] or that the seller agreed to repurchase or accept return of the goods, or to permit the purchaser to rescind or cancel the sale.[84] Likewise it has been held improper to admit into evidence oral agreements as to the price to be paid or deductions therefrom,[85] as to the terms of payment,[86] as to the

Utah.—Strike v. White, 63 P.2d 600, 91 Utah 170.
Vt.—Hambleton v. U. Aja Granite Co., 115 A. 102, 95 Vt. 295.
Wis.—In re Leedom's Estate, 261 N. W. 683, 218 Wis. 534—Mandelker v. Goldsmith, 188 N.W. 74, 177 Wis. 245.
22 C.J. p 1114 note 61.
Application of parol evidence rule to contracts of sale or exchange generally see supra § 910.

Standard form contract
The rule that a written contract, which was a mere memorandum, not purporting to contain all the terms of the agreement, can be explained and clarified by the introduction of oral testimony, cannot be applied, where the contract sued on was a standard form complete in every detail, adopted by plaintiff for use by it among its retail dealers everywhere, and was offered to its retail dealer as a complete contract, and so accepted and executed by him.—Commercial Auto Co. v. Brandeis Machinery & Supply Co., 248 S.W. 233, 198 Ky. 155.

82. U.S.—The Defiance, D.C.N.C., 3 F.2d 48—Inner Shoe Tire Co. v. Treadway, C.C.A.Tex., 286 F. 838.
Ala.—Stallings v. Savage, 90 So. 904, 206 Ala. 486.
Ark.—Pate v. J. S. McWilliams Auto Co., 101 S.W.2d 794, 193 Ark. 620—Bankers' Utilities Co. v. Cotton Belt Savings & Trust Co., 237 S. W. 707, 152 Ark. 135—Northwest Arkansas Lumber Co. v. Houston, 215 S.W. 165, 140 Ark. 182.
Cal.—A. R. G. Bus Co. v. White Auto Co., 198 P. 829, 52 Cal.App. 142.
Ga.—Sumner v. General Motors Acceptance Corporation, 186 S.E. 747, 53 Ga.App. 630—Palmer v. Knoxville Lumber & Mfg. Co., 108 S.E. 557, 27 Ga.App. 386—Parcel Delivery Co. v. American Oil Pump & Tank Co., 104 S.E. 27, 25 Ga. App. 659.
Ill.—Smith v. Rust, 33 N.E.2d 723, 310 Ill.App. 47—McCaskey Register Co. v. Little, 253 Ill.App. 431.
Md.—Rafferty v. Butler, 105 A. 530, 133 Md. 430.
Mass.—Vasen Mfg. Co. v. Slate, 190 N.E. 719, 286 Mass. 289—Benford Mfg. Co. v. Standard Tire & Rubber Co., 126 N.E. 667, 235 Mass. 380.
Miss.—Speir v. Jackson International Co., 134 So. 176, 160 Miss. 246—Perrault v. White Sewing Mach. Co., 127 So. 271, 157 Miss. 167—Junius Hart Piano House v. Stewart, 111 So. 106, 145 Miss. 488.
N.H.—Connell v. Diamond T. Truck Co., 188 A. 463, 88 N.H. 316.
N.Y.—Failing v. National Bond & Investment Corporation, 6 N.Y.S.2d 67, 168 Misc. 617, reversed on other grounds 12 N.Y.S.2d 260, affirmed Failing v. N. B. I. Corporation, 14 N.Y.S.2d 1011, 258 App.Div. 778.
N.C.—J. B. Colt Co. v. Turlington, 113 S.E. 600, 184 N.C. 137.
Pa.—Hill & MacMillan v. Taylor, 155 A. 103, 304 Pa. 18, 75 A.L.R. 1022—Gross v. Exeter Mach. Works, 121 A. 195, 277 Pa. 363—Lake Erie Nursery & Seed Co. v. Edwards, 86 Pa.Super. 103—Colt Co. v. Evans, 74 Pa.Super. 73—Oxweld Acetylene Co. v. Hastings, 71 Pa.Super. 178—Quarrie & Co. v. Robinson, 33 Luz.Leg.Reg. 113.
S.C.—J. B. Colt Co. v. Britt, 123 S.E. 845, 129 S.C. 226.
Tex.—Abner Mfg. Co. v. Nevels, Civ. App., 118 S.W.2d 607—Inner Shoe Tire Co. v. Williamson, Civ.App., 240 S.W. 330.
Wash.—Hall v. Hall, 234 P. 2, 133 Wash. 400—White v. T. W. Little Co., 204 P. 186, 118 Wash. 582.

83. U.S.—New Amsterdam Casualty Co. v. U. S. Shipping Board Emergency Fleet Corporation, to Use of U. S., C.C.A.Md., 16 F.2d 847.
Ala.—Hamilton Furniture Co. v. Brenard Mfg. Co., 110 So. 153, 215 Ala. 187.
Ark.—Wizard, Inc., v. Feldman, 49 S.W.2d 361, 185 Ark. 752.
Cal.—California Jewelry Co. v. Provident Loan Ass'n, 45 P.2d 271, 6 Cal.App.2d 506.
Ga.—H. L. Singer Co. v. Y. S. B. Gray & Son, 129 S.E. 555, 34 Ga. App. 345.

Agency
Miss.—Brenard Mfg. Co. v. Sumrall, 104 So. 160, 139 Miss. 507.

Consignment
Okl.—Murrell v. Advance-Rumely Thresher Co., 282 P. 343, 140 Okl. 129.

84. Cal.—California Credit & Collection Corporation v. Brandlin, 243 P. 41, 75 Cal.App. 609—First Nat. Bank v. Fickert, 196 P. 112, 51 Cal. App. 99.
Kan.—Gerlach-Barklow Co. v. Moore, 234 P. 958, 118 Kan. 274.
La.—Continental Jewelry Co. v. Weilbacher, 136 So. 110, 17 La.App. 420.
Miss.—Ross v. Morrimac Veneer Co., 92 So. 823, 129 Miss. 693.
N.H.—Connell v. Diamond T. Truck Co., 188 A. 463, 88 N.H. 316.
N.J.—Downs v. Jersey Central Power & Light Co., 170 A. 835, 115 N.J.Eq. 348, affirmed 117 N.J.Eq. 138, 174 A. 887—Letz & Katz v. Universal Cooler Corporation, 158 A. 110, 10 N.J.Misc. 139.
S.D.—Rockford Milling Mach. Co. v. Laughlin, 227 N.W. 374, 56 S.D. 15.
Tex.—Kimball-Mathews Co. v. Nagel, Civ.App., 235 S.W. 318.
Wash.—American Paper Co. v. Hastings, 212 P. 1071, 123 Wash. 595.
W.Va.—Braude & McDonnell v. Isadore Cohen Co., 106 S.E. 52, 87 W. Va. 763.

Varying repurchase agreement
Written agreement for sale of stock which provided for repurchase could not be varied, modified, or supplemented by different parol agreement concerning repurchase.—Edmond v. Neuberger, 169 A. 626, 112 N.J.Law 203.

85. Cal.—Pacific States Securities Co. v. Steiner, 220 P. 304, 192 Cal. 376.
Ga.—Robinson v. Belcher, 140 S.E. 412, 37 Ga.App. 412.
La.—Colorado Milling & Elevator Co. v. Rapides Grocery Co., App., 142 So. 626.
Md.—Auto Outing Co. v. McFrederick, 125 A. 886, 146 Md. 106.
Miss.—McArthur v. Fillingame, 186 So. 828, 184 Miss. 869—Bettman-Dunlap Co. v. Gertz Bros., 99 So. 384, 136 Miss. 160.
Mont.—Continental Oil Co. v. Bell, 21 P.2d 65, 94 Mont. 123.
N.Y.—John Van Benschoten, Inc., v. Rondos, 209 N.Y.S. 427, 213 App. Div. 874—Seiden v. Brous, 181 N. Y.S. 227.
Okl.—Bolon v. Massey, 222 P. 685, 101 Okl. 8.
S.C.—Armour Fertilizer Works v. Hyman, 113 S.E. 330, 120 S.C. 375.
Tex.—Dale Oil & Refining Co. v. City of Tulia, Civ.App., 25 S.W.2d 671.
Va.—Jones v. Franklin, 168 S.E. 753, 160 Va. 266.
22 C.J. p 1118 note 70.

86. U.S.—Liberty Petroleum Co. v. California Co., C.C.A.Colo., 114 F. 2d 980.
Ala.—Johnson-Brown Co. v. Dominey Produce Co., 102 So. 696, 212 Ala. 377—Miller Bros. v. Direct Lumber Co., 92 So. 473, 207 Ala. 338.
Ga.—Hill v. Sterchi Bros. Stores, 177 S.E. 353, 50 Ga.App. 193.
Ill.—Quait v. Wortham, 211 Ill.App. 453.
Iowa.—Cox v. Fleisher Const. Co., 223 N.W. 521, 208 Iowa 458.
Kan.—Argonia Oil & Gas Co. v. Wasson, 206 P. 320, 111 Kan. 124.

extent of individual liability for payment,[87] as to the nature or quantity of the goods or property sold,[88] as to the time or place of delivery or acceptance,[89] or as to the manner in which damages would be fixed in case of breach of contract.[90] So also an entire contract in writing may not be varied by evidence of parol agreements concerning the seller's obligation to insure the subject of the sale,[91] to make repairs or adjustments,[92] or to assist in the sale of the goods;[93] and it has been similarly held of parol agreements for the grant of exclusive sales territory,[94] or for restriction on the seller's right to reëngage in the business sold, within a specified time and territory.[95]

Warranty. The rule that parol contemporaneous agreements are admissible only where not inconsistent with a writing not intended to express the complete agreement of the parties applies to preclude the showing of parol agreements not meeting the condition specified, such as with respect to a warranty,[96] or with respect to varying, contra-

La.—Truett Nash Motor Co. v. Centanni, App., 184 So. 362.
Miss.—Natchez Pecan Marketing Ass'n v. Bramlett, 143 So. 429, 163 Miss. 596.
N.M.—Alford v. Rowell, 103 P.2d 119, 44 N.M. 392.
Okl.—Universal Credit Co. v. Cushing Motor Co., 79 P.2d 1014, 183 Okl. 63—Oklahoma Gas & Electric Co. v. Smith, 50 P.2d 1094, 174 Okl. 529.
R.I.—D. W. Flint Motor Sales Co. v. Crofton, 171 A. 236, 54 R.I. 160.
Utah.—Workman Motor Co. v. Pacific Finance Corporation, 26 P.2d 961, 83 Utah 19.
Wash.—Hall v. Hall, 234 P. 2, 133 Wash. 400.
W.Va.—O'Farrell v. Virginia Public Service Co., 177 S.E. 304, 115 W.Va. 502.
Wis.—Derbeck v. Albright, 203 N.W. 337, 186 Wis. 515.
22 C.J. p 1118 note 71—42 C.J. p 767 note 6.

87. Cal.—Shell Oil Co. v. Hanchett, 63 P.2d 338, 18 Cal.App.2d 240.
Mich.—Feldpausch v. Hendershot, 239 N.W. 338, 256 Mich. 204.
Mo.—Murphy v. Holliway, 16 S.W. 2d 107, 223 Mo.App. 714.
Pa.—Myers v. Gibson, 155 A. 563, 304 Pa. 249.

88. U.S.—Flannery Bolt Co. v. Flannery, D.C.Pa., 16 F.Supp. 803, modified on other grounds, C.C.A., 86 F.2d 43—Century Electric Co. v. Detroit Copper & Brass Rolling Mills, C.C.A.Mo., 264 F. 49.
Ga.—Jones v. Knightstown Body Co., 184 S.E. 427, 52 Ga.App. 667—Stamps v. Dawson Bros. Mfg. Co., 106 S.E. 195, 26 Ga.App. 349.
Mich.—Watson-Higgins Milling Co. v. Graczyk, 234 N.W. 132, 253 Mich. 175.
Mo.—Ross-Saskatoon Lumber Co. v. Turner, Dennis & Lowry Lumber Co., App., 253 S.W. 119.
N.J.—Guizzette v. Katrek, 12 A.2d 239, 124 N.J.Law 461.
N.Y.—Edison Electric Illuminating Co. of Brooklyn v. Thacher, 128 N.E. 124, 229 N.Y. 172, affirming 173 N.Y.S. 905, 186 App.Div. 966, and reargument denied 129 N.E. 928, 229 N.Y. 610.
Pa.—Duff v. Hamlin, 115 A. 829, 272 Pa. 245—Ruth-Hastings Glass Tube Co. v. Slattery, 109 A. 695, 266 Pa. 288.
Wash.—L. Teweles Seed Co. v. Fairbanks, 195 P. 40, 114 Wash. 321.
22 C.J. p 1117 note 68.

89. U.S.—Kramer v. Harsch, C.C.A. Pa., 278 F. 860.
Colo.—Bromley v. Ferguson, 202 P. 706, 70 Colo. 398.
Ga.—Wayne Oil Tank & Pump Co. v. Claxton Oil Co., 124 S.E. 75, 32 Ga. App. 530.
Ill.—Ferguson v. H. Paulman & Co., 226 Ill.App. 432.
Mass.—Star Fuse Co. v. Prussian, 143 N.E. 145, 248 Mass. 126.
Mo.—J. B. Colt Co. v. Watson, App., 247 S.W. 493.
N.J.—R. E. Brooks Co. v. Storr, 168 A. 382, 111 N.J.Law 316.
N.Y.—Goodman v. Goulard & Olena, 260 N.Y.S. 145, 145 Misc. 380.
Pa.—Popper v. Rosen, 140 A. 774, 292 Pa. 122.
R.I.—Phillips v. Columbus Wholesale Grocery Co., 197 A. 197, 60 R. I. 47.
Tex.—Browning-Ferris Mach. Co. v. Thomson, Civ.App., 58 S.W.2d 183—American Law Book Co. v. Fulwiler, Civ.App., 219 S.W. 881.
Wash.—National Finance Co. v. Emerson, 201 P. 4, 117 Wash. 297.
Wis.—Behling v. Rock County Sugar Co., 203 N.W. 908, 187 Wis. 95.
22 C.J. p 1118 notes 73, 74.

Payment of storage charges
Pa.—Collins v. Oliver, 149 A. 647, 299 Pa. 372.

90. S.D.—International Milling Co. v. Reierson, 225 N.W. 218, 55 S.D. 139.

91. Ala.—Gober Motor Co. v. Morrow, 118 So. 545, 218 Ala. 324.
Ga.—Webb v. Orme, 134 S.E. 841, 35 Ga.App. 784.

92. N.Y.—Columbia Weighing Mach. Co. v. Hansen, 227 N.Y.S. 324, 131 Misc. 770.
Okl.—Mascho v. Harbour Longmire Co., 85 P.2d 300, 184 Okl. 125.

93. Cal.—Estes v. Delpech, 238 P. 1085, 73 Cal.App. 643.
Mo.—Phœnix Cotton Oil Co. v. Morrow-Stout Wholesale Grocer Co., App., 236 S.W. 415.
Or.—Elastic Paint & Mfg. Co. v. Johnson, 271 P. 996, 127 Or. 647.

Advertising
Mich.—New Prague Flouring Mill Co. v. Hewett Grain & Provision Co. of Escanaba, 196 N.W. 890, 226 Mich. 35.

94. Mass.—Vasen Mfg. Co. v. Slate, 190 N.E. 719, 286 Mass. 289.
Tex.—Aero-Gas Refining Co. v. Fisk Tire Co., Civ.App., 137 S.W.2d 191, error refused.

95. Cal.—Diller v. Schindler, 263 P. 277, 88 Cal.App. 250.
Kan.—Graber v. Star Hardware Co., 251 P. 1116, 122 Kan. 416—Tong v. McArthur, 250 P. 262, 121 Kan. 870.
Mich.—Rose v. Waddell, 202 N.W. 987, 230 Mich. 161—Farmers' Co-op. Elevator of Fowler v. Sturgis & Sons, 198 N.W. 191, 226 Mich. 437.
Tex.—Alamo Lumber Co. v. Fahrenthold, Civ.App., 58 S.W.2d 1085, error refused.

96. U.S.—Victor Products Corporation v. Yates-American Mach. Co., C.C.A.Va., 54 F.2d 1062—American Mine Equipment Co. v. Butler Consol. Coal Co., C.C.A.Pa., 41 F. 2d 217—Leverette v. New London Ship & Engine Co., C.C.A.Fla., 24 F.2d 524—Sooke Harbour Fishing & Packing Co. v. McCallum, D.C. Wash., 2 F.2d 1008—The St. S. Angelo Toso, C.C.A.Pa., 271 F. 245, affirming, D.C., 265 F. 783—Miami Cycle & Mfg. Co. v. National Carbon Co., C.C.A.Ohio, 268 F. 46.
Ala.—Loegler v. C. V. Hill & Co., 193 So. 120, 238 Ala. 606.
Ariz.—O. S. Stapley Co. v. Newby, 110 P.2d 547.
Ark.—Shaver v. Clark County Bank, 31 S.W.2d 132, 182 Ark. 188—Missouri Paint & Varnish Co. v. Merck, 282 S.W. 370, 170 Ark. 1037—Federal Truck & Motors Co. v. Tompkins, 231 S.W. 553, 148 Ark. 655, 149 Ark. 664—Sweet Springs Milling Co. v. Gentry, Buchanan & Co., 218 S.W. 380, rehearing denied 219 S.W. 1013, 142 Ark. 234.
Cal.—Nimmo v. Fitzgerald, 261 P. 1015, 202 Cal. 565—Monahan v. Watson, 214 P. 1001, 61 Cal.App. 417—Hogan v. Anthony, 198 P. 47,

dicting, or extending a warranty contained in the writing;[97] and the inadmissibility of such evidence more clearly appears where the written contract specifically excludes all warranties or representations not expressly stated therein.[98]

52 Cal.App. 158—Lamb v. Otto, 197 P. 147, 51 Cal.App. 433—J. I. Case Threshing Mach. Co. v. Copren Bros., 187 P. 772, 45 Cal.App. 159.
Fla.—Marianna Lime Products Co. v. McKay, 147 So. 264, 109 Fla. 275.
Ga.—Smith v. Clements, 199 S.E. 327, 58 Ga.App. 513—West v. Miller, 122 S.E. 800, 32 Ga.App. 199—Bowen v. J. J. O. Fuller & Son, 98 S.E. 357, 23 Ga.App. 394.
Idaho.—First Nat. Bank v. Peterson, 279 P. 302, 47 Idaho 794.
Ill.—Sterling-Midland Coal Co. v. Great Lakes Coal & Coke Co., 165 N.E. 793, 334 Ill. 281.
Ind.—Michigan Pipe Co. v. Sullivan County Water Co., 127 N.E. 768, 190 Ind. 14, rehearing denied 129 N.E. 5, 190 Ind. 14—North Liberty Silo & Concrete Co. v. Huber, 149 N.E. 452, 83 Ind.App. 652.
Iowa.—Blecher v. Schmidt, 235 N.W. 34, 211 Iowa 1063.
Kan.—De Merritt v. Forbes Milling Co., 216 P. 1086, 114 Kan. 62.
Ky.—J. B. Colt & Co. v. Clay, 288 S.W. 745, 216 Ky. 782—Young v. Waltham Piano Co., 255 S.W. 850, 201 Ky. 70—Ades v. Wash, 251 S.W. 970, 199 Ky. 687.
La.—Goode-Cage Drug Co. v. Ives, 133 So. 813, 16 La.App. 383.
Mass.—Acorn Silk Co. v. Herscovitz, 146 N.E. 35, 250 Mass. 553—Stoehrer & Pratt Dodgem Corporation v. Greenburg, 146 N.E. 34, 250 Mass. 550—Kilroy v. Schimmel, 137 N.E. 366, 243 Mass. 262—Bennett v. Thomson, 126 N.E. 795, 235 Mass. 463.
Miss.—Porter Hardware Co. v. Peacock, 91 So. 856, 129 Miss. 129.
Mo.—Little v. Widener, 32 S.W.2d 116, 226 Mo.App. 525—J. B. Colt Co. v. Farmer, App., 286 S.W. 399—Humana Co. v. Hughes, App., 213 S.W. 515.
N.J.—Naegeli v. Silk City Exchange, 134 A. 721, 4 N.J.Misc. 763.
N.M.—Baca v. Fleming, 187 P. 277, 25 N.M. 643.
N.Y.—Lee v. Industrial Laundry Mach. Co., 27 N.Y.S.2d 202, 261 App.Div. 741—William H. Waters, Inc., v. March, 269 N.Y.S. 420, 240 App.Div. 120—Bareham & McFarland v. Kane, 240 N.Y.S. 123, 228 App.Div. 396—S. Stroock & Co. v. Joseph Lichtenthal, Inc., 229 N.Y.S. 371, 224 App.Div. 19, reversing 222 N.Y.S. 5, 129 Misc. 288—Cohan v. Markel, 213 N.Y.S. 681, 215 App.Div. 435—Ventimiglia v. Brockway Motor Truck Corporation, 257 N.Y.S. 27, 143 Misc. 681.
Okl.—Western Silo Co. v. Pruitt, 221 P. 106, 94 Okl. 154.
Pa.—Tondora v. Popky, 33 Luz.Leg. Reg. 3.
S.D.—Stoefen v. Brooks, 287 N.W. 330, 66 S.D. 587.
Tex.—White, Ward & Erwin v. Hager, 248 S.W. 319, 112 Tex. 516—Wright v. Couch, Civ.App., 54 S.W.2d 207.
Utah.—Landes & Co. v. Fallows, 19 P.2d 389, 81 Utah 432—Combined Metals v. Bastian, 267 P. 1020, 71 Utah 535.
Wash.—Peninsula Motor Co. v. Daggett, 218 P. 253, 126 Wash. 275—Western Farquhar Machinery Co. v. Pierce, 185 P. 570, 108 Wash. 621.
W.Va.—Appalachian Power Co. v. Tate, 111 S.E. 150, 90 W.Va. 428.
Wis.—Wisconsin Live Stock Ass'n v. Bowerman, 224 N.W. 729, 198 Wis. 447—Fox v. Boldt, 178 N.W. 467, 172 Wis. 333, modified on other grounds 179 N.W. 1, 172 Wis. 333—Northwestern Blaugas Co. v. Guild, 171 N.W. 662, 169 Wis. 98.
22 C.J. p 1119 note 83—42 C.J. p 783 note 11.

Warranty of condition cannot be incorporated by parol in written sale contract.—Brierton v. Anderson, 20 S.W.2d 313, 180 Ark. 12—Oil City Iron Works v. Belmont, 7 S.W.2d 772, 177 Ark. 223.

97. U.S.—George v. Crowder, C.C.A. N.C., 287 F. 53.
Cal.—Calpetro Producers' Syndicate v. Charles M. Woods Co., 274 P. 65, 206 Cal. 246—Kocher v. Cartman Tire Exchange, 291 P. 856, 108 Cal.App. 619.
Idaho.—Sorensen v. Webb, 214 P. 749, 37 Idaho 13.
Mass.—Whitty Mfg. Co. v. Clark, 180 N.E. 315, 278 Mass. 370.
Mich.—Murphy v. Gifford, 200 N.W. 263, 228 Mich. 287.
Miss.—Missouri Paint & Varnish Co. v. Clayborne, 144 So. 465, 164 Miss. 115—J. B. Colt Co. v. McCullough, 105 So. 744, 141 Miss. 328.
N.Y.—Raphael v. Hulett Motor Car Co., 188 N.Y.S. 209.
Okl.—Abdo v. Zero Air, 17 P.2d 389, 161 Okl. 93.
Tenn.—Southern Tractor Co. v. Brown Constructing Co., 98 S.W.2d 1082, 20 Tenn.App. 332.
Tex.—McGinness v. Cruse-Oille Motor Co., Civ.App., 26 S.W.2d 1095—International Harvester Co. of America v. Newberry, Civ.App., 16 S.W.2d 871, error refused—J. B. Colt Co. v. Kelly, Civ.App., 270 S.W. 942.
Wash.—Ross v. Cappon, 55 P.2d 329, 185 Wash. 389.
W.Va.—Guyandotte Coal Co. v. Virginian Electric & Machine Works, 118 S.E. 512, 94 W.Va. 300.
Wis.—Lee v. Pauly Motor Truck Co., 190 N.W. 819, 179 Wis. 139.
22 C.J. p 1119 note 84—42 C.J. p 783 note 11.

Omission of fixture

Where seller conveyed stock of goods and all fixtures with warranty of title, evidence of alleged oral understanding that one fixture was not included was inadmissible.—Rogers v. Battle, 43 S.W.2d 1071, 163 Tenn. 537.

98. Ala.—Griffin v. Tatum Chevrolet Co., 166 So. 49, 231 Ala. 534.
Ark.—Herron v. Southern Tractor Co., 87 S.W.2d 978, 191 Ark. 818.
Ga.—White v. General Discount Corporation, 3 S.E.2d 214, 60 Ga.App. 186—Holliman v. Attaway, 188 S.E. 292, 54 Ga.App. 464—Smith v. Eastern Light Co., 176 S.E. 545, 49 Ga.App. 593—C. J. Howard, Inc., v. C. V. Nalley & Co., 161 S.E. 380, 44 Ga.App. 311—Hoffman v. Franklin Motor Car Co., 122 S.E. 896, 32 Ga.App. 229—Connell v. New-kirk-George Motor Co., 111 S.E. 749, 28 Ga.App. 382.
Ky.—Pace Const. Co. v. Brandeis Machinery & Supply Co., 40 S.W.2d 268, 239 Ky. 693.
La.—Harnischfeger Sale Corporation v. Sternberg Co., 154 So. 10, 179 La. 317.
Mo.—Rock Island Implement Co. v. Wally, App., 268 S.W. 904.
N.J.—F. A. North Co. v. Beebe, 168 A. 632, 11 N.J.Misc. 759.
N.Y.—S. F. Bowser & Co. v. McCormack, 243 N.Y.S. 442, 230 App.Div. 303—John N. Benedict Co. v. McKeage, 195 N.Y.S. 228, 201 App.Div. 161.
N.C.—J. B. Colt Co. v. Springle, 129 S.E. 449, 190 N.C. 229.
Ohio.—Burr v. American Incubators, 187 N.E. 189, 45 Ohio App. 383.
Okl.—Henry v. Kennard, 62 P.2d 1184, 178 Okl. 368.
Pa.—Kull v. General Motors Truck Co., 166 A. 562, 311 Pa. 580.
Tenn.—Alexander Hamilton Institute v. Rogers, 84 S.W.2d 107, 19 Tenn.App. 150—Weeks v. Dealers' Implement Co., 65 S.W.2d 585, 16 Tenn.App. 599—Gilpin v. J. B. Colt Co., 7 Tenn.App. 630—Central Pottery Co. v. Doyle Hardware Co., 3 Tenn.App. 225.
Tex.—Willis v. Adams, Civ.App., 138 S.W.2d 855, error dismissed.
Utah.—Consolidated Wagon & Machine Co. v. Kay, 21 P.2d 836, 81 Utah 595.
Wash.—Peoples Bank & Trust Co. v. L. Romano Engineering Corporation, 62 P.2d 445, 188 Wash. 290, affirmed 65 P.2d 688, 188 Wash. 290—Webster v. L. Romano Engi-

m. Sales of Realty

Prior or contemporaneous agreements collateral to a sale of realty which is evidenced by a deed or other written instrument may be shown by parol provided such evidence does not tend to vary or contradict the writing.

Notwithstanding a sale of realty is evidenced by a deed or other written instrument, the parties may show by parol prior or contemporaneous agreements collateral to the transaction,[99] subject, of course, to the limitation that such evidence must not tend to vary or contradict the writing, but must be consistent therewith.[1]

This rule has been applied to permit the admission of evidence of agreements relating to the assumption or payment of encumbrances on the property,[2] or taking subject thereto;[3] the consideration for the sale;[4] the location of the dividing line

neering Corporation, 34 P.2d 428, 178 Wash. 118.
Wis.—Knight & Bostwick v. Moore, 234 N.W. 902, 203 Wis. 540.
Wyo.—International Harvester Co. of America v. Leifer, 293 P. 381, 42 Wyo. 283.
42 C.J. p 783 note 11 [c].
Effect of definite agreement to terms of sale on existence of warranty see the C.J.S. title Sales § 312, also 55 C.J. p 704 note 84–p 710 note 32.
Provision as to completeness of writing as excluding parol modification generally see supra § 999.

99. Cal.—Campbell v. Miller, 269 P. 536, 205 Cal. 22.
Conn.—Gagner v. Petrauskas, 152 A. 145, 112 Conn. 307.
Ga.—Jolley v. City of Macon, 143 S.E. 894, 166 Ga. 506—Home Builders v. Jones, 157 S.E. 521, 42 Ga.App. 794.
Ill.—Emmitt v. Carlson, 215 Ill.App. 304.
Iowa.—Swensen v. Union Central Life Ins. Co., 280 N.W. 600, 225 Iowa 428—Iowa Farm Credit Corporation v. Halligan, 241 N.W. 475, 214 Iowa 903—Huxford v. Trustees of Funds and Donations for Diocese of Iowa, 185 N.W. 72, 193 Iowa 134.
Kan.—Blankinship v. Porter, 47 P.2d 72, 142 Kan. 284—Peterson v. Honaker, 220 P. 1025, 114 Kan. 752.
Mass.—Stearns v. Warren, 187 N.E. 599, 284 Mass. 268.
Mo.—Meyer v. Dubinsky Realty Co., App., 133 S.W.2d 1106.
N.Y.—Coon v. Campbell, 240 N.Y.S. 772.
N.C.—Yopp v. Aman, 193 S.E. 822, 212 N.C. 479.
Pa.—In re Cridge's Estate, 137 A. 455, 289 Pa. 331.
S.C.—Crook v. Hallett, 164 S.E. 641, 166 S.C. 230.
Tex.—Spinner Lumber Co. v. Burwood Realty Co., Civ.App., 6 S.W. 2d 229—Flynt v. Garmon, Civ.App., 275 S.W. 444.
Va.—Sale v. Figg, 180 S.E. 173, 164 Va. 402.
W.Va.—Fairview Fruit Co. v. H. P. Brydon & Bro., 102 S.E. 231, 85 W. Va. 609.
22 C.J. p 1259 note 88.
Contracts for sale or exchange of realty as within parol evidence rule generally see supra § 910.
Deeds as writings within parol evidence rule generally see supra §§ 913–916.
Evidence held to establish separate agreement for transfer of insurance policies, independent of sale and conveyance of property.—U. S. Bond & Mortgage Corporaton v. Berry, 61 S.W.2d 293, 249 Ky. 610.
Effect
Parol understanding that son's land conveyed to mother would become his on her death did not warrant modification of judgment against wife denying cancellation of deed.—Ogg v. Ogg, 252 P. 205, 122 Kan. 244.
Agreement pertinent to damages
Such part of evidence respecting vendor's collateral parol agreement with vendee of realty to obtain owner's signature of sale contract as was pertinent to fixing of damages for failure to convey it was admissible in vendee's action for such breach of contract.—Altman v. Arata, 195 A. 454, 129 Pa.Super. 229.

1. Ala.—Birmingham Sawmill Co. v. Southern Ry. Co., 97 So. 78, 210 Ala. 126.
Ark.—Hoyer v. Edwards, 32 S.W.2d 812, 182 Ark. 624.
Cal.—Rilovich v. Raymond, 67 P.2d 1062, 20 Cal.App.2d 630—Coneland Water Co. v. Nickalls, 242 P. 518, 75 Cal.App. 212.
Ga.—Mathis v. Crowley, 100 S.E. 379, 149 Ga. 396.
Ind.—Miller v. Fletcher Savings & Trust Co., 133 N.E. 174, 78 Ind. App. 183.
Iowa.—Swensen v. Union Central Life Ins. Co., 280 N.W. 600, 225 Iowa 428—Galva First Nat. Bank v. Reed, 215 N.W. 732, 205 Iowa 7.
Ky.—Goldstein v. McDonald, 3 S.W.2d 200, 223 Ky. 161.
La.—Franton v. Rusca, 175 So. 66, 187 La. 578—Locascio v. First State Bank & Trust Co. of Hammond, 123 So. 304, 168 La. 723.
Mich.—Burlingame v. B. E. Taylor Realty Co., 225 N.W. 562, 247 Mich. 109.
Miss.—Edrington v. Stephens, 114 So. 387, 148 Miss. 583—Davis v. Butler, 91 So. 279, 128 Miss. 847, suggestion of error overruled 91 So. 709, 128 Miss. 847—H. Weston Lumber Co. v. Lacey Lumber Co., 85 So. 193, 123 Miss. 208, 10 A.L.R. 436.
Mo.—Burk v. Walton, 86 S.W.2d 92, 337 Mo. 781—McCaw v. O'Malley, 249 S.W. 41, 298 Mo. 401.
Or.—Southern Pac. Co. v. Erickson, 204 P. 942, 103 Or. 311.
Pa.—Grayboyes v. Kapner, 176 A. 40, 116 Pa.Super. 44.
S.C.—Welch v. Edisto Realty Co., 169 S.E. 667, 170 S.C. 31.
Tenn.—Caprum v. Bransford Realty Co., 4 Tenn.App. 237.
Tex.—Humble Oil & Refining Co. v. Parish, Civ.App., 146 S.W.2d 1045, error dismissed, judgment correct—City of Abilene v. McMahon, Civ. App., 271 S.W. 188—Silverman v. Harmon, Civ.App., 250 S.W. 206.
Va.—Huffman v. Landes, 177 S.E. 200, 163 Va. 652.
Wash.—Hardinger v. Fullerton, 5 P. 2d 987, 165 Wash. 483—Petkovits v. Huessy, 217 P. 41, 126 Wash. 38.
W.Va.—Anderson v. Hyman, 169 S.E. 741, 113 W.Va. 760.
Wis.—Hampton Plains Realty Co. v. Cohen, 252 N.W. 572, 214 Wis. 128.
22 C.J. p 1259 note 88.

2. U.S.—Stewart v. Meadows, C.C.A. Mo., 282 F. 861.
Fla.—Enns-Halbe Co. v. Templeton, 135 So. 135, 101 Fla. 609.
Ga.—Horton v. Stone, 123 S.E. 862, 158 Ga. 499.
Mich.—Duncan v. Kirker, 233 N.W. 341, 252 Mich. 353.
N.J.—Dieckman v. Walser, 168 A. 582, 114 N.J.Eq. 382, affirming Dieckmann v. Walser, 163 A. 284, 112 N.J.Eq. 46.
Tex.—Slaughter v. Morris, Civ.App., 291 S.W. 961.
Wash.—Hardinger v. Fullerton, 5 P. 2d 987, 165 Wash. 483.
15 C.J. p 1313 notes 24–25—22 C.J. p 1259 note 89.

3. Cal.—Campbell v. Miller, 269 P. 536, 205 Cal. 22.
15 C.J. p 1313 note 23.

4. Ariz.—Loganbill v. Zook, 3 P.2d 273, 38 Ariz. 540.
Cal.—Rundell v. McDonald, 182 P. 450, 41 Cal.App. 175.
Fla.—McClure v. Century Estates, 120 So. 4, 96 Fla. 568, followed in Hall v. University Realty Co., 121 So. 808, 97 Fla. 639.
Ga.—Russ v. Myrick, 115 S.E. 644, 154 Ga. 829—Home Builders v. Jones, 157 S.E. 521, 42 Ga.App. 794.
Iowa.—Iowa Farm Credit Corporation v. Halligan, 241 N.W. 475, 214 Iowa 903.

of the property;[5] reservations which the writing does not set forth,[6] as, for instance, a reservation of growing crops,[7] fixtures,[8] or the right of possession for a certain time;[9] and restrictions;[10] also agreements relating to a conveyance of personalty;[11] easements;[12] existing leases;[13] partnership of the grantees;[14] possession;[15] relinquishment of a trust;[16] repurchase,[17] resale,[18] or release of purchaser from liability on resale;[19] the right of the buyer to secure another purchaser;[20] taxes;[21] and waiver of the time for performance.[22] So also it has been held permissible to show agreements by the vendor to make certain improvements;[23] an agreement collateral to an expressed reservation;[24] an agreement to partition;[25] escrow agreements;[26] a guarantee of payment of a mortgage;[27] and that a warranty as to the quality of the land was part of a prior or contemporaneous agreement of the sale, although the deed contained only the usual covenants.[28]

On the other hand, in view of the particular circumstances involved, the courts have in numerous cases excluded evidence of agreements relating to the assumption or payment of encumbrances on the property,[29] or taking subject thereto;[30] the consideration for the sale,[31] for example, time for pay-

Pa.—In re Cridge's Estate, 137 A. 455, 289 Pa. 331.
Tex.—Hanna v. Lattimore, 81 S.W. 2d 496, 125 Tex. 243—Chambers v. Riggs, Civ.App., 86 S.W.2d 518, error dismissed.
Va.—Swain v. Virginia Bank & Trust Co., 144 S.E. 645, 151 Va. 655.
Wash.—Hanson v. Roesch, 176 P. 349, 104 Wash. 257.
Wis.—Borchert v. Coons, 171 N.W. 70, 168 Wis. 523.
Parol proof of consideration generally see supra §§ 948–958.

Agreement for sale by acre
Tex.—Franco-Texan Land Co. v. Simpson, 20 S.W. 953, 1 Tex.Civ. App. 600.

5. Cal.—McGuiness v. Lester, 260 P. 925, 86 Cal.App. 454.
N.C.—Yopp v. Aman, 193 S.E. 822, 212 N.C. 479.

6. Vt.—Noble v. Sylvester, 42 Vt. 146.

7. Ala.—Cryar v. Ogle, 99 So. 157, 19 Ala.App. 493, certiorari denied Ex parte Cryar, 99 So. 158, 211 Ala. 13.
Kan.—Soeken v. Hartwig, 261 P. 590, 124 Kan. 618.
22 C.J. p 1259 note 91.

Right to cut trees
U.S.—U. S. v. Raine-Andrews Lumber Co., D.C.W.Va., 262 F. 787.

8. Ind.—McCarty v. Twibell, 131 N. E. 826, 76 Ind.App. 454.
Pa.—Heysham v. Dettre, 89 Pa. 506.
Utah.—Workman v. Henrie, 266 P. 1033, 71 Utah 400, 58 A.L.R. 1346.
15 C.J. p 1313 note 20.

9. Ind.—Lindley v. Dakin, 13 Ind. 388.
15 C.J. p 1313 note 21—22 C.J. p 1259 note 93.

10. Wash.—Johnson v. Mt. Baker Park Presbyterian Church, 194 P. 536, 113 Wash. 458.

11. N.C.—Anderson v. Nichols, 123 S.E. 86, 187 N.C. 808.

12. Mo.—Schmidt v. City of Tipton, App., 89 S.W.2d 569.

13. Cal.—Campbell v. Miller, 269 P. 536, 205 Cal. 22.
Conn.—Romanoff v. De Santo, 126 A. 694, 101 Conn. 504.

14. Va.—Borden v. Rigby, 101 S.E. 875, 126 Va. 439.

15. N.D.—Fechner v. Finseth, 179 N.W. 701, 46 N.D. 348.

16. Tex.—Rebold Lumber Co. v. Scripture, Civ.App., 279 S.W. 586.

17. Wis.—Papenthien v. Coerper, 198 N.W. 391, 184 Wis. 156.

18. Wash.—Soderlund v. Puget Mill Co., 260 P. 664, 145 Wash. 477.

19. N.D.—Baldwin v. Opsvig, 219 N. W. 112, 56 N.D. 698.

20. N.C.—Henderson v. Forrest, 114 S.E. 391, 184 N.C. 230.

21. Tenn.—Duke v. Maness, 2 Tenn. App. 267.

22. Mo.—Katz v. Dreyfoos, App., 26 S.W.2d 999.

23. Cal.—Blahnik v. Small Farms Imp. Co., 184 P. 661, 181 Cal. 379—Mills v. Richmond Co., 206 P. 486, 56 Cal.App. 774.
Mo.—Meyer v. Dubinsky Realty Co., App., 133 S.W.2d 1106—Hart v. Riedel, App., 51 S.W.2d 891—Heath v. Beck, App., 231 S.W. 657, retransferred, see, Sup., 225 S.W. 993.
Tex.—Campbell v. Wilson, Civ.App., 238 S.W. 318.
Vt.—Roof v. Jerd, 146 A. 250, 102 Vt. 129, 68 A.L.R. 235.
Va.—Sale v. Figg, 180 S.E. 173, 164 Va. 402—Luck v. Wood, 132 S.E. 178, 144 Va. 355.

24. Me.—Farrar v. Smith, 64 Me. 74.

25. Tex.—Jones v. Texas Co., Civ. App., 80 S.W.2d 761.

26. Cal.—Campbell v. Miller, 269 P. 536, 205 Cal. 22.
La.—Viso v. Gullo, 153 So. 3, 178 La. 8.

27. Mass.—Maksymiuk v. Puceta, 181 N.E. 388, 279 Mass. 346.

28. Iowa.—Saville v. Chalmers, 41 N.W. 30, 76 Iowa 325.
Wis.—Green v. Batson, 36 N.W. 849, 71 Wis. 54, 5 Am.S.R. 194.
15 C.J. p 1313 note 22.

29. U.S.—Clay v. Connecticut General Life Ins. Co. of Hartford, Conn., C.C.A.Fla., 69 F.2d 156.
Ga.—Groover v. Simmons, 110 S.E. 179, 152 Ga. 423.
N.Y.—Daitzman v. Rembrandt Realty Co., 206 N.Y.S. 161, 210 App.Div. 484.
Tenn.—Stone v. Shuttle, 3 Tenn.App. 274.
Wis.—Borchert v. Coons, 171 N.W. 70, 168 Wis. 523.
15 C.J. p 1313 note 28.

Special assessments
Ill.—Hagen v. Lehmann, 148 N.E. 57, 317 Ill. 227, affirming 234 Ill.App. 395.
N.J.—Coughlin v. Englewood Heights Estates, 150 A. 337, 8 N.J.Misc. 436.

30. Mont.—Adams v. Durfee, 215 P. 664, 67 Mont. 315.
15 C.J. p 1313 note 26.

31. Ala.—Edwards v. Crittenden, 104 So. 277, 213 Ala. 156.
Ga.—Shapiro v. Steinberg, 175 S.E. 1, 179 Ga. 18.
Ill.—Davidson v. Dingeldine, 129 N.E. 79, 295 Ill. 367.
Mich.—Kahn v. Green, 245 N.W. 539, 260 Mich. 632.
Mo.—Bubach v. Musick, App., 256 S. W. 116.
Pa.—Chorba v. Sadoski, 34 Luz.Leg. Reg. 337.
S.C.—Drake v. Drake, 145 S.E. 705, 148 S.C. 147.
Tex.—Cobb-Holman Lumber Co. v. Liechty, Com.App., 41 S.W.2d 18, reversing, Civ.App., 30 S.W.2d 356—Hastings v. Champer, Civ.App., 139 S.W.2d 863—O'Mara v. Hall, Civ.App., 134 S.W.2d 348—Giles v. Giles, Civ.App., 94 S.W.2d 208, error dismissed—Shropshire v. Cornell, Civ.App., 82 S.W.2d 1082, error dismissed—Asbury v. Tucker, Civ. App., 50 S.W.2d 394, error dismissed—D. Sullivan & Co. v. Schreiner, Civ.App., 222 S.W. 314, error refused.
Utah.—Paloni v. Beebe, 110 P.2d 563.

Nonpayment
Parol evidence of vendor's oral agreement not to disturb vendee's

ment thereof;[32] the location of the dividing line of the property;[33] reservations,[34] for instance, a reservation of standing timber,[35] a life estate,[36] rents and profits,[37] or fixtures;[38] restrictions,[39] or permissible uses of the property,[40] and limitations;[41] also agreements relating to delivery of an abstract;[42] disposition of the proceeds of pending condemnation proceedings;[43] easements;[44] existing leases;[45] extensions of loans on property traded;[46] irrigation;[47] limitation of liability for taxes;[48] payment of insurance on the property;[49] reconveyance;[50] refund of deposited purchase money on nonperformance of the contract;[51] removal of timber;[52] the right of the purchaser to have a copy of the contract;[53] the right to rescind,[54] or the right of the vendor to withdraw;[55] security for the purchaser's performance;[56] time of vesting of title;[57] and the use of the purchaser's interest as security for another contract.[58] So also it has been held improper to show an agreement by the vendor to make certain improvements;[59] an agreement to devise the land to a third person;[60] an agreement not to engage in a certain business;[61] an escrow agreement;[62] and contracts to make a gift, or enlarging the subject matter.[63]

peaceful possession for nonpayment of mortgage interest until vendee could finance land and to pay value of improvements thereon, if vendee become unable to do so, was held inadmissible.—Felton v. Thompson, 227 N.W. 529, 209 Iowa 29.

32. Cal.—Urban v. Yoakum, 264 P. 493, 89 Cal.App. 202.
N.J.—Lean v. Leeds, 114 A. 402, 92 N.J.Eq. 455.
Or.—Thorne v. Edwards, 34 P.2d 640, 147 Or. 443.
Wis.—Stuart v. Crowley, 217 N.W. 719, 195 Wis. 47.

33. N.C.—Daniel v. Tallassee Power Co., 168 S.E. 217, 204 N.C. 274—Woodard v. Harrell, 132 S.E. 12, 191 N.C. 194.
Tenn.—Ray v. Crain, 80 S.W.2d 113, 18 Tenn.App. 603.

Property included

Parol evidence was held inadmissible to show parties to contract for conveyance of four-room cottage agreed entire lot one hundred and sixty two feet by one hundred and sixty five feet was included.—Day v. Adkins, 153 S.E. 915, 109 W.Va. 197.

34. Kan.—Board of Directors of Ft. Scott Public Library v. City of Ft. Scott, 7 P.2d 533, 134 Kan. 586.
Tex.—Russell v. Russell, 120 S.W. 2d 793, 132 Tex. 73, reversing, Civ. App., 94 S.W.2d 243—Null v. De Young, Civ.App., 71 S.W.2d 335.

35. Ark.—Broderick v. McRae Box Co., 210 S.W. 935, 138 Ark. 215.

36. Neb.—Erwin v. Kuhlman, 264 N.W. 676, 130 Neb. 249.

37. Cal.—Resh v. Pillsbury, 55 P. 2d 264, 12 Cal.App.2d 226.
Miss.—O'Keefe v. McLemore, 87 So. 655, 125 Miss. 394.

38. Or.—Blake-McFall Co. v. Wilson, 193 P. 902, 98 Or. 626, 14 A.L.R. 1275.

39. Cal.—Martin v. Holm, 242 P. 718, 197 Cal. 733.
Ga.—Renfroe v. Alden, 137 S.E. 831, 164 Ga. 77.
Tenn.—McGannon v. Farrell, 214 S. W. 432, 141 Tenn. 631.

40. Ky.—Bennett v. Consolidated Realty Co., 11 S.W.2d 910, 226 Ky. 747, 61 A.L.R. 453.

Size of timber to be cut

Pa.—Casselberry v. Stair, 34 Pa.Dist. & Co. 72.

41. S.C.—Greene v. Mobley, 99 S.E. 814, 112 S.C. 275.

42. Mo.—Atterbury v. Timm, App., 253 S.W. 100.

43. Cal.—Security Co. v. Rice, 9 P. 2d 817, 818, 215 Cal. 263, 82 A.L. R. 1059, disapproving contrary dictum in Russakov v. McCarthy Co., 275 P. 808, 206 Cal. 682.

44. N.Y.—Moore v. Day, 191 N. Y.S. 731, 199 App.Div. 76.

45. Mich.—Sanders v. Detlaff, 188 N.W. 446, 218 Mich. 471.
Mont.—Adams v. Durfee, 215 P. 664, 67 Mont. 315.
Okl.—Investors Royalty Co. v. Lewis, 91 P.2d 764, 185 Okl. 302.

46. Mo.—Way v. Raby, App., 49 S. W.2d 672.

47. Tex.—Harper v. Lott Town & Improvement Co., Com.App., 228 S.W. 188, affirming Lott Town & Improvement Co. v. Harper, Civ. App., 204 S.W. 452.

48. Mo.—Betts v. Harvey, App., 297 S.W. 995.

49. Mo.—Duncan v. Spencer, App., 211 S.W. 698.

50. N.C.—Swain v. Goodman, 112 S. E. 36, 183 N.C. 531.

51. Pa.—Evans v. Edelstein, 120 A. 473, 276 Pa. 516.

52. Miss.—Overby v. Burnham, 200 So. 591—Armstrong v. Jones, 170 So. 637, 177 Miss. 359.

53. Ill.—Stuckrath v. Briggs & Turivas, 161 N.E. 91, 329 Ill. 555.

54. Ga.—Taylor v. Fowler, 118 S.E. 212, 155 Ga. 654.
Ill.—Heeren v. Smith, 276 Ill.App. 438.

55. Pa.—Humphrey v. Brown, 139 A. 606, 291 Pa. 53.

56. Idaho.—Larsen v. Buys, 292 P. 239, 49 Idaho 615.
Tex.—Vaughan v. John Hancock Mut. Life Ins. Co., Civ.App., 61 S.W. 2d 189, error refused.

57. N.Y.—Herrmann v. Jorgenson, 189 N.E. 449, 263 N.Y. 348, reversing 263 N.Y.S. 981, 239 App.Div. 817, reargument denied 191 N.E. 549, 264 N.Y. 529.

58. Cal.—Sherwood v. Greater Berkeley Land Co., 279 P. 167, 99 Cal.App. 663.

59. Ala.—Johnson v. Delony, 1 So. 2d 11.
Mich.—Tufford v. Gordon, 187 N.W. 264, 217 Mich. 658.
N.Y.—Ball v. Grady, 196 N.E. 402, 267 N.Y. 470, affirming 275 N.Y.S. 581, 243 App.Div. 526—Mitchill v. Lath, 160 N.E. 646, 247 N.Y. 377, 68 A.L.R. 239, reversing Mitchell v. Lath, 221 N.Y.S. 864, 220 App.Div. 776, and reargument denied Mitchill v. Lath, 162 N.E. 511, 248 N.Y. 526—Neponsit Realty Co. v. Judge, 176 N.Y.S. 133, 106 Misc. 445.

60. S.C.—McMillan v. King, 7 S. E.2d 521, 193 S.C. 14.

61. Ga.—Curtis v. Pierce, 122 S.E. 208, 157 Ga. 717.
Tex.—Alamo Lumber Co. v. Fahrenthold, Civ.App., 58 S.W.2d 1085, error refused.

62. Neb.—State v. Banking House of A. Castetter, 224 N.W. 21, 118 Neb. 231.

63. Iowa.—Cady v. Lynam, 200 N.W. 190, 198 Iowa 661.
Or.—Lange v. Allen, 251 P. 715, 120 Or. 96.
Utah.—Last Chance Ranch Co. v. Erickson, 25 P.2d 952, 82 Utah 475.
Wyo.—Cary v. Manfull, 287 P. 433, 41 Wyo. 476.

Recommending grantee for position

Where agreements for sale of land entered into contemporaneously with deposit of deeds in escrow contained a complete statement of terms of contract and left no uncertainty as to object or extent thereof, parol evidence was inadmissible to prove vendor's agreement to resign from certain position and recommend purchaser as a successor, where no such promise was specified in written agreements.—Heffner v. Gross, 178 P. 860, 179 Cal. 738.

n. Miscellaneous Writings

The rules relating to parol evidence of prior and contemporaneous collateral agreements have been applied to antenuptial and separation agreements, bonds, contracts with banks, stock subscriptions, and various other particular contracts.

In addition to the particular writings treated supra this section, the rules discussed in §§ 997–1002 above as to the admission of parol evidence of prior and contemporaneous collateral agreements have been applied in the case of various other writings.[64] Thus the rules have been applied in the case of advertising contracts;[65] agreements relating to arbitration;[66] antenuptial[67] and separation[68] agreements; bonds;[69] contracts between a bank and its depositors or customers;[70] contracts of guaranty and suretyship.[71] Likewise, the rules have been applied

64. **Permit to cut and remove timber**
Me.—Amey v. Augusta Lumber Co., 148 A. 687, 128 Me. 472.
Writings within parol evidence rule see supra §§ 805–928.

65. Ga.—Alexander Film Co. v. Brittain, 11 S.E.2d 66, 63 Ga.App. 384.
Tex.—Unique Illustrating Co. v. Withers, Civ.App., 33 S.W.2d 1074.

Contract containing stipulation against verbal conditions
(1) Under written contracts for sale of advertising space providing that no verbal conditions made by agents would be recognized and every condition must be specified on face, parol promise as to cancellation on notice by buyer given by advertising company's agents when contracts were executed could not be added to them.—Eastern Advertising Co. v. E. L. Patch Co., 127 N.E. 516, 235 Mass. 580.
(2) Where a contract for the sale of advertising matter was in writing, and provided that it could not be canceled, and was not to be varied by any statements or oral conditions of salesmen, and that the only representations made related to the merits of the service, it could not be shown that the seller's agent told the buyer that if the advertising matter was not perfectly satisfactory, or was objected to by any newspaper men, he could cancel the order.—Outcault Advertising Co. v. Caruthersville Plumbing & Auto Co., Mo.App., 230 S.W. 340.

66. Ill.—Wechsler v. Gidwitz, 250 Ill.App. 136.
Pa.—Sukonik v. Shapiro, 5 A.2d 108, 333 Pa. 289.
Tex.—Callaway v. Albin, 261 S.W. 372, 114 Tex. 5.

67. Mass.—Wellington v. Rugg, 136 N.E. 831, 243 Mass. 30.
Pa.—In re Russo's Estate, 180 A. 741, 119 Pa.Super. 309.

68. Ark.—Kelly v. DeWees, 140 S.W. 2d 1011, 200 Ark. 770.
N.C.—Boone v. Boone, 9 S.E.2d 383, 217 N.C. 722.

69. Tenn.—Gibson County v. Fourth & First Nat. Bank, 96 S.W.2d 184, 20 Tenn.App. 168.

Bond for deficiency after foreclosure of mortgage
N.J.—Harms v. Coyte, 159 A. 690, 10 N.J.Misc. 559.

Indemnity bond or agreement
Kan.—U. S. Fidelity & Guaranty Co. v. Grabske, 207 P. 322, 111 Kan. 271.
N.Y.—Consolidated Indemnity & Insurance Co. v. Dein, 253 N.Y.S. 162, 233 App.Div. 380—Capital City Surety Co. v. Lazarus, 225 N.Y.S. 270, 221 App.Div. 740.
Wis.—Equitable Surety Co. v. Hartmann, 187 N.W. 686, 177 Wis. 38.

Injunction bond
Fla.—Sewell v. Huffstetler, 93 So. 162, 83 Fla. 629.

Statutory depositary bond
Iowa.—Leach v. Commercial Sav. Bank of Des Moines, 213 N.W. 612, 205 Iowa 975.

Application for surety bond
In bonding company's action against principal for renewal premiums based on principal's agreement, in application for surety bond, to pay such premiums, evidence of agreement by company's agent at time of signing of application that premiums were to be paid by another party was inadmissible, being an oral variance of a written contract contemporaneously made.—Fidelity & Deposit Co. of Maryland v. Mansfield, 175 N.W. 528, 187 Iowa 1250.

70. Iowa.—Dolan v. Danbury State Bank, 223 N.W. 400, 207 Iowa 597.
Ohio.—Nankas v. National Bank of Commerce, 164 N.E. 237, 30 Ohio App. 54.

Certificate of deposit
Where executor deposited money and took certificate of deposit, parol evidence was admissible, in proceeding for accounting by executor, to prove oral agreement with bank, later becoming insolvent, showing true nature of transaction.—In re Olson's Estate, 219 N.W. 401, 206 Iowa 706.

Contract to repay deposit used by bank
Where a bank which had used a portion of a deposit in a transaction between it and the depositor's brother agreed in writing to pay the depositor the amount so used, with eight per cent interest, provided certain land conveyed to it by the brother could be sold within a year, evidence of a parol stipulation sought to be added to such contract, to the effect that, if the land was not sold, the depositor should forfeit the amount of his deposit so used, was inadmissible for want of a consideration.—Allen v. Farmers' & Merchants' Bank, 135 P. 621, 76 Wash. 51.

Pass book
(1) Parol agreement between bank and employer which started savings account for and in name of employee, on cover of whose pass book was printed "Maytag Employee's Special Savings Account," that deposits consisting of wages could not be withdrawn for five years, was admissible in action against employee in which bank was garnished.—Sol Popofsky Co. v. Wearmouth, 248 N.W. 358, 216 Iowa 114.
(2) Testimony respecting oral agreement between depositor and bank as to special status of account as payroll account, entitled to preferential payment from defunct bank's assets, was not inadmissible as tending to vary and contradict terms of parties' written contract embodied in pass book, signature cards, deposit slips, etc.—In re Liquidation of Fidelity Bank & Trust Co., Mo.App., 77 S.W.2d 480.

Signature card
In absence of evidence that words "either or the survivor to draw," stamped on savings bank passbook, were placed there by donor's direction, they cannot be considered to enlarge or explain signature card contract, on which such words did not appear.—Commercial Trust Co. of New Jersey v. White, 132 A. 761, 99 N.J.Eq. 119, affirmed 135 A. 916, 100 N.J.Eq. 561.

71. U.S.—Canadian Bank of Commerce v. Berg, C.C.A.Or., 17 F.2d 867.
Ark.—Meadows v. Roos, 132 S.W.2d 818, 199 Ark. 14.
Cal.—Mortgage Guarantee Co. v. Chotiner, 64 P.2d 138, 8 Cal.2d 110, 108 A.L.R. 1080—McClendon v. Heisinger, 184 P. 52, 42 Cal.App. 780.
Ky.—Coons v. Bank of Commerce, 26 S.W.2d 15, 233 Ky. 457.
Mass.—National Shawmut Bank of Boston v. Goldfine, 31 N.E.2d 561, 308 Mass. 184.
Minn.—Cargill Commission Co. v. Swartwood, 198 N.W. 536, 159 Minn. 1.
Mo.—Kratz v. Rally, App., 47 S.W. 2d 221.

to contracts such as manufacturing contracts;[72] stock subscriptions;[73] and warrants of attorney.[74]

§ 1004. Subsequent Agreements

Parol evidence is generally admissible to show a subsequent agreement between the parties to a written instrument, although it may alter or abrogate the writing.

The rule forbidding the admission of parol or extrinsic evidence to alter, vary, or contradict a written instrument does not apply so as to prohibit the establishment by parol of an agreement between the parties to a writing, entered into subsequent to the time when the written instrument was executed, notwithstanding such agreement may have the effect of adding to, changing, modifying, or even altogether abrogating the contract of the parties as evidenced by the writing;[75] for the parol evidence does not in any way deny that the original agree-

N.J.—Platt v. Currie, 135 A. 808, 100 N.J.Eq. 543.
N.Y.—In re Lawyers Mortg. Co., 280 N.Y.S. 358, 244 App.Div. 53, affirmed In re Rehabilitation of Lawyers Mortgage Co., 200 N.E. 293, 270 N.Y. 509—Lafayette Nat. Bank of Brooklyn in New York v. Koch, 272 N.Y.S. 322, 152 Misc. 380.
Pa.—Germantown Trust Co. v. Emhardt, 184 A. 457, 321 Pa. 561, followed in 184 A. 460, 321 Pa. 567—Warner Co. v. North City Trust Co., 166 A. 230, 311 Pa. 1.
Tex.—J. I. Case Co. v. Laubhan, Civ. App., 77 S.W.2d 578—Frank L. Smith Tire Store v. Firestone Tire & Rubber Co., Civ.App., 68 S.W.2d 577, error refused.
Va.—Frieden v. Cluett, Peabody & Co., 128 S.E. 61, 142 Va. 738.
Wash.—Merchants' Bank of Canada v. Sims, 209 P. 1113, 122 Wash. 106.

Incomplete writing

A written contract, as modified by the memoranda, etc., added thereto, was incomplete and so parol evidence was admissible to show what the original guaranties were, such evidence not being inconsistent with terms of contract.—Western Silo Co. v. Stobaugh, 182 P. 670, 75 Okl. 73.

Oral agreement to resort to collateral security

(1) Parol evidence of payee's agreement to resort first to collateral security before enforcing guaranty was inadmissible, notwithstanding statutes, in action against indorser, as varying written contract whereby indorser guaranteed payment.—Perth Amboy Nat. Bank v. Mahler, 164 A. 284, 110 N.J.Law 228.

(2) Where defendant executed a note as surety, an oral agreement, whereby the creditor was to look for payment to the property secured by a mortgage and to call on the surety only if the security was insufficient, cannot be shown, where it would have the effect of varying the terms of a written contract between the parties.—Lee v. First Nat. Bank, Tex.Civ.App., 254 S.W. 394.

72. Cal.—Globe Mfg. Co. v. Harvey, 196 P. 261, 185 Cal. 255.
Ga.—North Georgia Lumber Co. v. Lawson, 150 S.E. 865, 40 Ga.App. 680.

73. Colo.—Denver Industrial Corporation v. Kesselring, 8 P.2d 767, 90 Colo. 295.
Fla.—Bryan v. St. Andrews Bay Community Hotel Corporation, 126 So. 142, 99 Fla. 132, followed in Sudduth v. St. Andrews Bay Community Hotel Corporation, 126 So. 302, 99 Fla. 151.
Ga.—Macon Union Co-op. Ass'n v. Chance, 122 S.E. 66, 31 Ga.App. 636.
Ky.—Hatcher-Powers Shoe Co. v. Bickford, 278 S.W. 615, 212 Ky. 163.
N.M.—Val Verde Hotel Co. v. Hubbell, 202 P. 982, 27 N.M. 545.
N.C.—Elizabeth City Hotel Corporation v. Overman, 160 S.E. 289, 201 N.C. 337.
Tex.—Mitchell v. Porter, Com.App., 223 S.W. 197, reversing, Civ.App., 194 S.W. 981—Burchill v. Hermsmeyer, Civ.App., 212 S.W. 767.
22 C.J. p 1251 note 32 [d].

Repurchase of stock

In stockholder's action against corporation for breach of agreement to repurchase stock, oral evidence respecting agreement was admissible notwithstanding certificate and subscription agreement did not provide for repurchase of stock.—Byrd v. Tide Water Power Co., 172 S.E. 183, 205 N.C. 589.

74. **Entry of judgment**

Evidence of oral agreement not to enter judgment under warrant of attorney expressly authorizing judgment entry at any time was inadmissible.—Hein v. Fetzer, 152 A. 388, 301 Pa. 403.

75. U.S.—New York Alaska Gold Dredging Co. v. Walbridge, C.C.A. Alaska, 76 F.2d 655, 662, citing **Corpus Juris**—In re Crosby Stores, C.C.A.N.Y., 65 F.2d 360—Atlas Petroleum Co. v. Cocklin, C.C.A.Iowa, 59 F.2d 571—Irwin Glass Co. v. Buchanan, C.C.A.Pa., 289 F. 348—Gray v. Schoonmaker, D.C.Ill., 30 F.Supp. 1019—Rash v. Shower Bros. Co., C.C.A.Pa., 288 F. 819.
Ala.—Morrison v. Jackson, 85 So. 573, 17 Ala.App. 338—Baker v. Green, 84 So. 545, 17 Ala.App. 290.
Ariz.—Sitkin v. Smith, 276 P. 521, 35 Ariz. 226, 66 A.L.R. 645—Kilbourn v. Marshall, 206 P. 785, 24 Ariz. 63.
Ark.—Ferguson v. C. H. Triplett Co., 134 S.W.2d 538, 199 Ark. 546—American Southern Trust Co. v. McKee, 293 S.W. 50, 173 Ark. 147—Thompson v. Short, 248 S.W. 263, 157 Ark. 314—Dewberry v. Furst & Thomas, 225 S.W. 294, 146 Ark. 26.
Conn.—Baier v. Smith, 181 A. 618, 120 Conn. 568—Simone v. Kirschner, 124 A. 20, 21, 100 Conn. 427, citing **Corpus Juris.**
Ga.—Dunson v. Gresham, 154 S.E. 783, 171 Ga. 146—Garvin v. Worthington Pump & Machinery Corporation, 8 S.E.2d 589, 62 Ga.App. 240—King v. Alexander Bros. Lumber Co., 171 S.E. 585, 47 Ga. App. 814—Guthrie v. Rowan, 131 S.E. 93, 34 Ga.App. 671—Wimberly v. Tanner, 129 S.E. 306, 34 Ga.App. 313—Johnson v. American Nat. Bank, 125 S.E. 506, 33 Ga.App. 70—J. T. Tice Co. v. Evans, 123 S.E. 742, 32 Ga.App. 385—Phelps v. Belle Isle, 116 S.E. 217, 29 Ga. App. 571.
Idaho.—Brooks v. Beach, 294 P. 505, 506, 50 Idaho 185, citing **Corpus Juris**—Shake v. Payette Valley Produce Exchange, 245 P. 683, 684, 42 Idaho 403, citing **Corpus Juris.**
Iowa.—Montgomery v. Beller, 222 N. W. 846, 850, 207 Iowa 278, citing **Corpus Juris.**
Kan.—Cretcher v. Fisher Mach. Works Co., 225 P. 1041, 116 Kan. 54.
Ky.—Smith v. Cloyd, 85 S.W.2d 873, 260 Ky. 393—Vandivier v. Tye, 21 S.W.2d 1006, 231 Ky. 630—Marks v. Grace, 266 S.W. 30, 205 Ky. 456.
La.—Tholl Oil Co. v. Miller, 3 So.2d 97, 197 La. 976—Investors Homestead Ass'n v. Anglada, 192 So. 69, 193 La. 596—Conklin v. Caffall, 179 So. 434, 189 La. 301—Parlor City Lumber Co. v. Sandel, 173 So. 737, 186 La. 982—Salley v. Louviere, 162 So. 811, 183 La. 92, setting aside, App., 158 So. 676—In re Industrial Homestead Ass'n, App., 198 So. 528—Boland Mach. & Mfg. Co. v. Favret, App., 177 So. 836—Flanders v. Cox, 130 So. 838, 15 La.App. 267—Fossier v. Knight Motors Co., 127 So. 87, 13 La.App. 11—Harvey v. Mouncou, 3 La.App. 231.
Me.—Osher v. Frangedakis, 174 A. 264, 133 Me. 512—Veneer Products Co. v. Ross, 144 A. 207, 127 Me. 442—Johnson v. Burnham, 115 A. 261, 120 Me. 491—Wiggin v. Goodwin, 63 Me. 389.

ment of the parties was that which the writing purports to express, but merely goes to show that the parties have exercised their right to change or abrogate the same, or to make a new and independent contract.[76] It must appear, however, that there was a subsequent agreement,[77] mere negotia-

Mass.—Stearns v. Warren, 187 N.E. 599, 284 Mass. 268—Weinstein v. Miller, 144 N.E. 387, 249 Mass. 516—Gilman & Son v. Turner Tanning Machinery Co., 122 N.E. 747, 232 Mass. 573.
Mich.—Johnson v. Douglas, 274 N.W. 780, 281 Mich. 247—Pierson v. Davidson, 233 N.W. 329, 252 Mich. 319—Kennedy v. Lynch Timber Co., 198 N.W. 985, 227 Mich. 269—Jacob v. Cummings, 182 N.W. 115, 213 Mich. 373.
Minn.—Hafiz v. Midland Loan Finance Co., 287 N.W. 677, 206 Minn. 76.
Miss.—Lusk-Harbison-Jones, Inc., v. Universal Credit Co., 145 So. 623.
Mo.—Kennedy v. Bowling, 4 S.W.2d 438, 319 Mo. 401—Tighe v. Locke, App., 299 S.W. 105, 110, citing **Corpus Juris.**
Mont.—Kenison v. Anderson, 272 P. 679, 83 Mont. 430.
N.H.—Warren v. Dodge, 138 A. 297, 83 N.H. 47.
N.Y.—Robert v. U. S. Shipping Board Emergency Fleet Corporation, 148 N.E. 650, 240 N.Y. 474, reversing 207 N.Y.S. 908, 211 App. Div. 868—Nester v. Nester, 19 N.Y.S.2d 426, reversed on other grounds 22 N.Y.S.2d 119, 259 App. Div. 1065—Merchants' Nat. Bank of Plattsburgh v. R. Prescott & Son, 249 N.Y.S. 6, 139 Misc. 603, affirmed 257 N.Y.S. 900, 235 App. Div. 878, reargument denied 258 N.Y.S. 1016, 236 App.Div. 764—Goldfeld v. Glickstein & Terner, 14 N.Y.S.2d 735—Coff-Garrod Co. v. Norma Chocolate Co., 185 N.Y.S. 553.
N.C.—Jefferson Standard Life Ins. Co. v. Morehead, 183 S.E. 606, 209 N.C. 174—Grubb v. Ford Motor Co., 182 S.E. 730, 209 N.C. 88—Roebuck v. Carson, 146 S.E. 708, 196 N.C. 672—Farmers' Co-op. Fertilizer Co. v. Eason, 139 S.E. 376, 194 N.C. 244—J. E. Lane & Co. v. Central Engineering Co., 111 S.E. 344, 183 N.C. 307—Acme Mfg. Co. v. McPhail, 106 S.E. 672, 181 N.C. 205.
Ohio.—Sears & Nichols Corporation v. Squire, 5 N.E.2d 486, 132 Ohio St. 140.
Okl.—Saab v. Clawson, 280 P. 598, 599, 138 Okl. 126, quoting **Corpus Juris**—Dike v. Martin, 204 P. 1106, 85 Okl. 103.
Pa.—Magazine Digest Pub. Co. v. Shade, 199 A. 190, 330 Pa. 487, 117 A.L.R. 960—Tomlinson v. Wilson, 164 A. 721, 310 Pa. 41—Tradesmen's Nat. Bank & Trust Co. v. Cummings Bros. Co., 159 A. 452, 306 Pa. 280—Myers v. Ohio-Penn Gas & Oil Co., 144 A. 93, 95, 294 Pa. 212, citing **Corpus Juris**—Ruth-Hastings Glass Tube Co. v. Slattery, 109 A. 695, 266 Pa. 288—Glick v. Peoples-Pittsburgh Trust Co., East End Branch, 7 A.2d 364, 136 Pa.Super. 349—KoEune v. State Bank of Schuylkill Haven, 4 A.2d 234, 134 Pa.Super. 108—Goldman v. National Refrigerator Co., 182 A. 730, 120 Pa.Super. 458—Collins v. Herwick, 167 A. 474, 109 Pa.Super. 413—De Long Hook & Eye Co. v. Tait, 164 A. 848, 108 Pa.Super. 369—Noon v. Rodstein, 89 Pa.Super. 153—Hudson v. Hyman, 85 Pa.Super. 245—Himeles v. Rose, 84 Pa.Super. 363—Prudden-Winslow Co. v. Stipp, 76 Pa.Super. 530—Cassone v. Kauffman, 19 Lehigh Co.L.J. 1—Washburn-Crosby Co. v. Parks, 31 Luz.Leg.Reg. 354.
S.C.—American Oil Co. v. Cox, 189 S.E. 660, 182 S.C. 419—Koth v. County Board of Education of Jasper County, 140 S.E. 99, 100, 141 S.C. 448, 55 A.L.R. 682, quoting **Corpus Juris**—Blume v. Weston, 127 S.E. 561, 131 S.C. 433.
Tenn.—Badger v. Boyd, 65 S.W.2d 601, 16 Tenn.App. 629.
Tex.—McDonald v. McDonald, Civ. App., 143 S.W.2d 142, error dismissed, judgment correct—Scott v. Industrial Finance Corporation, Civ.App., 265 S.W. 181—Latham v. Kistler, Civ.App., 235 S.W. 938, reversed on other grounds Kistler v. Latham, Com.App., 255 S.W. 983—Barnes v. Early-Foster Co., Civ.App., 228 S.W. 248—Ware v. Fairbanks-Morse Co. of Texas, Civ. App., 217 S.W. 211.
Utah.—Hogan v. Swayze, 237 P. 1097, 65 Utah 380.
Va.—Piedmont Mt. Airy Guano Co. v. Buchanan, 131 S.E. 793, 146 Va. 617.
Wash.—Tri-State Terminal Co. v. Washington Wheat Growers' Ass'n, 236 P. 75, 134 Wash. 519.
22 C.J. p 1274 note 85, p 1276 notes 98-1—10 C.J. p 199 note 93.

Subsequent independent and collateral agreements

(1) "The rule that parol evidence is not to be received to vary the terms of a written instrument . . does not exclude independent and collateral agreements made after the contract is completed, whether made on the same occasion or at a subsequent time."—W. T. Rawleigh Co. v. Cate, 38 P.2d 940, 170 Okl. 38—Minnehoma Oil Co. v. Koons, 226 P. 1048, 99 Okl. 266—Innis v. Boller, 222 P. 553, 97 Okl. 76.

(2) Prior and contemporaneous collateral agreements see supra §§ 997–1003.

Contractual restrictions

(1) The text rule usually applies notwithstanding an express prohibition in the writing against any oral modification thereof.
Ky.—National Union Fire Ins. Co. v. Duvall, 104 S.W.2d 220, 268 Ky. 168.
Mich.—Reid v. Bradstreet Co., 239 N.W. 509, 256 Mich. 282.
N.J.—Frank Wirth, Inc., v. Essex Amusement Corporation, 178 A. 757, 115 N.J.Law 228.

(2) In Oklahoma, however, a contract providing that no verbal agreement shall be binding on the parties precludes evidence tending to show a subsequent verbal agreement affecting the written contract between the parties.—Frickel v. Norval & Dial, 246 P. 381, 118 Okl. 41.

Statute as not affecting rule

Statutory change of common law as to alteration of contracts by contemporaneous parol agreements did not affect rule permitting change of written contract by subsequent parol agreement.—Piedmont Mt. Airy Guano Co. v. Buchanan, 131 S.E. 793, 146 Va. 617.

Authentic act

In Louisiana, in the absence of any allegation of fraud or error, what may have been said since the execution of an authentic act can be proved only by means of a counterletter or by the use of interrogatories on facts and articles.—Franton v. Rusca, 175 So. 66, 187 La. 578.

76. Conn.—Baier v. Smith, 181 A. 618, 120 Conn 568.
Ga.—Atlantic Orchard Corporation v Caldwell, 152 S.E. 298, 41 Ga.App. 205.
Mich.—Johnson v. Douglas, 274 N.W. 780, 281 Mich. 247.
N.C.—Grubb v. Ford Motor Co., 182 S.E. 730, 209 N.C. 88.
Okl.—W. T. Rawleigh Co. v. Cate, 38 P.2d 940, 170 Okl. 38—Minnehoma Oil Co. v. Koons, 226 P. 1048, 99 Okl. 266—Innis v. Boller, 222 P. 553, 97 Okl. 76.
Tenn.—Brunson v. Gladish, 125 S.W.2d 144, 147, 174 Tenn. 309, citing **Corpus Juris.**
Tex.—Leitch v. Shaw, Civ.App., 259 S.W. 208.
Wash.—Parker Lumber & Box Co. v. Ætna Casualty & Surety Co., 248 P. 795, 140 Wash. 262.
22 C.J. p 1275 note 86.

77. Idaho.—Hendrix v. Gold Ridge Mines, 54 P.2d 254, 56 Idaho 326.
Mo.—Pugh v. Ayers, 47 Mo.App. 590.
N.H.—Barclay v. Dublin Lake Club, 192 A. 620, 89 N.H. 87.
N.J.—Donnelly v. Paramount Organization, 155 A. 377, 9 N.J.Misc. 654,

tions[78] or representations[79] being insufficient; and it is usually necessary that such subsequent agreement be founded on a consideration,[80] although a contrary view has been asserted.[81] Where the statutes prohibit, as they do in some jurisdictions, the alteration of a written contract by a subsequent unexecuted parol agreement, such an agreement cannot of course be shown.[82] However, proof of alteration by an executed oral agreement is usually permitted under such statutes;[83] and such a statute has been held inapplicable to an entirely new agreement valid in itself.[84] While parol evidence of a subsequent agreement between the parties on a point not covered by the original contract is admissible,[85] such evidence is inadmissible for the purpose of explaining or interpreting an unambiguous written contract.[86]

The oral modification of a written contract generally is discussed in the C.J.S. title Contracts § 377.

Time of agreement. It makes no difference how soon after the execution of the written contract the parol one was made. If it was in fact subsequent and is otherwise unobjectionable it may be proved and enforced.[87]

§ 1005. —— Sealed Agreements and Contracts Required to Be in Writing

a. Sealed agreements
b. Contracts required to be in writing

a. Sealed Agreements

Under the early common-law rule, which is followed in some, but not other, jurisdictions, evidence of a subsequent unexecuted parol agreement is inadmissible to modify an executory agreement under seal.

Under the early common-law rule, which is followed in some jurisdictions, evidence of a subsequent unexecuted parol agreement is inadmissible to modify an executory agreement under seal.[88] A

reversed on other grounds 160 A. 569, 109 N.J.Law 57, 83 A.L.R. 219.

78. Idaho.—Hendrix v. Gold Ridge Mines, 54 P.2d 254, 56 Idaho 326.

79. N.Y.—Chalmers v. Weed, 25 N.Y.S.2d 195, 175 Misc. 740.

80. U.S.—Franklin Sugar Refining Co. v. Egerton, C.C.A.Md., 288 F. 698.
Ala.—Stallings v. Savage, 90 So. 904, 206 Ala. 486.
Cal.—Billings v. Farm Development Co., 240 P. 298, 74 Cal.App. 254.
Ga.—Guthrie v. Rowan, 131 S.E. 93, 34 Ga.App. 671—Phelps v. Belle Isle, 116 S.E. 217, 29 Ga.App. 571.
Me.—Johnson v. Burnham, 115 A. 261, 263, 120 Me. 491, citing **Corpus Juris.**
Miss.—Edrington v. Stephens, 114 So. 387, 148 Miss. 583.
N.C.—Yopp v. Aman, 193 S.E. 822, 212 N.C. 479—Shaffer v. Gaynor, 23 S.E. 154, 117 N.C. 15.
Okl.—Saab v. Clawson, 280 P. 598, 600, 138 Okl. 126, quoting **Corpus Juris.**
Or.—Craswell v. Biggs, 86 P.2d 71, 76, 160 Or. 547, quoting **Corpus Juris.**
Tex.—Szanto v. Pagel, Civ.App., 47 S.W.2d 632, error dismissed.
Wyo.—International Harvester Co. of America v. Leifer, 293 P. 381, 42 Wyo. 283.
22 C.J. p 1275 note 89.

81. Wis.—Schoblasky v. Rayworth, 120 N.W. 822, 139 Wis. 115.

82. U.S.—Davis v. Indian Territory Co., C.C.A.Okl., 93 F.2d 976—Gilbert Mfg. Co. v. Stroud & Co., C.C.A.S.D., 287 F. 527.
Cal.—Union Oil Co. of California v. Pacific Surety Co., 187 P. 14, 182 Cal. 69—Harbor Const. Co. v. Walters, 281 P. 1062, 101 Cal.App. 470—Urban v. Yoakum, 264 P. 493, 89 Cal.App. 202.
Mont.—Quong v. McEvoy, 224 P. 266, 70 Mont. 99.
Okl.—Montgomery v. Eufaula Motor Co., 38 P.2d 573, 170 Okl. 32—Summerall v. Covington Bros. Farm Loan & Investment Co., 280 P. 584, 138 Okl. 142.
22 C.J. p 1275 note 87.

83. Cal.—Bard v. Kent, 99 P.2d 308, 37 Cal.App.2d 160—State Finance Co. v. Hershel California Fruit Products Co., 47 P.2d 821, 8 Cal.App.2d 524—Fuller v. Mann, 6 P.2d 999, 119 Cal.App. 568—Shimizu v. Nojiri, 211 P. 40, 59 Cal.App. 375—Hooke v. Great Western Lumber Co., 202 P. 492, 54 Cal.App. 681—Scheimer v. James, 199 P. 827, 53 Cal.App. 207.
Mont.—Webber v. Killorn, 212 P. 852, 66 Mont. 130.

Requisites of executed parol agreement

(1) An executed parol agreement which will alter written contract must be one which is made subsequent to execution of written contract.—Cushing Refining & Gasoline Co. v. Smith & Smith, 68 P.2d 782, 180 Okl. 219.

(2) It must consist in the doing or suffering of something not required to be done or suffered by the terms of the writing.—Mackenzie v. Hodgkin, 59 P. 36, 126 Cal. 591, 77 Am.S.R. 209—Harbor Const. Co. v. Walters, 281 P. 1062, 101 Cal.App. 470.
Okl.—Saab v. Clawson, 280 P. 598, 138 Okl. 126.

Full performance as essential

"The cases are clear that an oral agreement is not executed within the meaning of the Code unless it has been fully performed by both parties."—Keeler v. Murphy, 3 P.2d 950, 951, 117 Cal.App. 386.

84. S.D.—Wangsness v. Stephenson, 184 N.W. 362, 44 S.D. 536.

Substitutionary agreement

Parol evidence is admissible to show substitution of new agreement, notwithstanding that original contract was in writing.—Gottlieb v. Tait's Inc., 275 P. 446, 97 Cal.App. 235.

85. Cal.—Brezniker v. T. J. Topper Co., 72 P.2d 895, 23 Cal.App.2d 298—Sintzel v. Wagner, 6 P.2d 293, 119 Cal.App. 335—Shelley v. Hart, 297 P. 82, 112 Cal.App. 231.
S.D.—Singer v. Long, 222 N.W. 487, 54 S.D. 34.

Matter left open for future negotiations

Where contract for a business association between the parties left open for future negotiations the matter of contribution to the capital stock, parol evidence as to subsequent agreement relating to the matter of contribution was admissible.—Overstreet v. Merritt, 200 P. 11, 186 Cal. 494.

86. La.—F. A. Cocke Live Stock Co. v. Adams, 2 La.App. 608.

87. Utah.—Parker v. Weber County Irr. Dist., 236 P. 1105, 65 Utah 354.
22 C.J. p 1275 note 88.

88. U.S.—In re United Finance Corporation, C.C.A.Ill., 104 F.2d 593.
N.H.—Larose v. Porter, 177 A. 297, 87 N.H. 241.
N.Y.—National Bank of Rochester v. Erion-Haines Realty Co., 232 N.Y.S. 57, 224 App.Div. 642—Robertson v. Schoonmaker, 285 N.Y.S. 204, 158 Misc. 627.
Vt.—Colodny v. American Clothing Co., 178 A. 714, 107 Vt. 321.
22 C.J. p 1275 notes 91, 92.

contrary rule prevails in other jurisdictions, however;[89] and even in jurisdictions where the common-law rule is followed, it is subject to various exceptions.[90] Thus where the subsequent agreement has been executed[91] or relates to matters as to which the original contract was silent,[92] parol evidence thereof is admissible; and it has also been held that the time for the performance of a contract under seal may be extended by parol.[93]

Parol modification of sealed contracts generally is discussed in Contracts § 378.

b. Contracts Required to Be in Writing

Evidence of a subsequent parol agreement is generally inadmissible to modify a written contract which is required to be in writing.

The general rule is that evidence of a subsequent parol agreement is inadmissible to prove a modification of a written contract which is required to be in writing.[94] The general rule is usually inapplicable, however, where the subsequent agreement has been executed,[95] or where acts amounting to an estoppel are shown.[96] The effect of the statute of frauds with respect to oral modification of written contracts is discussed in the C.J.S. title Frauds, Statute of § 232, also 27 C.J. p 327 note 44–p 331 note 91.

§ 1006. —— Applications of Principle

a. In general
b. Leases

a. In General

The rule authorizing parol proof of a subsequent agreement has been applied with reference to various particular writings, including bills and notes, mortgages, and building, carriage, employment, and sales contracts.

The rule authorizing parol proof of a subsequent agreement between the parties to a writing has been applied with reference to various particular writings,[97] including bills and notes,[98] mortgages,[99] and, likewise, the rule has been ap-

89. La.—Parlor City Lumber Co. v. Sandel, 173 So. 737, 186 La. 982.
Mass.—Tashjian v. Karp, 177 N.E. 816, 277 Mass. 42.
S.C.—Koth v. County Board of Education of Jasper County, 140 S.E. 99, 141 S.C. 448, 55 A.L.R. 682.

90. Ill.—Martin v. Topliff, 88 Ill. App. 362.
N.H.—Larose v. Porter, 177 A. 297, 87 N.H. 241.

91. Ill.—Worrell v. Forsyth, 30 N.E. 673, 141 Ill. 22—Stoneking v. Long, 142 Ill.App. 203.
N.H.—Larose v. Porter, 177 A. 297, 87 N.H. 241.
Intention of parties is the basis of this exception.—In re United Finance Corporation, C.C.A.Ill., 104 F. 2d 593.

92. **Time of performance**
(1) The time of performance of a sealed contract may be fixed by a subsequent parol agreement where the original contract is silent on that point.—Lawrence v. Miller, 86 N.Y. 131.
(2) So where a contract of sale under seal did not specify the time for delivery of certain stock, proof of a subsequent oral agreement as to the time of delivery was admissible.—Knabe v. Bowles, 91 A. 567, 123 Md. 475.

93. Fla.—Branch v. Wilson, 12 Fla. 543.
Executed parol agreement
Time of performance of obligation under seal may be extended by executed parol agreement.—Larose v. Porter, 177 A. 297, 87 N.H. 241.

94. La.—Conklin v. Caffall, 179 So. 434, 189 La. 301—In re Industrial Homestead Ass'n, App., 198 So. 528.
Md.—James L. Kernan Co. v. Cook, 159 A. 256, 162 Md. 137.
Mo.—McWilliams v. Drainage Dist. No. 19, Caldwell County, 224 S.W. 35, 204 Mo.App. 237.
N.J.—Schiff v. Alexander, 130 A. 133, 3 N.J.Misc. 817.
N.C.—Roebuck v. Carson, 146 S.E. 708, 196 N.C. 672.
Tex.—Maples v. Maples, Civ.App., 275 S.W. 1091.
Wash.—Cameron v. Purbaugh, 227 P. 858, 130 Wash. 440—McInnis v. Watson, 200 P. 578, 116 Wash. 680.
22 C.J. p 1276 note 97.
Subsequent verbal agreement canceling insurance policy is inadmissible under the Louisiana statute.—Laurent v. Unity Industrial Life Ins. Co., 179 So. 586, 189 La. 426.

95. Tex.—Ridgell v. Farmers' Nat. Bank of Rockwall, Civ.App., 275 S.W. 858.
Wash.—Gabrielson v. Swinburne, 51 P.2d 368, 184 Wash. 242—Mott v. McDonald, 265 P. 153, 147 Wash. 106—McInnis v. Watson, 200 P. 578, 116 Wash. 680.
Substituted mode of performance
In a suit on a written contract of sale, defendant may introduce parol evidence to prove, not a substituted contract, but the assent of the parties to a substituted mode of performance of the original contract, when performance is completed.—Albert Mackie & Co. v. S. S. Dale & Sons, 84 So. 453, 122 Miss. 430.
Execution or performance not shown
Wash.—Cameron v. Purbaugh, 227 P. 858, 130 Wash. 440—McInnis v. Watson, 200 P. 578, 116 Wash. 680.

96. Neb.—Hecht v. Marsh, 181 N.W. 135, 105 Neb. 502, 17 A.L.R. 1.
Estoppel not shown
Wash.—McInnis v. Watson, 200 P. 578, 116 Wash. 680.

97. **Assignment of lease**
Tex.—Wallace v. Renfroe, Civ.App., 124 S.W.2d 456, error dismissed, judgment correct.
Partnership articles
Parol evidence is admissible to show a mutual agreement between partners to a change of the firm name from that stated in the partnership articles.—Dorough v. Harrington, 42 So. 557, 148 Ala. 305.
Patent license contract
U.S.—In re Allbright-Nell Co., C.C.A.Ill., 78 F.2d 430.

98. U.S.—Polk County Nat. Bank of Bartow v. Shelton, C.C.A.Fla., 69 F.2d 352.
Conn.—Simone v. Kirschner, 124 A. 20, 100 Conn. 427.
Ill.—Lowe v. Huckins, 190 N.E. 683, 356 Ill. 360.
Kan.—Andregg v. Sparrow, 107 P.2d 739, 152 Kan. 744.
La.—Investors Homestead Ass'n v. Anglada, 192 So. 69, 193 La. 596—Parlor City Lumber Co. v. Sandel, 173 So. 737, 186 La. 982.
N.C.—Farmers' Co-op. Fertilizer Co. v. Eason, 139 S.E. 376, 194 N.C. 244.
Pa.—Tradesmen's Nat. Bank & Trust Co. v. Cummings Bros. Co., 159 A. 452, 306 Pa. 280.

99. La.—Parlor City Lumber Co. v. Sandel, 173 So. 737, 186 La. 982.
Mo.—Van Sant v. Austin-Hamill-Hoover Live Stock Commission Co., 295 S.W. 506, 221 Mo.App. 1096.

plied to contracts of carriage[1] employment contracts,[2] contracts for buildings or other works,[3] and sales contracts.[4] In the application of the rule parol or extrinsic evidence has been held admissible to show an extension of the terms of the contract;[5] the renewal of a contract which is by its terms renewable at its expiration by mutual consent;[6] a subsequent agreement for a different mode of performance;[7] a subsequent agreement as to the time of performance[8] or of delivery of goods sold;[9] the enlargement of a power grant-

R.I.—Whipple v. Rhode Island Hospital Trust Co., 155 A. 587.
S.C.—Blume v. Weston, 127 S.E. 561, 131 S.C. 433.
Tex.—Baughn v. Hensley, Civ.App., 14 S.W.2d 368.
Wash.—Mott v. McDonald, 265 P. 153, 147 Wash. 106—Bates v. Northern Bond & Mortgage Co., 225 P. 52, 129 Wash. 343—Sheller v. Seattle Title Trust Co., 206 P. 847, 120 Wash. 140.

1. N.Y.—Clyde v. Wood, 179 N.Y.S. 252, 189 App.Div. 737.

2. U.S.—New York Alaska Gold Dredging Co. v. Walbridge, C.C.A. Alaska, 76 F.2d 655.
Ala.—Moore v. Williamson, 104 So. 645, 213 Ala. 274, 42 A.L.R. 981.
Cal.—Berry v. De Haven, 232 P. 759, 70 Cal.App. 30.
Ga.—American Nat. Ins. Co. v. Lynch, 176 S.E. 546, 49 Ga.App. 580—Wimberly v. Tanner, 129 S.E. 306, 34 Ga.App. 313—J. T. Tice Co. v. Evans, 123 S.E. 742, 32 Ga.App. 385—J. R. Mitchell & Son v. La Fayette Investment & Realty Co., 118 S.E. 777, 30 Ga.App. 696.
Idaho.—Idaho Gold Dredging Corporation v. Boise Payette Lumber Co., 115 P.2d 401.
Ky.—National Union Fire Ins. Co. v. Duvall, 104 S.W.2d 220, 268 Ky. 168.
Mass.—Dixon v. Lamson, 136 N.E. 346, 242 Mass. 129—Richardson v. Hooper, 13 Pick. 446.
Wash.—Parker Lumber & Box Co. v. Ætna Casualty & Surety Co., 248 P. 795, 140 Wash. 262.

Brokerage contract
Idaho.—Shake v. Payette Valley Produce Exchange, 245 P. 683, 42 Idaho 403.
Mich.—Jacob v. Cummings, 182 N.W. 115, 213 Mich. 373.
Tex.—Pyron v. Brownfield, Civ.App., 238 S.W. 725.

3. Ariz.—Sitkin v. Smith, 276 P. 521, 35 Ariz. 226, 66 A.L.R. 645.
Ark.—Caldwell v. Dunn, 245 S.W. 809, 156 Ark. 126.
Kan.—Cretcher v. Fisher Mach. Works Co., 225 P. 1041, 116 Kan. 54.
La.—Boland Mach. & Mfg. Co. v. Favret, App., 177 So. 836.
Mo.—Kennedy v. Bowling, 4 S.W.2d 438, 319 Mo. 401.
N.J.—Bartz v. MacFarland, 14 A.2d 261, 125 N.J.Law 59.
N.C.—Pack v. Katzin, 1 S.E.2d 566, 215 N.C. 233.
Pa.—Trimble v. Fester, 162 A. 337, 106 Pa.Super. 544.
Tex.—Postal Savings & Loan Ass'n v. Powell, Civ.App., 47 S.W.2d 343, error refused.

4. Ariz.—Kilbourn v. Marshall, 206 P. 785, 24 Ariz. 63.
Cal.—Bard v. Kent, 99 P.2d 308, 37 Cal.App.2d 160.
Ga.—Walker v. Calhoun, 149 S.E. 791, 40 Ga.App. 385.
Ill.—Lyon & Healy v. Central States Hotel Co., 16 N.E.2d 155, 296 Ill. App. 245.
Iowa.—Webster County Buick Co. v. Nebraska Buick Automobile Co., 249 N.W. 203, 216 Iowa 485—Porter v. Carney, 172 N.W. 644, 186 Iowa 424.
La.—Hughes & Co. v. Buillard, 3 La. App. 639.
Minn.—Hafiz v. Midland Loan Finance Co., 287 N.W. 677, 206 Minn. 76.
N.Y.—R. & M. Chevrolet Co. v. Drug Luncheonette Supply Co., 296 N.Y. S. 364, 163 Misc. 57.
N.C.—Acme Mfg. Co. v. McPhail, 106 S.E. 672, 181 N.C. 205.
Pa.—Frechie v. Boyd, 100 Pa.Super. 553.
N.Y.—R. & M. Chevrolet Co. v. Drug Luncheonette Supply Co., 296 N. Y.S. 364, 163 Misc. 57.
Tex.—Ellerd v. Bell, 249 S.W. 456, 112 Tex. 536—Wilson v. Enfield, Civ.App., 249 S.W. 531.

5 Ga.—Savannah, etc., R. Co. v. Wideman, 25 S.E. 400, 99 Ga. 245.
Pa.—Hill v. Freeport Waterworks Co., 40 Pa.Super. 592.

6. Tex.—Pasteur Vaccine Co. v. Burkey, 54 S.W. 804, 22 Tex.Civ. App. 232.

Conditional or qualified renewal
"Oral evidence of a conditional or qualified renewal is just as competent as evidence of an unqualified renewal."—Gode v. Russell, Iowa, 194 N.W. 85, 86.

7. Miss.—Albert Mackie & Co. v. S. S. Dale & Sons, 84 So. 453, 122 Miss. 430.

Payment in other than money
The maker of a note may show by parol that after the note was made it was agreed that payment should be in something other than money.
Fla.—Wilson v. McClenny, 13 So. 873, 32 Fla. 363.
Wash.—Mott v. McDonald, 265 P. 153, 147 Wash. 106.

Agreement for credit
Subsequent parol agreement to apply certain credits on written contract as payment may be shown by parol.
Ga.—Walker v. Calhoun, 149 S.E. 791, 40 Ga.App. 385.
Minn.—Rugland v. Thompson, 51 N. W. 604, 48 Minn. 539.
Tex.—Dooley v. Gray, Civ.App., 54 S.W.2d 558, error dismissed.

Change in place of performance may be shown by parol evidence.
Md.—Coates v. Sangston, 5 Md. 121.
Pa.—Malone v. Dougherty, 79 Pa. 46.

8. Minn.—Hafiz v. Midland Loan Finance Co., 287 N.W. 677, 206 Minn. 76.
Mo.—Boland v. L. H. Prentice Co., App., 249 S.W. 95.
Pa.—Frechie v. Boyd, 100 Pa.Super. 553.
22 C.J. p 1277 note 20.

Time of payment
(1) Parol evidence is competent to show a subsequent agreement between the parties to a written instrument as to the time for the payment of money due or to become due by the terms of the contract.—Freeman v. Bell, 63 S.E. 682, 150 N. C. 146—22 C.J. p 1276 note 19.

(2) So a subsequent agreement to extend or otherwise change the time of payment may be properly shown by parol evidence.
U.S.—Williams v. Employers' Liability Assur. Corporation, Limited, of London, England, C.C.A.Tex., 69 F. 2d 285.
Ariz.—Button v. Wakelin, 15 P.2d 956, 141 Ariz. 84, followed in 15 P.2d 960, 41 Ariz. 94.
Conn.—Simone v. Kirschner, 124 A. 20, 100 Conn. 427.
Kan.—Andregg v. Sparrow, 107 P.2d 739, 152 Kan. 744.
Mo.—Main Street Bank v. Werner, App., 7 S.W.2d 723.
N.Y.—Nester v. Nester, 19 N.Y.S.2d 426, reversed on other grounds 22 N.Y.S.2d 119, 259 App.Div. 1065.
N.C.—Farmers' Co-op. Fertilizer Co. v. Eason, 139 S.E. 376, 194 N.C. 244.
Pa.—Tradesmen's Nat. Bank & Trust Co. v. Cummings Bros. Co., 159 A. 452, 306 Pa. 280—Frechie v. Boyd, 100 Pa.Super. 553.
Tex.—Ware v. Fairbanks-Morse Co. of Texas, Civ.App., 217 S.W. 211.
22 C.J. p 1276 note 19.

9. N.Y.—Potter v. Kurlander Bros. & Harfield Cloak & Suit Co., 185 N.Y.S. 556, 114 Misc. 117.
Ga.—Breman v. Rodbell, 120 S.E. 697, 31 Ga.App. 358.

ed;[10] the making of warranties as to property sold;[11] an agreement as to the place of delivery;[12] or the manner of shipment;[13] an agreement made after the execution of a bill of sale that title should remain in the vendor for a time;[14] and an agreement to lower[15] or increase[16] the rate of interest on a mortgage, or to make the interest payable semiannually instead of annually.[17]

b. Leases

The rule authorizing proof of a subsequent parol agreement applies, subject to certain limitations, to leases.

The rule in some jurisdictions is that parol or extrinsic evidence of a subsequent agreement is admissible to prove the abrogation or modification of a written lease,[18] at least where the lease is not one which the law requires to be in writing.[19] In other jurisdictions, however, sometimes under applicable statutory provisions, the rule is that evidence of a subsequent unexecuted parol agreement is inadmissible,[20] especially where the lease is one which is required to be in writing[21] or is under seal.[22] However, the latter rule does not apply where the subsequent agreement has been executed;[23] and it has been said to be inapplicable to a parol agreement for the extension of a sealed lease.[24] Evidence of a subsequent parol agreement is usually admissible where it is entirely consistent with the original agreement,[25] as, for example, where it deals with a subject not considered in the original lease,[26] or where it is offered for the purpose of showing a new agreement which was to become effective on termination of the original lease;[27] and it has also been held proper to show by parol a subsequent agreement which the parties intended as a substitute for the original lease.[28] Parol or oral modification of written and of sealed leases generally is discussed in the C.J.S. title Landlord and Tenant § 229, also 35 C.J. p 1172 notes 14–22.

Pa.—Fahey v. Adams, 78 Pa.Super. 209.

22 C.J. p 1277 note 21.

10. Ill.—Hartford F. Ins. Co. v. Wilcox, 57 Ill. 180.

11. Cal.—Western Steel & Engineering Co. v. Feykert, 232 P. 465, 69 Cal.App. 763.

Neb.—McCormick Harvesting Mach. Co. v. Hiatt, 95 N.W. 627, 4 Neb. (Unoff.) 587.

Tex.—Bell v. Self, Civ.App., 210 S.W. 304.

12. N.H.—Miles v. Roberts, 34 N.H. 245.

13. Mich.—Town v. Jepson, 95 N.W. 742, 133 Mich. 673.

Shipment by different boat

A subsequent agreement that the goods are to be shipped by another boat than that named, may be established by parol.—Hedricks v. Steamship Morning Star, 18 La.Ann. 353—10 C.J. p 199 note 93.

14. N.Y.—Keeney v. Swan, 2 N.Y. St. 214.

15. N.J.—Sharp v. Wyckoff, 39 N.J. Eq. 376.

16. Man.—Standard Trusts Co. v. Hurst, 24 Man. 185.

17. N.J.—Sharp v. Wyckoff, 39 N.J. Eq. 376.

18. Kan.—Weigand v. Leber, 244 P. 1038, 120 Kan. 704.

La.—Algiers Homestead Ass'n v. Salathe, App., 188 So. 202—Flanders v. Cox, 130 So. 838, 15 La.App. 267.

Or.—Knight v. Potter, 32 P.2d 1014, 147 Or. 339.

19. La.—Salley v. Louviere, 162 So. 811, 183 La. 92, setting aside, App., 158 So. 676.

20. Cal.—Parigian v. Citizens Nat. Trust & Savings Bank of Los Angeles, App., 110 P.2d 117—Sudden Lumber Co. v. Blue Diamond Co., 59 P.2d 545, 15 Cal.App.2d 344.

Ill.—First Trust & Savings Bank v. Economical Drug Co., 250 Ill.App. 112.

Mont.—Quong v. McEvoy, 224 P. 266, 70 Mont. 99.

Okl.—Stebbins v. Lena Lumber Co., 214 P. 918, 89 Okl. 244.

21. Wash.—McInnis v. Watson, 200 P. 578, 116 Wash. 680.

Option to lease

Where a written option to lease is required to be in writing, its extension cannot be shown by evidence of a subsequent oral option.—Loft, Inc. v. Glen Ridge Realty Corporation, 12 N.Y.S.2d 577.

22. Vt.—Colodny v. American Clothing Co., 178 A. 714, 107 Vt. 321.

23. U.S.—Gray v. Schoonmaker, D.C. Ill., 30 F.Supp. 1019.

Ill.—Snow v. Griesheimer, 120 Ill. App. 516, affirmed 77 N.E. 110, 220 Ill. 106.

Wash.—Gabrielson v. Swinburne, 51 P.2d 368, 184 Wash. 242.

24. Ill.—Martin v. Topliff, 88 Ill. App. 362.

Written extension

Where the parties to a written lease subsequently execute a written option to extend it, such option, not being parol evidence, may be properly admitted without violating the parol evidence rule.—Curry v. Bacharach Quality Shops, 117 A. 435, 271 Pa. 364.

25. Ind.—Karstedt v. Glick, 172 N. E. 198, 96 Ind.App. 55.

Tex.—Texas Co. v. Burkett, Civ.App., 255 S.W. 763, affirmed 296 S.W. 273, 117 Tex. 16, 54 A.L.R. 1397.

Providing for method of payment

Where landlord corporation was sole stockholder of undertenant, arrangement for offset of rent due landlord by tenant against rent due tenant by undertenant was not an attempt to vary terms of lease, but merely provided for method of payment.—Raslo Realty Co. v. Schwartz, 292 N.Y.S. 311, 161 Misc. 467.

26. Ky.—Smith v. Cloyd, 85 S.W.2d 873, 874, 260 Ky. 393, citing **Corpus Juris.**

Place of payment of rent

Where a rental contract providing for monthly payments of rent fixed no place of payment, a subsequent oral agreement that payment should be made at the lessee's place of business did not vary the terms of the written contract.—Thomasson v. Horton, 107 S.E. 363, 27 Ga.App. 27.

Repairs

Where a tenant is not obligated by his lease to make any particular repairs, evidence of a subsequent parol agreement whereby certain repairs are agreed on is admissible.—Woodworth v. Thompson, 62 N.W. 450, 44 Neb. 311—22 C.J. p 1276 note 14.

Time for clearing title

Testimony that parties to oil and gas lease stipulated title should be cleared by specified date or money returned to lessee was not inadmissible as varying terms of written lease where lease specified no particular time.—Pierson v. Davidson, 233 N.W. 329, 252 Mich. 319.

Ownership of trade fixtures on leased premises may be shown by evidence of subsequent parol agreement.—Podlech v. Phelan, 44 P. 838, 13 Utah 333.

27. Ill.—Buesch v. McCullough, 245 Ill.App. 68.

28. Pa.—Remaley v. People's Natural Gas Co., 161 A. 320, 307 Pa. 237.

Amount of rent. While parol evidence of a subsequent agreement modifying a lease as to the amount of rent has been held admissible,[29] there is contrary authority;[30] and in some jurisdictions such an agreement may be shown only to the extent that it has been executed.[31] Parol modification of a lease as to the amount of rent generally is discussed in the C.J.S. title Landlord and Tenant § 503, also 36 C.J. p 347 notes 78–83.

§ 1007. Subject Matter

a. General rules as to identification
b. Applications of rules

a. General Rules as to Identification

Parol or extrinsic evidence is usually admissible to identify, explain, or define the subject matter of a writing, or to apply the writing to its subject matter. However, the writing itself must contain a description sufficient to serve as a foundation for the admission of parol evidence and such evidence must be consistent with the writing.

Parol evidence is always admissible where it is necessary in order to identify, explain, or define the subject matter of a grant, mortgage, contract, or other writing,[32] or where it is necessary to apply the instrument or a description therein to its sub-

29. N.J.—Segal v. M. H. Harris, Inc., 10 A.2d 748, 124 N.J.Law 31.
Or.—Sherman, Clay & Co. v. Buffum & Pendleton, 179 P. 241, 91 Or. 352.
22 C.J. p 1276 note 15—36 C.J. p 347 note 78.

30. Ohio.—American Jewelry Co. v. Barrs Self-Driver Co., 192 N.E. 865, 48 Ohio App. 239.

31. Cal.—State Guaranty Corporation v. Richardson, 49 P.2d 606, 9 Cal.App.2d 287—Stoltenberg v. Harveston, 34 P.2d 472, 1 Cal.2d 264.
Vt.—Colodny v. American Clothing Co., 178 A. 714, 107 Vt. 321.
Wash.—McInnis v. Watson, 200 P. 578, 116 Wash. 680.
36 C.J. p 347 note 79.

32. U.S.—Wells Fargo Bank & Union Trust Co. v. McDuffie, C.C.A. Cal., 71 F.2d 720, certiorari denied McDuffie v. Wells Fargo Bank & Union Trust Co., 55 S.Ct. 346, 293 U.S. 626, 79 L.Ed. 713—Palmer v. Aeolian Co., C.C.A.Iowa, 46 F.2d 746, certiorari denied 51 S.Ct. 560, 283 U.S. 851, 75 L.Ed. 1458—Wilson v. W. R. Grace & Co., C.C.A. Cal., 4 F.2d 673—Smith v. Brown, C.C.A.Tex., 3 F.2d 926.
Ala.—Pieme v. Arata, 80 So. 811, 202 Ala. 427.
Ark.—Ashton Glassell Co. v. Mansfield Lumber Co., 39 S.W.2d 324, 183 Ark. 895—Riddle v. Holcomb, 254 S.W. 529, 160 Ark. 265.
Cal.—Lemm v. Stillwater Land & Cattle Co., 19 P.2d 785, 217 Cal. 474—Slankard v. Wagnon, 183 P. 562, 181 Cal. 135—Staley v. McClurken, 96 P.2d 805, 35 Cal.App.2d 622—Bayles v. Browning, 24 P.2d 546, 133 Cal.App. 618—Knight v. Paulton, 14 P.2d 94, 125 Cal.App. 688—Dairy Food Store v. Alpert, 8 P.2d 61, 116 Cal.App. 670—Fidler v. Board of Trustees of Roseville Union High School, 296 P. 912, 112 Cal.App. 296—Warden v. Brandes, 284 P. 1050, 103 Cal.App. 744—Richardson v. O'Hanrahan, 256 P. 1103, 83 Cal.App. 415—Gamble v. Fierman, 255 P. 269, 82 Cal.App. 180—Cowing v. Woffard, 229 P. 883, 68 Cal.App. 538—Hancock v. Clark, 204 P. 1098, 56 Cal.App. 277.
Del.—Cieniewicz v. Sliwka, 128 A. 527, 14 Del.Ch. 362.
Ga.—Motz v. Alropa Corporation, 15 S.E.2d 237—Prudential Ins. Co. of America v. Hill, 153 S.E. 516, 170 Ga. 600—Cowart v. Strickland, 153 S.E. 415, 170 Ga. 530—Oliver v. Head, 2 S.E.2d 716, 60 Ga.App. 13—Long v. Cash, 189 S.E. 73, 54 Ga.App. 764.
Ind.—Old First Nat. Bank & Trust Co. v. Scheuman, 13 N.E.2d 551, 214 Ind. 652, 119 A.L.R. 1165—Keithly v. Craig, 135 N.E. 156, 79 Ind. App. 403.
Iowa.—Lackey v. Melcher, 281 N.W. 225, 225 Iowa 698—Bakey v. Moeller, 171 N.W. 289, 185 Iowa 916—Hanson v. Hall Mfg. Co., 169 N.W. 471, 184 Iowa 1091.
Kan.—Brown v. Oliver, 256 P. 1008, 123 Kan. 711—Farmers' State Bank of Cuba v. Blazek, 222 P. 748, 115 Kan. 178.
Ky.—Apple v. McCullough, 38 S.W. 2d 955, 239 Ky. 74—Isert's Adm'r v. Carroll, 294 S.W. 783, 220 Ky. 54—Taylor v. Williams, 250 S.W. 820, 199 Ky. 154.
Mass.—Bianconi v. Crowley, 152 N.E. 305, 256 Mass. 187—Blanchard Lumber Co. v. Maher, 145 N.E. 62, 250 Mass. 159.
Mich.—Nichols v. Seaks, 295 N.W. 596, 296 Mich. 154.
Minn.—Selover v. Selover, 277 N.W. 205, 201 Minn. 562—In re Seper's Estate, 264 N.W. 427, 196 Minn. 60—Spielman v. Albinson, 236 N. W. 319, 183 Minn. 282.
Miss.—Massachusetts Protective Ass'n v. Cranford, 102 So. 171, 137 Miss. 876—Glover v. Falls, 82 So. 4, 120 Miss. 201.
Mont.—Barkemeyer Grain & Seed Co. v. Hannant, 213 P. 208, 66 Mont. 120.
N.H.—R. F. Robinson Co. v. Drew, 144 A. 67, 83 N.H. 459.
N.J.—Vassar Holding Co. v. Wuensch, 135 A. 88, 100 N.J.Eq. 147—Wollenburg v. Rynar, 124 A. 361, 96 N.J.Eq. 38—Weiss v. Gross, 165 A. 90, 11 N.J.Misc. 41—Winfield v. Saunders, 147 A. 537, affirming 142 A. 907, 6 N.J.Misc. 833.
N.M.—Garcia v. Pineda, 275 P. 370, 33 N.M. 651.
N.Y.—Cordua v. Guggenheim, 8 N. E.2d 274, 274 N.Y. 51, reversing In re Andrew's Will, 290 N.Y.S. 427, 248 App.Div. 771—Brill v. Brandt, 26 N.Y.S.2d 477, 176 Misc. 580.
Okl.—Chickasaw Lumber Co. v. Kunkel, 82 P.2d 1003, 1005, 183 Okl. 347, quoting **Corpus Juris.**
Or.—Security Savings & Trust Co. v. Ogden, 261 P. 69, 123 Or. 370—Merchant v. Marshfield Realty & Trading Co., 188 P. 174, 95 Or. 439.
Pa.—In re Brolasky's Estate, 163 A. 292, 309 Pa. 30—Hepler v. Shenk, 145 A. 63, 295 Pa. 108—Miller v. Miller, 131 A. 236, 284 Pa. 414—Laidley v. Rowe, 119 A. 474, 275 Pa. 389—Lawrence Leather Co. v. Ullman Hide & Leather Co., 32 Berks Co. 143.
S.C.—Halsey v. Minnesota-South Carolina Land & Timber Co., 177 S.E. 29, 174 S.C. 97, 100 A.L.R. 1—Southern Coal Co. v. Rice, 115 S. E. 815, 122 S.C. 484.
Tenn.—Robertson v. Ramsey, 66 S. W.2d 1022, 17 Tenn.App. 248—Polskee v. Friedlander, 8 Tenn.App. 533.
Tex.—Chapman v. Crichet, 95 S.W.2d 360, 127 Tex. 590, reversing Crichet v. Chapman, Civ.App., 63 S.W. 2d 1099, rehearing denied Chapman v. Crichet, 96 S.W.2d 64, 127 Tex. 590—Smith v. Sorelle, Com. App., 87 S.W.2d 703, reversing Busby v. Smith, Civ.App., 53 S.W.2d 138—Acme Products Co. v. Dunlap, Civ.App., 108 S.W.2d 274—Watson v. Magnolia Petroleum Co., Civ. App., 81 S.W.2d 138—National Bank of Commerce of Houston v. Irvine, Civ.App., 73 S.W.2d 929, error refused—Pecos Mercantile Co. v. Texlite, Inc., Civ.App., 65 S.W. 2d 811, affirmed Texlite Inc. v. Pecos Mercantile Co., 96 S.W.2d 73, 128 Tex. 57—Simpson v. Fulcher, Civ.App., 45 S.W.2d 1012, error refused—Reid v. Byrd, Civ.App., 34 S. W.2d 305—McGranahan Lumber Co. v. Pyramid Asbestos & Roofing Co.,

ject matter and to enable the court to execute it.[33] Accordingly, where the subject matter of the writing is imperfectly described therein or the description is in some respects inaccurate, ambiguous, or very general in character, it is always competent to aid the description and identify the subject matter to which it is intended to apply and to apply the description to such subject matter by extrinsic evidence not inconsistent with what is written.[34] The rule applies even though the contract or trans-

Civ.App., 18 S.W.2d 224, error refused—Stein v. Hamman, Civ.App., 13 S.W.2d 234, certified questions answered 6 S W.2d 352, 118 Tex. 16, rehearing denied 9 S.W.2d 1104, 118 Tex. 16—City of Ranger v. Hagaman, Civ.App., 4 S.W.2d 597—Easterling v. Simmons, Civ.App., 293 S.W. 690—Fidelity Union Fire Ins. Co. v. McDonald, Civ.App., 249 S.W. 538—Raney & Hamon v. Hamilton & White, Civ.App., 234 S.W. 229.

Vt.—Walsh v. Farrington, 165 A. 914, 105 Vt. 269.

Va.—Bradshaw v. Booth, 105 S.E. 555, 129 Va. 19.

Wash.—Bertelson v. Arthur, 244 P. 695, 696, 138 Wash. 445, citing **Corpus Juris**—Svarz v. Dunlap, 235 P. 801, 134 Wash. 555.

W.Va.—Brecker v. Brecker, 193 S.E. 439, 119 W.Va. 298—Rua v. Bowyer Smokeless Coal Co., 99 S.E. 213, 84 W.Va. 47.

Wis.—Darling & Co. v. Frank Carter Co., 242 N.W. 519, 208 Wis. 222.

Wyo.—Yellowstone Sheep Co. v. Diamond Dot Live Stock Co., 297 P. 1107, 1110, 43 Wyo. 15, quoting **Corpus Juris.**

22 C.J. p 1261 note 11.

Nature and qualities of subject

As written instruments are to be interpreted according to their subject matter, parol evidence may be introduced to ascertain the nature and qualities of the subject to which the instrument refers, for evidence to explain the subject matter of an agreement is essentially different from that which varies the terms in which the contract is expressed.—Marion T. Fannaly, Inc., v. Illinois Cent. R. Co., La.App., 160 So. 131—22 C.J. p 1270 notes 63–64.

Different descriptions in different instruments

Where different instruments relating to property describe it in a different manner, it may be shown by parol that such different descriptions relate to the same piece of property, if they are not absolutely repugnant.—Stewart v. Chadwick, 8 Iowa 463—22 C.J. p 1273 note 82.

33. U.S.—Maier v. Continental Oil Co., C.C.A.Ind., 120 F.2d 237—American Trust Co. v. Butler, C. C.A.Fla., 47 F.2d 482.

Ala.—Daniel v. Wade, 83 So. 99, 203 Ala. 355.

Ark.—Neal v. Harris, 216 S.W. 6, 140 Ark. 619—Ashcraft v. Tucker, 206 S.W. 896, 136 Ark. 447.

Cal.—E. E. McCalla Co. v. Sleeper, 288 P. 146, 105 Cal.App. 562—McKevitt v. City of Sacramento, 203 P. 132, 55 Cal.App. 117—Security Inv. Co. of San Bernardino v. Bartram, 202 P. 337, 54 Cal.App. 540.

Conn.—Gendleman v. Mongillo, 114 A. 914, 96 Conn. 541.

D.C.—Tyssowski v. F. H. Smith Co., 35 App.D.C. 403.

Fla.—Simons v. Tobin, 104 So. 583, 89 Fla. 321.

Ga.—Smith v. Federal Land Bank of Columbia, 181 S.E. 149, 181 Ga. 1—Holder v. Jordan Realty Co., 154 S.E. 353, 170 Ga. 764—Reeves v. Whittle, 153 S.E. 53, 170 Ga. 408, 72 A.L.R. 405—Stanaland v. Horne, 142 S.E. 142, 165 Ga. 685—Porter v. Paschal, 125 S.E. 846, 159 Ga. 416—Calhoun v. Ryals, 124 S.E. 867, 159 Ga. 35—H. A. Dover & Son v. Iroquois Mfg. Co., 117 S.E. 109, 30 Ga.App. 135.

Ill.—Rockford Trust Co. v. Moon, 18 N.E.2d 447, 370 Ill. 250—Harder v. Matthews, 141 N.E. 442, 309 Ill. 548—Higinbotham v. Blair, 139 N. E. 909, 308 Ill. 568.

Mass.—Malaguti v. Rosen, 160 N.E. 532, 262 Mass. 555—Butler v. Prussian, 147 N.E. 892, 252 Mass. 265—Chandler, Gardner & Williams v. Reynolds, 145 N.E. 476, 250 Mass. 309—Gerrish v. Towne, 3 Gray 82.

N.Y.—Cordua v. Guggenheim, 8 N.E. 2d 274, 274 N.Y. 51, reversing In re Andrew's Will, 290 N.Y.S. 427, 248 App.Div. 771—Dobbins v. Pratt Chuck Co., 242 N.Y. 106, 151 N.E. 146, reversing 206 N.Y.S. 5, 210 App.Div. 278—In re Sterling's Will, 27 N.Y.S.2d 36—Windsor Residences v. 201 East 18th St. Corporation, 25 N.Y.S.2d 329—People v. Call, 223 N.Y.S. 257, 129 Misc. 862.

Nev.—Bailey v. Neagle, 13 P.2d 634, 635, 54 Nev. 257, quoting **Corpus Juris.**

Okl.—Bowling v. Viets, 54 P.2d 653, 176 Okl. 107.

Or.—Bloech v. Hyland Homes Co., 247 P. 761, 119 Or. 297.

Pa.—O'Connell v. Cease, 110 A. 266, 267 Pa. 288.

Tenn.—Wilson v. Calhoun, 11 S.W.2d 906, 908, 157 Tenn. 667, citing **Corpus Juris.**

Tex.—Murphy v. Dilworth, 151 S.W. 2d 1004, reversing, Civ.App., 129 S.W.2d 418—Sanderson v. Sanderson, Civ.App., 82 S.W.2d 1008, affirmed 109 S.W.2d 744, 130 Tex. 264.

Vt.—Walsh v. Farrington, 165 A. 914, 105 Vt. 269.

Va.—Vanover v. Hollyfield, 144 S.E. 450, 151 Va. 287.

W.Va.—Day v. Adkins, 153 S.E. 915, 109 W.Va. 197.

Wis.—Hampton Plains Realty Co. v. Cohen, 252 N.W. 572, 214 Wis. 128.

22 C.J. p 1269 note 61, p 1112 note 45.

Extent of application of rule

This principle admits extrinsic evidence beyond the mere designation of the thing on which the contract operates and extends so far as to embrace the circumstances which accompany the transaction, when without the aid of those circumstances the written contract could not be applied to its proper subject matter.—Bradley v. Washington A. & G. Steam Packet Co., D.C., 13 Pet. U.S. 89, 10 L.Ed. 72—22 C.J. p 1269 note 62.

34. U.S.—American Surety Co. of New York v. Egan, C.C.A.Mich., 62 F.2d 223.

Ala.—Henderson v. Noland, 189 So. 732, 238 Ala. 213, 123 A.L.R. 483—Ezzell v. Richardson, 147 So. 132, 226 Ala. 345—Doe ex dem. Slaughter v. Roe ex dem. W. M. Carney Mill Co., 127 So. 671, 221 Ala. 121—Maloney v. Smith, 80 So. 169, 16 Ala.App. 595.

Ariz.—California Bank v. Daniel, 288 P. 7, 36 Ariz. 549.

Cal.—Norton v. Farmers Automobile Inter-Insurance Exchange, 105 P. 2d 136, 40 Cal.App.2d 556—Coats v. General Motors Corporation, 81 P. 2d 906, 11 Cal.2d 601—Warden v. Brandes, 284 P. 1050, 103 Cal.App. 744—Avis v. Rebhan, 267 P. 898, 92 Cal.App. 178.

Del.—Cieniewicz v. Sliwka, 128 A. 527, 14 Del.Ch. 362.

D.C.—Tyssowski v. F. H. Smith Co., 35 App.D.C. 403.

Fla.—Whitfield v. Webb, 131 So. 786, 100 Fla. 1619—Palatka Abstract & Title Guaranty Co. v. Haskell, 131 So. 394, 100 Fla. 1504.

Ga.—Manry v. Farmers' Bank of Forsyth, 170 S.E. 30, 177 Ga. 37—Little v. Saunders, 137 S.E. 49, 163 Ga. 842—Tilley v. Malcolm, 101 S. E. 127, 149 Ga. 514—Hayes v. Dickson, 98 S.E. 345, 148 Ga. 700.

Idaho.—Wood River Power Co. v. Arkoosh, 215 P. 975, 37 Idaho 348.

Ind.—Obering v. Swain-Roach Lumber Co., 155 N.E. 712, 86 Ind.App. 632.

Iowa.—Stoner v. Stehm, 202 N.W. 530, 200 Iowa 809.

La.—Winlock v. Gallaspy, 140 So. 846, 19 La.App. 861—Jackson v. Harris, 136 So. 166, 18 La.App. 484, reinstated 137 So. 653, 18 La.App.

action as to which the evidence is sought to be introduced is of such a nature that by the statute of frauds it is required to be in writing;[35] and it has been held to be not dependent on any distinction between latent and patent ambiguity.[36] It should be noted, however, that the rule does not authorize proof of the making of a contract different from that expressed in the instrument;[37] nor does it mean that unambiguous language used in the instrument may be violated or the legal effect thereof changed.[38] It merely permits proof of the then existing circumstances in order to enable the court to apply the language used therein to the facts as they then existed.[39]

Sufficiency of description. In order to admit parol evidence to aid in the description of the subject matter of a deed or other writing, there must be some such description as will serve as a foundation for such evidence; that is to say, the writing must at least give some data from which the description may be found and made certain. Evidence is not admissible to identify the property, where the description thereof is so vague as to amount practically to no description at all,[40] or, as it has been expressed, parol evidence cannot be admitted, first

484—Dorkins v. Montgomery, 2 La. App. 292.
Md.—Kalavan v. Hamburger, 13 A.2d 343, 178 Md. 218—Hoke v. Mehring, 195 A. 561, 173 Md. 183.
Mass.—Kennedy Bros. v. Bird, 192 N.E. 73, 287 Mass. 477—Baker v. Miller, 187 N.E. 699, 284 Mass. 217—Langevin v. Fletcher, 174 N.E. 194, 273 Mass. 543—W. R. Grace & Co. v. National Wholesale Grocery Co., 146 N.E. 908, 251 Mass. 251.
Mich.—Detroit, G. H. & M. Ry. Co. v. Howland, 224 N.W. 366, 246 Mich. 318, 68 A.L.R. 1.
Minn.—Spielman v. Albinson, 236 N.W. 319, 183 Minn. 282—First Nat. Bank v. Northwestern Trust Co., 231 N.W. 790, 181 Minn. 115—Foley v. Pilcher, 185 N.W. 652, 150 Minn. 312.
Mont.—Johnson v. Erickson, 185 P. 1116, 56 Mont. 550.
N.Y.—Windsor Residences v. 201 East 18th St. Corporation, 25 N.Y.S.2d 329—People v. Call, 223 N.Y.S. 257, 129 Misc. 862—Schultz v. Busendorf, 191 N.Y.S. 629, 117 Misc. 405.
N.C.—North Carolina Self Help Corporation v. Brinkley, 2 S.E.2d 889, 215 N.C. 615—Green v. Harshaw, 121 S.E. 456, 187 N.C. 213—Council v. Sanderlin, 111 S.E. 365, 183 N.C. 253, 32 A.L.R. 1527.
Or.—Bloech v. Hyland Homes Co., 247 P. 761, 119 Or. 297.
Pa.—Lawver v. Anderson, 77 Pa. Super. 208—Martin v. Hoshauer, 74 Pa.Super. 42.
S.C.—Shuler v. Williams, 99 S.E. 819, 112 S.C. 349.
Tex.—W. T. Raleigh Co. v. Land, 279 S.W. 810, 115 Tex. 319, affirming, Civ.App., 261 S.W. 186—Higginbotham Cattle Co. v. Whaley & Lewis, Com.App., 41 S.W.2d 34, reversing, Civ.App., 26 S.W.2d 308—Ross v. Houston Oil Fields Ass'n, Civ.App., 88 S.W.2d 586, error dismissed—Unknown Heirs of Thomas v. Harris County Houston Ship Channel Nav. Dist., Civ.App., 6 S.W.2d 396, affirmed Masterson v. Harris County Houston Ship Channel Nav. Dist., Com.App., 15 S.W.2d 1011, 67 A.L.R. 1324, rehearing denied 18 S.W.2d 588, 67 A.L.R. 1324—Smith v. Carpenter, Civ. App., 257 S.W. 637, reversed on other grounds Carpenter v. Smith, Com.App., 272 S.W. 128—Nelson v. Downtain, Civ.App., 249 S.W. 241, reversed on other grounds, Com. App., 265 S.W. 135—Rowley v. Bryan, Civ.App., 240 S.W. 1040—Delta Land & Timber Co. v. Spiller, Civ.App., 216 S.W. 414, error refused.
Wis.—Haumersen v. Sladky, 264 N.W. 653, 220 Wis. 91—Merchants' & Manufacturers' Bank v. Terrace Realty Co., 177 N.W. 329, 171 Wis. 109.
Wyo.—Caldwell v. Roach, 12 P.2d 376, 44 Wyo. 319.
22 C.J. p 1267 note 59—19 C.J. p 1163 note 21.

Conflicting clauses

Where two clauses of the description in a deed, if strictly construed, are so conflicting as to have no sensible meaning, even with reference to extrinsic circumstances, the court should look to these circumstances to see whether the meaning of the clauses is sensible in any secondary, looser, or more general sense, of which, with reference to these circumstances, they are capable.
Ala.—Chattahoochie & G. R. Co. v. Pilcher, 51 So. 11, 163 Ala. 401.
Ind.—Ault v. Clark, 112 N.E. 843, 62 Ind.App. 55.

35. U.S.—Maier v. Continental Oil Co., C.C.A.Ind., 120 F.2d 237.
22 C.J. p 1263 note 12.

36. Ill.—Cumberledge v. Brooks, 85 N.E. 197, 235 Ill. 249—Bulkley v. Devine, 20 N.E. 16, 127 Ill. 406, 3 L.R.A. 330.
Latent and patent ambiguity see supra § 961.

37. Ky.—Apple v. McCullough, 38 S.W.2d 955, 958, 239 Ky. 74, quoting **Corpus Juris.**
Tex.—Murphy v. Dilworth, 151 S.W.2d 1004, reversing, Civ.App., 129 S.W.2d 418.

38. Ill.—Rockford Trust Co. v. Moon, 18 N.E.2d 447, 370 Ill. 250—Harder v. Matthews, 141 N.E. 442, 309 Ill. 548.
Ky.—Apple v. McCullough, 38 S.W.2d 955, 958, 239 Ky. 74, quoting **Corpus Juris.**
Mass.—Buckley v. Gray, 188 N.E. 610, 285 Mass. 110.
Mont.—Johnson v. Erickson, 185 P. 1116, 56 Mont. 550.
Pa.—Hoffman v. Buchanan, 83 Pa. Super. 454.
Tex.—Murphy v. Dilworth, 151 S.W.2d 1004, reversing, Civ.App., 129 S.W.2d 418—Higginbotham Cattle Co. v. Whaley & Lewis, Civ.App., 26 S.W.2d 308, reversed on other grounds, Com.App., 41 S.W.2d 34.
22 C.J. p 1263 note 14.

39. Tex.—Murphy v. Dilworth, 151 S.W.2d 1004, reversing, Civ.App., 129 S.W.2d 418.

40. U.S.—In re Hartley, D.C.Ga., 29 F.2d 916.
Cal.—Cowing v. Wofford, 229 P. 883, 68 Cal.App. 538.
Conn.—Gendleman v. Mongillo, 114 A. 914, 96 Conn. 541.
Fla.—Kington v. Boone, 109 So. 580, 92 Fla. 560—Simons v. Tobin, 104 So. 583, 89 Fla. 321.
Ga.—Molton v. Woodruff, 165 S.E. 59, 175 Ga. 168—Van Dyke v. White Co., 127 S.E. 617, 33 Ga.App. 627.
Idaho.—Murphy v. Livesay, 197 P. 536, 34 Idaho 793.
Iowa.—First Nat. Bank v. Maxwell, 200 N.W. 401, 198 Iowa 813.
La.—Jackson v. Harris, 136 So. 166, 18 La.App. 484, reinstated 137 So. 653, 18 La.App. 484.
Miss.—National Foods v. Friedrich, 163 So. 126, 173 Miss. 717.
Mo.—Jamison v. Wells, 7 S.W.2d 347.
N.M.—Green v. Trumbull, 26 P.2d 1079, 37 N.M. 604.
N.C.—North Carolina Self Help Corporation v. Brinkley, 2 S.E.2d 889, 215 N.C. 615.
Or.—Hyland v. Oregon Agr. Co., 225 P. 728, 111 Or. 212.
S.C.—Martin v. La Boon, 107 S.E. 320, 116 S.C. 97.
Tenn.—Brier Hill Collieries v. Pile, 4 Tenn.App. 468—Maryville Furni-

to describe the subject matter of the deed or other writing and then to apply the description.[41] However, any description, however general and indefinite, which is capable of being made certain by other evidence is sufficient to sustain the writing and admit of parol evidence to identify the property meant,[42] and it has been held in some cases that it may be shown by parol that land is well known in the locality by the description thereof given in a deed, no matter how vague the description may appear on the face.[43]

After a deed has been excluded for insufficiency of the description, the court has no authority to receive parol evidence to describe the location of the land or to give any explanation of the instrument.[44]

Consistency of evidence with writing. The general rule that parol evidence is not admissible to vary or contradict a written instrument precludes the admission of evidence to identify the subject matter of a contract or the property described therein when such evidence is inconsistent with what appears in the writing.[45] However, where a portion of the description of property is erroneous, the fact may be shown by parol evidence and the property intended to be described may be identified, as this amounts merely to the rejection of the false reference in the description, pursuant to the well settled rule of interpretation falso demonstratio non nocet.[46]

ture Co. v. Rowen, 1 Tenn.App. 184.

Tex.—Smith v. Sorelle, 87 S.W.2d 703, 126 Tex. 353, reversing Busby v. Smith, Civ.App., 53 S.W.2d 138—City of Abilene v. Sayles, Com.App., 295 S.W. 578, affirming Sayles v. City of Abilene, Civ.App., 290 S.W. 239—Hanks v. Hamman, Com.App., 288 S.W. 143, reversing, Civ.App., 282 S.W. 935, and set aside on other grounds, Com.App., 289 S.W. 993—Continental Supply Co. v. Missouri, K. & T. Ry. Co., Com.App., 269 S.W. 1040, denying rehearing Continental Supply Co. v. Missouri, K. & T. Ry. Co. of Texas, 268 S.W. 444, which affirms, Civ.App., 250 S.W. 1095—Rasbury v. Hale, Civ.App., 131 S.W.2d 334, error dismissed, judgment correct—O'Herin v. Neal, Civ.App., 56 S.W.2d 1105, error refused—Walker v. Maynard, Civ.App., 31 S.W.2d 168.

Vt.—Goodsell v. Rutland-Canadian R. R. Co. et al, 56 A. 7, 75 Vt. 375.

22 C.J. p 1271 note 77.

"Extrinsic evidence is not admissible to identify the property which the parties had in mind when making the contract, as the writing must identify it in the light of the facts; but the extrinsic parol evidence is admissible to designate the property which has been identified in the minds of the parties as expressed in the writing."—Perry v. Wilson, 208 S.W. 776, 778, 183 Ky. 155.

Reservation of title in purchase-money note

Where property to which title was reserved by a purchase-money note was described only as "one five-passenger Ford touring car," parol evidence to identify it with the property sued for was not admissible against a bona fide purchaser, although such evidence might have been admissible as between the seller and the original purchaser.—Ellis v. Lynch, 112 S.E. 151, 28 Ga.App. 529.

41. Conn.—Gendleman v. Mongillo, 114 A. 914, 96 Conn. 541.

La.—Jackson v. Harris, 136 So. 166, 18 La.App. 484, reinstated 137 So. 653, 18 La.App. 484.

Miss.—Continental Jewelry Co. v. May, 140 So. 525, 526, 162 Miss. 873, citing **Corpus Juris.**

Or.—Bloech v. Hyland Homes Co., 247 P. 761, 119 Or. 297.

Tenn.—Ragsdale v. McFall, 237 S.W. 66, 145 Tenn. 684—Williams v. Buntin, 4 Tenn.App. 340.

22 C.J. p 1272 note 78.

42. U.S.—John L. Roper Lumber Co. v. Hinton, D.C.N.C., 260 F. 996, affirmed, C.C.A., 269 F. 574.

Ala.—Reynolds v. Shaw, 92 So. 444, 207 Ala. 274—McMillan v. Aiken, 88 So. 135, 205 Ala. 35.

Ark.—Magnolia Grocer Co. v. Clayton, 17 S.W.2d 877, 179 Ark. 661—Sullivan v. Wilson Mercantile Co., 271 S.W. 30, 168 Ark. 262.

Cal.—Johnson v. Schimpf, 239 P. 401, 197 Cal. 43.

Fla.—Crown Corporation v. Robinson, 174 So. 737, 128 Fla. 249—Simons v. Tobin, 104 So. 583, 89 Fla. 321.

Ga.—Union Central Life Ins. Co. v. Smith, 190 S.E. 651, 184 Ga. 158—Smith v. Federal Land Bank of Columbia, 181 S.E. 149, 181 Ga. 1—Holder v. Jordan Realty Co., 154 S.E. 353, 170 Ga. 764—Cowart v. Strickland, 153 S.E. 415, 170 Ga. 530—Valdosta Machinery Co. v. Finley, 139 S.E. 337, 164 Ga. 706—Powell v. Powell, 127 S.E. 117, 159 Ga. 837—Hightower v. Hightower, 127 S.E. 103, 159 Ga. 769—Nasworthy v. James, 110 S.E. 7, 152 Ga. 368—Paradies & Rich v. Warren Co., 186 S.E. 438, 53 Ga.App. 457.

Ky.—Prewitt v. Wilborn, 212 S.W. 442, 184 Ky. 638.

Minn.—Gustafson v. Juckem, 205 N.W. 446, 164 Minn. 516.

Miss.—McManus v. Wilson, 102 So. 543, 138 Miss. 1.

N.M.—Weeks v. Padilla, 291 P. 922, 35 N.M. 180—Garcia v. Pineda, 275 P. 370, 33 N.M. 651.

N.C.—North Carolina Self Help Corporation v. Brinkley, 2 S.E.2d 889, 215 N.C. 615—Savage Bros. Timber Co. v. Cozad, 133 S.E. 173, 192 N.C. 40—Sessoms v. Bazemore, 104 S.E. 70, 180 N.C. 102—Buckhorne Land & Timber Co. v. Yarbrough, 102 S.E. 630, 179 N.C. 335.

Tenn.—Wilson v. Calhoun, 11 S.W.2d 906, 157 Tenn. 667.

Tex.—Continental Supply Co. v. Missouri, K. & T. Ry. Co. of Texas, Com.App., 268 S.W. 444, affirming, Civ.App., 250 S.W. 1095, rehearing denied, Com.App., 269 S.W. 1040—Brittain v. Dickson, Civ. App., 60 S.W.2d 1093, error dismissed—Saner-Ragley Lumber Co. v. Spivey, Civ.App., 255 S.W. 193, modified on other grounds Spivey v. Saner-Ragley Lumber Co., Com. App., 284 S.W. 210—Sayles v. City of Abilene, Civ.App., 290 S.W. 239, affirmed City of Abilene v. Sayles, Com.App., 295 S.W. 578—Willson v. Riley, Civ.App., 240 S.W. 626—Mid-Texas Petroleum Co. v. Colcord, Civ.App., 235 S.W. 710.

Wis.—Gifford v. Straub, 179 N.W. 600, 172 Wis. 396.

22 C.J. p 1272 note 79, p 1118 note 69.

Executory agreements to convey

The text rule applies to executory agreements to convey as well as to actual conveyances.—Reynolds v. Shaw, 92 So. 444, 207 Ala. 274.

43. Mo.—Settles v. Scott, 211 S.W. 35.

N.C.—Pennell v. Brookshire, 136 S.E. 257, 193 N.C. 73.

22 C.J. p 1273 note 80.

44. Tex.—Cleveland v. Shaw, Civ. App., 119 S.W. 883.

45. Ind.—McKenna v. Smith, 133 N.E. 510, 77 Ind.App. 372.

22 C.J. p 1273 note 83.

46. N.C.—Goff v. Pope, 83 N.C. 123.

22 C.J. p 1273 note 84.

b. Applications of Rules

(1) Property or interest included generally
(2) Judicial proceedings
(3) Assessment rolls and tax deeds
(4) Boundaries
(5) Insurance contracts
(6) Mortgages

(1) Property or Interest Included Generally

Parol or extrinsic evidence is usually admissible to show the property or interest included in a description, but is inadmissible to include property wholly outside the description.

Where it is doubtful from the language used what property, or what interest in property, or what easements and appurtenances connected with the property, are included in the description in a deed or other writing, parol evidence is admissible;[47] but parol evidence is not admissible to show the intention of the parties wholly outside the description found in the instrument, and to include property not answering the description at all.[48]

Evidence has been admitted under this rule to identify the property covered by assignments;[49] assignments for the benefit of creditors;[50] bills of sale;[51] bonds;[52] contracts of sale[53] or exchange,[54] whether relating to real[55] or personal[56] property;

47. Ark.—Ward v. McIlroy, 290 S. W. 46, 172 Ark. 704.
Cal.—Del Barrio v. Sherman, 60 P. 2d 559, 16 Cal.App.2d 407—Miller v. First Sav. Bank of Colusa, 266 P. 294, 90 Cal.App. 387—Nay v. Bernard, 180 P. 827, 40 Cal.App. 364—Blair v. Wessinger, 178 P. 545, 39 Cal.App. 269.
Conn.—Mirando v. Mirando, 132 A. 910, 104 Conn. 318.
D.C.—Wardman v. Hanlon, 280 F. 988, 52 App.D.C. 14.
Fla.—Lester v. Schutt, 174 So. 583, 128 Fla. 302—Palatka Abstract & Title Guaranty Co. v. Haskell, 131 So. 394, 100 Fla. 1504.
Ga.—Holder v. Jordan Realty Co., 154 S.E. 353, 170 Ga. 764—Shackelford v. Fitzgerald, 105 S.E. 597, 151 Ga. 35—Vaughn v. Castleberry, 101 S.E. 299, 24 Ga.App. 496.
Ky.—Rice v. Blanton, 22 S.W.2d 580, 232 Ky. 195—Coldiron v. Martin's Fork Coal Co., 262 S.W. 948, 203 Ky. 577—Prewitt v. Wilborn, 212 S.W. 442, 184 Ky. 638.
La.—Werk v. Leland University, 99 So. 716, 155 La. 971.
Mass.—Chaton Fibre Co. v. Eaton, 150 N.E. 876, 255 Mass. 136.
Miss.—McManus v. Wilson, 102 So. 543, 138 Miss. 1.
Mo.—Meinhardt v. White, 107 S.W.2d 1061, 341 Mo. 446—Barnett v. Logan, App., 210 S.W. 440.
N.C.—McKay v. Bullard, 14 S.E.2d 657, 219 N.C. 589.
Pa.—Martin v. Weaver, 12 Pa.Dist. & Co. 230.
S.C.—Carson v. McCaskill, 99 S.E. 108, 111 S.C. 516.
Tex.—Ludtke v. Mackey, Com.App., 261 S.W. 140, reversing, Civ.App., 251 S.W. 606—Praeletorian Diamond Oil Ass'n v. Garvey, Civ.App., 15 S.W.2d 698, error refused—Palmer v. Guaranty State Bank of Alto, Civ.App., 292 S.W. 953—Barreda v. Cavazos, Civ.App., 266 S.W. 611—Payne v. Mt. Franklin Fuel & Feed Co., Civ.App., 234 S.W. 595, error refused.
W.Va.—State v. Edmunds, 164 S.E. 286, 112 W.Va. 316.
Wis.—Graham v. Lamp, 183 N.W. 150, 174 Wis. 373.
22 C.J. p 1270 note 65, p 1127 notes 46, 47.

Subject matter of an exception expressed in general terms in a deed, mortgage, or contract of sale may be identified or made certain by extrinsic evidence.
Ky.—Coldiron v. Martin's Fork Coal Co., 262 S.W. 948, 203 Ky. 577—Prewitt v. Wilborn, 212 S.W. 442, 184 Ky. 638.
Tex.—Marlett v. Brownfield, Civ.App., 145 S.W.2d 636.
22 C.J. p 1266 note 49.

Growing crops
Where crops are growing on land when sold and no reservation is made of such growing crops in the conveyance of said land, it may be shown by parol that said growing crops were reserved.—Wire v. Slocum, 194 P. 1061, 80 Okl. 111.

48. Cal.—Palm Springs-La Quinta Development Co. v. Palm Springs Land & Irrigation Co., 98 P.2d 530, 36 Cal.App.2d 730.
S.C.—Carson v. McCaskill, 99 S.E. 108, 111 S.C. 516.
Tex.—Bond v. Middleton, Civ.App., 131 S.W.2d 294, reversed on other grounds, Sup., 155 S.W.2d 789—Ellison v. Humble Oil & Refining Co., Civ.App., 106 S.W.2d 1083, reversed on other grounds Humble Oil & Refining Co. v. Ellison, 132 S.W.2d 395, 134 Tex. 140—Buie v. Miller, Civ.App., 216 S.W. 630, error refused.
22 C.J. p 1270 note 66.

49. Iowa.—Wolf v. Wolf, 131 N.W. 882, 152 Iowa 121.
22 C.J. p 1263 note 15.

50. Ga.—Block v. Peter, 63 Ga. 260.

51. Ga.—Cairo Banking Co. v. Citizens Bank, 11 S.E.2d 806, 63 Ga. App. 690—Warnell v. Ponder, 187 S.E. 261, 54 Ga.App. 1—Arnold v. Booth, 100 S.E. 779, 24 Ga.App. 416.
22 C.J. p 1263 note 17.

52. **Bond providing for performance of acts**
Where a bond provides for the performance of certain acts, and for the payment of a stipulated sum as damages in case of a breach, parol evidence concerning the subject matter of the contract, so far as the situation of the parties is concerned, is admissible when it tends to show that a breach has resulted in such damage as cannot be readily ascertained by a pecuniary standard.
Ky.—Pyne v. Edwards, 13 Ky.Op. 795.
Nev.—Morris v. McCoy, 7 Nev. 399.

53. Ill.—Less v. Alport, 217 Ill.App. 14—Lincoln Mining Co. v. Board of Education of State of Illinois, 212 Ill.App. 586.
La.—Snell v. J. Watts Kearny & Sons, 1 La.App. 106.
Md.—Luria Bros. & Co. v. Klaff, 115 A. 849, 139 Md. 586.
Mo.—Murphy v. Holliway, 16 S.W.2d 107, 223 Mo.App. 714.
Mont.—Barkemeyer Grain & Seed Co. v. Hannant, 213 P. 208, 66 Mont. 120.
N.Y.—Seaman v. Consolidated Finance Corporation, 219 N.Y.S. 163, 219 App.Div. 410.
S.C.—J. A. Fay & Egan Co. v. Mims, 149 S.E. 246, 151 S.C. 484.
Tex.—Vander Stucken v. Willoughby, Civ.App., 242 S.W. 478.
22 C.J. p 1263 note 18.

54. Mo.—Wilcox v. Sonka, 119 S.W. 445, 137 Mo.App. 54.

55. Cal.—Johnson v. Schimpf, 239 P. 401, 197 Cal. 43.
Ga.—Maxwell v. Citizens' Bank, 139 S.E. 864, 165 Ga. 125—Hoyt v. Ware, 118 S.E. 734, 156 Ga. 98.
Iowa.—Dawson v. McKinnon, 285 N. W. 258, 226 Iowa 756.
La.—Da Ponte v. Ogden, 108 So. 777, 161 La. 378.
N.J.—Vassar Holding Co. v. Wunsch, 135 A. 88, 100 N.J.Eq. 147—Franklin v. Welt, 131 A. 585, 98 N.J.Eq. 602.
22 C.J. p 1263 note 20.

56. Mass.—W. R. Grace & Co. v. National Wholesale Grocery Co., 146 N.E. 908, 251 Mass. 251.
Mo.—Wayne Oil Tank & Pump Co.

deeds of conveyance;[57] and leases;[58] as well as the property covered by notices of mechanics' liens,[59] options,[60] receipts,[61] and trust instruments;[62] the subject matter of a devise,[63] a guaranty,[64] a warranty in a deed,[65] a recorded vote of a corporation[66] or its directors;[67] judgments which have been assigned in writing;[68] the debts secured by a pledge,[69] bill of sale,[70] or bond;[71] water rights appurtenant to land conveyed;[72] and the obligations of one party to a contract which the other had undertaken to pay.[73] Evidence has also been admitted to show what was intended to pass under the term "privileges and appurtenances" used in a deed;[74] the time intended to be covered by a contract for the hiring of a hall for certain nights;[75] what particular work was intended by a contract obligating one party to complete "all the excavating the parties of the first part desire to have done by September 1st;"[76] what constituted a "ginnery," as the term was used in an advertisement of an administrator's sale;[77] whether a contract to pay for the procurement of a person "to buy my place" referred to the real estate or the business conducted thereon;[78] whether a guaranty of "the account" of a certain person with a firm to an amount named was a continuing guaranty;[79] what judgment was referred to in a letter addressed to a justice directing him to enter the writer's name as a stay to the judgment;[80] where one of two parties transferred in writing to the other his interest in the assets, including the accounts, to show that an indebtedness of the retiring partner to the firm was not intended to be included among the accounts;[81] and in many other cases.[82]

(2) Judicial Proceedings

The rule authorizing the admission of parol evidence to identify the subject matter of a writing applies to judicial proceedings.

With reference to judicial proceedings evidence has been admitted to identify the subject matter of

v. Equitable Refining Co., 275 S.W. 984, 220 Mo.App. 507.
N.J.—Meserve v. Traverso, 197 A. 54, 119 N.J.Law 566, affirming 192 A. 835, 15 N.J.Misc. 554.
S.D.—Rodenbour v. Quaschnick, 245 N.W. 255, 60 S.D. 561—McCaull-Webster Elevator Co. v. Steele, 180 N.W. 782, 43 S.D. 485.
Tex.—Adamson Lumber Co. v. J. E. King Lumber Co., Civ.App., 227 S.W. 702, dismissed for want of jurisdiction.
Va.—F. A. Rausch & Co. v. Graham Mfg. Corporation, 134 S.E. 692, 145 Va. 681.
Wis.—Peper v. Eveland, 272 N.W. 11, 224 Wis. 267.
Wyo.—Yellowstone Sheep Co. v. Diamond Dot Live Stock Co., 297 P. 1107, 43 Wyo. 15, 75 A.L.R. 1151.
22 C.J. p 1264 note 21.

57. Ga.—Holder v. Jordan Realty Co., 154 S.E. 353, 170 Ga. 764—Burns v. Tootle, 142 S.E. 861, 166 Ga. 226—Sheffield v. Sheffield, 104 S.E. 213, 150 Ga. 440.
Mo.—Massa v. Union Electric Light & Power Co., App., 50 S.W.2d 714.
Pa.—In re Brolasky's Estate, 163 A. 292, 309 Pa. 30.
S.C.—Shuler v. Williams, 99 S.E. 819, 112 S.C. 349.
Tex.—Lauderdale v. Lee, Civ.App., 264 S.W. 558—Delta Land & Timber Co. v. Spiller, Civ.App., 216 S.W. 414, error refused.
W.Va.—Laing v. McClung, 114 S.E. 253, 91 W.Va. 776—Pauley v. Decker, 109 S.E. 607, 89 W.Va. 485.
Wis.—Spence v. Frantz, 217 N.W. 700, 195 Wis. 69.
22 C.J. p 1264 note 22—19 C.J. p 1163 note 21.

Sheriff's deed
La.—Samuels v. Parsons, 83 So. 548, 146 La. 262.
Tex.—Gutierrez v. Rodriguez, Civ.App., 137 S.W.2d 220.

58. Cal.—Staley v. McClurken, 96 P.2d 805, 35 Cal.App.2d 622.
N.Y.—Wolper v. Redfield, 220 N.Y.S. 122, 129 Misc. 154.
22 C.J. p 1264 note 24.

Lease originally verbal
Where a lease was originally verbal, and the written lease was not executed until after possession had been delivered, a recital as to the quantity of property delivered could be varied by extrinsic proof.—Lemmon v. Sibert, 61 P. 202, 15 Colo.App. 131.

59. N.Y.—Hurley v. Tucker, 112 N.Y.S. 980, 128 App.Div. 580, affirmed 92 N.E. 1087, 198 N.Y. 534.
60. Utah.—Tyng v. Constant-Loraine Inv. Co., 154 P. 767, 47 Utah 330.
22 C.J. p 1265 note 27.
61. Neb.—Rankin v. Northern Assur. Co., 152 N.W. 324, 98 Neb. 172.
22 C.J. p 1265 note 28.
62. Miss.—Merchants' & Farmers' Bank v. Byrd, 97 So. 550, 133 Miss. 207.
Pa.—Ranney v. Byers, 68 A. 971, 219 Pa. 332, 123 Am.S.R. 660.
63. Kan.—Cummins v. Riordon, 115 P. 568, 84 Kan. 791.
64. Ill.—Hamlin v. Piser, 163 Ill.App. 51.
22 C.J. p 1112 note 45.
65. N.H.—Gill v. Ferrin, 52 A. 558, 71 N.H. 421.
66. Me.—Pope v. Machias Water Power & Mill Co., 52 Me. 535.
67. U.S.—In re Country Club Bldg. Corporation, C.C.A.Ill., 91 F.2d 713, certiorari denied Murphy v. Bloom, 58 S.Ct. 284, 302 U.S. 757, 82 L.Ed. 585.
68. Ala.—Harper v. Columbus Factory, 35 Ala. 127.
69. Cal.—Goodman v. Morthrift Finance Corporation, 85 P.2d 941, 30 Cal.App.2d 73.
70. Ga.—Skinner v. Elliott, 87 S.E. 759, 17 Ga.App. 511.
71. Ariz.—Kroeger v. Union Indemnity Co., 14 P.2d 258, 40 Ariz. 467.
Cal.—Municipal Bond Co. v. Balboa Const. Co., 34 P.2d 1032, 140 Cal. App. 57.
72. Mont.—Bullerdick v. Hermsmeyer, 81 P. 334, 32 Mont. 541.
73. N.Y.—Beemer v. Packard, 38 N.Y.S. 1045, 92 Hun 546.
74. Utah.—Fayter v. North, 83 P. 742, 30 Utah 156, 6 L.R.A.,N.S., 410.
75. Mass.—Buffington v. McNally, 78 N.E. 309, 192 Mass. 198.
76. Wis.—Boden v. Maher, 81 N.W. 661, 105 Wis. 539.
77. Ga.—Parks v. Hailey, 83 S.E. 100, 142 Ga. 391.
78. N.J.—Axford v. Meeks, 36 A. 1036, 59 N.J.Law 502.
79. Pa.—Denniston v. Schaal, 5 Pa. Super. 632.
80. Tenn.—Barr v. McGregor, 11 Humphr. 518.
81. Mo.—Long v. Long, 44 Mo.App. 141.
82. Tenn.—Robertson v. Ramsey, 66 S.W.2d 1022, 17 Tenn.App. 248.
Tex.—Fortson v. Williams, Civ.App., 128 S.W.2d 89.
22 C.J. p 1266 note 48 [a].

an action,[83] or property attached,[84] replevied,[85] or levied on under execution;[86] to show what was included in the inventory of an executor or administrator,[87] or that a particular action was included in a written agreement to settle all actions between the parties, although it was brought in the name of one of the parties as next friend to his son, who was a minor;[88] to identify a judgment as having been rendered on a replevin bond signed by plaintiff at defendant's request;[89] to identify a note designated in an award as "the note of" a certain person;[90] and to identify the matters submitted to arbitrators or referees and to prove that they acted on them.[91]

(3) Assessment Rolls and Tax Deeds

The rule authorizing the admission of parol or extrinsic evidence to explain or apply the description in a writing applies in a proper case to assessment rolls and tax deeds.

The rule authorizing the admission of parol or extrinsic evidence to explain or apply the description in a writing applies in a proper case to assessment rolls and tax deeds.[92] Accordingly, where an assessment roll[93] or tax deed[94] itself contains a description which identifies and furnishes an unmistakable clue as to the land or property intended, parol evidence may be used to explain the description or apply it to its intended object. If, however, the description in the roll or deed is void or insufficient, or if it furnishes no clue as to the property intended to be assessed or conveyed parol evidence is inadmissible to supply the deficiency.[95]

83. Ga.—Johnson v. McKay, 49 S. E. 757, 121 Ga. 763.
22 C.J. p 1266 note 50.

84. Me.—Darling v. Dodge, 36 Me. 370.

85. Ill.—Pool v. Tucker, 36 Ill.App. 377.
Ind.—Hallagan v. Johnston, 104 N. E. 91, 55 Ind.App. 509.

86. Mich.—Elliott v. Hart, 7 N.W. 812, 45 Mich. 234.
22 C.J. p 1266 note 53.

87. Iowa.—Wheeler v. Smith, 13 Iowa 564.

88. Pa.—Lawson v. McAnulty, 1 Pittsb. 200.

89. Mich.—Knickerbocker v. Wilcox, 47 N.W. 123, 83 Mich. 200, 21 Am. S.R. 595.

90. Wis.—Bancroft v. Grover, 23 Wis. 463, 99 Am.D. 195.

91. Me.—Buck v. Spofford, 35 Me. 526.

92. La.—Pierson v. Castell Land & Harbor Co., 105 So. 274, 159 La. 158.
Miss.—Landry v. Bedou, 147 So. 298, 166 Miss. 639.
N.C.—State Bd. of Education v. Remick, 76 S.E. 627, 160 N.C. 562.
Wyo.—Huber v. Delong, 91 P.2d 53, 54 Wyo. 240.
61 C.J. p 1357 notes 1, 4–6.

Arbitrary assessment of personalty
Where arbitrary assessment of personalty has been made in manner not clearly reflecting exact property included therein and taxpayer has paid taxes levied against assessment, parol evidence or other competent evidence is admissible in action to assess omitted property to establish fact that alleged omitted property was covered by arbitrary assessment.—State v. Rorabaugh-Brown Dry Goods Co., 45 P.2d 488, 172 Okl. 216.

Proof constituting sufficient identification
Where a tax sale is made under an assessment in which the description of the property intended to be assessed is so defective that resort must be had to evidence outside of the assessment roll to identify the property, identification of the property intended to be assessed may be confirmed by proof that party in whose name property was assessed did not own any other property in section or subdivision given in assessment.—Jackson v. Irion, 200 So. 18, 196 La. 728, 133 A.L.R. 566—Tillery v. Fuller, 182 So. 683, 190 La. 586—Gayle v. Slicer, 178 So. 498, 188 La. 940.

93. Miss.—Belhaven Heights Co. v. May, 192 So. 6, 187 Miss. 101.
Okl.—Watts v. Meriwether, 84 P.2d 643, 647, 184 Okl. 32, quoting Corpus Juris.
61 C.J. p 716 note 43.

In New Mexico
(1) Under L.1921 c 133 §§ 203, 435, extrinsic evidence may be used to aid a tax roll description if the latter furnishes the means of identification.—Eaves v. Lowe, 5 P.2d 525, 35 N.M. 610—Mutual Investment & Agency Co. v. Albuquerque Farm & Ranch Land Co., 275 P. 92, 34 N.M. 10—State v. Board of Trustees of Las Vegas, 253 P. 22, 32 N.M. 182.

(2) The earlier view was that under L.1921 c 133 § 435 the description must be sufficient in itself to identify the property.—Eaves v. Lowe, supra—61 C.J. p 716 note 44 [e].

94. Ala.—Grayson v. Schwab, 179 So. 377, 235 Ala. 398.
La.—Close v. Rowan, 130 So. 350, 171 La. 263.
Miss.—Seward v. Carter, 200 So. 248.
N.M.—Dickerson v. Montoya, 100 P. 2d 904, 44 N.M. 207.
Okl.—Watts v. Meriwether, 84 P.2d 643, 647, 184 Okl. 32, quoting Corpus Juris.
61 C.J. p 1357 notes 1, 4.

Description making good beginning of proof may be completed by proof aliunde of possession or other relevant facts.—Schwartzenberg v. Schwartzenberg, 70 So. 230, 138 La. 294—Cannon v. Hart, La.App., 154 So. 745.

Document recognizing title of tax sale purchaser, if not legal evidence of purpose for which it was intended, can serve as proof of relevant fact which can be used to assist in completing description of property of which there was beginning of proof in tax deed itself.—Cannon v. Hart, supra.

Maps
(1) Maps of the subdivisions and surveys of lots and tracts referred to in tax deeds have been held admissible to supplement the description.—Fitzimons v. Atherton, 124 P. 250, 162 Cal. 630—61 C.J. p 1357 note 6.

(2) A recorded map may be received to complete the description even though the deed itself makes no reference to the map.—Adams v. Slee, 268 P. 959, 92 Cal.App. 708.

95. Fla.—Schouten v. Hunt, 200 So. 923.
Miss.—Seward v. Carter, 200 So. 248—Brown v. Womack, 178 So. 785, 181 Miss. 66—Carr v. Barton, 162 So. 172, 173 Miss. 662—Patterson v. Morgan, 138 So. 362, 161 Miss. 807—Lott v. Rouse, 111 So. 838, 147 Miss. 802.
N.Y.—McCoun v. Pierpont, 187 N.Y.S. 856, 195 App.Div. 726, affirming 185 N.Y.S. 157, 194 App.Div. 912, and reversed on other grounds 133 N.E. 355, 232 N.Y. 66.
Okl.—Watts v. Meriwether, 84 P.2d 643, 647, 184 Okl. 32, quoting Corpus Juris.
Tex.—Pomeroy v. Pearce, Com.App., 2 S.W.2d 431, reversing Civ.App., 281 S.W. 315, reversed on other grounds, Com.App., 291 S.W. 214.
61 C.J. p 1357 notes 99, 7, p 716 note 44—22 C.J. p 1264 note 22 [d] (2).

(4) Boundaries

Parol or extrinsic evidence is generally admissible where it is necessary to locate and identify the actual boundaries of land described in an instrument.

For the purpose of showing the exact subject matter of a deed, grant, or other instrument relating to land, parol evidence is generally admissible to locate and identify the actual boundaries,[96] at least where the description in the instrument is ambiguous or uncertain, or gives rise to ambiguity when it is sought to be applied;[97] and evidence as to the actual boundaries or the lines actually run has been admitted, although it showed the actual lines to differ somewhat from those given in the instrument,[98] or contradicted ancient parish records.[99] So also evidence is admissible to show the practical location of a boundary,[1] or a fixing of a boundary by agreement of the parties.[2] However, where the description in the deed or other instrument is fatally indefinite, parol evidence is inadmissible to identify the boundaries.[3]

Monuments and calls. Parol evidence is admissible for the purpose of locating and identifying the monuments referred to, and explaining the calls of the description in a deed or other writing relating to real property.[4] Likewise, when the calls in a deed or other instrument are conflicting or ambiguous,[5] or when an effort to apply the description to the ground gives rise to ambiguity or conflict,[6]

Statute as not affecting rule
A statute making extrinsic evidence admissible properly to apply a description of land on an assessment roll or in a conveyance for taxes does not permit such evidence where a totally void description appears in the tax deed or assessment roll.—Brown v. Womack, 178 So. 785, 181 Miss. 66—Smith v. Brothers, 38 So. 353, 86 Miss. 241—61 C.J. p 1357 note 3.

96. Fla.—Deleware Securities Corporation v. Kahn, 175 So. 779, 129 Fla. 26.
Ga.—Porter v. Paschal, 125 S.E. 846, 159 Ga. 416—Byrd v. Olmstead, 105 S.E. 480, 150 Ga. 815.
Ill.—Kandlik et al. v. Hudek, 6 N.E.2d 196, 365 Ill. 292.
N.J.—Township of Long Beach v. Daniel B. Frazier Co., 161 A. 677, 10 N.J.Misc. 918, affirmed 164 A. 569, 112 N.J.Eq. 329.
N.C.—Perry v. Morgan, 14 S.E.2d 46, 219 N.C. 377—Lee v. Barefoot, 144 S.E. 547, 196 N.C. 107.
Va.—Blair v. Rorer's Adm'r, 116 S.E. 767, 135 Va. 1, motion for leave to file petition for writ of error denied 43 S.Ct. 704, 262 U.S. 234, 67 L.Ed. 1206—Bradshaw v. Booth, 105 S.E. 555, 129 Va. 19.
22 C.J. p 1270 note 67, 19 C.J. p 1163 notes 21, 22.

Location of surveys on the ground must necessarily be determined by parol evidence, which is therefore admissible.—Wigham v. Wilson, Tex. Civ.App., 211 S.W. 469.

97. Ark.—Dierks Lumber & Coal Co. v. Tedford, 146 S.W.2d 918.
Conn.—Bielby v. Blinn, 151 A. 357, 112 Conn. 1.
Mass.—Langevin v. Fletcher, 174 N.E. 194, 273 Mass. 543.
N.M.—Board of Trustees of Town of Casa Colorado Land Grant v. Pooler, 28 P.2d 519, 38 N.M. 87.
Okl.—School Dist. No. 1 of Marshall County v. School Dist. No. 2 of Marshall County, 39 P.2d 78, 169 Okl. 558—Hines v. Olsen, 190 P 266, 78 Okl. 259.
Pa.—Fleming v. Klein, 100 Pa.Super. 40.
Va.—Vanover v. Hollyfield, 134 S.E. 548, 145 Va. 749—Smith v. Bailey, 127 S.E. 89, 141 Va. 757—Reusens v. Lawson, 21 S.E. 347, 91 Va. 226.
22 C.J. p 1270 note 67—19 C.J. p 1163 notes 21, 22.

Patent ambiguous on face
Extraneous evidence is competent to locate and fix lines of patent where there is ambiguity on its face.—Richmond Cedar Works v. West, 147 S.E. 196, 152 Va. 533.

Ancient boundary
Parol evidence is competent for the purpose of establishing the location of an ancient boundary.—Gardner v. Town of Claverack, 22 N.Y.S.2d 265, affirmed 22 N.Y.S.2d 200, 259 App.Div. 1111.

98. Ky.—Thurman v. Leach, 116 S.W. 300.
22 C.J. p 1271 note 68.
Statements in deed as to boundaries as not variable by parol or extrinsic evidence generally see supra § 916.

99. La.—Fleming v. Scott, 26 La. Ann. 545.

1. N.Y.—Stewart v. Patrick, 68 N.Y. 450.
22 C.J. p 1271 note 70.

2. N.J.—Horner v. Stillwell, 35 N.J.Law 307.

3. Conn.—McMahon v. Plumb, 92 A. 113, 88 Conn. 547.
N.M.—Green v. Trumbull, 26 P.2d 1079, 37 N.M. 604.
Sufficiency of description to admit parol evidence generally see supra subdivision a of this section.

Description not too indefinite
N.C.—Lee v. Barefoot, 144 S.E. 547, 196 N.C. 107.

4. Ark.—Schweitzer v. Crandell, 291 S.W. 68, 172 Ark. 667.
Mo.—Stith v. Post, 232 S.W. 985—Kleine v. Kleine, 219 S.W. 610, 281 Mo. 317, 8 A.L.R. 1335.
N.C.—Lee v. Barefoot, 144 S.E. 547, 196 N.C. 107.
Pa.—Muia v. Herskovitz, 128 A. 828, 283 Pa. 163—Fleming v. Klein, 100 Pa.Super. 40.
Tex.—Floyd v. Day, Civ.App., 50 S.W.2d 371, 372, error dismissed, quoting **Corpus Juris**—Stevens v. Robb, Civ.App., 229 S.W. 891, dismissed for want of jurisdiction.
Va.—Vanover v. Hollyfield, 144 S.E. 450, 151 Va. 287.
22 C.J. p 1271 note 72.

Corner fixed by writing may be shown by parol to be marked by a monument.—O'Connell v. Cox, 60 N.E. 580, 179 Mass. 250.

Doubtful corner or monument
Parol evidence is admissible to establish the position of a doubtful corner or monument.
Ky.—Bolton v. Sears, 78 S.W.2d 914, 257 Ky. 676.
La.—Laurent v. Laurent, 84 So. 212, 146 La. 939.

Measuring point
Where a deed describes a lot as beginning at a certain stump, parol evidence is admissible to show whether it was the intention of the parties to measure from the center or from the side of the stump.—Jackson v. Perrine, 35 N.J.Law 137.

5. Tex.—Gill v. Peterson, 86 S.W.2d 629, 126 Tex. 216, reversing Peterson v. Gill, Civ.App., 51 S.W.2d 1057—Whittenburg v. Jameson, Civ. App., 143 S.W.2d 668—Vireca Corporation v. Cole, Civ.App., 129 S.W. 2d 433, error refused—Texas Co. v. Van Deventer, Civ.App., 290 S.W. 560—Bang v. City of Houston, Civ. App., 269 S.W. 856—McCormack v. Crawford, Civ.App., 181 S.W. 485—Minor v. Kirkland, Civ.App., 20 S.W. 932.
Statements in deed as to boundaries as not variable by parol evidence generally see supra § 916.

6. Tex.—Humble Oil & Refining Co. v. Ellison, 132 S.W.2d 395, 134 Tex. 140, reversing Ellison v. Humble Oil & Refining Co., Civ.App., 106 S.W.2d 1083—Gill v. Peterson, 86 S.W.2d 629, 126 Tex. 216, reversing

parol evidence is admissible to show where on the ground the surveys were actually made; so a conflict between a call of a deed for distance and a call for a railroad right of way may be explained so as to show the real intention of the parties, and the deed may be enforced accordingly.[7]

(5) Insurance Contracts

The rule authorizing the admission of parol evidence to identify, explain or define the subject matter of a writing applies to insurance contracts.

The rule authorizing the admission of parol evidence where it is necessary to identify, explain or define the subject matter of a writing applies to insurance contracts.[8] Accordingly, where the description of the property in an insurance policy is ambiguous or uncertain, parol or extrinsic evidence is admissible to connect the description with the property intended to be covered,[9] or to correct a mistake in the description,[10] and for this purpose, the application, diagrams of the property, and other papers on which insurer acted in making the insurance are material evidence.[11] Such evidence is admissible to show that the owner knew, or ought to have known, that the description in the policy could not have covered the property destroyed.[12]

(6) Mortgages

Parol or extrinsic evidence is generally admissible where it is necessary to identify the subject matter of a mortgage, provided the mortgage itself contains data which lead to definiteness when it is explained by parol.

Parol or extrinsic evidence may generally be received where it is necessary to identify the land[13] or chattels[14] intended to be covered by a mortgage, provided the mortgage itself contains data which

Peterson v. Gill, Civ.App., 51 S.W. 2d 1057—Texas Pacific Coal & Oil Co. v. Crabb, Com.App., 249 S.W. 835, reversing Crabb v. Texas Pacific Coal & Oil Co., Civ.App., 238 S.W. 279—Vireca Corporation v. Cole, Civ.App., 129 S.W.2d 433, error refused—Beck v. Gulf Production Co., Civ.App., 113 S.W.2d 258, error refused—Redden v. Pure Oil Co., Civ.App., 86 S.W.2d 874—Dow v. American Liberty Oil Co., Civ.App., 83 S.W.2d 401, error refused—Dilworth v. Buchanan, Civ. App., 260 S.W. 279.
Va.—Richmond Cedar Works v. West, 147 S.E. 196, 152 Va. 533.

Purpose of admitting parol evidence under such circumstances is not to override that which is written but properly to interpret it.—Gill v. Peterson, 86 S.W.2d 629, 126 Tex. 216—Humble Oil & Refining Co. v. Parish, Tex.Civ.App., 146 S.W.2d 1045, error dismissed, judgment correct.

7. Tex.—Couch v. Texas, etc., R. Co., 90 S.W. 860, 99 Tex. 464, reversing, Civ.App., 87 S.W. 847.

8. U.S.—Globe & Rutgers Fire Ins. Co. v. Baylen St. Wharf Co., C.C. A.Fla., 38 F.2d 197.
Fla.—Price v. Southern Home Ins. Co. of the Carolinas, 129 So. 748, 100 Fla. 338.
Mo.—Indiahoma Refining Co. v. National Fire Ins. Company of Hartford, Conn., App., 242 S.W. 710.
S.D.—Cass v. Pacific Mut. Life Ins. Co. of California, 253 N.W. 622, 62 S.D. 502, followed 256 N.W. 120, 63 S.D. 23.
Tex.—Dunn v. Second Nat. Bank, 113 S.W.2d 165, 131 Tex. 198, 115 A. L.R. 730, reversing Second Nat. Bank of Houston v. Dunn, Civ.App., 84 S.W.2d 766.
22 C.J. p 1264 note 23—26 C.J. p 78 note 60.

Showing protection against particular loss

Extrinsic evidence is admissible to prove that life policy procured by debtor and payable to creditor-beneficiary but containing no description of debt was intended to protect beneficiary against loss on a particular obligation.—Dunn v. Second Nat. Bank, supra.

9. Ky.—Firemen's Ins. Co. of Newark, N. J., v. Yarbrough, 28 S.W.2d 771, 234 Ky. 525.
Md.—Eagle Star & British Dominions Ins. Co. of London v. Fleischman, 2 A.2d 424, 175 Md. 433.
26 C.J. p 524 note 72, p 78 notes 60–63—22 C.J. p 1264 note 23.

Extent of interest intended to be covered may be shown by parol evidence.—Franklin M. & F. Ins. Co. v. Drake, 2 B.Mon. (Ky.) 47.

Property not in existence

Parol evidence may be resorted to to determine whether insurance contract includes property not then in existence, where contract is ambiguous.—Globe & Rutgers Fire Ins. Co. v. Baylen St. Wharf Co., C.C.A.Fla., 38 F.2d 197.

10. U.S.—Scottish Union & National, Ins. Co. v. McKone, Wyo., 227 F. 813, 142 C.C.A. 337.
Ill.—Buchanan v. Scottish Union & National Ins. Co., 210 Ill.App. 523.
26 C.J. p 524 note 73.

11. N.Y.—Saunders v. Agricultural Ins. Co., 60 N.E. 635, 167 N.Y. 261, reversing 57 N.Y.S. 683, 39 App. Div. 631.
26 C.J. p 524 note 74.

12. N.Y.—Saunders v. Agricultural Ins. Co., supra.
26 C.J. p 524 note 75.

13. U.S.—Port Wentworth Terminal Corporation v. Equitable Trust Co. of New York, C.C.A.Ga., 18 F.2d 379.
Ala.—Newell v. Armstrong, 161 So. 244, 230 Ala. 367—Mills v. Jordan, 101 So. 730, 212 Ala. 81—Barron v. Barron, 25 So. 55, 122 Ala. 194.
Conn.—Brooks Bank & Trust Co. v. Dineen, 117 A. 551, 97 Conn. 536.
22 C.J. p 1265 note 25.

14. U.S.—Liquid Carbonic Corporation v. Phillips, C.C.A.Miss., 68 F. 2d 515—In re Coleman & Brown, C. C.A.Ga., 2 F.2d 254, reversing, D.C., 291 F. 280.
Ala.—Stewart v. Clemens, 124 So. 863, 220 Ala. 224, 66 A.L.R. 1454.
Ariz.—C. I. T. Corporation v. Naudack, 38 P.2d 310, 44 Ariz. 413—Mosher v. Holladay, 277 P. 67, 35 Ariz. 299.
Ill.—Melody v. Arcola State Bank, 249 Ill.App. 85—Southern Illinois Nat. Bank of East St. Louis v. Thaxton, 224 Ill.App. 554.
La.—Commercial Bank of Arcadia v. Simmonds, 2 La.App. 658.
Mo.—Bruce v. Kays, 1 S.W.2d 214, 222 Mo.App. 77.
Nev.—Schmaling v. Johnston, 13 P.2d 1111, 54 Nev. 293, affirmed 27 P.2d 1059, 55 Nev. 164.
N.D.—Hellstrom v. First Guaranty Bank, 209 N.W. 379, 54 N.D. 322.
Okl.—Wichita Mill & Elevator Co. v. Farmers' State Bank of Tipton, 226 P. 870, 102 Okl. 83—First Nat. Bank of Washington, Okl., v. Haines, 185 P. 441, 76 Okl. 301.
Or.—Immel v. Albany Iron Works, 271 P. 53, 127 Or. 118.
S.C.—Clowney v. Rivers, 123 S.E. 759, 129 S.C. 58—First Nat. Bank v. Pierson, 117 S.E. 542, 124 S.C. 327.
Tex.—H. O. Wooten Grocer Co. v. Wade Meat Co., Civ.App., 37 S.W. 2d 1090—Lunsford v. Pearce, Civ. App., 19 S.W.2d 71—Radford v. Bacon Securities Co., Civ.App., 18 S.W.2d 848—Farmers' & Merchants' Nat. Bank of Kaufman v. Howell, Civ.App., 268 S.W. 776—First Nat. Bank v. First State Bank of Camp-

lead to definiteness when explained by parol.[15] Such evidence is also admissible in a proper case to identify the debt or obligation intended to be secured.[16] So it has been held that, even though a mortgage appears upon its face to be for the payment of a specified sum of money, it may be shown by parol evidence that it was really intended to secure advances to be made from time to time,[17] or a balance due from time to time.[18] So also it has been held permissible to show that a mortgage was given to secure or indemnify against a contingent liability of the mortgagee as the mortgagor's surety and the like,[19] although this has been denied.[20] Several mortgages, appearing on their face to be for distinct debts, may be shown in equity to be merely additional evidence of, and security for, the same debt;[21] and a creditor of the grantor in a deed of trust may present evidence to connect himself with the deed and show that his debt was one of those intended to be secured.[22]

§ 1008. Supplying Omissions

Matters required by law to appear in a judicial or other record cannot be supplied by parol; but in the interpretation of an ambiguous contract in order to arrive at the true intention of the parties, parol evidence may be admitted to supply a deficiency in the language which they have used.

Where a contract is silent as to a particular matter and because of the nature and character of the transaction an ambiguity arises, parol evidence is properly admitted for the purpose of supplying the deficiency in the language of the contract and establishing the true intent and meaning of the parties,[23] provided such evidence is entirely consistent with, and not contradictory of, the writing,[24] but, as has been noted supra § 959, the court under the guise of construction cannot make a contract for the parties. The admissibility of parol evidence of contemporaneous and collateral agreements where the writing is incomplete has been considered supra § 999, and the admissibility of such evidence where the writing does not express the entire agreement infra § 1013.

Judicial records. Matters which should but do not appear of judicial record cannot be supplied by parol,[25] especially if the omission is such as affects

bell, Civ.App., 252 S.W. 1089—Perkins v. Alexander, Civ.App., 209 S.W. 789.
Vt.—Symes v. Fletcher, 115 A. 502, 95 Vt. 431.
22 C.J. p 1265 note 25—42 C.J. p 758 note 36 [a].

15. U.S.—In re Coleman & Brown D.C.Ga., 291 F. 280, reversed on other grounds, C.C.A., 2 F.2d 254.
Ala.—Stewart v. Clemens, 124 So. 863, 220 Ala. 224, 66 A.L.R. 1454.
Tex.—Graham Nat. Bank v. Beavers, Civ App., 286 S.W. 604, affirmed, Com.App., 290 S.W. 529.

Mortgage held sufficiently definite
Ala.—Newell v. Armstrong, 161 So. 244, 230 Ala. 367.
Sufficiency of description to admit parol evidence generally see supra subdivision a of this section.

16. Minn.—Spielman v. Albinson, 236 N.W. 319, 183 Minn. 282.
Mont.—Noyes Estate v. Granite-Alaska Co., 189 P. 225, 57 Mont. 511.
N.J.—Ocean County Nat. Bank v. Stillwell, 197 A. 286, 123 N.J.Eq. 337.
Tex.—Texas Co. v. Tucker, Civ.App., 129 S.W.2d 762, error refused—Southwestern Drug Corporation v. First Nat. Bank, Civ.App., 45 S.W. 2d 424, error refused.
22 C.J. p 1265 note 35—41 C.J. p 455 note 50.

Declarations of mortgagor made at the time the mortgage was executed are admissible to show the indebtedness intended by the mortgagor to be secured.
Mich.—Albion State Bank v. Knickerbocker, 84 N.W. 311, 125 Mich. 311.
Tenn.—First Nat. Bank v. Tamble, Ch.App., 62 S.W. 308.

Where future advances are secured, parol evidence may be introduced to identify what advances were in fact intended by the parties.—Johnson v. Bratton, 70 N.W. 1021, 112 Mich. 319—41 C.J. p 456 note 54.

17. Fla.—McEwen v. Grovers' Loan & Guaranty Co., 139 So. 805, 104 Fla. 176.
S.D.—Charles Friend & Son v. Schmidt, 233 N.W. 913, 57 S.D. 477, quoting **Corpus Juris.**
22 C.J. p 1134 note 9—41 C.J. p 456 note 53.

18. S.D.—Charles Friend & Son v. Schmidt, supra, quoting **Corpus Juris.**
22 C.J. p 1134 note 10.

19. Minn.—Harrington v. Samples, 30 N.W. 671, 36 Minn. 200.
22 C.J. p 1134 note 11—41 C.J. p 456 note 52.

20. Mass.—Southwick v. Hapgood, 10 Cush. 119.
22 C.J. p 1135 note 12.

21. Va.—Anderson v. Davies, 6 Munf. 484, 20 Va. 484.

22. Va.—Griffin v. Macaulay, 7 Gratt. 476, 48 Va. 476.

23. Ala.—Disheroon v. Brock, 105 So. 899, 213 Ala. 637.
Ga.—De Beaugrine v. Ward, 105 S.E. 868, 26 Ga.App. 301.
N.Y.—Belfanc v. Belfanc, 300 N.Y.S. 319, 252 App.Div. 453, affirmed 16 N.E.2d 103, 278 N.Y. 563—Bank of New York & Trust Co. v. Snedeker, 16 N.Y.S.2d 930, 173 Misc. 126, affirmed 13 N.Y.S.2d 278, 257 App. Div. 939.
Tex.—Miller v. Wilson, Civ.App., 258 S.W. 540.
22 C.J. p 1186 note 92, p 1096 note 75 [a].

Unexpressed terms
The parol evidence rule does not apply when the language used is ambiguous by reason of unexpressed terms, and resort must be had to extrinsic evidence to determine the meaning and extent of the language employed by the contracting parties. Such evidence is admissible not to vary what is written, but to complete the instrument.—Welch v. Bombardieri, 147 N.E. 595, 252 Mass. 84—Hebb v. Welsh, 70 N.E. 440, 185 Mass. 335.

Negotiable instruments
Section of Negotiable Instruments Act prescribing construction to be given where omissions appear in language of instrument does not authorize admission of extrinsic evidence to supply omissions.—La Caisse Populaire Credit Union v. Cross, 199 N.E. 548, 293 Mass. 190.

24. N.Y.—Hendricks v. Clements, 186 N.Y.S. 378, 195 App.Div. 144.

25. Iowa.—Manion v. Brady, 138 N.W. 558, 158 Iowa 306.
22 C.J. p 1280 note 69.
Judicial records as writings within parol evidence rule see supra §§ 865–875.
Parol evidence to supply omissions

the conclusiveness or validity of the proceedings;[26] for the record must be complete and perfect in itself without reference to extrinsic circumstances, and, if deficient or imperfect, it cannot be assisted or aided by evidence dehors the same.[27] Likewise, it is not permissible to show by oral evidence that the record is defective and then have its defects corrected or supplied by the same evidence;[28] but where, although the record is complete and nothing which should have been incorporated therein is omitted, it becomes necessary for any purpose to ascertain a fact which does not appear on the record, parol evidence of such fact is admissible.[29]

§ 1009. —— Corporate Records

Omissions from corporate records may be supplied by parol evidence.

Omissions from corporate records may be supplied by parol evidence, particularly where there are no statutory provisions as to what the records shall show.[30]

§ 1010. Sustaining Instrument

a. In general
b. Instrument illegal or void on its face
c. Public records or documents

a. In General

Where the validity or binding effect of a written instrument, valid on its face, is attacked for any reason, parol evidence which is not contradictory of the writing is, as a general rule, admissible to sustain it.

As a general rule, where the validity or binding effect of an instrument in writing, not void on its face, is attacked for any reason, parol evidence, not contradictory of the writing, is admissible to sustain it.[31] Accordingly parol evidence may be received to repel a charge of fraud[32] or duress;[33] to disprove an allegation that the consideration was illegal[34] or that an obligation was usurious.[35] Likewise such evidence is admissible to establish the existence of a debt intended to be secured by a mortgage;[36] or to explain[37] or show consent to[38] alterations in an instrument; or to show the adoption of a seal[39] or that a scrawl was intended as a seal.[40]

Similarly parol evidence may be admissible to explain a variance with respect to names;[41] or to explain a discrepancy between the amount of a

in official records and documents see supra § 890.
Secondary evidence to prove judicial records see supra § 809.

Motions and orders
Where the motions and orders granted in a case are omitted from the minutes of the court, they may be proved by parol evidence.—Hickman v. Enterprise Lumber Co., 105 So. 343, 159 La. 280.

26. Mo.—Cunningham v. Pacific R. Co., 61 Mo. 33.
22 C.J. p 1281 note 70.

27. U.S.—James v. Stookey, C.C.Pa., 13 F.Cas.No.7,184, 1 Wash. 330.
22 C.J. p 1281 note 71.

28. Ala.—Jones v. Ritter, 56 Ala. 270.

29. Iowa.—Smith v. De Kock, 46 N.W. 1056, 81 Iowa 535.
22 C.J. p 1281 note 73.

30. Ark.—Chamber of Commerce of Hot Springs v. Barton, 112 S.W.2d 619, 195 Ark. 274.
Cal.—Peterson v. First Nat. Bank, 281 P. 1104, 101 Cal.App. 532.
Ky.—Bennett v. Madison Sales Co., 95 S.W.2d 604, 264 Ky. 728.
Mich.—Jacob v. Gratiot Central Market Co., 255 N.W. 331, 267 Mich. 262.
N.M.—Franciscan Hotel Co. v. Albuquerque Hotel Co., 24 P.2d 718, 37 N.M. 456.
N.Y.—In re Starbuck's Estate, 221 N.Y.S. 540, 129 Misc. 460, affirmed In re Starbuck, 228 N.Y.S. 174, 223 App.Div. 844, reversed on other grounds In re Starbuck's Ex'x, 167 N.E. 580, 251 N.Y. 439, 65 A.L.R. 216.
N.C.—Green River Mfg. Co. v. Bell, 137 S.E. 132, 193 N.C. 367—Wright v. Phillips Fertilizer Co., 136 S.E. 716, 193 N.C. 305—Everett v. Staton, 134 S.E. 492, 192 N.C. 216—Respess v. Rex Spinning Co., 133 S.E. 391, 191 N.C. 809—Bailey v. Hassell, 115 S.E. 166, 184 N.C. 458—Asbury v. Mauney, 92 S.E. 267, 173 N.C. 454.
Or.—Myrtle Point Mill & Lumber Co. v. Clarke, 203 P. 588, 102 Or. 533.
Pa.—In re Loeffler's Estate, 121 A. 186, 188, 277 Pa. 317, quoting **Corpus Juris**—Shuman v. Main, Beaver & Black Creek Mut. Fire Ins. Co., 108 A. 265, 265 Pa. 38.
22 C.J. p 1277 note 28—14 C.J. p 921 note 49.
Secondary evidence to supply omission in corporate record see supra § 810.

31. Ala.—Morris v. Waldrop, 105 So. 172, 213 Ala. 435.
Cal.—Mahana v. Los Angeles Engineering & Mfg. Co., 256 P. 279, 82 Cal.App. 710, modified on other grounds 257 P. 136—Ratzlaff v. Trainor-Desmond Co., 183 P. 269, 41 Cal.App. 586.
La.—Succession of Diez, 195 So. 613, 194 La. 1089.
Pa.—Miller v. Miller, 131 A. 236, 284 Pa. 414.
S.C.—Scott v. Wiggins, 101 S.E. 113, 113 S.C. 88.
Tex.—Latham v. Jordan, Com.App., 17 S.W.2d 805, reversing, Civ.App., 3 S.W.2d 555.
22 C.J. p 1277 note 29.

32. Cal.—Moore v. Franklin, 192 P. 1047, 49 Cal.App. 103.
Tex.—Hill v. Provine, Civ.App., 260 S.W. 681.
22 C.J. p 1277 note 30.

33. Tex.—Hardin v. Hardin, 38 Tex. 616.

34. Mass.—Rundell v. La Fleur, 6 Allen 480.
S.C.—Buckner v. Ruth, 47 S.C.L. 157.

35. Va.—Richeson v. Wood, 163 S.E. 339, 343, 158 Va. 269, citing **Corpus Juris.**
22 C.J. p 1277 note 33.

36. Cal.—Shaver v. Bear River & Auburn Water & Mining Co., 10 Cal. 396.

37. Ind.—Seymour Improvement Co. v. Viking Sprinkler Co., 161 N.E. 389, 87 Ind.App. 179.
Mo.—Murphy v. Holliway, 16 S.W.2d 107, 223 Mo.App. 714.
Or.—Zobrist v. Estes, 133 P. 644, 65 Or. 573.

38. Idaho.—State v. Baird, 89 P. 298, 13 Idaho 126.

39. S.C.—Twitty v. Houser, 7 S.C. 153.

40. S.C.—Relph v. Gist, 15 S.C.L. 267.

41. Ala.—Meredith v. Richardson, 10 Ala. 828.
22 C.J. p 1277 note 39.
Parol evidence to show mistake or variance in name of party to instrument see supra § 995.

debt and a mortgage securing it;[42] or to show that the execution of an instrument was authorized[43] or ratified;[44] or to show whether a deed was delivered,[45] or accepted,[46] or duly acknowledged and recorded.[47] It has also been held permissible to sustain a deed or other instrument, which is attacked on the ground that the consideration was illegal, or was not paid, or did not exist, by showing a valid consideration, although different from that expressed;[48] but there is authority for the contrary view.[49]

While parol evidence has been held admissible to show that the vendee of a contract to sell realty knew that the title contracted for was not good,[50] the evidence is inadmissible for such purpose where it is contradictory of the provisions of the contract.[51]

Corporate records may be aided or explained by extrinsic evidence.[52]

Insurance. The validity of an insurance policy may be sustained by parol evidence showing that the agent of insurer knew of, and assented to, the existence or procurement of other insurance or of a mortgage on the property insured, notwithstanding a provision in the instrument that it shall be void in case of such other insurance or a mortgage, unless the consent of insurer is shown by a written indorsement thereon.[53]

Although there is contrary authority,[54] it has been held that, on an issue as to whether insured gave mistaken or fraudulent answers in his application, it may be shown by parol evidence that insured did not make the statements, or that the statements given by insured to the agent of insurer were true and were different from those which the agent transcribed in the application which he sent to insurer;[55] and when, at the time the application is made, statements contained in it are known to the agents of insurer to be false, the facts may be established by parol evidence.[56]

It has likewise been held that where the agent inserted certain matters in the application for life insurance, on information which he obtained from third persons without the consent of insured, parol evidence is admissible to show the circumstances under which the insertion was made, although it contradicts the written contract.[57]

42. Ga.—Gunn v. Jones, 67 Ga. 398.

43. U.S.—Alexandria Mechanics' Bank v. Columbia Bank, D.C., 5 Wheat. 326, 5 L.Ed. 100.
22 C.J. p 1278 note 41.

44. Me.—Pike v. Bacon, 21 Me. 280, 38 Am.D. 259.
22 C.J. p 1279 notes 58, 59.

45. Ill.—Waters v. Lawler, 130 N.E. 335, 297 Ill. 63.
N.Y.—Buszozak v. Wolo, 211 N.Y.S. 557, 125 Misc. 546.

46. N.Y.—Buszozak v. Wolo, supra.

47. Mo.—Williams v. Butterfield, 114 S.W. 13, 214 Mo. 412.
22 C.J. p 1278 note 43.

48. La.—Citizens Bank & Trust Co. v. Willis, 162 So. 822, 183 La. 127—Exposito v. Lapeyrouse, App., 195 So. 814.
22 C.J. p 1278 note 44.

49. Md.—Glenn v. Randall, 2 Md. Ch. 220.
22 C.J. p 1278 note 45.

50. Ala.—Beck v. Simmons & Kornegay, 7 Ala. 71.
N.J.—Newark Sav. Inst. v. Jones Ex'rs, 37 N.J.Eq. 449, affirmed 38 N.J.Eq. 299.
Utah.—Leonard v. Woodruff, 65 P. 199, 23 Utah 494.

51. Cal.—Snowden v. Derrick, 111 P. 757, 14 Cal.App. 309.
Mass.—Swan v. Drury, 22 Pick. 485—Harlow v. Thomas, 15 Pick. 66.
N.Y.—Nathan v. Morris, 17 N.Y.S. 13, 62 Hun 452.

52. U.S.—Indian Refining Co. v. Buhrman, N.Y., 220 F. 426, 135 C.C.A. 231.
22 C.J. p 1281 note 74.

53. U.S.—McElroy v. British America Assur. Co., Wash., 94 F. 990, 36 C.C.A. 615.

54. N.J.—Franklin Fire Ins. Co. v. Martin, 40 N.J.Law 568, 29 Am.R. 271.
22 C.J. p 1278 note 50—26 C.J. p 522 note 27—32 C.J. p 1334 note 71.

55. Ala.—Commercial Casualty Ins. Co. v. Hudgens, 160 So. 106, 230 Ala. 182—Modern Woodmen of America v. Head, 96 So. 219, 209 Ala. 420.
Fla.—Massachusetts Bonding & Insurance Co. v. Williams, 167 So. 12, 123 Fla. 560.
Idaho.—Turner v. Pacific Mut. Life Ins. Co. of California, 20 P.2d 210, 211, 52 Idaho 672, citing **Corpus Juris.**
Kan.—Rigdon v. Farmers' Alliance Ins. Co., 251 P. 631, 122 Kan. 136—Blades v. Farmers' & Bankers' Life Ins. Co., 225 P. 1082, 116 Kan. 120.
La.—Parker v. Citizen Fire Ins. Co. of Missouri, 4 La.App. 711.
Me.—Spaulding v. York County Mut. Fire Ins. Co., 149 A. 143, 128 Me. 512.
Mo.—Yancey v. Central Mut. Ins. Ass'n, App., 77 S.W.2d 149—Security Life Ins. Co. v. Stockman, App., 242 S.W. 103.
N.C.—Willett v. National Accident & Health Ins. Co., 180 S.E. 580, 208 N.C. 344.
Or.—Simmons v. Washington Fidelity Nat. Ins. Co., 299 P. 294, 136 Or. 400—Williams v. Pacific States Fire Ins. Co., 251 P. 258, 120 Or. 1.
Pa.—Hoffman v. Mutual Fire Ins. Co. of Reading, Pa., 117 A. 917, 274 Pa. 292.
Tex.—Texas Banking & Ins. Co. v. Stone, 49 Tex. 4—Washington Fidelity Nat. Ins. Co. v. Smith, Civ.App., 80 S.W.2d 413.
W.Va.—Shinn v. West Virginia Ins. Co., 140 S.E. 61, 62, 104 W.Va. 353, citing **Corpus Juris.**
22 C.J. p 1278 note 49—26 C.J. p 522 note 26—32 C.J. p 1334 note 70—33 C.J. p 117 note 74—37 C.J. p 628 notes 38, 40, 41.

Effect of provision in policy
Provision in policy containing an explicit agreement that no statement made to any agent or other person, and not contained in the application, shall be considered as having been brought to the notice of the company, precluded parol evidence that agent had set down a written answer to a question without the knowledge of insured because, by its plain terms, it gave distinct notice to insured of a limitation on the power and authority of the agent.—Rinker v. Ætna Life Ins. Co., 64 A. 82, 214 Pa. 608, 112 Am.S.R. 773, affirming 6 Lack.Jur. 122.

56. Colo.—New York Life Ins. Co. v. Haru Fukushima, 220 P. 994, 74 Colo. 236.

57. U.S.—Union Mut. Ins. Co. v.

b. Instrument Illegal or Void on Its Face

Where an instrument is illegal or void on its face, parol evidence ordinarily is inadmissible to make it valid or effectual.

Where an instrument is on its face illegal or void, because it shows a violation of some statutory provision, or omits something which the law makes essential to its validity, or for any other reason, parol evidence cannot be admitted to contradict the portion which shows a violation of the statute, to supply the omission, or otherwise to make effectual that which the law declares shall be of no effect,[58] unless it can be shown that the provision which renders the instrument void was inserted by mistake.[59] Thus where an instrument or a portion thereof is void for indefiniteness or uncertainty in any of its terms, the deficiency cannot be cured by parol evidence;[60] but, before pronouncing an instrument void for uncertainty, the court should examine it in all the light to be gathered from contemporaneous facts and circumstances.[61]

Ratification. It has been held that a ratification of a transaction evidenced by a void instrument may be shown by parol.[62]

c. Public Records or Documents

Parol evidence may be admitted to aid or explain a public record or document, although such evidence is inadmissible to validate a judgment or proceeding which the record shows to be void.

Parol evidence which does not contradict but merely aids or explains the record or report of a public officer or board or a public document is admissible.[63] A fortiori matters not properly belonging in the record and not found there may be proved by other evidence.[64]

Judicial records. The rule against the reception of parol or extrinsic evidence to vary or contradict a judicial record does not preclude the reception of such evidence in aid of the record.[65] Such evidence may be admitted to explain an apparent discrepancy,[66] or an immaterial variance,[67] or to dispel obscurity or ambiguity.[68] A judgment or proceeding, however, which the record shows to be void cannot be validated by parol evidence.[69]

§ 1011. Writing Collateral to Issue

The rule against the admission of parol evidence to vary or contradict a written contract does not apply where the writing as to which it is sought to introduce the evidence is collateral to the issue involved and the action is not based on such writing.

The rule against the admission of parol evidence to vary or contradict a written contract does not apply where the writing as to which it is sought to introduce the evidence is collateral to the issue involved and the action is not based on such writing.[70] This exception to the parol evidence rule has been held applicable in cases where the action

Wilkinson, Iowa, 13 Wall. 222, 20 L.Ed. 617.

58. N.J.—Thomas v. Flanagan, 132 A. 305, 99 N.J.Eq. 198—Koperski v. Wira, 128 A. 382, 97 N.J.Eq. 88, affirmed 129 A. 185, 98 N.J.Eq. 377.
Okl.—Mann v. Brady, 196 P. 346, 80 Okl. 299.
S.D.—Ulvilden v. Sorken, 237 N.W. 565, 58 S.D. 466, 82 A.L.R. 1209.
22 C.J. p 1124 notes 27, 28, p 1186 note 94, p 1278 note 53.
Void judicial record see subdivision c of this section infra.

59. N.J.—Griffin v. New Jersey Oil Co., 11 N.J.Eq. 49.
Parol evidence to show mistake see supra § 978.

60. Miss.—Mayhaw Canning & Preserving Co. v. Cohen, 99 So. 896, 135 Miss. 378.
Mont.—Alderson v. Republican-Courier Co., 221 P. 544, 69 Mont. 271.
22 C.J. p 1279 note 55, p 1124 note 27 [c].

61. Cal.—Hancock v. Watson, 18 Cal. 137.
22 C.J. p 1279 note 56.

62. Pa.—Jourdan v. Jourdan, 9 Serg. & R. 268, 11 Am.D. 724.

63. U.S.—Western Surety Co. v. U. S., C.C.A.Cal., 72 F.2d 457.
Ill.—People v. Chicago & E. I. Ry. Co., 145 N.E. 714, 314 Ill. 382.
Mo.—State ex rel. McMillan v. Guinn, 274 S.W. 456, 309 Mo. 291.
Okl.—Schuman v. Campbell, 83 P.2d 549, 551, 183 Okl. 553, quoting **Corpus Juris.**
Vt.—Taylor v. Holcomb, 2 Tyler 344.
22 C.J. p 1279 note 60.

64. Ill.—Dunn v. Youmans, 79 N.E. 321, 224 Ill. 34.
Supplying omissions by parol evidence see supra § 1008.

65. Ga.—Stell v. Glass, 1 Ga. 475.
Ind.—Hammond Theatrical Co. v. Gregory, 194 N.E. 631, 208 Ind. 31.
Ky.—Turner v. Begely, 39 S.W.2d 504, 506, 239 Ky. 341, citing **Corpus Juris.**
Mo.—State ex rel. McMillan v. Guinn, 274 S.W. 456, 459, 309 Mo. 291, citing **Corpus Juris.**
22 C.J. p 1279 note 63, p 1280, note 67—34 C.J. p 506 notes 57, 58, 60.

66. U.S.—Ryan v. Staples, Colo., 76 F. 721, 23 C.C.A. 551, rehearing denied 78 F. 563, 23 C.C.A. 551, certiorari denied 17 S.Ct. 998, 166 U.S. 720, 41 L.Ed. 1186.
22 C.J. p 1280 note 64.

67. Tex.—San Antonio & A. P. R. Co. v. Brooking, Civ.App., 51 S.W. 537.
22 C.J. p 1280 note 65.

68. Mont.—Blaser v. Clinton Irr. Dist., 53 P.2d 1141, 1144, 100 Mont. 459, citing **Corpus Juris.**
22 C.J. p 1280 note 66.

69. Miss.—Bank of Richton v. Jones, 121 So. 823, 153 Miss. 796.
N.C.—McClure v. Crow, 146 S.E. 713, 196 N.C. 657.
22 C.J. p 1280 note 68.

70. U.S.—International Ticket Scale Corporation v. International Ticket Scale Corporation of Chicago, C.C.A.Ill., 56 F.2d 969.
Ala.—Tennessee Valley Bank v. Valley View Farm, 97 So. 62, 210 Ala. 123.
Cal.—Leeper v. Ginsberg, 85 P.2d 548, 29 Cal.App.2d 722.
Ga.—Monroe v. Guess, 154 S.E. 301, 41 Ga.App. 697—Saunders & McMullen v. Hudson, 119 S.E. 535, 30 Ga.App. 732—Carter-Moss Lumber Co. v. Lomax, 119 S.E. 534, 30 Ga.App. 718.
Ill.—Brady v. Marshall, 23 N.E.2d 764, 302 Ill.App. 151.
Mass.—Moskow v. Burke, 165 N.E. 416, 266 Mass. 286.
Mo.—Shapiro v. Childs Co., 17 S.W.2d 677, 222 Mo.App. 1126—Proctor

was not between the parties to the instrument,[71] in which case another exception to the rule is applicable, as shown supra § 861; and, although there is contrary authority,[72] the exception under consideration has also been held applicable where the parties to the action were the same as the parties to the writing.[73]

§ 1012. Writing Not Expressing Contract of Parties

Where the writing does not embody the contract between the parties to the controversy in which it is introduced, such contract resting in parol, the rule excluding parol evidence to vary a written instrument does not apply.

Where the writing is such that it does not embody the contract between the parties to the controversy in which it is introduced in evidence, such contract resting in parol, the rule excluding parol evidence to vary a written instrument does not apply, and the true contract may be shown.[74] Where a bill for relief alleges that a written contract between the parties to an action varies from their true agreement, and defendant admits that the contract does not express the agreement truly but sets up an agreement different from that alleged by plaintiff, the real contract may be established by parol evidence.[75]

§ 1013. Writing Not Expressing Entire Agreement

a. In general
b. Completeness of writing
c. Applications of rule

a. In General

Where only part of an agreement has been reduced to writing, parol evidence consistent with such written portion is admissible to prove the part resting in parol, provided the agreement is not one within the statute of frauds.

In order that the parol evidence rule may apply it is necessary ordinarily that there be a complete written contract between the parties of such a nature as to show that it was intended to evidence their whole agreement with reference to the subject matter,[76] and having the element of mutuality

v. Home Trust Co., 284 S.W. 156, 221 Mo.App. 577.

N.C.—Jones v. Raney Chevrolet Co., 9 S.E 2d 395, 217 N.C. 693—Chatham v. C. C. Disher Chevrolet Co., 1 S.E.2d 117, 215 N.C. 88—Hall v. Geissell & Richardson, 103 S.E. 392, 179 N.C. 657.

N.D.—Rott v. Provident Life Ins. Co., 298 N.W. 17, 70 N.D. 758.

Pa.—Davis v. Cauffiel, 135 A. 107, 287 Pa. 420—Hanauer v. National Surety Co., 123 A. 863, 279 Pa. 345.

S.C.—Knighton v. Des Portes Mercantile Co., 112 S.E. 343, 119 S.C. 340—Nauful v. National Loan & Exchange Bank of Columbia, 97 S.E. 843, 111 S.C. 309.

Tex.—Texas Hotel Supply Co. v. Lane, Civ.App., 32 S.W.2d 668—Continental Ins. Co. v. Scott, Civ. App., 254 S.W. 499.

22 C.J. p 1282 note 86.

Writings held not collateral within meaning of text rule.

Ala.—Liles v. Cox, 110 So. 716, 215 Ala. 327—Hamilton Furniture Co. v. Brenard Mfg. Co., 110 So. 153, 215 Ala. 187.

Pa.—Title Holding Co. v. Black, 159 A. 560, 306 Pa. 352.

Where suit was brought on account which was based on an unconditional agreement, defendant was properly denied the right to vary by parol the written terms of the agreement merely because the suit was not brought on the contract.—Wheelis v. D. Appleton & Co., 99 S.E. 11, 23 Ga.App. 563.

71. N.C.—Miles v. Walker, 102 S.E. 884, 179 N.C. 479.

22 C.J. p 1282 note 87.

72. Me.—Boody v. Goddard, 57 Me. 602.

73. Cal.—Campion v. Downey, 245 P. 1098, 1100, 77 Cal.App. 125, quoting **Corpus Juris.**

22 C.J. p 1282 note 89.

74. U.S.—Corral, Wodiska Y Ca, v. Anderson, Thorson & Co., C.C.A. Ill., 95 F.2d 11, certiorari denied 59 S.Ct. 72, 305 U.S. 613, 83 L.Ed. 390—Kunihiro v. Lyons Bros. Co., C.C.A.Cal., 12 F.2d 894, certiorari denied 47 S.Ct. 112, 273 U.S. 723, 71 L.Ed. 859—Kunihiro v. M. O. Coggins Co., C.C.A.Cal., 12 F.2d 894, certiorari denied 47 S.Ct. 112, 273 U.S. 723, 71 L.Ed. 859—Springsteen v. Lewis, Alaska, 259 F. 518, 171 C.C.A. 14.

Cal.—Smith v. Massachusetts Bonding & Insurance Co., 236 P. 176, 71 Cal.App. 661—Corison v. Williams, 208 P. 331, 58 Cal.App. 282.

Del.—Phœnix Finance Corporation v. Iowa-Wisconsin Bridge Co., Super., 16 A.2d 789

Ga.—Hall v. Wingate, 126 S.E. 796, 159 Ga. 630—Merritt v. Castleberry, 197 S.E. 75, 57 Ga.App. 891.

Mass.—Peerless Petticoat Co. v. Colpak-Van Costume Co., 173 N.E. 429, 273 Mass. 289—Sinclair v. Holden, 158 N.E. 753, 261 Mass. 412.

Mich.—Massachusetts Bonding & Insurance Co. v. Transamerican Freight Lines, 281 N.W. 584, 589, 286 Mich. 179, quoting **Corpus Juris.**

Mo.—Cantrell v. Burgess, App., 141 S.W.2d 200—Cunningham v. Holzmark, 37 S.W.2d 956, 225 Mo.App. 762, motion overruled 47 S.W.2d 1097, 225 Mo.App. 762.

Pa.—Saxman v. McCormick, 122 A. 296, 278 Pa. 268—Kreitman & Newman v. Gourvitz, 83 Pa.Super. 181.

S.D.—Knapp & Spencer Co. v. Daniels, 219 N.W. 479, 52 S.D. 612.

Wis.—Hoberg v. McNevins, 173 N.W. 221, 169 Wis. 486.

22 C.J. p 1283 note 91.

Applicability of parol evidence rule to noncontractual writings see supra § 928.

Confirmatory letter written by one of the parties after they had entered into an oral agreement for sale of wood, which letter did not completely state the terms of the contract, was merely evidentiary in part of what the contract was, and therefore subject to explanation by either party.—Motor Wheel Corporation v. Childs, 240 S.W. 417, 183 Ark. 178.

75. Ky.—Wells v. Hodges, 4 J.J. Marsh. 120.

Mich.—Massachusetts Bonding & Insurance Co. v. Transamerican Freight Lines, 281 N.W. 584, 589, 286 Mich. 179, quoting **Corpus Juris.**

76. U.S.—Anderson v. Missouri State Life Ins. Co., C.C.A.Ky., 69 F.2d 794—J. I. Case Threshing Mach. Co. v. Buick Motor Co., C. C.A.Mo., 39 F.2d 305—The Henry Kneeland, D.C.N.Y., 22 F.Cas.No. 13,282.

Ala.—Alabama Power Co. v. Pierre, 183 So. 665, 236 Ala. 521.

necessary to constitute a complete contract.[77] Where a written instrument, executed pursuant to a prior verbal agreement or negotiation, does not express the entire agreement or understanding of the parties, the parol evidence rule does not prevent the introduction of extrinsic evidence with reference to matters not provided for in the writing.[78] Under such circumstances it is not neces-

Ark.—Live Stock State Bank v. Forrest City Grocer Co., 266 S.W. 456, 166 Ark. 474.
Cal.—Yarbrough v. Rosenburg, 208 P. 1006, 58 Cal.App. 480.
Idaho.—Howell v. Blackfoot Creamery Co., 278 P. 1015, 1016, 47 Idaho 766, citing **Corpus Juris.**
La.—Levy v. Levy, 38 So. 155, 114 La. 239.
Mass.—Kesslen Shoe Co. v. Philadelphia Fire & Marine Ins. Co., 3 N.E.2d 257, 295 Mass. 123—Welch v. Bombardieri, 147 N.E. 595, 252 Mass. 84.
Mich.—Blue v. Gleaner Clearing House, 189 N.W. 29, 219 Mich. 620.
Pa.—Gianni v. R. Russel & Co., 126 A. 791, 281 Pa. 320—Colonial Mfg. Co. v. Carideo, 16 A.2d 731, 142 Pa.Super. 485.
S.D.—Janssen v. Tusha, 287 N.W. 501, 66 S.D. 604.
Utah.—Fox Film Corporation v. Ogden Theatre Co., 17 P.2d 294, 296, 82 Utah 279, citing **Corpus Juris.**
Wis.—Wulfers v. E. W. Clark Motor Co., 188 N.W. 652, 177 Wis. 497.
22 C.J. p 1105 note 5, p 1106 note 6.

77. Ala.—Stephenson Brick Co. v. Bessemer Engineering & Construction Co., 118 So. 570, 318 Ala. 325.
Ill.—Hood v. Polish National Alliance of U. S., 246 Ill.App. 137.
22 C.J. p 1106 note 7.
Noncontractual writings as within parol evidence rule see supra § 928.

78. U.S.—J. I. Case Threshing Mach. Co. v. Buick Motor Co., C.C.A.Mo., 39 F.2d 305, 307, quoting **Corpus Juris**—Harding v. Taubel, C.C.A.Pa., 1 F.2d 614—Burget v. Cranston, C.C.A.Ohio, 297 F. 32, certiorari denied 45 S.Ct. 94, 266 U.S. 610, 69 L.Ed. 466.
Ala.—Salvo v. Coursey, 124 So. 874, 220 Ala. 300—Woodall v. Malone-Harrison Motor Co., 122 So. 357, 219 Ala. 366—Morrison v. Jackson, 85 So. 573, 17 Ala.App. 338.
Ark.—City Nat. Bank v. Riggs, 66 S.W.2d 293, 188 Ark. 420—Magna Pipe Line Co. v. Ober, 24 S.W.2d 879, 880, 180 Ark. 1036, quoting **Corpus Juris**—Gray v. Brewer, 9 S.W.2d 81, 177 Ark. 486—Laney v. Faulkner County Hospital, 292 S.W. 364, 173 Ark. 402.
Cal.—Weil v. California Bank, 27 P.2d 904, 219 Cal. 538—Branch v. Bekins Van & Storage Co., 290 P. 146, 106 Cal.App. 623—Henika v. Lange, 203 P. 798, 55 Cal.App. 336.
Colo.—McCaffrey v. Mitchell, 56 P.2d 926, 57 P.2d 900, 98 Colo. 467.
Conn.—Hydro-Centrifugals v. Crawford Laundry Co., 147 A. 31, 110 Conn. 49—De Santo v. Burkle, 138 A. 788, 106 Conn. 677—O'Hara v. Hartford Oil Heating Co., 138 A. 438, 106 Conn. 468—Asbestos Products Corporation v. Matson, 116 A. 680, 97 Conn. 381.
Fla.—U. S. Rubber Products v. Clark, 200 So. 385—McClure v. Century Estates, 120 So. 4, 10, 96 Fla. 568, quoting **Corpus Juris,** and followed in Hall v. University Realty Co., 121 So. 808, 97 Fla. 639.
Ga.—Roberts v. Investors' Sav. Co., 113 S.E. 398, 154 Ga. 45—North Georgia Lumber Co. v. Lawson, 150 S.E. 865, 40 Ga.App. 680—McCreary v. Acton, 114 S.E. 230, 29 Ga.App. 162—Westbrook v. Griffin, 102 S.E. 453, 24 Ga.App. 808.
Iowa.—R. P. Andreas & Son v. Hempy, 276 N.W. 791, 794, 224 Iowa 561, quoting **Corpus Juris**—Smith, Landeryou & Co. v. Hollingsworth, 251 N.W. 749, 218 Iowa 920—Sol Popofsky Co. v. Wearmouth, 248 N.W. 358, 360, 216 Iowa 114, quoting **Corpus Juris.**
Kan.—Haston v. Citizens' State Bank of Sterling, 297 P. 1061, 132 Kan. 767—Kirk v. First Nat. Bank, 295 P. 703, 132 Kan. 404—Mayse v. Grieves, 285 P. 630, 130 Kan. 96—Robben v. Farmers' Co-op. Co., 278 P. 10, 128 Kan. 310—Handrub v. Griffin, 275 P. 196, 127 Kan. 732.
Ky.—Bullock v. Young, 67 S.W.2d 941, 252 Ky. 640—Turner Elkhorn Coal Co. v. Smith, 291 S.W. 715, 218 Ky. 503—Pickrell & Craig Co. v. Bollinger-Babbage Co., 264 S.W. 737, 204 Ky. 314—Tross v. Bills' Ex'x, 224 S.W. 660, 189 Ky. 115—White Sewing Mach. Co. v. Smith, 222 S.W. 81, 188 Ky. 407.
La.—Hamill v. Moore, 193 So. 715, 194 La. 486.
Mass.—Kesslen Shoe Co. v. Philadelphia Fire & Marine Ins. Co., 3 N.E.2d 257, 295 Mass. 123—Stearns v. Warren, 187 N.E. 599, 284 Mass. 268—Woolf v. Ashman, 183 N.E. 888, 281 Mass. 543.
Mich.—Labadie v. Boehle, 284 N.W. 707, 288 Mich. 223.
Minn.—Cargill Commission Co. v. Swartwood, 198 N.W. 536, 159 Minn. 1—Independent Harvester Co. v. Malzohn, 179 N.W. 727, 147 Minn. 145.
Mo.—Charles A. Liemke Co. v. Kreeler Grocer Co., 95 S.W.2d 820, 231 Mo.App. 169.
N.Y.—Hendricks v. Clements, 186 N.Y.S. 378, 195 App.Div. 144—Ragette v. R. C. Maxwell Co., 177 N.Y.S. 225, 188 App. Div. 715—Behrman v. Linde, 47 Hun 530, 15 N.Y.St. 129—V. Valente, Inc., v. Mascitti, 295 N.Y.S. 330, 163 Misc. 287.
N.C.—Boone v. Boone, 9 S.E.2d 383, 217 N.C. 722—Jefferson Standard Life Ins. Co. v. Morehead, 183 S.E. 606, 209 N.C. 174—Dawson v. Wright, 181 S.E. 264, 208 N.C. 418—Byrd v. Tide Water Power Co., 172 S.E. 183, 205 N.C. 589—Kindler v. Wachovia Bank & Trust Co., 167 S.E. 811, 204 N.C. 198—Standard Crown Co. v. Jones, 145 S.E. 5, 196 N.C. 208—National Bank of Suffolk v. Winslow, 137 S.E. 320, 193 N.C. 470—Hite v. Aydlett, 134 S.E. 419, 192 N.C. 166—Miller v. Farmers' Federation, 134 S.E. 407, 192 N.C. 144—Garland v. Linville Improvement Co., 115 S.E. 164, 184 N.C. 551—Henderson v. Forrest, 114 S.E. 391, 184 N.C. 230.
Okl.—Brazelton's Wholesale Cleaners & Dyers v. Cash, 78 P.2d 810, 182 Okl. 493—Starmer v. Mid-West Chevrolet Corporation, 51 P.2d 786, 175 Okl. 160—Mid-West Chevrolet Corporation v. Noah, 48 P.2d 283, 173 Okl. 198—Wichita Flour Mills Co. v. Guymon Equity Exchange, 1 P.2d 657, 150 Okl. 245—National Builders' Bureau v. Chickasaw Lumber Co., 264 P. 907, 130 Okl. 30—Britton v. Johnson-McQuity Motor Co., 251 P. 74, 120 Okl. 221—City Nat. Bank of McAlester v. Edwards, 229 P. 487, 100 Okl. 202—Edwards v. City Nat. Bank of McAlester, 201 P. 233, 83 Okl. 204—Stone v. Spencer, 191 P. 197, 79 Okl. 85.
Or.—Johns-Manville Corporation v. Heckart, 277 P. 821, 129 Or. 505—McDonald v. Supple, 190 P. 315, 96 Or. 486.
Pa.—Kisinger v. Pennsylvania Trust Co. of Pittsburgh, 180 A. 79, 119 Pa.Super. 16—Knapp Bros. Mfg. Co. v. Robinson Electrical Co., 157 A. 11, 103 Pa.Super. 463.
S.C.—Gladden v. Keistler, 140 S.E. 161, 165, 141 S.C. 524, quoting **Corpus Juris**—Maxwell v. Standard Furniture Co., 120 S.E. 834, 127 S.C. 225.
S.D.—Clark v. Weiland, 227 N.W. 193, 55 S.D. 644.
Tenn.—First Nat. Bank of Fayetteville v. Ashby, 2 Tenn.App. 666.
Tex.—Bell v. Mulkey, Com.App., 16 S.W.2d 287, affirming, Civ.App., 7 S.W.2d 115—Martin v. Hemphill, Com.App., 237 S.W. 550, reversing Civ.App., 221 S.W. 333—West Texas Utilities Co. v. Ellis, Civ.App., 102 S.W.2d 234, reversed on other grounds 126 S.W.2d 13, 133 Tex. 104—Watson v. Magnolia Petroleum Co., Civ.App., 81 S.W.2d 138, 140, citing **Corpus Juris**—Moore v.

sary that there should be any allegations of fraud, accident, or mistake in order to render parol evidence as to the real contract between the parties admissible.[79]

Consistency of extrinsic evidence with writing. In the case of an incomplete writing, or a contract which is partly in writing and partly in parol, the written part cannot be varied by parol evidence in the absence of fraud, accident, or mistake; the parts of the agreement proposed to be proved by parol must not be inconsistent with, or repugnant to, the intention of the parties as shown by the written instrument.[80]

B. & M. Chevrolet Co., Civ.App., 72 S.W.2d 945—Chadwick Machinery Co. v. Kelley, Civ.App., 60 S.W.2d 555—Blaylock v. Sheffield Rubber Products Corporation, Civ.App., 56 S.W.2d 227—Jackson v. Hughes, Civ.App., 52 S.W.2d 687, reversed on other grounds Hughes v. Jackson, Com.App., 81 S.W.2d 656—Atlanta Motor Co. v. Duncan, Civ. App., 1 S.W.2d 749—Towler v. Chambers, Civ.App., 299 S.W. 272—Bussey v. Davis, Civ.App., 276 S. W. 779—Willis v. First Nat. Bank, Civ.App., 262 S.W. 851—Waggoner v. Magnolia Petroleum Co., Civ. App., 252 S.W. 865—Foster v. Wright, Civ.App., 217 S.W. 1090.

Wash.—Sears, Roebuck & Co. v. Nicholas, 97 P.2d 633, 2 Wash.2d 128—P. S. Wick Co. v. Du Barry, 293 P. 447, 159 Wash. 380—Gaffney v. O'Leary, 283 P. 1091, 155 Wash. 171.

W.Va.—Corns-Thomas Engineering & Construction Co. v. McDowell County Court, 115 S.E. 462, 92 W. Va. 368.

22 C.J. p 1283 note 93.

Admission of prior or contemporaneous collateral agreement when writing incomplete see supra § 999.

Agreement partly written and partly oral see Contracts § 59.

Supplying omissions by parol see supra §§ 1008, 1009.

Additional terms in acceptance

When a written proposal is made and accepted, it is permissible to show that accompanying the acceptance, and in reality forming part of it, were terms in addition to those set forth in the proposal.—Lawrence v. Premier Indemnity Assur. Co., 182 P. 431, 180 Cal. 688.

Executed oral agreement

Under statutes providing that a written agreement may be modified by an executed oral agreement, where parties first execute a portion of their engagement and then commit the remainder to writing, parol evidence of the part executed is admissible.—Webber v. Killorn, 212 P. 852, 66 Mont. 130.

79. Tex.—Morgan v. Steinberg, Civ. App., 23 S.W.2d 527, 533, citing **Corpus Juris**—Cummings v. Moore, 65 S.W. 1113, 27 Tex.Civ.App. 555.

80. Cal.—Davis v. Stanislaus County Farmers' Union, 238 P. 95, 72 Cal.App. 698.

Conn.—O'Hara v. Hartford Oil Heating Co., 138 A. 438, 106 Conn. 468.

Fla.—Atwell v. Western Fire Ins. Co. of Fort Scott, Kan., 163 So. 27, 120 Fla. 694—Florida Moss Products Co. v. City of Leesburg, 112 So. 572, 93 Fla. 656.

Ga.—Young v. Young, 104 S.E. 149, 150 Ga. 515—North Georgia Lumber Co. v. Lawson, 150 S.E. 865, 40 Ga.App. 680—Robinson v. Odom, 133 S.E. 53, 35 Ga.App. 262—Rauschenberg v. Peeples, 118 S.E. 409, 30 Ga.App. 384—McCreary v. Acton, 114 S.E. 230, 29 Ga.App. 162.

Iowa.—Sol Popofsky Co. v. Wearmouth, 248 N.W. 358, 216 Iowa 114.

Ky.—World Fire & Marine Ins. Co. v. Rivard, 76 S.W.2d 264, 256 Ky. 457—Fannin v. Williams, 21 S.W. 2d 482, 231 Ky. 392—Pickrell & Craig Co. v. Bollinger-Babbage Co., 264 S.W. 737, 204 Ky. 314—Tross v. Bills' Ex'x, 224 S.W. 660, 189 Ky. 115—White Sewing Machine Co. v. Smith, 222 S.W. 81, 188 Ky. 407.

Mich.—Gorsche v. First Nat. Bank, 206 N.W. 992, 233 Mich. 428.

Minn.—Merchants' Nat. Bank of Detroit v. Bryngelson, 199 N.W. 905, 160 Minn. 205—Cargill Commission Co. v. Swartwood, 198 N.W. 536, 159 Minn. 1—Marshall Milling Co. v. Hintz-Cameron Co., 194 N.W. 772, 156 Minn. 301—Independent Harvester Co. v. Malzohn, 179 N.W. 727, 147 Minn. 145.

Mo.—Lion Match Co. v. Hess, App., 253 S.W. 108.

Neb.—Smith v. Bailey, 181 N.W. 926, 927, 105 Neb. 754, citing **Corpus Juris.**

N.Y.—Hendricks v. Clements, 186 N. Y.S. 378, 195 App.Div. 144—Schwartzman v. Pines Rubber Co., 179 N.Y.S. 284, 189 App.Div. 749—Robertson v. Schoonmaker, 285 N. Y.S. 204, 158 Misc. 627—Beechwood Gun Club v. City of Beacon, 275 N.Y.S. 249, 153 Misc. 358, affirmed 275 N.Y.S. 219, 242 App.Div. 761—Lynch v. Harrer, 263 N.Y.S. 640—Goldman v. Bloom, 175 N.Y.S. 793.

N.C.—Boone v. Boone, 9 S.E.2d 383, 217 N.C. 722—Jefferson Standard Life Ins. Co. v. Morehead, 183 S. E. 606, 209 N.C. 174—Dawson v. Wright, 181 S.E. 264, 208 N.C. 418—Byrd v. Tide Water Power Co., 172 S.E. 183, 205 N.C. 589—Kindler v. Wachovia Bank & Trust Co., 167 S.E. 811, 204 N.C. 198—Standard Crown Co. v. Jones, 145 S.E. 5, 196 N.C. 208—National Bank of Suffolk v. Winslow, 137 S.E. 320, 193 N.C. 470—Hite v. Aydlett, 134 S.E. 419, 192 N.C. 166—Miller v. Farmers' Federation, 134 S.E. 407, 192 N. C. 144—Henderson v. Forrest, 114 S.E. 391, 184 N.C. 230.

Okl.—Safety Cab Co. v. Fair, 74 P.2d 607, 181 Okl. 264—First Nat. Bank v. Beatty, 45 P.2d 158, 172 Okl. 47—West v. Anderson, 42 P.2d 548, 171 Okl. 165—Wichita Flour Mills Co. v. Guymon Equity Exchange, 1 P.2d 657, 150 Okl. 245—National Builders' Bureau v. Chickasaw Lumber Co., 264 P. 907, 130 Okl. 30—First State Bank of Hartshorne v. Southwest Nat. Bank of Oklahoma City, 257 P. 382, 127 Okl. 10—Britton v. Johnson-McQuity Motor Co., 251 P. 74, 120 Okl. 221—Stone v. Spencer, 191 P. 197, 79 Okl. 85.

Or.—McDonald v. Supple, 190 P. 315, 96 Or. 486.

Pa.—Kisinger v. Pennsylvania Trust Co. of Pittsburgh, 180 A. 79, 119 Pa. Super. 16.

S.C.—Maxwell v. Standard Furniture Co., 120 S.E. 834, 127 S.C. 225—Stalnaker v. Tolbert, 114 S.E. 412, 121 S.C. 437.

Tenn.—Gibson County v. Fourth & First Nat. Bank, 96 S.W.2d 184, 20 Tenn.App. 168.

Tex.—Bates v. Lefforge, Com.App., 63 S.W.2d 360, reversing, Civ.App., 42 S.W.2d 806—Hunt v. Bagwell, Civ. App., 111 S.W.2d 312, error refused—Robert & St. John Motor Co. v. Bumpass, Civ.App., 65 S.W.2d 399, error dismissed—Blaylock v. Sheffield Rubber Products Corporation, Civ.App., 56 S.W.2d 227—Jackson v. Hughes, Civ.App., 52 S.W.2d 687, reversed on other grounds Hughes v. Jackson, Com.App., 81 S.W.2d 656.

Va.—Harvey v. Richmond, F. & P. Ry. Co., 173 S.E. 351, 162 Va. 49, 92 A.L.R. 240.

Wash.—Sears, Roebuck & Co. v. Nicholas, 97 P.2d 633, 2 Wash.2d 128—P. S. Wick Co. v. Du Barry, 293 P. 447, 159 Wash. 380—Gaffney v. O'Leary, 283 P. 1091, 155 Wash. 171.

22 C.J. p 1105 note 99, p 1283 note 93 [e], p 1290 note 60.

Reason for rule

To receive parol proof of a part not reduced to writing, which is directly repugnant to the intention of the parties as expressed in the written instrument, would contravene the rule that parol evidence cannot

Effect of statute of frauds. The rule permitting resort to parol evidence to supply the omitted stipulation of an incomplete contract applies only in cases unaffected by the statute of frauds.[81] If the subject matter of the contract is within the statute of frauds, and the contract or memorandum is deficient in some one or more of those essentials required by the statute, parol evidence cannot be received to supply the defects, for this would be to do the very thing prohibited by the statute.[82]

Questions for court or jury. The question whether the parties intended to express the whole of their agreement in the written contract, so far as it relates to the admission or rejection of parol evidence, is for the court,[83] but the ultimate determination of the rights of the parties as depending on whether or not the entire agreement is contained in the writing is for the jury.[84]

b. Completeness of Writing

The intent of the parties and the writing itself must be considered in determining whether the writing is incomplete and therefore subject to be supplemented by parol evidence. The authorities do not entirely agree as to whether the incompleteness of the writing must appear on its face.

With respect to the admission of parol evidence, whether a writing will be considered to express the complete agreement of the parties depends on the intent of the parties[85] and the contents of the writing.[86] A writing which does not purport to include all the terms of the agreement between the parties, or which shows incompleteness on mere inspection of its face, may be enlarged by parol or extrinsic evidence to show the entire agreement.[87] Converse-

be received to contradict or vary the terms of a written agreement.
S.C.—Gladden v. Keistler, 140 S.E. 161, 165, 141 S.C. 524, quoting **Corpus Juris.**
Tex.—First State Bank of Otto v. Cohn, Civ.App., 247 S.W. 923, 925, quoting **Corpus Juris.**
22 C.J. p 1290 note 60.

81. N.C.—Jefferson Standard Life Ins. Co. v. Morehead, 183 S.E. 606, 209 N.C. 174—Dawson v. Wright, 181 S.E. 264, 208 N.C. 418—Kindler v. Wachovia Bank & Trust Co., 167 S.E. 811, 204 N.C. 198—Standard Crown Co. v. Jones, 145 S.E. 5, 196 N.C. 208—Hite v. Aydlett, 134 S.E. 419, 192 N.C. 166—Garland v. Linville Improvement Co., 115 S.E. 164, 184 N.C. 551—Henderson v. Forrest, 114 S.E. 391, 184 N.C. 230.
Tex.—Geo. S. Allison & Sons v. Hamic, Com.App., 260 S.W. 1037, affirming Hamic v. George S. Allison & Sons, Civ.App., 247 S.W. 918—Poe v. Poe, Civ.App., 118 S.W.2d 831, 835, quoting **Corpus Juris.**
Wash.—Martinson v. Cruikshank, 101 P.2d 604, 605, 3 Wash.2d 565, quoting **Corpus Juris.**
Parol evidence as affected by statute of frauds generally see the C.J.S. title Frauds, Statute of, §§ 281–283, also 27 C.J. p 381 note 64—p 385 note 22.

82. U.S.—Jacobs v. Merchants Fire Assur. Corporation of New York, C.C.A.Ga., 99 F.2d 655, certiorari denied 59 S.Ct. 643, 306 U.S. 654, 83 L.Ed. 1052.
Ga.—Robinson v. Odom, 133 S.E. 53, 35 Ga.App. 262.
N.Y.—Diamond v. Talbot, 295 N.Y.S. 309, 123 Misc. 339.
Tex.—Poe v. Poe, Civ.App., 118 S.W.2d 831, 835, quoting **Corpus Juris.**
Wash.—Martinson v. Cruikshank, 101 P.2d 604, 605, 3 Wash.2d 565, quoting **Corpus Juris**.—Black v. Milliken, 255 P. 101, 143 Wash. 204.
22 C.J. p 1290 note 59.

83. U.S.—South Florida Lumber Mills v. Breuchaud, C.C.A.Fla., 51 F.2d 490, certiorari denied 284 U.S. 659, 52 S.Ct. 37, 76 L.Ed. 558.
Cal.—Weil v. California, 27 P.2d 904, 219 Cal. 538—Heffner v. Gross, 178 P. 860, 179 Cal. 738.
Kan.—Brown v. Oliver, 256 P. 1008, 123 Kan. 711.
22 C.J. p 1291 note 61.

84. Mass.—MacDonald v. Kavanaugh, 156 N.E. 740, 259 Mass. 439.
22 C.J. p 1291 note 62.

85. Conn.—Cohn v. Dunn, 149 A. 851, 111 Conn. 342, 70 A.L.R. 740.
Ga.—Robinson v. Odom, 133 S.E. 53, 35 Ga.App. 262.
Md.—Winslow v. Atz, 177 A. 272, 168 Md. 230.
Pa.—McCormick v. Harris, 196 A. 885, 130 Pa.Super. 175—Kisinger v. Pennsylvania Trust Co. of Pittsburgh, 180 A. 79, 119 Pa.Super. 16.
Wis.—Danielson v. Bank of Scandinavia, 230 N.W. 83, 201 Wis. 392, 70 A.L.R. 746.
Completeness of writing as affecting admissibility of collateral oral agreements see supra § 999.

86. N.J.—Marcus & Co. v. K. L. G. Baking Co., 3 A.2d 627, 122 N.J. Law 202.
Wis.—Stuart v. Crowley, 217 N.W. 719, 195 Wis. 47.

Tests of completeness

(1) Test of completeness of written contract is the writing itself.
Minn.—Osterberg v. Section 30 Development Co., 200 N.W. 738, 160 Minn. 497—Cargill Commission Co. v. Swartwood, 198 N.W. 536, 159 Minn. 1.
Neb.—Dawson County State Bank v. Durland, 209 N.W. 243, 114 Neb. 605.
22 C.J. p 1289 note 51 [a].

(2) The most satisfactory method of determining whether a written instrument represents the agreement of the parties as to a particular element is to observe whether such element is dealt with in the writing; if it is dealt with, then presumably the writing was intended to express the parties' agreement as to such element; if not, then probably the writing was not intended to embody that element of the negotiation.
Ky.—Bullock v. Young, 67 S.W.2d 941, 252 Ky. 640.
N.J.—Kessler v. Troast, 138 A. 371, 101 N.J.Eq. 536.
Pa.—McCormick v. Harris, 196 A. 885, 130 Pa.Super. 175.

Writings held not to constitute parties' complete agreement

Ark.—Singer Sewing Mach. Co. v. Cole, 63 S.W.2d 977, 187 Ark. 1017.
Cal.—Weil v. California Bank, 27 P.2d 904, 219 Cal. 538—Wilkins v. Finnell, 245 P. 799, 77 Cal.App. 1.
Kan.—Brown v. Oliver, 256 P. 1008, 123 Kan. 711.
Minn.—Osterberg v. Section 30 Development Co., 200 N.W. 738, 160 Minn. 497.
Mo.—Chouteau v. Missouri-Lincoln Trust Co., 276 S.W. 49, 310 Mo. 665—Levine v. Hochman, 273 S.W. 204, 217 Mo.App. 76.
Or.—Klinge v. Farris, 273 P. 954, 128 Or. 142, affirming 268 P. 748, 128 Or. 142.

87. Ala.—Means v. Blanks, 84 So. 741, 203 Ala. 479.
Cal.—Crawford v. France, 27 P.2d 645, 219 Cal. 439—Kohl v. Lytle Creek Water & Improvement Co., 75 P.2d 71, 24 Cal.App.2d 353—Yarbrough v. Rosenburg, 208 P. 1006, 58 Cal.App. 480.
Colo.—Elder v. Eastwood, 216 P. 542, 73 Colo. 489.
Conn.—Fernandez v. Thompson, 132 A. 895, 104 Conn. 366.

ly, if the writing on its face purports to express the whole agreement, parol evidence is generally held inadmissible to add another term thereto,[88] even though the writing is silent as to the particular term sought to be established by the parol evidence.[89] It has been indicated by some authorities, however, that the incompleteness of the writing need not necessarily appear on its face, and that an omission of a portion of the agreement may be shown by parol;[90] and thus it has been held permissible to inquire into the surrounding circum-

D.C.—Wardman v. Hanlon, 280 F. 988, 52 App.D.C. 14.
Fla.—Everglade Lumber Co. v. Nettleton Lumber Co., 149 So. 736, 111 Fla. 333—McClure v. Century Estates, 120 So. 4, 96 Fla. 568, followed in Hall v. University Realty Co., 121 So. 808, 97 Fla. 639—Florida Moss Products Co. v. City of Leesburg, 112 So. 572, 93 Fla. 656.
Ga.—Roberts v. Investors' Sav. Co., 113 S.E. 398, 154 Ga. 45—Young v. Young, 104 S.E. 149, 150 Ga. 515—Robinson v. Odom, 133 S.E. 53, 35 Ga.App. 262—Westbrook v. Griffin, 102 S.E. 453, 24 Ga.App. 808.
Kan.—Loflin v. Ault, 87 P.2d 524, 149 Kan. 340—Whitacre v. State Bank of Keats, 26 P.2d 584, 138 Kan. 313—Kinsley Milling Co. v. Wait, 213 P. 160, 112 Kan. 809—Shire v. Farmers' State Bank of Eustis, Neb., 213 P. 159, 112 Kan. 690.
Ky.—World Fire & Marine Ins. Co. v. Rivard, 76 S.W.2d 264, 256 Ky. 457—Bullock v. Young, 67 S.W.2d 941, 252 Ky. 640—Fannin v. Williams, 21 S.W.2d 482, 231 Ky. 392—Pickrell & Craig Co. v. Bollinger-Babbage Co., 264 S.W. 737, 204 Ky. 314—Tross v. Bills' Ex'x, 224 S.W. 660, 189 Ky. 115—White Sewing Machine Co. v. Smith, 222 S.W. 81, 188 Ky. 407.
Minn.—Harding v. Texoleum Co., 191 N.W. 394, 154 Minn. 55.
Mo.—St. Louis Auto Parts & Salvage Co. v. Indiana Auto Salvage Co., App., 89 S.W.2d 134—Goodspeed v. Grand Nat. Bank, App., 46 S.W.2d 913—Renfro v. Lazerine, App., 298 S.W. 1067—Eggimann v. Houck, App., 240 S.W. 478—Morris v. Mahn, 235 S.W. 827, 208 Mo.App. 575—Bagnall v. Frank Fehr Brewing Co., 221 S.W. 793, 203 Mo.App. 635.
N.J.—Marcus & Co. v. K. L. G. Baking Co., 3 A.2d 627, 122 N.J.Law 202.
N.Y.—Obrey v. Collins, 200 N.Y.S. 175, 121 Misc. 93—Goldman v. Bloom, 175 N.Y.S. 793.
Ohio.—Morris v. Retail Clerks' International Protective Ass'n, Local No. 450, App., 33 N.E.2d 851, appeal dismissed 30 N.E.2d 993, 137 Ohio St. 540.
Okl.—First Nat. Bank v. Beatty, 45 P.2d 158, 172 Okl. 47—West v. Anderson, 42 P.2d 543, 171 Okl. 165.
S.C.—Midland Timber Co. v. Furman, 97 S.E. 831, 111 S.C. 287.
Tex.—Morgan v. Steinberg, Civ.App., 23 S.W.2d 527—Miller v. Wilson, Civ.App., 258 S.W. 540—Pyron v. Brownfield, Civ.App., 238 S.W. 725—D. Sullivan & Co. v. Schreiner, Civ.App., 222 S.W. 314, error refused.
Va.—King v. Commercial Finance Co., 175 S.E. 733, 163 Va. 260—Harvey v. Richmond, F. & P. Ry. Co., 173 S.E. 351, 162 Va. 49, 92 A.L.R. 240.
W.Va.—Corns-Thomas Engineering & Construction Co. v. McDowell County Court, 115 S.E. 462, 92 W.Va. 368.
Wis.—Dunn & Stringer Inv. Co. v. Schaefer, 245 N.W. 85, 209 Wis. 299—Wulfers v. E. W. Clark Motor Co., 188 N.W. 652, 177 Wis. 497.

88. U.S.—Wells Fargo Bank & Union Trust Co. v. McDuffie, C.C.A. Cal., 71 F.2d 720, certiorari denied McDuffie v. Wells Fargo Bank & Union Trust Co., 55 S.Ct. 346, 293 U.S. 626, 79 L.Ed. 713—Hazen Mfg. Co. v. Wareham, Mich., 242 F. 642, 155 C.C.A. 332.
Ala.—W. T. Rawleigh Co. v. Phillips, 167 So. 271, 232 Ala. 124.
Ariz.—Stewart v. Southwest Cotton Co., 2 P.2d 1041, 1042, 38 Ariz. 547, citing **Corpus Juris.**
Cal.—Davis v. Stanislaus County Farmers' Union, 238 P. 95, 72 Cal. App. 698.
Idaho.—Milner v. Earl Fruit Co. of Northwest, 232 P. 581, 40 Idaho 339—Hurt v. Monumental Mercury Mining Co., 206 P. 184, 35 Idaho 295.
Ill.—North Avenue State Bank v. Nichols, 252 Ill.App. 366.
Mo.—Marshall Hall Grain Co. v. P. H. Boyce Mercantile Co., 211 S.W. 725, 203 Mo.App. 220.
N.J.—Downs v. Jersey Central Power & Light Co., 174 A. 887, 117 N.J. Eq. 138, affirming 170 A. 835, 115 N.J.Eq. 348.
N.Y.—Ruppert v. Singhi, 153 N.E. 33, 243 N.Y. 156, reversing 214 N.Y.S. 912, 216 App.Div. 737—Electric Equipment Corporation v. Delco Appliance Corporation, 297 N.Y.S. 498, 252 App.Div. 1—William H. Waters, Inc., v. March, 269 N.Y.S. 420, 240 App.Div. 120—Hendricks v. Clements, 186 N.Y.S. 378, 195 App.Div. 144—Robertson v. Schoonmaker, 285 N.Y.S. 204, 158 Misc. 627—Gulickson v. Seglin Const. Co., 273 N.Y.S. 908, 152 Misc. 624—Johnson v. State, 175 N.Y.S. 234, 104 Misc. 201, affirmed 175 N.Y.S. 784, 188 App.Div. 33—Lynch v. Harrer, 263 N.Y.S. 640.
Pa.—Gianni v. R. Russel & Co., 126 A. 791, 281 Pa. 320—Colonial Mfg. Co. v. Carideo, 16 A.2d 731, 142 Pa. Super. 485—Goodrich Co. v. Litwak, 8 Sch.Reg. 100.
Tex.—Guarantee Life Ins. Co. v. Davidson, Com.App., 234 S.W. 883, reversing Davidson v. Guarantee Life Ins. Co., Civ.App., 220 S.W. 582—Alamo Lumber Co. v. Fahrenthold, Civ.App., 58 S.W.2d 1085, error refused.
Vt.—Freegard v. Bingham, 187 A. 801, 108 Vt. 404.
Va.—Wood v. Southern Shale Brick Corporation, 4 S.E.2d 360, 173 Va. 364—Harvey v. Richmond, L. & P. Ry. Co., 173 S.E. 351, 162 Va. 49, 92 A.L.R. 240.
Wash.—Alaska Pac. Salmon Co. v. Matthewson, 101 P.2d 606, 3 Wash. 2d 560.
W.Va.—Braude & McDonnell v. Isadore Cohen Co., 106 S.E. 52, 87 W. Va. 763.
Wyo.—Bushnell v. Elkins, 245 P. 304, 34 Wyo. 495, 51 A.L.R. 13.
22 C.J. p 1289 note 51, p 1290 note 52.

Presumption

A writing which appears on its face to be complete is presumed to embody the entire agreement between the parties.
Cal.—Shelley v. Byers, 238 P. 177, 73 Cal.App. 44.
Me.—Johnson v. Burnham, 115 A. 261, 120 Me. 491.
W.Va.—Braude & McDonnell v. Isadore Cohen Co., 106 S.E. 52, 87 W. Va. 763.

89. Cal.—California Jewelry Co. v. Provident Loan Ass'n, 45 P.2d 271, 6 Cal.App.2d 506—Davis v. Stanislaus County Farmers' Union, 238 P. 95, 72 Cal.App. 698.
Ill.—Decatur Lumber & Mfg. Co. v. Crail, 183 N.E. 228, 350 Ill. 319, reversing 264 Ill.App. 244—Sterling-Midland Coal Co. v. Great Lakes Coal & Coke Co., 165 N.E. 793, 334 Ill. 281—Armstrong Paint & Varnish Works v. Continental Can Co., 133 N.E. 711, 301 Ill. 102, reversing 220 Ill.App. 90.
Minn.—Hoy v. Nichols, 212 N.W. 530, 170 Minn. 191.
Tex.—Guarantee Life Ins. Co. v. Davidson, Com.App., 234 S.W. 883, reversing, Davidson v. Guarantee Life Ins. Co., Civ.App., 220 S.W. 582.
22 C.J. p 1289 note 51 [a].

90. Colo.—McCaffrey v. Mitchell, 56 P.2d 926, 57 P.2d 900, 98 Colo. 467.
Kan.—Lucas v. Individual Mausoleum Co., 5 P.2d 1077, 1078, 134 Kan. 266, citing **Corpus Juris.**

stances, the conduct of the parties, and their oral negotiations, to determine whether the parties intended the writing to express their entire agreement or only a part of it.[91] A possible reconciliation of these apparently divergent views is found in the theory enunciated in some cases that the intention of the parties is to be gathered from the writing itself, considered in the light of its subject matter and the surrounding circumstances,[92] and there are cases which, although stating that the test of completeness is the instrument itself, also contain expressions indicating that the surrounding circumstances and the purpose of the instrument may be considered.[93]

Statement in writing as to completeness. Express statements in a writing that the writing embodies the whole agreement of the parties, or that no representations or promises have been made other than those set forth, are usually held to indicate conclusively the parties' intent to have the writing express their entire agreement.[94] However, such a provision has been held not to exclude parol evidence of the true import of a contract where the written part is in fact incomplete and the meaning thereof is not manifest on its face.[95]

Terms supplied by presumption or implication. The omission of a detail does not render a writing incomplete where the detail omitted can be supplied by legal presumption[96] or implication.[97]

Pleadings. Where a party in his pleadings relies solely on an alleged written contract between himself and the other party, he is bound by his pleading and cannot object to treatment of the writing as the whole contract of the parties; hence he cannot introduce parol evidence to vary such contract.[98]

c. Applications of Rule

(1) Writings within rule
(2) Subject matter of parol testimony

(1) Writings within Rule

The rule admitting parol or extrinsic evidence in the case of writings not expressing the entire agreement has been applied in connection with many instruments, including bills and notes, contracts, deeds, insurance policies, leases, letters, and mortgages.

In applying the rules stated in subdivisions a and b of this section it has been held permissible to introduce evidence of matters resting in parol in cases where the portion of the agreement between the parties consisted of, or related to, such instruments or matters as assignments;[99] bills and notes;[1]

Wis.—In re Petzold's Estate, 265 N.W. 87, 220 Wis. 297.
22 C.J. p 1290 note 53.

91. Conn.—Hydro-Centrifugals v. Crawford Laundry Co., 147 A. 31, 110 Conn. 49—Reader v. Grossman, 119 A. 52, 98 Conn. 283.
Ga.—Young v. Young, 104 S.E. 149, 150 Ga. 515.
Kan.—Brown v. Oliver, 256 P. 1008, 123 Kan. 711.
Wis.—In re Petzold's Estate, 265 N.W. 87, 220 Wis. 297—Danielson v. Bank of Scandinavia, 230 N.W. 83, 201 Wis. 392, 70 A.L.R. 746.

92. U.S.—J. I. Case Threshing Mach. Co. v. Buick Motor Co., C.C.A.Mo., 39 F.2d 305, 307, quoting **Corpus Juris.**
Mich.—Massachusetts Bonding & Insurance Co. v. Transamerican Freight Lines, 281 N.W. 584, 591, 286 Mich. 179, quoting **Corpus Juris.**
22 C.J. p 1290 note 54.

93. U.S.—J. I. Case Threshing Mach. Co. v. Buick Motor Co., C.C.A.Mo., 39 F.2d 305, 307, quoting **Corpus Juris.**
Ga.—Robinson v. Odom, 133 S.E. 53, 35 Ga.App. 262.
Minn.—Taylor v. More, 263 N.W. 537, 195 Minn. 448—Osterberg v. Section 30 Development Co., 200 N.W. 738, 160 Minn. 497.
Pa.—Kisinger v. Pennsylvania Trust Co. of Pittsburgh, 180 A. 79, 119 Pa.Super. 16.
22 C.J. p 1290 note 55.
"While the only criterion of the completeness of a written contract is the writing itself, the incompleteness need not appear on the face of the document from a mere inspection. It is enough that the omission appear when the court, aided, if necessary, and only if necessary, by extrinsic evidence, comes to apply the contract to its proper subject-matter."—Cargill Commission Co. v. Swartwood, 198 N.W. 536, 159 Minn. 1.

94. Ga.—Automobile Battery Co. v. Geraghty & Co., 118 S.E. 412, 30 Ga.App. 446.
Mass.—Sullivan v. Roche, 153 N.E. 549, 257 Mass. 166.
Pa.—Sentry Safety Control Corporation v. Jaybee Amusement Co., 169 A. 419, 111 Pa.Super. 318—80th Division Veterans' Ass'n v. Johnson, 159 A. 467, 100 Pa.Super. 447—Autocar Sales v. McWilliams, 21 Erie Co. 74—National Cash Register Co. v. Elfenbein, 20 Erie Co. 390.
Vt.—Ætna Chemical Co. v. Spaulding & Kimball Co., 126 A. 582, 98 Vt. 51.

95. Ga.—Atlanta Chemical Co. v. Hardin Bag Co., 176 S.E. 772, 49 Ga.App. 748, followed in Atlanta Chemical Co. v. Hardin Bag & Burlap Co., 176 S.E. 776, 49 Ga.App. 755.

96. Ga.—Pryor v. Ludden & Bates, 67 S.E. 654, 134 Ga. 288, 28 L.R.A., N.S., 267—Robinson v. Odom, 133 S.E. 53, 35 Ga.App. 262.

97. Tenn.—McQuiddy Printing Co. v. Hirsig, 134 S.W.2d 197, 23 Tenn. App. 434.
Implied terms of contract see Contracts § 328–330.

98. Tex.—Batten v. Waddell, 12 S.W. 2d 111, 118 Tex. 111.
22 C.J. p 1290 note 58.
Proof of oral contract on pleading written contract see Contracts § 572.

99. Fla.—McClure v. Century Estates, 120 So. 4, 10, 96 Fla. 568, quoting **Corpus Juris,** and followed in Hall v. University Realty Co., 121 So. 808, 97 Fla. 639.
22 C.J. p 1286 note 95—5 C.J. p 1019 note 35.

1. Ark.—Newlin v. Webb, 233 S.W. 826, 150 Ark. 5—Parrott Tractor Co. v. Brownfiel, 233 S.W. 706, 149 Ark. 566.
Ga.—Roberts v. Investors' Sav. Co., 113 S.E. 398, 154 Ga. 45—Robinson v. Odom, 133 S.E. 53, 35 Ga.App. 262—Buckeye Cotton Oil Co. v. Malone, 126 S.E. 913, 33 Ga.App. 519.
Mo.—Broadway Bank v. Schlater, App., 17 S.W.2d 591.

bills of lading;[2] bills of sale;[3] bonds;[4] deeds;[5] extension agreements;[6] leases;[7] mortgages;[8] options to buy or sell property;[9] releases;[10] and subscriptions for corporate stock[11] or to public charities.[12]

Such evidence has also been held admissible in connection with other contracts,[13] such as contracts for buildings and construction of other works;[14] contracts of carriage or shipment;[15] contracts of employment;[16] and, likewise, in connection with

N.H.—Burque v. Brodeur, 158 A. 127, 85 N.H. 310.
Pa.—Ward v. Zeigler, 132 A. 798, 285 Pa. 557.
Tex.—Atlanta Motor Co. v. Duncan, Civ.App., 1 S.W.2d 749—Willis v. First Nat. Bank, Civ.App., 262 S.W. 851.
22 C.J. p 1286 note 96.
Parol evidence to show conditional delivery see supra § 937.

Additional collateral

Parol evidence is admissible to show that note was secured by collateral in addition to that mentioned therein.—Southwestern Public Service Co. v. Smith, Tex.Civ.App., 48 S.W.2d 456.

2. Tex.—Missouri, K. & T. R. Co. v. Stark Grain Co., 131 S.W. 410, 103 Tex. 542, modifying, Civ.App., 120 S.W. 1146.
22 C.J. p 1286 note 97.

3. Cal.—Kohl v. Lytle Creek Water & Improvement Co., 75 P.2d 71, 24 Cal.App.2d 353.
Idaho.—Howell v. Blackfoot Creamery Co., 278 P. 1015, 47 Idaho 766.
Mich.—Sewall v. Feller, 284 N.W. 662, 288 Mich. 107.
22 C.J. p 1286 note 98.

4. N.C.—Kernodle v. Williams, 69 S.E. 431, 153 N.C. 475, 34 L.R.A.,N.S., 934.
22 C.J. p 1286 note 99.

5. Cal.—Doxsee Co. v. All Persons Claiming Any Interest In, or Lien Upon Real Property Herein Described or Any Part Thereof, 45 P.2d 192, 3 Cal.2d 609—Kohl v. Lytle Creek Water & Improvement Co., 75 P.2d 71, 24 Cal.App.2d 353.
Md.—Levy v. Dundalk Co., 11 A.2d 476, 177 Md. 636.
Tex.—Bates v. Lefforge, Com.App., 63 S.W.2d 360, reversing, Civ.App., 42 S.W.2d 806.
Wis.—Coyne v. Coyne, 225 N.W. 138, 199 Wis. 263, rehearing denied 225 N.W. 935, 199 Wis. 263.
22 C.J. p 1287 note 9.

6. Pa.—Kisinger v. Pennsylvania Trust Co. of Pittsburgh, 180 A. 79, 119 Pa.Super. 16.

7. Miss.—Hartsell v. Myers, 57 Miss. 135.
N.J.—Segal v. M. H. Harris, Inc., 10 A.2d 748, 124 N.J.Law 31.
Pa.—Bole v. Alden Park Manner, 98 Pa.Super. 65.
Tex.—Pool v. Dunnam, Civ.App., 72 S.W.2d 398—Towler v. Chambers, Civ.App., 299 S.W. 272—Bussey v. Davis, Civ.App., 276 S.W. 779.
22 C.J. p 1288 note 12.

8. Fla.—Atwell v. Western Fire Ins. Co. of Fort Scott, Kan., 163 So. 27, 120 Fla. 694.
Tex.—Atlanta Motor Co. v. Duncan, Civ.App., 1 S.W.2d 749.
22 C.J. p 1288 note 13.

Time of payment

It has been held that where a mortgage does not recite when the sum secured is payable, but provides for the payment of interest thereon "until paid, at the times hereinbefore set forth," the presumption that the sum is immediately payable is overcome, and the agreement of the parties as to when payment shall become due may be shown by parol.—Crowley v. Langdon, 86 N.W. 391, 127 Mich. 51.

9. S.C.—Berry v. Marion County Lumber Co., 93 S.E. 328, 107 S.C. 108.

10. N.H.—Steinfeld v. Monadnock Mills, 123 A. 224, 81 N.H. 152.
Okl.—Safety Cab Co. v. Fair, 74 P.2d 607, 181 Okl. 264.
Pa.—Newland v. Lehigh Valley R. Co., 173 A. 822, 315 Pa. 193.
Tex.—Willis v. First Nat. Bank, Civ.App., 262 S.W. 851.

11. Tex.—Zapp v. Spreckles, Civ.App., 204 S.W. 786.
22 C.J. p 1288 note 15.

12. Ind.—Richards v. Wilson, 112 N.E. 780, 165 Ind. 335.

13. Cal.—Yarbrough v. Rosenburg, 208 P. 1006, 58 Cal.App. 480.
Conn.—Di Biase v. Garnsey, 133 A. 669, 104 Conn. 447.
Iowa.—R. P. Andreas & Son v. Hempy, 276 N.W. 791, 224 Iowa 561.
La.—Hamill v. Moore, 193 So. 715, 194 La. 486.
N.Y.—Saltzman v. Barson, 232 N.Y. 332, 146 N.E. 618, modifying 205 N.Y.S. 548, 210 App.Div. 84—Sayer v. Sunderland, 220 N.Y.S. 409, 219 App.Div. 615.
N.C.—Garland v. Linville Improvement Co., 115 S.E. 164, 184 N.C. 551.
Tex.—International Accountants Soc. v. Boner, Civ.App., 50 S.W.2d 490, error dismissed.
22 C.J. p 1286 note 1.

"If the entire contract is not required to be in writing, it may be partly written and partly oral; and in such case if the written contract be put in evidence, the oral part also may be proved, if not at variance with the written instrument."—Anderson v. Nichols, 123 S.E. 86, 87, 187 N.C. 808.

14. Ala.—Salvo v. Coursey, 124 So. 874, 220 Ala. 300.
Conn.—De Santo v. Burkle, 138 A. 788, 106 Conn. 677.
Iowa.—Golwitzer v. Hummel, 206 N.W. 254, 201 Iowa 751.
Mass.—McClintic-Marshall Co. v. Freedman, 175 N.E. 55, 274 Mass. 558.
Tex.—Lipscomb v. Adamson Lumber Co., Civ.App., 217 S.W. 228.
22 C.J. p 1109 note 26, p 1287 note 2.

Subcontractor's acceptance of original contract

Where subcontract was silent as to many particulars, parol evidence was held admissible to show that subcontractor accepted plans and specifications furnished to original contractor as basis of subcontract.—Storm & Butts v. Lipscomb, 3 P.2d 567, 117 Cal.App. 6.

Testimony that contractor represented roof would not leak was held admissible where the only writing between the parties was a bid, which did not constitute the whole agreement.—Larson v. McKendry, 226 N.W. 640, 58 N.D. 532.

15. Cal.—Mitchell v. North Pac. S. S. Co., 213 P. 293, 60 Cal.App. 554.
22 C.J. p 1287 note 3.

16. Cal.—Kolb v. Rusco, 282 P. 397, 101 Cal.App. 709.
Mo.—Keene v. Farris, App., 67 S.W.2d 526.
N.Y.—Ragette v. R. C. Maxwell Co., 177 N.Y.S. 225, 188 App.Div. 715.
Okl.—Brazelton's Wholesale Cleaners & Dyers v. Cash, 78 P.2d 810, 182 Okl. 493.
Pa.—Golder v. Rabinowitz, 190 A. 407, 125 Pa.Super. 573.
S.C.—Chatfield-Woods Co. v. Harley, 117 S.E. 539, 124 S.C. 280.
Tex.—Babb v. Mil-Po Clothes, Civ.App., 117 S.W.2d 873.
22 C.J. p 1287 note 4.

Attorney and client

Where the contract between an attorney and his client does not specify who shall pay expenses, and no attempt is made therein to cover the matter, parol testimony may be received with regard to it.—Forbes v. Chicago, R. I. & P. R. Co., 129 N.W. 810, 150 Iowa 177, Ann.Cas.1912D 311.

Contract for architectural services, to be compensated for on the basis of the cost of the building, may be supplemented by parol evidence as to the limits of the cost of the building, where the contract is silent in this respect.
Cal.—Spaulding v. Pardridge, 83 P.2d 80, 28 Cal.App.2d 658.
Mo.—Keene v. Farris, App., 67 S.W.2d 526.

contracts such as contracts of hiring;[17] contracts of partnership[18] or for the dissolution thereof;[19] and contracts for the sale or exchange of real or personal property.[20]

Insurance. The rule permitting the entire agreement of the parties to be shown where a writing expresses only part thereof has been applied in connection with insurance policies[21] and applications therefor.[22] Other instruments referred to in the policy and made a part thereof are admissible.[23] The regulations of an insurance company may be proved by parol where the policy refers to such regulations.[24] The articles of association and by-laws of an insurance company may be introduced in evidence by either party to determine the obligations and rights of the parties, in an action on a policy issued under the assessment plan, where they are referred to, and constitute a part of, the policy or contract;[25] but not where they do not constitute a

Term of another contract

Parol evidence was not admissible to supply term of written employment contract where the term sought to be proved did not relate to contract sued on, but to an earlier contract.—Smith v. Compania Litografica de la Habana, 217 N.Y.S. 39, 127 Misc. 508, affirmed 222 N.Y.S. 902, 220 App. Div. 782.

17. **Charter party**

U.S.—Dittmar v. Frederick Starr Contracting Co., N.Y., 249 F. 437, 162 C.C.A. 3, modifying, D.C., 235 F. 263.

18. Colo.—Brewer v. McCain, 41 P. 822, 21 Colo. 382.

19. N.C.—Spencer v. Bynum, 85 S. E. 216, 169 N.C. 119.

22 C.J. p 1287 note 7.

20. U.S.—International Ticket Scale Corporation v. International Ticket Scale Corporation of Chicago, C.C. A.Ill., 56 F.2d 969—Keur v. Weiss, C.C.A.Va., 37 F.2d 711—Bird & Son v. Guarantee Const. Co., C.C.A. Mass., 295 F. 451.

Ala.—Alabama Power Co. v. Pierre, 183 So. 665, 236 Ala. 521—Salvo v. Coursey, 124 So. 874, 220 Ala. 300 —Henderson v. Holmes & Dawson, 85 So. 536, 204 Ala. 203.

Ark.—Jackson County Gin Co. v. McCuistion, 5 S.W.2d 729, 177 Ark. 60 —McCorkle v. H. K. Cochran Co., 222 S.W. 34, 144 Ark. 269.

Cal.—Russell v. Ramm, 254 P. 532, 200 Cal. 348—Western Talc Co. v. Blaufuss, 77 P.2d 479, 25 Cal.App. 2d 270—Hahn v. Wilde, 39 P.2d 473, 3 Cal.App.2d 422—Brock v. Newmark Grain Co., 222 P. 195, 64 Cal.App. 577.

Conn.—Fernandez v. Thompson, 132 A. 895, 104 Conn. 366.

Ga.—McCreary v. Acton, 114 S.E. 230, 29 Ga.App. 162.

Ill.—Lyon & Healy v. Central States Hotel Co., 16 N.E.2d 155, 296 Ill. App. 245.

Kan.—Brown v. Oliver, 256 P. 1008, 123 Kan. 711—Shaffer v. Brittain, 247 P. 844, 121 Kan. 385.

La.—Bass v. Roby Motors Co., 124 So. 596, 14 La.App. 374.

Md.—May Oil Burner Corporation v. Munger, 152 A. 352, 159 Md. 605.

Mich.—Brainard v. Paw Paw Co-op. Ass'n, 200 N.W. 130, 228 Mich. 371.

Minn.—Johnson Hardware Co. v. Kempf, 246 N.W. 663, 188 Minn. 109.

Miss.—Williams v. W. M. Hardee & Son, 106 So. 17, 140 Miss. 155.

Mo.—Morris v. Mahn, 235 S.W. 827, 208 Mo.App. 575.

N.M.—Turner v. Denton, 83 P.2d 459, 42 N.M. 630.

N.Y.—Obrey v. Collins, 200 N.Y.S. 175, 121 Misc. 93.

N.C.—Dawson v. Wright, 181 S.E. 264, 208 N.C. 418.

Okl.—Starmer v. Mid-West Chevrolet Corporation, 51 P.2d 786, 175 Okl. 160.

Pa.—C. D. Brown & Co. v. Standard Hide Co., 152 A. 557, 301 Pa. 543—Dobkin v. Landsberg, 116 A. 814, 273 Pa. 174—Morris Lumber Co. v. Harrington, 12 Pa.Dist. & Co. 501.

S.C.—Beckroge v. South Carolina Public Service Co., 193 S.E. 315, 185 S.C. 210—Liquid Carbonic Co. v. Coclin, 159 S.E. 461, 161 S.C. 40.

Tex.—Atlanta Motor Co. v. Duncan, Civ.App., 1 S.W.2d 749.

22 C.J. p 1287 note 8—42 C.J. p 1219 note 34 [a].

Parol warranties

The rule against proving parol warranties affecting written instruments does not apply to incomplete and informal writings, containing no allusion to a warranty, such as a bill of parcels, an order signed only by the buyer, or a mere receipt for the price.—White v. Hager, 248 S.W. 319, 112 Tex. 516—42 C.J. p 783 note 13.

Order not purporting to contain entire agreement, may be supplemented, particularly where signed by only one of the parties.

U.S.—Davenport Ladder Co. v. Edward Hines Lumber Co., C.C.A. Iowa, 43 F.2d 63.

Ala.—Northwestern Rug Mfg. Co. v. Russellville Furniture & Mercantile Co., 116 So. 314, 22 Ala.App. 404.

Iowa.—Anderson Bros. & Johnson Co. v. Sioux Monument Co., 232 N. W. 689, 210 Iowa 1226.

Mass.—Caulfield v. Motor Specialties Co., 139 N.E. 502, 245 Mass. 420.

N.Y.—Kantor v. Aristo Hosiery Co., 226 N.Y.S. 582, 222 App.Div. 502, affirmed 162 N.E. 553, 248 N.Y. 630.

Or.—Johns-Manville Corporation v. Heckart, 277 P. 821, 129 Or. 505.

Va.—Economic Water Heating Corporation v. Dillon Supply Co., 159 S.E. 78, 156 Va. 597.

Wash.—Gaffney v. O'Leary, 283 P. 1091, 155 Wash. 171.

22 C.J. p 1117 note 64, p 1287 note 8 [a].

Sale by sample

Evidence that sale was by sample did not violate parol evidence rule where the writing between the parties was not a complete contract.—Jacobson v. E. T. Slattery Co., 219 N.Y.S. 331, 218 App.Div. 654.

21. Mich.—Massachusetts Bonding & Insurance Co. v. Transamerican Freight Lines, 281 N.W. 584, 286 Mich. 179.

S.C.—Hartford Fire Ins. Co. v. Young, 129 S.E. 129, 132 S.C. 34.

Tex.—National Life & Accident Ins. Co. v. Lucas Funeral Home, Civ. App., 89 S.W.2d 468, error dismissed.

22 C.J. p 1288 note 10.

Interest in proceeds

In proceeding to determine right to proceeds of policy payable to owner, mortgagee, and materialmen, evidence of negotiations carried on by materialmen's insurance brokers in obtaining coverage was not inadmissible as tending to vary terms of policy, since as among payees themselves policy was not necessarily the entire contract.—Walsh v. Tadlock, C.C.A.Cal., 104 F.2d 131, certiorari denied 60 S.Ct. 107, 308 U.S. 584, 84 L.Ed. 489.

22. Ohio.—Central Casualty Co. v. Fleming, 153 N.E. 345, 22 Ohio App. 129.

S.C.—Hartford Fire Ins. Co. v. Young, 129 S.E. 129, 132 S.C. 34.

Tex.—State Mut. Life Ins. Co. v. Ballard, Civ.App., 122 S.W. 267.

23. Cal.—Rankin v. Amazon Ins. Co., 26 P. 872, 89 Cal. 203, 23 Am. S.R. 460.

33 C.J. p 115 note 55.

24. Ind.—Hale v. Hale, 126 N.E. 692, 74 Ind.App. 405.

25. U.S.—Hayden v. Franklin Life Ins. Co., Mo., 136 F. 285, 69 C.C.A. 423.

33 C.J. p 116 note 56.

part of the contract[26] or where they are not attached to the policy as required by statute.[27]

Letters. Where letters between the parties do not represent their entire agreement, or where they show the contract to be incomplete, either in the proposition made or in its acceptance, parol evidence may be resorted to for the purpose of showing the exact terms of the contract.[28] Where a letter on its face professes to be merely a recitation or confirmation of an oral agreement, rather than a complete contract, the oral agreement, and not the letter, constitutes the real contract between the parties, and such contract may be shown by parol.[29]

(2) Subject Matter of Parol Testimony

Parol testimony introduced to supplement an incomplete writing may relate to matters of amount, time, place, mode, value, duties, risks, and other subjects.

Under the rules stated in subdivisions a and b of this section, parol or extrinsic evidence has been held admissible to show the amount to be paid under a contract,[30] such as a contract of sale,[31] and to show the compensation to be paid under a contract of employment.[32]

Time. Evidence of an omitted term has been received as to the time of payment of amounts due or to become due under a contract;[33] the time of performance of certain acts;[34] the time of delivery of goods or articles;[35] the time for the expiration of an option;[36] the length of time during which a contract was to remain in force,[37] for which a lease was to run,[38] or for which insurance was taken;[39] the time when title was to pass under a contract for the construction of a vessel;[40] the time when the performance of a contract for doing certain work should begin;[41] the time of the commencement of services under a contract of employment;[42] and whether title passed on delivery to a carrier or not until safe arrival of the goods at their destination.[43]

26. Mo.—McDonald v. Bankers' Life Ass'n, 55 S.W. 999, 154 Mo. 618.
33 C.J. p 116 note 57.

27. Ky.—Supreme Council C. K. A. v. Fenwick, 183 S.W. 906, 169 Ky. 269.
33 C.J. p 116 note 58.

28. U.S.—New York Alaska Gold Dredging Co. v. Walbridge, C.C.A. Alaska, 76 F.2d 655, 662, quoting **Corpus Juris**—W. B. Chubb Co. v. Sadler, C.C.A.Me., 284 F. 710.
Ala.—Williams v. Hargett, 116 So. 125, 217 Ala. 280.
Cal.—Kohl v. Lytle Creek Water & Improvement Co., 75 P.2d 71, 24 Cal.App.2d 353.
Ga.—McCreary v. Acton, 114 S.E. 230, 29 Ga.App. 162.
Iowa.—Gode v. Russell, 194 N.W. 85.
Md.—Poole Engineering & Machine Co. v. Swindell, 157 A. 763, 161 Md. 571.
Mo.—Busch & Latta Paint Co. v. Woermann Const. Co., 276 S.W. 614, 310 Mo. 419.
N.Y.—Geller v. Tow, 27 N.Y.S.2d 138, 261 App.Div. 773—Metzger v. Coe-Stapley Mfg. Corporation, 187 N.Y.S. 20, 195 App.Div. 664—John v. Coe-Stapley Mfg. Corporation, 188 N.Y.S. 836, reversed on other grounds John v. Coe-Stapley Mfg. Co., 194 N.Y.S. 681, 201 App.Div. 704.
Pa.—C. D. Brown & Co. v. Standard Hide Co., 152 A. 557, 301 Pa. 543.
R.I.—Logan-Long Co. v. Roger Laudati, Inc., 160 A. 199, 52 R.I. 256—Ancher Sawmills Co. v. Shambow Shuttle Co., 132 A. 1.
Tex.—Halbert v. Ward, Civ.App., 61 S.W.2d 162, error refused.
22 C.J. p 1132 note 93, p 1286 note 1 [a], p 1287 note 4 [a].

29. U.S.—New York Alaska Gold Dredging Co. v. Walbridge, C.C.A. Alaska, 76 F.2d 655, 662, quoting **Corpus Juris**—American Bridge Co. v. Crawford, C.C.A.Pa., 31 F.2d 708, 710, 68 A.L.R. 1246, citing **Corpus Juris.**
Ind.—Loyd v. Midwest Fuel Co., 179 N.E. 583, 97 Ind.App. 322.
Kan.—Thurston v. Lubrite Refining Co., 242 P. 126, 120 Kan. 137.
N.Y.—Frasca v. Metropolitan Life Ins. Co., 287 N.Y.S. 375, 248 App. Div. 588, affirmed 4 N.E.2d 816, 272 N.Y. 588—Jardella v. Welin Davit & Boat Corporation, 220 N.Y.S. 115, 219 App.Div. 353.
22 C.J. p 1133 note 94.

30. U.S.—In re International Raw Material Corporation, C.C.A.N.Y., 22 F.2d 920.
Ga.—Selph & Daniels v. Williams, 106 S.E. 206, 26 Ga.App. 336.
Mich.—Massachusetts Bonding & Insurance Co. v. Transamerican Freight Lines, 281 N.W. 584, 590, 286 Mich. 179, quoting **Corpus Juris.**

31. Iowa.—Larson v. Thoma, 121 N.W. 1059, 143 Iowa 338.
22 C.J. p 1288 note 18.

32. N.Y.—Ragette v. R. C. Maxwell Co., 177 N.Y.S. 225, 188 App.Div. 715.
Tex.—Babb v. Mil-Po Clothes, Civ. App., 117 S.W.2d 873.
22 C.J. p 1289 note 31.

33. U.S.—Howell v. Grocers, Inc., C.C.A.Mich., 2 F.2d 499.
Ala.—Henderson v. Holmes & Dawson, 85 So. 536, 204 Ala. 203.
Wash.—Gaffney v. O'Leary, 283 P. 1091, 155 Wash. 171.
22 C.J. p 1288 note 19.

34. Kan.—Kirk v. First Nat. Bank, 295 P. 703, 132 Kan. 404.
N.Y.—Beechwood Gun Club v. City of Beacon, 275 N.Y.S. 249, 153 Misc. 358, affirmed 275 N.Y.S. 219, 242 App.Div. 761.
Tex.—Bussey v. Davis, Civ.App., 276 S.W. 779.
22 C.J. p 1288 note 22.

35. U.S.—International Ticket Scale Corporation v. International Ticket Scale Corporation of Chicago, C.C.A.Ill., 56 F.2d 969.
Or.—McDonald v. Supple, 190 P. 315, 96 Or. 486.
22 C.J. p 1288 note 25.

36. Okl.—Packard Oklahoma Motor Co. v. Funk, 245 P. 571, 117 Okl. 96.

37. Conn.—Mills v. Roto Co., 133 A. 913, 104 Conn. 645.
N.Y.—Ker v. Stern, 175 N.Y.S. 475, 107 Misc. 4.
22 C.J. p 1283 note 93 [d], p 1288 note 28.

38. Tex.—Brincefield v. Allen, 60 S.W. 1010, 25 Tex.Civ.App. 258.

39. Minn.—Bankers' Acc. Ins. Co. v. Rogers, 75 N.W. 747, 73 Minn. 12.

40. U.S.—The Poconoket, Pa., 70 F. 640, 17 C.C.A. 309, affirming, D.C., 67 F. 262, and affirmed Bacon v. The Poconoket, 18 S.Ct. 939, 168 U.S. 707, 42 L.Ed. 1214.
22 C.J. p 1289 note 34.

41. N.Y.—Case v. Phœnix Bridge Co., 58 N.Y.Super. 435, 11 N.Y.S. 724, 19 N.Y.Civ.Proc. 373, reversed on other grounds 31 N.E. 254, 134 N.Y. 78.

42. Tex.—Meade v. Rutledge, 11 Tex. 44.

43. Ga.—De Pauw v. Kaiser, 3 S.E. 254, 77 Ga. 176.

Place. It has been held proper to introduce parol or extrinsic evidence of an omitted term dealing with the place of payment of amounts due or to become due under a contract;[44] the place of performance[45] of services contracted for;[46] the place of delivery of goods sold;[47] and the territory which a contract was to cover.[48]

Mode. Omitted terms dealing with the manner of performance of a contract,[49] and the mode of payment of amounts due or to become due under a contract or other instrument,[50] have been held admissible.

Value. Evidence has been received as to the value of certain securities[51] or articles,[52] and also as to the value of services rendered under a contract of employment not providing for any compensation.[53]

Intentions or understanding. Evidence as to intentions or understanding of the parties to a contract of sale with regard to the style and materials of the articles to be sold has been held admissible;[54] and this is true as to the understanding of the parties as to the basis of their accounting under a contract,[55] and the intended use of an article sold.[56]

Representations and warranties. Evidence as to representations of a vendor as to the thing sold,[57] or as to a warranty or guaranty as to articles sold or embraced in a contract of sale,[58] has, where not precluded by statute, been held admissible to establish an omitted term.

Respective duties and risks. Evidence has been held admissible to show at whose risk a shipment of goods was to be made;[59] which party was to bear certain losses;[60] and on whom the duty rested to furnish certain information necessary to the performance of a contract,[61] or to furnish an abstract of title.[62]

Other matters as to which parol or extrinsic evidence has been held admissible to supply omitted terms of an incomplete writing include the items entering into the settlement of a claim;[63] the quantity of merchandise ordered or sold;[64] the assent of the purchaser to an act of sale[65] or a promise to sell;[66] and various other subjects.[67] Evidence has been held admissible to identify and prove a paper which was a part of, and incorporated in, a building contract by a reference thereto,[68] and, where the agreement of one party only was reduced to writing, to show the agreement made by the other party as a consideration.[69]

§ 1014. Writing Not in Evidence

The parol evidence rule does not apply to writings which are not in evidence.

44. U.S.—Cox v. New York Nat. Bank, Ky., 100 U.S. 704, 25 L.Ed. 739.
22 C.J. p 1288 note 20.

45. Wis.—Wheelwright v. Pure Milk Ass'n, 240 N.W. 769, 208 Wis. 40, motion denied 242 N.W. 486, 208 Wis. 40.
22 C.J. p 1288 note 23.

46. Ky.—Cook v. Todd, 72 S.W. 779, 24 Ky.L. 1909.

47. Mich.—Hage v. E. L. Wellman Co., 187 N.W. 404, 217 Mich. 537.
Miss.—Williams v. W. M. Hardee & Son, 106 So. 17, 140 Miss. 155.
22 C.J. p 1288 note 26.

48. Wash.—P. S. Wick Co. v. Du Barry, 293 P. 447, 159 Wash. 380.

49. Tex.—Morgan v. Steinberg, Civ. App., 23 S.W.2d 527.
22 C.J. p 1288 note 24.

50. N.C.—Galloway v. Thrash, 176 S.E. 303, 207 N.C. 165—Stockton v. Lenoir, 150 S.E. 886, 198 N.C. 148.
22 C.J. p 1288 note 21.

51. Cal.—Hahn v. Wilde, 39 P.2d 473, 3 Cal.App.2d 422.

52. S.C.—Liquid Carbonic Co. v. Coclin, 159 S.E. 461, 161 S.C. 40.

53. Cal.—Toomy v. Dunphy, 25 P. 130, 86 Cal. 639.
Wash.—Peyser v. Western Dry Goods Co., 102 P. 750, 53 Wash. 633.

54. Iowa.—Dietrich v. Stebbins, 69 N.W. 564, 100 Iowa 426.

55. Minn.—Staples v. Edwards & McCulloch Lumber Co., 57 N.W. 220, 56 Minn. 16.

56. La.—Colt Co. v. Garman, 6 La. App. 296.

57. Kan.—Schoen v. Sunderland, 18 P. 913, 39 Kan. 758.
22 C.J. p 1289 note 43.

58. Tenn.—Elbinger Shoe Co. v. Thomas, 1 Tenn.App. 161.
22 C.J. p 1289 note 44.

59. Ga.—De Pauw v. Kaiser, 3 S.E. 254, 77 Ga. 176—Allen v. Comstock, 17 Ga. 554.

60. Okl.—Brazelton's Wholesale Cleaners & Dyers v. Cash, 78 P.2d 810, 182 Okl. 493.

61. N.Y.—Bien v. Parsons, 37 N. Y.S. 209, 15 Misc. 457.

62. Tex.—Bussey v. Davis, Civ.App., 276 S.W. 779.

63. Mich.—Wolverine Ins. Co. v. Klomparens, 263 N.W. 724, 273 Mich. 493.
N.H.—Steinfield v. Monadnock Mills, 123 A. 224, 81 N.H. 152.
N.J.—Dreschler v. Dreschler, 144 A. 308, 105 N.J.Eq. 741.

64. U.S.—International Ticket Scale Corporation v. International Ticket Scale Corporation of Chicago, C. C.A.Ill., 56 F.2d 969.
N.Y.—Samuel Strauss & Co. v. Schulman, 192 N.Y.S. 722.

65. La.—Crocker v. Nuley, 3 Mart. N. S. 583.
22 C.J. p 1289 note 41.

66. La.—Joseph v. Moreno, 2 La. 460.

67. **Particular matters held admissible**
(1) The kind of work to be done and the time for doing the same under a lease providing that part of the rent was "to be worked out on farm at one dollar per day".—Ingram v. Dailey, 98 N.W. 627, 123 Iowa 188.
(2) The size of brick to be used in carrying out a building contract, and the rule by which the work was to be measured.—Brown v. Rowland, Ky.Dec. 293.
(3) The fact of a vendee's notice of an encumbrance, where the contract of sale was silent as to the character of the title.—Leonard v. Woodruff, 65 P. 199, 23 Utah 494.

68. Pa.—Monocacy Bridge Co. v. American Bridge Mfg. Co., 83 Pa. 517.

69. N.Y.—Unger v. Jacobs, 7 Hun 220.

The rule against parol evidence to vary or contradict a written instrument does not apply where the writing which it is claimed the evidence offered will vary or contradict is not itself in evidence.[70]

§ 1015. Other Limitations and Exceptions

The parol evidence rule does not exclude evidence of the real nature of a transaction or of the time when a writing was delivered or recorded; nor does the rule protect void or unintelligible writings, or present rebuttal of a presumption which might arise from a writing.

It is generally considered that parol evidence is admissible where it is offered, not for the purpose of varying the terms of a written contract or instrument, but for the purpose of explaining and showing the true nature and character of the transaction evidenced thereby,[71] especially where it is plain that the language used, taken in its literal sense, does not exhibit the real transaction,[72] or where the writing is assailed on the ground of fraud.[73]

Applications of the foregoing principle are to be found in cases where evidence has been held admissible to show that, although a writing evidences on its face an absolute transfer of property or an absolute promise to pay money, the real transaction consisted merely in the giving of security[74] or indemnity,[75] or that the grantee in a written instrument, such as a deed, assignment, bill of sale, or the like, which on its face passes the title to property, took the title subject to a trust[76] or to a lien.[77]

70. Mich.—Curby v. Mastenbrook, 286 N.W. 123, 288 Mich. 676—Whalen v. Board of Education of City of Detroit, 220 N.W. 763, 243 Mich. 478.
Pa.—Hercules Chemical Co. v. Orlowitz, 72 Pa.Super. 21.
Tex.—Berry v. Shepperd, Civ.App., 131 S.W.2d 282.
22 C.J. p 1291 note 63.

71. U.S.—Pennsylvania Co. for Insurances on Lives and Granting Annuities v. U. S., D.C.Pa., 39 F. Supp. 1019—Cascaden v. Bell, Alaska, 257 F. 926, 169 C.C.A. 76.
Ark.—Temple v. Hamilton, 11 S.W. 2d 465, 178 Ark. 355.
Cal.—Ricker v. Fay Securities Co., 294 P. 732, 110 Cal.App. 750.
Kan.—Clark v. Howe, 247 P. 113, 121 Kan. 204.
Minn.—Stewart v. Bowman, 263 N.W. 618, 195 Minn. 543.
Mo.—Service Purchasing Co. v. Brennan, 42 S.W.2d 39, 43, 226 Mo.App. 110, citing **Corpus Juris**, and transferred, see, Sup., 32 S.W.2d 81.
N.J.—Elmer v. Lock, 162 A. 391, 392, 111 N.J.Eq. 426, quoting **Corpus Juris.**
N.D.—Kelly v. Baird, 252 N.W. 70, 64 N.D. 346.
Tex.—Silliman v. Oliver, Civ.App., 233 S.W. 867, error refused.
22 C.J. p 1259 note 95, p 1141 note 51, p 1096 note 74 [d]—13 C.J. p 835 note 15.

Lease intended as mortgage

It is permissible to show that a written instrument purporting on its face to be merely a lease was intended to operate as a mortgage to secure the payment of a debt.
S.D.—Meyer v. Davenport El. Co., 80 N.W. 189, 12 S.D. 172.
Wis.—Lamson v. Moffat, 21 N.W. 62, 61 Wis. 153.

Purchase for resale

Testimony that the purchaser of personalty told the seller he was buying for the purpose of resale is admissible to show the real agreement between the parties, notwithstanding his written representation that he was buying for his own use.—Buchanan v. Commercial Inv. Trust, 7 S.W.2d 318, 177 Ark. 579.

Parol or extrinsic evidence held admissible to show whether instrument or transaction constituted:

(1) Bailment or sale.
U.S.—McCabe v. McKinstry, C.C. Minn., 15 F.Cas.No.8,667, 5 Dill. 509.
Va.—Reherd's Adm'r v. Clem, 10 S.E. 504, 86 Va. 374.
Wash.—Barnes v. Patrick, 28 P.2d 293, 176 Wash. 142, 91 A.L.R. 901.

(2) Bill or receipt.—Sullivan v. Helli, 204 N.W. 87, 231 Mich. 348.

(3) Contract of sale or option.—Shirley v. Van Every, 167 S.E. 345, 159 Va. 762—Turner & Happersett v. Hall & Connor, 104 S.E. 861, 128 Va. 247.

(4) Contract of sale or of agency.—Sloat-Darragh Co. v. General Coal Co., C.C.A.Ohio, 276 F. 502.

72. N.J.—Elmer v. Lock, 162 A. 391, 392, 111 N.J.Eq. 426, quoting **Corpus Juris.**
22 C.J. p 1260 note 96.

73. N.J.—Elmer v. Lock, 162 A. 391, 392, 111 N.J.Eq. 426, quoting. **Corpus Juris.**
22 C.J. p 1260 note 97.
Showing fraud generally see supra § 979.

74. Ala.—Missouri State Life Ins. Co. v. Robertson Banking Co., 134 So. 25, 28, 223 Ala. 13, citing **Corpus Juris.**
Ark.—Kerby v. Feild, 38 S.W.2d 308, 183 Ark. 714.
Cal.—Kleinecke v. North Confidence Mining & Development Co., 182 P. 313, 41 Cal.App. 109.
Conn.—Calamita v. De Ponte, 187 A. 129, 122 Conn. 20.
Ga.—Buffington v. Bank of College Park, 122 S.E. 50, 157 Ga. 570—Saville v. Lee, 158 S.E. 441, 442, 43 Ga.App. 263, citing **Corpus Juris.**
Iowa.—First Nat. Bank v. Mether, 251 N.W. 505, 217 Iowa 695.
Mo.—Service Purchasing Co. v. Brennan, 42 S.W.2d 39, 43, 226 Mo.App. 110, citing **Corpus Juris**, and transferred, see, Sup., 32 S.W.2d 81.
N.J.—Elmer v. Lock 162 A. 391, 392, 111 N.J.Eq. 426, quoting **Corpus Juris.**
N.M.—Turner v. New Brunswick Fire Ins. Co. of New Brunswick, N. J., 112 P.2d 511, 45 N.M. 126.
N.Y.—In re Pritchard's Estate, 237 N.Y.S. 156, 227 App.Div. 105.
Tex.—Celada v. A. Mathias & Co., Civ.App., 269 S.W. 459.
22 C.J. p 1260 note 98, p 1141 note 51 [a] (3) —49 C.J. p 908 note 45.
Parol evidence to show deed intended as mortgage see the C.J.S. title Mortgages § 50, also 41 C.J. p 348 note 342, p 354 note 59.

Assignment of shares in building association, absolute in form, may be shown by parol to be by way of security only; and this is so even if the by-laws require an absolute transfer as a condition of the loan.—Ginz v. Stumph, 73 Ind. 209.

75. Cal.—Henning v. Wuest, 191 P. 713, 48 Cal.App. 147.
Conn.—Calamita v. De Ponte, 187 A. 129, 122 Conn. 20.
N.J.—Elmer v. Lock, 162 A. 391, 392, 111 N.J.Eq. 426, quoting **Corpus Juris.**
Okl.—Ledford v. Huggans, 214 P. 687, 89 Okl. 224.
22 C.J. p 1260 note 99.

76. N.J.—Elmer v. Lock, 162 A. 391, 392, 111 N.J.Eq. 426, quoting **Corpus Juris.**
Tex.—Silliman v. Oliver, Civ.App., 233 S.W. 867, error refused.
22 C.J. p 1260 note 1, p 1141 note 51 [a] (1).

77. Wash.—Merrick v. Neely, 255 P. 936, 143 Wash. 588.

Further, it may be shown that a conveyance by a parent to a child was intended as an advancement,[78] or that an indorsement of negotiable paper was merely for the purpose of collection.[79]

Rebutting presumption, implication, or equity. Parol evidence which does not contradict the express terms of a record or instrument in writing is usually held to be admissible to rebut a presumption or implication which would or might otherwise arise therefrom,[80] or to oppose a conclusion of fact which it tends, as circumstantial evidence, to establish.[81] However, there are cases in which evidence offered for the purpose of rebutting presumptions arising from a written instrument has been rejected.[82]

Parol evidence is admissible for the purpose of rebutting an equity.[83]

Recoupment or set-off. The rule against parol evidence to contradict or vary a writing does not preclude evidence on the part of an obligor or promisor establishing a recoupment or set-off against his liability under the writing.[84]

Time of delivery. It may be shown by parol that a deed, contract, or other instrument was delivered not on the day of its date but at some other time.[85] Where an instrument is dated on a Sunday, it may be shown that it was actually delivered on another day and is therefore valid.[86]

Time of recording. Parol or extrinsic evidence is admissible to show the time when an instrument was delivered to a recording officer to be recorded,[87] or when an execution, return, or levy was recorded in the office of a justice of the peace.[88]

Time or mode of performance. Parol evidence is sometimes admitted to show the time[89] or mode[90] of performance of a contract or other written instrument, at least where the writing is, as to these matters, ambiguous[91] or silent.[92]

Void and unintelligible writings. The parol evidence rule applies only to legal and valid written agreements, and not to a writing which is void or unintelligible.[93]

Miscellaneous. In addition to the limitations and exceptions to the parol evidence rule considered supra §§ 929–1014 and this section, there are various other limitations and exceptions.[94]

78. W.Va.—McClanahan v. McClanahan, 14 S.E. 419, 36 W.Va. 34.

79. Ga.—Goette v. Sutton, 57 S.E. 308, 128 Ga. 179.

80. Md.—Winslow v. Atz, 177 A. 272, 280, 168 Md. 230, citing Corpus Juris.
22 C.J. p 1261 note 6.

Presumption as to community property
Parol evidence that realty was community property has been held properly admitted as against contention that realty was conclusively presumed to be wife's separate property.—Durrell v. Bacon, 32 P.2d 644, 138 Cal.App. 396.

Third person's note as payment
Parol evidence rule does not preclude testimony to rebut the presumption that creditor accepted third person's promissory note as collateral security rather than as payment.—Gattavara v. Caldwell, 12 P.2d 593, 168 Wash. 484.

Implied warranty
The fact that a statute states implied warranties by transferor of negotiable instrument in absolute terms does not preclude parol evidence of transferee's knowledge of instrument's invalidity.—Queensboro Nat. Bank of City of New York v. Kelly, N.Y., 48 F.2d 574, 87 A.L.R. 1172, certiorari denied Kelly v. Queensboro Nat. Bank of City of New York, 52 S.Ct. 9, 284 U.S. 620, 76 L. Ed. 529.

81. Ga.—Rucker v. Brown, 65 S.E. 55, 6 Ga.App. 361.
Tenn.—Strong v. Harris, 3 Humphr. 451.

82. Ill.—Galbraith v. Littiech, 73 Ill. 209.
22 C.J. p 1261 note 9.

83. S.C.—Chestnut v. Strong, 10 S.C. Eq. 122.
22 C.J. p 1261 note 5.

84. Ga.—Brown v. Horn, 122 S.E. 710, 32 Ga.App. 95.
Ill.—Baumgartner v. Montavon, 276 Ill.App. 498.
Vt.—Noyes v. Hall, 28 Vt. 645.

85. Ga.—Twin City Fire Ins. Co. v. Wright, 167 S.E. 891, 46 Ga.App. 537.
N.J.—Wieson v. Automobile Ins. Co. of Hartford, Conn., 126 A. 652, 2 N.J.Misc. 1129, affirmed 130 A. 921, 102 N.J.Law 229.
22 C.J. p 1281 note 75.

86. Minn.—Swedish-American Nat. Bank v. Germania Bank, 79 N.W. 399, 76 Minn. 409.
22 C.J. p 1281 note 76.

87. Ky.—Bussing v. Crain, 8 B.Mon. 593.
22 C.J. p 1281 note 77.

88. Vt.—Morton v. Edwin, 19 Vt. 77.
22 C.J. p 1281 note 78.

89. Ky.—Apple v. McCullough, 38 S.W.2d 955, 239 Ky. 74.
22 C.J. p 1281 note 79.

Time of commencement of work
Pa.—Citizens' Bank of Palmerton v. Lesko, 120 A. 808, 277 Pa. 174.

90. N.C.—Galloway v. Thrash, 176 S.E. 303, 207 N.C. 165—Stockton v. Lenoir, 150 S.E. 886, 198 N.C. 148.
22 C.J. p 1281 note 80.

91. Ga.—Morrison v. Dickey, 50 S.E. 178, 122 Ga. 417.
22 C.J. p 1282 note 81.
Parol evidence to construe language of writing see supra §§ 959–962.

92. U.S.—Northern Pac. R. Co. v. Kempton, Mont., 138 F. 992, 71 C.C.A. 246.
Utah.—Wines v. Stevens, 1 Utah 305.

93. Ill.—Moulding v. Prussing, 70 Ill. 151.
22 C.J. p 1282 note 85.
Illegible writings see supra § 971.
Invalidating or defeating operation of instrument see supra §§ 972–983.
Sustaining instrument void on its face see supra § 1010.

94. **Independent rights**
The rule against varying a written contract by parol does not apply to rights which are asserted independently of the written instrument.—Supervisors, Inc., v. Arcadia Citrus Growers' Ass'n, 135 So. 296, 101 Fla. 804.
Writing collateral to issue see supra § 1011.

Intent of grantor
Where the making of a deed involves a criminal offense, the intention of the grantor may be shown.—U. S. v. Thomas, D.C., 28 F.Cas.No. 16,474, 2 Cranch C.C. 36.

Seal on instrument
(1) Parol evidence rule is not violated by showing that instrument ap-

XXI. WEIGHT AND SUFFICIENCY

A. DEGREE OF PROOF

§ 1016. Definitions

Various terms or phrases, in addition to those specifically considered in the sections immediately following, have been employed as descriptive of the degrees of proof which may be present in civil cases, as, for example, "conclusive evidence," "conflicting evidence," "cumulative evidence," or "prima facie evidence".

Terms other than the terms "preponderance of evidence," "clear and convincing proof," and "proof beyond a reasonable doubt," specifically discussed in §§ 1018–1024 infra, which are used as descriptive or definitive of degrees of proof are considered in this section. Definitions of "evidence," "testimony," and "proof" and various types thereof are given in §§ 1–4 supra.

Conclusive evidence has been defined as evidence which is incontrovertible,[95] either a presumption of law, or else evidence so strong as to overbear all other in the case to the contrary;[96] evidence from which only one reasonable conclusion can be drawn, taking all the facts and surroundings into consideration.[97] It has also been defined as such evidence as, being uncontradicted, controls the decision.[98]

Conflicting evidence. It has been said that there is not, in a legal sense, a conflict of evidence unless there is a possibility that men of ordinary reason and fairness would feel justified in drawing different conclusions from the evidence before them.[99]

"Corroborative" or "corroborating" evidence has been defined as additional evidence of a different character to the same point;[1] evidence which would tend to establish the disputed facts by other circumstances;[2] evidence which tends to confirm and strengthen, or to show the truth or probability of truth of the testimony of a witness sought to be corroborated.[3]

Cumulative evidence is additional evidence of the same kind tending to prove the same point as other evidence already given.[4] Evidence of a different kind[5] or of other and different circumstances[6] tend-

parently under seal is simple contract.—Jefferson Standard Life Ins. Co. v. Morehead, 183 S.E. 606, 209 N.C. 174.

(2) Where a corporation's contract is sealed but contains no reference to seal, extrinsic evidence is admissible to show whether seal was used to make contract a specialty or merely as evidence of its authorized execution, or to show that seal was used without authority.—General Petroleum Corporation v. Seaboard Terminals Corporation, D.C.Md., 23 F.Supp. 137.

Statute providing for taxing escaped improvements of realty not shown in tax returns has been held to contemplate parol evidence that improvements existed during taxing period.—State v. Mortgage-Bond Co. of New York, 140 So. 365, 224 Ala. 406, followed in State v. Investors' Syndicate, 140 So. 368 (two cases), 224 Ala. 409.

95. Miss.—Covington County v. Fite, 82 So. 308, 309, 120 Miss. 421.
N.J.—Di Mieri v. Metafield, 20 A.2d 39, 40, 126 N.J.L. 484, citing **Corpus Juris.**
23 C.J. p 8 note 99.

96. N.Y.—Haupt v. Pohlmann, 1 Rob. 121, 127.
23 C.J. p 8 note 1.

97. Miss.—Covington County v. Fite, 82 So. 308, 120 Miss. 421.

98. Minn.—State ex rel. Railroad & Warehouse Commission v. Minneapolis & St. L. R. Co., 79 N.W. 510, 514, 76 Minn. 469.

99. N.Y.—Seeley v. Osborne, 116 N.E. 97, 220 N.Y. 416, reversing 147 N.Y.S. 116, 161 App.Div. 844.
23 C.J. p 11 note 31.

1. Idaho.—Bell v. Bell, 96 P. 196, 15 Idaho 7.
23 C.J. p 9 note 22—14a C.J. p 1428 note 22.

2. Miss.—Williams v. State, 54 So 857, 99 Miss. 274—Louisville, N. O. & T. R. Co. v. Crayton, 12 So. 271, 69 Miss. 152, 159.

3. Va.—Varner's Ex'rs v. White, 140 S.E. 128, 130, 149 Va. 177.

Similar definition

Corroborating evidence is evidence which tends of its own strength and independently to support some essential allegation or issue testified to by the witness whose evidence is sought to be corroborated.
N.M.—In re Cardoner's Estate, 196 P. 327, 328, 27 N.M. 105.
Va.—Timberlake's Adm'r v. Pugh, 163 S.E. 402, 404, 158 Va. 397.
23 C.J. p 9 note 22.

4. Ala.—Foster v. Rosamond, 180 So. 334, 337, 28 Ala.App. 99, affirmed 180 So. 338, 235 Ala. 631.
Iowa.—Mullong v. Mullong, 159 N.W. 994, 995, 178 Iowa 552.
Miss.—Redmond v. Marshall, 137 So. 733, 734, 162 Miss. 359.
S.C.—Johnston v. Belk-McKnight Co. of Newberry, 198 S.E. 395, 399, 188 S.C. 149—McCabe v. Sloan, 191 S.E. 905, 909, 184 S.C. 158.
Tex.—Linthicum v. Richardson, Civ. App., 245 S.W. 713, 715.
Wash.—Roe v. Snyder, 170 P. 1027, 1028, 100 Wash. 311.
23 C.J. p 10 note 27.

Admissions

After one admission has been introduced to prove a fact in issue, other admissions tending to prove the same fact are cumulative.
Ind.—Hines v. Driver, 100 Ind. 315.
Iowa.—Larson v. Meyer & Meyer, 288 N.W. 663, 667, 227 Iowa 512.

5. Iowa.—Mullong v. Mullong, 159 N.W. 994, 178 Iowa 552.
S.C.—Johnston v. Belk-McKnight Co. of Newberry, 198 S.E. 395, 188 S.C. 149—McCabe v. Sloan, 191 S.E. 905, 184 S.C. 158.
Tex.—Linthicum v. Richardson, Civ. App., 245 S.W. 713.

Evidence of a higher type or character is not merely cumulative.—Foster v. Rosamond, 180 So. 334, 28 Ala.App. 99, affirmed 180 So. 338, 235 Ala. 631.

Circumstantial evidence

(1) Circumstantial evidence is not cumulative to evidence which tends to establish the same fact directly.—Vardeman v. Byrne, 7 How., Miss., 365.

(2) Corpus Juris statement of this rule quoted and applied in criminal proceeding.—State v. Harris, 64 S.W.2d 256, 258, 334 Mo. 38.

6. Idaho.—Brown v. Graham, 112 P. 2d 485, 493, citing **Corpus Juris.**
Mo.—State v. Harris, 64 S.W.2d 256, 258, 334 Mo. 38, quoting **Corpus Juris.**

ing to establish or disprove the same fact is not cumulative.

Degree of proof refers to the effect of evidence; it does not refer to the medium by which truth is established.[7]

Demonstration is such a degree of proof as, excluding the possibility of error, produces absolute certainty.[8]

Downright evidence has been held to mean a preponderance of evidence.[9]

"Establish," in the law of evidence, has been defined as meaning to prove;[10] to show conclusively;[11] to make certain;[12] to fix firmly or immovably;[13] to put beyond doubt or dispute;[14] and also to secure the preservation of evidence for possible future use in a judicial controversy.[15] As to the quantum of evidence necessary to warrant the existence of a fact in the issue, the term has been said to be more appropriate to a criminal than to a civil case.[16]

Indubitable evidence. "Indubitable," as applied to evidence, is a term which means evidence that is not only found credible, but of such weight and directness as to make out the facts alleged beyond a doubt.[17]

Moral evidence. By moral evidence is meant all evidence which is not obtained either from intuition or from demonstration,[18] or as opposed to "mathematical" or "demonstrative" evidence, that kind of evidence which, without developing an absolute and necessary certainty, generates a high degree of probability or persuasive force.[19]

Partial evidence is evidence of one or more of a series of facts which tend to prove or disprove a fact in issue.[20]

Presumptive evidence consists of proof of a fact or facts from which a fact in issue may be inferred,[21] or of proof of facts which, when taken together, inferentially establish or prove a fact in question to a reasonable degree of certainty.[22]

Prima facie evidence is that which, either alone or aided by other facts presumed from those established by the evidence, shows the existence of the fact which it is adduced to prove, unless overcome by counter evidence;[23] evidence which, unexplained

Tex.—Linthicum v. Richardson, Civ. App., 245 S.W. 713.
23 C.J. p 10 note 28.

An admission is not cumulative of other evidence tending to prove the same facts.—Humphreys v. Klick, 49 Ind. 189—Harris v. Jay, 174 N.E. 107, 92 Ind.App. 543.

7. Neb.—Sowle v. Sowle, 215 N.W. 122, 124, 115 Neb. 795.
50 C.J. p 721 note 87.

8. Cal.—Treadwell v. Whittier, 22 P. 266, 80 Cal. 574, 582, 13 Am.S.R. 175, 5 L.R.A. 498.
N.Y.—Boetgen v. New York & H. R. Co., 50 N.Y.S. 331, 332, reversed on other grounds 55 N.Y.S. 847, 36 App.Div. 460.

9. Wis.—Roe v. Bacheldor, 41 Wis. 360, 363.

10. Tex.—Carl v. Settegast, Civ. App., 211 S.W. 506, 519.
21 C.J. p 900 note 29.

11. Tex.—Fury v. State, 8 Tex.App. 471, 473.

12. Tex.—Casey v. State, 90 S.W. 1018, 1019, 49 Tex.Cr. 174.
21 C.J. p 900 note 31.

13. Ala.—Torian v. Ashford, 112 So. 418, 421, 216 Ala. 85.

14. Ala.—Torian v. Ashford, 112 So. 418, 421, 216 Ala. 85.

15. Mo.—In re Goode, 3 Mo.App. 226, 229.
21 C.J. p 900 note 32.

16. Tenn.—Endowment Rank K. P. v. Steele, 63 S.W. 1126, 1128, 107 Tenn. 1.
21 C.J. p 900 note 33.

17. Pa.—Highlands v. Philadelphia & R. R. Co., 58 A. 560, 562, 209 Pa. 286—Hart v. Carroll, 85 Pa. 508, 511.

18. 1 Greenleaf Ev. § 2.
23 C.J. p 9 note 5.

19. Black L.D.

20. Underhill Ev. § 2.

21. Ky.—Davis v. Curry, 2 Bibb 238, 239.
Statutory definition see infra § 1017.

22. Neb.—Horbach v. Miller, 4 Neb. 31, 44.

23. U.S.—Lilienthal's Tobacco v. U. S., N.Y., 97 U.S. 237, 268, 24 L.Ed. 901—U. S. v. Wiggins, Fla., 14 Pet. 334, 337, 10 L.Ed. 481—Kelly v. Jackson ex dem. Morris, N.Y., 6 Pet. 622, 631, 8 L.Ed. 523.
Fla.—Atlantic Land & Improvement Co. v. Lee, 112 So. 549, 551, 93 Fla. 579.
Ga.—Republic Truck Sales Corporation v. Padgett, 118 S.E. 435, 436, 30 Ga.App. 474.
Ill.—Shellabarger Elevator Co. v. Illinois Cent. R. Co., 212 Ill.App. 1, 8.
Ind.—Blough v. Parry, 43 N.E. 560, 564, 144 Ind. 463.
Me.—Foss v. McRae, 73 A. 827, 828, 105 Me. 140.
Mass.—Cincotta v. Dupuy, 1 N.E.2d 182, 294 Mass. 298.
Mo.—Missouri Dist. Telegraph Co. v. Southwestern Bell Telephone Co., 93 S.W.2d 19, 23, 338 Mo. 692—Gilpin v. Missouri, K. & T. Ry. Co., 94 S.W. 869, 871, 197 Mo. 319—Smith v. Burrus, 16 S.W. 881, 106 Mo. 94, 100, 13 L.R.A. 59, 27 Am.S.R. 329—Transamerican Freight Lines v. Marcrome Art Marble Co., App., 150 S.W.2d 547, 552.
N.Y.—People ex rel. Judson v. Thacher, 7 Lans. 274, 285, 1 Thomps. & C. 158, 167, dismissed 55 N.Y. 525, 14 Am.R. 312.
N.C.—White v. Hines, 109 S.E. 31, 37, 182 N.C. 275.
Okl.—Mayo v. Overstreet, 227 P. 396, 397, 107 Okl. 223—Hamilton v. Blakeney, 165 P. 141, 144, 65 Okl. 154.
S.C.—LaCount v. General Asbestos & Rubber Co., 192 S.E. 262, 266, 184 S.C. 232.
Tenn.—Macon County v. Dixon, 100 S.W.2d 5, 9, 20 Tenn.App. 425.
Tex.—Simonds v. Stanolind Oil & Gas Co., 136 S.W.2d 207, 209, 134 Tex. 332, denying rehearing 114 S.W.2d 226, 134 Tex. 332, reversing, Civ.App., 103 S.W.2d 784—Dodson v. Watson, 220 S.W. 771, 772, 110 Tex. 355—Willow Hole Independent School Dist. v. Smith, Civ.App., 123 S.W.2d 708, 710, error refused.
23 C.J. p 9 note 13.

Other definitions

(1) Evidence such as in law is regarded as sufficient to entitle a party to a recovery until it is fairly overcome by rebutting proof.—Porter v. Valentine, 41 N.Y.S. 507, 510, 18 Misc. 213.

(2) Sufficient evidence on which a party will be entitled to recover if his opponent produces no further testimony.—In re Hoagland's Estate,

or uncontradicted, is sufficient to maintain the proposition affirmed.[24] Prima facie evidence is sufficient, unless contradicted by other evidence, to establish for all purposes the existence of a fact in issue;[25] that is, it is sufficient to satisfy the burden of proof[26] and to support a verdict in favor of the party by whom it is introduced[27] when not controverted by other evidence. It may be rebutted or contradicted by other evidence,[28] and, unless there is no other controlling evidence and no discrediting circumstances,[29] it is not conclusive[30] and does not require a verdict for the party whose contention it supports.[31]

Prima facie case. A prima facie case is a case made out by proper and sufficient testimony;[32] one in which the evidence in favor of a proposition is sufficient to support a finding in its favor, if all the evidence to the contrary be disregarded;[33] one in which the adduced proof, standing alone, warrants a finding of the fact to be proved;[34] one which is apparently established by evidence adduced by plaintiff in support of his case up to the time such evidence stands unexplained and uncontradicted;[35] one which is established by sufficient evidence, and can be overthrown only by rebutting evidence adduced on the other side;[36] one which, in the absence of explanation or contradiction, constitutes an apparent case sufficient in the eyes of the law to establish the fact, and if not rebutted remains sufficient for that purpose;[37] one which is made out until the contrary is proved;[38] one which is received, or which continues, until the contrary is shown;[39] one which will support a judgment, unless other evidence is introduced;[40] one which has proceeded on sufficient proof to a stage where it must be submitted to the jury, and not decided against plaintiff

253 N.W. 416, 419, 126 Neb. 377—Eckman Chemical Co. v. Chicago & N. W. Ry. Co., 185 N.W. 444, 446, 107 Neb. 268.

(3) Evidence that warrants the inference, but does not compel it; that calls for explanation or rebuttal and may make a case to be decided by the jury.—In re Hoagland's Estate, supra.

(4) Evidence which, being inconsistent with the falsity of the hypothesis, nevertheless raises such a degree of probability in its favor that it must prevail, if it be credited by the jury, unless it be rebutted or the contrary be proved.
N.J.—Polhemus v. Prudential Realty Corp., 67 A. 303, 308, 74 N.J.Law 570.
N.Y.—People ex rel. Judson v. Thacher, 7 Lans. 274, 285, 1 Thomps. & C. 158, 167, dismissed 55 N.Y. 525, 14 Am.R. 312.

(5) A first view of the evidence which will serve the purpose of the litigant who brings it before the court to establish his cause of action or defense sufficiently on which to base a judgment, if no further and better evidence than such first view is adduced by his adversary.—Kirsch v. Federal Life Ins. Co., 87 P.2d 591, 593, 149 Kan. 309.

(6) Evidence which raises a presumption of fact which binds the jury, and throws the burden of proof on the party against whom it is made.—King v. Hopkins, 57 N.H. 334, 360.

(7) Statutory definition see infra § 1017.

Conjecture is not prima facie evidence.—Everett v. Whitney, 109 A. 386, 119 Me. 128.

24. Ill.—People ex rel. Sanders v. Cairo, V. & C. Ry. Co., 94 N.E. 11, 12, 249 Ill. 97—People v. Murphy, 195 Ill.App. 415, 416.
Ky.—Prudential Ins. Co. of America v. Tuggle's Adm'r, 72 S.W.2d 440, 443, 254 Ky. 814.
Mass.—South Lancaster Academy v. Inhabitants of Town of Lancaster, 136 N.E. 626, 627, 242 Mass. 553—Carroll v. Boston Elevated R. Co., 86 N.E. 793, 797, 200 Mass. 527.
Tenn.—Macon County v. Dixon, 100 S.W.2d 5, 9, 20 Tenn.App. 425.

25. Ill.—Scott v. Scott, 139 N.E. 70, 307 Ill. 586.

26. U.S.—Amtorg Trading Corporation v. Commissioner of Internal Revenue, C.C.A., 65 F.2d 583.

Conversion of general issue to affirmative defense

Prima facie evidence does not convert a plea of the general issue into an affirmative defense.
Neb.—In re Hoagland's Estate, 253 N.W. 416, 126 Neb. 377.
N.C.—Gallup v. Rozier, 90 S.E. 209, 172 N.C. 283.

27. Ga.—Little v. Dolvin, 103 S.E. 85, 25 Ga.App. 264.
Neb.—Eckman Chemical Co. v. Chicago & N. W. Ry. Co., 185 N.W. 444, 107 Neb. 268.
23 C.J. p 9 note 15.

Corpus Juris statement quoted in a criminal case as a clear statement of the rule.—Wells v. State, 239 N.W. 834, 835, 122 Neb. 178.

28. Ill.—Morrison v. Flowers, 139 N.E. 10, 308 Ill. 189.
Ky.—Simpson v. Simpson, 123 S.W. 2d 816, 276 Ky. 223.
Va.—Barton v. Camden, 137 S.E. 465, 147 Va. 263.

29. U.S.—Kelly v. Jackson ex dem Morris, N.Y., 6 Pet. 622, 631, 8 L. Ed. 523.
Mass.—Cincotta v. Dupuy, 1 N.E.2d 182, 294 Mass. 298.
N.J.—Polhemus v. Prudential Realty Corp., 67 A. 303, 74 N.J.Law 570.

30. Ill.—Shellabarger Elevator Co. v. Illinois Cent. R. Co., 212 Ill.App. 1.

31. N.C.—Dickerson v. Atlantic Refining Co., 159 S.E. 446, 201 N.C. 90.
23 C.J. p 9 note 16.

32. Mich.—Purity Ice Cream, etc., Co. v. Adams Express Co., 187 N.W. 296, 297, 217 Mich. 593.
Minn.—State v. Lawlor, 9 N.W. 698, 28 Minn. 216, 224.

33. Neb.—In re Hoagland's Estate, 253 N.W. 416, 420, 126 Neb. 377.
Tex.—Schallert v. Boggs, Civ.App., 204 S.W. 1061, 1062.
49 C.J. p 1346 note 7.

34. Kan.—Tice v. Crowder, 240 P. 964, 119 Kan. 494, 42 A.L.R. 893, 896.

35. Ill.—Morrison v. Flowers, 139 N.E. 10, 12, 308 Ill. 189.

36. Cal.—Frank Meline Co. v. Kleinberger, 290 P. 1042, 1043, 108 Cal. App. 60.
49 C.J. p 1347 note 10.

37. Neb.—In re Hoagland's Estate, 253 N.W. 416, 419, 126 Neb. 377.

38. Tenn.—Weisinger v. Bank of Gallatin, 10 Lea 330, 337.

39. Cal.—Frank Meline Co. v. Kleinberger, 290 P. 1042, 1043, 108 Cal. App. 60.
Neb.—In re Hoagland's Estate, 253 N.W. 416, 419, 126 Neb. 377.
Or.—Millar v. Semler, 3 P.2d 987, 988, 137 Or. 610, quoting **Corpus Juris**, and denying rehearing Miller v. Semler, 2 P.2d 233, 137 Or. 610.
49 C.J. p 1347 notes 11, 16.

40. Ill.—Anlicker v. Brethorst, 160 N.E. 197, 200, 329 Ill. 11.

as a matter of law;[41] or such established facts as the law recognizes as being sufficient to overcome the inertia of the court and to authorize affirmative action by the court, in the absence of evidence on the other side;[42] the phrase sometimes is used synonymously with "prima facie evidence."[43] A prima facie case is not necessarily conclusive even though no other evidence is introduced; a finding may be made for the adverse party where the evidence creating the prima facie case is insufficiently strong to require a finding for the party who introduced it.[44] Similarly, where the testimony offered by the party having the burden of proof is inherently weak, or contains contradictions or inconsistencies, a prima facie case may not be made out, and a finding for the adverse party may be made even though he offers no evidence.[45] A prima facie case must be sufficient in itself;[46] if it depends on an inference to be drawn, the facts shown in evidence must be sufficiently explanatory of themselves to justify the inference,[47] and the evidence must overcome every adverse inference or presumption.[48] A "strong fact" is not the same thing as a prima facie case.[49]

Probability exists in procedural law when the proof indicates that an alleged fact probably happened or existed, in the sense of probability as commonly understood in everyday language.[50]

Probative evidence has been defined to mean that testimony which carries the quality of proof and has fitness to induce a conviction of truth, consisting of facts and reason blending as coördinate factors.[51]

Satisfactory evidence, which is sometimes referred to as equivalent to "sufficient evidence,"[52] has been defined to be that amount of proof which ordinarily satisfies an unprejudiced mind beyond a reasonable doubt;[53] that which ordinarily produces moral certainty or conviction in an unprejudiced mind;[54] that testimony which carries the quality of proof and has fitness to induce a conviction of truth, consisting of facts and reason blending as coordinate factors.[55] Vague and unsatisfactory evidence has been taken to mean evidence which is dim and shadowy and fails to relieve the mind of the trier of facts from doubt or uncertainty.[56]

Scintilla of evidence has been defined as "any material evidence that if true would tend to establish the issue in the mind of a reasonable juror."[57] Other views are that a scintilla of evidence is no evidence[58] or but a spark, gleam, or mere conjec-

41. Neb.—In re Hoagland's Estate, 253 N.W. 416, 419, 126 Neb. 377.
49 C.J. p 1346 note 7 [a] (2), [b].
Similar definitions
(1) A prima facie case means that case has proceeded on sufficient proof to where it must be submitted to jury, unless it should be met by testimony of disinterested witnesses.—McMullen v. Warren Motor Co., 25 P.2d 99, 101, 174 Wash. 454.
(2) A prima facie case is a state of facts which entitles the state to have the case go to the jury.—State v. Hardelein, 7 S.W. 130, 169 Mo. 579, 586.

42. Tex.—Fields v. Allison, Civ. App., 171 S.W. 274, 277.

43. N.C.—White v. Hines, 109 S.E. 31, 38, 182 N.C. 275.

44. Iowa.—Griffith v. Arnold & Rasmussen, 216 N.W. 728, 204 Iowa 1216.
49 C.J. p 1346 note 7 [a].

45. Mo.—Moon v. Brown, 158 S.W. 79, 172 Mo.App. 516.

46. Mo.—Gilpin v. Missouri, K. & T. Ry. Co., 94 S.W. 869, 197 Mo. 319—Transamerican Freight Lines v. Marcrome Art Marble Co., App., 150 S.W.2d 547.

47. Mo.—Gilpin v. Missouri, K. & T. Ry. Co., 94 S.W. 869, 197 Mo. 319—Transamerican Freight Lines v. Marcrome Art Marble Co., App., 150 S.W.2d 547.

48. Or.—Millar v. Semler, 3 P.2d 987, 137 Or. 610, denying rehearing Miller v. Semler, 2 P.2d 233, 137 Or. 610.

49. Tenn.—Weisinger v. Bank of Gallatin, 10 Lea 330.

50. Miss.—Gulf Refining Co. v. Williams, 185 So. 234, 236, 183 Miss. 723.

51. Ky.—Dyche v. Scoville, 109 S.W.2d 581, 270 Ky. 196—Globe Indemnity Co. v. Daviess, 47 S.W.2d 990, 243 Ky. 356.

52. Me.—Thayer v. Boyle, 30 Me. 475, 481.
Mo.—Kenney v. Hannibal & St. J. R. Co., 70 Mo. 243, 248.
Ohio.—Cole v. McClure, 102 N.E. 264, 266, 88 Ohio St. 1.
Tex.—Missouri Pac. R. Co. v. Bartlett, 16 S.W. 638, 639, 81 Tex. 42—McCrary v. McCrary, Civ.App., 230 S.W. 187, 207—Brewer v. Doose, Civ.App., 146 S.W. 323, 324.

53. U.S.—Louie Dai v. U. S., Pa., 238 F. 68, 71, 73, 151 C.C.A. 144.
Kan.—Shriver v. Union Stockyards Nat. Bank, 232 P. 1062, 1066, 117 Kan. 638.
Mo.—Kenney v. Hannibal & St. Joseph R. Co., 70 Mo. 243, 248.
Neb.—Hyndshaw v. Mills, 187 N.W. 780, 781, 108 Neb. 250.
Ohio.—Cole v. McClure, 102 N.E. 264, 266, 88 Ohio St. 1.
Or.—Goltra v. Penland, 77 P. 129, 133, 45 Or. 254.
Tex.—McCrary v. McCrary, Civ.App., 230 S.W. 187, 207—Brewer v. Doose, Civ.App., 146 S.W. 323, 325.
23 C.J. p 10 note 24.
Other definitions
U.S.—U. S. v. Detroit Timber & Lumber Co., C.C.Ark., 124 F. 393, 402, reversed on other grounds 131 F. 668, 67 C.C.A. 1, which is affirmed 26 S.Ct. 282, 200 U.S. 321, 50 L.Ed. 499.
23 C.J. p 10 note 25 [a].

54. Kan.—Shriver v. Union Stockyards Nat. Bank, 232 P. 1062, 1066, 117 Kan. 638, 646.
Or.—Goltra v. Penland, 77 P. 129, 133, 45 Or. 254.

55. Ky.—Dyche v. Scoville, 109 S.W.2d 581, 270 Ky. 196.

56. Me.—Weliska's Case, 131 A. 860, 861, 125 Me. 147.

57. S.C.—Crosby v. Seaboard Air Line R. Co., 61 S.E. 1064, 1067, 81 S.C. 24—Taylor v. Atlantic Coast Line R. Co., 59 S.E. 641, 643, 78 S.C. 552.
Corpus Juris cited in support of the statement, in a criminal case, that even a scintilla of evidence must tend to prove an issue.—State v. Gregory, 96 S.W.2d 47, 52, 339 Mo. 133.

58. N.Y.—W. J. Crouch Co. v. Farrell, 184 N.Y.S. 564.
Tex.—Sinclair Refining Co. v. Womack, Civ.App., 66 S.W.2d 402.
Scintilla as insufficient to support verdict or finding see infra § 1042.

ture as distinguished from a reasonable inference.[59] The expression "mere scintilla" of evidence means the least particle of evidence—evidence which, without further evidence, is a mere trifle.[60]

Strong corroborating circumstances is a phrase which implies that the circumstances which corroborate the principal fact are calculated to carry conviction and to lead one to believe that the principal fact is true aside from other evidence on that subject.[61]

Substantial evidence is evidence which, if true, would have probative force on the issues;[62] something of substance and relevant consequence;[63] evidence which a reasonable mind might accept as adequate to support a conclusion.[64] The term implies "competent evidence."[65]

Sufficient evidence has been defined to be such evidence as in amount is adequate to justify the court or jury in adopting the conclusion in support of which it was adduced.[66]

Weight of evidence has been said to signify that the parol proof on one side of a cause is greater than on the other;[67] that the party having the burden of proof will be entitled to a verdict, if, on weighing the evidence, it is that the greater amount of creditable evidence sustains the issue which is to be established.[68] The phrase has been said to be synonymous with "effect of evidence"[69] and "sufficient evidence."[70] It has been distinguished from "preponderance,"[71] and from "demurrer to the evidence," as involving a question of fact, instead of law.[72]

§ 1017. Statutory Provisions

The degree of proof necessary or sufficient to establish a fact is sometimes determined by statute; and where such is done the statute affords a rule of substantive law.

Statutes governing the amount of proof necessary to establish liability have been held to provide a rule of substantive law and not one of procedure.[73]

Preponderance of evidence. The rule, stated infra § 1019, that in civil cases an issue of fact cannot be regarded as proved unless the party having the burden of proof thereon produces a preponderance of evidence is sometimes embodied in statute,[74] and a preponderance of the evidence, or preponderant evidence, has been defined as that superior weight of evidence which, while not enough wholly to free the mind from a reasonable doubt, is sufficient to incline a reasonable and impartial mind to one side of the issue rather than to the other.[75]

Presumptive evidence. The term "presumptive" as used in a statute relating to evidence has been

59. Mo.—Scrivner v. American Car & Foundry Co., 50 S.W.2d 1001, 330 Mo. 408.
Tex.—Lloyds of Texas v. Bobbitt, Civ.App., 40 S.W.2d 897, error dismissed, Com.App., 55 S.W.2d 803.

60. N.J.—Fitzpatrick v. Merchants & Manufacturers F. Ins. Co., 5 A. 2d 771, 773, 122 N.J.Law 468, citing **Corpus Juris.**
23 C.J. p 9 note 8.

61. Ky.—Brake v. Commonwealth, 292 S.W. 305, 306, 218 Ky. 747.

62. Mo.—Berkemeier v. Reller, 296 S.W. 739, 752, 317 Mo. 614—Shade v. Brinkopf, App., 119 S.W.2d 444, 446.

63. U.S.—National Labor Relations Board v. Thompson Products, C.C. A., 97 F.2d 13, 15.
60 C.J. p 978 note 54.

64. U.S.—Consolidated Edison Co. v. National Labor Relations Bd., N. Y., 59 S.Ct. 206, 217, 305 U.S. 197, 83 L.Ed. 126.
"Substantial evidence is more than a scintilla, and must do more than create a suspicion of the existence of the fact to be established. 'It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion' . . . and it must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury."—National Labor Relations Board v. Columbian Enameling & Stamping Co., 59 S.Ct. 501, 505, 306 U.S. 292, 83 L.Ed. 660—National Labor Relations Board v. Falk Corporation, C. C.A., 102 F.2d 383.

65. Mo.—Mississippi Valley Trust Co. v. Begley, 275 S.W. 540, 544, 310 Mo. 287.

66. U.S.—U. S. v. Detroit Timber & Lumber Co., C.C.Ark., 124 F. 393, 402, reversed on other grounds 131 F. 668, 67 C.C.A. 1, which is affirmed 26 S.Ct. 282, 200 U.S. 321, 50 L.Ed. 499—Walker v. Collins, Kan., 59 F. 70, 74, 8 C.C.A. 1, reversed on other grounds 17 S.Ct. 738, 167 U.S. 57, 42 L.Ed. 76.

67. Bouvier L.D. quoted in Pumorlo v. Merrill, 103 N.W. 464, 466, 125 Wis. 102, 107.

68. Mass.—Haskins v. Haskins, 9 Gray 390, 393.

69. Neb.—Jessen v. Donahue, 96 N. W. 639, 640, 4 Neb., Unoff., 838.

70. Ohio.—Waldron v. New York Cent. Ry. Co., 140 N.E. 161, 163, 106 Ohio St. 371.

71. Ark.—Shinn v. Tucker, 37 Ark. 580, 588.
"Preponderance is something more than weight. It is a superiority of weight, outweighing. The words are not synonymous, but substantially different."—Shinn v. Tucker, supra.

72. Mo.—Birdsong v. Jones, 30 S.W. 2d 1094, 1097, 225 Mo.App. 242.

73. Or.—Hopkins v. Spokane, P. & S. Ry. Co., 298 P. 914, 137 Or. 287, rehearing denied 2 P.2d 1105, 137 Or. 287.

74. Cal.—People v. Kovacevich, 65 P.2d 807, 19 Cal.App.2d 335.

Evidence to overcome adverse presumption

Construed in connection with a statute of the nature referred to in the text, a statute providing that a jury is not bound to decide in conformity with testimony which does not produce conviction in their minds, as against a presumption, has been held not to require that evidence establish facts to a moral certainty in order to overcome an adverse presumption.—Smellie v. Southern Pac. Co., 299 P. 529, 212 Cal. 540.

75. Ga.—Jones v. McElroy, 68 S.E. 729, 730, 134 Ga. 857, 137 Am.S.R. 276—Scott v. Brown, 56 S.E. 130, 127 Ga. 88—New York Life Ins. Co. v. Jennings, 6 S.E.2d 431, 437, 61 Ga.App. 557.

held to be synonymous with "prima facie."[76]

Prima facie evidence has been defined by statute to be that which suffices for the proof of a particular fact until contradicted and overcome by other evidence.[77] Such evidence is not conclusive, but is merely sufficient as proof until or unless contradicted and overcome by other evidence,[78] direct or indirect.[79] Under such a statute, the effect of such evidence is not destroyed merely by contradictory evidence, however, but it constitutes proof of a fact until it is both contradicted and overcome by other evidence.[80] Evidence may be prima facie or legally sufficient even though it is not "satisfactory" within the meaning of a statute defining satisfactory evidence as evidence which ordinarily produces moral certainty or conviction in an unprejudiced mind.[81]

Establish, as used in a statute providing for the establishment of right to property, has been held to mean to prove, or cause to be recognized as valid or legal.[82]

§ 1018. Preponderance of Evidence

a. In general
b. Evidence to overcome adverse presumptions
c. Evidence to overcome a prima facie case or prima facie evidence
d. Evidence as to improbabilities

a. In General

In civil actions, as is noted infra § 1019, a fact as to which a party has the burden of proof must be established by a preponderance of the evidence, and, as is noted infra § 1020, such a quantum of proof is ordinarily regarded as sufficient, a preponderance of evidence, as discussed infra § 1021, meaning simply evidence which is of a greater weight or more convincing than that which is offered in opposition.

b. Evidence to Overcome Adverse Presumptions

The party having the burden of proof must produce evidence sufficient to overcome opposing presumptions, if any, the quantum of evidence required for this purpose depending, generally speaking, on the strength of the particular presumption. A presumption is rebutted by evidence which merely balances it, and is generally overcome by direct and positive testimony which is uncontradicted and unimpeached.

The party having the burden of proving a fact must produce evidence sufficient to overcome opposing presumptions, if there are any, as well as opposing evidence.[83] The quantum of evidence required for this purpose depends, generally speaking, on the strength of the particular presumption.[84] It has been broadly stated, however, that the degree of proof necessary for this purpose is that which is necessary for the purpose of sustaining an issue;[85] the preponderance rule continues to operate, it has been held,[86] and the adverse presumption merely requires more evidence to constitute a preponderance than where no presumption exists.[87] It also has been held that a presumption may be overcome by any substantial evidence,[88] or even by slight evidence,[89] or by proof such as satisfies,[90] or reasonably satisfies,[91] the trier of fact; further, that a presumption is controverted when proof to the contrary satisfactorily overcomes it,[92] and is counterbalanced by proof such as ordinarily produces conviction in an unprejudiced mind.[93] The

76. N.C.—State v. Mitchell, 25 S.E. 783, 784, 1020, 119 N.C. 784.

77. Cal.—Moore v. Hopkins, 23 P. 318, 319, 83 Cal. 270, 17 Am.S.R. 248—Swamp Land Dist. No. 307 v. Gwynn, 12 P. 462, 464, 70 Cal. 566—MacDiarmid v. McDevitt, 275 P. 500, 502, 97 Cal.App. 414.
Mont.—State v. Nielsen, 187 P. 639, 640, 57 Mont. 137.

78. Cal.—In re Woodson's Estate, 96 P.2d 1016, 36 Cal.App.2d 77.

79. Cal.—MacDiarmid v. McDevitt, 275 P. 500, 97 Cal.App. 414.

80. Cal.—Miller & Lux v. Secara, 227 P. 171, 193 Cal. 755.

81. Cal.—MacDiarmid v. McDevitt, 275 P. 500, 97 Cal.App. 414.

82. Tex.—Sanders v. Farrier, Civ. App., 271 S.W. 293, 298.

83. U.S.—Troeder v. Lorsch, Mass., 150 F. 710, 80 C.C.A. 376.
La.—De Gruy v. Cire & Delhomer, 4 La.App. 558.
Or.—Metropolitan Casualty Ins. Co. of New York v. N. B. Lesher, Inc., 52 P.2d 1133, 152 Or. 161.
23 C.J. p 19 note 30.

84. U.S.—In re Trustees System Co. of Louisville, D.C.Ky., 30 F.Supp. 361—Troeder v. Lorsch, Mass., 150 F. 710, 80 C.C.A. 376.
Cal.—Simonton v. Los Angeles Trust & Savings Bank, 270 P. 672, 205 Cal. 252.
23 C.J. p 19 note 28.
Necessity of clear and convincing proof see infra § 1023.

85. Mont.—Story Gold Dredging Co. v. Wilson, 76 P.2d 73, 106 Mont. 166—Monaghan v. Standard Motor Co., 29 P.2d 378, 96 Mont. 165—In re Wray's Estate, 19 P.2d 1051, 93 Mont. 525.
Ohio.—Kennedy v. Walcutt, 161 N. E. 336, 118 Ohio St. 442.

86. Mont.—Story Gold Dredging Co. v. Wilson, 76 P.2d 73, 106 Mont. 166—Monaghan v. Standard Motor Co., 29 P.2d 378, 96 Mont. 165—In re Wray's Estate, 19 P.2d 1051, 93 Mont. 525.

87. Neb.—Doane v. Dunham, 89 N. W. 640, 64 Neb. 135.

88. Ark.—Missouri Pac. R. Co. v. Penny, 137 S.W.2d 934, 200 Ark. 69.

89. Me.—Eisenman v. Austen, 169 A. 162, 132 Me. 214.

90. Ala.—Sovereign Camp, W. O. W. v. Dennis, 87 So. 616, 17 Ala.App. 642.

91. Ala.—New York Life Ins. Co. v. Turner, 104 So. 643, 213 Ala. 286.

92. Mont.—Story Gold Dredging Co. v. Wilson, 76 P.2d 73, 106 Mont. 166—Monaghan v. Standard Motor Co., 29 P.2d 378, 96 Mont. 165—In re Wray's Estate, 19 P.2d 1051, 93 Mont. 525.

93. Cal.—In re Duncan's Estate, 70 P.2d 174, 9 Cal.2d 207—Simonten v. Los Angeles Trust & Savings Bank, 270 P. 672, 205 Cal. 252.

proof need not amount to a complete demonstration;[94] but the evidence must be credible[95] and possess probative weight.[96]

The degree of proof necessary to remove a presumption is to be distinguished from that which is necessary to sustain the burden of proof;[97] a presumption is rebutted by evidence which merely balances it.[98]

Uncorroborated testimony of an interested witness[99] or uncorroborated testimony which is improbable[1] will not overcome a presumption.

Uncontradicted evidence. While uncontradicted evidence is not necessarily sufficient to overcome a presumption, as where different inferences may reasonably be drawn therefrom,[2] distinct and positive testimony which is uncontradicted and unimpeached will generally overcome an adverse presumption.[3]

Dispelling presumption as matter of law. A presumption is not dispelled as a matter of law by evidence produced by the opposite party unless such evidence is absolutely conclusive.[4] It has been held, however, that a presumption is dispelled when a fact which is wholly irreconcilable with it is proved by uncontradicted testimony of the party, or a witness of the party, relying on the presumption, unless the testimony is the result of mistake or inadvertence.[5] Evidence in opposition which is conflicting, vague, uncertain, or improbable will not dispel an inference as a matter of law;[6] but an inference will be dispelled as a matter of law when opposed by evidence which is clear and positive, not open to doubt, and uncontradicted, even where the evidence is produced by the adverse party.[7]

c. Evidence to Overcome a Prima Facie Case or Prima Facie Evidence

It has been held that a prima facie case stands until clearly met and explained to the satisfaction of the trier of facts; but a prima facie case or prima facie evidence is rebutted and overcome by opposing evidence of equal weight.

It has been held that a prima facie case stands until it has been clearly met and explained to the satisfaction of the trier of facts,[8] and is not overcome by evidence which affords bare conjecture to the contrary.[9] A prima facie case, or prima facie evidence, is rebutted and overcome, however, by opposing evidence of equal weight;[10] and it has been held that where substantial controverting evidence is introduced, merely prima facie evidence is not sufficient to sustain the burden of proof and warrant a verdict.[11] In any case, prima facie evidence ceases to be sufficient when rebutted or impaired by contrary and better proof.[12]

94. Cal.—In re Duncan's Estate, 70 P.2d 174, 9 Cal.2d 207—Simonton v. Los Angeles Trust & Savings Bank, 270 P. 672, 205 Cal. 252.

95. Mo.—Maxey v. Railey & Bros. Banking Co., App., 57 S.W.2d 1091.

96. Me.—Eisenman v. Austen, 169 A. 162, 132 Me. 214.

Presumption that affidavit is accurate has been held not overcome by testimony of the person who signed it that he does not remember an event stated in the affidavit as having occurred.—Guardian Depositors' Corporation of Detroit v. Keller, 282 N.W. 194, 286 Mich. 403.

97. Ohio.—Kennedy v. Walcutt, 161 N.E. 336, 118 Ohio St. 442.

98. Cal.—In re Eakle's Estate, 91 P.2d 954, 33 Cal.App.2d 379—Jolley v. Clemens, 82 P.2d 51, 28 Cal. App.2d 55—Manufacturers' Finance Corporation v. Pacific Wholesale Radio, 19 P.2d 1013, 130 Cal.App. 239.
Ohio.—Kennedy v. Walcutt, 161 N.E. 336, 118 Ohio St. 442.

99. Mont.—Monaghan v. Standard Motor Co., 29 P.2d 378, 96 Mont. 165.
Wash.—McMullen v. Warren Motor Co., 25 P.2d 99, 174 Wash. 454.

Whether witness is interested within the rule must be determined from the particular circumstances of each case.—Sullivan v. Associated Dealers, 103 P.2d 489, 4 Wash.2d 352.

1. Mich.—Cameron v. Culkins, 7 N. W. 157, 44 Mich. 531.

2. Mont.—Story Gold Dredging Co. v. Wilson, 76 P.2d 73, 106 Mont. 166—Monaghan v. Standard Motor Co., 29 P.2d 378, 96 Mont. 165.

3. Mich.—England v. Ætna Life Ins. Co., 280 N.W. 771, 285 Mich. 302—Christiansen v. Hilber, 276 N.W. 495, 282 Mich. 403.
N.Y.—Elwood v. Western Union Tel. Co., 45 N.Y. 549, 6 Am.R. 140.

4. Cal.—Engstrom v. Auburn Automobile Sales Corporation, 77 P.2d 1059, 11 Cal.2d 64.
Dispelling presumptions of law see supra § 119.

5. Cal.—Engstrom v. Auburn Automobile Sales Corporation, 77 P.2d 1059, 11 Cal.2d 64—Whicker v. Crescent Auto Co., 66 P.2d 749, 20 Cal.App.2d 240.

Testimony of adverse party
A presumption is not dispelled, however, where the witness is the adverse party called under a statute authorizing a party to call the adverse party as a witness without becoming bound by his testimony.—Engstrom v. Auburn Automobile Sales Corporation, 77 P.2d 1059, 11 Cal.2d 64—Whicker v. Crescent Auto Co., 66 P.2d 749, 20 Cal.App.2d 240—Bushnell v. Yoshika Tashiro, 2 P. 2d 550, 115 Cal.App. 563.

6. Cal.—Engstrom v. Auburn Automobile Sales Corporation, 77 P.2d 1059, 11 Cal.2d 64.

Evidence held not absolutely conclusive
Cal.—Bard v. Kent, App., 116 P.2d 137.

7. Cal.—Engstrom v. Auburn Automobile Sales Corporation, 77 P.2d 1059, 11 Cal.2d 64.
Pa.—Halpern v. Gottesman, 2 Fay. L.J. 39.
23 C.J. p 19 note 27.
Probative force and conflict of presumptions see supra § 119.

8. Tenn.—Weisinger v. Bank of Gallatin, 10 Lea 330, 337.

9. W.Va.—Scioto Livestock Sales Co. v. Crockett, 178 S.E. 427, 116 W.Va. 27.

10. Ill.—Shellabarger Elevator Co. v. Illinois Cent. R. Co., 212 Ill.App. 1.
N.C.—Speas v. Merchants' Bank & Trust Co. of Winston-Salem, 125 S.E. 398, 188 N.C. 524.
22 C.J. p 78 note 20 [a].

11. N.Y.—Potts v. Pardee, 116 N.E. 78, 220 N.Y. 431, reversing 147 N. Y.S. 1136, 162 App.Div. 936.

12. N.Y.—People v. Thacher, 7 Lans. 274, 1 Thomps. & C. 158, 167, dismissed 55 N.Y. 525, 14 Am.R. 312.

Prima facie evidence may be rebutted by additional undisputed facts which, although consistent with its truth, tend to a contrary conclusion.[13]

Where two pieces of prima facie evidence are in conflict, both lose their prima facie quality.[14]

d. Evidence as to Improbabilities

The degree of proof required to establish a fact varies according to its probability. Improbability is not sufficient ground for holding a fact not proved where it is supported by apparently credible evidence.

The degree of proof required to establish a fact varies according to the probability of the fact.[15] Where the fact asserted is improbable, a high and convincing degree of proof is required;[16] but improbability alone is not sufficient ground for holding a fact not proved where it is supported by competent and apparently credible evidence.[17]

§ 1019. —— Preponderance Required

a. In general
b. Equilibrium of evidence

a. In General

In civil cases, an issue of fact is generally not regarded as proved unless the party having the burden of proof produces a preponderance of evidence.

It is a rule almost universally followed in civil cases that an issue of fact cannot be regarded as proved unless the party having the burden of proof thereon produces a preponderance of evidence.[18] The rule has been disapproved, however, on the

Tenn.—Macon County v. Dixon, 100 S.W.2d 5, 20 Tenn.App. 425.

13. Ga.—Republic Truck Sales Corporation v. Padgett, 118 S.E. 435, 30 Ga.App. 474.

14. Mass.—Boyas v. Raymond, 20 N.E.2d 411, 302 Mass. 519—Town of Lexington v. Ryder, 6 N.E.2d 828, 296 Mass. 566—Chandler v. Prince, 105 N.E. 1076, 217 Mass. 451.

15. Ill.—People v. Blumenberg, 193 Ill.App. 119, reversed on other grounds 110 N.E. 788, 271 Ill. 180.
N.Y.—Szpyrka v. International Ry. Co., 210 N.Y.S. 553, 213 App.Div. 390.

Disproof of improbable event

It has been said that a slight preponderance is sufficient to warrant a conclusion that an improbable event did not occur.—McBride v. New Orleans Public Service, 3 La. App. 474.

16. Va.—Morison v. Dominion Nat. Bank, 192 S.E. 707, 169 Va. 191.
23 C.J. p 19 notes 32, 33.

17. Ark.—Southern Lumber Co. v. Downey, 64 S.W.2d 552, 553, 188 Ark. 1167, quoting **Corpus Juris**—Producers' Sand & Gravel Co. v. Patterson, 64 S.W.2d 320, 188 Ark. 50, quoting **Corpus Juris.**
23 C.J. p 19 note 34.

18. Ariz.—Harvey v. Aubrey, 87 P. 2d 482, 53 Ariz. 210.
Ark.—National Ben. Life Ins. Co. v. Pitts, 30 S.W.2d 853, 181 Ark. 1146.
Cal.—Contra Costa County v. Cowell Portland Cement Co., 14 P.2d 606, 126 Cal.App. 267.
Del.—Warwick v. Addicks, 157 A. 205, 5 W.W.Harr. 43.
Fla.—Bourne v. State Bank of Orlando & Trust Co., 142 So. 810, 106 Fla. 46—Seaboard Air Line Ry. v. Royal Palm Soap Co., 86 So. 835, 80 Fla. 800.
Ga.—Wright v. Harber, 165 S.E. 616, 175 Ga. 696.
Ill.—Noyes v. Gold, 34 N.E.2d 1, 310 Ill.App. 1.
Ind.—Bechstein v. Sayler, 179 N.E. 581, 93 Ind.App. 686.
Iowa.—Johnson v. McVicker, 247 N. W. 488, 216 Iowa 654—First Nat. Bank v. Royal Indemnity Co., 186 N.W. 934, 193 Iowa 221.
La.—Aden v. Scott-Burr Stores Corporation, App., 176 So. 131—Hill v. Louisiana Coca-Cola Bottling Co., App., 170 So. 45—Haigler v. Southern Advance Bag & Paper Co., App., 142 So. 270—Kingsley v. Schnell, 120 So. 501, 9 La.App. 325—Morris v. Summers, 6 La.App. 378.
Minn.—Schendel v. Chicago, M. & St. P. Ry. Co., 206 N.W. 436, 165 Minn. 223.
Miss.—Masonite Corporation v. Dennis, 168 So. 613, 175 Miss. 855—Smith v. Gulf, M. & N. R. Co., 129 So. 599, 158 Miss. 188—D. L. Fair Lumber Co. v. Federal Land Bank of New Orleans, 128 So. 733, 158 Miss. 87.
Mo.—Stiers v. Edwards, 42 S.W.2d 362.
Mont.—Evans v. Silver Bow Motor Car Co., 29 P.2d 381, 96 Mont. 156—Hageman v. Arnold, 254 P. 1070, 79 Mont. 91.
N.J.—Constitution Indemnity Co. of Philadelphia v. Wickburg, 170 A. 632, 112 N.J.Law 348.
N.C.—Jones v. Coleman, 125 S.E. 406, 188 N.C. 631.
N.D.—Lindberg v. Burton, 171 N.W. 616, 41 N.D. 587.
Ohio.—Cleveland Metal Bed Co. v. Kutz, 160 N.E. 725, 27 Ohio App. 245.
S.C.—Turner v. American Motorists Ins. Co., 180 S.E. 55, 176 S.C. 260—Kirven v. Kirven, 160 S.E. 432, 162 S.C. 162—Burnette v. Augusta Coca-Cola Bottling Co., 154 S.E. 645, 157 S.C. 359.
Tenn.—Pickard v. Berryman, App., 142 S.W.2d 764.
Tex.—Burns v. American Nat. Ins. Co., Com.App., 280 S.W. 762, affirming American Nat. Ins. Co. v. Burns, Civ.App., 273 S.W. 339—Willow Hole Independent School Dist. v. Smith, Civ.App., 123 S.W. 2d 708, error refused—Miller v. Fallwell, Civ.App., 42 S.W.2d 644—New Amsterdam Casualty Co. v. Rutherford, Civ.App., 26 S.W.2d 377.
Vt.—Gentes v. St. Peter, 163 A. 569, 105 Vt. 103—Livanovitch v. Livanovitch, 131 A. 799, 99 Vt. 327.
23 C.J. p 11 note 32.

The weight, or greater weight, of evidence must be with the party having burden of proof in order for him to succeed.
N.C.—Hedgecock v. Jefferson Standard Life Ins. Co., 194 S.E. 86, 212 N.C. 638—Williams v. Blue Ridge Building & Loan Ass'n, 177 S.E. 176, 207 N.C. 362—Barker v. Massachusetts Mut. Life Ins. Co., 83 S.E. 16, 168 N.C. 87—Chaffin v. Fries Mfg. & Power Co., 47 S.E. 226, 135 N.C. 95.
Pa.—Couchara v. S. M. S. of Conshohocken, 54 Montg.Co. 132.

Affirmative or special defense

(1) Defendant must establish an affirmative or special defense by a preponderance of evidence.
U.S.—Wheeler v. Fidelity & Deposit Co. of Maryland, C.C.A.Iowa, 63 F. 2d 562.
Del.—Arthur Jordan Piano Co. v. Lewis, 154 A. 467, 4 W.W.Harr. 423.
La.—Evans v. Louisiana Gas & Fuel Co., 140 So. 245, 19 La.App. 529.
S.C.—Lorick & Lowrance v. Julius H. Walker & Co., 150 S.E. 789, 153 S.C. 309.

(2) It has been held, however, that "the defendant is not required to support any issue presenting an affirmative defense to the plaintiff's case by a preponderance of the testimony."—Thompson v. Shifflett, Tex. Civ.App., 267 S.W. 1030, 1033.

ground that it exacts too high a degree of proof,[19] and, as appears in § 1021 a, the proper standard of proof has been said to be that which will "reasonably satisfy" the jury. In any case the opposing party is not required to disprove such a fact by the preponderance of the evidence,[20] and if the evidence preponderates in the slightest degree against the party having the burden of proof his contention is not established.[21]

b. Equilibrium of Evidence

Where evidence on an issue is in equipoise, or there is doubt as to the side on which the evidence preponderates, the party having the burden of proof fails on that issue.

Where the evidence on an issue of fact is in equipoise,[22] or there is any doubt or perplexity as to the side on which the evidence preponderates,[23] the party having the burden of proof fails on that issue. It has been said, however, that where the evidence is in equilibrium a court of equity leans strongly toward that version of a transaction which is most in accord with ordinary business usage.[24] Evidence is not necessarily in equilibrium, of course, merely because contradicted.[25]

§ 1020. —— Preponderance Sufficient

a. In general
b. Where charge of crime is involved

a. In General

In ordinary civil actions, a fact is sufficiently proved by a preponderance of evidence, and the verdict or finding should be based on such preponderance, the requirement of a higher degree of proof being improper. A bare preponderance, however slight, is commonly regarded as sufficient.

Ordinarily the degree of proof which is required in civil actions is different from that required in

Negligence
The rule stated in the text applies in actions founded on negligence.—Plumb v. Richmond Light & R. Co., 135 N.E. 504, 233 N.Y. 285, 25 A.L.R. 685—45 C.J. p 1260 note 93.

Equitable set-off
A party claiming a right to an equitable set-off must produce evidence creating more than a prima facie case.—Feucht v. Real Silk Hosiery Mills, 12 N.E.2d 1019, 105 Ind.App. 405.

19. Ala.—Southern Ry. Co. v. Beaty, 103 So. 658, 212 Ala. 608—Killian v. Taylor, 104 So. 446, 20 Ala.App. 614.
23 C.J. p 11 note 32 [b].

20. Vt.—Gentes v. St. Peter, 163 A. 569, 105 Vt. 103.

Absence of negligence
In an action founded on negligence, defendant is not required to prove by a preponderance of evidence the absence of negligence.—Scarborough v. Urgo, 216 P. 584, 191 Cal. 341—45 C.J. p 1261 note 95.

21. Vt.—White River Chair Co. v. Connecticut River Power Co. of New Hampshire, 162 A. 859, 105 Vt. 24.
23 C.J. p 11 note 33.

22. U.S.—Mayfield v. Ætna Life Ins. Co., C.C.A.Tex., 100 F.2d 199.
Cal.—Manufacturer's Finance Corporation v. Pacific Wholesale Radio, 19 P.2d 1013, 130 Cal.App. 239.
Ind.—Great Atlantic & Pacific Tea Co. v. Custin, 13 N.E.2d 542, 214 Ind. 54, rehearing denied 14 N.E. 2d 538, 214 Ind. 54.
Iowa.—Wiederin v. Chicago & N. W. Ry. Co., 237 N.W. 344, 202 Iowa 1103.
La.—Wade v. Henry, 3 La.App. 190—Rey v. Culbertson, 2 La.App. 805.
Minn.—Benson v. Northland Transp. Co., 274 N.W. 532, 200 Minn. 445.
Mo.—Stofer v. Dunham, App., 208 S. W. 641.
Mont.—Putnam v. Putnam, 282 P. 855, 86 Mont. 135—Hageman v. Arnold, 254 P. 1070, 79 Mont. 91.
N.J.—Kresse v. Metropolitan Life Ins. Co., 168 A. 634, 111 N.J.Law 474.
N.Y.—Tobin v. Shwitzer, 295 N.Y.S. 590, 162 Misc. 747.
Ohio.—Ottgen v. Garey, 181 N.E. 485, 41 Ohio App. 499—Hopkins v. Kissinger, 166 N.E. 916, 31 Ohio App. 229—Licker v. Green, 17 Ohio Cir. Ct.,N.S., 49.
S.D.—Wright v. Dubbelde, 172 N.W. 500, 42 S.D. 12.
Tex.—Barton v. Tharp, Civ.App., 27 S.W.2d 885—New Amsterdam Casualty Co. v. Rutherford, Civ.App., 26 S.W.2d 377.
Vt.—Gentes v. St. Peter, 163 A. 569, 105 Vt. 103—White River Chair Co. v. Connecticut River Power Co. of New Hampshire, 162 A. 859, 105 Vt. 24.
23 C.J. p 11 note 34, p 12 note 36.
Evidence balancing presumption see supra § 1018 b.

Inconsistent propositions
(1) When the evidence tends equally to sustain either of two inconsistent propositions, a verdict in favor of the party bound to maintain one of them against the other is necessarily wrong.
U.S.—Fidelity & Deposit Co. of Maryland v. Grand Nat. Bank of St. Louis, C.C.A.Mo., 69 F.2d 177, reversing, D.C., 2 F.Supp. 666—Liggett & Myers Tobacco Co. v. De Parcq, C.C.A.Minn., 66 F.2d 678.
Ark.—Standard Pipe Line Co. v. Burnett, 66 S.W.2d 637, 188 Ark. 491, certiorari denied 54 S.Ct. 857, 292 U.S. 649, 78 L.Ed. 1499.
Cal.—Showalter v. Western Pac. R. Co., 106 P.2d 895, prior opinion, App., 96 P.2d 964.
Mass.—Hanna v. Shaw, 138 N.E. 247, 244 Mass. 57.
Mo.—Cluck v. Abe, 40 S.W.2d 558, 328 Mo. 81.
Pa.—Rau v. Wilkes-Barre & E. R. Co., 167 A. 230, 311 Pa. 510.
23 C.J. p 11 note 34 [a].
(2) In other words, evidence which leaves the question of liability so open that a conclusion of nonliability is as reasonable and plausible as a conclusion of liability does not establish liability.—New York Life Ins. Co. v. Doerksen, C.C.A.Kan., 75 F.2d 96.
(3) Inconsistent conclusions from circumstantial evidence see infra § 1039.

Negligence
The rule stated in the text applies in actions founded on negligence.—Straten v. Spencer, 197 P. 540, 52 Cal.App. 98—45 C.J. p 1261 note 94.

23. Cal.—Reese v. Smith, 70 P.2d 933, 9 Cal.2d 324.
Idaho.—Whalen v. Vallier, 266 P. 1089, 1092, 46 Idaho 181, citing **Corpus Juris**.
N.Y.—In re Stableford's Estate, 20 N.Y.S.2d 615, 174 Misc. 284—Tobin v. Shwitzer, 295 N.Y.S. 590, 162 Misc. 747.
23 C.J. p 12 notes 35, 36.

Inconclusive evidence
The responsibility for the inconclusive character of evidence must be borne by the party on whom rests the burden of proof.—Equitable Trust Co. of New York v. Washington-Idaho Water, Light & Power Co., D.C.Wash., 300 F. 601.

24. Pa.—White v. German-American Title & Trust Co., 12 Pa.Dist. 293, 28 Pa.Co. 576.

25. Minn.—Benson v. Northland Transp. Co., 274 N.W. 532, 200 Minn. 445.

criminal proceedings.[26] In ordinary civil actions a fact in issue is sufficiently proved by a preponderance of evidence,[27] and the verdict or finding should be based on the preponderance of the evidence,[28]

26. Mich.—Stephenson v. Golden, 276 N.W. 849, 279 Mich. 710, modifying 272 N.W. 881, 279 Mich. 493.
Pa.—De Reeder v. Travelers Ins. Co., 198 A. 45, 329 Pa. 328.

27. U.S.—Yarbrough v. Prudential Ins. Co. of America, C.C.A.Ga., 99 F.2d 874, rehearing denied 100 F. 2d 547—Chicago, D. & G. B. Transit Co. v. Moore, Mich., 259 F. 490, 170 C.C.A. 466, certiorari denied 40 S. Ct. 118, 251 U.S. 553, 64 L.Ed. 411.
Ariz.—Schwalbach v. Jones, 232 P. 558, 27 Ariz. 260.
Ark.—Arkansas-Louisiana Gas Co. v. Campbell, 156 S.W.2d 255, 257, quoting **Corpus Juris**—Mutual Life Ins. Co. of New York v. Springer, 104 S.W.2d 195, 193 Ark. 990.
Cal.—Myers v. Rovai, 226 P. 844, 66 Cal.App. 518.
Ga.—Modern Woodmen of America v. Williams, 137 S.E. 100, 36 Ga.App. 359—Jones v. Teasley, 105 S.E. 46, 25 Ga.App. 784.
Idaho.—Boise Street Car Co. v. Van Avery, 103 P.2d 1107, 61 Idaho 502—Watkins v. Federal Life Ins. Co., 29 P.2d 1007, 54 Idaho 174.
Kan.—Shurtz v. National Life & Accident Ins. Co., 92 P.2d 70, 150 Kan. 169.
La.—Wright v. Petty, 7 La.App. 584, 586, citing **Corpus Juris**—Pearce Films Co. v. Dumaine, 3 La.App. 468—Fein v. Finkelstein, 3 La.App. 347—Economon & Theodes v. Tromatore & Co., 3 La.App. 295.
Mich.—Stephenson v. Golden, 276 N.W. 849, 279 Mich. 710, modifying 272 N.W. 881, 279 Mich. 493.
Miss.—Durrett v. Mississippian Ry. Co., 158 So. 776, 171 Miss. 899.
Mo.—Blunk v. Snider, 111 S.W.2d 163, 166, 342 Mo. 26, citing **Corpus Juris**—Sheehan v. Terminal R. Ass'n of St. Louis, 81 S.W.2d 305, 308, 336 Mo. 709, citing **Corpus Juris.**
Nev.—Deiss v. Southern Pac. Co., 53 P.2d 332, 336, 56 Nev. 169, quoting **Corpus Juris.**
N.Y.—Schnur v. Cohen, 273 N.Y.S. 996, 152 Misc. 676.
N.C.—Wilson v. Inter-Ocean Casualty Co., 188 S.E. 102, 210 N.C. 585.
Okl.—General Exchange Ins. Corporation v. Edwards, 73 P.2d 1145, 1147, 181 Okl. 288, quoting **Corpus Juris**—Liberty Nat. Bank of Pawhuska v. Exendine, 11 P.2d 154, 156 Okl. 26.
Pa.—Rasner v. Prudential Ins. Co. of America, 13 A.2d 113, 140 Pa. Super. 124—Ferguson Packing Co. v. Mihalic, 99 Pa.Super. 158.
S.C.—Smith v. Smith, 9 S.E.2d 584, 194 S.C. 247—Powe v. Atlantic Coast Line R. Co., 159 S.E. 473, 161 S.C. 122, reversed on other grounds Atlantic Coast Line R. Co. v. Powe, 51 S.Ct. 498, 283 U.S. 401, 75 L.Ed. 1142.
Tenn.—Endowment Rank of Order of Knights of Pythias v. Steele, 63 S.W. 1126, 107 Tenn. 1—Bank of Commerce & Trust Co. v. Stavros, 103 S.W.2d 593, 20 Tenn.App. 662—Gifford v. Provident Life Ins. Co., 64 S.W.2d 64, 16 Tenn.App. 21.
Tex.—Community Natural Gas Co. v. Allen, Civ.App., 15 S.W.2d 657—Brewer v. Doose, Civ.App., 146 S. W. 323.
Wash.—State v. Superior Court in and for Pacific County, 245 P. 409, 139 Wash. 1, 45 A.L.R. 1530.
23 C.J. p 12 notes 38, 39.
In bastardy cases see Bastards § 95.

Other statements

(1) Verdict for plaintiff is justified if jury has determined that plaintiff has offered substantial evidence supporting his claim which outweighs, and is more convincing than, defendant's evidence.—Nelson v. Evans, 93 S.W.2d 691, 338 Mo. 991.

(2) A fact should be decided in accordance with the greater weight of the evidence, whether the fact consist of an event which has already occurred or of one which in all probability will occur.—Carolina Power & Light Co. v. South Carolina Public Service Authority, D.C. S.C., 20 F.Supp. 854, affirmed, C.C.A., 94 F.2d 520, certiorari denied 58 S. Ct. 1048, 304 U.S. 578, 82 L.Ed. 1541, South Carolina Power Co. v. South Carolina Public Service Authority, 58 S.Ct. 1048, 304 U.S. 578, 82 L.Ed. 1541, and South Carolina Electric & Gas Co. v. South Carolina Public Service Authority, 58 S.Ct. 1049, 304 U.S. 578, 82 L.Ed. 1541.

Deductions from facts

The rule requiring trier of fact to be governed by preponderance of evidence in answering issues has been held to apply only to ascertainment of facts and not to trier's deductions from facts.—Gulf States Utilities Co. v. Moore, Civ.App., 73 S. W.2d 941, reversed on other grounds 106 S.W.2d 256, 129 Tex. 604.

28. Ariz.—Brown v. Jerrild, 239 P. 795, 29 Ariz. 121.
Del.—Gibson v. Gillespie, 152 A. 589, 4 W.W.Harr. 331—Stuckert v. Cann, 111 A. 596, 1 W.W.Harr. 129—Rash v. Pratt, 111 A. 225, 1 W.W.Harr. 18—Palmer v. Lodge, 109 A. 125, 7 Boyce 537.
Idaho.—Manion v. Waybright, 86 P.2d 181, 59 Idaho 643.
Ind.—Putman v. Murden, 184 N.E. 796, 97 Ind.App. 313—Hammond, W. & E. C. Electric Ry. Co. v. Antonia, 83 N.E. 766, 41 Ind.App. 335.
Kan.—Shurtz v. National Life & Accident Ins. Co., 92 P.2d 70, 150 Kan. 169.
La.—Kirk v. United Gas Public Service Co., App., 165 So. 735, annulled on other grounds 170 So. 1, 185 La. 580.
Neb.—Whitney v. Wyatt, 196 N.W. 322, 111 Neb. 328.
N.J.—Jaeger v. Elizabethtown Consolidated Gas Co., 11 A.2d 746, 124 N.J.Law 420—Jackson v. Delaware, L. & W. R. Co., 170 A. 22, 111 N.J. Law 487.
Okl.—General Exchange Ins. Corporation v. Edwards, 73 P.2d 1145, 1147, 181 Okl. 288, quoting **Corpus Juris.**
Pa.—Richards v. Philadelphia Rapid Transit Co., 149 A. 186, 299 Pa. 163.
Tenn.—Ballinger v. Connecticut Mut. Life Ins. Co., 69 S.W.2d 1090, 167 Tenn. 367—Nashville, C. & St. L. Ry. Co. v. Union Ry. Co., 8 Tenn. App. 491.
Va.—Yeary v. Holbrook, 198 S.E. 441, 171 Va. 266.
Wyo.—Northwest States Utilities Co. v. Ashton, 65 P.2d 235, 51 Wyo. 168, rehearing denied 69 P.2d 623, 51 Wyo. 132.
23 C.J. p 13 note 40.

Greater weight of evidence is sufficient to warrant a finding for plaintiff.—Salley v. Globe Indemnity Co., 131 S.E. 616, 133 S.C. 342, 43 A.L.R. 971.

Particular actions

(1) In actions founded on negligence, plaintiff is required to prove his case only by a preponderance, or the greater weight, of the evidence.
Ark.—Chapman v. Henderson, 67 S.W. 2d 570, 188 Ark. 714.
Nev.—Deiss v. Southern Pac. Co., 53 P.2d 332, 56 Nev. 151, denying rehearing 47 P.2d 928, 56 Nev. 151.
S.C.—Crouch v. Cudd, 155 S.E. 136, 158 S.C. 1.
45 C.J. p 1261 note 99.

(2) A preponderance or greater weight of the evidence is sufficient to support an assertion that an instrument was not executed or was executed in an unauthorized manner.
Mass.—Kidder v. Greenman, 187 N.E. 42, 283 Mass. 601, 88 A.L.R. 1370.
N.C.—Jones v. Coleman, 125 S.E. 406, 188 N.C. 631.

(3) In an action to recover the value of real estate included in a deed by mistake and accepted by the grantee with intent to deceive, plaintiff is required to establish his case only by a preponderance of the evidence.—Montgomery v. Lewis, 122 S.E. 374, 187 N.C. 577.

whether the evidence is direct or circumstantial.[29] Under this rule, a party is not required to prove his case "beyond doubt,"[30] "beyond a reasonable doubt," see infra § 1024, "beyond any doubt,"[31] "beyond the possibility of doubt,"[32] "beyond all possible doubt,"[33] "beyond dispute,"[34] "beyond question,"[35] "conclusively,"[36] "to a certainty,"[37] or a "moral,"[38] "reasonable,"[39] or "absolute"[40] certainty, "to the satisfaction of the jury,"[41] or by evidence which is "clear and conclusive,"[42] "clear and convincing,"[43] "clear and satisfactory,"[44] "clear and unequivocal,"[45] "positive and conclusive,"[46] or such as to "satisfy" the jury,[47] or "exclude the truth of any other theory";[48] and the jurors' minds need not be freed from all doubt.[49] It is not indispensable that a party's evidence should be even equal to the testimony of one unimpeached witness.[50] All that is required of him at the outset is to give competent evidence sufficient, if undisputed, to establish the truth of his averments.[51]

Bare preponderance. It has been held in a number of cases that there are no degrees of preponderance,[52] and that a bare preponderance, how-

29. Cal.—Fountain v. Connecticut Fire Ins. Co. of Hartford, App., 117 P. 630, 634.
Kan.—Roediger v. Union Pac. R. Co., 147 P. 837, 95 Kan. 146.
Okl.—General Exchange Ins. Corporation v. Edwards, 73 P.2d 1145, 1147, 181 Okl. 288, quoting **Corpus Juris.**
Tenn.—Pickard v. Berryman, App., 142 S.W.2d 764—Gifford v. Provident Life Ins. Co., 64 S.W.2d 64, 16 Tenn.App. 21.
Tex.—Musslewhite v. Allen, Civ.App., 127 S.W.2d 970—Buro v. Home Ben. Ass'n, Civ.App., 28 S.W.2d 902, error dismissed.

30. Miss.—Durrett v. Mississippian Ry. Co., 158 So. 776, 171 Miss. 899.
Mo.—Nelson v. Evans, 93 S.W.2d 691, 694, 338 Mo. 991, citing **Corpus Juris**—Aly v. Terminal R. R. Ass'n of St. Louis, 78 S.W.2d 851, 855, 336 Mo. 340, quoting **Corpus Juris.**
Pa.—Rasner v. Prudential Ins. Co. of America, 13 A.2d 118, 140 Pa. Super. 124.
23 C.J. p 13 note 43.

31. Nev.—Deiss v. Southern Pac. Co., 53 P.2d 332, 56 Nev. 151, denying rehearing 47 P.2d 928, 56 Nev. 151.
N.Y.—New York Guaranty & Indemnity Co. v. Gleason, 78 N.Y. 503.

32. Kan.—Shurtz v. National Life & Accident Ins. Co., 92 P.2d 70, 150 Kan. 169.

33. U.S.—Chicago, D. & G. B. Transit Co. v. Moore, Mich., 259 F. 490, 170 C.C.A. 466, certiorari denied 40 S.Ct. 118, 251 U.S. 553, 64 L.Ed. 411.

34. Tex.—Torrey v. Cameron, 11 S. W. 840, 73 Tex. 583.

35. Neb.—Stevens v. Carson, 46 N. W. 655, 30 Neb. 544.

36. Cal.—Exposito v. United Railroads of San Francisco, 183 P. 576, 42 Cal.App. 320.
23 C.J. p 14 note 47.

In Texas

(1) It was said in a recent case that a plaintiff charged with the burden of establishing an issue essential to a judgment in his favor must establish such issue conclusively by the evidence.—Traders & General Ins. Co. v. Weatherford, Civ.App., 124 S. W.2d 423, error dismissed, judgment correct.

(2) There is earlier authority, however, which is in accord with the view stated in the text.—Greathouse v. Moore, Civ.App., 23 S.W. 226.

37. Nev.—Deiss v. Southern Pac. Co., 53 P.2d 332, 56 Nev. 151, denying rehearing 47 P.2d 928, 56 Nev. 151.
23 C.J. p 14 note 48.

Mathematical certainty cannot be exacted in determination of disputed issues of fact.—Sloss-Sheffield Steel & Iron Co. v. Snider, 132 So. 899, 222 Ala. 406.

In Louisiana, it is variously held that the proof must be sufficient to render a claim certain, or fairly, reasonably, or legally certain.—Dreher v. Guaranty Bond & Finance Co., 165 So. 711, 184 La. 197—Fridge v. Talbert, 158 So. 209, 180 La. 937—Riley v. City of New Orleans, 92 So. 316, 151 La. 731—Higdon v. W. R. Pickering Lumber Co., 87 So. 252, 148 La. 504—Gray v. Carter, App., 176 So. 885—Labbe v. Broussard, App., 171 So. 203—Kingsley v. Schnell, 120 So. 501, 9 La.App. 325—Louisiana Ry. & Nav. Co. v. J. L. Mullen Sawmill Co., 8 La.App. 509—Furlow v. Maison Blanche Co., 2 La.App. 351—23 C.J. p 14 note 48 [a].

38. N.C.—Williams v. Blue Ridge Building & Loan Ass'n, 177 S.E. 176, 207 N.C. 362.
23 C.J. p 14 note 49.

39. Wis.—Allen v. Murray, 57 N.W. 979, 87 Wis. 41.
23 C.J. p 14 note 50.

40. Ill.—May v. Belleville Enameling & Stamping Co., 247 Ill.App. 275.
Pa.—Rasner v. Prudential Ins. Co. of America, 13 A.2d 118, 140 Pa. Super. 124.
23 C.J. p 14 note 51.

41. Tex.—Brewer v. Doose, Civ.App., 146 S.W. 323.
23 C.J. p 14 note 52.

In Alabama, proof of a fact to the reasonable satisfaction of the jury is all that is required in a civil case.—Southern R. Co. v. Kendall, 69 So. 328, 14 Ala.App. 242, certiorari denied 69 So. 1020.

42. Ark.—White River, L. & W. R. Co. v. Star Ranch & Land Co., 91 S. W. 14, 77 Ark. 128.

43. Ohio.—Cleveland Metal Bed Co. v. Kutz, 160 N.E. 725, 27 Ohio App. 245.
When clear and convincing proof necessary see infra § 1023.

In action at law triable to a jury.—Blue Valley State Bank v. Milburn, 216 N.W. 299, 116 Neb. 131.

44. Nev.—Deiss v. Southern Pac. Co., 53 P.2d 332, 56 Nev. 151, denying rehearing 47 P.2d 928, 56 Nev. 151.
Wis.—Brennan v. Healy, 145 N.W. 641, 157 Wis. 37.

45. U.S.—Miller v. Steele, Ohio, 153 F. 714, 82 C.C.A. 572.

46. Utah.—Dearden v. San Pedro, L. A. & S. L. R. Co., 93 P. 271, 33 Utah 147.

47. Ill.—Hughes v. Medendorp, 13 N.E.2d 1015, 294 Ill.App. 424.
23 C.J. p 14 note 57.

48. Wis.—Wright v. Hardy, 22 Wis. 348.

49. N.J.—Jackson v. Delaware, L. & W. R. Co., 170 A. 22, 111 N.J.Law 487.
Pa.—Rosner v. Prudential Ins. Co. of America, 13 A.2d 118, 140 Pa.Super. 124.
Tenn.—Ballinger v. Connecticut Mut. Life Ins. Co., 69 S.W.2d 1090, 167 Tenn. 367—Endowment Rank of Order of Knights of Pythias v. Steele, 63 S.W. 1126, 107 Tenn. 1—Gifford v. Provident Life Ins. Co., 64 S.W.2d 64, 16 Tenn.App. 21.

50. N.H.—Fuller v. Rounceville, 29 N.H. 554.
Tex.—El Paso Fdy. & Mach. Co. v. De Guereque, 101 S.W. 814, 46 Tex. Civ.App. 86.

51. Minn.—Benson v. Northland Transp. Co., 274 N.W. 532, 534, 200 Minn. 445, citing **Corpus Juris.**
23 C.J. p 14 note 60.

52. Mich.—Stephenson v. Golden, 276 N.W. 849, 279 Mich. 710, modifying 272 N.W. 881, 279 Mich. 493—Peoples v. Evening News, 16 N.

ever slight, is sufficient.[53] The rule that a slight preponderance is sufficient has been disapproved, however,[54] and some authorities hold that a preponderance, or greater weight, of the evidence is not necessarily sufficient, but that the test is whether the evidence is sufficient to produce a reasonable belief in,[55] or reasonably to convince or satisfy,[56] the minds of the jury.

b. Where Charge of Crime Is Involved

Although some authorities take a different view, the great weight of authority is that in civil cases a preponderance of the evidence is sufficient to prove a charge of crime, and that it need not be proved beyond a reasonable doubt.

A criminal act which is directly in issue in a civil case has been required to be proved by more than a mere preponderance of the evidence;[57] thus, proof by clear and convincing, or clear and satisfactory, evidence, or similar evidence, has been required,[58] and there is some comparatively early authority holding that it must be proved beyond a reasonable doubt,[59] at least where the offense is charged in the pleadings.[60] However, the great weight of authority is that in civil cases a charge of crime need not be proved beyond a reasonable doubt, and that a preponderance of evidence is sufficient,[61] especially where the pleadings do not

W. 185, 51 Mich. 11—Elliott v. Van Buren, 33 Mich. 49, 20 Am.R. 668.
Vt.—Foundry Mfg. Co. v. Farr, 126 A. 548, 98 Vt. 109—Bradish v. Bliss, 35 Vt. 326.
23 C.J. p 14 note 61 [a].

53. Mo.—Nelson v. Evans, 93 S.W. 2d 691, 695, 338 Mo. 991, citing **Corpus Juris.**
Mont.—In re Wray's Estate, 19 P.2d 1051, 93 Mont. 525.
Tenn.—Nashville, C. & St. L. Ry. Co. v. Union Ry. Co., 8 Tenn.App. 494.
Vt.—Livanovitch v. Livanovitch, 131 A. 799, 99 Vt. 327.
Va.—Morison v. Dominion Nat. Bank, 192 S.E. 707, 169 Va. 191.
23 C.J. p 14 note 61.

Fact not disproved by party having knowledge

On failure of party to disprove fact peculiarly within his possession, slight circumstances are sufficient to establish it.—Smith v. Ohio Millers' Mut. Fire Ins. Co., 6 S.W.2d 920, 320 Mo. 146—Davenport v. King Electric Co., 145 S.W. 454, 242 Mo. 111—Montague v. Washington Fidelity Nat. Ins. Co., App., 72 S.W.2d 804.

54. Wis.—Guinard v. Knapp, Stout & Co., 70 N.W. 671, 95 Wis. 482, 489.

Reason for disapproval is that under such a rule "a case too weak to stand alone when unopposed by a defense may become invigorated and helped out by a still weaker defense."—Guinard v. Knapp, Stout & Co., 70 N.W. 671, 95 Wis. 482, 489.

55. Fla.—Atlantic Coast Line R. Co. v. Alverson, 116 So. 30, 95 Fla. 73—Seaboard Air Line Ry. v. Royal Palm Soap Co., 86 So. 835, 80 Fla. 800—Escambia County Electric Light & Power Co. v. Sutherland, 55 So. 83, 61 Fla. 167.

Evidence must produce just, rational belief of the existence of a fact.—McWilliams v. Phillips, 71 Ala. 80—Lehman v. McQueen, 65 Ala. 570—23 C.J. p 12 note 36.

56. Ala.—Oliver v. Oliver, 65 So. 373, 187 Ala. 340—Pullman Palace Car Co. v. Adams, 24 So. 921, 120 Ala. 581, 74 Am.S.R. 53, 45 L.R.A. 767—Louisville & N. R. Co. v. Jones, 3 So. 902, 83 Ala. 376—Vandeventer v. Ford, 60 Ala. 610—Acklen's Ex'r v. Hickman, 60 Ala. 568—Mays v. Williams, 27 Ala. 267.

57. Md.—Rent-A-Car Co. v. Globe & Rutgers Fire Ins. Co., 156 A. 847, 161 Md. 249.

Proof to moral certainty is required to overcome the presumption of innocence.—Drown v. New Amsterdam Casualty Co., 165 P. 5, 175 Cal. 21.

58. U.S.—Securities and Exchange Commission v. Macon, D.C.Colo., 28 F.Supp. 127.
Miss.—Truckers Exchange Bank v. Conroy, 199 So. 301.
Wis.—Ziegler v. Hustisford Farmers Mut. Ins. Co., 298 N.W. 610, 238 Wis. 238—Banking Commission v. First Wisconsin Nat. Bank of Milwaukee, 290 N.W. 735, 234 Wis. 60—In re Hatten's Estate, 288 N.W. 278, 233 Wis. 199—Maahs v. Schultz, 242 N.W. 195, 207 Wis. 624—Oberleitner v. Security Ins. Co., 225 N.W. 735, 199 Wis. 220.
23 C.J. p 14 note 66 [b].

59. Cal.—Merk v. Gelzhaeuser, 50 Cal. 631.
Pa.—Steinman v. McWilliams, 6 Pa. 170.
23 C.J. p 14 notes 63, 64.

60. Fla.—Williams v. Dickenson, 9 So. 847, 28 Fla. 90, followed in Schultz v. Pacific Ins. Co., 14 Fla. 73.
23 C.J. p 14 note 65.

61. Kan.—Amsden Lumber Co. v. American Surety Co., 274 P. 203, 127 Kan. 469, 62 A.L.R. 1446.
Mich.—Hetfield v. Mortimer, 210 N.W. 326, 236 Mich. 214.
Mo.—Prentiss v. Illinois Life Ins. Co., 225 S.W. 695.
Neb.—Weiner v. Ætna Ins. Co., 256 N.W. 71, 127 Neb. 572, supplemented Weiner v. Ætna Ins. Co. of Hartford, Conn., 259 N.W. 507, 128 Neb. 575.
Pa.—Gima v. Hudson Coal Co., 161 A. 903, 106 Pa.Super. 288, affirmed 165 A. 850, 310 Pa. 480, followed in Shott v. Hudson Coal Co., 165 A. 853, 310 Pa. 488, affirming 161 A. 909, 106 Pa.Super. 304—Floyd v. Paulton Coal Mining Co., 94 Pa. Super. 1.
Tenn.—Bryan v. Ætna Life Ins. Co., 130 S.W.2d 85, 174 Tenn. 602.
Vt.—In re Delligan's Estate, 13 A.2d 282—Foundry Mfg. Co. v. Farr, 126 A. 548, 98 Vt. 109.
23 C.J. p 14 note 66, p 15 note 68.
Charge of fraud see the C.J.S. title Fraud § 114, also 23 C.J. p 16 notes 80–90, and 27 C.J. p 62 note 85–p 65 note 8.

Particular crimes

(1) Abandonment of spouse.—Hyder v. Hyder, 1 S.E.2d 540, 215 N.C. 239.

(2) Forgery.—Dexter Horton Nat. Bank of Seattle v. U. S. Fidelity & Guaranty Co., 270 P. 799, 149 Wash. 343—23 C.J. p 14 note 66 [a] (1).

(3) Robbery.—McKinley v. Smith, 17 P.2d 1032, 128 Cal.App. 591.

(4) Theft.—Corporation of Royal Exchange Assur. of London v. Puckett, Tex.Civ.App., 246 S.W. 705.

In Illinois

(1) The requirement in civil actions with respect to proof of a crime, whether felony or misdemeanor, is now in accordance with the rule stated in the text.—Sundquist v. Hardware Mut. Fire Ins. Co. of Minnesota, 21 N.E.2d 297, 371 Ill. 360, 124 A.L.R. 1375, affirming 16 N.E.2d 771, 296 Ill.App. 510—Appa v. Pennsylvania Fire Ins. Co. of Philadelphia, Pa., 30 N.E.2d 100, 307 Ill. App. 85—Weber v. Buck, 23 N.E.2d 759, 302 Ill.App. 218.

(2) Previously the general rule had been that a crime must be proved beyond a reasonable doubt in civil as well as in criminal proceedings.—Waggoner v. Clark, 127 N.E. 436, 293 Ill. 256—Oliver v. Ross, 124 N.E. 800, 289 Ill. 624—Smothers v. Cosgrove-Meehan Coal Co., 264 Ill. App. 488—Wilson Grocery Co. v. National Surety Co., 218 Ill.App. 584—23 C.J. p 14 note 64.

charge the commission of any crime.[62] The rule stated has been applied to civil actions where a judgment against defendant may involve an adjudication that he has been guilty of crime.[63]

In cases involving a criminal charge, there is no preponderance unless the evidence is sufficient to overcome the presumption of innocence as well as the opposing evidence.[64]

§ 1021. —— What Constitutes Preponderance

a. In general
b. Preponderance of probabilities

a. In General

A preponderance of evidence means evidence which is of greater weight, or more convincing, than that which is offered in opposition. Evidence producing "conviction" is commonly not required for a preponderance; and the expressions "clear preponderance" and "full preponderance" have been condemned, although "fair preponderance" is commonly upheld.

By a preponderance of evidence is meant simply evidence which is of greater weight, or more convincing, than that which is offered in opposition to it.[65] It has been considered that the proof must

(3) The former rule, however, had come to be limited to felonies; where the charge was of a misdemeanor, proof beyond a reasonable doubt was not required.—Rost v. F. H. Noble & Co., 147 N.E. 258, 316 Ill. 357—Branch v. Woulfe, 21 N.E.2d 148, 300 Ill.App. 472—Metzler v. Layton, 19 N.E.2d 130, 298 Ill.App. 529, affirmed 25 N.E.2d 60, 373 Ill. 88—Wargo v. Buske, 273 Ill.App. 28—Kuhl v. Clark, 261 Ill.App. 491—Cooper v. Nutt, 254 Ill.App. 445—Gannon v. Kiel, 252 Ill.App. 550.

(4) The requirement of proof beyond a reasonable doubt was also regarded as inapplicable where the person charged with a crime was not a party to the action.—Bernier v. Illinois Cent. R. Co., 129 N.E. 747, 296 Ill. 464, affirming 215 Ill.App. 454—Foster v. Graf, 122 N.E. 845, 287 Ill. 559—Schultz v. Royal Neighbors of America, 9 N.E.2d 435, 291 Ill.App. 176—Wilson Grocery Co. v. National Surety Co., 218 Ill.App. 584.

(5) A denial of execution of written instrument was held not to constitute charge of forgery against party relying thereon, within rule requiring proof beyond reasonable doubt.—Fekete v. Fekete, 154 N.E. 209, 323 Ill. 468.

(6) Similarly, the question of whether complainant must prove his case beyond a reasonable doubt was held not involved on a motion to dissolve a temporary injunction based on a transaction asserted to be illegal.—Kuhl v. Clark, 261 Ill.App. 491.

62. Ill.—Sprague v. Dodge, 48 Ill. 142, 95 Am.D. 523.
Ohio.—Jones v. Greaves, 26 Ohio St. 2, 20 Am.R. 752.

63. U.S.—Wright v. Securities and Exchange Commission, C.C.A., 112 F.2d 89.
Or.—Millar v. Semler, 3 P.2d 987, 137 Or. 610, denying rehearing Miller v. Semler, 2 P.2d 233, 137 Or. 610.
23 C.J. p 15 note 69.

"Fair preponderance" of evidence has been held necessary to negative consent to sexual intercourse constituting the basis of an action for assault and battery.—Frey v. McManus, 191 N.W. 392, 154 Minn. 175.

64. Cal.—Simonton v. Los Angeles Trust & Savings Bank, 270 P. 672, 205 Cal. 252.
23 C.J. p 15 note 72.

65. Ark.—Louisiana & A. Ry. Co. v. Muldrow, 27 S.W.2d 516, 181 Ark. 674.
Cal.—In re Guilbert's Estate, 188 P. 807, 46 Cal.App. 55.
Colo.—Garver v. Garver, 121 P. 165, 166, 52 Colo. 227, Ann.Cas.1913D 674.
Del.—Warwick v. Addicks, 157 A. 205, 5 W.W.Harr. 43—Gibson v. Gillespie, 152 A. 589, 4 W.W.Harr. 331—Gray v. Pennsylvania R. Co., 139 A. 66, 3 W.W.Harr. 459.
Ga.—Jones v. Teasley, 105 S.E. 46, 25 Ga.App. 784.
Ind.—Great Atlantic & Pacific Tea Co. v. Custin, 13 N.E.2d 542, 214 Ind. 54, rehearing denied 14 N.E.2d 538, 214 Ind. 54—Hammond, W. & E. C. Electric Ry. Co. v. Antonia, 83 N.E. 766, 41 Ind.App. 335.
Mo.—Lampe v. Franklin American Trust Co., 96 S.W.2d 710, 339 Mo. 361, 107 A.L.R. 465—Nelson v. Evans, 93 S.W.2d 691, 695, 338 Mo. 991, citing **Corpus Juris**—Rouchene v. Gamble Const. Co., 89 S.W.2d 58, 63, 338 Mo. 123, citing **Corpus Juris**—Krup v. Corley, 69 S.W. 609, 95 Mo.App. 640.
Neb.—Parkins v. Missouri Pac. Ry. Co., 93 N.W. 197, 199, 4 Neb. (Unoff.) 1, reversed on other grounds 96 N.W. 683, 4 Neb. (Unoff.) 13, affirmed 101 N.W. 1013, 72 Neb. 831.
Nev.—Deiss v. Southern Pac. Co., 53 P.2d 332, 336, 56 Nev. 169, citing **Corpus Juris.**
N.C.—Williams v. Blue Ridge Building & Loan Ass'n, 177 S.E. 176, 207 N.C. 362—Cincinnati Butchers Supply Co. v. Conoly, 169 S.E. 415, 416, 204 N.C. 677, citing **Corpus Juris.**
Tex.—Mutual Reserve Life Ins. Co. v. Jay, 109 S.W. 1116, 50 Tex.Civ. App. 165.
Utah.—Stoker v. Ogden City, 54 P. 2d 849, 853, 88 Utah 389, citing **Corpus Juris**—Hickey v. Rio Grande Western R. Co., 82 P. 29, 29 Utah 392.
23 C.J. p 16 note 91.

Other definitions

(1) Evidence having probative force exceeding that of opposing evidence.—Gansey v. Orr, 73 S.W. 477, 480, 173 Mo. 532.

(2) Greater weight of credible testimony.
Mo.—Archambault v. Blanchard, 95 S.W. 834, 846, 198 Mo. 384—Rutledge & Kilpatrick Realty Co. v. Gartside, 106 S.W. 1126, 1130, 128 Mo.App. 580.
Tex.—Fritsche v. Niechoy, Civ.App., 197 S.W. 1017, 1018.

(3) Greatest amount of facts.—Nettles v. Nettles, 136 S.E. 297, 299, 138 S.C. 318.

(4) Evidence which appears to be more credible.
U.S.—U. S. v. Southern Pac. Co., D. C.Cal., 157 F. 459, 462.
Mo.—Stephan v. Metzger, 69 S.W. 625, 627, 95 Mo.App. 609.

(5) Evidence which, when weighed, with that opposed to it, has the most convincing force, and from which it results that the greater probability is in favor of the party presenting it.—Kenney v. Henson, Mo.App., 107 S.W.2d 947, 952.

(6) Evidence which is more satisfying and convincing.
Mo.—Browning v. Bailey, 261 S.W. 350, 352, 216 Mo.App. 122.
Okl.—Murphy v. Estle, 182 P. 83, 75 Okl. 75.

(7) Evidence which will convince or enforce belief on the trier of facts.
Ariz.—Cole v. Town of Miami, 83 P. 2d 997, 1001, 52 Ariz. 488.
Mass.—Sargent v. Massachusetts Accident Co., 29 N.E.2d 825, 827, 307 Mass. 246.

be such that the triers of fact are "satisfied,"[66] but the more common view is that a requirement of proof which "satisfies," without qualification, is too exacting, as it may be taken to demand more than a preponderance.[67] Certainly it cannot be required that the triers of fact should be "entirely"[68] or "thoroughly"[69] satisfied or convinced, or satisfied with "clearness and certainty,"[70] or that a fact in issue shall be proved "to full satisfaction" of the triers of fact.[71]

On the other hand, a requirement that the triers of fact shall be satisfied or convinced by a preponderance of the evidence expresses a proper degree of proof,[72] and a requirement that the triers of fact shall be "satisfied from the evidence" has been regarded as equivalent to "satisfied by a preponderance" of the evidence, and hence proper.[73] A requirement that the triers of fact shall be "reasonably satisfied" has been regarded as proper,[74] although it has also been held that a requirement of proof to the "reasonable satisfaction" of the jury calls for more than a preponderance and is improper.[75] It has also been considered that a requirement that the triers of fact shall be "reasonably certain" calls merely for a finding in accordance with the weight of the evidence and is proper.[76]

Although there is authority to the contrary,[77] it has been held that proof, to constitute a preponderance, need not be of such degree as to produce "conviction";[78] and a higher degree of proof than the law requires is that which produces "an abiding conviction,"[79] a "clear conviction,"[80] or "absolute belief,"[81] or which "convinces,"[82] or "clear-

Mo.—McKee v. Verdin, 96 Mo.App. 268, 271, 70 S.W. 154.

(8) Evidence sufficient to incline a reasonable and impartial mind to one side of the issue rather than to the other.—Wright v. Harber, 165 S.E. 616, 617, 175 Ga. 696—Central of Georgia Ry. Co. v. Stiles, 76 S.E. 570, 139 Ga. 49.

(9) Other definitions see 23 C.J. p 16 note 91 [a].

Elements involved

(1) Generally, what constitutes a preponderance of the evidence involves a consideration of credibility of witnesses and weight of evidence.—Evans v. Dr. Pepper Bottling Co., Tex.Civ.App., 123 S.W.2d 706.

(2) Preponderance relates to, among other matters, the character of the witnesses, and to the intrinsic characteristics of the evidence itself and the probabilities of its truth when tested by the ordinary experience of average people in their daily affairs.—Carter v. Carter, 114 A. 902, 139 Md. 265.

"The slightest difference in the weight of the evidence . . . [is] a preponderance."—Hammond, W. & E. C. Electric Ry. Co. v. Antonia, 83 N.E. 766, 769, 41 Ind.App. 335.

"Fair preponderance"

(1) A "fair preponderance" of evidence is that which is sufficient to create in the minds of the triers of fact the conviction that the party on whom is the burden has established its case, and not a mere suspicion that it has, however strong that suspicion may be.—Jackson Furniture Co. v. Lieberman, R.I., 14 A.2d 27.

(2) Where a party has not succeeded in fairly and reasonably convincing the trier of the facts of the truth of the proposition which he asserts, he has not sustained the proposition by a fair preponderance of the evidence.—Tobin v. Shwitzer, 295 N.Y.S. 590, 162 Misc. 747.

(3) "The term 'fair preponderance of the evidence' is often used in an instruction to the jury, and really is meaningless. All that the law requires is that the party having the burden of the issue shall have a preponderance of the evidence, and this means, and only means, that the evidence shall be in some degree more convincing to sustain his contention than [that] of his adversary."—Hammond, W. & E. C. Electric Ry. Co. v. Antonia, 83 N.E. 766, 769, 41 Ind.App. 335.

66. U.S.—Chicago Ry. Equipment Co. v. Blair, C.C.A., 20 F.2d 10.
Mich.—Hogan v. Detroit United Ry., 103 N.W. 543, 140 Mich. 101.
Tenn.—Nashville, C. & St. L. Ry. Co. v. Union Ry. Co., 8 Tenn.App. 494.
23 C.J. p 17 note 92.

Other statements

(1) Preponderance is such proof as satisfies the conscience and carries conviction to an intelligent mind.—Cole v. Town of Miami, 83 P.2d 997, 52 Ariz. 488.

(2) Proof must be satisfactory.—Brugger v. Lee Yim, 55 P.2d 564, 12 Cal.App.2d 38.

67. Iowa.—Rosenbaum v. Levitt, 80 N.W. 393, 109 Iowa 292.
23 C.J. p 17 notes 93, 94.

68. N.Y.—Sommer v. Oppenheim, 44 N.Y.S. 396, 19 Misc. 605.

69. Ky.—Guardian Life Ins. Co. v. Robison, 129 S.W.2d 192, 278 Ky. 678.
N.Y.—O'Donohue v. Simmons, 12 N.Y.S. 843, 58 Hun 467.

70. Tex.—Mixon v. Farris, 48 S.W. 741, 20 Tex.Civ.App. 253.

71. Tenn.—Gage v. Louisville, N. O. & T. R. Co., 14 S.W. 73, 88 Tenn. 724.

72. Ind.—Great Atlantic & Pacific Tea Co. v. Custin, 13 N.E.2d 542, 214 Ind. 54, rehearing denied 14 N.E.2d 538, 214 Ind. 54.
Pa.—Rasner v. Prudential Ins. Co. of America, 13 A.2d 118, 140 Pa. Super. 124.
Tex.—Musslewhite v. Allen, Civ. App., 127 S.W.2d 970—Buro v. Home Ben. Ass'n, Civ.App., 28 S.W.2d 902, error dismissed.
Wis.—Reiss v. Utter, 180 N.W. 810, 173 Wis. 180.
23 C.J. p 17 note 99.

73. Mo.—Braddy v. Kansas City, Ft. S. & M. R. Co., 47 Mo.App. 519.

74. Ala.—Southern Ry. Co. v. Beaty, 103 So. 658, 212 Ala. 608—Washam v. Beaty, 99 So. 163, 210 Ala. 635—Dorough v. Harrington, 42 So. 557, 148 Ala. 305—Eagle Iron Co. v. Baugh, 41 So. 663, 147 Ala. 613—Killian v. Taylor, 104 So. 446, 20 Ala.App. 614—Eutaw Ice, Water & Power Co. v. McGee, 81 So. 144, 16 Ala.App. 652.
Iowa.—Ball v. Marquis, 98 N.W. 496, 497, 122 Iowa 665.
23 C.J. p 18 note 2.

75. Tex.—Moore v. Stone, Civ.App., 36 S.W. 909.

76. Wis.—Beery v. Chicago & N. W. R. Co., 40 N.W. 687, 73 Wis. 197.

77. S.C.—Burnette v. Augusta Coca-Cola Bottling Co., 154 S.E. 645, 157 S.C. 359.
23 C.J. p 16 note 91 [a] (9).

78. Cal.—In re Guilbert's Estate, 188 P. 807, 46 Cal.App. 55.
When clear and convincing proof required see infra § 1023.

79. Ala.—Battles v. Tallman, 11 So. 247, 96 Ala. 403.

80. Ill.—Hoener v. Koch, 84 Ill. 408.

81. Ala.—Arndt v. Cullman, 31 So. 478, 132 Ala. 540, 90 Am.S.R. 922.

82. Cal.—Murphy v. Waterhouse, 45

ly,"[83] "fully,"[84] or "clearly and satisfactorily"[85] convinces, the mind. So, also, more evidence than the preponderance rule demands is required by such expressions as "abundant,"[86] "clear,"[87] "clear and affirmative,"[88] "clear and conclusive,"[89] "clear and satisfactory,"[90] or "irresistible"[91] proof, or a "great weight of testimony."[92] Similarly, the weight of authority,[93] although there is some authority to the contrary,[94] is that more evidence than the preponderance rule demands is required by the expression "clear preponderance"; and the same view has been taken of the expression "full preponderance."[95] It has even been held improper to use the expression "fair preponderance";[96] but a greater body of authority supports the expression.[97]

Where plaintiff has long delayed asserting a right, it has been held that defendant should not be held to the same strictness of proof as would be necessary were the transaction more recent.[98]

b. Preponderance of Probabilities

A conclusion of fact may be drawn from a preponderance of probabilities in its favor; mere possibilities are insufficient.

A conclusion of fact may be legitimately drawn from a preponderance of probabilities in its favor;[99] conversely, the existence of a fact is not established by evidence which does not render its existence more likely than its nonexistence.[1] The probabilities must be such that the conclusion is acceptable to the judgment of the court or jury applied to the evidence in the particular case;[2] mere

P. 866, 113 Cal. 467, 54 Am.S.R. 365.
23 C.J. p 18 note 8.

83. Ala.—Wilcox v. Henderson, 64 Ala. 535.
Cal.—People v. Preciado, 160 P. 1090, 31 Cal.App. 519.

84. Iowa.—Bryan v. Chicago, R. I. & P. R. Co., 19 N.W. 295, 63 Iowa 464.

85. Ala.—Wilkinson v. Searcy, 76 Ala. 176.
Cal.—People v. Preciado, 160 P. 1090, 31 Cal.App. 519.

86. Tex.—Swinney v. Booth, 28 Tex. 113.

87. Mo.—Bauer Grocery Co. v. Sanders, 74 Mo.App. 657.
23 C.J. p 18 note 13.

88. Neb.—Whitney v. Wyatt, 196 N.W. 322, 111 Neb. 328.

89. Ga.—Supreme Conclave K. D. v. Wood, 47 S.E. 940, 120 Ga. 328.
Mich.—Watkins v. Wallace, 19 Mich. 57, 77.

90. Tex.—Cabell v. Menczer, Civ. App., 35 S.W. 206.

91. Ill.—Carter v. Gunnels, 67 Ill. 270.

92. Ill.—Lundon v. Chicago, 83 Ill. App. 208.

93. Ill.—Hughes v. Medendorp, 13 N.E.2d 1015, 294 Ill.App. 424.
23 C.J. p 18 note 18.

94. La.—Labbe v. Broussard, App., 171 So. 203.
Neb.—Altshuler v. Coburn, 57 N.W. 836, 38 Neb. 881.

95. Tex.—Ridgell v. Reeves, 2 Tex. A.Civ.Cas. § 436.

96. Tex.—Lantry v. Lowrie, Civ. App., 58 S.W. 837.
23 C.J. p 18 note 20.

97. U.S.—The Cleary Bros. No. 61, C.C.A.N.J., 61 F.2d 393.
Colo.—Catron v. Kinghorn, 10 P.2d 953, 90 Colo. 520.
La.—James v. Schuster, 8 La.App. 97—Roberts v. Coffee, 6 La.App. 323—Allen v. Bender, 3 La.App. 546.
N.J.—Constitution Indemnity Co. of Philadelphia v. Wickburg, 170 A. 632, 112 N.J.Law 348.
Okl.—Chicago, R. I. & P. Ry. Co. v. Long, 227 P. 389, 99 Okl. 276.
Wash.—Tubb v. City of Seattle, 239 P. 1009, 136 Wash. 332—Clements v. Cook, 191 P. 874, 112 Wash. 217.
23 C.J. p 12 note 39 [c], p 18 note 21.

98. Tex.—Allen v. Urquhart, 19 Tex. 480.

99. Fla.—Boyd v. Gosser, 82 So. 758, 78 Fla. 64, 70, 6 A.L.R. 500.
Ill.—Hurzon v. Schmitz, 262 Ill.App. 337.
Mass.—Sargent v. Massachusetts Accident Co., 29 N.E.2d 825, 307 Mass. 246.
N.J.—Jaeger v. Elizabethtown Consolidated Gas Co., 11 A.2d 746, 124 N.J.Law 420—Miller v. New Amsterdam Casualty Co., 110 A. 810, 94 N.J.Law 508.
N.Y.—Commissioner of Public Welfare of City of New York v. Ryan, 265 N.Y.S. 286, 238 App.Div. 607—Wisser Oil Co. v. Ganfrank Holding Corporation, 296 N.Y.S. 806, 163 Misc. 357.
Tenn.—Nashville, C. & St. L. Ry. Co. v. Union Ry. Co., 8 Tenn.App. 494.
23 C.J. p 18 note 23—42 C.J. p 113 note 3 [b] (4).

Greater or less degree of probability is all that can be reasonably required to establish controverted facts:—Kenney v. Hannibal & St. J. R. Co., 70 Mo. 243—23 C.J. p 9 note 6.

Reasonable belief of probability
Proof is sufficient which produces a reasonable belief of the probability of the truth of a proposition in issue.—Esserman v. Madden, 195 A. 739, 123 Conn. 386—Judd v. H. S. Coe & Co., 169 A. 270, 117 Conn. 510—Darrow v. Fleischner, 169 A. 197, 117 Conn. 518.

"Balance of probabilities"
(1) Some authorities hold that issues in an ordinary civil case are determinable in accordance with a "balance of probabilities."—L'Esperance v. Sherburne, 155 A. 203, 85 N.H. 103—Goddard v. Berlin Mills Co., 131 A. 601, 82 N.H. 225—Moffie v. Slawsby, 94 A. 193, 77 N.H. 555—Felch v. Concord R. R., 29 A. 557, 66 N.H. 318—Fuller v. Rounceville, 29 N.H. 554.

(2) The rule applies to proof of future as well as of past events.—L'Esperance v. Sherburne, 155 A. 203, 85 N.H. 103.

(3) Opinion evidence as to a fact must be sufficiently definite to justify finding of that fact by balance of probabilities.—Miller v. Daniels, 166 A. 30, 86 N.H. 193.

(4) However, a "balance of probabilities" has been held insufficient.—Callahan v. Fleischman Co., 160 N.E. 249, 262 Mass. 437—Haskins v. Haskins, 9 Gray 390.

Preponderance of inferences
Where the evidence is circumstantial, the preponderance required is preponderance of all reasonable inferences that might be drawn from circumstances in evidence sufficient to outweigh all other contrary inferences.—Reed v. American Ins. Co. of Newark, N.J., 175 So. 224, 128 Fla. 549—King v. Weis-Patterson Lumber Co., 168 So. 858, 124 Fla. 272.

Improbability of nonexistence of fact
The improbability that a fact asserted to have existed did not exist may exceed the improbability of evidence produced in support of the assertion, warranting a conclusion that the fact did exist.—Marsh v. Vanness, 75 N.J.Eq. 607, 74 A. 47.

1. Mass.—De Filippo's Case, 188 N.E. 245, 284 Mass. 531.

2. La.—Dreher v. Guaranty Bond & Finance Co., 165 So. 711, 184 La.

proof of possibility,[3] or even a preponderance of possibilities[4] or a majority of chances,[5] never can suffice alone to establish a proposition of fact.

§ 1022. —— Number of Witnesses

a. In general
b. Equality in number
c. Disparity in number

a. In General

The weight or preponderance of the evidence in a civil case is not necessarily dependent on, or determined by, the number of witnesses.

As a general rule the weight or preponderance of the evidence in a civil case is not necessarily determined by, or dependent on, the number of witnesses testifying on either side, statutes sometimes so providing;[6] rather, it is to be determined, in accordance with the principles as to what constitutes preponderance, discussed supra § 1021, by the credibility which the trier of the facts attributes to their testimony in view of all the circum-

197—Riley v. City of New Orleans, 92 So. 316, 151 La. 731—Kingsley v. Schnell, 120 So. 501, 9 La.App. 325—Furlow v. Maison Blanche Co., 2 La.App. 351.
Mass.—Callahan v. Fleischman Co., 160 N.E. 249, 262 Mass. 437.
23 C.J. p 18 note 24.

Inability to determine true facts
Jury must not attempt to base verdict on what facts may be more probable, if they cannot decide what facts are true.—Lampe v. Franklin American Trust Co., 96 S.W.2d 710, 339 Mo. 361, 107 A.L.R. 465.

3. Mo.—Feldewerth v. Great Eastern Oil Co., App., 149 S.W.2d 410.

4. Wis.—Doherty v. S. S. Kresge Co., 278 N.W. 437, 227 Wis. 661—Creamery Package Mfg. Co. v. Industrial Comm., 248 N.W. 140, 211 Wis. 326.

5. Cal.—Reese v. Smith, 70 P.2d 933, 935, 9 Cal.2d 324, quoting **Corpus Juris**—Sweeney v. Metropolitan Life Ins. Co., 92 P.2d 1043, 1046, 30 Cal.App.2d 767, quoting **Corpus Juris.**
23 C.J. p 19 note 26.

6. U.S.—Massachusetts Protective Ass'n v. Allen, D.C.Mo., 54 F.2d 788—Ford v. Taylor, C.C.Nev., 140 F. 356.
Ala.—Lamar Life Ins. Co. v. Kemp, App., 1 So.2d 760.
Ariz.—Knapp v. Highway Department, 104 P.2d 180—Cole v. Town of Miami, 83 P.2d 997, 52 Ariz. 488.
Ark.—Missouri Pacific R. Co. v. Hancock, 113 S.W.2d 489, 195 Ark. 414—Walt v. Phillips, 266 S.W. 71, 166 Ark. 163—Casteel v. White River Grocery Co., 251 S.W. 31, 158 Ark. 640, 159 Ark. 93—Wild v. Mehaffy, Donham & Mehaffy, 234 S.W. 979, 149 Ark. 670—Texarkana & Ft. Smith Ry. Co. v Adcock, 231 S.W. 866, 149 Ark. 110.
Cal.—People v. Miller, 154 P. 468, 171 Cal. 649—Davis v. City and County of San Francisco, App., 114 P.2d 359—Shannon v. Mt. Eden Nursery Co., 25 P.2d 849, 134 Cal. App. 59—Fales v. New York Life Ins. Co., 17 P.2d 174, 128 Cal.App. 201—Southern California Music Co. v. Labes, 288 P. 1096, 106 Cal.App. 255.
Colo.—Oman v. Mishler, 22 P.2d 132, 92 Colo. 476—Pawnee Farmers' Elevator Co. v. Powell, 227 P. 836, 76 Colo. 1, 37 A.L.R. 6—Garver v. Garver, 121 P. 165, 52 Colo. 227, Ann.Cas.1913D 674.
Del.—Lecates v. Lecates, 190 A. 294, 8 W.W.Harr. 190—Sund v. Wilmington & P. Traction Co., 114 A. 281, 1 W.W.Harr. 328—Atlantic Refining Co. v. Feinberg, 112 A. 685, 1 W.W.Harr. 183.
Ill.—Sulzberger v. Sulzberger, 23 N.E.2d 46, 372 Ill. 240—Jones v. Eisenberg, 20 N.E.2d 906, 299 Ill.App. 551—Harre v. Fayette County Mut. Telephone Co., 1 N.E.2d 799, 284 Ill.App. 292—See People v. Stromberg, 202 Ill.App. 11.
Ind.—Great Atlantic & Pacific Tea Co. v. Custin, 13 N.E.2d 542, 214 Ind. 54, rehearing denied 14 N.E. 2d 538, 214 Ind. 54.
Iowa.—Brown v. Martin, 173 N.W. 25, 186 Iowa 564—White v. Hatton, 113 N.W. 830.
Kan.—Hughes v. Vossler, 203 P. 1107, 110 Kan. 279.
Ky.—Vale v. Illinois Pipe Line Co., 134 S.W.2d 940, 281 Ky. 1—Smith v. Ferguson, 76 S.W.2d 606, 256 Ky. 545.
La.—Thomas v. Harman, App., 170 So. 365—Reed v. Andrepont, App., 142 So. 184.
Me.—Arnst v. Estes, 8 A.2d 201, 136 Me. 272—Bennett v. Hathorn, 131 A. 860, 125 Me. 513.
Mich.—Dewey v. Perkins, 295 N.W. 333, 295 Mich. 611—Buchel v. Williams, 262 N.W. 759, 273 Mich. 132—Johnston Gravel Co. v. Borck, 201 N.W. 224, 229 Mich. 64—Gubas v. Bucsko, 189 N.W. 13, 219 Mich. 553.
Minn.—Benson v. Northland Transp. Co., 274 N.W. 532, 200 Minn. 445.
Miss.—Burrill v. Rau, 121 So. 118. 153 Miss. 437.
Mo.—Schwartzman v. London & Lancashire Fire Ins. Co., Limited, of Liverpool, England, 2 S.W.2d 593, 318 Mo. 1089—Pietzuk v. Kansas City Rys. Co., 232 S.W. 987, 289 Mo. 135—Haralson v. S. S. Kresge Co., App., 261 S.W. 740—Wrightsman v. Glidewell, 239 S.W. 574, 210 Mo.App. 367—Schwabe v. Estes, 218 S.W. 908, 202 Mo.App. 372.
Mont.—In re Silver's Estate, 38 P.2d 277, 98 Mont. 141—State v. Morris, 214 P. 332, 67 Mont. 40.
N.H.—Smith v. Hooper, 200 A. 780, 89 N.H. 452.
N.J.—Gray v. Elmo, 156 A. 825, 9 N.J.Misc. 1093—Barwick v. Blauvelt, Sup., 146 A. 430—McClave v. Barnaba, 144 A. 190, 7 N.J.Misc. 112—Rogoza v. Mahoney, 136 A. 196, 5 N.J.Misc. 247.
N.Y.—Devonshire v. Stubbs, 238 N.Y. S. 707, 135 Misc. 886.
Pa.—O'Farrell v. Mawson, 182 A. 538, 320 Pa. 316—Hegarty v. Berger, 155 A. 484, 304 Pa. 221—McCray v. Pittsburgh Rys. Co., 200 A. 717, 132 Pa.Super. 386—Jacobs v. McKelvey, 197 A. 494, 130 Pa. Super. 417—Sarbiewski v. Sarbiewski, 193 A. 91, 127 Pa.Super. 463—Lincoln v. Christian, 94 Pa.Super. 145—Kramer v. Linder, 8 Pa.Dist. & Co. 343, 7 Northumb.Leg.J. 358—Seier v. Brunner, 28 North.Co. 81.
R.I.—Rossi v. Ronci, 7 A.2d 773.
Tex.—Panhandle & S. F. Ry. Co. v. Brown, Civ.App., 74 S.W.2d 531, error dismissed—San Antonio Traction Co. v. Higdon, 123 S.W. 732, 58 Tex.Civ.App. 83, error refused.
Utah.—Wilkinson v. Anderson-Taylor Co., 79 P. 46, 28 Utah 346.
Vt.—Webster v. Canadian Pac. Ry. Co., 156 A. 524, 103 Vt. 460.
W.Va.—Crowl v. Buckhannon & N. R. Co., 114 S.E. 521, 92 W.Va. 188.
Wis.—Wright v. Friedman Department Store Co., 207 N.W. 417, 189 Wis. 128—Peltier v. Chicago, St. P., M. & O. Ry. Co., 60 N.W. 250, 88 Wis. 521.

Number as not sole determinant
Mo.—Hastings v. Scott, App., 248 S. W. 973.
Neb.—Thornton v. Davis, 204 N.W. 69, 113 Neb. 529.
N.J.—Rogoza v. Mahoney, 136 A. 196, 5 N.J.Misc. 247.

Burden of proof is not discharged by number of witnesses called, but by kind and quality of evidence offered.—Porter v. Porter, 177 A. 464, 168 Md. 296.

stances,[7] for there is no general rule requiring a specific number of witnesses to evidence a fact,[8] the testimony of a single witness being ordinarily sufficient, as appears infra § 1043. The question is one of the effect of the evidence in inducing belief, and not of the number of witnesses.[9]

The number of witnesses as a factor in the relative weight of positive and negative evidence is considered infra § 1037.

b. Equality in Number

Equality in number of witnesses is not necessarily equality in weight of evidence.

Evidence on an issue of fact is not necessarily in equilibrium because the witnesses who testify to the existence of the fact are directly contradicted by the same number of witnesses,[10] even though there is but a single witness on each side and their testimony is in direct conflict.[11] In such a situation, as in cases where the number of witnesses on each side is unequal, see subdivision c of this section, other circumstances are to be considered,[12] for even unimpeached witnesses are not necessarily of equal credibility,[13] and corroborative facts may turn the scale,[14] or a legal presumption may be decisive in favor of the party for whom it operates.[15] However, if an application of the recognized tests of credibility of witnesses and of evidence fails to show a preponderance on one side or the other, the issue should be determined against the party having the burden of proof.[16]

c. Disparity in Number

Preponderance in number of witnesses, although a factor to be considered together with other elements determining the weight of evidence, does not necessarily constitute a preponderance of the evidence; and the testimony of a single witness may be accepted as against that of several.

By a preponderance of evidence is meant not necessarily a preponderance in number of witnesses,[17]

7. U.S.—Ford v. Taylor, C.C.Nev., 140 F. 356.
Ark.—Missouri Pac. R. Co. v. Hancock, 113 S.W.2d 489, 195 Ark. 489—Texarkana & Ft. Smith Ry. Co. v. Adcock, 231 S.W. 866, 149 Ark. 110.
Cal.—Davis v. City & County of San Francisco, App., 114 P.2d 359—Shannon v. Mt. Eden Nursery Co., 25 P.2d 849, 134 Cal.App. 59.
Colo.—Pawnee Farmers' Elevator Co. v. Powell, 227 P. 836, 76 Colo. 1, 37 A.L.R. 6.
Ill.—Harre v. Fayette County Mut. Telephone Co., 1 N.E.2d 799, 284 Ill.App. 292.
Ind.—Great Atlantic & Pacific Tea Co. v. Custin, 13 N.E.2d 542, 214 Ind. 54, rehearing denied 14 N.E.2d 538, 214 Ind. 54.
Kan.—Hughes v. Vossler, 203 P. 1107, 110 Kan. 279.
Me.—Bennett v. Hathorn, 131 A. 860, 125 Me. 513.
Mo.—Schwartzman v. London & Lancashire Fire Ins. Co., Limited, of Liverpool, England, 2 S.W.2d 593, 318 Mo. 108.
N.J.—Rogoza v. Mahoney, 136 A. 196, 5 N.J.Misc. 247.
Pa.—Hegarty v. Berger, 155 A. 484, 304 Pa. 221—McCray v. Pittsburgh Rys. Co., 200 A. 717, 132 Pa.Super. 386—Jacobs v. McKelvey, 197 A. 494, 130 Pa.Super. 417—Sarbiewski v. Sarbiewski, 193 A. 91, 127 Pa. Super. 463—Lincoln v. Christian, 94 Pa.Super. 145—Kramer v. Linder, 8 Pa.Dist. & Co. 343, 7 Northumb.Leg.J. 358—Seier v. Brunner, 28 North.Co. 81.
R.I.—Rossi v. Ronci, 7 A.2d 773.

Factors considered

Weight to be given evidence cannot be determined alone by number of witnesses testifying, but rather by character of each witness, appearance and demeanor on witness stand, bias or prejudice, relationship, if any, to parties, reasonableness or unreasonableness of story told, and by other tests either consciously or unconsciously applied by triers of fact through observation of witness.—Thornton v. Davis, 204 N.W. 69, 113 Neb. 529—Moore v. Williams, 196 N.W. 695, 111 Neb. 342.

8. U.S.—Erie R. Co. v. Fritsch, C.C. A.N.J., 72 F.2d 766, certiorari denied 55 S.Ct. 213, 293 U.S. 620, 79 L.Ed. 708—Erie R. Co. v. Landau, C.C.A.N.J., 72 F.2d 766, certiorari denied 55 S.Ct. 213, 293 U.S. 620, 79 L.Ed. 708.

9. Ark.—Romines v. Brumfield, 136 S.W.2d 1023, 199 Ark. 1066.
Me.—Arnst v. Estes, 8 A.2d 201, 136 Me. 272—Chenery v. Russell, 167 A. 857, 132 Me. 130.
Mich.—Strand v. Chicago & W. M. Ry. Co., 34 N.W. 712, 67 Mich. 380.
Pa.—Braunschweiger v. Waits, 86 A. 155, 179 Pa. 47.

10. Nev.—Dixon v. Miller, 184 P. 926, 43 Nev. 280.
R.I.—Correy v. Michaelovitch, 128 A. 673, 46 R.I. 387, 39 A.L.R. 874.
23 C.J. p 19 note 36.

11. R.I.—Correy v. Michaelovitch, supra.
23 C.J. p 20 note 37.

12. La.—Davis-Wood Lumber Co. v. Beninate, 3 La.App. 450—Pailet v. Young, 3 La.App. 265.
Pa.—Pinkus v. Frank, 41 Lack.Jur. 173.
23 C.J. p 20 note 39.

Weight is for trier of facts

Nev.—Dixon v. Miller, 184 P. 926, 43 Nev. 280.
R.I.—Correy v. Michaelovitch, 128 A. 673, 46 R.I. 387, 39 A.L.R. 874.

13. Ind.—Howlett v. Dilts, 30 N.E. 313, 4 Ind.App. 23.
23 C.J. p 20 note 40.

14. La.—Roberts v. Coffee, 6 La. App. 323.
N.Y.—Sherry v. Proal, 109 N.Y.S. 1008, 125 App.Div. 508.

15. Or.—Templeton v. Bockler, 144 P. 405, 73 Or. 494.
23 C.J. p 20 note 42.

16. Ill.—Baker v. Abbott Mfg. Co., 212 Ill.App. 476.
Iowa.—Waxmonsky v. Hoskins, 249 N.W. 195, 216 Iowa 476.
La.—Roberts v. Coffee, 6 La.App. 323—Vidrine v. Texas & P. Ry. Co., 5 La.App. 457.
23 C.J. p 20 note 43.

Flatly contradictory testimony

U.S.—The John Martin, D.C.Mich., 13 F.Cas.No.7,357, 2 Abb. 172, 174.
Ill.—Brady v. Chaffee, 163 Ill.App. 242.
La.—Howard v. Coyle, 111 So. 697, 163 La. 257.

17. U.S.—Northern Nav. Co. v. Minnesota Atlantic Transit Co., C.C.A. Minn., 49 F.2d 203—U. S. v. Mancini, D.C.Pa., 29 F.Supp. 44.
Ark.—Missouri Pac. R. Co. v. Hancock, 113 S.W.2d 489, 195 Ark. 414.
Cal.—Mathes v. Aggeler & Musser Seed Co., 178 P. 713, 179 Cal. 697—McVay v. Central California Inv. Co., 91 P. 745, 6 Cal.App. 184.
Del.—Graham v. National Bank of Smyrna, 122 A. 85, 2 W.W.Harr. 264—Sund v. Wilmington & P. Traction Co., 114 A. 281, 1 W.W. Harr. 328—Atlantic Refining Co. v. Feinberg, 112 A. 685, 1 W.W.Harr. 183—Stuckert v. Cann, 111 A. 596,

but, as stated in § 1021 supra, evidence of greater weight, the applicable maxim in ascertaining the preponderance of evidence being testes ponderantur non numerantur, that is, that witnesses are not to be counted, but their testimony is to be weighed.[18] So, numerical preponderance of witnesses does not necessarily constitute a preponderance of evidence so as to require a contested question of fact to be decided in accordance therewith, statutes sometimes so providing;[19] the intelligence, fairness, and means of observation of the witnesses, and various other recognized factors in determining the weight of evidence, discussed infra §§ 1031–1039, should be taken into consideration.[20]

1 W.W.Harr. 129—Palmer v. Lodge, 109 A. 125, 7 Boyce 537.
Md.—Carter v. Carter, 114 A. 902, 139 Md. 265.
Mich.—Strand v. Chicago & W. M. Ry. Co., 34 N.W. 712, 67 Mich. 380.
Mo.—Kenney v. Henson, App., 107 S.W.2d 947.
N.Y.—Schargel v. United Electric Light & Power Co., 215 N.Y.S. 217, 127 Misc. 24.
Wash.—Bjorklund v. Continental Casualty Co., 297 P. 155, 161 Wash. 340—Shaw v. Woodland Shingle Co., 111 P. 1070, 61 Wash. 56.

18. Ala.—Timmerman v. Martin, 176 So. 198, 200, 234 Ala. 622, citing **Corpus Juris.**
Fla.—Mutual Ben. Health & Accident Ass'n v. Bunting, 183 So. 321, 133 Fla. 646—Jacksonville Traction Co. v. Greene, 151 So. 523, 113 Fla. 316.
La.—Hudson v. Jackson Brewing Co., 4 La.App. 549.
N.Y.—Foulke v. Thalmessinger, 28 N.Y.S. 684, 8 Misc. 445.
23 C.J. p 20 note 44—62 C.J. p 828 note 32, p 829 note 63.
"The courts do not merely count witnesses in determining any given question, but must be guided by the conviction produced upon the judicial mind by the witnesses examined."—Timmerman v. Martin, 176 So. 198, 200, 234 Ala. 622.
"Testimony must be considered in the light of probability, and not by counting the number of witnesses on each side."—Jones v. Hunsicker, App., 177 So. 262, 266, reversed on other grounds, 177 So. 576, 188 La. 468.

Party's uncorroborated testimony, if reasonable, can carry the burden of proof, unless contradictory evidence was so strong and positive that a verdict based on such testimony is clearly against the manifest weight of evidence.—Jacksonville Traction Co. v. Greene, 151 So. 523, 113 Fla. 316.

19. Ala.—Philips v. Smith, 94 So. 191, 18 Ala.App. 668.
Ariz.—Knapp v. Highway Department, 104 P.2d 180.
Ark.—Kory v. Less, 22 S.W.2d 25, 180 Ark. 342.
Cal.—Scott v. Flanagan, 57 P.2d 1382, 14 Cal.App.2d 105—Schultz v. Sussman, 45 P.2d 409, 7 Cal.App.2d 100—Taylor v. Bunnell, 28 P.2d 1062, 133 Cal.App. 177—Cohn v. Valentine, 263 P. 846, 88 Cal.App. 430—Morris v. Morris, 258 P. 616, 84 Cal.App. 599—Grantham v. Ordway, 182 P. 73, 40 Cal.App. 758.
Ill.—Jones v. Esenberg, 20 N.E.2d 906, 299 Ill.App. 551—Bowers v. Heflebower, 243 Ill.App. 129. See People v. Stromberg, 202 Ill.App. 11.
Ind.—Heerdink v. Kohmescher, 180 N.E. 683, 94 Ind.App. 296.
Iowa.—Garretson v. Harlan, 256 N.W. 749, 218 Iowa 1049—Heald v. Western Union Tel. Co., 105 N.W. 588, 129 Iowa 326.
Kan.—Hughes v. Vossler, 203 P. 1107, 110 Kan. 279.
Ky.—Vale v. Illinois Pipe Line Co., 134 S.W.2d 940, 281 Ky. 1—Asher v. Golden, 50 S.W.2d 3, 244 Ky. 56—W. H. Simmons & Co. v. Price's Adm'r, 38 S.W.2d 6, 238 Ky. 332—Consolidated Coach Corporation v. Phillips, 34 S.W.2d 722, 236 Ky. 823—Jennings v. Fain, 10 S.W.2d 1101, 226 Ky. 290—Old Colony Trust & Sav. Bank v. Sherrill-King Mill & Lumber Co., 221 S.W. 520, 188 Ky. 177—Cumberland R. Co. v. Girdner, 212 S.W. 105, 184 Ky. 375.
La.—Harrington v. Langlinais, App., 158 So. 26—Tallulah Plumbing & Sheet Metal Works v. Tallulah Housing Corporation, App., 141 So. 819—Thomas v. Deliberto, 136 So. 904, 17 La.App. 574—Lusco v. Corkern, 126 So. 540, 12 La.App. 557—Marcotte v. Montana, 121 So. 213, 9 La.App. 561—Hudson v. Jackson Brewing Co., 4 La.App. 549.
Me.—Arnst v. Estes, 8 A.2d 201, 136 Me. 272—Chenery v. Russell, 167 A. 857, 132 Me. 130—Ordway v. Cluskey, 149 A. 386, 129 Me. 13.
Mich.—Shapiro v. Kamman, 209 N.W. 204, 235 Mich. 337.
Mo.—Pietzuk v. Kansas City Rys. Co., 232 S.W. 987, 289 Mo. 135—Schwabe v. Estes, 218 S.W. 908, 202 Mo.App. 372.
Mont.—In re Silver's Estate, 38 P. 2d 277, 98 Mont. 141—Robinson v. F. W. Woolworth Co., 261 P. 253, 80 Mont. 431.
Neb.—Nielson v. Kammerer, 257 N.W. 534, 128 Neb. 57.
N.J.—Biscotto v. Dalrymple, 158 A. 101, 10 N.J.Misc. 41—Chambers v. Kramer, 137 A. 881, 5 N.J.Misc. 698—Fish v. Stoll, 134 A. 123, 4 N.J.Misc. 547.
N.Y.—Devonshire v. Stubbs, 238 N.Y.S. 707, 135 Misc. 886—Schargel v. United Electric Light & Power Co., 215 N.Y.S. 217, 127 Misc. 24.
Ohio.—Dime Sav. Bank of Canton v. Morton, 157 N.E. 825, 25 Ohio App. 157.
Or.—White v. Harrison, 194 P. 431, 98 Or. 508.
Pa.—O'Farrell v. Mawson, 182 A. 538, 320 Pa. 316—Baugh v. McCallum, 14 A.2d 364, 140 Pa.Super. 276—Kramer v. Linder, 8 Pa.Dist. & Co. 343, 7 Northumb.Leg.J. 358.
Tex.—McDaniel v. Orr, Com.App., 33 S.W.2d 427, reversing 30 S.W.2d 489, reversing, Civ.App., 30 S.W.2d 487—Texas & N. O. R. Co. v. Neill, Civ.App., 97 S.W.2d 279, application refused 100 S.W.2d 348, 128 Tex. 580, certiorari granted 57 S. Ct. 791, 301 U.S. 674, 81 L.Ed. 1336, certiorari dismissed 58 S.Ct. 118, 302 U.S. 645, 82 L.Ed. 501, rehearing denied 58 S.Ct. 268, 302 U.S. 778, 82 L.Ed. 602—Panhandle & S. F. Ry. Co. v. Brown, Civ.App., 74 S.W.2d 531, error dismissed—Teague v. Farmers' State Bank of Center, Civ.App., 55 S.W.2d 639—Zucht v. Brooks, Civ.App., 216 S.W. 684.
Vt.—Webster v. Canadian Pac. Ry. Co., 156 A. 524, 103 Vt. 460.
Wash.—Tomblinson v. Wise, 300 P. 1056, 163 Wash. 341.
W.Va.—State v. Williams, 120 S.E. 594, 95 W.Va. 218.
Wyo.—Montgomery v. Empey, 253 P. 17, 36 Wyo. 37.
23 C.J. p 20 note 45.

Reason for rule

"If the number of witnesses was the controlling factor in the rendition of a verdict, then we might, and in all probability would, have a court-house full of witnesses in every case, and each litigant would endeavor to call and swear the greatest number, in which case trials in court would become a travesty on justice and a mockery. If that were the case, then he who could produce the greatest number of witnesses would win and a wonderful incentive to bribe witnesses would prevail."—Kramer v. Linder, 8 Pa.Dist. & Co. 343, 344, 7 Northumb.Leg.J. 358.

20. Ark.—Texarkana & Ft. Smith Ry. Co. v. Adcock, 231 S.W. 866, 149 Ark. 110.
Colo.—Garver v. Garver, 121 P. 165, 52 Colo. 227, Ann.Cas.1913D 674.
Kan.—Hughes v. Vossler, 203 P. 1107, 110 Kan. 279.
Wash.—Tomblinson v. Wise, 300 P. 1056, 163 Wash. 341.

However, disparity in number of witnesses is a circumstance not to be overlooked, it being a circumstance to be considered by the trier of the facts,[21] and where, without regarding the difference in number of witnesses, a preponderance of evidence on either side cannot be detected, the court or jury may properly decide in conformity with the testimony of the greater number of witnesses;[22] indeed, some courts have emphatically declared this to be the only correct course in such a case.[23]

Single witness opposed to several. In view of the comparative probabilities of mistake or perjury, the testimony of a single witness who is opposed to several will not readily be accepted as controlling,[24] especially where he is a party or interested and all, or nearly all, the opposing witnesses are disinterested,[25] and the jury are not compelled to accept the testimony of one witness and disregard all other testimony to the contrary.[26] It has even been said that the testimony of two or more credible or unimpeached witnesses will prevail over that of one witness of like character,[27] or as against one witness who denies the testimony of the others only inferentially.[28] However, there is no absolute rule, and a single witness may be believed, sometimes by reason of statute, so that his testimony will sustain a verdict or finding, although several witnesses have testified to the contrary,[29] even though he is interested or a party to the action,[30] and especially where he has full knowledge of the facts and the knowledge of the opposing witnesses is only partial,[31] where his opportunities for observation were superior,[32] or where the circumstances surrounding the transaction in question are confirmatory of his testimony.[33]

W.Va.—State v. Williams, 120 S.E. 594, 95 W.Va. 218.
23 C.J. p 22 note 47.

21. U.S.—Erie R. Co. v. Fritsch, C. C.A.N.J., 72 F.2d 766, certiorari denied 55 S.Ct. 213, 293 U.S. 620, 79 L.Ed. 708.
Ark.—Texarkana & Ft. S. Ry Co. v. Adcock, 231 S.W. 866, 149 Ark. 110.
Ill.—Jones v. Esenberg, 20 N.E.2d 906, 299 Ill.App. 551.
La.—Thoman v. Deliberto, 136 So. 904, 17 La.App. 574.
Mich.—Dupuis v. Saginaw Valley Traction Co., 109 N.W. 413, 146 Mich. 151.
Or.—White v. Harrison, 194 P. 431, 98 Or. 508.
Tex.—McDaniel v. Orr., Com.App., 33 S.W.2d 427, reversing 30 S.W.2d 489, reversing, Civ.App., 30 S.W. 2d 487.
23 C.J. p 22 note 48.

Disparity as going to weight
That defendant had many witnesses testifying against two testifying to contrary went merely to weight of testimony.—Vanausdol v. Bank of Odessa, 5 S.W.2d 109, 222 Mo.App. 91.

22. Ill.—Feldman v. Karn, 247 Ill. App. 48.
La.—Stott v. Talbert, 2 La.App. 472.
Utah.—Wilkinson v. Anderson-Taylor Co., 79 P. 46, 28 Utah 346.
23 C.J. p 22 notes 49, 50.

23. Ala.—Graham v. State, 9 So. 530, 92 Ala. 55.
23 C.J. p 23 note 51.

24. N.Y.—Westervelt v. Shapiro, 132 N.Y.S. 338.
23 C.J. p 23 note 52.

25. La.—Preaus v. Western Union Telegraph Co., App., 151 So. 813.
23 C.J. p 23 note 53.

Evidence sufficient to support verdict
In action against a real estate dealer for value of an automobile which he agreed to give to plaintiff for procuring her father to sign contract authorizing sale of his farm, where plaintiff and her mother and father testified as to terms of agreement, and defendant testified alone, the evidence was held to support verdict for plaintiff.—Clark v. Dorsey, 276 S.W. 800, 210 Ky. 795.

26. Tex.—Carter v. Daniel, Civ.App., 273 S.W. 688.

27. La.—Thermo Electric Co. v. Dauterive, 8 La.App. 526—Perestreras v. Lombardo, 3 La.App. 324.

28. Wash.—Hazard v. Warner, 211 P. 732, 122 Wash. 687, 31 A.L.R. 381.

29. U.S.—The Reno, C.C.A.N.Y., 61 F.2d 966, modifying, D.C., 54 F.2d 682.
Ala.—Lamar Life Ins. Co. v. Kemp, App., 1 So.2d 760.
Cal.—Myles v. Russell, 213 P. 491, 190 Cal. 485—Leffingwell v. Faubion, 264 P. 306, 89 Cal.App. 157—Taylor v. U. S. Fidelity & Guaranty Co., 260 P. 898, 86 Cal.App. 382.
Ga.—Harrison v. Hester, 129 S.E. 528, 160 Ga. 865—McGriff v. McGriff, 115 S.E. 21, 154 Ga. 560—Dixon v. Virginia-Carolina Chemical Co., 116 S.E. 662, 30 Ga.App. 78.
Ill.—Springfield Consol. Ry. Co. v. Wright, 134 Ill.App. 598.
Ky.—Irvin v. Madden, 134 S.W.2d 942, 281 Ky. 7—Vale v. Illinois Pipe Line Co., 134 S.W.2d 940, 281 Ky. 1—Smith v. Ferguson, 76 S.W.2d 606, 256 Ky. 545—Jewell v. Janes, 36 S.W.2d 875, 238 Ky. 63—Security Ben. Ass'n of Topeka, Kan., v. Payne, 300 S.W. 861, 222 Ky. 332.
Me.—Ordway v. Cluskey, 149 A. 386, 129 Me. 13.
Mont.—Hill v. Haller, 90 P.2d 977, 108 Mont. 251—In re Silver's Estate, 38 P.2d 277, 98 Mont. 141—McKinster v. Great Northern Ry. Co., 218 P. 87, 67 Mont. 134—Doane v. Marquisee, 206 P. 426, 63 Mont. 166.
Neb.—Linch v. Berggren, 282 N.W. 528, 135 Neb. 530.
Nev.—McNee v. McNee, 237 P. 534, 49 Nev. 90.
N.Y.—Devonshire v. Stubbs, 238 N. Y.S. 707, 135 Misc. 886.
Tex.—Bailey v. Dillard, Civ.App., 147 S.W. 1167.
23 C.J. p 23 note 54.
Positive and negative testimony see infra § 1037.

To render applicable statutes entitling jurors to believe single witness as against a greater number, the witness must be entitled to full credit, and his testimony must be to facts which he knows of his own knowledge, unless testimony is within an exception to rule that nonexpert witnesses cannot testify to opinions, inferences, or conclusions from existing facts.—In re Silver's Estate, 38 P.2d 277, 98 Mont. 141.

Moral qualities must be considered in determining credibility of witnesses, and one witness having proper attributes outweighs any number not possessing such attributes.—Decoss v. Turner & Blanchard, C.C.A. N.Y., 15 F.2d 258.

30. Ala.—Lamar Life Ins. Co. v. Kemp, App., 1 So.2d 760.
Colo.—Wood v. Hazelet, 237 P. 151, 77 Colo. 442.
N.Y.—Devonshire v. Stubbs, 238 N.Y. S. 707, 135 Misc. 886.
23 C.J. p 23 note 55.

31. Me.—Ladd v. Bean, 104 A. 814, 117 Me. 445.

32. U.S.—Taylor v. Harwood, C.C. Md., 23 F.Cas.No.13,794, Taney 437.

33. U.S.—Mayer v. Mutschler, N. Y., 248 F. 911, 161 C.C.A. 29, certiorari denied 39 S.Ct. 8, 248 U.S. 563, 63 L.Ed. 423.

Where there are no physical facts to overcome the testimony of a party the fact that several witnesses gave contradictory testimony does not destroy it.[34]

Considerations favoring greater number. Under the facts in particular cases, various courts have advanced the following considerations as favoring the greater number of witnesses: That it is not possible for them to be mistaken and that their testimony is either true or willfully false;[35] that they, or most of them, are disinterested and opposed only by interested parties;[36] that the opposing witnesses are interested parties;[37] that the party against whom they testify has made admissions tending to corroborate their testimony;[38] that their testimony is corroborated by the conduct of the parties[39] or by written evidence;[40] that they are unimpeached and the only opposing witness is a confessed wrongdoer[41] or has given testimony which is contradictory and contains matters tending to impeach him;[42] that they are adults, while the opposing witnesses are children;[43] that they had equal or superior opportunities for observation;[44] that the opposing witness was not observant;[45] and that they are for various other reasons better entitled to credit.[46]

Considerations favoring smaller number. Under the facts in particular cases, courts have argued in favor of the smaller number of witnesses as follows: That they had superior opportunities for observation;[47] that their testimony is inherently probable[48] or not intrinsically improbable or incredible;[49] that they are sustained by the probabilities of the case[50] or the surrounding circumstances;[51] that their testimony is characterized by coherence and an air of veracity;[52] that their manner is markedly sincere and honest;[53] that they are corroborated by documentary evidence[54] or, with respect to observed conditions, by a photograph;[55] that the party to the suit for whom the opposing witnesses testified had made damaging admissions;[56] that the memory of the opposing witnesses was shown by their testimony to be at fault in various particulars;[57] that some of the opposing witnesses admitted that they were paying no particular attention to the matter,[58] or were impeached by contradictory statements;[59] that the greater number differ among themselves as well as from the smaller number, and that the recollection of the latter is more likely to be correct;[60] that the fewer are supported by a legal presumption, while the others are identified in feeling and interest;[61] that the opposing witnesses are employees of the party for whom they testify or otherwise so situated as to make their testimony unsatisfactory;[62] that two witnesses against one are husband and wife, the latter of whom is a party to the suit;[63] that there is inherent improbability in the testimony of the opposing wit-

34. Wash.—Holm v. City of Seattle, 294 P. 261, 159 Wash. 618.

35. Ill.—Chicago, B. & Q. R. Co. v. Stumps, 69 Ill. 409.

36. N.J.—Ross v. Director General of Railroads, 110 A. 705, 94 N.J. Law 295.

37. Tex.—South Texas Coaches v. Woodward, Civ.App., 123 S.W.2d 395.
23 C.J. p 24 note 61.

38. U.S.—The J. L. Hasbrouck, D. C.N.Y., 13 F.Cas.No.7,323, 4 Ben. 359, affirmed 93 U.S. 405, 23 L.Ed. 962.

39. Wis.—Tierman v. Gibney, 24 Wis. 190.

40. Man.—Sylvester v. Porter, 11 Man. 98.

41. Ill.—Newman v. Woolfs Clothing Co., 156 Ill.App. 377.

42. Ill.—Andreicyk v. Chicago & E. I. R. Co., 158 Ill.App. 46.

43. Ill.—Chicago, B. & Q. R. Co. v. Stumps, 69 Ill. 409.

44. La.—Preaus v. Western Union Telegraph Co., App., 151 So. 813.
Md.—Porter v. Porter, 177 A. 464, 168 Md. 296.
23 C.J. p 24 note 68.

45. La.—Langlinais v. Rose Hill Sugar Refining Co., 60 So. 195, 131 La. 697.

46. Ky.—Illinois Cent. R. Co. v. Applegate's Adm'x, 105 S.W.2d 153, 268 Ky. 458.
La.—Dauterive Lumber Co. v. Burnaman, 8 La.App. 666—Thermo Electric Co. v. Dauterive, 8 La.App. 526.
Tex.—South Texas Coaches v. Woodard, Civ.App., 123 S.W.2d 395.
23 C.J. p 24 note 70.

47. Wash.—Tomblinson v. Wise, 300 P. 1056, 163 Wash. 341.
23 C.J. p 24 note 71.

48. N.Y.—Schargel v. United Electric Light & Power Co., 215 N.Y.S. 217, 127 Misc. 24.
Pa.—Braunschweiger v. Waits, 36 A. 155, 179 Pa. 47.

49. Wis.—Hardy v. Milwaukee St. R. Co., 61 N.W. 771, 89 Wis. 183.

50. Ill.—West Chicago St. R. Co. v. Dean, 112 Ill.App. 10.

51. N.Y.—Cooper v. Fleischman, 147 N.Y.S. 65, 85 Misc. 1.
23 C.J. p 24 note 75.

52. U.S.—Sibley v. St. Paul Fire & Marine Ins. Co., C.C.Ill., 22 F.Cas. No.12,830, 9 Biss. 31.

53. Pa.—Braunschweiger v. Waits, 36 A. 155, 179 Pa. 47.
Puerto Rico.—Lausell v. American R. Co., 17 Puerto Rico 1027.

54. N.J.—State v. Weinberger, 94 A. 795, 87 N.J.Law 422.
23 C.J. p 24 note 78.

55. Ill.—La Salle v. Evans, 111 Ill. App. 69.
23 C.J. p 24 note 79.

56. N.Y.—Latham v. Delany, 15 N. Y.S. 146, affirmed 30 N.E. 1149, 133 N.Y. 601.

57. Pa.—Hale & Kilburn Mfg. Co. v. Norcross, 49 A. 80, 199 Pa. 283.

58. N.Y.—Small v. Brooklyn City & N. R. Co., 30 N.Y.S. 1076, 10 Misc. 266, affirmed 45 N.E. 1134, 151 N.Y. 631.

59. N.Y.—Small v. Brooklyn City & N. R. Co., supra.

60. N.Y.—Schick v. Brooklyn City R. Co., 10 N.Y.S. 528.
23 C.J. p 24 note 84.

61. Ill.—Knowles v. Knowles, 86 Ill. 1.
23 C.J. p 24 note 85.

62. N.Y.—Small v. Brooklyn City & N. R. Co., 30 N.Y.S. 1076, 10 Misc. 266, affirmed 45 N.E. 1134, 151 N. Y. 631.
23 C.J. p 24 note 86.

63. Mo.—Greditzer v. Continental Ins. Co., 91 Mo.App. 534.

nesses;[64] and that the manner of the opposing witnesses is such as to impair or destroy the force of their testimony.[65]

§ 1023. Clear and Convincing Proof

In a number of cases, as where an adverse presumption is to be overcome, or where there are peculiar facilities for perpetrating injustice by fraud, more than a mere preponderance of the evidence is required; so, parol or extrinsic evidence, in order to vary or contradict a written instrument, must be clear and convincing.

In ordinary civil actions a fact in issue is, as shown supra § 1020, sufficiently proved by a preponderance of evidence.

In a number of cases, however, where an adverse presumption is to be overcome, or on grounds of public policy and in view of peculiar facilities for perpetrating injustice by fraud and perjury, the degree of proof required is expressed in such terms as "clear," "clear and conclusive," "clear, precise, and indubitable," "convincing," "entirely satisfactory," "satisfactory," "strong," and "unequivocal";[66] and the phrase "preponderance of evidence" has been expressly disapproved as a measure of the proof required.[67] These and similar expressions have been said to have substantially the same meaning.[68] They have been used among other instances to characterize the degree of proof required to establish a parol antenuptial agreement,[69] a counterclaim,[70] a claim for damages by way of recoupment,[71] or a disavowal or renunciation of a right;[72] to prove that the maker of a note is not indebted to the payee to the amount thereof;[73] to establish inequality in the division of a decedent's estate by commissioners,[74] or integrity and fairness in a transaction between parties one of whom may be presumed to exercise a controlling influence over the will and conduct of the other;[75] to condemn as false and fraudulent a written instrument which was unquestionably executed by the person by whom it purports to have been made;[76] to set aside a deed and divest the title to real estate for breach of a condition subsequent;[77] to set aside a verdict on account of previously expressed opinions by jurors;[78] to set aside in favor of a creditor a settlement of accounts between his debtor and a third person;[79] to overcome the presumption of delivery of a deed duly executed in the presence of the grantee,[80] and recorded;[81] to rebut the presump-

64. N.J.—Horwath v. Horwath, 110 A. 576, 91 N.J.Eq. 435.
23 C.J. p 24 note 88.

65. Mont.—Lehane v. Butte Electric R. Co., 97 P. 1038, 37 Mont. 564.
23 C.J. p 24 note 89.

66. Ky.—Gotee v. Graves, 154 S.W. 386, 153 Ky. 26.
N.C.—Jones v. Coleman, 125 S.E. 406, 188 N.C. 631.
Va.—Atlantic Coast Realty Co. v. Robertson's Ex'r., 116 S.E. 476, 478, 135 Va. 247, quoting **Corpus Juris.**
Wis.—Reiss v. Utter, 180 N.W. 810, 173 Wis. 180.
23 C.J. p 24 notes 90–92, p 25 notes 32–33, p 26 note 54.

Conviction to unprejudiced mind

The rule that evidence must be clear, satisfactory, and convincing can require only such proof as would carry conviction to an unbiased or unprejudiced mind.—Massie v. Hutcheson, Tex.Civ.App., 296 S.W. 939.

Necessity of direct evidence

In order that evidence may be "clear and satisfactory," it is not necessary that it should be direct and positive, but presumptive and inferential evidence may suffice.—Bash v. Bash, 9 Pa. 260.

Statutory provision as to preponderance

All judicial expressions concerning necessity of clear and satisfactory proof must be construed in light of a statutory provision that when the evidence is contradictory the decision must be according to the preponderance thereof.—Pellaton v. Brunski, 231 P. 583, 69 Cal.App. 301.

Rule only in equity

(1) This degree of proof is required only in equity cases tried by the court, and the same questions of fact when submitted to a jury in an action at law are sufficiently proved by a preponderance of evidence.—Holt v. Brown, 19 N.W. 235, 63 Iowa 319—McAnnulty v. Seick, 13 N.W. 743, 59 Iowa 586.

(2) It is otherwise, however, when the question is submitted to a jury in an equity case for an advisory verdict.
Cal.—Sweetser v. Dobbins, 3 P. 116, 2 Cal.Unrep.Cas. 277.
N.C.—Ely v. Early, 94 N.C. 1.

(3) Burden of plaintiff is to satisfy jury in certain cases of an equitable nature by clear, strong, and cogent proof.—Williams v. Blue Ridge Building & Loan Ass'n, 177 S.E. 176, 207 N.C. 362.

Transmission of telegram

"Very clear and decisive evidence" is required to prove that a telegraph message regularly received was not transmitted from the office whence it purported to have been sent.—Elwood v. Western Union Tel. Co., 45 N.Y. 549, 554, 6 Am.R. 140.

67. Wis.—Dewey v. Spring Valley Land Co., 73 N.W. 565, 98 Wis. 83.

68. Kan.—Jackman v. Lawrence Drilling & Development Co., 187 P. 258, 106 Kan. 59.

69. Pa.—In re Krug, 46 A. 484, 196 Pa. 484.

70. N.Y.—Model Examining & Sponging Co. v. Mark, 157 N.Y.S. 763.

71. Del.—Moore v. Speal, 97 A. 237, 6 Boyce 101.
23 C.J. p 25 note 11.

72. S.C.—Irby v. McCrae, 4 S.C.Eq. 422.

73. N.Y.—Campbell Printing Press & Mfg. Co. v. Yorkston, 32 N.Y.S. 263, 11 Misc. 340.

74. N.J.—In re Thompson, 3 N.J. Eq. 637.

75. N.Y.—Ten Eyck v. Whitbeck, 50 N.E. 963, 156 N.Y. 341.
23 C.J. p 26 note 43.

76. Wis.—Russell v. Scofield, 113 N.W. 1094, 134 Wis. 21.
22 C.J. p 971 note 21.

77. Mo.—Dickson v. St. Louis & K. R. Co., 67 S.W. 642, 168 Mo. 90.
23 C.J. p 25 note 40.

78. Utah.—State v. Mickle, 70 P. 856, 25 Utah 179.

79. Wis.—Klauber v. Wright, 8 N.W. 893, 52 Wis. 303.
23 C.J. p 25 note 22.

80. N.Y.—Souverbye v. Arden, 1 Johns.Ch. 240.

81. Ala.—Wells v. American Mortg. Co., 20 So. 136, 109 Ala. 430.

tion of a gift in favor of a child or wife;[82] to open a stated or settled account;[83] to obtain equitable relief against the legal right of another;[84] to supply a lost record;[85] to authorize entry nunc pro tunc on court records of judicial action previously taken;[86] or to sustain an award by explanation of conduct by the arbitrators prima facie fatal to the award;[87] and other instances of the requirement of this type of proof are treated at appropriate points in various particular titles of this work. It has been considered that where a case has been permitted to drag on for a number of years without a trial, the party asserting rights is required to establish them by clearer evidence than if he had diligently pressed his claim to a decision.[88]

A plaintiff has been required to prove his case "beyond all doubt,"[89] or by evidence "free from suspicion";[90] but such expressions have been characterized as "apparently unconsidered,"[91] and, indeed, there is strong authority for the proposition that a preponderance of evidence suffices in this class of cases, although a higher degree of proof than in ordinary cases may be requisite to constitute that preponderance.[92]

Where a remedy is summary courts always require that a clear case be made out.[93]

Parol or extrinsic evidence. Clear and convincing evidence, or something beyond a mere preponderance of the evidence, is usually required in order to establish, by parol or extrinsic evidence, the invalidity of a written instrument,[94] or to vary or contradict, by such evidence, the terms or recitals of a written document or instrument.[95] Thus, parol or extrinsic evidence must be clear, positive, and convincing in order to contradict or vary,[96] or

82. N.J.—Read v. Huff, 40 N.J.Eq. 229.

83. N.J.—Somers v. Cresse, Ch., 13 A. 23.
23 C.J. p 25 note 21.

84. Md.—Duvall v. Hambleton, 55 A. 431, 98 Md. 12.
N.J.—Vanscıver v. Bryan, 13 N.J.Eq. 434.

85. Ala.—Whitney v. Jasper Land Co., 24 So. 259, 119 Ala. 497.

86. Ohio.—Jacks v. Adamson, 47 N. E. 48, 56 Ohio St. 397, 60 Am.S.R. 749.

87. N.J.—West Jersey R. Co. v. Thomas, 23 N.J.Eq. 431, affirmed 24 N.J.Eq. 567.
23 C.J. p 26 note 49.

88. U.S.—Kellogg Switchboard & Supply Co. v. Dean Electric Co., D.C.Ohio, 231 F. 194.
La.—Franks v. Scott, App., 191 So. 175—Murphy Iron Works v. Marx & Sons, 8 La.App. 16.

89. N.Y.—Sidway v. Sidway, 7 N.Y. S. 421, 4 Silv.Sup. 124.
Pa.—Lance's Appeal, 4 A. 375, 112 Pa. 456.

90. Ill.—Crilly v. Board of Education, 54 Ill.App. 371.

91. N.Y.—Southard v. Curley, 31 N. E. 330, 332, 134 N.Y. 148, 30 Am.S. R. 642, 16 L.R.A. 561.

92. Neb.—Doane v. Dunham, 89 N. W. 640, 64 Neb. 135.
23 C.J. p 25 note 1.

93. Ill.—Mackey v. McCaffrey, 23 Ill.App. 595.

94. Tenn.—Kyle v. Kyle, 74 S.W.2d 1065, 18 Tenn.App. 200.

95. U.S.—Frenzer v. Frenzer, C.C.A. Neb., 2 F.2d 218, certiorari denied 46 S.Ct. 101, 269 U.S. 574, 70 L.Ed. 419—In re Independent Distillers of Kentucky, D.C.Ky., 34 F.Supp. 724.
Ark.—Frazier v. Loftin, 137 S.W.2d 750, 200 Ark. 4—U. S. Bond & Mortgage Co. v. Reddick, 133 S.W. 2d 23, 199 Ark. 82—Bevens v. Brown, 120 S.W.2d 574, 196 Ark. 1177—Walker v. Streeter, 87 S.W. 2d 43, 191 Ark. 604—Terral v. Poe, 79 S.W.2d 69, 190 Ark. 346—Spencer v. Johnson, 13 S.W.2d 585, 178 Ark. 1200.
Cal.—In re Kellogg, 107 P.2d 964, 41 Cal.App.2d 833—Keck v. Wingert, 23 P.2d 99, 132 Cal.App. 475.
Fla.—Rountree v. Davis, 167 So. 820, 124 Fla. 212.
Iowa.—Dugan v. Zurmuehlen, 211 N. W. 986, 203 Iowa 1114—State v. Consolidated Independent School Dist. of Dawson, 187 N.W. 11, 193 Iowa 300.
Ky.—Vansant's Ex'x v. Gardner's Ex'x, 42 S.W.2d 300, 240 Ky. 318—Walker v. Walker, 15 S.W.2d 298, 228 Ky. 357.
Me.—Austin v. Austin, 191 A. 276, 135 Me. 155.
Md.—Quillen v. Bell, 149 A. 462, 158 Md. 677.
Mich.—Garey v. Morley Bros., 209 N.W. 116, 234 Mich. 675.
Mo.—Henry Evers Mfg. Co. v. Grant, App., 284 S.W. 525.
N.J.—Traska v. Piekielko, 124 A. 151, 96 N.J.Eq. 204, affirmed 126 A. 925, 96 N.J.Eq. 671.
N.Y.—Campanaro v. Prudential Ins. Co. of America, 255 N.Y.S. 704, 235 App.Div. 702.
N.C.—Jones v. Coleman, 125 S.E. 406, 188 N.C. 631.
Pa.—Berardini v. Kay, 192 A. 882, 326 Pa. 481—Speier v. Michelson, 154 A. 127, 303 Pa. 66—In re Baird's Estate, 148 A. 907, 299 Pa. 39—Kline v. Fitzgerald Bros., 110 A. 348, 267 Pa. 468—Werner v. Deutsch, 7 A.2d 511, 135 Pa.Super. 519—Preis v. Mulholland & Gotwals, 96 Pa.Super. 104—Pittsburgh-Texas Gas & Oil Co. v. Adams, 79 Pa.Super. 511.
Tenn.—Tennessee-Carolina Mills v. Mauk, 14 Tenn.App. 517.
Tex.—Rincon Inv. Co. v. White, Civ. App., 99 S.W.2d 390, error dismissed—Rincon Inv. Co. v. White, Civ. App., 54 S.W.2d 1052, error dismissed.
Utah.—Starley v. Deseret Foods Corporation, 74 P.2d 1221, 93 Utah 577.
Va.—Richeson v. Wood, 163 S.E. 339, 345, 158 Va. 269, 82 A.L.R. 1189, citing **Corpus Juris**—Whitaker & Fowle v. Lane, 104 S.E. 252, 128 Va. 317, 11 A.L.R. 1157.
Wis.—In re Flierl's Estate, 274 N.W. 422, 225 Wis. 493.
Wyo.—Binning v. Miller, 102 P.2d 54, 55 Wyo. 451.
23 C.J. p 26 note 56.

Rule not applied in actions at law
Iowa.—McAnnulty v. Seick, 13 N.W. 743, 59 Iowa 586.

96. U.S.—Thomas v. Baumer, C.C.A. Pa., 111 F.2d 648, affirming, D.C., 32 F.Supp. 36—Union Central Life Ins. Co. v. Deutser, D.C.Md., 13 F. Supp. 313, affirmed, C.C.A., Deutser v. Marlboro Shirt Company, 81 F. 2d 139—Peck v. Stafford Flour Mills Co., C.C.A.Ark., 289 F. 43.
Contra United Steel Co. v. Casey, C. C.A.Ohio, 262 F. 889.
Idaho.—Molyneux v. Twin Falls Canal Co., 35 P.2d 651, 656, 54 Idaho 619, 94 A.L.R. 1264, citing **Corpus Juris.**
Ky.—Fordson Coal Co. v. Garrard, 125 S.W.2d 977, 277 Ky. 218, 121 A.L.R. 841—Turner Elkhorn Coal Co. v. Smith, 291 S.W. 715, 218 Ky. 503.
Pa.—Culbertson v. Ansell, 153 A. 900, 303 Pa. 46—Pender v. Cook, 150 A. 892, 300 Pa. 468—Humphrey v. Brown, 139 A. 606, 291 Pa. 53—Danish Pride Milk Products Co.

supersede,[97] the terms of a written contract, or of a deed,[98] a note,[99] a receipt,[1] or a recital of payment,[2] or in order to establish a parol waiver of a written contract, or of its terms.[3] Parol evidence to explain an ambiguity in a written contract must be very convincing,[4] or reasonably convincing,[5] although it has been held that the rule as to certainty and precision of proof required for the reformation of a written instrument does not apply in such a case.[6] Clear and convincing proof is usually held to be necessary where it is sought by parol evidence to establish that a deed absolute on its face was intended as a mortgage;[7] and, indeed, proof "beyond reasonable controversy"[8] or "beyond all doubt"[9] has been required for this purpose, although there is also authority to the effect that so high a degree of proof is not necessary.[10]

§ 1024. Proof beyond a Reasonable Doubt

The party having the affirmative of an issue in a civil case is generally not required to establish his contention beyond a reasonable doubt.

The general rule is that the party having the affirmative of an issue in a civil case is not required to establish his contention beyond a reasonable doubt,[11] although such a degree of proof may be demanded where the nature of an issue or the circumstances of a particular case require it;[12] nor

v. Marcus, 116 A. 303, 272 Pa. 340—Ferguson v. Rafferty, 18 A. 484, 128 Pa. 337, 355, 6 L.R.A. 33—Schmitt v. William G. Johnston Co., 7 A.2d 131, 136 Pa.Super. 213—De Long Hook & Eye Co. v. Tait, 164 A. 848, 108 Pa.Super. 369—Preis v. Mulholland & Gotwals, 96 Pa.Super. 104—Hill v. Smith, 75 Pa.Super. 340—Michael v. Stuber, 73 Pa.Super. 390—Lenz v. Spencer, 28 Pa.Super. 31.

Wash.—Dinsmore Sawmill Co. v. Falls City Lumber Co., 126 P. 72, 70 Wash. 42.

Strict proof was required to show that a written agreement inadvertently included articles not contemplated by oral agreement of the parties.—Root v. John T. Robinson Co., D.C.Mass., 55 F.2d 303.

Sufficient evidence to prove oral agreement

Greater evidence is not necessary to establish oral contract changing terms of prior written one than is required to prove any oral agreement.—Goldman v. National Refrigerator Co., 182 A. 730, 120 Pa.Super. 458.

97. N.J.—McKinstry v. Runk, 12 N.J.Eq. 60.

98. Ark.—Maloch v. Pryor, 139 S.W.2d 51, 200 Ark. 380—Frazier v. Loftin, 137 S.W.2d 750, 200 Ark. 4—Stephens v. Keener, 137 S.W.2d 253, 199 Ark. 1051—Burns v. Fielder, 122 S.W.2d 160, 197 Ark. 85—Fretwell v. Nix, 288 S.W. 8, 172 Ark. 230.

Ky.—Goode v. Gover's Ex'r, 279 S.W. 639, 212 Ky. 418.

La.—Young v. Sartor, 95 So. 223, 152 La. 1064.

Mo.—Schwind v. O'Halloran, 142 S.W.2d 55.

Ohio.—Gardner v. Kern, 155 N.E. 134, 115 Ohio St. 575, affirming Kern v. Gardner, 159 N.E. 840, 26 Ohio App. 48.

Modification for mistake

The rule that, to show by parol that a deed is something other than its language shows it to be, the evidence must be clear and convincing, is applicable when mistake is put forward as the basis of the claim for modification.—Grott v. Grott, Mo., 249 S.W. 55.

99. Ky.—Farmers' Bank & Trust Co. v. Dent, 267 S.W. 202, 206 Ky. 405.

La.—Rice v. Passman, App., 196 So. 371.

1. U.S.—Yarbrough v. Prudential Ins. Co. of America, C.C.A.Ga., 99 F.2d 874, rehearing denied 100 F.2d 547.

Pa.—Vereb v. Yellow Truck & Coach Co., 89 Pittsb.Leg.J. 290.

18 C.J. p 266 note 16—23 C.J. p 26 note 57.

2. Ala.—Jenkins v. Matthews, 2 So. 518, 80 Ala. 486.

3. Ill.—Rockwood Sprinkler Co. v. Phillips Co., 265 Ill.App. 267.

23 C.J. p 26 note 60.

4. N.J.—Journal Plaza Holding Co. v. J. H. L. Co., 152 A. 14, 107 N.J.Eq. 14, reversing 147 A. 581, 105 N.J.Eq. 290.

5. Miss.—Bradley v. Howell, 134 So. 843, 161 Miss. 346, modifying 133 So. 660, 161 Miss. 346.

6. Pa.—Lever v. Lagomarsino, 127 A. 452, 282 Pa. 110.

7. Iowa.—McKenney & Seabury v. Nelson, 262 N.W. 101, 220 Iowa 504.

Tex.—Rincon Inv. Co. v. White, Civ.App., 99 S.W.2d 390, error dismissed—Rincon Inv. Co. v. White, Civ.App., 54 S.W.2d 1052, error dismissed.

23 C.J. p 26 note 62.

8. Wis.—Kent v. Lasley, 24 Wis. 654.

9. Pa.—Lance's Appeal, 4 A. 375, 112 Pa. 456, 467.

10. Neb.—Stall v. Jones, 66 N.W. 653, 47 Neb. 706.

11. U.S.—New York Life Ins. Co. v. Doerksen, C.C.A.Kan., 75 F.2d 96.

Ala.—Decatur Car Wheel & Manufacturing Co. v. Mehaffey, 29 So. 646, 128 Ala. 242.

Ark.—Yarbrough v. Arnold, 20 Ark. 592.

Conn.—Esserman v. Madden, 195 A. 739, 123 Conn. 386—Judd v. H. S. Coe & Co., 169 A. 270, 117 Conn. 510.

Ga.—Wright v. Harber, 165 S.E. 616, 175 Ga. 696—Central of Georgia Ry. Co. v. Stiles, 76 S.E. 570, 139 Ga. 49—Seymour v. Bailey, 76 Ga. 338.

Idaho.—Mainon v. Waybright, 86 P.2d 181, 59 Idaho 643—Riley v. City of Boise, 31 P.2d 968, 54 Idaho 335—Watkins v. Federal Life Ins. Co., 29 P.2d 1007, 54 Idaho 174—Roe v. Boise Grocery Co., 21 P.2d 910, 53 Idaho 82.

La.—Kirk v. United Gas Public Service Co., App., 165 So. 735, annulled on other grounds 170 So. 1, 185 La. 580.

Mass.—Callahan v. Fleischman Co., 160 N.E. 249, 262 Mass. 437.

Mich.—Hetfield v. Mortimer, 210 N.W. 326, 236 Mich. 214.

Miss.—Brown v. Walker, 11 So. 724.

Mo.—Brooks v. Roberts, 220 S.W. 11, 281 Mo. 551.

Okl.—General Exchange Ins. Corporation v. Edwards, 73 P.2d 1145, 1147, 181 Okl. 288, quoting **Corpus Juris.**

Pa.—Commonwealth v. Certain Confiscated Liquors, 91 Pa.Super. 165.

Tenn.—Bank of Commerce & Trust Co. v. Stavros, 103 S.W.2d 593, 20 Tenn.App. 662.

Wash.—Tubb v. City of Seattle, 239 P. 1009, 136 Wash. 332.

23 C.J. p 25 notes 98, 99, p 27 note 66—45 C.J. p 1261 note 98.

Where charge of crime is involved see supra § 1020 b.

"Beyond reasonable doubt" has the same meaning as "clear, precise, and indubitable."—Ferguson Packing Co. v. Mihalic, 99 Pa.Super. 158.

12. N.J.—Frayler v. United Cork Co., 182 A. 273, 14 N.J.Misc. 91.

23 C.J. p 27 note 67.

In patent infringement actions see the C.J.S. title Patents §§ 325–326, also 48 C.J. p 357 notes 33–34.

is proof satisfying a jury "to a moral certainty" required, the phrase being regarded as equivalent to "beyond a reasonable doubt."[13]

§ 1025. Proof of Negative Facts

A negative fact usually admits of no more than approximate proof, and is prima facie established by showing affirmative facts inconsistent with the affirmative of the proposition to be negatived.

A negative, from its nature, usually admits of no more than approximate proof,[14] and evidence which renders the existence of the negative improbable is sufficient, in the absence of proof to the contrary.[15] Generally, a negative fact is sufficiently proved prima facie by showing some affirmative fact or state of facts inconsistent with the affirmative of the proposition to be negatived, and therefore raising a presumption that the negative is true.[16]

B. MEMORY OF WITNESSES

§ 1026. In General

a. Importance of subject
b. Phenomena of memory in general
c. Relation between condition of memory and weight and sufficiency of testimony
d. Discrepancies between testimony of witnesses
e. Age of witness
f. Other particular matters affecting memory

a. Importance of Subject

The laws regulating the human memory may determine the credibility of a witness.

"The laws which regulate the human memory" determine in many cases the credibility of a witness.[17] The importance of a memory as a factor in the weight and sufficiency of evidence is particularly marked in those classes of cases, discussed in §§ 1023–1024 supra, in which proof beyond a reasonable doubt, or clear and convincing proof, or proof by more than a mere preponderance of evidence, is required.

b. Phenomena of Memory in General

The strength of memory of an event is ordinarily in proportion to its recency, the attention given to it, and its novelty or interest to the observer; one of a number of like experiences or events, without special circumstances or the calling of special attention, is not likely to be remembered. Memory retains the substance of events better than their precise order; and memory of transactions involving many names, dates, and amounts must be frail.

In weighing testimony, allowance is to be made for actual or presumptive want of recollection of facts occurring at a remote date,[18] and greater

In patent interference proceedings see the C.J.S. title Patents § 127, also 48 C.J. p 157 note 50.

Employer defending against injured employee's claim for compensation on ground of a previous condition was required to prove such condition to have existed without any reasonable doubt.—Frayler v. United Cork Co., 182 A. 273, 14 N.J. Misc. 91.

13. N.C.—Williams v. Blue Ridge Building & Loan Ass'n, 177 S.E. 176, 207 N.C. 362.

14. U.S.—Leonard v. St. Joseph Lead Co., C.C.A.Mo., 75 F.2d 390.
Ga.—Lawson v. Wright, 21 Ga. 242.
Positive and negative evidence see infra § 1037.

Inference
Proof of a negative must at times rest on inference.—Rich's Case, 17 N.E.2d 903, 301 Mass. 545.

15. Ill.—In re Bridge's Estate, 263 Ill.App. 499, affirmed Crimp v. First Union Trust & Savings Bank, 185 N.E. 179, 352 Ill. 930.

16. U.S.—Majestic Securities Corporation v. Commissioner of Internal Revenue, C.C.A., 120 F.2d 12—Southern Ry. Co. v. Stewart, C.C.A.Mo., 119 F.2d 85, modifying, D.C., 115 F.2d 317—Leonard v. St. Joseph Lead Co., C.C.A.Mo., 75 F. 2d 390.
Ala.—National Surety Co. v. Julian, 150 So. 474, 483, 227 Ala. 472, quoting **Corpus Juris**—Bankers' Mortg. Bond Co. v. Rosenthal, 145 So. 456, 461, 226 Ala. 135, citing **Corpus Juris.**
Tex.—Traders & General Ins. Co. v. Crouch, Civ.App., 113 S.W.2d 650, 654, citing **Corpus Juris**—American Surety Co. of New York v. Underwood, Civ.App., 74 S.W.2d 551, 554, citing **Corpus Juris**, error refused.
23 C.J. p 27 note 69.

Slight evidence is sufficient to introduce, or make out, a prima facie case to prove the existence of a negative.—Owens v. Carmichael's U-Drive Autos, 2 P.2d 580, 116 Cal. App. 348—Schlake v. McConnell, 257 P. 175, 83 Cal.App. 725.

Corpus Juris cited in application of text rule to weight and sufficiency of evidence in criminal prosecution. —Nichols v. U. S., C.C.A.Fla., 48 F. 2d 46, 49.

Disclaimer of knowledge
That janitor disclaimed knowledge of leaky gutters or other cause of ice on railroad platform did not justify conclusion that there was no other source from which water could have come except gutter.—Wessman v. Boston & M. R. R., 152 A. 476, 84 N.H. 475.

Failure of one to hear as not proving failure of others
Testimony that witness was nearest person speaking alleged slanderous words and did not hear such words was held not evidence that others present did not.—Starnes v. St. Joseph Ry., Light, Heat & Power Co., App., 22 S.W.2d 73, affirmed 52 S.W.2d 852, 331 Mo. 44.

17. N.J.—Rabinowitz v. Hawthorne, 98 A. 315, 89 N.J.Law 308—Adams v. Adams, 17 N.J.Eq. 324, 325.
Relation between condition of memory and credit of witness see infra § 1026 c.

18. U.S.—Peirce-Smith Converter Co. v. United Verde Copper Co., D.C.Del., 293 F. 763, affirmed, C.C. A., United Verde Copper Co. v. Peirce-Smith Converter Co., 7 F. 2d 13.
N.Y.—White v. Idsardi, 300 N.Y.S. 1239, 253 App.Div. 96.
23 C.J. p 27 notes 78, 79—42 C.J. p 113 note 8 [f] (1), (2).

credit may be given to the sworn or unsworn statements of a person when made near to the time of the fact under investigation than to his contrary testimony at a much later time.[19] An impression is remembered the better in proportion as it is attended to,[20] and the attention given to, and the recollection of, a particular fact or occurrence are ordinarily in proportion to its novelty or interest to the observer;[21] it is difficult or impossible to recall by effort of memory ordinary circumstances attending one of a multitude of like experiences occurring in a person's daily life or vocation.[22] Thus persons who witness signatures to ordinary written documents rarely have a definite memory of the matter for any considerable length of time,[23] and indeed the circumstances attending the execution of a will are naturally soon forgotten by one who frequently witnesses wills,[24] or probably by anyone else after great lapse of time.[25] The same observation applies to the memory of officers taking acknowledgments.[26] A person's memory of a casual event is reinforced by having his attention specially called to it, while the details are still accessible to recollection,[27] and a startling occurrence may justly be supposed to prompt a person's memory to hark back and recall the presence or absence of causative circumstances, within his cognizance, which alone would have made no impression on the memory;[28] so also an extraordinary or unusual incident in an ordinary transaction may preserve the memory of the latter, when it would otherwise perish.[29] Memory is more tenacious of the substance of events than of their precise order, when they are nearly contemporaneous,[30] especially if they are of an exciting character.[31] Memory of transactions involving a great number of names, dates, amounts, etc., must be frail.[32]

c. Relation between Condition of Memory and Weight and Sufficiency of Testimony

The statements of witnesses as to what they remember or do not remember must be weighed according to common experience with the capabilities and frailties of normal persons' memories. Forgetfulness of collateral and unimportant facts does not usually affect the rest of a witness' testimony; and testimony which is believable only on the hypothesis that the witness has an extraordinary memory is reduced to a minimum value.

A determination of what may be within the memory of a witness not shown to be abnormal must be based on common experience with normal individuals.[33] Thus the credibility of a witness, and the weight of his testimony, may be impaired by the positiveness and exactness of his statements as to matters which it is not probable would have strongly impressed him,[34] or which would almost certainly have been obliterated from his mind by lapse of time and a throng of later impressions,[35] especially where many of the witnesses to the same fact forbear to testify with exactness;[36] and the unfavorable inferences against such a witness are emphasized by contrast when he admits weakness of memory with regard to facts of no greater moment than those he professes to remember.[37] In balancing the testimony of any witness against opposing testimony, probabilities, or presumptions, the fact that he cannot recollect, or cannot recollect correctly, what a person of normal memory would

19. Mo.—Pulitzer v. Chapman, 85 S.W.2d 400, 337 Mo. 298.
23 C.J. p 28 note 80.
Effect of former evidence see supra § 402.

20. Or.—Dean v. Dean, 70 P. 1039, 42 Or. 290, 296.
23 C.J. p 28 note 81—42 C.J. p 113 note 3 [f] (2).

21. U.S.—Hayden v. Suffolk Mfg. Co., C.C.Mass., 11 F.Cas.No.6,261, affirmed 3 Wall. 315, 18 L.Ed. 76.
23 C.J. p 28 note 82.

Concurrent facts

A fact may easily depart from memory when it was concurrent with another fact of vastly preponderating interest.—Clark v. Clark, 30 A. 81, 52 N.J.Eq. 650—23 C.J. p 28 note 84.

Recollection of one's own acts is presumptively better than that of others who had not equal interest or concern in his doings.—In re Rawson, D.C.Mass., 9 F.Cas.No.4,837, 2 Lowell 519—23 C.J. p 28 note 83.

22. U.S.—Mack v. Spencer Optical Mfg. Co., C.C.N.Y., 52 F. 819.
23 C.J. p 28 note 86.

23. Tex.—Hutcheson v. Meazell, 64 Tex. 604.
22 C.J. p 29 note 87.

24. N.J.—Den v. Matlack, 17 N.J. Law 86.
23 C.J. p 29 note 88.

25. N.J.—Davis v. Elliott, 36 A. 1092, 55 N.J.Eq. 473.
23 C.J. p 29 note 89.

26. Mo.—Riecke v. Westenhoff, 10 Mo.App. 358, affirmed 85 Mo. 642.
23 C.J. p 29 note 90.

27. N.J.—Knowlden v. Knowlden, Ch., 52 A. 377, 379.
23 C.J. p 29 note 91.

28. Pa.—Corcoran v. Pennsylvania R. Co., 53 A. 240, 203 Pa. 380.
23 C.J. p 29 note 92.

29. Md.—Manufacturers' Nat. Bank v. Swift, 17 A. 336, 70 Md. 515, 14 Am.S.R. 381.
23 C.J. p 29 note 93.

30. N.Y.—Rieben v. Hicks, 3 Bradf. Surr. 353.

31. N.Y.—Ehrhard v. Metropolitan St. R. Co., 68 N.Y.S. 457, 58 App. Div. 613, 614.
23 C.J. p 29 note 98.

32. Md.—Owens v. State, 10 A. 210, 302, 67 Md. 307.

33. La.—Wimbish v. Mayer, 81 So. 373, 144 La. 865.

34. U.S.—Lee Sing Far v. U. S., Cal., 94 F. 834, 35 C.C.A. 327.
23 C.J. p 34 note 67.
Credibility and impeachment of witnesses generally see the C.J.S. title Witnesses §§ 458–490, also 70 C.J. p 759 note 8–p 820 note 20.

35. N.J.—Gordon's Case, 26 A. 268, 50 N.J.Eq. 397, affirmed 30 A. 19, 52 N.J.Eq. 317.

36. N.Y.—Porteus v. Holm, 4 Dem. Surr. 14.
23 C.J. p 35 note 69.

37. N.J.—Gordon's Case, 26 A. 268, 50 N.J.Eq. 397, affirmed 30 A. 19, 52 N.J.Eq. 317.
23 C.J. p 35 note 70.

hardly forget will detract more or less, according to circumstances, from the weight of his testimony[38] and from the weight to be given to what he affirms with confidence;[39] and indeed it has been said that "under some circumstances, feigned forgetfulness of a fact may be very satisfactory proof of its existence."[40] Where a witness' memory is conclusively shown to have been incorrect as to a substantial part of a transaction, it may raise a strong probability that he was mistaken as to other parts.[41]

Lapse of memory,[42] or positive misrecollection,[43] of collateral and unimportant facts does not usually affect the rest of the witness' testimony, although it might not escape comment in a close case or where indubitable proof is demanded.[44]

Preternatural memory. While history records a few examples of men possessing preternatural memory,[45] the fact that memory is fallible, as is commonly known,[46] reduces to a minimum value testimony which cannot be believed except on the hypothesis that the witness is gifted with a memory which is "amazing,"[47] "extraordinary,"[48] "incredible,"[49] "impossible,"[50] "miraculous,"[51] or "such as would constitute a prodigy."[52] However, special considerations may in a particular instance convince the court that a witness really has an exceptionally strong memory.[53]

d. Discrepancies between Testimony of Witnesses

Exact similarity is characteristic of corruptly prearranged testimony, and, unless the discrepancies are gross, differences in the recollection of witnesses do not affect the credit due to the substance of their testimony.

Among the ignorant, the strongest proof of the truth of testimony derived from several witnesses is the fact that the statements of each are nearly identical with those of the others;[54] experienced judges, however, are peculiarly aware that exact similarity is characteristic of the testimony of corrupt witnesses whose evidence has been prearranged.[55] It is expected that honest witnesses in speaking of a past transaction will not all reproduce it, in description, with the same fulness of detail,[56] and differences in their recollection do not affect the credit due to the substance of their testimony in which they agree,[57] although it might be otherwise in case of gross discrepancies.[58]

38. U.S.—The Santissima Trinidad, Va., 7 Wheat. 283, 5 L.Ed. 454, affirming Chacon v. Eighty-Nine Bales of Cochineal, 5 F.Cas.No.2,-568, 1 Brock. 478.
N.Y.—In re Dreyer's Estate, 275 N.Y.S. 839, 153 Misc. 624.
23 C.J. p 35 note 71.

Testimony may be wholly disregarded if the triers of contested issues are not satisfied of its verity because of lack of recollection of the witnesses.—In re Dreyer's Estate, supra.

39. N.Y.—In re Dreyer's Estate, supra.
23 C.J. p 35 note 72.

40. N.J.—Haydock v. Haydock, 33 N.J.Eq. 494, affirmed 34 N.J.Eq. 570, 38 Am.R. 385.

41. Wash.—Forrer v. John Davis & Co., 159 P. 696, 92 Wash. 452.
Credibility of witness as affected by false testimony generally see the C.J.S. title Witnesses § 469, also 70 C.J. p 783 note 24–p 788 note 64.

42. U.S.—The Nabob, D.C.Mich., 17 F.Cas.No.10,002, 1 Brown Adm. 115.
23 C.J. p 35 note 74.

43. N.J.—Davis v. Elliott, 36 A. 1092, 55 N.J.Eq. 473.
23 C.J. p 35 note 75.

44. N.J.—Adams v. Wells, 53 A. 610, 64 N.J.Eq. 211.
23 C.J. p 35 note 77.

45. Ga.—Miller v. Cotten, 5 Ga. 341.
23 C.J. p 29 note 1.

46. U.S.—Young v. Wolfe, C.C.N.Y., 120 F. 956, affirmed 130 F. 891, 65 C.C.A. 199.
23 C.J. p 30 note 2.

Veracity not impeached
That court attributes frailty of memory to a witness is no imputation against his veracity.—Simpson v. Harper, 111 S.W.2d 882, 21 Tenn. App. 431.

47. Ala.—Whitney v. Jasper Land Co., 24 So. 259, 119 Ala. 497.
23 C.J. p 30 note 3.

48. Mich.—Grosvenor v. Harrison, 19 N.W. 951, 54 Mich. 194, 199.
23 C.J. p 30 note 4.

49. N.J.—Midmer v. Midmer, 26 N.J.Eq. 299, affirmed 27 N.J.Eq. 548.
23 C.J. p 30 note 5.

50. U.S.—Young v. Wolfe, C.C.N.Y., 120 F. 956, 960, affirmed 130 F. 891, 65 C.C.A. 199.
23 C.J. p 30 note 6.

51. U.S.—Singer Mfg. Co. v. Schenck, C.C.N.Y., 68 F. 191, affirmed 77 F. 841, 23 C.C.A. 494.
23 C.J. p 30 note 7.

52. N.J.—Cooper v. Carlisle, 17 N.J.Eq. 525.
23 C.J. p 30 note 8.

53. N.J.—McConnell v. American Bronze Powder Mfg. Co., 5 A. 785, 41 N.J.Eq. 447, affirmed 17 A. 1104, 44 N.J.Eq. 603.
23 C.J. p 30 note 10.

Tests of a witness' recollection have been held inadmissible to show that he had a remarkable memory.—Richmond v. Denny, 191 P. 554, 47 Cal.App. 745.

54. N.J.—Adams v. Adams, 17 N.J.Eq. 324.

55. N.J.—Adams v. Adams, supra.
23 C.J. p 34 note 62, p 36 note 5.
Collusion affecting credibility of witnesses generally see the C.J.S. title Witnesses § 470, also 70 C.J. p 777 notes 78–81.
Discrepancy as to dates see infra § 1029.

Suspicion is lessened where witnesses giving similar testimony lived together and the event testified about is one over which they must have conversed much among themselves.—Fatjo v. Seidel, 33 So. 737, 109 La. 699.

56. La.—Boni v. Sovereign Camp, W. O. W., App., 154 So. 678.
23 C.J. p 34 note 63, p 36 note 4.

57. Colo.—Vasquez v. Morrow, 107 P.2d 246, 106 Colo. 540.
La.—Boni v. Sovereign Camp, W. O. W., App., 154 So. 678.
23 C.J. p 34 note 64.

One witness' uncertainty in recollection, where witnesses jointly inspected the situs of accident, does not impair the certain testimony of other witness.—Vasquez v. Morrow, 107 P.2d 246, 106 Colo. 540.

58. N.J.—Mulock v. Mulock, 31 N.J.Eq. 594, reversed on other grounds 32 N.J.Eq. 348.
23 C.J. p 34 note 65.

e. Age of Witness

The memory of an aged witness may, but need not necessarily, be regarded as untrustworthy as to recent events. Adult, and even aged, witnesses may well remember events occurring in their early lives, but such testimony should be received with caution.

In weighing testimony, the old age of a witness may support a presumption that his memory is to a considerable extent untrustworthy in respect of recent events,[59] and not altogether perfect as to transactions in his adult life.[60] On the other hand, such witnesses are often entitled to the credit of remembering what took place in their childhood or youth as accurately as persons of unimpaired faculties,[61] especially if it was a matter of domestic interest,[62] and even as to recent impressions and events defective memory is not always a concomitant of old age.[63]

A witness of mature age may well remember facts that occurred in his childhood,[64] but his testimony should be received with caution.[65] Indeed, as to matters of no special interest and without domestic connection, it is unwise to depend much on the testimony of persons quite young at the time of the occurrences as to which they testify,[66] confidence in the testimony being greatly reduced if the witness was of extremely tender years;[67] and the general credit of the witness may be destroyed by his recklessness in this respect.[68]

f. Other Particular Matters Affecting Memory

Among other matters affecting the accuracy of a witness' memory are confusion of different events, erroneous inferences, bias, opportunity for refreshment, as by memorandum, mental and physical condition, and illiteracy.

One who frequently hears of an occurrence or statement may come honestly to believe that he actually witnessed or heard it.[69] It is also true that the memory of an honest and intelligent person is likely to mingle with a transaction subsequent facts and occurrences and statements of other persons,[70] and that a witness may have formed and intensified an impression by perpetually thinking on the subject.[71] Transition from erroneous inference to erroneous memory is a common phenomenon.[72] Concomitants of one experience may in recollection get mixed with those of a similar experience,[73] and the date of an event may be confounded with the date of a preceding conversation in anticipation of it.[74]

The bias of a witness has a well known and pernicious influence in quickening or deadening his memory,[75] and much allowance is made therefor in weighing his testimony, even though he is of good character.[76] This is especially true when he testifies to conversations with, or oral statements made by, others,[77] to declarations of persons since deceased,[78] or to the contents of a lost document.[79]

59. U.S.—Bentley v. Phelps, C.C. Mass., 3 F.Cas.No.1,331, 2 Woodb. & M. 426.
23 C.J. p 30 note 12.
Age of witness as affecting credibility generally see the C.J.S. title Witnesses § 470, also 70 C.J. p 766 notes 19–24.

60. Ga.—Parke v. Foster, 26 Ga. 465, 71 Am.D. 221.
23 C.J. p 30 note 13.

61. U.S.—McClaskey v. Barr, C.C. Ohio, 54 F. 781.
23 C.J. p 30 note 14.
Perfect consistency has been required in order to credit testimony given more than fifty years after the occurrence as to a matter occurring when the witness was not more than seven years old.—Parker v. Chambers, 24 Ga. 518.

62. Ky.—Davis v. Meaux, 22 S.W. 324, 15 Ky.L. 308.
Ohio.—Sperry v. Tebbs, 10 Ohio Dec., Reprint, 318, 20 Cinc.L.Bul. 181.

63. U.S.—Bentley v. Phelps, C.C. Mass., 3 F.Cas.No.1,331, 2 Woodb. & M. 426.
23 C.J. p 30 note 16.

64. Ga.—Parke v. Foster, 26 Ga. 465, 470, 71 Am.D. 221.
23 C.J. p 30 notes 17, 18.

65. Ill.—Moffett v. South Park, 28 N.E. 975, 138 Ill. 620.
23 C.J. p 30 note 19.

66. Pa.—Lewars v. Weaver, 15 A. 514, 121 Pa. 268.
23 C.J. p 31 note 20.

67. Pa.—Sheehan's Estate, 20 A. 1003, 139 Pa. 168.
23 C.J. p 31 note 21.

68. Ky.—Patrick v. White, 6 B.Mon. 330.
23 C.J. p 31 note 22.

69. Ga.—Miller v. Cotten, 5 Ga. 341.
23 C.J. p 32 note 44.

70. U.S.—Peirce-Smith Converter Co. v. United Verde Copper Co., D. C.Del., 298 F. 763, affirmed, C.C.A., United Verde Copper Co. v. Peirce-Smith Converter Co., 7 F.2d 13.
23 C.J. p 32 note 45.

71. N.Y.—Cunningham v. Burdell, 4 Bradf.Surr. 343.
23 C.J. p 32 note 46.

72. N.J.—Stiefel v. Stiefel, Ch., 35 A. 287.
23 C.J. p 32 note 47.

73. U.S.—Peirce-Smith Converter Co. v. United Verde Copper Co., D. C.Del., 298 F. 763, affirmed, C.C.A., United Verde Copper Co. v. Peirce-Smith Converter Co., 7 F.2d 13.
23 C.J. p 33 note 48.

74. U.S.—Williams v. The Vim, D. C.N.Y., 29 F.Cas.No.17,744a.

75. Pa.—Miller v. Cohen, 34 A. 219, 173 Pa. 488.
23 C.J. p 33 note 52.
Bias:
As affecting weight of evidence generally see infra § 1031.
In:
Estimates of time see infra § 1030.
Testimony as to contents of written instrument see infra § 1028.

76. La.—Boni v. Sovereign Camp, W. O. W., App., 154 So. 678.
N.Y.—In re Dreyer's Estate, 275 N.Y. S. 839, 153 Misc. 624.
23 C.J. p 33 note 53—42 C.J. p 113 note 3 [f] (3).

77. N.J.—Ramsdell v. Streeter, 48 A. 575, 62 N.J.Eq. 718.
23 C.J. p 33 note 54.
Weight of testimony as to unsworn statements generally see supra § 265.

78. N.J.—Moore v. Kraemer, 26 A. 961, 50 N.J.Eq. 776.
23 C.J. p 34 note 55.
Testimony as to statements of decedents generally see supra § 266.

79. N.J.—Le Pard v. Russell, Ch., 39 A. 1059.

So also "witnesses whose memories are prodded by the eagerness of interested parties to elicit testimony favorable to themselves are not usually to be depended on for accurate information;"[80] but no presumption of law is here involved,[81] and the candor and moderation of the witness may relieve him from suspicion and justify full confidence in his testimony.[82]

Memory refreshed. That a thing forgotten on one day may be remembered on another, by attentive and careful recollection[83] or by conference with other witnesses to the same facts,[84] is an irregularity in the process of memory which courts fully recognize. Still, courts are accustomed to inquire by what means a memory once confessedly faded was revived,[85] and, unless the answer is satisfactory, the testimony of the witness may be lightly regarded[86] or rejected as clearly fictitious.[87] A witness' memory of a remote transaction may be aided by the circumstance that he testified on a former occasion when his memory was presumably fresh,[88] or that the transaction has for other reasons occupied his mind from time to time.[89] A contemporaneous memorandum made by the witness may not only serve to refresh his memory but may enhance the value of his testimony;[90] but no such enhancement can result from the use of a memorandum made some time after the transaction[91] or based on information furnished by another.[92]

Mental and physical condition of witness. The ability of a witness to recall accurately the details of a transaction is largely affected by his mental[93] and physical[94] condition at the time when it occurred or when remembrance is suggested or attempted. Intoxication tends to impair the accuracy both of observation and of memory.[95] The illness of a witness when his testimony is taken,[96] or admitted lapses of memory due to sunstroke,[97] may render his evidence valueless. Discrepancies attributable to fatigue induced by long cross-examination are excusable; that is to say, they do not necessarily impugn the general credibility of the witness.[98]

Illiteracy. Courts take judicial notice that persons engaged in business, who cannot read and write, have their faculty of memory more acutely educated, for the reason that they are compelled to depend on their memory and cannot rely on written memoranda.[99]

§ 1027. Memory of Oral Statements

The fallibility of human memory with respect to oral statements is discussed in §§ *265–269* supra.

§ 1028. Memory of Contents of Written Instruments

The memory of a witness may be sufficient to prove the contents of a written instrument, but the weight of his recollections is affected by such considerations as lapse of time, his age, his interest or bias, his ability to remember other matters, his experience with such

80. U.S.—Washburn & Moen Mfg. Co. v. Beat 'Em All Barbed-Wire Co., 12 S.Ct. 443, 143 U.S. 275, 284, 36 L.Ed. 154.

81. N.C.—Wiseman v. Cornish, 53 N. C. 218.
23 C.J. p 34 note 58.

82. N.J.—Young v. Young, 27 A. 627, 51 N.J.Eq. 491.
23 C.J. p 34 note 59.

83. N.J.—Stewart v. Stewart, 40 A. 438, 56 N.J.Eq. 761, affirmed 40 A. 438, 57 N.J.Eq. 664.
23 C.J. p 31 note 25.

84. U.S.—The Fortitude, C.C.Mass., 9 F.Cas.No.4,953, 3 Sumn. 228.

85. Eng.—Saph v. Atkinson, 1 Add. Eccl. 162, 162 Reprint 57.
23 C.J. p 31 note 27.

86. Ala.—Calloway v. Varner, 77 Ala. 541, 54 Am.R. 78.
23 C.J. p 31 note 28.

87. N.J.—Lokerson v. Stillwell, 13 N.J.Eq. 357.
23 C.J. p 31 note 29.

88. Idaho.—State v. Marren, 107 P. 993, 17 Idaho 766.

89. Me.—State v. Stain, 20 A. 72, 82 Me. 472.
23 C.J. p 31 note 31.

90. U.S.—Hartman v. The Will, D.C. Pa., 11 F.Cas.No.6,163.
23 C.J. p 31 note 33.
Refreshing memory with written memoranda generally see the C.J.S. title Witnesses § 358, also 70 C.J. p 580 note 79–p 600 note 62.
Corpus Juris section referred to in connection with criminal prosecution for murder where it was held proper for a witness to testify by examining memoranda.—State v. Jensen, 78 P.2d 600, 602, 194 Wash. 515.

91. N.H.—Watson v. Walker, 23 N. H. 471.
23 C.J. p 31 note 34.

92. N.Y.—Kirschner v. Hirschberg, 90 N.Y.S. 351.

93. N.H.—Piper v. Boston & M. R. Co., 72 A. 1024, 75 N.H. 228.
Mental capacity as affecting credibility of witness see the C.J.S. title Witnesses § 470, also 70 C.J. p 763 note 63–p 766 note 24.
Effect of injury
Incapability of memory for a long time after a party sustained an injury does not make his testimony valueless as to matters preceding the injury.—Dunton v. Hines, D.C.Me., 267 F. 452.

94. Or.—Dean v. Dean, 70 P. 1039, 42 Or. 290.
23 C.J. p 31 note 38.
Physical condition of witness affecting mental capacity and credibility generally see the C.J.S. title Witnesses § 470, also 70 C.J. p 763 note 63–p 766 note 24.

95. Tex.—Harris v. Freeman, Civ. App., 76 S.W.2d 557, 558, citing **Corpus Juris.**
23 C.J. p 31 note 39.
Corpus Juris section referred to in a case of criminal prosecution for murder in which the court mentions as generally recognized the fact that intoxication at the time of an event at least tends to impair a witness' later recollection of it.—Roberts v. State, 35 S.W.2d 175, 177, 117 Tex.Cr. 418.

96. N.J.—Graham v. Graham, 25 A. 358, 364, 50 N.J.Eq. 701.
23 C.J. p 32 note 40.

97. Mass.—Lewis v. Eagle Ins. Co., 10 Gray 508.
23 C.J. p 32 note 41.

98. Vt.—La Flam v. Missisquoi Pulp Co., 52 A. 526, 74 Vt. 125.
23 C.J. p 32 note 42.

99. N.Y.—Matter of Cross, 32 N.Y.S. 933, 85 Hun 343.

matters as the writing evidences, and his opportunity to refresh his memory.

While the recollection of a witness may be sufficient to prove the contents of a written instrument,[1] the difficulty of retaining in the memory the contents of a written instrument after much lapse of time is recognized by courts.[2] Especially is testimony as to the contents of a writing untrustworthy where the witness is aged and acquired his asserted knowledge of such contents when he was quite young;[3] and a nonprofessional witness who affects to remember complicated provisions with extraordinary certainty after a great many years is open to suspicion.[4] The same is true where the witness was a youth when he read the instrument, had no special reason to impress the contents on his memory, and was unfamiliar with such documents.[5] The fact that the witnesses are interested or otherwise biased always evokes adverse comment,[6] and it is recognized that repeated conferences by a friendly witness with the parties in interest concerning the matter to which he testifies are not calculated to guide his memory to exact truth.[7]

The fact that a witness is clearly mistaken in some other parts of his testimony tends to impeach the accuracy of his memory of the contents of a writing to which he testifies,[8] and faith in the testimony of a witness given with remarkable precision may be greatly shaken by his inability to recollect with equal accuracy the contents of important documents of a similar character in his own possession;[9] but the fact that a witness does not remember the minutiæ of the contents after several decades ought not seriously to impair confidence in his memory of the general character of the instrument.[10]

It has been intimated that the memory of a witness who testifies from hearing the instrument read would not be so reliable as though he had read the instrument itself.[11] The date of an instrument is the part least likely to make an impression on the memory.[12] The language of an instrument expressing its main object would be more likely to attract attention and adhere to the memory than qualifications of its essential provisions.[13]

The memory of a conveyancer as to the form of a deed drawn by him should be deemed superior to the memory of a person who was present when the deed was made and cognizant of its contents but who had no knowledge of the different forms of conveyancing.[14] The fair and impartial testimony of an experienced lawyer who drew the document and gave the transaction his careful personal attention is perhaps the strongest direct evidence that could be produced,[15] particularly where the provisions of the instrument are simple,[16] or the memory of the witness is refreshed by a memorandum.[17] Testimony of an intelligent lawyer who read the instrument for a special purpose is also cogent evidence;[18] and in a case where one who was named sole executor and residuary legatee in a brief will, read it several times, and made a draft of the substance of it, his testimony to its contents sufficed to establish the will.[19]

Positive testimony to a particular stipulation in an instrument overcomes testimony of persons who merely state that they did not notice it.[20]

§ 1029. Memory of Dates and Time of Day

Courts have little or no faith in a witness' recollection of dates or the time of day of events if he does not reckon or fix them by means of reliable associated facts or events. Conversely, discrepancies between witnesses concerning dates or the time of day do not ordi-

1. Colo.—Walker v. Drogmund, 74 P. 2d 1235, 101 Colo. 521.
Weight of evidence of lost instruments generally see the C.J.S. title Lost Instruments §§ 13, 27, 30, also 38 C.J. p 259 note 23–p 261 note 47, p 279 note 5–p 281 note 37, p 282 note 66.

2. Pa.—In re Bolton, 14 Pa.Co. 575.
23 C.J. p 35 note 81.

3. Va.—Apperson v. Dowdy, 1 S.E. 105, 82 Va. 776.
23 C.J. p 36 note 82.

4. Ala.—Whitney v. Jasper Land Co., 24 So. 259, 119 Ala. 497.
23 C.J. p 36 note 83.

5. Va.—Thomas v. Ribble, 24 S.E. 241.

6. Va.—Thomas v. Ribble, supra.
23 C.J. p 36 note 85.
Bias as affecting:
Weight of witness' recollection generally see supra § 1026 f.
Witness' credibility generally see the C.J.S. title Witnesses §§ 538–572, also 70 C.J. p 936 note 9–p 1011 note 15.

7. Conn.—In re Johnson, 40 Conn. 587.

8. Ill.—Bragg v. Geddes, 93 Ill. 39.

9. Va.—Thomas v. Ribble, 24 S.E. 241.

10. Pa.—McReynolds v. Longenberger, 57 Pa. 13.
23 C.J. p 36 note 91.

11. Va.—Apperson v. Dowdy, 1 S.E. 105, 82 Va. 776.
23 C.J. p 36 note 92.

12. Va.—Thomas v. Ribble, 24 S.E. 241.
Memory of dates generally see infra § 1029.

13. N.J.—Veghte v. Raritan Water Power Co., 19 N.J.Eq. 142, reversed on other grounds 21 N.J.Eq. 463.

14. Cal.—Kenniff v. Canfield, 73 P. 803, 140 Cal. 34.

15. N.J.—Golden v. Knapp, 28 N.J. Eq. 605.

16. U.S.—Southworth v. Adams, C. C.Wis., 22 F.Cas.No.13,194, 11 Biss. 256.

17. U.S.—Southworth v. Adams, supra.
23 C.J. p 36 note 99.

18. N.J.—Warmoth v. Durand, 42 A. 168, 57 N.J.Eq. 160.

19. N.J.—Wyckoff v. Wyckoff, 16 N. J.Eq. 401.

20. U.S.—Leitch v. Union R. Transp. Co., D.C.Ill., 15 F.Cas.No.8,224.
Positive and negative testimony generally see infra § 1037.

narily affect discreditably the substance of their testimony.

As witnesses are proverbially inaccurate as to dates,[21] courts have little or no faith in a witness' recollection of dates[22] or the time of day[23] of events if he has no collateral fact by which he ascertains or fixes them; and his recollection of two contemporaneous events proves nothing as to the time, unless the date of one of them is known.[24] Conversely, discrepancies between witnesses as to the day or time of day of an event do not ordinarily affect discreditably the substance of their testimony.[25]

The date of a transaction may and should be fixed by associating it with other circumstances of public and unquestioned notoriety, or with credible written documents, or with other facts occurring at a time clearly proved;[26] time of day may be established in this manner as well as by a timepiece.[27] Testimony to dates is destroyed or weakened by contradicting or casting suspicion on the transactions named as constituting the data by which the time is located.[28] Memory is very likely to confuse with one another the dates of transactions of a kindred character occurring at nearly the same time.[29] A witness may testify to his "impression" as regards a date, but the weight of such testimony depends very much on circumstances.[30] Dates do not strongly impress themselves on the young.[31]

§ 1030. Estimates of Time

Courts do not expect witnesses to testify with precision and harmony as to the time consumed in an occurrence, and their recollections as to time may be affected by their bias, their anxiety or expectation at the time of the occurrence, and the crowded character of the period of occurrence.

Courts do not expect witnesses to testify with precision and harmony with respect to the time consumed in a transaction or occurrence.[32] Estimates of the duration of short periods of time into which much experience is crowded are notoriously inexact,[33] and are apt to be excessive,[34] especially if the mind was in a state of anxiety or expectation;[35] and a witness who assumes to measure time with accuracy under such circumstances tends to discredit himself.[36] Periods of time are apt to be shortened or lengthened in the estimate of biased witnesses to accord with their own interests or desires.[37]

C. WEIGHT OF EVIDENCE

§ 1031. In General

a. In general
b. Interest or bias of witness
c. Inherently incredible or impossible evidence

a. In General

In determining the weight of the evidence or its effect in inducing belief, consideration should be given to all of the evidence, its reasonableness in view of surrounding circumstances and inherent probabilities, the existence or lack of corroboration, the accuracy and truthfulness of the witness, and all attendant and relevant facts accompanying the admission of the evidence; and the testimony of an individual witness should be considered as a whole. Direct or positive evidence has greater weight than opinion evidence.

Generally speaking, the weight of evidence is not a question of mathematics, but depends on its ef-

21. Mont.—Vidal v. Kensler, 51 P. 2d 235, 238, 100 Mont. 592, quoting **Corpus Juris.**
23 C.J. p 36 note 6.

22. Ky.—Begley v. Allen, 289 S.W. 257, 217 Ky. 231.
23 C.J. p 37 note 7.

23. Mont.—Vidal v. Kensler, 51 P. 2d 235, 238, 100 Mont. 592, quoting **Corpus Juris.**
23 C.J. p 37 note 8.

24. U.S.—Rogers v. Fitch, N.Y., 81 F. 959, 27 C.C.A. 23.
N.Y.—Cunningham v. Burdell, 4 Bradf.Surr. 343.

25. Pa.—Grow v. Pottsville, 47 A. 195, 197 Pa. 337.
23 C.J. p 37 notes 10, 11.
Discrepancies between memories of witnesses generally see supra § 1026 d.

26. D.C.—Storck v. Reichhelm, 44 App.D.C. 438.
23 C.J. p 37 note 12.

27. U.S.—American Wood-Paper Co. v. Glen's Falls Paper Co., C.C.N.Y., 1 F.Cas.No.321a, 8 Blatchf. 513.
23 C.J. p 37 note 13.

28. N.J.—In re Berdan, 55 A. 728, 65 N.J.Eq. 681.
23 C.J. p 37 note 14.

29. U.S.—Brooks v. Sacks, Mass., 81 F. 403, 26 C.C.A. 456.
23 C.J. p 37 note 15.

30. N.C.—McRae v. Morrison, 35 N. C. 46.

31. U.S.—McClaskey v. Barr, C.C. Ohio, 54 F. 781, 784.

32. Pa.—Born v. Bulletin Co., 100 Pa.Super. 300.
23 C.J. p 37 note 18.
Weight of opinion evidence generally see supra §§ 567–572.

33. Miss.—Yazoo & M. V. R. Co. v. Lamensdorf, 178 So. 80, 81, 180 Miss. 426, quoting **Corpus Juris,** and overruling suggestion of error 177 So. 50.
23 C.J. p 37 note 19.

34. U.S.—The British America, D.C. N.Y., 4 F.Cas.No.1,895, 10 Ben. 417.
N.J.—Davis v. Central R. Co. of New Jersey, 52 A. 561, 67 N.J.Law 660.

35. U.S.—The Monticello, D.C.Mass., 17 F.Cas.No.9,739, 1 Lowell, 184, affirmed, C.C., 7 F.Cas.No.3,971.
Pa.—Nolder v. McKeesport, W. & D. R. Co., 50 A. 948, 201 Pa. 169.

36. U.S.—Chapin v. The Hattie Ross, D.C.Conn., 5 F.Cas.No.2,598.
Miss.—Yazoo & M. V. R. Co. v. Lamensdorf, 178 So. 80, 81, 180 Miss. 426, quoting **Corpus Juris,** and overruling suggestion of error 177 So. 50, 180 Miss. 426.

37. N.J.—Ridge v. Pennsylvania R. Co., 43 A. 275, 58 N.J.Eq. 172.
Effect of bias generally see supra § 1026 f.

fect in inducing belief,[38] under all of the facts and circumstances proved.[39] The triers of fact may and should consider and weigh all the evidence in the case,[40] and cannot arbitrarily reject evidence,[41] whether the witness is interested or disinterested,[42] although they are not, of course, obliged to believe or disbelieve all, or any particular part of, the evidence which is presented to them,[43] or, conversely,

38. Me.—Chenery v. Russell, 167 A. 857, 132 Me. 130.
Pa.—Braunschweiger v. Waits, 36 A. 155, 179 Pa. 47.
Weight of particular evidence:
Admissions see supra § 382.
As affected by number of witnesses generally see supra § 1022.
Comparison of handwritings see supra § 895.
Documentary evidence see supra §§ 763–775.
Evidence as to character see supra § 437.
Evidence as to declarations see supra §§ 265–269.
Experiments see supra § 592.
Former evidence see supra § 402.
Opinion evidence see supra §§ 567–572.
Probative force of presumptions see supra § 119.

"Effect" of evidence

(1) The term "effect" of evidence is used as synonymous with "weight."—Jessen v. Donahue, 96 N. W. 639, 4 Neb., Unoff., 838.

(2) "Effect" of evidence is to be distinguished from "burden of proof."—Hill v. Nichols, 50 Ala. 336.

That the denial by one party is less emphatic than the affirmance of the other party is not to be considered in weighing their testimony, but circumstances in evidence may corroborate the latter so that his testimony will prevail.—Beason v. Johnston, 191 N.W. 311, 194 Iowa 1100.

39. Del.—Graham v. National Bank of Smyrna, 122 A. 85, 2 W.W.Harr. 264.

40. U.S.—Ariasi v. Orient Ins. Co., C.C.A.Cal., 50 F.2d 548—The Denny, D.C.N.J., 40 F.Supp. 92.
Ark.—Louisiana Petroleum Corporation v. Oil Well Supply Co., 289 S. W. 1, 172 Ark. 386.
Cal.—Fishman v. Silva, 2 P.2d 473, 116 Cal.App. 1.
Conn.—McGrath v. City of Waterbury, 149 A. 783, 111 Conn. 237.
Ill.—Sulzberger v. Sulzberger, 23 N. E.2d 46, 372 Ill. 240—Rugen v. Van Berschot, 274 Ill.App. 359—Bowers v. Heflebower, 243 Ill.App. 129—Rowan v. Bartonville Bus Line, 242 Ill.App. 451.
Ind.—Mid Continent Petroleum Corporation v. Weaver, 5 N.E.2d 146, 103 Ind.App. 96—Bell v. McCain, 2 N.E.2d 241, 102 Ind.App. 291.
La.—Johnson v. Hillyer, Deutsch, Edwards, Inc., App., 185 So. 652, rehearing denied 186 So. 365.
Mo.—Messer v. St. Louis-San Francisco Ry. Co., App., 274 S.W. 864.
Mont.—Betor v. National Biscuit Co., 280 P. 641, 85 Mont. 481.
Pa.—Clapp v. Vellner, 109 A. 636, 266 Pa. 332.
Wis.—Christiansen v. Schenkenberg, 236 N.W. 109, 204 Wis. 323.
23 C.J. p 38 note 32.

Cumulative effect of evidence as a whole may be greater than individual items composing it.—Dossenbach v. Reidhar's Ex'x, 53 S.W.2d 731, 245 Ky. 449.

Circumstances and inferences

Trier of facts should consider, not only what witnesses testify to, but also circumstances disclosed by evidence and inferences therefrom in determining truth.—Millowners' Mut. Life Ins. Co. v. Goff, 232 N.W. 504, 210 Iowa 1188.

Reference to other testimony

(1) The weight of evidence in any particular case is always dependent on its relation to all evidence in the case, and it is not aided or governed by precedent.—Smith v. Godfrey, 205 N.W. 366, 200 Iowa 768.

(2) Each part of the testimony should be considered in reference to the entire testimony so as to bring about a consistent result.—In re Irving's Will, 190 N.Y.S. 622, 198 App. Div. 414.

Oral evidence must be given consideration with undisputed physical facts in evidence to the end of determining value of oral evidence in establishing the asserted fact and also in considering conduct of plaintiff and defendant.—Robards v. Kansas City Public Service Co., 125 S. W.2d 891, 233 Mo.App. 962.

41. U.S.—Boggs & Buhl v. Commissioner of Internal Revenue, C.C.A., 34 F.2d 859.
Ark.—St. Louis-San Francisco Ry. Co. v. Harmon, 15 S.W.2d 310, 179 Ark. 248.
Minn.—O'Leary v. Wangensteen, 221 N.W. 430, 175 Minn. 368.
Mo.—Bank of Slater v. Harrington, 266 S.W. 496, 218 Mo.App. 645.
Ohio.—Farrell v. Travelers Ins. Co., 23 N.E.2d 952, 62 Ohio App. 319.
Or.—Inwall v. Transpacific Lumber Co., 108 P.2d 522.
Tenn.—Walters v. Staton, 111 S.W.2d 381, 21 Tenn.App. 401—Phillips-Buttorff Mfg. Co. v. McAlexander, 15 Tenn.App. 618.
Tex.—Dallas Ry. & Terminal Co. v. Glenn, Civ.App., 144 S.W.2d 961, error dismissed, judgment correct.
Utah.—Jensen v. Logan City, 88 P. 2d 459, 96 Utah 522, affirming 83 P.2d 311, 96 Utah 53.
Vt.—Pierre v. Halpin, 13 A.2d 281.
23 C.J. p 38 note 33.

The testimony of detectives and police officers must be considered, and its evidentiary value measured by the trier of facts by the same common tests that constitute the established and accepted criterion by which the evidentiary value of the testimony of all other witnesses is determined.—People v. Arcega, 193 P. 264, 49 Cal.App. 239.

Reason for rejection

The testimony of a competent witness cannot be capriciously rejected; some good reason must appear for such action, as, for example, that his story is inherently improbable, or that it is contradicted by some other testimony or by some proved fact or circumstances, or by testimony impeaching his truth and veracity.—Day v. Hopping, 123 A. 869, 95 N.J.Eq. 680.

42. Mo.—Crain v. McKinley, App., 222 S.W. 495.
N.M.—Medler v. Henry, 101 P.2d 398, 44 N.M. 275.

43. U.S.—Indianapolis Water Co. v. McCart, D.C., 13 F.Supp. 110, reversed on other grounds, C.C.A., 89 F.2d 522, certiorari granted McCart v. Indianapolis Water Co., 58 S.Ct. 14, 302 U.S. 665, 82 L.Ed. 513, modified on other grounds 58 S.Ct. 324, 302 U.S. 419, 82 L.Ed. 336.
Ark.—Missouri Pac. R. Co. v. Hancock, 113 S.W.2d 489, 195 Ark. 414.
Kan.—Johnson v. Soden, 103 P.2d 812, 152 Kan. 284.
Mass.—Lydon v. Boston Elevated Ry., 34 N.E.2d 642, 309 Mass. 205—Fulton v. Edison Electric Illuminating Co. of Boston, 21 N.E.2d 609, 303 Mass. 258—Ashapa v. Reed, 182 N.E. 859, 280 Mass. 514—Engel v. Checker Taxi Co., 176 N. E. 179, 275 Mass. 471—Learned v. Hamburger, 139 N.E. 641, 245 Mass. 461.
Mont.—Gervais v. Rolfe, 187 P. 899, 57 Mont. 209—State v. Nielsen, 187 P. 639, 57 Mont. 137.
N.H.—Hebert v. Boston & M. R. R., 8 A.2d 744, 90 N.H. 324—Morris v. Boston & M. R. R., 160 A. 52, 85 N.H. 265.
N.J.—Shearer v. Schaffer, 147 A. 559, 105 N.J.Eq. 278, reversed on other grounds 158 A. 405, 109 N.J.Eq. 49—Riehl v. Riehl, 137 A. 787, 101 N.J.Eq. 15—Buchanan v. Buchanan, 68 A. 780, 73 N.J.Eq. 544, reversed on other grounds 71 A. 745, 75 N.J. Eq. 274, 138 Am.S.R. 563, 22 L.R. A.,N.S., 454, 20 Ann.Cas. 91.
N.Y.—In re Dreyer's Estate, 275 N. Y.S. 839, 153 Misc. 624.
Tex.—Missouri-Kansas-Texas R. Co. of Texas v. McKinney, Civ.App.,

to give controlling effect to any particular evidence.[44] Mere disbelief of testimony is not affirmative proof of facts of an opposite nature or tendency;[45] but it has been held that the triers of fact may be justified in doing more than merely disregarding false testimony, and may infer that the truth would be unfavorable to the witness.[46]

Evidence is to be weighed according to the proof which it was in the power of one side to have produced, and in the power of the other to have contradicted,[47] and the reasonableness of the evidence given,[48] in view of the surrounding circumstances and the inherent probabilities,[49] should be considered in determining its weight. However, the triers

126 S.W.2d 789, affirmed Missouri, K. & T. R. Co. of Texas v. McKinney, 145 S.W.2d 1081, 136 Tex. 75.
Va.—Huff v. Huff, 129 S.E. 219, 143 Va. 46.
23 C.J. p 38 note 34.

Rule otherwise stated

(1) Testimony may be partially believed and partially disbelieved by the triers of fact.
Conn.—Leitzes v. F. L. Caulkins Auto Co., 196 A. 145, 123 Conn. 459.
La.—Goynes v. St. Charles Dairy, App., 197 So. 819.
Mass.—Fitch v. Ingalls, 170 N.E. 833, 271 Mass. 121.
Mo.—Griswold v. Haas, 210 S.W. 356, 277 Mo. 255, reversing 177 S.W. 728, 191 Mo.App. 97.

(2) Trier of fact may reject testimony as utterly false, or so unsubstantial as to be of no weight.—Beverage's Case, 138 A. 628, 126 Me. 601.

Variance in testimony

Generally, when two or more witnesses introduced by a party vary in their statements of facts, such party has the right to ask the triers of fact to accept as true the statements most favorable to him.—Massie v. Firmstone, 114 S.E. 652, 134 Va. 450.

44. Cal.—Wilson v. Kestenholz, 297 P. 954, 113 Cal.App. 13.
Mo.—Bradley v. Becker, 246 S.W. 561, 296 Mo. 548.
Tex.—Liberty Mut. Ins. Co. v. Boggs, Civ.App., 66 S.W.2d 787, error dismissed.
Wyo.—Salt Lake Hardware Co. v. Connell, 34 P.2d 23, 47 Wyo. 145.
23 C.J. p 38 note 35.

45. Cal.—Marovich v. Central California Traction Co., 216 P. 595, 191 Cal. 295.
La.—Ellis v. Kolb, App., 196 So. 89.
Mass.—Nichols v. Donahoe, 34 N.E.2d 681, 309 Mass. 241—De Blois v. Boylston & Tremont Corporation, 183 N.E. 823, 281 Mass. 498—Rubenstein v. Economy Grocery Stores Corporation, 174 N.E. 922, 274 Mass. 608—Caron v. Lynn Sand & Stone Co., 170 N.E. 77, 270 Mass. 340—Gates v. Boston & M. R. R., 151 N.E. 320, 255 Mass. 297—McDonough v. Vozzela, 142 N.E. 831, 247 Mass. 552—Boice-Perrine Co. v. Kelley, 137 N.E. 731, 243 Mass. 327—Martell v. Dorey, 126 N.E. 354, 235 Mass. 35, certiorari dismissed Byrne v. Martell, 41 S.Ct. 148, 254 U.S. 665, 65 L.Ed. 465.
N.H.—Coleman v. Stacy, 13 A.2d 466, 91 N.H. 60—Castonguay v. Acme Knitting Machine & Needle Co., 136 A. 702, 83 N.H. 1.
Ohio.—Kazdan v. Stein, 160 N.E. 704, 118 Ohio St. 217, affirming 160 N.E. 506, 26 Ohio App. 455.
Tex.—Boyd v. Chicago, R. I. & P. Ry. Co., Civ.App., 149 S.W.2d 1053.
70 C.J. p 760 note 23.

Uncontradicted testimony on one side of an issue cannot be held to have established the contrary.—Donovan v. White, 275 N.W. 889, 224 Iowa 138—Williams Sav. Bank v. Murphy, 259 N.W. 467, 219 Iowa 839—Pike v. Coon, 252 N.W. 888, 217 Iowa 1068.

46. La.—Ellis v. Kolb, App., 196 So. 89.
Minn.—Eckart v. Kiel, 143 N.W. 122, 123 Minn. 114.

47. U.S.—Mammoth Oil Co. v. U. S., Wyo., 48 S.Ct. 1, 275 U.S. 13, 72 L.Ed. 137, affirming, C.C.A., U. S. v. Mammoth Oil Co., 14 F.2d 705, reversing, D.C., 5 F.2d 330, and certiorari granted Mammoth Oil Co. v. U. S., 47 S.Ct. 332, 273 U.S. 686, 71 L.Ed. 840—Philadelphia Storage Battery Co. v. Kelley-How-Thomson Co., C.C.A.Minn., 64 F.2d 834, certiorari denied 54 S.Ct. 68, 290 U.S. 651, 78 L.Ed. 564—Henderson v. Richardson Co., C.C.A.W.Va., 25 F.2d 225.
Conn.—Ezzo v. Geremiah, 142 A. 461, 107 Conn. 670—De Marey v. Brugas, 131 A. 392, 103 Conn. 667—Knox v. Binkoski, 122 A. 400, 99 Conn. 582.
La.—J. C. Healy Co. v. Burglass, 1 La.App. 741.
Mo.—Munsill v. Atchison, T. & S. F. Ry. Co., App., 234 S.W. 376.
N.Y.—Travelers' Ins. Co. v. Pomerantz, 158 N.E. 21, 246 N.Y. 63, reversing 218 N.Y.S. 490, 218 App. Div. 431, affirming 207 N.Y.S. 81, 124 Misc. 250—Conk v. Metropolitan Life Ins. Co., 296 N.Y.S. 902, 251 App.Div. 442—Matejunas v. Prudential Ins. Co. of America, 279 N.Y.S. 381, 244 App.Div. 802—In re Van Muffling's Estate, 277 N.Y.S. 584, 154 Misc. 300.
23 C.J. p 37 note 25.
Evidence less strong than party might produce see infra § 1035.
Presumptions arising from withholding of evidence see supra 156.

Limitations of rule

(1) The text rule is inapplicable until plaintiff has first made out prima facie case.—Middletown Trust Co. v. Bregman, 174 A. 67, 118 Conn. 651.

(2) The fact that plaintiff was incompetent to testify could not be considered in passing on the probative value of evidence actually presented.—Troxler v. Bevill, 3 S.E.2d 8, 215 N.C. 640.

48. Iowa.—Steele v. Kluter, 214 N. W. 522, 204 Iowa 153.
Or.—Lauderback v. Multnomah County, 226 P. 697, 111 Or. 681.
R.I.—Paradise v. Rick, 7 A.2d 713—Armour v. Doonan, 180 A. 333, 55 R.I. 243—Armour v. Doonan, 181 A. 927.
S.D.—Houck v. Hult, 258 N.W. 142, 63 S.D. 290.
Tex.—Beeman v. Georgia Casualty Co., Com.App., 41 S.W.2d 39, reversing Georgia Casualty Co. v. Beeman, Civ.App., 24 S.W.2d 799.
23 C.J. p 38 note 26.

Direct positive testimony is not always conclusive, and it may be rebutted by inferences from the circumstances, together with the reasonable or unreasonable character of the testimony.
Iowa.—Allbaugh v. Ashby, 284 N.W 816, 226 Iowa 574.
Mont.—Roman v. Albert, 264 P. 115, 81 Mont. 393.

Doubt inherent in a witness' story because of the timely concurrence of many fortuitous circumstances considered in connection with her silence for a long time from reporting the facts to one she wanted to influence by the facts deprives it of any substantial probative force.—Jones v. Jones, 199 A. 513, 174 Md. 522.

Inconsistencies

(1) Triers of fact may give due consideration to inconsistencies in testimony in determining its weight.—Vogel v. Sheridan, 40 P.2d 946, 4 Cal.App.2d 298.

(2) However, the rule that testimony of party as witness in his own behalf must be construed most strongly against him when self-contradictory, vague, or equivocal is inapplicable against party in construction of testimony of other witnesses introduced by him.—Reaves v. Columbus Electric & Power Co., 122 S.E. 824, 32 Ga.App. 140.

49. Conn.—Knox v. Binkoski, 122 A. 400, 99 Conn. 582.
Iowa.—Rusch v. Hoffman, 274 N.W.

of fact cannot reject express testimony solely on the ground of its improbability;[50] and positive and affirmative evidence will sometimes outweigh proof of circumstances suggesting improbability.[51]

The triers of fact, in determining the quality or cogency of the evidence to establish the fact to which it relates, should also take into consideration all matters bearing on the accuracy, truthfulness, and sincerity of the witness,[52] and all attendant and relevant facts, such as the manner of witnesses, accompanying the admission of the evidence.[53] The

96, 223 Iowa 895—Kisor v. Litzenberg, 212 N.W. 343, 203 Iowa 1183.
La.—Marcotte v. Montana, 121 So. 213, 9 La.App. 561—U. S. Fidelity & Guaranty Co. v. A. C. Vreeland, Inc., 120 So. 489, 9 La.App. 343—Pailet v. Young, 3 La.App. 265.
Mass.—Vozzella v. Boston & M. R. R., 6 N.E.2d 770, 296 Mass. 491.
Mich.—Vanderhorst v. First Nat. Bank, 189 N.W. 98, 219 Mich. 413.
Minn.—Weber v. Arend, 222 N.W. 646, 176 Minn. 120.
Miss.—Parkinson v. Mills, 159 So. 651, 172 Miss. 784.
Mo.—Schenkmeyer v. Altheimer, 37 S.W.2d 944, 327 Mo. 666.
Mont.—Cook-Reynolds Co. v. Beyer, 79 P.2d 658, 107 Mont. 1.
N.H.—Putnam v. Employers Liability Assur. Corporation, 4 A.2d 353, 90 N.H. 74.
N.Y.—Eighth Avenue Coach Corporation v. City of New York, 10 N.Y. S.2d 170, 170 Misc. 243, affirmed 20 N.Y.S.2d 402, 259 App.Div. 870, appeal granted 20 N.Y.S.2d 986, 259 App.Div. 1002, affirmed 35 N.E.2d 907, 286 N.Y. 84—Wisser Oil Co. v. Ganfrank Holding Corporation, 296 N.Y.S. 806, 163 Misc. 357.
Or.—Sweek v. Bennett, 290 P. 747, 133 Or. 388.
R.I.—Armour v. Doonan, 180 A. 333, 55 R.I. 243—Armour v. Doonan, 181 A. 927.
W.Va.—Peck v. Roberts, 106 S.E. 540, 88 W.Va. 202.
Wis.—Marshall & Ilsley Bank v. Schuerbrock, 217 N.W. 416, 195 Wis. 203.
23 C.J. p 38 note 27.
Inherently incredible or impossible evidence see infra § 1031 c.

Test of probability

Inherent probability or improbability of fact is to be tested by ordinary laws governing human conduct.—Graber v. Cormack, 148 A. 156, 7 N.J. Misc. 1117.

Relative improbability

Evidence may be such as to substantiate a fact, however improbable, because its falsity would be more improbable than fact sought to be established.—Miller v. Hartford Live Stock Ins. Co., 116 So. 182, 165 La. 777.

Evidence against deceased

(1) Evidence against deceased person respecting agreement made by him is of weak character, but is legal evidence nevertheless, and should not be rejected entirely, unless shown to be wholly unreasonable and unreliable.—Witson v. Joseph, La.App., 158 So. 661.

(2) Single witness' uncorroborated testimony to establish claim or right against deceased person should be scrutinized carefully and is not to be looked on favorably.—Goldsmith v. Parsons, App., 161 So. 879, on remand 161 So. 175, 182 La. 122, and affirming, App., 156 So. 822, reinstating 154 So. 68.

Remarks escaping unwittingly under stress of emotion possess uncommon value as evidence.—Fink v. Prudential Ins. Co. of America, 90 P.2d 762, 162 Or. 37.

50. N.J.—Day v. Hopping, 123 A. 869, 95 N.J.Eq. 680.

51. La.—Alex Woldert Co. v. Jos. Samuel Co., 1 La.App. 251.
Pa.—Baumeister v. Baugh & Sons Co., 16 A.2d 424, 142 Pa.Super. 346.

52. U.S.—Joseph v. Village of Downers Grove, C.C.A.Ill., 104 F.2d 974, certiorari denied Village of Downers Grove v. Joseph, 60 S.Ct. 142, 308 U.S. 605, 84 L.Ed. 506.
Cal.—Takahashi v. White Truck & Transfer Co., 59 P.2d 161, 15 Cal. App.2d 107.
Del.—Wollaston v. Stiltz, 114 A. 198, 1 W.W.Harr. 273.
Ill.—Linehan v. Morton, 221 Ill.App. 70.
Ind.—Brush v. Public Service Co. of Indiana, 21 N.E.2d 83, 106 Ind.App. 554.
Mo.—Meffert v. Lawson, 233 S.W. 31, 289 Mo. 337.
Mont.—Kern v. Eichhorn, 107 P.2d 873, 111 Mont. 171.
N.Y.—In re Bregoff, 17 N.Y.S.2d 816, 258 App.Div. 551.
22 C.J. p 564 note 98.
Credibility of witnesses:
Generally see the C.J.S. title Witnesses §§ 458–470, also 70 C.J. p 759 note 9–p 788 note 71.
As question for jury or trial judge see the C.J.S. title Trial §§ 213–215, 593, also 64 C.J. p 348 note 55–p 361 note 92, p 1208 note 70–p 1210 note 95.
Interest or bias of witness see infra subdivision b of this section.

Matters for consideration

(1) Age and experience.—Busch v. Kilborne, 40 Mich. 297.

(2) Weight to be given testimony of witnesses depended on their opportunities for observation and formation of an opinion, their intelligence, apparent honesty, interests, relation to parties and circumstances appearing on trial which might affect their credibility.
Ill.—Sulzberger v. Sulzberger, 23 N.E.2d 46, 372 Ill. 240.
Ohio.—Hine v. Hine, 157 N.E. 308, 25 Ohio App. 120.

(3) Testimony of those swearing to performance of certain acts which they are charged with duty of doing themselves should be given more weight than that of other witnesses who happen to be present and are unconcerned with what is actually taking place.—Winfiele v. Texas & P. Ry. Co., La.App., 150 So. 43.

(4) Credibility of witnesses having limited opportunity for observing does not lend special weight to their testimony sufficient to overthrow testimony of witness testifying from investigation.—In re Stein, 260 P. 566, 86 Cal.App. 226.

(5) That witnesses testify to additional facts on second trial goes to weight rather than competency of testimony.—Murray v. Preferred Accident Ins. Co. of New York, 216 N.W. 702, 204 Iowa 1108.

Uncertainty of witness

(1) Testimony has probative force, even though witness does not speak with such certainty as to exclude all doubt in his mind.—Gurley v. Pilgrim Oil Co., Tex.Civ.App., 285 S.W. 283, affirming, Civ.App., 275 S.W. 295.

(2) However, the fact that one witness is positive and opposing witness uncertain may be a reason for giving greater weight to testimony of one than the other.—Leiser v. Thomas, La.App., 150 So. 81, rehearing refused 150 So. 670.

Witness' mistaken testimony as to what documents showed on their face has no probative force.—J. Baris & Son v. Lesser & Oppenheimer, Mo.App., 46 S.W.2d 1107.

Attorney

When attorney engaged in case becomes witness to other than formal matters, his testimony should not be entitled to greater weight than that of lay witness.—Culpepper v. Robie, 154 S.E. 687, 155 Va. 64.

53. Mo.—Davies v. Keiser, 246 S.W. 897, 297 Mo. 1.
42 C.J. p 114 notes 12–15.
Demeanor of witnesses generally as affecting credibility see the C.J.S. title Witnesses § 466, also 70 C. J. p 775 note 45–p 776 note 63.

Evasive evidence of the "I don't remember" class is of doubtful probative force.

weight of testimony is also dependent on whether it is corroborated in particulars where corroboration would reasonably be expected.[54] Other things being equal, the weight of the testimony should be accorded to that testimony which would establish the equities of the case.[55]

Relative weight of particular types of testimony. Direct and unimpeached evidence will prevail over testimony which is conflicting or contradictory,[56] or which is equivocal, vague, or indefinite,[57] or opposed to the probabilities;[58] but an unverified affirmation has no higher evidentiary value than the negation thereof.[59] Evidence given by witnesses testifying from personal observation is of greater weight than that of witnesses testifying merely from general knowledge.[60] So, direct or positive evidence has greater weight than opinion evidence,[61]

Mo.—Idalia Realty & Development Co. v. Norman, 168 S.W. 643, 184 Mo.App. 146.
N.Y.—Backhous v. Wagner, 138 N.E. 82, 234 N.Y. 429, reversing 192 N.Y.S. 914, 200 App.Div. 884.

Evidence of improper conduct of a party in his cause is chiefly persuasive, as distinguished from probative, in its effect.—Duval v. Metropolitan Life Ins. Co., 136 A. 400, 82 N.H. 543, 50 A.L.R. 1276.

54. U.S.—U. S. ex rel. Charley v. McGowan, D.C.Wash., 2 F.Supp. 426, affirmed, C.C.A., 62 F.2d 955, certiorari granted U. S. v. McGowan, 53 S.Ct. 790, 289 U.S. 721, 77 L.Ed. 1472, affirmed 54 S.Ct. 95, 290 U.S. 592, 78 L.Ed. 522 and U. S. v. Bakers Bay Fish Co., 54 S.Ct. 95, 290 U.S. 592, 78 L.Ed. 522.

Long-past events

(1) Documentary or contemporaneous corroboration should support testimony as to long-past facts to give oral evidence persuasive force.—Edwards v. U. S., D.C.Mass., 2 F.Supp. 49.

(2) Where oral testimony alone is produced to establish a fact, and especially where such testimony is given long after the occurrence of the events testified to, such testimony will be most carefully scrutinized.—Schnaier v. Farr, Cust. & Pat.App., 99 F.2d 968.

Corroboration by facts

(1) Testimony of witness which is corroborated by admitted or established facts must prevail over that which is inconsistent with those facts.—Fogleman v. Interurban Transp. Co., 187 So. 73, 192 La. 115, annulling, App., 182 So. 335—Fridge v. Talbert, 158 So. 209, 180 La. 937—Anders v. Lee-Rogers Chevrolet Co., 7 La.App. 481.

(2) On conflict in evidence as to occurrence of automobile collision, testimony corroborated by physical facts will prevail.—Fetter v. Torre, 1 La.App. 766.

55. Tenn.—Faust v. Crumley, 64 S.W.2d 860, 16 Tenn.App. 409.

56. La.—Kakarakis Bros. v. Patorno & Son, 7 La.App. 381.

57. Ark.—Pearson v. Vance, 107 S.W. 986, 85 Ark. 272.
Tex.—Uvalde County v. Oppenheimer, 115 S.W. 904, 53 Tex.Civ.App. 137.
42 C.J. p 113 note 3 [c].

58. Cal.—Mercantile Trust Co. of San Francisco v. All Persons Claiming, Etc., 191 P. 691, 183 Cal. 369.

59. Iowa.—In re Lear's Estate, 213 N.W. 240, 204 Iowa 346.

60. Neb.—Kropp v. Missouri Pac. Ry. Co., 193 N.W. 701, 110 Neb. 257, followed in Crouch v. Missouri Pac. Ry. Co., 193 N.W. 702, 110 Neb. 261.

61. U.S.—Cornec v. Baltimore & O. R. Co., C.C.A.Md., 48 F.2d 497, modifying, D.C., The Richelieu, 27 F.2d 960, and certiorari denied Baltimore & O. R. Co. v. Cornec, 52 S.Ct. 9, 284 U.S. 621, 76 L.Ed. 530.
La.—Goldsby v. Lowrey, 6 La.App. 450.
N.H.—Tuttle v. Dodge, 116 A. 627, 80 N.H. 304.
N.Y.—Oneida, Limited, v. National Silver Co., 25 N.Y.S.2d 271.
Va.—Hitt v. Smallwood, 133 S.E. 503, 147 Va. 778.
23 C.J. p 38 note 29.
Weight of opinion evidence generally see supra §§ 567–572.

Testimony of eyewitnesses

(1) Testimony of eyewitnesses who survived explosion on vessel undergoing repairs is entitled to greater weight than expert testimony.—Lancashire Shipping Co. v. Morse Dry Dock & Repair Co., D.C.N.Y., 43 F.2d 750, affirmed, C.C.A., 48 F.2d 1077, certiorari denied Morse Dry Dock & Repair Co. v. Lancashire Shipping Co., 52 S.Ct. 22, 284 U.S. 642, 76 L.Ed. 546.

(2) Employees' testimony as to seeing fellow employee mashed by cotton bale was sufficient to establish traumatic origin of pneumonia, from which he died, as against physicians' contrary testimony.—Pitre v. Guidry, La.App., 147 So. 767.

(3) Evidence that water flooding land flowed in certain direction is not rendered unsubstantial by topographical engineer's testimony that it could not have done so.—Sanchez v. Atchison, T. & S. F. Ry. Co., 264 P. 960, 33 N.M. 240.

(4) Other testimony of eyewitnesses held of greater weight than expert evidence.
La.—Maggiore v. Laundry & Dry Cleaning Service, App., 150 So. 394.
Mass.—Neiss v. Burwen, 191 N.E. 654, 287 Mass. 82.

On the question of authenticity of a signature, the testimony of a witness who saw the signature made is of more weight than the testimony of a handwriting expert.
Ky.—York's Ancillary Adm'r v. Bromley, 151 S.W.2d 28, 286 Ky. 533—Whinery v. Crawford, 116 S.W.2d 631, 273 Ky. 325—Wright's Ex'r v. Simpson, 22 S.W.2d 583, 232 Ky. 148.
Pa.—In re Henry's Estate, 120 A. 454, 276 Pa. 511.
Tex.—Joffre v. Mynatt, Civ.App., 206 S.W. 951.
Wis.—In re Miller's Will, 229 N.W. 656, 201 Wis. 148.

Opinion based on variant condition

An engineer's testimony that he did not make an emergency stop of train is not overthrown by contradictory testimony of experts in answer to hypothetical questions which varied in important particulars from the actual conditions as shown by the uncontradicted testimony of the engineer.—St. Louis & S. F. R. Co. v. Dorman, 89 So. 70, 205 Ala. 609.

Testamentary capacity

Testimony of witness that on day on which testatrix signed will she did not recognize the witness, and that she did not recognize the witness the day before nor until about a week afterward, was insufficient to break down the positive testimony of the subscribing witnesses that at time will was executed testatrix was mentally capable of making a testamentary disposition of her property.—Peavey v. Crawford, Ga., 15 S.E.2d 418.

Contradiction by subsequent conditions

Doctor's positive testimony that artery was not severed in operating on carbuncle may be contradicted by testimony as to conditions afterward.—Rae v. Nelson, 277 P. 75, 152 Wash. 10.

Opinion held insufficient to raise conflict

In a malpractice case, the opinion of a doctor could not raise a conflict with positive testimony of defendant, and another doctor, who reopened the wound, that the facial

or surmises or estimates,[62] or an expert's speculation;[63] and a theoretical possibility, wholly unsupported by proof or probability, cannot outweigh direct testimony, which, to the ordinary mind, carries conviction beyond a reasonable doubt.[64]

In weighing the testimony of an individual witness, consideration should not be restricted to isolated portions thereof, but all of the witness' testimony including that given on direct and on cross-examination, should be considered as a whole.[65] A witness' testimony which is so inconsistent and contradictory within itself as to bear the mark of improvisation is of no probative value.[66] So the force of a witness' statement while testifying is ordinarily destroyed by a later contradictory statement;[67] but positive testimony of a witness may be sufficient in weight to overcome evidence of acts affording a contradictory inference.[68] Language used by a witness must be given its ordinary meaning, considering the context.[69]

b. Interest or Bias of Witness

The interest or bias of a witness, as in the case of a party testifying, may and should be considered as affecting the weight of his testimony, but does not ipso facto deprive it of probative force.

The interest or bias of a witness, or the absence thereof, may be considered as affecting the weight of his testimony,[70] the weight of the testimony of

nerve was not severed in performing an operation.—Finke v. Hess, 174 N.W. 466, 170 Wis. 149.

62. Del.—Roberts v. Kennedy, 141 A. 319, 15 Del.Ch. 100, affirmed Kennedy v. Roberts, 140 A. 656, 15 Del. Ch. 401, affirming 140 A. 654, 15 Del.Ch. 24.
W.Va.—Keystone Mfg. Co. v. Fisher, 114 S.E. 443, 92 W.Va. 123.
23 C.J. p 38 note 30.

Sworn testimony respecting amount due subcontractor will be accepted as against subcontractor's figures unsupported by testimony showing correctness.—Red River Const. Co. v. Nordstrom, 120 So. 655, 10 La.App. 474.

63. Philippine.—Samson v. Corrales Tan Quintin, 44 Philippine 573.

Testamentary capacity
On issue whether testator had testamentary capacity to execute will shortly before his death, opinion testimony of doctors who were not present that testator was irrational could not overcome positive testimony to the contrary by witnesses who were present.—In re Holcomb's Will, 271 N.Y.S. 225, 150 Misc. 684, affirmed 275 N.Y.S. 481, 242 App.Div. 889.

64. La.—Burns v. Ruddock-Orleans Cypress Co., 38 So. 157, 114 La. 247.

65. Cal.—Mutch v. San Diego Electric Ry. Co., 102 P.2d 1100, 39 Cal. App.2d 327—May v. American Trust Co., 27 P.2d 101, 135 Cal. App. 385.
Iowa.—Thompson v. Butler, 274 N. W. 110, 223 Iowa 1085.
La.—Shaffer v. Southern Bell Telephone & Telegraph Co., 165 So. 651, 184 La. 158, annulling, App., 160 So. 439.
Mich.—Soberg v. Sanders, 220 N.W. 781, 243 Mich. 429—Perkins v. Holser, 182 N.W. 49, 213 Mich. 579.
Minn.—Klingman v. Loew's Inc., 296 N.W. 528—Kivak v. Great Northern Ry. Co., 173 N.W. 421, 143 Minn. 196.
Mont.—Bachman v. Gerer, 208 P. 891, 64 Mont. 28.
Pa.—Alwine v. Valley Smokeless Coal Co., 115 A. 882, 271 Pa. 571.
Tenn.—Jellico Grocery Co. v. Hendrickson, 110 S.W.2d 333, 172 Tenn. 148—Cincinnati, N. O. & T. P. Ry. Co. v. Denton, App., 140 S.W.2d 796—Standard Life Ins. Co. of the South v. Strong, 89 S.W.2d 367, 19 Tenn.App. 404.
Utah.—Putnam v. Industrial Commission, 14 P.2d 973, 80 Utah 187.

Single variant expression
The triers of fact will not segregate a single apparently variant expression from a witness' testimony, and thus neutralize the effect and clear meaning of the whole.—United Rys. & Electric Co. of Baltimore v. State, 96 A. 261, 127 Md. 197.

66. Ky.—Louisville & N. R. Co. v. Kilburn, 113 S.W.2d 844, 272 Ky. 44.

67. Mont.—U. S. Fidelity & Guaranty Co. v. Bourdeau, 208 P. 947, 64 Mont. 60.

Correction of prior statement
(1) When a witness makes a prompt correction of a prior statement, very little weight, if any, should be given to the prior statement.—Glazer v. Woodward, Tex. Civ.App., 127 S.W.2d 938, error dismissed, judgment correct.

(2) However, a witness' statement was not nullified by subsequent testimony inconsistent therewith where no attempt was made to explain away testimony first given.—Stoll v. First Nat. Bank, 132 S.W.2d 676, 234 Mo. App. 364.

68. Ala.—Louisiana State Life Ins. Co. v. Phillips, 135 So. 841, 223 Ala. 5.

69. Pa.—Ferguson v. Charis, 170 A. 131, 314 Pa. 164—Brungo v. Pittsburgh Rys. Co., 200 A. 893, 132 Pa.Super. 414.

70. Ark.—Wasson v. Lightle, 66 S. W.2d 652, 188 Ark. 440.
Cal.—Gosnell v. Lloyd, 10 P.2d 45, 215 Cal. 244.
Ill.—Neagle v. McMullen, 165 N.E. 605, 334 Ill. 168.
Mich.—Seifferlein v. Foerster, 187 N.W. 602, 218 Mich. 179.
Miss.—McHenry v. State, 80 So. 763, 119 Miss. 289.
Mo.—Meffert v. Lawson, 233 S.W. 31, 289 Mo. 337.
N.J.—Roth-Schlenger, Inc., v. Schlenger, 191 A. 762, 121 N.J.Eq. 536.
N.Y.—White v. Idsardi, 300 N.Y.S. 1239, 253 App.Div. 96.
Okl.—Carlisle v. State ex rel. Harris, 62 P.2d 617, 178 Okl. 231.
42 C.J. p 113 note 4.
Interest or bias as affecting:
Credibility of witness generally see C.J.S. title Witnesses §§ 538–572, also 70 C.J. p 936 note 10–p 1011 note 15.
Memory of witness see supra § 1026.
Province of jury to pass on credibility of testimony see C.J.S. title Trial § 215, also 64 C.J. p 358 note 49–p 361 note 92.

Relative weight
(1) The testimony of a disinterested witness is ordinarily entitled to at least the same weight as that of an interested witness.—Dozart v. F. Strauss & Sons, La.App., 180 So. 654.

(2) Evidence of distinterested witnesses was entitled to greater weight than that of interested witnesses. .
U.S.—The Elizabeth M. Baker, D.C. N.Y., 3 F.Supp. 977, modified on other grounds, C.C.A., 69 F.2d 54, certiorari denied Meseck Towing & Transportation Co. v. Baker.. 54 S.Ct. 714, 292 U.S. 636, 78 L.Ed. 1488, Meseck Towing & Transportation Co. v. Smith-Murphy Co., 54 S.Ct. 714, 292 U.S. 636, 78 L.Ed. 1488, and Meseck Towing & Transportation Co. v. Ryan, 54 S.Ct. 715, 292 U.S. 636, 78 L.Ed. 1488.
Mich.—Schiessler v. Pierce, 195 N.W. 804, 225 Mich. 91.

Particular witnesses
(1) The testimony of clergyman, because of his character and lack of bias, was entitled to great weight.—

an interested witness depending largely on the facts in each case.[71] So, where a party testifies as a witness, his interest in the outcome of the cause may and should be considered in determining the probative value of his testimony.[72] However, the interest or bias of a witness does not ipso facto wholly deprive his testimony of probative force.[73]

c. Inherently Incredible or Impossible Evidence

Established physical facts and circumstances may overcome evidence to the contrary, provided it is shown that such facts apply to the issues and that they permit no other conclusion.

Evidence of physical conditions and circumstances from which certain facts may be inferred may be of sufficient weight to overcome oral testimony to the contrary,[74] and evidence which is contrary to the physical facts, known physical laws, or general knowledge must be rejected as without probative force.[75] However, physical facts and circumstances will be given probative effect only where the existence of such facts and their connection with the question at issue, is established or admitted;[76] and proof of such nature cannot be construed to establish a particular conclusion as a

Fink v. Prudential Ins. Co. of America, 90 P.2d 762, 162 Or. 37.

(2) Professional relationship of attorney to client may be considered as adversely affecting the weight of his evidence in favor of client.—Beninca v. Nardiello, 150 N.E. 661, 320 Ill. 181—Chicago Title & Trust Co. v. Wallace, 250 Ill.App. 293.

Employee

(1) Weight of witness' testimony is ordinarily not affected by fact that he is employee of party.
U.S.—Wallar v. Southern Pac. Co., D.C.Cal., 37 F.Supp. 475.
La.—Matkins v. City of Monroe, App., 144 So. 758.

(2) Under some circumstances, however, the fact that witness was related to an employee of a party may be considered as affecting weight of testimony.—Hernandez v. Murphy, Cal.App., 115 P.2d 565.

Relatives and friends

(1) Testimony of close relatives and intimate friends is regarded as weakest of evidence.
Colo.—Ballou v. First Nat. Bank, 53 P.2d 592, 98 Colo. 101.
La.—Lewis v. Figures, 3 La.App. 223.

(2) However, the testimony of a relative who gave evidence against a party is entitled to full weight where the circumstances indicate no reason for falsification.—Bennett v. Pugh, La.App., 177 So. 112.

Adversely interested witness

Where interest of witnesses called by plaintiffs was against plaintiffs, but plaintiffs were compelled to use such witnesses, such fact must be considered in evaluating their testimony.—Koch v. Kiron State Bank of Kiron, Iowa, 297 N.W. 450.

71. Tex.—Shaw v. San Jacinto Realty Co., Civ.App., 16 S.W.2d 341, error refused.

72. Or.—In re Morley's Estate, 5 P.2d 92, 138 Or. 75.
Tex.—Dreyfuss & Son v. Dine, Civ.App., 90 S.W.2d 598—Smalley v. Octagon Oil Co., Civ.App., 82 S.W.2d 1049, error dismissed.
Utah.—Holt v. Industrial Commission of Utah, 87 P.2d 686, 96 Utah 484.
Vt.—Catto v. Liberty Granite Co., 141 A. 684, 101 Vt. 143.

Special rule for party as witness

The weight of the testimony given by a party as a witness is determined by a different rule than that applied in determining the weight to be given the testimony of other witnesses.—J. R. Watkins Co. v. King, Tex.Civ.App., 83 S.W.2d 405.

No greater weight

Testimony of defendant as to due care to furnish safe place for theater patrons was not entitled to any more weight than any other oral evidence.—Durning v. Hyman, 95 Pa. Super. 150.

73. Mo.—Campbell v. St. Louis Union Trust Co., 124 S.W.2d 1068, 343 Mo. 1041.
Pa.—McNitt v. Gilliland, 92 A. 508, 246 Pa. 378.
Tex.—Alexander Co. v. First Nat. Bank, Civ.App., 123 S.W.2d 908.
Wash.—McLaren v. Department of Labor and Industries, 107 P.2d 230.

74. U.S.—U. S. v. Jorgensen, C.C.A. Idaho, 66 F.2d 292.
Cal.—Dahl v. Spotts, 16 P.2d 774, 128 Cal.App. 133.
Ky.—Louisville & N. R. Co. v. Welsh, 113 S.W.2d 879, 272 Ky. 120.
La.—Van Baast v. Thibaut Feed Mills, App., 151 So. 226.
Mo.—Arnold v. Scandrett, 131 S.W.2d 542, 345 Mo. 115.
Pa.—Lott v. People's Natural Gas Co., 188 A. 582, 324 Pa. 517—Hawk v. Pennsylvania R. Co., 160 A. 862, 307 Pa. 214—Snyder v. Penn Liberty Refining Co., 153 A. 549, 302 Pa. 320.
Tenn.—Harris v. Miller, App., 144 S.W.2d 7.
Vt.—Page v. McGovern, 3 A.2d 543, 110 Vt. 166.
Wash.—Poland v. City of Seattle, 93 P.2d 379, 200 Wash. 208.
Wis.—Schmidt v. Milwaukee Electric Railway & Transport Co., 296 N.W. 609, 237 Wis. 220—Hunter v. Sirianni Candy Co., 288 N.W. 766, 233 Wis. 130.

Testimony of eyewitness is not conclusive on court or jury if facts and circumstances are such as irresistibly lead the mind to different conclusion.—Arndt v. Grayewski, 271 N.W. 740, 279 Mich. 224.

Evidence of conditions surrounding collision between motor vehicles may overcome positive contrary oral evidence.—Kerner v. Peacock Dairies, 19 P.2d 283, 129 Cal.App. 686.

75. U.S.—Jacobson v. Chicago, M., St. P. & P. R. Co., C.C.A.Minn., 66 F.2d 688.
Cal.—Finch v. Willmott, 290 P. 660, 107 Cal.App. 662.
Iowa.—Kapphahn v. Martin Hotel Co., 298 N.W. 901.
Ky.—Lambert v. Miller's Adm'r, 125 S.W.2d 1019, 277 Ky. 64.
Mo.—Gwaltney v. Kansas City Southern Ry. Co., 96 S.W.2d 357, 339 Mo. 249—Rohmann v. City of Richmond Heights, App., 135 S.W.2d 378—Fritz v. Manufacturers Ry. Co., App., 124 S.W.2d 603—Henry v. Missouri Ins. Co., App., 68 S.W.2d 852—Nowlin v. Kansas City Public Service Co., App., 58 S.W.2d 324—Vaccaro v. Pevely Dairy Co., App., 22 S.W.2d 858—Aldridge v. Missouri Pac. R. Co., 256 S.W. 93, 215 Mo.App. 217.
Pa.—Patton v. George, 131 A. 245, 284 Pa. 342.
Tenn.—Walters v. Staton, 111 S.W.2d 381, 21 Tenn.App. 401—Union Traction Co. v. Todd, 64 S.W.2d 26, 16 Tenn.App. 200.
Tex.—Austin v. Neiman, Com.App., 14 S.W.2d 794, reversing Austin v. Nieman, Civ.App., 3 S.W.2d 128—San Antonio & A. P. Ry. Co. v. Biggs, Civ.App., 283 S.W. 627.
Utah.—Haarstrich v. Oregon Short Line R. Co., 262 P. 100, 70 Utah 552.
Va.—Harris v. Howerton, 194 S.E. 692, 169 Va. 647—Norfolk & W. Ry. Co. v. Eley, 162 S.E. 3, 157 Va. 568.
Wis.—Stryk v. Sydarowich, 224 N.W. 479, 198 Wis. 542.

Credibility of testimony inherently improbable or conflicting with incontrovertible physical facts see C.J.S. title Witnesses § 468, also 70 C.J. p 777 note 86—p 782 note 9.

76. Ill.—Skala v. Lehon, 258 Ill.App.

matter of law unless the facts and circumstances lead to but one conclusion to the exclusion of all others.[77]

§ 1032. Affidavits and Depositions

Affidavits are only prima facie evidence, of weak probative force, and should be received with caution; depositions are a higher type of proof than affidavits, but authorities differ as to whether their weight is equal to, or smaller than, that of oral testimony in court.

A deposition is a higher type of proof than an affidavit.[78] Affidavits when admissible as a general rule are only prima facie evidence,[79] and they are not conclusive of the facts stated therein even though not contradicted by counter-affidavits.[80] Indeed, ex parte affidavits are commonly regarded as weak evidence, to be received with caution, and not to be used where better evidence is obtainable.[81] In matters presented by ex parte affidavits, the contents of all of the affidavits are ordinarily entitled to equal weight,[82] but an affidavit based on knowledge is of course entitled to greater weight than one based on information and belief.[83]

The weight and probative force of depositions are matters to be passed on by the triers of fact.[84] Ac-

252, affirmed 175 N.E. 832, 343 Ill. 602.

Pa.—Reiser v. Smith, 2 A.2d 753, 332 Pa. 389—Winters v. York Motor Express Co., 176 A. 812, 116 Pa. Super. 421—Richter v. Philadelphia Rapid Transit Co., 97 Pa. Super 492.

Vt.—Izor v. Brigham, 17 A.2d 236, 111 Vt. 438.

Clear cases

Doctrine of incontrovertible physical facts can be invoked only in clear cases.—Wagner v. Pennsylvania R. Co., 173 A. 450, 113 Pa. Super. 331.

Uncertain testimony

Exact mathematical calculations, designed to prevent plaintiff's recovery on ground of physical impossibility in automobile collision case, cannot be based on inexact and uncertain testimony.—Meyer v. American Stores Co., 100 Pa.Super. 303.

When rule inapplicable

(1) The "incontrovertible physical fact rule" does not apply where there are variables or doubtful estimates or where objects are not placed with certainty.—Rex v. Lehigh Valley Transit Co., 199 A. 324, 330 Pa. 275.

(2) "Incontrovertible physical facts" are never established by oral evidence as to the position or speed of movable objects.

U.S.—Meek v. Miller, D.C.Pa., 38 F. Supp. 10.

N.M.—Crocker v. Johnston, 95 P.2d 214, 43 N.M. 469.

Pa.—Reiser v. Smith, 2 A.2d 753, 332 Pa. 389—Hostetler v. Kniseley, 185 A. 300, 322 Pa. 248—Hegarty v. Berger, 155 A. 484, 304 Pa. 221—Adams v. Armour & Co., 16 A.2d 142, 142 Pa.Super. 280—Ross v. Reigelman, 14 A.2d 591, 141 Pa. Super. 293—Winters v. York Motor Express Co., 176 A. 812, 116 Pa. Super. 421—Zimmer v. Clark, 156 A. 815, 103 Pa.Super. 145.

77. Conn.—Carangelo v. Nutmeg Farm, 162 A. 4, 115 Conn. 457, 82 A.L.R. 1320.

Iowa.—Clark v. Berry Seed Co., 280 N.W. 505, 225 Iowa 262—Cuthbertson v. Hoffa, 216 N.W. 733, 205 Iowa 666.

La.—Wright v. Petty, 7 La.App. 584.

Minn.—Schmidt v. Riemenschneider, 265 N.W. 816, 196 Minn. 612.

Mo.—Walden v. Stone, App., 223 S. W. 136—Eldson v. Metropolitan St. Ry. Co., App., 209 S.W. 575.

Tenn.—Harris v. Miller, App., 144 S. W.2d 7.

Wis.—Tracy v. Malmstadt, 296 N.W. 87, 236 Wis. 642.

78. Ky.—Bard v. Bard, 132 S.W.2d 44, 279 Ky. 683—Tanner v. Ayer, 272 S.W. 720, 209 Ky. 247.

Va.—Griffin v. Tomlinson, 165 S.E. 374, 159 Va. 161.

79. Miss.—Striplin Cotton Co. v. Miller, 94 So. 227, 130 Miss. 430.

Neb.—Schlake v. Healey, 187 N.W. 427, 108 Neb. 35.

2 C.J. p 376 note 11.

Refusal to take oath

A paper prepared to be sworn to by one who afterward refused to swear to it will not be given any weight, although an affidavit is made stating that the intended affiant said that the paper was true.—Thompson v. Fuller, 8 N.Y.S. 62, 5 Silv.Sup. 41.

80. Mass.—Germain v. Raad, 8 N.E. 2d 355, 297 Mass. 73.

N.Y.—In re Sebring, 264 N.Y.S. 379, 238 App.Div. 281.

81. U.S.—Thomson Spot Welder Co. v. Ford Motor Co., D.C.Mich., 268 F. 836, affirmed, C.C.A., 281 F. 680, certiorari granted 43 S.Ct. 96, 260 U.S. 718, 67 L.Ed. 479, affirmed 44 S.Ct. 533, 265 U.S. 445, 68 L.Ed. 1098.

N.Y.—In re Hyde's Estate, 112 N.E. 581, 218 N.Y. 55, reversing 155 N. Y.S. 495, 169 App.Div. 568.

23 C.J. p 38 notes 37–39—2 C.J. p 376 note 12.

Inequality to oral testimony

Ex parte affidavits may be read in opposition to, and in support of, awards in cases at law, but they will be given much less weight than testimony taken in court or on notice and subject to cross-examination.—Tennant v. Divine, 24 W.Va. 387—2 C.J. p 376 note 12 [b].

Taking of proof

When the court directed that proof be taken as to the allegations of kinship, all petitions and affidavits of the parties became of no avail as affirmative evidence thereof.—In re Title Guarantee & Trust Co., 172 N.Y.S. 239.

82. U.S.—General Talking Pictures Corporation v. Stanley Co. of America, D.C.Del., 42 F.2d 904.

83. Ill.—Imminga v. Dinan, 160 Ill. App. 201.

N.Y.—Harris v. Taylor, 54 N.Y.S. 864, 35 App.Div. 462.

Information readily obtainable

Affidavits on information and belief, where information was readily obtainable, had but weak probative force.—Associated Sales Co. v. Elmer E. Frost & Co., 10 P.2d 175, 122 Cal.App. 234.

84. Tex.—England v. Pitts, Civ. App., 56 S.W.2d 493, error dismissed.

Consistency with oral testimony

Inconsistencies between statements in deposition and testimony did not stamp testimony as inherently unbelievable.—Bitsekas v. Parechanian, 226 P. 974, 67 Cal.App. 148.

Contradictory statements

That witness' deposition was contradicted by four written statements made prior to trial did not make testimony of witness so unworthy of belief as to make evidence insufficient because certain facts were supported only by such witness' testimony, where contradiction of statements was corroborated by other testimony.—Mayfield v. Kansas City Southern Ry. Co., Mo.App., 101 S.W. 2d 769.

Other circumstances in evidence

There being circumstances in evidence impairing accuracy of plaintiff's testimony, it was within trial court's province to determine credit and weight to be given thereto, although plaintiff testified by deposition.—Belser v. American Trust Co., 13 P.2d 951, 125 Cal.App. 344.

cording to some decisions, testimony given by deposition has the same probative force as if given by the deposing witness at the trial.[85] Accordingly, the jury may be instructed that depositions should be given the same weight as if the absent witnesses were personally present testifying;[86] and it is error to instruct a jury that, as a matter of law, testimony embodied in depositions is entitled to less confidence than would be the case if the testimony had been given orally at the trial.[87] According to other decisions, testimony given by deposition,[88] especially by deposition taken ex parte,[89] is to be deemed of inferior value to testimony delivered viva voce in the presence of the triers of facts. So, it has been held that an instruction that evidence by deposition is to receive the same weight as that in open court is erroneous as a charge on the effect of the evidence;[90] but the jury may be told that testimony by deposition is legal evidence to be duly considered.[91] A court may decide issues on testimony taken wholly by deposition.[92]

§ 1033. Written and Oral Evidence

While oral testimony is generally not as reliable as written or documentary evidence, the triers of fact are not obliged to give prevailing weight to written evidence.

As a general rule, oral testimony depending on the memory of witnesses is not as reliable as written or documentary evidence,[93] and a party seeking to establish a fact in opposition to written evidence

Rejection of statements
Jury in weighing testimony was entitled to take testimony of defendant's witness in light most favorable to plaintiff, and to reject statement in deposition, notwithstanding

Plaintiff's deposition construed as not barring recovery
Mo.—Peppas v. H. Ehrlich & Sons Mfg. Co., 71 S.W.2d 821, 228 Mo. App. 556.

85. U.S.—Kierce v. Central Vermont Ry., C.C.A.Vt., 79 F.2d 198, certiorari denied Central Vermont Ry. v. Kierce, 56 S.Ct. 152, 296 U.S. 629, 80 L.Ed. 447 and Central Vermont Ry. v. Pearson, 56 S.Ct. 152, 296 U.S. 629, 80 L.Ed. 447.
Effect of depositions generally see Depositions § 96.

Depositions of party taken under the statute and introduced as evidence stand on the same footing as that of any other interested witness, and do not require the testimony of two witnesses, or one witness with corroborating circumstances, to overcome the testimony thus given.—Garner v. State Banking Co., 102 S.E. 442, 150 Ga. 6.

86. Mo.—Empire Plow Co. v. Berthold & Jennings Lumber Co., App., 237 S.W. 137.
23 C.J. p 39 note 44 [a].

87. Ind.—Voss v. Prier, 71 Ind. 128.
23 C.J. p 39 note 46.

88. Iowa.—Bohen v. North American Life Ins. Co., of Chicago, 177 N.W. 706, 188 Iowa 1349.
23 C.J. p 38 note 42.

Care in consideration
Testimony given by way of deposition should be scanned with great care.—Smith v. Smith, 25 N.Y.S.2d 448, 261 App.Div. 930.

89. U.S.—Jolly v. Terre Haute Drawbridge Co., C.C.Ind., 13 F.Cas. No.7,441, 6 McLean 237—Rusk v. The Freestone, D.C.Ohio, 21 F.Cas. No.12,143, 2 Bond 234.

90. Ala.—Central of Georgia Ry. Co. v. Holmes, 134 So. 875, 223 Ala. 499.

92. U.S.—Consolidated Edison Co. of New York v. National Labor Relations Board, C.C.A., 95 F.2d 390, certiorari granted 58 S.Ct. 1038, 304 U.S. 555, 82 L.Ed. 1524, and International Brotherhood of Electrical Workers v. National Labor Relations Board, 58 S.Ct. 1041, 304 U.S. 555, 82 L.Ed. 1524, modified on other grounds Consolidated Edison Co. of New York v. National Labor Relations Board, 59 S.Ct. 206, 305 U.S. 197, 83 L.Ed. 126.

93. U.S.—Bowmaster v. Carroll, C. C.A.Okl., 23 F.2d 825.
Ark.—Hoyer v. Edwards, 32 S.W.2d 812, 182 Ark. 624.
Cal.—Bruno v. Severini, 196 P. 501, 51 Cal.App. 163.
Ky.—Prudential Ins. Co. of America v. Oaks, 139 S.W.2d 62, 282 Ky. 577, followed in Provident Life & Accident Ins. Co. v. Oaks, 145 S.W.2d 111, 284 Ky. 545—Glasgow Ice Cream Co. v. Fults' Adm'r, 105 S.W.2d 135, 268 Ky. 447.
Mich.—Rath v. Kelly, 224 N.W. 377, 246 Mich. 25—Harvey v. Rubin, 189 N.W. 17, 219 Mich. 307.
N.Y.—Susquehanna Silk Mills v. Jacobson, 173 N.Y.S. 271, 185 App. Div. 378—Yatter v. Mathies, 246 N.Y.S. 548, 139 Misc. 26.
Tex.—Bankers Life & Loan Ass'n v. Chase, Civ.App., 114 S.W.2d 374, 377, quoting **Corpus Juris**—Seastrunk v. Kidd, Civ.App., 53 S.W.2d 678.
Utah.—Bonneville Lumber Co. v. J. G. Peppard Seed Co., 271 P. 226, 72 Utah 463.
Wash.—Bemis v. Meyer, 206 P. 566, 119 Wash. 599.
23 C.J. p 39 note 48.

Conclusiveness not affected

Shaw v. American Ins. Union, Mo. App., 33 S.W.2d 1052.

(2) Conclusiveness and effect of documentary evidence generally see supra §§ 763–765.

Testimony of elderly men, based purely on unaided memory of events long past, has inherent infirmities and is not entitled to the weight given to contemporary official written records.—U. S. v. Appalachian Electric Power Co., C.C.A.Va., 107 F.2d 769, affirming, D.C., 23 F.Supp. 83, certiorari granted 60 S.Ct. 608, 309 U.S. 646, 84 L.Ed. 999, reversed on other grounds 61 S.Ct. 291, 311 U.S. 377, 85 L.Ed. 243, rehearing denied 61 S.Ct. 548, 312 U.S. 377, 85 L.Ed. 243.

When oral testimony is conflicting, contemporaneous writings have great probative value, especially when writings are intended to confirm oral conversations.—Segall v. Finlay, 213 N.Y.S. 540, 126 Misc. 625, affirmed 218 N.Y.S. 895, 218 App. Div. 723, affirmed 156 N.E. 97, 245 N.Y. 61.

Self-serving writing
Letter written by client referring to letter received from attorneys stating terms under which they would undertake contemplated litigation, authenticity of which was vouched for by client alone, was not entitled to greater weight, against attorneys' claim for reasonable value of services, than client's testimony.—Lyon v. Oliver, 147 N.E. 251, 316 Ill. 292, reversing 227 Ill. App. 511.

must make out his case with more than usual clearness.[94] However, the triers of fact are not ipso facto required to reject oral testimony contradicted by a writing,[95] and they may believe a witness' testimony given on the witness stand in preference to his previous contrary written statement.[96] Oral testimony may be of greater weight than written evidence impeached by evidence of malfeasance, mistake in records, or lack of opportunity to ascertain the facts;[97] and a written entry which is not of equal grade with record evidence and is hearsay in nature is not superior to parol testimony.[98]

The weight to be attached to ancient documents is controlled to some extent at least by the facts and circumstances accompanying their execution.[99]

§ 1034. Evidence Which Should Be Excluded on Objection

While some authorities have held differently as to evidence admitted without objection, a number hold that incompetent evidence should be given no probative force and that the admission of such evidence cannot raise an issue or form the basis of a verdict, finding, or judgment.

Evidence intrinsically destitute of probative quality acquires no new attribute in point of weight by its production in the case.[1] While some authorities have held differently as to evidence admitted without objection, see the C.J.S. title Trial §§ 150–156, also 64 C.J. p 224 note 13–p 232 note 84, according to a number of authorities wholly incompetent evidence possesses, and should be given, no probative force,[2] and the admission of such evidence cannot raise an issue or form the basis of a verdict, finding, or judgment.[3] So, it is commonly held that

94. Pa.—Schmitt v. William G. Johnston Co., 7 A.2d 131, 136 Pa. Super. 213.
Tex.—Bankers Life & Loan Ass'n v. Chase, Civ.App., 114 S.W.2d 374, 377, quoting **Corpus Juris.**
23 C.J. p 39 note 49.

Testimony tending to impair effect of writing should be regarded with suspicion.—Bryant v. P. H. Whiting & Co., 246 N.W. 497, 261 Mich. 561.

95. Ga.—Bankers' Health & Life Ins. Co. v. Nichols, 162 S.E. 161, 44 Ga.App. 536.

Log of vessel, which was not prepared until after the vessel arrived in port after a collision, and after some conversation and understanding between navigating officers, is not an independent record of the events, made by the officer charged with that duty at the time as they occurred, and does not outweigh the testimony of eyewitnesses and disinterested parties.—The Kagu Maru, D.C.Wash., 18 F.2d 295.

96. Conn.—Martino v. Connecticut Co., 147 A. 20, 109 Conn. 559.
Ky.—American Mut. Liability Ins. Co. v. Hartman, 72 S.W.2d 429, 254 Ky. 712.

97. Mich.—Rath v. Kelly, 224 N.W. 377, 246 Mich. 25.

98. Ky.—Prudential Ins. Co. of America v. Pierce's Adm'x, 109 S. W.2d 616, 270 Ky. 216.

Entry in family Bible
Ky.—Prudential Ins. Co. of America v. Pierce's Adm'x, 109 S.W.2d 616, 270 Ky. 216.

99. **Presumptions** are indulged in favor of, or in opposition to, ancient deeds, according to matters in pais which accompany them.—Taylor v. Goodenough, 270 N.Y.S. 278, 240 App. Div. 459.

Corroboration of ancient documents indicating the exercise of acts of ownership or dominion, by proof of actual possession under similar documents or by other facts adds to the weight of the evidence.
Mass.—Boston v. Richardson, 105 Mass. 351.
N.Y.—Hewlett v. Cock, 7 Wend. 371.

1. Tenn.—State, for use of Burrow, v. Cothron, App., 113 S.W.2d 81—Westmoreland v. Farmer, 7 Tenn. App. 385, 389, citing **Corpus Juris.**
23 C.J. p 40 note 57.

2. Ga.—Ensley v. Pollard, 194 S.E 426, 56 Ga.App. 884.
Tex.—Dallas Ry. & Terminal Co. v. Blankston, Com.App., 51 S.W.2d 304—Smith v. Lynn, Civ.App., 152 S.W.2d 838.
64 C.J. p 228 note 44 [a].

Parol evidence
Ga.—Peninsular Casualty Co. v. McCloud, 170 S.E. 396, 47 Ga.App. 316.
Tex.—Great Nat. Life Ins. Co. v. Presley, Civ.App., 129 S.W.2d 730, error dismissed—Tackett v. Cunningham, Civ.App., 91 S.W.2d 965.

Evidence properly stricken cannot be used to fortify other evidence.—Metropolitan Life Ins. Co. v. Lanigan, 222 P. 402, 74 Colo. 386.

Evidence not stricken out
However, it has been held that evidence concerning misrepresentations in application, in record and not stricken out, must be considered, although the trial court apparently disregarded it as incompetent.—Naudzius v. Metropolitan Life Ins. Co., 238 N.Y.S. 702, 136 Misc. 167.

3. U.S.—John Irving Shoe Co. v. Dugan, C.C.A.Mass., 93 F.2d 711—Builders & Manufacturers Mut. Casualty Co. v. Paquette, D.C.Me., 21 F.Supp. 858.
Ga.—Crawford v. Verner, 50 S.E. 958, 122 Ga. 814.
Ind.—Standard Oil Co. v. Baughman, 187 N.E. 843, 97 Ind.App. 672.
Me.—Shaw v. McKenzie, 160 A. 911, 131 Me. 248.
Mo.—State ex rel. and to Use of Alton R. Co. v. Public Service Commission, App., 110 S.W.2d 1121, transferred, see Sup., 100 S.W.2d 474, certiorari quashed State ex rel. Public Service Commission v. Shain, 119 S.W.2d 220, 342 Mo. 867—Holliday v. Walls, App., 64 S.W. 2d 318.
N.Y.—Feldt v. Kiener, 264 N.Y.S. 120, 147 Misc. 500.
Tex.—Dallas Ry. & Terminal Co. v. Blankston, Com.App., 51 S.W.2d 304—Smith v. Lynn, Civ.App., 152 S.W.2d 838—Lone Star Gas Co. v. Holifield, Civ.App., 150 S.W.2d 282—Lewis v. J. P. Word Transfer Co., Civ.App., 119 S.W.2d 106, error refused—Morehouse v. Morehouse, Civ.App., 111 S.W.2d 831, error dismissed—Sinclair Refining Co. v. Womack, Civ.App., 66 S.W. 2d 402—Edington v. Southern Old Line Life Ins. Co., Civ.App., 55 S.W. 2d 579—Cosden Oil Co. v. Sides, Civ.App., 35 S.W.2d 815—Shelton v. Thomas, Civ.App., 11 S.W.2d 254.
64 C.J. p 228 note 45.

However, it has been held that in an action for damages under the Employers' Liability Law, the erroneous admission of evidence of the number of dependents in the family of the injured servant justified the jury in considering it, as well as all the other testimony in the case, in arriving at its verdict.—Silver King of Arizona Mining Co. v. Kendall, 201 P. 102, 23 Ariz. 39.

Parol evidence
(1) The rule stated in the text has been applied to parol evidence.
Mo.—Sol Abrahams & Son Const. Co. v. Osterholm, App., 136 S.W.2d 86.
N.Y.—Mine Realty Corporation v. 2131 Broadway Corporation, 1 N. Y.S.2d 979, 253 App.Div. 299.

hearsay evidence, although admitted, has no probative value, is entitled to no weight, and cannot support a finding or judgment,[4] unless of a character coming within some exception to the general rule of incompetency,[5] although there is also authority for the view that hearsay evidence has probative force,[6] and that, once admitted, it may be weighed with the other evidence and given any evidentiary value which it may possess.[7] Likewise the conclusion of a witness,[8] or his mere guess,[9] or a non-expert witness' expression of opinion as to an ultimate legal question,[10] is of no probative value.

Applicability of evidence to pleadings. It has been considered that evidence brought out incidentally and not applicable to any issue made by the pleadings cannot be considered;[11] but there is also authority for the view that a party who without opposition suffers evidence to be adduced contrary to or beyond the allegations contained in the pleadings is bound by its effect.[12]

Testimony introduced surreptitiously after it has been once excluded on objection should be disregarded.[13]

Tex.—Great Nat. Life Ins. Co. v. Presley, Civ.App., 129 S.W.2d 730 error dismissed—Tackett v. Cunningham, Civ.App., 91 S.W.2d 965—Trout v. Wichita State Bank & Trust Co., Civ.App., 23 S.W.2d 871.

(2) Waiver of benefit of parol evidence rule see supra § 863.

Finding of value

Tex.—Land Title Bank & Trust Co. v. United Sav. Bank of Detroit, Mich., Civ.App., 117 S.W.2d 847, error dismissed.

Evidence inadmissible under pleadings

Va.—White v. White, 106 S.E. 350, 129 Va. 621.

Compulsory self-incrimination

Verdict based on material testimony which defendant was required to give, when called for cross-examination, in violation of his constitutional and statutory rights against compulsory self-incrimination, cannot stand.—Joslin v. Noret, 194 N.W. 983, 224 Mich. 240.

Competency against both parties

Finding that the conveyance in question was made with intent to hinder, delay, and defraud creditors must be sustained by evidence competent against the grantee, as well as against the grantor.—Meyer v. Mayo, 187 N.Y.S. 346, 196 App.Div. 78.

4. Ark.—Tipler-Grossman Lumber Co. v. Forest City Box Co., 229 S.W. 17, 148 Ark. 132.

D.C.—Murphy v. New York & Cuba Mail S. S. Co., 273 F. 305, 50 App. D.C. 341.

Ga.—Morgan v. Bell, 5 S.E.2d 897, 189 Ga. 432—Higgins v. Trentham, 197 S.E. 862, 186 Ga. 264—Ensley v. Pollard, 194 S.E. 426, 56 Ga.App 884—Spencer v. Wright, 172 S.E 91, 48 Ga.App. 126—Jarriel v. Savannah Guano Co., 138 S.E. 237, 34 Ga.App. 72—Reaves v. Columbus Electric & Power Co., 122 S.E. 824, 32 Ga.App. 140—Hale v. Hale, 111 S.E. 740, 28 Ga.App. 509.

Idaho.—Boise Street Car Co. v. Van Avery, 103 P.2d 1107, 61 Idaho 502.

Me.—Shaw v. McKenzie, 160 A. 911, 131 Me. 248.

Minn.—Kavli v. Leifman, 292 N.W. 210, 207 Minn. 549.

Mo.—Van Bibber v. Swift & Co., 228 S.W. 69, 286 Mo. 317—Holliday v. Walls, App., 64 S.W.2d 318.

N.Y.—Meyer v. Mayo, 187 N.Y.S. 346, 196 App.Div. 78—Leichtung v. Natkin, 183 N.Y.S. 1, 192 App.Div. 788—Hirsch v. Lehigh Valley R. Co., 174 N.Y.S. 68.

Tex.—Lone Star Gas Co. v. Holifield, Civ.App., 150 S.W.2d 282—Elmore v. Peavy, Civ.App., 143 S.W.2d 983—Lewis v. J. P. Word Transfer Co., Civ.App., 119 S.W.2d 106, error refused—Land Title Bank & Trust Co. v. United Sav. Bank of Detroit, Mich., Civ.App., 117 S.W.2d 847, error dismissed—Commercial Standard Ins. Co. v. Billings, Civ.App., 114 S.W.2d 709, error dismissed—Thames v. Culwell Packing Co., Civ.App., 114 S.W.2d 664—Sinclair Refining Co. v. Womack, Civ.App., 66 S.W.2d 402—Farrall v. Hood, Civ.App., 32 S.W.2d 480—Shelton v. Thomas, Civ.App., 11 S.W.2d 254.

23 C.J. p 40 note 58—64 C.J. p 230 note 64.

Substantial evidence

"Mere uncorroborated hearsay or rumor does not constitute substantial evidence."—Consolidated Edison Co. v. National Labor Relations Board, 59 S.Ct. 206, 217, 305 U.S. 197, 83 L.Ed. 126—U. S. v. Krumsiek, C.C.A.Mass., 111 F.2d 74, 78.

Fraud

The fraudulent character of a transaction, or the falsity of a representation, cannot be established by hearsay evidence.

Iowa.—Vacuum Oil Co. v. Carstens, 231 N.W. 380, 211 Iowa 1129.

N.J.—Ewart v. Johnson, 166 A. 716, 11 N.J.Misc. 472.

Municipal regulation held not established by hearsay testimony.—Gosselin v. Lemay, 153 A. 716, 85 N.H. 13.

Contradiction of testimony by hearsay

Hearsay testimony leaves undisputed the testimony against which it was directed.—Galloway v. Russ, 300 S.W. 390, 175 Ark. 659.

In Michigan

(1) The rule stated in the text has been followed.—Foster v. Kampmann, 275 N.W. 235, 281 Mich. 495.

(2) However, it has been held that where prostitution in apartment house was established, hearsay testimony offered by state showing particular apartment involved should be considered to limit closing to that apartment.—State v. Robinson, 229 N.W. 403, 250 Mich. 99.

5. Tex.—Firemen's Ins. Co. of Newark, N. J., v. Universal Credit Co., Civ.App., 85 S.W.2d 1061.

6. N.C.—Maley v. Thomasville Furniture Co., 200 S.E. 438, 214 N.C. 589.

7. Mass.—Mahoney v. Harley Private Hospital, 180 N.E. 723, 279 Mass. 96.

23 C.J. p 40 note 59—64 C.J. p 230 note 59.

Apparently so holding.—Grimes v Grimes, 200 A. 442, 61 R.I. 198.

Testimony by person quoted

Hearsay testimony as to what certain person said is of no greater value than facts to which such person testified as witness.—Messner v. Board of Dental Examiners of California, 262 P. 58, 87 Cal.App. 199.

8. Mo.—Banty v. City of Sedalia, App., 120 S.W.2d 59.

Tex.—Smith v. Lynn, Civ.App., 152 S.W.2d 838.

9. Mo.—Van Bibber v. Swift & Co., 228 S.W. 69, 286 Mo. 317.

10. Ga.—Morgan v. Bell, 5 S.E.2d 897, 189 Ga. 432.

11. Ind.—Marshall v. Mathers, 3 N.E. 120, 103 Ind. 458.

23 C.J. p 40 note 55.

12. La.—Powell v. Aiken & Gwinn, 18 La. 321—Draper v. Richards, 20 La.Ann. 306.

13. Pa.—Vollmer v. Simon, 46 A. 439, 196 Pa. 481.

§ 1035. Evidence Less Strong than Party Might Produce

Where weaker evidence is offered when stronger evidence is within the party's power, the evidence offered should be viewed with distrust.

It is a fundamental canon of proof that, where weaker and less satisfactory evidence is offered when stronger and more satisfactory evidence is within the power of the party, the evidence offered should be viewed with distrust.[14]

§ 1036. Answers to Leading Questions

The probative value of a witness' testimony is very much lessened where it is obtained by leading questions.

The probative value of a witness' testimony is very much lessened where it is obtained by leading questions, as where the witness merely assents to or dissents from a statement or assertion of an examining counsel put with such vocal inflection as to be a question.[15]

§ 1037. Positive and Negative Evidence

a. Evidence as positive or negative
b. Weight of negative evidence generally
c. Comparative weight of positive and negative evidence
d. Particular circumstances affecting weight

a. Evidence as Positive or Negative

A witness' testimony of failure to see or hear is negative if he was paying no particular attention; testimony that the witness did not see or hear something which he would have observed had it occurred is more commonly regarded as positive; and testimony that an event did not occur, given by one who was in a position to observe, is positive. Testimony may be positive in character although amounting to a negative statement or showing a negative situation.

As appears in § 2, supra, evidence is positive where the witness states that a certain thing did or did not happen or exist. Where a witness testifies that he was present and did not see nor hear such event, or that it did not occur, this is strictly negative evidence if nothing more appears or if it appears that he was paying no particular attention at the time, or was not in a position to observe,[16] even though the witness expresses the opinion, as he may do,[17] that he would have seen or heard had the fact taken place.[18] So also, where a witness who had a more or less adequate opportunity for correct ob-

14. Alaska.—Waechter Bros. Co. v. Stevens, 8 Alaska 88.
Ky.—Cochran's Adm'x v. Cochran, 115 S.W.2d 376, 384, 273 Ky. 1.
Miss.—Masonite Corporation v. Hill, 154 So. 295, 298, 170 Miss. 158, citing **Corpus Juris.**
Mont.—Michalsky v. Centennial Brewing Co., 134 P. 307, 48 Mont. 1.
N.Y.—Singer v. Zabelin, 24 N.Y.S.2d 962.
Pa.—Wright v. Pittsburgh Rys. Co., 181 A. 476, 320 Pa. 40.
Presumption from failure to produce most satisfactory evidence see supra § 156.
Weight of evidence according to power to produce or contradict see supra § 1031.

Positive proof is required, where it appears from nature of case that it might possibly have been had.—Belyus v. Wilkinson, Gaddis & Co., 178 A. 181, 115 N.J.Law 43, affirmed 182 A. 873, 116 N.J.Law 92.

Rule inapplicable
In a divorce suit, the husband's failure to produce evidence other than his own denial to disprove the wife's charges that he sent her to houses of prostitution for illicit gain did not render applicable the rule that evidence is to be weighed according to the proof in the power of the party to produce.—Wade v. Wade, Mo.App., 229 S.W. 432.

15. U.S.—Huffman v. Buckingham Transp. Co. of Colorado, C.C.A. Wyo., 98 F.2d 916, 921, citing **Corpus Juris.**
Ill.—John E. Burns Lumber Co. v. W. J. Reynolds Co., 148 Ill.App. 356.
Iowa.—Sinift v. Sinift, 293 N.W. 841.
Pa.—Commonwealth v. Chambers, 18 Wash.Co. 78.
Leading questions generally see the C.J.S. title Witnesses §§ 329–338, also 70 C.J. p 509 note 73–p 538 note 62.

16. Ariz.—Canion v. Southern Pac. Co., 80 P.2d 397, 52 Ariz. 245—Southern Pac. Co. v. Fisher, 274 P. 779, 35 Ariz. 87.
Cal.—Takahashi v. White Truck & Transfer Co., 59 P.2d 161, 15 Cal. App.2d 107.
Fla.—Powell v. Gary, 200 So. 854.
Iowa.—Chilcote v. Chicago & N. W. R. Co., 221 N.W. 771, 774, 206 Iowa 1093, citing **Corpus Juris.**
Md.—State, for Use of Emerson, v. Poe, 190 A. 231, 171 Md. 584.
N.Y.—Cannarozzo v. New York State Rys., 215 N.Y.S. 156, 216 App.Div. 243.
Okl.—Kugler v. White, 216 P. 903, 91 Okl. 130.
Pa.—Ealy v. New York Cent. R. Co., 5 A.2d 110, 333 Pa. 471—Zotter v. Lehigh Valley R. Co., 124 A. 284, 280 Pa. 14—Craft v. Hines, 116 A. 379, 272 Pa. 499.
Tenn.—Atkins v. Smith, 9 Tenn.App. 212.
Va.—Virginian Ry. Co. v. Haley, 157 S.E. 776, 156 Va. 350—Cooper v. Southern Ry. Co., 149 S.E. 444, 153 Va. 93.
Wis.—McMillan v. Chicago, M. & St. P. Ry. Co., 191 N.W. 510, 179 Wis. 323.
23 C.J. p 40 note 66—52 C.J. p 443 note 83.
Proof of negative facts see supra § 1025.
Relevancy and materiality of negative evidence generally see supra § 165.
Weight of positive and negative testimony as to unsworn statements see supra § 267.

"Negative testimony relates only to the testimony of a witness who had an opportunity to see an occurrence, testified by some other witness to have taken place, that he did not see it, or of one who had an opportunity to hear or know of an occurrence testified positively by some other witness to have happened, that he did not hear it or recollect it."—Suick v. Krom, 177 N. W. 20, 21, 171 Wis. 254.

Negative testimony as to sight
Testimony that witnesses did not see an object is no less negative testimony than testimony that they did not hear noises.—Fraser v. State, 182 N.Y.S. 491, 112 Misc. 19.

17. Ill.—Barnett v. Chicago City R. Co., 167 Ill.App. 87.

18. Tex.—Markusfeld v. Zahn, Civ. App., 99 S.W.2d 438, error dismissed.

servation testifies that he was attentive but did not see or hear a certain thing, his testimony is sometimes regarded as negative testimony,[19] although it is not of a purely negative character.[20] On the other hand, testimony of a witness that he did not see or hear something which he would have seen or heard had it occurred has been regarded as positive testimony,[21] although the witness admitted that he was not paying particular attention.[22]

A distinction must be made between testimony which is negative in form and that which is negative in character;[23] so testimony may be positive in character even though it amounts to a negative statement or tends to show a negative situation,[24]

Utah.—Jensen v. Oregon Short Line R. Co., 204 P. 101, 59 Utah 367.
23 C.J. p 41 note 68.

19. Md.—Travelers' Ins. Co. of Hartford, Conn., v. Fox, 141 A. 547, 155 Md. 210.
Miss.—Yazoo & M. V. R. Co. v. Beasley, 130 So. 499, 158 Miss. 370.
Mo.—Sing v. St. Louis-San Francisco Ry. Co., 30 S.W.2d 37.
Utah.—Jensen v. Oregon Short Line R. Co., 204 P. 101, 59 Utah 367.
23 C.J. p 41 note 69.

20. Kan.—Davis v. Atchison, T. & S. F. Ry. Co., 9 P.2d 990, 135 Kan. 96.
Md.—Travelers' Ins. Co. of Hartford, Conn., v. Fox, 141 A. 547, 155 Md. 210.
23 C.J. p 41 note 70.

21. Mass.—Shwartz v. Feinberg, 28 N.E.2d 249, 306 Mass. 331—Cairney v. Cook, 165 N.E. 406, 266 Mass. 279—Hough v. Boston Elevated Ry. Co., 159 N.E. 526, 262 Mass. 91.
Minn.—Perkins v. Chicago, M. & St. P. Ry. Co., 197 N.W. 758, 158 Minn. 184.
Or.—Lovett v. Gill, 20 P.2d 1070, 142 Or. 534.
Pa.—Mellon v. Lehigh Valley R. Co., 127 A. 444, 282 Pa. 39.
Va.—Chesapeake & O. R. Co. v. Jacobs, 183 S.E. 221, 166 Va. 11—White v. Southern Ry. Co., 144 S.E. 424, 151 Va. 302—Southern Ry. Co. v. Bryant's Adm'r, 23 S.E. 183, 95 Va. 215.
23 C.J. p 41 note 71—60 C.J. p 587 note 70.

Train signals

Where witnesses had good opportunity to hear train signals, and circumstances were such it was probable they would have heard them, had their attention been drawn to matter, their testimony that signals were not given was positive.—Virginian Ry. Co. v. Haley, 157 S.E. 776, 156 Va. 350.

Turning signal

"We do not see what more the driver of a vehicle in the rear of another can say than that he did not see a turning signal, if one was not given, and where he was alert to observe such notice . . . under such circumstances, the testimony is more than negative."—Nold v. Higgins Lumber Co., 119 A. 919, 920, 276 Pa. 195.

22. Mich.—Lonis v. Lake Shore & M. S. R. Co., 69 N.W. 642, 11[?] Mich. 458.

23. Okl.—Sand Springs Ry. Co. v McWilliams, 38 P.2d 539, 170 Okl 85—St. Louis-S. F. R. Co. v. Russell, 266 P. 763, 130 Okl. 237.
Wis.—Suts v. Chicago & N. W. Ry. Co., 234 N.W. 715, 203 Wis. 532—Richter v. Dahlman & Inbush Co., 190 N.W. 841, 179 Wis. 7, 30 A.L.R. 747.

"We do not see that the testimony on behalf of defendant is negative merely because its witnesses deny that something happened."—Franklin v. New Orleans Public Service, La. App., 187 So. 126, 130.

Absence of indication of fire

Testimony of plaintiff's witnesses in action against railway company for damages by fire that they looked toward place of origin of fire, but saw no evidence thereof until after train passed, when they observed fire, held negative in form but positive in character.—Hicks v. Chicago & N. W. Ry. Co., 255 N.W. 73, 215 Wis. 462.

24. Kan.—Kansas City, F. S. & G. R. Co. v. Lane, 7 P. 587, 33 Kan. 702.
Minn.—Perkins v. Chicago, M. & St. P. Ry. Co., 197 N.W. 758, 158 Minn. 184.
Mo.—Poehler v. Lonsdale, App., 129 S.W.2d 59—Fritz v. Manufacturers Ry. Co., App., 124 S.W.2d 603.
N.H.—Stinson v. Maine Cent. R. Co., 128 A. 562, 81 N.H. 473.
N.J.—Reiman v. Essex Chair Co., 159 A. 675, 10 N.J.Misc. 518.
Okl.—Kugler v. White, 216 P. 903, 91 Okl. 130.
Va.—Southern Ry. Co. v. Berry, 1 S.E.2d 261, 172 Va. 266.
Wis.—Hicks v. Chicago & N. W. Ry. Co., 255 N.W. 73, 215 Wis. 462—Suts v. Chicago & N. W. Ry. Co., 234 N.W. 715, 203 Wis. 532.
23 C.J. p 41 note 73—52 C.J. p 444 note 87.

The presence of the word "not" in the statement of a witness does not necessarily make his testimony negative, as respects the weight to be given to it; so a statement that "I did not have any packages at all," could not be characterized as negative testimony.—Cado v. Many, La. App., 180 So. 185, 186.

Denial of happening

"The witnesses on behalf of plaintiff state that the bus moved and the witnesses on behalf of the defendant state that it did not move. We do not see that the testimony on behalf of defendant is negative merely because its witnesses deny that something happened."—Franklin v. New Orleans Public Service, La. App., 187 So. 126, 130.

Physician's testimony that a compensation claimant was not suffering permanent disability as the result of an accident is positive.—Walker v. U. S. Fidelity & Guaranty Co., 13 S.E. 2d 526, 64 Ga.App. 459.

Occurrence in another's presence

"Where . . . one swears that a thing occurred in the presence of another and the other that it did not, the testimony of each is positive and not negative."—Pollard v. Todd, 8 S.E.2d 566, 571, 62 Ga.App. 251.

Failure to hear signal

(1) "Evidence that one did not hear a signal given when he was in a position to hear and could have heard had it been given is not purely negative in character, but is a positive statement of a fact. The value of such testimony depends upon whether the witness was in a position to hear, and the amount of attention he gave the giving of signals."—Sand Springs Ry. Co. v. McWilliams, 38 P.2d 539, 541, 170 Okl. 85—St. Louis-S. F. R. Co. v. Russell, 266 P. 763, 765, 130 Okl. 237.

(2) Automobilist's testimony that he did not hear a locomotive whistle, although he listened for a signal, is affirmative testimony, authorizing finding that whistle was not given or not heard.—State v. Norfolk & W. Ry. Co., 135 A. 827, 151 Md. 679.

Failure to see fire

Testimony that fire, allegedly visible three miles away, was not seen by persons who walked within several feet of place involved, although negative in form, is positive, not negative, in character.—Suts v. Chicago & N. W. Ry. Co., 234 N.W. 715, 203 Wis. 532.

Failure to receive notice

Testimony of banker concerning custom of sending notice to drawee on acceptance of draft held insufficient to overcome positive testimony of drawee that he did not receive notice.—Bank of Marianna v. Gandy, 139 So. 675, 19 La.App. 266.

Record showing omission of entries which would have appeared if

ınd if a witness who was in a position to observe estifies not merely that he did not see or hear, but hat the event did not occur, this is clearly positive estimony.[25] Testimony that signals were given, but ıot at the point specified by statute, is not negative, vithin the rule as to the comparative weight of posiive and negative testimony.[26]

Where a witness describes a fact observed by him nd an opposing witness describes the same fact ifferently, the testimony of both is equally posiive.[27] Testimony as to the absence of any record f a particular marriage from the records is negaive in character.[28]

b. Weight of Negative Evidence Generally

The common view is that negative evidence is not necessarily without probative value. Such value depends largely on circumstances, and in particular on whether the witness was paying attention to what occurred and had an opportunity to observe; and such value disappears where the negative statement is incredible in the face of the physical facts.

The negative character of evidence has been said to affect its weight and sufficiency.[29] While there have been statements to the effect that negative evidence is entitled to no weight,[30] the more common view is that it is not necessarily destitute of probative value,[31] but is entitled to consideration,[32] and,

ransactions were had is some evidence supporting positive evidence rhich negatives actuality of transacons.—Nix v. Armour Fertilizer Vorks, 151 S.E. 561, 40 Ga.App. 745.

5. U.S.—Romeo v. Campbell, C.C. A.N.Y., 35 F.2d 704.
:an.—Kansas City, F. S. & G. R. Co. v. Lane, 7 P. 587, 33 Kan. 702.
.H.—Fraser v. Berlin St. Ry., 146 A. 714, 84 N.H. 107.
kl.—Kugler v. White, 216 P. 903, 91 Okl. 130.
a.—White v. Southern Ry. Co., 144 S.E. 424, 151 Va. 302—Southern Ry. Co. v. Bryant's Adm'r, 28 S.E. 183, 95 Va. 215.
ı C.J. p 41 note 74.

In a slander action, testimony of itnesses who testified positively ıat defendant did not speak the ords charged is not negative tesmony.—Suick v. Krom, 177 N.W. ı, 171 Wis. 254.

ondition of floor

"The testimony of plaintiff and her itness in saying that the floor was ippery and that there was oil or 'ease on it, is no more positive than the statement of the defendant's itnesses to the effect that the floor as not slippery and did not conin oil or grease. . . . Defendıt's witnesses did not say that they d not see any oil or grease on the ·or, as would have been the case if eir testimony had been negative, t, on the contrary, they said that ere was no oil or grease there."—'eeves v. S. H. Kress & Co., La.App., 8 So. 171, 173.

. N.J.—Palumbo v. Pennsylvania R. Co., 159 A. 322, 10 N.J.Misc. 204.

. Iowa.—Marshall Dental Mfg. Co. v. Harkenson, 50 N.W. 559, 84 Iowa 117.
C.J. p 42 note 75.

Mass.—Riley v. Murphy, 164 N. E. 608, 265 Mass. 420.

Cal.—Exposito v. United Rail·oads of San Francisco, 183 P. 576, ı2 Cal.App. 320.

"Affirmative acts cannot be proved by mere negative testimony."—Merry Maid Mfg. Co. v. Lucy Lane Frock, 248 N.Y.S. 370, 372, 231 App. Div. 639.

30. Ill.—Farrand v. Yates, 249 Ill. App. 180.
Mass.—Rizzittelli v. Vestine, 141 N. E. 110, 246 Mass. 391.
N.J.—Vincze v. New York Cent. R. Co., 157 A. 159, 9 N.J.Misc. 1089.
Okl.—Lauderdale v. O'Neill, 177 P. 113, 74 Okl. 119.
Or.—Lauderback v. Multnomah County, 226 P. 697, 111 Or. 681.
Va.—Johnson v. Richmond, F. & P. R. Co., 169 S.E. 603, 160 Va. 766 —Norfolk & W. Ry. Co. v. Eley, 162 S.E. 3, 157 Va. 568—White v. Southern R. Co., 144 S.E. 424, 151 Va. 302.

Discredited evidence

Evidence which generally and categorically denies the existence of a fact may be so discredited or may so discredit itself as to destroy its probative value.—Kazdan v. Stein, 160 N.E. 704, 118 Ohio St. 217, affirming 160 N.E. 506, 26 Ohio App. 455.

31. Ala.—Mobile & O. R. Co. v. Davis, 137 So. 525, 223 Ala. 600.
Iowa.—Finley v. Lowden, 277 N. W. 487, 224 Iowa 999—Chilcote v. Chicago & N. W. R. Co., 221 N.W. 771, 206 Iowa 1093.
Ky.—Nashville, C. & St. L. Ry. v. Byars, 25 S.W.2d 733, 233 Ky. 309.
Md.—Travelers' Ins. Co. of Hartford, Conn., v. Fox, 141 A. 547, 155 Md. 210.
Mo.—Sharber v. National Life & Accident Ins. Co. of Nashville, Tenn., App., 226 S.W. 267.
N.C.—K. B. Johnson & Sons v. Southern Ry. Co., 199 S.E. 704, 214 N.C. 484.
R.I.—Little v. Rubin, 6 A.2d 683.
23 C.J. p 44 note 86.

"'Negative evidence' does not amount to no evidence at all; otherwise the term would be a misnomer. And jurors are not obliged to discard it merely because of the existence of positive evidence in conflict therewith."—Pollard v. Gorman, 182 S.E. 678, 681, 52 Ga.App. 127—Georgia R. & Banking Co. v. Wallis, 116 S.E. 883, 887, 29 Ga.App. 706.

Negative "evidence, when properly supported by circumstances, may run through 'all degrees of credibility.'"—Carruthers v. Atlantic & Yadkin Ry. Co., 9 S.E.2d 498, 500, 218 N.C. 49, annulled on other grounds 11 S.E.2d 157, 218 N.C. 377.

Ringing of train bell

That one in position to hear train bell did not hear it is some evidence that it was not rung.—Mobile & O. R. Co. v. Davis, 137 So. 525, 223 Ala. 600.

32. U.S.—Chicago & N. W. Ry. Co. v. Andrews, Iowa, 130 F. 65, 64 C.C.A. 399, certiorari denied 25 S. Ct. 787, 195 U.S. 628, 49 L.Ed. 351 —Thurlow v. U. S., D.C.Mass., 295 F. 905—Norfolk Southern R. Co. v. Stricklin, D.C.N.C., 264 F. 546.
Ind.—Bartley v. Chicago & E. I. Ry. Co., 24 N.E.2d 405.
Iowa.—Oelke v. Howey, 232 N.W. 666, 210 Iowa 1296.
Ky.—Louisville & N. R. Co. v. Ratliff's Adm'r, 85 S.W.2d 1006, 260 Ky. 380—Nashville, C. & St. L. Ry. v. Byars, 25 S.W.2d 733, 233 Ky. 309.
La.—Ogden v. Rosedale Inn, App., 189 So. 162.
Md.—Travelers' Ins. Co. of Hartford, Conn., v. Fox, 141 A. 547, 155 Md. 210—Sudbrook v. State, 138 A. 12, 153 Md. 194.
Mo.—Detchemendy v. Wells, App., 253 S.W. 150.
N.Y.—Cannarozzo v. New York State Rys., 215 N.Y.S. 156, 216 App.Div. 243.
N.C.—Johnson v. Atlantic Coast Line R. Co., 170 S.E. 120, 205 N.C. 127.
Pa.—Klein v. F. W. Woolworth Co., 163 A. 532, 309 Pa. 320—Gruber v. Hays, 124 A. 688, 280 Pa. 489—Chitwood v. Philadelphia & R. Ry. Co., 109 A. 645, 266 Pa. 435—Peruzzi v. Pennsylvania R. Co., 99 Pa. Super. 519.
R.I.—Little v. Rubin, 6 A.2d 683.
W.Va.—Cavendish v. Chesapeake & O.

where the facts justify it, is substantive evidence of a fact,[33] and may be sufficient to raise or establish an issue or support a finding.[34] Its probative force depends largely on circumstances,[35] and more particularly on the likelihood that the witnesses would

Ry. Co., 121 S.E. 498, 95 W.Va. 490.

23 C.J. p 44 note 87.

"In the majority of negligence cases plaintiff must establish that the defendant did not perform some act or did not do some thing which it was his duty to do or perform in the observance of due care. 'In following out this distinction courts have sometimes overlooked the fundamental fact that in such a case the plaintiff is necessarily confined to negative evidence. If such evidence is unworthy of belief simply because it is negative, then the plaintiff must nearly always fail.' Chicago, R. I. & P. R. Co. v. Stepp, 8 Cir., 164 F. 785, 787, 22 L.R.A.,N.S., 350."—Carruthers v. Atlantic & Yadkin Ry. Co., 9 S.E.2d 498, 500, 218 N.C. 49, annulled on other grounds 11 S.E.2d 157, 218 N.C. 377.

Inability to fix time of accident

Jury has right to believe statement of witness that he did not hear automobile siren, notwithstanding his inability to fix time of accident.—City of Sacramento v. Hunger, 249 P. 223, 79 Cal.App. 234.

33. Mo.—Sing v. St. Louis-San Francisco Ry. Co., 30 S.W.2d 37.

Time of sounding whistle

Testimony that railroad's witness did not hear whistle until after train passed whistling post held substantive evidence that whistle was not sounded at least eighty rods from crossing.—Sing v. St. Louis-San Francisco Ry. Co., supra.

Nonexistence of fact

"Evidence of failure to see or hear is in some circumstances substantial evidence of the nonexistence of the fact."—Norfolk & W. Ry. Co. v. Collingsworth, C.C.A.Ohio, 52 F.2d 827, 828.

34. U.S.—Flannery v. New York, O. & W. R. Co., C.C.A.N.Y., 29 F.2d 18.

Cal.—Takahashi v. White Truck & Transfer Co., 59 P.2d 161, 15 Cal. App.2d 107—Rogers v. City of Los Angeles, 44 P.2d 465, 6 Cal.App.2d 294—Gialdini v. Russell, 25 P.2d 845, 134 Cal.App. 524—Badostain v. Pacific Electric Ry. Co., 256 P. 576, 83 Cal.App. 290.

Miss.—St. Louis & S. F. Ry. Co. v. Nichols, 138 So. 364, 161 Miss. 795.

Mo.—Connole v. Illinois Cent. R. Co., App., 21 S.W.2d 907.

Mont.—Sullivan v. Northern Pac. Ry. Co., 94 P.2d 651, 109 Mont. 93—Rau v. Northern Pac. Ry. Co., 289 P. 580, 87 Mont. 521—Grant v. Chicago, M. & St. P. Ry. Co., 252 P. 382, 78 Mont. 97.

Tex.—Jameson v. Farmers' State Bank of Burkburnett, Civ.App., 299 S.W. 458, affirmed Farmers' State Bank of Burkburnett v. Jameson, Com.App., 11 S.W.2d 299, rehearing denied 16 S.W.2d 526.

Proof of negative facts see supra § 1025.

Failure to show rear light on a vehicle.—Linde v. Emmick, 61 P. 2d 338, 16 Cal.App.2d 676.

Failure to sound auto horn

Mass.—Cairney v. Cook, 165 N.E. 406, 266 Mass. 279.

Failure to sound street-car signal

Cal.—Keena v. United Railroads of San Francisco, 239 P. 1061, 197 Cal. 148—Carey v. Pacific Gas & Electric Co., 242 P. 97, 75 Cal.App. 129.

Mass.—McBride v. Middlesex & B. St. Ry. Co., 176 N.E. 185, 276 Mass. 29.

Mont.—McManus v. Butte Electric Ry. Co., 219 P. 241, 68 Mont. 379.

Failure to give train signals

(1) "Negative evidence . . . is usually the only method of proving the failure of a railway company to give signals."—Bartley v. Chicago & E. I. Ry. Co., Ind., 24 N.E.2d 405, 409.

(2) "The failure to ring the bell might never be proven, if proof that witnesses were in a position to hear, and that they did not hear it ring, is not to be accepted."—Kugler v. White, 216 P. 903, 908, 91 Okl. 130.

(3) Failure held shown.

Cal.—Cooper v. Southern Pac. Co., App., 111 P.2d 689—Lahey v. Southern Pac. Co., 61 P.2d 461, 16 Cal. App.2d 652, certiorari denied Southern Pac. Co. v. Lahey, 57 S.Ct. 508, 300 U.S. 665, 81 L.Ed. 873—Vaca v. Southern Pac. Co., 267 P. 346, 91 Cal.App. 470.

Ga.—Climer v. Southern Ry. Co., 159 S.E. 782 (first case), 43 Ga.App., 650, followed in 159 S.E. 782 (second case), 43 Ga.App. 651.

Ind.—Pennsylvania Co. v. Clark, 133 N.E. 588, 191 Ind. 470, transferred, see, App., from appellate court 128 N.E. 629.

Mass.—Klegerman v. New York, N. H. & H. R. Co., 195 N.E. 341, 290 Mass. 268.

"That a bell or a whistle was not sounded is a negative fact which may be established by negative evidence."—Crossno v. Terminal R. Ass'n of St. Louis, 41 S.W.2d 796, 800, 328 Mo. 826.

Negative testimony held insufficient to raise or support an issue.

U.S.—Norfolk Southern R. Co. v. Stricklin, D.C.N.C., 264 F. 546.

Ala.—Hestle v. Louisville & N. R. Co., 81 So. 149, 16 Ala.App. 657.

La.—Ogden v. Rosedale Inn, App., 189 So. 162.

Mass.—Cross v. Albee, 145 N.E. 45, 250 Mass. 170.

N.H.—Allison v. Boston & M. R. R., 190 A. 127, 88 N.H. 420.

N.C.—Justice v. Southern Ry. Co., 13 S.E.2d 553, 219 N.C. 273.

Pa.—Ealy v. New York Cent. R. Co., 5 A.2d 110, 333 Pa. 471.

Tex.—Fort Worth Independent School Dist. v. Hodge, Civ.App., 96 S.W.2d 1113.

Direct evidence negativing charge must control over mere conjecture.—Mueller Furniture Co. v. Citizens' Telephone Co., 203 N.W. 129, 230 Mich. 173.

Failure to remember receipt of letter

The mere fact that the addressee of a letter properly stamped and addressed does not remember of receiving it is no evidence that he did not receive it.—Reid v. Holcomb, 218 P. 76, 63 Cal.App. 89.

35. Colo.—Colorado & S. Ry. Co. v. Honaker, 19 P.2d 759, 92 Colo. 239.

Mass.—Hough v. Boston Elevated Ry. Co., 159 N.E. 526, 262 Mass. 91.

Minn.—Franklin v. Minneapolis, St. P. & S. S. M. Ry. Co., 229 N.W. 797, 179 Minn. 480.

Mont.—Sullivan v. Northern Pac. Ry. Co., 94 P.2d 651, 109 Mont. 93—Rau v. Northern Pac. Ry. Co., 289 P. 580, 87 Mont. 521—Grant v. Chicago, M. & St. P. Ry. Co., 252 P. 382, 78 Mont. 97.

N.C.—K. B. Johnson & Sons v. Southern Ry. Co., 199 S.E. 704, 214 N.C. 484.

Tenn.—Atkins v. Smith, 9 Tenn.App. 212.

W.Va.—Jones v. Virginian Ry. Co., 177 S.E. 621, 115 W.Va. 665—Cavendish v. Chesapeake & O. Ry. Co., 121 S.E. 498, 95 W.Va. 490.

"Negative evidence is only a species of circumstantial evidence."—Georgia R. & Banking Co. v. Wallis, 116 S.E. 883, 887, 29 Ga.App. 706.

"In some circumstances, its probative force may be so slight as to reach the vanishing point; in other circumstances, such testimony may be more persuasive than the positive testimony of some witnesses. It is only when it is so clear that such testimony has no probative value whatever that reasonable men would not differ in their conclusions with reference thereto that courts are justified in disregarding it on the ground that it does not rise to the dignity of evidence."—Colorado & S. Ry. Co. v. Honaker, 19 P.2d 759, 763, 92 Colo. 239.

have observed the fact had it occurred,[36] and on the question whether the witness was paying attention to what occurred, as by listening for signals, and was in a position, or had a reasonable opportunity, to observe;[37] and such probative force is, of course, reduced to absolute zero where the fact might reasonably have occurred without being observed by or known to the witness,[38] or where his negative statement is incredible in the face of the physical facts and circumstances, as where he claims to have paid attention and yet not to have seen or heard something which he must have observed had he

36. U.S.—Bergman v. Northern Pac. Ry. Co., C.C.A.Minn., 14 F.2d 580—Lehigh Valley R. Co. v. Mangan, C.C.A.N.Y., 278 F. 85—Chicago & N. W. Ry. Co. v. Andrews, Iowa, 130 F. 65, 64 C.C.A. 399, certiorari denied 25 S.Ct. 787, 195 U.S. 628, 49 L.Ed. 351.
Cal.—Thompson v. Los Angeles & S. D. B. Ry. Co., 134 P. 709, 165 Cal. 748—Lahey v. Southern Pac. Co., 61 P.2d 461, 16 Cal.App.2d 652, certiorari denied Southern Pac. Co. v. Lahey, 57 S.Ct. 508, 300 U. S. 665, 81 L.Ed. 873—Lindsey v. Pacific Electric R. Co., 296 P. 131, 111 Cal.App. 482.
Ga.—Southern Ry. Co. v. Riley, 4 S. E.2d 54, 60 Ga.App. 475.
Idaho.—Kerby v. Oregon Short Line R. Co., 264 P. 377, 45 Idaho 636.
Iowa.—Chilcote v. Chicago & N. W. R. Co., 221 N.W. 771, 206 Iowa 1093.
Md.—Travelers' Ins. Co. of Hartford, Conn., v. Fox, 141 A. 547, 155 Md. 210.
Mich.—Lambert v. Minneapolis, St. P. & S. S. M. Ry. Co., 176 N.W. 453, 209 Mich. 107.
Minn.—Lawson v. Minneapolis, St. P. & S. S. M. Ry. Co., 219 N.W. 554, 174 Minn. 404.
Miss.—St. Louis & S. F. Ry. Co. v. Nichols, 138 So. 364, 161 Miss. 795.
Mo.—Rosanbalm v. Thompson, App., 148 S.W.2d 830—Connole v. Illinois Cent. R. Co., App., 21 S.W.2d 907.
Mont.—Sullivan v. Northern Pac. Ry. Co., 94 P.2d 651, 109 Mont. 93—In re Silver's Estate, 38 P.2d 277, 98 Mont. 141—Rau v. Northern Pac. Ry. Co., 289 P. 580, 87 Mont. 521.
Neb.—Oliver v. Union Pac. R. Co, 179 N.W. 1017, 105 Neb. 243—Dodds v. Omaha & C. B. St. Ry. Co., 178 N.W. 258, 104 Neb. 692.
N.C.—K. B. Johnson & Sons v. Southern Ry. Co., 199 S.E. 704, 214 N.C. 484
Or.—Lauderback v. Multnomah County, 226 P. 697, 111 Or. 681.
Pa.—Wetherill v. Showell, Fryer & Co., 107 A. 808, 264 Pa. 449—Venchik v. Pennsylvania R. Co., 18 A.2d 118, 143 Pa.Super. 438.
Tex.—Hines v. Roan, Civ.App., 230 S.W. 1070.
Va.—White v. Southern Ry. Co., 144 S.E. 424, 151 Va. 302.
W.Va.—Jones v. Virginian Ry. Co., 177 S.E. 621, 115 W.Va. 665—Cavendish v. Chesapeake & O. Ry. Co., 121 S.E. 498, 95 W.Va. 490.
23 C.J. p 44 note 88—52 C.J. p 444 notes 89, 90.

37. U.S.—Bergman v. Northern Pac. Ry. Co., C.C.A.Minn. 14 F.2d 580—Lehigh Valley R. Co. v. Mangan, C.C.A.N.Y., 278 F. 85—The Melbourn P. Smith, D.C.Va., 256 F. 45, affirmed, C.C.A., The Ontario, 264 F. 1021—Brigham v. Luckenbach, D.C.Me., 140 F. 322—Chicago & N. W. Ry. Co. v. Andrews, Iowa, 130 F. 65, 64 C.C.A. 399, certiorari denied 25 S.Ct. 787, 195 U. S. 628, 49 L.Ed. 351.
Ala.—Nashville, C. & St. L. Ry. v. Prince, 103 So. 463, 212 Ala. 499.
Cal.—Cooper v. Southern Pac. Co., App., 111 P.2d 689—Lahey v. Southern Pac. Co., 61 P.2d 461, 16 Cal. App.2d 652, certiorari denied Southern Pac. Co. v. Lahey, 57 S.Ct. 508, 300 U.S. 665, 81 L.Ed. 873.
Fla.—Powell v. Gary, 200 So. 854—Seaboard Air Line R. Co. v. Myrick, 109 So. 193, 91 Fla. 918.
Ga.—Southern Ry. Co. v. Riley, 4 S. E.2d 54, 60 Ga.App. 475—Climer v. Southern Ry. Co., 159 S.E. 782 (first case), 43 Ga.App. 650, followed in 159 S.E. 782 (second case), 43 Ga. App. 651.
Idaho.—Kerby v. Oregon Short Line R. Co., 264 P. 377, 45 Idaho 636.
Ind.—Pennsylvania Co. v. Clark, 133 N.E. 588, 191 Ind. 470, transferred, see, App., 128 N.E. 629.
Iowa.—Lenning v. Des Moines & C. I. R. R., 227 N.W. 828, 209 Iowa 890—Bannister v. Illinois Cent. R. Co., 202 N.W. 766, 199 Iowa 657.
Ky.—Louisville R. Co. v. Sheehan, 142 S.W. 221, 146 Ky. 168.
La.—Mullens v. Vicksburg, S. & P. Ry. Co., 120 So. 122, 9 La.App. 232.
Mass.—Johnson v. Warner Bros. Circuit Management Corporation, 17 N.E.2d 147, 301 Mass. 348—Hough v. Boston Elevated Ry. Co., 159 N. E. 526, 262 Mass. 91—Gibb v. Hardwick, 135 N.E. 868, 241 Mass. 546.
Mich.—Lambert v. Minneapolis, St. P. & S. S. M. Ry. Co., 176 N.W. 453, 209 Mich. 107.
Minn.—Franklin v. Minneapolis, St. P. & S. S. M. Ry. Co., 229 N.W. 797, 179 Minn. 480—Lawson v. Minneapolis, St. P. & S. S. M. Ry. Co., 219 N.W. 554, 174 Minn. 404.
Mo.—Rosanbalm v. Thompson, App., 148 S.W.2d 830—Connole v. Illinois Cent. R. Co., App., 21 S.W.2d 907.
Mont.—Sullivan v. Northern Pac. Ry. Co., 94 P.2d 651, 109 Mont. 93—In re Silver's Estate, 38 P.2d 277, 98 Mont. 141—Rau v. Northern Pac. Ry. Co., 289 P. 580, 87 Mont. 521—Grant v. Chicago, M. & St. P. Ry. Co., 252 P. 382, 78 Mont. 97.
Neb.—De Griselles v. Gans, 219 N.W. 235, 116 Neb. 835—Oliver v. Union Pac. R. Co., 179 N.W. 1017, 105 Neb. 243—Dodds v. Omaha & C. B. St. Ry. Co., 178 N.W. 258, 104 Neb. 692.
N.H.—Gillingham v. Boston & M. R. R., 21 A.2d 174—Lavallee v. Boston & Maine R. R., 197 A. 816, 89 N.H. 323—Allison v. Boston & M. R. R., 190 A. 127, 88 N.H. 420—Collette v. Boston & M. R. R., 140 A. 176, 83 N.H. 210.
N.C.—K. B. Johnson & Sons v. Southern Ry. Co., 199 S.E. 704, 214 N.C. 484.
Okl.—Sand Springs Ry. Co. v. McWilliams, 38 P.2d 539, 170 Okl. 85—St. Louis-S. F. R. Co. v. Russell, 266 P. 763, 130 Okl. 237.
Or.—Lovett v. Gill, 20 P.2d 1070, 142 Or. 534.
Pa.—Ealy v. New York Cent. R. Co., 5 A.2d 110, 333 Pa. 471—Flanigan v. McLean, 110 A. 370, 267 Pa. 553—Wetherill v. Showell, Fryer & Co., 107 A. 808, 264 Pa. 449—Venchik v. Pennsylvania R. Co., 18 A. 2d 118, 143 Pa.Super. 438.
Tenn.—Atkins v. Smith, 9 Tenn.App. 212—Whitfield v. Loveless, 1 Tenn. App. 377.
Utah.—Anderson v. Union Pac. R. Co., 289 P. 146, 76 Utah 324.
Va.—White v. Southern Ry. Co., 144 S.E. 424, 151 Va. 302.
Wash.—Poland v. City of Seattle, 93 P.2d 379, 200 Wash. 208.
W.Va.—Jones v. Virginian Ry. Co., 177 S.E. 621, 115 W.Va. 665—Cavendish v. Chesapeake & O. Ry. Co., 121 S.E. 498, 95 W.Va. 490.

No conflict with positive testimony of persons favorably situated for hearing or seeing arises from the negative testimony of persons not so situated.
U.S.—Pere Marquette Ry. Co. v. Anderson, C.C.A.Ill., 29 F.2d 479, certiorari denied Anderson v. Pere Marquette Ry. Co., 49 S.Ct. 347, 279 U.S. 851, 73 L.Ed. 994—Bergman v. Northern Pac. Ry. Co., C.C.A.Minn., 14 F.2d 580.
Cal.—Hughes v. Atchison, T. & S. F. Ry. Co., 8 P.2d 853, 121 Cal.App. 271.

38. Iowa.—Chilcote v. Chicago & N. W R. Co., 221 N.W. 771, 206 Iowa 1093.
Tenn.—Atkins v. Smith, 9 Tenn.App. 212.
23 C.J. p 44 note 89.

paid attention.[39]

Negative testimony may constitute strong proof where positive evidence could hardly fail to exist if the fact actually occurred and none such is discovered,[40] and it may acquire great force from the neglect of the adverse party to call, or to explain the absence of, witnesses who know positively whether or not the fact in dispute occurred.[41] Prima facie evidence of consideration by acknowledgment thereof in a deed may be overcome by the purely negative testimony of a subscribing witness to the instrument.[42] The failure of records of a divorce case, introduced in evidence, to show that children had been born of the marriage has been held no evidence that none was born;[43] and the fact that there was no record in the county clerk's office of a marriage license about the date of an alleged marriage does not show that no such license had been issued, as it might have been issued, executed, and never returned, in which case no record would have appeared of such issuance.[44]

c. Comparative Weight of Positive and Negative Evidence

Other things, such as opportunity to observe and credibility of witnesses, being equal, greater weight should be given to positive than to negative evidence, even though the number of negative witnesses is larger; but if it appears that the attention of a negative witness was specially directed to the matter, or that he would, in the ordinary course of events, have observed the fact had it occurred, his testimony may be entitled to as much weight as opposing positive evidence, or even more.

Other things, such as opportunity to observe and the credibility of witnesses, being equal,[45] greater

39. U.S.—Baltimore & O. R. Co. v. Joseph, C.C.A.Ohio, 112 F.2d 518, certiorari denied 61 S.Ct. 551, 312 U.S. 682, 85 L.Ed. 1121, rehearing denied 61 S.Ct. 710, 312 U.S. 714, 85 L.Ed. 1144—Bash v. Baltimore & O. R. Co., C.C.A.Pa., 102 F.2d 48—McNabb v. Virginian Ry. Co., C.C.A.W.Va., 55 F.2d 137.
Ark.—Ball v. Hall, 118 S.W.2d 668, 196 Ark. 491.
Conn.—Roden v. Connecticut Co., 155 A. 721, 113 Conn. 408.
Ill.—Overstreet v. Illinois Power & Light Corporation, 190 N.E. 676, 356 Ill. 378.
Iowa.—Bowermaster v. Universal Producing Co., 266 N.W. 503, 221 Iowa 831—Shepherd v. Bremner, 260 N.W. 48, 220 Iowa 1.
Md.—Weinstein v. Meyer, 191 A. 238, 172 Md. 233—Weissman v. Hokamp, 188 A. 923, 189 A. 813, 171 Md. 197—Miller v. City of Baltimore, 157 A. 289, 161 Md. 312—United Rys. & Electric Co. of Baltimore v. Sherwood Bros., 157 A. 280, 161 Md. 304—Baltimore & O. R. Co. v. Bruchy, 155 A. 346, 161 Md. 175—Gitomir v. United Rys. & Electric Co. of Baltimore City, 146 A. 279, 157 Md. 464—Askin v. Moulton, 131 A. 82, 149 Md. 140—Baltimore & O. R. Co. v. Newton, 111 A. 481, 137 Md. 21—Maryland Electric Ry. Co. v. Beasley, 83 A. 157, 117 Md. 270—Baltimore Traction Co. v. Helms, 36 A. 119, 84 Md. 515, 36 A.L.R. 215.
Mich.—Goldman v. Grand Trunk Western Ry. Co., 283 N.W. 583, 287 Mich. 289—Heintzelman v. Pennsylvania R. Co., 245 N.W. 548, 260 Mich. 688—Richman v. Detroit, G. H. & M. Ry. Co., 236 N.W. 878, 254 Mich. 607.
Minn.—Jensen v. Minneapolis, St. P. & S. S. M. Ry. Co., 191 N.W. 908, 154 Minn. 414.
Mo.—State ex rel. Kansas City Southern Ry. Co. v. Shain, 105 S.W.2d 915, 340 Mo. 1195, quashing, Adams v. Kansas City Southern Ry. Co., App., 83 S.W.2d 913—Monroe v. Chicago & A. R. Co., 249 S.W. 644, 257 S.W. 469, 297 Mo. 633—Brown v. Alton R. Co., App., 151 S.W.2d 727—Rohmann v. City of Richmond Heights, App., 135 S.W.2d 378—Brown v. Alton R. Co., App., 132 S.W.2d 713, record quashed on other grounds State ex rel. Alton R. Co. v. Shain, Sup., 143 S.W.2d 233—Weishaar v. Kansas City Public Service Co., App., 128 S.W.2d 332—March v. Pitcairn, App., 125 S.W.2d 972—Robertson v. Atchison, T. & S. F. Ry. Co., App., 105 S.W.2d 996—Murphy v. Quick Tire Service, App., 47 S.W.2d 202.
N.H.—Brown v. Mailhot, 196 A. 764, 89 N.H. 240.
N.Y.—Weigand v. United Traction Co., 116 N.E. 345, 221 N.Y. 39—Quinn v. Union Ry. Co. of New York City, 234 N.Y.S. 722, 134 Misc. 188—Wass v. Western Union Telegraph Co., 10 N.Y.S.2d 956.
N.C.—Harrison v. North Carolina R. Co., 140 S.E. 598, 194 N.C. 656.
Pa.—Glancy v. Meadville Bread Co., 17 A.2d 395, 340 Pa. 452—Haskins v. Pennsylvania R. Co., 143 A. 192, 293 Pa. 537—Horen v. Davis, 118 A. 22, 274 Pa. 244—Spear & Co. v. Altmyer, 187 A. 309, 124 Pa.Super. 9—Newman v. Reinish, 163 A. 58, 106 Pa.Super. 351—Tulli v. Holt, 30 Del.Co. 149—Teel v. Erie Coach Co., 21 Erie Co. 82.
R.I.—Keenan v. Providence Journal Co., 157 A. 302, 52 R.I. 54.
Va.—Johnson v. Richmond, F. & P. R. Co., 169 S.E. 603, 160 Va. 766.
Wash.—Cronin v. Shell Oil Co., 112 P.2d 824—Poland v. City of Seattle, 93 P.2d 379, 200 Wash. 208—Proper v. Brenner, 71 P.2d 389, 191 Wash. 540.
Wis.—Szewczyk v. Milwaukee Electric Ry. & Light Co., 247 N.W. 854, 211 Wis. 265—Brown v. Haertel, 244 N.W. 630, 210 Wis. 345—Schroeder v. Wisconsin Cent. R. Co., 93 N.W. 837, 117 Wis. 33.
23 C.J. p 44 note 90—70 C.J. p 780 note 5.
Incredibility of testimony as bearing on credibility of witnesses generally see the C.J.S. title Witnesses § 468, also 70 C.J. p 777 note 85—p 782 note 9.

Lookout by engineer

Evidence of an engineer that he kept a vigilant lookout, under conditions where such lookout would discover man on track, is evidence that he did discover him although he may also testify that he did not.—Central of Georgia Ry. Co. v. Lee, 151 So. 840, 227 Ala. 661.

Testimony held not unbelievable as to failure to hear or see train.
Md.—State v. Norfolk & W. Ry. Co., 135 A. 827, 151 Md. 679.
Mo.—Henry v. Illinois Cent. R. Co., 3 S.W.2d 1004, 319 Mo. 432—Poehler v. Lonsdale, App., 129 S.W.2d 59.

40. U.S.—Fisher v. Carter, C.C.Pa., 9 F.Cas.No.4,815, 1 Wall.Jr. 69.

41. Tex.—Jameson v. Farmers' State Bank of Burkburnett, Civ.App., 299 S.W. 458, affirmed Farmers' State Bank of Burkburnett v. Jameson, Com.App., 11 S.W.2d 299, rehearing denied 16 S.W.2d 526.
23 C.J. p 47 note 27.
Presumption from failure to call witnesses generally see supra § 156.

42. N.H.—Lyford v. Thurston, 16 N.H. 399.

43. Tenn.—Miller v. Gratz, App., 3 Tenn.App. 498.

44. Tex.—Wiess v. Hall, Civ.App., 135 S.W. 384.

45. Alaska.—The Commonwealth, 8 Alaska 23—Fairhaven Mining Co. v. Immachuck Dredging Co., 5 Alaska 462.

weight and probative value should be given to positive and affirmative evidence than to negative evidence;[46] in other words, the testimony of a witness who testifies positively that a certain fact existed, or an event occurred, is, generally speaking, entitled to more weight than the evidence of another witness who swears that the event did not occur, or that he did not observe its occurrence,[47] for it is

Kan.—Davis v. Atchison, T. & S. F. Ry. Co., 9 P.2d 990, 135 Kan. 96.
Ky.—Consolidated Coach Corporation v. Hopkins' Adm'r, 37 S.W.2d 1, 238 Ky. 136—Cabble v. Hawkins, 216 S.W. 345, 186 Ky. 114.
La.—Natal v. Louisiana & A. Ry. Co., 137 So. 600, 18 La.App. 50.
N.J.—Benton v. Kernan, 6 A.2d 195, 125 N.J.Eq. 412, modified on other grounds 8 A.2d 719, 126 N.J.Eq. 343.
N.C.—Johnson v. Atlantic Coast Line R. Co., 170 S.E. 120, 205 N.C. 127.
Vt.—Bennett v. Robertson, 177 A. 625, 107 Vt. 202, 98 A.L.R. 152.
Wis.—Richter v. Dahlman & Inbush Co., 190 N.W. 841, 179 Wis. 7, 30 A.L.R. 747—Suick v. Krom, 177 N.W. 20, 171 Wis. 254.
23 C.J. p 42 note 76—52 C.J. p 443 notes 81, 82.

Discrediting of witnesses
"It is a rule of law that negative testimony cannot outweigh positive testimony, especially where the witnesses are not impeached or otherwise discredited."—Heiman v. Pan American Life Ins. Co., 165 So. 195, 197, 183 La. 1045.

46. U.S.—Lancashire Shipping Co. v. Morse Dry Dock & Repair Co., C.C.A.N.Y., 48 F.2d 1077, affirming, D.C., 43 F.2d 750, and certiorari denied Morse Dry Dock & Repair Co. v. Lancashire Shipping Co., 52 S.Ct. 22, 284 U.S. 642, 76 L.Ed. 546—Window Glass Mach. Co. v. Pittsburgh Plate Glass Co., D.C. Pa., 46 F.2d 484, affirmed, C.C.A., 284 F. 645—Boone v. Equitable Holding Co., D.C.W.Va., 32 F.Supp. 896, reversed on other grounds, C. C.A., Beckley Nat. Bank v. Boone, 115 F.2d 513—New Jersey Zinc Co. v. Singmaster, D.C.N.Y., 4 F. Supp. 967, modified on other grounds, C.C.A., 71 F.2d 277, certiorari denied Singmaster v. New Jersey Zinc Co., 55 S.Ct. 106, 293 U.S. 591, 79 L.Ed. 685.
Ala.—Nashville C. & St. L. Ry. v. Prince, 103 So. 463, 465, 212 Ala. 499, citing **Corpus Juris.**
Alaska.—The Commonwealth, 8 Alaska 23—Fairhaven Mining Co. v. Immachuck Dredging Co., 5 Alaska 462.
Ariz.—Knapp v. Highway Department, 104 P.2d 180—Olive v. Industrial Commission of Arizona, 83 P. 2d 784, 52 Ariz. 460—Canion v. Southern Pac. Co., 80 P.2d 397, 52 Ariz. 245.
Cal.—Takahashi v. White Truck & Transfer Co., 59 P.2d 161, 15 Cal. App.2d 107—Beecher v. Stafford, 256 P. 870, 83 Cal.App. 408.
Ga.—Pollard v. Todd, 8 S.E.2d 566, 62 Ga.App. 251.
Idaho.—Young v. Herrington, 99 P.2d 441.
Ind.—Baltimore & O. R. Co. v. Reyher, 24 N.E.2d 284.
Iowa.—Oelke v. Howey, 232 N.W. 666, 210 Iowa 1296.
Kan.—Davis v. Atchison, T. & S. F. Ry. Co., 9 P.2d 990, 135 Kan. 96.
Ky.—Mann v. Phelps, 107 S.W.2d 288, 269 Ky. 493—Louisville & N. R. Co. v. Ratliff's Adm'r, 85 S.W.2d 1006, 260 Ky. 380—Cabble v. Hawkins, 216 S.W. 345, 186 Ky. 114.
La.—Fulton Bag & Cotton Mills v. Fernandez, App., 159 So. 339—Acres v. Monroe Transfer & Warehouse Co., App., 154 So. 385—Natal v. Louisiana & A. Ry. Co., 137 So. 600, 18 La.App. 50—Taylor v. Southern Engineering Const. Co., 125 So. 877, 13 La.App. 292—Ellington Sugars, Inc., v. Texas & P. Ry. Co., 8 La.App. 271.
Md.—Title Guaranty & Surety Co. v. Poe, 114 A. 481, 138 Md. 446.
N.J.—Benton v. Kernan, 13 A.2d 825, 127 N.J.Eq. 434, modified on other grounds 21 A.2d 755, 130 N.J.Eq. 193—Benton v. Kernan, 6 A.2d 195, 125 N.J.Eq. 412, modified on other grounds 8 A.2d 719, 126 N.J.Eq. 343.
N.Y.—Oneida, Limited, v. National Silver Co., 25 N.Y.S.2d 271.
N.C.—Cordell v. Brotherhood of Locomotive Firemen and Enginemen, 182 S.E. 141, 208 N.C. 632—Johnson v. Atlantic Coast Line R. Co., 170 S.E. 120, 205 N.C. 127.
Okl.—Oklahoma Union Ry. Co. v. Houk, 235 P. 499, 109 Okl. 187.
Pa.—Grimes v. Pennsylvania R. Co., 137 A. 451, 289 Pa. 320—Mack v. Atlantic City R. Co., 92 Pa.Super. 455.
Puerto Rico.—Javierre v. Fritze, Lundt & Co., 7 Puerto Rico Fed. 16.
Tenn.—Whitfield v. Loveless, 1 Tenn. App. 377.
Tex.—Le Master v. Fort Worth Transit Co., Civ.App., 142 S.W.2d 908, error granted—Hines v. Roan, Civ.App., 230 S.W. 1070.
Utah.—East Grouse Creek Water Co. v. Frost, 245 P. 338, 66 Utah 587.
Vt.—Bennett v. Robertson, 177 A. 625, 107 Vt. 202, 98 A.L.R. 152.
Wis.—In re Bailey's Estate, 238 N. W. 845, 205 Wis. 648—Suick v. Krom, 177 N.W. 20, 171 Wis. 254.
23 C.J. p 42 note 77—52 C.J. p 442 note 77—p 445 note 93.

Rule limited
"The evidence must be as to the actual existence of the disputed fact, to the sensory knowledge of the witness, and not as to his opinion as to the existence of the ultimate fact, based solely upon inferences drawn from an existing and admitted fact."—Olive v. Industrial Commission of Arizona, 83 P.2d 784, 785, 52 Ariz. 460.

Test
"In respect of whether positive testimony . . . may be overcome by 'negative testimony,' the test is always to be made with reference to the facts and circumstances surrounding the witness at the time of the accident or homicide, even though the witnesses be of equal credibility."—Pollard v. Todd, 8 S.E. 2d 566, 571, 62 Ga.App. 251.

Explanation of negative testimony
"Mere negative testimony, with no proper accompanying and explanatory reasons in support thereof, is of no value as against positive evidence that a certain fact existed."—Illinois Bankers' Life Ass'n v. Theodore, 34 P.2d 423, 428, 44 Ariz. 160.

Testimony as to things done by witness
Where the fact in issue is what was actually done by the witness, "the reason for applying the rule is stronger than if the issue was merely what was seen or heard, for to remember what one does is easier than to remember what one has seen or heard; what one has done is in the very nature of things impressed more indelibly on the doer's mind."—Fairhaven Mining Co. v. Immachuck Dredging Co., 5 Alaska 462, 464.

47. U.S.—The Fort St. George, D.C. N.Y., 22 F.2d 195, affirmed, C.C.A., 27 F.2d 788, certiorari denied Bermuda & West Indies S. S. Co. v. Oceanic Steam Nav. Co., 49 S.Ct. 179, 278 U.S. 654, 73 L.Ed. 564—Union Pac. R. Co. v. Gaede, C.C.A. Colo., 110 F.2d 931, reversing, D.C., Gaede v. Union Pac. R. Co., 28 F. Supp. 396—The Bowling Green, D. C.N.Y., 11 F.Supp. 109, affirmed, C. C.A., Cyarnikow Rionda Co. v. Ellerman & Bucknall S. S. Co., 81 F. 2d 1017—The San Simeon, D.C.N.Y., 1 F.Supp. 506, affirmed, C.C.A. 63 F.2d 798, certiorari denied Pacific Atlantic S. S. Co. v. Mooremack Gulf Lines, 54 S.Ct. 61, 290 U.S. 643, 78 L.Ed. 558—Thurlow v. U. S., D.C.Mass., 295 F. 905—The Melbourn P. Smith, D.C.Va., 256 F. 45, affirmed, C.C.A., The Ontario, 264 F. 1021.
Ariz.—Illinois Bankers' Life Ass'n v. Theodore, 34 P.2d 423, 44 Ariz. 160—Southern Pac. Co. v. Fisher, 274 P. 779, 35 Ariz. 87.

far more probable that the latter has forgotten the occurrence than that it should be distinctly impressed on the mind of the former if it never took place,[48] and the failure to observe may be attributable to want of attention or opportunity.[49] A fortiori, the testimony of a witness that he does not remember, or has no knowledge of, a particular matter has little or no weight as against the direct testimony of a witness who does remember the matter, or against other positive evidence;[50] testimony that an event occurred is not contradicted by a witness' testimony that he does not remember whether it occurred.[51] Where a positive witness would be guilty of perjury if his statement were found untrue, while a negative witness could be found honestly mistaken, the former's testimony should be accepted.[52]

The marked superiority of positive testimony is

Colo.—Globe Indemnity Co. v. Stenger, 256 P. 658, 82 Colo. 47.
Del.—Gray v. Pennsylvania R. Co., 139 A. 66, 3 W.W.Harr. 459.
Fla.—Powell v. Gary, 200 So. 854—Southern Ry. Co. v. Mann, 108 So. 889, 91 Fla 948.
Ga.—Pollard v. Todd, 8 S.E.2d 566, 62 Ga.App. 251.
Ill.—Wineland ex rel. Abeln v. M. Huber, Inc., 275 Ill.App. 264—Baker v. Illinois Cent. R. Co., 227 Ill.App. 101.
Kan.—Davis v. Atchison, T. & S. F. Ry. Co., 9 P.2d 990, 135 Kan. 96.
Ky.—Louisville & N. R. Co. v. Ratliff's Adm'r, 85 S.W.2d 1006, 260 Ky. 380—Consolidated Coach Corporation v. Hopkins' Adm'r, 37 S.W.2d 1, 3, 238 Ky. 136, citing **Corpus Juris**—Reed v. Flynn, 266 S.W. 644, 205 Ky. 783.
La.—Lusk v. U. S. Fidelity & Guaranty Co., App., 199 So. 666—Franklin v. New Orleans Public Service, App., 187 So. 126—Handy v. New Orleans Public Service, 120 So. 271, 10 La.App. 72—Richard v. Poitevent & Favre Lumber Co., 120 So. 235, 10 La.App. 608, rehearing denied 121 So. 357, 10 La.App. 608—Lanier v. Missouri Pac. R. Co., 119 So. 710, 9 La.App. 586.
Minn.—Franklin v. Minneapolis, St. P. & S. S. M. Ry. Co., 229 N.W. 797, 179 Minn. 480.
Miss.—Yazoo & M. V. R. Co. v. Lamensdorf, 177 So. 50, 180 Miss. 426, suggestion of error overruled 178 So. 80, 180 Miss. 426.
Mo.—Ingram v. Mobile & O. R. Co., 30 S.W.2d 989, 326 Mo. 163—Murray v. Missouri Pacific R. Co., 13 S.W. 817, 101 Mo. 236, 20 Am.S.R. 601—Slater v. Atchison, T. & S. F. Ry. Co., 24 S.W.2d 660, 224 Mo. App. 824—Reid v. Schaff, App., 210 S.W. 85.
Mont.—Sullivan v. Northern Pac. Ry. Co., 94 P.2d 651, 109 Mont. 93.
Neb.—De. Griselles v. Gans, 219 N.W. 235, 116 Neb. 835—Nanfito v. Chicago, B. & Q. R. Co., 173 N.W. 575, 103 Neb. 577.
N.H.—Collette v. Boston & M. R. Co., 140 A. 176, 83 N.H. 210—Collins v. Hustis, 111 A. 286, 79 N.H. 446.
N.J.—Vincze v. New York Cent. R. Co., 157 A. 159, 9 N.J.Misc. 1089.
N.Y.—Yablonowitz v. Korn, 199 N.Y.S. 769, 205 App.Div. 440.
Pa.—Reilly v. City of Philadelphia, 195 A. 897, 328 Pa. 563—Twining v. Lehigh & N. E. R. Co., 165 A. 489, 310 Pa. 429—Miller v. Pennsylvania R. Co., 149 A. 85, 299 Pa. 63—Haskins v. Pennsylvania R. Co., 143 A. 192, 293 Pa. 537—Craft v. Hines, 116 A. 379, 272 Pa. 499—Rapp v. Central Railroad of Pennsylvania, 112 A. 440, 269 Pa. 266—Kemmler v. Pennsylvania Co., 108 A. 592, 265 Pa. 212—Rapczynski v. W. T. Cowan, Inc., 10 A.2d 810, 138 Pa.Super. 392—Man v. Lehigh Valley R. Co., 33 Luz.Leg.Reg. 380.
Tenn.—Whitfield v. Loveless, 1 Tenn. App. 377.
Tex.—Markusfeld v. Zahn, Civ.App., 99 S.W.2d 438, error dismissed—Hines v. Roan, Civ.App., 230 S.W. 1070.
Utah.—Anderson v. Union Pac. R. Co., 289 P. 146, 76 Utah 324—East Grouse Creek Water Co. v. Frost, 245 P. 338, 66 Utah 587—Jensen v. Oregon Short Line R. Co., 204 P. 101, 59 Utah 367.
Va.—Johnson v. Richmond, F. & P. R. Co., 169 S.E. 603, 160 Va. 766—Cooper v. Southern Ry. Co., 149 S.E. 444, 153 Va. 93.
Wis.—McMillan v. Chicago, M. & St. P. Ry. Co., 191 N.W. 510, 179 Wis. 323—Richter v. Dahlman & Inbush Co., 190 N.W. 841, 179 Wis. 7, 30 A.L.R. 747.
23 C.J. p 42 note 77—11 C.J. p 1191 note 80, p 1192 notes 81, 82, 88, 89, p 1193 note 1.

Presence of lights on vessel
U.S.—The Buenos Aires, C.C.A.N.Y., 5 F.2d 425, affirming, D.C., The Windrush, 286 F. 251.
Alaska.—The Commonwealth, 8 Alaska 23.
11 C.J. p 1191 note 80 [c].

Subject matter four years old
"This rule is particularly pertinent and persuasive here when it is noted that the subject-matter to which the witnesses testified dates back four years."—Boston Ins. Co. v. Mesick & Mesick, D.C.Conn., 286 F. 531, 536.

That the positive witnesses are employees of the party in whose favor they testify does not prevent the application of the rule.—Fraser v. State, 182 N.Y.S. 491, 112 Misc. 19.

Positive testimony held not conclusive
Positive testimony that bus causing injury sounded warning did not conclusively establish that warning was given, but merely created conflict with negative testimony that no warning was sounded.—Hunt v. Los Angeles Ry. Corporation, 294 P. 745, 110 Cal.App. 456.

Value of positive evidence held not entirely destroyed by negative evidence.—Dull v. Atchison, Topeka & S. F. Ry. Co., 81 P.2d 158, 27 Cal. App.2d 473.

48. Alaska.—Fairhaven Mining Co. v. Immachuck Dredging Co., 5 Alaska 462.
23 C.J. p 43 note 78.
"The witness who testifies to a negative may have forgotten what actually occurred, while it is impossible to remember what never existed."—Window Glass Mach. Co. v. Pittsburgh Plate Glass Co., D.C.Pa., 46 F.2d 484, 494, affirmed, C.C.A., 284 F. 645.

49. Ky.—Consolidated Coach Corporation v. Hopkins' Adm'r, 37 S.W. 2d 1, 238 Ky. 136.
Minn.—Franklin v. Minneapolis, St. P. & S. S. M. Ry. Co., 229 N.W. 797, 179 Minn. 480.
Puerto Rico.—Javierre v. Fritze, Lundt & Co., 7 Puerto Rico Fed. 16.

50. Ark.—Veith v. Jackson, 1 S.W. 2d 66, 175 Ark. 874.
La.—Armato v. Ross, App., 177 So. 491.
Md.—Title Guaranty & Surety Co. v. Poe, 114 A. 481, 138 Md. 446.
Mo.—Globe Automatic Sprinkler Co. v. Laclede Packing Co., App., 93 S.W.2d 1053.
Mont.—In re Nelson, 60 P.2d 365, 103 Mont. 43—Maynard v. Bara, 30 P. 2d 93, 96 Mont. 302.
Tex.—Rains County v. Spears, Civ. App., 120 S.W.2d 867.
23 C.J. p 43 note 79.

51. Mont.—Gallaher v. Theilbar Realties, 18 P.2d 1101, 93 Mont. 421—Lasby v. Burgess, 289 P. 1028, 1032, 88 Mont. 49, citing **Corpus Juris.**

52. U.S.—Thurlow v. U. S., D.C. Mass., 295 F. 905—McClean v. Bradley, D.C.Ohio, 282 F. 1011, affirmed, C.C.A., 299 F. 379, certiorari denied 45 S.Ct. 98, 266 U.S. 619, 69 L.Ed. 471.

most commonly affirmed in those cases where the opposing testimony is what has been, in subdivision a of this section, denominated strictly negative, in the sense of a mere failure to observe, without special or conscious attention.[53]

It has been broadly stated that negative testimony may be accepted in preference to positive.[54] More precisely, if there is evidence that the attention of a negative witness was specially directed to the matter, or it can be legitimately presumed or inferred that he was alert and would, in the ordinary course of events, had observed the fact had it occurred, his testimony that he did not see or hear, or that the fact did not occur, is not necessarily weaker than opposing positive and affirmative testimony,[55] and may indeed be entitled to more weight than the latter.[56]

Where witnesses testify positively to a fact and other witnesses absolutely deny it, the rule of comparative value as between positive and negative testimony does not apply, and the only question is to which side, under all the circumstances, credit is due.[57]

Number of witnesses. Positive testimony, even of a single witness, should prevail over the negative testimony of an equal, or even larger, number of equally credible witnesses,[58] unless, it has been held,

Pa.—Kelly v. Director General of Railroads, 118 A. 436, 274 Pa. 470.
Vt.—Bennett v. Robertson, 177 A. 625, 107 Vt. 202, 98 A.L.R. 152.
Va.—White v. Southern Ry. Co., 144 S.E. 424, 151 Va. 302.
23 C.J. p 43 note 81.

53. Alaska.—Fairhaven Mining Co. v. Immachuck Dredging Co., 5 Alaska 462.
Ariz.—Canion v. Southern Pac. Co., 80 P.2d 397, 52 Ariz. 245—Southern Pac. Co. v. Fisher, 274 P. 779, 35 Ariz. 87.
Del.—Gray v. Pennsylvania R. Co., 139 A. 66, 3 W.W.Harr. 459.
Fla.—Powell v. Gary, 200 So. 854.
Kan.—Davis v. Atchison, T. & S. F. Ry. Co., 9 P.2d 990, 135 Kan. 96.
La.—Natal v. Louisiana & A. Ry. Co., 137 So. 600, 18 La.App. 50.
Minn.—Franklin v. Minneapolis, St. P. & S. S. M. Ry. Co., 229 N.W. 797, 179 Minn. 480—Lawson v. Minneapolis, St. P. & S. S. M. Ry. Co., 219 N.W. 554, 174 Minn. 404.
Miss.—Yazoo & M. V. R. Co. v. Lamensdorf, 177 So. 50, 180 Miss. 426, suggestion of error overruled 178 So. 80, 180 Miss. 426.
Neb.—Nanfito v. Chicago, B. & Q. R. Co., 173 N.W. 575, 103 Neb. 577.
Pa.—Miller v. Pennsylvania R. Co., 149 A. 85, 299 Pa. 63—Zotter v. Lehigh Valley R. Co., 124 A. 284, 280 Pa. 14—Kemmler v. Pennsylvania Co., 108 A. 592, 265 Pa. 212.
Tenn.—Atkins v. Smith, 9 Tenn.App. 212—Whitfield v. Loveless, 1 Tenn. App. 377.
Utah.—Anderson v. Union Pac. R. Co., 289 P. 146, 76 Utah 324—Jensen v. Oregon Short Line R. Co., 204 P. 101, 59 Utah 367.
Va.—Cooper v. Southern Ry. Co., 149 S.E. 444, 153 Va. 93.
23 C.J. p 43 notes 83, 84, p 44 note 85—60 C.J. p 588 note 71.

"One of the commonest examples of true positive and negative testimony is where there is a dispute as to whether a whistle was blown or bell rung by an engineer. In such a case the issue is as to the existence of a physical fact, and the ringing of a bell or the blowing of a whistle is apparent to the physical senses of one witness, while it is not to another one."—Olive v. Industrial Commission of Arizona, 83 P.2d 784, 785, 52 Ariz. 460.

54. Ga.—Walker v. U. S. Fidelity & Guaranty Co., 13 S.E.2d 526, 64 Ga. App. 459—Bradberry v. Lumbermens Mut. Casualty Co., 4 S.E.2d 486, 60 Ga.App. 576.

55. U.S.—Flannery v. New York, O. & W. R. Co., C.C.A.N.Y., 29 F.2d 18.
Cal.—Thompson v. Los Angeles & S. D. B. Ry. Co., 134 P. 709, 165 Cal. 748—Gialdini v. Russell, 25 P.2d 845, 134 Cal.App. 524—Lindsey v. Pacific Electric R. Co., 296 P. 131, 111 Cal.App. 482.
Kan.—Kansas City, F. S. & G. R. Co. v. Lane, 7 P. 587, 33 Kan. 702.
Miss.—Heafner v. Columbus & G. R. Co., 190 So. 1—Albert v. Doullut & Ewin, 178 So. 312, 313, 180 Miss. 626, citing **Corpus Juris**—Yazoo & M. V. R. Co. v. Beasley, 130 So. 499, 158 Miss. 370—Columbus & G. R. Co. v. Lee, 115 So. 782, 784, 149 Miss. 543, citing **Corpus Juris.**
Tex.—American Asphalt Co. v. O'Rear, Civ.App., 36 S.W.2d 779, followed in American Asphalt Co. v. Commins, 36 S.W.2d 781.
Va.—Southern Ry. Co. v. Berry, 1 S.E.2d 261, 172 Va. 266—Chesapeake & O. R. Co. v. Jacobs, 183 S. E. 221, 166 Va. 11—Southern Ry. Co. v. Whetzel, 167 S.E. 427, 159 Va. 796—White v. Southern Ry. Co., 144 S.E. 424, 151 Va. 302—Director General of Railroads v. Pence's Adm'x, 116 S.E. 351, 135 Va. 329—Southern Ry. Co. v. Bryant's Adm'r, 28 S.E. 183, 95 Va. 215.
W.Va.—Cavendish v. Chesapeake & O. Ry. Co., 121 S.E. 498, 95 W.Va. 490.
Wis.—Richter v. Dahlman & Inbush Co., 190 N.W. 841, 179 Wis. 7, 30 A.L.R. 747.
23 C.J. p 44 note 92, p 45 notes 94, 96—52 C.J. p 444 note 91.

56. Cal.—Cooper v. Southern Pac. Co., App., 111 P.2d 689—Downing v. Southern Pac. Co., 59 P.2d 578, 15 Cal.App.2d 246—Rogers v. City of Los Angeles, 44 P.2d 465, 6 Cal. App.2d 294—Badostain v. Pacific Electric Ry. Co., 256 P. 576, 83 Cal.App. 290—Carey v. Pacific Gas & Electric Co., 242 P. 97, 75 Cal. App. 129.
Ga.—Southern Ry. Co. v. Riley, 4 S. E.2d 54, 60 Ga.App. 475—Climer v. Southern Ry. Co., 159 S.E. 782 (first case), 43 Ga.App. 650, followed in 159 S.E. 782 (second case), 43 Ga.App. 651.
Ky.—Louisville & N. R. Co. v. Ratliff's Adm'r, 85 S.W.2d 1006, 260 Ky. 380.
Miss.—Yazoo & M. V. R. Co. v. Beasley, 130 So. 499, 158 Miss. 370—Columbus & G. R. Co. v. Lee, 115 So. 782, 149 Miss. 543.
Or.—Lovett v. Gill, 20 P.2d 1070, 142 Or. 534.
Tex.—American Asphalt Co. v. O'Rear, Civ.App., 36 S.W.2d 779, followed in American Asphalt Co. v. Commins, 36 S.W.2d 781.
W.Va.—Cavendish v. Chesapeake & O. Ry. Co., 121 S.E. 498, 95 W.Va. 490.
23 C.J. p 45 notes 93, 94—52 C.J. p 445 note 92.

57. U.S.—The Catalina, D.C.Cal., 18 F.Supp. 461.
Del.—Hitchens v. Wilmington & Philadelphia Traction Co., 138 A. 617, 3 W.W.Harr. 375.
Mo.—Fritz v. Manufacturers Ry. Co., App., 124 S.W.2d 603.
N.C.—Carruthers v. Atlantic & Yadkin Ry. Co., 9 S.E.2d 498, 218 N.C. 49, annulled on other grounds 11 S.E.2d 157, 218 N.C. 377.
Va.—Virginian Ry. Co. v. Haley, 157 S.E. 776, 156 Va. 350.
23 C.J. p 45 notes 98, 99.

58. Alaska.—Fairhaven Mining Co. v. Immachuck Dredging. Co., 5 Alaska 462.
Neb.—De Griselles v. Gans, 219 N. W. 235, 116 Neb. 835.
Va.—White v. Southern Ry. Co., 144

the negative witnesses had equal opportunity to observe, or their attention was equally, or specially, drawn to the matter controverted;[59] but the rule is not always applied.[60] A fortiori, positive testimony of several witnesses ought ordinarily to outweigh the negative testimony of only one,[61] although it will not necessarily have this effect.[62]

d. Particular Circumstances Affecting Weight

The weight to be given to positive and negative evidence, separately or comparatively, is affected by various factors, such as the credibility of witnesses, their bias or interest, their opportunity for observation, and the attention they were giving.

Whether the positive or the negative evidence shall prevail is frequently determined by considerations affecting the weight of testimony in general,[63] such as the credibility of the witnesses,[64] the accuracy of their memory,[65] their opportunities for observation,[66] the attention they were giving at the time in question,[67] and the reasonableness of their testimony.[68] The weight of positive[69] or negative[70] testimony may be impaired by the interest or other bias of the witness; and, conversely, the absence of any interest or bias operates in favor of the witness.[71] Positive testimony that an act was done may be fortified by the circumstance that the actor's regard for his personal safety would prompt him to do it,[72] or weakened by the fact that the witness who testifies to his own act was in the habit of performing the same act at frequent intervals daily and would be unlikely to recollect the particular instance.[73] The weight of negative testimony may be augmented by the circumstance that the witness had a reason such as self-protection,[74] for observing whether or not the fact occurred.[75] Negative testimony may be weakened by the fact that the atten-

S.E. 424, 151 Va. 302—Southern Ry. Co. v. Bryant's Adm'r, 28 S.E. 183, 95 Va. 215.
W.Va.—Cavendish v. Chesapeake & O. Ry. Co., 121 S.E. 498, 95 W.Va. 490.
23 C.J. p 46 note 3.
Number of witnesses generally see supra § 1022.

Warning of approaching street car
"The testimony of a witness that a warning of an approaching street car was given is ordinarily worth more than the testimony of two witnesses who truthfully say that they did not hear it given."—Weir v. Kansas City Rys. Co., 196 P. 442, 108 Kan. 610.

59. Pa.—Urias v. Pennsylvania R. Co., 25 A. 566, 152 Pa. 326.
Va.—Southern Ry. Co. v. Berry, 1 S.E.2d 261, 172 Va. 266—Chesapeake & O. R. Co. v. Jacobs, 183 S.E. 221, 166 Va. 11—White v. Southern Ry. Co., 144 S.E. 424, 151 Va. 302—Southern Ry. Co. v. Bryant's Adm'r, 28 S.E. 183, 95 Va. 212.

60. **Train signals**
The testimony of a witness, who was in a situation to hear and see, that he heard no train signals has been accepted as against the positive testimony of three railroad employees.—Yazoo & M. V. R. Co. v. Beasley, 130 So. 499, 158 Miss. 370.

Lights on vessel
(1) The evidence of a single witness that a light was burning on a vessel will not outweigh the testimony of many witnesses who testify that no such light was visible to them.—The Monmouthshire, D.C.N.Y., 44 F. 697—11 C.J. p 1192 note 85.
(2) This is especially true where other corroborative circumstances exist, such as the lights being set far aft and low down, or the fact of a list in the vessel accused of fault, which might cause the lights to be obscured.—The Johanne Auguste, D.C.N.Y., 21 F. 134—11 C.J. p 1192 note 86.

61. N.Y.—Mitchell v. Newham, 190 N.Y.S. 459, 198 App.Div. 372—Dombroski v. New York Cent. R. Co., 8 N.Y.S.2d 619, affirmed 12 N.Y.S.2d 243, 257 App.Div. 916, reargument denied 14 N.Y.S.2d 495, 257 App.Div. 1014.
Pa.—Zotter v. Lehigh Valley R. Co., 124 A. 284, 280 Pa. 14.
23 C.J. p 46 note 5.

62. U.S.—Flannery v. New York, O. & W. R. Co., C.C.A.N.Y., 29 F.2d 18.
23 C.J. p 46 note 6.

63. N.C.—Carruthers v. Atlantic & Yadkin Ry. Co., 9 S.E.2d 498, 218 N.C. 49, annulled on other grounds 11 S.E.2d 157, 218 N.C. 377.
23 C.J. p 46 note 7.

64. Or.—Lovett v. Gill, 20 P.2d 1070, 142 Or. 534.
23 C.J. p 46 note 8.

65. N.C.—Carruthers v. Atlantic & Yadkin Ry. Co., 9 S.E.2d 498, 218 N.C. 49, annulled on other grounds 11 S.E.2d 157, 218 N.C. 377.
23 C.J. p 46 note 9.

66. U.S.—Chicago & N. W. Ry. Co. v. Andrews, Iowa, 130 F. 65, 64 C.C.A. 399, certiorari denied 25 S.Ct. 787, 195 U.S. 628, 49 L.Ed. 351.
Kan.—Davis v. Atchison, T. & S. F. Ry. Co., 9 P.2d 990, 135 Kan. 96.
Mo.—Murray v. Missouri Pacific R. Co., 13 S.W. 817, 101 Mo. 236, 20 Am.S.R. 601—Reid v. Schaff, App., 210 S.W. 85.
Mont.—In re Silver's Estate, 38 P.2d 277, 98 Mont. 141.
N.C.—Carruthers v. Atlantic & Yadkin Ry. Co., 9 S.E.2d 498, 218 N.C. 49, annulled on other grounds 11 S.E.2d 157, 218 N.C. 377.
Or.—Lovett v. Gill, 20 P.2d 1070, 142 Or. 534.
Va.—White v. Southern Ry. Co., 144 S.E. 424, 151 Va. 302.
Wash.—Poland v. City of Seattle, 93 P.2d 379, 200 Wash. 208.
23 C.J. p 46 note 10.

67. Kan.—Davis v. Atchison, T. & S. F. Ry. Co., 9 P.2d 990, 135 Kan. 96.
Md.—State, for Use of Emerson, v. Poe, 190 A. 231, 171 Md. 584.
Mo.—Murray v. Missouri Pacific R. Co., 13 S.W. 817, 101 Mo. 236, 20 Am.S.R. 601—Reid v. Schaff, App., 210 S.W. 85.
Pa.—Craft v. Hines, 116 A. 379, 272 Pa. 499.
W.Va.—Cavendish v. Chesapeake & O. Ry. Co., 121 S.E. 498, 95 W.Va. 490.

68. Ill.—Greenville v. Henry, 78 Ill. 150.

69. U.S.—Thurlow v. U. S., D.C. Mass., 295 F. 905.
23 C.J. p 46 note 13.

70. Ill.—Graham v. Anderson, 42 Ill. 514, 92 Am.D. 89.

71. U.S.—Thurlow v. U. S., D.C. Mass., 295 F. 905.
23 C.J. p 46 note 15.

72. U.S.—The Charlotte, D.C.Va., 124 F. 989, affirmed 128 F. 38, 62 C.C.A. 546.
23 C.J. p 46 note 16.

73. Mo.—State v. Kansas City, F. S. & M. R. Co., 70 Mo.App. 634.
23 C.J. p 46 note 17.

74. Ill.—Indiana, I. & I. R. Co. v. Otstot, 113 Ill.App. 37, affirmed 72 N.E. 387, 212 Ill. 429.
Mass.—Menard v. Boston & M. R. Co., 23 N.E. 214, 150 Mass. 386.

75. Pa.—Peruzzi v. Pennsylvania R. Co., 99 Pa.Super. 519.
23 C.J. p 46 note 18.

tion of the witnesses was diverted,[76] as by excitement or alarm,[77] or by ravishing strains of music.[78] It is also to be considered that familiar sounds often fail to be noticed where there is no occasion to notice them;[79] and that a sound may not have been heard because the wind was unfavorable[80] or other sounds interfered with hearing.[81]

§ 1038. Uncontroverted Evidence

Uncontroverted evidence should ordinarily be taken as true, and uncontradicted evidence which is not improbable or unreasonable cannot be disregarded, even if it comes from an interested witness, and, unless shown to be untrustworthy, is conclusive; but evidence not directly contradicted is not necessarily binding on the triers of fact, and may under proper circumstances be given no weight, as where it is inherently improbable or unreasonable, self-contradictory, or inconsistent with facts or circumstances in evidence.

Uncontradicted or undisputed evidence should ordinarily be taken as true.[82] More precisely, evidence which is not contradicted by positive testi-

Rule applied to locomotive signals
Pa.—Peruzzi v. Pennsylvania R. Co., 99 Pa.Super. 519.
23 C.J. p 46 note 18 [a].

76. Neb.—Dodds v. Omaha & C. B. St. Ry. Co., 178 N.W. 258, 104 Neb. 692.

77. N.C.—Strickland v. Atlantic Coast Line R. Co., 63 S.E. 161, 150 N.C. 4.
23 C.J. p 46 note 20.

78. Conn.—Johnson v. Scribner, 6 Conn. 185, 188.

79. La.—Handy v. New Orleans Public Service, 120 So. 271, 10 La. App. 72.
23 C.J. p 46 note 22.
Street-car gong
La.—Handy v. New Orleans Public Service, supra.
Railroad train or signals
La.—Ellington Sugars, Inc. v. Texas & P. Ry. Co., 8 La.App. 271.
23 C.J. p 46 note 22 [a].

80. Mo.—Cathcart v. Hannibal & St. J. R. Co., 19 Mo.App. 113.
N.Y.—Smith v. New York Cent. & H. R. R. Co., 58 N.Y.S. 63.

81. S.C.—Davis v. Payne, 113 S.E. 325, 120 S.C. 473, followed in Greene v. Atlantic Coast Line R. Co., 147 S.E. 927, 150 S.C. 239.
23 C.J. p 47 note 24.

82. U.S.—Smith v. U. S., D.C.Ky., 5 F.Supp. 475.
Ark.—St. Louis-San Francisco Ry. Co. v. Williams, 21 S.W.2d 611, 180 Ark. 413.
Cal.—Hollenbough v. Wickersheim, 299 P. 90, 114 Cal.App. 1—Walker v. Clark, 252 P. 334, 80 Cal.App. 520.
Fla.—Ruff v. Cooper, 169 So. 490, 124 Fla. 816.
Ga.—Barrington v. Davis Jenkins & Sons, 162 S.E. 642, 44 Ga.App. 682—Jarrell v. Seaboard Air Line Ry., 99 S.E. 386, 23 Ga.App. 717.
Idaho.—Pierstorff v. Gray's Auto Shop, 74 P.2d 171, 58 Idaho 438.
Ill.—Cusanelli v. Steele, 5 N.E.2d 296, 287 Ill.App. 490—Blodgett v. Blodgett, 266 Ill.App. 517, transferred, see 175 N.E. 777, 343 Ill. 569.
Ind.—Abel v. Love, 143 N.E. 515, 81 Ind.App. 328.
Iowa.—Pike v. Coon, 252 N.W. 888, 217 Iowa 1068.
Ky.—U. S. Rubber Products v. Browne, 150 S.W.2d 661, 286 Ky. 147—Hundley v. Baskett, 48 S.W. 2d 537, 243 Ky. 383.
La.—Becker v. Hollywood Theatre, App., 155 So. 522—O'Pry v. Berdon, App., 149 So. 287—Voisin v. Morales, 127 So. 758, 13 La.App. 318—Ledner v. Caddo Transfer & Warehouse Co., 124 So. 712, 14 La. App. 366—Brown v. Parish, 1 La. App. 246.
Mich.—England v. Ætna Life Ins. Co., 280 N.W. 771, 285 Mich. 302—Schulte v. Starks, 213 N.W. 102, 238 Mich. 102.
Minn.—Topinka v. Minnesota Mut. Life Ins. Co., 248 N.W. 660, 189 Minn. 75, 95 A.L.R. 739—Manley v. Harvey Lumber Co., 221 N.W. 913, 175 Minn. 489.
Neb.—Morris v. Equitable Life Assur. Soc. of U. S., 191 N.W. 190, 109 Neb. 348.
N.Y.—Harr v. Wells-Newton Nat. Corporation, 278 N.Y.S. 933, 244 App.Div. 288, affirmed 199 N.E. 521, 269 N.Y. 531—Caron v. Seidenbach's, 207 N.Y.S. 180, 124 Misc. 34—Giannini v. Foster, 196 N.Y.S. 247, 119 Misc. 343—Hoffman v. Ellis, 174 N.Y.S. 362, 106 Misc. 283.
Ohio.—Cleveland Ry. Co. v. McManus, App., 32 N.E.2d 66.
Or.—Inwall v. Transpacific Lumber Co., 108 P.2d 522.
Pa.—Burke v. Kennedy, 133 A. 508, 286 Pa. 344—Stroh v. Holmes, 83 Pa.Super. 129—Roccia v. Prudential Ins. Co., 28 Del.Co. 278.
R.I.—Cook, Borden & Co. v. R. Z. L. Realty Corporation, 147 A. 891, 50 R.I. 375.
Tenn.—Frank v. Wright, 205 S.W. 434, 140 Tenn. 535—Bank of Hendersonville v. Dozier, App., 142 S.W.2d 191—Walters v. Staton, 111 S.W.2d 381, 21 Tenn.App. 401—Nashville, C. & St. L. Ry. v. Sutton, 104 S.W.2d 834, 21 Tenn.App. 31—Standard Oil Co. of Louisiana v. Roach, 94 S.W.2d 63, 19 Tenn. App. 661—De Kalb County v. Tennessee Electric Power Co., 67 S.W.2d 555, 17 Tenn.App. 343—Phillips-Buttorff Mfg. Co. v. McAlexander, 15 Tenn.App. 618.
Tex.—Albright v. Smith, Com.App., 288 S.W. 178, affirming Smith v. Allbright, Civ.App., 279 S.W. 852, and reversed on other grounds Allbright v. Smith, Com.App., 5 S.W.2d 970—United Hay Co. v. St. Louis, B. & M. Ry. Co., Civ.App., 74 S.W.2d 766—American Surety Co. of New York v. Underwood, Civ.App., 74 S.W.2d 551, error refused—Benn v. Security Realty & Development Co., Civ.App., 54 S.W.2d 146, error refused—Nagy v. Bennett, Civ.App., 24 S.W.2d 778, error refused—Majors v. Turner, Civ.App., 280 S.W. 844.
Wash.—Bice v. Bice, 244 P. 1000, 138 Wash. 598.
23 C.J. p 47 note 30.
Province of court and jury as to uncontroverted facts or evidence see the C.J.S. title Trial §§ 210, 214, 215, also 64 C.J. p 338 note 30–p 346 note 29, p 354 notes 79–92, p 359 note 57–p 360 note 65.
"Absolute proof"
La.—Schmalz v. Schmalz, 84 So. 166, 146 La. 876.
Truth as matter of law
"Evidence which is uncontradicted by fact or inference deducible therefrom is taken as true, as a matter of law."—Williams v. Cohn, 206 N.W. 823, 825, 201 Iowa 1121.
Expert testimony
Cal.—Appliance Co. v. Kelley, 282 P. 518, 102 Cal.App. 67.
N.J.—Orsini v. Metropolitan Life Ins. Co., 154 A. 201, 9 N.J.Misc. 407.
Parol evidence as to meaning of written contract must be considered truth, if uncontradicted.—Hazlehurst Oil Mill & Fertilizer Co. v. Fornea, 8 La.App. 766.
Prima facie showing
(1) A fact is established prima facie by uncontradicted and unimpeached testimony.
Cal.—Pray v. Anthony, 274 P. 1024, 96 Cal.App. 772.
Ky.—Lee v. Lee, 284 S.W. 1052, 215 Ky. 226.
(2) Uncontradicted testimony by the owner suing for conversion of his automobile as to its reasonable value held to make a prima facie showing as to value.—Grath v. Wilson Motor Car Co., Mo.App., 253 S.W. 776.

mony or circumstances, and is not inherently improbable, incredible, or unreasonable, cannot be arbitrarily or capriciously discredited, disregarded, or rejected,[83] even though the witness is a party or

Party is bound "by the uncontradicted evidence of his opponent when not inherently improbable and, counter to no reasonable inference."—Virginia Electric & Power Co. v. Lenz, 164 S.E. 572, 573, 158 Va. 732.

Party called by adversary
The rules concerning effect of uncontradicted testimony apply even more strongly where party to the cause is called as a witness by his adversary.—Bank of Hendersonville v. Dozier, Tenn.App., 142 S.W.2d 191.

Suspicion should not outweigh uncontradicted evidence.—Becker v. Miller, C.C.A.N.Y., 7 F.2d 293, appeal dismissed 46 S.Ct. 105, 269 U.S. 596, 70 L.Ed. 431—23 C.J. p 47 note 31 [a].

Hostile witnesses
Where defendants offered no rebuttal of the testimony of hostile witnesses offered by plaintiff, such testimony must be received in light most favorable to plaintiff.—Stanton v. Schenck, 251 N.Y.S. 221, 140 Misc. 621.

Failure to recall
In an action by a husband to enforce a parol trust on the part of his wife to reconvey, his version will be accepted, where the wife did not deny the agreement, but merely testified that she did not recall it.—Tiedemann v. Tiedemann, 189 N.Y.S. 931, 115 Misc. 462, affirmed 194 N.Y.S. 782, 201 App.Div. 614.

Presence of adverse party's officers in court
(1) Undisputed testimony respecting negotiations leading to execution of notes must be accepted as true, where adverse party's officers who participated in transactions were in court.—Weicker v. Bromfield, C.C.A. Colo., 34 F.2d 377.

(2) Where evidence of agreement by bank was not controverted by officers of defendant bank, although present at trial, such agreement must be assumed to have been made, notwithstanding testimony with respect thereto may have been given by interested witnesses only.—First Nat. Bank of Schulenburg v. Winkler, Tex.Civ.App., 146 S.W.2d 201, error granted.

83. U.S.—Ariasi v. Orient Ins. Co., C.C.A.Cal., 50 F.2d 548—Southern Pac. Co. v. Hanlon, C.C.A.Cal., 9 F.2d 294.
Ala.—Edmonds v. Schreiber, 111 So. 755, 22 Ala.App. 24.
Ariz.—Phen v. All American Bus Lines, 110 P.2d 227—Rowe v. Goldberg Film Delivery Lines, 72 P.2d 432, 50 Ariz. 349—Sovereign Camp, W. O. W. v. Daniel, 62 P.2d 1144, 48 Ariz. 479—Illinois Bankers' Life Ass'n v. Theodore, 34 P.2d 423, 44 Ariz. 160—Otero v. Soto, 267 P. 947, 34 Ariz. 87—Crozier v. Noriega, 233 P. 1104, 27 Ariz. 409—Banco de Sonora v. Morales, 203 P. 328, 23 Ariz. 248.
Ark.—Kentucky Home Life Ins. Co. v. Mosley, 89 S.W.2d 744, 191 Ark. 1146—Milburn v. Martin, 76 S.W.2d 952, 190 Ark. 16—St. Louis-San Francisco Ry. Co. v. Williams, 21 S.W.2d 611, 180 Ark. 413—St. Louis-San Francisco Ry. Co. v. Harmon, 15 S.W.2d 310, 179 Ark. 248.
Cal.—Caldwell v. Weiner, 264 P. 1100, 203 Cal. 543—Hanlon v. Western Loan & Bldg. Co., App., 116 P.2d 465—Burdick v. Wittich, App., 116 P.2d 90—Lissauer v. Union Bank & Trust Co. of Los Angeles, App., 114 P.2d 367—State v. Arrata, 54 P.2d 532, 11 Cal.App.2d 662—Pene v. Mauk, 42 P.2d 697, 5 Cal.App.2d 428—James v. White Truck & Transfer Co., 36 P.2d 401, 1 Cal.App.2d 37—Rogers v. Burnham, 35 P.2d 329, 140 Cal.App. 336—Whitaker v. Whitaker, 30 P.2d 538, 137 Cal.App. 396—Lejeune v. General Petroleum Corporation of California, 18 P.2d 429, 128 Cal. App. 404—Speer v. Kittle Mfg. Co., 4 P.2d 575, 117 Cal.App. 717—Silva v. Goldman, 4 P.2d 191, 117 Cal. App. 423—Bohn v. Gruver, 295 P. 891, 111 Cal.App. 386—Briggs v. Cameron, 295 P. 347, 111 Cal.App. 189—Cowan v. Hill, 293 P. 871, 109 Cal.App. 656—First Nat. Bank v. Shipley, 292 P. 996, 109 Cal.App. 194—Michaels v. Pacific Soft Water Laundry, 286 P. 172, 104 Cal. App. 366, rehearing denied 286 P. 1071, 104 Cal.App. 366—Giannini v. Southern Pac. Co., 276 P. 618, 98 Cal.App. 126—Tillotson v. Findley, 262 P. 438, 87 Cal.App. 654—Sun-Maid Raisin Growers of California v. Papazian, 240 P. 47, 74 Cal. App. 231—Anso v. Anso, 237 P. 814, 72 Cal.App. 513—Shepard v. Shepard, 223 P. 1012, 65 Cal.App. 310—Sweeney v. Metropolitan Life Ins. Co., 92 P.2d 1043, 30 Cal.App. 2d Supp. 767.
Fla.—Catlett v. Chestnut, 146 So. 241, 107 Fla. 498, 91 A.L.R. 212—Howell v. Blackburn, 129 So. 341, 100 Fla. 114.
Ga.—Lankford v. Holton, 200 S.E. 243, 187 Ga. 94—Powell v. Blackstock, 13 S.E.2d 503, 64 Ga.App. 442—McRae v. Wilby, 1 S.E.2d 77, 59 Ga.App. 401—Fincher v. Harlow, 193 S.E. 452, 56 Ga.App. 578—Seaboard Air Line Ry. Co. v. D'Avignon, 153 S.E. 96, 41 Ga.App. 263, certiorari denied 51 S.Ct. 351, 283 U.S. 827, 75 L.Ed. 1441.
Idaho.—First Trust & Savings Bank v. Randall, 89 P.2d 741, 59 Idaho 705.
Ill.—Mammina v. Homeland Ins. Co. of America, 21 N.E.2d 726, 371 Ill. 555, reversing 17 N.E.2d 264, 297 Ill.App. 636—Porter v. Industrial Commission, 186 N.E. 110, 352 Ill. 392—Mannen v. Norris, 170 N.E. 273, 338 Ill. 322—Morrison v. Beers, 158 N.E. 371, 327 Ill. 139—Chicago Title & Trust Co. v. Central Trust Co. of Illinois, 144 N.E. 165, 312 Ill. 396, reversing 224 Ill.App. 474—Kelly v. Jones, 125 N.E. 334, 290 Ill. 375, 8 A.L.R. 792—Kuehne v. Malach, 121 N.E. 391, 286 Ill. 120—Liolios, for Use of University Hospital v. London Guarantee & Accident Co., 24 N.E. 2d 169, 302 Ill.App. 503—Morris v. Carroso, 11 N.E.2d 816, 292 Ill.App. 620—Paulsen v. Cochfield, 278 Ill. App. 596—Bowers v. Heflebower, 243 Ill.App. 129—Deheave v. Hines, 217 Ill.App. 427.
Iowa.—Williams v. Cohn, 206 N.W. 823, 201 Iowa 1121—Schraeder v. Sears, 185 N.W. 110, 192 Iowa 604.
Kan.—Woulfe v. Arkansas Valley Interurban Ry. Co., 223 P. 817, 115 Kan. 640—State v. Woods, 170 P. 986, 102 Kan. 499, L.R.A.1918C 889.
Ky.—Commonwealth Life Ins. Co. v. Pendleton, 21 S.W.2d 985, 231 Ky. 591, 66 A.L.R. 1526.
La.—Cole v. Central Contracting Co., 5 La.App. 513.
Minn.—Osbon v. Hartfiel, 276 N.W. 270, 201 Minn. 347—First Nat. Bank v. Van De Putte, 244 N.W. 416, 187 Minn. 96—Olsen v. Hoffmann, 221 N.W. 10, 175 Minn. 287—Benson v. Marshall County, 204 N.W. 40, 163 Minn. 309—Klare v. Peterson, 200 N.W. 817, 161 Minn. 16—Goedhard v. Folstad, 195 N.W. 281, 156 Minn. 453—Nelson v. Bullard, 194 N.W. 308, 155 Minn. 419—Anderson v. Liljengren, 52 N.W. 219, 50 Minn. 3.
Miss.—Tarver v. Lindsey, 137 So. 93, 161 Miss. 379—Holmes v. Holmes, 123 So. 865, 154 Miss. 713.
Mont.—Sullivan v. Northern Pac. Ry. Co., 94 P.2d 651, 109 Mont. 93—Ross v. Industrial Accident Board, 80 P.2d 362, 106 Mont. 486—Jeffrey v. Trouse, 50 P.2d 872, 100 Mont. 538—Piersky v. Hocking, 292 P. 725, 88 Mont. 358—Nichols v. New York Life Ins. Co., 292 P. 253, 88 Mont. 132—Laundreville v. Mero, 281 P. 749, 86 Mont. 43—Sylvain v. Page, 276 P. 16, 84 Mont. 424—Giebler v. Giebler, 222 P. 436, 69 Mont. 347—Haddox v. Northern Pac. Ry. Co., 113 P. 1119, 43 Mont. 8.
N.J.—Rains v. Rains, 12 A.2d 857, 127 N.J.Eq. 328, setting aside Rains v. Rains, 8 A.2d 715, 17 N. J.Misc. 310.
N.Y.—Kavanagh v. Wilson, 70 N.Y.

interested;[84] and, unless shown to be untrustworthy, is to be taken as conclusive, and binding on the

177—Elwood v. Western Union Telegraph Co., 45 N.Y. 549, 6 Am. R. 140—Harrison v. New York Cent. R. Co., 6 N.Y.S.2d 978, 255 App.Div. 183, reargument denied 8 N.Y.S.2d 1017, 255 App.Div. 1032, affirmed 22 N.E.2d 483, 281 N.Y. 653—Chapin-Owen Co. v. Yeoman, 253 N.Y.S. 568, 233 App.Div. 492, denying motion 250 N.Y.S. 95, 232 App.Div. 560—Coppo v. Coppo, 297 N.Y.S. 744, 163 Misc. 249—In re Freeman's Estate, 290 N.Y.S. 7, 160 Misc. 133—In re Seifried's Estate, 224 N.Y.S. 275, 130 Misc. 229—Rock v. Radice Electric Co., 221 N.Y.S. 457, 129 Misc. 421, reversed on other grounds 225 N.Y.S. 659, 131 Misc. 51—McCallum v. Pickens, 213 N.Y.S. 119, 126 Misc. 436, affirmed 215 N.Y.S. 882, 217 App. Div. 714—Rosenberg v. Douberman, 13 N.Y.S.2d 71—Cohen v. American Ry. Express Co., 184 N.Y.S. 601, reversed on other grounds 185 N.Y.S. 367.

Okl.—In re Miller's Estate, 78 P.2d 819, 182 Okl. 534—Taggart v. Snipes, 50 P.2d 640, 174 Okl. 449—Davis v. Wyskup, 223 P. 357, 97 Okl. 239—Fleming v. Drew, 212 P. 306, 88 Okl. 160—Hamilton v. Blakeney, 165 P. 141, 65 Okl. 154.

Or.—Fleishhacker v. Portland News Pub. Co., 77 P.2d 141, 158 Or. 476.

Pa.—Foster v. State Workmen's Ins. Fund, 48 Dauph.Co. 301.

R.I.—Somerset Realty Co. v. Shapiro, 155 A. 360, 51 R.I. 417—Gorman v. Hand Brewing Co., 66 A. 209, 28 R.I. 180.

S.D.—In re Tjarks' Estate, 227 N.W. 84, 55 S.D. 636.

Tenn.—Nashville, C. & St. L. Ry. v. Sutton, 104 S.W.2d 834, 21 Tenn. App. 31—Standard Oil Co. of Louisiana v. Roach, 94 S.W.2d 63, 19 Tenn.App. 661—Whitaker v. Bandy, 4 Tenn.App. 202.

Tex.—Simmonds v. St. Louis B. & M. Ry. Co., 91 S.W.2d 332, 127 Tex. 23—Nobles v. Texas Indemnity Ins. Co., Com.App., 24 S.W.2d 367, vacating, Civ.App., 12 S.W.2d 199, which reformed Texas Indemnity Ins. Co. v. Nobles, 1 S.W.2d 451—Dallas Ry. & Terminal Co. v. Glenn, Civ.App., 144 S.W.2d 961, error dismissed, judgment correct—American Nat. Ins. Co. v. Williams, Civ App., 144 S.W.2d 662—Fireman's Fund Ins. Co. of San Francisco, Cal., v. Honnoll, Civ. App., 128 S.W.2d 96—Lester v. Robinson, Civ.App., 101 S.W.2d 1038—Sterling Nat. Bank & Trust Co. of New York v. Ellis, Civ.App., 75 S.W.2d 716, error dismissed—Gulf, C. & S. F. Ry. Co. v. Downs, Civ.App., 70 S.W.2d 318, error refused—Butterworth v. France, Civ. App., 66 S.W.2d 369—Texas & N. O. R. Co. v. East, Civ.App., 57 S. W.2d 175—Stevens v. Hunt, Civ. App., 39 S.W.2d 124—Miller v. Panhandle & S. F. Ry. Co., Civ. App., 35 S.W.2d 194, error dismissed—Autrey v. E. Nelson Mfg. & Lumber Co., Civ.App., 26 S.W.2d 298—Williams Sign Co. v. Rodgers, Civ.App., 24 S.W.2d 478—Sigmond Rothschild Co. v. Moore, Civ.App., 22 S.W.2d 533, reversed on other grounds, Com.App., 37 S. W.2d 121—Daggett v. W. B. Worsham & Co., Civ.App., 264 S.W. 180—McKeever v. Dittman, Civ.App., 262 S.W. 1054—Hines v. Pennington, Civ.App., 240 S.W. 703—Hines v. Roan, Civ.App., 230 S.W. 1070.

Vt.—Valenti v. Imperial Assur. Co., 176 A. 413, 107 Vt. 65.

Va.—Drake v. National Bank of Commerce of Norfolk, 190 S.E. 302, 168 Va. 230, 109 A.L.R. 1517—Epperson v. De Jarnette, 180 S.E. 412, 164 Va. 482—Barnes v. Hampton, 141 S.E. 836, 149 Va. 740.

W.Va.—Beckley Nat. Exchange Bank v. Provident Life & Accident Ins. Co., 2 S.E.2d 256, 257, citing **Corpus Juris.**

Wis.—Brust v. First Nat. Bank, 198 N.W. 749, 184 Wis. 15.

23 C.J. p 47 notes 31–32.

Well considered case

N.M.—Medler v. Henry, 101 P.2d 398, 44 N.M. 275.

Oral testimony generally

U.S.—Joseph v. Village of Downers Grove, C.C.A.Ill., 104 F.2d 974, certiorari denied Village of Downers Grove v. Joseph, 60 S.Ct. 142, 308 U.S. 605, 84 L.Ed. 506.

Evidence as to value

Ill.—Chicago Title & Trust Co. v. Central Trust Co. of Illinois, 144 N.E. 165, 312 Ill. 396, reversing 224 Ill.App. 474.

Iowa.—Mendenhall v. Struck, 224 N. W. 95, 207 Iowa 1094.

Evidence of single witness

Cal.—Hynes v. White, 190 P. 836, 47 Cal.App. 549.

Testimony of employees of party

Ark.—S. Gumpert Co. v. Herrareich, 134 S.W.2d 568, 199 Ark. 376.

Evidence on material issue

Rule that trial court may not disregard uncontroverted credible evidence "refers to evidence bearing on a material issue in the case."—Vesel v. Polich Trading Co., 28 P.2d 858, 861, 96 Mont. 118.

Absence of right to recover

"When a state of facts is proven showing that a party is not entitled to recover and these facts are not contradicted by competent evidence, neither the jury nor a court may disregard the evidence."—Louisville & N. R. Co. v. Slusher's Adm'r, 290 S.W. 677, 680, 217 Ky. 738.

That damages claimed are obviously padded does not justify the jury in disregarding uncontradicted testimony offered by plaintiff.—Gash v. Khan, 160 A. 367, 10 N.J.Misc. 708.

Even improbable testimony cannot be utterly disregarded unless contradicted or impeached by other evidence.—McGinnis v. McGinnis, 211 Ill.App. 240, error dismissed 124 N. E. 562.

Change of vessel's course

Where the positive testimony of two witnesses that an approaching schooner changed her course just prior to a collision with another schooner is uncontradicted, a court is not authorized to reject it merely because no particular reason appears why such change of course should have been made.—The Mary Buhne, D.C.Cal., 95 F. 1002, affirmed 118 F. 1000, 55 C.C.A. 494.

84. Cal.—Showalter v. Western Pac. R. Co., 106 P.2d 895, prior opinion, App., 96 P.2d 964.

Iowa.—Ransom v. Lochmiller, 224 N. W. 469, 207 Iowa 1315.

Ky.—Deboe v. Brown, 248 S.W. 855, 198 Ky. 275.

Me.—Mitchell v. Mitchell, 11 A.2d 898, 136 Me. 406.

Minn.—Krahmer v. Voss, 276 N.W. 218, 201 Minn. 272—Ewer v. Coppe, 271 N.W. 101, 199 Minn. 78.

N.Y.—Hull v. Littauer, 57 N.E. 102, 162 N.Y. 569—Locicero v. Messina, 267 N.Y.S. 901, 239 App.Div. 635—Powers v. Wilson, 196 N.Y.S. 600, 203 App.Div. 232—Bratt v. Magidow, 28 N.Y.S.2d 1011—People v. S. W. Straus & Co., 285 N.Y.S. 648, 158 Misc. 186, 222, modified in part on other grounds 289 N.Y.S. 209, 248 App.Div. 785, affirmed 290 N. Y.S. 423, 248 App.Div. 785—Rock v. Radice Electric Co., 221 N.Y.S. 457, 129 Misc. 421, reversed on other grounds 225 N.Y.S. 659, 131 Misc. 51.

Tenn.—Bank of Hendersonville v. Dozier, App., 142 S.W.2d 191.

Tex.—Trinity Gravel Co. v. Cranke, Com.App., 282 S.W. 798, modifying Cranke v. Trinity Gravel Co., Civ. App., 272 S.W. 604—Pyland v. Sayers, Civ.App., 148 S.W.2d 450, error granted—Waybourne v. Plains Chevrolet Co., Civ.App., 125 S.W.2d 344—Texas Creosoting Co. v. Sims, Civ.App., 113 S.W.2d 227, error dismissed—Sterling Nat. Bank & Trust Co. of New York v. Ellis, Civ.App., 75 S.W.2d 716, error dismissed—Benn v. Security Realty & Development Co., Civ.App., 54 S.W.2d 146, error refused—Miller v. Panhandle & S. F. Ry. Co., Civ.App., 35 S.W.2d 194, error dismissed.

Va.—Drake v. National Bank of Com-

triers of fact;[85] and where the evidence tends to establish a fact which it is within the power and to

merce of Norfolk, 190 S.E. 302, 168 Va. 230, 109 A.L.R. 1517—Epperson v. De Jarnette, 180 S.E. 412, 164 Va. 482—C. G. Blake Co. v. W. R. Smith & Son, 133 S.E. 685, 694, 147 Va. 960, quoting **Corpus Juris.**

Wash.—Danich v. Culjak, 66 P.2d 860, 190 Wash. 79.

23 C.J. p 47 note 33—70 C.J. p 943 note 74.

Interest or bias of witnesses generally see the C.J.S. title Witnesses §§ 533–572, also 70 C.J. p 936, note 9–p 1011 note 15.

"The mere fact that testimony comes from mouth of an interested witness will not sustain a verdict in opposition thereto, if that testimony is clear and full, not extraordinary or incredible in the light of general experience, and not contradicted, either directly or indirectly, by other witnesses or by circumstances disclosed, and is so plain and complete that disbelief therein could not arise by rational processes applied to the evidence."—Counts v. Kary, S.D., 297 N.W. 442, 444.

"The testimony of even interested witnesses is not to be regarded as raising a mere issue of fact if it is direct, positive, and not in anywise contradicted by the circumstances."—Stanolind Oil & Gas Co. v. Simpson-Fell Oil Co., Tex.Civ.App., 85 S.W.2d 325, 331, affirmed Simpson-Fell Oil Co. v. Stanolind Oil & Gas Co., 125 S.W.2d 263, 136 Tex. 158, reversed on other grounds 146 S.W. 2d 723, 136 Tex. 158.

Employee of party

Tex.—Gibson v. Southern Pac. Co., C.C.A.Tex., 67 F.2d 758, certiorari denied Southern Pac. Co. v. Gibson, 54 S.Ct. 458, 291 U.S. 673, 78 L.Ed. 1062.

Testimony against interest

Jury cannot arbitrarily reject affirmative uncontradicted testimony of witness when it is against his interest, and return a finding contrary to such testimony.—Sterling Nat. Bank & Trust Co. of New York v. Ellis, Tex.Civ.App., 75 S.W.2d 716, error dismissed—Trice v. Bridgwater, Civ.App., 51 S.W.2d 797, modified on other grounds 81 S.W.2d 63, 125 Tex. 75, 100 A.L.R. 1014.

85. U.S.—Quock Ting v. U. S., Cal., 11 S.Ct. 733, 140 U.S. 417, 35 L.Ed. 501—State Farm Mut. Automobile Ins. Co. v. Bonacci, C.C.A.Neb., 111 F.2d 412—Alabama Title & Trust Co. v. Millsap, C.C.A.Ala., 71 F.2d 518—Gibson v. Southern Pac. Co., C.C.A.Tex., 67 F.2d 758, certiorari denied Southern Pac. Co. v. Gibson, 54 S.Ct. 458, 291 U.S. 673, 78 L.Ed. 1062.

Ala.—Hill v. Johnson, 106 So. 814, 214 Ala. 194.

Ark.—St. Louis-San Francisco Ry. Co. v. Hill, 121 S.W.2d 869, 197 Ark. 53—Casteel v. Yantis-Harper Tire Co., 39 S.W.2d 306, 183 Ark. 912—Skillern v. Baker, 100 S.W. 765, 82 Ark. 86, 12 Ann.Cas. 243, 118 Am.S. R. 52.

Cal.—Westberg v. Willde, 94 P.2d 590, 14 Cal.2d 360, superseding, App., 85 P.2d 507—Caldwell v. Weiner, 264 P. 1100, 203 Cal. 543—Mar Shee v. Maryland Assur. Corporation, Baltimore, 210 P. 269, 190 Cal. 1—Scott v. Sheedy, 102 P.2d 575, 39 Cal.App.2d 96—State v. Arrata, 54 P.2d 532, 11 Cal.App.2d 662—Briggs v. Cameron, 295 P. 347, 111 Cal.App. 189—First Nat. Bank v. Shipley, 292 P. 996, 109 Cal.App. 194—Michaels v. Pacific Soft Water Laundry, 286 P. 172, 104 Cal.App. 366, rehearing denied 286 P. 1071, 104 Cal.App. 366—Tillotson v. Findley, 262 P. 438, 87 Cal.App. 654—Sun-Maid Raisin Growers of California v. Papazian, 240 P. 47, 74 Cal.App. 231—Anso v. Anso, 237 P. 814, 72 Cal.App. 513—Shepard v. Shepard, 223 P. 1012, 65 Cal.App. 310.

D.C.—O'Laughlin v. Helvering, 81 F. 2d 269, 65 App.D.C. 135, followed in 81 F.2d 271, 65 App.D.C. 137.

Ga.—Lewis v. Patterson, 12 S.E.2d 593, 191 Ga. 348—Whiddon v. Hall, 118 S.E. 347, 155 Ga. 570—Powell v. Blackstock, 13 S.E.2d 503, 64 Ga. App. 442—E. P. Redd & Co. v. W. A. Lathem & Sons, 123 S.E. 175, 32 Ga.App. 214.

Kan.—Woulfe v. Arkansas Valley Interurban Ry. Co., 223 P. 817, 115 Kan. 640.

Ky.—Equitable Life Assur. Soc. of U. S. v. Spencer, 90 S.W.2d 704, 262 Ky. 478—Hatcher-Powers Shoe Co. v. Hitchens, 22 S.W.2d 444, 232 Ky. 87—Johnson's Adm'r v. Louisville & I. R. Co., 251 S.W. 843, 199 Ky. 524, overruled Johnson v. Louisville & I. R. Co., 252 S.W. 122, 200 Ky. 74.

La.—Istrouma Mercantile Co. v. Northern Assur. Co., Limited of London, 165 So. 11, 183 La. 855.

Md.—Drury v. State Capital Bank of Eastern Shore Trust Co., 161 A. 176, 163 Md. 84.

Minn.—First Nat. Bank v. Van De Putte, 244 N.W. 416, 187 Minn. 96—Turner v. Gackle, 209 N.W. 626, 168 Minn. 514—Nelson v. Bullard, 194 N.W. 308, 155 Minn. 419—Anderson v. Liljengren, 52 N.W. 219, 50 Minn. 3.

Miss.—Tarver v. Lindsey, 137 So. 93, 161 Miss. 379—Stevens v. Stanley, 122 So. 755, 153 Miss. 809, 154 Miss. 627, overruling suggestion of error 121 So. 814, 153 Miss. 801—Crichton v. Halliburton & Moore, 122 So. 200, 154 Miss. 265—Wilson v. Blanton, 94 So. 214, 130 Miss. 390—Stewart v. Coleman & Co., 81 So. 653, 120 Miss. 28, suggestion of error denied 82 So. 69, and modified on other grounds 82 So. 338.

Mo.—Breslin-Griffitt Carpet Co. v. Asadorian, App., 145 S.W.2d 494.

N.J.—State Board of Medical Examiners v. Baker, 160 A. 339, 10 N. J.Misc. 663.

N.M.—Walker v. Smith, 42 P.2d 768, 39 N.M. 148.

N.Y.—Hull v. Littauer, 57 N.E. 102, 162 N.Y. 569—Kavanagh v. Wilson, 70 N.Y. 177—Locicero v. Messina, 267 N.Y.S. 901, 239 App.Div. 635—Deregibus v. Saracoo, 233 N.Y.S. 99, 225 App.Div. 354—Burns v. Knight, 187 N.Y.S. 504—Cohen v. American Ry. Express Co., 184 N.Y. S. 601, reversed on other grounds 185 N.Y.S. 367.

Ohio.—Farrell v. Travelers Ins. Co. 23 N.E.2d 952, 62 Ohio App. 319.

Okl.—Ironside v. Ironside, 108 P.2d 157—Cummins v. Chandler, 97 P. 2d 765, 186 Okl. 200—McClendon v. Kennedy, 77 P.2d 15, 182 Okl. 153—Burkhart v. Lasley, 75 P.2d 1124, 182 Okl. 43—Carlisle v. State ex rel. Harris, 62 P.2d 617, 178 Okl. 231—Wise v. Wise, 52 P.2d 715, 175 Okl. 310—Taggart v. Snipes, 50 P.2d 640, 174 Okl. 449—Davis v. Wyskup, 223 P. 357, 97 Okl. 239.

R.I.—Somerset Realty Co. v. Shapiro, 155 A. 360, 51 R.I. 417—Millard v. Hall, 135 A. 855—Halliday v. Rhode Island Co., 107 A. 86, 42 R.I. 350—Gorman v. Hand Brewing Co., 66 A. 209, 28 R.I. 180.

S.D.—National Bank of Commerce of New York v. Bottolfson, 225 N.W. 885, 55 S.D. 196, 69 A.L.R. 892.

Tex.—Day v. Grayson County State Bank, Civ.App., 153 S.W.2d 599—Lester v. Robinson, Civ.App., 101 S.W.2d 1038—Great Southern Life Ins. Co. v. Dorough, Civ.App., 100 S.W.2d 772—Williams v. Chew, Civ. App., 19 S.W.2d 68—Winter v. Morgan & Williams, Civ.App., 256 S.W. 342.

Wash.—Inland Empire Land Co. v. Grant County, 245 P. 14, 138 Wash. 439.

W.Va.—Beckley Nat. Exchange Bank v. Provident Life & Accident Ins. Co., 2 S.E.2d 256, 121 W.Va. 152.

Wis.—Schulz v. General Casualty Co., 233 N.W. 803, 233 Wis. 118—Quass v. Milwaukee Gaslight Co., 170 N. W. 942, 168 Wis. 575.

Testimony of party or interested witness

U.S.—Riggle v. Janss Inv. Corporation, C.C.A.Cal., 88 F.2d 111—Becker v. Glenn, D.C.Ky., 29 F.Supp. 558.

Ga.—Stubbs v. Pinholster, 200 S.E. 511, 58 Ga.App. 863.

La.—Burk v. Livingston Parish School Board, 185 So. 284, 191 La. 864, annulling, App., 180 So. 246—Cellized Block Flooring Co. v.

the interest of the opposing party to disprove, if false, his failure to attempt to disprove it strengthens the probative force of the evidence tending to prove it.[86] Where there are no contradictions, the evidence of a witness must be considered as a whole and in the setting in which it was given.[87]

However, the evidence relied on to support a verdict must in itself have fitness to induce conviction, even if uncontradicted;[88] the persuasiveness of evidence may on occasion be destroyed by analysis even though uncontroverted;[89] and a substantial conflict in the evidence may arise when all of the evidence is produced by one party.[90] A fact is not undisputed merely because one or more witnesses testify to it and no one denies it, since it is for the trial court to determine what credence it will give to witnesses.[91] Further, evidence is not regarded as undisputed if it is at variance with the facts and circumstances in the case, or with reasonable inferences therefrom or from the evidence;[92] and reasonable inferences from circumstances or physical facts may outweigh undisputed oral testimony.[93] Thus, the general rule that uncontradicted evidence cannot be disregarded, or is to be taken as true, is subject to many qualifications and exceptions;[94] and it has even been declared a general rule that the

Campbell, App., 188 So. 674—Dugas v. Mayer, App., 179 So. 607.
Md.—Milkton v. French, 150 A. 28, 159 Md. 126.
Miss.—Wilson v. Blanton, 94 So. 214, 130 Miss. 390.
Mo.—Dixon v. Western Tablet & Ticket Co., App., 246 S.W. 619.
N.Y.—Powers v. Wilson, 196 N.Y.S. 600, 203 App.Div. 232—Richard v. Lieberman, 9 N.Y.S.2d 531.
R.I.—Rostron v. Rostron, 142 A. 162, 49 R.I. 292.
Tex.—Simonds v. Stanolind Oil & Gas Co., 136 S.W.2d 207, 134 Tex. 332, denying rehearing 114 S.W.2d 226, 134 Tex. 332, reversing, Civ.App., 103 S.W.2d 784—Myrick v. Central Texas Securities Corporation, Civ. App., 122 S.W.2d 687—Heiner v. Homeland Realty Co., Civ.App., 100 S.W.2d 793.

Oral testimony generally
U.S.—Joseph v. Village of Downers Grove, C.C.A.Ill., 104 F.2d 974, certiorari denied Village of Downers Grove v. Joseph, 60 S.Ct. 142, 308 U.S. 605, 84 L.Ed. 506.

"Belief"
Testimony of witnesses must be accepted in absence of contrary evidence, although they used the terms "belief" and "believe" instead of "recollection".—Litwin v. Allen, 25 N.Y.S.2d 667.

Corroboration by photographs
Jury could not disbelieve oral testimony as to physical facts, which was uncontradicted and corroborated by photographs whose correctness was not questioned.—Lunzer v. Pittsburgh & L. E. R. Co., 145 A. 907, 296 Pa. 393.

Personal knowledge of witness held reasonably inferred.—Breslin-Griffitt Carpet Co. v. Asadorian, Mo.App., 145 S.W.2d 494.

Value of services
Where plaintiff was entitled to compensation for services, her uncontradicted testimony, which was the only testimony as to value of her services, was held required to be assumed to be reasonable compensation.—Riggle v. Janss Inv. Corporation, C.C.A.Cal., 88 F.2d 111.

86. Ill.—Plano Foundry Co. v. Industrial Commission, 190 N.E. 255, 257, 356 Ill. 186, citing **Corpus Juris.**
Neb.—Morris v. Equitable Life Assur. Soc. of U. S., 191 N.W. 190, 109 Neb. 348.
Tex.—Martin v. Cable, Civ.App., 140 S.W.2d 894—Union Central Life Ins. Co. v. Williams, Civ.App., 99 S.W.2d 319—Stark v. Haynes, Civ. App., 211 S.W. 343, dismissed for want of jurisdiction.
23 C.J. p 47 note 34.
Presumption from failure to produce evidence see supra § 156.

Readily discreditable testimony
The rule that the uncorroborated testimony of interested witnesses, although not controverted, does not conclusively establish a fact, is not applicable where the nature of the testimony is such that it might readily be discredited, if it were not true, and the adverse party offers no disparaging proof whatever.—Matthews v. Wilson, Tex.Civ.App., 141 S.W.2d 747—Century Ins. Co., Limited, of Edinburgh, Scotland, v. Hogan, Tex. Civ.App., 135 S.W.2d 224—Taylor-Link Oil Co. v. Anderson, Tex.Civ. App., 92 S.W.2d 499, error dismissed—L. E. Whitham & Co. v. Allen, Tex. Civ.App., 64 S.W.2d 1024, error dismissed—Gardner v. Wesner, Tex. Civ.App., 55 S.W.2d 1104, error refused—Luling Oil & Gas Co. v. Edwards, Tex.Civ.App., 32 S.W.2d 921, error dismissed.

87. Mo.—Dimond v. Terminal R. Ass'n of St. Louis, 141 S.W.2d 789.

88. Tenn.—Standard Oil Co. of Louisiana v. Roach, 94 S.W.2d 63, 19 Tenn.App. 661.
Utah.—Gagos v. Industrial Commission of Utah, 48 P.2d 449, 87 Utah 101, reversing 39 P.2d 697, 87 Utah 92.

89. U.S.—Goodyear Tire & Rubber Co. v. Federal Trade Commission, C.C.A., 101 F.2d 620, certiorari denied Federal Trade Commission v. Goodyear Tire & Rubber Co., 60 S. Ct. 74, 308 U.S. 557, 84 L.Ed. 468.

Force of uncontradicted evidence
(1) Uncontradicted evidence has no superior legal quality, whatever its persuasive force may be.—Topjian v. Boston Casing Co., 192 N.E. 507, 288 Mass. 167.
(2) However, a statement which alone may afford substantial support for a fact finding may lose its weight entirely in face of uncontradicted facts inconsistent with the statement.—Foote Bros. Gear & Machine Corporation v. National Labor Relations Board, C.C.A., 114 F.2d 611, reversed on other grounds National Labor Relations Board v. Foote Bros. Gear & Machine Corporation, 61 S. Ct. 318, 311 U.S. 620, 85 L.Ed. 394—Independent Union of Gear Workers v. National Labor Relations Board, C.C.A., 114 F.2d 611, reversed on other grounds National Labor Relations Board v. Independent Union of Gear Workers, 61 S.Ct. 318, 311 U.S. 620, 85 L.Ed. 394.

90. Cal.—Isham v. Trimble, 43 P.2d 581, 5 Cal.App.2d 648.

91. Conn.—Morse v. Morse, 20 A.2d 730, 128 Conn. 138—Searle v. Gerent, 159 A. 892, 114 Conn. 671.

92. Ark.—Brummitt v. Wilmans, 70 S.W.2d 841, 189 Ark. 1171—Jolley v. Meek, 47 S.W.2d 43, 185 Ark. 393.
Okl.—Ironside v. Ironside, 108 P.2d 157—Cummins v. Chandler, 97 P.2d 765, 186 Okl. 200—McClendon v. Kennedy, 77 P.2d 15, 182 Okl. 153—Burkhart v. Lasley, 75 P.2d 1124, 182 Okl. 43—Carlisle v. State ex rel. Harris, 62 P.2d 617, 178 Okl. 231—Wise v. Wise, 52 P.2d 715, 175 Okl. 310—Davis v. Wyskup, 223 P. 357, 97 Okl. 239.

93. Okl.—Wise v. Wise, 52 P.2d 715, 717, 175 Okl. 310.

Manner of living
"The defendant's apparent assets, but more particularly his manner of living, were wholly at variance with his contention of no income or property."—Wise v. Wise, supra.

94. U.S.—Quock Ting v. U. S., Cal., 11 S.Ct. 733, 140 U.S. 417, 35 L.Ed.

trier of facts may disregard[95] or discount[96] uncontradicted evidence. The common view is that evidence not directly contradicted is not necessarily binding on the triers of fact, and may, in proper circumstances, be disbelieved and given no weight,[97]

501—Southern Pac. Co. v. Hanlon C.C.A.Cal., 9 F.2d 294.
Ariz.—Crozier v. Noriega, 233 P. 1104, 27 Ariz. 409.
Ark.—Casteel v. Yantis-Harper Tire Co., 39 S.W.2d 306, 183 Ark. 912—Skillern v. Baker, 100 S.W. 765, 82 Ark. 86, 12 Ann.Cas. 243, 118 Am. S.R. 52.
Cal.—Caldwell v. Weiner, 264 P. 1100, 203 Cal. 543—State v. Arrata, 54 P.2d 532, 11 Cal.App.2d 662—Berg v. Journeymen's Plumbers' & Gas Fitters' Union, 42 P.2d 1091, 5 Cal. App.2d 582—Briggs v. Cameron, 295 P. 347, 111 Cal.App. 189—First Nat. Bank v. Shipley, 292 P. 996, 109 Cal.App. 194.
D.C.—O'Laughlin v. Helvering, 81 F. 2d 269, 65 App.D.C. 135, followed in 81 F.2d 271, 65 App.D.C. 137.
Fla.—Rountree v. Davis, 167 So. 820, 124 Fla. 212.
N.Y.—Elwood v. Western Union Telegraph Co., 45 N.Y. 549, 6 Am.R. 140.
Okl.—McClendon v. Kennedy, 77 P. 2d 15, 182 Okl. 153.

"The rule has no application unless the testimony is sufficiently positive in its character to be satisfactory from that standpoint, and, even though the evidence is both positive and uncontradicted, it may be disregarded under certain circumstances."—Berg v. Journeymen's Plumbers' & Gas Fitters' Union, 42 P.2d 1091, 1092, 5 Cal.App.2d 582.

95. Cal.—In re Braue's Estate, App., 114 P.2d 386.
N.H.—Hackett v. Boston & M. R. R., 6 A.2d 139, 89 N.H. 514.

96. N.H.—Hackett v. Boston & M. R. R., 6 A.2d 139, 89 N.H. 514.

97. U.S.—Elzig v. Gudwangen, C. C.A.Minn., 91 F.2d 434—Spiro State Bank v. Bankers' Nat. Life Ins. Co., C.C.A.Ark., 69 F.2d 185—Pariso v. Towse, C.C.A.N.Y., 45 F.2d 962—Easton v. Brant, C.C.A.Cal., 19 F.2d 857, 859, quoting **Corpus Juris**—Reiss v. Reardon, C.C.A.Mo., 18 F.2d 200—U. S. v. One 1939 Cadillac Two Passenger Coupe, Motor No. 8291842, License No. NJ-MH-27-V, D.C.N.J., 36 F.Supp. 847—Duwamish v. U. S., 79 Ct.Cl. 530, certiorari denied 55 S.Ct. 913, 295 U.S. 755, 79 L.Ed. 1698.
Ariz.—Knapp v. Highway Department, 104 P.2d 180, 181, 56 Ariz. 54, citing **Corpus Juris**—Illinois Bankers' Life Ass'n v. Theodore, 34 P.2d 423, 44 Ariz. 160—Otero v. Soto, 267 P. 947, 34 Ariz. 87.
Cal.—Hanlon v. Western Loan & Bldg. Co., App., 116 P.2d 465—Isham v. Trimble, 43 P.2d 581, 5 Cal.App.2d 648—Farmers' & Merchants' Nat. Bank of Los Angeles v. Bailie, 32 P.2d 157, 138 Cal.App. 143—Vasiljevich v. Radanovich, 31 P.2d 802, 138 Cal.App. 97—Whitaker v. Whitaker, 30 P.2d 538, 137 Cal. App. 396—Irwin v. Pickwick Stages System, 25 P.2d 998, 134 Cal.App. 443—Dickey v. Kuhn, 13 P.2d 834, 125 Cal.App. 68—Silva v. Goldman, 4 P.2d 191, 117 Cal.App. 423—Worthington v. People's State Bank of Chula Vista, 288 P. 1086, 106 Cal.App. 238—Citizens' State Bank of Santa Monica v. Castro, 287 P. 559, 105 Cal.App. 284—Morgan v. Matthieson, 285 P. 325, 103 Cal.App. 510—MacDiarmid v. McDevitt, 275 P. 500, 97 Cal.App. 414—Deacon v. Bryans, 263 P. 371, 88 Cal.App. 322—Dierks v. Newsom, 194 P. 518, 49 Cal.App. 789—Richey v. Butler, 180 P. 652, 40 Cal.App. 314.
Colo.—Nelson v. Lunt, 220 P. 1006, 74 Colo. 265.
Conn.—McCarten v. Connecticut Co., 131 A. 505, 103 Conn. 537.
Ga.—Lewis v. Patterson, 12 S.E.2d 593, 191 Ga. 348—Cooper v. Lumbermen's Mutual Casualty Co., 175 S.E. 577, 179 Ga. 256—Whiddon v. Hall, 118 S.E. 347, 155 Ga. 570—McRae v. Wilby, 1 S.E.2d 77, 59 Ga. App. 401—Fincher v. Harlow, 193 S.E. 452, 56 Ga.App. 578—Newsom v. Reynolds Chevrolet Co., 158 S.E. 763, 43 Ga.App. 376—Sligh v. Whitley, 153 S.E. 237, 41 Ga.App. 428—Seaboard Air Line Ry. Co. v. D'-Avignon, 153 S.E. 96, 41 Ga.App. 263, certiorari denied 51 S.Ct. 351, 283 U.S. 827, 75 L.Ed. 1441—Wilson v. Gray, 129 S.E. 297, 34 Ga.App. 320—E. P. Redd & Co. v. W. A. Lathem & Sons, 123 S.E. 175, 32 Ga.App. 214—Haverty Furniture Co. v. Calhoun, 84 S.E. 138, 15 Ga. App. 620.
Ill.—Oliver v. Oliver, 172 N.E. 917, 340 Ill. 445—Mannen v. Norris, 170 N.E. 273, 338 Ill. 322.
Iowa.—Schulte v. Ideal Food Products Co., 213 N.W. 431, 203 Iowa 676.
Kan.—Johnson v. Soden, 103 P.2d 812, 152 Kan. 284—Kallail v. Solomon, 72 P.2d 966, 146 Kan. 599—Potts v. McDonald, 69 P.2d 685, 146 Kan. 366—Reed-Smith v. Lockridge, 65 P.2d 345, 145 Kan. 395—Ross v. Ross, 31 P.2d 718, 139 Kan. 316—Eastman v. Morrow, 23 P.2d 595, 138 Kan. 26—People's Nat. Bank of Ottawa v. Diven, 10 P.2d 883, 135 Kan. 400—Trustees of Baker University v. Farrar, 8 P.2d 343, 134 Kan. 722—Boucher v. Conley, 5 P. 2d 820, 134 Kan. 194—Young v. Lucas, 296 P. 362, 132 Kan. 484—Weber Implement & Automobile Co. v. Dubach, 295 P. 979, 132 Kan. 309—Fenn v. Kansas Gas & Electric Co., 234 P. 77, 118 Kan. 131—Sharp v. Losee, 199 P. 94, 109 Kan. 211—Swartz v. Levin, 194 P. 646, 108 Kan. 224—Collins v. Hayden, 179 P. 308, 104 Kan. 351—State v. Woods, 170 P. 986, 102 Kan. 499, L.R.A. 1918C 889—Hope v. Bashor, 163 P. 463, 99 Kan. 804.
Ky.—Saxton Coal Co. v. Kreutzer's Adm'x, 290 S.W. 475, 217 Ky. 670.
Md.—Pennsylvania R. Co. v. Stallings, 170 A. 163, 165 Md. 615.
Mass.—Stacy v. Dorchester Awning Co., 195 N.E. 350—Johnson v. Czeikus, 193 N.E. 13, 288 Mass. 428—Commonwealth v. Davis, 187 N.E. 33, 284 Mass. 41—Cosman v. Donovan, 184 N.E. 664, 282 Mass. 224—Denny v. Riverbank Court Hotel Co., 184 N.E. 452, 282 Mass. 176—Ashapa v. Reed, 182 N.E. 859, 280 Mass. 514—Wilson v. Grace, 173 N. E. 524, 273 Mass. 146—Gilchrist v. Boston Elevated Ry., 172 N.E. 349, 272 Mass. 346—Guinan v. Famous Players-Lasky Corporation, 167 N. E. 235, 267 Mass. 501—Learned v. Hamburger, 139 N.E. 641, 245 Mass. 461—Jordan v. Malden Electric Co., 138 N.E. 536, 244 Mass. 342—Dorne v. Adams, 137 N.E. 650, 243 Mass. 438—Morrison v. Boston Ins. Co., 125 N.E. 698, 234 Mass. 453—Ryan v. Fall River Iron Works, 86 N.E. 310, 200 Mass. 188—Lindenbaum, v. N. Y., N. H. & H. R. Co., 84 N. E. 129, 197 Mass. 314.
Minn.—Coffman v. Kummer, 228 N. W. 751, 179 Minn. 120—Barnes v. Verry, 191 N.W. 589, 154 Minn. 252, 31 A.L.R. 707—Nelson v. Schmidt, 191 N.W. 281, 153 Minn. 474.
Mo.—Murphy v. Doniphan Telephone Co., 147 S.W.2d 616—Thomson v. Butler, 147 S.W.2d 437—Woehler v. City of St. Louis, 114 S.W.2d 985, 342 Mo. 237—Shaw v. Fulkerson, 96 S.W.2d 495, 339 Mo. 310—Dempsey v. Horton, 84 S.W.2d 621, 337 Mo. 379—Young v. Wheelock, 64 S.W.2d 950, 333 Mo. 992, certiorari denied Wheelock v. Young, 54 S.Ct. 527, 291 U.S. 676, 78 L.Ed. 1064—Cluck v. Abe, 40 S.W.2d 558, 328 Mo. 81—Barz v. Fleischmann Yeast Co., 271 S.W. 361, 308 Mo. 288—State ex rel. Missouri Gas & Electric Service Co. v. Trimble, 271 S.W. 43, 307 Mo. 536—Diehl v. A. P. Green Fire Brick Co., 253 S.W. 984, 299 Mo. 641—Unrein v. Oklahoma Hide Co., 244 S.W. 924, 295 Mo. 353—Rutledge v. Weisenborn, App., 142 S.W.2d 884—Wilson v. Kansas City Life Ins. Co., 128 S.W.2d 319, 233 Mo.App. 1006—Kaeuven v. Berliner's Estate, App., 54 S.W.2d 494—Mundy v. St. Louis-San Francisco Ry. Co., App.,

in whole or part,[98] especially where the witness is a party or otherwise interested,[99] some authorities

45 S.W.2d 941—Gray v. Willard, App., 288 S.W. 798—Pavey v. London & Provincial Marine & General Ins. Co., 288 S.W. 788, 221 Mo.App. 930—Ford v. Ford Roofing Products Co., App., 285 S.W. 538—Bank of Slater v. Harrington, 266 S.W. 496, 218 Mo.App. 645—Way v. Rupp, App., 234 S.W. 515—Heller v. Chicago & A. R. Co., App., 209 S.W. 567.

Mont.—Ross v. Industrial Accident Board, 80 P.2d 362, 106 Mont. 486—McLaughlin v. Corcoran, 69 P. 2d 597, 104 Mont. 590—Simons v. Jennings, 46 P.2d 704, 100 Mont. 55—Roman v. Albert, 264 P. 115, 81 Mont. 393.

Nev.—In re Golding's Estate, 89 P.2d 1049, 59 Nev. 201—In re Duffill's Estate, 61 P.2d 985, 57 Nev. 224.

N.H.—Andrew v. Goodale, 161 A. 36, 85 N.H. 510.

N.Y.—Harding v. Harding, 22 N.Y.S. 2d 810, affirmed 25 N.Y.S.2d 525, 261 App.Div. 924.

Okl.—McClendon v. Kennedy, 77 P.2d 15, 182 Okl. 153.

Tex.—Houston E. & W. T. Ry. Co. v. Runnels, 47 S.W. 972, 92 Tex. 307—Greenway v. Great Atlantic & Pacific Tea Co., Civ.App., 114 S. W.2d 435—Thomas Inv. Co. v. Thompson, Civ.App., 32 S.W.2d 708—Stefka v. Lawrence, Civ.App., 288 S.W. 1092—Twichell v. Klinke, Civ.App., 272 S.W. 283—Booker v. Booker, Civ.App., 207 S.W. 675.

Utah.—Gagos v. Industrial Commission of Utah, 48 P.2d 449, 450, 87 Utah 101, reversing 39 P.2d 697, 87 Utah 92, citing **Corpus Juris**—Miller v. Columbia Trust Co., 225 P. 609, 63 Utah 305.

Vt.—La Pierre v. Halpin, 13 A.2d 281—Valenti v. Imperial Assur. Co., 176 A. 413, 107 Vt. 65.

Va.—Goodloe v. Smith, 164 S.E. 379, 158 Va. 571—Metropolitan Life Ins. Co. v. Botto, 143 S.E. 625, 153 Va. 468, reversed on other grounds on rehearing 154 S.E. 603, 153 Va. 468.

Wash.—Bice v. Bice, 244 P. 1000, 138 Wash. 598.

Wis.—Zastrow v. Schaumburger, 245 N.W. 202, 210 Wis. 116.

23 C.J. p 47 note 35.

Uncontroverted opinion evidence as not necessarily conclusive see supra § 567.

"A trial judge or jury is not required to blindly believe a witness, nor to find in accordance with his statements merely because his testimony is uncontradicted or unimpeached by the party against whom he testifies."—Travis Glass Co. v. Ibbetson, 200 P. 595, 597, 186 Cal. 724.

"The jury are never required to draw the inference that any testimony before them, whether contradicted or uncontradicted, is true."—Knox v. Binkoski, 122 A. 400, 405, 99 Conn. 582.

"The testimony of a witness founded in ignorance, confusion, mistake, bias, or prejudice, or falsehood is not acceptable simply because no other witness has testified conversely."—Jensen v. Logan City, 88 P.2d 459, 460, 96 Utah 522, affirming 83 P.2d 311, 96 Utah 53.

No presumption of truth

"There is no presumption of law that an uncontradicted witness has testified truly."—Rains v. Rains, 8 A.2d 715, 17 N.J.Misc. 310, set aside on other grounds 12 A.2d 857, 127 N.J.Eq. 328.

Opposing party held not bound by uncontradicted evidence.—Morris v. E. I. Du Pont De Nemours & Co., Mo., 139 S.W.2d 984, 129 A.L.R. 352.

Amount necessary for support

Testimony by mother, party to a divorce suit, as to amount necessary for support of child, although not disputed, is not conclusive on courts, since "on such question as that the testimony of no witness can be conclusive upon the courts."—Barish v. Barish, 180 N.W. 724, 725, 190 Iowa 493.

Amount of charge

In an action to recover for services to defendant's minor son, although there was no evidence to meet that of plaintiff as to the amount of his charge, the jury were not obliged to find in his favor for that sum.—Stimpson v. Hunter, 125 N.E. 155, 234 Mass. 61, 7 A.L.R. 1067.

Corpus Juris cited in connection with statement as to criminal law.—Brannen v. State, 114 So. 429, 431, 94 Fla. 656.

98. U.S.—Ætna Life Ins. Co. v. Hagemyer, C.C.A.Tex., 53 F.2d 636, affirming, D.C., Killingsworth v. Ætna Life Ins. Co., 49 F.2d 399, and certiorari denied Ætna Life Ins. Co. v. Hagemyer, 52 S.Ct. 314, 285 U.S. 542, 76 L.Ed. 934.

Mass.—Lydon v. Boston Elevated Ry., 34 N.E.2d 642, 309 Mass. 205—Learned v. Hamburger, 139 N.E. 641, 245 Mass. 461.

Mo.—Thomson v. Butler, 147 S.W.2d 437—In re Franz' Estate, 127 S.W. 2d 401—Connole v. East St. Louis & S. Ry. Co., 102 S.W.2d 581, 340 Mo. 690—Dempsey v. Horton, 84 S.W.2d 621, 337 Mo. 379.

Vt.—Valenti v. Imperial Assur. Co., 176 A. 413, 107 Vt. 65.

99. U.S.—Ætna Life Ins. Co. v. Hagemyer, C.C.A.Tex., 53 F.2d 636, affirming, D.C., Killingsworth v. Ætna Life Ins. Co., 49 F.2d 399, and certiorari denied Ætna Life Ins. Co. v. Hagemyer, 52 S.Ct. 314, 285 U.S. 542, 76 L.Ed. 934—Easton v. Brant, C.C.A.Cal., 19 F.2d 857, 859, quoting **Corpus Juris**—Southern Pac. Co. v. Hanlon, C.C.A.Cal., 9 F.2d 294—Duwamish v. U. S., 79 Ct.Cl. 530, certiorari denied 55 S. Ct. 913, 295 U.S. 755, 79 L.Ed. 1698.

Ariz.—Rowe v. Goldberg Film Delivery Lines, 72 P.2d 432, 50 Ariz. 349—Lentz v. Landers, 185 P. 821, 21 Ariz. 117.

Ark.—Casteel v. Yantis-Harper Tire Co., 36 S.W.2d 406, 183 Ark. 475—Skillern v. Baker, 100 S.W. 765, 82 Ark. 86.

Cal.—Chamberlain v. Chamberlain, 38 P.2d 790, 2 Cal.App.2d 684—Whitaker v. Whitaker, 30 P.2d 538, 137 Cal.App. 396—Lejeune v. General Petroleum Corporation of California, 18 P.2d 429, 128 Cal. App. 404—First Nat. Bank v. Shipley, 292 P. 996, 109 Cal.App. 194—Simon Newman Co. v. Woods, 259 P. 460, 85 Cal.App. 360.

Colo.—Greenlee v. Owens, 220 P. 496, 74 Colo. 225.

Ga.—Horton v. Johnson, 15 S.E.2d 605—Detwiler v. Cox, 48 S.E. 142, 120 Ga. 638.

Ill.—Morrison v. Beers, 158 N.E. 371, 327 Ill. 139.

Ind.—National City Bank v. Kirk, 134 N.E. 772, 85 Ind.App. 120.

Iowa.—Ransom v. Lochmiller, 224 N.W. 469, 207 Iowa 1315.

Kan.—Citizens' Finance Co. v. Seamans, 284 P. 422, 129 Kan. 743.

Me.—Mitchell v. Mitchell, 11 A.2d 898, 136 Me. 406.

Mich.—Cuttle v. Concordia Mut. Fire Ins. Co., 295 N.W. 246, 295 Mich. 514.

Minn.—Weinstein v. Schwartz, 283 N.W. 127, 204 Minn. 189—Barnard v. Seaman, 211 N.W. 473, 169 Minn. 409—Stephon v. Topic, 180 N.W. 221, 147 Minn. 263.

Mo.—Rutledge v. Weisenborn, App., 142 S.W.2d 884.

Mont.—Roman v. Albert, 264 P. 115, 81 Mont. 393—Reid v. Hennessy Mercantile Co., 123 P. 397, 45 Mont. 383.

N.H.—Crook v. Parkhurst, 197 A. 827, 89 N.H. 280.

N.Y.—Kavanagh v. Wilson, 70 N.Y. 177—Elwood v. Western Union Tel. Co., 45 N.Y. 549, 6 Am.R. 140—Karpas v. Bandler, 218 N.Y.S. 500, 218 App.Div. 418—Federal Varnish Co. v. Boelsen, 128 N.Y.S. 658.

Or.—Hill v. Harritt, 12 P.2d 1021, 1024, 140 Or. 86, citing **Corpus Juris.**

Pa.—Ringer v. Finfrock, 17 A.2d 348, 340 Pa. 458.

Tenn.—Carter v. Kelsey Wheel Co., 77 S.W.2d 449, 168 Tenn. 262.

Tex.—Sturtevant v. Pagel, 130 S.W. 2d 1017, 134 Tex. 46, affirming,

holding that, in determining the legal significance of evidence, the testimony of interested parties is not to be regarded as undisputed.[1]

So, evidence not directly contradicted may be disbelieved, and accorded no weight, where it is contrary to natural or physical laws or physical facts,[2] opposed to common knowledge or human experience,[3] inherently improbable, unreasonable, or unworthy of belief,[4] obnoxious to some established

Civ.App., 109 S.W.2d 556—Houston E. & W. T. Ry. Co. v. Runnels, 47 S.W. 972, 92 Tex. 307—Sigmond Rothchild v. Moore, Com.App., 37 S.W.2d 121, reversing Sigmond Rothchild v. Moore, Civ.App., 22 S.W.2d 533—Casualty Reciprocal Exchange v. Parker, Com.App., 12 S.W.2d 536, affirming, Civ.App., 300 S.W. 230—Schumann v. Brownwood Mut. Life Ins. Ass'n, Com App., 286 S.W. 200, reversing Brownwood Mut. Life Ins. Ass'n v. Schumann, Civ.App., 276 S.W. 956—Poulter v. Miller, Com.App., 221 S. W. 965, reversing Miller v. Poulter, Civ.App., 189 S.W. 105—Nunn v. Daly, Civ.App., 150 S.W.2d 834, error dismissed, judgment correct—Commercial Standard Ins. Co. v. First State Bank of Vernon, Civ. App., 142 S.W.2d 621, error dismissed—Texas Employers' Ins. Ass'n v. Humphrey, Civ.App., 140 S.W.2d 313, error refused—James v. Flippen, Civ.App., 122 S.W.2d 1090—Greenway v. Great Atlantic & Pacific Tea Co., Civ.App., 114 S. W.2d 435—Texas Creosoting Co. v. Sims, Civ.App., 113 S.W.2d 227, error dismissed—Great Southern Life Ins. Co. v. Dorough, Civ.App., 100 S.W.2d 772—Krueger v. Bankers Lloyds, Civ.App., 45 S.W.2d 363—Gulf, C. & S. F. Ry. Co. v. Dunman, Civ.App., 15 S.W.2d 1053, affirmed, Com.App., 27 S.W.2d 116, 72 A.L.R. 90—Moore v. Follett, Civ.App., 11 S.W.2d 662, error dismissed—Stefka v. Lawrence, Civ. App., 288 S.W. 1092—Chapman v. Nieman, Civ.App., 276 S.W. 302—Harlan v. First State Bank of Sterling City, Civ.App., 270 S.W. 895—Wheeler v. Stone, Civ.App., 261 S.W. 1082—Queen v. Turman, Civ.App., 241 S.W. 786, reversed on other grounds, Com.App., 257 S. W. 1092—Briggs v. Briggs, Civ. App., 227 S.W. 511—Gulf, C. & S. F. Ry. Co. v. Davis, Civ.App., 225 S.W. 773—Dendinger v. Martin, Civ.App., 221 S.W. 1095, dismissed for want of jurisdiction—Fagan v. Texas Co., Civ.App., 220 S.W. 346—Hinds v. Allen, Civ.App., 213 S.W. 671.

Vt.—Watts v. Mulliken's Estate, 115 A. 150, 95 Vt. 335.

Wash.—Pyle v. Wilbert, 98 P.2d 664, 2 Wash.2d 429—Danich v. Culjak, 66 P.2d 860, 190 Wash. 79—Bond v. Werley, 28 P.2d 318, 175 Wash. 659—Nearhoff v. Rucker, 287 P. 658, 156 Wash. 621—Mattingley v. Oregon-Washington R. & Nav. Co., 280 P. 46, 153 Wash. 514—Day v. Polley, 266 P. 169, 147 Wash. 419—Siegel v. Kracower, 258 P. 493, 144 Wash. 609—Gosline v. Dryfoos, 88 P. 634, 45 Wash. 396.

23 C.J. p 48 note 41—70 C.J. p 940 note 51.

Testimony not clear on issue involved.—Arcadia Refining Co. v. Cook, Tex.Civ.App., 146 S.W.2d 767, error dismissed, judgment correct.

Witness held not party or interested

Tex.—Sterling Nat. Bank & Trust Co. of New York v. Ellis, Civ.App., 75 S.W.2d 716, error dismissed—Modern Woodmen of America v. Baker, Civ.App., 56 S.W.2d 891, error dismissed.

1. Ark.—Kilgo v. Garvin, 144 S.W. 2d 1067—Brown v. Dark, 119 S.W. 2d 529, 196 Ark. 724—Myers v. Hobbs, 115 S.W.2d 880, 195 Ark. 1026—Missouri Pac. R. Co. v. Nelson, 115 S.W.2d 872, 195 Ark. 883—Strickland v. Missouri Pac. Transp. Co., 115 S.W.2d 830, 195 Ark. 950—Seeman v. Hilderbrand, 113 S.W. 2d 724, 195 Ark. 677—Missouri Pac. R. Co. v. Hancock, 113 S.W.2d 489, 195 Ark. 414—McDonald v. Olla State Bank, 93 S.W.2d 325, 192 Ark. 603—Gunther v. Cotner, 92 S. W.2d 865, 192 Ark. 498—Rutherford v. Casey, 77 S.W.2d 58, 190 Ark. 79—Milburn v. Martin, 76 S. W.2d 952, 190 Ark. 16—Brummitt v. Wilmans, 70 S.W.2d 841, 189 Ark. 1171—French v. Browning, 63 S.W.2d 647, 187 Ark. 996—Davis v. Oaks, 60 S.W.2d 922, 187 Ark. 501—Bridges v. Shapleigh Hardware Co., 57 S.W.2d 405, 186 Ark. 993—McGraw v. Miller, 44 S.W.2d 366, 184 Ark. 916—Elmore v. Bishop, 42 S.W.2d 399, 184 Ark. 243—Metcalf v. Jelks, 8 S.W.2d 462, 177 Ark. 1023—Blankenship v. Modglin, 6 S. W.2d 531, 177 Ark. 388—Zorub v. Missouri Pac. R. Co., 31 S.W.2d 421, 182 Ark. 232—Walker v. Eller, 10 S.W.2d 14, 178 Ark. 183—Nelson v. Missouri Pac. R. Co., 292 S. W. 120, 172 Ark. 1053—Kansas City Southern Ry. Co. v. Cockrell, 277 S.W. 7, 169 Ark. 698—Scott v. Montgomery County Bank, 250 S. W. 902, 158 Ark. 644—Salmon v. Boyer, 213 S.W. 383, 139 Ark. 236.

Tex.—Humphreys v. Green, Civ.App., 234 S.W. 562.

Employee

Ark.—Missouri Pac. R. Co. v. Thomas, 124 S.W.2d 820, 197 Ark. 565—Ball v. Hall, 118 S.W.2d 668, 196 Ark. 491—Missouri Pac. R. Co. v. Hancock, 113 S.W.2d 489, 195 Ark. 414.

Party's testimony held contradicted by that of the other party.—Kec v. Kec, 137 N.E. 632, 79 Ind.App. 186.

2. U.S.—Easton v. Brant, C.C.A.Cal., 19 F.2d 857, 859, quoting **Corpus Juris.**

Fla.—Catlett v. Chestnut, 146 So. 241, 107 Fla. 498, 91 A.L.R. 212.

Ga.—Seaboard Air Line Ry. Co. v. D'Avignon, 153 S.E. 96, 41 Ga. App. 263, certiorari denied 51 S.Ct. 351, 283 U.S. 827, 75 L.Ed. 1441.

Ill.—Kelly v. Jones, 125 N.E. 334, 290 Ill. 375, 8 A.L.R. 792.

Miss.—Stevens v. Stanley, 122 So. 755, 153 Miss. 809, overruling suggestion of error 121 So. 814, 153 Miss. 801.

Nev.—In re Golding's Estate, 89 P.2d 1049, 59 Nev. 201.

23 C.J. p 48 note 36.

3. U.S.—Easton v. Brant, C.C.A.Cal., 19 F.2d 857, 859, quoting **Corpus Juris.**

Fla.—Catlett v. Chestnut, 146 So. 241, 107 Fla. 498, 91 A.L.R. 212.

Miss.—Stevens v. Stanley, 122 So. 755, 153 Miss. 809, overruling suggestion of error 121 So. 814, 153 Miss. 801.

Nev.—In re Golding's Estate, 89 P.2d 1049, 59 Nev. 201.

Or.—Hill v. Harritt, 12 P.2d 1021, 140 Or. 86.

Wash.—Poland v. City of Seattle, 98 P.2d 379, 200 Wash. 208.

23 C.J. p 48 note 37.

4. U.S.—Quock Ting v. United States, Cal., 11 S.Ct. 733, 140 U.S. 417, 35 L.Ed. 501—Gibson v. Southern Pac. Co., C.C.A.Tex., 67 F.2d 758, certiorari denied Southern Pac. Co. v. Gibson, 54 S.Ct. 458, 291 U.S. 673, 78 L.Ed. 1062—Lowenstein v. I. N. Platt & Co., C.C.A. N.Y., 58 F.2d 173—Fire Ass'n of Philadelphia v. Weathered, C.C.A. Tex., 54 F.2d 779—Allen v. Collins, C.C.A.Neb., 52 F.2d 708—U. S. v. Bethlehem Shipbuilding Corporation, D.C.Md., 28 F.2d 880, reversing 25 F.2d 157—Easton v. Brant, C.C.A.Cal., 19 F.2d 857, 859, quoting **Corpus Juris**—Southern Pac. Co. v. Hanlon, C.C.A.Cal., 9 F.2d 294—American Casualty Co. of Reading, Pa. v. Windham, D.C.Ga., 26 F.Supp. 261, affirmed, C.C.A., 107 F.2d 88, certiorari denied 60 S.Ct. 714, 309 U.S. 674, 84 L.Ed. 1019.

Ala.—Umphrey v. Barfield, 189 So. 64, 238 Ala. 11—Williams v. Mahone, 182 So. 464, 236 Ala. 94—Williams v. Ellington, 172 So. 903, 233 Ala. 638.

Cal.—Burdick v. Wittich, App., 116

legal mode of testing the truth,[5] inconsistent with | facts or circumstances in evidence,[6] unclear and

P.2d 99—Lissauer v. Union Bank & Trust Co. of Los Angeles, App., 114 P.2d 367—Willis v. Holback, 91 P.2d 140, 33 Cal.App.2d 145—State v. Arrata, 54 P.2d 532, 11 Cal.App. 2d 662—Pene v. Mauk, 42 P.2d 697, 5 Cal.App.2d 428—Rogers v. Burnham, 35 P.2d 329, 140 Cal.App. 336 —Rasic v. Schultheiss, 9 P.2d 550, 121 Cal.App. 560—Speer v. Kittle Mfg. Co., 4 P.2d 575, 117 Cal.App. 717—Bohn v. Gruver, 295 P. 891, 111 Cal.App. 386—Cowan v. Hill, 293 P. 871, 109 Cal.App. 656—Michaels v. Pacific Soft Water Laundry, 286 P. 172, 104 Cal.App. 366, rehearing denied 286 P. 1071, 104 Cal.App. 366—MacDiarmid v. McDevitt, 275 P. 500, 97 Cal.App. 414—Tillotson v. Findley, 262 P. 438, 87 Cal.App. 654—Anso v. Anso, 237 P. 814, 72 Cal.App. 513—Shepard v. Shepard, 223 P. 1012, 65 Cal.App. 310—Dierks v. Newsom, 194 P. 518, 49 Cal.App. 789.

D.C.—O'Laughlin v. Helvering, 81 F. 2d 269, 65 App.D.C. 135, followed in 81 F.2d 271, 65 App.D.C. 137.

Fla.—Rountree v. Davis, 167 So. 820, 124 Fla. 212—Catlett v. Chestnut, 146 So. 241, 107 Fla. 498, 91 A.L.R. 212—Howell v. Blackburn, 129 So. 341, 100 Fla. 114.

Ga.—Lewis v. Patterson, 12 S.E.2d 593, 191 Ga. 348—Sligh v. Whitley, 153 S.E 227, 41 Ga.App. 428—Jones v. Teasley, 105 S.E. 46, 25 Ga.App. 784.

Idaho.—First Trust & Savings Bank v. Randall, 89 P.2d 741, 59 Idaho 705—Pierstorff v. Gray's Auto Shop, 74 P.2d 171, 58 Idaho 438.

Ill.—Kavale v. Morton Salt Co., 160 N.E. 752, 329 Ill. 445, affirming 242 Ill.App. 205—Morrison v. Beers, 158 N.E. 371, 327 Ill. 139—Kelly v. Jones, 125 N.E. 334, 290 Ill. 375, 8 A.L.R. 792—In re Hanson's Estate, 26 N.E.2d 175, 304 Ill.App. 157—Morris v. Carroso, 11 N.E.2d 816, 292 Ill.App. 620—Paulsen v. Cochfield, 278 Ill.App. 596—Clements v. Western Fire Ins. Co., 264 Ill.App. 473—De Bow v. Cleveland, C., C. & St. L. Ry. Co., 245 Ill.App. 158. See Bailey v. Niebruegge, 211 Ill.App. 82.

Ind.—De Lange v. Cones, 19 N.E.2d 850, 215 Ind. 355.

Mich.—Cuttle v. Concordia Mut. Fire Ins. Co., 295 N.W. 246, 295 Mich. 514.

Minn.—Osbon v. Hartfiel, 276 N.W. 270, 201 Minn. 347—Manley v. Harvey Lumber Co., 221 N.W. 913, 175 Minn. 489—Olsen v. Hoffmann, 221 N.W. 10, 175 Minn. 287—Turner v. Gackle, 209 N.W. 626, 168 Minn. 514—Klare v. Peterson, 200 N.W. 817, 161 Minn. 16—Nelson v. Bullard, 194 N.W. 308, 155 Minn. 419—Olsson v. Midland Ins. Co., 165 N. W. 474, 138 Minn. 424—Anderson v. Liljengren, 52 N.W. 219, 50 Minn. 3.

Miss.—Holmes v. Holmes, 123 So. 865, 154 Miss. 713.

Mont.—Ross v. Industrial Accident Board, 80 P.2d 362, 106 Mont. 486 —Jeffrey v. Trouse, 50 P.2d 872, 100 Mont. 538—Vukmanovich v. State Assur. Co. of Liverpool, England, 264 P. 933, 82 Mont. 52—Roman v. Albert, 264 P. 115, 81 Mont. 393—Reid v. Hennessy Mercantile Co., 123 P. 397, 45 Mont. 383.

Nev.—In re Golding's Estate, 89 P. 2d 1049, 59 Nev. 201—In re Duffill's Estate, 61 P.2d 985, 987, 57 Nev. 224, citing **Corpus Juris.**

N.H.—Trudeau v. Manchester Coal & Ice Co., 192 A. 491, 89 N.H. 83 —Morrison v. Boston & M. R. R., 164 A. 553, 86 N.H. 176.

N.M.—Medler v. Henry, 101 P.2d 398, 44 N.M. 275—Walker v. Smith, 42 P.2d 768, 39 N.M. 148.

N.Y.—Kavanagh v. Wilson, 70 N.Y. 177—Elwood v. Western Union Tel. Co., 45 N.Y. 549, 6 Am.R. 140—In re Stegman's Will, 234 N.Y.S. 239, 133 Misc. 745, affirmed 235 N.Y.S. 890, 227 App.Div. 647—In re Seifried's Estate, 224 N.Y.S. 275, 130 Misc. 229—Federal Varnish Co. v. Boelsen, 128 N.Y.S. 658.

Okl.—Cummins v. Chandler, 97 P.2d 765, 186 Okl. 200—In re Miller's Estate, 78 P.2d 819, 182 Okl. 534—McClendon v. Kennedy, 77 P.2d 15, 182 Okl. 153—Burkhart v. Lasley, 75 P.2d 1124, 182 Okl. 43—Carlisle v. State ex rel. Harris, 62 P.2d 617, 178 Okl. 231—Taggart v. Snipes, 50 P.2d 640, 174 Okl. 449—Davis v. Wyskup, 223 P. 357, 97 Okl. 239.

Or.—Fleishhacker v. Portland News Pub. Co., 77 P.2d 141, 158 Or. 476 —Miller v. Service and Sales, 38 P.2d 995, 149 Or. 11, 96 A.L.R. 628.

Pa.—Burke v. Kennedy, 133 A. 508, 286 Pa. 344.

R.I.—Little v. Rubin, 6 A.2d 683—Somerset Realty Co. v. Shapiro, 155 A. 360, 51 R.I. 417—Gorman v. Hand Brewing Co., 66 A. 209, 28 R.I. 180.

Tex.—Casualty Reciprocal Exchange v. Parker, Com.App., 12 S.W.2d 536, affirming, Civ.App., 300 S.W. 230—First State Bank of Seminole v. Dillard, Civ.App., 71 S.W.2d 407 —Harlan v. First State Bank of Sterling City, Civ.App., 270 S.W. 895.

Wash.—Siegel v. Kracower, 258 P. 493, 144 Wash. 609—Maytown Lumber Co. v. Maytown Mill Co., 240 P. 902, 136 Wash. 534.

23 C.J. p 48 note 38—70 C.J. p 780 note 2.

Incredibility of testimony as affecting credibility of witnesses generally see the C.J.S. title Witnesses § 468, also 70 C.J. p 77 note 85—p 782 note 9.

"It is a wild conceit that any court of justice is bound by mere swearing; it is the swearing credibly that is to conclude its judgement."—O'Laughlin v. Helvering, 81 F.2d 269, 271, 65 App.D.C. 135, followed in 81 F.2d 271, 65 App.D.C. 137.

Test

"The testimony of an unimpeached witness . . . must be measured by the standard of common experience and business usage."—Howell v Blackburn, 129 So. 341, 100 Fla. 114.

5. Fla.—Rountree v. Davis, 167 So. 820, 124 Fla. 212.

6. U.S.—Gibson v. Southern Pac. Co., C.C.A.Tex., 67 F.2d 758, certiorari denied Southern Pac. Co. v. Gibson, 54 S.Ct. 458, 291 U.S. 673, 78 L.Ed. 1062—Lowenstein v. I. N. Platt & Co., C.C.A.N.Y., 58 F.2d 173.

Ariz.—Lentz v. Landers, 185 P. 821, 21 Ariz. 117.

Ark.—Walker v. Eller, 10 S.W.2d 14, 178 Ark. 183.

Cal.—Staples v. Hawthorne, 283 P. 67, 208 Cal. 578—Caldwell v. Weiner, 264 P. 1100, 203 Cal. 543—Raisic v. Schultheiss, 9 P.2d 550, 121 Cal.App. 560—Briggs v. Cameron, 295 P. 347, 111 Cal.App. 189—First Nat. Bank v. Shipley, 292 P. 996, 109 Cal.App. 194—Citizens' State Bank of Santa Monica v. Castro, 287 P. 559, 105 Cal.App. 284—Morgan v. Matthieson, 285 P. 325, 103 Cal.App. 510—MacDiarmid v. McDevitt, 275 P. 500, 97 Cal.App. 414 —Simon Newman Co. v. Woods, 259 P. 460, 85 Cal.App. 360—Anso v. Anso, 237 P. 814, 72 Cal.App. 513.

Conn.—New Haven Trust Co. v. Doherty, 51 A. 130, 74 Conn. 468.

Fla.—Catlett v. Chestnut, 146 So. 241, 107 Fla. 498, 91 A.L.R. 212.

Ga.—Horton v. Johnson, 15 S.E.2d 605—Lewis v. Patterson, 12 S.E.2d 593, 191 Ga. 348—Cooper v. Lumbermen's Mutual Casualty Co., 175 S.E. 577, 179 Ga. 256—Whiddon v. Hall, 118 S.E. 347, 155 Ga. 570—Detwiler v. Cox, 48 S.E. 142, 120 Ga. 638—McRae v. Wilby, 1 S.E.2d 77, 59 Ga.App. 401—Fincher v. Harlow, 193 S.E. 452, 56 Ga.App. 578—Seaboard Air Line Ry. Co. v. D'Avignon, 153 S.E. 96, 41 Ga.App. 263, certiorari denied 51 S.Ct. 351, 283 U.S. 827, 75 L.Ed. 1441—E. P. Redd & Co. v. W. A. Lathem & Sons, 123 S.E. 175, 32 Ga.App. 214 —Porter v. Whelchel, 105 S.E. 388, 26 Ga.App. 39—Jones v. Teasley, 105 S.E. 46, 25 Ga.App. 784.

Idaho.—First Trust & Savings Bank v. Randall, 89 P.2d 741, 59 Idaho 705.

Ind.—De Lange v. Cones, 19 N.E.2d 850, 215 Ind. 355—Great Lakes

unconvincing,[7] vague, indefinite, or uncertain,[8] or self-contradictory.[9] The manner in which the uncontradicted testimony is given may also be considered,[10] as may the fact that, in the very nature of things, as where the testimony relates to statements attributed to a person who has died, it is impossible to secure opposing testimony,[11] and the

Dredge & Dock Co. v. Totzke, 121 N.E. 675, 69 Ind.App. 303.
Ky.—McGill v. Dunaway, 71 S.W.2d 435, 254 Ky. 234.
Me.—Mitchell v. Mitchell, 11 A.2d 898, 136 Me. 406.
Mich.—Cuttle v. Concordia Mut. Fire Ins. Co., 295 N.W. 246, 295 Mich. 514.
Minn.—Weinstein v. Schwartz, 283 N.W. 127, 204 Minn. 189—Olsen v. Hoffmann, 221 N.W. 10, 175 Minn. 287—Goedhard v. Folstad, 195 N. W. 281, 156 Minn. 453—Anderson v. Liljengren, 52 N.W. 219, 50 Minn. 3.
Mont.—Roman v. Albert, 264 P. 115, 81 Mont. 393—Reid v. Hennessy Mercantile Co., 123 P. 397, 45 Mont. 383.
Neb.—Leon v. Kitchen Bros. Hotel Co., 277 N.W. 823, 134 Neb. 137, 115 A.L.R. 1078.
Nev.—In re Golding's Estate, 89 P. 2d 1049, 59 Nev. 201.
N.J.—Dobbin v. Plager, 111 A. 404, 92 N.J.Eq. 231, affirmed 111 A. 926, 92 N.J.Eq. 231.
N.M.—Medler v. Henry, 101 P.2d 398, 44 N.M. 275.
Okl.—Cummins v. Chandler, 97 P.2d 765, 186 Okl. 200—McClendon v. Kennedy, 77 P.2d 15, 182 Okl. 153—Burkhart v. Lasley, 75 P.2d 1124, 182 Okl. 43—Carlisle v. State ex rel. Harris, 62 P.2d 617, 178 Okl. 231—Taggart v. Snipes, 50 P.2d 640, 174 Okl. 449—Davis v. Wyskup, 223 P. 357, 97 Okl. 239.
Pa.—Ringer v. Finfrock, 17 A.2d 348, 340 Pa. 458.
R.I.—Somerset Realty Co. v. Shapiro, 155 A. 360, 51 R.I. 417—Gorman v. Hand Brewing Co., 66 A. 209, 28 R.I. 180.
Tex.—Poulter v. Miller, Com.App., 221 S.W. 965, reversing Miller v. Poulter, Civ.App., 189 S.W. 105—Krueger v. Bankers Lloyds, Civ. App., 45 S.W.2d 363—Moore v. Follett, Civ.App., 11 S.W.2d 662, error dismissed—Wheeler v. Stone, Civ.App., 261 S.W. 1082.
Vt.—Watts v. Mulliken's Estate, 115 A. 150, 95 Vt. 335.
Wash.—Simmons v. Anderson, 32 P. 2d 1005, 177 Wash. 591.
W.Va.—Watson v. Burley, 143 S.E. 95, 105 W.Va. 416, 64 A.L.R. 839.
23 C.J. p 48 note 39.

7. Ill.—In re Hanson's Estate, 26 N.E.2d 175, 304 Ill.App. 157.

8. Cal.—Worthington v. People's State Bank of Chula Vista, 288 P. 1086, 106 Cal.App. 238.
Ky.—McGill v. Dunaway, 71 S.W.2d 435, 254 Ky. 234—Martyn v. Jacoby's Adm'r, 4 S.W.2d 684, 223 Ky. 674.
Wash.—Maytown Lumber Co. v. Maytown Mill Co., 240 P. 902, 136 Wash. 534.

9. U.S.—Quock Ting v. U. S., Cal., 11 S.Ct. 733, 140 U.S. 417, 35 L. Ed. 501—Easton v. Brant, C.C.A. Cal., 19 F.2d 857, 859, quoting Corpus Juris.
Cal.—Rogers v. Burnham, 35 P.2d 329, 140 Cal.App. 336.
Fla.—Catlett v. Chestnut, 146 So. 241, 107 Fla. 498, 91 A.L.R. 212.
Ill.—Mannen v. Norris, 170 N.E. 273, 338 Ill. 322—Morrison v. Beers, 158 N.E. 371, 327 Ill. 139. See Bailey v. Niebruegge, 211 Ill.App. 82.
Mich.—Cuttle v. Concordia Mut. Fire Ins. Co., 295 N.W. 246, 295 Mich. 514.
Minn.—Williams v. Jayne, 299 N.W. 853—Osbon v. Hartfiel, 276 N.W. 270, 201 Minn. 347—Klare v. Peterson, 200 N.W. 817, 161 Minn. 16—Nelson v. Bullard, 194 N.W. 308, 155 Minn. 419—Anderson v. Liljengren, 52 N.W. 219, 50 Minn. 3.
Mont.—Roman v. Albert, 264 P. 115, 81 Mont. 393—Reid v. Hennessy Mercantile Co., 123 P. 397, 45 Mont. 383.
Nev.—In re Golding's Estate, 89 P. 2d 1049, 59 Nev. 201.
Okl.—Cummins v. Chandler, 97 P.2d 765, 186 Okl. 200—In re Miller's Estate, 78 P.2d 819, 182 Okl. 534—McClendon v. Kennedy, 77 P.2d 15, 182 Okl. 153—Taggart v. Snipes, 50 P.2d 640, 174 Okl. 449—Davis v. Wyskup, 223 P. 357, 97 Okl. 239.
Or.—Hill v. Harritt, 12 P.2d 1021, 140 Or. 86.
R.I.—Somerset Realty Co. v. Shapiro, 155 A. 360, 51 R.I. 417—Gorman v. Hand Brewing Co., 66 A. 209, 28 R.I. 180.
Tex.—James v. Flippen, Civ.App., 122 S.W.2d 1090—Krueger v. Bankers Lloyds, Civ.App., 45 S.W.2d 363.
Utah.—Miller v. Columbia Trust Co., 225 P. 609, 63 Utah 305.
Va.—Standard Oil Co. of New Jersey v. Davis, 162 S.E. 29, 157 Va. 709—Metropolitan Life Ins. Co. v. Botto, 143 S.E. 625, 153 Va. 468, reversed on other grounds on rehearing 154 S.E. 603, 153 Va. 468.
Wash.—Siegel v. Kracower, 258 P. 493, 144 Wash. 609.
23 C.J. p 48 note 40.

10. U.S.—Quock Ting v. U. S., Cal., 11 S.Ct. 733, 140 U.S. 417, 35 L. Ed. 501—Lowenstein v. I. N. Platt & Co., C.C.A.N.Y., 58 F.2d 173—Duwamish v. U. S., 79 Ct.Cl. 530, certiorari denied 55 S.Ct. 913, 295 U.S. 755, 79 L.Ed. 1698.
Cal.—Caldwell v. Weiner, 264 P. 1100, 203 Cal. 543—Hanlon v. Western Loan & Bldg. Co., App., 116 P.2d 465—Burdick v. Wittich, App., 116 P.2d 90—Lejeune v. General Petroleum Corporation of California, 18 P.2d 429, 128 Cal.App. 404—First Nat. Bank v. Shipley, 292 P. 996, 109 Cal.App. 194—Dierks v. Newsom, 194 P. 518, 49 Cal.App. 789—Richey v. Butler, 180 P. 652, 40 Cal.App. 314.
Ga.—Sligh v. Whitley, 153 S.E. 237, 41 Ga.App. 428—Seaboard Air Line Ry. Co. v. D'Avignon, 153 S.E. 96, 41 Ga.App. 263, certiorari denied 51 S.Ct. 351, 283 U.S. 827, 75 L.Ed. 1441—Haverty Furniutre Co. v. Calhoun, 84 S.E. 138, 15 Ga.App. 620.
Iowa.—Hotz v. Equitable Life Assur. Soc. of U. S., 276 N.W. 413, 224 Iowa 552.
Minn.—Osbon v. Hartfiel, 276 N.W. 270, 201 Minn. 347.
Nev.—In re Golding's Estate, 89 P. 2d 1049, 59 Nev. 201.
Tex.—Houston E. & W. T. Ry. Co. v. Runnels, 47 S.W. 972, 92 Tex. 307—Greenway v. Great Atlantic & Pacific Tea Co., Civ.App., 114 S.W.2d 435.
Vt.—Watts v. Mulliken's Estate, 115 A. 150, 95 Vt. 335.
Va.—Metropolitan Life Ins. Co. v. Botto, 143 S.E. 625, 153 Va. 468, reversed on other grounds on rehearing 154 S.E. 603, 153 Va. 468.

11. U.S.—Easton v. Brant, C.C.A. Cal., 19 F.2d 857, 859, quoting Corpus Juris—U. S. v. One Ford V-8 Sedan, D.C.Mich., 7 F.Supp. 705.
Ill.—In re Hansen's Estate, 26 N.E. 2d 175, 304 Ill.App. 157.
Iowa.—Hotz v. Equitable Life Assur. Soc. of U. S., 276 N.W. 413, 224 Iowa 552.
Mont.—Roman v. Albert, 264 P. 115, 81 Mont. 393—Reid v. Hennessy Mercantile Co., 123 P. 397, 45 Mont. 383.
Nev.—In re Duffill's Estate, 61 P.2d 985, 57 Nev. 224.
N.J.—Trenton Banking Co. v. Howard, Ch., 187 A. 569, affirmed 187 A. 575, 121 N.J.Eq. 85—De Rose v. Delaware, L. & W. R. Co., 153 A. 251, 9 N.J.Misc. 183, appeal dismissed 160 A. 423, 109 N.J.Law 135.
N.Y.—Gill v. Jamaica Bay Mfg. Co., 157 N.Y.S. 52, 171 App.Div. 165—Allen v. General Acc., F., & L. Assur. Corp., 162 N.Y.S. 934, 98 Misc. 206.
Pa.—Ringer v. Finfrock, 17 A.2d 348, 340 Pa. 458.
"Where the only person who could directly dispute a witness is dead, the testimony of that witness should

fact that the witness has shown himself unworthy of credit.[12]

The uncontradicted evidence of a claimant has been required to be construed most strongly against him.[13]

§ 1039. Circumstantial Evidence

Any fact in issue may be established by circumstantial evidence, if the circumstances, which must themselves be proved, lead to the conclusion with reasonable certainty. Authorities differ as to whether circumstantial evidence, to support a conclusion, must be such as to exclude every other reasonable conclusion.

Any issue may be proved by circumstantial evidence,[14] or by a combination of direct and circum-

be clearly scrutinized, its reasonable probability should be carefully considered, and, for this purpose, attention should be given to the circumstances surrounding any transaction which the witness may narrate, and his testimony compared with all inferences derivable from all the established facts."—Hills v. Hill, 237 N.W. 769, 771, 58 S.D. 556—In re Tjarks' Estate, 227 N.W. 84, 85, 55 S.D. 636.

Evidence entirely within one party's control

Md.—Dorsey v. Winters, 122 A. 257, 143 Md. 399.

Close scrutiny

Evidence of transactions with decedent not capable of contradiction by direct evidence should be closely scrutinized.

Cal.—Morgan v. Matthieson, 285 P. 325, 103 Cal.App. 510.

Iowa.—Heavner v. Kading, 223 N.W. 311, 209 Iowa 1271.

12. Cal.—Travis Glass Co. v. Ibbetson, 200 P. 595, 186 Cal. 724—Whitaker v. Whitaker, 30 P.2d 538, 137 Cal.App. 396.

N.M.—Medler v. Henry, 101 P.2d 398, 44 N.M. 275.

Okl.—McClendon v. Kennedy, 77 P. 2d 15, 182 Okl. 153.

Pa.—Burke v. Kennedy, 133 A. 508, 286 Pa. 344.

Wash.—Maytown Lumber Co. v. Maytown Mill Co., 240 P. 902, 136 Wash. 534.

13. Ga.—Jones v. Avant, 152 S.E. 264, 41 Ga.App. 211.

14. U.S.—National Ben Franklin Fire Ins. Co. v. Stuckey, C.C.A. Ga., 79 F.2d 631.

Ark.—Arkmo Lumber Co. v. Luckett, 143 S.W.2d 1107, 201 Ark. 140—Missouri Pac. R. Co. v. Sullivan, 122 S.W.2d 947, 197 Ark. 360—Myers v. Hobbs, 115 S.W.2d 880, 195 Ark. 1026—Hanna v. Magee, 72 S. W.2d 237, 189 Ark. 330—Pekin Wood Products Co. v. Mason, 46 S.W.2d 798, 185 Ark. 166—Missouri Pac. R. Co. v. Hull, 33 S.W.2d 406, 182 Ark. 873.

Ill.—Gardner v. Railway Express Agency, 274 Ill.App. 626.

Ind.—First Nat. Bank v. Federal Land Bank of Louisville, 177 N.E. 462, 93 Ind.App. 15.

Kan.—Asche v. Matthews, 18 P.2d 177, 136 Kan. 740.

Ky.—Jones Savage Lumber Co. v. Thompson, 25 S.W.2d 373, 233 Ky. 198.

Mich.—Heppenstall Steel Co. v. Wabash Ry. Co., 219 N.W. 717, 242 Mich. 464.

Mo.—Lappin v. Prebe, 131 S.W.2d 511, 345 Mo. 68—Bates v. Brown Shoe Co., 116 S.W.2d 31, 342 Mo. 411—Hasenjaeger v. Missouri-Kansas-Texas R. Co., 53 S.W.2d 1083, 227 Mo.App. 413—Tueteberg v. St. Louis Public Service Co., App., 41 S.W.2d 956—Boggess v. Kansas City Rys. Co., 229 S.W. 404, 207 Mo.App. 1.

Mont.—Koppang v. Sevier, 75 P.2d 790, 106 Mont. 79—Dalbey v. Equitable Life Assur. Soc. of U. S., 74 P.2d 432, 105 Mont. 587—In re Bragg's Estate, 76 P.2d 57, 106 Mont. 132—Moffett v. Bozeman Canning Co., 26 P.2d 973, 95 Mont. 347—Exchange State Bank of Glendive v. Occident Elevator Co., 24 P.2d 126, 95 Mont. 78, 90 A.L.R. 740.

Neb.—Tongue v. Perrigo, 265 N.W. 737, 130 Neb. 564.

N.J.—Jackson v. Delaware, L. & W. R. Co., 170 A. 22, 111 N.J.Law 487.

N.Y.—Srogi v. New York Cent. R. Co., 286 N.Y.S. 215, 247 App.Div. 95—Collins v. William W. Spencer & Sons Corp., 213 N.Y.S. 437, 215 App.Div. 243.

Okl.—Cities Service Gas Co. v. Eggers, 98 P.2d 1114, 186 Okl. 466, 126 A.L.R. 1278—Phillips Petroleum Co. v. Davis, 77 P.2d 1147, 182 Okl. 397—Wise v. Wise, 52 P.2d 715, 175 Okl. 310—Barker v. Creek Coal & Mining Co., 194 P. 195, 80 Okl. 86.

Pa.—Hulmes v. Keel, 6 A.2d 64, 335 Pa. 117.

Tenn.—Crowe v. Birmingham & North Western Ry. Co., 2 Tenn. App. 634.

Tex.—Texas & N. O. R. Co. v. Warden, 78 S.W.2d 164, 125 Tex. 193, reversing, Civ.App., 49 S.W.2d 486—Baker v. Loftin, Com.App., 222 S.W. 195, reversing, Civ.App., 198 S.W. 159—Kahn v. Grothaus, Civ. App., 104 S.W.2d 932, error dismissed—Standard Accident Ins. Co. v. Ritchie, Civ.App., 89 S.W.2d 498, error dismissed—Baylor University v. Chester Sav. Bank, Civ. App., 82 S.W.2d 738, error refused—Metropolitan Casualty Ins. Co. of New York v. Texas Sand & Gravel Co., Civ.App., 68 S.W.2d 551, error dismissed.

Va.—Chick Transit Corporation v. Edenton, 196 S.E. 648, 170 Va. 361—Southern Ry. Co. v. American Peanut Corporation, 164 S.E. 261, 158 Va. 359—Allen v. Rouseville Cooperage Co., 161 S.E. 50, 157 Va. 355.

Wis.—Reichert v. Rex Accessories Co., 279 N.W. 645, 228 Wis. 425.

45 C.J. p 1261 note 1.

Corroboration may come as effectively from circumstantial evidence as from direct evidence.—Union Land & Grazing Co. v. Arce, 152 P. 1143, 21 N.M. 115.

Inference on an inference

The statutory rule that an inference may not be based on an inference does not forbid judgments based on circumstantial evidence.—McKay v. State Industrial Accident Commission of Oregon, 87 P.2d 202, 161 Or. 191.

Intent may be established by circumstantial evidence.—Majestic Securities Corporation v. Commissioner of Internal Revenue, C.C.A., 120 F.2d 12.

Speculation and guesswork

Rule that neither court nor jury may indulge in speculation or guesswork does not destroy weight of circumstantial evidence.—Perry's Adm'x v. Inter-Southern Life Ins. Co., 58 S.W.2d 906, 248 Ky. 491.

Circumstances which usually attend a fact may be taken as establishing that fact in a civil case.

N.J.—Jackson v. Delaware, L. & W. R. Co., 170 A. 22, 111 N.J.Law 487.

Tenn.—Bryan v. Ætna Life Ins. Co., 130 S.W.2d 85, 174 Tenn. 602—Pickard v. Berryman, App., 142 S.W.2d 764—Tennessee Electric Power Co. v. Van Dodson, 14 Tenn.App. 54.

Probative force

That the only evidence available to show the time of the levy of an execution and issuance of a venditioni exponas is circumstantial does not make such evidence incompetent, or destroy its probative force.—Ludtke v. Bankers' Trust Co., Tex.Civ. App., 251 S.W. 600.

Execution of a written instrument may be established by circumstances.—Abeel v. Weil, 283 S.W. 769, 115 Tex. 490.

Circumstances not literally testified to

Tribunals determining facts may consider circumstances, surround-

stantial evidence.[15] A well connected train of circumstances is as cogent of the existence of a fact as any array of direct evidence,[16] and may outweigh opposing direct testimony;[17] and the con-

ings, remarks, parties' actions, and other factors not literally testified to.—Robbins v. Robbins, 55 S.W.2d 31, 246 Ky. 411.

Intoxication

The odor of liquor on a person's breath, alone, does not prove, nor is it evidence of, intoxication, or of being under the influence of intoxicating liquor, but in combination with other facts it may be evidential.—Law v. Gallegher, 197 A. 479, 9 W.W.Harr., Del., 189.

Where positive proof appears obtainable, it is required.—Belyus v. Wilkinson, Gaddis & Co., 178 A. 181, 115 N.J.Law 43, affirmed 182 A. 873, 116 N.J.Law 92.

Comparison with rule in criminal cases

(1) Degree of proof required in cases depending on circumstantial evidence is not as great in civil cases as in criminal cases.—Powe v. Atlantic Coast Line R. Co., 159 S.E. 473, 161 S.C. 122, reversed on other grounds Atlantic Coast Line R. Co. v. Powe, 51 S.Ct. 498, 283 U.S. 401, 75 L.Ed. 1142.

(2) Weight of circumstantial evidence in criminal cases see Criminal Law § 907.

15. Mont.—Dalbey v. Equitable Life Assur. Soc. of U. S., 74 P.2d 432, 105 Mont. 587.
N.C.—Sink v. City of Lexington, 200 S.E. 4, 214 N.C. 548—Kitchen Lumber Co. v. Tallassee Power Co., 174 S.E. 427, 206 N.C. 515.

16. Ark.—City of Dumas v. Edington, 147 S.W.2d 997, 1002, 201 Ark. 1021, citing **Corpus Juris**—Arkmo Lumber Co. v. Luckett, 143 S.W.2d 1107, 201 Ark. 140—Missouri Pac. R. Co. v. Sullivan, 122 S.W.2d 947, 197 Ark. 360—Meyers v. Hobbs, 115 S.W.2d 880, 882, 195 Ark. 1026, citing **Corpus Juris**—Kelly v. Sparks, 102 S.W.2d 838, 840, 193 Ark. 811, citing **Corpus Juris**—Plunkett-Jarrell Grocer Co. v. Freeman, 92 S.W.2d 849, 192 Ark. 380—Mutual Ben. Health & Accident Ass'n v. Basham, 87 S.W.2d 583, 191 Ark. 679—Andrews v. James' Estate, 82 S.W.2d 262, 263, 190 Ark. 1177, citing **Corpus Juris**—Hanna v. Magee, 72 S.W.2d 237, 241, 189 Ark. 330, citing **Corpus Juris**—Pekin Wood Products Co. v. Mason, 46 S.W.2d 798, 185 Ark. 166—McGill v. Miller, 37 S.W.2d 689, 692, 183 Ark. 585, quoting **Corpus Juris**—Jackson v. Richardson, 33 S.W.2d 1095, 1097, 182 Ark. 997, quoting **Corpus Juris**—Missouri Pac. R. Co. v. Hull, 33 S.W.2d 406, 182 Ark. 873, quoting **Corpus Juris**—St. Louis-San Francisco Ry. Co. v. Bishop, 33 S.W.2d 383, 386, 182 Ark. 763, quoting **Corpus Juris.**
Mo.—Payne v. Reed, 59 S.W.2d 43, 332 Mo. 343—McCain v. Trenton Gas & Electric Co., 15 S.W.2d 970, 222 Mo. 1146—Kelsey v. Israel, App., 298 S.W. 1065.
Neb.—Leon v. Kitchen Bros. Hotel Co., 277 N.W. 823, 134 Neb. 137, 115 A.L.R. 1078.
N.C.—Planters Nat. Bank & Trust Co. of Rocky Mount v. Atlantic Coast Line R. Co., 181 S.E. 635, 208 N.C. 574.
Okl.—Wise v. Wise, 52 P.2d 715, 175 Okl. 310.
Va.—Barry v. Tyler, 199 S.E. 496, 171 Va. 381.
Wyo.—Tisthammer v. Union Pac. R. Co., 286 P. 377, 41 Wyo. 382.
23 C.J. p 48 note 44.

Direct and circumstantial evidence compared

(1) "The law makes no distinction as to the probative value of . . . [circumstantial] evidence and direct evidence."—Moffett v. Bozeman Canning Co., 26 P.2d 973, 978, 95 Mont. 347.

(2) It has been said, however, that circumstantial evidence is inferior in cogency and effect to direct evidence.—Haywood v. State, 43 So. 614, 90 Miss. 461.

Cumulative effect

(1) Case may be established by number of facts, although any one of facts alone would be insufficient.
Ill.—Wolf v. People's Bank, 255 Ill. App. 127.
Miss.—Hulett v. Hulett, 119 So. 581, 152 Miss. 476.
Mo.—Look v. French, 144 S.W.2d 128.
Okl.—Young v. Smith, 41 P.2d 461, 171 Okl. 222.

(2) Proof of a material fact is not accomplished by inference from one isolated incident or circumstance but from the aggregation of all the related circumstances that appear.—McGarry v. Mathis, 282 N.W. 786, 226 Iowa 37.

17. U.S.—Tucker Stevedoring Co. v. W. H. Gahagan, Inc., D.C.Del., 6 F.2d 407, reversed on other grounds, C.C.A., W. H. Gahagan, Inc., v. Tucker Stevedoring Co., 15 F.2d 935.
Ark.—Arkmo Lumber Co. v. Luckett, 143 S.W.2d 1107, 201 Ark. 140—Missouri Pac. R. Co. v. Sullivan 122 S.W.2d 947, 197 Ark. 360—Myers v. Hobbs, 115 S.W.2d 880, 882, 195 Ark. 1026, citing **Corpus Juris**—Interurban Transp. Co. v. Reeves, 108 S.W.2d 594, 194 Ark. 321—Hanna v. Magee, 72 S.W.2d 237, 241 189 Ark. 330, citing **Corpus Juris**—Pekin Wood Products Co. v. Mason, 46 S.W.2d 798, 185 Ark. 166.
Ind.—Pennsylvania Ice & Coal Co. v. Elischer, 21 N.E.2d 436, 106 Ind. App. 613—First Nat. Bank v. Federal Land Bank of Louisville, 177 N.E. 462, 93 Ind.App. 15.
Ky.—Cincinnati, N. O. & T. P. R. Co. v. Graves, 176 S.W. 974, 165 Ky. 148.
Mo.—Boggess v. Kansas City Rys. Co., 229 S.W. 404, 207 Mo.App. 1.
Okl.—Wistar v. Whitewing, 116 P.2d 565—Ironside v. Ironside, 108 P.2d 157—Missouri-Kansas-Texas R. Co. v. Embrey, 33 P.2d 481, 168 Okl. 433, certiorari denied 55 S.Ct. 119, 293 U.S. 603, 79 L.Ed. 695—St. Louis-San Francisco Ry. Co. v. Bryan, 237 P. 613, 113 Okl. 39.
Tex.—Carwile v. Roberts, Civ.App., 11 S.W.2d 549, error dismissed.
Va.—Hinton v. Indemnity Ins. Co. of North America, 8 S.E.2d 279, 175 Va. 205.
Wyo.—Tisthammer v. Union Pac. R. Co., 286 P. 377, 41 Wyo. 382.
23 C.J. p 49 note 45—42 C.J. p 113 note 3 [g].

"The jury and the court have the right to believe the circumstantial evidence and to disbelieve the direct evidence."—Brothers v. Adams, 107 P.2d 757, 763, 152 Kan. 675.

Knowledge may be established by circumstantial evidence in face of professions of ignorance.—Kuchlik v. Feuer, 267 N.Y.S. 256, 239 App.Div. 338, affirmed 191 N.E. 555, 264 N.Y. 542.

Testimony of contradicted witness

Unimpeached circumstantial evidence, however strong, is not required inevitably to yield to oral testimony of a witness who has been contradicted on a material issue.—Ryan v. Maryland Casualty Co., 3 S.E.2d 416, 173 Va. 57.

Incredible testimony

Circumstantial evidence overbears testimony that is contrary to physical facts or so inconsistent or contrary to human experience as to be impossible of belief.—George M. Danke Co. v. Marten, 255 N.W. 121, 215 Wis. 470.

Circumstances justifying disbelief of testimony

Direct testimony may be contradicted by circumstantial evidence, and the contradiction may be so strong that it will justify a disbelief of the testimony.—Parsons v. Easton, 195 P. 419, 184 Cal. 764.

Speed

(1) In action by pedestrian for injuries sustained when struck by automobile, jury were not compelled to accept motorist's lowest estimate of speed, but were warranted in in-

currence of well authenticated circumstances has been said to be stronger evidence than positive testimony unconfirmed by circumstances.[18]

For circumstantial evidence to be sufficient to warrant the finding of a fact, the circumstances must lead to the conclusion with reasonable certainty,[19] and must have sufficient probative force to constitute the basis for a legal inference, and not for mere speculation.[20] The conclusion must be a reasonable and probable one,[21] and must follow logically from the facts.[22] The circumstances must, of course, agree with and support the hypothesis which they are adduced to prove;[23] but circumstantial evidence is not sufficient to establish a conclusion where the circumstances are merely consistent with such conclusion,[24] or where the circumstances give equal support to inconsistent conclusions, or are equally consistent with contradictory hypotheses.[25] A fact cannot be established by cir-

ferring from physical facts that his speed was excessive.—Skulte v. Ahern, 71 P.2d 340, 22 Cal.App.2d 460.

(2) However, it has been held that, where plaintiff produced positive evidence of eyewitnesses as to rate of speed of defendant's truck, no justifiable inference of greater speed could be drawn from the force and violence of the impact and the results of the collision.—Fisher v. Hemrich Brewing Co., 49 P.2d 1, 183 Wash. 489, adhered to 53 P.2d 1198, 183 Wash. 489.

18. Ky.—Perry's Adm'x v. Inter-Southern Life Ins. Co., 58 S.W.2d 906, 248 Ky. 491.

19. U.S.—Cudahy Packing Co. v. National Labor Relations Board, C.C.A., 116 F.2d 367.
Ga.—Bentley v. Southern Ry. Co., 182 S.E. 815, 52 Ga.App. 188.
Kan.—Sheftel v. Kansas City Public Service Co., 19 P.2d 434, 137 Kan. 79.
Mo.—Lappin v. Prebe, 131 S.W.2d 511, 345 Mo. 68—Bates v. Brown Shoe Co., 116 S.W.2d 31, 342 Mo. 411—Collins v. Star Paper Mill Co., 143 Mo.App. 333, 127 S.W. 641.
Neb.—Tongue v. Perrigo, 265 N.W. 737, 130 Neb. 564.
52 C.J. p 123 notes 11, 12.

All the circumstances must be considered together.
Ind.—New York Cent. R. Co. v. Reidenbach, 125 N.E. 55, 71 Ind.App. 390.
La.—Faulk v. Mutual Life Ins. Co., 107 So. 395, 160 La. 529 followed in Vallee v. Mutual Life Ins. Co., 107 So. 401, 160 La. 547.
Tex.—Duke v. Houston Oil Co. of Texas, Civ.App., 128 S.W.2d 480, error dismissed, judgment correct.
23 C.J. p 50 note 53.

Preponderance of probabilities
Circumstantial or presumptive evidence in determination of civil causes is mere preponderance of probabilities, and hence sufficient basis of decision.—Vollkommer v. Menge, 192 A 373, 118 N.J.Law 360—Titone v. Economy Bootery, 184 A. 809, 14 N.J.Misc. 349.

Circumstances having force of witness
There is no rule that circumstances, in order to be sufficient to establish a fact, shall have the force and effect of the direct testimony of at least one credible witness.—Bixby v. Carskaddon, 8 N.W. 354, 55 Iowa 533—23 C.J. p 49 note 46.

20. Tex.—Green v. Texas & P. Ry. Co., 81 S.W.2d 669, 125 Tex. 168, reversing, Civ.App., 50 S.W.2d 353—Baker v. Loftin, Com.App., 222 S. W. 195, reversing, Civ.App., 198 S. W. 159—Duke v. Houston Oil Co. of Texas, Civ.App., 128 S.W.2d 480, error dismissed, judgment correct—Kahn v. Grothaus, Civ.App., 104 S.W.2d 932, error dismissed—Baylor University v. Chester Sav. Bank, Civ.App., 82 S.W.2d 738, error refused—Metropolitan Casualty Ins. Co. of New York v. Texas Sand & Gravel Co., Civ.App., 68 S.W.2d 551, error dismissed.
Wis.—Rumary v. Livestock Mortg. Credit Corporation, 290 N.W. 611, 234 Wis. 145.
52 C.J. p 123 note 12.

21. U.S.—American Bureau of Shipping v. Allied Oil Co., C.C.A.Ohio, 64 F.2d 509.
Ark.—St. Louis-San Francisco Ry. Co. v. Bishop, 33 S.W.2d 383, 182 Ark. 763, certiorari denied 51 S.Ct. 647, 283 U.S. 854, 75 L.Ed. 1461.
Tex.—Texas & N. O. R. Co. v. Warden, 78 S.W.2d 164, 125 Tex. 193, reversing, Civ.App., 49 S.W.2d 486.

22. Md.—Singer Transfer Co. v. Buck Glass Co., 181 A. 672, 673, 169 Md. 358, citing **Corpus Juris.**
Miss.—Hulett v. Hulett, 119 So. 581, 152 Miss. 476.

23. Ark.—Jackson v. Richardson, 38 S.W.2d 1095, 182 Ark. 997.
23 C.J. p 49 note 52.

24. Cal.—Halla v. Bank of America Nat. Trust & Savings Ass'n, 45 P.2d 231, 6 Cal.App.2d 561—Albert v. McKay & Co., 200 P. 83, 53 Cal. App. 325.
Fla.—Stigletts v. McDonald, 186 So. 233, 135 Fla. 385.
Ill.—Celner v. Prather, 22 N.E.2d 397, 301 Ill.App. 224—Kelley v. Public Service Co. of Northern Illinois, 21 N.E.2d 43, 300 Ill.App. 354.
Iowa.—Jakeway v. Allen, 290 N.W. 507, 227 Iowa 1182—Claussen v. Johnson's Estate, 278 N.W. 297, 224 Iowa 990—Comparet v. Wm. H. Metz Co., 271 N.W. 847, 222 Iowa 1328—Gregory v. Sorenson, 242 N.W. 91, 214 Iowa 374—Field v. Southern Surety Co. of New York, 235 N.W. 571, 211 Iowa 1239—Ohlson v. Sac County Farmers' Mut. Fire Ins. Ass'n, 182 N.W. 879, 191 Iowa 479.
Kan.—Hurla v. Capper Publications, 87 P.2d 552, 149 Kan. 369.
Tenn.—Standard Oil Co. of Louisiana v. Roach, 94 S.W.2d 63, 19 Tenn. App. 661.

25. U.S.—Texarkana Bus Co. v. National Labor Relations Board, C.C. A., 119 F.2d 480—U. S. v. Holland, C.C.A.Cal., 111 F.2d 949—Bussmann Mfg. Co. v. National Labor Relations Board, C.C.A., 111 F.2d 783—Massachusetts Protective Ass'n v. Mouber, C.C.A.Mo., 110 F.2d 203—Thomson v. Stevens, C.C.A.Iowa, 106 F.2d 739—Prudential Ins. Co. of America v. King, C.C.A.Mo., 101 F.2d 990—Metropolitan Life Ins. Co. v. Gosney, C.C.A.Mo., 101 F.2d 167—New York Life Ins. Co. v. King, C.C.A.Mo., 93 F.2d 347—Bonner v. Texas Co., C.C.A.Tex., 89 F.2d 291—New York Life Ins. Co. v. Roufos, C.C.A.Mich., 83 F.2d 620—P. F. Collier & Son Co. v. Hartfell, C.C.A.Minn., 72 F.2d 625—Grand Trunk Western R. Co. v. Holstein, C.C.A.Mich., 67 F.2d 780—Tucker Stevedoring Co. v. W. H. Gahagan, Inc., C.C.A.Del., 6 F.2d 407, reversed on other grounds, C. C.A., W. H. Gahagan, Inc., v. Tucker Stevedoring Co., 15 F.2d 935—Roberts v. U. S., D.C.Idaho, 17 F. Supp. 641.
Fla.—Stigletts v. McDonald, 186 So. 233, 135 Fla. 385.
Ill.—Celner v. Prather, 22 N.E.2d 397, 301 Ill.App. 224.
Iowa.—Natalini v. Northwestern Fire & Marine Ins. Co., 259 N.W. 577, 219 Iowa 806—Gregory v. Sorenson, 242 N.W. 91, 214 Iowa 374.
Me.—Mills v. Richardson, 137 A. 689, 126 Me. 244.
Mo.—Muesenfechter v. St. Louis Car Co., App., 139 S.W.2d 1102.
N.M.—Stambaugh v. Hayes, 103 P.2d 640, 44 N.M. 443.
N.Y.—Ford v. McAdoo, 131 N.E. 874, 231 N.Y. 155, reversing 178 N.Y.S.

cumstances which are perfectly consistent with direct, uncontradicted, and unimpeached testimony that the fact does not exist.[26]

It is asserted by a number of authorities, that a conclusion is not supported by circumstantial evidence unless the facts relied on are of such a nature, and so related to each other, that no other conclusion can fairly or reasonably be drawn from them;[27] but there is also authority for the view

890, 190 App.Div. 884, and certiorari denied Ford v. Davis, 42 S.Ct. 52, 257 U.S. 641, 66 L.Ed. 411—Collins v. William W. Spencer & Sons Corp., 213 N.Y.S. 437, 215 App.Div. 243.
Okl.—Highway Const. Co. v. Shue, 49 P.2d 203, 173 Okl. 456.
Pa.—De Reeder v. Travelers Ins. Co., 198 A. 45, 329 Pa. 328.
Tex.—National Aid Life Ass'n v. Driskill, Civ.App., 138 S.W.2d 238—Paris & M. P. R. Co. v. Russell, Civ.App., 104 S.W.2d 650—Texas Pac. Fidelity & Surety Co. v. Hall, Civ.App., 101 S.W.2d 1050.
Utah.—Spackman v. Benefit Ass'n of Ry. Employees, 89 P.2d 490, 97 Utah 91—Reid v. San Pedro, L. A. & S. L. R. Co., 118 P. 1009, 39 Utah 617.
Va.—Pearcey v. St. Paul Fire & Marine Ins. Co., 177 S.E. 843, 163 Va. 928.
Wyo.—Northwest States Utilities Co. v. Ashton, 65 P.2d 235, 51 Wyo. 168, rehearing denied 69 P.2d 623, 51 Wyo. 132.
23 C.J. p 11 note 34 [a].
Equilibrium of evidence see supra § 1019 b.

Judgment against party having burden of proof

(1) Where proved facts give equal support to each of two inconsistent inferences, judgment as matter of law must go against party having burden of proof.
U.S.—Pennsylvania R. Co. v. Chamberlain, N.Y., 53 S.Ct. 391, 288 U.S. 333, 77 L.Ed. 819, reversing, C.C.A., Chamberlain v. Pennsylvania R. Co., 59 F.2d 986, certiorari granted Pennsylvania R. Co. v. Chamberlain, 53 S.Ct. 93, 287 U.S. 589, 77 L.Ed. 514—Gary Theatre Co. v. Columbia Pictures Corporation, C.C.A.Ill., 120 F.2d 891—Southern Ry. Co. v. Stewart, C.C.A.Mo., 119 F.2d 85, modifying 115 F.2d 317, certiorari granted 62 S.Ct. 71—Kehoe v. Commissioner of Internal Revenue, C.C.A., 105 F.2d 552, certiorari granted Helvering v. Kehoe, 60 S.Ct. 142, 308 U.S. 543, 84 L.Ed. 458, reversed on other grounds 60 S.Ct. 549, 309 U.S. 277, 84 L.Ed. 751—Henry H. Cross Co. v. Simmons, C.C.A.Ark., 96 F.2d 482—Fort Smith Gas Co. v. Cloud, C.C.A.Ark., 75 F.2d 413—U. S. v. Barry, C.C.A.Tenn., 67 F.2d 763, certiorari denied Barry v. U. S., 54 S.Ct. 857, 292 U.S. 648, 78 L.Ed. 1498—National Bank of South Carolina of Sumter v. American Surety Co. of New York, C.C.A.S.C., 67 F.2d 131—Wheelock v. Freiwald, C.C.A.Mo., 66 F.2d 694—Liggett & Myers Tobacco Co. v. De Parcq, C.C.A.Minn., 66 F.2d 678—Wallar v. Southern Pac. Co., D.C.Cal., 37 F.Supp. 475.
Cal.—Showalter v. Western Pac. R. Co., 106 P.2d 895, prior opinion, App., 96 P.2d 964.
Mo.—Lutgen v. Standard Oil Co., 287 S.W. 885, 221 Mo.App. 773.
Neb.—Bernhardt v. Chicago, B. & Q. R. Co., 272 N.W. 209, 132 Neb. 346, certiorari denied 58 S.Ct. 34, 302 U.S. 685, 82 L.Ed. 529.
N.J.—Cvelich v. Erie R. Co., 199 A. 771, 120 N.J.Law 414, affirmed 4 A.2d 271, 122 N.J.Law 26, certiorari denied 59 S.Ct. 1033, 307 U.S. 633, 83 L.Ed. 1516.

(2) The rule is particularly applicable in tax cases, where any doubt must be resolved in favor of taxpayer.—Kehoe v. Commissioner of Internal Revenue, C.C.A., 105 F.2d 552, certiorari granted Helvering v. Kehoe, 60 S.Ct. 142, 308 U.S. 543, 84 L.Ed. 458, reversed on other grounds 60 S.Ct. 549, 309 U.S. 277, 84 L.Ed. 751.

Guess; conjecture

When conflicting inferences equally justified may be drawn from the proof, there is nothing for the jury or court sitting without a jury but mere guesses and conjectures, on which no verdict or decision can be founded.
Cal.—In re Moore's Estate, 223 P. 73, 65 Cal.App. 29.
Mo.—Speakman v. Kurn, App., 115 S.W.2d 185.

26. U.S.—Arnall Mills v. Smallwood, C.C.A., 68 F.2d 57.
Ga.—Taggart v. Savannah Gas Co., 175 S.E. 491, 179 Ga. 181—Foster v. Jones, 12 S.E.2d 141, 64 Ga.App. 66—Slaton v. Atlanta Gas Light Co., 7 S.E.2d 769, 62 Ga.App. 42—McRae v. Wilby, 1 S.E.2d 77, 59 Ga.App. 401—Federal Reserve Bank of Atlanta v. Haynie, 168 S.E. 112, 46 Ga.App. 522—Neill v. Hill, 123 S.E. 30, 32 Ga.App. 381.
Neb.—Bixby v. Ayers, 298 N.W. 533.
Wyo.—Tisthammer v. Union Pac. R. Co., 286 P. 377, 41 Wyo. 382.
23 C.J. p 50 note 54.

Jury must reconcile defendant's direct testimony and circumstances relied on by plaintiff, if possible, without disregarding any evidence.—Tisthammer v. Union Pac. R. Co., 286 P. 377, 41 Wyo. 382.

Evidence not consistent

Positive testimony of truck driver that automobile ran, unattended, onto the highway where it was struck by truck could not be said to be consistent with circumstantial evidence that the automobile was parked with hand brake set and that brakes were in effective condition, and hence jury could find for automobile owner notwithstanding truck driver's testimony.—Georgia Highway Express v. Sturkie, 9 S.E.2d 683, 62 Ga.App. 741.

27. Ill.—Celner v. Prather, 22 N.E.2d 397, 301 Ill.App. 224.
Iowa.—In re Brooks' Estate, 294 N.W. 735—Jakeway v. Allen, 290 N.W. 507, 227 Iowa 1182—Claussen v. Johnson's Estate, 278 N.W. 297, 224 Iowa 990—Comparet v. Wm. H. Metz Co., 271 N.W. 847, 222 Iowa 1328—Natalini v. Northwestern Fire & Marine Ins. Co., 259 N.W. 577, 219 Iowa 806—Nichols Roofing & Paving Co. v. City of Des Moines, 245 N.W. 358, 215 Iowa 894—Gregory v. Sorenson, 242 N.W. 91, 214 Iowa 374—Field v. Southern Surety Co. of New York, 235 N.W. 571, 211 Iowa 1239—Tracy v. Liberty Oil Co., 226 N.W. 178, 208 Iowa 882—Cotten v. Halverson, 207 N.W. 795, 201 Iowa 636—Hemminger v. City of Des Moines, 203 N.W. 822, 199 Iowa 1302—Ohlson v. Sac County Farmers' Mut. Fire Ins. Ass'n, 182 N.W. 879, 191 Iowa 479—Gibson v. Iowa Cent. R. Co., 113 N.W. 927, 136 Iowa 415.
La.—Wright v. Petty, 7 La.App. 584—Cannon v. Winnfield Oil & Gas Co., 4 La.App. 384.
Miss.—Hulett v. Hulett, 119 So. 581, 152 Miss. 476.
Neb.—Bixby v. Ayers, 298 N.W. 533.
Or.—Sullivan v. Mountain States Power Co., 9 P.2d 1038, 139 Or. 282.
Pa.—Gardocki v. Polish Nat. Alliance of U. S. of America, 14 A.2d 604, 141 Pa.Super. 53.
23 C.J. p 49 note 48.

Inconsistency with other rational theory

To establish particular theory by circumstantial evidence, facts and circumstances must not only be consistent with such theory, but inconsistent with any other rational theory.—Erickson v. Todd, 252 N.W. 879, 62 S.D. 280.

Every other possible hypothesis need not be excluded; it is sufficient that every other fair and reasonable hypothesis is excluded.—Miller v. Uvalde Asphalt Pav. Co., 118 N.Y.S. 885, 134 App.Div. 212.

that it is sufficient for the party having the burden of proof to make out the more probable hypothesis,[28] and that the evidence need not rise to that degree of certainty which will exclude every other reasonable conclusion.[29]

Where circumstantial evidence is relied on, the

A theory of how injuries were caused is established by circumstantial evidence only when it is the only reasonable conclusion that can be drawn from the evidence.—Kelley v. Public Service Co. of Northern Illinois, 21 N.E.2d 43, 300 Ill.App. 354.

Suicide

When circumstantial evidence is relied on to establish self-destruction, one relying thereon carries burden of proving it to exclusion of every reasonable hypothesis of accidental death.—Mutual Life Ins. Co. of New York v. Johnson, 166 So. 442, 122 Fla. 567.

Where direct evidence is available, but is not produced, circumstantial evidence relied on to establish the fact must be such as permits of no other explanation.—Jones v. Davis, D.C.N.Y., 13 F.Cas.No.7,460, 1 Abb. Adm. 446—23 C.J. p 49 note 49.

In Missouri

(1) Where evidence is wholly circumstantial, it must establish the ultimate fact sought to be proved so conclusively as to eliminate every other reasonable hypothesis.—McGill v. Walnut Realty Co., Mo.App., 148 S.W.2d 131.

(2) On the other hand, it has been held that circumstantial evidence in a civil case need not exclude every other reasonable hypothesis than the truth of the fact or facts sought to be proved thereby; but it is enough that the jury can reasonably find such fact or facts from the circumstances, without piling inference on inference.—Farber v. Boston Ins. Co., 256 S.W. 1079, 215 Mo.App. 564.

28. Ariz.—New York Life Ins. Co. v. McNeely, 79 P.2d 948, 52 Ariz. 181.

Fla.—Stigletts v. McDonald, 186 So. 233, 135 Fla. 385—King v. Weis-Patterson Lumber Co., 168 So. 858, 124 Fla. 272.

Contra Florida East Coast Ry. Co. v. Acheson, 135 So. 551, 102 Fla. 15, reversed on other grounds 137 So. 695, 102 Fla. 15, rehearing denied 140 So. 467, 102 Fla. 15, 87 A.L.R. 905, and certiorari denied 52 S.Ct. 407, 285 U.S. 551, 76 L.Ed. 941.

Ga.—Foster v. Jones, 12 S.E.2d 141, 64 Ga.App. 66.

Kan.—Sternbock v. Consolidated Gas Utilities Corporation, 98 P.2d 162, 151 Kan. 81—Lane v. Southern Kansas Mut. Ins. Co. of Wellington, 214 P. 92, 113 Kan. 365, quoting **Corpus Juris.**

N.J.—In re Le Van's Will, 198 A. 278, 283, 123 N.J.Eq. 463, citing **Corpus Juris**—Kuczynski v. Humphrey, 192 A. 371, 118 N.J.Law 321, reversing 182 A. 259, 14 N.J. Misc. 82.

N.M.—Lopez v. Townsend, 82 P.2d 921, 42 N.M. 601.

Okl.—Tulsa County Truck and Fruit Growers Ass'n v. McMurphey, 90 P.2d 927, 185 Okl. 132.

Tenn.—Bryan v. Ætna Life Ins. Co., 130 S.W.2d 85, 88, 174 Tenn. 602, citing **Corpus Juris**—Pickard v. Berryman, 142 S.W.2d 764, 768, 24 Tenn.App. 263, citing **Corpus Juris**—Gifford v. Provident Life Ins. Co., 64 S.W.2d 64, 16 Tenn. App. 21.

Tex.—National Aid Life Ass'n v. Driskill, Civ.App., 138 S.W.2d 238—Duke v. Houston Oil Co. of Texas, Civ.App., 128 S.W.2d 480, error dismissed, judgment correct.

23 C.J. p 49 note 50—52 C.J. p 123 note 14.

"When but two equally reasonable conclusions can be drawn from a set of circumstances, one favoring the existence of a fact and the other its nonexistence, the party relying upon proof of such fact has failed to meet the burden of establishing that fact by a preponderance of the evidence, but to establish such preponderance requires merely that the existence of the fact be made more probable than its nonexistence."—Northwest States Utilities Co. v. Ashton, 65 P. 2d 235, 238, 51 Wyo. 168, quoting **Corpus Juris,** and rehearing denied 69 P.2d 623, 51 Wyo. 132.

The improbability of any other explanation of facts, as an exclusionary premise, may serve to strengthen force of deduction from such facts.—Emery v. Tilo Roofing Co., 195 A. 409, 89 N.H. 165.

Preponderance of evidence

Rule as to circumstantial evidence is that party will prevail if preponderance of evidence is in his favor.

Mont.—Exchange State Bank of Glendive v. Occident Elevator Co., 24 P.2d 126, 95 Mont. 78, 90 A.L.R. 740—Herness v. McCann, 300 P. 257, 90 Mont. 95.

Tex.—Duke v. Houston Oil Co. of Texas, Civ.App., 128 S.W.2d 480, error dismissed, judgment correct.

Preponderance of probabilities

Circumstantial or presumptive evidence, as a basis for deductive reasoning in determination of civil causes, is a mere preponderance of probabilities.—Hercules Powder Co. v. Nieratko, 173 A. 606, 113 N.J.Law 195, affirmed 176 A. 198, 114 N.J.Law 254—Jackson v. Delaware, L. & W. R. Co., 170 A. 22, 111 N.J.Law 487.

29. U.S.—Cudahy Packing Co. v. National Labor Relations Board, C.C.A., 116 F.2d 367.

Contra Mutual Life Ins. Co. of New York v. Zimmerman, C.C.A.Fla., 75 F.2d 758—Tucker Stevedoring Co. v. W. H. Gahagan, Inc., D.C.Del., 6 F.2d 407, reversed on other grounds W. H. Gahagan, Inc. v. Tucker Stevedoring Co., 15 F.2d 935—The Cabo Hatteras, D.C.N.Y., 5 F.Supp. 725.

Cal.—Katenkamp v. Union Realty Co., 98 P.2d 239, 36 Cal.App.2d 602, superseding 93 P.2d 1035—Hilson v. Pacific Gas & Electric Co., 21 P.2d 662, 131 Cal.App. 427—Robertson v. Weingart, 267 P. 741, 91 Cal.App. 715—Ley v. Bishopp, 263 P. 369, 88 Cal.App. 313—Chalmers v. Hawkins, 248 P. 727, 78 Cal.App. 733.

Contra Halla v. Bank of America Nat. Trust & Savings Ass'n, 45 P.2d 231, 6 Cal.App.2d 561—In re Wallace's Estate, 220 P. 682, 64 Cal.App. 107.

Kan.—Donley v. Amerada Petroleum Corporation, 106 P.2d 652, 152 Kan. 518—Sternbock v. Consolidated Gas Utilities Corporation, 98 P.2d 162, 151 Kan. 81—Asche v. Matthews, 18 P.2d 177, 136 Kan. 740—Lane v. Southern Kansas Mut. Ins. Co. of Wellington, 214 P. 92, 113 Kan. 365, quoting **Corpus Juris.**

N.M.—Lopez v. Townsend, 82 P.2d 921, 42 N.M. 601.

Okl.—Cities Service Gas Co. v. Eggers, 98 P.2d 1114, 186 Okl. 466, 126 A.L.R. 1278—Tulsa County Truck & Fruit Growers Ass'n v. McMurphey, 90 P.2d 927, 185 Okl. 132—Deep Rock Oil Corporation v. Fox, 63 P.2d 24, 178 Okl. 516—Wise v. Wise, 52 P.2d 715, 175 Okl. 310—Ramsey Oil Co. v. Dunbar, 46 P.2d 535, 172 Okl. 571—Missouri-Kansas-Texas R. Co. v. Embrey, 33 P.2d 481, 168 Okl. 433, certiorari denied 55 S.Ct. 119, 293 U.S. 603, 79 L.Ed. 695—Eastern Oklahoma Light & Power Co. v. Hare, 286 P. 769, 142 Okl. 283—Marland Refining Co. v. Snider, 257 P. 797, 125 Okl. 260—Marland Refining Co. v. Snider, 251 P. 989, 120 Okl. 116—Schaff v. Coyle, 249 P. 947, 121 Okl. 228—Kansas City Southern Ry. Co. v. Jones, 216 P. 909, 90 Okl. 231—Midland Valley R. Co. v. Taylor, 204 P. 1102, 85 Okl. 95—Barker v. Creek Coal & Mining Co., 194 P. 195, 80 Okl. 86—Missouri, K. & T. Ry. Co. v. Simerly, 180 P. 551, 72 Okl. 251.

Tenn.—Bryan v. Ætna Life Ins. Co., 130 S.W.2d 85, 88, 174 Tenn. 602, citing **Corpus Juris**—Pickard v. Berryman, 142 S.W.2d 764, 768, 24 Tenn.App. 253, citing **Corpus Juris**—Gifford v. Provident Life Ins. Co., 64 S.W.2d 64, 16 Tenn.App. 21.

circumstances must be proved and not themselves be presumed or rest in conjecture.[30]

The lack of circumstantial evidence may have weight where the direct evidence is conflicting.[31]

D. CONCLUSIVENESS OF EVIDENCE

§ 1040. On Party Introducing It

a. In general
b. Adverse party or employee called as witness
c. Party's own testimony
d. Documentary evidence

a. In General

As a general rule, a party calling a witness vouches for the credibility of, and is bound by, his testimony, unless it is contradicted or is of an unreliable character.

As a general rule, a party is bound by uncontradicted evidence produced by him to prove a particular fact or facts;[32] and where he introduces a witness to testify on his behalf he ordinarily vouches for the credibility of his testimony,[33] and, in the absence of contradictory evidence, is bound by such

Contra Standard Oil Co. of Louisiana v. Roach, 94 S.W.2d 63, 19 Tenn. App. 661—Bishop v. Botto, 65 S.W.2d 834, 16 Tenn.App. 178—Crowe v. Birmingham & North Western Ry. Co., 2 Tenn.App. 634.
Wyo.—Northwest States Utilities Co. v. Ashton, 65 P.2d 235, 238, 51 Wyo. 168, quoting **Corpus Juris**, and rehearing denied 69 P.2d 623, 51 Wyo. 132.
Contra Tisthammer v. Union Pac. R. Co., 286 P. 377, 41 Wyo. 382.
23 C.J. p 49 note 51.

Reason for rule

"Such a rule [that the circumstances must be inconsistent with any other reasonable hypothesis] requires proof beyond a reasonable doubt."—Northwest States Utilities Co. v. Ashton, 65 P.2d 235, 239, 51 Wyo. 168, rehearing denied 69 P.2d 623, 51 Wyo. 132.

Well considered case

Wyo.—Northwest States Utilities Co. v. Ashton, 65 P.2d 235, 51 Wyo. 168, rehearing denied 69 P.2d 623, 51 Wyo. 132.

Criminal law rule inapplicable

(1) The criminal law rule that, where circumstantial evidence is relied on, facts proved must preclude every other hypothesis than that sought to be established is inapplicable in civil cases, wherein proof of circumstances warranting given inference is sufficient.
Fla.—King v. Weis-Patterson Lumber Co., 168 So. 858, 124 Fla. 272.
Okl.—Tulsa County Truck & Fruit Growers Ass'n v. McMurphey, 90 P.2d 927, 185 Okl. 132.
S.C.—Leek v. New South Express Lines, 7 S.E.2d 459, 192 S.C. 527.
Tenn.—Bryan v. Ætna Life Ins. Co., 130 S.W.2d 85, 174 Tenn. 602.

(2) The doctrine that, where the development of a civil case requires a charge of crime to be maintained and the case rests on circumstantial evidence, the circumstances must be such as to establish the charge of crime beyond a reasonable doubt or such as to exclude any other reasonable hypothesis than that of guilt has been repudiated.—Bryan v. Ætna Life Ins. Co., supra.

(3) Weight of circumstantial evidence in criminal cases see Criminal Law § 907.

In New York

(1) Party proving facts from which inference in his favor may be drawn need not go further and exclude all possible explanation which might negative such inference.—Ditmars v. Renz, 199 N.E. 54, 269 N.Y. 191, reversing 276 N.Y.S. 789, 243 App.Div. 514.

(2) It has been held, however, that for a fact to be established by circumstantial evidence the circumstances must lead fairly and reasonably to conclusion sought to be established and exclude any other hypothesis fairly and reasonably.—Srogi v. New York Cent. R. Co., 286 N.Y.S. 215, 247 App.Div. 95—Carr v. Donner Steel Co., 201 N.Y.S. 604, 207 App.Div. 3—Lavenia v. State, 184 N.Y.S. 108, 113 Misc. 114.

30. U.S.—The Cabo Hatteras, D.C. N.Y., 5 F.Supp. 725.
Ark.—Jackson v. Richardson, 33 S.W.2d 1095, 182 Ark. 997.
Ill.—Henninger v. Inter-Ocean Casualty Co., 217 Ill.App. 542.
Miss.—Hulett v. Hulett, 119 So. 581, 152 Miss. 476.
N.Y.—Love v. Baltimore & O. R. Co., 278 N.Y.S. 289, 244 App.Div. 72—Grawunder v. Beth Israel Hospital Ass'n, 272 N.Y.S. 171, 242 App.Div. 56, affirmed 195 N.E. 221, 266 N.Y. 605—Lane v. City of Buffalo, 250 N.Y.S. 579, 232 App.Div. 334—Collins v. William W. Spencer & Sons Corp., 213 N.Y.S. 437, 215 App.Div. 243—Lavenia v. State, 184 N.Y.S. 108, 113 Misc. 114.
Tex.—Duke v. Houston Oil Co. of Texas, Civ.App., 128 S.W.2d 480, error dismissed, judgment correct.
Wash.—Prentice Packing & Storage Co. v. United Pac. Ins. Co., 106 P. 2d 314, 5 Wash.2d 144.
23 C.J. p 50 note 56.

Proof of circumstances by direct evidence has been required.—Duke v. Houston Oil Co. of Texas, Tex.Civ. App., 128 S.W.2d 480, error dismissed, judgment correct—Standard Accident Ins. Co. v. Ritchie, Tex.Civ. App., 89 S.W.2d 498, error dismissed.

31. Wash.—Puyallup v. Vergowe, 163 P. 779, 95 Wash. 320.
23 C.J. p 50 note 57.

32. Ala.—Inter-Ocean Casualty Co., v. Foster, 147 So. 127, 226 Ala. 348—Tedder v. Home Ins. Co., 103 So. 674, 212 Ala. 624.
Colo.—Scott v. Shook, 249 P. 259, 80 Colo. 40, 47 A.L.R. 1108.
Idaho.—Groome v. Fisher, 284 P. 1030, 48 Idaho 771.
Iowa.—Cooney v. Graves, 230 N.W. 407.
Mo.—Conduitt v. Trenton Gas & Electric Co., 31 S.W.2d 21, 326 Mo. 133.
N.Y.—Bulkley v. Kaolin Products Co., 175 N.Y.S. 219, 187 App.Div. 108.
Tex.—Texas Pacific Coal & Oil Co. v. Bridges, Civ.App., 110 S.W.2d 1248. Error dismissed.
Vt.—Beatty v. Dunn, 154 A. 770, 103 Vt. 340, reargument and remand denied 157 A. 823, 103 Vt. 439.
Conclusiveness of admissions see supra §§ 379–381.

Evidence on which instructions are based is conclusive on the party furnishing the evidence.—Le Cato v. Eastern Shore of Virginia Agr. Ass'n, 133 S.E. 488, 147 Va. 885.

Value

Party introducing evidence showing forced sales of realty, vouches for such sale as reflecting fair value, and cannot discredit such evidence.—Kansas City & G. Ry. Co. v. Haake, 53 S.W.2d 891, 331 Mo. 429, 84 A.L.R. 1477.

33. Conn.—Roberts v. New York, N. H. & H. R. Co., 142 A. 455, 107 Conn. 681.
Ky.—Black Motor Co. v. Blair, 18 S.W.2d 866, 230 Ky. 78.
Mo.—Platt v. Platt, 123 S.W.2d 54, 343 Mo. 745—Kneezle v. Scott County Milling Co., App., 113 S.W.2d

testimony,[34] although the testimony was objected to by the adverse party.[35] In accordance with this rule, a party who has introduced certain evidence cannot subsequently object that it should not have been received,[36] or that it should not be given such

817—Ritz v. Cousins Lumber Co., 59 S.W.2d 1072, 227 Mo.App. 1167.
N.Y.—Lee v. Pennsylvania R. Co., 280 N.Y.S. 285, 244 App.Div. 558, reversed on other grounds 198 N.E. 629, 269 N.Y. 53, reargument denied 200 N.E. 52, 269 N.Y. 674, amendment of remittitur denied 1 N.E.2d 364, 270 N.Y. 629—Healy v. Erie R. Co., 251 N.Y.S. 414, 233 App. Div. 147, reversed on other grounds 180 N.E 888, 259 N.Y. 40, certiorari denied 53 S.Ct. 81, 287 U.S. 628, 77 L.Ed. 545—Marconi v. Becci, 228 N.Y.S. 485, 132 Misc. 222, 223 App. Div. 858, affirmed 168 N.E. 430, 251 N.Y. 567—Powers v. Wilson, 196 N.Y.S. 600, 203 App.Div. 232—Marks v. Thompson, 1 N.Y.S.2d 215.
Ohio.—Baily v. Weaver, 35 N.E.2d 1006, 67 Ohio App. 259.
Or.—Hibernia Bank v. McElligott, 34 P.2d 652, 147 Or. 387—Hope v. Stoner, 218 P. 555, 108 Or. 592.
Pa.—Felski v. Zeidman, 126 A. 794, 281 Pa. 419.
Tenn.—Pearson Hardwood Flooring Co. v. Phillips, 120 S.W.2d 973, 22 Tenn.App. 206.
Tex.—Pickett v. Dallas Trust & Savings Bank, Com.App., 24 S.W.2d 354, reversing, Civ.App., 13 S.W.2d 195—City of Waco v. Criswell, Civ. App., 141 S.W.2d 1046—Whitefield v. Whitefield, Civ.App., 140 S.W.2d 347.

Although they differ widely on material matters a party vouches for witnesses called by him.—Evans v. Louisiana Gas & Fuel Co., 140 So. 245, 19 La.App. 529.

34. U.S.—Jacobson v. Hahn, C.C.A. N.Y., 88 F.2d 433, modifying, D.C., 14 F.Supp. 339—Wiget v. Becker, C.C.A.Mo., 84 F.2d 706—Yellow Cab Co. of Philadelphia v. Rodgers, C.C.A.Pa., 61 F.2d 729—North & Judd Mfg. Co. v. Krischer's Mfg. Co. of Connecticut, D.C.Conn., 11 F.Supp. 739.
Ark.—Wilson v. Biles, 287 S.W. 373, 171 Ark. 912.
Cal.—Smellie v. Southern Pac. Co., 299 P. 529, 212 Cal. 540—Worthington v. People's State Bank of Chula Vista, 288 P. 1086, 106 Cal. App. 238.
Conn.—Roberts v. New York, N. H. & H. R. Co., 142 A. 455, 107 Conn. 681.
Fla.—Duncan v. Growers Equipment Co., 1 So.2d 458.
Idaho.—Brooke v. Nolan, 87 P.2d 470, 59 Idaho 759.
Ill.—Dry v. Adams, 11 N.E.2d 607, 367 Ill. 400.
La.—Young v. Williamson, 133 So. 807, 16 La.App. 406—Joseph v. Sliman, 6 La.App. 552.
Me.—Harmon v. Perry, 175 A. 310, 133 Me. 186—Hanscom v. North Anson Mfg. Co., 113 A. 179, 120 Me. 220.
Mich.—Waldbauer v. Michigan Bean Co., 270 N.W. 285, 278 Mich. 249.
Mo.—Rucker v. Alton R. Co., 123 S.W. 2d 24, 343 Mo. 929—Lolordo v. Lacy, 88 S.W.2d 353, 337 Mo. 1097—Chawkley v. Wabash Ry. Co., 297 S. W. 20, 317 Mo. 782—Frye v. St. Joseph Ry., Light, Heat & Power Co., 99 S.W.2d 540, 231 Mo.App. 407—Tunget v. Cook, App., 94 S.W.2d 921—Walradt v. St. Joseph Ry., Light, Heat & Power Co., App., 48 S.W.2d 93.
Mont.—Sommerville v. Greenhood, 210 P. 1048, 65 Mont. 101.
Neb.—Ross v. Carroll, 291 N.W. 726—Zinman v. Miller Hotel Co., 146 N. W. 1030, 95 Neb. 809.
N.J.—Veenstra & De Haan Coal Co. v. Pepper, 4 A.2d 791, 125 N.J.Eq. 243, affirmed 8 A.2d 315, 126 N.J.Eq. 218.
N.Y.—P. Pastene & Co. v. Irving Nat. Bank, 164 N.E. 49, 249 N.Y. 272, reversing 229 N.Y.S. 905, 224 App.Div. 719, and reargument denied 166 N. E. 316, 250 N.Y. 538—In re Brush's Estate, 240 N.Y.S. 380, 136 Misc. 581, reversed on other grounds In re McLaren, 244 N.Y.S. 921, 230 App.Div. 787, affirmed 177 N.E. 153, 256 N.Y. 592—Rosenblum v. Pas Holding Corporation, 28 N.Y.S.2d 589—Jacob & Emil Leitner, Inc. v. Scalzo, 22 N.Y.S.2d 910, affirmed 26 N.Y.S.2d 572.
Or.—Fowler v. Gehrke, 111 P.2d 831—Nicolai-Neppach Co. v. Smith, 58 P.2d 1016, 154 Or. 450, 107 A.L.R. 1124, opinion adhered to 60 P.2d 979, 154 Or. 450—Murphy v. Panter, 125 P. 292, 62 Or. 522.
Pa.—Lott v. People's Natural Gas Co., 188 A. 582, 324 Pa. 517—Evans v. Penn Mut. Life Ins. Co. of Philadelphia, 186 A. 133, 322 Pa. 547—Balin v. Kimmelman, 145 A. 303, 295 Pa. 301—Palkovitz v. American Sheet & Tin Plate Co., 109 A. 789, 266 Pa. 176—Fetterolf v. Yellow Cab Co., 11 A.2d 516, 139 Pa.Super. 463—Leonard v. American Stores Co., 198 A. 524, 131 Pa.Super. 14—Arndt v. Brockhausen, 191 A. 362, 126 Pa.Super. 269.
Tex.—Pickett v. Dallas Trust & Savings Bank, Com.App., 24 S.W.2d 354, reversing, Civ.App., 13 S.W. 2d 195—Whitefield v. Whitefield, Civ.App., 140 S.W.2d 347—Texas Prudential Ins. Co. v. Turner, Civ. App., 127 S.W.2d 563, error dismissed.
Vt.—Pellon v. Connecticut General Life Ins. Co., 178 A. 902, 107 Vt. 129.

Uncontroverted evidence generally see supra § 1038.

Damages

Plaintiff held limited to lowest amount of damages which his witnesses testified would suffice to repair damaged automobile.—McClary v. Endom's Transfer & Storage Garage, 139 So. 702, 19 La.App. 515.

Sole evidence

A party is bound by the testimony of a witness called by him, where the testimony of such witness is the only evidence adduced concerning the matter in question.
U. S.—In re Erickson, D.C.N.Y., 13 F. Supp. 853.
Ark.—Wilson v. Biles, 287 S.W. 373, 171 Ark. 912.
Ga.—Farmers Peanut Co. v. Zimmerman-Alderson Carr Co., 183 S.E. 115, 52 Ga.App. 265.
Mo.—State ex rel. and to Use of Wilkinson v. Central Surety & Insurance Corporation, 112 S.W.2d 607, 232 Mo.App. 748—Schroer v. Brooks, 224 S.W. 53, 204 Mo.App. 567, transferred, see, Sup., 200 S.W. 1068.

Presumption of consideration to support written agreement disappears when plaintiff's own witnesses definitely prove that agreement was without consideration.—Johnson v. Grimes, 7 P.2d 196, 119 Cal.App. 625.

Former witness for adversary

Where defendant called as her own witness a person who had previously testified for plaintiff, and his evidence given in her behalf emphasized and made more clear the testimony previously given on behalf of plaintiff, defendant was bound by his evidence.—Tebay Land & Live Stock Co. v. Hastie, 210 P. 605, 64 Mont. 509.

Last of contradictory statements

Where testimony of plaintiff's witness on cross-examination showed contributory negligence, contradicting direct examination, and witness, after plaintiff's counsel called attention to discrepancies, reiterated testimony showing contributory negligence, plaintiff is bound by witness' final statement.—Kessler v. Philadelphia Rapid Transit Co., 163 A. 393, 107 Pa.Super. 143.

35. Mich.—Waldbauer v. Michigan Bean Co., 270 N.W. 285, 278 Mich. 249.
Mo.—Chawkley v. Wabash Ry. Co., 297 S.W. 20, 317 Mo. 782.

36. Vt.—State v. Jackson, 65 A. 657, 79 Vt. 504, 8 L.R.A.,N.S., 1245.
Wis.—In re Nieman's Estate, 283 N. W. 452, 459, 230 Wis. 23, quoting **Corpus Juris**.
23 C.J. p 51 note 71.

consideration as its natural probative value entitled it to.[37]

The practical effect of this general rule is to confine within certain narrow limits the method by which the party calling the witness may impeach him;[38] and the rule is also subject to the right of a party to contradict his own witness, as explained in the C.J.S. title Witnesses § 630, also 70 C.J. p 1156 note 77–p 1160 note 90. Accordingly, a party calling a witness is not necessarily or absolutely bound by his testimony;[39] he is not bound where the testimony is contradicted, either expressly or by inference, by other evidence or circumstances,[40] as where the circumstances or the evidence of other witnesses would warrant the trier of facts in disregarding the testimony or drawing a contrary inference.[41] The party calling a witness is not bound by his testimony where it is inherently improbable,[42] is due to mistake,[43] or is not a statement of fact, but a mere estimate or expression of opinion;[44] or where, to the party's surprise, the witness turns out to be unfriendly, or testifies to the contrary of what the party was in good faith led to expect;[45] or where the witness is adverse or hostile, but it was necessary to call him, in order to make out a prima facie case or matter of defense.[46] It has al-

37. Wis.—In re Nieman's Estate, supra, quoting **Corpus Juris.**
23 C.J. p 51 note 72.

38. Cal.—Worthington v. People's State Bank of Chula Vista, 288 P. 1086, 106 Cal.App. 238.
Impeachment of one's own witness see the C.J.S. title Witnesses § 477, also 70 C.J. p 793 note 41–p 798 note 10.

39. Ga.—Green v. Fairburn Banking Co., 113 S.E. 59, 29 Ga.App. 3.
Kan.—Stecher v. London Guarantee & Accident Co., Limited of London, England, 298 P. 754, 133 Kan. 89—Walls v. Edgar Zinc Co., 216 P. 308, 113 Kan. 700.
Mass.—Lydon v. Boston Elevated Ry., 34 N.E.2d 642, 309 Mass. 205—Gordon v. Harris, 195 N.E. 744, 290 Mass. 482—Griffin v. New York, N. H. & H. R. Co., 181 N.E. 839, 279 Mass. 511—Kelley v. Jordan Marsh Co., 179 N.E. 299, 278 Mass. 101—Haun v. Le Grand, 168 N.E. 180, 268 Mass. 582.
Mo.—Schroer v. Brooks, 224 S.W. 53, 204 Mo.App. 567, transferred, see, Sup., 200 S.W. 1068.
Vt.—White River Chair Co. v. Connecticut River Power Co. of New Hampshire, 162 A. 859, 105 Vt. 24.
Wash.—Harris v. Saunders, 182 P. 949, 108 Wash. 195.
Statutory prima facie case of owner's responsibility by reason of registration of automobile is not waived by plaintiff's calling witnesses whose testimony is contradictory of such prima facie evidence.—Haun v. Le Grand, 168 N.E. 180, 268 Mass. 582.

40. U.S.—Jacobson v. Hahn, C.C.A. N.Y., 88 F.2d 433, modifying, D.C., 14 F.Supp. 339—Michigan Cent. R. Co. v. Zimmerman, C.C.A.Ohio, 24 F.2d 23—In re Erickson, D.C.N.Y., 13 F.Supp. 853—Pennsylvania R. Co. v. Crouse, C.C.A.Ohio, 286 F. 376, certiorari denied 44 S.Ct. 5, 263 U.S. 699, 68 L.Ed. 513.
Ill.—People v. Illiana State Bank, 265 Ill.App. 29.
Ky.—Dorsey v. Proctor, 269 S.W. 316, 207 Ky. 385.
Me.—Harmon v. Perry, 175 A. 310, 133 Me. 186.
Mass.—Giannelli v. Metropolitan Life Ins. Co., 29 N.E.2d 124, 307 Mass. 18—Coyle v. Worcester Consol. St. Ry. Co., 173 N.E. 586, 273 Mass. 475.
Mo.—Hoffman v. Peerless White Lime Co., 296 S.W. 764, 317 Mo. 86—Scott v. Kansas City Public Service Co., App., 115 S.W.2d 518—Frye v. St. Joseph Ry., Light, Heat & Power Co., 99 S.W.2d 540, 231 Mo. App. 407—Walradt v. St. Joseph Ry., Light, Heat & Power Co., App., 48 S.W.2d 93—Klaber v. Fidelity Bldg. Co., App., 19 S.W.2d 758—Tucker v. Kollias, 16 S.W.2d 649, 223 Mo.App. 367—Voorhees v. Chicago, R. I. & P. Ry. Co., App., 7 S. W.2d 740—Gilman v. Fleming, App., 265 S.W. 104.
Neb.—Ross v. Carroll, 291 N.W. 726.
N.Y.—P. Pastene & Co. v. Irving Nat. Bank, 164 N.E. 49, 249 N.Y. 272, reversing 229 N.Y.S. 905, 224 App. Div. 719 and reargument denied 166 N.E. 316, 250 N.Y. 538—Vulcan Detinning Co. v. Assmann, 173 N. Y.S. 334, 185 App.Div. 399.
Pa.—Arndt v. Brockhausen, 191 A. 362, 126 Pa.Super. 269.
Tenn.—Pearson Hardwood Flooring Co. v. Phillips, 120 S.W.2d 973, 22 Tenn.App. 206—Brassfield Hardware Co. v. Harris, 5 Tenn.App. 652.
Contra Leadman v. Querbes, La.App., 163 So. 745.
Contradicting one's own witness see the C.J.S. title Witnesses § 630, also 70 C.J. p 1156 note 77–p 1160 note 90.

41. Mass.—Lydon v. Boston Elevated Ry., 34 N.E.2d 642, 309 Mass. 205—Fulton v. Edison Electric Illuminating Co. of Boston, 21 N.E. 2d 609, 303 Mass. 258—U. S. Fidelity & Guaranty Co. v. English Const. Co., 20 N.E.2d 939, 303 Mass. 105—Kingsbury v. Terry, 16 N.E. 2d 48, 300 Mass. 516—Sluskonis v. Boston & M. R. R., 12 N.E.2d 858, 299 Mass. 413—Ballam v. Metropolitan Life Ins. Co., 3 N.E.2d 1012, 295 Mass. 411, 108 A.L.R. 1—Country Club Soda Co. v. Arbuckle, 181 N.E. 256, 279 Mass. 121.
Mo.—Smithers v. Barker, 111 S.W. 2d 47, 341 Mo. 1017, reversing, App., 97 S.W.2d 121—Hoffman v. Peerless White Lime Co., 296 S. W. 764, 317 Mo. 86—Squire v. William S. Drozda Realty Co., App., 288 S.W. 988—Sbiglio v. St. Joseph Lead Co., App., 243 S.W. 204—Evans v. Western Union Telegraph Co., 256 S.W. 81, 215 Mo.App. 187.
Neb.—Ross v. Carroll, 291 N.W. 726—Zinman v. Miller Hotel Co., 146 N.W. 1030, 95 Neb. 809.
N.Y.—Jacob & Emil Leitner, Inc., v. Scalzo, 22 N.Y.S.2d 910, affirmed 26 N.Y.S.2d 572.

42. U.S.—Jacobson v. Hahn, C.C.A. N.Y., 88 F.2d 433, modifying, D. C., 14 F.Supp. 339—In re Erickson, D.C.N.Y., 13 F.Supp. 853.
N.Y.—P. Pastene & Co. v. Irving Nat. Bank, 164 N.E. 49, 249 N.Y. 272, reversing 229 N.Y.S. 905, 224 App.Div. 719, and reargument denied 166 N.E. 316, 250 N.Y. 538.

43. U.S.—Wiget v. Becker, C.C.A. Mo., 84 F.2d 706—Pennsylvania R. Co. v. Crouse, C.C.A.Ohio, 286 F. 376, certiorari denied 44 S.Ct. 5, 263 U.S. 699, 68 L.Ed. 513.
Mo.—Rucker v. Alton R. Co., 123 S. W.2d 24, 343 Mo. 929.

44. Conn.—Weiner v. E. M. Loew's Enterprises, 181 A. 921, 120 Conn. 581.
Ill.—Liquid Carbonic Co. v. Industrial Commission, 186 N.E. 140, 352 Ill. 405.
Iowa.—Matthews v. Concrete Engineering Co., 292 N.W. 64.
Mo.—Scott v. Kansas City Public Service Co., App., 115 S.W.2d 518—Tunget v. Cook, App., 94 S.W.2d 921.

45. Mo.—Lolordo v. Lacy, 88 S.W.2d 353, 337 Mo. 1097.

46. U.S.—Thonnesen v. Montgomery Ward & Co., D.C.N.Y., 33 F.Supp. 81.
Ala.—Gilchrist-Fordney Co. v. Bearry, 98 So. 478, 210 Ala. 472.
N.Y.—In re Pearse's Estate, 216 N.Y.

so been held that a spouse, as a party, is not necessarily bound by the testimony of the other spouse, whom he or she calls as a witness.[47]

A party is not bound by the voluntary unresponsive answer of the adverse party's witness on cross-examination,[48] especially where he did not know what the answer would be and had nothing to do with it.[49]

b. Adverse Party or Employee Called as Witness

A party calling his adversary, or the latter's employee, officer, or servant, as a witness is generally bound by the testimony so elicited, unless it is contradicted.

As a general rule, a party calling his adversary as a witness vouches, at least to some extent, for his credibility,[50] and is concluded by his testimony, so elicited, if it is not contradicted or proved false;[51] and this rule also applies to testimony so elicited from an officer, employee, or servant of the adverse party.[52] A party on whom it is incumbent to prove an alleged fact cannot call his adversary as a witness as to that fact, elicit testimony from him to the effect that such alleged fact has no existence, and then call on the jury to discredit the evidence of such adversary merely because he is interested as a party, and to base on the assumed falsity of his evidence an affirmative finding of the existence of such alleged fact, without any other evidence of its existence, or from which it may be inferred.[53]

Under some statutes, the rule is that a party call-

S. 704, 217 App.Div. 602, motion granted 155 N.E. 900, 244 N.Y. 567.
Pa.—Fetterolf v. Yellow Cab Co., 11 A.2d 516, 139 Pa.Super. 463.
Tex.—City of Waco v. Criswell, Civ. App., 141 S.W.2d 1046.

47. Mass.—Connors' Case, 3 N.E.2d 31, 295 Mass. 106—Salem Trust Co. v. Deery, 194 N.E. 307, 289 Mass. 431.
Or.—Hill v. Harritt, 12 P.2d 1021, 140 Or. 86.

48. Tex.—Williams v. Long, Civ. App., 106 S.W.2d 378, error dismissed.

49. Tex.—Williams v. Long, supra.

50. Conn.—Walsh v. Studwell, 135 A. 554, 105 Conn. 453.
Iowa.—Goeb v. Bush, 286 N.W. 492, 226 Iowa 1224—Pike v. Coon, 252 N.W. 888, 217 Iowa 1068—Kelley v. Kelley, 177 N.W. 45, 189 Iowa 311.
La.—Dunckelman v. Shockley, App., 183 So. 52.
N.J.—Krafte v. Belfus, 168 A. 755, 114 N.J.Eq. 207—Carluccio v. Winter, 154 A. 427, 108 N.J.Eq. 174.
N.Y.—Shultz v. Manufacturers & Traders Trust Co., 5 N.Y.S.2d 61, 254 App.Div. 128, affirmed 18 N.E. 2d 865, 279 N.Y. 781, reargument denied 20 N.E.2d 20, 280 N.Y. 571—In re Berardini's Will, 264 N.Y. S. 479, 238 App.Div. 433, affirmed In re Berardini, 189 N.E. 730, 263 N.Y. 627—Ward v. Iroquois Gas Corporation, 251 N.Y.S. 300, 233 App.Div. 127, motion denied 178 N. E. 789, 257 N.Y. 547, and affirmed 179 N.E. 317, 258 N.Y. 124, followed in Kaplan v. Herman, 180 N.E. 338, 258 N.Y. 573, affirming in part and dismissing appeal 250 N.Y.S. 532, 232 App.Div. 513—Capitula v. New York Cent. R. Co., 210 N.Y.S. 651, 213 App.Div. 526, affirmed 150 N.E. 577, 241 N.Y. 614.
Or.—Maupin Warehouse Co. v. Fleming, 255 P. 606, 121 Or. 531—Grant v. Cartozian Bros., 253 P. 531, 120 Or. 607—Sitton v. Peyree, 242 P. 1112, 117 Or. 107, denying rehearing 241 P. 62, 117 Or. 107.

51. U.S.—Wirfs v. D. W. Bosley Co., C.C.A.Mo., 20 F.2d 632—Standard Water Systems Co. v. Griscom-Russell Co., C.C.A.N.J., 278 F. 703, certiorari denied Griscom-Russell Co. v. Standard Water Systems Co., 42 S.Ct. 464, 259 U.S. 580, 66 L.Ed. 1073.
Conn.—Walsh v. Studwell, 135 A. 554, 105 Conn. 453.
Ill.—Chance v. Kinsella, 142 N.E. 194, 310 Ill. 515—Hershe v. Rinkenberger's Estate, 3 N.E.2d 953, 286 Ill.App. 494—Grosch v. Mendota Nat. Bank, 239 Ill.App. 515.
Iowa.—May v. Hall, 266 N.W. 297, 221 Iowa 609—Pike v. Coon, 252 N.W. 888, 217 Iowa 1068—Erusha v. Wisnewski, 224 N.W. 517, 207 Iowa 1187.
Ky.—Herancourt v. Taylor, 97 S.W. 359, 29 Ky.L. 1299.
Mich.—Dean v. Torrence, 299 N.W. 793, 299 Mich. 24—Riesterer v. Couchez Bros., 279 N.W. 910, 284 Mich. 512.
Mo.—Toomay v. Graham, App., 151 S.W.2d 119—State ex rel. and to Use of Wilkinson v. Central Surety & Insurance Corporation, 112 S. W.2d 607, 232 Mo.App. 748—Cook v. St. Joseph Ry., Light, Heat & Power Co., 106 S.W.2d 38, 232 Mo. App. 313—Myers v. Golloday, App., 104 S.W.2d 1007, opinion quashed on other grounds State ex rel. Golloday v. Shain, 110 S.W.2d 719, 341 Mo. 889—Vassia v. Highland Dairy Farms Co., 104 S.W.2d 686, 232 Mo. App. 886—Spencer v. Anderson, App., 229 S.W. 226.
Mont.—Cook v. MacGinniss, 233 P. 129, 72 Mont. 280.
N.J.—Krafte v. Belfus, 168 A. 755, 114 N.J.Eq. 207—Rapczynski v. Eagle Inv. Co., 175 A. 560, 12 N.J. Misc. 801.
Tex.—McAfee v. Shirley, Civ.App., 140 S.W.2d 932—Gurley v. Pilgrim Oil Co., Civ.App., 275 S.W. 295, affirmed, Com.App., 285 S.W. 283.
70 C.J. p 1160 note 88.

A necessary link in the chain of plaintiff's case cannot be proved by drawing a conclusion directly contrary to the evidence of the adverse party, who testified as plaintiff's witness, and whose testimony is the only evidence on the point.—State ex rel. and to Use of Wilkinson v. Central Surety & Insurance Corporation, 112 S.W.2d 607, 232 Mo.App. 748—Raw v. Maddox, 93 S.W.2d 282, 230 Mo.App. 515.

52. Fla.—Union Bus Co. v. Matthews, 192 So. 811, 141 Fla. 99.
Mo.—Smith v. Kansas City Public Service Co., 43 S.W.2d 548, 328 Mo. 979—March v. Pitcairn, App., 125 S.W.2d 972—Williams v. Excavating & Foundation Co., 93 S.W.2d 123, 230 Mo.App. 973—Polkowski v. St. Louis Public Service Co., 68 S.W.2d 884, 229 Mo.App. 24.
Mont.—Electrical Products Consolidated v. El Campo, Inc., 73 P.2d 199, 105 Mont. 386.
Nev.—Nevada Rock & Sand Co. v. Grich, 93 P.2d 513, 59 Nev. 345.
N.Y.—Shultz v. Manufacturers & Traders Trust Co., 5 N.Y.S.2d 61, 254 App.Div. 128, affirmed 18 N.E. 2d 865, 279 N.Y. 781, reargument denied 20 N.E.2d 20, 280 N.Y. 571—Rosenblum v. Pas Holding Corporation, 28 N.Y.S.2d 589.
Or.—Hoffman v. Employer's Liability Assur. Corporation, 29 P.2d 557, 146 Or. 66.
Pa.—Riley v. Wooden, 165 A. 738, 310 Pa. 449—Hellam Furniture Co. v. Strassman, 87 Pa.Super. 202—Epstein v. Erie Indemnity Co., 39 Pa.Dist. & Co. 117.
Tex.—Smith v. Gulf, C. & S. F. Ry. Co., Civ.App., 23 S.W.2d 501.

53. Tenn.—Bank of Hendersonville v. Dozier, 142 S.W.2d 191, 201, 24 Tenn.App. 178, quoting **Corpus Juris**.

ing an adverse party, or his agent, servant, or employee, as a witness as if under cross-examination, is not concluded by such witness' testimony,[54] except so far as it is not disputed or contradicted.[55] This statutory rule applies, even though the party calling the witness does not announce that he is calling him as an adverse witness under the statute;[56] and the rule applies not only to testimony developed by the party who called the witness, but also to statements then elicited which are merely explanatory of such testimony.[57] Under such statute the party so eliciting evidence of the adverse party may rely on such portion of the evidence as is favorable to him, and is not bound by adverse testimony;[58] but he cannot select isolated portions of the testimony and claim force and effect for such portions which the whole of the testimony does not warrant;[59] nor can he select that which is favorable and reject that which is unfavorable where he has not attempted to contradict the unfavorable testimony;[60] nor is he estopped from claiming under other evidence produced regarding the same matter.[61] However, such statute applies only where the adverse party is called as for cross-examination, and hence, where he is not so called, the party

Tex.—McAfee v. Shirley, Civ.App., 140 S.W.2d 932.

23 C.J. p 51 note 67.

54. U.S.—Sampsell v. Anches, C.C.A.Wash., 108 F.2d 945.

Ariz.—Tucker v. Reil, 77 P.2d 203, 51 Ariz. 357.

Cal.—People v. Mahoney, 91 P.2d 1029, 13 Cal.2d 729—Engstrom v. Auburn Automobile Sales Corporation, 77 P.2d 1059, 11 Cal.2d 64—In re Burns' Estate, 80 P.2d 77, 26 Cal.App.2d 741—Jensen v. Findley, 62 P.2d 430, 17 Cal.App.2d 536—Cook v. Sanger, 293 P. 794, 110 Cal.App. 90—First Nat. Bank v. Shipley, 292 P. 996, 109 Cal.App. 194—Schwarz v. Schwarz, 269 P. 755, 93 Cal.App. 252—Valentini v. Gobbi, 212 P. 718, 60 Cal.App. 289—Grantham v. Ordway, 182 P. 73, 40 Cal.App. 758.

Colo.—Rio Grande Fuel Co. v. Colorado Central Power Co., 63 P.2d 470, 99 Colo. 395.

Ill.—Hadley v. White, 11 N.E.2d 813, 367 Ill. 406—Luthy & Co. v. Paradis, 132 N.E. 556, 299 Ill. 380—Strayer v. Shepard, 19 N.E.2d 234, 298 Ill.App. 630—Kovell v. North Roseland Motor Sales, 275 Ill.App. 566.

Mich.—Hanover Fire Ins. Co. of New York v. Furkas, 255 N.W. 381, 267 Mich. 14—Fleegar v. Consumers' Power Co., 247 N.W. 741, 262 Mich. 537—Steele v. City of Ionia, 177 N.W. 259, 209 Mich. 595.

Pa.—Pagliarulo v. Lippolis, 173 A. 709, 114 Pa.Super. 53—Stroh v. Holmes, 83 Pa.Super. 129.

Wash.—Crown v. Miller, 91 P.2d 713, 199 Wash. 354—Camp v. Peterson, 71 P.2d 1074, 191 Wash. 634—Peizer v. City of Seattle, 24 P.2d 444, 174 Wash. 95.

Statute remedial in nature

Ill.—Hadley v. White, 11 N.E.2d 813, 367 Ill. 406.

55. Mich.—In re Taylor's Estate, 260 N.W. 895, 271 Mich. 404—Snyder v. Johnson, 249 N.W. 856, 264 Mich. 286—Fleegar v. Consumers' Power Co., 247 N.W. 741, 262 Mich. 537—Swank v. Croff, 224 N.W. 393, 245 Mich. 657.

Pa.—First Nat. Bank of Blairstown v. Goldberg, 17 A.2d 377, 340 Pa. 337—Borits v. Tarapchak, 12 A.2d 910, 338 Pa. 289—Flanagan v. Jennings, 2 A.2d 722, 332 Pa. 75—Golder v. Bogash, 198 A. 149, 329 Pa. 350—Marach v. Kooistra, 198 A. 66, 329 Pa. 324—Commonwealth Trust Co. of Pittsburgh v. Hugo, 194 A. 904, 328 Pa. 116—Little v. Straw, 192 A. 894, 326 Pa. 577—Conley v. Mervis, 188 A. 350, 324 Pa. 577, 108 A.L.R. 160—Evans v. Penn Mut. Life Ins. Co. of Philadelphia, 186 A. 133, 322 Pa. 547—Krell v. Jacobson, 172 A. 697, 314 Pa. 522—Maguire v. Brogin, 171 A. 578, 314 Pa. 306—Readshaw v. Montgomery, 169 A. 135, 313 Pa. 206—Lawrence v. Godfrey, 146 A. 107, 296 Pa. 474—Conroy v. Commercial Casualty Ins. Co., 140 A. 905, 292 Pa. 219—Morningstar v. Northeast Pennsylvania R. Co., 137 A. 800, 290 Pa. 14—Felski v. Zeidman, 126 A. 794, 281 Pa. 419—Farne v. Pennsylvania Lighting Co., 119 A. 537, 275 Pa. 444—Krewson v. Sawyer, 109 A. 798, 266 Pa. 284—Hollander v. Kressman, 17 A.2d 669, 143 Pa.Super. 32—Pfordt v. Educators Beneficial Ass'n, 14 A.2d 170, 140 Pa.Super. 170—Fetterolf v. Yellow Cab Co., 11 A.2d 516, 139 Pa.Super. 463—Alfandre v. Bream, 7 A.2d 502, 135 Pa.Super. 538—James v. Shapiro, 5 A.2d 815, 135 Pa.Super. 550—Shobert v. Brookville Bank & Trust Co., 200 A. 942, 132 Pa.Super. 365—Phillips v. Public Service Commission, 191 A. 641, 127 Pa.Super. 341—Willits v. Camden Fire Ins. Ass'n, 189 A. 559, 124 Pa.Super. 563—Sher v. Ohlbaum, 188 A. 553, 124 Pa.Super. 425—RKO Distributing Corporation v. Fretz, 184 A. 315, 121 Pa. Super. 605—Garis v. Hanff, 176 A. 859, 116 Pa.Super. 567—Pagliarulo v. Lippolis, 173 A. 709, 114 Pa.Super. 53—Kosior v. National Surety Co., 171 A. 94, 112 Pa.Super. 390—Reese v. Trasoff, 165 A. 672, 108 Pa.Super. 478—Sebastianelli v. Frank, 165 A. 664, 108 Pa.Super. 550—Hellam Furniture Co. v. Strassman, 87 Pa.Super. 202—Cherry v. Union Nat. Bank, 87 Pa. Super. 114—Stroh v. Holmes, 83 Pa.Super. 129—Brown v. George B. Newton Coal Co., 28 Del.Co. 23—Montgomery Trust Co. v. Griscom, 27 Del.Co. 437—Kiddies Pal v. Waxman, 27 Del.Co. 244—Spinelli v. DePaola, 38 Lack.Jur. 194—New York Life Ins. Co. v. Schweidel, 14 Northumb.Leg.J. 206—Newpher v. Becker, 52 York Leg.Rec. 103.

Va.—Saunders v. Temple, 153 S.E. 691, 154 Va. 714.

Contradiction of testimony of party or his employee called as a witness by his adversary see the C.J.S. title Witnesses § 630, also 70 C.J. p 1159 note 85—p 1160 note 90.

As destroying presumption

Assuming that there was presumption of automobile driver's negligence under doctrine of res ipsa loquitur, effect was destroyed by plaintiff calling defendant for cross-examination, and failing to rebut his testimony.—Clune v. Mercereau, 1 P.2d 101, 89 Colo. 227.

56. Cal.—Worthington v. People's State Bank of Chula Vista, 288 P. 1086, 106 Cal.App. 238.

Nev.—Cann v. George B. Williams Land & Livestock Co., 48 P.2d 887, 56 Nev. 242.

57. Pa.—Readshaw v. Montgomery, 169 A. 135, 313 Pa. 206—Pfordt v. Educators Beneficial Ass'n, 14 A.2d 170, 140 Pa.Super. 170—James v. Shapiro, 5 A.2d 815, 135 Pa.Super. 550—Kiddies Pal v. Waxman, 27 Del.Co. 244.

58. Cal.—In re Lances' Estate, 14 P.2d 768, 216 Cal. 397—In re Burns' Estate, 80 P.2d 77, 26 Cal.App.2d 741—Cioli v. Kenourgios, 211 P. 838, 59 Cal.App. 690.

59. Mich.—In re Taylor's Estate, 260 N.W. 895, 271 Mich. 404.

60. Pa.—Dunmore v. Padden, 105 A. 559, 262 Pa. 436—Reese v. Trasoff, 165 A. 672, 108 Pa.Super. 478.

61. Cal.—Valentini v. Gobbi, 212 P. 718, 60 Cal.App. 289.

calling him as a witness is concluded by his testimony.[62]

A party, however, is not necessarily concluded by the testimony of his adversary whom he calls as a witness,[63] but all the testimony of such witness, whether favorable or unfavorable must receive equal consideration,[64] and must be weighed in the same manner as the testimony of any other witness, being accorded such weight as it is entitled to when its reasonableness and other tests of credibility are taken into consideration;[65] and the fact that a party is regarded as concluded by his adversary's testimony does not mean that all other evidence on the matter testified to must be disregarded.[66]

Limitations of rule. The party calling an adverse party as a witness is bound only by that part of the adversary's testimony which he offers and vouches for as the truth,[67] and he is entitled to the benefit of any conflict, inconsistency, or incongruity in the adversary's testimony.[68] He is not necessarily bound by the part of such testimony most unfavorable to him;[69] nor is he bound by the adversary's testimony where it is inconsistent, contradictory, or evasive,[70] inherently improbable or incredible,[71] or a mere expression of opinion,[72] or where it is inconsistent with, or contradicted by, other testimony or evidence in the case,[73] or is inadmissible, as not

62. Colo—Rio Grande Fuel Co. v. Colorado Central Power Co., 63 P.2d 470, 99 Colo. 395.

63. Iowa.—Kelley v. Kelley, 177 N. W. 45, 189 Iowa 311.

Mass.—Canavan v. George, 198 N.E. 270, 292 Mass. 245—Holton v. Denaro, 179 N.E. 595, 278 Mass. 261.

N.Y.—Manhattan Co. v. Phillips, 109 N.Y. 383, 17 N.E. 129, reversing 53 N.Y.Super. 84—Frey v. Green Bus Lines, 19 N.Y.S.2d 810, 259 App.Div. 891, reargument denied 21 N.Y.S. 2d 389, 259 App.Div. 1029, appeal denied—In re Bartowicz' Estate, 3 N.Y.S.2d 764, 254 App.Div. 705—Tryon v. Willbank, 255 N.Y.S. 27, 234 App.Div. 335.

Pa.—Alfandre v. Bream, 7 A.2d 502, 135 Pa.Super. 538.

Tenn.—Bank of Hendersonville v. Dozier, 142 S.W.2d 191, 201, 24 Tenn. App. 178, quoting **Corpus Juris**—West v. Southern Ry. Co., 100 S. W.2d 1004, 20 Tenn.App. 491.

23 C.J. p 50 note 64.

64. Ill.—Chance v. Kinsella, 142 N. E. 194, 310 Ill. 515—Lord v. Reed, 98 N.E. 553, 254 Ill. 350, Ann.Cas. 1913C 139.

Iowa.—Steffy v. Schultz, 246 N.W. 910, 215 Iowa 837.

Tenn.—Bank of Hendersonville v. Dozier, 142 S.W.2d 191, 24 Tenn.App. 178.

65. Ark.—Robertson v. Chicago, R. I. & P. Ry. Co., 180 S.W. 507, 121 Ark. 233.

Cal.—Figari v. Olcese, 195 P. 425, 184 Cal. 775, 15 A.L.R. 192.

Ill.—Lasher v. Colton, 80 N.E. 122, 225 Ill. 234, 8 Ann.Cas. 367, affirming 126 Ill.App. 119—Strayer v. Shepard, 19 N.E.2d 234, 298 Ill.App. 630—Crowder v. Nuttall, 1 N.E.2d 912, 285 Ill.App. 254.

Mass.—Goldberg v. Federman, 121 N.E. 416, 231 Mass. 443.

Mich.—In re Taylor's Estate, 260 N. W. 895, 271 Mich. 404—Fleegar v. Consumers' Power Co., 247 N.W. 741, 262 Mich. 537.

Mo.—Cook v. St. Joseph Ry., Light, Heat & Power Co., 106 S.W.2d 38, 232 Mo.App. 313.

Tenn.—Bank of Hendersonville v. Dozier, 142 S.W.2d 191, 24 Tenn.App. 178.

Vt.—In re Barron's Estate, 105 A. 255, 92 Vt. 460.

Wash.—Crown v. Miller, 91 P.2d 713, 199 Wash. 354.

23 C.J. p 51 note 66.

Tests

Credibility and probative value of testimony of adversary is subject to proper analysis, comparison with other testimony, with physical facts, and with due regard to nature of transaction sought to be proved.—Johnson v. Warrington, 240 N.W. 668, 213 Iowa 1216.

A statutory provision that a party calling his adversary as a witness, as if under cross-examination, is not bound by his testimony means merely that such testimony is to be treated as though given on cross-examination, and that plaintiff is not concluded from rebutting the testimony or from impeaching the witnesses.—Figari v. Olcese, 195 P. 425, 184 Cal. 775, 15 A.L.R. 192.

Construction against party eliciting testimony

Tex.—Magnolia Petroleum Co. v. Muehl, Civ.App., 237 S.W. 599.

When weighed against a presumption, the testimony of adverse party called as witness is not evidence of party calling witness, and does not dispel presumption contrary thereto in favor of party calling adverse witness.—Smellie v. Southern Pac. Co., 299 P. 529, 212 Cal. 540.

66. Nev.—Nevada Rock & Sand Co. v. Grich, 93 P.2d 513, 59 Nev. 345.

67. Mo.—Jones v. Chicago, R. I. & P. Ry. Co., 108 S.W.2d 94, 341 Mo. 640—Lolordo v. Lacy, 88 S.W.2d 353, 337 Mo. 1097—Steinmetz v. Saathoff, App., 84 S.W.2d 434.

68. Iowa.—Goeb v. Bush, 286 N.W. 492, 226 Iowa 1224.

69. Mo.—Cook v. St. Joseph Ry., Light, Heat & Power Co., 106 S. W.2d 38, 232 Mo.App. 313—Kierns v. Gibson, App., 289 S.W. 358.

70. U.S.—Osley v. Adams, C.C.A.Ga., 268 F. 114, affirming, D.C., Adams v. Osley, 255 F. 117.

Mass.—Cook v. Cole, 174 N.E. 271, 273 Mass. 557.

Mo.—Toomay v. Graham, App., 151 S. W.2d 119.

Pa.—Marach v. Kooistra, 198 A. 66, 329 Pa. 324—Pfordt v. Educators Beneficial Ass'n, 14 A.2d 170, 140 Pa.Super. 170.

71. Iowa.—Hatheway v. Hanson, 297 N.W. 824—Goeb v. Bush, 286 N.W. 492, 226 Iowa 1224.

N.J.—Krafte v. Belfus, 168 A. 755, 114 N.J.Eq. 207.

Pa.—Marach v. Kooistra, 198 A. 66, 329 Pa. 324—Pfordt v. Educators Beneficial Ass'n, 14 A.2d 170, 140 Pa.Super. 170—Fetterolf v. Yellow Cab Co., 11 A.2d 516, 139 Pa.Super. 463—James v. Shapiro, 5 A.2d 815, 135 Pa.Super. 550—Alfandre v. Bream, 53 York Leg.Rec. 16.

72. Conn.—Weiner v. E. M. Loew's Enterprises, 181 A. 921, 120 Conn. 581.

73. U.S.—Lopez v. Gautier, C.C.A. Puerto Rico, 41 F.2d 914, certiorari granted Sanchez v. Borras, 51 S.Ct. 80, 282 U.S. 826, 75 L.Ed. 937, certiorari dismissed Lopez v. Gautier, 51 S.Ct. 490, 283 U.S. 798, 75 L.Ed. 1421—Campbell v. Berryman, D.C. Ga., 256 F. 402—McLean v. Clark, C.C.Mich., 31 F. 501.

Iowa.—Hatheway v. Hanson, 297 N. W. 824.

Mass.—Flynn v. First National Stores, 6 N.E.2d 814, 296 Mass. 521—Cook v. Cole, 174 N.E. 271, 273 Mass. 557.

Mich.—Aphoresmenos v. McIntosh, 155 N.W. 715, 189 Mich. 680.

Mo.—Toomay v. Graham, App., 151 S. W.2d 119—Cook v. St. Joseph Ry., Light, Heat & Power Co., 106 S. W.2d 38, 232 Mo.App. 313—Myers v. Golloday, App., 104 S.W.2d 1007, opinion quashed on other grounds State ex rel. Galloway v. Shain, 110 S.W.2d 719, 341 Mo. 889—Williams v. Excavating & Foundation Co., 93 S.W.2d 123, 230 Mo.App. 973—Voorhees v. Chicago, R. I. & P. Ry. Co.,

tending to establish any issue needing proof.[74] The general rule also does not apply where the adverse party is a witness of the court, and not of the party calling and examining him;[75] nor is he bound by the adverse party's answers to questions by the court, beyond the extent of the cross-examination.[76]

c. Party's Own Testimony

Authorities disagree as to whether a party is bound by his testimony, so as to prevent the consideration, in his favor, of other evidence which conflicts therewith. Authorities regarding a party as so bound have stated a number of limitations on the principle.

It is frequently held, in general terms or in effect, that a party is bound by his own testimony,[77] pro-

App., 7 S.W.2d 740—Pabst Brewing Co. v. Chicago, M. & St. P. Ry. Co., 273 S.W. 424, 221 Mo.App. 338—Bennett v. Punton Sanitarium Ass'n, 249 S.W. 666, 213 Mo.App. 363—Weddle v. Tarkio Electric & Water Co., App., 230 S.W. 386—Spencer v. Anderson,, App., 229 S.W. 226.

N.Y.—Cherry v. North Side Trucking Co., 219 N.Y.S. 654, 128 Misc. 677.

Pa.—Maguire v. Brogin, 171 A. 578, 314 Pa. 306—Goehring v. McDiarmid, 137 A. 187, 289 Pa. 193—Pfordt v. Educators Beneficial Ass'n, 14 A.2d 170, 140 Pa.Super. 170—Fetterolf v. Yellow Cab Co., 11 A.2d 516, 139 Pa.Super. 463—Alfandre v. Bream, 7 A.2d 502, 135 Pa.Super. 538.

Tex.—Gurley v. Pilgrim Oil Co., Civ. App., 275 S.W. 295, affirmed, Com. App., 285 S.W. 283.

Vt.—Wellman v. Wales, 129 A. 317, 98 Vt. 437.

74. Tex.—Fenner, Beane & Ungerleider v. Donosky, Civ.App., 62 S. W.2d 269, error dismissed.

Testimony regarding existence of partnership solicited from adverse party is not binding on party introducing it, where evidence was inadmissible because of absence of denial of existence of partnership.—Fenner, Beane & Ungerleider v. Donosky, supra.

75. Ill.—Keshner v. Keshner, 33 N.E. 2d 877, 376 Ill. 354, reversing In re Keshner's Estate, 26 N.E.2d 529, 304 Ill.App. 640.

In statutory proceeding by executor to compel delivery of bonds and money which respondents claimed were given by deceased to his wife, respondents were witnesses of the court, no matter by whom they were called, and executor, by reason of calling respondents as witnesses, could not be bound by their testimony or held to have vouched for its truthfulness.—Keshner v. Keshner, supra.

76. Pa.—Sher v. Ohlbaum, 188 A. 553, 124 Pa.Super. 425.

77. Iowa.—Beh v. Van Ness, 180 N. W. 292, 190 Iowa 151.

Mass.—McFaden v. Nordblom, 30 N.E. 2d 852, 307 Mass. 574—Murphy v. Smith, 29 N.E.2d 726, 307 Mass. 64—Giannelli v. Metropolitan Life Ins. Co., 29 N.E.2d 124, 307 Mass. 18—Beebe v. Randall, 23 N.E.2d 142, 304 Mass. 207—Ramseyer v. Conlon, 21 N.E.2d 272, 303 Mass. 270—Smith v. Brown, 19 N.E.2d 732, 302 Mass. 432—Head v. Morton, 19 N.E.2d 22, 302 Mass. 273—MacInnis v. Morrissey, 11 N.E.2d 472, 298 Mass. 505—Germaine v. Boston & Albany R. Co., 11 N.E.2d 447, 298 Mass. 501—Cohen v. Martin, 11 N.E.2d 2, 298 Mass. 425—Engel v. Boston Ice Co., 4 N.E.2d 455, 295 Mass. 428—Folan v. Price, 199 N.E. 320, 293 Mass. 76—McDonald v. Employers' Liability Assur. Corporation, 192 N.E. 608, 288 Mass. 170—Roselli v. Riseman, 182 N.E. 567, 280 Mass. 338—Joly v. City of Salem, 177 N.E. 121, 276 Mass. 297—Grady v. Gardiner, 172 N.E. 602, 272 Mass. 491—Silano v. Carosella, 172 N.E. 216, 272 Mass. 203—Walsh v. Boston Elevated Ry. Co., 171 N.E. 441, 271 Mass. 477—Bascombe v. Inferrera, 171 N. E. 435, 271 Mass. 296—Fortune v. New York, N. H. & H. R. Co., 170 N.E. 923, 271 Mass. 101—Austin v. Eastern Massachusetts St. Ry. Co., 169 N.E. 484, 269 Mass. 420—Pabujian v. Pabujian, 165 N.E. 421, 266 Mass. 403—Egan v. Massachusetts Bonding & Insurance Co., 165 N.E. 386, 266 Mass. 270—Latus v. Boston Elevated Ry. Co., 158 N.E. 668, 261 Mass. 233—Fitzpatrick v. Boston Elevated Ry. Co., 144 N.E. 75, 249 Mass. 140—Will v. Boston Elevated Ry. Co., 142 N.E. 44, 247 Mass. 250—Goodwin v. E. B. Nelson Grocery Co., 132 N.E. 51, 239 Mass. 232.

Miss.—Greenville Insulating Board Corporation v. McMurray, 145 So. 730, 164 Miss. 809.

Mo.—Golden v. Onerem, App., 123 S. W.2d 617—Tunget v. Cook, App., 94 S.W.2d 921—Vandenberg v. Snider, App., 83 S.W.2d 201—Ellis v. Wolfe-Shoemaker Motor Co., 55 S. W.2d 309, 227 Mo.App. 508.

N.H.—Heidenreich v. Dumas, 190 A. 705, 88 N.H. 453—Bridgham v. Town of Effingham, 174 A. 769, 87 N.H. 103—Niemi v. Boston & M. R. R., 173 A. 361, 87 N.H. 1, affirmed 175 A. 245, 87 N.H. 1—Merritt v. Merritt, 155 A. 692, 85 N.H. 210, 76 A.L.R. 1019—Saidel v. Union Assur. Soc., 149 A. 78, 84 N.H. 232.

Pa.—Balin v. Kimmelman, 145 A. 303, 295 Pa. 301.

Tenn.—Roddy Mfg. Co. v. Dixon, 105 S.W.2d 513, 21 Tenn.App. 81.

Tex.—Dallas Railway & Terminal Co. v. Bishop, Civ.App., 153 S.W. 2d 298—Foster v. Woodward, Civ. App., 134 S.W.2d 417, error refused—Wristen v. Wristen, Civ.App., 119 S.W.2d 1104, error dismissed—Moore v. Conway, Civ.App., 108 S. W.2d 954.

Va.—Federal Land Bank of Baltimore v. Birchfield, 3 S.E.2d 405, 173 Va. 200—South Hill Motor Co. v. Gordon, 200 S.E. 637, 172 Va. 193—Virginia Electric & Power Co. v. Vellines, 175 S.E. 35, 162 Va. 671—W. B. Bassett & Co. v. Wood, 132 S. E. 700, 146 Va. 654.

Wash.—Ross v. Cappon, 55 P.2d 329, 185 Wash. 389.

23 C.J. p 50 note 63.

Credibility of parties as witnesses see the C.J.S. title Witnesses §§ 541–543, also 70 C.J. p 939 note 40—p 946 note 9.

"Positive and circumstantial testimony"

N.H.—Hurley v. Nashua Hospital Ass'n, 191 A. 649, 88 N.H. 469.

Testimony in deposition

Tex.—J. R. Watkins Co. v. King, Civ. App., 83 S.W.2d 405.

Party's testimony sole evidence

Ala.—Robertson v. Business Boosters' Country Club, 103 So. 576, 212 Ala. 621.

Minors

(1) Minor plaintiff held bound by his testimony on cross-examination.—Maffioli v. George L. Griffin & Son, 194 N.E. 726, 289 Mass. 488.

(2) Rule that party is bound by his testimony in court does not require "that all the conflicting assertions which experienced counsel may elicit from a 12 year old boy in regard to his knowledge at a particular time shall be taken as conclusively establishing the facts most unfavorable to him which are stated therein."—Cote v. Sears, Roebuck & Co., 166 A. 279, 281, 86 N.H. 238.

Fact not in dispute

Matter categorically testified to by plaintiff as to his own intention "became a fact no longer in dispute."—Silano v. Carosella, 172 N.E. 216, 218, 272 Mass. 203.

Inferences

"[A litigant's] statements of fact and the necessary inferences therefrom are binding upon him."—Federal Land Bank of Baltimore v. Birchfield, 3 S.E.2d 405, 415, 173 Va. 200—Virginia Electric & Power Co. v. Lenz, 164 S.E. 572, 573, 158 Va. 732—W. B. Bassett & Co. v. Wood, 132

vided it is understandingly given,[78] and at least as to matters within his special knowledge or about which he could not be mistaken;[79] and he is bound even though the falsity of his testimony is demonstrated.[80] He may not ask the triers of fact to believe or find that he has not told the truth,[81] and cannot say for his own advantage that his own testimony shall be treated as false and that of an opposing witness as true;[82] and he cannot make out a better case for himself than he has himself testified to, at least where his case depends on facts within his own knowledge;[83] nor can he recover on a

S.E. 700, 702, 146 Va. 654—Davis Bakery v. Dozier, 124 S.E. 411, 415, 139 Va. 628—Massie v. Firmstone, 114 S.E. 652, 656, 134 Va. 450.

Issues of fact

"The testimony of a party to a suit and admissions made by him must be construed as binding upon him, and not merely as raising issues of fact."—Kimmell v. Tipton, Tex.Civ.App., 142 S.W.2d 421, 428—Southern Surety Co. v. Inabnit, Tex. Civ.App., 1 S.W.2d 412, 415.

Law of forum governs as to plaintiff being bound by his own testimony.—Smith v. Brown, 19 N.E.2d 732, 302 Mass. 432.

Adopting one of inconsistent statements

Where a party, after making inconsistent statements, finally adopts one of them as the truth, and adheres to it, he is bound by the testimony thus adopted.—Osborne v. Boston Consol. Gas Co., 6 N.E.2d 347, 296 Mass. 441—Martin v. Boston Elevated Ry. Co., 160 N.E. 300, 262 Mass. 542—Sullivan v. Boston Elevated Ry. Co., 112 N.E. 1025, 224 Mass. 405.

Terms of contract

Plaintiff is bound by his own testimony as to terms of contract relied on.—Egan v. Massachusetts Bonding & Insurance Co., 165 N.E. 386, 266 Mass. 270—Gould v. Converse, 140 N.E. 785, 246 Mass. 185.

Other plaintiffs not bound

Testimony of one plaintiff that he did not use way with intention to impose on owner of land was not binding on other plaintiffs.—Shepard v. Gilbert, 249 N.W. 54, 212 Wis. 1.

78. Conn.—Kanopka v. Kanopka, 154 A. 144, 113 Conn. 30, 80 A.L.R. 619.
Ga.—Harris v. Folsom, 87 S.E. 1090, 17 Ga.App. 676.
Iowa.—Hughes v. Grider, 190 N.W. 420, 194 Iowa 726.
N.H.—Harlow v. Laclair, 136 A. 128, 82 N.H. 506, 50 A.L.R. 973.
Va.—Krikorian v. Dailey, 197 S.E. 442, 171 Va. 16—Chakales v. Djiovanides, 170 S.E. 848, 161 Va. 48.

79. Conn.—King v. Spencer, 161 A. 103, 115 Conn. 201.
N.H.—Bowdler v. St. Johnsbury Trucking Co., 4 A.2d 871, 90 N.H. 68—Morris v. Boston & M. R. R., 160 A. 52, 85 N.H. 265—Fraser v. Berlin St. Ry., 146 A. 714, 84 N.H. 107.
Va.—Chakales v. Djiovanides, 170 S. E. 848, 161 Va. 48—Thalhimer Bros. v. Casci, 168 S.E. 433, 160 Va. 439.

"When a party testifies to facts in regard to which he has special knowledge, such as his own motives, purposes, or knowledge, or his reasons for acting as he did, the possibility that he may be honestly mistaken disappears. His testimony must be either true or deliberately false. To allow him to contradict his own testimony under these circumstances would not be 'consistent with honesty and good faith.' Whether his statements be true or false, he will be bound by them, and possible contradictions by other witnesses become immaterial. He will not be allowed to obtain a judgment based on a finding that he has perjured himself."—Harlow v. Laclair, 136 A. 128, 131, 82 N.H. 506, 50 A.L. R. 973.

Leading case

N.H.—Harlow v. Laclair, supra.

Party's testimony as to his knowledge and feelings is binding on him.—McFaden v. Nordblom, 30 N.E.2d 852, 307 Mass. 574—Murphy v. Smith, 29 N.E.2d 726, 307 Mass. 64—Butler v. Graves, 187 N.E. 115, 284 Mass. 84—Laffey v. Mullen, 175 N.E. 736, 275 Mass. 277.

Rule criticized

"If [the party] is human . . . [the possibility that he may be honestly mistaken] does not disappear. Knowledge may be 'special' without being correct. Often we little note nor long remember our 'motives, purposes, or knowledge.' There are few, if any subjects on which plaintiffs are infallible."—Alamo v. Del Rosario, 98 F.2d 328, 332, 69 App.D.C. 47.

Party not real party in interest

"The reason for the rule holding that the party to an action is bound by his own testimony as to facts peculiarly within his own knowledge, is that it would be manifestly unjust to allow him to prevail after he had clearly and unequivocally given sworn testimony destructive of his right of action or defense. Where, as here, it appears that the party giving such testimony is not the real party in interest, the reason for the rule fails and the rule does not apply to his testimony. In such a case it is not unjust to permit the true facts to be shown by other evidence in the case."—King v. Spencer, 161 A. 103, 105, 115 Conn. 201.

80. N.H.—Morris v. Boston & M. R. R., 160 A. 52, 85 N.H. 265—Saidel v. Union Assur. Soc., 149 A. 78, 84 N.H. 232.

81. N.H.—Noel v. Lapointe, 164 A. 769, 86 N.H. 162—Harlow v. Laclair, 136 A. 128, 82 N.H. 506, 50 A.L.R. 973.
Va.—Federal Land Bank of Baltimore v. Birchfield, 3 S.E.2d 405, 173 Va. 200—Thalhimer Bros. v. Casci, 168 S.E. 433, 160 Va. 439—Virginia Electric & Power Co. v. Lenz, 164 S.E. 572, 158 Va. 732—W. B. Bassett & Co. v. Wood, 132 S.E. 700, 146 Va. 654—Davis Bakery v. Dozier, 124 S.E. 411, 139 Va. 628—Massie v. Firmstone, 114 S. E. 652, 134 Va. 450.

Well considered case

N.H.—Harlow v. Laclair, 136 A. 128, 82 N.H. 506, 50 A.L.R. 973.

82. Cal.—Trombley v. Kolts, 85 P.2d 541, 29 Cal.App.2d 699.

83. S.D.—Miller v. Stevens, 256 N. W. 152, 63 S.D. 10.
Va.—Worrell v. Worrell, 4 S.E.2d 343, 174 Va. 11—Federal Land Bank of Baltimore v. Birchfield, 3 S.E.2d 405, 173 Va. 200—South Hill Motor Co. v. Gordon, 200 S.E. 637, 172 Va. 193—Virginia Electric & Power Co. v. Lenz, 164 S.E. 572, 158 Va. 732—W. B. Bassett & Co. v. Wood, 132 S.E. 700, 146 Va. 654—Davis Bakery v. Dozier, 124 S. E. 411, 139 Va. 628—Massie v. Firmstone, 114 S.E. 652, 134 Va. 450.

"A plaintiff who has no case on his own evidence has no case at all."—Virginia Electric & Power Co. v. Vellines, 175 S.E. 35, 38, 162 Va. 671.

"It surely can never be unfair to a party laboring under no mental infirmity to deal with his case from the standpoint of his own testimony as a witness."
Ga.—Western & A. R. Co. v. Evans, 23 S.E. 494, 495, 96 Ga. 481.
S.D.—Miller v. Stevens, 256 N.W. 152, 155, 63 S.D. 10.

Rule is based on instances where a plaintiff testifies in court to facts within his knowledge, and on which his case turns.—Worrell v. Worrell, 4 S.E.2d 343, 174 Va. 11.

Party who testified to all details of automobile accident on which action was based could not make out more favorable case than was justified by her own evidence.—Frazier v. Stout, 181 S.E. 377, 165 Va. 68.

ground or theory,[84] or rely on a defense,[85] which he has directly or in effect repudiated by his own testimony, at least where there is nothing in the record to indicate that he was confused or uncertain in testifying.[86]

The application of the general rule first stated has been said to be narrow even in jurisdictions where the principle is recognized,[87] and it has been limited to situations in which a party's testimony amounts to such a stipulation or waiver as to have the force of a judicial admission,[88] and has been said to apply only when a party's testimony is clear and unequivocal and not when it is inconsistent and conflicting.[89] It is subject to exceptions, as where a party has made a mere slip of the tongue,[90] where he subsequently modifies, explains, or corrects his former testimony,[91] where his testimony relates to an objective matter about which he might honestly be mistaken,[92] such as estimates of time, distances, or speed,[93] or where it consists of a mere expression of an opinion, rather than a statement of fact.[94] More broadly, the view is expressed that a party is not bound by his own testimony where there is other evidence in the case, including the adverse party's, which is more favorable to him, even though it conflicts with his testimony,[95] since

84. N.H.—Lafountaine v. Moore, 6 A.2d 751, 90 N.H. 258—Fraser v. Berlin St. Ry., 146 A. 714, 84 N.H. 107.
Tex.—Kimmell v. Tipton, Civ.App., 142 S.W.2d 421.

Place of accident

Motorist's testimony that accident on highway happened on approach to culvert precluded recovery for accident caused by defectively railed culvert.—Bridgham v. Town of Effingham, 174 A. 769, 87 N.H. 103.

85. Ill.—Weiland v. Weiland, 17 N.E.2d 625, 297 Ill.App. 239.

86. N.H.—Bartis v. Warrington, 20 A.2d 642.

87. Conn.—Kanopka v. Kanopka, 154 A. 144, 113 Conn. 30, 80 A.L.R. 619.

88. Conn.—Kanopka v. Kanopka, supra.
Conclusiveness of admissions see supra §§ 379–381.

89. N.H.—Maltais v. City of Concord, 166 A. 267, 86 N.H. 211.

90. Va.—Chakales v. Djiovanides, 170 S.E. 848, 161 Va. 48.

91. Iowa.—Hughes v. Greider, 190 N.W. 420, 194 Iowa 726.
Mich.—Moreau v. Grandmaison, 189 N.W. 860, 220 Mich. 238.
Mo.—Pilkington v. Pilkington, 93 S.W.2d 1068, 230 Mo.App. 569—Fenton v. Missouri Motor Distributing Corporation, App., 52 S.W.2d 213.
Tex.—Kimmell v. Tipton, Civ.App., 142 S.W.2d 421—Foster v. Woodward, Civ.App., 134 S.W.2d 417, error refused—J. R. Watkins Co. v. King, Civ.App., 83 S.W.2d 405—McMath Co. v. Staten, Civ.App., 42 S.W.2d 649, error dismissed.

Rebutting depositions

(1) Plaintiff's evidence taken in deposition is not conclusive on him, but is subject to contradiction by his testimony at the trial.—Cunningham v. Kansas City Public Service Co., 77 S.W.2d 161, 229 Mo.App. 174.

(2) Plaintiffs were not bound by testimony of one of the plaintiffs in oral depositions, where that plaintiff clearly testified to facts which rebutted or modified testimony in depositions.—Foster v. Woodward, Tex. Civ.App., 134 S.W.2d 417, error refused.

Showing due care

A positive statement of fact by plaintiff, establishing contributory negligence on his part, cannot, by subsequent testimony that statements might or might not be true, be rendered an affirmative showing of due care.—Stein v. General Necessities Corporation, 205 N.W. 104, 232 Mich. 322.

92. Conn.—King v. Spencer, 161 A. 103, 115 Conn. 201.
Mass.—McFaden v. Nordblom, 30 N.E.2d 852, 307 Mass. 574.
Mo.—Golden v. Onerem, App., 123 S.W.2d 617.
N.H.—Ross v. Burnham, 13 A.2d 733, 91 N.H. 80—Keck v. Hinkley, 6 A.2d 165, 90 N.H. 181—Sarkise v. Boston & M. R. R., 186 A. 332, 88 N.H. 178—Howe v. Amoskeag Mfg. Co., 174 A. 776, 87 N.H. 122—Watkins v. Boston & M. R. R., 138 A. 315, 83 N.H. 10.

"If a party's testimony consists only of a narrative of events in which he participated or which he observed, there is an obvious possibility that he may be mistaken like any other witness. In such a situation, if other witnesses give a different version of the occurrence, his testimony must be weighed with theirs, and he will not be concluded by his own statements."—Harlow v. Laclair, 136 A. 128, 131, 82 N.H. 506, 50 A.L.R. 973.

93. Conn.—Januszewski v. Sargent, 155 A. 58, 113 Conn. 757.
Mass.—Brightman v. Blanchette, 30 N.E.2d 864, 307 Mass. 584.
Mo.—Golden v. Onerem, App., 123 S.W.2d 617—Tunget v. Cook, App., 94 S.W.2d 921.
N.H.—Ross v. Burnham, 13 A.2d 733, 91 N.H. 80—Keck v. Hinkley, 6 A.2d 165, 90 N.H. 181.

94. Conn.—King v. Spencer, 161 A. 103, 115 Conn. 201.
Mo.—Rowe v. United Rys. Co. of St. Louis, 247 S.W. 443, 211 Mo.App. 526.
Tex.—McMath Co. v. Staten, Civ. App., 42 S.W.2d 649, error dismissed—Southern Surety Co. v. Inabnit, Civ.App., 1 S.W.2d 412—Southwestern Portland Cement Co. v. Kezer, Civ.App., 174 S.W. 661, writ refused.

Plaintiff's "supposition" that defendant owed him "at least half" of the sum due him "did not destroy the other testimony in the case, which showed that . . . [defendant] either owed the whole account or nothing at all."—Gustafson v. Zunker, Tex.Civ.App., 257 S.W. 1114, 1115.

Fault of driver

The rule that a plaintiff cannot make out a better case than he has himself testified to could not be extended to preclude recovery from owner of bus line in personal injury action by a plaintiff who had signed written statements after accident, stating that accident was not the fault of the bus driver.—Worrell v. Worrell, 4 S.E.2d 343, 174 Va. 11.

Estimate of cost

However, it was held, in a partnership accounting suit, that where the court accepted defendants' own estimate of the probable cost of a water supply, the testimony of one defendant that the cost would probably exceed the amount of the estimate "is too vague a statement to contradict defendants' own estimates."—Wilson v. Brown, 273 P. 847, 849, 96 Cal.App. 140.

95. Md.—Surry Lumber Co. v. Zissett, 133 A. 458, 150 Md. 494.
Mass.—Murphy v. Smith, 29 N.E.2d 726, 307 Mass. 64—Beebe v. Randall, 23 N.E.2d 142, 304 Mass. 207—Smith v. Brown, 19 N.E.2d 732, 302 Mass. 432—Baker v. Hemingway Bros. Interstate Trucking Co., 12 N.E.2d 95, 299 Mass. 76—Cohen v. Martin, 11 N.E.2d 2, 298 Mass. 425—Randall v. Boston, R. B. & L. R. Co., 193 N.E. 829, 289 Mass. 241—Sooserian v. Town Taxi, 191

a party may be mistaken in his testimony, like any other witness;[96] in other words, a party is regarded as not bound by his testimony where there is contradictory evidence or circumstances which the trier of facts might fairly believe.[97] Other authorities, however, expressly refuse to allow a party to benefit by other evidence in the case which is in direct conflict with his own testimony,[98] at least where his testimony is definite and positive, clear beyond question, and unequivocal,[99] or is as to facts within his knowledge on which his case turns,[1] or where the testimony relied on to help the party's case involves a repudiation of his general trial theory.[2]

A party is not bound by the testimony of his witnesses which conflicts with his own testimony,[3] and, where his own testimony makes out a case, the contradictory testimony of his own witnesses does not destroy it as a matter of law.[4]

d. Documentary Evidence

Authorities differ as to whether documentary evidence is binding on, or may be impeached or contradicted by, the party introducing it.

It has been said to be unquestionably the general rule that a party who introduces documentary evidence to support his contention vouches for its integrity and is conclusively bound thereby.[5] A more common statement is to the effect that a party introducing documentary evidence is, at least if he introduces it without qualification or reservation,[6]

N.E. 763, 287 Mass. 65—Joughin v. Federal Motor Transp. Co., 181 N.E. 754, 279 Mass. 408.
N.J.—Schreiber v. Public Service Ry. Co., 98 A. 316, 89 N.J.Law 183—Graber v. Cormack, 148 A. 156, 7 N.J.Misc. 1117.
Availability of evidence introduced by adverse party generally see infra § 1046.

No estoppel
In tort action, plaintiff ordinarily is not "estopped" to rely on other witnesses' testimony more favorable to her than her own in establishing defendant's liability.—McFaden v. Nordblom, 30 N.E.2d 852, 307 Mass. 574.

Rule against impeaching witness
"The rule which does not permit a party to impeach one of her own witnesses does not preclude her from proving the truth of any particular fact by competent testimony in direct contradiction of that to which any of the witnesses called by her may have testified; and a party testifying is in the same position in this regard as that of any witness not a party."—Schreiber v. Public Service Ry. Co., 98 A. 316, 89 N.J. Law 183.

Auditor's findings
Evidence more favorable to him, within this rule, is not limited to more favorable evidence in the form of testimony, but includes findings of an auditor which are more favorable than the party's own testimony.—Murphy v. Smith, 29 N.E.2d 726, 307 Mass. 64.

Other positive testimony by party
In action for injuries sustained when struck by transformer being unloaded by others, plaintiff's answer to question placing him in position where transformer could not have fallen on him did not destroy force of plaintiff's other positive and direct testimony.—Gulf Production Co. v. Adams, Tex.Civ.App., 49 S.W. 2d 889, error refused.

96. Mass.—Mitchell v. Lynn Fire & Police Notification Co., 197 N.E. 456, 292 Mass. 165—Hill v. West End St. R. Co., 33 N.E. 582, 158 Mass. 458, 459.
N.J.—Graber v. Cormack, 148 A. 156, 7 N.J.Misc. 1117.
"A jury might well conclude that a party has made a mistake as to a fact as well as any other witness, and therefore, if upon the whole matter the jury is of opinion that the plaintiff or defendant has proved the case, then the verdict should be for that party, although it rests upon testimony contrary to that given by the party, and despite the fact that the party gave testimony which, standing alone, might preclude a recovery. The mistake of a plaintiff or defendant cannot change facts proved by other witnesses."—Schreiber v. Public Service Ry. Co., 98 A. 316, 317, 89 N.J.Law 183.

Well considered case
D.C.—Alamo v. Del Rosario, 98 F. 2d 328, 69 App.D.C. 47.

97. Cal.—Gibson v. Mendocino County, 105 P.2d 105, superseding, App., 96 P.2d 1005—Parker v. Manchester Hotel Co., 85 P.2d 152, 29 Cal. App.2d 446—Whicker v. Crescent Auto Co., 66 P.2d 749, 20 Cal.App. 2d 240.
Mass.—Orcutt v. Sigouin, 22 N.E.2d 18, 302 Mass. 373—Jennings v. Bragdon, 194 N.E. 697, 289 Mass. 595.
23 C.J. p 50 note 61.

Narrative testimony
An injured party whose testimony consisted of a narration of events as they appeared to her at or immediately prior to happening of accident causing injury was not conclusively bound by her own testimony as against circumstantial or other evidence bearing on question of proximate cause which the fact-finding body might fairly have believed.—Gibson v. Mendocino County, Cal., 105 P.2d 105, superseding, App., 96 P.2d 1005.

98. Mo.—Griffin v. Missouri Power & Light Co., App., 99 S.W.2d 474—Tunget v. Cook, App., 94 S.W.2d 921—McCullough v. Chicago, R. I. & P. R. Co., App., 88 S.W.2d 400—Scoggins v. Miller, App., 80 S.W.2d 724—Long v. Binnicker, 63 S.W.2d 831, 228 Mo.App. 193—McCoy v. Home Oil & Gas Co., App., 60 S.W. 2d 715.
Va.—Massie v. Firmstone, 114 S.E. 652, 134 Va. 450.

99. N.H.—Feuerstein v. Grady, 169 A. 622, 86 N.H. 406.

1. N.H.—Harlow v. Laclair, 136 A. 128, 82 N.H. 506, 50 A.L.R. 973.
Va.—Thalhimer Bros. v. Casci, 168 S.E. 433, 160 Va. 439.

2. Mo.—Pabst v. Armbruster, App., 91 S.W.2d 652.

3. Mass.—Canavan v. George, 198 N.E. 270, 292 Mass. 245—Harding v. Boston Elevated Ry. Co., 163 N.E. 860, 265 Mass. 344.
Mo.—Ullom v. Griffith, App., 263 S.W. 876—Albert v. United Rys. Co. of St. Louis, App., 232 S.W. 793.
Wash.—Weinman v. Puget Sound Power & Light Co., 26 P.2d 395, 175 Wash. 73.

4. U.S.—Maher v. Chicago, M. & St. P. Ry. Co., C.C.A.Ill., 278 F. 431.
23 C.J. p 50 note 60.

5. U.S.—Barnsdall Refining Corporation v. Birnamwood Oil Co., D.C. Wis., 32 F.Supp. 308.
Ariz.—Peters v. Taylor, 251 P. 446, 31 Ariz. 169.
Conclusiveness:
And effect of documentary evidence generally see supra §§ 763-775.
Of answers to interrogatories see Depositions § 67 b and Equity § 469 note 59.

6. La.—Wylie v. Shreveport Rys. Co., App., 140 So. 715, affirmed 145 So. 513, 176 La. 193.

bound thereby,[7] for all purposes,[8] and cannot impeach it,[9] but vouches for its accuracy so far as the issue on which it bears is concerned;[10] and, as appears supra § *774*, all parts of the document, whether in the party's favor or against his interest, must be considered. The rule is subject to exceptions;[11] so such a party may disprove facts stated in the document,[12] and the rule does not apply where a document is introduced for the purpose of impeaching it on the ground of fraud;[13] further, a party introducing a document for one purpose is not bound by it for other purposes, and may contradict it as to other purposes.[14]

On the other hand, there is authority for the view that a party introducing documentary evidence is not bound thereby, and is not precluded from impeaching or contradicting it.[15]

Tex.—Stancil v. Mills & Exports Co., Civ.App., 146 S.W.2d 787.

Insurance policy

In suit to determine right to proceeds of insurance policy, involving question whether insured's signature to application for change of beneficiary was forged, introduction by plaintiff of policy issued after alleged change of beneficiary held not to preclude recovery under earlier policy, where plaintiff expressly reserved the right to contradict the validity of any writing affecting change of beneficiary.—Popalis v. Yanchura, 173 A. 743, 114 Pa.Super. 204.

7. Mich.—Groves v. Jones, 233 N.W. 375, 252 Mich. 446.
N.Y.—Bandes v. Triborough Bridge Authority, 1 N.Y.S.2d 921, 165 Misc. 698, modified on other grounds 3 N.Y.S.2d 758, 166 Misc. 731.
Tex.—Seifert v. Brown, Civ.App., 53 S.W.2d 117, error refused—McClung Const. Co. v. Langford Motor Co., Civ.App., 33 S.W.2d 749.
23 C.J. p 51 note 69.

Garnishee's answer

Tex.—Stancil v. Mills & Exports Co., Civ.App., 146 S.W.2d 787.

Judgments

Tenn.—Black v. Nashville Banner Pub. Co., App., 141 S.W.2d 908.

Affidavit of defense

(1) In Pennsylvania a plaintiff offering in evidence an affidavit of defense, without restriction or limitation, is bound by its averments.—McCord v. Durant, 19 A. 489, 134 Pa. 184—Crew Levick Co. v. Gibbon, 176 A. 27, 115 Pa.Super. 595—Dental Mfg. Supply Co. v. Southern Ry. Co., 82 Pa.Super. 558.

(2) The averments of fact in the affidavit "must be given due credit."—Buehler v. United States Fashion Plate Co., 112 A. 632, 634, 269 Pa. 428—Kull v. Mastbaum & Fleisher, 112 A. 631, 632, 269 Pa. 202.

(3) If plaintiff offers no testimony in contradiction, "the averment of fact in the affidavit of defense must be accepted as proven."—Fidelity & Casualty Co. of New York v. Brua, 10 Pa.Dist. & Co. 575.

(4) Where, on the trial of an action on a contract, plaintiff offered in evidence a portion of the affidavit of defense to show defendant's admission as to what the terms of the contract were, this does not estop plaintiff from showing by his own testimony that the contract was not in all particulars as admitted by defendant.—Warne v. Johnston, 48 Pa. Super. 98.

Signature on letters offered in evidence by a party of his own volition, unconditionally, and without limitation to a specific purpose, cannot be questioned by him.—Hibernia Securities Co. v. United Mfg. Co., 59 P.2d 384, 154 Or. 369.

8. U.S.—Snell Isle v. Commissioner of Internal Revenue, C.C.A.Fla., 90 F.2d 481, certiorari denied 58 S.Ct. 120, 302 U.S. 734, 82 L.Ed. 568.
Tex.—Masterson v. Bouldin, Civ. App., 151 S.W.2d 301, error refused—Stancil v. Mills & Exports Co., Civ.App., 146 S.W.2d 787.

9. Ill.—Cuneo Press Co. v. Industrial Commission, 173 N.E. 470, 341 Ill. 569.
Tex.—McClung Const. Co. v. Langford Motor Co., Civ.App., 33 S.W. 2d 749.
23 C.J. p 51 note 69.

Rule applied

(1) To bank commissioner's inventory.—Goldsworthy v. Anderson, 21 P.2d 718, 92 Colo. 446, 87 A.L.R. 1396.

(2) To hospital record.—Cuneo Press Co. v. Industrial Commission, 173 N.E. 470, 341 Ill. 569.

Log of vessel

Master of vessel cannot impeach his own log, especially when log entry is corroborated by disinterested person.—The President Madison, D. C.Wash., 13 F.Supp. 692, affirmed, C. C.A., 91 F.2d 835.

10. Tex.—Masterson v. Bouldin, Civ.App., 151 S.W.2d 301, error refused—Stancil v. Mills & Exports Co., Civ.App., 146 S.W.2d 787.

11. Ariz.—Peters v. Taylor, 251 P. 446, 31 Ariz. 169.
Tex.—Masterson v. Bouldin, Civ. App., 151 S.W.2d 301, error refused.

12. Tex.—Masterson v. Bouldin, supra.

13. U.S.—Snell Isle v. Commissioner of Internal Revenue, C.C.A.Fla., 90 F.2d 481, certiorari denied 58 S.Ct. 120, 302 U.S. 734, 82 L.Ed. 568.

The party is not estopped from showing that the document constitutes part of a fraudulent scheme.—Peters v. Taylor, 251 P. 446, 31 Ariz. 169—23 C.J. p 51 note 68 [e].

14. U.S.—Kohler v. Cline Electric Mfg. Co., D.C.Ill., 28 F.2d 405, affirmed, C.C.A., Cline Electric Mfg. Co. v. Kohler, 27 F.2d 638, certiorari denied 49 S.Ct. 82, 278 U.S. 646, 73 L.Ed. 559.
Tex.—Masterson v. Bouldin, Civ. App., 151 S.W.2d 301, error refused—Box v. Ussery, Civ.App., 108 S. W.2d 230, error dismissed.
Purposes for which evidence available see infra §§ 1045, 1046.

Opponent's pleadings in prior suit

Cal.—Thompson v. Municipal Bond Co., 73 P.2d 274, 23 Cal.App.2d 402.

No estoppel

Tex.—Masterson v. Bouldin, Civ. App., 151 S.W.2d 301, error refused.

Report of auditor

Plaintiff was not bound by findings in an auditor's report that defendant automobile owner was not responsible for the negligent operation of his automobile by a third person, notwithstanding plaintiff himself introduced the report to show the findings of negligence of the operator.—Boyas v. Raymond, 20 N.E.2d 411, 302 Mass. 519.

15. Mass.—Kelley v. Jordan Marsh Co., 179 N.E. 299, 278 Mass. 101.
R.I.—Luther v. Greenberg, 199 A. 746, 747, 61 R.I. 20.
23 C.J. p 51 note 68.

"The manner in which this case was tried cannot change the character of the writing, or the probative value of the statements that it contains."—Luther v. Greenberg, supra.

Rule applied

(1) To books of account.—Long Beach Brick Co. v. De Dodson, 285 P. 382, 104 Cal.App. 99.

(2) Effect of books of account as evidence generally see supra § 768.

(3) To financial statements.—Birney v. Solomon, 181 N.E. 318, 348 Ill. 410.

(4) To hospital records.—Wolfe v. Checker Taxi Co., 12 N.E.2d 849, 299 Mass. 225—Kelley v. Jordan Marsh Co., 179 N.E. 299, 278 Mass. 101—

A deposition is regarded by some authorities as conclusive and binding on the party introducing it in evidence,[16] but others hold to the contrary.[17]

§ 1041. Evidence as to Value

The price paid for property is not conclusive evidence of actual value; nor is selling price alone sufficient to establish market value.

The price paid for property,[18] real[19] or personal,[20] or the market value of an article,[21] is not conclusive evidence of actual value; nor is selling price alone sufficient to establish market value.[22] Evidence of a state bank commissioner's order that certain notes be charged off as worthless has been held not conclusive on the question of their value.[23]

Corporate assets and stocks. The book value of a corporation's assets is not conclusive as to their actual present value.[24] The price paid[25] or of-

Newman v. Levinson, 165 N.E. 122, 266 Mass. 264.

(5) To tax deeds.—Willard George Hotel Co. v. Warden, 278 P. 898, 99 Cal.App. 401.

(6) To written statements of injured employee's physician offered in evidence by employee.—Independence Indemnity Co. v. Polk, Tex.Civ. App., 14 S.W.2d 330, error dismissed.

Letters

(1) The rule stated in the text applies to letters.—Stallings v. De Bardeleben Coal Co., 96 S.E. 708, 22 Ga.App. 600.

(2) A letter written by the adverse party is not binding on a party who introduces it for the purpose of attacking the credibility of the adverse party's witness.—Joe Lyons Machinery Co. v. Wiegel, 271 S.W. 333, 168 Ark. 572.

Pleadings

(1) Where plaintiff introduced in evidence defendant's answer, he was not concluded by parts thereof adverse to his case, or estopped to contradict them.—Phillips v. Anderson, 128 S.E. 922, 34 Ga.App. 190.

(2) A defendant introducing the petition filed in another case against him, involving the same issues, does not admit the truthfulness of the statements made therein, but is bound by it as showing that such statements were made.—Knight v. Cecil, 235 P. 1107, 110 Okl. 57.

(3) Value of pleadings as evidence generally see supra § 772.

Instrument attacked in pleadings

A plaintiff attacking an instrument in his pleadings as constituting fraud was not bound by its contents when offering it in evidence to prove that it did not contain true facts about parties' transaction.—Universal Credit Co. v. Boling, Tex.Civ. App., 108 S.W.2d 836.

Res judicata

Rule that litigant, offering statement of adversary as evidence, is bound thereby, has no application where adversary's pleadings are offered on plea of res judicata.—Judkins v. Doty, Tex.Civ.App., 27 S.W. 2d 588, error dismissed.

16. U.S.—Jacobson v. Hahn, C.C.A. N.Y., 88 F.2d 433, modifying, D.C., 14 F.Supp. 339.

Mo.—Orlann v. Laederich, 92 S.W. 2d 190, 338 Mo. 783—Costello v. Pitcairn, App., 116 S.W.2d 257—Conaghan v. Dean, App., 96 S.W.2d 924—McLain v. Atlas Assur. Co., Limited, of London, England, App., 67 S.W.2d 849.

Or.—Nicolai-Neppach Co. v. Smith, 58 P.2d 1016, 154 Or. 450, 107 A. L.R. 1124. opinion adhered to 60 P.2d 979, 154 Or. 450, 107 A.L.R. 1124.

S.D.—Clute v. Des Moines Mut. Hail & Cyclone Ins. Ass'n, 170 N.W. 154, 41 S.D. 311, rehearing denied 171 N.W. 817, 41 S.D. 574.

17. Cal.—Lewis v. Southern California Edison Co., 2 P.2d 419, 116 Cal.App. 44—Weir v. New York Life Ins. Co., 266 P. 996, 91 Cal. App. 222.

Ky.—Chesapeake Stone Co. v. Fossett, 100 S.W. 825, 30 Ky.L. 1175.

N.C.—Hershey Corporation v. Atlantic Coast Line R. Co., 176 S.E. 265, 207 N.C. 122.

Utah.—Brooks v. Scoville, 17 P.2d 218, 81 Utah 163.

70 C.J. p 1159 note 84.

Contradicting one's own witness generally see the C.J.S. title Witnesses § 630, also 70 C.J. p 1156 note 77—p 1160 note 90.

18. Iowa.—Curtis v. Town of Dunlap, 210 N.W. 800, 802, 202 Iowa 588, citing **Corpus Juris.**

Mont.—Doyle v. Union Bank & Trust Co., 59 P.2d 1171, 102 Mont. 563, 108 A.L.R. 1047.

19. U.S.—Plant v. Walsh, D.C.Conn., 43 F.2d 256.

Mo.—City of St. Louis v. Turner, 55 S.W.2d 942, 331 Mo. 834.

Wash.—Grosgebauer v. Schneider, 31 P.2d 90, 177 Wash. 43.

22 C.J. p 180 note 64.

The selling price of contiguous land is not conclusive.—Rice v. Rice, 138 N.W. 1111, 158 Iowa 128.

The agreed price is not necessarily conclusive as to fair value.—U. S. v. Gideion-Anderson Co., D.C.Mo., 16 F.Supp. 627.

20. Ga.—Lamon v. Perry, 125 S.E. 907, 33 Ga.App. 248.

N.Y.—People v. Public Service Commission, 104 N.E. 952, 210 N.Y. 456, modifying 143 N.Y.S. 148, 158 App. Div. 251, and reargument denied 105 N.E. 1095, 211 N.Y. 533.

Price obtained at auction sale

Mo.—Bachos v. Chicago, R. I. & P. Ry. Co., App., 61 S.W.2d 416.

22 C.J. p 185 note 56—23 C.J. p 51 note 75.

Price offered

Cal.—Otten v. Spreckles, 141 P. 224, 23 Cal.App. 251.

22 C.J. p 184 note 33 [a].

Motor vehicle

Ala.—Warrant Warehouse Co. v. Cook, 95 So. 282, 209 Ala. 60.

Mont.—Evankovich v. Howard Pierce, Inc., 8 P.2d 653, 91 Mont. 344.

Wash.—Cline v. Northern Pac. Ry. Co., 211 P. 878, 123 Wash. 86.

42 C.J. p 1297 note 10.

Forced sale

The amount paid for personal property at a forced sale is not conclusive as to its value.

Ind.—Stott v. Harrison, 73 Ind. 17.

Pa.—In re Alldred, 79 A. 143, 229 Pa. 632.

22 C.J. p 185 note 57—23 C.J. p 57 note 37.

Trading value

The amount agreed on as the trading value of property may be prima facie evidence of its true value, but is not conclusive.—Tydings v. Farrington Auto Co., 189 Ill.App. 387.

21. U.S.—Findlay v. Pertz, Ohio, 74 F. 681, 20 C.C.A. 662.

Ill.—Waldo v. Gray, 14 Ill. 184.

22. Ga.—Collins & G. R. Co. v. Beasley, 136 S.E. 167, 36 Ga.App. 241.

Mont.—Evankovich v. Howard Pierce, Inc., 8 P.2d 653, 91 Mont. 344.

Wash.—Crosby v. Kitsap County, 281 P. 494, 154 Wash. 212.

23 C.J. p 57 note 52.

Contract price of commodity sold is not necessarily its market value on date of sale.—Garrard v. Southern Cotton Oil Co., 132 S.E. 234, 35 Ga. App. 137.

Trade-in value, in exchange of properties, is not conclusive proof of market value.—Ed S. Hughes Co. v. Scott, Tex.Civ.App., 46 S.W.2d 1111.

23. Kan.—Bushey v. Coffman, 201 P. 1103, 109 Kan. 652.

24. Pa.—Jarvis v. Bell, 146 A. 153, 296 Pa. 568.

25. Colo.—Otis & Co. v. Grimes, 48 P.2d 788, 97 Colo. 219.

fered[26] for corporate stock is not conclusive as to its actual value, except in the absence of other evidence;[27] nor is price paid conclusive as to its market value.[28] The value of corporate assets is not conclusive as to the value of preferred stock;[29] nor is the book value of corporate stock conclusive evidence of its value.[30]

E. SUFFICIENCY OF EVIDENCE

§ 1042. In General

A verdict or finding must be based on the evidence, and cannot rest on conjecture, suspicion, or mere possibilities. It must be supported by legal and substantial evidence, and cannot be based on evidence which is inherently incredible or opposed to natural laws, common knowledge and experience, or established physical facts.

A verdict or finding must be based on the evidence and must be based on the facts proved.[31] Un-

Utah.—Beaver Drug Co. v. Hatch, 217 Pa. 695, 61 Utah 597.

Weight and sufficiency of evidence as to value of corporate stock see infra § 1049.

Market quotations

U.S.—Mandelbaum v. Goodyear Tire & Rubber Co., C.C.A.Iowa, 6 F.2d 818.

N.Y.—Kahle v. Mount Vernon Trust Co., 22 N.Y.S.2d 454.

26. Iowa.—Morril v. Bentley, 126 N. W. 155.

27. N.Y.—Pett v. Spiegel, 202 N.Y.S. 650.

28. U.S.—Heiner v. Crosby, C.C.A. Pa., 24 F.2d 191, affirming, D.C., Crosby v. Heiner, 12 F.2d 604.

Pa.—Chestnut Hill & Spring House Turnp. Road Co. v. Montgomery County, 76 A. 726, 228 Pa. 1.

29. U.S.—Oxford Paper Co. v. U. S., Ct.Cl., 52 F.2d 1008, supplemented 56 F.2d 895.

30. R.I.—Cook v. Dunbar, 18 A.2d 658.

31. U.S.—Southern Ry. Co. v. Stewart, C.C.A.Mo., 119 F.2d 85, modifying 115 F.2d 317, certiorari granted 62 S.Ct. 71—Gay, Sullivan & Co. v. Glaser, Crandell Co., C.C.A.Ill., 102 F.2d 149.

Ark.—Hough v. Leech, 62 S.W.2d 14, 187 Ark. 719—International Harvester Co. of America v. Hawkins, 24 S.W.2d 340, 180 Ark. 1056.

Cal.—Adrian v. Guyette, 69 P.2d 197, 21 Cal.App.2d 306.

Del.—Gibson v. Gillespie, 152 A. 589, 4 W.W.Harr. 331.

Idaho.—McMaster v. Warner, 258 P. 547, 44 Idaho 544.

Ind.—New York Cent. R. Co. v. Green, 15 N.E.2d 748, 105 Ind.App. 488.

Ky.—Oliver v. Clark, 273 S.W. 46, 209 Ky. 519.

La.—Becker v. Ashley, App., 150 So. 74.

Me.—Ogunquit Beach Dist. v. Perkins, 21 A.2d 660—Cooper & Co. v. American Can Co., 153 A. 889, 130 Me. 76—Emery v. Fisher, 148 A. 677, 128 Me. 453.

Mass.—Edward Rose Co. v. Globe & Rutgers Fire Ins. Co., 160 N.E. 306, 262 Mass. 469.

Mich.—Joldersma v. Muskegon Development Co., 282 N.W. 229, 286 Mich. 520—Michigan Aero Club v. Shelley, 278 N.W. 121, 283 Mich. 401—Albers v. Pommerening, 278 N.W. 108, 283 Mich. 389.

Mo.—Isreal v. Fanchon & Marco, App., 58 S.W.2d 774.

N.C.—Sampson v. Jackson Bros. Co., 166 S.E. 181, 203 N.C. 413—Shuford v. Scruggs, 161 S.E. 315, 316, 201 N.C. 685, citing **Corpus Juris**—Denny v. Snow, 155 S.E. 874, 199 N. C. 773, quoting **Corpus Juris**.

Or.—Storla v. Spokane, Portland & Seattle Transp. Co., 297 P. 367, 136 Or. 315, rehearing denied 298 P. 1065, 136 Or. 315.

Pa.—Rosenthal v. Ostrow, 134 A. 384, 385, 287 Pa. 87, quoting **Corpus Juris**—Bradley v. Rhodes, 188 A. 564, 124 Pa.Super. 161.

R.I.—Grande v. Boston Mut. Life Ins. Co., 193 A. 516, 58 R.I. 502.

S.C.—McMillan v. Southern Ry.-Carolina Division, 13 S.E.2d 915, 196 S. C. 373.

Tex.—Federal Underwriters Exchange v. Chambers, Civ.App., 139 S.W.2d 849—Southwestern Paper Co. of Dallas v. Campbell, Civ.App., 97 S.W.2d 520, error dismissed—Karr v. Cockerham, Civ.App., 71 S. W.2d 905, error dismissed—Morgan v. Maunders, Civ.App., 37 S.W.2d 791, error dismissed.

Va.—Huff v. Huff, 129 S.E. 219, 143 Va. 46.

Wash.—Prentice Packing & Storage Co. v. United Pac. Ins. Co., 106 P. 2d 314, 5 Wash.2d 144.

Wis.—Rosenbluth v. State, 269 N.W. 292, 222 Wis. 623.

23 C.J. p 51 note 76.

There must be some reasonable basis in testimony for verdict and judgment.—Depfer v. Walker, 169 So. 660, 123 Fla. 862, 125 Fla. 189.

Particular kind of evidence

Proof of a fact need not be made by any particular kind or class of evidence.

Ark.—Plunkett-Jarrell Grocer Co. v. Freeman, 92 S.W.2d 849, 853, 192 Ark. 380, citing **Corpus Juris**.

Ind.—Sullivan v. Indianapolis, C. & W. Tract. Co., 103 N.E. 860, 55 Ind. App. 407.

Verdict cannot be based on sympathy, but must be grounded in evidence justifying it.

Me.—Byron v. O'Connor, 153 A. 809, 130 Me. 90.

Va.—Harris v. Howerton, 194 S.E. 692, 169 Va. 647.

Probability cannot take place of evidence on disputed point.

Ariz.—Monaghan v. Barnes, 61 P.2d 158, 48 Ariz. 213.

Fla.—Babcock v. Flowers, 198 So. 326.

Conviction

Every trier of facts should decide case on conviction reached from consideration of evidence.—Chicago Ry. Equipment Co. v. Blair, C.C.A., 20 F. 2d 10.

Mere claim cannot stand in the place of evidence and operate as proof, and facts not made to appear must be taken as not existing.—Michigan Aero Club v. Shelley, 278 N. W. 121, 283 Mich. 401.

Suggestions

(1) Litigant's rights are determined on evidence tending to prove issues, not on evidence raising suggestions.—Lopa v. Smith, 174 N.E. 258, 37 Ohio App. 346, affirmed Smith v. Lopa, 174 N.E. 735, 123 Ohio St. 213.

(2) Suggestions of counsel, however plausible, cannot take place of evidence.

U.S.—U. S. v. Coal Cargo of the Henry County, D.C.Pa., 11 F.2d 805, affirmed, C.C.A., 11 F.2d 809, certiorari denied U. S. v. A Cargo of About 3,253 Tons of Coal, 47 S.Ct. 92, 273 U.S. 696, 71 L.Ed. 845—U. S. v. Coal Cargo of The Franklin County, D.C.Pa., 11 F.2d 805, affirmed, C.C.A., 11 F.2d 809, certiorari denied U. S. v. A Cargo of About 3,248 Tons of Coal, 47 S.Ct. 93, 273 U.S. 696, 71 L.Ed. 845.

Mo.—Long-Costello v. Rider, App., 7 S.W.2d 387.

Insufficiency for instructed verdict

Where the evidence is insufficient to support an instructed verdict, then a jury's finding thereon to the contrary is sufficiently supported.—King & King v. Porter, Civ.App., 256 S.W. 627, setting aside 229 S.W. 646, in conformance to answers to certified questions 252 S.W. 1022, 113 Tex. 198.

der this well established rule the verdict or finding I cannot rest on surmise[32] or speculation.[33] Like-

No aider from adversary's weakness

(1) Litigants must prevail on the strength of their own cases and not on the weakness of their adversaries.—McFarland v. Commercial Boiler Works, Wash., 116 P.2d 288.

(2) In suit on double indemnity provisions of industrial policies which excepted death by suicide, basing of finding for plaintiff on trial without jury on insurer's failure to sustain affirmative defense of suicide, rather than on proof produced by plaintiff, held reversible error.—Cockcroft v. Metropolitan Life Ins. Co., 189 A. 687, 125 Pa.Super. 293.

(3) In action to contest will, the burden of proof is on plaintiff on the issue of undue influence on the part of testator's wife, and it is immaterial that the wife did not testify, although present, if plaintiff failed to show any undue influence.—Frohman v. Lowenstein, 260 S.W. 460, 303 Mo. 339.

Proof of counterclaim

The same character of proof is required to establish a counterclaim as is required to sustain any other claim.—Bethlehem Steel Co. v. U. S., 75 Ct.Cl. 845.

32. U.S.—Pennsylvania R. Co. v. Chamberlain, N.Y., 53 S.Ct. 391, 288 U.S. 333, 77 L.Ed. 819, reversing, C. C.A., Chamberlain v. Pennsylvania R. Co., 59 F.2d 986, certiorari granted Pennsylvania R. Co. v. Chamberlain, 53 S.Ct. 93, 287 U.S. 589, 77 L.Ed. 514—Southern Ry. Co. v. Stewart, C.C.A.Mo., 119 F.2d 85, modifying 115 F.2d 317, certiorari granted 62 S.Ct. 71—U. S. v. Sandifer, C.C.A.La., 76 F.2d 551—Brown v. Maryland Casualty Co., C.C.A. Mo., 55 F.2d 159—Cudahy Packing Co. v. U. S., D.C.Ill., 37 F.Supp. 563—Samuel v. George Weidemann Co., C.C.A.Ky., 295 F. 314.

Ala.—Goodwyn v. Union Springs Guano Co., 153 So. 246, 228 Ala. 173.

Ariz.—Salt River Valley Water Users' Ass'n v. Blake, 90 P.2d 1004, 53 Ariz. 498.

Ark.—Lewis v. Jackson, 83 S.W.2d 69, 191 Ark. 102.

Cal.—Smith v. Schumacker, 85 P.2d 967, 30 Cal.App.2d 251, certiorari denied 59 S.Ct. 1046, 307 U.S. 646, 83 L.Ed. 1526.

Colo.—Neal v. Wilson County Bank, 263 P. 18, 83 Colo. 118.

Conn.—Braithwaite v. Lee, 2 A.2d 380, 125 Conn. 10—Meagher v. Colonial Homes Co., 146 A. 609, 109 Conn. 343.

Ill.—Kanne v. Metropolitan Life Ins. Co., 34 N.E.2d 732, 310 Ill.App. 524.

Iowa.—Harris v. Chicago, M., St. P. & P. R. Co., 278 N.W. 338, 224 Iowa 1319—Field v. Southern Surety Co. of New York, 235 N.W. 571, 211 Iowa 1239.

Kan.—Lukens v. Kellogg, 274 P. 225, 127 Kan. 568.

Ky.—Magness' Adm'x v. Hutchinson, 117 S.W.2d 1041, 274 Ky. 226—Chesapeake & O. Ry. Co. v. Crider, 250 S.W. 499, 199 Ky. 60.

Me.—Crowley's Case, 153 A. 184, 130 Me. 1—Adams v. Ketchum, 151 A. 146, 129 Me. 212.

Md.—Thompson v. Sun Cab Co., 184 A. 576, 170 Md. 299.

Mass.—Herlihy's Case, 166 N.E. 556, 267 Mass. 232—Edward Rose Co. v. Globe & Rutgers Fire Ins. Co., 160 N.E. 306, 262 Mass. 469.

Miss.—Missouri Pac. Transp. Co. v. Beard, 176 So. 156, 179 Miss. 764—Columbus & G. R. Co. v. Coleman, 160 So. 277, 172 Miss. 514.

Mo.—Curtis v. St. Louis Material & Supply Co., App., 54 S.W.2d 736.

Nev.—Deiss v. Southern Pac. Co., 53 P.2d 332, 56 Nev. 151, denying rehearing 47 P.2d 928, 56 Nev. 151.

N.H.—Russell v. Boston & M. R. R., 141 A. 227, 83 N.H. 246—Nadeau v. Stevens, 111 A. 749, 79 N.H. 502.

N.Y.—Demjanik v. Kultau, 274 N.Y. S. 387, 242 App.Div. 255—Manufacturers' Liability Ins. Co. of New Jersey v. McQuade Stevedoring Co., 193 N.Y.S. 67, 200 App.Div. 470—Wass v. Western Union Telegraph Co., 10 N.Y.S.2d 956.

N.C.—Bunn v. Harris, 5 S.E.2d 149, 216 N.C. 366—Sampson v. Jackson Bros. Co., 166 S.E. 181, 203 N.C. 413.

Okl.—Pace v. Ott, 115 P.2d 253—Mackey v. Jarvis, 69 P.2d 662, 180 Okl. 404—Oklahoma City v. McAllister, 50 P.2d 361, 174 Okl. 208.

S.C.—McMillan v. Southern Ry.-Carolina Division, 13 S.E.2d 919, 196 S.C. 373.

Tenn.—Nashville, C. & St. L. Ry. v. Sutton, 104 S.W.2d 834, 21 Tenn. App. 31.

Tex.—Houston Fire & Casualty Ins. Co. v. Biber, Civ.App., 146 S.W.2d 442, error dismissed, judgment correct—Wells v. Henderson, Civ. App., 78 S.W.2d 683, error refused—Rouse v. Milnar, Civ.App., 63 S. W.2d 1093—Woodward-Wanger Co. v. Nelson, Civ.App., 11 S.W.2d 371—Hall Music Co. v. Robinson, Civ. App., 7 S.W.2d 625—Kirby Lumber Co. v. Boyett, Civ.App., 221 S.W. 669, dismissed for want of jurisdiction—Modern Woodmen of America v. Atcheson, Civ.App., 219 S.W. 537, dismissed for want of jurisdiction.

Utah.—Dern Inv. Co. v. Carbon County Land Co., 75 P.2d 660, 94 Utah 76.

Vt.—Johnson v. Burke, 183 A. 495, 108 Vt. 164—Wellman v. Wales, 129 A. 317, 98 Vt. 437.

Wis.—Ledvina v. Ebert, 296 N.W. 110, 237 Wis. 358.

23 C.J. p 52 note 78.

33. U.S.—Pennsylvania R. Co. v. Chamberlain, N.Y., 53 S.Ct. 391, 288 U.S. 333, 77 L.Ed. 819, reversing, C.C.A., Chamberlain v. Pennsylvania R. Co., 59 F.2d 986, certiorari granted Pennsylvania R. Co. v. Chamberlain, 53 S.Ct. 93, 287 U.S. 589, 77 L.Ed. 514—U. S. v. Sandifer, C.C.A.La., 76 F.2d 551—Sears, Roebuck & Co. v. Peterson, C.C.A.Minn., 76 F.2d 243—Stanolind Oil & Gas Co. v. Kimmel, C. C.A.Okl., 68 F.2d 520—Cudahy Packing Co. v. U. S., D.C.Ill., 37 F.Supp. 563—Wallar v. Southern Pac. Co., D.C.Cal., 37 F.Supp. 475—Thonnesen v. Montgomery Ward & Co., D.C.N.Y., 33 F.Supp. 81—Samuel v. George Weidemann Co., C.C.A.Ky., 295 F. 314.

Ala.—Harbin v. Moore, 175 So. 264, 234 Ala. 266—Georgia Power Co. v. Edmunds, 171 So. 256, 233 Ala. 273—Goodwyn v. Union Springs Guano Co., 153 So. 246, 228 Ala. 173—Continental Casualty Co. v. Paul, 95 So. 814, 209 Ala. 166, 30 A.L.R. 802—Southern Ry. Co. v. Clark, 170 So. 93, 27 Ala.App. 244.

Ariz.—Salt River Valley Water Users' Ass'n v. Blake, 90 P.2d 1004, 53 Ariz. 498.

Ark.—Industrial Machinery Co. v. Timbrook, 151 S.W.2d 665—Malvern Gravel Co. v. McMillan, 139 S.W.2d 390, 200 Ark. 386—Defries v. Batesville White Lime Co., 132 S.W.2d 169, 198 Ark. 986—Missouri Pac. R. Co. v. Wright, 126 S.W.2d 609, 197 Ark. 933—Missouri Pac. R. Co. v. Holmes, 124 S.W.2d 14, 197 Ark. 576—Coca-Cola Bottling Co. v. Wood, 123 S.W.2d 514, 197 Ark. 489—Missouri Pac. Transp. Co. v. Bell, 122 S.W.2d 958, 197 Ark. 250—Missouri Pac. Transp. Co. v. Jones, 122 S.W.2d 613, 197 Ark. 79—Brown v. Dark, 119 S.W.2d 529, 196 Ark. 724—St. Louis-San Francisco Ry. Co. v. Evans, 109 S.W.2d 918, 194 Ark. 1156—Interurban Transp. Co. v. Reeves, 108 S.W.2d 594, 194 Ark. 321—Mutual Life Ins. Co. of New York v. Springer, 104 S.W.2d 195, 193 Ark. 990—Chicago, R. I. & P. Ry. Co. v. Manus, 100 S.W.2d 258, 193 Ark. 397—Kurn v. Teague, 94 S.W.2d 1037, 192 Ark. 687—Marathon Oil Co. v. Sowell, 88 S.W.2d 82, 191 Ark. 865—Mutual Ben. Health & Accident Ass'n v. Basham, 87 S.W.2d 583, 191 Ark. 679—Lewis v. Jackson, 83 S.W.2d 69, 191 Ark. 102—Southwestern Gas & Electric Co. v. May, 78 S.W.2d 387, 190 Ark. 279—Turner v. Hot Springs St. Ry. Co., 75 S.W.2d 675, 189 Ark. 894—National Life & Accident Ins. Co. v. Hampton, 72 S.W.2d 543, 189 Ark. 377—Hough v. Leech, 62 S.W.2d 14, 187 Ark. 719—International Harvester Co. of America v. Haw-

wise, under the above mentioned well established rule

a verdict or finding cannot rest on conjecture.[34] Like-

kins, 24 S.W.2d 340, 180 Ark. 1056—St. Louis-San Francisco Ry. Co. v. Smith, 19 S.W.2d 1102, 179 Ark. 1015.

Cal.—Sweeney v. Metropolitan Life Ins. Co., 92 P.2d 1043, 30 Cal.App. 2d 767—Smith v. Schumacker, 85 P.2d 967, 30 Cal.App.2d 251—Adrian v. Guyette, 69 P.2d 197, 21 Cal. App.2d 306.

Conn.—Meagher v. Colonial Homes Co., 146 A. 609, 109 Conn. 343.

Idaho.—Osier v. Consumers' Co., 239 P. 735, 41 Idaho 268.

Ind.—J. C. Penney, Inc., v. Kellermeyer, 19 N.E.2d 882, 107 Ind.App. 253, rehearing denied 22 N.E.2d 899, 107 Ind.App. 253.

Iowa.—Gowing v. Henry Field Co., 281 N.W. 281, 225 Iowa 729—Harris v. Chicago, M., St. P. & P. R. Co., 278 N.W. 338, 224 Iowa 1319.

Ky.—Magness' Adm'x v. Hutchinson, 117 S.W.2d 1041, 274 Ky. 226—Chesapeake & O. Ry. Co. v. Crider, 250 S.W. 499, 199 Ky. 60.

Me.—Eaton v. Ambrose, 180 A. 363, 133 Me. 458—Crowley's Case, 153 A. 184, 130 Me. 1.

Mich.—In re Luders' Estate, 212 N. W. 965, 238 Mich. 87—Butrick v. Snyder, 210 N.W. 311, 236 Mich. 300.

Miss.—Shell Petroleum Corporation v. Eagle Lumber & Supply Co., 158 So. 331, 171 Miss. 539.

Mo.—Federal Cold Storage Co. v. Pupillo, 139 S.W.2d 996—Berry v. Kansas City Public Service Co., 121 S.W.2d 825, 343 Mo. 474—Carner v. St. Louis-San Francisco Ry. Co., 89 S.W.2d 947, 338 Mo. 257—Knight v. Wabash Ry. Co., 85 S.W.2d 392—Scotten v. Metropolitan Life Ins. Co., 81 S.W.2d 313, 336 Mo. 724, reversing, App., 68 S.W.2d 60—State ex rel. Gosselin v. Trimble, 41 S.W.2d 801, 328 Mo. 760, quashing certiorari Gosselin v. Yellow Cab Co., App., 29 S.W.2d 186—Watkins v. Bird-Sykes-Bunker Co., 16 S.W.2d 38, 322 Mo. 830—Hamilton v. St. Louis-San Francisco Ry. Co., 300 S.W. 787, 318 Mo. 123—Pietraschke v. Pollnow, App., 147 S.W.2d 167—Myers v. Golloday, App., 104 S.W. 2d 1007, opinion quashed on other grounds Golloday v. Shain, 110 S. W.2d 719, 341 Mo. 889—Curtis v. St. Louis Material & Supply Co., App., 54 S.W.2d 736—Hasenjaeger v. Missouri-Kansas-Texas R. Co., 53 S.W.2d 1083, 227 Mo.App. 413—Snyder v. Murray, 17 S.W.2d 639, 223 Mo.App. 671, followed in 17 S.W.2d 646.

Mont.—McDonald v. Royal Ins. Co., 40 P.2d 1005, 98 Mont. 572—Reilly v. City of Butte, 209 P. 1057, 64 Mont. 355.

Neb.—Securities Inv. Corporation v. Krejci, 271 N.W. 287, 132 Neb. 146—Peabody v. Continental Life Ins. Co., 257 N.W. 482, 128 Neb. 23.

Nev.—Deiss v. Southern Pac. Co., 53 P.2d 332, 56 Nev. 151, denying rehearing 47 P.2d 928, 56 Nev. 151.

N.J.—Scali v. Public Service Electric & Gas Co., 142 A. 821, 6 N.J. Misc. 795.

N.Y.—Von Reitzenstein v. Tomlinson, 162 N.E. 584, 249 N.Y. 60, reversing 226 N.Y.S. 919, 222 App. Div. 835—Wass v. Western Union Telegraph Co., 10 N.Y.S.2d 956.

N.C.—Bunn v. Harris, 5 S.E.2d 149, 216 N.C. 366—Sampson v. Jackson Bros. Co., 166 S.E. 181, 203 N. C. 413.

Okl.—Pace v. Ott, 115 P.2d 253—Tulsa County Truck & Fruit Growers Ass'n v. McMurphey, 90 P.2d 927, 185 Okl. 132—Phillips Petroleum Co. v. Davis, 77 P.2d 1147, 182 Okl. 397—Lowden v. Van Meter, 73 P.2d 424, 181 Okl. 210—Mackey v. Jarvis, 69 P.2d 662, 180 Okl. 404—Oklahoma City v. McAllister, 50 P.2d 361, 174 Okl. 208—Chicago, R. I. & P. Ry. Co. v. Smith, 16 P.2d 226, 160 Okl. 287—Atchison, T. & S. F. Ry. Co. v. Phillips, 12 P.2d 908, 158 Okl. 141.

Or.—Vale v. State Industrial Accident Commission, 86 P.2d 956, 160 Or. 569.

Pa.—Hulmes v. Keel, 6 A.2d 64, 335 Pa. 117—Ranck v. Sauder, 193 A. 269, 327 Pa. 177.

S.C.—McMillan v. Southern Ry.-Carolina Division, 13 S.E.2d 915, 196 S.C. 373.

Tenn.—Yancey v. Utilities Ins. Co., 137 S.W.2d 318, 23 Tenn.App. 663—Calhoun v. Fraser, 126 S.W.2d 381, 23 Tenn.App. 54—Nashville, C. & St. L. Ry. v. Sutton, 104 S.W.2d 834, 21 Tenn.App. 31—Hoback v. Coca Cola Bottling Works of Nashville, 98 S.W.2d 113, 20 Tenn. App. 280—Nashville, C. & St. L. Ry. v. Pollard, 14 Tenn.App. 388.

Tex.—Barker v. Heaney, Civ.App., 82 S.W.2d 417, error dismissed.

Utah.—Spackman v. Benefit Ass'n of Ry. Employees, 89 P.2d 490, 97 Utah 91—Dern Inv. Co. v. Carbon County Land Co., 75 P.2d 660, 94 Utah 76.

Vt.—Sargent v. Platt, 13 A.2d 195—Durkee v. Delaware & H. R. Co., 174 A. 921, 106 Vt. 488.

Va.—Harris v. Howerton, 194 S.E. 692, 169 Va. 647.

Wash.—Prentice Packing & Storage Co. v. United Pac. Ins. Co., 106 P. 2d 314, 5 Wash.2d 144—Nelson v. West Coast Dairy Co., 105 P.2d 76, 5 Wash.2d 284, 130 A.L.R. 606—Poland v. City of Seattle, 93 P.2d 379, 200 Wash. 208—Thomas v. Inland Motor Freight, 68 P.2d 603, 190 Wash. 428.

Wis.—Central Wisconsin Trust Co. v. Chicago & N. W. Ry. Co., 287 N.W. 699, 232 Wis. 536—Reichert v. Rex Accessories Co., 279 N.W. 645, 228 Wis. 425—Schiefelbein v. Chicago, M., St. P. & P. R. Co., 265 N.W. 386, 221 Wis. 35, certiorari denied Chicago, M., St. P. & P. R. Co. v. Schiefelbein, 57 S.Ct. 20, 299 U.S. 558, 81 L.Ed. 411—Enders v. Sinclair Refining Co., 263 N.W. 568, 220 Wis. 254, rehearing denied 265 N.W. 67, 220 Wis. 254—Chaimson v. American Ry. Express Co., 189 N.W. 529, 178 Wis. 286.

23 C.J. p 52 note 79.

34. U.S.—Pennsylvania R. Co. v. Chamberlain, N.Y., 53 S.Ct. 391, 288 U.S. 333, 77 L.Ed. 819, reversing, C.C.A., Chamberlain v. Pennsylvania R. Co., 59 F.2d 986, certiorari granted Pennsylvania R. Co. v. Chamberlain, 53 S.Ct. 93, 287 U.S. 589, 77 L.Ed. 514—Southern Ry. Co. v. Stewart, C.C.A.Mo., 119 F.2d 85, modifying 115 F.2d 317, certiorari granted 62 S.Ct. 71—Doggett v. Peek, C.C.A.Tex., 116 F.2d 273—Cupples Co. Manufacturers v. National Labor Relations Board, C.C.A., 106 F.2d 100—Shapleigh v. United Farms Co., C.C.A. Tex., 100 F.2d 287—Interstate Circuit v. Le Normand, C.C.A.Tex., 100 F.2d 160—U. S. v. Sandifer, C. C.A.La., 76 F.2d 551—Deadrich v. U. S., C.C.A.Nev., 74 F.2d 619—Schoening v. Chicago, B. & Q. R. Co., C.C.A.Wyo., 30 F.2d 803—Cudahy Packing Co. v. U. S., D.C. Ill., 37 F.Supp. 563—Wallar v. Southern Pac. Co., D.C.Cal., 37 F. Supp. 475—Ivey v. Phillips Petroleum Co., D.C.Tex., 36 F.Supp. 811—Samuel v. George Weidemann Co., C.C.A.Ky., 295 F. 314.

Ala.—Harbin v. Moore, 175 So. 264, 234 Ala. 266—Georgia Power Co. v. Edmunds, 171 So. 256, 233 Ala. 273—City of Tuscaloosa v. Fair, 167 So. 276, 232 Ala. 129—Goodwyn v. Union Springs Guano Co., 153 So. 246, 228 Ala. 173—De Bardeleben v. Western Ry. of Alabama, 151 So. 56, 227 Ala. 553—Central of Georgia Ry. Co. v. Lee, 142 So. 660, 225 Ala. 283—Southern Ry. Co. v. Dickson, 100 So. 665, 211 Ala. 481.

Ariz.—U. S. Smelting, Refining & Mining Exploration Co. v. Wallapai Mining & Development Co., 230 P. 1109, 27 Ariz. 126.

Ark.—Industrial Machinery Co. v. Timbrook, 151 S.W.2d 665—Defries v. Batesville White Lime Co., 132 S.W.2d 169, 198 Ark. 986—Missouri Pac. R. Co. v. Wright, 126 S.W.2d 609, 197 Ark. 933—Missouri Pac. R. Co. v. Holmes, 124 S.W.2d 14, 197 Ark. 576—Coca-Cola Bottling Co. v. Wood, 123 S.W.2d 514, 197 Ark. 489—Missouri Pac. Transp. Co. v. Bell, 122 S.W.2d 958, 197 Ark. 250—Missouri Pac. Transp. Co. v. Jones, 122 S.W.2d 613, 197 Ark. 79

—St. Louis-San Francisco Ry. Co v. Evans, 109 S.W.2d 918, 194 Ark. 1156—Interurban Transp. Co. v. Reeves, 108 S.W.2d 594, 194 Ark. 321—Mutual Life Ins. Co. of New York v. Springer, 104 S.W.2d 195, 193 Ark. 990—Chicago, R. I. & P. Ry. Co. v. Manus, 100 S.W.2d 258, 193 Ark. 397—Marathon Oil Co. v. Sowell, 88 S.W.2d 82, 191 Ark. 865 —Mutual Ben. Health & Accident Ass'n v. Basham, 87 S.W.2d 583, 191 Ark. 679—Turner v. Hot Springs St. Ry. Co., 75 S.W.2d 675, 189 Ark. 894—National Life & Accident Ins. Co. v. Hampton, 72 S.W.2d 543, 189 Ark. 377—International Harvester Co. of America v. Hawkins, 24 S.W.2d 340, 180 Ark. 1056—St. Louis-San Francisco Ry. Co., 19 S.W.2d 1102, 179 Ark. 1015.

Cal.—Showalter v. Western Pac. R. Co., 106 P.2d 895, prior opinion, App., 96 P.2d 964—Bartholomai v. Owl Drug Co., App., 108 P.2d 36—Smith v. Schmacher, 85 P.2d 967, 30 Cal.App.2d 251—Sweeney v. Metropolitan Life Ins. Co., 92 P.2d 1043, 30 Cal.App.2d Supp. 767.

Conn.—Braithwaite v. Lee, 2 A.2d 380, 125 Conn. 10—Meagher v. Colonial Homes Co., 146 A. 609, 109 Conn. 343.

Idaho.—McMaster v. Warner, 258 P. 547, 44 Idaho 544.

Ill.—Halowatsky v. Central Greyhound Lines, 35 N.E.2d 541, 311 Ill. App. 127—Kanne v. Metropolitan Life Ins. Co., 34 N.E.2d 732, 310 Ill.App. 524—Chapin & Gore v. Powers' Estate, 270 Ill.App. 382—Mueller Grain Co. v. Lake Erie & W. R. Co., 213 Ill.App. 108.

Ind.—New York Cent. R. Co. v. Green, 15 N.E.2d 748, 105 Ind.App. 488—Furst v. Mills, 188 N.E. 866, 98 Ind.App. 266—Deery v. Hall, 175 N.E. 141, 96 Ind.App. 683.

Iowa.—Gowing v. Henry Field Co., 281 N.W. 281, 225 Iowa 729—Field v. Southern Surety Co. of New York, 235 N.W. 571, 211 Iowa 1239.

Kan.—Lukens v. Kellogg, 274 P. 225, 127 Kan. 568.

Ky.—Louisville & N. R. Co. v. Campbell's Adm'r, 217 S.W. 687, 186 Ky. 628.

Me.—Eaton v. Ambrose, 180 A. 363, 133 Me. 458—Crowley's Case, 153 A. 184, 130 Me. 1.

Md.—Chesapeake & Potomac Telephone Co. of Baltimore City v. Noblette, 199 A. 832, 175 Md. 87—Thompson v. Sun Cab Co., 184 A. 576, 170 Md. 299.

Mass.—Herlihy's Case, 166 N.E. 556, 267 Mass. 232—Edward Rose Co. v. Globe & Rutgers Fire Ins. Co., 160 N.E. 306, 262 Mass. 469.

Mich.—Vannett v. Michigan Public Service Co., 286 N.W. 216, 289 Mich. 212—Joldersma v. Muskegon Development Co., 282 N.W. 229, 286 Mich. 520—Holgate v. Chrysler Corporation, 271 N.W. 539, 279 Mich. 24—In re Luders' Estate, 212 N.W. 965, 238 Mich. 87—Butrick v. Snyder, 210 N.W. 311, 236 Mich. 300.

Minn.—Susnik v. Oliver Iron Mining Co., 286 N.W. 249, 205 Minn. 325 —Krell v. Robinson, 217 N.W. 596, 173 Minn. 483.

Miss.—Mutual Ben. Health & Accident Ass'n v. Johnson, 186 So. 297 —Missouri Pac. Transp. Co. v. Beard, 176 So. 156, 179 Miss. 764—Reily v. Crymes, 168 So. 267, 176 Miss. 133—Columbus & G. R. Co. v. Coleman, 160 So. 277, 172 Miss. 514—Williams v. Lumpkin, 152 So. 842, 169 Miss. 146—New Orleans & N. E. R. Co. v. Holsonback, 151 So. 726, 168 Miss. 493—Burnside v. Gulf Refining Co., 148 So. 219, 166 Miss. 460—Yazoo & M. V. R. Co. v. Green, 147 So. 333, 167 Miss. 539—Hercules Powder Co. v. Calcote, 138 So. 583, 161 Miss. 860—Tyson v. Utterback, 122 So. 496, 154 Miss. 381, 63 A.L.R. 1188.

Mo.—Bates v. Brown Shoe Co., 116 S.W.2d 31, 342 Mo. 411—Knight v. Wabash Ry. Co., 85 S.W.2d 392—Scotten v. Metropolitan Life Ins. Co., 81 S.W.2d 313, 336 Mo. 724, reversing, App., 68 S.W.2d 60—Anton v. St. Louis Public Service Co., 71 S.W.2d 702, 335 Mo. 188—State ex rel. Gosselin v. Trimble, 41 S.W.2d 801, 328 Mo. 760, quashing certiorari Gosselin v. Yellow Cab Co., App., 29 S.W.2d 186—Watkins v. Bird-Sykes-Bunker Co., 16 S.W.2d 38, 322 Mo. 830—Hamilton v. St. Louis-San Francisco Ry. Co., 300 S. W. 787, 318 Mo. 123—Griffith v. Continental Casualty Co., 253 S.W. 1043, 299 Mo. 426—Pietraschke v. Pollnow, App., 147 S.W.2d 167—Myers v. Golloday, App., 104 S.W.2d 1007, opinion quashed on other grounds Golloday v. Shain, 110 S. W.2d 719, 341 Mo. 889—Curtis v. St. Louis Material & Supply Co., App., 54 S.W.2d 736—Hasenjaeger v. Missouri-Kansas-Texas R. Co., 53 S.W.2d 1083, 227 Mo.App. 413—Murphy v. Quick Tire Service, App., 47 S.W.2d 202.

Mont.—McDonald v. Royal Ins. Co., 40 P.2d 1005, 98 Mont. 572—Reilly v. City of Butte, 209 P. 1057, 64 Mont. 355.

Neb.—Securities Inv. Corporation v. Krejci, 271 N.W. 287, 132 Neb. 146 —Hayes v. Chicago, B. & Q. Ry. Co., 269 N.W. 623, 131 Neb. 687—Peabody v. Continental Life Ins. Co., 257 N.W. 482, 128 Neb. 23.

Nev.—Deiss v. Southern Pac. Co., 53 P.2d 332, 56 Nev. 151, denying rehearing 47 P.2d 928, 56 Nev. 151.

N.H.—Cozzi v. Hooksett, 153 A. 317, 84 N.H. 530, affirmed 155 A. 41, 84 N.H. 530—Caplan v. Caplan, 142 A. 121, 83 N.H. 318—Russell v. Boston & M. R. R., 141 A. 227, 83 N.H. 246—Nadeau v. Stevens, 111 A. 749, 79 N.H. 502—Ingerson v. Grand Trunk Ry., 106 A. 488, 79 N.H. 154.

N.Y.—Demjanik v. Kultau, 274 N.Y.S. 387, 242 App.Div. 255—Wass v. Western Union Telegraph Co., 10 N.Y.S.2d 956.

N.C.—Bunn v. Harris, 5 S.E.2d 149, 216 N.C. 366—Sampson v. Jackson Bros. Co., 166 S.E. 181, 203 N.C. 413 —Ivey v. Eastern Cotton Oil Co., 154 S.E. 740, 199 N.C. 452.

Ohio.—Armour & Co. v. Reams, 166 N.E. 592, 31 Ohio App. 390.

Okl.—Griesel v. Fabian, 84 P.2d 634, 184 Okl. 42—Phillips Petroleum Co. v. Davis, 77 P.2d 1147, 182 Okl. 397 —Lowden v. Van Meter, 73 P.2d 424, 181 Okl. 210—Mackey v. Jarvis, 69 P.2d 662, 180 Okl. 404—Oklahoma City v. McAllister, 50 P.2d 361, 174 Okl. 208—Chicago, R. I. & P. Ry. Co. v. Smith, 16 P.2d 226, 160 Okl. 287—Atchison, T. & S. F. Ry. Co. v. Phillips, 12 P.2d 908, 158 Okl. 141—Midland Valley R. Co. v. Rupe, 210 P. 1038, 87 Okl. 286.

Pa.—Kirk v. Kirk, 16 A.2d 47, 340 Pa. 203—Hulmes v. Keel, 6 A.2d 64, 335 Pa. 117—De Reeder v. Travelers Ins. Co., 198 A. 45, 329 Pa. 328—Walters v. Federal Life Ins. Co., 184 A. 25, 320 Pa. 588—Watkins v. Prudential Ins. Co. of America, 173 A. 644, 315 Pa. 497, 95 A.L.R. 869—Riebel v. Land Title Bank & Trust Co., 17 A.2d 742, 143 Pa.Super. 136—Hollander v. Kressman, 17 A.2d 669, 143 Pa.Super. 32 —Kallish v. American Base Ball Club of Philadelphia, 10 A.2d 831, 138 Pa.Super. 602—Bradley v. Rhodes, 188 A. 564, 124 Pa.Super. 161—Wanner v. Boyer, 31 Berks Co.L.J. 256.

R.I.—Ficocelli v. Yellow Cab Co., 3 A.2d 246.

S.C.—McMillan v. Southern Ry.-Carolina Division, 13 S.E.2d 915, 196 S.C. 373.

Tenn.—Yancey v. Utilities Ins. Co., 137 S.W.2d 318, 23 Tenn.App. 663—Nichols v. Smith, 111 S.W.2d 911, 21 Tenn.App. 478—Willis v. Heath, 107 S.W.2d 228, 21 Tenn.App. 179—Nashville, C. & St. L. Ry. v. Sutton, 104 S.W.2d 834, 21 Tenn.App. 31—Boulineaux v. City of Knoxville, 99 S.W.2d 557, 20 Tenn.App. 404—Hoback v. Coca Cola Bottling Works of Nashville, 98 S.W.2d 113, 20 Tenn.App. 280—Loew's Nashville & Knoxville Corporation v. Durrett, 79 S.W.2d 598, 18 Tenn.App. 489—Hoover Motor Express Co. v. Thomas, 65 S.W.2d 621, 16 Tenn. App. 664—Nashville, C. & St. L. Ry. v. Pollard, 14 Tenn.App. 388.

Tex.—Schumacher v. Missouri Pac. Transp. Co., Civ.App., 116 S.W.2d 1136, error dismissed—Barker v. Heaney, Civ.App., 82 S.W.2d 417, error dismissed.

Utah.—Spackman v. Benefit Ass'n of Ry. Employees, 89 P.2d 490, 97 Utah 91—Dern Inv. Co. v. Carbon County Land Co., 75 P.2d 660, 94 Utah 76—Mehr v. Child, 61 P.2d 624, 90 Utah 348.

Vt.—Sargent v. Platt, 13 A.2d 195—

wise, under the above mentioned well established | rule a verdict or finding cannot rest on guess,[35]

Dansro v. Scribner, 187 A. 803, 108 Vt. 408—Johnson v. Burke, 183 A. 495, 108 Vt. 164—Durkee v. Delaware & H. R. Co., 174 A. 921, 106 Vt. 488—Goodwin v. Gaston, 154 A. 772, 103 Vt. 357—Wellman v. Wales, 129 A. 317, 98 Vt. 437—Gilman v. Central Vermont Ry. Co., 107 A. 122, 93 Vt. 340, 16 A.L.R. 1102.

Wash.—Prentice Packing & Storage Co. v. United Pac. Ins. Co., 106 P. 2d 314, 5 Wash.2d 144—Nelson v. West Coast Dairy Co., 105 P.2d 76, 5 Wash.2d 284.

W.Va.—Legg v. Junior Mercantile Co., 142 S.E. 259, 105 W.Va. 287.

Wis.—Ledvina v. Ebert, 296 N.W. 110, 237 Wis. 358—Central Wisconsin Trust Co. v. Chicago & N. W. Ry. Co., 287 N.W. 699, 232 Wis. 536—Dierkes v. White Paving Co., 283 N.W. 446, 229 Wis. 660—Reichert v. Rex Accessories Co., 279 N.W. 645, 228 Wis. 425—Schiefelbein v. Chicago, M., St. P. & P. R. Co., 265 N.W. 386, 221 Wis. 35, certiorari denied Chicago, M., St. P. & P. R. Co. v. Schiefelbein, 57 S. Ct. 20, 299 U.S. 558, 81 L.Ed. 411—Enders v. Sinclair Refining Co., 263 N.W. 568, 220 Wis. 254, rehearing denied 265 N.W. 67, 220 Wis. 254—Creamery Package Mfg. Co. v. Industrial Commission, 248 N.W. 140, 211 Wis. 326—Thomas v. Steppert, 228 N.W. 513, 200 Wis. 388—Chalmson v. American Ry. Express Co., 189 N.W. 529, 178 Wis. 286—Quass v. Milwaukee Gaslight Co., 170 N. W. 942, 168 Wis. 575.

23 C.J. p 52 note 80.

Burden of proof is not sustained by mere conjecture.

Pa.—De Reeder v. Travelers Ins. Co., 198 A. 45, 329 Pa. 328.

Vt.—Wellman v. Wales, 122 A. 659, 97 Vt. 245.

What constitutes conjecture

(1) Where there is no evidence or not even slight evidence of an essential fact to be proved by plaintiff, a conclusion of a trial court or jury based thereon becomes a mere "conjecture."—Juchert v. California Water Service Co., Cal., 106 P.2d 886, prior opinion, App., 97 P.2d 259.

(2) A verdict and judgment based on circumstantial evidence which is not sufficient to render the fact or conclusion sought to be established more probable than one or more other conclusions which would be inconsistent with liability, is founded on conjecture and speculation and cannot stand when the sufficiency of the evidence is properly challenged. —Tulsa County Truck & Fruit Growers Ass'n v. McMurphey, 90 P.2d 927, 185 Okl. 132.

(3) The possibility that the facts might not be as indicated by the verdict, does not render verdict speculative or conjectural.—Kantonen v. Braley Motor Co., 30 P.2d 245, 176 Wash. 577.

However shrewd the conjecture, a verdict cannot rest thereon.

Ky.—Oliver v. Clark, 273 S.W. 46, 209 Ky. 519.

Mont.—Fisher v. Butte Electric Ry. Co., 235 P. 330, 72 Mont. 594.

Impossibility of proof

Enforcement of rights and obligations of parties depend on matters revealed at the trial and not on matters left to conjecture because proof is impossible.—Manufacturers Trust Co. v. Gray, 16 N.E.2d 373, 278 N.Y. 380, 117 A.L.R. 1176, modifying 297 N.Y.S. 184, 251 App.Div. 482, motion granted 298 N.Y.S. 1020, 252 App.Div. 756, motion denied 14 N.E.2d 182, 277 N.Y. 600—In re Roessler's Estate, 12 N.Y.S.2d 572, 171 Misc. 306.

Conjectures of expert witnesses are within the rule.—Susnik v. Oliver Iron Mining Co., 286 N.W. 249, 205 Minn. 325.

Mere conjecture based on uncertain inference does not make substantial evidence.—Pandjiris v. Oliver Cadillac Co., 98 S.W.2d 969, 339 Mo. 711.

35. U.S.—Doggett v. Peek, C.C.A. Tex., 116 F.2d 273—Shapleigh v. United Farms Co., C.C.A.Tex., 100 F.2d 287—Interstate Circuit v. Le Normand, C.C.A.Tex., 100 F.2d 160—Stanolind Oil & Gas Co. v. Kimmel, C.C.A.Okl., 68 F.2d 520—Brown v. Maryland Casualty Co., C.C.A. Mo., 55 F.2d 159—Ivey v. Phillips Petroleum Co., D.C.Tex., 36 F.Supp. 811—Thonnesen v. Montgomery Ward & Co., D.C.N.Y., 33 F.Supp. 81.

Ark.—Malvern Gravel Co. v. McMillan, 139 S.W.2d 390, 200 Ark. 386—Coca-Cola Bottling Co. v. Wood, 123 S.W.2d 514, 197 Ark. 489.

Cal.—Bartholomai v. Owl Drug Co., App., 108 P.2d 36—Sweeney v. Metropolitan Life Ins. Co., 92 P.2d 1043, 30 Cal.App.2d Supp. 767.

Conn.—Braithwaite v. Lee, 2 A.2d 380, 125 Conn. 10.

Fla.—Babcock v. Flowers, 198 So. 326.

Ill.—Kanne v. Metropolitan Life Ins. Co., 34 N.E.2d 732, 310 Ill.App. 524.

Ind.—J. C. Penney, Inc. v. Kellermeyer, 19 N.E.2d 882, 107 Ind.App. 253, rehearing denied 22 N.E.2d 899, 107 Ind.App. 253—Furst v. Mills, 188 N.E. 866, 98 Ind.App. 266.

Iowa.—Harris v. Chicago, M., St. P. & P. R. Co., 278 N.W. 338, 224 Iowa 1319.

Ky.—Magness' Adm'x v. Hutchinson, 117 S.W.2d 1041, 274 Ky. 226—Chesapeake & O. Ry. Co. v. Crider, 250 S.W. 499, 199 Ky. 60.

Mich.—Michigan Aero Club v. Shelley, 278 N.W. 121, 283 Mich. 401.

Mo.—Snyder v. Murray, 17 S.W.2d 639, 223 Mo. 671, followed in, App., 17 S.W.2d 646—Griffith v. Continental Casualty Co., 253 S.W. 1043, 299 Mo. 426—Weeks v. Atchison, T. & S. F. Ry. Co., 109 S. W.2d 374, 232 Mo.App. 429—Myers v. Golloday, App., 104 S.W.2d 1007, opinion quashed on other grounds Golloday v. Shain, 110 S.W.2d 719, 341 Mo. 889—Christner v. Chicago, R. I. & P. Ry. Co., 64 S.W.2d 752, 228 Mo.App. 220.

Neb.—Hayes v. Chicago, B. & Q. Ry. Co., 269 N.W. 623, 131 Neb. 687.

Nev.—Deiss v. Southern Pac. Co., 53 P.2d 332, 56 Nev. 151, denying rehearing 47 P.2d 928, 56 Nev. 151.

N.H.—Ingerson v. Grand Trunk Ry., 106 A. 488, 79 N.H. 154.

N.J.—Scali v. Public Service Electric & Gas Co., 142 A. 821, 6 N.J. Misc. 795.

N.Y.—Manufacturers' Liability Ins. Co. of New Jersey v. McQuade Stevedoring Co., 193 N.Y.S. 67, 200 App.Div. 470.

Ohio.—Armour & Co. v. Reams, 166 N.E. 592, 31 Ohio App. 390.

Pa.—De Reeder v. Travelers Ins. Co., 198 A. 45, 329 Pa. 328—Watkins v. Prudential Ins. Co. of America, 173 A. 644, 315 Pa. 497, 95 A.L.R. 869—Long v. Frock, 156 A. 88, 304 Pa. 355—Dangelo v. Pennsylvania R. Co., 152 A. 743, 301 Pa. 579—Bloom v. Bailey, 141 A. 150, 292 Pa. 348, 57 A.L.R. 585—Hollander v. Kressman, 17 A.2d 669, 143 Pa.Super. 32—Kallish v. American Base Ball Club of Philadelphia, 10 A.2d 831, 138 Pa.Super. 602—Reagan v. Reading Co., 190 A. 412, 126 Pa.Super. 175—Bradley v. Rhodes, 188 A. 564, 124 Pa.Super. 161.

Tenn.—Yancey v. Utilities Ins. Co., 137 S.W.2d 318, 23 Tenn.App. 663—Boulineaux v. City of Knoxville, 99 S.W.2d 557, 20 Tenn.App. 404—Nashville, C. & St. L. Ry. v. Pollard, 14 Tenn.App. 388.

Tex.—Bishop-Babcock-Becker Co. of Texas v. Jennings, Civ.App., 245 S.W. 104—Kirby Lumber Co. v. Boyett, Civ.App., 221 S.W. 669, dismissed for want of jurisdiction.

Utah.—Dern Inv. Co. v. Carbon County Land Co., 75 P.2d 660, 94 Utah 76.

Wash.—Huffine v. Alvin Inv. Co., 218 P. 194, 126 Wash. 490.

Wis.—Dierkes v. White Paving Co., 283 N.W. 446, 229 Wis. 660.

Wyo.—Wright v. Conway, 242 P. 1107, 34 Wyo. 1, denying rehearing 241 P. 369, 34 Wyo 1.

23 C.J. p 53 note 84.

supposition,[36] assumption,[37] imagination,[38] or suspicion.[39]

The evidence on which the verdict or finding is based must be competent, legal evidence,[40] and must support every material fact;[41] and where there is no evidence,[42] or the evidence as to a material is-

Guess is not substantial evidence
Mo.—O'Neil Implement Mfg. Co. v. Gordon, App., 269 S.W. 636.

Prior inconsistent statements
Rule that burden of proof is not met by contradictory testimony rendering conclusion mere guess is applicable only to testimony given at pending trial and not to prior inconsistent statements by witness.—Hegarty v. Berger, 155 A. 484, 304 Pa. 221.

36. Iowa.—Reimer v. Musel, 264 N.W. 47, 220 Iowa 1095—Reimer v. Musel, 251 N.W. 863, 217 Iowa 377.
Kan.—Lukens v. Kellogg, 274 P. 225, 127 Kan. 568.
Me.—Adams v. Ketchum, 151 A. 146, 129 Me. 212.
Mo.—Myers v. Golloday, App., 104 S.W.2d 1007, opinion quashed on other grounds Golloday v. Shain, 110 S.W.2d 719, 341 Mo. 889.
Nev.—Deiss v. Southern Pac. Co., 53 P.2d 332, 56 Nev. 151, denying rehearing 47 P.2d 928, 56 Nev. 151.
Okl.—Pace v. Ott, 115 P.2d 253—Mackey v. Jarvis, 69 P.2d 662, 180 Okl. 404.

Supposition has no legitimate support in judicial administration.—Prudential Ins. Co. of America v Tuggle's Adm'r, 72 S.W.2d 440, 254 Ky. 814.

37. Ind.—Muncie Building Trades Council v. Umbarger, 17 N.E.2d 828, 215 Ind. 13.
Pa.—Walters v. Federal Life Ins. Co., 184 A. 25, 320 Pa. 588.

38. Mass.—Edward Rose Co. v. Globe & Rutgers Fire Ins. Co., 160 N.E. 306, 262 Mass. 469.
Mo.—Hamilton v. St. Louis-San Francisco Ry. Co., 300 S.W. 787, 318 Mo. 123.
Nev.—Deiss v. Southern Pac. Co., 53 P.2d 332, 56 Nev. 151, denying rehearing 47 P.2d 928, 56 Nev. 151.

39. U.S.—Cupples Co. Manufacturers v. National Labor Relations Board, C.C.A., 106 F.2d 100.
Ark.—Grand Nat. Bank of St. Louis v. Taylor, 1 S.W.2d 818, 176 Ark. 1.
Colo.—Neal v. Wilson County Bank, 263 P. 18, 83 Colo. 118.
Ill.—Halowatsky v. Central Greyhound Lines, 35 N.E.2d 541, 311 Ill. App. 127—Chapin & Gore v. Powers' Estate, 270 Ill.App. 382—Mueller Grain Co. v. Lake Erie & W. R. Co., 213 Ill.App. 108.
Ind.—Craig v. Citizens Trust Co., 26 N.E.2d 1006.
Me.—Adams v. Ketchum, 151 A. 146, 129 Me. 212.
Mich.—Joldersma v. Muskegon Development Co., 282 N.W. 229, 286 Mich. 520.
Miss.—Dr. Pepper Bottling Co. v Gordy, 164 So. 236, 174 Miss. 392
N.C.—Bunn v. Harris, 5 S.E.2d 149, 216 N.C. 366—Sampson v. Jackson Bros. Co., 166 S.E. 181, 203 N.C. 413.
Pa.—Kirk v. Kirk, 16 A.2d 47, 340 Pa. 203.
Tex.—Houston Fire & Casualty Ins Co. v. Biber, Civ.App., 146 S.W.2d 442, error dismissed, judgment correct—Wells v. Henderson, Civ.App., 78 S.W.2d 683, error refused—Rouse v. Mlinar, Civ.App., 63 S.W.2d 1093—Woodward-Wanger Co. v. Nelson, Civ.App., 11 S.W.2d 371—Hall Music Co. v. Robinson, Civ. App, 7 S.W.2d 625—Kirby Lumber Co. v. Boyett, Civ.App., 221 S.W. 669, dismissed for want of jurisdiction—Modern Woodmen of America v. Atcheson, Civ.App., 219 S.W. 537, dismissed for want of jurisdiction.
Utah—Spackman v. Benefit Ass'n of Ry. Employees, 89 P.2d 490, 97 Utah 91.
Vt.—Johnson v. Burke, 183 A. 495, 108 Vt. 164—Wellman v. Wales, 129 A. 317, 98 Vt. 437.
22 C.J. p 52 note 81.

However well grounded the suspicion, a verdict cannot rest thereon
Ky.—Oliver v. Clark, 273 S.W. 46, 209 Ky. 519.
Mont.—Fisher v. Butte Electric Ry. Co., 235 P. 330, 72 Mont. 594.

40. U.S.—Schoening v. Chicago, B. & Q. R. Co., C.C.A.Wyo., 30 F.2d 803.
Ind.—Indiana Limestone Co. v. Murphy, 177 N.E. 350, 93 Ind.App. 76.
Miss.—Columbus & G. R. Co. v. Coleman, 160 So. 277, 172 Miss. 514.
Mo.—Myers v. Golloday, App., 104 S.W.2d 1007, opinion quashed on other grounds Golloday v. Shain, 110 S.W.2d 719, 341 Mo. 889.
Mont.—West v. Wilson, 4 P.2d 469, 90 Mont. 522.
Or.—Maupin Warehouse Co. v. Fleming, 255 P. 606, 121 Or. 531.
Pa.—Lettieri v. Mamaroneck Sand & Gravel Co., 186 A. 762, 123 Pa.Super. 13.
23 C.J. p 52 note 82.

Incompetent evidence cannot be considered in determining sufficiency of evidence to support verdict or judgment.—Soria v. American Nat. Ins. Co., Tex.Civ.App., 57 S.W.2d 321.

Evidence not entitled to judicial consideration
Evidence is insufficient to establish a fact when it fails in a legal sense to establish the fact to such a degree or extent as is necessary to entitle it to judicial consideration.—Moore v. Cincinnati, N. O. & T. P. Ry. Co., 256 S.W. 876, 148 Tenn. 561.

41. Colo.—First Nat. Bank v. American State Bank, 215 P. 473, 476, 73 Colo. 254, citing **Corpus Juris.**
Ind.—Indiana Limestone Co. v. Murphy, 177 N.E. 350, 93 Ind.App. 76.
Mont.—West v. Wilson, 4 P.2d 469, 90 Mont. 522.
Or.—Maupin Warehouse Co. v. Fleming, 255 P. 606, 121 Or. 531.
Tex.—Evans v. Dr. Pepper Bottling Co., Civ.App., 123 S.W.2d 706.
Va.—Copperthite Pie Corporation v. Whitehurst, 162 S.E. 189, 157 Va. 480.
23 C.J. p 52 note 82.

"In order to constitute a failure of proof, the material allegations, or some of them, as averred in the statement of claim or in the declaration, must be unproved in their entire scope and meaning. The evidence must fail to make a prima facie case."—Wackerle v. Nies, 195 N.E. 35, 37, 359 Ill. 548, affirming 273 Ill App. 609.

42. U.S.—Cliett v. Scott, C.C.A.Tex., 102 F.2d 725.
Cal.—Rancho Santa Margarita v. Vail, 81 P.2d 533, 11 Cal.2d 501—Vitagraph, Inc., v. Liberty Theatres Co. of California, 242 P. 709, 197 Cal. 694—Peck v. Simon Newman Co., 224 P. 245, 65 Cal.App. 430—Vail v. Nichibei Bussan Co., 223 P. 577, 65 Cal.App. 60—Gallick v. Bell, 181 P. 808, 41 Cal.App. 52—Whitaker v. Regents of the University of California, 178 P. 308, 39 Cal.App. 111.
Ill.—Needham v. Village of Winthrop Harbor, 163 N.E. 468, 331 Ill. 523.
Ky.—Harponola Co. v. Conklin, 266 S.W. 626, 205 Ky. 736.
La.—Gerner v. Bradford-Hutchinson Lumber Co., 8 La.App. 370.
N.M.—In re Landers' Estate, 283 P. 49, 34 N.M. 431.
Pa.—Jameson v. Jameson, 80 Pa.Super. 254.
Tex.—Greene v. Smith, Civ.App., 148 S.W 2d 909.
Va.—Copperthite Pie Corporation v. Whitehurst, 162 S.E. 189, 157 Va. 480.
Wis.—La Chance v. Stuart, 288 N.W. 262, 233 Wis. 246.

Sufficient evidence as "some" evidence
"When used in connection with 'evidence' . . . ['sufficient'] certainly implies some evidence. . . There is no possible sense in which the term 'sufficient', as associated with the word 'evidence', may be used so as to imply that there is an entire lack of evidence. It may be slight and unsatisfactory, or it may

sue is insufficient,[43] the decision should be against the party having the burden of proof. The evidence must be sufficient to warrant a reasonable belief in the existence of those facts which the verdict or finding establishes;[44] the verdict or finding must be grounded on a reasonable certainty as to probabilities arising from a fair consideration of the evidence,[45] and not on mere possibilities.[46]

be only a little short of the amount required. In either case it may be insufficient, but still it is some."—Brittain v. Industrial Commission of Ohio, 115 N.E. 110, 111, 95 Ohio St. 391.

Difficulty of procuring evidence

Absence of proof on vital issue loses case for party having burden of proof on that issue, regardless of difficulty or impossibility of procuring evidence.—McGerty v. Nortz, 254 N.W. 601, 191 Minn. 443.

Whether there was no evidence to support an essential finding or whether the evidence was insufficient is not concluded by the fact that an essential finding is not supported by a preponderance of the evidence.—Evans v. Dr. Pepper Bottling Co., Tex.Civ.App., 123 S.W.2d 706.

43. U.S.—Spain v. Powell, C.C.A.Va., 90 F.2d 580.

Cal.—Parker v. Parker, 241 P. 581, 74 Cal.App. 646—Roncelli v. Fugazi, 186 P. 373, 44 Cal.App. 249.

La.—Cockraft v. Vicksburg, S. & P. Ry. Co., 1 La.App. 684.

Allegations of complaint

Where there is not sufficient evidence in record to support allegations of complaint, no recovery could be had thereon.—Emrich Furniture Co. v. Valinetz, 185 N.E. 654, 96 Ind. App. 668.

44. U.S.—Arundel Corporation v. U. S., 79 Ct.Cl. 343.

Miss.—Teche Lines v. Bounds, 179 So. 747, 182 Miss. 638.

Pa.—Pittsburgh-Texas Gas & Oil Co. v. Adams, 79 Pa.Super. 511.

Tex.—McCarty v. Hogan, Civ.App., 121 S.W.2d 499, error dismissed—Western Oil Fields Corporation v. Nowlin, Civ.App., 288 S.W. 554.

Wis.—Kaboth v. Schrewe, 247 N.W. 835, 211 Wis. 280.

Insufficient evidence

(1) Insufficient evidence is no evidence in the eyes of the law.

N.Y.—In re Stern's Will, 256 N.Y.S. 54, 235 App.Div. 60, affirming In re Stern's Estate, 244 N.Y.S. 250, 137 Misc. 668, affirmed In re Stern's Will, 185 N.E. 762, 261 N.Y. 617, reargument denied 188 N.E. 47, 262 N.Y. 522—Shtevelan v. Metropolitan Life Ins. Co., 295 N.Y.S. 735, 162 Misc. 835, affirmed Shtevelman v. Metropolitan Life Ins. Co., 5 N.Y.S.2d 767, 254 App.Div. 729—Wass v. Western Union Telegraph Co., 10 N.Y.S.2d 956.

Tex.—Houston Fire & Casualty Ins. Co. v. Biber, Civ.App., 146 S.W.2d 442, error dismissed, judgment correct.

(2) "By a loose use of language, it may be said that a verdict 'contrary to the evidence' or 'against the weight of evidence' was rendered upon 'insufficient evidence;' and on the other hand, that a verdict upon insufficient evidence is one contrary to or against the weight of evidence."—Stewart v. Elliot, 13 D.C. 307, 315—32 C.J. p 948 note 99 [d].

Evidence must produce a reasonable belief of the facts essential to the verdict.—Stevens v. Tampa Electric Co., 88 So. 303, 81 Fla. 512.

Evidence must be of a convincing nature, imparting the qualities of reasonable certainty.—St. Louis Southwestern Ry. Co. v. Braswell, 127 S.W.2d 637, 198 Ark. 143.

That a party produces the best evidence he has, or could be expected to have, does not exempt him from rule which requires evidence to be sufficient to satisfy jury.—Citizens Bank of Coldwater v. Callicott, 174 So. 78, 178 Misc. 747.

Absence of proper denials

Verdict for plaintiff did not lack proper evidence to sustain it, where warranted by averments of statement of claim to which answers were not responsive.—Seaman v. Tamaqua Nat. Bank, 147 A. 56, 297 Pa. 294.

45. U.S.—Tippens v. Metropolitan Life Ins. Co., C.C.A.Ga., 99 F.2d 671—New York Life Ins. Co. v. Trimble, C.C.A.La., 69 F.2d 849, certiorari denied Trimble v. New York Life Ins. Co., 55 S.Ct. 72, 293 U.S. 561, 79 L.Ed. 661.

Ark.—St. Louis-San Francisco Ry. Co. v. Bishop, 33 S.W.2d 383, 386, 182 Ark. 763, quoting **Corpus Juris.**

Me.—Arnst v. Estes, 8 A.2d 201, 136 Me. 272—Page v. Moulton, 141 A. 183, 127 Me. 80.

Miss.—Southern Ry. Co. v. Buse, 193 So. 918, 187 Miss. 752—Gulf Refining Co. v. Williams, 185 So. 234, 183 Miss. 723—Teche Lines v. Bounds, 179 So. 747, 182 Miss. 638—Reily v. Crymes, 168 So. 267, 176 Miss. 133—Universal Truck Loading Co. v. Taylor, 164 So. 3, 174 Miss. 353.

N.H.—Russell v. Boston & M. R. R., 141 A. 227, 83 N.H. 246.

N.C.—Mills v. Moore, 12 S.E.2d 661, 664, 219 N.C. 25, quoting **Corpus Juris**—Mercer v. Powell, 12 S.E.2d 227, 231, 218 N.C. 642, quoting **Corpus Juris**—Cummings v. Atlantic Coast Line R. Co., 6 S.E.2d 837, 839, 217 N.C. 127, quoting **Corpus Juris**—Allman v. Southern Ry. Co., 166 S.E. 891, 892, 203 N.C. 660, quoting **Corpus Juris.**

Ohio.—Armour & Co. v. Reams, 166 N.E. 592, 31 Ohio App. 390.

Wis.—Schiefelbein v. Chicago, M., St. P. & P. R. Co., 265 N.W. 386, 221 Wis. 35, certiorari denied Chicago, M., St. P. & P. R. Co. v. Schiefelbein, 57 S.Ct. 20, 299 U.S. 558, 81 L.Ed. 411—Liberty Tea Co. v. La Salle Fire Ins. Co., 238 N.W. 399, 206 Wis. 639.

23 C.J. p 52 note 83.

Courts act on reasonable probabilities in civil cases.—Columbus & G. R. Co. v. Coleman, 160 So. 277, 172 Miss. 514.

Utmost boundaries of reason

The triers of fact may seek the truth within the field of the evidence to the utmost boundaries of reason which rational men of common sense might set without passing beyond the line between the field of probabilities and the field of conjecture.

Ark.—Plunkett-Jarrell Grocer Co. v. Freeman, 92 S.W.2d 849, 853, 192 Ark. 380, citing **Corpus Juris.**

Tex.—Helmerich-Payne, Inc. v. Debus, Civ.App., 148 S.W.2d 243, quoting **Corpus Juris.**

23 C.J. p 53 note 87.

Preponderance of probabilities

(1) A jury's verdict may be sustained by preponderance of probabilities.—Nygaard v. Wadhams Oil Co., 284 N.W. 577, 231 Wis. 236.

(2) A verdict does not rest on surmise or conjecture when there is evidence that there is a greater probability that a thing happened in such a way as to fix liability on person charged with such liability than there is that it happened in a way for which the person so charged would not be liable.—Letres v. Washington Co-op. Chick Ass'n, Wash., 111 P.2d 594.

"Reasonable probabilities" mean those for which fair reason under facts may be found.—Williams v. Lumpkin, 152 So. 842, 169 Miss. 146.

46. U.S.—New York Life Ins. Co. v. Trimble, C.C.A.La., 69 F.2d 849, certiorari denied Trimble v. New York Life Ins. Co., 55 S.Ct. 72, 293 U.S. 561, 79 L.Ed. 661—Stanolind Oil & Gas Co. v. Kimmel, C.C.A. Okl., 68 F.2d 520—Love v. New York Life Ins. Co., C.C.A.Miss., 64 F.2d 829.

Ala.—Central of Georgia Ry. Co. v. Lee, 142 So. 660, 225 Ala. 283.

Ind.—New York Cent. R. Co. v. Green, 15 N.E.2d 748, 105 Ind.App. 488—Deery v. Hall, 175 N.E. 141, 96 Ind.App. 683.

Md.—Thompson v. Sun Cab Co., 184 A. 576, 170 Md. 299—Swoyer v. Swoyer, 145 A. 190, 157 Md. 18.

While there is no set formula for determining the quantum of evidence required, each case being governed by its own circumstances,[47] the verdict or findings must be supported by substantial evidence.[48] Under above mentioned rule, according to the de-

Miss.—Southern Ry. Co. v. Buse, 193 So. 918, 187 Miss. 752—Kramer Service v. Wilkins, 186 So. 625, 184 Miss. 483—Mutual Ben. Health & Accident Ass'n v. Johnson, 186 So. 297—Gulf Refining Co. v. Williams, 185 So. 234, 183 Miss. 723—Teche Lines v. Bounds, 179 So. 747, 182 Miss. 638—Reily v. Crymes, 168 So. 267, 176 Miss. 133—Columbus & G. R. Co. v. Coleman, 160 So. 277, 172 Miss. 514—Williams v. Lumpkin, 152 So. 842, 169 Miss. 146—New Orleans & N. E. R. Co. v. Holsonback, 151 So. 720, 168 Miss. 493.

Mo.—Feldewerth v. Great Eastern Oil Co., App., 149 S.W. 410.

N.H.—Russell v. Boston & M. R. R., 141 A. 227, 83 N.H. 246.

N.C.—Ivey v. Eastern Cotton Oil Co., 154 S.E. 740, 199 N.C. 452.

Ohio.—Scrabic v. Cincinnati, N. O. & T. P. Ry. Co., 182 N.E. 528, 531, 42 Ohio App. 473, citing **Corpus Juris.**

Okl.—Mackey v. Jarvis, 69 P.2d 662, 180 Okl. 404—Midland Valley R. Co. v. Rupe, 210 P. 1038, 87 Okl. 286.

Pa.—Hollander v. Kressman, 17 A.2d 669, 143 Pa.Super. 32.

Tex.—Kirby Lumber Co. v. Boyett, Civ.App., 221 S.W. 669, dismissed for want of jurisdiction.

Utah.—Spackman v. Benefit Ass'n of Ry. Employees, 89 P.2d 490, 97 Utah 91.

Vt.—Johnson v. Burke, 183 A. 495, 108 Vt. 164—Wellman v. Wales, 129 A. 317, 98 Vt. 437.

Wis.—Schiefelbein v. Chicago, M., St. P. & P. R. Co., 265 N.W. 386, 221 Wis. 35, certiorari denied Chicago, M., St. P. & P. R. Co. v. Schiefelbein, 57 S.Ct. 20, 299 U.S. 558, 81 L.Ed. 411.

23 C.J. p 53 note 85.

Choice of possibilities

Where the evidence presents no more than a choice of possibilities, it is not substantial.—Henry H. Cross Co. v. Simmons, C.C.A.Ark., 96 F.2d 482.

47. N.Y.—Weiner v. Mager & Throne, 3 N.Y.S.2d 918, 167 Misc. 338.

Lack of abundance of evidence does not, of itself, establish insufficiency of evidence.—Vallee v. Spaulding Fibre Co., 197 A. 697, 89 N.H. 285, rehearing denied 199 A. 894, 89 N.H. 558.

Absence of contrary evidence

(1) Very slight evidence is sufficient to sustain a finding, where there is no evidence to the contrary. —Central Amusement Co. v. Van Nostran, 152 N.E. 183, 85 Ind.App. 476, rehearing denied 154 N.E. 390, 85 Ind.App. 476—Ferger v. Interprovincial Flour Mills, 140 N.E. 450, 80 Ind.App. 248.

(2) Prima facie proof, in the absence of any other contradictory evidence, is sufficient to justify a judgment.—Weiss v. Mayfield, La. App., 178 So. 511.

48. U.S.—U. S. v. Krumsiek, C.C.A. Mass., 111 F.2d 74—McDonald v. Robertson, C.C.A.Mich., 104 F.2d 945—U. S. v. McAlister, C.C.A. Mont., 88 F.2d 379—Equitable Life Assur. Soc. of U. S. v. Guiou, C. C.A.Neb., 86 F.2d 865—Pennsylvania Pulverizing Co. v. Butler, C. C.A.N.J., 61 F.2d 311.

Ark.—Malvern Gravel Co. v. McMillan, 139 S.W.2d 390, 200 Ark. 386 —Mutual Ben. Health & Accident Ass'n v. Basham, 87 S.W.2d 583, 191 Ark. 679—Hough v. Leech, 62 S.W.2d 14, 187 Ark. 719.

Cal.—Barham v. Widing, 291 P. 173, 210 Cal. 206—Fendley v. City of Anaheim, 294 P. 769, 110 Cal.App. 731—Wilson v. Droege, 294 P. 726, 110 Cal.App. 578.

Conn.—Meagher v. Colonial Homes Co., 146 A. 609, 611, 109 Conn. 343, citing **Corpus Juris.**

Ky.—Henderson v. Lane, 260 S.W. 361, 202 Ky. 610.

Me.—Arnst v. Estes, 8 A.2d 201, 136 Me. 272.

Miss.—Yazoo & M. V. R. Co. v. Lamensdorf, 178 So. 80, 180 Miss. 426, overruling suggestion of error 177 So. 50, 180 Miss. 426.

Mo.—Grange v. Chicago & E. I. Ry. Co., 69 S.W.2d 955, 334 Mo. 1040—Watkins v. Bird-Sykes-Bunker Co., 16 S.W.2d 38, 322 Mo. 830—Hamilton v. St. Louis-San Francisco Ry. Co., 300 S.W. 787, 318 Mo. 123—Pietraschke v. Pollnow, App., 147 S.W.2d 167—Myers v. Golloday, App., 104 S.W.2d 1007, opinion quashed on other grounds State ex rel. Golloday v. Shain, 110 S.W. 2d 719, 341 Mo. 889—Murphy v. Quick Tire Service, App., 47 S.W. 2d 202.

N.H.—Nadeau v. Stevens, 111 A. 749, 79 N.H. 502.

N.C.—Bunn v. Harris, 5 S.E.2d 149, 216 N.C. 366.

Or.—Vale v. State Industrial Accident Commission, 86 P.2d 956, 160 Or. 569.

Tenn.—Mutual Ben. Health & Accident Ass'n v. Denton, 124 S.W.2d 278, 22 Tenn.App. 495.

Wash.—Poland v. City of Seattle, 93 P.2d 379, 200 Wash. 208.

23 C.J. p 51 note 77.

"Substantial evidence" defined

(1) "Substantial evidence" is more than a mere scintilla, and means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.

U.S.—Consolidated Edison Co. of New York v. National Labor Relations Board, N.Y., 59 S.Ct. 206, 305 U.S. 197, 83 L.Ed. 126, modifying C.C.A., 95 F.2d 390, certiorari granted 58 S.Ct. 1038, 304 U.S. 555, 82 L.Ed. 1524, and International Brotherhood of Electrical Workers v. National Labor Relations Board, 58 S.Ct. 1041, 304 U.S. 555, 82 L. Ed. 1524—U. S. v. Krumsiek, C.C. A.Mass., 111 F.2d 74—Commercial Casualty Ins. Co. v. Stinson, C.C. A.Mich., 111 F.2d 63, certiorari denied 61 S.Ct. 25, 311 U.S. 667, 85 L. Ed. 428—Montgomery Ward & Co. v. National Labor Relations Board, C.C.A., 107 F.2d 555—U. S. v. Fain, C.C.A.Ark., 103 F.2d 161—National Labor Relations Board v. Louisville Refining Co., C.C.A., 102 F.2d 678, certiorari denied Louisville Refining Co. v. National Labor Relations Board, 60 S.Ct. 81, 308 U. S. 568, 84 L.Ed. 477.

D.C.—Minnesota Min. & Mfg. Co. v. Coe, 118 F.2d 593, 73 App.D.C. 146, affirming 28 F.Supp. 430, and 28 F.Supp. 433—Avignone Freres, Inc. v. Cardillo, 117 F.2d 385, 73 App. D.C. 149.

N.Y.—In re Gilligan, 22 N.Y.S.2d 757, 175 Misc. 160.

Pa.—Modern Transfer Co. v. Pennsylvania Public Utility Commission, 12 A.2d 458, 139 Pa.Super. 197.

Wis.—Jasperson v. Industrial Commission, 285 N.W. 391, 231 Wis. 142.

(2) If reasonable men may fairly differ as to whether certain evidence establishes a fact in issue, then such evidence must be considered as "substantial evidence."—Smith v. Schumacker, 85 P.2d 967, 30 Cal.App.2d 251, certiorari denied 59 S.Ct. 1046, 307 U.S. 646, 83 L.Ed. 1526.

(3) "'Substantial evidence' is evidence from which the triers of the fact reasonably could find the issue in harmony therewith."—Walter v. Alt, Mo., 152 S.W.2d 135, 141.

(4) "By 'substantial evidence' is meant evidence which, if true, would have probative force."—Berkemeier v. Reller, 296 S.W. 739, 752, 317 Mo. 614—Muesenfechter v. St. Louis Car Co., Mo.App., 139 S.W.2d 1102.

(5) "Mere uncorroborated hearsay or rumor does not constitute substantial evidence."—Consolidated Edison Co. of New York v. National Labor Relations Board, N.Y., 59 S.Ct.

cisions, a scintilla of evidence is not sufficient.[49] The evidence is sufficient if it reasonably tends to establish the essential facts, either directly or indirectly, or by permissible inference,[50] even though there may be an honest difference of opinion as to the effect of the evidence,[51] and the verdict or finding is supported where the evidence on which it is based meets the requirements of clearness, certainty, and convincing force in the particular case.[52] Evidence which is sufficient is not rendered insufficient

206, 217, 305 U.S. 197, 83 L.Ed. 126, modifying, C.C.A., 95 F.2d 390, certiorari granted 58 S.Ct. 1038, 304 U.S. 555, 82 L.Ed. 1524, and International Brotherhood of Electrical Workers v. National Labor Relations Board, 58 S.Ct. 1041, 304 U.S. 555, 82 L.Ed. 1524—U. S. v. Krumsiek, C.C.A.Mass., 111 F.2d 74, 78.

Mere pyramiding of theories is insufficient.—Ford v. Nicol, 246 N.W. 130, 261 Mich. 307.

Aider by assumptions

Verdict resting on evidence which is dependent to some extent on matters indeterminate and necessary to be eked out by assumptions offends against rule that verdicts must be based on substantial evidence and not on conjecture and speculation.—Knight v. Wabash Ry. Co., Mo., 85 S.W.2d 392.

Testimony contrary to party's own evidence

Where plaintiff's own evidence demonstrates that the alleged fact on which he predicates a right of action could not exist, it cannot be said that the testimony of one of the witnesses that such fact did exist was any substantial evidence thereof.—De Maet v. Fidelity Storage, Packing & Moving Co., 96 S.W. 1045, 121 Mo.App. 92.

Verdict contrary to uncontradicted positive testimony cannot be said to be supported by any evidence.—Bratt v. Magidow, 28 N.Y.S.2d 1011.

A verdict against the party having the burden of proof need not be supported by affirmative substantial evidence.—State v. Gomer, 101 S.W.2d 57, 340 Mo. 107.

49. U.S.—U. S. v. Krumsiek, C.C.A.Mass., 111 F.2d 74—Commercial Casualty Ins. Co. v. Stinson, C.C.A.Mich., 111 F.2d 63, certiorari denied 61 S.Ct. 25, 311 U.S. 667, 85 L.Ed. 428—Farr Co. v. Union Pac. R. Co., C.C.A.Colo., 106 F.2d 437—McCaffrey v. Great Atlantic & Pacific Tea Co., C.C.A.N.Y., 103 F.2d 326, denying rehearing 102 F.2d 689—Murray Co. v. Harrill, C.C.A.Okl., 51 F.2d 883.
Miss.—Mutual Ben. Health & Accident Ass'n v. Johnson, 186 So. 297—Yazoo & M. V. R. Co. v. Lamensdorf, 178 So. 80, 180 Miss. 426, overruling suggestion of error 177 So. 50.
Mo.—Grange v. Chicago & E. I. Ry. Co., 69 S.W.2d 955, 334 Mo. 1040—Pietraschke v. Pollnow, App., 147 S.W.2d 167.
N.H.—Allison v. Boston & M. R. R., 190 A. 127, 88 N.H. 420.
N.Y.—Fisick v. Lorber, 159 N.Y.S. 722, 95 Misc. 574.
Tex.—Texas Employers' Ins. Ass'n v. Herring, Com.App., 280 S.W. 740, reversing, Civ.App., 269 S.W. 249—Sovereign Camp, W. O. W., v. Oliva, Civ.App., 128 S.W.2d 101, error refused—Paris & M. P. R. Co. v. Russell, Civ.App., 104 S.W.2d 650—Wells v. Henderson, Civ.App., 78 S.W.2d 683, error refused.
Vt.—C. E. Johnson & Co. v. Marsh, 15 A.2d 577, 113 A.L.R. 502.
Wash.—Poland v. City of Seattle, 93 P.2d 379, 200 Wash. 208—Thomson v. Virginia Mason Hospital, 277 P. 691, 152 Wash. 297—Davison v. Snohomish County, 270 P. 422, 149 Wash. 109.
23 C.J. p 9 note 10, p 51 note 77 [a].
"Scintilla of evidence" defined see supra § 1016.

Contradiction of unsupported statement

The fact that several witnesses contradict a party's unsupported statement does not make his statement a mere scintilla of evidence so as to be insufficient to support a verdict in his favor.—Lizott v. Big Blackfoot Milling Co., 136 P. 46, 48 Mont. 171.

Scintilla doctrine

(1) The scintilla doctrine does not conflict with rule that a conclusion as to liability that rests on speculation or mere conjecture is not proper basis for verdict.—Harbin v. Moore, 175 So. 264, 234 Ala. 266—Georgia Power Co. v. Edmunds, 171 So. 256, 233 Ala. 273—Continental Casualty Co. v. Paul, 95 So. 814, 209 Ala. 166, 30 A.L.R. 802.

(2) Scintilla of evidence as warranting or requiring submission of cause to jury see the C.J.S. title Trial § 208, also 64 C.J. p 309 note 80–p 310 note 85.

50. Cal.—In re Presho's Estate, 238 P. 944, 196 Cal. 639.
Colo.—Schtul v. Wilson, 266 P. 1112, 83 Colo. 528.
Okl.—Cities Service Gas Co. v. Eggers, 98 P.2d 1114, 186 Okl. 466, 126 A.L.R. 1278—Maryland Casualty Co. v. Cowan, 91 P.2d 756, 185 Okl. 304—Lutner v. Shoffner, 73 P.2d 1140, 181 Okl. 271—Braniff v. McPherren, 58 P.2d 871, 177 Okl. 292—Darby Petroleum Corporation v. Mason, 54 P.2d 1046, 176 Okl. 138—State Bank of Seneca, Mo., v. Miller, 42 P.2d 834, 171 Okl. 253—McAlester-Edwards Coal Co. v. Stephenson, 260 P. 78, 126 Okl. 219—Midland Valley R. Co. v. Rupe, 210 P. 1038, 87 Okl. 286—Midland Valley R. Co. v. Goble, 186 P. 723, 77 Okl. 206.
Pa.—Watkins v. Prudential Ins. Co. of America, 173 A. 644, 315 Pa. 497, 95 A.L.R. 869.
Inferences from evidence generally see infra § 1044.

Absolute certainty is not required to meet standards of legal proof.—Smith v. Kingsley, 200 A. 11, 331 Pa. 10.

Complete credit to plaintiff's case

If, discarding all adverse evidence and giving credit to all the evidence favorable to plaintiff and indulging every legitimate conclusion favorable to plaintiff which might have been drawn from the proved facts, a jury might have found in favor of plaintiff, the evidence is sufficient to support a verdict in his favor.—Hulsey v. Patterson, Tex.Civ.App., 121 S.W.2d 509—McCarty v. Hogan, Tex.Civ.App., 121 S.W.2d 499, error dismissed—Traders & General Ins. Co. v. Durbin, Tex.Civ.App., 119 S.W.2d 595, error dismissed—Pennsylvania Fire Ins. Co. v. W. T. Waggoner Estate, Tex.Civ.App., 41 S.W.2d 340, affirmed, Com.App., 39 S.W.2d 593.

Where there is evidence to take case to jury on issues, evidence is sufficient to support findings of jury on such issues.—National Life & Accident Ins. Co. v. American Trust Co., 68 S.W.2d 971, 17 Tenn.App. 516—Tennessee Cent. Ry. Co. v. Schutt, 2 Tenn.App. 514—Citty v. Miller, 1 Tenn.App. 1.

Judgment notwithstanding verdict

Respecting sufficiency of evidence, test whether evidence supports verdict or requires granting judgment non obstante veredicto does not differ perceptibly.—Meylink v. Minnehaha Co-op. Oil Co., S.D., 291 N.W. 572—Wolff v. Stenger, 239 N.W. 181, 59 S.D. 231.

51. Cal.—In re Presho's Estate, 238 P. 944, 196 Cal. 639.

Where the evidence of a fact is not conclusive, but leaves no other hypothesis, it will be considered sufficient.—Fisher v. Pfeifer & Co., 4 La.App. 492.

52. N.Y.—Howard v. St. Lawrence Life Assoc., 45 N.Y.S. 110, 20 Misc. 118.
23 C.J. p 53 note 96.

by the fact that there is other evidence which, if believed, would warrant a contrary result.[53] It is sufficient if the substance of an allegation is proved,[54] and if the evidence on the whole agrees with and supports the hypothesis which it is adduced to prove,[55] all that is required being that the triers of fact should be reasonably satisfied of the facts on which the verdict or finding is based.[56]

Testimony consisting of a mere legal conclusion[57] or utterly destitute of reasonable precision[58] is insufficient; and a verdict or finding cannot be based on evidence which cannot possibly be true,[59] is demonstrated to be false,[60] is inherently unbelieva-

Physical facts held to warrant finding

(1) That vehicle was on wrong side of highway.

Ark.—Crawford v. Center, 100 S.W.2d 83, 193 Ark. 287.

Tex.—Kindle v. Armstrong Packing Co., Civ.App., 103 S.W.2d 471.

(2) That brakeman fell from top of train —Kulp v. Chicago, St. P., M. & O. Ry. Co., C.C.A.Minn., 88 F.2d 466, certiorari denied Chicago, St. P., M. & O. R. Co. v. Kulp, 57 S.Ct. 930, 301 U.S. 700, 81 L.Ed. 1355.

(3) That plaintiff's automobile in collision at intersection entered intersection first.—Cenovese v. Krebs, 138 So. 470, 18 La.App. 639.

Evidence held sufficient

Ark.—Thomas v. Spires, 22 S.W.2d 553, 180 Ark. 671.

Cal.—Harvey v. San Diego Electric Ry. Co., 268 P. 468, 92 Cal.App. 487.

Ga —Western & A. R. R. v. Morgan, 150 S.E. 850, 40 Ga.App. 611.

Hawaii.—Nawahi v. First Trust Co. of Hilo, 31 Hawaii 958.

Ill.—Kretschmar v. Goven, Eddins & Co., 21 N.E.2d 932, 301 Ill.App. 8—Frank v. Central Mut. Ins. Co., 273 Ill.App. 445—Perks v. Tippett, 202 Ill.App. 619.

La.—Fossier v. Knight Motors Co., 127 So. 87, 13 La.App. 11.

Mass.—Weiner v. D. A. Schulte, Inc., 176 N.E. 114, 275 Mass. 379—Murphy v. New England Transp. Co., 173 N.E. 430, 273 Mass. 275—Kearns v. South Middlesex St. R Co., 64 N.E. 200, 181 Mass. 587—Woodman v. Metropolitan R. Co., 21 N.E. 482, 149 Mass. 335, 14 Am.S.R. 427, 4 L.R.A. 213.

Minn.—Larson v. First Nat. Bank, 146 N.W. 1097, 125 Minn. 275.

Mo.—State ex inf. Mansur ex rel. Fowler v. McKown, 290 S.W. 123, 315 Mo. 1336—State ex rel. Consolidated School Dist. No. 9, Bates County v. Lee, 262 S.W. 344, 303 Mo. 641.

Nev.—Butzbach v. Siri, 5 P.2d 533, 53 Nev. 453.

N.Y.—Meltzer v. Kaminer, 227 N.Y.S. 459, 131 Misc. 813.

Okl.—Mid-Continent Petroleum Corporation v. Miller, 79 P.2d 804, 183 Okl. 27.

Pa.—Crick v. Paull, 135 A. 103, 287 Pa. 431.

Tenn.—Whitfield v. Loveless, 1 Tenn. App. 377.

Tex.—Roberson v. Hughes, Com.App., 231 S.W. 734, reversing Hughes v. Robinson, Civ.App., 214 S.W. 946—Praeletorian Diamond Oil Ass'n v. Garvey, Civ.App., 15 S.W.2d 698, error refused—Durham v. Scrivener, Civ.App., 259 S.W. 606, affirmed, Com.App., 270 S.W. 161.

Utah.—Taylor Motor Car Co. v. Hansen, 282 P. 1040, 75 Utah 80.

Wash.—Kusah v. McCorkle, 170 P. 1023, 100 Wash. 318, L.R.A.1918C 1158.

Wis.—Darling & Co. v Frank Carter Co., 242 N.W. 519, 208 Wis. 222.

Evidence held insufficient

U.S.—The President Arthur, C.C.A.N. Y., 72 F.2d 276, affirming, D.C., 42 F.2d 288, certiorari denied Morse Dry Dock & Repair Co. v. The President Arthur, 55 S.Ct. 149, 293 U.S. 615, 79 L Ed. 704.

Cal.—Steinhofer v. Georgeson, 202 P. 350, 54 Cal.App. 550.

D.C.—Ross v. Washington Railway & Electric Co., 39 App.D.C. 591.

Ill.—Selamakos v. Victory Ice & Ice Cream Co., 246 Ill.App. 178.

Iowa.—Galva First Nat. Bank v. Reed, 215 N.W. 732, 205 Iowa 7.

Ky.—Farmers' Bank & Trust Co. v. Dent, 267 S.W. 202, 206 Ky. 405.

La.—Morris v. Summers, 6 La.App. 378.

Mo.—Winter v. City of Kirkwood, App., 296 S.W. 232.

Neb.—Vybiral v. Schildhauer, 265 N. W. 241, 130 Neb. 433.

N.H.—Lavigne v. Nelson, 18 A.2d 832.

Or.—McMillan v. Montgomery, 253 P. 879, 121 Or. 28.

Pa.—Pender v. Cook, 150 A. 892, 300 Pa. 468—Brenard Mfg. Co. v. Kroker, 91 Pa.Super. 254.

Tex.—Magnolia Petroleum Co. v. Muehl, Civ.App., 237 S.W. 599.

Wis.—Krahn v. Goodrich, 160 N.W. 1072, 164 Wis. 600.

Wyo.—Arp & Hammond Hardware Co. v. Hammond Packing Co., 236 P. 1033, 33 Wyo. 77.

53. Cal.—Popp v. Exchange Bank, 208 P. 113, 189 Cal. 296—Waer v. Waer, 207 P. 891, 189 Cal. 178—Hall v. Williams, 11 P.2d 19, 123 Cal.App. 148.

Under conflicting evidence, trier of fact may find for either party.—Morton v. Wallace, 171 S.E. 720, 177 Ga. 856—Moss v. Moss, 151 S.E. 506, 169 Ga. 734—Davis v. McKenzie Motor Co., 166 S.E. 869, 46 Ga.App. 151.

Evidence which establishes facts as a matter of law is obviously insufficient to support a verdict or finding to the contrary.—Evans v. Dr. Pepper Bottling Co., Tex.Civ.App., 123 S.W.2d 706.

54. La.—Gueble v. Lafayette, 46 So. 917, 121 La. 909.

55. Colo.—Maley v. Heichemer, 256 P. 4, 81 Colo. 379.

Idaho.—Riley v. City of Boise, 31 P. 2d 96—Roe v. Boise Grocery Co., 21 P.2d 910, 53 Idaho 82.

23 C.J. p 53 note 91.

56. U.S —William Cramp & Sons Ship & Engine Bldg. Co. v. U. S., 50 Ct.Cl. 179.

Ala.—Phillips v. Morris, 53 So. 1001, 169 Ala. 460.

57. Hawaii.—Tyler v. Wise, 21 Hawaii 148.

23 C.J. p 53 note 88.

58. U.S.—McDonald v. Robertson, C. C.A.Mich., 104 F.2d 945.

Tex.—Bishop-Babcock-Becker Co. of Texas v. Jennings, Civ.App., 245 S. W. 104.

23 C.J. p 53 note 89.

Speed

Where witness testified that the engine was "not running so fast or so slow, either," it was held that such a statement had no probative value and was not evidence of negligent speed.—Nashville & St. L. Ry. v. Perry, 13 Tenn.App. 268.

Time

Where testimony is sufficient to prove act or transaction within certain period, but is so vague and uncertain as not to fix the time within that period, best that can be done for party producing such testimony is to fix date at end of period.—Vidal v. Kensler, 51 P.2d 235, 100 Mont. 592.

59. U.S.—Chicago, M., St. P. & P. R. R. Co. v. Linehan, C.C.A.Minn., 66 F.2d 373.

Va.—Johnson v. Richmond, F. & P. R. Co., 169 S.E. 603, 160 Va. 766.

Superficially relevant evidence may not be basis for finding by jury, and not fit to be submitted thereto, as in case of testimony as to happening of physical impossibility, testimony as to strange and unusual transaction or event, not entitled to credence, or false statement made under such circumstances as to preclude finding of good faith.—Hebert v. Boston & M. R. R., 8 A.2d 744, 90 N.H. 324.

60. Mo.—Grange v. Chicago & E. I.

ble,[61] is contrary to reason,[62] is opposed to natural or physical laws,[63] is contrary to common knowledge and experience[64] or to established physical facts,[65] or is contrary to an infallible mathematical

Ry. Co., 69 S.W.2d 955, 334 Mo. 1040.

Discredited evidence

A case is never proved where testimony which supports it is discredited to satisfaction of tribunal which tries the issue.—Pickens v. Jackson, 129 S.E. 639, 161 Ga. 124.

61. Miss.—Teche Lines v. Bounds, 179 So. 747, 182 Miss. 638.

Mo.—Grange v. Chicago & E. I. Ry. Co., 69 S.W.2d 955, 334 Mo. 1040.

"Believable or credible evidence" in civil case is evidence reconcilable with probabilities of case, and bare possibilities are not sufficient.—Teche Lines v. Bounds, 179 So. 747, 182 Miss. 638.

62. Miss.—Teche Lines v. Bounds, supra.

N.Y.—Szpyrka v. International Ry. Co., 210 N.Y.S. 553, 213 App.Div. 390.

63. Ky.—Cincinnati, N. & C. Ry. Co. v. Johnson, 136 S.W.2d 769, 281 Ky. 565—Norfolk & W. Ry. Co. v. Stewart, 111 S.W.2d 1044, 271 Ky. 348—Commonwealth Life Ins. Co. v. Pendleton, 21 S.W.2d 985, 231 Ky. 591, 66 A.L.R. 1526.

Miss.—Teche Lines v. Bounds, 179 So. 747, 182 Miss. 638.

Mo.—Dunn v. Alton R. Co., 104 S.W.2d 311, 340 Mo. 1037—McCollum v. Winwood Amusement Co., 59 S.W.2d 693, 332 Mo. 779—Roussell v. St. Louis-San Francisco Ry. Co., App., 257 S.W. 516.

N.H.—Brown v. Mailhot, 196 A. 764, 89 N.H. 240.

N.Y.—Szpyrka v. International Ry. Co., 210 N.Y.S. 553, 213 App.Div. 390—Cohen v. Chalmers, 194 N.Y.S. 636.

Va.—Ellett v. Carpenter, 3 S.E.2d 370, 173 Va. 191.

Wash.—Leach v. Erickson, 297 P. 738, 161 Wash. 473.

64. Miss.—Teche Lines v. Bounds, 179 So. 747, 182 Miss. 638.

Mo.—Kibble v. Quincy, O. & K. C. R. Co., 227 S.W. 42, 285 Mo. 603—Burkett v. Gerth, App., 253 S.W. 199.

Va.—Norfolk & W. Ry. Co. v. Simmons, 103 S.E. 609, 127 Va. 419.

Wash.—John Smith Co. v. Hardin, 218 P. 2, 126 Wash. 425.

65. U.S.—Egan Chevrolet Co. v. Bruner, C.C.A.Minn., 102 F.2d 373, 122 A.L.R. 987.

Iowa.—Bowermaster v. Universal Producing Co., 266 N.W. 503, 221 Iowa 831.

Ky.—Norfolk & W. Ry. Co. v. Stewart, 111 S.W.2d 1044, 271 Ky. 348.

Mo.—Grange v. Chicago & E. I. Ry. Co., 69 S.W.2d 955, 334 Mo. 1040—Kibble v. Quincy, O. & K. C. R. Co., 227 S.W. 42, 285 Mo. 603—Roussell v. St. Louis-San Francisco Ry. Co., App., 257 S.W. 516—Burkett v. Gerth, App., 253 S.W. 199.

Neb.—Elwood v. Schlank, 252 N.W. 828, 126 Neb. 213—Oliver v. Union Pac. R. Co., 179 N.W. 1017, 105 Neb. 243.

Pa.—Radziemenski v. Baltimore & O. R. Co., 128 A. 735, 283 Pa. 182.

Va.—Norfolk & W. Ry. Co. v. Simmons, 103 S.E. 609, 127 Va. 419.

Wash.—Leach v. Erickson, 297 P. 738, 161 Wash. 473.

Wis.—Stryk v. Sydarowich, 224 N.W. 479, 198 Wis. 542.

Requirements for application of rule

(1) Testimony is not to be rejected, as not amounting to substantial evidence on the ground of conflicting with physical facts and common observation and experience except when the deductions from physical law and fact appear so clear and irrefutable that no room is left for entertainment, by reasonable minds, of any other.—Braun v. Wells, Mo.App., 267 S.W. 98.

(2) The conflict between the testimony and the established physical facts must be such that it is impossible for the testimony to be true.—Henry v. Missouri Ins. Co., Mo.App., 68 S.W.2d 852.

A mathematical calculation not based on undisputed or admitted figures cannot be availed of to defeat the findings of the jury on the evidence as a whole, as showing such findings are contrary to the physical facts.—Davis v. Christensen, Tex.Civ.App., 247 S.W. 303, error denied 278 S.W. 1114, 114 Tex. 581.

Position or speed of movable objects

Incontrovertible physical facts are never established by oral evidence as to the position or speed of moving objects.—Adams v. Armour & Co., 16 A.2d 142, 142 Pa.Super. 280—Zimmer v. Clark, 156 A. 815, 103 Pa. Super. 145—Theiss v. Moreland, 22 Erie Co., Pa., 154.

Facts as they appeared to witness

Statements by plaintiff, as a witness, of the facts of the accident as they appeared to him are not physical facts, relative to findings being contrary to the clearly established physical facts.—Gilmore v. Orchard, 187 N.W. 1005, 177 Wis. 149.

Estimate

Plaintiff's testimony that truck over five feet wide passed between curb and wagon, and collided with latter three feet from curb, was held not to require reversal of judgment for plaintiff, such testimony being mere estimate.—Schargel v. United Electric Light & Power Co., 215 N.Y.S. 217, 127 Misc. 24.

Evidence held in conflict with physical facts

Ala.—Tennessee Coal, Iron & R. Co. v. Carson, 88 So. 650, 205 Ala. 518.

Conn.—Abrams v. Director General of Railroads, 111 A. 798, 95 Conn. 479.

La.—Recknagle v. Uddo Bros. Co., 92 So. 390, 151 La. 935.

Neb.—Peterson v. Omaha & Council Bluffs St. Ry. Co., 269 N.W. 510, 131 Neb. 676.

N.Y.—Young v. Rochester Gas & Electric Corporation, 17 N.Y.S.2d 35, 258 App.Div. 418.

Pa.—Lessig v. Reading Transit & Light Co., 113 A. 381, 270 Pa. 299.

R.I.—Whalen v. Dunbar, 115 A. 718, 44 R.I. 136.

Tex.—Aycock v. Green, Civ.App., 94 S.W.2d 894, error dismissed—San Antonio Public Service Co. v. Fraser, Civ.App., 70 S.W.2d 232.

Wash.—De Temple v. Schafer Bros. Logging Co., 13 P.2d 446, 169 Wash. 102.

Wis.—Schulz v. General Casualty Co., 288 N.W. 803, 233 Wis. 118—Bergner v. Chicago & N. W. Ry. Co., 267 N.W. 288, 221 Wis. 606—Burns v. Weyker, 261 N.W. 244, 218 Wis. 363.

Evidence held not in conflict with physical facts

U.S.—Champlin Refining Co. v. Thomas, C.C.A.Okl., 93 F.2d 133—Chicago, M., St. P. & P. R. R. Co. v. Linehan, C.C.A.Minn., 66 F.2d 373.

Cal.—Hilton v. Carey, 106 P.2d 944, 41 Cal.App.2d 375.

Conn.—Saarela v. Allen Bros. Garage, 9 A.2d 814, 126 Conn. 150.

Idaho.—Butler v. Townend, 298 P. 375, 50 Idaho 542.

Ind.—Lindley v. Skidmore, App., 33 N.E.2d 797.

Ky.—Willett v. Bradas & Gheens, 142 S.W.2d 139, 283 Ky. 525—Louisville Ry. Co. v. Lowe, 133 S.W.2d 742, 280 Ky. 465—D. G. Hayes Wholesale Grocery Co. v. Fortney's Adm'r, 126 S.W.2d 864, 277 Ky. 441.

Mass.—Gartland v. Freeman, 178 N.E. 732, 277 Mass. 520.

Mo.—Ownby v. Kansas City Rys. Co., App., 228 S.W. 879.

N.Y.—Slomka v. Nassau Electric R. Co., 182 N.Y.S. 156, 191 App.Div. 727.

Ohio.—Hoover v. Turner, 182 N.E. 598, 42 Ohio App. 528—Armour & Co. v. Yoter, 178 N.E. 596, 40 Ohio App. 225.

Pa.—Scalet v. Bell Telephone Co. of Pennsylvania, 140 A. 141, 291 Pa. 451—Donovan v. Philadelphia Rapid Transit Co., 116 A. 807, 273 Pa. 152—Tenore v. McKinley, 181 A. 825, 119 Pa. Super. 368.

R.I.—Muscente v. R. S. Brine Transp. Co., 196 A. 259, 59 R.I. 482.

test,[66] or which is contrary to other facts which must be established to sustain the verdict.[67]

Where the evidence would sustain a finding for plaintiff as to all the relief demanded by him, it is sufficient to sustain a finding awarding relief only in part.[68] Where the evidence would support an award in an amount greater than that allowed, the amount allowed is supported.[69] Where the declaration in an action contains several counts, the fact that one good count is established by the evidence is sufficient to warrant a verdict;[70] conversely, where separate defenses are made, each of which is complete on the pleading, defendant is entitled to a verdict, if one defense is established, although the others are not.[71] Evidence which is sufficient to establish a defense may not be sufficient to warrant affirmative relief.[72]

Errors and inconsistencies. Evidence may be sufficient, even though it contains errors and inconsistencies.[73] Where the evidence is conflicting, it is the duty of the triers of fact to reconcile it, if possible,[74] or, if this is not possible, to accept that part of it which is worthy of credit and reject the balance,[75] having regard to all the facts and circumstances tending to show the credibility or want of credibility of the witnesses.[76]

Admissibility and sufficiency are separate and distinct;[77] and evidence may be of sufficient probative force with respect to an issue to be admissible without being sufficient to establish the issue.[78]

Causation. The mere fact that one event follows another in time does not establish a causal relationship between them.[79]

The trier of fact may not speculate as to the cause of a happening, such as an injury;[80] so the trier is not permitted to choose between two or more equally probable causes for a happening for

Tex.—Gulf, C. & S. F. Ry. Co. v. Hector, Civ.App., 283 S.W. 562.
Va.—Norfolk & W. Ry. Co. v. Simmons, 103 S.E. 609, 127 Va. 419.
Wis.—Henry v. La Grou, 227 N.W. 246, 200 Wis. 110.

66. Pa.—Radziemenski v. Baltimore & O. R. Co., 128 A. 735, 283 Pa. 182.

Geometrical inconsistency

In a proceeding to quiet title to property in a block in a city, a decree for defendant was held plainly not supported by the evidence, since the evidence on which the witnesses all agreed, and which was supported by all probabilities, cannot be overcome by its inconsistency geometrically with an estimated street frontage.—Mercantile Trust Co. of San Francisco v. All Persons Claiming, etc., 191 P. 691, 183 Cal. 369.

67. N.H.—Collette v. Boston & M. R. R., 140 A. 176, 83 N.H. 210.

68. Cal.—Dillon v. Cross, 91 P. 439, 5 Cal.App. 766.

69. Mont.—Sturm & Drake v. Roberts Elevator Co., 198 P. 545, 60 Mont. 239.

70. Ga.—Reid v. Morrison, 121 S.E. 860, 31 Ga.App. 613.
Ill.—Illinois Cent. R. Co. v. Andrews, 116 Ill.App. 8.
Md.—Parks v. Skipper, 165 A. 319, 164 Md. 388.

71. Or.—Gilman v. Cochran, 90 P. 1001, 49 Or. 474.

72. Mont.—Continental Oil Co. v. Bell, 21 P.2d 65, 94 Mont. 123.

73. U.S.—Romine v. Hodges, Cust. & Pat.App., 70 F.2d 272.
Cal.—Grant v. Gladstone, 259 P. 112, 85 Cal.App. 181.
Mo.—Lutgen v. Standard Oil Co., 287 S.W. 885, 221 Mo.App. 773.

74. U.S.—Madden v. Mac Sim Bar Paper Co., C.C.A.Mich., 103 F.2d 974, certiorari denied 60 S.Ct. 102, 308 U.S. 556, 84 L.Ed. 468, rehearing denied 60 S.Ct. 136, 308 U.S. 635, 84 L.Ed. 528.
Cal.—Boens v. Bennett, 67 P.2d 715, 20 Cal.App.2d 477—Citizens State Bank of Long Beach v. Gentry, 67 P.2d 364, 20 Cal.App.2d 415—Fishman v. Silva, 2 P.2d 473, 116 Cal. App. 1.
Del.—Reese v. Hoffecker, 65 A. 588, 22 Del. 198.
Ind.—Chicago, M. & St. P. Ry. Co. v. Turpin, 145 N.E. 316, 82 Ind.App. 78.
Utah.—Jensen v. Logan City, 88 P.2d 459, 96 Utah 522, affirming 83 P.2d 311, 96 Utah 53.
64 C.J. p 355 note 1.

Inconsistencies in testimony

Inconsistencies and incongruities in the testimony of witness whose general character for veracity has not been attacked should be reconciled when possible, especially where there is no extrinsic reason for suspecting error or fraud.—The Seeandbee, C.C. A.Ohio, 102 F.2d 577.

75. Cal.—Boens v. Bennett, 67 P.2d 715, 20 Cal.App.2d 477—Citizens State Bank of Long Beach v. Gentry, 67 P.2d 364, 20 Cal.App. 415.
Del.—Reese v. Hoffecker, 65 A. 588, 22 Del. 198.
64 C.J. p 353 note 68.

76. Del.—Reese v. Hoffecker, supra.

77. Mo.—Look v. French, 144 S.W.2d 128.

78. Tex.—Jennison v. Darnielle, Civ. App., 146 S.W.2d 788.

79. U.S.—Bussmann Mfg. Co. v. National Labor Relations Board, C.C.A., 111 F.2d 783.
Ga.—Payne v. Chandler, 153 S.E. 96, 41 Ga.App. 385.

Post hoc ergo propter hoc is not sound as evidence or argument.—Kramer Service v. Wilkins, 186 So. 625, 184 Miss. 483.

Proof of possibility

"Except in rare cases . . . proof, without more, that a certain event transpired as a result of a stated condition, is proof only of the possibility and does not establish the probability."—Columbus & G. R. Co. v. Coleman, 160 So. 277, 279, 172 Miss. 514.

Insanity

Proof that a person was sane prior to accident and that at some time after accident he became insane does not, in absence of evidence that accident was cause of insanity, constitute proof that insanity is result of accident.—Traders & General Ins. Co. v. Cole, Tex.Civ.App., 108 S.W.2d 864, error dismissed.

80. U.S.—Thonnesen v. Montgomery Ward & Co., D.C.N.Y., 33 F.Supp. 81.
Tenn.—Boulineaux v. City of Knoxville, 99 S.W.2d 557, 20 Tenn.App. 404.

As a theory of causation, a "conjecture" is an explanation consistent with known facts or conditions but not deducible from them as a reasonable inference, but, if there is evidence which points to any one theory of causation, indicating a logical sequence of cause and effect, there is a juridical basis for such a determination, notwithstanding existence of other plausible theories with or without support in the evidence.—Prentice Packing & Storage Co. v. United Pac. Ins. Co., 106 P.2d 314, 5 Wash. 2d 144.

only one of which defendant is responsible.[81] The cause need not be established with certainty, it being sufficient if the cause for which defendant is responsible is shown to be the most probable cause;[82] it is not necessary to exclude the possibility that something else might have been the cause.[83] However, proof of a bare possibility that a happening may be due to a given cause does not justify a finding that it was so caused.[84]

Where it is shown that causes calculated to produce a certain result were in operation at a given time, it is permissible to infer that the natural results in fact followed,[85] and, where such results have followed, it is proper to infer that they were occasioned by those causes.[86]

§ 1043. Of Single Witness

Ordinarily the testimony of a single witness, if accepted as true, is sufficient to establish any fact.

Ordinarily in civil cases the testimony of a single witness is sufficient to establish any fact[87] except the fact of reputation or notoriety,[88] unless more proof is required by statute,[89] even though the wit-

81. Ark.—Missouri Pac. R. Co. v. Hampton, 112 S.W.2d 428, 195 Ark. 335.
Mo.—Hayes v. S. S. Kresge Co., App., 100 S.W.2d 325.
N.H.—Ahern v. Eldredge Brewing Co., 188 A. 470, 88 N.H. 287.
Okl.—Mid-Continent Petroleum Corporation v. Miller, 79 P.2d 804, 183 Okl. 27.
Or.—Crawford v. Cobbs & Mitchell Co., 253 P. 3, 121 Or. 628, affirmed 257 P. 16, 121 Or. 628.
Pa.—Dangelo v. Pennsylvania R. Co., 152 A 743, 301 Pa. 579.
Tenn.—Nashville, C & St. L. Ry. v. Pollard, 14 Tenn.App. 388—Tennessee Electric Power Co. v. Van Dodson, 14 Tenn.App. 54.
Tex.—Houston Fire & Casualty Ins. Co. v. Biber, Civ.App., 146 S.W.2d 442, error dismissed, judgment correct.

Circumstantial evidence is uncertain when disputed fact is natural effect of fact attested, but may have been caused by other things.—Perry's Adm'x v. Inter-Southern Life Ins. Co., 58 S.W.2d 906, 248 Ky. 491.

82. Okl.—Griesel v. Fabian, 84 P.2d 634, 184 Okl. 42—St. Louis, I. M. & S Ry. Co. v. True, 176 P. 758, 71 Okl. 264, certiorari denied 39 S.Ct. 386, 249 U.S. 611, 63 L.Ed. 801.
Tenn.—Coppenger v. Babcock Lumber & Land Co., 8 Tenn.App. 108.
Weight and sufficiency of evidence as to cause of injury see the C.J.S. title Negligence § 244, also 45 C.J. p 1267 note 38–p 1272 note 66.

Obscure cause

Where source of disease or injury is obscure, court can base its findings on preponderance of probabilities or inferences drawn from established facts.—Acme Body Works v. Koepsel, 234 N.W. 756, 204 Wis. 493, opinion supplemented on other grounds 236 N.W. 378, 204 Wis. 493.

83. Idaho.—Riley v. City of Boise, 31 P.2d 968—Hendrix v. City of Twin Falls, 29 P.2d 352, 54 Idaho 130.

84. N.H.—Russell v. Boston & M. R. R., 141 A. 227, 83 N.H. 246.

85. N.H.—Emery v. Tilo Roofing Co., 195 A. 409, 89 N.H. 165—McDonald v Elkins, 187 A. 725, 88 N. H. 249.

86. N.H.—Northen v. Abbott, 5 A. 2d 715, 90 N.H. 164.

No other adequate cause shown

Where a cause is present which might produce a condition that has occurred, and there is no other adequate cause proved, the matter is not within the equipoise rule, and it may under such conditions be found that the only thing suggested by the evidence which could cause an effect found present did cause it.—Turner v. Hartford Fire Ins. Co., 172 N.W. 166, 185 Iowa 1363.

87. Ark.—St. Louis-San Francisco Ry. Co. v. Hill, 121 S.W.2d 869, 197 Ark. 53.
Cal.—Minikin v. Hendrix, 101 P.2d 473, 15 Cal.2d 338—Myles v. Russell, 213 P. 491, 190 Cal. 485—Thompson v. Byers, 2 P.2d 496, 116 Cal.App. 214—Southern California Music Co. v. Labes, 288 P. 1096, 106 Cal.App. 255.
Colo.—Cohen Sons, Inc. v. Dowd, 84 P.2d 830, 832, 103 Colo. 211, citing **Corpus Juris.**
Fla.—Mutual Ben. Health & Accident Ass'n v. Bunting, 183 So. 321, 133 Fla. 646—Jacksonville Traction Co. v. Greene, 151 So. 523, 113 Fla. 316.
Ga.—Donald v. Groves, 126 S.E. 583, 160 Ga. 163.
Idaho.—Farrar v. Parrish, 245 P. 934, 42 Idaho 451.
Ill.—Goldstein v. Muller, 189 Ill.App. 145.
Iowa.—Corbin v. Pike, 37 Iowa 637.
Mont.—Hill v. Haller, 90 P.2d 977, 103 Mont. 251—Whitney v. Bertoglio Mercantile Co., 211 P. 323, 65 Mont. 358.
Okl.—Sharp v. Young, 78 P.2d 815, 182 Okl. 596.
Or.—Riley v. Good, 18 P.2d 222, 142 Or. 155.
Pa.—Kramer v. Linder, 8 Pa.Dist. & Co. 343, 7 Northumb.Leg.J. 358.
23 C.J. p 53 note 2.
Number of witnesses generally see supra § 1023.

Bad reputation of sole witness

The testimony of one witness entitled to credit is sufficient to establish a fact, although contradicted, and notwithstanding declarations by other witnesses that reputation of such witness was bad.—Leffingwell v. Faubion, 264 P. 306, 89 Cal. App. 157.

Perjury or treason excepted

Direct evidence of single witness entitled to full credit is sufficient to prove any fact except perjury or treason and to create substantial conflict in evidence.—Southern California Music Co. v. Labes, 288 P. 1096, 106 Cal.App. 255.

Transactions or communications with deceased person

(1) Generally testimony of one witness is sufficient to establish a fact, even though witness be testifying to transactions or communications with deceased person.—Donald v. Groves, 126 S.E. 583, 160 Ga. 163.

(2) Rule that single witness' uncorroborated testimony to establish claim or right against deceased person is weakest kind of evidence affects only weight of evidence and not admissibility.—Goldsmith v. Parsons, 161 So. 175, 182 La. 122, remanding case, App., 156 So. 822, reinstating 154 So. 68, and which is affirmed 161 So. 879.

88. U.S.—Watts v. Lindsey, Ohio, 7 Wheat. 158, 162, 5 L.Ed. 423.
Wis.—Wojahn v. Oshkosh Nat. Union Bank, 129 N.W. 1068, 144 Wis. 646.

89. **In Louisiana**

(1) Under statute the testimony of one witness, unsupported by corroborating circumstances, is insufficient to prove a contract where the amount exceeds five hundred dollars.—Davilla v. Boswell, 1 So.2d 703, 197 La. 438—Succession of Mereno, 108 So. 133, 161 La. 84—Sabine Lumber Co. v. Trumbull, 104 So. 476, 158 La. 621—Louisiana Oil Burning Equipment Co. v. McGregor, 118 So. 894, 9 La.App. 349—Gray v. Feazel, 8 La.App. 142—23 C.J. p 54 note 4 [a].

(2) Proof of an oral gift of over five hundred dollars is within the statute.—Succession of McBurney, 111 So. 86, 162 La. 758.

(3) Statute does not apply where the amount claimed is composed of

ness is a party or interested in the action.[90] The triers of fact are not, however, bound to accept the testimony of a single witness as true,[91] even though he is not contradicted.[92]

In some cases the testimony of a single witness is not such clear and convincing proof as is required to sustain a verdict or finding,[93] particularly where it was offered for the purpose of varying or contradicting a writing,[94] or was opposed by a strong presumption of law,[95] as, for instance, the presumption that a written instrument expresses the real intention of the parties,[96] or that a deed duly executed and acknowledged and in possession of the grantee was duly delivered to him,[97] or the presumption of the truth of an officer's return of service of process,[98] or the verity of an officer's certificate of acknowledgment.[99]

§ 1044. Inferences from Evidence

A verdict or finding may be based on inferences fairly drawn from the facts in evidence. An inference cannot be based on surmise or speculation, and is without probative force if inconsistent with undisputed or clearly established facts.

A verdict or finding may be based on reasonable inferences fairly drawn from the facts in evidence,[1]

separate and distinct items, not one of which exceeds five hundred dollars.—Thompson v. Steinkamp, 5 La. App. 274.

(4) A reconventional demand for filling premises in action for rents and profits is not within the statute. —Roussel v. Railways Realty Co., 115 So. 742, 165 La. 536.

(5) In particular cases the testimony of one witness with corroborating circumstances has been held sufficient to meet the statutory requirement.—O'Ferrall v. Nashville Bridge Co., 116 So. 399, 165 La. 963 —Succession of Mereno, 108 So. 133, 161 La. 84—Audubon Homestead Ass'n v. A. Stef Lumber Co., 105 So. 62, 158 La. 1054—Louisiana Abstract & Title Guarantee Co. v. Xeter Realty, Limited, 101 So. 402, 156 La. 1019—Webster v. Harman, 88 So. 462, 148 La. 1080—Victory Gravel Co. v. Dyer, 134 So. 701, 17 La.App. 123—Electrical Supply Co. v. Moses, 3 La.App. 286.

90. Ark.—Hot Springs St. Ry. Co. v. Hill, 128 S.W.2d 369, 198 Ark. 319.
Cal.—Klein v. Baker, 296 P. 631, 112 Cal.App. 157.
Fla.—Winter Haven Fruit Sales Corporation v. De Vane, 162 So. 909, 120 Fla. 385.
Ga.—Donald v. Groves, 126 S.E. 583, 160 Ga. 163.
La.—Farris v. Miller, App., 159 So. 132—Boe v. Conrad, 3 La.App. 72.
N.J.—Brown v. Coast Cities Ry. Co., 165 A. 866, 11 N.J.Misc. 347.
N.Y.—Buguero v. U. S. Shipping Board Emergency Fleet Corporation, 218 N.Y.S. 589, 218 App.Div. 553, affirmed 159 N.E. 685, 246 N. Y. 643.
Pa.—Bastian v. Marienville Glass Co., 126 A. 798, 281 Pa. 313—Mentser v. Mentser, 7 A.2d 541, 136 Pa. Super. 582—Burchfield v. Borough of Conneaut Lake, 174 A. 668, 114 Pa.Super. 114—Kramer v. Linder, 8 Pa.Dist. & Co. 343, 7 Northumb. Leg.J. 358.
Tex.—Davis v. Christmas, Civ.App., 248 S.W. 126.
23 C.J. p 54 note 5.

A party's testimony corroborated by circumstances will be accepted as true.—Munson v. Wilson, 6 La. App. 560.

Attorney for party as sole witness
Where the testimony of an attorney for plaintiff in ejectment suit was uncontradicted, although his conduct in managing the suit and making himself a witness was unbecoming, it was sufficient to establish a fact.—Barto v. Kellogg, 124 N.E. 633, 289 Ill. 528.

91. U.S.—Storley v. Armour & Co., C.C.A.N.D., 107 F.2d 499—Easton v. Brant, C.C.A.Cal., 19 F.2d 857, 859, quoting **Corpus Juris**, and certiorari denied 48 S.Ct. 117, 275 U. S. 557, 72 L.Ed. 424.
N.Y.—Harris v. Herskowitz, 180 N. Y.S. 646.
Pa.—Stein v. Hopewell Chocolate Co., 87 Pa.Super. 289—Hrestak v. Koscevic, 45 Dauph.Co. 88.
Tex.—Dubinski Electric Works v. J. Lang Electric Co., Civ.App., 111 S.W. 169.
Va.—D. Humphreys & Son v. Broughton, 141 S.E. 764, 149 Va. 789.

92. U.S.—Easton v. Brant, C.C.A. Cal., 19 F.2d 857, 859, quoting **Corpus Juris**, and certiorari denied 48 S.Ct. 117, 275 U.S. 557, 72 L.Ed. 424.
Ind.—Woodsmall v. Myers, 158 N.E. 646, 87 Ind.App. 69.
Iowa.—Platter v. Minneapolis & St. L. R. Co., 143 N.W. 992, 162 Iowa 142.
Okl.—Sharp v. Young, 78 P.2d 815, 817, 182 Okl. 596, citing **Corpus Juris.**
Uncontroverted evidence see supra § 1038.

93. U.S.—Easton v. Brant, C.C.A. Cal., 19 F.2d 857, 859, quoting **Corpus Juris**, and certiorari denied 48 S.Ct. 117, 275 U.S. 557, 72 L.Ed. 424.
Ill.—Jeffery Bulk Service Station v. Goetzinger, 26 N.E.2d 146, 304 Ill. App. 254.
Puerto Rico.—Schroder v. Mayaguez Municipal Council, 7 Puerto Rico 1.
Requirement of clear and convincing proof see supra § 1023.

Party's testimony contradicted
Pa.—Mentser v. Mentser, 7 A.2d 541, 136 Pa.Super. 582—Twaddell v. Twadell, 95 Pa.Super. 429.

94. U.S.—Easton v. Brant, C.C.A. Cal., 19 F.2d 857, 859, quoting **Corpus Juris**, and certiorari denied 48 S.Ct. 117, 275 U.S. 557, 72 L.Ed. 424.
Iowa.—Anderson v. Ætna Life Ins. Co., 188 N.W. 883, 193 Iowa 1037.
Mich.—Gardner v. Johnson, 210 N.W. 295, 236 Mich. 258.
Pa.—Kline v. Fitzgerald Bros., 110 A. 348, 267 Pa. 468—Brenard Mfg. Co. v. Kroker, 91 Pa.Super. 254—In re Katzenmoyer's Estate, 31 Pa. Dist. & Co. 296.

Proof required to vary or contradict written instrument
The testimony of two witnesses, or the testimony of one witness with corroborating circumstances equivalent to the testimony of another witness, is necessary to vary or contradict a written instrument on ground of fraud or mistake.—Pender v. Cook, 150 A. 892, 300 Pa. 468—Werner v. Deutsch, 7 A.2d 511, 135 Pa.Super. 519—Preis v. Mulholland & Gotwals, 96 Pa.Super. 104—Hill v. Smith, 75 Pa.Super. 340—Hrestak v. Koscevic, 45 Dauph.Co.,Pa., 88—In re Orwig, 16 York Leg.Rec.,Pa., 149.

95. U.S.—Easton v. Brant, C.C.A. Cal., 19 F.2d 857, 859, quoting **Corpus Juris**, and certiorari denied 48 S.Ct. 117, 275 U.S. 557, 72 L.Ed. 424.
23 C.J. p 54 note 10.

96. U.S.—Easton v. Brant, supra, quoting **Corpus Juris.**
23 C.J. p 54 note 11.

97. N.J.—Benson v. Woolverton, 15 N.J.Eq. 158.

98. Ala.—Loeb v. Waller, 18 So. 268, 110 Ala. 487.
Ill.—O'Donnell v. Kelliher, 62 Ill. App. 641.

99. Wis.—Smith v. Allis, 9 N.W. 155, 52 Wis. 337.
23 C.J. p 54 note 14.

1. U.S.—Baush Mach. Tool Co. v.

and a material fact need not be proved by direct evidence; it is sufficient if there is evidence from which the fact can properly be inferred.[2] The triers of fact may draw all reasonable and legitimate inferences and deductions from the evidence adduced before them;[3] indeed, it is their duty to

Aluminum Co. of America, C.C.A. Conn., 72 F.2d 236, certiorari denied Aluminum Co. of America v. Bausch Machine Tool Co., 55 S.Ct. 104, 293 U.S. 589, 79 L.Ed. 683.

Cal.—Baumann v. Harrison, App., 115 P.2d 530—General Petroleum Corporation of California v. City of Los Angeles, App., 109 P.2d 754—Kossine v. Styliano, 105 P.2d 952, 40 Cal.App.2d 721—Adrian v. Guyette, 69 P.2d 197, 21 Cal.App.2d 306—Blank v. Olcovich Shoe Corporation, 67 P.2d 376, 20 Cal.App.2d 456.

Conn.—Adams v. Mohican Hotel, 200 A. 336, 124 Conn. 400—Rescigno v. Rosner, 198 A. 751, 124 Conn. 253—Saunders v. New England Collapsible Tube Co., 110 A. 538, 95 Conn. 40.

Ga.—Stephens v. Wilson, 197 S.E. 350, 58 Ga.App. 24.

Ky.—Prudential Ins. Co. of America v. Tuggle's Adm'r, 72 S.W.2d 440, 254 Ky. 814.

Me.—Cooper & Co. v. American Can Co., 153 A. 889, 130 Me. 76.

Mich.—Butrick v. Snyder, 210 N.W. 311, 236 Mich. 300.

N.J.—Nardone v. Public Service Electric & Gas Co., 174 A. 745, 113 N.J. Law 540—Ocean Accident & Guarantee Corporation v. Lincoln Nat. Bank, 172 A. 45, 112 N.J.Law 550—Glaser v. B. V. D. Sales Corporation, 170 A. 49, 112 N.J.Law 179—Queen v. Jennings, 108 A. 379, 93 N.J.Law 353.

Pa.—Kamensky v. Honoroff, 89 Pa. Leg.J. 377.

Vt.—Fairbanks v. Frank, 176 A. 294, 107 Vt. 45.

Wash.—Scholz v. Leuer, 109 P.2d 294—Thomas v. Inland Motor Freight, 68 P.2d 603, 190 Wash. 428.

23 C.J. p 54 note 16.

Circumstantial evidence generally see supra § 1039.

"Inference" defined see Inference.

"Reasonable inference" is process of reasoning whereby reasonable conclusion may be drawn from facts admitted or established by evidence or from common knowledge or experience that a further fact is established.—Stambaugh v. Hayes, 103 P. 2d 640, 44 N.M. 443.

Where ultimate facts are not susceptible of direct proof, their existence must directly follow as reasonable conclusion from basic facts and circumstances shown.—Fenton v. Hart, Mo.App., 73 S.W.2d 1034.

Facts within adversary's knowledge

(1) Where facts of transaction are entirely within adverse parties' knowledge, and plaintiff cannot secure direct testimony, court may base judgment on reasonable inferences from evidence.—Moore v. McDonald, 9 P.2d 556, 122 Cal.App. 61.

(2) A litigant should not lose his property, or be required to pay his money as damages, when his liability for such damages rests only on inference, especially where the fact necessary to establish liability, if it existed, was within the exclusive knowledge of the opposing party, who testified in the case and failed to state such fact.—Western Union Telegraph Co. v. Mobley, Tex.Civ. App., 220 S.W. 611.

Implications and inferences alone will not sustain finding; but when accompanied by relevant testimony of probative character, they will do so.—Smith v. Ohio Millers' Mut. Fire Ins. Co., 6 S.W.2d 920, 320 Mo. 146—Keim v. Blackburn, Mo., 280 S.W. 1046.

Liability

A mere inference is insufficient to fix liability.—Green v. Wilson, 105 S. W.2d 1074, 194 Ark. 165.

2. Conn.—Fiala v. Connecticut Electric Service Co., 158 A. 211, 114 Conn. 172.

Ind.—Bell v. McCain, 2 N.E.2d 241, 102 Ind.App. 291—Beaman v. Cleveland, C., C. & St. L. Ry. Co., 134 N.E. 510, 77 Ind.App. 633.

Mo.—Schanbacher v. Lucido Bros. Grocery Co., App., 93 S.W.2d 1076.

Neb.—Perry v. Johnson Fruit Co., 243 N.W. 655, 123 Neb. 558—Finegold v. Union Outfitting Co., 193 N.W. 331, 110 Neb. 202—Weber v. Thompson-Belden & Co., 181 N.W. 649, 105 Neb. 606.

Or.—Donis v. Sawyer Service, 21 P.2d 776, 143 Or. 433.

Tenn.—Pickard v. Berryman, App., 142 S.W.2d 764.

Tex.—Galveston, H. & S. A. Ry. Co. v. Cook, Civ.App., 214 S.W. 539, dismissed for want of jurisdiction.

Demand and refusal need not be proved in exact words, but it is enough that there is ample evidence from which the jury can infer them.—Richardson v. Stinson, 100 So. 209, 211 Ala. 254.

Motive with which an act is done may be determined by inference from the facts and circumstances connected with the transaction and the parties to it.—Winestine v. Rose Cloak & Suit Co., 107 A. 500, 93 Conn. 633.

3. U.S.—Caldwell v. U. S., D.C.Pa., 30 F.Supp. 308, affirmed, C.C.A., 114 F.2d 995.

Cal.—Juchert v. California Water Service Co., 106 P.2d 886, prior opinion, App., 97 P.2d 259—Hamilton v. Pacific Electric Ry. Co., 86 P.2d 829, 12 Cal.2d 598—Perry v. D. J. & T. Sullivan, Inc., 26 P. 2d 485, 219 Cal. 384—Wilton v. Clarke, 80 P.2d 141, 27 Cal.App.2d 1—Anglo-American Land Co. v. Heine, 198 P. 1009, 52 Cal.App. 472.

Colo.—Venetucci v. City of Colorado Springs, 63 P.2d 462, 99 Colo. 389.

Conn.—Dadio v. Dadio, 192 A. 557, 123 Conn. 88—Latham v. Hankey, 166 A. 400, 117 Conn. 5—Southern New England Ice Co. v. Town of West Hartford, 159 A. 470, 114 Conn. 496.

Ga.—White v. Hammond, 4 S.E. 102, 79 Ga. 182—Gaines v. Brown, 162 S.E. 722, 44 Ga.App. 630, reversed on other grounds 164 S.E. 806, 175 Ga. 66, conformed to 165 S.E. 454, 45 Ga.App. 525.

Ind.—Rush v. Hunziker, 24 N.E.2d 931—Federal Life Ins. Co. v. Sayre, 142 N.E. 223, 195 Ind. 7, followed in Federal Life Ins. Co. v. Harding, 166 N.E. 926, 201 Ind. 704—Bell v. McCain, 2 N.E.2d 241, 102 Ind.App. 291—Butz v. Lyle, 197 N. E. 700, 101 Ind.App. 331—Keenan Hotel Co. v. Funk, 177 N.E. 364, 93 Ind.App. 677—Charters v. Miller, 137 N.E. 67, 82 Ind.App. 535—Russell v. Scharfe, 130 N.E. 437, 76 Ind.App. 191.

Iowa.—In re Green's Estate, 288 N. W. 881, 227 Iowa 702—In re Secondary Road Dist. No. 11 of Clay County, 238 N.W. 66, 213 Iowa 988.

Mich.—Faustman v. Hewitt, 264 N. W. 863, 274 Mich. 458—Paull v. McBride, 263 N.W. 877, 273 Mich. 661—Wilkins v. Bradford, 225 N. W. 609, 247 Mich. 157—Heppenstall Steel Co. v. Wabash Ry. Co., 219 N.W. 717, 242 Mich. 464.

Mo.—Martin v. St. Louis-San Francisco Ry. Co., 46 S.W.2d 149, 329 Mo. 729, certiorari denied St. Louis-San Francisco Ry. Co. v. Martin, 52 S.Ct. 644, 286 U.S. 562, 76 L.Ed. 1294—Hulsey v. Tower Grove Quarry & Construction Co., 30 S.W.2d 1018, 326 Mo. 194—Surbeck v. Surbeck, App., 208 S.W. 645.

Mont.—Orem v. Hansen Packing Co., 7 P.2d 546, 550, 91 Mont. 222, citing **Corpus Juris.**

N.J.—Kellogg v. Martin, 22 A.2d 430, 432, citing **Corpus Juris**—Bowen v. Healy's Inc., 197 A. 655, 16 N.J. Misc. 113, appeal dismissed Fisher v. Healy's Special Tours, 1 A.2d 848, 121 N.J.Law 198.

N.Y.—Swistak v. Erie R. Co., 203 N. Y.S. 791, 208 App.Div. 553, affirmed 147 N.E. 190, 239 N.Y. 549—Gallagher v. Perot, 202 N.Y.S. 441, 122 Misc. 845.

N.C.—Long v. Eagle 5, 10 and 25¢ Store Co., 198 S.E. 573, 214 N.C. 146.

make, and give consideration to, all inferences and deductions which may properly be drawn.[4] A reasonable inference is as truly evidence as the matter on which it is based, and is not a mere presumption or guess;[5] appropriate inferences from proved facts are not a low order of evidence,[6] and whether or not they should be permitted to overcome positive and direct testimony depends, in every case, on the relative strength of the one or the other.[7]

An inference can be drawn only from the facts in evidence,[8] and cannot be based on surmise, spec-

Ohio.—Frommel v. Coney Island, App., 36 N.E.2d 9.
Or.—Curtis v. Keller, 298 P. 196, 136 Or. 67.
Pa.—Broad Street Trust Co. v. Heyl Bros., 193 A. 397, 128 Pa.Super. 65—Nesbit v. Vandervort & Curry, 193 A. 393, 128 Pa.Super. 58.
Tex.—Schumaker v. Whiteside-Appling Motor Co., Civ.App., 144 S.W.2d 944—Missouri-Kansas-Texas R. Co. of Texas v. McKinney, Civ.App., 126 S.W.2d 789, affirmed Missouri, K. & T. R. Co. of Texas v. McKinney, Com.App., 145 S.W.2d 1081—Edwards v. West Texas Hospital, Civ.App., 89 S.W.2d 801, error dismissed—Employers' Liability Assur. Corporation v. Mills, Civ.App., 81 S.W.2d 1028, error dismissed—Associated Indemnity Corporation v. Baker, Civ.App., 76 S.W.2d 153, error dismissed—Mrs. Baird's Bakery v. Davis, Civ.App., 54 S.W.2d 1031—Reilly v. Buster, Civ.App., 52 S.W.2d 521, reversed on other grounds 82 S.W.2d 931, 125 Tex. 323—Spencer v. Pettit, Civ.App., 17 S.W.2d 1102, affirmed, Com.App., 34 S.W.2d 798—Community Natural Gas Co. v. Allen, Civ.App., 15 S.W.2d 657—Galveston, H. & S. A. R. Co. v. Cook, Civ. App., 214 S.W. 539, dismissed for want of jurisdiction.
Vt.—Fairbanks v. Frank, 176 A. 294, 107 Vt. 45.
Va.—Barry v. Tyler, 199 S.E. 496, 171 Va. 381.
23 C.J. p 55 note 18.

Existence of fact

(1) Existence of resulting facts may be inferred from proved existence of relevant facts.—Capitol Hotel Co. v. Rittenberry, Tex.Civ.App., 41 S.W.2d 697, error dismissed.

(2) While courts will not presume existence of essential fact, they are required to give reasonable construction to language used by witnesses, and may infer existence of such fact.—Great American Indemnity Co. v. Essary, Tex.Civ.App., 57 S.W.2d 891, error dismissed.

Jury may draw as many different inferences as the different basic facts and circumstances shown in evidence may justify.—Wills v. Berberich's Delivery Co., 134 S.W.2d 125, 345 Mo. 616—Beaber v. Kurn, 91 S.W.2d 70, 231 Mo.App. 22—Kelly v. Kansas City Building & Loan Ass'n, 81 S.W.2d 440, 229 Mo.App. 686.

Necessary or warranted inference

(1) The inference need not be a necessary one.—Puget Sound Electric R. Co. v. Benson, Wash., 253 F. 710, 165 C.C.A. 304—23 C.J. p 55 note 17.

(2) The evidence may warrant but not require, a certain inference.—Clarkson v. United Railroads of San Francisco, 227 P. 710, 67 Cal.App. 372.

(3) When it is said that a certain inference is warranted by certain facts proved, no more is meant than that the jury are reasonably warranted in making that deduction from the facts proved.—Engstrom v. Auburn Automobile Sales Corporation, [illegible] P.2d [illegible], 11 Cal.2d [illegible].

Inference from admissions

Facts may be inferred from admissions of other facts.—Brea v. McGlashan, 39 P.2d 877, 3 Cal.App.2d 454.

Action and nonaction

Court is authorized to look and to draw inferences from acts and sometimes nonaction, when demonstration or other means of information fails to disclose the true state of any subject of inquiry.—Hoch v. Martin, 188 A. 602, 124 Pa.Super. 445.

Where defendant offered no evidence, but demurred to the evidence of plaintiff, the jury may properly resolve every inference in plaintiff's favor.—Brigham City Fruit Growers' Ass'n v. G. H. Zollmann Produce Co., Mo., 220 S.W. 911.

Oral or written contract

That contract for sale of assets to defendant was partly in writing did not preclude conclusion from evidence that an oral contract for repurchase of stock from plaintiff existed.—Cottingham v. Hershey, C.C.A.Pa., 71 F.2d 473.

4. Cal.—Merced Security Sav. Bank v. Bent Bros., 279 P. 765, 207 Cal. 652—Rovegno v. San Jose Knights of Columbus Hall Ass'n, 291 P. 848, 108 Cal.App. 591.
Ind.—Czuczko v. Golden-Gary Co., 177 N.E. 466, 94 Ind.App. 47, rehearing denied 179 N.E. 19, 94 Ind.App. 47—New York Cent. R. Co. v. Reidenbach, 125 N.E. 55, 71 Ind.App. 390.
Mich.—Sullivan v. Detroit & Windsor Ferry Co., 238 N.W. 221, 255 Mich. 575.
N.Y.—Donohue v. Erie County Sav. Bank, 285 N.Y. 24, 32 N.E.2d 777, reversing 15 N.Y.S.2d 689, 258 App. Div. 1, and reargument denied 34 N.E.2d 904.
Or.—Donis v. Sawyer Service, 21 P.2d 776, 143 Or. 433.

5. Iowa.—Stickling v. Chicago, R. I. & P. Ry. Co., 247 N.W. 642, 215 Iowa 1312.
Me.—Gould v. Maine Central Transp. Co., 9 A.2d 263, 136 Me. 336—Brooks-Bischoffberger v. Bischoffberger, 149 A. 606, 129 Me. 52.
Mich.—Butrick v. Snyder, 210 N.W. 311, 236 Mich. 300.
Or.—Gray v. Hammond Lumber Co., 232 P. 637, 113 Or. 570, rehearing denied 233 P. 561, 113 Or. 570.
Pa.—Hodgson v. Bigelow, 7 A.2d 338, 335 Pa. 497.

Legal evidence

Finding reasonably inferable from facts and conditions directly proved is "legal evidence" and not mere conjecture.—Hornick v. Bethlehem Mines Corporation, 161 A. 75, 307 Pa. 264.

6. Neb.—Smith v. Bankers Nat. Life Ins. Co., 265 N.W. 546, 130 Neb. 552.
23 C.J. p 55 note 19.

Inferences drawn from physical facts may be as strong as direct evidence.—Barry v. Tyler, 199 S.E. 496, 171 Va. 381.

7. Iowa.—Womack v. Horsley, 152 N.W. 65, 178 Iowa 1079.
Neb.—Smith v. Bankers Nat. Life Ins. Co., 265 N.W. 546, 130 Neb. 552.
Tex.—Texas Motor Coaches v. Palmer, Civ.App., 97 S.W.2d 253, reversed on other grounds 121 S.W.2d 323, 132 Tex. 77.

8. Ark.—Fort Smith Gas Co. v. Blankenship, 102 S.W.2d 75, 193 Ark. 718.
Cal.—Reese v. Smith, 70 P.2d 933, 935, 9 Cal.2d 324, quoting **Corpus Juris.**
Conn.—Latham v. Hankey, 166 A. 400, 117 Conn. 5.
Me.—Bechard v. Lake, 11 A.2d 267, 136 Me. 385—Eddy v. Bangor Furniture Co., 183 A. 413, 134 Me. 168.
N.Y.—Blaikie v. Post, 122 N.Y.S. 292, 137 App.Div. 648.
Or.—Inwall v. Transpacific Lumber Co., 108 P.2d 522.
Tex.—Garrett v. Hunt, Com.App., 283 S.W. 489, reversing Hunt v. Garrett, Civ.App., 275 S.W. 96.
Wash.—Prentice Packing & Storage Co. v. United Pac. Ins. Co., 106 P.2d 314, 5 Wash.2d 144.
Wyo.—Wright v. Conway, 242 P.

ulation, conjecture, or guess;[9] it must be reasonably drawn from, and supported by, the facts on which it purports to rest,[10] and must be made in accordance with correct and common modes of reasoning.[11] An inference has been required to be

1107, 34 Wyo. 1, denying rehearing 241 P. 369, 34 Wyo. 1.
23 C.J. p 55 note 23.
Inference based on inference see supra § 116.
Presumption based on presumption see supra § 116.

Basis on legal testimony required. —W. P. Brown & Sons Lumber Co. v. Yarbrough, 169 So. 337, 27 Ala. App. 229.

Inference may be based on circumstantial, as well as on direct, evidence.
Cal.—Paiva v. California Door Co., 242 P. 887, 75 Cal.App. 323.
Ind.—Odd Fellows Cemetery of New Haven v. Daniels, App., 33 N.E.2d 357.
N.Y.—Atrick v. Bellecourt Realty Corporation, 21 N.Y.S.2d 537.

Fact as evidence
Facts from which another fact may be rationally inferred are evidence of that fact.—Olberg v. Kroehler, C.C.A.Minn., 1 F.2d 140.

Evidence held to authorize inference
(1) That plaintiff's loss of sexual power was result of injury.—Morris v. Union Depot Bridge & Terminal R. Co., 8 S.W.2d 11, 320 Mo. 371.

(2) That reservation of oil royalty was omitted from deed through fraud, accident, or mistake.—Middleton v. Brawley, Tex.Civ.App., 12 S.W.2d 257.

(3) That the word "branded" is in general use among potato dealers to indicate quality.—Miles v. Vermont Fruit Co., 124 A. 559, 98 Vt. 1.

Evidence held not to authorize inference
(1) Statement that witness does not know which of two inconsistent things are true raises no inference that either is fact.—Leach v. Board of Dental Examiners of California, 262 P. 61, 87 Cal.App. 207.

(2) That automobile injuring plaintiff had been struck and forced on sidewalk was not inferable from evidence of dent in car.—Goss v. Pacific Motor Co., 259 P. 455, 85 Cal. App. 455.

(3) Pedestrian's burden of proving motorist's failure to warn was not met by drawing inference of such failure from silence of witnesses on the matter.—Paskewicz v. Hickey, 149 A. 671, 111 Conn. 219.

(4) Mere testimony of defendant's bookkeeper that defendant's books showed a balance due from plaintiff did not tend to prove that plaintiff refused to accept and pay for certain articles constructed by defendant for plaintiff pursuant to a con tract between them.—New Haven Sand Blast Co. v. Dreisbach, 128 A. 320, 102 Conn. 169.

(5) That subsequent experiment disclosed person could be recognized in time to stop train was insufficient to authorize inference that engineer actually recognized deceased flagman. —Voorhees v. Chicago, R. I. & P. Ry. Co., 30 S.W.2d 22, 325 Mo. 835, 70 A.L.R. 1106.

(6) Other evidence.
U.S.—Royal Baking Powder Co. v. Hessey, C.C.A.Md., 76 F.2d 645, affirming, D.C., In re L. Van Bokkelen, 7 F.Supp. 639, certiorari denied Lowendahl v. Hessey, 56 S.Ct. 110, 296 U.S. 595, 80 L.Ed. 421.
Mo.—Schaeffer v. Reineke, App., 121 S.W.2d 213.

9. U.S.—Sinclair Refining Co. v. Jenkins Petroleum Process Co., C. C.A.Me., 99 F.2d 9, certiorari denied Jenkins Petroleum Process Co. v. Sinclair Refining Co., 59 S. Ct. 362, 305 U.S. 659, 83 L.Ed. 427, rehearing denied 59 S.Ct. 464, 306 U.S. 667, 83 L.Ed. 1062, rehearing denied 59 S.Ct. 1035, 307 U.S. 651, 83 L.Ed. 1530—Kentwood Lumber Co. v. Illinois Cent. R. Co., C.C.A. La., 65 F.2d 663.
Ark.—Missouri Pac. R. Co. v. Ross, 109 S.W.2d 1246, 194 Ark. 877.
Cal.—Hubbert v. Aztec Brewing Co., 80 P.2d 185, 26 Cal.App.2d 664, followed in Cerezo v. Aztec Brewing Co., 80 P.2d 198, 26 Cal.App.2d 754, and rehearing denied Hubbert v. Aztec Brewing Co., 80 P.2d 1016, 26 Cal.App.2d 664.
Conn.—General Petroleum Products v. Merchants' Trust Co., 160 A. 296, 115 Conn. 50.
Ill.—Stewart v. McIntosh, 9 N.E.2d 427, 291 Ill.App. 65.
Ind.—Odd Fellows Cemetery of New Haven v. Daniels, App., 33 N.E.2d 357.
Me.—Bechard v. Lake, 11 A.2d 267, 136 Me. 385.
N.Y.—Corrigan v. Bobbs-Merrill Co., 126 N.E. 260, 228 N.Y. 58, 10 A.L.R. 662, reversing 169 N.Y.S. 1089, 182 App.Div. 919.
R.I.—Da Rosa v. First Nat. Stores, 4 A.2d 918, 62 R.I. 213—Noel v. Berard, 190 A. 686, 57 R.I. 463—Kilgore v. Shepard Co., 158 A. 720, 52 R.I. 151.
Tex.—Texas Employers' Ins. Ass'n v. Mints, Civ.App., 10 S.W.2d 220.

Impossibility of proof
Court or jury cannot supplement facts with speculation, and draw inference, requiring support by evidence, merely because facts necessary for recovery are beyond scope of possible evidence.—Cox v. St. Louis-San Francisco Ry. Co., 9 S.W. 2d 96, 223 Mo.App. 14.

10. U.S.—Kentwood Lumber Co. v. Illinois Cent. R. Co., C.C.A.La., 65 F.2d 663.
Ala.—Southern Ry. Co. v. Dickson, 100 So. 665, 211 Ala. 481—W. P. Brown & Sons Lumber Co. v. Yarbrough, 169 So. 337, 27 Ala.App. 229.
Ind.—Spickelmier Fuel & Supply Co. v. Thomas, 144 N.E. 566, 81 Ind. App. 604.
Tex.—Garrett v. Hunt, Com.App., 283 S.W. 489, reversing Hunt v. Garrett, Civ.App., 275 S.W. 96.

Reasonable belief in impartial mind
When probability of truth of inference is sufficient to induce reasonable belief in impartial mind, court is justified in finding the fact.—Ruerat v. Stevens, 155 A. 219, 113 Conn. 333.

Remoteness
(1) "The more remote the inference, the more enfeebled its probative force."—Sturm v. Employers' Liability Assur. Corporation, 212 Ill. App. 354, 363.

(2) "A jury is not permitted to indulge in . . . a series of inferences with only remote direct evidence upon which to support it. This goes beyond the bounds of inference and enters the realm of speculation."—Da Rosa v. First Nat. Stores, 4 A.2d 918, 922, 62 R.I. 213.

(3) "The decision on deductions from evidence cannot be made on remote inferences."—Green v. Texas & P. Ry. Co., 81 S.W.2d 669, 673, 125 Tex. 168, reversing, Civ.App., 50 S. W.2d 353.

(4) "The law requires an open, visible connection between the principal and evidentiary facts and the deduction from them, and does not permit a decision to be made on remote inferences."—De Kalb County v. Tennessee Electric Power Co., 67 S.W.2d 555, 559, 17 Tenn.App. 343.

11. Ind.—Russell v. Scharfe, 130 N. E. 437, 76 Ind.App. 191.
Mo.—Adelsberger v. Sheehy, 59 S.W. 2d 644, 332 Mo. 954.
23 C.J. p 55 note 21.

Teachings of experience
The inferences to be drawn in given matter depend on facts, circumstances, and teachings of experience with regard to them.—Allan v. Essanee, Inc., 33 N.E.2d 271, 309 Mass. 1.

Unreliable premises
No inference of fact or of law is reliable if it is drawn from premises which are unreliable.—Schendel v.

based on probabilities,[12] and not on mere possibility or possibilities;[13] but according to other authorities, probabilities, as distinguished from facts proved, will not support an inference.[14]

An inference is to be considered in connection with all other facts which may weaken or strengthen it.[15] An inference is unjustified and without probative force if it is inconsistent with undisputed or clearly established facts,[16] or is contrary to direct, positive, and uncontradicted testimony.[17] Evidence which is consistent with direct, positive, and otherwise uncontradicted testimony that a fact does not exist will not support an inference that it does,[18] and an inference should not be adopted from a few of the facts proved when it is absolutely inconsistent with, and repelled by, other equally well proved facts.[19] It has also been said that "the susceptibility of a fact to produce an inference must be denied, when the probative force or effect of that inference may be wholly frustrated, at the option of the one to be affected by it."[20]

Overcoming inference. A permissible inference may be overcome by proof to the contrary;[21] but an inference is not overcome by contradictory evidence which is vague or uncertain or is weakened by contradictions or improbabilities.[22]

Chicago, M. & St. P. Ry. Co., 206 N. W. 436, 165 Minn. 223.

12. U.S.—Kentwood Lumber Co. v. Illinois Cent. R. Co., C.C.A.La., 65 F.2d 663.

Inference is never certainty, but it may be plain enough to justify finding of fact.—Tortora v. State, 199 N.E. 44, 269 N.Y. 167, affirming 279 N.Y.S. 794, 244 App.Div. 861—In re Bohenko's Estate, 4 N.Y.S.2d 420, 254 App.Div. 140.

13. U.S.—Kentwood Lumber Co. v. Illinois Cent. R. Co., C.C.A.La., 65 F.2d 663.
Cal.—Cloverdale Union High School Dist. of Sonoma County v. Peters, 264 P. 273, 88 Cal.App. 731.
Conn.—General Petroleum Products v. Merchants' Trust Co., 160 A. 296, 298, 115 Conn. 50, citing **Corpus Juris.**
Ind.—Deery v. Hall, 175 N.E. 141, 96 Ind.App. 683.
Iowa.—Phillips v. Briggs, 245 N.W. 720, 215 Iowa 461.
Md.—Shafer v. State, for Use of Sundergill, 189 A. 273, 171 Md. 506.
Miss.—Masonite Corporation v. Hill, 154 So. 295, 170 Miss. 158, 95 A.L.R. 157.
Ohio.—Scrabic v. Cincinnati, N. O. & T. P. Ry. Co., 182 N.E. 528, 531, 42 Ohio App. 473, citing **Corpus Juris.**
Wyo.—Wright v. Conway, 242 P. 1107, 34 Wyo. 1, denying rehearing 241 P. 369, 34 Wyo. 1.
23 C.J. p 56 note 24.

Possible existence of fact to be proved
It is not enough for one who has the burden of proving a fact merely to show that it may have been, but he must go further and furnish some logical basis for the inference that it was or is.—Central Bank & Trust Co. v. Alabama Broom & Mattress Co., 85 So. 738, 204 Ala. 410.

14. Me.—Bechard v. Lake, 11 A.2d 267, 136 Me. 385—Eddy v. Bangor Furniture Co., 183 A. 413, 134 Me. 168—Mahan v. Hines, 115 A. 132, 120 Me. 371—Bennett v. Thurston, 114 A. 459, 120 Me. 368.
R.I.—Kilgore v. Shepard Co., 158 A. 720, 52 R.I. 151.
Wyo.—Wright v. Conway, 242 P. 1107, 34 Wyo. 1, denying rehearing 241 P. 369, 34 Wyo. 1.

15. N.Y.—In re Callahan's Estate, 254 N.Y.S. 46, 142 Misc. 28, affirmed In re Callahan, 259 N.Y.S. 987, 236 App.Div. 814, affirmed In re Callahan's Estate, 188 N.E. 48, 262 N.Y 524.

Absence of report of accident
Inference that there was no accident to passenger because there was no report thereof, would have little weight without evidence of rules regarding reports.—Mallory v. International Ry. Co., 231 N.Y.S. 385, 224 App.Div. 455.

16. Ind.—New York Cent. R. Co. v. Green, 15 N.E.2d 748, 105 Ind.App. 488—Russell v. Scharfe, 130 N.E. 437, 76 Ind.App. 191.
Mo.—Lappin v. Prebe, 131 S.W.2d 511, 345 Mo. 68—Stines v. Dillman, App., 4 S.W.2d 477—George v. Missouri Pac. R. Co., 251 S.W. 729, 213 Mo.App. 668.

Hypothesis contradictory to or inconsistent with undisputed fact cannot be accepted in considering circumstantial evidence.—Lusby v. Wing, 224 N.W. 554, 207 Iowa 1287.

Basis of inference contradicted
In action for death of switchman crushed between couplers, inference from plaintiff's evidence that deceased was attempting to get out from between cars on opposite side of train, or to close knuckle on way out when cars separated, but was caught when cars came together, was not destroyed merely because railroad produced evidence that switchman had gotten in clear and had returned, where such evidence was based on a state of facts directly contradicted by plaintiff's evidence.—Truesdale v. Wheelock, 74 S.W.2d 585, 335 Mo. 924.

17. Cal.—Huddy v. Chronicle Pub. Co., 103 P.2d 421, 15 Cal.2d 554, superseding, App., 94 P.2d 56—Curcic v. Nelson Display Co., 64 P.2d 1153, 19 Cal.App.2d 46—Giannini v. Southern Pac. Co., 276 P. 618, 98 Cal.App. 126.
Ill.—Lowry v. Chicago & N. W. Ry. Co., 248 Ill.App. 306.
Ind.—Pennsylvania Ice & Coal Co. v. Elischer, 21 N.E.2d 436, 106 Ind. App. 613.
Mo.—Raw v. Maddox, 93 S.W.2d 282, 230 Mo.App. 515.

18. U.S.—Pennsylvania R. Co. v. Chamberlain, N.Y., 53 S.Ct. 391, 288 U.S. 333, 77 L.Ed. 819, reversing, C.C.A., Chamberlain v. Pennsylvania R. Co., 59 F.2d 986, certiorari granted Pennsylvania R. Co. v. Chamberlain, 53 S.Ct. 93, 287 U.S. 589, 77 L.Ed. 514—Winn v. Consolidated Coach Corporation, C.C.A.Tenn., 65 F.2d 256, certiorari denied 54 S.Ct. 453, 291 U.S. 668, 78 L.Ed. 1059, rehearing denied 54 S Ct. 557, 291 U.S. 651, 78 L.Ed. 1059.
Ala.—Equitable Life Assur. Soc. of U. S. v. Welch, 195 So. 554, 239 Ala. 453.

19. Ky.—Broughton's Adm'r v. Congleton Lumber Co., 31 S.W.2d 903, 235 Ky. 534.
Minn.—Akerson v. Great Northern Ry. Co., 197 N.W. 842, 844, 158 Minn. 369, citing **Corpus Juris.**
23 C.J. p 55 note 22.

20. U.S.—Lee v. Malleable Iron Range Co., D.C.Wis., 247 F. 795, modified on other grounds, C.C.A., 263 F. 896, certiorari denied 40 S. Ct. 342, 251 U.S. 562, 64 L.Ed. 415.

21. U.S.—New York & Cuba Mail S S. Co. v. Continental Ins. Co. of City of New York, D.C.N.Y., 32 F. Supp. 251, reversed on other grounds, C.C.A., 117 F.2d 404.

22. Cal.—Huddy v. Chronicle Pub. Co., 103 P.2d 421, 15 Cal.2d 554, superseding, App., 94 P.2d 56—Orwitz v. Board of Dental Examiners of California, 107 P.2d 407, 41 Cal.App.2d 653—Finley v. Steiner, 104 P.2d 819, 40 Cal.App. 2d 331.

F. PURPOSES FOR WHICH EVIDENCE AVAILABLE

§ 1045. In General

Facts are to be found by weighing all the competent evidence, whatever may be its source.

Facts are to be found by weighing all the evidence which is competent on the issues to be decided, whatever may be the source of the evidence.[23]

§ 1046. Evidence Introduced by Adverse Party

The weight and sufficiency of the evidence of one party may generally be aided by the evidence of the adverse party.

The weight and sufficiency of one party's evidence may generally be aided by evidence introduced by the adverse party,[24] but lack of conclusive proof of defendant's case cannot be used as a substitute for affirmative proof of plaintiff's claim.[25] A plaintiff not concluded by the unfavorable testimony of his own witnesses may have the benefit of facts favorable to him developed by defendant's evidence, which are not contradictory to his own statements or to the fundamental theory of the

23. Ind.—Federal Life Ins. Co. of Chicago, Ill., v. Bower, 193 N.E. 104, 107, 102 Ind.App. 65, citing **Corpus Juris.**

Mo.—Mertz v. Tower Grove Bank & Trust Co., 130 S.W.2d 611, 620, 344 Mo. 1150, citing **Corpus Juris.**

Ohio.—Farrell v. Travelers Ins. Co., 23 N.E.2d 952, 62 Ohio App. 319.

Wash.—Bresemann v. Hiteshue, 275 P. 543, 151 Wash. 187.

23 C.J. p 56 notes 26, 28.

Effect of admission of evidence in general see the C.J.S. title Trial § 86, also 64 C.J. p 137 notes 3–23.

Evidence restricted to special purpose see the C.J.S. title Trial §§ 87–89, also 64 C.J. p 137 note 24–p 139 note 54.

Conclusiveness of evidence on party introducing it see supra § 1040.

That automobile guest introduced testimony of witnesses which he knew would exonerate automobile driver and show that collision was caused through negligence of truck driver did not deprive guest of benefit of evidence tending to prove automobile driver's negligence.—Martinelli v. Poley, 292 P. 451, 210 Cal. 450.

24. U.S.—Campbell v. Preferred Accident Ins. Co. of New York, C.C.A.N.Y., 98 F.2d 53—Alpine Forwarding Co. v. Pennsylvania R. Co., C.C.A.N.Y., 60 F.2d 734, certiorari denied Pennsylvania R. Co. v. Alpine Forwarding Co., 53 S.Ct. 93, 287 U.S. 647, 77 L.Ed. 559—Root v. John T. Robinson Co., D.C.Mass., 55 F.2d 303.

Cal.—Jones v. Estep, 70 P.2d 492, 22 Cal.App.2d 181—Green v. Newmark, 28 P.2d 395, 136 Cal.App. 32.

Colo.—L. J. Mueller Furnace Co. v. J. A. Battin Stove Supply Co., 246 P. 272, 79 Colo. 418.

Conn.—Boardman v. Burlingame, 197 A. 761, 123 Conn. 646—Leitzes v. F. L. Caulkins Auto Co., 196 A. 145, 123 Conn. 459—Russell v. Vergason, 111 A. 625, 95 Conn. 431.

Ga.—Farm Products Co. v. Eubanks, 116 S.E. 327, 29 Ga.App. 604.

Ind.—Fishman v. Eads, 168 N.E. 495, 90 Ind.App. 137.

Iowa.—Urdangen v. Edwards, 174 N.W. 769, 187 Iowa 1005—Kolb v. Mall, 174 N.W. 226, 187 Iowa 193.

Kan.—Kansas Milling Co. v. Edwards, 197 P. 1113, 108 Kan. 616, 109 Kan. 194.

Ky.—Clark v. Commonwealth, 108 S.W.2d 1036, 269 Ky. 833.

La.—Lucas v. American Bankers' Ins. Co., App., 141 So. 394.

Md.—Blacher v. National Bank of Baltimore, 135 A. 383, 151 Md. 514, 49 A.L.R. 1366.

Mass.—Marquandt v. Young Women's Christian Ass'n, 184 N.E. 287, 282 Mass. 28.

Mo.—Smithers v. Barker, 111 S.W.2d 47, 341 Mo. 1017, reversing, App., 97 S.W.2d 121—Castorina v. Herrmann, 104 S.W.2d 297, 340 Mo. 1026—Young v. Wheelock, 64 S.W.2d 950, 333 Mo. 992, certiorari denied Wheelock v. Young, 54 S.Ct. 527, 291 U.S. 676, 78 L.Ed. 1064—Scoggins v. Miller, App., 80 S.W.2d 724—Long v. Binnicker, 63 S.W.2d 831, 228 Mo.App. 193—Wilson v. Washington Flour Mill Co., App., 245 S.W. 205—Yarbrough v. Wisconsin Lumber Co., App., 211 S.W. 713.

N.C.—Mitchell v. Saunders, 13 S.E.2d 242, 219 N.C. 178.

Ohio.—Farrell v. Travelers Ins. Co., 23 N.E.2d 952, 62 Ohio App. 319—Ford v. Commercial Motor Freight, 14 N.E.2d 354, 57 Ohio App. 384.

Okl.—Maxwell v. Zenith Limestone Co., 286 P. 879, 142 Okl. 286.

Or.—Brown v. Meier & Frank Co., 86 P.2d 79, 160 Or. 608—Hope v. Stoner, 218 P. 555, 108 Or. 592.

Pa.—Zaltouski v. Scranton Ry. Co., 165 A. 847, 310 Pa. 531—Silberstein v. Showell, Fryer & Co., 109 A. 701, 267 Pa. 298.

R.I.—Rossi v. Ronci, 7 A.2d 773.

Tex.—Tate v. Johnson, Civ.App., 140 S.W.2d 288, error dismissed, judgment correct—Century Ins. Co., Limited, of Edinburgh, Scotland, v. Hogan, Civ.App., 135 S.W.2d 224—Commercial Credit Co. v. Groseclose, Civ.App., 66 S.W.2d 709, error dismissed—Fidelity Union Casualty Co. v. Koonce, Civ.App., 51 S.W.2d 777.

Utah.—Haycraft v. Adams, 24 P.2d 1110, 82 Utah 347.

45 C.J. p 1261 note 97.

Codefendant called as adverse party

Where one of two or more joint defendants is called under Code Civ. Proc. § 2055, providing for calling adverse party as witness, his testimony, if material, is evidence for all purposes of case, and is binding on himself and codefendants, the statute not limiting effect of such testimony to witness' own case.—Goehring v. Rogers, 227 P. 689, 67 Cal.App. 260.

Evidence introduced by one defendant is available in plaintiff's behalf against another defendant.

Mo.—Mertz v. Tower Grove Bank & Trust Co., 130 S.W.2d 611, 344 Mo. 1150.

N.Y.—Neglia v. Chadorow, 237 N.Y.S. 81, 227 App.Div. 200.

Offer of compromise

A letter written by one party and introduced in evidence by him may be used by the adverse party, although, if the latter party had offered the letter in evidence, it might have been excluded on the ground that it was written for the purpose of effecting a compromise.—Madole v. Walker, Tex.Civ.App., 223 S.W. 280.

A referee may base his finding in favor of one party on evidence introduced by the adverse party.—N. E. Redlon Co. v. Franklin Square Corporation, 11 A.2d 821, 90 N.H. 519.

25. N.H.—Duval v. Metropolitan Life Ins. Co., 136 A. 400, 82 N.H. 543, 50 A.L.R. 1276.

case.[26] It has been said that a party cannot use the favorable part of a statement by his adversary's witness without also accepting the unfavorable part of the statement.[27]

G. EVIDENCE BEARING ON PARTICULAR FACTS OR ISSUES

§ 1047. Identity

The identity of a person may be shown by circumstantial evidence.

The identity of a person is a fact to be proved like any other fact,[28] and may be established by circumstantial evidence.[29] In pedigree cases involving proof of identity, coincidences and circumstances based on undisputed facts all pointing to only one conclusion should be proved.[30]

The inability of a person claiming an estate to recall the names of associates and the events of childhood will cast suspicion as to his identity.[31]

Weakness of evidence in disproof tends to strengthen the evidence of identity, since identity is more easily disproved than established.[32]

In particular cases evidence has been held sufficient or insufficient as to the identity of objects.[33]

§ 1048. Pedigree

In pedigree cases, one undisputed fact or coincidence is seldom of value; but the proof lies in the accumulation of such facts and coincidences, bound together.

In pedigree cases, proof of a single and independent undisputed fact or coincidence is seldom of value, but the accumulation of coincidences and undisputed facts and records, when bound together, multiplies the convincing quality of the entire case.[34] General reputation as to marriages, births, and deaths is highly satisfactory evidence.[35] The official register of births and baptisms is usually strong evidence of the facts stated therein[36] and better than testimony to oral declarations and admissions of strangers to the record.[37] Testimony of interested parties to oral declarations of persons long since dead is regarded with suspicion,[38] and is inferior in weight to testimony of witnesses who speak from personal knowledge.[39] Entries in a family Bible manifestly not contemporaneous with the event recorded are of doubtful value.[40]

§ 1049. Value

a. In general
b. Market value
c. Real Estate
d. Corporate stock
e. Services

26. Mo.—Smithers v. Barker, 111 S.W.2d 47, 341 Mo. 1017, reversing, App., 97 S.W.2d 121—Tunget v. Cook, App., 94 S.W.2d 921.

Contradictory evidence

Plaintiff is entitled to benefit of defendant's evidence supporting plaintiff's theory and consistent with latter's testimony, but cannot claim benefit of defendant's evidence contradicting plaintiff's testimony and contrary to his theory.—Elkin v. St. Louis Public Service Co., 74 S.W.2d 600, 335 Mo. 951.

27. N.Y.—Capella v. Southern Pac. Co., 218 N.Y.S. 366, 218 App.Div. 448.

28. Wash.—In re Ampusait's Estate, 250 P. 463, 141 Wash. 74.

Evidence held sufficient

Conn.—Toletti v. Bidizcki, 173 A. 223, 118 Conn. 531.

Mass.—Rich v. Weeks, 181 N.E. 712, 279 Mass. 452.

Tex.—Sproles v. Rosen, Civ.App., 47 S.W.2d 331, affirmed 84 S.W.2d 1001, 126 Tex. 51.

Evidence held insufficient

Wash.—In re Ampusait's Estate, 250 P. 463, 141 Wash. 74.

Corporation

Evidence was held to establish prima facie case of identity between corporation purchasing land on tax sale and corporation subsequently conveying title thereto.—Mills v. Snyder, Tex.Civ.App., 8 S.W.2d 790.

29. Cal.—Card v. Boms, 291 P. 190, 210 Cal. 200.

Mont.—Johnson v. Rocky Mountain Fire Ins. Co., 226 P. 515, 70 Mont. 411.

30. N.Y.—In re Hayden's Estate, 29 N.Y.S.2d 852, 176 Misc. 1078—In re Wood's Estate, 299 N.Y.S. 195, 164 Misc. 425.

Exclusion of more than one object

In pedigree cases involving proof of a person's identity, the process of constructing an inference of identification consists usually in adding together a number of circumstances, each of which by itself might be a feature of many objects, but all of which together can conceivably coexist in a single object only, and in every instance the process depends on the extent to which the common feature can be associated in human experience with more than one object.—In re Wood's Estate, supra.

31. Ky.—Jordan v. Caldwell, 12 Ky. Op. 66.

32. Ga.—Mullery v. Hamilton, 71 Ga. 720, 51 Am.R. 288.

33. **Motor vehicles held identified**

Ala.—Feore v. Trammel, 102 So. 529, 212 Ala. 325.

La.—Guarisco v. Molony, 7 La.App. 554.

Mo.—Linders v. Elliott & Barry Engineering Co., App., 258 S.W. 67.

Seed held identified

Ala.—Harris, Cortner & Co. v. Union Cotton Oil Co., 94 So. 559, 208 Ala. 535.

34. N.Y.—In re Hayden's Estate, 29 N.Y.S.2d 852, 176 Misc. 1078.

35. Tenn.—Flowers v. Haralson, 6 Yerg. 494, 496.

Not conclusive

"It is nowhere held that mere repute alone is sufficient to establish the ultimate fact of parentage."—Hays v. Claypool, 145 N.W. 874, 164 Iowa 297, 299.

36. U.S.—Denoyer v. Ryan, C.C. Minn., 24 F. 77.

37. U.S.—Denoyer v. Ryan, supra.

38. Cal.—In re Friedman, 172 P. 140, 178 Cal. 27.

23 C.J. p 58 note 76.

Declarations as to pedigree see supra §§ 226–232.

39. Tenn.—Saunders v. Fuller, 4 Humphr. 516.

40. La.—Greenwood v. New Orleans, 12 La.App. 426.

a. In General

Value may be shown by either direct or circumstantial evidence. The price paid for property is an important element, among others, in establishing value.

Value must be found from something which legitimately appears in the case,[41] although it may be shown by either direct or circumstantial evidence.[42] Value may be found from evidence not stated in terms of market price.[43] The purpose for which goods are to be used is not ordinarily the best test of their value.[44]

In particular cases evidence as to value has been held sufficient[45] and insufficient.[46]

Appraisement. An appraisement is prima facie evidence of the value of property.[47]

Price paid for property. The price paid for property at an actual, voluntary, and bona fide sale thereof is presumptive evidence of its value.[48] In addition, it has been stated that in determining the value of property the price paid is the best evidence,[49] strong evidence,[50] some evidence,[51] and ev-

41. Ga.—American Ins. Co. v. Keene, 7 S.E.2d 427, 61 Ga.App. 754.

42. Ga.—Farm Products Co. v. Eubanks, 116 S.E. 327, 29 Ga.App. 604—Landrum v. Swann, 68 S.E. 862, 8 Ga.App. 209.

Conclusiveness of evidence as to value see supra § 1041.

Weight of opinion evidence as to value see supra §§ 568, 569.

Value of accounts

Accounts are prima facie worth face value.—Smith v. McDonald, 130 So. 516, 24 Ala.App. 88.

43. Pa.—Jakway v. Lehigh Valley R. Co., 98 Pa.Super. 300.

Evidence of depreciation of commodity

Value of a commodity may be found from evidence that the commodity has depreciated a given amount below what it will sell for in the market; in other words, that the value is the selling price plus the depreciation stated in the evidence.—Jakway v. Lehigh Valley R. Co., supra.

44. Mo.—Stevens v. Springer, 23 Mo.App. 375.

45. Cal.—Bank of Italy Nat. Trust & Savings Ass'n v. Johnson, 46 P.2d 244, 7 Cal.App.2d 463.

Iowa.—Heessel v. Cresto Nat. Bank, 218 N.W. 298, 205 Iowa 508.

La.—Rapides Grocery Co. v. Grant, 142 So. 696, 174 La. 1083—Hardee v. Nevers, 120 So. 227, 10 La.App. 537.

Okl.—Darby Petroleum Corporation v. Mason, 54 P.2d 1046, 176 Okl. 138.

Wis.—Thomson v. Chicago, M. & St. P. Ry. Co., 217 N.W. 927, 195 Wis. 78.

22 C.J. p 185 note 52.

Interest in property

In action for depriving plaintiff of property rights and interest in mercantile stock and its related assets, finding that plaintiff's interest at time of exclusion was seven thousand five hundred dollars was sufficiently supported by evidence.—Fowler v. Shaw, 240 P. 970, 119 Kan. 576.

Value at sale as value at delivery

Proof of the value of a commodity at time of sale is sufficient to establish the value at the date of the delivery, in the absence of contrary evidence.—Dickerman v. Ohashi Importing Co., 218 P. 458, 63 Cal.App. 101.

Testimony as to actual market value

Testimony by insured as to the actual market value of the leased property at the time of the fire is sufficient to establish the actual cash value, to which the company's liability was limited by the terms of the policy.—Leer v. Continental Ins. Co. of New York, Mo.App., 250 S.W. 631.

46. **Original cost of article**

The cost of an article two years before loss was not sufficient evidence of value, in the absence of evidence of market value.—Rauch v. Wander, 203 N.Y.S. 553, 122 Misc. 650.

Exchange value placed by owner on property is insufficient to warrant a finding that such is its reasonable value.—Hay v. Boggs, 137 P. 474, 77 Wash. 329.

Tax assessment of personal property is insufficient to warrant a finding of its value as against some evidence to the contrary.—James v. Murray, 120 A. 376, 142 Md. 101.

47. D.C.—Ruppert v. McArdle, 42 App.D.C. 392, L.R.A.1915C 846, Ann.Cas.1916B 126.

Corporation's balance sheet stating value of assets is no evidence that such value actually exists.—Oxford Paper Co. v. U. S., Ct.Cl., 52 F.2d 1008, supplemented 56 F.2d 895.

Valuation by interested party

A jury is not bound to accept the valuation placed on property by an interested party.—Wallace v. First Nat. Bank, Tex.Civ.App., 246 S.W. 737.

48. Ill.—McKeown Bros. Co. v. Ogden Kennel Club, 269 Ill.App. 622.

N.Y.—Rathbone v. Ayer, 105 N.Y.S. 1041, 121 App.Div. 355, reversed on other grounds 89 N.E. 1111, 196 N.Y. 503.

Tenn.—Equitable Life Assur. Soc. of the United States v. Ellis, 65 S.W.2d 250, 255, 16 Tenn.App. 551, citing Corpus Juris.

Amount agreed on as trading value of property may be prima facie evidence of its true value.—Tydings v. Farrington Auto Co., 189 Ill.App. 387.

Price offered for property

Price one was willing to pay for lease and personalty a year after administratrix took it over was not fair criterion of value at time administratrix took possession.—Wilhelm v. Orlamuende's Adm'x, 15 S.W.2d 511, 228 Ky. 719.

49. U.S.—Ommen v. Talcott, D.C.N.Y., 175 F. 261, reversed on other grounds 188 F. 401, 112 C.C.A. 239.

22 C.J. p 185 note 51.

Judicial sale

D.C.—Ruppert v. McArdle, 42 App. D.C. 392, L.R.A.1915C 846, Ann. Cas.1916B 126.

Better evidence

The actual amount of money, for which the timber on a tract of land was sold by the thousand feet, is better evidence of its value per acre than a calculation at proved prices per thousand feet, based on a mere estimate of the quantities of the several kinds of timber.—Alderson v. Horse Creek Coal Land Co., 111 S.E. 589, 90 W.Va. 637.

50. Mont.—Doyle v. Union Bank & Trust Co., 59 P.2d 1171, 102 Mont. 563, 108 A.L.R. 1047.

Wash.—Cline v. Northern Pac. Ry. Co., 211 P. 878, 123 Wash. 86.

51. Ala.—Warrant Warehouse Co. v. Cook, 95 So. 282, 209 Ala. 60.

Cal.—Divani v. Donovan, 6 P.2d 247, 214 Cal. 447.

Kan.—Reeser v. Hammond, 253 P. 233, 122 Kan. 695.

N.Y.—Palestine Hebrew Wine Co. v. Terminal Warehouse Co., 123 N.Y.S. 346, 67 Misc. 456.

Tendency to prove value

The price paid for property has some tendency to prove value, but the weight of such evidence depends on the circumstances.—Houghton v. Grimes, 151 A. 642, 103 Vt. 54.

Price paid for one-half interest in property is some evidence of the value of the entire property, in the absence of countervailing testimony.—Hyde v. Henman, Mo.App., 256 S.W. 1088.

idence which is entitled to great weight.[52]

b. Market Value

The fair market value of property is the conclusion of such value drawn from all of the evidence. Ordinarily evidence of an actual sale in the open market at a certain price is sufficient to establish market value.

Market value may be shown either by direct or circumstantial evidence.[53]

The fair market value of property is the conclusion of such value by the jury drawn from the evidence, opinion and positive, shedding light thereon.[54] In the case of a commodity bought and sold in the open market, evidence of actual sale at a certain price is sufficient to establish that such was the market value.[55] The market value of property should not be held to be more than the largest amount shown to have been offered for it.[56] A witness testifying to the "value" of chattels presumably means their market value, unless a different meaning appears.[57]

In particular cases evidence as to market value has been held sufficient[58] or insufficient.[59]

c. Real Estate

The absolute and exact value of real estate is ordinarily difficult to ascertain. The price paid for the property and evidence of other property sales are important factors in estimating its value.

The absolute and exact value of real estate is not ordinarily ascertainable, either by appraisal or by actual sale,[60] but within certain limits the actual value is a question of judgment, and such judgment is necessarily more or less variable.[61]

The price paid for real property, improvements made thereon, and the amount offered to the owner for the property are important considerations in estimating its value,[62] although it has been consid-

52. N.Y.—People v. Public Service Commission, 104 N.E. 952, 210 N. Y. 456, modifying 143 N.Y.S. 148, 158 App.Div. 251, and reargument denied 105 N.E. 1095, 211 N.Y. 533.

53. Ga.—Farm Products Co. v. Eubanks, 116 S.E. 327, 29 Ga.App. 604.

54. Ala.—National Surety Co. v. Citizens' Light & Power Co., 78 So. 834, 201 Ala. 456.

Cost as element of value

Market value is not of necessity dependent on cost, and it does not follow as an ultimate fact that, because the ratio between sound value (cost of reproduction new less depreciation) and market price is so much in one case, it will be the same in another.—Winchester Mfg. Co. v. U. S., 75 Ct.Cl. 710, certiorari denied 54 S.Ct. 47, 290 U.S. 628, 78 L.Ed. 546—Winchester Mfg. Co. v. U. S., 72 Ct.Cl. 106, certiorari denied 52 S.Ct. 21, 284 U.S. 633, 76 L.Ed. 538.

55. Ill.—Sterling-Midland Coal Co. v. Great Lakes Coal & Coke Co., 266 Ill.App. 46.

Mo.—Jackson v. Western Union Tel. Co., 156 S.W. 801, 174 Mo.App. 70.

N.M.—Security State Bank v. Clovis Mill & Elevator Co., 68 P.2d 918, 920, 41 N.M. 341, citing **Corpus Juris.**

Tenn.—DaFoe v. Starek, 9 Tenn.App. 668, 677, citing **Corpus Juris.**

"The market value of any property is established when other property of the same kind has been the subject of purchase or sale to so great an extent and in so many instances that the value becomes fixed."—Pett v. Spiegel, 202 N.Y.S. 650, 655.

Absence of sales on particular date

In the absence of sales of a commodity on a particular date, recourse may be had to sales within a reasonable period before or after such date to establish the market value.—Clark v. Commercial Trust Co. of New Jersey, 181 A. 269, 119 N.J.Eq. 133.

Prices quoted by firms unable and unwilling to sell at such prices is not a proper basis for finding market price.—Becker v. Arnstaedt & Co., 202 N.Y.S. 627, 207 App.Div. 633.

Sale by auction is not a true criterion of market value.—Spear v. City of Bath, 130 A. 507, 125 Me. 27.

56. Ala.—Van Heuvel v. Long, 75 So. 339, 200 Ala. 27.

57. Okl.—Rogers v. O. K. Bus & Baggage Co., 148 P. 837, 46 Okl. 289, Ann.Cas.1917B 581.

58. Tex.—Milwaukee Mechanics' Ins. Co. v. Weathered, Civ.App., 234 S. W. 568.

Utah.—Kendall v. Samuel McIntyre Inv. Co., 203 P. 653, 59 Utah 228.

59. D.C.—Phillips & Sager v. Kern, 271 F. 547, 50 App.D.C. 317.

Ill.—Sharp v. National Bond & Inv. Co., 260 Ill.App. 297.

Tex.—Dargan v. Robinson, Civ.App., 140 S.W.2d 561, error dismissed.

Retail market price

N.Y.—Goldberg v. James, 177 N.Y.S. 157.

Testimony derived from newspaper reports

The testimony of witness deriving information as to market value from reports in single newspaper published in city remote from place of sale is not sufficient.—Commander v. Smith, 134 S.E. 412, 192 N.C. 159.

60. Iowa.—Rice v. Rice, 138 N.W. 1111, 158 Iowa 128.

Appraisal as prima facie proof

The decision of the secretary of state, accepting appraised value given to property conveyed to corporation, is prima facie proof of value. —Park v. Compton, C.C.A.Tex., 55 F. 2d 80.

61. Iowa.—Rice v. Rice, 138 N.W. 1111, 158 Iowa 128.

62. Mo.—Friedel v. Bailey, 44 S.W. 2d 9, 14, 329 Mo. 22, citing **Corpus Juris.**

23 C.J. p 57 note 42.

Auction sale

In determining whether taxpayer is overrated with reference to actual value in assessment of his property, sale by auction is not criterion of just or market value.—Spear v. City of Bath, 130 A. 507, 125 Me. 27.

Distress sale

The price paid for land sold under distress is not usually indicative of its true value.—Park v. Compton, C. C.A.Tex., 55 F.2d 80.

Bona fide offers to buy or sell may be some evidence of value.—United States v. Gideion-Anderson Co., D. C.Miss., 16 F.Supp. 627.

Cost and character of buildings

In determining whether a taxpayer is overrated, with reference to the actual value of buildings, their character and original cost are of but little significance.—Spear v. City of Bath, 130 A. 507, 125 Me. 27.

Rental value of land

The testimony as to restrictions placed on cotton acreage, and the price per acre therefor, is without probative value, where the factors taken into consideration in determining acreage value are not shown, and the figures produced are excessive in so far as rental value is concerned, and in sharp conflict with evidence as to highest price paid per acre.—First Carolinas Joint Stock

ered that they constitute evidence of present value only in the absence of more direct evidence on the subject.[63] Evidence of other land sales as proof of value of particular land can only be given such weight as in the court's judgment it is entitled to in the light of other competent evidence.[64]

In particular cases evidence as to the value of real estate has been held sufficient[65] or insufficient.[66]

Valuation for taxation. The assessed valuation of realty for purposes of taxation has some weight in determining its value,[67] but it is not controlling as a standard by which to ascertain the actual value.[68]

d. Corporate Stock

The par value of, and the price paid for, corporate stock are some of the elements entitled to weight in establishing its value.

The par value of corporate stock is presumed to be its actual value in the absence of other evidence,[69] but it may be shown to be worth more or less.[70] In determining the market value of corporate stock, all of the testimony offered on value may be considered.[71] The price paid for corporate stock is some evidence of its value.[72] The fact that corporate stock has never been offered for sale in a market,[73] or that there is no market,[74] is not evidence that the stock has no value.

In particular cases evidence as to the value of corporate stock has been held sufficient[75] or insufficient.[76]

Land Bank of Columbia v. Knotts, 190 S.E. 114, 183 S.C. 68.

63. Utah.—Crosby v. Anderson, 162 P. 75, 49 Utah 167.

64. U.S.—Chicago & N. W. Ry. Co. v. Eveland, D.C.S.D., 285 F. 425, vacated, C.C.A., 289 F. 783.

Similarly situated land

Unless the prices received for land are shown to be a fair average for property similarly situated, they do not form evidence of great value in determining the actual value of particular land.—People v. Millard, 139 N.E. 113, 307 Ill. 556.

Selling price of land throws light on the value of contiguous lands.—Rice v. Rice, 138 N.W. 1111, 158 Iowa 128.

65. **Rental value of unexpired lease of railroad**

U.S.—In re New York, N. H. & H. R. Co., D.C.Conn., 30 F.Supp. 541.

Absence of market value

In an action for damages to grass land by fire set out by sparks from a railroad engine, evidence was sufficient to show that there had been no sale of grass land of the kind involved in that vicinity at about the time of the fire and that there was no established market value.—Fort Worth & D. C. Ry. Co. v. Amason, Tex.Civ.App., 239 S.W. 359.

66. **Price paid for property** was insufficient to prove value, where there was no market at time of sale.—Tierney v. Home Title Ins. Co. of New York, 207 N.Y.S. 550, 124 Misc. 645, affirmed 213 N.Y.S. 922, 215 App. Div. 830.

Price paid at prior sale

Price paid for land fifteen years prior to conveyance is insufficient to prove value at time of conveyance. —Diltz v. Dodson, Tex.Civ.App., 207 S.W. 356.

67. Tenn.—Union Joint Stock Land Bank of Louisville v. Knox County, 97 S.W.2d 842, 20 Tenn.App. 273.

Va.—Dunn v. Silk, 155 S.E. 694, 155 Va. 504.

68. Md.—Thompson v. Williams, 60 A. 26, 100 Md. 195.

69. Ariz.—American Surety Co. of New York v. Duvall, 196 P. 457, 22 Ariz. 261—Tevis v. Ryan, 108 P. 461, 13 Ariz. 120.

Ind.—Walker v. Bement, 94 N.E. 339, 50 Ind.App. 645.

Book value of stock in close corporation is prima facie true value.—In re Frank's Estate, 261 P. 893, 123 Or. 286, 57 A.L.R. 1155.

70. Ky.—White v. Jouett, 144 S.W. 55, 147 Ky. 197.

23 C.J. p 57 note 47.

71. Mass.—Blabon v. Hay, 169 N.E. 268, 269 Mass. 401.

Mining stock

The potential value of mining ground may be an element to be considered as to the value of stock in a mining corporation, in the absence of market value.—Page v. Walser, 213 P. 107, 46 Nev. 390.

72. Colo.—Otis & Co. v. Grimes, 48 P.2d 788, 97 Colo. 219.

N.Y.—Pett v. Spiegel, 202 N.Y.S. 650.

Pa.—Chestnut Hill & Spring House Turnp. Road Co. v. Montgomery County, 76 A. 726, 228 Pa. 1.

Market quotations

The quotations of the selling price of securities dealt in on any public exchange are some evidence of the value of the security.—Kahle v. Mount Vernon Trust Co., 22 N.Y.S.2d 454.

Price which stock had almost uniformly brought is some evidence of its market value.—Blabon v. Hay, 169 N.E. 268, 269 Mass. 401.

Value in new corporation as value in old corporation

The value of the stock in a new corporation is some evidence of the value of the stock of an old corporation, for which the new corporation issued its stock "dollar for dollar."—Wunsch v. Consolidated Laundry Co., 198 P. 383, 116 Wash. 44.

Price received by individual stockholder

The price that a stockholder may have received for his shares is hardly persuasive as to the value of the entire corporate stock.—Beaver Drug Co. v. Hatch, 217 P. 695, 61 Utah 597.

73. Conn.—Henry v. Kopf, 131 A. 412, 104 Conn. 73.

74. N.Y.—Kahle v. Mount Vernon Trust Co., 22 N.Y.S.2d 454.

75. U.S.—Nolting v. Tait, D.C.Md., 3 F.Supp. 686.

Cal.—McClory v. Dodge, 4 P.2d 223, 117 Cal.App. 148.

Pa.—Ferrando v. U. S. Nat. Building & Loan Ass'n, 160 A. 716, 307 Pa. 25.

Vt.—Houghton v. Grimes, 151 A. 642, 103 Vt. 54.

Bank stock

N.D.—Elliott School Dist. No. 23 v. Gorder, 223 N.W. 694, 57 N.D. 668.

Good will value of stock

N.Y.—Pett v. Spiegel, 202 N.Y.S. 650.

Market value

U.S.—Heiner v. Crosby, C.C.A.Pa., 24 F.2d 191, affirming, D.C., Crosby v. Heiner, 12 F.2d 604.

N.J.—Clark v. Commercial Trust Co. of New Jersey, 131 A. 269, 119 N.J.Eq. 133.

76. Cal.—Lichtenberg v. Burdell, 281 P. 518, 101 Cal.App. 20.

Nev.—Page v. Walser, 213 P. 107, 46 Nev. 390.

Book value

Tex.—Wineinger v. Kay, Civ.App., 58 S.W.2d 876.

e. Services

The contract price is some evidence of the value of services.

The amount paid for services is not the criterion of their value, and is not, itself, sufficient to authorize a verdict.[77] However, the contract price is some evidence of the reasonable value of services, and is sufficient in the absence of contrary evidence.[78]

§ 1050. Other Facts or Issues

The courts have passed on the weight and sufficiency of evidence as to various other facts or issues, such as the cause of death, insanity, intention, etc.

In addition to evidence bearing on facts or issues treated in §§ 1047–1049 supra, and in various titles in this work, reference is made in the note to cases involving the weight and sufficiency of evidence as to other facts or issues.[79]

Evidence that stock was valueless
Vt.—Houghton v. Grimes, 151 A. 642, 103 Vt. 54.

Private sales as evidence of market value
Where the stock of a corporation was closely held and not generally traded, and private sales were few and in comparatively small lots, there was not sufficient dealing in the stock to justify taking the prices obtained as evidence of market value.—Pett v. Spiegel, 202 N.Y.S. 650.

Proof of sale of stock at less than par is insufficient to show that stock was worth less than par at time of purchase.—Nunemacher v. Western Motor Transport Co., 255 P. 266, 82 Cal.App. 233.

Evidence as to value of stock at a subsequent date is insufficient to prove value of such stock at a prior date.
Mont.—Doyle v. Union Bank & Trust Co., 59 P.2d 1171, 102 Mont. 563, 108 A.L.R. 1047.
Vt.—Houghton v. Grimes, 164 A. 371, 105 Vt. 230.

77. Ga.—Lamon v. Perry, 125 S.E. 907, 33 Ga.App. 248.
22 C.J. p 191 note 70.

Presumption of reasonable value
The payment of a properly itemized bill for hospital care may create a sufficient presumption of reasonable value.—Ege v. Born, 236 N.W. 75, 212 Iowa 1138.

78. Cal.—Pacific States Savings & Loan Co. v. Painter, 99 P.2d 1103, 37 Cal.App.2d 645—Milwaukee Bldg. Co. v. Wetzel, 270 P. 382, 93 Cal. App. 775.

Evidence held insufficient to support jury's finding of reasonable value of architectural services.—Brust v. First Nat. Bank, 198 N.W. 749, 184 Wis. 15.

79. Wash.—St. Martin v. Skamania Boom Co., 140 P. 355, 79 Wash. 393.
23 C.J. p 58 note 80.

Amount of money in treasury
Pa.—Woodling v. Holshue, 14 Northumb.Leg.J. 301.

Cause of death
Fla.—Mutual Life Ins. Co. of New York v. Johnson, 166 So. 442, 122 Fla. 567.
Tenn.—Jett v. Life & Casualty Ins. Co., 109 S.W.2d 104, 21 Tenn.App. 266.

Genuineness of signature
Fla.—Boyd v. Gosser, 82 So. 758, 78 Fla. 64, 70, 6 A.L.R. 500.
N.C.—Itterly v. Hill, 2 S.E.2d 862, 215 N.C. 797.

Insanity
Cal.—Albertson v. Schmidt, 17 P.2d 158, 128 Cal.App. 344.

Intention
Testimony as to intention of witness is not conclusive.—Commonwealth v. Davis, 187 N.E. 33, 284 Mass. 41.

Origin and development of disease
Cal.—Barham v. Widing, 291 P. 173, 210 Cal. 206.

Pathology of disease
Issues involving the "pathology" of disease must ordinarily be determined on testimony of qualified expert witnesses.—Willis v. Heath, 107 S.W.2d 228, 21 Tenn.App. 179.

Preparation and mailing of document
Ohio.—Hitz v. Ohio Fuel Gas Co., 183 N.E. 768, 43 Ohio App. 484.

Evidence held sufficient as to:
(1) Demand for payment.—Bartholomae Oil Corporation v. Oregon Oil & Development Co., 288 P. 814, 106 Cal.App. 57.

(2) Grade of cotton.—Smith v. Coburn, Tex.Civ.App., 222 S.W. 344.

(3) Indebtedness.—Harris v. Valencia, Ga.App., 15 S.E.2d 900.

(4) Issuance of insurance policy.—Casualty Reciprocal Exchange v. Berry, Tex.Civ.App., 90 S.W.2d 595, error refused.

(5) Letter as a forgery.—Brown v. Union Cent. Life Ins. Co., 44 S.W.2d 514, 241 Ky. 514.

(6) Mailing of letters.—Ponder v. Jefferson Standard Life Ins. Co., D.C. La., 6 F.2d 300.

(7) Other facts or issues.
Minn.—Rathbun v. Goldman, 205 N. W. 436, 164 Minn. 507.
N.C.—Commander v. Smith, 134 S.E. 412, 192 N.C. 159.

Evidence held insufficient to establish
(1) Existence of a foreign law.—Groome v. Freyn Engineering Co., 28 N.E.2d 274, 374 Ill. 113.

(2) Mailing of letter.—Cook v. Phillips, 162 A. 732, 109 N.J.Law 371, 86 A.L.R. 539.

(3) Present ability to pay obligation.—Vollmer v. Vollmer, 266 P. 677, 46 Idaho 97.

(4) Receipt of letter.—Benefit Ass'n of Railway Employees v. Hancock, 58 S.W.2d 578, 248 Ky. 315.

(5) That blow caused discharge of pistol.—Warren v. Pilot Life Ins. Co., 9 S.E.2d 479, 217 N.C. 705.

(6) Other facts or issues.
Ala.—Alabama Bank & Trust Co. v. Garner, 142 So. 568, 225 Ala. 269.
Ill.—Metcalf v. Metcalf, 219 Ill.App. 96.
Iowa.—Legler v. West Side Mut. Fire Ins. Ass'n of Linn County, 243 N. W. 157, 214 Iowa 937.
Tex.—Insurance Co. of North America v. Irby, Alexander & Irby, Civ. App., 263 S.W. 1071—Associated Mfg. Co. v. Jordan, Civ.App., 223 S.W. 1050.
23 C.J. p 58 note 80 [a]–[c].

EVIDENCE OF INDEBTEDNESS and **EVIDENCING FEATURE.** See definition Evidence 31 C.J.S. p 476 note 85 (1), p 477 note 86 (2).

EVIDENT. Apparent, notorious, palpable;[1] apparent to observation, noticeable;[2] manifest, obvious, or plain;[3] also clear, clear to the vision,[4] or clear to the mind;[5] especially, clear to the understanding, and satisfactory to the judgment, hence conclusive;[6] that which is clearly established by the evidence.[7] The term is as definite to the legal mind as any words of explanation would make it, and is intended to indicate the same degree of certainty, whether the evidence is direct or circumstantial.[8]

It has been held synonymous with "clear" see 14 C.J.S. p 1199 note 39, and "manifest."[9] It has been compared with "clear" see 14 C.J.S. p 1199 note 39, "manifest," and "plain."[10]

Phrases employing the word are set out in the note.[11]

EVIDENTIA. Latin, evidence.[12]

EVIDENTIAL FACTS. As distinguished from ultimate facts see the C.J.S. title Pleading §§ 12, 13, also 49 C.J. p 40 note 78–p 46 note 8.

EVIDENTIARY. Having the quality of evidence, constituting evidence, evidencing.[13]

Evidentiary fact. A fact furnishing evidence of the existence of some other fact;[14] a fact from which an inference may be drawn of the existence of the main or ultimate fact;[15] proofs or testimony.[16] It has been said that what the evidentiary facts are in a particular case must be determined from the testimony and other evidence.[17]

The term has been distinguished from "inferential fact,"[18] and "ultimate fact."[19]

Other phrases are set out in the note.[20]

EVIDENTLY. In an evident manner, clearly, obviously, or plainly.[21] The term is employed to ex-

1. Tex.—Ex parte Boyett, 19 Tex.App. 17, 45—Ex parte Foster, 5 Tex.App. 625, 646, 42 Am.R. 577.

2. Iowa.—Hamill v. Joseph Schlitz Brewing Co., 143 N.W. 99, 107, 145 N.W. 511, 165 Iowa 266.

3. Fla.—Russell v. State, 71 So. 27, 28, 71 Fla. 236.
23 C.J. p 174 notes 7, 10, 12.

4. S.D.—State v. Kauffman, 108 N.W. 246, 20 S.D. 620.
23 C.J. p 174 note 5.

5. Tex.—Ex parte Boyett, 19 Tex.App. 17, 45—Ex parte Foster, 5 Tex.App. 625, 646, 42 Am.R. 577.

6. Fla.—Russell v. State, 71 So. 27, 28, 71 Fla. 236.
S.D.—State v. Kauffman, 108 N.W. 246, 20 S.D. 620.

7. Iowa.—Hamill v. Joseph Schlitz Brewing Co., 143 N.W. 99, 107, 145 N.W. 511, 165 Iowa 266.

8. Tex.—McCoy v. State, 25 Tex. 33, 38, 78 Am.D. 520.

9. Fla.—Russell v. State, 71 So. 27, 28, 71 Fla. 236.
38 C.J. p 957 note 62 [a].

10. "**'Evident' suggests something more of a mental process** (than 'clear' or 'plain') but no difficulty in seeing that the thing is true; 'manifest' is a degree stronger than 'evident,' the mind getting the truth as by an intuition."—Bremner v. Marc Eidlitz & Son, 174 A. 172, 174, 118 Conn. 666.

11. **Phrases construed**
(1) "Evident miscalculation."—Brown v. Harness, 38 N.E. 1098, 11 Ind.App. 426.
(2) "Evident mistake."—State v. Frey, 221 N.W. 445, 447, 206 Iowa 981.
(3) "Proof evident" or "evident proof" see Bail § 34 b (2) (a).

12. Black L.D.

13. Black L.D.
The term was introduced by Bentham, and, from its convenience, adopted by other writers.—Black L.D.

14. Miss.—General Tire & Rubber Co. v. Cooper, 165 So. 420, 421, 176 Miss. 491.
Or.—Maeder Steel Products Co. v. Zanello, 220 P. 155, 158, 109 Or. 562, quoting **Corpus Juris**—Oregon Home Builders v. Montgomery Inv. Co., 184 P. 487, 489, 94 Or. 349, citing **Corpus Juris.**
23 C.J. p 174 note 20.
See generally the C.J.S. title Trial §§ 553, 629, also 64 C.J. p 1165 note 91–p 1167 note 37, p 1251 note 79–p 1253 note 91.
Held to include
Items of pleadings, plats, photographs, correspondence, deeds, leases, and other exhibits.—Ocean Accident & Guarantee Corporation v. J. L. Brandeis & Sons, C.C.A.Neb., 75 F.2d 605, 606.
Held not to include
Mere denials of averments in a pleading.—Svensen v. Zurich General Accident & Liability Ins. Co. Limited, of Zurich, Switzerland, 16 N.Y.S.2d 751, 752, 258 App.Div. 964.

15. Ga.—Scott v. State, 195 S.E. 923, 924, 57 Ga.App. 489.

16. N.Y.—In re Britton's Will, 4 N.Y.S.2d 715, 719, 167 Misc. 747.

17. U.S.—Commissioner of Internal Revenue v. Sharp, C.C.A., 91 F.2d 804, 805.
Tex.—Texas Employers Ins. Ass'n v. Reed, Civ.App., 150 S.W.2d 858, 862.

18. Wis.—Porter v. Industrial Commission of Wisconsin, 181 N.W. 317, 318, 173 Wis. 267.

19. U.S.—Commissioner of Internal Revenue v. Sharp, C.C.A., 91 F.2d 804, 805.
Miss.—General Tire & Rubber Co. v. Cooper, 165 So. 420, 421, 176 Miss. 491.
N.Y.—In re Britton's Will, 4 N.Y.S.2d 715, 719, 167 Misc. 747.
Tex.—Texas Employers Ins. Ass'n v. Reed, Civ.App., 150 S.W.2d 858, 862.
Wis.—Fuller v. General Accident Fire & Life Assur. Corporation, Limited, of Perth, Scotland, 272 N.W. 839, 842, 224 Wis. 603.

20. **"Evidentiary circumstances"**
(1) As meaning circumstances with reference to which each party has the right to introduce evidence.—Lake Erie & W. R. Co. v. Klinkrath, 81 N.E. 377, 378, 227 Ill. 439, 442—Illinois Iron & Metal Co. v. Weber, 63 N.E. 1008, 1009, 196 Ill. 526.
(2) As relevant to the principal fact when they tend to show that the latter probably did or did not occur, mere remoteness usually going to the weight, and not the admissibility, of such evidence.—Brunger v. Pioneer Roll Paper Co., 92 P. 1043, 1044, 6 Cal.App. 691.
"Evidentiary issue," as distinguished from "ultimate issue."—State Nat. Bank of Houston v. Woodfin, Tex.Civ.App., 146 S.W.2d 284, 287.

21. Tex.—Ex parte Boyett, 19 Tex.App. 17, 45.

press the idea of full proof-conviction.[22]

Phrases employing the word are set out in the note.[23]

EVIL. Having harmful qualities or characteristics; productive of, or attended by, harm or injury; hurtful to the body, mind, or feelings; effecting mischief, trouble, or pain; bad.[24] Also the term has been compared with, and distinguished from, "bad" see 7 C.J.S. p 1317 note 8.

Phrases employing the word are set out in the note.[25]

EVINCE. To show clearly or make evident.[26] Under particular circumstances, the word has been held not to have the force of proof beyond a reasonable doubt.[27]

It has been held to be a synonym of "indicate."[28]

Phrases employing the word are set out in the note.[29]

EVOCATION. In French law, the withdrawal of a cause from the cognizance of an inferior court, and bringing it before another court or judge, in some respects resembling certiorari.[30]

EVOLUTION. The process of evolving or becoming developed, an unfolding, growth, or development;[31] and, more specifically, the broadening of a process, or technique, from precedent to precedent, described as a phenomenon in which the expectable follows the expectable, and, in this respect, as the antithesis of "invention."[32]

EVOLVE. To unfold or develop by a process of natural, consecutive, or logical growth.[33]

Evolved. Developed; applicable to persons attaining highly developed mental training and experience in the arts, sciences, or learned professions.[34]

EWAGE. From the law French "ewe," meaning water. In old English law, a toll paid for water passage; the same as "aquage" or "aquagium."[35]

EWBRICE. Adultery, spouse-breach, or marriage-breach.[36]

EWE. A female sheep which has had a lamb.[37]

EWRY. An office in the royal household where the table linen, etc., is taken care of.[38]

EX. Literally "out" or "out of."[39] In law Latin, "ex," or its variant form "e" which occurs only be-

22. Ala.—McWilliams v. Rodgers, 56 Ala. 87, 93.

23. **Phrases construed**
(1) "Evidently not identical," as meaning distinct.—Bayne v. Kansas City, Mo.App., 263 S.W. 450, 451.
(2) "Evidently unsuitable."—Gray v. Parke, 29 N.E. 641, 642, 155 Mass. 433—Thayer v. Homer, 11 Metc., Mass., 104, 109.

24. Century D.

25. **Phrases construed**
(1) "Evil liver," as a term in ecclesiastical law applied to a person deemed unfit, through improper conduct or improper mode of living, to partake of the holy communion.—Jenkins v. Cook, 1 P.D. 80, 101.
(2) "Evil name and fame," as meaning reputation.—State v. Littman, 96 A. 66, 67, 88 N.J.Law 392.
(3) "Evil reputation," as meaning that character imputed to person in community is generally bad.—People v. Pieri, 199 N.E. 495, 497, 269 N.Y. 315.

26. Century D.

27. Tex.—Kilgore v. Northwest Texas Baptist Educational Association, 37 S.W. 598, 600, 90 Tex. 139.

28. Cal.—People v. Smith, 92 P.2d 1039, 1041, 36 Cal.App.2d 748.

29. **Phrases construed**
(1) "Evince an intention . . . to abandon the contract."—Kilgore v. Northwest Texas Baptist Educational Association, 37 S.W. 598, 599, 90 Tex. 139.
(2) "Evince no intention" as meaning "evince an absence of intention."—Sioux City & St. P. R. Co. v. Singer, 51 N.W. 905, 906, 49 Minn. 301, 32 Am.S.R. 554, 15 L.R.A. 751.
(3) "Evincing the lunacy of the party," as meaning setting forth particular instances of incoherent conduct or expressions.—In re Covenhoven, 1 N.J.Eq. 19, 24, 25.

30. Black L.D.

31. Century D.

32. U.S.—Less Car Load Lots Co. v. Pennsylvania R. Co., D.C.N.Y., 10 F.Supp. 642, 648.
See also the C.J.S. title Patents § 53, also 48 C.J. p 65 note 7–p 67 note 34.

33. Century D.

34. N.Y.—In re Carpenter's Estate, 297 N.Y.S. 649, 652, 654, 163 Misc. 474.
Phrase
"Such highly evolved individuals, . . . as to him . . . may seem worthy."—In re Carpenter's Estate, supra.

35. Black L.D.

36. Black L.D.

37. Eng.—Reg. v. Jewett, 2 Cox C.C. 227, 228.
Ewe teg
A female sheep more than twelve months old but which has not had a lamb.—Reg. v. Jewett, 2 Cox C.C. 227, 228.

38. Black L.D.

39. Fla.—State v. De Witt C. Jones Co., 147 So. 230, 232, 108 Fla. 613.
In English phrases
(1) "Ex boats Spencer and Galt," in describing corn sold, does not necessarily evidence a guaranty that the corn was taken from these boats.—Hay v. Leigh, 48 Barb. (N.Y.) 393, 397.
(2) "Ex cars from alongside steamer."—Steamship Isis Co. v. Bahr, [1899] 2 Q.B. 364.
(3) "Ex dock, duty paid, New York."—Old Colony Trust Co. v. Columbia Trust Co., 206 N.Y.S. 257, 260, 210 App.Div. 705.
(4) "Ex dock New York."—Brown v. Raritan Chemical Works, 177 N.Y.S. 309, 312, 188 App.Div. 578.
(5) "Ex quay or warehouse."—Davies v. McLean, 28 L.T.Rep.N.S. 113.
(6) "Ex ship," as not contemplating a shipment by any particular ship, and simply denoting that the property in the goods sold shall pass to the buyer on their leaving the

fore consonants, is a preposition used as the opening word of various maxims, hereinafter set out in their proper alphabetical sequence, or as the introductory word in numerous Latin phrases, as indicated in the subjoined notes, wherein it has been given varying meanings, such as "according to,"[40] "after,"[41] "at,"[42] "by,"[43] "by virtue of,"[44] "for,"[45] "from,"[46] "in,"[47] "of,"[48] "on,"[49] "on account of,"[50] "out of,"[51] "through,"[52] "upon,"[53] or "with;"[54] and sometimes the word is not separately rendered, but

ship's tackle, and that he shall be liable for all subsequent charges of landing them.—Harrison v. Fortlage, Pa., 16 S.Ct. 488, 490, 161 U.S. 57, 40 L.Ed. 616.

(7) "Ex the first parcel of brimstone."—Leidemann v. Gray, 3 Jur.N. S. 219.

40. Ex æquitate.—According to equity.—Black L.D.

Ex statuto Magnae Chartæ.—According to the statute of Magna Charta.—Adams Gloss.

Other phrases in which "ex" means "according to," defined by lexicographers, see 23 C.J. p 177 note 41.

41. Ex intervallo.—After an interval.—Adams Gloss.

42. Ex arbitrio.—At the discretion.—Burrill L.D.

Ex bene placito.—At pleasure.—Adams Gloss.

43. Ex comitate et jure gentium.—By comity and law of nations.—Robinson v. Bland, 1 W.Bl. 257, 258, 96 Reprint 141.

Ex industria.—By diligence or industry; with deliberate design.—Martin v. New Orleans, 38 La.Ann. 397, 400, 58 Am.R. 194—23 C.J. p 176 note 35 [w].

Ex provisione hominis.—By the provision of man.—Bowles' Case, 11 Coke 79 b, 80 b, 77 Reprint 1252.

Ex provisione legis.—By provision or disposition of the law.—Adams Gloss.

Other phrases in which "ex" means "by," defined by lexicographers, see 23 C.J. p 176 note 35.

44. Ex officio et debito justitiæ.—By virtue of the office, and in the obligation of justice.—Adams Gloss.

Ex officio judicis.—By virtue of the office of judge.—Adams Gloss.

45. Ex longo.—For a long time back.—Adams Gloss.

46. Ex assignatione.—From or according to the assignment.—Darell v. Wybarne, 2 Dyer 206 b, 73 Reprint 455.

Ex concessis.—From things or premises granted.—Great Western R. Co. v. Railway Comrs., 7 Q.B.D. 182, 187.

Ex fumo dare lucem.—To give light from smoke.—Adams Gloss.

Ex justis nuptiis procreatus.—Born from or in a lawful marriage.—Doe v. Vardill, 5 B. & C. 438, 453, 11 E.C.L. 531.

Ex malitia.—From malice, or maliciously, the term, in its legal signification, importing a publication that is false and without legal excuse.—Dixon v. Allen, 11 P. 179, 180, 69 Cal. 527.

Ex necessitate rei.—From the necessity of the thing.

Cal.—Garwood v. Garwood, 29 Cal. 514, 522.

Mo.—Steele v. Steele, 85 Mo.App. 224, 225.

Ex relatione.—From a narrative or information.—Shattock v. Shattock, 35 Beav. 489, 55 Reprint 986.

Ex sola animi.—From or according to the mind or intention alone.—Adams Gloss.

Ex turpi contractu.—From or out of a base, immoral, corrupt contract.—Adams Gloss.

Ex visceribus testamenti.—From the interior parts or essential substance of the will.—Homer v. Shelton, 2 Metc. (Mass.) 194, 213.

Other phrases in which "ex" means "from", defined by lexicographers, see 23 C.J. p 175 note 32.

47. Ex æquo.—In an equal degree, equally.—Archer v. Morris, 47 A. 275, 276, 61 N.J.Eq. 152.

Ex æquo et bono.—In justice and fairness.—Scott v. Ford, 78 P. 742, 746, 80 P. 899, 43 Or. 531, 68 L.R.A. 469—23 C.J. p 177 note 43 [b].

Ex diametro.—In or through a diameter.—Adams Gloss.

Other phrases using "ex" as meaning "in," defined by lexicographers, see 23 C.J. p 177 note 43.

48. Ex gratia.—Of, or out of, grace or favor.—Citizens' Ins. Co. v. Parsons, 4 Can.S.C. 215, 325—23 C.J. p 176 note 34 [e].

Ex mero motu.—Of his own mere motion, "ex proprio motu," or "sua sponte," being equivalent.—Black L. D.

Also without cause assigned at all.—Hammond v. McLay, 26 U. C.Q.B. 434, 441.

Ex necessitate.—Of or through necessity.—Georgetown v. Alexandria Canal Co., D.C., 12 Pet. (U.S.) 91, 97, 9 L.Ed. 1012—23 C.J. p 176 note 34 [f].

Ex proprio motu.—Of his own accord.—Consumers Cordage Co. v. Connolly, 31 Can.S.C. 244, 298.

Ex stipulatu actio.—An action of or upon stipulation.—Adams Gloss.

Other phrases in which "ex" means "of," defined by lexicographers, see 23 C.J. p 176 note 34.

49. Ex adverso.—On the other side.—Hill v. Harris, 2 Show. 460, 461, 89 Reprint 1041.

Ex facie.—On the face of it.—Burnett v. Great North of Scotland R. Co., 10 App.Cas. 147, 165—Reynell v. Sprye, 1 De G. M. & G. 660, 672, 50 Eng.Ch. 510, 42 Reprint 710.

Ex parte materna or Ex parte paterna.—Literally "On the mother's side" or "On the father's side."—Black L.D.

The phrases have a well-known signification in the law, and are found constantly in the books, being used to denote the line, or blood of the mother or father, and have no such restricted or limited sense, as from the mother or father, exclusively.—Banta v. Demarest, 24 N.J.Law 431, 433—25 C.J. p 170 note 23.

Other phrases in which "ex" means "on," defined by lexicographers, see 23 C.J. p 176 note 39.

50. Ex capite lecti.—On account of the extremity of sickness in bed.—Adams Gloss.

Ex maleficio —On account of misconduct, as in the expressions "trust ex maleficio" and "trustee ex maleficio."—Cordovano v. State, 7 S.E.2d 45, 47, 61 Ga.App. 590.

Ex reverentia maritali.—On account of the reverence belonging to married people.—Adams Gloss.

Other phrases in which "ex" means "on account of," as defined by lexicographers, see 23 C.J. p 177 note 40.

51. Ex abundanti cautela.—Out of great or abundant caution.—Commercial Union Assur. Co. v. Scammon, 35 Ill.App. 659, 662—23 C.J. p 176 note 33 [c].

Ex speciali gratia, certa scientia, et mero motú.—Out of special grace, certain knowledge, and mere motion.—U. S. v. Arredondo, Fla., 6 Pet. (U.S.) 691, 739, 8 L.Ed. 547—23 C.J. p 176 note 33 [s].

Other phrases in which "ex" means "out of," defined by lexicographers, see 23 C.J. p 176 note 33.

52. Ex dolo.—Through fraud or deceit.—Adams Gloss.

Ex vi aut metu.—Through force or fear.—Adams Gloss.

53. Ex demissione.—Upon the demise, a phrase forming part of the title of the old action of ejectment; commonly abbreviated "ex dem."—Black L.D.

Ex insidiis fortunæ.—Upon, within, or through the snares of fortune.—Adams Gloss.

Ex occasione.—Upon occasion.—Adams Gloss.

54. Ex assensu suo.—With his assent.—Nicholas v. Chapman, Comb. 220, 90 Reprint 440.

Ex assensu totius curiæ.—With

the entire phrase is used to express an adverbial idea.[55] Under particular circumstances "ex" may be equivalent to "without," "reserving," or "excepting,"[56] as probably an abbreviation of "except" see Abbreviations 1 C.J.S. p 276 in Pocket Parts. It is also sometimes used as an abbreviation for "exempli" and for "exhibit" see Abbreviations 1 C.J. S. p 276 note 5. As a prefix, it may denote removal or cessation,[57] as indicated by the examples set out in the note.[58] "Ex" is also used to form various Latin compounds, some of which occur in the civil law, or in early English law, as indicated in the subjoined note.[59]

Ex contractu. A term known in English law at

the assent of the whole court.—Adams Gloss.

Ex cathedra.—With the weight of one in authority, originally applied to the decisions of the Popes from their cathedra, or chair.—Wharton L. Lex.

Applied in Cresson v. Cresson, C. C.Pa., 6 F.Cas.No.3,389.

Ex consulto.—With consultation or deliberation.—Black L.D.

55. Ex confesso.—Confessedly, or beyond doubt.—Adams Gloss.

Ex consequenti.—Consequently.—Thornby v. Fleetwood, 10 Mod. 114, 124, 88 Reprint 651—Germain v. Orchard, 1 Salk. 346, 347, 91 Reprint 303.

Ex consequentia.—Consequently.—Adams Gloss.

Ex professo.—Openly, avowedly, intentionally, professedly.—Adams Gloss.

Other phrases expressing adverbial ideas see 23 C.J. p 177 note 45.

56. Black L.D.

Ex coupons.—Black L.D.

Ex improviso.—Without preparation.—Adams Gloss.

Ex interest.—Black L.D.

"Ex July coupons," as meaning a sale reserving the coupons, that is, a sale in which the seller receives, in addition to the purchase price, the benefit of the coupons, which benefit he may realize either by detaching them, or receiving from the buyer an equivalent consideration.—Porter v. Wormser, 94 N.Y. 431, 442.

57. Black L.D.

58. **"Ex-convict"**

(1) A convict who has served out a sentence for crime or has been pardoned.—Morrissey v. Providence Tel. Pub. Co., 32 A. 19, 19 R.I. 124.

(2) A person after he has been once convicted by a proper tribunal of a crime is thereafter correctly termed an "ex-convict."—Cameron v. Tribune Assoc., 7 N.Y.S. 739, 742.

"Ex-officer"

(1) An officer who has been in office, but has gone out.—Cordiell v. Frizell, 1 Nev. 130, 132.

(2) The terms "retired officer" and "ex-officer," and "cidevant" officer are synonymous, implying that he is no longer an "officer" in the proper sense of the term.—Reed v. Schon, 83 P. 77, 79, 2 Cal.App. 55.

Other examples

"Ex-judge," "ex-mayor," and "ex-partner."—Black L.D.

59. **Words compounded with "ex"**

(1) "Exactor," in the civil law, a gatherer or receiver of money, a collector of taxes, and in old English law, a collector of the public moneys, hence a tax gatherer.—Black L. D.

(2) "Exactor regis," the king's tax collector, who took up the taxes and other debts due the treasury.—Black L.D.

(3) "Exaltare," in old English law, to raise, or to elevate; frequently spoken of water, that is, to raise the surface of a pond or pool.—Black L. D.

(4) "Excambiator," an exchanger of lands, a broker, now obsolete.—Black L.D.

(5) "Exceptis excipiendis," with all necessary exceptions.—Black L. D.

(6) "Excerpta" or "excerpts," extracts.—Black L.D.

(7) "Exclusa," in old English law, a sluice to carry off water; also the payment to the lord for the benefit of such a sluice.—Black L.D.

(8) "Excommengement," excommunication.—Black L.D.

(9) "Excusare," in the civil law, to relieve or absolve one from a thing.—Reg. v. Hammond, 29 Ont. 211, 219, 1 Can.Cr.Cas. 373.

(10) "Excusatio," in the civil law, an excuse, or a reason which exempts from some duty or obligation. —Black L.D.

(11) "Excusator," in English law, an excuser; in old German law, a defendant, he who utterly denies the plaintiff's claim.—Black L.D.

(12) "Excuss," to seize and detain by law.—Black L.D.

(13) "Excussio," in the civil law, a diligent prosecution of a remedy against a debtor, the exhausting of a remedy against a principal debtor, before resorting to his sureties, translated "discussion;" and, in old English law, rescue or rescous.—Black L.D.

(14) "Executio," the doing or following up of a thing, the doing of a thing completely or thoroughly; also management or administration; in old practice, execution, the final process in an action.—Black L.D.

(15) "Executio bonorum," in old English law, management or administration of goods. "Ad ecclesiam et ad amicos pertinebit executio bonorum," the execution of the goods shall belong to the church and to the friends of the deceased.—Black L.D.

(16) "Exemplum," in the civil law, a copy, a written, authorized copy; also used in the modern sense of "example,"—"Ad exemplum constituti singulares non trahi," that is, exceptional things must not be taken for examples.—Black L.D.

(17) "Exennium," in old English law, a gift, particularly a New Year's gift.—Black L.D.

(18) "Exercitalis," a soldier, a vassal.—Black L.D.

(19) "Exercitoria actio," in the civil law, an action which lay against the employer of a vessel (exercitor navis) for the contracts made by the master.—Black L.D.

(20) "Exercitus," in old European law, an army, an armed force; it was absolutely indefinite as to number, and was applied, on various occasions, to a gathering of forty-two armed men, of thirty-five, or even of four.—Black L.D.

(21) "Exfestucare," to abdicate or resign, to resign or surrender an estate, office, or dignity, by the symbolical delivery of a staff or rod to the alienee.—Black L.D.

(22) "Exfrediare," to break the peace, to commit open violence.—Black L.D.

(23) "Exhæredatio," in the civil law, disinheriting, disherison; the formal method of excluding an indefeasible (or forced) heir from the entire inheritance, by the testator's express declaration in the will that such person shall be exhæres.—Black L.D.

(24) "Exhaeres," in the civil law, one disinherited.—Black L.D.

(25) "Exhibere," to present a thing corporeally, so that it may be handled; also to appear personally to conduct the defense of an action at law.—Black L.D.

(26) "Exhibitio billæ," exhibition of a bill; in old English practice, actions were instituted by presenting or exhibiting a bill to the court, in cases where the proceedings were by bill; hence this phrase is equivalent to "commencement of the suit." —Black L.D.

(27) "Exilium," in old English law, exile, banishment from one's

a very early period, and defined as meaning from or out of a contract.[60] While ordinarily applied to actions at law, as distinguished from suits in equity, it may at times include all suits or proceedings, both at law and in equity, for the enforcement of contracts, particularly where the measure of recovery is fixed or made approximately certain by some rule of law,[61] as, for example, a suit on a bond even though the bond was given for the payment of damages arising from a tort.[62] The term is usually contrasted with "ex delicto," although an obligation may be both "ex contractu" and "ex delicto," as in the case of certain classes of contracts which create a relation from which the law implies duties, a breach of which will constitute a tort.[63] The phrase "quasi ex contractu" means in the nature of, or as, a contract.[64]

"Action ex contractu" and "action quasi ex contractu" defined and distinguished from "action ex

country; also driving away, or despoiling; hence a species of waste, which consisted in driving away tenants or vassals from the estate, as by demolishing buildings, and so compelling the tenants to leave, or by enfranchising the bond-servants, and unlawfully turning them out of their tenements.—Black L.D.

(28) "Existimatio," in the civil law, the civil reputation which belonged to the Roman citizen, as such, called a state or condition of unimpeached dignity or character (dignitatis inlæsæ status;) the highest standing of a Roman citizen; also the decision or award of an arbiter. —Black L.D.

(29) "Exitus," primarily a going or coming out, hence children, or offspring; also, the rents, issues, and profits of lands and tenements; also an export duty; and also the conclusion of the pleadings.—Black L.D.

(30) "Exlegalitas," in old English law, outlawry.—Black L.D.

(31) "Exlegalitus," he who is prosecuted as an outlaw.—Black L. D.

(32) "Exlegare," in old English law, to outlaw, to deprive one of the benefit and protection of the law, (exuere aliquem beneficio legis).—Black L.D.

(33) "Exlex," in old English law, an outlaw; "qui est extra legem," one who is out of the law's protection.—Black L.D.

(34) "Expediment," the whole of a person's goods and chattels, bag and baggage.—Black L.D.

(35) "Expeditatæ arbores," trees rooted up or cut down to the roots. —Black L.D.

(36) "Expeditio," an expedition, an irregular kind of army.—Black L. D.

(37) "Expeditio brevis," in old practice, the service of a writ.—Black L.D.

(38) "Expensæ litis," costs or expenses of the suit, which are generally allowed to the successful party.—Black L.D.

(39) "Expilare," in the civil law, to spoil; to rob or plunder, applied to inheritances.—Black L.D.

(40) "Expilatio," in the civil law, the offense of unlawfully appropriating goods belonging to a succession; it is not technically theft (furtum) because such property no longer belongs to the decedent, nor to the heir, since the latter has not yet taken possession.—Black L.D.

(41) "Expilator," in the civil law, a robber, a spoiler or plunderer, "Expilatores sunt atrociores fures." —Black L.D.

(42) "Expleta," "expletia," or "explecia," in old records, the rents and profits of an estate.—Black L.D.

(43) "Explicatio," in the civil law, the fourth pleading; equivalent to the surrejoinder of the common law. —Black L.D.

(44) "Explorator," a scout, huntsman, or chaser.—Black L.D.

(45) "Expositio," explanation, exposition, or interpretation.—Black L.D.

(46) "Expromissio," in the civil law, the species of novation by which a creditor accepts a new debtor, who becomes bound instead of the old, the latter being released. —Black L.D.

(47) "Expromissor," in the civil law, a person who assumes the debt of another, and becomes solely liable for it, by a stipulation with the creditor, differing from a surety, inasmuch as this contract is one of novation, while a surety is jointly liable with his principal.—Black L. D.

(48) "Expromittere," in the civil law, to undertake for another with the view of becoming liable in his place.—Black L.D.

(49) "Exquæstor," in Roman law, one who has filled the office of quaestor; used in the ablative case "exquæstore", as a title given to Tribonian.—Black L.D.

(50) "Exrogare," compound of "ex," from, and "rogare," to pass a law; in Roman law, to take something from an old law by a new law. —Black L.D.

(51) "Extensores," in old English law, extenders or appraisers, the name of certain appointed officers whose duty it was to make a survey, schedule, or inventory of the lands, to lay them out under certain heads, and then to ascertain the value of each, as preparatory to the division or partition.—Black L.D.

(52) "Extenta manerii," the extent or survey of a manor, the title of a statute passed 4 Edw.I.St. 1, being a sort of direction for making a survey or terrier of a manor, and all its appendages.—Black L.D.

(53) "Exterus," a foreigner or alien, one born abroad, the opposite of "civis".—Black L.D.

(54) "Extocare," in old records, to grub woodland, and reduce it to arable or meadow, "to stock up."—Black L.D.

(55) "Extracta curiæ," in old English law, the issues or profits of holding a court, arising from the customary fees, etc.—Black L.D.

(56) "Extrahuria," in old English law, an animal wandering or straying about, without an owner, an estray.—Black L.D.

(57) "Extraneus," in old English law, a foreigner, one foreign born; and, in Roman law, an heir not born in the family of the testator; also those of a foreign state, the same as "alienus."—Black L.D.

(58) "Extumæ," in old records, relics.—Black L.D.

(59) "Exuere patriam," to throw off or renounce one's country or native allegiance, to expatriate one's self.—Black L.D.

(60) "Exulare," in old English law, to exile or banish, "Nullus liber homo, exuletur, nisi, etc.,"—no freeman shall be exiled, unless, etc.—Black L.D.

(61) "Exuperare," to overcome, to apprehend or take.—Black L.D.

60. Black L.D.

61. Ill.—Barber v. Keiser's Estate, 116 N.E. 706, 707, 279 Ill. 287. See also Actions § 1 f (3) note 8.

62. La.—Leche v. United States Fidelity & Guaranty Co., App., 188 So. 197, 198.

63. Cal.—Beck v. Sirota, 109 P.2d 419, 422, 42 Cal.App.2d 551.
Ga.—American Oil Co. v. Roper, 14 S.E.2d 145, 148, 64 Ga.App. 743.

64. Tayler L. Gloss.

delicto" and "action quasi ex delicto" see Actions §§ 1 f (3) and 44.

Ex delicto. It has been said that the term has a well-defined meaning, is in general use, may be found in the English dictionaries, and may even be classed as an English expression, requiring no definition in statutes making use of it.[65] Like its companion phrase "ex contractu," it was well known in English law at an early period, and it has been defined as meaning from a delict, tort, fault, crime, or misfeasance,[66] in contradistinction to "ex contractu" as indicated in note 63 supra. The phrase "quasi ex delicto," means in the nature of, or as, an offense or crime.[67]

"Action ex delicto" and "action quasi ex delicto" defined and distinguished from "action ex contractu" and "action quasi ex contractu" see Actions §§ 1 f (4) and 44.

Ex officio. By virtue of the office,[68] from office, or officially;[69] without any other warrant or appointment than that resulting from the holding of a particular office.[70] The term describes authority derived from official character merely, not expressly conferred on the individual, but rather annexed to the official position; also an act done in an official character, or as a consequence of office, and without any other appointment or authority than that conferred by the office itself.[71]

"Ex officio services" are those duties performed by an officer for the compensation of which no express provision is made by law;[72] services which relate to the public interests, or business of the county or state, as contradistinguished from those relating to the private interests of individuals.[73]

"Ex officio" occurs in other phrases listed in the note.[74]

Ex parte. On one side only, by or for one party; also done for, in behalf of, or on the application of, one party only.[75] It implies the presence of one of the parties and the absence of the other.[76] Applied to judicial proceedings, the term has reference to such proceedings in an action had on the application or at the instance of one side only, and without notice or opportunity to oppose given to the other side, and to proceedings in which there is no adverse party,[77] as, for example, in the case of naturalization proceedings.[78] The term has been held not to

65. La.—King v. New Orleans Ry. & Light Co., 74 So. 168, 169, 140 La. 843.

66. Black L.D.

It has been held not to include an action against sureties on a bond to recover damages resulting from a tort or omission of duty of the principal therein.—Leche v. United States Fidelity & Guaranty Co., La. App., 188 So. 197, 198.

67. Tayler L. Gloss.

68. Neb.—King v. Physicians' Casualty Assoc., 150 N.W. 1010, 1011, 97 Neb. 637.

69. La.—Lobrano v. Police Jury of Parish of Palquemines, 90 So. 423, 425, 150 La. 14.

70. Black L.D.

71. La.—Lobrano v. Police Jury of Parish of Plaquemines, 90 So. 423, 425, 150 La. 14.

72. Ala.—Macon County v. Abercrombie, 62 So. 449, 450, 9 Ala.App. 147.
Tex.—Nichols v. Galveston County, 228 S.W. 547, 548, 111 Tex. 50.

Similarly expressed

(1) "Services for which no remuneration is allowed."—Allin v. Mercer County, 192 S.W. 638, 640, 174 Ky. 566.

(2) "Those which the law annexes to a particular office and requires the incumbent to perform without providing specific or precise compensation therefor."—State ex rel. Fowler v. Stone, 185 So. 404, 408, 237 Ala. 78—City of Birmingham v. Hawkins, 94 So. 62, 65, 208 Ala. 79.

(3) "Every service a circuit court clerk is required by law to perform, for which no fee or charge is specified."
Ala.—Calhoun County v. Watson, 44 So. 702, 703, 152 Ala. 554.
Tenn.—State, for Use of Sullivan County, v. O'Dell, 84 S.W.2d 577, 578, 169 Tenn. 248.

73. Ky.—Gilbert v. Marshall County, 18 B.Mon. 427, 430.
Mich.—Chemical Bank & Trust Co. v. Oakland County, 251 N.W. 395, 400, 264 Mich. 673.

74. **Other phrases**

(1) "Ex officio agent."—Drainage Dist. No. 1 of Lincoln County v. Suburban Irr. Dist., Neb., 297 N.W. 645, 650.

(2) "Ex officio assessor."—Oakland v. Snow, 78 P. 1060, 1064, 145 Cal. 419.

(3) "Ex officio clerk."—Drennen v. People, 78 N.E. 937, 222 Ill. 592, 593.

(4) "Ex officio county treasurer." —Terr. v. Ritter, 1 Wyo. 318, 330.

(5) "Ex officio members of . . . [particular] state board."
Ky.—Reid v. Commonwealth, 94 S.W. 641, 642, 123 Ky. 240.
Mo.—State v. Walker, 10 S.W. 473, 474, 97 Mo. 162.

(6) "Ex officio state librarian."—State v. Laughton, 8 P. 344, 345, 19 Nev. 202.

(7) "Ex officio supervisor of assessments."—Foote v. Lake County, 69 N.E. 47, 48, 206 Ill. 185.

(8) "Ex officio tax collector."—People v. Kelsey, 34 Cal. 470, 473.

(9) "Ex officio treasurer of the school board."—Brace v. Solner, 1 Alaska 361, 379.

75. Black L.D.

76. Ill.—Lincoln v. Cook, 3 Ill. 61, 62.

77. Ky.—Ex parte Covington, 195 S.W. 439, 440, 176 Ky. 140.

Similarly expressed

(1) "A proceeding taken or granted at the instance and for the benefit of one party only, and without notice to, or contestation by, any person adversely interested."—City Nat. Bank & Trust Co. v. Davis Hotel Corporation, 280 Ill.App. 247—25 C.J. p 170 note 20.

(2) "A judicial proceeding brought for the benefit of one party only, and without notice to or contest by any person adversely interested."—Stella v. Mosele, 19 N.E.2d 433, 435, 299 Ill. App. 53.

In practice

(1) Ex parte deposition see Depositions § 27.

(2) Ex parte or temporary injunction see the C.J.S. title Injunctions § 180, also 32 C.J. p 305 note 49—p 307 note 74.

(3) "Ex parte proceeding" see Actions § 1 h (3).

78. U.S.—U. S. v. Brass, D.C.N.Y., 37 F.Supp. 698, 700.

apply where the adverse party has had opportunity to learn the date of the hearing.[79] It is abbreviated "ex p." see Abbreviations 1 C.J.S. p 276 note 5, and has been contrasted with the phrase "adversary proceedings."[80]

Ex post facto. From, through, or in consequence of, an after-fact; from a thing done afterward, or after the event;[81] by matter of after-fact; by something after the fact.[82]

Ex vi termini. From, or by, the force of the term.[83]

EX ABUSU NON ARGUITUR AD USUM.[84]

EXACCIÓN ILEGAL. In Spanish law, literally "Illegal exaction," hence extortion by public officials.[85]

EXACT. As a verb, to claim or require.[86] The term has been held synonyomus with "require."[87] It has been distinguished from "demand" see 26 C.J.S. p 704 note 86.

As an adjective, precisely accurate.[88]

Phrases employing the word are set out in the note.[89]

EXACTION. The act of demanding and receiving;[90] and, more specifically, the wrongful act of an officer or other person in compelling payment of a fee or reward for his services, under color of authority, where no payment is due.[91]

It has been distinguished from "extortion."[92]

Phrases employing the word are set out in the note.[93]

EXACTLY. In an exact manner; accurately; precisely according to rule, measure, fact, circumstance, etc.; with minute correctness.[94] Under particular circumstances, however, the term is not construed strictly, but is given the meaning of substantially.[95]

Phrases employing the word are set out in the note.[96]

EXACTOR. See Ex ante p 1143 note 59 (1), (2).

EXAGGERATE. To amplify unduly in thought or in description, to use exaggeration in speech or writing;[97] and "exaggerated" has been defined as meaning enlarged beyond the truth, overstated.[98]

79. Pa.—Gliwa v. U. S. Steel Corporation, 185 A. 584, 585, 322 Pa. 225.

80. U.S.—U. S. v. Brass, D.C.N.Y., 37 F.Supp. 698, 700.
See also Adversary 2 C.J.S. p 503 note 18.

81. Adams Gloss.

82. U.S.—Calder v. Bull, Conn., 3 Dall. 386, 393, 1 L.Ed. 648.
Ind.—Strong v. State, 1 Blackf. 193, 196.
Ex post facto laws see Constitutional Law §§ 435–451.

83. Black L.D.
Phrase applied or employed
U.S.—Miller v. Stewart, N.J., 9 Wheat. 680, 704.
25 C.J. p 332 note 20.

84. A maxim meaning "No argument can be drawn from the abuse (of a thing) against its use."—Tayler L. Gloss.
Applied in Star Bottling Co. v. Louisiana Purchase Exposition Co., 144 S.W. 776, 777, 240 Mo. 634.

85. Escriche Diccionario, citing Pen. Code Spain arts 223, 227.

86. Century D.

87. Dak.—Kennedy v. Falde, 29 N. W. 667, 670, 4 Dak. 319.
54 C.J. p 691 note 48 [a].

88. Mont.—Gallatin County School Dist. No. 7 v. Patterson, 24 P. 698, 10 Mont. 17, 20.

89. **Phrases in which the verb is used**
(1) "Demand and exact."—State ex rel. Williams v. Coleman, 180 So. 360, 131 Fla. 872.
(2) "Exact license money."—Sweet v. Wabash, 41 Ind. 7, 11.
(3) "To exact more than ten hours' work."—In re Ten Hour Law for St. R. Corps., 54 A. 602, 609, 24 R.I. 603, 61 L.R.A. 612.
Phrases in which the adjective is used
(1) "Exact census."—Gallatin County School Dist. No. 7 v. Patterson, 24 P. 698, 10 Mont. 17, 20.
(2) "Exact copy" see 18 C.J.S. p 132 note 47.
(3) "Exact correspondence of parts," as implying more than one part.—Cover v. Schwartz, Cust. & Pat.App., 116 F.2d 512, 515.
(4) "Exact reverse," as distinguished from "counterpart."—Maurer v. Mitchell, 53 Cal. 289, 293.
(5) "Exact schedule," as distinguished from "estimate" see Estimate 31 C.J.S. p 183 note 45.
(6) "Exact sciences," defined as those in which the truths and statements are immutable and unchangeable, and distinguished from "inexact sciences."—U. S. v. Perkins, D. C.S.C., 221 F. 109, 110.
(7) "Exact weight."—Ex parte Dietrich, 84 P. 770, 771, 149 Cal. 104, 5 L.R.A.,N.S., 873.

90. U.S.—Laidlaw v. Abraham, C.C. Or., 43 F. 297, 298.

91. Black L.D.

92. Black L.D.

93. **Phrases construed**
(1) "'Exaction' of interest."
Fla.—Wilson v. Conner, 142 So. 606, 609, 106 Fla. 6.
Mo.—Missouri Discount Corporation v. Mitchell, 261 S.W. 743, 746, 216 Mo.App. 100.
(2) "Exactions of whatever character."—Hiram Walker & Sons, Inc., v. U. S., Cust. & Pat.App., 99 F.2d 337, 339.

94. Century D.

95. Conn.—Lipsher v. Resnikoff, 120 A. 859, 860, 99 Conn. 13.

96. **Phrases construed**
(1) "Exactly alike," in describing living apartments, construed as meaning not absolutely identical, but substantially so in size, design, finish, and fixtures.—Lipsher v. Resnikoff, 120 A. 859, 860, 99 Conn. 13.
(2) "Exactly corresponding," as one of the meanings of "similar".—Stowell v. Blanchard, 119 A. 866, 868, 122 Me. 368.
(3) "Exactly parallel."—Cunningham v. Peoria, 41 N.E. 1014, 1016, 157 Ill. 499, 504.
(4) "Not exactly the actual amount."—Hoyles v. Blore, 15 L.J. Exch. 28, 30.

97. Century D.

98. Ohio.—Harrison v. State, 147 N. E. 650, 652, 653, 112 Ohio St. 429.

Phrases employing the word are set out in the note.[99]

EXAGGERATION. An undue or excessive enlargement, an amplification, an unreasonable or extravagant overstating or overdrawing in the representation of things, something at variance with the truth.[1]

EXALTARE. See Ex ante p 1143 note 59 (3).

EXAMEN. Latin, a swarm, or a swarm of bees; and it has been said that "examine" may be derived from this word, with its implication of the industry and perseverance of the bee.[2]

In law Latin, a trial.[3]

In Spanish law, examination, as of witnesses.[4]

EXAMINADOR. In Spanish law, an examiner.[5]

EXAMINATION. The term is a general one,[6] broadly defined as an investigation, or search;[7] an investigation made in order to form a judgment;[8] and, as sometimes used, it does not import an examination so thorough and exhaustive as necessarily to preclude the possibility of error or of failure to discover the slightest irregularity.[9] The word as used in connection with legal proceedings is commonly understood to mean an examination under oath or affirmation.[10] In connection with records generally, the right of examination may sometimes imply the right to make a copy of them,[11] although not necessarily so.[12]

In medical practice, an examination is made for the purpose of diagnosing the condition complained of, after which the question of treatment arises.[13]

Under particular circumstances, the term has been held equivalent to, or synonymous with, "abstract" see Abstracts of Title § 1 note 4, "investigation,"[14] and sometimes "testimony."[15] It has been compared with, or distinguished from, "adjustment" see 2 C.J.S. p 53 note 60, "audit" see 7 C.J.S. p 1275 note 33, "autopsy" see 7 C.J.S. p 1298 note 26, "discovery" see Discovery § 20, "investigation," "litigation,"[16] and "treatment;"[17] and, in the plural, has been held not synonymous with "proceedings."[18]

As to the examination of witnesses generally see the C.J.S. titles Evidence §§ 547–560, and Witnesses §§ 315–457, also 70 C.J. pp 473–759. In criminal proceedings as denoting a preliminary examination see Criminal Law § 331; and in equity as the taking of proofs see Equity §§ 449–452. For references to other specific uses of the term see 23 C.J. p 178 note 59.

Phrases employing the word are set out in the note.[19]

EXAMINE. To inspect or survey carefully; look into the state of; scrutinize and compare the parts of; view or observe in all aspects and relations, with the purpose of forming a correct opinion or judg-

99. **Phrases construed**

(1) "Exaggerated statement," as one which conveys a false notion to some intended victim of fraud.—Harrison v. State, supra.

(2) "Wilfully exaggerated," as similar in meaning with "false."—Harrison v. State, supra.

1. Ohio.—Harrison v. State, 147 N. E. 650, 652, 653, 112 Ohio St. 429.

2. N.Y.—Brouwer v. Cotheal, 10 Barb. 216, 218.

3. Black L.D.

"Examen computi"

"The balance of an account."—Black L.D.

4. Escriche Diccionario.

5. Escriche Diccionario.

6. N.Y.—Mora v. Great Western Ins. Co., 23 N.Y.Super. 622, 628.

Characterized as nomen collectivum

Eng.—Reg. v. Outwell, 9 A. & E. 836, 838, 36 E.C.L. 436, 112 Reprint 1431.

7. Anderson L.D.

8. N.Y.—Mora v. Great Western Ins. Co., 23 N.Y.Super. 622, 628.

23 C.J. p 178 note 63.

9. Ill.—United States Fidelity & Guaranty Co. v. First National Bank, 84 N.E. 670, 673, 233 Ill. 475.

10. U.S.—Edelstein v. U. S., Minn., 149 F. 636, 640, 79 C.C.A. 328, 9 L.R.A.,N.S., 236.

Sometimes it designates the written record of the evidence taken at an examination.—Reg. v. Outwell, 9 A. & E. 836, 838, 36 E.C.L. 436, 112 Reprint 1431.

11. N.Y.—Brouwer v. Cotheal, 10 Barb. 216, 218.

12. Ala.—Randolph v. State, 2 So. 714, 715, 82 Ala. 527, 60 Am.R. 761.

Kan.—Cormack v. Wolcott, 15 P. 245, 247, 37 Kan. 391.

13. Mo.—Lutman v. American Shoe Mach. Co., App., 151 S.W.2d 701, 709.

14. N.Y.—In re McLaughlin, 210 N. Y.S. 68, 73, 124 Misc. 766.

15. N.Y.—Cherbuliez v. Parsons, 108 N.Y.S. 321, 322, 123 App.Div. 814.

16. N.Y.—Mora v. Great Western Ins. Co., 23 N.Y.Super. 622, 627, 628.

17. Mo.—Lutman v. American Shoe Machinery Co., App., 151 S.W.2d 701, 709.

18. N.Y.—Daniels v. Becker, 290 N. Y.S. 487, 489, 160 Misc. 649.

19. **Phrases construed**

(1) "Examination of a long account."—State v. Grimm, 243 N.W. 763, 767, 208 Wis. 366.

(2) "Examination of the entire cause," as meaning the entire cause as shown by the record.—Shelby Iron Co. v. Bierly, 80 So. 806, 808, 202 Ala. 422.

(3) "Examination on oath."—Laughran v. Kelly, 8 Cush., Mass., 199, 204.

(4) "Examination on their own behalf."—In re Custer's Estate, Iowa, 295 N.W. 848, 853.

(5) "Examination pro interesse suo" see the C.J.S. titles Receivers § 130, also 53 C.J. p 121 notes 72, 73, and Sequestration § 18, also 23 C.J. p 179 note 69.

(6) "Examination and survey," as an incident of right to appropriate, see Eminent Domain § 113 notes 93–96.

(7) "Records . . . must be free for the examination of all persons while not in use."—Randolph v. State, 2 So. 714, 715, 82 Ala. 527, 60 Am.R. 761.

ment.[20] The term necessarily implies the power of allowance or rejection,[21] and, in a particular connection, a disputed fact which is the subject of the examination.[22]

The term has been held synonymous with "scrutinize."[23] It has been distinguished from "dissect" see 27 C.J.S. p 353 note 75.

Phrases employing the word are set out in the note.[24]

EXAMINER. One who examines, inspects, or tries, or one who interrogates a witness or an accused person; also a person appointed to conduct an examination, as in a school or college, or one appointed to examine candidates for degrees or for public employment.[25]

Phrases employing the word are set out in the note.[26]

EXANNUAL ROLL. In old English practice, a roll into which (in the old way of exhibiting sheriffs' accounts) the illeviable fines and desperate debts were transcribed, and which was annually read to the sheriff upon his accounting, to see what might be gotten.[27]

EX ANTECEDENTIBUS ET CONSEQUENTIBUS FIT OPTIMA INTERPRETATIO.[28]

EXCAMB. In Scotch law, to exchange.[29]

EXCAMBIATOR. See Ex ante p 1143 note 59 (4).

EXCAMBION. Etymologically, the term implies simply an exchange, although in Scotch law it appears to have been applicable only to heritable property.[30]

EXCAMBIUM. An exchange,[31] a place where merchants meet to transact their business.[32] Also an equivalent in recompense; a recompense in lieu of dower ad ostium ecclesiæ.[33]

EXCAMBIUM NATURALITER VULT IN SE WARRANTIUM.[34]

EXCAMBIUM NON POTEST ESSE RERUM DIVERSÆ QUALITATIS, NEQUE EXCAMBIUM INTER TRES PARTES DATUR.[35]

EXCAVATE. To hollow out or make a cavity by digging or scooping;[36] it ordinarily comprehends not only the digging down into the earth but also the removal of whatever material or substance is found beneath the surface,[37] but, depending on local trade usage, the term may or may not cover the removal of solid rock as well as earth and loose material,[38] and usually it does not include blasting and

20. Century D.

21. Nev.—State v. Doron, 5 Nev. 399, 412.
N.Y.—People v. Dutchess, 9 Wend. 508, 509.

22. "It requires no dictionary to demonstrate that one cannot 'examine' as to a non-disputed fact."—U. S. ex rel. Vounas v. Hughes, C. C.A.N.J., 116 F.2d 171, 172.

23. Pa.—Com. v. White, 115 A. 870, 871, 271 Pa. 584.

24. **Phrases construed**
(1) "Examine, hear, and punish." —Groenvelt v. Burwell, 1 Salk. 200, 91 Reprint 179.
(2) "Examined copy" see Evidence §§ 650, 655, 661, 746, and as distinguished from "duplicate" see 28 C. J.S. p 591 note 43.
(3) "Examined on his own behalf."—In re Custer's Estate, Iowa, 295 N.W. 848, 852.
(4) "Examining court" see Courts § 11, 21 C.J.S. p 26 note 1, Criminal Law § 334.

25. Century D.

26. **Phrases construed**
(1) "Bank examiners" see Banks and Banking §§ 35, 569, 878, 890.
(2) "Bar examiner" see Attorney and Client § 10.
(3) "Examiner in chancery," defined as an officer of the court of chancery before whom witnesses are examined, and their testimony reduced to writing, for the purpose of being read on the hearing of the cause.—Black L.D.
(4) "Mine examiners" see the C. J.S. title Mines and Minerals §§ 3, 237, also 40 C.J. p 748 notes 2, 3, p 1139 note 3–p 1140 note 12.
(5) "Patent examiner" see the C. J.S. title Patents § 109, also 48 C. J. p 138 notes 49–61.
(6) "Special examiner," in English law, a person, not one of the examiners of the court of chancery, appointed to take evidence in a particular suit. This may be done when the state of business in the examiner's office is such that it is impossible to obtain an appointment at a conveniently early day, or when the witnesses may be unable to come to London.—Black L.D.
(7) "State examiners" see the C. J.S. title States § 66, also 59 C.J. p 118 notes 18–21.

27. Black L.D.

28. A maxim meaning "A passage will be best interpreted by reference to that which precedes and follows it."—Broom Leg. Max.
Applied in Alcorn Combustion Co. v. M. W. Kellogg Co., 166 A. 862, 863, 311 Pa. 270—23 C.J. p 179 note 73 [a].

29. Black L.D.

30. Eng.—Coats v. Inland Revenue Comrs., [1897] 2 Q.B. 423, 425—Coats v. Inland Revenue Comrs., 66 L.J.Q.B. 434, 437.

31. Pa.—Gamble v. McClure, 69 Pa. 282, 284—Dean v. Shelly, 57 Pa. 426, 427, 98 Am.D. 235.

32. Black L.D.

33. Black L.D.

34. A maxim meaning "An exchange naturally creates in itself a warranty."—Adams Gloss.

35. A maxim meaning "An exchange cannot be of things of a different quality; nor is it granted among three parties."—Adams Gloss.

36. Me.—Dionne v. West Paris Bldg. Ass'n, 139 A. 497, 498, 126 Me. 454.
Held to constitute "excavating"
Digging trenches with shovel in a plumber's business of making private connections with city sewers and water pipes.—Scully v. Industrial Commission of Illinois, 120 N. E. 492, 493, 284 Ill. 567.

37. N.Y.—Hanssel v. P. Tomasetti Contracting Corporation, 8 N.Y.S. 2d 873, 881.

38. Va.—Rosenberg v. Turner, 98 S. E. 763, 765, 124 Va. 769.

removing rock or ledge, unless a broader use of the word is indicated.[39] The term is not a word of art requiring explanation from those skilled in a particular trade or branch of learning, although, by usage in a particular locality or trade, its signification may be restricted or limited,[40] for while cutting a furrow with a plow, digging a pit for storing vegetables, or drilling a hole in the ground may all be "excavating" in the broadest sense, yet the word is more often restricted to excavations made in connection with improvements upon the land.[41]

The term has been distinguished from "dig" see 26 C.J.S. p 1306 note 88, and "scoop."[42]

Phrases employing the word are set out in the note.[43]

EXCAVATION. An uncovered cutting in the earth, in distinction from a covered cutting or tunnel.[44] In construction operations, the term has been said to have its plain and natural meaning of hollowing out or digging out and removing whatever material was encountered in order to expose the cavity required by plans and specifications, and to include the removal of rock or ledge.[45]

The word has been distinguished from the noun, "borrow" see 11 C.J.S. p 527 note 31.

Phrases employing the word are set out in the note.[46]

EXCEED. To be more or greater; to be paramount.[47]

The term has been held sometimes synonymous with "extend."[48]

Phrases employing the word are set out in the note.[49]

EXCELLENCY. In English law, the title of a viceroy, governor general, ambassador, or commander in chief. In America, the title is sometimes given to the chief executive of a state or of the nation.[50]

EXCELLENT. Excelling or exceeding in kind or degree.[51]

EXCEPT.

As a Verb

——**Present Tense.** To exclude from a statement, to omit or withhold, or to take or leave out of consideration.[52] In conveyances or transfers, the word is said to be appropriate when some part or parcel of the thing granted is withdrawn from the operation of the conveyance.[53]

The verb has been held synonymous with, or equivalent to, and also compared with, or distinguished from, "exclude"[54] and "reserve."[55]

39. Me.—Dionne v. West Paris Bldg. Ass'n, 139 A. 497, 498, 126 Me. 454.
N.Y.—Hellwig v. Blumenberg, 7 N.Y. S. 746, 5 Silv.Sup. 290.

40. Va.—Rosenberg v. Turner, 98 S. E. 763, 765, 124 Va. 769.

41. Kan.—Bassett v. Carpenter, 220 P. 1028, 1030, 114 Kan. 828.

42. N.Y.—Hanssel v. P. Tomasetti Contracting Corporation, 8 N.Y.S. 2d 873, 880.

43. Phrases construed
(1) "Construction, excavating or electrical work," as constituting extrahazardous business.—Scully v. Industrial Commission of Illinois, 120 N.E. 492, 493, 284 Ill. 567.
(2) "Excavate any other material."—Hanssel v. P. Tomasetti Contracting Corporation, 8 N.Y.S.2d 873, 880.
(3) "Excavate the earth, stone, old foundations, rubbish, and all other materials," as not including blasting and removing ledge.—Dionne v. West Paris Bldg. Ass'n, 139 A. 497, 498, 126 Me. 454.
(4) "Grading, filling in or excavating any land."—Bassett v. Carpenter, 220 P. 1028, 1030, 114 Kan. 828.

44. Webster New Int.D.

45. U.S.—U. S., for Use and Benefit of Davies v. Blauner Const. Co., D.C.Mass., 37 F.Supp. 968, 970.
For references to specific uses see 23 C.J. p 179 note 80.

46. Rock excavation
(1) Applicable to all rock tunnels and tunnels in mixed earth and rock. —Chicago v. McKechney, 68 N.E. 954, 982, 205 Ill. 372.
(2) Defined as the excavation of all the diverse qualities of what is properly called "rock," encountered in the progress of the work.—Dhrew v. Altoona City, 15 A. 636, 639, 121 Pa. 401.

Other phrases construed
(1) "Excavation actually and in good faith begun."—People ex rel. 71 Park Ave. v. Goldfogle, 235 N.Y.S. 189, 191, 226 App.Div. 241.
(2) "Excavations incidental to building construction," as not including sewer ditches in public streets.—State v. Industrial Commission of Ohio, 156 N.E. 605, 116 Ohio St. 509.

47. Webster New Int.D.

48. N.Y.—Campbell v. Jimenes, 27 N.Y.S. 351, 352, 7 Misc. 77.

49. Phrases construed
(1) "Does not exceed in value the sum of" amount stated.—Southwick v. Davis, 21 P. 121, 122, 78 Cal. 504.
(2) "Exceeding by one-half."—State v. Judge Second Judicial Dist., 21 La.Ann. 64, 65.
(3) "Exceeding four per cent. of value of taxable property."—Armer v. Wade, 58 P.2d 525, 528, 48 Ariz. 1.
(4) "Exceeding one year in duration."—Lane v. Ozias, 217 P. 331, 114 Kan. 46.
(5) "Not exceeding eighty acres." —David v. David, 56 Ala. 49, 50.
(6) "Shall have exceeded his jurisdiction."—Leary v. Patrick, 15 Q. B. 266, 268, 69 E.C.L. 265, 117 Reprint 459—23 C.J. p 179 note 82 [d].

50. Black L.D.

51. Webster Int.D.

Phrase
"Excellent piece of cloth," as mere puffing and not misrepresentation although not strictly true.—State v. Hefner, 84 N.C. 751, 753.

52. Ky.—Rickman v. Commonwealth, 243 S.W. 929, 195 Ky. 715.

53. U.S.—Adams v. Osage Tribe of Indians, C.C.A.Okl., 59 F.2d 653, 655.
Mo.—Brown v. Weare, 152 S.W.2d 649, 656, 136 A.L.R. 286.

54. U.S.—Palmer v. Warren Ins. Co., C.C.Mass., 18 F.Cas.No.10,698, 1 Story 360, 365.

55. U.S.—Adams v. Osage Tribe of

——**Excepted.** Objected.[56] The term has been used in connection with the computation of time in the sense of "excluded," as in the phrase "Sunday excepted."[57] It has been erroneously used in connection with commercial paper as the equivalent of "accepted."[58] The term is sometimes used synonymously with "reserved," although a technical distinction is recognized between an exception and a reservation.[59]

——**Excepting.** The term has been held synonymous with "excluding,"[60] and is frequently used interchangeably with "reserving" although strictly speaking it is distinguishable therefrom.[61]

Phrases employing the word are set out in the note.[62]

As a Preposition or Conjunction

Not including;[63] but.[64] The word has also been construed to mean "until."[65]

It has been held equivalent to, or synonymous with, "but" see 12 C.J.S. p 859 note 37, "other than,"[66] "otherwise than,"[67] and "unless."[68]

Phrases employing the word are set out in the note.[69]

EXCEPTANT. A person making an exception.[70]

Indians, C.C.A.Okl., 59 F.2d 653, 655.

56. Mo.—Elsner v. Supreme Lodge K. & L. H., 11 S.W. 991, 992, 98 Mo. 640.

57. Cal.—People v. Whitman, 6 Cal. 659, 660.

58. N.J.—Meyer v. Beardsley, 30 N. J.Law 236, 243.
23 C.J. p 180 note 88.

59. Ky.—Inland Steel Co. v. Isaacs, 143 S.W.2d 503, 504, 283 Ky. 770.

60. N.H.—Smith v. Furbish, 44 A. 398, 406, 68 N.H. 123, 47 L.R.A. 226.

61. Ky.—Stephan v. Kentucky Valley Distilling Co., 122 S.W.2d 493, 496, 275 Ky. 705—Hicks v. Phillips, 142 S.W. 394, 395, 146 Ky. 305, 47 L.R.A.,N.S., 878.
N.H.—Smith v. Furbish, 44 A. 398, 406, 68 N.H. 123, 47 L.R.A. 226.
N.Y.—Houghtaling v. Stoothoff, 12 N.Y.S.2d 207, 210, 170 Misc. 773.
Okl.—Porter v. Warner-Caldwell Oil Co., 80 P.2d 252, 253, 183 Okl. 1—Burns v. Bastien, 50 P.2d 377, 382, 174 Okl. 40.
Pa.—Whitaker v. Brown, 46 Pa. 197, 198.

62. **Phrases construed**
(1) "Excepting and reserving."—Houghtaling v. Stoothoff, 12 N.Y.S. 2d 207, 209, 170 Misc. 773.
(2) "Excepting free passage."—Bush v. Cole, 12 Mod. 24, 88 Reprint 1140, 1 Show 388, 89 Reprint 657.

63. Ala.—Austin v. Willis, 8 So. 94, 95, 90 Ala. 421.

64. Neb.—State v. Marsh, 187 N.W. 810, 812, 108 Neb. 267.

65. Mass.—Fowle v. Bigelow, 10 Mass. 379, 382.

66. Ala.—Ingram v. State, 3 So.2d 431, 432, 241 Ala. 166.
N.Y.—In re Nelson's Estate, 273 N. Y.S. 268, 274, 152 Misc. 245.

67. La.—State v. White, 197 So. 745, 747, 195 La. 1028.

68. Iowa.—Ward v. Interstate Business Men's Acc. Ass'n, 169 N.W. 451, 452, 185 Iowa 674.

69. **Phrases construed**
(1) "Except as authorized by law."—Petersen v. U. S., C.C.A.Hawaii, 287 F. 17, 21.
(2) "Except as hereafter excepted."—Campbell v. Red Bud Consol. School Dist., 198 S.E. 225, 228, 186 Ga. 541.
(3) "Except as hereinafter allowed."—State v. Myrick, 163 S.E. 803, 804, 202 N.C. 688.
(4) "Except as hereinafter provided."
Cal.—Williams Co. v. Superior Court of California within and for Los Angeles County, 275 P. 838, 840, 97 Cal.App. 422.
Mo.—In re McFarland, 12 S.W.2d 523, 525, 223 Mo.App. 826.
(5) "Except as herein provided."—State v. Wong Hing, 222 N.W. 639, 640, 176 Minn. 151—23 C.J. p 180 note 85 [a].
(6) "Except as otherwise provided."—Lillard v. Noble, 42 N.E. 844, 847, 159 Ill. 311.
(7) "Except as otherwise specifically provided by law."—Mortgage & Debenture Co. v. Burrows, 182 P. 238, 239, 75 Okl. 94.
(8) "Except as provided by law."—Pace v. Pace Bros. Co., 59 P.2d 1, 8, 91 Utah 132.
(9) "Except as such employees."—Matill v. City of Chattanooga, Tenn., 132 S.W.2d 201, 202.
(10) "Except as to the said 270 acres."—Doe v. Clayton, 2 So. 24, 31, 81 Ala. 391.
(11) "Except building restrictions and Zone 2."—Dixon v. Fox, 271 P. 593, 594, 127 Or. 446.
(12) "Except by the consent of the parties."—Fowle v. Bigelow, 10 Mass. 379, 383.
(13) "Except for," as synonymous with "but for" and "only for."—Rickman v. Commonwealth, 243 S. W. 929, 195 Ky. 715.
(14) "Except for cottage residence purposes."—Jones v. Mulligan, N.J. Ch., 121 A. 608, 609.
(15) "Except for services rendered."—Webb-Crawford Co. v. Federal Trade Commission, C.C.A., 109 F.2d 268, 270—Great Atlantic & Pacific Tea Co. v. Federal Trade Commission, C.C.A., 106 F.2d 667, 674.
(16) "Except for the intestate share of the surviving spouse."—Russell v. Roberts, 7 N.E.2d 811, 813, 54 Ohio App. 441.
(17) "Except mortgages."—Polhemus v. Fitchburg R. Co., 26 N.E. 31, 32, 123 N.Y. 502.
(18) "Except right of way."—Jennings v. Amerada Petroleum Corporation, 66 P.2d 1069, 1071, 179 Okl. 561.
(19) "Except that," as meaning "but."—State v. Marsh, 187 N.W. 810, 812, 108 Neb. 267.
(20) "Except that stock may be transferred."—In re Garvin's Estate, 6 A.2d 796, 800, 335 Pa. 542.
(21) "Except the law otherwise directs."—Connor v. Gardner, 82 N. E. 640, 644, 230 Ill. 258, 15 L.R.A., N.S., 73.
(22) "Except the widow's dower."—Starr v. Brewer, 3 A. 479, 481, 58 Vt. 24.
(23) "Except to fill vacancies."—Carey v. Cruise, 158 N.E. 315, 317, 246 N.Y. 237.
(24) "Except two acres in the south-east corner."—Green v. Jordan, 3 So. 513, 514, 83 Ala. 220, 3 Am.S.R. 711.
(25) "Except where otherwise provided by statute."—Buckley v. Hull Docks Co., [1893] 2 Q.B. 93, 95—In re Tarn, [1893] 2 Ch. 280, 284.
(26) "Save and except."—Houston Oil Co. of Texas v. Williams, Tex. Civ.App., 57 S.W.2d 380, 384.

70. **It may be done** either by a formula of dissent from a ruling such as is usually expressed by the phrase "I except," or by any other clear expression adequate to convey the idea of nonassent and nonsubmission to the ruling and of intention to question the ruling there-

EXCEPTIO. In the civil law, a proceeding by which defendant challenges the last preceding claim of plaintiff.[71] In modern civil law, a plea by which the defendant admits the cause of action, but alleges new facts which, provided they be true, totally or partially answer the allegations put forward on the other side; thus distinguished from a mere traverse of the plaintiff's averments.[72]

In Roman law, an exception. In a general sense, a judicial allegation opposed by a defendant to the plaintiff's action, a stop or stay to an action opposed by the defendant.[73] Various examples of "exceptio," with brief explanations of each, are listed in the note.[74]

EXCEPTIO EJUS REI CUJUS PETITUR DISSOLUTIO NULLA EST.[75]

EXCEPTIO EST CONDITIO QUÆ MODO EXIMIT REUM DAMNATIONE, MODO MINUIT DAMNATIONEM [CONDEMNATIONEM].[76]

after on appeal.—Snelling v. Yetter, 49 N.Y.S. 917, 919, 25 App.Div. 590.

71. Escriche Diccionario.

72. Black L.D.

Common-law analogy

"In this use, the term corresponds to the common law plea in confession and avoidance."—Black L.D.

73. Black L.D.

In a stricter sense, the exclusion, on grounds of equity, of an action that lay in strict law, "actionis jure stricto competentis ob æquitatem exclusio;" a kind of limitation of an action by which it was shown that the action, although otherwise just, did not lie in the particular case; a species of defense allowed in cases where, although the action as brought by plaintiff was in itself just, yet it was unjust as against the particular party sued.—Black L.D.

Common-law analogy

"Answering to the 'defense' or 'plea' of the common law. An allegation and defense of a defendant by which the plaintiff's claim or complaint is defeated, either according to strict law or upon grounds of equity."—Black L.D.

74. Exceptio dilatoria.—A dilatory exception; called also "temporalis," (temporary;) one which defeated the action for a time, (quæ ad tempus nocet,) and created delay, (et temporis dilationem tribuit;) such as an agreement not to sue within a certain time, as five years.—Black L.D.

Exceptio doli mali.—An exception or plea of fraud.—Black L.D.

Exceptio dominii.—A claim of ownership set up in an action for the recovery of property not in the possession of the plaintiff.—Black L. D.

Exceptio dotis cautæ non numeratæ.—A defense to an action for the restitution of a dowry that it was never paid, although promised, available on the dissolution of the marriage within a limited time.—Black L.D.

Exceptio in factum.—An exception on the fact; an exception or plea founded on the peculiar circumstances of the case.—Black L.D.

Exceptio in personam.—A plea or defense of a personal nature, which may be alleged only by the very person to whom it is granted by the law.—Black L.D.

Exceptio in rem.—A plea or defense not of a personal nature, but connected with the legal circumstances on which the suit is founded, and which may therefore be alleged by any party in interest, including the heirs and sureties of the proper or original debtor.—Black L.D.

Exceptio jurisjurandi.—An exception of oath; an exception or plea that the matter had been sworn to. This kind of exception was allowed where a debtor, at the instance of his creditor, (creditore deferente,) had sworn that nothing was due the latter, and had notwithstanding been sued by him.—Black L.D.

Exceptio metus.—An exception or plea of fear or compulsion, answering to the modern plea of duress.—Black L.D.

Exceptio non adimpleti contractus.—An exception in an action founded on a contract involving mutual duties or obligations, to the effect that plaintiff is not entitled to sue because he has not performed his own part of the agreement.—Black L.D.

Exceptio non solutæ pecuniæ.—A plea that the debt in suit was not discharged by payment (as alleged by the adverse party) notwithstanding an acquittance or receipt given by the person to whom the payment is stated to have been made.—Black L.D.

Exceptio pacti conventi.—An exception of compact; an exception or plea that plaintiff had agreed not to sue.—Black L.D.

Exceptio pecuniæ non numeratæ.—An exception or plea of money not paid; a defense which might be set up by a party who was sued on a promise to repay money which he had never received.—Black L.D.

Exceptio peremptoria.—A peremptory exception; called also "perpetua," (perpetual); one which forever destroyed the subject matter or ground of the action, (quæ semper rem de qua agitur perimit), such as the exceptio doli mali, the exceptio metus, etc.—Black L.D.

Exceptio rei judicatæ.—An exception or plea of matter adjudged, a plea that the subject matter of the action had been determined in a previous action; the term is adopted by Bracton, and is constantly used in modern law to denote a defense founded on a previous adjudication of the same matter, or a plea of a former recovery or judgment.—Black L.D.

Exceptio rei venditæ et traditæ.—An exception or plea of the sale and delivery of the thing. This exception presumes that there was a valid sale and a proper tradition; but although no property was actually transferred, because of the rule that no one can transfer to another a greater right than he himself has, nevertheless because of some particular circumstance the real owner is estopped from contesting it.—Black L.D.

Exceptio senatusconsulti macedoniani.—A defense to an action for the recovery of money loaned, on the ground that the loan was made to a minor or person under the paternal power of another; so named from the decree of the senate which forbade the recovery of such loans.—Black L.D.

Exceptio senatusconsulti velleiani.—A defense to an action on a contract of suretyship, on the ground that the surety was a woman and therefore incapable of becoming bound for another; so named from the decree of the senate forbidding it.—Black L.D.

Exceptio temporis.—An exception or plea analogous to that of the statute of limitations in our law, namely, that the time prescribed by law for bringing such actions has expired.—Black L.D.

75. A maxim meaning "A plea of that matter, the dissolution of which is the object of the action, is of no effect."—Adams Gloss.

76. A maxim meaning "An exception is a condition which sometimes exempts or frees a defendant from condemnation, sometimes diminishes the condemnation or sentence."—Adams Gloss.

EXCEPTIO FALSI OMNIUM ULTIMA.[77]

EXCEPTIO FIRMAT REGULAM IN CASIBUS NON EXCEPTIS.[78]

EXCEPTIO FIRMAT REGULAM IN CONTRARIUM.[79]

EXCEPTIO FIRMAT REGULAM IN REBUS NON EXCEPTIS.[80]

EXCEPTION. The act of excepting or excluding from a number designated or from a description;[81] the act of excepting or leaving out of account;[82] or the specific exclusion of something which might otherwise have been included;[83] also a thing, or some thing, taken out;[84] something withheld, not granted or parted with, the exclusion of the thing, or the thing or matter itself as excluded;[85] that which is excepted or separated from others in a general rule or description; a person, thing, or case, specified as distinct, or not included.[86] In a slightly different sense, that which is, or may be, offered in opposition to a rule, proposition, statement, or allegation;[87] and so more specifically in practice, an objection,[88] or a protest and notice of nonacquiescence in the decision objected to.[89] In a particular connection, the term has been construed as meaning in addition to.[90]

While there is a distinction between "exception" and "reservation," they are quite commonly used as interchangeable terms, and the meaning intended must be determined by reference to the subject matter and the surrounding circumstances,[91] or the nature and effect of the provision in which it is used.[92]

In one or another of the senses above indicated, "exception," in the singular, has been contrasted with, or distinguished from, "condition,"[93] "objection" see Appeal and Error § 323 note 17, "plea in abatement,"[94] "proviso,"[95] "reservation,"[96] and "variance;"[97] and, in the plural, from "exclusions."[98]

As applied, defined, or employed in particular legal connections see such C.J.S. titles as: Appeal and Error §§ 323–351; Contracts § 343; Criminal Law § 1076; Deeds §§ 137–140; Equity §§ 352, 457, 546; Insurance §§ 757–790, 798, 807, 808, 817–823, 834–837, 876; Mines and Minerals § 153, also 23 C.J. p 180 note 8, 40 C.J. p 971 notes 97–1; Plead-

77. A maxim meaning "A plea of that which is false is the last of all."—Wharton L. Lex.

Otherwise rendered

"A plea denying a fact is the last of all."—Black L.D.

78. A maxim meaning "An exception affirms the rule in cases not excepted."—Black L.D.

Applied in U. S. v. Lee Sa Kee, 3 Hawaii Fed. 262.

Also frequently expressed, "Exceptio probat regulam de rebus non exceptis."—Trayner Leg.Max.

79. A maxim meaning "The exception affirms the rule to be the other way."—Adams Gloss.

Otherwise rendered

"An exception proves an opposite rule."—Black L.D.

80. A maxim meaning "The exception confirms or strengthens the rule in matters not excepted."—Adams Gloss.

81. N.Y.—In re Kelly's Estate, 274 N.Y.S. 488, 495, 153 Misc. 445.

Similarly expressed

Exclusion of the act or excluding from number designated or from a statement or description.—Cassidy v. Royal Exch. Assur. of London, 59 A. 549, 551, 554, 99 Me. 399.

82. Me.—Cassidy v. Royal Exch. Assur. of London, supra.

Similarly expressed

"The act of excepting, omitting from mention or leaving out of consideration."—In re Kelly's Estate, 274 N.Y.S. 488, 495, 153 Misc. 445.

83. U.S.—Kirkby v. Federal Life Ins. Co., C.C.A.Mich., 35 F.2d 126, 128.

Cal.—New v. Mutual Benefit Health & Accident Ass'n, 76 P.2d 131, 134, 24 Cal.App.2d 681.

The object of an "exception" in a contract is to exclude that which otherwise would be included within it.—Estabrook v. Eastern Commercial Travelers Accident Ass'n, 32 N.E.2d 250, 252, 308 Mass. 439

84. N.H.—Raymond v. Great American Indemnity Co., 163 A. 713, 716, 86 N.H. 93.

Tex.—Reliance Ins. Co. v. Naman, 6 S.W.2d 743, 745, 118 Tex. 21.

85. Me.—Cassidy v. Royal Exch. Assur. of London, 59 A. 549, 551, 99 Me. 399.

86. N.Y.—In re Kelly's Estate, 274 N.Y.S. 488, 495, 153 Misc. 445.

87. Century D.

88. Mo.—Elsner v. Supreme Lodge K. & L. H., 11 S.W. 991, 992, 98 Mo. 640.

N.C.—McCormick v. Patterson, 139 S.E. 225, 226, 194 N.C. 216.

The object of "exceptions" is to point out errors of law and fact.—In re Thompson, 114 A. 774, 775, 271 Pa. 225.

89. Or.—State v. Laundy, 206 P. 290, 103 Or. 443.

90. N.Y.—In re Kelly's Estate, 274 N.Y.S. 488, 495, 153 Misc. 445.

91. Miss.—Federal Land Bank of New Orleans v. Cooper, 200 So. 729, 730, 190 Miss. 490.

92. Mo.—Brown v. Weare, 152 S.W.2d 649, 656, 136 A.L.R. 286.

93. Ill.—Mowery v. Washington Nat. Ins. Co., 7 N.E.2d 334, 336, 289 Ill.App. 443.

94. Mo.—State v. Reisman, 37 S.W.2d 675, 677, 225 Mo.App. 637.

95. Kan.—Sowers Plan Crop Ins. Mut. Co. v. Hobbs, 68 P.2d 1110, 1111, 146 Kan. 166.

Me.—Cassidy v. Royal Exch. Assur. 59 A. 549, 551, 99 Me. 399.

N.J.—New Jersey State Board of Optometrists v. S. S. Kresge Co., Sup., 174 A. 353, 357, 113 N.J.Law 287.

N.Y.—Landau v. Equitable Life Assur. Soc. of United States, 1 N.Y.S.2d 891, 895, 166 Misc. 42—People v. Bailey, 171 N.Y.S. 394, 397, 103 Misc. 366—People v. Thursam, 23 N.Y.S.2d 706, 710, 713.

Tenn.—Evans v. McCabe, 52 S.W.2d 159, 160, 164 Tenn. 672.

50 C.J. p 835 note 19 [b].

96. Ky.—Inland Steel Co. v. Isaacs, 143 S.W.2d 503, 504, 283 Ky. 770.

Mo.—Brown v. Weare, 152 S.W.2d 649, 656, 136 A.L.R. 286.

97. N.H.—Stone v. Cray, 200 A. 517, 521, 89 N.H. 483.

98. N.H.—Raymond v. Great American Indemnity Co., 163 A. 713, 716, 86 N.H. 93.

ing § 211 et seq, also 23 C.J. p 180 note 4, 49 C.J. p 362 note 50 et seq; Statutes § 382, also 23 C.J. p 180 note 7, 59 C.J. p 1092 note 62–p 1093 note 83; and Trial §§ 54, 146–149, 196, 247, 265, 413–426, also 64 C.J. p 109 notes 60–69, p 222 note 65–p 224 note 12, p 284 note 89–p 287 note 61, p 419 note 52–p 420 note 55, p 508 note 19–p 509 note 42, p 933 note 89–p 958 note 24.

Phrases employing the word are set out in the note.[99]

EXCEPTIONAL. Contrary to the rule, out of the regular or ordinary course, relating to or forming an exception.[1] The term has been contrasted with "usual."[2]

Phrases employing the word are set out in the note.[3]

EXCEPTIO NULLA EST VERSUS ACTIONEM QUÆ EXCEPTIONEM PERIMIT.[4]

EXCEPTIO PROBAT REGULAM.[5]

EXCEPTIO PROBAT REGULAM DE REBUS NON EXCEPTIS.[6]

EXCEPTIO QUÆ FIRMAT LEGEM EXPONIT LEGEM.[7]

EXCEPTIO QUOQUE REGULAM DECLARAT.[8]

EXCEPTIO SEMPER ULTIMA PONENDA EST.[9]

EXCEPTIS EXCIPIENDIS. See Ex ante p 1143 note 59 (5).

EXCEPTOR. In old English law, a party who entered an exception or plea.[10]

EXCERPTA or EXCERPTS. See Ex ante p 1143 note 59 (6).

EXCESS. The quality or state of exceeding the proper or reasonable limit or measure,[11] the state of going beyond limits;[12] also the degree or amount by which one thing or number exceeds another, the remainder or the difference between two numbers being the excess of one over the other.[13] Applied

99. **Phrases construed**

(1) "Dilatory exceptions" defined as those which, if sustained, do not destroy plaintiff's demand as alleged, but merely retard the action.—Riche v. Ascension Parish School Board, La.App., 200 So. 681, 685.

(2) "Exception of lack of capacity to stand in judgment," as challenging the authority of plaintiff to institute and prosecute the suit regardless of whether plaintiff owns or has an interest in the claim sued on and distinguished from "exception of no right of action."—Riche v. Ascension Parish School Board, supra.

(3) "Exception of misjoinder," as distinguished from "exception of no cause of action."—Henrichs v. New Orleans Public Service, La.App., 179 So. 610, 612.

(4) "Exception of no cause of action."—Younger Bros. v. Spell, 193 So. 354, 356, 194 La. 16—Young v. Thompson, La.App., 189 So. 487, 489—Henrichs v. New Orleans Public Service, supra.

(5) "Exception of no right of action" defined as a special plea directed to absence of any right in plaintiff to maintain action.—Levin v. Missouri Pac. R. Co., La.App., 2 So. 2d 99, 102.

(6) "Exceptions sustained," as equivalent to "decree reversed".—Woodworth v. Woodworth, 173 N.E. 578, 579, 273 Mass. 402.

(7) "Exception to the other bequests."—In re Kelly's Estate, 274 N.Y.S. 488, 495, 153 Misc. 445.

(8) "Joint exception."—State v. Gregory, 31 N.E. 952, 132 Ind. 387.

(9) "Just exceptions."—Elgin City Banking v. Mawhinney, 17 Dom.L.R. 577, 581.

(10) "Peremptory exceptions" as meaning those which, if sustained, destroy plaintiff's demand as alleged, contrasted with "dilatory exceptions," and including an exception of no right of action.—Riche v. Ascension Parish School Board, La.App., 200 So. 681, 685.

(11) "Special exception [in Texas pleading]" see the C.J.S. title Pleading § 212 also 58 C.J. p 821 note 88.

1. Century D.

2. Pa.—Carter v. Philadelphia Coal Co., 77 Pa. 286, 290.
Wis.—Beauregard v. State, 131 N.W. 347, 351, 146 Wis. 280.

3. **Phrases construed**

(1) "Exceptional case," as meaning the rare—the unusual case or circumstances.
U.S.—Legg's Estate v. Commissioner of Internal Revenue, C.C.A., 114 F.2d 760, 766—In re Irving-Austin Bldg. Corporation, C.C.A.Ill., 100 F.2d 574, 577.
Cal.—People v. Simms, App., 107 P. 2d 86, 88—Ex parte Daniels, 294 P. 735, 736, 110 Cal.App. 638.
See also Criminal Law § 1567.

(2) "Exceptional circumstances."
U.S.—McLeod v. Majors, C.C.A.Fla., 102 F.2d 128, 129.
N.Y.—Anonymous v. Anonymous, 18 N.Y.S.2d 806, 811, 173 Misc. 679—Szilagyi v. Szilagyi, 11 N.Y.S.2d 469, 474, 170 Misc. 1009—Home Life Ins. Co. v. Klein, 25 N.Y.S. 2d 215, 218—Anonymous v. Anonymous, 24 N.Y.S.2d 613, 619.

4. A maxim meaning "There is [can be] no plea against an action which destroys [the subject or matter of] the plea."—Adams Gloss.

5. A maxim meaning "The exception proves the rule."—Black L.D.

6. A maxim meaning "An exception proves a rule concerning things not excepted."—Bouvier L.D.
Applied in Lloyd v. Keach, 2 Conn. 175, 181, 7 Am.D. 256—23 C.J. p 180 note 11 [a].

7. A maxim meaning "An exception which confirms a law expounds (or explains) the law."—Trayner Leg. Max.
Applied in Rex v. Tooley, 2 Bulstr. 186, 189, 80 Reprint 1055.

8. A maxim meaning "The exception also declares the rule."—Black L.D.

9. A maxim meaning "An exception should always be put last."—Black L.D.
Applied in Hickmot's Case, 9 Coke 52 b, 53 a, 77 Reprint 808.

10. Black L.D.

11. Ga.—Georgia Cent. R. Co. v. Johnston, 32 S.E. 78, 79, 106 Ga. 130, 136.

12. Philippine.—Forbes v. Chuoco Tiaco, 16 Philippine 534, 600.

13. N.Y.—In re Bunce's Estate, 165 N.Y.S. 426, 178 App.Div. 954.

to figures, the term involves the idea of a comparison between two amounts.[14]

The term is opposed to "defect" see 26 C.J.S. p 669 note 64, and the expression "to excess" has been held to mean the same as "excessively" or "intemperately."[15]

Phrases employing the word are set out in the note.[16]

EXCESSIT EX EPHEBIS EST PERSONA.[17]

EXCESSIVE. A general term for what goes beyond just measure or amount,[18] defined as meaning characterized by, or exhibiting, excess; greater than the usual amount or degree;[19] exceeding what is usual or proper;[20] overmuch;[21] the quality or state of exceeding the proper or reasonable limit or measure;[22] tending to, or marked by, excess;[23] unreasonably great, and clearly disproportionate.[24]

It has been held not to be the antonym of "occasional."[25]

Phrases employing the word are set out in the note.[26]

14. Neb.—Rasp v. City of Omaha, 203 N.W. 588, 589, 113 Neb. 463.

15. Miss.—Penn Mut. Life Ins. Co. v. Nunnery, 167 So. 416, 419, 176 Miss. 197.
N.Y.—Moore v. Prudential Ins. Co. of America, 87 N.Y.S. 368, 369, 92 App.Div. 135.

16. **"Excess insurance"**
(1) Contrasted with "other insurance."—St. Paul Fire & Marine Ins. Co. v. Garza County Warehouse & Marketing Ass'n, C.C.A.Tex., 93 F. 2d 590, 592.
(2) To be resorted to only after policy in another company has been exhausted.—Great American Indemnity Co. v. McMenamin, Tex.Civ. App., 134 S.W.2d 734, 737.
Other phrases construed
(1) "Drinking to excess."
Iowa.—Biermann v. Guaranty Mut. L. Ins. Co., 120 N.W. 963, 965, 142 Iowa 341.
N.Y.—Moore v. Prudential Insurance Co. of America, 87 N.Y.S. 368, 92 App.Div. 135.
Va.—Metropolitan Life Ins. Co. v. Johnson, 2 S.E.2d 288, 292, 172 Va. 506.
(2) "Excess credits", as the balance remaining after deducting total of debts from total of credits due.—Tax Commission v. Kelly-Springfield Tire Co., 175 N.E. 700, 705, 38 Ohio App. 109.
(3) "Excesses, cruel treatment, or outrages."
La.—Moore v. Moore, 187 So. 670, 672, 192 La. 289.
Tex.—Hyatt v. Hyatt, Civ.App., 111 S.W.2d 341, 343—Boydston v. Boydston, Civ.App., 290 S.W. 927, 928.
See also Divorce § 24.
(4) "Excess fees of a tax collector."—American Indemnity Co. v. Red River Nat. Bank in Clarksville, Tex.Civ.App., 132 S.W.2d 473, 480.
(5) "Excess interest."—Penn Mut. Life Ins. Co. v. Commissioner of Internal Revenue, C.C.A., 92 F.2d 962, 970.
(6) "Excess moisture."—Marine Bank & Trust Co. v. National Union Fire Ins. Co., 123 So. 635, 168 La. 945.
(7) "Excess of jurisdiction" see the C.J.S. titles Certiorari § 23, Courts § 25, and Justices of the Peace § 246, also 35 C.J. p 862 note 40–p 863 note 41.
(8) "Excess of parties," as distinguished from "defect of parties."—Baird v. Meyer, 215 N.W. 542, 544, 55 N.D. 930.
(9) "Excess of speed."—In re Clyde SS. Co., D.C.N.Y., 134 F. 95, 98.
(10) "Excess or surplus water" see the C.J.S. title Waters § 191, also 67 C.J. p 1042 note 55–p 1043 note 57.
(11) "In excess of the capital stock."—State v. Union Bldg. Corporation, 170 So. 7, 12, 185 La. 598.
(12) "Sums in excess of."—Farm Products, Land & Investment Co. v. Stout, 208 P. 456, 71 Colo. 574.
(13) "Used intoxicating liquor to excess."—Penn Mut. Life Ins. Co. v. Nunnery, 167 So. 416, 419, 176 Miss. 197.

17. A maxim meaning "He who comes out of, exceeds his minority, becomes legally a person."—Adams Gloss.

18. Tex.—Austin St. Ry. Co. v. Oldham, Civ.App., 109 S.W.2d 235, 237.

19. Mo.—Morrow v. Missouri Gas & Electric Service Co., 286 S.W. 106, 111, 315 Mo. 367.

20. U.S.—U. S. v. Oglesby Grocery Co., D.C.Ga., 264 F. 691, 695.
Mo.—Morrow v. Missouri Gas & Electric Service Co., 286 S.W. 106, 111, 315 Mo. 367.
Vt.—Parker v. Boston & M. R., 79 A. 865, 872, 84 Vt. 329.
Similarly expressed
Greater than what is usual or proper.—Austin St. Ry. Co. v. Oldham, Tex.Civ.App., 109 S.W.2d 235, 237.

21. Mo.—Morrow v. Missouri Gas & Electric Service Co., 286 S.W. 106, 111, 315 Mo. 367.
Tex.—Austin St. Ry. Co. v. Oldham, Civ.App., 109 S.W.2d 235, 237.

22. Mo.—Morrow v. Missouri Gas & Electric Service Co., 286 S.W. 106, 111, 315 Mo. 367.

23. Ga.—Central of Georgia R. Co. v. Johnston, 32 S.E. 78, 79, 106 Ga. 130.
Mo.—Morrow v. Missouri Gas & Electric Service Co., 286 S.W. 106, 111, 315 Mo. 367.

24. Cal.—Ex parte Ryan, 44 Cal. 555, 558.

25. Ga.—National Life & Accident Ins. Co. v. Barnes, App., 7 S.E.2d 299, 302.

26. **Excessive speed**
(1) Discussed generally.
Ga.—Central of Georgia R. Co. v. Johnston, 32 S.E. 78, 79, 106 Ga. 130.
Me.—Esponette v. Wiseman, 155 A. 650, 653, 130 Me. 297.
Tex.—Austin St. Ry. Co. v. Oldham, Civ.App., 109 S.W.2d 235, 237.
Vt.—Higgins v. Metzger, 143 A. 394, 397, 101 Vt. 285.
(2) Synonymous with "too fast."—Austin St. Ry. Co. v. Oldham, supra.
(3) Distinguished from "unlawful speed".—Higgins v. Metzger, supra.
Other phrases construed
(1) "Excessive assessment" see the C.J.S. title Taxation § 634, also 61 C.J. p 981 note 78–p 982 note 87.
(2) "Excessive bail" see Bail §§ 9 b, note 50.
(3) "Excessive charge."—Jefferson Deposit Co. v. Central Illinois Light Co. of Peoria, 140 N.E. 817, 819, 309 Ill. 262.
(4) "Excessive compensation," as distinguished from "wasteful compensation."—McQuillen v. National Cash Register Co., D.C.Md., 27 F. Supp. 639, 653.
(5) "Excessive damages" see Damages §§ 196–201.
(6) "Excessive distress."—Field v. Mitchell, 6 Esp. 71, 72.
(7) "Excessive drunkenness," as meaning that a person is so far deprived of his reason and understanding as to render him incapable of understanding character and consequences of his act.—Taylor v.

EXCESSIVELY. Beyond measure, in an extreme degree, with excess, etc.[27]

The term has been held to mean the same as "to excess" see Excess ante p 1154 note 15, and intemperately.[28]

Phrases employing the word are set out in the note.[29]

EXCESSIVUM IN JURE REPROBATUR.[30]

EXCESSUS IN JURE REPROBATUR.[31]

EXCESSUS IN PETITA EXCUSATIO MANIFESTA FIT.[32]

EXCESSUS IN RE QUALIBET, JURE REPROBATUR COMMUNI.[33]

Koenigstein, 260 N.W. 544, 547, 128 Neb. 809.

(8) "Excessive gaming."—Foot v. Baker, 5 M. & G. 335, 339, 44 E.C.L. 181, 134 Reprint 593.

(9) "Excessive heat" as a relative term dependent upon the time, place and circumstances.—Cagle v. Judson Mills, 11 S.E.2d 376, 380, 195 S. C. 346.

(10) "Excessive or intemperate use of intoxicants."—Wising v. Brotherhood of American Yeomen, 156 N.W. 247, 248, 132 Minn. 303.

(11) "Excessive oxidation," as equivalent to "harmful oxidation," and "harmful chemical action," as used in connection with bleached and dyed furs and the like, to describe what would occur if it was attempted to effect oxidation, bleaching of a dark skin with an ordinary bleach, such as strong hydrogen peroxide, without a protecting agent.—Steinfur Patents Corporation v. J. Meyerson, Inc., D.C.N.Y., 56 F.2d 372, 382.

(12) "Excessive penalty."—Allen v. State, Tex.Cr.App., 146 S.W.2d 384, 386.

(13) "Excessive punishment" see Criminal Law § 1984.

(14) "Excessive quantities."—Morrow v. Missouri Gas & Electric Service Co., 286 S.W. 106, 111, 315 Mo. 367.

(15) "Excessive sentence" see Criminal Law § 1584.

(16) "Excessive sums."—State v. Tri-State Telephone & Telegraph Co., Minn., 295 N.W. 511, 512.

(17) "Excessive verdict."—Babb v. Murray, 79 P.2d 159, 160, 26 Cal. App.2d 153—McManus v. Arnold Taxi Corporation, 255 P. 755, 758, 82 Cal.App. 215.

(18) "Excessive violence," as generally synonymous with "wanton or malicious force."—Atchison, T. & S. F. R. Co. v. Gants, 17 P. 54, 64, 38 Kan. 608, 627, 5 Am.S.R. 780.

(19) "Excessive weight."—Wallington v. Hoskins, 6 Q.B.D. 206.

23 C.J. p 181 note 20 [g].

27. Vt.—Parker v. Boston & M. R. R., 79 A. 865, 872, 84 Vt. 329.

28. Miss.—Penn Mut. Life Ins. Co. v. Nunnery, 167 So. 416, 419, 176 Miss. 197.

N.Y.—Moore v. Prudential Ins. Co., 87 N.Y.S. 368, 92 App.Div. 135, 136.

29. **Phrases construed**

(1) "Excessively burdened."—Sheldon v. State, 7 A. 901, 59 Vt. 36, 38—23 C.J. p 181 note 24 [a].

(2) "Excessively intoxicated," as being deprived of reason.—Keedick v. Brogan, 217 N.W. 583, 585, 116 Neb. 339.

(3) "Excessively vicious conduct."—Hyatt v. Hyatt, 196 A. 317, 318, 173 Md. 693—McKane v. McKane, 137 A. 288, 289, 152 Md. 515—Shutt v. Shutt, 17 A. 1024, 1025, 71 Md. 193, 17 Am.S.R. 519.

30. A maxim meaning "Excess in law is reprehended."—Adams Gloss.

Applied in Godfrey's Case, 11 Coke 42 a, 44 a, 77 Reprint 808.

31. A maxim meaning "All excess is condemned by law."—Adams Gloss.

32. A maxim meaning "An excess in seeking an excuse, becomes manifest, i. e. he who excuses before he is accused manifests his own guilt."—Adams Gloss.

33. A maxim meaning "Excess in anything is reprehended in common law."—Adams Gloss.

Applied in Godfrey's Case, 11 Coke 42 a, 44 a, 77 Reprint 808.

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